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SUPREME COURT JUDGMENTS

1940

Vol. I

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ARNOLD M. APELBOM

LI. B., BARRISTER AT LAW, ADVOCATE

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CRIMINAL APPEAL No. 63/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

Attorney General. — APPELLANT.

v.

Vladimir Nikolaiovitch & 15 ors. — RESPONDENTS.

Immigration — Aiding and abetting illegal immigrants — Immigration Ordinance, Sec. 12(3) — Offence committed outside territorial waters of Palestine — R. v. Oliphant, R. v. De Marny, R. v. Stoddart — Aiding and abetting, an offence per se and therefore only punishable if committed wholly within the territorial limits — Macleod v. A.G. for N.S.W., ultra vires legislation.

In dismissing an appeal from the judgment of the District Court of Jaffa dated the 3rd November, 1939, whereby the Respondents were convicted of being found in Palestine without permission contrary to Secton 5(1) (g) and (h) of the Immigration Ordinance, 1933 and section 12(2) (a) of the Immigration Ord., 1933, together with section 7 and 7(3) (C) of the Immigration (Amendment) Ordinance), 1937, and section 3 of the Immigration (Amendment) Ordinance, 1939 and sentenced to one month's imprisonment each.

HELD: 1. On the charge sheet, which had not been amended, the accused could not be convicted as they had been compelled by the passengers to leave the ship before the material time.

2. Under Section 12(3) of the Immigration Ordinance, the act of aiding and abetting is specially prescribed as an offence *per se*, and therefore is only punishable if it is committed within the territorial limits of Palestine.

The offence of aiding and abetting had been committed outside those limits.

3. If the legislature had intended the wider construction to be given to the Section, it would have been beyond its jurisdiction to have enacted such a law.

DISTINGUISHED: R. *v.* Oliphant (1905) 2. K.B. 67,
R. *v.* De Marny (1907) 1. K.B. 388,
R. *v.* Stoddart 2. Cr.App.R. 217.

APPLIED: Macleod *v.* A.G. for New South Wales (1891) A.C. *dictum* of Lord Halsbury at p. 458.

ANNOTATIONS: The following Palestine authorities deal with similar questions arising out of the Immigration Ordinance: CR.A. 51/38 (1938, 1 S.C.J. 367); CR.A. 62/38 (*ibid.* 422); CR.A. 24/39 (*ante*, p. 323); CR.A. 29/39 (*ante*, p. 345); CR.A. 35, 36/39 (*ante*, p. 452).

See *Digest* XIV, p. 134, Sub-sec. 3 — *Offences Partly Committed Outside the Jurisdiction* and, on the last point, *Digest* XXXXII, p. 687 sec. 3 *Local Limits of Operation.*

FOR APPELLANT: Crown Counsel (Hogan).

FOR RESPONDENTS: J. Shapiro.

JUDGMENT.

In this case the accused were charged before the District Court of Jaffa on two counts with contravention of the Immigration Ordinance 1933-1939. On the first count, that of aiding and abetting some 800 Jewish immigrants to enter Palestine contrary to the provisions of the above Ordinance, the Court held that the accused had no case to answer in that there was no evidence that at the material time any of the accused was within the territorial limits of Palestine.

Against this decision the Attorney General now appeals.

The particulars of the offence are described in the Charge Sheet in the following words:

> "In that each of the accused persons during the night of 21/22.8.39 at a place off the Tel-Aviv coast, aided and abetted 800 Jewish Immigrants who had not in their possession, in addition to a valid passport or similar document as required by paragraph (g) (h) of Section 5(1) of the Immigration Ordinance 1935, an Immigration Certificate or permit granted by the Director of the Department of Immigration, to enter Palestine."

Now the only evidence adduced before the District Court was that before the material time and before the ship on which the accused were travelling entered the territorial waters of Palestine, the accused had already been compelled by the passengers to leave her. It is clear, therefore, that the accused could not properly have been convicted of the charge as laid and, since no amendment of the charge was made or even applied for by the prosecution, this is sufficient to dispose of the appeal.

As, however, considerable argument was addressed to us on the point as to whether in order to establish that a person is guilty of "aiding and

abetting" within the meaning of Section 12(3) of the Immigration Ordinance it is necessary to show that such aid was actually given within the three mile limit, we feel that it may be useful if we express our opinion on the matter.

Crown Counsel referred in his argument to R. *v.* Olivant (1905) 2 K.B. 67 and *v.* De Marny (1907) 1 K.B. 388. These cases are the accepted authorities for the proposition of English Law, which would seem, *mutatis mutandis*, to be applicable to Palestine, that if a person from a foreign country initiates acts which take effect in England and are criminal by the Law of England, he is liable to indictment in the places in England in which the acts take place. R. *v.* Stoddart 2 Cr. App. R. 217, which was also cited, carries the matter no further.

This proposition, however, in our view does not avail the Attorney-General in the present matter, as under Section 12(3) of the Immigration Ordinance, the act of aiding and abetting is specifically prescribed as an offence *per se,* and therefore is only punishable if it is committed within the territorial limits of Palestine. In this case, as we have already mentioned, there was no such evidence, for, even assuming that the completed offence of entering Palestine in contravention of the Ordinance had been committed by the said 800 Jewish immigrants, the fact remains that the aiding and abetting by the accused persons had been completed outside these limits.

We would add that, having regard to the language of Lord Halsbury in Macleod *v.* Attorney General for New South Wales, 1891, A.C. at p. 458, we are of opinion that if, which we do not suppose to be the case, the legislature had intended the wider construction to be given to the Section, it would have been beyond its jurisdiction to have enacted such a law.

The appeal must therefore be dismissed.

Delivered this 4th day of January, 1940.

Chief Justice.

CRIMINAL APPEAL No. 67/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:

Keitoun Khorozian. APPELLANT.

v.

Attorney General. RESPONDENT.

Rape — Unlawful sexual intercourse with a person mentally deficient — Corroboration of complainant's evidence — Failure to give evidence on oath or affirmation, Trial Upon Information Ordinance, Sec. 34.

In allowing an appeal from the judgment of the District Court of Jerusalem dated the 6th day of December, 1939, whereby the Appellant was convicted of rape contrary to section 153 of the Criminal Code Ordinance, 1936 and sentenced to three years' imprisonment; and in quashing the conviction: —

HELD: 1. The Court of Trial believed the complainant's evidence story, and found corroboration from the medical evidence and the fact that the girl was with the accused at his shop for a short time.

2. The evidence of the complainant could not be accepted as she had not be examined on oath or affirmation, notwithstanding the terms of Section 34 of the Criminal Procedure (Trial Upon Information) Ordinance.

ANNOTATIONS: As regards the necessity for corroboration in sexual offences, *vide* CR.A. 75/39 (*post*, p. 11) and annotations.

For medical evidence as corroboration, see A.A. 9/29 (C. of J. 607).

As regards the presence of the prosecutrix in the shop of the accused, note that corroboration must show not only opportunity but probability: Burbury *v.* Jackson (1917) 1 K.B. 16 & see *Digest* XXII p. 492 No. 5211. See also CR.A. 70/39 (*post*, p. 7).

FOR APPELLANT: Salah.

FOR RESPONDENT: Acting Solicitor General (Bell).

JUDGMENT.

This is one of the saddest cases that can come before a Court, that is a charge of unlawful sexual intercourse with an insane or imbecile female, and one cannot but feel that these poor creatures should not have to look for protection to the criminal law.

The girl in this case was some nineteen years old and had the mentality of a young child. She was usually in her mother's charge but she wandered away and was missing for some three days; when she was found she had indications of recent intercourse.

The Court of Trial stated that they believed the complainant's (*i. e.* the girl's) story, and found corroboration from the medical evidence and the fact that the girl was with the accused at his shop for a short time.

It appears however that the girl did not give evidence on oath — presumably because she did not understand the nature of an oath — and Section 34 of the Criminal Procedure (Trial Upon Information) Ordinance, except in the special case of a young child, requires a witness to be examined on oath or affirmation. Her evidence could not therefore be accepted.

The Acting Solicitor General admits, I think rightly, that without her evidence — such as it was — there was not sufficient evidence to convict the Appellant. The appeal is allowed and the Appellant discharged unless he is detained on any other charge.

Delivered this 4th day of January, 1940.

Chief Justice.

CRIMINAL APPEAL No. 70/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:

Yacoub Toukan. APPELLANT.

v.

Attorney General. RESPONDENT.

Identification — Insufficient evidence to justify conviction — Evidence of opportunity insufficient — Wrongful exclusion of evidence — Cross-examination of complainant as to character.

In allowing an appeal from the judgment of the District Court of Jaffa sitting at Tel-Aviv dated the 6th day of December, 1939, whereby the Appellant was convicted of breaking and entering a building with intent to steal, contrary

to section 295(a) of the Criminal Code Ordinance, 1936, and sentenced to three months' imprisonment, and in quashing the conviction: —

HELD: 1. The first point as to the irregularity of procedure (absence of *allocutus*) was bad, as the District Court corrected the mistake and no justice could possibly have been caused.

2. There was not sufficient evidence to support the conviction: Nobody had identified the Appellant as the person who was seen entering or leaving the complainant's house. The remaining evidence was insufficient to support the conviction.

3. The cross examination of the complainant as to her character was wrongly stopped by the trial Court.

ANNOTATIONS: On identification *cf.* CR.A. 75/39 (*post*, p. 11) and see *Digest* XIV, pp. 358 *sq.* 2 — *Identification of accused.*

On the admissibility of evidence tending to show the character of the prosecutor, and cross-examination of the prosecutor as to character, *vide Digest, ibid*, pp. 364 *sq. passim.*

FOR APPELLANT: Hutory.

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

The Appellant was charged before the District Court sitting at Tel-Aviv with breaking into a dwelling house and stealing therein. He was convicted and sentenced to three months' imprisonment. On appeal several points have been taken, one of them bad and two of them good. The point as to the irregularity of procedure is obviously a bad one because the District Court corrected on their own motion the mistake in procedure which they had made and no injustice could have been caused.

The main ground of appeal is that there was not sufficient evidence to support the conviction. We agree with that contention. Nobody identified the Appellant as the person who was seen entering or leaving the complainant's house. The witnesses merely said that they had seen a person resembling this Appellant. That, of course, in the absence of any other evidence, is not sufficient.

The only other evidence was that the Appellant had the opportunity of taking the key of the complainant's room from her bag, and the fact that the stolen property was found in the Appellant's garden, incidentally an open garden, to which anybody could have had access; we are of opinion that this evidence is not enough to support the conviction.

There is one further point, and that is, that evidence was wrongly excluded at the trial. The complainant was being cross-examined by the Appellant's counsel as to her character when the presiding Judge of the Court stopped it. In the circumstances of this case and indeed in most cases it seems to us that that cross-examination was material, and that the cross-examination was therefore wrongly stopped. For these reasons we are of opinion that the appeal should be allowed and the conviction quashed.

Delivered this 11th day of January.

British Puisne Judge.

CRIMINAL APPEAL No. 73/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:

Izhak Baroukheil. APPELLANT.

v.

Attorney General. RESPONDENT.

Forgery — Forging and uttering cheques — Findings of fact — Evidence to support conviction — Evidence on appeal, when it will be heard.

In dismissing an appeal from the judgment of the District Court of Jerusalem dated the 15th day of December, 1939, whereby the Appellant was convicted of forging two cheques contrary to section 337 and of uttering one cheque contrary to Section 340 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment.

HELD: 1. The District Court believed the evidence of the cashier who identified the Appellant.

2. The evidence of forgery consisted of the evidence of the hand-writing expert, corroborated by the evidence of the bank cashier, as to the presentation of one of the cheques by the Appellant.

3. The evidence of Mr. Elkes would not be heard on appeal as he should have been called by the Appellant in the District Court.

The Court of Appeal will not exercise their power to hear further evidence on appeal when the existence of the evidence was known, and the evidence was available, at the time of the original trial.

ANNOTATIONS : On identification, see CR.A. 70/39 (*ante*, p. 7) and note. For identification as corroboration see CR.A. 54/38 (1938, 1 S.C.J. 341); CR.A. 39/26 (P.L.R. 90; C. of J. 465).

The last point in this case is fully dealt with in CR.A. 52/38 (1938, 1 S.C.J. 332) and cases mentioned in annotations thereto.

FOR APPELLANT: Levitzky.

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

We need not trouble you, Mr. Hogan.

The Appellant was convicted by the District Court Jerusalem on a charge of forging two cheques of LP. 10.— and LP. 25.— respectively, and of uttering one of those cheques, and was sentenced to two years' imprisonment.

The arguments on this appeal, as we so often have to remark, have been addressed almost entirely to questions which would doubtless have been very good questions to be put before the Trial Court, but are not matters with which we can deal. It is argued before us that the District Court should not have believed the bank cashier when he said that he recognised the Appellant as the person who presented one of those forged cheques. Various reasons have been advanced to us which were equally before the District Court why the cashier should not have been believed, but unfortunately the District Court did believe him, and that Court having seen and heard him, it is not for us to say that he should not have been believed.

It is again argued that there was no evidence of forgery before the Court. The evidence of forgery consists of the evidence of the handwriting expert, whom the Court believed, and corroboration by the evidence of the bank cashier, as to the presentation of one of these cheques by the Appellant. It is difficult to imagine what further evidence of forgery would be required so long as the evidence given was believed. There is nothing in this point.

Application has been made here for the evidence to be heard of a Mr. Elkes, who is a handwriting expert of some experience. The fact that Mr. Elkes had examined these cheques was known to the Appellant at the time of the original trial, and therefore, if the

evidence of Mr. Elkes was required, the proper place in which to have called him was the District Court. It is true that this Court has power to hear further evidence on appeal, but that is a power which is only exercised in very special circumstances. I think I am safe in saying it is never exercised when the existence of the evidence was known, and the evidence was available, at the time of the original trial. We cannot see that there is any grave doubt such as appears to Mr. Levitzky. To us it seems a very clear case of forgery. We do not think that the sentence of two years is to much. We think that the appeal should be dismissed.

Delivered this 11th day of January, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 75/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:

Hans Nouestein — APPELLANT.

v.

Attorney General — RESPONDENT.

Rape — C.C.O. 152(1) — Prosecutions for rape to be anxiously scrutinized — Conduct consistent with consent — Conduct prior and subsequent to alleged rape — Absence of early complaint — Inference to be drawn from the evidence — Confession, whether voluntary.

In allowing an appeal from the judgment of the District Court of Jaffa, sitting at Tel Aviv, dated the 21st day of December, 1939, whereby the Appellant was convicted of rape contrary to Section 152(1) of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment; and in quasing the conviction:

HELD: 1. Prosecutions for rape should be anxiously scrutinised by the Court in view of the possibility of indirect or improper motive on the part of the complainant.

2. The conduct of the complainant prior and immediately subsequent to the connection was consistent with consent. Nor had there been an early complaint.

3. The only reasonable inference which a Court could draw from the evidence was that there had been such a degree of consent as to take the case outside the scope of the Criminal Law altogether.

4. Having regard to the considerations set out and to the circumstances surrounding the making of the statement by the accused to the police, it was not safe to rely upon the statement.

ANNOTATIONS: On the necessity for corroboration in sexual offences, see CR.A. 160/37 (1938, 1 S.C.J. 103); CR.A. 44/38 (*ibid.* 287). CR.A. 71/38 (*ibid.* vol. 2, 45); CR.A. 6/39 (*ante*, p. 76) CR.A. 83/38 (1938, 2 S.C.J. 246); CR.A. 46/38 (*ibid.* 238). See also CR.A. 67/39, 70/39 (*ante*).

On confessions, see CR.A. 51/39 (*ante*, p. 499).

On early complaints, see CR.A. 14/38 (1938, 1 S.C.J. 121); CR.A. 71/38 (*supra*).

FOR APPELLANT: Henigman and Goitein.

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

In this case the Appellant was convicted of rape *contra* Section 152(1) of the Criminal Code Ordinance 1936. The case presents difficulties and we are indebted to counsel both for the Appellant and the Respondent for the assistance which they have given to the Court.

The complainant is a young woman of twenty two years of age and the accused a youth of about eighteen. The evidence of the complainant, upon which the case for the prosecution largely depends, was briefly as follows: —

On the afternoon of the 9th of August 1939, the complainant met the accused for the first time while both were bathing in the sea off the beach at Tel-Aviv. She invited him to teach her to swim; he complied with her request and they remained in the water together for that purpose for some quarter of an hour. An appointment having been kept, the complainant ultimately accompanied the accused to his room at about 9.30 p.m. The accused undressed the complainant and then proceeded to undress himself, after which connection took place.

Up to the point of the actual connection the evidence of the complainant and the accused is substantially the same and it is therefore clear that even on the most unfavourable construction from the point of view of the accused, there was a considerable measure

of consent. Now, there is probably no class of cases which calls for more anxious scrutiny on the part of a Court than a prosecution for rape, in view of the fact that the possibility of some indirect or improper motive on the part of a complainant must always be borne in mind. Particularly is this so when, as in the present case, the complainant's conduct in the preliminary stages is consistent with consent. The complainant's story is that the actual connection took place by force and against her will. In view of this allegation her description of the subsequent events is somewhat surprising. She states that when the time came for her departure from the accused's room he turned on the light on the staircase for her and that, after an appointment for a further meeting had been made, she then shook hands with him. She further admits that the accused actually called at her room on one or two subsequent occasions, when she declined to see him. It is not until eight or nine days after the alleged rape that she lodged her complaint with the Police. Nor did she make any immediate complaint to the young woman who was living with her and sharing the same room. So far from doing so, the complainant in fact informed her that the black eye, which she later alleged to have been inflicted by the accused, was caused accidentally after she had left the accused's room.

The accused in the witness box told a coherent story which agreed in the main with that of the complainant, with the vital distinction that, in his version, the physical connection was by consent and not by force. He also stated that their mutual conduct in the sea was such as to leave neither of them in any doubt as to what was the purpose of their subsequent appointment.

With all respect to the Trial Court, we feel that, in view of the facts disclosed in the complainant's own story as well as the evidence of the accused himself, the only reasonable inference which a Court can draw is that there was such a degree of consent in this case as to take it outside the scope of the criminal law altogether. Nor do we suppose that the Trial Court would have drawn any other inference had it not been for a certain matter that has caused us considerable difficulty.

It appears that on the night of the 17th August, 1939, after he had gone to bed, the accused was arrested and taken to the police station, where he was prevailed upon to make a statement at about one o'clock in the morning. This statement, which was surprisingly detailed, can be said to be consistent with the guilt of the accused. Having regard, however, to the considerations to which we have

already referred, we do not consider that it is safe to rely upon this statement.

For these reasons the appeal must be allowed, the conviction quashed, and the accused discharged unless he is detained upon any other charge.

Delivered this 15th day of January, 1940.

British Puisne Judge.

HIGH COURT No. 2/40.

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

BEFORE: Copland, Rose and Frumkin, JJ.

IN THE APPLICATION OF:

Anis Hunaykati. PETITIONER.

v.

1. President, District Court, Haifa, acting as Chief Execution Officer,
2. Nasrallah Haddad for himself and as attorney for his brother Lutfallah Haddad. RESPONDENTS.

Discretion — Discretion of C.E.O. under Sec. 14(1) of the Land Transfer Ordinance.

In dismissing an application for an order to issue directed to Respondents to show cause why the order of the First Respondent dated the 10th November, 1939, as explained in his order of 30th November, 1939, in Haifa Execution file No. 312/39 should not be set aside, and an order for the sale of the mortgaged property be substituted therefor.

The C.E.O. had allowed the mortgagor an extension of time until the expiration of the mortgage upon the terms that he should pay LP. 1200 until the end of 1940.

HELD: It could not be said that the Chief Execution Officer had exercised his discretion improperly.

ANNOTATIONS: On discretion, see H.C. 12/39 (1939, S.C.J. p. 112) and annotations; H.C. 20/39 (*ibid.* p. 139) and annotations; H.C. 41/39 (*ibid.* p. 462).

FOR PETITIONER: Gavison.

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

ORDER.

This case has caused us a very considerable amount of difficulty and it is hard to find the right answer.

The Chief Execution Officer after hearing the parties made an order in certain terms and the Petitioner has come to this Court and has asked us to hold that the Chief Execution Officer has not exercised his discretion properly in accordance with the provisions of Section 14(1) of the Land Transfer Ordinance as amended. Now, in some respects, when his Order was first considered it struck us that perhaps the Chief Execution Officer had not exercised his discretion correctly, but on considering it and taking into consideration the various circumstances which the Chief Execution Officer detailed in his Order, we find it very difficult to say that he has exercised his discretion improperly even though perhaps we might not have come to the same conclusion as that at which he arrived. That being so we feel that the Rule will have to be discharged. In the circumstances each side must pay their own costs.

Given this 22nd day of January, 1940.

British Puisne Judge.

HIGH COURT No. 3/40.

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

BEFORE: Copland, Rose and Frumkin, JJ.

IN THE APPLICATION OF:

Miriam Rabikoff (Stargitsky). PETITIONER.

v.

1. District Officer, Tel-Aviv,

2. Chairman of Assessment Committee, Urban Property Tax, Tel-Aviv,

3. The Assessment Committee, Urban Property Tax, Tel-Aviv. RESPONDENTS.

Urban Property tax — Time to file objection to valuation — Urban Property Tax Ord. Secs. 12, 15(1) — Delay by authorities in sending notice of valuation — Proceedings not invalidated.

In dismissing an application for an order to issue to the 2nd and 3rd Respondents directing them to show cause why they should not accept and determine an objection to valuation of urban property tax, and for an order directing the 1st Respondent to refrain from collecting urban property tax on the property of the Petitioner until the determination of this application, and/or for alternative or ancilliary relief.

HELD: 1. Under Section 15(1) of the Urban Property Tax Ordinance, an objection to the valuation list must be lodged within thirty days of the posting of the valuation list. This had not been done.

2. The law provides no remedy for failure by the authorities to send notice of valuation.

The fact that the Petitioner had received notice of valuation after the posting of the valuation list did not exnerate her from payment of the tax.

ANNOTATIONS: See also H.C. 39/39 (1939 S.C.J. p. 389) on Urban Property Tax.

FOR PETITIONER: Apelbom.

FOR RESPONDENTS: *Ex-parte.*

ORDER.

We regret, I think, I may say, that this application must be refused. Under the law, Section 15(1) of the Urban Property Tax Ordinance, any person who is aggrieved by an assessment in the valuation list, must lodge his objection to the specified authority within thirty days of the posting of the valuation list. Section 12 of the Ordinance says that a separate notice of valuation in the prescribed form should be sent to every reputed owner but we do not think that the Petitioner, who admittedly did not receive a separate notice of valuation until some months after the posting of the valuation list, can say that she is not liable to assessment because she did not receive the separate notice of valuation, The law provides no remedy in this rather peculiar case.

Objection must be made within thirty days of the posting of the valuation list and that admittedly has not been done. The application, therefore, must be refused.

Given this 22nd day of January, 1940.

British Puisne Judge.

HIGH COURT No. 1/40.

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

BEFORE: Copland, Rose and Frumkin, JJ.

IN THE APPLICATION OF:

1. Jacob Nissim Mizrahi,
2. David Bracha,
3. Haim Bracha. PETITIONERS.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Ezra Sasson,
3. Menasche Aelan. RESPONDENTS.

Receivers — Appointment of receiver over mortgaged property — Opportunity given to object to the appointment.

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 29th day of November, 1939 and that of the 15th day of December, 1939, respectively, appointing a receiver in Execution file No. 14210/38, Tel-Aviv, should not be set aside.

HELD: The order *nisi* was granted on the point that it was not clear whether Petitioners had had an opportunity of objecting to the receiver. It now appeared that the first Petitioner had and there was no reason why the second and third Petitioners could not equally have objected.

ANNOTATIONS: On receivers see H.C. 19/39 (1939, S.C.J. p. 200); C.A. 88/39 (*ibid.* p. 408); H.C. 75/39 (*ibid.* p. 459); C.A. 118/39 (*ibid.* p. 519).

FOR PETITIONERS: No. 1 — Goitein.
Nos. 2-3 — A. Moyal.

FOR RESPONDENTS: No. 1 — Absent served.
Nos. 2-3 — Salomon Siev.

ORDER.

On the 29th November, 1939, the Chief Execution Officer, Tel-Aviv, after hearing all parties, appointed Mr. Shohat, an advocate, as receiver of certain property belonging to the second and third Petitioners. On the 4th December objection was made by the 1st Petitioner, who is the lessee of the property, to the appointment of a receiver and also to the nomination of Mr. Shohat for that post.

On the 15th December, the Chief Execution Officer considered the arguments and came to the conclusion that the original order of appointing a receiver and of Mr. Shohat to that post should stand. The Petitioners came to this Court objecting both to the appointment of the receiver and to Mr. Shohat and an order *nisi* was granted, as I am informed by my brothers, on the point that it was not clear that the Petitioners had had the opportunity of objecting to Mr. Shohat. From the papers, however, and further hearing the parties, we are satisfied that there is nothing in this point. The first Petitioner made an objection to Mr. Shohat and we can see no reason why the second and third Petioners could not equally have objected. It seems that the Chief Execution Officer, at any rate, if he had made a mistake originally, remedied that mistake after hearing what Petitioners had to say.

For these reasons the rule *nisi* must be discharged. The second and third Respondents will have their costs to include LP. 10 advocate's fees for attending the hearing. Costs to be levied jointly and severally against all the Petitioners.

Given this 22nd day of January, 1940.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 23/38.

IN THE PRIVY COUNCIL.

BEFORE: Viscount Sankey, Sir Lancelot Sanderson and Sir Philip Mac Macdonell.

IN THE APPEAL OF:

Apostolic Throne of St. Jacob — APPELLANT.

v.

Saba Eff. Said — RESPONDENT.

Privy Council — Currency — Loan in French liras — Inference of gold clause from manner of payment of interest — Admissions, Mejelle Arts. 79, 1588 — Adelaide Electric Supply Co., Ltd. v, Prudential Assurance Co., Ltd., — Feist v. Société Intercommunale Belge d'Electricité — Ottoman Bank of Nicosia v. Chakarian.

In dismissing an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 14th May, 1937;

HELD: The payments of interest showed that the Respondent, by his conduct over a period of years, admitted that the loan was in gold. The inference thus created was not displaced by Respondent.

REFERRED TO: Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd. Dig. Supp.

Feist v. Société Intercommunale Belge d'Electricité, Dig. Supp.

Ottoman Bank of Nicosia v. Chakarian. Dig. Supp.

ANNOTATIONS: See *Digest* vol. XXXV, pp. 169—176. For earlier proceedings see C.A. 72/36 (1 Ct.L.R. p. 59, 1937, 1 S.C.J. 156, C of J. 1934-6 558).

FOR APPELLANT: Collin H. Pearson.

FOR RESPONDENT: Sir Thomas Strangman, K.C. and Phineas Quass.

Viscount Sankey: This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated May 14, 1937, affirming the judgment of the District Court of Jerusalem, dated May 25, 1936, which ordered the appellant (hereinafter called the defendant) to pay to the respondent (hereinafter called the plaintiff) an amount in Palestine currency to be measured by the value on the date of payment of 1,000 French gold napoleons, with interest and costs.

The question raised by the appeal is the extent of the defendant's liability to the plaintiff as representing the estate of Yakoub Giries Said, deceased, on a bond dated August 16, 1916. The plaintiff submits, and both the Palestinian courts have so held, that the de-

fendant was bound under the bond to pay the value on the date of repayment in Palestine currency of 1,000 French gold napoleons, with interest from August 21, 1931. The defendant admits liability to repay the principal of the loan and interest thereon from August 16, 1931, as sums of Palestinian currency — that is to say, (i) for the principal, £P. 791.282, and (ii) for the interest, £P. 55.385 per annum.

The bond referred to was in the following terms:

The Apostolic Throne of St. Jacob, Jerusalem.

August 16, 1916.

No. 107.

French L. 1,000.

DEBT BOND.

Loaned for the needs of this Apostolic Throne, from Yakoub Giries Said of Jerusalem, only (1,000) one thousand French liras at an annual interest of 4% (four per cent.), and on condition that if he should claim the recovery of the capital on the expiration of one year, he shall notify us 3 months beforehand, and in confirmation whereof we gave this bond, sealed.

SEAL (Signed) The Chief of the Holy Throne,

David Wartabet Derderian.

It will be observed that the bond provided for interest at the rate of 4 per cent., but, by agreement between the parties, the rate of interest was increased in 1918 to 6 per cent. Interest was paid from time to time either in Turkish liras, Egyptian liras, French liras, Egyptian piasters and Palestine pounds, and the payments were after August 21, 1931. On October 28, 1935, the plaintiff commenced proceedings for the recovery of the amount due to him, and by paragraph 4 of his statement of claim he alleged:

As can be seen from the bond the liability of the defendant is expressed in French liras which expression always had and can only have the meaning of French gold napoleons, and the claim is made accordingly, the value of the claim being calculated on the basis of the rate of gold napoleons at the time of lodging the action.

The defendant denied the allegations of the plaintiff, and in particular denied that the bond was given in respect of a loan in gold napoleons. The defendant also reserved the right to counter-claim or set-off against the acount of the plaintiff certain overpayments which he alleged he had made.

The hearing in the District Court of Jerusalem took place on April 9, 1936, the plaintiff contending that the bond indicated a debt of 1,000 gold napoleons, and he argued that the defendant was estopped by his own conduct from claiming that the debt was in other than

gold napoleons. He drew attention to the payments made for interest and indorsed, as stated above, on the bond. The case was adjourned for a short time to enable the defendant to search the Turkish records for the exact text of the law enacted by the Ottoman government during the period of the Great War substituting paper currency for gold in Turkish dominions. The judgment of the court was given on May 25, 1936. It was brief, and in the following terms:

> The defendant is bound by the loan document and his subsequent admission by payment of interest on the basis of gold loan.
>
> Following decision in C.A. No. 85/32, the judgment must be given for plaintiff, amount of debt, 1,000 gold napoleons at the rate of exchange upon date of payment, with interest from August 21, 1931, as agreed, to date of payment, provided the interest does not exceed the principal.

The defendant appealed, and, in his notice of appeal, advanced grounds many of which were abandoned as the case proceeded. Before this court, only three of these grounds were relied upon. It was pointed out that neither the word "gold" nor the word "napoleon" was mentioned in the bond. It was denied that there was payment of interest on the basis of a gold loan, and that the indorsement on the bond itself constituted such an admission, and it was contended that the only evidence available proved that interest was paid on the basis of a certain arbitrary or tariff rate, which, over the course of years, bore no relation to the fluctuating gold-exchange rate.

At the hearing in the Supreme Court on April 22, 1937, the defendant expressly admitted, apparently for the first time, that he was liable to pay at tariff rate, and subsequenty in this court he admitted his liability to repay the principal of the loan and interest thereon from August 16, 1931, as sums of Palestinian currency (i) for principal, £P. 791.282, and (ii) for interest, £P. 55.385 per annum.

Their Lordships were referred, in an appendix to the case for the appellant, to various extracts from the Turkish, Egyptian and Palestinian currency laws, decrees and ordinances, but it is not necessary to set them out at length. By art. 1 of a draft decree concerning Turkish coinage in 1296 (1881), which was subsequently passed by the Chamber of Deputies it is provided that the Turkish monetary unit is the gold pound of 100 piastres. By a Turkish ordinance of August 22-24, 1914, it was provided that the Ottoman Bank would be exonerated of its obligation to redeem bank notes in gold for as long a period as that law should be in force. By a decree relating to the monetary system of Egypt, dated October 18, 1916, it was provided in art. 1 that the monetary unit

of Egypt is the Egyptian pound. The Egyptian pound is divided into 100 piastres. After the occupation of Palestine by the Allies, a notice was issued on November 23, 1917, making Egyptian coins and bank notes legal tender. On January 18, 1918, a notice was issued relating to acceptance of certain coins for purposes of receipts and payments, and it was provided as follows:

> The following are the official rates of conversion into Egyptian piastres of the coins mentioned below. On the basis of these rates these coins may be accepted for purposes of receipt and payment in addition to currency.
>
> (1) Coinage other than Turkish: —
>
> In addition to Egyptian currency the following may also be accepted for purposes of receipts and payments in the occupied country. Gold at the following exchange: French 20 francs, 77.15 P.T. (Egyptian).
>
> (2) Turkish coins: —
>
> £ Turkish (Gold) — 87.75 P.T. (Egyptian).

By a notice of Jan. 18, 1918, from the acting administrator of occupied enemy territory, the public was reminded that the Egyptian Bank note was worth exactly its face value in Egyptian gold, silver or nickel currency, and that, on the basis of the above rate of P.T. 87.75 for the pound Turkish gold, the value of the 100 P.T. Egyptian note must be considered as 144 Turkish piastres gold.

The payments of interest indorsed upon the bond are as follows. The first two indorsements (the only indorsements which relate to the period prior to the British occupation) show that interest for the first year, i.e., from August, 1916, to August, 1917, was paid in Turkish liras. The second indorsement clearly means "20 French liras in its equivalent of 17.5 Turkish liras," as in the first indorsement. For the year August, 1917-August, 1918, interest was paid in Egyptian liras at the tariff rate for gold coins. For the year August, 1918-August, 1919, the interest was actually paid in French liras For the year August, 1919-August, 1920, interest was again paid at the tariff rate for gold napoleons. For the year August, 1920-August, 1921, interest was paid similarly, and again for the year August, 1921-August, 1922. The payments were continued at the tariff rate for the years 1922-1923, 1923-1924, 1924-1925, 1925-1926, 1926-1927, 1927-1928, in each case the payment being 5,400 Egyptian piastres, being the equivalent of 70 gold napoleons at the tariff rate of 77.15 Egyptian piastres, per gold napoleon. The remaining three indorsements represent similar payments for the year 1928-1929, 1929-1930, and 1930-1931, the payments being made in Palestine pounds, at the same tariff rate, with the necessary adjustment between the gold value of the Palestine pound and the Egyptian pound.

The judgment of the Supreme Court was given on May 14, 1937:

The case came before the District Court on April 9, 1936. The plaintiff's case was that the defendant was estopped from saying the transaction was not gold by the payments which were made and accepted on account of interest, these showing that the parties must have treated the loan as gold. This was done by showing that the payment of interest was calculated at the tariff rate under a public notice, dated December 12, 1918 on the basis that the interest was payable on a gold loan.

The defendant argued that the transaction could not have been gold as there was then no gold coin in circulation, and that, if it was in gold, the transaction was void, gold transactions being forbidden by law. He went on to say there was a definite issue of fact between the parties as to whether the transaction was gold.

Then *Sir Harry Trusted,* C.J., proceeded as follows:

I think that the fact that interest had been paid a number of years upon a basis compatible with the loan being gold cast the onus of proof upon the defendant, and it is clear that he made no effort, by the production of his books or otherwise, to discharge that onus, and, although I do not think, upon the evidence, that the defendant was estopped from denying that the loan was gold, I think the District Court was entitled, in the absence of any evidence by the defendant, to hold that it was gold. This disposes of the first point raised for the appellant before us by Abcarius Bey — namely, that the onus was on the respondent (the plaintiff) to prove that he gave gold.

Counsel for the defendant argued before their Lordships that the loan was repayable in any currency legal at the time of repayment. He contended that the two questions for determination were (i) did the bond by itself show that the contract was, to put it briefly, a gold or a gold value contract? and (ii) did the payment of interest show that the bond was a gold or a money contract? Several cases were referred to, including *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd., Feist* v. *Société Intercommunale Belge D'Électricité* and *Ottoman Bank of Nicosia* v. *Chakarian,* but none of these authorities was in point in the present case, for reasons which will appear later.

In the view of their Lordships, the judgment of the Supreme Court was right upon the materials which were before it. With regard to the bond, the defendant submitted that the French lira or napoleon was a Turkish unit of account, and that there was no gold clause in the bond, or any indication in it that repayment was required to be in gold, or in anything other than legal currency.

If the bond stood alone, and if attention were directed to the bond only, it might have been successfully contended that the contract was a currency contract as distinguished from a gold one. However, the bond did not stand alone. The payments of interest were sometimes in Egyptian liras at the tariff rate for gold coins, sometimes actually

in French liras, sometimes in Egyptian piastres equivalent in amount and value to gold napoleons, sometimes in Palestine pounds with the necessary adjustment between the gold value of the Palestine pound and the Egyptian pound. These were admissions by the defendant by which he was bound.

The legal effect of admissions in Palestine is to be found in the Turkish Code (the Méjelle) which provides in art. 79 that a person in bound by his own admission, and, in art. 1588, that no person may validly retract an admission made with regard to private rights. It is clear, as was held by both of the courts below, that these payments of interest show that the defendant, by his conduct over a number of years, admitted that the loan was one of 1,000 gold napoleons, and consequently he was prevented by such admissions from claming that he could discharge his liability other than by the payment of the amount claimed.

In order to counteract the effect of these admissions, the defendant contended before their Lordships that the interest had been paid, not on the basis of the gold rate, but on that of a tariff rate, which, he alleged, had borne no relation over the course of years to the gold rate. He further alleged that the tariff rate of gold coins was not the gold exchange rate. Had the defendant been able to substantiate these points, or had he proved them in the District Court, he might have been in a position to displace the inference drawn in both courts from the payment of interest, but the difficulty in his way in the present appeal is that in the court of first instance he made no attempt, either by the production of his books or otherwise, to displace the only inference which could be drawn from a proper consideration of the payments of interest indorsed upon the bond. Those payments indicated that the basis of the bond was compatible, and compatible only, with the loan being gold. Consequently, the Palestine courts were entitled, on the evidence which was before them, and, indeed, bound to hold that the loan was a gold one. In the result, their Lordships will humbly advise His Majesty to dismiss this appeal, and order the defendant to pay the costs of the appeal.

(November 21th, 1939).

HIGH COURT No. 78/39.

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

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

IN THE APPLICATION OF:

Gedaliah Havkin — PETITIONER.

v.

1. The Inspector-General of Police & Prisons,
2. Dr. Levy, Examining Magistrate, Jerusalem,
3. Anglo-Palestine Bank Ltd. — RESPONDENTS.

Search warrants — As applied to current account in bank — Arrest and Searches Ordinance, Sec. 16 *— Seizure of motor car without warrant — Failure to file affidavits in reply — Jurisdiction of High Court, Palestine Order-in-Council, Art.* 43, *Courts Ordinance, Sec.* 6 *— H.C.* 69/25, *H.C.* 51/32, *H.C.* 21/32, *H.C.* 1/39, *H.C.* 40/38, *H.C.* 57/38, *H.C.* 31/39, *H.C.* 20/39, *H.C.* 81/27, *H.C.* 15/30, *H.C.* 74/32, *H.C.* 17/25, *H.C.* 28/33, *HC.* 56/33, *H.C.* 86/36, *H.C.* 37/27, *H.C.* 13/36 —

In allowing an application for an Order to issue directed to the first Respondent calling upon him to show cause why he should not return Petitioner's car and why he should not release the seizure or attachment which he had made on the monies of the Petitioner standing to his account with the third Respondent, and further to show cause why he should not withdraw his order to the third Respondent forbidding the third Respondent Bank to allow transactions in connection with the said account and further praying that the Second Respondent be ordered to confine his Search Warrant to an Order of search and/or seizure of any document that may be necessary for the first Respondent in his investigation, but that the Warrant should not include seizure of money at the third Respondent Bank: —

HELD: 1. The jurisdiction of the High Court is exercised under Article 43 of the Palestine Order-in-Council and Section 6 of the Courts Ordinance, which should be read together.
This jurisdiction is broadly speaking in the nature of *mandamus* and prohibition, although there is no. mention of these remedies as there is of *habeas corpus*.
There has been a tendency to use terms familiar to English practice.

2. The High Court will exercise a wider jurisdiction, conferred upon it by law, than that of the Supreme Court in England, but that jurisdiction is discretionary, and remedies will not be given unless they are necessary in the interest of justice. It is also subject to the following limitations:

a. If a public officer's duties are defined by statute, the High Court will not order him to do something outside those duties: H.C. 51/32, H.C. 40/38, H.C. 57/38, H.C. 31/39.

b. When the exercise of a discretion is vested in a public officer, the High Court will not be inclined to interfere unless he has misdirected himself in law or has failed to direct his mind to the question of discretion: H.C. 20/39.

c. The High Court will not assume jurisdiction when some other remedy exists: H.C. 81/27, H.C. 15/30, H.C. 74/32.

d. The High Court will not interfere when the act of which complaint is made is already completed or carried into effect: H.C. 17/25, H.C. 28/33, H.C. 56/33, H.C. 86/36, and apart from the question of delay, the Court will not make an order which cannot be effective.

e. The High Court has refused to exercise its discretion when the petitioner has been guilty of delay (H.C. 13/36).

3. No provision being made in the Arrests and Searches Ordinance for appeals, actions thereunder may be questioned before the High Court, by analogy with proceedings against Chief Execution Officers.

In the present case, however, the order made by the Magistrate was not *prima facie* bad and the Court would not interfere.

4 As regards the third Respondent, the Anglo-Palestine Bank, this was not a public officer, or body, and as between it and the Applicant nothing arose which was not within the jurisdiction of another Court.

5. As to the first Respondent, no distinction was drawn by the Crown Counsel between the Inspector General and the Officer who did the acts of which complaint was made.

6. In taking the Applicant's car Mr. Soffer did not purport to act under any order of any Court and any complaint which the Applicant had about the motor car could be brought in another Court.

7. The words "seize the moneys belonging to Mr. Gedaljah Havkin" in the warrant did not authorise the seizure of moneys standing to the Applicant's credit in a deposit account with a bank. Nor was the question involved within the jurisdiction of any Court.

This was a proper case, therefore, for an order to a public officer.

CONSIDERED: H.C. 69/25 (1 P.L.R. 57; C. of J. 1190); H.C. 51/32 (1 P.L.R. 733; C.of J. 1579); H.C. 21/32 (1 P.L.R. 683; C. of J. 734); H.C. 1/39 (1939, S.C.J. 83); H.C.40/38 (1938 1 S.C.J. 400); H.C. 57/38 (1938, 2 S.C.J. 91); H.C. 31/39 (1939, S.C.J. 333); H.C. 20/39 (1939, S.C.J. 138); H.C. 81/27 (1 P.L.R. 243; C. of J. 1756); H.C. 15/30 (1 P.L.R. 455; C. of J. 1835); H.C. 74/32 (1 P.L. R. 782; C. of J. 1127); H.C. 17/25 (1 P.L.R. 38; C. of J. 884); H.C. 28/33 (1 P.L.R. 829; C. of J. 866; P.P. 3.X.33); H.C. 56/33 (2 P.L.R. 15; P.P. 14.I.34; C. of J. 761); H.C. 86/36 (C. of J. Vol. VIII, 458; P.P. 22.1.37); H.C. 37/27 (1 P.L.R. 148; C. of J. 1551); H.C. 13/36 (C. of J. Vol. VII, 29; P.P. 12, 14, 15. VII. 36).

FOR PETITIONER: Goitein.

FOR RESPONDENTS: No. 1 — Crown Counsel (Hogan),
No. 2 — Absent, served,
No. 3 — Marein.

JUDGMENT.

It appears that Gedaliah Havkin, a Government servant employed by the Public Health Department, is charged before the Examining Magistrate upon a number of counts with defalcations of Government moneys.

On 30th November, 1939, Mr. Soffer, A.S.P., who is concerned in the case, swore by affidavit that —

> "I know that the accused, the said Mr. Gedalia Havkin, holds the sum of LP. 2850 in the Anglo-Palestine Bank, Jerusalem, and the sum of LP. 19.870 in the Kupat-Am Bank, Jerusalem, and I have sufficient reason to believe that these monies are the property which he took by theft from the Government in connection with the offences which I am investigating against him at present, and that these monies are necessary for me for the purposes of investigation and for their production in Court, therefore I apply to Your Worship with a request that you give me an order for search in accordance with Section 16 of the Criminal Procedure (Arrest & Searches) Ordinance, Chapter 32, Drayton, Volume I, so that I may seize the said sums in the Anglo-Palestine Bank and the Kupat-Am Bank."

From this wording it is not wholly clear if application was made under Section 16(a) or (b) of the Criminal Procedure (Arrest & Searches) Ordinance. Upon this affidavit the Magistrate made the following order with regard to the Anglo-Palestine Bank - -

> "To make a search at the Anglo-Palestine Bank, Jerusalem, and to seize the moneys belonging to Mr. Gedaliah Havkin, deposited in the said Bank, who is charged with stealing Government funds, and to seize any papers or property which appear to have relation to the commission of the alleged offence."

Mr. Soffer went to the Bank and there found that Havkin had no actual moneys in the sense of notes or coin, in a safe or otherwise, deposited there, but that he had a deposit account, and the Bank gave him (Soffer) an undertaking in Hebrew to the effect that they would hold the money therein at his disposal, and we are told that, in consequence, they refused to deal with it in accordance with Havkin's instructions.

It also appears that in the course of these investigations, Mr. Soffer, without any warrant, took possession of Havkin's motor car.

Upon these facts an application was made to this Court for an order *nisi* directed to the Inspector-General of Police & Prisons, the Examining Magistrate and the Anglo-Palestine Bank, which was granted, and Mr. Hogan now appears to show cause. Mr. Marein also appears for the Bank, but has filed no affidavit as required by the Rules.

Some argument has been addressed to us as to the jurisdiction of this Court, and it may be convenient to consider it. It is founded upon the second paragraph of Article 43 of the Order-in-Council, which provides:

> "The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice."

and Section 6 of the Courts Ordinance, which provides, *inter alia*, —

> "The High Court of Justice shall have exclusive jurisdiction in the following matters: —
>
> (a) applications (in the nature of *habeas corpus* proceedings) for orders of release of persons unlawfully detained in custody;
>
> (b) orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from doing certain acts."

It is clear that to ascertain its jurisdiction this Court has read those provisions together, and there are a number of cases in the reports which show that it has made orders covering a wide range of subjects directed to public officers.

This jurisdiction is broadly in the nature of *mandamus* and prohibition, although in paragraph (b) of the section there is no mention of these remedies as there is of *habeas corpus* in paragraph (a), and there has been a tendency to use terms familiar to English practice, and in some cases it has been sought to limit the paragraph to English remedies.

In High Court Case No. 69/25, P.L.R., Vol. I, p. 57, it was argued that the appropriate remedy was injunction, as to which Corrie J., at page 65, observed —

> "It is questionable whether the issue of Orders under Section 6(2) of the Courts Ordinance is to be governed by the rule of English Law which has been cited."

In High Court Case No. 51/32, P.L.R., Vol. I, p. 733, McDonnell C.J. stated —

> "The Attorney-General impugns the Order *Nisi* on the ground that it does not tally with a Rule *Nisi* for the grant of a *mandamus*

> as employed in the High Court of Justice in England; but the order follows the precedents established during the last eight years in respect of orders directed to public officers under Sec. 6(b) of the Courts Ordinance, No. 21 of 1924, which is concerned with a procedure which in the absence of petitions of right has been built up in this territory as regards orders not only in the nature of *mandamus* and prohibition as contemplated in that subsection but also as regards orders on petitions and applications as contemplated in the second para. of Art. 43 of the Palestine Order-in-Council."

and in High Court Case No. 21/32, P.L.R., Vol I, p. 683, he began his judgment as follows: —

> "I am satisfied that whether or not we are concerned with a request for an order directed to a public officer or a public body in regard to the performance of their public duties, as contemplated by Sec. 6 of the Courts Ordinance, 1924, the present application is one not within the jurisdiction of any other Court and necessary to be decided for the administration of justice, and is, in consequence, one within the contemplation of Art. 43 of the Palestine-Order-in-Council."

I think it is clear that this Court will exercise a wider jurisdiction, conferred upon it by law, than that of the Supreme Court in England, but that jurisdiction is discretionary, and remedies will not be given unless they are necessary in the interests of justice, see H.C. 1/39, R.L.R., Vol. VI, p. 85, and is subject to certain limitations.

Firstly, this Court has held that if a public officer's duties are defined by statute, it will not order him to do something outside those duties. In H.C. 51/32 cited above, the Chief Justice went on to say, at page 734 —

> "We have to consider whether the Commandant of Police is in breach of any statutory duty in refusing to allow such examination."
>
> "The duty of the Commandant of Police *vis-à-vis* unconvicted prisoners is set out in Secs. 254, 258 and 259 of the Prisons Regulations, 1925, and since we can find no statutory duty imposed upon him of the nature claimed by the Petitioner, the Rule must be discharged."

and this principle was approved in three recent cases, H.C. 40/38, P.L.R. Vol. V., p. 357, H.C. 57/38, P.L.R. Vol. V., p. 450, and H.C. 31/39, P.L.R. Vol. VI, p. 340.

Secondly. Where the exercise of a discretion is vested in a public officer this Court will not be inclined to interfere unless he has misdirected himself in law or has failed to direct his mind to the question of discretion, H.C. 20/39, P.L.R. 6, p. 171.

Thirdly. This Court has been careful not to assume jurisdiction

when some other remedy existed, — examples will be found in H.C. 81/27, P.L.R. Vol. I, p. 243, H.C. 15/30, P.L.R. Vol. I, p. 455, H.C. 74/32, P.L.R. Vol. I, p. 782.

Fourthly. It would appear from the reports that this Court will not interfere when the act of which complaint is made is already completed or carried into effect, as where a road had already been made, H.C. 17/25, P.L.R. Vol. I, p. 38; moneys had been distributed, H.C. 28/33, P.L.R. Vol. I, p. 829; the petitioner had been evicted from land, H.C. 56/33, P.L.R. Vol. II, p. 15; ghaffirs had been appointed, H.C. 86/36, Rutenberg, Vol VIII, p. 458.

The basis of the order in the last case is not altogether clear, as from the report it would appear that the petitioners were asking the Court to order that the cost of twelve ghaffirs should not be collected, whereas the Court dealt with the matter as an application to cancel the appointment of the ghaffirs.

On the other hand, in H.C. 37/27, P.L.R. Vol. I, p. 148, where the facts are very like those with which we are now concerned, and an order had been made by the P.D.C. Nablus under Section 14(a) of the Arrest & Searches Ordinance in civil proceedings, this Court ordered —

> "that the order of the P.D.C., Nablus, made under the said section be set aside and the books seized in consequence thereof returned to the petitioner."

Apart from the question of delay which may have influenced some of these decisions, and with which I will deal later, in my view the proper limitation is that this Court will not make an order which cannot be effective.

Lastly, this Court has also refused to exercise its discretion when the petitioner has been guilty of delay, H.C. 13/36, Rutenberg, Vol. VII, p. 29.

Having indicated the principles upon which we will act, I turn to this application.

As to the Magistrate. No provision for appeal is made in the Arrest & Searches Ordinance, and, by analogy with proceedings against Execution Officers which are frequently brought to this Court, I think that actions thereunder may be questioned before us, but it does not appear that the order which was made in this case is *prima facie* bad. As against the Magistrate, therefore, I think the rule should be discharged.

As to the Bank. It is not a public officer or body, and as between it and the Applicant nothing arises which is not within the jurisdiction of another Court, the rule should be discharged.

As to the Inspector-General. Mr. Hogan draws no distinction between the Respondent and the officer who did the acts of which complaint is made. In taking the motor car Mr. Soffer did not purport to act under any order of any Court. The complaint which the Applicant may have about the motor car can be brought in another Court, but no doubt in the light of the discussion in this application the Inspector-General will desire to consider his position.

As I have stated, I think that the order which was made by the Magistrate was not *prima facie* bad. The question is therefore, did Mr. Soffer act properly under it?

Mr. Hogan argues that the words — "seize the moneys belonging to Mr. Gedaljah Havkin" authorise the attachment of money standing to his credit in a deposit account with a bank. I do not think that they do so, nor do I think that the questions involved between the Applicant and Mr. Soffer are within the jurisdiction of any other Court. In my judgment this is a proper case for us to give an order to a public officer, and the rule will be made absolute insofar as it directs him to release the seizure or attachment which he has made on the moneys of the Applicant standing to his credit in his deposit account with the Anglo-Palestine Bank.

The Applicant having succeeded in part and failed in part, we make no order as to costs.

Delivered this 29th day of January, 1940.

Chief Justice.

CIVIL APPEAL No. 120/39

CIVIL APPEAL No. 121/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Joseph Zenober. — APPELLANT.

v.

1. Joseph Bernblum,
2. Jacob Tenenbaum. — RESPONDENTS.

Opposition — Whether notice was received by third party — Attachments — Attachment of moneys in hands of third party — Question of fact cannot be raised on appeal to Court of Appeal.

In dismissing an appeal from the judgment of the District Court of Haifa, sitting as a Court of Appeal, dated the 20th July, 1937: —

HELD: Though the plea of non service of the notice of attachment upon Appellant was a serious ground, it was a question of fact which could not be entertained on appeal to the Court of Appeal.

FOR APPELLANT: Werner.

FOR RESONDENTS: No. 1 — C. Gluckman,
No. 2 — No appearance — served.

JUDGMENT.

These are two appeals which have been consolidated, by leave, from judgments of the District Court, Haifa, in which judgments they dismissed appeals from the Magistrate's Court. The facts are the same in both cases and it is therefore only necessary to deal with one of them. Judgment had been given against the present Appellant as a third party on the ground that he held a certain sum of money for the account of the second Respondent here who was defendant in the Magistrate's Court. The first Respondent was the plaintiff in the original action. Opposition was made by the present Appellant to the Magistrate and in that opposition the Appellant stated that he owed no money to the second Respondent. The Magistrate dismissed the opposition on the ground that since the second Respondent had recently become bankrupt, he had no jurisdiction under which to entertain the action. Appeal was made to the District Court which dismissed the appeal when dealing with it not on the ground advanced by the Magistrate in dismissing the opposition but on the ground that the present Appellant was out of time inasmuch as he should have entered an opposition within eight days of the service of the notice of provisional attachment upon him and that he had not done so.

Appeal is now made to this Court. The main ground of appeal is that the order of provisional attachment was not served upon the present Appellant and therefore a statement in the judgment of the District Court that he had been served is wrong and that this necessitates the upsetting of the judgment of the District Court.

As we pointed out in the course of the argument, this plea of non-service was never made in the notice of opposition which was lodged in the Magistrate's Court. It was of course a serious ground and is

the first ground, if I may say so, which should have been advanced, as, if it is really true that notice was not served, this fact would have been conclusive. The Appeal to this Court is unfortunate for the Appellant, it being purely on a question of fact. I am afraid that in an appeal to this Court to upset on appellate judgment of the District Court, when an appeal lies an a point of law only, we cannot deal with the question whether it is a fact or not that an order of attachment was served.

For these reasons the appeal must be dismissed with costs to include LP. 15, hearing fees consolidated for both appeals as to the first Respondent.

Delivered this 23rd day of January, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 8/40.

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

BEFORE: Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF:

Moshe Gershon Washbein. — APPELLANT.

v.

The Attorney-General. — RESPONDENT.

Insanity — Murder appeal — Intention to kill — Proof of enmity — Degree of sanity — Test of legal insanity, Macnaughton's case; C.C.O., sec. 14 *— Findings of trial Court — Killing in cold blood — Inference to be drawn from judgment.*

In dismissing an appeal from the judgment of the Court of Criminal Assize sitting at Tiberias, dated the 9th of January, 1940, 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 had not been seriously suggested by the defence that the Appellant was insane within the terms laid down for legal insanity in Macnaughtons' case.

2. The Court of trial having found that the Appellant had resolved to kill and had prepared himself and the instrument to do so, that

there had been no immediate provocation, that the man was not insane and that the shots had not been fired aimlessly, the finding of cold blood followed from these findings and was therefore implicit.

REFERRED TO: R. *v.* MacNaughton (1843), 10 Cl. and F. 200.

ANNOTATION: On cold blood, see CR.A. 17/38 (1938, 1 S.C.J. 218) and annotations. On insanity, see CR.A. 16/39 (1939 S.C.J. 185).

FOR APPELLANT: Hoter Ishay and Ben Haviv.

FOR RESPONDENT: Crown Counsel (Bell).

JUDGMENT.

The Appellant was convicted of the murder of his brother-in-law, Abraham Washbein, and was sentenced to death. He has now appealed to this Court and asks us to say that this verdict is wrong. A very large number of points has been taken by the Appellant's advocate, most of which were possibly very good points to be brought before the Court of Trial, but are not points with which a Court of Appeal can deal.

The first point with which we need deal is that there was no evidence that the Appellant had resolved to kill the deceased, and had prepared himself and the instrument to do so. In other words, the intention to kill was not proved. Now the man was killed — of that there is no doubt — by a shot fired by the Appellant. There is no evidence to support the contention of Mr. Hoter Ishay that the Appellant could not have seen the deceased while discharging the shots, and that should the deceased not have raised himself after the first shot he would not have been hit by the second shot. On the facts as proved in the Trial Court that Court was fully justified in rejecting this theory and in coming to the conclusion that the Appellant had resolved to kill the deceased. It may have been that the Appellant and the murdered man had been on good terms, but there was evidence that for some time previously they had not been on speaking terms and their wives also had not been on speaking terms.

The next point is that the Appellant was insane, and that the Court should have found that the Appellant was insane at the time he fired the shots. According to the law every person is presumed to be sane until the contrary is proved. It is of course true that all sane men have not the same mental ability. The test of legal insanity in English Law is laid down in Macnaughton's case, and has been applied since: —

> "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease

> of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

This test has been substantially enacted in Section 14 of the Criminal Code. Now the evidence before the Trial Court upon which the Appellant asks us to say that he was insane is this: — There is evidence of persons who have know him and who said that he had been depressed and used to cry, and that he seemed peculiar. There is the evidence of a doctor who was called by the defence and who said that he had treated the Appellant at the time immediately before the crime, and had found that he was suffering from neurasthenia. There is no word whatever in the doctor's note-book that this man was insane. It is true that the doctor said in cross-examination that he thought that the Appellant was mental (*sic*), but he did not say that he was suffering from a mental disease. The test that is laid down in Macnaughton's case was not put by the defence to the doctor. We cannot see that there was any evidence on which any Court could find that the Appellant was insane. It is true, that in its judgment the Court said: "It is not suggested by the defence that the Appellant was insane." What they might have said was that it was not seriously suggested. The meaning in any case is quite clear, and there was no evidence to suggest that he was insane.

Equally the Trial Court was justified in rejecting the evidence of the Appellant that he intended to commit suicide and that the shots he fired were aimless ones. There was evidence to support the Court's conclusion, and we need say no more about it.

The last point is that the Trial Court did not make any finding that the murder was committed in cold blood, and that there was no evidence to support such a finding if it had been made. The Court found that the Appellant had resolved to kill and had prepared himself and the instrument to do so. It found equally that there was no immediate provocation. It found that the man was not insane, and that the shots were not fired aimlessly. It seems to us from all these findings that the further finding of cold blood is implicit — it follows from them — and that the Court's omission to state in the judgment that the murder was committed in cold blood is not fatal to a conviction, and does not call for criticism.

That being so, it follows that this appeal fails. It must therefore be dismissed, and the conviction and sentence of death are confirmed.

Delivered this 30th day of January, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 5/40.

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

BEFORE: Copland, Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:

1. Mohammad Abdallah Jamma'in,
2. Jamil Ali Jaber. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Sodomy — Previous convictions — Sentences — Character of subject of offence.

In dismissing an appeal from the judgment of the District Court of Jerusalem dated the 10th day of January 1940, whereby the appellants were convicted of attempted sodomy contrary to sections 152(a), 154 and 23(b) of the Criminal Code Ordinance, 1936 and both sentenced to three years, imprisonment, but in reducing the sentences: —

HELD: Whilst nothing could be said against the correctness of the conviction, the sentences were unduly severe. Nothwithstanding the previous convictions against Appellants, and considering the boy's bad character, the sentences would be reduced.

APPELLANTS: In person.

FOR RESPONDENT: Crown Counsel (Bell).

JUDGMENT.

The two Appellants were convicted of attempting to commit an unnatural offence with a boy and were each sentenced to three years' imprisonment. It is unnecessary to go into the details, and all one need say is this, that the two Appellants were found in such circumstances that the Court was fully justified in convicting them of the attempted offence. Nothing can therefore be said against the correctness of the convictions, but we feel that the sentences of three years' imprisonment each are unduly severe. It is true that the first Appellant Mohammad Abdallah Jamma'in has thirty convictions for various offences in the last twenty years, one of which was attempting to commit an unnatural offence in 1938, and the second Appellant Jamil Ali Jaber has five previous convictions, one for the completed offence

of the same type as this case in 1937, but we feel, even taking those convictions into consideration, and the fact that there is no doubt that the boy was of bad character, that the sentences should be reduced in each case to one of twelve months' imprisonment to run from the date of conviction.

Delivered this 31st day of January, 1940.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 1/40.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: His Honour the Chief Justice (In Chambers).

IN THE APPLICATION OF:

Gedalia Havkin. — APPLICANT.

v.

Attorney General. — RESPONDENT.

Application for release en bail.

ANNOTATION: Other proceedings in this case: H.C. 78/39 (*ante*, p. 25).

O R D E R.

Upon hearing Mr. Goitein in support of the application for release on bail, and upon hearing the Crown Counsel, Mr. Hogan, in reply, I hereby order that the Magistrate's order herein be varied and the Applicant be released upon the performance of the following conditions:

(a) That a bail bond in the sum of LP. 750 be entered by the wife of the Applicant secured by a *caveat* against the mortgage Deed No. 2242/37 in File No. 1433/37, made in her favour in the Land Registry, Jerusalem, to the effect that she will not dispose of the mortgage in any manner whatsoever and that this *caveat* will not be raised except upon further order by the Chief Justice.

(b) That a bail bond or bonds be entered into by one or more sureties in the total sum of LP. 750 whose ability to meet their respective obligations to be certified by the Chamber of Commerce.

(c) That the Applicant do enter into a bail bond in the sum of LP 750 and do produce an undertaking from the bank in which his monies are deposited to the effect that the bank will not dispose of a sum of LP. 750 now standing to the credit of the Applicant unless and until the Applicant produces to them an authority in writing to that effect from the Chief Justice.

A copy of this order to be served on the Director of Land Registration, Jerusalem, and on the Anglo-Palestine Bank, Jerusalem.

Given this 11th day January, 1940.

Puisne Judge.

CIVIL APPEAL No. 119/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Pessia Nuchim Leibovna Schwalboim. APPELLANT.

v.

Hirsh (Zvi) Schwalboim. RESPONDENT.

Maintenance — Judgment based on defendant's admission — Maintenance cannot be granted for the past — Law applicable where parties are Palestinian Jews is Rabbinical Law, as personal Law — Discretion in awarding monthly payments — Payments should run from date of filing action.

In dismissing an appeal from the judgment of the District Court of Tel Aviv dated the 30th November, 1939, and in varying the judgment of the lower Court:—

HELD: 1. In the absence of authority to the contrary, the Court was right in refusing to grant past maintenance.

2. The parties being Palestinian Jews, the personal law applicable was Rabbinical law and not English law.

3. Payments should run from the month following filing the action.

4. There was no reason to interfere with the discretion of the lower Court regarding the monthly amounts of maintenance.

ANNOTATIONS: For authorities on maintenance, see H.C. 28/38 (1938, 1 S.C.J. 373) and annotations; C.A. 49/39 (1939 S.C.J. 258) and annotations.

FOR APPELLANT: Bar Shira.

FOR RESPONDENT: Weissman.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel Aviv, in a maintenance case. The learned President after a patient trial, occupied mostly with long speeches by counsel, gave judgment against the present Respondent largely on his own admission, that he was prepared to pay monthly a sum of money, £P. 2, as from the 1st December, 1939. The case is a peculiar one because, except for the evidence of the Respondent, there is not one little scrap of evidence in the whole proceedings to prove the claim of the present Appellant who was the plaintiff in the Court below. The learned President refused to grant maintenance for the past on the ground that nobody had quoted any authority in law to prove that maintenance for the past could be granted and that he was not going to do so unless somebody quoted some such law. In that we think that he was right.

Appeal is now being made by the deserted wife to this Court. The learned President in his judgment declined to apply English law since he held that the defendant being a Palestinian Jew, the law applicable was the national law and that for Palestinian Jews in Palestine the national law was the Rabbinical law. Mr. Bar-Shira, with much force and vigour, has tried to argue that this is a gross error and that the personal law is English law. This is an argument which no one would dream of advancing except to maintain a controversial position, it is an argument which really needs no reply. It is clear, and has been recognised as being clear for many many years, that in a case such as this the personal law is the Rabbinical law. It is said by Mr. Bar-Shira that he has been unable to find any such statement in the reported cases — he is now at any rate provided with one.

The only real point in this appeal is the date as from which the payments should run. The claim for the future was for payment from date of action. The learned President made an order for payment from the 1st December, 1939, which was the first new month after the judgment was delivered. Here again, very kindly, the Respondent consents to pay £P. 2 per month from the date of action; so we think in this case the payment should run from the 1st February, 1939, which is a few days after the action was lodged.

It is argued that the amount awarded is too small. Now, in maintenance cases the amount to be awarded depends upon the present means of the defendant. The only evidence as to the defendant's means was his own statement. According to his statement, which was uncontradicted, he was spending between £P. 5 to £P. 6 monthly on himself. We do not think that in making an award for £P. 2 per month to pe paid, the discretion is exercised wrongly, for the Court's discretion is to be exercised in considering the amount of maintenance to be awarded. The judgment of the District Court will, therefore, be varied by stating that the payment will run as from the 1st of February, 1939; otherwise the appeal will be dismissed, in the circumstances with no costs to either side.

Delivered this 23rd day of January, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 7/40.

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

BEFORE: Copland, Rose and Abdulhadi, JJ.

IN THE APPEAL OF:

The Attorney General. APPELLANT.

v.

Eliahu Lalo. RESPONDENT.

Criminal Procedure — Perjury — Acquittal on a submission of no case to answer — Whether depositions disclose an offence — Court may not try offence on depositions alone — Case must be tried.

In allowing an appeal from the judgment of the District Court of Jaffa dated the twenty-third day of November, 1939, whereby the Respondent was acquitted of the charge of perjury contrary to section 117 of the Criminal Code Ordinance, 1936, and in remitting the case for trial:—

HELD: No Court is entitled to try a case on the depositions alone. The witnesses must be heard and the case tried.

ANNOTATIONS: Compare the procedure on applications to quash the indictment — Digest Vol. XIV, p. 251 sub-sec. 4. On the motion of the accused, p. 253, sub-sec. 4(c).

FOR APPELLANT: Crown Counsel (Bell).

FOR RESPONDENT: S. Felman.

JUDGMENT.

The Respondent to this appeal was committed for trial by the Magistrate to the District Court on a charge of perjury. When the case came before the District Court a submission was made by the Respondent's advocate that there was no offence disclosed on the depositions. The District Court accepted that view and acquitted the Respondent. The Attorney General has now appealed and his first ground of appeal, and the only one with which we shall deal, is this — that *prima facie*, the information discloses an offence, and it is therefore the duty of the Court to try it. We think that this submission is correct. No Court is entitled to try a case on the depositions alone. It may quite possibly be that after a trial they would come to the same conclusion as the one at which they arrived in the first instance, but they must hear the witnesses. At any rate, the case must be tried, and the appeal will therefore have to be allowed and the case remitted to the District Court, as in this case there has not been any trial at all.

We would like to add that possibly the prosecution may care to consider very carefully, having won the preliminary point on the question of purity of procedure, whether it is worth while proceeding with the prosecution further in the District Court. That is a matter of course which entirely concerns them.

Delivered this 31st day of January, 1940.

British Puisne Judge.

CIVIL APPEAL No. 3/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland and Abdulhadi, JJ.

IN THE APPEAL OF:

Fakhri el Din el Ansari
on behalf of the estate of his father
the late Sheikh Mahmoud Jawdat
Daoud el Ansari. APPELLANT.

v.

Awkaf Commission. RESPONDENTS.

Salary — Claim for salary from Supreme Moslem Council (Awkaf Commission) Interpretation of H.C. 61/31 — Conditions of employment — Improper dismissal — Hearing witnesses — Record of proceedings.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 6th December, 1939:—

HELD: 1. High Court action No. 61/31, between the same parties, did not deal with the question of salary at all but only with the question of dismissal.

2. There was nothing in the record to indicate that Appellant wanted other witnesses heard than the one whom the Court had heard.

ANNOTATIONS: Other proceedings H.C. 61/31 (P.P. 16.XII.32; 15.XII.33; C. of J. 1701).

FOR APPELLANT: Khoury.

FOR RESPONDENTS: Abu Sha'ar.

JUDGMENT.

We need not hear you, Najib Eff. Abu Sha'ar.

This case was originally before this Court in 1937 when we made an order allowing the appeal and sending it back to the District Court in order that the present Appellant should be given the opportunity of proving, if he could, that an oral agreement existed between himself and the Supreme Moslem Council, the predecessors in title of the Respondents, with regard to the Appellant's salary.

The facts are shortly as follows: The late Sheikh Mahmoud Ansari

was appointed to a post as Curator of the Mosque of Omar by a *Bara't* of the late Sultan of Turkey. In that *Bara't* his salary was fixed at 200 Turkish Piastres. Subsequently that salary was raised by the Supreme Moslem Council to £P. 5 monthly and again later on to £P. 8 monthly. The last increase of £P. 3 was stated to be as compensation in lieu of the gratuities which the Sheikhs had previously been in the habit of receiving from visitors. Later on in 1929 disputes arose and the Supreme Moslem Council reduced the salary of Sheikh Mahmoud to £P. 4 monthly. He was afterwards dismissed from his office but as a result of an application to the High Court that Court ordered that he should be reinstated. The salary was still paid to him at the rate of £P. 4 monthly and subsequently that was again reduced to the sum of £P. 3.200 mils. Sheikh Mahmoud then in 1934 entered an action in the District Court claiming arrears of salary on the basis of the difference between the £P. 8 which he claimed he was entitled to and the sume actually paid to him. The District Court after hearing the parties gave a decision dismissing the claim; it was appealed, as I have said before, to this Court, sent back to the District Court who heard the evidence of Abdallah Eff. Mukhlis, the Administrator of the Awkaf and as a result the District Court again gave a decision dismissing the claim.

Appeal has now been made to this Court. The main basis of the appeal is, if I may say so, that the High Court Case No. 61 of 1931 decided that the Appellant should be reinstated in his office and his original salary paid to him. Now what the High Court case decided is this, that the Sheikh had been dismissed improperly from his office because the terms of Art. 53 of the Ottoman Regulations of 1529 had not been complied with and therefore he should be reinstated. No mention is made in the judgment of the question of salary beyond the words in the opening paragraph saying that the action was one to show cause why the petitioner should not be reinstated in his substantive office and his original salary paid to him. There is nothing to show, even supposing that the judgment did deal with the question, there is nothing to show what the term "original salary" means. The original salary might well mean the sum of 200 Turkish Piastres which was in fact the original salary which he received. We do not however think that the judgment does in terms deal with the question of salary at all but merely with the question of dismissal from his office.

The second main point is that the Court, which had previously given a decision that certain witnesses should be heard, when the case actually came on for hearing did not hear the evidence of those

witnesses. Now, we have looked through the record and we find that the advocate for the Appellant asked for the evidence of Abdallah Eff. Mukhlis to be heard and it was heard. There is no further mention in the proceedings that other witnesses were then asked for or that the Court refused to adjourn or summon or to hear such witnesses. The parties have the duty of conducting their cases properly and it was open to the Appellant at the original trial before the District Court to have said. "I want these witnesses, which the Court had already decided to hear, I want those witnesses heard". He does however nothing of the sort and sits still and from that we are entitled to assume and I suppose the District Court was equally entitled to assume, that though the Appellant's original intention was perhaps to call these witnesses yet that he later came to the conclusion that he did not want their evidence. That point therefore fails.

Several other points have been raised but they are unimportant ones and in any case there is nothing in them.

At the re-hearing there was no further evidence of any kind on which the District Court could come to a conclusion that an oral agreement with regard to his salary existed between the late Sheikh Mahmoud Ansari and the predecessors of the present Respondents, the Supreme Moslem Council, and we think therefore that the judgment of the District Court was correct.

The appeal must be dismissed with costs both here and below for all the various hearings that have taken place in the last six years, and £P. 10 fees for attending the hearings in this Court for the two appeals.

Delivered this 5th day of February, 1940.

British Puisne Judge.

CIVIL APPEAL No. 116/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

Julia daughter of the late
Tannous Nasr. APPELLANT.

v.

1. Fatmeh, Bint Mohammad Abu Azim,
2. Mustafa, Ibn Mohammad Mustafa Abu Jabara,
3. Ibrahim, Ibn Mohammad Mustafa Abu Jabara,
4. Khalil, Ibn Mohammad Mustafa Abu Jabara,
5. Mahmoud, Ibn Mohammad Mustafa Abu Jabara,
6. Kamel, Ibn Mohammad Mustafa Abu Jabara,
7. Amneh, Bint Mohammad Mustafa Abu Jabara,
8. Zeinab Hassan Abu Jabara,
9. Ali Hassan Mohammad Mustafa Abu Jabara,
10. Su'ad, Bint Hassan el Haj Mohammad Abu Jabara,
11. Is'af, Bint el Hassan el Haj Mohammad Abu Jabara. RESPONDENTS.

Fraud — Statement of claim disclosing no cause of action regarding fraud — C.P.R. — Alleged omission or mistake in old land register — C.A. 141/37 — Land Settlement — Costs.

In dismissing an appeal from the judgment of the Land Court of Jaffa, dated the 8th November, 1939: —

HELD: 1. 1. The Land Court was right in holding that on the pleadings and arguments there was no cause of action disclosed in fraud.

2. (Following C.A. 141/37) On the alternative cause of action Appellant could not succeed as there had been a variation of registration since the date of the entry in the old register.

FOLLOWED: C.A. 141/37 (2 Ct.L.R. 130).

FOR APPELLANT: Yunis (by delegation).

FOR RESONDENTS: Nos. 1-4, 6-11 — Nijem,
No. 5 — Dunkelblum.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jaffa. It concerns certain land which in the past was registered in the name of the Appellant's father.

In 1930 the land in question came under land settlement and was then registered by the Land Settlement Officer in the name of the Respondents' ancestor.

The Appellant was for some years absent from Palestine, but in 1938 she brought her action pleading in her statement of claim *inter alia*,—

> "Plaintiff was absent in Egypt during the Settlement operation and registration in the village of Masudiyeh. After her return to Palestine she learnt that her land in question was registered into the name of the late Mohammad Abu Jabara, and this in an illegal way and without a right."

There was no more particular allegation of fraud, but this pleading was filed before the commencement of the Civil Procedure Rules.

Issues were framed on 31.5.39 (after the commencement of the Rules); they contain no allegation of fraud.

At the hearing the Plaintiff's advocate submitted —

> "The basis of our claim is under Section 66 for an alteration of the register on two grounds (a) Fraud, and alternatively (b) that the rights in the old register have been omitted or incorrectly set out."

The Land Court ruled — clearly rightly — that on the pleadings and arguments there was no cause of action on the ground of fraud.

There remained therefore the alternative claim. In considering Section 66 of the Land Settlement Ordinance this Court held, in Civil Appeal No. 141/37, Current Law Reports, II, page 130, —

> "We are concerned only with the latter part of the first paragraph, *i.e.* "that a right recorded in the existing registers has been omitted or incorrectly set out in the register." I do not think that this provision has any application when the right recorded in the existing register has been varied by the settlement officer or the Courts on appeal from a Settlement Officer under the provision of the ordinance."

This applies equally to the present case, and it disposes of the matter.

The appeal will be dismissed on these grounds, which differ somewhat from those of the Court below set out in the judgment, with costs on the lower scale. We certify £P. 10 for attending the hearing,

which will be divided between the Respondents, represented by the advocates who appeared. As to half, to those represented by Ibrahim Eff. Nijem, and half to those represented by Dr. Dunkelblum.

Delivered this 24th day of January, 1940.

Chief Justice.

CRIMINAL APPEAL No. 3/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

1. Mohammad Hussein Ali el Yazbaky,
2. Sami Mohammad Abder Rahman. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Evidence on appeal — Affidavits must be filed — Whether new evidence should be heard — Identification — Findings of fact — Age of accused.

In dismissing an appeal from the judgment of the Court of Criminal Assize sitting at Gaza, dated the 3rd of January, 1940, whereby the Appellants were convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and both sentenced to death.

HELD: 1. In a case such as this the Court was prepared to consider new evidence but no affidavits had been filled and there was no new fact brought to light which the Court should consider.

2. The identification of the Appellant could not be challenged.

3. The point raised by the second Appellant regarding age had been dropped at the hearing.

ANNOTATIONS: The admissibility of evidence on appeal is dealt with in *Digest* Vol. XIV, p. 512. This should be in form of affidavit: *ibid*, No. 5703.

FOR APPELLANTS: No. 1 — Nuweihid,
No. 2 — Mohammad Budeiri.

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

The two Appellants were convicted of murder by the Court of Assize sitting at Gaza.

On behalf of the First Appellant it is urged that there are certain new facts which we should consider. In a case such as this we are prepared to consider any relevant matter, but no affidavits have been filed, and at most it would seem that the Appellant's advocate desires to rely upon a statement made to him (the advocate) by the Appellant. We are satisfied that there is no new fact brought to light that we should consider.

The identification of the Appellant is challenged, but as to that the Court of Trial found —

> "Several of the witnesses at the first identification parade said that although they recognised the first accused, they did not say so. They have given as their reasons for this the fact that they were in terror of their lives owing to the state of insecurity then prevailing in the town, and because many of the principal rebels were at that time still at large. We have heard and seen these witnesses before us. They have not been shaken in cross-examination. They have given what in our opinion is an honest and sufficient reason for not saying that they identified the accused at the first parade. We believe them and are satisfied that they have told the truth. We do not believe the two accused when they say they were not there."

It is clear that that Court carefully considered this point.

In his notice of appeal to this Court the second Appellant alleged that his age did not exceed 17 years, and requested an X-ray examination. This was made, and the Government Radiologist estimated his age between 20 and 21, and this point was dropped at the hearing. This Appellant also questioned the identification.

We are satisfied that there was evidence upon which the Court could find as it did, and the appeal of each Appellant is dismissed.

Delivered this 25th day of January, 1940.

Chief Justice.

CRIMINAL APPEAL No. 4/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

Abraham Amsterdamer. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Post Office offence — Postman secreting letters, Post Office Ord., Sec. 83 — No intention to deprive the owner permanently need be shown — Extention of legislation in case of postal employees — Sentence.

In dismissing an appeal from the judgment of the District Court of Jaffa sitting at Tel-Aviv, dated the 7th day of December, 1939, whereby the Appellant was convicted of concealing postal packets contrary to Section 83 of the Post Office Ordinance, and sentenced to nine months' imprisonment, and in reducing the sentence: —

HELD: 1. In order to convict of the offence of secreting it was not necessary to show an intention to deprive the owner permanently.
2. In view of the circumstances in this case the sentence would be reduced.

FOR APPELLANT: Frank.

FOR RESPONDENT: Hogan (Crown Counsel).

JUDGMENT.

The Appellant, who was a postman, was charged before the District Court sitting at Tel-Aviv under Section 83 of the Post Office Ordinance. It appeared at the trial that he had a number of letters in his possession which he failed to deliver or return to the Post Office. Upon those facts he was charged with having secreted them.

It is argued before us that under the section, having regard to the words: "Steals, embezzles, secretes or destroys a postal packet", in order to convict of secreting, an intention to deprive the owner thereof permanently must be shown. We do not think that this is the true construction of the section. Officers of the Post Office have many opportunities wrongly to deal with letters and other articles intrusted to them, and it is in the public interest that their integrity should be maintained. It is for this reason that the legislature has imposed upon them this criminal liability when for any purpose whatever they secrete a postal packet.

We are satisfied from the evidence that the accused secreted some letters and thus committed an offence.

The second question raised by his advocate is that of sentence. He is young, being only 18 years old, and when the offence was committed he was only 17. It is not for us to criticize the persons employed by the Postmaster-General in the public service, we can only deal with cases as they come to us. We are justified in taking into consideration the youth of this Appellant. We also take into consideration that it is in the public interest that Post Office officials must maintain a high standard. Having regard these factors we feel that a sentence of three months' imprisonment is adequate, and we reduce the sentence accordingly.

Delivered this 25th day of January, 1940.

Chief Justice.

CIVIL APPEAL No. 117/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

1. The Shell Company of Palestine, Ltd.,
2. The Socony Vacuum Oil Company, Inc.,
3. Societe du Naphte S.A.

Sous La Raison A.I. Mantachieff and Cie. APPELLANTS.

v.

The Municipal Corporation of Haifa. RESPONDENTS.

Arbitration — Application to arbitrators to state a case — Betterment tax — Consolidation of cases — Interim award — Arbitration Ordinance Sec. 8(2) — Submission to arbitration pre-supposes agreement that only one award should be given — Award on a preliminary question not a final award.

In allowing an appeal from the judgment of the District Court of Haifa dated the 27th November 1939, and in remitting the case to the lower Court: —

HELD: The Appellants were not out of time in applying to the District Court to state a case as the Interim Award was merely a decision of the arbitrator on a preliminary point, decided before the delivery of the award itself.

ANNOTATIONS: On statement of a special case during reference see *Digest*, vol. II pp. 456 *Sqq.*, Sec. 3, sub. sec. 1.

FOR APPELLANTS: No. 1 — A. Levin.
No. 2 — Eliash.
No. 3 — Abcarius Bey.

FOR RESPONDENTS: Weinshall.

JUDGMENT.

ROSE, *J.*: This is an appeal from an order of the District Court of Haifa, dismissing an application by the Appellants for an order directing the arbitrator to state in the form of a special case for the opinion of the Court, certain questions of law arising out of arbitration proceedings between the Appellants and the Respondents.

By a deed of submission, dated the 25th November, 1938, made between the Respondents and the First Appellant, two questions were submitted for the arbitrator's determination. First, whether the Respondents are liable to betterment tax in respect of Haifa Oil Scheme No. 13. Secondly, if the answer to the first question is in the affirmative, what is the amount of such tax. Similar submissions were made separately between the Respondents and the Second and Third Appellants, and it was agreed by all of the parties that the three arbitrations should be heard together.

We are informed by counsel in the case that at the hearing the parties agreed that "the question of liability or no liability should be dealt with first", and that after hearing argument on this preliminary question the arbitrator, on the 5th of July, 1939, adjourned the proceedings. The following note appears on the record: —

> "Agreed that the arbitration should adjourn until parties notified either that hearing will continue or that a final award is ready for delivery (*i.e.* to be handed over)."

On the 15th of July, 1939, the arbitrator completed for each of the Appellants a copy of a document which he termed "Interim Award", the final paragraph of which reads as follows: —

> "In the result I am of opinion that the Applicant is entitled to recover betterment tax from the Respondent. The arbitration will therefore be continued in order to ascertain the extent of the Respondent's liability."

On the same date the arbitrator wrote a letter to each of the Appellants in the following terms:

> "Gentlemen,
>
> On the question submitted to me as to the existence of any liability at all upon the Respondents I have made an Interim Award, which may be obtained from my chambers at the Law Courts, Haifa, on any morning other than Sunday between the hours nine and ten.
>
> 2. This Interim Award contains a detailed statement of my reasons, so that any party desiring a special case to be stated for the opinion of the Court may be in a position to take the necessary steps.
>
> 3. Subject to the result of such proceedings (if any), the arbitration will be continued in order that I may make my award as to the amount of the Respondent's liability in each case.
>
> 4. No costs of the award will be payable until the final award is issued."

The Appellants subsequently obtained their copies of this document from the arbitrator's chambers, and in due course applied to the District Court for an order under Section 8(2) of the Arbitration Ordinance (Chapter 6 of the Revised Edition) directing the arbitrator to state in the form of a special case for the opinion of the Court certain questions of law arising out of the arbitration.

The District Court dismissed this application on the ground, *inter alia*, that the Appellants were too late, in that they had already taken up the Interim Award.

The main point to be decided in this appeal is a short one, namely, whether this so-called Interim Award is an award at all in the technical sense of the term. We are of opinion that, in the absence of express agreement between the parties to the contrary, a submission to arbitration under the Arbitration Ordinance pre-supposes that there is to be only one award; nor do we consider that the facts of this case justify the inference that there has been any such agreement between the parties as to displace this supposition.

Having regard to this and to the passage in the so called award itself, to which we have already referred, as well as to the terms of the arbitrator's covering letter, we consider that this arbitration has not been completed, and that the Appellants are therefore not out of time in their application to the District Court to exercise its powers under Section 8(2) of the Arbitration Ordinance. In other words, we think that the proper view to take of the document which is described as an Interim Award is that it is merely a decision of the arbitrator on a preliminary point, which for the convenience of

the parties and to obviate the calling of unnecessary evidence, was decided before the delivery of the award itself.

A further point was successfully taken by the Respondents in the Court below as against the Second and Third Appellants, namely, that they should have lodged separate applications. This matter was not pressed in argument before us in this Court, and we do not think that there is any substance in it.

For these reasons the appeal must be allowed, the order of the District Court, dated 27th November, 1939, set aside, and the matter remitted to the District Court to enable it to consider the Appellants' application on its merits. The Appellants will have their costs, on the lower scale, of this appeal in any event, to include £P. 10 advocate's attendance fee for each of them.

Delivered this 2nd day of February, 1940.

Chief Justice.

CIVIL APPEAL No. 4/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

The Anglo-Palestine Bank, Ltd. APPELLANTS.

v.

Dr. Paul Berg. RESPONDENT.

Guarantee — Construction of documents — CR.A. 10/39, oral arguments in the Magistrates Courts.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv (in its appellate capacity) dated the 21st day of November, 1939: —

HELD: On the construction of the guarantee given by Appellant to Respondent it applied to a judgment of the Court of first instance given during its currency, and was not limited to a judgment given in first instance in the sense of firstly given.

REFERRED TO: CR.A. 10/39 (1939 S.C.J. 155).

FOR APPELLANTS: I. Levin.

FOR RESPONDENT: Zakheim.

JUDGMENT.

The Respondent was the Plaintiff in an action lodged in the District Court, Tel-Aviv, and in order to release an attachment the Appellants gave him a guarantee, written in Hebrew, the material provision of which may be translated as follows: —

> "We hereby undertake to pay you the said amount of the said claim in full or in part up to £P. 50.— on your first demand in writing enclosing copy of the judgment in the said case, which will be issued by the Court of first instance and adjudging Dr. Itzhak Karokes in your favour."

The guarantee was to remain in force for a year.

During the year the Respondent first lost his case before the District Court, but on appeal this Court set aside the judgment of the District Court and returned the case to be retried. On the retrial the Respondent was successful, and he sued the Appellants under the guarantee. The Magistrate found in his favour, the Judges of the District Court differed, hence this appeal.

The Appellants sought to argue that the guarantee applied only to the first hearing before the District Court.

The case turns entirely on the meaning of the guarantee. I think it applies to a judgment of the Court of First Instance given during its currency, and is not limited to a judgment given in first instance in the sense of firstly given.

In the course of his judgment the Magistrate referred to a *dictum* of mine in Criminal Appeal No. 10/39, in which I said written submission by advocates should be discouraged, and he complains that oral argumente are sometimes oppressive. In my opinion it is most undesirable that either party should be able to put forward arguments and possibly statements which the other party has not had an opportunity of hearing and answering, but when the Magistrates Courts Procedure Rules are brought into operation, which I trust will be shortly, it should be possible easily to ascertain what are the issues, and for advocates to confine themselves to them and thus prevent hearings before Magistrates' Courts, which are generally busy Courts, becoming unduly prolonged.

The appeal will be dismissed, and the judgment of the Magistrate will be confirmed, with costs on the lower scale, and we certify £P. 10 for attending the hearing.

Delivered this 6th day of February, 1940.

Chief Justice.

CIVIL APPEAL No. 12/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J.

IN THE APPLICATION OF:

1. Nimer Hassan Al Abid,
2. Mohammad Hassan Al Abid. APPLICANTS.

v.

Hafiza Bint Hamdan el Halabi
on behalt of the heirs of her deceased
husband, Mohammad Jaber el Muhsin. RESPONDENT.

Sale of land — Interpretation of contract — Land not contemplated by parties.

In refusing an application for leave to appeal, from the decision of the Settlement Officer, Jaffa, Settlement Area, dated the 21st December, 1939:—

HELD: The Land Settlement Officer was correct in coming to the conclusion that it was not intended to include the piece of land, the subject-matter of the dispute, in the contract since at the time of making it the parties did not know that the vendor owned a share in the land in dispute.

APPLICANTS: In person.

RESPONDENT: In person.

ORDER.

In this application for leave to appeal from the decision of the Settlement Officer, the whole question turns upon the interpretation of a contract of sale entered into beween the Applicants (Defendants before the Settlement Officer) and the deceased husband of the Respondent (who was Plaintiff No. 4 before the Settlement Officer) in which contract he sold "all what he inherits legally from his wife Ghaliya Hasan all 'Abid and his sons (dead) in all the eight pieces in the *Miri* lands and also the two *waqf* pieces which boundaries and situations are known."

The contract of sale does not specify the pieces, and the Settlement Officer had to find out what the intention of the parties was when this contract of sale was entered into. He came to the conclusion that it was not intended to include the piece of land which is the subject-

matter of this dispute, since at the time of the making of the contract it was not known that the vendor owned a share in the land in dispute.

That being so, I think that the Settlement Officer was correct in his conclusions, and the application for leave to appeal is refused.

Given this 19th day of February, 1940.

Chief Justice.

HIGH COURT No. 6/40.

IN THE SUPREME COURT SITTING AS A COURT OF JUSTICE.

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

IN THE APPLICATION OF:

Menahem Cohen. PETITIONER.

v.

The Mayor and Members of the Council of the Municipal Corporation of Jerusalem. RESPONDENTS.

Water supply — Municipal Corporations — Municipal Corporations Ord. Sec. 96(4) *— Municipal Corporations (Sewerage Drainage and Water) Ord.*, 1936, *sec.* 24 *— Duty of owner to supply water etc. — "House" — Part occupier cannot demand separate supply.*

In dismissing an application for an order to issue directed to the Respondents calling upon them to show cause why they should not supply water to the Petitioner at the price usually charged by them from time to time, subject to the Petitioner complying with those terms and conditions which are generally and lawfully imposed by them upon consumers of water within the Municipal Area of Jerusalem.

HELD: The Applicant could not, by reason of his occupation of a part of a building demand a contract for the separate supply of water from the Council.

FOR PETITIONER: Eisenberg.

FOR RESPONDENTS: Said.

JUDGMENT.

This is the return to an order *nisi* directed to the Municipal Corporation of Jerusalem calling upon it show cause why it should not enter into a contract with the Applicant to supply him water.

He states that he is he occupier of part of a building in Jerusalem where he carries on a duly licensed hotel. Heretofore the landlord has arranged for a supply of water for that part of the building, but he is no longer willing to do so.

The Applicant applied for water to the Department of the Corporation but was informed that it was impossible to accede to his request as, in accordance with instructions given by the Council, the owners of houses but not the occupiers of parts of buildings should be supplied.

The Municipal Corporations Ordinance, 1934, by Section 96(4) cast a duty upon the Corporation as regards waterworks, to regulate the terms and conditions upon which water would be supplied. This would have been done by By-laws, but none were made. By the Municipal Corporations (Sewerage, Drainage and Water) Ordinance, 1936, which was applied to Jerusalem, the powers of the Corporation were increased. By Section 24 it was given a monopoly for the supply of water.

Section 23 provides —

> "It shall not be lawful in any municipal area for the owner of any house which may be erected after the date of the commencement of this Ordinance, or any house which after that date may be pulled down to or below the ground floor and rebuilt, to occupy the same, or cause or permit the same to be ocupied unless and until he has obtained from the Municipal Council of the area a certificate that there is introduced into the house such an available supply of wholesome water as may appear to such authority, on the report of the Medical Officer of the Department of Health and of the engineer, to be sufficient for the consumption and use for domestic purposes of the inmates of the house.

There are also provisions that water shall be supplied in accordance with the provisions of By-laws made under the Municipal Corporation Ordinance, but none have been made.

We have therefore to consider what is the effect of the law as it stands in the absence of By-laws.

I understand that the Council itself has at different times taken different views, but I doubt that it affects the legal position in this case.

"House" is defined in the 1936 Ordinance as "Any building or structure used for human habitation", and no distinction is drawn between flats, or appartments or parts of houses separately let.

Having regard to the wideness of the definition, I do not think that the Applicant, by reason of his occupation of a part of a building (for this purpose part of a house) is entitled to demand a contract for the separate supply of water from the Council.

We are now concerned with the obligations of the owner of the house.

The rule is therefore discharged with costs, which we assess at £P. 10.

Delivered this 28th day of February, 1940.

Chief Justice.

HIGH COURT No. 76/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPLICATION OF:

Abir Company, Ltd. APPLICANTS.

v.

1. Inspector-General of Police and Prisons,
2. Egged Cooperative Society Ltd. RESPONDENTS.

Road transport — Road transport (Routes and Tariffs) Regulations 1934 — Renewal of permits to ply when old route is closed — Exercise of discretion by licensing authority — No indication of partiality.

In dismissing an application for an order to issue directed to the First Respondent calling upon him to show cause why he should not, upon the next distribution of permits, grant a sufficient number to the Petitioner in accordance with the number he held previously, and why he should not treat impartially all persons or companies applying for permits on the Tel-Aviv—Haifa route.

HELD: 1. Petitioners did not have a vested right to the renewal of their permits when the old routes on which they plied were abolished.

2. In the exercise of his statutory duty the Licensing Authority must act impartiality and there was no indication that he had not done so in the present case,

ANNOTATIONS: For discretion of C.E.O, see H.C. 46/39 (1939, S.C.J. 417) and annotation.

FOR PETITIONER: Goitein.

FOR RESPONDENTS: No. 1 — Crown Counsel (Bell).
No. 2 — B. Joseph and Levitsky.

JUDGMENT.

This is a return to a rule *nisi*. It is concerned with the regulation of public vehicles, in this case motor omnibuses, upon the highways, a matter which under modern conditions causes great difficulties owing to the number of interests involved, and various methods have been adopted to deal with it.

Here, under the Road Transport Ordinance and the Rules, we have in addition to regulations as to the construction of vehicles and the qualifications of drivers a number of Regulations made by the High Commissioner known at the Road Transport (Routes and Tariffs) Regulations, 1934. As amended they provide *inter alia*, for the routes to be followed, the number of omnibuses authorised to ply thereon, and the fares to be charged.

Any person desiring to operate an omnibus on these routes must apply for authority, which takes the form of a permit, to the Local Licensing Authority, who is a police officer. These permits are for particular routes and are valid for the same period as that for which the omnibus is licensed, and will be renewed if and when the licence for the omnibus is renewed subject to certain conditions as to efficient working and absence of offence under the Ordinance.

It will be seen, therefore, that so long as a route remains scheduled, a permit in effect, subject to proper working, remains good if desired for the life of the vehicle, but it is not transferable. There are also provisions for special permits.

It appears that some time ago the present Applicants under routes Nos. 19, 12 and No. 3 then existing, held six permits. When the coastal road was opened, one route — G. 1, was substituted for a number of others, including those above mentioned, and the Applicants therefore lost their permits.

For the new route, G. 1, seventy-nine omnibuses were scheduled. It is not clear if the Applicants applied for permits on this new route, and Mr O'Rorke (the Licensing Authority) in his affidavit states —

> "On the introduction of the new G. 1 route and guided by the fact that one of the brothers Kornstock had told me in the

presence of the General Manager of the Egged Omnibus Cooperative Society, Ltd., that Kornstock Brothers (the name under which the Applicants then traded) had agreed to amalgamate their bus services with those of the Egged Omnibus Cooperative Society, Ltd., which would have had the result of leaving no other applicants for permits on the new route, I allocated the maximum number of permits, namely 79, to the Egged Omnibus Cooperative Society, Ltd.

"I was later informed that this amalgamation had not in fact taken place and that negotiations for it were not proceeding favourably. Kornstock Brothers were granted special permits by virtue of Rule 10(2) of the Road Transport (Routes and Tariffs) Regulations, 1934, to enable them to continue to operate the services operated by them before the introduction of the new G. 1 route.

"To the best of my knowledge and belief, the grant of these special permits prevented any interruption of the services operated by the Kornstock Brothers prior to the allocation of the 79 permits to the Egged Omnibus Cooperative Society, Ltd.

"I was eventually informed that the negotiations between these parties had reached an apparent dead-lock, in consequence the 79 permits were re-allocated, 76 being granted to the Egged Omnibus Cooperative Society, Ltd., and 3 to the Kornstock Brothers.

"I was of the opinion at the time of the allocation of these three permits to the Kornstock Brothers that they were being fairly and generously treated in all the circumstances, bearing in mind *inter alia* the fact that before the introduction of the G. 1 route they had operation rights for one omnibus from Tel-Aviv to Hadera, 3 from Hadera to Haifa, and 2 from Hadera to Hadera Station, that is to say, operation rights for 225 omnibus kilometres, whereas with the 3 G. 1 permits their operation rights were being extended to 300 omnibus kilometres over the same route."

After the further negotiations these proceedings were brought, and we are asked to direct the Licensing Authority, on the next distribution of permits, to grant a sufficient number to the Applicants in accordance with the number they held previously, and to treat impartially all persons or companies applying for permits on the Tel-Aviv—Haifa route. (*i. e.* Route G. 1).

Mr. Goitein, on behalf of the Applicants, really complains that the Applicants have not been treated as generously as have the Egged Society, but even if this be so I do not think that there are any grounds on which we can interfere. They had no vested right to the renewal of their permits when the old routes were abolished, and we cannot indicate to the Licensing Authority, with regard to particular applications, how he should exercise his discretion when next he has to do so.

It is manifest that in the exercise of a statutory duty he must act

impartially in the future, and we should make no order so directing him unless we were satisfied that he was proposing not to do so, and there is nothing before us to justify any such conclusion.

The rule will be discharged.

Delivered this 29th day of January, 1940.

Chief Justice.

CIVIL APPEAL No. 6/40.

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

BEFORE: Copland, Rose and Khayat, JJ.

IN THE APPEAL OF:

1. Louis Moubarak Jabrieh,
2. Anton Moubarak Jabrieh,
   Butrus Hanna Jabrieh,
   Albina Hanna Jabrieh and
   Maria Hanna Jabrieh.
   Through their attorney
   Louis Moubarak Jabrieh. — APPELLANTS.

v.

1. Afifeh, the widow of Bishara Jabrieh,
   now known as Afifeh Morcos,
2. Marguerite Issa Jabrieh,
   through her attorney Giries
   Bischara Zoughbi. — RESPONDENTS.

Succession — Competency of Civil and Religious Courts — Whether certificate issued by Religious Court includes Miri — Consent to jurisdiction.

In dismissing an appeal from a judgment of the District Court of Jerusalem dated the 18th of December, 1939: —

HELD: 1. The Religious Court having issued a certificate of succession which did not include the *miri* property, the District Court was entitled to issue the required certificate.

2. The consent of the parties to the jurisdiction of the Religious Court applied only to the property other than *miri* and, before

the actual certificate was issued, the parties were entitled to come to the District Court.

FOR APPELLANTS: Levitsky.

FOR RESPONDENTS: No. 1 — Elia.
No. 2 — in person.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem in its probate jurisdiction in which that Court issued a Certificate of Succession to the heirs of the late Bishara Jabrieh. Appeal has been made from that decision by Louis Jabrieh, one of the heirs, and he objects to the inclusion in the District Court Certificate of the name of Afifeh, widow of the late Bishara.

The main point in the appeal concerns the competency of the District Court to issue a certificate; the allegation being made that the competent Ecclesiastical Court, in this case the Latin Religious Court, had already dealt with this matter and that all persons concerned had consented thereto. If we read the Certificate of succession dated the 8h February, 1932, issued by the Latin Ecclesiastical Court, it is clear that there is no mention in that certificate that Afifeh had renounced anything.

From the evidence given before the District Court, it is also clear that this document of the 8th February, 1932, in the opinion of the learned Ecclesiastical President, who issued it, and if he does not know, I do not know who does, did not refer to the *Miri* property and the learned gentleman was of the opinion that a second certificate for the *Miri* would have to be issued, but he cannot say if that certificate was issued. It is clear, therefore, on the documents before us, that this question of the *Miri* inheritance was not dealt with in the certificate issued by the Latin Ecclesiastical Court. That being so, the District Court was entitled to issue the required certificate, since any consent which there may have been was, at any rate, a consent which applies only to property other than *Miri,* and, before the actual certificate is issued, parties are entitled to come to the District Court.

We are of the opinion that the appeal must therefore be dismissed with costs, to include £P. 10 hearing fee to the first Respondent and £P. 2 expenses to the second Respondent.

Delivered this 13th day of February, 1940.

British Puisne Judge.

CIVIL APPEAL No. 5/40.

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

BEFORE: Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF:

1. S. Cohen and Company,
2. Isaac Levy. APPELLANTS.

v.

Abraham Capun. RESPONDENT.

Custom — Compensation in the textile trade — Mejelle on custom — The first 100 *articles, Arts.* 562, 565, 188 — *New custom — Custom defined and analysed — Proving custom under the Mejelle — Point not raised in first instance but included in intermediate judgment — Sufficiency of evidence a question of law.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv (in its appellate capacity) dated the 30th of November, 1939, and in dismissing the Respondent's action: —

HELD: *Per Frumkin, J.* 1. In so far as it comes within the framework of the principles laid down in the maxims of the *Mejelle,* any custom, whether in existence at the time of the compilation of the *Mejelle* or not, and whether it is referred to in any of the articles in the text of the *Mejelle* or not, has a valid effect.

2. Custom is the creation of a long established uniform practice, accepted by the public of its own free will, and when so established beyond any doubt acquires the force of law and is only then enforceable against those who do not wish to abide by it.

3. The principles for proving, under the *Mejelle* that an adopted practice has aquired the force of custom is the following:

Firstly. A custom, to have the force of law, must be continuous, not temporary, and the practice which it is claimed has established this custom must be of a permanent nature for a period which is, however, not fixed. (*Mejelle,* Art. 41).

Secondly. The custom, even if adopted as above, must be notorious. Presumption of knowledge, as in law, is not sufficient. Compare the requirement of certainty in English Law (*Mejelle,* Arts. 42-4).

Thirdly. Custom should not be infrequent. The English law element of reasonableness may also be inferred.

No provision is made in the *Mejelle* concerning the length of time required to form a custom. This must be left to the discretion of the Court but there is nothing to justify exceptional length of time, such as living memory.

4. Once a custom is proved it is not necessary to prove that custom again in future cases of the same sort, and if a plaintiff fails to prove that custom, it does not prevent other people from again bringing the matter up for consideration at a later stage.

5. There had not been sufficient evidence to satisfy the above requirements.

Per Copland, J. 6. Whilst the point whether Palestine Law would enforce the custom referred to had not been argued in the lower Court, it had formed the basis of Judge Edward's dissenting judgment so that leave to appeal had properly been granted thereon.

7. Whether evidence is sufficient or not is a question of law.

8. The articles referring to custom, among the first hundred articles of the *Mejelle* amount to substantive law.

APPROVED: Gardlin *v.* Amirov, (C.A.D.C.T.A. 327/38) reported in 1939, Tel Aviv, District Court Judgments.

ANNOTATIONS: Similar questions were discussed in C.A.D.C.T.A. 19/39 (Tel Aviv District Court Judgments, 1938, p. 36); C.A.D.C.T.A. 217/38 (*ibid.* 97).

On the essential characteristics of custom under English law, see *Digest* XVII pp. 9 *sqq.*

FOR APPELLANTS: Goitein and Pardo.

FOR RESPONDENT: Smoira and Usiel.

JUDGMENT.

Copland, J. This is an appeal by leave from a judgment of the District Court Tel Aviv, dismissing an appeal from the Magistrate's Court. The appeal raises certain questions of general importance, namely, can custom be enforced by Palestine Law and, secondly, was there sufficient evidence in this case to prove the existence of an alleged custom. On the first point there has in the past been a considerable difference of judicial opinion in the District Courts.

Before the Magistrate's Court the present Respondent, who was then plaintiff, claimed from the Appellant compensation or a gratuity, on dismissal from his employment, at the rate of one month's salary for every year's service, on the ground that there was a custom in the textile trade, in which he had been employed, to make such payments. The Magistrate found that such a custom was proved to exist and gave judgment for the amount claimed. On appeal, the two learned Judges of the District Court disagreed, Judge Edwards being of the opinion, first, that the law of Palestine would not enforce such a custom, and secondly, if the were wrong on the first point, that the existence of such a custom had not been sufficiently proved — whilst

Judge Korngruen held that the judgment of the Magistrate being based on evidence could not be interferred with. The appeal was consequently dismissed. The presiding Judge gave leave to appeal to this Court.

There were two points taken by Dr. Smoira for the Respondent, with which I will deal first. Dr. Smoira argues that the point whether Palestine Law would enforce such a custom was never argued in the Court below and that therefore leave to appeal was wrongly given on it. This point however formed the basis of Judge Edward's dissenting judgment, and since the appeal is brought from the judgment of the Court, a point dealt with in one of the judgments is obviously one on which an appeal can be made, and, further, the point goes to the root of the whole case. I do not think that the Respondent's argument is a sound one.

The second objection, if I understand Dr. Smoira correctly, is that the second ground on which leave to appeal was given is a question of fact and not of law. It is enough to say that whether evidence is sufficient or not is, beyond any doubt, a question of law, and the Appellant contends that in this case there was not sufficient evidence to prove the custom alleged.

It is true that where two Courts in succession have held that there was sufficient evidence, this Court on a further appeal would not be inclined to differ from the Courts below, but in this case the two Courts have not so held, since the learned Judges of the District Court disagreed on this question and the matter is therefore still open to review.

With regard to the appeal itself, I do not agree with the Appellant's contention that those of the first hundred articles of the *Mejelle* which refer to customs, at any rate, are only maxims and are not of general application and must be read subject to the remainder of the articles. When one reads those articles such as Articles 36, 41, 43 and 45, it is clear, I think, that they amount to substantive law, and further there is nothing in them from which one could say that only customs in existence at the time of the promulgation of the *Mejelle* are recognised. The Articles are perfectly general, and are, to my mind, the tests to be employed in determining whether the existence of a custom has been established. If the alleged custom passes these tests, then it will be enforced by the Courts of this country. In essentials those provisions do not differ greatly from the provisions of English Common Law, to be found in the Laws of England, Hailsham Edition, Vol. 10, though, generally speaking, the former are somewhat less stringent than the English law. With all respect, therefore, I cannot agree with the

opinion of Judge Edwards in his interpretation of the *Mejelle,* and I think that Judge Cressall in Gardlin *v.* Amirov (C.A.D.C.T.A. 327/38) correctly sets out the law on this point.

On the second point, whether the evidence was sufficient to prove the existence of the custom claimed, I think that the evidence in this case falls very far short of what is required. For example, there is no certainty in the details of the alleged custom — as to the classes of persons to which it is said to apply — as to the length of employment which would give rise to it — as to whether the one-twelfth is payable only for completed years or for parts of a year — or as to the grades of employees who could claim extra payment, that is, whether all salaried employees can claim or only those whose salaries are under a certain amount. Furthermore I think that evidence of the practice extending over a much longer period than has been given in this case is required before the existence of such a custom can be recognised in the Courts of this country. Custom is a creation of long growth, and a few instances in a few years are certainly insufficient to establish it.

I have given these reasons shortly, in my own words out of respect to the arguments put to us, and also because we are differring from the opinions expressed in the Courts below. I might have been content to say, as I do say, that I agree with the reasoning and with the conclusion expressed in the judgment which Frumkin J. is about to deliver, and I think that this appeal must be allowed with the consequences indicated by Frumkin J.

Delivered this 22nd day of February, 1940.

British Puisne Judge.

JUDGMENT.

Rose, J. I agree with the judgment which my learned brother Copland has just read and I have had the advantage of reading the judgment, with which I also agree, which my learned brother Frumkin is about to deliver.

Delivered this 22nd day of February, 1940.

British Puisne Judge.

JUDGMENT.

Frumkin, J. I propose to deal first with the main and most relevant question which presents itself in this case, namely whether Palestine law recognises the validity of a custom of the nature of that claimed by the Respondent. On the answer to that will depend further questions. If it is in the affirmative, the principles on which such customs are based and the evidence required to prove them must be considered. If on the other hand the answer is in the negative, can English common law be invoked, and if so what then is the position?

It is surprising that this question has only now for the first time come up for determination by the Supreme Court. Although the present case relates only to an alleged custom of payment of compensation or a gratuity as between employers and employees in a particular branch of trade, namely, the textile trade, it is not unknown that a similar custom is claimed to exist in many other branches of trade and industry both in Tel Aviv and in other localities with a Jewish population, and the decision in this case will therefore be of considerable importance to a large portion of the community.

The Respondent in presenting his claim before the Magistrate relied on the *Mejelle* as the only authority for the validity of the custom. Against that it was argued, and the argument was accepted by Judge Edwards, that there is nothing in the *Mejelle* which recognises a custom of this particular nature. The first hundred articles of the *Mejelle*, on which the Respondent relied, do not have the force of law, the argument maintains, and in the body of the *Mejelle* there is nothing which permits the introduction of a custom of the nature claimed.

I shall deal later with the scope of the so-called maxims included in the first hundred articles of the *Mejelle*, but I would first like to say a word or two with regard to the reference by Judge Edwards to Articles 562 and 565. These articles have no relation to payments to be made after the period of agreement. Article 565 lays down the rule that in the absence of an agreement as to the rate of wages payable during the period of service, wages must be fixed on the basis of a *quantum meruit,* and it would be rather far fetched to suggest that a custom as to the payment of a compensation or gratuity could only be introduced in cases like those referred to in that article.

Mr. Goitein went even further than that and suggested that even

in those cases where in the body of the *Mejelle* reference is made to the application of custom, that application must be confined to such customs as were in existence at the time of the promulgation of the *Mejelle*. Needless to say there is no foundation whatsoever in that argument. If Mr. Goitein were right it would mean that if we look for instance at Article 188 which was referred to by him, if in the course of time a custom became established say in the wireless trade that when a dealer sells a wireless set he is under a liability also to fix the antennae thereof, such a custom would be of no effect just because wireless sets were unknown at the time of the *Mejelle*, although a similar custom about nailing a lock in its place as part of the sale would be so.

There is more force in the next argument of Mr. Goitein that the most one could say as regards the establishment of customs under the *Mejelle* is, that validity is given only to those cases, about 20 in number, in which the *Mejelle* specifically refers the determination of certain matters to existing custom. It is only then, he argues, that the principles laid down in Articles 36 and onwards are to be applied, because the first articles are of a general nature and do not have the force of law.

Let us examine the position. It is true that the first one hundred articles are, standing alone, inapplicable as sole authority. As is said in the report of the *Mejelle* Commission: "the Judges of the *Sharia* Court cannot give judgment by these alone until they have found an authority."

Those hundred maxims are of a general character and may be regarded as a sort of introduction to the several books of the *Mejelle*. If one were permitted to re-classify the articles of the *Mejelle* one might well place certain of those maxims or sets of maxims at the head of certain books or chapters. Articles 76 to 81 would serve well as an introduction to the 15th book on proofs and oaths, and articles 92 and 93 as an introduction to the chapter dealing with damages to property which begins with Articles 912. The maxims lay down a principle in general form which is later elaborated, qualified and analysed in detail in its proper place in the body of the *Mejelle*. It is for that reason that no judgment can be based on any such maxim, alone, because it is incomplete when taken by itself.

The case seems however to be different when one comes to deal with customs. In that case one cannot expect to find any details and elaboration of principles within the written law. Customs are generally

introduced either in the absence of specific written law on the subject or when the written law has outgrown its scope, and life has introduced a practice contrary to it. It would be futile therefore to look for particulars as to the nature of a custom and the scope of its application in the written law. All that the legislature needs to do in providing for the possibility of settling certain matters according to a prevailing custom is to lay down the principles to be adopted in proving such a custom, its extent and its force.

It follows that, in so far as it comes within the framework of the principles laid down in the maxims of the *Mejelle*, any custom, whether in existence at the time of the compilation of the *Mejelle* or not, and whether it is referred to in any of the articles in the text of the *Mejelle* or not, has a valid effect.

A custom is not like a legislative enactment which can be imposed upon the public and enforced even against those who do not like it against their will. Custom, broadly speaking, is the creation of a long established uniform practice, accepted by the public of its free will, and when so established beyond any doubt acquires the force of law and is only then enforceable against those who do not wish to abide by it. Every system of law has its own principles fixing the method of proving when and how an adopted practice becomes a real custom which the law would enforce.

The *Mejelle* also has its principles. They are laid down in a few maxims, and in this case they are not devoid of sound logic.

What are those principles? In the first place, a custom in order to have the force of law must be continuous, not temporary, and the practice which it is claimed has established this custom must be of a permanent nature for a period which is however not fixed. That is what is provided for in Article 41. It allows, however, another alternative, namely, that it is enough for the practice to prevail in an overwhelming number of cases. The Turkish term for overwhelming, which Tyser translates as "preponderant", is "*ghaleb*" which means: in most cases. It is not necessary now to determine what sort of a majority is wanted. Certainly more than a mere majority would be needed. For instance, if it is alleged that a certain practice has been adopted in a given sort of dealing, and a hundred instances of that sort have taken place, it would not be necessary to prove that throughout those one hundred dealings that practice had been observed, but it would be enough if that practice had been adopted in say 70 or 80 of the hundred cases.

Secondly, the custom even if adopted as above must be notorious

(Article 42). The same principle is embodied in Articles 43 and 44. Only such thing as has been known by common usage or among merchants could be accepted as a stipulation between the parties. Custom is not like law which everybody is presumed to know; presumption of knowledge in custom is not enough, actual knowledge is necessary. This principle is similar to the requirement of certainty in proving custom under English Common Law. There can be no knowledge of a custom if it is not certain.

Thirdly, a further element in establishing a custom is that it should not be infrequent. If in seventy or eighty out of a hundred cases a certain practice has been adopted but very long intervals have elapsed between each it could not then be said that a custom has been established.

Comparing those principles with the principles of English Common Law, we find that there is no great difference between them. We have the elements of notoriety and certainty. There is no clear demand for reasonableness, but one can assume it in the result. If a practice has been adopted and continued with certainty and thus acquired permanence and validity among a certain class, members of that class cannot claim that that practice is unreasonable, at least as far as they are concerned.

What is lacking under the principles of the *Mejelle* with regard to custom is any provision as to the length of time necessary to create a custom. This is a matter which must be left for the discretion of the Court in the particular circumstances of each case. Obviously a custom is not created overnight nor within a couple of years, but there is nothing to justify any exceptional length of time such as living memory.

If I come now to apply the principles just stated to the present case, it would appear that in order to satisfy a Court that there exists a custom under which an employer has to pay a gratuity amounting to one month's salary for each year of service, it would need evidence as to the following: —

a) When did this practice begin?

b) How many cases of dismissal took place since the beginning of that practice until the date of claim?

c) In how many cases was compensation paid and what intervals elapsed between each case?

d) What was the proportion of compensation paid in each case? Was

it one month's salary for each year of service notwithstanding the number of years or perhaps one month's salary for the first year or a few years, and less for subsequent years? Is the gratuity paid according to the wages in the different years of service or of the wages at time of dismissal? What is the position with regard to portions of a year?

(a), (b) and (c) would provide the basis for a decision as to the permanence and frequency, in other words as to the existence of the custom. It is no good saying that in X cases compensation was paid and in Y cases compensation was not paid when there is no idea as to how many cases of that sort took place altogether. Evidence under (d) would provide material for coming to the conclusion as to the certainty of the custom. If possible and available, such evidence should refer to statistical figures, otherwise at least approximate data should be produced and proved.

These principles are of general application and should be applied in all cases were proof of a custom is necessary. They are not limited to the mater in dispute in this case.

I can see the hardship involved in requiring evidence of that kind from a dismissed employee who is claiming compensation from his employer, but it is not an unknown fact that in claims of this nature the dismissed employee is backed by an organized labour body who is interested in giving such a plaintiff all necessary support because of the social principle involved in that claim. And equally the employer would most likely obtain support from the organization to which he belongs. Those organizations are efficiently run and it would certainly not be impossible and not too difficult for an organization wishing to establish a custom to gather all the necessary proof in suport of it, and for an organization opposing the custom to collect the evidence in rebuttal. Once a custom has so been established it would not be necessary to prove that custom again in future cases of the same sort and on the other hand if a plaintiff failed to prove that custom it would not prevent other people from again bringing the matter up for consideration at a later stage when the practice had become more deeply rooted in the life of the community.

In this case plaintiff has certainly failed to prove his case on the lines stated, and on the point of insufficiency of evidence the Appellants will succeed. They fail on the first point as to recognition of custom under the law of Palestine.

On the preliminary objection I concur with my learned brother Copland.

In the result the appeal is allowed and the judgments of the District Court and Magistrate's Court are set aside and the plaintiff's action is dismissed. The Appellants will have their costs here and below to include £P. 10 for attending the hearing.

Delivered this 22nd day of February, 1940.

Puisne Judge.

CRIMINAL APPEAL No. 9/40.

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.

1. H. Sherf & Co.,
2. Haim Sherf,
3. Shmuel Sherf. RESPONDENTS.

Private complaints — Proceedings under the Merchandise Marks Ordinance and Trade Marks Ordinance — Election — Authority of complainant to prosecute in District Court — Right of Attorney General to appeal — Magistrates' Courts Jurisdiction Ordinances — Criminal Procedure (Trial Upon Information) Ordinance, Sec. 67 — Law of Procedure Amendment Ordinance, Sect. 5 — Ottoman Code of Criminal Procedure, Art. 1, superseded — District Court (Summary Trials) Rules, 1938, Rule 15 intra vires — To whom it applies — M.D.C. Ha. 92/38.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 15th day of December, 1939, whereby the Respondents were charged of:

1. Making use of an imitation of a trade mark, contrary to Section 38(a) of the Trade Marks Ordinance, 1938.
2. Selling, storing for the purpose of sale, and exposing for sale, goods bearing a mark contrary to Section 38(b) of the Trade Marks Ordinance, 1938.

3. Falsely applying to goods a mark so nearly resembling a trade mark, contrary to Section 3(1)(b) and (c), and Section 3(2) of the Merchandise Marks Ordinance as to be calculated to deceive.

and the case was dismissed; and in remitting the case to the District Court for trial:—

HELD: 1. The right of the Attorney Gnereal to appael either from a decision of a Magistrate or of a District Court exercising summary jurisdiction is a statutory right in general terms given by the Magistrates' Courts Jurisdiction Ordinance, and extends to all cases properly brought under that Ordinance, subject to the limitation therein.

2. Apart from Section 5 of the Law of Procedure Amendment Ordinance, 1934, it is clear that where an individual is given a statutory right to lay a complaint he should be allowed to prosceute that complaint. The Magistrates' Courts Jurisdiction Ordinance superseded Article 1 of the Ottoman Code of Criminal Procedure which had, therefore, no bearing on the point.

3. Rule 15 of the District Court (Summary Trials) Rules makes it clear that a complainant or his advocate may prosecute. These rules are not *ultra vires* Article 1 of the Code as it is superseded. The Rule does not apply only to persons expressly authorised by law to prosecute.

NOT APPROVED: M.D.C. Ha. 92/38.

ANNOTATIONS: The proceedings before the District Court (CR.D.C.Jm. 131/39) are reported in the *"Palestine Post"* of the 8.XII.39.

FOR APPELLANT: Crown Counsel (Bell).

FOR RESPONDENTS: A. Levin.

JUDGMENT.

Proceedings under the Merchandise Marks Ordinance and the Trade Marks Ordinance were brought by private complainants against several defendants in the Magistrate's Court. The defendants elected to be tried by a District Court.

The matter went to the Jerusalem District Court, and before the plea was taken the Defendants submitted that without the authority of the Atorney-General the complainants could not prosecute, and that Court held —

> "The Complainant is not a person authorised by Ordinance to institute proceedings before the District Court. The complainant has authority to lay his complaint before the Magistrate only, in accordance with Section 10 of the Magistrates' Courts' Jurisdiction Ordinance, No. 16 of 1935.
>
> "The accused, however, when brought before the Magistrate had the right to elect to be tried by the District Court according to Section 3, Magistrates' Courts Jurisdiction Ordinance, but this article

> does not give authority to a private complainant to prosecute before a District Court without authority from the Attorney-General.
>
> "The District Court Summary Procedure Rules, Section 18 (*sic*) referred to, merely sets out who may address the Court, a matter of procedure and cannot in any way be taken as giving an authority to a complainant to prosecute who is not authorised so to do by Ordinance."

The Attorney-General appeals to this Court.

Firstly we have to decide if he is entitled to do so.

The Magistrates' Courts Jurisdiction Ordinance, 1924, (which became Cap. 87 in Drayton) provided in Section 9 that where no public interest was served a private complainant might lay the complaint before the Magistrate who should hear and give judgment. No express provision for appeal from such a case was made, but a convicted person was given a right of appeal, and the Attorney-General or his representative had the right to appeal from any judgment of a Magistrate's Court in a criminal case.

In 1935 the jurisdiction of Magistrates' Courts was enlarged, and the procedure altered. In particular, an accused person was given the right to elect in certain cases to be tried by the District Court.

The old section as to complaints by private persons was retained, and there was no substantial change as to appeals by the Attorney-General from any judgment of a Magistrate's Court, but provision was made by reference that appeals from summary trials by the District Courts should be governed by the Criminal Procedure (Trial Upon Information) Ordinance, which provided in Section 67 —

> "The Attorney-General may appeal from a judgment....."

The right of the Attorney-General to appeal either from a decision of a Magistrate or of a District Court exercising summary jurisdiction, is a statutory right in general terms given by the Magistrates' Courts Jurisdiction Ordinance, and I see no reason why it does not extend to all cases properly brought under that Ordinance, subject to the limitations therein.

As to the main point in this appeal. In 1934 a procedure Ordinance, No. 21 of 1934, was promulgated which dealt generally with the instituting and conduct of proceedings. This expressly provided in Section 5 that where a complaint was made by a private person he might, by himself or his advocate, prosecute the proceedings before a Magistrate's Court.

This made the position clear, but apart from this Ordinance I should require strong argument to convince me that where an individual is given a statutory right to lay a complaint he should not be allowed to prosecute that complaint.

I may here deal with what to me appears to be a fallacy which has crept into this argument. It is said that Article 1 of the Ottoman Code of Criminal Procedure has not been expressly repealed and has some bearing on this matter. The material words are —

> "The action for the application of the punishments prescribed by the law is an action of public order; consequently it can only be instituted by the officials specially appointed thereto by the law."

In my view the express provisions of the Magistrates' Courts Jurisdiction Ordinance whereby a private complainant may lay a complaint clearly supersede, in cases to which they apply, the provision that actions for punishment could only be instituted by officials specially appointed, and the article therefore has no bearing on the matter.

As I have said, in 1935 the Magistrates' Courts Jurisdiction Ordinance was amended, and an accused person was given the right to elect summary trial by a District Court, which brings us to the point for decision — if he does so can the private complainant prosecute?

It is obvious that the provisions of the Criminal Procedure (Trial Upon Information) Ordinance could not conveniently apply to summary trials, and the Courts Ordinance was expressly amended to give power to the Chief Justice to make rules of Court regulating the practice and procedure to be followed in summary criminal trials before District Courts, and the District Court (Summary Trials) Rules, 1938, were made. By Rule 11, to which the District Court does not refer, and Rule 15 (referred to by the District Court as 18) it is clear that a complainant or his advocate may prosecute. If these rules are *intra vires,* and apply, they dispose of the matter.

It is argued that the are *ultra vires* because they are contrary to Article I of the Ottoman Criminal Procedure Code, but as I have already said, in my opinion the express provision of the Magistrates' Law giving a private individual the right to lay complaint, must supersede that article.

It is argued that they do not apply to private complainants but only to persons expressly authorised by law, *e.g.* the Collector of Customs, see Section 223 of the Customs Ordinance. As I have stated, I should require strong argument to convince me that where the law expressly gives a private person a right to lay a complaint he is not to be allowed to prosecute it, I should require still stronger to convince me that a defendant in such a case can avoid the prosecution by electing to be tried by a District Court because the complainant cannot prosecute him there. I find nothing in the law to justify any such suggestion.

In my opinion the rules are *intra vires* and apply, and a private

complainant or his advocate may prosecute in a summary trial before a District Court.

This question was considered by the Haifa District Court in Misdemeanour Case No. 92/38, but as the attention of that Court does not appear to have been called to the District Court (Summary Trials) Rules, I need not consider its judgment.

The judgment of the District Court is set aside, and the case returned to it to be heard and determined in the light of this judgment.

Delivered this 15th day of February, 1940.

Chief Justice.

HICH COURT No. 8/40.

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

BEFORE: Copland, Frumkin and Abdulhadi, JJ.

IN THE APPLICATION OF:

Sale in execution — When transfer deemed to have been effected — Actual entry in the register not necessary — H.C. 17/24 distinguished.

1. Hanna Obeid Azar
2. Ibraim Obeid Azar
3. Jabbour Obeid Azar
4. Hanneh Obeid Azar
5. Huda Obeid Azar
6. Rasha Obeid Azar
7. Kawkab Obeid Azar. PETITIONERS.

v.

1. The Chief Execution Officer, Haifa.
2. Yousef Imsallam.
3. Ronnie Limited. RESPONDENTS.

In dismissing an application for an order to issue directsd to the First Respondent calling upon him to show cause why his order dated the 14th day of February, 1940, in Haifa Execution File No. 271/38 should not be set saide, the attachment removed and the sale proceedings annuled: —

HELD: 1. In an ordinary case by consent, the critical moment is when the parties appear before the Registrar of Land, acknowledge the transfer and pay the prescribed fees. The transaction is then, for all practical purposes complete even before inscription of the transfer in the Registry book.

2. In execution transactions, the order of the Chief Exceution Officer for transfer, duly given and duly brought to the notice of the Land Registrar, coupled with the receipt by him of the prescribed transfer fees is equivalent to acknowledgment in a consent transaction.

3. The present case was distinguishable from H.C. 17/24 in which the registration fees had apparently not been paid.

DISTINGUISHED: H.C. 17/24 (P.L.R. 24, C. of J. 309).

ANNOTATIONS: In H.C. 22/29 (C. of J. 845) a transfer registered in the Land Registers was set aside on the ground that proper notices of the sale had not been exhibited on the property and in H.C. 52/27 (P.L.R. 189, C. of J. 837) on the ground that the provisions of Article 91 of the Law of Execution had not been complied with. A similar application was refused in H.C. 15/32 (C. of J. 855, P.P. 8.XI.33). See also, on this question, the following cases in 1938 1. S.C.J. and, in particular, the annotations thereto: H.C. 73/37 (p. 5); C.A. 3/38 (p. 136); H.C. 32/38 (p. 330) and C.A. 94/38 (p. 385).

FOR PETITIONERS: Atalla.

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

J U D G M E N T.

Frumkin J.: The only point which arises in this application is to determine the date at which transfer is deemed to have taken place in the case of the sale of land by public auction by order of the Chief Execution Officer. It is undisputed that in an ordinary case of transfer by consent of the parties the critical moment is when the parties appear before the Registrar of Land, acknowledge the transfer and pay the prescribed transfer fees. From that moment and onwards this transfer is for all intents and purposes conclusive and the Registrar would proceed with further transactions relating to the same property such as mortgaging the property just transferred without first awaiting the actual inscription of the transfer in the Registry book.

We cannot accept the argument that, although that is the case in consent transactions, in execution transactions entry in the actual register is required. The Order of the Chief Execution Officer for transfer duly given and duly brought to the notice of the Land Registrar, coupled with the receipt by him of the prescribed transfer

fees must be taken to be equivalent to acknowledgment in a consent transaction.

The present case is distinguishable from H.C. 17/24 in which it was held that "until the immovable property sold is actually registered in the Land Registry in the name of the purchaser, the debtor is entitled to pay off the debt", in which case however registration fees were apparently not paid by the time the offer for payment of the debt was made.

In the present case the Respondent has done all what was incumbent upon him to do in bringing the order of the Chief Execution Officer to the notice of the Registrar of Land and in paying the transfer fees. It was not until after that, that the applicant offered to pay the debt. He was then too late.

The order *nisi* is therefore discharged with costs to include LP. 10 for attending the hearing.

Deliverd this 4th day of March, 1940.

Puisne Judge.

CIVIL APPEAL No. 20/40.

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

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

IN THE APPEAL OF:

1. The Royal Italian Consul-General in Palestine and Trans-Jordan,
2. Filippo Crudelini, Administrator of the Estate of Miriam Adara. — APPELLANTS.

v.

1. Kidana Mariam Abdul Mariam,
2. The Official Receiver as Administrator of the Estate of the deceased. — RESPONDENTS.

Succession — Discretion of Court in appointment of administrators — No finding of bona vacantia.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 15th January, 1940:

HELD: 1. There was no reason to interfere with the appointment of an administrator by the lower Court as objection was made only to the person appointed and not to the appointment.

2. There had been no finding by the lower Court that the property became *bona vacantia*.

ANNOTATIONS: See also C.A. 21/40 in this issue.

FOR APPELLANTS: Abcarius Bey.

FOR RESPONDENTS: No. 1 — Geichman.
No. 2 — no appearance, served.

JUDGMENT.

The proceedings arise out of an application for the grant of probate of a will alleged to have been made by a deceased woman, said to have been an Ethiopian. Abcarius Bey, on behalf of the Italian Consul-General, and an administrator appointed by the Consul opposed the grant, and the application was ultimately refused, but during the proceedings the Court cancelled the appointment of the second Appellant as administrator and eventually appointed the Official Receiver.

In its order the Court stated that "If, as it is stated..... the deceased left no heirs either in Palestine or abroad, and so far as there are no claims by creditors or other lawfully entitled persons against the estate, I find the property of the deceased to be *bona vacantia*."

The statement is conditional, and I do not think that there is in these words any definite finding or decision that the estate is *bona vacantia*. That question must be decided in the future, if and when it is raised.

It is not suggested that it was not just and convenient to appoint an administrator, and Abcarius Bey raises no objection to the individual appointed, in effect his complaint is that he would have preferred somebody else, *i.e.* the nominee of the Consul General.

We see no reason to interfere with the appointment, and except insofar as we decide that there was no decision that the property became *bona vacantia*, the appeal is dismissed with costs to the First Respondent which we assess at an inclusive sum of £P. 5.

Delivered this 26th day of February, 1940.

Chief Justice.

CIVIL APPEAL No. 29/40.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: The Chief Justice.

IN THE APPLICATION OF:

1. Nu'man Selim Saleh el Jammal,
2. Tewfik Selim Saleh el Jammal. APPLICANTS.

v.

1. Wadi'a Selim Saleh el Jammal,
2. Yousef Amin Saleh el Jammal. RESPONDENTS.

Land settlement — Leave to appeal granted on question of interpretation — Deed of surrender.

In granting an application for leave to appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 30th December, 1939:—

HELD: As the question turned upon the interpretation of the deed of surrender and its effect leave to appeal would be granted.

FOR APPLICANTS: Hawa.

FOR RESPONDENTS: No. 1, absent — served.
No. 2, Nakkara.

ORDER.

The question involved in this case turns upon the interpretation of the deed of surrender entered into between the Applicants for leave to appeal and the first Respondent. As to that deed of surrender the Settlement Officer held:

> "There remains one last point to be decided, and that is the surrender by certain of the heirs of Selim Saleh el Jammal of their shares in favour of the other heirs. There is some doubt as to whether the parties wish to surrender their shares, and, since no valuable consideration appears to have been given and the surrenders have not been approved by the Settlement Officer, I order registration of the land in the names of the heirs of Selim Saleh el Jammal."

And in refusing the application for leave to appeal by the Applicants, the Settlement Officer stated:—

> "The evidence given orally was that certain heirs had transferred their shares, but as stated in my decision I found there was doubt as to the true intentions of the parties, and perusal of document

D/348, and the statements of Wadi'a Salim Saleh el Jammal, dated the 3rd of February, 1938, and the 10th of March, 1938, will show them to be contradictory."

That being so, and as stated above, the whole question turns upon the interpretation of the deed of surrender and its effect, leave to appeal is granted.

Given this 29th day of February, 1940.

Chief Justice.

CIVIL APPEAL No. 27/40.

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

BEFORE: The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF:

Aniseh Bint Hassant Hameideh. APPELLANT.

v.

1. Chief Execution Officer, Haifa,
2. Mohammad Baradey Abassi,
3. Mohammad El Kalla,
4. Shehadeh Assad Khoury RESPONDENTS.

Appeal — Findings of fact — Evidence on Appeal.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 26th of January, 1940.

HELD: 1. The appeal was based on questions of fact and there was no substance in the point that the lower Court had not heard a witness whom the Appellant wished to call.

2. The application to admit certain documents on appeal should be refused as no reason was adduced by Appellant for her failure to produce them in the lower Court.

ANNOTATIONS:

1. For earlier proceedings *vide* C.A. 17/38 (1938, 1 S.C.J. 208), H.C. 33/38 (*ibid.*, 326) and C.A. 230/38 (1938, 2 S.C.J. 190).

2. On fresh evidence on appeal see CR.A. 73/39 (*ante*, p. 9) and annotations, and CR.A. 3/40 (*ante*, p. 47).

FOR APPELLANT: Faiz Bey Haddad.

FOR RESPONDENTS: No. 1, absent — served.
Nos. 2, 3, 4, Cattan.

JUDGMENT.

We are grateful to Faiz Bey for the clear way in which he put his points before us in this troublesome case. As he said, the Court already knows a good deal about it. It first came before this Court, as at present constituted, in March, 1938. There were allegations of fraud and collusion against the Respondents, and in view of the fact that two of them occupy official positions, and in view of the application by Mr. Cattan on their behalf, inviting a full investigation, it was thought desirable for all concerned that these allegations should be more fully investigated, and the case was returned to the Land Court.

Subsequently the case was transferred by the High Court on the application of the Appellant from the Land Court, Haifa, in which it originally was, to the Land Court, Jerusalem, as it was thought desirable that the case should be tried by a fresh Court.

When the case came for trial before the Land Court, Jerusalem, owing to repeated adjournments which had been caused by delays on the part of the Appellant, and owing to her failure to attend the trial, the case was struck out. An appeal was again made by the Appellant, and on that occasion the Court of Appeal, differently constituted, took, if I may say so, a lenient view of the situation and sent back the case to the Land Court for trial.

The Land Court heard the Appellant's case at length, and found clearly, and in no uncertain voice, that the Appellant's claim is unjustified, saying in its judgment —

> "Having heard the evidence of the Plaintiff and her witnesses at great length, and carefully examined all the documents and files produced by the Plaintiff, we are satisfied that the Plaintiff has so completely failed to prove even a *prima facie* case that it is quite unnecessary to call upon the Defendant and to hear his defence."

From this judgment an appeal has again been brought. The first two points involved in the appeal relate to questions of fact which have been decided by the Land Court against Appellant, and there is no reason for us to interfere. It is also said that a witness, whom the Appellant wished to call, was not heard by the lower Court. We find that there is no substance in this point.

As application has been made to us to admit certain documents at this stage. No reason has been advanced by Appellant for her failure to produce them in the lower Court, and no substantial cause is shown why we should admit them, and we refuse the application. The appeal therefore fails. I would add that this has been prolonged litigation and there have been a number of letters addressed by Appellant to Judges and officials of the Court in respect of it. Owing largely to the official position occupied by two of the Respondents, the Appellant has been treated with leniency. She must understand that she must cease writing personal letters to us in respect of this case.

The appeal is dismissed, and the judgment of the Land Court confirmed. Respondents Nos. 2, 3 and 4 will have their costs assessed at £P. 5 in respect of Civil Appeal No. 17/38, and will also have their costs of this appeal on the lower scale to include a fee of £P. 15 for attending the hearing, these costs to be divided between them.

Delivered this 6th day of March, 1940.

Chief Justice.

CIVIL APPEAL No. 21/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Assad Awad Khoury & 18 ors.,
all heirs of Isyeed Awad Khoury, deceased. APPELLANTS.

v.

1. John Asfour.
2. Nimeh Awad Khoury.
Both administrators of the Estate
of Isyeed Awad Khoury, deceased. RESPONDENTS.

Administrators — Appointment and dismissal within the discretion of the Court.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 13th January, 1940:—

HELD: The refusal of the District Court to dismiss the administrators was a matter for the discretion of that Court and the Court of Appeal would not interfere as the District Court had not gone wrong in law, having found that there had been no allegation of collusion or fraud.

ANNOTATIONS: See also C.A. 20/40 in this issue and, on the difference between removing an executor or an administrator, C.A. 118/38 (1938, 1 S.C.J. 411).

FOR APPELLANTS: Boustany.

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

JUDGMENT.

This appeal is against a decision of the District Court refusing to dismiss the administrators of an estate. Such matters are largely for the discretion of the District Court, and a Court of Appeal will always be reluctant to interfere, unless the District Court had gone wrong in law.

Considering the judgment of the District Court, we cannot say that they have misdirected themselves in any way, and it is true that as the District Court found, there was no clear allegation of collusion or fraud. In such circumstances the District Court were fully entitled to come to the decision at which they in fact arrived.

The appeal must therefore be dismissed with costs to include £P. 10, fee for attending the hearing to the second Respondent.

Delivered this 7th day of March, 1940.

British Puisne Judge.

CIVIL APPEAL No. 8/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

BEFORE: Copland, Rose and Khayat, JJ.

IN THE APPEAL OF:

1. Mas'ad Yousef Sayegh,
2. Taher Ahmad Abou Sultaneh. APPELLANTS

v.

1. Abdul Rahim Mustapha Abdul-Khaleq Matar,
2. Mohammad Abdul Kader Mustafa Matar,
3. Amna Abdul Kader Mustafa Matar,
4. Su'ad Abdul Kader Mustafa Matar,
5. Haleemeh Abdul Kader Mustafa Matar. RESPONDENTS.

Adverse possession — Land settlement — Land Law Amendment Ordinance 1933, *not retroactive, L.A.* 11/35 — *Judgment in favour of person not a party to the proceedings, Land (Settlement of Title) Ordinance, Sect.* 27(4) — *Land (Settlement of Title) Amendment Ordinance,* 1939 — *Right of appeal to Supreme Court.*

In allowing an appeal from the judgment of the Land Court of Haifa (sitting as a Court of Appeal) dated the 8th November, 1938, and in setting aside the judgment of the Land Court and restoring the judgment of the Land Settlement Officer:—

HELD: 1. (Following L.A. 11/35) Section 2 of the Land Law Amendment Ordinance, 1923, is not retroactive.

There could not be, in this case, adverse possession by co-heirs.

2. By Section 27(4) of the Land (Settlement of Title) Ordinance, if a Settlement Officer is satisfied that any person, who has not presented a claim, is entitled to any right in land, he may proceed as if such person had made a claim.

3. The judgment of the Land Court was given in October, 1939, and the Appellant's right to appeal was not affected by the subsequent enactment, on the 1st January, 1940, of the Land (Settlement of Title) Amendment Ordinance.

FOLLOWED: L.A. 11/35 (not reported).

ANNOTATIONS:

1. On rectroactivity see: CR.A. 20/39 (1939, S.C.J. 242) and annotations, C.A. 23/39 (*ibid.* p. 171) on p. 178, and C.A. 63/39 (*ibid.* p. 356) and annotations.
2. On possession by co-heirs, see H.C. 13/39 (1939 S.C.J. 196) and annotations.

FOR APPELLANTS: Cattan.

FOR RESPONDENTS: Nos. 1—2: Linderman.
Nos. 3—5: Absent — served.

JUDGMENT.

This is an appeal from a judgment of the Land Court in which that Court set aside a judgment given by the Land Settlement Officer at Tulkarm. The facts have been very clearly set out both in the judgment of the Settlement Officer and in the judgment of the Land Court. They have been accepted as correct and it is not therefore necessary for us to repeat them.

The main ground of appeal is that on the facts there is no adverse possession, and in law, that the Land Law (Amendment) Ordinance of 1933, Section 2, not being retrospective, cannot yet be enforced, as ten years have not elapsed since its enactment. The view that we take in this case is that it is not necessary to deal with the facts as to whether there is or is not adverse possession. The point about Section 2 of the Land Law (Amendment) Ordinance, 1933, has already been before this Court in Land Appeal 11/35, which was decided on the 11th of June 1936. In the judgment the learned Chief Justice, Sir Michael McDonnell, said this:

> "We are not satisfied that Section 2 of the Land Law Amendment Ordinance 1933 can, in the absence of express words, be held to be retrospective in its operation".

That is sufficient authority for us to decide this case and we adopt and follow this judgment, no other authority to the contrary having been brought to our notice. In law there cannot be any adverse possession by co-heirs in this case.

One other point has been taken by the Appellants and that is with regard to the second Appellant Taher. The Land Court said that the Settlement Officer was wrong in giving judgment in favour of Taher because he was not a party to the case, but by Section 27(4) of the Land (Settlement of Title) Ordinance, Chapter 80, it is clear that a Settlement Officer, if he is satisfied that any person, who has not presented a claim, is entitled to any right in land, he may proceed as if such person had made a claim. We are of opinion therefore that the Settlement Officer war correct in admitting Toher and giving judgment accordingly.

Lastly, the Respondent has taken the point that since the enactment, on the 1st January this year, of the Land (Settlement of Title) Amendment Ordinance, no appeal lies to this Court from a judgment given by a Land Court in settlement cases. We do not think that this is correct. The judgment of the Land Court was given on the 10th of October 1938, and at that date the Appellants had the right to appeal. In the absence of express words taking away that right we hold that that right remains in existence.

For these reasons, therefore, the appeal must be allowed, the judgment of the Land Court set aside and the judgment of the Settlement Officer restored. The Appellants will have their costs in the Land Court and in this appeal to include £P. 15 hearing fees on this appeal.

Delivered this 21st day of February, 1940.

British Puisne Judge.

CIVIL APPEAL No. 22/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

BEFORE: Copland, Frumkin and Khayat, JJ,

IN THE APPEAL OF:

1. Rimeh daughter of Abdalla Issa Iddini of Nazareth,
2. Nasmeh daughter of Abdalla Issa Iddini of Beisan. APPELLANTS.

v.

Father Naim Abdalla Issa Iddini. RESPONDENT.

Consent to jurisdiction — Religious Courts — Consent may not be implied but must be definite — C.A. 127/26 — Certificate not conclusive on question of consent.

In allowing an appeal from the judgment of the District Court of Haifa, dated the 2nd February, 1940, and in remitting the case to the lower Court with directions:—

HELD: (Following C.A. 127/26) It was not sufficient, in order to hold that the parties had consented to the jurisdiction of the Religious Court, that no party had objected to the jurisdiction. The consent in such matters must be a definite consent by the parties themselves.

The statement in the certificate of succession that the parties had consented proved nothing.

FOLLOWED: C.A. 127/26 (1 P.L.R. 109, C. of J. 1668).

ANNOTATIONS: On consent to the jurisdiction of Religious Courts *vide* H.C. 44/38 (1938, 1. S.C.J. 405) and annotations.

FOR APPELLANTS: Boustany.

FOR RESPONDENT: Nakim.

JUDGMENT.

This appeal raises one point only, that is, whether the Appellants had consented to the jurisdiction of the Greek Orthodox Ecclesiastical Court, which had issued a Certificate of succession, in relation to the estate of their deceased father. The Appellants denied that they consented and applied to the District Court for the issue of the Certificate of Succession by that Court. The District

Court refused the application on the ground that the Appellants had consented to the religious jurisdiction. In arriving at that decision, the learned Relieving President based himself upon a sentence in the Certificate of the Ecclesiastical Court, that no one of the heirs had objected to the jurisdiction, and that it was done with the consent of each. We are of opinion that this is not sufficient. The consent in such matters must be a definite consent by the parties themselves. See C.A. 127/26 (1 P.L.R. 109). The statement in the Certificate, that they had so consented, by itself proves nothing. We think therefore that this appeal will have to be allowed and the judgment of the learned relieving President quashed. The case will have to go back to the District Court for that Court to hear evidence on this question of consent, both as regards the question of the Certificate of succession issued by the Religious Court, and also on the question of the will, which has been referred to but which, apparently through inadvertence, the District Court omitted to deal with.

Costs to await the result of the retrial.

Delivered this 7th day of March, 1940

British Puisne Judge.

CIVIL APPEALS Nos. 34, 35 & 36 of 1940.

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

BEFORE: Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF:

Civil Appeal No. 34/40.

1. Usha Kvutzat Poalim Lehityashvut Shetufit Limited.
2. The Erez-Israel Palestine Foundation Fund Keren Hayesod Limited. APPELLANTS.

v.

Keren Kayemeth Leisrael Limited. RESPONDENTS.

Civil Appeal No. 35/40.

1. Ramat Yohanan Kvutzat Poalim Lehityashvut Shetufit Limited.

2. Palestine Agricultural Settlement Association Limited.
3. The Erez-Israel Palestine Foundation Fund Keren Hayesod Limited. APPELLANTS.

v.

Keren Kayemeth Leisrael Limited. RESPONDENTS.

Civil Appeal No. 36/40.

1. Kvutzat Kfar Hamacabi Kvutzat Poalim Lehityashvut Shetufit Limited.
2. The Erez-Israel Palestine Foundation Fund Keren Hayesod Limited. APPELLANTS.

v.

Keren Kayemeth Leisrael Limited. RESPONDENTS.

Land settlement — Mortgage of leasehold interests — Land (Transfer) Ordinance, Sec. 11(1) *— Uncontested claim.*

In allowing three consolidated appeals from the decision of the Land Settlement Officer, Haifa Settlement Area, dated the 28th December, 1939, and in remitting the cases to the Settlement Officer with instructions to include in the Schedule of Rights all undisputed claims lodged by the Appellants in respect of the properties appearing in the Schedule of Claims:

HELD: The reasons given by the Settlement Officer for his refusal to register Appellants' claims were not sound ones.

ANNOTATIONS: The appeals were brought by way of test cases.

FOR APPELLANTS: Horowitz.

FOR RESPONDENTS: Salomon.

JUDGMENT.

In these three consolidated appeals the same point arises for discussion. The Settlement Officer refused in each case to enter in the Schedule of Rights certain leases and mortgages executed before him in respect of the property owned by the Respondents, the mortgages being mortgages of the leasehold interests. The Settlement Officer's reasons were that he was not concerned with investigating claims which had not been previously registered in the Land Registry, and also that the leases were dispositions which were void being contrary to Section 11(1) of the Land (Transfer) Ordinance.

These appeals come before us and there is no opposition whatsoever raised by the Respondents. In the absence of any explanation of the

reasons which animated the Land Settlement Officer, the reasons given in his letters do not appear to us to be sound ones. We therefore allow the appeals and remit the cases to the Settlement Officer with instructions to include in the Schedule of Rights all undisputed claims lodged by the Appellants in respect of these properties as appear in the Schedule of Claims.

No order as to costs.

Delivered this 12th day of March, 1940.

British Puisne Judge.

CIVIL APPEAL No. 37/40.

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

BEFORE: Copland, Khayat and Abdulhadi, JJ.

IN THE APPEAL OF:

Shihadeh Ibn Muheissen El Kadi. APPELLANT.

v.

Ali Ibn Khalil Abu Loz. RESPONDENT.

Co-owners — Independent action — Magistrate's Jurisdiction — Appeals in land matters.

In allowing an appeal from the judgment of the Magistrate's Court of Beersheba, dated the 31st January, 1940 and in remitting the case for trial:

HELD: The Appellant and his brother, being co-owners, were independent of each other as regards their respective shares and Appellant was entitled to bring action asking for the cancellation of the contract as regards his interest therein.

The Magistrate consequently had jurisdiction to try the claim.

ANNOTATIONS: As regards *Musha'a* Land and a comparison with tenancy in common and joint tenancy in English law, see Goadby-Doukhan, The Land Law of Palestine, *pp.* 199, 207.

FOR APPELLANT: Mallah.

FOR RESPONDENT: Barbari.

JUDGMENT.

When this case came before the Magistrate, the Magistrate decided that he had no jurisdiction to try it, since the value of the land stated in the contract was more than £P. 150.

The Appellant and his brother sold a certain piece of land set out in the statement of claim to the Respondent by an unregistered deed. The Appellant now wishes to cancel the contract as regards his share in the land. We are of opinion that the Appellant and his brother, the two co-owners of this land, are independent of one another in respect of his own share (*sic*), and that being so, it is clear that the Magistrate has jurisdiction to take this case.

We do not deal with the point taken by the Respondent that the appeal was made to the wrong Court because he has dropped it. The appeal must therefore be allowed and the case remitted to the Magistrate to try it on its merits.

Costs to await the result of the re-trial.

Delivered this 12th day of March, 1940.

British Puisne Judge.

CIVIL APPEAL No. 25/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

IN THE APPEAL OF:

Keren Kayemeth Leisrael Ltd. — APPELLANTS.

v.

Mudir El Awqaf Al'am, in trust for the Cemetery of Arab Li'miriyyeh. — RESPONDENT.

Waqf — Cemetery on miri land antedating promulgation of Land Code.

In dismissing an appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 5th of January, 1940:—

HELD: Inasmuch as the lands in dispute had been used as a cemetery prior to the promulgation of the Land Code, the Settlement Officer was

justified in coming to the conclusion that there was a presumption of an origin in some lawful title to support the claim of the Respondent.

ANNOTATIONS: On *ab antiquo* user *vide* L.A. 87/28 (C. of J. 726).

FOR APPELLANTS: Feiglin.

FOR RESPONDENT: Khamra.

JUDGMENT.

Copland, J. In this case the *Mudir El Awqaf* claimed before the Settlement Officer that certain parcels of land used as a cemetery for a Moslem village were *waqf* and should be registered in his name. The Settlement Officer gave judgment that the area actually covered with graves and the ground between them should be registered in the name of the *Mudir* as *waqf*, but dismissed the claim with respect to certain adjoining parcels in which no graves were to be found. The Keren Kayemeth Leisrael who hold a *kushan* for these parcels and other adjoining lands, in which the land is described as *miri*, and who had claimed that since the land was *miri*, therefore it could not be converted into a *waqf sahih*, have appealed.

The facts were very simple. It is proved that this ground had been used as a cemetery for the Arab village of Harbaj, an ancient village though now abandoned, for a period going back long before the year 1274 A.H., when the Ottoman Land Code was promulgated. In these circumstances we think that the learned Settlement Officer was justified in coming to the conclusion that there was a presumption of an origin in some lawful title to support the claim of the *Mudir el Awqaf*. It is a lawful presumption which the Settlement Officer was entitled to make, where this land had been used as a cemetery for such a long time before 1274 A.H. and had been quietly enjoyed as such, that the land had been properly constituted as a cemetery, as *waqf*, in accordance with the law as it then existed.

We say nothing about the plea which the Respondent put forward that the land was a holy place, because that argument was not pursued before us, and the point was expressly dropped.

We think, therefore, that the learned Settlement Officer came to a correct decision and the appeal must be dismissed with costs to include £P. 15 for attending the hearing.

Delivered this 21st day of March, 1940.

Chief Justice.

CIVIL APPEAL No. 51/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Rashikah bint Hassan Saleh el Dahnous. APPELLANT.

v.

Saleh Ibn Hassan Saleh el Dahnous. RESPONDENT.

Leave to defend — Leave granted conditionally upon security being provided — Fresh application alleging impossibility to comply with order — Appeal from refusal of second order — Whether appeal in time — C. P. R. 250, 317 — Yearly Practice, 1938 p. 164 — Substantial defence — Costs.

In allowing an appeal from an order of the District Court of Tel-Aviv, dated the 26th day of February, 1940 and in granting to the Appellant leave to defend the case :—

HELD : 1. The appeal was not out of time as it was directed against the order dated the 26th February, not that of the 7th February.

2. A condition that leave to defend be granted upon defendant giving a security for the entire amount of the claim should not be made except in cases where the defendant consents to it or when the defence is so vague and unsatisfactory that it is practically certain that there is no defence at all.

3. It could not be said, in this case, that it was practically certain that plaintiff was entitled to judgment and the condition imposed by the judge of the District Court had wrongfully been imposed.

Appellant should therefore be granted leave to appear and defend upon her written undertaking not to dispose of any of her properties.

ANNOTATIONS :

1. As to the proper judgment to be appealed see also C.A. 76/38 (1938, 1 S. C. J. 266) and C.A. 119/37 (1938, 2 S. C. J. 243).

2. For the English Practice under Order 14 Rule 6 of the S. C. J. R. see Wind *v.* Thurlow, 10 Times Rep. 53, 151.

FOR APPELLANT : Elia.

FOR RESPONDENT : Moyal.

JUDGMENT:

This is an appeal from a decision of Judge Korngrun, in the District Court of Tel-Aviv, granting leave to defend in a case under the Summary Procedure Rules, but attaching thereto a condition that the

Defendant should provide a sufficient and adequate security for the whole amount of the claim to be produced within fourteen days. That decision was given on the 26th of January, 1940. On the 7th of February, 1940, the Defendant applied again in the District Court for leave to appear and defend unconditionally on the ground that she could not provide the security which the learned Judge had ordered on the 26th of January, and the Defendant offered to give an undertaking not to sell, or dispose of, or deal with, in any way, any of the properties, which devolved upon her by inheritance, before the case should be finally decided. That application was heard on the 26th of February by the learned Judge and he refused the application of the 7th February, but granted the Defendant leave to appeal against that decision. The Defendant has now applied to this Court and her grounds are that the condition to file security for the full amount of the claim is a harsh condition and in effect deprives her of any right to make a defence at all. She says that she has a substantial defence, and on the papers, we cannot say that her defence is a frivolous one. It may not be a successful defence if the case would come to trial but that is not the point. The point is whether she should get leave to appear and defend conditionally or unconditionally.

The Respondent's main point is that the appeal to this Court is out of time. He has argued that the Appellant's proper course was to apply under Rule 250 to the District Court, and that the present application under Rule 317 is out of time, if it is held to refer to the Order of the learned Judge dated the 26th of January, 1940. It is of course out of time if it be held to refer to the Order of the 26th of January, for the fifteen days would have expired, and a considerable length of time has passed before the application was in fact made to this Court on the 9th March, 1940, but we think that the appeal to this Court is an appeal against the decision of the 26th February, 1940. In that second decision of the learned Judge he refused the application of the 7th of February and that application did in fact propose another form of security to the one which the learned Judge had ordered on the 26th of January. We, therefore, think that the present appeal is in time. There is no question, as I said, that the present appeal was made within fifteen days from the 26th of February.

Now, with regard to the condition imposed by the learned Judge granting leave to defend, according to the Red Book, the Yearly Practice of the Supreme Court, 1938 Edition, page 164, it is stated that a condition such as this to bring a security for the whole amount of the claim, should not be made, except in cases where the Defendant consents to it, or where the defence is so vague and unsatisfactory

that it is practically certain that there is no defence at all, because of the hardship and the injustice of imposing any such condition on a defendant.

In fact such a condition should never be made unless the Master, or, in this country, the learned Judge of the Court, thinks that it is practically certain that the Plaintiff is entitled to judgment. We cannot say that in this case it is practically certain that the Plaintiff is entitled to judgment, and we therefore think that the condition imposed by the learned Judge was wrongfully so imposed.

We, therefore, allow this appeal and leave is given to the Appellant to appear and defend, on her giving a written undertaking within seven days from to-day not to dispose of, or deal with, in any way, any of her properties as offered by her in her application dated the 7th February, 1940. In the circumstances, we do not think either side should have any costs.

Delivered this 9th day of April, 1940.

British Puisne Judge.

HIGH COURT No. 24/40.

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

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

IN THE APPLICATION OF :—

Morris Louis Silverman (Caspi). PETITIONER.

v.

1. Pearl Buxenbaum (Harubi),
2. Moshe Harubi,
3. Neshka Talmudi,
4. Shmuel Talmudi,
5. Rachel Rosental,
6. Shmuel Rosental. RESPONDENTS.

Habeas Corpus — Custody of minor child — Family dispute — Welfare of child.

In refusing an application for summons to issue directed to the Respondents calling upon them to produce the child, Yoram Silverman (Caspi) before this Court, and to show cause why the said child, Yoram Silverman (Caspi) is detained by them, and why he should not be handed over to the Petitioner (his father). —

HELD : The child was viewed by the Court and appeared to be healthy, well cared for and happy. He would remain where he was until order of the Court while the father applied to the appropriate Court to have the dispute determined.

ANNOTATIONS :

1. Compare C. A. 176/26 (1 P. L. R. 136, C. of J. 985), H. C. 43/28 (C. of J. 299) and H. C. 31/37 (P. P. 16.vii.37) ;

2. Palestinian authorities on *habeus corpus* : H. C. of 1926 (C. of J. 898) ; H. C. 92/27 (1 P. L. R. 252, C. of J. 907) ; H. C. 49/29 (1 P. L. R. 430, C. of J. 950) ; H. C. 12/33 (P. P. 22.iii.33, C. of J. 908) ; H. C. 23/33 (1 P. L. R. 798, C. of J. 951, P. P. 9.iv.33) ; H. C. 89/34 (2 P. L. R. 234, P. P. 7.i.35, C. of J. 1934—6, 414) ; H C. 42/35 (2 P. L. R. 310, C. of J. 1934—6, 418, P. P. 13.v.35) ; H. C. 39/36 (C. of J. 1934—6, 426) ; H. C. 66/36 (P. P. 11.viii.36, C. of J. 1934—6, 428) ; H. C. 74/36 (P. P. 9, 30.viii.36) ; H. C. 87/36 (P. P. 15.x.36, C. of J. 1934—6, 298) ; H. C. 1/37 (P. P. 15, 17.ii.37, 1937, S. C. J. 407).

FOR PETITIONER : Rand.

FOR RESPONDENTS : Nishry.

JUDGMENT:

This is a return to an order in the nature of *habeas corpus*.

It is clear that there is a family dispute as to whether a little boy, who is at present with his maternal relations, should remain with them as it is said was his deceased mother's wish, or whether he should return to his father.

The father, through his advocate, undertaking to apply to the appropriate Court to have these matters settled, we direct that the little boy shall remain where he is until that Court orders thereon.

We have seen the little boy, who appears to be healthy, well cared for and happy, and we are satisfied that no harm will come to him in the meantime.

Delivered this 11th day of April, 1940.

Chief Justice.

CIVIL APPEAL No. 42/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Ali Ahmad Hamdan,
2. Mohammad Ahmad Hamdan,
3. Yousef Mahmoud Hamdan,
4. Ibrahim Ali Ahmad Hamdan,
5. Hamdan Mahmoud Hamdan,
6. Abd el Haj Mahmoud Hamdan,
7. Jameel Haj Mahmoud Hamdan,
8. Ahmad Haj Mahmoud Hamdan,
9. Saleh Hamdan,
10. Ali Saleh Hamdan. APPELLANTS.

v.

1. Mohammad el Haj Saleh, on his own behalf and on behalf of the heirs of his father, El Haj Saleh,
2. Ahmad, son of the late Haj Saleh,
3. Haj Othman, son of the late Haj Saleh,
4. Abdul Aziz, son of the late Haj Saleh,
5. Mohammad Tewfiq, son of the late Haj Saleh,
6. Mohammad Abu Ali, son of the late Haj Saleh. RESPONDENTS.

Ownership of land — Recent trend in favour of admission of evidence relating to ownership of unregistered land — Evidence of possession may raise inference of ownership — C. A. 195/37 ; C. A. 244/37 ; C. A. 238/37 — Sufficiency of evidence.

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated the 9th February, 1940 :—

HELD : 1. There was sufficient evidence for the Land Court to hold that the Respondents had been in undisputed possession and that the land was not included in the Appellants' *kushan*.

2. As Appellants had not suggested that the land could have been included in other *kushans*, it followed that it had not been registered.

3. (Following C. A. 195/37, 244/37, 238/37). The recent trend of judicial opinion has been to enlarge the admission of evidence in regard to claims of ownership of unregistered land. Where land

is unregistered evidence of possession may be given from which an inference of ownership may be made.

FOLLOWED : Abu Khusah & ors. *v.* Abu Sweireh & ors., C. A. 195/37, (3 Ct. L. R. 41, Ha. 24.iii.38) ; Soufan & ors. *v.* Dukka, C. A. 244/37, (1938, 1 S. C. J. 37) ; Khalil *v.* Mohammad & an., C. A. 238/37, (1938, 1 S. C. J. 32).

ANNOTATIONS : In addition to the cases cited in the judgment see C. A. 80/38 (1939, S. C. J. 426) and annotations, wherein it was held (following L. A. 13/34 and C. A. 239/37) that "where neither party has a registered title, evidence of possession may be adduced, and ownership may be inferred from the fact of possession".

FOR APPELLANTS : Goitein.
FOR RESPONDENT: : Levanon.

JUDGMENT:

This is an appeal from a judgment of the Land Court, Jerusalem, allowing a claim by the present Respondents to be registered as owners of certain land in Kessla village.

Three grounds of appeal have been advanced by the Appellants — first that no Court can give judgment in a claim of ownership of immovable property based solely on evidence of possession. Secondly, that there was no evidence to support the finding of fact by the Land Court as to the possession of the Respondents, and that if there were possession it was not undisputed. And lastly, that there was no evidence to support the finding of fact that the land in claim was not included in certain *kushans* belonging to the Appellants.

With regard to the last two points, a very large amount of evidence was heard by the Land Court, and in that evidence there was sufficient material to justify the Land Court in making these two findings of fact, and we see no reason to disturb them. As a result of the second finding, that the land is not included in the Appellants' *kushans,* it follows that the land is unregistered, as it is not suggested that if it is not covered by the Appellants' *kushans* it must be included in some other *kushan* or *kushans.*

Bearing these findings and the necessary corollary in mind, we now come to the first ground of appeal. The recent trend of judicial opinion in this country has been to enlarge the admission of evidence in regard to claims of ownership of unregistered land, and it seems now to be settled law that where land is unregistered, evidence of possession may be given from which an inference of ownership may be made. A Court may refuse to draw such an inference — it is a matter purely for the Trial Court based on the evidence before it. We would refer in particular to Abu Khusah and Others *v.* Abu Sweireh and Others,

C. A. 195/37, Soufan and Others *v.* El Dukka, C. A. 244/37, and Khalil *v.* Mohammad and Another, C. A. 238/37, which lay down this principle in very clear terms.

In this case we cannot say that the Land Court was wrong in coming to the decision which it did, and that being so, it follows that the appeal fails and must be dismissed with costs, and LP. 15.— fees for attending the hearing.

Delivered this 16th day of April, 1940.

British Puisne Judge.
Puisne Judge.

CRIMINAL APPEAL No. 22/40.

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

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

IN THE APPEAL OF :—

Falek Novick. APPELLANT.

v.

The Attorney General. RESPONDENT.

Brothels — Knowingly allowing premises to be used as a brothel — C. C. O. Sec. 163(b)(c) — Failure to register names of visitors to hotel — Trades & Industries (Regulation) Ord. Secs. 7, 11 — Difference between English and Palestine law.

In allowing an appeal from the judgment of the District Court of Tel-Aviv (sitting in its appelate capacity) dated this 16th day of January, 1940, confirming the judgment of the Magistrate's Court of Tel-Aviv, dated the 23rd day of November, 1939, whereby the Appellant was convicted of knowingly allowing his hotel to be used as a brothel, contrary to Section 163(b) and (c) of the Criminal Code Ordinance, 1936, and of failing to register the names and particulars of his visitors, contrary to Sections 7 and 11 of the Trades and Industries Ordinance, and sentenced to pay a fine of LP. 10 or two months' imprisonment, and in setting aside the conviction.

HELD : 1. There was insufficient evidence to sustain the conviction.
2. The English definition of brothel is wider than that in the Criminal Code Ordinance.

ANNOTATIONS :

1. See also H. C. 95/30 (C. of J. 1201).

2. The Criminal Law Amendment Act, 1885, Sec. 13 of which corresponds to Sec. 163 of the C. C. O. does not contain a definition of brothel. It was held in Singleton *v.* Ellison, 1895, 1 Q. B. 608, that "a brothel is the same thing as a

"bawdy-house", and is a term which in its legal acceptance applies to a place resorted to by persons of both sexes for the purposes of prostitution".

FOR APPELLANT : Wilner.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

The Appellant was charged before the Magistarte's Court with knowingly allowing his premises, or part thereof, to be used as a brothel or for the purpose of habitual prostitution, contrary to Section 163(b) and (c) of the Criminal Code Ordinance, 1936. Sub-section (c) is not material in this case, and sub-section (b) is the appropriate section. He was also charged with failure to register the names and particulars of certain visitors to his hotel, contrary to Sections 7 and 11 of the Trades and Industries (Regulation) Ordinance. He was found guilty by the Magistrate in general terms on all articles or counts of the charge.

The Appellant appealed to the District Court, which found there was sufficient evidence upon which the Magistrate could convict.

It may be noted that the English definition of brothel is wider than that in the Criminal Code Ordinance. After discussing the evidence the Crown Counsel admitted that it was insufficient to sustain the conviction. The appeal on this point, therefore, succeeds.

As to the second charge. The Crown Counsel has referred us to the relevant regulation dealing with this, and again we do not think the facts support the conviction.

The appeal is allowed and the conviction quashed, and the judgments of the District Court and the Magistrate's Court set aside. We direct that the fine paid by the Appellant be refunded to him.

Delivered this 18th day of April, 1940.

Chief Justice.

CIVIL APPEAL No. 17/40.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

The Syndic in Bankruptcy of the Firm "S. N. Khoury" of Haifa. APPELLANT.

v.

Mary Khayat. RESPONDENT.

Currency — Turkish promissory note — Ottoman Commercial Code, Art. 145 — Conversion of currency, English and Palestine law — C. A. 39/32, C. A. 85/32 — In Palestine conversion is at the rate prevailing at the time of payment — C. A. 79/36, Daniel v. C. E. O., P. C. 23/38 — Established principle.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 17th January, 1940 :—

HELD : 1. The document was a promissory note under the Ottoman Commercial Code.

2. (Following C. A. 39/32, C. A. 85/32, C. A. 79/36, P. C. 23/38 ; Considering H. C. 2/39). In an action on a promissory note conversion should be at the rate of exchange prevailing at the actual date of payment.

FOLLOWED : Abu Laban & Sons *v.* Bergman, C. A. 39/32 (P. P. 27.vi.33, C. of J. 658) ; Abu Laban & Sons *v.* Lieder & an., C. A. 85/32 (P. P. 14.vii.33, C. of J. 664) ; Makarious *v.* Cattan, C. A. 79/36 (1937, 1 S. C. J. 164) ; Apostolic Throne of St. Jacob *v.* Said, P. C. 23/38, (1940, S. C. J. 19).

CONSIDERED : Daniel *v.* C. E. O., H. C. 2/39 (1939, S. C. J. 29).

ANNOTATIONS :

1. Palestinian cases on currency are collated in the annotations to H. C. 2/39 (*supra*). See also C. A. 22/39 (1939, S. C. J. 131) and P. C. 23/38 (*supra*).

2. For the proposition that according to English Law a debt payable in foreign currency must be converted into English currency at the rate prevailing at the date of maturity *vide* British American Continental Bank, Ltd., *in re* Crédit Général Liégois Claim, 1922, 2 Ch. 589 ; Uellendahl *v.* Pankhurst, Wright & Co., 1923, W. N. 224 ; Peyrac *v.* Wilkinson, 1924, 2 K. B. 166.

FOR APPELLANT : Sanders.

FOR RESPONDENT : Cohen.

JUDGMENT:

This is an appeal from the District Court of Haifa. The (Plaintiff) Respondent claimed that the two defendants were jointly and severally liable to pay the sum of LP. 1,722.155 mils (with costs and interest), being the equivalent in local currency of the balance due under three promissory notes made by the second Defendant to the order of the Plaintiff to the total sum of 2,357 Turkish Gold Pounds.

The second Defendant was dismissed from the action at an early stage of the proceedings, but judgment was given for the Plaintiff against the first Defendant, who now appeals to this Court on two grounds. First, that the Trial Court erred in holding that the documents in question were promissory notes within the meaning of Article 145 of the Ottoman Commercial Code. Secondly, that, whether the

documents were promissory notes or undertakings to deliver bullion, the Trial Court erred in holding that they should be converted into Palestine currency at the rate of exchange prevailing at the date of payment.

As to the first point, it is common ground that the law as to promissory notes, which is applicable to this case, is contained in the Ottoman Commercial Code.

Article 145 thereof reads as follows :

> Art. 145.— "A promissory note shall be dated. It shall specify the amount to be paid, the name of the person to whose order it is payable, the time when it must be paid, and whether the value thereof has been received in cash, in goods, in account, or by the transfer of a debt".

We agree with the Trial Court that these documents satisfy the requirements of this Article and are in fact promissory notes, and we have nothing to add to the judgment of the Trial Court on this point.

As to the second point, counsel for the Appellant cited a number of English authorities which, he contended, establish the proposition that, in an action brought in England for a debt payable in foreign currency, the amount must be converted into English currency at the rate of exchange prevailing at the date of maturity of the debt.

As far as Palestine is concerned, however, as the learned President pointed out in his long and careful judgment, the balance of authority is the other way.

The leading authorities, both decisions of the Supreme Court, are Ahmad Hassan Abu Laban and Sons *v.* Fritz Bergman, Civil Appeal No. 39/32 reported in Vol. 2, Rotenberg's Collection of Judgments at p. 658, and Abu Laban and Sons *v.* Lieder and Fisher, Civil Appeal No. 85/32, reported at p. 664 of the same volume, which may be summarised as laying down the proposition that, in an action on a promissory note, conversion from (*sic.*) Palestine currency should be at the rate of exchange prevailing at the actual date of payment.

This decision was accepted by the Supreme Court in Archimandrite Makarious *v.* Issa Cattan, Civil Appeal No. 79 of 1936 (unreported) in which Mr. Justice Manning said :

> "There is no reason to depart from the ordinary rule which always prevails in these matters, that is, sums payable in foreign currency in Palestine have to be paid at the rate of exchange prevailing on the date of payment".

In Milian Daniel *v.* Chief Execution Officer, Jerusalem and Hanns Epstein, Palestine Law Reports, Volume 6, at p. 65, the Supreme Court do not seem to have criticised, or even to have been invited

by either party to criticise, the Chief Magistrate's decree insofar as it stated that the conversion of a number of Reichmarks into Palestine currency should be at the rate of exchange prevailing at the date of payment.

Finally, in Apostolic Throne of St. Jacob *v.* Saba Said, Privy Council Appeal No. 23 of 1938, reported in Palestine Law Reports, Vol. 6 at page 528, the second paragraph of the judgment of the Court of First Instance read as follows :

> "Following decision in C. A. No. 85/32 the judgment must be given for Plaintiff, amount of debt, 1,000 gold napoleons at the rate of exchange upon date of payment with interest from 21st August, 1931, as agreed to date of payment provided the interest does not exceed the principal".

The point as to the date of conversion was never taken by either party, either at first instance or on appeal, and the view of the District Court on this matter is inferentially accepted both by the Supreme Court and the Judicial Committee of the Privy Council.

This being so, we consider that the District Court was right in following these Palestine authorities and we would add that, apart from any other consideration, we should be reluctant to reverse a principle which has been recognised by the Courts of this country as having been established since, at any rate, 1932, and in accordance with which many contracts may well have been entered into.

For these reasons the appeal must be dismissed with costs, to include LP. 15.— for advocate's attendance fee.

Delivered this 24th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL No. 54/40.

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

BEFORE : Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF :—

1. George Naggiar on behalf of the estate of his late mother Labibeh daughter of Moussa Sursock, wife of the late Anton Naggiar,
2. Gabriel F. Debbas, on behalf of the Estate of his late mother Rosa, daughter

of Moussa Sursock, wife of Fadlallah Debbas. APPELLANTS.

v.

Mrs. Maria Theresa Serra du Kassano, in her own capacity and as guardian of her daughter, Sorrie Sursock. RESPONDENT.

Succession — Quasi mulk — Land planted prior to 1331 *— Admissions — Failure to plead point of law in just instance — Estoppel.*

In dismissing an appeal from the judgment of the District Court of Halfa, dated the 1st March, 1940 : —

HELD : 1. Appellants did not prove that the land was no longer planted and as it had been registered prior to 1331 as "*miri* planted", it descended as *mulk*.

2. Respondent had not admitted that the land was *miri* and a mere entry of distribution in accordance with *miri* succession did not necessarily amount to an admission of the non existence of plantations.

3. The Appellants could not plead that the registration was illegal as it had not been roused in the lower Court.

4. The point that the first appeal judgment had not been served upon Appellants had been waived by Appellants' advocate's own action at the commencement of the rehearing.

ANNOTATIONS :

1. On *Miri*-plantations *vide* Goadby—Doukhan, the Land Law of Palestine, pp. 29—30, and L. A. 32/22 (C. of J. 20), C. A. 147/22 (*ibid.* 21).

2. On the inadmissibility of a point not raised at the trial see C. A. 106/39 (1939, S. C. J. 489) and cases cited in the annotations thereto.

3. On estoppel by conduct of advocate, *vide* C. A. 68/38 (1938, 1 S. C. J. 261).

FOR APPELLANTS : Sahyoun.

FOR RESPONDENT : Weinshall.

JUDGMENT:

This is the second time that this case has come before this Court on appeal. In the first trial in the Land Court that Court decided, after both parties had closed their case, that further evidence should be called upon a certain question. On appeal by the Defendant (Respondent) that order was set aside, and the case was remitted to the Land Court to give judgment on the material already before it. The case went back and, since the Court was differently constituted, it was re-argued and the Land Court came to the conclusion that, on the material before it, the Plaintiffs had failed to prove their case. That case depended upon proving that the land in question was *miri* because it is admitted that if it was *mulk*, then the Appellants had no share.

Since the year 1329, that is for nearly thirty years, the registration of this particular land is shown in every *kushan* as "*miri* planted". As this original registration was before the year 1331, this "*miri* planted", so long as it remains planted, descends as *mulk*. It was therefore essential for the Plaintiffs in the original action to show that this land was not planted in 1920, at the time when the property devolved by succession on the death of the then owner, Nakhle Sursock.

Now, though this point stood out in our opinion with startling clarity, the Plaintiffs called no evidence whatever in the Court below to prove that the land was no longer planted. They relied on some so-called admissions made by the Defendant in the course of the arguments in the first trial and on certain documentary evidence. They said that the Defendant himself admitted the land was *miri* by pleading, as a defence, prescription for ten years under Article 20 of the Land Code. The Defendant has explained this in this Court by saying that since the basis of the Plaintiffs' claim was that the land was *miri,* prescription for ten years would be a good defence, and cannot in these circumstances be regarded as an admission that the land was *miri*. With that contention we agree.

It is further argued that an entry in 1922 in the Land Registry in favour of the heirs of Nakhle Sursock shows a division of the land between the heirs as though the right of succession was determined by the law relating to succession to *miri,* inasmuch as the female heirs received equal shares with the male heirs. This however is explained by the fact that Alfred Sursock, the only brother and one of the heirs of the late Nakhle Sursock, bought at the same time all his sisters' shares, and it was therefore immaterial what shares were registered in their names. Apart from this however we do not think that a mere entry of distribution in accordance with *miri* succession would necessarily amount to an admission of the non-existence of plantations.

Other points were raised about the registration being illegal, and the fact that the first appeal judgment was not served on the Appellants. On both these points the Appellants were stopped, because the first one was not raised in the Court below, and as to the second one, their advocate, by his own action at the commencement of the rehearing in the Land Court, must be held to have waived it.

The Appellants having failed to discharge the onus on them of showing that the category of land as registered is wrong, we hold that the Land Court was correct in its judgment and this appeal must, therefore, be dismissed with costs and LP. 15.— fees for attending the hearing.

Delivered this 24th day of April, 1940.

British Puisne Judge.

HIGH COURT No. 19/40.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :—

1. Hilde Joseph,
2. Rosa Wertheimer,
3. Robert Nachmann. PETITIONERS.

v.

1. President, District Court, Haifa, acting as Chief Execution Officer,
2. Shimshon Brockmann,
3. Abraham Winograd,
4. Haim Posnansky,
5. Lea Zeidelman,
6. Gedalia Linetzky,
7. Yehiel Goldkrants,
8. Abraham Kirshenbaum,
9. Mordechai Frieling,
10. Shmuel Bachman,
11. Zipora Shwartzbrot,
12. Shmuel Bachman,
13. Youseff Goldberg,
14. Zvi Himmelstein. RESPONDENTS.

Sale of Mortgage — Application to cross-examine deponent — Discretion of C. E. O. under Sec. 14 of the L. T. O. — May sanction an agreement — Non interference with discretion of C. E. O.

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 5th February, 1940, in Haifa Execution file No. 2/1938, should not be set aside, and there should be substituted therefor an order for final sale of the mortgaged properties or such other order as the Court may deem fit :—

HELD : It could not be said that the Chief Execution Officer had wrongly exercised his discretion and the High Court would not interfere.

ANNOTATIONS : On the discretion of the C. E. O. *vide* H. C. 2/40 (*ante*, p. 14) and annotations. See especially the annotations to H. C. 20/39, cited therein.

JUDGMENT:

This is a return to a rule *nisi* ordered by this Court calling upon the Chief Execution Officer to show cause why an order made by him on the 5th of February, 1940, should not be set aside and an order for sale of the mortgaged properties given.

An application was made on behalf of the Petitioners, who are the mortgagees, to cross-examine certain deponents of the affidavits filed on behalf of the Respondents, but in the view we take of this case we do not think such a course is necessary, and we see no reason for hearing them.

The Petitioners, as I have said, are the mortgagees, the 2nd and 3rd Respondents are the mortgagors, and Respondents 4 to 14 are said to be persons interested in the mortgaged property inasmuch as they have entered into agreements of sale with the 2nd and 3rd Respondents in respect of flats erected on the property which they agreed to purchase.

The order objected to is one which, in fact, was a compromise order given by the Chief Execution Officer having regard to a suggestion made on behalf of the 4th to the 14th Respondents. The property in this case was mortgaged, and an order of sale was made because interest for more than two quarters was overdue, and instalments on capital, also due, were unpaid. If there had been no default the final instalment of LP. 500 was not due until December, 1941.

The Chief Execution Officer, after hearing all the parties, ordered a stay of proceedings for six months on condition that the mortgagors and the third parties, that is to say the Respondents to this petition, complied with the proposal. That proposal shortly was, that all arrears in interest should be paid within forty-eight hours, and that instalments in repayment of capital, at the rate of LP. 500 per annum, should be made punctually. As a protection the advocate appearing on behalf of the Petitioners was appointed receiver of the mortgaged properties. All the undertakings which I have outlined have been carried out, all arrears of interest to date have been paid, and a sum of LP. 444 is standing in the Execution Office for collection.

The point which we have to decide is this, is the Chief Execution Officer, in accepting this plan and making it an order, exercising properly the discretion vested in him by the Land Transfer Ordinance, Section 14. All questions of discretion are difficult, and this case is no exception to that rule. It is always difficult for this Court to interfere with the discretion of the Chief Execution Officer, who, in that capacity, is in an infinitely better position to decide, and can better appreciate the

conditions and circumstances obtaining in his district than we, sitting in the seclusion of this Court, can possibly do, — we are always reluctant to interfere, and taking all the circumstances into consideration we do not think that we can say that the Chief Execution Officer has improperly exercised his discretion. The Respondents 4 to 14 are persons who have, one might say, a vital interest in the properties. By this proposal they make themselves responsible for the due repayment of the mortgage monies, they guarantee the repayment, and if the repayment does not take place, of course there is little doubt that proceedings will be resumed.

In these circumstances we think that the order *nisi* will have to be discharged, with costs to include LP. 5.— each, fees for the two advocates appearing on behalf of the two sets of Respondents.

Delivered this 25th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL No. 49/40.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Khalid El Azem. APPELLANT.

v.

Raja El Rayis. RESPONDENT.

Usurious interest — Case brought before and after enactment of Usurious Loans Ordinance, C. A. 76/33, C. A. 59/34 — Res judicata — Effect of judgment being set aside on points not dealt with in appeal — Ordinance not retroactive, Interpretation Ordinance, Sec. 5 — Whether accounts closed, Art. 6, Ottoman Law of Interest — P. C. 54/38.

In dismissing, by majority, an appeal from the judgment of the District Court of Haifa, dated the 9th February, 1940 :—

HELD : 1. Although the Supreme Court, in C. A. 59/34, only dealt with one of the grounds on which the District Court based its decision, the whole judgment of the District Court was set aside, and the other grounds in the judgment remained undecided, so that no question of *res judicata* arose.

2. The Usurious Loans Ordinance did not apply to this case as Appellant's rights were preserved in virtue of Sec. 5 of the Inter-

pretation Ordinance, and the Ordinance itself had no retroactive action.

3. The action was for excessive interest and not for a balance of account.

4. (Khayat, J., *dissentiente*). The amount had been paid to Respondent so that the accounts between the parties had been closed and relations severed, within the meaning of Article 6 of the Ottoman Law of Interest.

MENTIONED : Khoury Syndics *v.* Germain, P. C. 54/38.

ANNOTATIONS :

1. Earlier proceedings in this case : C. A. 76/33 (P. P. 24.iv.34, C. of J. 1052) and C. A. 59/34 (not reported).

2. On *res judicata vide* C. A. 6/39 (1939, S. C. J. 108), C. A. 9/39 (*ibid.*, p. 104), C. A. 195/38 (1938, 2 S. C. J. 157) and the cases cited in annotations to the last mentioned judgment.

3. On retroactivity see C. A. 8/40 (*ante*, p. 84) and cases cited in annotations thereto. See also C. A. 8/24 (1 P. L. R. 15, C. of J. 1036) wherein it was held that the Usurious Loans (Evidence) Ordinance, 1922, being a law of procedure, was retro-active.

4. Palestinian authorities on usurious interest ; C. A. 393/21 (1 P. L. R. 4, C. of J. 7), C. A. 165/23 (1 P. L. R. 11, C. of J. 1035), C. A. 8/24 (*supra*), C. A. 10/24 (1 P. L. R. 17, C. of J. 1037), C. A. 45/24 (1 P. L. R. 25, C. of J. 1228), C. A. 20/27 (1 P. L. R. 140, C. of J. 703), C. A. 71/28 (1 P. L. R. 347, C. of J. 1040), C. A. 125/28 (C. of J. 1041), C. A. 40/29 (C. of J. 1042), C. A. 54/29 (1 P. L. R. 517, C. of J. 1042), C. A. 29/30 (C. of J. 1044), C. A. 45/30 (C. of J. 1299), C. A. 42/31 (1 P. L. R. 577, C. of J. 1005), C. A. 68/31 (C. of J. 948), C. A. 64/32 (1 P. L. R. 885, C of J. 1074), C. A. 78/32 (P. P. 22.ii.33, C. of J. 1048), C. A. 89/32 (P. P. 28.iii.33, C. of J. 20), C. A. 110/32 (C. of J. 67), C. A. 163/32 (2 P. L. R. 83, C. of J. 1049, P. P. 17.v.34), C. A. 167/32 (P. P. 22.xi.33, C. of J. 1305), C. A. 173/32 (C. of J. 970, P. P. 17.ii.33), C. A. 69/33 (P. P. 16.iii.34, C. of J. 1649), C. A. 76/33 (*supra*), C. A. 86/33 (P. P. 20.vi.34, C. of J. 1084), H. C. 99/34 (P. P. 13.ii.35, C. of J. 1934—6, 472), H. C. 104/34 (P. P. 5.ii.35), C. A. 126/35 (1937, I S. C. J. 30, C. of J. 1934—6, 476), C. A. 80/36 (1937, 1 S. C. J. 106, C. of J. 1934—6, 188), C. A. 130/38 (1938, 2 S. C. J. 3), C. A. 248/38 (1939, S. C. J. 22).

FOR APPELLANT : Goitein and Moghannam.

FOR RESPONDENT : Weinshall.

JUDGMENT:

Copland, J. This unfortunate litigation commenced in the year 1932, and has already been on two occasions on appeal to this Court. The previous history has been very fully set ut in the judgment now under appeal, and I do not propose to repeat it here. The salient features are, that in July, 1932, the Respondent brought an action concerning LP. 1360.076 mils asking that this sum be declared to be excessive

interest, and the Supreme Court held, in Civil Appeal 76/33, that a District Court had no power to issue a declaratory judgment. Thereupon the Appellant took out the above sum, which had been attached with the sub-accountant.

Soon after the Usurious Loans Ordinance, 1934, had been passed into law, the Respondent instituted another action claiming this same sum as excessive interest. On the 7th February, 1935, the District Court dismissed the claim on several grounds, one of them being that the matter was *res judicata*. On appeal, Civil Appeal 59/34, this Court held that there was no *res judicata*, but did not deal — perhaps unfortunately — with the other grounds in the judgment of the District Court, and remitted the case for completion.

After long delays both before and during the trial, the retrial was finished, and judgment was given on the 9th February, 1940, in favour of the Respondent for the amount claimed. The present appeal is from this last mentioned judgment.

The case is one of considerable difficulty, and I must admit that during the course of the argument my opinion has varied from one side to the other.

In the first place there are certain matters that can be disposed of, as to which, to my mind, no uncertainty exists. One is the argument that that part of the judgment of the District Court, which the Supreme Court in C. A. 59/34 did not refer to, was not set aside, and is therefore still binding as not having been upset on appeal. This argument is not a sound one ; though the Supreme Court only dealt with one of the grounds on which the District Court based its decision, this Court set aside the judgment of the District Court — the whole judgment — and the other grounds in the judgment set aside still, therefore, remain undecided, and no question of *res judicata* arises.

It is also quite clear, in my opinion, that the Usurious Loans Ordinance, 1934, cannot be relied in regard to this case, and has no application. By Section 5 of the Interpretation Ordinance such rights as may have existed in favour of the Appellant are preserved, and this Ordinance of 1934 cannot affect is position, since it has no retrospective action — this again is clear from the provisions of Section 5 of the Interpretation Ordinance. Insofar, therefore, as the judgment of the District Court is based upon this Ordinance of 1934 it cannot be supported.

Further, the Respondent's argument that his action, whatever it might be called, was for the balance of an account, is not correct — his action, all through, from the abortive action of 1932 to the present

day, was based on the allegation that the amount was for the repayment of excessive interest. This is incontrovertible both from the Statements of Claim and from the arguments in Court.

The case, as I see it, depends upon the determination of this question — were the accounts closed between the parties prior to the institution of this action in 1934, or not. All arguments as to the provisions of the Ordinance of 1934 seem to me to be beside the mark, once it has been held that this Ordinance cannot apply in this case.

The answer to this question depends on the legal effect of the judgment in the 1932 case, combined with the withdrawal by the Appellant of the amount claimed after the dismissal of the 1932 case, and this again further depends upon the true construction of Article 6 of the Ottoman Law of Interest of 1304. This reads as follows :—

> "During the continuation of the transaction of lending and borrowing between the creditor and the debtor, whether the account was transferred or the deed of debt was renewed or changed, or not, claims for the reduction of usurious interest to its legal rate are hearable. But if the debt was paid in full and the relation between the creditor and the debtor was cut, then claims for the recovery of usurious interest are not hearable".

I would mention that in the event of this case going further, and in deference to the wish expressed by Their Lordships in the Syndic of the Bankruptcy of the Firm S. N. Khouri *v.* Germain (P. C. Appeal No. 54 of 1938) the above literal translation has been prepared from the original Turkish text by a Judge of this Supreme Court, and by a lawyer, both of whom pursued their legal studies in the University of Istanbul, and who have an intimate knowledge of the Turkish language, and it may, therefore, be taken to be correct. The idea has been to give as nearly as possible the actual literal meaning of the Turkish words.

In the present case, the amount of the debt has been paid — it was paid when the Appellant took out the sum of LP. 1360.076 mils from the sub-accountant, when the attachment on the monies was released when the 1932 action failed. I think that it is reasonably clear that the amount of the debt was agreed at the above figure, that is to say, that the amount in dispute was agreed by the parties, since in the statement accompanying the application of the Respondent, dated the 17th July, 1932, for provisional attachment, and again in his Statement of Claim dated the 27th July, 1932, and further again in the Statement of Claim in this present case, the above figure is stated by the Respondent to be the correct account as alleged by him, and this figure has been expressly agreed to by the Appellant in

the course of his arguments on this appeal. In a sense I suppose it can be said, that when once the amount in dispute has been agreed upon, and that amount has been paid, then the accounts between the parties have been closed — but the position here is not quite so simple as that. The amount was not paid by the Respondent, but was taken out by the Appellant on the release of the provisional attachment to which it was subject. The 1932 action, also, had not been dismissed on its merits, but because it was wrong in form, inasmuch as it asked for a declaratory judgment which at that time the District Courts were not empowered to give.

On the other hand, it must be remembered that after the judgment of this Court in Civil Appeal 76/33, the position was that the Respondent was in the position of having brought an action challenging the account which had failed, and that the amount of the disputed debt had been paid to the Appellant. It seems to me that, on the strict wording of the Article, at that moment the very situation had arisen which is contemplated by the second part of Article 6, namely, that the debt had been paid, and that the account between the parties had been closed by that payment and by the judgment, — otherwise there would be nothing to prevent a person, at any time within the period of limitation of actions, and after years of inactivity and apparent acquiescence, challenging an account and reopening it on the ground that it contained excessive interest — a situation which, it seems to me, Article 6 was expressly designed to prevent. I think that where, as here, the whole claim of the creditor had been satisfied, and he was claiming nothing further from the debtor, then it was too late for the debtor to claim that what he had already paid, or what the creditor had already received in respect of the claim, included excessive interest, and that it should be repaid. There must be some item, claimed by the creditor, and unsatisfied, or the debtor must have entered an action disputing the account, which action was still pending at the time when payment of the whole of the creditor's claim had been effected, in order to take the case out of the operation of the second part of Article 6.

As I have said, I have reached this result with considerable hesitation, and the matter is by no means free from doubt, but after careful consideration I think that, for the above reasons, this appeal should be allowed, the judgment of the District Court set aside, and judgment entered for the Appellant (Defendant) in the action, the claim of the Respondent (Plaintiff) being dismissed.

In the result, the appeal is allowed by majority, with the con-

sequences indicated by me above. The Appellant will have all his costs both here and below in respect of all the trials, to include, for this Court, hearing fees of LP. 10.— in respect of the first appeal, and LP. 15.— in respect of the second appeal.

Delivered this 25th day of April, 1940.

British Puisne Judge.

I concur.

British Puisne Judge.

Khayat, J.: I agree with His Honour the Presiding Judge on the facts and legal points stated in his judgment, but in my view, the intention of the last paragraph of Article 6 of the Ottoman Law of Interest is to disallow the hearing of claims in cases where the debtor has paid the amount of the debt willingly, but not where the creditor has deducted the debt from the price of property that is registered in his name in the Land Registry. It is not within the power of the debtor to prevent him from deducting the debt except by instituting an action against him (the creditor).

Here, in this case, the debtor instituted proceedings against the creditor, and certain monies were attached by order of the Court, and the relationship between the debtor and the creditor was not cut — the dispute remained — and the debtor did not cease claiming from the creditor the amount taken as excessive interest. If it is argued that the relationship between the creditor and the debtor was severed by the receipt of the amount of the debt, then, in such a case, the relationship was severed by an act of the creditor, and not by an act of the debtor, and it cannot be taken as acceptance on the part of the debtor of the existing state of affairs.

The legislator was not satisfied with the words "payment of the debt" only, but made it a condition that the relationship between the creditor and the debtor must also be cut, that is I think, that there should be no question as to the validity of the payment of the debt.

I am, therefore, of the opinion that the appeal must be dismissed, and the judgment of the Court below be confirmed, with such variation to bring it within the provisions of Article 6.

Puisne Judge.

HIGH COURT No. 26/40.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :—

1. Abed Abdel Fattah Yacoub,
2. Tewfik Abdel Fattah Yacoub,
3. Ahmed Abdel Fattah Yacoub. PETITIONERS.

v.

1. Isaac Yousef Balaila,
2. The President, District Court, Haifa. RESPONDENTS.

Sale of mortgage — Consolidation of execution files of three mortgagees — Irregularities of proceedings alleged in respect of one file — H. C. 50/28 distinguished — Mortgagor not prejudiced by consolidation.

In dismissing an application for an order to issue directed to the Respondents calling upon them to show cause why the sale proceedings in Execution File No. 282/39, District Court, Haifa, should not be declared void, and why Respondent No. 2 should not be ordered to re-open proceedings in accordance with law starting by valuation and taking possession.

HELD : (Distinguishing H. C. 50/28). Where property is being sold in satisfaction of more than one mortgage, the files pertaining to each of the mortgagees may be consolidated and the mortgagor is not prejudiced by the fact that the sale proceedings are not effected separately in respect of each mortgagee.

DISTINGUISHED : H. C. 50/28 (1 P. L. R. 344, C. of J. 1297).

FOR PETITIONERS : Atallah.

FOR RESPONDENTS : No 1, Gavison.
No. 2, absent — served.

J U D G M E N T :

In this case the Petitioners are the mortgagors, and the 1st Respondent is the mortgagee in respect of certain property mortgaged on the 4th of February, 1936. This mortgage — which I will call Mortgage A. — was for a sum of LP. 1,500.— payable as to LP. 500.— in January, 1938, and as to the balance, LP. 1,000.—, in January, 1939. Interest was payable quarterly in advance.

At the same time as Mortgage A. was executed, another mortgage —

which I will call Mortgage B. — was executed to rank *pari passu* with Mortgage A. This was for the sum of LP. 2000, and was to be paid in two instalments. The mortgagee in this case was Mr. Hars. No instalments on capital were paid in either case, and no interest has been paid for over two years.

In September, 1939, both mortgagees in Mortgages A. and B. applied for sale, and an order of sale was given in respect of both files in October, 1939.

On this same property there was another mortgage executed after Mortgages A. and B. — the first and second mortgages — for LP. 5,600, which was equally overdue and has not been paid. Proceedings of sale in respect of this third mortgage were commenced in Tel-Aviv. The proceedings in Mortgages A. and B. were entered in Haifa, and the proceedings in the third mortgage were transferred to Haifa, and the proceedings would appear to have been continued in respect of all three files, at the same time and on the one file — the original Tel-Aviv file.

Now it has been argued before us on behalf of the Petitioners that the proceedings in respect of Mortgage A. — which is the only one with which we are concerned in these proceedings — were irregular in respect of the taking possession, valuation and auction proceedings, which ought to have been commenced *de novo* in respect of this mortgage, and that they should not have been amalgamated and consolidated with the proceedings in respect of the third Tel-Aviv mortgage file.

A case has been quoted to us, No. 50/28, Petro Abella *v.* Chief Execution Officer, Haifa, 1 P. L. R. 344, which is said to be in the Petitioner's favour. This was a case where there were four distinct properties, mortgaged by four distinct deeds. Only one order of sale was made, and the sale was advertised and carried ut as though all the properties were sold as one united property. The High Court held that this was irregular ; that where there were properties mortgaged by separate mortgage deeds, the properties must be advertised separately, and separate bids made for each of the mortgaged properties. In this present case, however, there is only one property, which is the subject matter of three separate mortgages, and we do not think, therefore, that the case cited to us is of any assistance in determining this point. No authority has been quoted to us by either the Petitioners or the Respondent in support of or against the theory of consolidation or amalgamation, such as I have described had taken place in this case. The matter is, therefore, free from any authority.

It seems to us that where, as here, there are three mortgages in respect of one and the same property, the Petitioner is in no way being prejudiced by the fact that the valuation and taking possession of this property had not been repeated three times. A separate valuation of Mortgage A., a separate valuation in respect of this mortgage, and separate auctions would have had no effect whatsoever on the situation. The mortgagors in respect of Mortgage A., and in respect of Mortgage B., had the opportunity of objecting to the sale, which was the only matter which concerned them, since the property had been valued and possession taken in respect of the third mortgage, and we think, therefore, that there is no such irregularity of proceedings, or in fact any irregularity at all, which would justify us in ordering a separate valuation and separate sale proceedings in respect of Mortgage A.

It seems to us a complete waste of time, and unnecessary, to repeat the same operation three times in respect of the same property, and therefore we hold that such a course would be unnecessary. That being so, we think that the order of the Chief Execution Officer is correct, and the order *nisi* is discharged, with LP. 10.— fees for attending the hearing.

We would add that we are glad to be able to arrive at a solution such as this, as a contrary one would have violated all one's feelings of common sense.

Delivered this 25th day of April, 1940.

British Puisne Judge.

Puisne Judge.

HIGH COURT Nos. 27/40 and 28/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPLICATIONS OF :—

1. Afif Canan,
2. Bahjat Canan,
3. Adel Canan,
4. Bahijeh Canan,
5. Afifeh Canan,

6. Adla Canan,
7. Andalib Canan,
All sons of Ragheb Canan. PETITIONERS.

v.

1. Chief Execution Officer, Nablus,
2. Director of Orphanage, Nablus,
3. Haj Mamdouh Abdul Latif Nabulsi. RESPONDENTS.

Mortgages — Whether interest due thereon — Admission in mortgage deed that interest is payable although rate not stated — Interest payable at same rate after expiration of mortgage — H. C. 21/40, 22/40 overruled.

In dismissing applications for an order to issue directed to the First Respondent calling upon him to show cause why his orders in Execution file No. 376/40 and in Execution file No. 377/40 both dated 9.3.40 should not be set aside and an order given in each of the said files for the sale of the properties in question in satisfaction of the balances of the respective principal sums due without interest :—

HELD : 1. When it is stated in a mortgage deed that interest is payable at a certain rate, interest goes on being payable after the term of the mortgage until final payment has been effected.
2. (Overruling H. C. 21—22/40) The mortgage deeds contained an admission that interest was payable so that the quesion whether the separate undertaking was executable did not arise.

OVERRULED : H. C. 21/40, H. C. 22/40.

ANNOTATIONS : The question as to how far the Court of Appeal is bound by its own decisions is fully dealt with in C. A. 158/38 (1938, 2 S. C. J. 126). Other instances of cases having been overruled because not fully argued are H. C. 40/38 (1938, 1 S. C. J. 400), C. A. 126/38 (*ibid.* 430) and H. C. 19/39 (1939, S. C. J. 200).

FOR PETITIONERS : Salah.

FOR RESPONDENT No. 1 — Absent — served.
Nos. 2 and 3 — Zuieter.

ORDER :

These two applications have been consolidated but the facts are the same in each. Each is for an order directed to the Chief Execution Officer of Nablus to show cause why his order dated the 9th March, 1940, should not be set aside and an order be given for the sale of the property in question in satisfaction of the balance of the principal sum due without interest. The whole dispute between the parties centers round this point, whether interest is or is not payable on these two mortgage deeds.

Now, the mortgage deeds are the same in each case. They are stated to be for the sum of LP. 118.— payable in three annual instalments. Blanks are left in the clause regarding the payment of interest, in these forms. It is, however, agreed between the parties that this sum of LP. 118.— is made up of LP. 100.— principal together with interest at 9% on the balances outstanding at the end of the three years on payment of the annual instalments. At the same time as these mortgage deeds were executed, or within a day or two, supplementary deeds were also executed before the *Sharia* Court, in which certain stipulations were made with regard to the payment of interest. In both cases the instalments due under the two mortgages not having been paid, application was made in July, 1933, to the Chief Execution Officer to order sale. That application came on for hearing in September of that year and on the present Petitioners stating that the situation was very bad, that they had not any money or any work, the applications were adjourned until the 14th December, 1933, the Chief Execution Officer stating that at that time all sums due would have to be paid.

Now, it is beyond dispute that when in an ordinary mortgage deed it is stated that interest at so much per cent is payable during the currency of the mortgage, interest goes on being payable after the term of the mortgage until final payment has been effected. It seems to us, after further consideration, that these mortgage deeds in these two cases contained an admission that interest was payable, or an undertaking to pay interest, because it is admitted by the parties that the sum of LP. 118.— in fact included LP. 18.— interest during the three years for which the mortgage deed was stated to run. That being so, it is not necessary for us to discuss the question whether this supplementary deed of debt is or is not executable, and we do not, therefore, propose to do so. There is of course unfortunately a conflict between this judgment which we are giving now and the one which we gave two weeks ago in regard to similar mortgage deeds, but after further consideration and in view of the further arguments which were put forward to us by the advocate for the Respondents, we think that the present solution is the correct one and the former cases H. C. 21/40 and H. C. 22/40 must therefore be considered as not binding. The orders *nisi* granted must be discharged with costs to include LP. 2.— hearing fees in each case.

Given this 30th day of April, 1940.

Puisne Judge.

CIVIL APPEAL No. 58/40.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Charles Tadros. APPELLANT.

v.

1. Trade and General Development Trust Ltd.,
2. Max Seligman, purporting to act as agent of Receiver appointed by a debenture holder of Respondent number one. RESPONDENTS.

Barclays Bank (D. C. & O.) Tel-Aviv. THIRD PARTY.

Notarial notice — Claim for wrongful dismissal by Company in liquidation — Whether for damages or for salary — Notarial notice not required when company dissolved — Averment of readiness and willingness to work not required in the circumstances.

In allowing an appeal from the judgment of the District Court of Tel-Aviv, dated the 23rd February, 1940, and in remitting the case to the District Court :

HELD : 1. Appellants claim was for damages, as he could not claim salary in respect of a period which had not expired when the claim was brought.

2. The company being in liquidation this was one of the cases in which a notarial notice was not necessary. The object of a notarial notice is to give the person to whom it is addressed the chance of remedying a breach and also to fix definitely the fact that there is a breach of contract.

3. It was unnecessary that the Appellant in his statement of claim should allege that he was ready and willing to continue his employment.

Quaere if this would have been necessary if the Company had been functioning normally.

ANNOTATIONS :

1. On compensation for wrongful dismissal *vide* C.D.C. Jm. 368/33 (P. P. 30.viii.35), C. A. 81/29 (C. of J. 1643) and C. A. 5/40 (*ante*, p. 63).

2. On dispense with the necessity of a notarial notice, otherwise than by waiver, see C. A. 116/36 (1938, 1 S. C. J. 257) and annotations ; see also C. A. 22/39 (1939, S. C. J. 131 on p. 136).

FOR APPELLANT : Polonsky and Kost.

FOR RESPONDENT : Nos. 1—2 Sussmann.

FOR THIRD PARTY : Haim Choumla — Officer of the Bank.

JUDGMENT:

This is an appeal from a judgment of the District Court of Tel-Aviv rejecting a claim by the Appellant for salary and damages for wrongful dismissal. The Appellant was engaged by the first Respondent company by means of a letter dated the 7th of December 1938. According to that letter he was engaged at the salary of LP. 35 per month as from the 1st of November, 1938, for one whole year. On the 28th of February, 1939, the first Respondent, through the second Respondent, purporting to be the agent of a Receiver appointed in respect of the first Respondent, addressed a letter to the Appellant saying —

> "I have been instructed by the Receiver to inform you that owing to the winding up of the Company your services are no more required."

and the letter goes on to ask him to hand over the cash in hand, the books of the company, keys of the safe and so on, which were apparently handed over on the same day according to a receipt which was filed in Court Exhibit C. T. 3.

On the 28th April, 1939, the Appellant filed an action against the present Respondents claiming eight months' salary. Alternatively, he claimed damages for wrongful dismissal.

The District Court held that the claim of the Appellant was one for damages for wrongful dismissal and, the Appellant not having served a notarial notice on the Respondent, the claim must fail. The Appellant thereupon appealed.

Various points have been taken on appeal, but the case really turns on this point, whether in the circumstances of this case, a notarial notice was necessary. It is, we think, quite clear that the claim of the Appellant was one for damages for wrongful dismissal. It could not be a claim for salary because he could not claim salary in respect of a period which had not expired at the time when the claim was brought.

We come therefore to consider the case on the basis that it was a claim for damages for wrongful dismissal. The Respondent has sought to argue that the company is not in liquidation, but we think from the letter written by the Respondents that they are estopped from raising that plea. In that letter they admitted this, that the company was in liquidation, and that was the reason for the discharge of the Appellant. The Respondents go on to argue that a notarial notice should have been served because, if they had received such a notice, they would have been able to remedy the breach by re-employing the

Appellant. In our opinion however this is one of those cases in which a notarial notice is not necessary. It would be useless in a case of this nature to call upon a company, admitted to be in liquidation, to re-employ somebody whom they have discharged. The object of a notarial notice is to give the person to whom it is addressed the chance of remedying a breach and also to fix definitely the fact that there is a breach of contract. It is also in our opinion unnecessary that the Appellant in his statement of claim should have alleged that he was ready and willing to continue his employment. If the company had been a company that was functioning normally, it is quite possible that such an allegation would be necessary, but it seems to us to be unnecessary to aver that one is willing to serve a company which is in the stages of dissolution.

For these reasons, therefore, we think that the appeal will have to be allowed, the judgment of the District Court set aside, and the case remitted to be tried on its merits. The Appellant will have the costs of this appeal together with LP. 10 hearing fees in any event, for the first and second Respondents.

Attachment to continue pending trial of action.

Delivered this 22nd day of April, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 23/40.

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

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

IN THE APPEAL OF :—

1. Abdallah Naser Salem Abu Wady,
2. Ahmad Abdallah Faraj,
3. Ibrahim Saleh Salah,
4. Husein Mahmoud Haj Hamad. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Criminal procedure — Discrepancy between evidence given by witness at trial and deposition at preliminary enquiry — Discrepancy should be put to witness and record produced.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 18th of March, 1940, whereby the Appellants were convicted of robbery

contrary to Section 288(1) and 23 of the Criminal Code Ordinance, 1936, and sentenced, the first three Appellants to eight years' imprisonment, and the fourth Appellant to seven years' imprisonment :

HELD : If there is any discrepancy between the evidence of a witness given at the trial and his evidence at the preliminary enquiry, such discrepancy should be put to the witness in cross examination, and if the earlier statement is denied, the deposition may be put in evidence.

ANNOTATIONS :

1. The ruling in this case follows the English Law as laid down in Sec. 5 of the Criminal Procedure Act, 1865.

2. For the criminal consequences of such contradictions see T. U. I. Ordinance, Sec. 56.

3. See also Cr. A. 27/39 (1939, S. C. J. 364).

FOR APPELLANTS : Nos. 1—3, in person.
No. 4, Hutory.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

We think there was evidence upon which the Court below could convict as it did. There is, however, one point submitted to us to which I would refer.

It has been suggested by counsel for the fourth Appellant that there was a discrepancy between the evidence of the first witness given at the trial and the evidence he gave at the preliminary enquiry. It should be clearly understood that if there is any such discrepancy it should be put to the witness in cross-examination, and if the earlier statement is denied, the deposition may be put in evidence. The depositions taken by the Examining Magistrate do not form part of the case unless they are properly put in evidence.

It is also submitted that the sentence is excessive. We do not think that this is so.

The appeal is therefore dismissed.

Delivered this 6th day of May, 1940.

Chief Justice.

CRIMINAL APPEAL No. 29/40.

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

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

IN THE APPEAL OF :—

Ahmad Mohammad el Haj Ishak. APPELLANT.

v.

The Attorney General. RESPONDENT.

Early complaint — Evidence Ordinance, Sec. 7 — Must be made in presence of accused or by a person who is himself a witness — Credibility a matter for the Court of Trial.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 10th of April, 1940, whereby the Appellant was convicted of causing grievous harm to a person, contrary to Section 238 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, and the complainant was awarded LP. 30 by way of satisfaction and compensation :

HELD : Any complaint made to the police not in the presence of the accused is not evidence unless it falls within the provisions of Section 7 of the Evidence Ordinance as being a statement by a person who is himself a witness.

In this case the complaint was made by a man subsequently called as a witness.

ANNOTATIONS : On early complaints *vide* CR. A. 75/39 (*ante*, p. 11) and cases cited in the last paragraph of the annotations thereto.

FOR APPELLANT : Asal.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

Apart from the question of sentence there is one unusual point in this appeal.

Two witnesses before the Court below stated that the first accused before the Court, that is the grand-father of this Appellant, was present when the crime was committed. The Court of its own motion called a Police Inspector to enquire as to the first complaint which was made. Any complaint made to the police not in the presence of the accused is not evidence unless it falls within the provisions of Section 7 of the Evidence Ordinance as being a statement by a person who is himself a witness. In this case the complaint was made by a man subsequently called as a witness. He complained against the

son — *i. e.* the Appellant — and the Appellant's father, who has not been tried, but he did not complain against the grand-father who was the first accused at the trial. Upon this the Court of trial said —

> "We think it to be of importance the fact that the father of the injured boy, Ibrahim, did not in making his first official complaint to the police mention the name of the Accused No. 1 to them, in the story of his (Accused No. 1's) son and grandson, if in fact he, Accused No. 1, had actually participated as is now alleged in the offence and was at the actual scene of it. It is quite possible that the name of the first Accused was included as an after-thought. Although the actual fact may be otherwise, nevertheless we entertain some doubt as to this and to the benefit of this doubt the Accused El Haj Ishak is entitled. He is therefore acquitted and discharged."

It is argued for the Appellant that the Court did not believe the evidence of the two eye-witnesses when they saw the grand-father 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. I do not think there is anything in this point. . .

We see no reason to interfere with the sentence. The appeal is dismissed.

Delivered this 6th day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 63/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

The General Mortgage Bank of Palestine, Ltd. APPELLANT.

v.

Jacob Peremen. RESPONDENT.

Execution of mortgage — Declaratory judgment — Construction of mortgage deed — Finding of fact set aside.

In allowing an appeal from the judgment of the District Court of Tel-Aviv, dated the 29th of February, 1940, and in entering judgment for the Appellant:

HELD: It was clear that the Appellants were entitled to charge the sum of LP. 46.500 as lawyer's expenses, and they had been charged in connection with the house in Lewinsky Street.

FOR APPELLANT: Bilesky.

FOR RESPONDENT: A. Hamburger.

JUDGMENT:

This is an appeal from a judgment of the District Court Tel-Aviv, in a case in which the Respondent, who was then Plaintiff, asked for a declaratory judgment to the effect that he did not owe to the Appellant Bank on the 19th November, 1937, any monies in connection with a certain mortgage and that, therefore, the Bank had no right to take steps to execute the mortgage.

In arriving at the figures as to what the indebtedness of the Respondent was on that date and the amounts which had been paid by him up to that date, the District Court deducted certain sums which had been debited to his account. One of those sums is the amount of LP. 46.500 mils, said to be expenses and Court fees in connection with execution proceedings on the mortgage. It has been argued by the Respondent, and the District Court accepted his view, that this sum referred to expenses in connection with a mortgage on another house. The Respondent apparently owned two houses, one in Mikveh Israel Street, and the other in Levinsky Street, Tel-Aviv. The mortgage proceedings, which are the subject matter of this action, are in connection with the house in Mikveh Israel Street.

We think that it is clear that the view which the District Court took is not a correct one. From Exhibit NA/1, which refers to house 2, which it is not disputed is the house in Mikveh Israel Street, the sum of LP. 222.865 mils was paid and duly receipted by the Bank and this sum includes the amount of LP. 46.500 mils. It is, therefore, clear that this amount is in relation to the house in Mikveh Israel Street, and was properly charged by the Bank against the Respondent and the District Court was therefore wrong in deducting it. This being so there is no need to go into the other items which were deducted by the District Court, because if this sum of LP. 46.500 mils is debited against the Respondent's account, it is clear that at this date, 19th November, 1937, he was indebted to the Appellants and the fact

that the sum of LP. 30 was paid in December, 1937, cannot in any way affect the position as it stood on the 19th November, 1937. This sum also of LP. 46.500 mils was correctly charged against the Respondent because there is a clause in each of the mortgage deeds, clause 13 in one and clause 14 in the other, by which all costs, charges and expenses properly incurred by the Company, that is by the Appellants, shall be repaid on demand, and, until the payment, shall be a charge upon the mortgaged properties. The amount, therefore, was correctly charged.

That being so, the appeal must be allowed and the judgment of the District Court set aside and judgment entered for the Appellants, with costs here and below to include LP. 10 hearing fees on the appeal in this Court.

Delivered this 8th day of May, 1940.

British Puisne Judge.

CIVIL APPEAL No. 68/40.

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

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

IN THE APPEAL OF :—

Mrs. Miriam, widow of Anton George. APPELLANT.

v.

Assaf Wahbeh. RESPONDENT.

Adjoining neighbours — Boundaries — Dividing Wall — Mejelle, Art. 906 — Monetary compensation in case of bona fide encroachment.

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated the 21st day of March, 1940 :—

HELD : The Land Court had acted correctly in awarding monetary compensation after holding that Respondent had encroached on the Appellant's boundaries under the belief he had some legal justification for so doing.

ANNOTATIONS :

1. On *Mejelle* Art. 906, *vide* : L. A. 72/28 (C. of J. 23) ; L. A. 56/30 (C. of J. 25) ; L. A. 16/32 (1 P. L. R. 767, C. of J. 26) ; L. A. 23/32 (C. of J. 27) ; L. A. 25/36 (1937, 1 S. C. J. 347).

2. On adjoining neighbours, *vide* : C. A. 68/27 (1 P. L. R. 339, C. of J. 1368) ; C. A. 199/35 (1937, 1 S. C. J. 74) ; C. A. 95/38 (1938, 1 S. C. J. 338) and annotations thereto.

APPELLANT : In person.

FOR RESPONDENT : Atalla.

JUDGMENT:

The Appellant and Respondent are owners of adjoining land, and the Respondent was minded to build a wall to enclose his land. It seems that one boundary mark was missing and the boundary between the two parcels was marked out by agreement between a builder representing the Respondent and the sons of the Appellant representing her, and the wall was built on that boundary. Later is was discovered that a mistake had been made, and in consequence, the wall deviated slightly into the Appellant's land.

The Appellant then brought her action in the Land Court asking for an order that the wall be demolished. That Court applied Article 906 of the *Mejelle* and gave her monetary compensation.

The only question that arises is, was that Court right in so doing ?

The Respondent having built his wall in accordance with an agreed boundary, I think the Land Court was right in holding that he did so under the belief that he had some legal justification for so doing.

As to the amount awarded, the Land Court came to its decision after hearing evidence, and I see no reason to interfere. There is no appeal from the Land Court's order as to costs.

The appeal will be dismissed. The Respondent will have costs on the lower scale, and we certify LP. 15.— for attending the hearing.

Delivered this 8th day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 77/40.

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

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

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

1. Joseph Porty,
2. Wasila Boulos,
3. Anton Khabbaz. RESPONDENTS.

Land Settlement — Evidence — Point of law evidence to justify finding of fact — Land Settlement Ordinance, sec. 64, Land Settlement (Amendment) Ordinance.

In dismissing an appeal from the judgment of the Land Court of Haifa, (in its appellate capacity), dated the 19th of April, 1940 :—

HELD : Whatever view the court of appeal took of the facts, it would not interfere with the decision of the Land Court as it could not be said that the Land Court on a matter of law was not entitled upon the evidence to take the view which it did.

ANNOTATION : On non-interference with findings of facts *vide* C. A. 241/38 (1939, S. C. J. 62) and annotations ; C. A. 80/39 (*ibid.*, p. 426) ; C. A. 102—104/39 (*ibid.*, p. 434) ; C. A. 27/40 (*ante*, p. 81) etc., etc..

FOR APPELLANT : Toukan.

FOR RESPONDENTS : Weinshall.

JUDGMENT:

Naim Eff. Toukan has assisted us with a full argument.

This is an appeal from a decision of the Land Court varying a decision of a Settlement Officer. The case falls to be considered under Section 64 of the Land Settlement Ordinance, as it was before it was amended by No. 48/39, whereunder an appeal lies to this Court on a point of law.

The Settlement Officer took one view of the facts and the Land Court took another. The point of law would appear to be whether there was evidence upon which the Land Court could find as it did. It might be that we should prefer the view of the Land Settlement Officer, but we cannot say the Land Court on a matter of law was not entitled upon the evidence to take the view which it did.

The appeal is, therefore, dismissed with costs on the lower scale. We certify LP. 15.— for attending.

Delivered this 9th day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 83/40.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mohammad Ahmad El Khatib. APPELLANT.

v.

Ismail Mahmoud Hammoudeh. RESPONDENT.

Evidence — Witnesses to a deed may be heard — Proof of signature.

In allowing an appeal from the judgment of the District Court of Jaffa, (sitting as a Court of Appeal), dated the 2nd day of March, 1940, and in remitting the case to the Magistrate to hear the witnesses.

HELD : The lower Courts had erred in refusing to hear the witnesses who signed the deed. The only reason for witnesses on a deed is to prove the signature if denied or if formal proof should be necessary.

ANNOTATIONS :

1. English Law as to evidence of execution of documents : *vide* Halsbury, Vol. XIII, *pp.* 640, *seq.* and *pp.* 766 *seq.* ; Digest XXII, *pp.* 351 *seq.* and *pp.* 495 *seq.* ; see also Criminal Procedure Act, 1865, Secs. 1 & 8.

2. Palestinian authorities : C. A. 53/22 (C. of J. 763); L. A. 122/23 (C. of J. 718) ; L. A. 141/23 (1 P. L. R. 14, C. of J. 719) ; L. A. 68/26 (1 P. L. R. 104, C. of J. 778) ; L. A. 42/33 (2 P. L. R. 201, P. P. 14.i.35, C. of J. 813) ; L. A. 2/35 (2 P. L. R. 417, P. P. 10.xii.35, C. of J. 1934-6, 373) ; L. A. 23/35 (P. P. 22.iv.36, C. of J. 1934-6, 374) ; C. A. 64/38 (1938, 1 S. C. J. 241) ; C. A. 167/38 (1938, 2 S. C. J. 37).

FOR APPELLANT : Nasser.

RESPONDENT : In person.

JUDGMENT:

This appeal will be allowed. The Magistrate declined to hear the witnesses who signed the deed and sent the deed to be examined by experts who found out that the thumbprints alleged to be those of Respondent on the deed are too blurred and so unsuitable for identification. The only reason for witnesses on a deed is to prove the signature if denied or if formal proof should be necessary. We think, therefore, that the Magistrate and the District Court were wrong in refusing to hear those witnesses.

The appeal will be allowed, the judgments of the Magistrate and the District Court will be set aside and the case will be remitted to the Magistrate to hear the witnesses who signed the deed. Costs to await the result of retrial.

Delivered this 15th day of May, 1940.

British Puisne Judge.

CIVIL APPEAL No. 59/40.
CIVIL APPEAL No. 60/40.

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

BEFORE : Copland, Rose and Frumkin, JJ.

IN THE APPEALS OF :—

Civil Appeal 59/40 —

General Manager Palestine Railways. APPELLANT.

v.

Salim Matalon. RESPONDENT.

Civil Appeal 60/40 —

General Manager Palestine Railways. APPELLANT.

v.

Joseph Albina. RESPONDENT.

Railways — Liability for failure to deliver goods — Railway By-Laws Sec. 25 — Marriott v. Yeoward Bros. — Ambiguous words of exemption from liability construed contra proferentes — Negligence, Scott v. Landau & St. Katharines Docks Co., Ballard v. N. B. Rlwy. — Res ipsa loquitur — Findings of fact.

In dismissing consolidated appeals from the judgment of the District Court of Jerusalem, dated the 11th March, 1940 : —

HELD : 1. (Following Marriott *v.* Yeoward Brothers). A man cannot by stipulation excuse himself from the wrongful act of his servants unless he does so in plain and unambiguous language. If the language is ambiguous it must be construed against him. On this principle By-law 25, which was incorporated in the conditions of the contract, was of no avail to Appellants.

2. (Following Scott *v.* Landau & St. Katharines Docks Co. and Ballard *v.* N. B. Railway). This was a case where the maxim *res ipsa loquitur* applied and it was for Appellants to discharge the onus of disproving negligence. The Trial Court had found against Appellant on this question of fact and there was no reason to interfere with their finding..

FOLLOWED : Marriott *v.* Yeoward Brothers (1909) 2 K. B. 937 *dictum* of Pickford, J., at p. 944.

Scott *v.* Landau and St. Katharines Docks Co. (3 H.& C.596) *dictum* of Erle, C. J.

Ballard *v.* N. B. Railway (1923) S. C. (H. L.) 43 *dictum* of Cave, C. J.

ANNOTATIONS :

1. For cases against the Railway Administration, *vide* C. A. 18/39 (1939, S. C. J. 247) and annotations.

2. On the maxim *res ipsa loquitur* see also CADC Jm. 143/37 (P. P. 16.vii.39).

FOR APPELLANT : Salant.
FOR RESPONDENT : Friedenberg and Marein.

JUDGMENT:

Rose, J. : In these consolidated appeals the facts of both cases are similar. The (Plaintiffs) Respondents in both cases delivered certain goods to the Defendant for conveyance and claim the value of these goods on the ground that they were not in fact delivered to the respective consignees, having been destroyed in an accident which was due to the negligence of the Defendant or his servants. The value of the goods was agreed between the parties and the only point for the Court to decide was therefore the question of liability.

The Defendant pleaded, first, that he was exempted from liability by By-law 25 of the Railway By-laws. Secondly, that in any event there was no negligence on the part of any servant of the railway.

The invoices under which the goods were booked had the following words printed on them :—

> "The goods are accepted subject to the regulations and general conditions of Tariff in force".

By-law 25 is one of the regulations referred to and therefore becomes one of the terms of the contract. This By-law reads as follows :—

> "The railway administration shall not be liable for loss or damage of or to animals or goods booked for carriage by railway, or partly by sea and partly by railway, from the act of God, King's enemies, fire, accidents, and all other dangers and accidents of whatever nature or kind".

Pickford, *J.* in Marriott *v.* Yeoward Brothers, 1909 2 K. B. at page 944 refers with approval to "The principle that a man cannot by stipulation excuse himself from the wrongful act of his servants unless he does so in plain and unambiguous language". He goes on to say that "If the language is ambiguous it must be construed against him, and whether particular language is ambiguous or not is a matter which it is not always easy to determine". The learned Judge then want on to consider the particular facts of his case, in which the condition which he had to interpret began as follows : — "The owners ..... are not responsible for any loss, damage, injury, delay, detention .... by whatsoever cause or in whatever manner the matters aforesaid may be occasioned". The learned Judge added that if the condition ended there, there could be no doubt that it was meant to protect and did protect the Defendants from the results of their negligence and even of their wilful misconduct.

By-law 25 contains no such provision ; nor does it contain any clear statement that the Railway is to be absolved from liability in cases where the accident is due to the negligence of its servants. This being so, we consider that By-law 25 is of no avail to the Appellant.

The question of negligence then arises. The admitted facts of these two cases are that the accident occurred as a result of the breaking of a coupling, and we agree with the Trial Court that this is eminently a case which falls within the principle enunciated by Erle C. J. in Scott *v.* Landau and St. Katharines Docks Co. (3 H. & C. 596) which was quoted with approval by Cave C. J. in Ballard *v.* N. B. Railway (1923) S. C. (H. L.) 43, namely,

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

The learned Relieveing President went on to say —

> "The operation in the course of which this accident occurred was under the sole control of the Railway servants, and it was an operation which could be carried through in perfect safety if ordinary care was exercised. Presumably many goods trains had passed safely over this section of line in the past, and although snatching (or jerking) is a feature of goods-train working, I cannot find that the breaking of a perfectly sound hook was anything but a very abnormal occurrence. So I find that the maxim *res ipsa loquitur* applies in this case, and that the onus of showing that there was no negligence is on the Defendant. The Defendant has failed to show that the very severe snatch which broke the hook was not due to negligence".

Whether or not the Defendant satisfied the onus which was upon him of disproving his negligence is a question of fact, upon which we see no reason to dissent from the finding of the Trial Court.

The appeals in both cases must therefore be dismissed with costs, to include in each case the sum of LP. 10 for advocate's attendance fee.

Delivered this 17th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL No. 56/40.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Shlomo Shapira. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Urban Property Tax — U. P. T. Ord., Sec. 8 — 1935 *amendment without retroactive effect — Application of exemption in respect of new buildings, to additions — Ottoman Law with regard to werko and musaqqafat — Effect of order of High Commissioner under Sec.* 3(1) *of the Ordinance on Ottoman Law — Retroactivity — Interpretation.*

In dismissing an appeal from the judgment of the District Court of Tel-Aviv, dated the 23rd February, 1940 :—

HELD : 1. When the High Commissioner, by order under Section 3(1) of the Ordinance, has declared that the Urban Property Tax is in force in a certain area, the Ottoman Law on *werko* and *musaqqafat* is thereupon, impliedy at any rate, repealed and has no effect in such an area.

2. The 1935 amendment to the Ordinance could not be relied upon by Appellant, as it was not retroactive prior to its enactment, but was limited and was stated to have come into force on the 1st of April, 1935.

3. The whole of Section 8 should be read together. Sub-section (1) allowed to a person who would have enjoyed exemptions under the Ottoman Law the same enjoyment in respect of taxes imposed under the Ordinance ; the sub-section referred to general exemptions such as those enjoyed by charitable institutions etc. Sub-section (3), however, was a qualification of subsection (1) and referred in specific terms to newly constructed buildings and paragraph (iii) thereof excluded additions made to existing buildings.

ANNOTATIONS :

1. Other cases on Urban Property Tax : H. C. 39/39 (1939, S. C. J. 389) and H. C. 3/40 (*ante,* p. 15).

2. On retroactivity *vide* C. A. 49/40 (*ante,* p. 106) and cases cited in 2nd paragraph of annotations thereto.

3. On repeal by implication see Halsbury, Vol. 31, *p.* 561, *sec.* 759, Digest, Vol. 42, *pp.* 763 *seq., Nos.* 1882 *seq.* ; see also C. A. 121/34 (2 P. L. R. 436, P. P. 1.3.iii.36, C. of J. 1934-6, 75 Ha. 19.iii.36) and C. A. 237/37 (1939, S. C. J. 46).

4. Statutes and sections to be read as a whole : Halsbury, Vol. 31, *p.* 464, *sec.* 566 ; Digest, Vol. 42, *pp.* 645 *seq., Nos.* 505 *seq.* ; see also H. C. 58/37 (P. P. 23.xi.37).

5. Generally on the interpretation of statutes, see C. A. 234/37 (1938, 1 S. C. J. 26) and annotations, C. A. 237/37 (1939, S. C. J. 46) and sixth paragraph of annotations, C. A. 20/39 (*ibid.*, p. 116) and C. A. 63/39 (*ibid.*, p. 356).

FOR APPELLANT : Fellman.
FOR RESPONDENT : Salant.

JUDGMENT:

This appeal raises an interesting point on the construction of Section 8 of the Urban Property Tax Ordinance, Cap. 147. The Appellant was assessed to three years' Urban Property Tax on certain additions that he made to an existing building, which additions were completed and assessed to taxation in December 1934. On the 1st of April, 1935, which is the opening day of the new financial year, the property would normally be liable to pay taxes. In October 1935 an amendment to the Urban Property Tax Ordinance was brought into force, in particular of Section 8, and this amendment is said to have come into force on the 1st of April 1935. The relevant sections of the original Ordinance as found in Vol. II, Laws of Palestine Cap. 147 are as follows :—

S. 3(1) "The High Commissioner may, by order published in the Gazette, declare that, in place of the house and land tax payable at the date of such order, there shall be payable annually from the date specified in the order by the reputed owners of house property and land within the area described in such order (in this Ordinance called "the urban area") a tax which shall be assessed and paid in accordance with the provisions of this Ordinance".

S. 8(1) "Any person who would have enjoyed under the law for the time being in force exemption from, or abatement in respect of, house and land tax if an order under this Ordinance had not been made shall enjoy the like exemption or abatement in respect of the tax imposed hereunder".

S. 8(3)(i) "Subject to the provisions of Section 5(4), where a buiding is being newly constructed at the time of assessment or revision, the reputed owner of the house property shall not be liable to pay the tax for the year for which the assessment is made and for two years following such assessment :

Provided that the reputed owner shall give notice to the district commissioner of the nature of the building which he desires to construct within two months from the date of the commencement of the construction or, where the construction was begun prior to the date of an order under this Ordinance, within two months from the date of the application of the Ordinance".

S. 8(3)(iii) "Nothing in this subsection shall be deemed to extend to any addition made to an existing building".

The Appellant has argued first that under the true construction of the Urban Property Tax Ordinance, as amended by the 1935 Ordinance,

he is entitled to exemption for three years for the additions to his existing building. He further argues that if this is not correct, then by reason of Section 8(1) of the Ordinance, the exemptions which he would have enjoyed under Ottoman Law are preserved, and under the Ottoman Law, additions to existing buildings were exempt for a term of two years, and his last argument is that the Ottoman Law with regard to *werko* and *musaqqafat* has never been repealed.

It will be convenient to deal with the last point first. We are of opinion that when the High Commissioner by Order under Section 3(1) of the Ordinance has declared that the Urban Property Tax is in force in a certain area, the Ottoman Law on *werko* and *musaqqafat* is thereupon, impliedly at any rate, repealed, and has no effect in such an area. We are also of opinion that the amendment to the Urban Property Tax of 1935 cannot be relied upon by the Appellant in this case because it is not retrospective, prior to its enactment, and indeed, so far from being retrospective, this Section is limited and is stated to have come into force on 1st of April, 1935.

With regard to the argument that the exemptions enjoyed under Ottoman Law are still preserved under Section 8(1) of the Ordinance, it is true that this sub-section does allow to a person who would have enjoyed under the Ottoman Law exemption from, or abatement in respect of, house and land tax if an order under this Ordinance had not been made such enjoyment in respect of taxes imposed under this Ordinance, but we feel that the whole of Section 8 should be read together.

Section 8(1) would seem to refer to general exemptions such as those enjoyed by charitable institutions, religious bodies and Consular Corps, or the like, whereas sub-section 3 of Section 8 refers in specific terms to newly constructed buildings. In any case, we think, that sub-section 3 is in the nature of a qualification of sub-section 1, and as I have said, the whole clause must be read together. In sub-section 3 it is provided by paragraph (iii) — "Nothing in this sub-section shall be deemed to extend to any addition made to an existing building".

It seems to us that under this sub-section (iii) the Government were entitled to charge in this particular case Urban Property Tax on these additions and that the Appellant cannot claim the exemption to which he has urged that he is entitled.

For these reasons we think that this appeal should be dismissed with costs to include LP. 10 hearing fees.

Delivered this 22nd day of April, 1940.

British Puisne Judge.

CIVIL APPEAL No. 66/40.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

The Palestine Ashrai Bank, Ltd. — APPELLANT.

v.

1. Ali el Mustakim,
2. Mohammad el Mustakim,
3. Rose T. Wolfe. — RESPONDENTS.

Stay of proceedings — C.P.R. 6, 183–6 — "Stay", "Postpone or adjourn" — Interpretation — No inherent jurisdiction where specific powers are given — Art. 46, P. O. in C. — Court cannot stay except where allowed by the rules — When stay should be granted — Exercise of discretion.

In allowing an appeal from the ruling of the District Court of Tel-Aviv, dated the 21st February, 1940, and in remitting the case to the lower Court :—

HELD : 1. The words "stay" "postpone" and "adjourn" as used in the Civil Procedure Rules, had different meanings and were not used indiscriminately to mean the same thing. The Court has no power to stay except as laid down in the Rules, and no inherent jurisdiction could be invoked under the Rules or under Article 46 of the Palestine Order in Council.

2. In using the word "stay" the learned judge below had not meant "adjourn".

3. Even if the Court had inherent jurisdiction to grant a stay, this was not a proper case for the exercise of this jurisdiction.

ANNOTATIONS :

1. It has already been held in C. A. 52/36 (P. P. 7.vii.36 ; C. of J. 1934-6, 105, Ha. 30.vii.36) and in C. A. 20/39 (1939, S. C. J. 116) that the English Rules of the Supreme Court are not applicable in Palestine.

2. On the construction of words in context, *vide* Halsbury, Vol. 31, *p.* 482, *sec.* 598, Digest, Vol. 42, *pp.* 643 *seq., Nos.* 479 *seq.* ; see also H. C. 23/32 (P. L. R. 687, C. of J. 740).

3. On the interpretation of statutes generally see C. A. 56/40 (*ante*) and 5th paragraph of annotations.

4. On the discretion of the District Court see *e. g.* C. A. 27/39 (1939, S. C. J. 260), C. A. 43/39 (*ibid.*, p. 315), C. A. 85/39 (*ibid.*, p. 438) and C. A. 90/39 (*ibid.*, p. 415) — *adjournments* ; C. A. 247/38 (*ibid.*, p. 13) — *remitting an award, calling arbitrator as witness* ; C. A. 83/39 (*ibid.*, p. 467) and C. A. 93/39 (*ibid.*, p. 471) — *awarding costs* ; C. A. 60/39 (*ibid.*, p. 283) — *ad-*

ministration of estate in bankruptcy ; C. A. 88/39 (*ibid.*, p. 408) — *appointment of receiver* ; C. A. 20/40 (*ante*, p. 78) and C. A. 21/40 (*ibid.*, p. 83) — *appointment and dismissal of administrator* ; etc. etc..

FOR APPELLANT : P. Joseph and Karwassarsky.

FOR RESPONDENTS : No. 1 — Cattan.
No. 2 — Sassoon.
No. 3 — absent — served.

JUDGMENT:

This is an appeal from an Order made by Judge Curry, granting stay of an action filed in the District Court of Tel-Aviv. The arguments on this appeal have ranged over a somewhat wide ground, but the two points to be considered are, first, has a Court power to stay proceedings under the rules or otherwise ; and secondly, if the answer to that is in the affirmative, was the Order for stay granted in this case correctly made.

Now the Civil Procedure Rules in this country lay down a very large number of provisions with regard to the conduct and trial of actions, and the rules really which may throw a little light on this problem are Rules 6 and 183—186. Rule 6 gives power to the Chief Justice in certain circumstances to "stay" proceedings in an action. Rule 183 gives a Court power, if it thinks it expedient for the interests of justice, to "postpone or adjourn" a trial. Rule 186, which is in the same part as Rule 183, (Part XIV) talks about a "stay" of proceedings. I think one must presume that where the words "adjourn" or "postpone" or "stay" are used in the Rules, especially when they are used in the same part of the Rules, they have different meanings ; one cannot presume that they are used indiscriminately to mean the same thing. It seems to me that "postpone" or "adjourn" and "stay" are not the same, and where, as in these Rules, there is a certain rule giving power to stay, and other rules give power to adjourn, I do not think that under the Rules there is any power to stay except as laid down in those Rules. There is nothing in the Rules themselves which gives a Court inherent jurisdiction to stay, and where you have elaborate Rules giving certain powers to a Court to stay, then I do not think that you can invoke an inherent jurisdiction to do things outside those Rules, nor can you invoke Article 46 of the Palestine Order-in-Council to authorise the introduction of English Rules of Procedure, which have not been embodied possibly for very good reasons, in the Rules in force in this country.

It has been argued before us that the learned Judge in using the word

"stay" really meant "adjourn". I do not think that that can be so, because in his Order granting leave to appeal the learned Judge says that Dr. Joseph, who was appearing for the present Appellants, argued that — "Although the Court has inherent jurisdiction to adjourn or postpone a case, it has no inherent jurisdiction to stay proceedings save in special cases, none of which arises in this case". The learned Judge goes on to say, "I therefore grant leave to appeal as to whether this Court has power to grant the stay".

It is obvious from the wording of this Order that the learned Judge had in his mind the difference between "adjourning" and "staying", and if in his original Order he had said "stay" when he meant "adjourn", then, when he made his Order granting leave to appeal, that moment would, I think, have been the correct moment to indicate what he really meant. I am therefore of opinion that there is no power given to the Court under the Rules or under any inherent jurisdiction to stay proceedings except in the special circumstances laid down in the Rules.

That disposes of this appeal, but I would add that, even if I had thought that the Court had inherent jurisdiction to stay, I do not think that this jurisdiction would have been properly exercised in this case. I can see no reason why the District Court case should be stayed pending the determination of the Land Court case, and at any rate the reasons given by the learned Judge are not sound ones. As Dr. Joseph remarked, a prospective fear of what may possibly occur in the future is no ground for granting a stay now. If the circumstances in the future should show the necessity for a stay, then that future moment would be the correct one on which to grant such an application.

I think, therefore, that the appeal should be allowed and the Order made by the learned Judge to stay further proceedings in the District Court case should be set aside, as there was no power to make it. The Appellant is entitled to his costs and LP. 15 fee for attending the hearing.

We would like to express the opinion that we think it is highly desirable that this present action, which is the only one with regard to which an appeal lies before us, should be disposed of at the earliest possible moment.

Delivered this 7th day of May ,1940.

British Puisne Judge.

HIGH COURT No. 31/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Ottoman Bank, Jaffa. PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Arab Bank Limited, Jaffa,
3. Engineering Corporation of Palestine,
4. Sheikh Abdul Kader el Muzaffar. RESPONDENTS.

Attachments — C.E.O. may not order cancellation.

In granting an application for an order to issue directed to the First Respondent calling upon him to show cause why his Order made in Execution File No. 15/39 Jaffa District Court dated 19th April, 1940 should not be set aside and why he should not be directed to withhold the sum of LP. 1800 until the determination of case No. 2/39 and final judgment is given. Alternatively, to keep in Court a proportional amount to which petitioner may ultimately be entitled in the distribution of the said monies :—

HELD : A Chief Execution Officer cannot order the cancellation of an attachment granted by a Court.

ANNOTATIONS : It was already held in H. C. 26/39 (1939, S.C.J. 288) that the C.E.O. is bound to carry out orders of the Court.

FOR PETITIONER : Richardson.

FOR RESPONDENTS : No. 1 — absent — served.
No. 2 — Elia (by delegation).
No. 3 — Polonsky.
No. 4 — In person.

ORDER:

This order will have to be made absolute. The Chief Execution Officer disregarded, not in specific terms but in effect, the order of the District Court imposing a provisional attachment which he has no power whatsoever to do. Only a Court can cancel a provisional attachment — not a Chief Execution officer. The order *nisi* will be made absolute. The Petitioner will share in the distribution of the monies and take the proportional amount to which he may be entitled. The second Respondent will pay the Petitioner his costs and LP. 10 fee for attending the hearing.

Given this 14th day of May, 1940.

British Puisne Judge.
Puisne Judge.

CIVIL APPEAL No. 78/40.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Zuhdi Abu Jibain,
2. Banco-di-Roma. APPELLANTS.

v.

Benjamin Friedman. RESPONDENT.

Contracts — Transfer subject to "approval of competent authorities" — Town Planning Ordinance — Approval of parcellation scheme — Parcellation not a disposition.

In allowing an appeal from the judgment of the District Court of Tel-Aviv (sitting as a Court of Appeal) dated the 23rd of February, 1940 :—

HELD : To determine what was meant by the term "approval by the competent authorities" reference must be had to the Town Planning Ordinance and the term meant approval by the bodies specified in that Ordinance. It could not mean approval by the Director of Land Registration as parcellation did not constitute a disposition and in view of the fact that separate provision was made in the contract for transfer at the Land Registry within four months after the approval.

ANNOTATIONS :

1. On impossibility of performance, *vide* C. A. 246/37 (1938, 1 S.C.J. 40), C. A. 4/38 (*ibid.*, 159), C. A. 9/39 (1939, S. C. J. 104).

2. Recent cases on interpretation of contracts : C. A. 24/39 (1939, S.C.J. 378), C. A. 84/39 (*ibid.*, 477), C. A. 12/40 (*ante*, p. 55).

FOR APPELLANTS : Goitein.
FOR RESPONDENT : Silberg.

JUDGMENT:

This is an appeal by leave from the District Court of Tel-Aviv, sitting as a Court of Appeal, when that Court dismissed an appeal from the Magistrate's Court, awarding the present Respondent a sum of LP. 100 for breach of contract.

This case arises really out of the use of the term "competent authorities" in the contract without specifying what the parties meant by that term. Now, the contract between the parties provides that

the approval of the competent authorities to the parcellation, which was in contemplation, should be given within twelve months from the date of signature of contract, and that registration of the particular plot purchased by the Respondent should be effected within a further four months. It is admitted, quite frankly, by the Respondent, that there is nothing in the Town Planning Ordinance which says that the Director of Land Registration must approve a parcellation scheme, and equally, that there is nothing in the Town Planning Ordinance which says that a parcellation scheme must be approved by the Department of Surveys. To determine what is meant by the term "approval by the competent authorities", I think, we must refer to the Town Planning Ordinance, and it seems to me that the approval required in the contract must be the approval of the bodies specified in that Ordinance. This view is borne out by the fact that the contract allows a further four months for the registration of the plot purchased in the name of the purchaser, and, therefore, contemplates a distinction between the approval of the parcellation scheme and the completion by the registration of the plot purchased in the name of the purchaser. There is nothing in any ordinance which gives a Director of Lands power to approve or disapprove a parcellation scheme. We are of opinion that a parcellation scheme is not a disposition, since a disposition, as Mr. Goitein has correctly argued, means a disposal of ownership or possession, and a parcellation is not such a disposition, unless and until effect is given to it by registration of the various plots in the names of the new owners. There is no difference to our minds between a parcellation and a parcellation scheme. The only approval that is required is the approval of a parcellation scheme, and, as we find, that approval was given within the twelve months laid down in the contract.

The appeal must therefore be allowed, and the judgments of both the lower Courts set aside, and the action of the Respondent, Plaintiff in the Magistrate's Court, must be dismissed. The Appellant will have all his costs both here and below to include LP. 10 hearing fees for the appeal to this Court.

Delivered this 15th day of May, 1940.

British Puisne Judge.

HIGH COURT No. 33/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Elsa Munk. PETITIONER.

v.

Inspector General of Police and Prisons. RESPONDENT.

Detention — Restriction and Detention Orders (Objections) Rules, 1939 — Whether appearance before Tribunal a matter of right or of grace.

In dismissing an application for an order to issue directed to the Respondent calling upon him to show cause why he should not serve the Petitioner with a ... and form of objections as set out in forms I and II in the Schedule to the ...tion and Detention Orders (Objections) Rules, 1939 :—

...: The order *nisi* would be discharged upon Respondent undertaking urgently to send Petitioner before the Tribunal.

...ETITIONER : Zommerfeld.
...ESPONDENT : Crown Counsel (Bell).

ORDER:

... Court after hearing Mr. Zommerfeld for the Petitioner and ... Crown Counsel for the Respondent, orders that the order *nisi* be discharged on undertaking by the Respondent to send Petitioner before Tribunal urgently without prejudice to the question of whether the Petitioner is entitled as of right to be heard or merely as a matter of grace.

Liberty to apply.

Given this 20th day of May, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 34/40.

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

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

IN THE APPEAL OF :—

1. Aref Ahmad Tumallah,
2. Salim Abdul Majid Tumallah. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Advocates — Accused not represented at trial immaterial if no legal points involved — Findings of fact — Sentence.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 23rd of April, 1940, whereby the Appellants were convicted of robbery contrary to Sections 288 and 23 of the Criminal Code Ordinance, 1936 and each sentenced to three years' imprisonment :—

HELD : The fact that the Appellants were not represented in the Court below did not affect the case as there was no point of law which they might have taken out only questions of fact which Appellants could have refuted by their own evidence.

ANNOTATIONS : On the effect of accused not being represented by an advocate, *vide* CR. A. 151/37 (1938, 1 S. C. J. 21), CR. A. 16/38 (*ibid.*, p. 131), CR. A. 81/38 (1938, 2 S. C. J. 111), CR. A. 6/39 (1939, S. C. J. 76), CR. A. 8/39 (*ibid.*, p. 93), CR. A. 88/38 (*ibid.*, p. 102) and CR. A. 54/39 (*ibid.*, p. 484).

FOR APPELLANTS : Nuweihid.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

We do not interfere with the judgment of the Court below. There was evidence upon which the Court acted. The fact that the Appellants were not represented in the Court below does not affect the case, as there was no question of law which they might have taken, but only questions of fact which Appellants were capable of refuting by their evidence. As to the sentences, we think that they are not excessive, and no good ground is urged on behalf of the Appellants why they should be reduced. The appeal will be dismissed.

Delivered this 20th day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 90/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Mahmoud Hamdan Alayan El-Masri,
2. Mohammad Hamdan Suleiman El-Masri. APPELLANT.

v.

Abdel Ruhmen El-Farra as Mayor of Khan Yunis. RESPONDENT.

Bond on appeal — C. P. R. 325—7 — Bond and application to approve security.

In dismissing an appeal from the judgment of the District Court of Jaffa (sitting as a Court of Appeal) dated the 11th April, 1940 :—

HELD : Under Rule 327 of the Civil Procedure Rules, an Appellant may, if he does not wish to file a bond, apply to give other reasonable security to the satisfaction of the Registrar. The notice of appeal is then accompanied by this application.

There was no bond in this case, nor had an application been made to approve a security. This Appellant could have done when objection was taken by the Respondent that there was no proper security, but he had failed to do so.

ANNOTATIONS : Other decisions on the bond for appeal under the new rules : C. A. 149/38 (1938, 1 S.C.J. 439) and C. A. 76—77/39 (1939, S.C.J. 361).

FOR APPELLANTS : Moghannam.

FOR RESPONDENT : Nasr.

JUDGMENT:

This is an appeal from a judgment of the District Court of Jaffa, sitting as a Court of Appeal. The point raised is a simple one, on the true construction of Rules 325 and 327 in the Civil Procedure Rules, 1938. There is no doubt, when looking at the document which is said to be a security, that it was intended to be a bond under Rule 325. Rule 327 says that if an Appellant does not wish to file a bond he can, *inter alia*, apply to give other reasonable security to the satisfaction of the Registrar, and if he should so desire, then a notice of appeal shall be accompanied by an application to settle and approve the security offered.

There was no application as provided for by Rule 327 to the Registrar to settle and approve the security offered, if this document was in fact intended to be a security and not a bond. The Appellant, when the objection was taken that there was no proper security for the costs of the appeal, could have applied to the Court to allow him file further security. He did not do so, instead of which, he comes to this Court on appeal against the judgment of the District Court.

For these reasons we think that this appeal must fail and be dismissed with costs and LP. 10 fees for attending the hearing.

Delivered this 23rd day of May, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 20/40.

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

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

IN THE APPEAL OF :—

Moshe Yehezkiel. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Town planning offence — Town Planning Ordinance, Sec. 35(2) — *Order of demolition — Conviction quashed on appeal but demolition order upheld — No miscarriage of justice — Magistrates' Court Jurisdiction Ordinance, Sec.* 11(2).

In dismissing an appeal from the judgment of the District Court of Jerusalem (sitting as a Court of Appeal) dated the 17th of January, 1940, whereby the Magistrate's judgment, dated 5.12.39, convicting the Appellant of failing to comply with the order of the Magistrate, Jerusalem, dated the 26th of January, 1939, in Criminal Case No. 508/39, was set aside but the order of demolition to be carried out by the Jerusalem Local Town Planning Commission was confirmed :—

HELD : Although the judgment of the District Court was open to some criticism, the proviso to Section 11(2) of the Magistrates' Courts Jurisdiction Ordinance could be applied, no miscarriage of justice having actually occurred.

ANNOTATIONS :

1. Palestinian authorities on Town Planning are collated in the annotations to CR. A. 10/39 (1939, S. C. J. 155) ; see also CR. A. 20/39 (*ibid.*, p. 242) and CR. A. 65/39 (*ibid.*, p. 515).

2. On irregularities which do not cause injustice, *vide* CR. A. 5/38 (1938, 1 S. C. J. 63) and CR. A. 78/38 (1938, 2 S .C. J. 112).

FOR APPELLANT : Ginio.
FOR RESPONDENT : Said.

JUDGMENT:

On 26th January, 1939, the Magistrate made an order for the demolition of certain property if in the interim the Defendant did not obtain a permit from the proper authority. Against this there was no appeal.

No permit was obtained and the property was not demolished. Further proceedings were therefore taken against the Defendant under Section 35(2) of the Town Planning Ordinance, 1936—38.

The Magistrate fined him LP. 1, and ordered demolition. Against that order the Defendant appealed to the District Court. The District Court remitted the fine and quashed the conviction, but held —

> "As to the part of the judgment of the Magistrate directing that the demolition of the building originally ordered to be carried out by the Jerusalem Local Town Planning Commission, we consider that the Magistrate was entitled to explain his order of 26.1.39 as to who should carry out the order of demolition, and we see no reason to interfere with this part of the judgment".

The Defendant now appeals to this Court.

It may be that the judgment of the District Court is open to some criticism, but we think that this is a case to which the proviso to Section 11(2) of the Magistrates' Courts Jurisdiction Ordinance, 1939, may be applied, and we do not think any miscarriage of justice has actually occurred.

The appeal is therefore dismissed.

Delivered this 26th day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 57/40.

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

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

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

1. Hasan Yusuf Fityan,
2. Ahmad Mahmoud Saleh El Attariya,
3. Reshid Mahmoud Saleh el Attariya,
4. Mohammad Abd er Rahman Saleh el Attariya,
5. Hamdan Mohammad Khalil Saleh,
6. Mustafa Mohammad Khalil Saleh,
7. Ali Ithman Yusuf Abu al Ful,
8. Mohammad Kayed Mohammad Abu al Ful,
9. Umar Kayed Mohammad Abu al Ful,
10. Mohammad Said Mohammad Abd al Qasem,
11. Ayisha Mohammad Abd el Qasem,
12. Fatima Mohammad Abd el Qasem,
13. Mustafa Yasin Dawud Abu al Ful,
14. Ali Yasin Dawud Abu al Ful,
15. Abd er Rahman Hamdan Khalil Saleh. RESPONDENTS.

Land Settlement — Claim of title under Art. 78, Ottoman Land Code — Both possession and cultivation to be proved — Costs.

In allowing an appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 12th January, 1940, and in setting aside the decision of the Settlement Officer and registering the land as *miri* in the name of the Government of Palestine :—

HELD : In order to establish title under Article 78 of the Ottoman Land Code it is necessary to prove both possession and cultivation. In this case cultivation had not been proved.

ANNOTATIONS : Other cases on Art. 78 O. L. C. : L. A. 56/24 (1 P. L. R. 41, C. of J. 1212) ; L. A. 64/24 (reported as 64/24 in C. of J. 646) ; L. A. 71/25 (C. of J. 57) ; L. A. 76/25 (1 P. L. R. 87, C. of J. 1472) ; L. A. 81/25 (1 P. L. R. 86, C. of J. 1474 ; L. A. 135/26 (C. of J. 1729) ; L. A. 35/27 (C. of J. 1093). See also C. A. 238/37 (1938, 1 S. C. J. 32) and annotations ; C. A. 228/37 (*ibid.* 99) and annotations.

FOR APPELLANT : Salant — J. G. A.

FOR RESPONDENTS : No. 9, absent — served, detained at Acre. For the rest, Haddad.

JUDGMENT:

Rose, J. : This is an appeal by the Attorney General from a decision of the Land Settlement Officer, Haifa Settlement Area, in which he held that the Respondents were entitled to certain land in accordance with the provisions of Article 78 of the Ottoman Land Code.

The point of appeal is a short one, namely, that in order to establish

a title under Article 78 it is necessary for the claimants to prove both possession and cultivation, and that in the present case not only is there no finding of cultivation but there is an inference from the wording of the decision that the land was actually uncultivable.

The wording of the Article is quite clear and unambiguous, and we consider that the absence of a finding that the land was in fact cultivated is sufficient to decide this appeal.

The appeal, therefore, must be allowed, the decision of the Settlement Officer set aside, and the land registered in the name of Government as *miri* land. In the circumstances there will be no order as to costs.

Delivered this 16th day of April, 1940.

Chief Justice.

I concur.

British Puisne Judge.

CIVIL APPEAL No. 28/40.

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

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

IN THE APPEAL OF :—

Mudir El Awqaf El Islamyeh El'Am. APPELLANT.

v.

1. Keren Kayemeth Leisrael, Ltd.,
2. The Attorney General. RESPONDENTS.

Holy places — Holy Places Order in Council — Test for determining whether area is a Holy place — C. A. 25/40 — Cemetery not necessarily a Holy Place.

In dismissing an appeal from the decision of the Settlement Officer, Tulkarm Settlement Area, dated the 21st November, 1939 :—

HELD : Before the Holy Places Order in Council applies to an area there must be some evidence that the place in question has been regarded as a Holy Place by a number of people for a period of time or, alternatively, that the character of the place is so well known that the Tribunal may take notice of it. A cemetery is not a Holy Place unless there are special facts to make it so.

DISTINGUISHED : C. A. 25/40 (*ante*, p. 91).

ANNOTATIONS : On Holy Places see L. A. 53/32 (P. P. 18.vi.33, C. of J. 983), L. A. 2/33 (2 P. L. R. 53, P. P. 23.iii.34, 28.i.35, C. of J. 983) and C. A. 178/33 (2 P. L. R. 247, P. P. 3.vii.34, 27.i.35, C. of J. 1934—36, 88).

FOR APPELLANT : Muhtadie.

FOR RESPONDENTS : No. 1 — Ben Shemesh.
No. 2 — Crown Counsel — (Hogan).

JUDGMENT:

In the circumstances we do not think this case should be remitted to the Settlement Officer.

We are left with the question whether part of the land in question comes within the provisions of the Holy Places Order-in-Council.

We are of opinion that before that Order applies there must be some evidence that the place in question has been regarded as a Holy Place by a number of people for a period of time or, alternatively, that the character of the place is so well known that the Tribunal may take notice of it. I do not think that the decision in Civil Appeal 25/40 is an authority against this view. In that case the parties dropped the point, and this Court had no reason to think the place was holy in the sense of the Order-in-Council.

In the case now before us the lands in question are cemeteries. Although a cemetery may be holy in the sense that it is consecrated ground or is so regarded by the friends and relations of those buried in it, we do not think it is a Holy Place unless there are special facts to make it so. There was no evidence of such facts in this case, and we have no knowledge of the places concerned.

The appeal is dismissed. The Respondents will respectively have costs on the lower scale, and we certify LP. 15 for attending the hearing for each of them.

Delivered this 23rd day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 74/40.

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

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

IN THE APPEAL OF :—

Abdel Lateef Bey Salah. APPELLANT.

v.

Kasem Almad Abu Ez Zelaf. RESPONDENT.

Advocate and client — Fee agreement — Dispute subsequently settled — Mejelle Art. 443 — Remedy of advocate by way of quantum meruit if no payment made under the contract — Otherwise client to apply for recovery under plea of total failure of consideration — Advocates Ordinance not to be extended beyond its intention, compare Usurious Loans Ordinance.

In allowing an appeal from the judgment of the District Court of Nablus, dated the 21st day of March, 1940, and in dismissing Respondent's action and entering judgment for the Appellant :—

HELD : 1. The provisions of the *Mejelle* were inadequate to meet the case.

2. No implied terms could be read into the contract whereby the client could not settle his action, thereby preventing the advocate from performing his part of the contract.

3. When the case was settled by the client, if no payment had been made under the contract, the advocate could have sued under *quantum meruit,* but money having been paid, it could only be recovered if there had been a total failure of consideration which was not the case.

4. The Advocates Ordinance could not be extended, as suggested by Respondent, under any doctrine of equitable construction and the legislature had not intended to reopen every transaction between advocate and client.

ANNOTATIONS : Palestinian authorities on advocates' remuneration :

C. A. 104/30 (C. of J. 86) ; C. A. D. C. J'm 186/30 (C. of J. 87) ; C. A. 135/32 (P. L. R. 795, C. of J. 91, P. P. 24.iii.33) ; C. A. 36/33 (P. P. 13.ii.34, C. of J. 93) ; C. A. 171/33 (2 P. L. R. 182, P. P. 7.x.34, C. of J. 1239) ; C. A. 13/35 (P. P. 29.vi.36, C. of J. 1934—6, 22, Ha. 16.vii.36) ; C. A. 176/35 (C. of J. 1934—6, 24, P. P. 24.i.36, Ha. 1.iv, 1.vii.36) ; C. A. 177/35 (P. P. 27.i.36, C. of J. 1934—6, 26) ; C. A. 195/35 (1937, 1 S. C. J. 74) ; C. A. 133/38 (1938, 1 S. C. J. 414), C. A. D. C. T. A. 123/38 (Tel-Aviv Law Reports, 1938, p. 89) ; C. A. D. C. T. A. 285/38 (*ditto*, 1939, p. 7) ; C. A. D. C. T. A. 139/39 (*ibid.*, p. 51).

FOR APPELLANT : Abcarius Bey and Cattan.
FOR RESPDNDENT : Siksek.

JUDGMENT:

By an agreement in writing the present Respondent, whom I will call the client, engaged the Appellant as his advocate in connection with a substantial claim which he was proposing to prosecute. From the agreement it is clear that the advocate was to act in the preliminary proceedings and to appear at the trial. His remuneration was to be LP. 600 — LP. 250 of which was paid on the signing of the agreement, the balance being payable under a promissory note.

It appears that the client settled his dispute, and he then sued the advocate for the return of the LP. 250 paid under the agreement. No question arises before us with regard to the promissory note.

The District Court held that the terms of the agreement had not been varied, that the advocate had not been negligent, and that he had done work under the contract the value of which it assessed at LP. 125, and it gave judgment for the client for the sum claimed (*i. e.* LP. 250) less this amount, basing itself on the following proposition :—

> "The relation between advocate and client is one of trust and we feel that the Advocates Ordinance is intended to cover those relations. Neither the *Mejelle* nor the ordinary laws of contract are applicable in this case. The Court, therefore, in enforcing this agreement, must apply section 21 of the Advocates Ordinance (Laws of Palestine, Vol. 1, Cap.. 2) (*sic.*). This section applies whether it is the advocate who is seeking to enforce the agreement or whether the client is seeking relief".

In deference to the arguments which were addressed to us I would say that the provisions of the *Mejelle,* in particular Article 443, with its homely examples, are inadequate to decide this case.

Firstly it is necessary to consider the contract. I do not think that any implied term can be read into it whereby the client could not settle his action, thereby preventing the advocate from performing his part of the contract. When this was done, if no payment had been made under the contract, no doubt the advocate could have sued upon a *quantum meruit* in respect of any work done by him, but where money has been paid somewhat different considerations arise, and I do not think it can be recovered unless there is a total failure of consideration. Clearly there was no such failure here, as the advocate had done work the value of which the Court assessed at LP. 125.

I do not think the Advocates Ordinance can be extended, as it was by the District Court, under any doctrine of equitable construction as suggested by the Respondent. If the legislature had intended to give the Court power to open every transaction between an advocate and a client it would have done so, as it did in the case of usurious loans.

The appeal succeeds and the judgment of the District Court will be set aside, and judgment entered for the Defendant in the action. The Appellant will have costs of the action with LP. 7 for attendance fee and costs of the appeal on the lower scale with LP. 15 fee for attending the hearing.

Delivered this 27th day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 89/40.

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

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

IN THE APPEAL OF :—

1. Yousef Hassan Salah of Nablus, through his curator,
2. Mohammad Hassan Salah,
3. Adel Hassan Salah,
4. Omar Salah. APPELLANTS.

v.

Aref Abd El Kader ar-Raziq and 37 others. RESPONDENTS.

Appeals — C. P. R. 24, 69(1) — Advocates Ordinance Sec. 4(2) — Appeal must be signed by appellant or by his advocate — May not be signed by general attorney — C. P. R. 313 — Omission to cite all parties as respondents — C. P. R. 333 — No good cause shown — Land (Settlement of Title) (Amendment) Ord. 1939 — Quaere whether appeal lies to Court of appeal under old Ordinance.

In dismissing an appeal from the judgment of the Land Court of Nablus (sitting as a Court of Appeal), dated the 8th April, 1940 :—

HELD : 1. Rule 24 of the Civil Procedure Rules must be strictly interpreted and under it a litigant must act either in person or by an advocate.

The appeal on behalf of the first three Appellants having been signed on their behalf by the holder of a general power of attorney was consequently not before the Court.

2. As regards the fourth Appellant his appeal would be dismissed for failure to cite as Respondents all the parties to the original action. A mistake did not constitute good cause under Rule 333.

ANNOTATIONS :

1. On defective representation of parties, see also C. A. 115/31 (P. L. R. 675, C. of J. 90) ; C. A. 33/33 (2 P. L. R. 14, P. P. 2.i.34, C. of J. 92) ; C. A. 139/34 (2 P. L. R. 240, P. P. 11.i.35, C. of J. 1934–6, 18) ; C. A. 194/35 (C. of J. 1934–6, 677) ; M. A. 7/35 (2 P. L. R. 362, P. P. 24.vii.35, C. of J. 1934–6, 676) ; C. A. 235/37 (1938, 1 S. C. J. 49) and C. A. 60/38 (*ibid.*, p. 249).

2. On failure to cite all respondents and good cause therefor, see C. A. 89/39 (1939, S. C. J. 414) and C. A. 107/39 (*ibid.*, p. 482).

FOR APPELLANTS : Cattan.

FOR RESPONDENTS : Nos. 36, 37 & 38 — Goitein.
Nos. 1, 4, 7, 20, 30 — in person.
Others absent — served.

JUDGMENT:

This is an appeal from the Land Court Nablus, sitting as a Court of Appeal, from a decision of the Settlement Officer, Tulkarm Settlement Area.

Several preliminary objections have been taken by counsel for Respondents 36, 37 and 38. The first is that insofar as the first three Appellants are concerned there is no proper appeal before the Court in that the notice and grounds of appeal were not signed by these appellants in person or by an advocate duly appointed on their behalf. It appears that the fourth Appellant signed the notice of appeal on behalf of his fellow Appellants and he purported to do this by virtue of the fact that he holds from them a general power of attorney in very wide terms. Counsel for Respondents 36 to 38 contends that Rule 24 of the Civil Procedure Rules is fatal to the first three Appellants.

Rule 24 reads as follows :—

"Any application to or appearance or act in any Court required or authorized by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by an advocate duly appointed to act on his behalf : Provided that

any such appearance shall, if the Court or Judge so directs, be made by the party in person".

Counsel argues, and we consider with force, that this Rule must be strictly interpreted and that therefore under it a litigant must act either in person or by an advocate duly appointed on his behalf. Counsel for the Appellants contends that a person who holds a power of attorney steps into the shoes of the litigant in person. We do not consider that Rule 24 is open to this construction and are strengthened in our view by Civil Procedure Rules 69(1) and Sec. 4(2) of the Advocates Ordinance, 1938. In both instances an exception is provided to what is evidently regarded as a general rule that a person must conduct his litigation either in person or by an advocate. The inference from this seems to me to be that in the absence of any such provision the general rule must apply.

For these reasons we must consider that the fourth Appellant could not properly sign the notice of appeal on behalf of the other Appellants. It follows that as regards the first three Appellants there is no appeal before this Court.

As regards the fourth Appellant the point is taken that he failed to comply with Rule 313 of the Civil Procedure Rules in that he omitted to cite as Respondents five of the original parties to the action. In accordance with Rule 333 we have to consider whether good cause has been shown for such omission. In the course of argument the only good cause suggested was that a mistake had been made and that possibly the fourth Appellant had copied the wrong list of names. However sympathetic we may feel towards such a mistake we cannot hold that good cause has been shown within the meaning of the Rule. We think therefore that the objection taken is fatal to the fourth Appellant.

As we have decided this appeal on these two preliminary points, we do not think that it is necessary to decide a further point raised, namely, whether since the coming into operation of the Land (Settlement of Title) (Amendment) Ordinance, 1939, an appeal lies to this Court at all, as the point is somewhat academic in that it is clear that very soon it will be unnecessary to interprete the saving clause as to proceedings in progress before the coming into operation of the Ordinance.

The appeal is therefore dismissed and the decision of the Land Court dated the 8th April, 1940, confirmed. Respondents 36, 37 and 38, that is, Maurice Litwinsky, Emile Litwinsky and Raymond Litwinsky

will have their costs on the lower scale to include LP. 15.— advocate's attendance fees. Respondents 1, 4, 7, 20 and 30, that is Aref Abd El Qader ar Raziq, Hassan Abd El Kader Abdel Raziq, Farid Hamid, Nimer Suleiman Salim Ad Dabis and Amer Ibrahim As Salim will each have LP. 1, as travelling expenses. The Remaining Respondents will have no costs. Counsel for Respondents 36, 37 and 38 agrees that the travelling expenses for Respondents 1, 4, 7, 20 and 30 should be paid first out of the money available under the Appellants' guarantee, and we so order.

Delivered this 27th day of May, 1940.

Chief Justice.

CRIMINAL APPEAL No. 36/40.

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.

Victor Habib Asfour. — RESPONDENT.

Criminal procedure — Criminal Procedure (T. U. I.) Ord. sec. 39 — C. C. O. 301, 340 — Submission of no case to answer — Accused must first be heard if a prima facie case is made out.

In allowing an appeal from the judgment of the District Court of Haifa, dated the 15th of April, 1940, whereby the Respondent was discharged of obtaining goods by false pretences, contrary to Section 301 of the Criminal Code Ordinance, 1936, and of knowingly and fraudulently uttering a false document, contrary to Section 340 of the Criminal Code Ordinance, 1936 :—

HELD : 1. There was *prima facie* evidence that the signature on the promissory note was not that of the accused.

2. Where a *prima facie* case is made out the Court cannot form an opinion as to the accused's intention without hearing the defence.

ANNOTATIONS : On the submission that there is no case to answer, *vide* Halsbury, Vol. 9, *p.* 167, *sec.* 240 ; Digest, Vol. 14, *pp.* 286–7, *sub-sec.* C. See also CR. A. 7/40 (*ante*, p. 41).

FOR APPELLANT : Crown Counsel (Bell).

FOR RESPONDENT : Hazou.

JUDGMENT:

This is an appeal by the Attorney-General against a judgment of the District Court, dismissing a case against the Respondent, in which he was charged under Sections 301 and 340 of the Criminal Code Ordinance, without calling upon him for his defence.

I would again call attention to Section 39 of the Criminal Procedure (Trial Upon Information) Ordinance. If the Court had had that section in mind I do not think it would have fallen into the present error.

There was clear evidence that the accused had borrowed LP. 30.— upon the security of a promissory note purporting to be signed by him. There was evidence of two witnesses that the signature on the note was not his.

Upon that the Court at the close of the case for the prosecution listened to submissions by the defence and held —

> "There is not sufficient positive evidence before us that the promissory note was not written or signed by the accused to justify the Court in calling upon him to enter upon his defence. We would, however, add that even if it was not in fact his signature which appeared on the promissory note, we think that he had adopted it as his own and it follows therefore that one could not sustain a charge either of obtaining money by false pretences or of uttering a false document. We would add that we do not think that at the time when the accused obtained a loan he had any intention to defraud and it is probable that he may have decided later to deny liability. We accordingly discharge the accused".

As to the first point, the Court does not say it did not believe the witnesses, and there was certainly *prima facie* evidence as to the signature.

I do not understand the suggestion that the accused had "adopted" the signature, — presumably it means that he explained that the signature was not his but that he would be bound by it, — but whatever it may mean it is not clear upon what evidence it was based.

Where a *prima facie* case is made out I do not understand how the Court can form an opinion as to the accused's intention without hearing the defence.

The case must go back to the District Court to be completed, heard and determined, but I desire at this stage to say nothing which may influence the eventual result.

Delivered this 29th day of May, 1940.

Chief Justice.

HIGH COURT No. 40/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Nahum Perlmutter. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Eliezer Hazav. RESPONDENTS.

Execution — Judgment for return of specified articles — Notice of execution allowing alternative of paying value of subject matter — Application to Magistrate under Art. 6 of the Execution Law — Functions of Registrar — C. E. O. cannot alter orders once execution is completed — H. C. 42/39, H. C. 78/39 — Costs.

In allowing an application for an order to issue directed to the Respondents calling upon them to show cause why the orders of the First Respondent in Tel-Aviv Execution File No. 1621/40, dated 3.5.1940 and 10.5.1940 should not be set aside :—

HELD : 1. When an application is made under Article 6 of the Execution Law, it is the duty of the Judicial Officer who is referred to to give his explanations in writing as the law demands.

2. The registrar has no power to deal with an application addressed to the Chief Execution Officer.

3. (Following H. C. 42/39, H. C. 78/39). The seizure of the goods after the release was illegal. When once the goods had been released, and handed over to the purchaser, execution had been completed and there were no further execution proceedings then pending.

FOLLOWED : H. C. 42/39 (1939, S. C. J. 401). H. C. 78/39 (*ante*, p. 25).

1. On Art. 6 of the Execution Law see also : H. C. 36/33 (C. of J. 1238) ; H. C. 91/36 (1937, 1 S. C. J. 393).

2. An other instance of the Registrar overstepping his functions is H. C. 14/38 (1938, 1 S. C. J. 172).

3. On the principle that the High Court will not interfere when the act complained of is already executed, *vide*, (in addition to H. C. 42/39 (*supra*), H. C. 78/39 (*supra*) and the cases cited in the last mentioned judgment) the following decisions ; H. C. 57/38 (1938, 2 S. C. J. 91) and H. C. 51/39 (1939, S. C. J. 429).

FOR PETITIONER : Wolf, for Hoffmann.

FOR RESPONDENTS : No. 1 — absent, served.

No. 2 — Wilner.

ORDER:

This is a return to an order *nisi* directed to the Respondents calling upon them to show cause why certain orders of the Asst. Chief Execution Officer, Tel-Aviv, should not be set aside. The facts in the proceedings are complicated but, I think, they can be summarized sufficiently as follows.

The Petitioner brought an action in the Chief Magistrate's Court, asking for the value of certain goods alleged to be detained by the second Respondent or for the return of the goods, and for provisional attachment on the goods. The provisional attachment was granted and the Chief Magistrate tried the case and gave judgment in the following terms, after making various remarks, of a not too complimentary nature, against the Defendant (second Respondent) :—

> "I give judgment for plaintiff against defendant for return of the goods claimed and costs and advocate's fees LP. 10.— provisional attachment confirmed".

This judgment was put in execution and the notice issued from the Execution Office served upon the Respondent was to pay the sum of LP. 140 and the costs or to return the goods. This was the first mistake because the judgment was for the return of goods and no mention was made in the judgment of any sum of money. The second Respondent then offered to pay the money and the Asst. Chief Execution Officer, on the 3rd of May last, ordered release of the attachment upon payment of the whole sum due. Another application was made to the Asst. Chief Execution Officer on the 5th of May with the same result. On the 6th of May, the sum of LP. 159.645 mils was paid into the Execution Office, and on a further application, after some difficulty had apparently been met with, the Asst. Chief Execution Officer ordered the return of the goods and ordered force to be used if necessary. A further application was made to the Asst. Chief Execution Officer and finally, on the 8th of May, the Chief Magistrate was interviewed by the parties, and the Asst. Chief Execution Officer then wrote a minute in which he said that he applied to the Chief Magistrate in accordance with Article 6 of the Execution Law to get an explanation of the judgment and the Chief Magistrate had expressed the opinion that there was no ambiguity in the judgment and that the goods were attached only to secure the debt.

Now, with regard to that, I would like to remark that when an application is made under Article 6, it is the duty of the Judicial Officer, who is referred to, to give his explanations in writing as the law demands and not in conversations with various people. It is clear

in this case that the Chief Magistrate's memory had completely misled him as to what his original judgment was. That is another mistake in the series of mistakes made in these proceedings, due to irregularity in procedure. After expressing this opinion, the Asst. Chief Execution Officer ordered the release of the attachment and the goods were then released and handed over to the purchaser.

We come now to an even more startling episode, namely, the action of the Registrar of the District Court of Tel-Aviv. After the goods had been released an application was made by the Petitioner to the President of the District Court, which was entirely in order. He had every right to make it and no complaint can be made on that score, but this petition was dealt with by the Registrar, who had no right to do so, who endorsed on it the following :—

> "Asst. Chief Execution Officer.
> Before placing this application before H. H. the President District Court, and having regard to the urgency of this matter, I forward this application to you for any action you may deem necessary to protect the rights of both sides".

I desire to speak with moderation, but it seems to me that this action of the Registrar merits enquiry, which I trust will be forthcoming. I say no more on that point. When the Asst. Chief Execution Officer received this communication, if not an order, from the Registrar, he himself made the following order :—

> "To detain the delivery of the goods to the purchaser pending new decision in the presence of the parties tomorrow".

This order was too late because the goods had already been delivered to the purchaser, and were no longer in the custody of the Execution Officer. Having found this out the Asst. Chief Execution Officer made the following further instruction :—

> "To stop goods and to use force if necessary",

and upon that order the goods were taken back by the Execution Office clerk and were again locked up in the store. On the 9th of May, and it is noteworthy that all these proceedings had taken place in a record time, a further application was made to the Asst. Chief Execution Officer who maintained his previous decision of accepting money in lieu of the goods, and refused to refer the matter again to the Chief Magistrate and he again ordered release. Now, it is difficult to imagine any case in which a greater number of people could have made a greater number of mistakes. The action of the Asst. Chief Execution Officer in re-seizing the goods which he had already released has no justification whatsoever in law. When once the goods had been

released, and handed over to the purchaser, execution had been completed, and there were no further execution proceedings then pending. The seizure after release was completely illegal.

It is the rule in this Court that when execution has been completed, whether rightly or wrongly, this Court will not interfere. There are a series of cases which lay that down which are well known, see for example H. C. 42/39 (6 P. L. R. 449) and H. C. 78/39 and the cases therein cited. Even though the original order of the Asst. Chief Execution Officer was wrong, we cannot interfere now, execution having been completed.

The rule *nisi* must therefore be discharged and the goods returned to the purchaser, Moshe Shimoni, and the money paid in by the purchaser will, of course, be paid out to the Petitioner. In view of the unfortunate proceedings, we do not think that this is a case in which any costs should be allowed to either side.

Given this 31st day of May, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 42/40.

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

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

IN THE APPEALS OF :—

Juma' Mohammad Abu El Enain. APPELLANT.

v.

The Attorney General. RESPONDENT.

Accused unrepresented — Appeal after plea of guilty — When may be entertained — R. v. Forde — Court should be satisfied that accused understands when pleading guilty — Doubt as to permanent injury — Sentence.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 14th May, 1940, whereby the Appellant was convicted of causing grievous harm contrary to Section 238 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment but in reducing the sentence :—

HELD : 1. (Following R. v. Forde). An appeal may be entertained if there is a plea of guilty if it appears that the Appellant did not appreciate the nature of the charge, or did not intend to admit

that he was guilty of it, or that upon the admitted facts he could not in law have been convicted of the offence charged.

It could not be said that the Appellant had not known what he was doing or had not understood the nature of his plea.

2. Where an accused person is unrepresented it is important that the Court should be satisfied that he understands what he is doing when he pleads guilty. It would be well to insert a note to this effect on the record.

3. There was no evidence on record to support the finding of permanent injury and this did not necessary follow from the plea.

FOLLOWED : R. v. Forde, L. T. 128, p. 798.

1. On appeals after a plea of guilty, *vide* Halsbury, Vol. IX, *pp.* 263–4, *sec.* 375 ; Digest, Vol. XIV, *pp.* 503–4, *Nos.* 5537 *seq.*

2. On the effect of accused not being represented, see CR. A. 34/40 (*ante*, p. 143) and annotations.

FOR APPELLANT : Siksek.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

In the Court of trial the Appellant pleaded guilty and asked for mercy. As appears from Rex *v.* Forde, L. T. 128, p. 798, an appeal may be entertained when there is a plea of guilty if it appears —

"(1) That the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it ; or

(2) that upon the admitted facts he could not in law have been convicted of the offence charged."

I do not think in this case that the Appellant did not know what he was doing, or did not understand the nature of his plea.

I would, however, point out that where an accused person is unrepresented it is important that the court of trial should be satisfied that he understands what he is doing when he pleads guilty, and it would be of assistance to this Court if a suitable note to this effect could be made upon the record.

As regards sentence, it does not appear from the record that any evidence was called to support the finding of permanent injury, which does not necessarily follow from the plea, and in these circumstances we have some doubt as to the nature of the injury. We therefore reduce the sentence from two years' to one year's imprisonment to run from the date of conviction.

Delivered this 6th day of June, 1940.

Chief Justice.

CIVIL APPEAL No. 80/40.

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

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

IN THE APPEAL OF :—

Deeb Badran. APPELLANT.

v.

Edward Khalil Haddad. RESPONDENT.

Landlords & tenants — Statutory tenancy under Landlords & Tenants (Ejection & Rent Restriction) Ordinance — Sec. 4(1)(b), (2) — Tenancy automatically continued for a year — Under same terms as original tenancy — Increase of rent — Failure to comply with terms of tenancy by omitting to deliver promissory notes — Lessor entitled to apply for eviction.

In allowing an appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated the 29th February, 1940, and in making an order of eviction against the Respondent in favour of the Appellant :—

HELD : A statutory tenant is entitled under the Ordinance to continue in occupation after the expiration of the contract of tenancy, and the terms and conditions of such contract of tenancy, so far as applicable, are deemed to apply to such occupation. One of the terms of the original agreement was that the ~~Appellant~~ Respondent should give promissory notes to secure payment of rent. This the Respondent had failed to do and the Appellant was therefore entitled to apply for eviction.

ANNOTATIONS : On eviction under the Landlords and Tenants Ordinance, *vide* C. A. 232/37 (1938, 1 S. C. J. 72) and case cited in annotation ; see also Law Reports of the District Court of Tel-Aviv, 1939, *pp.* 79 *seq.*

FOR APPELLANT : Koussa.

FOR RESPONDENT : Abcarius Bey.

JUDGMENT:

Rose, J. : This is an appeal, by leave, from a judgment of the District Court of Haifa, dismissing an appeal from a judgment of the Magistrate's Court, Haifa.

The Respondent was the tenant of a dwelling house, the property of the Appellant, under an agreement for a period of one year which terminated on the 30th of November, 1939. The Respondent held over

as a statutory tenant under the Landlords and Tenants (Ejection and Rent Restriction) Ordinance, 1934, and it is claimed by the Appellant and conceded by counsel for Respondent that the tenant should be treated as being a tenant for a period of one year to date from the termination of the original agreement. This being so, we are treating the matter on this basis and expressly refrain from deciding the point, which has not been argued before us, as to whether a statutory tenant stands in the same position in all respects as if he held under a subsisting lease for a term.

Section 4(1)(b) of the Ordinance provides that no Court shall make any order for the eviction of a tenant from a dwelling house, notwithstanding that such tenant's contract of tenancy has expired, unless such tenant has failed to comply with any term of any agreement of tenancy in respect of such dwelling house. Section 4(2) provides that where by reason of the provisions of this section any tenant continues in occupation of any dwelling house after the expiration of any contract of tenancy the terms and conditions of such contract of tenancy shall, in so far as they may be applicable, be deemed to apply to such occupation. There is also a proviso that in certain circumstances the rent may be increased.

Apart, therefore, from the fact that the rent had been slightly increased, the terms and conditions of the original agreement survived.

Now, one of the terms of the original agreement was that the Respondent should pay the first month's rent in advance and should at the same time give the Appellant eleven promissory notes, payable at monthly intervals, in respect of the rent of the remaining months. It is common ground that the Respondent failed to comply with this condition. The Magistrate's Court and the District Court seemed to think that this condition was unimportant and, provided that the rent was paid punctually, might properly be disregarded.

While the matter is not free from difficulty, I cannot agree with this view. But for the Ordinance, the Respondent would not be a tenant at all and he is only entitled to remain in possession so long as he complies with its provisions. While it is unnecessary for this Court to weigh the comparative advantages for the landlord of receiving his rent monthly in advance or, at the outset of the term, receiving promissory notes for the full period, it may perhaps be pointed out that in the latter case the landlord might well be able to discount the notes forthwith. Be that as it may, payment by promissory notes was a term of the contract of tenancy.

For these reasons the appeal must be allowed ; the judgment of the Magistrate's Court and the District Court set aside and an order of eviction be made in favour of the Appellant against the Respondent. The Appellant will have the costs of this appeal and of the proceedings in both Courts below. As far as this appeal is concerned the costs will include the sum of LP. 15 for advocate's attendance fee.

Delivered this 14th day of June, 1940.

Chief Justice.

I agree.

British Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 86/40.

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

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

IN THE APPEAL OF :—

1. Dov Rosenstein,
2. D. Rosenstein,
3. A. Geller. APPELLANTS.

v.

1. The Official Receiver, in his capacity as such and also as liquidator of King Solomon Bank, Ltd.,
2. Mordekhai Levanon. RESPONDENTS.

Winding up — Banking Emergency Ordinance, Sec. 6 — Winding up by order of the High Commissioner — Companies Ordinance, Sec. 148 — Committee of Inspection, Court appointing manager of bank other than nominee of the contributories — Appeal whether from order or decree — C. P. R. 317 — C. A. 243/38.

In allowing an appeal from a judgment of the District Court of Jerusalem, dated the 1st of April, 1940 :—

HELD : 1. (Following C. A. 243/38) The order of the District Court was appealable without leave.

2. The case should be remitted with directions that a fresh meeting of the contributories should be held to elect somebody to the committee of Inspection who was not a director of the Bank in liquidation.

FOLLOWED: C. A. 243/38 (1939, S. C. J. 26).

ANNOTATIONS:

1. On C. P. R. 317, see also C. A. 179/38 (1938, 2 S. C. J. 81), C. A. 230/38 (*ibid.*, p. 191), C. A. 1/39 (1939, S. C. J. 57), C. A. 48/39 (*ibid.*, p. 236), C. A. 51/40 (*ante*, p. 93).

2. Palestine authorities on winding up of companies: C. A. 29/27 (P. L. R. 196, C. of J. 1454), C. A. 81/28 (P. L. R. 361, C. of J. 1063), C. A. 80/29 (P. L. R. 560, C. of J. 350), C. A. 159/33 (2 P. L. R. 43, C. of J. 257, P. P. 22.ii.34; 6.iii.35), H. C. 5/36 (P. P. 13.v.36, C. of J. 1934—6, 113), C. A. 37/37 (1937, 1 S. C. J. 264, 1 Ct. L. R. 52), C. A. 227/37 (1938, 1 S. C. J. 139) and C. A. 243/38 (*supra*).

FOR APPELLANTS: Scharf and Eliash.

FOR RESPONDENTS: No. 1, absent — served.
No. 2, in person.

JUDGMENT:

On the 5th of January of this year, the High Commissioner, by virtue of his powers under Section 6 of the Banking Emergency Ordinance, ordered the winding up of the King Solomon Bank Ltd.

The Companies Ordinance thereupon applied as though an order for winding up had been made by the Court under Section 148 of that Ordinance.

Steps were taken to set up a Committee of Inspection and application was made to the Court to approve the committee. Objection was taken to one nominee, and eventually the Court ordered as follows:—

> "I do not find that the Court is bound to accept the original nominees of the contributories. Having heard the Official Receiver I consider that it is better that Miss Geller should not be a member of the Committee of Inspection, and I appoint Mr. Harutz, subject to his holding or obtaining a general power of attorney".

Against this order appeal is now brought.

For the Respondents it is objected that no leave to appeal has been obtained as required by the second paragraph to Rule 317, this being an order and not a decree, and that it is now too late to obtain leave.

In Civil Appeal 243 of 1938, a somewhat similar point arose in connection with the appointment of a liquidator. Following that authority, I think that this objection fails.

In the circumstances I do not think the Court was justified in

appointing Mr. Harutz, but in so holding I wish to make clear that I am in no way casting any reflection upon that gentleman individually. I think the order of the District Court should be varied as suggested by the Appellant in his notice of appeal, by directing that instead of the appointment of Mr. Harutz it should direct that a fresh meeting of the contributories should be held to elect somebody to the Committee of Inspection who is not a Director of the Bank in liquidation.

The Appellant will have an inclusive fixed sum of LP. 5 as costs of this appeal, which will be paid out of the funds of the liquidation.

Delivered this 5th day of June, 1940.

Chief Justice.

CRIMINAL APPEAL No. 52/40.

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

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

IN THE APPEAL OF :—

1. Taleb Ali Rb'a,
2. Hussein Zabn Sweiti. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Previous convictions — Evidence to be led — T. U. I. Ord., Sec. 71.

In allowing an appeal as to the first Appellant from the judgment of the District Court of Jerusalem, dated the 30th of May, 1940, whereby the Appellants were convicted of robbery, contrary to Section 288(1) of the Criminal Code Ordinance, 1936, and sentenced to fifteen years' and seven years' imprisonment respectively, and in remitting the case to the lower Court with directions :—

HELD : The Court below seemed to have been influenced by previous convictions, but it did not appear from the record that these convictions had been proved.

ANNOTATIONS : On proof of previous convictions, *vide* CR. A. 55/24 (C. of J. 586) ; for the English law on the subject, see Halsbury, Vol. 9, *p.* 179, Footnote *d* ; Digest, Vol. 14, *p.* 471, *Nos.* 5037 *seq.*, Digest Supplt., XIV, *p.* 44, *No.* 5039 a.

FOR APPELLANTS : No. 1, Darwish.
No. 2, in person.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

In this case the first Appellant was convicted of robbery and sentenced to fifteen years' imprisonment. Probably the Court below was influenced by the fact that he had "five or six convictions already by the Court for robbery", but it does not appear from the record that these convictions were proved, and no details regarding them are given.

We think, therefore, that under Section 71 of the Criminal Procedure (Trial Upon Information) Ordinance as amended, this case should go back to the Court below, with directions to hear evidence as to the nature of these previous convictions and their dates.

As regards the second Appellant, no good grounds were shown why we should interfere, and his appeal is dismissed.

Delivered this 6th day of June, 1940.

Chief Justice.

CRIMINAL APPEAL No.49/40.

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

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

IN THE APPEAL OF :—

Abdallah Abdul Jabbar Shweiki. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Criminal procedure — Form of judgment — Requirements of Sec. 51, Criminal Procedure (T. U. I.) Ord. — Proviso to the section — Facts sufficiently clear from judgment.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 27th of May, 1940, whereby the Appellant was convicted of burglary, contrary to Section 295(a) of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment.

HELD: The judgment of the lower Court did not comply with Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance but the facts were sufficiently established so that the appeal would be dismissed.

ANNOTATIONS: On T. U. I. Ord., Sec. 51, *vide* CR. A. 79/38 (1938, 2 S. C. J. 114) and cases cited in annotation 2; see also CR. A. 9/39 (1939, S. C. J. 113).

FOR APPELLANT : Sa'ad.
FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

The judgment in this case is as follows :—

> "Abdullah Abdul Jabbar Shweiki is found guilty of offence as charged in the information under Section 295(a) of Criminal Code Ordinance, 1936. Very clear case on the evidence before us."

This certainly does not comply with the requirements of Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance. This is particularly unfortunate as the prosecution relied upon a statement by the accused as to the making of which there are no findings. We are, however, satisfied that the facts were sufficiently established to enable us to dismiss the appeal under the proviso to that section.

Delivered this 6th day of June, 1940.

Chief Justice.

CIVIL APPEAL No. 65/40.
CIVIL APPEAL No. 76/40.

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

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

IN THE APPEALS OF :—

Civil Appeal No. 65/40.

Habib and Rashid Yusef Habiby. APPELLANTS.

v.

The Government of Palestine. RESPONDENT.

Civil Appeal No. 76/40.

Jamil Ibrahim Khalil Habibi. APPELLANT.

v.

1. The Attorney General, on behalf of the Government of Palestine,
2. Najib Ibrahim Khalil Habibi,
3. Jad Ibrahim Khalil Habibi. RESPONDENTS.

Evidence — Refusal to hear evidence — Land Settlement — Admissibility of maps — Onus of proof of cultivation is lighter for prescription under O. L. C. Art. 78 than in the case of claiming revival of mewat — Findings of fact.

In allowing an appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 21st of February, 1940, and in remitting the case with directions :—

HELD : 1. (As regards C. A. 65/40) Appellants had been prepared to adduce evidence but the Settlement Officer relied instead on his own observations together with a map which had not been properly proved. The appeal would be remitted for evidence.

2. (As regards C. A. 76/40) In order to redeem land from the category of *mewat* it is necessary for the claimant to prove revival *i. e.*, conversion from the unfruitful to the productive ; but in order to set up a prescriptive title to *miri* land, under Article 78 of the Ottoman Land Code, it is only necessary to prove occupation and cultivation for a period of ten years.
Cultivation in this sence means such regular cultivation as is reasonably possible, having regard to the nature of the land and the crops for which it is suitable. It may be that a lower standard of proof will be needed to satisfy the requirements of cultivation than those of revival.
The Settlement Officer had therefore applied the wrong test, having held that there was no revival, after finding that the land was not *mewat*.

3. (As regards C. A. 76/40) The finding regarding possession was not supported by evidence.

ANNOTATIONS :

1. On Art. 78, O. L. C. see C. A. 57/40 (*ante*, p. 147) and annotations.

2. On *mewat* land, see L. A. 35/27 (1, P. L. R. 162, C. of J. 1093) ; L. A. 72/34 (1938, 1 S. C. J. 191).

3. On wrongful exclusion of evidence, see *e. g.* C. A. 40/38 (1938, 1 S. C. J. 211), C. A. 97/38 (1938, 2 S. C. J. 17) and C. A. 205/38 (*ibid.*, p. 173).

C. A. 65/40.

FOR APPELLANTS : Asfour.

FOR RESPONDENT : Crown Counsel — (Bell).

C. A. 76/40.

FOR APPELLANT : A. Levin.

FOR RESPONDENTS : No. 1, Crown Counsel — (Bell).
Nos. 2 & 3, Asfour.

JUDGMENT:

Rose, J.: These two appeals are from a decision of the Settlement Officer, Haifa Settlement Area, and by consent of the parties were heard together.

In the proceedings before the Settlement Officer it appears that Government was cited as Plaintiff because the Appellants in both cases claimed ownership of their respective parcels of land by virtue partly of a *kushan* and partly by occupation plus cultivation for a period exceeding ten years.

In both cases it appears that the area now claimed by the Appellants exceeds that described in their *kushans*. The issue to be decided, therefore, is one of fact, namely, whether the Appellants have occupied and cultivated the balance of the land for the prescribed period.

In Civil Appeal 65/40 the Appellants' complaint as regards parcel 15 (which is the description assigned to the land claimed by them in the proceedings before the Settlement Officer) is that, although they were prepared, and in fact anxious to adduce evidence as to occupation and cultivation, the Settlement Officer declined to allow them to do so, and relied instead on his own observation together with a map, which purported to have been made in 1928 but which was not formally proved or otherwise properly admitted as evidence.

Counsel for the Government of Palestine informed us that he had no instructions which led him to doubt the truth of the Appellants' allegation, and he therefore very properly declined to contest the statement of fact that evidence, on behalf of Appellants, was available and was not permitted to be called. This, in my opinion, is sufficient to decide the appeal, and the decision of the Settlement Officer, dated the 21st of February, 1940, must therefore be set aside as far as parcel 15 is concerned, and the matter remitted to him to enable him to hear any evidence on the relevant issues which the Appellants or the Government of Palestine may desire to call, and to give his decision accordingly. The costs of this appeal will abide the event.

As regards Civil Appeal 76/40, the issue of fact, as I have already pointed out, is the same as in Civil Appeal No. 65/40. In this case the Appellant's complaint is that in deciding the issue of fact as regards parcel 7, the Settlement Officer misdirected himself by applying a wrong test. Having found in paragraph 3 of his decision that none of the area in suit is *Mewat*, he proceeds in paragraph 14 to state that the sporadic patch-cultivation which is now apparent on the land does not constitute revival. Now, in order to redeem land from the category of *Mewat* it is necessary for the claimant to prove revival — that is

to say — conversion from the unfruitful to the productive ; but in order to set up a prescriptive title to *Miri* land, under Article 78 of the Ottoman Land Code, it is only necessary to prove occupation and cultivation for a period of ten years. Cultivation in this sense means, in my view, such regular cultivation as is reasonably possible, having regard to the nature of the land and the crops for which it is suitable. It may be that a lower standard of proof will be needed to satisfy the requirements of cultivation than those of revival. In any event the matters are not the same, and I think, therefore, that there is substance in the Appellant's point.

Further, in paragraph 14 of his decision, the Settlement Officer finds as a fact that there was no evidence of possession of the greater part of the land in dispute prior to 1934. This finding is unsupported by the record of the proceedings.

For these reasons the decision of the Settlement Officer, dated the 21st of February, 1940, must be set aside, as far as parcel 7 is concerned, and the matter remitted to enable him to make a finding as to whether the Appellant has satisfied him that he has occupied and cultivated the land claimed for a period of ten years, and to hear any further evidence which he himself, or the parties, may think it necessary to call.

The costs of this appeal will abide the event.

Delivered this 7th day of June, 1940.

Chief Justice.

CIVIL APPEAL No. 62/40.

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

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

IN THE APPEAL OF :—

1. Georg Jacobovitz, Building Ltd.,
2. Dr. Hans Jacobovitz,
3. Georg Jacobovitz. APPELLANTS.

v.

Zwi Jawitz. RESPONDENT.

Libel — Publication of libel — Whether action for libel lies in Palestine — P. O. in C. Art. 46 — Interrogatories not put in but referred

to — Whether answered in personal capacity — Discretion of Court to order evidence on commission — Costs.

In dismissing an appeal from the judgment of the District Court of Jaffa, dated the 4th March, 1940, as regards the first and second Appellant, and in allowing the appeal as regards the third Appellant, and dismissing the claim against him :—

HELD : 1. The question of publication depended on the answer to the interrogatories. A party intending to rely upon such an answer should put it in evidence — the Court is not entitled to rely upon it merely because it is on the file. In the present case, however, the answers were referred to several times and the Court was therefore entitled to treat them as before it.

2. As to the first and second Appellants, the Court was justified in holding that there had been publication.

3. As to the third Appellant, his answers were given as director and not in his personal capacity. As answers to interrogatories they could not be evidence against him. Nor were the second Appellant's answers evidence against the third Appellant.

ANNOTATIONS :

1. On interrogatories in libel suits, see Halsbury, Vol. XI, *pp.* 416 *seq.*, Nos. 509 *seq.* ; Digest, Vol. 18, *pp.* 203 *seq.*, sub-sec. E.

2. On answers to interrogatories, see Halsbury, Vol. XI, *pp.* 427 *seq.*, secs. 6—8 ; Digest, Vol. 18, *pp.* 225 *seq.*, sec. 8.

3. On publication of libels, *vide* Halsbury, Vol. XX, *pp.* 437 *seq.* ; Digest, Vol. 32, *pp.* 76 *seq.* ; see also Criminal Code Ordinance, 1936, sec. 5, definition of "publish".

4. Palestinian authorities on the applicability of English Law by virtue of Art. 46, P. O. in C., are reviewed in C. A. 20/38 (1938, 1 S. C. J. 351) and in C. A. 132/38 (*ibid.*, p. 388). In addition to the cases cited in these judgments, see also CR. A. 160/37 (1938, 1 S. C. J. 105), C. A. 126/38 (*ibid.*, p. 429), C. A. 183/38 (1938, 2 S. C. J. 197), C. A. 195/38 (*ibid.*, p. 158), C. A. 233/38 (*ibid.*, p. 193), C. A. 18/39 (1939, S. C. J. 249), CR. A. 29/39 (*ibid.*, p. 346), C. A. 94/39 (ibid., p. 447), C. A. 66/40 (*ante*, p. 136).

5. On the direction of the District Court, *vide* C. A. 66/40 (*supra*) and cases cited in annotation 4 thereto.

FOR APPELLANTS : Nos. 1 & 2, Grunwald.
No. 3, Seligman.

FOR RESPONDENT : Sassoon.

JUDGMENT:

The Respondent as Plaintiff in the District Court began an action on 1st June, 1938, against Georg Jacobowitz Building Ltd. and Dr. Hans Jacobovitz, a director thereof, claiming damages for libel. The libel was said to be contained in two circulars, copies of which were

attached to the Statement of Claim, and which were alleged to have been published in or about February and March, 1938. The first was dated 14th February, 1938, was addressed to the Ashrai Bank, and was as follows :—

> "Our firm has erected a building at 57, Pinsker Street, for Mr. Zvi Javitz (address : Agrobank, Tel-Aviv).
> "We beg to inform you that we shall willingly give you any information about Mr. Javitz, on the basis of our experience with him in the above deal.
> "The above information will be given by us confidentially".

The second was headed Tel-Aviv, date as post-mark, and began "Information *re* Zvi Javitz", and then followed some allegations about a building transaction, and other matters. The innuendo was that the Plaintiff was a dishonest business man.

In the defence dated 21st July, 1938, the first Defendant (the Company) admitted writing and sending circular No. 1, but denied that it was libelous, and said that the allegations of fact were true. They denied that they wrote or published circular No. 2.

The second Defendant pleaded :—

> "Defendant (*i. e.* No. 2) denies that he ever wrote and published circular No. 1 or circular No. 2 attached to the statement of claim, and whilst circular No. 1 is known to him in his capacity as member of the Board of Directors of Defendant No. 1, circular No. 2 is wholly unknown to him".

The parties submitted agreed issues on 11th November, 1938.

It may be noted that apart from the question whether an action for libel would lie, the only issue as to circular No. 2 as regards both Defendants was, was it published generally, not to any particular person or at any particular date ?

Next came interrogatories to be answered by Georg Jacobovitz, a director of the company, on behalf of the first Defendant, and by the second Defendant.

In his answer Georg Jacobovitz said that he dictated and had posted circular No. 1, and that it was sent to several persons, that it was followed by circular No. 2, which he authorized and dictated, but "that circular No. 2 was posted and dispatched without my authorization, and to my knowledge without my signature, by a mistake in my office. I do not know to whom it was posted".

Dr. Hans Jacobovitz said that circular No. 1 was authorized and composed by Georg at the office of the Company, and "that as far as I remember I was informed on or about February, 1938, by Mr. Georg Jacobovitz that circular No. 2 was posted without his signature and without his authorization".

After these answers Georg was joined as a Defendant, and on 20th March, 1939, issues between him and the Plaintiff were approved by the Court.

There then followed certain applications with regard to the adequacy of the pleadings, which could have been more conveniently considered before the issues were framed.

After delays, for which each side blames the other and to which local conditions may have contributed, the action came before the Court on 5.4.39.

It was firstly argued that there is no civil remedy for libel in Palestine, but the District Court decided that English law could be imported under Article 46 of the Order-in-Council, and no argument has been addressed to us upon the point.

Then there followed further argument as to the adequacy of the pleadings. Again it is obviously convenient that such matters should be considered before the issues are settled. After much time had been wasted, on 31.5.39, Mr. Sassoon for the Plaintiff submitted that the Defendants had admitted the publication of the circulars, and the Court pointed out with admirable clarity that in the issues as agreed "publication of circular No. 2 is denied by Defendant No. 1, while No. 2 denies publication of both circulars. Defendant No. 3 denies publication of both circulars".

The Plaintiff then gave evidence. He said he got circular No. 2 from different persons. He said, apparently without objection being taken :—

> "When I heard about these circulars I thought it was a joke at first. I did not take them seriously. When they were repeated however many people called me up on the 'phone and asked me what I had done to the defendants to warrant the statements they were making".

He also denied the allegations as to the building transactions.

On behalf of the first and second Defendants he was not cross-examined as to the publication.

In answer to Mr. Seligman for the third Defendant he said:—

> "When I first got the circular it conveyed no particular meaning and I treated it as a joke. Subsequently I changed my mind and brought this action because people asked me several times what I had done to defendants as if I had robbed him or done him something wrong. ..... The arbitration negotiations took place before the publication of the circulars.
>
> "I received a number of copies of Z. J. from different people. I can't remember them all. I may have shown the document to persons. I am sure persons brought me the document. Mr. Cohn

> Amdursky showed me the document. I am not sure if I showed it to Amdursky first".

It will be seen that there is no cross-examination as to the date of publication.

A witness, Otto Kohn, said he received a copy of circular No. 2 about October, 1938, and another, Jacob Amdursky, said he saw it in the Defendants' office, and that Hans Jacobovitz gave it to him to read. In cross-examination by the third Defendant he said :—

> "It may have been in November, or in October, or in December. I used to see the parties nearly every day. The first person who told me about the circular was Hans Jacobovitz".

He then referred to a meeting and said — "This meeting was after the circular had been published". In re-examination he said :—

> "Defendant (presumably Hans) said to me I have written this circular and I am showing it to you now. He did not say he had just written it. I don't remember the month. It was in the rainy season".

and to the Court he said :—

> "He told me he had written the circular because Plaintiff had caused him inconvenience and he wanted to tell his friends to be careful with their dealings with Mr. Jawitz. He said it was his intention to send the circular out".

There was other evidence as to the building, and the Plaintiff closed his case. He did not formally put in the answers to the interrogatories.

The Defendants submitted that no case was made out, but the Court rejected the submission.

An advocate was called who dealt with the building transaction, and in cross-examination he said :—

> "I did not advise the firm about the circulars but on the contrary young Jacobovitz (Hans) said his father was about to send a circular about the plaintiff and he asked me to speak to his father and advise him not to. I spoke to the father about it and he said he would not send the circulars. I deny that I told them anything about the chamber of commerce".

and two engineers gave evidence about the building.

On 24.11.39 it was said that Defendant No. 3 (Georg) was on his way to Palestine, and that defendant No. 2 (Hans) was also out of Palestine, and an adjournment was sought and granted. On 15.12.39 it was stated that Georg was still away but would be back in January, and that Hans was in England, and an application was made to take his evidence on commission. The application for a commission was refused, but a final adjournment was granted until January.

In the result no further evidence was produced by the defence.

In their final address to the Court the Defendants took the point that the answers to interrogatories had not been put in. The position with regard to them was that they were on the file of the Court, and that on 23.2.39, before the third Defendant had been joined, his answers on behalf of the Company had been referred to, and on 20.3.39, after the third Defendant had been joined, Mr. Sassoon for the Plaintiff said :—

> "In answers to interrogatories Defendants admit that the circulars were posted by them to various persons. Third Defendant says although he authorized the printing he did not authorize the posting. He admits that he dictated the letter to his clerk. That is 'publication'."

to which Mr. Seligman for third Defendant replied :—

> "No. 3 Defendant has made no admissions in his personal capacity. He has not replied to interrogatories in his personal capacity".

The District Court found the documents to be defamatory and untrue, and then went on to consider publication. It found that the circulars had been published, and that all three Defendants were liable, and awarded the Plaintiff LP. 300. —as damages. In so doing the Court stated :—

> "The answers to the interrogatories form part of the record of the proceedings, and as such it is competent for the Court to consider them in their entirety as part of the evidence in the case".

There can be no doubt that the words were defamatory, and the Court held that they were untrue — the onus of proving they were true clearly beeing upon the Defendants — and I do not think there are any grounds upon which we should interfere with the amount of the danages. There remains the question of publication.

Having regard to the issues, and the Plaintiff's evidence — apart from the answers to the interrogatories — I think the Court was entitled to find that the libel was published before action brought, — who then published it ? To answer which question brings me to the consideration of the answers to interrogatories. A party intending to rely upon such an answer should put it in evidence, — the Court is not entitled to rely upon it merely because it is on the file. As I have said, however, in this case the answers were referred to several times, and I think the Court was entitled to treat them as being before it.

As to the Company, — on Georg's answers, without further explanation there can be no question that the Court was entitled to hold that that Defendant published the libel. Hans, in his answers, to some extent supports the case against the Company, but there is no admission

by him in his personal capacity, and, for what it is worth, to show his state of mind, there is the answer of the advocate, but I think the Court was justified — taking Amdursky's evidence as a whole — in holding Hans liable.

As to Georg — his answers were given as a director of the Defendant Company, not in his personal capacity, before he became a party to the proceedings. They never could become admissible against him as answers to interrogatories. As admissions they might be evidence against him, but they would have to be proved as any other admission. This was not done, and I do not think they were even made evidence against him in his personal capacity. Neither do I think that Hans' answers to interrogatories were evidence against Georg.

I see no reason, particularly having regard to the delay in making the application, to interfere with the discretion exercised by the District Court in refusing to order Hans' evidence to be taken on commission.

In my judgment the appeal by Georg Jacobovitz succeeds, and the judgment against him should be set aside. The appeals by Georg Jacobovitz Building Ltd. and Hans Jacobovitz fail, and are dismissed.

In the circumstances of this case, Dr. Grunwald on behalf of all the Appellants, and Mr. Sassoon for the Respondent, agree that no order should be made as to costs.

Delivered this 23rd day of May, 1940.

Chief Justice.

CIVIL APPEAL No. 81/40.

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

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

IN THE APPEAL OF :—

Salim Khalil el Salfiti. APPELLANT.

v.

1. Bishop Keladion, Metropolite of Acre and Haifa, and Locum Tenens of the Greek Orthodox Patriarchate of Jerusalem,
2. Archimandrite Costandios, A/Metropolite of Acre and Haifa, on behalf of the Greek Bishopric of Acre. RESPONDENTS.

Juridic persons — No evidence that Bishopric of Acre a legal entity — P/N sealed with seal of Bishopric.

In dismissing an appeal from the judgment of the District Court of Jerusalem, sitting as a Court of Appeal, dated the 15th February, 1940 :—

HELD : The Appellant was seeking to treat the Bishopric of Acre as legal entity and there was no evidence that it was such a person.

ANNOTATIONS : Juridical persons are also discussed in C. A. 215/37 (1938, 1 S. C. J. 86) and C. A. 98/39 (1939, S. S. J. 479).

FOR APPELLANT : Ousta.

FOR RESPONDENTS : Said.

JUDGMENT:

This action was commenced in the Magistrate's Court, where the Plaintiff sought to recover upon a promissory note. The note was signed "Archimandrite Prophorious, Acting Metropolite of Acre, Haifa, and the District thereof", and there was added the seal of the Greek Orthodox Bishopric of Acre.

The Defendants to the proceedings were Bishop Keladion, Metropolite of Acre and Haifa, and Archimandrite Costandios, Acting Metropolite of Acre and Haifa, on behalf of the Greek Orthodox Bishopric of Acre. It will be seen Archimandrite Prokhorious was not personally made a party.

In effect the Plaintiff was seeking to treat the Bishopric of Acre as a legal entity, or what has been termed a juristic person. If it were such a person it could and should be so sued, but apart from this there is no evidence that it is such a person, and I think the appeal should be dismissed.

Costs will be on the lower scale, and we certify LP. 10 fees to the Respondents for attending the hearing.

Delivered this 5th day of June, 1940.

Chief Justice.

HIGH COURT No. 42/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Khamis Ibn Suleiman Abu Hasirah. PETITIONER.

v.

The Mayor and Municipal Councillors of Gaza. RESPONDENTS.

Municipal By-Laws — Gaza By-Laws, clause 2 — Power to impose fees and taxes and to regulate sale of fish — Jurisdiction of High Court — Nothing on record to show that Petitioner was asked for fees.

In dismissing an application for an order to issue directed to the Respondents calling upon them to show cause why they should not be stopped from collecting municipal fees on fish sold at Gaza seashore : —

HELD : 1. The Applicant's conviction was based on the by-laws regulating the sale of fish in open spaces. There was nothing on record to show that the Municipal Corporation had asked fees from the Petitioner.

2. Petitioner had chosen the wrong Court as he should have contested the validity of the by-law in the District Court, after applying for leave to appeal from the decision of the Magistrate.

ANNOTATIONS :

1. On municipal fees and taxes, see also H. C. 54/26 (C. of J. 727) ; H. C. 56/26 (C. of J. 1704) ; H. C. 2/29 (1 P. L. R. 112, C. of J. 1705) ; C. A. 58/30 (1 P. L. R. 627, C. of J. 1323) ; H. C. 23/32 (1 P. L. R. 687, C. of J. 740) ; H. C. 58/32 (C. of J. 1715) ; C. A. 194/35 (P. P. 28.iii.37, C. of J. 1934—6, 657) ; C. A. 69/37 (1937, 1 S. C. J. 294, 1 Ct. L. R. 73) ; C. A. 45/38 (1938, 1 S. C. J. 248).

2. On the principle that the High Court will not assume jurisdiction where there is an other remedy available, see H. C. 32/39 (1939, S. C. J. 282) and annotations, H. C. 78/39 (*ante*, p. 25) and cases cited therein.

FOR PETITIONER : Mallah.

FOR RESPONDENTS : *Ex parte.*

ORDER:

This petition fails. The Petitioner was convicted by the Magistrate of selling fish, otherwise then in the public market of Gaza, contrary to the Gaza Municipal Bye-laws, 1935. In his petition to this Court

he asks us to prohibit the Municipal Corporation of Gaza from collecting fees from him under the Bye-laws. In the first place, there is nothing whatever in the papers before us to show that the Municipal Corporation have asked fees from the Petitioner. In the second place, the Bye-law seems to us to be perfectly in order, because the seashore on which the Petitioner sold fish is an open space, and, as such, is covered by clause 2 of the Bye-laws. Thirdly, the Petitioner has come to the wrong Court, because if he thought he had been wrongly convicted he should have applied for leave to appeal to the President of the District Court from the conviction of the Magistrate, and, if he got leave, tested the validity of the Bye-law in the District Court.

For these reasons the petition must be dismissed.

Given this 11th day of June, 1940.

British Puisne Judge.

CIVIL APPEAL No. 102/40.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Khalil Abdo, on behalf of the estate of his late father Nafi Abdo. — APPELLANT.

v.

1. Fariza Zureick, widow of Darwish Asad Masri,
2. Omar Eff. Masri,
3. Rafat Rashid Masri, on behalf of the estate of Rashid el Masri,
4. Munib Abdo,
5. Tahir Abdo, on behalf of the estate of his late father, Mohammad Abdo,
6. Shafiq Abdo, on behalf of the estate of his late father. — RESPONDENTS.

Prescription — Findings of fact — Power of attorney whether amounting to an admission — Admission not necessarily in favour of Appellant — Admission of ownership, not of possession.

In dismissing an appeal from a judgment of the Magistrate's Court of Nablus, dated the 28th April, 1940 :—

HELD : The power of attorney, although it might amount to an admission of ownership, could not be held to be an admission as to possession. Moreover, it was not necessarily an admission in favour of Appellant.

ANNOTATIONS :

1. As to when prescription begins to run, see C. A. 23/39 (1939, S. C. J. 171) and annotations.

2. On admissions, see *e. g.* C. A. 218/37 (1938, 1 S. C. J. 19), C. A. 233/37 (*ibid.*, p. 130), C. A. 53/38 (*ibid.*, p. 308), C. A. 97/38 (1938, 2 S. C. J. 18), C. A. 165/38 (*ibid.*, p. 32), C. A. 219/38 (*ibid.*, p. 149), C. A. 4/39 (1939, S. C. J. 56), C. A. 110/39 (*ibid.*, p. 507), P. C. 23/38 (*ante*, p. 19).

FOR APPELLANT : Salah.

FOR RESPONDENTS : Nos. 1, 2 & 3, Zuayter.
No. 4, dead.
No. 5, in person.
No. 6, absent — served.

JUDGMENT:

We need not trouble you, Adel Eff.

This is a very simple case, and the facts can be told in a few words. The Appellant asked the Magistrate's Court, sitting as a Land Court, for a declaration of ownership in regard to a one-fifth share in certain lands registered in the name of Appellant and four others. The Respondent raised the defence that prescription — that is to say, adverse possession — was made by them as against the Appellant for a period of over ten years. The Magistrate gave judgment against the Appellant, finding that there was prescription for over ten years. Hence this appeal.

The only point on the appeal is as to the date from which the period of prescription is to be deemed to start. The Magistrate held that it commenced on 27th July, 1927 ; the Appellant contends that it should start on 4th February, 1928 ; and it is common ground that a case for dispossession was brought on the 11th of October, 1937, — which would be the end of the period.

Now the Appellant contends that by reason of an irrevocable power-of-attorney, dated 4th February, 1928, and given by Sheikh Abdul Rahman Abdo, one of the co-owners of this piece of land but not the ancestor of the Appellant, — which was made out in favour of two persons, there is an admission that the vendor, that is to say Sheikh Abdul Rahman, was the owner of the land at the time of the 4th February, 1928.

Now the most one can say of this power-of-attorney is, that it might

be an admission as to ownership, but it certainly cannot be held to be an admission as to possession. And there is the further point that whatever the value may be as an admission of ownership against Sheikh Abdul Rahman, it is not necessarily an admission in favour of the Appellant.

For these reasons the appeal will be dismissed, with costs and LP. 15 for attending the hearing, and LP. 2 travelling expenses to Respondent No. 5.

Delivered this 22nd day of June, 1940.

British Puisne Judge.

HIGH COURT No. 12/40.

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

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

IN THE APPLICATION OF :—

Itzchaq Roginsky. PETITIONER.

v.

Local Council of Raanana. RESPONDENTS.

Licences — Trades and Industries (Regulation) Ordinance, Sec. 4(2) — Refusal by Local Council to grant pharmacy licence — Quaere whether power is discretionary — Arrears in payment of rates insufficient reason for refusal of licence.

In granting an application for an order to issue directed to the Respondents calling upon them to show cause why they should not sign and issue to the Petitioner a licence (or renew the present licence) to keep a pharmacy in the house and premises of the Petitioner at Raanana colony, for the year 1940 :—

HELD : 1. (Following H. C. 34/31, H. C. 8/36, H. C. 7/36). There are limits to the exercise of discretion and the refusal of the Respondents to grant the licence for non payment of rates was not a proper exercise of discretion.

2. *Quaere* whether the Respondents had a discretion in this matter.

FOLLOWED : H. C. 34/31 (1 P. L. R. 595, C. of J. 1203) ; H. C. 8/36 (P. P. 12.iii.36, C. of J. 1934—6, 831) ; H. C. 7/36 (P. P. 29.iv.36, C. of J. 1934—6, 907).

ANNOTATIONS : On the discretion of licensing authorities, see H. C. 37/38 (1938, 1 S. C. J. 377) and annotations, H. C. 37/39 (1939, S. C. J. 367) and H. C. 76/39 (*ante*, p. 59).

FOR PETITIONER : B. Cohen.
FOR RESPONDENT : Harari.

JUDGMENT:

This is a return to an order *nisi* issued by this Court calling upon the Respondents, the Local Council of Raanana, to show cause why they should not sign and issue a licence to the Petitioner to carry on a pharmacy.

The power is found in the Trades and Industries (Regulation) Ordinance, which provides for the issue of licences for certain trades, a pharmacy being one of them. Section 4, Sub-section (2) provides, *inter alia*, —

> "A licence shall be issued —
> (a) where the classified trade is carried on within the municipal area, by the municipal council ;"

and by the definition "municipal area" includes the area of a local council, and "municipal council" includes a local council constituted under the Local Councils Ordinance. Raanana was so constituted.

It is argued that the Local Council has a discretion in the issue of these licences, and our attention has been called to authorities, in particular High Court No. 34/31, reported in the Palestine Law Reports, Vol. I, at page 595, followed in H. C. 8/36, Rottenberg IX, p. 831, and H. C. 7/36, Rottenberg IX, p. 907.

These authorities are clear, but I may perhaps say that in their absence — apart from the sale of intoxicating liquors, as to which there are special provisions — I should have doubted the existence of this discretion, but that point has not been argued.

It is admitted by Mr. Ishar Harari for the Respondents that there are limits to the exercise of the discretion, and the last authority cited speaks of legal reasons for the refusal of a licence.

In their affidavit the Respondents do not allege that they considered the matter and exercised their discretion, they merely allege that the applicant owed them a substantial sum as arrears of rates, which he could and should have paid.

Mr. Harari relies upon paragraph 7 of the Applicant's affidavit in which he says —

> "On the 27/12/39, when Petitioner had had his letter returned, he came again personally to the Respondent with his application and fee, and this time Petitioner was informed that the local council had considered his case and that the decision and instructions were to refuse to accept the application and fee unless and until Petitioner

paid to Respondent the various rates alleged to be due from the Petitioner to the Respondent as local council, rates which have nothing to do with the present application"

The position is, therefore, that the Respondents maintain that they were justified in refusing to issue the licence unless and until the arrears of rates were paid.

We do not consider this a proper exercise of the discretion or, to use the phrase in H. C. 7/36, an exercise thereof for a legal reason. I may point out that if rates are in arrear the law provides a method for their collection.

The order will be made absolute, and the Applicant will have an inclusive sum of LP. 5 for his costs.

Delivered this 7th day of March, 1940.

Chief Justice.

CIVIL APPEAL No. 9/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :—

Eliyahu Bichovsky. APPELLANT.

v.

Nitsa Lambi-Bichovsky. RESPONDENT.

Marriage and divorce — Marriage celebrated in Cyprus between Palestinian Jew and Christian wife — Application for decree of nullity on ground that such marriage is not recognized as valid by Rabbinical law — P. O. in C. Arts. 47, 64 — Palestine Citizenship Order in Council Art. 12 — Dicey's Conflict of Laws — Attorney General invited to assist — Jurisdiction of Palestinian Courts dependent upon whether parties are Palestinian citizens — Wife may be Palestinian citizen by virtue of the Citizenship O. in C. irrespective of the results of the proceedings for decree of nullity — Brook v. Brook, marriage contrary to public policy — Sottomayor v. De Barros, Mette v. Mette, Simonin v. Mallac, Bethell v. Hildyard, Banister v. Thompson, De Wilton v. De Wilton, marriage valid according to lex loci celebrationis may be held invalid in England — Salvesen v. Administrator of Austrian Property — White v. White — Validity of marriage to be ascertained according to religious law — Goadby's International and Inter-Religious Private Law in Palestine, p. 152 — C. P. R. 341.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 9th January, 1940, allowed and case remitted.

Appellant was a Palestinian Jew domiciled in Palestine who married Respondent in civil form, in Cyprus, in 1935.

A few days before the marriage Respondent, who had until then been a member of the Greek Orthodox Church, made a declaration in writing that she was no longer a member of that Church. She did not accept any other religion.

In 1938 the parties separated by agreement and the Appellant then applied to the District Court, Tel-Aviv, for a decree of nullity on the ground that a Jew cannot contract a valid marriage with a non Jew.

The District Court held (C. C. 351/38 — Curry, R/P., Korngrun, J.) that it had no jurisdiction as, if the marriage was void *ab initio*, as Appellant contended, then the Respondent was not a Palestinian citizen.

The Appellant appealed.

HELD : 1. (Following White *v.* White, considering Brook *v.* Brook, Sottomayor *v.* De Barros, Bethell *v.* Hildyard, Banister *v.* Thompson, De Wilton *v.* De Wilton) The jurisdiction of the Court depended upon the nationality of the parties, and the first question to be decided was whether the Respondent was the wife of Appellant within the meaning of Article 12 of the Palestine Citizenship Order in Council, irrespectively of the ultimate result of the proceedings. The Courts of Cyprus might not give the same answer to this question as the Palestine Courts, for an English Court, in considering the marriage of an Englishman domiciled in England celebrated in another country, will not regard such marriage as valid, if it was contrary to the law of England or contrary to the Christian conception of marriage.

2. (Distinguishing Salvesen *v.* Administrator of Austrian Property) Where a marriage celebrated in England is declared null and void by a competent Court of the country of domicile, in the absence of fraud and collusion, the English Courts will accept such judgment as determining the status of the parties. This had no application to the present case.

3. It was necessary, therefore, to inquire whether the marriage was lawful according to the law of Palestine, not that of Cyprus, *i. e.*, whether, apart from the question of form, the Appellant could lawfully contract such a marriage. The law to be applied was the religious law which was the personal law applicable under the Palestine Order in Council.

4. The case would be returned for trial.

5. (Per Frumkin, J.) As long as the marriage was not declared invalid by a competent Court, the wife was entitled to be considered as a Palestinian citizen, so that the local Courts had jurisdiction.

FOLLOWED : White *v.* White, 1937, 1 All E. R., (P. 111).

CONSIDERED : Brook *v.* Brook, 1861, 9 H. L. C. 193.
Sottomayor *v.* De Barros, 1879, 5 P. D. 94.

Bethell *v.* Hildyard, 1888, 38 Ch. D. 220.
Banister *v.* Thompson, 1908, P. 362.
De Wilton *v.* De Wilton, 1900, 2 Ch. D. 481.

DISTINGUISHED: Salvesen *v.* Administrator of Austrian Property, 1927, A. C. 641.

ANNOTATIONS: 1. Similar questions came for discussion in Khayat *v.* Khayat (C. of J. 1244) and in C. A. 186/37 (P. P. 9.xi.37, 2 Ct. L. R. 132). See also the "Palestine Divorce Case in Cyprus" (P. P. 1.iv.38).

2. On the validity of marriages in Private International Law generally, *vide* Dicey, Conflict of Laws, 5th ed., Chap. xxvii, especially, *pp.* 749—754.

FOR APPELLANT: Silberg.

FOR RESPONDENT: No appearance — served.

JUDGMENT:

The Appellant, as Plaintiff in the District Court, asked for a decree declaring his marriage null and void. The Respondent — his putative wife — although served, did not appear before the District Court or this Court.

The District Court found the following facts :—

> "Petitioner is a Palestinian Jew domiciled in Palestine, and he married the Respondent in Civil Form in Cyprus in 1935.
> "Respondent at one time was apparently a member of the Greek Orthodox Church, but few days before the marriage she made a Declaration in writing that she was no longer a member of that Church. According to the evidence submitted she did not accept any other religion".

An experienced Rabbi gave evidence that Jewish law does not recognize a marriage between a Jew and non-Jew, no matter where the marriage takes place nor the form of the marriage.

The District Court appears to have accepted this evidence and found that the marriage was void *ab initio,* and concluded its judgment as follows :—

> "I find it impossible to hold in one and the same judgment that a person acquired Palestinian Citizenship as a result of an act which I am asked to hold to be void.
> "It therefore follows that by virtue of Article 64 this Court has no jurisdiction to pronounce a decree of nullity. Application, therefore, dismissed".

The case involves questions of general importance, and we have had the assistance of argument by the Attorney-General.

The jurisdiction of the Civil Courts is conferred by the first paragraph

of Article 47 of the Order-in-Council. That Article is subject to the provisions of that Part of the Order-in-Council, and also itself imposes certain limits on the exercise of the jurisdiction. That Part deals with the jurisdiction of the Religious Courts, and by Article 64, which deals with the personal status of foreigners, provides that the District Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage of foreigners.

A foreigner is any person who is not a Palestinian citizen. By Article 12 of the Citizenship Order-in-Council as in force at the time of this marriage, the wife of a Palestinian citizen was deemed to be a Palestinian citizen.

Before the Court can consider a matter of personal status it has first to consider if it has the necessary jurisdiction. This was appreciated by Dr. Silberg, who has appeared throughout for the Appellant, in his admirably clear statement of issues, the first of which is, "Are the parties Palestinian citizens ?" and I think the first question to be decided in order to ascertain the jurisdiction was — is the Respondent the wife of the Plaintiff within the meaning of the Citizenship Order-in-Council, and it seems to me that the District Court confused this issue with the possible result of the proceedings.

As to this it may be that there is a conflict of laws and that the Courts of Cyprus might not give the same answer as the Courts of this Territory.

The Attorney-General, basing himself on Dicey's Conflict of Laws, puts forward the proposition that a marriage which is *prima facie* good in the country in which it is celebrated will be regarded as good and binding here for the purpose of determining whether a woman is the wife of a Palestinian citizen. He admits, however, that this proposition may not be of universal application.

Owing to its nature the question is difficult, and there are a number of cases in the reports of the English Courts which I have consulted in the hope of finding some underlying principle to assist in the present enquiry.

In Brook *v.* Brook (1861) House of Lords Cases 193, it was held that a marriage with a deceased wife's sister, both parties being domiciled in England, though legal in the foreign country in which it was celebrated, was void in England, and the general principle was enunciated that a marriage abroad of English subjects domiciled in England, if contrary to English notions of public policy, *e. g.* polygamous or incestuous, would not be recognized in England.

In Sottomayor *v.* De Barros (1879) 5 P. D. at page 105, the learned President stated —

> "Of the cases cited on the argument the only one which I think necessary to mention is that of Mette *v.* Mette, where Sir C. Cresswell held that a domiciled English subject could not marry his deceased wife's sister at the place of her domicile, although by the law of that place the marriage would be good. But Sir C. Cresswell had himself pointed out in Simonin *v.* Mallac the difference between controversies arising in the country where the marriage was celebrated and those arising elswhere ; and his judgment in that case showed that he considered that the law of the place of celebration must prevail before the tribunals of that place".

In Bethell *v.* Hildyard (1888) 38 Ch. D., at 234, Stirling, J. said —

> "I conceive that, having regard to these authorities, I am bound to hold, that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence 'the voluntary union for life of one man and one woman to the exclusion of all others'".

These authorities have been referred to in a number of cases, but I do not find any doubt thrown upon them. On the other hand, in Banister *v.* Thompson, 1908 P., a case dealing with church discipline, the Dean of the Arches held that a marriage of persons of English domicile celebrated in Canada, though valid there, was in England null and void ; and in De Wilton *v.* De Wilton, 1900, 2 Ch. D. 481, Stirling, J. held that persons of the Jewish faith domiciled in England, who contracted a marriage abroad, which was valid according to the law in force where the marriage was celebrated and also valid by Jewish law — provided that at the time of the ceremony both parties were of the Jewish faith — were not lawfully married in England if such marriage offended against the English law as to prohibited degrees of relationship.

From these authorities the proposition seems to emerge that the English Courts, in considering the marriage of an Englishman domiciled in England celebrated in another country, will not regard such marriage as valid if it was contrary to the law of England or contrary to the Christian conception of marriage.

There are a number of authorities dealing with the view the English Courts will take when the marriage was celebrated in England ; they no doubt would be of assistance to the Courts of Cyprus in considering the present matter if they had occasion and authority so to do, but I do not think that they influence our view.

There is another line of authorities to which I should perhaps refer, as at first sight it may appear to complicate the question — that is, those based on Salvesen *v.* Administrator of Austrian Property, 1927, Appeal Cases 641. That case seems to me to decide that where a marriage celebrated in England is declared null and void by a competent Court of the country of the domicile, in the absence of fraud or collusion, the English Courts will accept such judgment as determining the status of the parties, which has no application to the present enquiry.

There is one other case to which I would refer, that is, White *v.* White, 1937, Probate 111, also reported in All England Reports, 1937, Vol. 1. In some of its aspects this decision may be open to criticism, but insofar as it decided that a woman, domiciled in England, may obtain a decree of nullity of a marriage contracted in Australia on the ground that such marriage was bigamous, it would seem to be in favour of the proposition that I have stated.

I come to the conclusion, therefore, that on general principles we have to enquire if this marriage was lawful according to the law of Palestine — not that of Cyprus. By that I mean a marriage which the Appellant could lawfully contract, not lawful as regards mere form.

I am of opinion, owing to the provisions of the Order-in-Council that as marriage is a matter of personal status, any question whether a Palestinian who is a member of a recognized religious community is married, or if a woman is his wife, must be answered in accordance with the law applicable, that is, the religious law which for such purpose, when ascertained, forms part of the law of Palestine.

I am fortified in this view by the well-known passage at page 152 of Dr. Goadby's "International and Inter-Religious Private Law in Palestine", as follows :—

> "The validity in substance of a marriage contracted by Palestinians, whether in Palestine or abroad, depends, it is submitted, upon the personal (religious) law of each party. This is in accordance with Ottoman and Oriental tradition. Thus a marriage contracted abroad though valid according to the *Lex loci celebrationis* both in form and substance might be held invalid in Palestine on the ground that it was substantially unlawful by the religious law of one or both of the parties. In Egypt it has been held that the marriage of an Egyptian Moslem woman with a foreign Christian is bad under Moslem law and consequently invalid. The same conclusion appears to follow in Palestine. And it is the religious law which must determine the substantial validity of foreign marriages contracted by Palestinian Jews or Christians".

Upon that view the question now arises, can the Civil Courts grant the relief for which the Plaintiff asks under Articles 47 and 64 of the Order-in-Council. I should have felt disposed to consider that question under the provisions of Civil Procedure Rule 341, but the other members of the Court are of opinion that the case should be returned to the District Court.

The judgment of the District Court is therefore set aside, and the case returned to that Court for further consideration. It is unnecessary to make any order as to costs.

Delivered this 15th day of May, 1940.

Chief Justice.

Frumkin, J.: The Appellant in this case, who was the Plaintiff in the Court below, is a Palestinian Jew who married a non-Jewess in Cyprus before the civil authorities there. He instituted these proceedings before the District Court, Tel-Aviv, asking for a decree declaring the marriage null and void, his ground being that under Jewish law, which according to his submission is the law applicable to this case, a marriage between a Jew and a non-Jewess is null and void. The Court below, without entering into the merits of the claim, dismissed it on the ground that it had no jurisdiction to maintain the claim because one of the parties was not a Palestinian.

The matter of jurisdiction is, to my mind, the only question with which we, as a Court of Appeal, are at present concerned. If the Court below was right in its decision, that is the end of the matter. If not, the case will have to go back for trial on the merits.

There are a number of questions of great importance involved in this action: Is a marriage between a Jew and a non-Jewess invalid? Which is the law applicable, Palestinian law or the law of the country in which the marriage took place? Is the jurisdiction of the religious Courts ousted when one of the parties to a marriage is not a member of the community concerned? Can a civil Court issue an order of nullity or dissolution of marriage when one party only is a foreigner and the other a Palestinian? I would be loath to decide points like those on appeal without such points being first dealt with and decided by a Court of first instance.

Now the Court below, in dismissing the claim for lack of jurisdiction, incidentally in fact held that the marriage was invalid; it had no jurisdiction because the wife was not a Palestinian; the wife was not a Palestinian because the marriage was invalid. I do not think that

that view could be right, even if the Plaintiff himself took up that attitude. In the first stage the Court should have considered the position of the parties as it appeared to be at the time of the action. The marriage took place in Cyprus. It is not contested that under the law of Cyprus the marriage was good. The wife of a Palestinian becomes a Palestinian by marriage. The immigration authorities were therefore right in including the wife in the passport of her husband, and for the purposes of jurisdiction I am of opinion that as long as the marriage has not been declared invalid by a competent Court, the wife is entitled to be considered as a Palestinian citizen.

The appeal must therefore be allowed, the judgment of the District Court set aside, and the case remited for the Court to assume jurisdiction as if both parties were Palestinian citizens.

Delivered this 15th day of May, 1940.

Puisne Judge.

Khayat J.: In my view this appeal involves the following point of law.

There was a request to the Court for the dissolution of a contract of marriage that was entered into and registered according to the Civil Law of Cyprus on the ground that it is contrary to the Mosaic Law which is deemed to be the law governing matters of personal status affecting Jews in Palestine and therefore conflicting with two bodies of laws.

I think this point, until decided by a competent Court, does not in any way change the relations between the parties according to the Law of Palestine which recognizes the wife as a Palestinian, especially if it is borne in mind that the result to which the Court may arrive will be that the contract of marriage was valid according to the Law of Cyprus, but it cannot be considered as valid if it is established that it is contrary to the Palestine Law.

I therefore think that the judgment of the Court below should be set aside and the case remitted to be decided on its merits.

Delivered this 15th day of May, 1940.

Puisne Judge.

CIVIL APPEAL No. 113/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Mordechai Sherman,
2. Palestine Electric Corporation Ltd. APPELLANTS.

v.

Feivel Danovitz. RESPONDENT.

Torts — Damages for injury to the person through negligence — Running down case — Applicability of English Common Law relating to torts — P. O. in C. Art. 46 — C. A. 18/39, C. A. 62/40 — Mejelle inapplicable in the case of injuries to the person — C. C. O. Sec. 43, Civil and Religious Courts (Jurisdiction) Ordinance, Sec. 6 — Common law means customary law of the English people and includes rules of law derived from decided cases and other authorities — Odgers on the Common Law Vol. 1, p. 1 — Difficulty in applying English customary law to Palestine — Inhabitants unacquainted with Common Law — Lack of opportunity to ascertain the Common Law — Law of torts amended by statutes which are inapplicable in Palestine — Certain provisions of English law already applied in Palestine — Circumstances of Palestine and its inhabitants do not permit wholesale introduction of law of torts — Form of statement of claim — Quaere whether difference between special and general damages obtains in Palestine — Loss of time and damage to business are personal injuries — Findings in criminal case binding in civil case only if parties are the same — L. A. 57/36, C. A. 25/39 — Finding of negligence — Res ipsa loquitur — C. A. 88/30, C. A. 132/38 — Mejelle Art. 29.

In allowing by majority (Frumkin, J. *dissentiente*) an appeal from a judgment of the District Court of Tel-Aviv (sitting as a Court of Appeal), dated the 12th of April, 1940 :—

HELD : 1. (Distinguishing C. A. 18/39, not following C. A. 62/40) The English Common law of Torts is not applicable to Palestine. Although the *Mejelle* provides no remedy for injury to the person, and section 43 of the Criminal Code Ordinance, and Section 6 of the Civil and Religious Courts (Jurisdiction) Ordinance provide only a limited remedy, recourse must be had to legislation and the provisions of Article 46 of the Palestine Order in Council could not be invoked to introduce the entire bulk of the law of Torts.

2. Common Law, in the sense in which it is used in the Order in Council means customary law as opposed to statute law, and includes rules of law derived from decided cases and other authorities. This customary law is founded on the customs and habits of the English people and to introduce the entire law of Torts to Palestine would cause injustice by forcing on one country the habits and customs of another. The circumstances of Palestine and of its inhabitants do not, in the words of the proviso to Article 46, permit this course to be adopted.

3. A graver objection to the introduction of the law of Torts is that it is not readily available to the public and even to some of the judges who cannot read English. It is a fundamental principle that people must have an opportunity of knowing what the law is.

4. Again the English law of Torts has largely been amended by statutes which are inapplicable in Palestine. To accept the law of Torts without its statutory amendments would mean applying, in its original customary form, a law which has been found unsatisfactory in certain respects in England — another injustice.

5. Although the statement of claim could have been more happily worded, it was sufficient in form regarding the claim to damages, and plaintiff's evidence as regards damages was uncontradicted by any other evidence. It was doubtful whether the distinction between special and general damages obtained in Palestine.

6. Loss of time and damage to business due to incapacity are properly classed, on the authority of English cases, as personal injuries and not as damage to property.

7. (Following C. A. 25/39, Distinguishing L. A. 57/36) Findings of facts by a criminal Court are only conclusive in a subsequent civil action where the parties are the same — which was not the case here.

The Chief Magistrate should have based his findings of negligence on evidence heard by himself but in this case the error was of no importance as the evidence was uncontradicted and the facts came within the doctrine of *res ipsa loquitur.*

DISTINGUISHED: C. A. 18/39 (1939, S. C. J. 249), L. A. 57/36 (C. of J. 1934—6, 882).

NOT FOLLOWED: C. A. 62/40 (*ante*, p. 172).

FOLLOWED: C. A. 25/39 (1939, S. C. J. 194).

REFERRED TO: C. A. 88/30 (1 P. L. R. 724, C. of J. 1343); C. A. 132/38 (1938, 1 S. C. J. 388).

ANNOTATIONS: 1. Cases on Art. 46, P. O. in C. are collated in annotation 4 to C. A. 62/40 (*supra*).

2. On the difference between special and general damages, *vide* Halsbury, Vol. 10, Part I. *pp.* 84—5, Digest, Vol. 17, Part I, *p.* 78, *Nos.* 3—6.

3. On the maxim *res ipsa loquitur*, see C. A. 59—60/40 (*ante*, p. 130) and annotation 2.

4. On the binding force of findings in criminal cases on subsequent civil proceedings, see (in addition to the two cases cited in the judgment) C. A. 43/39 (1939, S. C. J. 316) and the first paragraph of the annotations to C. A. 25/39 (*supra*).

FOR APPELLANTS : Henigman.
FOR RESPONDENT : Friedman.

JUDGMENT:

Copland, J.: This is an appeal from a judgment of the District Court, Tel-Aviv, dismissing an appeal from the Chief Magistrate who had awarded damages for LP. 193.400.— against both the Appellants jointly and severally, and for LP. 5.— against the first Appellant only.

The first Appellant is a motor driver in the employment of the second Appellants, the Palestine Electric Corporation Ltd. A truck driven by the first Appellant was involved in a running-down accident on the Petach Tiqva road, in which the Respondent was seriously injured and was unable to work for a considerable time. He sued both the Appellants before the Chief Magistrate, asking for LP. 5.— loss of clothing — medical expenses LP. 3.400 — travelling expenses LP. 5.— and for "loss of time, and working capacity and damages to business" LP. 185.000. The Chief Magistrate gave judgment in his favour, holding that the English Common Law applied in the absence of any provision in Palestine Law for damage to the person, and this judgment was confirmed by the learned President on appeal, apparently with some doubt.

This appeal raises the question whether the English Common Law can be applied in cases such as this of damage to the person through negligence. There have been several cases in the lower Courts of this country, where it has been held that the Law of Torts is applicable in this country under the provision of Article 46 of the Order-in-Council, but there has hitherto been no definite judgment of this Court to this effect. In the Attorney General *v.* Blam, C. A. 18/39, (6 P. L. R. 247) the point was raised, but the Chief Justice held that on the facts of that case it was unnecessary to consider it, since the act of negligence alleged was failure to erect gates at a railway level crossing, and since the obligation to erect gates was in England a statutory one, no question of the Common Law arose, and the other Judges concurred. Again in Georg Jacobovitz Building Ltd. and others *v.* Jawitz, C. A. 62/40, which was a case of libel, the District Court had held that since there was no civil remedy for libel in Palestine the English Law could be imported, but no argument on the point

was addressed to this Court, so this case cannot be an authority on the subject, since this Court expressed no opinion on this point.

It is common ground that the *Mejelle* provides no remedy for injuries to the person, the reason possibly being that the Ottoman Criminal Code contained certain provisions dealing with cases of compensation where a person was injured. These provisions have now been repealed, and the only provisions now are, first Section 43 of the Criminal Code, which allows a Criminal Court to award compensation up to LP. 100.— where a person has been injured as the result of an act for which the perpetrator has been convicted. This is a very limited remedy, since the Criminal Court which tried the criminal case must award the compensation immediately after the conviction. There is again the Civil and Religious Courts (Jurisdiction) Ordinance, Cap. 18, Section 6 of which allows a Criminal Court to award compensation in lieu of *diyet* — again a limited remedy. The Respondent's case rests, therefore, entirely on whether the English Law can be imported, and that depends on the applicability of Article 46 of the Order-in-Council. This Article is as follows :—

> "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may thereafter be applied or enacted ; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.
>
> Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

Now what is the Common Law ? In the sense in which it is used in the Order-in-Council it means, I think, customary law as opposed to statute law, and it includes rules of law derived from decided cases and other authorities — see Odgers on the Common Law, Vol. 1, p. 1. What is this customary law ? It is the law founded on the customs

and habits of the English people, developed and extended over many generations, but all the time based on *their* customs and *their* habits. And the customs and habits, mode of life, mode of thought, and character of the English people are very different from those of the inhabitants of Palestine. This in itself would make it difficult to apply the English Law of Torts in its entirety to this country. It would be a grave injustice to force on another counry a customary law which is founded on the totally different customs and habits of a totally different race. But there is another and a graver objection, to my mind, and that is that hardly anyone in this country knows what the Common Law is. The Law of Torts is contained in various textbooks, and in hundreds of decided cases, which the large majority of the people in this country cannot even read, because they are in English, and the same applies to a considerable number of the Judges and Magistrates, who would be called upon to enforce and apply it. It is not right or possible in my opinion to create a liability which may affect a large proportion of the population, when that population has no means of knowing what the extent of that liability is. It is a fundamental principle that people must have an opportunity of knowing what the law is.

Again, the English Law of Torts has been largely amended by statute — if the Courts of this country were therefore to enforce it, we should have to apply only the Common Law, since we cannot apply any statutory amendments — in other words we should apply, in its original customary form, a law which has been found unsatisfactory in certain respects in England — another injustice.

I am not unmindful of the fact that certain provisions of the Common Law and doctrines of equity have been applied in this country, but they have been applied only to a minor degree. We now have, rightly or wrongly, the difference between a penalty and liquidated damages — the doctrines of specific performance and equitable title can now be invoked, and the Common Law rules of evidence are largely applied in the trial of cases in the Courts. But it is a very different matter to apply the whole Law of Torts by this method. If it is desired to introduce a Law of Torts in this country, then it should be done by Ordinance, when everyone will then, in theory at any rate, know what it is. Such a revolutionary change in the Law of this country must be made by legislation. If the Courts were to introduce it, then we should in effect be acting as law-makers — whereas our duty is to interpret laws, not to make them. For many years the Courts of this country were reluctant to act on Article 46,

in my opinion wisely, since the difficulties of introducing the Common Law were too apparent — the doctrines of equity are more easy to bring into force, since they are aimed at removing hardships, and ensuring fair play.

For these reasons I do not think that the English Common Law of Torts can be introduced into this country by means of Article 46, except in certain minor matters, since in the words of the proviso, the circumstances of Palestine and its inhabitants do not permit this course to be adopted.

It follows therefore in this case that the second Appellants are under no liability towards the Respondent, and neither is the first Appellant except for the amount of LP. 5.— being the cost of a suit of clothes.

There were two further matters which were argued before us, and which, I think, should be dealt with. One is that there was no proof of special damage, and that the statement of claim does not disclose any allegation of pain and suffering. I think that the claim is sufficient, though it might have been better if it had been shown in the claim how the item in para. 5(e) had been made up. At the time when the claim was lodged, the new Magistrates' Courts Procedure Rules were not in force, it must be remembered, and the evidence of the plaintiff as regards damage was uncontradicted by any other evidence. And in any case, I doubt whether the distinction between special and general damages obtains in Palestine.

The second point is that loss of time and damage to business due to the incapacity of the Plaintiff is damage to property. It is quite clear that, on the authority of English cases, this is not so — such items are properly classed as personal injuries.

There is one more point which I would mention. The Chief Magistrate, basing himself in his judgment on the judgment in Keren Kayemeth Leisrael *v.* Hillel, L. A. 57/36, held that he was bound by the findings of the Magistrate in the criminal case. In this I think that he was wrong, because the parties in the criminal case were not the same as those in the civil case before him.

The law on this point was further considered in Abu Sham *v.* Attorney General, C. A. 25/39 (6 P.L.R. 216) and it was there laid down that the findings of fact by the Criminal Court are only conclusive in a subsequent civil action where the parties are the same — that was not the case here. The Chief Magistrate should have based his finding of negligence on evidence heard by himself.

I mention this in order to put the matter straight, though in this particular instance the error made by the Chief Magistrate is not of importance in the result. As the evidence led before the Chief Magistrate was in no way contradicted, the Chief Magistrate was right in his finding of negligence, though he gave the wrong reason. In any event from the facts of this case, namely, that the Respondent was walking on his left side of the road and was overtaken from behind by a motor car, well over on its wrong side of the road, this in itself is *prima facie* evidence of negligence on the part of the driver, and the doctrine of *res ipsa loquitur* applies.

I think, therefore, that this appeal should be allowed in respect of the sum of LP. 193,400.— adjudged to be paid by the two Appellants jointly and severally, and the judgments of both Courts below in this respect set aside, and the claim of the Respondent (Plaintiff) in respect of this amount should be dismissed.

With regard to the amount of LP. 5.— therefore, awarded against the first Appellant singly, the appeal must be dismissed.

The Appellant will have three-quarters of the costs in all Courts, both here and below, and LP. 10.— fee for attending the hearing in this Court.

Delivered this 12th day of July, 1940.

British Puisne Judge.

I concur.

Puisne Judge.

Frumkin, J.: On previous occasions I expressed at some length my views as to the main points of law involved in this appeal. In Haifa Municipality *v.* Khoury (C. A. 88/30, 1 P. L. R. 724) it was for the first time laid down that the *Mejelle* applies only to claims for damages to property, and not to claims for damages to the person, and why. In Attorney General *v.* Blam (C. A. 18/39, 6 P. L. R. 247) I explained why, to my mind, the law of Palestine provides no relief for a claim in the nature of the present one as against an employer. In another case, Khoury *v.* Slavousky (C. A. 132/38, 5 P. L. R. 378) I stated my views as to when and under what circumstances Section 46 of the Palestine Order-in-Council is to be invoked, and in Attorney General *v.* Blam (*supra* at p. 254) involving a principle similar to the one of this appeal, I came to the conclusion that —

> "... neither the *Mejelle* nor any other law contemplated in the first part of Section 46 of the Palestine Order-in-Council does extend

> or apply to the present case. There is nothing which calls for the application of the qualifying proviso of the said Section, and this case may therefore be decided in conformity with the common law and doctrines of equity in force in England."

It follows, therefore, that both the Chief Magistrate and the District Court were to my mind right in invoking Section 46 of the Palestine Order-in-Council and in holding that the English Common Law of Torts applies to this case.

It remains, therefore, for me to consider whether under common law the Chief Magistrate was right in the conclusions he arrived at. Since I remain in the minority, and the judgment of the learned Chief Magistrate will be set aside because my learned Brothers are of the opinion that common law does not apply at all, I will deal with the alternative grounds of appeal very shortly. The Chief Magistrate relied on the criminal proceedings in so far as it was necessary to establish the facts of the accident, which in any case were not disputed. As to the amount of damages, he himself heard evidence in the civil proceedings at which both the Appellants were represented, and on that evidence he was justified in his findings. For the purpose of this case it does not much matter whether the claim was for special or general damages, and in any event I would not be inclined to upset the judgment on these technical grounds alone. In my view, therefore, the appeal should be dismissed, and the judgments of the lower Courts confirmed.

I wish, however, if I may say so, to approve of one argument advanced by my learned Brother, Copland, in pointing out the difficulties in introducing the Common Law of Torts into this country, and that is that the common law has been amended by statute, and such amendments this Court would not be in a position to apply. If an institution could not be made use of in its entirety, it may perhaps be better not to make use of it at all.

But regard should also be given to the other side of the picture. My brother considers it an injustice from several points of view to introduce the English Common Law of Torts into this country, but what about the injustice to which any member of the public is subjected if he has the misfortune to be the victim of an accident, especially when that accident was caused by a negligent employee?

Not only has he no relief whatsoever against the employer even if the employer was the cause of the negligence, but even as regards the person directly causing the accident he may claim for torn clothes but has very little relief for damages caused through injuries to the

person, such as surgical expenses and incapacity to work. He has certainly no relief whatsoever before a civil Court as distinct from a criminal Court.

Of course it would be much better if the legislature had enacted a complete code to cover all aspects of the law of Torts, but pending such legislation I am tempted to turn to a very wise maxim of the *Mejelle* —

"The smaller of two harms is chosen". (Art. 29).

Rather than leave the citizen without an effective relief it would, in my humble opinion, be better to invoke Article 46 of the Order-in-Council, which in the words of Lord Atkin enriches the jurisdiction of the Courts of Palestine, and apply the Common Law of Torts, incomplete as it may be, which was however good enough for the English people for centuries without the recent statutory improvements, and leave it to the legislature of this country to introduce such improvements by statute as it has already done with the Workmen's Compensation Ordinance.

But as the majority of the Court is against me, the entire remedy now lies with the legislature.

Delivered this 12th day of July, 1940.

Puisne Judge.

HIGH COURT No. 47/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

1. Abdel Raouf Barakat,
2. Zaki Barakat,
3. Hassan Barakat. APPLICANTS.

v.

1. Chief Execution Officer, Tel Aviv,
2. Abdul Hamid Bibi,
3. Henri Fogel & Yehiel Shugerman, Administrators of the Estate of the late Haim Shugerman,
4. Barclay s Bank, Tel Aviv,
5. Ashrai Bank, Tel Aviv. RESPONDENTS.

In dismissing an application for an order to issue to the first Respondent directing him to show cause why his order dated the 28th June, 1940, in Execution File No. 16703/37, should not be set aside and why he should not be directed to reinstate his previous order dated the 24th June, 1940, and for an order to issue to the first Respondent to stay the execution in the above file pending the determination of this petition :—

Execution — Sale of mortgage — Execution Law, Art. 110 — *C. E. O. may accept new bid after expiry of three days' notice — Land Transfer Ordinance, Sec.* 14(1)(b) — *Discretion.*

HELD : A larger bid having been made, exceeding the final bid by 25%, it would have involved undue hardship on the debtor if the property were sold for the amount of the lower bid. Notwithstanding the fact, therefore, that a final order of sale had been made under Article 110 of the Execution Law, the Chief Execution Officer was empowered, by Section 14(1)(b) of the Land Transfer Ordinance, to accept the new bid.

ANNOTATIONS : On the discretion of the C. E. O. under Sec. 14 L. T. O., especially in respect of extensions of time, see H. C. 2/40 (*ante*, p. 15) and annotations.

FOR RESPONDENTS : *Ex parte.*

FOR APPLICANTS : Elkayam.

ORDER:

This is an application for an order to the Chief Execution Officer Tel Aviv, to show cause why an order made by him allowing a sale of mortgaged property to be re-opened after the expiry of the final three days mentioned in Article 110, should not be set aside. Final Order for Sale in respect of the property has been given on the 24th of June, 1940, in the sum of LP. 10,000 to the Petitioners. Incidentally the valuation of the property is LP. 23,000. On the 28th of June a new bidder appeared and offered the sum of LP. 12,500.— an advance, in other words, of 25% on the amount realised at the previous sale. This offer was accepted by the Chief Execution Officer. The Petitioners, who were the purchasers for LP. 10,000, object to the postponement and to the acceptance of this further bid on the ground that it is illegal and that the Chief Execution Officer had no power to accept the bid after the expiry of the final three days' notice. We are of opinion that the action of the Chief Execution Officer is covered by the provisions of Section 14, sub-section 1(b) as amended, of the Land Transfer Ordinance. That section gives the President of the District Court, who is of

course the Chief Execution Officer, power to postpone the sale of mortgaged property if, *inter alia,* having regard to all the circumstances of the case, it would involve undue hardship to sell the property. In our opinion it would involve undue hardship on the debtor if the property were sold for LP. 10,000 when it could be sold for LP. 12,5000. It is unnecessary to say more. The application for an order is therefore refused.

Given this 4th day of July, 1940..

British Puisne Judge.

CIVIL APPEAL No. 137/40.

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

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

IN THE APPEAL OF :—

The Attorney General, on behalf of the Government of Palestine. APPELLANT.

v.

The Greek Catholic Church represented by His Grace Bishop G. Hajjar. RESPONDENT.

Registrars — Taxation of costs — Whether on higher or lower scale — Jurisdiction of registrar as regards costs — Discretion — Appeals from decisions of registrars re costs are final — Registrars Ordinance, Sec. 8.

In dismissing an application for leave to appeal from the order of the Land Court of Haifa, dated the 6th June, 1940 : —

HELD : 1. No appeal lies from a judgment of a Land Court reviewing a ruling of a Registrar on a question of costs, the question coming under Section 8 of the Registrars Ordinance.

2. Registrars have a discretion to award costs on the higher or lower scale, in the absence of an order by the Court. That discretion had been exercised in the present case, upon proper grounds.

ANNOTATIONS : 1) On Registrars see also H. C. 40/40 (*ante,* p. 157) and annotation 2.

2) It has already been laid down in C. A. 95/39 (motion, 1939, S. C. J. 501), that an application for costs is to be made immediately upon delivery of judgment.

FOR APPELLANT : Crown Counsel (Hogan).
FOR RESPONDENT : Asfour.

JUDGMENT:

After prolonged litigation the present Appellant was unsuccessful before the Land Court, Haifa, and judgment was given against him, but the Court did not indicate on what scale the costs would be paid.

The present Respondent therefore applied to that Court for an order that the costs should be on the higher scale, but that Court held that the application was too late and that the interpretation of the judgment had become a matter for the Registrar on which he should come to a decision himself.

The Registrar gave the Respondent costs on the higher scale, and the Appellant applied to the Land Court for review on the ground that no discretion as to scale of costs was vested in the Registrar. That Court held that such discretion was so vested, and refused the application. It also refused the application for leave to appeal to this Court.

The Appellant now applies for leave to appeal to this Court, to which the Respondent replies that no appeal lies by reason of Section 8 of the Registrars Ordinance.

While reserving our decision on this first point, we heard argument on the main issue, in order that we might consider it.

We are of opinion that the Respondent's first argument is well founded and that no appeal lies to this Court. We therefore refuse the application for leave to appeal, but since the other matters have been argued it may be convenient that we should say that in the absence of an order by the Court we are of opinion that the discretion is vested in the Registrar, and that in this case the Registrar exercised that discretion upon the proper grounds.

I should like to add that the provisions as to costs are simple but were intentionally made elastic so that Courts could deal adequately with the question, and that parties, both successful and unsuccessful, should make any application they wish in connection with costs when judgment is delivered.

The Respondent will have the costs of this application, which we fix at an inclusive sum of LP. 10.

Delivered this 25th day of July, 1940.

Chief Justice.

CIVIL APPEAL No. 118/40.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Harry Friedman,
2. Samuel David Fried,
3. Itzhak Magali. APPELLANTS.

v.

1. Mohammad Ali Sheikh Ali,
2. Mordechai Talithman. RESPONDENTS.

Promissory notes — Payable on demand where no time expressed for payment, B/E Ord. Sec. 9(1)(h) — Issues — Effect of Secs. 57(2) and 90 when there is no indorser — Presumption as to person guaranteed — Rebuttal of presumption — Weight of evidence — Desirability of making findings on all issues.

In allowing an appeal from the judgment of the District Court of Tel Aviv, dated the 8th May, 1940, and in remitting the case for retrial :—

HELD : 1. Sections 57(2) and 90 of the Bills of Exchange Ordinance, create a presumption in law that an aval guarantee, in the absence of a statement for whose benefit it is given is deemed to be given for the first endorser.
When, as in the present case, there are no endorsements, the question on whose account the guarantee was given is a matter to be decided by evidence.
2. As regards the first Respondent, the evidence was consistent only with an intention to guarantee the maker. The case would be remitted to consider the evidence relating to the signature of the second Respondent, and to deal with the remaining issues.

ANNOTATIONS : On the combined effect of sections 57(2) and 90 of the Bills of Exchange Ordinance, see C. A. 87/32 (P. P. 24.iii.33, C. of J. 256) and C. A. 222/37 (1938, 1 S. C. J. 80).

FOR APPELLANTS : Wilner.
FOR RESPONDENTS : No. 1, Elia (by delegation).
No. 2, Scharf.

JUDGMENT:

The Appellants were the payees named in a promissory note for LP. 700, dated 16th February, 1933, on the face of which appear the

names of the two Respondents as guarantors, in these words — "I guarantee. (Sgd.) M. Talithman," and "Guarantor on and after maturity. (Sgd.) Mohammad Ali Sheikh Ali." Since no time for payment is expressed in the note, the note is one payable on demand, see Sec. 9(1)(b) of the Bills of Exchange Ordinance, Cap. 10. The maker of the note was one Jacob Bechor, who is not a party to these proceedings. The note carries no indorsements. The Appellants sued the two Respondents in the District Court for the amount of the note. Issues were framed, eight in number, and as usual were disregarded by the Court. Evidence was heard of Bechor, and of the two Respondents, and the learned judges held that "the guarantee on the note was given in favour of the plaintiffs and not in favour of the maker of the note", and dimissed the claim, finding that the Appellants (Plaintiffs) had not proved their case.

The main point in this appeal is this — when there is no indorser, what is the effect of Section 57(2) and Section 90 of the Bills of Exchange Ordinance ? We are informed by advocates on both sides that this is the first time that this point has come before this Court so far as can be discovered. We assume for the purposes of this judgment, but without expressing any opinion as to the correctness or otherwise of this view, that the guarantees are avals, since neither side is prepared to dispute it.

Now, the guarantees do not state on whose account they are given, and in the absence of such a statement the effect of Sections 57(2) and 90, as interpreted by previous judgments of this Court, is that they are deemed to be given for the first indorser. As already stated, there is here no first indorser. It is argued by the Respondents that in such a case, a guarantee must be a nullity. With this we do not agree. The guarantees were obviously given and taken with the idea that they should be effective, and we think that in such a case as this, where the legal presumption cannot apply — and Section 57(2) merely creates a presumption in law, which can be rebutted by evidence — the question on whose account the guarantee was given, is a matter to be decided by evidence.

The District Court heard evidence on this question, and we must now examine it.

Bechor's evidence at any rate is perfectly clear. He said — "I signed the bill for LP. 700. ...There were two guarantors to the bill — the two defendants in this case. I asked the first Defendant (Mohammad Ali Sheikh Ali) to sign as a guarantor, and he signed voluntarily. I do not think the first Defendant knows the Plaintiffs. As regards the signature of the second Defendant, I obtained it through the

medium of a friend". In cross-examination he said — "I was in need of a guarantee in order to obtain money". Bechor, at any rate, was in no doubt as to why and for what purpose the guarantees were given — they were given for him, as without them he could not obtain the LP. 700.

The first Respondent, Mohammad Ali Sheikh Ali, was also very frank. He said : "I signed as a guarantor. Mr. Bechor brought the bill to me and asked me to sign.... I do not know in whose favour I guaranteed. I guaranteed the bill". The only possible construction to be given to these words is that he guaranteed the payment of the note, and by the person who had to pay the note, that is the maker, at whose request he had signed, and who was the only person whom he knew.

The judgment of the District Court, so far as it concerns the first Respondent, therefore, cannot stand since it is entirely contrary to the evidence. Incidentally, the judgment shows signs of carelessness, since it speaks of "the guarantee", whereas in fact there were two guarantees.

Mr. Talithman admitted his signature and said that he was asked by a friend to sign, and he goes on — "I signed in favour of one of the Plaintiffs, Friedman. I know Mr. Bechor well. I did not intend to guarantee Bechor".

The effect of this evidence is more difficult to ascertain. In one place Mr. Talithman said that he signed in favour of one of the Plaintiffs, Friedman, which might easily mean that he guaranteed that Friedman should be paid, and then he says that he did not intend to guarantee Bechor. The evidence is utterly self-contradictory, and we find it difficult to see on what material the District Court came to the conclusion to which it did. As the case has to go back in any event with regard to Sheikh Ali, we think that the District Court should be given an opportunity of reconsidering their judgment *re* Talithman in the light of our remarks in regard to both Respondents.

If it should be proved that the note was given in relation to the alleged contract, which is one of the issues still to be determined, then it seems clear beyond doubt that the note was given to secure the repayment of the LP. 700 advanced to Bechor, and equally clear that the guarantees vere given to ensure that payment by Bechor to the Plaintiffs.

The cases that have been quoted to us are not of any assistance, since in every one there was an indorser of the bill or note, and the present point did not arise.

We think, therefore, that as regards both Respondents the appeal

must be allowed, the judgment of the District Court set aside, and the case remitted to the District Court for a determination of the other issues involved, and to state definitely on what evidence they rely with regard to the non-liability of the second Respondent. We say nothing about the plea that the note is prescribed, since the District Court, though that point was clearly one of the issues framed, neglected to make any finding on it. This case is another example of the undesirability of the practice of dismissing a case on one issue only. The course of justice would be expedited if District Courts would be good enough to make findings on all relevant issues, and not only on one, in case the Court should be wrong on that one, as has unfortunately happened here. The costs of all parties to await the result of the retrial.

Delivered this 26th day of July, 1940.

Senior Puisne Judge.

CIVIL APPEAL No. 26/40.

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

BEFORE : Rose, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Alex Levin. APPELLANT.

v.

1. Liquidator of "Brosh" Co-operative Society, Ltd.
2. Leo Feuchtwanger,
3. Alexander Aron. RESPONDENTS.

Security for appeal — Application under R. 329 C. P. R. for increase of amount of security for costs — Interference with discretion of Registrar — Appellant leaving the country and having no property in Palestine — Affidavits — English practice.

In granting an application by the second Respondent for an increase of the amount to be paid into Court by the Appellant as security for the costs of the appeal :—

HELD : In the absence of an affidavit on behalf of the Appellant the Court would assume that the facts set out in the Applicant's affidavit were accurate.

2. This was a case where English practice ought to be followed.

whereby a substantial security for costs is usually ordered in the case of an absent appellant with no property in the country.

3. In view of the probable costs to be incurred the amount of the deposit would be increased.

ANNOTATIONS : For the English practice, under O. 65, R. 6 of the R. S. C., *vide* Halsbury, Vol. 26, *pp.* 64 *seq.*, *No.* 108, Digest, Practice and Procedure, *pp.* 903 *seq.*, *Sec.* 20.

FOR APPELLANT : Dickstein, I. Cohen.

FOR RESPONDENTS : No. 1 — Iszajewitz.
No. 2 — Baker, Kirschenbaum.
No. 3 — Absent, Served.

ORDER:

This is an application by the 2nd Respondent under Rule 329 of the Civil Procedure Rules, 1938, to increase the amount to be paid into Court by the Appellant as security for the costs of this appeal, such amount having been fixed by the Chief Registrar at LP. 20.

This Court is slow to interfere with the discretion of the Chief Registrar in a matter of this kind, but in this case there are unusual factors which, it would seem, were not known to the Chief Registrar when he made the order.

The Applicant, in his affidavit, states that the Appellant has left Palestine and gone to Holland, and that to the best of his knowledge, information and belief, the Appellant has left no property in Palestine. Counsel for the Appellant admits that the Appellant has no property in this country (apart from expectations arising from the present litigation) but he states that the Appellant's absence from Palestine is only temporary, and that he has the intention of returning in the near future. This statement is unsupported by affidavit, and we must therefore assume, for the purpose of this application, that the facts set out in the Applicant's affidavit are accurate.

We think that this is eminently a case in which we ought to follow the English practice, whereby a substantial security for costs is usually ordered in the case of an absent appellant with no property in the country.

In the Court below the 1st and 2nd Respondents were separately represented, there were separate and substantial issues, and each was awarded separate costs, including advocate's attendance fees. For the purpose of this application we must assume that the Court below was right in so dealing with the matter.

In the circumstances we consider that the sum of LP. 20 fixed by

the Chief Registrar is insufficient, and we increase the amount to LP. 35 to be paid into Court within one month of this date. In fixing this figure we are omitting from our calculation the amount of costs already incurred in the Court below, which we are informed have not yet been paid. Costs of this application to be costs of the cause.

Given this 18th day of March, 1940.

Senior Puisne Judge.

CIVIL APPEAL No. 146/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General on behalf of the General Manager of the Palestine Railways. APPELLANT.

v.

Isaac Bernstein. RESPONDENT.

Res judicata — Findings in criminal case binding in civil proceedings between the same parties — Claim by Palestine Railways for negligence and damages — C. A. 25/39 — No claim for damages in the absence of negligence.

In dismissing an appeal from the judgment of the District Court of Haifa (appellate capacity) dated the 30th day of May, 1940 :—

HELD : 1. (Following C. A. 25/39). It is settled law that criminal proceedings are conclusive evidence, as between the same parties, not only of the conviction, and the same applies also to acquittals, but also of the facts on which that conviction or acquittal was based. Neither the conviction or acquittal can be queried in a civil case.

The absence of negligence by the Respondent was, therefore, *res judicata* between the parties.

2. Even though, under the *Mejelle*, responsibility for damage may be wide, yet a plaintiff cannot sue a defendant for damages due to his, the plaintiff's, negligence, as was the case here.

FOLLOWED : C. A. 25/39 (1939, S. C. J. 193).

ANNOTATIONS :

1. On the binding force of findings in a criminal case on subsequent civil proceedings, see C. A. 113/40 (*ante*, p. 192) and annotation 4 thereto.

2. For other Railway cases, see C. A. 200/38 (1938, 2 S. C. J. 146) and annotations, C. A. 242/38 (1939, S. C. J. 5), C. A. 18/39 (*ibid.*, p. 247), C. A. 59—60/40 (*ante*, p. 130).

FOR APPELLANT : Crown Counsel — (Bell).

FOR RESPONDENT : Ben-Haviv.

JUDGMENT:

We need not trouble you, Mr. Ben-Haviv.

The facts out of which this present appeal arises are the following : The Respondent was prosecuted on a criminal charge before the Magistrate of driving a lorry rashly and carelessly, by reason of which rashness and carelessness he collided with a trolley car on the Palestine Railway, as the result of which several persons were injured and considerable damage was done apparently to the railway trolley. The Magistrate heard the evidence and found as a fact that the Respondent was not negligent but that the accident was due to careless driving on the part of the man in charge of the railway trolley. Attached to the criminal case there was a civil claim lodged on behalf of the General Manager of the Railways claiming a sum of LP. 144.450 mils. The Magistrate, after his finding that there was no negligence on the part of the Respondent, dismissed the criminal charge but failed to make any mention of the fate of the civil claim. Thereupon, nothing daunted, the Attorney General filed a civil action before the Magistrate claiming this same sum of LP. 144.450 mils, alleging that the General Manager had suffered damage due to the wilful and improper driving of the Respondent. The Magistrate who heard the case held that he was bound by the findings of fact in the criminal case, since the parties were the same in both the criminal and civil cases, and dismissed the action on the ground that it was *res judicata*. On appeal to the District Court, that Court dismissed the appeal and gave leave to the Appellant, the Attorney General, to come here.

In our opinion the learned Magistrate was correct in holding that he was bound by the findings of fact made in the criminal case. Following Civil Appeal No. 25/39, Abu Sham *v.* Attorney General (6 P.L.R. 216), it is settled law that criminal proceedings are conclusive evidence, as between the same parties, not only of the conviction, and the same applies also to acquittals, but also of the facts on which that conviction or acquittal was based. Neither the conviction or acquittal can be queried in a civil case. The basis of the

present Appellant's claim is negligence of the Respondent. It has already been found in the criminal proceedings between the same parties that the Respondent was not negligent. The question of negligence therefore is *res judicata* as between the two parties to this action ; it is in that sense, and not perhaps in the wider sense as held by the learned Magistrate, that the matter is *res judicata*. Even though, under the *Mejelle,* responsibility for damage may be wide, yet a plaintiff cannot sue a defendant for damage due to his, the Plaintiff's negligence, as was the case here.

For these reasons we think that this appeal fails and must be dismissed. The Respondent will have his costs on the lower scale and LP. 10 fee for attending the hearing.

Delivered this 23rd day of July, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 10/40.

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.

Alexander Glinsky. RESPONDENT.

Immigration offence — Captain of ship charged with aiding and abetting illegal immigrants — Immigration Ordinance, Secs. 5, 12(3), 12C — *Compliance with Royal Instructions.*

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 15th December, 1939, whereby the Respondent was acquitted of a charge of aiding and abetting illegal immigrants, contrary to Section 12(3) of the Immigration Ordinance, as amended :—

HELD : There was no reason to interfere with the decision of the Relieving President who had applied his mind to the relevant considerations and declined to form the opinion that any of the passengers were on board the ship with the intention of entering Palestine in contravention of Section 5 of the Immigration Ordinance.

ANNOTATIONS : Similar cases on Immigration offences are collated in the annotations to CR. A. 63/39 (*ante*, p. 4).

FOR APPELLANT : Crown Counsel (Hogan).

FOR RESPONDENT : J. S. Shapiro.

JUDGMENT:

Trusted, C. J. : I agree with the judgment which my brother is about to deliver.

In the course of argument it was stated that it was not known if the requirements of the Royal Instructions at to Ordinances relating to immigration had been complied with in certain cases. It is well, therefore, that I should read the following letter from the High Commissioner, in which he states —

> "I confirm that I had received instructions thereupon from His Majesty's Secretary of State for the Colonies before I promulgated the Immigration (Amendment) Ordinance, 1937, the Immigration (Amendment) Ordinance No. 2, 1939, the Immigration (Amendment) Ordinance No. 3, 1939, and the Immigration (Amendment) Ordinance, No. 4, 1939."

Rose, J. : This is an appeal by the Attorney General from a judgment of the District Court of Haifa dismissing a charge against the Respondent of contravening Section 12(3) of the Immigration Ordinance (Chapter 67 of the Revised Edition, as amended).

The Respondent at the material time was the captain of the steamship S. S. Noemijulia and it appears that on the 19th of September, 1939, this ship entered the port of Haifa with a large number of Jews on board, most, if not all, of whom were without the necessary papers which would have entitled them to land in Palestine.

The story which the Trial Court appears to have accepted is, in substance, that while it was the original intention of the Respondent to transfer his passengers to small boats outside the territorial waters of Palestine with a view to their being landed illegally in Palestine, he subsequently (partly out of humanitarian motives and partly under pressure from the passengers themselves) altered this intention and brought them instead, openly and without concealment, to Haifa.

The point to be decided is a short one, namely whether the prosecution succeeded in proving that there had been a contravention of the Ordinance on the part of these passengers or any of them. In view of Section 12C of the Ordinance, it would have been sufficient for the prosecution had the trial Court formed the opinion that any of the passengers was on board the steamship Noemijulia with the intention of entering Palestine in contravention of Section

5 of the Immigration Ordinance. The learned Relieving President, however, having, as is clear from his judgment, applied his mind to the relevant considerations, declined to form this opinion; a decision with which we see no reason to interfere. The appeal therefore fails and must be dismissed.

Given this 26th day of February, 1940.

British Puisne Judge.

I concur.

Puisne Judge.

HIGH COURT No. 45/40.

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

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Moshe Levy. PETITIONER

v.

Joseph Kupperman, Returning Officer of the Municipal Elections of Petah Tiqva, 1940. RESPONDENT.

Elections — Petah Tiqva elections — Municipal Corporations Ordinance, 8th Schedule, Secs. 1(1) 2(1) — Deposit to be made at nomination — Nomination made when nomination paper handed to returning officer — Laches.

In dismissing an application for an order to issue directed to the Respondent calling upon him to show cause why he should not afford the Petitioner an opportunity to nominate candidates without requiring him to make any deposit in connection therewith. And that an interlocutory order be issued directing the Respondent to postpone the elections pending the determination of this application :—

HELD: 1. Section 2(1) of the eighth Schedule, which provides that a candidate who is nominated must deposit with the returning officer, at the time of the nomination, the sum of LP. 25, should be read with Section 1(1) which provides that a candidate is nominated when his name is written on the nomination paper and handed to the returning officer. The deposit must be made at the time of the nomination.

2. The application was made too late. Seven days after the nomination day was fixed. The grant of an order *nisi* would result in the postponement of the elections.

ANNOTATIONS :

1. Cases on elections are collated in the annotations to H. C. 40/38 (1938, 1 S. C. J. 401).

2. On statutes to be read as a whole, see C. A. 56/40 (*ante*, p. 133) and annotation 4 thereto.

3. The High Court is always reluctant to interfere when the Petitioner has slept on his rights : H. C. 33/39 (1939, S. C. J. 320) and annotations ; H. C. 45/39 (*ibid*, p. 400) ; H. C. 78/39 (*ante*, p. 25, on p. 30). In H. C. 33/39 (*supra*) it was also held that "Possibly in one case six months would not be an excessive time whilst in some circumstances forty-eight hours would be too long to wait". In the present case, although the delay was comparatively short, any intervention by the Court would have resulted in the postponement of the elections.

FOR PETITIONER : Seligman.

FOR RESPONDENT : *Ex parte*.

ORDER:

This is an application for an order to issue to the Returning Officer for the Municipal Elections of Petah Tiqva to show cause why he should not allow the Petitioner to nominate candidates for election without requiring the candidates to make deposits at the time of nomination.

Section 1(1) of the Eigth Schedule says that—

> "Each candidate shall be nominated in writing on a separate nomination paper etc., etc.,"
> The nomination paper shall be delivered to the returning officer etc., etc."

Section 2(1) of the same Schedule says —

> "Every candidate for the office of councillor who shall be nominated therefor shall deposit with the returning officer the sum of twenty-five pounds".

Now, a candidate is nominated when his name is written on the nomination paper and handed to the returning officer. That follows, I may say, from the only possible construction of Section 1(1). The candidate therefore is nominated at the time the nomination paper is handed to the returning officer, and it seems to me that Section 2(1) of the Eighth Schedule must be read with Section 1(1) of the same Schedule, that is to say, that the candidate who shall be nominated shall deposit with the returning officer at the time of nomination

the sum of twenty-five pounds ; giving the only logical construction, the only sensible construction, this is what the section seems to me to mean that at the time of the nomination it is the duty of the candidate to deposit with the returning officer the sum demanded, otherwise great difficulties and endless confusion will be caused in voting, and in the conduct of the elections.

In any case, apart from these reasons, we should refuse this application because it has been made too late. The nomination day was fixed for the 21st of June, and it was not until the 28th of June that the application was made to this Court. If, for the sake of argument, we would have been prepared to grant an order *nisi,* it would have resulted in the postponement of the elections which, I understand, are fixed for the 3rd of July. There is no reason why this application should not have been made four days previously, at least.

The application must therefore be refused.

Given this 1st day of July, 1940.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 5/40.

IN THE APPELLATE TRIBUNAL APPOINTED UNDER SECTION 20(2) OF THE ADVOCATES ORDINANCE, 1938.

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

IN THE APPEAL OF :—

Max Seligman. APPELLANT.

v.

Chairman and Members of the Law Council. RESPONDENTS.

Advocates — Proceedings under the Advocates Ordinance, Sec. 20 and the Law Councils Ordinance, Sec. 4 — Complaint into conduct of advocate, Law Council Rules 17(3) — Council dealing with the complaint before receiving the findings of the Committee — Meaning of "conduct derogatory to the profession of an advocate", Law Council Rules 16(1) — No allegation of fraudulent conduct — Moral turpitude negatived — Costs.

In allowing an appeal from a decision of the Law Council dated January 29, 1940, suspending the Appellant's licence for a period of six months :—

HELD : The words "conduct derogatory to the profession of an advocate" appearing in Section 4(1)(h) of the Law Council Ordinance, did not constitute a new offence. They are qualified by the words "in accordance with the provisions of any ordinance." The Ordinance should be read together with the Advocates Ordinance and the words referred to disgraceful and fraudulent conduct and convictions for offences involving moral turpitude. The Committee having found that the conduct was not disgraceful, it having never been suggested that it was fraudulent and moral turpitude having been rejected, the Appellant was entitled to succeed in the appeal.

ANNOTATIONS : The criminal proceedings referred to were reported in P. P. 22.vi.—2.vii.1939 and the proceedings on appeal (CR. A. 29/39) in 1939, S. C. J. 345.

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

In 1938 two Ordinances were promulgated, the Advocates Ordinance and the Law Council Ordinance, to deal with advocates and to make various provisions in connection with them and the practice of their profession, among which are provisions for enquiry into the conduct of advocates.

Here as elsewhere, advocates are in many respects in a favoured position, and in consequence the law imposes upon them certain liabilitise and penalties. The Advocates Ordinance, Section 20, provides :—

> "Where any advocate is alleged to be guilty of disgraceful, fraudulent or unprofessional conduct, or where an advocate is convicted by any Court of any offence involving moral turpitude, the Law Council shall enquire into such allegation or into the circumstances of such conviction, and may either warn or reprimand the advocate, or suspend such advocate's practising licence for such period as it may think fit or recommend to the Chief Justice that such advocate's practising licence shall be cancelled and his name be struck off the roll of advocates, and thereupon the Chief Justice shall direct that the name of the advocate shall be struck off the roll of advocates."

and by Section 4(1)(h) of the Law Council Ordinance that Council is charged with :—

> "Enquiry into the conduct of any advocate or person permitted to practise before the Moslem Religious Courts alleged to have been guilty of unprofessional conduct or conduct derogatory to the profession of an advocate in accordance with the provisions of any Ordinance."

and Rules have been made which provide for such enquiries.

This, so far as I know, is the first occasion on which these provisions of the law have been invoked.

Mr. Seligman, the present Appellant, was convicted before the Courts of certain offences which may be summarized as conspiracy in connection with illegal immigration. That being so, the question as to the applicability of these disciplinary provisions arose, and the matter came before the Law Council. In the ordinary way, complaints of the conduct of advocates are made to the Council by complainants, and when there is no private complainant Rule 17(3) of the Law Council Rules, which deals with costs, would seem to contemplate the laying of a formal complaint by the Attorney General or his representative or a judge or magistrate, but it is not clear if formal complaint was made in this case. Mr. Bell, who was Acting Solicitor-General at the time, has told us what happened when the case first came before the Council.

As I understand the Rules they contemplate that when a complaint is laid before the Law Council, it calls upon the advocate to exculpate himself, and if he does not do so the Council refers the matter to a Committee of the Council to enquire into it.

In this case this procedure was not strictly followed, and the Council considered some aspects of the case before receiving Mr. Seligman's reply and before the Committee had submitted its findings, and decided that the criminal offence of which the Appellant was convicted did not involve moral turpitude. We are also told the Council considered wether there was unprofessional conduct, and it apparently came to the conclusion that there was not, as in the result it referred two questions to a committee : (1) was the Appellant's conduct disgraceful ; (2) was his conduct derogatory to the profession of an advocate.

Upon that reference the Committee found that there was no disgraceful conduct within the meaning of Section 20(1) of the Advocates Ordinance, but they found that there was "conduct derogatory to the profession of an advocate" within the meaning of Rule 16(1) of the Law Council Rules (*sic*).

These findings were returned to the Council which, on the 30th January, 1940, through its Chairman, informed the Appellant that these findings had been confirmed and that his practising licence would be suspended for six months, and Mr. Seligman, acting under the provisions of Section 20(2) of the Advocates Ordinance, appeals to this special tribunal against the decision of the Law Council.

There is nothing more in the law with regard to this tribunal and its powers than appears in that sub-section.

The Appellant's main argument is, either there is no such offence as conduct derogatory to the profession of an advocate, or, if there is such an offence, there is no penalty for it. I think it clear that the two Ordinances must be read together. In Section 4(1)(h) of the Law Council Ordinance the words "in accordance with the provisions of any Ordinance" must qualify the words "conduct derogatory to the profession of an advocate."

The Advocates Ordinance and the Law Council Ordinance both deal with unprofessional conduct, and the former also deals with disgraceful and fraudulent conduct and convictions involving moral turpitude. When the Ordinances are read together it would seem that conduct derogatory in accordance with the provisions of any Ordinance must be a summary reference to disgraceful and fraudulent conduct and convictions for offences involving turpitude, and I do not think, as was submitted by Mr. Bell, that the words create an additional offence which can be read into Section 20 of the Advocates Ordinance so that the penalties in that section may be applied to it.

If this view is accepted the finding of the Committee that the Appellant was guilty of conduct derogatory would be tantamount to a finding that he had been guilty of one or more of the ingredients to which I have referred, but it expressly found that the conduct was not disgraceful — it was never suggested that it was fraudulent and admittedly the Committee never considered moral turpitude.

In these circumstances Mr. Bell submits formally, that we have power to return the case for further enquiry, but as the Attorney General's representative he most fairly does not ask us to do so, because, as I have said, the Council, before referring the case to the Committee, considered this aspect and decided it in the Appellant's favour.

It follows that the Appellant is entitled to succeed in his appeal, and in the result the decision of the Law Council is set aside. There is provision under Rule 17 of the Law Council Rules as to costs, and the Appellant is entitled to his costs, *i. e.*, the actual amount he paid as Court fees.

Given this 8th day of February, 1940.

Chief Justice.

CIVIL APPEAL No. 145/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Raji and Bahjat El Issa. — APPELLANTS.

v.

The Syndic in the Bankruptcy of Selim Nasralla Khoury. — RESPONDENTS.

Usurious interest — Set off — Admissibility of evidence, C. A. 49/40 — Appeal from interlocutory order — No interference when lower Court has given no ruling on the merits.

In dismissing an application for leave to appeal from the order of the District Court of Haifa, dated the 28th day of February, 1940 :—

HELD : The District Court had not decided whether or not there could be a set off, and would have to bear in mind the principle laid down in C. A. 49/40. It would be dangerous, at this stage, to stop the evidence which might otherwise be relevant.

REFERRED TO : C. A. 49/40 (*ante*, p. 108).

ANNOTATIONS :

1. Cases on usurious interest are collated in annotation 4 to C. A. 49/40 (*supra*).

2. Leave to appeal from an interlocutory order was also refused in C. A. 16/39 (1939, S. C. J. 96) ; it was granted in C. A. 37/39 (*ibid*, p. 225) and in C. A. 118/39 (*ibid.*, p. 519).

FOR APPELLANTS : No. 1 — Abcarius Bey.
No. 2 — Geiger.

FOR RESPONDENTS : Hazou.

ORDER:

This is an application for leave to appeal from an interlocutory order of the District Court of Haifa. The order was to give the defendant an opportunity to bring evidence with respect to two sums. The District Court said in its order :

> "We have decided to give Mr. Asfour an opportunity of bringing evidence as to usurious interest as to both sums of LP. 1,324 and LP. 2,750. We shall reserve to the plaintiffs the right to argue, after all evidence has been heard, whether or not, even if usurious interest is proved, the defendant is entitled to any set off".

This much is quite clear, that the District Court came to no decision and the question of whether there is set off or not is still to be argued. We are in no way questioning the principle laid down in C. A. 49/40 — neither has the District Court done so in its interlocutory order. As I remarked it is very dangerous for us to stop the hearing of evidence which might be found, if heard, to be of importance. When all the evidence is heard the District Court will say whether it is admissible or not and then if the case comes before the Court of Appeal there will be no necessity to remit it for hearing further evidence as might otherwise easily happen. The District Court in arriving at its final decision will no doubt carefully consider the principle laid down in C. A. 49/40.

The application is therefore refused principaliy on the ground that the District Court came to no decision. The Respondent will have his costs to include LP. 10 for attending the hearing, to be paid in any event.

Given this 13th day of July, 1940.

British Puisne Judge.

Puisne Judge.

CIVIL APPEAL No. 122/39.

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

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

IN THE APPEAL OF :—

Keren Kayemeth Leisrael Ltd. APPELLANT.

v.

1. The Members of the Arab Mazareeb Tribe,
2. The villagers of Ma'lul. RESPONDENTS.

Cultivators — C. A. 14/39 referred back for case to be stated — Proceedings can be brought in the name of a tribe or village — Interpretation Ordinance, Sec. 3C, Cultivators (Protection) Ordinance, Sec. 2, "person", Mejelle, Arts. 1645—6, L. A. 121/26, L. C. Nab. 15/30, L. C. Nab. 35/30, L. A. 12/33, "statutory tenant", Maxwell, Interpretation of Statutes, Cultivators (Protection) Ordinance, Sec. 19(1)(d) — Particulars of claim — C. A. 30/39 — "Beneficial occupation" does not include pitching of tents or mere habitation,

sec. 18 — Alleged injustice by Commissioners expressing view of facts — Quaere whether a point of law — No injustice caused to Appellant.

In dismissing an appeal from the judgment of the Land Court of Haifa (appellate capacity), dated the 30th November, 1939, and in amending the judgment of the lower Court :—

HELD : 1. The proceedings, under Section 19(1)(d) of the Land (Settlement of Title) Ordinance, could be brought in the name of a tribe or of the inhabitants of a village, having regard to the definition of "person" in the Interpretation Ordinance.

2. The Respondents had given sufficient particulars of the land over which they claimed rights.

3. Inhabiting an area or pitching tents therein is not "beneficial occupation" within the meaning of section 18 of the Ordinance, as the characteristic of beneficial occupation is something taken from the land.

4. No injustice had been caused to Appellant by the expression of fact set out in the findings of the commission. *Quaere* whether this was a point of law.

REFERRED TO : C. A. 30/39 (1939, S. C. J. 299).

ANNOTATIONS :

1. Previous proceedings in this case : H. C. 61/38 (1938, 2 S. C. J. 107) and C. A. 14/39 (1939, S. C. J. 145).

2. For other decisions on the Cultivators (Protection) Ordinance, *vide* the cases cited in, and mentioned in the annotations to C. A. 30/39 (*supra*).

3. Compare C. A. 47/39 (1939, S. C. J. 293) for an other instance of the Court doubting the existence of a point of law.

4. On representative actions, see C. A. 85/38 (1938, 1 S. C. J. 285) and annotations, C. A. 229/38 (1938, 2 S. C. J. 182), Misc. A. 22/39 (1939, S. C. J. 341), C. A. 89/40 (*ante*, p. 152) and annotation 1 thereto.

FOR APPELLANTS : Horowitz, Feiglin.

FOR RESPONDENTS : Boustany.

JUDGMENT:

Certain disputes between the Appellants, the Keren Kayemeth, and the Respondents, the Arab Mazareeb Tribe and the villagers of Malul, were referred to a special commission under the Cultivators (Protection) Ordinance. The matter came before this Court in March of last year in Civil Appeal 14/39, when it appeared that there were irregularities in the case stated as required by Section 19 of the Ordinance — as amended — and in order to dispose of the matter in the special circumstances which were explained, this Court ordered

the case to be returned to the Land Court that it might deal with points of law which were raised by the advocates, on the basis of the facts found by the Commission, the documents which were before the Commission, and the record of the Commission.

This has been done and the matter again comes before us.

I may observe that the actual points of law with which we are concerned were raised and formulated by the present Appellants.

The paragraph under which the proceedings were brought provides :—

> "any dispute —
>
> . . . . . .
>
> (d) as to whether any person has exercised continuously any practice of grazing or watering animals or cutting wood or reeds or other beneficial occupation of a similar character by right, custom, usage or sufferance shall be referred to a special Commission".

which paragraph implements Section 18 of the Ordinance.

The first question of law raised is whether the proceedings could be brought, heard and determined in the name of indefinite and fluctuating bodies of persons, *viz.*, a tribe or the inhabitants of a village.

The commission, relying upon the Interpretation Ordinance, which defines person as including any association or body of persons, corporate or unincorporate, and Articles 1645 and 1646 of the *Mejelle*, held that the proceedings were properly brought, and that there was no need for every person to prove his claim. They went on to say :—

> "The proceedings of the hearing of the Commission begin with the words :
> "Claimants (1) The members of the Arab Mazareeb Tribe represented by Muhammad Hussein Khalaf.
> (ii) The villagers of Malul represented by Awad Elias and Yusuf Muhammad Abbas'.
> "These words read out to both parties as the chairman of the Commission wrote them in the proceedings. No objection to this representation was made by the appellants at any time during the proceedings".

The Land Court took the view :—

> "It is too late now for the Appellant to argue that the inhabitants of a village, or members of a family or tribe have not in Palestine been treated as forming a legal entity enjoying rights of tenancy or use of land. Mahmud Ahmad and other *v.* Saleh Ibrahim Ismail, Land Appeal 121/26, in Palestine Law Reports, 234, Jallad *v.* Jallad, Nablus, Land Case No. 15/30 ; Odeh *v.* Odeh, Nablus, Land Cases 35/30 and 12/33 ; and Agudath Netaim Co. Ltd. *v.* Arab El Fuqara Tribe, Law Reports of Palestine, Volume VI

> page 363. In these cases, moreover, strict proof of admission to membership of the unincorporated body does not seem to have been given. This case was not brought in a Court of law but before a special commission intended to deal with claims of peasants, and was we think properly brought."

In the last case cited, which also arose out of a reference to a special commission under the Ordinance, an Arab tribe was Respondent, but this point was not raised. Mr. Horowitz argues that the rights contemplated by the section are in the nature of *profits à prendre*, and in consequence are individual, but I do not think that argument is sound, a *profit a prendre*, may be exercisable in common with others.

In construing the section it does not seem to me that there is anything in the context which prevents the application of the Interpretation Ordinance. It is argued that in the definition of "statutory tenant", Section 2 of the Ordinance, the words: "person, family or tribe", impart an individual meaning to the word "person", and that if this be so the same meaning should be given throughout the Ordinance. The principle invoked is well stated in Maxwell, 7th Edition, page 272, as follows:—

> "It has been justly remarked that, when precision is required, no safer rule can be followed than always to call the same thing by the same name. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. Accordingly, in ascertaining the meaning to be attached to a particular word in a section of an Act, though the proper course would seem to be to ascertain that meaning if possible from a consideration of the section itself, yet, if the meaning cannot be so ascertained, other sections may be looked at to fix the sense in which the word is there used".

But on closer examination one finds in Section 19(1)(c) the question, whether any person is a landlord — there the word person clearly must have the wider meaning. Assuming therefore the argument on Section 2 is well founded, upon which I expressly reserve my opinion, it is clear that the meaning of the word is not uniform throughout the Ordinance, and I think the Interpretation Ordinance should apply to Section 19(1)(d). When it is applied the question arises, is an Arab village or tribe a body of persons unincorporate. Having regard to local circumstances I am of opinion that each is within the definition.

This disposes of the first point.

The second point is set out in paras. 2 to 5 of the points of law, and shortly is, whether or not the Respondents gave sufficient particulars of the land over which they claimed rights.

On 24.1.39 the village Mukhtar and elders wrote to the Assistant District Commissioner as to their rights in the land which the Jews had annexed to the King George Forest.

The *Mukhtar* of the Mazareeb wrote in similar terms.

The summons issued to Mr. Pausner (representing the Keren Kayemeth) stated :—

> "The inhabitants of Malul and Arab Mazareeb claiming water, grazing and settlement rights in the Forest Area belonging to the Keren Kayemeth known as King George Forest".

In the special case the Commission recorded :—

> "It is submitted that the term "King George Forest" is sufficient to fulfil the requirements of this Regulation as it is a matter of common knowledge that the Forest is called in full "King George V. Jubilee Forest".
>
> "The Commission at their first sitting asked the claimants to give a description of the land which had been briefly described in their application."
>
> "The land was then described by the claimants, in detail, and the appellants raised no objection or query as to its boundaries or name. It is submitted that the "brief" description in (b) above, when supplemented by the detailed description given verbally by the respondents, was sufficient to keep the appellants at all times well informed of the land concerned in the dispute."
>
> "Although the applications of Malul named the land as "the Jubilee Forest" and that of Mazareeb as "the King George Forest" both applications contained the secondary names of "Waaret Mazareeb" and "Sammunieh site" respectively. In order to make the description of the land clear to both parties the Commission not only questioned the Registrar of Lands as to the nomenclature but also inspected the land, and in the presence and with the assistance of both parties, marked the boundaries on a map attached to the proceedings. They further held that for the purpose of the dispute, the land should be called "King George V. Jubilee Forest"."

The Land Court held :—

> "We do not think it desirable that claims before a special commission should be subject to undue formality. Before the hearing began the claimants were required and did define clearly and indicated by reference to a map the land claimed. The appellants were offered adjournments to enable them to meet any variation or amendment there might seem to be in the claim and to prevent their being taken unawares."

The actual land over which the rights were claimed must be a question of fact, but I have set out the proceedings at some length to make clear that there was no sort of injustice to the Appellants such as I gathered Mr. Horowitz was inclined to allege.

I do not think there is anything in this point.

Mr. Horowitz agrees that with Civil Appeal 30/39 P. L. R. Vol. 6, p. 363, against him, which was decided after these points of law were drawn up, he cannot argue his point of law — No. 6. — but he desires to reserve it.

The next question is :—

> "Whether the Special Commission was not wrong in holding that the pitching of tents and inhabiting a locality or area is or can be a "beneficial occupation" within the meaning of s. 18 of the Cultivators (Protection) Ordinance."

This appears to me to be a simple question of construction. The actual words in Section 19(1) which is the section under which the Commission acts, are :—

> "any practice of grazing or watering animals or cutting wood or reeds or other beneficial occupation of a similar character."

The characteristic is something taken from the land, and I do not think extends to pitching tents or inhabiting a locality. The Land Court seems to have taken the view that camping may be ancillary to grazing, and so protected. As a matter of common knowledge, grazing can be carried on without camping, and I do not think the words of the section justify that construction.

The Commission's finding of 23.3.37 will be varied by striking out the words :—

> "The Commission further finds that the inhabitants of Arab Mazareeb have exercised for a similar period a beneficial occupation by pitching of tents and inhabiting of the same area."

It appears that at the close of the claimants' evidence the Commission recorded :—

> "The Malul People wish to call further evidence."
> "The Commission is of opinion that there is no doubt that both claimants have in fact grazed their animals in the Forest for the past five years, and the Arab Mazerib have exercised the beneficial occupation of pitching their tents on the land for this period. No further evidence is therefore required from claimants."

Mr. Horowitz invites us to say that this offends against the general principles of the administration of justice and is therefore a ground of appeal under the section. He does not, however, assist us with any authorities.

The Land Court held that it had no jurisdiction to deal with this matter on appeal by case stated on a point of law.

I feel considerable doubt if this is a point of law within the section, but be that as it may, I do not think there was any injustice. The observation was unfortunate in its terms, but it is clear that

the Commission were indicating that a *prima facie* case had been made out. It was made in the middle of the proceedings, and there is no suggestion that after making it the Commission refused to hear the Appellants or their witnesses, and there is no reason to assume that the final decision was given without due consideration of the case which the Appellants put forward, and which the Commission recorded.

The appeal fails on all the points raised except the variation of the finding as to pitching tents and inhabiting the area.

The Respondents, who are represented by one advocate, will together have a fixed sum of LP. 10 in respect of all costs.

Given this 15th day of February, 1940.

Chief Justice.

CIVIL APPEAL No. 114/39.

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

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

IN THE APPEAL OF :—

1. M. Chaikin & Co.,
2. Mendel Chaikin,
3. Benjamin Louis Daichowsky. APPELLANTS.

v.

1. Anglo Palestine Bank, Ltd.,
2. S. Aaronson & Co. RESPONDENTS.

Promissory notes — Note made payable at a certain place in the body of it — Presentment for payment necessary — Bills of Exchange Ord. Sec. 88(1) — Words of presentment form part of the body of the note — Bills of Exchange Act, Sec. 87(1) compared — Holder's claim dismissed for lack of presentation.

In allowing an appeal from a judgment of the District Court of Haifa (appellate capacity) dated the 2nd November, 1939, and in restoring the judgment of the Magistrate whereby the respondents' claim was dismissed :—

HELD : 1. The words "Payment at Jerusalem, Romeima, M. Chaikin" appearing on the notes were written in such a manner at to justify the Magistrate in finding that they formed part of the body of the note.

There was nothing in the evidence of the person who wrote those words to cause him to alter that finding.

2. The Magistrate was right in holding that there had been no presentation or waiver of presentation.

ANNOTATIONS :

1) On the meaning of the words "in the body of the note", *vide* Halsbury, Vol. 2. *pp.* 684—5, *No.* 954, Digest, Vol. 6, *pp.* 239 *seq.*, *Subsect.* 7, B(a).

2) On due presentment for payment *cf.* C. A. 54/31 (1, P. L. R. 699, C. of J. 245), C. A. 65/33 (2, P. L. R. 88, C. of J. 272, P. P. 6.v.34).

FOR APPELLANTS : Agranat.

FOR RESPONDENTS : 1st — A. Levin, N. Lipschütz,
2nd — No appearance.

JUDGMENT:

The Appellants are an English partnership who were sued in the Magistrate's Court, Haifa, as the makers of a promissory note, payable to Aaronson & Co., by the Respondents, the Anglo Palestine Bank, as holders.

A number of defences were raised, but the substantial defence was that the note in its body was made payable at a particular place, and that it had not been presented as required by Section 88(1) of the Bills of Exchange Ordinance.

The Plaintiffs maintained that the place of payment mentioned in the bill was not in the body thereof, but was only a memorandum. Alternatively, that the bill had been presented, or presentation waived.

In his judgment of 29th July, 1938, the learned Magistrate dealt with these matters at some length, and decided them in favour of the Defendants.

The matter went on appeal to the District Court, which on the 31st October, 1938, after some argument, ordered :—

> "By consent of both parties the Court hereby directs that the judgment of the Magistrate herein be set aside and the case be remitted to him to enquire into and to hear the evidence produced by both parties in regard to the circumstances generally in which the words "the payment is in Jerusalem, Romeima, Mr. Chaikin" were inserted in the said Promissory Note and by whom and in whose presence, and for a fresh judgment to be given".

We are told now that it was to ascertain the intention of the Appellants. If this was so, it seems strange that the Court did not say so. The language used seems to me clearly to contemplate an inquiry as to whether the words in question were inserted properly in the note, but

in the light of the subsequent evidence this distinction does not appear to be of any consequence.

The case went back to the Magistrate, who heard only one witness, S. Aaronson, a son-in-law of one of the Defendants who did business with the Defendant partnership but was not their agent. It is now suggested that he was called by the Plaintiff Bank, but he was examined by the Defendants' advocate and is stated by the Magistrate to be a witness for the Defendants.

This again is not of consequence, as I understand both sides to accept his evidence. Certainly the Bank called no evidence to contradict it.

The witness stated that he actually wrote the bill, except the signature and some figures, and he stated that he wrote the words "payment in Jerusalem" "because Daichowsky (one of the partners) gave me permission to add in where the payment is, and the Bank demanded this", and he amplified this account. I think it is clear that the words were properly inserted, with the intention that the bills should be payable in Jerusalem.

The Magistrate then referred to his earlier judgment and went on to say that, having complied with the District Court's order, and having heard the only witness called, he saw no reason to change his opinion.

The case then went back to the District Court, which, on 2nd November, 1939, held :—

> "We think the conclusion arrived at by the Magistrate here in regard to the words "payment at Jerusalem, Romeima, Mr. Chaikin" was wrong. If any doubt could arise on the oral testimony of the one and only witness S. Aaronson — on this point — the balance must be decided by the documents themselves — their form and contents, *viz.* Exhibits P/1 and P/2, and reference also to P/5 and P/3."
>
> "We therefore set aside the judgment of the Magistrate and hold that the said words are not a part of the body of the note and therefore the note need not be presented at a particular place in order to render the respondents (maker and endorser) liable on it."

With all respect to the District Court, I find this difficult to follow.

There are a number of English cases under Section 87(1) of the Bills of Exchange Act, which is similar to our sub-section. It would appear that the place of payment must be inserted in the body of the note, and not in the margin nor at the foot, as distinguished from the body. In this case the words are written in a convenient place, underneath a statement as to consideration — the first words of the line being level with the lines above them. They cannot, therefore, be said to be in the margin. There is no undue space between the words in question and

the words above them, and the last line is roughly level with the signature on the opposite side of the bill. I do not think, therefore, the words can be said to be at the foot.

At the first hearing, in my opinion, the Magistrate was certainly entitled to come to the conclusion that the words were in the body of the note, and I can see nothing in the said evidence of Aaronson to cause him to alter that view.

We heard Mr. Levin, for the Respondents, at some length in order that we might dispose of this unduly prolonged litigation. I think it is clear that the Magistrate was right in holding that there was no presentation or waiver of presentation.

The Magistrate, at the end of his second judgment, stated that he dismissed the action with regret, and Mr. Levin sought to introduce a measure of prejudice against the Appellants. I need only say that they are entitled, as others have done before them, to shelter themselves behind the provisions of the law.

The appeal will be allowed, and the judgment of the District Court set aside, and that of the Magistrate restored, and the Appellants will have the costs of the first hearing before the District Court (no sum was certified for attending that hearing), the costs of the second appeal before the District Court — when the sum of L. P. 3 was certified for attending the hearing — and as against the first Respondents, the Anglo Palestine Bank, the costs of this appeal on the lower scale, with LP. 15 for attending the hearing.

Given this 12th day of January, 1940.

Chief Justice.

CIVIL APPEAL No. 106/40.

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

BEFORE : Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF :—

1. Moses Rashkovitz (David),
2. Isaac Ben Benjamin Diskin. APPELLANTS.

v.

Moise D. Silberstein. RESPONDENT.

Wills — Civil form, Succession Ord., Secs. 11, 12 — *Requirements of religious law need not be complied with — Capacity to make a will*

explained — Capacity is determined by religious law — Will in civil form is alternative to will under religious law — Point not taken in the lower Court.

In allowing an appeal from the judgment of the District Court of Tel Aviv dated the 30th April, 1940, and in granting probate of the will of the *de cujus* :—

HELD : 1. The will was a will in civil form under Section 12 of the Succession Ordinance. This section provides an alternative to wills in accordance with the personal law of the testator. It enables a testator to avoid the restrictions of his personal law with regard to dispositions. Section 11 does not limit or restrict the operation of Section 12. It was, therefore, immaterial that the provisions of the Rabbinical Law regarding dispositions had not been complied with.

2. The allegations of fraud and undue influence had been rejected by the lower Courts.

3. The word "incapable" in Section 12(b) referred to capacity to make a will at all, not to the capacity to make certain dispositions which may be contrary to the religious law.

4. The only point at which the question of the religious law comes in, in a case such as this, is as to the capacity, under Section 12(b), of a testator to make a testamentary disposition.

5. The argument that the Succession Ordinance was *ultra vires* the Palestine Order in Council had not been raised in the lower Court and could not be taken on appeal.

ANNOTATIONS :

1) On wills in civil form, see C. A. 85/28 (C. of J. 1870) ; compare Halsbury, Vol. 28, Part V, *pp.* 545 *seq.* ; Digest, Vol. 44, Part V, *pp.* 227 *seq.*

2) On capacity to make a will, *vide* C. A. 87/36, (P. P. 6, 13, 18.i.38, 1 Ct. L. R. 70, 1937 1 S. C. J. 178, C. of J. 1934—6, 779), Halsbury, Vol. 28, Part III, *pp.* 532 *seq.*, Digest, Vol. 44, Part III, *pp.* 217 *seq.*

3) On the inadmissibility of a point not raised at the trial, see C. A. 54/40 (*ante*, p. 104) and annotation 2.

FOR APPELLANTS : Gluckmann.

FOR RESPONDENT : Margalith.

JUDGMENT:

This is an appeal from a judgment of the District Court of Tel-Aviv dismissing a petition for probate of a will made by the late Leib Ben Dov Ber Silberstein. The District Court, whilst apparently holding that the will was in civil form according to Section 12 of the Succession Ordinance, nevertheless held that certain formal provisions of the Jewish Religious Law with regard to the promulgation of the will and other

matters had not been complied with and decided, therefore, that this will of the deceased could not be admitted to probate.

Now, it seems to us, that the learned Judge was wrong and that the whole question, the one and only question is this — is this will a will in civil form in accordance with Section 12 of the Succession Ordinance. The will is in writing, it is signed by the testator in the presence of two witnesses at least (in this case there were three witnesses, because the Notary Public was present) and no point has been raised as to the capacity of the witnesses who attested the will.

With regard to paragraph (c) of Section 12, there was an allegation of fraud or undue influence made by the present Respondent but this was rejected by the Court below which had sufficient evidence on which to do so. The question of the testator being incapable of making a will depends upon what is meant by the word "incapable". We hold that the question of capacity under paragraph (b) of Section 12 is the capacity to make a will at all, and does not refer to the capacity to make certain dispositions which may be contrary to the religious law. It has not been suggested that the testator was under the age of eighteen, in fact he was about the age of eighty. It is not suggested that he was suffering from mental infirmity to prevent him from understanding what he was doing. That is the sole meaning of paragraph (b) of Section 12, and we, therefore, hold that this will is a good and valid will in accordance with the civil form.

It is said that a will, being made in civil form, cannot be a valid will if it contains provisions or dispositions against the personal law, in this case the Jewish Rabbinical Law. With this we do not agree. The only point at which the question of the religious law comes in, in a case such as this, is as to the capacity, under paragraph (b) of Section 12, of a testator to make a testamentary disposition. In our opinion, Section 12 is intended to provide an alternative method of making a will to that provided under the law governing the personal status of a testator ; in other words, to enable a testator, if he so wishes, to avoid the restrictions of his personal or religious law, with regard to the dispositions which he may wish to make -- that is to say, a person can make a will according to his personal law or his religious law, but, on the other hand, if he makes a will according to the provisions of Section 12, that is equally valid, and is an alternative method of testamentary disposition. And we do not think that Section 11 in any way limits or restricts the provisions of Section 12. And Section 12 contains no restriction as to the dispositions which a testator may desire to make.

It is unnecessary to say anything about the argument which the Re-

spondent sought to advance that the Succession Ordinance is *ultra vires* the Order-in-Council of 1922. This point was never raised in the Court below and cannot now be taken on appeal.

For these reasons the appeal must be allowed and the judgment of the District Court set aside and we order probate to be granted of this will of the deceased, Leib Ben Dov Ber Silberstein, dated the 16th *Nissan,* 5699, 5th April, 1939. The Appellant will have his costs both here and below to include a sum of LP. 15, for attending the hearing in this Court, and the costs will be paid by the Respondent personally.

Delivered this 19th day of June, 1940.

British Puisne Judge.

HIGH COURT No. 41/40.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Shlomo Salem Levy esh-Sheikh (called also Salomon Alsheikh). PETITIONER.

v.

Ayshe Abdul Halim Ghanyem of Tireh. RESPONDENT.

Habeas corpus — Cases where the application will not be granted — Undertaking by Respondent not to remove child.

In dismissing an application for a summons to issue directed to Respondent calling upon her to produce the body of the child Malka Alsheikh before this Court on a date to be fixed and to show cause why she should not hand over the said Malka Alsheikh to the Petitioner :—

HELD : This was not a case where the High Court would interfere. The Respondent had undertaken not to remove the child for a period of three months so as to enable the Applicant to institute proceedings.

ANNOTATIONS :

1) For other cases on custody of minor children, see H. C. 24/40 (*ante,* p. 95) and annotation 1. See also C.A. 65/37 (1937, 1 S.C.J. 291, 1 Ct.L.R. 72).

2) The writ of *habeas corpus* is "a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody" (Halsbury, Vol. 9, *p.* 701, *No.* 1200) ; see also Courts Ordinance, 1940, Sec. 7(a).

In the present case, the Respondent having undertaken not to remove the child for a given period in order that the matter might be decided by a competent Court, the writ could not issue, since :

a) It will never issue where there is an other remedy available : Halsbury, Vol. 9, *pp.* 703—4 ;

b) it cannot be used to decide a dispute as to guardianship : Digest, Vol. 28, *pp.* 269—270, *Nos.* 1218 *seq.*

3) Palestinian authorities on *habeas corpus* are collated in annotation 2 to H. C. 24/40 (*supra*).

FOR PETITIONER : Argaman.

FOR RESPODENT : Abdul Hamid.

ORDER:

This is eminently not a matter in which this Court should interfere. The Respondent, having undertaken not to allow the child to be removed from the place where she is for a period of three months to give the Petitioner an opportunity to institute proceedings, if he so wishes, in the appropriate Court, the Rule is discharged with costs to include LP. 10 for advocate's attendance fee.

Given this 18th day of June, 1940.

British Puisne Judge.

HIGH COURT No. 52/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

The Colnoa Company Ltd. (in Hebrew : Hevrath Colnoa Beeravon Mugbal). PETITIONERS.

v.

1. The Chief Execution Officer (President District Court) and the Assistant Chief Execution Officer, District Court, Tel-Aviv.
2. Moshe Nathaniel and Esther Nathaniel. RESPONDENTS.

Execution of pledge — Notary Public Law, Art. 72 — Security executed in connection with a lease — The two documents to be regarded as one.

In dismissing an application for an order to issue directed to the Respondents calling upon them to show cause why the three decisions of the First Respondent dated 20.5.40, 5.7.40 and 14.7.40 respectively in Execution File of Tel-Aviv No. 4576/40 be not set aside and the application of the second Respondent dated the 7th July, 1940, for the enforcement of the pledge be not refused, and an order be made staying the decisions of the first Respondent pending the issue of an order absolute :—

HELD : In a case such as this, where a security is executed in compliance with an undertaking given in the lease, the two documents must be regarded as one for the purposes of Artice 72 of the Notary Pubic Law.

The proceedings were therefore regular.

ANNOTATIONS : Authorities on pledges are collated in the annotations to H. C. 23/39 (1939, S. C. J. 233). On Art. 72 of the Notary Public Law, see in particular H. C. 14/31 (C. of J. 1641).

FOR PETITIONERS : P. Goldberg.

FOR RESPONDENTS : *Ex parte.*

ORDER:

This is an application for an order against the Chief Execution Officer, Tel-Aviv. The Chief Execution Officer had ordered execution of a security which had been attested by the Notary Public under Article 72 of the Notary Public Law. The Petitioner tried three times various Execution Officers and Assistant Execution Officers, all of whom declined to assist him and has come to this Court.

The principal point taken by the Petitioner and the only one we find it necessary to refer to is this : that under the provisions of Article 72 the security must be embodied in the lease. In this particular instance the lease contained an undertaking to execute the security and in carrying out that undertaking this particular security was subsequently executed. We are of opinion that in a case such as this where a security is executed in compliance with an undertaking given in the lease the two documents must be regarded as one for the purposes of Article 72 of the Notary Public Law, and the proceedings are therefore quite regular.

The application must therefore be refused.

Given this 26th day of July, 1940.

British Puisne Judge.

HIGH COURT No. 60/40.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Dr. Paltiel Novik. PETITIONER.

v.

1. The Chief Execution Officer, District Court, Tel-Aviv,
2. Mrs. Lina Wozniansky. RESPONDENTS.

Imprisonment for debt — Application by judgment creditor that debtor be examined as to his means — C. E. O. must be satisfied that the debtor has been properly served — Service upon clerk is insufficient.

In granting 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 should not be set aside and that the said order be cancelled :—

HELD : The Chief Execution Officer should not have issued an order for the imprisonment of the Petitioner before being satisfied that the notice of the creditor asking for the examination of the Petitioner as to his means had been properly served upon the debtor. Service at the office of the Petitioner and upon his clerk was not good service.

ANNOTATIONS :

1) On sufficiency of service, see the following decisions : H. C. 14/29 (C. of J. 1498), C. A. 17/34 (P. P. 3.vi.34, C. of J. 1934—6, 785, 2 P. L. R. 93), C. A. D. C. Ja. 42/36 (C. of J. 1934—6, 104), H. C. 14/39 (1939, S. C. J. 163), C. A. 86/39 (*ibid.*, p. 450), C. A. 89/39 (*ibid.*. p. 414) and C. A. 120—121/39 (*ante*, p. 32).

2) On imprisonment for debt, *vide* H. C. 23/38 (1938, 1 S. C. J. 229), H. C. 55/38 (1938, 2 S. C. J. 71) and H. C. 6/39 (1939, S. C. J. 80).

FOR PETITIONER : Hake.

FOR RESPONDENTS : No. 1 — Absent — Served.
No. 2 — Sommerfeld.

O R D E R :

We need not hear you, Mr. Hake.

In this case the judgment debtor has applied for an order against the Chief Execution Officer to show cause why his order of imprisonment against the Petitioner should not be set aside. A notice was issued on behalf of the judgment creditor calling upon the judgment debtor to

appear before the Chief Execution Officer to be examined as to his means. Before the Chief Execution Officer can proceed to hear the application of the judgment creditor, he must be satisfied that the judgment debtor has been properly served. This, the judgment creditor failed to prove was done. The notice was served in the office and upon the clerk of the judgment debtor, which is not a good service in accordance with the Rules. In the circumstances, the rule *nisi* will be made absolute with costs and the sum of LP. 10 for attending the hearing, to be paid by the second respondent, Mrs. Lina Wozniansky.

Given this 23rd day of August, 1940.

British Puisne Judge.

HIGH COURT No. 65/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :

Ignac Kerpner. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Dov Goradesky. RESPONDENTS.

Discretion of C. E. O. — Stay of execution proceedings — C. E. O. not to assume functions of legislature in granting moratorium.

In refusing an application for an order to issue directed to the Respondents calling upon them to show cause why the order of the first Respondent dated 13.8.40 staying execution proceedings in file No. 8538/38, Tel-Aviv, should not be set aside, and why the registration of the property in the Land Registry in the names of the bidders should not be proceeded with.

HELD : Although the proceedings had been protracted for a considerable time, the extension given by the Chief Execution Officer was within his discretion. No further delay should, however, be granted at the expiration of the period as the Chief Execution Officer would in effect be granting a moratorium and assuming the duty of the legislature.

ANNOTATIONS :

On the discretion of the Chief Execution Officer, see H. C. 47/40 (*ante*, p. 200) and annotation.

FOR PETITIONERS : Fellman.

FOR RESPONDENTS : *Ex parte.*

ORDER:

In this case we do not think that the application for a rule *nisi* should be granted. It is true that in this case the execution proceedings had been protracted for a considerable period. It is stated in the last order of the Chief Execution Officer that :

> "Execution stayed provided that the mortgagor pays LP. 85.650 mils interest due by 14.8.40 and all future interest when due up to the 10th of February, 1941.
> Failing which Execution will proceed."

This, we hold, is within the discretion of the Chief Execution Officer to make. We do not think however that a further delay should be granted when the period expires, because the Chief Execution Officer will be in effect granting a moratorium and assuming the duty of the legislature.

The rule *nisi* will, therefore, be refused.

Given this 5th day of September, 1940.

British Puisne Judge.

HIGH COURT No. 61/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

1. Abed Abdul Fatah Yacoub,
2. Tewfic Abdul Fatah Yacoub,
3. Ahmad Abdul Fatah Yacoub. — PETITIONERS.

v.

1. President District Court, Haifa,
2. Isaac Yosef Balaile. — RESPONDENTS.

Execution proceedings — Irregularities raised after final order for sale — No case made out — Application for further evidence to be heard refused.

In refusing an application for an order to issue directed to the First Respondent calling upon him to show cause why the rulings made by him on the 24th July and the 30th July, 1940, in Haifa Execution File No. 282/39 should not be

set aside and that the First Respondent be commanded to hear further evidence as submitted and to give his final decision after hearing such evidence :—

HELD : The Chief Execution Officer had rightly refused to set aside the final order for sale and to hear evidence to prove that perjury had been committed before him.

ANNOTATIONS :

1. Earlier proceedings : H. C. 26/40 (*ante*, p. 114).

2. For the principle that the High Court will not easily upset a final order for sale, see H. C. 20/39 (1939, S. C. J. 138) and annotations, H. C. 17/39 (*ibid.*, p. 167), H. C. 45/39 (*ibid.*, p. 400). For an exception, *vide* H. C. 14/39 (*ibid.*, p. 163).

FOR PETITIONERS : Toister.

FOR RESPONDENTS : *Ex parte.*

ORDER:

In this case an allegation is made that certain technical requirements in connection with execution proceedings had not been carried out. It is said that these infringements were not discovered until after final order for sale. The Chief Execution Officer most generously heard evidence at considerable length from both sides and came to the conclusion that he was not satisfied with the allegations brought. The present Petitioner wanted him to hear further evidence in order to prove that some of the evidence he had heard was perjury. Quite properly, in our opinion, the Execution Officer also refused to comply with this request.

The application for an order *nisi* must, therefore, be refused.

Given this 2nd day of September, 1940.

British Puisne Judge.

HIGH COURT No. 4/40.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Zuhra bint Ibrahim Radwan. PETITIONER.

v.

1. Chief Execution Officer, Majdal,
2. Mohammad ibn Mohammad Abdul Fattah Hammoudeh. RESPONDENTS.

Execution — Chief Execution Officer may not order the cancellation of a previous order already executed — Order made proprio motu — Laches — Costs.

In granting an application for an order calling upon the first Respondent to show cause why his orders dated January 13th, 1936, and January 13th, 1940, in Execution File No. 303/35, Majdal, whereby he refused to execute a judgment of the Magistrate's Court, Majdal, should not be set aside and why he should not execute the said judgment :—

HELD : 1. The Chief Execution Officer was wrong in ordering the cancellation of his previous order, which had already been executed, particularly as this had been done without application being made to him.

2. Applicant had been guilty of delay so that she would have no costs, but the order could not be allowed to stand.

ANNOTATIONS :

1) The Chief Execution Officer is entitled to cancel or vary orders previously made (H. C. 36/38, 1938, 1 S. C. J. 343 and annotations ; H. C. 52/38, 1938, 2 S. C. J. 61) and the present case is distinguishable on the ground that this had been done without application and after the order had already been executed (compare H. C. 51/39, 1939, S. C. J. 428 and H. C. 40/40 *ante*, p. 157).

2) On delay in applying to the High Court, see H. C. 45/40 (*ante*, p. 213 and annotation 3 thereto).

PETITIONER : In person.

FOR RESPONDENTS : No appearance.

ORDER:

We think that the Chief Execution Officer in this case was clearly wrong, because, having given an order to execute on 12.1.36, and that order having been executed, he, on the 13.1.36, reversed his previous decision and ordered delivery of possession to be cancelled. He did this without any application having been made to him on the subject by the judgment debtor. We do not think that he can cancel a completed execution in this way.

The only point which has troubled us is the length of time which the Petitioner has taken to come to this Court. But in spite of the delay, we feel that it would not be just to allow the second decision of the Chief Execution Officer to stand. It is true that the delay may have caused damages to the Second Respondent, but that is another matter. The order *nisi* must therefore be made absolute, and execution of the judgment must proceed. But in view of the delay we do not think that the Petitioner should have her costs.

Given this 19th day of February, 1940.

British Puisne Judge.

CIVIL APPEAL No. 24/40.

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

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

IN THE APPEAL OF :—

Mustafa Ahmad Mohammad Abdulnabi and 9 others. APPELLANTS.

v.

Ibrahim Adham Hassan Husseini Abu el-Huda, in his capacity as Mutawalli, Wakf Sheikh Abu el-Huda. RESPONDENT.

Wakfs — Claim by prescription — Agreement for cultivation entitling cultivator to a share of the land — Wakf property cannot be alienated in this manner — No prescription where possession as tenants.

In dismissing an appeal from a decision of the Land Settlement Officer, Ramleh Settlement Area, dated 19 August, 1939 :—

HELD : 1. The land being *wakf* could not be sold and there could not be any legal or equitable claim to a share thereof.

2. The point of prescription failed as the Appellants were in possession by consent of the *Mutawalli,* and were in the position of tenants.

ANNOTATIONS :

1) On the inalienability of *Wakf* lands, see Goadby-Doukhan, The Land Law of Palestine, pp. 71—2 and L.A. 173/26 (1 P.L.R. 269, C. of J. 1843).

2) On possession which is not adverse, see C. A. 68/39 (1939, S.C.J. 359), C. A. 8/40 (*ante,* p. 84) and annotation 2 thereto.

FOR APPELLANTS : Cattan.

RESPONDENT : In person.

JUDGMENT:

This is an appeal by leave from the decision of the Settlement Officer, Ramle Settlement Area. The basis of this claim is an agreement given by the predecessor of the present *Mutawalli* to the predecessors of the present Appellants in the year 1312 A.H., that is, more than 36 years ago. In that agreement they were allowed, *inter alia,* to take possession of the land in dispute, to revive it by ploughing and planting and in consideration for this they were allowed to take a portion of the produce, and were after twelve years to have a share in the land.

In this appeal Mr. Cattan, on behalf of the Appellants, argues that the agreement is an unregistered transfer of a share in the land, in accordance with which his clients have taken possession of the land and revived it, and he asks for one-third of the land on equitable if not on legal grounds. In the alternative he claims the land by prescription, since the Appellants and their predecessors in title were admittedly in possession for over thirty-six years.

As to the first point, the land being *waqf* a share thereof could not lawfully be sold, and we do not think there can be any legal or equitable claim to a share thereof.

As to prescription, it is clear that the Appellants were in possession by consent of the *Mutawalli*, and were in the position of tenants paying rent, and this is fatal to the claim.

The appeal will therefore be dismissed with costs which we fix at an inclusive sum of LP. 1.

Given this 14th day of March, 1940.

Chief Justice.

CRIMINAL APPEAL No. 56/40.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPLICATION OF :—

George Salim Dick. APPLICANT.

v.

The Attorney-General. RESPONDENT.

Corroboration — Theft of electricity under Sec. 285(1) C. C. O. — Corroboration of evidence of an accomplice — Proof of opportunity insufficient corroboration.

In allowing an application for leave to appeal from the judgment of the District Court of Jaffa dated the 17th day of June, 1940, whereby the Applicant was convicted of fraudulent appropriation of electric power contrary to Section 285(1) of the Criminal Code Ordinance, 1936, and sentenced to three months' imprisonment and in quashing the conviction :—

HELD : A mere possibility of access is not sufficient to comply with the law regarding corroboration of an accomplice.

ANNOTATIONS :

1) The necessity for corroboration of the evidence of an accomplice was established in CR. A. 160/37 (1938, 1 S. C. J. 103) ; see also CR. A. 46/38 (1938, 2 S. C. J. 239), CR. A. 6/39 (1939, S. C. J. 76) and CR. A. 68/39 (*ibid.*, p. 521).

2) Palestinian authorities on corroboration generally are collated in annotation 5 to CR. A. 160/37 (*supra*), annotations to CR. A. 46/38 (*supra*) and to CR. A. 75/39 (*ante*, p. 12).

3) Mere opportunity or facility to commit the offence is not corroboration, unless there be also likelihood of the offence having been committed. See CR. A. 70/39 (*ante*, p. 8) ; Halsbury, Vol. 13, *p.* 763, *No.* 839 ; Digest, Vol. 22, *p.* 492, *No.* 5211.

FOR APPLICANT : Malak.

FOR RESPONDENT : Salant.

JUDGMENT:

The Court after granting leave to appeal proceeded with the hearing of the appeal.

The Appellant was convicted of the fraudulent appropriation of electric power contrary to Section 285 of the Criminal Code Ordinance and was sentenced to three months' imprisonment.

The principal point taken on appeal is that he has been convicted on the uncorroborated evidence of an accomplice. The evidence against him was given by a co-accused who was herself convicted and fined. In her evidence she said that it was this accused that did the tampering with the meter. It is suggested by Mr. Salant, that corroboration can be found in the fact that this tampering could not have taken place except by the use of a seal, which is given to the Electric Corporation employees, and that this Appellant had the opportunity of access to the seal. We do not think this is sufficient corroboration or indeed any corroboration at all. A mere possibility of access is not sufficient to comply with the law regarding corroboration of an accomplice.

For these reasons the appeal must be allowed and the conviction quashed.

Delivered this 24th day of June, 1940.

British Puisne Judge.

CIVIL APPEAL No. 134/40.

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

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

IN THE APPEAL OF :—

1. Boulos A. Atalla,
2. Michael S. Kanawati. APPELLANTS.

v.

The "Corner House", Jerusalem. RESPONDENT.

Lease — Claim for pro rata reduction of rent after premises closed by police owing to the disturbances — Mejelle, Art. 478, C. A. 138/37 — Lessee not entitled to relief — No steps taken to cancel the lease, exercise any option or challenge police order — Quaere whether police order valid, Sec. 21(2) Sale of Intoxicating Liquors Ordinance.

In dismissing an appeal from the judgment of the District Court of Jerusalem (sitting as a Court of Appeal) dated the 23rd of May, 1940 :—

HELD : 1. (Following C. A. 138/37). The Appellants were not entitled to relief under Article 478 of the *Mejelle*. Moreover, they had taken no steps to cancel the lease or exercise any other option, if they had any.

2. *Quaere* whether the order made by the police was valid under Section 21(2) of the Sale of Intoxicating Liquors Ordinance, 1935, and in consequence, the Appellants not having taken adequate steps to test it, whether they could rely upon it.

FOLLOWED : C. A. 138/37 (P. P. 5—8, 10.x.37, 2 Ct. L. R. 73, Ha. 4.xi.37).

ANNOTATIONS : See also the cases cited in C. A. 138/37 (*supra*), namely C. A. 43/33 (C. of J. 1934—6, 543, P. P. 28.vi.37, Ha. 13.viii.36) and C. A. 77/37 (1937, 1 S. C. J. 303, P. P. 27.vi.37, 1 Ct. L. R. 61).

FOR APPELLANTS : No. 1 — Atalla.
No. 2 — Abcarius Bey.

FOR RESPONDENT : Eliash.

JUDGMENT:

The Appellants are the lessees of property in Jerusalem known as the Marina Café. In 1938, owing to the disturbances, they were ordered by the Police to close the café, and they now claim a *pro rata* reduction of the rent by virtue of Article 478 of the *Mejelle*. The learned Magistrate accepted that view, but the District Court reversed his decision.

Having regard to the general principles laid down in Civil Appeal No. 138/37, upon the facts of this case we do not think the lessees are entitled to the relief ; moreover they took no step to cancel the lease, or exercise any other option, if they had any.

Prima facie, I doubt if the order made by the Police was valid under Section 21(2) of the Sale of Intoxicating Liquors Ordinance, 1935, and if in consequence the Appellants, not having taken adequate steps to test it, can rely upon it, but it is unnecessary to decide this point.

The appeal will be dismissed with costs on the lower scale, and LP. 15 for advocate's attendance fee.

Delivered this 30th day of July, 1940.

Chief Justice.

CIVIL APPEAL No. 41/40.

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

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

IN THE APPEAL OF :—

Eliahu Saporta. APPELLANT.

v.

Malka Meyuhas Saporta. RESPONDENT.

Maintenance — Claim by wife of Spanish Jew for maintenance — P. O. in C. Art. 64 — Defendant unrepresented — Court may invite assistance of Consul on foreign law — Case remitted — Judgment of lower Court a decree — Appeal in time.

In allowing an appeal from a judgment of the District Court, Tel-Aviv, dated the 31st January, 1940, and in remitting the case for a fresh judgment to be given :—

HELD : 1. The statement of claim was improperly framed. The District Court should have applied the law under the Palestine Order in Council and, in case of difficulty, invited the assistance of the Counsul, under the provisions of Article 64.

2. The judgment appealed from was a decree and the appeal had therefore been filed in time.

ANNOTATIONS :

1) For authorities on maintenance, see C. A. 119/39 (*ante*, p. 38) and annotations.

2) On Art. 64 P. O. in C., see C. A. 220/38 (1938, 2 S. C. J. 151), C. A.

9/40 (*ante*, p. 186) and Goadby, International and Interreligious Private Law in Palestine, pp. 115 *seq.*

3) As to whether a ruling is a decree or an order, see also C. A. 86/40 (*ante*, p. 164) and annotation 1.

FOR APPELLANT : P. Joseph, Elkayam.

FOR RESPONDENT : D. Hamburger.

JUDGMENT:

This case has gone wrong from the beginning.

The Plaintiff claimed, *inter alia*, maintenance from her husband who, it now appears, is a foreigner. *Prima facie* Article 64 of the Order-in-Council applied. The statement of claim should have set out this fact, alleged the law applicable and the facts required by the law. The defence could have dealt with the matters raised and proper issues could have been framed.

The issues as framed ignore these matters.

In his judgment the learned President said :—

> "In this case the Defendant has not been represented by an advocate and the Plaintiff's advocate, Mr. Hamburger, has argued the case in his final address all through as if English Law applied. The English Law on the matter is entirely statutory, namely, the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, which do not apply here. It seems that the Defendant is a Spanish Jew from Salonica. He himself holds a passport issued at Madrid ; he apparently is an hereditary Spaniard. Now no evidence of Spanish Law has been laid before me. It is not, in my view, a function of a Civil Court of its own motion, to call for evidence. I admit, however, that the position is very peculiar in view of the provisions of Article 64(2) and Article 64(3) of the Order-in-Council, and in view of the fact that the Defendant in this case has not been represented by an advocate. I do not think that this matters very much. I am satisfied that the law of any civilized country would not refuse to order a husband to pay appropriate maintenance for his wife and infant child in a proper case".

It is clear that the Court must apply the law for which provision is made in the Order-in-Council, and if any difficulty arises as to that law, Article 64 provides that the President may invite the assistance of the Consul for the purpose of advising upon the law concerned.

The Defendant appeals, and the only question is, must judgment be entered for him or can the case be sent back to the District Court.

Dr. Philip Joseph, who now appears in the case for the first time,

urges that the case should not be remitted, but having regard to the provisions to which I have referred, I think it is clear that the Court did not deal properly with the matter and that the judgment should be set aside, and the case remitted to the Court to re-hear it.

It was argued that the appeal was out of time, as it was from an order and not a decree. We hold that the decision appealed from was a decree and the appeal is in time.

Costs to be costs in the cause, and we certify LP. 10 for attending the hearing.

Given this 21st day of March, 1940.

Chief Justice.

CIVIL APPEAL No. 115/40.

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

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

IN THE APPEAL OF :—

Subhi Aweida. APPELLANT.

v.

Father Augustin Galanti,
Procureur Mont Carmel. RESPONDENT.

Promissory notes — Payment to agent — If payment admitted, circumstances may be proved by oral evidence, C. A. 62/31.

In allowing an appeal from the judgment of the District Court of Haifa (sitting as a Court of Appeal) dated the 13th day of April, 1940, and in entering judgment for the Respondent :—

HELD : 1. There had been evidence on which the Magistrate could find that Abyad acted as agent of the Respondent and, as such, had received the sum of LP. 35 from the Appellant on account of rent.

2. (Following C. A. 62/31). Where actual payment is not disputed but a question arises as to what matter the payment related to, oral evidence can be heard as to the facts.

FOLLOWED : C. A. 62/31 (C. of J., 794).

ANNOTATIONS :

1) For other cases on the admissibility of oral evidence, see C. A. 87/37 (1937, 2 S. C. J. 15, P. P. 2, 3.viii.37, 2 Ct. L. R. 19, Ha. 7, 21.x., 4.xi.37) and cases therein cited ; C. A. 215/37 (1938, 1 S. C. J. 85), C. A. 98/38 (*ibid.*, p. 361) and C. A. 97/38 (1938, 2 S. C. J. 17).

2) On non-interference with findings of fact, *vide*, C. A. 77/40 (*ante*, p. 127) and annotations.

FOR APPELLANT : Salah.

FOR RESPONDENT : Hawa.

JUDGMENT:

Rose, J. : This is an appeal from a judgment of the District Court of Haifa setting aside a judgment of the Magistrate's Court of Haifa.

The Plaintiff (Respondent) brought an action against the Appellant on twelve promissory notes for the sum of LP. 91.660 mils and interest. These promissory notes had been given in respect of rent of premises leased by the Respondent to the Appellant, and the Appellant alleged, *inter alia,* that certain sums had already been paid on account of this rent to the agent of the Respondent, one Jamil Abyad, and that therefore the Respondent was, at the most, only entitled to judgment for the balance.

The Respondent denied that the said Jamil Abyad was his agent to receive rent and further alleged that, if Jamil received any monies from the Appellant, such monies were not in respect of rent.

A power of attorney was produced in evidence authorising in the widest terms the said Jamil Abyad to act on behalf of the Respondent in various matters. The learned Magistrate found, in my opinion rightly, that this Power of Attorney authorised Jamil to receive rent on behalf of the Respondent. The learned Magistrate also found that the said Jamil received the sum of LP. 35 from the Appellant on account of rent of the premises in question. There appears to have been evidence on which the Court could properly so find and, as this is eminently a question of fact for the Trial Court to decide, I see no reason to disagree with its finding.

The learned Relieving President, after criticising this finding of fact of the Magistrate, proceeded to hold that the Magistrate was wrong in law in hearing oral evidence which went to show that some payments had been made in reduction of the debt due on the promissory notes. In my opinion, there is no substance in this contention. Civil Appeal No. 62/31 (reported in Vol. II Rotenberg's Collection of Judgments at p. 794) is direct authority for the proposition that, in a case such as the present where actual payment is not disputed but a question arises as to what matter the payment related to, the Court may, and in fact should, hear such oral evidence as the parties choose to adduce as to the facts.

I would add that the only question raised before us by the Appellant was whether or not he should be given credit for this sum of LP. 35.

There being, as I have said, no reason to disagree with the findings of fact of the learned Magistrate, it follows that the appeal must succeed on this point. The judgment of the District Court must therefore be set aside and judgment be entered for the Respondent for the sum of LP. 56.660 mils with interest at 9% from the date of action, the amount to be paid into the Execution Office, Haifa. The Appellant will have the costs of this appeal on the lower scale and for both Courts below, the costs of this appeal to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 31st day of July, 1940.

British Puisne Judge.

I concur.

Chief Justice.

CIVIL APPEAL No. 11/40.

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

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

IN THE APPEAL OF :—

Arab Bank, Ltd. — APPELLANT.

v.

1. Subhi Meheshem,
2. Anis Mudawaz. — RESPONDENTS.

Stamp duty — Ruling on inadmissibility of document for improper stamping not subject to appeal — English practice.

In allowing an appeal from the judgment of the District Court of Haifa (appellate capacity), dated the 19th September, 1939, and in restoring the judgment of the Magistrate's Court :—

HELD : The English principle that no appeal lies from a decision that the stamp upon a document is sufficient, or that a document does not require a stamp, applied and the District Court had therefore not been justified in reversing the decision of the Magistrate on the admissibility of exhibit No. 2 in evidence, on the ground that the said exhibit was insufficiently stamped.

ANNOTATIONS :

1) For the English principle referred to, *vide* Halsbury, Vol. 13, *p.* 721, *No.* 796 ; Digest, Vol. 22, *pp.* 274—5, *Sub-sec.* 8.

2) For other Palestinian authorities on stamp duty, see C. A. 32/39 (1939, S. C. J. 291) and annotations, C. A. 59/39 (*ibid.*, p. 325), C. A. 78/39 (*ibid.*, p. 463).

FOR APPELLANT : Cattan.

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

JUDGMENT:

Mrs. Ginzburg, who appears for the First Respondent, agrees that the only point in the case is whether Exhibit 2, which was admitted in evidence and acted upon by the Magistrate, was properly admitted. This depends upon the sufficiency of its stamp. The District Court dealt with this point at length and came to the conclusion that it was not sufficiently stamped and therefore inadmissible. We are of opinion, however, that the English principle that no appeal lies from a decision that the stamp upon a document is sufficient, or that a document does not require a stamp applies.

The appeal will be allowed, the judgment of the District Court set aside, and the judgment of the Magistrate restored with costs on the lower scale, and LP. 10 for attending the hearing in this Court and a fee of LP. 5 for attending the hearing in the District Court to be paid by the First Respondent.

Given this 22nd day of February, 1940.

Chief Justice.

CRIMINAL APPEAL No. 64/40.

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

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

IN THE APPEAL OF :—

Salah As'ad Hamameh. APPELLANT.

v.

The Attorney General. RESPONDENT.

False information, C. C. O. Sec. 123(1) — *Conviction under wrong provision.*

In allowing an appeal from the judgment of the District Court of Nablus, in its appellate capacity, dated the 16th of May, 1940, whereby it confirmed the

judgment of the Magistrate's Court of Nablus, dated the 11th of May, 1940, who convicted the Appellant of giving false information, contrary to Section 123 of the Criminal Code Ordinance, 1936, and sentenced him to nine months' imprisonment :—

HELD : To constitute an offence under the section the information must be given with the object of setting the law in motion.
The Appellant gave the information in question in the course of an ordinary investigation and has, thus, been convicted under the wrong section.

ANNOTATIONS : *Semble* the charge ought to have been laid under Sec. 120 ; see Criminal Procedure (Evidence) Ordinance, Sec. 2.

FOR APPELLANT : Kamal.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

The Appellant has been convicted of giving false information contrary to Section 123 of the Criminal Code Ordinance, 1936. Section 123(1) reads as follows :—

> "Any person who gives to the Attorney General or to a Police Officer, or any other officer entitled to institute a criminal prosecution written information which he knows to be false of the commission of an offence punishable by law, is guilty of a misdemeanour."

As I understand the section it means that the information must be given by the person to an officer entitled to commence criminal proceedings, with the object of setting the law in motion. There are other provisions of the law dealing with the giving of false information to an investigating officer.

The facts in this case, as they appear on the record, are that the Appellant, in the course of an ordinary investigation, was interrogated as a witness by a Police Officer, who took down his statement in writing, which was alleged to be untrue. That being so he has been convicted under the wrong provision of the law.

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

Delivered this 2nd day of September, 1940.

Chief Justice.

CIVIL APPEAL No. 170/40.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

Shlomo Goldstein. APPELLANT.

v.

Maurice Robert. RESPONDENT.

Claim for brokerage fees — Brokers Ordinance, Sec. 8(b), *C. A.* 121/34, *C. A.* 166/40 — *Financial broker not a broker within the meaning of the Ordinance.*

In allowing an appeal from the judgment of the District Court of Tel-Aviv (in its appellate capacity), dated the 21st day of June, 1940, and in entering judgment for the Appellant :—

HELD : (Following C. A. 121/34, C. A. 166/40). The Brokers Ordinance only applies to brokers who engage in the businesses set out in the Schedule to the Ordinance.

2. The Appellant, being a financial broker, did not need a licence, and, having proved his claim in the Magistrate's Court, he was entitled to judgment in his favour.

FOLLOWED : C. A. 121/34 (2 P. L. R. 436, C. of J. 1934—6, 75, P. P. 1—3.iii.36, Ha. 19.iii.36) ; C. A. 166/40 (*post*).

ANNOTATIONS : Other cases on brokerage fees : C. A. 94/28 (C. of J. 120) ; C. A. 1/29 (P.L.R. 406, C. of J. 121) ; C. A. 61/29 (C. of J. 122) ; C. A. 7/32 (C. of J. 124) ; C. A. 121/34 (*supra*).

FOR APPELLANT : Koenigsberger.

FOR RESPONDENT : Polonsky.

JUDGMENT:

This is an appeal by leave from an appellate judgment of the District Court of Tel-Aviv.

The claim before the Magistrate was for brokerage on a financial transaction for a loan which the Appellant, Plaintiff, said he had brought to a successful conclusion for the parties. The commission claimed was LP. 30, the loan being one for LP. 2400. The Magistrate found

that the Appellant had proved the facts necessary to support his claim, that it is not denied that the contract was concluded and the Magistrate found that the amount was also proved, but he decided that the Appellant, being a broker and not being in possession of a broker's licence at the time when this transaction was carried through, by reason of Section 8(b) of the Brokers Ordinance, the Appellant's claim must fail. On appeal, the District Court confirmed this view.

Now it is clear and was decided in effect by this Court in Lammam *v.* Asfour, Civil Appeal No. 121/34 (2 P. L. R. 436) and in a case which we decided yesterday Salim Sam'an Ziodie *v.* Abraham Izhak Chrem and another, Civil Appeal No. 166/40, that the Brokers Ordinance only applies to those brokers who engage in the businesses set out in the Schedule to the Ordinance. A financial broker or financial agent is, therefore, not a broker within the meaning of the Brokers Ordinance and need not be in possession of a licence. Civil Appeal No. 121/34 has been followed, so far as we are aware, consistently for the last six years and must be held to be settled law. The Magistrate had sufficient evidence before him to determine the facts of this case and he found, as I have already said, on the facts that the Appellant's claim was proved. We see no reason to differ from that opinion.

The appeal is, therefore, allowed and the judgments both of the District Court on appeal and the Magistrate's Court are set aside and judgment will be entered for the Appellant, Plaintiff, in the sum of LP. 30 with interest at the legal rate from the date of action in the Magistrate's Court, together with all costs both here and in both Courts below. The Appellant will have the fees allotted by the Courts below for advocate's fees and also a sum of LP. 10 fee for attending the hearing in this Court.

Delivered this 13th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL No. 153/40.

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

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

IN THE APPEAL OF :—

Mahmoud Atallah el Serouri. APPELLANT.

v.

Rushdi el Immam el Husseini. RESPONDENT.

Cross accounts — Experts — Insufficient evidence.

In allowing an appeal by leave from the judgment of the District Court of Jerusalem (in its appellate capacity), dated the 29th day of May, 1940, and in remitting the case to the Magistrate :—

HELD : The Magistrate was wrong in giving judgment without having some further evidence.

ANNOTATIONS : "Whether evidence is sufficient or not is, beyond any doubt, a question of law" ; see C. A. 5/40 (*ante*, p. 63 at p. 65).

FOR APPELLANT : Haddad.

FOR RESPONDENT : Budeiri.

JUDGMENT:

In this case, I granted leave to appeal and upon the law as it stood at the time when this matter was before the Magistrate, we think that the learned Magistrate was wrong in giving judgment as he did, without having some further evidence as to the amounts due from the Defendant to the Plaintiff. It is quite clear that there were cross accounts between the parties and the question was submitted to an expert. This fact was known to everybody.

That being so, the appeal will be allowed, the judgments of both the District Court and of the Magistrate's Court are set aside and the case remitted to the Magistrate to hear further evidence and to complete the case and give a fresh judgment. The costs here and the costs in the District Court will be costs in the cause and we assess the costs here at an inclusive sum of LP. 5.

Delivered this 12th day of September, 1940.

Chief Justice.

CIVIL APPEAL No. 161/40.

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

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

IN THE APPEAL OF :—

Sara Komarov. APPELLANT.

v.

Zussia Gokman. RESPONDENT.

Building on land belonging to another — Acquiescence — Claim for demolition of building — Compromise judgment — Costs.

In varying the judgment of the Land Court, Tel-Aviv, dated the 28th of June, 1940 :—

HELD : 1. The Appellant could have the house on payment to the Respondent of its value, plus the amount paid by the Respondent in part payment for the land.

2. The judgment being in the nature of a compromise, both parties would pay their own costs.

ANNOTATIONS : Compare C. A. 68/40 (*ante*, p. 126) and annotation 1.

FOR APPELLANT : Goldberg.

FOR RESPONDENT : Gruenwald.

JUDGMENT:

It is quite clear that the parties to this appeal had relations together with regard to certain land and the building thereon. As a result of these relations, to put it shortly, the present Appellant allowed the Respondent to erect a substantial house on this land, upon part payment for the land — throughout the Appellant knew perfectly well what was going on. The Appellant, for some reason, sat still for many years and did nothing, but when some nine years had elapsed since the house was erected he started proceedings in Jaffa and then transferred them to the District Court of Tel-Aviv, his claim being that the house should be demolished.

In the circumstances to which I have referred, a Court would be slow to order the destruction of this house unconditionally, and the District Court ordered as follows :—

> "We therefore order that the Defendant shall remove the house built by him on half of the plot No. 4, at Shkhunat Geula Katan, in Tel-

Aviv, Hovevei Zion Street 20 — when he will receive from the Plaintiff the sum of LP. 432.539 and to pay to the Plaintiff costs and LP. 10 (inclusive) advocate's fees."

The effect of this order may be open to some doubt, and on the facts of this case we think the right order is that the present Appellant may have this house, upon payment to the Respondent of the sum which was found by the District Court to represent its value, plus the amount paid by the Respondent in part payment for the land, *i. e.* LP. 432.539, and we order that the judgment of the District Court be varied accordingly.

In the circumstances, this being in the nature of a compromise, both parties will pay their own costs here and below.

Delivered this 9th day of September, 1940.

Chief Justice.

CIVIL APPEAL No. 142/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. Malka Lerner-Ezrahi (Krishevsky),
2. Mordehai Ezrahi Krishevsky. APPELLANTS.

v.

1. Abraham Polit,
2. Keren Kayemeth Leisrael Ltd. RESPONDENTS.

Equitable title — Transfer and agreement to transfer — Estoppel — Transfer with knowledge.

In dismissing an appeal from a judgment of the Land Court of Tel-Aviv, dated the 27th day of May, 1940 :—

HELD : 1. The oral agreement between the second Appellant and the first Respondent was not a transfer of a lease but an agreement to transfer. It was not, therefore, a void transaction.

2. This question had not been in issue before the Chief Magistrate and no question of estoppel arose.

3. The Appellant and the second Respondent both had notice of the oral agreement.

ANNOTATIONS :

1) On the difference between dispositions and agreements to sell, *vide* C. A.

221/38 (1938, 2 S. C. J. 161) and annotation 1, C. A. 217/38 (*ibid.*, p. 221), C. A. 15/39 (1939, S. C. J. 118).

2) On equitable title, see C. A. 218/37 (1938, 1 S. C. J. 19) and annotations, C. A. 15/38 (*ibid.*, p. 205), C. A. 48/38 (*ibid.*, p. 327), C. A. 224/38 (1938, 2 S. C. J. 116), C. A. 218/38 (*ibid.*, p. 124) and C. A. 221/38 (*supra*).

3) On purchasers with notice, see C. A. 48/38 (*supra*), C. A. 215/38 (1938, 2 S. C. J. 177) and C. A. 84/38 (*ibid.*, p. 241).

FOR APPELLANTS : Olshan & Felman.
FOR RESPONDENTS : No. 1 — Y. Frankel.
No. 2 — Absent — served.

JUDGMENT:

We need not trouble you, Mr. Frankel.

This is an appeal from a judgment of the Land Court of Tel-Aviv by which it held that the first Respondent had established an equitable right to the transfer of a lease into his name and ordered the cancellation of the registration of the lease in the name of the first Appellant and ordered registration in the name of the first Respondent. It is not necessary to go into the full statement of the facts which are set out in much detail in the judgment of the Land Court. The appeal really rests on the question whether the transaction or arrangement of 1929, which was an oral one, was an agreement to transfer the lease or an actual transfer. This oral arrangement was made between Mr. Polit and Mr. Ezrahi. In our opinion this arrangement was an agreement to transfer and not a transfer. We do not see how there could be such a thing as an oral transfer. There can only be a transfer when it has been completed by registration in the Land Registry.

The next point taken by the Appellant is this, that this point, which I have just dealt with, has already been decided in the Chief Magistrate's Court, where it has been held that the agreement was null and void. To that argument all we need say is this, that the question before the Chief Magistrate was solely a question of who should have possession of this particular plot of land, and any finding not relevant to this particular issue is not binding and cannot create any form of estoppel. It was unnecessary for the Chief Magistrate's decision to determine whether the agreement was null and void or not. In any case, I doubt whether he had the power to give that decision, and the Land Court on appeal, of course, had no greater powers than the Chief Magistrate in first instance, sitting in that particular capacity. Being, as we have held, an agreement to transfer it is not null and void or contrary to the Land Transfer Ordinance ; this has been decided on many occasions in the past and we agree with the Land Court that

in the circumstances of this case there is an equitable right in the first Respondent, Mr. Polit, to the transfer of the lease.

The last objection taken was that Mrs. Ezrahi either not having notice of the oral agreement between Mr. Ezrahi and Mr. Polit or having taken the transfer from the Jewish National Fund, who had no notice of the agreement, she therefore took the title of her transferor and her registration cannot be upset. With that we do not agree because the evidence shows that she did have notice of this agreement and that the Jewish National Fund also had notice of this oral agreement, and the two transactions, the release of the lease by Mr. Ezrahi to the Jewish National Fund and this re-grant by the Jewish National Fund to Mrs. Ezrahi, in effect, are really one transaction which could have been carried out by a transfer by Mr. Ezrahi to his wife with the consent of the Jewish National Fund.

For all these reasons we think therefore that this appeal fails. It will be dismissed with costs on the lower scale and LP. 15 fee for attending the hearing to the first Respondent.

Delivered this 29th day of July, 1940.

British Puisne Judge.

CRIMINAL APPEAL No. 77/40.

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

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

IN THE APPEAL OF :—

Elias Bawwab. APPELLANT.

v.

The Attorney General. RESPONDENT.

Official corruption, C. C. O., Sec. 106 — Evidence of accomplice to be corroborated — Sufficiency of corroboration.

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 8th day of August, 1940, whereby the Appellant was convicted of official corruption contrary to Section 106 of the Criminal Code Ordinance, 1936, and sentenced to six months' imprisonment :—

HELD : 1. It was clear that the two witnesses for the prosecution were accomplices in the crime with which the Appellant was charged.

2. There was not sufficient corroboration of the evidence of the accomplices.

ANNOTATIONS : On corroboration of the evidence of an accomplice, and on what amounts to sufficient corroboration, *vide* annotations to CR. A. 56/40 (*ante*, p. 241).

FOR APPELLANT : Cattan and Shehadeh.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT:

Rose, J. : The Appellant was convicted by the District Court of Jaffa of receiving corruptly the sum of LP. 3 from one Ahmad Hassan Itbil, *Mukhtar* of the village of Khasas, contrary to section 106 of the Criminal Code Ordinance, 1936.

At the material time the said Ahmad was himself lying under a charge of corruption and the Appellant was the police Officer in charge of the prosecution.

The story of the prosecution is that the Appellant accepted the sum of LP. 3 as an instalment of a bribe which was to be paid by Ahmad in order that the Appellant should secure the withdrawal of the charge against him. Ahmad had previously told Mr. Scott, Assistant Superintendent of Police, Gaza, of the proposed transaction. Mr. Scott thereupon provided Ahmad with three marked one pound notes with instructions to hand them over to the Appellant. This was duly done and subsequently the Appellant was found in possession of the marked notes.

As the District Court pointed out, it is clear that Ahmad and another prosecution witness, one Hamad Semour, who deposed that he acted as an intermediary between Ahmad and the Appellant, were accomplices in the crime with which the Appellant is charged. The question to be decided, therefore, is whether there was sufficient corroboration of the evidence of these two witnesss to justify a conviction. The trial Court obviously appreciated that this was the principal issue in the case and made the following finding :

> "We hold there is ample corroboration of the *Mukhtar*'s evidence that the sum of LP. 3 was given to the accused by him as a bribe in connection with the accused's duties as a police officer."

But unfortunately the Court did not proceed to specify the facts upon which it relied in coming to this conclusion.

In fact, apart from statements made by Ahmad to Mr. Scott, which amount to no more than corroboration of an accomplice by himself, and the fact that the case was adjourned on two occasions at the request of the prosecution, no evidence being adduced to show that there was anything irregular in such requests, the only substantial

matter which can be adduced as corroboration is the payment to the Appellant of the marked notes.

The Appellant did not deny that he received the notes and the question for us to decide is therefore whether the fact of the payment of these notes by Ahmad to the Appellant necessarily connects the Appellant with the crime with which he is charged. Although the matter is not free from difficulty, we have come to the conclusion that it does not. Clearly such a transaction might well have an innocent explanation and the fact that the trial Court disbelieved the particular explanation which the Appellant elected to give is not really material to the consideration of the matter which we have to decide.

Although therefore there are strong grounds for suspicion in this case and although, to put it at its lowest, it is most unfortunate for a police officer in charge of a prosecution to have financial transactions with the person charged, we think that there is a flaw in the case for the prosecution of which the Appellant is entitled to avail himself.

For these reasons the appeal must be allowed, the conviction quashed and the Appellant discharged unless he is detained upon any other charge.

Delivered this 5th day of September, 1940.

British Puisne Judge.

I concur.

Chief Justice.

I concur.

Puisne Judge.

HIGH COURT No. 55/40 and 57/40.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATIONS OF :—

H. C. 55/40.

Pastor D. V. Oertzen, the Executor of the Will and Codicils of the late Otto Paul Fischer. PETITIONER.

v.

1. The Chief Execution Officer, Haifa,
2. Shakib Bader. RESPONDENTS.

H. C. 57/40 :

Charles Fischer. PETITIONER.

v.

1. The Chief Execution Officer, Haifa,
2. Shakib Bader. RESPONDENTS.

Succession — Testator leaving Miri and Mulk property — Will — Probate not registered in Land Registry, Succession Ordinance, Secs. 14(4), 9(2) *— Probate Officer — Certificate of succession in respect of Mulk property notwithstanding will, C. A.* 103/40 *— Defective service, proceedings void ab initio — Laches — Alien enemies — Vesting of Mulk property in executor, creditor of heir not entitled to attach and sell such Mulk property — Jurisdiction of High Court.*

H. C. 55/40 : In granting an application for an order to issue directed to the Respondents calling upon them to show cause why the part of the order of the 1st Respondent, dated 16.7.40, in Haifa Execution File No. 5881/39, ordering the sale of all *mulk* properties of the late Otto Paul Fischer (except the property in the German Colony) to proceed should not be set aside, and the attachment of the *mulk* properties and sale proceedings thereof at the instance of First Respondent should not be cancelled, and

H. C. 57/40 : In granting an application for an order to issue directed to the first Respondent, calling upon him to show cause why his order, dated the 29th day of July, 1940, should not be set aside :—

HELD : 1. The probate should have been registered in the Land Registry in accordance with the provisions of Sec. 14(4) of the Succession Ordinance.

2. The Registrar is a probate officer.

3. The certificate of succession was in order with regard to the *Miri* property, which can in no case be affected by a will, but it should not have been issued with regard to the *Mulk* property until the probate proceedings were terminated. If issued, it should have been limited to the residue (if any) of the *Mulk* after deduction of the legacies and expenses. The issue of a certificate of succession is discretionary.

4. (In H. C. 57/40) : The service of the execution notice on a person stated to be living in the same house as the judgment debtor was clearly insufficient and, consequently, all proceedings thereafter were void.

The Petitioner was not guilty of laches.

5. (In H. C. 55/40) : There was no satisfactory proof of the Petitioner being an enemy.

6. Where there is a will, which has been admitted to probate, all the *Mulk* property of the testator vests in the executor from the date of the testator's death.

It follows therefrom that in such a case an heir has no legal estate

in the *Mulk*, but only an interest in the residuary estate or such part of it as has not been disposed of in carrying out the terms of the will.

A creditor of such an heir is not a creditor of the estate and cannot attach and sell properties vested in the executor. All the attachments and sale proceedings in respect of the *Mulk* property must be cancelled.

Since the executor did not object to an attachment of the residuary share of the debtor in the *Mulk* property, such an attachment should be substituted for the orders of attachment made by the Chief Execution Officer.

7. Neither the Probate Court nor the Land Court could interfere in the matter which was purely one of execution within the exclusive jurisdiction of the High Court.

REFERRED TO: C. A. 103/40 (*post*).

ANNOTATIONS:

1. On certificates of succession and the functions of the Probate Court, *vide* C. A. 83/39 (1939, S. C. J. 467).

2. On defective service, see H. C. 60/40 (*ante*, p. 235) and cases cited in note 1 thereto, and in particular H. C. 14/39 (1939, S. C. J. 163).

3. On laches, see H. C. 45/40 (*ante*, p. 213) and note 3.

4. On the jurisdiction of the High Court, see H. C. 78/39 (*ante*, p. 25).

H. C. 55/40:

FOR PETITIONER: J. Gavison.

FOR RESPONDENTS: No. 1 — Absent, served.
No. 2 — Asfour.

H. C. 57/40.

FOR PETITIONER: Atallah.

FOR RESPONDENTS: No. 1 — Absent, served.
No. 2 — Asfour.

ORDER:

In the first of these petitions, the Petitioner is the Executor of the Will and codicils of Otto Paul Fischer, deceased — in the second petition, the Petitioner is Charles Fischer, a son and one of the heirs of Otto Paul Fischer. In each case the Respondents are the same, namely, the Chief Execution Officer Haifa and one Shakib Bader, who is a judgment creditor of the above named Charles Fischer. The two petitions have been heard together because the main point for determination in each is the same.

Otto Paul Fischer died at Haifa on or about the 19th October, 1936. He had been of German nationality but at the time of his death

he was of undefined nationality and a member of the Protestant Community. He left a Will and codicils which were contested, and it was not until the 11th April, 1938, that probate of the said will and codicils was granted by the District Court, Haifa, to the executor named therein, Pastor D. V. Oertzen. The estate was of considerable value, being sworn at LP. 40,000 approximately, equally divided between the *mulk* and *miri* property. By his Will and codicils, the testator *inter alia* gave his house in the German Colony Haifa for the use and benefit of his daughter, and bequeathed several legacies amounting in the aggregate to approximately LP. 12,000 to various charitable institutions, and at the same time ordered that these legacies should not be payable until two years after his death. The *mulk* immovable property consists of three parts. First, there is the house in the German Colony which has been valued, so it is stated, at LP. 13,000, but as above mentioned this house has been devised for the use of the testator's daughter, and is therefore not available for the payment of the legacies or the testamentary expenses, unless the remaining property should prove to be insufficient.

The remaining *mulk* property of which the value is about LP. 7,000 consists of house property in the Old *Suk* in Haifa, which at the present moment is said to be unsaleable, and property in Allenby Street. With regard to this latter, Mr. Gavison, who appears for the executor, has told us that one half of it belongs to a Mr. Brugger, residing in Switzerland, and was registered in the name of the testator as nominee only. He states that as the result of enquiries which have been made, they are fully satisfied that this is true, and that the heirs have agreed that this is so. We are also informed that the only debt owing by the estate is some LP. 600 for probate fees. It is a little startling that this item should still be owing nearly four years after the death of the testator. It is also stated that the executor has been paying certain sums, as directed by the Will, for the upkeep of the daughter and has also made certain advances to the heirs on account of their shares in the residuary estate.

On the 10th March, 1938, by consent of all the heirs, a Certificate of Succession was issued by the Registrar of the District Court Haifa, ordering that the movable property, *mulk* immovable property and *miri* immovable property of the testator should be distributed between his three heirs, stated to be Charles William Fischer, his son (one of the present Petitioners), Emile Martin Fischer his son and Sofie Christianne Fischer, his daughter, in equal shares. To this certificate the Registrar appended the following note :—

"This order has not the effect of a grant of Letters of Administration

> or Probate. It is a declaratory order as to the heirs of the deceased and their respective shares in the estate. Provisional administrators have been appointed and proceedings for probate are pending. The heirs are not to dispose of the *mulk* property until further order of this Court."

I shall have something to say about this certificate later.

This is the background which it is necessary to bear in mind when we come to examine the details of the present dispute to which these petitions relate.

Charles Fischer is indebted to Shakib Bader for the sum of LP. 179.550 mils together with interest and costs. Execution proceedings were commenced against him on the 16th June 1939, and attachment of all his share in the *mulk* and *miri* properties of the testator was ordered on 2nd July 1939. Assessment was made on the 25th January 1940, and on 18th March 1940 a notice was issued calling on the debtor to show cause why his property should not be sold in satisfaction of the above debt and of the amounts owing in participating files. On the 23rd March 1940, this notice was served on a Mr. S. Adler who signed "for Mr. Ch. Fischer". An order for sale was given on the 5th April 1940, publication for the purposes of sale was made on the 7th May, 1940. Both Petitioners state that it was not until some time in June that they became aware of these execution proceedings. The executor on the 24th June, 1940 thereupon filed an objection to the sale and Charles Fischer also filed an objection. After considering the objections, the Chief Execution Officer on the 17th July, 1940 ordered final sale of the Allenby Street property and the final order was thereupon issued. At the same time an extension of thirty days was granted in respect of the other properties. On the application of the Petitioners the Chief Execution Officer ordered stay of registration on the 29th July, 1940, for fifteen days to enable the Petitioners to come to this Court.

I should mention that the one-third share in the Allenby Street property was valued at LP. 1,600 and the last bid was for LP. 1,400.

Now, much of this present trouble would never have arisen but for two serious mistakes in procedure. The probate was never registered at the Land Registry as required by Section 14(4) of the Succession Ordinance, Cap. 135. This sub-section provides :—

> "In any case in which the will affects *mulk* land, the probate officer shall forthwith, upon probate being granted, register the probate at the land registry and such registration shall have the effect specified in section 9(2)".

If the probate had been registered then by Section 9(2) of the same Ordinance the effect would have been that the Director of Lands

would have been restrained from making any entries in the register in respect of the interests of persons in the *mulk* property of the estate except by order of the President of the District Court. Consequently no attachment could have been made in execution. Owing to this failure to observe the law, an attachment has got on the register, which never should have been there. We are informed by Mr. Gavison that there appears to be some doubt in the Haifa District Court as to who the probate officer is and no one was willing to act. With all respect to those who find a difficulty in this, I am afraid that I cannot see where the difficulty lies. The wording may be somewhat unfortunate but I should have thought that a probate officer was an officer of the Probate Court, and since the Registrar is empowered to issue probates and certificates of succession, it seems to me obvious that he is a probate officer. Though the duty is mandatory, yet the executor cannot altogether be acquitted of all blame — he should have taken steps to see that the requirements of the sub-section were duly complied with and he could have compelled compliance by an application to this Court. This omission might well have proved fatal to the executor's case, but is not decisive in this case, which turns on other grounds.

The second matter is the question of the Certificate of Succession. This certificate was entirely in order with regard to the *miri* property, which can in no case be affected by a Will, but it was entirely wrong with regard to the *mulk* property. It was known to the Registrar that there was a Will, which purported to deal with the *mulk,* and that probate proceedings were pending.

It is wrong to issue a Certificate of Succession in such a case, because if probate is granted the certificate may be useless, and in any case there is a grave danger of it being misleading as has happened in this case. The certificate was wrong because the heirs were not entitled each to an one-third share in the *mulk* property left by the deceased, but to an one-third share in the *residue* of the *mulk* property, which remained undisposed of by the Will, a very different thing. And it is impossible to say what that share in residue is until the probate fees and the legacies have been paid, and the property necessary for those payments has been realised. On the sworn valuation of the estate an one-third share of the *mulk* properties in the estate would be about LP. 6,660 — when the property has been distributed according to the Will and expenses paid an one-third share of the undisposed of residue of the *mulk* properties, on that valuation, would come to but little more than LP. 1,400, even assuming that the whole of the Allenby Street property belongs to the estate. The certificate in respect of the *mulk* property should have been limited to the residue

(if any) of the *mulk*, though it should never have been issued at all until the probate proceedings were terminated, and until it was known how much of the *mulk* property remained undisposed of. The issue of a Certificate of Succession is a judicial act and discretionary, and a Court is not bound to issue one, if the position is uncertain — on the contrary, in such a case it should not issue one. See C. A. 103/40— Iddini *v.* Iddini.

To come now to the Petitioners. The main question which is common to both of them, is this — can a creditor of a beneficiary or an heir under a will attach and sell *mulk* property which is vested in the executor without the consent of the executor ? I will now deal with each case separately, dealing with the above main point on the last case.

H. C. 57/40 — Fischer v. Chief Execution Officer, Haifa.

In this case the Petitioner has argued that he had no notice of the execution proceedings at all and in particular that the notice calling on him to show cause why his property should not be sold in execution was never served on him. This notice was in fact served on a Mr. S. Adler, who signed "for Ch. Fischer". Mr. Adler is stated to be living in the same house as the judgment debtor, but he is not a relative, and it is not alleged and certainly not proved that he is a partner of the debtor. The second Respondent in reply has said that since the property was attached in July, 1939, and was assessed in January, 1940, the debtor must have had knowledge of these proceedings. One would have thought that if such were the case, then an extract from the execution file showing service of some notice could have been forthcoming. But the only evidence produced is this service on Mr. Adler. This is clearly insufficient. Unless substituted service is ordered, service must be personal, on the judgment debtor himself, or on some member of his family living with him. Neither of these conditions has been fulfilled here — the service is therefore bad and all proceedings subsequent to this are void. And it cannot be said that there has been such a delay in applying to this Court as to deprive the Petitioner of his remedy. There is no proof that he knew his property was to be sold before June, 1940, and in that month he made an application to the Chief Execution Officer which was rejected. The order *nisi* in this case must therefore be made absolute on this ground alone.

H. C. 55/40 — Oertzen v. Chief Execution Officer, Haifa.

The decision in the first case covers this one also, but in case there

should be further proceedings it is necessary to deal with all the points raised.

A preliminary objection has been taken by the second Respondent that the Petitioner is an enemy subject residing in enemy territory and he is therefore an enemy within the meaning of the Trading with the Enemy Ordinance, 1939. He is admittedly a German, and the second Respondent alleges that he is residing in Italian territory. On the other hand, Mr. Gavison, for Petitioner, tells us that he is residing in Switzerland, and that he has recently been in telegraphic communication with him there. The affidavit filed on behalf of the second Respondent does not state the grounds for the belief or the means of knowledge, and the Petitioner's advocate obviously has the better means of knowing where his client is. I am not satisfied on the facts produced to us that the Petitioner is an "enemy", and so disentitled to bring proceedings here.

The main ground of objection, common to both cases, is that the execution proceedings are irregular from the start, that there was no power to attach and sell this property at all. I do not think that it can be disputed that where there is a Will, which has been admitted to probate, all the *mulk* property left by the testator vests in the executor from the date of the testator's death. And an executor has power to sell such of that *mulk* property as may be necessary in order to pay the testamentary expenses and to provide for the payment of legacies. The legal estate vests in the executors and in them alone — if this were not so, then it would be impossible to administer the estate and to carry out the terms of the Will. It follows from this that where there is a Will an heir has no legal estate in the *mulk* — all that he has is an interest in the residuary estate or such part of it as has not been disposed of in carrying out the terms of the Will. There is therefore no share in the estate which can be sold — all that an heir has is a residuary interest. And an executor has an entire discretion, subject to the terms of the Will, as to which property or properties he will sell. If a creditor of an heir or of a beneficiary could attach and sell properties vested in an executor, he would be usurping the functions of an executor for his own purposes, and thereby nullifying the administration of the estate. Such a creditor is not in the position of a creditor of the estate.

Much of what I have said in the first case applies to this one too, and *vice verse*. I think that the attachments and sale proceedings were wrong from the start. In any case they could never have been in order with regard to the house in the German Colony, which is specifically devised for the use of the testator's daughter, and in which

Charles Fischer, the debtor, has no interest whatever, residuary or otherwise, and never did have. I think that the learned Chief Execution Officer must have failed to appreciate that the second Respondent's claim was not one against the estate but against an heir of the estate.

In my opinion, all the attachments and sale proceedings in respect of the *mulk* property must be cancelled. The executor has stated that he has no objection to an attachment on the residuary share of the debtor in the *mulk* property. I think that such an attachment should be substituted for the orders of attachment made by the Chief Execution Officer. Subject to the above, the order *nisi* in this case must also be made absolute.

During the course of the arguments I had some doubt whether another Court might not have had jurisdiction but I am now satisfied that that is not so — the Probate Court would have no power to interfere, since its functions are limited to granting probate and dealing with executors or administrators, and I do not see how the Land Court could decide this question — it is purely a matter of execution.

In conclusion I would suggest that it is highly desirable that steps should be taken to wind up this estate at the earliest moment. Nearly four years have elapsed since the testator's death and very little would appear to have been done. The executor is abroad, and will be unable to act for some time, and I suggest that steps should be taken to appoint administrators in his place by an application to the Court. The present state of affairs is obviously most unsatisfactory. Many of the legacies would appear to be due to enemy institutions, and the Custodian of Enemy Property should be consulted. The time for their payment has long since passed, and until they are paid or provided for, the residuary shares of the children of the testator cannot be ascertained or paid.

It cannot be said that the Allenby Street property is unsaleable — what appears to be a very fair price was obtained in the execution auction.

As for costs, each of the Petitioners is entitled to his costs, and LP. 10.— fee for attending the hearing, to be paid by the second Respondent.

Delivered this 5th day of September, 1940.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 54/38.

IN THE PRIVY COUNCIL

BEFORE : Viscount Maugham, Lord Porter and Sir George Rankin.

IN THE APPEAL OF :—

Syndic of the Bankruptcy of the Firm S. N. Khoury. APPELLANT.

v.

Victor Germain. RESPONDENT.

Bankruptcy — Claim admitted by syndic and objected to by bankrupt on account of excessive interest — Debt not certified — Verification of debts, Ottoman Commercial Code Arts. 198-210 *— Translation of Turkish text — Admission of long standing not interfered with, Banon Frères C. Lobin et Ferchat, C. A.* 29/30 *— Reopening of account because of excessive interest — French decisions not binding in Palestine, Michailides v. Michailides — Interpretation of code adopted from foreign country, Quebec Railway Light, Heat and Power Co. v. Vandry, Laverdure v. du Tremblay — Usurious interest, whether against public policy, Ottoman Law of Interest, Arts.* 1—6.

In dismissing an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 4th June, 1935 :—

HELD : 1. The public admission of the debt should not be interfered with when so long a period has elapsed between the admission of the debt and its dispute by the bankrupt.

2. The mere omission of the certification or affirmation does not of itself invalidate the admission of the debt.

3. The Ottoman Commercial Code is a partial adaptation of the French Commercial Code without any of the enactments of the French Code Civil on which the French Commercial Code is based and the conclusions of French Courts or French jurists upon articles of the French Commercial Code similar, if not identical, with those in the Ottoman Code now under consideration, though entitled to great respect, are not of binding authority in Palestine.

4. The charging of excessive interest, although prohibited by the Ottoman Law of Interest, is not contrary to public order in Palestine.

5. A point not raised before the local Courts could not be raised before the Privy Council.

FOLLOWED : Quebec Railway Light, Heat and Power Co. *v.* Vandry (1920 A. C. 662 at p. 671). Laverdure *v.* du Tremblay (1937 A. C. 666 at p. 677).

REFERRED TO : Banon Frères C. Lobin et Ferchat (Dalloz, Jurisprudence Générale, 1886, p. 69).

C. A. 29/30 (C. of J. 1044).

E. Michailides *v.* A. Michailides (10 Cyprus L. R. 77 at p. 80).

ANNOTATIONS :

1. On the translation of Turkish laws, see C. A. 87/37 (1937, 2 S. C. J. 15, P. P. 2, 3.viii.37, 2 Ct. L. R. 19, Ha. 7, 21.x, 4.xi.37), C. A. 191/37 (P. P. 6—9.xii.37, 2 Ct. L. R. 169, Ha. 23.xii.37) and C. A. 49/40 (*ante*, p. 108).

2. On the bearing of French law on the interpretation of Ottoman enactments based upon it, *vide* C. A. 227/37 (1938, 1 S. C. J. 138) and annotations.

3. On usurious interest, see C. A. 49/40 (*supra*) and note 4 thereto.

FOR APPELLANT : Maurice Share.

FOR RESPONDENT : Phineas Quass.

JUDGMENT:

Lord Porter : This is an appeal from a judgment, dated 4th June, 1935, of the Supreme Court of Palestine, sitting as a Court of Appeal. That Court by a majority reversed the decision in favour of the Appellant of the District Court of Haifa, dated the 15th October, 1934.

The material facts are short and are not in issue.

The Appellant is the Syndic of the Bankruptcy of the firm Selim Nasrallah Khouri of Haifa. The firm was declared bankrupt in October, 1930, and the winding-up is not yet concluded.

The Respondent claimed to be a creditor in the bankruptcy in respect of the sum of LP. 1354.670 and on the 7th August, 1931, the Appellant admitted and the Juge Commissaire attested the claim subject to a deduction of LP. 301.620 stated to be excessive interest — the debt was accordingly reduced to a sum of LP. 1053.050.

On the 21st April, 1933, a meeting of creditors took place for the purpose of considering the question of a concordat (composition). Both at this meeting held some year and a half after the admission of the debt at LP. 1053.050, and also on a subsequent occasion, the bankrupt objected to the admission of the claim on the ground, as he asserted, that the claim was solely made up of excessive interest on an original debt which had been wholly and indeed more than wholly paid off if legitimate interest alone had been charged.

Beyond objecting, however, he took no further steps until the 2nd May, 1933, when he petitioned the District Court of Haifa that the Court should order the Syndic to reject the claim of the Respondent and request him to prove his debt in a competent Court. On the 6th April, 1934, this petition was sent by the Syndic to the Juge Commissaire together with a forwarding note. In this note the Syndic stated that, in accordance with legal advice which he had received, the matter was one for reference to the Court and suggested that the points for discussion were :—

"(1) Is it possible to enquire into an opposition after a debt has

been confirmed and the document concerned endorsed with the confirmation, in spite of the fact that all the creditors have not applied to the Juge Commissaire as per last para. of Art. 204, to have their amounts ratified ?

(2) If the decision will be that, generally speaking it is not possible to object to a debt duly proved by the creditor before the Syndic and duly endorsed, then are the views of some of the advocates to be adopted, *i. e.*, that the question of excessive interest is subject to opposition even after the debt is proved and the confirmation procedure is completed as per Art. 204 ?"

After receiving this petition the Juge Commissaire reported on the Appellant's note and referred the matter to the Commercial Court in the following terms :—

"I find that the points raised by the Syndic are legal points which are to be decided by Your Honourable Court. Therefore, in accordance with Art. 205 of the Commercial Code, I pray the Court to decide whether it is possible to enquire again into the debts which have already been confirmed if and when an opposition is made as to the illegality of the confirmed debts alleging that they contain excessive interest or for any other reason."

The case was argued before the District Court of Haifa on the 24th May, 1934, when two points were taken on behalf of the bankrupt : — (1) that the Respondent's claim had not been certified by the Juge Commissaire as required by the last paragraph of Article 204 of the Commercial Code, and ; (2) that even if such a certification was either unnecessary in the first instance or its omission could not alone form a ground of objection in the case of an admitted debt, yet in the case of usurious or excessive interest the debt could be objected to so long, at any rate, as it had not been paid or the bankruptcy had not been closed.

The answer to the first question depends primarily on the construction to be placed upon and the steps to be taken under Section 204 of the Ottoman Code de Commerce. But in order to arrive at a correct conclusion on the matter it is necessary to consider certain other articles of the code and the method by which under Ottoman law the debts entitled to rank for dividend in the distribution of the assets are to be ascertained.

The general provisions as to the verification of debts are contained in the fifth section of the Code, Articles 198 to 210. In this connection it is perhaps sufficient to point out that in Ottoman as in French law the debts are not verified by the oath of the creditor but are publicly determined in the presence of all creditors who desire to be present, of the debtor, of the Syndic and of the Juge Commissaire.

The latter part of Article 200 and Article 201 are as follows :—

> "(200) ... After the personal claims of the Syndics have been verified by the Judge Commissary the claims of the other creditors shall be examined, considered and verified by the Syndics in the presence of the creditors or their agents and before the Judge-Commissary, who shall draw up a report of the proceedings.
> "(201) Every creditor whose claims have been verified or noted in the balance sheet of the bankrupt is entitled to be present at the verification of the claims and advance his objections in reference to any claims that have been verified or are under examination. The bankrupt also has the same right".

Some dispute arose before their Lordships as to the correct translation of Article 204. The first paragraph as to which there is no dispute runs as follows :—

> "Where a debt of the bankrupt is admitted, the Syndics shall endorse each document proving such debt with a statement of the amount noted in respect of it in the list of the bankrupt's liabilities, and shall date such statement, which shall also be attested by the Judge-Commissary."

In the case of all the French versions of the Ottoman Code which their Lordships were able to examine the second paragraph may be translated as follows :—

> "Eight days at latest after his debt has been admitted, each creditor shall be obliged to affirm before the Judge-Commissary that his debt is really and honestly due."

On the other hand the translation apparently accepted by both parties in Palestine and recognized by the District Court runs as follows :—

> "Every creditor shall within eight days after the verification of his claim cause the same to be certified by the Judge-Commissary to be a true claim."

In the latter translation no doubt verification means admission after public verification, but it substitutes certification by the Judge-Commissary for affirmation by the creditor.

In this conflict their Lordships do not propose to lay down, even if they had the means of doing so, the true meaning of the Turkish text. Though the Ottoman Code de Commerce is no doubt founded upon the French Code, and generally copies certain articles of that Code, they are not prepared to accept the French version as necessarily correct.

Their Lordships cannot part with this aspect of the case without expressing the hope that an authoritative translation of the Ottoman Codes will be made at some early date, since the serious differences in the various translations now in use may well add to the difficulty of ascertaining the law in force in Palestine. Meanwhile in any case in which the wording or true construction of the wording of a Turkish

Act or document comes in question their Lordships would be greatly assisted if the local courts would determine exactly what the true wording and meaning of the Turkish text is.

In the present case, however, they think the ascertainment of the exact terms of the section immaterial, and so far as they are able to ascertain, the correctness of the latter version was not called in issue until it was challenged before their Lordships' Board. It appears to be common ground that the debt was admitted, a statement of the amount noted and dated, and attested by the Juge Commissaire. But it was not either affirmed thereafter before the Juge Commissaire if affirmation was necessary, or certified by him if certification was necessary.

Plainly in either view the second paragraph of section 204 was not complied with. What then is the effect of this omission ?

The District Court appears to have taken the view that Ottoman law required certification by the Juge Commissaire only, that as that official had already attested the claim, the further formality of certification was unnecessary and that the neglect to comply with this part of the section was sanctioned by long usage in the Ottoman Empire. Their Lordships doubt whether this result was seriously contested in the Court of Appeal, but whether this is so or not they think the public admission of the debt, after the sum claimed had been reduced in amount owing to an allegation of excessive interest, should not be interfered with when so long a period has elapsed between the admission of the debt and its dispute by the bankrupt, especially as it was open to the debtor and to all other interested parties to object to the admission in the first instance.

This indeed has been the practice in Palestine and even if French law or its principles be applicable appears to be the view of the French Courts. Their Lordships' attention was called to the case of *Banon freres C. Lobin et Ferchat,* a decision of the Cour de Cassation, to be found in *Dalloz Jurisprudence Générale* (1886) p. 69, where it was held, and is stated to be a long recognised principle of French law, that an admission "pure et simple" of a debt as part of the liabilities in a bankruptcy constitutes between the creditor and the Syndic a "Contrat Judiciaire", *i. e.,* a legally binding bargain subject to the right of any of the interested parties to dispute it in case such a bargain is contrary to the requirements of public order or presumably in the case of fraud.

In opposition to this view their Lordships' attention has been called to an unreported case decided on the 6th February, 1930, by the Court of Appeal in Palestine on appeal from the District Court of Jaffa of

which the short title is "C. A. No. 29/30, *Muhammad Sha'aban el-Hindi and his sons Mahmud and Ali v. Ayesh Omar Ajjour on behalf of the heirs of his father Omar Ajjour.*"

In that case it appears to have been held that a judgment which had been signed and under which some payments had apparently been made could be reopened on proof that excessive interest had been charged and a reduction to the legal rate of interest directed in accordance with Art. 6 of the Ottoman Law of Interest.

The facts and circumstances of the case are not set out in the report furnished to their Lordships and without further particulars the principles there followed cannot be determined. In any case the decision deals with the setting aside of a judgment and not with a case in which a debt has been admitted in bankruptcy and therefore is not in *pari materia* with the case now under consideration.

It follows that in their Lordships' view the mere omission of the certification or affirmation, as the case may be, does not of itself invalidate the admission of the debt or enable the debtor, the Syndic, or the other creditors to dispute it.

But this decision does not finally determine the case since the Appellant has contended that the debtor's liability can be reopened in Ottoman as in French law in case the Contrat Judiciaire created by the admission is contrary to the requirements of public order.

In French law the contract could be reopened in the case of deceit, fraud, and *force majeure* and, as appears from the case quoted above from *Dalloz,* in certain cases where the admission would be contrary to those laws which in France before 1921 limited the interest permitted to be charged to a maximum percentage.

Their Lordships do not think it necessary to determine in what instances French Law would regard, or more accurately, would before 1921 have regarded the exaction of excessive interest as contrary to public policy. At one time the charging of usurious interest was undoubtedly penal but the meaning of usurious interest is a matter of French law, and not in their Lordships' opinion germane to the determination of the present case.

The principle upon which a claim for usurious interest could be rejected under French law is that it is contrary to public order in France and their Lordships are prepared for the purposes of the present case to assume that a debt admitted in bankruptcy could under Ottoman law likewise be rejected if it were found to be contrary to public order in Palestine.

But the Ottoman Code in adopting a certain limited number of the articles of the French Code de Commerce even if it accepted them

without variation did not adopt the background of French law in the light of which the Code de Commerce is construed in that country. As Tyser, C. J., said in *E. Michailides v. A. Michailides* (10 Cyprus L. R. 77 at p. 80) : "the Ottoman Commercial Code is a partial adaptation of the French Commercial Code without any of the enactments of the French Code Civil, on which the French Commercial Code is based." It does not follow therefore that the charging of excessive interest even if it were in all cases against public order in France would be against public order in Palestine.

The true method of interpretation of a foreign code which is adopted in whole or in part within the territory of a country governed by a system of law other than that of the country from which the code is borrowed has been set out on many occasions in judgments of this Board. It is only necessary to refer to the principles laid down in a judgment of the Board in *Quebec Railway Light, Heat and Power Co. v. Vandry*, (1920) A. C. 662 at p. 671 in the words :—

> "The contention on the other hand is that the Civil Code of Lower Canada was founded on the Code Napoleon from which it differed only in language, and that the reasoning of recent decisions of the French Courts on the corresponding art. 1384 ought to be applied, the prior decisions of the Canadian Courts notwithstanding. ...
> It seems plain that both these trains of reasoning start rather from the text of the Code Napoleon as interpreted by French Courts and the general jurisprudence of Quebec than from the very words of arts. 1053 and 1054 themselves. Natural as this may be, the statutory character of the Civil Code of Lower Canada must always be borne in mind. The connection between Canadian law and French law dates from a time earlier than the compilation of the Code Napoleon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law." *Maclaren v. Attorney General for Quebec*, (1914) A. C. 258, 279. Thus, however, stimulating and suggestive the reasoning of French Courts or French jurists upon kindred subjects and not dissimilar texts undoubtedly is, "recent French decisions, though entitled to the highest respect... are not of binding authority in Quebec" (*McArthur v. Dominion Cartridge Co.* (1905) A. C. 72, 77) still less can they prevail to alter or control what is and always must be remembered to be the language of a Legislature established within the British Empire."

The same principle is more lately to be found set out in *Laverdure v. Du Tremblay*, (1937) A. C. 666 at p. 677, where the meaning of the Civil Code of Quebec was in issue.

> "The Civil Code of Quebec" it is said "must no doubt be construed according to the principles laid down in *McArthur v. Dominion Cartridge Co.* ; *Maclaren v. Attorney General for Quebec* ; and *Quebec Railway Light, Heat and Power Co. v. Vandry*. The conclusions of

> French Courts or French jurists upon articles of a Code similar, if not identical, with those in the Civil Code now under consideration, though entitled to great respect, are not of binding authority in Quebec. The Civil Code of Quebec, as Lord Sumner pointed out in the last cited case, is in the language of a legislature established within the British Empire".

In the light of these considerations the question which their Lordships have to determine is not whether the charging of excessive interest is against public policy in France or in other countries which have adopted the French Commercial Code but the narrower one, *viz.*, whether the charging of excessive or usurious interest is contrary to public order in Palestine.

No doubt under Ottoman law the recovery of interest beyond the amount of 9 per cent. per annum has been prohibited by an Act dated the 9th *Rajah* 1304. The material provisions are as follows :—

> "Article 1. — — As from the date of publication of this law the maximum rate of interest for all ordinary and commercial debts shall be 9 per cent. per annum.
>
> Article 3. — — If it be proved that a creditor and debtor have in a deed of contract agreed to a rate of interest higher than the legal rate, whether this be explicit in the deed or whether the excess be included in the principal amount, the rate shall be reduced to 9 per cent. per annum.
>
> Article 4. — — The total interest on a debt shall not exceed the capital amount of the debt, irrespective of the period of the debt. No court shall grant a decree for interest exceeding the capital amount.
>
> Article 5. — — Compound interest shall not be allowed. Provided that if the debtor has paid nothing on account for 3 years or if the creditor and debtor have agreed that the accumulated interest for three years shall be added to the capital, compound interest for three years but not more, shall be added to the capital. Compound interest on current accounts between merchants kept under the rules of the Commercial Code are excepted from the provisions of this article.
>
> Article 6. — — Claims for the reduction of interest to the legal rate may be heard so long as there is an account standing between the parties, even though the account has been transferred or the debt renewed. When the debt has been paid and accounts between the creditor and the debtor have been closed, no claim to recover an excess of interest paid shall be heard."

Even under French law it seems doubtful whether the mere charging interest beyond a maximum stipulated by law is in all cases contrary to public order. See *Dalloz Répertoire Pratique,* Vol. XII, p. 568, Sect. 1, sub-divisions 2, 4 and 6 under the heading *"Usure"*. However this may be the Ottoman Code in their Lordships' view shows no indication that a failure to comply with its terms constitutes an offence against public order. It is true that an action founded upon a claim for ex-

cessive interest as such cannot succeed. But the result of charging such interest is not to make the contract illegal or even invalid but merely to limit the amount recoverable to interest calculated at the limited rate. Where, however, the claim is based not upon the contract to pay excessive interest but as here upon an agreement to pay a specified sum publicly admitted to be due, the statute would not of itself prevent recovery, and so far from such a contract being contrary to public order the terms of Article 6 of the statute appear to recognize the rights of the creditor to the stipulated interest, even though the statutory rate has been exceeded, once the account has been closd and the debt paid.

It is difficult in such circumstances to hold that the charging of interest beyond that permitted by the statute is contrary to public order and their Lordships agree with the view expressed by the Palestine Court of Appeal that it is not.

The Appellant's representatives feeling the difficulty of this objection to their contention maintained that the admission of the debt should be set aside on the ground that the interest charged was not only in excess of that allowed by law but was usurious and that usury consisted in the charging of exorbitant interest, *i. e.*, interest greatly in excess of that which the lender could legitimately exact. They maintained therefore that the Ottoman law of interest had no application to the matter and that no deduction such as that mentioned above could be drawn from the wording of Art. 6. Altogether apart from the difficulty of ascertaining what interest is usurious in the sense contended for under a system of law in which the maximum interest is fixed, their Lordships cannot find that such a contention was ever raised in the local courts. In them the argument throughout was that the interest was usurious because it exceeded the permitted maximum, and that argument their Lordships, as they have indicated, find to be unsound. But even if it were open to the Appellant to contend that usurious as opposed to excessive interest was contrary to public policy in Palestine their Lordships have not been able to find, and their attention has not been drawn to, any provision in the Ottoman law making usurious interest, in the sense in which the Appellant seeks to define it, contrary to public policy.

In the result, therefore, their Lordships are of opinion that both the Appellant's contentions fail, and will humbly advise His Majesty that the appeal be dismissed.

The Appellant must pay the costs of the appeal.

(*February* 22nd, 1940).

PRIVY COUNCIL APPEAL No. 56/38.

IN THE PRIVY COUNCIL

BEFORE : Viscount Maugham, Lord Porter and Sir George Rankin.

IN THE APPEAL OF :—

Mamur Awqaf of Jaffa. — APPELLANT.

v.

Government of Palestine. — RESPONDENT.

Land Settlement — Land (Settlement of Title) Ordinance, Secs. 43, 44, 64 — *Law to be applied, Land (S. of T.) Ordinance, Sec.* 10(3), *Palestine Order in Council, Art.* 46, *P. C.* 1/35 — *Claim by Mamur Awqaf for registration of certain lands as takhsisat Waqf — Classes of land in Palestine, Ottoman Land Code, Arts.* 4, 102, *Ibrahim Mehmet v. Hadji Pauyioti Kosmo, Mejelle Art.* 1675 — *Limitation, Ottoman Land Code, Arts.* 20, 78, *Mejelle, Arts.* 1660, 1661 — *Evidential value of tapou entries — Stale claim.*

In dismissing an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 22nd April, 1937 :—

HELD : 1. Art. 20 of the Ottoman Land Code must be read as a whole and its language cannot be held to cover the claim of a *waqf* to its share of the state imposts.

There was nothing in the law of Palestine entitling the Settlement Officer to apply a ten years' period of limitation in such a case, nor could Arts. 78 or 102 of the Ottoman Land Code be applied.

2. The latest *tapou* register is competent evidence as to the character of the land in question, and the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect.

3. The claim was a stale claim insufficiently considered and put forward with the utmost economy of information, and as the evidence adduced does not amount to *prima facie* proof of the title which has been put in issue the case should not be remitted and the appeal should be dismissed.

REFERRED TO : P. C. 1/35 (2, P. L. R. 390, C. of J. 1934—6, 331, P. P. 22.i.36, Ha. 20.ii.36).

Ibrahim Mehmet *v.* Hadji Pauyoti Kosmo (1884, 1 Cyprus L. R. 12).

ANNOTATIONS :

1. The judgment under appeal (L. A. 68/35) is reported in 1937, S. C. J. 329, C. of J. 1934—6, 552.

2. On the different kinds of *waqf*, see Goadby-Doukhan, The Land Law of Palestine, *pp.* 69 *seq.*

3. On Arts. 20 & 78 of the Ottoman Land Code, *vide* C. A. 23/39 (1939, S. C. J. 171) and C. A. 57/40 (*ante*, p. 146) and cases cited in annotations thereto.

4. On sections to be read as a whole, see C. A. 56/40 (*ante*, p. 133) and annotation 4, and on the construction of words in context, see C. A. 66/40 (*ante*, p. 136) and annotation 2.

5. It has already been held in L. A. 72/34 (1938, 1 S. C. J. 191) that if land is registered, it belongs *prima facie* to the category in which it is registered.

FOR APPELLANT: J. M. Gover, K. C., and F. E. Skone James.

FOR RESPONDENT: L. P. E. Pugh, K. C., and Kenelm Preedy.

JUDGMENT:

Sir G. Rankin: By the Land (Settlement of Title) Ordinance No. 9 of 1928 provision was made to effect a settlement of the rights in land in any area in Palestine and for the registration thereof in a register of title. The settlement was to be based upon a survey after demarcation of boundaries, every claimant to land in a village within a settlement area being required to submit his claim to the settlement officer, who had to draw up a schedule of claims and to investigate all claims publicly. The settlement officer was given power to hear and determine conflicting claims and was required to set forth the results of his investigations in a schedule of rights to be transmitted to the Registrar together with a signed plan of the parcels comprised therein. After the publication of the schedule of claims no fresh entries were to be made in the existing land registers but a new register was to be opened for each village and the land was to be entered therein in accordance with the schedule of rights and plan transmitted by the settlement officer, and in accordance with his decisions in the case of rights shown in the schedule as disputed. The Ordinance provided (section 43) that registration of land in the new register should invalidate any right conflicting with such registration: also (section 44) that no disposition of land registered in the new register other than a lease for not more than three years and no transmission of land on death should be valid until registered.

The law to be applied by the settlement officer in the decision of disputes is defined by sub-section (3) of section 10 :—

> "(3) A Settlement Officer shall apply the land law in force at the date of the hearing of the action:
> "Provided that he shall have regard to equitable as well as legal rights to land and shall not be bound by any rule of the Ottoman Law or by any enactment issued by the British Military Administration prohibiting the Courts from hearing actions based on unregistered

documents or by the rules of evidence contained in the Ottoman Code of Civil Procedure or the Ottoman Civil Code."

This mention of equitable and legal rights is to be read with reference to the provisions of article 46 of the Palestine Order in Council 1922, which as observed by Lord Atkin delivering the judgment of this Board (11th October, 1935), in the case of *Sheikh Suleiman Taju Faruqi v. Michel Habib Aijub* (P. C. Appeal No. 1 of 1935) "enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity..."

In November, 1931, the Appellant who is *Mamur Awqaf* (Registrar of *Waqfs*) at Jaffa brought before the Settlement Officer for the Jaffa area a claim in respect of certain land in two villages Yahudiya and Petach Tiqva. The claim as regards Yahudiya was numbered Case No. 210/31 and the Petach Tiqva claim was case 189/31 but the two cases were joined and treated as identical. The claim of the Appellant was that the lands in question (certain numbered "blocks" or units of survey and registration) should be entered in the schedule of rights, for the purposes of the new register under Ordinance No. 9 of 1928 above-mentioned, as land in respect of which the *Waqf* Khashki Sultani was entitled to the whole of the tithe and half of the land registry fees. The Settlement Officer (23rd March, 1932), and on appeal from him the Land Court (19th October, 1933), and the Supreme Court (22nd April, 1937), have dismissed the Appellant's claim on the ground of limitation having regard to Article 20 of the Otoman Land Code of 1858.

This Code was originally applicable not to Palestine only but to the old Ottoman Empire generally. By its first six articles it defines and distinguishes five kinds of land which range from *"mulk"* — that which is in the full ownership of private persons — to *"mevat"* — that which is waste in the sense of being used by no one. Between these extremes lie three classes. First, *"mirie"* or State Land : this is land of which the ownership (*raqaba*) is in the Treasury but the enjoyment or possession (*tassaruf*) is granted to an occupier whose interest is heritable and (with permission) transferable. The interest of this occupier is in some respects analogous to a perpetual leasehold and the object of the grant to him is in general that the land may be cultivated and that the State may derive a tithe therefrom. This interest is described in Article 20 of the Land Code by the Turkish word *"tapoulé"* which characterises it as of the kind that is held by *tapou* (*Ibrahim Mehmet v. Hadji Panyioti Kosmo* (1884) 1 Cyprus Law Reports 12). A fee called the

tapou fee was payable to the State upon the grant of the right, and upon registration in the *tapou* register a title deed was given in respect of it.

Another class of land is *"mevquſe"* or dedicated land : which may be either *mulk* which has been dedicated by the full owner, or State land which has been dedicated by the Sultan or others with his sanction. With reference to such State land it is explained in Article 4 of the Land Code : "The dedication of this land consists in the fact that some of the State imposts such as the tithe and other taxes on the land ... have been appropriated by the Government for the benefit of some object. *Mevquſe* land of this kind is not true *Waqf*. Most of the *mevquſe* land in the Ottoman Empire is of this kind. The legal ownership of land which has been so dedicated (of the *takhsisat* category) belongs as in the case of purely State land to the Treasury, and the provisions and enactments hereinafter contained apply to it in their entirety. Provided that, whereas in the case of purely State land the fees for transfer, succession and the price for acquiring vacant land are paid into the Public Treasury, for this kind of *mevquſe* land such fees shall be paid to the *waqf* concerned."

Yet another class of land is *"metrouke"* — that is land devoted to use by the public such as public roads. This class of land is the subject matter of the second book of the Land Code which in Article 102 contains a provision that no period of limitation applies to actions relating to such land (cf. Art. 1675 of the *Mejelle*).

The claim of the Appellant is that the lands in question are *mevquſe* land in the sense described by Article 4. The only basis of the claim and the only evidence of it which has been put forward lie in the fact that in the *tapou* register between the fiscal years 1309 and 1326 (A. D. 1893 — 1810) the entries in respect of these lands contain in a column headed "reference to *waqf*" the name *"waqf* Khashki Sultani" with or without the addition of the word *"mazbuta"*. In or about 1893 certain lands in Yahudiya came to be held by one Isidore Brown a French subject and in 1905 they were entered for convenience as belonging to another village called Mulabes or Petach Tiqva : in 1907 Isidore Brown died and the lands were entered as belonging to his heirs in various shares. The entries made on each of these occasions contain a reference to the *Waqf* Khashki Sultani. In 1910, when the lands were transferred to one Henry Frank Alphonso a French subject they were entered in the *tapou* register as *mirie* land without mention of the *Waqf* Khashki Sultani. From that date 1910 until 1931 they stood in the register as *mirie* lands. The entries of 1910 appear to be certified by members of the *Waqf* administration and it is not open

to dispute that they came at the time to their knowledge. It was suggested by the Appellant that the change in the form of entry was due to inadvertence, and that the *Waqf* had received monies from the lands now in question after 1910 and until "the occupation", but no evidence was given to that effect and the Courts in Palestine have had little difficulty in holding that no such payments were made after 1910. No evidence was adduced to prove the nature and character of the *Waqf* Khashki Sultani ; the properties dedicated to it or acquired by it ; or the sums received, if any, from the land now in question before 1910. No *tapou* title deed was produced to throw light upon any of the entries in the register.

It appears that a *waqf mazbuta* is one which was administered directly by the Ministry of *Waqf*. It was suggested in argument by learned counsel for the Respondent that a *Waqf* of the *takhsisat* kind could not be described as a *mazbuta waqf* but this has not been shown to their Lordships' satisfaction. It is somewhat disconcerting however to find that the Appellant, whose case consists entirely in reliance upon the entries in the *tapou* register from 1309 to 1326, began before the Settlement Officer by denying that the lands in question were *waqf* of the *takhsisat* kind and claiming that they were true *waqf* (*sahih waqf*) — that is, the subject of dedication by a dedicator entitled to the full ownership as of *mulk*.

The first question for decision is whether the Appellant's claim is barred by Article 20 of the Land Code. The original is in Turkish and the translations hereunder given are taken from Fisher's "Ottoman Land Laws" (1919), Young's "Corps de Droit Ottoman" (1906) and Ongley's "Ottoman Land Code" ed. Miller (1892).

> "Article 20. (Fisher).
> "In the absence of a valid excuse according to the Sacred Law, duly proved, such as minority, unsoundness of mind, duress, or absence on a journey (muddet-i-sefer) actions concerning land of the kind that is possessed by title-deed the occupation of which has continued without dispute for a period of ten years shall not be maintainable. The period of ten years begins to run from the time when the excuses above-mentioned have ceased to exist. Provided that if the Defendant admits and confesses that he has arbitrarily (fouzouli) taken possession of and cultivated the land no account is taken of the lapse of time and possession and the land is given back to its proper possessor."
>
> "Article 20. (Young).
> Lorsqu'une personne ayant droit à la possession d'une terre miri l'aura laissé occuper par une autre pendant dix ans sans la revendiquer en justice, et sans pouvoir invoqer aucune excuse valable telle que la violence exercée par l'occupant, la minorité, la démence, l'absence

pour cause de voyage, les procès tendant à la restitution de la possession de cette terre ne pourront pas être accueillis. Le délai de dix ans court à partir du moment où les excuses ci-dessus auraient cessé d'exister. Mais, si le défendeur reconnaît qu'il a pris possession de la terre et qu'il l'a cultivée sans droit (fouzouli), il n'est pas tenu compte du délai qui s'est écoulé et la terre est remise au légitime possesseur."

"Article 20. (Ongley).
Actions concerning Tapu land which has been held for ten years without opposition will not be heard without one of the legal disabilities, such as minority, madness, force, and being absent in a distant country, having been proved according to the Sheri. They will be heard up to ten years from the date of the cessation of such valid excuses, and after that time has passed they will not be heard. But if the Defendant admits having unlawfully seized and cultivated the land, attention will not be paid to the lapse of time and possession, and the land will be taken and given to the owner."

The Settlement Officer arrived at the conclusion that "there exist no definite provisions of law or judicial precedents defining the period of prescription in regard to claims to revenue by a *takhsis waqf*." But he thought that "in the absence of any better authority" it was open to him to apply the period of ten years prescribed by Articles 20 and 78 which regulate prescription as regards possession of *mirie* land. The Land Court would appear to have accepted this view. The Supreme Court held that the provisions of Article 20 covered the present claim ; saying "it is to be noted that the article does not deal with an action for the possession of land but with an action relating to land so possessed (*i. e.* by *tapou* deed)."

As a matter of construction their Lordships cannot but hold in accordance with the Appellant's contention that Article 20 deals with conflicting claims to the *tassaruf* or possession of *mirie* land, and that it is not so expressed as to apply to claims made on behalf of a *takhsisat waqf* against the Treasury to a share of tithe and registration fees. The phrase "actions concerning land of the kind that is possessed by title deed" must be taken in its context. Whichever of the translations above set out be preferred it is required by the structure of Article 20 that it be read as a whole. This article finds place in the first chapter of the first book — *viz.* the chapter headed "Concerning the nature of possession." It is one of a set of provisions intended to apply to cases in which land has been taken and cultivated by a person other than the holder by *tapou* title deed. The reference to valid excuses and the examples of disability given in the article point to the same conclusion. It is difficult to hold a confident opinion upon the question whether from the standpoint of 1858 the suggestion of a ten year limi-

tation could be regarded as reasonable or proper for the purpose of bringing to an end a dedication of the *takhsisat* kind. The right in question though concerned with *mirie* land is very different from the right of an occupier of land. In any case their Lordships cannot regard the language of Article 20 as covering the claim of a *waqf* to its share of the State imposts, and they have not been shown any basis in the law of Palestine for the view that the Settlement Officer in the absence of any enactment applicable to the case had a discretion to apply a ten years' period of limitation.

It is manifest, however, that the claim put forward in 1931 was a stale claim and one which should have been made only upon the basis of carefully ascertained facts laid fully before the Courts so as to show the true nature and character of the dedication alleged and the objects thereof ; the facts as to the abandonment of the claim of *waqf* by the representatives of the *waqf* administration ; and the facts as to receipt or non-receipt of income both before and after 1910. 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. It would seem from the facts above stated to be quite untrue that the change was made by inadvertence or that the consequences of the change were not immediately apparent. 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. The terms of the original endowment of the *Waqf* Khashki Sultani or the conditions of dedication of the land now in question may or may not have a bearing upon the conduct of the *Waqf's* representatives in 1910. Their Lordships are not disposed to place reliance on the suggestion made by the Land Court to explain the entry made in 1910 — a suggestion of which the probability is difficult to discover — that it is accounted for by new arrangements taking effect between the Ministry of *Waqfs* and the Ministry of Finance. After twenty-one years it is not for the Government to explain and justify their claim to the State imposts but for the Appellant to establish the rights of the *waqf* therein. He had done no more than give proof of the entries in the *tapou* register and these for the last twenty-one years are against him. 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 that on such a matter the subsisting entries are incorrect : otherwise the provisions for a new register would be made to unsettle titles in disregard of the land law. The Appellant has adduced no evidence of any right to have

these lands recorded as *mevqufe* in the schedule of rights which was in course of preparation for the purposes of the new register.

Section 64 of Ordinance 9 of 1928 gives to the Land Court on appeal from the Settlement Officer a discretion to rehear the evidence or to hear fresh evidence, and their Lordships have considered whether it would be right that this case should be remitted to the Land Court with or without a direction that the Appellant should have an opportunity in that Court to adduce evidence afresh in support of his case. They think, however, that the claim is a stale claim insufficiently considered and put forward with the utmost economy of information, and that as the evidence adduced does not amount to *prima facie* proof of the title which has been put in issue the Appellant's claim ought now to be dismissed. Nothing is here said as to the effect in such a case as the present of the provisions of Articles 1660 or 1661 of the *Mejelle ;* but their Lordships think it plain that Articles 78 and 102 of the Land Code have no application to the present case, the former being directed solely to the rights of a cultivator against the State and the latter to land which is *metrouke* in the sense already explained.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The Appellant will pay the Respondent's costs.

(*February 22nd,* 1940)

HIGH COURRT No. 44/40.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

1. Kefar Vitkin Moshav Ovdim Cooperative Ltd.,
2. Neemanim Ltd. PETITIONERS.

v.

1. The Director of Land Registration,
2. The Director of Land Settlement,
3. The District Commissioner, Samaria District. RESPONDENTS.

Land Settlement — Fees on registration of mortgage, Settlement of Title (Registration Fees) (Amendment) Order, 1939 — *Retroactivity.*

In dismissing an application for an order to issue directed to the Respondents calling upon them to show cause why they should not be ordered to reduce the charge of registration fees from LP. 69.300 to LP. 0.050 mils in respect of the mortgage No. 441 of LP. 6930.— registered in favour of the 2nd Petitioner on the leasehold interest of the 1st Petitioner in Block 8353 Parcel 45 :—

HELD : Entry in the Schedule of claims does not amount to registration in the register of rights. The fees payable on registration are the fees in force at the date of registration, there being no possible question of the amendment to the Order being retrospective.

ANNOTATIONS : On retroactivity, see C. A. 8/40 (*ante*, p. 85) and annotation 1, C. A. 49/40 (*ante*, p. 108) and C. A. 56/40 (*ante*, p. 133).

FOR PETITIONERS : Heinsheimer.
FOR RESPONDENTS : *Ex Parte.*

ORDER:

In this application the following facts emerge. A mortgage was filed with the Settlement Officer on the 20th of April, 1939, being a new mortgage to replace a previous one. On that date in April, the mortgage was entered in the Schedule of Claims. In October, 1939, it was entered in the Schedule of Rights and in November, 1939, the mortgage was registered in the Register of Rights to land. In September, 1939, the fees payable under the Settlement of Title (Registration Fees) Order, 1932, were altered. The Land Registry are claiming the fees under the amendment of September, 1939. The Petitioner says that they are not so entitled but, that at the time that he made the mortgage, 20th April, 1939, the fees that would then have been payable are the fees now to be taken from him. Unfortunately the words in the Order are — "That the fees are payable on registration in the Register of rights to land." Entry in the Schedule of Claims is not registration in the Register of Rights. A claim is not a right, it is merely a possible right that may become a real right in the future. It is perfectly clear that the fees payable on registration are the fees in force at the date that registration is made, and there is, in our opinion, no possible question of this amendment to the law being retrospective. There is nothing of the sort. The order *nisi* must therefore be refused.

Given this 1st day of July, 1940.

British Puisne Judge.

CIVIL APPEAL No. 26/40.

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

BEFORE : Rose, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Alex Levin. APPELLANT.

v.

1. The Liquidator of "Brosh" Cooperative Society Ltd.,
2. Dr. Leo Feuchtwanger,
3. Alexander Aharon. RESPONDENTS.

Mortgage not registered with Registrar of Co-operative Societies — Companies Ordinance, Sec. 132, 127(1) — *"Issue" of certificate of registration by the Land Registry — Certificate conclusive evidence, Companies Ordinance, Sec.* 127(8), *Co-op. Societies Ordinance, Sec.* 59 — *Point not raised in Court below — No relief after winding up order made, Companies Act, Sec.* 85 — *Priorities, Co-op. Societies Ordinance, Sec.* 48(3) — *Irregularity not causing injustice.*

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

HELD : 1. The language of Sec. 127(1) of the Companies Ordinance is unambiguous and is open to only one construction, namely, that the period of 21 days begins to run from the date of the issue of the certificate by the Land Registry. The certificate of registration is conclusive evidence that the conditions as to registration have been complied with.

2. The plea of fraud could not be heard as it had not been specifically pleaded, nor had an issue been framed on it.

3. No relief under Sec. 132 of the Companies Ordinance could be granted once the rights of the creditors were crystallized by reason of the order of liquidation having been made.

4. As soon as liquidation has begun priorities can be dealt with only by the liquidator.

5. Since the Appellant's application was bound to fail in any case, it was not necessary to remit the case on account of the irregularity of procedure.

ANNOTATIONS :

1. Earlier proceedings in this cases are reported *ante*, p. 207.

2. On Sec. 132 of the Companies Ordinance, see also C. A. 112/35 (P. P. 2.ix.36), C. D. C. T. A. 80/39 (P. P. 27.iv.39), CR. D. C. T. A. 97/39 (P. P. 31.x.39).

3. On the English practice under Sec. 85 of the Companies Act, *vide* Halsbury, Vol. 5, *pp.* 512—3, *Nos.* 828—9, Digest, Vol. 10, *pp.* 790—1, *Nos.* 4952 *seq.*

4. On failure to plead fraud, see C. A. 95/39 (1939, S. C. J. 531) and annotation 2.

5. On the impossibility of raising a point which has not been raised in the Court below, see C. A. 106/39 (1939, S. C. J. 489) and annotations, C. A. 54/40 (*ante*, p. 104) and C. A. 106/40 (*ante*, p. 230).

6. On Sec. 48 of the Co-op. Societies Ordinance, see also C. A. D. C. T. A. 18/39 (Tel-Aviv Judgments, 1939, p. 40, P. P. 6.vi.39).

7. On irregularities in procedure which do not cause injustice, see C. A. 231/37 (1938, 1 S. C. J. 28).

FOR APPELLANT : Dickstein.

FOR RESPONDENTS : No. 1 — Iszajewicz,
No. 2 — Baker and Kirschenbaum,
No. 3 — Absent.

JUDGMENT:

This is an appeal from a judgment of the District Court of Tel-Aviv.

The Appellant's application in the District Court was for rectification of the register of mortgages in accordance with Section 132 of the Companies Ordinance. It appears that, on the 6th of August, 1936, the "Brosh" Cooperative Society Limited effected first and second mortgages with the Appellant and the second Respondent respectively. On 10th of July, 1938, the second Respondent registered his mortgage with the Registrar of Cooperative Societies, this date being within 21 days after the certificate of registration was issued by the Land Registry. The Appellant has never so registered his mortgage.

The Appellant complains that the registration of the second Respondent's mortgage was irregular in that, *inter alia,* the time limit imposed by Section 127(1) of the Companies Ordinance had expired. The relevant part of Section 127 reads as follows :—

> "Any mortgage or charge created by a Company registered in Palestine ... shall, so far as any security on the Company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company unless the prescribed particulars of the mortgage or charge ... are delivered to or received by the Registrar of Companies for registration ... (in the case of a mortgage of land in Palestine) within 21 days after the certificate of registration of the mortgage is issued by the Land Registry."

In my opinion the language of this sub-section is unambiguous and is open to only one construction, namely, that the period of 21 days begins to run from the date of the issue of the certificate by the Land Registry, and not from any other date.

Apart from this, Section 127(8) of the Companies Ordinance, (Chapter 22 of the revised Edition) states in implicit terms that the certificate shall be conclusive evidence that the terms of the Section as to registration have been complied with. Section 127 is applicable to the present case by virtue of Section 59 of the Cooperative Societies Ordinance, (Chapter 24 of the revised Edition).

The Appellant further endeavoured in the Court of Appeal to allege fraud on the part of the second Respondent. This was not specifically pleaded, nor was an issue framed on this point, and I do not think that this Court should now listen to such a plea.

On 12th January, 1939, the order for the liquidation of "Brosh" Co-operative Society Limited was made, this being prior to the date of the Appellant's application to the District Court. It follows that, on the latter date, the rights of the creditors had already crystallized. Section 132 of the Companies Ordinance is similar to Section 85 of the corresponding English Act, upon the application of which Section we were referred in the course of argument to a line of English Authorities. The effect of these is that, as a matter of practice, relief is only granted without prejudice to prior creditors and is not granted at all in a case, such as this, where it would be of no practical use to the Applicant owing to his application being subsequent to the order for liquidation.

Further, although it is unnecessary to decide this point in order to dispose of this appeal, I agree with the arguments of Counsel for the first and second Respondent, that, in view of Section 48(3) of the Co-operative Societies Ordinance, as soon as liquidation has begun priorities can be dealt with only by the liquidator.

The question which has caused me the most difficulty is whether this case should be remitted to the District Court for completion. The final entry on the record of the District Court proceedings reads :—

"Decision on preliminary objections reserved."

The Court proceeded to give a final judgment and to make certain findings of fact and the Appellant has argued at length that he has been prejudiced by this proceeding. After careful consideration, however, I am of opinion that it is unnecessary to remit this case as, for the reasons which I have already given, the Appellant's application is bound to fail.

The appeal must, therefore, be dismissed with costs on the higher scale to include, for each of the first and second Respondents, the sum of LP. 15.— for advocate's attendance fee.

Delivered this 3rd day of July, 1940.

British Puisne Judge.

HIGH COURT No. 46/40.

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

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

IN THE APPLICATION OF :

Ibrahim Othman Abdul Fattah Hamdan,
on behalf of the estate of his father. PETITIONER.

v.

1. The Chief Execution Officer, District Court of Jaffa,
2. Menashe Azouri Barukh. RESPONDENTS.

Sale in execution — Extension of time — Discretion.

In dismissing an application for an order to issue directed to the first Respondent calling upon him to show cause why he should not go back on his orders dated 3.5.40 and 28.6.40 in Execution File No. 3319/37, that the execution proceedings be renewed by virtue of Article 114. Alternatively, that the time of bidding be extended for a further period of one month according to Article 108 of the Execution Law. And alternatively, the sale be postponed for a further period by virtue of Section 14 of the Land Transfer (Amendment) Ordinance in view of the present conditions and owing to the fact that the price paid is less than one quarter of the assessed value :—

HELD : The application should be refused.

ANNOTATIONS : On discretion of the C. E. O., *vide* H. C. 2/40 (*ante*, p. 15) and annotations, H. C. 19/40 (*ante*, p. 106), H. C. 47/40 (*ante*, p. 200) and H. C. 65/40 (*ante*, p. 236).

FOR PETITIONER : Cattan.

FOR RESPONDENTS : *Ex Parte.*

O R D E R :

We do not think that an order *nisi* should be granted. The application is therefore refused.

Given this 8th day of July, 1940.

Chief Justice.

CIVIL APPEAL No. 131/40.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Ma'mour Awqaf Gaza, in his capacity as Qayim Maqam Mutawalli on the Waqf of El-Khazendar and El-Kharizati. APPELLANT.

v.

Bahiya Mustafa Shaker el Khuzundar & 47 others. RESPONDENTS.

Land Settlement — Alleged refusal to hear witnesses — Record — Assessors on waqf law, Land (S. of T.) Ordinance, Sec. 11(3).

In dismissing an appeal from the decision of the Settlement Officer, Gaza Settlement Area, dated the 24th day of October, 1940 :—

HELD : 1. No witnesses were asked for in the Court below.
2. No point of *waqf* law was involved in the case and there was, therefore, no necessity for inviting the *Kadi Shar'ia*.

ANNOTATIONS :

1. On failure to apply for the hearing of witnesses, see CR. A. 2/38 (1938, 1 S. C. J. 61) and C. A. 3/40 (*ante*, p. 42).

2. On the binding force of the record, *vide e. g.* C. A. 4/39 (1939, S. C. J. 55), C. A. 5/39 (*ibid.*, p. 152), C. A. 65/39 (*ibid.*, p. 354), C. A. 69/39 (*ibid.*, p. 376) and C. A. 3/40 (*supra*).

3. On Sec. 11(3) of the Land (S. of T.) Ordinance, see also L. A. 60/33 (2, P. L. R. 265, C. of J. 1934—6, 895, *sub* No. C. A. 99/34).

FOR APPELLANT : Moubasher.

FOR RESPONDENTS : Nos. 1, 3, 6—8, 13, 15—20, 22, 24—26, 30, 32—34, 36, 45, 46 — Nasser.
No. 43 — Dead. All others served, absent.

JUDGMENT:

In this appeal from a decision of the Settlement Officer, Gaza, the Appellant stated as one of his grounds of appeal that the Settlement Officer refused to hear his witnesses. When we turn to the record we find one and half pages of legal arguments put forward by the Appellant in which not one of his witnesses is mentioned and at the end of the Appellant's arguments is this note of the Settlement Officer :—

"Plaintiff admits that this represents his case."

It is, therefore, perfectly clear that no witnesses were asked for in the Court below and the Settlement Officer was never asked to hear any.

The second point is that the *Kadi Sharia* should have been sitting as an assessor with the Settlement Officer for the purpose of advising him upon the law of *waqf* involved under Section 11(3) of the Land (Settlement of Title) Ordinance. By no possible flight of the imagination could any point of *waqf* law be involved in this case and we, therefore, fail to see the necessity for inviting the *Kadi Sharia*.

This disposes of the appeal which is dismissed with costs and LP. 10 fee for attending the hearing.

Delivered this 13th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL No. 136/40.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Arifeh bint Ismail el Tafkaji,
2. Ismail Ahmad Othman El-Ghalayini,
3. Jalal Ahmad Othman El-Ghalayini,
4. Kamal Ahmad Othman El-Ghalayini,
5. Othman Ahmad Othman El-Ghalayini,
6. Wasfiyeh Ahmad Othman El-Ghalayini,
7. Khaldiyeh Ahmad Othman El-Ghalayini. APPELLANTS.

v.

1. Ali Khalaf Kirrit Siyam,
2. Ilian Khalaf Kirrit Siyam,
3. Ahmad Khalaf Kirrit Siyam,
4. Mohammad Khalaf Kirrit Siyam,
5. Hilmi Atallah El-Tarazi,
6. Haj Abed Zindah Tafish. RESPONDENTS.

Land Settlement — Whether land included in sale — Findings of fact.

In dismissing an appeal from the decision of the Settlement Officer, Gaza Settlement Area, dated the 26th day of February, 1940 :—

HELD : The appeal was directed against findings of fact which were supported by evidence and with which the Court of Appeal could not interfere.

ANNOTATIONS : See C. A. 77/40 (*ante*, p. 127) and annotations.

FOR APPELLANTS : Muhtadie.

FOR RESPONDENTS : 1 to 4 — Nasser — by delegation.
5 & 6 —Absent, served.

JUDGMENT:

We need not trouble you, Mr. Nasser.

This is an appeal from a decision of the Land Settlement Officer, Gaza, in which he dismissed the claim of the Appellants to certain plots of land. The Settlement Officer reached his decision after hearing a very large amount of evidence, running to some twenty-five pages of the record, and the principal ground of appeal, in fact the only substantial ground of appeal, is that this particular land in dispute was not included in a sale by the Appellants.

Now, this of course is a pure question of fact and where there is evidence to support findings of fact this Court cannot interfere. The Settlement Officer tried the case with great care and patience and there is nothing in the arguments advanced to us in the appeal causing us to think that he was wrong in his decision.

The appeal must therefore be dismissed for the reasons given by the Settlement Officer and Respondents one to four will have their costs to include LP. 10 hearing fees.

Delivered this 15th day of July, 1940.

British Puisne Judge.

HIGH COURT No. 43/40.

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

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

IN THE APPLICATION OF :—

1. Dr. Jacob Sheinkermann,
2. Nissan Ruda. PETITIONERS.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Itzchak Machniss. RESPONDENTS.

Sale of Mortgage — Liability of mortgagee to pay 10% deposit on bidding, Execution Law, Art. 105 — Meaning of "deposit".

In granting an application for an order to issue directed to the first Respondent calling upon him to show cause why his order, dated the 31st of May, 1940, in Tel-Aviv Execution File No. 13704/37, whereby he refused to allow Petitioners to make a bid for the purchase of the mortgaged properties if they failed to deposit in the Execution Office in cash 10% of the amount assessed, or furnish a bank guarantee in a like sum, should not be set aside. Alternatively, that the first Respondent be ordered to accept from Petitioners a personal or notarial guarantee in the said sum against security of the money invested in the mortgage (in other words, that transfer of the mortgages of the Petitioners be not allowed pending the final sale in the said file) :—

HELD : The mortgagee is entitled to bid on giving a personal or notarial guarantee against the security of the money invested in the mortgage, subject to his liability, if any, being a charge on any monies received on account of the mortgage debt.

ANNOTATIONS : On bidders in execution see also H. C. 47/39 (1939, S. C. J. 528) and H. C. 74/39 (*ibid.*, p. 530).

FOR PETITIONERS : Ruda.

FOR RESPONDENTS : No. 1 — Salant.
No. 2 — absent, served.

ORDER:

This is a return to an order *nisi* directed to the Chief Execution Officer, Tel-Aviv, to show cause why his order, requiring the mortgagee to pay a deposit on a bid he had made in the sale of the mortgaged property, or to file a bank guarantee for that sum, should not be set aside.

We have had the assistance of Mr. Salant, who appeared for the Chief Execution Officer.

Article 105 of the Ottoman Law of Execution, which came into force in 1914, as translated, requires that bidders on offering their bid must pay a deposit of ten per cent. of the estimated value of the property. The interpretation of this provision depends on the meaning that must be given to the word deposit.

There was some controversy as to the practice prevailing in the different districts in this matter. We made inquiries, and it seems deposit has been taken to include a bank guarantee, and in many cases an undertaking such as is contemplated in the order *nisi*.

We therefore make the order absolute subject to its being made

clear that the bidder's liability, if any, shall be a charge on any moneys received on account of the mortgage debt.

Subject to this, Applicant is entitled to the order for which he asks, and it is made absolute.

Delivered this 23rd day of July, 1940.

Chief Justice.

CIVIL APPEALS Nos. 95, 96, 97 and 138/40.

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

BEFORE : Copland, Rose and Frumkin, JJ.

IN THE APPEALS OF :—

Civil Appeal 95/40.

The Palestine Jewish Colonization Association. APPELLANT.

v.

The Attorney General on behalf of the Government of Palestine. RESPONDENT.

Civil Appeal 96/40.

The Palestine Jewish Colonization Association. APPELLANT. (*Originally Defendant*).

v.

1. Village Settlement Committee of Jaba through 'Ali Ziyadi, Mukhtar of Jaba Village,
2. Village Settlement Committee of Sarafand. FIRST RESPONDENTS. (*Originally Plaintiffs*).
3. The Attorney General on behalf of the Government of Palestine. SECOND RESPONDENTS. (*Originally Third Party*).

Civil Appeal 97/40.

The Palestine Jewish Colonization Association. APPELLANT.

v.

1. The Attorney General on behalf of the Government of Palestine. FIRST RESPONDENT. (*Originally Defendant*).

2. Village Settlement Committee of Jaba through 'Ali Ziyadi, Mukhtar of Jaba Village.

3. Village Settlement Committee of Sarafand. SECOND RESPONDENTS. (*Originally Third Party*).

Civil Appeal 138/40.

The Attorney General on behalf of the Government of Palestine. APPELLANT.

v.

1. The Palestine Jewish Colonization Association,

2. The Village Settlement Committees of Jaba and Sarafand. RESPONDENTS.

Land Settlement — Kushans — Findings of fact — Registration of land in name of Government, Land (S. of T.) Ordinance, Sec. 29 — Mejliss Idara of 1323 — Fixing of boundaries — Possession.

In dismissing three appeals (C. A. 95/40, 96/40 and 97/40) from the decisions of the Settlement Officer in Settlement Cases No. 16, 19 and 20/Athlit, dated 20th March, 1940, and in allowing an appeal (C. A. 138/40) from the judgment of the Land Court (in its appellate capacity) in Land Appeal No. 145/39, dated the 20th May, 1940) :—

HELD : 1. (In C. A. 95/40, 96/40 and 97/40). The findings of the Settlement Officer as to the extent of the *kushans* and as to possession were based on evidence and would not be interfered with.

2. (In C. A. 138/40). The Settlement Officer was right in ordering registration of the land in the name of Government as no other title had been made out.

3. (In all four appeals). The *Mejliss Idara* of 1323 was concerned with the definition of the village boundaries and not with a settlement of the titles to the land within the boundaries so defined.

4. (In C. A. 138/40). The Land Court misconstrued the *Mejliss Idara* of 1323.

5. (In C. A. 138/40). The Settlement Officer was right in his decision as to the boundaries and in holding that the erection of walls and the digging of trenches in 1906 by the 1st Respondent's predecessor in title were not by themselves evidence of effective and exclusive possession.

ANNOTATIONS :

1. Questions as to whether certain land was included in a *kushan* arose also in C. A. 125/38 (1938, 1 S. C. J. 426) and in C. A. 98/39 (1939, S. C. J. 479).

2. On non interference with findings of fact, *vide* C. A. 77/40 (*ante*, p. 127) and annotations.

3. On the question of what amounts to possession, see C. A. 23/39 (1939, S. C. J. 171) and C. A. 57/40 (*ante*, p. 147).

FOR THE PALESTINE JEWISH COLONIZATION ASSOCIATION : Horrowitz and Farragi.

FOR THE ATTORNEY GENERAL : Crown Counsel — (Hogan).

JUDGMENT:

These four consolidated appeals are all from the Land Settlement Officer and concern certain parcels in the southern part of the Athlit village lands. There were other claimants at settlement whose claims were all dismissed and no appeals have been entered in respect of those, so the present dispute is between the Palestine Jewish Colonization Association commonly known as the P. I. C. A. and the Government of Palestine. In appeal No. 138/40, the Settlement Officer ordered the parcels in dispute in cases 14/- 18/- and 21/Athlit to be registered in the name of the Government as unregistered unassigned stateland. On appeal to the Land Court, that Court allowed the appeal and ordered registration in the name of the P. I. C. A. The Government have now appealed. In the other three appeals, it is the P. I. C. A. which is the Appellant, the cases having come direct to this Court and not *via* the Land Court.

Leaving on one side for the moment the question of the effect of the decision of the *Mejliss Idara* of 1323 in respect of the Athlit lands, on which the P. I. C. A. mainly base their case in all four appeals, appeals Nos. 95, 96 and 97 can be easily disposed of, so far as the other evidence is concerned. The parcels in dispute are all on or near the seashore. The Settlement Officer inspected the parcels, and insofar as the P. I. C. A.'s claim was based on *kushans* he was unable to identify any of the lands as falling within the boundaries of the *kushans* and with those findings, based as they are on several close inspections of the land, I do not think that we can interfere. Insofar as the P. I. C. A.'s claim is based on uninterrupted possession the Settlement Officer found on the evidence that there had been no sets of possession in the way of fencing, cultivation, or otherwise for any continuous period. The claim therefore by possession, as the Settlement Officer held, must also fail.

In case No. 138 the dispute is as regards the ownership of rocky

land lying along the Eastern boundary of the Athlit lands in its Southern portion where it adjoins the lands of Igzim village.

Six localities are concerned — in three of them the E. boundary is shown on the *kushans* to be a road — in the three others this boundary is shown as *wa'ar* (wasteland). The Settlement Officer held that this wasteland was within the boundaries of Athlit and took its Western edge as the Eastern boundary of the parcels. The P. I. C. A. argue that he should have taken the middle line of the wasteland or the watershed, which is the boundary shown in the map of 1323 as the Eastern boundary of Athlit Village lands. The Settlement Officer found that the rocky land was unregistered, and that there had been no effective and exclusive possession by the P. I. C. A., and therefore ordered the land to be registered in the name of the Government under Section 29 of the Land (Settlement of Title) Ordinance, Cap. 80.

Mr. Horowitz for the P. I. C. A. has complained that, since Government led no evidence and were not represented at the hearing, there is something inequitable in assigning the land to it. Personally I cannot see anything unfair in Government taking land to which no other title has been made out, neither can I see any reason why such land should go to adjoining registered owners rather than to Government, but whatever one's personal views may be is immaterial since this course is prescribed by Section 29, and there is no alternative, so long as the law remains as it is.

I leave for the moment deciding whether the Settlement Officer was right in his decision because before that can be done, the judgment of the Land Court on appeal must be considered, and before considering that, it is I think now the place to deal with the decision of the *Mejliss Idara* of 1323, on which rests, as I have already stated, the main case of the P. I. C. A. in all four appeals.

Turning to this report and decision, we find that it is headed "The result of our investigations for the definition and fixing of boundaries between Athlit Village and the neighbouring villages", and the five sub-heads of the report are all concerned with "boundaries" of villages. In one instance where the report makes certain proposals with regard to some cisterns and water supply, these proposals were not approved by the *Mejliss Idara* in its decision, which pointed out that these matters were for the Courts to decide. This is in fact a strong argument in favour of the Government's contention that the report was concerned only with the fixing of the Athlit Village lands boundaries. I do not think that it is necessary to consider the exact powers of the *Mejliss Idara* in regard to questions of ownership, because on carefully reading

the report I can find nothing to suggest that that body dealt with any questions of private ownership or attempted in any way to settle them. It is true that there are certain passages in the report which refer to lands in the possession of Mr. Frank, who was the predecessor in title of the P. I. C. A., and to certain differences between the people of Tira village and Mr. Frank, but I cannot find anything from which it can be inferred that the whole of the lands of Athlit belonged to Mr. Frank nor that the lands included in the groups of *kushans* in case 138 extended eastward as far as the watershed, which is the eastern boundary of the Athlit village lands. The report in fact, and the accompanying decision which is based on it, are exactly what they are declared to be, namely, "the definition and the fixing of the boundaries between Athlit Village and the neighbouring villages". The learned Settlement Officer in case No. 138 says :—

> "So far as the Report discloses and from the evidence of the Plaintiffs' witness it appears that the *Mejliss Idara* were concerned at the time with the definition of the village boundaries and I do not find that the Report contains any decision that in effect amounted to a settlement of the title to the land within the boundaries so defined."

With that conclusion I respectfully agree.

Turning now to the judgment of the Land Court in case 138, that Court held that the Settlement Officer was wrong in his view in saying that the Report and plan were concerned only with village boundaries as the contents of the report showed that the boundaries were fixed on the basis of accepted private tenancy.

For the reasons already given I cannot accept this view, and I think that the Land Court misconstrued the effect and contents of the Report.

Coming back to the evidence before the Settlement Officer in case 138 and to the conclusions and inferences which he drew with regard to the eastern boundaries of the P. I. C. A.'s *kushans*, I think that he came to a correct conclusion for the reasons given by him and I see no reason for interfering.

In particular it seems to me that the Settlement Officer was right in holding that, where a boundary is stated to be wasteland, the edge of the wasteland should be taken as the boundary line, and not some arbitrary line in the centre of the wasteland. To adopt the view advanced by the P. I. C. A. would be contrary to all the accepted principles of construction and to common sense.

As to possession of the P. I. C. A., I do not think that the erection of walls and the digging of trenches in 1906 by their predecessor in title are by themselves evidence of effective and exclusive possession, and

it is worthy of note that Mr. B. Levy, who was the P. I. C. A.'s manager in Palestine, when giving evidence said that the P. I. C. A. had no *kushans* for the rocky land.

Holding as I do that the Report of the *Mejliss Idara* and the plan cannot bear the interpretation placed on them by the Land Court, it follows that in my opinion the judgments of the learned Settlement Officer were right in every respect.

I would therefore dismiss the appeals by the P. I. C. A. in cases No. 95, 96 and 97 and allow the appeal by Government in case No. 138 and restore the judgment of the Settlement Officer in this latter case.

The Government will have their costs in all four appeals to this Court, and their costs in the Land Court in case No. 138 in all instances on the lower scale, to include LP. 15.— hearing fees in this Court for all the appeals.

Delivered this 26th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL No. 163/40.

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

BEFORE : Copland, Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Municipal Commission of Haifa. APPELLANT.

v.

Anisseh, daughter of Issa Matta. RESPONDENT.

Claim for compensation in respect of land — Statements made by advocates not evidence — No basis for claim.

In allowing an appeal from the judgment of the Land Court of Haifa, dated the 28th day of June, 1940 :—

HELD : 1. Statements made by advocates are not evidence of facts.
2. The letter from the Haifa Municipality did not contain an undertaking to pay the Respondent or anybody else.

ANNOTATIONS : See, on the first point, C. A. 50/36 (1937, S. C. J. 106).

FOR APPELLANT : Weinshall.

FOR RESPONDENT : Koussa.

JUDGMENT:

This is an appeal from a judgment given by the Land Court, Haifa, awarding the Respondent who was Plaintiff in the Land Court the sum of LP. 8.138 mils, compensation for land belonging to her deceased husband. The Land Court gave judgment basing themselves on a letter from the Municipality dated the 19th October, 1927, written by the Mayor of Haifa to the present Respondent, and also on a statement made by Mr. Koussa who was appearing for the Plaintiff, which the Court said was not challenged by the Defendant's advocate. Now, the Plaintiff's claim in the Court below must have been based on one of these two factors. First, the Plaintiff's claim must have been brought under the Land (Expropriation) Ordinance or, secondly, it must have been based on an agreement between the parties. It is common ground that the Land (Expropriation) Ordinance does not apply and the Plaintiff is therefore confined to the question of agreement.

With regard to the statements which apparently the Land Court have relied upon, it is unnecessary to remark that statements made by advocates are not evidence of facts and, therefore, Mr. Koussa's statement that the Municipality took an undertaking from Nakhle Aboud is not evidence. There is no evidence whatever in this case to support that statement.

The only other point relied upon in support of the claim is this letter of the 19th October, 1927. I am afraid that I cannot see that this letter in any way contains any undertaking by the Municipality of Haifa to pay the Plaintiff or anybody.

That being so, the whole basis of the Respondent's claim goes. The result is that the appeal is allowed with costs here and below on the lower scale to include LP. 10 fee for attending the hearing of this appeal.

Delivered this 10th day of September, 1940.

British Puisne Judge.