Current Law Reports

Editor: M. LEVANON, Advocate, Jaffa Road, Jerusalem

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VOLUME XI

(1st January 1942 — 30th June 1942)



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Weiss Press, Jerusalem



CRIMINAL APPEAL NO. 147/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Copland, A.C.J., Rose, J. and Frumkin, J.

Zakariya Abdul Rahman Dahdah — Appellant.

v.

The Attorney-General — Respondent.

Sentence to 3 year's imprisonment on conviction of breaking and entering into a coffee house and stealing money — Previous 2 sentences of 5 year's each reduced on appeal in each case to 2 years — Sentence of 3 years ordered by trial Court to run after termination of previous sentences — Proper course in dealing with offences committed about same time by same person, in similar circumstances — Imposition of consecutive sentences.

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

2. Save in most exceptional circumstances, as e.g. commission of offence in prison by person already serving sentence, consecutive sentences should not be imposed.

Appellant in person. *Wa'ary* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 15.12.41, in Criminal Case No. 208/41, whereby Appellant was convicted of breaking into a building and committing theft therein, contrary to Section 297(a) of Crim. Code Ord., 1936, and sentenced to 3 years' imprisonment to run after expiry of sentence he is serving.

JUDGMENT.

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

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

Delivered this 8th day of January, 1942.

CRIMINAL APPEAL NO. 143/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:-- Copland, A.C.J., Rose, J. and Frumkin, J.

Ni'man Ali Darwish Ja'bari and 3 others Appellants.

v.

The Attorney-General Respondent.

Conviction of several accused of assault and of doing grievous bodily harm—Point that incriminated act being only one, Prosecution should have charged all accused also under sec. 23, Criminal Code Ordinance —Import of sec. 23, Criminal Code Ordinance and whether necessary to join it in Information.

Sec. 23 of Criminal Code Ordinance (defining who can be charged as principal offenders) — explanatory, not creating any offence, hence not necessary to join it in Information.

Elia for Appellants. *Wa'ary* for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 10.12.41, in Felony No. 291/41, whereby Appellants were convicted of doing grievous harm, contrary to Sec. 238 of Crim. Code Ord., and of assault, contrary to Sec. 250 of Crim. Code Ord., 1936, and sentenced to fifteen months' imprisonment each.

JUDGMENT.

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

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

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

Delivered this 8th day of January, 1942.

CIVIL APPEAL No. 226/41

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

Before:— Copland, A.C.J. and Khayat, J.

1. Menachem Lebov 2. Rivka Lebov Appellants.

v.

1. Zvi Gaber 2. Eliezer Berkovitz Respondents

Action in Magistrate's Court on promissory note — Defence that promissory note without consideration and only given as security — Trial Court accepting evidence of Defendants and entering judgment for them — Judgment of Magistrate's Court reversed by District Court in its appellate capacity — When and in what circumstances appellate Court can vary or upset judgment of trial Court which believed or disbelieved witnesses.

If trial Court says it believes witnesses called by party and gives judgment accordingly appellate Court should not interfere, unless tale as told by witnesses so preposterous that no reasonable Court could possibly have believed it.

Edit. Note: see CA 129/35 2 CtLR 14; Cr.A 2/38 3 CtLR 92; CA 196/38 4 CtLR 134; CA 127/38 4 CtLR 7; CA 229/38 5 CtLR 13; Cr.A 1/39 5 CtLR 70, 72; CA 183/38 5 CtLR 19; CA 39/40 6 CtLR 132; CA 119/40 8 CtLR 48; CA 36/41 10 CtLR 54 CA 35/41 10 CtLR 91; but see also CA 219/38 4 CtLR 159; CA 241/38 5 CtLR 128.

Launer for Appellants. *Greenbaum* for Respondent No. 1.

Appeal from judgment of D.C. T.-A., dated 10.10.41, in C.A. No. 144/41.

JUDGMENT

This is an appeal by leave upon an appellate judgment of the District Court, in which that Court reversed the judgment of the learned Magistrate and found that the Appellant was liable on a promissory note. The appeal raises the question as to when and in what circumstances an appellate Court can upset or vary a judgment of a trial Court. A trial Court is the sole judge of facts. A trial Court hears the witnesses, and, if it says that it believes those witnesses, then an appellate Court should not interfere unless the tale as told by the witnesses is so preposterous that no reasonable Court could possibly have believed it.

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

he disbelieved the third defendant, who was the son-in-law of the Plaintiff, and the Magistrate then gave judgment for the defendants.

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

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

Delivered this 2nd day of January, 1942.

CIVIL APPEAL No. 184/41.

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

Before:— Copland, A.C.J., Frumkin, J. and Abdul Hadi, J.

1. Hijar bint Abdu-Salam el Shakir el Husseini, widow of late Kamil Bey el Husseini.
2. Salim Ibn Abdu-Salam el Shakir el Husseini in his capacity as guardian on the minors Arif, Zaki, Karim Eddin and Wadad children of late Kamil Bey el Husseini Appellants.

v.

Lam'a Arif Bey el Husseini Respondent.

Presiding Judge of District Court granting in presence of both parties leave to appeal against judgment on appeal from Magistrate's Court — Chief Registrar granting application (made 28 days after leave to appeal given) for extension of time for lodging appeal — Limits of power of Chief Registrar to grant extension of time to enter appeal.

1. Period within which to lodge appeal from judgments of District Courts, not being judgments on appeal from Magistrate's Courts, — defined by Rule, not by Ordinance, from appellate judgments of District Courts by Ordinance, not by Rules.
2. Chief Registrar has power to extend time defined by Rules, but not time defined by Ordinance; hence any order by him purporting to grant extension of time for appeal from appellate

judgment of District Court — ineffective as being made without authority.

3. Only body that can alter time laid down by Ordinance — legislature itself.

Budeiri and *Hanania* for Appellants. *Huseini* for Respondent.

Appeal from judgment of District Court, Jerusalem, sitting as a Court of Appeal, dated 21.5.41, in Civil Appeal No. 12/41.

JUDGMENT.

In this appeal, which is from the District Court of Jerusalem on appeal from the Magistrate's Court, a point has been taken by the respondent that the appeal is out of time. Leave was granted by the Presiding Judge of the District Court in the presence of both parties on 7th July 1941. On the 4th of August an application was filed to extend the time for lodging an appeal. This was granted by the Chief Registrar on the 17th of September, 1941, and the appeal was filed on the same day.

Now by Section 14(2) of the Magistrate's Court Jurisdiction Ordinance, 1939, it is provided that if leave to appeal is granted such appeal should be entered within 15 days of the date of the order granting leave if made in presence. The Chief Registrar purported to grant extension of time for leave under Rule 324 of the Civil Procedure Rules 1938. Rule 324 begins "when notice of appeal has not been entered within the period prescribed by the preceding rules...." and Rule 321 says —

> "The period within which notice of appeal against any decree, other than a decree or judgment to which the Magistrates' Courts Jurisdiction Ordinance applies, may be lodged etc."

And further Rule 240 of the Magistrates Courts Procedure Rules, 1940, provides:

> "Appeals shall lie from decisions of Magistrates' Courts in civil actions and in criminal cases to the District Court, and from the District Court to the Supreme Court, in accordance with the provisions of the Magistrates' Courts Jurisdiction Ordinance, 1939, applicable thereto."

The period within which an appeal could be entered from judgments of the District Court, which are not judgments on appeal from the Magistrate's Court, is defined by Rule and not by Ordinance. The period within which an appeal should be lodged from appellate judgments of District Courts is laid down by Ordinance. While the Chief Registrar has power to extend time defined by Rules, he has no power whatever to extend the time defined by Ordinance and in fact the only body that can alter the time laid down by Ordinance is the legislature itself. The order of the Chief Registrar purporting to grant the application for an extension of time was ineffective as being made without any authority whatsoever. That being so it is obvious that this appeal was lodged many, many days out of time and there is no proper appeal before

this Court. The appeal must therefore be dismissed with costs on the lower scale to include LP.5 advocate's attendance fee.

Delivered this 13th day of November, 1941.

MISCELLANEOUS APPLICATION No. 60/41.

IN THE SUPREME COURT OF PALESTINE

Before:— Copland, A.C.J.

Shlomo Salem Levy Esh-Sheikh (called also Solomon Alsheikh) Applicant.

v.

Ayshe Abdul Hail Ghanayem Respondent.

Application to Chief Justice under first part of art. 55 of Palestine Order in Council concerning guardianship of infant — Circumstances determining decision as to which Court should have jurisdiction in disputed matter of guardianship.

In deciding which Court should have jurisdiction in matter of guardianship of an infant Chief Justice will take into consideration circumstances such as environment in which child was brought up interest taken by father (or mother) in its welfare and whereabouts and whether paternity (or maternity) disputed or not.

Edit. note:— see: HC 29/3 5 C of J 1610; LA 52/35 9 C of J 740; HC 52/37 2CtLR 138; HC 28/38 3CtLR 287; CA 40/40 8 CtLR 174.

Argaman for Applicant. *Abdul-Hamid* for Respondent.

Application under first paragraph of Art. 55, Palestine Order-in-Council, 1922, to decide which Court shall have to determine dispute between parties to application.

ORDER.

This is an application under the first part of Article 55 of the Palestine Order in Council to decide which Religious Court should deal with the question of guardianship of an infant aged 7 years. The question is an extremely difficult one, but I think that the Sharia Court is the proper tribunal. I have seen the child, which has been brought up in a Moslem environment for practically the whole of its life, and it looks exactly like a Moslem child. The applicant, who alleges that he is the father, would seem to have taken no interest whatever, until comparatively recently, in the welfare or whereabouts of his alleged child. There is also a dispute as to the paternity of the child.

In these circumstances, I decide that the Sharia Court is the Court to have jurisdiction to decide the question involved.

Costs LP. 2 to the Respondent.

Given this 31st day of October, 1941

CIVIL APPEAL No. 220/41.

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

Before:— Copland, A.C.J., Edwards, J. and Abdul Hadi, J.

Hasan 'Abd er Raziq Ahmad Kullab & 3 others Appellants.

v.

Jabr Hasan Ahmad Kullab & 3 others. Respondents.

Claim before land Settlement Officer of two out of a large number of qirats in Masha' land — Settlement Officer, while rejecting Defendants' claim of prescriptive title by advers possession, finding for Defendants on ground of acquisition of whole land in good faith by virtue of a hijje and undisputed possession for 22 years — Question of adverse possession as between co-heirs — Rebuttal of presumption that amongst co-heirs possession by one — possession by all.

1. (a) Presumption that amongst co-heirs possession by one is possession by all, — only a presumption which may be rebutted as other presumptions may be.

(b) Where Court finds that for many years, far beyond period laid down in law for prescriptive possession, persons who claim, as co-heirs, had asserted no right and no claim to property in question, presumption (that amongst co-heirs possession by one — possession by all) — definitely rebutted.

2. Court of Appeal may find reasons which animated judgment of trial Court wrong and uphold judgment on other grounds.

Edit. Note, as to 1 see: — LA 142/24 3 C of J 955; LA 121/26 1 PLR 234; LA 65/27 3 C of J 957; LA 66/28 ibid 958; LA 36/30 ibid 959; LA 6/33 2 PLR 25; LA 54/36 2 CtLR 65; CA 228/37 3 CtLR 95; HC 13/39 5CtLR217; CA 214/40 8 CtLR 170; CA 8/40 ibid 198.

Moyal for Appellants. *Abcarius* for Respondents.

Appeal from decision of Settlement Officer, Gaza Settlement Area, dated 22.9.41, in Case No. 40/32/Bash-shit.

JUDGMENT.

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

Three grounds are raised by the appellants. The first one is that the Settlement Officer wrongly reopened the case after judgment had been

reserved. Now this depends very largely upon what actually took place at the hearing before the Settlement Officer. In his Interlocutory order of the 14th June, 1940, the Settlement Officer states —

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

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

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

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

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

Delivered this 12 th day of January 1942.

CRIMINAL APPEAL No. 9/42

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J., Edwards, J. and Abdul Hadi, J.

Ahmad Musa el Muhammad — Appellant.

v.

The Attorney-General — Respondent.

Charge of murder committed together with other person — Court expressing in its judgment some doubt "whether accused actually fired" and making no finding as to threatening with rifle before or after shooting — Finding that accused was present on scene armed with a rifle but without giving any reasons for inference of "full intention of assisting other man in murder".

1. Finding by trial Court trying person charged with murder: "We have some doubt whether accused actually fired" tantamount to a finding that he did not fire.

2. Trial Court must give reasonable grounds for inferences it draws. Finding: "accused was present on scene armed with a rifle with full intention of assisting other man in murder — insufficient.

Edit. Note — as to 1 see: CrA 22/38 3CtLR 154; as to 2 see: CA 169/38 4 CtLR 90; CA 127/38 ibid 7; CA 116/41 10 CtLR 56

Mogannam, Zu'yter and *Abbasi* for Appellant.

Crown Counsel (*Rigby*) for Respondent.

Appeal from judgment of Criminal Assize Court, sitting at Nablus, dated 15.1.42, in Crim. Assize Case No. 71/41, whereby appellant was convicted of murder contrary to sec. 214(b) and sec. 23 of Crim. Code Ord., 1936, and sentenced to death.

JUDGMENT.

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

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

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

The defence was a denial and an alibi. The Court stated quite definitely that it disbelieved the accused on that matter and this appeal has been argued before us on the basis that the accused was present but did not fire.

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

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

On this matter the Court made the following finding.

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

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

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

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

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

It may well be that the accused has been fortunate in that the judgment of the Assize Court is inadequate, but the fact remains that, in

our opinion, this conviction cannot stand.

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

Delivered this 31st day of January, 1942.

CIVIL APPEAL No. 232/41.

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

Before:— Copland A.C.J., Frumkin, J. and Khayat, J.

Shlomo Wolstein — Appellant.

v.

The Attorney-General — Respondent.

Claim in connection with a mortgage — Cashier collecting fees in amount contended by claimant to be sufficient — Action settled between parties — Government suing claimant for balance of fees upon Auditor discovering under-assessment — Right of Government to sue for fees or balance of fees due.

1. While Court may decline to continue hearing of case until claimant pays balance of fees due from him, nothing prevents Government from suing for that balance whether judgment in that case given or not.

2. Court fees — payable on institution of action and not dependant upon judgment being given.

Apelbom for Appellant. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of District Court, TelAviv, in its appellate capacity, dated 30.9. 41, in C.A. No. 107/41.

JUDGMENT

This is a second appeal with regard to whether a balance of court fees in the sum of LP. 16 is owing or not. The facts are that in the Magistrate's Court the appellant contended that only LP.4 was owing and being sufficiently persuasive the Cashier accepted what he said and collected LP.4 only. The Auditor, apparently on examination of the files, came to the conclusion that the fees had been wrongly assessed and that the sum of LP. 20 was in fact owing on the action, the claim being one in connection with a mortgage of LP.700. The actual action, we are informed, was settled in the course of the proceedings, and the Government have now sued the appellant for the balance of LP.16 under-assessed.

We think that both the Magistrate and the District Court were right; if Government thinks that anyone owes money to it then Government can sue that person for the amount which is claimed to be due. It is true that if this under-assessment had been discovered during the course of the proceedings, then the Court could have declined to continue the hearing until the balance was paid but even in that case there

would have been nothing to prevent Government from suing for the balance of fees which were payable on the institution of the action, if the appellant had refused to pay the balance. Fees are not dependent upon judgment being given but fees are collected, as I said before, on the institution of the action. This action was an ordinary action for debt, the Magistrate was satisfied that the sum of LP. 16 was, in fact, owing. The District Court saw no reason to dissent and we see no reason to disagree with either of these tribunals. It is not a question of assessment by the normal Assessing Officer, it is a question of determining the debt alleged to be due by the appellant.

For these reasons the appeal is dismissed. The respondents will get a total sum of LP.10 costs.

Delivered this 18 th day of December 1941.

CRIMINAL APPEAL Nos. 144/41 and 145/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Copland, A.C.J. Edwards, J. and Khayat, J.

Criminal Appeal No. 144/41.

Subhi Ibrahim Abu Jarad — Applicant.

v.

The Attorney General — Respondent.

Application for leave to appeal from judgment of D.C., Jaffa sitting at Gaza, dated 15.12.41, in Misdemeanour No. 193/41, whereby applicant was convicted of giving false evidence contrary to section 4 of the Crim. Procedure (Evidence) Ord. and sentenced to pay a fine of L.P. 10.—, in default two months' imprisonment.

Criminal Appeal No. 145/41.

Musa el Jarusheh — Applicant.

v.

The Attorney General — Respondent.

Application for leave to appeal from judgment of D.C., Jaffa sitting at Gaza, dated 15.12.41, in Misdemeanour No. 192/41, whereby applicant was convicted of giving false evidence contrary to section 4 of the Crim. Procedure (Evidence) Ord. and sentenced to pay a fine of LP. 10.—, or two months imprisonment in default.

Conviction by District Court sitting summarily of 2 persons charged with giving false evidence contrary to sec. 4 of Cr. Proc. (Evidence) Ord. — Committal proceedings before Magistrate whether criminal proceedings within meaning of said section — Question whether Examination Magistrate can commit witness for false evidence after having committed person in respect of whom evidence given.

1. Committal proceedings before Examining Magistrate —

Criminal proceedings like any criminal case in Magistrate's Court.

2. Committal by Examining Magistrate of witness giving false evidence may indifferently be after person in respect of whom witness gave evidence was committed or before.

Shihadeh for Applicant. *J.G.A. ('Akel)* for Respondent.

JUDGMENT.

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

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

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

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

Delivered this 13th day of January, 1942.

CIVIL APPEAL No. 260/41.

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

Before: Rose, J., Frumkin, J. and Abdul Hadi, J.

Abdul Halim Abdallah Nasser — Appellant.

v.

Ahmad Shukri Taji el Faruki — Respondent.

District Court making Receiving Order against judgment debtor in default of appearance — Discretion of Court to rescind Receiving Order — Technical points re failure to mention creditor's address in body of bankruptcy notice and to state amount with sufficient accuracy.

1. Court has discretion for good reason to rescind Receivnig Order in spite of debtor's failure, without lawful excuse, to appear when the application for the Order was made.

2. Purely technical point that creditor's address not mentioned in body of bankruptcy notice but only at conclusion of it — devoid of merit.

3. Where wording of bankruptcy notice identical with that of judgment and principal amount mentioned, debtor cannot succeed in application for rescision of Receiving Order on ground that amount due not sufficiently accurately stated in notice.

As to 1 see: CA 118/41 10 CtLR 119.

Dunkelblum for Appellant. *Elia* for Respondent.

Appeal from order of D.C., Nablus, dated 11.12.41, in M.R. No. 48/41 (Bankruptcy No. 2/41).

JUDGMENT.

This is an appeal from an Order of the District Court of Nablus declining to rescind a Receiving Order which had been previously made by it. The original Receiving Order was made on the 15th September, 1941, and the appellant, who was duly served, failed to appear. In due course the appellant moved the Court to rescind this order and in his order the learned Judge says: —

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

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

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

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

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

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

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

It is admitted by counsel for the appellant that the wording used in the notice is identical with the wording of the judgment. The principal amount LP. 3,376 is mentioned. The learned Judge of the District Court came to the view that there was no merit in that point either and he saw no reason for rescinding the decree on that ground. We agree.

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

Delivered this 22nd day of January, 1942.

MISCELLANEOUS 2/42.

IN THE SUPREME COURT OF PALESTINE

Before:— Copland, A.C.J.

Otto Schnider — Applicant.

v.

The Attorney General — Respondent.

Application for special treatment by person sentenced to 3 years' imprisonment for burglary — What has and what has not to be taken into consideration in awarding or refusing special treatment.

1. Prisoner of good family who used to be a man in a considerable way of business may still be refused special treatment, if during preceding years he has served numerous sentences of imprisonment in respect of separate convictions of similar offences.
2. Medical grounds — not such as should be taken into consideration in awarding prisoner special treatment or not.

Application for Special Treatment.

Rand for Applicant. *J.G.A. (Wa'ary)* for Respondent.

ORDER

This is an application for special treatment by one Otto Schnider, who has been sentenced on a plea of guilty by the District Court to three years' imprisonment for burglary. All applications for special treatment are difficult to deal with and this one is certainly no exception to that general rule. In this particular case the man, it is not disputed, is of a good family, used to be a man in a considerable way of business — it is stated that he had a business worth LP. 10,000 — and yet since March, 1938, he has served sentences varying from four months to nine months in respect of fourteen separate instances of theft and burglary.

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

One further point has been submitted, that on medical grounds the applicant should have special treatment. In my opinion, medical grounds are not such grounds as should be taken into consideration in awarding special treatment or not. The medical condition of prisoners in the prisons is under the control of the medical officer of the prison and if the medical officer is satisfied that special food is necessary for the prisoner's health, then that will be furnished. I am not a medical officer and I cannot possibly say whether he should have a special diet or not, that is a matter which must rest with the Medical Officer of the prison. In these circumstances I think the application will have to be refused.

Given this 9th day of January, 1942.

CRIMINAL APPEAL NO. 12/42

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J., Edwards, J. and Abdul Hadi, J.

Faris Mahmoud Abu el'Adas — Appellant.

v.

The Attorney General — Respondent.

Prosecution in murder case depending largely upon evidence of one eye-witness corroborated by other, circumstancial, evidence — Question of credibility of witness.

Fact that eye-witness of murder did not tell his own relatives or Mukhtar, but made a statement on same night in secret to Police or that about 20 years ago he was convicted and fined for giving false evidence — not conclusive reason for trial Court to disbelieve his evidence.

Edit. Note:— See:CrA 14/38 3CtLR 246 & Edit. Note thereto; CrA 57/40 8CtLR 225. As to elements of premeditated murder see: CrA 41/38 3CtLR 186; CrA 16/39 5CtLR 174; CrA 68/39 7CtLR 7; CrA 14/40 ibid 117; Cr.A 18/40 ibid 125; CrA 57/40 8CtLR 225.

Cattan for Appellant. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of Crim. Assize Court sitting at Nablus, dated 17.1.42, in Crim. Assize No. 52/41, whereby appellant was convicted of murder contrary to section 214(b) of Crim. Code Ord., 1936, and sentenced to death.

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Nablus, convicting the accused of murder. The circumstances in which the deceased met his death are really common ground between the prosecution and defence; that is to say, that about 2 hours before sunset on the 17th June, 1941, he was riding on a donkey with two other men, one on foot and one on a donkey, when he was

shot at and killed by a man. The eye-witnesses aver that two shots were fired and the medical evidence supports that supposition.

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

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

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

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

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

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

The point is further taken by Mr. Cattan, who has put forward every possible argument on behalf of the appellant, that it is not safe in a murder charge to depend upon the evidence of a single witness. But in this case there is an important connecting link. Two empty cartridges were found on the scene and when the accused

was arrested he led the Police immediately to a place where a rifle and ammunition were hidden. Upon tests being made it was proved that these two cartridges were fired from this particular rifle. Mr. Cattan argues that it is not fair to draw an inference from that that the rifle belonged to the accused. That may be so, but at least it is reasonable for a Court to draw an inference from that evidence that the accused had access to this rifle, even if not exclusive access. This fact, coupled with the evidence of the witness Yasin, is very damning against the accused.

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

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

Delivered this 4th day of February, 1942.

CIVIL APPEAL NO. 140/41.

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

Before:— Copland, A.C.J., Frumkin, J. and Khayat, J.

Asher Weichenberg — Appellant.

v.

Abraham Weichenberg — Respondent

Action in Magistrate's Court for partition of immovable property — Finding by Magistrate that property incapable of partition — Dismissal of claim for partition on finding that parties had agreed not to sell the property for a certain period — District Court on appeal confirming judgment of Magistrate's Court that no partition but appointing a receiver — Argument that equity cannot deprive claimant of statutory right of partition — Effect of agreement between co-owners not to sell their common property for a specified period — Appellate Court making an order although no application to that effect in trial Court — Costs.

1. Agreement between co-owners of an immovable property not to sell it for a specified number of years — good and valid.
2. Law of partition cannot be applied where property by

its nature incapable of partition and owing to an agreement between co-owners cannot be sold.

3. Appellate Court can make any order which trial Court should have made, if an application to that effect in Court below.

4. No application can be made on appeal which should or could have been made in trial Court.

5. Party succeeding on main points on appeal—entitled to costs though on one point he lost.

Edit Note: As to 3 & 4 see CA 254/37 3CtLR 88; CA 213/37 ibid 13; CA 205/38 4CtLR 206. As to 5 see CA 126/38 4CtLR 37; CA 84/39 7CtLR 89; CA 83/39 6CtLR 138.

B. Joseph and *Caspi* for Appellant. *Goitein* and *Frankel* for Respondent.

Appeal from judgment of DC Tel-Aviv, dated 29.4.41, in C.A. Case No. 154/40, confirming judgment of Magistrate, Tel-Aviv, dated 23.10.40 in file No. 1886/40.

JUDGMENT.

This is an appeal from a judgment of the learned President of the District Court, Tel-Aviv, on appeal from the Magistrate's Court. The dispute arises between two brothers who are joint owners of a house.

The Appellant applied to the Magistrate for partition. The Magistrate, after an inspection, decided — and that decision has not been queried — that the house was incapable of partition, and he then had to consider the question of sale.

The Respondent pleaded that there was an oral agreement, between himself and his brother, that the property should not be partitioned for ten years. The Magistrate found that there was insufficient proof that the agreement was that the property should not be partitioned for ten years, but found that there was an agreement that it should not be sold for ten years. There was evidence upon which the Magistrate could come to that decision, and we see no reason to interfere.

The position before the learned Magistrate was, therefore, that whilst the Appellant was entitled to ask for partition, yet he was faced with the fact that the property could not be sold owing to this agreement, and the property by its nature could not be partitioned. The Magistrate therefore decided to dismiss the action, each party to bear its own costs.

On appeal to the District Court the learned President came to the conclusion that the purchase of the house was effected by way of partnership, and that the only satisfactory solution was to appoint a receiver. He held also that the action for partition was an attempt to make use of this procedure to force a sale. The effect of the judgment was to dismiss the appeal.

On appeal to this Court the Appellant has argued that he has a statutory right to partition, that equity cannot deprive him of that statutory right, and that the Respondent's only remedy, if any, is damages. He also has argued that there is no partnership, to which the Respondent agrees, and that therefore there can be no receiver; that

the effect of appointing a receiver is to continue a partnership, which is contrary to the object of appointing a receiver, which is the winding up of the partnership.

The Respondent argues that an agreement was made, and states that it was a perfectly lawful agreement, and that even if he could not have enforced that agreement not to sell for ten years, it was nonetheless lawful. As regards the question of a receiver, he refers us to Rule 297 of the Civil Procedure Rules.

We think that the appeal on the main point fails. The Magistrate, in our opinion, came to the correct conclusion, that since the property could not be partitioned, therefore the only remedy in law was to sell. That remedy could not be exercised in view of the agreement between the two parties, which had been proved, and he therefore refused — in our opinion rightly — that the law of partition be applied.

With regard to the question of a receiver, we think, with regret having regard to the circumstances in which the parties find themselves, that the learned President had no power to appoint a receiver. It is pointed out, rightly, that an appellate Court can make any order which the Court of first instance should have made, but in this case no application was made to the Magistrate's Court, and it could not therefore be made on appeal.

In the result, therefore, that part of the judgment of the learned President appointing a receiver must be set aside; the judgment of the Court below will accordingly be varied, and as to the rest, the appeal will be dismissed.

Since it is said, quite rightly, that the Respondent has succeeded on the main points by implication before the learned President, and in effect actually on appeal to this Court, we think he is entitled to the costs, though he has lost on the receivership point.

Costs of this appeal will be on the lower scale to include LP. 10 advocate's attendance fee. The costs of the receiver should be made by motion to the District Court.

Delivered this 11th day of December, 1941.

CIVIL APPEAL No. 231/41

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

Before:— Rose, J. and Edwards, J.

Aviv Sherut Automobilim — Appellant.

v.

Herbert Zabinsky — Respondent.

Contract between a Company and B entitling either party to withdraw within specified period and B to recover money advanced by him — Allotment by Company, before expiry of probationary period, of shares to B in respect of his money — Ques-

tion of divisibility of contract — Allegation of waiver, by conduct, of option to withdraw from contract.

1. In absence of any definite finding by trial Court of a waiver of option by conduct and where no evidence on which the Court Could have so found, Court of Appeal will not draw any inference from certain undisputed fact.
2. Court right in ordering rectification of Register of Members of Company on finding that allotment of shares in respect of money recoverable from Company — premature.

Edit. Note:— As to divisibility of contract see CA 246/37 3CtLR 53; CA 9/39 6CtLR 208.

Felman for Applicant. *Sommerfeld* for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 24.10.41, in Case No. 347/40.

JUDGMENT

This is an appeal from the District Court of Tel-Aviv. The respondent who was the plaintiff in the Court below relies on an agreement marked "P. 1". This agreement which takes the form of a letter from the appellant company to the respondent, reads as follows:— "You have up till this date paid on account of the acquisition of shares of our company by cheque drawn on the

Anglo-Palestine Bank, Haifa	LP. 270.—
The balance amounting to	LP. 130.—
Total	LP. 400.—

will be entered by us on a/c of dividents in the event of there being in any such case.

Your joining shall be temporary valid, as a probationary, for three months. The probationary period commences on the day you start work with us, namely, Sunday, the 12th December, 1937. During this probationary period, both you and we shall be entitled to terminate the services at any time whatsoever. In the event of such termination, and without taking into account as to who is responsible for the termination, we undertake to refund to you the amount which you have paid in cash without any deduction not later than on the last day of the probationary period.

Your place of work will be in our Tel-Aviv station, where you will be at the counter (lattice).

On the termination of the probationary period, and in the event of your deciding to remain in the company and the management deciding to accept you as a member, you will be given shares in consideration of the amount you have paid and the contract of employment.

By signing the equivalent copy of the original of this letter, you declare to agree to its contents".

Now, it is argued, in the first place, by the appellant that the contract should be regarded as divisible and the first paragraph relating to the LP. 270 should be separated from the remainder of the contract. Reading the document it is perfectly clear that that would not be a reasonable interpretation and we entirely agree with the learned Presi-

dent that that document must be read as a whole and the contract must be treated as a whole.

The facts are that the probationary period started on the 12th December and by two subsequent letters from the appellant to the respondent these periods were extended for three months from the 12th March, 1938 to 12th June, 1938 and then for a further three months, to 12th September, 1938. Therefore the probationary period came to an end on 12th September, 1938. On the 9th of September, 1938, that is, three days before the termination of the period, the respondent wrote a letter exercising his option under the contract to withdraw from the contract and asking for the return of his money. On the 16th of August, that is, nearly four weeks before the end of the probationary period, it appears that the appellant purported to allot shares in respect of this amount to the respondent. The Court below found, and I must say that I agree with them, that that allottment was premature. The agreement says that the allottment, if any, should took place after the probationary period. This allottment took place a month before. Now, it has been argued with great force that the fact that the respondent remained physically and working with the company from the 12th September 1938, until May 1939, must be taken as a waiver of his exercising the option to withdraw. In the absence of any definite finding by the Court below that the parties treated this as such a waiver and there is no evidence whatsoever on which the Court could have so found, it is not for this Court to draw any such inference. The legal position seems to me to be that on the 9th September, 1938, this agreement, "P. 1" came to an end. I therefore think that the Court below were right in coming to the conclusion that the plaintiff was entitled to recover the sum of LP. 270 which he had paid to the appellant.

There is one further point. The Court also ordered rectification of the Register of Members and it is alleged now by the appellant that this was not pleaded and, therefore, the Court was wrong in depriving the appellant of the opportunity of producing in the Court below. There may have been good reasons why it was not pleaded and, in the circumstances of this case, it seems quite unnecessary to allow the appeal on that point because as Mr. Sommerfeld points out the relief of rectification is not inconsistent with the relief asked for since, if, in fact, the plaintiff is entitled to recover LP. 270, clearly the allottment of shares of 1938 is not a good one. It seems to me therefore that if the case were remitted to the District Court it would only mean additional expense and waste of time to the parties.

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

Delivered this 18th day of December, 1941.

CRIMINAL APPEAL NO. 146/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Gordon Smith C.J., Edwards J. and Khayat, J.

1. Itzhak Soriano 2. David Soriano Applicants.

v.

The Attorney General Respondent.

Application for leave to appeal from judgment of DC, Jerusalem, dated 23.12.41, in Felony No. 306/41, whereby Applicants were convicted of conspiracy to commit a felony, contrary to Sec. 34 of Crim. Code Ord., and of obtaining money by false pretences, contrary to Sec. 301 of Crim. Code Ord., and sentenced to one year's imprisonment.

The Attorney-General Appellant.

v.

1. Itzhak Soriano 2. David Soriano Respondents

Appeal from judgment of DC Jerusalem, dated 23.12.41, in Felony No. 306/41, whereby Respondents were convicted of conspiracy to commit a felony contrary to Sec. 34 of Crim. Code Ord. and of obtaining money by false pretences, contrary to Sec. 301 of Crim. Code Ord., and sentenced to one year's imprisonment.

Claim of Insurance money for damage caused by fire alleged to have broken out accidentally — Finding by Magistrate that fire "must have been unlawfully set" — Trial on charge of arson and acquittal — Receipt of Insurance money — Charge against Insured of conspiracy to defraud and obtaining money by false pretence — Form of charge laid — Evidence of a self-confessed accomplice and blackmailer — Question of autrefois acquit and estoppel by record — Admissibility of evidence.

1. Acquittal of Insured for arson — no bar to his being subsequently charged with obtaining money by false pretences from Insurer.

2. Acquittal on arson charge does not necessarily involve acquittal on false pretence charge.

3. Untrue allegation by Insured that fire was caused accidentally — a false pretence within meaning of sec. 301, Crim. Code Ord., and a continuing one up to receipt of Insurance money.

4. Evidence relevant in proof of a certain charge— admissible even though it tends to show that accused, in fact, guilty of another charge on which he had already been tried and acquitted.

Edit Note: Rex v. Barron, 1914, 2 K.B., 570 and Reg. v. Ollis, 1900, 2 Q.B.D., 758 followed.

Levitsky and *Abcarius* for Applicants (Respondents).

J.G.A. (*Salant*) for Respondent (Appellant).

JUDGMENT

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

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

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

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

As regards the second count, the material parts are that the accused, on the 21st June, 1939, at Jerusalem, with intent to defraud, obtained from the Insurance Company LP. 1.950 by falsely pretending that goods — the property of Soriano Brothers at their store at Jaffa Gate, were destroyed by an accidental fire, when in fact, to their knowledge, such fire was not accidental.

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

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

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

On the 10th April, 1938, two formal claims were filed with the Insurance Company, there being two policies in respect of two warehouses, the total sum claimed being LP. 3539.869, out of a total stock of LP. 7000.

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

The Police being justifiably suspicious as to the origin and nature of the fire, an enquiry under Ordinance No. 7 of 1937 was held, the

Magistrate giving his decision on the 21st May, 1938. The finding was as follows:

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

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

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

Apparently an award was made in the arbitration proceedings, and further negotiations took place, with the result that, on the 21st June, 1939, Mr. Levin handed a cheque for LP. 1950 to the two accused in his Office, against a full receipt and discharge (Ex. P. 8) signed by both accused.

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

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

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

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

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

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

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

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

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

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

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

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

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

The maximum punishment for the crime of arson is imprisonment for life, whereas that for false pretence is five years — a rather big distinction. Besides, the two offences are in their very natures so different and distinct and the evidence required to support them must respectively and necessarily be so very different that we cannot see how an

acquittal for arson can be a bar to a subsequent charge of false pretence. Nor can we possibly agree with the submission that in this false pretence trial the two accused were in fact being retired for arson, on which charge they had previously been acquitted. Also see Rex. v. Barron, 1914, 2 K. B., 570. That an acquittal on the arson charge necessarily involved an acquittal on the false pretence charge cannot be maintained.

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

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

Did the Accused know of its falsity? We have the finding by the Magistrate at the Fire Enquiry dated the 21st April, 1938, that this fire started in various parts of the store room in the upper part of the premises of Soriano Brothers, and that it must have been unlawfully set. But this finding in no way absolved the Insurance Company from payment of the claim and was quite irrelevant to the question of the Company's liability. On the evidence before it the District Court found as a matter of fact that the second accused deliberately and falsely represented to the Company that the fire was caused accidentally, and that he knew at the time of this representation that it was false and untrue. We can see no reason or cause for thinking that the District Court was wrong or erred in coming to this conclusion. It is not disputed that the money was obtained, and it cannot be disputed that if these premises are correct, then there was a deliberate intent to defraud. The necessary ingredients for maintaining a charge of false pretences were therefore, in the opinion of the District Court, all present and proved sufficiently.

The third point was that the evidence of Lederman was wrongly admitted. Objection was taken at the trial to the admission of this evidence, but the Court over-ruled it. The grounds were that such evidence was irrelevant and that, as it tended to show that accused were guilty of arson, on a charge for which they had been acquitted, therefore such matter was 'res judicata' and that estoppel by record applied. Against this it was argued that Reg. v. Ollis, 1900, 2 Q. B. D., p. 758, applied, and that such evidence was admissible for the purpose of proving guilty knowledge. Quite briefly the facts in Reg.

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v. Ollis were that, having already been acquitted on a charge of false pretence in respect of a "worthless" cheque, on a subsequent trial of the same man, in respect of other similar cheques, evidence of the facts in the first case and on which the accused was acquitted was admitted for the purpose of proving guilty knowledge. It might be mentioned that the arguments of Mr. Levitsky closely followed those of Counsel for Ollis, such arguments being over-ruled. As this case was the subject of considerable argument and controversy before us, it is desirable to examine it at some length, as the prosecution largely relies on it.

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

> "The only point for our present determination is, whether that evidence was legally admissible on the ground that the facts disclosed in it were relevant to the subsequent charges. It does not appear to have been argued that it was not relevant and shewing guilty knowledge, if it were not inadmissible on the grounds suggested — namely, that the facts sought to be given in evidence had already been given, and that the accused had already been acquitted of the charge to which they related. It is clear that there was no estoppel; the negativing by the jury of the charge of fraud on the first occasion did not create an estoppel; nor is there any question arising upon the maxim 'Nemo debet bis puniri pro uno delicto'. The evidence was not less admissible because it tended to shew that the accused was, in fact, guilty of the former charge. The point is, was it relevant in support of the three subsequent charges? In the opinion of the majority of the Court, and in my own opinion, it was relevant as shewing a course of conduct on the part of the accused, and a belief on his part that the cheques would not be met."

Grantham J. said:

> "The real test is, was the first charge the same as that on which the prisoner is being charged again, or, was the evidence necessary to support the second indictment sufficient to prove a legal conviction on the first? If not, the evidence on the first charge can be used again, because it is being used in a different case, and on a different charge.
>
> For these reasons, in my judgment, our answer must be 'Yes — the evidence was admissible'."

Wright J. said:

> "In the present case the use at the subsequent trial of Ramsey's evidence was not an attempt to reopen the question of the prisoner's innocence on the charge on which he had been acquitted, or to defeat the immediate and direct object of the former acquittal on that charge.
>
> Lastly, it may be observed that the defence of autrefois acquit seems never to have been rested on the ground of estoppel. Both that defence, as well as the defence of autrefois convict, has always been rested on the rule that a man shall not be twice put in jeopardy for the same matter — a rule which has not been violated in this case."

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

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

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

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

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

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

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

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

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

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

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

The weight to be attached to his evidence was very carefully considered by the Court below, as also the need for corroboration of it, and the Court dealt with this point at length and it is impossible for us to say that the Court below erred in this respect. There was strong evidence before the Court below on all the material elements of a charge of conspiracy and false pretences, and these being questions of fact it is impossible for us to say that the conclusions by the Court below on these questions of fact were wrong. Nor do we think that the Court below misdirected itself either on these questions of fact or on any points of law. It is no argument to say that the Insurance Company also knew that the fire was not accidental. They could not prove it — although extremely suspicious as to its origin — and they had before them the necessary declaration by the accused that the fire was accidental. These were the pro forma foundations of the claims against the Company, and although payment was delayed for various reasons, it is clear that, on the acquittal of the accused on the arson charge and under threat of civil proceedings, the Company felt bound to pay. Mr. Levin stated that had Lederman's evidence come to light before payment, such would not have been made.

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

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

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

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

This appeal is therefore dismissed.

Delivered this 29th day of January, 1942.

CIVIL APPEAL NO. 235/41.

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

Before:— Copland, A.C.J. and Rose, J.

Hussein Saleh Hajjat — Appellant.

v.

Ahmad Khamis el Ghajawi and others — Respondents.

Non-appearance of plaintiffs in Magistrate's Court and subsequent appearance of one of them asking for adjournment because advocate sick — Defendant asking dismissal of case by default of appearance and Magistrate ordering striking out with liberty to renew without fees — Proper procedure when Plaintiff fails to appear — Effect of non-compliance with Rule of Procedure in reliance upon an ultra vires order of Court.

1. *a*) If Plaintiff fails to appear, Defendant entitled to have case dismissed there and then;

b) Court has no power to order temporary striking out of case with liberty to renew without fees within fixed period.

2. Only way in which Plaintiff in Magistrate's Court can proceed after case struck out — to apply by motion (under Rule 163, Mag. Courts Proc. Rules) to set aside ex-parte judgment.

3. Even where Magistrate ordered striking out of case with liberty to reinstate it without fees, Plaintiff bound to proceed in accordance with rule 163, Mag. Courts Proc. Rules; failure to do so vitiates caurse of case subsequent to striking out.

Edit. Note: As to 2 see CA 20/38 3 CtLR 289.

Appeal from judgment of Magistrate's Court, Haifa, sitting as a Land Court, dated 5.11.41, in Case No. 4607/40.

Asfour for Appellant. *'Asal* for Respondents.

JUDGMENT.

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

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

What happened in this unfortunate litigation was that when the case came for trial on the 20th of January, 1941, the attorney for the defendant was duly present in Court but nobody appeared for the plaintiffs. Later on one of the plaintiffs appeared and asked for adjournment because his advocate was sick. There was then a certain amount of discussion. The defendant asked the Court to dismiss the case because it had been already adjourned several times and the plaintiff was showing reluctance in bringing his witnesses or to appear, but finally the Magistrate ordered the temporary striking out of the case with liberty to renew without fees within two months. Now, that, of course, was entirely wrong and that order the learned Magistrate had no power whatever to make. In circumstances such as these, when the plaintiff had not appeared, the Magistrate should have proceeded under Rule 137(c). He could have adjournd the case if he liked but since the defendant asked for dismissal the Magistrate should have dismissed the case there and then. We have no sympathy with the plaintiffs who could not even appear in time in Court and inform the Court and the other parties that their advocate was sick. The case therefore having been struck out the only way in which the plaintiffs could have proceeded after that was to apply under Rule 163 by motion to set aside the ex parte judgment. This they did not do and the reinstatement therefore was entirely wrong and their failure to apply under Rule 163 vitiated the whole subsequent course of the case.

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

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

Delivered this 7th day of January, 1942.

CIVIL APPEAL No. 224/41.

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

Before:— Edwards J. and Abdul Hadi, J.

Abdul Wahhab Abu Askul — Appellant.

v.

1. Sarah Bint Ibrahim el Jirbi of Besh-shit (deceased) her sole heir being her son Rabha Muhammad Jabir 'Askul, of unknown residence.
2. Rabah Ibn Muhammad Jaber 'Askul of Bash-Shit village,

unknown residence. Respondents.

v.

Ibrahim Khalil el Haj and 7 others in their capacity as heirs of Sarah Ibrahim El Jirbi and Rabah Mohammad Jaber 'Askul Respondent (Cross-Appellants).

(By order of Court dated 15.1.1942).

Declaration before Settlement Officer by occupant of land of his willingness to hand over certain shares held by him to absent heir on his return — Finding by Settlement Officer that no adverse possession in respect of shares of absentee — Discretionary power of Settlement Officer regarding registration of possessory title under sec. 52, Land Settl. Ord. — Question of rights of heirs of party to appeal who died after judgment appealed from — Failure to give 7 days' notice of cross-appeal.

1. "May enter" in sec. 52 (registration of possessory title) of Land Settl. Ord. — purely discretionary.

2. Where there was an undertaking by occupant of land to hand over certain shares to absentee on his return, Settlement Officer right in holding there was no adverse possession by occupant within art. 20 of Land Code and refusing registration of these shares in his name.

3. Court of Appeal only concerned with correctness of judgment of trial Court at the time; it will, therefore, not consider rights of heirs (or even only their according to Certificate of Succession) of party who died after that judgment.

4. *a*) Seven days' notice in Rule 339, Civil Procedure Rules, in view of word "shall", is mandatory; non-compliance — fatal to appeal.

b) Some difficulty in obtaining signature of one of heirs of deceased party — no good ground for adjournment to enable Respondent to give 7 days' notice of cross-appeal.

Edit. Note: As to 1 compare CA 237/37 5 CtLR 49. As to 4*a*) see LA 58/28; CA 50/37 3 CtLR 19. As to 4*b*) see CA 129/37 2 CtLR 87 and Edit. Note thereto; CA 227/38 4 CtLR 238; PCLA 13/38 ibid 236.

Haddad for Appellant. *Shihadeh* for Respondents (Cross-Appellants) *Dajani* for Administrator of Rabah.

Appeal and cross-appeal from decision of Settlement Officer, Ramleh Settlement Area, dated 18.9.41, in Case No. 19/32/Bash-Shit, No. 2/39/Bash-Shit (Rehearing).

JUDGMENT.

This is an appeal by leave from a decision of the Land Settlement Officer of Ramleh in Case No. 19/32 Bash-Shit, No. 2/39/ Bash-Shit (Re-hearing). The re-hearing referred to had been ordered by the Land Court of Jaffa sitting as a Court of Appeal in Land Settlement Appeal No. 92/37. The whole facts of the history of

the land are set out in the judgment of the Land Court of Jaffa dated 28th July, 1939, and it is unnecessary for us to restate them here. Only one point had been remitted by the Land Court namely to enquire into an alleged agreement between the appellant and Sarah Bint Ibrahim with regard to the share of her absent son Rabah. In the first judgment of the Settlement Officer dated the 3rd August, 1937, he found that the defendant, that is the present appellant, had admitted that he had taken three kirats of Mohamed, son of the deceased Jabir Ahmad, when he died as he had no male heir present and that the appellant had said to the Land Settlement Officer that he was willing to hand over these three kirats to Rabah, the absentee, on his return and in view of this admission the Land Settlement Officer held that there was no adverse possession within the meaning of Article 20 of the Land Code. This would appear to be so. We find it therefore rather difficult to unterstand why the Land Court of Jaffa found it necessary to refer back to the Land Settlement Officer, the question of the value of an alleged verbal agreement as to a promise by the present appellant to maintain the woman Sara until the return of her son Rabah. Be that as it may, the matter did go back to the Land Settlement Officer and he gave a decision on the 18th of September 1941. Against that decision the present appellant Abdul Wahhab Abu Askul now appeals.

The first ground of appeal is that the Land Settlement Officer gave the appellant no opportunity of proving anything; but in answer to a question by the Court Rashid Eff. Haddad, the present appellant's advocate, said that the Land Settlement Officer did hear the parties and it is apparently not suggested that the Land Settlement Officer refused to hear witnesses or refused any adjournment for that purpose. In fact it does not seem that the appellant asked the Land Settlement Officer to hear witnesses ; in any event the judgment of the Land Court did not really order a rehearing but merely ordered the Land Settlement Officer to consider this question of the agreement and give a fresh judgment thereafter. It does not appear to us that the Land Settlement Officer acted improperly or omitted to do anything he should have done and we fail to see how the judgment can attacked on that ground.

The next ground of appeal is that the Land Settlement Officer should have acted under Section 52 of the Land (Settlement of Title) Ordinance ; we refer to the words "may enter" in Section 52 which show that it is purely discretionary; but, in any event, in view of the undertaking by the appellant to hand back these three kirats to Rabah on his return, we think that the Land Settlement Officer would have been wrong in registering these three kirats in the name of the appellant. We therefore find that there is nothing objectionable in the decision of the Land Settlement Offi-

cer of 18th September, 1941, it seems that Sarah had died. This may be so ; but, as we are a Court of Appeal, we are merely concerned with the correctness of the decision of the Land Settlement Officer at the time and parties must take the usual steps consequent on the death to have the necessary alterations in the land register by way of producing the necessary certificates of succession etc. Aziz Eff. Shehadeh, the advocate acting on behalf of the heirs of Sarah, has asked the Court to presume the death of Rabah and in support thereof has asked us to look at a certificate of succession in favour of the heirs of Sarah according to which it would seem that this Land Settlement Cadi was satisfied that Rabah had died and that Sarah had succeeded to all his shares. Here again the answer is the same. We are not concerned with whether Rabah has or has not died on 18th of September, 1941. The Land Settlement Officer treated him as being still alive or so an absente. We see no reason to or need to alter that decision. There the matter must remain so far as this appeal is concerned.

At the commencement of the hearng of this appeal, Aziz Eff. Shehadeh, advocate on behalf of the heirs of Sarah, asked to be allowed to argue a cross appeal. He admitted that he had not given the necessary 7 days notice to the other side as is required by Rule 339. The advocate for the appellants, Rashid Eff. Haddad, who was only served yesterday with the notice, told the Court that he was not prepared to argue any cross appeal. Now, in view of the word "shall" in line 4 of Rule 339, the 7 days' notice is mandatory. The only possibility therefore was for us to grant an adjournment if we thought fit. The reason given by Aziz Eff. Shehadeh for the delay was that he had found some difficulty in obtaining the signature of one of the heirs of Sarah on his power of attorney. We were not satisfied that this was a good ground for the adjournment of the appeal and we accordingly refused Aziz Eff.'s application. In the result the appeal against the decision of the Land Settlement Officer of the 18th of September, 1941, is dismissed with costs as follows : The appellant will pay to Aziz Eff. Shehadeh's clients costs to be taxed on the lower scale to icnlude an advocate's attendance fee of LP. 10. Aziz Eff. Shehadeh's clients will pay to Daoud Eff. Dajani's clients a sum of LP. 5 inclusive costs as fixed costs. The cross appeal is dismissed without costs.

Delivered this 5th day of February, 1942.

CIVIL APPEAL No. 239/41.

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

Before:— Copland, A.C.J., Frumkin, J. and Khayat, J.

Jadalla Elias El Najjar — Applicant.

v.

Ali Mustafa Salah and 3 others Respondents.

Unsuccessful appeal fromMagistrate's Court to District Court in an arbitration matter — Refusal of application to District Court for leave to appeal to Supreme Court — Application to Court of Appeal from appelate judgment of District Court — Provisions governing appeals and applications for leave to appeal in arbitration matters.

1. Appeals and applications for leave to appeal in cases brought before Magistrate regarding arbitration matters — governed by provisions of Arbitration Ordinance not by those of Magistrate Courts Jurisdiction Ordinance.

2. Application for leave to appeal in arbitration matter must he made to District Court before coming to Supreme Court.

3. Application to Supreme Court for leave to appeal will not be entertained if application to District Court for such leave was out of time.

4. (Obiter) Court of appeal will not entertain application for leave to appeal from an appellate judgment of District Court which ought to be made to Chief Justice.

Edit. Note: As to 1 & 2 see CA 15/37 2 CtLR 13; CA 161/37 ibid 113; CA 164/37 3 CtLR 66; CA 111/39 6 CtLR 210 and cases cited there. As to 3 see CA 193/38 4 CtLR 131.

Abedrabbo for Applicant. *Elia* for Respondents Nos. 1. 3 & 4.

Application for leave to appeal from judgment of DC, Jerusalem, sitting as a Court of Appeal, dated 13.10.41, in Civil Appeal No. 46/41.

ORDER

In this application for leave to appeal from a judgment of the District Court, given on appeal from the Magistrate in an arbitration matter, the point has been taken that there is no application proper before this Court. The argument is that if Section 15(3) of the Arbitration Ordinance applies, then the applicantion for leave to appeal to the District Court was out of time under Rule 322 of the Civil Procedure Rules. If, on the contrary, the Magistrates Courts Jurisdiction Ordinance applies, then, it is argued by the respondents, application for leave to appeal from a refusal of the presiding Judge of the District Court to grant leave lies not to the Court of Appeal but to the Chief Justice.

The main argument of the appellant is that there is a concurrent jurisdiction under both Ordinances. There is no doubt that the case before the Magistrate was an arbitration matter. The judgment of the learned President of the District Court, who was sitting alone in his appellate capacity, was given on the 13th October, 1941. Application for leave to appeal from that judgment was filed in the District Court on the 3rd November, 1941, and was based on Section 12 of the

Magistrates Courts Jurisdiction Ordinance. By Section 15(1) of the Arbitration Ordinance, the Civil Procedure Rules in force for the time being apply to all applications to the Court under the Ordinance. Rule 322 of the Civil Procedure Rules says that application for leave to appeal from a decree, judgment, order, decision or ruling of a District Court must be made within fifteen days from the date on which such judgment, order, decision or ruling was delivered if in presence as was the case here.

Now, in our opinion, appeals and applications for leave to appeal in cases such as the present one are governed by the provisions of the Arbitrations Ordinance and not by those of the Magistrates Courts Jurisdiction Ordinance. That being so, it follows that the application for leave to appeal to the District Court was made out of time and no proper application was therefore before that Court, and since it has been decided on several occasions by this Court that application for leave must be made to the District Court before coming to the Supreme Court, it equally follows that there is no proper application before this Court. Even if the Magistrates Courts Jurisdiction Ordinance applied, and we have already stated that in our opinion it does not apply, there would equally be no application before this Court which we could entertain, since an application for leave to appeal from an appellate judgment of the District Court must be made under Section 12 of that Ordinance to the Chief Justice, and not to the Supreme Court sitting as a Court of Appeal.

There being no proper application before us the application is dismissed. The first, third and fourth respondents will have their costs which we certify at the sum of LP. 10 total costs.

Delivered this 15th day of December, 1941.

HIGH COURT No. 107/41.

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

Before:— Rose, J., Frumkin, J. and Khayat, J.

Ellern's Bank, Ltd. — Petitioner.

v.

1. The Chief Execution Officer, Haifa.
2. Shmuel Tayar
3. The partnership Mechres and Negri Freres — Respondents.

Judgment against two Defendants jointly and severally — Arrangement to pay judgment debt by instalments — Order of Chief Execution Officer postponing sale of judgment debtor's

property — Discretion of Chief Execution Officer regarding sale or payment by instalments.

To proceed with sale of debtor's property or grant payment by instalments — a matter of discretion of Chief Execution Officer; High Court will, unless caprice or grave injustice to parties shown, not interfere.

Edit. Note: see HC 50/41 10 CtLR 88; HC 98/40 8 CtLR 159; HC 2/40 7 CtLR 44; HC 19/40 ibid 146.

Radt for Petitioner.
Geiger for Respondent No. 2. *Eisenberg* for Respondent No. 3.

Application for an order to issue directed to 1st Respondent calling upon him to show cause why his order, dated 13.11.1941, cancelling sale proceedings against 2nd Respondent, in Haifa Execution file No. 5047/40, should not be set aside, and why he should not be ordered to direct that sale proceedings against 2nd Respondent be continued.

ORDER

This a return to an order directed to the Respondents to show cause why an order made by the first Respondent in execution proceedings should not be set aside. It appears that the Petitioner has obtained a judgment jointly and severally against the second and third Respondents. Arrangements seem to have taken place by which the third Respondents to pay, or make an attempt to pay, this debt by instalments. It appears to be the opinion, at any rate of the Execution Officer concerned, that the second Respondent was a party to this arrangement- The order complained against was made on the 13th November, 1941, and orders that the sale fixed for that day be postponed. If one looks at the expression of opinion madeby Mr. Kassan, after Mr. Landau dismissed the applicaiton, it seems to be clear that he said that there should be a further enquiry in February 1942, provided presumably, as said by Mr. Kassan, that the third Respondent continues to pay the instalments. The petitioner says that his position is prejudiced by this, as there is no reason why he should not proceed for with against the second Respondent. That may or may not be so, but it seems to us that this is eminently a matter of discretion, and no caprice or grave injustice to the parites has been shown.

For these reasons the rule must be discharged with costs to include, as far as the second Respondent is concerned, the sum of LP. 10 advocate's attendance fee, and as regards the third Respondent, to include the sum of LP. 5 advocate's attendance fee.

Given this 22nd day of December, 1941.

HIGH COURT No. 3/42.

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

Before:— Edwards, J. and Khayat, J.

Tova Ben Ami — Petitioner.

v.

1. Local Council Kfar Jona
2. Inspector-General of Police and Prisons.
3. Police Inspector of Kfar Jona — Respondents.

Local Council refusing application for a licence to open and keep a cafe — Words in Order constituting Local Council giving them implicit power to limit number of cafes — Power of Local Council to fix particular area as "approved zone" for businesses, even thoug no Town Planning Scheme yet made — Discretionary power of Local Council in finding one candidate for licence less suitable than others.

1. Words "to regulate and control establishment of businesses" in order of High Commissioner constituting a local council gives council discretionary power to limit number of businesses.

2. Mere fact of having been one of first persons to have applied to Local Council for a licence — no reason for being given preference, provided council not acting capriciously or with bias or from improper motives or other wrong reasons.

3. Local Council may decide upon a particular area as "approved zone" for certain businesses, even though no Town Planning scheme yet made for area within their jurisdiction.

4. Fact that Police has no objection to character of person applying for a licence to open a certain business does not determain question, for Local Council to decide whether applicant a suitable person, or less suitable than other candidates.

Edit. Note: HC 12/40 7 CtLR 187 distinguished; HC 7/36 9 C of J 907 referred to; see also HC 34/31 PLR 595 and HC 8/36 9 C of J 831.

E. Z. Fellman for Petitioner.
M. Goldberg for Respondent No. 1.

Application for an order to issue directed to 1st respondent (or any officers acting for it) calling upon it to show cause why it should not forward application for a cafe, heretofore filed by petitioner, to 2nd or 3rd respondents for their approval and thereafter so sign and issue to petitioner a licence to keep a cafe in abovementioned premises of petitioner at Kfar Jona.

ORDER

This is a return to a petition or application for an order of mandamus directed to the Local Council of Kfar Yona, calling upon

them to show cause why they should not be ordered to issue to the petitioner a licence for the opening and keeping of a cafe in Kfar Yonah. Originally, the Inspector-General of Police was a party to the petitioner; but on the return date, the representative of the Inspector-General of Police said that he did not oppose the petition. There was no request that the application be forwarded to the Director of Health under Section 6 of Cap. 143 i. e., Trades and Industries (Regulation) Ordinance (see also Section 3 and 4 of Ordinance 7 of 1939). For the purposes of this petition we assume that the petitioner had satisfied the requirements of the Director of Health and the Inspector-General of Police under the Orrdinance.

Now, it is argued by Mr. E Fellman, advocate for the petitioner that once a petitioner had satisfied both those parties, the Local Council of Kfar Yona had no power to refuse to grant the licence. In this connection, Mr. Fellman has referred us to High Court Case No. 12/40 *) and he suggests that a former Chief Justice (Sir Harry Trusted) doubted the existence of the discretion but it is clear that he admitted that that point had not been argued in that case. Now, there is a series of authorities — in particular High Court 7 of 1936, Rutenberg Vol. 9 p. 107, — which make it clear that this Court has held that the discretion exists ; but, in any event, this matter must be decided in accordance with the statute law on the subject. Under Section 2 of the Local Councils Ordinance (Cap. 84), the High Commissioner, in making an order constituting a local council, must specify the composition and functions of such council and its powers and obligations and its area of jurisdiction. In respect of Kfar Yona Council Order No. 202 of 1940 namely the Local Councils (Kfar Yona) Order 1940 was made (Palestine Gazette Supplement No. 2 1940 page 1679 paragraph 10 (m), (o) and (p)). The Council have been given wide powers which, in our view, enable them to control even the number of cafes for which licences may be granted in the area under their jurisdiction. We lay particular stress on the words in paragraph 10(p) "to regulate and control the establishment of businesses" ; this in our view gives them power to limit the number of cafes. Although Mr. Fellman suggests that the Council limited the number to 12, Mr. Goldberg, advocate for the respondent Council, assured us that, in fact, the number of cafes approved is 20 and although it may well be that one or two of these 20 people have not yet taken out their licences, yet licences for 20 have in fact been granted. Now, of course, one question which at once arises is whether it is a reasonable exercise of the discretion to limit the number to 20 having regard to the population of Kfar Yona. From what we have

*) 7 CtLR p. 187.

heard, we are not prepared to say that 20 is too small a number and we think that there is nothing before us to show that the Local Councils exercised a wrong discretion in so limitting the numbers. The petitioner complains, however, that she is one of the first persons to have applied for a licence, that is to say, one of the first of the 20; and she accordingly feels she has a legitimate grievance in having been refused. Now, the mere fact that she was one of the first of a large number of applicants to apply is no reason why she should have been given preference provided always the Local Council did not act capriciously or with obvious bias or from wrong motives. Now, there is no suggestion that any member of the Local Council was biased against this particular petitioner or that she has suffered because of any personal animosity. The main attack of the petitioner is really against some of the reasons given by the President of the Council, Mr. Rosenzweig, in his affidavit on reply.

Apart from the question of numbers, with which we have already dealt, it is suggested that a wrong reason was given, namely that the cafe of the petitioner is outside what the Local Council calls the "approved zone". It is urged by Mr. Fellman that, having regard to Section 7(1) of the Trades and Industries (Regulation) Ordinance as amended by Section 4 of Ordinance 7 of 1939, such considerations are only relevant when there is a Town Planning scheme in force. That, however, does not, in our view, prevent a local council in the exercise of its powers under para 10(o) and (p) from deciding whether cafes should be situated in a particular area; in other words, they may for such purposes approve a zone even although no Town Planning scheme has yet been made for the area within their jurisdiction. It is also said that, in view of the fact that the Police and no objection to this lady's character, the Local Council should have been satisfied. Now, there is an allegation made in paragraph 9 of Mr. Rosenzweig's affidavit. What is said there may be ambiguous, but, in fairness to the petitioner, we may say that we gather that no affirmative allegations were made regarding her character; and, in fairness to Mr. Rosenzweig, we would point out that in paragraph 9 Mr. Rosenzweig does not say that her character was bad. The real question before the Local Council seems to have been whether the petitioner was a suitable person to have a licence for a cafe having regard to the fact that she was only one of apparently many candidates for a licence the number of which the Council had, in our view, every right to restrict to 20. Now, that question of whether she was a suitable person, or less suitable than others of the candidates, was, of course, one for the Local Council to decide, and, apart from the matters with which we have dealt, there is nothing before us to show that the Local Council acted capriciously or with bias or from improper motives or forother wrong reasons.

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

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

Given this 12th day of February, 1942.

HIGH COURT No. 96/41.

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

Before:— Rose, J., Frumkin, J. and Khayat, J.

Gabriel Abyad — Petitioner.

v.

1. The Chief Execution Officer, Haifa,
2. Karim George, and 6 others. — Respondents.

Final order of sale in favour of highest bidder and payment of transfer fees by him — Chief Execution Officer allowing fresh bids to be accepted after final order of sale — Highest bidder taking for long period no objection to fresh bids — Arrangement between lower bidder, judgment debtor and creditors ousting highest bidder — Rights and risks of bidders in sales through Execution Office — Filing of affidavit in High Court after prescribed period — Strictness of High Court Rules.

1. If after final order of sale in favour of highest bidder and order for registration of property in his name issued and transfer fees paid Chief Execution Officer allowed fresh bids to be accepted, objection 1½ or 2 years later that bids out of time — too late.

2. Judgment creditor can at any time prior to actual transfer of property under sale of Execution Office settle execution proceedings by withdrawing his claim.

3. Bidder has no standing after end of execution proceedings by payment, by transfer or by any other means to creditors' satisfaction.

4. High Court Rules to be strictly observed; High Court will not entertain petition if, without good cause shown, affidavit filed after prescribed period.

Edit. Note: As to 1 see HC 99/41 10 CtLR 165. As to 2 & 3 see HC 83/41 10 CtLR 100. As to 4 see PCLA 13/38 4 CtLR 236; HC 8/40 7 CtLR 102 distinguished.

Levin and *Lifshitz* for Petitioner
Bustani for Respondent No. 2. *Goitein* for Respondent No. 3. *Gluckmann* by delegation for Respondents Nos. 5, 6, 7 and 8.

Application for an order to issue directing first Respondent to show cause why his ruling dated 31.10.41, in Execution file of District Court, Haifa, No. 567/37, whereby he refused to accept bid of Petitioner in amount of LP. 1050.— being highest bid in file in respect of the property of Second Respondent to be sold by auction, and accepting lower bid made by third respondent in amount of LP. 700 should not be set aside and an order substituted therefore directing that bid made by Petitioner be accepted.

Frumkin, J. ORDER.

The facts in this case are somewhat complicated but in so far as they are relevant they were dealt with by the Chief Execution Officer. We are only concerned with the latest stages of these protracted proceedings and the interpretation of the law in so far as it relates to those latest steps.

Before coming to that, however, we have to dispose of an objection taken by Mr. Goitein, for the third respondent, that the bid relied upon by the petitioner was out of time because if that were so Mr. Levin should have no standing at all in these proceedings. The objection is that at one time in 1940 there was a final order of sale in favour of the third respondent, an order for the registration of the property in his name issued and transfer fees paid by him. In view of the principles laid down in H.C. 8/40*), the matter was then, Mr. Goitein argues, concluded and no fresh bid could be accepted. The answer to this objection is that not only was this point only taken recently, one and a half years after the event, but the third respondent acted upon the order of the Chief Execution Officer allowing fresh bids to be accepted and it is therefore too late now to take this objection. We have to assume that the bid given by the petitioner was properly tendered.

Now, what happened in this case was this, that after an order for final sale was issued in favour of the petitioner, who was the highest bidder, an arrangement was made between the judgment debtor and judgment creditor under which the land, the subject matter of execution, would pass to the third respondent, the judgment creditor. In consideration of this transfer the latter has agreed to waive all claims against the judgment debtor and apparently has also agreed to satisfy claims of other judgment creditors.

A bidder in execution is never sure of getting the land for which he is bidding. He always runs the risk of having a higher bid made and if he was the highest bidder he runs the risk that at the last moment the judgment debtor will pay off his debt and thus bring the execu-

*) 7 CtLR p. 102.

tion proceedings to an end, in which case his only claim would be to get his deposit back. So far it is common ground, but Mr. Levin, for the petitioner, argues with great zeal that Article 107 of the Execution Law must be strictly applied and that only payment or a transfer by consent would exclude a highest bidder from his claim to the property. With that we do not agree.

The main object of forced sales by execution is to give judgment creditors an opportunity of collecting their debts, at the same time, safeguarding the interests of the judgment debtor. Execution proceedings are brought into motion upon an application of a judgment creditor and he can always settle the execution proceedings by withdrawing his claim. In so far as an outside bidder is concerned we can see no difference between execution proceedings coming to an end by payment in cash, by transfer or by other means to the satisfaction of the creditors.

The issues in this case seem to be complicated by the fact that the third respondent was himself a bidder and his bid was much lower than that of petitioner, who is the highest bidder, but the position would have not been different had he made no bid at all. At any time prior to actual transfer a judgment creditor can say "I have got my rights and have no more claims to the land" and that is the end of the matter.

Mr. Levin has also tried to put before us the case of some judgment creditors of the second respondent who are not represented in this case. It is unfortunate perhaps that they are not represented. Their position is this — they applied at the last moment to the Chief Execution Officer who said that they had no standing in the proceedings at all because at that time there was not even a provisional attachment in their favour. On behalf of these creditors Mr. Gluckman appeared before this Court but the affidavit of his clients was out of time having been filed two days after the prescribed period. No good cause was shown for that delay and the rules have to apply strictly. If those parties wanted to have their case considered they had to apply in time.

We therefore consider that the order nisi must be discharged and the third respondent only will have his costs and LP. 10 advocate's attendance fee.

Given this 3rd day of December, 1941.

CIVIL APPEAL No. 236/41.

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

Before:— Rose, J. and Edwards, J.

Palestine Kupat 'Am Cooperative Society Ltd. Appellant.

v.

Hussein Abdul Rahman el Batal and another Respondents.

Land Court constituting of 2 Judges deciding in 2 out of 3 issues for Plaintiff and dismissing case on disagreement on 3rd issue, that of prescription — Position in case of disagreement between 2 Judges constituting Land Court.

1. Sec. 12(3)(a) of Courts Ord. (appointing third Judge if two disagree) cannot be applied by analogy to Land Court.

2. Party cannot succeeded unless satisfies Court (or a majority of it) on issues upon which onus on him; this where Defendant's only defence in Land Court is (or remains) prescription — Plaintiff must succeed if two Judges constituting Court disagree whether the defence established.

Edit. Note: As to 2 see CA 237/37 5 CtLR 49 and Edit. Note thereto.

Eliash and *Margolin* for Appellant. *Atalla* for Respondents.

Appeal from judgment of Land Court, Haifa, dated 30.10 1941, in Land Case No. 31/38.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Haifa. Three issues were framed upon which it appears that the case was contested. On the first issue, as to whether the parcels in question are covered by the appellant's kushans, Judge Shems gives a specific and Judge Curry an implied finding in favour of the appellant that in fact the parcels were covered by the kushans. With regard to the third issue as to whether or not the appellant was a purchaser in good faith, both Judges find not only that there was no proof of bad faith but affirmatively that the plaintiff bought in good faith .

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

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

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

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

The position, therefore, is left open.

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

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

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

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

Delivered this 4th day of February, 1942.

CIVIL APPEAL No. 252/41.

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

Before:— Gordon Smith, C. J., Frumkin, J. and Khayat, J.

David Bronstein — Appellant.

v.

1. Chief Execution Officer, Tel-Aviv.
2. The firm Essinger & Kahn and 2 others. — Respondents

Action for recovery of a car previously adjudged in favour of other persons — Plaintiff's title in action for recovery of car derived from one of Defendants in previous case brought by other person for recovery of same car — Successful plea of res judicata — Elements negativing plea of res judicata or estoppel.

1. Judgment, particularly if by default, against a person never properly made Defendant nor served with statement of claim — null and void.

2. Judgment for return of certain property — ineffective if impossible of performance by Defendant owing to fact that it was in "custodia legis" and so not in his possession.

3. No estoppel or res judicata where judgment relied upon — null and void, or where parties to case distinct to those in previous case.

Edit. Note:— As to 1 see CA 21/39 5 CtLR 225; HC 38/38, ibid 104; HC 66/38 ibid 57; CA 43/39 CtLR 56; CA 109/40 9 CtLR 136. As to 2 see HC 80/40 8 CtLR 107. As to 3 see CA 49/40 7 CtLR 153; CA 122/40 9 CtLR 169; CA 234/40 10 CtLR 33; CA 6/39 5 CtLR 133; CA 183/38 ibid 28; CA 59/38 4 CtLR 10; CA 195/38 ibid 229.

Goitein and *Hake* for Appellant.

Ben-Jaminy & Vorchheimer for Respondents Nos. 1—2.

Nashashibi for Respondent No. 4.

Appeal from judgment of District Court, Tel-Aviv, sitting as a Court of Appeal, dated 14.11.41, in Civil Appeal NO. 171/41.

JUDGMENT.

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

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

Closely bound up with this suit is another suit, namely Civil Case

No. 7190/40, and it is necessary to refer to the facts of that case in some detail, as and how they appear to us from a copy of the record and the explanations afforded by the judgments now being appealed against, together with arguments of counsel before us.

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

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

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

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

However, the present Appellant filed his action 2476/41 in which he claimed, as set out at the commencement of the Magistrate's judg-

ment therein, dated the 25th August, 1941. The Magistrate's judgment deals with the earlier proceedings at some length and then concludes —

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

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

In my opinion the irregularities in the earlier proceedings were such as to render the judgment null and void, particularly in view of the fact that judgment was, in effect, given in default of appearance — a default that was justified, anyhow by the 4th Respondent who was apparently never properly made a Defendant — nor was he, apparently, served with the statement of claim either unamended or amended. Moreover, the judgment is ineffective, inasmuch as it was impossible of performance by the Defendants as neither of them had possession of the car which was apparently in "custodia legis", and such custodia legis was confirmed.

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

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

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

Delivered this 25th day of February, 1942.

CIVIL APPEAL No. 68/41.

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

Before:— Copland, A.C.J. and Edwards, J.

'Abed Saleh 'Uthman & 12 others — Appellants.

v.

1. Sha'ban 'Umar Hassn es-Saghir & 25 others
27. The Government of Palestine. — Respondents.

'Abed Salah 'Utman and 12 others Appellants.

v.

1. Sha'ban 'Umar Hasan es-Saghir & 26 (51) others
27. The Government of Palestine Respondents.

(As regards 12, 18 & 20 — See Order of Supreme Court dated 5th June , 1941).

..(As regards 12(d) — See Order of Supreme Court dated 31st July, 1941).

Land Settlement Officer holding that sale some 50 years ago by means of a Hijjeh valid and possession for long period by one set of heirs against others effective — Weight of Hijjeh found in duly kept registers of Sharia Court — Long undisturbed possession of land by co-heirs.

1. Hijjeh found in duly kept registers of Sharia Court must be treated as genuine and for most practical purposes as judgment of Sharia Court.

2. Fact that persons for several decades in undisturbed possession of land descend from same common ancestor as those claiming shares therein does not prevent possession being regarded as adverse.

Edit. Note: — As to 2 see CA 214/40 8 CtLR 169; CA 13/39 6 CtLR 217; CA 228/37 3 CtLR 95; LA 54/36 2 CtLR 65; but see also 24/40 8 CtLR 154.

Levin and *Gavison* for Appellants.

Khamra for Respondents Nos. 6 & 24. *Koussa* for Respondent No. 23.

Appeal from decision of Settlement Officer, Haifa Area, dated 4.2.41, in Case No. 40/Haifa Lands.

JUDGMENT.

We do not need to hear the respondents.

This is an appeal from a decision of the Land Settlement Officer, Haifa Settlement Area, in a case regarding Haifa lands. The Settlement Officer found in favour of the respondents on two grounds, first, holding that the sale by means of a Hujjeh in the year 1306 was a valid sale and secondly, on the question of possession by the respondents as against the defendants (now the appellants).

It has been argued this appeal that the Hujjeh was not signed, and it was not therefore duly executed, that the date was wrong by one year and that the ancestor Saleh Uthman purported to sell the whole of the land though in fact he was only the registered owner of one half, the other half belonging to Saleh's brother the appellants' uncle.

With regard to the Hijjeh, in Civil Appeals 147 and 148/40, 7 P.L.R. 464, certain documents, alleged to be copies of Powers of Attorney, were produced to this Court, and the objection was taken that they had not been confirmed before the Court of the Kaza in

which they were made, and that the copies did not show that they had been signed by the donors of the powers. This Court overruled the objection on the ground that though the registers of the Sharia Courts in this particular district had been lost and therefore it was not possible to check the copies with the originals, yet, nevertheless, it was inconceivable that copies would be issued officially of non-existent entries in the registers, and there could not have been any entries unless the deeds had been properly executed by the parties. It seems to us that the same form of reasoning applies here; the hujjehs therefore, being found in the duly kept registers of the Sharia Court, must be treated as genuine, and a hujjeh is, of course, in the same position, for most practical purposes, as a judgment of the Sharia Court — its form in itself shows this. I have dealt with this point in detail because it may come up again and it was therefore necessary once more to show what the views of the Court are in regard to such documents.

This case, in our opinion, turns really on the question of possession. There was evidence, which the Settlement Officer accepted, that the respondents were in possession from 1918 to 1926. There is further evidence that in 1932 and 1933 they allowed sand and stones to be taken from this land, and in 1933 they further entered into a written lease with the Palestine Government. The Settlement Officer was satisfied with this evidence and, if he believed it, it is difficult to see how he could have come to any other conclusion than that the respondents had been in possession for the requisite time as against the appellants.

With regard to the allegation that there is no adverse possession as against the uncle, in the first place, the uncle is not an ancestor, and secondly, for 50 years or more the appellants have done nothing to show that they had exercised any right of possession of ownership in this property at all. As we remarked in a recent case Civil Appeal No. 197/41 *) — Ahmad Mahmud Mustafa Nijim & others v. Husni Jabr 'Ali Nijim & others, an impossible situation would arise if people after 40 or 50 years could come forward and say "this land is mine because there is no adverse possession seeing that I am descended from the same common ancestor as the other side."

I would only say this that the Settlement Officer found that the hujjeh was a valid document and was properly executed and we see no reason to interfere. As to the argument that it was prescribed by lapse of time, it is unnecessary to deal with this point since the question of adverse possession is decisive.

For these reasons the appeal must be dismissed with costs on the lower scale and LP. 10 advocate's attendance fee to each of the advocates representing the respondents.

Delivered this 10th day of December, 1941.

*) 10 CtLR 205.

HIGH COURT No. 13/42.

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

Before:— Gordon Smith (C. J.) and Edwards, J.

Solomon Horowitz — Petitioner.

v.

The Assessing Officer, Jerusalem District — Respondent.

Assessing Officer requiring further particulars as to income of profession from which recipient of request retired — Application to High Court for order directing Assessing Officer to refrain from demanding further particulars regarding income — Non-interference of High Court in view of other remedies available for petitioner.

1. Mandamus and other remedies in High Court do not lie where other appropriate remedies available.

2. Income Tax Ordinance making provision for notice to Assessing Officer to reverse assessment and also for appeal in case of refusal, intervention of High Court restraining Assessing Officer from demanding return or further particualrs — unnecessary, so unavailable.

Edit. Note: As to 1 see HC 11/38 3 CtLR 96; HC 18/38 ibid, 179; HC 27/38 ibid 221; HC 78/39 7 CtLR and cases cited therein.

Petitioner in person. *Crown Counsel* (*Hogan*) for Respondent.

Application for an order to issue directed to Respondent calling upon him to show cause why he should not refrain from demanding Return required in his said letter, of 31.12.41, (exhibit "B") or any Return of Petitioner's professional income for 1941, or any other year.

ORDER

This is an application by way of petition and on which a Rule Nisi was issued calling upon the Assessing Officer to refrain from demanding a return under the Income Tax Ordinance, or any return of the Petitioner's professional income for the year 1941, or any other year, and it is claimed that the Respondent, the Assessing Officer, has acted without jurisdiction, or alternatively, in excess of his jurisdiction in demanding this return, inasmuch as the income in respect of which the return is required is not income chargeable under the Ordinance.

Putting it very briefly, the complaint is that the Petitioner having ceased to carry on a profession, the Assessing Officer is attempting to charge him with income tax, or will attempt to charge him with income tax, on receipts which may be received by him arising out of that profession but

subsequent to his retirement. If I understand the Petitioner correctly, that is his complaint.

Now, we have recently had an Income Tax Ordinance and the imposition of income tax, under which income may be chargeable with income tax under the Ordinance. In order to enable the Assessing Officer to make an assessment, returns have to be made in accordance with notice, and on receiving those returns the Assessing Officer can by notice require further particulars. In this case a return was made and the Assessing Officer has required further particulars.

It is claimed that he is not entitled to those further particulars because, in the submission of the Petitioner, the income which might be taxable in the opinion of the Assessing Officer is not taxable in his opinion, that is in the Petitioner's opinion. Under the Ordinance he can give notice to the Assessing Officer requiring him to revise an assessment, and the Assessing Officer can do so if he thinks fit, or he can do otherwise and refuse to revise his assessment, in which case the Petitioner or anybody else aggrieved by an assessment, can appeal against such assessment to the Supreme Court, in accordance with Part 9 of the Ordinance, which provides for such appeals. If an Assessing Officer can be restrained from obtaining the necessary details of income on which he can make an assessment and from saying whether all or any part of such income is chargeable or not, it strikes at the whole framework and foundation of the Income Tax Ordinance.

As has been pointed out by Crown Counsel for the Respondent, there are alternative methods in which this matter can be brought before the Court and where such a remedy is provided, an intervention is not necessary for the administration of justice. Ample provision is made in the Ordinance, and in our opinion such intervention is not necessary. It is clear from Hailsham that at home remedies by way of mandamus, prohibition, petition of right, and *certiorari*, are extraordinary remedies, and will not lie where other appropriate remedies are available. In this case it may be argued whether certain income becomes chargeable or not. That is a matter for the Assessing Officer in the first instance, and it is for the Petitioner to object, on which the Assessing Officer can revise the assessment, and there is a further remedy that if he does not revise his opinion then the Petitioner can come to Court and have it thrashed out in camera before the Supreme Court. In our opinion that is ample and sufficient remedy. It is in the hands of the Petitioner, and for that reason we have come to the conclusion that this rule must be discharged, with LP. 10 inclusive costs.

Given this 24th day of February, 1942.

HIGH COURT No. 109/41.

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

Before:— Rose, J. and Abdul Hadi, J.

Badia Jubran Sarkis & 10 others — Petitioners.

v.

1. Mikhail Eff. Hanna Touma
2. Chief Execution Officer, Haifa — Respondents.

Application by heirs of mortgagor to stay execution of mortgage on ground of hardship involved — Question whether necessary to serve all heirs of deceased mortgagor and to produce certificate of succession.

1. Question of hardship to mortgagors — eminently a matter for discretion of Chief Execution Officer, High Court will not interfere.

2. Where persons sued admittedly heirs of mortgagor, service on one of them sufficient; not necessary that mortgagee serve all heirs or produce certificate of succession.

Edit. Note:— As to 1 see HC 2/40 7 CtLR 44; HC 19/40 ibid 146; HC 46/39 6CtLR 125; HC 68/38 5 CtLR 84 and Edit. Note thereto. As to 2 see HC 74/35 2 PLR 378 followed.

Application for an order to issue directed to 2nd Respondent, calling upon him to show cause why his order, in Haifa Execution File No. 212/41, dated 20.11.41, should not be set aside.

F. Atalla for Petitioners. *Mu'ammar* for Respondent No. 1.

ORDER

This is a return to an odrer nisi directed to the Respondents to show cause why an order in execution of the second Respondent should not be set aside.

Two points are taken by the Petitioner. The first is that hardship is involved to the mortgagors. This is eminently a matter for the discretion of the Chief Execution Officer, and we do not propose to interfere.

The second point taken is, that as the original mortgagor is dead, and some of his heirs are alleged to be minors, service should be effected on all the heirs, and that a proper certificate of succession should be produced before the Court. The matter seems to us to be covered by High Court No. 74 of 1935, As'ad Salim Warwar v. Chief Execution Officer, Nablus, and Adla Muweis, Vol. 2, P.L.R., p 378. It is admitted by the Petitioner that the people for whom he appears are, in fact, heirs, in which case service on one is sufficient.

For these reasons the petition must be dismissed, with costs to include the sum of LP. 10 advocate's attendance fee.

Given this 23rd day of December, 1941.

HIGH COURT No. 16/42.

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

Before:— Gordon Smith, C.J. and Frumkin J.

Efteem Dahbourah — Petitioner

v.

1. Director of Medical Services,
2. Chief Secretary to the Government of Palestine — Respondents.

Service of Government — Leave of Government Officer.

1. High Court will not interfere if not shown that Public Officer arbitrarily exercised or refused to exercise his discretion.
2. Service of Government Officers — at pleasure and according to regulations.
3. Grant of leave to officers — a matter of privilege and not a right of officer.

Edit. Note:— As to 1 see HC 12/40 7 CtLR 187; HC 78/39 ibid 45; HC 8/36 9 C of J 831; HC 7/36 ibid 907; HC 37/38 4 CtLR 9; HC 37/39 6 ibid 189; HC 71/37 3 ibid 13; HC 9/38 ibid 111; HC of 1925 3 C of J 1188; HC 88/32 1 PLR 826; HC 34/31 ibid 595.

Nakhleh for Petitioner. Ex parte.

Application for an order to issue directed to Respondents calling upon them to show cause why Petitioner was not given all kinds of leave for which he is eligible under General Regulations for Government of Palestine, before it was decided that he be retired from Government Service on medical grounds, and why he should not be restored to Government Service as a Government officer.

ORDER.

We are agreed that this petition should be refused. It has not been shown to us that Government arbitrarily has exercised or has refused to exercise its discretion. The service of Government officers is at pleasure and according to the regulations; grant of leave to officers is a matter of privilege and not a right of the officer. We are unable to interfere with the discretion of the Government.

The rule nisi will therefore be refused.

Delivered this 17th day of February, 1942.

HIGH COURT No. 10/42.

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

Before: —Gordon Smith, C.J. and Frumkin, J.

Nissan Katz — Petitioner.

v.

1. His Worship Ali Eff. Zein el 'Abdin in his capacity as one of CXO, Jerusalem.
2. Izhak Arie Shpak and Gershon Gurvitz, — Respondents.

Judgment of eviction against tenant — Compromise between Landlord and Tenant allowing latter to continue to occupy premises for certain period in consideration of withdrawing his appeal against eviction judgment — Judgment creditor resuming execution proceedings against tenant on expiry of period of extension — Allegation that eviction judgment obsolete, in view of agreement between parties amounting to a fresh lease.

Agreement between parties not to execute eviction judgment for certain period, even if of unusual length, does not operate as fresh lease — only suspension of execution, which may be resumed once period expired.

Krongold for Petitioner. *Goitein* and *Geichman* for Respdt. No. 2.

Application for an order to issue directed to 1st Respondent calling upon him to show cause why he should not refrain from executing judgment dated 12.3.41 in Magistr. Court Jerusalem File No. 503/41, as it became obsolete, and why his order of eviction against petitioner given in Execution File No. 1067/41, should not be set aside.

ORDER

The rule nisi must be discharged. It is perfectly clear that there was compromise entered into between the Landlord — Respondent and the Petitioner, on the strength of which the respondent agreed that he, the petitioner, should continue to occupy the premises till the end of the past Hajira year, and that in consideration thereof there should be the withdrawal of the appeal filed by the petitioner in the District Court of Jerusalem against the eviction judgment. The respondent acted upon that compromise but the petitioner has failed to do so. And therefore the Respondent applied to the Chief Execution Officer to execute the original judgment which execution was delayed till the end of the year.

The rule will be discharged and the Respondents will have their costs to include LP. 5 as advocate's fees.

Delivered this 17th day of February, 1942.

Chief Justice.

I concur, but I would like to add that at first sight it appeared to me that there was some substance in the argument put forward on behalf of the petitioner that there was a fresh lease entered into in view of the unusual length of time granted as an extension of the original lease bringing up the extended time to a full year from the date of the expiration of the original lease which was the subject matter of the Magistrate's judgment, but on further consideration I came to the conclusion that all what the arrangement amounted to was the suspension of the execution of the judgment and once the extended period has expired the execution proceedings have to continue.

17.2.1942.

Puisne Judge.

CIVIL APPEAL No. 234/41.

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

Before:— Copland, A.C.J., Frumkin, J. and Khayat, J.

The Attorney-General — Appellant.

v.

John D. Khoury — Respondent.

Appeal to Court of Appeal from order of District Court in an arbitration matter — Question of necessity of application for leave to appeal from judgments of District Courts under Arbitr. Ord. — "Judgment" or "order" — Application for extension of time on ground of misunderstanding of the law.

1. In all cases under Arbitration Ordinance leave to appeal against judgment of District Court, whether given in first instance or on appeal, must be obtained either from District Court or from Court of Appeal.

2. Fact that Court described its decision as "judgment" when it should have been described as "order" does not alter position.

3. Misunderstanding of law — no good cause for enlarging time under Rule 333, Civil Procedure Rules.

Edit. Note: — As to 1 see CA 164/37 2 CtLR 194 and CA 111/39 6 CtLR 210 followed; see also CA 239/41 11 CtLR 38 and Edit. Note thereto. As to 2 see CA 161/38 4 CtLR 75 and Edit. Note thereto.

Crown Counsel (*Hogan*) for Appellant. *B. Joseph* for Respondent.

Appeal from judgment of DC, T.-A. dated 31.10.41, in Case No. 88/41.

JUDGMENT.

In this case a preliminary point has been taken that there is no appeal proper before this Court on the ground that no leave to appeal was obtained. The original proceedings in the District Court were to enforce part of an award and to set aside another part.

It is admitted that no leave to appeal was asked for, but Mr. Hogan for the appellant has argued that in this case leave to appeal is not necessary, since under the provisions of Section 15(3) of the Arbitration Ordinance no appeal shall lie from a District Court except by leave of the Court or of the Court of Appeal, but that those words apply only to appeals from an appellate judgment of the District Court. Many cases, since the amendments affecting the Arbitration Ordinance were made, have come before this Court, and the consistant view in this Court has been that in all cases under the Arbitration Ordinance leave to appeal is necessary. To cite only two of them. In Civil Appeal 164/37 *) from a judgment given by a District Court in an appellate capacity, it was held that leave was necessary; and in Civil Appeal 111/39**), which was an appeal from the decision of the District Court, Haifa in first

*) 2 CtLR p. 194. **) 6 CtLR p. 210.

instance, the law was reviewed, and various cases decided previously were taken into account, and this Court held that leave to appeal under the Arbitration Ordinance must be obtained in every case, either from the District Court or from the Court of Appeal. We do not think that the construction which Mr. Hogan seeks to put on Section 15(3) is sound — there is no reason why the subsection should be given that limited effect, when the wording is clear. We do not feel that we can make a distinction between "a n order" and the words "t h e order".

Following the authorities quoted by us, leave to appeal is necessary, whether the judgment of the District Court was given in first instance or on appeal from a Magistrate's Court.

A further point taken is that the learned President described his decision as a "judgment" and not an "order". We do not think there is anything in that point. It is an order and what it is called is of no moment. In our opinion it should have been described as an order.

With regard to the further application, that we should enlarge the time for the appellant to obtain leave to appeal under Rule 333, good cause must be shown before this Court can grant it. The matter which is put forward as a good cause is that the Law was misunderstood, and that the using of the word "judgment" and not the word "order" misled the Appellant. Misunderstanding of the law, I am afraid, is not a good cause, and as I remarked in the course of the argument, anyone who read the judgment would immediately have seen that it was dealing with a case of arbitration and the point should have at once been seen that leave to appeal was necessary.

For these reasons we hold that there is no appeal before this Court and the application must therefore be dismissed. The respondent is entitled to his costs on the lower scale, and we certify a sum of LP. 10 advocate's fee for attending the hearing.

Delivered this 11th day of December 1941.

CIVIL APPEAL No. 255/41.

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

Before:— Gordon Smith, C.J., Khayat, J. and Abdul Hadi, J.

Sheikh Muhammad 'Ubeid — Appellant.

v.

Zahwa Hamid 'Ubeid and another. — Respondents.

Action in Magistrate's Court for share in income of Waqf — Magistrate finding on strength of Waqfia that Plaintiff a beneficiary and entitled to his share in income — Question of jurisdiction where dispute whether Plaintiff a beneficiary of Waqf or not.

Civil Court has jurisdiction to entertain action for share in income of waqf, even where dispute in case whether Plaintiff a beneficiary or not.

Asal for Appellant. *Sarraj* for Respondent No. 1.

Appeal from judgment of District Court, Jerusalem, sitting as a Court of Appeal, dated 24.11.41, in Civil Appeal No. 10/41.

JUDGMENT

Khayat, J

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

The appellant before us raised three points which shortly are : first, that the Civil Courts have no jurisdiction to entertain this action, since the dispute in this case is whether the first respondent is a beneficiary in the waqf or not, and argued that this question falls entirely within the exclusive jurisdiction of the Sharia Court. Secondly, if the Civil Courts are entitled to decide this question, then the documentary evidence before the lower Courts was not sufficient to prove that the first respondent is a beneficiary. Thirdly, that both Courts misinterpreted the terms of the second waqfia which on the face of it contradicts the allegation of the first respondent.

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

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

Delivered this 10th day of February, 1942.

CIVIL APPEAL NO. 173/41.

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

Before:—The Acting Chief Justice (Copland A.C.J.) Frumkin, J. and Khayat, J.

Between:

The Attorney-General, on behalf of the Government of Palestine. Appellant.

v.

1. Abdul Raouf el Bitar
2. Salim El 'Umari Respondents.

and between:

The Attorney-General, on behalf of the Government of Palestine. Appellant.

v.

1. Zakiya Rashed Khurshid, in her personal capacity and, together with Omar Issa Ibn el Haj Ibrahim el Bitar, as guardians of her minor children, Omar, Walid, Khalid, Leila and Samiya Abdul Raouf el Bitar.
2. Salim El 'Umari Respondents.

(By order of the Supreme Court sitting as a Court of Civil Appeal, dated 6.11.41).

Claim before Settlement Officer to have registration in name of Government in a certain share of land cancelled — Allegation that previous admission in favour of Government made by claimant was under duress, viz. risk to pay heavy damages to purchaser of land which included Government's share.

Awkward position caused by claimant himself not amounting to duress in law where person has to choose either to break contract and become liable to pay heavy damages or to admit an adverse claim of third prty he cannot say admission was made under duress, if his position was due to his own negligence or fault in making contract without allowing therein for the adverse claim.

J.G.A. (*Gavison*) for Appellant.

Elia for Respondents.

Appeal from decision of Settlement Officer, Ramleh Settlement Area, dated 20.6.41, in case No. 44/Muzairi'a.

JUDGMENT.

This is an appeal from a judgment of the learned Settlement Officer of the Ramle Settlement Area, in which he allowed the claim brought by the Respondents, the late Abdul Raouf Eff. el Bitar and Salim Eff. El 'Umari, against the Government of Palestine, to have the registration in the name of Government in a certain share of land in Muzairi'a village, cancelled. The facts are stated in the judgment of the learned Settlement Officer, and the history of the case was also gone into by him in considerable detail, and I do not propose to repeat them now.

Several points have been taken on appeal, but in our opinion the case hinges upon whether an alleged admission made on the 30th of March, 1929, was made under duress or not. It is alleged that the Respondents were compelled to admit the Government's claim to this one share in forty-one in the Muzairi'a lands, because the Respondents had made a contract with the Keren Kayemeth to sell a large quantity of land for a very considerable price and there was a very heavy penalty

clause involved. The Respondents say that they had no time to fight the Government claim, as if they had done so, the time for completion would have passed, and they would then have been liable to pay damages. The Appellant's reply to that is that the Respondents knew of Government's registration and that, knowing of it, they were negligent in making a contract without allowing in that contract for this particular adverse registration.

In our opinion it is quite clear, both from Palestine and English law, that the duress alleged in this case cannot by any stretch of imagination be termed to be duress in law. It may be that the Respondents were in an awkward position, but that was largely due to their own negligence, their own default. They had to choose either to break the contract or to agree to the Government's claim, but the fact that they were in this position is due, as I said, largely to their own fault, and it cannot possibly be termed to be duress.

It follows, therefore, that the appeal must be allowed and the decision of the Settlement Officer set aside, and his order to cancel the registration of Government to the land known as Final Parcel No. 78 in Block No. 4042 of al-Muzeiri'a must also be set aside, and the Respondents' claim dismissed. The Appellant will get costs on the lower scale for this appeal only, and LP. 10 advocate's attendance fee. The Settlement Officer's order as to costs will stand.

Delivered this 9th day of December, 1941.

Acting Chief Justice.

HIGH COURT No. 18/42.

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

Before:— Rose, J. Frumkin, J. and Abdul Hadi, J.

Mordechai Cohen & 3 others — Petitioners.

v.

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

Chief Execution Officer ordering eviction of tenants of mortgaged property sold in execution — Legal position of purchaser in execution towards tenants of previous owner in connection with Rent Restriction Ord.

1. High Court will assume facts as stated in petition, if not adequately denied in affidavit of Respondent.

2. a) Person buying at a sale in execution does not derive title from Execution Office but from owner of property.

b) Purchaser of a house in Execution Office — a "landlord" within meaning of Rent Restriction Ordinance, hence tenants of previous owner — tenants of purchaser.

Edit. Note:— As to 1 see CA 26/40 8 CtLR 153.

Meridor for Petitioners. *M. Gratch* for Respondent No. 2.

Application for an order to issue directed to 1st respondent calling upon him to show cause why his orders dated 31.1.42, and 9.2.42, in Execution file No. 397/40, Jerusalem, authorizing eviction of petitioners from their premises should not be set aside.

ORDER

This matter raises an important point as to whether the tenants of a mortgagor who are residing in a dwelling house which has been sold as a result of the mortgagor having failed in the fulfilment of his obligations to the mortgagee, are protected by the Rent Restriction (Dwelling Houses) Ordinance, 1940.

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

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

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

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

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

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

Given this 23rd day of February, 1942.

HIGH COURT NO. 5/42

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

Before:— Edwards, J., Frumkin, J. and Khayat, J.

Israel Rokach, Tel-Aviv Chairman of Committee of Jewish Community, Tel-Aviv. Petitioner.

v.

1. District Commissioner, Lydda District, Jaffa.
2. David Potash.
3. Shraga Steinberg. Respondents.

Israel Rokach, Tel-Aviv, Chairman of Committee of Jewish Community, Tel-Aviv. Petitioner.

v.

1. District Commissioner, Lydda District, Jaffa.
2. David Potash.
3. Shraga Steinberg.
4. Central Agudath Israel. Respondents.

(By order of Court dated 30.1.1942).

Application to High Court by Chairman of Jewish Committee of Tel-Aviv for an order directing District Commissioner to refrain from issuing Forms of Marriage Registration Certificates and Divorce Registration Certificates to certain Rabbis of a so called "Jewish orthodox congregation" founded as a Society under Ottoman Law of Societies — Question of competence of Chairman of Jewish Community to apply to High Court in matter of issuing Registration Certificates — Question whether High Court can entertain application for order directing public officer to do or to refrain from doing act which in law he is not bound to do — Meaning of "the Rabbi" in Marriage and Divorce (Registration) Ordinance — Question whether body other than the Jewish Community has statutory right to designate their own Rabbis to officiate as registering authorities for Jewish marriages and divorces.

1. Religious Community feeling that Public Officer in doing certain act shows latitude not warranted by law and detrimental to public interests of Community at large may apply to High Court to test validity of act.

2. Issue of Forms of Marriage and Divorce Registration Certificates — in practice, if not in law (there being no statutory provision for it) a necessary link in operation of Marriage and Divorce (Registration) Ordinance, so High Court competent to hear application for order restraining Public Officer from doing certain act concerning such issue.

3. (a) "The Rabbi" in Marriage and Divorce (Registration) Ordinance does not mean "a qualified Rabbi" generally but the Rabbi designated by the competent religious authority of the Jewish Community.

(b) Persons not members of Jewish Community, whether organised as a congregation or not, have no statutory right to have their own Rabbis officiating as registering authorities for Jewish marriages and divorces.

Eliash and *Katznelson* for Petitioner.
Solicitor General for Respondent No. 1
Seligman, Wittkowiski and *Frank* for Respondents Nos. 2, 3 & 4.

Application for an order to issue directed to first respondent calling upon him to refrain from issuing Forms of Marriage Registration Certificates and Divorce Registration Certificates, for celebration of Jewish Marriages and issue of Jewish Divorces, to second and/or third respondents and/or to any other persons who do not have a Rabbinical Warrant of Appointment and are not Religious Officers of the Community.

Frumkin, J. ORDER

This is an application for an order against the first respondent, the District Commissioner, Lydda District, directing him to refrain from issuing Forms of Marriage Registration Certificates and Divorce Registration Certificates for the celebration of Jewish Marriages and the issue of Jewish Divorces to the second and third respondents.

Originally the petitioner asked for the order to extend also to "any other persons who do not hold a Rabbinical Warrant of Appointment and are not Religious Officers of the Community."

A body known as the Central Agudath Israel, whose Rabbis, although not Religious Officers of the Community,have hitherto been supplied with Books of Certificates referred to above, then applied to this Court to be issued with a summons to appear as third party and having been granted leave, they, in fact, did appear.

The petitioner, however, has in Court declared that he does not intend to interfere with the rights of such Rabbis of the Agudath Israel who have hitherto been supplied with Books of Certificates and restricted his application to the 2nd and 3rd respondents. The Central Agudath Israel then withdrew from these proceedings and although our order might in the result affect persons in a similar position to the 2nd and 3rd respondents, we now are directly concerned with them only.

The petitioner, who is the Mayor of Tel-Aviv, applies in his capacity as Chairman of the Committee of the Jewish Community of Tel-Aviv — Jaffa, pursuant to a resolution passed by his committee to that effect. The 2nd and 3rd respondents are Rabbis of a so-called "Jewish Orthodox Congregation" founded as a Society under the Ottoman Law of Societies.

The immediate cause for the petition was a letter written by the Assistant District Commissioner, Tel-Aviv, dated 2nd December, 1941, and addressed to the Petitioner, (Ex. 4) which reads as follows :

"District Offices
Tel-Aviv
2nd December, 1941.

I have the honour to refer to your letter No. L/2/2—16484 of

8.10.41 and to inform you that the District Commissioner is not prepared to refuse the issue of Marriage Registration Certificates to Rabbis Potash and Steinberg for the reason that he is unable to state in the High Court that:—

(*a*) they are not qualified Rabbis; and

(b) they are "unfitted" to receive books of Registration Certificates.

Being incompetent to express an opinion in such matters such a statement cannot be made by the District Commissioner and in his opinion it should be made by the Head of the Vaad Hakehillah or any person competent to testify to the High Court on the above two points. It is proposed, therefore, to continue to issue marriage certificates to these Rabbis.

A demand from these rabbis or any other rabbi for divorce certificate must similarly be granted by the District Commissioner.

I have the honour to be,
Sir,
Your obedient servant,
(Sgd.) *T. V. Scrivenor*
ASSISTANT DISTRICT COMMISSIONER,
TEL-AVIV

Chairman,
Local Jewish Community,
Tel-Aviv — Jaffa."

Before coming to the merits I wish to dispose of two formal objections taken on behalf of the 2nd and 3rd respondents, the first of which relates to the competence of the petitioner, as the Chairman of the Jewish Community of Tel-Aviv — Jaffa, to make the petition. The answer to this objection is this, namely, that if the Committee of the Jewish Community feels that the District Commissioner in issuing Forms to the 2nd and 3rd Respondents is showing a latitude which is not warranted by law and is detrimental to the public interest of the Jewish Community at large, there is no reason why he should not be given the opportunity of testing the validity or otherwise of the showing of such latitude.

Another objection was taken to the effect that there is no statutory provision for the issue of Books of Certificates, nor is the form of the Certificates provided for in any legislation. That being so, it is argued, a public officer should not be asked to do or to refrain from doing a thing which in law he is not bound to do. But we have been told by the learned Solicitor General that it has been the practice since 1928 that no Marriage or Divorce is registered otherwise than upon the contents of a formal certificate issued to competent persons by the District Commissioner, and it follows that the issue of the forms in question is, if not in law, at least in practice, a part of the machinery of registration and thus a necessary link in the operation of the law.

I turn now to the merits of the petition. But before doing so, I might

as well, at this stage, note that the Solicitor General, who appeared on behalf of the District Commissioner, stated that the District Commissioner holds no strong view one way or another in the matter, although he thought that the District Commissioner acted in accordance with law.

The case for both sides rests largely on the meaning to be given to the words "the Rabbi", in the Marriage and Divorce (Registration) Ordinance. This Ordinance introduces for the first time a system of compulsory registration of marriages and divorces making non-compliance with the provisions a punishable offence. The novelty of the Ordinance is only in the matter of Registration. The celebration of marriages, however, was already at the time the Ordinance was promulgated controlled by law, and the Ottoman Penal Code provided for penalties for people celebrating marriages without a licence from the competent Courts.

The Ordinance provides for a "registering authority" and in Section 2 defines the "registering authority" as meaning :

> "In the case of a civil marriage, the official who celebrates the marriage and, in the case of a Moslem marriage, the Imam, a Christian marriage, the Priest, a Jewish marriage, the Rabbi, and a Druze marriage the Sheikh of the tribe."

It seems that in 1919 the Legislature visualized the introduction in Palestine of a Civil Marriage, but up to date the only marriages recognised by law as regards Palestinians are religious marriages celebrated in accordance with religious law and subject to the control and supervision of the religious authorities of the respective communities.

Now it has been argued on behalf of the 2nd and 3rd respondents, and this view has been accepted by the first respondent, that "the Rabbi" means "a qualified Rabbi". And since the District Commissioner was not in a position to say that the 2nd and 3rd respondents were not qualified Rabbis or otherwise "unfit" to receive Books of Registration Certificates, he felt that he could not refuse to furnish them with such Books, thereby constituting them "registering authorities". That cannot be a correct view of the law.

A "Rabbi" is both a title or degree and an office. It is not necessary in this case to go at great length into the question of how the title of "Rabbi" can be obtained. It suffices to say that it is granted by high religious dignitaries to candidates who have successfully devoted themselves to the study and learning of Jewish law and have also, by religious devotion, proved themselves worthy of the title. I am prepared to accept, for the purposes of this case, that the second and third respondents are well qualified to bear the title of Rabbi.

The office of Rabbi is connected with some communal function entrusted to a Rabbi which function might be judicial as in the case of a Judge of a Rabbinical Court, or spiritual as in the case of religious

head, commonly known simply as "the Rabbi of a Community", or otherwise, such as is required for the supervision of ritual matters. Now the office of a Rabbi would not as a rule be vested in a person who did not have the necessary qualifications or the title of Rabbi, but the title of Rabbi does not necessarily confer on the holder thereof the office of Rabbi. In fact, there are hundreds of people qualified to be Rabbis as a result of their studies who are waiting for a vacancy in an office to occur. Furthermore, there are at present in this country hundreds of Rabbis who not only have the qualifications and title of a Rabbi but who also had at one time held offices as Rabbis in communities abroad. It cannot be a proper interpretation of the law that all these Rabbis, however highly qualified they might be, are to be considered "registering authorities" just as it could not be said that "the Official" in the definition can mean any of the hundreds of officials of the Government of Palestine; or the Priest, any Priest; or the Imam, any Imam. And just as in the case of Civil Marriages, if and when introduced, the "Official" would obviously be the Registrar of Civil Marriages appointed for this office, and none else, so in Religious Marriages, it must be the Religious Officer designated for that purpose.

And the question we are called upon to answer is who, with regard to Jews, is the proper authority to designate the Rabbi or Rabbis who can exercise, either as a principal or an additional function, the office of registering authority of Marriages and Divorces of Jews?

There is no difficulty whatsoever in connection with the recognised Jewish Community. The Rabbinical Council or the local Rabbi recognised under the Jewish Community Rules would notify the respective District Commissioners as to who are the Rabbis designated by them to celebrate Marriages of Jews, and it would be to such Rabbis and to such Rabbis only that the District Commissioner should issue Books of Certificates. No doubt this is also the case as regards Moslems, Books of Certificates being issued to the Imams nominated by the Moslem Supreme Council, and as regards Christians, when Books of Certificates would be issued to Priests designated for that purpose by the heads of their respective communities.

The matter becomes somewhat complicated with regard to Jews who have elected to opt out of the Jewish Religious Community. Before dealing with them, it would be opportune at this stage to review the legislation enacted in this country relating to Jews as a public body.

Article 83, Palestine Order-in-Council, 1939, provides:

> "All persons in Palestine shall enjoy full liberty of conscience, and the free exercise of their forms of worship subject only to the maintenance of public order and morals. Each religious community shall enjoy autonomy for the internal affairs of the community subject to the provisions of any Ordinance or Order issued by the High Commissioner."

Based on this article, the Religious Communities Ordinance was promulgated in 1926. Section 2(1) of it provides that

> "If any religious community in Palestine makes application under this Ordinance, the High Commissioner in Council may, with the approval of a Secretary of State, make rules for the organisation as a *religious community* and its recognition as such by the Government of Palestine;"

and Section 2(2) that

> "Separate rules shall be made in each case and shall be suited to the special circumstances and organisation of the community concerned."

Under this Ordinance, the Jewish Community Rules were promulgated in 1928. Rule 3 reads as follows:

> "There shall be a recognised Community of the Jews in Palestine and local Communities constituted in the manner hereinafter provided and the organs of the Community shall include—
>
> (*a*) A Rabbinical Council;
>
> (*b*) Local Rabbinical Offices;
>
> etc.

Rule 4(1) provides:

> "A Rabbinical Council, constituted as hereinafter described shall exercise general supervision over the local Rabbinical Offices and the Rabbis of local Communities."

And Rule 8 is:

> "The Rabbinical Council shall be the recognised religious representative of the Community in relation to the Government of Palestine; and the local Rabbi or Rabbinical Office shall be the recognised religious representative of the local Community in relation to the district administration."

It is obvious that the law thus recognises for the Jews of Palestine one religious community, with one set of Courts (Rule 6), one religious representative body (Rule 8), one national or General Representative body (Rule 14) and one power of taxation (Rule 13).

The same rules visualise also the possibility of Jews not wishing to remain under the authority of the recognised community. In Rule 2 "community" is defined thus :

> "Community" includes all Jews who, in the manner hereinafter prescribed, are registered as members of the Community."

Rule 17 provides for a Register which automatically includes all Jews who have been resident in Palestine for a certain period, but provides in paragraph 3 of that rule (as amended in 1937) that

> "Any person who desires his name to be struck off the register shall, within one month of the publication of the relevant portion thereof or within the month of Iyar of each year, give notice either personally or by an agent duly authorized in writing to the General Council (Vaad Leumi) which shall acknowledge the receipt of the notice and strike his name off accordingly. He may send a copy of such notice to the office of the District commissioner."

Now what right or status do Jews who have thus opted out of the community acquire ? Rules 26 and 27 foresee the possibility of persons not

registered in the community organising themselves as a congregation and give such congregation a right to be represented on the Board to control the affairs of ritual killing (Rule 26(3)) and a right to make its own arrangement for burial (Rule 27).

These are the only two instances in which the rules confer certain rights on congregations consisting of persons who are not members of the Jewish Community. We were not referred to any legislation, either in these Rules or elsewhere, conferring upon such congregations a right to have their own machinery for the celebration and registration of marriages.

The vast majority of the Jews who are not registered as members of the Jewish Community are organised in an organisation or congregation known as the "Central Agudath Israel" who, it is common knowledge, have for the last 20 years or more tried hard to obtain recognition as an independent Jewish Community with rights similar to those accorded to the recognised Jewish Community, and it is also common knowledge that all these efforts have thus far been unsuccessful. See the letter of the Chief Secretary to the Central Agudath Israel of the 4th February, 1932 (Ex. 3), of which I would quote the following paragraph.

> "I am directed by the High Commissioner to refer to your letter of the 14th January, 1932, regarding the separate organisation of the Central Agudath Israel congregation as a community under the Religious Communities Organisation Ordinance, 1926, and to inform you that His Excellency sees no grounds for reviewing the decision taken by his predecessor with the approval of the Secretary of State that the Central Agudath Israel should not be recognised as a separate community under that Ordinance, with powers of taxation over their members and compulsory power of jurisdiction in matters of personal status" etc.

As regards registration of marriages, however, the Rabbis of the Agudath Israel at present enjoy an administrative privilege by having their Rabbis supplied with Books of Certificates, and such Rabbis are thus recognised as registering authorities. See the letter of the Deputy District Commissioner dated the 23rd August, 1928, (Ex. 1) which includes the following paragraph —

> "I enclose therefore one specimen Register of Marriages and one of Divorces for use by the Registering Marriage Officer under your jurisdiction, and shall be grateful if you will inform me of the number of books you will require."

As stated earlier in this judgment, the petitioner does not wish to interfere with this practice.

There is now also the Palestine (Amendment) Order-in-Council, 1939, Section 65(a) of which lays down that provision may be made by Ordinance for the Celebration of Marriages of persons neither of whom are members of a religious community.

In scrutinizing all this legislation one can come to only one conclusion,

namely, that as regards Jews the Rabbi entitled to be recognised by the District Commissioner as registering authority is the Rabbi designated by the competent religious authority of the Jewish Community; and that persons who are not members of the Jewish Community, whether organised as a congregation or not, have no statutory right to have their own Rabbis officiating as registering authorities so long as Government has not availed itself of the power vested in it by the Palestine (Amendment) Order-in-Council, 1939, 65A(a).

To an outsider the law as stated may appear to be hard on these persons who for one reason or another have elected to opt out of the Jewish Community.

The answer to that objection is that, good or bad, that is the law. But one must also bear in mind that so far as the vast majority of persons who are not registered as members of the community are concerned, this hardship does not exist, since, as shown before, the Rabbis of the Central Agudath Israel are in practice recognised as registering authorities. And even as regards the congregation represented by the 2nd and 3rd respondents no such hardship exists, as it is admitted that until recently that congregation was attached to the Central Agudath Israel.

On the other hand one cannot overlook the danger of upholding the contention of the respondents, both from the point of view of public policy as well as of the preservation of the traditional purity of Jewish Family Life, a danger to which the respondents themselves must be alive no less than anyone else, if it is held that any group of persons can organise themselves into a congregation for religious purposes, (and then they could also do so for anti-religious purposes,) register themselves as an Ottoman Society, appoint Rabbis and thus become registering authorities. The main object of the Ordinance would then be defeated and the purpose of keeping the celebration of marriages and divorces within the framework of law and good order, undermined.

The order should therefore be made absolute and should take the following form: That the first respondent refrain from issuing forms of marriage registration certificates and divorce registration certificates for the celebration of Jewish marriages and the issue of Jewish divorces to the second and third respondents.

Given this 24th day of March, 1942.

Puisne Judge.

Edwards, J.

ORDER

I concur in the judgment of my brother Frumkin. The only matters as to which, during the hearing of the application, I entertained doubts were, firstly, as to whether we could issue an order to a District Commissioner not to issue books of forms of certificates, in view of the fact that in the Ordinance no mention is made of such certificates, and, secondly, whether we might not be unduly fettering the discretion of

the District Commissioner by stating who, in our view, should be regarded as "the Rabbi", and indeed whether we might not even be legislating instead of interpreting the law by stating our views as to who should be regarded as "the Rabbi". As regards the first point, I think that it would be highly artificial were we to discharge the order nisi on this ground. As regards the other point, in view of the history of the legislation as set out in the judgment of my brother Frumkin, I am now satisfied that we are not only entitled but indeed compelled to interpret the term "the Rabbi" in the manner which he has indicated. The serious practical difficulty for the second and third respondents is the Lack of any Rabbi recognised by the District Commissioner as authorized to celebrate marriages and to sanction divorces of members of their congregation who have seen fit to opt out of the "Jewish Community" and who are not members of the Central Agudath Israel.

What is their remedy, if any? It would seem to be to try to persuade the Authorities to enact legislation under Art. 65(a) as amended by Art. 13 Palestine (Amendment) Order-in-Council, 1939.

I accordingly concur in my brother Frumkin's judgment. The order will therefore be made absolute and will take the following form, namely; That the first respondent refrain from issuing forms of marriage registration certificates and divorce registration certificates for the celebration of Jewish marriages and the issue of Jewish divorces by the second and third respondents. The applicant will have a sum of LP. 10 as fixed or inclusive costs to be borne by each of 2nd and 3rd respondents in equal shares, that is, LP. 5.— to be paid by each of them.

Given this 24th day of March, 1942.

British Puisne Judge.

ORDER

Hayat, J.

I am of opinion that the term "Rabbi" described in section 2 of the Marriage and Divorce (Registration) Ordinance (Cap. 88) as "registering authority" must be a special Rabbi designated by the Jewish Community or by a Jewish independent congregation in the terms of section 2 of the Jewish Community Rules made under the Religious Communities (Organisation) Ordinance, (Cap. 126).

The special rights of these independent congregations are mentioned in sections 26(11) and 27(6) of the Jewish Community Rules for ritual killing and burials.

Article 13 of the Palestine (Amendment) Order-in-Council, 1939, provides for a special legislation for the celebration or dissolution of marriage of persons not members of a religious community.

All that law contemplates is the existence of independent congregations as a fact and the "Agudath Israel" as an independent body is a confirmation of that fact.

It is not necessary to make a special legislation for the constitution of independent congregations, but it is for the executive authority to inquire about and recognise such a body as it is stated in paragraph 2 (Ex. 3) of the letter of the Chief Secretary dated the 4th February, 1932, to the Agudath Israel.

I am of the opinion that the order nisi should be discharged.

Given this 24th day of March, 1942.

Puisne Judge.

P.L.R. vol 9 pg. 121 HIGH COURT No. 100/41.

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

Before:— Gordon Smith, C.J. and Edwards, J.

Elia Shubeita — Petitioner.

v.

1. Chief Execution Officer, Jaffa.
2. Alice Shubeita — Respondents.

Member of Greek Orthodox Community entering Catholic Melkite Community and marrying woman of Latin Community — Court of Greek Catholic Melkite Community treating husband and wife as members of that Community and ordering husband to pay alimony — Question as to whether woman deemed properly having changed religion — Question of jurisdiction of Religious Court over husband when wife member of another Religious Community and vice versa — attacking judgment of Religious Court as contrary to natural justice.

1. Change of Religious Community without complying with sec. 2 of Religious Community (Change) Ordinance has no legal effect; person so changing Religious Community — not subject, even if he consents, to jurisdiction of Court of Community which he claims having entered.

2. (*Obiter*) Court of Appeal will not entertain point that judgment of Religious Court allowing payment of alimony without specific request contrary to natural justice.

Edit. Note— As to 1 see: HC 23/40 7 CtLR 113; HC 52/37 2 CtLR 138. As to 2 see: CA 62/37 2 CtLR 134; HC 24/41 9 CtLR 178.

Goitein for Petitioner. *Abcarius* for Respondent No. 2.

Application for an Order to issue to 1st Respondent directing him to show cause why his order dated 7.11.41, in Jaffa Ex. File No. 205/41, should not be set aside and a stay of proceedings in file ordered.

ORDER

Edwards, J.

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

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

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

> "I am the head of the Latin Community in Jaffa. I know Madame Alice Shbeita. She was married to Mr. Elia Shbeita in the year 1933 in the Greek Catholic Church in Jaffa. Before her

> marriage to the said Mr. Elia she was of our community and upon her marriage with Mr. Elia Shbeita in the Greek Catholic Church, she became of the said community and I do not regard her to be one of our community."

It is quite clear, therefore, that the second respondent remained a member of the Latin Catholic Community until her marriage to the present petitioner, and if she ever became a member of the Greek Melkite Community it was only coincidentally with her marriage. Now, Mr. Goitein has argued that the Greek Melkite Ecclesiastical Tribunal can have jurisdiction only if the second respondent and the petitioner are members of that Community and he points to the word "their" in line 2 of Article 54(1) of the Palestine Order-in-Council, 1922. There can, of course, be no question that the present petitioner would be subject to the jurisdiction of the Greek Melkite Community, as he properly changed his religion and gave the requisite notice required by Section 2 of the Religious Community (Change) Ordinance, and (notwithstanding his subsequent reversion to the Greek Orthodox Community) he would still be subject to the jurisdiction of the Greek Catholic Community Church Court, by reason of the provisions of Section 4(2). It seems, however, that the second respondent never registered her change of religious community as required by Section 2 of Cap. 127. The question, then, is "Can the Greek Catholic Melkite Church Court have jurisdiction in view of her non-compliance with Section 2". Mr. Goitein argues that it cannot and he says that the consent of the second respondent to that jurisdiction cannot clothe the Court of the Greek Melkite Church with jurisdiction. We think that this contention of Mr. Goitein is correct, and that this is so is borne out by the appearance of the word "such" in Article 54(2) of the Order-in-Council ; in other words, jurisdiction can only be given over persons who are members of the community. Now, as the second respondent never took the proper legal steps to change her religion, we fail to see how the Court of the Greek Catholic Church could have jurisdiction in the matter. It is not clear that this matter was sufficiently brought to the notice of the learned Chief Execution Officer, although Mr. Goitein assures us that he, who himself argued the matter before the Chief Execution Officer, *did* mention the fact to the Chief Execution Officer. Mr. Goitein says that what was behind Judge Shaw's reasoning was the alleged consent. Although, because of the view we take of the matter, this question is not now very relevant, we think that it is at least doubtful whether the present petitioner even when he was before the Ecclesiastical Court of First Instance, ever gave his consent. This would seem to be implicit from paragraph 5 of the typescript of the summary of the objections of the present petitioner when he was before the Ecclesiastical Court of Appeal. Now, were it not for the question of the second respondent never having properly ceased to be a member of the Latin Catholic Community, we

might have held that there is little substance in any of Mr. Goitein's other objections to the order of the Chief Execution Officer. At the hearing before us Mr. Goitein did suggest that the order compelling his client to pay LP. 5— a month was contrary to natural justice because there had been no specific request by the second respondent for anything other than an order that the petitioner be made to return to her and be ordered to give her a reasonable allowance while staying with her. All such matters, however, were eminently matters for the Ecclesiastical Court and this Court is not a Court of Appeal from the Ecclesiastical Court.

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

Given this 27th day of February, 1942.

Chief Justice.

CIVIL APPEAL No. 241/41.

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

Before:— Edwards, J., Frumkin, J. and Abdul Hadi, J.

The Attorney-General — Appellant.

v.

Abdul Qadir Deeb el Hassan — Respondent.

Accused found guilty of offence of affray ordered by Magistrate to enter into security to be of good behaviour for one year — Accused convicted (along with several other persons) of certain offences including affroy and fined a few months after entering bond to be of good behaviour — Attorney General unsuccessfully suing accused in a civil action for recovery of sum mentioned in bond — What necessity to prove in order to enforce bond for good behaviour.

1. To recover sum mentioned in bond for good behaviour, all Attorney-General has to prove — that accused had not been of good behaviour during period specified in bond.

2. Judgment showing that accused was convicted under several sections of Crim. Code Ord. — sufficient proof that he had not been of good behaviour.

3. Bond containing several specified conditions and providing

that it should become void if all conditions fulfilled remains in full force if person executing it fails to observe any one of those conditions.

J.G.A. (*Akel*) for Appellant. Respondent: In person.

Appeal from judgment of District Court, Haifa, sitting in its appellate capacity, dated 22.7.41, in Civil Appeal No. 51/41.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Haifa, in its appellate capacity, dismissing an appeal from a judgment of one of the Magistrates of Haifa in a civil action in which the Attorney-General had sued the present Respondent for the recovery of LP. 5. Shortly stated, the facts are as follows : —

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

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

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

Now, we are of opinion that all that the appellant had to prove to the satisfaction of a Magistrate's Court (vide Section 46(6)) was that the accused had not been of good behaviour during the year. It is quite clear from paragraph 4 of the judgment of the District Court on appeal that the Attorney General had proved that the accused had not been of good behaviour. Now, turning to the form of the recognizance and the conditions of the recognizance signed by the Respondent, the recognizance was void only if all the conditions of the bond were fulfilled. There were several specified conditions, and it is clear to us that if he failed to observe any one of those conditions the bond remained in full force.

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

Delivered this 13th day of January, 1942.

British Puisne Judge.

HIGH COURT No. 21/42.

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

Before:— Gordon Smith, C.J. and Edwards, J.

Shlomo Wolstein — Petitioner.

v.

1 Chief Execution Officer, Tel-Aviv.

2. Isaac Braun — Respondents.

Discrepancies in valuation of Mortgage property put up for sale by Execution Office — Incomplete description of immovable pro-

perty in advertisements of Execution Office — Chief Execution Officer making no order on application dealing with irregularities in execution proceedings — Non-interference of High Court with order of sale made by Chief Execution Officer.

Small discrepancies in valuation and in advertising in executjon proceedings for sale of immovable property — no reason to cancel valuation and subsequent proceedings, thereby causing further delay of execution.

Edit. Note — See: HC 16/39 5 CtLR 153; HC 20/39 ibid 143; HC 45/39 6 CtLr 109; HC 94/40 9 CtLR 182.

Doukhan for Petitioner. Ex parte.

An application for an order directing first Respondent to show cause why his order, dated 5.12.41, in Ex. File No. 5168/39, ordering execution to proceed (without any valuation and without new advertisements being published) should not be set aside; and to shew cause why no order was made at the hearing of Petitioner's application on 13.2.42, dealing with irregularities in execution proceedings in same file; and to shew cause why all execution proceedings in said file, save order of sale, should not be cancelled.

ORDER

The main complaint in this application is that there are certain discrepancies occurring in the valuations which were made in connexion with the execution proceedings for the sale of the mortgaged property. Another complaint is that the advertising of the sale was erroneous in that a small store, three trees and a flower garden, the area of which does not exceed a total of three hundred square metres, have been omitted from the notices. But the real reason for the application is quite apparent — to delay further the proceedings. The execution proceedings were commenced in 1939, and we are now well into 1942, but it is true they were postponed for one year upon payment of LP. 300 on account.

We do not think that because of these small discrepancies the execution proceedings should be delayed any longer. In any event the mortgagor can always redeem the mortgage, even within three days of the final order of sale and before the registration of the property.

We see therefore no reason to grant the order nisi, and the application will be dismissed.

Given this 24th day of February, 1942.

Chief Justice.

HIGH COURT No. 82/41.

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

Before:— Copland A/C. J., Rose, J. and Khayat, J.

In the application of:—

Hubert Olles — Petitioner.

v.

Superintendent of Detention Camp, Mazra — Respondent.

Illegal immigration, an enemy alien, who arrived in Palestine in September 1939, *detained and subsequently released, then again arrested in July,* 1940, *and placed in a detention camp under oral instructions issued by High Commissioner — Unsuccessful appearance before Advisory Committee appointed to deal with cases of interned enemy aliens — Oral notice to detained person that he was detained as prisoner of war — Application in nature of Habeas Corpus to High Court — Two affidavits setting out different grounds for detention of petitioner — Question of power of High Commissioner to exercise on behalf of His Majesty prerogative of the Crown — Alleged distinction between military and civil prisoner of war — Insufficiency of other than legal basis for detention of enemy alien — Implied power of Executive Government to take measures necessary for defence of the realm including power to detain enemy alien as prisoner of war.*

1. No distinction can be made between a military and a civil prisoner of war, and where an enemy alien is stated to be a prisoner of war, not necessary to aver that he is hostile.

2. War Defence scheme, not being a law or Defence Regulation, can by itself confer no authority on anyone to intern an enemy alien.

3. Order by Chief Secretary that all enemy aliens should be detained by virtue of Royal Prerogative — no good reason for detention of an enemy alien, since High Commissioner has, in absence of express delegation, no power to exercise prerogative of the Crown.

4. If person interned and informed on internment in writing that he was to be interned as enemy alien and prisoner of war, no question can arise as to reasons for internment or as to whether he had been informed of the reasons.

5. Executive Government has an implied power to take measures necessary for defence of the realm, and a person detained as an enemy alien and declared, even if only before return to order nisi, as prisoner of war — not entitled to sue out a writ of Habeas Corpus.

Edit Note:— HC 67/41 10 CtLR 149 followed: see also HC 108/40 9 CtLR 18.

Copland A/C. J.: The facts of this case are as follows:

The Petitioner, Hubert Olles, an enemy alien, arrived in this country in September 1939, and was detained as an illegal immigrant. He was subsequently released, and disappeared, but in July, 1940, he was again arrested and placed in a detention camp.

No specific order for his detention was made at that time, but it appears from information given to us by Mr. Hogan, in the course of the hearing, that he, together with other enemy aliens, was detained under oral instructions issued by the High Commissioner. On the 10th February, 1941, it is stated, the Petitioner, on his own request, appeared before the Advisory Committee appointed to deal with the cases of interned enemy aliens, and there stated his case. Apparently he was unsuccessful, because he is still under detention. It is stated that on the 24th September, 1941, probably in view of the judgment of this Court in Nathan v. Inspector-General of Police and Prisons and another, ex parte Birnstiel, High Court 67/41 *), the Petitioner was informed that he was detained as a prisoner of war — that he was so informed is denied by his advocate, and it is admitted that no written notice was served on him. He has now made an application in the nature of Habeas Corpus to this Court, asking that the Respondent should show cause why he should not be released, on the grounds that he has never been charged with any offence nor brought before any Court, that he would not appear to be detained under the Defence Regulations, and that he is being detained unlawfully without any proper authority.

When the matter came before us on the application for an order nisi, we requested that the Respondent should produce a copy of the order under which it was purported to detain the Petitioner. No such copy was appended to either of the affidavits in reply, but in the final stages of the arguments Mr. Hogan produced a letter from the Chief Secretary, dated the 12th April, 1941, containing instructions to the Police to detain all enemy aliens under the Royal Prerogative. It will be noted that this was a general order, no names of individuals being mentioned.

Two affidavits have been filed by the Respondent. It is well to set them out in full, since they give different reasons for the detention of the Petitioner. The first one is dated the 2nd October 1941, and is as follows:—

> "I, Alan Saunders, C.M.G., O.B.E., M.C., hereby take oath and say as follows:
>
> 1. I have read the Order Nisi, dated 30th September, 1941, and the petition, dated the 26th September, 1941, relative to the above described matter.
>
> 2. The Petitioner, Hubert Olles, is an enemy alien and a prisoner of war and is detained as such by the Executive Government.

*) 10 CtLR 149.

3. I am the Inspector-General of Police and Prisons in Palestine. (—) *A. Saunders*
INSPECTOR GENERAL.
Signature of Deponent".

The second is dated the 6th October, 1941, and is in these terms:—

"I, Henry Bennet Shaw, Deputy Superintendent of Police, aged 30 years and upwards, hereby take oath and say as follows:—

In accordance with the War Defence scheme His Excellency the High Commissioner has given a general direction to officers of the Palestine Police Service to take and intern all enemy aliens including the Petitioner, who has been so taken and interned and informed accordingly. (Sgd.) *H. B. Shaw*
Signature of Deponent".

Mr. Goitein for the Petitioner draws attention to the fact that these two affidavits are contradictory, as in the first it is alleged that the Petitioner is detained as an enemy alien and a prisoner of war, and in the second, that under the War Defence scheme the High Commissioner has given a general direction to the Police to intern all enemy aliens; that the first affidavit makes no reference to any order, and that the second one recites the War Defence scheme as in the nature of an authority, and he argues that such a scheme is not a regulation, and can confer no power to detain in itself, and that both affidavits are defective and are no answer to the petition, and he further complains that no copy of an order was produced as required in this Court. He further says that there are ample powers under Regulation 17 to detain anyone, and that it is the duty of the Court to see that the powers existing in the Executive Government are properly exercised.

His next line of argument is that in any case there is no power in this country to detain under the prerogative, and he refers to the Birnstiel case (supra) in support. In that case the full Court decided that the High Commissioner had no power to exercise on behalf of His Majesty any prerogative of the Crown, in the sense in which that term is generally used in the text books, unless the power so to do is expressly delegated to him, and held, applying the principles laid down in Rex v. Vine Street Police Station Suprintendent, ex parte Liebmann (1916 I.K.B. 268), that an enemy alien who is not stated to be a prisoner of war, can only be detained under Regulation 17. From that, the argument is that the power to detain as a prisoner of war is an incident of the prerogative — see Rex v. Commandant of Knockaloe Camp, ex parte Forman (117 L. T. R. 627).

Since the High Commissioner has no power to exercise any prerogative, and since here he is not acting under Regulation 17, then, Mr. Goitein continues, under what power is he acting? Reliance is also placed on the words of Bailhache J. in the Liebmann case (supra) where he said "that a German subject resident in the United Kingdom who in the opinion of the Executive Government is a person hostile to the

welfare of this country and is on that account interned, may properly be described as a prisoner of war", and that in this present case there is no allegation that the Petitioner is hostile. Liebmann had been served with a notice that it was intended to intern him as a prisoner of war.

A distinction is also sought to be made between military and civilian prisoners of war, and that in the former class it is the Military Authorities who authorise the detention, the High Commissioner's powers being limited, under Regulation 25(3) of the Defence Regulations as amended, to prescribing the method and place of imprisonment.

Finally, objection is taken to the fact that a wholesale order was made and no individual consideration was given to each case, as shewn in Mr. Shaw's affidavit — a practice which was adversely and severely commented on in In re Budd, a case recently decided by the Divisional Court and reported in the Law Times of the 14th June, 1941.

In reply, Mr. Hogan submits that the Petitioner is detained now as a prisoner of war, and that he knew why he was detained since he made an application to the Advisory Committee, as stated above ; that in his petition he never complained that he had not been informed, and that in fact he was informed on the 24th September, 1941, that he was detained as a prisoner of war.

In the first place I do not think that any distinction can be made between a military and a civil prisoner of war — both are prisoners of war, and Bailhache J. in the Liebmann case treated them as being in the same category, How they came to be prisoners is not material.

Neither do I think that Mr. Goitein's argument is correct when he says that the converse of the ruling in the Birnstiel case does not apply. Trusted C. J., in delivering the judgment of the Court, said : "In my view an enemy alien who is entitled to the protection of the Government, and who is not stated to be a prisoner of war, can only be detained under Regulation 17." It follows from that statement of the law that if he is stated to be a prisoner of war then his detention is lawful. I do not think that it is necessary to aver that the person is hostile. Ex parte Forman makes no reference to this requirement, and this was a later case than Rex v. Vine Street Police Station Superintendent. It is therefore important to determine whether or not the Petitioner is a prisoner of war.

The first affidavit, that of Major Saunders, states that the Petitioner is an enemy alien and a prisoner of war, and is detained as such by the Executive Government. The second affidavit made by Mr. Shaw refers to instructions given by the High Commissioner under the War Defence Scheme to the Police to intern all enemy aliens, including the Petitioner, "who has been so taken and interned and informed accordingly". The reasons given in this second affidavit cannot possibly justify the action taken, since the War Defence Scheme is not a law nor a Defence Regulation, and can by itself confer no authority on any-

one to intern an enemy alien. The order given by the Chief Secretary on the 24th April, 1941, that all enemy aliens should be detained in virtue of the Royal Prerogative, equally does not disclose a good reason (though I will deal with it from another aspect later) since this Court has held that the High Commissioner has no power to exercise on behalf of His Majesty the prerogative unless such power is expressly delegated — and there has been no such delegation here.

I do not think that In re Budd is of relevance here for the reason that that case was concerned with Regulation 18 B., which corresponds to our Regulation 17, and concerned a British subject and not an enemy alien.

Much trouble would be saved if all persons who are to be interned were informed on internment in writing that they were to be interned as alien enemies and prisoners of war. No question could then arise as to the reasons for internment or as to whether the person had been informed of the reasons. This was the course adopted in ex parte Liebmann, and it is obvious that it is desirable that it should be followed.

But I think that the Inspector-General's affidavit is a sufficient answer to the petition. The Executive Government decdied that enemy aliens should be interned — that is clear from the fact that many hundreds of enemy aliens have been and are still interned in execution of that policy. The fact that the reason given by the Chief Secretary for such internment was an invalid one does not alter the fact that this was the decision of the Executive Government. It was a decision which they most certainly ought to have come to, as was said by Darling J. in ex parte Forman. There is not the slightest doubt that Hubert Olles knew of it because he, with other persons similarly situated, applied in February, 1941, to the Advisory Committee to reconsider his case. He is an enemy alien, and always has been an enemy alien. He was placed in an internment camp, he was therefore a prisoner, and he was liable to be made a prisoner of war, and he has been declared, though somewhat late in the day, to be a prisoner of war. Whatever may have been the position beforehand, it has now been regularised before the return to the order nisi. From Short and Mellor's Crown Office Practice, 2nd Ed., p. 326, it is clear that this is an order. The effect of the decision of this Court in ex parte Birnstiel was that, though the prerogative did not run in this country, there was an implied power vested in the Executive Government to take measures necessary for the defence of the realm, and such a power must exist. Following the ruling in that case, a person who is an enemy alien and a prisoner of war may be detained as such.

The Petitioner fulfils both these requirements, and as such, he is not in my judgment entitled to sue out a writ of habeas corpus. The rule nisi must be discharged. In the circumstances I do not think that either side should be given costs.

Rose, J.: I agree, and only wish to add one word. In the course of argument some doubt was cast upon the meaning to be given to the last paragraph of the judgment of the full Court in Gustav Nathan v. Inspector-General of Police and Prisons and Another (ex parte Birnstiel), High Court 67/41. In order to help remove any such doubts I would observe that, in my opinion, what this Court was then intending to lay down what in any event is in my view the correct statement of the law is that in proceedings of this nature instituted by an enemy alien, not being entitled to the protection of Government, it is a complete answer on the part of the Executive Government to aver that the person in question is detained as a prisoner of war.

Khayat, J.: I agree with Copland, A/C. J.

HIGH COURT No. 7/42.

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

Before:— Gordon Smith, C.J., Edwards, J. and Frumkin, J.

In the application of:—

Hubert Olles — Petitioner.

v.

Superintendent of Detention Camp, Mazra, near Acre. — Respondent.

Detention of enemy alien by Executive Government as prisoner of war — New application to High Court in nature of Habeas Corpus by person detained who previously applied, unsuccessfully, in the matter — Issue of successive writs of Habeas Corpus — Exercise by High Commissioner or Executive Government of prerogatives of the Crown — High Court reviewing earlier decision and expressing contrary view.

1. (*Obiter*) There may be prerogatives, of a personal nature, exercisable personally by the Crown which may have been delegated to High Commissioner by implication and by virtue of his commission and by being personal representative of His Majesty in Palestine.

2. (*a*) Prerogative to arrest and detain any person whether as enemy alien or as so-called prisoner of war or otherwise, without charge, trial or inquiry, does not vest either in High Commissioner or Executive Government in Palestine, unless such power expressly delegated.

(b) Where power to arrest and detain delegated by or contained in legislative enactment, High Commissioner or Executive Government must exercise it in accordance with such legislation and within limits and restrictions imposed thereby.

3. Where a person detained under alleged or implied prerogative, Courts can enquire into it, and Habeas Corpus proceedings will lie.

4. (Obiter) Imperial Defence Act, 1939, as applied to Palestine amply provides for detention of any person whose detention appears to High Commissioner to be expedient in interests of public safety or defence of the Territory, but regulations made thereunder must be complied with.

In such event action thereunder cannot be questioned by Habeas Corpus proceedings.

5. (a) Successive writs of Habeas Corpus may be issued.

(b) Court has inherent power to prevent abuse of its own process.

6. High Court may review its earlier decisions and express contrary views subsequently, though undesirable to adopt such course, generally.

Edit. Note: As to 1—4 see: HC 82/41 11 CtLR 81; see also Defence (Amendment) Regulations (No. 4), 1942 Palestine Gazette 1175 (5.3.42), Supplement No. 2, p. 410.

As to 5 see: HC 1/41 9 CtLR 80.

As to 6 see CA 39/41 9 CtLR 109 and Edit. Note thereto.

Goitein and *Weyl* for Petitioner.

Crown Counsel (*Rigby*) for Respondent.

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

Gordon Smith, C.J. ORDER

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

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

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

It is desirable, before discussing the arguments to refer to recent local cases of a similar nature and examine these in order to see what is the effect of the decisions therein. The earliest is High Court No. 108/40 **), P.L.R. Vol. 7, p. 617 which I will call the *Steindler case.*

*) Reported supra on p. 81. **) 9 CtLR p.18.

By consent, this application was taken as one for a rule in the nature of a Habeas Corpus, but strictly speaking the original application had been to shew cause why the Petitioner should not be served with the notice and form of objection in accordance with the Restriction and Detention Orders (Objection) Rules, 1939. It was contended for the Respondent that the Petitioner was detained by virtue of the prerogative powers vested in the High Commissioner and not by virtue of or under Regulation 17 of the Defence Regulations, 1939. *The decision was that the Petitioner was improperly detained because if there was any such prerogative power* (which point was not decided) *then such power was in view of the decision in A. G. v. De Keyser's Royal Hotel, Ltd.* (A. C. 1920, p. 508) *limited and restricted by Regulation* 17.

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

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

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

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

The last case is High Court No. 82/41, P. L. R. Vol. 8, p. 429, in which the Petitioner is the same as now, and which I will call the first Olles case. It came before the Acting Chief Justice, Rose and

*) 10 CtLR p. 149.

Khayat J. J. Two affidavits were filed in reply to the Order Nisi, one stating the Petitioner to be an enemy alien and a prisoner of war, and the material passage in the other affidavit reads —

> "In accordance with the War Defence Scheme, His Excellency the High Commissioner has given a general direction to officers of the Palestine Police Service to take and intern all enemy aliens, including the Petitioner, who has been so taken and interned and informed accordingly."

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

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

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

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

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

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

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

Now I think it is very desirable, in discussing this question of the Royal Prerogative, to state that, in my opinion, it may be that in the exercise of the Royal Prerogative a distinction should be drawn between its exercise in Palestine and its exercise in England, or in other words, that from the fact that it has been exercised in England under circumstances prevailing there, it does not necessarily follow that it can be exercised under similar or somewhat similar circumstances in Palestine. The Royal Prerogative has been defined as being that "preeminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of his regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law". (Hailsham Vol. 6, p. 443, s. 511). And again, (vide De Keyser's Royal Hotel case per Lord Dunedin, 1920, A.C. at p. 526): "The prerogative is defined by a learned constitutional writen as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'."

To quote Hailsham again, paragraph 512,

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

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

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

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

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

It is a matter, therefore, of ascertaining to what extent such prerogative has been delegated to the High Commissioner and Government of

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

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

It follows, therefore from Section I, sub-section (2) (a) of this Act that the High Commissioner may make regulations, inter alia, for "the apprehension, trial, punishment of persons offending against the Regulations and for the detention of persons whose detention appears to the High Commissioner to be expedient in the interests of the public safety or defence of the territory". It is also to be noted that by Section 9 of the Act, the powers conferred are to be "in addition to, and not in derogation of, the powers exercisable by virtue of the prerogative of the Crown". It is however also to be noted that although this Section 9 is expressly excluded from being applicable

to the Territory yet Article 4 of the Order-in-Council itself provides that the powers conferred shall be "in addition to, and not in derogation of, any other power possessed by the High Commissioner". In consequence, the Defence Regulations, 1939, came into force on the 26th August, 1939, and it is desirable to set out Regulation 17 as amended subsequently, which reads as follows, as far as is pertinent:—

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

There are subsequent safeguarding provisions included.

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

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

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

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

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

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

For the Respondent two submissions were made: (a) that a writ of Habeas Corpus will not be granted in the case of a prisoner of war, following Bailhache J. in the Vine Street Case: and (b) that the detention of the Petitioner was not in exercise of the Royal Prerogative but was in exercise of an implied power vested in the Executive to take all necessary steps for the security of the realm, and arose out of a doctrine of political necessity and expediency.

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

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

the subject, enabling the absolute curtailment of freedom and without question.

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

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

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

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

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

I have already set out previously what these cases decided, and it would appear that if it had been stated that Miss Birnstiel had been detained as a prisoner of war, then her detention would have been lawful and the rule nisi would have been discharged. As, however, she was stated only to have been detained by virtue of the prerogative as an enemy alien and that she was not consequently detained under Defence Regulation 17, therefore her detention was unlawful and her release was ordered. Further, the case decided that when the power of the Crown to interfere with the liberty of the subject had been regulated by legislation, the Executive must exercise the restrictions imposed by that legislation. I cannot see that, except as regards the personal Royal Prerogative, which admittedly can be and has been delegated to the High Commissioner, e.g. the power of pardon, there is any distinction to be drawn between the High Commissioner and the Executive. If there are powers implied in the High Commissioner then they must equally, in my opinion, be implied in the Executive. Similarly, if powers are specifically conferred upon the High Commissioner, then unless a contrary intention is expressed or appears, they can equally be exercised by the Executive.

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

I would quote Lord Dunedin at page 526 of the judgment in that case—

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

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

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

In this latter case there appears to have been a slight misunderstanding of the facts as set out at the commencement of the judgment, and which the Petitioner has referred to in his affidavit in support of the Rule Nisi in the case now before us. We understand that it is correct that the Petitioner has never been before the Advisory Committee provided for under Regulation 17 of the Defence Regulations. I have already referred in detail to the judgment in this first Olles case and would merely refer briefly to paragraphs (1) and (5) of the head note as correctly reported and which briefly and in effect state, (1) the detention by the Executive Government of an enemy alien as a prisoner of war is lawful; and (2) the power so to detain in the Executive Government is an implied and necessary power and cannot be questioned by Habeas Corpus.

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

(1) I agree with paragraph 2 of the head note to the Birnstiel case but would add that in my opinion there may be prerogatives of the Crown, of a personal nature, exercisable personally by the Crown which may have been delegated to the High Commis-

sioner by implication and by virtue of his commission and by being the personal representative of His Majesty in this Territory.

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

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

(4) As obiter dicta only, I express the view that the Imperial Defence Act, 1939, as applied to the Territory, amply provides for the detention of any person whose detention appears to the High Commissioner to be expedient in the interests of the public safety or the defence of the Territory, but that regulations for that purpose made thereunder must be complied with.

In such event, it would appear that action thereunder cannot be questioned by Habeas Corpus proceedings.

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

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

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

Delivered this 27th day of February, 1942.

Chief Justice.

JUDGMENT.

Edwards J.

I agree. The only matter about which, at one time during the argument, I had some doubt was as to whether we should not have considered ourselves bound by the decision in H.C. 82/41. In view, however, of certain statements both of fact and of law, in the judgments in that case, to which I shall presently refer, and in view of the dictum of Branwell L. J. in Smith's case, II Ch. D. (1879) page 596, my doubts have been resolved. There is, moreover, the authority of two recent cases of this Court, namely, H.C.27/40 and H.C. 28/40. It is impossible for one to guess to what extent the mind of Copland, J. may have been affected by his belief that Olles had appeared "before *the* Advisory Committee" (See top of p. 431 Vol. 8 P.L.R.) whereas we now know that Olles never did appear before *the* Advisory Committee, that is, before the Advisory Committee set up under Regulation 17(2). Moreover, with respect, I am unable to regard as correct law the statement at p. 435, that though the prerogative does not run in this country, there is an "implied power vested in the Executive Government to take measures necessary for the defence of the realm and such a power must exist." Once it is admitted that the prerogative does not exist I fail to see how any powers can exist except such powers as are given by regulation Crown Counsel (Mr. Rigby) frankly admitted to us that he rested his case solely on the allegation that Olles was a "prisoner of war". It may be that Mr. Rigby felt that he was on sound ground because of the dictum of Rose, J. at page 435. Now, that dictum may be a correct statement of the law in the United Kingdom; but it, of course, rests on the assumption that the Royal Prerogative exists in Palestine as it does in the United Kingdom. In this connection I would refer to the decision in the Husgrave case 5 A.C. 102 (1879) cited by Mr. Goitein. I would here quote from Stephen's "Commentaries on the Laws of England" 19th Edition Vol. 4, p. 276, "Although the actual exercise of the Prerogative cannot be inquired into in a Court of law, the limits of the prerogative are a matter of Common Law, and it is the duty of the Courts to investigate, if called upon for that purpose, any claim of the Crown to exercise a discretion by virtue of its Prerogative, and, if they find that there is no warrant for the claim at Common Law, to disallow it."

In my view, one really comes back to the decision in H.C. 67/41, P.L.R. Vol. 8, p. 363. I fail to see how it can be said that the answer in the affidavit produced by the Government in that case (p. 365)

"Miss Birnstiel is detained by virtue of the Prerogative as the subject of a State at War with His Majesty" is in essence different from the affidavit produced in the present case "Olles is an enemy alien and a Prisoner of War and is detained as such by the Executive Government." The sole question therefore is whether in Palestine the reply that a person is detained as a so-called prisoner of war is a sufficient answer to an application for a Writ of Habeas Corpus. With this matter My Lord has sufficiently dealt. I agree with the order proposed by my Lord.

British Puisne Judge.

ORDER

Frumkin, J.

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

Puisne Judge.

CIVIL APPEAL No. 245/41.

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

Before:— Edwards, J., Frumkin, J. and Khayat, J.

Abdul Jabir Abdul Aziz — Appellant.

v.

1. Abdul Aziz Abdul Hamid Daoud Khalid and a. — Respondents.

Action in Magistrate's Court for rectification of land register under sec. 66 of Land (Settlement of Title) Ord. — Magistrate holding that he had jurisdiction to deal with matter concerning land in accordance only with provisions of Land Courts Ord. — Interpretation of sec. 3(b) of Magistrates Courts Jurisdiction Ord.

Magistrate has jurisdiction in cases regarding land under Land Courts Ordinance but not under Land (Settlement of Title) Ordinance.

Shihadeh for Appellant. *Azar* for Respondents.

Appeal from judgment of Magistrate's Court, Jaffa, sitting as a Land Court, dated 27.11.41, in Civil Case No. 694/41.

JUDGMENT.

In this appeal a very short point arises. The appellant brought an action in the Magistrate's Court of Jaffa for the rectification of a land register under Section 66 of the Land (Settlement of Title) Ordinance. The Magistrate (His Worship Mr. S. Daoud) held that he had no jurisdiction because, under Section 3(b) of the Magistrates Courts Jurisdiction Ordinance, 1939, he had jurisdiction to deal with actions concerning immovable property in accordance only with the provisions of the Land Courts Ordinance. When one turns to Section 3 of the Land Courts Ordinance, one finds that the powers given to Land Courts are restricted to six specified matters. Now, had the Legislature intended to give to Magistrate's Courts the powers given to Land Courts under Section 66 of the Land (Settlement of Title) Ordinance, read together with the definition of "Land Court" in Section 2 of that Ordinance, the Legislature could well have done so ; and, in enacting Section 3(b) of the Magistrates Courts Jurisdiction Ordinance, 1939, would certainly not have limited the powers of Magistrates to dealing only with the matters specified in Section 3 of the Land Courts Ordinance. For example, they could have said, when enacting Section 3(b) "in accordance with the provisions of the Land Courts Ordinance and the Land (Settlement of Title) Ordinance". They omitted however, to mention the Land (Settlement of Title) Ordinance and we consider that this omission must have been intentional.

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

Delivered this 15th day of January, 1942.

British Puisne Judge.

MISC. No. 9/42.

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

Before:— Edwards,J. and Frumkin, J.

In the application of:—

Emile Bey Baghous and 5 others — Applicants.

v.

The Palestine Land Development Co. — Respondent.

Application on behalf of executors and heirs of deceased, all residing outside Palestine, for exemption from Court fees on

appeal against judgment of District Court — Affidavit by a Mukhtar in Palestine that appellants unable to pay Court fees and that estate has no funds — Court of Appeal enquiring first into poverty or otherwise before deciding question of whether appellants have reasonable ground for appealing — Insufficiency of affidavit containing bare allegation of poverty of all appellants and necessity of detailed statement as to means of each of them — Question of acceptance or otherwise of affidavit in absence of rebutting evidence.

1. While Rule regarding exemption from Court fees in an intended appeal contemplates a decision on question of whether appellant has reasonable ground for appeal before enquiring into his poverty or otherwise, yet Court may, if it finds it desirable, deal firstly with question of poverty.

2. Where several appellants intend to appeal on behalf of estate affidavit merely stating that they are unable to pay Court fees (instead of referring to means of each of individual appellants) and that estate has no funds — not sufficient.

3. An affidavit of means, or lack of means, to be of any value should specify property or means of individual e.g. whether he has nothing but his bedding and his working tools or whether he has any land or houses, and if so, of what value; whether he has any shop or goods and if so, of what value, etc. etc.

4. Fact that Respondent adduced no evidence to rebut Appellant's affidavit as to poverty — not sufficient, if affidavit a bare allegation which almost impossible for Respondent to rebut and Court not satisfied that allegation true.

Cattan for Applicants. *Scharf* for Respondent.

Application for exemption from Court Fees on appeal from judgment of District Court, Jaffa, dated 8.1.42, in Civil Case No. 236/35, whereby Applicants' case against Respondent was dismissed.

ORDER

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

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

Now, a mere allegation that a whole body of individuals are without means is not sufficient nor can we understand how a Mukhtar in Jaffa can know about the means of persons living in the Lebanon. An affidavit of means, or lack of means, to be of any value should set forth in detail a list of the property owned or the means of the individual, e. g. whether he has nothing but his bedding and his working tools or whether he has any land or houses, and if so, the value of such ; and whether he has any shop or shop goods and if so of what value ; and whether he has any cattle or sheep and if so their value ; and whether he has merely weekly wages, and if so, of what amount, and so on and so on.

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

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

Given this 10th day of March, 1942.

CIVIL APPEAL NO. 6/42

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

Before:— Gordon Smith, C.J., Khayat, J. and Abdul Hadi, J.

In the appeal of:

Salem Sam'an Ziyadeh — Appellant.

v.

Yusif el 'Abed Salem and 2 others. — Respondents.

Action before Magistrate sitting as Land Court for declaration

of ownership and for order restraining Defendant from interfering with his title and possession — Proper remedies of person having no title to land but only agreement to purchase.

Person holding no title to land under his possession but having an agreement to purchase may bring an action for possession, specific performance or damages but not one for declaration of ownership and order restraining Defendant from interference with his title and possession.

Edit. Note:— see CA 132/38 4 CtLR 25 and Edit. Note thereto; CA 21/38 ibid 151; CA 15/38 3 CtLR 149; CA 48/38 ibid 257 and Edit. Note thereto; CA 16/39 5 CtLR 113; CA 13/39 6 CtLR 39.

Sa'adeh for Respondents Nos. 2 & 3.

Appeal from judgment of Magistrate's Court, Ramallah, sitting as a Land Court, dated 13.12.41, in case No. 346/41.

JUDGMENT.

This case was originally improperly brought before the Magistrate's Court, in that the plaintiff (Appellant) misconceived his remedy by applying for a declaration of ownership and for an order to restrain the defendants from interfering with his title and possession. Undoubtedly the Magistrate could not grant the declaration because the Appellant does not hold title to the land, but instead has an agreement to purchase.

On these facts it appears to us that his remedy is to bring another action for possession, specific performance or damages.

The appeal will be dismissed but without prejudice to the Appellant in bringing another action for such other remedies as he may be advised.

Appellant will pay the second and third Respondents their costs, which we fix at an inclusive sum of LP. 5.

Delivered this 5th day of March, 1942.

CIVIL APPEAL NO. 240/41

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— Rose, J. and Edwards, J.

Nasrallah S. Khoury, in his personal capacity and on behalf of the heirs of Yousif Salim Khoury — Appellant.

v.

1. Munir 'Alami
2. Philipe Bitar, in his capacity as one of the heirs of the Late Yousif S. Khoury — Respondents.

Bills drawn on and accepted by Syndic with express approval and consent of bankrupt—Bankrupt subsequently denying authority of Syndic to accept bills — Consent which does not creak estoppel — Acceptance not being in nature of acceptance by agent on behalf of principal.

1. Syndic in bankruptcy has no authority under Ottoman Commercial Code to accept bills drawn on him.

2. Bankrupt consenting to acceptance by Syndic of bills drawn on him — not estopped from subsequently denying Syndic's authority to accept bills.

3. Bankrupt not a party to bills drawn on and accepted by Syndic, if acceptance cannot be said to be on behalf of a principal by an agent manifestly so described on document itself.

Levin for Appellant. *Eliash* for Respondent No. 1.

Appeal from judgment of District Court, Haifa, dated 7.11.41, in Civil Case No. 92/40.

JUDGMENT.

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

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

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

For these reasons the appeal must be allowed and the judgment of

the District Court set aside, with costs here and below, the costs of this appeal to include the sum of LP. 15 advocate's attendance fee.

Delivered this 10th day of March, 1942.

HIGH COURT No. 17/42.

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

Before:— Edwards, J., Frumkin, J. and Khayat, J.

In the application of:

Sheikh Mahmoud Atalla Srouri — Petitioner.

v.

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

Mutawalli of Waqf called upon through Execution Office to pay out of his own pocket costs of unsuccessful action brought by him on behalf of Waqf — Objection by Judgment Debtor that he was not served with copy of judgment — Liability of Mutawalli in certain circumstances to pay judgment debt of Waqf from his own pocket.

1. Where Judgment Debtor called upon through Execution Office to pay judgment debt and Chief Execution Officer heard him and Judgment Creditor before making any order against him, formal objection that he was not served with copy of judgment — of no avail.

2. Where Administrator called upon to pay certain debt on behalf of Waqf he may, if inspite of opportunity to do so he failed to reserve from Waqf funds sufficient money to meet liability, be ordered to pay from own pocket with liberty to repay himself in future from Waqf funds.

Edit. Note:— As to 1 see: HC 57/40 8 CtLR 86; CA 120/39 ibid 143; HC 60/40 ibid 214. As to 2 see: CA 84/40 8 CtLR 133.

Kamal for Respondent No. 2.

Application for an order to issue directed to 1st Respondent calling upon him to show cause why his order dated 12.1.42 in Execution Files Nos.: 53/41 and 97/41, Jerusalem whereby Petitioner was ordered to pay amount of judgment debt from his own personal property, should not be set aside and that all execution proceedings in the said Execution Files be cancelled for non service of judgment and orders on Petitioner, as required by Rule 212 of Civil Procedure Rules, 1938.

ORDER

In this case the Petitioner, who is the Mutawalli of a Waqf, brought an action in the Magistrate's Court, Jerusalem about September, 1939,

in which he claimed a certain sum as "badl hikr". He won the action in the Magistrate's Court and the judgment of the Magistrate was upheld on appeal to the District Court; but both judgments were reversed by the Supreme Court on appeal. In the result, the Petitioner was called upon to pay the sum of LP. 50 odd as total costs, that is, costs of the proceedings in the several Courts. His main complaint is that he has now been called upon by the Chief Execution Officer, Jeruslem, to pay this sum out of his own pocket. He contends that the Waqf at the moment have not sufficient funds to meet the sums due. He also has a formal complaint namely that he was not served with a copy of the judgment, but, in view of the provisions of Rule 279 of the Civil Procedure Rules and in view of the fact that the Chief Execution Officer or the Assistant Chief Execution Officer heard him and the present second Respondent before he made any order against him, there is no substance in this formal objection. As we have said, seeing that the action was brought by the present Petitioner in September, 1939, in our view, it was incumbent upon him to realise that he might lose and that he might be called upon to pay the costs of the other side. A prudent person would therefore have reserved from the funds of the Wakf sufficient money to allow for the payment of those costs from Wakf funds. He admitted at the Bar before us that in the year 1940, (Hejira year 1359), the gross income of the Wakf was about LP. 300. He admitted that he spent this on the beneficiaries of the Wakf, including himself, but says that he himself received only LP. 20. In any event, it is clear that from this sum of LP. 300 he could well have reserved a sum of LP. 50. His suggestion is that the second Respondent should wait until the Wakf is again in funds. To that the second Respondent replied that he sees no reason why the Petitioner should not pay now and repay himself in the future from Wakf funds. This seems reasonable. The Petitioner has only himself to thank if he has to pay now from his own pocket because he had no right to spend all the LP. 300 without reserving sufficient funds to enable him to pay any costs that he might have to pay and, in the event, has now been called upon to pay.

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

Given this 9th day of March, 1942.

HIGH COURT No. 15/42.

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

Before:— Gordon Smith, C.J., Edwards, J. and Frumkin, J.

Raji and Bahjat el Issa — Petitioners.

v.

1. The Chief Execution Officer, Haifa
2. The Syndic in the Bankruptcy of S. N. Khoury
3. Nasrallah Khoury — Respondents.

Application for setting aside execution proceedings — Irregularities mistakes and delays making it advisable to clear everything up and start proceedings afresh.

Where High Court finds that notice calling upon Judgment Debtor to pay was bad, and that besides there were many irregularities, orders wrongly made, delays etc. it may order proceedings to start afresh upon fresh application for execution to be lodged by Judgment Creditor *).

Edit. Note:— See HC 21/42 11 CtLR 80 and Edit. Note thereto.

*) For the relevant facts of this case see the following extract of the petition sworn to by the Petitioner:

1. .. ..

2. On or about 13.12.33 judgment was given by the District Court, Haifa, in Civil Case No. 92/33 ordering Petitioners to pay to the 2nd Respondent a sum of LP.4355.— with costs and interest.

3. An appeal was made from the said judgment and on 2.3.34 the Supreme Court held in Civil Appeal No. 72/34 that Petitioners must pay to 2nd Respondent a sum of LP. 1324.— with the right of claiming the same in the usual legal way.

4. Petitioners after payment by 2nd Respondent was refused, filed an action against him for the sum of LP. 1324.— in the District Court, Haifa Civil Case No. 106/35 — which has not yet been completed for various reasons, inter alia changes in the constitution of the Court, non completion of hearing of witnesses and the difficulty in obtaining a date for the hearing of the case.

5. The second Respondent filed the judgment of the District Court in the Execution Office under file No. 532/34 and Petitioners obtained an Order for stay of proceedings once by the District Court, consisting of two judges — on 24.2.34 and then on 18.4.35 by a judge of the District Court. The latter Order was given upon the production of a strong guarantee and in view of the fact that Petitioners brought the said action before the District Court, Haifa, for the very same amount which they were ordered to refund to the second Respondent by the judgment of the District Court in Civil Case 92/33 as modified by Civil Appeal No. 72/34.

6. Execution Proceedings were abandoned and renewed from time to time and on 12.12.39 the Registrar of the District Court, after having carefully examined the proceedings, held that the Order for stay of the District Court is valid and no proceedings can be taken pending a decision in Civil Case 106/35.

7. On or about the begining of January, 1941, the second Respondent re-

Goitein and *Geiger* for Petitioners.
Asfour and *Catafago* for Respondent No. 3.

Application for an order to issue directed to 1st Respondent calling upon him to show cause why execution proceedings in execution Office File No. 532/34, Haifa, should not be set aside.

ORDER

We propose to make this order absolute on the technical grounds that the notice of the 3rd January, 1941, was bad, but apart from that we feel that there have been many irregularities, orders wrongly made, delays, etc., that it would be advisable to clear everything up and start afresh as regards the proceedings.

It will therefore need a fresh application to proceed with execution of the judgment, and we propose to order that the amount already paid into Court should remain there another seven days. That will give time to the Respondents to take any steps that they think fit, and also for the Petitioners if they can proceed with any action now in progress.

We make no order as to costs.

Given this 6th day of March, 1942.

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newed the proceedings and Petitioners were called upon to pay a sum of LP. 4355.— Petitioners objected to the renewal of proceedings and on 3.6.41 the Acting Chief Execution Officer held that the Order of stay of 18.4.35 is invalid and that proceedings can be continued.

8. On 19.12.41 the Acting Chief Execution Officer stayed proceeding for 20 days in order to enable Petitioners to obtain an Order of stay. Petitioners applied to the District Court for an Order of Stay and the District Court held that they have no jurisdiction to order a stay.

9. Petitioners applied again to the Chief Execution Officer to stay proceedings and on 3.2.42 the Chief Execution Officer ruled: "I see no good reason why any stay should be granted". (A certified copy of the Execution Office file (No. 532/34) covering the period 23.1.41 to 1.2.42 is annexed herewith and marked "A" — this record contains both Orders referred to above. A certified true copy of the application and the Order of a judge of the District Court, Haifa, for stay of proceedings dated 18.4.35 is also annexed herewith and marked "B". A certified copy of the Registrar's District Court, Haifa, Order dated 19.12.39, is annexed herewith marked "C").

10. On 4.2.42 the Chief Execution Officer granted Petitioners' application dated 3.2.42, (a certified copy of which (with the Order endorsed thereon) is annexed herewith and marked "D"), provided application is filed within 3 days from to-day i. e. 4.2.42.

11. .. ..
12. .. ..
13. .. ..

CIVIL APPEAL NO. 15/42.

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

Before:— Edwards, J. and Frumkin, J.

Israel Smoly, Tel-Aviv. Appellant.

v.

Eliezer Weingarten, T-A and 2 others. Respondents

Appeal by leave from judgment of District Court dismissing application to set aside award of arbitrator — Oral evidence to prove partnership — Presumption as to ownership of goods purchased by partner and brought by him into partnership premises — Presumption in favour of validity of award of arbitrator.

1. If partner buys goods and brings them on to partnership premises or into partnership business, presumption is that he bought them for partnership and with partnership funds, unless and until he produces documentary evidence in rebuttal showing that goods his own personal property, purchased with other than partnership funds.

2. Courts always inclined to support validity of award and will make every reasonable intendment and presumption in favour of its being a final, certain and sufficient termination of matters in dispute. Award will be sustained although arbitrator omitted in it to notice some claim put forward by a party if, on fair interpretation, arbitrator to be presumed to have taken claim into consideration in making his award.

Edit. Note:— As to 2 see CA 32/40 7 CtLR 95; CA 63/36 3 CtLR 5; 2 CtLR 104.

Harari for Appellant. *Rotenstreich* for Respondent No. 1 & 2.
Caspi for Respondent No. 3.

Appeal from judgment of District Court, Tel-Aviv in Civil Case No. 167/41 dated 30.11.41, whereby Respondents' application to confirm award made by arbitrator Mr. Ben Ari, Advocate, on 10.6.41 was granted, and Appellant's application to set aside said award was dismissed.

JUDGMENT

This is an appeal by leave from a judgment of the District Court of Tel-Aviv, whereby the present appellant's application to set aside the award of an arbitrator was dismissed.

The appellant's main ground of appeal is that oral evidence was admitted by the arbitrator to prove a partnership and it is said that this was contrary to article 80 of the Ottoman Code of Civil Procedure. At the hearing before us reference was made to Civil Appeal 87/37 *). It seems, however, that at the hearing before the arbitrator the appellant did at the beginning allege that there was no partnership. It

*) 2 CtLR p. 19.

seems, however, that later on, the facts and circumstances proved were too much for him and it became obvious that there was in fact a partnership, of which the present appellant was one of the members. The partnership business was that of doing scaffolding work. The substantial complaint of the appellant is that the arbitrator held that certain scaffolding was part of the partnership property. The appellant contended that certain of the scaffolding, not only that scaffolding in his possession but also the scaffolding in the possession of other partners, was his own property and not that of the partnership. It was admitted that scaffolding had been purchased during the currency of the partnership. A certain document of sale was produced but that proved nothing beyond the fact that the appellant had purchased the scaffolding. Any reference, therefore, to article 80 is on this point irrelevant because it is not denied that the appellant may have purchased the scaffolding but it is said that he purchased it as a partner and for the partnership business and with partnership funds. This document, therefore, is not conclusive, because if a partner buys goods and brings these goods on to the partnership premises or into the partnership business, the presumption is that he bought them for the partnership and with partnership funds. Had he wished to rebut this he should have been careful to produce documentary evidence which would have left no doubt that the scaffolding was his own personal property, purchased with funds other than partnership funds. This he failed to do. In the result, the arbitrator found that the property was held in equal shares by four persons who were partners, one of them being the present appellant. It is impossible to see what misconduct the arbitrator committed. It is also argued that he did not give sufficient reasons and that he did not deal with every point but it is laid down in Russel on Arbitration and Award, 13th Edition, pages 203 and 204—

> "The Courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favour of its being a final, certain, and sufficient termination of the matters in dispute. The award will be sustained although the arbitrator has omitted in his award to notice some claim put forward by a party if, according to the fair interpretation of the award, it is to be presumed that the arbitrator has taken the claim into his consideration in making his award."

The arbitrator dealt fully in his award with all the various contentions of the parties' advocates. We therefore think that the District Court came to a right conclusion. The appeal is therefore dismissed with costs, to be taxed on the lower scale, and we certify LP. 7.500 mils for the first and second respondents and LP. 7.500 for the third respondent as advocate's attendance fees.

Delivered this 11th day of March, 1942.

CIVIL APPEAL NO. 16/42.

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

Before:— Edwards, J. and Frumkin, J.

Fahmi Qassem Agha Nimer, in his capacity as Mutawalli of Wakf (1/3) Agha Nimer. Appellant.

v.

1. Ihsan Agha Nimer on behalf of the estate of his late father Najib Agha, Nablus
2. Ragheb Affouri, Nablus. Respondents

Claim in Magistrate's Court by Waqf for Ajr Misl in respect of land occupied by Defendant — Defendant producing Kushan and denying identity of land in question — Question of jurisdiction.

If person sued for equivalent rent in respect of a certain portion of land produces a Kushan and denies that land occupied by him same as appears in Plaintiff's Kushan (or Waqfieh) this is a matter for Land Court.

Barguthy and *Abcarius* for Appellant. *Khamra* for Respondent No. 1.

Appeal from judgment of District Court, Nablus (Appellate Capacity) in Civil Appeal No. 35/41 dated 11.12.41, whereby judgment of Magistrate's Court, Nablus, dated 6.8.41 in Civil Case No. 529/41 was set aside.

JUDGMENT

This is an appeal by leave from the District Court of Nablus, which Court set aside a judgment of the Magistrate of Nablus, who had given judgment in favour of the present appellant for the sum of LP. 56 as Ajr.. Misl, or equivalent rent, in respect of a certain portion of wakf land.

At the hearing of this appeal Abcarius Bey, advocate, on behalf of the appellant, drew our attention to certain judgments of this Court on appeal from the Land Court of Nablus. These judgments establish the fact that the wakfieh in question is a valid wakfieh and that the land called Maidan Ein Miri is included in that wakfieh. When the case came before the Magistrate the present respondent, then defendant, produced a kushan and in effect denied that the land which he was alleged to have leased, and which was the basis of the claim, was the identical land called Maidan Ein Miri. In spite of this the Magistrate proceeded to adjudicate on the matter. In our view, the question was not a question as to the validity of the Wakfieh or as to whether Maidan Ein Miri was land included in the wakfieh. These matters are now beyond dispute. The question was whether the land which the respondent had been leasing was in fact the same land as was called Maidan Ein Miri and as appears in the wakfieh. In our view, this was a matter for a Land Court and beyond the jurisdiction of the Magistrate.

The District Court of Nablus has given several reasons for its judgment and we must not be regarded as agreeing with all those reasons. We think that the result arrived at by the District Court is correct although we decide this solely on the grounds which we have just stated.

In the result the appeal is dismissed with costs to be taxed on the lower scale and we certify advocate's attendance fee for the first respondent LP. 10 and to the second respondent we grant fixed inclusive costs of LP. 1.

Delivered this 12th day of March, 1942.

CIVIL APPEAL No. 185/41

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

Before:— Copland, J., Khayat, J. and Abdul Hadi, J.

Salama son of Odeh Ibn Hassan of Arab el Shalalin and 2 others — Appellants.

v.

Hamda bint Musa Abu Ibhais of Arab el Shalalin — Respondent.

Magistrate Court, sitting as Land Court, appointing Chief Clerk to hear evidence of witnesses on land in dispute — Illegality of Chief Clerk hearing witnesses.

Chief Clerk, even if appointed for that purpose by Court, has no power to hear evidence of witnesses, no matter on what point.

Shawa for Appellants. *Khalafawi* for Respondent.

Appeal from judgment of Magistrate's Court, Beersheba, sitting as a Land Court, dated 9.7.41, in Case No. 101/41.

JUDGMENT.

In this case the learned Magistrate appointed his Chief Clerk to hear the evidence of witnesses on the land itself, to inspect the land and to make a report thereon. This the Chief Clerk proceeded to do, and he heard witnesses on the land with regard to the boundaries thereof. This of course, was quite illegal and the Chief Clerk had no power whatever to hear witnesses, no matter on what point those witnesses gave evidence. This elementary proposition was laid down as long ago as 1924 in Land Appeal 61/24, Abu Yahai v. Abu Radi 1 P.L.R. 20.

The appeal must therefore be allowed and the judgment of the learned Magistrate quashed and the case remitted to the Magistrate's Court to hear properly. Costs to await the result of the retrial and we certify the sum of LP. 5 advocate's attendance fee at the hearing of this appeal.

Delivered this 3rd day of November, 1941.

CIVIL APPEAL NO. 186/41.

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

Before:— Copland, A/C.J., Frumkin, J. and Khayat, J.

1. Abd er-Rahman Hassan el Haj el Atrash (heirs of)
2. Mutlaq Yasin el Haj el-Atrash
(being one of the heirs of Yasin) Appellants.

v.

Fatima ed-Dasouqi el Haj el Atrash Respondent

Court of Appeal remitting case to Land Settlement Officer to hear further evidence and give fresh judgment — Settlement Officer declining to hear argument on subject of specific performance and equitable title on ground that he has only to hear evidence — Court of Appeal again remitting case to Settlement Officer to hear case in light of its judgments delivered since original decision of Settlement Officer.

1. Trial Court called upon to hear further evidence and give fresh judgment should also apply its mind to principles laid down in Supreme Court judgments delivered after original decision of trial Court.

2. Land Settlement Officer should apply his mind to doctrines of specific performance and equitable title.

Edit Note:— See CA 195/40 10 CtLR 3; CA 48/41 ibid 8.

Goitein (*by delegation from Moyal*) for Appellants.

Z. Eddin for Respondent.

Appeal from judgment of Settlement Officer, Gaza Settlement Area, dated 22.7.41, in case No. 24/32/Bash-Shit.

JUDGMENT

It is unfortunate, but we think this appeal will have to be allowed and the case remitted to the Land Settlement Officer a second time.

On its first remittal the Land Settlement Officer was called upon to hear all the evidence of Plaintiffs and Defendant, and to give a fresh judgment. He heard further evidence, and apparently was not impressed by any of it, and he declined to hear any arguments on the subject of specific performance and equitable title, on the grounds that all he had to do was to hear further evidence. It is true that the various judgments to which Mr. Moyal referred the Land Settlement Officer had been delivered after the date of the Settlement Officer's original decision. That, however does not affect the position. The Settlement Officer should have applied his mind to the doctrines of specific performance and equitable title, and for these reasons the appeal must be allowed, the judgment set aside, and the case remitted for the Settlement Officer to deal with it in the light of this judgment.

Costs to await the result of the re-trial, and we certify a sum of LP. 10 for advocate's attendance fee.

Delivered this 12th day of November, 1941.

CRIMINAL APPEAL No. 23/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Rose, J. Edwards, J. and Abdul Hadi, J.

Jum'a Ali Khalil Abu Jineh — Appellant.

v.

The Attorney-General — Respondent.

Conviction of uttering note knowing same to be forged and having in possession forged notes — Question of guilty knowledge — Reduction of sentence by Court of Appeal in view of "no previous conviction", and also other circumstances.

Question whether or not guilty knowledge present — eminently one for consideration of trial Court, Court of Appeal will only consider whether sufficient material from which Court could reasonably infer guilty knowledge.

Abcarius for Appellant. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 10.2.42, in Crim. Case No. 8/42, whereby appellant was convicted of uttering a note purporting to be a bank note knowing same to be forged, contrary to sec. 349(1) of Crim. Code Ord., and having without lawful authority or excuse in his possession forged notes purporting to be bank notes knowing same to be forged, contrary to sec. 349(2) of the Crim. Code Ord., 1936, and sentenced to two years imprisonment.

JUDGMENT

This is an appeal from a judgment of the District Court of Jaffa convicting the accused of an offence under Section 349 of the Criminal Code Ordinance. The question as to whether or not guilty knowledge is present is, of course eminently one for the consideration of the Trial Court and all we have to consider is whether there is sufficient material from which the Court could reasonably infer guilty knowledge. We think that, both on the evidence as contained in the Record and on the facts cited in the judgment, there is sufficient material on which the Court could properly come to that conclusion.

As to sentence, the accused has no previous conviction. There is no suggestion that he was engaged in the manufacture of these notes and the particular amount involved, as far as he was concerned, was only LP. 20. While we have no desire to minimize the seriousness of this class of offence, we think that a sentence of two years is perhaps a little on the high side and we reduce it to one of 15 months imprisonment. Subject to that the conviction is affirmed. Sentence to run from the date of the judgment.

Delivered this 17th day of March, 1942.

CRIMINAL APPEAL No. 27/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Copland, J., Rose, J. and Khayat, J.

Kalman (Karl) Friedenberg and H. Beigel Applicants.

v.

The Attorney-General Respondent.

Failure of Appellant released on bail to appear in Court on date fixed for delivery of reserved judgment — Forfeiture of bail bond made by Appellant to appear in Court of Appeal — Unsuccessful application for remission of forfeiture of bail bond — Duty of persons on bail and their sureties.

1. Persons on bail and their sureties must keep in touch with Courts and inform themselves as to question of bail, whether dates fixed or not.

2. Where definitely stated on affidavit that person on bail was informed by his advocate of date fixed for delivery of reserved judgment, failure of that person to appear entails forfeiture of bail.

Fogel for Applicant No. 1. *Crown Counsel* (*Rigby*) for Respondents

Application for remission of forfeited bond under section 8(3) of Crim. Procedure (Release on Bail) Ord. in Crim. Appeal No. 27/41.

JUDGMENT

This is an application for remission of the forfeiture of a bail bond made by the appellant to appear in this Court. The facts of the case are that the appellant had been convicted apparently of arson, in the District Court and appealed to this Court. The appeal was heard and judgment reserved. One of the learned Judges of the Court was in the fortunate position of departing shortly upon leave and Mr. Goitein who was appearing for the appellant, was asked whether he preferred the judgment to be given by the two remaining members of the Court, one of whom was the then Chief Justice of Palestine, or whether he would prefer his client to remain on bail until the Judge on leave returned. Not perhaps unnaturally, the appellant who was consulted by his advocate Mr. Goitein, replied that he certainly preferred to remain on bail for a further period. When that further period terminated, the appellant was absent at Tiberias. Now, it is the duty, of course, of persons on bail and their sureties to keep in touch with the Courts and to inform themselves as to what the position is with regard to this question of bail whether the dates were fixed or not. In this case it is stated definitely on affidavit that Mr. Goitein informed his client of the date on which the reserved judgment would be given. That being so we are afraid that this application has no merits whatsoever and we consider that there is no reason therefore for cancelling the forfeiture. We have considered the question as to whether we should remit a part of the bail bond but the sum was only LP. 100 and we do not feel that there would

therefore be any justification, in the circumstances, in remitting part of this sum.

The application is dismissed.

Delivered this 24th day of March, 1942.

CIVIL APPEAL No. 223/41.

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

Before:— Edwards, J., Frumkin, J. and Khayat, J.

Between:

1. Yacub Abdel Rahim el Hirbawi
2. Muhammad Rashid el Hirbawi
3. Hafiz son of the late Ahmad el Hirbawi

on behalf of the estate of the late Ahmad el Hirbawi. Appellants

v.

1. Amin Ahmad Diab on behalf of all the heirs of Ahmad Diab.
2. Mamduh Ibn Muhammad Sharif el Nuss, on behalf of all the heirs of Muhammad Sharif el Nuss who died during the proceedings. Respondents.

and between:

1. Muhammad Rashid el Hirbawi
2. Hafiz son of the late Ahmad el Hirbawi

on behalf of the estate of the late Ahmad el Hirbawi. Appellants

v.

1. Amin Ahmad Diab on behalf of all the heirs of Ahmad Diab.
2. Mamduh Ibn Muhammad Sharif el Nuss, on behalf of all the heirs of Muhammad Sharif el Nuss who died during the proceedings.
3. Salwa Khanum widow of Muhammad Sharif el Nuss.
4. Omar son of Muhammad Sharif el Nuss and 7 others

Respondents.

(By order of Supreme Court dated 14.1.42).

Action filed in name of a partnership of which one partner dead — Heirs of deceased partner claiming to have stepped into shoes of their testator — Foreign partnership carrying on business in Palestine, not registered

1. (a) If one of partners dies partnership no longer exists and no proper action can be brought in its name.

(b) In absence of evidence that surviving partner assumed heirs of deceased as partners or evidence of an agreement between original partners that in event of death partnership should continue with heirs, latter cannot be said to have stepped into testator's shoes as far as partnership concerned.

2. A foreign partnership, by forming a partnership in Palestine, must be regarded as carrying on business in Palestine, and if not registered — illegal and cannot sue here.

3. If action could never have been brought, fact that certain matters not argued or certain other not contested in trial Court — irrelevant; judgment cannot stand.

Edit. Note:— As to 2 see: CA 194/33 2 PLR 289 and CA 140/26 1 PLR 99; CA 83/27 1 PLR 206 referred to.

Abcarius for Appellant No. 1. *Eisenberg* for Appellant No. 2. *Eliash & Kehaty* for Respondents Nos. 1—10.

Appeal from judgment of District Court, Jerusalem, dated 17.10.41, in Civil Case No. 129/36.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, whereby the appellants as heirs of one Ahmad el Hirbawi, deceased, were ordered to pay LP. 423 on the basis of certain promissory notes to the respondents on behalf of the estate of one Mohammad Sharif el Nuss and Ahmad Diab. The action was originally filed in the name of a partnership called "Ahmad Diab and Mohammad Sharif el Nuss". Before the action was filed, one of the partners had already died and during the course of the action the other partner died. Now, it is clear that the partnership was dissolved by the death of one of the partners and it is quite impossible to understand how the action could have been brought in the partnership name. Mr. Kehaty, respondents' advocate, at the hearing before us, suggested that the heirs of the deceased partners stepped into the shoes of the deceased as far as the partnership was concerned. There is, however, no evidence that the surviving partner ever assumed the heirs as partners nor is there evidence of any agreement between the original partners that, in the event of the death of one of them, the partnership should continue with the surviving heirs of the deceased. A certain trade circular was produced; but that document proves nothing. It is apparent, therefore, that at the time when the action was brought, there was no proper partnership in existence, and it is difficult to understand how any proper action could have been instituted.

Now, Mr. Kehaty at the hearing before us, said that the action was brought by a Syrian partnership. He says that the Syrian partnership was entitled to sue on bills for debts owing to it by a guarantor. He says that the action was brought on behalf of the Syrian partnership and not on behalf of the Palestine partnership. His argument is that the partnership in Syria entered into a partnership in Palestine composed of the Syrian partnership as one partner and one Yacub Hirbawi of Hebron, Palestine, as the other partner. He says that it was the Syrian partnership which were plaintiffs and he contends that the Syrian partnership was entitled to bring an action in Palestine without being registered in Palestine, and in support thereof he cited C. A. 194/33 P. L. R. Vol. 2 p. 289. He denies that Hirbawi was an agent for the Syrian Partnership. He says that Hirbawi was not a member of the Syrian

Partnership. Reference was also made to Civil Appeal 83 of 1927 P. L. R. Vol. 1, p. 206.

Now, it seems clear to us that the Syrian partnership, by forming a partnership in Palestine, must be regarded as carrying on business in Palestine. It was not registered in Palestine and therefore it was an illegal body under Section 70 of the Partnership Ordinance, and it could not sue in Palestine. We refer also to Section 74 of the Partnership Ordinance. Evidence was taken on commission in Syria and it is clear from that evidence that the plaintiff firm was carrying on business in Palestine with Hirbawi. Mr. Kehaty argues that, because certain matters were not argued in the Court below and because of the fact that certain matters were not contested in the Court below, the appellant cannot take those points now. If, however, the action could never have been brought it seems clear to us that the judgment cannot stand. Certain other matters were argued ; but it is unnecessary to deal with them. The appeal should be allowed on one point alone, namely, that at the time when the action was brought one of the partners was dead and the partnership therefore no longer existed. It is equally clear, however, that the appeal should be allowed on the ground that the partnership was carrying on business in Palestine and was not registered and was consequently illegal and therefore could not sue. We accordingly allow the appeal and set aside the judgment of the District Court and the action of the respondents is dismissed with costs here and below, that is, against respondents 1 to 10 inclusive costs of this appeal to be taxed on the lower scale and to include an advocate's attendance fee of LP. 10 to each advocate.

Delivered this 18th day of March, 1942.

HIGH COURT No. 23/42.

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

Before:— Copland, J. and Rose, J.

Between:

1. Yacoub Bey Tewfic el Chussein.
2. The heirs of Tewfic Bey el Chussein. Petitioners

v.

1. The President District Court, Jaffa, sitting as CXO.
2. Hemnutah Ltd.
3. The Agricultural Mortgage Co. of Pal. Ltd. Respondents.

and between:

1. Yacoub Bey Tewfic el Chussein.
2. The heirs of Tewfic Bey el Chussein. Petitioners

v.

1. The President District Court, Jaffa, sitting as CXO.

2. Hemnutah Ltd.
3. The Agricultural Mortgage Co. of Pal. Ltd.
4. The Arab National Fund Ltd. Respondents.

(By order of the Court dated 18.3.42).

Chief Execution Officer disallowing bid on ground that security tendered by him in place of deposit insufficiently stamped — Highest bid published by mistake as substantially exceeding real last bid — Chief Execution Officer allowing last bidder whose security was defective to replace preceding bidder — Application in High Court not mentioned in petition.

1. Bid in Execution Office not accompanied by prescribed deposit, whether in cash or in security as Chief Execution Officer may order, — not a valid bid.

2. High Court will not entertain application on a point not mentioned in petition.

Edit. Note:— As to 2 see HC 39/41 9 CtLR 191; HC 80/40 8 CtLR 107.

Cattan & *Chussein* for Petitioners. *Levin* & *Persitz* for Resp. No. 3. *Abcarius* & *M. Y. Husseini* for Respondent. No. 4.

Application for an order to issue directed to respondents calling upon them to show cause why order dated 27.2.42 made by 1st respondent in Jaffa Execution Files Nos. 2767/37 and 1841/38 should not be set aside and/or why auction for sale of mortgaged property in question should not be extended for one further month in accordance with his previous order dated 23.1.42.

ORDER

This is a return to an order nisi asking that an order made by the Chief Execution Officer in Jaffa Execution Files 2767/37 and 1841/38 should be set aside and further asking for an extended auction of one month in accordance with the Chief Execution Officer's previous order dated 23.1.42.

In the first place we can state straight away that we see nothing wrong in Execution File 1841/38. There are no possible objections that can be urged against the Chief Execution Officer's order. The auction was held in the presence of the Chief Execution Officer. The bid LP. 4,250 was the highest bid given and was accepted as such on the 23rd February, 1942, and then later on, on the 6th March, 1942, another Chief Execution Officer agreed to the substitution of the 4th respondents in place of the 2nd respondents as the purchasers of the property comprised in this particular file. The only real dispute comes in regard to the amount of the bid in file 2767/37.

Now, these execution proceedings commenced in the year 1937 and 1938 and it is a fact, not disputed apparently, that since that date only a comparatively minor sum, stated to be LP. 170, has been paid by the

first petitioner in respect of three mortgages. When the auction was held on the 27th February, there were two bids finally before the Chief Execution Officer, one LP 5,500 made by the 2nd respondents and one for LP. 6,000 made by the 4th respondents. The Chief Execution Officer disallowed the bid for LP. 6,000 on the ground that the guarantee which had been tendered in place of the deposit of 10% on the amount of the bid was not in order having been insufficiently stamped. Now we do not say that the Chief Execution Officer was wrong in this respect in making this order because a bid is only completed by the deposit of 10% whether in cash or in security as the Chief Execution Officer may order, that is to say, the mere offer of a bid not accompanied by the deposit is not a valid bid, but a further point arises in this case which affects the matter to a considerable extent.

Before the final auction was held before the Chief Execution Officer, the amount of LP. 6,000 had been published in the papers in accordance with instructions and the usual procedure, as the amount of the last highest bid then accepted, and the petitioner complains that the fact that that sum of LP. 6,000 was mentioned as the last bid prejudiced him because it prevented anyone who was prepared to offer a sum between LP. 5,500 and LP. 6,000 from appearing at the auction. He argues that the acceptance by the second Chief Execution Officer of LP. 5,500 and the substitution of the bidder by the 4th respondents has caused him considerable harm. He also asks for the auction to be extended and a further delay of one month to be given. The delay of one month which was granted on the 23rd of January, 1942, has already been completed and we see no reason why any further extension of auction should be given but we do feel that there is some substance in the argument that the publication of the LP. 6,000 in the papers may quite possibly have misled intended bidders even if unlikely, it might be possible. The petitioners also ask that, at any rate, the sum of LP. 6,150 should be the sum to be allowed in respect of the property in file 2767/37 but if we turn to the petition we find that there is no mention of their objection to this Court of this sum of LP. 6,150. We therefore think that the rule nisi granted should be discharged but with the alteration of the figure of LP. 5,500 in the order of Judge Bodilly in respect of Execution file 2767/37, to the sum of LP. 6,000 to be paid by the 4th respondents — otherwise with the exception of this alteration the rule nisi is discharged. We allow the sum of LP. 10 as total costs to each of the 3rd and 4th respondents. We allow the same figure because the 4th respondents have substantially succeeded in their opposition to the rule nisi.

Delivered this 27th day of March, 1942.

CIVIL APPEAL NO. 256/41.

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

Before:— Edwards, J. and Frumkin, J.

Mustafa Rida el-Khairi — Appellant.

v.

Nicolas Schmidt — Respondent.

Land Settlement Officer deciding in favour of holder of Kushan as against person setting up defence of prescriptive possession and purchase by private sale — Land Settlement Officer failing to make a finding as to oral evidence of long possession of land — Question of admissibility in evidence against one party of letters written by agent of other party.

1. (a) Letters written by Plaintiff's agent cannot bind Defendant or be held up against him.

(b) Term "ancient documents" in English text books on evidence refers to title deeds, public records or certified copies thereof etc. not to ordinary letters.

2. If Settlement Officer had before him official receipts for tithe and werko and oral evidence as to prescriptive possession but failed to make a definite finding on it, while admitting documents which he should exclude, case will be remitted to him for fresh judgment on that oral evidence plus tithe and werko receipts.

Edit. Note:— CA 92/39 6 CtLR 162 referred to.

Abcarius for Appellant. *H. Atallah* for Respondent.

Appeal from decision of Settlement Officer Ramleh Settlement Area, in Case No. 22 Kunaiyisa, dated 29.11.1941.

JUDGMENT.

This is an appeal from a judgment of the Land Settlement Officer, Ramleh Settlement Area, in his case No. 22/Kunaiyisa, whereby he found in favour of the present Respondent, then Plaintiff, and ordered registration of certain parcels of land in his favour. Respondent was the holder of a kushan, while the present Appellant relied on prescription under Article 20 of the Land Code, he having purchased by private sale. The Land Settlement Officer heard oral evidence, and in paragraph 9 of his judgment he said :

> "In general, however, the oral evidence heard by me, even that of the witnesses for the plaintiff, is to the effect that the defendant was in possession of the Lands since about the time when the Great War began in 1914, and that the plaintiff was never in possession of any of it."

It is to be noted that he does not say whether he believed or disbelieved the oral evidence. The difficulty in this case has arisen from the fact that the Land Settlement Officer went on to consider the effect of certain documents, that is to say, the effect which these documents

might or should have on the question of the defendant's possession. Abcarius Bey, the Appellant's advocate, has argued that there was no proper documentary evidence before the Land Settlement Officer which he should have considered. It seems that the first document which the Land Settlement Officer had before him was a mazbata, namely exhibit P. 17. In paragraph 13 of his judgment he said that he did not attach much value to this certificate as evidence. This being the case, we think that he should have entirely disregarded it. He next went on to consider three letters signed by one, Salih Hassan, now deceased, who was apparently the agent of the Respondents exhibits P/18, P/19 and P/20. Now Abcarius Bey has argued with force that what is contained in those letters is not proof of their contents and cannot bind his client, nor can they be held up against him. We agree with this submission.

Respondent's advocate, Mr. H. Atallah, suggested that they should be regarded as "ancient documents" as referred to in Best on Evidence, 12th Ed., by Thipson, page 422, para. 499, but we are not prepared to hold that ordinary letters can be regarded as "ancient documents", which term we consider is meant to refer to such documents as title deeds, public records, or certified copies of public records, etc. We consider that the Land Settlement Officer should have excluded these three documents from consideration. It seems, therefore, that the sole material before the Land Settlement Officer proper for him to consider, was the oral evidence as to possession, plus such official receipts for tithe and werko as were produced by the present Appellant. It will be noted that, as we have said, the Land Settlement Officer made no definite finding on the oral evidence.

The case must accordingly be remitted for him to give a fresh judgment on that oral evidence, and for him to decide whether on that evidence the present Appellant has made out a defence under Article 20 of the Land Code and Section 51 of the Land (Settlement of Title) Ordinance. We would call the attention of the Land Settlement Officer to Civil Appeal 92/39 *) of this Court, reported in Vol. 6, P. L. R., at page 511.

We, accordingly, set aside the judgment of the Land Settlement Officer and remit the case for him to give a fresh judgment in the sense which we have intimated. Costs to abide the event ; we certify LP. 15 for advocate's attendance fee at the hearing of this appeal.

Delivered this 16th day of March, 1942.

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*) 6 CtLR p. 162.

HIGH COURT No. 48/41.

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

Before:— Trusted, C.J. and Rose, J.

Kupath Milveh Wehissachon Lebaalei Melacha Coop. Soc. Ltd., Petitioner.

v.

1. Chief Execution Officer, Tel Aviv
2. Jacob Medalia Respondents.

Land Court confirming Plaintiff's title to house and ordering Defendant to deliver possession to Plaintiff — Occupiers of house objecting to their being evicted claiming that judgment could only be executed against Judgment Debtor — Chief Execution Officer ordering Judgment Creditor to produce judgment for possession against occupiers other than Judgment Debtor — Proper course under provisions of Execution Law in cases of judgments for eviction affecting 3rd parties.

Third party occupying premises possession of which adjudged to Plaintiff and claiming that order of eviction cannot affect him must invoke provisions of art. 43, Execution Law (providing for opportunity to be given to 3rd party to apply to Court for stay of execution), failing which the order will be executed also against him.

Edit. Note: See HC 59/41 10 CtLR 66.

Shwartzmann and *Uziel* for Petitioner

Kadury for Respondent No. 2.

Application for an order to issue calling upon First Respondent to show cause why his orders in Execution File No. 9709/40, Tel Aviv, dated 14.2.41 and 14.3.41 should not be set aside, and why he should not execute judgment of Land Court, Tel Aviv No. 3/39, dated 16.4.40, by delivering possession of whole property in question to Petitioner.

ORDER

This is an application for an order directed to the Chief Execution Officer , Tel-Aviv. It seems to me that this case presents no difficulty.

In an action brought in the Land Court, Tel-Aviv, by the present Petitioner, the Court held —

> "It (the Court) confirms the title of the Plaintiff to the property, and in view of the Land Court Amendment Ordinance, 1939, orders Defendant to give Plaintiff possession of the property".

This judgment was put in the Execution Office, and Judge Many, in his capacity as Chief Execution Officer, noted on it — "To execute".

When execution was to be effected it was found that the children of the second Respondent were in occupation of the premises, and they objected to the judgment being executed against them on the ground that they were not parties to it. Whereupon Judge Plunkett ruled, on 5.11.40,

> "The judgment is apparently against Medalia, and can only affect such property as is registered in his name".

In a later order, dated 8.1.40 (? 41), the Chief Execution Officer ruled—

> "The Bank has been declared owner of all the property (Judg. 16.4.40) and is therefore entitled to possession of the whole property".

The occupiers of the house then made further objection and pointed out to the Chief Execution Officer that the judgment which the Petitioner was seeking to execute was against the second Respondent, and could only be executed against him. Whereupon the Chief Execution Officer made the following order on 14.2.41:—

> "It would appear that the Land Court judgment 17.10.39, was only as to the question of possession which was not at the time a case for the Land Court."
>
> "The Plaintiff must produce a judgment for possession from a competent Court in respect of the names of the Defendant(s)".

The Petitioner was not satisfied with this order and made application to the Chief Execution Officer requesting him to hear the parties and to vary it. Upon the hearing the occupiers contended that they were not a party to the proceedings in the Land Court, although originally they had been, the proceedings having been dismissed against them for want of jurisdiction. The Chief Execution Officer, after hearing the parties, directed: "No further order".

Article 43 of the Execution Law is clear, and reads:

> "If the property have changed hands since the decree this shall have no effect on the execution. The place stated in the decree must be vacated by the person who is in possession. If persons other than the judgment-debtor are residing in the place which is to be vacated and if they claim at the Execution Officer that their possession is adverse to or independent of the judgment-debtor and that they have not borrowed or rented the said place from him and produce documents to support their claim, they shall be given sufficient time to apply to the Court to obtain an order for stay of execution and proceedings will follow the event of the suit."

It was upon the third parties to invoke the provision of this article if they wished. They have had ample time to do so, but have not done so.

In these circumstances the rule will be made absolute. No order as to costs.

Delivered this 10th day of July, 1941.

HIGH COURT No. 26/42.

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

Before:— Copland, J. and Abdul Hadi, J.

Kenda Leah Koltunovsky — Petitioner.

v.

1. The Chief Execution Officer in the District Court of Haifa
2. Nachman Koltunovsky
3. Yehuda Koltunovsky Respondents.

Judgment in favour of father against son for cancellation of registration of house in son's name and order of eviction of son — Father wife living in house to be vacated declining to go — Refusal of Chief Execution Officer to stay execution — Failure of wife to invoke provisions of art. 43 of Execution Law as interpreted in two High Court judgments regarding application to Court for order staying execution.

1. Person, other than judgment debtor, wishing to remain in place to be vacated must petition Court under art. 43 of Execution Law (3rd sentence) for order suspending execution.
2. Where High Court decides that it cannot interfere with execution of judgment, not for it to give parties time to adopt line of procedure they may think fit.
3. (*Obiter*) Under Civil Law in Palestine wife has no rights in husband's property apart from those which he may allow her to exercise.

Edit. Note:— As to 1 see HC 48/41 11 CtLR 121 and HC 59/41 to CtLR 66 followed.

J. Shapiro for Petitioner. *Levitsky* for Respondent No. 2.

Application for an order to issue directed to 1st respondent calling upon him to show cause why his order dated 21.3.42, in Haifa Execution Office file No. 11/42, should not be set aside and why he should not refrain from evicting petitioner from premises occupied by her at 37, Hechalutz Street, Haifa.

ORDER

This is a return to an order nisi granted to a woman asking for an order that her eviction from her husband's house should not be carried out. Apparently for some 16 years the husband and wife most unfortunately had not been living together. There is proof in the case before the District Court that the husband had sent money to his son in Haifa for the erection of a house for his (father's) benefit, and that the son had registered this house as his own property in his (son's) name. In an action in the District Court the present second respondent, the husband, got a judgment in his favour cancelling registration in the son's name and ordering registration in his own name, and he also got an order of eviction of his son, the third respondent in this case. When the Execution Officer went to execute, he found that the second respondent's wife was living in these premises and she declined to go. The Chief Execution Officer refused to stay execution and the wife has now come to this Court.

Now, it is difficult to see under the Civil Law of Palestine (because I understand Jewish Religious Law is different) what rights a wife has in her husband's property apart from those which her husband may allow her to exercise. I do not think that it is possible for a wife to go and say "I am going to reside in such and such a house belonging to my husband", and that if he does not want it he must ask for an eviction action to dispossess her. That would make domestic relations even more complicated than they already are in many instances.

In our opinion, this case depends upon article 43 of the Execution Law. Article 43 has last year been subject to two interpretations, both the same, namely, in High Court Cases Nos. 48/41 *) 8 PLR 298 and 59/41 **) 8 PLR 353. In the second one of these cases the Court decided that the third sentence in article 43 is entirely independent of the first two sentences, i.e. if persons are residing in a place which is to be vacated they must apply to the Court to obtain an order of stay of execution. The first High Court case, No. 48/41, laid down that on the proper interpretation of article 43 it was upon the other parties to invoke the provisions of this article if they wished.

The provisions of article 43 have not been invoked by the petitioner, and for these reasons the rule nisi must be discharged.

With regard to the request that we should give time, we do not think that we should do so. If we cannot interfere with the execution, it is not for us to give time to parties to adopt whatever other lines of procedure they may think fit.

The rule nisi is, therefore, discharged. The second petitioner will have his costs fixed at an inclusive sum of LP. 5.

Given this 13th day of April, 1942.

CIVIL APPEAL NO. 237/41

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

Before:— Rose, J. Frumkin, J. and Khayat, J.

Muhammad Adib el Mutawalli, in his capacity as Mutawalli of Waqf Sinan Pasha. Appellant.

v.

Muhammad Ali el Nakib el Husseini & 7 others Respondents

Application to District Court by lessee of land that he is entitled to receive tithes payable on it — Trial Court finding that applicant has for several years received the tithes of the land concerned — Both parties making admissions in Court of Appeal as a result of which finding of trial Court cannot stand.

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*) 11 CtLR p. 121. **) 10 CtLR p. 66.

While Court of Appeal will seldom interfere with findings of fact, position different where admissions before them both by counsel for Appellant and Respondent show that finding of trial Court not in accordance with what actually happened.

Edit. Note:— See cases cited in Edit. Note to CA 226/41 11 CtLR 5.

L. Salah for Appellant. *Ayoubi* for Respondents.

Appeal from judgment of District Court, Jaffa, dated 16.11.41, in Civil Case No. 37/41.

JUDGMENT

This is an appeal from the District Court of Jaffa. Various preliminary and technical points were taken by advocates on both sides but as we think that there is no substance in any of them we need not deal with them in detail.

As to the substantial appeal, it appears that the respondents who had leased certain lands from the appellant asked for a declaratory judgment that they were entitled to receive certain tithes payable on the land, the subject matter of the lease. The money was in fact in the hands of Government. They relied on an exhibit called Exhibit 'A', the contract of lease, which ran from the 1st January, 1940, to 31st December, 1942, and the relevant part of this document says that the lessees are entitled "To draw ordinary benefit from all the leased properties in accordance with the current practice which has been going on in respect of them in pursuance of the previous contract of lease for a period of three full years".

Assuming that on the question of law these tithes can be said to fall within the words "Ordinary benefit from all the leased properties", we have to consider the findings of the Court below. The finding of fact of the Court below, on the face of it, would seem to be in favour of the respondents, the Court holding : "It has appeared that the plaintiffs, (respondents), have for several years received the tithes of the land concerned".

Unhappily that finding of fact does not seem to be in accordance with what actually happened. While, of course, this Court will seldom interfere with findings of fact the position is different when, as in this case, we have admissions both by counsel for the appellant and respondents stating that so far from having received the tithes for a period of three years prior to exhibit 'A', the respondents only received them for one year, a dispute having arisen as to what should be done with the remaining two years' tithes. The point then to consider, which is a very short one, is whether the respondents are entitled to have a declaratory judgment in the terms in which it has been given to them when in fact they have, on their own admission, been unable to establish the practice, the proof of which is essential for them to succeed. It seems to me that

as the respondents have failed in this first step, the judgment of the Court below cannot stand.

No doubt the parties concerned will consider their position and will avail themselves of other opportunities of having this substantial question of law and fact decided before the appropriate Court. As far as this appeal is concerned, we are of opinion, that the appeal must be allowed and the judgment of the Court below set aside. The appellant will have his costs here and below, the costs of this appeal to be on the lower scale and to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 22nd day of December, 1941.

— — —

CIVIL APPEAL No. 229/41.

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

Before:— Rose, J. and Edwards, J.

The Palestine Edible Products, Ltd. Appellant.

v.

Meir Hershmann Respondent.

Application to set aside arbitrators' award on account of misconduct — Allegation of misconduct in that party to arbitration was allowed to pay arbitrators' fee by promissory notes — Allegation of improper communications of arbitrator with party appointing him — Arbitrators taking draft award to advocate for him to put it into legal shape — Refusal of arbitrators after summing up of advocates to allow further witnesses to be called.

1. Where all three arbitrators decide to allow one of parties to pay arbitrators' fee by promissory notes and decision recorded in minutes this does not amount to misconduct.

2. Where arbitrators draft an award and make an advocate put in into better shape and both versions (draft and ultimate form) substantially same, one cannot say they improperly delegated their powers or misconducted themselves.

3. *a)* Where award asked to be set aside on account of misconduct, — quite wrong to put arbitrator into position of having to explain how he arrived at his findings of facts.

b) Arbitrator fully entitled to refuse to answer in Court questions as to how he arrived at findings of facts; but if he does answer, his answers cannot be a ground for setting aside award, if award, on face of it, not unreasonable or capricious.

4. If after agreed witnesses called by both sides arbitrators decide that hearing of witnesses finished and then advocates sum up their respective cases, a matter for discretion of arbitrators to grant or refuse request at that stage by advocate to call more wirnesses; refusal in such circumstances — not misconduct.

Werner for Appellant. *Margolin* for Respondent.

Appeal from judgment of District Court, Haifa, dated 28.7.41, in case No. 190/40.

JUDGMENT

This is an appeal from a judgment of the District Court, Haifa, dismissing an application to set aside an arbitrator's award. The Appellants allege that the arbitrators concerned were guilty of various acts of misconduct.

First it is alleged that one of the parties to the arbitration, the ultimately successful party, was permitted to pay the arbitrators' fee by promissory notes (or partly by promissory notes) and not in cash. The Appellant argues that the inference to be drawn from this is that the arbitrators improperly had an interest in the result of the arbitration, as it is suggested that the party concerned was poor, and that if he had been unsuccessful in the proceedings he might have been unable to meet the promissory notes. It should be noted that the decision to allow payment by promissory notes was made by the three arbitrators, including the arbitrator appointed by the Appellant, who in fact made a dissenting award. Also, that the decision to allow payment by this method was recorded in the minutes of the meeting. Whether or not these minutes were brought to the knowledge of the Appellant I do not know, but I agree with the Court below that whether they were or not, the conduct of the arbitrators in this matter did not amount to misconduct so as to justify the setting aside of the award.

The next allegation made is that the arbitrator appointed by the Respondent held improper communications with the party appointing him, which may have influenced his decision. That, I should have thought, was eminently a question of fact, and the Court below finds on that, that the Appellant has failed to establish the allegation. It seems to me that the Court of Appeal should not interfere with this clear finding.

The next allegation is that the arbitrators delegated their authority improperly to a certain advocate, Mr. Lipshitz, who in fact made the award. What actually happened the arbitrators admit, and Mr. Lipshitz substantially confirms, namely, that the arbitrators took a rough draft of the award, Exhibit A. K. 2, a translation of which is before us, to an advocate for him to put it into legal shape. It is now suggested that so far from doing this Mr. Lipshitz substantially altered the award. The trial Court unhesitatingly found that the two documents, the draft and the final award, were in substance the same, and looking at the two documents we come to the same conclusion. In the draft award prepared by the arbitrators they decided that a sum of LP. 315 should be paid to Mr. Hershmann. They found by implication that there had been a stoppage of supplies, and they set out certain mathematical calculations which indicate how they arrived at their conclusion. If we turn to Mr. Lipshitz's version of this award we see that the figure LP. 315 is still there, that the details are still the same mathematically, the

only difference being that he sets out the facts very shortly to justify the figures e. g. where the arbitrators say —

> "By this the plaintiff has sustained considerable damage 16×15=240".

Mr. Lipshitz says —

> "Damages for stoppage by Mazon of supply of goods during a period of 16 months, i.e. from date of cessation of supply until the end of the period of agreement at the rate of LP. 15 a month, in total LP. 240."

With regard to the item of LP. 75, it is set out as follows:—

> "Damages which Hershman had to pay to his sub-agents Messrs. Haim Azran, Afuleh, Yisrael Goldfinger, Haifa, M. H. Kaminer, Haifa, namely LP. 25 to each of them, in total LP. 75."

It seems to us that there is nothing objectionable in that. These gentlemen produced a rough draft to an advocate to put it into better shape. I think there is no ground whatever for saying that they improperly delegated their powers to Mr. Lipshitz, or that they were in any way influenced by Mr. Lipshitz in arriving at their conclusion.

Another point was taken that the award should be set aside because the chairman of the arbitrators who was called as a witness before the learned Relieving President admitted in evidence that a certain part of the damage assessed by the arbitrators was not proved before them, and the District Court did not disbelieve that admission. As I intimated during the course of argument, it seems to me quite wrong that in a case of this kind, when an award is asked to be set aside on account of misconduct, the arbitrator should be put into the position of having to explain how he arrived at his findings of fact. It seems to me that an arbitrator is fully entitled to refuse to answer such questions ; but if he does answer, his answers cannot be a ground for setting aside the award if in fact the award, on the face of it, is not unreasonable or capricious.

The only remaining point is the allegation that the arbitrators refused to hear three witnesses whom the Appellants wished to call. It appears that after the agreed witnesses had been called by both sides an endorsement was made by the arbitrators —

> "with this was finished the hearing of the witnesses and no more witnesses should be heard."

At the next meeting on 27.6.40 the advocates of the parties summed up their respective cases, and advocate for the Appellant asked to call three more witnesses in order to hear further evidence. The arbitrators refused his request. The matter was eminently one for their discretion, and I cannot think that in such circumstances a refusal can be called misconduct.

For these reasons the appeal must be dismissed, with costs on the lower scale to include the sum of LP. 5 for advocate's attendance fee.

Delivered this 17th day of December, 1941.

CIVIL APPEAL No. 250/41.

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

Before:— Rose, J. and Edwards, J.

1. Julia, wife of Abed Khayatto, born Meheshem
2. Nabiha, wife of Ibrahim Azzam, born Mehesham. Appellants.

v.

Yusif Mehesham. and 3 others. Respondents.

Member of Latin Community dying in 1901 *leaving a Will by which his property goes to his wife and sons, daughters' share of estate to be a fixed amount of money — Registration of property in* 1917 *in accordance of Certificate of Succession in name of all heirs without knowledge of sons — Action by sons in* 1932 *for cancellation of registration — Question of validity of Will certified in* 1901 *by a person signing as spiritual head of community.*

1. Under Ottoman Law if person other than Moslem wrote a Will in presence of witnesses and confirmed it by Patriarch or Metropolite or their deputies (wakies) or, being a foreigner, at Consulate of State to which he belongs — deed deemed proper and executable.

2. If Will certified some 40 years ago by a person signing as spiritual head of religious community and no evidence to throw doubt on validity of certificate or authority of that person to give it, Court will consider Will good.

3. Registration of mulk land upon certificate of succession cannot stand if there is a valid Will covering that land.

Edit. Note: See CA 120/34 2 PLR 447 referred to; LA 145/22 4 C of J 1880 and LA 111/24 5 C of J 1864 followed.

Eliash for Appellants. *Weinshal & Abcarius* for Respondents Nos. 1—3.

Appeal from judgment of Land Court Haifa, dated 21.11.41, in Land Case No. 35/32.

JUDGMENT.

Edwards, J.

This is an appeal from a judgment of the Land Court of Haifa whereby that Court ordered cancellation of registration of certain immovable property and in lieu thereof ordered registration in accordance with the terms of a Will. The facts as found by the Land Court are briefly as follows:

The deceased who was a member of the Latin Community died in the year 1901 having left a will by which his property went to his wife and four sons and there was a bequest of 10,000 piastres to each of his daughters upon their marriage. The signature of the testator was attested and on 18th January, 1901, the Religious Head of the Latin Community in Haifa purported to confirm it.

Two of the daughters subsequently married and each received 10,000

piasters in accordance with the Will — the marriages of each took place within a few months of the death of the Testator.

In October, 1917, the property in dispute, a mulk house, was apparently transferred in accordance with a Certificate of Seccession without (it is alleged) the knowledge of the Plaintiffs (the present respondents) and it was not until 1932, when one of the daughters brought an action against plaintiffs claiming a share in the rents for 1935, that the plaintiffs became aware of the registration. Plaintiffs, therefore, applied for cancellation of that registration.

The main point argued on appeal was as to the confirmation of the will. We shall deal, first of all, with the confirmation of the 18th January, 1901. Before doing so, we think it right to point out that there can be no question that this will was in fact the last will of the deceased Khalil Heheshem. At the hearing before the Land Court, the first defendant, Julia, admitted that her father signed it and that he had made the will three hours before his death. She knew that the 10,000 piasters represented her share of her father's estate and she admitted that it was not until 1932 that she brought an action for rent. The second defendant, Nahiba, likewise admitted that her father made his will in the agency of death and that she received 10,000 piasters to buy her trousseau and that she was married only two months after her father died. There can be little doubt that the will represented the last wishes of the deceased as to the disposal of his estate and that both Julia and Nabiha accepted the 10,000 piasters under the will. There is ample authority in law for the proposition that in 1901 a member of the Latin Community in Palestine was entitled to make a will and to leave mulk land by will. We refer to the following cases, namely, Land Appeal 145/22 Rutenberg's Collection of Judgments, Volume 4 p. 1580, Land Appeal 111/24, Rutenberg Vol. 5, p. 1864. Young's Corps de Droit Ottoman Volume 1, p. 322 and Goadby's International and Inter-religious Private Law in Palestine, p. 104. We also refer to the Palestine Order-in-Council, 1922, Articles 52(1) and 54(1). We have been referred to various commentaries such as Fares of Khoury's commentary on the Ottoman Civil Procedure Code p. 194 dealing with the jurisdiction of the Sharia Court, and to the Vizirial circular of 8th October, 1868, that is, 4 Rajab 1285 H., and to Art. 18 of Khati Hamayouni of 10 Jamad el 'Akher 1272 and to Salim Baz' Commentaries on the Ottoman Civil Procedure Code p. 127. The last named is so important that we here set it out fully :

> "If the maker of the will was other than a Moslem and wrote his will in a deed in presence of witnesses of the notables of his Community, and confirmed it by the Patriarch or the Metropolite or their deputies (wakils), or was a foreigner and confirmed his will at the Consulate of the State to which he belongs, the will is deemed proper and executable, as is inferred from the Circulars issued on

> 12th Safar, 298, and 1st January, 296, by virtue of an Imperial Order."

Now, the only serious objection to the confirmation of 1901 raised by Dr. Eliash, advocate for the appellants, was that the person who purported to confirm the will that is, Father Elias Saba, was not the Patriarch or the Metropolite or a properly appointed deputy. Now, all this happened in 1901. Father Elias Saba signed as the "Spiritual Head of the Latins." There is no suggestion that there was anything fraudulent or that Father Elias Saba was not in fact the Spiritual Head of the Latins. After the lapse of so long a period of time as forty years, and in the absence of any evidence tending to throw doubt on the validity of this certificate by Father Elias Saba or of his authority to give it, we are quite unable to say that Father Elias Saba was not one of those properly appointed deputies such as were contemplated by Salim Bas in the commentary which we have cited. In our view, the confirmation of 1901 must be regarded as being good. It is to be noted that the Land Court was also inclined to consider it good ; in any event they did not hold it to be bad. All they said was that, whatever view one might take of the 1901 confirmation, there could be no question but that the confirmation of 1932 by the Ecclesiastical Court of Nazareth was good. With regard to the 1932 confirmation, Dr. Eliash has cited Civil Appeal 120/34 Vol. 2 P. L. R. p. 447. At p. 448 it is stated :

> "In the case of the Succession Ordinance, 1923, the only provision which affects rights of succession arising on a death prior to the Ordinance is contained in Section 22(ii); and the operation of that Section is limited to cases in which the death occurred since the 31st December, 1918."

Dr. Eliash's contention in this regard may or may not be sound ; as to this we express no opinion, but, as we think that the confirmation of 1901 was good, the appeal must fail. We think it proper, however, to deal with certain other matters argued before us. It is said that it is now too late to upset this registration. This action was brought in 1932 and there was, of course, no cause of action till 1917 when registration was effected on the assumption that there had been an intestacy. It is quite clear that the defendants to the present action did nothing till 1932 when Julia brought an action for rent against one of her brothers. The defendants Nos. 1 and 2 were never in actual possession and it was admitted that the present respondents were in actual physical possession. In the judgment of the Land Court it was stated that it was not until 1932 when Julia brought her action claiming her share of the rents for 1925 that the present respondents became aware of the registration. This statement does not seem to have been disputed. Now, a certificate of succession is merely a certificate stating who are the heirs and what are their shares in movable and mulk immovable property, in the event of an intestacy. It is clear, therefore,

that a registration following on a certificate of succession cannot be allowed to stand if there is a valid will covering mulk immovable property. We, therefore, think that there is nothing in the contention of the appellants' advocate on this ground. Dr. Eliash raised a point with regard to Article 55 of the Order-in-Council; but Article 55 refers to actions of personal status involving persons of different religious communities. In the case now before us there is nothing to show that all the sons and daughters of the late Khalil Mehesham were not members of the same community, namely, the Latin Community. In the result, the appeal fails and is dismissed.

The appellants will pay one set of costs to the first and 2nd Respondents to be taxed on the lower scale, to include an advocate's attendance fee of LP. 15. The Appellants will also pay the costs of the 3rd Respondent to be taxed on the lower scale to include an advocate's attendance fee of LP. 15.

No costs to the 4th Respondent.

Delivered this 17th day of April, 1942.

CIVIL APPEAL No. 196/41.

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

Before:— Gordon Smith C.J., Frumkin, J. and Khayat, J.

Between:—

1. Aziz Khayat
2. Michel Nieme
3. Anis, son of Hanna Nieme through his guardian S. Nieme.
4. Suraya Assili, widow of the late Hanna Nieme of Haifa.
5. Evelyne Hanna Nieme of Haifa.
6. Gabriel Hanna Nieme
7. Abla and Ideh, children of Hanna Nieme, through their guardian Shukri Nieme.

Appellants.

v.

1. Magda Schantz, as guardian of Erica Elizabeth Unger, heir of the late Johanna and Hans Unger, and heir of Ruth Wilhelmine Unger.
2. The Custodian of Enemy Property, representing the interests of,
   (a) Rudolf Jacob Unger and Hans Unger, heirs of the late Johanna and Hans Unger, and heirs of Ruth Wilhelmine Unger.
   (b) Fritz Ernst Unger, as heirs of Ruth Wilhelmine Unger.

Respondents.

and between:

same Appellants.

v.

same Respondents.

(By order of this Court, dated 24.2.42).

Action before Magistrate's Court for partition of land — Claim by one of parties of independent possession and ownership of certain parcel (exceeding in value LP. 150) proposed to be included in partition Magistrate giving claimant of ownership time to apply to competent Court, and adjourning case — District Court entertaining appeal against Magistrate's decision regarding grant of time and adjournment — Question whether decision of Magistrate giving party time to bring an action in competent Court appealable as of right.

Where party before Magistrate's Court alleges certain rights affecting the action and Magistrate, having no jurisdiction to adjudicate thereon, decides, without making any decree determining rights of parties with regard to matter in dispute, to give claimant time to apply to competent Court, such decision to adjourn — not appealable as of right.

Edit. Note: See CA 18/41 9 CtLR 77; CA 86/40 7 CtLR 193.

F. Atalla for Appellant No. 1. *Weinshall* for Appellants Nos. 2—7.
J. Levy for Respondent No. 1.

Appeal from judgment of District Court, Haifa, sitting as a Court of Appeal, dated 27.6.41, in Civil Appeal No. 27/41.

JUDGMENT.

This was an action before the Magistrate's Court claiming partition of certain land, for which jurisdiction is conferred by paragraph (d) of section 3 of the Magistrates' Courts Jurisdiction Ordinance, 1939, and the matter was therefore properly before the Magistrate.

It transpired during the course of the proceedings that one of the owners claimed that the whole of a certain parcel which it was proposed to include in the partition, was in this owners possession independently, and was not co-owned by him with the other owners. The value of this disputed piece of land was such that the Magistrate had no jurisdiction to adjudicate on this claim of ownership. He was therefore in the position that if he proceeded with the partition he would, in effect, be adjudicating upon the question of ownership, that is, whether he included the disputed parcel of land in his order for partition, or whether he excluded it. He therefore gave a judgment in the following terms:

> "I decide to grant Mr. Levy, the Attorney of defendants, a period of 15 days to apply to the competent Court regarding the sole independent ownership of this parcel by his clients, and to adjourn the hearing to 20.2.41, and both parties are informed accordingly."

This judgment was given on the 5th February, 1941, but we under-

stand that thereafter the period of fifteen days mentioned was extended to thirty days.

Against this decision there was an appeal to the District Court, and the preliminary objection was taken at the hearing of this appeal that this order or judgment was not appealable. The District Court held otherwise and dealt with other points taken on the appeal, and sent the case back to the Magistrate for ascertainment as to various facts.

Against this decision of the District Court the Appellants bring the matter before the Supreme Court on various grounds, but if we decide that the decision of the Magistrate was not appealable, then the whole judgment of the District Court on appeal must be set aside. It is necessary therefore to decide this point first.

In the first place, the Magistrates' Courts Jurisdiction Ordinance, by Section 11(5), allows an appeal, as of right, in a partition matter before a Magistrate's Court, and Section 11(10) states that any such appeal shall be heard in accordance with the Civil Procedure Rules. These Rules, however, do not deal with the point in question but detail how such an appeal shall be proceeded with, vide Rule 313 et seq. and Rule 334. The Magistrates' Courts Procedure Rules, 1940, have however been enacted and are relevant, having been made under the authority of the Order-in-Council, and Section 26 of the Magistrates' Courts Jurisdiction Ordinance, 1939. Rule 240 refers back to the Ordinance but Rule 2 defines what is a judgment and what is a decree. A judgment is defined as meaning "the statement given by a Magistrate of the grounds of a decree", and a decree is defined as meaning "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final."

It was submitted before us on behalf of the Respondents that the Magistrate, by reason of the concluding part of the judgment, which I have quoted above, decided the rights of the parties by giving the Respondent time to bring an action to have his rights declared therein.

No formal decree was ever drawn up or entered, and in my view the only thing the Magistrate decided was to adjourn the hearing, to enable the Respondent to take whatever action or steps he might think fit to safeguard his alleged rights.

The Magistrate does not proceed with the partition, gives no decision, exclusive or otherwise, on any matter in dispute and merely states in effect that a claim has arisen therein which he has no jurisdiction to adjudicate upon, and therefore he adjourned the matter to enable such claimant to establish his alleged right before a competent Court or not, as he thought fit.

No appeal from an order by a Magistrate granting an adjournment lies as of right. The Respondent has as yet not brought such action

to establish his alleged rights, but appealed against the decision granting such adjournment, and before the District Court an objection was taken to such appeal, which was overruled.

If the Respondent had waited for the adjourned hearing before the Magistrate, the Magistrate might then possibly have proceeded with the partition, and upon the Magistrate giving a preliminary decision so to proceed with the partition, the Respondent might have asked for a decree in that respect to have been drawn up and entered, and against which the Respondent might have appealed.

The reason for the adjournment given by the Magistrate was really unnecessary, as the Respondent might at any time, and without the Magistrate specifically giving him time to do so, or authority to do so, take action in the proper Court to establish his alleged rights. If the Magistrate had proceeded with the partition and made an order thereon which prejudiced the Respondent in his alleged rights, then equally the Respondent would have had the right to appeal against such order.

In my view the District Court erred in the respect that an appeal lay from the order of the Magistrate's Court, and the order of the District Court, allowing the appeal, should be set aside. It is therefore unnecessary to go into the other grounds of appeal, and on which it was also urged that the District Court had gone wrong.

The order will therefore be that the judgment of the District Court on appeal is set aside, the effect of which will be that the order of the Magistrate's Court, granting an adjournment, remains effective.

The Respondent must pay the costs of both appeals, including attendance fee of LP. 5.— each.

Delivered this 26th day of March, 1942.

HIGH COURT No. 35/42.

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

Before:— Gordon Smith, C.J. and Copland, J.

Benno Marx — Petitioner.

v.

The Commissioner for Migration & Statistics, Acting Director, Department of Immigration. — Respondent.

Director of Department of Immigration refusing application to allot Immigration Certificate to certain minor — Non-interference of High Court where matter discretionary.

High Court will not interfere where matter purelly discretionary, though it may be a hard and harsh case on Petitioner.

Edit. Note:— As to 1 see HC 16/42 11 CtLR 57 and Edit. Note thereto.

Perles and *Gil'adi* for Petitioner. — Ex parte.

Application for an order to issue directed to Respondent calling upon him to show cause why he should not allot one of Immigration Certificates of Category B(iii), given to Jewish Agency for Palestine (Youth Immigration Department) for distribution amongst young immigrants by that Youth Immigration Department, to Petitioner's minor grandson, Heinz Hirschmann.

ORDER.

This application must be refused. The matter is purely discretionary, with which we will not interfere. It may be a hard and harsh case on the Petitioner, but with this we are not concerned.

Given this 17th day of April, 1942.

CRIMINAL APPEAL No. 44/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Gordon Smith C.J., Rose, J. and Frumkin, J.

Mahmoud el Jammal Appellant

v.

Local Town Planning Commission of Ramleh Respondent.

Appeal from judgment of Magistrate's Court convicting and sentencing appellant — Appellate Court finding that no evidence to support charge and allowing appeal, yet remitting case for retrial.

If appellate Court allows appeal on basis that no evidence to support charge, it cannot remit case for retrial but must acquit appellant.

Edit. Note:— See CrA 107/40 9 CtLR 164; CrA 75/39 7 CtLR 29; CrA 70/39 ibid 37; CrA 56/40 ibid 201.

Siksik for Appellant. *Municipal Engineer* (*Badawi*) for Respondent.

Appeal from judgment of District Court, Jaffa, sitting as a Court of Appeal, in Criminal Appeal No. 1/42, dated 14.2.42.

JUDGMENT

This appeal should be allowed. In his judgment the learned President of the District Court found that there was no evidence to support the charge; he then allowed the appeal and remitted the case to the Magistrate's Court for retrial. In this he erred. Once he allowed the appeal on the basis that there was no evidence to support the charge, he should have acquitted.

The appeal is therefore allowed, and the conviction and sentence quashed. The Appellant will have his costs, which we fix at an inclusive sum of LP. 10.

Delivered this 15th day of April, 1942.

CIVIL APPEAL No. 141/41.

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

Before:— Copland, J. and Khayat, J.

The Custodian of Enemy Property in Palestine on behalf of Societa Marmifera Italiana Henraux, also styled as Societa Anonima — Henraux. Appellant.

v.

1. "Hamachtsav" (Levin Bros., Michael Neustadt, Joseph Mendelson).
2. Elkana Levin.
3. Michael Neustadt
4. Joseph Mendelson. Respondents

Bills drawn upon Partnership whose Firm name includes names of partners — Sub-agent of foreign Company agreeing that certain member of partnership, drawee of bills, should not be liable thereon, although acceptance on bills purports to be on behalf of Partnership — Effect of stating incorrectly name of Partnership in acceptance of bills by omitting name of partner forming part of Firm name.

1. Where drawer through his agent or sub-agent agrees not to hold certain member of partnership liable on bills drawn upon it and purporting to be accepted on behalf of it, such member — free from liability.
2. Where name of partnership not correctly stated in acceptance of bill, only persons liable thereon — actual signatories.

Marein for Appellant.

Levin for Respondent No. 1.

Appeal from judgment of District Court, dated 22.6.41, in Civil Case No. 87/39.

JUDGMENT

This is an appeal against a judgment of the District Court of Haifa, in which they dismissed the fourth respondent from any liability on Certain bills drawn by the Societa Marmifera Italiana S. Henraux upon the first defendant, the partnership "Hamachtsav" (Levin Bros., Michael Neustadt, Joseph Mendelsohn). There was evidence before the District Court on which they could hold, as they did, in para. 11 of their judgment that the appellant firm, through their sub-agent Mr. Elkana Levin *), had agreed not to hold the fourth defendant Mr. Joseph Mendelsohn liable on this claim. The appeal is largely on questions of fact and the evidence given by the various witnesses referred to by the District Court in their judgment is quite clear and enough to support that finding, but in addition to that, the fourth respondent Mr. Mendelsohn cannot be liable on these bills for this reason that

*) Edit. Note: This is obviously a slip, the name of the sub-agent as it appears throughout para 11 of the judgment being Mr. Aloni.

the name of the firm is not correctly stated in the acceptance. The firm name is, as I have already said, "Hamachtsav" (Levin Bros., Michael Neustadt, Joseph Mendelsohn). The acceptance is in these words — "for 'Hamachtsav' " and is signed by two persons Elkana Levin and Michael Neustadt only. On none of these bills does the name of the fourth respondent Joseph Mendelsohn appear. From the case quoted to us by Mr. Levin for the respondents — Kirk v. J. Morton and another, 60 Revised Reports, 729, it is clear that the fourth respondent cannot be liable on these bills but the only persons liable are the actual signatories. There was no authority for the second and third respondents to bind the partnership unless in the name of the partnership itself. The case quoted is clearly a leading case and has been followed continually since it was delivered.

The second point which I have mentioned is clearly contained in the second issue drawn up for the purpose of the trial. namely, whether the plaintiff can sue the partnership as defendant and the other defendants members thereof upon the bills.

For these reasons the appeal must be dismissed with costs on the lower scale to include LP. 15.— advocate's attendance fee to Mr. Levin. The respondent who appeared in person will have LP. 2 expenses.

Delivered this 30th day of September, 1941.

CRIMINAL APPEAL No. 49/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J., Edwards, J. and Khayat, J.

Ahmad Abed Mohammad el Kaisi and 4 others — Appellants

v.

The Attorney General — Respondent

Party of several persons convicted and sentenced for burglary — Appeal against sentence — Effect of previous convictions, previous relation of master and servant between complainant and accused, etc.

1. Fact that person now convicted of burglary has a 9 years old conviction of theft for which he got 20 days' imprisonment — not aggravating circumstance to justify an increased penalty.

2. Court imposing penalty — entitled to take into consideration adverse factor that accused taking part in committing offence was previously servant of complainant and that he acted as a guide to the party.

3. If accused convicted of burglary had several previous convictions of theft and kindred offences and sentences imposed in each case were comparatively short, Court entitled to take view that these short sentences had not sufficient deterrent effect and impose heavy penalty.

Appellants in person. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 16.3.42, in Felony No. 19/42, whereby Appellants were convicted of burglary, contrary to Section 295(a) of Criminal Code Ordinance, 1936, and sentenced 2nd Appellant to three years' imprisonment, and Appellants Nos. 1, 3, 4 and 5 to five years' imprisonment each.

JUDGMENT

These are appeals against sentence only.

The second Appellant, who had no previous conviction, pleaded guilty in the Court below and was sentenced to a term of three years' imprisonment . That is in no way an excessive sentence for the offence of burglary, and we think that the appeal must fail and the sentence be confirmed.

With regard to the first Appellant, he was sentenced to five years' imprisonment, the distinction presumably being because he had one previous conviction for theft. This conviction was nine years old and the sentence imposed was one of twenty days' imprisonment.We think that perhaps it is a little severe to penalize this man nine years later for what was apparently regarded as a comparatively minor offence. We think, therefore, that his sentence should be reduced to one of three years to make it the same as that of the second Appellant.

With regard to the third Appellant, he was sentenced to five years' imprisonment. He had no previous conviction. As against him it is alleged that he had previously been a servant of the complainant, and acted as a guide to the party. We think that that is an adverse factor, which the trial Court was entitled to take into consideration. We see no reason, therefore, to interfere with the sentence of five years' imprisonment, and his appeal must be dismissed.

With regard to the fourth accused, he had, apart from other minor offences, no less than four previous convictions for theft and being in possession of stolen property, the last conviction being as recent as 1940. The sentences imposed in each of the cases were comparatively short, and we consider that the Court was entitled to take the view that these short sentences had not had the necessary deterrent effect. We think, therefore, that the trial Court was entitled to distinguish his case from that of the second accused, and we see no reason to interfere with the sentence of five years' imprisonment.

With regard to the fifth Appellant, substantially the same considerations apply. He has, apart from other minor convictions, three previous convictions for theft the last one being in 1937, when he was sentenced to two months' imprisonment. We think that in his case also the Court was entitled to take the view that these small sentences had not had sufficient deterrent effect, and we do not propose to interfere with the sentence of five years' imprisonment. His appeal, therefore, also fails.

In the case of the first Appellant, whose appeal was successful, the sentence will date from the date of conviction.

As regards the four whose appeals were unsuccessful, the usual rule will be followed.

Delivered this 14th day of April, 1942.

HIGH COURT No. 76/41.

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

Before:— Edwards, J., Frumkin, J. and Khayat, J.

Shaul Karelitz and 4 others — Petitioners.

v.

1. The Chief Execution Officer, Tel Aviv.
2. Edward Zvi Fellman and 4 others — Respondents.

Application to High Court for setting aside final order of sale — Test as to whether or not application to High Court too late — Chief Execution Officer refusing to consider written application submitted by advocate on ground that advocate has no power of attorney — When power of attorney necessary in Execution Office — Duty of Chief Execution Officer to consider written applications submitted to him by or on behalf of party to execution proceedings.

1. Where transfer fees not yet received (no matter whether or not tendered) — not too late for High Court to entertain petition for setting aside final order of sale.

2. Advocate making written application in Execution Office on behalf of party to execution proceedings — under no obligation of filing power of attorney, though he cannot appear before Execution Officer unless he holds such power.

3. Party to execution proceedings — entitled to have his representatoins submitted in writing by advocate considered, whether or not Execution Officer after perusing and considering them will decide to grant a hearing.

Edit. Note: HC 8/40 7 CtLR 101 followed.

Goitein for Petitioners. Z. *Felman* for Respondents Nos. 2—6.

Application for an order to issue directed to 1st respondent calling upon him to show cause why his order dated 3rd Sept. 1941, 8th and 9th Sept. 1941, in file No. 11288/39 in Execution Office, Tel-Aviv should not be set aside and that he do exercise his discretion in accordance with law after hearing parties and further that he be ordered to refuse to allow the mortgaged property to be transferred to Achuzat Bnei Haim Co. Ltd., so long as that company has no authority to hold real property.

ORDER

The petitioners' claim is for an order commanding the Chief Execution Officer of Tel-Aviv to set aside orders made by him and those acting for him dated respectively September 3rd, September 8th and 9th,

of final sale of certain mortgaged property and refusing to reconsider those final orders.

The first question which we must decide is whether it is too late for us to consider the petition. Mr. Felman, the respondents' advocate, has admitted that no order of registration has yet been made and contends that his clients had offered to pay registration fees. We consider, however, that the test is that laid down in H.C. 8/40 *) P. L. R. Vol. 7 p. 121, We quote from the judgment of Frumkin J,

> "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 test therefore is whether the prescribed transfer fees had been received (no matter whether or not they had been tendered). It being admitted that the transfer fees had not been received, we do not consider that it is too late for us to entertain this petition. We have listened to much argument and criticism of the various orders of the Chief Execution Officer. We think that there can be no criticism of the orders of 18th July and 3rd September, 1941. We think, however, that the Chief Execution Officer misdirected himself when he refused to consider the petition dated 7th September filed by Mr. Goitein, advocate. The first paragraph of that petition set out that Mr. Goitein had been specially requested by His Eminence the Chief Rabbi to take up the matter. The Chief Execution Officer apparently considering that Mr. Goitein should have had a Power of Attorney from His Eminence made the following order:

> "His Eminence is not a party to this case. Mr. Goitein. I am informed, has no Power of Attorney from any party. I accordingly ignore this letter."

It would seem that the Chief Execution Officer considered that an advocate making a written application on behalf of a mortgagor in the Execution Office was under the obligation of filing a Power of Attorney before his written application could be considered. In this we think he was wrong because Section 21(1) Advocates Ordinance 1938 merely says that no advocate shall "appear before any Execution Officer unless he is the holder of a power of attorney". We consider that the mortgagors were entitled to have their representations, at any rate, considered, whether or not the Execution Officer after perusing and considering the representations, would have decided to grant a hearing.

We hold that the Chief Execution Officer gave wrong reasons for refusing to consider the representations made in the letter of 7th September. The Chief Execution Officer could have told Mr. Goitein that if he (Mr. Goitein) wanted a hearing, then he would have to produce a Power of Attorney. He did not do so. As we hold that the Chief Execution Officer gave wrong reasons for not attending to the

*) 7 CtLR p. 101.

letter of Mr. Goitein, we make absolute the order nisi and we set aside the order of final sale. The order of 9th September, 1941, granting to the mortgagee advocate's fee of LP. 30 is also set aside.

With regard to costs of this petition, we feel that the circumstances are peculiar. We feel that the petitioners must accept some blame for not approaching the Chief Execution Officer just immediately before the 1st September, 1941, as it is clear from the order of 18th July, 1941, that the Chief Execution Officer expected to receive some report from the mortgagor, at any rate, at the latest by the 31st August.

In the circumstances we order no costs, that is, each party will pay their own costs except that the petitioners must pay to the respondent the sum of LP. 4 of the two adjourned hearings.

Given this 4th day of November, 1941.

CIVIL APPEAL No. 248/41.

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

Before:— Rose, J. Khayat, J. and Abdul Hadi, J.

Hassan Mustafa Abdalla Hussein el Marridi and 2 others. Appellants.

v.

1. Waqf of Hudayatallah and Taji el Din Sheikh Abu el Hudda, through its Mutawalli Ibrahim Adnam Abu el Huda el Faruqi.
2. Waqf Shams el Din el Su'udi el Alami through its Mutawalli Khamis Shihada el Alami.
3. Muhammad Ahmad Mustafa Abdalla el Marridi and 9 others. Respondents.

Mutawalli of Waqf claiming land in dispute to be true Waqf (Waqf sahih) by virtue of a Waqfieh — Land in dispute found by Settlement Officer to have been entered in Schedule of Rights as miri mawqufa and entry not appealed against — Settlement Officer, while rejecting claim of Waqf sahih, ordering registration of land in name of Plaintiff on ground of possession — Order founded on basis never relied on by Plaintiff.

1. Once land entered in Schedule of Rights as miri mawqufe and no appeal brought to test correctness of entry, claim that land Waqf sahih by virtue of Waqfieh must fail.

2. Settlement Officer wrong in ordering registration of land in dispute in name of Plaintiff on ground of possession if Plaintiff never relied on possession.

Edit. Note: As to 1 see CA 237/37 5 CtLR 149.

Malak for Appellants. *Abcarius* for Respondent No. 1.
Respondent No. 2 — Absent. Rest — ex parte.

Appeal from decision of Settlement Officer, Ramleh Settlement Area, dated 18.10.41, in Case No. 63/Lydda.

JUDGMENT.

Khayat, J.

This is an appeal from the decision of the Settlement Officer, Ramleh Settlement Area, dated the 14th October, 1941, whereby he decided in favour of the first Respondent (Second Plaintiff) and dismissed the claim of appellants and respondents 3 to 12.

The first respondent, in his capacity as Mutawalli of Waqf of Hudayatallah and Taji el Din Sheikh Abu el Huda, claimed the land in dispute as true waqf (waqf sahih) by virtue of a waqfieh and produced the waqfieh in support of his claim. The Settlement Officer held that the land in question having been entered in the Schedule of Rights as miri mawqufi (Waqf Khashi Sultan), he was bound by that entry as no appeal had been brought to test the correctness of that entry in the Schedule of Rights and he could not go beyond it. We further held that on the evidence before him the waqf acquired a title to the land in dispute by possession. The appellants, on the hearing of the appeal, urged two points of law, firstly, that the waqf could not acquire title by possession in miri mawqufi lands, and, secondly, that the waqf cannot acquire such land by possession if the mutawalli of that waqf did not rely on possession, the first point was never raised before the Settlement Officer nor was it a ground of appeal.

We are of opinion that the Settlement Officer, having found that the land was entered in the Schedule of Rights as miri mawqufi (Waqf Khaski Sultan), should have dismissed the first respondent's claim because he claimed the land to be waqf sahih by virtue of the waqfieh. We further think that the Settlement Officer was also wrong in ordering the registration of the land in dispute in the name of the waqf since the first respondent never relied on possession.

In the result the appeal must be allowed ; the decision of the Settlement Officer must be set aside and the first respondent's claim dismissed with costs on the lower scale to include the sum of LP. 15 advocate's attendance fee to be paid by the first respondent.

Delivered this 25th day of March, 1942.

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CRIMINAL APPEAL No. 33/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J. Edwards, J. and Khayat, J.

Ali Muhammad Ibrahim — Appellant.

v.

Attorney General — Respondent.

Conviction of attempted murder — Court finding that accused

was provoked and acted in hot blood — Premeditation as ingredient of attempted murder — Court of Appeal leaving sentence undisturbed while quashing conviction of attempted murder and substituting for it one doing grievous bodily harm.

One ingredient of offence of attempted murder — premeditation *); if trial Court finds "there was provocation and accused acted in hot blood" and other facts of case also do not indicate premeditation, conviction of attempted murder cannot stand.

Nasr for Appellant. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 17.2.42, in Crime No. 367/41, whereby appellant was convicted of attempted murder, contrary to sec. 222(a) of Crim. Code Ord., 1936, and sentenced to 3 years' imprisonment.

JUDGMENT

In this case the appellant was convicted by the District Court, Jerusalem, of attempted murder, contra Section 222(a) of the Code, and was sentenced to three years imprisonment.

The facts of the case apparently were that a brawl or altercation broke out between the complainant and the accused, in which there is no doubt that the complainant was in the wrong in the initial stages, having, in company with some relatives, started an attack on the accused; but the Court found that of the persons who took part in this quarrel, the only one who used a dagger was the accused. With that finding, of course, we cannot interfere.

Now, the Court, in a part of its judgment, says "Undoubtedly there was provocation and the accused acted in hot blood". Having regard to that observation and to the facts of the case as found in the judgment, we think that the Court was wrong in holding that the offence of attempted murder was proved. One ingredient of the offence of attempted murder is premeditation and that was not present in this case. We think, however, that the accused should be convicted of an offence contra Section 238 of the Code, of unlawfully doing grievous harm.

The question we have to consider is what is a reasonable sentence to impose for that offence. It is true that there are considerable mitigating circumstances in this case, but we think that sufficient allowance is made for all those circumstances if a sentence of three years imprisonment is imposed.

The conviction of attempted murder is therefore quashed and instead the accused must be convicted of doing grievous bodily harm contra Section 238. The sentence of three years imprisonment will not be disturbed.

Delivered this 25th day of March, 1942.

*) Edit. Note. This proposition obviously refers to attempt of premeditated murder (sec. 214(b) of Crim. Code Ord.) only.

CIVIL APPEAL No. 230/41.

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

Before: Edwards, J., Khayat, J. and Abdul Hadi, J.

Raphael Levy — Appellant.

v.

Dr. Haim Gittelman and 2 others — Respondents.

Claim for cancellation of mortgage entered into between parties — Plaintiff filing in District Court document headed "Application for registration of Egyptian... judgment... and provisional attachment against judgment debtor "but containing neither in body of document nor in prayer any application for registration — President District Court considering document as an application for provisional seizure under Ottoman Civil Procedure Code and granting attachment but cancelling it by subsequent order, without giving Plaintiff opportunity to be heard — Land Court holding provisional attachment invalid and dismissing case without hearing evidence on remaining issues — Question of costs of appeal.

1. *a*) Attachment under relevant articles of Ottoman Civil Procedure Code cannot be ordered in favour of judgment creditor of Egyptian judgment if registration of judgment not made nor asked for.

b) If President District Court, considering that no proper application made by judgment creditor of Egyptian judgment, cancels attachment granted by him, one cannot say (even if no opportunity given to judgment creditor to be heard) order of cancellation wrong.

c) Provisional attachment on strength of Egyptian judgment, while no proper application under sec. 3 of Cap. 73 and no application for confirmation of attachment nor case filed within 8 days — invalid.

2. Civil Procedure Rules give District Court no power to decide a case on one issue only.

3. Once issues framed and case set down, and actually comes on, for hearing, procedure envisaged by Rules 188 and 189 must be followed.

4. Where Appellant (though failing on some of points) succeeds in having case remitted to hear evidence but it appears that Respondent would not have resisted application to that effect, and trial Court of its own motion held hearing of evidence unnecessary, costs of appeal may be disallowed.

Edit. Note: As to 2 and 3 see CA 63/39 6 CtLR 75; CA 118/40 8CtLR 41; CA 28/41 9 CtLR 97 and Edit. Note thereto; CA 117/40 10 CtLR 26. As to 4 see CA 83/39 6 CtLR 136; CA 93/39 ibid 141; HC 36/40 7 CtLR 196; CA 103/40 8 CtLR 95; CA 154/40 ibid 91; CA 41/41 9 CtLR 134; CA 70/41 10 CtLR 48.

J. Maman for Appellant. *Weinshall & Heth* for Respondents Nos. 1—2.

Appeal from judgment of Land Court of Haifa, dated 23.10.41, in Land Case No. 12/39.

JUDGMENT

This is an appeal from a judgment of the Land Court of Haifa whereby the plaintiff's claim for the cancellation of a mortgage entered into between the first and second respondents was dismissed. Seven issues were framed in the Land Court. We intend in this judgment to deal with issues Nos. 2, 3 and 4. It seems that on the 29th of May, 1937, the present appellant filed in the District Court of Haifa a document headed :

> "Application for registration of an Egyptian mixed Court of Appeal of Alexandria Judgment in accordance with the Reciprocal Enforcement of Judgments (Egypt), Ordinance, 1929, and for a provisional attachment against judgment debtor."

But neither in the body of the document nor in the prayer was there any application for the registration of the Egyptian judgment. Now, it is clear, that the proper document to have filed in the District Court was an application under Section 3 of the Ordinance, namely, Cap. 73. That application would have come on for hearing, had it been properly filed, as a case before the District Court. In the ordinary course of events an order would have been made *ex parte* for registration of the judgment as laid down by this Court in Civil Appeal No. 121 of 1930 P. L. R. Vol. 1 p. 589. This document was not brought before the District Court of Haifa, but was placed before the learned President of that Court and it seems that he regarded it as an application for provisional seizure made under Articles 271 and 294 of the Ottoman Code of Civil Procedure. Now, it is clear that Article 272 of that Code does not apply to this case because registration of the judgment had not been made nor had it been asked for in the application of 29th May, 1937. One of the complaints of the appellant before this Court is that the President, District Court, Haifa, cancelled the attachment without giving the appellant an opportunity to be heard. It is, however, quite clear from the order of the learned President of 25th June, 1937, that he made the order under Article 280 of the Ottoman Code of Civil Procedure, as he did not consider that a proper application under Rule 3 of the Foreign Judgment Rules 1938 had been made. In this connection, of course, the position was not actually as the learned President conceived it to be because the law applicable was Section 3 of Cap. 73. Be that as it may, there was before the District Court neither a proper application under Section 3 of Cap. 73 nor was there a proper application for confirmation of the provisional seizure nor had any case been filed within the usual eight days. We consider, therefore, that the Land Court in its judgment of the 23rd October, 1941, came to a correct conclusion when it held that on the 28th June and on the 25th October, 1937 there was no valid attachment upon the land in question and we agree with it in thinking that it is impossible to say that the order of the President of the District Court of 25th June, 1937, was wrong. It follows,

therefore, that the Land Court was correct in holding the plaintiff bound by the order of the President of 25th June, 1937, and we also think that the decision of the Land Court on issue 4, that is, whether the validity of the removal of the said attachment can be questioned in these proceedings, was also correct. The present appellant was therefore clearly not entitled to succeed on any one of issues 2, 3 and 4. As to issues Nos. 1, 5, 6 and 7, it seems that the Land Court did not allow the plaintiff to lead evidence. Now, it is clear from Rule 189(1) of the Civil Procedure Rules, 1938, that the plaintiff is entitled not only to state his case but to produce his evidence. It might well be that if the Land Court were able to answer issue 1 in a particular way it might be able to dispose of the case at once ; but, as has been held by this Court in a recent appeal, (Civil Appeal No. 28 of 1941, P. L. R. Vol. 8 pages 127 and 129) the Civil Procedure Rules give a District Court no power to decide a case on one issue only. The only time when this can be done is before the hearing, either under Rule 20 or Rule 21 and possibly under certain other provisions of the law which do not occur to us at the moment. But, it is clear that, once issues have been framed and the case set down for hearing, and the case actually comes on for hearing, the procedure envisaged by Rules 188 and 189 must be followed. We accordingly set aside the judgment of the Land Court and remit the case to it with directions to follow the procedure laid down by Rule 189 and to hear evidence adduced by all parties and to give a decision on each of issues 1, 5, 6 and 7.

We are informed by Dr. Weinshall that he would not have resisted an application by the present appellant to hear evidence led by him in the Land Court. This being the case and as it was the Land Court of its own motion which held that it was unnecessary to hear evidence, we think that there should be no costs of this appeal, that is to say, each party will pay its own costs of this appeal.

Delivered this 17th day of February, 1942.

CRIMINAL APPEAL No. 132/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before Copland, A/C.J., Edwards, J. and Frumkin, J.

Anis Tewfiq el Yusif — Appellant.

v.

The Attorney General — Respondent.

Conviction and sentence for burglary upon evidence of confession made in a statement to Police Constable — Necessity of applying common sense tests to uncorroborated confession.

a. Court may convict upon uncorroborated confession but only after applying certain tests, common sense tests, as to possibility of confession, its truthfulness, its consistency with other ascertained facts, etc. etc.

b. If trial Court convicting upon uncorroborated confession did not apply common sense tests and Court of Appeal unable to do so on facts of case, conviction cannot stand.

Edit. Note: see CrA 41/38 3 CtLR 186, CrA 29/39 6 CtLR 85; CrA 75/39 7 CtLR 29; CrA 146/40 9 CtLR 69; CrA 29/41 ibid 112 CrA 19/38 3 CtLR 140 followed.

Appellant in person. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of District Court Nablus, dated 1.11.41, whereby Appellant was convicted of burglary, contrary to Sec. 295(a) of Crim. Code Ord. 1936, and sentenced to 3 years' imprisonment.

JUDGMENT

In this case the Appellant was convicted of burglary and sentenced to three years' imprisonment. Only two witnesses were called for the prosecution. The first one was the owner of the house in which the burglary occured. He gave no evidence against this particular accused; he merely proved the facts of burglary. The second one was a Police Constable who took a statement from the accused. That statement is the only evidence against this man. In that statement he said that he went with two other persons, whom he named, to this particular house, and he stood outside as a guard while the other two went in and ransacked the place, and that afterwards the three of them divided the spoils.

Now, it is quite clear and settled law that a Court may convict upon the uncorroborated confession made to a Police Constable. The circumstances in which they may do so are laid down in the case of Rabah Abdel Rahman Hassan and others v. The Attorney-General, Criminal Appeal No. 19/38,*) reported in Vol. 5, P. L. R., p. 210, In that case the learned Chief Justice who was delivering the judgment of the Court, and quoting from the judgment in Rex v. Sykes, C. A. R., Vol. VIII, at pages 236 and 237, said as follows :

> "A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession, which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it."

But what has to be done is that certain tests, which have been called common sense tests, have to be applied to this confession, and amongst those tests are these questions — "Is there anything outside it to show it was true? It is corroborated? Are the statements made in it of fact, so far as we can test them, true ? Was the prisoner a man who had the opportunity of committing the crime ? Is the confession possible ? Is it consistent with other facts which have been ascertained, and which have been proved to the Court ?" That case was applied and followed in Criminal Appeal No. 25/39 (not reported).

*) 3 CtLR p. 140.

Now in this case, unfortunately, there is nothing to show that the learned Judges of the Court below, or any of them as a matter of fact, applied their minds to the correct considerations. The learned Relieving President merely said that it was not safe, in his opinion, to convict on an uncorroborated confession. The Court as a whole accepted the confession as voluntary and true, and said nothing more. If one tries to apply these tests, which this Court has just cited, it is somewhat difficult to do so on the facts of this case as known to us.

For these reasons we think that the conviction cannot stand. The appeal is allowed and the conviction quashed.

Delivered this 20th day of November, 1941.

CRIMINAL APPEAL No. 10/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J., Edwards, J. and Abdul Hadi, J.

Abdul Rahman el Sheikh Salim Abdul Rahman Appellant.

v.

The Attorney General Respondent.

Trial for premeditated murder — Assize Court presided over by President District Court appointed by acting Chief Justice to act as British Puisne Judge — Question of powers of acting British Puisne Judge and of acting Chief Justice — Credibility of witnesses — Adducing evidence after trial.

1. Person acting as British Puisne Judge — in every respect in same position as person holding the substantive post.
2. Person acting in office of Chief Justice has all powers of substantive holder.
3. Court of Criminal Appeal will not take action on evidence adduced after trial unless satisfied that 1) it would not have been available at trial to defence even if it had exercised reasonable diligence. 2) evidence so important that it must have had a pronounced effect upon mind of trial Court.

Mogannam for Appellant *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of Crim. Assize Court sitting at Nablus, dated 13.1.1942, in Crim. Assize No. 64/41, whereby appellant was convicted of murder contrary to sec. 214(b) of Crim. Code Ord., 1936, and sentenced to death.

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Nablus convicting the accused of murder. A preliminary point has been taken by counsel for the appellant that the Court was improperly constituted. The presiding Judge was His

Honour Judge Plunkett, who holds the substantive post of President of a District Court, but was appointed by the Acting Chief Justice to act as a British Puisne Judge of the Supreme Court from the 5th to the 19th of January, 1942, inclusive. This period covers the time during which this particular trial took place.

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

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

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

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

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

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

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

It has also been urged that there were no sufficient positive reasons for the Court to believe the evidence of Hassan Jawad, another eyewit-

ness, particularly in view of the fact that there was considerable delay before he gave his information to the Police. On that matter the Court, after stating that it believes his evidence, says that it accepts his reasons for delay in coming forward because, while the accused was still at large, the witness was afraid to give such a statement. That seems to us to be a reasonable conclusion to which the Court might properly come.

A further point raised by the appellant is that he now has two witnesses who were not available before, whose evidence, he says, might, and in fact should, strongly influence the Court. The first of these persons is a man called Abdul Ruhman el Haj Ghabin who swore an affidavit on the 20th January, 1942, to the effect that Hajeh Safiya, the first eyewitness for the prosecution, could not possibly have been at the scene. Counsel for the appellant urged upon us that this evidence was available to the prosecution, in view of the fact that this man made a statement to the Police on the actual day of the shooting, and that the prosecution improperly concealed the subject-matter of his evidence from the defence. Learned Crown Counsel has shown us the statement that this man made to the Police on the day of the incident and it is quite clear that it is a perfectly colourless statement expressing ignorance as to what occured. Nobody reading that statement would have any reason to suppose that the witness would be in a position to give the evidence contained in his affidavit of the 20th January, 1942.

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

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

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

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

Delivered this 31st day of January, 1942.

CRIMINAL APPEAL No. 40/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Copland, J., Rose, J. and Khayat, J.

Nimar Namad Daghmash and 2 others — Appellants.

v.

The Attorney General — Respondent.

Conviction and sentence of three accused for attempt to break and enter a building with intent to commit theft therein — Evidence against accused consisting only of evidence of alleged confession — Failure of trial Court to apply common sense tests to confession.

Where conviction based only on alleged confession by accused and nothing shows that Court applied to confession correct considerations or common sense tests, conviction will be quashed.

Edit. Note: see CrA 132/41 11 CtLR 147 and Edit. Note thereto.

Appellant in person. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of District Court, Jaffa dated 4.3.42 in Crim. Case No. 36/42, whereby appellants were convicted of attempt to break and enter a building with intent to commit theft therein, contrary to sec. 297(a) and 29(d) of the Crim. Code Ord. 1936, and sentenced to 3 years' imprisonment each.

JUDGMENT

The three appellants were convicted before the Jaffa District Court of attempting to break and enter a building with intent to commit theft therein, contrary to section 297(a) and 29(d) of the Criminal Code Ordinance, 1936, and were sentenced to three years' imprisonment each. The three appellants were not defended by advocates in the Court below, neither was their appeal taken by an advocate here. Mr. Rigby, with that characteristic fairness which he always displays, admits to this Court that the only evidence against them is the evidence of alleged statements by the appellants and he is unable to contend that the requirements laid down in Criminal Appeals 19/38 and 132/41, have been complied with. What those two judgments laid down was that certain common sense tests had to be applied to the confessions. The Court regrets to have to observe that this is the third or fourth time that we have had to lay down these rules and it is time that our remarks should be observed and acted upon. In this present appeal we cannot fail to remark that there is nothing to show that the learned Judges of the Court below applied their minds to the correct considerations, either in whole or in part.

The result is that the appeals of these three appellants are allowed and the convictions quashed.

Delivered this 1st day of April, 1942.

HIGH COURT No. 97/41.

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

Before:— Rose, J., Frumkin, J. and Khayat, J.

Joshua Isaac Gwirzman and another — Petitioners.

v.

1. The Director of Medical Services, Jerusalem.
2. Mr. B. Binah, District Officer, District Commissioner's Offices, Haifa. — Respondents.

Hut dwellers made homeless as a result of measures taken by appropriate authorities for prevention of plague — Order by Director Medical Services for requisition of private house for accommodation of homeless — Interpretation of sec. 20, Public Health Ord. — Conflict between private and public rights — Powers of Director Medical Services in matter of requisition.

1. Duty of Courts to safeguard private rights, and where such rights conflict with rights of community, former must prevail unless definite and unambiguous statutory provision to contrary.
2. Director Medical Services has no power to requisition except under sec. 20(2) (h), Public Health Ordinance.

Levin for Petitioners. *Crown Counsel* (*Rigby*) for Respondents.

Application for an Order to issue to Respondents, calling upon them to show cause why order of 1st Respondent, that is Order of Requisition No. 6/3 of 24.10.41, should not be set aside.

ORDER

This is the return to an order directed to the respondents calling upon them to show cause why a requisition order of the first respondent dated the 24th October, 1941, should not be set aside.

The matter concerns the interpretation of Section 20 of the Public Health Ordinance, 1940, and the facts substantially are not in dispute. It appears that a number of hut dwellers in Haifa have been rendered homeless as a result of certain measures which have been taken by the appropriate authorities for the prevention of plague. One of these persons required to be housed and for his accommodation the first respondent requisitioned a flat belonging to the first petitioner.

It is clear that for any such action by any local or health authority some statutory provision must be required, and learned Crown Counsel relies on Section 20(1)(b) of the Ordinance which provides that the Director of Medical Services "shall be empowered to arrange", inter alia, "for accommodation". Under subsection (c) he "may arrange for any such matters or things as may to him appear advisable for preventing or mitigating such disease".

Mr. Rigby submits that the language of these two subsections is

sufficiently wide to enable us to hold that the Director is justified in requisitioning a part of a building for the use of somebody who has been evacuated from a pestilential area. He stresses, quite properly, that the authorities concerned have acted only for the public good and urges that every possible latitude should be given to them.

It is, however, the duty of Courts to safeguard private rights and where such rights conflict with what are alleged to be the rights of the community, it is a fundamental principle of English law that the private rights must prevail unless there is definite and unambiguous statutory provision to the contrary.

Now, even if these subsections stood alone I should have thought that any Court would be reluctant to say that the words "the Director shall be empowered to arrange for accommodation", coupled with the provisions of subsection (c) for preventing and mitigating disease, cover the specific act complained of in this case. But they do not stand alone, because Section 20(2)(h) of the Ordinance contains a specific provision relating to the requisitioning of buildings, which, as Mr. Rigby concedes, is inapplicable to the present matter. It is true that this subsection begins with the usual "without prejudice" clause, but it seems to me that the normal rule of interpretation of statutes in such a case is fatal to the contention that the Director has any wider powers of requisitioning than those contained in section 20(2)(h).

For these reasons the rule must be made absolute with costs to include the sum of LP. 10 for advocate's attendance fees. The costs to be borne by the first respondent.

Given this 26th day of November, 1941.

HIGH COURT CASES Nos. 8/42 & 9/42.

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

Before:— Gordon Smith, C.J., Frumkin, J. and Khayat, J.

High Court No. 8/42.

Registrar of Trade Marks — Petitioner.

v.

1. Paldag Ltd.
2. Frankenthal Co. — Respondents.

High Court No. 9/42.

Registrar of Trade Marks — Petitioner.

v.

1. Paldag Ltd.
2. Frankenthal & Co. — Respondents.

Application by rival claimants for registration of trade mark — Registrar of Trade Marks referring dispute to High Court under sec. 17(*b*) *of Trade Marks Ord. — High Court deciding ques-*

tions of fact by scrutinizing and analysing affidavits of rival claimants before it.

Right of person to user of unregistered trade mark, if not abandoned, nor sold, but merely suspended during certain period by virtue of an agreement, reverts to person on expiration of that period.

Seligsohn for Respondent. No. 1. *Goitein* for Respondent No. 2.

Application by Registrar of Trade Marks for an order adjudicating as between the rival claimants as to ownership of trade mark forming subject matter of dispute.

JUDGMENT.

This was a reference by the Registrar of Trade Marks under Section 17(6) of the Trade Marks Ordinance No. 35 of 1938, arising out of two applications for registration of a trade mark by (a) Paldag Ltd. (hereinafter referred to as "the Company") being application No. 5812 filed on the 16th September, 1941, and (b) Frankenthal and Company (hereinafter referred to as "the Firm") being application No. 5814, filed on the 18th September, 1941.

The applicants having failed to come to an agreement, the matter was brought before the Court by reference by the Registrar, dated the 21st January, 1942.

Affidavits on behalf of the Company, dated respectively the 3rd and 4th February, 1942, by Mr. Kaufman a director, and his wife Mrs. O. Kaufman who designed some labels, were filed, and similarly an affidavit by Mr. Leo Frankenthal dated the 16th February, 1942, was filed on behalf of the Firm but on being served with copies of the two affidavits of the Company Mr. Frankenthal filed a further affidavit, dated the 27th February, 1942, in reply thereto, and which in itself was replied to by a further affidavit by Mr. Kaufman dated the 3rd March, 1942.

It is on the material contained in these affidavits upon which the Court has to come to the decision as to which applicant is entitled to registration of the trade mark in dispute.

The trade mark itself mainly consists of the use of the word "gold" superimposed upon some local scenery, and the label is used in connection with and advertises a brand of soup cubes.

The main points which arise are (a) whether the Firm had, some time previously, acquired a right to the user of this unregistered trade mark, and if so, (b) whether, for a certain period, the use of the same by the Company was by licence of the Firm or otherwise, and (c) whether at the expiration of that certain period, the right of user reverted to the Firm or whether such right had been so abandoned and that the Company had retained such right.

All these points are questions of fact to be ascertained from the evidence put before the Court by way of affidavits, and after hearing the arguments of Counsel thereon, and after a close scrutiny and analysis of these affidavits, we have come to the following conclusions.

(1) in 1936 or thereabouts and possibly earlier, the Firm was importing a substantial quantity of soup cubes from abroad, which it repacked and labelled and distributed amongst its customers. To identify these particular soup cubes the Firm had invented the name "Gold" in English and "Zahab" in Hebrew.

(2) Amongst the Firm's customers in 1937, was the Company, and it is stated that the Company's sales of "Gold" soup cubes amounted to about 10% of the total sold or distributed by the Firm, but that during this year the Company sold also other brands of soup cubes. In 1938 these "Gold" cubes were sold only by the Firm and were not sold by the Company. These facts were not disputed, and we take them as being conclusively proved.

(3) Early in 1939 Frankenthal Senior arrived in Palestine and he and his son both invested money in the Company, the father becoming Managing Director. The Company then commenced selling "Gold" cubes again, having apparently acquired the existing stock from the Firm, and they also supplied the Firm's previous customers with this brand. These facts also are not disputed.

(4) Frankenthal Senior died in December, 1940, and the son as his administrator sold his father's shares in the Company and also his own shares.

(5) The son alleges that upon his father becoming Managing Director of the Company he agreed not to use the label or trade mark "Gold" as long as his father remained Managing Director, and he alleges that there is a Minute in the records of the Company to the effect that the Company was entitled to use this trade mark "Gold" only so long as the father remained Managing Director of the Company. The answer to this allegation by Mr. Kaufman is, in our opinion, equivocal, as it reads: "There is no record of any condition as to the reversion of the trade mark "Gold" to Mr. Leo Frankenthal or his Firm" (vide paragraph 3 of affidavit of 2/3/42). We are satisfied that there was such an agreement as alleged.

So far, we can answer the first point by saying that the firm had by previous user acquired and established a right to the user of the unregistered trade mark, as previously described, and we are satisfied that the use of this trade mark during 1939 and 1940 by the Company was by permission of or by agreement with the Firm — in other words, by licence of the Firm. No contract for sale of this right or agreement other than that alleged by the Firm has been substantiated by the Company. Such licence permitted the Company to use the trade mark while the father Frankenthal was Managing Director, and the son undertook

not to exercise his right in this respect during this period. On the death of the father in December, 1940, such right and such undertaking ceased. It follows therefore that the right of the Firm not having been abandoned, nor sold, but being merely suspended during a prescribed period, reverts to the firm on the expiration of that period.

This really concludes the matter, as there was no real dispute on the law on the subject, but subsequent events are of some interest.

It appears that, owing to war conditions, the import of these soup cubes ceased, and the Firm proposed to manufacture these cubes locally, and negotiations were entered upon between the Firm and the Company in August, 1941, on the terms set out in paragraph 4 of Mrs. Kaufmann's affidavit of 4/2/42, and provisional agreement was come to. It is noteworthy that it was not then disputed that the use of the word "Gold" was vested in the Firm, and the Firm undertook to reserve these "Gold" labelled and locally manufactured soup cubes exclusively for the Company. However, final agreement did not eventuate, and both Firm and Company put on the market their own and respectively locally manufactured cubes, advertised under different trade marks, the Firm's trade mark being the original label "Gold", and that of the Company being labelled "Star", and the Company specifically disclaimed any connection with the soup cubes labelled "Gold".

It is obvious that on the final breakdown of the provisional agreement of August, 1941, the Company endeavoured to forestall any application by the Firm, and sought to obtain registration of the word "Gold" in connection with their own soup cubes, before the Firm could do so in respect of their "Gold" soup cubes. There would therefore appear to be every justification for the statements contained in the final paragraph of Mr. Leo Frankenthal's affidavit of the 16th February, 1941.

The order to the Registrar of Trade Marks will therefore be that the rights of the firm Frankenthal & Co. to the use of the word "Gold" in respect of labels for soup cubes entitle the Firm to registration in that respect, and to the exclusion of the Company, Paldag, Ltd.

The Company will pay the costs of the reference to include LP. 5 in respect of each reference.

Delivered this 14th day of April, 1942.

CRIMINAL APPEAL No. 1/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Gordon Smith C.J., Rose, J. and Khayat, J.

Spiros Yanoulatos — Appellant.

v.

Attorney-General — Respondent.

Charge against master of ship having prohibited immigrants on board and application for forfeiture of ship — Acquittal of master of ship and decision that no application because not signed by Attorney-General — Subsequent proceedings by Attorney-General and judgment of District Court for forfeiture of ship — Question of res judicata and of rebuttal of statutory presumption.

1. Acquittal of master of ship carrying prohibited immigrants and decision that no proper application for forfeiture of ship before Court because not signed by Attorney General does not make matter res judicata; Attorney General may subsequently take proceedings for forfeiture of ship.

2. Mere fact that master of ship having prohibited immigrants on board was acquitted — not sufficient to rebut statutory presumption in Regulation 7 of Defence (Immigration) Regulations, which refers not only to master but also to owner and agent.

Edit. Note:— See CA 252/41 11 CtLR 49 and Edit. Note thereto; see also CrA 86/41 10 CtLR 157.

Weinshall and *Toister* for Appellant.
Crown Counsel (*Hogan*) for Respondent.

Application for leave to appeal and appeal from judgment of District Court, Haifa, dated 23.12.41, in Crim. Case No. 112/41, whereby Court ordered forfeiture of S.S. Atlantic.

JUDGMENT.

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

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

"If in any proceedings under these regulations it is shown that there were prohibited immigrants on board any vessel the owner,

> agent or master of such vessel shall be presumed to have knowledge of that fact."

and the Court held that that was a rebuttable presumption.

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

I am taking the grounds of appeal as set out in the Notice of Appeal. The first ground was that the District Court had no jurisdiction. That has already been dealt with, as I have just referred to and in the judgment of the Court of Criminal Appeal in case 119/41. The learned Judge said in the judgment — "I think, therefore, though with some doubt, that applications for forfeiture under Regulation 3 should be made to the District Court on its Criminal Side."

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

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

The next ground is that the District Court was wrong in refusing to hear arguments on Regulation 3. That regulation was the subject of the interpretation of the Court of Criminal Appeal and I have al-

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

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

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

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

Delivered this 26th day of January, 1942.

CIVIL APPEAL No. 259/41.

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

Before:— Gordon Smith, C.J. and Khayat, J.

Dr. Leopold Baer — Appellant.

v.

The Palestine Building Syndicate, Ltd. — Respondents.

Agreement with firm in Germany for supply of materials against payment of deposit, subject to payer entering within fixed period building agreement with a company in Palestine, failing which deposit to be returned — Plaintiff failing to conclude building agreement, German firm sending materials to building company, Plaintiff claiming ownership of materials — Application of German law and interpretation of clauses in contract.

Foreign law — a question of fact for Court to decide after hearing expert evidence.

Edit. Note:— see CA 49/39 6 CtLR 32; CA 41/40 7 CtLR 109; CA 123/41 10 CtLR 77.

Rottenstreich and *Caspi* for Appellant.

Smoira and *Rosenblueth* for Respondents.

Appeal from judgment of District Court, Tel-Aviv, dated 30.11.41, in Civil Case No. 65/40.

JUDGMENT

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

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

As stressed by Dr. Smoira for the defendants, the important clauses in that agreement are clauses 7 and 8. In clause 7 the plaintiff states that he is under an obligation to enter into a building agreement with the defendant firm, and that such agreement was to be concluded not later than the 30th September, 1938, and it provides that the period may be extended by mutual consent. Then it states in clause 8 (one

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

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

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

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

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

Delivered this 16th day of February, 1942.

HIGH COURT No. 33/42.

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

Before : Gordon Smith C. J. and Copland. J.

Between :

Khamis Dib Jarbo'a — Petitioner.

v.

The Director, Department of Land Registration, Jerusalem. — Respondent.

and between :

Khamis Dib Jarbo'a — Petitioner.

v.

1. The Director, Department of Land Registration, Jerusalem.
2. Khalil Saleh Jarboa', duly appointed guardian of Khamis Dib Jarbo'a — Respondents

(By order of the Court dated 28.4.42)

Director of Land Registration refusing to allow Moslem ward who attained full majority to sell his property — Petition to High Court for issue of mandamus to Director of Land Registration — Non-interference of High Court in a matter within exclusive jurisdiction of Sharia Court — Cessation of guardianship under Mohammedan law — Non-interference of High Court where other remedy open.

1. Whether minor for whom Sharia Court had appointed a guardian attained full majority, so that he can deal with his property, — a question within exclusive jurisdiction of Sharia Court and only for it to say whether guardianship should cease or not.

2. (Obiter) under sec. 496 of Mohammedan Personal Law guardianship does not cease in respect of property by minor attaining majority and aptitude for good administration.

3. If Petitioner had alternative remedy of appealing to Religious Court of Appeal, High Court will not exercise its discretion in ordering issue of mandamus.

As to 3 see H.C. 99/41 10CtLR 165.

Eliash for Petitioner

Crown Counsel (*Hogan*) for Respondent No. 1

Abcarius for Respondent No. 2.

Petitioner for an order to issue directed to 1st Respondent, calling upon him to show cause why he should not allow Petitioner to complete transaction of sale of his property in file No. 595/41, Land Registry, Tel-Aviv.

ORDER

We are quite of the settled opinion that this Order Nisi must be discharged on two grounds. Firstly, the Order-in-Council specifically confers jurisdiction on the question of personal status on the Sharia Courts. They have exclusive jurisdiction in these and other matters. Guardianship is one of these matters of personal status, as defined in Article 51. As to whether this Petitioner has or has not attained full

Abcarius for Respondent No. 2.

majority, so that he can deal with his property, is a question for the Sharia Court and not a question for us. Section 496 of the Mohammedan Personal Law is quite clear on that point. It says :

> "Nevertheless guardianship does not cease in respect of property by the minor attaining majority and aptitude for good administration."

That is part of the Mohammedan Personal Law, and it is a question for the Sharia Court to say whether the guardianship in respect of the property should continue or should cease.

Secondly, the present guardian was appointed in 1941 at which date, I think, the Petitioner, according to Mr. Eliash had then attained the age of 21. He did not appeal when the new guardian was appointed, to the Sharia Court of Appeal, but has subsequently made this application to us, and it is clear that, there being an alternative remedy open to the Petitioner, we should not exercise our discretion in ordering the issue of a mandamus to the Director of Lands.

We are certainly not bound by, and I think we can say that, cases quoted to us from Cyprus or from India can have no real application to the particular laws of this territory, as specifically laid down in the Order-in-Council and under which matters of this kind are referred to the Sharia Courts, and they have exclusive jurisdiction in such matters.

For these reasons the Order Nisi will be discharged with costs to include LP. 10 advocate's attendance fee to the Respondent, and to Abcarius Bey who appears for the present guardian.

Given this 28th day of April, 1942.

HIGH COURT CASE No. 30/42.

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

Before : Copland J. Edwards J. and Khayat J.

Mohammad Sharif el Nuss — Petitioner.

v.

The Director of Customs, Excise & Trade, Haifa.

Respondent.

Director of Customs authorising in writing import of certain goods to Palestine in transit for Syria — Subsequent refusal to allow consignment to Syria and forfeiture of goods under pretext that they were imported without import licence. — Question whether alternative remedy of suing for the goods under Customs Ordinance sufficient for High Court not to interfere.

1. No prescribed form for import licence; any authorisation in writing by Director of Customs to import goods — an import licence.

2. Nothing prevents owner changing destination of his goods whilst in transit.

3. An import licence or export licence in transit granted and acted upon cannot be withdrawn.

4. Where goods authorised to be imported to Palestine in transit for another country subsequently forfeited by Director of Customs, suing for them under sec. 190 of Customs Ordinance — not an effective alternative remedy barring way for interference by High Court.

Abcarius and Sanders for Petitioner
Crown Counsel (*Rigby*) for Respondent

Application for an order to issue directed to Respondent to show cause why Petitioner should not be allowed to consign 77 bales of cotton yarn to Syria.

ORDER

This case can be disposed of in a few words and in fact the less said about certain aspects of it the better.

The petitioners were desirous of importing 77 bales of Indian cotton thread from Baghdad to Syria in transit through Palestine. On the 18th August, 1941, their agents in Haifa applied to this effect to the Director of Customs, Excise and Trade at Haifa. On the 23rd August, 1941, the Director of Customs replied as follows :—

Messrs. Wardeh Kabbab.

Gentlemen,

Reference : Your letter dated 18.8.41

You are hereby authorised to import from Baghdad to Palestine in transit to Syria the 77 bales of Indian cotton thread referred to in your above mentioned letter. I have etc.

Director.

At or about the same time the petitioners obtained Syrian import licences, permitting the importation of the said goods into Syria, and these licences were produced to the Director of Customs in Haifa.

When the goods arrived in Palestine about 8th October, 1941, the Director refused to allow their consignment to Syria but required documentary evidence from the Iraqian Customs that the said goods were actually sent in transit from Baghdad to Syria through Palestine. The Manifest issued in Iraq showed that the goods were consigned in transit for Syria.

It is true that the invoice from Bombay shows that the goods were consigned to Baghdad in transit for Palestine, but there is nothing to prevent the owner changing the destination whilst in transit, and there is not the slightest suggestion even that the Syrian destination is not the correct one.

Evidence was also produced proving, beyond any doubt, that the goods were paid for in Baghdad and that no Palestine funds were in-

volved, but the Palestine Customs authorities, for some reason known only to themselves, required the original bill of lading and original invoice from Japan. How these could have been of any relevance completely passes my comprehension, since these goods were probably merely a small proportion of the goods imported from Japan and the firms in Japan had probably never in their lives heard of the petitioners or their agents in Baghdad. The only possible relevant documents could have been in the bill of lading from Bombay and evidence from the bank in Baghdad of payment against documents there, both of which were duly furnished.

Finally, the supply of excuses for not complying with their own written word having apparently run short, on the 17th December, 1941, the respondent informed petitioners for the first time that as the said goods were imported without an import licence they had been forfeited under section 5 (1) of the Import, Export and Customs Powers (Defence) Ordinance. 1939.

It is difficult, if not possible, to imagine a more flagranly dishonest reply than this letter of the 17th December, 1941. A licence is an authorization, and there can be no doubt that the respondent's letter of the 23rd August, 1941, was an authorization to import in transit for Syria, and therefore a licence to do so. There is no prescribed form for a licence.

It has been argued somewhat half-heartedly that the Director at any time has an absolute discretion to withdraw a licence. He cannot at any rate withdraw a licence, when that licence had been acted on and on the strength of it goods have been imported in transit. And to say that the goods had been imported without a licence was, not to mince words, a lie. They had been imported by virtue of the authorization or licence of the 23rd August, 1941, and the respondent knew it.

As to the argument that there is an alternative remedy and therefore this Court will not interfere, I do not think that there is any effective alternative remedy. To sue for the goods under section 190 of the Customs Ordinance will not give the petitioners what they want which is to secure the importation of these goods into Syria, and there is no other measure. The whole matter reflects the gravest discredit on the respondent's department and gives rise to very sinister suspicions.

The rule must be made absolute and the petitioners will have their costs assessed at a total sum of LP. 15.—

Given this 17th day of April, 1942.

R. Copland
British Puisne Judge

I agree that the rule must be made absolute.

D. Edwards

HIGH COURT CASE No. 31/42.

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

Before : Copland J. Edwards J. and Khayat J.

Adel Coudga & Co. of Damascus. Petitioners.

v.

The Director of Customs, Excise & Trade, Haifa.

Respondent.

Edit. Note: Headnotes 1., 2. and 3. in H.C. 30/42 (p. 161—162 *supra*) also refer to this case, the points involved being the same.

Abcarius & *Sanders* for Petitioners

Crown Counsel (*Rigby*) for Respondent

Application for an order to issue directed to respondent to show cause why petitioners should not be allowed to forward 152 cases of artificial silk yarn to Syria.

ORDER

This case is slightly different from High Court 30/42 heard on the same day, but many of the main facts are the same. It concerns 152 cases of artificial silk yarn which the petitioners wished to import from Baghdad to Syria in transit through Palestine. The Syrian authorities granted import licences for these goods into Syria, and Petitioners' agents in Baghdad were instructed to forward the said goods to Damascus via Palestine. In letters dated 18th and 19th September, 1941, petitioners' agents asked for permission to forward certain goods, including twenty-two cases of artificial silk yarn, in transit to Syria, and on the 22nd September the Respondent replied as follows :—

"Messrs. Wardeh Kabbab & Co.

Reference : Your two letters dated 18th and 19th September.

I have no objection that you import in transit to Syria the goods referred to in your above mentioned letter, provided the original Manifest is presented to this office on arrival of the goods in Palestine. I have, etc.

Director."

This letter of September 22nd, 1941, is an authorization to import in transit for Syria for twenty-two cases for the reasons given in High Court 30/42.

After some correspondence, the Respondent addressed the following letter to the Petitioners' advocate :—

"Mr. H. C. Weston Sanders. 20th November, 1941.

Sir,

With reference to your interview at this Office and in confirmation of my telephone message this morning, the goods referred to will be allowed to go forward in transit to Syria provided you produce documentary evidence showing that the goods were originally paid for by funds from Iraq and that no funds from Palestine were involved in this purchase.

Satisfactory evidence would be :—

(a) The original B/L from Japan to Bombay.
(b) The original invoice from the firm in Japan.
(c) The contract made by your clients on 26.7.41.
(d) A statement from the bank which opened credit for the payment of the goods in Japan.

I have, etc.

Director."'

This letter refers to an interview and a telephone message but does not in any way give any clue to the goods referred to. For a business letter it is a masterpiece of ambiguity.

Prior to this, on November, 17th, 1941, the Petitioners' advocate had sent a letter to the respondent in which reference is made to 152 cases of Artificial Silk Yarn to be imported by the petitioners, and to the 77 bales of Indian cotton which were the subject-matter of High Court 30/42.

On the 2nd December, 1941, the Petitioners' advocate wrote to the Respondent in answer to the latter's letter of November 20th, Ex. 90, and in this letter we again find mention of the 152 cases of artificial silk. In that letter attention is called to the documents already produced by the petitioners, and that all the transactions were between Baghdad/Damascus and Bombay, and all bore the stamp of the Ottoman Bank in Baghdad. From the correspondence as a whole it seems clear that the letter from the Respondent of 20th November, 1941, referred also to the 152 cases of artificial silk. Here again all the invoices from Baghdad for these 152 cases show them as consigned "Haifa, in transit for Syria". The Bombay invoices show destination as Baghdad, in transit for Palestine. Again there is nothing to prevent an owner changing the destination of his goods whilst in transit, and as the goods were shipped from Bombay they were obviously not enemy property. How, therefore, the original bill of lading and invoice from Japan could have any bearing on the character or ultimate destinations of these goods again defeats me completely.

Incidentally paragraph 6 of the respondent's affidavit in reply is untrue — application had been made to the respondent in respect of the 152 cases of artificial silk. The respondent's letter of the 17th December, 1941, is proof of that.

Finally we come again to the notorious letter of the 17th December, 1941, in which the respondent informed the Petitioners that as the 152 cases of artifical silk had been imported without a licence, they were seized and forfeited under Section 5(1) of the Import, Export and Customs Powers (Defence) Ordinance, 1939.

The petitioners' main arguments are that the goods were not imported without a licence, that a licence when granted and acted upon cannot be withdrawn arbitrarily, and that the Regulations do not refer to goods

in transit, to which indeed they would be inapplicable. The respondent traverses all these arguments, at any rate as regards 130 cases, in respect of which he says no authority of any kind was ever granted.

Now it is as clear as daylight, or should be, to any person who had not already made up his mind not to be convinced that these 152 cases on arrival in Palestine were not imported into this country but were in transit for Syria, and were not paid for by Palestine funds. In answer to a question put by me from the Bench we were informed that with regard to goods in transit the practice was not to issue an import licence but only an export licence in transit. There was no evidence before the respondent upon which he could hold that the goods were "destined for and imported into Palestine", but all the evidence was to the effect that they were in transit for Syria, and in such circumstances the Department's practice is not to demand an import licence. The reason given therefore for their forfeiture cannot hold water, and the goods were illegally seized. I very much doubt if these Regulations apply at all to goods in transit, which are in a class by themselves, and that would seem to be the Department's own view, since they do not ask for import licences for them.

From the affidavits in reply, in both these cases, which were made by a subordinate official, it would seem a reasonable inference that the respondent himself had no knowledge of what was taking place. Is it too much to express the hope that cases involving discretion should in future be dealt with by the officer to whom that discretion is given by law, and should not be delegated by him to a subordinate.

The rule must be made absolute, with costs to the petitioners fixed at the inclusive sum of LP. 15.—

Given this 24th day of April, 1942.

HIGH COURT No. 28/42.

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

Before: Copland, J. and Rose, J.

Izzidian, son of Mirza Mahmoud Kashan Irani in person, and as guardian of his sister Jamileh Mirza Mahmoud Kashan Irani. Petitioner.

v.

1. The Chief Execution Officer of the Magistrate's Court, Acre.
2. Nazleh, Hawieh, Hasna, Mahro and Shakib, children of Tarazallah Wadoud Mahmoud Kashan Irani Respondents.

Application for cancellation of whole of execution proceedings filed after lapse of nearly 4 months from date of service of notice of execution on applicant — Discretionary jurisdiction of High Court — Fatal delay in making application.

High Court will not exercise discretion to set aside execution proceedings, if petitioner waited until last minute in order to cause inconvenience to opponent.

Edit. Note:— See HC 21/42 11 CtLR 79 and Edit. Note thereto; HC 80/41 10 CtLR 87.

Hawa for Petitioner. *Moghannan* for Respondent No. 2.

Application for an order to issue directed to 1st respondent calling upon him to show cause why his order given in Execution File No. 275/41, Acre, dated 25.3.42, and proceedings purporting to be in execution of so-called judgment of 25.10.41, in Civil Case No. 93/41, including notices of sale and bidding, should not be set aside, and that 2nd respondents should go, if they so wish, to the Magistrate's Court, to follow up the partition proceedings accordingly.

ORDER

This is a return to an order nisi calling upon the Chief Execution Officer to show cause why his refusal of the petitioner's application of the 14th of March, 1942, which was an application to cancel all the execution proceedings which had hitherto taken place, should not be set aside.

In this case dates are of some importance. The judgment was filed in execution on 11th November, 1941. On the 22nd November, 1941, notice of execution was served on the petitioner. On 11th December, 1941, the Chief Execution Officer ordered the enforcement of the last paragraph of the judgment based on article 9 of the Law of Partition, in other words, he ordered that the property should not be partitioned but that it should be sold. The notices were published and it was not until the 14th March, 1942, that this application was filed with the Magistrate to cancel the whole of the execution proceedings which had taken place in the last three months. Now it is I suppose, necessary again to remark that this Court is not a Court of Appeal and that it does not exist to give persons, debtors or creditors, whoever they may be, a chance of further delay or to upset a judgment which has become final. Our activities are purely discretional and it depends upon many factors whether we should exercise them. In this case it seems quite clear from the course of events, that the petitioner has waited until what he considered to be the last minute in order to cause the maximum amount of inconvenience to his opponents. Unfortunately for him, but fortunately for his opponents, he made a mistake as to what was the last minute, because the last minute expired before he made his application. We do not think that this is a case in which we should exercise our discretion to remedy technical defects which should have been brought to our notice much sooner as we have remarked. In this case we cannot say that any injustice whatever has been suffered.

For these reasons we think that the order nisi should be discharged and execution proceedings will continue. Costs to include the sum of LP. 10 advocate's fee for attending this hearing.

Given this 22nd day of April, 1942.

MISCELLANEOUS APPLICATION No.27/42.

IN THE SUPREME COURT OF PALESTINE.

Before:— Gordon Smith, C.J.

Avraham Gorochov Applicant.

v.

Yvette Claudine Gorochov (nee Raymond) Respondent.

Couple, Palestinian citizens, he a member of Jewish Religious Community, she not belonging to any Religious Community, married to each other by Civil Marriage abroad — Application to Chief Justice for order determining Court to try action for divorce or decree of nullity of marriage.

Where couple, Palestinian citizens, one being member of Jewish Religious Community, other not belonging to any Religious Community marry each other by Civil Marriage in foreign country, Court to try action for divorce or decree of nullity between them when they reside in Palestine — District Court of place of residence, and law applicable Matrimonial Law of that foreign country as at time of marriage.

Edit. Note: Compare Misc. Appl. 60/41 11 CtLR 8.

Silberg for Applicant. Respondent: absent-served

Application under first part of Art. 55 of Palestine Order-in-Council to determine what Court has jurisdiction.

ORDER

This is an application by the petitioner, Avraham Gorochov, made to me under the first part of Article 55 of the Palestine Order-in-Council for an order determining which Court shall have jurisdiction to deal with and decide in an action for a decree of nullity of marriage or a decree of divorce which the petitioner intends to bring against the respondent, his wife. The petitioner states that he and the respondent were married to each other by Civil Marriage in Paris, France, on the 12th January, 1939; that both are Palestinian citizens and hold Palestinian passports; that the petitioner is a member of the Jewish Religious Community and respondent does not belong to any Religious Community and did not at the time of the marriage belong to any Religious Community; that both petitioner and respondent are domiciled in Tel-Aviv, and that since the month of February, 1942, the respondent, as alleged by the petitioner, has been entertaining and is still entertaining

intimate relations with a lover and has committed adultery on several occasions and he therefore prays for the order already referred to above.

After hearing Dr. Silberg for the petitioner, I hereby order that the District Court of Tel-Aviv do have jurisdiction to try the action and to apply the French Matrimonial Law as at the time the marriage was contracted.

Given this 24th day of April, 1942.

HIGH COURT No. 32/42.

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

Before : Gordon Smith C. J. Copland J.

Epstein-Strykovsky, Ltd., Haifa Bay. Petitioner.

v.

1. The Chairman and Members of the General Claims Tribunal, Jerusalem, viz :
   (a) E. Mills Esq.
   (b) W. A. Morrison Esq.
   (c) Lt. Col. L. Pedretti.
2. The Assistant Director of Public Works, as Competent Authority. Respondents.

Assessment of compensation by General Claims Tribunal — Law to be followed by High Court exercising its discretionary jurisdiction.

1. High Court will not interfere with assessment made by General Claims Tribunal according to their discretion if it finds that they went into matter carefully and exercised their discretion reasonably.

2. Law to be followed by High Court — fully set out in H.C. 78/39*)

Edit. Note: as to I see H.C. 16/42 11 CtLR 57 & Edit. Note thereto.

Eliash for Petitioner. *Crown Counsel* (*Hogan*) for Respondents.

Petition for an order to issue to 1st Respondents directing them to show cause why they should not award compensation in accordance with law for Requisition No. 742.

ORDER

We are of the definite opinion that the order nisi should be discharged. This is not a Court of Appeal from the Tribunal, which went into the matter very carefully and were at the same time liberal in the assessment which they made according to their discretion. We therefore do not wish to interfere with this discretion. High Court 78/39 fully sets out the law to be followed by this Court.

The order nisi is therefore discharged, with costs for the Respondents which we fix at LP. 10.

Given this 23rd day of April, 1942.

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*) CtLR Vol. VII p. 45.

CIVIL APPEAL No. 34/42.

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

Before : Copland J. and Rose J.

Mrs. Margarete Kahn — Appellant

v.

1. Hardware Manufacturing Co. (Tooval) Ltd.
2. Jechiel Weizmann. — Respondent

Informal document containing certain statements as to state of affairs of company — Figures of document changing to the worse at time of Plaintiff investing money in company — Action for damages for fraudulent misrepresentation.

1. Question of fraud or no fraud — one for trial Court; Court of Appeal will not interfere unless satisfied that trial Court when making the finding did not apply its mind to proper considerations.
2. (Obiter) Plaintiff claiming damages for fraudulent misrepresentation must prove:
   (*a*) there was a representation which was false, to knowledge of Defendant, or was made recklessly without caring whether true or false.
   (*b*) plaintiff relied upon this representation.
3. (Obiter) A material representation true at time of its being made but falsified by later events is, if allowed to remain uncorrected, a continuing representation

Edit. Note: as to I see: CA. 237/41 11CtLR 124 & Edit. Note thereto.

Sommerfeld for Appellant
Frankel for Respondent

Appeal from judgment of District Court Tel-Aviv dated 10.2.42 given in Civil Case No. 327/40, as far as claim was dismissed against Respondent No. 2.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv dismissing an action by the appellant (plaintiff) for damages for fraudulent misrepresentation. The case is an unfortunate one as there is no doubt that the appellant has lost a substantial sum of money as a result of a most unfortunate investment. The question, however, that the Court has to decide is whether the plaintiff has been able to show that there was a fraudulent misrepresentation within the meaning of the law.

The elements that it is necessary for a plaintiff to prove in such a case are, of course, well known — that there was a representation which was false, to the knowledge of the defendant, or which was made recklessly without caring whether it was true or false, and that the plaintiff relied upon this representation.

In this case the false representation alleged is contained, in the do-

cument Exh. P/1 which is a document written in almost colloquial language and does not purport to be, and certainly is not, a balance-sheet, and cannot even be said to be a prospectus in the ordinary sense of the term. It is admitted by counsel for the appellant that the statements in this document were true at the time that it was issued. But he says, and there is substance in his contention, that by the time his client finally invested her money in the Company concerned, the figures had changed for the worse.

There is authority for the proposition that, in certain instances, a material representation which was true at the time of its being made but is falsified by later events is, if allowed to remain uncorrected, a continuing representation. In this case, however, the lady in question was advised throughout by an experienced business-man, Mr. Sherek, and Mr. Sherek stated in evidence that he did not rely on this document and that he asked no subsequent questions about the figures mentioned in the document. I have little difficulty in believing him on this point as it would seem to be most unlikely that a person of any commercial experience would invest money, or advise anyone else to invest money, on the basis of such a document.

Apart from this, the question of fraud or no fraud is eminently one for the Court of first instance and where,as in this case, the trial Court has made a finding that there was no fraud, a Court of Appeal is most reluctant to interfere unless it can be satisfied that the trial Court did not apply its mind to the proper considerations.

It is an unfortunate case, but the appellant (plaintiff) has failed to prove her allegations of fraud and the appeal is therefore dismissed with costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 28th day of April, 1942.

HIGH COURT No. 44/42.

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

Before : Gordon Smith C. J. and Copland J.

Isaac Trachtengott — Petitioner.

v.

The Attorney General — Respondent.

Petition to High Court for order to transfer criminal case from Municipal Tribunal to Magistrate's Court — Proceedings before Municipal Tribunal cannot be tested in High Court.

High Court has no power to question any proceedings before a Municipal Tribunal.

Goitein for Petitioner

Application for an order to Respondent to show cause why Crim. Case No. 21/42 (Munic. Trib. Tel-Aviv) should not be instituted against petitioner in Magistrate's Court, Tel-Aviv, instead of Municipal Tribunal Tel-Aviv.

ORDER

In view of the terms of Regulation 6 of the Defence (Municipal Tribunals) Regulations, 1941, this Court has no power to question any proceedings before a Municipal Tribunal. The application for a rule nisi is therefore refused.

Given this 4th day of May, 1942.

HIGH COURT No. 43/42.

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

Before : Copland J. and Khayat. J.

Muhammad 'Abdul 'Al — Petitioner.

v.

District Officer, Haifa — Respondent.

Petition to High Court to set aside order of District Commissioner dismissing petitioner from office of Mukhtar — Absence of law dealing with appointment etc. of Mukhtars — Absolute discretion of District Commissioner in appointing and dismissing Mukhtars — Non-interference of High Court where no law authorising Public Officer to do or ordering him not to do certain act.

1. Where no law authorising Public Officer to do or ordering him not to do a certain thing, High Court cannot interfere.

2. a) Municipal Corporations Ordinance 1934 having repealed Ottoman Legislation regarding administration of Vilayets, at moment no law which authorises appointment of Mukhtars or defines their conditions of service or reasons of dismissal.

b) Person designated as Mukhtars hold office solely at pleasure of District Commissioner, who appoints them and can dismiss them for any reason or no reason at all.

Edit Note: as to I see H.C. 16/42 11 CtLR 57.

Khamra for Petitioner — For Respondent: Ex parte.

Application for an order to issue directed to respondent calling upon him to show cause why his order dated 15.4.42 removing petitioner from office as a Mukhtar for Egyptian Community in Haifa should

not be set aside and why he should not continue to act as a Mukhtar for said community in Haifa.

ORDER

In this case the petitioner, who is stated to be the late Mukhtar of the Egyptian Community in Haifa, asks for an order nisi to issue to the District Officer Haifa, to show cause why an order for his dismissal from the office of Mukhtar dated 15th April, 1942, should not be set aside. The petitioner relies upon the Vilayet Law of 1281 A.H. Unfortunately that law was repealed many years before the British Occupation of Palestine, and all subsequent laws affecting the same subject, that is to say, the Law regarding the administration of Vilayets of 1287, A. H., the Regulations regarding the administration of Vilayets of 1293, A. H., the Provisional Law for the general administration of Vilayets of 1331, A. H., with the amendment of 1332 A. H., have all been repealed by Section 133 subsection 1 of the Municipal Corporations Ordinance, 1934 which says : "The Ottoman laws mentioned in the thirteenth Schedule to this Ordinance shall cease to have effect", and there is unfortunately no saving clause with regard to rural areas though the Municipal Corporations Ordinance itself, of course deals solely with the administration of municipal areas.

There is, therefore, no law at the moment authorising the appointment of Mukhtars or defining their conditions of service or the reasons which might justify their dismissal. It seems, accordingly, that the position is that such persons who are designated as Mukhtars hold office solely at the pleasure of the District Commissioner who appoints them and, that being so, the District Commissioner, if so moved, can dismiss them for any reason or indeed for no reason at all. The cases referred to by the petitioner, Bayyad & anr. v. District Officer Jaffa, H.C. 70/27 (1P.L.R. 174) and Al Bustani v. District Commissioner Haifa, H.C. 4/30 (1 P.L.R. 468), were both decided before 1934, when different considerations applied — since the enactment of the Municipal Corporation Ordinance in that year, they can no longer be relied upon.

This Court is limited in its duties with regard to this particular type of order which is asked for by the fact that it can only order a District Commissioner to do something which, by law, he is authorised to do or to refrain from doing something which the law orders that he shall not do. There being no law here this application must fail.

The application for an order nisi must be dismissed.

Given this 7th day of May, 1942.

HIGH COURT No. 59/42.

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

Before : Copland J. and Frumkin J.

Ibrahim of Haj Darwish el Haj Ali — Petitioner.

v.

1. The Chief Execution Officer, Jaffa.
2. Zakiya el Haj Darwish — Respondents.

Judgment given in May 1931 *"for* 2,000 *Napoleons i. e.* 40,000 *francs, or their equivalent at present time" — Chief Execution Officer refusing to accept French paper francs in satisfaction of judgment debt — High Court upholding Chief Execution Officer's order.*

1. No judgment can be satisfied in foreign currency.
2. Where final judgment states at what time equivalent value of foreign currency should be calculated calculation must be made accordingly.

Edit. Note: see CA 17/40 7 CtLR 157 and cases cited therein.

Moghannam for Petitioner

Petition for an order to issue directed to 1st respondent to show cause why his order of 9.5.1942, given in Ex. File No. 74/42 D. C. Ex Office Jaffa, refusing to release the attachment laid on petitioner's property should not be set aside and why said attachment should not be released; and why said order refusing to consider payment of 40,000 Francs in cash paid by petitioner with costs in full settlement of judgment debt against said petitioner in Civil Case No. 60/31 DC. Jaffa, should not be set aside; and why such payment should not be considered as proper payment and in full settlement and discharge of said judgment debt in Ex. File No. 74/42; and why alternatively said order of 1st respondent ordering payment in Palestine currency at rate of exchange on date of judgment i. e. 19.5.31 should not be set aside and instead an order made for payment to be made at rate of exchange on date of actual payment.

ORDER

This is an application to this Court to set aside an order of the Chief Execution Officer in which he refuses to accept the sum of 40,000 French paper francs in satisfaction of a judgment, but asked for their equivalent value in Palestinian currency at the date when the judgment was given. It is curious to note that the judgment says — "It is for the sum of 2,000 Napoleons i. e. 40,000 francs, or their equivalent value at the present time" Well, French francs, of course, are not legal currency or legal tender in this country, and no judgment can possibly be satisfied in a foreign currency unless one perhaps would be suing for specific coins. In this case, our opinion is that the Chief Execution Of-

ficer was perfectly right. He said : "No, I cannot take French paper francs ; they are not legal tender".

The question then arose at what time the equivalent value should be calculated. Well, that point, which might have given some difficulty in this case, does not give any difficulty because it is stated in the judgment : "Their equivalent value at the present time" i. e. the date of the judgment which was some time in 1931.

For these reasons the application is refused.

Given this 2nd day of June, 1942.

CIVIL APPEAL No. 167/41.

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

Before : Rose, J. and Edwards J.

In the Appeal of :

Hayim Baroukh Abraham Sham'un Blaw. Appellant.

v.

Moshe Ludmir Respondent.

House beneath road or path used for pedestrians and for animals to pass over — Road widened and strengthened by neighbour with consent of Municipality — Action in Magistrate's Court to restrain neighbour from allowing motor vehicles to pass over road because "injury might result to the property".

Where plea in an action to resttain defendant from doing certain things not nuisance in sense of loss of amenities but that "injury might result to the property", Court right in going only into question of injury and dismissing claim if this plea not proved.

Edit. Note: Compare CA 236/37 3 CtLR 29.

Mughamam for Appellant *Eliash* for Respondent

Appeal from judgment of Magistrate's Court, Safad, sitting as a Land Court dated 28.7.41 in Civil Case No. 77/41 — Lands.

JUDGMENT

It appears that in this case the appellant owns a house, two rooms of which are under a road or path. This road or path, whatever it may be, is marked on a plan of the Municipality of Safed as a road and it is admitted that for a number of years, I think the witnesses say fifty years, it has been used for pedestrians and for donkeys to pass over. Recently the defendant, with the consent and approval of the Municipality, strengthened this road and widened it by between a half and one metre to enable a lorry to go over it.

The appellant brought an action before the Magistrate's Court of Safad, sitting as a Land Court, to restrain the respondent from allow-

ing motor vehicles to pass over this road or path. Now, there are various things which the appellant might have contended. He could have complained, for example, of loss of amenities. He might have alleged, amongst other things, that the passing of a motor vehicle overhead would have shaken the house and made it intolerable for him to live in. It is unnecessary to go into that question now because nuisance in the sense of loss of amenities was never alleged and the Magistrate was therefore quite right in not going into that issue.

What was alleged in the statement of claim was that the allowing of heavy motor vehicles to go over this path was dangerous for the house below and for the people in it. The exact plea was that "injury might result to the property". On that matter evidence was called and the Magistrate, who appears to have applied his mind to the proper issue, says in paragraph 5 of his judgment :

> "It is understood from the Plaintiff's answers that he does not object to the existence of the road and the passing of people and even animals thereon but objects to the running of cars thereon fearing that that will cause damage to those two vaults. But after it has been technically proved that there is no danger to the house of the plaintiff from the passing of any motor vehicle, there seems to be no room therefore for the plaintiff to complain."

Is that finding of the Magistrate justified by the evidence? In our opinion it is, nor has the contrary been suggested by counsel for the appellant. In fact no physical damage appears to have been caused and the evidence is conclusive that the road had been reinforced with concrete to guarantee the safety of the two rooms beneath.

That being so, that seems to me to be sufficient to dispose of this appeal.

A further point has been raised as to whether the Magistrate was correct in allowing certain witnesses to give evidence by affirmation and not on oath. I do not think it is necessary to go into that matter. It is clear that the evidence of these witnesses is really immaterial as there is no substantial dispute between the parties as to the facts. For all practical purposes, the facts are common ground.

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

Delivered this 14th day of November, 1941.

HIGH COURT No. 49/42.

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

Before : Copland, J. Frumkin J. and Khayat J.

In the Application of :

1. Issa Elias Salman & 4 others — Petitioner.

v.

1. Chief Execution Officer, District Court, Jerusalem.
2. Joseph P. Albina. — Respondents.

Proceedings of sale of mortgaged property extending over a long period — Belated claim that area, as shown in notice of sale, wrong — Necessity of due diligence in applying to Chief Execution Officer before coming to High Court.

Parties applying for discretionary exercise of jurisdiction of High Court must first show due diligence in bringing to notice of public officer the matter complained of.

Edit. Note: see HC 28/42 11 CtLR 170 and Edit. Note thereto.

Elia for Petitioner — *Marein* for Respondent No. 2

Return to a rule nisi issued on 18.5.42 directed to 1st respondent calling upon him to show cause why his order dated 17.4.1942, in Ex. file No. 390/40, District Court, Jerusalem, should not be set aside.

JUDGMENT

After hearing the various arguments of the parties, this application seems to be out of time. The mortgage debt fell due in 1935, application for sale of the mortgage property was lodged in June, 1940; service was duly effected ; parties were heard and possession was taken in December, 1940. The first publication was in July, 1941. It was not until December, 1941, that it was claimed that the area, as shown in the notice, was wrong. Parties when they apply for the discretionary exercise of the jurisdiction of this Court must show due diligence. In this case no diligence whatever has been shown by the petitioner in bringing to the notice of the Chief Execution Officer the matter complained of. The respondent, however, very fairly has repeated his offer which was made some considerable time ago, that the notice of sale should be amended to show what the area as estimated by the mortgagors is.

We therefore discharge the rule, but the notice of sale must be amended to show that the registered area according to the Koushan is 6 dunams 800 pics but that the area estimated by the mortgagors is 20 metric dunams 710 metres.

The second respondent is entitled to his costs which we fix at an inclusive sum of LP. 5.

Delivered this 29th day of May, 1942.

HIGH COURT CASE No. 42/42.

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

Before : Rose, J. and Edwards, J.

In the Application of :

Rahamin Lalo — Petitioner.

v.

1. The Registrar of Lands, Jaffa.
2. Abbas Abdel Rahim Yusef Beidas — Respondents.

Application for order nisi regarding transactions of Land — To whom must order nisi be directed in matters of land registration — Non-interference of High Court where alternative remedies exist.

1. High Court will, as elementary rule of practice, not interfere where petitioner has alternative remedies.
2. (Obiter) Rule nisi to show cause why certain land transaction should or should not be completed must be directed to Director of Lands, not to Registrar of Lands.

Edit. Note: as to 1 see HC 55/42 published on p. 182 infra. See also HC 13/42 11 CtLR 54 and Edit. Note thereto.

Polonsky for Petitioner

Crown Counsel (*Hogan*) for Respondent No. 1

Olshan for Respondent No. 2

Application for an order to issue directed to 1st Respondent calling upon him to show cause why he should not approve for completion files Nos. 2854/41, 2851/41 and 2853/41 of Land Registry Office, Jaffa, and why he should not refrain from proceeding with transactions in files Nos. 1671/42, 1672/42 and 1673/42 of Land Registry Office.

ORDER

This is a return to a rule nisi directed to the Registrar of Lands, Jaffa. The first point taken by the respondent is that this rule should have been directed to the Director of Lands and not the Registrar of Lands. Speaking for myself, I should have thought that that argument was sound. We do not, however, decide this matter on that point because the fact appears to be that in the past a number of rules, on matters of a similar nature to the present one, have been directed to the Registrar of Lands and not to the Director, and that no objection appears to have been taken.

The point on which we decide this matter is the elementary one of the existence of alternative remedies. It is not for us to go into the merits of this matter at all, and we must clearly refrain from making any finding as to whether or not the power of attorney in question was obtained by fraud. That is a matter that may have to be decided in due course by the appropriate Court. But it seems to us to be plain that the Petitioner in this matter has alternative remedies. It is

not for us to advise him as to what is his appropriate Court, whether it be the Land Court or the District Court, and generally we think that the less we say about the merits and details of this matter the less embarrassing it will be for the Court that may ultimately have to decide the issues in question.

The rule must therefore be discharged with costs, which we assess at an inclusive sum of LP. 10 to the second respondent.

Crown Counsel does not ask for costs for the first respondent.

Given this 19th day of May, 1942.

HIGH COURT No. 55/42.

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

Before : Copland J. and Frumkin J.

In the Application of :

1. Shmuel Lebanon
2. Aharon Zerkoff — Petitioners.

v.

1. The President District Court, Tel-Aviv, in his capacity as Chief Execution Officer.
2. Zvi Pechthold
3. Shamai Kobrinsky. — Respondents.

District Court on appeal, while remitting case for completoin, confirming Magistrate's decision that he had jurisdiction — District Court, on second appeal in same case, again upholding Magistrate's view in matter of jurisdiction — Chief Execution Officer rejecting application by judgment debtor not to proceed with execution because judgment a nullity — Application to High Court to set aside order of Chief Execution Officer — Non-interference of High Court where there is or there was another remedy — Can Chief Execution refuse to execute judgment of District Court on ground of its being a nullity?

1. Invariable practice of High Court not to interfere in any case where another Court had, or would have had, jurisdiction.
2. High Court will not interfere with order of Chief Execution Officer to proceed with execution, if petitioner could have applied for leave to appeal to Supreme Court to test validity (or correctness) of judgment.
3. Chief Execution Officer has no power to say District Court judges were wrong, their judgment a nullity and therefore not executable.

Edit. Note: as to 1 see HC 42/42 published on p. 181, supra and Edit. Note thereto.

Goldberg for petitioner — Respondents: *Ex parte*

Petition for an order to issue directed to 1st respondent to set aside his decisions dated 12.5.42 in Execution File No. 2781/42 and

19.5.42 in Execution File No. 3051/42 respectively ordering execution to proceed therein insofar as judgment of District Court, Tel-Aviv, in its appellate capacity dated 23.3.42 given in File No. 5/42 as well as order of Registrar, District Court, Tel-Aviv in said file (ordering payment of LP. 5.385) were and are, in each case, a nullity and that execution proceedings be restored to same state as it was before aforesaid orders of first respondent.

ORDER

In this case judgment was first given by the learned Magistrate and that judgment was taken to the District Court on appeal. On appeal the District Court held that the learned Magistrate had jurisdiction to try the case, but remitted it to the Magistrate with certain instructions, with regard to the question of excessive interest. The Magistrate again gave judgment in the amount claimed and the case was again taken by petitioner on appeal to the District Court and the District Court dismissed the appeal. The same question of jurisdiction was therefore raised twice before the Magistrate and twice before the District Court on appeal. The petitioner did not, as he could well have done, apply for leave to appeal to this Court on a point of law. Two Magistrates' Courts and two District Courts have held that the case was within the jurisdiction of the Magistrate. The petitioner, not content with this mass of judicial opinion against him, proceeds to the Chief Execution Officer and says to him "Magistrates and District Courts were all wrong. You have no power to execute this judgment because it is a nullity". The Chief Execution Officer, not unnaturally, rejected the application, and the petitioner, originally full of hope and disregarding the mass of judicial opinion against him, has now come to this Court against the Order of the learned Chief Execution Officer.

Now, the petitioner cited to us various judgments none of which fits the facts of this case. There is one standard rule of this Court, I suppose, which has been maintained from the earliest days the High Court was instituted, and that is that the High Court will not interfere in any case where another Court had, or would have had, jurisdiction. Now, it is perfectly clear that two District Courts of Appeal have held against the petitioner. He could have appealed to the Supreme Court if he had wanted and the Supreme Court would have had jurisdiction to entertain his appeal. He did not choose to avail himself of that right and therefore, following our invariable practice, he cannot now come to the High Court. In any case the Chief Execution Officer has no power to say that a judgment of the District Court on appeal is a nullity. The Chief Execution Officer was, therefore, perfectly correct in declining to order that the judgment should not be executed and the Chief Execution Officer being correct, it is not for us to interfere. Whether or not the District Court judgments were right, is a matter that is immaterial. Those judgments were delivered; they were not

appealed ; they are final. It is not for the Chief Execution Officer to say that the District Court Judges were wrong.

The application must be dismissed.

Given this 2nd day of June, 1942.

CIVIL APPEAL No. 23/42.

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

Before : Gordon Smith C. J. Frumkin J. and Khayat J.

In the Appeal of :

Eva Laster & 3 others — Appellants

v.

Nissan Rutman — Respondent

Claim on guarantee in respect of a mortgage — Offer by mortgagor to pay a specified sum by way of compromise in consideration, inter alia, of mortgagee discharging guarantor — Acceptance by mortgagee of mortgagor's offer of compromise subject to a fixed time limit — Debtor failing to fulfil his offer — Legal position of guarantor.

1. Offer of compromise made by debtor and subsequent failure to fulfil it cannot be said to prejudice guarantor or constitute alteration of his guarantee.

2. Where offer and acceptance between debtor and creditor does not prejudice guarantor, his liability on guarantee subsists both under English law and under Mejelle.

Edit. Note: see HC 60/38 4 CtLR 24 and Edit. Note thereto.

Klebanoff for Appellants — *Kaisermann* for Respondents

Appeal from judgment of District Court Haifa dated 30.1.42, in Civil Case No. 79/39.

JUDGMENT

This is an appeal against the decision of the District Court dated 30th January, 1942. The claim against the defendant, that is the respondent, was on a guarantee in respect of a mortgage for an amount not exceeding LP. 900. There were several mortgagees and the position was somewhat involved. Proceedings had been taken in respect of some of the mortgages, and the statement of claim in this action claimed the sum of LP. 900 on this guarantee in favour of the representatives of the plaintiff. It was held by the District Court in paragraph 19 of the judgment that under English Law the act of the creditor as in this case would obviously release the guarantor from his liability, and in the following paragraph the judgment discusses the question of whether the English law or English principles of guarantee applied or whether the relevant articles of the Mejelle applied.

The whole question turns on the two letters which were attached as exhibits. The one from the principal debtor dated 31st October, 1940, makes a certain offer in the following terms :

> "... I therefore propose to you by way of compromise to pay as a final settlement of the aforesaid debts (that is to say of the said two mortgages and of the said guarantee) until 15.12.40 the sum of 1,900 Pounds cash.
>
> Provided that at the time and in consideration of the said payment you will officially release the said mortgages and will officially transfer them to whom I may desire and also that you will officially and legally discharge the guarantee of Rutman and will finally discontinue the action now heard against the aforesaid Mr. Rutman."

And on the same day the reply by Eva Laster came acknowledging the offer, and she said in effect that if he would comply with and carry out the offer she would accept it, and that she would accept the sum of LP. 1,900 cash as a final and complete discharge of all debts due from him upon the two mortgages and upon the guarantee of Mr. Rutman. And then it goes on to say :

> "And provided that it is clear and understood that your offer contained in your letter to me and this my letter to you of today's date shall not be deemed as binding upon me and shall not be deemed an extension and shall in no way affect the guarantee of Mr. N. Rutman; and the acceptance on my part of your offer shall be confirmed only upon receipt by me of the said amount on the above date."

It is not disputed that that sum of LP. 1,900 has never been paid, and in her acceptance she further went on to say :

> "And if the said date, 15.12.40, will pass and your offer not be actually carried into effect, your offer will thereby be immediately revoked and I will not agree to any offers whatsoever and will continue the legal proceedings against you and against Mr. N. Rutman, the guarantor, without any delay, for the whole amount of the debts for principal, interests, expenses and advocate's fees."

It is clear that there was a firm offer and acceptance subject to conditions, the main condition being payment of the money that was offered on a specified date. That sum was not paid and the whole offer and the provisional acceptance of it became abrogated in terms of the acceptance. The matter is, therefore, dependent on the interpretation put upon that offer and that provisional acceptance. It has been argued for the respondent that the English Law applies and that on the English Law those negotiations prejudiced the position of the surety. On the other hand, it is submitted that the Mejelle applies and that there is nothing in the Mejelle which would abrogate the rights against the surety on these negotiations. It seems to us that it is really immaterial which law applies ; under both laws, if this offer and acceptance did not prejudice the surety then the guarantee still subsisted and he is liable thereunder. We cannot see that this surety was in any way prejudiced as regards his liability on his guarantee. In

fact, if the offer had been fulfilled and the money had been paid he would have been relieved from his liability under the guarantee. The fact that that offer was not fulfilled cannot, in our view, have prejudiced the surety. His complaint is that if he had known of it he might have made a better offer, I assume, or an offer more advantageous to himself in regard to liquidating the two mortgages. I cannot see that that constitutes an alteration in the terms of his guarantee. As regards the terms of the guarantee he could, at any time, make negotiations in respect of the mortgages. Such negotiations would be entirely separate and apart from the terms of the guarantee or his undertakings under the guarantee.

We therefore find that the District Court erred in this respect and that the Court should have given judgment for the appellant in the sum of LP. 900 which sum, it is admitted, is due under the guarantee.

The decision of the District Court will therefore be set aside and judgment will be entered for the appellant in the sum of LP. 900, together with costs here and below including advocate's fee of the hearing of this Court of LP. 15. We make no order at all as to interest.

Delivered this 19th day of May, 1942.

CRIMINAL APPEAL No. 34/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before : Rose, J. Edwards J. and Frumkin J.

Haj Hafiz el Luh — Appellant.

v.

The Attorney-General — Respondent.

Conviction by Assistant District Commissioner sitting as a Magistrate for concealing food and essential commodities — Hoarding not concealing.

Concealing not the same as hoarding and latter — not an offence; thus where evidence only shows that accused was found in possession of certain quantities of controlled articles conviction under Concealment and Destruction of Controlled Articles (Prohibition) Order cannot stand.

Goitein and Eisenberg for Appellant

Crown Counsel (Rigby) for Respondent

Appeal from judgment of District Court Jaffa, sitting as a Court of Appeal, dated 13.2.1942, in Crim. Appeal No. 71/41, whereby it confirmed judgment of Assistant District Commissioner, Gaza, acting in his capacity as a Magistrate, dated 20.11.1941, who convicted Appellant of concealing controlled articles, contrary to Sect. 2 of Concealment and Destruction of Controlled Articles (Prohibition) Order, 1941, and was sentenced to 3 months' imprisonment.

For Appellant : *Goitein and Eisenberg.*

For Respondent : *Crown Counsel (Rigby)*

JUDGMENT

This is an appeal by leave from the District Court of Jaffa dismissing an appeal from the Assistant District Commissioner of Gaza, sitting as a Magistrate. The Appellant was convicted of an offence against an order passed under the Food and Essential Commodities Ordinance, 1939, the relevant rule being Rule 2 of an order appearing on page 266 of the 2nd Supplement of 1941, which reads :

> "No person shall, in Palestine, conceal or destroy any of certain articles set out in the Schedule".

There is no doubt that the accused had in his house certain controlled articles as set out in the schedule to the Order. He had not destroyed them, and we may therefore assume that he was charged with concealing them. The point, as the learned President of the District Court appreciated when granting leave to appeal, is whether there is sufficient evidence of concealment.

The relevant and only admissible evidence called on behalf of the prosecution was as follows :

> "I searched a room in the accused's house. I found 560 rottles of wheat. 1040 rottles of barley, and 280 rottles of dura."

There is no allegation that these articles were concealed, and the witness himself does not say so.

That is sufficient, in our opinion, to dispose of the matter. We would add that it would seem that both the Assistant District Commissioner, and the Prosecution were under the impression that concealing is the same thing as hoarding, the latter, of course, not being an offence under the Order.

For these reasons the appeal must be allowed and the conviction and sentence quashed.

Delivered this 26th day of March, 1942.

HIGH COURT CASE No. 60/42.

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

Before : Copland J. and Frumkin J.

Khadil Jamil Rishani, Private in His Majesty's Forces Petitioner.

v.

1. Superintendent of Central Prison, Jerusalem.
2. The Attorney-General. Respondents.

Application in nature of Habeas Corpus on behalf of person sought to be extradited — Question of identity.

Where person admits his name, his father's name, his occupation and his country of origin were as stated in application for his extradition, any eventual discrepancy in date of birth may be considered a matter of minor or no importance at all.

Edit. Note: Compare HC 52/41 9 CtLR 189.

Moghannan for Petitioner

Application for a writ of Habeas Corpus to issue directing Superintendent of Central Prison, Jerusalem to show cause why he should not produce said Khalil Rishani, Petitioner, before High Court of Justice on a date to be fixed for the purpose of deciding that Petitioner is unlawfully detained, and to show cause why said Petitioner should not be released and to await further order of this Court.

ORDER

This is an application in the nature of habeas corpus in respect of Private Khalil Jamil Rishani, lately serving in His Majesty's Forces, who is required on a charge of murder in the Lebanon.

He was brought before the Chief Magistrate. The Chief Magistrate had before him the requisite documents, and in answer to questions, this particular person, a young man, admitted his name was as stated in the application for his extradition ; admitted his father's name was corect ; admitted his occupation was correct ; admitted he was a Syrian. It is perfectly clear from this, therefore, that he admitted his identity. Are we to suppose that there are two sets of persons with exactly the same name, exactly the same father's name, exactly the same occupation ? That being so, the only ground — the question of the date of birth — may well be a clerical error. If the identity is admitted by the man himself, that date becomes a matter of minor or no importance at all.

There is nothing in any of the other points raised.

The application is refused.

Given this 2nd day of June, 1942.

HIGH COURT No. 88/41.

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

Before : Rose, J. and Edwards, J.

In the Application of :

1. Muhammad Ahmad Abu Shanab & 5 others Petitioners.

v.

1. Registrar District Court, Jaffa.
2. Sheikh Saleh Ibn Omar Es-Sharif el Jazayiri.
3. Omar Es-Sharif el Jazayiri. Respondents.

Registrar making final order of sale and afterwards order of registration of immovable property in name of bidder in execution of judgment — Land Settlement Officer registering immovable property in accordance with order of Registrar — Application by judgment debtor to High Court to set aside final order of sale and order of registration.

1. After order complained of executed — too late to come to High Court; petition, therefore, after order of registration of land made and registration fees paid — unavailing.

2. High Court will not interfere where petitioner had other remedies.

3. Where petitioner was granted permission to apply to High Court *in forma pauperis*, there may be no costs to successful Respondent.

Edit. Note: As to 1: HC 57/38 4 CtLR 136 and HC 40/40 8 CtLR 33 followed. As to 2 see HC 55/42 on p. 182, supra and Edit. Note thereto.

Petitioners in person — *Germanous* for Respondents 2 and 3

Application for an order to issue directed to 1st respondent calling upon him to show cause why his orders dated 9.8.41 and 2.9.41 in Ex. File No. 34/41, District Court, Jaffa should not be set aside and that he be refrained from selling the immovable properties of Petitioners.

ORDER

On the 9th of August, 1941, the Registrar, District Court, Jaffa, made an order of final sale of immovable property of the present petitioners in execution of a judgment in Civil Case No. 252/35, in which case the present petitioners were the judgment-debtors. The Registrar presumably made that order under Section 6(a) (1) of the Registrars Ordinance, 1936. Following that final order of sale he made an order of registration on the 2nd September, 1941, and the Land Settlement Officer did on the 19th September, 1941, issue a certificate of registration to the present respondents in respect of this property. The petitioners now come to this Court and ask that the orders of final sale and of registration be set aside. We have heard Mr. Germanus, advocate for second and third respondents, and we have heard some of the petitioners in person. The respondents' advocate has referred us to High Court Cases Nos. 57/38 *) and 40/40*). It was held in those cases, and it has since been held in other cases, that it is too late to come to this Court for such an order after execution has been completed i. e. in this case after the order of registration has been made and the fees for registration paid. In this case, not only was the order of registration made as far back as the 7th September, but the fees were duly paid on some date after 7th and the property was in fact registered on the 19th September. The application to this Court is dated 7th October 1941. For that reason alone the Order Nisi must be discharged.

Mr. Germanus has advanced another reason why the present petitioners are mistaken in their remedy. He says that it is clear that the order complained of must have been made under Section 6(a) of the Registrars Ordinance and that accordingly the remedy of the petitioners was under Section 8(1) of that Ordinance. Now, it seems that the present petitioners must have known of the Order of the 9th August and they certainly knew of the Order of 2nd September. It seems

*) 4 CtLR 136 **) 8 CtRL 33

that they could well have applied under Section 8(1) immediately after the order of 9th August was made and certainly after the order of 2nd September. In support of this argument, Mr. Germanus referred us to High Court Case 47/38*). It would seem that on this ground also the Order Nisi must be discharged.

For the foregoing reasons we discharge the order nisi. As the petitioners were granted permission to bring this petition *in forma pauperis,* there will be no costs. We would add that, in any event, the petition seems to have no merits.

Given this 12th day of November, 1941.

CIVIL APPEAL No. 18/42.

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

Before : Rose, J. Edwards J. and Khayat J.

1. David Ilgovsky.
2. Gedalia Ilgovsky. Appellants.

v.

Shevach Shprinski. Respondent.

A suing B in Magistrate's Court for his share in taxes paid to foreign Government by A on B's account — District Court in its appellate capacity overruling objection taken in it and remitting case to Magistrate's Court — Proper course for party affected by ruling of District Court — Assumption that proceedings in foreign Court in order.

1. If District Court in appellate capacity overrules an objection and remits case to Magistrate, then (and not after second appellate judgment) time for party dissatisfied with District Court's ruling to test it in Court of Appeal.

2. Where A seeks to recover from B foreign Government taxes which he paid for B's account one cannot say A invites Court to enforce Penal or Revenue Law of foreign country.

3. Court in Palestine will not assume that proceedings in foreign Court were conducted otherwise than in accordance with usual practice and principles of natural justice, thus if record of foreign Court says "Parties did not appear", Court in Palestine will assume parties duly summoned.

Edit. Note: As to 1: CA 76/38 3 CtRL 220 followed.

Goitein and Rabinowitz for Appellants *Frenkl* for Respondents

Appeal from judgment of District Court, Tel-Aviv in its appellate capacity in Civil Appeal No. 94/41 dated 16.12.1941, whereby judgment of Magistrate's Court, Tel-Aviv in Civil Case No. 4832/38, dated 4.4.41, was set aside.

JUDGMENT

This is an appeal, by leave, from a judgment of the District Court of Tel-Aviv dated 16th December, 1941, whereby that Court reversed

*) 4 CtRL 59.

the judgment of one of the Magistrates of Tel-Aviv dated 4th April, 1941, by which the defendant (now respondent) was ordered to pay to the plaintiff (now appellant) 1594.86 Lits in Palestinian Currency at the rate of exchange current at the date of payment with interest and costs etc. Shortly stated, the facts were that the present appellant had obtained a contract with the Lithuanien Government for the construction of certain roads, and later, with the consent of that Government, the appellant asked the present respondent to do half the work, to which the latter agreed. In support of the plaintiff's case, there was produced at the trial a portion of the contract between the Lithuanian Government and the present appellant. Clause 28 of that contract is in the following terms :

> *Clause* 28: The contractor shall pay all the taxes in connection with the present agreement. The stamp tax is paid by the contractor at the time of the signature of the present agreement, should the quantity of work increase, the respective share of the stamp tax will be collected by reducing 1/000 from the future accounts or from the amount of the guarantee.
>
> We the undersigned D. & W. Ilgowsky Bros. untertook to carry out all the works specified in this agreement as a partner Mr. Shebach Shprinski residing at Mariampol, and Shprinski undertakes to carry out half (50%) of the works as per the present agreement with all rights and obligations of the present agreement.

Eventually the present appellant paid certain taxes to the Lithuanien Government. He alleged that he had been compelled by that Government to pay; and ,in consequence, he sued the present respondent in the Magistrate's Court, Tel-Aviv, for the recovery of half of the amount which he had paid. As has been said, the appellant succeeded before the Magistrate.

When the appeal was first heard in the District Court before Judges Curry and Korngrun the present respondent's advocate took the objection that the whole contract should have been produced ; but that objection was overruled. The same objection was also taken in this Court. We think, however, that it was too late to take the objection before us in view of the judgment in C. A. No. 76/38*) in which this Court said :

> "The proper course for the appellant to follow was to appeal to the Supreme Court from the first judgment of the District Court."

The next question falling for decision is whether the payment of half the tax due to the Lithuanien Government was an obligation under Clause 28 of the agreement. We are decidedly of the opinion that it was in view of the words in clause 28 "Sprinsky undertakes to carry out half (50%) of the works as per the present agreement with all rights and obligations of the present agreement".

The next question is "Assuming that it was an obligation did the appellant meet it?" There was ample evidence before the Court of trial

*) CtLR Vol. III p. 220.

to show that the amount was paid by the appellant. There can, indeed, be really no dispute as to this. At this stage we think that we ought to deal with the argument which seemed to influence Judge Hubbard in his judgment of 16th December, 1941, namely, that, were he to give judgment for the plaintiff, he would be enforcing the Penal or Revenue Law of a foreign Government (Dicay's Conflict of Laws 5th Edition, p. 212).. In this connection, we think that the learned Relieving President was under a misapprehension as to the facts. To begin with, there was no question of enforcing a penal tax because the tax had already been paid. The plaintiff sought to recover the sum from the defendant on the basis of a contract. There seems to be no difference in principle between this case and that of a person who happens, say, to be in New-York and who requests his agent in England to pay his United Kingdom Income Tax and thereafter the agent who has paid the tax on his client's instructions, seeking to recover from his client the amount of the tax so paid.

The next question is whether, once it was proved that the present appellant had paid the tax on behalf of Shprinski, the latter was liable to the present appellant in one half of the tax. We think that he was. That separate receipts were given is purely a neutral fact and cannot alter the real state of affairs nor can an inference adverse to the contention of the present appellant be drawn from it.

This really disposes of the appeal. We would, however, mention that, at the hearing before us, the respondent's advocate complained that his client had had no chance of cross-examining the witness, Jonas Chmilauskas, who gave evidence on commission at Kaunas, Lithuania. We observe from the record of the evidence on commission that the District Court Judge in Kaunas said "Parties did not appear". From this we assume that the District Court Judge was satisfied that the parties had been duly summoned. In any event, it is not for us to assume that proceedings were conducted otherwise than in accordance with the usual proper practice and in accordance with principles of natural justice. There is therefore nothing in this point. The respondent's advocate also argued that the appeallant had not been compelled to pay the tax. In view of the evidence given on commission at Kaunas as to the consequence ensuing on non-payment of taxes, it is clear that those taxes had to be paid. This point also fails.

For all the foregoing reasons, we allow the appeal, set aside the judgment of the District Court of Tel-Aviv of the 16th December, 1941, and we order that the judgment of the Magistrate of 4th April, 1941 be restored.

The respondent will pay the costs of the appellant to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.—

Delivered this 20th day of May, 1942.

MISCELLANEOUS APPLICATION No. 34/42.

IN THE APPELLATE TRIBUNAL APPOINTED UNDER SECTION 20(2) OF THE ADVOCATE'S ORDINANCE, 1938.

Before : Gordon Smith C. J. Copland J. and Abdulhadi J.

Najeeb Jad Appellant.

v.

The Chairman and Members of the Law Council Jerusalem. Respondents.

Court convicting advocate of obtaining money by false pretences, stealing by an agent and fraudulent procuration of signature on documents — Law Council calling on advocate to state in writing grounds, if any, for his exculpation — Decision of Law Council that offences brought home to advocate involved moral turpitude and sufficient to justify striking off Roll of Advocates — Question of giving or not giving advocate opportunity to appear, possibly with counsel and possibly with witnesses, before committee of enquiry — Powers of Appellate Tribunal appointed under sec. 20(2), *Advocates Ordinance.*

1. Where Court convicts advocate of charges which in their nature necessarily involve disgraceful conduct, professional misconduct and moral turpitude, Law Council right in holding that no necessity to appoint a committee to rehear those charges, especially where advocate given opportunity to explain his conduct to Law Council and his answers fail to exculpate him.

2. Although sec. 20(2) of Advocates Ordinance does not specify rights of Appellate Tribunal, Tribunal has by implication, power to confirm decision of Law Council, to vary it, quash it or remit case for further enquiry.

Goitein for Appellant. *Crown Counsel* (*Hogan*) for Respondent.

Appeal from decision of Law Council made under Sec. 20(1) of Advocates Ord. 1938.

ORDER

This is a case where the advocate appeals to a Tribunal, the appointment of which is prescribed by Section 20(2) of the Advocates Ordinance. In consequence of proceedings before the Law Council, the advocate had been struck off the Roll of Advocates in accordance with the provisions of Section 20(1). The facts were that the advocate had been convicted of four offences: obtaining money by false pretences, stealing by an agent, fraudulent procuration of signature on documents, and a second charge of fraudulent procuration of signature on other documents. On his plea of guilty before the District Court, he was sentenced to six weeks' imprisonment.

On the matter being referred to the Law Council, the Council cal-

led on the advocate in accordance with Rule 16(1) of the Rules made under the Law Council Ordinance, to state in writing any grounds upon which he relied to exculpate himself. The Law Council considered these answers by the advocate and came to the conclusion that such answers did not exculpate him, and then, having considered the matter, came to the decision that these offences, ipso facto, involved moral turpitude and were sufficient to justify him being struck off the Roll of Advocates. In doing so the Council were evidently of the opinion that the accused having been charged before a Court, and having been convicted by that Court, there was no necessity for the Council to appoint a sub-committee to enquire into the circumstances of the charges made by the prosecution before the District Court, and to rehear the same. In effect, although there are several grounds of appeal, the substance of the appeal is that the advocate has not had an opportunity, possibly with counsel and possibly with witnesses, of showing to the Committee that these offences of which he had been convicted did not involve moral turpitude on his part.

It has been urged by Mr. Goitein before us that the Council was under an obligation, in accordance with the rules under the Law Council's Ordinance, to appoint a committee, to call the advocate before them, and to hear him, possibly with counsel and possibly with witnesses, in respect to this question of moral turpitude.

We agree entirely with the Law Council in its finding, in effect, that charges of this nature, of which a person is found guilty, must necessarily involve disgraceful conduct, conduct derogatory to the profession of an advocate, and necessarily involve moral turpitude.

It has been urged that in the only other case which has been before a Tribunal (the case of Mr. Seligman *) such confirms the submissions put forward by Mr. Goitein. I would point out that, as is illustrated by this quotation from the judgment, a clear distinction can be made between that case and this case. It states on page 54 :

> "In this case this procedure was not strictly followed, and the Council considered some aspects of the case before receiving Mr. Seligman's reply and before the Committee had submitted its findings, and decided that the criminal offence of which the Appellant was convicted did not involve moral turpitude. We are also told the Council considered whether there was unprofessional conduct, and it apparently came to the conclusion that there was not, as in the result it referred two questions to a committee: (1) was the Appellant's conduct disgraceful; (2) was his conduct derogatory to the profession of an advocate."

Now it is quite clear that those two questions which were so referred, do not necessarily involve moral turpitude arising out of the charges which were considered by the Court which convicted Mr. Se-

*) Misc. Appl. 5/40 8 CtLR 200.

ligman, and which were in respect of certain charges dealing with illegal immigration. Although the judgment states that the Advocates Ordinance and the Law Council Ordinance both deal with unprofessional conduct and says — "when the Ordinances are read together", I do not think it necessarily means that the Ordinances must be read together, in all respects.

The judgment goes on after the paragraph that was read and quoted by Mr. Goitein —

> "If this view is accepted the finding of the Committee that the appellant was guilty of conduct derogatory would be tantamount to a finding that he had been guilty of one or more of the ingredients to which I have referred, but it expressly found that the conduct was not disgraceful — it was never suggested that it was fraudulent, and admittedly the Committee never considered moral turpitude."

So that, it being clear that the facts are so very different in that case to what they are in this one, we are not bound at all by that decision and remarks made in that judgment which, admittedly, are not very clear. I think those remarks were really in the nature of obita.

The question we really have to decide is whether in a case of this nature where an advocate has been convicted, on his own plea of guilty or otherwise, of charges which must, in their very nature, involve all the offences which are mentioned in Section 20(1) of the Advocates Ordinance, I think, that the Council was quite right in coming to the conclusion that there was no necessity to rehear those charges. And coming to the question of the finding of fact, in other words, whether the advocate was or was not guilty of the offences with which he was charged by the Law Council, they carried out their obligation by calling on the advocate to offer any further explanations of his conduct he could possibly put forward. That was done. A letter was sent to the advocate and he attempted, at length, to explain his conduct. That explanation is that although he pleaded guilty to these four charges, yet in effect he was not guilty of such charges and was innocent of any acts of disgraceful conduct, professional misconduct or moral turpitude. We cannot see that the Law Council could have done otherwise, under the circumstances, than to find that those answers did not exculpate the adwocate, in view of the facts and circumstances, and that therefore there was no necessity to appoint a committee to enquire again into whether the advocate was or was not guilty of those charges.

The section which authorises this appellate Tribunal does not specify what our rights are, but I think it is clear, anyhow by inference, that we would have power to confirm the findings of the Law Council, to vary it, quash it or remit it back to the Law Council for further enquiry.

Under the circumstances we find that there is no necessity to come to any other decision than that the decision of the Law Council must be confirmed.

The application is therefore dismissed.

Given this 21st day of May, 1942.

MISCELLANEOUS APPLICATION No. 33/42.

IN THE SUPREME COURT OF PALESTINE

Before : Gordon-Smith C. J. (in chambers)

Willy Alexander Philippsthal — Applicant.

v.

Henriette Pauline Martha Philippsthal — Respondent.

A Jew marrying, in 1924, by civil marriage a Protestant woman in Germany — Husband and wife both Palestinian citizens, domiciled in Palestine ,he a member of Jewish Community, she a Protestant — Husband intending to bring an action for a decree of divorce against his wife on ground of adultery — Application to Chief Justice under first part of art. 55 Palestine Order in Council — Court to have jurisdiction and law to be applied in the matter.

If a Jew and a Protestant woman married to each other by civil marriage in Germany, and both Palestinian citizens, domiciled in Palestine, he a member of Jewish Community, she a Protestant, Court having jurisdiction to entertain suit for divorce — District Court of their place of residence and law applicable German law of divorce as at time of their marriage.

Edit. Note: See Misc. Appl. 27/42 11 CtLR 171.

Silberg & *Sandler* for Applicant

Respondent absent, served.

Applicatoin under first part of Art. 55 of Palestine Order in Council to determine which Court shall have jurisdiction.

ORDER

This is an application under the first part of Article 55 of the Palestine Order-in-Council, to determine which Court shall have jurisdiction to deal with, and decide in, an action for a decree of divorce which the applicant intends to bring against his wife, the respondent. The applicant states in his application that he and the respondent were married to each other by a civil marriage in Essen, Germany, on the 16th day of May, 1924 ; that both of them are Palestinian citizens and holders of Palestinian passports; that applicant is a member of the Jewish Community and the respondent is a Protestant and was a Protestant at the time of celebration of the marriage; that both applicant and respondent are do-

miciled in Tel-Aviv; and that since 1939, the respondent has been, and still is, entertaining intimate relations with a lover, Dr Julius Jandorf and committed adultery with him on several occassions. The applicant further contends that under German law which is the "lex loci celebrationis" adultery is a legal ground for granting a decree of divorce.

After hearing Mr. Silberg on behalf of the applicant, I hereby order that the District Court of Tel-Aviv is to have jurisdiction to entertain the suit and to apply the German law to the matter of divorce as at the time of the marriage in 1924.

Given this 27th day of May, 1942.

HIGH COURT No. 19/42.

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

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

I. David Ketter — Petitioner.

v.

1. The District Officer
2. The District Commissioner
3. The Attorney-General — Respondents.

Application for order to show cause why a Coroner's inquest should not be ordered in respect of immature death of certain person — Locus standi in High Court.

High Court will not interfere nor agree to any amendment of petition or adjournment, if not satisfied that petitioner personally interested or that he sustains damage by non-performance of duties sought to be enforced.

Crown Counsel (*Rigby*) for Respondents.

Application for an order to issue directed to 1st Respondent, calling upon him to show cause why he should not be ordered to hold a Coroner's Court and a Coroner's inquest into causes leading to immature deaths of Yiczchak Aisik Gerhard, deceased, lately an inmate of United Aged home, Romema Quarter, Jerusalem, Abraham Cohen, also of said Home, and Dr. A. Ginsburg, of Mekor Barukh, Jerusalem.

ORDER

I am afraid we cannot agree to any amendment to this petition or adjournment to enable Petitioner to file further affidavits. The Petitioner has failed to satisfy us that he is personally interested in the matter, and he agrees that he does not sustain damage by the non-performance of the duties sought to be enforced.

The rule is therefore discharged.

Given this 20th day of March, 1942.

HIGH COURT CASE No. 51/42.

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

Before : Copland J. and Khayat J.

Israel Reznitzky — Petitioner.

v.

1. Inspector-General of Police and Prisons, Jerusalem.
2. Assistant Superintendent, Jaffa Lock-up, Jaffa. Respondents.

Order nisi in nature of Habeas Corpus — Detention under Warrant of Commitment pending trial under a charge under Emergency Regulations, 1936 — *Solitary confinement of prisoner.*

Nothing prevents keeping prisoner in solitary confinement.

Apelbom for Petitioner *Crown Counsel* (*Rigby*) for Respondents

Return to an order nisi in nature of Habeas Corpus issued on 18.5. 1942, directed to Respondents calling upon them to produce Itzhaq Reznitzky before High Court, and to await further order of this Court.

ORDER

This is a return to an order nisi in the nature of Habeas Corpus made by Israel Reznitzky ex parte Ishaq Reznitzky. On the return an affidavit has been filed by Mr. Catling, Assistant Superintendent of Police, and the Respondent has produced a Warrant of Commitment pending trial on the charge of possession of a bomb, contrary to Regulation 8.C.(a) of the Emergency Regulations, 1936, signed by Mr. Morton, Assistant Superintendent of Police, who has the power to sign such warrants under the Defence (Military Courts) Regulations, 1937. That, of course, is a sufficient return to the writ, and Izhaq Reznitzky is therefore properly detained in custody.

With regard to the point that was raised about the solitary confinement, there is nothing in the Regulations, as far as I know, that prisoners should be kept in association, and as is common knowledge, in England all prisoners are detained in separate cells. In this country, of course, no prisons have been built with that very desirable arrangement, but there is nothing in that point, and, as I said before, he cannot claim to be associated with other persons. The Petitioner does not contest the matter any further.

The order nisi is therefore discharged. The Respondent is entitled to LP. 4 expenses for producing the body of Izhaq Reznitzky before this Court.

Given this 21st day of May, 1942.

HIGH COURT No. 45/42.

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

Before: Copland, J. and Edwards, J.

Albert Schutz — Petitioner

v.

The Commissioner for Migration and Statistics, Acting Director, Department of Immigration, Jerusalem, — *Respondent.*

Palestinian joining, in July 1940, His Majesty's Air Service after marrying, in October 1939, a German lady who entered Palestine illegally — Unsuccessful application by husband to Commissioner of Migration to legalise in one way or other position of wife — Non interference of High Court with discretion of Commissioner of Migration — Scope of sec. 4(1) (c) of Immigr. Ord. exempting wives of members of H. M's Military Services from provisions of Ordinance.

1. Where person has no valid passport in his possession Commissioner of Migration cannot be ordered to endorse it to effect that holder exempt from provisions of Immigration Ordinance.

2. High Court cannot direct Commissioner of Migration to issue an immigration certificate in catagory D for a wife of a Palestinian, matter — entirely within discretion of Commissoiner.

3. a) Immigration Ordinance must be read as a whole.

b) Sec. 4 (1) (c) of Immigr. Ord. does not necessarily exempt wife of member of H. M.'s Military Services from provisions of Ordinance, if wife a foreigner and illegally in Palestine at time of her marriage; her admittance or otherwise as legal resident of Palestine — within discretion of Commissioner of Migration.

Perles for petitioner

Application for an Order commanding Respondent —

(a) to grant Petitioner's wife Gertrud Schutz a certificate of naturalization as a Palest. citizen under Art. 12(2) of Palestine Citizenship Order as amended in 1939, or to proceed with her application for such a certificate on the footing that she is lawfully in Palestine; or

(b) to endorse the Passport of Petitioner's wife to the effect that she is exempt from provisions of Immigr. Ordin., 1941; and/or

tioner's application for issue of an immigration certificate of category

(c) to grant, at present or out of the next immigration quota, Petitioner's application for issue of an immigration certificate of Category D in respect of Petitioner's wife, such certificate to be forwarded to a British Consular or other Representative outside Palestine.

ORDER

This is a peculiar application, the first of its kind to come before this Court. The petitioner is a Palestinian and since the 16th July, 1930, he has been a member of His Majesty's Air Service. On the 22nd October

1939, that is to say, before he joined His Majesty's Forces, he married a Miss Gertrud Hausmann, who was at that moment a German subject. By that marriage, under the law as it stands at this present moment, Miss Hausmann or Mrs. Schutz did not acquire Palestinian nationality, but under the provisions of the German law, it is stated she lost her German nationality and has now become stateless. The petitioner is anxious to legalise the position of his wife in Palestine and he has applied to the Commissioner of Migration to grant his wife a certificate of naturalization under Ariticle 12(2) of the Palestine Citizenship Order-in-Council, as amended. Alternatively, he asked for the endorsement of his wife's passport to the effect that she is exempt from the provisions of the Immigration Ordinance. Alternatively again, he asked that the Commissioner of Migration should issue an immigraton certificate in category 'D' in respect of the petitioner's wife. All these requests the Immigration Officer refused. The petitioner has therefore come to this Court.

With regard to the first request, that we should order the Commissioner to endorse the passport of petitioner's wife to the effect that she is exempt from the provisions of the Immigration Ordinance, that is a matter that we cannot do for the simple reason that the petitioner's wife has no valid passport in her possession. Neither can we direct the Commissioner to issue an immigration certificate in category 'D' for the lady because we are not an Immigration Office and this is entirely in the discretion of the Commissioner of Migration.

The only point that arises is really this: Section 4(1) (e) of the Immigration Ordinance says:

> "This Ordinance shall not apply to the wives of any persons exempt under the provisions of paragraphs (a), (c) and (d) hereof".

and paragraph (c) exempts members of His Majesty's Military, Air, Diplomatic or Consular services.

The point for decision is, therefore, whether the provisions of Section 4(1) (c) apply to this lady, who is undoubtedly, according to the law of this country, a foreigner. In our opinion, the Ordinance must be read as a whole and just because any particular lady may be the wife of a member of His Majesty's Air Service, if she is a foreigner and was illegally in the country at the time of her marriage, she is not necessarily exempt from the other provisions of the Ordinance. It is not disputed that this lady was in Palestine illegally before her marriage, she therefore did not become a Palestinian citizen on marriage to a Palestinian. It seems to us that it is within the discretion of the Commissioner of Migratoin in such a case whether he should admit her as a legal resident of Palestine or not.

The application must therefore be refused.

Given this 13th day of May, 1942.

CIVIL APPEAL No. 45/42.

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

Before: Copland, J., Edwards and Abdulhadi J.

In the Appeal of:

Deeb Ali Abu Zeeneh — Appellant.

v.

1. Mustafa Surani
2. Yusif Surani — Respondents.

Default judgment against defendant serving sentence of imprisonment — Trial Court dismissing application to set aside judgment given in default — Discretionary powers of Court in matter of setting aside ex parte order — Non-interference of appellate Court with discretion of Court of trial.

1. Whether an ex parte order or decree should be set aside or not under Rule 213 of Civil Procedure Rules, 1938 — a matter for discretion for Court or Judge issuing the order or decree.
2. In questions of discretion appellate Court always extremely loath to interfere; they will not interfere merely because they might have exercised discretion differently.

Nashashibi for Appellant — *Muhtadie* for Respondent

Appeal from judgment of District Court Jerusalem dated 6.1.42, in Motion No 317/41 Civil Case No. 70/41.

JUDGMENT

This is an appeal against a refusal by the District Court of Jerusalem to set aside a judgment given in default. At the time the summons was served on the appellant, he was a prisoner, serving a sentence of three years in the Jerusalem Prison. The summons was duly served upon him as certified by the Assistant Superintendent, Central Prison, Jerusalem. The appellant endorsed on the summons — " I pray that this case be adjourned pending my discharge from Prison in view that I cannot defend myself, to show justice". After that he took no further steps. The case came on for trial and the appellant did not brief anybody to defend him and did not make any application to appear and defend himself. It is said that he had no knowledge of advocates but he had three advocates to defend him in the Court of Trial for his criminal offence. The District Court came to the conclusion that there was ample time from the service of the summons until the hearing for the appellant to take legal steps and dismissed the application.

Whether a decree or order given ex parte should be set aside or not under Rule 213 of the Civil Procedure Rules, 1938, is a matter for discretion for the Court or Judge who gave the order and in questions of

discretion an appellate Court is always extremely loath to interfere. The rule is that an appellate Court will not interfere with a discretion merely because they might have exercised the discretion, if it had attached to them, in another way. An appellate Court will interfere if it is shown that the Court below failed to take into consideration some material matter. From the order it is quite clear that the District Court had the material facts before them and that they duly considered the matter and came to the conclusion that there was ample time.

The appeal must be dismissed with costs on the lower scale to include a sum of LP. 10 for advocate's attendance fee.

Delivered this 29th day of April, 1942.

CIVIL APPEAL No. 31/42

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

Before: Rose, J., Edwards J. and Frumkin J.

In the Appeal of:

Uliyan Khalaf Kirrit of Gaza — Appellant.

v.

Amneh, bint Haj Hassan el Ajra, widow of the late Khalaf Kirrit of Gaza — Respondent.

Claim in Magistrate's Court for share in proceeds of sale based on document purporting to be executed by Defendant and stating that he received specified sum of money — Question of genuineness of thumb-print on document — Alternative allegation by Defendant that he has not received money — Finding by Magistrate, upheld on appeal before District Court, that Plaintiff failed to prove payment of money — On whom lies onus of proof?

Where A relies on document signed by B wherein stated that he (B) received sum of money, onus of proof, in case B denies receipt, on B not on A.

Elia for Appellant — *Barbari* for Respondent

Appeal from judgment of District Court Jaffa in its appellate capacity dated 20.1.42 in Civil Appeal No. 86/41.

JUDGMENT

In this case the plaintiff (appellant) claimed the sum of LP.75, in reliance on a document which he alleged was signed by the respondent, stating that she (the respondent) had received the sum of LP.300 (of which this LP. 75 represents the appellant's share) as the purchase price of certain property which she undertook to sell to the other parties to the agreement. It is not disputed that the property mentioned in the

agreement was in fact sold to somebody else.

There were two issues of fact. First, whether the thumb-print, which was alleged to be that of the respondent, was in fact that of the respondent. On that issue the finding of the Court was in favour of the appellant. The learned Magistrate found, and there was clear evidence upon which he could so find, that the respondent put her thumb-print on the document. Secondly, the respondent alleged in the alternative that there was no consideration in that she never received the money in question. That, in my opinion, was clearly a matter for her to prove and it was for her to satisfy the learned Magistrate that the money, in fact, had not been paid. She gave evidence herself and certain evidence was called on her behalf and as a result of that evidence the learned Magistrate said:

> "Whereas the plaintiff (appellant) did not prove that he paid the defendant the sum in claim, I dismiss the case and order the plaintiff to pay the costs, fees and LP.10 advocate's fees."

If we look at the judgment of the appeal Court on this matter they say:

> "We are of opinion that the Magistrate rightly dismissed the case of the appellant on the ground that the existence of consideration for the deed sued upon before him was not proved."

In my opinion, both the learned Magistrate and District Court erred in law in this matter, both Courts seeming to be under the impression that the onus was upon the appellant to prove that the money had been paid whereas, in fact, the onus was on the respondent to prove that the money had not been paid.

In view of that, Mr. Elia asks us to give judgment straightaway for his client, and, speaking for myself, I feel considerable doubt whether that would not be the correct course. However, one does feel in this case that the learned Magistrate may merely have confused himself on this matter and that, had the true issue been presented to him, he might have made a more positive finding. I therefore consider that it would be unfortunate to decide the case on a point of this nature, having regard to the whole trend of the learned Magistrate's judgment. I therefore propose to remit the case to him to enable him to make a finding of fact on the second relevant issue, namely, whether the respondent has satisfied him that the money in question was not paid; the onus, I repeat, being in my opinion clearly upon the respondent to satisfy the Court on this point Both parties to be at liberty to call such evidence as is admissible in law on this matter.

Costs will be in the cause and the ultimately successful party will receive in respect of this appeal costs on the lower scale, to include a sum of LP.10 for advocate's attendance fee.

Delivered this 27th day of April, 1942.

High Court Case No. 39/42.

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

Before: Gordon Smith C. J., Edwards J. and Frumkin J.

In the Application of:

David Bornstein — Petitioner

v.

1. The Chief Execution Officer, Tel-Aviv,
2. The firm Essinger & Kahn, Insurance & Financial Brokers — Respondents.

Petition for an order commanding 1st Respondent to show why his orders of 9.4.1942*), in so far as it relates to furnishing of a guarantee and of 21.4.1942**) should not be set aside.

Chief Execution Officer ordering, after case remitted by Court of Appeal to decide question of ownership, delivery of property in dispute to applicant against usual guarantee — Chief Execution Officer upon objection by other party, varying his order as to terms —— Property having come into possession of party without his complying with order as to guarantee, CXO ordering re-seizure of it — Discretionary powers of CXO.

1. Where appellate Court reversing judgment for delivery of certain property seized by attachment remits case to decide question of ownership, attachment still holds good and property — in "custodia legis".

2. a) Chief Execution Officer may upon application of interested party vary terms of attachment or its release.

b) Question of guarantee to be given by applicant in connection with attachment or release thereof — in discretion of Chief Execution Officer.

3. Where property attached somehow gets into possession of party ordered first to produce a special guarantee, Chief Execution right, if guarantee not forthcoming, in ordering re-seizure, and if necessary by force, of property in question.

Goitein and *Hake* for Petitioner *Ben-Jaminy* for Respondent No. 2.

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*) (Translation)

Whereas no final decision was given yet as to the ownership of the car, it is therefore decided to hand over the car to Mr. David Bronstein as a third party and to receive from him the usual undertaking not to transfer the car and not to damage it until the results of the case.

9.4.42

**) (Translation):

Whereas the guarantee was not given it is decided to take the car by force and to hand it over to a garage and to receive the usual undertaking until the determination of the dispute between the parties.

21.4.42

ORDER

This is an application to set aside two orders of the Chief Execution Officer, one of the 9th April and one of the 21st April. It has been submitted in argument that the Magistrate was not properly seized of the matter and that his order was in effect ultra vires. In the original proceedings the judgment was set aside and the matter has been remitted to the Magistrate's Court to decide the question of ownership of the car but in those early proceedings the car had been properly attached and when the matter was remitted to the Magistrate's Court that attachment still held good. It is not that the proceedings were set aside but the judgment was set aside. Therefore the position was, as is stated in the judgment, that the car was in 'custodia legis'. Then we get an application ex-parte to the Magistrate to release the attachment of the car. The Magistrate heard that application and, in our view, was properly seized of the matter, and made an Interim Ordr. After that order had been served on the respondent they objected to the Interim Ordr. on the grounds of the insufficiency of the security demanded by the Magistrate, who was prepared to release the attachment on terms. The Magistrate then, and we agree, properly varied the order previously made. So far we think the matter was in order and the guarantee was in the discretion of the Magistrate. Somehow, however, the plaintiff has now got possession of the car from the Execution Officer. The Execution Officer had, however, by his final order decided to retake possession of the car in view of the fact that the guarantee as finally ordered by the Magistrate has not been forthcoming. We feel that the Magistrate's order is correct and what we are not satisfied is the actual sufficiency of the guarantee. We have a certain amount of sympathy with the plaintiff, and Mr. Ben-Jaminy, I think, is prepared to accept a notarial deed under which the plaintiff will undertake to keep the car insured and to enter into a guarantee of LP.400 with surety. We agree that there should be a surety to that amount. We therefore order that a notarial guarantee be given by the Plaintiff, with a surety, for the safe custody of the car in the sum of LP.400. Such surety and the security pledged to be to the satisfaction of the Magistrate and if real property is included in such security then such is to be attached. On such guarantee being duly executed and approved by the Magistrate, the attachment on the car is to be released.

We make no order as to costs.

Delivered this 11th day of May, 1942.

CRIMINAL APPEAL No. 30/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before: Copland J., Rose J. and Abdulhadi J.
In the Appeal of:
Musa Muhammad Abdullah el Tamam — Appellant
v.
Attorney General — Respondent

Court convicting on all 8 counts of information (robbery with violence and possession of firearm and ammunition)— Identification made in Magistrate's Court — Court failing to state facts forming basis of conclusion they arrived at.

Conviction cannot stand if identification defective and Court failed to state facts upon which its conclusion based and impossible to apply proviso of sec. 51 of Trial upon Information Ord., (validating conviction if fact, though not included in Judge's record, sufficiently established by evidence).

Abdulhadi for Appellant *Crown Counsel (Rigby)* for Respondent

Appeal from Judgment of District Court Haifa, dated 16.2.1942, in Crime No. 4/42, whereby appellant was convicted of robbery contrary to sec. 287 of Crim. Code Ord. 1936, and of being in possession of a firearm and ammunition without a licence, contrary to sec. 36(2)(a), and (f) of Firearms Ord., and sentenced to 7 years imprisonment.

JUDGMENT

The appellant was charged on an information of 8 counts before the District Court of Haifa, six of the counts being for robbery with violence and the other two counts for being in possession of a firearm and ammunition. He was found guilty on all counts and sentenced to seven years imprisonment.

On appeal, his advocate has argued that there was not sufficient evidence to convict him and that the evidence of identification was completely insufficient. Now of the various witnesses that were called against him only one apparently knew this appellant beforehand. One of the other witnesses says that he was never called to any identification parade but that he identified him in the Magistrate's Court. Other witnesses said that the one witness who knew the appellant told them who he, the appellant, was. Now an identification at the Magistrate's Court only is quite useless. The District Court in their judgment dealt with all the evidence in these words: "We are satisfied that the accused was identified in the course of this robbery by some of the complainants who gave evidence before this Court." Now, brevity of language of course is very often desirable but it can be carried too far and in this case it is carried much too far. It is really rather ridiculous, if we may say so, that in a

serious charge of robbery with violence where sentence can be imprisonment for life, that all the pith of the judgment, is contained in two lines of typescript. The District Court does not even say which witnesses it believed and with regard to the counts of possession of the rifle and ammunition there is in the record not the slightest scrap of evidence with regard to the possession or otherwise of the appellant. Neither does the Court below state the facts upon which it arrived at the conclusion at which it did, and in the circumstances of this case it is quite impossible to apply the proviso to Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance.

In the circumstances the appeal must be allowed and the conviction quashed.

Delivered this 24th day of March, 1942.

CIVIL APPEAL No. 50/42.

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

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

In the appeal of:

Maroun Ibrahim Imtanis — Appellant.

v.

Deebeh Azar

on her own behalf and on behalf of her minor children

Munir, Mufid and Munib — Respondent.

Court awarding maintenance for wife and children as from date Defendant ceased to maintain them — Claim regarding past maintenance.

1. Court of Appeal dealing with judgment of maintenance for child — not concerned with question of its custody, if no such claim in trial Court.

2. Maintenance for wife or children payable neither from date when Defendant ceased to support them nor from date of judgment but from date of commencement of action.

Edit. Note: See CA 14/35 2 PLR 336.

Asfour, for Appellant — *Sahyoun,* for Respondent.

Appeal from judgment of District Court, Haifa, in Civil Case No. 214/41, dated 14.3.1942.

JUDGMENT

Although in this appeal a great deal of argument was addressed on the point as to whether the father was not entitled to the custody of the children, there has in fact been no claim for the custody of the children by him. If he insists on having that custody, then he must take action in the proper Court and obtain an order of that Court, which would only be given after going into the matter comprehensively and

considering all the details and all the facts. So we are not concerned with the question of the custody of the children.

All we are concerned about is the maintenance awarded by the District Court. On the authority of the case quoted, namely Civil Appeal 14/35, 2 P. L. R., p. 336, which held that maintenance was payable neither from the date when the Appellant ceased to maintain the Respondent, nor from the date of the judgment of the District Court, but from the date of the commencement of the action by the Respondent, we feel that that order awarding LP.50 maintenance as from the time the husband ceased to support the children till the date of the action, cannot be supported.

As regards the amount in respect of the three children, i. e. LP.1.500 per month in respect of each of them, we do not propose to interfere with that. As admitted by Mr. Asfour, it is not at all an unreasonable amount, — LP.4.500 a month in respect of three children. There is no evidence that the eldest son is in a job; it may be that he goes downtown and tries to earn and odd piastre or two by doing something or other, but apparently he is living with his mother. He helps his mother just for his keep, and we can by no means say that that is regular employment. There is no reason, therefore, why there should not be an order of maintenance in respect of the eldest son. In his evidence before the District Court he stated he was 12, and the other children are both smaller and younger, but apparently he was born in 1927.

The appeal, therefore, will be dismissed, except that we find that the Court erred in awarding LP.50 for past maintenance. Judgment will be varied in that respect. Each party will pay its own costs of this appeal

Delivered this 5th day of May, 1942.

CIVIL APPEAL No. 10/42.

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

Before: Copland J. and Edwards J.

In the Appeal of:

1. Muhammad Ra'afat Dirhalli
2. Hashem Dirhalli — Appellants.

v.

1. Hassan Haj Ibrahim Dirhalli & 4 others — Respondents.

Some of heirs paying whole of mortgage debt subsequently suing co-heirs for their shares — Co-heirs denying liability, as payment of debt made without their consent and no admission on their part of mortgagee's claim — Legal position of co-heirs as regards payment of actual debt and of any eventual excess.

Heirs paying with or without consent of co-heirs, whole of debt

actually due under mortgage from estate — entitled to recover proportionate shares; if they paid more, others not liable for excess.

Elia for Appellants *Cattan* for Respondents.

Appeal from judgment of District Court, Jaffa in its appellate capacity dated 8.11.41. in Civil Appeal No. 59/41.

JUDGMENT

This is an appeal by two of the heirs of one Dirhalli against the respondents, five others of the heirs. The matter came before the Magistrate who found that, as the sum paid by the respondents to the Anglo Palestine Bank had not been paid with the consent of the appellants, the proportionate share of the payment could not be recovered from the appellants. The case was taken on appeal to the learned President District Court and the learned President reversed the Magistrate on the line taken by him and sent the case back to the learned Magistrate to find out whether the amount paid in settlement was or was not in excess of the amount due to the bank. If it was not in excess the learned Judge directed that the Magistrate should give judgment against each of the appellants in respect of his proportionate share. On appeal here the arguments used by the learned Magistrate have been stressed by the appellants, that according to Articles 78 and 79 of the Mejelle the appellants are not bound by any admission made by anyone other than themselves; that the respondents were not their agents, and that the money was not paid on their request. We think, however, that the judgment given by the learned President is correct.

It is not disputed that payment of a share only of a mortgage debt does not release that particular proportionate share of the mortgage itself. It was essential for the respondents to get the mortgage released, and to do so, they had to pay the whole amount due. If the amount paid by the respondents is not in excess of the amount actually due to the bank, then there is no doubt that the appellants have benefited from the settlement and have no cause for complaint. If, of course, the amount paid *is* in excess then they will only be liable for the amount less the excess.

For these reasons we think that the learned President came to a correct decision and the appeal must be dismissed.

The respondents are entitled to their costs on the lower scale to include the sum of LP.10 advocate's fee for attending the hearing of this appeal.

Delivered this 21st day of April, 1942.

CIVIL APPEAL No. 143/41.

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

Before: Rose J. and Frumkin J.

In the Appeal of:

The Custodian of Enemy Property — Appellant.

v.

Naftali Hirsch Brender — Respondent.

Question as to whether Custodian of Enemy Property has right to appeal — English authorities and Palestinian case — Court of Appeal reversing finding of fact of trial Court on holding certain document in the file to be sufficient proof of the contrary — Court of Appeal differing in its view from trial Court as to clarity or otherwise of evidence given by one of witnesses.

1. Court of Appeal may consider itself bound by a previous decision in a similar matter, even if decision would seem to be in conflict with English authorities.

2. Custodian of Enemy Property, like any other administrator who can sue and be sued, has also right to appeal.

3. Court of Appeal may reverse finding of fact of trial Court on holding that document exhibited below proves contrary.

4. Court of Appeal may find evidence of witness rejected by trial Court, not because disbelieved but because of its lack of clarity, perfectly clear and unambiguous supporting opposite of trial Court's finding of fact.

Edit. Note: As to 1 see: HC 40/38 4 CtLR 105 and Edit. Note thereto. See also: CA 39/41, 9 CtLR 109 and Edit. Note thereto.

As to 3 and 4 see: CA 237/41 11 CtLR 125 and Edit. Note thereto; and CA 36/41 10 CtLR 53; CA 24/41 10 CtLR 193.

Kirschner for Appellant — *B. Joseph & Caspi* for Respondent.

Appeal from judgment of District Court Tel-Aviv dated 30.6.41 in Civil Case No. 8/41.

JUDGMENT

A preliminary point was taken by the Respondent in this appeal that the Public Custodian has no right to appeal. The Trading with the Enemy Ordinance, Section 9A(2) as amended on the 11th of October, 1940, provides:

> "If a custodian considers it to be necessary for the proper discharge of his duties so to do, he shall be entitled to institute civil proceedings against any person."

and it has been argued that "to institute Civil proceedings" does not include the right of appeal because an appeal is not "instituted" nor do

"proceedings" include appeals. In view of the English authorities cited by Dr. Joseph it would seem to be arguable that an appeal does not lie. The matter, however, so far as this country is concerned, would seem to be covered by recent authority.

The Succession Ordinance contains a similar provision where it has been provided in section 17(ii) :—

> "The administrator shall be entitled in due course of administration —
>
> (a) to institute in his own name and on behalf of the estate any proceedings with a view to the recovery of any debt or the liquidation of any claim due to the estate."

In Civil Appeal 233/40 Atallah Mantoura and another vs. Nur Michail El Khoury (P.L.R. Vol. 8, p. 20) the point was taken that the administrator has no right to appeal. Copland J. in delivering the judgment of the Court held: —

> "He (the Respondent) also attempted to argue that under the Succession Ordinance administrators have no power to appeal, but this is fallacious — if an administrator can sue and be sued it is obvious that he can appeal."

While this would seem to be in conflict with the English authorities cited to us, we regard ourselves as being bound by the Palestine decision and the objection will be overruled.

To turn now to the appeal. The dispute between the parties is on a matter of accounts and the appeal is in respect of two items. The first is an amount of LP.250 being the equivalent of 3.000 to 4.000 marks claimed by the appellant to have been received by the Respondent on his account for which the respondent failed to account, and the Court below decided against him (the appellant). In examining the account submitted by the Respondent in Exh. "N.P.1" and from the words used therein there seems to us to be no doubt that the amount of 3.000 to 4.000 marks were actually received and not paid by the respondent as alleged by him. This is supported by the evidence of Mr. Flint. The Court below rejected this witness's evidence not because they disbelieved it but because of its lack of clarity but to our mind Mr. Flint's evidence was perfectly clear and unambiguous. On this item the appeal must therefore succeed.

The second item on appeal is an amount of LP.175 charged by the respondent for remuneration. It is argued by the appellant that in view of the behaviour of the Respondent he is not entitled to any remuneration. We do not accept the reasoning of the learned Judges in the Court below that the respondent was not bound to tell the truth to Mr. Flint or to his agent, but on the whole we do not consider that the appellant has made out a proper case to show that the respondent so misbehaved himself that he is not entitled to remuneration, nor could the appellant show sufficient authority in support of his proposition. The appeal on this point must, therefore, fail.

As regards small items of expenses charged by the respondent and claimed by the appellant that it should be regarded as part of the remuneration we think that they were expenses incurred for matters other than the transfer of the money for which the remuneration is charged.

In the result the judgment of the District Court will be amended by adding an amount of LP.250 to the amount of LP.884.907 to be paid by the Respondent.

As the appellant has partly succeeded and partly failed in his appeal he will get half his costs on the lower scale and no attendance fee.

Delivered this 6th day of November 1941.

CRIMINAL APPEAL No. 57/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before: Copland J., Edwards J. and Abdulhadi J.

In the appeal of:

Attorney General — Appellant.

v.

Fadl Eddin Muhammad Amin Muhammad Sirhan, Respondent.

Two District Court Judges trying accused summarily on a charge of bribery, principal witness being an accomplice — Acquittal owing to disagreement between Judges as to whether or not there was sufficient corroboration — Interpretation of sec. 13 of Magistrates Courts Jurisdiction Ordinance as regards right of appeal by Attorney General — Scope of sec. 67(1)(b) of Cr. Procedure (Trial Upon Information) Ordinance.

1. Under sec. 13 of Magistrates Courts Jurisdiction Ord., and sec. 67 of Criminal Procedure (Trial Upon Information) Ord., appeal from District Courts in summary trials lies not only by person tried but also by Attorney General.

(Per Copland J.) Sec. 13 of Magistrates Courts Jurisdiction Ord. gives a right of appeal only to person tried summarily but not to Attorney General.

2. Where two Judges constituting trial Court disagree upon facts and no findings made by them, Attorney General cannot appeal under sec. 67(1) (b) of Cr. Procedure (Trial upon Information) Ordinance ("the law was wrongly applied to the facts")

Edit. Note see: CrA 111/41 10 CtLR 155.

Crown Counsel (Rigby) for Appellant — *Cattan* for Respondent.

Appeal from judgment of District Court, Jaffa, siting at Gaza, dated 11.2. 1942, in Misd. No. 260/41, whereby respondent was acquit-

ted of offences contrary to sec. 106(a) and 109 of Crim. Code Ord. 1936.

JUDGMENT

This is an appeal by the Attorney General against the acquittal of the respondent owing to the disagreement of the two judges who tried the case. The respondent was tried summarily before the District Court composed of the Relieving President, Judge Bodilly, and Judge Daoudi, on a charge of corruptly accepting a bribe and also receiving property or benefit contrary to Section 109 of the Criminal Code.

The pincipal witness against the respondent was the man who alleged that he had given the bribe. This man, it is common ground, was an accomplice and therefore, his evidence needed corroboration; corrobora tion, that is to say, as to the illegal motive which prompted the payment alleged to have been made by him. In the District Court the two Judges disagreed—the learned Relieving President thought that there was sufficient corroboration upon the finding of the marked money on the respondent, and the demeanour of the respondent when he was searched, and the general evidence for the prosecution, whatever that omnibus phrase may mean. Judge Daoudi, if one reads his judgment, apparently disbelieved the evidence of the accomplice, Haj Sadik, and he then goes on to say that in any case, referring to a Criminal Appeal heard in this Court No. 77/40*), Elias Bawab v Attorney-General, 7 P.L.R. p. 438, there was not sufficient corroboration in this case on which to convict the respondent.

For the respondent it has been argued, first of all, that no appeal lies from an acquittal in such circumstances. First, because under Section 13 of the Magistrates Courts Jurisdiction Ordinance, 1939, an appeal can only be made by an accused person. Section 13 reads as follows:—

> "Notwithstanding anything contained in section 3 of the Criminal Procedure (Trial Upon Information) Ordinance, where any person has been tried summarily by a District Court, the provisions of sections 63, 65 to 68 inclusive and 70 to 73 inclusive of that Ordinance shall apply mutatis mutandis to such person and any appeal by him as though he had been tried by a District Court upon information".

The argument is that this section gives a right of appeal only to the person tried summarily. Speaking for myself, I think that that argument is sound. My two brethren, however, hold the contrary view and hold that since section 67, which gives a right of appeal by the Attorney General, is applied to summary trials, that application must be given effect to and, therefore, an appeal under Section 13 does lie by the Attorney General. This point therefore fails.

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*) 8 CtLR 57.

The second point is that the provisions of section 67 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36 cannot apply to this case . Section 67 (1) (b) gives the right to the Attorney General to appeal on the ground that the law was wrongly applied to the facts. Now, in this case, the two learned Judges in the Court below did not agree upon the facts and there are findings of fact made by the Court. The Court is unanimously of opinion that, in such a case as this, an appeal does not lie, but we would go on to say that if the two Judges had agreed upon the findings of fact and that they then had disagreed upon the law as applied to those facts, then an appeal by the Attorney General might lie. That really disposes of this appeal, since whether there was or was not, in law, corroboration of the evidence of the accomplice, is immaterial. By Rule 21 of the District Courts (Summary Trials) Rules, 1938, if there is a disagreement between a Court composed of more than one judge the accused shall be acquitted. In this case there was a disagreement on the facts between the two learned Judges of the Court below and applying Rule 21, the District Court acquitted him.

For these reasons the Court thinks that this appeal fails and must be dismissed.

Delivered this 29th day of April, 1942.

CIVIL APPEAL No. 168/41.

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

Before: Rose J. and Edwards J.

Sadr-Eddin Et-Tibi — Appellant

v.

1. Shafiqa bint Jamal-Eddin Dasuki
2. Sheikh Khalil Dasuki — Respondents

Plea of fraud against document relied upon by Plaintiff — Finding of Court that conduct while suggestive that something amiss yet not fully amounting to fraud — Admissibility or otherwise of oral evidence to prove absence of consideration — Admissions under Palestine law.

1. In issues of fraud onus of proof always on party alleging.
2. Finding that "conduct of party although not fully amounting to fraud was suggestive that something was amiss" means that allegation of fraud not established.

3. Admissions in Palestine—goverend by provisions of Mejjelle, without reference to principles of English law.

4. Defence against a document, including lack of consideration, may only be proved by documentary evidence, admissions of opponent or entries in opponent's books.

Edit. Note: as to 1 see: CA 116/39, 7 CtLR 72; CA 214/40, 8 CtLR 169; CA 229/40 9CtLR 117.

As to 3 and 4: PCA 23/38, 7 CtRL 205 and CA 97/38, 4 CtLR 101 followed; CA 2/38, 3 CtLR 122, CA 87/37 2 CtLR 19 and CA 19/41 distinguished; see also CA 130/38 4 CtLR 39 and Edit. Note thereto.

Elias for Appellant

Salah for first Respondent.

Second Respondent in person.

Appeal from judgment of District Court, Nablus, dated 27.7.41 in Civil Case No. 14/40.

JUDGMENT

This is an appeal from a judgment of the District Court of Nablus. The facts are sufficiently set out in the judgment of the District Court, which made a finding that the conduct of the appellant "although not fully amounting to fraud was suggestive that something was amiss".

In issues of fraud the onus is always upon the party alleging and, in my opinion, the effect of this somewhat ambiguous finding of the trial Court is that the allegation of fraud has not been established. The question of fraud or no fraud is eminently one for the Court of first instance, and I see no reason to differ from its conclusion.

The only point, therefore, for our consideration is whether, in the absence of fraud, oral evidence is admissible to show absence of consideration and thus nullify the formal admissions in writing made by the first respondent.

In apostolic Throne of St. Jacob v. Saba Said 1939 P.L.R. Vol. 6 at page 534*), Lord Sankey said:

> "The legal effect of admissions in Palestine is to be found in the Turkish Code (The Mejelle) which provides in Article 79 that a person is bound by his own admission and in Article 1588 that no person may validly retract an admission made with regard to private rights".

This would seem to be clear authority for the proposition that admissions in this country are governed by special considerations, without reference to principles of English law.

The appellant contends that, in the absence of fraud, to disprove a written admission only written evidence is admissible. There is a line of authorities in support of this view and it will suffice if I express my agreement with the judgment of Frumkin J. in Rackosky and Epstein v. Danon, 1938**). P.L.R. p. 391, in which he observes, at page 394, that

*) CtLR VII p. 205 (PCA 23/38).

**) CtLR IV p. 101 (CA 97/38).

Article 80 of the Ottoman Code of Civil Procedure provides that a defence against a document may only be proved by documentary evidence, the admissions of the opponent or entries in the opponent's books.

Counsel for the first respondent disputes this proposition and relies on a passage in the judgment of Trusted C. J., in Gaber v. Migdal Insurance Co Ltd*) 1938, PLR p. 187, which, at p. 193, reads as follows:

> "Such an estoppel (i. e. by an admission in the Land Registry) may be rebutted by proof of fraud or duress, and in certain circumstances is it open to a party to show that despite his admission he has not received the consideration stated".

The last words may well refer to documentary evidence or an admission of the opponent, and I see nothing in their context to make this impossible. If, however, a wider meaning is to be attached to them, then I prefer the view expressed by Frumkin J. in the case which I have referred.

Our attention has also been called by counsel for the first respondent to Civil Appeal 87/1937, Blumenfeld and another v. Imperial Chemical Industries (Levant) Ltd. Vol. 2, Current Law Reports p. 19, in which Trusted C. J. discusses at length the interpretation of Article 80 of the Ottoman Civil Procedure Code. Counsel did not indicate upon what particular passage of the judgment he relied but in any event the case concerns a promissory note, to which special considerations apply, and any observations which may have a bearing on the present matter are only obiter dicta and, if and in so far as they conflict with the view which I have adopted, I do not follow them.

I have felt some difficulty with regard to Civil Appeal 19/41, which is so far unreported, in which the Court said:

> "The next point is that oral evidence is not admissible to contradict documents. Generally speaking of course that is the rule but oral evidence is admissible to prove lack of consideration and that is where it was admitted in this case".

The same Judge, however, was presiding both in this case and in Rackovsky and Epstein v. Danon, in which he concurred in the judgment of the Court. I prefer the view expressed in the earlier case and, as I have already said, adopt it.

For these reasons the appeal must be allowed with costs both here and below. The costs of this appeal to be on the lower scale and to include the sum of LP.15 for advocates's attendance fee. The costs throughout will be borne by the first respondent.

Delivered this 8th day of December, 1941.

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*) 2/38 CtLR III p. 122.

CIVIL APPEAL No. 56/42.

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

Before: Copland J., Khayat J. and Abdulhadi J.

In the Appeal of:

Ohannes B. Krikorian — Appellant.

v.

Haim Arama — Respondent.

Lessee failing to pay one year's rent due at beginning of year — Lessor bringing action against lessee for eviction and rent for whole year — Claim that land not owned by lessor only and that co-owner sold his share, while case pending, to a Society of which Defendant a member — District Court on appeal reversing Magistrate's judgment for eviction and rent and remitting case to join Society in proceedings — Court of Appeal restoring Magistrate's judgment.

Fact that lessor not sole owner and that during pendency of lessor's case for eviction and rent overdue co-owner sold his share to a Society of which lessee a member — irrelevant, and judgment for eviction and rent without joining Society in proceedings — good.

Elia for Appellant — *Matusevich* for Respondent.

Appeal from Judgment of District Court, Jaffa in its appellate capacity, dated 30.1.1942, in Civil Appeal No. 104/41 *).

JUDGMENT

This is an appeal from the appellate judgment given by the learned President in the Jaffa District Court on appeal from the judgment of the Magistrate's Court. In the Magistrate's Court the present appellant sued the respondent on a lease for one year's rent and eviction. The lease was made on the 15th of August, 1939, for three years and the rent was payable in advance each year. The first year's rent was duly paid; neither the second nor the third year's rent was paid, in fact no effort was made to do so. The rent for the second year was due on the 15th August, 1940, almost two years ago. In May, 1941, the appellant brought an action for a year's rent which was due at the beginning of the year and asked for eviction. The learned Magistrate granted both requests and gave judgment in his favour. On appeal to the District Court the learned President, in an extremely long judgment, much too long for the importance of the case, reversed the learned Magistrate and ordered that the Cooperative Society of which the present respondent claims to be a member should be joined in the proceedings as it was alleged that the Cooperative Society was a part-owner of the premises.

*) Reported on pp. 218 & seq. infra.

Now, with great respect, it seems that both the learned Judge and the respondent forgot this vital and important point. The lease on which this action was based was entered into between the appellant and the respondent personally and the second year's rent was due nearly eleven months before the alleged purchase by the Cooperative Society of a share in the property. If those two important facts had been borne in mind, we do not think that the learned President could have made the mistake which he did in fact make.

The appeal must be allowed, the judgment of the learned President on appeal set aside and the judgment of the learned Magistrate restored.

None of the cases quoted to us have any bearing on this present case at all, since the action, as we have stated, was based upon a lease.

The appellant is entitled to his costs on the lower scale both here and in the District Court on appeal there, together with the sum of LP.10 advocate's attendance fee on the hearing of the appeal in this Court.

Delivered this 27th day of May, 1942.

CIVIL APPEAL No. 104/41.

IN THE DISTRICT COURT OF JAFFA SITTING AS A COURT OF APPEAL

Before: His Honour the President sitting alone.

Haim Arama, represented by Matussevich, Advocate, Tel-Aviv — Appellant.

v.

Ohannes B. Krikorian, Jaffa — Respondent

Matussevich for Appellant — *Shehadeh* for Respondent.

JUDGMENT

This is an appeal from the judgment dated 18.11.41 of the learned Magistrate, Jaffa, in Civil case No. 875/41 *) whereby he ordered the Appellant to pay to the Respondent LP.12 being rent due from 15.8.40 to 15.8.41, and also to vacate the leased premises.

The Appellant leased the premises from Respondent on 15.8.39 for a period of 3 years. The rent was payable in advance, and theAppellant paid LP.12 for the first year. He did not pay rent for the second year. On 30.5.41 the Respondent brought the action claiming LP.12 on account of rent for the second year, and also asking for eviction.

Briefly stated the case for the Appellant is that he had become a member of the Mishkenot Co-operative Society Ltd. which had purchased from one Ishaq Kabrilovitz certain mushaa shares in these premises; that having become a member of the Society he had in law vacated the premises and the Society had become a part owner therein; and the Society being a part-owner in occupation does not have to pay rent to an-

*) Reported on p. 221, infra.

other part-owner (the Respondent).

The case for the Respondent briefly stated is that he had two partners in this land — his sister and one Shaker Eff. Ghalayini; that he (Respondent) was in possession of the land on behalf of himself and his 2 partners and had been leasing it out since 1922; that his brother who had been a co-owner had sold his share to Kabrilovitch in 1935, and had in fact never been in possession of the land.

The land is stated by Mr. Shehadeh for Respondent, to be mulk. If that is so, the period of prescription is 15 years, but it is submitted by Dr. Matussevitch for Appellant that there is no prescription between co-heirs.

The Land Law Amendment Ordinance, Cap. 78, Section 2, provides that the presumption that one heir holds the land on behalf of the other co-heirs may be rebutted by evidence that his occupation is adverse to the other co-heirs. But in C.A. 8 of 1940 *) (See Vol. 7 P.L.R. 1940 page 76) it was held that section 2 is not retrospective.

The witness Friedman who was called as a defence witness stated that the deed of sale by Kabrilovitch to the Society was dated 2.7.41, and another defence witness Ziev Shemnov stated that the transfer to the Society had taken place on 4.7.41, i.e. the Society acquired an interest in the land only about 6 weeks before the second year's tenancy came to an end (on 14.8.41).

At the hearing on 14.10.41 in the lower Court the defendant's advocate had asked for the Society to be summoned as a third party, but that application was disallowed by the Magistrate who held that the contractual relation under the lease was between Plaintiff and Defendant, and that if the Society was claiming ownership that question must be decided at the proper time in the competent Court.

It has been submitted by the Appellant that the fact that the Respondent sued for rent for a period after the filing of the action, was fatal to his claim. I am unable to agree with that submission. The rent for the second year was due and payable in advance i. e. before the action was filed. The Respondent when he filed his claim for rent made it clear that he wished to take advantage of the forfeiture. If he had first filed an action for rent for the whole on the second year he could not subsequently have filed a separate action for forfeiture for non-payment of that year's rent, but he did both things at the same time and I am unable to see any reason why he should not do so. Of course he would not get rent for the whole year if he obtained possession before the year had ended. But that was a matter for adjustment. The Magistrate if he gave judgment before the end of the second year (which he did not do) would presumably have ordered that the Respondent should not recover rent for any period after the date of ejectment. The mere fact that he asked for more rent than he might in certain circumstances be entitled to

*) 8 CLR 198.

recover, does not prevent the respondent from getting an order for ejectment.

The Respondent, as I have already observed, stated in evidence that his brother had sold his shares to Kabrilovitch in 1935. If Kabrilovitch sold to the Society what he had bought from the Respondent's brother then the Society now stands in the shoes of the Plaintiff's brother. Article 429 of the Mejelle provides that the co-owners of a share of an undivided jointly owned property may let his share to his co-owner, but he may not let it to another person. In Civil Appeal No. 91 of 1941 (at page 290 Vol. 8 P.L.R. 1941) it was held that if one joint owner leases jointly owned property without the consent of a co-owner the lease is void.

Mr. Shehadeh for Respondent avers that Respondent's brother had lost any rights that he may have had in this land, but that has not been proved, and in view of the decision in C.A. 8 of 1940 it does not appear that it could be proved.

If the Society has acquired rights in the land which the Appellant now occupies it is difficult to see how the Respondent could evict the Appellant from the land if the Society did not want him to do so.

It appears to be highly desirable that the rights (if any of the Society in this land should be determined, otherwise if the Society subsequently brings an action to vindicate its rights, there judgments may be given which contradict each other.

Article 1077 of the Mejelle provides that if one of the joint owners lets on hire the thing held in common and receives the rent for it he must hand over to the joint owner his share. So if the Society can prove that it owns shares in this land, it will be at least entitled to a share of the rent which the Respondent was claiming from the Appellant in this case.

For these reasons I consider it desirable that the Society should be brought before the Court by being made a third party or defendant.

I allow the appeal and set aside the judgment dated 18.11.41 and remit the case to the Magistrate in order that he may give effect to the Appellant's prayer to join the Society as a third party or defendant.

If when the Society is so joined it does not put forward any claim to this land the Magistrate can repeat his judgment without hearing the witnesses again. If however the Society does claim shares in this land, and if the Magistrate finds that he has no jurisdiction to hear the Society's claim, then he should re-hear the case and adjourn the proceedings for a reasonable time to enable the Society to sue in the proper Court for a declaration of its rights, and give a fresh judgment when those rights have been determined.

Costs etc.

CIVIL CASE No. 875/41.

IN THE MAGISTRATE'S COURT OF JAFFA

Before: His Worship, Samman Eff. Daoud, Magistrate.

Wanes Boghos Krikorian — Plaintiff

v.

Haim Arama — Defendant

Claim: LP.12.— amount due for rent and eviction of premises let to Defendant.

JUDGMENT

The Plaintiff leased to Defendant a plot of land for a term of 3 years at a yearly rent of LP. 12.— payable in advance. The rent for the first year was paid. The rent for the second year which began 15.8.40 was not paid. About nine months later Plaintiff brought this action claiming the whole of the second year's rent and asking for an order of eviction of Defendant for his failure to pay rent due in time.

Advocate for Defendant argues:

(a) That Defendant is at present a member of the "Mishknot" Co-operative Society Ltd. which is now a part owner by purchase of the area which comprises the plot occupied by Defendant and that this means that the Society is now in the occupation of the said premises os owner through its member the Defendant and as such cannot be evicted.

(b) Alternatively by claiming the full rent the Plaintiff had evinced his readiness to allow Defendant to remain until the termination of the contract of lease, thus in effect waiving his claim for eviction.

The contract of lease made by the parties is binding on them and effect must be given to it. The Defendant agreed to pay rent in advance he failed to do so and refuses to leave the premises sheltering behind a Society of which he claims to be a member, and which, so he says, became a part owner. This in my view does not effect the issue. Plaintiff delivered the premises to Defendant and the latter must hand them back, I am not aware of any law, and none was quoted to me, by which the circumstances, as the one put forward by the Advocate; operate as a bar, to a claim of eviction.

As regards the second point there is nothing in it. The whole of the second year of the lease has expired and the two months of the third year have expired too. The rent was not paid and there seems no intention of paying it. In reality the claim of rent should have been claimed up to the date of action. This, however, is not important since what was then claimed has now become very much over due and the Defendant was not in any way prejudiced.

The Defendant is ordered to pay Plaintiff the sum of LP.12.—(Twelve Palestine Pounds) the rent due for the year 15.8.40 to 18.8.41. He is also ordered to evict the leased premises with costs and LP.3.— Advocates fees.

Delivered this 18th day of November, 1941.

CIVIL APPEAL NO. 228/41.

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

Before: Copland A/C. J. and Edwards J.
In the Appeal of:
Tewfik Zaboura & 3 others — Appellants.
v.
Anna Zaboura — Respondent.

Award remitted to arbitrator as he came to no decision — Second award setting out alternative solutions without saying which one adopted as arbitrator's decision — Court, without motion and without hearing parties, remitting case to arbitrator to adopt one or alternative solutions — Arbitrator, without hearing parties, completing award remitted to him — Award impliedly rejecting plea of prescription, though making no reference to it in specific terms — Proper time for objection to a witness.

1. Where award sets out alternative solutions without singling out one as arbitrator's decision, procedure of remitting award to arbitrator, although no motion filed nor parties heard, to state his decision — not actually wrong; in most cases, though, better to make such orders on motion or, at least, after hearing parties.

2. If award remitted to arbitrator to state which of his alternative solutions (basis for which fully argued and considered in proceedings before him) he adopts, no necessity for him again to hear parties.

3. Where arbitrator, after hearing all evidence decides in favour of party whose rights opponent claimed were prescribed, award not vitiated by fact that prescription not specifically mentioned in it.

4. Correct time at which to object to a witness being heard — before he swears, at any rate, not after he gives evidence.

Cattan and *Machlis* for Appellants *Seligman* and *Kritzman* for Respt.

Appeal from judgment of Land Court, Jaffa, dated 30.10.1941, in case No. 4/40.

JUDGMENT

This is an appeal from a judgment of the learned President of the Jaffa Land Court on a motion to set aside an award which the learned President confirmed with a small variation, and the unsuccessful parties have now appealed to this Court. On this appeal a very large number of points have been taken but in three only of these were the Respondents called upon to reply. With regard to the other points, we are satisfied that there is nothing in them and that the decision of the learned President on those matters was correct.

With regard to the three points on which we decided to hear arguments, the first one is that when the second award which was made on the 19th

July, 1941, had been made, the learned President, when hearing the parties, decided to remit the case to the arbitrator mainly on the ground that the arbitrator in his award had put forward three alternative solutions and had not said which of these three solutions he adopted. The prior history can be stated simply. The first award was made on the 13th of May, 1941, and a motion was entered to enforce it, which was opposed. The case was remitted to the arbitrator on 11.7.41 since the arbitrator had come to no decision at all. The second award of 19.7.41, as I have said, set out three alternatives without saying which was the one to be adopted. The learned President on the 28th July, 1941, remitted the award for the second time to the arbitrator who, on the same day, made what has been called his third award and it is again complained that this third award was made without hearing the parties and was communicated in a letter to the Registrar of the Land Court.

It has been argued, with considerable force, by Mr. Cattan, that the second remission on 28th July, 1941, should never have been made except upon motion by one of the parties affected by the award with notice to the other side. We agree that it is certainly better in most cases for an order of this nature to be made either on motion or, at any rate, after notifying the parties and hearing whatever they may feel moved to say, but in this case we do not think that the procedure actually has been wrong. As the learned President remarked, the second award of 19.7.41 had a defect patent on the face of it in that it set out three alternatives. Whatever the parties could have argued on a motion to enforce, or set aside, or to remit, in our opinion there was only one course open to the learned President and that was to remit to the arbitrator to state which of the three alternatives he adopted as his decision. For these reasons we think that the first point fails. There was, in our opinion, equally no necessity when the second award had been remitted to the arbitrator for the arbitrator again to hear the parties before he issued what is called his third award. He merely adopted one of the three alternatives which he had already set out and the basis for which had been thoroughly considered and argued in the proceedings before him. So much for the first point.

The second point is the question of prescription. It is submitted that the arbitrator did not deal with the question of prescription and that prescription was one of the main foundations of the appellants'case. In the first place the arbitrator is not a lawyer, and in the second place the question of prescription had already been dealt with by the Land Court on the 7th October, 1940, in previous proceedings between the same parties as in this case, where the learned President said, "I have formed the view, however, that they (that is the appellants), have failed to prove adverse possession", and he then proceeds to give his reasons why he so held. That case was taken on appeal to this Court and the judgment of the Appellate Court does not deal with the matter but the case

was remitted to the Land Court on an entirely different point. We are informed by Mr. Seligman that he was stopped when trying to deal with this question of prescription but, in any event, we agree with the learned President when he says"it is true that in his award the arbitrator has not specifically mentioned prescription but he heard all of the evidence that the parties wished to tender and it is clear that he was satisfied that the plaintiff's rights had not been prescribed." It is quite clear that he was so satisfied, if we may say so, since, if he would not have been so satisfied, judgment would not have been in favour of the respondent.

The last point is that the arbitrator misconducted himself inasmuch as he called two witnesses of his own motion and that those witnesses were objected to by the appellant. From the very lengthy record of these extremely lengthy proceedings, and it is necessary, I suppose, once again to reiterate that we are bound by the record, it appears that one witness was never objected to at all, the second witness was sworn and examined and it was not until the appellants' turn to cross examine came that the witness was objected to. It cannot be too strongly emphasized that the correct time at which to object to a witness is when he comes to the box to be sworn and before he is sworn. It is useless to allow a witness to be sworn, hear him and then if you consider that his evidence is against you to object to his being heard as a witness. No one can have the best of both worlds though many try. For these reasons we think that the learned President came to a correct conclusion when he confirmed the award as he did and the appeal must therefore be dismissed. The respondent will get her costs on the lower scale and we certify the sum of LP.15 advocate's attendance fees on the hearing of this appeal.

Delivered this 22nd day of December, 1941.

CIVIL APPEAL No. 25/42.

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

Before: Copland J. and Frumkin J.
In the Appeal of:
Ilbert Issler — Appellant

v.

Jassin Ibrahim Doulhe — Respondent.

Claim for return of property sold under alleged hire purchase agreement — Agreement, though on face of it a hire purchase agreement, held by Court, after hearing witnesses, to be an ordinary contract of sale — Condition in agreement that ownership shall not pass until price paid — Breach by seller of undertaking firmly bound with agreement — Estoppel.

Seller under contract of sale claiming property back cannot invoke stipulation that ownership shall not pass until price paid, if he broke contract (or undertaking bound with it).

Elhanani for Appellant *Porter* for Respondent.

Appeal from judgment of District Court, Tel-Aviv dated 30.1.42, in Case No. 258/41.

JUDGMENT

This is an appeal from a judgment of the District Court of Tel Aviv in which they dismissed the appellant's claim to return certain machinery. The District Court held that a particular agreement (P/1), though on the face of it a hire purchase agreement was not, in fact, such a thing but was an ordinary contract of sale. There was evidence to support that finding and we see no reason to differ from the learned judges of the Court below.

The appellant's main arguments were that the District Court were wrong in disbelieving the witnesses; that they were wrong in holding that this contract (P/1) was an agreement for sale — in other words that they should have found all points in his favour. There is only one point which it is necessary to mention and that is the last one in which he says, quoting an English case, 1895, Appeal Cases p. 457, that if an agreement for sale contains a condition that the ownership shall not pass until the price has been paid, then there is no reason why that condition should not be fulfilled. That point, however, is disposed of by paragraph 2 of the conclusions at which the Court arrived, in which they said that

> "The undertaking of the partnership to return to defendant certain bills is firmly bound with the agreement P/1: and whereas the partnership committed a breach of the undertaking to the defendant and endorsed the bills to a third party, it cannot rely upon the agreement P/1."

The District Court came to a right conclusion, and we see no reason to differ from them.

The appeal is dismissed. The appellant will pay costs on the lower scale together with LP.10 advocate's fee for attending hearing of this appeal.

Delivered this 23rd day of April, 1942.

CRIMINAL APPEAL No. 54/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before: Rose J., Edwards J. and Abdulhadi J.

In the appeal of:

1. Shukri Hanna el Nihi

2. Tewfiq Elias Salman — Appellants.

v.

Attorney General — Respondent.

Conviction by majority based on confession and corroborated evidence of accomplice — One of 3 accused acquitted on Court not being satisfied that his confession was properly obtained — Belief or disbelief with regard to one accused not affecting others.

1. Appellate Court must have regard to majority judgment and apply to it precisely same tests as if there were no disagreement.

2 Court may be satisfied that confession of one accused was free and voluntary and properly taken while that of other — not so.

Edit. Note: As to 1 see: CrA 55/41 10 CtLR 93. As to 2 see: CrA 132/41 11 CtLR 147 and Edit. Note thereto.

Abedrabbo for Appellants *Crown Counsel* (*Rigby*) for Respondents.

Application for leave to appeal and appeal from judgment of District Court, Jerusalem, dated 25.3.1942, in Felony No. 348/41, whereby by majority accused were convicted of burglary contrary to Sec. 295 (a) of Crim. Code Ord. 1936, and sentenced 1st appellant to 1 year's imprisonment and 2nd appellant to 18 months' imprisonment.

JUDGMENT

This is an appeal from a judgment of the District Court of Jerusalem convicting the two appellants of burglary contra section 295(a) of the Criminal Code Ordinance. The matter is perhaps rendered a little difficult in that there was a disagreement amongst the members of the Trial Court, the presiding Judge being in favour of acquitting the two appellants. The duty of an appellate Court, however, in such a case is, in our opinion, quite clear, namely, to have regard to the judgment of the majority of the Court (which is the effective judgment) and to apply precisely the same tests to that judgment as it would do if there were no disagreement. We have to consider, therefore, whether there was sufficient evidence to justify the finding of the majority judgment that these two appellants were guilty of the offence with which they were charged.

With regard to the first appellant the case for the prosecution depended upon three matters. First, there was an alleged confession. Secondly, there was the evidence of an accomplice which, if believed, directly implicated the first accused and thirdly there was the evidence of a police officer that he found three rings which were identified as being part of the stolen property, these rings being actually taken from a hiding place and handed over to him by the first appellant.

Counsel for this appellant contends that the confession was improperly obtained and was not free and voluntary and he argues that as one of the accused, the second accused, was acquitted on the ground that the

Court was not satisfied that his confession was free and voluntary, it was unreasonable in respect of the other two accused to hold that their confessions were free and voluntary. That seems to us to be entirely a question of fact for the Trial Court. There is no reason, in principle, why a Trial Court should not believe that the confession of one accused was improperly taken and that of another was properly taken. It is purely a question of fact. It is true that the learned President took an opposite view but that cannot affect the position, as the majority found that it was free and voluntary.

We have, therefore, the clear evidence of the accomplice, which is sufficiently corroborated by the finding of the rings and the confession, and we think that there is no reason to interfere with the conviction of the first appellant.

With regard to the second appellant, the evidence is substantially the same except that these rings were not found in his possession and were not handed by him to the police officer concerned. There was, however, in our opinion, sufficient corroboration of the accomplice's evidence, and there were also matters extraneous to the confession which tended to show that it was true. That being so, we think that with regard to the second appellant also there is no reason to interfere with the conviction.

As to sentence, the first appellant was sentenced to one year's imprisonment and we cannot say that a sentence of one year for burglary is excessive. The second appellant was sentenced to eighteen months' imprisonment. He was presumably treated more severely because he had had a recent previous conviction for shop-breaking. We cannot say, in the light of these circumstances, that the Court was wrong in giving him an additional six months' imprisonment.

Both appeals are therefore dismissed and the convictions and sentences confirmed. The sentences will run from the date of conviction.

Delivered this 23rd day of April, 1942.

CIVIL APPEAL No. 14/42.

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

Before: Edwards J. and Frumkin J.

In the Appeal of:

Estate of the late Anton Michael Malak, through the Administrator of the Estate Advocate Soubhi el Ayyoubi. Appellant.

v.

1. Gabriel Mikhael Malak,
2. Giulia Mikhael Malak, wife of Issa el Sawabini
3. Hilaneh Michael Malak, in their capacity as heirs of the Estate of late Khalil Malak Respondents.

Administrator of estate of deceased payee of promissory note suing heirs of deceased maker for payment of note — Defence that note an accommodation bill without consideration and subsequently exchanged for another note in similar terms and amount— Court hearing evidence and drawing inferences from certain facts and, in absence of evidence in rebuttal, dismissing claim — Non-interference of Court of Appeal.

If in an action on a promissory note between estates of deceased payee and maker oral evidence adduced for defence that note an accommodation bill without consideration and, in absence of rebutting evidence, Court finds accordingly and dismisses claim, Court of Appeal will not interfere.

Gorodissky for Appellant *Malak* and *Beiruti* for Respondents.

Appeal from judgment of District Court, Jaffa in Case No. 195/40, dated 23.12.1941, whereby Appellants' claim against Respondents was dismissed.

JUDGMENT

This is an appeal from the judgment of the District Court of Jaffa whereby a claim for LP.500 based on a promissory note was dismissed. In the Court below the following issues were framed by consent of the parties' advocates.

1. Is the bill sued upon an accommodation bill held by the deceased without consideration?
2. Did Antoine Michel Malak obtain another bill in similar terms and amount as the bill sued upon?
3. Was the second bill given in discharge of the bill sued upon or not?

The trial Court after hearing evidence held that the bill sued upon was an accommodation bill and that it was given without consideration and that A. Michel Malak, whose administrator is the present appellant obtained another bill in similar terms and amount and that the second bill was given in exchange for the first. The appellant's advocate has argued before us that the onus was on the respondents to prove lack of consideration. This, of course, is perfectly true and is a statement of the law which cannot be contested; but the Court below did in fact hear a considerable amount of evidence. The fact that A. Malak and the maker of the note, Khalil Malak, died in the year 1937 made it impossible to bring direct evidence one way or the other. The Court below was therefore perfectly entitled to draw inferences from the evidence. There was ample evidence that Khalil and Anton were brothers who used to have business relations of this nature. The evidence of the witness Amin Shabab Eddin showed that the two brothers used to help each other in discounting accommodation bills. This witness says that he never saw either of them paying the other any sums of money. There was a very significant fact namely that the bill made on the 15th of April,

was given on the very day on which the bill made on the 9th December, 1936, fell due .

Now, there was ample evidence that the late Anton was a good business man and that whenever he had any commercial transactions these transactions were entered in his books, and all accounts over LP.20 were paid by cheque. The advocate for the first respondent, Mr. Peter Malak, has argued before us that it is incredible that if the late Anton had given such a large sum as LP.500 some entry of it would not have been found in his books, or in his bank-account. The only entry made seems to have been in a small book as testified by the witness, Subhi Eff. el Ayyoubi. The Court below considered that the note issued was replaced by another note, namely note B, and that this note was not in the hands of the plaintiffs but was in the hands of the Banco Di Roma, and the Court below felt that they could have dismissed the case on that ground alone, as they considered that the second note took the place of the first one. We think that there is substance in this reasoning. On the whole, we think that there was ample evidence to entitle the Court below to find as a fact that the bill sued upon was an accommodation bill and that there was no consideration. Mr. Gorodissky, the appellant's advocate, has argued that it was not for him to bring any rebutting evidence because he contended that respondents in the Court below had not proved lack of consideration or that it was an accommodation bill and that, the onus being on them, they should have failed. It is here that we differ from Mr. Gorodissky, because we think that there was ample evidence. We do not consider that we are entitled to interfere with the findings of fact of the Court below.

We accordingly dismiss the appeal with costs to be taxed on the lower scale to include advocate's attendance fee of LP.7.500 to each of the two advocates, but we order that the costs be paid by the estate of the late Anton Malak and not (as asked for by the respondent's advocate) by the administrator in person.

Delivered this 10th day of March, 1942.

CRIMINAL APPEAL No. 124/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before: Rose, J., Edwards, J. and Khayat J.

1. Nuri Eddin Ahmad Halawa
2. Kazim Khayyal — Appellants.

v.

Attorney General — Respondent.

Conviction of possession of, and attempting to export, dangerous drugs — Point on appeal that principal witnesses in case accomplices and no sufficient corroboration — Irrelevance of absence

of intention with person who had to act as agent in exporting dangerous drugs.

1. Question whether witness an accomplice — a matter for trial Court, provided they apply their minds to proper test in coming to their conclusion.

2. Test in a case of attempt to commit an offence — not intention of agent but that of accused himself.

Edit. Note: As to 1 see: CrA 77/41 10 CtLR 6, CrA 108/41 10 CtLR 175; CrA 77/40 8 CtLR 57 and Edit. Note thereto, CrA 91/40 ibid 103.

For Appellants: No. 1: *Awni Daoudi,* No. 2: *Abcarius.*
For Respondent: *Crown Council (Rigby).*

Appeal from judgment of DC, Jaffa dated 11.10.1941, in Crime No.151/41, whereby appellants were convicted by a majority of being in possession of dangerous drugs contrary to sec. 7 of Dangerous Drugs Ord., 1936, as amended by Dang. Drugs (Amendment) Ord., 1941, and of an attempt to export a quantity of dangerous drugs contrary to sec. 4 of Dang. Drugs Ord., 1936 and sec. 29(d) of Crim. Code Ord., 1936, and sentenced to 1 year's imprisonment each and to a fine of LP. 100 or 3 months imprisonment.

JUDGMENT

In this case the two accused were charged on four counts with infringements of the Dangerous Drugs Ordinance, 1936. They were acquitted on the two counts of conspiracy but convicted on the count of possession and of attempting to export quantities of drugs contrary to the Ordinance.

The first point raised by the appellants is that the two principal prosecution witnesses, that is, Cpl. Bodger and Cpl. Ritchie were in fact accomplices and that there was not sufficient corroboration of their evidence.

The question as to whether or not a witness is an accomplice is primarily a matter for the Court of trial provided of course that they apply their minds to the proper test in coming to their conclusion. The learned Relieving President considered this matter and said:

> "On the question of whether the two Corporals were accomplices. In my opinion, the whole of the evidence shows that they were not. For a man to be an accomplice there must be a guilty intent. There was none here at any time. The two Corporals returned to billets late at night and reported the matter first thing next morning. That was the reasonable thing to do. Nothing would be gained by waking Sgt. Kidd and reporting that night".

It seems to us quite clear that the learned President applied his mind to the proper considerations and he came to a result with which we certainly do not propose to interfere. The question of corroboration therefore does not arise.

With regard to the count of attempting to export, it has been argued by the appellants that there was no attempt in law for two reasons. First because the two Corporals who were to act as the agents for the exportation never had any genuine intention of exporting the drugs at all and secondly because in any event the act alleged against the accused was not an overt act but was merely an act of preparation. With regard to the first point, as learned Crown Counsel pointed out, the test in a case of this kind is not the intention of the agents but the intention of the accused persons themselves and, as far as they are concerned, it is apparent that they fully intended (and the Court was clearly entitled to draw that inference) that this hashish should be exported to Egypt.

With regard to the second point as to whether the act proved against them was merely an act of preparation, there was evidence which the Court accepted and which, in our opinion, amply justified the finding that an overt act had been committed.

We now come to the third count that is the question of possession. As regards the first accused, the evidence of Cpl. Bodger is as follows: "We entered the house. Accused No. 1 put packages (containing hashish) in each. Small packages in each. I and No. 1, accused put them in bags. No. 1 accused locked the keys of the bag". That clearly is a sufficient finding of possession as regards the 1st accused.

With regard to the second accused it has been argued with considerable force by Abcarius Bey that there was no sufficient evidence to justify the finding that he was in possession. It is perfectly true that there is not the same complete clarity in his case as in that of the 1st accused but we consider that, having regard to the evidence of Cpl. Bodger and Ritchie and the facts of the case taken as a whole, it would be highly artificial for us to say that there was not sufficient evidence for the trial Court to infer that the second accused was also in possession of hashish. We are therefore of the opinion that the trial Court was entitled to come to the conclusion to which it did on the count of possession as well as on that of attempting to export.

For these reasons the appeals must be dismissed and the sentences, which in the circumstances we do not think are excessive, should be confirmed.

Delivered this 10th day of November, 1941.

CIVIL APPEAL No. 39/42.

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

Before: Gordon Smith C. J. Khayat J. and Abdulhadi J.

In the Appeal of:

Ibrahim Adham Abu el Huda ed Farouqi in his capa-

city as Mutawalli of Waqf Abu el Huda and his two sons — Appellant

v.

Salim Mohammad el Masri — Respondent.

Municipality expropriating land against payment of compensation — Disputes between partners as to apportionment of compensation — Proper course to follow by person under liability to pay money if two or more persons take adverse claims thereto — No interest on damages.

1. Right course for Municipality expropriating land over which disputes between co-owners exist — to pay amount of compensation into Court and for parties to go to Court to settle their disputes.

2. No interest payable on compensation for damage.

Edit Note: As to 2 see CA 85/40 8 CtLR 63 and Edit. Note thereto.

Dajani for Appellant — *'Akel* for Respondent.

Appeal from judgment of District Court, Jaffa, in Case No. 24/41, dated 14.2.1942.

JUDGMENT

We need not hear you Amin Eff.

Counsel for the appellant has raised three points in this appeal. First that the appellant is not a party to the action, in that the respondent should have sued the Municipality who expropriated the land. Second that he was paid LP.70.— for the value of the trees and the respondent is entitled only to half this amount. Finally that the amount awarded by the District Court to the respondent includes compensation for damage for which no interest thereon could be adjudged.

There is nothing in these points. The right course for the Municipality to follow in these proceedings was to pay the amount of the compensation into Court, to which the parties could go to settle or decide their disputes as to its apportionment. The second point raises purely questions of fact which is entirely for the lower Court. Both parties tendered evidence and the Court did not believe a good bit of it. The Court said that both parties were of no help and it arrived at its conclusion by carefully sifting the evidence and by inference from the surrounding circumstances. We do not propose to interfere with its finding.

As regards the interest we agree that the lower Court erred in giving interest as from the date of action. The judgment of the lower Court will, therefore, be varied in this respect, otherwise the appeal is dismissed and the judgment of the District Court is confirmed. The respondent will get his costs on the lower scale to include the sum of LP. 10 advocate's attendance fee.

Delivered this 27th day of April, 1942.

CIVIL APPEAL No. 30/42.

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

Before: Rose J., Edwards J. and Frumkin J.

In the Appeal of:

Zwi Werner — Appellant.

v.

Agudath Hastudentim Shel Hatechnion Haivri, Haifa, — Respondents.

Contract for lease of sole right to sell food etc. in lessor's premises — Lessor breaking contract by allowing others to sell foodstuffs etc. — Liquidated damages in contract found by Court to be a genuine estimate by parties of eventual losses and not a penalty — Lessee withholding, after breach by lessor, payment of money, due from him under contract — Plaintiff's failure to perform his own obligation disentitling him to recover damages for Defendant's breach.

Person claiming damages for breach of contract must prove that he himself performed or at all material times was ready and willing to perfotm his own obligations; thus, even if breach caused him substantial damage, he cannot recover if he, whether before or after breach, withheld payment of money due from him under contract.

Cassel Knoch for Appellant — *Erdstein* for Respondents.

Appeal from judgment of District Court, Haifa, sitting in its appellate capacity, dated 30.1.1942, in Civil Appeal No. 120/41.

JUDGMENT

This is an appeal from a judgment of the District Court of Haifa dismissing an appeal from the Magistrate's Court. The facts are sufficiently set out in the two previous judgments and need not be referred to here. The appellant contends that by reason of Clause 1 of the contract ,which reads as follows

> The students hereby give on lease to Mr. Zvi Werner the sole right of arranging on the 15th of February, 1941, a Buffet, Bar, Cafe and Cigarettes in the Ball halls, and the students shall not be entitled to allow anyone else to sell food or drinks or cigarettes in the halls of the Technical High School and those of the Students Association.

he was entitled to expect that no other drinks, cigarettes or foodstuffs should be sold or offered at the dance on the night in question except those which were provided by himself. He points out that the contingency of the students being presented with articles falling within the prohibition is met by clause 7 of the agreement which obliges Mr. Werner to buy at the wholesale price all such articles. I consider that his conten-

tion is sound and am therefore of opinion that by arranging and carrying out the tombola in question the respondents broke clause 1 of the contract. Mr. Werner, however, did not elect to treat the contract as being at an end but continued to perform his part of it in that he continued the sale of his products up to the termination of the dance. The matter would, therefore, seem to be one for damages, and the Magistrate, in fact, found that the respondents' breach caused him substantial damage. Under Clause 15 of the agreement, there is a provision that any defaulting party shall pay LP.50 as liquidated damages. The District Court held, and I see no reason to differ from its conclusion, that this sum represented a genuine estimate of the parties as to the damages likely to ensure from a breach of the contract, and was not a penalty.

In order, however, to entitle himself to succeed on his claim for damages, the appellant was bound to satisfy the Court that he himself had performed, or at all material times was ready and willing to perform, his own obligations under the contract. Clause 2 of the contract provided that in consideration of his exclusive rights under the agreement the appellant was to pay LP. 25 upon the signature of the agreement and a further LP. 75 by post-dated cheque to be met on the 16th February, 1941, which was the day following the ball. Unfortunately for him the appellant decided to withhold payment of this balance of LP.75, and the respondents contend, and I agree with them, that he thus also committed a breach of the contract which disentitles him to recover damages for the respondents' breach. I feel a certain sympathy for the appellant in this matter, but would point out that in any event, by withholding this payment of LP.75, he was retaining LP.25 more than he would have been entitled to as the agreed damages under the contract.

The appeal is therefore dismissed. The appellant must pay the respondents costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee of LP.10.

Delivered this 16th day of June, 1942.

CRIMINAL APPEAL No.81/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before: Copland J., Edwards J. and Khayat J.

In the Appeal of:

Mahmoud Diab Abed Saffouri — Appellant.

v.

The Attorney General — Respondent.

Conviction on two charges (breaking into a store and wilfully receiving stolen property) — Trial Court ordering consecutive sentences of imprisonment — General principle regarding consecutive sentences.

1. Save in special circumstances consecutive sentences should not be imposed.

2. Duty of Police to bring to notice of prosecution and prosecution's duty to inform Court if more charges pending against prisoner.

In person for Appellant *Crown Counsel* (*Hogan*) for Respondent.

Appeal from judgments of District Court of Haifa dated 19.5.42, in Crim. Cases Nos. 121/42 and 123/42, whereby appellant was convicted under sec. 297 (a) and 309 of Crim. Code Ord., 1936, and sentenced to 12 months' and 2 years' imprisonment respectively.

JUDGMENT

We need not hear you Mr. Hogan.

The appellant pleaded guilty to two charges of breaking into a store and committing theft therein and wilfully receiving stolen property. It is stated that the value of the property stolen was about LP.700 . The appellant has nine previous convictions varying from six strokes in the year 1934 to one year in the year 1940. One of those convictions was for housebreaking, three for theft and one for possession of stolen property. This list of sentences shows the futility of a succession of short sentences. The appellant was sentenced to two years imprisonment from the date of his arrest. In our opinion that is not one day too much. The appeal is dismissed.

It appears that the appellant was also sentenced on another charge to twelve months' imprisonment to commence after the expiration of the sentence of two years in the first case. There was ample evidence upon which the Court could act and that appeal is also dismissed. Save in special circumstances, which are not present here, the Court is of opinion that consecutive sentences should not be imposed. It is the duty of the police to bring to the notice of the prosecution and the prosecution's duty to inform the Court if more charges are pending against a particular prisoner. In these circumstances we order that the two sentences of two years and twelve months respectively shall run concurrently from to-day the date of the appeal.

Delivered this 15th day of June, 1942.

CIVIL APPEAL No. 59/42.

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

Before: Copland J. and Edwards J.

Between:

Zaki Rashid El Shanti and 7 others Appellants

v.

Yehoshua Hankin, Hussein Rashid El Shanti & 25 others — Respondents.

And between:

Zaki Rashid El Shanti and 7 others — Appellants.

v.

Yehoshua Hankin, Hussein Rashid El Shanti & 25 others — Respondents.

(By order of the Supreme Court dated 4th June, 1942).

Land Settlement Officer disregarding instructions of Court of Appeal — Duty of trial Court to carry out instructions contained in appellate judgment — Desirability of retrial of case by a different Settlement Officer.

1. Trial Court directed by Court of Appeal to re-hear case — bound to carry out instructions of appellate judgment whether they appear to it right or wrong, their disregard cannot be too strongly reprobated.

2. Court of Appeal remitting case to Settlement Officer for retrial may direct that it should go before a different Settlement Officer.

A. L. Saleh, Cattan, Saleh for Appellants *Eliash* for Respondents.

Appeal from decision of Settlement Officer, Tulkarem Settlement Area, dated 21.2.42 in Case No. 3/Qalqilia.

JUDGMENT

Copland J.

This is an appeal from a decision of the learned Settlement Officer of the Tulkarem Settlement Area, on a retrial which had been ordered by this Court, in Civil Appeal 215/38*) (5 PLR p. 553). In that judgment this Court held that the alleged settlement by Husein and Kamel, two of the heirs of Rashid el Shanti, with the respondents, must be proved by the appellant. That was a part of the judgment also of the Land Court.

This Court sent the case back to the Settlement Officer to decide the case on the lines suggested by the Land Court and in the light of the observations in the judgment of this Court. The case went back to the learned Settlement Officer and it has taken him nearly three years to decide the very simple points involved in the second judgment. The Settlement Officer proceeds to argue at considerable length that the Supreme Court was wrong in its first judgment in remitting the case to him for a retrial, that we had not understood the arguments and not understood the points in the case and that he was the only one, apparently, who had any idea of what he was talking about. As was remarked by this Court, differently constituted then what it is today, in Civil

*) 9 CtLR p. 209.

Appeal No. 33/41, "the Settlement Officer seemed to have misunderstood his functions. In a judgment of some twenty pages not only has he critisized the decision of this Court but he has also referred in the most unbecoming terms to an earlier consent judgment of this Court." This Court went on to say — "The Land Settlement Officer is not the Court of Appeal from this Court". It seems that the Settlement Officer in this case, who actually was not the same Settlement Officer as referred to in Civil Appeal 33/41, also considered himself a Court of Appeal from the Supreme Court. In his written decision granting the application for leave to appeal he also criticises this Court and says — "For conscientious reasons, I find myself unable literally to carry out the instructions of the Supreme Court in referring the case back to me for re-hearing that the defendant is to be considered bound by certain admissions of two of the plaintiffs". He goes on to say — "On equitable grounds, I could not see how defendant's opposing parties should be able so to bind him" and so on, and various other matters which he says he cannot see. It is quite immaterial to us whether he can see or not. His duty is to carry out the instructions of this Court which were perfectly lucid and clear and admit of no doubt whatsoever. That the Settlement Officer has not done, and his conduct in disregarding our judgment cannot be too strongly reprobated. In the middle of his record of proceedings he states, on no evidence whatever, that "here is the fraud". A very similar remark was made by this Settlement Officer in another appeal to this Court, when the use of such a phrase in the middle of a record, showing that the Settlement Officer had already made up his mind on a vital point, could not be justified, and on that ground alone the appeal had to be allowed.

Dr. Eliash has argued with very considerable but, if I may say so, unsound eloquence, that the Settlement Officer was entitled to take fresh points into consideration. Of course, Dr. Eliash does not purport to criticise the judgment of this Court or to support the language of the Settlement Officer, yet, in fact, he is trying to go round the very clear directions that we gave in the first judgment. That, of course, he is entitled to do but his efforts, I am afraid, do not succeed.

We have considered whether the case should be remitted to the Settlement Officer to proceed as we have previously directed, or whether we should give final judgment in this case. With regret we have come to the conclusion that the case will have to be remitted to the Settlement Officer in order that the terms of our original judgment should be complied with.

The appeal will, therefore, have to be allowed, the judgment of the Settlement Officer set aside and the case sent back, so that the Settlement Officer may deal with this case as directed by this Court and give effect to the judgment of this Court, without further delay.

It seems that the Settlement Officer has himself requested to be re-

lieved from taking this case again. That is the only point in his judgment and in his decision on the application for leave to appeal with which I find myself in complete agreement. It is highly desirable that this case should go before a different Settlement Officer. The appellants are entitled to costs, on the lower scale, to include the sum of LP.10 for each of the advocates appearing on behalf of the appellants, to be paid by the first respondent.

Delivered this 4th day of June, 1942.

Edwards J.

I agree that the case should be remitted on the lines suggested by My Lord. I also agree, generally, with most of the remaks made by My Lord as to the action taken by the Land Settlement Officer on the rehearing ordered by this Court. I would merely add, the effect of such action on his part has been merely to impede and delay the final decision on the rights of the respective parties to this litigation.

CIVIL APPEAL No. 11/41

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

Before:— Trusted, C.J., Frumkin, J. and Khayat, J.

Eliyahu Bichovsky — Appellant.

v.

Nitsa Lambi-Bichovsky — Respondent.

Good and valid marriage in a foreign country of a Palestinian citizen under incapacity (according to his personal law) to contract such marriage — Clash between personal law of parties — Validity or otherwise of marriage under law of Defendant or of Plaintiff — Question of acquisition de jure of domicile in Palestine by marrying a Palestinian — Action for declaration of nullity included in "suits relating to marriage" — Limits of powers of Palestine Courts as regards marriages celebrated abroad — Principle of lex loci celebrationis.

Palestine Courts cannot declare a marriage celebrated abroad null and void, if good and binding under lex loci celebrations.

(*Per Trusted C.J.*)

1. Where clash between personal law of parties, law of Defendant should be applied.

2. (*Obiter*) To a Palestinian, not a member of any religious community, English law of marriage must apply.

3. Palestine Courts have no jurisdiction over a woman who married a Palestinian abroad, but marriage illegal under his personal law (though valid in loco celebrationis), who therefore never acquired a domicile in Palestine.

(*Per Frumkin J.*)

1. Woman married to a Palestinian abroad, being regarded

Palestinian citizen until marriage annulled by competent Court, — also deemed "a person in Palestine" for purpose of art. 47 of Palestine Order in Council (jurisdiction in matters of personal status), having by marriage acquired, technically at least, her husband's domicile.

2. Jurisdiction of Courts in cases of "persons in Palestine" other than foreigners — a general one in all matters of personal status including suits relating to marriage, hence also action for declaration of nullity of marriage.

3. Validity of marriage should not depend upon technical chance as to who Plaintiff and who Defendant in case.

4. A marriage invalid under law of one party, whether Defendant or Plaintiff, — invalid as regards both parties.

(*Per Khayat J.*)

In marriages between members of different communities or different religions law under which marriages celebrated prevails.

Silberg for Appellant.

Appeal from judgment of District Court, Tel Aviv, dated 16.1.41, in case No. 351/38.

JUDGMENT

Trusted, C.J.:

The jurisdiction of the Courts of this Territory in matters of personal status is laid down in the Order-in-Council, and it varies with the status of the parties.

In the present proceedings this Court decided that in order to consider whether the relief sought could be granted it was first necessary to determine whether the Respondent is a Palestinian citizen.

It seemed to me that as she could only claim that status by virtue of her marriage to a Palestinian citizen, and not by any independent right, it was necessary to enquire if by the law of Palestine she was the wife of a Palestinian citizen, and in my view, for the reasons given in my first judgment, she is not. The other members of the Court took the view that as she was regarded by the Immigration Authorities as a Palestinian, she was a Palestinian citizen until declared otherwise.

On that basis the matter was returned to the District Court. It has been further considered and the Judges disagreed, so that in the result (the case being governed by the old procedure) the Appellant's application for a declaration that his marriage was null on the ground of his legal incapacity to contract it was refused.

I will firstly consider the matter on the basis that the Respondent is a Palestinian cititzen. The appropriate article of the Order-in-Council is 47, which provides:

> "The Civil Courts shall further have jurisdiction, subject to the provisions contained in this Part of this Order, in matters, of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any law,

> Ordinances or Regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable".

It may be noted that the Respondent is not in fact in Palestine, nor has she acquired a de facto domicile here; it does not appear that she has ever been here, and she can only be said to be "in Palestine" in so far as she has a technical matrimonial domicile here. Assuming that this is sufficient to bring her within the article, what is the personal law to be applied, there being no law, Ordinance or Regulation applicable.

There is authority for the proposition that in cases such as this where there is a clash between the personal law of the parties, the law of the Defendant should be applied C.A. 20/29, 1 P.L.R. 420, C.A. 80/31, 1 P.L.R. 662, and C.A. 119/39 *) (7 P.L.R. 20).

The Appellant is a member of the Jewish Community, but the Defendant is a Palestinian who is not a member of any religious community; her personal law is then Palestinian so far as it applies, but there is no Palestinian law (apart from the religious law of the recognised communities) dealing with marriage, one must therefore, I suppose, apply English law. As she has no Palestinian domicile apart from the marriage, the situation seems similar to that described by Lord Phillimore when discussing Ogden v. Ogden in Salvesen v. The Administrator of Austrian Property, 1927 A.C. pp. 669, 670, where he says: —

> "but in truth the problem inOgden v. Ogden was almost insoluble. The short cohabitation between the parties which followed the ceremony of marriage did indeed take place in England, (Cyprus), but after this very temporary residence the man returned to his home in France (Palestine) and never lost his French (Palestinian) domicile. On the other hand the woman did not follow the man to France (Palestine) and, if she were not married to him, never acquired a French (Palestinian) domicile. To treat her as domiciled in France (Palestine) would be to treat her as a wife, who takes her necessary domicile from her husband....."

Alternatively, can one approach the problem upon the assumption that this be regarded, as would be in England, a marriage contracted out of England, legal in the country where celebrated but illegal for lack of capacity of the husband in England — e. g. a marriage with a deceased wife's sister, prior to the Act, — but if one begins with this premise then again there was no marriage, and the wife never acquired a domicile to give the Palestinian Courts jurisdiction over her as a person in Palestine.

Mr. Silberg submits that if the marriage is not binding according to the personal law of their party, the Court may act under the article, but I do not think that is so. I may point out that where the persons are members of different religious communities special provision is made by Article 55 to meet the difficulty.

*) 7 CtLR 55.

In the result, on the basis of Article 47 and the facts of this case, I do not think the civil Courts have jurisdiction to grant the relief sought.

If one takes the view which I adopted in my first judgment i. e. that in order to ascertain if the lady was a Palestinian citizen, one has to enquire if she was the wife de jure of a Palestinian citizen, the position is clearer.

I came to the conclusion that she was not the wife of a Palestinian citizen. In my view, therefore, she is a foreigner, and the matter must be considered under Article 64. Apart from the fact that under this article the District Court was wrongly constituted,the question again arises, what law must be applied, — and it seems to me on the same principles as apply to Article 47, that of the Defendant must be applied, i.e. her national law, unless that imports the law of her domicile.

If there was no marriage her nationality and domicile were always Cypriot.

At the second hearing an affidavit was put in showing that the marriage was a good and binding marriage in Cyprus, and this has never been doubted throughout the proceedings. I do not see, therefore, how we can declare it to be null and void as against her, even if under that article the Court has power to declare a marriage void for legal incapacity — which I do not decide.

It will be appreciated that my judgments in this case are concerned without jurisdiction as laid down in the Order-in-Council, rather than the merits of the case, but it is only right to say that Mr. Silberg informed us that the wife approves of the husband's action. If this be so, individually his action would not appear to be open to the obvious adverse criticism which might be levelled against it.

The appeal will be dismissed. No order as to costs.

Frumkin J. :

The question of jurisdiction in so far as it relates to the nationality of the Respondent has already, in my opinion, been settled in my previous judgment, when I held that as long as her marriage with a Palestinian subject has not been annulled by a competent Court she is to be regarded as a Palestinian citizen. For the purpose of Article 47 of the Palestine Order-in-Council she is also deemed to be "a person in Palestine" because by marriage she acquired, technically at least, the domicile of the husband.

These findings in themselves are not, however, sufficient to vest the Civil Courts of Palestine with jurisdiction to grant the Appellant the remedy he is seeking, namely, to annul a marriage validly contracted, at least as regards form, in a foreign country. But in examining the relevant Articles of the Palestine Order-in-Council, there is nothing to restrict the jurisdiction of our Courts in granting that remedy if

justified in law. The view was taken that the restriction as regards decrees of dissolution of marriage under Article 64 does not include decrees of nullity. In cases of "persons in Palestine" other than foreigners, there is not even any restriction as regards dissolution. The jurisdiction is a general one in all matters of personal status including suits relating to marriage (Article 51), and it could hardly be said that an action for declaring the nullity of a marriage is not a suit relating to marriage.

We are therefore faced with the question, what is the law the Appellant has to rely upon in order to satisfy us that under that law he is entitled to his relief. I do not think that he could be refused his relief because it would not be warranted by the personal law of the Defendant — in his case the wife — a Palestinian, but a non-Jewess. I have grave doubts whether in cases directly affecting the validity or otherwise of a marriage one could safely apply the doctrine that where there is a conflict of laws as regards different parties, the law of the Defendant is to be applied. This is quite a sound principle in cases involving monetary results, when it would be improper to impose upon a defendant a liability not warranted under his own law merely because it is justified by the law of the Plaintiff. I would even go so far as to apply this doctrine in a matter of the validity of a marriage when it arises incidentally under the second paragraph of Article 47, the determination of which is necessary for the purposes of the cause. But when the marriage itself is at stake it is difficult to see how a marriage could remain valid because it is valid under the law of one of the parties, whether Defendant or Plaintiff, although invalid as regards the other party. This seems to me to be a case of, once invalid as regards one it must be invalid as regards both.

In England there are conflicting decisions on this matter. I am quoting from Dr. Goadby's International and Inter-Religious Private Law in Palestine (p. 146):

> "It has not always been clear in English Law whether the incapacity must exist for both parties or whether incapacity of one party alone does not invalidate the marriage. In a later stage of the case of Sottomayor v. de Barros it was ascertained that the husband was domiciled in England and the marriage was then held valid". (1879, 5 P.D. 94).

(It might be recalled that in that case it was previously held (1877, 3 P.D. 1) that a marriage celebrated in England between first cousins (being domiciled Portuguese) was prohibited by the Law of Portugal and was consequently invalid).

> "In Mette v. Mette (1859), however, a marriage with a deceased wife's sister, invalid at that time by the law of the man's domicile (England) but valid by that of the woman's (Frankfort), was held invalid".

The latter view seems to me, in all respects, to be the better one, if only for one practical reason, namely, that the validity of a marriage

should not depend upon the technical chance as to who was the plaintiff and who the defendant in a case.

The result of this reasoning will be that the Plaintiff's action could not be dismissed merely because he failed to prove that under the law governing the Defendant the marriage was invalid. But it does not follow that he can succeed if he satisfies the Court that under his own personal law the marriage is invalid.

In exercising jurisdiction under the first paragraph of Article 47 of the Palestine Order-in-Council, the Civil Courts do so "in conformity with any law, Ordinances or Regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable". No such "Law, Ordinance or Regulation" has so far been applied or enacted, and such personal law does not necessarily come in.

As already pointed out, this is not a case in which the matter incidentally arises. It is the Plaintiff who comes to this Court asking to declare null an act he has done, of his own free will in a place where the law permitted him to do so, his only reason being that in this country he would not be able to do that act because it would be contrary to his religious belief. I do not think that the Civil Courts are in such circumstances compelled to grant him that relief even if it is proved that under his personal religious law he could not have contracted the marriage in Palestine. In this case we are told no hardship will be caused to his wife, who supports his application. But if the application is granted it might create a dangerous precedent, affecting the welfare and social status of a woman who was led to enter into what she believed to be a lawful matrimonial relationship, later to find herself not to have been married at all, to say nothing about the legal position of children, if born from such a marriage.

I am of opinion that in circumstances like these the principle of lex loci celebrationis is to be applied; and just as in the case of an ordinary contract lawfully contracted in a foreign country a Palestinian could not come to the Courts of this country asking to declare such a contract null and void for the reason only that such contract, if made in Palestine, would be contrary to law, the Appellant cannot succeed before the Courts of Palestine in his request, which would amount to setting aside a marriage which he voluntarily contracted in Cyprus, and which he admits is lawful under the Law of Cyprus.

The appeal must therefore fail.

Khayat J.:

In this appeal the Appellant applied to the District Court for a judgment declaring his marriage to the Respondent as null and void on the ground that his personal law, the Jewish Religious Law, does not permit him to marry a non-Jewess. The Respondent was a member of the Greek Orthodox Church, and some time before her marriage to

the Appellant left that Church and did not embrace any other community. The District Court refused the application on the ground of lack of jurisdiction, and on appeal to this Court it was decided to remit the case for that Court to assume jurisdiction on the basis that the Respondent is prima facie a Palestinian citizen.

The District Court went into this question, and the Judges differed in opinion, and the application was refused. Hence this second appeal.

The jurisdiction of the Civil Courts in matters of personal status is to be found in Article 47 of the Palestine Order-in-Council. The main argument of the Appellant is that according to this personal law, which is the Jewish law, he could not contract that marriage. The jurisdiction of the Courts of this country is to be exercised in conformity with any law, Ordinance or Regulation that may be applied or enacted, and subject thereto according to the personal law applicable — it being common ground that no such law, Ordinance or Regulation exists.

The Jewish law is not a common law in Palestine applicable to all persons, but it is a personal law affecting only members of that community, and I think a distinction ought to be drawn between a disability grounded on domicile affecting all persons domiciled in Palestine, and a disability based on the personal law of any person as recognised for certain purposes in Palestine, by the Order-in-Council.

The Courts of this country have taken the view that in marriages between members of different communities or different religions, the law under which the marriage was celebrated prevails and must be applied, See Special Tribunal decision in Khayat v. Khayat, and in Husseini v. Abu Ghanem.

The Appellant in this case contracted this civil marriage in accordance with the law of Cyprus.

The law of that country allows such marriage and recognises it as valid, and counsel for Appellant admitted that according to the law of Cyprus his client cannot obtain a decree of nullity, nor can he obtain a decree of dissolution of marriage.

I therefore think that the appeal must be dismissed.

Delivered this 6th day of June, 1941.

MISCELLANEOUS APPLICATION No. 19/42.

IN THE SUPREME COURT OF PALESTINE

Before: Gordon Smith C. J.

In the Application of:

Alice Shubeita — Applicant

v.

Elia Shubeita — Respondent.

Wife a member of Greek (Melkite) Catholic Community, hus-

band joining same Community prior to marriage but later re-entering Greek Orthodox Community — Wife intending to sue husband for separation and maintenance — Proper Religious Court to have jurisdiction in matrimonial suits between persons of different Religious Communities.

In matrimonial suits between persons of different Religious Communities Court of party's Community within which the marriage was solemnized should exercise jurisdiction.

Edit. Note: Khayat v. Khayat, 4 C of J 1244 followed.
CA 178/34 2 PLR 282, CA 119/39 7 CtLR 55, CA 11/41 11 CtLR 238, CA 38/41 9 CtLR 181 referred to; see also HC 100/41 11 CtLR 74 and Edit. Note thereto; Misc. Appeal 33/42 and Edit. Note thereto.

Abcarius for Applicant — *Goitein* for Respondent.

Application under first part of Art. 55 of the Palestine Order-in Council to determine which Religious Court has jurisdiction.

ORDER

This was an application to me under the first part of Article 55 of the Order-in-Council, 1922, whereby I am required to decide which Court shall have jurisdiction in an action of personal status involving persons of different religious communities.

My task is somewhat simplified by reason of the fact that both Applicant and Respondent were before the Court in High Court 100/41*), and certain facts as to the different religious communities of the parties can be ascertained from the judgment in that case. Taking the Applicant first, it was there found that she remained a member of the Latin Catholic Community until her marriage with the Respondent, and that if she ever became a member of the Greek (Melkite) Catholic Community, it was only coincidentallly with her marriage, and that as she had not given the notice required by Section 2 of the Religious Community (Change) Ordinance, Cap. 127, such coincidental change (if any) had no legal effect. Prior to such marriage, however, the Respondent had, properly and legally changed his community from the Greek Orthodox Community to that of the Greek (Melkite) Catholic Community. For the reason therefore that the two parties were of different communities the order of the Greek (Melkite) Catholic Court of Appeal was, in that case, set aside. Subsequently to the marriage, the Respondent properly and legally changed back to the Greek Orthodox Community, and subsequently to the decision in High Court Case No. 100/41 the Applicant has properly and legally become a member of the Greek Catholic Community as evidenced by the Certificate of Registration produced to me.

*) 2 CtLR 74.

The position therefore now is that the applicant is a member of the Greek Catholic Community, whereas the Respondent is a member of the Greek Orthodox Community. For the Applicant Abcarius Bey submitted that I should decide in favour of the Greek Catholic Court, as being the Court of the Community within which the marriage was solemnized. For the Respondent, Mr. Goitein, submitted that the Court of the Community of the Defendant, namely the Greek Orthodox Court should be clothed with jurisdiction, but he suggested and was prepared to agree to the District Court as an alternative. Before referring to the authorities quoted by Mr. Goitein in support of his contention, I think it is desirable to make certain observations.

The applicant in the previous proceedings had applied for and been awarded maintenance, the order for which, owing to a technical omission on the part of the Applicant, had to be set aside.

It is not disputed that she intends to obtain in further proceedings, a proper and valid order for separation and maintenance.

Neither the Latin Catholic Community (to which the Applicant previously belonged) nor the Greek Catholic Community (to which she now technically and legally belongs) recognize divorce, and a marriage solemnized within either Community is recognized as being indissoluble. On the other hand the Greek Orthodox Community recognizes and grants divorce. In these respects there is a very great distinction to be drawn between these two Communities, far less so than between the Latin Catholic and the Greek Catholic or Melkite Communities.

In order to marry the applicant the respondent forsook his religion and entered a community which did not recognize divorce and which regarded such marriage as indissoluble, and of which fact he must have been well aware and accepted it, and now that the marriage has not turned out a success, he changes his religion back again to that which would enable him to seek a divorce!

My own views agree with those of Abcarius Bey, namely that the Community within which the marriage was solemnized, should be the community which should exercise jurisdiction over such a marriage. I have therefore to ascertain whether there is anything in the authorities quoted which precludes me from giving effect to those views.

Mr. Goitein referred to the following cases: (a) C.A. 178/1934, PLR Vol. 2, p. 282; (b) C.A. 119/1939 *), PLR Vol. 7, p. 20; (c) C.A. 11/1941**), PLR Vol. 8, p. 241; and (d) C.A. 38/41***) S.C. Judgments 1941, p. 173. I have examined all these cases with interest, and although the personal law of a defendant may have been applied, e.g. in (b), there is nothing in any of them that precludes me from ordering

*) 7 CtLR p. 55. **) 11 CtLR p. 238.
***) 9 CtLR p. 181.

that the Religious Court of the Community in which the marriage was solemnized should be clothed with jurisdiction.

I would also refer to Khayat v. Khayat, reported in Rotenberg, Vol. IV, p. 1244, which was a similar application under Article 55 of the Order in Council, with practically similar facts, but made by an applicant for the purpose of seeking a divorce; and I would quote the following from the judgment:

> "In this case I have to decide whether the Respondent, who was married to the Petitioner in the Melkite Church and who has always remained a member of that Community, may sue him for alimony before a Melkite Religious Court, or whether she must follow him to a court of the Orthodox Church which he has joined since the marriage. To put it in other words, may the Petitioner by changing his religion and joining another community oblige his wife to follow him to the court of that community, a court which does not administer the law of the marriage contract, but a law to which she is a stranger? The answer in my opinion is this — the Petitioner, when he married in the Melkite Church submitted to the Melkite law of marriage with its attendant consequences. It was his own law and the law of the woman he married, and the obligations it entailed were known to him as matters of common knowledge in the Community. Were I to hold that he could avoid these obligations voluntarily contracted by joining another Community such a decision would not be in accordance with the duty put upon me by the Order-in-Council of doing justice between persons of different communities."

These are exactly my sentiments, which are also confirmed by Section 4(2) of the Religious Community (Change) Ordinance, Cap. 127, and I therefore direct that the Religious Court of the Greek (Melkite) Catholic Community shall have jurisdiction as prayed for by the applicant.

There will be no order as to the costs of this application.

Delivered this 24th day of April, 1942.

CRIMINAL APPEAL No. 46/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J. Edwards, J. and Khayat, J.

Abdul Rahim Mahmoud — Appellant.

v.

Attorney-General — Respondent.

Eye witnesses giving evidence that all accused struck deceased on head and killed him in course of a brawl — All accused denying in witness box their presence on scene at material time — One accused admitting his presence on scene but denying having taken any part in brawl — Court entertaining doubts as to veracity of prosecution witnesses and acquitting all accused except one who made "the partial admission" — Untenableness of conviction.

Where eye witnesses depose that all accused took actual part in manslaughter and all accused plead alibi except A who admits his presence on scene but denies all participation in offence and Court disbelieves prosecution witnesses and acquits all except A, latter's conviction cannot stand.

Abcarius for Appellant. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 27.2.42, in Crim. Case No. 127/41, whereby appellant convicted of manslaughter, contrary to sec. 212 of Crim. Code Ord., 1936, and sentenced to 5 years' imprisonment.

JUDGMENT

This is the second time that this case has been before this Court. On the first occasion, the trial Court having acquitted three of the accused of the offence of manslaughter and convicted the fourth, the present appellant, this Court remitted the case to give the trial Court an opportunity of explaining why it came to a different conclusion with regard to him, the evidence against all four accused appearing to have been identical.

The case for the prosecution depended substantially upon the evidence of three women eye witnesses, who deposed that the present appellant as well as the other accused who were acquitted struck the deceased on the head with an iron fork in the course of a village brawl. The other three accused went into the witness box and denied that they were present at the material place at the material time, while the appellant admitted that he was on the scene at the time but said that he took no part in the fracas except in a passive way. In the event the trial Court held that the denials of the other three accused raised a doubt in their mind as to their guilt but partial admission of the appellant resolved that doubt as far as he was concerned.

With all respect to the District Court we find difficulty in following their reasoning. For the prosecution to succeed in this case it was essential that the women eye witnesses, or at least one of them, should have been believed. If the Court was not prepared to believe their evidence, or that of any of them, we are of opinion that it is unfair to the appellant to convict him on the strength of his own evidence, which so far from constituting an admission of guilt was, if believed, entirely exculpatory.

The appeal will therefore be allowed and the conviction quashed. It follows that the order for the payment of compensation must be set aside.

Delivered this 2nd day of April 1942.

Current Law Reports

Editor : M. LEVANON, Advocate, Jaffa Road, Jerusalem

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OF JUDGMENTS PUBLISHED IN THE
"CURRENT LAW REPORTS"

VOLUME XI

(1st January, 1942 — 30th June, 1942)

Price — 250 mils

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weiss Press, Jerusalem

LIST OF ABBREVIATIONS

AG, Attorney General
Applt. Appellant
AszC, Assize Court
CA. Court of Appeal
Co, Company
Coop. Cooperative
CPR, Civil Procedure Rules
Cr. Cruminal
CXO, Chief Execution Officer
DC, District Court
Dept, Department
Dfdt, Defendant
Eccles, Ecclesiastical
Ex. Execution
HC, High Court
Jurisd, Jurisdiction
Jdgt, Judgment
LC, Land Court
L Reg, Land Registry — Registrar
LS Ord. Land Settlement Ordinance
LSO, Land Settlement Office:
Mag, Magistrate
MC, Magistrate's Court
NP, Notary Public
OCCP, Ottoman Civil Procedure Code
O. in C., Order in Council
OLL Ottoman Land Law
Ord, Ordinance
P/A. Power of Attorney
Pal Palestine, Palestinian
PC. Privy Council
PDC, President District Court
Pltf, Plaintiff
P/n, Promissory Note
Proc, Procedure
Reg. Regulation
Respdt, Respondent
Soc. Society
SC, Supreme Court
UPT Urban Property Tax
WC Ord. Workmen Compensation Ordinance
XO. Execution Office, — Officer

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a = another; o = others.

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