# ANNOTATED
# SUPREME COURT JUDGMENTS

# 1941

## Vol. I

EDITED BY

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IN

COLLABORATION WITH

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CIVIL APPEAL No. 249/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Moshe and Sara Friedmann. APPELLANTS.

v.

"Pearl" Assurance Company, Ltd., Tel-Aviv. RESPONDENT.

*Insurance — Mortgage combined with endowment insurance policy on mortgagor's life — Default in payment of life insurance premium not default under mortgage.*

In allowing an appeal from the judgment of the District Court of Haifa dated the 31st October, 1940, in Civil Case No. 1/40 :—

HELD : 1. The life insurance policy could not be considered as one with the mortgage as it had not been registered in the Land Registry.

2. Clause 10B of the special conditions did not contain a covenant to keep in force and pay the premiums on the life policy.

3. The Respondent could not ask for sale of the mortgaged property as nothing was due under the mortgage, default having only been made under the collateral security.

ANNOTATIONS :

1. On the interpretation of mortgage deeds, see also H. C. 34/38 (1938, 1 S. C. J. 306) and note, H. C. 64/38 (1938, 2 S. C. J. 169), C. A. 88/39 (1939, S. C. J. 408) and C. A. 63/40 (1940, S. C. J. 124).

2. On collateral securities, *vide* C. A. 248/38 (1939, S. C. J. 22), C. A. 55/39 (*ibid.*, p. 313). Compare also H. C. 52/40 (1940, S. C. J. 233).

FOR APPELLANTS : Eliash.

FOR RESPONDENT : Levinson.

## JUDGMENT:

The Respondents, the Pearl Assurance Co. Ltd. of London, have a scheme by which persons who wish to buy houses, can obtain the

necessary money on mortgage combined with Endowment Insurance Policy effected on their own lives for the amount of the loan. Under this arrangement, the Company advance up to 50 *per cent* of the amount of their valuation of the property and the mortgagor assigns the life policy to the company as collateral security. The Appellants took advantage of this scheme and obtained the sum of LP. 2,450 on a mortgage of their premises on 26th January, 1937, and on the same day they assigned the life policy, which had been duly effected, to the company by Exhibit J. which is stated to be supplemental to the mortgage of the Appellants' premises of even date. In the assignment the Appellants covenanted, *inter alia,* to pay regularly all premiums which might become due on the life policy, and the Company retained the power, if default were made in such payment, to keep the policy on foot by adding the amount of such unpaid premiums to the principal sum due under the mortgage. The assignment further provides :—

> "That all covenants and other powers and provisions contained or implied in the Mortgage shall extend so far as applicable to the premises hereby assigned, pledged and delivered in the same manner as if such premises had been included in the Mortgage".

Default was made in the payment of the life policy premiums and the Company thereupon applied to the Chief Execution Officer for an order of sale under Section 14 of the Land Transfer Ordinance on the ground that there had been breach of the special conditions in the mortgage deed. The Appellants disputed that they owed any money under the mortgage and the Chief Execution Officer, very properly, ordered them to go to the competent Court to prove that no such money was due, and gave them one month's stay of execution, subsequently extended by another week, to enable them to do so. The matter then came before the learned President (Judge Edwards) sitting in the District Court. The Company alleged default in three sums — with regard to two of them, the Court found in favour of the Appellants, but in regard to the third sum, LP. 192.700, premiums on the Life Insurance Policy, the Court found that there had been default and made a declaratory judgment accordingly.

The case on appeal has been well argued by the advocates on both sides, and we are much indebted to them for the conciseness and clarity with which they have put forward their contentions.

Dr. Eliash bases his appeal on this quite short point, that there is no mention in the mortgage deed of the collateral security and that clause 10B of the special conditions can only refer to risks on the property itself — that the undertaking to keep the life policy in force

was contained in the collateral security only and that since only the mortgage itself was sought to be executed, the Appellants owed no money under the mortgage. He says that the Company's remedy is to sue on the collateral security for breach of contract.

Mr. Levinson for the Company in reply, submits that clause 10B is sufficiently wide to include the premiums on the life policy, that it was one of the conditions on which the loan was made that the Appellants would take out, and keep in force the life policy, and that the mortgage and collateral security must be read as one. He also says that in an assignment made between the parties on the 14th August, 1938, the fourth rectial and third clause show that the collateral security was admittedly included in the mortgage and the Appellants, therefore, are now estopped from denying this.

It may be convenient here to set out Clause 10B of the special conditions, as in our opinion the case depends on this clause. Its terms are as follows :—

> "To take out and effect with the Company and in its favour (or as it shall otherwise direct) a policy or policies of insurance and cause the same to be endorsed in favour of the Company or as the Company may direct against fire and such other risks as the Company shall from time to time require to the full value as determined by the Company of the property comprised herein and to maintain such policy or policies in force throughout the continuance of this security and punctually pay all premiums in respect thereof and to deposit the policy or policies and all receipts for such premiums with the Company and upon any default by the Borrower of this condition the Company at its option shall have the right (without derogation from other remedies to which it may be entitled) to maintain such insurance policies in force and to recover all money so expended forthwith from the Borrower or at the Company's option to treat same as principal moneys secured hereunder".

In our opinion, unless it can be shown that this clause contains a covenant to take out and maintain the life policy, or that the mortgage is sufficiently wide to include the collateral security, then it cannot be said that a failure to maintain the life policy is a breach of the terms of the mortgage deed. We do not think that the collateral security can be considered as one with the mortgage in the sense that a breach of its conditions would be a breach of the conditions in the mortgage for this reason, that it was not registered in the Land Registry. Neither do we think that clause 10B can be interpreted to contain a covenant to keep in force and pay the premiums on the life policy. The words "fire and such other risks as the company shall from time to time require to the full value ..... of the property

comprised herein" can refer only to risks affecting the property and by no stretch of words can a life risk be classed as a risk affecting the property. It would have been quite an easy matter to insert in the mortgage deed a covenant that the borrower should effect and maintain a life policy and pay the premiums thereon, and on breach of such a covenant then there might have been a breach of the mortgage deed entitling the Company to realise the mortgage. But there is no such covenant in this deed, and we cannot imply it. The Company might also have been protected if it had been stipulated in the mortgage deed itself that the collateral security of even date was to be deemed to be a part of the mortgage deed and to be read as one therewith.

It is quite true, as the learned Judge said, that sitting as a Court he was entitled to look at other documents in order to determine whether money was due or not under the mortgage, whilst a Chief Execution Officer is limited to the mortgage deed itself. But the money must be due under the mortgage which is the security which it is sought to execute. In this case the money was due under the collateral security and not under the mortgage. The result may be unfortunate, but we can see no alternative. In England, the result would probably be different, but this case depends on the Law of Palestine.

Holding this view, it is not necessary to deal with the second point in the appeal, namely, that the Company had cancelled the life policy and, therefore, could not claim premiums on a policy which had been cancelled. In any case it is admitted that one quarterly premium was due and not paid whilst the policy was admittedly in force. Since we hold that no money was due under the mortgage, the question of the amount of premiums owing does not arise.

In the result the appeal must be allowed, and the judgment of the District Court set aside, and a declaratory judgment issued that, on the facts of this case, no money was due under the mortgage at the time that the application for sale was made to the Chief Execution Officer. The Appellants are entitled to their costs on the lower scale both here and below, to include LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this 17th day of January, 1941.

*British Puisne Judge.*

CRIMINAL APPEAL No. 141/40.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Zeev Meiri. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Road Transport — Driving a vehicle without a licence, Road Transport Ordinance, Sec. 3 — Increased licence fees — Road Transport Rules, Rule 77 — Costs.*

In allowing an appeal from the judgment of the District Court, Nablus, (appellate capacity) dated the 19th of December, 1940, whereby that Court quashed the judgment of the Magistrate's Court, Nathanya, acquitting the Appellant, and convicted him for driving a vehicle without a licence, contrary to Section 3 of the Road Transuort Ordinance, and sentenced him to a fine of LP. 10 :—

HELD : 1. Although the licence fee had been increased during the currency of the Appellant's licence, no legislation had been passed providing that licences already issued should be cancelled, and it could not be said that at the material time the Appellant had no licence.

2. Rule 77 of the Road Transport Rules did not apply to the facts of the case.

3. In the circumstances the Attorney General should consider doing something in the matter of costs.

ANNOTATIONS : Compare CR. A. 17/39 (1939, S. C. J. 230).

FOR APPELLANT : Sassoon.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

The Appellant was charged before the Magistrate, Nathanya, with driving a motor vehicle without a licence. The case went to and fro between the Magistrate and the District Court, Nablus, and eventually he was convicted by the latter Court, and he now appeals.

It seems that some time ago he was issued with a licence to drive his vehicle, and during the currency of that licence, the fee for his particular class of vehicle was increased. No legislation was passed providing that licences already issued should be cancelled, with or without any *pro rata* allowance for the fee already paid.

The position is that when he requires a new licence he will have to

pay more for it, but how for that reason he could at the material time be said to have no licence I am at a loss to understand.

Some reference was made in the proceedings to Rule 77 of the Road Transport Rules, but that rule does not appear to apply to the facts of this case.

I think the judgment of the Magistrate of the 1st of April, 1940, was right, and that the appeal should be allowed, and the conviction by the District Court of the 27th of November, 1940, quashed.

It is not the practice to give costs in this Court, but in the circumstances of this case we think the Attorney General may well wish to consider doing something in the matter, as this man had to appear twice before the Magistrate, twice before the District Court, and now in this Court.

Delivered this 9th day of January, 1941.

*Chief Justice.*

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HIGH COURT No. 1/41.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Aron Meier Fridman. PETITIONER.

v.

1. Superintendent of Prison of Jaffa,
2. Magistrate, Petah-Tiqva, as Execution Officer,
3. Pessil Bash. RESPONDENTS.

*Habeas corpus — Successive applications — Different position in England and Palestine — Imprisonment for debt.*

In refusing an application for summons to issue directed to the first and second Respondents, calling upon them to show cause why they should not produce the Petitioner, Aron Meier Fridman, before this Court on a date to be fixed for the purpose of setting aside the warrant of arrest and releasing the Petitioner and to await the further Order of the Court. It is further prayed that an interim order may be made to release the Petitioner on bail pending the determination of this Petition :—

HELD : 1. Whilst applications for writs of *habeas corpus* may be made successively to various Judges of the Supreme Court in England, the position is different in Palestine, and repeated applications to the High Court, based upon the same facts, amount to an abuse of the process of the Court.

2. There was no reason to interfere with the judgment of the Magistrate which was based upon evidence.

ANNOTATIONS :

1. On the impossibility of importing English practice into Palestine, compare C. A. 154/40 (1940, S. C. J. 334) and note 1.

2. On *habeas corpus* generally, *vide* annotations to H. C. 41/40 (1940, S. C. J. 232).

FOR PETITIONER : S. Felman.

FOR RESPONDENTS : *Ex Parte.*

## JUDGMENT:

This is an application for an order in the nature of *habeas corpus,* and it is the second time in which this matter has been brought before this Court.

It is clear that applications for writs of *habeas corpus* may be made successively to Judges of the Supreme Court in England, but the position is somewhat different here. By the Order-in-Council and the Courts Ordinance the jurisdiction is vested in the High Court, and the High Court consists of not less than two Judges, as the Chief Justice may appoint, provided that at least one Judge shall be a British Judge.

We cannot admit that an Applicant has the right to choose the Judges who shall sit upon any particular case, but no doubt he can apply for a writ to the High Court as it may be constituted, but it may be that repeated applications, based upon the same facts, might amount to an abuse of the process of the Court.

This application is based upon the same grounds as an application which was made a short time ago, and it concerns the imprisonment for debt of the Applicant. The matter was argued before a Magistrate, when he heard evidence, and having considered his judgment we see no reason to interfere.

Delivered this 7th day of January, 1941.

*Chief Justice.*

CRIMINAL APPEAL No. 3/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPLICATION OF :—

Eliza Channes Lireshian. APPLICANT.

v.

The Attorney General. RESPONDENT.

*Possession of cocaine — Dangerous Drugs Ordinance, Secs.* 6, 7 *and* 8 — *Whether offence created — Benefit of doubt.*

In allowing an application for leave to appeal from the judgment of the District Court of Jerusalem of 17th January, 1941, whereby the Applicant was convicted of being in possession of dangerous drugs contrary to Section 7(1) and (2) of the Dangerous Drugs Ordinance, 1936, and sentenced to one year's imprisonment, and in quashing the conviction :—

HELD : There were no specific provisions in Secs. 6 or 7 of the Ordinance creating an offence and as the wording was obscure the Appellant was entitled to the benefit of the doubt.

ANNOTATIONS :

1. Compare CR. A. 89/38 (1939, S. C. J. 10).
2. On the benefit of doubt, *vide* note 2 to CR. A. 11/40 (1940, S. C. J. 368).

FOR APPLICANT : Elia.

FOR RESPONDENT : Junior Government Advocate — (Ghussein).

### JUDGMENT:

This is an application for leave to appeal from a judgment of the District Court of Jerusalem, convicting the Applicant, of an offence under Section 7 of the Dangerous Drugs Ordinance 1936, of possession of cocaine.

The point has been taken by the Applicant, that there is nothing in Section 7 which makes it an offence to possess dangerous drugs, and the same argument, of course, would apply to an offence under Section 6. There are no specific words in either section creating an offence. The learned Judges of the District Court held that this was a regrettable omission and thereupon proceeded to remedy that omission but, I am afraid, that is in the province of the legislature, not of the Courts. It is argued that Section 8 of the Ordinance makes it an offence to aid, abet or counsel the commission of any offence under Section 7. The wording of these sections is obscure and the matter, in our opinion, is extremely doubtful. One cannot say definitely that

an offence has been created. That being so the Applicant is entitled to the benefit of that doubt. The application for leave to appeal is granted, the appeal is allowed and the conviction quashed.

Delivered this 20th day of January, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 206/40.

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

BEFORE : Trusted, C. J. and Copland, J.

IN THE APPEAL OF :—

1. Fatima bint Mustafa Pasha el Khalil,
2. Dia bint Mustafa Pasha el Khalil,
on their own behalf and on behalf of the mulk heirs of the late Ibrahim Bey el Khalil (other than the Respondents). APPELLANTS.

v.

1. Mahasen 'Umar Sa'ed ed-Da'uq,
2. Widad bint Ibrahim Bey el Khalil. RESPONDENTS.

*Land Settlement — Revision of Schedule of Rights, Land (S. of T.) Ord., Sec. 33(4) — Right to appeal, Land (S. of T.) Ord., Sec. 63 — Change of registration from mulk to miri — Category of land, L. A. 72/34, P. C. 56/38 — Government's rights — Power of L. S. O. to change category of land — Change of mulk into miri — Mulk accretions.*

In dismissing an appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated the 14th day of September, 1940 :—

HELD : 1. A refusal by the Settlement Officer to revise the Schedule of Rights affected rights to land and an appeal lay, therefore, from this decision.

2. (Following L. A. 72/34 and P. C. 56/38). As the land was registered as *miri* it belonged *prima facie* to this category.

3. The description of the land as *mulk* in the memorandum of claim was a mis-statement owing to which the appeal would fail.

4. As a change of land from *miri* to *mulk* involved rights of the state, the Attorney General had to be joined, and possibly the consent of the High Commissioner should have been obtained.

5. *Quaere* whether a Land Settlement Officer had power to change the category of land.

6. The Appellants as heirs of Ibrahim Bey could not be in a better position than the latter.

7. There was nothing in the law preventing a man from abandoning

the *raqabe* of his *mulk* land and thus changing its category into *miri*, nor was there any authority to show that such an act was illegal or inoperative.

8. (Following P. C. 56/38) The proposition that no man, except labouring under a mistake, could possibly have abandoned the *raqabe* of his *mulk* land, was not shown to be based on evidence or to be other than a mere guess.

9. The term "planted *miri*" was to include such trees as remained on the land, and there was no reason to interfere with findings of the Settlement Officer that the orchard had been ruined during the last War and never been restored, *i. e.* that the *mulk* accretions had disappeared.

FOLLOWED: L. A. 72/34 (1938, 1 S. C. J. 191); P. C. 56/38 (1940, S. C. J. 277).

ANNOTATIONS:

1. See, on the first point, C. A. 173/40 (1940, S. C. J. 311) and note.
2. On the second and eighth point, *vide* P. C. 56/38 (*supra*) and note 5.
3. Compare, on mis-statements in claims, C. A. 15/38 (1938, 1 S. C. J. 204).
4. On the fourth point see also C. A. 132/40 (1940, S. C. J. 317).
5. For the statutory powers of the Settlement Officer, *vide* Secs. 10 and 22 of the Land (Settlement of Title) Ordinance.
6. On *mulk* accretions, see C. A. 54/40 (1940, S. C. J. 103) and note 1, C. A. 127/40 (*ibid.*, p. 440).

FOR APPELLANTS: A. Levin.

FOR RESPONDENTS: Eliash and Olshan.

## JUDGMENT:

*Copland, J.*: This is the considered judgment of the Court.

This is an appeal from a refusal by the Land Settlement Officer, Haifa, to revise the Schedule of Rights in respect of certain lands in Haifa on an application under Section 33(4) of the Land Settlement Ordinance as amended.

A so-called preliminary point was taken by the Respondents that no appeal lay in this case. By Sec. 63 as amended of the Land Settlement Ordinance an appeal lies from any decision of the Settlement Officer in regard to rights to land. The Settlement Officer's decision in this case obviously affects rights to land and there is nothing in this point.

The facts are set out in detail in the decision of the Land Settlement Officer. Put shortly the Appellants are heirs to the *mulk* property of the late Ibrahim Bey el Khalil, whilst the Respondents are his sole *miri* heirs. Originally the property was *mulk* from the first registration in 1291 *A. H.* down to 1922. In this latter year Ibrahim Bey opened a file in the Land Registry Haifa for the correction of the boundaries and area of the property and obtained a fresh *kushan* describing his property as "planted land". In November, 1923, Ibrahim Bey submitted to the Land Registry a petition for sale, in which he described

the land as *miri,* and on the strength of this petition, the land was divided into four parts — the Government of Palestine purchased one part and held for it a *miri kushan,* and Ibrahim Bey obtained three *miri kushans* for the other parts. This is the present registration of this property. Ibrahim Bey died in 1937.

The Appellants claim that the *miri* registration was a mistake, and ask to have it corrected to a *mulk* one. In their memorandum of claim submitted to the Land Settlement Officer, they described the land as of the *mulk* category. This in fact is the basis of their claim since they are among the *mulk* heirs. But the present registration of the land describes it as *miri,* and it is clear, therefore, that *prima facie* its category is *miri.* See Abu Hana and others *v.* The Attorney General, Land Appeal 72/34 (5 P. L. R. 221) where Trusted, Chief Justice said (at p. 224) : "if land is not registered in any category, it is possible that its history and physical characteristics may be factors in determining its category, but if it is registered, *prima facie* it belongs to the category in which it is registered, any other view would lead to a state of great confusion". And in Mamur Awqaf, Jaffa *v.* Government of Palestine (Privy Council Appeal No. 56/38, 7 P. L. R. 105), Sir George Rankin, in delivering the judgment of the Board said at page 113 : "Their Lordships are of opinion that the latest *tapou* register is competent evidence as to the character of the land in question, and that the strictest proof should be required before holding on such a matter the subsisting entries to be incorrect ; otherwise the provisions for a new register would be made to unsettle titles in disregard of the land law".

On this ground alone it seems to us that the appeal would fail owing to the mis-statement in the memorandum of claim.

And further, since the land is registered as *miri,* in any proceedings to change its category to *mulk,* the Attorney General must be joined, since the rights of the State are involved, and possibly also the consent of the High Commissioner would have to be obtained. This is assuming that a Land Settlement Officer has power to change the category of land, on which question we express no opinion. On this ground too the present proceedings would appear to be misconceived.

To turn now to the merits of the appeal. In the first place it is clear that the Appellants can have no better position than Ibrahim Bey had or would have had. The Appellants say that the *miri* registration of 1924 was a mistake. It is for them, therefore, to prove their allegation. As proof they file the entries in the Land Register prior to 1922, and advance the theory that the *miri* registration must be a mistake, first, because there is now law permitting the

category to be changed from *mulk* to *miri*, and secondly, because it is such a peculiar thing to do, that no land owner could possibly have consented to it expect by mistake. As to the first ground, it is not disputed that a man can abandon all his land to the state, and if he can abandon all his rights, we can see no reason why he cannot abandon a part of them, such as the *raqabe*.

Certainly, no authority in law has been quoted to us to show that such an act is illegal, or inoperative.

As to the second ground, it must be remembered that the petition of 1923 was written and signed by Ibrahim Bey himself, and that until 1937, when he died, he never made any attempt to rectify this alleged mistake. It has been argued that no man, except labouring under a mistake, could possibly have done such a thing as to abandon the *raqabe* of his *mulk* land to the State. The obvious comment (and it seems to us to be a sufficient one) is that this proposition is not shown to be based on evidence or to be other than a mere guess. To quote again from Their Lordships' judgment in Mamur Awqaf *v.* Government of Palestine (*Supra*, at p. 112) : — "merely to file the entries in the *tapou* register is not to prove that the entries for the last twenty one years are incorrect because they differ from previous entries ..... The Settlement Officer is not to be asked to embark upon speculation as to the cause of the change in the absence of evidence produced in support of a definite case". *Mutatis mutandis*, and very little mutation is necessary, these observations apply exactly to the facts of this present case.

Finally, there is the alternative claim that so long as any traces of fruit bearing trees or the old well exist, those accretions are *mulk*, and the *mulk* succession rules apply. The learned Settlement Officer found that the land was originally registered in 1291 as an orchard (*baghjasi*) and also in 1328. From evidence which he heard, and which would justify his finding, and from the result of an inspection made by him, he has found as a fact that the land was ruined as an orchard during the last War, before Ibrahim Bey took a *miri* title, that it was no longer an orchard when Ibrahim Bey died, and it is certainly not an orchard now. The term "planted *miri*" must include such trees as remain on the land. We are not prepared to interfere with those findings.

For all these reasons we are of opinion that the appeal fails and must be dismissed with costs on the lower scale, to include LP. 15 advocate's attendance fee for this Court.

Delivered this 17th day of January, 1941.

*British Puisne Judge.*

CRIMINAL APPEAL No. 2/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Yousef Said Abu Dourrah. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Murder — Extradition from Trans-Jordan, Extradition-Agreement of* 1934, *Arts.* 3—6 — *Admissibility of evidence — Political offence.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Jerusalem, dated the 1st of January, 1941, whereby the Appellant was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936 and sentenced to death :—

HELD : 1. Under the Extradition Agreement with Trans-Jordan the order for extradition was to be made by the Government concerned, which had to be satisfied that Articles 4—6 of the Agreement had been complied with.

2. There was nothing in the law which provided that all the evidence available against the person whose extradition was sought had to be forwarded to the country in which he was found. All that was necessary was that a *prima facie* case should be made out.

3. There was nothing in the criminal law of this country or of England which created a special offence called political murder.

4. Even if it were a political offence nothing prevented the man, if he was within the jurisdiction of this country, from being tried for it.

ANNOTATIONS :

1. Palestine authorities on extradition are collated in annotations to H. C. 25/40 (1940, S. C. J. 384).

2. On the third and fourth point, compare Sec. 7(a) of the Extradition Ordinance.

FOR APPELLANT : Moghannam.

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

### J U D G M E N T :

The Appellant was charged before the Assize Court in Jerusalem with murder in the Jenin District and was convicted and sentenced to death. On this appeal several legal points have been taken ; the facts upon which the conviction was based have not been queried. It is argued, in the first place, that the extradition proceedings were im-

proper and that, therefore, the Assize Court had no jurisdiction to try the man. Extradition proceedings between this country and Trans-Jordan are conducted under an Extradition Agreement made in the year 1934. By Article 3 of that agreement the fugitive criminal shall be surrendered upon the request for extradition being made in conformity with the procedure set forth in Articles 4, 5 and 6 of the agreement. Under this agreement, contrary to the procedure under the Extradition Ordinance, the order for extradition is made by the Government concerned. If the Government concerned is satisfied that the provisions of Articles 4, 5 and 6 have been carried out, that, we think, must be the end of the matter, except that possibly the Courts of this country are not entitled to try the man for an offence different from that on which his extradition was obtained.

Another point taken by the Appellant is that the evidence of one of the witnesses was improperly admitted at the trial because the depositions, or statements made to the police, of this witness, were not among the documents forwarded to the Trans-Jordan Government. There is nothing in the law which says that all the evidence available against this particular person whose extradition is sought has got to be forwarded to the country in which he is found. All that is necessary is that a *prima facie* case should be made out.

Finally, it is said that this is a political offence. Under the law of this country, murder is murder pure and simple, whatever the motives may be which inspired it. We know of nothing in the criminal law of this country or of England that creates a special offence called political murder. In any case, even supposing it were a political murder, nothing prevents the man, if he is within the jurisdiction of this country, from being tried for it.

The Appellant was convicted by the Assize Court, upon very clear evidence, of a brutal crime. He was tried with the greatest care and any evidence that was considered possibly not to be admissible was rejected by the Assize Court. We have considered the evidence as a whole and all we can say is that it is the verdict which any Court would have given. The appeal is dismissed and the conviction and sentence of death are confirmed.

Delivered this 20th day of January, 1941.

*British Puisne Judge.*

CIVIL APPEAL No. 246/40.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

David Sternberg. APPELLANT.

v.

Samuel Aaronson. RESPONDENT.

*Succession — Whether person member of Jewish Community — Special Tribunal — Proof of membership, P. O. in C., Art. 51, Jewish Community Rules — Jurisdiction of Religious Courts, P. O. in C., Art. 53.*

In allowing an appeal from the Ruling of the District Court of Haifa, dated the 31st day of October, 1940 :—

HELD : 1. The deceased was not on the register of members of the Jewish Community, and he was, therefore, technically not a member thereof. 2. The Religious Court had, therefore, no power to decide the validity of the deceased's will, nor could such jurisdiction be conferred by consent. The only Court having jurisdiction was the District Court and the matter should not have been referred to the Special Tribunal.

ANNOTATIONS : This decision is in accordance with a *dictum* in H. C. 5/30 (C. of J. 131).

FOR APPELLANT : Eliash.

FOR RESPONDENT : Schwarz (by delegation).

## JUDGMENT:

This is an appeal from a judgment of the learned President, Judge Edwards, in a succession case, where he held that the question whether a person was or was not a member of the Jewish Religious Community was a matter to be decided by a Special Tribunal. He thereupon referred the case to a Special Tribunal. The appeal is not opposed but has to be taken by the Appellant in order that he may get his Order of Probate from the Court competent to give it to him.

Dr. Eliash argues that whether a person is a member or not of the Jewish Community is purely a question of fact and he bases his argument on the provisions of Article 51 of the Order-in-Council as amended and the Jewish Community Rules which were made under the Religious Communities Organization Ordinance, which, by the amendment to the Order-in-Council, have been declared to be lawfully en-

acted. It was proved by affidavit, and in fact not disputed, that the deceased was not on the register of members of the Jewish Community. That, as I say, was not disputed in any way and it seems to us that the proof whether a person is or is not technically a member of the Jewish Community must be decided by the fact whether he is or is not on the register duly established for such members.

Under Article 53 of the Order-in-Council, the Rabbinical Courts of the Jewish Community have the exclusive jurisdiction with regard to confirmation of wills of members of their community other than foreigners. It follows that if a person is not a member of the community the Rabbinical Court has no power whatever to give any decision with regard to the validity of a will and no consent or no mistake on the part of litigants can give a Court jurisdiction where that jurisdiction is not conferred by Order-in-Council or by Ordinance. It is clear in this case, that the deceased was not a member of the Jewish Community and that, therefore, the only Court having jurisdiction in this matter of probate was the District Court and the learned President seems to us to have come to a wrong conclusion when he declined jurisdiction and referred the matter to a Special Tribunal. The appeal must, therefore, be allowed, the ruling of the learned President must be set aside and the case remitted to the District Court to be dealt with in the normal course. The Appellant is entitled to his costs both here and below on the lower scale to include the sum of LP. 10 advocate's attendance fee at the hearing of this appeal, to be paid out of the estate.

Delivered this 24th day of January, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 235/40.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

Qasem Agha Nimer. — APPELLANT.

v.

1. Ismail Agha Nimer,
2. Hafiz Agha Nimer,
3. Nayif Agha Nimer. — RESPONDENTS.

*Waqfs — Prescription — No adverse possession by beneficiaries of waqf — Findings of fact.*

In allowing an appeal from the judgment of the Land Court of Nablus, dated the 23rd of October, 1940 :—

HELD : 1. There was no reason to disagree with the findings of the Land Court as regards the validity of the *waqfieh* and the inclusion of Karm Iskander in the *waqf* properties.

2. The principle that a lessee cannot claim adverse possession against his lessor, applied also in the case of beneficiaries of a *waqf*, and it was immaterial whether the beneficiaries consented to, or had notice of, the appointment of the *mutewalli*.

3. The fact that one group of beneficiaries was in separate possession of one-third of Karm Iskander, in no way affected the other two groups.

ANNOTATIONS :

1. On non-interference with findings of fact, see *e. g.* C. A. 136/40 (1940, S. C. J. 291) and note, C. A. 32/40 (*ibid.*, p. 338) and note 2, C. A. 45/40 (*ibid.*, p. 387), *etc.*

2. See, on the second point, C. A. 24/40 (1940, S. C. J. 240) and note 2.

FOR APPELLANT : Abcarius and Saleh.

FOR RESPONDENTS : No. 1 — in person.
No. 2 — Cattan.
No. 3 — Asal.

JUDGMENT:

The dispute in this present case concerns the Agha Nimr *Waqf* in Nablus. In the year 1284 *A. H.* a large part, if not all, of the property of this family was constituted a *waqf* and there were three groups of beneficiaries with a separate *mutewalli* for each group. The father of the present Appellant was *mutewalli* for the first group and was succeeded in that office by the Appellant on the death of the father. The second group, to which the Respondents belong, had Abdul Fattah Agha as its *mutewalli*, and the *mutewalli* of the third group was Abdulla Agha. Ismail Agha the first Respondent was appointed *mutewalli* for the second group in 1928, after a long interval of some 33 years during which the second group had no *mutewalli* representing them. The property, the subject matter of this action, is only a small portion of the *waqf* properties and is known as Karm Iskander. It was claimed by the Appellant, as *mutewalli* of the first group, to be part of the *waqf* estate, and he asked that the Respondents in the second group be restrained from disputing the true status of the land

as *waqf*, whilst the Respondents alleged that this land had been in their exclusive possession for a period exceeding thirty six years whether the *waqfieh* of 1284 be valid or not.

The Land Court, after hearing a considerable body of evidence, found that the *waqfieh* of 1284 was a valid document — that Karm Iskander was part of the *waqf* properties, but that the claim of prescription succeeded and the Appellant's action was consequently dismissed except as against the first Respondent, Ismail Agha. The Land Court held that as Ismail Agha had been appointed *mutewalli* the plea of prescription in his case must necessarily fail, but that this did not affect this plea in respect of the other Respondents, since it was not proved that they were a party to, or had notice of, Ismail Agha's appointment. No appeal has been lodged by Ismail Agha against this finding.

With regard to the first two points, namely the validity of the *waqfieh* of 1284, and the question whether Karm Iskander is or is not included in the *waqf*, it is not necessary to say very much. We see no reason to disagree with these findings of the Land Court, and in any event there has been no appeal against them. There can be no dispute that the *waqfieh* is valid, and that Karm Iskander is included in the *waqf* properties.

As to the plea of prescription raised by the second and third Respondents, with all respect we cannot agree with the decision of the Land Court on this point. The property is *waqf* — these Respondents are beneficiaries in that *waqf* and we are unable to see how, in such a case, one beneficiary can claim that his possession is adverse to that of other beneficiaries as represented by the *mutewallis*. A lessee cannot claim adverse possession against his lessor, because he is in possession by permission of the lessor, and the same principle must, we think, apply here. The properties are owned in common, each of the three groups taking one-third of the profits or produce. The properties themselves are not divided into the three groups, but the beneficiaries only. We think that there can be no prescription in this case between the parties to this present action. It is immaterial whether the beneficiaries consented to, or had notice of, the appointment of a *mutewalli*. The appointment is made by the *Sharia* Court, and no objection has been taken to it. And it is idle to suggest that this particular property only was not known to be *waqf*. As to the position created by the fact that the Abdulla group is in separate possession of one-third of Karm Iskander, that is not a matter that can in any way affect the other two groups. Whether the judgment of

1316 is right or wrong, it is too late now to challenge it, but the remaining two-thirds of Karm Iskander are not affected by that judgment and still remain part of the Agha Nimr *waqf*.

The appeal must, therefore, be allowed and that part of the judgment of the Land Court as affects the second and third Respondents must be set aside and judgment entered against them for the Plaintiff (Appellant) in the original action. The Appellant will have his costs here and below, on the lower scale, to include LP. 15 advocate's attendance fee on this appeal, to be paid by the second and third Respondents.

Delivered this 11th day of January, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 267/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Perl Roman,
2. Isaac Roman,
3. Israel Aschkenazi in his capacity as Administrator of the Estate of Ania Rosa Segal. APPELLANTS.

v.

Johara Farjoun. RESPONDENT.

*Claim for shufa, Mejelle, Arts.* 1029 *and* 1030 — *Provisions to be interpreted strictly* — *Costs.*

In allowing an appeal from the judgment of the Magistrate's Court of Safad, sitting as a Land Court, dated the 20th of November, 1940 :—

HELD : 1. The names of the purchasers from whom the Appellant claimed the property had not been stated as required by Art. 1030 of the *Mejelle,* and it was the practice to interpret strictly the provisions regarding *shufa.*

2. The third Respondent was not entitled to costs as there had been no necessity for him to appeal since he was in no way affected by the Magistrate's judgment.

ANNOTATIONS :

1. See, on the first point, C. A. 95/38 (1938, 1 S. C. J. 338) and note.

2. On costs, compare *e. g.* C. A. 137/40 (1940, S. C. J. 202), H. C. 4/40 (*ibid.*, p. 238), C. A. 154/40 (*ibid.*, p. 334) and H. C. 36/40 (*ibid.*, p. 410).

FOR APPELLANTS : Nos. 1 and 2 — Bernblum.
No. 3 — Eisenberg.
FOR RESPONDENT : Maman.

JUDGMENT:

This is an appeal from the judgment of the Magistrate given in a claim for *shufja*. The appeal can be decided on one short point that is, that the provisions of Articles 1029 and 1030 of the *Mejelle* have not been complied with. Article 1030 in particular says that the person claiming the right of *shufja* must state the names of the purchasers from whom he claims this property. There is nothing in the evidence of any of the witnesses which says that the names of the purchasers were mentioned at the material time or in fact at all. It has always been our practice to apply these archaic provisions of the *Mejelle* strictly. That being so this appeal must be allowed with costs here and below on the lower scale to the first and second Appellants together with LP. 10 advocate's fee for attending the hearing of this appeal. As for the third Appellant he is not entitled to costs nor will he have to pay them. There was no necessity for him to appeal since there is nothing in the judgment of the learned Magistrate which in any way affects him. The judgment of the Magistrate accordingly must be set aside and the Respondent's action dismissed.

Delivered this 24th day of January, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 242/40.

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

BEFORE : Trusted, C. J. and Rose, J.

IN THE APPEAL OF :—

1. Yishuv Co. & Co.,
2. Eliezer Bolotin,
3. Yitshak Moshe Henigsberg,
4. Moshe Shor,

5. Yirmiahu Kern,
6. Elimeleh Neubauer. APPELLANTS.

v.

1. Fishel Weitsman,
2. Registrar of Partnerships. RESPONDENTS.

*Partnership — Interpretation of partnership agreement — Expulsion of member, Barnes v. Youngs, Halsbury, Vol. 24, Green v. Howell, Russell v. Russell, Blisset v. Daniel — Duties of quasi-judicial tribunals.*

In allowing an appeal from the judgment of the District Court, Tel-Aviv, dated the 18th of October, 1940 :—

HELD : 1. A partnership is an *uberrimae fidei* contract.

2. Wherever it is left to a judicial or quasi-judicial tribunal to decide on the expulsion of a partner, common justice requires that explanations and notice should be given to the person concerned and that he should have an opportunity of defending himself.

3. The meeting had been regularly convened, and the Respondent, knowing of the meeting and its object, and being able to attend, chose not to do so.

4. There were grounds upon which the partners could decide on the expulsion of the Respondent.

REFERRED TO : Barnes *v.* Youngs, 1898, 1 Ch. D. 414 ; Green *v.* Howell, 1910, 1 Ch. D. 495 ; Russell *v.* Russell, 1880, 14 Ch. D. 471 ; Blisset *v.* Daniel, 1853, 10 Hare, 493.

ANNOTATIONS :

1. On contracts *uberrimae fidei,* see Halsbury, Vol. 7, *p.* 98, footnote *m.*

2. On expulsion of partners, *vide* Halsbury, Vol. 24, *pp.* 496—7, *Sec.* 945, Digest, Vol. 36, *pp.* 501 *seq., Sub-sec.* 7.

3. On the duties of judicial officers or bodies, compare H. C. 9/38 (1938, 1 S. C. J. 116) and H. C. 39/39 (1939, S. C. J. 389).

FOR APPELLANTS : Goitein and Shaoni.

FOR RESPONDENTS : No. 1 — Smoira and Bar-Shira.
No. 2 — absent — served.

## JUDGMENT:

This case raises an interesting point of law and arises out of an agreement of partnership. Article 22 of that agreement provides that —

> "Should a member contravene any of the provisions of this agreement or should he appear to be detrimental to the partnership business by any act or omission, the management shall be entitled

> to move the general meeting to expel such member from the partnership."

and Article 17 provides for the formalities to be followed to convene a general meeting.

It seems that some of the partners, who are the Appellants before us, desired to invoke Clause 22 against the Respondent, and that a meeting was summoned for and held on the 13th of October, for that purpose. At that meeting a resolution was passed excluding the Respondent from the partnership, and in consequence he brought this action before the District Court.

That Court found in his favour, placing reliance upon the judgment of Romer J., in Barnes *v.* Youngs, 1898, 1 Ch. D., page 414.

Mr. Goitein for the Appellants opened the appeal by stating that that decision was over-ruled by Green *v.* Howell, 1910, 1 Ch. D., page 495, and it is true that in that report and in another report in another series the head-note so states, but in fairness to the Court below I may point out that Barnes *v.* Youngs is still quoted as an authority in Hailsham, Vol. 24, pages 496 and 497.

Neither of these cases is strictly an authority in this case, as the terms of the agreements were different, but in Green *v.* Howell the Judges of the Court of Appeal discussed the principles which a Court should take into consideration when dealing with matters of this kind, in particular at page 504 the Master of the Rolls said :—

> "We have had a great deal of discussion upon the mutual obligations and duties of partners. So far as I am concerned, I am disposed to think they may all be embraced in the well-known phrase that a partnership is a contract in which *uberrima fides* is required. A clause like this enabling one partner to expel the other cannot be relied upon unless there is good faith ; it cannot be used if the motive is really to get an undue advantage over the other partner by purchasing him out on unfavourable terms ; but that is the root of the principle, so far as I am aware, applicable to partners in these relations. There is also a further principle, not in any way confined to partnership transactions, which is this, that wherever it is left to a judicial tribunal, strictly so called, or a quasi-judicial tribunal, to determine whether a person is or is not properly excluded, common justice requires that explanation and notice shall be given to the person said to be amenable to the jurisdiction and that he should have an opportunity of defending himself."

and at page 510 Buckley, L. J., as he then was, stated :—

> "It is familiar to all of us that partnership relations are relations in which the greatest good faith must be observed between the parties. ..... It is also a familiar principle, which appeals to all

> of us as a matter of justice, that a man should never be condemned without being heard."

I would also draw attention to a passage in the judgment of Jessel M. R., in Russell *v.* Russell, 14 Ch. D., at page 479, where, speaking of the decision in Blisset *v.* Daniel, he says :—

> "There the Vice-Chancellor was of opinion that even in that limited case, where it was only *inter se* as regards the partners themselves, yet, if the reason, as far as the other partners were concerned, was misconduct, they ought to give the partner sought to be expelled an opportunity of explaining his alleged misconduct. ..."

I incline to the view that where, as in a case such as this, the partners themselves are to enquire *inter se,* the second principle tends to merge into the first principle.

To turns to the facts of this case, I think it is clear that the meeting was regularly convened. It is clear that the Respondent knew the object of the meeting, because on that day he left a note at the place in which the meeting was to be held, in which he stated —

> "I request you, therefore, to discontinue these shameful actions and to cancel any discussion as to my exclusion from the partnership."

and although there has been some argument as to the precise interpretation of the agenda, before the Court of Trial he admitted that he knew that his expulsion from the partnership was to be discussed. Had the meeting been fixed for a date when the other partners knew that the Respondent could not attend, it might be said that that offended against one or other of the principles, but that was not the fact. Had the Respondent attended the meeting and not been allowed to answer the allegations which were made against him, or had he attended and asked for an adjournment in order to controvert the allegations by the production of documents or witnesses, and this had been refused, again it might be said that one or both of the principles had been violated. But if he himself, knowing of the meeting and its object, and able to attend, does not attend, he can hardly complain.

From the minutes it appears that the meeting considered this question, among others. (The learned President would seem to be wrong when he states that all other matters on the agenda, save the expulsion of the Plaintiff, were ignored). The various members present appear to have expressed their view, and a resolution was passed excluding the Respondent.

It is said by Dr. Smoira, on behalf of the Respondent, relying upon the passage in the judgment of Cozens-Hardy, M. R., to which I have

referred, that a notice should have been given to the Respondent setting out the allegations against him. I do not think that the learned Judge is really saying anything more than is said by Buckley, L. J., when he states that a man should not be condemned without being heard.

In my opinion a partner whom it is sought to exclude from a partnership by a decision of the other partners, should have an adequate opportunity of defending himself, which must presuppose a knowledge of the allegations against him, but I do not think there is any rule of law that he must be given a written notice. In this particular case the parties had expressly provided that any such question should be raised by the management at a general meeting, and I think it was sufficient if that was done.

In my view there was, in this case, compliance with the principles to which I have referred.

It only remains, therefore, to consider whether the partners could come to the conclusion to which they came. I have already cited the material part of Article 22 of the partnership agreement. Whether a member is detrimental to a partnership business must be essentially a matter for the partners to decide, and the Court can only look to see if there was any evidence upon which they could reasonably come to that conclusion. In this case the learned President sets out the allegations which were made, and in particular he says :—

> "Although the conduct of the Plaintiff in leaving the store may have given rise to some legitimate grounds of complaint, I must hold that the proceedings at the meeting expelling him were entirely irregular."

I think it is clear, therefore, that there were grounds upon which the partners could decide as they did.

The appeal should be allowed, the judgment of the District Court will be set aside, with costs therein to the Appellants, and the Appellants will have costs in this Court on the lower scale, and we certify LP. 15 for attending the hearing, to be paid by the first Respondent.

Delivered this 9th day of January, 1941.

*Chief Justice.*

CIVIL APPEAL No. 233/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Atallah Mantoura,
2. Habib Homsi,
   Both in their capacity as Administrators of the estate of Salim Khoury, deceased. APPELLANTS.

v.

Nur Michail el Khoury. RESPONDENT.

*Sale of land — Deed of renunciation — Action for purchase price — Right of administrators to appeal — Statements of deceased persons against their proprietary interests, Phipson on Evidence — Contradictory evidence — Oral evidence as to oral agreement with deceased person, Beckett v. Ramsdale — Findings against weight of evidence.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 21st October, 1940, in Civil Case No. 84/40 :—

HELD : 1. As aministrators of an estate could sue and be sued, it was obvious that they could appeal.

2. Exhibits B and C were partially at any rate against the proprietary interest of the deceased and, therefore, admissible in evidence.

3. The Respondent's evidence as to the alleged purchase price was contradicted by her own admission in writing.

4. (Following Beckett *v.* Ramsdale). It was obviously dangerous to rely only on oral evidence of an oral contract, when one of the alleged parties was dead, and could not contradict it.

5. The findings of the District Court were against the weight of evidence and could not be supported.

FOLLOWED : Beckett *v.* Ramsdale, 1885, 31 Ch. D. 177.

ANNOTATIONS :

1. See, on the first point, Succession Ordinance, Sec. 17, and compare C. A. 72/40 (1940, S. C. J. 456).

2. On statements of deceased persons against their proprietary interests, *vide* Halsbury, Vol. 13, *pp.* 585 *seq.*, *Nos.* 657—8, Digest, Vol. 22, *pp.* 98 *seq.*, *Sub-sec.* 2.

3. See, on the fourth point, Halsbury, Vol. 13, *pp.* 765—6, *No.* 841(3) and footnote *o*, Digest, Vol. 22, *pp.* 493 *seq.*, *Sub-sec.* 4, *Nos.* 5222 *seq.*

4. Generally, on oral agreements with regard to land, compare C. A. 223/40 (1940, S. C. J. 459).

5. Other recent instances of findings of fact being upset as contrary to the weight of evidence: C. A. 65 & 76/40 (1940, S. C. J. 168), C. A. 118/40 (*ibid.*, p. 204), C. A. 203/40 (*ibid.*, p. 428) and C. A. 223/40 (*supra*).

FOR APPELLANTS: Abcarius.

FOR RESPONDENT: Goitein and Malak.

## JUDGMENT:

This is an appeal from a judgment of the District Court of Jaffa, in favour of the Respondent for the sum of LP. 694.635 mils with interest and costs against the estate of the late Salim Khoury.

The circumstances giving rise to this litigation are rather peculiar. By a deed of renunciation Ex. 1 the Respondent renounced in favour of her brother Salim Khoury all her shares in certain land in Haditha village, amounting in area to some 68 *dunums*. This deed was filed in the Land Settlement Office and the land was duly registered in the name of Salim Khoury. No mention is made in the deed of the reason for its execution, nor is any price specified therein.

Two documents produced, Ex. B and Ex. C, made by Salim Khoury and dated 9.12.37 and 16.7.37 respectively purport to show that Salim Khoury admitted buying, out of this area of 68 *dunums*, 10 *dunums* at LP. 15 per *dunum*, 22 *dunums* at LP. 7.500 mils per *dunum*, and on the 24.12.37 3 *dunums* at LP. 5 per *dunum*, making 35 *dunums* in all, at a total price of LP. 330. By Ex. A the Respondent acknowledged to have received from Salim Khoury "The amount of LP. 330 as the price of 35 *dunums* in the village of Haditha". This receipt is dated 24.12.37.

After Salim Khoury's death, his sister the Respondent sued the administrators of his estate for the balance of the amount due on the sale of 68 *dunums* at LP. 15 per *dunum* alleging that there was an oral agreement to this effect between her and the deceased. The District Court after hearing her evidence and that of other witnesses found in her favour and gave judgment accordingly. Hence this appeal.

Abcarius Bey for the Appellants has argued that there was no evidence to support the existence of the alleged oral agreement to purchase 68 *dunums* at LP. 15 per *dunum* — that Ex. A confirmed the truthfulness of Ex. B and C, which are against the interest of the deceased, that there was no evidence to show that the deceased paid

any taxes on the whole land after 15.7.37 — and that the object of the deed of renunciation was to reimburse the deceased if he should be called upon to implement a guarantee which he had given to his sister. Mr. Goitein on the other hand has argued that this is a question of fact, that the District Court having believed the witnesses, the Court of Appeal cannot interfere, and that Ex. B and C are not against the deceased's interest. He also attempted to argue that under the Succession Ordinance administrators have no power to appeal, but this is fallacious — if administrators can sue and be sued, it is obvious that they can appeal.

Now it is quite clear from the evidence heard that the Respondent knew perfectly well when she signed Ex. A what she was doing, and that she understood the contents. That receipt shows quite clearly that the price of the 35 *dunums* was not LP. 15 per *dunum* nor anything like it, and thus it contradicts totally her evidence as to the price of each *dunum* in the alleged sale. She also admitted in her evidence that the transfer of the land was in connection with a guarantee to be given by Salim in her favour which guarantee was never in fact given. In our opinion also Ex. B and C are partially at any rate against the proprietary interest of the deceased, inasmuch as he states in his own writing in Ex. B that 36 *dunums* (subsequently reduced to 33 *dunums*) belonged to his sister and that he had only bought 35 *dunums*. These Exhibits are, therefore, admissible in evidence. See Phipson on Evidence, 7th Ed., p. 270. In these circumstances we find it difficult to see on what the learned Judge relied in finding that an oral agreement had been concluded between the Respondent and the deceased. Her evidence as to the alleged price — a vital term — being flatly contradicted by her own admission in writing, her evidence as to other details of the alleged contract becomes worthless. The fact that Ex. 1 contains no reasons for its execution, nor mentions any consideration, in itself tends to negative the suggestion of an oral contract for sale, and supports the suggestion that it was given in connection with the guarantee mentioned by the Respondent. There is not a scrap of documentary evidence to support the existence of such a contract and it is obviously dangerous to rely only on oral evidence of an oral contract, when one of the alleged parties is dead, and cannot contradict it. See Beckett *v.* Ramsdale, L. R. 31 Ch. D. 177. We are of opinion that the findings of the learned Judge are against the weight of evidence and his finding that the oral contract had been proved cannot be supported.

The appeal must be allowed, and the judgment appealed from set aside, and judgment entered for the Appellants with costs on the lower scale both here and below, to include LP. 15 advocate's attendance fee in this Court. We note that the Appellants are prepared to retransfer the 33 unsold *dunums* to the Respondent. This obviously should be done.

Delivered this 10th day of January, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 251/40.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

1. Said Khamis,
2. Hussein Abdullah Nubeishi,
3. Ali el Hassan,
4. Ali el Husein,
5. Mohammad Salama,
6. Sad el Hassan,
7. As'ad Abul Izz,
8. Hussein As'ad el Subeitan. RESPONDENTS.

*Eviction — Submission to arbitration — Some defendants taking steps in the action — Costs.*

In allowing an appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated the 25th of September, 1940, and in remitting the case to the Magistrate :—

HELD : 1. It was for the Magistrate to decide whether the land in dispute was covered by the lease and, therefore, by the submission to arbitration.

2. The fact that some of the Respondents had taken steps in the action could not affect those who had not taken such steps and as it would be most inconvenient to split the claim into two parts, the whole claim should go to arbitration if it were in fact covered by the submission.

ANNOTATIONS : On stay of proceedings on account of an arbitration agreement, see C. A. 90/39 (1939, S. C. J. 415) and note, and Admir. C. 1/39 (*ibid.*, p. 537).

FOR APPELLANT : Toukan.

FOR RESPONDENTS : 1, 4 and 7 : In person.
2, 3, 5, 6 & 8 — Absent — served.

JUDGMENT:

This is an appeal by the Attorney General from a judgment of the District Court which arises in the following circumstances. The Attorney General brought an action for eviction from certain land against the Respondents. The Respondents allege that this land is covered by a lease entered into some years ago with Government with regard to which there was an agreement to go to arbitration in the event of any dispute arising.

The first point to be decided in this case is whether the land now in dispute is the same land, or is part of the land, covered by the lease. It seems to us that that is a matter which the Court of first instance, that is in this case the Magistrate of Haifa, should decide. If he finds as a fact, after hearing evidence, that the land now in dispute is covered by the lease then the question of arbitration of course arises. If, on the other hand, he finds that it is not so covered, he can dispose of the case in the ordinary way.

A point has been taken by the Attorney General that, in any event, the Respondents have lost their right to arbitration by reason of the fact that the majority of them have taken steps in the action. Having regard to the grounds of appeal and also to the finding of the District Court on this matter, we are treating this case on the basis that at least one of the Respondents has taken no steps in the action. In the absence of any authority to the contrary, it seems to us inequitable that any Respondent who has taken no step in the action should lose his right to arbitration merely because some of his fellow Respondents have taken such steps. I suppose, technically, that it might be argued that the Court should proceed to determine the action as against those Defendants who have taken steps in the action. This however would mean splitting the claim into two parts ; part to be tried before the Arbitrator and part to be tried before the Court. This seems to us to be a most inconvenient course and we, therefore, think that, assuming that the Magistrate finds the land to be subject to the arbitration agreement, then the claim against all the Respondents should go to arbitration. The appeal must, therefore, be allowed and the case

remitted to the Magistrate to make the necessary findings, after hearing such evidence as may be required, and to determine the matter accordingly.

Having regard to all the circumstances of this case we think that the fairest order is that the costs of this appeal and the costs of the preliminary proceedings before the Magistrate and before the District Court, should be in the cause.

Delivered this 14th day of January, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 146/40.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Samuel Solomon Sgheir. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Accessory to forgery, C. C. O., Secs.* 23, 337 & 340 — *Confessions, whether free and voluntary — Statements taken at night — Findings of fact — Sentence.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 16th of December, 1940, whereby the Appellant was convicted of being an accessory, contrary to Section 23 of the Criminal Code Ordinance 1936, to forgery contrary to Section 337 of the Criminal Code Ordinance and to uttering false documents contrary to Section 340 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, with special treatment :—

HELD : 1. The Court of Criminal Appeal would not interfere with the definite finding of the Trial Court that the confession had been freely and voluntarily made.

2. The Appellant was not wrongly in custody at the time the statement was made, and the statement was, therefore, not inadmissible.

3. It was not desirable that statements should be taken from persons in custody at late hours of the night.

ANNOTATIONS : On confessions *vide* CR. A. 51/39 (1939, S. C. J. 499) and cases cited in annotations and CR. A. 75/39 (1940, S. C. J. 11).

FOR APPELLANT : Goitein and Wilner.

FOR RESPONDENT : Junior Government Advocate — (Salant).

JUDGMENT:

We need not trouble you, Mr. Salant.

The Appellant was convicted before the District Court of Tel-Aviv of being an accessory contrary to Section 23 of the Criminal Code Ordinance, 1936, on counts 1 to 8 of an information of 12 counts, namely, to forgery contrary to Section 337, and to uttering false documents contrary to Section 340 of the Criminal Code Ordinance. The case for the prosecution depended largely upon statements in the nature of confessions alleged to have been made by the Appellant. Mr. Goitein has addressed us at considerable length as to the various reasons why these confessions should not have been believed by the learned Judge who tried the case but when we read the judgment of the learned Judge, it is quite clear that he applied his mind to all the relevant considerations, that he considered all these points and that he found that the confession was free and voluntary as was also the statement of the Appellant that LP. 850 was his share.

Now, in the face of definite findings of fact, it is always very difficult for an appeal Court to disagree with a trial Court. It seems to us that when the Appellant made his statement to the Directors of Barclays Bank he could well have complained then that he had been beaten and that he had been forced to say that he was guilty of these frauds. He did not do so. As I said, we find it very difficult to understand why he did not.

The only point really of interest is whether, if the Appellant was wrongly in custody at the time the statement was made, that of necessity makes the statement inadmissible. We do not think that he was wrongly in custody at this particular time and, therefore, on that ground we cannot find that the statement given was necessarily inadmissible, but we would like to say this that it is not right and it is not desirable that statements should be taken from persons in custody at late hours of the night. It is quite possible that if we had been trying this case in first instance we might not have convicted him but we cannot say that the conviction is wrong on the findings made by the Trial Judge, which findings are supported by the evidence heard by him. There is no appeal against sentence but in the circumstances, having regard to the large amount of frauds amounting to some LP. 3000, we do not think that the sentence of two years with special treatment can in any way be termed other than lenient. For these reasons the appeal must be dismissed.

Delivered this 20th day of January, 1941.

*British Puisne Judge.*

CRIMINAL APPEAL No. 4/41.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. — APPELLANT.

v.

1. Yacoub Shlomo Ekes,
2. Zion Haim Chev,
3. Manuel Izhak Mazal,
4. Shemuel Shalom Shoshany,
5. Victor Ephraim Rahamim. — RESPONDENTS.

*Appeal against sentence — Shop-breaking, C. C. O., Sec. 297(a), CR. A. 15/39 — Binding over.*

In allowing, as to the third Respondent, and in otherwise dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 10th of December, 1940, whereby the Respondents were convicted of shop-breaking, contrary to Section 297(a) of the Criminal Code Ordinance, 1936, and the first, second, fourth and fifth Respondents were released conditionally, upon their each entering into a bond in the sum of LP. 50, with two sureties each in like amount, to be of good behaviour for two years, and the third Respondent was sentenced to two years' imprisonment, to run from date of his detention, 5.10.40 :—

HELD : 1. The sentence imposed upon the third Respondent should be increased as he had already been treated with leniency once before.

2. (Referring to CR. A. 15/39) : Shop-breaking was a serious offence, and Courts of trial should satisfy themselves whether, in all the circumstances, it was right that persons convicted for the offence should be bound over.

REFERRED TO : CR. A. 15/39 (1939, S. C. J. 184).

ANNOTATIONS : On appeals by the Attorney General against sentence, see CR. A. 11/39 (1939, S. C. J. 121) and note.

FOR APPELLANT : Crown Counsel — (Bell).

FOR RESPONDENTS : Nos. 1 & 2 — in person.
No. 3 — Eliash.
No. 5 — Frank.

JUDGMENT:

This is an appeal against sentence by the Attorney General. The five Respondents pleaded guilty to shop-breaking, contrary to Section 297(a) of the Criminal Code Ordinance. This is a serious offence, for which the maximum penalty is seven years' imprisonment.

The third Accused, Manuel Izhak Mazal, was sentenced to two years' imprisonment. In June, 1939, it appears that he was bound over for two years on a charge of theft. Dr. Eliash, on his behalf, informs us that he is the son of respectable professional parents, and that he is a man of some education. This is not a case of a man falling into sudden temptation. He has already been treated with leniency once before, and we can see no excuse in his case. The offence is a bad one, and was deliberately planned and carried out, and we think the sentence should be increased.

We, therefore, allow the appeal as to this Accused, and increase his sentence to one of three years' imprisonment, to run from the 5th October, 1940.

As to the other Respondents, No. 4 has joined the Armed Forces for the Crown, and is not before us. He, and the first, second and fifth Respondents were bound over, as it was their first offence.

We were somewhat surprised to find that the first and second Accused had been given an opportunity of rehabilitating themselves in the Police Force, but the authorities were no doubt satisfied that it was right to give them this opportunity. The fifth Accused is working with his father, who is a grocer.

In Criminal Appeal No. 15/39, where the convicted persons were also accused under this section, this Court held :—

> "The accused may be fortunate in receiving a light sentence, but it does not follow that if other persons are convicted of this crime they will not receive a heavier sentence."

We are certainly in favour of first offenders being given an opportunity to mend their ways, and we think that on the whole the appeal as to these four Accused should be dismissed, but we should like to make it very clear that this is a serious offence, and that Courts of Trial should satisfy themselves if, in all the circumstances, it is right that persons convicted of it should be bound over.

Delivered this 3rd day of February, 1941.

*Chief Justice.*

CIVIL APPEAL No. 261/40.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :—

1. Moshe Matalon,
2. Moshe Carasso. — APPELLANTS.

v.

Zvi Goldberg. — RESPONDENT.

*Sale of land — Default by purchaser — Action for return of purchase price — Penalty and liquidated damages — Default by both parties — Payment on account of purchase price and not as deposit by way of guarantee, Howe v. Smith, Mayson v. Clouet — Assessment of damages — Amendment of statement of claim — Refund of purchase price, C. A. 133/38 — Readiness and willingness, P. C. 47/32 — Area of land, Mejelle, Art. 226 — Failure to appear in Land Registry — Cross-appeal, C. P. R. 339 — Interest.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 15th of November, 1940 :—

HELD : (Distinguishing Howe *v.* Smith) : The sum of LP. 1,400.— had not been paid as a deposit by way of guarantee to be forfeited on failure to complete, but had been in part payment of the purchase price.

2. (Following Mayson *v.* Clouet) : Whether a claim for refund of purchase price could succeed depended in the first instance on the terms of the contract on this point.

3. As the sum of LP. 500.— mentioned in Clause 5 of the contract was a penalty, the clause had to be read as providing for the return of the balance of LP. 1,400 after deduction of the actual amount of the damages.

4. The amendment of the statement of claim had to be allowed in order that the rights of the parties might be properly determined.

5. (Distinguishing C. A. 133/38) : The facts in the present case were distinguishable from those in Civil Appeal 133/38 where the failure of consideration had been entirely due to the purchasers' own default.

6. (Following P. C. 47/32) : A party claiming damages, even by way of counterclaim, had to prove that he had been willing and able to carry out his part of the contract.

7. The vendors were also in default as they had sold 710 square metres and were the owners of only 699 square metres. Moreover, they had not appeared at the Land Registry on the day fixed for completion.

8. Both parties being in default, neither was entitled to damages.
9. In accordance with the terms of the contract the Respondent was entitled to the return of the LP. 1,400.—, part payment by him of the purchase price.
10. The Respondent was entitled to interest on the sums ordered to be returned to him.

DISTINGUISHED :

Howe *v.* Smith, 1884, 27 Ch. D. 89.
C. A. 133/38 (1938, 1 S. C. J. 414).

FOLLOWED :

Mayson *v.* Clouet, 1924, A. C. 980.
P. C. 47/32 (P. L. R. 831, C. of J. 406).

ANNOTATIONS :

1. See, on the first and second points, Halsbury, Vol. 29, *pp.* 375 *seq.*, *Sec.* 2, *Sub-secs.* 1 & 2, Digest, Vol. 40, *pp.* 226 *seq.*, *Sec.* 2, *Sub-secs.* 1—3.
2. On return of purchase price generally, *vide* C. A. 108/38 (1938, 1 S. C. J. 345), C. A. 132/38 (*ibid.*, p. 387), C. A. 133/38 (*supra*), C. A. 217/38 (1938, 2 S. C. J. 221), C. A. 162/38 (1939, S. C. J. 262), C. A. 69/39 (*ibid.*, p. 376), C. A. 95/39 (*ibid.*, p. 531), C. A 85/40 (1940, S. C. J. 474).
3. On penalties and liquidated damages, compare C. A. 162/40 (1940, S. C. J. 321) and note 3.
4. On amendment of the statement of claim, *vide* C. P. R., Rule 125.
5. On readiness and willingness to complete, see C. A. 85/40 (*supra*) and note 3.
6. On Art. 226 of the *Mejelle*, compare C. A. D. C. J'm, 96/36 (P. P. 30.xii.36), C. A. D. C. T. A. 59/39 (Tel-Aviv Judgments, 1939, p. 121).
7. On the last point see C. A. 85/40 (*supra*) and note 4.

FOR APPELLANTS : Goitein.

FOR RESPONDENT : Eliash

## JUDGMENT:

We have already announced that in our opinion this appeal failed, and we now give our reasons for so holding.

The facts are simple and are not in dispute. By a contract dated the 4th October, 1935, the Respondent undertook to purchase from the Appellants a plot of land in Tel-Aviv, of the area of 710 square metres, the boundaries being given in the contract, for the price of LP. 3,786.750 mils. The sum of LP. 1,000 was paid on signing. By agreement between the parties a further sum of LP. 400, instead of LP. 900, as stipulated in the contract, was paid by the Respondent on the 28th November, 1935, and, by a further addendum, the time for payment of the balance of LP. 500 was extended to the 28th November, 1936, when transfer was to take place. By Clause 5 of the con-

tract the sum of LP. 500 was agreed upon as liquidated damages and it was provided that if the Respondent should commit a breach of the agreement the Appellants should be entitled to retain the amount of LP. 500, out of the sums received on account of the purchase price, the balance of the latter to be returned to the Respondent. The Respondent further paid LP. 87.915 mils for road-making.

The Respondent was unable to complete, and admits this, giving the reason that owing to currency restrictions imposed by the Polish Government he was unable to get the necessary sums from Poland.

On the 11th November, 1939, the Respondent entered an action in the District Court claiming that the sum of LP. 987.915 mils should be returned to him out of the sums already paid by him on account of the purchase price, at the same time without waiving his right to the balance of LP. 500.— but excepting it for the time being in case the Appellants should be entitled to damage under Clause 5 of the contract on account of his, the Respondent's, admitted default. By an amendment of the claim, which was allowed by the Court on the 16th September, 1940, he claimed the return to him of this further sum of LP. 500.

The Appellants on the 18th February, 1940, filed a statement of defence. This was divided into two parts — the first is headed "I. Denials" — and the second — "II. Defence by way of counterclaim". The main part of the defence appears to be in Part II. They denied that the Respondent's claim disclosed any cause of action, they alleged that the Respondent had committed a breach of the contract (which had already been admitted), and they further claimed that they had performed all the terms and conditions of the contract to be performed on their part and by the Respondent's default they had suffered damages to the extent of LP. 1,500. They admitted having received the sum of LP. 1,487.915 mils and counterclaimed for the balance of LP. 12.085 mils.

By an interlocutory judgment dated the 19th June, 1940, the Court decided that, since the Respondent had admitted that he was in default, and holding that the reasons for that default did not amount to *force majeure* as claimed by the Respondent, the Respondent was not entitled to the return of his money, and that the remaining point for determination was the amount of damages to which the Respondent was liable. The Court held that the sum of LP. 500 mentioned in Clause 5 of the contract was a penalty and not liquidated damages and the case was adjourned for hearing evidence, in the first place that the Appellants were ready and willing to perform their part of the contract

and were not in default themselves and, secondly, on the amount of damages suffered by the Appellants.

In a final judgment dated the 15th November, 1940, the Court held that both parties were in default on the appointed date and accordingly gave judgment for the Respondent for the return of the LP. 1,400. The sum of LP. 87.915 mils, the balance of the claim, seems to have mysteriously disappeared, but no appeal is made on that point. The Court also held that up to 28.11.38 no damages had been suffered by the Appellants.

The arguments on this appeal have ranged over a wide field, but the main ground, I think I am right in saying, is that the Respondent's statement of claim disclosed no cause of action. The Appellants say, rightly, that a claim and counterclaim are two distinct actions except for purposes of execution and that when once the claim failed, as fail it must, when the Respondent had admitted his default, the claim should have been dismissed without any regard to the counterclaim. But I think that it is quite clear that the learned Judge, in the interlocutory order, had in mind the terms of Clause 5 of the contract, and that he never intended nor indeed purported to hold that the Respondent was liable to forfeit his LP. 1,400 together with a further sum for damages. If he did so intend or purport, then he would obviously be wrong. The LP. 1,400 was not paid as a deposit by way of guarantee to be forfeited on failure to complete, but was in part payment of the purchase price, and the case quoted by Mr. Goitein, Howe *v.* Smith — 27 Ch. D. 89, does not apply here as that case referred to a claim to refund of a deposit. Mayson *v.* Clouet, 1924 A. C., p. 980, lays down quite clearly that whether a claim to refund of the purchase price can succeed depends in the first instance on the terms, if any, of the contract on this point. And Clause 5 of this contract here makes specific provision in this regard, for it states that the balance of the money received is to be returned after deduction of LP. 500 as liquidated damages. Since the sum of LP. 500 has been held to be a penalty, and neither side contests this, then Clause 5 would have to be amended to provide that the balance of the LP. 1,400 would be returnable after deducting the actual damages suffered, if any. To my mind the statement of claim dicloses a very good cause of action, and I think that the amendment to the statement of claim was rightly allowed, since the Respondent, as Plaintiff, had expressly reserved all rights in regard to this amount of LP. 500. Since the Apppellants claimed that they were entitled to LP. 1,500 damages, the Respondent was fully entitled to say that no damages were payable, and the

whole of the LP. 1,400 was returnable. The amendment had to be allowed in order that the rights of the parties might be properly determined.

Mr. Goitein has placed considerable reliance on the case of Hawa and others *v.* Rayyes and another — C. A. 133/38, 5 P. L. R. 363, where the refund of purchase price was refused, there being a failure of consideration due to the purchasers' default, and this Court held that the purchasers could not set up their own default as a ground for recovery. But the circumstances of that case were very different from the present case. There the vendors had given an irrevocable power of attorney to the purchasers, who at any moment could have used that power and obtained the property for which they had paid. This Court held that in such circumstances where the failure of consideration was due entirely to the purchasers' own action, and particularly after a lapse of twenty years, the action for the return of the purchase price must fail. I do not think that that case has any bearing on the present dispute.

The position, therefore, as I see it, is this — that the Respondent is entitled to claim back the sums he had paid on account of the purchase price, subject to a deduction of whatever amount may be found due to the Appellants as damages for the Respondent's default. And this brings us to the question as to what damages, if any, are payable. Any party claiming damages must prove that he was willing and able to carry out his part of the contract, and this applies not only to a plaintiff on the main claim, but also to a defendant who seeks to establish a claim to damages on a counterclaim. In this case, therefore, the Appellants, if they claim damages, must establish this vital point, that they were in a position and willing to carry out their part of the contract. The doctrine set out in Chedid *v.* Tennenbaum, Privy Council Appeal 47/32, P. L. R. 831, applies to any claim to damages. The learned Judge held that the Appellants had also made default on the contract and I think that he was right in so holding. The contract stated that the area of the land to be sold was 710 square metres — see the first recital, where the Appellants were stated to be the owners of a plot of this area. In fact, according to the Land Registry extract Ex. P. 1, they were actually the owners of only 699 square metres on the 25th July, 1935, which is the last entry prior to the date of the contract. For this reason only, the Respondent, according to Article 226 of the *Mejelle,* could have disclaimed the contract. Also, it is not denied that the Appellants did not appear in the Land Registry on the date fixed for completion. This may be

only a formality, but it may at the same time be a very necessary formality. There was, in my opinion, sufficient evidence before the District Court to justify that Court's finding, that the Appellants too were in default and that being so, they cannot succeed in a claim for damages. Both sides being in default, neither is entitled to damages. In accordance with the terms of the contract, therefore, the Respondent was entitled to the return of the LP. 1,400, part payment by him of the purchase price, and the District Court was right, in my opinion, in its judgment. Holding this view, the question of the amount of damages does not arise.

The judgment under appeal makes no mention of the result of the counterclaim, but it is obvious that since the Court held that no damages were payable, the counterclaim failed. In this connection it is not quite correct to say that the counterclaim was for LP. 12.085 mils. It was in effect for LP. 1,500, that being the amount of damages alleged to have been suffered by the Appellants. To the part satisfaction of this sum, they admitted the receipt of LP. 1,487.915 mils and, therefore, only actually claimed LP. 12.085 mils, but to succeed for this amount they would have had to establish that they had suffered damages to the amount of LP. 1,500.

There only remains the question of interest on this sum of LP. 1,400. The District Court omitted to award interest though this was claimed in the original statement of claim. By notice under Rule 339 of the Civil Procedure Rules, 1938, the Respondent has served notice on the Appellants that he intended to ask that the decision of the District Court should be varied by the addition of interest at the rate of 9 *per cent per annum* on the amount of LP. 900 from the date of action, the 11th November, 1939, and on the amount of LP. 500 from the 16th September, 1940, until payment. We think that he is entitled to this, and the judgment under appeal will be varied accordingly. Subject to this the appeal will be dismissed with costs on the lower scale, to include LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this fourteenth day of February, 1941.

*British Puisne Judge.*

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CRIMINAL APPEALS Nos. 8 & 9/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

1. Mahmoud Nimer Ibrahim,
2. Ahmad Yousef el Khatib. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Murder — Identification — Contradictory evidence — Confession, whether free and voluntary, Reg. v. Thompson, R. v. Chadwick, Ibrahim v. The King.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Haifa, dated the 16th of January, 1941, whereby the Appellants were convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. There was nothing to show that the Court took as evidence against the first Appellant the statement made to the Police by the second Appellant.

2. In case of contradictory statements it was for the Trial Court to say what they believed, and what they did not believe.

3. The Trial Court was justified in finding that the first Appellant had been properly identified.

4. (Following Reg. *v.* Thompson, R. *v.* Chadwick, Ibrahim *v.* The King) : It was on the prosecution to prove that a confession had been freely and voluntarily made.

In the present case the prosecution had discharged that onus.

FOLLOWED : Reg. *v.* Thompson, 1893, 2 Q. B. 12, R. *v.* Chadwick, 1934, 24 Cr. App. R. 138, Ibrahim *v.* The King, 1914, A. C. 599.

ANNOTATIONS :

1. Compare, on the first point, CR. A. 19/38 (1938, 1 S. C. J. 199) in the middle of page 201.

2. See, on the second point, Evidence Ordinance, Sec. 11.

3. On identification, *vide* CR. A. 70/39 (1940, S. C. J. 7) and notes, CR. A. 73/39 (*ibid.*, p. 9) and note, CR. A. 3/40 (*ibid.*, p. 47) and CR. A. 91/40 (*ibid.*, p. 341).

4. In addition to the English authorities relied upon by the Court, the rules relating to the admissibility of confessions are expressly laid down in Sec. 9 of the Evidence Ordinance.

5. On confessions generally, compare CR. A. 146/40 (*ante*, p. 32) and note.

FOR APPELLANTS : No. 1 — Asfour and Abassi.
No.2 — Cattan.
FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

We need not trouble you, Mr. Hogan.

The Appellants were charged before the Court of Criminal Assize, sitting at Haifa, with the wilful murder of one, Shafik Sadek Mustafa, by shooting him. They were convicted and sentenced to death. The evidence for the prosecution shows that three armed men, including these two Appellants, came to the house where the deceased and his parents were staying. After a very short conversation the three men took the deceased and his father out. After having taken them to a certain distance, the father was sent back, and told that he would be killed if he did not go back. The evidence was that the father said that the men told him that they were going to take his son to the gang leader. The next day the father saw his son shot and seriously wounded in the hospital.

The father and mother of the deceased man both identified the first Appellant Mahmoud and the father identified the second man Ahmad. A further witness, Abdul Rahman Saleh, met the party of three men, with the deceased and his father, and he said that he recognised the second Appellant Ahmad. In addition to that the first Appellant Mahmoud made a statement to the police in which he admitted, and it is quite clear, that he was associating with Appellant No. 2 Ahmad. There is nothing to show that the Court took as evidence against this Appellant the statement made to the Police by the second Appellant. The deceased before he died — he had been shot through the jaw and in the chest and was very seriously ill — said briefly that "Mahmoud of Koumia" had killed him. It is not denied that the first Appellant is from Koumia and, therefore, fits the description.

Now, Mr. Asfour for the first Appellant, rests his appeal on the fact that the identification was not conclusive, inasmuch as one of the witnesses who identified this man had made contradictory statements. This is a point to be taken in the Court of Trial and not in the Court of Appeal, as we have mentioned in the course of the argument and on numberless other occassions. In many criminal cases contradictory statements are made and it is for the Trial Court to say what they believe and what they do not believe. At the identification parade the witness was quite definite as regards the identity of both Appel-

lants. The Trial Court considered this point and made a definite finding upon it and held that the identification parade was properly conducted and that the identification by the father and by the mother was to be believed. We see no reason to interfere with that finding.

It has been proved that the first Appellant, Mahmoud, was one of those who abducted the deceased from his house. The Trial Court believed the deceased's statement, as they were entitled to do, that a man called Mahmoud of Koumia had shot him. The Trial Court was fully entitled to hold that it was this Appellant, Mahmoud of Koumia, who abducted the deceased and later on shot him. It would have been in the highest degree improbable that another Mahmaud of Koumia was substituted in between the two incidents of the abduction and the murder, and there is the further point that the first Appellant, Mahmoud, on his own admission, was associated with the second Appellant Ahmad. There was ample evidence, therefore, on which the first Appellant could be convicted.

With regard to the second Appellant, the main ground of appeal, and the only substantial ground of appeal, is that the statement F. N. 1, which he was alleged to have made to the police on the 11th March, 1940, was improperly admitted inasmuch as it was not proved that it was made voluntarily. It is the law that it must be affirmatively proved that the confession was free and voluntary. That proposition was laid down in The Queen *v.* Thompson (1893, 2 Q. B. 12) and was confirmed by Rex *v.* Chadwick (24 Crim. App. R. 138) and was further approved in Ibrahim *v.* The King, (1914 Appeal Cases 599). Nobody disputes this proposition. It is, therefore, important for the prosecution to prove that this statement was voluntary.

The Police Inspector charged him and cautioned him, the statement was read over and signed by him. At the head of that statement it appears that he was charged, cautioned very fully, and the statement goes on to say that " 'Whatever you say shall be taken down in writing word by word and may be produced as evidence at your trial and you are not compelled to say anything if you do not wish to do so.' He then voluntarily said 'I want to make a statement to you'."

The opinion of this Court is that this was proof that the statement was voluntarily made and that the prosecution so proved, and it was for the defence to disprove it, if they could, in cross-examination. Actually there was no cross-examination as to whether the statement was free and voluntary — the defence was merely a denial that the statement was ever made. The statement was, therefore, properly admitted.

From the statement F. N. 1, it is perfectly clear that the second Appellant went out without compulsion with two persons who had announced to him that they wanted to kill the man who was actually killed. He admits that he stood outside the house whilst the two other men went into the house and brought Shafik and his father out. He admits that he and the others took them both away and that the father was sent back. He admits that in his presence the actual murderer fired three shots at Shafik and wounded him and Shafik fell to the ground. He admits that after the shots had been fired they all escaped, leaving the wounded man lying on the ground. And the statement is in part corroborated by the identifications of the second Appellant, as one of the abductors, by the father of the deceased and by the witness Abdul Rahman.

In the face of this mass of evidence, to say that there was no material on which the Assize Court could find that the second Appellant took part in this murder is to fly in the face of the manifest realities of the situation.

There are no grounds for interfering with the convictions, and both appeals must, therefore, be dismissed, and the convictions and sentences of death confirmed.

Delivered this 12th day of February, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 270/40.

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

BEFORE : Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEAL OF :—

Charles Fisher. APPELLANT.

v.

1. Pastor Detwig von Oerzen,
2. Emile Fisher,
3. Gertrude Richter. RESPONDENTS.

*Removal of executor — Executor an enemy subject — Discretion of District Court.*

In dismissing an appeal from the order of the District Court of Haifa, dated the 10th of December, 1940 :—

HELD : No rule of law had been quoted to the effect that an enemy subject could not remain an executor, and the discretion of the President would not be interfered with.

ANNOTATIONS :

1. Other proceedings in respect of this estate : H. C. 55 & 57/40 (1940, S. C. J. 259).

2. On discretion as regards the appointment and removal of administrators or executors, *vide* C. A. 21/40 (1940, S. C. J. 83) and note.

3. On non-interference with the discretion of the District Court generally, compare C. A. 66/40 (1940, S. C. J. 136) and note 4, C. A. 62/40 (*ibid.*, p. 171), C. A. 171/40 (*ibid.*, p. 308), CR. A. 85/40 (*ibid.*, p. 328), C. A. 244/40 (*ibid.*, p. 422).

FOR APPELLANT : Atalla.

FOR RESPONDENTS : No. 1 — Gavison.
No. 2 — Abent — served.
No. 3 — Blumberg.

JUDGMENT:

The Appellant applied to the District Court to remove an Executor and to appoin another in his place. It is said that the present Executor is an enemy subject and is absent from Palestine. No rule of law has been quoted to us whereby this Executor should have been removed, and the matter would seem to be one of discretion.

His Honour Judge Evans considered it fully, and I see no reason to interfere with his decision, but I should like to make clear that I do not necessarily think that an enemy subject who is absent from Palestine is a suitable person to be an Executor.

The appeal will be dismissed, with costs to the first Respondent on the lower scale, with LP. 10 certified for attending the hearing.

The third Respondent will have an inclusive sum of LP. 5 as costs.

Delivered this 5th day of February, 1941.

*Chief Justice.*

CRIMINAL APPEAL No. 12/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Abraham Hayim Haibi. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Sentence — Successive terms in Reformatory.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 17th of January, 1941, whereby the Appellant was convicted of housebreaking contrary to Section 259(a) of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment :—

HELD : It was wrong that any young person should be sent to a reformatory on three different occasions. If one term in a reformatory was useless then other methods should be tried.

ANNOTATIONS : On young offenders compare CR. A. 90/40 (1940, S. C. J. 331) and note 2.

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

This is one of the most frivolous appeals that we have ever had. The Appellant pleaded guilty to three charges of housebreaking. He has, since the year 1935, been convicted on four occassions for theft and housebreaking. In fact there are ten charges on which he has already been convicted. He had been for two years under probation, five years in 3 terms in a reformatory school and on two occassions he had been whipped. As the learned President of the District Court said, he only avoids getting into trouble when under the detention of the Government and, when free, makes a habit of molesting the public at the earliest opportunity — thereby abusing his right to freedom. This case is a striking example of the futility of giving light sentences and it is wrong also, that any young person should be sent to a reformatory on three different occassions. If one term in a reformatory is useless then other methods should be tried.

In the circumstances, it is necessary that he should have a sentence

which, perhaps, may make him think a little bit. The sentence of three years imposed upon him by the District Court will, we hope, have that effect.

The appeal is dismissed.

Delivered this 12th day of February, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 138/40.

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mohammad Nimer Obeid. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Attempted rape — Corroboration — Early complaint, R. v. Lillyman.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 21st of November, 1940, whereby the Appellant was convicted of an attempt to commit rape, contrary to Section 154 of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment :—

HELD : 1. (Following Reg. *v.* Lillyman) : The complaint made by complainant to her husband immediately after the event was not corroboration as regards the accused person, but was evidence of the consistency of the complainant's story and was also admissible in order to negative consent.

2. In case of sexual offences corroboration was required as a matter of practice, and there was no such corroboration implicating the accused.

FOLLOWED : Reg. *v.* Lillyman, 1896, 2 Q. B. 167.

ANNOTATIONS :

1. See, on the first point, CR. A. 104/40 (1940, S. C. J. 395) and notes.

2. On the necessity of corroboration in case of sexual offences, *vide* CR. A. 75/39 (1940, S. C. J. 11) and notes.

3. On coroboration which does not implicate the accused, compare CR. A. 71/38 (1938, 2 S. C. J. 45).

FOR APPELLANT : Dajani.

FOR RESPONDENT : Acting Solicitor General — (Bell).

## JUDGMENT:

The Appellant was convicted before the District Court of Jaffa, on a charge of attempted rape and was sentenced to one year's imprisonment. On appeal a point has been taken that, as a matter of practice, in these sexual offences there must be corroboration of the complainant's story and that there is no such corroboration to be found in the evidence of this case.

Now, the complainant made a complaint to her husband immediately after the event had taken place. It is quite clear on the authority of several cases beginning with Reg. *v.* Lillyman — 1896, 2 Q. B. 167, that such a complaint is not corroboration as regards the accused person but is evidence of the consistency of the complainant's story and also it is admissible in order to negative consent. The only other corroboration that is alleged is that the husband immediately proceeded to the scene and found certain signs of disorder, which seemed to indicate that a struggle had taken place. There is nothing in all this however which in any way implicates the accused as being corroboration of the complainant's story that it was this actual person who assaulted her, or in fact that the assault was in any way a sexual one. As we have said corroboration in these cases is required as a matter of practice and there is no such corroboration to be found here.

The appeal must, therefore, be allowed and the Appellant discharged. The Acting Solicitor General admits that there are not sufficient grounds to support the conviction.

Delivered this 16th day of January, 1941.

*British Puisne Judge.*

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HIGH COURT No. 10/41.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Rifka Tamara Kaplan. — PETITIONER.

**v.**

1. Chief Execution Officer, Haifa,
2. Pinchas Kaplan. — RESPONDENTS.

*Custody of minor child — Jurisdiction of Rabbinical Court — Laches — Special Tribunal.*

In dismissing an application for an Order to issue to the first Respondent, directing him to show cause why his decision dated the 24th day of January, 1941, in Execution Office File, Haifa, No. 375/40 should not be set aside and why that part of the Judgment of the Rabbinical Court, Haifa, filed in the said Execution File, directing that the son of Petitioner should pass to the custody of his father, the Respondent No. 2, should not be declared void and not subject to execution :—

HELD : 1. The question of jurisdiction was one which should have been decided when the matter came before the Rabbinical Court, and the Petitioner had not raised the question at that stage.

2. The Special Tribunal is not a Court of Appeal.

3. The Chief Execution Officer had no option but to execute the judgment which on the face of it was a good judgment.

ANNOTATIONS :

1. On the power of the Chief Execution Officer to enquire into the jurisdiction of Religious Courts, see H. C. 28/38 (1938, 1 S. C. J. 373).

2. On laches compare H. C. 45/40 (1940, S. C. J. 213) and note 3.

3. On custody of minor children generally, *vide* note 1 to H. C. 41/40 (1940, S. C. J. 232).

4. On the functions of the Special Tribunal compare H. C. 28/38 (*supra*), C. A. 195/38 (1938, 2 S. C. J. 157), H. C. 22/39 (1939, S. C. J. 273, on p. 276) and C. A. 246/40 (*ante*, p. 17).

FOR PETITIONER : Abcarius.

FOR RESPONDENTS : No. 1 — Absent — served.
No. 2 — Eliash by delegation from Weinshal.

ORDER :

This is a return to an Order *nisi* issued by this Court in a case in which the Chief Execution Officer had decided to execute a judgment given by the Rabbinical Court.

Now, the Petitioner says that this is a matter which is not related to divorce but concerns the custody of a child and was not within the jurisdiction of the Rabbinical Court, that is to say, that the Rabbinical Court had no jurisdiction in the matter unless consent of the parties was obtained.

The Chief Execution Officer was faced with what purported to be a perfectly good judgment which he was asked to execute. The question of the jurisdiction of the Rabbinical Court to issue that judgment was one which could and should have been decided when the matter came before the Rabbinical Court, and the Petitioner did not take those steps which she should have done in this matter. Even before the

Chief Execution Officer, the Petitioner declined to ask to refer the matter to the Special Tribunal. And the Special Tribunal is not a Court of Appeal from the Chief Execution Officer nor from any Court.

That being so, we think that the Chief Execution Officer had no option but to execute this judgment which on the face of it was a good judgment. That really disposes of this case. There must be some *prima facie* ground for saying that the order is wrong. The Chief Execution Officer was under no obligation to refuse to execute merely because certain allegations were made. The Rule *nisi* must be discharged with LP. 5 total costs, to the second Respondent.

Given this 21st day of February, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 18/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Ahmad Abed Shawish. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Murder — Confessions — Identification.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Haifa, dated the 31st of January, 1941, 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 confession made by the Appellant was admissible in evidence. The lower Court stated that they disregarded the confession and they could not be said to have been influenced thereby.

2. Although the statement of the deceased was not by itself conclusive to identify the Appellant, there was ample material before the Court of Trial to convict him.

ANNOTATIONS :

1. On confessions compare CR. A. 146/40 (*ante*, p. 32) and note.

2. On identification of the accused, *vide* CR. A. 8 & 9/41 (*ante*, p. 42) and note 3.

FOR APPELLANT : Asfour.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant was charged at the Haifa Assizes with the premeditated murder of Dr. Anwar Shukeiri on the 8th of June, 1939, at Acre. He was charged incidentally with four other persons. The other four were acquitted, and this Appellant was convicted and sentenced to death. The evidence showed quite clearly that the Appellant went to the house of this doctor, told him that his wife was ill, and asked the doctor to come and see her. The doctor went out with the Appellant, and in the course of their journey, outside what they call the Casino in Acre, the doctor was shot. There was a mass of evidence which showed beyond any doubt that it was the Appellant who shot, or that, at any rate, he was one of those persons who shot at the doctor and killed him.

Mr. Asfour for the Appellant has raised two main points really. The first one is that the alleged confession made by the Appellant was wrongly admitted in evidence, and, even if disregarded, must have influenced the minds of the Court ; and the second, that the statement made by the deceased man in hospital to Sergeant Billing, that it was a person called Ahmad who shot him, was inconclusive as a means of identification of the Appellant.

Now, a very considerable amount of argument was advanced in the Court of Trial as to whether this confession was admissible or not. After hearing evidence the Court decided that it was admissible, and it was admitted and read. When it came to consider its judgment and the evidence of the defence, the Trial Court decided that no weight should be attached to this statement, and it said : "We disregard it".

We think that the confession was clearly admissible. As to the argument that it must have influenced the minds of the Court, even if disregarded, it is not as though the confession had been read to a jury. It was read by a Bench of Judges, which makes a considerable difference. In any case, when the Court said that it disregarded it, it does not mean that it had second thoughts about it and held that it was inadmissible. The statement being, as the Court rightly held, admissible, the point is actually irrelevant.

With regard to the statement made by the dying man that his assailant was Ahmad, this would not, of course, by itself be conclusive, but the fact remains that this present Appellant's name is Ahmad. On the evidence there was ample material before the Court of Criminal Assize upon which to convict the Appellant of what was undoubtedly a most cowardly and despicable crime. To call out a doctor under a false pretence on an errand of mercy, and then to shoot him in cold

blood, is an act which it is beyond words to describe in adequate terms of condemnation.

In these circumstances there are no grounds whatever for disturbing the verdict of the Trial Court. The appeal must be dismissed and the conviction and sentence of death are confirmed.

Delivered this 26th day of February, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 14/41.

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

BEFORE : Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEAL OF :—

Mas'oud Suleiman Ajeeb. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Examining Magistrate refusing to commit and discharging Accused after summary trial under C. C. O., Sec. 311 — Committal order by Attorney General — Conviction under C. C. O., Sec. 276(b) — Autrefois acquit, C. C. O. Sec. 21, Interpretation Ordinance, Sec. 25.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 15th of January, 1941, whereby the Appellant was convicted of stealing by agent, contrary to Section 276(b) of the Criminal Code Ordinance, 1936, and sentenced to eighteen months' imprisonment :—

HELD : A person acquitted under Section 311 of the Criminal Code Ordinance could not, upon the same facts, be convicted under Section 276(b).

ANNOTATIONS :

1. On committal by the Attorney General after discharge by the Magistrate, see CR. A. 85/38 (1939, S. C. J. 15).

2. On the plea of *autrefois acquit*, compare Halsbury, Vol. 9, *pp.* 152—4, *No.* 212, Digest, Vol. 14, *pp.* 336 *seq.*, *Sec.* 1, especially *pp.* 342—4, *Sub-sec.* 3(C). See also M. A. 31/28 (C. of J. 686), M. A. D. C. J'm. 50/35 (C. of J. 1934—6, 257) and CR. A. 65/37 (1937, S. C. J. 468).

FOR APPELLANT : Levitsky and Amdur.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant in this case was convicted upon information before the District Court of stealing as an agent, contrary to Section 276(b) of the Criminal Code Ordinance.

It appears that the investigating Magistrate, after hearing the evidence, refused to commit the Appellant for trial, and considered the case under Section 311 of the Criminal Code Ordinance, that is being in unlawful possession of goods which are reasonably suspected of having been stolen, and discharged the Appellant.

The Attorney General, notwithstanding that the Magistrate had refused to commit, exercised his powers and filed an information.

At the close of the case for the prosecution the Appellant's then advocate drew attention to these facts, and the Court no doubt considered them, but unfortunately the view which they took was not recorded in the record, and they convicted the Appellant.

Mr. Levitsky on his behalf, submits that he was entitled to rely on the defence of *autrefois acquit*, the principles of which for this Territory are to be found in Section 21 of the Criminal Code Ordinance, and Section 25 of the Interpretation Ordinance.

It is clear that the Magistrate acquitted the Appellant upon the same evidence that was adduced before the District Court.

The matter has been fully argued, and we are satisfied that an accused person who has been acquitted under Section 311 cannot, upon the same facts, be convicted under Section 276(b).

The appeal will, therefore, be allowed and the Appellant discharged, unless he is detained on any other charge.

The Appellant was alleged to have stolen petrol from the Military Forces of the Crown, and I should like to make it very clear that at the present time offences of that sort are of a most serious nature, and may well be visited with heavy penalties.

Delivered this 13th day of February, 1941.

*Chief Justice.*

HIGH COURT No. 9/41.

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

BEFORE : Trusted, C. J. and Rose, J.

IN THE APPLICATION OF :—

Hanina (Hana) Cohen. PETITIONER.

v.

The Chairman and Members of the Local Town Planning Commission, Jerusalem. RESPONDENTS.

*Town Planning — Demolition Order, Town Planning Ordinance, Sec. 35, Town Planning (Am.) Ordinance, 1938, Sec. 11 — Section to be read as a whole — Jurisdiction of High Court.*

In allowing an application for an order to issue directed to the Respondents, calling upon them to show cause why they should not refrain from executing the order of the Magistrate's Court, dated 29.8.38, in Criminal File No. 4791/38, and to abstain from demolishing Petitioner's property :—

HELD : 1. The order of the Magistrate did not comply with the provisions of the law.

2. When Sec. 35 of the Town Planning Ordinance was read as a whole it was clear that the words "or some other person" did not mean the Town Planning authority.

3. As the Applicant had not been heard before the Magistrate, she had not mistaken her remedy and was entitled to apply to the High Court.

ANNOTATIONS :

1. On demolition of buildings under the Town Planning Ordinance see CR. A. 20/40 (1940, S. C. J. 145) and note 1.

2. On sections to be read as a whole, compare note 4 to P. C. 56/38 (1940, S. C. J. 277).

3. See, on the 3rd point, H. C. 85/40 (1940, S. C. J. 413) and note 2.

FOR PETITIONER : Levitsky and Abramovsky.

FOR RESPONDENTS : Said.

## O R D E R.

This is an application for an Order directed to the Jerusalem Town Planning Commission calling upon that body to show cause why they should not refrain from executing an order directing the demolition of the Petitioner's property.

The property in question is small, and upon the facts we are not impressed with the merits of the application, but there are several technical points which call for consideration.

The Applicant is the owner of a property in the Nahlat Zion Qarter. Upon this property her husband, without the requisite permission, made certain additions.

In 1937 he wrote to the City Engineer admitting that he had repaired the building and in his letter he implied that it was his property.

In 1938 proceedings were taken against him, and the description of the offence was as follows :—

> "In that the above Accused has erected a wall, W. C. alterations and additional building for sanitary accomodation without a permit at Nahlat Zion Quarter.
> Application :
> Application is hereby made for :—
> 1) the trial and conviction of the above Accused on the charge described above ;
> 2) an order that all buildings erected without a permit should be demolished."

At the hearing there was no evidence as to who was the owner of the property, and the Defendant did not allege that it was not his. The Magistrate in his judgment said :—

> "Court orders Accused to pay a penalty of 500 mils ; in case of non-payment of the fine to be arrested for three days. A period of three months is granted to the Accused to arrange the matter with the Municipality or to demolish those parts which were built without a licence, as otherwise the Town Planning Commission will demolish the parts built without a licence on the account of the Accused, and declared in open Court on 29.8,38."

The buildings were not demolished.

The provisions of Section 35(1) of the Town Planning Ordinance, which are to be found in Section 11 of the Town Planning (Amendment) Ordinance, 1938, are clear. By paragraph (1) the Court may order the building or structure to be pulled down, and sub-section (2) provides that if the order is not complied with, another offence is committed, and the Court shall (see Section 11(b) of the 1938 amending Ordinance) direct that the order shall be carried out by the Local Commission, or some other person.

It is quite clear that the Magistrate's order did not comply with the Ordinance. Saba Eff. Said seeks to defend it upon the ground that paragraph (i) of (1) of Section 35 provides for pulling down by such person, that is the person convicted, "or some other person", but it is

clear not only from the first proviso but also from the general scheme of the section to which I have referred, that some other person does not mean the Town Planning authority. In addition to this defect the judgment does not specify what buildings are to be demolished or where they are to be found.

The owner of the building which it is sought to demolish may, therefore, well protest that there is no judgment applicable in terms to the building, and that there is no judgment against her personally.

Saba Eff. says this Court should not interfere, as her real remedy was to appeal against the judgment under sub-section (8) of Section 35, but sub-section (1) (ii) proviso makes clear that any person against whom an order may be made is first to be heard, and if they are not heard I do not think they are limited in their remedy to sub-section (8). It is not suggested that the present Applicant was heard by the Magistrate. I think, therefore, she is entitled to take these proceedings, and to succeed in them.

The order will therefore be made absolute, with costs which we assess at an inclusive sum of LP. 10.

Given this 28th day of February, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 17/41.
CRIMINAL APPEAL No. 20/41.

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

BEFORE : Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEALS OF :—

1. Sa'ad Hamad Mahmoud *alias* Abu Jildeh,
2. Hamed Mohammad Hussein el Mahmoud. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Murder — Allocutus, Trial Ordinance, Sec. 47 — Whether accused and advocate entitled to address Court — Tribal Custom, C. C. O., Sec. 42(3).*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Nablus, dated the 1st of February, 1941, whereby the Appellants were

convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. Sec. 47 of the Criminal Procedure (T. U. I.) Ordinance provided for the accused *or* his advocate to be allowed to address the Court before sentence was passed, but it was the practice in some Courts to allow both of them to do so.

2. The ordinary practice of making peace in tribal areas in Palestine was not a custom within the meaning of Sec. 42(3) of the Criminal Code Ordinance.

ANNOTATIONS :

1. See, on the first point, CR. A. 8/39 (1939, S. C. J. 93) and, on *allocutus* generally, CR. A. 40/34 (2, L. R. P. 176, C. of J. 1934—6, 232), CR. A. 187/36 (1937, S. C. J. 441), CR. A. 70/39 (1940, S. C. J. 7).

2. On the second point, *vide* CR. A. 38/38 (1938, 1 S. C. J. 243).

FOR APPELLANTS : No. 1 — Irsheid.
No. 2 — Abu Khalil and Salah.

FOR RESPONDENTS : Crown Counsel — (Bell).

JUDGMENT:

The two Appellants were tried together and convicted of murder. They have entered separate appeals and the appeals have been heard together. The evidence has been discussed at considerable length, but we are satisfied that the Court could properly come to the conclusion to which it came.

A novel point has been raised on behalf of the first Appellant. It is said that after judgment and before sentence his advocate was not allowed to address the Court. Section 47 of the Criminal Procedure (Trial Upon Information) Ordinance provides that before passing sentence the Court should hear the prisoner or his advocate on his behalf, if he has anything to say in respect of the sentence to be passed. It will be observed that the section distinctly says "or", and that the first Appellant himself had an opportunity of addressing the Court, but it is a practice in some Courts, and one which I myself follow, of allowing both the accused and his advocate to address the Court at this stage in the proceeding if they wish.

It is said before us that had the advocate had an opportunity of addressing the Court he would have invoked sub-section 3 of Section 42 of the Criminal Code Ordinance, which is as follows :—

> "If the Court is satisfied that the Accused is a member of a tribe which has been accustomed to settle its disputes in accordance with tribal custom, and it is in the interests of public order that the case should be so settled, the court after sentencing the accused to

the penalty prescribed by this Code or any other law, may substitute therefor such penalty not being repugnant to natural justice or morality as is customary under the tribal custom."

and it appears from the evidence of the District Officer, Jenin, that some foundation was laid for this. He says that he tried to make peace in the village, that arbitrators went into the case and settled the matter as far as he knew according to tribal custom. "Village of Tammoun applies tribal custom in these cases. Whole village was fined something". So far as I am aware it has never been suggested that the ordinary practice which obtains in Palestine of making peace is a custom within the meaning of the sub-section, and whether in any circumstances, having regard to the words "in the interests of public order" any Court would apply this sub-section to a case of conviction for murder, I do not think that it can be applied in this case, as it is quite clear from the evidence that the accused persons were not members of a tribe.

The appeal, therefore, will be dismissed.

Delivered this 26th day of February, 1941.

*Chief Justice.*

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HIGH COURT No. 107/40.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

1. Ibrahim Shawki,
2. Ahmad Shawki as attorney for the heirs of Mohammad El Azab. PETITIONERS.

v.

Director of Land Registration, Jerusalem. RESPONDENT.

*Prescriptive title, Ottoman Land Code, Art. 78 — Registrar of Lands refusing to effect registration without order of Court.*

In refusing an application for an order to issue directed to the Respondent, calling upon him to show cause why he should not register the land of the Petitioners, situated in Tel-Aviv and known as parcel No. 580, in Block No. 6902, in their names in accordance with law :—

HELD : The Registrar of Lands, not being satisfied with the title made out by the Petitioners, was justified in refusing registration unless directed

by an order of a Court and the High Court was not competent to decide a claim to registration and ownership of land.

ANNOTATIONS: On Art. 78 of the Ottoman Land Code see C. A. 57/40 (*ante*, p. 146) and note.

FOR PETITIONERS: Goitein.
FOR RESPONDENT: *Ex parte.*

ORDER:

This is an application by the Petitioners asking for an order directed to the Director of Land Registration to effect registration of certain property claimed by the Petitioners under Article 78 of the Land Code. The Land Registrar, after certain documents had been submitted to him, and correspondence had taken place, refused by a letter of the 26th November, 1940, to register the land in these words:—

"I am to inform you that I am unwilling to effect such registration unless directed by a competent Court to do so".

It is quite clear from this letter that the Land Registrar was not satisfied with the documents produced or the title made out by the Applicants because he does not say that he cannot effect the registration, he merely says that he is unwilling unless directed by an order of a Court. We are not a Court that is competent to decide a claim to registration and ownership of land. The only Court that can do so is the Land Court. We are afraid, therefore, that the Petitioners, however unwilling they may be to do so, will have to make their application to the Land Court.

This application must therefore be refused.

Given this 9th day of January, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 21/41.

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

BEFORE: Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEAL OF:—

Qasim Ahmad Abdul Razik Abu Hableh. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Murder — Identification of victim's body.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Nablus, dated the 4th of February, 1941, whereby the Appellant was convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : As a general principle, in cases of murder there had to be evidence as to the finding of the body, or a satisfactory explanation as to why it had not been found. In the present case, the Court of Trial was entitled to hold that one of the two skeletons found in the well was that of the victim.

ANNOTATIONS : Compare Halsbury, Vol. 9, *p.* 449, *No.* 768, Digest, Vol. 14, *pp.* 432 *seq.*, *Sub-sec.* 3A.

FOR APPELLANT : Jayyousi.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The only point which has been raised in this appeal is that the body of the victim was not sufficiently identified. It is clear that as a general principle in cases of murder there must be evidence as to the finding of the body, or a satisfactory explanation given as to why it was not found.

In this case there is evidence that the victim's body was thrown into a well, together with that of another man. There was evidence that later two skeletons were found in the well, although the Police were unable fully to descend the well or to recover the bodies, and in addition — I quote from the judgment of the Court of Trial — "There is a confession made to the Police by the Accused (first Accused, *i. e.* the Appellant), which corroborates Abdul Latif's story in remarkable detail. We are satisfied that this statement was properly taken and is admissible in evidence."

In these circumstances we think that the Court was entitled to find that one of the skeletons was that of the victim, and the appeal will be dismissed.

Delivered this 26th day of February, 1941.

*Chief Justice.*

CIVIL APPEAL No. 276/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Dr. Julius Weissmann. APPELLANT.

v.

Arieh Shmuel Doerfler. RESPONDENT.

*Transfer of currency and gold from Poland to Palestine — Contract illegal according to Polish Law — Proper law of Contract — Contract not enforceable in Palestine, Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Credit Bank.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated 29th November, 1940 :—

HELD : 1. The proper law of the contract was Polish law as the negotiations had taken place in Poland, the money had been handed over in Poland and had to be taken out of Poland by the Respondent.

2. (Following Kleinwort Sons & Co. *v.* Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Credit Bank) : As the contract was illegal by the *lex loci contractus*, it could not be sued upon in Palestine.

FOLLOWED : Kleinwort Sons & Co. *v.* Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Credit Bank, 1939, 2 K. B. 678.

ANNOTATIONS :

1. On the proper law of the contract, *vide* Dicey's Conflict of Laws, 5th edition, *pp.* 628—9 and *pp.* 667 *seq.*, Halsbury, Vol. 6. *pp.* 263 *seq.*, *Sec.* 4, Digest, Vol. 11, *pp.* 387 *seq.*, *Seq.* 2.

2. See, on the second point, Dicey, *pp.* 655—6, Halsbury, Vol. 6, *p.* 271, *Nos.* 325—326, Digest, Vol. 11, *pp.* 401—2, *Sub-sec.* 6A and B.

FOR APPELLANT : Smoira.

FOR RESPONDENT : Goitein and Kurt.

JUDGMENT:

We need not hear you Mr. Goitein.

This is an appeal from the District Court of Tel-Aviv, dismissing an action brought by the Appellant here against the Respondent for the value of certain Polish currency and gold which the Appellant alleges he gave to the Respondent to take out of Poland for him and pay to

his brother-in-law in Palestine. It is not disputed that the export of Polish money and gold was and is prohibited under the law of Poland. The contract, therefore, concerned the doing of an illegal act in Poland. The English Authorities all say, including the last one, that if the contract is illegal by the *lex loci contractus* then it cannot be enforced in the Courts of England.

Now, it is quite clear to our minds, that the proper law of the contract is Polish. The negotiations took place in Poland. The money was handed over in Poland. The money had to be taken out of Poland by the Respondent, or through arrangements made by him and for these reasons we are quite convinced in our minds, that the proper law of the contract is Polish.

That being so it is clear on the last English Authority, the Kleinwort case, 1939 2 K. B. 678, that this action must fail. The contract cannot be sued upon in the Courts of Palestine. The District Court, therefore, came to a correct conclusion and the appeal must be dismissed with costs on the lower scale and LP. 10 advocate's attendance fee.

Delivered this 4th day of February, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 13/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Abdulla Mahmoud el Ahmad *alias* Badawiyeh el Kannawi. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Conviction for manslaughter on charge of murder — Evidence of one witness given at place different from where preliminary enquiry held, CR. A. 6/39 — Sentences, whether to run concurrently or consecutively.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Haifa, dated the 18th of January, 1941, whereby the Appellant was convicted of manslaughter contrary to Section 212 of the Criminal Code Ordinance, 1936 and sentenced to fifteen years' imprisonment :—

HELD : 1. (Following CR. A. 6/39) : As Haifa and Acre were in the same judicial district, there was nothing in the point that the doctor had given evidence in Haifa whilst the rest of the preliminary enquiry had taken place in Acre.

2. There was no reason to interfere with the order of the Assize Court that the sentences should run consecutively.

FOLLOWED : CR. A. 6/39 (1939, S. C. J. 76).

ANNOTATIONS :

1. Compare, on the first point, CR. A. 6/39 (*supra*).
2. On the second point compare Criminal Code Ordinance, Sec. 48.

FOR APPELLANT : Hawa.

FOR RESPONDENT : Crown Counsel — (Bell).

## JUDGMENT:

The Appellant was charged with murder before the Haifa Assize Court and was convicted of manslaughter contrary to Section 212 of the Criminal Code. Only two points have been raised on this appeal — one that the evidence of the doctor who was called at the preliminary enquiry was given in Haifa, and not where the rest of the preliminary enquiry took place, which was Acre, though the Magistrate was the same. There is nothing, in our opinion, in this point. In the case of Odeh Sirriyah *v.* The Attorney General, Criminal Appeal No. 6 of 1939 (6 P. L. R. 113), this Court held that there was no point in the objection that the preliminary enquiry was held partly in one place and partly in another, if both places are in the same district. This obviously means the same judicial district, the district in which the same District Court exercises jurisdiction. Haifa and Acre are in the same judicial district. That point therefore fails.

The other point is that the sentence is excessive, inasmuch as it runs consecutively to the sentence of four years' imprisonment that the Appellant is now serving, and not concurrently. On the evidence before the Assize Court, that Court might well have convicted the Appellant of murder. If they had done so it would have been most unlikely for this Court to have interfered. Fortunately for him the Court took a lenient view. We see no ground for interfering with the order and the sentence should be consecutive as ordered by the Assize Court and the appeal will, therefore, be dismissed.

Delivered this 12th day of February, 1941.

*British Puisne Judge.*

CIVIL APPEAL No. 245/40.

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

BEFORE : Trusted, C. J. and Copland, J.

IN THE APPEAL OF :—

The Palestine Land Development Co., Ltd. APPELLANTS.

v.

1. Abraham Mograbi,
2. Jacob Mograbi. RESPONDENTS.

*Right of preference, Ottoman Land Code, Art.* 41 *still in force — Translation of Turkish Laws, Disposal Law, Art.* 5 *— Time for effecting transfer, Land Law (Am.) Ordinance, Sec.* 6(2) *— Costs.*

In dismissing an appeal from a judgment of the Land Court of Tel-Aviv, dated the 31st of October, 1940, and in varying the judgment of the Court below :—

HELD : 1. Art. 41 of the Ottoman Land Code, though perhaps unsuitable to modern conditions, is still in force.

2. The current translation of Art. 5 of the Law of Disposition had been accepted for many years and the Article extended to applications under Art. 41 of the Land Code.

3. The judgment of the Land Court should be varied by imposing a time limit for the registration to be effected.

4. In view of the circumstances the question of costs should stand over until after the expiration of the above time limit.

ANNOTATIONS :

1. On Art. 41 of the Ottoman Land Code see C. A. 225/38 (1938, 2 S. C. J. 167) and note 2.

2. See, on the translation of Turkish Laws, P. C. 54/38 (1940, S. C. J. 268) and note 1.

3. On costs, compare note 2 to C. A. 267/40 (*ante*, p. 21).

FOR APPELLANTS : Eliash and Eisenberg.

FOR RESPONDENTS : P. Joseph and Hamburger.

## J U D G M E N T :

The Plaintiffs claimed a right under Article 41 of the Land Code in respect of certain *miri* land in Tel-Aviv upon which a building, known as the Mograbi Cinema, has been constructed.

The Land Court found in their favour as follows :—

> "I hold that the Plaintiffs are entitled to succeed in their claim to have the property, namely 7 (seven) out of 24 (twenty-four) shares, transferred to their names in equal shares, upon payment by the Plaintiffs to the Defendant of the value of the said shares at the time of filing of this action."

Dr. Eliash, for the Appellants, firstly urges that the Article in question is unsuitable to modern conditions. That may be true, but we cannot alter the law, and it may be observed that so recently as 1933 the Legislature amended this provision, thereby making it clear that it considered it desirable to retain it as amended.

Dr. Eliash admits that the Provisional Law Regulating the right to dispose of Immovable Property, of 1331, applies to the property in question. He suggests, however, that the generally accepted translation of Article 5 thereof, which states :—

> "The rules for 'disposal and transfer' in the manner specified above, of vines and trees, plants and buildings together with the fixtures and additions constructed on *mirie* or *waqf* land will be the same as for the land itself."

should read "... for inheritance and possession ..." We think that this criticism comes somewhat late, as the translation has been accepted for many years, and we hold that the Article extends to applications under Article 41 of the Land Code.

Dr. Eliash also refers to Section 6(2) of the Land Law (Amendment) Ordinance, Cap. 78, and argues that thereunder a duty is cast upon the Court to order the transfer within a specified time. With that view we agree. It does not, however, seem necessary to return the case for an order to be made by the Land Court, and we vary the judgment of that Court by directing that the transfer shall be effected by January 31st, 1941.

If the Plaintiffs do not complete by that date they will lose their rights under the sub-section, and it would be manifestly wrong that they should have put the Defendants to the expense of fighting an action and an appeal which, by their — the Plaintiffs' — own failure they had made abortive. In my view no order should at present be made as to costs either in the Land Court or in this Court. The order of the Land Court as to costs will be set aside, and all questions of costs will be reserved, with liberty to either party to apply to this Court after 31st January, 1941.

Delivered this 9th day of January, 1941.

*Chief Justice.*

HIGH COURT No. 11/41.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPLICATION OF :—

1. Ibrahim Mahmoud Mohamad Saleh,
2. Shlomo Kashi. PETITIONERS.

v.

The Land Registrar of Jaffa. RESPONDENT.

*Land Transfers Regulations, 1940 — Transfer of land in prohibited zone.*

In refusing an application for an Order to issue directed to the Respondent, calling upon him to show cause why he should not be ordered to register the sale from Petitioner No. 1 to Petitioner No. 2 of Parcel 43 of Block 6135 of Salame Village, Lydda District :—

HELD : The affidavit sworn to by the Director of Land Registration and the maps supporting it showed that the plot in question fell within the prohibited zone.

ANNOTATIONS : Compare Art. 16 D of the Palestine Order in Council, Regulation 3 of the Land Transfers Regulations, 1940 (P. G. No. 988) and Schedule thereto, Zone A, Jaffa Sub-District, para. (c).

FOR PETITIONERS : Felman.
FOR RESPONDENT : Crown Counsel — (Hogan).

### O R D E R.

The complaint against the Land Registrar of Jaffa in this case is that he refused to register the sale of certain land on the ground that it was situated within a prohibited zone within the meaning of the Land Transfer Rules, 1940.

Mr. Stubbs, Director of Land Registration, swore an affidavit in which he set out facts which seem to us to establish that the plot in question in fact falls within the prohibited zone. His affidavit was supported by maps which led us to the same conclusion.

The rule must, therefore, be discharged with costs, to include the sum of LP. 10 as advocate's attendance fee.

Given this 28th day of February, 1941.

*British Puisne Judge.*

HIGH COURT No. 13/41.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPLICATION OF :—

1. Yevgenia Pines, Tel-Aviv,
2. Rachel Pines, Tel-Aviv. PETITIONERS.

v.

The Custodian of Enemy Property. RESPONDENT.

*Trading with the Enemy — Fees to be charged by Custodian, Custodian Order, Art.* 9(1).

In refusing an application for an Order to issue to the Respondent, calling upon him to show cause why he should not advise His Excellency, the High Commissioner to revest the property of the Petitioners to them and limit his claim for fees to LP. 120 :—

HELD : In view of the affidavit sworn to by the Custodian of Enemy Property, it could not be said that the figure arrived at by him was unreasonable.

ANNOTATIONS :

1. Compare the previous proceedings, H. C. 90/40 (1940, S. C. J. 382) and note.

2. Generally, on enquiries by the High Court into the reasonableness of orders, see also H. C. 96/40 (1940, S. C. J. 429) and note 2.

FOR PETITIONERS : Eliash.

FOR RESPONDENT : Solicitor General and Blum.

ORDER.

This is the second time on which this matter has been before the Court. It turns on the interpretation of Article 9(1) of the Trading with the Enemy (Custodian) Order, 1939, as amended. In the amendment it says : —

> "Provided that where any such property is vested in him for a period not exceeding one year he may at his discretion retain such fee not exceeding five *per centum* of the value at the date of vesting as may, in the circumstances, be reasonable."

Another amendment provides that the fees are in respect of the Custodian's general administrative expenses.

The Custodian of Enemy Property has sworn an affidavit in which

he refers to a memorandum to Government in which he set out in detail his method of arriving at the figure in question. We are unable to say that this figure is unreasonable.

The rule must, therefore, be discharged. In view of the special circumstances of the matter, we make no order as to costs.

Given this 28th day of February, 1941.

*British Puisne Judge.*

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PRIVY COUNCIL LEAVE APPLICATION No. 11/40.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Catherine Bustros, widow of the late Nadra Habib Moutran, & 9 others. APPLICANTS.

v.

1. Najib Habib Moutran,
2. Evelin Malhami widow of Elias Habib Moutran,
3. Joseph Elias Moutran,
4. Jean Elias Moutran,
5. Maud Elias Moutran. RESPONDENTS.

*Privy Council —Guarantee not filed in time.*

In rescinding an order for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court, sitting as a Court of Civil Appeal in Civil Appeal No. 109/40 :—

HELD : The Court of Civil Appeal has no power to extend the time for filing a guarantee.

ANNOTATIONS :

1. The judgment in question (C. A. 109/40) is reported in 1940, S. C. J. 302.
2. Recent instances on Privy Council practice : P. C. L. A. 13/38 (1939, S. C. J. 98), P. C. L. A. 9/36 (*ibid.*, p. 100), P. C. L. A. 2/39 (*ibid.*, p. 326), P. C. L. A. 213/37 (*ibid.*, p. 328), P. C. L. A. 6/40 (1940, S. C. J. 381) and P. C. L. A. 1/40 (*ibid.*, p. 393).

FOR APPLICANTS : Ossorguine by delegation from Weinshall.

FOR RESPONDENTS : No. 1 — Kehaty.
Nos. 2—5 — Kehaty by delegation from Atallah.

JUDGMENT:

This Court has no power to extend the time for filing a guarantee. The Applicants' motion must, therefore, be refused and the conditional leave granted on 20th September, 1940, is rescinded.

The Court fixes the sum of LP. 5 to the Respondents for the costs of the hearing.

Delivered this 17th day of February, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 7/41.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Jawad Sam'an Farah. — APPELLANT.

v.

Ismail Hassan Ikreizim. — RESPONDENT.

*Action against partner — Musakat agreements, Partnership Ord., Sec. 6(2).*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 20th December, 1940, and in remitting the case to the District Court :—

HELD : The partnership in question was by way of *musakat*, and the Partnership Ordinance was, therefore, inapplicable.

ANNOTATIONS : On *muzaraa* and *musakat* agreements, see Goadby and Doukhan, The Land Law of Palestine, *pp.* 195 *seq.* and C. A. 105/32 (P. L. R. 810, C. of J. 1172, P. P. 8.v.33) therein cited.

FOR APPELLANT : Shehadeh.

FOR RESPONDENT : Anebtawi.

JUDGMENT:

This is an appeal from a judgment of the District Court of Jaffa, dismissing the Plaintiff's action on the ground that he was suing a partner whilst the partnership was still in existence and that this was contrary to the Partnership Ordinance. Unfortunately the attention of the learned Relieving President would not seem to have been called to

the provisions of Section 6(2) of the Partnership Ordinance. This Section says :—

> "Partnerships by way of *muzaraa* or *musakat* and, in general, partnerships formed by cultivators for any common enterprise in connection with the cultivation of land shall not be deemed to be partnerships for the purpose of carrying on a trade, profession or industry."

It is quite clear that there is not the least doubt that this is a *musakat* agreement. It is stated to be so in Clause 1(a) of the agreement, which is itself headed "Agreement of *Musakat* Company", and even if it were not an agreement of *musakat* it would be a partnership formed by cultivators in connection with the cultivation of land, as its whole purport is to revive and cultivate a certain orange grove.

The appeal will, therefore, have to be allowed, the case remitted to the District Court, to be tried on its merits. Costs to await the result of retrial. We certify the sum of LP. 10 advocate's hearing fee on this appeal.

Delivered this 11th day of February, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 5/41.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Haim Gorodisky. — APPELLANT.

v.

1. Zalman Forer,
2. Ezra Forer,
3. Israel Forer. — RESPONDENTS.

***Arbitration — Application to set aside made after three years — No statutory time limit in Palestine, R. S. C., Order 64, Rule 14, Arbitration Ordinance, Secs. 13, 14, 15, C. A. 247/38, Atwood v. Chichester, C. A. 171/37, C. P. R. 305 — English principles applicable — Reasonable time — Both parties negligent.***

In allowing an appeal from the judgment of the District Court of Tel-Aviv, dated the 29th November, 1940 :—

HELD : 1. (Distinguishing C. A. 247/38) : The award was not a nullity on the face of it and it was, therefore, necessary to apply to set it aside.

2. (Referring to C. A. 171/37) : Following English principles, an application to set aside an award had to be made within a reasonable time after the issue of the award.

3. (Following Atwood *v.* Chichester) : The application should not be dismissed on the ground that it had not been made within a reasonable time, unless the other side had suffered damages because of the delay, which was not the case here.

DISTINGUISHED : C. A. 247/38 (1939, S. C. J. 13).

REFERRED TO : C. A. 171/37 (2, Ct. L. R. 137).

FOLLOWED : Atwood *v.* Chichester, 38, L. T. Rep. 98.

ANNOTATIONS :

1. See, on the first point, C. A. 247/38 (*supra*) and note 1.

2. Compare, on the second point, C. D. C. T. A. 312/38 (P. P. 18.viii.39).

3. On the question as to how far English practice can be imported into Palestine, see H. C. 1/41 (*ante*, p. 8) and note 1.

4. Generally, on setting aside an award, *vide* Halsbury, Vol. 1, *pp.* 674 *seq.*, *Sec.* 14, Digest, Vol. 2, *pp.* 545 *seq.*, *Sec.* 16.

FOR APPELLANT : Iszajewicz.

FOR RESPONDENTS : Nos. 1 and 2 — Goitein.
No. 3 — No appearance.

JUDGMENT:

This is the considered judgment of the Court.

The facts of this case are as follows : Arbitration proceedings took place between the parties to this appeal and the award was dated the 12th November, 1937, more or less in favour of the Respondents, who however took no steps to enforce it. Various proceedings between the parties then took place in the Magistrate's and District Court, but it was not until the 22nd July, 1940, that the Appellant entered an action in the District Court seeking to set aside the award. The District Court made no definite findings as to the allegation of misconduct on the part of the arbitrators nor on the point raised that the award was issued out of time, as stated by the Appellant as his grounds for setting aside of the award, but dismissed the petition on the ground that an application to set aside an award must be made within a reasonable time and that a delay of nearly three years was not reasonable. It is

common ground that there is no time limit in the law of Palestine within which an application to set aside an award must be made, such as is to be found in England, in Order 64, Rule 14 of the Rules of the Supreme Court.

Before us the Appellant has argued that there is no time limit, whether specific or reasonable, in this country — that an application to set aside an award is an action, and that, therefore, the general period of limitation of actions only applies, and he relies on Secs. 14 and 15(1) of the Arbitration Ordinance, Cap. 6. He also relies upon the fact that the Respondents were themselves negligent in not seeking to enforce the award and that if they have suffered damage, it is due entirely to their own fault. He has referred to the Palestine Building Syndicate Ltd. *v.* Breitmann — C. A. 247/38 (6 P. L. R. 31) as authority for the proposition that there is no necessity to apply to set aside an ineffective award, but that was a case where the award was a nullity on the face of it which is not the case here. Alternatively he says that if it is a question of reasonable time then the correct statement of the law is to be found in Atwood *v.* Chichester (38 L. T. 98). That was an action by a married woman to set aside a judgment given against her in default, and which had been entered by her after a long delay. The court held that, in view of the fact that the married woman was under no legal liability in the original statement of claim, an application to set aside, even though made after a long delay, should be granted unless the opposing party had suffered irreparable damage by reason of the delay.

The Respondents in reply have argued that the power conferred by Section 13 of the Arbitration Ordinance to set aside an award is discretionary, that the judgment in Benjamin Maschieff *v.* Fritz Zonnenfeld — C. A. 171/37 (Ct. L. R. Vol. 2, p. 137) lays down that the principles of English law and procedure in arbitration should be followed, where not opposed to Palestine law, and that since under English law an application to enforce an award must be made within a reasonable time, by analogy in this country an application to set aside should equally be so made, in the absence of any statutory time limit. They also argue that they have suffered damage since now, owing to the length of time that has elapsed, it is quite impossible to say what really happened in the arbitration proceedings. They also contend that by reason of Section 15 of the Ordinance, and Rule 305 of the Civil Procedure Rules, 1938, an application under Section 15(1) is not an action, and, therefore, the general period of limitation of actions cannot apply.

There is also this further consideration to be borne in mind, that

it can be argued that an arbitration award is similar to a judgment (see Sec. 14) and that a party, seeking to enforce it, should not be so strictly limited as to time, as in the case of a party seeking to set aside a judgment or an award, in other words, that what is a reasonable time should be construed more liberally as regards the former, then as regards the latter.

We are satisfied that, in the absence of any statutory time limit in the law of this country, an application to set aside an award must be made, following the English principles, within a reasonable time after the issue of the award, and the question, therefore, remains whether, on the facts of this case, the District Court was right in dismissing the petition on the ground that it had not been made within a reasonable time. The question is not free from difficulty, but on the whole we think that the principle laid down in Atwood *v.* Chichester (*supra*) is the one which the Courts of this country should apply, that is that the petition to set aside should not be dismissed on the ground that it was not brought within a reasonable time, unless the other side has suffered damage because of the delay. And in this case it cannot be argued that the delay of the Appellant has caused damage to the Respondents. Any damage which they may have suffered has been caused entirely by their own action in not asking for the enforcement of the award, which they could have done at any moment, if they had so chosen.

For these reasons, we think that the appeal must be allowed and the judgment of the District Court set aside, and the case remitted to the District Court for that Court, after hearing any further evidence which may be tendered, to determine whether the award was made in time or not, and whether there was such misconduct on the part of any of the arbitrators which would justify the Court in its discretion in setting aside the award.

Costs to await the result of the retrial. We certify the sum of LP. 15 for advocate's attendance fee on the hearing of this appeal.

Delivered this 21st day of February, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 7/41.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mustafa Ahmad Ali Shaqqur. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Compensation under Criminal Code Ordinance.*

In partly dismissing and partly adjourning an appeal from the judgment of the District Court of Nablus, dated the 15th of January, 1941, whereby the Appellant was convicted of attempt to murder contrary to Section 222(a) of the Criminal Code Ordinance, 1936 and sentenced to four years' imprisonment and to pay to complainant Abdul Hamid Ali Shaqqur of Kifl Haris LP. 50.— for expenses and compensation :—

HELD : The Complainant should be heard by the Court of Criminal Appeal as regards the sum of LP. 50.— compensation awarded to him.

ANNOTATIONS : On Sec. 43 of the Criminal Code Ordinance, compare C. A. D. C. T. A. 91/39 (P. P. 19.xii.40), CR. A. 84/38 (1938, 2 S. C. J. 227), C. A. 18/39 (1939, S. C. J. 247, on p. 251) and C. A. 113/40 (1940, S. C. J. 192, on p. 195).

FOR APPELLANT : Zueyter.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The appeal against sentence of four years' imprisonment is dismissed. As regards the question of compensation the Court wishes to hear the Complainant to whom the sum of LP. 50 expenses and compensation was awarded. The appeal will be adjourned for a period of fourteen days to enable Appellant to cause service to be made upon the Complainant Abdul Hamid Ali Shaqqur. If no service is effected by the end of this period the appeal will be listed for dismissal or further consideration.

Given this 3rd day of February, 1941.

*Chief Justice.*

CIVIL APPEAL No. 18/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

1. Abdullah el Surani and sons,
2. Mustafa el Surani,
3. Yussef el Surani,
4. Hashem el Surani. APPELLANTS.

v.

Barclays Bank (D. C. & O.), Jaffa. RESPONDENT.

*Appeal against ruling as to admissibility of evidence, C. P. R. 317 — Previous appeal — Stamp duty.*

In dismissing an appeal from the order of the District Court of Jaffa, dated the 13th of December, 1940 :—

HELD : 1. A ruling as to the admissibility of evidence was not an order as contemplated by Rule 317 of the Civil Procedure Rules.

2. No appeal lay from a decision as to the sufficiency of the stamp on a document.

ANNOTATIONS :

1. The previous proceedings referred to (C. A. 155/40) are reported in 1940, S. C. J. 310.

2. Compare C. A. 73/38 (1938, 1 S. C. J. 263).

3. See, on the second point, C. A. 11/40 (1940, S. C. J. 248) and note 1.

FOR APPELLANTS : Moyal.

FOR RESPONDENT : Papo.

JUDGMENT:

I have no doubt that this appeal should be dismissed. It is in effect an attempt to appeal under Rule 317 against a ruling as to the admissibility of evidence — in this instance a document — given in the course of the hearing, and I am satisfied that that is not an order as contemplated by the rule.

The matter is complicated by the fact that a similar appeal in these same proceedings was entertained by this Court in September last, but I would point out that the Judge's ruling that the document was admissible in evidence was headed "order", which may have misled this

Court, and moreover, I understand that the advocate who appeared for the Respondent on that application made certain submissions to the Court as to the effect of the lack of a necessary stamp, but that he did not take the point that no appeal lay from such a ruling.

The Respondent will have an inclusive sum of LP. 10 costs.

Delivered this 17th day of February, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 257/40.

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Rosa Bishara Aiyub & 25 others. APPELLANTS.

v.

1. Muhammad Salem Abu Najila,
2. Ruqiya Salem Abu Najila,
3. The Village Settlement Committee of Beit Vegan in its public capacity and in its capacity as representative of various absentee Respondents,
4. "Hevrat Ma'agal" Co-operative Society Ltd.,
5. The Palestine Land Development Company Ltd.,
6. The Government of Palestine. RESPONDENTS.

*Land Settlement — Appeals, Land (Settlement of Title) Ordinance, Sec. 63(2), C. P. R. Rules 314, 315 — Omission to consider documents.*

In dismissing an appeal from the decision of the Settlement Officer, Jaffa Settlement Area, dated the 15th day of October, 1940 :—

HELD : 1. The appeal would be heard although the provisions as to lodging an appeal from the decision of the Settlement Officer did not seem to have been complied with.

2. The Settlement Officer had dealt adequately with all questions involved, and a further consideration by him of the documents in question would not be likely to lead him to a different conclusion.

ANNOTATIONS :

1. Note that the provisions regarding appeals from the Settlement Officer are

now set out in Sec. 10(d) of the Land (Settlement of Title) (Am.) Ordinance, 1939.

2. On defective appeals compare C. A. 72/40 (1940, S. C. J. 456) and note 2.

3. On exclusion of irrelevant evidence, *vide* C. A. 88/39 (1939, S. C. J. 408) and C. A. 85/39 (*ibid.*, p. 438).

FOR APPELLANTS : Abcarius.

FOR RESPONDENTS : Nos. 1 & 2 — Absent — not served.
No. 3 — Mr. Avni — Member of the Village Settlement Committee.
Nos. 4 & 5 — Eliash.
No. 6 — Wa'ary.

JUDGMENT:

*Rose, J.* : This is an appeal by leave from the Settlement Officer, Jaffa Settlement Area. We are extremely doubtful whether we should entertain this appeal at all as there does not seem to have been an adequate compliance with Section 63(2) of the Land (Settlement of Title) Ordinance, Chapter 80 of the revised edition, or with rules 314 and 315 of the Civil Procedure Rules, 1938. However, exercising what is probably an undue clemency in favour of the Appellants, we have proceeded to hear the appeal.

The Appellants' complaint is that the Settlement Officer omitted to take into consideration certain documents. As to this, the Settlement Officer says that he has read every word of the oral evidence and pleadings and examined every plan, document and folio as well as the *Yuklama* records and has also inspected the lands in question. He points out that it took him five days to examine the material in the files and two more to prepare his judgment and that his general conclusion is that the claim is one of the most frivolous on which he has ever wasted his time. We are satisfied that the Settlement Officer dealt adequately with the various questions involved and have no reason to believe that any further consideration by him of the documents in question would be likely to lead him to a different conclusion.

The appeal is, therefore, dismissed with costs to include, as far as the 4th and 5th Respondents are concerned, the sum of LP. 15 for advocate's attendance fee. The 3rd Respondent will have LP. 2 for his out of pocket expenses.

Delivered this 27th day of February, 1941.

*British Puisne Judge.*

CIVIL APPEAL No. 272/40.

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

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

IN THE APPEAL OF :—

Mrs. Esther D. Abrevaya. APPELLANT.

v.

1. Citrus Exporters and Growers Association Ltd.,
2. Daniel Abrevaya. RESPONDENTS.

*Judgments by default — Magistrates' Courts Procedure Rules, Rule 163 — Application to set aside judgment — Appeal from judgment heard together with appeal against dismissal of application to set aside — Both remedies cannot be used together — C. A. 230/38, Vint v. Hudspith.*

In dismissing an appeal from a judgment of the District Court of Tel Aviv (in its appellate capacity), dated the 18th of October, 1940 :—

HELD : 1. The proper procedure was to apply to have the judgment set aside under Rule 163 but (following Vint *v.* Hudspith) an appeal against the judgment could also be filed.

2. (Following *dictum* in C. A. 230/38) : Both remedies could not be pursued at the same time.

FOLLOWED : Vint *v.* Hudspith, 29 Ch. D. 322, C. A. 230/38 (1938, 2 S. C. J. 190).

ANNOTATIONS : See *Digest* Pleadings, Practice etc., *p.* 553, *Sub-sec.* 4 ; *p.* 818, *Sub-sec.* 5.

FOR APPELLANT : Eliash.

FOR RESPONDENTS : No. 1 — Levison.
No. 2 — In person.

## JUDGMENT:

The Appellant was sued before the Magistrate on several promissory notes. She appeared at the first hearing, but neither she nor her advocate appeared at the adjourned hearing, and judgment was given against her in her absence.

She appealed to the District Court against the actual judgment, and

she also applied to the Magistrate under Rule 163 of the Magistrates' Courts Procedure Rules to set aside the judgment given by default. This he refused to do. She then appealed to the District Court against the decision of the Magistrate to set aside.

In the result it seems that these two appeals were heard together by the District Court.

In its judgment the District Court said :—

> "This Court agrees with the view of Respondents' advocate that according to the new procedure it is not possible to make use of both ways mentioned in the Civil (? Magistrates' Courts) Procedure Rules against a judgment given in default of the Defendant, but only of one of them, namely, either make an application to the Court which gave the judgment to set it aside, or to appeal against his judgment. In the case before us, Appellant took the first course, and applied to the Magistrate to set aside his judgment of the 2nd June, 1940. The Magistrate dismissed Appellant's application and gave judgment to this effect on 28.7.40. Against such judgment the Appellant was entitled to appeal, and this she did in time. The other preliminary points, therefore, do not arise.
>
> "This Court does not consider that Appellant had sufficient grounds to appeal against the judgment of the Magistrate dismissing her application for the setting aside of his judgment of the 2nd June, 1940."

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

The appeal will be dismissed with costs on the lower scale, and LP. 10 advocate's attendance fee, to the first Respondent.

Delivered this 28th day of February, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 269/40.

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

BEFORE : Trusted, C. J. and Copland, J.

IN THE APPEAL OF :—

S. Slonim. APPELLANT.

v.

Solel Boneh Ltd., Central Contracting Office of the Jewish Labour Federation. RESPONDENTS.

*Assignment of debts — Debt (Assignment) Ordinance, Sec. 2(1)(a) — Defect in form — Estoppel.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv (in its appellate capacity), dated the 31st of October, 1940: —

HELD : The receipt given by the Respondent was nothing more than an acknowledgment of the receipt of the documents and could not operate as an estoppel.

ANNOTATIONS :

1. Cases on assignment of debts are collated in annotations to C. A. 105/39 (1939, S. C. J. 456). See also C. A. 109/39 (*ibid.*, p. 504).

2. Recent authorities on estoppel : P. C. 23/38 (1940, S. C. J. 19), C. A. 54/40 (*ibid.*, p. 103), C. A. 39/40 (*ibid.*, p. 387) and P. C. 57/38 (*ibid.*, p. 402).

FOR APPELLANT : Sussmann.

FOR RESPONDENTS : Berinson.

## JUDGMENT:

The Appellant, the Respondents and the Hameretz Co-operative Society, had business relations together. Had they taken the trouble to incorporate their arrangement into a simple agreement this dispute might have been avoided.

In the course of these dealings the Hameretz Society assigned to the Appellant debts due from the Respondents to the Society. By Section 2(1)(a) of the Debt (Assignment) Ordinance, such assignment must be in writing under the hand of the assignor.

One of those assignments was defective in form in that it was only signed by one officer of the Society instead of two, as required by the rules of the Society.

In consequence the Magistrate and the District Court held that this

assignment was bad. It is admitted that the Appellant saw this document, and sent it to the Respondents. The Respondents, on 4.9.38, gave the following document :—

> "Received from Mr. Slonim two assignments of 'Hameretz' in the amount of LP. 100 (one hundred) for payment on the account which will be payable in respect of transports September."
>
> SOLEL BONEH LTD.

Dr. Sussmann for the Appellant argues that this is such a confirmation and acceptance by the Respondents that, in the circumstances, he is (*sic*) now estopped from saying that the assignment was defective. I do not think that this is anything more than an acknowledgement of the document — the argument, therefore, is not well founded.

The appeal will, therefore, be dismissed with costs on the lower scale and LP. 10 advocate's fee for attending the hearing.

Delivered this 6th day of February, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 258/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Dr. Selig Eugen Soskin,
2. Sonja Soskin. APPELLANTS.

v.

Dr. Friedrich Ettinger. RESPONDENT.

*Invitation to stay as guest — Claim for rent for period in excess of invitation.*

In dismissing an appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated 31st October, 1940 :—

HELD : The Respondent having been invited to stay had every reason to think that the invitation would continue until withdrawn.
No intimation to that effect having been given to him, he could not be charged with rent.

ANNOTATIONS :

1. See the proceedings for contempt of Court, H. C. 51/40 (1940, S. C. J. 516) in connection with this case.
2. *Cf. Mejelle,* Arts. 5, 9 and 10.

FOR APPELLANTS : Werner.

FOR RESPONDENT : Radt.

JUDGMENT:

We need not hear you, Dr. Radt.

This is an appeal by leave from a judgment of the learned President District Court of Haifa. The dispute concerned a claim of rent for a house in which the Respondent had been allowed to live for two months, September and October, 1938, by invitation without paying rent and was for the next three months November and December, 1938, and January, 1939. The owners of the house were away, they never informed the Respondent that he would be required to pay rent if he stayed on, and it was not until August, 1939, when the Respondent claimed from the Appellants LP. 30.— interest on the mortgage which he, the Respondent held on the Appellants' property, that the Appellants suddenly bethought themselves of claiming the same amount from the Respondent as rent for the house. The Magistrate found in favour of the Appellants. On appeal the learned President reversed that decision. We think that the judgment of the learned President is correct. The Respondent having been invited to stay had every reason to think that that invitation would continue until withdrawn or until he was told that it was withdrawn. It is admitted that no such intimation was ever given to him and until such intimation was given we do not think that he could in law be charged with rent. As for the merits of the case there are none on either side. The only difficulty we find is how leave to appeal was ever given to this Court.

The appeal is dismissed with costs on the lower scale in all Courts here and below to include LP. 10 advocate's hearing fee in this Court.

Delivered this 31st day of January, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 2/41.

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

BEFORE : Trusted, C. J. and Copland, J.

IN THE APPEAL OF :—

1. Hassan Ahmad Hussein Di'bis,
2. Na'im Hussein Ahmad Di'bis,
3. Fahid Hussein Ahmad Di'bis,
4. Ahmad Hussein Ahmad Di'bis,
5. Fadha Hussein Ahmad Di'bis,
6. Sa'da Mohammad el Musa. APPELLANTS.

v.

1. Keren Kayemeth Leisrael, Ltd.,
2. The Government of Palestine. RESPONDENTS.

*Land Settlement — Immaterial irregularity in procedure.*

In dismissing an appeal from the decision of the Settlement Officer, Acre Settlement Area, dated the 6th of November, 1940 :—

HELD : The first Appellant, though not present during part of the hearing, had given evidence and there was no such irregularity as to invalidate the proceedings.

ANNOTATIONS : On irregularities which do not cause injustice, *vide* C. A. 26/40 (1940, S. C. J. 286) and note 7.

FOR APPELLANTS : No. 1 — Hussayni.
Nos. 2—6 — Absent — served.

FOR RESPONDENTS : No. 1 — Levin.
No. 2 — Salant.

JUDGMENT:

This is an appeal from the decision of the Settlement Officer, in which there were two Claimants and two sets of Defendants. These Defendants were son and grandchildren of the original testator. The basis of their claim to the land in question is the same. It is said that some irregularity of procedure took place at the hearing, in that the first Appellant was not present at part of the hearing. It is, however, clear that he gave evidence, and that all the material facts were considered by the Settlement Officer. That being so we do not think that there was such irregularity as would invalidate the proceedings.

The appeal will be dismissed with costs to the first Respondent which we fix at an inclusive sum of LP. 6 to be paid by the first Appellant. As regards the second Respondent, there will be no order as to costs.

Delivered this 10th day of February, 1941.

*Chief Justice.*

CIVIL APPEAL No. 274/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Roza Levin. APPELLANT.

v.

Frida Zucker. RESPONDENT.

*Succession — Allegation of insanity of deceased — Medical evidence — Findings of fact — Costs.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 29th November, 1940 :—

HELD : 1. There was evidence to support the finding of the District Court that the deceased, when signing the two agreements, was capable of understanding.

2. The costs of the proceedings would be paid by the administratrix personally and not out of the estate.

ANNOTATIONS :

1. On evidence as to insanity, compare CR. A. 8/40 (1940, S. C. J. 33).
2. On non interference with findings of fact, *vide* note 1 to C. A. 235/40 (*ante*, p. 18).
3. See, on the second point, C. A. 84/40 (*ante*, p. 313).

FOR APPELLANT : Turtledove & Sandler.

FOR RESPONDENT : Eliash & Wittkowsky.

### JUDGMENT:

We need not trouble you, Dr. Eliash.

This appeal raises one of those disagreeable matters where certain of the heirs to a deceased person, having made an agreement as to a certain division of the estate, then endeavoured to go back upon what they had agreed in order to obtain a settlement more favourable to themselves. The contention in the District Court was that the mother, Mrs. Minna Ullendorff, now deceased, was not of sound mind and was incapable of understanding what she was doing when she signed two agreements, the first in Marienbad on the 12th August, 1937, and the second in Tel-Aviv on the 5th January, 1938. The District Court found that there was not the slightest evidence that when the Marienbad agreement was signed the woman was of bad mental condition, and with regard to the second agreement they found that at the time it was

signed she was being advised by her son and by an advocate, that she was capable of understanding what these persons told her and that she was quite capable of appreciating the contents of the documents she signed.

Now, on appeal the Appellant, who is the administratrix of the estate of the late Minna Ullendorff, has tried to show us that these findings of fact with regard to the mental state of the deceased were not justified by the evidence. Two mental specialists were called by the present Appellant. The Respondent did not call any medical evidence but relied upon the results of the cross-examination of these two alienists. The most striking evidence was that of Professor Pappenheim where he says in cross examination :—

> "At the beginning of 1938 she was capable of understanding a simple transaction of business. She could recognise people and her son undoubtedly. Such sick persons are inclined to get advice and rely on others. She could understand her son telling her that the contract was drafted by a lawyer and that it is in order."

and the evidence of Dr. Herman is very much to the same effect. It is quite impossible on the face of this evidence to say that the District Court came to a wrong conclusion and that there was no evidence to support its finding that she was capable of understanding. We agree with that finding.

In the circumstances the appeal is bound to fail and it is dismissed. Costs on the lower scale and LP.15 advocate's attendance fee to be paid by the administratrix personally and not out of the estate. The appeal in our opinion is one which should never have been brought.

Delivered this 24th day of February, 1941.

*British Puisne Judge.*

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HIGH COURT No. 12/41.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Mohammad and Tewfic el Korm. PETITIONERS.

V.

1. Chief Execution Officer, Jaffa,
2. Khalil Taqqiddin. RESPONDENTS.

*Execution — Discretion of C. E. O., Land Transfer Ord., Sec. 14.*

In refusing an application for an Order to issue directed to the first Respondent, calling upon him to show cause why his order of the 7th February, 1941, given in Execution File No. 185/40 (Jaffa), should not be set aside :—

HELD : There was nothing to show that the Chief Execution Officer's discretion had been in any way improperly exercised or that he had taken into consideration matters which he should not have taken into consideration.

ANNOTATIONS : Compare, on discretion of the Chief Execution Officer, H. C. 101/40 (1940, S. C. J. 398) and note.

FOR PETITIONERS : Barbari.

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

ORDER :

This is a return to an Order *nisi* calling upon the Chief Execution Officer to show cause why he should not cancel his order of sale. The Chief Execution Officer's final order against which this application has been brought said "The sale must continue. The matter will be further considered if the bid is clearly inadequate."

Now Section 14 of the Land Transfer Ordinance vests in the Chief Execution Officer an entire discretion as to whether he will order sale or whether he will postpone sale and if so for what period. We get very large numbers of these applications made to us in which it is alleged that the Chief Execution Officer has failed to exercise his discretion properly. I am afraid that in most cases the ground advanced that he has failed to exercise his discretion properly is that he has failed to exercise it in favour of the Applicants and that is no ground. There is nothing to show in this case that the Chief Execution Officer's discretion has been in any way improperly exercised or that he has taken into consideration matters which he should not have taken into consideration. The Rule *nisi* will, therefore, have to be discharged but we call the attention of the Chief Execution Officer to the fact that the amount for which the sale is ordered may perhaps need checking.

The rule is discharged with total costs fixed at LP. 10.

Given this third day of March, 1941.

***British Puisne Judge.***

CIVIL APPEAL No. 255/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Perl Lider. APPELLANT.

v.

The Municipal Corporation of Jerusalem. RESPONDENT.

*Sale in execution — Claim for damages to property sold — Applicability of Execution Law, Art. 112 — Estoppel.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, (in its appellate capacity), dated the 11th of October, 1940 :—

HELD : 1. Art. 112 of the Ottoman Law of Execution did not apply as the Article was intended only to determine any dispute as to whether or not the property sold in execution had deteriorated.

2. The Appellant's remedy was to withdraw her bid.

3. By purchasing the property and having it registered in her name, the Appellant was considered to have consented to take the property in its present condition.

ANNOTATIONS :

1. On withdrawal of bids in execution, see H. C. 72/36 (P. P. 25.xii.36) and H. C. 74/39 (1939, S. C. J. 530).

2. On estoppel see note 2 to C. A. 269/40 (*ante*, p. 81).

FOR APPELLANT : Sharf.

FOR RESPONDENT : Said.

### JUDGMENT:

We need not trouble you Saba Eff. Said.

This is an appeal by leave from an appellate judgment of the District Court of Jerusalem, dismissing a claim for damages done to certain property bought in execution by the Appellant, such damage having been inflicted on the property prior to the date when the property was registered in her name. Both Courts below rejected the claim and, in our opinion, rightly so. The Appellant has relied upon the provisions of Article 112 of the Execution Law. We do not think that this in any way helps her. The effect of Article 112 is that if there is any dispute about the condition of the property at the time of its transfer

then that dispute is determined by reference to its state at the time of taking possession. The meaning of this is perfectly clear. If it is alleged that the property has deteriorated through some act then the fact whether it has or has not deteriorated is determined by reference to the possession report. The Appellant's remedy was, when she was aware of this deterioration, this damage to the property, to have withdrawn her bidding which she would probably have been fully entitled to do. Instead of that she purchased the property which is now registered in her name. She must, therefore, be considered as having consented to take the property in its damaged condition.

In these circumstances the action and the appeal were bound to fail. The appeal must be dismissed with costs on the lower scale.

Delivered this 22nd day of January, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 6/41.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Nahum Tverski. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Companies — Failure to submit annual returns, Companies Ordinance, Sec.* 36(1) & (8) — *Penalty not to be imposed for future offence.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv, dated the 8th of January, 1941, whereby the Appellant was convicted of failing to submit annual returns according to Section 36(1) & (8) and 252 of the Companies Ordinance, and sentenced to pay a fine of LP. 25, and LP. 1 per day until the returns are sent in, and in amending the judgment of the District Court :—

HELD : A penalty could not be imposed in respect of the future.

FOR APPELLANT : Iszajewicz.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant was convicted by the District Court, Tel-Aviv, of failing to submit annual returns according to Section 36(1) and (8) of the

Companies Ordinance. He was fined LP. 25, and one pound per day until the returns are sent in.

In the result the appeal was against the latter part of this judgment, and the Attorney General's representative agrees that a penalty cannot be imposed in respect of the future. The judgment will, therefore, be amended by striking out the words "one pound per day until the returns are sent in".

Delivered this 3rd day of February, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 29/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Gershon and Ziona Yosselevitch. APPELLANTS.

v.

Emmanuel and Rivkind. RESPONDENTS.

*Workmen's compensation arbitration — Right of appeal, Arbitration Ordinance, Sec.* 15(3), *Workmen's Compensation Ordinance, Schedule* 6, *para.* 3 *— Injunction against Chief Registrar not to register award pending proceedings to have the award set aside.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv (in its appellate capacity), dated the 31st of October, 1940 :—

HELD : 1. An appeal lay from the Magistrate's order of injunction to the District Court and thence, by leave, to the Court of Civil Appeal.

2. The proceedings started by the Respondents to have the award set aside having been instituted *bona fide* and not merely for the purpose of causing delay, the Magistrate was justified in requiring the Chief Registrar to postpone the recording of the award until after the decision of the action.

ANNOTATIONS :

1. On workmen's compensation arbitration, see C. A. 32/40 (1940, S. C. J. 338) and C. A. 48/40 (*ibid.*, p. 385).

2. Palestinian authorities on injunctions are collated in annotations to C. A. 35/39 (1939, S. C. J. 161). See also C. A. 42/39 (*ibid.*, p. 412).

FOR APPELLANTS : Smoira & Bar-Shira.

FOR RESPONDENTS : Wittkowski.

JUDGMENT:

A preliminary objection was taken by the Respondents that no appeal lies to this Court. In view of Section 15(3) of the Arbitration Ordinance (Cap. 6 of the Revised Edition) and paragraph 6 of the 3rd Schedule to the Workmen's Compensation Ordinance (Cap. 154 of the Revised Edition), we are of opinion that an appeal from an order of this nature lies to the District Court and thence, by leave, to this Court.

It appears that as a result of certain arbitration proceedings the Appellants obtained an award in their favour against the Respondents. This award was duly forwarded to the Chief Registrar to be recorded in the Register.

The Respondents thereupon filed an action in the Chief Magistrate's Court of Tel-Aviv to set aside the award on certain grounds, with which we are not here concerned, and applied *ex parte* to the Chief Magistrate for an injunction to issue restraining the Chief Registrar from recording the award pending the decision of the action.

This interim injunction was granted on the 8th of August, 1940. The Chief Magistrate appears to have had doubts as to whether he was right to grant such an injunction *ex parte* and on the 12th September, 1940, the matter was reargued before him by both parties. The Chief Magistrate then confirmed his previous order. Presumably he was satisfied, after hearing the parties, that the institution by the Respondents of these proceedings to set aside the award was *bona fide* and not merely for the purpose of causing delay.

We are not prepared, therefore, to say that he acted unreasonably in requiring the Chief Registrar to postpone the recording of the award until after the decision of the action.

It is probably unnecessary to add that we have formed no view as to the merits of the pending action, to which the Appellants may have good defences both of law and of fact.

The appeal must, therefore, be dismissed with costs to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 11th day of March, 1941.

*British Puisne Judge.*

CIVIL APPEAL No. 12/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Yitzhack Arie Karlstadt. APPELLANT.

v.

Zvi Lites. RESPONDENT.

*Sale of mortgage — Allegation of usurious interest — Question to be decided by Court, Execution Law, Art.* 36, *H. C.* 65/37 — *Question of excessive interest not arising — Judgment for alleged balance instead of ascertaining amount due — Amount in dispute, Jurisdiction of Magistrate's Court — Corroboration, Evidence Ordinance, Sec.* 6.

In dismissing an appeal from the judgment of the District Court of Tel-Aviv (in its appellate capacity), dated the 15th of November, 1940 :—

HELD : 1. On the facts of the case, the question of usurious interest did not arise.

2. The Appellant could not get judgment for the amount alleged to have been overclaimed as his object in going to the Court could only be to ascertain the amount due by him under the mortgage.

3. The amount involved being LP. 267, *i. e.* the amount claimed in the foreclosure proceedings, the case fell within the jurisdiction of the District Court and not of the Magistrate's Court.

REFERRED TO : H. C. 65/37 (1938, 1 S. C. J. 43).

ANNOTATIONS :

1. Compare H. C. 65/37 (*supra*) and notes.
2. On usurious interest, *vide* P. C. 54/38 (1940, S. C. J. 268) and note 3.
3. Compare, on the third point, C. A. 42/39 (1939, S. C. J. 286) and C. A. 37/40 (1940, S. C. J. 90).

FOR APPELLANT : Hoffman.

FOR RESPONDENT : Goitein.

## JUDGMENT:

The Respondent, who is a contractor, built a house for the Appellant, and in payment therefor took a mortgage for LP. 450 with interest for a period at 9% payable over two years by seven agreed instalments.

Default was made and the Respondent took foreclosure proceedings before the Execution Officer. The Appellant alleged usurious interest, and the sale was postponed.

It was decided by this Court in High Court No. 65/37, 1938, P. L. R. 47, that Article 36 of the Execution Law applies to such a case.

Presumably acting thereunder the Appellant went to the Magistrate's Court, Tel-Aviv.

In his claim he stated :—

> "Defendant has brought execution proceedings to foreclose the mortgage (file No. 11587/39) claiming LP. 267, *i. e.* LP. 71.245 in excess to what is due to him.
>
> "I therefore pray that the Defendant may be adjudged to pay LP. 71.245 with costs, advocate's fees and legal interest as from the date of claim".

It will be seen that he alleges that the Respondent was claiming too much. There is no suggestion of excessive interest.

The Magistrate went into the facts, which seem to have turned upon the question of whether certain payments were made by the Appellant in respect of the mortgage debt or in respect of additional work alleged by the Respondent to have been done by him to the house, and held :—

> "It would appear that the matter of additional works came to conceal the excessive interest charged by the defendant or the undue payments."

and gave judgment for the Respondent to pay the Appellant LP. 66.781 mls with interest.

The District Court set this aside, and the Respondent appeals to this Court.

On the facts of this case I cannot see how the claim of excessive interest ever arose. It is not suggested that the building of the house was not a genuine transaction to be paid for as I have stated. The only question seems to me to be how much of the mortgage debt remains unpaid. I fail to see how in any circumstances the Appellant could get judgment for the amount he alleged was over-claimed by the Respondent. His, the Appellant's, object in going to the Court could only be to ascertain the amount due by him under the mortgage, and having regard to the amount involved — LP. 267 was claimed in the foreclosure proceedings — I think the proper Court was the District Court, not the Magistrate's Court.

It is also argued that there was not sufficient evidence before the Magistrate to satisfy Section 6 of the Evidence Ordinance.

The appeal, therefore, fails and is dismissed.

Respondent will have costs on the lower scale, and we certify LP. 10 for attendance.

Delivered this 7th day of March, 1941.

*Chief Justice.*

CIVIL APPEAL No. 22/41.

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

BEFORE : Trusted, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Municipality of Safad. APPELLANT.

v.

Jubran Sam'an. RESPONDENT.

*Appeal out of time — Whether judgment delivered in presence or in absence — Presence through agent.*

In dismissing an appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated the 11th day of December, 1940 :—

HELD : The Appellant Municipality was present at the delivery of the judgment through its agent, the Secretary of the Council, and the appeal was, therefore, out of time.

ANNOTATIONS : Compare C. A. 88/38 (1938, 1 S. C. J. 279) and C. A. 2/39 (1939, S. C. J. 53).

FOR APPELLANT : Salah.

FOR RESPONDENT : Atalla (by delegation).

### J U D G M E N T :

The Magistrate of Safad upon completing the hearing of this case reserved his judgment and stated that it would be delivered on 30.5.40. On that date the judgment was not ready and its delivery was further postponed to 4.6.40. We heard some argument as to whether the Appellant had received notice of this postponement. Counsel for the Appellant stated before us, that neither he nor the Municipality was served with a notice but he states that he came later in the day and was told that the judgment had been delivered and the Secretary of the Municipality was present when it was read.

When the case went to the District Court on appeal the Respondent raised the point that the appeal was out of time, as it had been delivered in presence. As it was not clear from the judgment of the Magistrate whether it was delivered in the presence or absence of the Appellant, the case was remitted in accordance with the rules to the Magistrate to hear evidence on this point. Evidence was heard and remitted to the District Court which found :—

> "As stated above we do not believe that the Secretary appeared in his personal capacity. The fact that he was present in Court in the morning during Municipality office hours and sitting in the ad-

vocates' bench, and the fact that he reported the judgment of the Court to the Municipal Council on the very same day together with the evidence of the witness Abdul Ghani Eff. Nahawi show clearly that he appeared in his official capacity as representing the Municipal Council".

There was evidence upon which the Court based its findings, that the Appellant Municipality was present through its agent the Secretary of the Council. The judgment was, therefore, delivered in the presence of the Appellant and the appeal was out of time.

That being so, the appeal will be dismissed with costs on the lower scale and LP. 10 advocate's attendance fee.

Delivered this 10th day of March, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 24/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Raphael Sabban. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Robbery — Identification — Cumulative evidence, R. v. Cartwright — Sentence, reasons for mitigation.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 17th of February, 1941, whereby the Appellant was convicted of robbery contrary to Section 288(1) of the Criminal Code Ordinance, 1936, and being in possession of firearms and ammunition contrary to Section 36(2)(a) and (f) of the Firearms Ordinance, 1922, and sentenced to five years' imprisonment :—

HELD : 1. (Following R. *v.* Cartwright) : The evidence as to the identification of the Appellant had been of a cumulative character and the Appellant was properly convicted upon it.

2. The Appellant had rightly been sentenced to a heavier penalty than his accomplice as the latter was only twenty years old and had pleaded guilty.

FOLLOWED : R. *v.* Cartwright, 10 C. A. R. 219.

ANNOTATIONS :

1. On identification compare note 2 to CR. A. 18/41 (*ante*, p. 51).

2. On the impossibility of assessing sentences one by the other, see CR. A. 29/39 (1939, S. C. J. 345, *dictum* of Trusted, C. J., at p. 347).

3. Reasons for a lenient sentence : Prisoner assisting the police, CR. A. 8/39

(1939, S. C. J. 93) ; Reconciliation, CR. A. 3/39 (*ibid.*, p. 61) ; Old age, CR. A. 158/37 (1938, 1 S. C. J. 24) ; Youth, CR. A. 4/40 (1940, S. C. J. 49) ; Assistance in recovery of stolen property, CR. A. 28/38 (1938, 1 S. C. J. 228) ; Maximum sentence imposed without special grounds, CR. A. 58/39 (1939, S. C. J. 512) ; First offence, CR. A. 4/41 (*ante*, p. 34).

FOR APPELLANT : Levitsky.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant was convicted of robbery with violence, having taken part in what is generally called a "hold up" of a bank.

The Court of Trial accepted the identification of the Appellant by one of the witnesses. It is argued by Mr. Levitsky on his behalf that it should not have done so, as she, the witness, failed to identify the Appellant at an identification parade. This the witness explained by saying that at the parade the Appellant was wearing a hat.

Had this been the only evidence the Court might have felt some doubt if it was safe to convict upon it, as to that we can express no opinion, but it was not, there were two other matters, one, the finding of a bullet in the Appellant's pocket, and the other, the fact that immediately after the robbery the Appellant was seen running away and was subsequently found with a revolver loaded with three rounds.

In a somewhat similar case, Rex *v.* Cartwright, X., C. A. R. 219, the Lord Chief Justice pointed out that the evidence was of a cumulative character — and that is the position here. We are satisfied that there was evidence upon which the Court could properly convict.

Mr. Levitsky also questions the sentence of five years' imprisonment chiefly on the ground that another prisoner charged together with the Appellant was only given three years. Each case must be considered on its merits, but I may point out, the other prisoner was only twenty years old and he pleaded guilty. When an accused person does so and thereby saves public time, and — as in a case such as this — saves respectable young women being brought into the atmosphere of a Criminal Court, I think the Court in the public interest is entitled to take these matters into consideration in awarding the sentence.

On the facts of this case there is no doubt that the sentence was not excessive.

The appeal will be dismissed.

Delivered this 13th day of March, 1941.

*Chief Justice.*

CIVIL APPEAL No. 278/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Alexander Eliash,
2. Elazar Eliachar,
3. Rachele, widow of Moreno Eliachar,
4. Menashe Eliachar. APPELLANTS.

v.

1. The Government of Palestine,
2. Mudir el Awqaf el Islamiya el 'Am. RESPONDENTS.

*Land Settlement — C. A. 227/40 — Correction of register to include area encroached upon and revived — New evidence on appeal — Bedl el misl — Payment of taxes in respect of area in dispute — Estoppel — Costs.*

In allowing an appeal from the decision of the Settlement Officer, Jerusalem Settlement Area, dated 21st of October, 1940 :—

HELD : 1. The certificate of the Revenue Authorities would be admitted in evidence, although it had not been before the Settlement Officer, since it was in reply to a statement made by Respondent's advocate before the Settlement Officer after judgment had been reserved, to which the Appellants had had no opportunity of replying.

2. Government having for nearly 30 years treated the entire area claimed by the Appellants as the taxable property of the Appellants or their predecessor in title and having collected *werko* and rural property tax from them on that basis, was now estopped from denying Appellants' ownership rights to the land.

3. *Quaere* whether Government had a claim for payment of *bedl el misl.*

4. The citation of the second Respondent being purely formal, he would have to pay no costs.

MENTIONED : C. A. 227/40 (*post*, p. 107).

ANNOTATIONS :

1. On fresh evidence on appeal see C. A. 27/40 (1940, S. C. J. 81) and note 2.

2. Recent cases on estoppel are collated in note 2 to C. A. 269/40 (*ante*, p. 81). See also C. A. 255/40 (*ante*, p. 88).

3. See, on the last point, C. A. 267/40 (*ante*, p. 21) and note 2.

FOR APPELLANTS : Eliash.

FOR RESPONDENTS : No. 1 — Junior Government Advocate — (Akel) and Alhassid.
N. 2 — Muhtadie.

JUDGMENT:

This is another appeal from the Settlement Officer, Jerusalem Settlement Area, in which very much the same points arise as in C. A. 227/40, Fatima bint Mahmud Hassan Abu Ghosh *v.* Government of Palestine and another, which we heard on the same day.

The dispute concerns the actual area of the land which the Appellants bought, in or about the year 1934, when the land was sold as the result of non-payment of a mortgage on it, after being duly advertised by the Execution Office.

The land originally belonged to the late Fadlallah Haroum. Owing to encroachments made by him, the *Mejliss Idara* in 1333 held an enquiry, and a fresh registration was made on the 25th August, 1333, in which the area was stated to be 200 *dunums,* but an endorsement was made on the register to the following effect :—

> "Fadlallah Marum, an Ottoman subject and of the Latin Community, is in possession, by way of undivided shares, of 79 shares out of 110 shares and though the total area as registered in the Land Registry is 200 *dunums* and 1457 *ziras,* the balance which appeared to be in excess of the registered area is, therefore, 324 *dunums* and 1457 *ziras* and whereas it has been established that the excess in area was taken from State Lands, by way of encroachment, and whereas by virtue of a decision of the *Majlis* (dated the 14th of August, 1333, No. 428, based on a certificate of *mukhtars*) it was decided to grant the said excess in area on payment of *Bedel Missl* and to issue a corrected Title Deed in respect of the other part, therefore, this title deed was issued by correction and exchange."

Other endorsements in regard to other plots show that encroachments were made and revival had taken place for more than ten years.

It is proved by a certificate from the Revenue Authorities, dated the 9th October, 1940, that the Appellants and their predecessors in title have paid taxes on the whole of the 543 *dunums* claimed by them for close upon 30 years. This certificate was not before the learned Settlement Officer but we admit it, since it is in reply to a statement made by Mr. Alhassid before the Settlement Officer after judgment had been reserved, to which the Appellants had no opportunity of replying. It is not disputed that the Appellants bought in good faith.

The main ground of the Government's case seems to be that there is no proof that the *bedl el misl* of LT. 107 was ever paid, and that, therefore, the Appellants or their predecessors in title cannot have acquired any title to the extra area. Apart from the fact that it seems most unlikely that the endorsements in the *Mahlul* register would ever have been made, if *bedl el misl* had not been paid, the fact remains that for nearly 30 years the Government have treated the entire area claimed by the Appellants as the taxable property of the Appellants or their predecessor in title and that the Government have collected *werko* and rural property tax from them on this basis. If estoppel is to have any meaning at all, we cannot imagine a clearer case. There may or may not be a claim for payment of *bedl el misl* — that is another question — but Government, having for this long period by their conduct and actions admitted that the land was the Appellants' when it was a question of getting taxes on the basis that the Appellants and their predecessor in title were the owners, cannot now deny that ownership, just because it suits them to put in a claim for the land itself.

In these circumstances the judgment of the learned Settlement Officer cannot stand. The appeal must be allowed, and his judgment set aside, and judgment entered for the Appellants in accordance with their claim.

The first Respondent must pay the Appellants' costs of their appeal on the lower scale to include LP.15 advocate's attendance fee on the hearing of this appeal. The citation of the second Respondent being purely a formal one, he is discharged with no order as to costs.

Delivered this 11th day of March, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 23/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Paul Wolfe Kantrovitz. RESPONDENT.

*Charge of manslaughter, C. C. O., Sec. 212 — Submission of no case to answer, CR. A. 36/40, Criminal Procedure (T. U. I.) Ord., Sec. 39 —*

*Charge reduced to causing death by carelessness, C. C. O., Sec. 218 — Failure to amend charge, Criminal Procedure (T. U. I.) Ordinance, Secs. 52 & 31 as amended — Right of election, Magistrates' Courts Jurisdiction Ordinance, Sec. 6 — Attorney General's right of appeal, Criminal Procedure (T. U. I.) Ord., Secs. 67 & 65, CR. A. 36/40.*

In dismissing an appeal from the ruling and order of the District Court of Jerusalem, dated the 15th of January, 1941, whereby the charge of manslaughter against Respondent, contrary to Sections 212 and 213 of the Criminal Code Ordinance, 1936, was reduced to a misdemeanour offence under Section 218 :—

HELD : 1. (Referring to CR. A. 36/40) : As the evidence disclosed a *prima facie* case of manslaughter the Accused should have been called upon to plead.

2. After having called upon the Accused the Trial Court should have decided whether there was any offence, and if so whether this was under Section 212, or under Sec. 218.

3. Upon the view it took the Court of trial should have amended the charge and considered the case under the amended charge.

4. A person charged with a misdemeanour before the District Court has no right of election.

5. (Distinguishing CR. A. 36/40) : The ruling of the District Court being based on an irregularity of procedure, the Attorney General had no right of appeal.

REFERRED TO & DISTINGUISHED : CR. A. 36/40 (1940, S. C. J. 155).

ANNOTATIONS :

1. Previous proceedings in this case : CR. A. 127/40 (1940, S. C. J. 452).

2. See, on the first and second points, note 1 to CR. A. 36/40 (*supra*).

3. On the third point compare CR. A. 125/40 (1940, S. C. J. 415) and note ; see also note to CR. A. 127/40 (*supra*).

4. On the right of election, *vide* CR. A. 145/37 (1938, 1 S. C. J. 118) and CR. A. 9/40 (1940, S. C. J. 73).

5. Compare, on the Attorney General's right to appeal, CR. A. 18/38 (1938, 1 S. C. J. 156), CR. A. 31/38 (*ibid.*, p. 177) and CR. A. 9/40 (*supra*).

FOR APPELLANT : Crown Counsel — (Bell).

FOR RESPONDENT : Levitsky.

JUDGMENT:

The Accused was charged before the District Court, Jerusalem, with manslaughter under Section 212, having killed a child while driving a motor-lorry. The facts are simple, and the case could and should have been disposed of in one short sitting.

At the end of the case for the prosecution Mr. Levitsky for the Accused submitted that there was no case to answer. From the record it appears that one witness had stated : "There came no other cars then on that part of the road. Accused was driving very fast", and in cross-examination : "I don't know why he ran over the child unless because he was going so fast". Another witness said she was leading the child by the hand on the edge of the road when the lorry struck it from behind. In my view that is clearly *prima facie* evidence of manslaughter.

In Criminal Appeal 36/40 this Court drew attention to the difficulties which arise when Courts of Trial do not comply with Section 39 of the Criminal Procedure (Trial Upon Information) Ordinance.

In this case the Court gave what it called a Ruling and Order as follows :—

> "We think the evidence does not disclose any case under Section 212, but there is one under Section 218 to answer to here. We, therefore, acquit the Accused of the charge of manslaughter and call upon him to plead to the charge of unintentionally causing the death of the child, Miriam, on the day and place in question when driving the lorry, with want of precaution under Section 218".

It follows from what I have said, that in my view the Court should have called upon the Accused and, having heard him if he chose to give evidence or make a statement, and his witnesses, if any, have made up its mind if there was any offence, and if so if it was an offence under Section 212 — or — having regard to Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, as amended by Section 22 of the Criminal Procedure (Trial Upon Information) (Amendment) Ordinance, 1939, which make it quite clear that the Court may convict of an offence triable summarily — an offence under Section 218.

Having made the ruling and order to which I have referred the Court even then did not amend the information and call upon the Accused to plead, and dispose of the matter, but listened to more argument and gave another so-called Ruling and Order as follows :—

> "In the circumstances the charge now having been reduced to a misdemeanour offence under Section 218 which is triable summarily, and in view of the objection by the Defence — we think that the Accused should not be deprived of the exercise of his right of election and, therefore, we leave it to the Prosecution to take such steps as it may deem fit in the matter".

This, with all respect to the District Court, I am at a loss to understand. If the Court felt that it should not proceed under Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, and

ought to proceed under 31(2) as set out in Section 12 of the Criminal Procedure (Trial Upon Information) (Amendment) Ordinance, 1939, it is clear that it should have considered the case upon that basis.

Of what right of election the Accused would be deprived I do not know. If an accused person is charged before a Magistrate he is given certain rights by Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1939, but sub-section (2) of that section makes it clear that a person may in the first instance be charged before a District Court. That section clearly has no application when an accused person is charged with a misdemeanour upon information under Section 31, but I quote it to show that even when charged summarily before a District Court an accused person has no right of election to be tried by a Magistrate.

The Attorney General appeals against this last ruling and order, but he is in difficulty. Section 67 of the Criminal Procedure (Trial Upon Information) Ordinance gives him the right to appeal from a judgment on certain grounds, but an irregularity of procedure is not one of them, *cf.* Section 65 of that Ordinance. Had he appealed against the acquittal on the charge of manslaughter the case would have been similar to Criminal Appeal 36/40, and we might have considered if the law was wrongly applied to the facts, but as it is I do not think we can do so, as the ruling and order does not appear to be based upon the facts but upon a misconception of the procedure to be followed.

Although I feel that the proceedings have been most unsatisfactory, and that the result is to be deplored, I think this appeal must be dismissed.

Delivered this 13th day of March, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 4/41

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Abdul Hamid Bibi. APPELLANT.

V.

Jirius Ibn Costandi Zacharia. RESPONDENT.

*Instructions to agent to pay certain persons — Payments made to other persons — Recovery from agent — Fees on cross-appeal, C. A. 98/40, C. A. 182/40.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 21st of December, 1940 :—

HELD : 1. The Respondent was entitled to recover from the Appellant the sums paid out by the latter against the former's instructions.

2. (Following C. A. 98/40, C. A. 182/40) : The cross-appeal could not be entertained as no fees had been paid on it.

FOLLOWED : C. A. 98/40, cited at the end of C. A. 182/40 (1940, S. C. J. 343).

ANNOTATIONS :

1. In the previous judgment referred to (C. A. 64/35, not reported), the case was remitted to the District Court to determine by whom the payments in question had been made.

2. See, on the first point, *Mejelle,* Arts. 506 *seq.,* especially Art. 513.

3. On the second point see also C. A. 223/40 (1940, S. C. J. 459).

FOR APPELLANT : Richardson & Berouti.

FOR RESPONDENT : Goitein & Malak.

JUDGMENT:

*Rose, J.* : This is an appeal from a judgment of the District Court of Jaffa, in which judgment was given for the Respondent for the sum of LP. 149.030 mils and costs.

It would seem that the Appellant was empowered by a Power of Attorney to pay certain named creditors of the Respondent. In the event payments were made to certain creditors not mentioned in the Power. The Appellant contends that he himself made no such payments, the payments in question being made by a third party.

It is admitted in the pleadings that the Appellant in fact received certain sums of money for, *inter alia,* the above purpose and it is apparently undisputed that the Appellant debited the Respondent with certain amounts paid to creditors not mentioned in the Power of Attorney.

From these facts we are of opinion that the trial Court was right in holding that the Respondent is entitled to recover the amount in question, namely, LP. 149.030 mils.

The appeal is, therefore, dismissed. The Respondent, however, endeavoured to bring a cross-appeal before the Court. It appears that no

fees were paid on this cross-appeal and in view of the decisions of this Court in Civil Appeal No. 98/40, I. S. David *v.* Ishaya D. Mizrahi and Civil Appeal No. 182/40, Government of Palestine *v.* Keren Kayemeth Leisrael Ltd. & another, we are unable to entertain it.

We would add that it would seem that the cross appeal would in any event have been bound to fail as it would appear from the record of the earlier proceedings in this Court that the question raised in the cross appeal has, inferentially, already been decided in favour of the present Appellant.

The Respondent will have the costs of this appeal to include the sum of LP. 15.— for advocate's attendance fee.

Delivered this 14th day of March, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 253/40.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Sheikh Suleiman el Taji el Farouqi. APPELLANT.

v.

The Arab Agricultural Bank Ltd. RESPONDENT.

*Summary Procedure — Ex parte judgment by Registrar — Judgment not served within 12 months, C. P. R., 214 — Non service due to oversight in Court Office — Summons served afresh — New judgment — Res judicata — Evidence admitted after case closed — Proof of receipt of payment — Admissibility of oral evidence — Interest.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 14th of October, 1940 :—

HELD : 1. As the failure to serve the Registrar's judgment was not due to any fault of the Respondent but to an oversight in the Court's office, it would not be fair to penalise the Respondent, and the matter should not be held to be *res judicata.*

2. Although the case had not been conducted in strict application of the rules it could not be said that the District Court went wrong in allowing the Respondent to produce evidence after addressing the Court as the case had not been closed.

3. The fact that the Appellant had used the cheque to settle part

of his account with the Respondent did not alter the position of the Appellant as having received the money.

4. The oral evidence of the manager had been given neither against documentary evidence nor to contradict it, but merely to show the connecting link between the agreement and the cheque

5. As there was an agreement for interest between the parties, interest continued to run after the expiration of the specified period.

ANNOTATIONS :

1. On *res judicata,* compare C. A. 234/40 (1940, S. C. J. 439) and note.
2. See, on the second point, C. A. 246/38 (1939, S. C. J. 24) and note.
3. On the fourth point, *vide* C. A. 115/40 (1940, S. C. J. 246) and note 1.
4. On the last point compare H. C. 27 & 28/40 (1940, S. C. J. 116).

FOR APPELLANT : P. Joseph and Caspi.

FOR RESPONDENT : Abcarius and Hussayni.

## JUDGMENT:

*Frumkin, J.* : Proceedings in this case started in May, 1938, when the present Respondents, the Arab Agricultural Bank as Plaintiffs instituted an action under Summary Procedure against the present Appellant as Defendant. The claim was based on an agreement dated 31st December, 1936, entered into between the Bank on one side and the Appellant and others on the other, under which a credit in current account to the amount of LP. 2,000.— was granted to the Appellant and others entitling, however, the Appellant alone to draw on this account. Upon this agreement the Appellant drew on the bank a cheque for LP. 2,000.— which sum was the subject matter of the claim. No appearance was entered by the Defendant and on the 29th September, 1938, the Registrar entered an *ex-parte* judgment for Plaintiffs in the sum of LP. 2,000.— with interest at the rate of 8% from 31.12.36 until payment. This judgment was never served and at the end of 1939 the bank put the judgment into execution. The Relieving President, in his capacity as Chief Execution Officer, refused to execute it relying on Rule 214 of the Civil Procedure Rules, on the ground that more than a year had passed before it was served. Prior to that the Appellant applied to the District Court asking that the judgment of the Registrar be set aside on the same ground and the District Court on the 4th January, 1940, gave the following judgment :—

"In view of the provisions of Rule 214 we find that the judgment (which was not served on the Respondent within a period of 12 months from its date) is now null and void.

But the proceedings are not otherwise null and void, and it appears

> that the Applicant actually applied for service of the judgment, and paid the fee for service, within a period of one month from the date of the judgment. Through some oversight in the Court Office the judgment was not served. It would not be fair to penalise the Applicant in such circumstances.
>
> We order the summons to be served afresh on the Respondent and the proceedings to take the normal course thereafter. No costs".

Thereupon a fresh summons was issued and the case was tried before the District Court, which finally gave judgment for the Plaintiff bank, in the same terms as the previous judgment of the Registrar. Against this judgment there is this appeal.

The first ground of appeal advanced by the Appellant is shortly put thus : The cause of action of the Plaintiff was merged in the judgment of the Registrar, the judgment of the Registrar became null and void, and the District Court erred in re-opening the case which was *res judicata.*

As however pointed out in the Order of the District Court, non-service of the Registrar's judgment was in no way due to any fault of the Respondent, who in due time actually applied for service of the judgment and paid the fees for service, and it was only due to some oversight in the Court's office that the judgment was not served, and we agree with the learned District Court that it would not be fair to penalise the party in such circumstances. It might have been a better course for the Court below, having come to that conclusion, to direct then that the judgment of the Registrar be served on the Defendant, but the effect would be the same.

Another ground of appeal is that evidence was admitted after the case was closed. If one looks into the record of proceedings of the Court below it appears that the case was not conducted in strict application of the rules and that counsel on both sides addressed the Court on more than the usual number of occasions. The case was last adjourned upon the application of counsel for Appellant to have his client called as a witness and for certain accounts to be produced by the Respondent. At the resumed hearing counsel for Appellant addressed the Court at some length. Again, it would have perhaps been better procedure if the attention of counsel had been called by the Court or by the other side as to the object of the adjournment to that date, but if this was not done it does not really mean that the case was actually closed and we cannot say that the Court went wrong, under these circumstances, in allowing the Respondent to produce the evidence called for and directed by the Court in a previous hearing.

On the merits the Appellant argues that the cheque was drawn to the order of the bank itself and could, therefore, not be taken in evidence that he actually received the LP. 2,000. He admits, however, that prior to the agreement referred to above, he had no credit with the bank, on the contrary there was a large amount to his debit and it was only by virtue of the agreement that he could so draw on the bank. The fact that this cheque was used to settle in part an old account outstanding between him and the bank does not alter the position.

The Appellant also complains that the oral evidence of the manager of the bank should not have been accepted. This evidence was given neither against documentary evidence nor to contradict it, but merely to show the connecting link between the agreement and the cheque which, to my mind, is quite obvious even without that evidence.

There remains only the question of interest to be dealt with. Interest at the rate of 8% was provided for in the agreement and it has been held more than once by this Court that once there is an agreement for interest between contracting parties, interest continues to run even after the expiration of the specified period.

For these reasons the appeal is dismissed and the judgment of the District Court confirmed with costs on the lower scale to include LP. 15 attendance fee.

Delivered this 21st day of March, 1941.

*Puisne Judge.*

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CIVIL APPEAL No. 227/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Fatmeh Mahmoud Hassan Abu Ghosh & 71 ors. APPELLANTS.

v.

1. The Attorney General, on behalf of the Government of Palestine,
2. Mudir el Awqaf el Islamiya el Am. RESPONDENTS.

*Land Settlement — Government's claim to land as unassigned state land — Partition — Yoklama Registration — Miri Kushans — Assessment of taxes for area in dispute — Fraud — Estoppel — Costs.*

In allowing an appeal from the decision of the Settlement Officer, Jerusalem Settlement Area, dated the 21st day of October, 1940, and in remitting the case to the Settlement Officer :—

HELD : 1. Government were estopped from denying the category of the land as *miri* and the Appellants' ownership rights thereto.
2. The second Respondent would be dismissed from the appeal, as he had only been a formal party.

ANNOTATIONS : This is the case referred to in C. A. 278/40 (*ante*, p. 97). See also notes 2 and 3 thereto.

FOR APPELLANTS : Abcarius.
FOR RESPONDENTS : No. 1 — Junior Government Advocate (Akel).
No. 2 — Muhtadie.

JUDGMENT:

This is an appeal from a decision of the Settlement Officer in regard to certain village lands of Abu Ghosh. The Settlement Officer found in favour of Government in regard to the majority of the claims, finding that the lands were unassigned state land. The claim of the *Mudir el Awqaf al 'Am* was dismissed by the Settlement Officer and no appeal on that point has been made.

The case for the Appellants can be shortly stated as follows. In 1927 these lands, which were originally pasture for the village, were partitioned on the suggestion of the then District Officer and this partition was completed in 1935. Then the village was assessed to Rural Property Tax and a map for that purpose was prepared and adopted by Government as a basis for that tax, Ex. B, which shows that the land is described as partitioned. On that basis of that map, Rural Property Tax Distribution Lists were sent out. Ex. C. shows the shares of each of the inhabitants and on that basis taxes were levied on such of the lands as were not exempted. In addition, Abcarius Bey has produced a *werko* extract for 1933/4, Ex. D, which shows that 5700 *dunums* were described as pasture land and three other areas as cultivated land, all being in the name of all the inhabitants. Further, in some half a dozen instances, plots have been sold, by the persons shown as owners of them, to others, and those transactions have all been duly registered in the Land Registry, without any opposition on the part of the Government.

These plots are situated in the middle of the land now in dispute, and are described by Government themselves as *miri.*

Finally, there is the claim that there was an original *Yoklama* registration of all these lands in the name of three of the inhabitants, presumably on behalf of the village, in 1327. It was stated before the Settlement Officer that these *Yoklama Kushans* had been lost, together with the Turkish registers, and the learned Settlement Officer disbelieved the fact that there had ever been such a registration, but since his decision a *Yoklama kushan,* dated 1319 and issued in 1322, has been discovered and produced by Abcarius Bey, together with another *kushan,* stated to be a copy of an earlier one, which would appear to show that the Appellants' assertions were correct. A certificate from the Land Registry has also been produced to us to the effect that the *Yoklama* Registers have in fact been lost. A large amount of evidence was called on behalf of the Appellants in support of their claims, and it is entirely uncontradicted by any evidence adduced by the Government.

The Respondent's case is that no taxes were paid on this land which were in fact exempted — that the *kushans* in respect of certain plots were fraudulently obtained — in regard to which there is not the slightest scrap of evidence even tendered. It is admitted that the Land Registry had issued *miri kushans,* but that this was an error, and that the whole land was never registered in the *Tabu,* but only in the *Werko.*

In the face of all these facts, it seems to us clear that Government, by their own conduct, are estopped from denying what they have themselves accepted. They have accepted the partition scheme, and we have never heard of a partition of unassigned state lands, they have themselves issued *miri kushans* for certain plots in the centre of the disputed lands, thereby clearly approving the sales, and in effect confirming that the vendors had the right to sell these plots, which implies that the vendors were the owners of them, and it is certainly not right for the Government to make allegations of fraud, with no evidence whatever to support it. Government cannot now deny the category of the land nor its ownership. And in addition there is all the uncontradicted evidence led by the Appellants. Further, there is in fact a *Yoklama* registration.

For all these reasons we think that the appeal must be allowed, and the judgment of the learned Settlement Officer set aside. The case must be remitted to the Settlement Officer to amend the Schedule of Rights in accordance with the Appellants' claims unless there should be any conflicting claims.

The Appellants will have the costs of this appeal on the lower scale and LP. 15 fee for attending the hearing of this appeal, against the 1st Respondent. The 2nd Respondent is dismissed from the appeal, as he was only a formal party under the Civil Procedure Rules.

Delivered this 11th day of March, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 284/40.

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

BEFORE : Trusted, C. J. and Rose, J.

IN THE APPEAL OF :—

1. Joseph Klein,
2. Israel Shaffer. APPELLANTS.

v.

1. Henry Rock,
2. Labibeh Rock,
3. Arthur Rock (erroneously named "Zaki Rock" in the heading of the judgment of the District Court under appeal),
4. Edward (otherwise "Edmond") Rock,
5. Eveline Rock,
6. Adelaide Khayat née Rock. RESPONDENTS.

*Contracts — Power of attorney from lunatic void, Mejelle, Arts.* 979, 966 & 1530 — *Curator not properly appointed — Signature of contract — No damages for breach of void contract.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 9th of November, 1940 :—

HELD : 1. A lunatic could not make a valid disposition of his property except through a curator, who had been duly appointed by the appropriate Court.

2. The second Respondent had not been properly appointed as curator of the third Respondent at the material time and it followed that the second Respondent's signature on behalf of the third Respondent was ineffective.

3. As the contract lacked the signature of one of the persons who, together, constituted one of the contracting parties, it could not serve either party as a basis for a claim for damages.

ANNOTATIONS :

1. Previous proceedings between the same parties : C. D. C. Ja. 485/33 (C. of J. 1512) ; C. A. 58/34 (1937, S. C. J. 4) ; C. A. 157/34 (C. of J. 1934—6, 123, 1937, S. C. J. 8).

2. Compare, on the first and second points, the previous proceedings referred to above. See, on insanity generally, C. A. 274/40 (*ante*, p. 85).

3. On the third point see also C. A. 200/35 (1937, S. C. J. 77) and C. A. 161/37 (P. P. 3.ii.38).

4. No damages can be claimed for breach of a void agreement : compare C. A. 4/38 (1938, 1 S. C. J. 159) and C. A. 31/38 (*ibid.*, p. 179).

FOR APPELLANTS : Levin.

FOR RESPONDENTS : Eliash.

## JUDGMENT:

*Rose, J.* : This is an appeal from a judgment of the District Court of Jaffa.

The point for decision is a short one. By a contract of sale dated the 4th of June, 1933, the Respondents purported to sell a certain orange grove to the Appellants. The commencement of the contract is as follows :—

> "CONTRACT OF SALE
>
> made between Mrs. Labibeh Rock in her personal capacity and on behalf of Zaki Rock as per Power of Attorney, dated No. 962 of 3.4.1926, and Mr. Henry Rock in his personal capacity and on behalf of his brother Arthur Rock, as per Power of Attorney, dated No. 738 of 22.4.33 and Mr. Edmond Rock and Miss Adelaide Rock Khayat and Miss Eveline Rock, all of them jointly and severally, from one part, hereinafter called first party,
> And Messrs. Joseph Klein and Israel Asher Shaffier, jointly and severally from the other part, hereinafter called Second Party."

It is common ground that at all material times the said Zaki Rock was a lunatic, and in view of Articles 979, 966 and 1530 of the *Mejelle* it would seem that a lunatic cannot make any valid disposition of his property except through a curator, who has been duly appointed by the appropriate Court.

In the present case Labibeh Rock who purported to sign on behalf of Zaki Rock, was not at the material time his properly appointed curator and, in my opinion, it follows that her purported transfer of the property on behalf of Zaki Rock is ineffective.

This being so, it seems that the contract lacks the signature of one of those persons who together constitute one of the contracting parties and cannot, therefore, serve either party to it as a basis of a claim for damages for the breach of any of its terms.

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 21th day of March, 1941.

*British Puisne Judge.*

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HIGH COURT No. 2/41.

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

BEFORE : Trusted, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

1. Costandi Habib Hawa,
2. Tewfiq Habib Hawa, on behalf of the estate of his late father, Elia Hawa. PETITIONERS.

v.

1. Chief Execution Officer, District Court, Haifa,
2. Asst. Chief Execution Officer, Haifa,
3. Sleiman and Jamil Nassir. RESPONDENTS.

*Execution — Prescription, Execution Law Art.* 144 — *Gregorian or Hejira Calendar, C. A.* 184/37, *C. A.* 112/31, *C. A.* 204/37.

In allowing an application for an order to issue to the first and second Respondents, calling upon them to show cause why their orders given in Execution File No. 476/40, Acre, dated December 19, 1940 and August 1, 1940, respectively, should not be set aside, and why the judgment of 11.12.24 of the Magistrate's Court, Acre, given in favour of the Petitioners against the third Respondent, should not be executed :—

HELD : (Distinguishing C. A. 184/37, following C. A. 112/31, C. A. 204/37) : As the judgment which it was sought to execute was dated according to the Gregorian calendar, the fifteen years' period of limitation was to be calculated according to the same calendar.

FOLLOWED : C. A. 112/31 (1, P. L. R. 674, C. of J. 281) ; C. A. 204/37 (2 Ct. L. R. 153).

DISTINGUISHED : C. A. 184/37 (2 Ct. L. R. 219).

ANNOTATIONS : In addition to the cases cited in the Order see also C. A. 23/39 (1939, S. C. J. 171).

FOR PETITIONERS : No. 1 — Abcarius.
No. 2 — Hawa.

FOR RESPONDENTS : Nos. 1 & 2 — No appearance.
No. 3 — Saba.

ORDER:

This is the return to a rule *nisi* directed to the Chief Execution Officer, Haifa, to show cause why he should not execute a judgment, dated 11.12.24. Several points were raised, but there is the only point of substance — which is one of general importance — that is, is the period of fifteen years provided for the limitation of executions by Article 144 of the Execution Law to be calculated according to the *Hejira* or the Gregorian calendar.

In the course of the proceedings it was stated, quoting Manning, J., in Civil Appeal 184/37 :—

> "In cases relating to the limitation of actions for the recovery of immovable property, "year" means a *Hejira* year. I do not agree that Section 7 of Chapter 78, Laws of Palestine, Volume 2, is declaratory and, therefore, retrospective in its operation."

but this clearly is not such a case. Abcarius Bey, for the Applicants relies upon the decision of this Court in Civil Appeal 112/1931, P. L. R. Vol. 1, p. 674, followed and explained in Civil Appeal 204/1937, Levanon II, p. 153.

Those cases lay down the proposition that where an action is founded upon a document bearing a Gregorian date, "year" for the purpose of limitations is to be taken to be a Gregorian year. The document in the present proceedings, *i. e.* the judgment, bears such a date, and I think, therefore, that the Gregorian calendar applies, and the rule will be made absolute, with costs fixed at an inclusive sum of LP. 10 to be paid by the third Respondent.

Delivered this 19th day of February, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 33/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Ibrahim Ahmad Charkasi,
2. Ismail Ahmad Charkasi,
   Heirs of Ahmad Mustafa Charkasi. APPELLANTS.

v.

1. The Government of Palestine,

2. The Mutawalli of the Waqf, Jami 'Quisaria Ahmad Hassan Katkhuda Bushnaq,
3. The Mamur Awqaf of the Northern (Waqf) District,
4. Ahmad Bey Hassan Katkhuda. RESPONDENTS.

*Land settlement — Functions of Land Settlement Officer — Claim by waqf based upon occupation — Miri land claimed as waqf — Claim for accretions — Mutawalli cited personally as a third party during the proceedings — Mahlul Ordinance.*

In allowing an appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 19th December, 1940, and in remitting the case to the Land Settlement Officer with directions :—

HELD : 1. The *mutawalli* should not have been permitted to become third party at that stage of the proceedings, particularly having regard to the previous finding of the Court of Appeal.

2. At the death of the grantor without heirs, the portion not dedicated had been occupied by the *waqf*. This did not give the *waqf* title to that land which would have to be distributed in accordance with the consent judgment.

3. Any claim by the *waqf* in respect of the trees planted by them would have to be dealt with in accordance with the Law, but not by the Land Settlement Officer.

ANNOTATIONS : The previous decisions referred to in the judgment are L. A. 50/32 (unreported) and C. A. 189/37 (2 Ct. L. R. 209).

FOR APPELLANTS : No. 1 — Sanders.
No. 2 — Eliash.

FOR RESPONDENTS : No. 1 — Crown Counsel (Hogan).
Nos. 2 & 4 — Abcarius.
No. 3 — Khamra.

JUDGMENT:

The facts of this case are set out in the judgment of this Court when it was first before us. It appeared that in addition to the property dedicated by a *Waqfieh, i. e.* a garden, orchard and house, other *miri* property of the dedicator had been occupied for many years by the *mutawalli* and registered in the name of a *Waqf*.

The Land Settlement Officer had held that this property, although *miri,* was to be registered in the name of the *mutawalli* for the time being of the *Waqf* on behalf of the *Waqf*. The substantial point before

us was whether he was right in law in so holding. For the reasons stated at length in our judgment we held that he was not, and the case was returned to him to decide how the land should be divided.

The Settlement Officer has further considered the case and seems to have misunderstood his functions. In a judgment of some twenty pages not only has he criticised the decision of this Court to which I have referred, but he has also, in paragraph 5 referred in the most unbecoming terms to an earlier consent judgment of this Court. The Land Settlement Officer is not the Court of Appeal from this Court. He has also permitted the *mutawalli,* in his personal capacity, to become a third party, which was clearly wrong at that stage of the case and directly contrary to the judgment of this Court which pointed out "that it was not suggested that the occupation of the *mutawalli* was otherwise than on behalf of the *Waqf.*"

The Land Settlement Officer appears to have confused himself by the Mahlul Ordinance. The position is very simple. At the death of the grantor — without heirs — the land, including, as the Settlement Officer puts it in paragraph 21 of his second judgment, the portion not dedicated, was occupied and continued to be occupied by the *Waqf.* This Court held that the *Waqf* can acquire no title by occupation. The land, therefore, has to be distributed in accordance with the consent judgment. The present Appellants who take thereunder agree that any claims which the *Waqf* may have for trees planted on the land must be met in accordance with the law, but that does not concern the Land Settlement Officer.

The Land Settlement Officer concluded his second judgment by holding that the claim of the Government and that of the Charkasis — who claim through Government — fail, and that that of the *mutawalli, qua mutawalli,* succeeds. That is what he found in his first judgment, and what this Court held was wrong.

The case must, I fear, go back to the Land Settlement Officer in order that he may find the facts as already directed by this Court and give effect to the judgment of this Court, without further delay.

Each Appellant will have an inclusive sum of LP. 5 as costs to be paid by the second Respondent.

Delivered this 20th day of March, 1941.

*Chief Justice.*

CRIMINAL APPEAL No. 28/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Tihon Konstantinoff Cheyko. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Immigration offence, Defence (Immigration) Regulations, 1940, Reg. 3 & 4 — Whether vessel "came" into territorial waters of Palestine — Sentence.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 26th of February, 1941, whereby the Appellant was convicted of being the Master of a vessel found in the territorial waters of Palestine, having on board to his knowledge prohibited immigrants, contrary to Regulation 4 of the Defence (Immigration) Regulations, 1940, and sentenced to two years' imprisonment, and the S. S. "Libertad" forfeited to the Government of Palestine :—

HELD : 1. The words "whether it (the vessel) came into those waters voluntarily or not" should be read to mean that it was immaterial how the vessel arrived there.

2. As the Appellant had been detained in custody awaiting trial for some seven months the sentence would run from the day of arrest.

ANNOTATIONS :

1. Note that Regulation 3 of the Defence (Immigration) Regulations has been revoked by the Defence (Immigration) (Am.) Regulations, 1940, P. G. No. 1030.

2. Compare, on immigration offences, CR. A. 10/40 (1940, S. C. J. 211) and note.

FOR APPELLANT : Shapiro.

FOR RESPONDENT : Crown Counsel — (Hogan).

### JUDGMENT:

The Appellant was convicted under Regulation 4 of the Defence (Immigration) Regulations, 1940.

It seems that he was the Master of an 89 ton ship, in which were 380 Jewish persons who were prohibited immigrants.

On 18.7.40 the ship was discovered by Sub-Lieut. King some four miles off Haifa, with her auxiliary engine broken down, becalmed. She was taken in tow to Haifa.

In order that the Appellant may be convicted under Regulation 4 it

is necessary that there should be a contravention of Regulation 3. That Regulation is as follows :—

> "If any vessel is found in territorial waters of Palestine, whether it came into those waters voluntarily or not, having on board, to the knowledge of the owner, agent or master of such vessel, any prohibited immigrant then...".

The argument for the Appellant is that if a vessel is towed in by the authorities it does not come in, and if it does not come in it cannot be found.

No doubt, strictly speaking, a vessel does not come voluntarily or involuntarily, and I think the real meaning in the Regulation of the words "whether it came into those waters voluntarily or not" is "in whatsoever circumstances it arrived there", or, to put it more shortly, "however it got there".

The appeal against conviction will, therefore, be dismissed, but as the Appellant was detained in custody awaiting trial for some seven months we direct the sentence of two years' imprisonment to run from 18th July, 1940. We dismiss the appeal against the order forfeiting the ship.

Delivered this 28th day of March, 1941.

*Chief Justice.*

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HIGH COURT No. 18/41.

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

BEFORE : Trusted, C. J. and Rose, J.

IN THE APPLICATION OF :

David Ketter. — PETITIONER.

v.

1. The President of the Rabbinical Court of Appeal, Jerusalem,
2. The General Secretary of the Chief Rabbinate, Jerusalem,
3. Sarah Orah Heller,
4. The Attorney General. — RESPONDENTS.

*Rabbinical Courts — Enquiry of High Court into exercise of jurisdiction by Rabbinical Courts — Inherent right of appeal from Rabbinical Court of first instance.*

In allowing an application for an order to issue, directed to the first and second Respondents, calling upon them to show cause why they should not be ordered to accept the appeal against the judgment of the Rabbinical Court of First Instance, dated 28.1.41, in the case between the Petitioner and the third Respondent, and why that appeal should not be put before the Rabbinical Court of Appeal for hearing in due course :—

HELD : 1. In proper cases the High Court would enquire into the exercise of the jurisdiction of Rabbinical Courts.

2. (Referring to H. C. 29/30) : The Rabbinical Court of Appeal had to hear the appeal brought by Petitoner against the judgment of the Rabbinical Court of first instance.

REFERRED TO : H. C. 29/30 (1, P. L. R. 462, C. of J. 1610).

ANNOTATIONS : Compare H. C. 28/38 (1938, 1 S. C. J. 373), H. C. 11/39 (1939, S. C. J. 244) and C. A. 246/40 (*ante*, p. 17).

PETITIONER : In person.

FOR RESPONDENTS : Nos. 1 and 2 — Eliash.
No. 3 — Ginzberg.
No. 4 — Crown Counsel — (Bell).

## O R D E R.

This is the return to an application for an order calling upon the Rabbinical Court of Appeal to hear an appeal from a judgment of a Rabbinical Court.

The Applicant in effect sought a declaration that he was married to a certain lady. Assuming the parties are within its jurisdiction, that is a matter for the Rabbinical Court, and we are not concerned with its merits, but as under the Order-in-Council the judgments of Religious Courts are executed by the Civil Courts, this Court has in proper cases taken upon itself to enquire into the exercise of their jurisdiction.

In his application the Applicant put in a copy of what is described as a judgment ; he also put in a copy of a rule of procedure of the Rabbinical Courts which says : "All judgments decided by a Court of first instance may be appealed against", and he put in a copy of a letter from the Chief Rabbinate, saying the judgment was not subject to appeal.

We now have an affidavit from the Secretary of the Chief Rabbinate in which he does not deny that the decision was a judgment, nor does he impugn the Rule of Court, — it would seem, therefore, that the appeal should have been heard. Moreover, in H. C. 29/30, Vol. 1,

P. L. R. 462, this Court held that a right to appeal is inherent in all cases tried before a Rabbinical Court of First Instance.

The order, therefore, will be made absolute.

The Applicant does not ask for costs.

Delivered this 28th day of March, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 31/41.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Elias Bishara el Abed,
2. Butros Bishara el Abed. — APPELLANTS.

v.

1. Keren Kayemeth Leisrael Ltd.,
2. Yusef Fein. — RESPONDENTS.

*Possession — Weight of evidence, Entry in Commuted Tithe register, prosecution for trespass — Uncontradicted evidence — Plan — Immaterial irregularity.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 2nd of January, 1941 :—

HELD : 1. An entry in the Commuted Tithe register was not conclusive evidence as to possession.

2. There was no rule that oral evidence had to be believed because it was uncontradicted.

3. The plan had properly been admitted as evidence of the village boundaries.

4. Even if the contract had been wrongly admitted in evidence it had not influenced the judgment in any way.

ANNOTATIONS :

1. See, on evidence as to possession generally, *e. g.* C. A. 23/39 (1939, S. C. J. 171), C. A. 85/39 (*ibid.*, p. 438), C. A. 95, 96, 97 & 138/40 (1940, S. C. J. 294).
2. On "uncontradicted evidence" compare C. A. 85/40 (1940, S. C. J. 474).
3. On the third point see also C. A. 65 & 76/40 (1940, S. C. J. 168).

FOR APPELLANTS : Asfour.

FOR RESPONDENTS : Weinshall.

JUDGMENT:

We need not hear you, Dr. Weinshall.

This is an appeal by leave from a judgment of the Haifa District Court given on appeal from the Magistrate's Court. The action before the Magistrate concerned possession of certain land in Al-Hweish area. The case turns entirely upon the evidence as to possession. The Magistrate did not believe the evidence. He said he was not convinced that the Plaintiffs were in possession of the land claimed in accordance with the official plan prepared by the Survey Department.

The learned Relieving President on appeal pointed out that the evidence called by the Appellant was divided into two types, the official dealing with prosecutions and other evidence dealing with possession.

With regard to the official evidence, the learned Relieving President pointed out that the officials called did not clearly prove that they were on the land then and now and that the land in both disputes is the same, nor could they show on any of the maps the site of these disputes.

With regard to the other evidence, the learned Relieving President said that "this seems to be the usual sort of evidence as to possession which seems to be readily obtainable in villages but much of which is not impressive".

Mr. Asfour's chief complaint seems to be that his evidence should have been believed and that the Magistrate had no discretion in believing or disbelieving it. He says in particular that the entry in the commuted Tithe Register is conclusive evidence of possession. He also says that a judgment of the Magistrate's Court in 1935 discharging a Government prosecution for trespass also confirmed possession and that evidence of this type was not within the discretion of the Magistrate to say that he disbelieved. The answer to that is that the Magistrate did not say he did not believe it. The entry in the commuted Tithe Register is certainly not conclusive evidence as to possession, and the prosecution in the other case appears to have broken down because the Government claimed the land and they failed to prove that they were the owners of the land and the learned Relieving President remarks that this is in no way inconsistent with the ownership of the Respondents' predecessors.

With regard to the other witnesses the learned Relieving President knew of no rule, and neither do we, that oral evidence must be believed just because it is not contradicted.

With regard to the point that the plan was wrongly regarded by the Magistrate we do not think that there is anything in that point. The plan was properly admitted and would be evidence as to village boundaries and assisted the Magistrate to come to a decision on the main point which was that the Appellants failed to prove their own possession.

As to the argument that the contract was wrongly admitted, even if it were, we do not think that it influenced the judgment in any way.

For all these reasons, which I trust are sufficiently detailed for the Appellant, we think the appeal should fail and it must be dismissed with costs and LP. 10 attendance fee.

Delivered this 28th day of March, 1941.

*British Puisne Judge.*

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HIGH COURT No. 16/41.
HIGH COURT No. 17/41.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :-

*H. C.* 16/41.

"Nehasim" Investment Company Ltd. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Marc L. Gorodisky, in his capacity as receiver of the property of Mordechai Ben-Yosef Halbreich, Mortgagor,
3. Gresham Life Assurance Society Ltd.,
4. Shlomo Segal, Haim Shalom Segal and Frumi E. Segal,
5. Mordechai ben Yosef Halbreich. RESPONDENTS.

*H. C.* 17/41.

1. Shlomo Segal,
2. Haim Shalom Segal,
3. Fruma Esther Segal. PETITIONERS.

v.

1. Chief Execution Officer, Jerusalem,

2. Gresham Life Assurance Society Ltd.,
3. "Nehasim" Investment Co. Ltd.,
4. Mordechai Halbreich,
5. Marc. L. Gorodisky as receiver of the property of the 4th Respondent. RESPONDENTS.

*Mortgage — Distribution of rents collected by receiver amongst mortgagees — No jurisdiction as regards payments already effected — Priority of first mortgage extending to rents collected by receiver, Ottoman Mortgage Law, Art.* 1.

In refusing (in H. C. 16/41) an application for an order to issue, directed to the Respondents, calling upon them to show cause why the order made by the first Respondent in Execution File No. 44/38 (joined with Execution Files Nos. 154/39, and 437/39) which bears the date of the 27 December, should not be set aside, and the first Respondent ordered to direct the second Respondent to distribute the balance of monies in his hands accruing from the collection of rentals of the property of the fifth Respondent in his capacity as receiver, and the sums he may receive in that capacity in the future, amongst the Petitioner, the third Respondent and the fourth Respondent in proportion to the amount of he mortgage debts owing to them, or according to such *pro rata* distribution as to this Court may seem fit and proper, and (in H. C. 17/41) in refusing an application for an order to issue, directed to the first Respondent, calling upon him to show cause why his order, dated the 27th December, 1940, in Execution File No. 154/39, Jerusalem, should not be set aside and to substitute therefor an order that the sum standing in his hands be paid to the Petitioners and that similarly the balance of all future sums be paid to the Petitioners :—

HELD : 1. No question arose in respect of the sums paid out as the High Court would not interfere with an act already executed.

2. The duty of the receiver was to protect the property for the benefit of the mortgagees in order of priority.

3. The order of priority of several mortgages extended also to all proceeds, such as rents, found in the hands of the receiver.

4. A clause in a subsequent mortgage providing for all the rents to belong to the mortgagee could not affect the rights of the first mortgagee, when these rents were in the hands of a receiver, whatever might have been the position previously.

ANNOTATIONS :

1. See, on the first point, H. C. 40/40 (1940, S. C. J. 157) and note 3.
2. On the third point see also Ex. T. A. 12755/38 (P. P. 12.xii.39).
3. On the fourth point compare Motion J'm 2/39 (P. P. 31.i.39).

*H. C.* 16/41.

FOR PETITIONER : Eliash and Gluckmann.

FOR RESPONDENTS : No. 1 — absent — served.
No. 2 — in person.

No. 3 — P. Joseph.
No. 4 — Goitein and Buxbaum.
No. 5 — Levitsky.

*H. C.* 17/41.

FOR PETITIONERS : Goitein and Buxbaum.

FOR RESPONDENTS : No. 1 — absent — served.
No. 2 — P. Joseph.
No. 3 — Eliash & Gluckmann.
No. 4 — Levitsky.
No. 5 — in person.

ORDER.

In these cases, the principal point for determination is whether rents collected by a receiver appointed by the Court to take charge of mortgaged property pending its sale are to be distributed *pari passu* between all the various mortgagees, in this case, three, or whether they should be paid over to the mortgagee who is first in order of priority.

With regard to the money already paid over by the receiver, acting on the direction of the Court, no question arises. It has already been paid, and acting on our invariable rule we do not interfere in such a case. The present question is in regard to future payments. The learned Chief Execution Officer held that they should equally go to the first mortgagee.

Mr. Eliash for the Petitioners in the first case argues that the security of the mortgage is only on the immovables, and does not include rents, that the appointment of a receiver does not give additional security and is only a procedural remedy. Mr. Goitein for the Petitioners in the second case supports this view, but further claims that under his mortgage, clause 7, he is entitled to all the rents from the mortgaged property. It is further argued that the rents are not subject to the mortgages but that the rents belong to all creditors generally, and that the appointment of a receiver is in the nature of an attachment, and that the duty of a receiver is to protect all existing rights.

After careful consideration, we think that the order of the Chief Execution Officer is correct, and sets out the law adequately. The fallacy underlying the Petitioners' arguments seems to me to be this, that the receiver was appointed to preserve the property pending sale, and that whilst the mortgagor was in possession it is true that the rents could not be seized, yet now that he is no longer in possession

but a receiver has stepped into his shoes, the rents are no longer his. The duty of the receiver is to protect the property for the benefit of the person or persons who will eventually become entitled to it, or to its proceeds when sold, in this case the mortgagees in order of priority, subject of course to priority claims for taxes and so on. And for the reasons given by the learned Chief Execution Officer we think that the principle laid down in Art. 1 of the Ottoman Law of 1328, applies equally to all proceeds such as rents found in the hands of the receiver, and Clause 7 in Mr. Goitein's mortgage cannot affect the rights of the first mortgagee, when these rents are in the hands of a receiver, whatever might have been the position previously.

I do not think that we can usefully add anything further to the exhaustive and carefully reasoned order of the Chief Execution Officer.

The order *nisi* must, therefore, be discharged with costs, in the first case, against the Petitioners estimated at LP. 10 each to the third and fifth Respondents and LP. 5 to the second Respondent, and in the second case against those Petitioners, estimated at LP. 10 each to the 2nd and 4th Respondents, and LP. 5 to the fifth Respondent.

Delivered this 8th day of April, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 35/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Badawi Salman Salhoub. — APPELLANT

v.

The Attorney General. — RESPONDENT.

*Criminal procedure — Date of offence, Halsbury, Vol. 9 — Immaterial irregularity.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 13th of March, 1941, whereby the Appellant was convicted of robbery, contrary to Section 288(1) of the Criminal Code Ordinance, 1936, and sentenced to four years' imprisonment :—

HELD : 1. The date in this case was not of the essence of the offence.
2. No miscarriage of justice had occurred by the Court finding a fact of which there had been no evidence.

ANNOTATIONS :

1. Compare, on the first point, CR. A. 2/39 (1939, S. C. J. 66).
2. On the second point, *vide* CR. A. 86/40 (1940, S. C. J. 333) and note.

FOR APPELLANT : Abu Sha'ar.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The only point in this appeal is a technical one. It is said that the Appellant was charged on the information with committing the offence on a particular night, namely 15/16 July, 1939. The prosecution failed to prove that the offence was committed on that particular night.

We think the law is well stated in Hailsham, Vol. 9, page 133, as follows :—

> "It is usual to insert the date on which the crime charged is alleged to have been committed, and it is essential to do so where time is of the essence of the offence. In such case, the day of the month or year, and sometimes the time of day, when the alleged offence was committed must be alleged."

In this case the date was not of the essence of the offence.

The Court, however, found as a fact that the offence was committed on that date, and of this there was no evidence. The Court, therefore, found a fact of which there was no evidence, but we do not think that any miscarriage of justice has actually occurred, and the appeal is dismissed.

Delivered this 1st day of April, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 41/41.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

The Palestine Mercantile Bank Ltd. APPELLANT.

v.

1. Kamel Geadah,
2. Dib Badran,
3. Elias Issa Sahyoun. RESPONDENTS.

*Guarantee — Discharge of guarantors on alteration of principal liability — Advocate's fees — Costs.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 3rd day of February, 1941 :—

HELD : 1. As the guarantee had been given on the strength of the clause in the agreement that the credit would not be allowed to exceed LP. 300.— the guarantors were discharged on the above sum being exceeded.

2. The second Respondent would not get advocate's fees since he had raised two preliminary objections which had failed.

ANNOTATIONS :

1. See, on the first point, C. A. 146/24 (C. of J. 941) and C. A. D. C. T. A 72/39 (Tel-Aviv Judgments, 1939, p. 25).

2. On the second point compare C. A. 154/40 (1940, S. C. J. 334).

FOR APPELLANT : Olshan by delegation from Gross.

FOR RESPONDENTS : No. 1 — No appearance.
No. 2 — Koussa.
No. 3 — Sahyoun.

JUDGMENT:

This appeal concerns the proper interpretation of an agreement dated the 15th March, 1936, made between the Appellant bank and the first Respondent, and guaranteed by the other two Respondents. The important parts of the agreement are the first para and the guarantee on the document. They are in these terms :—

> "You have accorded me an Overdraft in Current Account for a total sum not exceeding LP. 300.— (Three hundred Palestine Pounds) which you may allow me from time to time to overdraw on the terms and conditions mentioned hereunder which I accept without reservation of any kind, and I hold myself liable to you for the repayment of such amounts overdrawn together with all interest and commission and any expenses that may be incurred in connection with the above account."

> "We, the undersigned jointly and severally guarantee the fulfilment of all the paragraphs in full in the above contract and hereby undertake to pay you on your first demand, any sum up to LP. 300 (Three hundred Palestine Pounds) plus interest, commission and any expenses that may be incurred in connection with the above overdraft up to date of settlement of the whole debt due from the abovenamed".

The learned Relieving President found for the second and third

Respondents, on the ground that the authorised overdraft of LP. 300 had been exceeded and that had altered the liability of the guarantors.

On this appeal, the Appellants contend that any restriction in the agreement affects the debtor only, and does not restrict the guarantee, except that the guarantors cannot be liable for more than the LP. 300, that this is a continuing guarantee on a current account, and that more than LP. 300 may be supplied during the continuance of the guarantee. The Respondents' answer is that, by allowing the overdraft to exceed LP. 300, the Appellants have caused prejudice to them, since they are now called upon to pay more than would have been the case, in other words, that they would have had to pay less than LP. 300, if the limit had not been passed. They further contend that they guaranteed the first Respondent because they thought he was good for LP. 300 but not for more, and that the alteration was made without their knowledge.

We think that the Respondents are right in their view. It is clear to our minds that the wording of the agreement and of the guarantee shows that the guarantee was given on the strength of the clause in the agreement that the credit would not be allowed to exceed LP. 300. It has been so exceeded, and the learned Judge was, therefore, right in holding that the guarantors were discharged, since their liability had been increased without their consent.

It is unnecessary to say more. The appeal must be dismissed with costs to the second and third Respondents on the lower scale.

We do not allow advocate's fees to the second Respondent, since he raised two preliminary objections which failed. The most cursory enquiries would have shown that the first one had no foundation and the second one was equally without substance. The third Respondent will have LP. 10 advocate's attendance fee. We see no reason to award interest against the first Respondent nor to interfere with the discretion exercised by the learned Relieving President as to costs.

Delivered this 8th day of April, 1941.

*British Puisne Judge.*

CRIMINAL APPEAL No. 31/41

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Mohammad Saleh Abu Miriam. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Murder — Family honour not a defence — Recommendation for mercy.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Nablus, dated the 11th of March, 1941, whereby the Appellant was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : The Court of Criminal Appeal could not recognise "honour" as in any sense a defence but the attention of the High Commissioner would be drawn to cases where it was said to have actuated the crime.

ANNOTATIONS : Compare CR. A. 35/37 (P. P. 9.v.37, 1937, S. C. J. 448), CR. A. 17 & 20/41 (*ante*, p. 57) ; see also note 3 to CR. A. 24/41 (*ante*, p. 95).

FOR APPELLANT : Jayousi.

FOR RESPONDENT : Crown Counsel — (Bell).

### J U D G M E N T :

Rashed Eff. Jayousi, on behalf of the Appellant, does not impugn the conviction but impresses upon us that this is a case of family honour in that the Appellant caused the death of his step-mother, whose conduct was suspected of being bad.

This Court has never recognised "honour" as in any sense a defence, but it has recognised it to the extent of drawing the High Commissioner's attention to cases where it is said to have actuated the crime.

Delivered this 1st day of April, 1941.

*Chief Justice.*

HIGH COURT No. 3/41.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

Aron Meir Fridman. — PETITIONER.

v.

1. Superintendent of Prison, Jaffa,
2. Execution Officer Petach-Tiqva,
3. Pessil Bash. — RESPONDENTS.

*Habeas Corpus — Imprisonment for debt — Successive committal orders for default to pay instalments — Application to be made to Chief Execution Officer.*

In refusing an application for an order, directing the Respondents to produce the Petitioner before the High Court of Justice on a date to be fixed for the purpose of setting aside the warrant of arrest and releasing the Petitioner :—

HELD : 1. When once an examination had been held and an order for payment by instalments made, it was for the judgment-debtor to show cause to the Chief Execution Officer that his means had altered since the original order.

2. The judgment-debtor could apply to the Chief Execution Officer at any moment and *habeas corpus* proceedings in such a case were totally inappropriate and misconceived.

ANNOTATIONS :

1. Earlier proceedings in this case (H. C. 1/41) are reported *ante*, p. 8.

2. On imprisonment for debt compare note 2 to H. C. 60/40 (1940, S. C. J. 235) ; later decisions : H. C. 84/40 (1940, S. C. J. 417) and H. C. 1/41 (*supra*).

3. On the second point, *vide* H. C. 41/40 (1940, S. C. J. 232) and notes 2 and 3.

FOR PETITIONER : S. Felman.

FOR RESPONDENTS : No. 1 — In person.
No. 2 — Absent — served.
No. 3 — Kaduri.

### ORDER.

This is an application in the nature of *habeas corpus* to the Superintendent of the Prison at Jaffa and to the judgment-creditor to show cause why the judgment-debtor should not be released. The Chief Execution Officer made an order of payment of the judgment debt by instalments, on the 1st October, 1940, the instalments to commence

from the 15th of October. Default was made in the October and November instalments and the debtor was duly arrested. When he was about to be released, after the period of twenty days' imprisonment, a further warrant of committal was issued in respect of the instalment due on the 15th December which was executed on the 15th of January.

It has been argued on the debtor's behalf, that before a warrant is issued in respect of each separate instalment, there must be a fresh examination of the judgment-debtor. We do not agree. When once an examination has been held and an order for instalments made, it is for the judgment-debtor to show cause to the Chief Execution Officer, if he can, that his means have altered since the original order of instalments was given. *Habeas corpus* proceedings in such a case as this are totally inappropriate and misconceived. If the judgment-debtor wishes to apply to the Chief Execution Officer he can do so at any moment. The rule is discharged with total costs of LP. 5, to the third Respondent.

Given this 24th day of January, 1941.

*British Puisne Judge.*

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HIGH COURT No. 23/41.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :—

Arnold Gronner. PETITIONER.

v.

Director, Department of Immigration. RESPONDENT.

*Naturalisation — Meaning of "reside" in Palestinian Citizenship Order, Art. 7(1)(a) — Casual or temporary residence not within scope of the article — High Commissioner's power to make exceptions, Art. 7(5) of the Order.*

In refusing an application for an order *nisi* to issue to the Respondent, calling upon him to show cause why an order should not be made directing him to proceed with the Petitioner's application for the issue of a certfiicate of naturalisation on the basis that the Petitioner has established the qualifying residence in Palestine prescribed under Article 7(1) of the Palestinian Citizenship Order, 1925 :—

HELD : 1. Temporary residence for purposes of travel or health or business could not be termed residence for the purpose of being naturalised

under Article 7(1)(a) of the Palestinian Citizenship Order.

2. The Petitioner might apply to the High Commissioner under Article 7(5) of the Order as, if his statements were true, there would appear to be certain circumstances meriting special consideration.

ANNOTATIONS :

1. Other authorities on the Palestinian Citizenship Order : CR. C. J'm 14/24 (C. of J. 892), A. A. 15/27 (1, P. L. R. 246, C. of J. 487), H. C. 68/27 (1, P. L. R. 215, C. of J. 301), H. C. 77/28 (1, P. L. R. 353, C. of J. 990), H. C. 34/33 (1, P. L. R. 822, C. of J. 303), H. C. 71/33 (C. of J. 1934—6, 92), H. C. 1/37 (P. P. 15—17.ii.37, 1937, S. C. J. 405), H. C. 58/37 (P. P. 25.xi.37), H. C. 15/38 (1938, 1 S. C. J. 193), CR. A. 68/38 (1938, 2 S. C. J. 42), C. A. 220/38 (*ibid.*, p. 151), C. A. 9/40 (1940, S. C. J. 184), R. *v.* Ketter (P. P. 17.iii.39).

2. The special circumstances alleged by the Petitioner were that his wife who was in Siberia could only join him if she became a Palestinian citizen.

FOR PETITIONER : P. Joseph.

FOR RESPONDENT : No appearance.

## ORDER.

The point in this application is the meaning of the word "resided" in Article 7(1)(a) of the Palestine Citizenship Order in Council 1925. This reads as follows :—

> "7(1) The High Commissioner may grant a certificate of naturalisation as a Palestinian citizen to any person who makes application therefor and who satisfies him :—
>
> (a) That he has resided in Palestine for a period not less than two years out of the three years immediately preceding the date of the application."

The facts are short. The Petitioner was in Palestine for two months in 1938 — he again arrived in this country on the 14th February, 1939, on a three months' temporary visa which was extended for another month, and on the 28th July, 1939, he received permission to remain permanently in Palestine and has remained here ever since. In January 1941, he applied for a naturalisation certificate, which was refused. The Petitioner contends that he has "resided" in Palestine since the 14th February, 1939, *i. e.* for two full years in the last three years, whilst the Director of Immigration says that the qualifying residence for naturalisation under Article 7(1)(a) only begins to run from the date of registration as an immigrant, in this case the 12th July, 1939, when Petitioner received permission to remain permanently in Palestine.

We think, after careful consideration, that this latter view is the correct one, and what one might call casual or temporary residence is not included within the scope of Article 7(1)(a). Temporary resid-

ence for purposes of travel or health or business cannot be termed residence for the purpose of being naturalised.

The application for an order *nisi* must, therefore, be refused, but under Article 7(5) of the Order in Council the High Commissioner can make exception to the general rule in cases of hardship. The Petitioner might possibly try this course, as if his statements are true, there would appear to be certain circumstances meriting consideration. That however is not a matter with which we can deal.

Delievered this 8th day of April, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 14/41.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hindeh Bint Ismail Ighneim of Bataneh Gharbieh, through her husband Mussa el Haj Ismail Saker & 7 ors. APPELLANTS.

v.

Abdul Kader Abdul Hamid en Nawajhah & 27 ors. RESPONDENTS.

*Land Settlement — Claim out of time — Alteration of boundaries.*

In dismissing an appeal from the judgment of the Settlement Officer of Gaza, dated the 16th December, 1940 :—

HELD : The Appellants having failed to prove that the land in dispute did not belong to Block No. 451, their claim was lodged late as the Schedule of Rights had been published in 1934 and the claim had only been submitted in 1937.

ANNOTATIONS : Compare, as to the provisions of the Land Settlement Ordinance to be strictly adhered to, C. A. 172/40 (1940, S. C. J. 537) ; see, on the other hand, C. A. 257/40 (*ante*, p. 77).

FOR APPELLANTS : Khadra.

FOR RESPONDENTS : Nos. 1—8, 11, 13, 15—20, 25—28 — Said Eff. Zein Eddin.
Nos. 9, 10, 12, 14, 22—24 — Dead.
21 — Absent — Out of country.

JUDGMENT:

We need not hear you Said Eff.

This is an appeal in connection with a dispute concerning certain land in Batani Village. The Settlement Officer dismissed the Appellants' claim on the ground that the claim which they made was in respect of certain parcels in Block 451 and they were three and a half years late in submitting their claim. The Schedule of Rights in respect of this block had been issued in April 1934 and the Appellants attempted to include the Block in their claim in September, 1937. It was alleged by the Appellants that the boundaries had been altered between these parcels and that the plan was not the same as the plan made at the time of the original partition. The learned Settlement Officer examined both lands and plans and found that this was not correct. The learned Settlement Officer gave the Appellants the opportunity of proving that the land which they had was actually less than the area which they should have received. As the Land Settlement Officer said in his judgment the Appellants were unable to satisfy him on this point.

We see no reason to disagree with the judgment of the learned Settlement Officer which we think is correct in every respect. The appeal must, therefore, be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 31st day of March, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 28/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

George C. Sabbagha, as Curator of Badi'a Salim Ankoud. APPELLANT.

v.

1. Abraham Lax,
2. Rabbi Jehoshua Kaniel (Kanial) and Jacob Meir Rishman (Administrators of and on behalf of the estate of Mordechai Eliaxtam),
3. The Registrar of Lands, Tel-Aviv. RESPONDENTS.

*Three issues before Land Court — Appeal by leave from decision of one issue only — Difference between English and Palestinian Law, R. S. C., O. 36, r. 5, Piercy v. Young — Appeals from interlocutory orders.*

In dismissing an appeal by leave from the order of the Land Court of Jaffa, dated the 4th November, 1940 :—

HELD : 1. There was no rule similar to Order 36, rule 7 of the English Rules of the Supreme Court under which one or more questions of fact may be tried before others.
(Referring to Piercy *v.* Young) : Even in England applications under the rule in question were granted very sparingly.
2. The Court of Civil Appeal would not entertain an appeal from a decision on one issue only as there might, if this practice were allowed, be several trials and several appeals to the Court of Civil Appeal.

REFERRED TO : Piercy *v.* Young, 15 C. D. 475, 480.

ANNOTATIONS :

1. On Order 36, rule 7 of the English Rules of the Supreme Court compare Halsbury, Vol. 26, *p.* 89, *No.* 163 and footnote l, Digest, Practice and Procedure, *pp.* 541—3, *sub-sec.* 6.

2. On interlocutory appeals, see C. A. 145/40 (1940, S. C. J. 219) and note 2 and C. A. 155/40 (*ibid.*, p. 310).

FOR APPELLANT : Cattan.

FOR RESPONDENTS : No. 1 — Shereshewsky.
No. 2 — Ben-Israel.
No. 3 — absent.

JUDGMENT:

In the case there are apparently three issues, *i. e.* the mental capacity of the Plaintiff, fraud and compulsion.

The Land Court dealt with the first of these in what is called an interlocutory order against which, by leave of that Court, appeal is brought. This is not an interlocutory order by the decision of one issue in the case.

We have no rule similar to the English Rule 7 of Order 36 under which, *inter alia,* one or more questions of fact may be tried before others, but even in England applications under this rule will only be granted very sparingly. As Jessel, M. R., in Piercy *v.* Young, 15 C. D. 479, points out, "Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds."

If this practice were allowed there might, in a case such as this, in effect be three trials and three appeals to this Court.

The case must go back to the Land Court to hear and determine it in accordance with the Rules.

As leave to appeal was granted so much of the order giving leave to appeal as deals with costs will be set aside, and the costs of that application will be costs in the cause. The costs of the proceedings in this Court will be costs in the cause — and for that purpose we certify an inclusive sum of LP. 5 for each party represented.

Delivered this 17th day of March, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 21/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Farid Knezevitch. APPELLANT.

v.

Husni Hashem Khalil Es-Shawwa & 9 others. RESPONDENTS.

*Land Settlement — Judgment creditor of person interested in unregistered land trying to obtain registration in name of judgment debtor — Not a claimant to land.*

In dismissing an appeal from the decision of the Settlement Officer, Gaza Settlement Area, dated the 10th September, 1940 :—

HELD : As the Appellant did not claim any land or interest in lands, he was not a claimant within the meaning of the Land Settlement Ordinance.

ANNOTATIONS : Compare Sec. 16(1) of the Land (Settlement of Title) Ordinance.

FOR APPELLANT : Cattan.

FOR RESPONDENTS : No. 1 — Shawa.
Nos. 2 & 9 — Absent — served.
Nos. 3, 4, & 10 — In person.
No. 5 — In person and representing Nos. 6, 7 & 8.

JUDGMENT:

This case was originally before the Land Settlement Officer. It went on appeal to the Land Court and is now before this Court.

The Appellant's claim is unusual. Some years ago he obtained judgment against a certain individual but was unable to execute it on certain land of his because that land was unregistered. Before the Settlement Officer the Appellant sought to get that land registered in the debtor's name, presumably in order that he might then try and execute upon it. The Land Settlement Officer said :—

> "The case as presented seems to me an extraordinary one. So-called Plaintiffs do not come before me and say : 'We want our rights in land in the parcels in dispute'. What they do demand is for me to force the real owners of the parcel to divide the parcel of land among themselves not as they, the owners, wish, but as they, the so-called Plaintiffs, wish. So-called Plaintiffs are not real Claimants to land as defined in the Land Settlement Ordinance, 1928—33. What so-called Plaintiffs really want is money, and that is not my affair. Their claim in reality is in the nature of a protest"...

There were also allegations of fraud.

I think the Settlement Officer was right in holding that the Appellant was never a claimant within the meaning of the Land Settlement Ordinance, and I do not think the Appellant claimed any land or interest in land as contemplated by that Ordinance, and certainly the Land Settlement Officer was not the right tribunal to try a claim, if there be one, based on fraud.

The appeal will be dismissed. Respondent No. 1 will have costs on the lower scale, and we certify LP. 10 for attendance. Respondents Nos. 3, 4, 5, and 10, who appear in person, will each have an inclusive sum of LP. 1 for attending.

Delivered this 17th day of March, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 271/40.

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

BEFORE : Trusted, C. J., Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Fatmeh Bint Hassan Eisa. APPELLANT.

v.

1. Mustafa Ali el Asmar,
2. Salha Bint Abdul Hadi el Daoud. RESPONDENTS.

*Right of preference — Magistrate refusing to hear evidence as to renunciation of right, C. A. 225/38.*

In allowing an appeal from a judgment of the Magistrate's Court of Ramleh, sitting as a Land Court, dated the 23rd November, 1940 :—

HELD : (Following C. A. 225/38) : The Magistrate should hear evidence as to whether the Respondent had renounced his right to purchase the land.

FOLLOWED : C. A. 225/38 (1938, 2 S. C. J. 167).

ANNOTATIONS : On the right of preference see, in addition to C. A. 225/38 (*supra*), annotation 2 thereto and C. A. 245/40 (*ante*, p. 65).

FOR APPELLANT : Naser.

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

JUDGMENT:

Three points are raised by the Appellant, but it appears to me that there is only one of substance, that is that the Magistrate refused to hear evidence that the Respondent had renounced his right to purchase the land.

It is clear that neither side called the attention of the Magistrate to the decision of this Court in Civil Appeal 225 of 1938, 1938 P. L. R. p. 551.

The judgment will be set aside and the case returned in order that the Magistrate may consider it in the light of that judgment.

The costs of the first hearing and of this appeal will be costs in the cause.

Delivered this 5th day of February, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 29/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Tuvia Friedman. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal Procedure — Failure to record findings of fact, Criminal Procedure (T. U. I.) Ord., Sec. 51 — Too many counts charged — Remittal of case, Criminal Procedure (T. U. I.) Ord., Sec. 71 — Case dealt with by Court of Criminal Appeal on basis of confession — Sentence — Evidence on affirmation, Criminal Procedure (T. U. I.) Ord., Sec. 34 — Reasons for refusal to take oath to be recorded.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 25th of February, 1941, whereby the Appellant was convicted of conspiracy, contrary to Section 34 of the Criminal Code Ordinance, 1936, to commit a forgery, contrary to Section 338, conspiracy with intent to defraud, contrary to Section 36(f) of the Criminal Code Ordinance, and inducing by false pretences the delivery to another person of something capable of being stolen, contrary to Section 301 of the Criminal Code Ordinance, and sentenced to four years' imprisonment, and in reducing the sentence :—

HELD : 1. Courts of Trial should comply with the provisions of Sec. 51 of the Criminal Procedure (Trial Upon Information) Ordinance and record the findings of fact on which the conviction or acquittal is based.

2. As the District Court had found that the confession by the Accused had been free and voluntary, the Court of Criminal Appeal would accede to the request of the Crown Counsel and deal with the case upon the basis of the confession.

3. Owing to the Appellant's antecedents the sentence would be reduced to one of three years' imprisonment.

4. Before a witness gave evidence upon affirmation the Court should be satisfied that he was entitled to do so, and it was desirable that his reasons should be recorded.

ANNOTATIONS :

1. On conspiracy in connection with immigration, see also CR. A. 29/39 (1939, S. C. J. 345).
2. See, on the first point, CR. A. 49/40 (1940, S. C. J. 167) and note.
3. On the third point compare note 3 to CR. A. 24/41 (*ante*, p. 95).

FOR APPELLANT : Goitein.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

This Court has on several occasions called attention to Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance, which is as follows :—

"Upon the conviction or acquittal of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction or acquittal is based :— Provided that no conviction shall be invalid for failure to include

in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case".

If this is not complied with — apart from the possibility of unfairness to the convicted person — the work of this Court is greatly increased.

In this case there were twenty-three counts — which was too many, and in effect the Accused was charged with conspiracy and fraud in connection with immigration by reason of a number of transactions spread over a period of time.

In such a case one may expect to be able to discover from the judgment at least what the story is and what part the Accused played. There is nothing of the sort here. The Court says :—

> "We, therefore, believe the evidence of the witnesses for the prosecution on all material points and this belief and our unqualified acceptance of the confession by the accused to Insp. Rosenstein is strengthened by the fact that no evidence has been submitted by the accused in these proceedings to contradict the case for the prosecution on any single point or issue.
>
> "As regards the 13 charges of conspiracy alleged in the various counts in the information ; apart from what we have said before, the strong circumstantial and other evidence with that in particular of Mackenzie Turner, Dixie, Arieh Ragolsky and Abdul Nur, which very substantially corroborates on material points that of the accomplices, M. Safieh and others, and stands unshaken and uncontradicted by any other evidence, leaves us with no difficulty in drawing the inferences necessary which do establish in our view beyond any doubt the relevant criminal acts done by this accused and his confederate in pursuance of apparent criminal purposes in common between them".

The Court did, however, find that a confession by the Accused was free and voluntary.

The case might well go back for the Court of Trial to furnish fuller findings under Section 71 of the Criminal Procedure (Trial Upon Information) Ordinance, but the Crown Counsel asks us to deal with it upon the basis of the confession, and he admits that this will result in the conviction upon some of the counts not being sustained. He also agrees that the Appellant's antecedents would justify the Court considering the grant of special treatment.

We, therefore, reduce the sentence to one of three years' imprisonment with special treatment.

There is one other matter to which I would refer. It appears that one witness, Mr. Mendel, gave his evidence upon affirmation. Section 34 of the Criminal Procedure (Trial Upon Information) Ordinance provides :—

"Every witness shall be examined on oath except where the Court is satisfied that the taking of an oath is contrary to the religious belief of the witness or that he has no religious belief, in either of which cases he may be examined on his affirmation only."

We are told that Mr. Mendel did not state why he desired to affirm, and there is no note as to this upon the record.

Before a witness gives evidence upon affirmation the Court should be satisfied that he is entitled to do so, and it is desirable that his reason should be recorded.

Delivered this 2nd day of April, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 240/40.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Habib Yusef Harroum. APPELLANT.

v.

Father Augustin Kalanti in his capacity as Agent for the property of the Carmelite Convent. RESPONDENT.

*Several obligations in one agreement — Whether promises independent or concurrent, Chitty, on Contracts — Readiness and willingness — Findings of fact.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 26th October, 1940 :—

HELD : 1. Following the tendency of the English Courts which is against construing contracts as containing two independent promises, the promises of the parties in the present case should be regarded as giving rise to concurrent obligations.

2. The District Court was justified in finding that the Appellant had failed to prove the Respondent's breach of the contract and that he had been ready and willing to perform his obligations.

ANNOTATIONS : On readiness and willingness see note 5 to C. A. 261/40 (*ante*, p. 36).

FOR APPELLANT : Goitein.

FOR RESPONDENT : A. Levin by delegation from Mu'ammar.

## JUDGMENT:

This is an appeal from a judgment of the District Court of Haifa.

By an agreement dated the 4th of July, 1935, the Respondent undertook to sell to the Appellant a certain plot of land for the purpose of building a house thereon.

The Court below found as a fact that the Appellant had committed certain breaches of the agreement and we think that there was evidence upon which it could properly so find. The Appellant, however, contends that the Respondent committed a prior breach of the agreement in that he failed to comply with Clause 4 thereof, which required him to transfer the plot to the Appellant upon the completion and approval by the Town Planning Commission of a parcellation scheme which, at the date of the signing of the agreement, was in the course of being carried out.

The first question which we have to decide is whether the respective promises of the parties were independent, the breach of any of which would be actionable upon mere proof of damage, or whether they amounted to concurrent considerations, in which case the complaining party would have to show that he was ready and willing to perform his part of the contract.

The form of the contract is unusual and complicated, and the question, therefore, is not free from difficulty. As Mr. Chitty points out in his book on Contracts (at page 836 of the 18th edition) the tendency of the Courts is against construing contracts as containing two independent promises, and we consider that, having regard to this tendency and to the tenour of the contract as a whole, we should regard the promises of the parties in this case as giving rise to concurrent obligations.

Before, therefore, the Appellant can recover damages for the Respondent's failure to transfer the plot, he must prove that he was ready and willing to perform his own obligations under the contract.

Issue 6 reads as follows :—

> "In the event that the Defendant committed a breach, was the Plaintiff ready and willing to perform his obligation in the contract and, therefore, entitled to claim the damages ?"

The Court of Trial made a somewhat equivocal finding on this matter and we have felt some hesitation as to whether we should not remit the case for an express finding to be made. However, in dealing with the seventh issue in this case, the Court said as follows :—

> "If Plaintiff had established to our satisfaction that it was Defendant who committed breach of the contract and that he was willing

and ready to perform his obligations he would have been entitled to the real and actual damages namely LP. 206 ....., but he has failed to satisfy us on this point ...".

We take this as meaning that, in the opinion of the Trial Court, the Plaintiff failed to prove both that Respondent committed a breach and that he (the Appellant) was ready and willing to perform his obligations. There was, in our opinion, material on which the Court could properly come to the latter conclusion, especially having regard to the fact that the Appellant had not made any considerable effort to comply with his obligations under the contract up to the time when the Respondent treated the contract as rescinded, namely, some nine or ten months after the expiration of the two year period contemplated in the agreement.

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

Delivered this 8th day of April, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 36/41.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Z'ev Sapir of Haifa. APPELLANT.

v.

Belgo Palestine Bank Ltd. RESPONDENT.

*Principles of appellate Court in respect of findings of fact — Promissory notes admissible in evidence after penalty for defective stamp paid and notes duly stamped — Trial spread over inordinate length of time — Case not to be remitted as Magistrate out of Palestine.*

In partly allowing an appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated the 2nd January, 1941 :—

HELD : 1. An Appellate Court should always be reluctant to reverse a finding of fact made by a lower Court when that finding was based on the evidence of witnesses which had not been heard by the appellate Court, and they should never overrule a lower Court when that Court disbelieves the witnesses, unless such a finding is obviously perverse.

2. The District Court was, consequently, wrong in reversing the findings of the Magistrate which were based upon evidence.

3. The penalties for deficient stamping having been paid and the notes duly stamped, the two promissory notes were admissible in evidence.

4. Although the promissory notes which were important evidence of the amount owing had been wrongly disregarded by the Magistrate, the case would not be sent back as the Magistrate who had tried the case was out of the country and his return uncertain and as there was sufficient material before the Court of Appeal on which to make a finding.

ANNOTATIONS :

1. The principles guiding an Appellate Court in dealing with findings of fact made by a lower Court have already been set out — following English Law — in C. A. 241/38 (1939, S. C. J. 62).

2. For Palestinian authorities on stamp duty, *vide* note 2 to C. A. 11/40 (1940, S. C. J. 248).

FOR APPELLANT : Eliash.

FOR RESPONDENT : Baker (by delegation).

JUDGMENT:

The Respondent in this appeal, who was the Plaintiff in the Magistrate's Court, claimed from the Appellant the sum of LP. 133.613 mils being balance of the price of coal supplied to the Appellant. In support of the claim he relied on a contract dated 6.2.38, between the parties, on two promissory notes dated 21.3.38 and 21.2.38, for LP. 83.613 mils and LP. 50 respectively, and on the evidence of witnesses. He further alleged that an invoice for the amounts of coal supplied, said to be confirmed by the Appellant on 21.3.38, except as to two trucks said not to be yet cleared, which had been filed by him with his statement of claim, had been lost from the Court file, and he endeavoured to prove its contents by secondary evidence.

The learned Magistrate, after a very lengthy series of hearings, found that he was not satisfied that an invoice had been confirmed by the Appellant and be disbelieved the Respondent's witnesses on this point. He found on the evidence that coal to the value of LP. 375.283 mils only had been supplied by the Respondent, that LP. 305 on account was admittedly received, leaving a balance of LP. 70.283 mils to be explained. He further held on the evidence that LP. 70 of this balance had been paid by the Appellant and gave judgment for the balance of 283 mils with costs against the Respondent.

On appeal the District Court reversed all these findings holding that there was sufficient evidence to prove that the Appellant had signed

and confirmed the invoice except in respect of two truck loads and that the promissory notes were given in respect of the balance of the price of the coal and that the Magistrate had erred in not dealing with the said notes. It further held that the Appellant had not established payment by him of the LP. 70. Consequently the District Court entered judgment for the Respondent for the amount originaly claimed *viz.* LP. 133.613 mils together with interest and costs.

This appeal raises the point as to how far, if at all, an Appellate Court is entitled to over-rule a lower Court's appreciation of the evidence heard by the latter Court. Generally, I think it can be said that an Appellate Court should always be reluctant to reverse a finding of fact made by a lower Court when that finding is based on the evidence of witnesses which has not been heard by the Appellate Court, and that they should never over-rule a lower Court when that Court has said that it disbelieved the witnesses, unless such a finding is obviously perverse.

To take the question of the invoice first. The learned Magistrate revised at length the evidence given in this respect and it is obvious that he disbelieved that evidence. As to Mr. Malz, the Respondent's Manager, he said that his evidence proved to him the want of order and of correctness of his accounts and that there were contradictions in his evidence, and that his notes relating to this case had been lost. He refused to put any reliance on Foss's evidence, since his notes were contradicted by Railway documents. He declined to place any reliance on the evidence of Sara Laufer, since she said that she only knew what Mr. Malz, her brother-in-law, told her, and that she signed, without question, whatever Malz told her to sign. In these circumstances I find it difficult to appreciate what was the evidence which the learned Judges of the District Court found sufficient to establish the fact that the invoice had been confirmed by the Appellant. It must be remembered that all these witnesses were those of the Respondent. The finding of the District Court on this point is without any support at all from the evidence, and in my opinion it cannot stand.

Similarly I think that the District Court was wrong in over-ruling the Magistrate's findings with regard to the payment of a further LP. 70.

As to the LP. 50, copies of the contract were produced by each side, and these copies varied in their contents. There was however sufficient evidence to support the Magistrate's finding that the LP. 50 had been paid, and that finding should not have been disturbed.

With regard to the LP. 20, there was sufficient evidence in my opinion, to prove that the LP. 20 had been paid. The allegation that

this promissory note for LP. 20 related to another transaction was one that the Respondent should have proved. He did not do so, and the District Court was again wrong in over-ruling the Magistrate on a question of evidence.

I now come to the question of the two promissory notes for LP. 83.813 mils and LP. 50. Each of these notes was insufficiently stamped by 10 mils for the respective amounts stated in them, but the penalties were paid and the notes duly stamped, and they were properly admissible, therefore, in evidence. And at the trial in the Magistrate's Court they were tendered as evidence only to prove the amount of the balance still owing to the Respondent — the action was not one on the notes.

The learned Magistrate refers to the existence of these notes in para 2 of his judgment but makes no finding with regard to them in his decision. This perhaps is not to be wondered at, when it is remembered that this case took from 13 to 14 months for trial before the Magistrate's Court. It is impossible to try a case satisfactorily, when the trial is spread over this inordinate length of time.

To my mind it is obvious that these notes referred to the present case and to this transaction between the parties, and that they were important evidence on the question of the exact amount of coal delivered and the money owing. Unfortunately it would seem that the learned Magistrate in an otherwise unimpeachable judgment did not apply his mind to this precise question. Normally in such circumstances the case would have to be sent back to the Magistrate for him to make a finding of fact, but the Magistrate who gave the judgment is not in Palestine, and his return is uncertain. It is impossible to contemplate another year's proceedings before another Magistrate followed perhaps by two further appeals — such a situation must, if possible, be avoided at all costs. I think, however, that there is sufficient material before us on which to make a finding. It seems to me, considering the case and the evidence as a whole, that these two notes are connected with the contract, and that even if they were signed in blank by the Appellant and filled in by the Respondent, yet they are none the less evidence showing the amount owing. In this respect I agree with the finding of the District Court.

I think, therefore, that the appeal should be allowed in part and that instead of LP. 133.613 mils the Appellant must pay LP. 63.613 mils with legal interest from 3.1.39 until payment. Each side should pay their own costs both here and in the two Courts below.

Delivered this 31st day of March, 1941.

*British Puisne Judge.*

CRIMINAL APPEAL No. 27/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Kalman Friedenberg. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal Procedure — Judgment signed by two out of three judges, Criminal Procedure (T. U. I.) Ordinance, Secs.* 35, 45, 51 & 70 — *Marginal note to Sec.* 51 — *Calling of witness not called at preliminary enquiry, Criminal Procedure (T. U. I.) Ordinance, Secs.* 36 & 38 — *Immaterial irregularity — Recalling of witness by Court — Findings of fact — Court addressed by Appellant personally — Special treatment.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 10th of March, 1941, whereby the Appellant was convicted of arson, contrary to Section 321 and 23 1(c)(d) of the Criminal Code Ordinance, and of attempting to obtain money by false pretences, contrary to Section 301 and 29 of the Criminal Code Ordinance, 1936, and sentenced to twelve months' imprisonment and in directing special treatment :—

HELD : 1. The word "judgment" in Sec. 70 of the Criminal Procedure (Trial Upon Information) Ordinance, having regard to the marginal note to Sec. 51, referred to the presiding judge's record of the findings of fact and there was no objection to the record being typed out.

There was, therefore, nothing in the point that the judgment had only been signed by two of the three judges which constituted the District Court.

2. Sec. 38 of the Criminal Procedure (Trial Upon Information) Ordinance applied also to witnesses, called only for the purposes of Sec. 36 to explain the absence of other witnesses.

No miscarriage of justice had, however, been caused by the omission to notify Appellant of the intention to call these witnesses.

3. The Trial Court should not recall a witness to give additional evidence amounting to a page of typewritten notes ; there was, however, nothing against the Appellant in that evidence.

4. There was evidence upon which the Trial Court could come to the conclusion to which it came.

5. Where cases have been fully argued by experienced advocates it was undesirable that parties should address communications to the Court.

ANNOTATIONS :

1. On marginal notes see also C. A. 18/39 (1939, S. C. J. 247, on p. 251).
2. On irregularities which do not cause injustice compare CR. A. 35/41 (*ante*, p. 124) and note 2.
3. See, on the third point, H. C. 63/40 (1940, S. C. J. 514).

FOR APPELLANT : Goitein.

FOR RESPONDENT : Junior Government Advocate — (Salant).

JUDGMENT:

The Appellant and his wife were charged and convicted of arson, in that they set fire to the contents of a furniture shop, and attempting to obtain goods by false pretences in connection with the fire. The wife does not appeal.

For the Appellant Mr. Goitein has raised a number of points, and I will firstly deal with those which are technical.

The judgment was only signed by two of the three Judges constituting the Court, and Mr. Goitein submits that this makes the proceedings a nullity.

The Criminal Procedure (Trial Upon Information) Ordinance, Section 35, requires the presiding judge to record in writing all evidence and all objections and rulings, and Section 51 requires the presiding judge to record upon his notes the findings of fact on which the conviction or acquittal is based. The marginal note refers to this as "form of judgment". Section 45 provides that the Court shall give a verdict, and Section 70 provides that among the documents to be used on the appeal shall be the judgment. Having regard to the marginal note to 51, I take that to mean the presiding judge's record of the findings of fact. In practice these are frequently typed out and signed, and there would seem to be no objection to this, as 51 does not say — as does 35 — that the presiding judge shall record in writing.

In this case the record was typed and signed by the presiding judge.

It is not suggested that the three Judges were not present when the verdict was given and sentence was pronounced. I do not think there is anything in this point.

It appears that three witnesses, two doctors and one Frontier official, were called at the trial who were not called at the preliminary enquiry. They were called for the purposes of Section 36 to explain the absence of other witnesses, and it is argued by Mr. Salant that Section 38 does not apply to such witnesses, but they give evidence at the trial — although they do not give evidence against the accused. I think, there-

fore, notice should have been given. This was no doubt an irregularity of procedure, but as the result I do not think any miscarriage of justice has actually occurred.

It appears that when the witnesses for the prosecution had all given evidence, one of them was recalled by the Court. No one doubts that a witness may be recalled to clear up a point, no one doubts that a Court may put questions to a witness, but I think it most unfortunate that a witness should be recalled by the Court, and give additional evidence amounting to a page of typewritten notes, — but I have read this evidence and I can find nothing in it against the Appellant, and in their judgment, insofar as he is concerned, I do not think the Court relied upon it.

We have had considerable argument as to the facts, but we cannot say that there was not evidence upon which the Court of Trial could come to the conclusion to which it came.

There is one other matter to which I should refer. After this case was adjourned in order that we might consider our decision, the Appellant addressed a communication to us. Where cases have been fully argued by experienced advocates it is most undesirable that this should be done.

The appeal is dismissed.

Delivered this 24th day of April, 1941.

The Court directs special treatment.

*Chief Justice.*

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CIVIL APPEAL No. 44/41.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Khalid Saleem Omar, Mukhtar of Majdel Yaba,
2. Abdullah Yousef El Silleh,
3. Cooperative "Hairgun" Lehovala Vehaspaka, Tel Aviv,
4. Isaac Aharonovitz,

5. Eliezer Finkelstein,
6. David Ben Porah. APPELLANTS.

v.

1. Kamil Abdul Karim Abdel Ruhman,
2. Wasila Khader el Sadek,
3. Zaheedeh Abdel Karim Abdel Ruhman. RESPONDENTS.

*Mukhtars appearing in name of village — Provisions of Mejelle as to representation of villages — No proof of trespass by quarrying stones — Case remitted to be tried de novo as one of original judges out of the country.*

In allowing an appeal from the judgment of the Land Court of Jaffa, dated 8th February, 1941 :—

HELD : 1. There was no proof that the inhabitants of the village of Majdal Yaba numbered more than hundred persons and could thus be represented by the *mukhtars*.

2. There was no proof whatsoever that the third, fourth, fifth and sixth Appellants had trespassed on Respondents' lands by quarrying stones thereon.

3. The case would be remitted to the Land Court for retrial and as the then President was no longer in the country, the case would be reheard *de novo*.

ANNOTATIONS :

1. Compare, on the first point, *Mejelle*, Arts. 1645 and 1646 and see C. A. 122/39 (1940, S. C. J. 220) and note 4.

2. On the last point see also C. A. 69/38 (1938, 1 S. C. J. 262) and note. Compare C. A. 20/39 (1939, S. C. J. 116) and C. A. 36/41 (*ante*, p. 142).

FOR APPELLANTS : Seligman.

FOR RESPONDENTS : Moghannam.

JUDGMENT:

This is an appeal from the Jaffa Land Court in relation to certain land in the village of Majdal Yaba. The question in dispute is the position of one of the boundaries of this land. A very large amount of evidence was heard and if it was merely a question of dealing with that evidence on appeal I do not know if we should be able to interfere with the judgment of the Court below, but it seems to us that in two other respects the Land Court went wrong.

The first point is with regard to the question of the first two Appellants who are *mukhtars* of Majdal Yaba whether they could act as agents on behalf of the village with regard to the leasing of village

lands. The Land Court dealt with that point rather summarily but the main objection is that there is no proof that the provisions of the *Mejelle* had been complied with, that is to say, there is no proof that the inhabitants of Majdal Yaba number more than 100 persons.

The second point is with regard to Appellants Nos. 3 to 6. They denied in their statement of defence that they quarried any stones on any land belonging to the Respondents. That being so it was for the other side to prove that they were in fact trespassing on this land by quarrying stones. There is no proof whatever of this nature. For that reason also the judgment appealed from cannot stand. As I said at the beginning we made no remarks on the question as to evidence. The case will have to go back in any case to be retried and as the learned President who was a member of the Court who gave the first judgment is now no longer in the country, the whole case would have to be reheard *de novo*. The appeal will, therefore, be allowed, the judgment of the Land Court set aside and the case remitted for retrial. The Appellants will have their costs of this appeal on the lower scale in any event and we certify the sum of LP. 15 advocate's attendance fee and costs of this appeal. The costs of the original trial in the Land Court will await the result of the retrial there.

Delivered this 7th day of April, 1941.

*British Puisne Judge.*

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HIGH COURT No. 32/41.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Dr. M. Bileski, advocate, as receiver on behalf of the General Mortgage Bank of Palestine Ltd. PETITIONER.

v.

The Assistant District Commissioner, Lydda District. RESPONDENT.

*Receiver appointed under Credit Banks Ordinance — Rents attached under Taxes (Collection) Ordinance — Rents due to owner in spite of receivership — Duties of Receiver, Credit Banks (Receivers) Rules,*

*Rule 7 — Receiver not in position of new owner, Urban Property Tax Ordinance, Sec. 24.*

In refusing an application for an order to issue to the Respondent, directing him to show cause why his orders of attachments Nos. 15128 and 15130, dated 30th January, 1941, in respect of rent due from Baruch Rohde and Zev Richbach, tenants of the house of Shlomo Mintz, Tel-Aviv, Basel Street, 18, should not be set aside :—

HELD : 1. The rents attached were rents due to the owner of the house even though collected by the receiver.

2. It was the duty of the receiver to discharge any taxes accruing before or after his appointment.

3. The appointment of the receiver did not involve any change of ownership.

ANNOTATIONS :

1. On distribution of rents collected by a receiver *cf.* H. C. 16 & 17/41 (*ante*, p. 121).

2. Note that Sec. 24 of the Urban Property Tax Ordinance, 1928, referred to in the Order, has not been reproduced in the Urban Property Tax Ordinance, 1940.

3. Compare, on ownership not being affected by a provisional attachment, H. C. 80/40 (1940, S. C. J. 350).

PETITIONER : In person.

ORDER :

In this case the Petitoner is asking for an order to the Respondent, who is the Assistant District Commissioner in Tel-Aviv, to show cause why orders of attachment made by him under the Collection of Taxes Ordinance on rents due from two tenants of a house of Mr. Shlomo Mintz, of which the Petitioner is receiver under the Credit Banks Ordinance, should not be set aside.

In the first place, the Petitioner submits that the rents attached are not rents due to the defaulter. This argument cannot stand. They are rents which are due to the owner of the house but which are now collected by the receiver, and if they were not rents due to the owner of the house they could not be collected by the receiver.

The second argument is that the receiver is only liable to pay taxes accruing on and after the date of his appointment. This is also clearly unsound. The duty of the receiver is to discharge any taxes, rates and outgoings affecting the mortgaged property. These taxes now claimed clearly come within the terms of the Credit Banks Receivers Rules, Rule 7.

The third point is that since under Section 24 of the Urban Property Tax Ordinance a new owner is only liable for taxes as from the beginning of his ownership, a receiver similarly is only liable to pay taxes from the beginning of his receivership. The answer to that is that the appointment of a receiver does not involve any change of ownership and there is no such corresponding provision in the Credit Banks Ordinance.

The application for an order *nisi* must, therefore, be refused.

Given this 9th day of April, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 45/41.

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

BEFORE : Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEAL OF :—

Ali Ibn Mohammad El Naouk. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Receiving stolen property, C. C. O., Sec. 310 — Sentence not to exceed maximum sentence for simple stealing, C. C. O. Sec. 270.*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 19th of March, 1941, whereby the Appellant was convicted of being in possession of stolen property contrary to Section 310 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, and in reducing the sentence :—

HELD : The Appellant having been charged under Sec. 310 of the Criminal Code Ordinance, the principal offender must have been guilty only of a misdemeanour under Sec. 270 and the Appellant could not be liable to a greater penalty than under Sec. 270.

ANNOTATIONS : *Cf.*, on Sec. 310, *dictum* in CR. A. 107/40 (1940, S. C. J. 481).

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant was convicted, after pleading guilty, under Section 310 of the Criminal Code Ordinance. That section provides as follows :—

> "Any person who, by himself or by an agent, receives or takes upon himself, either alone or jointly with any other person, the control or disposition of any thing, money, valuable security or other property whatsoever, knowing the same to have been unlawfully taken, obtained, converted or disposed of in a manner which constitutes a misdemeanour, is guilty of a misdemeanour and is liable to the same punishment as the offender by whom the property was unlawfully obtained, converted or disposed of."

As the Accused pleaded guilty no evidence was called before the Court, and this being a summary trial there were no depositions. A Police Inspector informed the Court that the property was stolen from several flats in the same building.

It will be seen that Section 310 requires that the taking, *etc.*, shall be in a manner which constitutes a misdemeanour. The principal offence, therefore, could not have been felony, *e. g.* house-breaking or burglary, and there did not appear to be any facts to show that it was anything more than simple stealing under Section 270.

If that is so the principal offender could only receive a punishment of imprisonment for one year, and by Section 310 the Appellant is liable to the same punishment, and it does not seem that this can be increased by reason of his twenty previous convictions.

The sentence must, therefore, be reduced to one of one year's imprisonment.

Delivered this 10th day of April, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 33/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Ali Ibrahim el Irr. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Provocation — Accused not represented — Depositions of witnesses not called at trial read by Court of Criminal Appeal — Sentence.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 13th of March, 1941, whereby the Appellant was convicted of manslaughter, contrary to Sections 212 and 213 of the Criminal Code Ordinance, 1936, and sentenced to fifteen years' imprisonment, and in reducing the sentence :—

HELD : 1. As the accused had not been defended by an advocate in the Trial Court the Court of Criminal Appeal would allow further evidence to be taken.

2. The additional evidence in question did not prove provocation.

3. The sentence was excessive and would be reduced.

ANNOTATIONS :

1. On the admissibility of fresh evidence on appeal in criminal cases, *vide* CR. A. 73/39 (1940, S. C. J. 9) and note, CR. A. 3/40 (*ibid.*, p. 47) and note and CR. A. 11/40 (*ibid.*, p. 368) and note.

2. On the effect of the accused not being represented, see CR. A. 34/40 (1940, S. C. J. 143) and note and CR. A. 42/40 (*ibid.*, p. 160).

3. On provocation compare CR. A. 151/37 (1938, 1 S. C. J. 21).

4. See, on the last point, note 3 to CR. A. 24/41 (*ante*, p. 95).

FOR APPELLANT : Mogannam.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The only point urged in this appeal is that the Appellant was provoked by the deceased, who fired a shot from a pistol before the Appellant used his knife. It is said that this fact was supported by the depositions of two defence witnesses not called by the prosecution at the trial. As the Accused was not defended by an advocate in the lower Court, we allowed this further evidence to be read. These two depositions may bear out the fact that the deceased had a firearm, but taking this into consideration we see no reason to interfere with the conviction, which will stand.

We think, however, taking the whole case into consideration, that the sentence is on the high side, and we reduce it to one of twelve years' imprisonment.

Delivered this 1st day of April, 1941.

*Chief Justice.*

CIVIL APPEAL No. 39/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Gershon Kleiner. APPELLANT.

v.

Rivka Bat Aga Baba in her name and in the name of her minor children : Rachel, Ezra and Lea. RESPONDENT.

*Claim for diyet — Meaning of "Ottoman Law in force on* 1.xi.1914", *P. O. in C., Art.* 46, *dicta of Frumkin, J., in C. A.* 88/30, *C. A.* 18/39 — *Effect of references to diyet, Ottoman Penal Code, Arts.* 1, 171, 182, *Civil and Religious Courts (Jurisdiction) Ordinance, Sec.* 6, *C. C. O., Sec.* 43, *Iradeh of* 1887 — *Repeal of Ottoman Penal Code immaterial — No distinction between diyet and compensation in lieu, C. A.* 118/33 — *Long practice, CR. A.* 96/37.

In dismissing an appeal from the judgment of the District Court of Jerusalem (sitting as a Court of Appeal), dated the 14th of January, 1941 :—

HELD : 1. (Not following *dicta* of Frumkin, J., in C. A. 88/30, C. A. 18/39) : Articles 1, 171 and 182 of the Ottoman Penal Code did not confer a positive right to an award of *diyet*, but referred only to the existence of *sharia* rights.

2. The repeal of the Ottoman Penal Code was, consequently, immaterial.

3. (Following C. A. 118/33) : No distinction could in this respect be drawn between an action for *diyet* and one for compensation in lieu of *diyet*, as the latter could only be awarded to a person entitled to *diyet*.

4. (Referring to CR. A. 96/37) : There was no reason to depart from the principle that a Court of Appeal should be extremely reluctant to accept a proposition which entailed the assumption that a consistent practice of the Courts over a number of years had no legal basis.

FOLLOWED : C. A. 118/33 (2, P. L. R. 249, C. of J. 306).

REFERRED TO : CR. A. 96/37 (P. P. 15.x.37).

NOT FOLLOWED : C. A. 88/30 (1, P. L. R. 724, C. of J. 1343), C. A. 18/39 (1939, S. C. J. 247).

ANNOTATIONS :

1. Compare the cases cited in and the annotations to C. A. 18/39 (*supra*).

Later decisions on *diyet* or compensation in lieu : C. M. B., Ha. 4420/39 (P. P. 12.i.40), C. M. B., Ha. 4530/39 (P. P. 17.v.40), C. M. B., J'm 2008/40 (P. P. 9.vii.40) and C. A. 113/40 (1940, S. C. J. 192).

2. On Art. 46 of the Palestine Order in Council, generally, *vide* C. A. 62/40 (1940, S. C. J. 171) and note 4, C. A. 113/40 (*supra*) and P. C. 56/38 (1940, S. C. J. 277).

3. On the effect of a long line of decisions see H. C. 15/39 (1939, S. C. J. 122) and note ; later authorities : H. C. 19/39 (1939, S. C. J. 200), C. A. 39/39 (*ibid.*, p. 254), C. A. 46/39 (*ibid.*, p. 295), C. A. 17/40 (1940, S. C. J. 100).

FOR APPELLANT : Levitsky and Abramovsky.

FOR RESPONDENT : Abcarius.

JUDGMENT:

*Rose, J.* : This is an appeal from the District Court of Jerusalem, setting aside the judgment of the Chief Magistrate of Jerusalem, the latter having held that the Respondent (the Plaintiff in the action) is not entitled to sue for *diyet*.

Mr. Levitsky, who argued the Appellant's case with commendable brevity, contends that the reference in Article 46 of the Palestine Order-in-Council, 1922, to "the Ottoman Law in force in Palestine on first of November, 1914," refers only to such laws as on that date formed part of the Ottoman Statute Law. He bases this contention on the *dicta* of Frumkin, J., in the Municipality of Haifa *v.* Ceasar Khoury, Civil Appeal No. 88 of 1930, (1 P. L. R. at page 730 *et seq.*) and in The Attorney General *v.* Blam, Civil Appeal No. 18 of 1939, (6 P. L. R. at page 253), where the learned Judge says :—

> "There are at present only two references to *diyet*, as distinct from compensation in lieu of *diyet*, in the law in force in Palestine, neither of them conferring the actual right for an award of *diyet*.
>
> The first reference is to be found in Section 6(1) of the Civil and Religious Courts (Jurisdiction) Ordinance which confers upon Civil Courts jurisdiction in certain cases of applications for *diyet*. But that is all that this sub-section does : conferring jurisdiction. In order to enable the Civil Court to exercise its jurisdiction, a party claiming *diyet* will have to rely on substantive law conferring upon him a right to be awarded *diyet*. Such right as existed in the Ottoman Penal Code has been extinguished with the repeal of the Code.
>
> The second reference to *diyet* is to be found in the Criminal Code Ordinance, 1936, where it is said in Section 43(c), "Nothing in this section shall affect rights to *diyet*" ; again, a right to *diyet* has to be established by some substantive law applicable in the Civil Courts of this country conferring such rights. As more fully set out in Haifa Municipality *v.* Khoury, and Palestine Mercantile Bank, Ltd.,

v. Fryman and Others, (C. A. 240/37, P. L. R. Vol. 5, p. 165) Moslem law as such is not a part of the legal system of Palestine and only such parts of it became applicable as have been embodied in the Civil Legislation by special Imperial *Irade*, or otherwise."

The Appellant contends that apart from the Ottoman Penal Code, which was repealed on 1st January, 1937, there is no substantive law conferring upon a person a right to be awarded *diyet*, and that, therefore, such right died with the repeal of the Code.

The argument is an attractive one and, supported as it is by so experienced a Judge as my brother Frumkin, deserves the closest consideration.

The articles of the Code to which reference was made in argument, are 1, 171 and 182, and I rely on Bucknill's and Utidjan's translation from the Turkish text.

Article 1 provides that the operation of the Code shall be "without prejudice in any case to the personal rights prescribed by the *Sharia*".

Article 171 reads :—

"Whereas the effect of the law cannot defeat the personal rights, if the person killed has heirs the claim for personal rights is referred to the *Sharia* Court at their instance."

Article 182 reads :—

"If a person kills an individual by mistake or unintentionally becomes the cause of the destruction of his life he is, after satisfaction upon trial of the *sharia* rights of the person killed, punished with imprisonment for from six months to two years if this affair of killing has arisen from carelessness or unobservance of the laws."

In my opinion these articles do no more than refer to the existence of *Sharia* rights. They do not confer a positive right to an award of *diyet*. The references contained in these articles are, in my view, no more conclusive than those in Section 6 of the Civil and Religious Courts (Jurisdiction) Ordinance (chapter 18 of the revised edition), Section 43 of the Criminal Code Ordinance, 1936, and a decree of the Turkish Council of Ministers, dated 1887, which is referred to in the first volume of Young's book on Ottoman Law at page 291, and which appears to have conferred exclusive jurisdiction in matters of *diyet* on the *Sharia* Courts.

If I am right in this view it follows that, from the point of view of Mr. Levitsky's argument, the repeal of the Ottoman Penal Code is immaterial, and that his contention that there is no substantive provision of law establishing the right to *diyet* could have been urged with equal force while the Ottoman Penal Code was still in operation.

On the assumption, therefore, that Mr. Levitsky's argument is correct, it would follow that, in the numerous cases in which either *diyet*

or, more commonly, compensation in lieu has been awarded by the Civil Courts in virtue of Section 6 of the Civil and Religious Courts (Jurisdiction) Ordinance, the Courts were in error.

In my opinion no distinction in this respect can be drawn between an action for *diyet* and one for compensation in lieu, as the latter can only be awarded to a person who is entitled to *diyet*. If any authority is needed for what is, in my opinion, so self-evident a proposition, it is provided in Guardians of Shlomo Slonim *v.* Issa Arafeh and Khalaf el Khatib, Civil Appeal No. 118 of 1933 (2, P. L. R. at page 250), where Corrie, J., says : "If the Respondents are not liable to pay *diyet* they cannot be liable to compensation in lieu."

In fact, as recently as 1937 (*i. e.* subsequent to the repeal of the Ottoman Penal Code) compensation in lieu of *diyet* was awarded by a Court of Criminal Assize and upheld on appeal in the case of Zwanger and Others *v.* Scheinzwit, Criminal Appeal No. 96 of 1937, in which, incidentally, none of the interested parties was a Moslem. I would add that, although counsel of great experience were engaged in the case, the proposition that compensation in lieu of *diyet* was not payable was not even argued.

It is a well established principle that any Court of Appeal should be extremely reluctant to accept a proposition which entails the assumption that a consistent practice of the Courts over a number of years has no legal basis, and I do not consider that there is in this case any sufficient reason to make an exception to so eminently sensible and convenient a principle.

The appeal will, therefore, be dismissed, with costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 7th day of April, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 37/41.

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

BEFORE : Trusted, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mordehai Baum. APPELLANT.

v.

Ahmad Abu Ismail. RESPONDENT.

*Civil Procedure — Failure to notify amount of security approved, C. P. R. 328, 327 — Good cause, C. P. R. 333, C. A. 171/40.*

In dismissing an appeal from the order of the District Court of Jaffa, dated the 30th of September, 1940 :—

HELD : (Referring to C. A. 171/40) : As the Appellant had failed to show good cause for the omission to notify the Respondent of the amount of security fixed the District Court was entitled to dismiss the appeal.

REFERRED TO : C. A. 171/40 (1940, S. C. J. 308).

ANNOTATIONS :

1. Compare C. A. 171/40 (*supra*) and notes.
2. On failure to show good cause, *vide* C. A. 44/40 (1940, S. C. J. 448) and note 3.

FOR APPELLANT : Henigman.

FOR RESPONDENT : Elia.

JUDGMENT:

This is an appeal from the judgment of the District Court of Jaffa. Owing to some inadvertence the Appellant failed to comply with Rule 328(c) of the Civil Procedure Rules, 1938, in that he neglected to give notification of the security approved by the Registrar to the Respondent.

It would seem that the general practice, when a bond is not filed with the notice of appeal, is to file therewith forms in blank which are filled up in the Registry and served in order to comply with Rule 328(c)(ii).

In this case the Appellant was given an adjournment, as the security was not fixed under Rule 327 by the Registrar. On the second hearing the security was fixed, and it was paid, but it is admitted that no notification thereof was given. In such cases the attention of the Court should be invited to Rule 333, which appears to be made expressly to meet such a case, but it was not invoked in the lower Court by the Appellant, and he showed no good cause ; therefore he cannot rely on it now. In these circumstances the Court below was entitled to dismiss the appeal.

I may add that in Civil Appeal 171/40, where a similar point arose, Rule 333 was not invoked.

The appeal is dismissed with costs on the lower scale and LP. 5 advocate's attendance fee.

Delivered this 24th day of March, 1941.

*Chief Justice.*

HIGH COURT No. 30/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPLICATION OF :—

The Attorney General. PETITIONER.

v.

Gershon Agronsky. RESPONDENT.

*Contempt of Court — Article calculated to prejudice proceedings — Contempt of Court Ordinance, Sec. 4 — Whether proceedings pending — Apology.*

In allowing an application for an order to issue, directed to the Respondent, calling upon him to show cause why he should not be punished in accordance with Section 4 of the Contempt of Court Ordinance, for publishing a writing entitled "Two more arrests in Tel-Aviv theft" in the issue of the Palestine Post, dated Wednesday, the 5th of March, 1941, the said writing being calculated to prejudice the proceedings in the case of the Attorney General *v.* Abraham Ben Zvi Feigenbaum and Baruch Ben Shaul Rozinel, now pending before the Magistrate's Court, Tel-Aviv, and in accepting an apology :—

HELD : 1. Where persons have been remanded, proceedings are deemed to be pending within the meaning of Sec. 4 of the Contempt of Court Ordinance.

2. The apology tendered by the Respondent would be accepted.

ANNOTATIONS :

1. See, on the first point, H. C. 5/38 (1938, 1 S. C. J. 135).

2. Palestinian authorities on Contempt of Court are collated in note 1 to H. C. 51/40 (1940, S. C. J. 516).

FOR PETITIONER : Crown Counsel — (Bell).

FOR RESPONDENT : Baker.

### O R D E R.

This is a petition by the Attorney General asking that the Editor of the Palestine Post should be committed for contempt of Court by reason of an article in that paper of March, 5, 1941. The article, which was headed "Two More Arrests in Tel-Aviv Theft", reported that two men had been arrested, and went on to say :—

> "Both prisoners were remanded for 15 days by the Magistrate, Mr. Rosenzweig, here today."

> "One of the suspects, ..... has a police record and only recently returned to town from Ekron where he had been deported by an administrative order under the Emergency Regulations. The second prisoner is ....., in whose flat ..... lived."

It is a basic principle of English justice that so far as possible nothing should be done to prejudice the trial of a person accused of having committed a crime. A statement in the public press that he has a bad record may well do so. No doubt here, where there are no juries, the danger is less than in countries where there are juries, but it still remains.

Mr. Baker, for the Respondent, argues that there was no proceeding pending, as required by Section 4 of the Contempt of Court Ordinance, but it seems to me that where persons are remanded proceedings are pending.

Mr. Agronsky, the Editor of the paper, has filed an affidavit in which he explains how inadvertently the report came to be published, and he expresses his regret and makes apology.

We accept his explanation and apology, and if these proceedings have made it clear that such reports should not be published, they will have served a useful purpose.

Given this 25th day of April, 1941.

*Chief Justice.*

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HIGH COURT No. 24/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPLICATION OF :—

Simaan Musa Zaadeh. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Rosa Simaan Musa (née Freiha). RESPONDENTS.

*Custody of child — Order of Ecclesiastical Court giving child to mother unless she remarries — Jurisdiction as to guardianship, P. O. in C., Arts. 54, 51 — Byzantine Law — Guardian ad litem, C. A. 40/40 H. C. 10/41 — Principles of natural justice.*

In refusing an application for an order to issue, directed to the first Respondent, calling upon him to show cause why his orders, dated the 6th of December, 1940,

and the 27th of February, 1941, in Execution File No. 254/40, Jerusalem, should not be set aside, and why the first Respondent should not be ordered to carry out the judgment of the Orthodox Ecclesiastical Court of Appeal, in Jerusalem, dated the 1st of March, 1940, and that Petitioner be given the custody of the child :—

HELD : 1. In cases concerning the custody of minor children, the High Court was concerned to see, in so far as the substantive law allowed, that the best interests of the child were served.

2. Guardianship did not fall under Art. 54(i) of the P. O. in C., but — being a matter of personal status — it fell under Art. 54(ii).

3. (Following C. A. 40/40, referring to H. C. 10/41) : A guardian *ad litem* should be appointed and the matter brought before the appropriate Court.

4. An order of an Ecclesiastical Court may be said to be contrary to natural justice if it provides for a change of custody of a child in the future — *e. g.* upon the re-marriage of a young mother — without regard to the state of affairs then existing.

FOLLOWED : C. A. 40/40 (1940, S. C. J. 444).

REFERRED TO : H. C. 10/41 (*ante*, p. 49).

ANNOTATIONS :

1. On custody of minor children see note 3 to H. C. 10/41 (*supra*).

2. On the question of jurisdiction, *vide* H. C. 28/38 (1938, 1 S. C. J. 373) and notes, H. C. 22/39 (1939, S. C. J. 273) and notes and C. A. 40/40 (*supra*) and notes.

3. On orders of Ecclesiastical Courts being contrary to natural justice see C. A. 62/37 (P. P. 6.xi.37, 2 Ct. L. R. 133).

FOR PETITIONER : Abcarius.

FOR RESPONDENTS : No. 1 — Absent, served.
No. 2 — Levitsky.

ORDER:

This is an application for a rule, directed to the Chief Execution Officer, Jerusalem, and it concerns the guardianship of a young child.

It seems that the Petitioner and his wife, the second Respondent, were divorced by the Orthodox Ecclesiastical Court, which Court ordered that the second Respondent should have the custody of the child, but that if she re-married, the custody was to be given to the Petitioner — the father.

It is said that she has re-married, and the father seeks to execute the conditional order of the Ecclesiastical Court, but the Chief Execution Officer refused to do so.

In cases such as this we are concerned to see, in so far as the substantive law allows us to do so, that the best interests of the child are served. I should make clear that in this case neither party suggests that the other is not a fit and proper person to have the child.

It is argued that in a case such as this guardianship is ancillary to divorce, and therefore falls under paragraph (i) of Article 54 of the Order-in-Council. If this were so I think it would be expressly included, as is alimony. Guardianship is a matter of personal status by Article 51, and I think it falls under Article 54(ii).

According to the Chief Execution Officer the Byzantine Law provides that on re-marriage the Court may order a change of custody, but in order to do so, in my view, they should and no doubt would wish to consider the state of affairs then existing, in particular the home and surroundings which the mother can give the child after her re-marriage, and the home the father can give.

Following the principles laid down by this Court in Civil Appeal No. 40/40, 7 P. L. R., 411, I think a guardian *ad litem* should be appointed, and the matter brought before the appropriate Court to consider the matters to which I have referred.

Our attention was called to a decision of this Court, High Court No. 10/41, but the question whether the child should have consented through a guardian *ad litem* to the jurisdiction does not seem to have been argued therein.

Apart from these considerations, on broad grounds I think an order of an Ecclesiastical Court may be said to be contrary to natural justice if it provides for a change of custody of a child in the future without regard to the state of affairs then existing, and I have no sympathy with an order which provides that a young mother, to whom custody of her child has been given, shall lose it merely because she re-marries.

The order will be discharged with costs, which we assess at an inclusive sum of LP. 10.

Given this 25th day of April, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 30/41.

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

BEFORE : Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEAL OF :—

Abraham Dov Katzberg. APPELLANT.

v.

1. Pinhas Wagman,
2. Lea Wagman. RESPONDENTS.

*Damages — Penalty clause — Assessment of damages.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv (in its appellate capacity), dated the 22nd of November, 1940 :—

HELD : The penalty clause could not be applied and the Magistrate had been right in assessing the damages.

ANNOTATIONS : On penalties and the assessment of actual damages compare C. A. 79/39 (1939, S. C. J. 493) and note and C. A. 162/40 (1940, S. C. J. 321) and note 3.

FOR APPELLANT : B. Joseph and Caspi.

FOR RESPONDENTS : Levanon.

JUDGMENT:

The parties to this appeal entered into a contract in writing for the joint ownership of a property in Tel-Aviv.

Clause 7 provided :—

> "If one of the parties desires to take for himself any flat in the above property in order to live therein or for any other purpose, he shall be entitled to do so only by agreement with the other party."

Clause 8 provided that in case of breach of the contract, LP. 500 as agreed and liquidated damages should be payable.

The case was heard by a Magistrate, who found that the Defendants (Respondents) "took the flat on the third floor without getting the permission of the Plaintiffs", and later stated that he was of opinion "that the share of the Plaintiff in the rent (or his damages) of the rooms taken by the Defendants, as described above, is LP. 18.125 (at the rate of LP. 1.812 per month)."

The District Court reversed the Magistrate's judgment on the ground that the Plaintiff had suffered no loss.

It is not suggested that the penalty clause can apply, and I think the Magistrate was right in assessing the damages.

The decision of the District Court will be set aside and that of the Magistrate restored.

The Appellant will have the costs in the District Court, and in this Court on the lower scale, and we certify LP. 10 for attendance here.

Delivered this 24th day of April, 1941.

*Chief Justice.*

HIGH COURT No. 22/41.

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

BEFORE : Trusted, C. J., Copland and Khayat, JJ.

IN THE APPLICATION OF :—

Binyamin Goldberg. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Kadar Pottery Works Ltd. RESPONDENTS.

*Imprisonment for debt — No evidence as to debtor's ability to pay — Period of detention not indicated.*

In allowing an application for an order to issue, directed to the first Respondent, calling upon him to show cause why he should not be restrained from executing his order, dated 12.2.41, in Execution File No. 11209/40, Tel-Aviv, ordering the imprisonment of Petitioner :—

HELD : The order of imprisonment was improper, as it had not been granted upon any evidence or proof concerning the debtor's ability to pay, and as it did not indicate the period of detention.

ANNOTATIONS : See, on the other hand, H. C. 3/41 (*ante*, p. 129) ; *cf.* also note 2 thereto for other cases on imprisonment for debt.

PETITIONER : In person.

FOR RESPONDENTS : No. 1 — Absent, served.
No. 2 — Zysman.

### ORDER.

This rule must be made absolute. The Petitioner undertook to pay his debt by monthly instalments, and this undertaking was confirmed by a formal order of the Chief Execution Officer. It is said that the Petitioner failed to pay two instalments, and the second Respondent applied to the Chief Execution Officer for an order for imprisonment. The order was made, but it does not appear that any evidence was adduced to prove Petitioner's ability to pay or that he had not complied with the order to pay instalments. The actual order was :—

"B. Goldberg to be arrested."

This order is clearly improper, as it was not granted upon any evidence or proof concerning the ability of the debtor to pay, and it does not indicate the period of detention, which it certainly should do.

The rule will be made absolute with costs, and LP. 2 to cover the Applicant's expenses, as he appears in person.

Given this 22nd day of April, 1941.

*Chief Justice.*

CIVIL APPEALS Nos. 229 & 230/40.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEALS OF :—

*C. A.* 229/40 :

The Arab Agricultural Bank. APPELLANT.

v.

1. Keren Kayemeth Leisrael Ltd.,
2. Mahmoud Haj Nassir Jallad & 55 ors. RESPONDENTS.

*C. A.* 230/40 :

Mahmoud Haj Nassir Jallad & 55 ors. APPELLANTS.

v.

1. Keren Kayemeth Leisrael Ltd.,
2. The Arab Agricultural Bank. RESPONDENTS.

*Judgment granting right of preference given in* 1933, *Land Code, Art.* 45 — *Purchase price raised by registering mortgage — Judgment set aside by settlement officer but restored by Supreme Court, C. A.* 94/39 — *Action in Land Court to set aside original judgment — Constitution of Land Court — Minors among claimants for right of preference — "Need" of the land, Land Code, Art.* 45, *use of land allegedly for cereal growing but intention to plant citrus.*

In allowing two consolidated appeals from the interlocutory order and the judgment of the Land Court of Nablus, dated 13th September and 17th October, 1940, respectively :—

HELD : 1. The decision of the Settlement Officer could not affect the present action which had been brought to set aside the judgment of the Land Court given in 1933.

2. (Referring to C. A. 94/39) : The Land Court was properly constituted in accordance with the Land Courts (Amendment) Ordinance, 1939, since an action to set aside a judgment, though in reality a continuation of the original action, was technically a new one.

3. The fact that two out of the 56 claimants for the right of preference were minors was not sufficient to enable the Land Court to set aside the original judgment on the ground of fraud, as the remaining 54 claimants could have claimed the whole land for themselves.

4. There was nothing in the law requiring a person claiming a right of prior purchase personally to have the money.

5. Nor could fraud be inferred from the fact that the land had originally been claimed and its value assessed as needed for cereal cultivation whilst a few years later the purchasers intended to turn it into an orange grove.

REFERRED TO: C. A. 94/39 (1939, S. C. J. 446).

ANNOTATIONS:

1. Earlier proceedings in this case: C. A. 119/37 (1938, 2 S. C. J. 243), P. C. L. A. 9/38 (1938, 1 S. C. J. 410) and C. A. 94/39 (*supra*).

2. On the right of preference see C. A. 245/40 (*ante*, p. 65) and note 1.

3. Compare, on the second point, C. A. 226/38 (1939, S. C. J. 337) and case therein cited.

4. On the fourth point see, on the other hand, H. C. 47/39 (1939, S. C. J. 528).

5. On setting aside judgments obtained by fraud, *cf.* C. A. 195/38 (1938, 2 S. C. J. 157) and note. See also note 2 to C. A. 94/39 (*supra*).

*C. A.* 229/40:

FOR APPELLANT: Abcarius and Y. Husseyni.

FOR RESPONDENTS: No. 1 — Eliash and Ben Shemesh.
Nos. 2—57 — Bushnaq.

*C. A.* 230/40:

FOR APPELLANTS: Bushnaq.

FOR RESPONDENTS: No. 1 — Eliash and Ben Shemesh.
No. 2 — Abcarius and Y. Husseyni.

JUDGMENT:

In these two consolidated appeals the same points arise for decision. In the first case the Appellants (hereinafter called the first Appellants) are the Arab Agricultural Bank. In the second case the Appellants (hereinafter called the second Appellants) are some fifty-six persons of Hum Khalid village. The Respondents in each case are the Keren Kayemeth Leisrael, Ltd. This unfortunate litigation has been before the Courts for some nine years, with varying results. The facts are shortly as follows:

In 1931 the Respondents bought some 1400 *dunums* of land. In 1932, in Land Case No. 10/32, the second Appellants claimed the land in dispute by right of prior purchase under Article 45 of the Land Code. On 28.6.33 the Land Court gave judgment confirming their right to the land, and ordered the value thereof to be assessed, an by a later judgment the Land Court decided that the assessment should be made on the basis that the land was to be used as agricultural land. Assessment was duly made, and the Court held that the value as agricultural land at the time of claim was six pounds per *dunum*, but that

if the land was to be used for citrus production its value would be nine pounds per *dunum*. Applying the assessment on the basis of the land being agricultural land, the Court ordered that a sum of LP. 8.400 should be paid into Court by the second Appellants, together with the amount of the value of certain improvements effected by the Respondents. This was duly done, and on the 4th July, 1938, the land was duly registered in the names of the second Appellants, a share of 1/56 going to each. On the same day fifty-five out of the fifty-six second Appellants registered a mortgage in the name of the first Appellants for LP. 10.000.

The land was now declared to be within a Settlement Area, and the Respondents applied to the Settlement Officer to set aside the judgment of 1933 on the ground that it had been obtained by fraud. On reference to the Land Court from the Settlement Officer's decision, that Court held that the Settlement Officer had no power to set aside the judgment of the Land Court, which latter Court alone could do so, and this was duly confirmed by the Supreme Court in Civil Appeal 94/39, Keren Kayemeth Leisrael, Ltd., *v.* Mahmoud Haj Nassir Jallad and others (6 P. L. R., p. 493), on the 4th October, 1939. Thereupon, in January, 1940, the Respondents entered an action, Land Case 1/40, against the first and second Appellants, asking to have the judgment in Land Case 10/32 set aside on the ground of fraud. The learned President, Judge Cressal, sitting alone, decided in their favour. Hence these appeals.

Abcarius Bey, on behalf of the first Appellants, states that the mortgage of his clients was made in good faith for value, that the mortgage was made after the Land Court judgments were final, and his clients had not been parties to these Land Court actions. He complains that no mention was made of the rights of his clients in the judgment now under appeal. He says, rightly, that if the second Appellants should win the appeal he is not concerned, but that if the second Appellants should lose, then he asks that the retransfer to the Respondents should be made subject to the money paid into Court being paid out to his clients, and subject also to a charge being entered, for the balance owing on the amounts advanced under their mortgage, on the land. He has raised another point with regard to the constitution of the Court — which is not seriously pressed — and that is, that the Court which gave the judgment now under appeal was improperly constituted by the President, sitting alone, and that it should have been composed of the President and one Judge seeing that the action was not a fresh one but in fact a continuation of case No. 10/32. With regard to the second Appellant he has argued that "need" in Article 45 of the Land Code means need for any kind of cultivation, and that it is immaterial

where his clients get the money from, with which to pay the price for the land — that there is nothing in the law which says that they must have the money themselves when they bring an action for right of prior purchase. He further argues that the fact that two of the fifty-six Appellants were minors at the time the original action was brought is immaterial, seeing that the other fifty-four second Appellants had the right to claim all the land for themselves. There is no suggestion that the first Appellants were parties to the alleged frauds.

Osman Eff. Bushnaq, for the second Appellants, has pleaded also that the Settlement Officer has given a judgment ordering the land in dispute to be registered in his clients' names, and this judgment has not been appealed, and that therefore this present action cannot be heard. This point can be disposed of straightaway. Whatever the Settlement Officer may have decided cannot affect the present action which has been brought to set aside the judgment of the Land Court given in 1933. The Respondents also contend that the Court was properly constituted because of this action having been entered, and fees duly paid, in 1940, after the amendment of the Land Courts Ordinance came into force. We agree with this contention, and we do not think that the judgment in Civil Appeal 94/39 (*supra*) is against this view. What the Court said in that case was that an action to set aside the original action was in reality a continuation of an action properly entered originally in the Land Court, and within that Court's jurisdiction, but it is clear that Land Case No. 1/40 is technically a new action.

In his judgment the learned President found that fraud by the second Appellants was proved for these reasons :—

> (a) that two of the fifty-six second Appellants at the time the action was instituted were minors, and were, therefore, incapable of bringing an action themselves, or of executing a power-of-attorney, and that this fact was known to the second Appellants ;
>
> (b) that throughout the original proceedings the second Appellants claimed that they had the money required to purchase the land from their own pockets, and that they allowed the Court to believe that they needed the land as a means of existence, whereas in fact they had no money and had decided to embark on a speculation by borrowing money from a bank ; and
>
> (c) That the second Appellants wrongly stated that they required the land for the production of cereals, and that the assessment of value was made on this basis, whereas in truth and in fact they never intended to cultivate it for cereals, but had intended to turn it into an orange grove ;

and Dr. Eliash, on behalf of the Respondents, has contended that these conclusions were right. It is to be noted that the learned President,

no doubt by inadvertance, omitted to deal with the position of the first Appellants.

We think that the fact that two of the second Appellants were minors is not sufficient in itself to enable the Court to set aside the original judgment on the ground that it had been obtained by fraud. It is not contested that the other fifty-four second Appellants were entitled to bring the action, and we hold that they could have claimed the whole land for themselves. We also do not think that the fact that the second Appellants had to borrow money to pay for the land, and that they had not disclosed this fact to the Court, is a sufficient proof of fraud. There is nothing in the law which says that a person claiming a right of prior purchase under Article 45 must have the money himself, and we agree with Abcarius Bey that where they get the money from is a matter which concerns only themselves — even though the second Appellants may have arranged with the first Appellants to advance them the money to purchase the land so far back as 1934, this does not affect the position. They would naturally take steps to be in position to pay for the land, if their right to it were established.

The third ground might have been a sufficient one on which to base fraud but for the fact that the original action was filed in 1932 and the mortgage of the first Appellants was not executed until 1938, after the land had been registered in the names of the second Appellants, and the first mention of citrus cultivation in connection with this land was not until 1938. A person may very well in 1932 have intended to use the land, if he obtained it, for cereal cultivation, but he could not be held to be bound by that intention for the rest of his life. In 1938, quite possibly citrus cultivation would have provided a better means of livelihood than the cultivation of cereals. It is also a fact, which has not been contradicted, that up to this moment the land has not been used for citrus cultivation. But the fact that it was and is intended to be used for cereals is also borne out when one remembers that the amount of the mortgage is only LP. 10,000, whereas the amount to be paid for the land, including the cost of the improvements, is LP. 9641. Since the amount of the mortgage debt included two years' interest, and each year's interest on the purchase price would come to about LP. 690, it is obvious that no money would be left over, after the purchase price was paid, for developing the land as a citrus estate. It is true that, by the terms of the mortgage, the second Appellants are under an obligation to make an orange grove, but, if they do not do so, that is a matter between themselves and the first Appellants only.

For these reasons we do not think that the grounds given by the learned President for setting aside the original judgment on the ground

of fraud are valid ones, and his decision, therefore, cannot be supported. This result may be an unfortunate one, but the Respondents undoubtedly took a grave risk when they started to develop the land at a time when their ownership of it was in dispute.

Both appeals must be allowed, and the judgment of the learned President set aside, and the Respondents' action dismissed. The first and second Appellants are entitled to their costs on the lower scale, both here and below, to include in each case LP. 10 advocate's fee for attending the hearing of this appeal, to be paid by the Respondents, the Keren Kayemeth Leisrael, Ltd.; the money paid into Court — LP. 8631.014 — to be paid out to the Respondents.

Delivered this 24th day of January, 1941.

*British Puisne Judge.*

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PRIVY COUNCIL LEAVE APPLICATION No. 6/41.

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

BEFORE: Rose and Abdul Hadi, JJ.

IN THE APPLICATION OF:

The Mutawalli of the Wakf Jama'i Quisaria Ahmad Hassan Kat-khuda Bushnak. APPLICANT.

v.

1. Ibrahim Ahmad Charkasi,
2. Ismail Ahmad Charkasi, both heirs of Ahmad Mustafa Charkasi,
3. The Government of Palestine,
4. The Mamour Awkaf of the Northern Wakf District,
5. Ahmad Bey Hassan Kat-khuda. RESPONDENTS.

*Privy Council — Supreme Court judgment not final, Palestine (Appeal to Privy Council) O. in C., Art. 3(a), P. C. L. A. 15/38 — Discretion under Art. 3(b) of the Order.*

In refusing an application for Leave to Appeal to His Majesty in Council, from the judgment of the Supreme Court, sitting as a Court of Civil Appeal, dated the 20th of March, 1941, in Civil Appeal No. 33/41.

HELD: 1. (Following P. C. L. A. 15/38): A judgment is final if it finally determines the rights of the parties.

2. In the present case the rights of the parties had not been finally

determined as they depended to a certain extent on the decision of the Settlement Officer.

3. The Court of Civil Appeal would not exercise its discretion under Art. 3(b) of the Palestine (Appeal to Privy Council) Order in Council.

FOLLOWED : P. C. L. A. 15/38 (1939, S. C. J. 21).

ANNOTATIONS :

1. The judgment under appeal is reported *ante*, at p. 113. See note thereto for previous proceedings in this case.

2. Compare P. C. L. A. 15/38 (*supra*) and cases therein cited. See also note 2 to P. C. L. A. 11/40 (*ante*, p. 69) for other recent cases on Privy Council practice.

FOR APPLICANT : Abcarius.

FOR RESPONDENTS : Nos. 1 & 2 — Sanders.
No. 3 — Crown Counsel — (Hogan).
Nos. 4 & 5 — Absent.

## ORDER.

The point to be decided in this case is whether the judgment of the Supreme Court, the subject of this appeal, is a final judgment. It seems to me that the test, for the purposes of the interpretation of Article 3 of the Order in Council, as to whether or not a judgment is final is whether it finally determines the rights of the parties. The authority for that proposition is Privy Council Leave to Appeal No. 15/38 Yehoshua Hankin *v.* Zaki Rashid Ash Shanti and 7 others, in which the facts were different to those in the present case but the position was the same in that the case had been remitted to a lower Court for further findings of fact. In the present case the rights of the parties before they are finally determined must depend to a certain extent on the decision of the Settlement Officr, even though the principal matters in dispute have already been decided.

That being so I think that the judgment is not a final one and therefore Article 3(a) is not applicable. In the circumstances we feel most reluctant to exercise our discretion under Article 3(b) and we think that the application should be refused with costs to the first group of Respondents in an inclusive sum of LP. 10.

Delivered this 7th day of May, 1941.

*British Puisne Judge.*

CIVIL APPEAL No. 38/41.

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

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

IN THE APPEAL OF :—

Arieh Leopold Zwillinger. APPELLANT.

v.

Blanka Schuster. RESPONDENT.

*Custody of child, P. O. in C., Art. 47 — Law to be applied — Validity of mixed marriage — Jewish law on custody of minor children — Access to child.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv, dated the 31st of January, 1941 :—

HELD : 1. Jewish law applied as the father and the child were Jews of Palestinian nationality.

2. The mother having been described in various documents before and after marriage as a Jewess, the District Court was right in holding that she had been legally maried.

3. According to Jewish law the father was entitled to the custody of a male child over seven years unless he was not a suitable person. The fact that the father had re-married could not of itself affect this rule particularly as the father was willing to give the mother reasonable access to the child.

ANNOTATIONS :

1. On custody of minor children generally, *vide* H. C. 41/40 (1940, S. C. J. 232) and note 1, H. C. 10/41 (*ante*, p. 49) and, especially on the effect of re-marriage on the right to custody, H. C. 24/41 (*ante*, p. 161).

2. See, on the first point, C. A. 119/39 (1940, S. C. J. 38) and C. A. 9/40 (*ibid.*, p. 184).

3. On the validity of marriages between Jews and non-Jews, compare C. A. 9/40 (*supra*) and H. C. 23/40 (*ibid.*, p. 371).

FOR APPELLANT : Goitein and Reich.

FOR RESPONDENT : H. Cohen.

### JUDGMENT:

The parties to this appeal were married in Palestine about 1930, and a child was born to them and three years later they were divorced in Czechoslovakia. They are now fighting for the custody of the child, which the District Court has given to the mother.

The proceedings were brought under Article 47 of the Order-in-Council. The mother, who was the Plaintiff, is said to be of Czechoslovakian nationality ; the father and son are of Palestinian nationality. The question now arises, what law is to be applied under the Order-in-Council. Mr. Goitein submits that whether we take the personal law of the father, who was Defendant in the action, or the child, Jewish law applies, as both are Jews, and that is not controverted by the Respondent, who agrees that the Jewish law should apply.

It is said on behalf of the Respondent, that she was not legally married to the Appellant, because at the time of the marriage she was a Christian, and according to the Jewish law such marriage is null and void *ab initio*. -- Consequently the child is illegitimate and the father can claim no parental rights over him, the mother being the only legal guardian. The Court below found as a fact that the Appellant and Respondent were duly married. Furthermore, we have looked at documents, official and otherwise, in which the woman was described before and ofter marriage as a Jewess.

There was evidence that under Jewish law the custody of a Jewish male child, whose age is over seven years, is given to the father unless he is not a suitable person. The child in question is over seven, and there is no suggestion that the father is in any way an unsuitable person to have the child.

The District Court appears to have decided on general principles that as the father has remarried, and has a child by the second marriage, it is in the interests of the child that he should remain with his mother.

Mr. Goitein, on behalf of his client, the father, informed us that he is willing to give the Respondent, the mother, reasonable access to the child, and we think that that is a right and proper course for him to take.

In the result the judgment of the District Court will be set aside, and we order that the father shall have the custody of the child. No order as to costs.

Delivered this 8th day of May, 1941.

*Chief Justice.*

CIVIL APPEAL No. 60/41.

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

BEFORE : Trusted, C. J. and Rose. J.

IN THE APPEAL OF :—

Sima Browar-Glass, of Zurich, Switzerland, by her attorney Dr. Leon Bernfeld. APPELLANT.

v.

Meyer Socholotzky. RESPONDENT.

*Power of Attorney — Interpretation — Whether includes power to institute bankruptcy proceedings — Meaning of "proceeding", Ex parte Wallace.*

In allowing an appeal from the order of the District Court of Tel-Aviv, dated the 31st of March, 1941 :—

HELD : (Following *ex parte* Wallace) : The word "proceeding" in Clause 7 of the power of attorney was wide enough to cover an application for a receiving order in bankruptcy.

FOLLOWED : *Ex parte* Wallace, 14 Q. B. D. 22.

ANNOTATIONS :

1. On the interpretation of powers of attorney see also C. A. 72/40 (1940, S. C. J. 456).

2. On the meaning of the word "proceeding" compare Misc. Appl. 48/38 (1938, 2 S. C. J. 250).

FOR APPELLANT : Karwassarsky.

FOR RESPONDENT : Bedolach.

JUDGMENT:

The question in this case is whether or not a power-of-attorney which was given by a lady, who is absent from Palestine, to her agent in Palestine, entitles him to institute bankruptcy proceedings, the learned Judge of the District Court having held that it did not.

Article 7 of the power-of-attorney is as follows :—

> "To appear for me in any Court in any action or other proceeding which may be instituted against me and defend the same or suffer judgment to go against me, and to commence and prosecute any action or proceeding on my behalf in any Court in any matter as my said Attorney shall think fit."

Article 13 and 14 would also appear to be material. They provide :—

"13. If any person, firm or company indebted to me is or shall become bankrupt or be liquidated, to prove in the bankruptcy or liquidation for all debts due to me.

"14. Generally to act in the premises as fully and effectually as I myself could do if personally present and acting."

For the Respondent it is argued that Article 13 limits the powers of the attorney in bankruptcy matters to proving in bankruptcies, but with that view I do not agree. It seems to me clear that Article 7 provides that the attorney may defend actions and may commence and prosecute any action or proceeding, and I think that "proceeding" is wide enough to cover an application for a receiving order in bankruptcy, and if authority is wanted for that proposition it is to be found in *Ex parte* Wallace, 14 Q. B. D., page 22. Article 13 does not deal with defending and instituting proceedings, which as I have said are dealt with in Article 7, but deals with proving in bankruptcies.

Mr. Karwassarsky informs us that he did not draw the attention of the learned Judge to the authority to which I have referred, and it may be that had he done so a different decision would have been given.

The appeal will be allowed, and the case remitted to the District Court.

The Appellant will have an inclusive sum of LP. 10 as his costs.

Delivered this 2nd day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 61/41.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

George Talamas. APPELLANT.

v.

Baleem Barakat. RESPONDENT.

*Amendment of statement of claim — Entirely new issues not to be permitted.*

In dismissing an appeal from the Order of the District Court of Jaffa, dated the 24th January, 1941 :—

HELD : The Appellant never having alleged a partnership in his original claim the District Court was right in disallowing an amendment of the statement of claim asking for dissolution of the partnership, the appointment of a receiver and taking of accounts.

ANNOTATIONS : On amendment of the statement of claim see C. A. 261/40 (*ante*, p. 36) and note 4.

FOR APPELLANT : Shehadeh.

FOR RESPONDENT : Wittkowski.

JUDGMENT:

The Appellant never alleged a partnership in his original claim.

The relief he asked for was judgment for LP. 1995.816 mils. Now, he seeks by amendment of the statement of claim to get an order dissolving a partnership which he never alleged existed, for a receiver to be appointed, and for accounts to be taken, and all this after the issues have been settled. The learned Relieving President was correct in disallowing the motion, for to have permitted such an amendment would have been a gross injustice to the other side.

The appeal is dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 30th day of April, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 64/41.

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

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

IN THE APPEAL OF :—

Maurice Fischer. APPELLANT.

v.

Mordehai Gefen. RESPONDENT.

*Bills of exchange — Contribution between several avalists, Bills of Exchange Ord., Sec. 57(3), C. D. C. T. A. 189/37 — English principle of contribution between sureties, Halsbury, Vol. 16.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv, (in its appellate capacity), dated the 28th of February, 1941 :—

HELD : (Overruling C. D. C. T. A. 189/37) : The English principle of contribution between sureties applied and an avalist who had been called upon to pay was entitled to contribution from his co-avalist.

OVERRULED : C. D. C. T. A. 189/37 (Law Reports of the District Court in Tel-Aviv, 1937, p. 84).

ANNOTATIONS :

1. On the English principle referred to, see also Digest, Vol. 26, *pp.* 139 *seq.*, *Sec.* 2.

2. See, in addition to C. D. C. T. A. 189/37 (*supra*), C. A. D. C. T. A. 307/38 (Law Reports of the District Court of Tel-Aviv, 1939, p. 24).

FOR APPELLANT : Zakheim.

FOR RESPONDENT : Abrahami.

## JUDGMENT:

This appeal raises an interesting point, which has not before been considered by this Court.

The Appellant and the Respondent both signed an aval upon a promissory note. The note was in printed form, and the aval was in Hebrew, which has been translated :—

> "We guarantee mutually by aval for the maker (signor) of the bill."

and in English :—

> "Bon pour aval with joint and several liability for maker(s) of note."

Below that there were three dotted lines, upon the first of which the Appellant signed, and upon the second the Respondent.

The Appellant was called upon to pay, and did so, and now seeks contribution from the Respondent. He failed before the Magistrate and before the District Court, which relied upon an earlier decision of that Court, No. 189/37, Smilansky *v.* Ostrovsky, which was not appealed. It would appear that the basis of that decision was Section 57 of the Bills of Exchange Ordinance, which introduces the aval into what is otherwise substantially the English Law of Bills of Exchange, and provides in sub-section 3 that :—

> "When the giver of an aval pays the bill he has a right of recourse against the party whom he has guaranteed and against the parties liable to that party."

and the District Court held that that is exhaustive as to the rights of the giver of an aval.

With that contention I do not agree. It is true that there is no English law dealing with the position of givers of avals, but I think the general proposition that there should be contribution between sureties, the right to which "is not founded on contract, but is the result of a general equity arising at the inception of a contract of guarantee on the ground of equality of burden and benefit", (see Hailsham Vol. 16, p. 113) applies.

It is not now necessary to decide the rights under the sub-paragraph to which I have referred, of any giver of an aval who had been called upon to pay.

The appeal will, therefore, be allowed, and the judgments of the District Court and the Magistrate's Court set aside, and judgment will be entered for the Appellant in the sum claimed, with costs here and below. The costs in this Court will be on the lower scale, with the sum of LP. 10 for advocate's attendance fee.

Delivered this 8th day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 47/41.

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

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

IN THE APPEAL OF :—

Na'ame, also known as
Consuelo Mubarak Batarseh. APPELLANT.

v.

1. Jamileh, daughter of Issa Elias, widow of the late Jiries Mubarak el Batarseh,
2. Joseph, adopted child of the late Jiries Mubarak el Batarseh. RESPONDENTS.

*Constitution of District Court in succession matters, Succession Ord., Sec. 26(2) — Method of dealing with judgment given without jurisdiction — Whether judgment void.*

In dismissing an appeal from the order of the District Court of Jerusalem, dated the 18th of February, 1941 :—

HELD : 1. In the absence of an appeal, the question of a judgment given without jurisdiction might be tested by bringing an order in execution before the High Court.

2. As it was arguable that the District Court had been properly constituted in the present case, the matter should have been tested by way of appeal.

3. As the present Appellant could not appeal from the order in question she should either have accepted the order and asked that it be varied, or treated it as a nullity and applied for an order of

succession.

In either case she would have obtained an order which could have been considered by the Court of Civil Appeal.

4. Whilst it was doubtful whether the President of the District Court could hold that the original order was void *ab initio*, he had been right in holding that the application in its then form could not be entertained.

ANNOTATIONS :

1. On Courts being improperly constituted, see CR. A. 134/40 (1940, S. C. J. 504) and note.

2. For another recent instance of a judgment being given without jurisdiction see C. A. 173/40 (1940, S. C. J. 311).

FOR APPELLANT : Eliash.

FOR RESPONDENTS : Atalla.

## JUDGMENT:

Some time ago a succession order was made by the District Court of Jerusalem, constituted of two Palestinian Judges.

Later an application was made to vary it, which again went before two Palestinian Judges, who held that they had no jurisdiction to deal with it. In the result another application to vary was filed in September, 1940. This went before the President, and it is from his order that appeal is now made to this Court.

The application stated, *inter alia*,:—

> "The said order (the original order granting succession) is wrong in the following respects :—
>
> 1) This Honourable Court was not properly constituted as Section 26(2) of the Succession Ordinance provides that for the purposes thereof the Court must be constituted either by the President sitting alone or with one or more judges."

and concluded :—

> "Wherefore the Petitioner prays that the said order be altered by increasing the share of the widow to one half of the estate and by distributing the other half thereof among the sister and the brothers of the deceased as follows : .....".

There is old English authority for the proposition that a judgment obviously given without jurisdiction is a nullity. That may be so, but the difficulty seems to be, who is to decide if it was given without jurisdiction. Possibly in Palestine, in the absence of an appeal, the question might be tested by bringing an order in execution before the High Court, but I do not think this is quite that case, as it is at least arguable that by the combined effect of the Succession Ordinance and the Courts Ordinance, the Court which made the order was properly

constituted. I think, therefore, the matter should have been tested by appeal.

It is true that the present Appellant could not appeal, but in my view two courses were open to her, — either to accept the order and to ask that it be varied, or to treat it as a nullity and to apply for an order of succession. In either case, after the present Respondents had been heard, an order could have been made which could have been considered by this Court.

While feeling some doubt if in the circumstances it was open to the President to hold that the original order was void *ab initio*, I agree with him that the Appellant's application in its present form could not be entertained, and I think the appeal should be dismissed.

The Respondents will have their costs on the lower scale and we certify LP. 5 advocate's attendance fee.

Delivered this 25th day of April, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 55/41.

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

BEFORE : Trusted, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

M. Taylor. APPELLANT.

v.

George S. Shiber. RESPONDENT.

*Eviction for breach of contract — Failure to meet promissory notes — Interpretation of contract, C. A. 54/38.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 17th of February, 1941 :—

HELD : 1. The words "any such failure to pay in time shall also be considered ....." appearing in Clause 3 of the Contract referred to the non-payment of an instalment or of a note without the necessity of a demand for all the outstanding payments.

2. (Distinguishing C. A. 54/38) : Upon the terms of the contract failure to pay in time gave the lessor the right to terminate the contract.

DISTINGUISHED : C. A. 54/38 (1938, 1 S. C. J. 268).

ANNOTATIONS : On eviction for breach of contract compare C. A. 80/40 (1940, S. C. J. 162) and note.

FOR APPELLANT : Asal.

FOR RESPONDENT : Goitein.

JUDGMENT:

This appeal arises out of a claim by the Respondent for an order evicting the Appellant from certain premises. That claim is based on the terms of the contract of lease, whereunder the Appellant was the lessee and the Respondent the lessor.

A certain sum was paid in respect of rent when the lease was entered into, and the balance of the rent for the term was payable by two promissory notes. One of these, for sixty pounds, was due on the 30th of July last, and has not been paid.

Clause 3 of the contract provides :—

> "If any instalment is not paid on the day fixed in the contract, or if any note is not paid on the date of payment, all the outstanding rent and all notes outstanding shall become immediately due and payable together with legal interest. Any such failure to pay in time shall also be considered as a breach of the contract giving the lessor the right to terminate the contract without further notice and to claim all the damages as provided for in Clause 1."

and Clause 19 also provides that :—

> "every undertaking in this agreement shall be considered as of the essence of the contract, and any violation by the lessee of any of his undertakings shall be considered a breach of the whole contract, giving the lessor the right to terminate the contract ....."

It is argued by the Appellant that the forfeiture under Clause 3 does not become operative unless there has been a demand for all the outstanding payments and that this has not been met, but this interpretation seems to me to do violence to the language of the clause. The words "Any such failure to pay in time shall also be considered..." I think clearly must have reference to the non-payment of an instalment or the non-payment of a note.

Our attention has been drawn to Civil Appeal 54/38 reported in the third volume of Levanon, page 208.

Paragraph 7 of that judgment is as follows :—

> "The only obligation imposed upon the Respondent under the contract was to pay the rent. The payment of rent was secured by promissory notes. In strict application of the law there might be no obligation on the Appellant to present the notes for payment to the Respondent who was the maker of the notes. Yet I am not

prepared to go so far as to hold that by non-payment of the rent the Respondent has committed a breach of the contract or shown his unwillingness to perform it when the Appellant has taken no steps to collect the rent.'

We do not know what were the terms of the contract which the Court was considering in that case, but we do know the terms of the contract in this case, and it seems to me quite clear thereunder that a failure to pay in time gave the lessor the right to terminate the contract.

I think, therefore, the appeal fails, and it will be dismissed with costs on the lower scale, and we certify LP. 10 advocate's attendance fee.

Delivered this 28th day of April, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 54/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

1. Mahmoud Ahmad Younis,
2. Mohammad Ismail Abdul Fattah. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Abduction, C. C. O. Sec. 258 — Information for murder changed to one for abduction, C. C. O., Sec. 256, T. U. I. Ord., Sec. 31(7) — Charge should have been for murder, C. C. O. 214 — Plea of no case to answer — Charge amended by Court to one under Sec. 258 — President dissenting, T. U. I. Ord., Sec. 48 — Position of dissenting President — Failure to record findings of fact, T. U. I. Ord., Sec. 51 — Immaterial irregularity — Sentence, T. U. I. Ord., Sec. 72(2).*

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 27th of March, 1941, whereby the Appellants were convicted of abducting a person in order to subject him to grievous harm, contrary to Section 258 of the Criminal Code Ordinance, 1936, and sentenced to five years' and seven years' imprisonment each, respectively :—

HELD : 1. Where a person had been abducted, and had as part of the

same transaction been murdered, the charge should be laid under Sec. 214 for murder.

2. A person could not appear to have been guilty of an offence within the meaning of Sec. 48 of the Criminal Procedure (T. U. I.) Ordinance until the defence had been heard.

3. Where one member of a Court had taken a certain view and had been overruled by the majority and the case proceeded, it was his duty to direct his mind to the issues which were then before the Court, and to the suitability of the sentence after conviction upon those issues.

Nor was a presiding judge relieved of his obligations under Sec. 51 of the Criminal Procedure (T. U. I.) Ordinance because he disagreed with the majority of the Court as to an amendment of the charge.

4. The Court below was justified in coming to the conclusion that the Appellant had abducted the victim, Deeb, in order that he might be subjected or might be put in danger of being subjected, to grievous harm.

5. Notwithstanding the irregularities no miscarriage of justice had actually occurred.

6. The sentence should run as directed by the District Court, *i. e.* from the date of Appellant's arrest, and not from the date of this decision.

ANNOTATIONS :

1. Compare CR. A. 23/41 (*ante*, p. 99) and notes 1—3.

2. On Sec. 51 of the Criminal Procedure (T. U. I.) Ordinance, *vide* CR. A. 29/41 (*ante*, p. 137) and note 2.

3. On the fifth point see note 2 to CR. A. 27/41 (*ante*, p. 146).

FOR APPELLANTS : No. 1 — Beiruti.
No. 2 — In person.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant, Mahmoud Ahmad Younis, was convicted, together with another man who has not appealed, by the District Court, Jaffa, of an offence contrary to Section 258, — *i. e.* abducting in order to subject the person abducted to grievous hurt.

It appears that the Attorney General originally laid information against the Appellant and four other men, charging them with murder, but that he applied to the Court of Assize under Section 31(7) of the Criminal Procedure (Trial Upon Information) Ordinance, and in the result the Appellant and the other men were brought before the District Court, Jaffa, charged with abduction in order to murder, contrary to Section 256. As I believe I have remarked elsewhere, where a person

has been abducted, and has as part of the same transaction been murdered, it seems to me that the charge should be laid under Section 214. In this case the victim was in fact shot, and I assume that the Attorney General was satisfied that the actual shooting could not be linked up with the abduction.

In the District Court, at the close of the case for the prosecution, it was submitted that there was no case to answer upon the information then laid.

The majority of the Court decided that the information should be amended to a charge under Section 258, but the learned President disagreed with that view and expressed the opinion that the Appellants should be committed for trial for murder under the provisions of Section 48 of the Criminal Procedure (Trial Upon Information) Ordinance. That is a peculiar section and provides as follows :—

> "If it shall appear during a trial on information that the accused person has been guilty of an offence upon conviction of which he would be liable to a more severe punishment than could be awarded to him on conviction of the offence charged in the information, the Court .....".

With all respect to the learned acting Judge who was sitting as President of the Court, I fail to see how it can appear that a person has been guilty of an offence until the defence has been heard.

The information was amended, the Appellant pleaded to the amended information, and the trial proceeded.

At the close of the trial the Appellant was found guilty, and a so-called judgment was drawn up and signed by the two members of the Court, to which again the President of the Court dissented for the reasons given on the submission of the accused's advocate at the close of the prosecution.

It seems to me that where one member of a Court has taken a certain view and has been over-ruled by the majority and the case proceeds, it is his duty to direct his mind to the issues which are then before the Court, and to the suitability of the sentence upon conviction upon those issues. I would also point out that Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance provides clearly that the presiding Judge shall, upon his notes of the proceedings, record the findings of fact upon which the conviction was based, and I certainly do not think that because he disagrees from the majority of the Court as to an amendment of the charge, he is relieved of his obligations under this section. The proviso to the section, however, provides that no conviction shall be invalid because of failure to include a finding

of fact, if such fact shall appear to be sufficiently established by the evidence.

I have read through the evidence in this case, and I certainly think that upon it it was open to the Court to come to the conclusion that the Appellant, with others, abducted the victim, Deeb, in order that he might be subjected or might be disposed of as to be put in danger of being subjected, to grievous harm.

The case can hardly be regarded as a very satisfactory one, but we are satisfied that no miscarriage of justice has actually occurred.

The appeal will, therefore, be dismissed.

The Appellant was sentenced to five years' imprisonment as from the date of his arrest. By reason of the provisions of Sec. 72(2) of the Criminal Procedure (Trial Upon Information) Ordinance he is in danger of losing the benefit of a not inconsiderable period, but having regard to the fact that the trial was certainly open to criticism, we think that the sentence should run as directed by the District Court and not from the date of this decision.

Delivered this 15th day of May, 1941.

*Chief Justice.*

Mohammad Ismail Abdul Fattah withdrew his appeal.

*Chief Justice.*

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CIVIL APPEAL No. 67/41.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Alfred Salzmann. APPELLANT.

v.

Trust and Transfer Office "Haavara" Ltd. RESPONDENTS.

*Promissory notes — Allegation that promise was conditional, reference to other documents — Onus of proof, Jury v. Barker — Estoppel — Counterclaim, simple denial of liability without plea of set off.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 21st of March, 1941, and in allowing the cross-appeal :—

HELD : 1. (Following Jury *v.* Barker) : Where a document which might

be a promissory note had reference to some other agreement, it was upon the defendant to show that the promise was conditional.

2. The District Court was right in holding that the promise was not a conditional one, and in addition, the Respondent in a letter written by him had not denied that he had signed an unconditional promissory note.

3. The Respondent having merely denied liability but not having pleaded a set off, was not entitled to be given credit for a sum of money allegedly due to him by the Appellant.

FOLLOWED : Jury *v.* Barker, 113, R. R. 731.

ANNOTATIONS :

1. See, on the first and second points, Halsbury, Vol. 2, *pp.* 615—6, *No.* 841, Digest, Vol. 6, *pp.* 14 *seq., Sub-sec.* 1.

2. On the last point compare C. A. 109/40 (1940, S. C. J. 303) and note 2.

FOR APPELLANT : Shereshewsky.

FOR RESPONDENT : Krongold.

## JUDGMENT:

This is an appeal from the District Court of Jerusalem. The Respondents were the Plaintiffs in an action which they based upon what they described as a promissory note, which was a document, dated 4.7.39, and in the course of the proceedings became Exhibit A.

The Defendant, who is now the Appellant, in his defence, dated 3rd March, 1940, stated that the document filed by the Plaintiffs and designated by them as a promissory note was not a promissory note, as the promise therein contained, to pay the Plaintiffs the amount claimed, is conditional. He goes on to say that the said document in its opening refers to a writing dated 12.6.39, and its body mentions an agreement. The writing referred to on top of the document in turn relates to another writing, dated 4.6.39, which in turn is based on a memorandum of 7.9.38 embodying certain conditions under which the payments by Defendant to Plaintiffs of the amounts in question are to be made. He then pleads that there was no consideration for the note, and concludes the pleading by again saying that the sums mentioned in the documents attached to the statement of claim were to be paid on the fulfilment of certain conditions, which in fact have never been fulfilled, hence the agreement became ineffective and the documents attached to the statement of claim are worthless.

The document itself, *i. e.* Exhibit A., after referring to the matter as pleaded, said :—

"According to the agreement entered into I pay today to you the

> sum of LP. 250 in cash, and I undertake to pay another LP. 400 in the following manner .....".

and the LP. 400 is to be paid by four separate payments of LP. 100, and it is signed "A. Salzmann".

I think it is clear that if a document which may be a promissory note has reference to some other agreement, by the authority of an old case of Jury and Barker which is reported in Vol. 113 of the Revised Reports, p. 731, it is upon the Defendant to show that the promise is conditional ; to quote the words of the learned Lord Chief Justice therein :—

> "If the words of the note in question make the promise conditional it is on the defendant to show that."

It seems to me that the proper course was taken by the District Court in this case, when they called upon the Defendant to show that the reference in the note made it conditional, and not an unconditional promise to pay, and the Court below having heard evidence and examined the documents came to the conclusion that it was a good and binding promissory note.

Argument was addressed as to whether or not this note was conditional, which was based on the suggestion that the condition is to be found in what is Exhibit D., *i. e.* the memorandum of an agreement dated 7.9.38, but I think it is abundantly clear that the agreement to which reference is made in the note is Exhibit C. — that is a document in writing, dated 4.6.39. It is linked up clearly by what was Exhibit B., *i. e.* the letter of 12.6.39. It is quite true that Exhibit C. has reference to the matters which were discussed in Exhibit D., but it is clear that as a result a definite agreement was reached whereby a sum of LP. 750 was to be paid, LP. 250 of that and LP. 400 of that to be paid precisely in the terms of the promissory note. Exhibit C., which must be the agreement to which reference is made, contains no conditions at all, so there can be no question whatever of a condition applying to this note not being fulfilled, because there were not any, and if one, owing to the difficulties of the translation of documents and so on, had any doubt as to that position, it is entirely removed by subsequent correspondence between the parties.

In a letter dated 22.8.39 addressed to the Appellant, the Respondents wrote :—

> "You expressly stressed that this document had the meaning of a promissory note, and we are, therefore, extremely surprised that in spite of our demand you failed to pay."

In reply to that letter the Appellant never suggested that the document was not a promissory note, but he says, —

"that the dates of maturity agreed with you were fixed on the tacit understanding that I should until then receive all my monies too."

He may say that he was in a difficulty, but certainly did not say that he did not sign a promissory note or that the note was conditional.

It only remains to consider a notice in the nature of a counterclaim which was filed by the Respondents. It seems that the District Court allowed the Defendant in the action a sum of LP. 40 for various reasons which are explained in the judgment, but there is no plea in the defence of set off, there is merely a denial of liability. I do not think, therefore, that the Defendant having failed entirely on his main defence of liability is entitled now to say that if he is liable he is entitled to be given credit for a sum of money for some reason ; not having pleaded it, I certainly do not think he should recover it.

The appeal on the main issue fails. The cross-appeal succeeds, and the judgment of the District Court will be varied in so far as it reduced the amount claimed, and the Respondents will have judgment entered in their favour for the total amount claimed in the action, which was LP. 400. The order of the District Court as to costs will stand, and here the Respondents will have costs on the lower scale, and LP. 15 attendance fee. The order of the District Court as to interest will apply to the sum of LP. 400.

Delivered this 5th day of May, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 62/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPEAL OF :—

Zaki Mahmoud el Katnani. APPLICANT.

v.

The Attorney General. RESPONDENT.

*Management of premises used for smoking hashish, Dangerous Drugs Ordinance, Secs. 14 and 16 — Evidence of accomplice — Possession of hashish not proof of connection with management — Suggestion of Crown Counsel not evidence.*

In allowing an application for leave to appeal from the judgment of the

District Court of Jaffa, in Misdemeanour Case No. 379/40, dated the 5th day of May, 1941, whereby the Applicant was convicted of running a place for smoking hashish, contrary to Section 14(b), and of being in possession of utensils for smoking hashish contrary to Section 14(c) of the Dangerous Drugs Ordinance, read with Section 16 of the said Ordinance, and sentenced to six months' imprisonment, and in allowing the appeal :—

HELD : 1. The evidence of Mustafa Abed Tabikh, being that of an accomplice, required corroboration.

2. The suggestion of the Crown Counsel regarding the persons supplying hashish was not supported by evidence.

3. Possession of hashish by a person in a café was not sufficient to corroborate other evidence that he was concerned in the management of the premises.

ANNOTATIONS :

1. On offences under the Dangerous Drugs Ordinance see CR. A. 3/41 (*ante*, p. 10) and compare the Dangerous Drugs (Amendment) Ordinance, No. 1 of 1941.

2. See, on the first point, CR. A. 91/40 (1940, S. C. J. 341) and note 1.

3. On the second point, *cf.* C. A. 163/40 (1940, S. C. J. 299) and note.

FOR APPLICANT : Shehadeh.

FOR RESPONDENT : Crown Counsel — (Bell).

## JUDGMENT:

The Appellant was convicted under Sections 14(b) and 14(c) of the Dangerous Drugs Ordinance, 1936, which make it an offence to be concerned in the management of any premises used for preparing or smoking, *etc.* of opium or hashish, or to have in possession pipes or other utensils for smoking opium or hashish. The only evidence against him was that of a witness, Mustafa Abed Tabikh, whom the Court below regarded as an accomplice.

It may perhaps be noted that in his examination-in-chief all that this witness said against the Appellant was that another accused took hashish from the Appellant, and it was not until he was questioned by the Court that he gave direct evidence that the Appellant was "running" the café. It is only right to point out that after this evidence had been given the Appellant's advocate was allowed to cross-examine again.

The District Court rightly appreciated that this evidence required corroboration, being that of an accomplice, and they found it in the fact that when the Police were making enquiries the Appellant dropped a small packet containing a substance which looked like hashish.

Even assuming this packet contained hashish, can it be said that the fact that a person is in possession of hashish in a café in which

hashish is said to have been smoked, is any evidence that he was concerned with the management of that café ?

Crown Counsel suggests that it is the practice for the management to supply the hashish in such cafés, and therefore any person who is in a position to supply it may be assumed to be connected with the management, — but of this there is no evidence, it is only speculation.

I do not think the fact that a person is in possession of hashish in a café is alone sufficient to corroborate other evidence that he is concerned in the management of the premises.

It is not suggested that if he is not concerned in the management he was in possession of any pipes or other utensils.

This was an application for leave to appeal, and leave was granted and we heard the appeal. The Appellant will be discharged unless detained on any other charge.

Delivered this 15th day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 15/41.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

BETWEEN :—

Mudir-el-Awkaf El-Islamya El-Am. APPELLANT.

v.

The Village Settlement Committee, Zeita & 20 others. RESPONDENTS.

AND BETWEEN :—

Mudir-el-Awkaf El-Islamya El-Am. APPELLANT.

v.

The Village Settlement Committee, Zeita & 21 others. RESPONDENTS.

(By order of the Supreme Court dated the 7th of April, 1941).

*Land Settlement — Allocation of land to Government, Land Code, Art.* 105 — *Agreement entered into by Village Settlement Committee*

*and objected to by villagers — Powers of Village Settlement Committee, Land (S. of T.) Ord., Sec. 14, L. A. 38/33.*

In dismissing an appeal from the decision of the Settlement Officer, Tulkarm Settlement Area, dated the 30th of October, 1940 :—

HELD : 1. The Settlement Officer was justified in allocating certain lands to Government under Art. 105 of the Ottoman Land Code.

2. (Distinguishing L. A. 38/33) : A Village Settlement Committee was empowered by statute to represent the village in "matters of common interest", *i. e.* in matters in which the village as a whole was interested.

3. The Village Settlement Committee could not represent and bind individuals who had put forward their claims ; still less was it empowered to represent one section of the *Musha'a* holders as against another section.

DISTINGUISHED : L. A. 38/33 (2, P. L. R. 427, C. of J. 1934—6, 833).

ANNOTATIONS :

1. On Art. 105 of the Ottoman Land Code. *cf,* Goadby-Doukhan, The Land Law of Palestine, p. 51. See also CR. A. 65/40 (1940, S. C. J. 494).

2. Compare L. A. 38/33 (*supra*).

FOR APPELLANT : Zu'yter.

FOR RESPONDENTS : No. 1 — Mukhtar of Zeita Village, Haj Mohammad Nimer.
No. 2 — Crown Counsel (Hogan).
Nos. 3 & 6 — Moghannam.
No. 18 — Eliash.
Nos. 12, 14, 17, 20(a) & (b) — in person.
Others — absent, served.

JUDGMENT:

This is an appeal by the *Mudir-el-Awkaf* which arises out of the settlement of the Zeita lands.

It appears that certain of the *Musha'a* holders in that village sold their shares to the *Mudir* and to one, Moshe Smilansky, for, in the aggregate, considerable sums of money.

The history of the Zeita lands is complicated, and is dealt with at length by the Settlement Officer in his judgment.

The Appellant firstly complains of his decision with regard to certain lands in the *Basset* which he allocated to Government under Article 105 of the Land Code. There was evidence to support his findings as to this, and I do not think that we should interfere with them.

The difficulty in the case arises out of the shares which were sold, and which in settlement were renounced in favour of the Appellant and Smilansky. It is manifestly difficult to deal with transactions of this kind, and there are no substantive provisions in the law which can be applied.

It appears that between the hearing and the delivery of judgment an agreement was submitted to the Settlement Officer which purported to be made between the Village Settlement Committee, the *Mudir* and Smilansky.

The Settlement Officer states that he received a number of petitions from the villagers protesting against the terms of this settlement, and in the result he stated that however desirable an agreement might be, he could not approve this agreement.

The main ground of appeal is that he — the Settlement Officer — was bound by that agreement, and Dr. Eliash on behalf of Smilansky, who is a nominal Respondent, supports the Appellant in this contention. The argument is based upon the decision of this Court in Land Appeal No. 38/33, 2 P. L. R. p. 427. In that case is appears that an agreement was made by the Village Settlement Committee, which it was sought to make an order of Court. Considerable delay occurred, with the result that a newly appointed Village Settlement Committee, some fifteen months later tried to avoid the agreement, and this Court held that it could not do so. It may be pointed out that it does not appear from the record that any of the villagers objected to the original agreement.

The powers and duties of a Village Settlement Committee are statutory, and are to be found in Section 14 of the Land (Settlement of Title) Ordinance. It represents the village in matters of common interest — that I take to mean, matters in which the village as a whole is interested, *e. g.* village grazing lands, as distinct from claims which individual villagers may have. That, I think, also appears from the first paragraph on page 429 of the report to which I have referred, but with all respect to the Court in that case, I do not think a common interest depends upon the possibility of compromise rather than litigation. The Village Settlement Committee also represents persons who are not able to put forward their own claims at settlement.

I do not think the Village Settlement Committee has any statutory power to represent and bind individuals who can put forward their own claims ; still less do I think it has any power to represent one section of the *Musha'a* holders as against what is in effect another section of those holders.

In my view the Settlement Officer was right in holding himself not bound by this agreement.

Dr. Eliash admits that if the agreement is not binding then the decision of the Settlement Officer would seem to be fair and reasonable. With that view I agree, and I think the appeal should be dismissed.

Respondent No. 2 will have its costs on the lower scale and LP. 10 for attending the hearing. Respondents Nos. 3 and 6 will together have costs on the lower scale and LP. 15 advocate's attendance fees. Respondents Nos. 14 and 17, who appeared in person, will have LP. 2 each as travelling expenses. Respondent No. 18 will have no costs, as he does not ask for them.

Delivered this 19th day of May, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 65/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPLICATION OF :—

1. Abdallah Said Kanan,
2. Ishak Ibrahim Yahizkail. APPLICANTS.

v.

The Attorney General. RESPONDENT.

*Charge of keeping a brothel, C. C. O., Sec. 163(a) — Evidence of accomplices to be corroborated.*

In granting an application for leave to appeal from the judgment of the District Court of Jaffa, in Misdemeanour Case No. 359/40, dated the 13th of May, 1941, whereby the Applicants were convicted of managing a brothel, contrary to Sections 163(a) and 23 of the Criminal Code Ordinance, 1936, and sentenced to six months' and three months' imprisonment respectively, and in allowing the appeal :—

HELD : The material witnesses against the Appellants were accomplices and there was no corroboration of their evidence.

ANNOTATIONS : See note 1 to CR. A. 91/40 (1940, S. C. J. 341), and CR. A. 62/41 (*ante*, p. 189).

FOR APPLICANTS : Anabtawi.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

This is an application for leave to appeal.

The Court of Trial did not direct its mind to the need for corroboration, or its presence. The Applicants were convicted under Section 163(a) of the Criminal Code Ordinance of keeping a brothel. It is clear that the material witnesses who gave evidence against them were accomplices. One was a girl who said, "We were prostitutes in the home", and the other a man who said, "I know both Accused. I worked with them as a pimp."

The Crown Counsel admits that there is no corroboration sufficient to support the conviction.

We, therefore, grant leave to appeal.

The appeal is allowed, the conviction and sentence of the lower Court is quashed, and the Appellants are discharged unless they are detained upon any other charge.

Delivered this 28th day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 49/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Moshe David Hanoch Halevy. APPELLANT.

v.

1. The Attorney General,
2. Feivel Dimsky. RESPONDENTS.

*Expropriation of land — Assessment of value, Land (Expropriation) Ord., Sec. 10(b).*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 10th of March, 1941, in Land Case No. 15/40 :—

HELD : The representations made by the Appellant when applying for reductions of taxes on the property could be taken into account by the Land Court in assessing the value of the land for purposes of expropriation.

ANNOTATIONS : Compare L. A. 44/30 (C. of J. 885) ; generally, on assessing

the value of land, see C. A. 79/39 (1939, S. C. J. 493) and C. A. 229 & 230/40 (*ante*, p. 166).

FOR APPELLANT : P. Joseph and Eliash.

FOR RESPONDENTS : N. 1 — Junior Government Advocate — (Salant).
No. 2 — Danon.

JUDGMENT:

The Government expropriated certain land at Ramat Gan, and applied to the District Court of Tel-Aviv to assess the value. This it did, and the owner of the land now appeals to this Court.

There was considerable discrepancy between the evidence of the Government as to the value and that of the experts called by the owner, but it also appeared that the owner had on several occasions made representations as to the value of the property for purposes of taxation, and that as a result the value, for that purpose, had been reduced. By Section 10(b), second proviso, of the Land Expropriation Ordinance, this is a matter which may be taken into account.

In these circumstances we think there was evidence on which the Court could come to the conclusions to which it came, and the appeal will be dismissed.

The first Respondent will have his costs fixed on the lower scale and a sum of LP. 10 advocate's attendance fee. The second Respondent will have an inclusive sum of LP. 5.

Delivered this 13th day of May, 1941.

*Chief Justice.*

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HIGH COURT No. 26/41.

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

BEFORE : Trusted, C. J., Rose and Khayat, JJ.

IN THE APPLICATION OF :—

Izhak Gabriolovitch. PETITIONER.

v.

The Chief Execution Officer, Tel-Aviv and 6 others. RESPONDENTS.

*Execution — Delay in transfer of property — Property damaged — Right of highest bidder to withdraw, Execution Law, Art.* 111.

In refusing an application for an order to issue directed to the Respondent, calling upon him to show cause why the Petitioner should not be allowed to withdraw his bid of LP. 5000 in Tel-Aviv Execution Files Nos. 15114/38 and 14810/39, and to substitute therefor a previous bid of LP. 4000 without any liability for the difference, and/or alternatively to order a fresh assessment of the property :—

HELD : 1. The fact that the property had been damaged and depreciated in value might entitle the bidder to compensation, but did not give a right *per se* to withdraw.

2. *Quaere* whether a misleading advertisement as to the value of the property constituted a ground for withdrawal.

The Petitioner had, on the facts of this case, not in any way been misled.

3. Art. 111 of the Execution Law applied only in cases where the bidder had paid the purchase price and the property was not transferred within one month.

ANNOTATIONS :

1. On withdrawal of bids in execution, *vide* C. A. 255/40 (*ante*, p. 88) and note 1.

2. On misdescription of the property sold see H. C. 94/40 (1940, S. C. J. 547) and note 4.

FOR PETITIONER : Eliash.

FOR RESPONDENTS : Nos. 1, 5, 6 and 7 — absent — served.
No. 2 — Siev.
No. 3 — Dinstein.
No. 4 — B. Joseph and Caspi.

ORDER:

The only question in this application is whether or not the order of the Chief Execution Officer is good or bad. It reads :—

> "The bidder must either take the property and pay the price, or be liable for the difference between this and the next bidder to whom the property will be transferred."

In other words, is the Applicant entitled to withdraw his bid without paying the difference between his bid and the next bidder to whom the property will be transferred.

It is contended by the Applicant that the transfer has been delayed for a considerable time and that certain facts have arisen, and upon these he says he is entitled to withdraw. He says that the property has been damaged in certain ways and depreciated in value. For this

it may be he is entitled to be compensated, but it does not give a right *per se* to withdraw. He also says that a mistake in an advertisement as to the value of the property has misled him. Even if this had deceived him I doubt if it is a good ground for withdrawal, but on the facts of this case I am satisfied he was not in any way misled.

I think the real question is whether the Applicant can withdraw under Article 111 of the Execution Law. This article says :—

> "The Execution Officer must complete the transfer of the property to the bidder to whom it has been finally knocked down without delay. If the transfer be not completed within one month the purchaser has the option of cancelling the sale."

This means if the bidder pays the purchase price and the property is not then transferred to him in a month he can withdraw, but that is not the case here, and the purchaser has not paid the purchase money.

In the result the rule will be discharged, and Respondents Nos. 2, 3 and 4 will have their costs fixed at an inclusive sum of LP. 10 each.

Given this 1st day of May, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 64/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPLICATION OF :

Isaac Lemberg. APPLICANT.

v.

The Attorney General. RESPONDENT.

*Robbery — Plea of guilty — Temporary mental derangement, but no plea of insanity — Medical evidence — Special treatment.*

In granting an application for leave to appeal from the judgment of the District Court of Tel-Aviv in Criminal Case No. 53/41, dated the 6th of May, 1941, whereby the Applicant was convicted of robbery, contrary to Section 288(1) of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment, and in dismissing the appeal :—

HELD : 1. The Appellant having pleaded guilty and there being no sug-

gestion of insanity, but only that he had been temporarily mentally deranged, the conviction would not be interfered with.

2. The Appellant would be given special treatment and the sentence would run from the date of the judgment of the District Court.

ANNOTATIONS :

1. On the defence of insanity, *vide* CR. A. 8/40 (1940, S. C. J. 33) and note.

2. On appeals after a plea of guilty, *cf.* CR. A. 42/40 (1940, S. C. J. 160) and note 1.

3. See, on the last point, CR. A. 54/41 (*ante*, p. 183, on p. 186).

FOR APPLICANT : Goitein and Shvo.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

This is an application for leave to appeal.

The case presents difficulties. The Applicant, it would seem, although there is no record in the Court below as to the facts, saw someone else draw a substantial sum of money from the bank, followed him in the street some thousand yards, and struck him on the head with a bottle which he happened to have in his hand and took his money. There is no actual evidence as to why he had this bottle, but Mr. Goitein told us that he entertained his workers on that day, and that this bottle remained over. Be that as it may, it was a brutal attack, *prima facie* with the object of robbery. As against that, the offence took place in the public street of Tel-Aviv, during the day-time, with no sort of preparation for escape, as in an ordinary "hold up" of this kind.

It is said that the Applicant, before he came to Palestine, lived in Danzig, where he carried on business ; that as a result of his being a Jew he was badly treated by the organizations there, and that — to some extent — deranged his mind. So far as the actual case is concerned his wife gave a statement roughly to that effect, and a doctor was called to speak as to his present condition. The Accused himself made no statement, and I am at a loss to understand why he could not do so and explain these facts to the Court, as we are told he did to his advocates in prison.

The doctor who was called on his behalf says that he thinks that the Applicant was not in his normal state when he committed the crime, and in answer to the Court he further said :—

"I think that at the moment of act he was changed. The Accused understands what he is asked and his replies are reasonable. Generally Accused understands the acts he does. Cannot say to what degree he lost his consciousness and knew at time what he was

doing or not. I don't think further observation would alter my opinion."

We are, therefore, faced with a man who pleads guilty to a serious offence, who cannot put forward the defence of insanity, but on whose behalf it was said that he might not have known what he was doing at the time.

It does not seem to me as a matter of law that anything has been raised to justify us in interfering with this conviction and light sentence. The plea was a plea of guilty. There is no suggestion of insanity. There is only this suggestion that the Accused was temporarily mentally deranged, which is supported by the medical testimony to which I have referred.

The question now arises whether we should accede to the request that the Applicant should be given special treatment.

We grant leave to appeal, confirm the conviction and direct that the Appellant have special treatment in prison. The sentence to run from the date of the judgment of the Court of Trial.

Delivered this 28th day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 42/41.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hussein Ibn Mohammad Abu Sissa. APPELLANT.

v.

1. Yusef Ibn Ismail el Najjar, *alias* Abdul-Ash.
2. Mustafa Ibn Hussein Najjar,
3. Hissan Ibn Abdul Raheem Yusef Najjar,
4. Khalil Ibn Ali Abu Sissa,
5. Yusef Ibn Ali Abu Sissa,
6. Jebril Hussein Najjar. RESPONDENTS.

*Adjournments — Summoning witnesses — Admissibility of record of evidence in other proceedings — Findings of fact.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 8th of February, 1941 :—

HELD : 1. As Appellant's witnesses had appeared and their evidence been taken, there was nothing in the point that the adjournment was insufficient.

2. The District Court was right in disregarding a record of another case as no evidence had been led that the parties or the issues in the two cases were the same.

3. There was no reason to interfere with the findings of fact made by the District Court.

ANNOTATIONS :

1. On adjournments see note 1 to CR. A. 85/40 (1940, S. C. J. 328).

2. Compare, on the second point, C. A. 113/40 (1940, S. C. J. 192) and note 4 and C. A. 234/40 (*ibid.*, p. 439).

3. On the last point, *vide* C. A. 36/41 (*ante*, p. 142).

FOR APPELLANT : Cattan.

FOR RESPONDENTS : Nos. 1, 2, 3 & 6 — Shehadeh.
Nos. 4 & 5 — In person.

JUDGMENT:

This is an appeal from a judgment of the District Court of Jaffa.

The first point raised by the Appellant is that he was prevented from calling his witnesses at the trial. It appears that, in the first instance, the case was adjourned at the request of counsel for the Appellant, for his personal convenience, and that a new date was fixed for the hearing, which happened to be a Friday. The Appellant's witnesses, who were Moslems, declined to appear on that day and the Court, therefore, adjourned to the next day, a Saturday.

Mr. Cattan argues that this adjournment was insufficient to enable the witnesses to attend, as they resided at Gaza. It seems that at the sitting of the Court the Appellant's witnesses were not in fact present, but later in the morning the Appellant's counsel, according to the record, informed the Court that his four witnesses had arrived. Their evidence was duly recorded.

This seems to me to dispose of the first point in the appeal.

Secondly, the Appellant argues that the Court disregarded a certain document, which purported to be a certified copy of the evidence given by the first Respondent in another case, in which the parties were the same as those in the present proecedings.

No evidence was called to the effect that the Defendant in those proceedings was the same person as the first Respondent in the present case, or that the issues in the two cases were the same. This being so, I do not consider that the Trial Court erred in refusing to attach importance to this document.

As regards the other matters raised, the Court would seem to have considered them in its judgment and come to findings of fact from which we see no reason to differ.

The appeal is, therefore, dismissed with costs on the lower scale to include, as far as Respondents 1 to 3 and 6, the sum of LP. 15 for advocate's attendance fee. No order for costs as to Respondents Nos. 4 and 5.

Delivered this 27th day of May, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 75/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Ahmed Abdel Fattah el Yacoub,
2. Tewfiq Abdel Fattah el Yacoub. APPELLANTS.

v.

1. Joseph Halperin,
2. A. Hoter Ishay,
3. Abed Abdel Fattah el Yacoub. RESPONDENTS.

*Action for cancellation of mortgage — Property sold in execution pending proceedings — Jurisdiction of Land Court, C. A. 70/39.*

In allowing an appeal from the judgment of the Land Court of Haifa, dated the 28th of March, 1941, in Land Case No. 13/39, and in remitting the case for completion :—

HELD : (Distinguishing C. A. 70/39) : Although the property had in the meantime been sold in execution of the first mortgage, the Land Court had jurisdiction to decide whether the second mortgage should be cancelled.

DISTINGUISHED : C. A. 70/39 (1939, S. C. J. 383).
ANNOTATIONS : On the exclusive jurisdiction of the Land Court as to the validity of a mortgage, *vide* C. A. 154/40 (1940, S. C. J. 334) and note 2.

FOR APPELLANTS : No. 1 — Attallah.
No. 2 — Toister.
FOR RESPONDENTS : No. 1 — Levitzky.
Nos. 2 & 3 — absent — served.

## JUDGMENT:

This case raised an interesting point, and, so far as I am concerned, a novel one. The Appellants went to the Land Court to have a mortgage deed cancelled or set aside. In their original statement of claim they prayed :—

> "that judgment be given cancelling the said mortgage deed in respect of all and every one of the Plaintiffs herein, with costs and advocate's fees."

The mortgage in question was a second mortgage. While these proceedings in the Land Court were going on, the first mortgagee obtained an order for the sale of the property, and it was sold by public auction, the first mortgagee being paid, and the balance of the purchase price remaining in the hands of the Execution Officer.

We are not now concerned with the merits of the case, which turn on an allegation of lack of authority by an agent of the Appellants, but with the question if the Land Court was right in dismissing the action on the ground that it no longer had jurisdiction to entertain it.

Dr. Joseph, on behalf of the first Respondent, took the point — I am reading here from the record of the President — that :—

> "The real question in issue has faded out ; you cannot cancel the mortgage. ..... The land is gone. The money is just money ; it is not land. ..... The Court cannot give a declaration in a matter in which its jurisdiction is excluded by statute. ....."

The Land Court, accepting the views expressed by Dr. Joseph, gave a judgment saying :—

> "We hold that in this case there is and can be at present, no dispute as to ownership, mortgage or other registrable rights in respect of the immovable property, the subject matter of this action."

The Land Court accordingly dismissed the action.

Mr. Levitsky, for the first Respondent, fairly and rightly agreed that the action was originally properly brought before the Land Court. Could it continue the case, or must it be brought afresh in the District Court, entailing fresh proceedings and payment of fees ?

It is true that the Land Court cannot give judgment for a payment of money, see Serouri *v.* Abu Khater, C. A. 70/39, P. L. R. Vol. 6, p. 397, but in this case it was never asked to do so, and I can see no reason why it cannot still decide whether a mortgage which still exists should or should not be cancelled or set aside. On the result of its judgment may depend the rights in a certain fund into which the land has been converted.

We, therefore, find that the Appellants are entitled to succeed in

their appeal, and the judgment of the Land Court is set aside, and the case remitted for completion.

By agreement the Appellants together will be entitled to costs on the lower scale, and we certify LP. 10 as hearing fees.

Delivered this 21st day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 62/41.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

As'ad Bey Ghussein. APPELLANT.

v.

Shafouka bint Hefiz Bey Ghussein. RESPONDENT.

*Action based on admission — Underlying facts irrelevant — Proof of guardianship.*

In dismissing an appeal from the judgment of the District Court of Jaffa (sitting as a Court of Appeal), dated the 22nd of March, 1941, in Civil Appeal No. 135/40 :—

HELD : 1. As the claim was based upon an admission of indebtedness the question of jurisdiction did not arise.

2. The argument that advanced dowry could only be claimed before marriage failed for the same reason as an admission could not be repudiated for reasons of this nature.

3. Guardianship, being a formal act of a Court, had to be proved by a certified extract of the Court records and could not be proved by oral evidence.

ANNOTATIONS :

1. Compare S. T. 1/30 (1, L. R. P. 511, C. of J. 1255).
2. On admissions, generally, see note 2 to C. A. 102/40 (1940, S. C. J. 180).

FOR APPELLANT : Kamleh.

FOR RESPONDENT : Germanus.

JUDGMENT:

This is an appeal by leave from a judgment of the District Court of Jaffa given on appeal from a judgment of the Magistrate's Court. Both

Courts below gave judgment in favour of the present Respondent. The claim is based on an admission of indebtedness dated the 17th of August 1925. The question of jurisdiction, therefore, does not arise because the claim is on the admission of indebtedness and how that indebtedness arose is not a question before the Courts in any way at all.

With regard to the argument that the advanced dowry can only be claimed before marriage, the answer is the same. The action is based on an admission of indebtedness and an admission cannot be repudiated for reasons of this nature.

As to the question whether the late Tewfik Bey El Ghussein was the guardian of the Respondent, guardianship is a formal act of a Court and must be proved by a certified extract of the Court records. Obviously it cannot be proved by oral evidence.

The appeal must, therefore, be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee. It is a little difficult to see how leave to appeal was given and the case seems to have occupied much more time before the Courts than it was really worth.

Delivered this 29th day of May, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 125/40.

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

BEFORE : Trusted, C. J., Copland and Khayat, JJ.

IN THE APPEAL OF :—

The Village Settlement Committee of Arab en Nufei'at. APPELLANTS.

v.

Aharon Samsonov & 73 others. RESPONDENTS.

*Prescriptive title — Grazing and wood cutting — Pitching of tents.*

In dismissing an appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 21st of March, 1940 :—

HELD : 1. Grazing and wood cutting were rights recognised by law, but their exercise did not give any right to the land itself.

2. A prescriptive title could not be established by moving tents hither and thither over a tract of land.

ANNOTATIONS :

1. It was held in C. A. 122/39 (1940, S. C. J. 220) that pitching tents did not amount to "beneficial occupation" within the meaning of Sec. 18 of the Cultivators (Protection) Ordinance.

2. Generally, on what amounts to possession, see C. A. 95—97 & 138/40 (1940, S. C. J. 294) and note 3.

FOR APPELLANTS : Khadra and Khamra.

FOR RESPONDENTS : Nos. 1, 3, 5—9, 12, 14, 16, 17, 24, 26, 27, 29—31, 33, 34, 36—39, 46, 50, 57, 59—69 — Kaiserman.
Nos. 43, 48, 49, 51, 52, 55, 70—72 — absentees — served through Village Settlement Committee of Hadera.
No. 10 — Crown Counsel — (Hogan).
No. 23 — Krongold.
Nos. 4, 11, 13, 18—22, 28, 35, 40, 45, 47, 53, 54, 56, 58, 73 — absent — served.
Nos. 15, 25, 32, 44, 74 — deceased, one heir — absent — served.
No. 42 — in person.

## JUDGMENT:

In this case the Appellants claim certain land by prescription on the ground that for many years they have used the land as common grazing lands, and for wood cutting and camping sites.

It is clear that grazing and wood cutting are rights which are recognized by the law, but I do not think that their exercise gives any right to the land itself.

As to camping, whether or not the pitching of tents on the same spot for many years would give rise to prescriptive rights it is not necessary to determine, as in this case the Settlement Officer found that the tents were pitched in the most convenient and accessible places according to the seasons and occupations followed at the time. I do not think that by moving tents hither and thither over a tract of land the owners of the tents can establish prescriptive title to the land.

I would also point out that the L. S. O. also found :—

> "It is admitted that the Arab en Nufei'at have lived on the lands without interruption for many years, but that their existence there was permitted as relations between all parties were cordial until this litigation arose. The Arab en Nufei'at moved freely about the lands, were engaged in various occupations in Hadera and lived

on the very best possible terms with the colonists. The Defendants have paid the *werko* as registered owners, have drained the swamps, planted the eucalyptus and exploited the lumber. Because their possession did not expel the Arab en Nufei'at from the land, it does not follow that possession was abandoned."

The appeal will be dismissed, and Respondents No. 16 and No. 23 will respectively have their costs on the lower scale, and LP. 7.500 each attendance fee. Respondent No. 42 will have LP. 2 as travelling fees.

Delivered this 22nd day of April, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 57/41.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General on behalf of the Government of Palestine. APPELLANT.

v.

Jubran son of Fuad Sa'ad & 9 others. RESPONDENTS.

*Expropriation of land — Failure to cite all parties to original action, C. P. R. 313 — Right of appeal, Land (Expropriation) Ord., Sec. 11, C. P. R. 317 — Value of land to be assessed by Land Court as no agreement possible with persons failing to make out a good title to the land, Land (Expropriation) Ord., Secs. 8 and 15.*

In allowing an appeal from the judgment of the Land Court of Haifa, dated the 24th of March, 1941, in Land Case No. 17/40, and in remitting the case to the Court below :—

HEID : 1. There was no need to cite as Respondent an original Defendant who had been dismissed from the case in the Court below.

2. An appeal lay under Rule 317 of the Civil Procedure Rules in cases not covered by Sec. 11 of the Land (Expropriation) Ordinance.

3. The protection afforded by the latter part of Sec. 15 of the Land (Expropriation) Ordinance applied only in cases in which compensation had been awarded by the Court.

4. If the Respondents were unable to make out a good title to the land there could be no effective agreement within the meaning of Sec. 8 of the Ordinance.

ANNOTATIONS :

1. On expropriation of land, *cf.* C. A. 49/41 (*ante*, p. 195) and note.
2. See, on the first point, C. A. 89/40 (1940, S. C. J. 152) and note 2.

FOR APPELLANT : Crown Counsel — (Hogan).

FOR RESPONDENTS : Koussa.

JUDGMENT:

This is an appeal from a judgment of the Land Court of Haifa.

Two preliminary objections were raised by the Respondents. First, that Rule 313 of the Civil Procedure Rules, 1938, was not complied with in that one of the Defendants (No. 11) to the original action was not cited as a Respondent. It seems however that during the proceedings in the Trial Court the learned President dismissed this Defendant from the case and I do not, therefore, think that this objection is a good one. Secondly, it is contended that no appeal lies in a matter of this kind except under the provisions of Section 11 of the Land Expropriation Ordinance, Chapter 77 of the Revised Edition, which section does not cover the present case. I am of opinion, however, that except in cases where, as contemplated by Section 11, an award of compensation has been made, Rule 317 of the Civil Procedure Rules is applicable. It follows that in the present case an appeal lies to this Court.

As to the appeal itself, the point is a short one. It seems that Government and the ten Respondents agreed that the value of a certain plot of land which purported to be acquired by the former from the latter was LP. 3.500 mils per *dunum*. The Respondents, however, having failed in the view of Government to make out a good title to the land, Government invited the Land Court to assess the amount of compensation payable in order to obtain the benefit of the protection afforded by the latter part of Section 15 of the Ordinance, which reads :—

> "Such payment (*i. e.* of compensation paid into Court) shall discharge the promoters from all liability in respect of the compensation awarded to the extent of the amount so paid."

It is to be noted that these words apply only to cases in which compensation has been awarded by the Court. Whether this was the intention of the legislature is, in my opinion, immaterial in view of the absence of ambiguity in the words themselves.

It seems to me that learned Crown Counsel is right in his contention that if the Respondents are unable to make out a good title to the land

there can be no effective "agreement" within the meaning of Section 8 of the Ordinance.

The appeal must, therefore, be allowed and the case remitted to the Land Court to consider whether the Respondents have in fact failed to make out a good title to the land and, if they have so failed, to assess the compensation payable. The Appellant will have the costs of this appeal on the lower scale to include the sum of LP. 10 for advocate's attendance fee and an inclusive sum of LP. 10 in respect of the costs in the Court of Trial.

Delivered this 13th day of May, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 71/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPLICATION OF :—

Paul Wolfe Kantrovitz. APPLICANT.

v.

The Attorney-General. RESPONDENT.

*Charge of manslaughter, C. C. O., Secs. 212 and 213 — Conviction for causing death by want of precaution, C. C. O., Sec. 218, without amendment of the information, T. U. I. Ord., Sec. 31(3) — Fatal irregularity, T. U. I. Ord., Sec. 65(1) — Time for amendment of information, T. U. I. Ord., Sec. 31(2) — Autrefois acquit.*

In granting an application for leave to appeal from the judgment of the District Court of Jerusalem, dated the 16th of May, 1941, in Felony No. 23/41, whereby the Applicant was convicted of unintentionally causing the death of a child through want of precaution, contrary to Section 218 of the Criminal Code Ordinance, 1936, and sentenced to pay a fine of LP. 59, or in default three months' imprisonment, and in allowing the appeal : —

HELD : 1. The failure of the District Court to amend the information when continuing the trial under another section was fatal.

2. The appeal could not be dismissed on the ground that no miscarriage of justice had occurred.

3. An information could be amended at any time before judgment, but the District Court having acquitted the Appellant of the charge of manslaughter, it might be argued that the proceedings had come

to an end, and that there was no information left which could be amended, and this argument might support a defence of *autrefois acquit*.

ANNOTATIONS :

1. Previous proceedings in this case : CR. A. 127/40 (1940, S. C. J. 452) and CR. A. 23/41 (*ante*, p. 99).

2. On amendment of informations, *vide* notes to CR. A. 23/41 (*supra*) and CR. A. 54/41 (*ante*, p. 183).

3. See, on the second point, CR. A. 27/41 (*ante*, p. 146) and note 2, and CR. A. 54/41 (*supra*).

4. On the defence of *autrefois acquit*, see CR. A. 14/41 (*ante*, p. 53) and note 2.

FOR APPLICANT : Levitsky.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

In this case we granted leave to appeal.

The Appellant was originally charged with manslaughter under Sections 212 and 213 of the Criminal Code Ordinance. At the close of the case for the prosecution the Court of Trial gave the following ruling :—

> "We think the evidence does not disclose any case under Section 212, but there is one under Section 218 to answer here. We, therefore, acquit the Accused of the charge of manslaughter, and call upon him to plead to the charge of unintentionally causing the death of the child .....".

That Court did not amend the information, and in the result did not continue the trial of the Appellant on the ground that he had certain rights to elect. The Attorney General appealed, but that appeal was dismissed by this Court, as irregularity of procedure is not one of the grounds on which the Attorney General can appeal.

After the judgment of this Court the case was continued by the District Court on the application of the Attorney General, and without amending the information that Court heard the case against the Appellant under Section 218, and convicted him. He now appeals.

Section 31(3) of the Criminal Procedure (Trial Upon Information) Ordinance, as amended, is clear. It says that "where an information is amended, a note of the order of amendment shall be endorsed on the information." As I have said, the District Court continued the trial without complying with that requirement. To my mind the failure to do so was fatal.

It is submitted that under Section 65(1) of the Ordinance the appeal should be dismissed if no miscarriage of justice has actually occurred. I do not think we can accede to that suggestion.

It may be observed that the power to amend the information under Section 31(2) is given at any time during the proceedings before judgment. From the ruling of the District Court that I have quoted it will be seen that the Court acquitted the Accused of the charge of manslaughter — it is true they did so in the same breath in which they called upon him to plead to another charge, but it may well be argued that having acquitted him the proceedings were at an end, and there was no information left which could be amended, and on the facts of this case the same argument might support a defence of *autrefois acquit*.

The appeal will be allowed, and the conviction and sentence quashed.

Delivered this 29th day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 71/41.

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

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

IN THE APPEAL OF :—

The Attorney General. — APPELLANT.

v.

Yoseph Azta. — RESPONDENT.

*Claim for ownership of land and for dispossession — Jurisdiction of Land Court, Land Courts Ord., Sec. 3, Land Courts (Am.) Ord., Sec. 2 — Mulk-mahlul lands — Undisputed possession for over 15 years, Mejelle, Art. 1660 — Previous recovery action dismissed, res judicata — Whether fifteen years' occupation in respect of mulk-mahlul sufficient, Disposal Law, Art. 15 — raqabe not affected.*

In dismissing an appeal from the judgment of the Land Court of Tel-Aviv, dated the 25th of March, 1941, in Land Case No. 22/39 :—

HELD : 1. The question whether a claim for dispossession could have been made in the Land Court in December, 1939, was academic in view of Sec. 2 of the Land Courts (Am.) Ordinance, 1939.

2. Government having failed in an earlier action for dispossession in respect of plot 211, the matter was *res judicata*.

3. There was evidence upon which the Land Court could find that the Respondent had been in undisputed possession of plots 210 and 211 for over 15 years.

4. A fifteen years' period of occupation was a good defence to an action for dispossession from *mulk mahlul* land as Art. 15 of the Law of Disposition related only to the *raqabe* of those lands with which the present proceedings were not concerned.

ANNOTATIONS :

1. On *mulk mahlul*, see Goadby-Doukhan, The Land Law of Palestine, *pp.* 258 *seq.*

2. See, on the second point, note 2 to C. A. 42/41 (*ante*, p. 200).

3. *Cf.* also P. C. 56/38 (1940, S. C. J. 277).

FOR APPELLANT : Doukhan.

FOR RESPONDENT : Olshan and Etzioni.

## JUDGMENT:

In this case the Attorney General on behalf of the Government, who is the Appellant, sued the Defendant (now the Respondent) in the Land Court of Tel-Aviv, asking for a declaration of ownership of certain land, and *inter alia* for an order for dispossession from the said plots to be made against the Defendant, and that an order be made for the demolition of a certain building, the huts and the fence. The statement of claim was filed on the 4th of December, 1939, and it is doubtful, therefore, if a claim for possession could have been made in the Land Court. Having regard, however, to the amendment of Section 3 of the Land Courts Ordinance, enacted in Section 2 of the Land Courts (Am.) Ordinance, 1939, which came into force on the 1st of January, 1940, the point is academic.

The property in question consisted of three plots, Nos. 210, 211 and 212, of certain land in Tel-Aviv.

Judgment was given by the Land Court for the Plaintiff in respect of plot 212, and as to this there is no notice of cross-appeal, and we are therefore, not concerned with it.

The land in question is what is sometimes called *mulk-mahlul, i. e. mulk* property which has fallen to the State by reason of the death of the owner without heirs, and it is so registered in the name of the High Commissioner.

I would point out that the proceedings may appear to have been complicated by a passage in the judgment of the Land Court, which reads :—

> "The present claim is in respect of parcels No. 210, 211 and 212, ownership of which the Defendant claims by possession for a period of over 15 years, the period of prescription in respect of *mulk* property."

This no doubt was inserted by inadvertance, as the Defendant did not, nor does he now, claim ownership of the land.

The Defendant's case was, and is, that owing to the period for which he has occupied the land, and having regard to the circumstances in which he first did so, he is entitled to rely upon Article 1660 of the *Mejelle* as a defence to the Government's claim for possession.

The Defendant, in his evidence-in-chief, stated that he had been in possession of the land for nineteen years, that he purchased it and paid money for it, and that parcels 210 and 211 form one piece of land, and there was a fence around it. In cross-examination he explained how he came to buy the land by what appears to have been a rough and ready transaction. Strictly speaking he did not buy the land but entered into a contract to purchase. He did say that he purchased 416 *dra's*, that he did not know the exact area, and :—

> "I am in possession of more than this. There were no boundaries and no plans. I fenced the land on an area bigger than I purchased. Now it transpires I enclosed six or seven hundred *pics*."

Whether in the cross-examination Plaintiff was referring to two plots of land, or three, was not made clear.

I may point out that earlier proceedings were taken by Government in the Magistrate's Court to recover possession of plot 211. They failed, and the District Court upon appeal upheld the Magistrate's decision, although on other grounds. No appeal was made to this Court from the decision of the District Court, so that it would appear that this question is *res judicata*.

In these circumstances the Land Court found that the Defendant has been in undisputed possession of plots 210 and 211 for over fifteen years. I take this to mean that the possession is such that it raises a good defence to the Government's action, and I think there was evidence upon which the Land Court could so find.

Mr. Doukhan, on behalf of Government, contends that as the land is *mulk-mahlul* the period of occupation constituting a good defence to a claim for possession is thirty-six years. That argument is based upon Article 15 of the Law of Disposition, *A. H.* 1331 (Tute, p. 171), which article says that the period of prescription in cases relating to the *raqaba* of "these lands" (*inter alia mulk-mahlul*) is thirty-six years. There may be argument as to whether this article has been well translated, and there may be argument as to the precise meaning of *raqaba*, but it does

not seem to me that these proceedings are concerned with the *raqaba* of the land. There is certainly no question as to changing the category of the land, nor changing the ownership of the land, which will still remain in the Government. The only question is, has the Government, by delay, lost its right to obtain possession, — and it does not seem to me that the article applies to such a case.

The land in question is already registered in the name of the High Commissioner in trust for the Government of Palestine. I suppose that the Appellant is entitled, if he desires it, to a declaration that that is a correct registration as against the Respondent, but I think that his appeal against the decision of the Land Court, refusing an order for possession, must be dismissed.

The Respondent will have his costs on the lower scale and we certify the sum of LP. 10 for attending the hearing.

Delivered this 30th day of May, 1941.

*Chief Justice.*

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SPECIAL TRIBUNAL No. 1/41.

IN THE SPECIAL TRIBUNAL.

BEFORE : Trusted, C. J., Rose, J. and Sheikh Hussam Eddin Eff. Jarallah.

IN THE APPLICATION OF :—

Aghabi Karakosian Husseini. APPLICANT.

v.

Farida bint Khalil Abu Ghanem. RESPONDENT.

*Special Tribunal, P. O. in C., Art.* 55 — *Jurisdiction re administration of an estate, P. O. in C., Arts.* 51(1) *and* 52 — *Change of community, Religious Community* (*Change*) *Ord., Sec.* 4(1), *P. O. in C., Art.* 51.

In deciding, upon reference from the District Court of Jerusalem in Probate Case No. 16/40, whether the administration of the estate of Ihsan Abdul Muhsen el Husseini was within the jurisdiction of the *Sharia* Court, or of the District Court :—

HELD : 1. As the deceased had re-embraced Islam before his death the administration of his estate was a matter for the *Sharia* Court.

2. The *Sharia* Court had to consider the provisions of Sec. 4(1) of the Religious Community (Change) Ordinance.

ANNOTATIONS :

1. Other Special Tribunal decisions : S. T. 4/25 (C. of J. 1244), S. T. 1/28 (1, L. R. P. 395, C. of J. 126), S. T. 2/28 (1, L. R. P. 377, C. of J. 1601), S. T. 1/30 (1, L. R. P. 511, C. of J. 1255) and S. T. 1/35 (C. of J. 1934—6, 768, P. P. 9.ii.35).

2. *Cf.* C. A. 246/40 (*ante*, p. 17) and H. C. 24/41 (*ante*, p. 161) and note 2.

3. On change of Religious Community, *vide* H. C. 5/30 (C. of J. 131), H. C. 87/32 (C. of J. 1265), H. C. 52/37 (P. P. 21.xi.37) and H. C. 23/40 (1940, S. C. J. 371).

FOR APPLICANT : Elia.

FOR RESPONDENT : Asal.

## DECISION :

It appears that Ishan Abdul Muhsen el Husseini was born a Moslem, that he became a member of the Latin Community, and it is said that he married in accordance with the law of that Community. He re-embraced Islam, and died a Moslem.

Application is made to this Tribunal under the second part of Article 55 of the Order-in-Council with regard to the administration of his estate.

It is clear that successions, wills and legacies are matters of personal status under Article 51(1). Article 52 provides that Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems who are Palestinian citizens.

I think it is clear, therefore, that the administration of the deceased's estate is a matter for the *Sharia* Court.

Section 4(1) of the Religious Communities (Change) Ordinance, which is validated by Article 51 of the Order-in-Council (as amended) is a substantive provision of the law, which should be considered by the *Sharia* Court when this matter comes before it.

We make no order as to costs.

Delivered this 24th day of May, 1941.

*Chief Justice.*

*President, Sharia Court of Appeal.*

CIVIL APPEAL No. 58/41.

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

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

IN THE APPEAL OF :—

Zvi Sederovsky. APPELLANT.

v.

Zevulun (Zavel) Kwartin. RESPONDENT.

*Bankruptcy — Whether debtor "carried on business" in Palestine, Bankruptcy Ord., Sec.* 3(1)(*c*) *— Banana-orange grove as business — Act of bankruptcy, onus of proving fraudulent transfer — Discretion of District Court under Sec.* 6(6) *of the Bankruptcy Ordinance.*

In dismissing an appeal from the Order of the District Court of Haifa, dated the 17th of March, 1941, in Civil Case No. 53/40 :—

HELD : 1. The question whether a person is carrying on business in Palestine was largely a question of fact.

2. *Quaere* whether on the facts of this case the holding of a banana-orange grove did not amount to carrying on a business.

3. It was on the petitioning creditor to prove the fraudulent transfer of property which had been alleged as an act of bankruptcy.

4. In the circumstances of this case, and having regard to the offer of re-transfer made to Appellant by the son of the debtor, the District Court was right in dismissing the petition.

ANNOTATIONS :

1. See, on the first and second points, Halsbury, Vol. 2, *pp.* 61 *seq., No.* 74, Digest, Vol. 4, *pp.* 26 *seq., Sub-sec.* 3.

2. On the last point, *vide* Halsbury, Vol. 2, *pp.* 80 *seq., Sub-sec.* 1, Digest, Vol. 4, *pp.* 155 *seq., Sec.* 2. See also C. A. 60/39 (1939, S. C. J. 283).

FOR APPELLANT : Levin and Lipshitz.

FOR RESPONDENT : Seligman.

### JUDGMENT:

In this case there has been considerable dispute between the parties, and the litigation took the form of bankruptcy proceedings, but I understand only the present parties are interested, and that there are no other creditors. The District Court dismissed the petition, and the petitioning creditor appeals.

The first point taken by the debtor, who is not in Palestine, was that the Palestine Courts have no jurisdiction to deal with the matter, as he, the debtor, was not carrying on business in Palestine as required by Section 3(1)(c) of the Bankruptcy Ordinance. It seems to me that this is largely a question of fact. The debtor's primary business is a cantor, but I do not think that he is prevented from carrying on other business. It has been found as a fact by the Court below that the Respondent held certain properties in Palestine, and among them has a banana-orange grove in Migdal.

In our view a man may hold a banana-orange grove and yet not be considered as carrying on business ; but it may be that he is carrying on business if he sells the produce and uses the proceeds to pay wages and other expenses. His creditors are entitled to be paid, and it would seem only right that they should have recourse to bankruptcy proceedings if he does not pay them for materials and so on which have been used by him in order to earn, or try and earn, money. In this case the learned Judge found that the debtor was not carrying on business, but upon the evidence I should be disposed to come to a different conclusion. However, the matter is of no great consequence owing to the view which we take on the other point.

The act of bankruptcy alleged was that there was a fraudulent transfer of certain property by the debtor. The onus of proving this fact is on the petitioning creditor. The learned Judge, in the tenth paragraph of his order says,

> "The point whether the Respondent made a fraudulent transfer of his properties is also not without some doubt."

This seems to show that the learned Judge was not satisfied that the onus had been discharged. It is clear also that the property was transferred to the son of the debtor, who before and after transfer offered to re-transfer the property to Petitioner to settle his father's outstanding debt. In these circumstances we think the learned Judge was entitled to dismiss the petition under Section 6(6) of the Ordinance.

The appeal, therefore, fails. Respondent will have costs on the lower scale, and we certify LP. 10 for attending the hearing.

Delivered this 20th day of May, 1941.

*Chief Justice.*

CRIMINAL APPEAL No. 66/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Kasim Abed el Razzak Abdul Kader. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal Procedure — Depositions of absent witnesses — Adjournments — Case remitted for additional evidence to be taken and additional findings of fact to be made, T. U. I. Ord., Secs.* 71(1)(*b*) *and* 71(2).

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 13th of May, 1941, in Criminal Case No. 106/41, whereby the Appellant was convicted of manslaughter, contrary to Sections 212 and 213 of the Criminal Code Ordinance, 1936, and sentenced to fifteen years' imprisonment, and in remitting the case with directions :—

HELD : 1. The District Court was wrong, in the circumstances, in refusing an adjournment.

2. The case would be returned to the Court below to hear the evidence of the Medical Officer, and in the light of his evidence to make fuller and additional findings of fact upon which the conviction had been based.

ANNOTATIONS :

1. On adjournments in criminal cases, *vide* CR. A. 85/40 (1940, S. C. J. 328) and note 1.

2. This seems to be the only instance of a case remitted by the Court of Criminal Appeal for fuller or additional findings of fact under Sec. 71(2) of the Criminal Procedure (T. U. I.) Ordinance as enacted in Sec. 30(2) of the Criminal Procedure (T. U. I.) (Am.) Ord., 1939.

FOR APPELLANT : Salah.

FOR RESPONDENT : Crown Counsel — (Bell).

### JUDGMENT:

In this case the Appellant was charged before the District Court of Jerusalem with manslaughter, in that he caused the death of his wife. One of the principal witnesses against him was Prosecution Witness

No. 2, Awwad Ahmad el Khatib, who swore that the deceased woman, before she died said, "My husband has killed me."

Now, unfortunately as it turned out, the Medical Officer who examined the deceased woman after her death, was not called at the trial. It seems that he was absent from Palestine, and we are told that short notice was given to the defence that it was proposed to read his deposition in his absence. In the circumstances the defence applied to the Court for an adjournment, which was refused, and the Court recorded upon the proceedings :—

> "We have had too many adjournments in our cases already, for one reason or another, this session, *i. e.* reasons which the Court had no alternative but to accept."

While I sympathize with District Courts which are asked to adjourn criminal cases and so increase the number of persons who are awaiting trial, it must be borne in mind that each case must be decided on its merits. In this case the Court may have been influenced in refusing to grant this adjournment by the number of other adjournments that had been granted. Be that as it may, the medical evidence is before us and it appears that the deceased received several stab wounds, and I gather one of them penetrated the heart. It is desired by the defence to cross-examine the doctor with a view to showing that on this evidence it would not have been possible for this woman to have made the statement which the witness Awwad Ahmad el Khatib said that she made.

Whether that would or would not affect the mind of the Court is not for us to speculate. There was other evidence besides the statement by the wife before the Court below, but we do not know from the judgment what effect, if any, that statement had on the mind of the Court.

We, therefore, feel that the ends of Justice would be well served by sending the case back to the Court of Trial with a direction that they should hear the evidence of the Medical Officer who made the report, and the cross-examination of that officer, and we direct that under Sections 71(1)(b) and 71(2) of the Trial Upon Information Ordinance the case be returned to the Court below to hear the evidence of the Medical Officer, and in the light of his evidence to make any further finding of fact that may be necessary, and to make fuller and additional findings of fact upon which the conviction was based.

Delivered this 28th day of May, 1941.

*Chief Justice.*

CIVIL APPEAL No. 80/41.

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

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

IN THE APPEAL OF :—

Nicola Shihadeh el Natour. — APPELLANT.

v.

1. 'Azar Salameh Barbar,
2. Khader Saleh Hassan,
3. Musa Daoud Naser,
4. Jiryes Ibrahim el Keileh. — RESPONDENTS.

*Right of way — New road built in place of old one which had been built over — Right to close road, Mejelle, Art. 1226 — No proof of ab antiquo user.*

In allowing an appeal from the judgment of the Magistrate's Court of Ramallah, in Civil Case No. 39/41, dated the 29th of March, 1941 :—

HELD : There being no evidence that there had existed an *ab antiquo* right to use the old road or that there was any agreement by the Appellant about the road when he built the house, the Appellant was entitled to a declaration that the Respondents did not enjoy a right of way.

ANNOTATIONS :

1. Palestine authorities on easements are collated in note 2 to C. A. 182 & 185/40 (1940, S. C. J. 343).
2. On *ab antiquo* user see C. A. 25/40 (1940, S. C. J. 91) and note.

FOR APPELLANT : Muhtadie.

FOR RESPONDENTS : No. 1, 2 and 4 — Kamleh.
No. 3 — Absent, served.

## JUDGMENT:

This case is concerned with a right of way or footpath over which difficulty has arisen. The District Officer intervened, and as a result of his intervention the Appellant commenced proceedings in the Land Court and asked for a declaration that the Respondents enjoy no right of way, and that they be restrained from passing over his land.

The facts as alleged are that some fifteen years ago the Appellant constructed a house upon what is called the old "road", over which the villagers had been used to pass, and that he allowed them to

use a new "road" at the back of his house, which is the subject matter of these proceedings. Some time later the Appellant closed this new "road" and prevented the Respondents using it. The Respondents complained to the District Officer, who ordered the Appellant to re-open the road and to take legal proceedings in Court if he wished to establish his right.

So far as the new road is concerned there is no evidence to show that it existed *ab antiquo,* on the contrary, the evidence shows that it came into existence some ten or fifteen years ago, after the house was built.

The Magistrate in his judgment stated :—

> "Article 1226 of the *Mejelle* clearly states that the Plaintiff has the right to revoke his permission if there was no consideration for the grant, but in this case it was proved that the consideration for that road was the right of way of the inhabitants over the old road on which the Plaintiff constructed his house, therefore the Plaintiff has no right to revoke this grant which was given by his own free will. I hereby dismiss the claim of the Plaintiff."

but there is neither evidence nor finding that the old road was *ab antiquo,* and that the public had acquired a right therein, nor is there any suggestion of any agreement by the Appellant about the road when he built this house.

The appeal will be allowed, and the Magistrate's order set aside, and the Appellant will have the order which he sought, with costs in the Magistrate's Court and here on the lower scale, and LP. 5 advocate's attendance fee.

Delivered this 4th day of June, 1941.

*Chief Justice.*

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HIGH COURT No. 38/41.

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

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

IN THE APPLICATION OF :—

Fakhriyyeh Abdul Razzak Touqan. PETITIONER.

v.

1. The Chief Secretary to the Government of Palestine,

2. The Accountant General for the Government of Palestine,
3. The Attorney General on behalf of the Government of Palestine,
4. Samiha Fahmi el Nashashibi. RESPONDENTS.

*Pension — Deceased Moslem officer leaving two widows — Right of both widows to participate equally, Pensions Ordinance, Sec.* 18A — *Power to discriminate between several widows on account of children.*

In granting an application for an order to issue, directed to the Respondents, calling upon them to show cause why Petitioner should not be treated on the principle of equality with the second wife of the late Afif Abdul Razzak Touqan (fourth Respondent), who is a Moslem like Petitioner, and that the annual pension granted to the widows be divided equally between Petitioner and the fourth Respondent, the two wives each to be given one-half of one-fourth of the annual pension allotted to the widows, equal in figures to LP. 87.500 mils, and that the order granting Petitioner LP. 60 be cancelled :—

HELD : 1. A comparison of paragraphs (i) and (ii) of Sec. 18A of the Pensions Ordinance showed that the Legislature intended one pension to be paid in respect of the widow or widows.

2. When the High Commissioner had exercised his discretion and granted a pension, he had performed the functions vested in him, and it became the duty of the administrative officer charged with giving effect to the High Commissioner's decision, to pay the widow entitled to the pension.

3. In the case of a deceased Moslem officer leaving more than one widow, it was the duty of the administrative officer to divide the pension equally between the widows, unless possibly it could be shown that according to the Religious law applicable their rights in the estate differed.

4. In the present case the rights of the two widows according to the *Sharia* law were equal and the fact that one of them had children was immaterial as Sec. 18A of the Pensions Ordinance provided expressly for children in their own right.

5. The Accountant General would be directed, so long as the other widow was living and entitled to a share in this pension, to pay to the Applicant half the pension granted.

ANNOTATIONS : For other authorities on pensions, *cf.* C. A. 136/33 (2, L. R. P. 114, C. of J. 1415) and C. A. 70 & 90/36 (1937, S. C. J. 127, C. of J. 1934—6, 307).

FOR PETITIONER : Moghannam and Zu'yter.

FOR RESPONDENTS : Nos. 1, 2, 3 — Solicitor General.
No. 4 — Haddad.

ORDER:

This is the return to an order *nisi* directed to several Government Officers, calling upon them to show cause why the pension granted — owing to the death of Afif Abdul Razzak Touqan — in the words of the order, should not be divided equally between the Petitioner and the fourth Respondent.

We are fully alive to the general principles as to the payment of pensions, and as to the provisions of the law which provide that an officer has no absolute right to compensation for past services or pension, but this case raises an unusual point.

The Pensions Ordinance was amended in 1938 by the introduction of a new Section 18A., which provides :—

> "Where an officer in the service of Palestine dies in consequence of injuries which in the opinion of the High Commissioner were directly attributable to serious and wide-spread disturbance in Palestine, it shall be lawful for the High Commissioner to grant, in lieu of any award under Section 18 of the Ordinance and in addition to the grant, if any, made to his legal personal representative under Section 17 of this Ordinance :—
>
> (i) if the deceased officer leaves a widow, a pension to her, while unmarried and of good character, at a rate not exceeding one-fourth of his pensionable emoluments ;
>
> (ii) if the deceased officer leaves a child or children, a pension in respect of each child until he or she attains the age of eighteen years, at a rate not exceeding one twenty-fourth of his pensionable emoluments :—
>
> Provided ....."

In this case the officer who met his death in unfortunate circumstances was a Moslem, and he left surviving him two widows.

I think it appears from a comparison of paragraphs (i) and (ii) above, that the Legislature intended one pension to be paid in respect of the widow or widows, and the learned Solicitor General who opposes the order bases his argument upon that interpretation, and does not contend that two widow's pensions are payable.

It is not suggested that the High Commissioner (or, as the law was, the High Commissioner in Council) has not a discretion to grant a pension : the question raised is, what is the position when he has exercised that discretion ?

I think that the fair interpretation of the section is that when the High Commissioner has exercised that discretion, and has granted a pension to the widow, he has performed the functions which are vested in him, and it becomes the duty of the administrative officer charged

with giving effect to the High Commissioner's decision, to pay the widow entitled to the pension ; in the case of a deceased Moslem Officer there may be more than one widow. (We are told that in this particular case reference was made to the *Sharia* Court to decide if the present Applicant was a lawful widow, and it was decided that she was.).

The administrative officer may, therefore, be called upon to distribute a pension of an amount which had been fixed between the widows of the deceased officer so long as there is more than one. If one becomes disentitled, or dies, presumably the pension continues for the benefit of the survivor or survivors.

A letter was written by the Acting Accountant General on the 14th of March, 1941, addressed to Sitt Fakhriyyeh Touqan, the Applicant, in which he says :—

> "I have the honour to refer to your letter of the 14th March, 1941, regarding the pension granted by Government to the heirs of your late husband, Afif Bey Touqan, and the emoluments on which it was calculated, and to furnish you with the following information :—
>
> LP. 29.166 mils pension to the son Muhib
> LP. 29.166 mils pension to the son Munib
> LP. 115.— pension to the widow Samiha
> LP. 60.— pension to the widow Fakhriyyeh.
>
> 2. The pension was calculated on a salary of LP. 700 per annum."

It may be noted that the second paragraph of that letter refers to the pension.

Is the administrative officer entitled so to discriminate between the widows, and could he, in an extreme case, go so far as to exclude one widow altogether ? It does not seem to me that he has any such power.

*Prima facie* I think it is his duty to divide the pension between them, unless possibly it could be shown that according to the religious law applicable their rights in the estate differ. In this case, according to *Sharia* law, their rights are equal, so that it is unnecessary to consider this point.

It is suggested that the reason why one widow was given more than the other is because she has children. We are not concerned with that, but I may point out that the section contains no support for such suggestion, on the contrary it provides expressly for children in their own right.

I am of opinion that in the absence of any express provision in the law, directing that the pension which can be granted can be allocated

in any particular way, the Applicant is entitled to an order directing the Accountant General, so long as the other widow is living and entitled to a share of this pension, to pay to the Applicant half the pension granted.

The Applicant will have her costs fixed at an inclusive sum of LP. 10 recoverable against the Attorney General.

Given this 5th day of June, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 67/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPLICATION OF :

Lydia Rundstein. APPLICANT.

v.

The Attorney General. RESPONDENT.

*Permitting premises to be used as brothel, C. C. O., Sec. 163(b) — Use of flat for own prostitution not permission of such use — Insufficient evidence.*

In granting an application for leave to appeal from the judgment of the District Court of Tel-Aviv, dated the 8th of May, 1941, whereby the Applicant was convicted of knowingly permitting her house to be used for ordinary prostitution, contrary to Section 163(b) of the Criminal Code Ordinance, 1936, and sentenced to pay a fine of LP. 50 or three months' imprisonment, and in allowing the appeal :—

HELD : 1. To support a conviction for permitting premises to be used as a brothel it was not enough to prove that the accused person herself used the flat for her own prostitution, but there had to be evidence that she permitted somebody else to use the premises for such a purpose.

2. The District Court had not directed its mind to this question and there was not enough evidence to enable the Court of Criminal Appeal to make such a finding.

ANNOTATIONS :

1. On Sec. 163 of the Criminal Code Ordinance, see also CR. A. 22/40 (1940, S. C. J. 99) and notes, and CR. A. 65/41 (*ante*, p. 194).

2. For the English authorities referred to, *vide* Halsbury, Vol. 9, *p.* 400, *No.* 678 and footnote *n*, Digest, Vol. 15, *p.* 756, *Nos.* 8140—8142.

FOR APPLICANT : Schwager.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

This is an application for leave to appeal. We granted the leave and we heard the appeal.

The Appellant, Lydia Rundstein, was charged, together with another woman, Rosa Pardiss, with an offence under the Criminal Code Ordinance, Section 163(a), that is, keeping or managing or acting or assisting in the management of a brothel, and secondly, alone, with being the tenant or person in charge of any premises, knowingly permitting such premises or any part thereof to be used as a brothel, or for the purpose of habitual prostitution, contrary to 163(b).

Both women were discharged under the first offence, that is keeping or managing a brothel, but the first accused, Lydia, the Appellant before us, was convicted of the second offence, that is being the tenant of the premises and permitting them to be used for habitual prostitution. It is admitted by the Appellant that she was the tenant of the flat in which the two women lived. There was, I think, clear evidence that she herself was using these premises for the purpose of habitual prostitution, but it is pointed out that there is English authority interpreting the English provision which is similar to 163(b), that where a woman is the occupier of a house which she uses for the purposes of her own habitual prostitution with men, she cannot properly be convicted of permitting the premises to be used for the purposes of habitual prostitution. In other words, the accent of the paragraph should be laid on the word "permits", and the gravamen of the offence is permitting, not using. It became necessary, therefore, to consider precisely what the Appellant did, or did not do, in relation to the other woman. Did she permit the other woman to use those premises of which she, the Appellant, was the tenant, for the purposes of prostitution ?

Unfortunately, we have no record of the argument which was addressed to the Court of Trial, but it certainly does not appear from the judgment of that Court that it directed its mind to this all-important issue. On the other hand, I think from reading the judgment and giving it a fair interpretation it is clear that the Court of Trial misdirected itself in that it appeared to think that it was sufficient for the purposes of paragraph (b) if the Appellant was herself using the premises for this purpose.

The learned Crown Counsel has called our attention to one or two passages in the evidence, and he suggested that they are adequate to enable us to make findings to support the conviction. We feel, however, that not only is the evidence scanty, but that it would not be easy or safe for us so to do, and we think on the whole that the Appellant is entitled to succeed.

The appeal will be allowed and the conviction quashed. The fine of LP. 50, which the Appellant has paid, will be refunded to her.

Delivered this 28th day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 69/41.

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

BEFORE : Trusted, C. J. and Rose. J.

IN THE APPEAL OF :—

Menahem Solomon Howard. — APPELLANT.

v.

Joseph Solomon Howard. — RESPONDENT.

*Appeals — Bond to be signed by surety and not by Appellant himself, C. P. R. 325 — Alternatives to bond, C. P. R. 327 — Failure to show good cause, C. P. R. 333.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 20th of March, 1941, in Civil Case No. 135/38 :—

HELD : 1. A bond under Rule 325 had to be executed by a surety, *i. e.* by a person other than the Appellant himself.

2. The Appellant should have availed himself of the alternatives provided by Rule 327 and there was no good cause for his omission to do so.

ANNOTATIONS :

1. Earlier proceedings in this case : C. D. C. T. A. 135/38 (P. P. 5.xii.39 and 1.ii.40).

2. See C. A. 90/40 (1940, S. C. J 144) and note for other decisions on the bond for appeal.

3. On failure to show good cause, *vide* C. A. 37/41 (*ante*, p. 158) and note 2.

FOR APPELLANT : P. Joseph.

FOR RESPONDENT : Eliash.

JUDGMENT:

The Appellant's advocate in his statement of appeal, stated that therewith he filed a bond in accordance with Rule 325 of the Civil Procedure Rules, 1938. That rule provides that the bond, to secure the costs of the Respondent, must be executed by a reliable surety. The wording is clear. A surety means some person other than the Appellant. Here the bond is executed by the Appellant himself, and it is not in accordance with the rule.

When that was pointed out to the Appellant's advocate he invoked Rule 333 and applied for an extension of time within which to make good the defect. Under that rule we have to enquire if there was good cause which prevented the Appellant complying with the rules. We are told that the Appellant could not raise money or find a surety as all his assets are in dispute.

The answer to that is Rule 327 of the Civil Procedure Rules, which provides for the alternatives the Appellant has in case he is unable to comply with Rule 325. Having seen that he could not find a reliable surety for whatever reason, he could have applied accordingly to the Registrar of this Court. The Appellant failed to take such a course, and we are not satisfied that he has shown any good cause. The application will be refused and the appeal will be dismissed and the Respondent will have his costs on the lower scale. We certify LP. 15 as hearing fees.

Delivered this 29th day of May, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 268/40.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

"Haoreg" — Stein & Fogel. APPELLANTS.

v.

Zeev Reichard. RESPONDENT.

*Claim for return of machinery specially endorsed under C. P. R. 241 — Mistake cannot be remedied under C. P. R. 359.*

In allowing an appeal by leave from the order of the District Court of Tel-Aviv, dated the 3rd December, 1940, in Civil Case No. 93/40 :—

HELD : 1. It was clear that Rule 241 applied only to actions for the recovery of a debt or liquidated demand in money and not to an action for return of machinery.

2. The action being in its inception misconceived, Rule 359 of the Civil Procedure Rules could not be applied.

ANNOTATIONS : *Cf.*, on C. P. R., Rule 359, Misc. Appl. 53/38 (1938, 2 S. C. J. 252).

FOR APPELLANTS : Levin and Geiger.

FOR RESPONDENT : Shereshevsky.

JUDGMENT:

This is an application for leave to appeal from a decision of the District Court, Tel-Aviv. The Plaintiff specially endorsed his claim under Rule 241 for the return of certain machinery. It is clear that that rule applies to actions for the recovery of a debt or liquidated demand in money.

The District Court held :—

> "As to the second argument, the Court is of opinion that although the Plaintiff's action is not one of the categories mentioned in Rule 241, it should not be dismissed on this ground. No injury was caused to Defendant inasmuch as he was given leave to defend generally. It is therefore decided to enter into the merits of the case."

and against this ruling the Defendant appeals.

For the Respondent it is argued that Rule 359 is wide enough to give power to the Court to make the order which it did.

The provisions of Rule 241 are clear, and we think that this action was, in its inception, misconceived. That being so we do not think that Rule 359 could be applied.

We give leave to appeal and by consent of parties we decide the appeal.

The appeal will be allowed, and the order of the Court below will be set aside, and the action struck out with costs below, and an inclusive sum of LP. 5 for costs in this Court.

Delivered this 7th day of January, 1941.

*Chief Justice.*

CIVIL APPEAL No. 11/41.

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

BEFORE : Trusted, C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Eliyahu Bichovsky. APPELLANT.

v.

Nitsa Lambi Bichovsky. RESPONDENT.

*Marriage between Jew and non-Jew, C. A. 9/40 — Acquisition of Palestinian citizenship — Jurisdiction in matters of personal status, P. O. in C., Art. 47 — Matrimonial domicile — Different personal laws, C. A. 20/29, C. A. 80/31, C. A. 119/39 — Acquisition of domicile, Ogden v. Ogden, Salvesen v. Administrator of Austrian Property — Legality of mixed marriage — Different religious communities, P. O. in C., Art. 55 — National law of foreigner, P. O. in C., Art. 64 — Marriage valid according to lex loci celebrationis — Jurisdiction as regards dissolution of marriage, P. O. in C., Arts. 51 & 64 — Invalidity of marriage for one party only, Sottomayor v. de Barros, Mette v. Mette — Application not contested by wife — Dangerous precedent — Principle of lex loci celebrationis — Applicability of Jewish Law — Khayat v. Khayat, S. T. 1/41.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 16th of January, 1941 :—

HELD : *By Trusted, C. J.* :

1. *Quaere* whether a technical matrimonial domicile was sufficient to confer jurisdiction.

2. (Referring to C. A. 20/29, C. A. 80/31 and C. A. 119/39) : There was authority for saying that, where there was a clash between the personal law of the parties, the law of the defendant had to be applied.

3. The personal law of the Respondent was Palestinian, but there being no Palestinian law of marriage in respect of persons not members of a recognised Religious community, English law had to be applied.

4. (Referring to Ogden *v.* Ogden, Salvesen *v.* Administrator of Austrian Property) : As the Respondent had no Palestinian domicile apart from her marriage she could not be considered as domiciled in Palestine unless treated as a wife who took her necessary domicile from her husband.

5. If the marriage were considered as illegal for lack of capacity

on the part of the husband then there was no marriage and no domicile on the part of the wife to give the Palestinian Courts jurisdiction.

6. The Civil Courts had, consequently, no jurisdiction to grant the relief sought.

7. If, on the other hand, the Respondent was not considered as the wife *de jure* of a Palestinian citizen, she was a foreigner and her national law had to be applied ; this was Cypriote law according to which the marriage was a good and binding one.

8. *Quaere* whether the District Court had jurisdiction to declare, as against a foreigner, a marriage void for legal incapacity.

*By Frumkin, J.* :

9. By virtue of her marriage the Respondent had to be regarded as a Palestinian citizen and had acquired her husband's Palestinian domicile, thereby becoming a "person in Palestine".

10. An action for declaring the nullity of a marriage was a "suit relating to marriage" and, as regards "persons in Palestine other than foreigners", within the jurisdiction of the Palestinian Courts.

11. Where the marriage itself was at stake the principle of deciding the question according to the national law of the defendant could not be applied.

12. (Referring to Sottomayor *v.* de Barros, Mette *v.* Mette) : Where a marriage was invalid by the personal law of one of the parties it had to be considered as invalid as regards both parties.

13. This was not a case where the question arose incidentally, and the Civil Courts were not compelled to declare null and void an act which the Plaintiff had done, of his own free will, in a place where the law permitted him to do it, for the sole reason that he could not have done the act in Palestine as being contrary to his religious belief.

14. The principle of the *lex loci celebrationis* should be applied and the Appellant could not succeed before the Courts of Palestine in his request to set aside a marriage voluntarily contracted by him in Cyprus and valid under the law of Cyprus.

*By Khayat, J.* :

15. Jewish Law was not a common law in Palestine applicable to all persons, but a personal law affecting only members of that community and a distinction ought to be drawn between a disability affecting all persons domiciled in Palestine, and a disability based on the personal law of any person.

16. (Referring to Khayat *v.* Khayat, S. T. 1/41) : In the case of a marriage between members of different communities or different religions, the law under which the marriage had been celebrated prevailed and had to be applied.

17. As the marriage was valid according to the law of Cyprus where it had been contracted, it could not be declared null and void in Palestine.

REFERRED TO: C. A. 20/29 (1, L. R. P. 420, C. of J. 934), C. A. 80/31 (1, L. R. P. 662, C. of J. 300), C. A. 119/39 (1940, S. C. J. 38), Salvesen *v.* Administrator of Austrian Property (1927, A. C. 641, at pp. 669—670), Ogden *v.* Ogden (1907, P. 107; 1908, P. (C. A.) 46), Sottomayor *v.* de Barros (1879, 5 P. D. 94), Mette *v.* Mette (1859, 1 Sw. & Tr. 416), Khayat *v.* Khayat (C. of J. 1244), S. T. 1/41 (*ante*, p. 214).

ANNOTATIONS:

1. See the previous judgment in this case, C. A. 9/40 (1940, S. C. J. 184) and notes.

2. On the matrimonial domicile, *cf.* Dicey, Conflict of Laws, 5th ed., *pp.* 107 *seq.*, 597 *seq.*, 760 *seq.* and 893 *seq.*

3. The case of Ogden *v.* Ogden referred to by Trusted, C. J., is discussed in Dicey, *op. cit.*, Appendix, Note 23, *pp.* 966 *seq.*

4. On the question of jurisdiction under the Palestine Order-in-Council see, in addition to C. A. 9/40 (*supra*), C. A. 238/40 (1940, S. C. J. 515) and H. C. 24/41 (*ante*, p. 161).

5. On jurisdiction to grant a decree of nullity according to Private International law, *vide* Dicey, *op. cit.*, *pp.* 294 *seq.* and 928 *seq.*, Goadby, International and Interreligious Private Law in Palestine, *p.* 156.

6. On the applicability of the *lex loci celebrationis* to marriages, *cf.* Dicey, *op. cit.*, *pp.* 732 *seq.* and 931 *seq.*

7. On mixed marriages see also C. A. 38/41 (*ante*, p. 173) and notes.

FOR APPELLANT: Silberg.

FOR RESPONDENT: Absent — served.

## JUDGMENT:

*Trusted, C. J.*: The jurisdiction of the Courts of this Territory in matters of personal status is laid down in the Order-in-Council, and it varies with the status of the parties.

In the present proceedings this Court decided that in order to consider whether the relief sought could be granted it was first necessary to determine whether the Respondent is a Palestinian citizen.

It seemed to me that as she could only claim that status by virtue of her marriage to a Palestinian citizen and not by any independent right it was necessary to enquire if by the law of Palestine she was the wife of a Palestinian citizen, and in my view, for the reasons given in my first judgment, she is not. The other members of the Court took the view that as she was regarded by the Immigration Authorities as a Palestinian, she was a Palestinian citizen until declared otherwise.

On that basis the matter was returned to the District Court. It has been further considered and the Judges disagreed, so that in the result

(the case being governed by the old procedure) the Appellant's application for a declaration that his marriage was null on the ground of his legal incapacity to contract it was refused.

I will firstly consider the matter on the basis that the Respondent is a Palestinian citizen. The appropriate article of the Order-in-Council is 47, which provides :—

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

It may be noted that the Respondent is not in fact in Palestine, nor has she acquired a *de facto* domicile here ; it does not appear that she has ever been here, and she can only be said to be "in Palestine" in so far as she has a technical matrimonial domicile here. Assuming that this is sufficient to bring her within the article, what is the personal law to be applied, there being no law, Ordinance or regulation applicable.

There is authority for the proposition that in cases such as this where there is a clash between the personal law of the parties, the law of the Defendant should be applied. C. A. 20/29, 1 P. L. R. 420, C. A. 80/31, 1 P. L. R. 662, and 119/39, VII Lev. 55.

The Appellant is a member of the Jewish Community, but the Defendant is a Palestinian who is not a member of any religious community ; her personal law is then Palestinian so far as it applies, but there is no Palestinian law (apart from the religious law of the recognised communities) dealing with marriage, one must therefore, I suppose, apply English law. As she has no Palestinian domicile apart from the marriage, the situation seems similar to that described by Lord Phillimore when discussing Ogden *v.* Ogden in Salvesen *v.* The Administrator of Austrian Property, 1927, A. C. pp. 669, 670, where he says :—

> "But in truth the problem in Ogden *v.* Ogden was almost insoluble. The short cohabitation between the parties which followed the ceremony of marriage did indeed take place in England, (*Cyprus*), but after this very temporary residence the man returned to his home in France (*Palestine*) and never lost his French (*Palestinian*) domicil. On the other hand the woman did not follow the man to France (*Palestine*) and, if she were not married to him, never acquired a French (*Palestinian*) domicil. To treat her as domiciled in France (*Palestine*) would be to treat her as a wife, who takes her necessary domicil from her husband. ....."

Alternatively, can one approach the problem upon the assumption that this be regarded, as would be in England, a marriage contracted out of England, legal in the country where celebrated but illegal for lack of capacity of the husband in England — *e. g.* a marriage with a deceased wife's sister, prior to the Act, — but if one begins with this premise then again there was no marriage, and the wife never acquired a domicile to give the Palestinian Courts jurisdiction over her as a person in Palestine.

Mr. Silberg submits that if the marriage is not binding according to the personal law of either party, the Court may act under the article, but I do not think that is so. I may point out that where the persons are members of different religious communities special provision is made by Article 55 to meet the difficulty.

In the result, on the basis of Article 47 and the facts of this case, I do not think the civil Courts have jurisdiction to grant the relief sought.

If one takes the view which I adopted in my first judgment, *i. e.* that in order to ascertain if the lady was a Palestinian citizen, one has to enquire if she was the wife *de jure* of a Palestinian citizen, the position is clearer.

I came to the conclusion that she was not the wife of a Palestinian citizen. In my view, therefore, she is a foreigner, and the matter must be considered under Article 64. Apart from the fact that under this article the District Court was wrongly constituted, the question again arises, what law must be applied, —and it seems to me on the same principles as apply to Article 47, that of the Defendant must be applied, *i. e.* her national law, unless that imports the law of her domicile.

If there was no marriage her nationality and domicile was always Cypriot.

At the second hearing an affidavit was put in showing that the marriage was a good and binding marriage in Cyprus, and this has never been doubted throughout the proceedings. I do not see, therefore, how we can declare it to be null and void as against her, even if under that article the Court has power to declare a marriage void for legal incapacity — which I do not decide.

It will be appreciated that my judgments in this case are concerned with our jurisdiction as laid down in the Order-in-Council, rather than the merits of the case, but it is only right to say that Mr. Silberg informed us that the wife approves of the husband's action. If this be so, individually his action would not appear to be open to the obvious adverse criticism which might be levelled against it.

The appeal will be dismissed. No order as to costs.

*Chief Justice.*

*Frumkin, J.*: The question of jurisdiction in so far as it relates to the nationality of the Respondent has already, in my opinion, been settled in my previous judgment, when I held that as long as her marriage with a Palestinian subject has not been annulled by a competent Court she is to be regarded a Palestinian citizen. For the purpose of Article 47 of the Palestine Order-in-Council she is also deemed to be "a person in Palestine" because by marriage she acquired, technically at least, the domicile of her husband.

These findings in themselves are not, however, sufficient to vest the Civil Courts of Palestine with jurisdiction to grant the Appellant the remedy he is seeking, namely, to annul a marriage validly contracted, at least as regards form, in a foreign country. But in examining the relevant Articles of the Palestine Order-in-Council, there is nothing to restrict the jurisdiction of our Courts in granting that remedy if justified in law. The view was taken that the restriction as regards decrees of dissolution of marriage under Article 64 does not include decrees of nullity. In cases of "persons in Palestine" other than foreigners, there is not even any restriction as regards dissolution. The jurisdiction is a general one in all matters of personal status including suits relating to marriage (Article 51), and it could hardly be said that an action for declaring the nullity of a marriage is not a suit relating to marriage.

We are, therefore, faced with the question, what is the law the Appellant has to rely upon in order to satisfy us that under that law he is entitled to his relief. I do not think that he could be refused his relief because it would not be warranted by the personal law of the Defendant — in this case the wife — a Palestinian, but a non-Jewess. I have grave doubts whether in cases directly affecting the validity or otherwise of a marriage one could safely apply the doctrine that where there is a conflict of laws as regards different parties, the law of the Defendant is to be applied. This is quite a sound principle in cases involving monetary results, when it would be improper to impose upon a defendant a liability not warranted under his own law merely because it is justified by the law of the Plaintiff. I would even go so far as to apply this doctrine in a matter of the validity of a marriage when it arises incidentally under the second paragraph of 47, the determination of which is necessary for the purposes of the cause. But when the marriage itself is at stake it is difficult to see how a marriage could remain valid because it is valid under the law of one of the parties, whether Defendant or Plaintiff, although invalid as regards the other party. This seems to me to be a case of, once invalid as regards one it must be invalid as regards both.

In England there are conflicting decisions on this matter. I am quoting from Dr. Goadby's International and Inter-Religious Private Law in Palestine (p. 146) :—

> "It has not always been clear in English Law whether the incapacity must exist for both parties or whether incapacity of one party alone does not invalidate the marriage. In a later stage of the case of Sottomayor *v.* de Barros it was ascertained that the husband was domiciled in England and the marriage was then held valid." (1879, 5 P. D. 94).

(It might be recalled that in that case it was previously held (1877, 3 P. D. 1) that a marriage celebrated in England between first cousins (being domiciled Portuguese) was prohibited by the Law of Portugal and was consequently invalid).

> "In Mette *v.* Mette (1859), however, a marriage with a deceased wife's sister, invalid at that time by the law of the man's domicile (England) but valid by that of the woman's (Frankfort), was held invalid."

The latter view seems to me in all respects to be the better one, if only for one practical reason, namely, that the validity of a marriage should not depend upon the technical chance as to who was the Plaintiff and who the Defendant in a case.

The result of this reasoning will be that the Plaintiff's action could not be dismissed merely because he failed to prove that under the law governing the Defendant the marriage was invalid. But it does not follow that he can succeed if he satisfies the Court that under his own personal law the marriage is invalid.

In exercising jurisdiction under the first paragraph of Article 47 of the Palestine Order-in-Council, the Civil Courts do so "in conformity with any Law, Ordinance or Regulation that may hereafter be applied or enacted, and subject thereto according to the personal law applicable". No such "Law, Ordinance or Regulation" has so far been applied or enacted, and such personal law does not necessarily come in.

As already pointed out, this is not a case in which the matter incidentally arises. It is the Plaintiff who comes to this Court asking to declare null an act he has done, of his own free will, in a place where the law permitted him to do so, his only reason being that in this country he would not be able to do that act because it would be contrary to his religious belief. I do not think that the Civil Courts are in such circumstances compelled to grant him that relief even if it is proved that under his personal religious law he could not have contracted the marriage in Palestine. In this case we are told no hardship will be caused to his wife, who supports his application. But if the applica-

tion is granted it might create a dangerous precedent, affecting the welfare and social status of a woman who was led to enter into what she believed to be a lawful matrimonial relationship, later to find herself not to have been married at all, to say nothing about the legal position of children, if born from such a marriage.

I am of opinion that in circumstances like these the principle of *lex loci celebrationis* is to be applied ; and just as in the case of an ordinary contract lawfully contracted in a foreign country a Palestinian could not come to the Courts of this country asking to declare such a contract null and void for the reason only that such contract, if made in Palestine, would be contrary to law, the Appellant cannot succeed before the Courts of Palestine in his request, which would amount to setting aside a marriage which he voluntarily contracted in Cyprus, and which he admits is lawful under the Law of Cyprus.

The appeal must, therefore, fail.

*Puisne Judge.*

*Khayat, J.* : In this appeal the Appellant applied to the District Court for a judgment declaring his marriage to the Respondent as null and void on the ground that his personal law, the Jewish Religious Law, does not permit him to marry a non-Jewess. The Respondent was a member of the Greek Orthodox Church, and some time before her marriage to the Appellant left that Church and did not embrace any other community. The District Court refused the application on the ground of lack of jurisdiction, and on appeal to this Court it was decided to remit the case for that Court to assume jurisdiction on the basis that the Respondent is *prima facie* a Palestinian citizen.

The District Court went into this question, and the Judges differed in opinion, and the application was refused. Hence this second appeal.

The jurisdiction of the Civil Courts in matters of personal status is to be found in Article 47 of the Palestine Order-in-Council. The main argument of the Appellant is that according to his personal law, which is the Jewish law, he could not contract that marriage. The jurisdiction of the Courts of this country is to be exercised in conformity with any law, Ordinance or Regulation that may be applied or enacted, and subject thereto according to the personal law applicable — it being common ground that no such law, Ordinance or Regulation exists.

The Jewish Law is not a common law in Palestine applicable to all persons, but it is a personal law affecting only members of that community, and I think a distinction ought to be drawn between a disability

grounded on domicile affecting all persons domiciled in Palestine, and a disability based on the personal law of any person as recognised for certain purposes in Palestine, by the Order-in-Council.

The Courts of this country have taken the view that in marriages between members of different communities or different religions, the law under which the marriage was celebrated prevails and must be applied. See Special Tribunal decision in Khayat *v.* Khayat, and in Husseini *v.* Abu Ghanem.

The Appellant in this case contracted this civil marriage in accordance with the law of Cyprus.

The law of that country allows such marriage and recognises it as valid, and counsel for Appellant admitted that according to the law of Cyprus his client cannot obtain a decree of nullity, nor can he obtain a decree of dissolution of marriage.

I therefore think that the appeal must be dismissed.

Delivered this 6th day of June, 1941.

*Puisne Judge.*

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CRIMINAL APPEAL No. 1/41.

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Leopold Lindenfeld. RESPONDENT.

*Attempt to trade with the enemy, Trading with the Enemy Ord., Sec.* 3(2)(a)(ii) *— Whether attempt punishable, C. C. O. Secs.* 28, 29 *— "Offence", C. C. O., Sec.* 5 *— Effect of specific provision in Defence (Trading with the Enemy) Regulations,* 1940 *— Meaning of "enemy", Sec.* 4 *of the Ordinance — Political opinions of enemy resident immaterial — Motive — Attempt — Sentence.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv (appellate capacity), dated the 31st of October, 1940, in Criminal Appeal No. 79/40, whereby the Respondent was acquitted of a charge of attempting to trade with the enemy, contrary to Section 3(2)(a)(ii) of the Trading with the Enemy

Ordinance, 1939, and Section 29 of the Criminal Code Ordinance, 1936, and in convicting and sentencing the Respondent :—

HELD : 1. Having regard to Sections 28 and 29 and the definition of "offence" in Section 5 of the Criminal Code Ordinance, 1936, there could be no doubt that at the material time it was an offence to attempt to trade with the enemy.

The fact that since then the ordinance had been amended by the specific addition of the offence of attempting to trade with the enemy did not necessitate the inference that such an attempt had not been an offence prior to the amendment.

2. Where a person was in fact resident in enemy territory his political opinions were immaterial.

3. The motives of the Respondent were also immaterial.

4. Having regard to the terms of the letter referred to in the judgment, it was clear that the Respondent attempted to transmit money for the benefit of an enemy and to a place in enemy territory within the meaning of the Ordinance.

5. The fact that the letter had been stopped by the censorship and that even if it had arrived at its destination the recipient might not have acted upon it, was immaterial.

6. In view of the extenuating circumstances the Respondent would be bound over in his own recognisance.

ANNOTATIONS :

1. See CR. A. 109/40 (1940, S. C. J. 423) for another case of an offence against the Trading with the Enemy Ordinance.

2. On the second point *cf.* Blum—Roskin-Levy, The Law relating to Trading with the Enemy, *pp.* 8—9 and cases cited in footnotes 15 *seq.* See also C. A. 193/40 (1940, S. C. J. 520).

3. On attempt and the difference between preparatory acts and attempts, *vide* Halsbury, Vol. 9, *pp.* 40—42, *No.* 41, Digest, Vol. 14, *pp.* 101 *seq.*, *Sub-Sec.* 6.

4. See, on the last point, note 3 to CR. A. 24/41 (*ante*, p. 95).

FOR APPELLANT : A/Solicitor General — (Bell).

FOR RESPONDENT : Levitsky.

## JUDGMENT:

In this case the Respondent was charged before the Magistrate's Court of Tel-Aviv with attempting to trade with the enemy within the meaning of Section 3(2)(a)(ii) of the Trading with the Enemy Ordinance, 1939. The Magistrate having acquitted the Respondent, and the District Court on appeal having confirmed the Magistrate's decision, although for different reasons, the Attorney General now appeals to this Court.

The first point to be decided is whether it is an offence under the law of Palestine to attempt to trade with the enemy. With all respect to the

District Court, we consider that having regard to Sections 28 and 29 and the definition of "offence" in Section 5 of the Criminal Code Ordinance, 1936, there can be no doubt that at the material time it was an offence to attempt to trade with the enemy. It is true that, since the date of the alleged offence in these proceedings, the ordinance has been amended, by the Defence (Trading with the Enemy) Regulations, 1940, by the specific addition of the offence of attempting to trade with the enemy. We do not consider, however, that an inference must necessarily be drawn from this that such an attempt was not an offence prior to the passing of these regulations. It must be borne in mind in this connection, apart from other considerations, that the effect of this amendment would seem to be to increase the penalty for an attempt to the same level as that applicable to the completed offence.

The point now remains to be decided whether the Respondent in fact attempted to pay or transmit any money for the benefit of an enemy. It appears that on the 25th of May, 1940, the Respondent sent a letter to a friend in Yugoslavia containing the following request : —

> "I take the liberty of asking you a favour and I shall be greatly obliged if you will do it for me. My brothers in Warsaw are in a very bad financial position and one of them ill. I would like to help them at any price. All I have undertaken hitherto was useless. You have written that there is a way of sending money at the rate of 45 zloty for a dollar. I would be greatly obliged if 1000 zloty could be remitted to them. The best thing would be if the payment were to be effected there, in dollars, but if impossible, in zloty. I am sure you will choose the best way, as it is needless for me to emphasize how hard it is to exist without an income. My brother's address is Henry Lindenfeld, Warsaw, Wapolna 7/9. The amount paid out by you I shall repay with thanks in accordance with your instructions."

Section 4 of the Ordinance defines an enemy as "Any individual resident in enemy territory." The Chief Magistrate's judgment on this matter reads as follows :—

> "Man was enemy of Germany detained there. Enemy only by definition in Section 4(i)(b) — not in fact. Object of gift was charitable. Nothing to show that money would be paid out illegally from Palestine. Accused says it would not. It is not a safe case to convict. The man acted innocently even if there is a breach of the strictly technical interpretation of the law and I am not satisfied that there is."

If the man in question was in fact resident in enemy territory (which does not seem to be in dispute) his political opinions are clearly immaterial, having regard to the wording of the section. Also the mo-

tives of the Respondent are immaterial if in fact he committed an attempt within the meaning of Section 3(2)(a)(ii) of the Ordinance. It is in our opinion clear that the learned Chief Magistrate failed to apply his mind to the relevant considerations, but in view of the evidence adduced before him we are of opinion that this Court has sufficient material to dispose of the matter without having to remit the case to the Magistrate for completion. Having regard to the terms of the letter referred to above, it seems to us that the only reasonable inference to draw is that the Respondent attempted to transmit money for the benefit of an enemy and to a place in enemy territory within the meaning of the Ordinance. The fact that the letter was interrupted by the censorship and that even if it had arrived at its destination the recipient might not have acted upon it is, in our view, immaterial.

The appeal must, therefore, be allowed, the judgments of the learned Chief Magistrate and of the District Court must be set aside and the Respondent convicted of the offence with which he is charged under Section 3(2)(a)(ii) of the Ordinance. With regard to sentence, in view of the extenuating circumstances it will be sufficient if the Respondent is bound over in his own recognisance in the sum of LP. 25 to be of good behaviour for one year.

Delivered this 20th day of January, 1941.

*British Puisne Judge.*

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ADMIRALTY No. 8/40.

IN THE SUPREME COURT SITTING AS A COURT OF ADMIRALTY.

BEFORE : Copland, J.

IN THE CASE OF :—

General Steamship Company Ltd. PLAINTIFF.

v.

S/S Tiger Hill. DEFENDANT.

*Claim for ownership and possession of ship — Government claiming ownership — Applicability of Crown Actions Ordinance, Sec. 3 — Jurisdiction of Admiralty Court, Colonial Courts of Admiralty Act, 1890, Snia Viscota Società & Co. v. "Yuri Maru"–Canadian American Shipping Co. v. "Woron", Palestine Admiralty Jurisdiction Order – Crown Actions*

*Ordinance still in force, P. O. in C., Art. 17, repeal of P. O. in C., Art. 50, first para. — Taking possession of wreck, Wrecks and Salvage Ordinance, Secs. 11, 12 and 14 — Failure to notify taking of possession in the Gazette — Proper Court, effect of Crown Actions Ord., Sec. 3(3) — Costs.*

In setting aside the writ and quashing all proceedings in the action brought by the Plaintiff for ownership and possession of the S/S "Tiger Hill" :—

HELD : 1. Since the Government claimed ownership and possession of the ship it was clear that the claim was against Government although the writ did not expressly state so.

2. Under the provisions of the Palestine Admiralty Jurisdiction Order, 1937, all the relevant sections of the Colonial Courts of Admiralty Act, 1890, apply to Palestine, and the Supreme Court, therefore, had the jurisdiction of the High Court of Justice in England in admiralty matters, subject, however, to any local ordinances.

3. The repeal of the first paragraph of Art. 50 of the Palestine Order-in-Council did not affect the validity of the Crown Actions Ordinance which had been validly made and enacted, and could well have been made under Art. 17 of the Order as an ordinance for the good government of the country.

4. As the Crown Actions Ordinance was still in force it applied to the present case which was a claim against Government for the ownership and possession of a ship and, its provisions not having been complied with, the present proceedings were null and void.

5. The six months' period provided for in Sec. 12 of the Wrecks and Salvage Ordinance ran from the date on which the assistant receiver had taken actual possession of the ship and not from the date of notification in the *Gazette*.

6. *Quaere* whether the provision of Sec. 3(3) of the Crown Actions Ordinance that every claim against Government had to be preferred before a District- or Land Court deprived the Admiralty Court of jurisdiction in this country to try actions against Government.

REFERRED TO : Snia Viscosa Società & Co. *v.* "Yuri Maru" — Canadian American Shipping Co. *v.* "Woron", 1927 (137, L. T. Rep. 747).

ANNOTATIONS :

1. Other Palestinian Admiralty decisions : Adm. 1/39 (1939, S. C. J. 537) and Adm. 2/40 (1940, S. C. J. 562).

2. For authorities on Crown Actions, *vide* C. A. 132/40 (1940, S. C. J. 317) and note 3 ; later decisions : C. A. 165/40 (*ibid.*, p. 363), H. C. 16/40 (*ibid.*, p. 365), C. A. 133/40 (*ibid.*, p. 497) and C. A. 206/40 (*ante*, p. 11).

FOR PLAINTIFF : Shapiro.

FOR GOVERNMENT OF PALESTINE AND DIRECTOR OF CUSTOMS : Crown Counsel — (Hogan).

## JUDGMENT:

This matter comes before me on a motion by the Government to set aside the writ and proceedings in the case of the S/S "Tiger Hill" on the grounds that the provisions of the Crown Actions Ordinance, Cap. 38, have not been complied with. A further point has also been argued in relation to Section 11(2) of the Wrecks Ordinance, Cap. 155.

The first point to be decided is whether this is an action against the Government. In their defence the Government claims, that under the provisions of Section 14 of the Wrecks Ordinance, they are entitled to the proceeds of the sale of the ship, and alternatively, that the ship or its proceeds have been forfeited to the Government under the provisions of the Immigration Ordinance. In other words the Government is claiming the ownership of the ship, and also that the ship is in their possession. The sale of the ship has been ordered by consent. I think that it is clear that this is a claim against the Government though the writ does not expressly state so. The effect is, therefore, to implead the Crown, and it becomes necessary to consider whether the Crown Actions Ordinance is applicable to this case, it being common ground that its provisions have not been complied with.

Section 3 of the Ordinance is in these terms :—

> 3. (1) Save as hereinafter provided, no claim of any kind whatsoever, whether by way of original claim, counterclaim or otherwise, against the Government or any government department shall be entertained in any court unless it be a claim for obtaining relief, other than relief in the nature of specific performance or injunction, against the Government or a government department in respect —
>
> (a) of the restitution of any movable property or compensation to the value thereof, or
>
> (b) of the payment of money or damages in respect of any contract lawfully entered into on behalf of the Government or a government department, or
>
> (c) of the possession or restitution of any immovable property or compensation to the value thereof.
>
> (2) No claim which may lawfully be made against the Government shall be entertained in any court unless the claimant shall have obtained the written consent of the High Commissioner authorising him to bring an action.
>
> (3) Every such claim shall be preferred before a district court, or a land court if the claim is one which relates to a matter in which the land court has exclusive jurisdiction, in an action instituted by the claimant as plaintiff against the Attorney General as defendant, or such other officer as the High Commissioner may from time to time designate for that purpose.

Mr. Hogan for the Government has argued that assuming that the Colonial Courts of Admiralty Act, 1890, is in force in this country, then the Admiralty Court is governed also by the statute law of Palestine, and he has referred to Snia Viscosa Società & Co. *v.* "Yuri Maru" — Canadian American Shipping Co. *v.* "Woron", 137 L. T. Rep. 747. He says that the Admiralty Court has the jurisdiction of the High Court of Justice in England. I think that, under the provisions of the Palestine Admiralty Jurisdiction Order 1937, all the relevant and necessary sections of the Colonial Courts of Admiralty Act, 1890, have been applied to Palestine, and so this Court has the jurisdiction of the High Court of Justice in England in admiralty matters, subject however to any ordinances of the local legislative authority. The sections which have not been applied are those which confer powers on the Queen in council and other matters not concerning the jurisdiction of the Admiralty Court here.

Mr. Shapiro for the Plaintiffs argues that the Crown Actions Ordinance is not in force any longer in this country since this Ordinance was based on the first para. of Article 50 of the Palestine Order-in-Council, 1922, and this para. having been repealed in 1939, any ordinance founded on it must be deemed to have lapsed or to have been impliedly repealed. I do not think that this contention is right. The Ordinance was validly made and enacted, and could well have been made under Article 17 of the Order-in-Council as amended as an ordinance for the good government of the country. I think that the Ordinance is still in force, and in the words of Section 3(1) it applies to any claim against Government and therefore it applies to the present case which is a claim against Government for the ownership and possession of this ship. It follows that the present proceedings are null and void.

With regard to the point under the Wrecks Ordinance, I may as well deal with it, as it has been argued at some length, and if proceedings should be renewed it may save further argument. The relevant Sections are as follows :—

> 11. (1) When an assistant receiver takes possession of any wreck, such wreck shall be deemed to be in the possession of the receiver, and the assistant receiver shall without delay furnish the receiver with a description of the wreck and any marks by which it is distinguishable and with an estimate of the value of the wreck.
>
> (2) The receiver shall cause to be published in the *Gazette* a notice setting forth the description of such wreck and of the marks, if any, by which it is distinguishable, and shall, if the value of the wreck exceed twenty pounds, also send a copy of such notice to the agent of Lloyds in Palestine or if there is no such agent to the Secretary of Lloyds in London.

> 12. The owner of any wreck in the possession of the receiver, upon establishing his claim to such wreck to the satisfaction of the receiver within six months from the time at which the wreck came into the possession of the receiver, shall, upon paying the salvage, fees and expenses due, be entitled to have the wreck or the proceeds thereof delivered up to him.
>
> 14. Where no owner establishes a claim to any wreck found in Palestine and in the possession of the receiver, within six months after it came into his possession, the receiver shall sell such wreck and shall pay the proceeds of the sale, after deducting therefrom the expenses of the sale and any other expenses incurred by him and his fees, and paying thereout to the salvors such amount of salvage as the High Commissioner may, in each case or by any general rule, determine, to the Treasurer, to be dealt with as part of the revenue of Palestine.

The ship was stranded on the shores of Palestine on or about the 1st September, 1939. A notice, as provided for in Section 11(2), was duly sent to the Secretary of Lloyds in London, but no notice was published in the *Gazette* here until the 21st November, 1940.

Mr. Shapiro has argued that possession must be made by some overt act or acts, and that one such act, at any rate, must be the notification in the *Gazette,* and that the six months' period mentioned in Sections 12 and 14 only begins to run from the date of such notification. It must be noted, however, that the ordinance states that the claims must be established within six months from the time at which the wreck came into possession of the receiver. Section 11(1) also says that "when the assistant receiver takes possession of any wreck, such wreck shall be deemed to be in the possession of the receiver .....". It is the duty of the receiver, not the assistant receiver, to cause the notice to be published in the *Gazette.* From these provisions I think it follows that it is the assistant receiver who takes possession of the wreck, and that such possession is complete, when possession is so taken, and that a notice in the *Gazette* is no part of the act of taking possession. The six months' period therefore runs from the date on which the assistant receiver took actual possession and not from the date of notification in the *Gazette.* When and if the assistant receiver did take possession is a matter to be determined after hearing evidence and I do not now decide it.

I would remark that it would be as well, however, if Government departments would take the trouble to read through and comply with their own ordinances. There is really very little excuse to be found for a delay of over one year in publishing the notice required by Section 11(2).

In the result the writ must be set aside and all proceedings in the action quashed.

Finally I think that I ought to call attention to another point in case further proceedings should be instituted regularly, and in order to avoid further possible disappointment and embarrassment to the Plaintiffs. Section 3(3) of the Crown Actions Ordinance lays down that every claim against Government, which is authorised by Section 3(1), shall be preferred before a District Court or a Land Court. The effect of this provision may possibly be to deprive the Admiralty Court of jurisdiction in this country to try actions against Government, though I expressly refrain from deciding this point, as it has not been argued before me. I suggest, however, that it should be carefully considered by counsel if the renewal of proceedings should be contemplated.

The decision in this case applies also to the S/S "Parita" — Folio 9 of 1940. The writ there must also be set aside and all proceedings quashed.

After hearing counsel on the subject of costs, I direct, under Rule 127, that the Plaintiffs in each case pay a lump sum of LP. 5 in lieu of taxed costs.

Delivered this 10th day of January, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 85/4.1

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mohammad Ibn Abdallah el Ali el Kaddoumi. APPELLANT.

v.

The Attorney-General. RESPONDENT.

*Murder — Insanity to be proved in Court of trial.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, dated the 10th day of June, 1941, in Criminal Assize Case No. 24/41, whereby the Appellant was convicted of murder, contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : Insanity was a defence and had to be proved like any other defence in the Court of trial. On the records of the lower Court there was nothing to show that the Appellant was insane.

ANNOTATIONS: See, on the defence of insanity, note 1 to CR. A. 64/41 (*ante*, p. 198).

FOR APPELLANT: Abcarius.

FOR RESPONDENT: Crown Counsel — (Bell).

JUDGMENT:

The Appellant was convicted of premeditated murder committed on the 4th of January, 1941, and was sentenced to death. The Appellant, in a statement made after the assault had been committed, admitted what he had done, and there is no doubt as to the correctness of the conviction.

The only point raised by Abcarius Bey on the appeal is the question that the man might be insane. Insanity is a defence and must be proved like any other defence. The place in which to prove it is the Court of trial. On the records of the lower Court there is nothing in this appeal and it must, therefore, be dismissed and the conviction and sentence of death confirmed.

The Court understands that the Appellant is under medical observation. That being so, of course it is needless to say that such medical reports would be given most careful consideration by the authorities responsible for deciding whether the sentence should be carried out or not.

Delivered this 30th day of June, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 98/41.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF:

The Custodian of Enemy Property. APPLICANT.

v.

1. Victor Kahler,
2. The Anglo-Palestine Bank Ltd. RESPONDENTS.

*Reinstatement of case on proof that Plaintiff not in enemy territory — Hearsay evidence not sufficient proof — Appeal dismissed on account*

*of production of further sufficient evidence — Extension of time to file defence.*

In refusing an application for leave to appeal from the order of the District Court of Tel-Aviv, dated the 24th of April, 1941, in Civil Case No. 241/39 :—

HELD : Although the letter on which the District Court purported to act was purely hearsay and, therefore, insufficient evidence of the first Respondent's whereabouts, it would be a waste of time to allow the appeal as the further evidence tendered was sufficient proof that the first Respondent was at present in New York.

ANNOTATIONS :

1. Earlier proceedings in this case : C. A. 132/40 (1940, S. C. J. 317).

2. On the inadmissibility of hearsay evidence, *vide* Halsbury, Vol. 13, *pp.* 573 *seq.*, *Sec.* 3, Digest, Vol. 22, *pp.* 76 *seq.*, *Sec.* 4.

FOR APPLICANT : Solicitor General and Blum.

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

JUDGMENT:

This is an application for leave to appeal against an Order given by the District Court of Tel-Aviv on the 24th April, 1941, ordering the reinstatement of the case in the list. The question that had arisen was whether the Plaintiff in the original action was or was not an enemy, he having at one time been residing in Paris. The District Court had adjourned the case *sine die* apparently for enquiries to be made as to the exact whereabouts of the Plaintiff. The application to the District Court for reinstatement was made on the basis of a letter dated the 24th December, 1940, written by a firm of London solicitors, Herbert Smith & Co., to Messrs. Richardson & Co., in Jaffa. That letter stated that the writers had received a telegram from the Plaintiff stating that he had legally immigrated to the United States and that his permanent address was in New York. On that letter the District Court ordered the case to proceed on the ground that the Plaintiff had sufficiently proved that he was not within enemy territory.

It was agreed on the hearing of this application for leave that the matter should be treated as the appeal itself, if necessary. The advocate for the Respondent, Mr. Levison, has now produced three cables, two of them emanating from New York, and dated the 1st June and 4th June, 1941, respectively, and purporting to be signed by the Plaintiff himself. Now, it seems to us that these cables are as good evidence of the present whereabouts of the Plaintiff as can reasonably be expected

in these days but, it is quite clear, that the letter of the 24th December, 1940, on which the District Court purported to act, was in no way sufficient proof of the Plaintiff's whereabouts. It is, of course, purely hearsay when the London Solicitors write to say that they have heard from their client that he is in the United States. That letter, as I said, was quite insufficient material on which the District Court could have given judgment, but, in view of the further evidence which has now been produced before us. it would merely be a waste of time to allow the appeal and send the case back for that further evidence to be tendered before the District Court and we, therefore, think that the best thing to do would be to refuse leave to appeal. In the circumstances there will be no costs to either side.

With regard to the other application by the Custodian he is granted a further fifteen days from to-day in which to file the defence.

Delivered this 23rd day of June, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 259/40.

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

BEFORE : Trusted, C. J., Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Afifeh bint Hussein el Mulla. APPELLANT.

v.

1. Mohammad Doukhi el Mulla, in his capacity as guardian of Yousif ibn Suleiman Ali el Mulla,
2. Tamimeh bint Suleiman Ali el Mulla,
3. Hishmeh bint Doukhi Hussein Ma'di, wife of Suleiman Ali el Mulla,
4. Watfeh bint Hussein el Mulla. RESPONDENTS.

*Appeals — Magistrate's judgment in partition case appealed to Land Court, Magistrates' Courts Jurisdiction Ord., Sec.* 11(5) *— Application to re-submit appeal in District Court granted under C. P. R.* 330 *— Scope of the Rule — Proper judgment to be appealed, C. P. R.* 317, *proviso.*

In allowing an appeal from the judgment of the District Court of Haifa (appellate capacity), dated the 23rd October, 1940, in Civil Appeal No. 42/40 :—

HELD : 1. Rule 330 of the Civil Procedure Rules had been wrongly applied as it dealt with the original acceptance of an appeal for filing while in the present case the original notice of appeal had already been lodged.

2. The Appellant was under no obligation to appeal against the order of the President allowing Respondent's application, but in view of the proviso to Rule 317 of the Civil Procedure Rules, she was entitled to take the point during the present appeal.

ANNOTATIONS :

1. On Rule 330 of the Civil Procedure Rules, *vide* C. A. 147/38 (1938, 1 S. C. J. 446), C. A. 161/38 (1938, 2 S. C. J. 27), C. A. 173/38 (*ibid.*, p. 72) and Misc. Appl. 37/38 (*ibid.*, p. 255).

2. On the proper judgment to be appealed, *cf.* C. A. 51/40 (1940, S. C. J. 93) and note 1 ; see also C. A. 154/40 (*ibid.*, p. 335).

FOR APPELLANT : Atalla.

FOR RESPONDENTS : Nos. 1 & 2 — Y. Hussayni.
Nos. 3 & 4 — No appearance.

JUDGMENT:

This is an unfortunate case, which has arisen from a judgment of a Magistrate's Court in a partition action, as to the rightness of which I say nothing. Possibly owing to its being connected with land, the appeal was filed in the Land Court, and came for hearing before the President. It was then submitted that owing to the provisions of Section 11(5) of the Magistrates' Courts Jurisdiction Ordinance the statement of appeal was wrongly filed in the Land Court, and should have been filed in the District Court. Thereupon the Appellants in the lower Court applied for leave to amend, and the learned President, after hearing arguments, granted the application and allowed the Applicants to re-submit their appeal under Rule 330, and gave them fourteen days to serve the other party. It should be noted that this was done after the original notice of appeal was lodged. In our opinion Rule 330 does not apply, as it deals with the original acceptance for filing. If the appeal had been re-submitted to the proper Court in time it would no doubt have put the matter right, but this was never done and it is now too late to go to the District Court.

It was also argued that the Appellant here should have appealed this order of the President, but in view of the provision of the proviso to Rule 317, we think that she is entitled to take the point at this stage.

In the result, the matter could never be properly before the District Court, the appeal will have to be allowed, the judgment of that Court

will be set aside, and that of the Magistrate be restored. The Appellant is entitled to costs on the lower scale, and LP. 10 advocate's fee for attending the hearing, to be paid by the first and second Respondents.

Delivered this 10th day of February, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 70/41.

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

BEFORE : Trusted, C. J., Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Hans Sampter. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Negligent driving, C. C. O., Sec. 243, Road Transport Ord., Sec. 18, Road Transport Rules, Rules 11(b) and 51(1) — Proof of negligence — Defective brakes — Ne bis in idem.*

In dismissing an appeal from the judgment of the District Court of Jaffa (in its appellate capacity), dated the 15th of May, 1941, in Criminal Appeal No. 25/41, confirming the judgment of the Magistrate's Court of Jaffa, dated the 26th of March, 1941, whereby the Appellant was convicted under Section 243(1) of the Criminal Code Ordinance, 1936, and Rules 11(b) and 51(1) of the Road Transport Rules, and Section 18 of the Road Transport Ordinance, 1929, and sentenced to two months' imprisonment :—

HELD : 1. There was clear evidence upon which the Court could find the Appellant guilty of the charge of negligence.

2. There was no reason to suppose that the Appellant had been punished twice, *i. e.*, for negligent driving and for driving with defective brakes.

ANNOTATIONS :

1. For other Road Transport cases see CR. A. 89/38 (1939, S. C. J. 10) and note 1 and CR. A. 141/40 (*ante*, p. 7).

2. See Section 21 of the Criminal Code Ordinance on the principle of *"Ne bis in idem"*.

FOR APPELLANT : Apelbom.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

The Appellant was charged under Section 243 of the Criminal Code Ordinance, *i. e.*:

> "Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person:
> (a) drives a vehicle .....
> is guilty of a misdemeanour."

That is the basic charge. When he came before the Magistrate he was charged with:

1. Causing injury to another by negligence and recklessness, contrary to Section 243(1) of the Criminal Code Ordinance, 1936.
2. Driving a car without good brakes, contrary to Section 11(b) of Part 2, and Section 51(1) of Part 6 of the Road Transport Rules and Section 18 of the Road Transport Ord., 1929.

There was clear evidence upon which the Court could find the Accused guilty of the charge of negligence. There was the evidence of an eye-witness who said that the truck was going at a high speed, and there was evidence that the bicycle of the man who was struck was propelled for a distance of about fifty metres. The case does not stop there. There was also the evidence that the brakes were defective.

The only point which now arises is whether the Accused has been punished twice — once for causing injury, and secondly for driving a car with defective brakes.

If the evidence of defective brakes is treated as part of the negligence leading to conviction under Section 243, it would not be right that he should be punished again for it under the Road Transport Ordinance.

The sentence is light, and I do not think there is any reason to suppose that he has been punished twice for the same offence.

The appeal is, therefore, dismissed.

Delivered this 17th day of June, 1941.

*Chief Justice.*

CIVIL APPEAL No. 76/41.

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

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

IN THE APPEAL OF :—

Haya Eta Agrest (née Hershcovitz). APPELLANT.

v.

1. Yirmiahu Hershcovitz,
2. Elimelech Hershcovitz,
3. Dov Hershcovitz,
4. The Palestine Jewish Colonization Association. RESPONDENTS.

*Estate divided by consent — Subsequent claim for share in Land Settlement — Relinquishment of rights not a disposition — Failure to prove fraud — Calling of evidence.*

In dismissing an appeal from the decision of the Settlement Officer, Haifa Settlement Area, in Case No. 22/Zichron Ya'aqov, dated the 7th of February, 1941: —

HELD : 1. The settlement in respect of the estate did not purport to transfer property but only to relinquish certain rights and was, therefore, not void as a disposition of land.

2. The Appellant had failed to prove the alleged fraud.

3. It was the duty of a party to produce his evidence and tender it, and circumstances might arise in which he could properly ask for an adjournment in order to do so. The Appellant had done neither.

ANNOTATIONS :

1. See C. A. 274/40 (*ante*, p. 85) for another case where a settlement in respect of an estate was unsuccessfully attacked by one of the parties thereto.

2. *Cf.*, on the first point, C. A. 53/39 (1939, S. C. J. 280).

FOR APPELLANT : Gross.

FOR RESPONDENTS : Nos. 1, 2, 3 — Kaiserman.
No. 4 — Faraggi.

JUDGMENT:

Some time ago the owner of certain property died, leaving heirs. These heirs, in the year 1927, entered into a settlement and made a declaration by which some of them, including the Appellant, received

a certain sum of money in full consideration and payment for their shares in the estate, and they renounced all their rights in the estate.

Notwithstanding this, the Appellant claimed at settlement her share by inheritance in land at Zichron Ya'aqov, being part of the estate. She did not offer to repay any of the consideration she had received.

The Settlement Officer found against her. She appeals and submits in the first place that this declaration concerns the disposession of *miri* land and has never been registered in the Land Registry and is therefore void. I do not think that this submission is well founded, as the declaration does not purport to transfer property but only relinquishes certain rights which the Appellant may have had.

Secondly, the Appellant submits that this declaration was obtained by fraud in that not all the assets of the estate were disclosed. Some years elapsed from the date of the declaration to the date of the claim in settlement, during which the Appellant took no action.

As to the fraud the Settlement Officer said :—

> "As regards Plaintiff's claim of fraud, there is no evidence to show that the Defendants acted fraudulently in any manner. On the contrary, the execution of the declaration followed an amicable settlement between the parties, and the making of the irrevocable Power-of-Attorney and the withdrawal of her application from the District Court serve to prove that Plaintiff knew what she was doing and that she acted freely and voluntarily."

It is admitted that no evidence was called, but it is said that it is the duty of the Court to ask for evidence or to give an opportunity for the parties to call their evidence. It is the duty of a party to produce his evidence and tender it, and circumstances may arise in which he can properly ask for an adjournment in order to do so. In this case the Appellant did neither, and I do not think she can complain of the finding.

The appeal fails and is dismissed. Respondents will have their costs on the lower scale, and each will have the sum of LP. 10 attendance fee.

Delivered this 4th day of June, 1941.

*Chief Justice.*

CIVIL APPEAL No. 3/41.

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

BEFORE : Trusted, C. J. and Copland, J.

IN THE APPEAL OF :—

Shawkat Yanni, on his own behalf and on behalf of the estate of Saba Yanni Kouboursi and 8 others. APPELLANTS.

v.

1. Alice Tewfiq Tannous,
2. Evelyne Tewfiq Tannous,
3. Land Registrar, Jaffa. RESPONDENTS.

*Interlocutory order to report on certain matters after case closed — Nature of order, C. P. R. 221 — Witness called by Court, C. A. 21/39 — Objections to evidence, C. P. R. 200 — Waiver by conduct.*

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 12th December, 1940, in Land Case No. 32/38 :—

HELD : 1. (Referring to C. A. 21/39) : The order objected against was not a direction under Rule 221 of the Civil Procedure Rules, but amounted to calling a witness by the Court and, generally speaking, it was not the function of the Court to call evidence.

2. Where a party in a civil case objects to the reception of any evidence, he should raise objection when that evidence is tendered, and invite the Court to record that objection under Rule 200 of the Civil Procedure Rules.

3. By cross-examining the witness, and addressing the Court as to the effect of his evidence the Appellants were deemed to have assented to having their rights decided in accordance with it.

REFERRED TO : C. A. 21/39 (1939, S. C. J. 209).

ANNOTATIONS :

1. See, on the first point, C. A. 21/39 (*supra*) at p. 218.

2. On the admissibility of evidence after the case had been closed, see also C. A. 253/40 (*ante*, p. 104).

3. On failure to take a point at the trial, *cf.* C. A. 26/40 (1940, S. C. J. 286) and note 5.

4. On waiver of a point by advocate's conduct, *vide* C. A. 54/40 (1940, S. C. J. 103) and note 3.

FOR APPELLANTS : P. Joseph.

FOR RESPONDENTS : No. 1 — Cattan.
No. 2 — Abcarius.
No. 3 — No appearance.

JUDGMENT:

This is an appeal from a decision of the Land Court, Jaffa. The proceedings were prolonged, and that Court delivered an exhaustive judgment.

Dr. Philip Joseph, on behalf of the Appellants, has addressed us at length on the facts, and it seems to me that the only substantial point in the appeal is whether the evidence of Mr. Noble, a civil engineer, was properly admitted, as it is clear from the judgment that his evidence was one of the factors upon which the Court relied.

After the parties had addressed the Court and the case was adjourned for judgment, the Court made what it termed an interlocutory order calling upon Mr. Noble to visit the land — the subject-matter of the action — and to report to the Court upon certain matters of fact. This order does not purport to be, and I do not think that it was, a direction to make necessary enquiries under Rule 221, and in my view the true position was that Mr. Noble was called by the Court as a witness. Generally speaking, it is not the function of the Court to call evidence, see C. A. No. 21/39, P. L. R. Vol. 6, at page 242.

Where, however, a party in a civil case, including a land case, objects to the reception of any evidence, he should raise objection when that evidence is tendered, and should invite the Court to record that objection under Rule 200. In this case, not only was no objection taken to the evidence of Mr. Noble being received, but the Apppellants' advocate cross-examined him at length, and addressed the Court as to the effect of his evidence.

In these circumstances I do not think that the Appellants can now take objection to the reception of this evidence, as it seems to me they were content in the Court below to argue the case without objecting to it, and that they must be taken to have assented to having their rights decided in accordance with it.

The appeal, therefore, will be dismissed. The Respondents will respectively have their costs on the lower scale, and we certify LP. 15 for each of them as attendance fee.

Delivered this 28th day of February, 1941.

*Chief Justice.*

CRIMINAL APPEAL No. 84/41.

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Saleh Ibn Mohammad Yusef el Sa'iedi. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Murder — Constraint not a defence, C. C. O., Sec. 17 — Attempted robbery.*

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, dated the 11th of June, 1941, in Criminal Assize Case No. 27/41 whereby the Appellant was convicted of murder, contrary to section 214(c) of the Criminal Code Ordinance, 1936 and sentenced to death :—

HELD : 1. Constraint and necessity were no defence whatsoever in cases of murder.

2. When armed men came at midnight and demanded money and clothes the obvious inference to be drawn was that they attempted to extort money by menaces.

ANNOTATIONS : See, on the first point, Halsbury, Vol. 9, *pp.* 23—4, *No.* 20, Digest, Vol. 14, *pp.* 67 *seq.*, *Sub-sec.* 4A.

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant was convicted at the Nablus Assizes, with the murder of a woman Aisheh bint Mahmoud el Saleh at Zulfa village on the 8th November, 1936, and was sentenced to death. The evidence shows clearly that the Appellant, together with another man, came to a house at night, both armed, knocked at the door and asked the woman inside for money and clothes for a woman the other man was said to have kidnapped. The deceased woman refused and the demand was repeated. Thereupon the other man, Yousef, told this Accused to shoot the woman. The Appellant apparently declined. Then Yousef said that he himself would not shoot her and that unless the Appellant shot her, he would be shot himself. Thereupon the Appellant shot the woman.

On appeal it is argued that the Appellant was acting under compul-

sion or constraint and that, therefore, he should be excused. Section 17 of the Criminal Code Ordinance makes it quite clear that constraint and necessity are no defence whatsoever in cases of murder.

The second point taken is that there was no evidence of any attempt to commit another offence. The answer to that is that when armed men come at midnight and demand money and clothes the obvious inference to be drawn from the evidence is that they attempted to rob or to extort money by menaces. The judgment of the Court below is beyond any criticism. The appeal is, therefore, dismissed and the conviction and sentence of death are confirmed.

Delivered this 30th day of June, 1941.

*British Puisne Judge.*

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HIGH COURT No. 52/41.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Rivka Hakak. PETITIONER.

v.

1. The Attorney General,
2. The Superintendent of Central Prison, Jerusalem. RESPONDENT.

*Extradition to Egypt — Causing grievous harm, Egyptian Criminal Code, Art. 204 — Prescription of offence — Extradition Agreement between Palestine and Egypt, Extradition Ordinance, Sec. 7 — Identity.*

In allowing an application for a summons to issue directed to the second Respondent, calling upon him to produce the body of Yosef Yehezkiel Hakak, Petitioner's husband in this Court and to show cause why the said Yosef Yehezkiel Hakak is being detained in the Central Prison, Jerusalem, and why he should not be released from custody :—

HELD : 1. The question of the person charged being a minor and of the offence being prescribed was not for the High Court, but for the Courts in Egypt to decide.

2. Extradition proceedings between Palestine and Egypt were governed by the Extradition Agreement between the two countries which agreement entirely superseded the Extradition Ordinance, with the exception of Section 7 thereof.

3. By the said agreement an extraditable offence was any offence which carried a sentence of one year or more.

4. The question of identity in an extradition case was of paramount importance, and in the present case the evidence in this respect was insufficient.

ANNOTATIONS :

1. Palestine authorities on extradition are collated in annotations to H. C. 25/40 (1940, S. C. J. 384) ; see also CR. A. 2/41 (*ante*, p. 15).

2. On prescription of an extradition crime, *cf.* H. C. 42/35 (2, L. R. P. 310 on pp. 316—8, C. of J. 1934—6, 418 on pp. 423—5, P. P. 13.v.1935).

3. On the third point see, *per contra*, H. C. 66/36 (C. of J. 1934—6, 428, P. P. 11.viii.1936).

4. See, on the last point, Halsbury, Vol. 14, *p.* 532, *No.* 1004 and footnote *k*, Digest, Vol. 24, *p.* 880, *Nos.* 68—9.

PETITIONER : In person.

FOR RESPONDENT : Junior Government Advocate — (Salant).

## ORDER.

This is an application for a writ of *habeas corpus* made on behalf of one Yosef Yehezkiel Hakak. An application was received from the Egyptian Government asking for his extradition on a charge of having caused grievous harm to one Zion Mizrachi, on the 4th December, 1933, contrary to article 204 of the Egyptian Criminal Code. The necessary documents were all furnished to the learned Judge who took the case in the District Court of Tel-Aviv and it appears that Yousef Yehezkel Daoud *alias* Cohen was convicted in default by the Egyptian Criminal Court in Cairo on the 10th December, 1934.

A number of points has been raised and, with the exception of one, they are all futile. With regard to the question that the person charged was a minor and that the offence is prescribed, those questions are not for us but for the Courts in Egypt to decide. From the proceedings before the Egyptian Court it is quite clear who the person injured was and what was the date on which the offence took place.

Extradition proceedings between Palestine and Egypt are conducted under the provisions of the Provisional Agreement between the respective countries and that agreement supersedes entirely the provisions of the Extradition Ordinance, with the exception of the provisions of Section 7 of that Ordinance. By that agreement an extraditable offence is any offence which carries a sentence of one year or more.

The only point really is the question of identity. In the proceedings before the Egyptian Criminal Court he was named Yosef Yehezkel

Daoud *alias* Cohen. In the statement of identity he is said to be Yosef Yehezkel Daoud. In his own passport he has the name of Hakak. Cohen and Daoud are not mentioned. The surname 'Hakak' does not appear all through the proceedings in the Egyptian Court. It is true that a photograph had been sent from Cairo. The photograph might or might not have been the photograph of that person. The picture does not seem to be very clear. A Police Constable from the Petah-Tiqva Police identified this man as the person required by the Egyptian Court but it does not appear that this constable was ever present in Egypt.

It should be realised that the question of the identity of a man in an extradition case is of paramount importance. It is a very serious matter to send a man to a foreign country to be tried for an offence which was committed eight years ago, if he is not the person actually required.

With all respect to the learned Judge who tried the case in Tel-Aviv, we think that the evidence in this respect is very thin. The rule *nisi* must, therefore, be made absolute and the person named will be discharged.

Given this 19th day of June, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 93/41.

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

BEFORE : Trusted, C. J., Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Jacob Hausdorf. APPELLANT.

v.

Richard Metzger. RESPONDENT.

*Agreement for sale of shares — Shares deposited in trust and returned to vendor — Vendor not entitled to bring action on cheque and promissory note for price of the shares.*

In allowing an appeal from the judgment of the District Court of Haifa (sitting as a Court of Appeal), dated the 31st day of March, 1941, and in restoring the judgment of the Magistrate :—

HELD : As the shares which were the subject matter of the agreement between the parties had been returned to the Respondent, he could not sue the Appellant on the cheque and promissory note which had been given to secure payment of the purchase price of the shares.

FOR APPELLANT : Toister.

FOR RESPONDENT : Weinshall.

JUDGMENT:

We are of opinion that this appeal succeeds.

In March, 1940, the Respondent, as Plaintiff in the Magistrate's Court, Haifa, sued the Appellant, basing his claim on an unpaid cheque, dated 28.9.37, and on an unpaid promissory note maturing on the 20th of February, 1938.

The Defendant relied upon an agreement dated the 24th of August, 1937, for the transfer of certain shares. Clause 5 of that agreement is as follows :—

> "Until the cheque and promissory note are paid, the shares remain in trust with the Belgo-Palestine Bank Ltd., Tel Aviv.
> The trustee shall be bound, against presentation of one or more of the following documents, *viz.* the cheque or promissory note, by the vendor, after their date of maturity, to hand the shares free to the vendor ; and the purchaser, in such an event, forfeits all the payments made by him under this contract in favour of the vendor by way of liquidated damages (fine), without necessity for service of a notarial notice in the event of the cheque or promissory note not being paid either wholly or partly."

It seems that in July, 1939, the Belgo-Palestine Bank, Ltd., returned the share certificates to the Respondent (Plaintiff in the Magistrate's Court) with a covering slip, which gives no explanation as to why they were returned.

If they were taken by the Respondent under the above cited clause, it is clear that he could not sue on the cheque and the note. If they were returned to him by the Bank of its own volition, one would have expected him to write to the Appellant informing him that the Bank had returned the share certificates, and possibly making suggestions as to what should be done with them, but it seems clear that he did not do so, and that a still further delay occurred until he brought his action, as I have said, in March, 1940. In the statement of claim he did not set out that the share certificates were in his possession.

In these circumstances I do not think that he is entitled to recover upon this cheque and promissory note, and the Magistrate's judgment in favour of the Defendant will be restored.

The Appellant will have the costs of this appeal on the lower scale, and we certify LP. 10 attendance fee. The judgment of the District Court will be set aside, and the Appellant before us will have an inclusive sum of LP. 8 for his costs in the District Court, and the Magistrate's order as to costs will be restored.

Delivered this 26th day of June, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 101/41.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

1. Zvi Yarost,
2. The Palestine Rubber Co. Megama, Zvi Yarost Ltd. APPELLANTS.

v.

The Levant Bonded Warehouse Co. Ltd. RESPONDENTS.

*Warehouse — Claim for value of goods destroyed by fire — Exemption clause in respect of goods insured by warehousing company.*

In dismissing an appeal from the judgment of the District Court of Haifa, sitting as a Court of Appeal, dated the 23rd day of April, 1941, in Civil Appeal No. 33/41 :—

HELD : 1. By regulation 34 of the Respondent company's regulations the company was not responsible for fire to goods which the company had insured.

2. The Respondent company would pay over to the Appellants the monies received from the Insurance Company in respect of the goods in question.

ANNOTATIONS : See, on the construction of an exemption clause, C. A. 59 & 60/40 (1940, S. C. J. 130).

FOR APPELLANT : Sanders.

FOR RESPONDENTS : Cohen.

JUDGMENT:

This is an appeal by leave from a judgment of the District Court of Haifa, given on appeal from the Chief Magistrate. The action be-

fore the Chief Magistrate was brought by the present Appellants, claiming the value of goods destroyed by fire in the warehouses of the Respondents. The contract between the parties is contained in the deposit receipts and the tariff and regulations issued by the company. The regulation which concerns this case is regulation 34. Mr. Sanders has tried hard to convince us that regulation 34 is full of ambiguity. To our minds the meaning is perfectly clear. The meaning of that is that the company, that is to say the Respondents, are not responsible for fire so far as concerns such goods in respect of which they shall have opened policies in their capacity as intermediaries or agents. The company have insured these goods as a matter of fact with the Union Insurance Co. We have read through the judgment of the learned Chief Magistrate, and the judgment of the District Court on appeal, and to repeat the words of the Chief Magistrate we do not see that there is anything more to be said than what has already been said. The appeal must, therefore, be dismissed with costs on the lower scale to include the sum of LP. 15 advocate's attendance fee. We presume that the monies which the Respondents have received from the Insurance Co., in respect of these particular goods, will be paid over to the Appellants, subject of course to the deductions which may have been incurred in this long and, as it turns out, fruitless litigation.

Delivered this 2nd day of July, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 90/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Itzhak Ougatti. APPELLANT.

v.

Zori Pharmaceutical and Chemical Products Manufacturing Co., Ltd. RESPONDENTS.

*Wrongful dismissal — Damages — Ejusdem generis rule of construction — Disobedience to order as ground for immediate dismissal — No necessity of one month's notice or payment in lieu of notice.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv,

sitting as a Court of Appeal, dated the 20th of February, 1941, in Civil Appeal No. 147/40, and in allowing the cross-appeal :—

HELD : 1. The words "or is injurious to its interests" appearing in Clause 2 of the agreement were *ejusdem generis* with the words preceding them.

2. The Appellant could properly be called upon to instruct another person in the routine and organization of the Respondents' business and his refusal to do so entitled the Respondents to dismiss him.

3. The District Court was wrong in holding that the Appellant was entitled to one month's notice or payment in lieu thereof.

ANNOTATIONS :

1. The Appellant had changed his name from Beigelmann — as in the agreement — to Ougatti.

2. On the *ejusdem generis* rule of construction see C. A. 36/28 (1, L. R. P. 303, C. of J. 1493) and C. A. 157/34 (C. of J. 1934—6, 123, 1937, S. C. J. 8 & 48).

3. On dismissal of an employee for disobedience to orders, *vide* Halsbury, Vol. 22, *pp.* 151—2, *No.* 252, Digest, Vol. 34, *pp.* 68 *seq.*, *Nos.* 461 *seq.*

4. *Cf.*, on wrongful dismissal C. A. 58/40 (1940, S. C. J. 119) and note 1.

FOR APPELLANT : Wilner.

FOR RESPONDENTS : Sommerfeld.

## JUDGMENT:

The Appellant, Itzhak Ougatti, was employed by the Zori Pharmaceutical and Chemical Products Manufacturing Co. Ltd., who are the Respondents, and on the 25th of May, 1936, the terms of his employment were incorporated in an agreement in which he is described as the engineer-chemist.

Clause 1 provides :—

> "The work of Mr. Beigelmann includes chemical and technical works in the industry and other works according to the rules of the management."

It is said that no rules of management have been drafted, and certainly we have not been referred to any.

Clause 2 provides :—

> "Mr. Beigelmann undertakes to work for 'Zori' only ; he may do other works only with the agreement in writing of 'Zori'. Any action or conduct by Mr. Beigelmann which directly or indirectly competes or opposes 'Zori', or is injurious to its interests, entitles 'Zori' to damages, to a demand to refrain from this, and, besides, to dismiss him without notice."

In the course of these proceedings some misunderstanding as to the meaning of this clause seems to have arisen. I think it is clear that

the object of this clause is to prevent the servants giving assistance to the competitors of the Company, and that the words, "or is injurious to its interests" are *ejusdem generis* with the words which precede them.

It seems that the Respondents' business increased, and that they were desirous of adding to their staff, but to this, apparently, the Appellant objected. On the 2nd of May, 1940, an interview took place between the Directors and the Appellant, as to which in his evidence, a Director — Paul Weiss — stated :—

> "I called my clerk to be present at talk. I said to Plaintiff on behalf of Board, 'I instruct you to introduce Mr. Bennett to the work. You shall remain the responsible man.'
> Plaintiff said, 'I refuse to do so'.
> I therefore asked Plaintiff if he realized consequences.
> Plaintiff said, 'I fully realize.'
> Then I said, 'I regret very much I must dismiss you immediately under contract.'
> Plaintiff said, 'You are bound by contract to send me written notice.'
> I said, 'Not ordinary dismissal but immediate, without notice.'
> Can't say if Plaintiff had professional secrets to keep hidden.
> After Plaintiff's dismissal factory goes on as before."

and the following day a letter was written confirming this.

The Appellant brought his action in the Magistrate's Court claiming damages for wrongful dismissal. From the Magistrate's record it is clear that the Defendant admitted the dismissal, and that the issue was, was the dismissal wrongful or not. The Appellant himself before the Magistrate stated :—

> "I refused to teach Bennett this work because contract did not provide I should teach anybody. They said they couldn't depend on one person ; in case he was sick work would stop. That was few years ago.
> I said, I'd teach Weiss' brother-in-law.
> Two years ago they asked me to teach Bennett. Bennett is the official chemist. Had I done so I'd have given away my knowledge and rendered myself superfluous."

The whole question seems to be one of degree. I think it is clear that a manager or inspector could properly be called upon to instruct another person in the routine and the organization of the business, although it might well be that he could not be called upon to teach an unqualified person complicated scientific matters.

We are satisfied that the Appellant was called upon only to instruct Mr. Bennett in the working of the business, and we are fortified in this by the evidence of Mr. Moshe Protto, on page 16 of the record, where he says :—

> "2/5/40 Plaintiff dismissed.

On 3/5/40 we worked, I, Bennett, and a third, took us 3—4 days to supply tablets. No break in manufacture."

We think, therefore, that the Appellant was not justified in refusing to introduce Mr. Bennett into the business, and that the Respondents were entitled, therefore, to dismiss him.

The learned Magistrate found in favour of the Defendants (Respondents), but the learned President of the District Court seems to have held that the Plaintiff was entitled to one month's notice or payment in lieu therefor, with payment of no further compensation. This clearly was not in accordance with the contract, even if the Appellant had been improperly dismissed, and against this judgment the Respondents have given notice of cross-appeal.

I think the appeal should be dismissed and the cross-appeal allowed. The Respondents will have the costs of this appeal on the lower scale, and we certify LP. 10 for advocate's attendance fee. They will have an inclusive sum of LP. 5 as their costs in the District Court, and the Magistrate's order as to costs will be restored.

Delivered this 25th day of June, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 83/41.

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Kassem el Haj Taher Abu Halimeh. APPELLANT.

v.

The Attorney-General. RESPONDENT.

*Murder — Several persons acting in concert — Meaning of "presence" at commission of offence, C. C. O., Sec. 23(1)(c) — Recommendation for mercy.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Nablus, dated the 9th day of June, 1941, in Criminal Assize Case No. 26/41, whereby the Appellant was convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. It was quite clear from the evidence that the Appellant was acting in concert with two other men.

2. By detaining the companions of the deceased man and preventing them from rendering any assistance the Appellant was "present" at the place where the offence was committed, within the

meaning of Section 23(1)(c) of the Criminal Code Ordinance. 3. It was not the function of the Court of Criminal Appeal to make a recommendation for mercy.

ANNOTATIONS :

1. See, on the second point, Halsbury, Vol. 9, *pp.* 27 *seq.*, *Sub-sec.* 2, Digest, Vol. 14, *pp.* 74 *seq.*, *Sub-secs.* 1 and 3A.

2. As regards the last point note that the Court of Criminal Appeal will in proper cases forward to the High Commissioner a recommendation for mercy made by the trial Court : CR. A. 51/37 (1937, S. C. J. 457), CR. A. 71/37 (P. P. 14.ix.37). *Cf.* also CR. A. 31/41 (*ante*, p. 128).

FOR APPELLANT : Abcarius.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant was charged and convicted before the Assize Court at Nablus with the premeditated murder of one Musa Ata el Kasem on the 25th September, 1940, and sentenced to death. The evidence showed quite clearly that the Appellant, together with two other men, came upon a group of men in a grove which included the man Musa who was killed. Musa ran away followed by one of the Appellant's companions, and was shot at a distance of 500 metres from the place where they encountered him.

There was evidence before the Assize Court which they believed, that the Appellant together with a third man prevented the companions of the deceased man from doing anything. It is quite clear on this evidence, that the three men were acting in concert.

It is argued by Abcarius Bey that under Section 23(1)(c) of the Criminal Code the Appellant was not "present" at the place where the offence was committed. He was certainly present there inasmuch as he detained the companions of the deceased man and prevented them from rendering any assistance. It is quite true that the Appellant does not seem to be the man who fired the fatal shot that killed the deceased but, it is clear beyond a shadow of doubt that he was present aiding and abetting the actual perpetrator. Abcarius Bey has suggested that the Court should make a recommendation of mercy on the ground that it was an old offence. It is not the function of this Court to make such a recommendation and it does not do so. There is nothing to be said against the judgment under appeal.

The appeal must, therefore, be dismissed and the conviction and sentence confirmed.

Delivered this 30th day of June, 1941.

*British Puisne Judge.*

CIVIL APPEAL No. 82/41.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Jamileh Mahmoud el Hamdan el Abed,
2. Jamil Ibn Ibrahim el Yousef,
3. Mohammad Ibn Ibrahim el Yousef,
4. Farid Ibn Ibrahim el Yousef. APPELLANTS.

v.

1. Azizeh Mohammad Abu Mana',
2. Leila Bint Ibrahim el Yousef,
3. Bahiya bint Ibrahim el Yousef. RESPONDENTS.

*Claim to land — Failure to prove that land under settlement — Magistrate indicating right to bring separate action in respect of one plot — No res judicata by superfluous findings.*

In dismissing an appeal from the judgment of the Magistrate's Court of Tulkarm, sitting as a Land Court, dated the 31st day of March, 1941, in Land Case No. 219/40 :—

HELD : 1. The Appellants having failed to prove that the lands in dispute were in a settlement area the Magistrate sitting as a Land Court had jurisdiction.

2. The Magistrate distinctly gave judgment for the Respondents' shares in the land and not for the whole land.

3. The absence of a finding with regard to certain trees had no effect upon the case.

4. The right of a person to bring an action depended upon the law and not on what the Magistrate said. The paragraph in the Magistrate's judgment giving the Respondents permission to lodge a separate action was, therefore, superfluous and could not create any question of *res judicata*.

ANNOTATIONS :

1. *Cf.*, on the first point, C. A. 94/39 (1939, S. C. J. 446).
2. On the effect of irrelevant findings see also C. A. 142/40 (1940, S. C. J. 255).

FOR APPELLANTS : Moghannam.

FOR RESPONDENTS : Bushnaq.

### JUDGMENT:

This is an appeal from a judgment of the Magistrate, sitting at Tulkarm as a Land Court. The dispute concerned four plots of lands

in the village of Zeita. The Magistrate gave judgment in favour of the Respondent with regard to three of the plots of land. As regards the other land he dismissed the claim and gave the Respondents the right to bring a separate action if they thought fit.

The principal ground of appeal is again on the question of jurisdiction. The Appellant advances the argument that the lands of Zeita had been declared a Settlement area in 1934, and that, therefore, the jurisdiction of a Land Court was ousted. As he made this allegation it was, therefore, for the Appellant to prove that before the Magistrate. The evidence on this point was that of the Assistant Settlement Officer who said he had not any knowledge at all whether these plots of land were in the lands which had been declared under settlement but that at any rate in all such lands in Zeita which had been so declared settlement had been completed. The *Mukhtar* and one or two other witnesses came forward and said that these lands had not been declared in a settlement area. On the contrary the Appellant produced an extract regarding these lands from the *Tabu* with a note made by a clerk who said that these lands were under settlement. On cross-examination on this subject the clerk said he made a mistake. It was quite clear, therefore, that, on the evidence at any rate which was before the learned Magistrate, he was correct in deciding that the lands were not in a settlement area. That being so the Court below had jurisdiction to entertain the case.

Another point taken on appeal is that the learned Magistrate gave judgment for the whole of the land and not for the twelve out of twenty four shares. This unfortunately is inaccurate. The Magistrate distinctly gave judgment for the ownership of the Plaintiffs to their said shares in these plots of land. As for another point that the Magistrate made no finding of fact with regard to certain trees, we are of opinion that the absence of such a finding has no effect upon the case.

Finally it is said that the Magistrate was wrong in giving the Respondents permission to bring a further action with regard to a plot of land in which he declined to give judgment. Whether a person has a right to lodge an action depends upon the law and not merely on what the Magistrate says. If he has that right, then nothing that the Magistrate says can have any effect on this case. If he has not got that right in law then the learned Magistrate cannot give him that right. This paragraph in the judgment is, therefore, superfluous and that being so cannot create any question of *res judicata*. The appeal is dismissed with costs to include LP. 15 advocate's attendance fee.

Delivered this 25th day of June, 1941.

*British Puisne Judge.*

CIVIL APPEAL No. 74/41.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Heyrouth Colony. APPELLANT.

v.

Yousef Hamed el Mansour. RESPONDENT.

*Jurisdiction of Magistrate sitting as Land Court — Whether value of road to be included in value of land — Consent to construction of road — Law of Disposition, Art. 9.*

In dismissing an appeal from the judgment of the Magistrate's Court of Tulkarm, sitting as a Land Court, dated the 27th of March, 1941, in Land Case No. 4/40 :—

HELD : 1. As the Respondent, the Plaintiff in the Court below, claimed the land only, and not the road, the value of the road was to be excluded in determining the value of the claim, and the matter was within the jurisdiction of the Magistrate.

2. The Magistrate was right in holding that failure to object to the road while it was being constructed was not sufficient to infer consent.

3. There was no analogy whereby Art. 9 of the Law of Disposition could be applied.

ANNOTATIONS :

1. On assessment of the value of a claim, *cf.* C. A. 223/40 (1940, S. C. J. 459).

2. See, on estoppel, note 2 to C. A. 278/40 (*ante*, p. 97) ; later cases : C. A. 227/40 (*ante*, p. 107) and C. A. 67/41 (*ante*, p. 186).

FOR APPELLANT : Ben Shemesh and Eliash.

FOR RESPONDENT : Shehadeh.

### JUDGMENT:

This is an appeal from a judgment of the Magistrate of Tulkarm, sitting as a Land Court, in which the Magistrate gave judgment in favour of the Plaintiff in the Court below, that the land on which the present Appellants had built a road belonged to the Plaintiff, the present Respondent, and he ordered the Appellants to refrain from interfering with it.

On appeal several points were taken. The only important point is the question of jurisdiction. The Appellants allege that the value of

the land plus the road is more than LP. 150 and the case is, therefore, not within the jurisdiction of the Magistrate. It is agreed that the land by itself is worth under LP. 100 but that the land plus the road is more than LP. 150. The answer, therefore, depends upon whether the value of the road must be excluded from that of the land with regard to this present dispute. Now, the question of jurisdiction depends upon what is the value of the land or the subject-matter of the dispute. The claim before the Magistrate was for the land on which the road was built and it seems to us that the subject-matter of the dispute was the land. The Respondent was not interested in the road, or at any rate professed not to be interested in the road, and the fact that the Appellants were interested in it, in our opinion does not affect the matter. We are satisfied, therefore, that the Magistrate had jurisdiction to take this case.

The only other points were that the Respondent had consented to the construction of this road. There was, however, no evidence before the Magistrate as to consent. It was half-heartedly suggested, though, that there was an oral consent but the main argument on this point was that the Respondent consented by not objecting to the road while it was being constructed. We are not inclined to interfere with the view taken by the learned Magistrate that this is not sufficient from which to infer consent. It was also suggested to us that Article 9 of the Law of Disposition should be applied by analogy, but unfortunately we are unable to see where the analogy lies.

For these reasons the appeal fails and must be dismissed with costs on the lower scale together with LP. 15 advocate's attendance fee.

Delivered this 25th day of June, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 23/41.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Akmal Kharpoutli, as one of the heirs and on behalf of the estate of his late father Ahmad Kheir Ed-Din Kharpoutly,

2. Raja Rayes, as one of the heirs and on behalf of the estate of his late father Selim Rayes,
3. Yousef Shlomo Dayan,
4. Sylvie Boustros, widow of the late Anis George Trad, as one of the heirs of her late husband Anis Trad, on behalf of his estate. APPELLANTS.

v.

Haj Ahmad Abdallah el Mughraby. RESPONDENT.

*Rights to land — Same land registered twice — Strict proof necessary to upset registered title, P.C. 56/38 — Purchaser not bona fide, C.A. 48/38, C.A. 215/38 — Kushan obtained by fraud — Equitable title.*

In allowing an appeal from the judgment of the Land Court of Haifa, dated the 7th January, 1941, in Land Case No. 55/35 : —

HELD : (Following P.C. 56/38, C.A. 48/38, C.A. 215/38) : The registration of the Respondent's vendor had been improperly obtained and the Respondent had notice thereof and was, therefore, not a *bona fide* purchaser.

For the same reason, there could be no question of equitable title.

FOLLOWED : P. C. 56/38 (1940, S.C.J. 277), C.A. 48/38 (1938, 1 S.C.J. 327), C.A. 215/38 (1938, 2 S.C.J. 177).

ANNOTATIONS :

1. Earlier proceedings in this case : C.A. 75/39 (1939, S.C.J. 448).
2. See the cases cited in the judgment and notes thereto ; *cf.* also C.A. 195/40 (1940, S.C.J. 491).

FOR APPELLANTS : Weinshall.

FOR REPSONDENT : Cattan.

## JUDGMENT:

The facts of this case have been very clearly set out in the judgment of the learned R/President, together with certain corrections, of no great importance, in the judgment of Judge Baradey. For the purposes of this appeal, the salient features are that between 1324 and 1333 the Appellants obtained *kushans* for the land in dispute, and that up to 1921 at the earliest, the Respondent had never been in possession of the land. After 1921 there were various encroachments on the land and on the 7th July 1925, the Appellants brought an action against the Respondent, Haj Khalil Taha, the Respondent's vendor and many

others. That action was struck out on the 23rd October, 1925, owing to the misjoinder of the Defendants. In the meantime, on the 26th September 1925, the Respondent obtained registration in his favour of this land on sale from Haj Khalil Taha, who immediately before had himself been registered as owner, on the ground of long possession and that there was no previous registration of this land. The preliminaries of this registration are stated to have been carried out in the remarkably short period of eleven days, during which time the consent of the Director of Lands was also obtained. It was not until the 26th June 1935, that the present action was commenced against the Respondent.

At the trial in the Land Court, four issues were framed, three by the parties and the fourth one by the Court. On the first two issues — the identity of the land and the claim by the Respondent that the action was prescribed, the two learned Judges found themselves in agreement. They found that there was in fact a double registration of this land, the last one being in the name of the Respondent and that the plea of prescription by the Respondent failed. On the third and fourth issues the learned Judges disagreed. On the third issue — whether the Respondent was a *bona fide* purchaser without notice of the Appellants' rights and had acquired an equitable interest in the land, Judge Evans in both cases decided in the negative, whilst Judge Baradey thought that the Respondent had proved this plea. On the fourth issue, whether the Respondent's *kushan* had been improperly obtained, both learned Judges referred to the principles laid down in the case of the Mamur Awkaf Jaffa *v.* Government of Palestine, Privy Council Appeal No. 56 of 1938 (7 P.L.R. 105), but disagreed on the question whether there had been furnished that "strictest proof" required before a subsisting entry in the Land Register should be held to be incorrect. In view of the disagreement the Appellants' action was dismissed.

No question arises in this appeal on the first two issues which are not now contested. The Appellants in their notice of appeal raised two points — the first, that the Court was wrong in dismissing the action owing to disagreement, and secondly, that the Court was not entitled of its own motion to frame the fourth issue. These points have been dropped at the hearing, and we are no longer concerned with them — the appeal is based entirely on the question of *bona fide* purchase, and equitable title, and the question whether there was sufficient proof that the registration of the Respondent was improperly obtained.

As to the first ground, we have no doubt whatever that the Res-

pondent was not a *bona fide* purchaser without notice, and that the registration of Haj Khalil Taha was also improperly obtained. In view of the finding of the Court that there was no possession prior to 1921, the certificates which accompanied the application for registration in 1925, were palpably false and were false to the knowledge of Haj Khalil Taha and of the Respondent and both Haj Khalil Taha and the Respondent were defendants in the 1925 action, which had not been disposed of when the registrations were respectively made in succession in their names. Both of them therefore had notice that there was an adverse claim to this land, at the time that registration was effected and the principles laid down in Daoud *v.* Zakay, C.A 48/38 (5 P.L.R. 313) and Hankin *v.* Shanti, C.A. 215/38 (5 P.L.R. 553) apply, namely, that where a person has notice of an adverse claim and nevertheless proceeds to effect registration of the disputed land in his name, he is not a *bona fide* purchaser without notice, and if he proceeds to complete the purchase he must take the consequences. And also it makes no difference that the agreement to purchase may have been made before notice was received. Both Haj Khalil Taha and the Respondent knew of the first registration, when carrying through their own registrations, as this first registration was the basis of the action brought against them, and it was therefore a false statement to claim registration on the ground that there was no previous registration. The Respondent's argument that there was no proof of any irregularity and that the transactions were authorised by the Director of Lands cannot avail him in the light of these facts, neither does the argument hold water that proof is a question of fact, and that the Appellants had failed to discharge the onus of proof in the Court below and that therefore the action was rightly dismissed. On the facts before the Court the judgment of Judge Baradey was contrary to the weight of evidence and cannot be supported. It seems to us that these two questions, of *bona fides* and strict proof, are bound up with one another.

It is clear to our minds beyond a shadow of doubt that the registrations of 1925 were improperly obtained and that there was ample, indeed more than ample, evidence to prove this, and to comply with the judgment of Their Lordships in Mamur Awqaf Jaffa *v.* Government of Palestine (*supra*). No question in this case of an equitable title can arise, since the Respondent purchased from a person who was himself a trespasser, and an equitable title also implies *bona fides*, which is lacking here.

We find ourselves in agreement with Judge Evans on the issues involved in this appeal.

In these circumstances, the appeal must be allowed, the judgment of the Land Court set aside, and judgment entered for the Appellants with an order for possession.

The Appellants will have their costs on the lower scale both here and below, together with LP. 15 advocate's fee for attendance here. The Appellants will also have the LP. 10 assessed as attendance fee in the Land Court.

Delivered this 6th day of March, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 94/41.

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

BEFORE : Trusted, C. J. and Rose, J.

IN THE APPEAL OF :—

Keren Kayemeth Leisrael Limited. APPELLANTS.

v.

1. Abdul Rahman Mustafa el Aalem,
2. Mohammad Mustafa el Aalem. RESPONDENTS.

*Claim for equivalent rent from trespassers — Previous notarial notice inconsistent with allegation of trespass — Equivalent rent, Disposal Law, Art.* 14 *— Appeal dismissed on grounds different from those of District Court, C. P. R.* 341.

In dismissing an appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated the 3rd of April, 1941, in Civil Appeal No. 10/41 :—

HELD : By reason of the notarial notice previously sent by them the Appellants could not now allege that the Respondents cultivated the land without their consent and the appeal would be dismissed on that ground in accordance with Rule 341 of the Civil Procedure Rules.

ANNOTATIONS :

1. See, on estoppel, note 2 to C. A. 278/40 (*ante*, p. 97) and C. A. 67/41 (*ante*, p. 186).

2. On C. P. R., Rule 341, *vide* C. A. 234/38 (1939, S. C. J. 72 on p. 75) and C. A. 9/40 (1940, S. C. J. 184, on p. 190).

FOR APPELLANTS : Lipshitz.

FOR RESPONDENTS : Bustani.

JUDGMENT:

The Appellants are the registered owners of certain lands.

It seems that in 1935 the Appellants sent to a group of persons, of which the first Respondent was one, a notarial notice. We have not been shown a copy of it, but in reply thereto the persons addressed, including the first Respondent, stated :—

> "1. What you mentioned in your above-mentioned notice to the effect that we neglect and are inattentive to the lands, *etc.* is absolutely false. On the contrary, we are most concerned with the land because taking care of the land and its fructification is in our interest, since the greater the crop obtained the more we benefit from its use...
>
> 4. As to the rent of the land which is 60 mils per *dunam,* we are ready to pay it as soon as we are required to do so, as is our custom every year...
>
> 5. ... We are awaiting the fact that the harvest is not yet over and the crops have not yet been sold. We shall pay immediately when you call upon us so to do."

In 1937 the Appellants brought action against the Respondents in the Magistrate's Court, Tiberias. We have no copy of the judgment in that case, but on appeal the District Court, Nablus, held :—

> "In this case the Plaintiffs, who are Appellants before this Court, claim from Defendants *Ajr el-Misl* in respect of land of which the Defendants are admittedly in possession. Plaintiff does not claim possession. Defendants set up a title in themselves, and claim to be rightly in possession. The Magistrate was of opinion that this was a genuine claim of ownership and found that he had no jurisdiction. We agree with his finding. Appellants should either join their claim to one for recovery of possession to put an end to Defendants' irregular possession, or bring an action for declaration of ownership if they think the latter course desirable."

It would appear that there was a claim to ownership by the Respondents, and the action failed for lack of jurisdiction.

The matter came before the Land Court, Haifa, and in its judgment of the 21st of February, 1940, that Court said :—

> "The Plaintiffs in this case hold *kushans* for the land in dispute, and Defendants rely on possession. ... The Defendants have not satisfied us that they have been in possession since for the period of prescription.
>
> ... The 1st Defendant's reply to the notarial notice we believe refers to this land and is entirely inconsistent with his present claim. We therefore find that the Defendant has failed to prove that they have acquired any prescriptive title to the land in dispute."

The Appellants then claimed equivalent rent for the period that

the Respondents had occupied the land, and the Magistrate dismissed their claim. The Appellants appealed, and the learned President of the District Court held :—

> "I am of the opinion that until the Plaintiffs (*i. e.* present Appellants) had, in fact, established their ownership they could not succeed in their claim, and I do not think that now that they have established their ownership they can claim arrears, *i. e.* arrears prior to the date of the judgment establishing their ownership."

The Appellants appeal to this Court claiming the equivalent for the whole period of occupation.

The Plaintiffs' (Appellants') claim in the Magistrate's Court, paragraph 2, reads :—

> "In 1933 the Defendants trespassed on the said lands and took possession thereof unlawfully by force and without consent of the Plaintiffs and have up to date retained possession thereof."

and paragraph 4 reads :—

> "Plaintiffs estimate the value of the rent of the said property at the rate of LP. 0.080 per *dunum* per *annum*, making a total of LP. 118.160 for the period of seven years mentioned herein."

It is clear that they relied upon Article 14 of the Provisional Law Regulating the Right to Dispose of Immovable Property, which provides :—

> "If a person takes possession of *mirie* or *mauquf* land and cultivates it without the consent of the owner, the owner may claim its rent for the period during which it was held by the other, but he shall have no right to compensation for the decrease in the value of the land. This rule applies to *Moussaqafat* and *Moustaghillat Waqf*."

As I have said, we have not seen the original notarial notice — if the Appellants desired to rely upon it they could have produced it.

From the reply there is nothing to show that the Appellants were suggesting that the Respondents were occupying without the consent of the owner — on the contrary it would seem that they were referring to the method of cultivation and to the rent.

That being so, I do not see how the Appellants can now allege that the Respondents cultivated without their consent, and there was no claim for rent by agreement.

By reason of the provision of Rule 341 I think the appeal fails. There is no notice of cross-appeal.

The Respondents together will have their costs on the lower scale and the sum of LP. 15 advocate's attendance fee.

Delivered this 3rd day of July, 1941.

*Chief Justice.*

HIGH COURT No. 51/41.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

I. David Ketter. — PETITIONER.

v.

The Attorney General. — RESPONDENT.

*Application to High Court for declaratory judgment — Citizenship — District Court only competent Court.*

In refusing an application for a declaratory judgment to be given declaring that the Petitioner was a British subject :—

HELD : The High Court had no jurisdiction to issue declaratory judgments the power to give which lay within the province of the District Courts by virtue of their residuary jurisdiction.

ANNOTATIONS :

1. See R. *v.* Ketter (P. P. 17.iii.1939) where the Petitioner failed on the merits of his present application in the English Court of Criminal Appeal.
2. On citizenship generally, *vide* note 1 to H. C. 23/41 (*ante*, p. 130).
3. On the jurisdiction of the High Court see H. C. 78/39 (1940, S. C. J. 25).
4. See, on the residuary jurisdiction of the District Court, C. A. 199/40 (1940, S. C. J. 548) and note 2. *Cf.* Adm. 2/40 (1940, S. C. J. 562) as to Criminal Courts not being entitled to issue declaratory judgments, Note, however, that Rule 41 of the Magistrates' Courts Procedure Rules gives this power to Magistrates' Courts.

PETITIONER : In person.

### ORDER.

In this case the Petitioner has come to the High Court asking for a declaratory judgment that he is a British subject. The jurisdiction of the High Court is laid down in the Courts Ordinance and there is nothing in that Ordinance which, in any way, entitles us to grant what is called a declaratory judgment of this nature. If the Petitioner wished for an order for *mandamus* he should have worded his application accordingly. Declaratory judgments of the kind asked for in the application are not within the province of this Court to give, but are within the province of District Courts, who have the residuary jurisdiction which is not vested in other Courts.

The application must, therefore, be refused.

Given this 17th day of July, 1941.

*British Puisne Judge.*

PRIVY COUNCIL APPEAL No. 30/39.

## IN THE PRIVY COUNCIL.

BEFORE : Viscount Sankey, Lord Atkin and Luxmoore, L. J.

IN THE APPEAL OF :—

Michel Habib Raji Ayoub & ors. — APPELLANTS.

v.

Sheikh Suleiman el Taji el Farouqi. — RESPONDENT.

*Contract for sale of land — Breach of contract by purchaser — Enforcement of penalty clause, P. C. 1/35 — Liquidated damages and penalty, Ottoman C. P. C., Arts. 111, 112, Translation of Turkish Laws, P. O. in C., Art. 46 — Interest in case of failure to pay instalment.*

In dismissing an appeal from the judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 25th November, 1937, in Civil Appeal No. 191/37, whereby the case had been remitted to the District Court to assess the actual damages :—

HELD : 1. The sum of LP. 2.500 provided for in the contract was clearly a penalty and the terms of Art. 111 of the Ottoman Code of Civil Procedure could be readily construed so as to afford the Courts the means of giving relief against a merely penal stipulation.

2. Art. 111 of the Ottoman Civil Procedure Code could only be applied to an agreement representing "a genuine pre-estimate of damages".

3. A penalty, *i. e.* a sum fixed *in terrorem* covering breaches of contract of many varying degrees of importance, the possible damages from which bore no relation to the fixed sum, and which obviously had at no time been estimated by the contracting parties, could not be enforced whatever the sum thus fixed had been called in the contract.

4. The Ottoman Code of Civil Procedure had to be construed in the light of the doctrines of English law, but where there was a clear and infrangible antinomy the code prevailed.

5. Art. 112 applied not only to a single undertaking to pay money, but also to failure to pay one instalment of a purchase price payable by instalments and it was irrelevant that there were other obligations outstanding on either side, if it was once established that a fixed sum was due and payable.

6. Arts. 111 and 112 were independent of each other, though when it came to assessing the actual damages the plaintiffs might have to fall back on Art. 112.

ANNOTATIONS :

1. Previous proceedings in this case : C. A. 176/32 (C. of J. 444) ; P. C. 1/35 (2, P. L. R. 390, C. of J. 1934—6, 331, P. P. 22.i.36, Ha. 20.ii.36) ; C. A.

191/37 (2, Ct. L. R. 169, P. P. 6—9.xii.37, Ha. 23.xii.37) ; P. C. L. A. 191/37 (1938, 1 S. C. J. 252).

2 On the introduction of English law by virtue of Art. 46 of the Order in Council, *vide* C. A. 113/40 (1940, S. C. J. 192) and note 1 ; see also C. A. 39/41 (*ante*, p. 155) and note 2.

3. On penalties and liquidated damages see C. A. 30/41 (*ante*, p. 163) and note.

4. *Cf.*, on the translation of Turkish Laws, note 1 to P. C. 54/38 (1940, S. C. J. 268).

FOR APPELLANTS : Sir Thomas Strangman, K.C. and Phineas Quass.

FOR RESPONDENT : No appearance.

JUDGMENT:

This is an appeal from the Supreme Court of Palestine, sitting as a Court of Appeal who set aside a judgment of the District Court of Jaffa in favour of the Appellants, the Plaintiffs in the suit, for £ 2,500 for breach of contract. The hearing in the District Court was the result of a decision of this Board on appeal in the same case, who after judgments in the two Courts in Palestine ultimately in favour of the Plaintiffs remitted the case for a further and fuller hearing. The dispute between the parties arises out of a contract in writing dated November 12, 1929, under which the Appellants agreed to sell to the Respondent certain land in the district of Jaffa. The purchase price was to be paid as to £ 200 on the signing of the agreement, when the purchasers were to be let into possession, and the balance by instalments. There was a date fixed for completion and there were various stipulations by either party, as to payment of taxes, survey of the land, proof of registration and the like. The agreement was subsequently varied by correspondence as to the date of the subsequent payments with an express stipulation that the remaining stipulations of the agreement remained in force. The purchasers paid the initial £ 200 on signature and went into possession ; but it does not appear that they have made any further payment. There was in the agreement Clause 8 : "The second party" (the purchaser) "shall pay to the first party £ 2,500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or part of his undertaking under this agreement." There was a similar stipulation by the vendor in the event of any breach on his part. By the varied agreement the purchaser was to pay £ 400 by the end of February, 1931. On March 2, 1931, the vendors gave the purchasers written notice to pay the £ 400 within three days, and on July 25, 1932,

delivered their statement of claim in the present action which averred the contract, averred two breaches in respect of the non-payment of taxes, and the non-payment of £400, and claimed £2,500 as the agreed damages. The District Court dismissed the action on the ground that the claim as to damages did not apply to the contract as varied. This was obviously wrong and in effect the Supreme Court so held, and treating this as the only issue gave judgment for the Plaintiffs. On appeal to the Privy Council this Board affirmed the opinion of the Supreme Court so far as it went ; but as it was apparent that other points raised by the purchasers had not been disposed of, remitted the case for further hearing. In their judgment attention was called to the provisions of S. 46 of the Palestine Order-in-Council, 1922, and to the introduction into the jurisprudence of Palestine of the provisions of the rules of the English common law and equity as there provided. It is plain that their Lordships studiously refrained from expressing any opinion as to the effect of this clause upon the issues in this action ; and in this respect it would appear that one of the Judges of the Supreme Court was under a missapprehension.

The questions that remained for consideration on the new trial, and have now been decided by the Supreme Court, arise out of the provisions of Articles 111 and 112 of the Ottoman Code of Civil Procedure. Unfortunately disputes have arisen in this and other cases as to the correct translation of this code which is in Turkish. Fortunately in the present case we have translations into Arabic by two of the learned Judges of the Supreme Court who were members of the Appeal Court, and their Lordships are able to approach this part of the case with some confidence that the English translation of the Arabic by the Court interpreter conveys the true text. There were some slight verbal differences in the Arabic translations which did not affect the substance, and for the purpose of this decision their Lordships adopt the rendering of the Senior Judge, Mr. Justice Khaldi.

Art. 111. If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of what he undertook, he pays to the other party a fixed amount as damages, no greater or less should be awarded.

Art. 112. The damages to be awarded for failure to carry out the undertaking which amount to payment of money, is a judgment for the interest at the rate of 1 *per cent.* per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (*Sanad*) regarding the interest and interest is claimed in respect

of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim.

It is necessary now to refer to Section 46 of the Palestine Order-in-Council of 1922.:—

> "46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions." "Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary."

The Appellants contend that the case falls to be decided by the express provisions of Article 111 of the Code being Ottoman Law in force at the material time. It is only subject thereto that the common law and doctrines of equity are directed to be in force: and there is, therefore, no support for the Defendant's contention that the English distinction between penalty and liquidated damages has to be applied. That the stipulation as to £2,500 would be considered a penalty according to English rules was admitted by the Appellants' counsel. There could hardly be a plainer case. For any failure to pay any of the instalments on due date, for failure to pay taxes, to take the agreed part in the appointment of a surveyor, this sum of £2,500 became payable. It was the contention of counsel, and it seems correct, that the recovery of this sum left the instalments still outstanding: and that from time to time the agreed sum would be recovered as and when there was any breach. Their Lordships cannot hold that under the present system in Palestine such harsh and oppressive terms have to be enforced by the Courts. The terms of Article 111 can be readily construed so as to afford the Courts the means of giving relief against a merely penal stipulation. The code speaks in a legal system which

does not know penalties as such : in which an agreement to pay damages must, therefore, be strictly enforced "no more and no less." But when the difference between penalty and liquidated damages is introduced into the legal concepts which now owing to Sec. 46 of the Order-in-Council form the jurisprudence of Palestine the terms of the Article 111 can be given a plain and just meaning. Agreed liquidated damages, if to be enforced, must be the result of a "genuine pre-estimate of damages" to use the illuminating phrase of Lord Dunedin. They do not include a sum fixed *in terrorem* covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. It seems right therefore to conclude that now when the code is applied to contracts "damages" will be taken to mean actual damages, and the article will only apply to an agreement which represents "a genuine pre-estimate of damages". Where there is such an agreed sum "no more and no less" can be awarded. But if the Court applying well known rules has to conclude that the sum agreed was a penalty whatever it may be called in the agreement then the penal stipulation will not be enforced. It results from what has been said that it appears more correct to say that the code must be construed in the light of the doctrines of English law rather than that the English principles relieve against the code. If there is a clear and infrangible antinomy the code must of course prevail. On this point, therefore, the appeal fails. It nevertheless remains to consider the construction of Article 112. The action has been remitted to the District Court to assess the damage caused to the Appellants by the breaches alleged, and unless the Plaintiffs can claim interest under the article it seems difficult to see what other damage they could establish. The view taken by the majority of the Supreme Court was apparently that the article only applied to a single obligation to pay money. It may be supposed that a simple money bond, or a promissory note would be instances. It was not considered applicable to a contract where there were reciprocal undertakings. On this point their Lordships agree with the Acting Chief Justice that the words of the article do not appear to be as limited in this scope as appeared to the other two learned Judges. The promise to pay the purchase price in instalments is an "undertaking which amounts to the payment of money". A debt is constituted whether the price be for real or personal property, and whether it be due in one sum or in instalments : and it would appear irrelevant that there are other obligations outstanding on either side, if once it is established that a fixed sum is due and payable. It seems difficult to see why in-

terest should be allowed on a single payment and not on instalments : or why if in fact there has been a delay in making payment, the creditor should not be compensated because there are further and other obligations outstanding. At the hearing it would appear that the Respondent contended for the construction now adopted arguing that Article 112 provided the only remedy for delay in payment ; and that where it applied Article 111 had no operation. Their Lordships do not take this view. The two articles are independent, though when it comes to assessing the actual damages the Plaintiffs may have to fall back on Article 112. What the effect may be of a suit to recover interest only and not the principal is a matter which was not discussed at the hearing, and no opinion is expressed upon it. For the reasons above given their Lordships will humbly advise His Majesty that this appeal be dismissed.

As the Respondent has not appeared there will be no order respecting costs.

Delivered this 11th day of March, 1941.

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CRIMINAL APPEAL No. 82/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Mary Yousef Pino. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Outraging religious feelings, C. C. O., Sec. 149 — Prosecution to prove that offence occurred in a public place — Slander, C. C. O., Sec. 202 — Excessive sentence.*

In partly allowing and partly dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 3rd of June, 1941, in Criminal Appeal No. 55/41, whereby it confirmed the judgment of the Magistrate's Court of Jerusalem, dated the 20th of May, 1941, in Criminal Case No. 4730/41, whereby the Appellant was convicted of uttering in a public place and in the hearing of another person words calculated to outrage the religious feelings of such person, contrary to Sections 149(b) and 202 of the Criminal Code Ordinance, 1936, and

sentenced to pay a fine of LP. 25 or in default, three months' imprisonment, and in reducing the sentence :—

HELD : 1. In a prosecution for outrage to religious feelings it was upon the prosecution to show that the offence had taken place in a public place and that onus had not been discharged.

2. The penalty imposed by the District Court was a heavy one and would be reduced.

ANNOTATIONS :

1. On the meaning of "public place" see Criminal Code Ordinance, Sec. 5.

2. *Cf.*, on the onus of proving the whole case being always on the prosecution, CR. A. 136/40 (1940, S. C. J. 500) and note 2.

3. See, on the last point, CR. A. 24/41 (*ante*, p. 95) and note 3, CR. A. 33/41 (*ante*, p. 153).

FOR APPELLANT : Elia.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

It seems that the Appellant and her neighbour had a difference of opinion, and it may well be, expressed themselves with too great freedom, and I gather from the evidence of a Police officer who was called for the defence, that it was not the first occasion on which this had happened.

The Appellant was then charged with two offences under the Criminal Code Ordinance, one under Section 149, that is, outraging religious feelings, and the other under Section 202, that is slander. With regard to the first, the Crown Counsel agrees that the onus is on the prosecution to show that the offence took place in a public place, and that that onus was not discharged. The conviction under Section 149 must, therefore, be quashed.

As regards the offence under Section 202, Mr. Elia, appealing on behalf of the Respondent (*sic*), does not contend that she was improperly convicted.

Before the Magistrate the prosecution pressed for a heavy sentence in view of the seriousness of the offence, and possibly in the light of that observation the Magistrate sentenced the Appellant to four months' imprisonment, which certainly complied with the request.

The matter was carried to the District Court, which reduced the sentence to a fine of LP. 25, but it is quite clear that that is a heavy penalty for this Appellant even assuming that the conviction for both these charges was right.

The Appellant must understand that she must not create disturbance and wake people in the middle of the night, nor must she say things about the religions of other people which may cause them pain. If she is brought before the Courts again for this sort of thing she may find herself in a more serious position.

As the result of the judgments she has already been imprisoned for nine days, and taking that into account and the fact that she is now only convicted of one of the two offences, we think it would be adequate for her to go to prison for one day, and she will be discharged at the rising of the Court unless detained on any other charge. The conviction under Section 149 will be quashed, and the sentence varied accordingly.

Delivered this 30th day of June, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 117/41.

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

BEFORE : Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Raji and Bahjat el Issa. — APPELLANTS.

v.

1. Mohammad Ali Saleh,
2. Mohammad Deeb el Said. — RESPONDENTS.

*Local jurisdiction of Magistrate's Court — Meaning of appropriate Court, M. C. P. R., Rule 3, Establishment of Courts Order, C. A. D. C. Ha. 95/39, C. A. 156/40, CR. A. 13/41.*

In dismissing an appeal from the judgment of the District Court of Haifa, sitting as a Court of Appeal, dated the 28th of April, 1941, in Civil Appeal No. 13/41 :—

HELD : (Overruling C. A. D. C. Ha. 95/39, distinguishing C. A. 156/40, CR. A. 13/41) : The appropriate Court of the place where a defendant resides meant the Magistrate's Court situated in the sub-district in which the defendant resided and nothing in the Establishment of Courts Order could in any way conflict with the Magistrates' Courts Procedure Rules.

OVERRULED : C. A. D. C. Ha. 95/39 (not reported).

DISTINGUISHED : C. A. 156/40 (1940, S. C. J. 545), CR. A. 13/41 (*ante*, p. 63).

ANNOTATIONS : See C. A. 175/40 (1940, S. C. J. 305) and note 2.

FOR APPELLANTS : Geiger.

FOR RESPONDENTS : Hawa.

JUDGMENT:

This is an appeal by leave from an appellate judgment of the District Court of Haifa. The short point involved is this — the Defendants lived in Acre Sub-District, the money involved was paid in Acre and the learned Magistrate decided under Rule 3 of the Magistrates' Courts Procedure Rules, 1940, that the Court which had jurisdiction to hear the case was the Magistrate's Court of Acre. The present Appellants appealed to the District Court, where they met with no greater success than they met in the Magistrate's Court, for the learned Relieving President dismissed the appeal for reasons other than those which animated the learned Magistrate.

The Appellants have now come to this Court. The learned Relieving President said that there was in his opinion a confusion of thought between jurisdiction and procedure and that the jurisdiction of the Magistrate was fixed by the Establishment of Courts Order, 1939, and the procedure to be adopted by the litigants was that laid down in the Magistrates' Courts Procedure Rules, 1940. In our opinion the learned Relieving President rightly dismissed the appeal for the reasons given by the learned Magistrate. It is quite clear to our minds that the place in which an action should be brought is regulated by Rule 3 of the Magistrates' Courts Procedure Rules. Rule 3 says definitely that actions shall be instituted before the Magistrate's Court of the place where the Defendant resides or the undertaking is made. The appropriate Court of the place where a defendant resides must be the Magistrate's Court situated in the sub-district in which the defendant resides and nothing in the Establishment of Courts Order can in any way conflict with the Magistrates' Courts Procedure Rules. Haifa Civil Appeal 95/39, if it purported to hold the opposite, was, in our opinion, wrongly decided. Shehadeh *v.* Shurik and others, C. A. 156/40 (7 P. L. R. 435), cited by the Appellants, has no bearing on the present case, for there the Court decided that the District Courts of Jaffa and Tel Aviv had concurrent jurisdiction throughout the Lydda District, and Abdulla Mahmoud El Ahmed *v.* the Attorney General, Crim. Ap. 13/41 (8 P. L. R. 68) decided that an Acre Magistrate

conducting a preliminary investigation could take the evidence of a witness in Haifa — quite a different point from the one in this present appeal.

For these reasons this appeal fails and will be dismissed with the usual consequences. Costs will be on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 8th day of July, 1941.

*British Puisne Judge.*

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ADMIRALTY No. 1/41.

IN THE SUPREME COURT SITTING AS A COURT OF ADMIRALTY.

BEFORE : Copland, J.

IN THE APPLICATION OF :

Captain N. D. Rossolymos, Captain of the S/S Urania. — APPLICANT.

v.

Captain Earwaker, Divisional Sea Transport Officer, Haifa. — RESPONDENT.

*Application for writ to restrain Divisional Sea Transport Officer from boarding and removing ship — Said ship requisitioned by High Commissioner under Defence Regulations, Reg. 51 — Applicability of Crown Actions Ordinance, Adm. 8/40 — Divisional Sea Transport Officer not a proper party.*

In setting aside the writ and quashing all proceedings in the action brought by the Applicant in respect of the S/S Urania :—

HELD : 1. The first requisitioning order was a nullity as at that time the ship was not in Palestine.

2. (Following Adm. 8/40) : The Crown Actions Ordinance applied to claims against Government brought in the Admiralty Court in Palestine.

3. The present Respondent was not a proper defendant as he had merely carried out an order, good on the face of it, lawfully made by the High Commissioner.

FOLLOWED : Adm. 8/40 (*ante*, p. 241).

ANNOTATIONS :

1. See, on the first point, Regulation 51(1)(b) of the Defence Regulations

as enacted in Regulation 4 of the Defence (Am.) Regulations (No. 8), 1940, P. G. No. 1037 which allows the requisitioning of any ship *registered in Palestine* wherever the ship may be.

2. *Cf.* Adm. 8/40 (*supra*) and notes.

FOR APPLICANT : Goitein.

RESPONDENT : In person.

AMICUS CURIAE : Solicitor General — (Griffin).

## JUDGMENT:

In this case a writ has been issued by the Captain of the S/S "Urania" against Captain Earwaker, the Divisional Sea Transport Officer in Haifa, asking that he should be restrained from boarding the S/S "Urania" and from removing the said ship from the Port of Haifa until further order from this Court. The matter came before me sitting in the Admiralty Court on Saturday and I issued a temporary injunction and adjourned the application to this morning for further argument. The Defendant has appeared in person and the Solicitor General has come to this Court as *amicus curiae* in order to assist us in the decision on the motion. The application raises matters of considerable difficulty.

The first point to be decided is this. The Solicitor General has suggested that Captain Earwaker is the wrong Defendant to be summoned and that the proper Defendant would be the High Commissioner or the Government of Palestine, and the argument is this, that the ship has been requisitioned by the High Commisisoner acting under the powers conferred upon him by Regulation 51 of the Defence Regulations, 1939, — that the present Defendant is an agent of the Government of Palestine and is not in a position either to obey or disobey an order issued by this Court, and that the proper procedure for the Plaintiff would be to apply under the Crown Actions Ordinance for a writ to be issued against the Government of Palestine.

Now, the facts of the case are quite short. On the 7th February this year, the High Commissioner requisitioned this ship under Regulation 51. It appears that on that day the ship was not in Palestine and did not arrive in Palestine waters until about the 20th of last month, or a day or two after. The original requisitioning order was, therefore, a nullity under the Regulations. On the 1st March, a further order was issued by the High Commissioner under the same Regulation, requisitioning the ship which was then lying in the Port of Haifa, and by the same order the original order of the 7th February

was revoked. The Plaintiff admits, or does not contest, that Regulation 51 was properly made and is a perfectly good regulation. He has argued that he can only proceed against this Defendant, who was the person who notified him on the 21st February last, that the ship was being requisitioned for British Government service. It has been previously held by this Court, in the case of the Ship "Tiger Hill", folio No. 8 of 1940, that the Crown Actions Ordinance applies with regard to claims against Government brought in the Admiralty Court here.

It seems to me, after carefully considering the arguments, that the contention put forward by the Solicitor General is the correct one, and that the present Defendant, Captain Earwaker, is not a proper Defendant in this present action. My reason for so holding is that the requisitioning order was made by the High Commissioner and not by Captain Earwaker. Captain Earwaker merely carried out an order, good on the face of it, lawfully made by the High Commissioner under the Regulation so empowering him. It follows, therefore, that the wrong Defendant has been named in this action. The result must be that the writ must be set aside and all proceedings thereunder quashed.

I make no order as to costs.

Delivered this 3rd day of March, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 72/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

1. Shteiwi Iyadeh Abu Adra,
2. Abed Rabbo Salman Abu Adra. APPELLANTS.

v.

The Attorney General. RESPONDENT.

*Conviction of two out of three accused on same evidence — Benefit of doubt given to third accused — No reason to interfere, CR. A. 29/40 — Compensation a punishment and not to be awarded jointly and severally, C. C. O., Sec. 37(d).*

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 15th of May, 1941, in Criminal Case No. 120/41, whereby the Appellants were convicted of unlawfully causing together, and with a third person, grievous harm contrary to Section 238 of the Criminal Code Ordinance, and of unlawfully wounding contrary to Section 241 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment each, and to pay jointly and severally LP. 50 compensation to Abdallah under Section 43 of the Criminal Code Ordinance, and in varying the judgment of the District Court :—

HELD : 1. (Following CR. A. 29/40) : The fact that the District Court had given the benefit of doubt to one of the accused before it did not imply that there was not sufficient evidence against the Appellants, *i. e.* the remaining accused.

2. Compensation under the Criminal Code Ordinance was a punishment and could, therefore, not be awarded jointly and severally.

FOLLOWED : CR. A. 29/40 (1940, S. C. J. 123).

ANNOTATIONS :

1. Credibility of witnesses is a matter for the Court of trial to decide : CR. A. 29/40 (*supra*), CR. A. 57/40 (1940, S. C. J. 442), CR. A. 8 & 9/41 (*ante*, p. 42) and C. A. 36/41 (*ante*, p. 142).

2. On compensation under the Criminal Code Ordinance, *vide* CR. A. 7/41 (*ante*, p. 75) and note ; see especially C. A. D. C. T. A. 91/39 (P. P. 19.xii.39, *not* 19.xii.40, as therein stated).

FOR APPELLANT : Abcarius.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The first point taken by Abcarius Bey, for the Appellants, is similar to that in Criminal Appeal 29/40 which is reported in the May volume of the Palestine Law Reports for 1940. In that case the Court said :—

> "It is argued for the Appellant that the Court did not believe the evidence of the two eye-witnesses when they said they saw the grandfather at the scene of the crime, and that they should not therefore have believed the same witnesses against the Appellant (*i. e.* the grandson) as they did.
>
> "This may appear to be an attractive argument, but we have to enquire if there was evidence on which the Court could lawfully find the facts necessary to support the judgment, and there was such evidence. Moreover, in this case the Court did not say they actually disbelieved the witnesses when they spoke of the grandfather — they said they entertained some doubt."

Here, possibly owing to evidence of an *alibi*, the Court said they had a slight doubt, and gave one Accused the benefit of it ; again, they did not say they disbelieved the witnesses. That being so, I do

not think it can be argued that there was no evidence upon which the Court could find as they did.

The Court awarded compensation in the sum of LP. 50 payable jointly and severally by the convicted persons. It is clear that under the Criminal Code Ordinance, Section 37(d), payment of compensation is a punishment. That being so I do not think it can be made joint and several.

We, therefore, vary the judgment and direct that each Appellant respectively shall pay compensation in the sum of LP. 25.

Delivered this 30th day of June, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 115/41.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

Mann and Berman. APPELLANTS.

v.

Sami el Jamai son of Sheikh Ali el Khatib. RESPONDENT.

*Premises used by co-owner — Whether co-owner liable for rent, Disposal Law, Arts.* 10–14 *— Meaning of "person" in Art.* 14, *C. A. D. C. Jm.* 230/35 *— District Court judgment binding on District Courts — Findings of fact.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, sitting as a Court of Appeal, dated the 9th of April, 1941, in Civil Appeal No. 66/40 :—

HELD : 1. (Referring to C. A. D. C. J'm 230/35) : A judgment of a District Court was binding on District Courts, being given by a Court of co-equal jurisdiction.

2. There was no logical or legal reason why a co-owner who uses joint property for his own purpose, without the consent of the other co-owners, should not have to pay for that privilege or usurpation.

REFERRED TO : C. A. D. C. J'm 230/35 (not reported).

ANNOTATIONS :

1. On Art. 14 of the Law of Disposition see also C. A. 94/41 (*ante*, p. 275).

2. Note the express provisions to the contrary in respect of *mulk* land in Arts. 907 and 1075(4) of the *Mejelle*.

3. *Cf.*, on the first point, C. A. 158/38 (1938, 2 S. C. J. 126, especially pp. 133 *seq.*). For instances of District Courts overruling decisions of another District Court see *e. g.* C. A. D. C. T. A. 246/38 (P. P. 9.xi.38, Tel-Aviv Judgments, 1938, p. 101 and C. D. C. T. A. 312/38 (P. P. 18.viii.39).

FOR APPELLANTS : Kehaty and Eliash.

FOR RESPONDENT : Abcarius and Budeiri.

JUDGMENT:

This is an appeal by leave from an appellate judgment of the learned President of the District Court of Jerusalem, in which he dismissed the appeal from the judgment of the Magistrate.

The case has been argued at considerable length and has been the reason for two very long judgments. Actually only one point, in our opinion, is involved in this appeal, and that is — does Article 14 of the Provisional Law of Disposition of Immovable Property of 1331 apply to a co-owner or not ? It is to be noted that Articles 10, 11 and 14 use the words "a person", whilst Articles 12 and 13 use the phrase "a co-owner". Mr. Eliash for the Appellants argues that there is, therefore, a distinction between "a co-owner" and "a person" and that that distinction must be given effect to when we come to construe article 14. Abcarius Bey, on the other hand, says that "a co-owner" is in effect "a person", which of course in one sense is true. It is curious to note that no authority has been quoted to us by either side in any judgment of this Court on this point. It would appear, therefore, that the point has never previously come before this Court. The only authority is a judgment of the District Court of Jerusalem, given on appeal in Jerusalem Civil Appeal No. 230/35, curiously enough again in respect of the same property. In that case the learned President, Judge Plunkett, held that :—

> "Under Article 14 of the Ottoman Law of Disposition of Immovable Property, 1329, a co-owner is entitled to claim rent "*ejr-el-misl*" from another co-owner who utilises it without his consent, whether by cultivation or otherwise".

In the absence of authority other than this which, though not binding on this Court, is, we think, binding on the District Court, being given by a Court of co-equal jurisdiction, the matter would appear to be open. It may be true that the matter is perhaps not altogether free from doubt but there seems no reason to exclude a co-owner from the operation of article 14 and common sense is certainly in favour of the inclusion. There is no logical reason, nor in our opinion, any legal one, why a co-owner who uses joint property for his own purpose, without

the consent of the other co-owners, should not have to pay for that privilege or usurpation.

The other matters raised in the appeal are purely questions of fact. Two Courts have already heard them and it is not for us on a second appeal to deal with questions not of novelty, complexity or general importance. As I said they are purely questions of fact.

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

Delivered this 10th day of July, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 45/41.

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

BEFORE : Rose, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mustafa Eff. El Sa'di & 7 others. APPELLANTS.

v.

Mahmoud Lutfi El Safadi & 7 others. RESPONDENTS.

*Dispute as to extent of right to take water — Land Court has no jurisdiction, C. A. 199/40, Land Courts Ord., Sec. 3.*

In allowing an appeal from the judgment of the Land Court of Haifa, dated the 13th February, 1941, in Land Case No. 4/35 :—

HELD : (Following C. A. 199/40) : The claim concerned an easement and did not involve the actual ownership of the water itself. It was consequently not within the jurisdiction of the Land Court.

FOLLOWED : C. A. 199/40 (1940, S. C. J. 548).

ANNOTATIONS : See the annotations to C. A. 199/40 (*supra*).

FOR APPELLANTS : Abcarius and Dajani.

FOR RESPONDENTS : Nos. 1, 2, 3, 4, 5, 6 — Weinshall.
Nos, 7, 8 — absent — served.

JUDGMENT:

This is an appeal from a judgment of the Land Court of Haifa. As set out in the opening paragraph of the judgment, the action

of the Plaintiff-Respondents, was for an order to restrain the Appellants from taking water from the Manwat stream in excess of their share as had been previously established between the parties.

The Appellants contend, in the first instance, that the Land Court had no jurisdiction to consider such a claim and referred to *Mutawalli* of Shazlieh *Waqf v.* Municipal Council, Acre, Civil Appeal 199 of 1940, P. L. R. Vol. 7, 1940, p. 509. In that case Copland, J. at p. 511 says :—

> "It seems to us that the right which is claimed is undoubtedly an easement and does not involve a claim to actual ownership of the water itself, but is the right to take a certain amount of water from a particular stream."

Later on the same page he says :—

> "The case falls we think within the jurisdiction of the District Court which has the residuary jurisdiction in all civil matters in Palestine."

It seems to me that the present case does not fall within Section 3 of the Land Courts Ordinance (Cap. 75) but is exactly covered by the case referred to above and I, therefore, come to the conclusion, although not without reluctance, that the contention of the Appellants is correct and that the Land Court had no jurisdiction to hear this case. That being so, the appeal must be allowed, the judgment of the Land Court set aside and the action of the Plaintiff-Respondents dismissed. The Appellants will have the costs of this appeal on the lower scale to include the sum of LP. 15 for advocate's attendance fee and also the costs of the proceedings in the Land Court.

Delivered this 10th day of July, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 87/41.

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

BEFORE : Trusted, C. J., Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Moshe Axelrod. APPELLANT.

v.

The Attorney-General. RESPONDENT.

*Murder — Credibility of witnesses — Remarks on presiding judge's record — Premeditation.*

In dismissing an appeal from the judgment of the Criminal Assize Court sitting at Haifa, dated the 19th of June, 1941, in Criminal Assize Case No. 35/41, whereby the Appellant was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. In using the words "the probabilities ..... are in favour of the prosecution ....." the Judge below had said nothing more than that he had made up his mind that he believed the witnesses for the prosecution, and disbelieved the Appellant's story.

2. It was undesirable that the notes kept by the presiding judge should contain anything more than a record of the evidence.

3. Upon the facts found the Court below was justified in drawing the inference of premeditation.

ANNOTATIONS :

1. See, on the first point, note 1 to CR. A. 72/41 (*ante*, p. 290).
2. On the third point, *vide* CR. A. 57/40 (1940, S. C. J. 442) and note 3.
3. The sentence has since been commuted.

FOR APPELLANT : Kaisermann.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

This is an appeal from the conviction of the Appellant for murder. Mr. Kaisermann, on his behalf, urged everything which could be urged, but in our opinion the appeal must be dismissed. In the first place, a passage in the judgment of the learned Judge who, at the trial, sat alone, is criticized. The actual passage is where, in the fourth paragraph, he says :—

> "the probabilities in my opinion are in favour of the story of the prosecution, as told by the two witnesses above referred to, whose evidence I believe."

The case for the prosecution was, that on the night of the 14th of August, 1940, the Appellant called at the house of his mistress, and sought an interview with her ; that he adopted a truculent attitude, and uttered threats against her and her family, and after telling her not to go to bed, but to await his return, he went away in the direction of his home, and returned some ten or fifteen minutes later. The deceased then went out to speak with him, and shortly afterwards two shots were fired, one of which killed her, the other wounding the Appellant.

The Appellant gave evidence in his own defence and said that owing to the unfortunate state of affairs which existed, he wanted to commit

suicide in the deceased woman's presence, and that when he was about to do so she was accidentally shot.

The learned Judge had to weigh these two stories in order to make up his mind if the Appellant's story was true. In using the words in question I think he was saying no more than that he had done this particularly having regard to the express finding that he believed the witnesses for the prosecution, and disbelieved the Appellant's story.

Our attention is also drawn to a note in the record at the end of Eliahu Leder's evidence, as follows :—

"Witness vague on details as to distance."

The presiding Judge is under a statutory obligation to record the evidence, and it is undesirable that he should do anything more, but I do not think that owing to this note it can be said that there is any inconsistency in the judgment.

Having accepted the evidence for the prosecution, and rejected the defence, the only question remaining is — is that evidence sufficient to satisfy the requirements of the law as to premeditation ? Upon the facts found we think the Court could draw the neccessary inferences.

The appeal is dismissed.

Delivered this 9th day of July, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 99/41.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Jacob Eskenazi, Mordechai Friedenberg, Kalman Friedenberg and Nathan Marein, the Administrators of the Estate and Executors of the Will of the late M. J. Mizrachi. APPELLANTS.

v.

1. Joseph H. Mizrachi,
2. I. Olshan, guardian *ad litem* of Simon and Lily Mizrachi. RESPONDENTS.

*Appeals — Application to approve account and sanction remuneration of administrators cf on estate — Whether appeal lies — Application one under Succession Ordinance, Succession Ord., Sec. 18 — No right of appeal, C. P. R., Rule 3, proviso, C. A. 118/27 — Costs, C. A. 84/40 Westminster Corporation v. St. George's, Hanover Square.*

In dismissing an appeal from the order of the District Court of Jerusalem, dated the 7th day of April, 1941, in Probate No. 4/37, Motion No. 396/40 :—

HELD : 1. An application for approval of accounts and for sanctioning of the administrators' remuneration was an application for directions as to the administration of an estate under the Succession Ordinance.

2. (Following C. A. 118/27) : As the Civil Procedure Rules did not apply to matters under the Succession Ordinance, no appeal lay and the leave to appeal granted by the President District Court was ineffective.

3. (Following C. A. 84/40, Westminster Corporation *v.* St. George's, Hanover Square) : As the appeal was brought by the administrators, not to protect the interests of the estate, but to protect their own personal interests, the Appellants were personally liable for the costs.

FOLLOWED : C. A. 118/27 (1, P. L. R. 259, C. of J. 1061), C. A. 84/40 (1940, S. C. J. 313), Westminster Corporation *v.* St. George's, Hanover Square, 1909, 1 Ch. D. 592 at pp. 615—6.

ANNOTATIONS :

1. See, on the first and second points, in addition to C. A. 118/27 (*supra*), C. A. 127/26 (1, P. L. R. 109, C. of J. 1668) and C. A. 118/38 (1938, 1 S. C. J. 411).

2. For another instance of leave to appeal having been granted erroneously *cf.* C. A. 28/41 (*ante*, p. 133).

3. On the last point see, in addition to C. A. 84/40 (*supra*), C. A. 274/40 (*ante*, p. 85).

APPELLANTS : In person.

RESPONDENTS : In person.

JUDGMENT:

This is an appeal from an order of the learned President of the Jerusalem District Court in an application made by the Administrators of the Estate of the late Moshe Joseph Mizrachi who are also the Executors of the Will. The learned President disallowed certain remuneration which the administrators claimed for themselves under the Will. Hence this appeal. Preliminary objections have been taken by the 2nd Respondent who is the guardian *ad litem* of certain infants' interests in this case.

The first point is that no appeal lies. Mr. Olshan submits that this is an application for directions under Section 18 of the Succession Ordinance and that by virtue of Trevich *v.* Trevich, Civil Appeal 118 of 1927, 1 P. L. R., p. 259, no appeal lies since a direction under Section 18 of the Succession Ordinance is not a judgment subject to appeal. Of course, when that judgment was delivered the Civil Procedure Rules were not in force and there was no provision in the then existing law for appeals from decisions other than judgments. The Civil Procedure Rules do not apply to proceedings brought in a District Court under the Succession Ordinance. That was added to the Rules by a proviso dated the 30th March, 1939. The first point in the decision is whether this is an application under the Succession Ordinance. We are quite clear in our own minds that it can be nothing else. The application is headed, in the first place, "In the matter of the succession of the late M. J. Mizrachi." The file in which the application was made was a probate file in 4/37 of the Jerusalem District Court and the application asked for the approval of accounts and of the payments set out therein and "more particularly" the confirmation and allowance of the remuneration of the administrators due to them unde Clause 15 of the Will, for their services in administering the estate and for professional services rendered by them. When one looks at this application it is a little difficult to see how it can possibly be argued that the matter is not an application under the Succession Ordinance. The approval of accounts is properly asked for by an application under Section 18. The approval of remuneration of the administrators is equally a matter in which, if the approval of the Court is sought, it must be obtained under Section 18 of the Ordinance. As I said, therefore, it is quite clear to us that this is an application by the administrators for directions as to the administration of the estate under the Succession Ordinance. In view of the proviso to Rule 3 of the Civil Procedure Rules, the Civil Procedure Rules do not apply, therefore, in such a case, and on the strength of this judgment which I quoted, Civil Appeal 118/27, and the proviso to Rule 3 it is clear that no appeal lies in this matter and, therefore, the leave to appeal which the learned President purported to give is ineffective. The appeal must be dismissed.

With regard to the costs, and after hearing arguments, it is clear that this appeal was brought by the present Appellants, the administrators, not to protect the interests of the estate, but to protect their own personal interests. In such a matter we think that the rule in Barakat *v.* Willner, Civil Appeal 84/40, reported in 7, P.L.R., p. 241 should be applied in this case. Following an English case, Westminster Cor-

poration *v.* St. George, Hanover Square (1909), 1 Ch. D. p. 615, the rule was laid down that where a trustee or an administrator appeals from a direction of the Court which he himself has obtained, he must bear the consequences if that appeal fails. We see no reason why that rule should not be applied here. Respondents will have their costs on the lower scale together with, for the 2nd Respondent, LP. 10 advocate's attendance fee to be paid by the Appellants personally.

Delivered this 1st day of July, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 104/41.

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

BEFORE : Trusted, C. J. and Rose, J.

IN THE APPEAL OF :—

E. Karwassarsky and B. Azar joint trustees in bankruptcy of Husni Ramadan Abu Khadra. APPELLANTS.

v.

Husni Ramadan Abu Khadra. RESPONDENT.

*Bankruptcy — Appeal against decision of trustee — Before delivery of judgment motion to reserve decision for three months — Whether proceedings pending, Bankruptcy Ord., Sec.* 95(2).

The Respondent had moved the Court below under Sec. 75 of the Bankruptcy Ordinance to reverse an order by the trustee in bankruptcy. At the end of the hearing judgment was reserved, but before it was delivered the Respondent made a further application in which he asked the District Court not to pronounce judgment on the original motion before the expiration of a period of three months, on the ground that the decision might prejudice certain negotiations. The application was allowed and the Appellants appealed, alleging that since the hearing had been adjourned for delivery of judgment only, there were no longer any proceedings pending which could be adjourned.

Appeal from the order of the District Court of Tel-Aviv, dated the 23rd of May, 1941, in Civil Case No. 17/38 dismissed :—

HELD : Until the decision on the original motion had been actually delivered there were proceedings pending which could properly be adjourned.

ANNOTATIONS : *Cf.* H. C. 30/41 (*ante*, p. 160).

APPELLANTS : In person.

FOR RESPONDENT : Machlis.

JUDGMENT:

This appeal arises out of bankruptcy proceedings which differ from an ordinary trial.

The facts are that at the end of March, 1941, a hearing took place in the lower Court on a motion, and after both parties had made their submissions the Court reserved its decision. Before decision was delivered an application was made to the Court by the present Respondent to withhold its decision for a period of three months. *Prima facie* I doubt if this is a proper application to make. In the result the learned Judge made the following order :—

> "Now in his motion, dated the 6th of May, 1941, the Petitioner asked for a delay of three months in order to enable him to negotiate with a prospective purchaser.
>
> "Taking into account the present situation in Palestine, and relying on Section 95(2) of the Bankruptcy Ordinance, I adjourn these proceedings for a period of three months.

Section 95(2) of the Bankruptcy Ordinance, 1936, gives power to adjourn proceedings, and the question would seem to be, was there a proceeding before the Court? We think there was a proceeding before the Court within the meaning of that sub-section, and that being so the Court was entitled to adjourn it, and the appeal is therefore dismissed.

In the circumstances we make no order as to costs.

Delivered this 1st day of July, 1941.

*Chief Justice.*

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HIGH COURT No. 45/41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPLICATION OF :—

T. Saca, on behalf of the estate of his late father Khalil Hanna Saca. PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Subhi Yousef Dajani, on behalf of the estate of his father. RESPONDENTS.

*Sale of mortgage — Land Court judgment affecting part of mortgaged property — Mortgagee entitled to proceed until third party intervenes — Costs.*

In allowing an application for an order to issue, directed to the first Respondent, calling upon him to show cause why his order, dated the 16th May, 1941, in Execution Case No. 234/40, Jaffa, should not be set aside, and why parcel 27, Block 6089 of Beit Dajan should be excluded from the sale, and in varying the order of the first Respondent :—

HELD : 1. *Prima facie* a mortgagee was entitled to his order for sale even if some third party claimed a right in the land, as it was for the third party to intervene.

2. The execution proceedings would be postponed for a short period to enable the third party to come in if he wished.

3. The costs of the application would be costs in the execution proceedings.

ANNOTATIONS : *Cf.* H. C. 52/39 (1939, S. C. J. 486) and second paragraph of annotations thereto.

PETITIONER : In person.

FOR RESPONDENTS : No. 1 — absent, served.
No. 2 — Kehaty.

ORDER.

This is an application for an order directed to the Chief Execution Officer, Jaffa, and Subhi Yousef Dajani, to show cause why an order made by the Chief Execution Officer should not be set aside, and why Parcel 27, Block 6089, of Beit Dajan, should be excluded from the sale.

These proceedings arose in the execution proceeding in connection with a mortgage. The order made by the Chief Execution Officer is as follows :—

> "The judgment dated 2.1.1941 of the Land Court, Jaffa, in Case No. 33/38, is binding until it is upset. The mortgagee does not ask for time to file proceedings with a view to upsetting that judgment. In the circumstances Parcel 27, Block 6089, Beit Dajan, must be excluded from the sale."

This order is not very clear, but it appears that the judgment to which reference is made is a judgment which affects or is alleged to affect this parcel 27, and it is said that as a result of that judgment the parcel belongs to somebody else, and the mortgagee cannot, therefore, execute his mortgage upon that land.

The Chief Execution Officer seems to have thought that the onus was upon the mortgagee to show that he was entitled to execute his mortgage despite that judgment. It seems to me that he was wrong. *Prima facie* the mortgagee is entitled to his order for sale if some third party claims a right in the land which would prevent his exercising his right to sell, as it is for the third party to intervene.

I think, therefore, that the right order should have been that the sale of Parcel 27 would be postponed for a short period in order that the judgment holder in case No. 33/38 could come in if he wished, and show that his right was a better right than that of the mortgagee.

In those circumstances the order of the Chief Execution Officer should be varied, and the order for the sale of Parcel 27 should be postponed until the end of this month, that is July, to give the judgment holder in the action in question an opportunity to take any steps which he may be advised to test the position, and the matter could be considered at the end of this month by the Chief Execution Officer, and he will then make any order he may see necessary.

Subject to what I have said, the rule will be made absolute. The costs of this application will be costs in the execution proceedings, and an inclusive sum of LP. 10 will be fixed which will be dealt with by the Chief Execution Officer in the execution proceedings.

Given this 15th day of July, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 88/41.

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

BEFORE : Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Ali Atallah Ali. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

*Murder — Witnesses partly believed and partly disbelieved — Sufficient evidence.*

In dismissing an appeal from the judgment of the Criminal Assize Court, sitting at Jerusalem, in Criminal Assize Case No. 38/41, dated the 21st day of June, 1941, whereby the Appellant was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to be detained during the High Commissioner's pleasure in accordance with section 13 of the Juvenile Offenders Ordinance, 1937 :—

HELD : 1. There was no authority in law for the proposition that witnesses which were partly disbelieved as regards part of their evidence should be disbelieved on the whole.

2. It was for the trial Court to sift out what they thought was the truth and there was ample evidence to support the conviction.

ANNOTATIONS : See CR. A. 72/41 (*ante*, p. 290) and note 1.

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

The Appellant was charged together with four other men before the Jerusalem Assize Court with the premeditated murder of one, Sheiban Salameh Atallah, in El Beerah village on the 19th day of March, 1941. The other four men were acquitted and this Appellant was convicted and ordered to be detained during the High Commissioner's pleasure, being under the age of eighteen.

The appeal seems to be based on the fact that because the witnesses were partly disbelieved as regards some of their evidence, therefore they should be disbelieved on the whole. So far as the Court knows there is no authority in law for this theory. Witnesses tell many tales, part of which may be embroidery, but there is no reason why some of it should not be true, and it is for the trial Court to sift out what they think is the truth to the best of their ability.

The daughter gave evidence that she actually saw this Appellant stabbing her brother. The Assize Court believed that evidence. Even leaving aside the evidence of the mother there was ample and cogent evidence before the Assize Court to indicate what the verdict should be. The appeal is dismissed.

Delivered this 14th day of July, 1941.

*British Puisne Judge.*

HIGH COURT No. 59/41.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Alexander Eliash & Co., Ltd., in their capacity as Receivers of the Halbreich Property. PETITIONERS.

v.

1. His Worship Ali Eff. Zein el Abdin, in his capacity as one of the Chief Execution Officers, Jerusalem,
2. Arieh Keiner,
3. Shlomo Duner. RESPONDENTS.

*Eviction — Execution Law, Art. 43 — Sub-tenants to leave premises on eviction of tenant.*

In granting an application for an Order to issue directed to the first Respondent to show cause why he should not order the eviction of the second and third Respondents from the premises occupied by them in the property administered by Petitioners in Execution File No. 1149/41, Jerusalem :—

HELD : 1. Unless the possession of the persons, other than the judgment-debtor, was adverse to or independent of the judgment debtor, they had no right to stay in the premises. A sub-tenant had to undergo the fate of the head-tenant, if judgment for eviction was given against the latter.

2. The practice of joining all sub-tenants in an action for eviction was bad and unnecessary.

FOR PETITIONERS : Eliash.

FOR RESPONDENTS : No. 1 — Absent — served.
Nos. 2 and 3 — Bitan.

### O R D E R.

This case depends entirely upon the construction of Article 43 of the Law of Execution. The Respondent argues that the first two sentences are to be read together with the last sentence. In our opinion this is not so, — the third sentence is entirely independent of the first two sentences and deals with a separate set of circumstances.

From that section it is quite clear that unless the possession of the persons, other than the judgment-debtor, is adverse to or independent of the judgment-debtor, they have no right to stay in the premises.

That is to say, a sub-tenant must undergo the fate which awaits the head-tenant, if judgment for eviction is given against the latter. If it is true that it has been the practice in eviction cases to consider all and sundry sub-tenants as tenants and join them, the practice is bad and is unnecessary, and we doubt if such a practice really exists, — though there may be isolated instances.

In these circumstances the order *nisi* will be made absolute, with costs and LP. 10 advocate's attendance fee.

Delivered this 30th day of July, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 90/41.

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

BEFORE : Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF :—

The Attorney General. — APPELLANT.

v.

Mohammad Khalil Misto. — RESPONDENT.

*Sentence — Appeal by Attorney General — Binding over inadequate in case of shop-breaking.*

In allowing, by a majority, an appeal from the judgment of the District Court of Tel-Aviv, in Criminal Case No. 45/41, dated the 9th of June, 1941, whereby the Respondent was convicted of breaking and entering a store and stealing therein, contrary to Section 297(a) of the Criminal Code Ordinance, 1936, and was bound over to come up for sentence when called upon within two years in LP. 50 and one surety, and in increasing the sentence :—

HELD : (Copland, J., *dissentiente*) Having regard to the seriousness of the offence of shop-breaking, which carried a maximum penalty of seven years' imprisonment, public interest demanded that a sentence of imprisonment be imposed, although the Accused had no previous convictions.

ANNOTATIONS : On appeals by the Attorney General against sentence, and on the advisability or not of binding over first offenders, *cf.* CR. A. 4/41 (*ante*, p. 34) and note.

FOR APPELLANT : Crown Counsel -- (Bell).

FOR RESPONDENT : Haddad.

### JUDGMENT:

*Rose, J.* : In this case the Accused, who was represented by counsel, pleaded guilty to breaking and entering a store-house and stealing

therefrom property to the value of LP. 30. It appears that the offence was committed in the small hours of the morning.

The Accused was bound over to be of good behaviour for two years. The Attorney General now appeals on the ground of inadequacy of sentence.

It does not appear from the record what, if any, facts were stated to the Court by Mr. Salant, who appeared on behalf of the prosecution. However, apart from the facts which are contained in the Information, it is most informative, in my opinion, to consider what was urged in mitigation on behalf of the Accused by his advocate. No reference is made to any mitigating circumstances in the facts themselves but it is urged that the Accused served ten years in the Police Force, is a mechanic and comes of a good Jaffa family. Speaking for myself, I think that the fact that a man is of good family and has served ten years in the Police Force must be regarded as an aggravating rather than a mitigating circumstance. I am naturally reluctant to interfere with the discretion of a District Court in matters of this kind but having regard to the seriousness of the offence, which carries a maximum penalty of seven years' imprisonment, I feel that public interest demands that a sentence of imprisonment be imposed, even although the Accused has had no previous conviction.

I am of opinion, therefore, that the appeal should be allowed and the sentence should be varied to one of three months' imprisonment.

Delivered this 14th day of July, 1941.

*British Puisne Judge.*

*Frumkin, J.*: I concur.

*Puisne Judge.*

*Copland, J.*: I regret to find myself in disagreement with the other two members of the Court. Although my disagreement will have no effect on this appeal I feel that I should state my reasons for dissenting.

There is nothing on the record of the Court below to show that there were any aggravating circumstances to make the offence a serious case of breaking and entering. Breaking and entering is a crime which is subject to infinite variety. It may be a little more than a technical breaking, it may be mere walking into premises that were unfastened, or it may be a serious case where great deliberation and work is involved in effecting entry. There is nothing on the record to show what the breaking actually amounted to in this case. I do not think one can lay down that binding over in a case of burglary is a sentence which should never be imposed. There may be very good reasons

why a sentence of imprisonment should not be imposed. I am reluctant always to interfere with the sentence of the Court below, particularly on an appeal by the Attorney General, unless the sentence is clearly ridiculous, though I think the Court itself, of its own motion, can, and should, increase a sentence if it is not sufficient, on an appeal by the convicted person.

For myself I see no reason to interfere with the discretion of the District Court in this case, and I would dismiss the appeal, but as my brethren unfortunately think otherwise, the judgment of the Court will be as stated by them.

Delivered this 14th day of July, 1941.

*British Puisne Judge.*

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CIVIL APPEAL No. 129/41.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPEAL OF :—

Sheikh Abdul Qader el Muzaffar. APPELLANT.

v.

Tewfiq Musa Kweider. RESPONDENT.

*Power of attorney — Whether power to appeal given, C. A. 72/40, C. A. 89/40 — Joint and separate representation — Construction.*

In allowing an appeal from the judgment of the District Court of Jerusalem, sitting as a Court of Appeal, dated the 31st day of May, 1941, in Civil Appeal No. 9/41 :—

HELD : 1 . (Distinguishing C. A. 72/40, C. A. 89/40) : The power of attorney was an unlimited power in the widest possible terms and was sufficient to enable the advocate to enter an appeal on behalf of the donors.

2. The power of attorney authorised the advocate to act on behalf of both donors jointly or of one of them separately.

DISTINGUISHED : C. A. 72/40 (1940, S. C. J. 456), C. A. 89/40 (*ibid.*, p. 152).

ANNOTATIONS : See, in addition to the cases cited in the judgment and the annotations thereto, C. A. 60/41 (*ante*, p. 175).

APPELLANT: : In person.

FOR RESPONDENT : Kamal.

JUDGMENT:

This is an appeal from a judgment of the District Court of Jerusalem, dismissing an appeal from the Magistrate of Jerusalem on a preliminary point.

The matter turns upon the construction of a Power of Attorney by virtue of which an advocate appointed therein purported to enter an appeal on behalf of the Appellant. The learned President considered that the matter was covered by Civil Appeal No. 89/40, P. L. R. Vol. 7, p. 258 and by Civil Appeal 72/40, P. L. R. Vol. 7, p. 334. As regards Civil Appeal 89/40 counsel for the Respondent agrees that that case is not applicable in that the person who signed the appeal in that case was not an advocate at all but a layman. The Court of Appeal at p. 260 said :—

> "Counsel argues, and we consider with force, that this rule (*i. e.* Rule 24 of the Civil Procedure Rules) must be strictly interpreted and that therefore under it a litigant must act either in person or by an advocate duly appointed on his behalf."

This case does not seem to be relevant in considering the present appeal.

The Respondent, however, relies upon Civil Appeal 72/40. It is to be noted, however, in that case that Copland, J. appears to have considered that the generality of the power was limited in that the advocate in question was only empowered to appear on behalf of his clients "in their capacity as defendants." That, in my opinion, was the basic reason of his judgment.

In the present case there is no such limitation. After nominating the advocate in question "to litigate and defend us in all the actions raised and which shall be lodged by us or against us before all the various Civil Courts in their different capacity either Civil or Criminal ....." the Power of Attorney goes on to say "In general we have appointed the said attorney to take all the necessary steps for the protection of our rights from loss, a general Power of Attorney valid to the final stage of proceedings before the Courts." This seems to me to be an unlimited power in the widest possible terms and I think that it is sufficient to enable the advocate in question to enter an appeal on behalf of the givers of the power.

It was further urged by the Respondent, although this point does not seem to have been argued in the Court below, that the power only authorised the advocate to act on behalf of both the parties and not one of them. I do not think that there is any substance in this contention, particularly having regard to the final sentence of the power which contemplates separate as well as joint representation.

The appeal must, therefore, be allowed and the case remitted to the District Court to hear it upon its merits and to give a fresh judgment. The Appellant will have an inclusive sum of LP. 10 for his costs of this appeal in any event.

Delivered this 31st day of July, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 98/41.

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

BEFORE : Trusted, C. J., Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Aviv Ben Yacob Wasserman. RESPONDENT.

*Sentence — Appeal by Attorney General against sentence — Binding over a punishment against which the Attorney General may appeal, C. C. O., Secs.* 37(*e*) *and* 46, *T. U. I Ord., Sec.* 67(*c*) *— Binding over of first offenders, CR. A.* 4/41.

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated 1.7.41, in Criminal Case No. 83/41, whereby the Respondent was convicted of offences contrary to Sections 276(c) and 315(b) of the Criminal Code Ordinance, 1936, and bound over to come up for sentence when called upon within two years in LP. 100 :—

HELD : 1. Binding over was a statutory punishment enabling the Attorney General to appeal under Section 67(c) of the Criminal Procedure (T. U. I.) Ordinance.

2. (Referring to CR. A. 4/41) : There was no rule of law that a first offender should necessarily be bound over and each case depended upon its own facts.

In the present case there was no reason to interfere with the sentence imposed by the District Court.

REFERRED TO : CR. A. 4/41 (*ante*, p. 34).

ANNOTATIONS :

1. *Cf.*, on the first point, CR. A. 72/41 (*ante*, p. 290) and C. A. D. C. T. A. 91/39 cited in note 2 thereto.

2. On the second point see CR. A. 90/41 (*ante*, p. 306) and note.

FOR APPELLANT : Crown Counsel — (Bell).

FOR RESPONDENT : Goitein and Orren.

JUDGMENT:

This is an appeal by the Attorney General. It seems that a young man, aged 21, stole on a number of occasions from an institution known as the N. A. A. F. I. sums of money, for which he was convicted, having pleaded guilty in all to thirteen counts, and he was bound over. In the circumstances the Attorney General maintains that that is inadequate.

I will firstly deal with the technical point taken by Mr. Goitein for the Respondent. He argues that there is no appeal to this Court when, under Section 46 of the Criminal Code Ordinance, the Court of Trial binds over the accused, there being no punishment to enable the Attorney General to invoke Section 67(c) of the Trial Upon Information Ordinance. But, as the Crown Counsel points out, binding over is a statutory punishment under Section 37(e) of the Criminal Code Ordinance, and I do not think there is any substance in the point.

In Criminal Appeal 4/41 this Court stated that it was in favour of first offenders being given an opportunity to mend their ways, but we pointed out that Courts of Trial should satisfy themselves if, in all the circumstances, it is right that persons convicted of a serious offence should be bound over. It should be made clear that there is no rule of law that a first offender should necessarily be bound over. Each case must depend upon its own facts, regard being had to the nature of the offence, and the age and other circumstances of the convicted person.

Although in this case we think that the Respondent may well regard himself as fortunate, we do not feel that we should interfere.

The appeal, therefore, is dismissed.

Delivered this 30th day of July, 1941.

*Chief Justice.*

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CRIMINAL APPEAL No. 66/41.

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

BEFORE: Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF:—

Kasim Abdel el Razzak Abdul Kader. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Criminal Procedure — Police file handed to one member of Trial Court — Irregularity fatal although not raised at first appeal — Case remitted for retrial, T. U. I. Ord., Sec. 72(1)(c).*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 13th day of May, 1941, in Criminal Case No. 106/41, whereby the Appellant was convicted of manslaughter contrary to Sections 212 and 213 of the Criminal Code Ordinance, 1936, and sentenced to fifteen years' imprisonment, and in remitting the case for retrial :—

HELD : The Court of Trial was not entitled to look at the Police file, or any part of it, unless properly put before it as evidence.
Although the matter had not been raised at the first appeal the irregularity was of such a nature that the conviction would be quashed and the case remitted for retrial.

ANNOTATIONS :

1. The first appeal in this case, CR. A. 66/41, is reported at p. 218, *ante*.
2. *Cf.*, as to when the depositions before the Examining Magistrate form part of the evidence, CR. A. 23/40 (1940, S. C. J. 121).

FOR APPELLANT : Salah.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

This is a most unfortunate case. It is the second time it has been before this Court. On the first occasion when it was before this Court Mr. Salah, on behalf of the Appellant, pointed out that by an unfortunate chain of circumstances he had not had an opportunity of cross-examining a doctor. The object of his cross-examination was to test the possibility of a statement which had been made by one of the principal witnesses, to the effect that the deceased woman had cried out after she had been stabbed. The Court of Trial had stated in their judgment that they believed the evidence of that witness who so stated, so that it appeared to us desirable that the defence should have an opportunity at least of ascertaining the doctor's view of the possibility of the woman being able to call out. We, therefore, returned the case to the Court of Trial in order that the doctor might be cross-examined. This was done, and he expressed the opinion that the woman would not have been able to call out after she had been stabbed. Despite that, the Court of Trial have made it clear that they still accept the evidence of that witness and convict the Appellant.

But another matter has now been brought to our notice, although there was no reference to it in the grounds of appeal which were filed. We are told that in the course of the first trial the Police file was handed to one member of the Court. We do not of course know

what that file may have contained, but it was an unfortunate irregularity of procedure, because it may very well be that there are statements in that file which implicate the Accused, made against him either by persons who are not called as witnesses for one reason or another, or statements by persons who were called as witnesses, and whose statements carry the matter further than their evidence before the Court.

Criminal Courts must decide cases in accordance with the evidence which is placed before them.

It is the practice in this country for the Court to have a copy of the depositions, but it is clear that a Court is not entitled to find any finding of fact based upon the depositions unless the particular part of the depositions concerned has been properly put in evidence and proved before it. Certainly the Court of trial is not entitled to look at the Police file, or any part of it, unless such part has been properly put before it as evidence, as occasion may arise.

It is unfortunate that this irregularity was not brought to our notice in the course of appeal, but it has now been brought to our notice, and this being a criminal matter it is our duty to see that everything has been properly and rightly done. The learned Crown Counsel agrees that in the circumstances the proceedings, owing to this irregularity, are certainly open to question, and that a new trial would not be inappropriate.

By virtue of the powers vested under Section 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, we quash the conviction and remit the case to the Court below for retrial.

Delivered this 24th day of July, 1941.

*Chief Justice.*

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CIVIL APPEAL No. 113/41.

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

BEFORE : Trusted, C. J., Copland and Rose, JJ.

IN THE APPEAL OF :—

Behiyya Levy. APPELLANT.

v.

1. Amin Nicola Khouri,
2. Hanna Nicola Khouri,
3. Mitri Mikhail Khouri. RESPONDENTS.

*Appeals — Failure to cite all parties to original action, C. P. R., Rule* 313 *— Power of L. S. O. to enquire into authenticity of documents, Settlement of Title (Procedure) Rules, Rule* 13.

In dismissing an appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 14th of March, 1941, in Case No. 34/Haifa Lands :—

HELD : 1. As the remaining defendants and third parties in the original action had never been actually dismissed or struck out, the appeal had to be dismissed for Appellant's failure to cite all parties as Respondents.

2. The view taken by the Settlement Officer as to the interpretation of Rule 13 of the Settlement of Title (Procedure) Rules should not be taken as a precedent.

ANNOTATIONS : See, on the first point, C. A. 57/41 (*ante*, p. 207) and note 2.

FOR APPELLANT : Weinshall.

FOR RESPONDENTS : Nos. 1 & 2 — Asfour.
No. 3 — Absent — served.

JUDGMENT:

This is an appeal from the decision of the Land Settlement Officer of Haifa. It is said that apart from the merits or lack of merit in this case, the Appellant has failed to comply with Rule 313 of the Civil Procedure Rules. That Rule provides that all parties to the original action shall be made parties to an appeal. Admittedly, all the parties to the original proceedings are not parties to the appeal, as it is quite clear that there were a number of persons besides the present Respondents concerned with the Appellant's original claim before the Land Settlement Officer.

The Land Settlement Officer, in an interlocutory judgment in which he refers to those other parties, says :—

> "The Plaintiff admits the justness of this plea and is prepared to accept the parcellation in order not to embarrass the other Defendants."

That, of course, may have been an indication that the Appellant dropped or intended to drop her claims against the other Defendants, but there was no formal application to dismiss them, or any formal statement that she did not propose to proceed against them. When the Land Settlement Officer gave his final judgment their names still remained on the record, and in that judgment he says :—

> "This decision is given without prejudice to the conflicting claims of the Defendants and Third Parties that remain to be decided."

That being so, it is difficult it seems to me to say that the remaining Defendants and the third parties are not still parties to the proceed-

ings. They have never been actually dismissed or struck out, and they are included in the final judgment. We feel, therefore, that the technical point that Rule 313 has not been complied with is a good one, and is an answer to this appeal. That is, of course, in some respects an unsatisfactory result. At the same time, we do not feel that in this particular case it is likely to result in any injustice.

There is only one other point to which I wish to refer, and that is to the Land Settlement Officer's interlocutory judgment, in which, as I understand it, he held that he could not enquire into the authenticity of certain documents, and he said :—

> "This I must decline to do, and find support for my decision in Rule 13 of the Land Settlement of Title (Procedure) Rules, which empowers a Settlement Officer to enquire into the authenticity of documents, *etc.*"

I need only say that we feel that the view which he took of Rule 13 is certainly open to argument, and that without further argument it should not be taken as a precedent for the interpretation of that Rule. The appeal will, therefore, fail.

The Respondents 1 & 2 will have their costs on the lower scale, and we certify a sum of LP. 10 attendance fees.

Delivered this 23rd day of July, 1941.

*Chief Justice.*

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HIGH COURT No. 60/41.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Ibrahim Saleh Abu Shindi. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Zeev Shertok. RESPONDENTS.

*Imprisonment for debt — Examination of judgment debtor, Debt (Imprisonment) Ord., Sec. 11 — Delay in execution of order — Change in financial position of debtor, H. C. 3/41.*

In refusing an application for an order to issue, directed to the first Respondent, calling upon him to show cause why his order of imprisonment of the Petitioner in Exectuion File No. 4154/38, Tel-Aviv, dated 29th June, 1941, should not be set aside and that the said order be cancelled :—

HELD : 1. (Following H. C. 3/41) : When once an examination of the debtor had been held and an order for instalments made, it was for the debtor to show cause to the Chief Execution Officer, if he could, that his means had altered since the original order for instalments had been made.

2. In the present case the Chief Execution Officer had considered the Petitioner's financial position again and had considerably reduced the amount of the instalments.

3. The special arrangement arrived at had not been carried out promptly by the debtor and could not affect the position.

FOLLOWED : H. C. 3/41 (*ante*, p. 129).

ANNOTATIONS : See note 2 to H. C. 3/41 (*supra*) and H. C. 22/41 (*ante*, p. 165).

FOR PETITIONER : Rabinovitch.

FOR RESPONDENTS : No. 1 — Absent — served.
No. 2 — Y. Goldenberg.

## ORDER.

In this case the judgment-debtor is asking for a stay of an order for imprisonment given by the Chief Execution Officer, Tel-Aviv. The first order for imprisonment was issued in June, 1938, after the judgment-debtor had been duly examined under Section 11 of the Debt (Imprisonment) Ordinance. That order was not executed for over two and a half years, though it is stated that the judgment-debtor is a well-known merchant and a resident of Jaffa, and if that statement is true it may be advisable to enquire into the reasons for the delay in executing.

The Petitioner states that he has produced records of registration, and that his property so disclosed is worth more than the amount of the debt. The Respondent has shown that the property is mortgaged for more than its value. The statement, therefore, that this property is sufficient to pay the debt is an untruth.

This Court decided in Fridman *v.* Superintendent of Prison, Jaffa and others (H. C. 3/41, 8 P. L. R. 59) that once an examination of a debtor had been held and an order for instalments made, it was for the debtor to show cause to the Chief Execution Officer, if he could, that his means have altered since the original order for instalments was made.

In this case two examinations have been held, and in May, 1941, when the debtor applied for the joinder of files, the Chief Execution Officer made an order reducing the amount of the instalments payable on the files separately, for a sum considerably below the total, thus showing he had considered the debtor's financial position again.

Some reliance has been placed on the fact that an arrangement was made for LP. 2 at any rate to be paid by instalments. This arrangement was not carried out promptly, as it should have been, and cannot affect the general position.

The order *nisi* is, therefore, discharged with costs and LP. 10 advocate's attendance fee.

Delivered this 30th day of July, 1941.

*British Puisne Judge.*

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CRIMINAL APPEAL No. 77//41.

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

BEFORE : Trusted, C. J., Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Peretz Arzieli. APPELLANT.

v.

The Attorney General. RESPONDENT.

*Possession of stolen property, C. C. O., Sec. 310 — Accused asked to plead to two charges — Evidence wrongly admitted — Immaterial irregularities — Corroboration in law and in fact — Identification of stolen property.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, sitting as a Court of Appeal, dated the 9th of April, 1941, in Criminal Appeal No. 9/41, whereby it confirmed the conviction by the Magistrate's Court of Jerusalem in its judgment, dated 13.1.41, in Criminal Case No. 10388/40, of being in possession of stolen property, knowing it to be stolen, contrary to Section 310 of the Criminal Code Ordinance, 1936, and varied the sentence to pay a fine of LP. 50 or in default three months' imprisonment :—

HELD : 1. The irregularities of procedure, *i. e.* the fact that the Appellant was called upon to plead to two charges before the beginning of the trial of the first charge and the admission, at the hearing of the first charge, of evidence which, it was alleged, could only have been relevant with regard to the second charge, had not caused any miscarriage of justice.

2. In the light of Appellant's previous denial of his possessing any of the stolen property the fact that part of the property had later been found in his shop was sufficient corroboration in law of the evidence of the accomplice.

Whether the corroboration was sufficient in fact was a matter for the Court of Trial.

3. The Court below was entitled to accept the identification of the property in question by the evidence of the complainant.

ANNOTATIONS :

1. On irregularities which do not cause injustice, see note 3 to CR. A. 54/41 (*ante*, p. 183).

2. *Cf.*, on wrongful admission of evidence in criminal proceedings, CR. A. 107/40 (1940, S. C. J. 481) and note 2.

3. As to what is sufficient corroboration, *vide* CR. A. 138/40 (*ante*, p. 48) and note 3.

4. See, on the last point, CR. A. 21/41 (*ante*, p. 60).

FOR APPELLANT : Goitein.

FOR RESPONDENT : Crown Counsel — (Bell).

JUDGMENT:

*Rose, J.* : This is an appeal from a judgment of the District Court of Jerusalem, dismissing an appeal from a judgment of the Magistrate's Court, Jerusalem, whereby the Appellant was convicted of an offence against Section 310 of the Criminal Code Ordinance.

Various technical points were raised on behalf of the Appellant. In the first place it was contended that two charges were tried together. It appears that what in fact happened was that the Accused was asked to plead to both charges before the beginning of the trial of the first charge. The charges were, however, tried separately and I do not think that the irregularity which occurred is sufficient to invalidate the trial of the first charge.

It was further contended that the Magistrate admitted evidence on the hearing of the first charge which could only have been relevant with regard to the second. The record is a long one and the evidence objected to appears in two short passages only. No reference to this evidence is made in the judgment and there is no reason to suppose that the Magistrate placed any considerable reliance upon it or that, if it had been omitted, the result would have been different. That being so, I do not think that any miscarriage of justice has occurred as the result of the acceptance of this inadmissible evidence.

It was further contended that there was no sufficient corroboration of the boy accomplice who alleged that he had stolen the property in question from the complainant and sold it for a small sum to the Accused. It is true that only a small part of the property alleged to have been stolen was actually found in the shop of the Accused. It is important to remember, however, that the Accused had previously denied having in his possession any of the said property and, in the light of such denial, I do not think that it can be said that the subsequent discovery of part of the property in his shop is not sufficient corroboration, in law, of the boy's story that he had disposed of the whole to the Accused. Whether the corroboration was sufficient in fact is a matter for the Court of Trial, and I do not think that this

Court should interfere with its conclusion.

The same considerations apply to the question whether the identification of the property found in the shop was satisfactory. Mr. Goitein pressed upon us the extreme difficulty of identifying the kind of articles in question ; but this is eminently a matter for the Court of Trial and the fact that the complainant definitely identified the property and that the Court believed her evidence concludes the matter.

For these reasons the appeal must be dismissed and the conviction and sentence, as varied by the District Court, confirmed.

Delivered this 24th day of July, 1941.

*British Puisne Judge.*

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HIGH COURT No. 53/41.

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

BEFORE : Rose, Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Sheikh Ali Haider. PETITIONER.

v.

1. The Supreme Moslem Council,
2. Sheikh Muhieddin Abdul Shafi,
3. Sheikh Kamal Isma'il,
4. Sheikh Yusef Tahboub,
5. Amin Bey Abdulhadi,

Members of the Supreme Moslem Council. RESPONDENTS.

*Waqfs — Post of first teacher at Ahmadiya School — Regulations concerning appointments to Religious Posts, Reg. 4 & 23 — Waqfieh prevails over Regulations.*

In refusing an application for an order to issue, directed to the Respondents, calling upon them to show cause why their decision, dated the 27th of June, 1941, should not be set aside and why they should not act in accordance with the *Iradé Sultani* in the hands of the Petitioner which confers on him the right which his predecessor had, and why Petitioner should not be appointed first teacher in the Ahmadiya School :—

HELD : The provisions of the will of the dedicator of the *waqf* as expressed in the *waqfieh* prevailed and the Ottoman Regulations concerning appointments to Religious Posts could not be applied.

ANNOTATIONS : *Cf.* H. C. 48/30 (L. R. P. 501, C. of J. 1693), H. C. 61/31 (P. P. 16.xii.32, 15.xii.33, C. of J. 1701) and C. A. 3/40 (1940, S. C. J. 42).

FOR PETITIONERS : Atalla and Abdulhamid.

FOR RESPONDENTS : Abcarius.

ORDER:

*Abdulhadi, J.*: This is a return to a rule *nisi*, calling upon the Respondents to show cause why Petitioner should not be promoted to the post of first teacher in the Mosque of Ahmad Pasha el Jazzar at Acre.

In support of his application, Petitioner relies on three *Firmans* by the Sultan, dated 1291, 1326 and 1329 *A. H.* and on Regulations 4 and 23 of the Regulations regulating appointments to Religious Posts.

It is clear from those *Firmans* and from the *waqfieh* itself, copy of which Respondents' counsel produced, that there exists only one post of teacher and not two. This fact is also admitted by Petitioner's counsel before us, and that provision in the *waqfieh* does not permit promoting Petitioner from the post of teacher he now holds to that of first teacher in the Mosque.

Further, Regulation 4 of the above Regulations speaks of the manner as to how the Religious Posts can be held and there is nothing in it to support Petitioner's contentions. Regulation 23 of the same Regulations also speaks of such posts as exist under *waqf* institutions for the service of which institutions there are several servants who hold first class posts and second class posts. And the order of succession to such posts is in turn, that is to say, the holder of a second class post succeeds the holder of a first class post whenever the latter becomes vacant, subject, of course, to the will of the dedicator of the *waqf* as expressed in his *waqfieh*. But if the dedicator's will as expressed in the *waqfieh* does not permit of such course being followed, then effect must be given to the dedicator's will.

In the present case before us, not only the *waqfieh* itself does not provide for two teachers, but also the dedicator's will as expressed in the *waqfieh* does not permit the application of the order of succession, as referred to above, since the dedicator entrusted the post of teacher in the Mosque to a specified person and after his death it goes to his son and after the son's death to the grandson, and this condition in the *waqfieh* is fatal to the Petitioner's claim to be appointed as first teacher in the Mosque.

For these reasons, the order *nisi* must, therefore, be discharged with costs and LP. 10 advocate's attendance fees to Respondents.

Delivered this 22nd day of July, 1941.

*Puisne Judge.*