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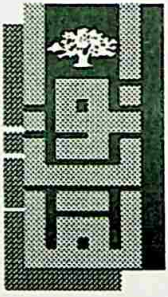

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VOLUME VI.

(1st. July 1939 – 31st. December 1939)

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Weiss Press, Jerusalem

CIVIL APPEAL NO. 59/39.

IN THE SUPRFME COURT SITTING AS A COURT OF APPEAL.

Before :— Copland, J. Frumkin, J. and Abdul Hadi, J.
In the appeal of :
Tewfiq Sanadiki — Appellant.
v.
Tewfiq Renno — Respondent.

Action for price of land alleged to have been sold to Defendant — Unstamped document purporting to be an agreement — Dismissal of case for lack of evidence

Unstamped document purporting to be an agreement cannot be accepted in evidence of agreement, and, if no evidence without this document, case must be dismissed.

Sahyoun for Appellant.
Gavison for Respondent.

Appeal from the judgment of the District Court of Haifa, dated 1st May, 1939.

JUDGMENT.

We do not wish to hear you, Mr. Gavison.

This is an appeal from a judgment of the District Court of Haifa in which that Court dismissed the appellant's action for the price of certain land alleged to have been purchased by the respondent, on the ground that there was no agreement in writing before the Court and therefore no evidence of any agreement. A document Exhibit A, alleged to be an agreement, was produced in Court and the Court refused to admit it on the ground that it had not been stamped. This document was known to the appellant because it was produced in support of his case ; he must therefore have known that it was not stamped and, before he attempted to use it in Court, he should have

applied to get it stamped properly, if possible. This he did not do. The District Court, rightly in our opinion, rejected this document as evidence, and without this document there is of course no evidence of any agreement between the parties.

For these reasons we think that the judgment of the District Court is correct and the appeal is dismissed. The appellant will pay the costs of the respondent, to include a sum of LP. 15.— for attending the hearing.

Delivered this 19th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 48/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the Application of : —

Johan (Hanna) Awad Sifri — Petitioner.

v.

Benyamin Boutagy — Respondent.

Application to Supreme Court for leave to appeal from appellate judgment of District Court after order of presiding Judge refusing similar application — Scope of Part XXXI of Civil Procedure Rules — Magistrates' Courts Jurisdiction Ordinance overriding provisions contained in Civil Procedure Rules — Magistrate's Courts Jurisdiction Ordinance, sec. 6 — Civil Procedure Rules, Rules 213 —333, 334, Part XXXI. CA 148/38 4 CtLR 12.

If presiding Judge refused leave to appeal from appellate judgment of District Court, no application for leave to appeal can be entertained by Supreme Court, as this would be contrary

to express provisions of sec. 6 of Magistrates' Courts Jurisdiction Ordinance.

Atallah for Petitioner.
Germanus (*by delegation*) for Respondent.

Application for leave to appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated the23rd of March, 1939.

ORDER.

This is an application for leave to appeal to this Court from a decision of the District Court, Haifa, upon an appeal to it from the Magistrate's Court, the presiding Judge of the District Court having refused such leave.

Section 6 of the Magistrate's Courts Jurisdiction Ordinance provides that a decision of the District Court, in any appeal from a Magistrate's Court, shall be final, but the presiding Judge may grant leave to appeal to the Supreme Court on point of law.

Prior to the coming into force of the Civil Procedure Rules it was held that no appeal could be made to this Court if the presiding Judge refused leave.

Rule 317 of the Civil Procedure Rules provides, that subject to the provisions of any Ordinance an appeal shall lie to the Supreme Court from a decree of a District Court; and it further provides that any party aggrieved by an order of a District Court, or a Judge thereof, other than a decree, may with the leave of such Court or Judge, or of the Supreme Court, appeal to the Supreme Court against such order, and it is argued that the present application falls within the second part of that rule.

A similar application was made in Civil Appeal 148/38 *), P.L.R., Vol. 5, p. 389. This was refused on the ground that Rules 313 to 333 of the Civil Procedure Rules did not apply to District and Land Courts, and that therefore Rule 317 did not apply in the case of appeals to the District and Land Courts. This decision was based upon the interpretation of Rule 334, and that rule has now been amended

*) 4 CtLR p. 12.

to make clear the scope of Part XXXI of the Rules. The question still remains, however, whether an application can be made for leave to appeal when an order refusing leave to appeal has been given by the presiding Judge.

We are of opinion that it cannot, as if such order were made by this Court it would have the effect of allowing an appeal to lie contrary to the express provisions of Section 6 of the Magistrates' Courts Jurisdiction Ordinance.

The application for leave to appeal is therefore refused, with costs assessed at an inclusive figure of LP. 5.—

Given this 22nd day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 14/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the appeal of :

Keren Kayemeth Leisrael Ltd. — Appellant.

v.

1. The Members of the Arab Mazareeb Tribe.
2. The Villagers of Ma'lul. — Respondents.

Leave to appeal from special Commission appointed under Cultivators (Protection) Ord. — Proper procedure when asking for a case to be stated — Power of Land Court to decide rights of parties upon special case as stated, though defectively, by Special Commission — Cultivators (Protection) Ordinance — Cultivators' (Special Commission) Appeal Rules, Rule 3 — Civil Procedure Rules, Part XXII.

1. Where on an application for leave to appeal from a decision of a special Commission appointed under Cultivators (Protection) Ordinance Land Court satisfied that there is a prima facie point of law to be considered leave should be given and case prepared in accordance with Civil Procedure Rules.

2. Where a Special Commission appointed under Cultivators (Protection) Ord. made certain findings of facts and gave certain decision, Land Court, instead of remitting the matter to Commission for amendment, may dispose itself of the points raised on basis of the facts found by Commission.

Horowitz & Feiglin for Appellant.

Muhammad Hussein El Khalaf Mukhtar of Arab el Mazareeb for 1st Respondents.

Yusef Muhammad El Abbas and 'Awad Elias El Khalil — Mukhtars of Ma'lul Village for 2nd Respondents.

Appeal from judgment of Land Court, Haifa, dated 19. 1. 39.

JUDGMENT.

This is an appeal by leave from a judgment of the Land Court, directing that a special case be returned to Special Commissioners appointed under the Protection of Cultivators' Ordinance, for amendment. Unfortunately, a number of points are involved, and the Respondents before us, who are illiterate, are not represented by an advocate.

Early in 1937 an Arab tribe and certain Arab villagers claimed certain rights over land, the property of the Keren Kayemeth. The matter came before the Commission, who gave its finding on 23. 3. 37.

The Keren Kayemeth, under section 19 of the Ordinance, applied to the Land Court for leave to appeal. By the time the Land Court gave its order the Cultivators' (Special Commission) Appeal Rules had been made. The Court appears to have overlooked those rules, and instead of complying with rule 3 it made an order directed to the Commission to state a case on certain points of law.

In my judgment the object of the section and the rules is to prevent frivolous appeals, and the combined effect of those provisions is that when the Court is satisfied that there is a prima facie point of law to be considered leave should be given and the case prepared in accordance

with the Civil Procedure (Special Case) Rules, 1935, now replaced by Civil Procedure Rules, Part XXII.

These rules provide, inter alia, that the case shall be signed by the parties, or their representatives, and a form is given in the schedule, the whole object being to present the case in such a way that the court can conveniently deal with it.

It may be of interest to observe that Hallsbury, 2nd Ed., Vol. 21, paragraph 1257, states—

> "The special case should contain all the points which it is desired to raise, since the High Court will not hear argument on any point not raised before the justices unless, indeed, it arises upon the face of the facts as stated, or upon a question of law thereon which no evidence could alter; nor will it admit doubts as to the accuracy of the case, unless there is a patent defect in it. The usual practice is for the case to be drafted by the party for its terms to be finally settled by the justices by whom the case applying for it, and, after it has been considered by the respondent, was heard."

There is much to be said for the case being drafted by the party asking for it, and although our Rules do not provide for it — as in some cases it would be impossible — there is no reason why parties should not make a draft in the first instance for consideration by the commission and other parties, if they wish.

The special case with which we are concerned did not comply with the Rules, for which all parties, and to some extent the Court, must be regarded as to blame.

After four abortive hearings by the Nablus Land Court sitting at Nazareth, the case was transferred by the High Court to Haifa, the Nazareth Court having been burnt down, and on the 19th of January last the case came before that Court.

The Land Court was critical of the form of the special case and remitted it to the Commision for amendment. One of the commissioners is absent from Palestine and it is not known when he will return.

I feel strongly therefore that if the rights of the parties can be decided upon the special case as it stands, this should be done.

The Commission made certain findings of fact in paragraph 1 of the special case. Mr. Horowitz before us, on behalf of the Appellant, that is the party seeking the special case, agrees that these findings and the relevant documents are adequate for the case to be argued.

The special case then sets out the contention of the parties and goes on to state —

> "The question of law submitted by the appellants for the opinion of the Court, is as shown in the Order of the Land Court No. 37/37, dated the 10th July, 1937."

Having regard to the leave to appeal from the Commission's decision having been given in the form of an order of the Court setting out the points of law, and the parties having taken no part in the preparation of the case as contemplated by the rules, I feel that there was some justification for the Commission not properly setting out the questions of law which the parties desired to argue. I see no reason why, in these circumstances, in order to overcome the difficulty to which I have referred, this cannot be put right by the parties formulating the questions of law which they wish to argue. Mr. Horowitz has submitted his points to us, and as the Respondents are not represented, the advocate who acted for them in the Land Court and who we understand from them may act for them again, or any other advocate they may properly employ, should be at liberty to submit further questions, if any, that he wishes to be raised. By this I do not mean that he needs submit his arguments on the points the Appellants raise.

The Commission concluded the case by making what it described as the "following replies", as to which the Land Court, in its judgment said—

> "Further in its substance it (i. e. the special case) is not a fair and impartial statement of the contentions of the parties but is an argumentive justification by the Commission of its original decision and findings. The Commission might have been described as having without any authority constituted itself a 3rd party to the proceedings; it is like arbitrators trying to justify their award before the Court which obviously is an impossible procedure, and like justices attempting to appeal to support their decision. For these reasons we think there is no proper case stated before us in accordance with law and natural justice."

It is quite clear that the Commission misunderstood what was required, their replies were surplusage and no Court would be affected by them. I think the Land Court was unduly influenced by them, and I do not think they prevent the Court dealing with the matter in the way I have indicated.

The judgment of the Land Court will be set aside and the case returned to that Court in order that it may dispose of the points of law which are raised on the basis of the facts found by the Commission

and the documents which were before the Commission, and the record of the Commission.

Appellant does not apply for costs, therefore no order.

Delivered this 30th day of March, 1939.

Chief Justice.

CIVIL APPEAL NO. 29/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the appeal of :

Keren Kayemeth Leisrael Ltd. — Appellant.

v.

The heirs of Habib musa el Kutt

1. Wardeh Yusef el Khalil (widow)
2. Salim Habib el Kutt
3. Zuhrah Habib el Kutt
4. Nijmeh Habib el Kutt
5. Salimeh Habib el Kutt
6. Salma Habib el Kutt

Respondents.

Appeal upon a case stated by a Special Commission appointed under Cultivators (Protection) Ordinance. —

Upon appeal by way of special case under Cultivators (Protection) Ord. no need to furnish to Land Court grounds of appeal, and a reply thereto.

Feiglin for Appellant.
Bustani for Respondent.

Appeal from the judgment of the Land Court of Haifa, in its appellate capacity, dated 28th February, 1939.

JUDGMENT.

This is an appeal from a decision of the Land Court, Haifa, dismissing an appeal upon a case stated by a Special Commission appointed under the provisions of the Cultivators (Protection) Ordinance, Cap. 40.

In Civil Appeal 14/39 *) this Court considered the law and practice applicable to special cases, and I would only add that upon an appeal by way of special case there is no need to furnish to the Land Court grounds of appeal, and a reply thereto, as was done in this case.

The special case as drawn was adequate to enable the Land Court to come to a conclusion upon the points raised, and in the result we think that that Court came to right conclusions.

The appeal is therefore dismissed with costs assessed at an inclusive fee of LP. 15.

Delivered this 17th day of May, 1939.

Chief Justice.

CIVIL APPEAL NO. 62/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Tewfiq Feidi El-Nablusi — Appellant.

v.

Badrieh Bint Hassan Sandoukah in her capacity as guardian of her two minor daughters Rabiha and Zahiyah. — Respondent.

Sharia Court dismissing trustee from his office for maladministration — Judgment against trustee for payment of money received on behalf of minors and accounted for — Applicability of art. 1774 of Mejelle regarding oath of trustee.

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*) 6 CtLR p. 5.

Whatever may be effect of art. 1774 of Mejelle (providing that oath of trustee in regard to trust affairs must be accepted) a trustee cannot claim whatever benefit under this article when he is no longer a trustee.

Zaki Ousta for Appellant.
Khader Aweidah for Respondent.

Appeal from the judgment of the District Court of Jerusalem (in its appellate capacity) dated 29th April, 1939.

JUDGMENT.

We need not trouble you, Mr. Aweidah.

This is an appeal by leave from a judgment of the District Court Jerusalem, dismissing an appeal from the Magistrate's Court. The Chief Magistrate had given judgment against the appellant for the sum of LP. 225 odd, being money received by the appellant on behalf of certain minors for whom he was guardian and not accounted for by him. There is evidence that the appellant had been the guardian of these minors, but had been dismissed from his office for maladministration by a judgment of the Sharia Court which was confirmed by the Sharia Court of Appeal. Practically the only ground of appeal in this case is that the appellant having been a trustee, his oath in regard to the trust affairs must be accepted, as laid down by Article 1774 of the Mejelle. Whatever may be the effect of the law with regard to the oath of a trustee in such a case as this, the appellant is now no longer a trustee, and in these proceedings he cannot claim whatever benefit there may be attached to a trustee, because he is no longer a trustee and is in the same position as any ordinary person in regard to the value to be attached to his evidence.

The District Court in our opinion came to a perfectly correct conclusion in law, and we see no reason to interfere with it. The appeal is entirely frivolous and should not have been brought. It is dismissed, and the respondent will got the costs of the appeal together with a sum of LP. 15, fee for attending the hearing.

Delivered this 19th day of June, 1939.

British Puisne Judge.

-CIVIL APPEAL NO. 47/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :—

1. Yehuda Cohen
2. Yehia Zarum — Appellants.

v.

Abraham Bass — Respondent.

Receipt of money on account of purchase price — Relationship between payer and payee — Burden of proof — Liability of members of committee of unregistered association.

1. If from wording of receipt it appears sufficiently that recipient was vendor, while he alleges he was only an agent of payer and therefore has only to account for the money he received, it is for him to prove his allegation.

2. While committee of unregistered association cannot sue or be sued qua committee, nothing prevents individual members who signed on behalf of it being sued.

Edit. Note:— As to 2 see C.A. 215/37 3 CtLR 75.

Ph. Joseph for Appellants.

Livay for Respondent.

Appeal from judgment of District Court, Jaffa, sitting at Tel-Aviv in its appellate capacity) dated 23.2.1939.

JUDGMENT.

This is an appeal from a judgment of the District Court Jaffa sitting at Tel-Aviv in its appellate capacity. Leave to appeal was granted in this case on a particular point of law, so no question arises on that at this stage.

The point on which leave was granted was, what was the relationship between the Appellants and the Respondent? The case had originally ben tried before a Magistrate, and the Magistrate had found that the relations between the parties were those of vendors and purchasers of land, that the Defendants, that is the present Appellants, had received on account of the purchase price certain monies from the Respondent, and that they had not transferred any land to the Respondent. The defence was that the Defendants were agents of the Plaintiff for the purchase of land. That defence failed before the Magistrate.

On appeal to the District Court, that Court dismissed the appeal holding that the appeal was directed against findngs of fact and that it saw no reasons to interfere with those findings.

The case of the Respondent was based upon two receipts signed by one of the Appellants on behalf of a committee, each of which stated that the sum of LP. 40.— had been received from the Respondent on account of the purchase of twenty dunums of land. It is admitted that no land has been transferred to the Respondent, and it is further admitted that the maximum amount of land which could possibly be transferred to him is not twenty dunums but somewhere about one dunum.

Evidence was heard by the Magistrate and the Magistrate came to the conclusion that the relationship between the parties was one of vendors and purchaser, and ordered the return of the money.

We are satisfied that the Magistrate was correct and that the relationship between the parties was that of vendors and purchaser, that appears sufficiently from the wording of the receipts produced, and it was therefore, for the present appellants to establish, if they could so do, that the relationship was one of agency and that the only duty of the Appellants was to account for the money received by them. This they failed to do. Equally with the District Court we can see no reason to interfere with those findings of fact.

The point has been taken that the so called committee of which the Appellants were two of the members is an illegal association inasmuch as it has not been registered, and therefore it cannot be sued — a simple argument which, to our mind, is entirely unsound. The purpose of this association is not an illegal purpose, the only reason for it being a so called illegal association is that it is not registered and and so the committee, qua committee, cannot sue or be sued, but there is nothing to prevent the individual members of the committee being sued, and we think therefore, that the action was quite properly brought against these present Appellants.

In these circumstances we think that this appeal fails. We would only add that we have a grave doubt as to whether what we have been called upon to deal with in this case is not, after all, purely a question of fact and not one of law on which leave to appeal only can be given.

The appeal must be dismissed with costs to include LP. 15.— fees for attending the hearing.

Delivered this 1st day of June, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 53/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— Copland, J. and Khayat, J.

In the appeal of:—

Zahara Haybi — Appellant.

v.

Habiba Levy Bassani — Respondent.

Relinquishment of claim to land against reduction of purchase price — Oral evidence contradicting kushan.

1. If purchaser of land relinquishes his right to certain portion of it in return for certain sum being allowed off purchase price, this is not a disposition within sec. 11 of Land Transfer Ordinance.

2. Land Court when considering equitable rights to land not precluded from hearing oral evidence contradicting kushan (registered title deed).

Edit. Note :— As to 2 see : C.A. 225/38 4 CtLR 218; C.A. 221/38 4 CtLR 253 & Edit. Note thereto.

Persitz for Appellant.

Wiesel for Respondent.

Appeal from judgment of Land Court, Jaffa, sitting at Tel-Aviv, dated 20.4.1939.

JUDGMENT.

We need not trouble you, Mr. Wiesel.

This is an appeal from a judgment of the Land Court, sitting at Tel-Aviv, in which the claim of the appellant, who was the plaintiff, was dismissed. The dispute concerns an area of some 16 square metres only. The appeal is largely directed to the argument that there is no evidence to support the findings of fact made by the learned Judges in the Court below. There is a mass of evidence, not to say overwhelming evidence, in support of their findings, that the appellant agreed to relinquish her claim to the 16 square metres in return for the sum of LP. 10 allowed off the price of LP. 120. We therefore do not see our way to interfere with those findings of fact made in the Court below.

Further arguments by the appellant are directed to the point that no oral evidence can contradict a kushan and that if the LP 10 was in fact paid, the transaction was a sale and was therefore void under the Land Transfer Ordinance. Land Courts, however, are directed by Section 8(2) of the Land Courts Ordinance Cap. 75 to have regard to equitable as well as legal rights to land. In this case the appellant was found by the Court below to have received LP. 10.— in relinquishment of her rights to the 16 square metres. She accepted that situtation and as between her and the respondent that transaction cannot now be upset. The provisions of the Land Transfer Ordinance do not apply and the appeal therefore fails. The Respondent will have her costs to include LP. 15.— for attending the hearing.

Delivered this 14th day of June, 1939.

British Puisne Judge.

HIGH COURT NO.34/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before:—Copland, J. and Frumkin, J.
In the application of:—
Israel Asher Shaffir — Petitioner.
v.
1. The Chief Execution Officer, Tel-Aviv
2. Max Rosenbaum — Respondents.

Mutual consent to extend time of repaying mortgage loan — Delay granted by Chief Execution Officer — Refusal of application for further delay — Non-interference of High Court with discretion of Chief Execution Officer.

High Court not a Court of Appeal from discretion exercised by Chief Execution Officer, it can only interfere if discretion was exercised wrongly or from irrelevant motives.

Edit. Note :— see H.C. 67/38 4 CtLR 252 and Edit. Note thereto.

Hutory for Petitioner.
Ex parte.

Application for an Order Nisi to issue directed to the First Respondent to show cause why his order dated 17.2.39 in Execution File No. 16906 Tel-Aviv should not be set aside, and why the Petitioner should not be granted an extension until 30.11.39 for the payment of the mortgage debt.

ORDER.

This application must be refused. The arguments of Petitioner are directed solely to the point that the Chief Execution Officer should have given him a longer time than in fact he did give to repay the mortgage loan.

The mortgage originally fell due on 11th May, 1938. It was extended by mutual consent of the parties to 30th November, 1938. Payment was not made, and on 17th February the mortgagee applied for and obtained an order for sale not to take effect until 1st May 1939.

On the 11th May,1939, Petitioner submitted an application to the Chief Execution Officer asking for a further delay of six months which was refused.

We are not a Court of Appeal from the discretion which has been exercised by the Chief Execution Officer in these mortgage cases, and we can only interfere if that discretion has been exercised wrongly, or from irrelevant motives. There is nothing whatever in this to show that that discretion has been wrongly exercised.

The application for an order nisi must therefore be refused.

Given this 26th day of June, 1939.

British Puisne Judge.

PCLA 2/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

Moses Blam — Applicant.

v.

The Attorney General Respondent.

Application for leave to appeal to Privy Council in forma pauperis — Art. 6 of Palestine (Appeal to Privy Council) Order-in-Council 1924 — Walker v. Walker.

Application for leave to appeal, in forma pauperis, from judgment of Supreme Court must be made by petition for special leave to appeal directed to His Majesty in Council, but before doing so applicant must apply for leave to appeal to Supreme Court.

Spindel for Applicant.
Salant (*J.G.A.*) for Respondent.

Application for leave to appeal in forma pauperis to the Privy Council from a judgment of the Supreme Court sitting as a Court of Appeal (C.A. 18/39)*) dated 10.5.1939.

ORDER.

This is an application for leave to appeal in forma pauperis from a judgment of this Court. The powers of this Court in granting leave to appeal to His Majesty in Council are limited by the terms of the Palestine (Appeal to Privy Council) Order-in-Council, 1924.

Article 6 says that leave to appeal shall only be granted by the Court in the first instance upon certain conditions, one of which is that the applicant for leave to appeal must give good and sufficient security for the costs of the appeal within a period not exceeding three months from the date of the hearing of the application.

We have no powers other than those laid down in this Order-in Council, and an application for leave to appeal, in forma pauperis, must be made by the applicant by petition for special leave to appeal directed to his Mejesty in Council. This is very clearly stated in Bentwich's Privy Council Practice, 2nd Edition, page 150. The applicant, however, has taken a correct course in coming to this Court first, because unless he had done so, the Judicial Committee would have refused leave when he applied later. This is clear from Walker v. Walker (1903) A.C., 170, where Their Lordships refused an application for leave to appeal in forma pauperis on the ground that no application for leave was made in due time to the Court from which it was proposed the appeal should be brought.

This application must therefore be dismissed. No costs.

Given this 26th day of June, 1939.

British Puisne Judge.

*) 5 CtLR p. 241.

CIVIL APPEAL NO. 69/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J., Frumkin, J. and Abdul Hadi J.
In the appeal of:—

Hamad Khalil Hreimi — Appellant.

v.

Shehadeh Saleh Diab — Respondent.

Award of liquidated damages and refund of purchase money in same judgment — Court omitting interest on purchase money — Claim of interest not mentioned by Plaintiff in concluding statement.

1. If damages (for breach of contract) not claimed, interest due normally on purchase money advanced.
2. Interest not to be awarded on sums said to be damages solely.
3. Where in concluding statement party asks for sum claimed, costs and advocate's fees making no mention of interest and circumstances raise presumption of waiver, he cannot ask for it on appeal.

Edit. Note :— As to 2 see : C.A. 237/38 5 CtLR 35 and Edit. Note thereto, see also C.A. 46/35 8 C of y 474.

Elia for Appellant.
Muhatadie for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 15.2. 1939.

JUDGMENT.

This is an appeal from a judgment of the District Court, Jerusalem. In that judgment the District Court awarded the Appellant the sum of LP. 300, the money paid on account of the purchase price of some land, and LP. 200 liquidated damages for breach of contract. In this appeal the Appellant says that the District Court wrongly omitted to award him interest on the sum of LP. 300.

The case, when it originally came before the learned Judges of the District Court, was undefended, and judgment was given in the Ap-

pellant's favour, by default, for the LP. 500, and interest on the LP.300. Opposition was made and allowed, and the case was re-tried at some considerable length.

The appeal raises an interesting point as to whether liquidated damages, and interest on the amount of purchase money to be refunded, can be awarded in the same judgment. There is no doubt that if damages are not claimed, then interest is due normally on the amount of the purchase money advanced. There is equally no doubt that interest is not to be awarded on sums which are said to be damages solely. When, however, liquidated damages and refund of purchase moneys have been awarded in the same judgment, the matter seems to be more complicated; and it has been complicated also by the unfortunate fact that there are two contradictory judgments of this Court — Civil Appeal 46/35 and Civil Appeal 122/36. In the first case the Court refused to award interest on either the liquidated damages or the purchase price, and in the second case the Court gave judgment for interest on the amount of the purchase price. Interesting as it will be, at some time, to solve this apparent conflict of opinion, on the view that we take in this case, we do not think we need do so at present.

When we look at the notes of the learned presiding Judge we find the Counsel for Appellant, in his final remarks, said that he asked for judgment for LP. 500 costs and advocate's fees. There is no mention in his concluding statement that he claimed interest. We are bound by the notes of the learned Presiding Judge, which cannot be queried. They are, fortunately or otherwise, presumed to be accurate. In these circumstances it would appear that the Appellant may have been afflicted by qualms of conscience, and may have felt that his claim for a mere LP. 18 intereest might well be waived. Not having asked for it, he cannot very well appeal and ask for it now.

The appeal is therefore dismissed, with costs to include LP. 10 hearing fees.

Delivered this 26th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 54/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C. J.) and Khayat, J.

In the appeal of :—

Hussein Khalil Daoudi — Appellant.

v.

1. Moshe Levy
2. Kalman Cohen
3. Meir Efrima
4. Israel Levy — Respondents.

Magistrate's power as regards non-payment of Court fees — Allowing opposition to default judgment conditionally.

1. Magistrate has power to exempt from, but not to postpone, payment of fees, and an order made by him for postponement may be taken to mean exemption.
2. Magistrate has no power to allow opposition to default judgment conditionally.

Goitein for Appellant.

D. B. Mizrahi for Respondents.

Appeal from the judgment of the District Court, Jerusalem, (in its appellate capacity) dated 19th December, 1938.

JUDGMENT.

This is a most unsatisfactory case by reason of its peculiar facts. It raises a number of technical points, but I do not think they are of substance.

The claim was against four defendants in respect of a promissory note, the first defendant being the maker and the other three guarantors. On 18th May, 1937, judgment was given in default of appearance against Defendants 1, 3 and 4, No. 2 not having been served.

Opposition was lodged to this judgment on 25th June, 1937, on the ground that the Plaintiff had agreed to adjourn the case, and on that date Moshe Levy (the principal debtor and first defendant) appeared before the Magistrate and stated —

> "I cannot pay the fees now, the time for lodging the opposition expires tomorrow. I have not got the money to pay now, but will pay at the end of the month."

On this the Magistrate noted —

> "Certified Applicant cannot pay fees now and I direct that opposition may be lodged without payment of fees, such payment being postponed to 31. (sic.) 6.37."

As it it clear that under the Court Fees Rules, 1935, Rule 19, the Magistrate had no power to postpone the payment of fees, I think he must be taken to have allowed the opposition to be lodged without fees. Sub-rule 2, which provides for subsequent collection of fees, was in effect applied later, and fees were paid on 29.6.37, and on 14.7.37 the Magistrate heard the opposition by the three opposers and found —

> "The evidence for the Petitioner (sic.) has been very confused and is not easily reconcilable, but no evidence has been given against it."
> "I am satisfied that the Petitioners would have appeared in Court on 18.5.37 had they not been led to believe that it was unnecessary, but it is clear that they have not carried out their side of the agreement on which they rely. Unless they do so I do not consider the judgment should be set aside. But conditionally upon the Petitioners paying to the Respondent LP. 30 on or before 5.8.37, the judgment obtained on 18.5.37 shall be set aside and the case re-opened."

There is no power under the Judgment by Default (Magistrates' Courts) Rules, to alow an opposition conditionally. Rule 4(3) says —

> "Upon the hearing the court shall reject the opposition unless it is satisfied that the opposing party had had good cause for non-appearance at the original hearing."

and I think the effect of the Magistrate's judgment must be that he was satisfied that the opposing parties had good cause for non-appearance at the original hearing. If this view is correct the fact that he subsequently varied the terms of the condition is immaterial.

The matter came before the Magistrate on 5.10.37, and in his judgment he said —

> "The Plaintiff sues on a promissory note signed or purporting to be signed by the 1st Defendant as promissor, and the other three as guarantors or endorsers.
> "The 2nd Defendant says that he never signed the note, the others maintain that all but a small portion of the note has been paid and in addition raise the preliminary points."

He then discusses a number of points arising under the Bills of Ex-

change Ordinance, and concludes his judgment by finding —

> "the 2nd, 3rd and 4th Defendants are discharged from liability. The case will proceed as against the 1st Defendant."

The Plaintiff appealed to the District Court, which on 27th January, 1938, ruled —

> "After consideration, the Court finds that the appeal is premature and should be brought after a final judgment.
>
> "We therefore dismiss the appeal and return the papers to the Magistrate to proceed with the case.
>
> "Judgment final."

The terms of that judgment are obscure.

The case came again before the Magistrate on 1.4.38, the Plaintiff and the Defendant, Moshe Levy, both appearing in person. The other Defendants did not appear. The Plaintiff and Defendant were allowed to argue their respective cases at considerable length, on 8.4.38, Mr. Mizrahi again appeared for the Respondent, and the matter was again argued at great length, and it was not until 22.6.38 that the first witness, Moshe Levy, was called. Israel Levy and Meir Efrima, both of whom were Defendants, also gave evidence. The Plaintiff did not give evidence and called no witnesses, although in argument he had made allegations of fact contradicting the Defendant's story. There was more argument and the case was adjourned on several occasions, and on 5th August, 1938, the Magistrate found that the circumstances in which the note came into existence were such that the Defendants were not liable upon it.

The Plaintiff appealed, and the District Court dismissed the appeal, holding that there was evidence on which the Magistrate could find as he did, and gave leave to appeal to this Court.

I have dealt with the matters raised, and in my judgment the appeal should be dismissed with costs and advocate's fee fixed at LP. 15.

Delivered this 20th day of June, 1939.

Chief Justice.

CIVIL APPEAL NO. 52/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C.J.), Frumkin, J. and Khayat J.

In the appeal of:—

Barclays Bank (D.C. & O.) — Appellant.

v.

Afifeh Odeh Hallak and others. — Respondents.

Relief sought by way of interpleader.

Court right in disallowing application for relief by way of interpleader, if not satisfied that any action would be brought against applicant.

Weinshall for Appellant.
Atallah & Naser for Respondent 1.
Respondents 2—14 not present — served.

Appeal from judgment of the District Court of Haifa, dated 14th March, 1939.

JUDGMENT.

The Appellants sought relief from the District Court by way of interpleader. No action has yet been brought against them, and the District Court was not satisfied that any action would be brought against them in that Court.

We see no reason to interfere with the judgment of the District Court, and the appeal is dismissed, with costs fixed at LP. 10.—, to the first Respondent.

Delivered this 12th day of June, 1939.

CIVIL APPEAL NO. 162/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Chief Justice (Trusted, C. J.), Frumkin, J. and Abdul Hadi, J.

In the appeal of:—

1. Louis Mubarak Jabrieh
2. Heirs of the late Mary Mubarak Jabrieh
   (1) Louis M. Jabrieh

(2) Anton M. Jabrieh — Appellants.

v.

1. Anton Shukri Laurenzo
2. Michael Anton Morcos
3. Heirs of the late Hanna Anton Morcos
   (1) Hanneh Shukri Lorenzo, widow
   (2) Clotilde H. A. Morcos, daughter
   (3) Michael Anton Morcos
   as guardian of the minor children Marcele Laurice, Lawrence, Ivonne and Anton — Respondents.

Contract for sale of land — Action for return of money paid on account of purchase price and for liquidated damages — Court assessing actual damages — Award of interest on money paid on account of purchase price.

1. Where money received on account of purchase price is ordered by Court to be repaid, it will, in absence of express agreement, carry legal interest from date of action.
2. No interest payable on sums awarded as damages.

Edit. Note:— As to 2 see: C.A.69/39 6 CtLR19 and Edit. Note thereto.

Levitzky for Appellants.
Hassan Budeiri for Respondents.

Appeal from judgment of District Court Jerusalem, (CDC Jm 12/35) dated 19.5.1938.

JUDGMENT.

Trusted, C. J.

This appeal arises out of a straight-forward contract for the sale of land. The facts and findings appear from the judgment of the District Court. The vendors were the defaulting party, and the contract contained a provision for the payment of LP.500 as damages, in case of such breach. As to this the Court of trial held —

> "As regards the claim for damages, we are unable to give judgment for the amount of damages stipulated in the contract. But in view of the evidence submitted, we are satisfied that the price of the land improved at that time, and that the plaintiffs had suffered damages due to the difference in the price, because they were unable to purchose land in the said place at the price agreed upon, as the price of a square pic of land reached up to 120 mils and more.
>
> "We therefore consider that the amount of damages which they suffered is 60 mils on every square pic, total LP. 240."

The Respondents gave no notice that they intended to contend, nor did they contend before us that LP.500 should have been awarded as damages.

The principle to be applied in such a case was laid down in Civil Appeal 217/38 * P.L.R. Vol. 5, p. 606.

I can find no evidence that the value of the land at the date of the breach exceeded the contract price by 60 mils per square pic; on the contrary, the evidence shows that there was no change in value.

In addition to the damages the District Court gave judgment for LP.156, with legal interest as from the date of action brought. This involves a question of importance. The District Court presumably acted under Article 112 of the Ottoman Code of Civil Procedure.

In Civil Appeal 46/35, reported in Rotenberg, Vol. VIII, p. 474, where the purchasers had deposited certain sums on account of the price of land, and the vendor had refused to complete, and there was a stipulation for the payment of a fixed sum as damages, this Court held —

> That part of the judgments awarding appellants the respective sums of LP. 66 and LP. 61, being the respective sums advanced to respondents, must be affirmed.
>
> "The Court was correct in not awarding interest on these two sums, for where there is a stipulation for damages in case of non-performance of a contract, the parties to the contract are considered to have contemplated the question of interest when arriving at the amount of damages to be paid."

I have consulted the record and I find no reference in argument to Article 112, but there is a reference, as appears from the head note to the report, to Article 86 of the Mejelle a reference which I must confess I find it difficult to follow.

In Civil Appeal 122/36, in a somewhat similar case, the District Court held —

> "We enter judgment for the Plaintiff for the sum of LP. 7.600, being the amount of the consideration stated in the contract, and for the sum of LP. 20.000 being the stipulated damage, together with interest at 9 per centum on both these sums as from date of action."

and this Court varied the judgment to the effect that interest would not be paid on the amount awarded as damages.

In Civil Appeal 101/36, the District Court, in the result gave judgment on a counterclaim for the return of moneys paid on account of the purchase of land, and this Court held —

> "Another point in the cross-appeal is that the Respondent is entitled to interest on the amount paid by him from the date of this counter-claim. I hold that on this point he must suc-

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* 4 CtLR 243.

ceed, as this amount is not damages but money actually paid. To this extent only the cross-appeal will be allowed and the judgment varied by ordering the Appellant to pay to the Respondent LP. 180, plus interest at the rate of 9%, from 28th July, 1934, until date of payment."

The result of these cases would seem to be that where money has been paid on account of the purchase price of land, and the Court orders it to be repaid, it will, in the absence of express agreement, carry interest at the legal rate from the date of action brought — but that where a sum is awarded as damages, such sum will not carry interest.

The appeal will be allowed, the judgment of the District Court varied by entering judgment for the Plaintiffs for LP.156, with legal interest from 19.1.35 until payment with costs, and Court fees on that amount with advocate's fees LP.5.

As the Appellants only suceeded in part of their appeal they will have half the costs of appeal, and advocate's fees assessed at LP. 5.

Frumkin, J.

In concurring I wish to state that there seems to be a difference of opinion on the point whether or not a party recovering damages for a breach of contract is at the same time entitled to interest on amounts paid. In Civil Appeal 122/36 this Court awarded both damages and interest on the amount paid. In another case, Civil Appeal 46/35, this Court did not award interest when it awarded stipulated damages. True, that was at a time when a condition to pay any amount as liquidated damages was enforced by the Court. There might be a change in the position now, when actual damages are awarded. In any event this point does not arise in this case since judgment is entered for the Appellants on the amount paid only, and they are certainly entitled to interest.

Abdul Hadi, J.

I concur with the judgment of the Chief Justice.

Delivered this 31st day of May, 1939.

CIVIL APPEAL NO. 51/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C. J.) and Khayat, J.

In the appeal of :—

Zvi Lebel — Appellant.

v.

1. Yohanan Mattias
2. Ahron Rosenfeld — Respondents.

Order by Chief Registrar for Appellant to pay into Court deposit to indemnify Respondent for costs of appeal — Failure of Appellant to pay deposit within fixed time — Application to Supreme Court for enlargement of time — Civil Procedure Rules, Rules 327, 361..

Court of appeal will not enlarge time for paying deposit fixed by Chief Registrar for costs of appeal, if Appelant had ample opportunity to apply for extension to Chief Registrar.

Edit. Note :— See C.A. 231/38 5 CtLR 47 and Edit. Note thereto.

Lebel for Appellant.
Gorodissky for Respondent No. 1.
No. 2 absent — not served.

Appeal from judgment of District Court, Jaffa, sitting at Tel-Aviv, dated 6. 4. 1939.

JUDGMENT.

In this appeal the Chief Registrar ordered payment into Court by the Appellant of the sum of LP. 20 as deposit to indemnify the Respondents for the costs of the appeal under Rule 327 (as amended). The Appellant failed to comply with the order and failed to apply for and obtain any extension of time, and the appeal is listed for dismissal. The Appellant now applies to us under Rule 361, and requests the enlargement of the time within which to pay the deposit.

We think that the Appellant had an ample opportunity to apply to the Chief Registrar for extension of time under the Rule had he wished, and we do not think that he had any adequate excuse for not doing so.

The Application is therefore refused, and the appeal is dismissed.

Delivered this 5th of June, 1939.

HIGH COURT NO. 23/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J. and Khayat, J.
In the Application of : —
Bank Atid Limited. Petitioner.

v.

1. The Chief Execution Officer, Tel-Aviv.
2. Mr. J. L. Pinchas.
3 Mr. Eliyahu Retuchnik.
4. Moshe Mala (Mala-Mud) Respondents.

Claim of priority on proceeds of sale of articles pledged — Scope of Chief Execution Officer's duties and powers — Effect of judgment of Court regarding validity of pledge — Res judicata and third party.

1. Chief Execution Officer has no power to inquire into validity of a pledge.
Judgment allowing Plaintiff to sell the movables pledged to him — binding upon Chief Execution Officer.
2. Judgment creditor has priority on proceeds of sale of articles found to have been pledged to him, though other creditors, not having been parties to action between pledgor and pledgee, may go to competent Court to prove that there is no pledge over these goods.

Koenigsberger for Petitioner.
Lebel for Respondents No. 2 &3.

Application for an order to issue directed to the First Respondent to show cause why his orders dated 22.3.39 and 29.3.39 in Execution File Tel-Aviv No. 16682/38 should not be set aside, and why an order for a right of preference should not be made in favour of the claim of plaintiff.

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ORDER.

This is a return to an Order Nisi issued by this Court, calling upon the respondents to the petition to show cause why the orders of the Chief Execution Officer, Tel-Aviv, dated the 22nd March, 1939, and the 29th March, 1939, should not be set aside, and why an order for a right of preference should not be made in favour of the petitioner.

The facts so far as they are material are as follows. The petitioner, the Bank Atid, claimed in the Magistrate's Court, Tel-Aviv, from the 4th Respondent Malamud a sum of LP. 125 on two promissory notes, and it also asked that certain articles specified in an attached list and stated to be pledged to the Bank, should be sold, and that the Bank should be given a right of priority on the proceeds of the sale. The Magistrate gave judgment in favour of the petitioner for the sum of LP. 125 with costs and interest but failed to make any order with regard to the remainder of the claim. The Bank appealed to the District Court which allowed the appeal and completed the judgment of the Magistrate by an order to allow to the plaintiff, that is the Bank, to sell the movables pledged to it by the defendant Malamud, as specified in the Statement of Claim.

The District Court declained to deal with the question of priority saying that that was a matter for the Chief Execution Officer. The 2nd and 3rd Respondents, who are also judgment-creditors of the 4th Respondent Malmud, appeared before the Chief Execution Officer on the petition by the present petitioner, the Bank, in order that the question of priority should be decided. The Chief Execution Officer by his first Order of the 22nd March, 1939, said this — "it appears from the judgment of the District Court that their intention was that the Chief Execution Officer should deal with the question of the pledge, and decide the matter of priority by inquiring into the legality of the pledge." The Chief Execution Officer then held that he could not decide that the Bank had priority unless the Bank satisfied him that it was a legal pledge.

The petitioner protested to the Chief Execution Officer against this decision, and the matter again came up for hearing on the 29th of March. at that hearing the advocate for the petitioner said that he wanted to prove through the Directors of the Bank that the Bank had received the jewellery by way of pledge, and he stated that no special deed of pledge in respect of the jewels existed, and that he wished to prove that the pledge was in accordance with the Mejelle by witnesses and receipts.

Now in the first place we are of opinion that the Chief Execution Officer was completely wrong when, in his order of the 22nd March, 1939, he said that it appeared that the intention of the District Court was that the Chief Execution Officer should inquire into the legality of the pledge. The Chief Execution Officer has no such power and cannot have it and the District Court never said that he hed. As we have so often remarked, his duty is to execute judgments and where he had this judgment of the District Court stating that the petitioner was allowed to sell the movables pledged to him, that was all that the Chief Execution Officer can deal with and act upon. That statement by the District Court that the movables were pledged is binding upon the Chief Execution Officer. Having gone wrong in his Order of the 22nd March, his further Order of the 29th March is of course equally wrong, if not more so, since the Chief Execution Officer having said on the 22nd March that he had to inquire into the legality of the pledge, on the 29th March holds that he has no power to inquire into that legality, and referred the petitioner to the competent Court instead of referring the respondents.

We think that the Chief Execution Officer when this judgment was produced to him was under the obligation to execute it and had no power to inquire into the question whether there was or was not a pledge. The rule therefore must be made absolute with costs to include L.P. 10 fee for attending the hearing, to be paid by the 2nd and 3rd Respondents jointly and severally.

The effect of this decision is that the petitioner is entitled to priority over the proceeds of the sale of the articles pledged. The Respondents of course are not debarred from going to the competent Court and proving, if they can do so, that there is no pledge over these goods, because though the matter of pledge is res judicata as between the petitioner and the 4th Respondent Malamud, it is not a matter of res judicata as between the petitioner and the 2nd and 3rd Respondents, the latter not having been parties to the action between the petitioner and the 4th Respondent.

Given this 17th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 49/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :—

Hanna Glueck — Appellant.

v.

Leo Glueck — Respondent.

Applicability of Austrian Personal Law — Austrian law regarding maintenance of wife.

1. If husband and wife are of Austrian nationality, question of maintenance is governed by Austrian Personal Law.

2. Under Austrian Law, while mere fact that husband bad tempered and swears at wife does not entitle her to maintenance, physical or mental ill-treatment by husband does and frees her from living with him.

Smoira for Appellant.
Kleinzeller for Respondent.

Appeal from Judgment of District Court, Jaffa, sitting at Tel-Aviv, dated 17.3.39.

JUDGMENT.

This is an appeal from the District Court of Jaffa sitting at Tel-Aviv dismissing an application for an order for maintenance brought by the appellant Mrs. Hanna Glueck against the respondent her husband Mr. Leo Glueck.

The parties are of Austrian nationality and the case, therefore, falls to be governed by the Austrian personal Law. We agree with the learned President that the evidence of the legal experts who were called in the Court below was not very helpful but it can be gathered from their evidence that physical or mental ill-treatment by a husband of his wife entitles the wife under Austrian Law to maintenance from the husband and she is not compelled to live with him.

A certain amount of evidence was heard by the learned President and he found, and with that finding we agree, that according to the law, the wife is not entitled to maintenance merely because her husband is bad tempered or swears at her. These two persons have been married for some eleven years and their married life seems to have been not a particularly happy one owing to the differences between them.

The learned President said in his judgment that he believed the evidence of the wife. It is important, therefore, to see exactly what the wife said. In her evidence she said that her husband used to beat her regularly once a week. That statement is no doubt an exaggeration, but even allowing for that exaggeration, we think that there was evidence before the learned President that she was ill-treated by her husband and no evidence to the contrary was adduced by the respondent. There is also the evidence of her mother, who said that the husband did threaten his wife on one occasion with a knife, and the respondent's explanation of that incident does not carry conviction.

It is not necessary for us to go into the question as to what constitutes mental ill-treatment because we think that there was physical ill-treatment and as the result of that physical ill-treatment the wife was justified in leaving her husband and is entitled to maintenance.

In the result we think that the appeal will have to be allowed, and the judgment of the learned President will be set aside, and judgment given for the appellant that she is entitled to maintenance. We are unable on the material before us to fix the amount which the husband should pay to his wife, and the case, therefore, will be remitted to the District Court to fix what amount should be paid after hearing further evidence if it should be thought fit, and from what date it should be payable.

The appellant will have the costs of this appeal, and as she was exempted from payment of fees and is suing in forma pauperis, she will have LP. 5.— advocate's fees for attending the hearing.

Delivered this 23rd day of May, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 21/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C. J.), Greene, J. and Abdul Hadi, J.

In the appeal of :—

Shehadeh Mohamed Khuzendar — Appellant.

v.

The Attorney-General — Respondent.

Killing during a quarrel by striking on head with a club — Limits of self defence.

If in a quarrel A is armed with a knife and B with a stick, B may be justified in protecting himself with his stick, but not so if A was being held by another person.

Barbari and Elia for Appellant.
Hogan (*Crown Counsel*) for Respondent.

Appeal from judgment of District Court of Jaffa, dated 10th of May, 1939, whereby the Appellant was convicted of manslaughter contrary to Section 212 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment.

JUDGMENT.

There can be no doubt that the Appellant killed one, Ali, by striking him on the head with a club. It seems that there was some sort of quarrel between Ali and his son and the Appellant and one, Hussein, and that Ali probably had a knife.

No doubt, if a quarrel takes place, and one man is armed with a knife and another with a stick, in certain circumstances the man armed with a stick is entitled to protect himself, but it must be a question of degree, and each case considered upon its own facts.

In this case the Court found that the Appellant struck the deceased while Hussein held him. I do not think that if the quarrel had reached the stage when Hussein could hold the deceased, the Appellant was

justified in striking the blow which he did.

The District Court took all the circumstances into account and passed a sentence of three years' imprisonment, and we see no reason to interfere either with the conviction or the sentence.

The appeal is therefore dismissed.

Delivered this 24th day of May, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 27/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C. J.), Copland, J. and Frumkin, J.

In the appeal of :—

1. Nimer Hassan Tawil
2. Shukri Mahmoud Ali Hussein — Appellants.

v.

The Attorney General — Respondent.

Statement of witness not on oath contradicting his evidence in box — Credibility of witness.

A witness's evidence in Court contradicting an earlier statement not on oath should be regarded with care, but not necessarily disbelieved.

Cattan for Appellants.

Bell (*Crown Counsel*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 19.5.1939, whereby the appellants were convicted of manslaughter contrary to section 212 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment.

JUDGMENT.

The principles upon which this Court acts in cases of this sort are laid down by law by the Criminal Procedure (Trial Upon Information) Ordinance and they should be known to everybody.

Mr. Cattan has addressed us at some length and much of his argument carries us beyond the scope of our powers as laid down by that Ordinance.

He said that there was no proof of death of the victim sufficient to link it with the actual blow that caused it. It is true that no witness was with the deceased when he died, but the doctor saw him the following day, and it is quite clear that he found him dead as a result of the blows on the head. The Court was entitled to come to the conclusion to which it came and to connect one with the other.

It is said that the verdict is against the weight of evidence, but the Court of Trial weighed the evidence before it and was satisfied as to that. Two witnesses said that the Appellants hit the man on the head — it is true that another witness said that Appellant No. 1 and the accused No 2 (not an Appellant) hit him on the head — but this is esentially a matter for the Court of Trial.

It is suggested, and I only refer to this in order to prevent a heresy springing up that where a witness has made an earlier statement not on oath which contradicts his evidence in the box, such witness's evidence must be disbelieved, but if the authority cited to us is read carefully, it will be seen that such evidence should be regarded, if not with suspicion, at any rate with care. I do not think it amounts to more than that.

In my view this appeal should be dismissed. I certainly think that the sentence is on the light side and should not be reduced.

Delivered this 14th day of July, 1939.

Chief Justice.

CIVIL APPEAL NO. 41/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:—

Moshe Eliezer Pilosoff — Appellant.

v.

The Assicurazioni Generali — Respondent.

Claim from Insurance Company for damage caused by fire — Allegation by Insurance Company that damage arose in connection with exceptional conditions freeing it from liability — Clause in Policy as to burden of proof — Freedom of parties to Insurance Policy to except whatever risks they wish — C.A. 188/38 4 *CtLR* 223 — *Ottoman Adittional Law on Insurance Operations,* 1923.

1. Nothing prevents an insured and an Insurance Company from excepting by agreement whatever risks they wish to except.
2. Where Policy places on insured the onus of proof that loss or damage happened independently of abnormal conditions as therein specified, insured cannot recover damages if he failed to dischargee that onus.

Weinshall for Appelant.
Levin for Respondent.
Apeal from judgment of District Court, Haifa, dated 22.3.39.

JUDGMENT.

This is an appeal from the District Court of Haifa dismissing a claim by the appellant against the Assicurazioni Generali Insurance Company for damage caused by a fire in the appellant's premises in Haifa, which premises and contents thereof had been insured by the Company.

The District Court dismissed the appellant's claim on the ground that the case was covered by the decision of this Court in Assicurazioni Generali v. Samuel M. Levy, C.A. 188/38,*) which was a claim by

*) 4 CtLR 223.

another insured person against the same Insurance Company and by the same form of Insurance Policy as the Policy in this case

In the present case the District Court held that, according to the judgment of this Court, the burden of proof lay upon the insured under clause 6 of the policy to prove that the fire happened independently of abnormal conditions as specified in the Insurance Policy, and that the insured had failed so to do. It is not necessary for me to read again this clause 6 but it is a clause in very wide terms in which there is excepted, from the risks on which insurance was granted, any loss or damage happening during abnormal conditions directly or in directly occasioned by or contributed to by any of the following occurrences, or arising out of or in connection with any of the said occurrences, such as war, riot, civil commotion, insurrection, rebellion, revolution, conspiracy and so on, and the burden of proving that the loss or damage is not due to abnormal conditions is laid on the insured if the claim is disputed.

From the evidence before the District Court it was proved that on the 6th of July last year, a bomb exploded in Haifa with very disastrous results and that during the next two weeks after that explosion a series of fires broke out in Jewish shops and most of them in Souk El Abiad in Haifa. These fires numbered thirty four in all . In most cases the Jewish shops were shut up and locked and the Jewish owners were not able to visit them because of the dangerous conditions in that town. In each case the incendiaries smashed the locks and threw in inflammable material and then pulled down the shutters. In these circumstances of course the natural inference which would be drawn is that there were for some time abnormal conditions in the city of Haifa, and the natural inference is that these fires were due to and were attributable to arson and conspiracy and the state of rebellion and the abnormal conditions which existed in Haifa.

It is true that on the day of this fire, the 16th of July, there was no actual riot in Haifa itself, but there can be no doubt in our minds that the series of fires including the fire in the appellant's shop was due to conspiracy to commit arson, and that the town was not in a normal state.

Adopting the words of the learned Chief Justice, in delivering judgment in the case to which I have referred, "can it be fairly said that the loss or damage must, upon any reasonable view, have happened independently of these abnormal conditions? I do not think that it can. The Plaintiff has failed, therefore, to discharge the ous placed upon him."

In this case the appellant has equally failed to discharge the onus legally placed upon him and, therefore, the appeal must be dismissed.

It has been argued before us that this policy is contrary to the Ottoman Additional Law on Insurance Operations of the year 1323, in particular contrary to article 19 of that Law. We are unable to accept this argument. We know of nothing which can prevent an insured and an Insurace Company from excepting by agreement whatever risks they wish so to except. No authority that they cannot do this was quoted to us.

We think that this appeal fails and must be dismissed with costs to include LP. 15.— fees for attending the hearing.

Delivered this 23rd day of May, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 13/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.) and Khayat, J.

In the appeal of:—

Nazirah Khattar — Appellant.

v.

1. Emile Khattar
2. Carmella Khattar
3. Anna Khattar
4. Julia Asar

Heirs of Halkeh Bawab — Respondents.

Joining as third party in an action regarding ownership of land — Irrevocable power of attorney and deed of admission that land belongs to third party — Equitable right in land — Specific performance of contract — Question of actual possibility of getting any compensation from party to contract — Land Courts Ordinance, sec. 8(1) *— Transfer of Land Ordinance,* 1920 *— Civil Procedure Rules,* 1938, *Rule* 342 *— L. A.* 21/30, *L. A.* 1/36 *— C.A.* 132/38.

While an irrevocable power of atorney or any deed of transfer of land not taking place in Land Registry does not create a right in the land, Land Court may grant as an equitable right specific performance of a contract for sale of land.

Edit. Note :— See C.A. 132/38 4 CtLR 25, cases cited there and Edit. Note thereto.

Asfour for Appellant.
Respondent No. 1 in person.
Respondents Nos. 2, 3 and 4, not present — served
Appeal from judgment of Land Court, Haira, dated 18.1.1939.

JUDGMENT.

Khayat, J

A summary of the facts giving rise to this appeal is as follows:—

The Appellant joined as a third party in a dispute with regard to the ownership of certain lands in an action brought by the first Respondent against the other three Respondents in the Land Court of Haifa, claiming the registration of the said lands in her name. In the result, on the 18th January, 1939, judgment was given in favour of the first Respondent declaring his (sic!) ownership to the lands and dismissing Appellant's claim.

1. The document relied upon by the Appellant is a power-of-attorney dated the 17th November, 1928, and signed by the first Respondent, Emile Khattar, in favour of a person named Jabour Daoud Asfour, of Haifa, and attested on the same date by the Notary Public of Sidon (Lebanon) in which she admits having received the purchase price from the purchaser, Elias Rafoul Raji, and authorises him to effect the transfer of the lands sold to him. .

2. The Appellant produced a deed of admission by the said purchaser, Elias Raji, dated 9.5.32, in which he admits that the sale in his name was merely a fictitious sale, and that it was in fact for the Appellant.

3. The Land Court took the view that the said power-of-attorney does not confer any legal or equitable right in the said land on the Appellant, as it was drawn subseequent to the enactment of the Transfer of Land Ordinance, 1920.

4. The Appellant relied on the English equitable principle of specific performance in applying for the enforcement of the contract, but the Land Court dismissed her claim on the ground that it was filed late, and that Court had doubt as to whether or not it could order the enforcement of such a contract, especially as such contract was the result of an irrevocable power-of-attorney, and the latter is based on a previous power-of-attorney, which has become inoperative by prescription.

Against the said judgment the Appellant appealed and confined her pleadings on appeal for the enforcement of the contract by specific performance, urging the following points:

(i) that the Court of Appeal decided in Civil Appeal No. 132/38*) that the Courts in Palestine can order specific performance of a contract;

(ii) that Appellant's right is based on Section 8(1) of the Land Courts Ordinance, 1921, which provides:

> "A land court shall apply the Ottoman Law in force at the date of the British Occupation as amended by any Ordinance or Rules of Court issued since the Occupation.
>
> Provided that the court shall have regard to equitable as well as to legal rights to the land and shall not be bound by any rule of the Ottoman Law prohibiting the Courts from hearing actions based on unregistered documents."

(iii) that the Appellant cannot obtain any compensation from the Respondent because he is burdened with debts ;

(iv) that Appellant claimed the registration of the lands in her name by virtue of the irrevocable power-of-attorney;

(v) that she was not late in applying for the specific performance of the contract, because her interest could not be established till after judgment for ownership of the lands in dispute, in favour of the 1st Respondent, was given; and

(vi) that the Appellant paid the price in 1928, and went into possession, and that since that date paid the taxes, and that until now she is still in possession of the said lands.

The 1st Respondent objected to the above on the ground that there is no order joining the Appellant as 3rd party, and that the power-of-attorney is not valid relying on Land Appeal No. 21/30, P.L.R., Vol. I, p. 555.

In reply, Counsel for the Appellant said that his client was actually joined as a third party, as he, on her behalf, was summoned and pleaded in Court, and that the only objection of the Respondent in the Court below was limited to the assignment of the power-of-attorney as quoted in the judgment of the lower Court.

It appears from the above that the Land Court was acting upon the principle decided in Land Appeal No. 21/30 which lays down that a power-of-attorney, having been drawn after the Transfer of Land Ordinance, 1920, does not confer any right in the property; but that judgment did not deal with the question of an equitable right.

I am of the opinion that it is a well-established principle that an irrevocable power-of-attorney, or any deed given as a result of which no transfer took place in the Land Registry, does not create a right in the land, but the Appellant is asking for the application of the principle of specific performance as an equitable right, and supports her

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*) 4 CtLR 25.

claim by the statutory provision laid down in Section 8(1) of the Land Courts Ordinance.

The Court of Appeal has introduced the principle of specific performance in Land Appeal No. 1/36 *), and in Civil Appeal No. 15/38 **), L.R.P. Vol. 5, of March, 1938, p. 237, and Civil Appeal 132/38 ***, L.R.P. Vol. 5, of June, 1938, p. 378.

The Land Court did not go into and make findings upon all the facts brought to our notice by the Appellant's counsel. On the facts before us we cannot decide whether the circumstances of this case allow us to apply the provisions of Section 8(1) of the Land Courts Ordinance or the principle of specific performance.

As regards the second finding of the Land Court, i.e. the delay in applying for the enforcement of the contract I am of the view that that was not sufficient cause for dismissing the Appellant's claim.

This Court, therefore, in order to be able to dispose of this appeal, by virtue of the powers conferred on it by Rule 342 of the Civil Procedure Rules, 1938, remits the case to the Court below to hear evidence and make findings on the following issues:

(1) whether the power-of-attorney containing the admission of the first Respondent that he (sic!) received the purchase price from another person confers any right on the Appellant;

(2) whether the purchase price was in fact paid in 1928, and the Appellant received the lands, went into possession and remained therein until the present time, and paid taxes thereon; and

(3) whether the Appellant, having regard to the Respondent's indebtedness, could get any compensation from the Respondent;

and when this has been done to return the file to this Court.

Costs to await the result.

Delivered this 31st day of May, 1939.

Puisne Judge.

I concur

Chief Justice.

CRIMINAL APPEAL NO. 20/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin J.

In the appeal of:—

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*) P. Post 30/10/36 & seq.

) 3 CtIR 149. *) 4 CtLR 25.

Shamuel Bernstein — Appellant.

v.

The Attorney-General — Respondent.

Person who obtained building permit prosecuted for work done not in accordance with permit — Offence under Town Planning Ordinance committed prior to enactment of Criminal Code Ordinance — Attorney General appealing after expiry of period within which convicted person could appeal. — Town Plaining Ordinance, 1936, *sec.* 35(1) — *Criminal Code Ordinance sec.* 23, 391 — *Criminal Law Amendement Ordinance, Cap.* 31, *sec.* 3.

Though convicted person cannot complain of conviction if he does not appeal in time, he may, if Attorney General later appeals, argue that he should not have been convicted, and if court satisfied, it will not increase, and in a proper case may even reduce, penalty.

Shapiro and *Amikam* for Appellant.
Hogan (*Crown Counsel*) for Respondent.

Appeal from judgment of District Court, Haifa, (in its appellate capacity) dated 15.3.39. whereby Appellant was convicted of contravening Section 35(1) of the Town Planning Ordinance, 1936, and was ordered to remove the uauthorised structures made in his building and fined also LP. 5, and in case of default, one month's imprisonment.

JUDGMENT.

The Appellant was charged before the Magistrate (His Worship Y. Zuckermann) with an offence under the Town Planning Ordinance in that he carried out certain work otherwise than in accordance with a permit.

At the first hearing the Magistrate found —

> "There is no doubt that the accused, Shmuel, who was one of the persons who obtained the building licence, knew of every thing that was done either on his request or his instructions. But as the prosecution has failed to bring evidence that he has done anything whereby he could be made liable according to the provisions of the said section, and as the provisions of Section 23 of the Criminal Code Ordinance, 1936, cannot be applied here, and the Ordinance was not in force when the offence was committed, therefore there is no room to make them liable of a criminal offence. There is no legal ground for making an order for demolition for the said reasons."

The prosecution appealed and the District Court pointed out that so far as this case was concerned Section 3 of the Criminal Law Amendment Ordinance, Cap. 31, applied. That section was repealed by the Criminal Code Ordinance, but section 391 of that Ordinance provided —

> "that nothing in this Code shall apply to any offence committed prior to such commencement or to the trial of any person for any such offence and the provisions of any law repealed by this Code shall be deemed to apply to any such offence or the trial of any such offender."

This Court is greatly surprised that the Magistrate should have overlooked this provision.

The District Court returned the case to the Magistrate, who thereupon convicted the Appellant and fined him LP. 1, but refused to make an order with regard to the property.

The Attorney-General again appealed to the District Court, which increased the penalty to one of LP. 5, and directed the removal of the unauthorised structure.

It is argued that the Attorney-General has a longer time in which to appeal to the District Court than a convicted person, and that this may result injustice in that a convicted person, upon whom a small penalty has been imposed — particularly if no moral turpitude is involved, although he may have good grounds for appeal — may not trouble to appeal, and that if the Attorney-General appeals on the ground that the sentence is inadequate, the convicted person may then be too late to appeal. It is said that this was such a case.

This alleged injustice is more apparent than real.

If the convicted person does not appeal in time he cannot complain of the conviction. If the Attorney-Ceneral later appeals, and the convicted person can satisfy the Court that he should not have been convicted, it is unlikely that it will increase the penalty, and in a proper case I think it might reduce it.

In law, upon the facts of this case, I think the District Court was entitled to do what it did, and I do not think the Appellant has suffered any injustice.

The appeal is dismissed.

Delivered this 31st day of May, 1939.

British Puisne Judge.

HIGH COURT NO. 22/39.

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

Before:— The Chief Justice (Trusted, C. J.) and Frumkin, J.

In the applications of:—

Zussman Shtark — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Hanna Sokal (wrongly calling herself Shtark). — Respondents.

Action by wife before Rabbinical Court for maintenance — Question of existence of matrimonial relations between parties — Finding by Rabbinical Court that there was sanctification (Kiddushin) between parties but not complete marriage (Nissuin Gemurim) — Order of Rabbinical Court to pay lump sum and give divorce or to make monthly payments as maintenance — Constitution of Rabbinical Court of Appeal — Meaning of "marriage" in Palestine Order-in-Council — Jurisdiction of Religious Courts in matters of marriage — Alleged uncertainty of judgment.

(Per Trusted C. J.)

Palestine Order-in-Council, when it refers to marriage as a matter of personal status, means marriage in accordance with law of community concerned. Religious Courts not limited in their jurisdiction as to matters of marriage to marriage as known to English law in England.

(Per Frumkin J.)

1. Three Judges from a quorum of a Rabbinical Court, whether sitting in first instance or on appeal.

2. Question before Religious Court whether or not there was a marriage, complete or incomplete, must be decided in accordance not with English Law but with law of Religious Community applicable in that Court.

3. A marriage may under Jewish Law be incomplete and a party allowed to sue for certain rights under it.

4. One of tests applicable in determining question whether or not a marriage subsistes under Jewish Jaw is whether or not ties between them can be dissolved otherwise than by divorce.

5. A judgment not uncertain for reason only that it gives Defendant two alternatives.

Goitein for Petitioner.
Gorodissky for Respondent No. 2.

Application for an Order to issue directed to the First Respondent to show cause why he should not refrain from executing the judgment of the Rabbinical Court of Appeal, dated the 21st Iyyar, 5698, in Execution file No. 10337/38, Tel-Aviv.

JUDGMENT.

Trusted, C. J.

I concur in substance with the judgment which my brother is about to deliver ; there is, however, one matter about which I should like more fully to express my views.

I understand Mr. Goitein to agree that the matter before us is a matter of marriage within the Rabbinical law but that by analogy with the decisions of these Courts that the words alimony and maintenance in the Order-in-Council should be given their English meaning, (i.e. S.T. 1/28 P.L.R. 1, 395, and C. A. 62/37*), marriage must be given its English meaning, and that its English meaning does not extend to, or cover, the relationship with which we are concerned.

This is not a matter on which it is easy to find authority. In Warrender v. Warrender, cited in Hyde v. Hyde, 1 L.R. P. & D., at page 134, Lord Brougham stated —

> "If indeed, there go two things under one and the same name in different countries — if that which is called marriage is of a different nature in each — there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate."

and in this conection the following dictum of Lord Penzance in Wilson and Wilson, quoted by Sir Robert Phillimore in Niboyet v. Niboyet, 1878, 3 P., at pages 59 and 60, is of interest:—

> "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon all the parties, in all cases, referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the

*) 2 CtLR p. 133.

> cases which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. The honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

Bearing in mind these principles which have influenced the Courts in England, I am of opoinion that the Order-i-Council, when it refers to marriage as a matter of personal status, means marriage in accordance with the law of the community concerned.

As Articles 53 and 54 of the Order-in-Council draw a distinction betwen alimony and maintenance, I think these Courts are bound to enquire into the English meaning of these words, but having ascertained that thereunder alimony is payment by a husband to a wife in consequence of divorce proceedings, and that maintenance means certain other payments, such payments, when their nature is ascertained, will respectively be governed by the law of the community concerned. I do not think the application of the English meaning goes further than that.

It is obvious that questions may arise whether any particular matter is within the jurisdiction which has been given to a community, and for that reason Article 55 of the Order-in-Council provides for a tribunal specially constituted to decide such questions.

I do not think the Rabbinical Courts are limited in their jurisdiction as to matters of marriage to marriage as it is known to English law in England.

Delivered this 6th day of June, 1939.

Chie Justice.

Frumkin, J.

JUDGMENT.

The Respondent sued the applicant in this case before the Rabbinical Court of Tel-Aviv for maintenance. In the course of the proceedings before the Rabbinical Court the question arose whether or not there were in fact matrimonial relations between the parties, and the Court in delivering judgment held :

> 'Whereas it was found by us through the evidence produced by witnesses that there was sanctification (Kiddushin) in accordance with our religion between these two and that the neighbours took them to be husband and wife, and whereas it was found on the other hand that was not complted marriage

(Nissuin Gemurim) between the two, now therefore we decide :

a) to recognise the plaintiff Mrs. Hanna Shtark, the daughter of Abraham Sokol, as the betrothed of the defendant Mr. Zussman Shtark.

b) to hold the defendant liable to pay to the said plaintiff at the time of her receiving the bill of divorcement from him the sum of LP.10.— as damages.

c) a delay of one month is given to the defendant Zussman Shtark to deposit the sum of LP.10.— in our office to the credit of his said betrothed mentioned in paragraph b) of this decision and to deliver to her the bill of divorcement.

d) to hold the defendant Zussman Shtark liable to pay to his said betrothed the sum of LP.3.— per mensem in the event of his refusal to carry out paragraph 2 of this decision and after one month.

The Respondent appealed to the Rabbinical Court of Appeal of Palestine which varied the judgment by increasing the lump payable from from LP. 10 to LP. 30 and by reducing the monthly sum from LP. 3 to LP. 2.

When the judgment of the Rabbinical Court of Appeal was put into execution the applicant took certain objections which were overruled by the Chief Execution Officer, who on the 3rd of March 1939, ordered executon of the Judgment.

This application is now made to set aside the said order of the Chief Execution Officer.

The first objection taken on behalf of the applicant is that the body which holds itself out to be the Rabbinical Court of Appeal is not the Court of Appeal of the Jewish Community of Palestine and the judgment put into execution is therefore no judgment at all.

The judgment is headed and sealed "The Chief Rabbinate of Palestine, Eretz Israel, Rabbinical Court of Appeal" and hears the signatures of Chief Rabbi Isaac Halevy Herzog (President), and Rabbis Zvi Pesach Frank and Jacob Kalmas.

The Jewish Community Rules (Cap. 126, Laws of Palestine, page 2132) provide for the constitution and functions of a Rabbinical Council. Rule 4(2) reads as follows:

> "The Council shall consist of two Chief Rabbis, one of whom shall be a Sephardi and one an Ashkenazi and six members, of whom three shall be Sephardim and three Ashkenazim."

Rule 7 reads as follows:—

> "The Rabbinical Council shal be the Court of appeal in matters in which the Rabbinical courts have jurisdiction and shall issue from time to time rules of court with regard to the hearing of appeals."

No rules have been issued, at any rate, in the sense that they have

been brought to the notice of the Public.

It is admitted that had all the eight members of the Council signed the judgment, it would be a good judgment in spite of its being headed Chief Rabbinate and not Rabbinical Council, the Chief Rabbis being the heads of the Rabbinical Council. Two questions, therefore, arise:

a) Is it necessary that all the eight members of the Council should sit together when they act as a Court of Appeal, or could a lesser number form a quorum?

b) Are the signatories of the judgment members of the Rabbinical Council?

In Harry v. Hary, H.C. 27/36*) followed in Hazan vs. Hazan, H.C. 11/39,**) this Court came to the conclusion that, under Jewish Law, a minimum number of three Judges is necessary to form a quorum of a Rabbinical Court, whether sitting in first instance or on appeal. The names of the members of the Rabbinical Council are given in a notice published in Palestine Gazette No. 658 of 14th January, 1937, (Supplement No. 2, page 9) and we find this list to include the names of all the three Rabbis who delivered the judgment in question. We are, therefore, of opinion that the Judgment in execution is a judgment issued by the Rabbinical Council in its capacity as Rabbinical Court of Appeal.

Before passing to the next point I would like to take this opportunity of observing that it would be very desirable for the Rabbinical Council to make use of the powers vested in it and to issue rules as to the hearing of appeals before the Court of appeal. The public is expected not to be kept in the dark in such important matters of procedure as to the constitution of the Court, time and conditions of lodging an appeal, etc.

The next point taken by Mr. Goitein on behalf of the applicant is that the Rabbinical Courts, whether the Court of first instance of Tel Aviv or the Court of Appeal of Jerusalem, have no jurisdiction in the matter in dispute between the parties since there was no marriage proper between them. A marriage is either complete or non-existent. The Rabbinical Courts derived their jurisdiction from the Palestine Order-in-Council, 1922, Section 53, and in considering whether or not the Court has jurisdiction in a matter of marriage it must, it is argued, consider "marriage" as understood in English Law. By analogy he referred to Haddad v. Haddad, C.A. 62/37***), where the Court

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*) 9 C of J 745.
**) 5 CtLR 204.
***) 2 CtLR 133.

in dealing with article 51 of the Palestine Order-in-Council, 1922, accepted the terms of alimony and maintenance in the meaning of English Law.

I am unable to accept this proposition. There is certainly a difference between maintenance and alimony which provide for monetary relief and marriage which goes to the root of the matrimonial relations between the parties. If it will be said that Religious Courts have jurisdiction in matters of marriage only when there is marriage within the meaning of English Law, it would result in the fact that Religious Courts would hardly be in a position to deal with matters of marriage at all; they certainly have no jurisdiction to deal with, say, civil marriages. The first point in issue before a Religious Court in determining a dispute as to marriage between the parties within their jurisdiction, would be to decide whether or not there was a marriage contracted between the parties, contracted obviously according to the Law applicable before that Court. It must to my mind, therefore, be left to the Court of the Community to decide whether under the law of the Community there was a marriage or not.

What happened in this case was that the applicant in the presence of witnesses sanctified the respondent and lived with her as husband and wife for some time. The procedure of sanctification was not performed in the presence of congregation of ten and was not followed by a written contract (Ketuba).

On more than one occasion I expressed my distaste to forms of marriage like this and I have a very strong view that semi-marriages of that sort, if I may so call it, should be discouraged, but if under Jewish Law some sort of a tie is established between a couple undergroing such a formality a dispute arising out of or in connection with it must be left for the Rabbinical Court to decide. However strange it might seem that there might be a marriage which is yet incomplete such a thing apparently exists in the Jewish Law and just as parties are allowed to sue for certain rights under a defective agreement, there is no reason why a party should not be allowed to sue for certain rights under an incomplete marriage.

The Rabbinical Courts have certainly no jurisdiction when no marriage at all took place between the parties but whether or not there was a marriage, complete or incomplete, in a matter for the Rabbinical Court to decide. One of the tests applicable in determining the question whether or not a marriage subsists between two parties is, whether or not the ties between them can be dissolved otherwise than

by a divorce. In this case the Rabbinical Courts have found that a divorce is necessary. Hence there was a marriage and I am, therefore, of opinion that the Rabbinical Courts, both the Court of First Instance and the Court of Appeal acted within their jurisdiction in this matter.

Another ground taken by Mr. Goitein was that this judgment could not be executed because of uncertainty.

I do not think there is anything uncertain in the judgment. The effect of the judgment is that the applicant was given two alternatives, either to pay LP. 2 monthly as maintenance or divorce his wife paying a lump sum of LP. 30. In order to safeguard the interest of the applicant the Rabbinical Court held that the lump sum would not be handed over to the respondent unless and until she receives the divorce. If the applicant chooses the second alternative he has only to deposit with the Chief Execution Officer a further amount of LP. 20 (having already paid LP. 10) and so far as the Chief Execution Officer is concerned he, the applicant, would then be free of any further liability apart of course of any matter arising out of the judgment, such as costs. If the Respondent will try to avail herself of the money paid in the Execution Office, she will first have to satisfy the Execution Officer (probably by a certificate issued by the Rabbinical Court) that she has received the divorce.

On bebalf of the Respondent an objection has been taken that the applicant is estopped from challenging the validity of the judgment after having himself paid an amount on account of the judgment debt and having applied to the Chief Execution Officer for an extension of time. In view of the conclusion arrived at it is not necessary to deal with this objection.

In the result I think that the application must fail and the order be discharged with costs to include LP. 10 for attending the hearing.

Delivered this 6th day of June, 1939.

Puisne Judge.

CRIMINAL APPEAL NO. 22/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Copland, J. and Frumkin, J.

In the appeal of:—

The Attorney-General — Appellant.

v.

Nissim Yousef Aboutboul — Respondent.

Accused charged with having stolen property entrusted to him — English plea of demurrer — Criminal Code Ordinance, sec. 275, 276(b).

Plea of demurrer, if it can be pleaded in Palestine, can only be so upon admission that facts stated in information are true.

Bell (Crown Counsel) for Appellant.
Maman for Respondent.

Appeal from judgment of District Court, Haifa, dated 5.4.1939.

JUDGMENT.

Thi is an appeal by the Attorney-General from a decision of the District Court, Haifa. The Respondent was charged upon information under Section 276(b) of the Criminal Code Ordinance with having stolen property which had been entrusted to him.

It appears that before the accused was called upon to plead and any evidence heard, some argument took place upon the facts, upon which the Court decided that the Respondent could not be charged under that section.

Assuming that the English plea of demurrer can be pleaded in Palestine, it can only be so upon an admission that the facts stated in the information are true, the argument being that upon those facts either no offence has been committed or the information is bad. There was no such admission in this case.

In the circumstances, I think, the case should go back to the District Court in order that it may try the accused upon the information.

I would say a word as to the other point which has been raised. In my view, subject to any further argument which may be addressed to us hereafter, the object of Section 275 of the Criminal Code Ordinance is to increase the liability of a servant. I do not think that it operates to decrease the liability of an agent who also happens to be a servant, who is charged under Section 276.

In the result, the judgment of the District Court is set aside, and the case remitted to be ried.

Delivered hsi 31st day of May, 1939.

Chief Justice.

Copland, J.

I agree. I would only add that prima facie I can see no reason why a servant or clerk cannot be an agent and so liable to be prosecuted, if the facts are proved, under Section 276(b).

British Puisne Judge.

CIVIL APPEAL NO. 43/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:—
Benjamin Mashoieff — Appellant.
v.
Peter Deuel — Respondent.

Claim for return of purchase price of land — Allegation of misrepresentation and fraud on part of vendor — District Court relying on judgment of Criminal Court that documents were forged—Refusal of application for adjournment to appoint another advocate — Action against one of two signatories as party of one part to contract of sale — Restitution of land transferred by misrepresentation and fraud against return of purchase price.

1. Where statement of claim discloses a good cause of action, no matter what the action was called.

2. Civil Court entitled to rely on judgment of Criminal Court that documents in connection with transaction between the parties were forged.

3. Point not included in Grounds of Appeal will not be heard on appeal.

4. If A on basis of forged Power of Attorney and Certificate of Succession sold land to B and transferred it into B's name or into name of his nominee, B entitled to sue A for return of purchase price without first instituting an action in Land Court for cancellation of Kushan (registered title deed).

5. Question of adjournment — a matter for discretion of Court of trial, and an appellate Court would only interfere with exercise of that discretion very rarely.

6. In an action for recovery of money on ground of false representation and fraud no legal necessity to join as defendants all persons comprised as party to agreement, if all through they took no part whatsoever in transaction. Person alleged to have made false representation and to have been guilty of fraud can be sued alone.

7. Person who by misrepresentation and fraud sold land and transferred it into name of purchaser or of his nominee — entitled to have the land restituted to him upon payment to purchaser of sum adjudged by Court, any other persons who

may have been defrauded in these transactions having their remedy or remedies against vendor.

Edit. Note: As to 1 see: C.A. 105/38 4 CtLR 49 and Edit. Note thereto.

As to 3 see: C.A. 72/38 and Edit. Note thereto, 3 CtLR 229, C.A. 23/39 and Edit. Note thereto 5 CtLR 193.

As to 5 see: C.A. 222/38 4 CtLR 219.

Levitsky for Appellant.

Weinshall for Respondent.

Appeal from the judgment of the District Court of Haifa, dated 23rd March, 1939.

JUDGMENT.

This is the considered judgment of the Court.

This is an appeal from a judgment of the District Court, Haifa, in favour of the Respondent who was plaintiff in the Court below, for L.P 1826.500 with interest at 9 % per annum from date of action. The claim was for the return of money paid by the respondent to the present appellant in respect of the purchase of certain lands on Mount Carmel and it was alleged that the respondent was induced to enter into the contract for purchase by misrepresentation and fraud on the part of the appellant. It was alleged that the appellant shewed the respondent certain land which he alleged were the lands to be comprised in the contract, whereas in fact they were not the same lands, and that the transfer by the appellant into the name of the respondent's nominee was effected by means of a forged power of attorney and certificate of succession and that such transfer was worthless. The District Court found that the respondent's allegations were true and gave judgment accordingly.

The argument before us in this appeal has covered no small amount of ground. When once however the essential facts of this case are remembered, the matter assumes comparatively simple proportions. The action was one for repayment of money paid over on the misrepresentation and fraud of the appellant — that is one of the essential considerations, and to our minds it does not matter what the action was called. The statement of claim discloses a perfectly good cause of action.

There were only two points in the lengthy arguments of the appellant upon which we found it necessary to ask the respondent to reply. We will deal with those two points last and we will first dispose of the other arguments.

The District Court were fully entitled to rely on the judgment of the Criminal Court finding that the Power of Attorney and the

Certificate of Succession were forged — it was a judgment of a Court competent and entitled to deal with such a question — and the appellant had in fact been a party to that criminal case and was aware of the fraud though he was acquitted of the charges made against him — whilst several of his co-defendants were convicted. This in itself would be sufficient to vitiate the contract, and it is therefore unnecessary for us to discuss the further question of misrepresentation with regard to the identity of the land to be sold, upon which possibly there might be much to be said on both sides. The question that there was no proof that the sum awarded had in fact been paid to the appellant was not included in the voluminous grounds of appeal and we declined to allow the statement of appeal to be amended. That question therefore is not before us.

We do not agree that the proper course for the respondent to have adopted would have been to institute an action in the Land Court, for cancellation of the kushan, prior to bringing an action for recovery of the money paid. He was suing for money paid owing to the fraud and misrepresentation of the appellant, and the fraud at any rate was amply proved.

It was perhaps unfortunate that the appellant was not represented by an advocate before the District Court, but for that he is himself really only to blame. He seems to have assumed as so many people do, that his application for adjournment would be granted. The question of adjourment is a matter for the discretion of the Court of Trial, and an appellate Court would only interfere with the exercise of that discretion very rarely. The appellant would seem to have taken no active steps to appoint another advocate, though on the admission of his advocate here he had several days available in which to do so. We do not think that the District Court exercised its discertain wrongly in the circumstances in refusing the adjournment in proceeding with the trial.

We come now to the point that since the contract of sale dated the 24th June 1934 was made between the appellant and one Naim Mulki of the first part, and the respondent of the second part, this action should have been brought against both the appellant and Mulki.

The appellant relies on Mohammad Khamis Khalil Shahin v. Daud Bey Moyal C.A. 157/35 *), which lays down the ruling that where more than one person is comprised as a party to an agreement, all such persons comprising the party must sue on the agreement, and that some of them alone cannot sue. From that he argues that if one of two persons

*) Judgment cited by party is C.A. 151/35 7 C of J 182.

cannot sue, then equally one of two persons cannot be sued. But in the present case, as the respondent points out, it was only the appellant who was alleged to have made the false representation and to have been guilty of fraud. Mulki made no representation, Mulki never shewed the land to the respondent, Mulki took no part in the transaction leading to the transfer, neither did he receive any of the purchase price from the respondent. It was Masoieff alone, who signed the undertaking, Ex. P.D. 2, to take the land back from the respondent if not sold. In fact, all through Mulki took no part in the transaction.

In these circumstances, we think that there was no legal necessity to join Mulki as a defendant in the original action and the appellant was properly sued alone. If the appellant had so wished, he could have taken steps to have joined Mulki in the case.

The only point that has caused us any difficulty is the question of restitution. —

The appellant complains that the District Court, in giving judgment for the return of the purchase price, should equally have ordered the respondent to have returned the land to the appellant, that the respondent cannot do this, since the land is not registered in his name, but in the name of two other persons — Messrs. Rosenfeld and Eichwald — and that he cannot be ordered to return the purchase price unless he has the land back. The respondent says that he makes no claim to the land whatsoever, and that the Fidelity Co., of whom Messrs. Rosenfeld and Eichwald are the representatives, equally make no claim to this land which was sold to the respondent. The only difficulty is — to whom should restitution be made, in view of the complicated nature of the dealings in the transfer and registration of the property.

We obviously are not in a position to make any order affecting the persons who are at present the registered owners of this property since they are not parties to this action.

It is clear that the respondent is not entitled to recover the money paid by him without restoring the land.

The registered owners, are holding the land as his nominees, and it is for him to see that the land is restored. Seeing that it was the appellant who purported to sell the land, and it was he who received the money, and it was he who caused the land to be transferred into the names of the present registered owners, we think that it is he who is entitled to have the land restituted to him, upon payment of the sum adjudged. We are not concerned in this case with any other persons who may have been

defrauded in these transactions, and they have their remedy or remedies against the appellant.

In the result the judgment of the District Court must be amended to the effect that upon he respondent causing the land comprised in the deeds Nos. 2540 and 2967 as set out in Ex. P.D. 3 to be transferred in the Land Registry into the name of the appellant, the respondent will be entitled to the amount awarded to him by the judgment of the District Court. Subject to this amendment the appeal is dismissed with costs and LP. 10.— advocate's fees for attending the hearing.

Delivered this 16th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 60/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J., Green, J. and Frumkin, J.

In the appeal of :—

1. Bank der Tempelgesellschaft Ltd.
2. Stanleh Works G.m.b.H., of Velbert, Germany. Appellants.

v.

I. The Estate of Zvi Strachilevitz through the Administrators Messrs.
   1. Dr. V. Gruenwald,
   2. S. Turtledove,
   3. Moshe Strachilevitz,
   4. J. Papo.

II. Moshe Strachilevitz as heir of the late Zvi Strachilevitz.

Respondents.

Application for an order for administration in bankruptcy — District Court exercising discretionary powers — Non-interference of Court of Appeal where discretion of Court below not exercised wrongly — Bankruptcy Ordinance, sec. 112.

1. Power of District Court to administer in bankruptcy an estate — entirely discretionary.

2. Discretion must be exercised judicially and not capriciously; it must be based, in order to be judicial, on legal reasons.

Linderman for Appellants.
P. Joseph for Respondents Nos. I(3) and II.

Appeal from Judgment of District Court, Jaffa, sitting at Tel-Aviv dated 22nd May, 1939.

JUDGMENT.

We need not hear you Mr. Joseph.

This is an appeal from a judgment of the District Court of Tel-Aviv, sitting in bankruptcy, dismissing an application by the present appellants for an order under Section 112 of the Bankruptcy Ordinance, 1936, for the administration of the estate of one Zvi Strachilevitz deceased.

The estate is apparently a large one and it is stated that the assets at the present valuation come to LP. 68,000; the liabilities to the sum of LP. 78,000. The administrators were appointed to the estate by the District Court on 6th March, 1938, and those administrators were added to and substituted at later dates in that year. The Order of Administration was taken out apparently one week ago. The petitioning creditors, who are the appellants before us, are creditors for the amount of roughly LP. 8,000, one of them being the creditor for LP. 146 of this amount. The District Court heard a considerable amount of evidence, including that of two of the administrators of the estate, and they came to the conclusion that, taking all points into consideration, it would not be in the general interest of all concerned to impose upon the estate, at the present time, the extra costs of bankruptcy administration. The power of the District Court to administer in bankruptcy an estate, is one that is entirely discretionary, but, as has been remarked so many times, that discretion must be exercised judicially and not capriciously; it must be based, in order to be judicial, on legal reasons.

We agree with the District Court that the application presents some difficulties, but when considering the arguments and the proceedings of the Court below, we are unable to say that the District Court, in refusing the order for administration, did not act judicially. Matters of discretion are always difficult to deal with and on the materials before us, we cannot say that the discretion in this case was exercised wrongly.

The appeal must therefore be dismissed with costs to include LP. 15, fee for attending the hearing to respondents Nos. I(3) and II.

Delivered this 21st day of June, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 38/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.), Greene, J. and Khayat, J.

In the appeal of:—

The Attorney-General — Appellant.

v.

1. Ali Khalil Ali and 17 others.
   All of Kufr Misr, Beisan Sub-District — Respondents.

Claim by Government of ownership to land — Dismissal of action on ground that having a Kushan and being registered owner claimant's position could not be strengthened by a declaration of ownership — Registered owner's right to ask for a declaratory judgment as to ownership.

In an action before Land Court against tresspassers registered owner of land may be entitled to a declaration of ownership, and his case should not be dismissed for reason only that such declaration could not strengthen his position.

Hogan (*Crown Counsel*) for Appellant.

Respondents not present.

Appeal from judgment of Land Court, Haifa, dated 18.3.1939.

JUDGMENT.

This is an appeal by the Attorney-General from a judgment of the Haifa Land Court.

The Attorney-General as Plaintiff pleaded that Government was the owner and proprietor of certain lands upon which twenty defendants were respectively trespassing, details of the parcels and areas being set out, and asked for a declaration that the Government was the owner of the lands in question, and for certain other relief.

The defendants did not appear, and two of them, Nos. 11 and 18, who were not served, dropped out.

The Land Court held that as the Government had a kushan and was the registered owner nothing that it (the Land Court) could say would

strengthen Government's position, and that the action was misconceived, and dismissed it.

The Attorney-General appealed to this Court and pursues his appeal against all the remaining defendants except Nos. 6, 9, 14 and 17, as to the declaration of ownership. He does not appeal as to the other relief which he originally claimed. None of the defendants appeared before us.

Prima facie I see no reason why the Plaintiff is not entitled to the declaration of ownership which he seeks against the following in respect of the Land set out against their names in the Statement of Claim:

1. Ali Khalil Ali
2. Deeb El Omar
3. Said Ayoub El Yusef
4. Abd el Bayer
5 Deeb el Omar
7. Ayed el Ahmad
8. Awad Abdallah Shukri
10. Abdallah Husein
11. Abed Mustafa Hayim
12. Ali Dgheidi
13. Ali Khalil
15. Mahmud el Kasem
16. Ahmed Mustafa Abu Ayadeh
18. Ibrahim el Khader.

and the appeal will be allowed accordingly.

I realise that there may be decisions of this Court upon which relevant arguments might be based, and I would therefore expressly call attention to the provisions of Civil Procedure Rule 338 under which the Respondents may, within fifteen days of the service of the decree upon them respectvely, apply to this Court to re-hear the case, and this Court may do so if satisfied that the Respondents were prevented by sufficient cause from attending the hearing.

Delivered this 20th day of June, 1939.

British Puisne Judge.

HIGH COURT NO. 31/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J. and Khayat, J.

In the Application of : —

1. H. G. G. Goddard
2. Max Seligman. Petitioners.

v.

Attorney General. Respondent.

Accused charged before Magistrate electing to be tried by District Court — Application to High Court for an order to Attorney-General to furnish defence with names of prosecution witnesses and copies or summaries of their statements made to Police — Inapplicability of rule granting facilities in cases triable upon information to cases tried by Magistrates or by District Court summarily.

1. Defence always entitled to call for production at trial of statements previously made by prosecution witnesses.

2. Established rule, based on decision of Court of Appeal several years ago, allowing accused to see before trial statements of prosecution witnesses, made to Police whose names appear on back of information — restricted to cases triable upon information and cannot be extended to charges before Magistrates or before District Courts sitting summarily.

3. A Mandamus will not be issued against an officer, whose office and duty are prescribed by statute, for an act not clearly provided for by that statute; in such case writ of mandamus entirely discretionary and cannot be demanded as of right.

4. Person applying for writ of mandamus must show that he has a real interest in subject matter and a specific legal right to enforce.

5. No misdemeanour can be tried on information.

Edit. Note:— As to 1 and 2 see: H.C. 33/37 P. Post 12/7/37; P.C.A. 79/35; Cr.A. 162/28 1 PLR 348; As to 3 see: H.C. 40/38 4 CtLR 105; As to 5 see: Cr.A. 150/37 3 CtLR 27.

Goitein for Petitioner No. 1.

Levitzky for Petitioner No. 2.

Ex parte.

Application for an Order to issue commanding Respondent to show to petitioners or their Counsel the statements of the witnesses to be called

by the Respondent at the trial of the Petitioners, or, in the alternative, to hand over the petitioners or their Counsel summaries of such statements.

ORDER.

The petitioners in this case have been charged before the Chief Magistrate with certain offences under the Criminal Code and the Police Ordinance. They have elected to be tried by the District Court and the case has therefore been remitted to that Court for trial.

The petitioners have applied to the Attorney-General for permission to inspect or to be furnished with any statements made by the witnesses whom the prosecution intend to call for the trial. The Attorney-General refused that application and the petitioners have now come to this Court asking for an Order Nisi of Mandamus to issue to the Attorney-General, directing him to show cause why he should not furnish to the petitioners (a) the names of witnesses whom it is proposed to call at the trial, and (b) copies of the statements already made by those witnesses to the police or at any rate sufficient summaries of those statements.

The petitioners base their claim relying, partly upon the judgment of this Court in Sheinzwit v. Inspector General of Police, H.C. 33/37 *), but principally on the question of convenience and also the serious prejudice to which they will be subjected if they do not know the names of the witnesses to be called and do not know at any rate the gist of the evidence to be given by them.

Now, this question has previously come before this Court as to the duty of the Police to furnish statements made to them by persons in the course of their investigation of offences. The first case which has been cited to us is Criminal Appeal, 162/28 Vol. I. P.L.R. p. 348. That was an appeal, if I remember rightly, from a conviction by the Jaffa District Court, presided over, I believe, by myself, and the Court of Criminal Appeal laid down the ruling that defendants are entitled, if they so desire, to have such police statements put in evidence and to use them as a ground for cross-examination of the persons by whom they were made. They go on to say this:

"It follows that an opportunity must be given to the defence to peruse such statements before the trial, if they so desire, for the purpose of deciding whether they wish to have the statements put in evidence."

In the Sheinzwit case (supra) an application was made to this Court for an Order Nisi against the Inspector General of Police, based upon

*) P. Post 12/7/37.

Criminal Appeal 162/28, which I have just quoted, and this Court granted that application on the ground that "having regard to the difficulties caused by the conditions in this country particularly the need for translation, we think that the balance of convenience decrees that such access should be given before rather than at the trial."

Now it is quite clear that the defence are always entitled to call for the production at the trial of statements previously made by prosecution witnesses. That is the rule in England and has been confirmed by a Privy Council Case of Mahadeo v. The King, Privy Council Appeal No. 79/35. There is no provision in English Law for production of statements, made to the police, before trial and speaking for myself, if it had not been for the existence of Criminal Appeal 162/28, I do not think that we would have been prepared to concur in the judgment in High Court 33/37, but seeing that it had been the rule in regard to criminal cases triable upon information, for some ten years, to grant this facility, we did not feel justified in throwing doubt upon the correctness of that decision. This present case however, concerns the alleged right of persons charged before a Magistrate or before a District Court sitting summarily, to take advantage of the same rule, which has been held to apply in trials upon information.

There are however certain differences in summary trials. There is no information, there are no names therefore on the back of the information, and it has been held by this Court in the Sheinzwit case (supra) that the facility of inspecting police statements is limited to the names appearing on the back of the information and cannot be extended to statements of any person not on the information, whom the police may have interrogated during the course of their investigations. In a summary trial it may well be that the police do not know when it will be taken, if at all, nor whom they will intend to call, and we think that it would be inadvisable to extend the rule any further than it has been extended up to now. There is this further consideration that there is no Statutory obligation, no legal duty upon the Attorney-General, to allow what the petitioners claim and it is the rule that a Mandamus will not be issued against an officer, whose office and duty are prescribed by statutes, for an act not clearly provided for by that statute, although it may be highly convenient and desirable, that such an act should be done by him. See Slutzki v. President Local Council Ramat Gan & others. 5 P.L.R. p. 357 *). The writ of Mandamus is entirely discretionary and cannot be demanded as of right. The person applying for the writ must show that he has a real interest

*) H.C. 40/38 4 CtLR 105.

in the subject-matter and a specific legal right to enforce, see page 201 Short and Mellor's Crown Office Practice, 2nd Ed., and the cases therein cited. There is no legal right here which can be enforced.

There is one further reason why the writ should not be issued and that is that a Mandamus will not lie to the Crown nor to the officers of the Crown acting as such, nor will it lie to the Lords of the Admiralty nor to the Secretary of State for war nor to the Commissioners for Customs. See Short and Mellor's Crown Office practice p.202.

The words of Cockburn L.C.J. may be quoted:—

> "We must start with this unquestionable principle: that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim, even in appearance, to have any power to command the Crown. Over the Sovereign we can have no power. In like manner, where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

For all these reasons therefore, we do not think that a writ, or order nisi for mandamus should be issued.

We are not insensible of the fact that there are cases now under the Criminal Code which it is undesirable should be tried summarily. Under the law as it at present stands, however, no misdemeanour can be tried upon information. It is true that in such complicated cases the defendant may suffer considerable disability, but we are here to administer the Law as we find it, not as what we think it might be. We are however quite sure that the District Court when trying this case will bear these considerations in mind and will exercise every care to ensure that the defence will not be prejudiced owing to the summary nature of the proceedings. We have however in our opinion no power to issue the writ asked for. The application must therefore be refused.

Given this 14th day of June, 1939.

British Puisne Judge.

HIGH COURT NO. 35/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before:— Copland, J. and Frumkin, J.

In the application of:—

Shephatya and Hanna Segal — Petitioners.

v.

1. The Chief Execution Officer, Tel-Aviv.

2. Aaron Cherkof,
3. Banco Di Roma. Respondents.

Application to High Court to set aside order of Chief Execution Officer substituting one person for another as holder of the Execution Order.

High Court will refuse application for order nisi, if petitioner can raise his points before public officer to whom he asks order to issue.

Edit Note:— See C.A. 43/39 6 CtLR 53 and Edit. Note thereto.

E. Fellman for Petitioners.

Ex parte.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his order dated 2nd May, 1939, in Tel-Aviv Execution file No. 14466/38, substituting the 2nd Respondent for Banco di Roma as the holder of the Execution Order in this file and allowing the 2nd Respondent to proceed in the abovementioned file without obtaining a fresh order of sale in his name should not be set aside and why the 2nd and 3rd Respondents should not be ordered from proceeding in the above-mentioned file.

ORDER.

After hearing Mr. E. Fellman for the petitioner the application is refused. So far as we can see there is nothing to prevent the petitioner from going to the Chief Execution Officer and raising these points before him as regards present mortgagee.

Given this 23rd day of June, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 30/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

The Agudath Netaim Co. Ltd. Appellants.

v.

The Arab El Fuquara Tribe, represented by the Mukhtar Sheikh Muhammad El Hilou Respondent.

Claim of grazing right after unsuccessful claim of ownership before Land Settlement Officer —Case stated from Special Commission appointed under Cultivators (Protection) Ordinance — Grounds of appeal in cases under Cultivators (Protection) Ordinance — when can Cultivators (Protection) Ordinance be invoked.

1. On an appeal by way of case stated in an action under Cultivators (Protection) Ordinance parties limited to findings of fact made by Commission in Special Case; they cannot argue there was no evidence to support those findings. Only question that can arise in such appeals — whether Commission have come to a correct finding of law on facts stated.

In such appeals parties also limited to the contentions set out in case stated by Commission.

2. Claim of ownership before Land Settlement Officer does not bar subsequent claim before Special Commission to be statutory tenant under Cultivators (Protection) Ordinance.

3. If Settlement Officer dismissed claim of certain rights to ownership in land and ordered eviction and order was carried out, a subsequent claim by evicted person of grazing rights in same land — not res judicata, and where claim is contested by other party, a dispute may be said to have arisen which claimant may ask to be referred to Special Commission.

Edit. Note:— See C.A. 14/39 6 CtLR 6; C.A. 201/38 4 CtLR 150; C.A. 29/39 6 CtLR 10.

Eliash for Appellants.
F. Attallah for Respondents.

Appeal from judgment of Land Court, Haifa, (in its appellate capacity) dated 26.1.1939.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Haifa dismissing an appeal by way of case stated from the Commission appointed under the Cultivators (Protection) Ordinance, Cap. 40. It raises an interesting and short point, but before dealing with that point, I would dispose of certain other questions which have been raised on the appeal.

First of all we think it necessary to say that on an appeal by way of case stated, the parties are limited to the findings of fact made by the Commission in the Special Case. Those findings are considered to be proved and the only question that can arise in such an appeal, is whether the Commission have come to a correct finding in law on the facts stated. The reason for that is that the grounds of appeal in these cases under the Cultivators (Protection) Ordinance should be crystallised, and the parties should not be able to go over all findings made by the Commission and argue that there is no evidence to support those findings. Procedure under the Cultivators (Protection) Ordinance is supposed to be summary and the points of the appeal are to be defined succinctly. Further, in the appeals, the parties again are limited to the contentions set out in the case stated by the Commission.

We will now deal with the points taken by Dr. Eliash in their reverse order. Dr. Eliash, for the appellants, has argued that the Commission should have set aside a specified area for grazing and should not have given grazing rights in the whole of the land claimed. On the case as stated, that point cannot be raised. The boundaries of the land claimed are set out in the case. The commission have found that the respondents have been disputing this land in question for the last eight years, and have been in the habit of grazing their animals thereon. The question of setting aside a special area does not arise out of the case.

The second point of the appellants is that the respondents, having claimed ownership before the Settlement Officer, cannot now in other procedings claim grazing rights under the Cultivators (Protection) Ordinance. The Land Court found that in dealing with the prescriptive and possessory title to the land the Settlement Officer did not deal with the issue of grazing rights under the Cultivators (Protection) Ordinance, for this question lay within the exclusive jurisdiction of the Special Commission, and any finding by anybody, other than the Special Commission, would be superfluous and of no effect. In this respect the Land Court, in dismissing the appeal to it based itself upon a judgment of this Court, Sliheet v. The Orthodox Patriarchate Jerusalem, Civil Appeal 201/38 *).

We agree with the Land Court that the two issues of ownership and grazing rights are distinct issues and at no time had the claim of grazing rights been determined by the proper authority, that is the Commission. It is true that, speaking for myself, on an appeal to the Jaffa Land Court, when I was president of the Tribunal in the year 1934, I held that, when a person has claimed ownership before the Land Settlement Officer, he cannot claim to be a statutory tenant before the Commission. On re-consideration, however, I think that that judgment was not a sound one and that the opinion expressed by the Haifa Land Court states the Law correctly.

We come now to the last point, which as I said is an interesting one, and that is, whether in order to give the Commission jurisdiction there must be a dispute "to be referred". Section 19 of the Cultivators (Protection) Ordinance states that any dispute as to various matters defined in the section, shall be referred to a Special Commission to be appointed by the High Commissioner. No mention is made in the Ordinance as to who shall make the reference, but in the rules and regulations published under Section 20 of the Ordinance and made by

*) 4 CtLR 150.

the High Commissioner, it is stated that "any person, desiring to refer any dispute, may apply etc.". It is argued in this case that there is now no dispute on which a reference can be made by reason of the following circumstances. The respondents of this appeal claimed, before the Land Settlement Officer, certain rights of ownership in this land. The Land Settlement Officer found against them and ordered their eviction from this land. That eviction was duly carried out. It was not until after eviction had been completed that the present respondents applied for the appointment of a Special Commission to hear their claim as to grazing rights. There was a somewhat similar case before this Court, Keren Kayemeth Leisrael v. Heirs of Habib Mussa el Kutt, Civil Appeal 29/39 *), where a Magistrate had ordered eviction of certain property and during the course of the eviction proceedings, the persons in possession of the land made an application to the Special Commission on the grounds that they were statutory tenants and so could not be evicted. In that case, however, though judgment had been given for their eviction, the process of eviction had not been completed. It seems to us that, in order to invoke the Cultivators (Protection) Ordinance, there must be a dispute and it seems equally to us that a dispute may be said to have arisen when one party claims a certain thing and the other party contests that claim. There is nothing in Section 19 of the Cultivators (Protection) Ordinance which, in any way, limits the time within which a dispute may be referred to a Special Commission. In this case we think that the dispute arose when the respondents claimed the protection of the Cultivators (Protection) Ordinance and the question of grazing rights was not res judicata, since that question had not been determined up to then by the competent statutory authority.

For these reasons we think that the Land Court came to a correct decision in law. There is no doubt that this is, if I may say so, a particularly hard case, but if it is a hard case it is unfortunately the law which has created it, and we are not sitting in this Court as legislature; our duty is to interpret the law in what we think is the correct legal manner.

The appeal must therefore be dismissed, the respondents will get the costs of this appeal together with a fee of LP. 15 for attending the hearing.

Delivered this 22nd day of June, 1939. *British Puisne Judge.*

I concur with His Honour as to the results and reasons given in the Judgment.

Puisne Judge.

*) 6 CtLR 10.

HIGH COURT NO. 33/39.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

Talhami Brothers Films and Cinema Company Limited — Petitioners.

v.

1. The Chief Execution Officer, Magistrate's Court, Jerusalem
2. Metro Goldwyn Meyer of Egypt Inc. — Respondents.

Reasonable und unreasonable delay in applying to High Court — Undertaking to pay lessor's debt if and when adjudged — Order by Chief Execution Officer to debtor of judgment debtor to pay certain sum to judgment creditor — Question of summoning before Chief Execution Officer judgment debtor who is not himself called upon to pay anything — Debtor of judgment debtor denying owning latter any money — Order of Chief Execution Officer based on admissions made by debtor — Execution Law, Art. 80.

1. Where sum due to judgment debtor attached and ordered to be paid to judgment creditor no necessity in proceedings before High Court to cite judgment debtor, as he himself not called upon to pay anything.

2. What is unreasonable delay in applying to High Court depends upon merits and circumstances of each case.

3. If a Director of a Company holds himself out to be its Manager, his statements before Chief Execution Officer must be held sufficient to bind the Company.

Edit Note:— As to 1 see H.C.94/36 CtLR Vol. 1 Report 56. As to 2 see H.C. 80/33 3 C of J 874.

Nagib Abu Shaar for Petitioners.

For Respondent No. 1: Not present — served.

Olshan for Respondent No. 2.

Application for an order to issue directed to the first Respondent calling upon him to show cause why his Order dated 21st March, 1939, in Execution File No. 1594/38, Jerusalem, should not be set aside.

ORDER.

This is a return to an Order Nisi calling upon the Chief Execution Officer, Magistrate's Court, Jerusalem, to show cause why his Order against Petitioners should not be set aside.

The Chief Execution Officer made an order against the Petitioners to pay a certain sum of money, alleged to be a debt due by them to

one Gottlieb Baeurle, to the second Respondents. Several points were taken against the rule. The first one is that the judgment-debtor should be cited in these proceedings. We do not think there was any necessity to cite him as he himself is not called upon to pay anything.

The second point is that the Petitioners have taken an unreasonable time in applying to this Court. The time was about three months after the hearing before the Chief Execution Officer, and we do not think that in the circumstances of this case that was unreasonable time. Each case must of course depend upon its own merits and the citation of other cases to us on this particular matter is not very helpful. Possibly in one case six months would not be an excessive time whilst in some circumstances forty-eight hours would be too long to wait.

To deal now with the merits of the application. The Chief Execution Officer had before him an agreement dated the 9th August, 1937, made between Mr. Baeurle and the Petitioners. This agreement was one of lease for certain premises known as the Orient Cinema, German Colony, Jerusalem. The lesseees, who were the Talhami Brothers Co., undertook to pay the rent and agreed, inter alia, to keep, preserve and maintain the cinema and inventory in good repair and order, and to use it exclusively for holding therein cinemas, theatrical or musical performances, and to pay the rent of LP. 625.— per annum, and by Clause 3(g) the Talhami Brothers Company agreed that they were bound to pay the lessor "any sum the lessor may be liable to pay to the Metro Goldwyn Mayer of Egypt Inc. by virtue of a judgment to be obtained by the said Metro Goldwyn Mayer of Egypt Inc. against the lessor in the case pending before the Chief Magistrate's Court, Jerusalem, File No. 1904/37, dated February, 1938".

The Chief Magistrate gave judgment against Baeurle in favour of the second Respondents for the sum of LP. 217.— plus costs, and that judgment has not been satisfied. The second Respondents made an application to the first Respondent to attach this sum from the Petitioners under Article 80 of the Execution Law, as a debt due by the Petitioners to the judgment-debtor, Mr. Baeurle.

The Chief Execution Officer on the 21st March, 1939, summoned, at the request of the second Respondents, the Manager of the Petitioners Company. I should say that when the order of attachment was served on Petitioners it was endorsed to the effect —

"We do not owe any money to Mr. Baeurle for Talhami Brothers".
(Sgd.) *I. Talhami.*

The same Ibrahim Talhami who is admitted to be a director of the Company appeared on the summons before the Chief Execution Officer, and when put on oath admitted that when they signed the agree-

ment to which I have referred, they knew of the case between second Respondents and the judgment-debtor. He admitted that one of the conditions of the agreement was that they should pay any sum found due by Baeurle to the second Respondents. He also admitted that they know that judgment had been given against Baeurle and that they had not paid the second Respondents as had been agreed upon. The Chief Execution Officer therefore ordered Petitioners to pay a sum of LP. 217.— with costs.

Now it has been argued on behalf of the Petitioners that they dispute the legality of this agreement — that was not a matter with which the Chief Execution Officer could deal, and ipso facto not a matter with which we can deal. If the legality of the contract is queried there are Courts competent to decide that question. We in our present capacity are not that Court. The Chief Execution Officer had before him an agreement containing this undertaking to pay such amount as should be found due from Baeurle to the second Respondents. One of the directors of the petitioners admitted signing the agreement, admitted he knew of the conditions of the agreement, admitted he knew the sum had been found due from Baeurle, admitted that they had not paid that sum, and admittedly; by implication, if not in exact words, the liability of the Company under the agreement.

The Chief Execution Officer, as has been rightly remarked by Mr. Olshan, is not concerned with the internal management and the in-internal affairs of the Company. Mr. Ibrahim Talhami was apparently sufficiently competent to sign on behalf of the Company when served with the notice of attachment, and he appeared before the Chief Execution Officer in answer to the summons on the Manager of the Company. Mr. Ibrahim Talhami being, as is admitted, the Director of the Company, it is not for the Chief Execution Officer to enquire the actual capacity, the actual functions or authority of Ibrahim Talhami. This gentleman held himself out to be the Manager of the Company on two occasions, and in these circumstances, what he says must be held sufficient to bind the Company. Our only duty is to determine whether or not the Chief Execution Officer has misdirected himself in law. In spite of the lengthy arguments addressed to us on behalf of the Petitioners, we find that the Chief Execution Officer has not misdirected himself in law and that he has acted, as in fact, he was bound to do, on the evidence before him.

For these reasons we think that the Order Nisi must be discharged with costs to include LP. 10.— fee for attending the hearing.

Delivered this 30th day of June, 1939 .

British Puisne Judge.

CIVIL APPEAL NO. 132/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—Copland, J. and Frumkin,J.

In the application of:—

Woolf Slavousky — Applicant.

v.

Syndics in the Bankruptcy of the Firm "N. S. Khoury" — Respondents.

Effect of word "costs to await the result of the completed trial" — Right and wrong procedure in applying for reserved costs of previous appeal.

Proper course for successful party seeking to be allowed costs which in a previous appeal were ordered to await result of completed trial — not motion on notice but to apply at time of determination of final appeal.

Krongold for Applicant.

Respondents did not appear.

ORDER.

This is an application to allow the costs of the first of the three appeals in the dispute between these parties.

The first appeal*) was on one issue only. That issue was duly determined by this Court and the case was sent back to the Land Court to be tried on the other issues. This Court in dealing with that appeal ordered costs to await the result of the completed trial. When this third appeal came on for hearing, which was a final appeal on the whole question at issue between the two parties, that appeal was dismissed in favour of the present applicant and the present applicant was awarded the costs of that appeal. In our opinion he should have then applied for the reserved costs of the first appeal. It is argued on behalf of the applicant that he could only do so by motion on notice. With that, we do not agree, as authority for applying for the costs of the first appeal is found in the words at the conclusion of that appellate judgment of "costs to await the result". If an applicant does not apply at the correct time, the respondent might be put to very considerable costs in addition, which would not have been incurred by him if the applicant had made his application at the correct moment.

In this present case we will allow the present applicant the costs of this first appeal to include LP. 15.— hearing fees but we do not allow the costs of this application. In future we may not take such

*) 4 CtLR 25.

a lenient view if the procedure indicated by us in this judgment be not followed.

Delivered this 12th day of July, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 70/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Sheikh Mahmoud Ata el Surouri in his capacity as Mutawalli of the Waqf of Sheikh Ahmad el Thawry in Jerusalem — Appellant.

v.

Haj Hussein Mahmoud Abu Khater — Respondent.

Claim in Land Court for "hikr" — Unregistered land in long possession of Patriarchate ultimately registered as wakf — Cancellation by High Court of note added by Registrar in remarks column of register re amount of annual mukata'a — Purchaser's duty to make enquiries to determine details of Wakf etc.

1. Person buying land bound to examine register; if he sees land is Wakf he should make enquiries to ascertain details and whether there are any obligations such as payment of an annuity to Wakf, or the like. He cannot escape liability by failing to do so and claiming he was unaware of existence or nature of obligations.

2. Land Court*) incompetent to give judgment for a sum of money.

3. Court of Appeal may issue a declaratory judgment.

Rashid Haddad for Appellant.

Hanna Atallah for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated 20.5.1939.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jerusalem, rejecting a claim by the Appellant for hikr. The Respondent to this appeal purchased in the year 1923 certain land from the Greek Orthodox Patriarchate, Jerusalem. This land had been in the possession of the Patriarchate for many years and up to the time of the sale the land had not been previously registered, but on the 18th October, 1923, the first registration took place in the name of the Patriarchate and under the heading "class of land" the land is shown as "wakf".

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*) as a rule (semble).—*Ed.*

In 1930 a note was added to the remarks column of the register that the annual mukata'a amounted to LP. 1,295 mils. Two years later this note was cancelled by an order of the High Court on the ground that it had been made by the Registrar without any authority. In the register there also appears under the heading "class of land", "Wakf Sheikh El Thoury". There is some doubt as to whether these words were or were not added at the same time as the note regarding the mukata'a was inserted. For the purposes of this judgment I do not think it makes any difference, and we propose to treat the class of land as being simply "wakf".

Now, the only point in this appeal is whether a prudent purchaser on seeing this registration, was under any obligation to enquire further, in particular, as to whether or not the wakf carried any incidents or obligations such as hikr. Of course not all wakf lands are subject to hikr, but, so far as I am aware, payment of hikr or mukata'a is not an unusual incident. On consideration we think that when a purchaser sees in the register that the land is wakf he should make enquiries so as to determine what are the details of the wakf, and if the purchaser takes over any obligations. If he does not do so, we do not think he can escape liability any more than he could escape liability by saying that he did not know that certain land was subject to certain taxes. And equally he cannot escape liability by saying that he did not examine the register. It was his duty to do so.

We think therefore, this appeal will have to be allowed. We are, however, unable to give judgment for the amount claimed for the reason that a Land Court is incompetent to give judgment for a sum of money. All we can do in this appeal therefore is to allow the appeal, set aside the judgment of the Land Court, and make a declaration that the land is subject to hikr. The Appellant is entitled to his costs of the appeal and LP. 10.— advocate's fees for attending the hearing.

Delivered this 3rd day of July, 1939. *British Puisne Judge.*

Abdul Hadi, J.

I concur *Puisne Judge.*

Frumkin, J.

I agree. If a person buys land knowing it to be wakf and later discovers that the "Wakf" is entitled to a certain annuity out of the land, he cannot dispute liability to pay such annuity on the ground only that at the time of the transaction, although he knew the land was wakf, he was unaware of the existence or of the amount of such annuity.

Puisne Judge.

CIVIL APPEAL NO. 63/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—Copland, J. and Frumkin, J.

In the application of:—

1. Zakieh el Mulki, widow of George Hawa deceased.
2. Habib Hawa, son of the said George Hawa, deceased.
3. Michael Hawa, son of the said George Hawa, deceased
4. Lili Aleco, daughter of the said George Hawa, deceased. Appellants.

v.

Barclays Bank, (D.C. & O.) Ltd. Respondents.

Agreement of parties that application for leave to appeal should if granted, be treated as final appeal — Question of fixing issues in a case instituted, but not set down for trial, before enactment of Civil Procedure Rules 1938 — *Striking out of case by Registrar relying on Rule* 137(3) *of Civil Procedure Rules* 1938 — *Proper interpretation of Civil Procedure Rule* 137(3).

1. Parties may agree, and Court may decide accordingly, that application for leave to appeal should, if granted, be treated as final appeal.

2. Where a case, though possibly ready, was not set down for trial before Civil Procedure Rules 1938 came into force, issues should be fixed.

3. Rule 137(3) (striking out) of Civil Procedure Rules 1938 not automatic in its action; either Registrar of his own motion or Defendant must make application to Court to strike out, such application to be by motion on notice.

Abcarius for Appellants No. 1 and 2.

Eliash for Appellants No. 3 and 4.

Mrs. Ginzberg (by delegation) for Respondents.

Application for leave to appeal from Order of Land Court, Haifa, dated 26.4.1939.

JUDGMENT.

It was agreed by the parties that this application for leave to appeal should, if granted, be treated as the final appeal.

This case raises a short and interesting point under the Civil Procedure Rules which probably is one which may quite frequently occur in the course of the preliminary proceedings with regard to the trial of cases.

Two points have been raised by the appellants. The first one is that in this particular case the Civil Procedure Rules did not apply,

for the reason that the action was instituted on the 4th of January 1938, and, under the rules at that time in force, it was not necessary that issues should be fixed. As a matter of fact, on the 19th March, 1938, an application was made by the present appellants that the action should be set down for trial. That application was not granted on the ground apparently that there was no special reason why the case should be advanced out of its turn. In May 1938, the present Civil Procedure Rules came into force. The first point raised by the appellants is that since the case was ready for fixing before the new Civil Procedure Rules came into force, there was no necessity that issues should be fixed. The answer to that contention is that the case was not fixed for trial and we think that where a case, though possibly ready, was not fixed, it is necessary after the Civil Procedure Rules came into force that issues should be fixed. The matter is possibly one of academic interest, because it is unlikely that the same circumstances will recur.

The second point is on the interpretation of Rule 137(3) which says:

> "If no application is made or issues agreed within such period of two months, the case shall, unless the Court otherwise orders, be struck out."

The Land Court on appeal from the Registrar took the view that the words "the case shall, unless the Court otherwise orders, be struck out" necessitated the automatic striking out of the case if no application was made and no issues agreed. It seems to us that this is not the correct view. It is a little difficult to say how the Court could "otherwise order" if given no opportunity to order, and if a case can be struck out under this rule by the Registrar, the Court obviously is never given the opportunity to order otherwise. We think that this rule is not automatic in its action, but that either the Registrar of his own motion or the defendant must make an application to the Court to strike out and such applicatin of course in accordance with the rules themselves must be by motion on notice. We therefore allow the application for leave to appeal and allow the appeal itself and order that the case shall be restored to the list in the Haifa Land Court. In order to avoid any further arguments on this point, we order that the issues, the long delayed issues, if I may say so, should be fixed within two months from to-day. The appellants will get their costs here and below and LP. 10 fee for attending the hearing to each of the appellants' advocates in this Court.

Delivered this 13th day of July, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 57/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Frumkin, J., and Abdul Hadi, J.

In the appeal of:—

Abd Mustafa Khalaf on behalf of himself and on behalf of the Estate of Musallam Khalaf — Appellant.

v.

1. Said Muhammad Said El'Jauni
2. Majida Fawzi Ali El-Ja'uni
3. Wijdan Fawzi Ali El-Jauni — Respondents.

Ottoman judgment before Settlement Officer — Admissibility in evidence of judgment prescribed by lapse of time.

Though judgment prescribed by lapse of time cannot be put into execution or be sued upon, it can be produced and accepted in evidence in support of claim.

Edit. Note:— Campare C.A. 182/37 3 CtLR 133.

Cattan for Appellant.

Ibrahim Kamal for Respondents.

Appeal from judgment of Land Court, Jerusalem (in its appellate capacity) dated 6.5.1939.

JUDGMENT.

Frumkin, J.

This is an appeal from a judgment of the Land Court of Jerusalem given in its appellate capacity upon an appeal from the Land Settlement Officer. The appeal came twice before the Land Court and there were two judgments of the Land Settlement Officer.

In his first judgment the Land Settlement Officer held in favour of the present appellants who relied mainly on an old Tabu registration in the name of their ancestor allegedly referring to the land in dispute. They proved no possession neither by themselves nor by their ancestor. On the first appeal to the Land Court the present respondents produced a judgment relating to the land, issued by the Ottoman Court of First Instance in Jerusalem prior to the occupation. The effect of that judgment was to "refrain (the present appellants) from interfering

with the (present respondents') right of enjoyment of the land claimed". The judgment, in the opinion of the Land Court, embraced all the land in dispute. The Land Court thereupon remitted the case to the Settlement Officer who in his second judgment held that:—

"The Turkish judgment issued in Jerusalem on the 24th August, 1331 decides the matter. The case was imperfectly presented by the appellants in the original hearing..... I find that the evidence now produced establishes the appellants' right to the parcels in dispute. There is no possession by respondents. I order registration of the parcels in the names of appellants as claimed by them".

The judgment of the Land Court confirming this second judgment of the Land Settlement Officer is now under appeal.

It will be remembered that an appeal from the judgment of the land Court issued in its appellate capacity from a judgment of the Land Settlement Officer lies only on a point of law (Chapter 80, Section 64(2)). There is no appeal on questions of fact. The only possible point of law we can see in this appeal is whether the Land Settlement Officer and the Land Court were right in relying on the Ottoman judgment. Mr. Cattan's argument on that point is that they could not do so on the ground that it was prescribed by the lapse of over 15 years from the date of the delivery of the judgment.

The principle of limitation relating to judgments is that after a certain period a judgment could not be put into execution or sued upon. But there is nothing to prevent a party in an action to produce in evidence an old judgment bearing upon the rights claimed in that action. The Court before whom such a judgment is produced will consider how far it will rely on it as evidence.

In the present case the Ottoman judgment was neither put into execution nor was it in any way acted upon. The Land Settlement Officer accepted it in evidence and his finding in this respect was upheld by the Land Court and we do not propose to interfere. The judgment of both the Land Settlement Officer and the Land Court are confirmed and the appeal dismissed with costs to include LP 15.— for attending the hearing.

Delivered this 27th day of June, 1939.

Puisne Judge.

I concur

Chief Justice

I concur

Puisne Judge.

CIVIL APPEAL NO. 24/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of:—

The Engineering Corporation of Palestine, Ltd. Appellants.

v.

1. Casino Bat Galim
2. Pesah Bonstein
3. Abraham Teicher
4. David Bigger
5. Jacob Levkowitz
6. Bela Levkowitz

Respondents.

Contract speaking throughout of hiring but containing provisions for purchase by hirer — Conditions in contract providing for goods to remain property of owner until payment of full purchase price and empowering owner to retake possession and demand payment of arrears if buyer in default — Necessity of examining contract as a whole and looking at its substance — Distinction between "sale" and "agreement to sell" — Seller's remedy on buyer defaulting to meet obligations in case of sale and in case of agreement to sell.

1. According to English law, where under a contract of sale property in goods is transferred from seller to buyer it is a "sale"; where transfer of property in goods to take place at a future time or subject to some condition thereafter to be fulfilled — "agreement to sell".

2. As a rule, where a buyer defaults, if there has been a sale, seller can sue for price; if an agreement to sell, he may sue for damages.

3. Where Court taking contract as a whole and looking at its true effect finds it an agreement to sell, although it purports to be a hire or hire-purchase agreement, stipulations empowering owner in certain cases to recover possession of goods and demand payment of arrears — of no avail.

Edit. Note:— See Art. 64, Ottoman Civil Procedure Code; Mejelle, Art. 167; C.A. 98/38 3 CtLR 270; C.A. 94/38 and Edit. Note thereto, 3 CtLR 268.

Levin for Appellants.

Respondents Nos. 1, 2, 3 and 4: Not present — served.
Respondents Nos. 5 and 6: Served by substituted service.
Appeal from decree of District Court, Haifa, dated 16.2.1939.

JUDGMENT.

This is an appeal from the District Court, Haifa. The Respondents though served, do not appear, and we are told by Mr. Levin, for the Appellants, that this is possibly because there are negotiations for a settlement; If so, I trust they will be successful; meanwhile Mr. Levin asks us to hear his appeal.

The action arose under a contract in writing whereby the Appellants, as owners, let to the Respondents as hirers, certain machinery. The contract is headed "Hire — Agreement" and throughout it speaks of hiring. There are, however, provisions (to which I will later refer) which refer to purchase by the hirer, and it becomes necessary to decide — is it a hire purchase agreement under which the hirer has an option to purchase, or is he obliged to purchase; in other words, does it amount to a sale or an agreement to sell and buy.

Cases of this sort have repeatedly presented difficulty, and I would refer to the judgments of Lord Herschell L.C. in McEntire v. Crossley and Helby v. Matthews, both reported in 1895 A.C., in particular in the first of these at pp. 462—463 he says —

> "Coming than to the examination of the agreement, I quite concede that the agreement must be regarded as a whole — its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is. But there is no such thing, as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained.

Under the agreement with which we are concerned, the hirer has

to pay a lump sum of LP. 1400, which is stated to be due on the signing of the agreement, but for his convenience the lump sum may be paid by instalments. The agreement further provides that if he observes the conditions the hirer "shall be entitled to purchase the machine for LP. 1400, less any sums previously paid by him.... and upon the payment of such price the hire under the agreement shall come to an end and the machine shall become the property of the hirer, but until such payment as aforesaid the machine shall remain the property of the owners."

It is to be observed that there is no provision in the agreement that in order to become owner the hirer has to do anything more than to pay the price which he is under a primarily binding obligation to do, nor is he permitted to terminate the hiring and return the machine.

The hirer fell into arrear with the payments, and the owner sued for LP. 313.985, the balance due, and the delivering up and return of the machine. The latter claim was no doubt based on condition 6 of the schedule to the contract, which provided that if, inter alia, the hirer make default in payment —

> "the Owners may then and in any of the said events and from time to time as often as any of them shall happen at their absolute discretion determine the hire (without any previous notice or demand on the part of the Owners and although the Owners may have waived some previous default of a like nature) and thereupon it shall be lawful for the Owners without previous notice (with or without reference to any Court of Law) to retake and resume possession of the machine and for that purpose to enter by force, if necessary, upon any premises or place in the occupation of the Hirer or in which the machine is or is believed to be kept *provided however* that such determination shall not in any way derogate from any other or further rights or remedies which the owners may have hereunder or by law nor affect any liability of the Hirer to pay all sums due hereunder."

The District Court, applying the general principle which Lord Herschell laid down, held that under both the Mejelle and English Common Law this was an agreement of sale.

Article 245 of the Mejelle provides that —

> "A sale for a deferred payment or for payment by instalments is good."

It does not, however, say when the property passes.

According to English law, where under a contract of sale the property in the goods is transferred from the seller to the buyer the

contract is called a "sale"; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an "agreement to sell". An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. This is now statutory but I believe it to have been the Common Law.

The District Court does not appear to have considered the provision of the agreement to which I have referred, that until the payments are made the machine shall remain the property of the owners.

Nothing could be clearer than this, and I would again adopt the words of Lord Herschell in McEntire v. Crossley at p. 463, —

> "Upon an agreement to sell it depends upon the intention of the parties whether the property passes or does not pass. Here the parties have in terms expressed their intention, and said that the property shall not pass till the full purchase-money is paid. I know of no reason to prevent that being a perfectly lawful agreement. If that was really the intention of the parties, I know of no rule or principle of law which prevents its being given effect to. I quite agree that if, although the parties have inserted a provision to that effect, they have shewn in other parts of the agreement, by the language they have used or the provisions they have made, that they intended the property to pass, you must look at the transcation as a whole; and it might be necessary to hold that the property has passed, although the parties have said that their intention was that it should not, because they have provided that it shall."

Following this line of argument I can find nothing to show that the property was intended to pass on the signing of the agreement, and on the other hand, there are various obligations upon the hirer, one being to insure the machine in the name of the owners.

In my view the true effect of the agreement, taking it as a whole, is that it is an agreement to sell, and that the property is not to pass until the instalments are paid.

What then is the position when there is a breach?

Generally speaking, where a buyer is in default, if there has been a sale, the seller can sue for the price; if there is an agreement to sell he may sue for damages; I do not think he can sue for the purchase-money and insist that the property in the goods, the price of which he is suing for, has not passed, — again see the judgment of Lord Herschell at p. 464. — and that is what the Plaintiff did in this case.

I may add that I have not overlooked the South Bedfordshire Electrical Finance, Ltd., v. Bryant, 1938, All England Law Reports, Vol. 3, p. 582, to which Mr. Levin referred us, but the agreement in that case was one of hire-purchase.

Although I differ somewhat from the view taken by the District Court, I am of opinion that this appeal should be dismissed.

Delivered this 29th day of June, 1939.

Chief Justice.

CIVIL APPEAL NO. 66/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Chief Justice (Trusted, C. J.), Copland, J. and Frumkin, J.

In the appeal:—

Dresdner Bank — Appellant.

v.

Ludwig Bing — Respondent.

Action on foreign judgment — Claim alternatively based on undertaking by judgment debtor to pay judgment debt by instalments — Lask of consideration — Cause of action — Foreign Judgments Rules.

Where judgment debtor undertakes to pay judgment debt, i.e. to do what he is already liable to do, and there is consideration for this undertaking, no fresh cause of action can be based thereon.

Edit. Note:— See Mejelle Art. 1628; C.A. 240/37 3 CtLR 104.

Lindermann for Appellant.
Wittkowski for Respondent.
Appeal from judgment of District Court, Tel Aviv, dated 30.5.1939.

JUDGMENT.

This is an appeal from a judgment of the District Court sitting at Tel Aviv. The Plaintiff's claim was based firstly upon a judgment given by a German Court.

Under the Foreign Judgments Rules (Laws of Palestine, Vol. 3, p. 2332) a foreign judgment may be made executory in Palestine either by action thereon before a District Court, or by the grant of an exequatur issued by a District Court. In this case the Appellant brought an action upon the judgment, but admittedly did not comply with the rules.

Alternatively, the Plaintiff based a claim upon an undertaking to pay the foreign judgment by instalments. There appears to be no consideration for this undertaking, and by it the Defendant only undertook to do what he was already liable to do, and I do not think that any fresh cause of action can be based upon it.

The appeal is therefore dismissed, with costs and advocate's fees for attending the hearing LP. 15.

Delivered this 29th day of June, 1939.

Chief Junstice.

CRIMINAL APPEAL NO. 29/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.), Copland, J. and Frumkin, J.

In the appeal of :—

Max Seligman — Appellant.

v.

The Attorney General — Respondent.

Conspiracy to aid and abet illegal entry in Palestine — Conviction of three counts which constitute one offence — Statement by one conspirator against another — Applicability of English Common Law in regard to evidence — Statement by accused that he was engaged in conspiracy — Defeating enforcement or preventing execution of Ordinance — Aiding and abetting commission of an offence — Conspiracy to aid and abet. — Immigration Ordinance —Criminal Code Ordinance, Sec. 21, 36 — *Evidence Ordinance-Palestine-Order-in-Council,* 1922, *Art.* 46 — *District Courts (Summary Trials) Rules, Rule* 3.

1. An offence can be charged under several different sections in same charge sheet or information, and if necessary facts proved, accused can be so convicted (though not punished twice).

2. In all charges of conspiracy both existence of conspiracy and participation of accused must be proved.

3. When existence of conspiracy proved, acts and statements by one conspirator in execution or furtherance of common purpose, but not otherwise, are evidence against other conspirator as if done or made by him.

4. Where no definite provision can be found in Ottoman Law or in any ordinance in regard to evidence, provisions of English Common Law on this subject to be applied.

5. In judging whether statement of accused that he was engaged in a conspiracy should be believed Court must apply common sense tests, just as it would do in regard to an extra judicial confession.

6. No material difference between defeating or preventing enforcement or execution of an Ordinance, also no difference between transgressing a law or defeating its enforcement.

7. No conviction of aiding and abetting commission of an offence without proof that offence has been committed by person who has been aided or abetted.

8. Conspiracy completely committed the moment two or more agree to effect an unlawful purpose; not necessary, in order to complete conspiracy, that any one thing should be done beyond agreement.

(Per Trusted, C. J.) If charges based on same facts, i. e. if facts constitute more than one offence, accused should not be punished twice therefor.

Eliash for Appellant.

Bell (Crown Counsel) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 30.6. 1939, whereby Appellant was convicted of :

a) Conspiracy to commit a misdemeanour, contrary to Section 35 of the Criminal Code Ordinance, 1936 ;

b) Conspiracy to defeat the enforcement of the Immigration Ordinance, contrary to Section 36(a) of the Criminal Code Ordinance, 1936 ; and

c) Conspiracy to effect an unlawful purpose, contrary to Section 36(f) of the Criminal Code Ordinance, 1936 ;

and sentenced to six months' imprisonment with special treatment.

Copland, J.

JUDGMENT.

This appeal from the District Court of Jerusalem is interesting, partly because the case raises matters of some importance, and partly because I confess I think we have listened to some remarkable heresies, if I may be allowed to say so, in the arguments addressed to us.

The appellant was charged together with one Goddard on a charge sheet containing thirty counts, and elected to be tried summarily by the District Court. He was convicted on three counts and acquitted on the remainder. Goddard, who was tried by another Court, was convicted on the same three counts as the appellant, and also on other counts. In all three counts the gist of the offence was that the appellant, together with Goddard and other persons unknown, conspired to aid and abet divers persons to enter Palestine in contravention of the Immigration Ordinance. In the first count the charge was laid under Section 35 of the Criminal Code, as a conspiracy to commit a misdemeanour. In the secound count the charge was conspiracy to defeat the enforcement of the Imigration Ordinance contrary to section 36(a) of the Criminal Code, and in the third count they were charged with conspiracy to effect an unlawful purpose contrary to section 36(f) of the Criminal Code.

The first argument in this appeal is that the District Court in convicting on the three counts is in effect punishing the appellant three times for the same offence. I do not think that this is so — if an offence can be charged under three different sections, I can see no reason why it should not be so charged in the same charge sheet or information, and if the necessary facts are proved why a person cannot be so convicted. He is only convicted of one offence, even though that offence

can be described in three different ways, and the District Court only passed one sentence.

In all charges of conspiracy it is necessary to prove two things — first, the existence of the conspiracy, and secondly, the participation of the accused persons in it. When the existence of the conspiracy has been proved, acts and statements of one of the several conspirators are evidence against the other conspirator or conspirators, as if they were done or made by him or them, so far as they were done or made in the execution or furtherance of their common purpose, but not otherwise.

It has been argued on behalf of the appellant that there was no evidence to prove the existence of a conspiracy, nor his participation in it, — that evidence was wrongly admitted, in particular, evidence of statements made by Goddard, inasmuch as the Evidence Ordinance (Cap. 54) does not contain any provision allowing the admission of hearsay evidence. This argument might carry force if the Evidence Ordinance were a code of evidence — it is not, however, anything of the sort. Its title sets out that it is an Ordinance to declare the law of evidence on certain points and to amend the law on other points, and that is exactly what this Ordinance is — it only purports to deal with certain points, and with nothing else. The Ottoman Law of Evidence was notoriously deficient and antiquated, and in practice for many years, the Courts of this country, where no definite provision can be found in the Ottoman Law or in any ordinance in regard to evidence, have applied the provisions of the English Common Law on this subject. This, in my opinion, is the correct procedure, and is justified by the provisions of Article 46 of the Palestine Order-in-Council, 1922, the terms of which it is not necessary for me to set out here.

The existence of the conspiracy was proved by Gilpin's evidence as to statements made to him by the appellant, and the making of those statements is corroborated, though corroboration is not strictly necessary, by the evidence of Christie. The District Court heard those witnesses and believed that they were speaking the truth. The exictence of a conspiracy between the appellant and Goddard being thus proved, evidence of Goddard's statements then became admissible as evidence against the appellant. It is further said that there is no corroboration of the statements made by the appellant, and that the mere statement of the appellant that he was engaged in a conspiracy is not sufficient. In judging whether the statement should be believed, the Court must apply common sense tests, just as it would do in regard to an extra judicial confession — is it likely to be true — is it borne out by the

surrounding circumstances — and the character and station and circumstances of the person making it are also relevant considerations. Corroboration, in the strict sense of the term, is certainly not necessary, and applying these common sense tests, I can see no reason why it should not be true. Believing as it did the evidence of the witnesses, the District Court and sufficient evidence to justify it in holding that the existence of the conspiracy was proved, and also that the appellant was one of the conspirators.

A somewhat lengthy and involved argument has been addressed to us to the effect that a person cannot be said to defeat the enforcement of the Immigration Ordinance by aiding and abetting persons in entering Palestine in contravention of that Ordinance, though he might be preventing the execution of it. With all respect, I must confess that this seems to me to be a mere play upon words. I can see no material difference between the phrases preventing the execution, preventing the enforcement, defeating the execution or defeating the enforcemnt, to adopt the four possible permutations of the words employed in Section 36(a) of the Criminal Code, when applied to the present charge, and it seems to me to be bordering on the ridiculous to suggest that it is not defeating the enforcement of the Immigration Ordinance to conspire to aid and abet persons to enter Palestine who have no authority to do so, and in contravention of the express provisions of the Ordinance. Enforcement does not necessarily mean punishment — enforcement means the due operation of the various provisions of the Ordinance, and the whole scheme of the Ordinance is set at naught if immigration is carried out, uncontrolled by Government, and in contradiction of the terms of the Ordinance. And equally there is nothing in the argument that transgressing a law is not defeating its enforcement — defeating the enforcement of any Ordinance is a statutory offence under the Criminal Code, and is punishable as an offence.

With regard to the third count, this is merely a different way of expressing what has been already charged in the first and second counts. To commit a misdemeanour is to effect an unlawful purpose, to defeat the enforcement of an Ordinance is equally to effect an unlawful purpose.

We come now to what is perhaps the main ground of the appeal namely, that the appellant cannot be convicted of conspiring with others to aid and abet divers persons to enter Palestine in contravention of the Immigration Ordinance, unless it is proved that persons did actually enter Palestine, and by so entering that such persons committed an offence under that Ordinance. This argument would have

deserved serious consideration if the appellant had been charged with aiding and abetting the commission of an offence, or contravention, because in that case I agree that, in order to sustain the conviction, it must be proved that an offence or contravention has been committed by the person who has been aided or abetted. But the appellant has not been charged with aiding and abetting — he has been charged with conspiring to aid and abet, which is a very different matter. The argument on behalf of the appellant loses sight of this essential fact — that the essence of a conspiracy is the agreement between the parties to the conspiracy, and not the commission of the offence which it was agreed to commit, when once the agreement to commit the offence is proved, and also the participation in the agreement of the persons charged, than the offence of conspiracy is complete, and it is immaterial whether the offence agreed upon is or is not actually committed. Conspiracy usually envisages the commission of an offence in the future. One may conspire or agree with others to commit murder — it is immaterial whether murder is actually committed; one may equally conspire to aid and abet or help another in the commission of murder — it is equally immaterial whether the help is given or the murder done.

It is true that in many cases conspiracy is proved by the commission or partial commission of the offence agreed upon, but this merely affects the proof — the offence itself of conspiracy is completed by agreement. This is clearly set out in The Queen v. Aspinall (1876, 2 Q.B. 48), where Brett J.A. said (at p. 58) :

> "Now, first the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary, in order to complete the offence, that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented or may faill. Nevertheless the crime is complete; it is completed when they agreed."

For these reasons, I think that the appeal against the conviction fails.

With regard to the sentence, I have only a few words to say. I agree entirely with what the Chief Justice has said. The offence of which the appellant has been convicted is, undoubtedly, a serious one, as it shewed an attempt, a deliberate attempt, to defy the policy of Government in a matter which vitally concerns the administration of this country, and the appellant is a lawyer, who must have been fully aware of what he was doing. I agree with the learned Judges of the District Court, that a fine would be quite inappropriate.

I agree that a sentence of four months' imprisonment is a fair one, considering all the circumstances, and the judgment of the District Court should be amended accordingly.

Dated this 7th day of July, 1939.

Delivered this 11th day of July, 1939.

British Puisne Judge.

Trusted, C. J.

JUDGMENT.

The law in this case appears to me to present no difficulty, and I agree with the judgment which my brother is about to deliver.

I desire to say a word about the sentence.

The Appellant was convicted upon three charges. That any number of charges might have been joined in the same statement of charge is clear from Rule 8 of the District Courts (Summary Trials) Rules, 1938, and by the same rule an accused person may be convicted generally upon the whole statement of charge. If the charges are based upon the same facts, or, in other words, if the facts may constitute more than one offence, it is clearly wrong that an accused person should be punished twice therefore. (Where death results there is a special exception provided by section 21 of the Criminal Code Ordinance). Although they did not say so in terms, I think the Court of Trial regarded the Appellant as having in effect committed one offence.

That Court took the view that the punishment in this case should be deterrent in that the Appellant had been guilty of an attempt to frustrate and bring to naught the policy of Government. That countries must have immigration and other laws regulating the persons who may enter, and the method of their entry is obvious. The number of persons who may enter Palestine involves political considerations with which we are not concerned, but we are concerned to see that the provisions of the relevant Ordinance are carried out, and it should be realised that they are, inter alia, for the protection of all the inhabitants of this country, whether Arab, Jew or English. That an educated man, knowing the conditions from which illegal immigrants may come and the conditions under which they may travel to this country, and the consequent ever present danger of contagious or infectious disease, should contemplate assisting them to land in such a way that proper supervision may be avoided, is appalling, and one hopes that this danger is in itself sufficient to prevent others seeking to do the same thing.

The Court of Trial, in considering the sentence, compared it with that passed upon another conspirator in the same conspiracy, convic-

ted by another Court a few days before. To so weigh the effect of the sentences and to assess one by the other, is well nigh impossible.

While making it clear that I in no way desire to criticise the Court of Trial, I feel that it is so difficult to assess a sentence in a case like this upon a proffessional man, that I am prepared to accede to Dr. Eliash's plea and to reduce the sentence of six months' imprisonment passed upon the Appellant to one of four months' imprisonment with special treatment.

As I said at the end of the hearing the appeal against conviction is dismissed and the sentence reduced accordingly.

Dated this 7th day of July, 1939.
Delivered this 11th day of July, 1939.

Chief Justice.

JUDGMENT.

Frumkin J.

There is nothing in the law of Palestine affecting the admissibility of any of the evidence relied upon by the Court below. The evidence, if believed, justified the Court below in deriving its conclusions, and the conviction on all three counts must stand.

As regards sentence, I do not think we should be guided by the sentence passed on Goddard, particularly as it was passed by a differently constituted Court, and this Court was not given an opportunity to express its views on that sentence.

I agree that a sentence of a fine would not be an adequate punishment for a professional man in Appellant's position. His attempt to give the authorities unsolicted information, whether it was done in order to whitewash himself by shifting suspicions on others, or for whatever other purpose, are certainly not of such a nature as to call for sympathy and mitigation. The length of the period of imprisonment, however, is not of special relevance, and four months will meet the case. In the result I concur both as regards conviction and sentence.

Dated this 7th day of July, 1939.
Delivered this 11th day of July, 1939.

Puisne Judge.

HIGH COURT NO. 30/39.

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

Before : Copland, J. and Abdul Hadi, J.

In the application of:—

Khaled Sharif el Husseini — Petitioner.

v.

1. The Director of Land Registration Jerusalem
First Respondent

2. Mohamed son of Ahmed Ibreigheet and 8 others.
Second Respondents.

Application to register land in accordance with Certificate of Succession — Director of Land Registration acting upon a deed of renunciation earlier in date to Certificate of Succession.

Director of Land Registration under duty to register land of deceased in accordance with Certificate of Succession issued by proper Court, he cannot refuse registration on strength of an earlier document, validity of which must be proved before competent Court.

Elia for Petitioner.

Respondents absent.

Application for an order to issue directed to the First Respondent calling upon him to show cause why, if any, the various immovable Miri properties, the subject matter of the Hebron Land Registry file No. 11/36 should not be registered in the names of all the heirs of the owners thereof as per the Certificate of Succession of the Sharia Court of Hebron dated the 26th February, 1936, and why his order of the 7th of June, 1939, to the effect that the said immovable properties should be registered in the name of the Second Respondents to the exclusion of the Petitioner (confirming a previous order dated the 9.2.39) should not be set aside.

ORDER.

On considering this petition we think that the Rule Nisi must be made absolute.

The Director of Land Registration appears to have taken upon himself the functions of a Court and has refused to register a share of the property in the name of the Petitioner on the strength of a deed of renunciation the validity of which must be proved before a competent Court. Needless to say he should not have done so. His duty is to register the property in accordance with the Certificate of Succession issued by the Sharia Court, which is a document later in date than the deed.

The Rule Nisi is made absolute but this registration is not to be effected until after one month from to-day, so that the Second Respondents may go to the Iand Court if they will be so advised. Petitioner to have his costs which we fix at an inclusive amount of LP. 18.— to include disbursements and fees for attending the hearing, to be paid by the Second Respondents jointly and severally.

Given this 6th day of July, 1939. *British Puisne Judge.*

HIGH COURT NO. 18/39.

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

Before:— Copland, J. and Frumkin, J.

In the application of:—

The Central Bakery "Bet-Lehem" Ltd. Petitioners.

v.

1. Oskar Pischinger, Firm of Vienna
2. Registrar of Trade Marks Respondents.

Agreement granting user of certain trade marks — Opposition by licencee of trade marks to their registration in name of grantor — Ownership and user of trade marks.

Ownership of trade marks may be distinct from their user, hence grant of licence to use trade marks — no bar to their registration in name of grantor.

Pevsner for Petitioners.

Sussmann for Respondents No. 1.

Application for an order to issue to the Second Respondent to show cause why he should not refrain from the Registration of the Trade Mark No. 5022 in class 42 in respect of cakes, tarts and pies.

ORDER.

This is an opposition under the Trade Marks Ordinance to the registration of certain marks in the name of the first Respondents to this application. The opposition is based upon the terms of an agreement entered into between the Petitioners and the first Respondents, dated the 25th of May, 1935. The effect of this agreement is that the first Respondents gave to the Petitioners a licence, to use, amongst other things, the trade marks, recipes, and the firm name of the first Respondents for a term of years. The application for the registration by the first Respondents, however, is an application in regard to the ownership of the marks and not their user. The agreement in no way transfers the ownership of the marks of the first Respondents to the Petitioners, but merely grants to the Petitioners a licence to use them. That ownership may be distinct

from user is clear from in re Neostyle. (20 Patent Cases 803.) Incidentally too, the ownership of these marks is not claimed by the Petitioners. Whatever the rights may be of the various parties under this agreement, they will not, in our opinion, be affected by the registration of the ownership of the marks. In particular in Clause 14 of the agreement the Petitioners undertook, as attorney, to register the marks obviously in the name of the first Respondents, which admittedly they have not done.

We express no opinion as to the rights of either side to this agreement. We equally express no opinion as to whether or not there has been any breach of the agreement — these are questions which we are not competent to decide, but which must be decided by other means. These questions, in any event, do not affect the present case.

In the result we think that the opposition will have to be dismissed for the reasons which we have given. The first Respondents will get their costs to include LP. 10.— fee for attending the hearing.

Given this 10th day of July, 1939.

British Puisne Judge.

HIGH COURT NO. 36/39.

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

Before:—Copland, J. and Frumkin, J.

In the application of:—

Mordechai Zielony (Yarkoni) — Petitioner.

v.

1. The Chief Execution Officer, Tel-Aviv.
2. Isaieh Rabinowitz. — Respondents.

Attachment and sale of judgment debtor's property — Application by a judgment creditor for a share in proceeds of sale — First judgment creditor alleging collusion between judgment debtor and second judgment creditor and claiming right of preference — Non interference of High Court with Chief Execution Officer's Order.

Where a judgment creditor applies for a proportional share in proceeds of sale of judgment debtor's property and Chief Execution Officer holds there was collusion between debtor and applicant and acts accordingly or does not hold so and grants application, High Court will not interfere in either case.

Edit. Note :— See H.C. 88/30 1 PLR 644; H.C. 60/27 3 C of J 840; H.C. 13/33 3 C of J 864; H.C. 43/27 1 PLR 194; H.C. 25/39 6 CtLR

Shlein for Petitioner.
Iszajewicz for Respondent No. 2.

Application for an Order to issue directed to the First Respondent calling upon him to show cause why his order dated 20.6.39 in Execution Files Nos. 15276/36 and 8854/37 of Tel-Aviv concerning the right of preference to an attachment should not be set aside and why a new order should not be given allowing petitioner a right of preference on other creditors in accordance with Article 123 of the Execution Law.

ORDER.

Frumkin J.

The petitioner in this case has obtained judgment against one Izhak Shay which was put into execution. An attachment was ordered in respect of certain property belonging to this judgment-debtor which property was sold and the proceeds are still in the Execution Office. The 2nd respondent also obtained judgment against the same Izhak Shay, also put it into execution and the Chief Execution Officer has ordered that both judgment-creditors should share in the proceeds of the sale of the property of the judgment-debtor in accordance with the proportion of their relative debts. The petitioner objects to the 2nd respondent's sharing in the proceeds of that sale relying on Article 123 of the Execution Law as interpreted by this Court in High Court 43/27 *). His argument is based mainly on the fact that insofar as the 2nd respondent is concerned, his action against the judgment-debtor was based on collusion. This argument of the petitioner is based on the facts that the 2nd respondent and the debtor are relatives, that the basis of the action was an entry in the books of the 2nd respondent, that the action was not defended by the judgment-debtor and that he did not oppose the judgment entered against him. All these facts might very well show that in fact there was a collusion and, had the Chief Execution Officer acted accordingly, I do not think this Court would have interfered. But he did not hold that there was a collusion. He may have been impressed by the facts as stated on behalf of the 2nd respondent, particularly that the entries

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* 1 PLR 194.

in the ledger are based upon a contract which was entered into between the 2nd respondent and the judgment-debtor as early as 1934 which contract was deposited with a third person, in this case, the Mukhtar of the Village of Kefar Saba, already in 1936, a long time before the cause of action relied upon by the petitioner came into being. The Chief Execution Officer who was not satisfied with the contentions of the petitioner, having refused his request for preference as against the 2nd respondent, we do not think that it is for us to interfere, and the order will therefore be discharged. The 2nd respondent will have the costs to include LP. 10 for attending the hearing.

Given this 13th day of July, 1939.

Puisne Judge.

I agree

British Puisne Judge.

CIVIL APPEAL NO.226/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J., Khayat, J. and Abdul Hadi, J.

In the appeal of:—

1. Fatmeh Bint Ahmed El-Haj Mahmoud
2 Amineh Bint El-Sheikh Hassan Soufan — Appellants.

v.

1. Muhammad Ibn Mustafa El-Hussein
2. Yunis Hassan Abu Kandil
3. Yachin Agricultural Society Ltd. — Respondents.

Re-entering case in Land Court in respect of land included in Notice of Settlement — Effect of renewal of an action struck out for non-appearance of Plaintiff.

Action re-entered after being struck out — a continuation of original action; hence case struck out in Land Court for non-appearance and renewed must be heard there even if Notice of Settlement including the land in dispute was published long before renewal.

Edit. Note:— See C.A. 50/37 3 CtLR 18; C.A. 146/38 4 CtLR 71;

Hanna Attalla for Appellants.

1st Respondent in person.

Hamburger for Respondent No. 3.

Appeal from judgment of Land Court, Nablus, (L C 65/37), dated 25.4.1938.

JUDGMENT.

The circumstances out of which this present appeal arises are the following : The appellants entered an action in the Land Court of Nablus in the year 1932. Notice of Settlement was published in respect of the lands, to include the land at present, in dispute, in Khirbet el Zababidi, on the 8th November, 1933. The Land Case was not transferred to the Settlement Officer, or if it had been transferred at any rate it found its way back again to the Land Court, because on the 30th September, 1937, the case was struck out by the Land Court of Nablus on the ground of the non-appearance of the present appellants who were plaintiffs.

In accordance with Rule 13 of the Court Fees Rules 1935, the action was re-entered on the 12th October, 1937, and on the 25th April, 1938, the Land Court dismissed the case on the ground that the re-entering of a case struck out for non-appearance is an entering within Section 6 of the Land (Settlement of Title) Ordinance and that the case had been accepted and entered in error and was therefore a nullity.

At the first hearing of this case in this Court on the 30th May, 1939, the second respondent was dismissed from the appeal on the ground that he was no longer concerned in the particular pieces of land which are disputed between the appellants and the 1st and 3rd respondents.

Now the first principal point to decide in this case is this, was the re-entering of the case in the Land Court, on the 12th October, 1937, a fresh action or a continuation of the original action entered in 1932. Rule 2 of the Judgment by Default (District and Land Courts) Rules 1926 states :—

> "If at any stage of any civil proceedings in first instance before a district court or land court the plaintiff does not appear in person or by a representative, the action shall be forthwith struck out, without prejudice to the plaintiff's right to institute a fresh action upon payment of the prescribed fees."

Rule 13 of the Court Fees Rules 1935, is in these terms :—

> "An action or matter which has been struck out may be restored on payment of half the fees payable on entering the original action or matter."

The Rule then goes on to provide the time within which the fees may be paid and other matters with which we are not concerned here.

Now, the same point or a very similar point has already been dealt with by this Court and the first case to which I will refer is El Fahoum v. Khalaf, Civil Appeal 50/37 (Volume 3, Current Law Reports, page 18). That was a case where the Land Court of Nablus had held that there was no right to renew an action which had been struck out. This Court reversed that decision and, in so doing, discussed the effect of Rule 2 of the Judgment by Default Rules and Rule 13 of the Court Fees Rules, and we said this :

> "Both sets of Rules are of equal legal validity as against each other, and I do not think that they are contradictory when read together. And in any case the Court Fees Rules are of later date and should prevail in the event of inconsistency with any previous Rule."

In another case Najia v. Bitar, Civil Appeal 146/ 38 *), a somewhat similar point arose. In that case an action entered before the District Court was struck out for non-appearance. It was re-entered in the Magistrate's Court after the date when the jurisdiction of the Magistrate's Courts had been enlarged and the Magistrate dismissed the action on the ground that the case was prescribed in as much as the action re-entered before him was a fresh action. The District Court confirmed that decision but this Court held that the action when lodged in the Magistrate's Court was not a fresh one in view of the change of jurisdiction, but was a renewal of the original action brought in the District Court. That is a strong case, if I may say so, because we held that an action entered in the Magis-

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*) 4 CtLR 71.

trate's Court was a renewal of an action originally brought in the District Court.

It seems to us equally that the same principles, which are laid down in these two cases which I have cited, apply to this present case. The Court Fees Rules which are later in date speak of an action being "restored". The restoration of an original action can only mean that the action when re-entered becomes a continuation of the original action. That being so it seems to us that the Land Court was wrong in dimissing this present action.

The appeal must therefore be allowed and judgment of the Land Court dismissing the appellants' action set aside and the case remitted to the Land Court to hear on its merits. The appellants will have in any event the costs of this appeal to include LP. 15 fee for attending the hearing to be paid by the 1st and 3rd respondents jointly.

British Puisne Judge.

HIGH COURT NO. 25/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before:— The Chief Justice (Trusted, C. J.) and Frumkin, J.
In the application of :—

Crossley Brothers Ltd. — Petitioners.

v.

1. Chief Execution Officer, Magistrate's Court, Jaffa
2. Daoud Dadis
3. Bendali Zaccharia. — Respondents.

Elia for the Petitioner.

G. *Salah* for Respondent No. 2.

Executory attachment on moneys due to judgment debtor from a third person — Third person attaching moneys due from him to judgment debtor and applying for a set off — Right of preference to attached moneys under art. 123 *of Execution Law.*

Chief Execution Officer when dealing with moneys attached by his order must do so in accordance with provisions of art. 123 of Execution Law (regarding priority of an earlier attachment).

Edit. Note:— An attachment was originally put by the Petitioners (Crossley Co.) through the Execution Office on a sum of

LP. 50 adjudged in favour of the 3rd Respondent (B. Zaccharia) against the 2nd Respondent (Daoud Dades). Subsequently the 2nd Respondent obtained a judgment against the 3rd Respondent inter alia confirming a provisional attachment made by the former on the said sum of LP. 50 which he owed the latter.

See also H.C. 36/39 6 CtLR and Edit. Note thereto.

ORDER.

The Court, after hearing George Eff. Salah on behalf of the second Respondent, and Mr. E. George Elia on behalf of the Petitioners, orders that the order nisi issued by this Court on the 8th of May, 1939, be made absolute, that the order of the first Respondent, in Execution file No. 2060/37, Jaffa Execution Office, dated 18.4.39, be set aside, the attachment therein in favour of the Petitioners, be restored, and that the attached monies in the said file be partitioned in accordance with the provisions of Article 123 of the Execution Law; and it is further ordered that the second Respondent do pay to the Petitioners costs of this petition and advocate's fees assessed at an inclusive figure of LP. 10.

Given this 30th day of May, 1939.

Chief Justice.

X. O. 2060/37

Chief Execution Officer, Jaffa,

ORDER.

1. Neither of the parties has submitted legal proofs to support his views.

2. It was not alleged or proved that the judgment obtained by Daoud Dades against Zacharia for the amount of LP. 85 was resulting out of a collusion.

3. I do not see any legal objection which prevents Daoud Dades from applying for set off and deducting the amount owed by him from the amount due to him.

4. Release of attachment made by Crossley Co. and set off, after proper statement of account is made are hereby ordered.

5. This order will not operate untill after 10 days from this day in order to enable Crossley Co. to apply to the High Court, during this period, if so they wish".

18.4.1939 Chief Execution Officer.

CIVIL APPEAL NO. 55/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Chief Justice (Trusted, C. J.), Greene, J. and Frumkin, J.

In the appeal of :—
Jacob Cohen — Appellant.

v.

Mizrahi Bank Ltd. — Respondent.

Debtor assigning as further security a mortgage executed in his favour — Assignee of mortgage by way of security agreeing to sale of property without assignor's consent — Test applicable in cases of pledgee interfering with security — Mejelle, Art. 98, 690, 741, 746.

If security can be handed back to pledgor undamaged, his liability to pay whole debt subsists.

Tovbin for Appellant .
Levitsky for Respondent.

Appeal from Judgment of District Court, Haifa, (CADC 43/39), dated 3.4.1939.

JUDGMENT.

This is an appeal in one of several actions brought by the Mizrahi Bank, the Respondents before us, against Jacob Cohen, the Appellant. The actions were upon promissory notes, and the same considerations apply to all of them.

It appears that the Defendant had a current account with the Plaintiffs which was over-drawn, and the Magistrate found that the promissory notes had "been given as security for the debt, and were not intended for discount", and he further found that —

> On 17.3.1937 the defendant Mr. Jacob Cohen, had assigned to the Plaintiff Bank as further security a mortgage for LP. 500.— executed in his favour by Messrs. Henigman and Epstein under a mortgage deed. The date of maturity of the said mortgage deed had to be 20.4.1938. The principal debtors under the said mortgage deed wanted to sell their property to Meonot Yalag Co. Ltd. The Defendant was sure that upon the transfer of the property

> either he or the Bank would be paid off the amount of mortgage due to him. The Plaintiff Bank agreed to the transfer of the property in question from the principal debtors Epstein and Henigman to the Meonot Yalag Co. Ltd. and left the mortgage in force without getting the consent of Mr. Yaacov Cohen in writing, but, in accordance with an agreement entered into between Messrs. Epstein and Henigman, Meonot Yalag Co. Ltd. and the Bank, the Bank had furthermore, taken from Messrs Epstein and Henigman a seperate guarantee in writing by which they remained liable to the Bank for the payment of LP. 500. The property in question was transferred at the Land Registry in the name of Meonot Yalag Co. Ltd. on 30.3.38, that is twenty days before the maturity of the mortgage transferred (assigned) by the defendant Yacob Cohen to the plaintiff."

We have seen a certified copy of the guarantee given by Henigman and Epstein, and it was "in favour of the Bank Mizrahi Ltd., and in favour of any person or institution who will come in its place."

The Magistrate, relying upon Articles 98, 690 and 746 of the Mejelle, accepted the contention that the transfer of this mortgage was equivalent to the LP. 500 having been paid by the Defendant, and "therefore the promissory notes which were given by way of security for the sum of LP. 500 are considered as paid", and gave judgment for the Defendant.

The District Court took the view that Article 741 of the Mejelle, which provides —

> "In the event of a pledgor destroying or damaging the pledge, he must make good such destruction or damage. Should a pledgee destroy or damage the pledge, a sum corresponding to the amount of such destruction or damage shall be deducted from the debt."

applied.

It is interesting to observe, as was pointed out in argument, that a similar principle is found in English law, see Trustee of Ellis & Co. v. Dixon-Johnson, 1925, A.C. 489.

It seems to me the test to be applied is, can the security be handed back "undamaged"; 'if not, to what extent has its value been depreciated by the pledgee.

In the present case the mortgage on the same property could have been retransferred, and the undertaking by the original debtors, Henigman and Epstein, could have been assigned to Cohen, I do not see, therefore, how the security was "damaged", and in my opinion the appeal should be dismissed.

Costs of this appeal to include LP. 15 fees for attending the hearing.

Delivered this 27th day of June 1939.

Chief Justice.

CRIMINAL APPEAL NO. 31/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :—

Attorney General — Appellant.

v.

1. Yacoub Khamra
2. Osman Khamra — Respondents

Prosecuting for trespass undertaken by private complainant — Accused electing trial before District Court — Court finding accused not guilty because of non-prosecution — Appeal by Attorney general posted by registered mail — Meaning of "lodge" — Trial Upon Information Ordinance, sec. 67 (ii).

Notice of appeal is not lodged in Court by being registered in Post office, nor when drawn from Post office by Court postman.

Hogan (*Crown Counsel*) for Appellant.
Anas Khamra for Respondents.

Appeal from judgment of District Court, Haifa, (92/38), dated 9.5.1939

JUDGMENT.

This is an appeal by the Attorney-General from a judgment given by the District Court of Haifa. The facts can be stated quite shortly.

The present Respondents were charged before the Chief Magistrate of Haifa with trespass. The Police had refused to prosecute, and the prosecution was undertaken by a private complainant. When charged before the Chief Magistrate the Respondent elected trial before the District Court, and the case was remitted accordingly.

On appearance before the District Court, Dr. Weinshall, who was appearing for the complainants, appeared to entertain some difficulty as to his capacity to prosecute before the District Court. Dr. Weinshall then asked that the Attorney-General should be summoned to appear. The District Court quite properly refused his application and refused an adjournment, and proceeded to give judgment: holding

that a private complainant had no power to prosecute before the District Court on a summary trial, and thereupon found the Respondents not guilty, in the absence of any prosecutor, ordering their discharge.

The Attorney-General then came into the case, and has appealed to this Court on the ground that the District Court should have tried the case, and not acquitted without hearing the case.

The appeal is an interesting one, but unfortunately we are afraid that we cannot entertain it. The Trial Upon Information Ordinance, Section 67 (ii), says this:

> "Notice of appeal by the Attorney-General shall be lodged in the District Court or in the Court of Appeal within two months from the date of the judgment."

Now judgment in this case was given by the District Court on the 9th of May, 1939. The last day for lodging the appeal was therefore the 9th of July, 1939. The notice of appeal itself bears the date of the 6th of July, and we are assured by Mr. Hogan that it was in fact drafted on that date, and realising that the time was running short, he gave instructions that it should be lodged forthwith. The Crown Counsel's clerk, with apparently peculiar ideas as to the word forthwith, though the office of the Crown Counsel is within one hundred metres of the Supreme Court, took this unhappy document to the General Post Office, and registered it there on the 7th of July. The delivery slip, which is signed by the person drawing the registered letter, bears the date of the 8th of July.

Now it all depends upon the meaning of the word "lodged." Stroud's Judicial Dictionary does not deal with the word "lodge", but merely with the words — "lodger, lodging, lodging houses", and other unhelpful ideas; but the concise Oxford Dictionary, amongst the many meanings which arise out of the word "lodge," gives this — "to place or deposite," and under this meaning there is the comment — "e.g. to deposit with a Court or an official, an information, a complaint, etc." The word "lodge" being used in the Trial Upon Information Ordinance, necessitates that the notice of appeal should be deposited in the District Court or in the Court of Appeal, and in our opinion the notice of appeal cannot be said to be deposited in the Court unless and until it is received by the officer who is responsible for dealing with such notices. A notice of appeal is not lodged in the Court by being registered in the Post Office, and it is not lodged in the Court when it is drawn from the Post Office by the Court postman.

It is most unfortunate, we all agree, that in these circumstances the appeal cannot be heard, and will have to be dismissed. We want, however, to make it quite clear, that the point raised in this appeal has not been decided. We make no comments upon it and it will remain open for discussion should it arise in the future.

Delivered this 27th day of July, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 76/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J. and Frumkin, J.

In the appeal of:—

1. Salim Mahmoud Suleiman Odeh
2. Fares Mahmoud Suleiman Odeh on behalf of heirs of their late father Mahmoud Suleiman Odeh

Appellants.

v.

Abdel Rahim Ibrahim Abdel Rahman Odeh on behalf of all the heirs of his late father Ibrahim Abdel Rahman Odeh.

Respondents.

Appltcation by advocate to withdraw from appeal — Security for costs of appeal without effecting mortgage — Civil Procedure Rules, Rules 315, 333.

1. Court of Appeal will refuse advocate's application to withdraw from appeal, if of opinion that its object is to force an adjourment of hearing.

2. Where appellant chooses to file a bond and execute a mortgage (instead of paying a deposit, which is easier and safer) appeal will be dismissed, if mortgage not effected before appeal heard.

Edit. Note: See C.A. 91/38 3 CtLR 263 and Edit. Note thereto.

Fuad Atalla for Appellants.
Walid Salah for Respondents.

Appeal from judgment of Land Court, Haifa, (15/30) dated 3.6.1939.

JUDGMENT.

In these two consolidated appeals an application was made by the advocate for the appellants to withdraw from these appeals. We declined to allow that application since its object was to force an adjournment of the hearing of these appeals and ordered a preliminary point raised by counsel for respondents to be heard. Under Rule 325 of the Civil Procedure Rules, 1938, it was argued, no valid security is filed, inasmuch as there is no identification of the lands to be mortgaged, nothing to show that the lands belong to the guarantor and are not attached or mortgaged and no mortgage has been effected, as it should have been done according to Form 31.

The appellants argued that the property is situated in Tulkarm Sub-District, the Land Registry at Tulkarm is closed and moved to Nathanya where they are afraid to go in these present circumstances and further asked us to use our discretion under Rule 333 and allow them to effect the mortgage before hearing the appeals.

In our opinion when a person says "I agree to mortgage" he must put that into effect. Three weeks have elapsed since the security was attested, and two weeks have gone by after the appeals were filed in this Court. I agree that to file a bond and execute a mortgage is a complicated affair because it entails the payment fo extra costs, fees and, in many cases, is not worth the trouble. This Court has advised on many occasions that payment of cash is easier and safer. The mortgage must be effected before the appeal is heard.

In our opinion the security filed is an improper security and there was no good cause shown to allow such defect to be remedied before the hearing of the appeals under Rule 333.

The appeals are therefore dismissed. Respondent in C.A. 76/39 and respondents Number one to three in Civil Appeal No. 77/39 will get their costs and LP.10 fees for attending the hearing which sum will cover both appeals, and respondents four and six in Civil Appeal 77/39 will get LP.1 each travelling expenses.

Delivered this 14th day of July, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 24/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Chief Justice (Trusted, C. J.), Copland, J. and Abdul Hadi, J.

In the appeal of :—

Nicolas Kiafas — Appellant.

v.

The Attorney General — Respondent.

Captain of ship seeking to assist persons to enter Palestine illegally — Case transferred by Attorney General to British Magistrate after accused remanded by Palestinian Magistrate — Offence of aiding and abetting illegal immigration — Magistrate ordering confiscation of ship involved in illegal immigration — Immigration Ordinance, sec. 5, 12 — Ports Ordinance — Defence Regulations Reg. 3 A.

1. A person charged remains so until convicted or acquitted, hence under Regulation 3 of Defence (Amendment) Regulations (No. 5) 1939 Attorney General may transfer a case to British Magistrate even if accused was remanded by Palestinian Magistrate.

2. To convict accused for aiding persons acting in contravention of sec. 5(1)(h) of Immigration Ordinance not necessary that those persons should be guilty of a completed offence under sec. 12(2)(a) of the Ordinance.

3. Magistrate has power and no discretion in matter of confiscation of ship under sec. 12 as amended by Immigration (Amendment) Ordinance, 1937.

Edit. Note :— As to 2 see Cr.A. 51/38 3 CtLR 265; Cr.A. 62/38 4 CtLR 47.

Weinshall and Z. Shapiro for Appellant.
Naim Toukan for Respondent.

Appeal from judgment of District Court, Haifa, (Misd. A. 17/39) dated 10.5.1939.

JUDGMENT.

This is an appeal from a decision of the District Court, Haifa, supporting a decision of the Magistrate whereby the Appellant, as cap-

tain of a ship, was convicted of offences under the Immigration Ordinance and the Ports Ordinance.

That the Appellant sought to assist a number of persons to enter Palestine illegally is clear from his own statement and is borne out by other evidence, but Mr. Weinshall, on his behalf, raises several technical points. Firstly he submit that the Attorney-General has no power under regulation 3 A., enacted in Regulation 3 of the Defence (Amendment) Regulations (No. 5) 1939, to transfer the case to Haifa, as the Appellant had been remanded by the Magistrate at Tel-Aviv, although the hearing had not begun there.

The Regulation speaks of a person charged, and in my view a person against whom a charge is made is a person charged, until he is convicted or acquitted. This point therefore fails.

Secondly, it is said that to convict the Appellant of the offence charged, i.e. aiding and abetting persons acting in contravention of Section 5(1)(h) of the Immigration Ordinance, those persons must have been guilty of the completed offence under Section 12(2) of the Ordinance. Section 12(2)(a) clearly refers to a foreigner contravening Section 5, although it may be that he is not guilty of an offence untill he is found. There was evidence that persons entered Palestine in contravention of Section 5, and I think the Appellant was rightly convicted.

The Magistrate ordered the confiscation of the ship involved, and it is argued that he had no power to do so. Section 12 as amended by the Immigration (Amendement) Ordinance, 1937, — provided the ship is of a certain tonnage — gives no discretion in the matter, and there is no reason why the Magistrate should not make the order.

As the District Court gave leave to appeal on a point of law, we direct that the sentences, which are concurrent, shall run from the date of the judgment of the District Court, that is, the 10th of May, 1939. Subject to that the appeal will be dismissed.

Delivered this 28th day of June, 1939.

Puisne Judge.

HIGH COURT NO. 45/39.

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

Before:—The Acting Chief Justice (Copland, J.) and Abdul Hadi, J.

In the application of:—

Abraham Jacob Basher — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem
2. Alter Rakman — Respondents.

Objection to Power of Attorney used to initiate proceedings of sale — Absence of Mukhtar's signature on certificate of auctioneer — Quotation in newspaper of wrong figure of valuation — Lack of diligence in applying to High Court — Summoning judgment debtor before actual making of final order of sale.

1. High Court will not consider arguments against validity of Power of Attorney on which sale proceedings were based, if petitioner allowed unreasonably long time to pass since proceedings were initiated.

2. Fact that certiftcate of auctioneer has not been signed by Mukhtar — immaterial.

3. After final order of sale — useless to argue that wrong figure of valuation was quoted in newspaper.

4. Chief Execution Officer under no obligation to summon judgment debtor before actual making of final order for sale.

Edit. Note:—As to 1 & 3 see: H.C. 16/39 5 CtLR 153 and Edit. Note thereto.

As to 2 see: Execution Law, Art. 104.

Eisenberg for Petitioner.

Ex parte.

Application for an order to issue directed to the First Respondent calling upon him to show cause why the proceedings in Jerusalem Execution File No. 74/38 should not be stayed, or alternatively, to set aside the order for final sale made in that file on 13th July, 1939.

ORDER.

This is an application for an order nisi directed to the Chief Execution Officer Jerusalem, to show cause why proceedings in a certain Execution file should not be stayed, or alternatively why the Chief Execution Officer's order of final sale should not be set aside.

It is quite possible that if this application had been made earlier, we should have listened with more attention to the arguments which had been addressed to us and quite possibly we might have thought that they were valid arguments and we would have granted the order

nisi. But it is no good to come to us and complain to us that the power of attorney on which these sale proceedings were based which is dated July, 1938, and was used to initiate these proceedings in September 1938, is invalid, when it is remembered that we are at the moment at the end of August, 1939.

Further points with regard to the certificate of the auctioneer not having been signed by the Mukhtar, are really immaterial, and though the argument taken that the wrong figure giving the valuation was accidentally quoted in the "Haboker' might quite possibly have been a good one, it is useless after a final order of sale has been made to come to raise objections of this nature.

The last point taken by the petitioner was that he was not summoned to appear before the Chief Execution Officer before the actual making of the final order for sale. We know of no authority, and more than the Chief Execution Officer did, why this should be done. The application for the Order Nisi is therefore refused.

Given this 29th day of August, 1939.

Acting Chief Justice.

HIGH COURT NO. 41/39.

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

Before:—The Acting Chief Justice (Copland, J.) and Abdul Hadi, J.

In the application of:—

Zakie Mizrahi de Balid — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem
2. Itzhack Horwitz — Respondents.

Order of sale of mortgaged property — Question of service upon Judgment debtor of final order of sale — Non-interference of High Court with Chief Execution Officer's discretion.

1. Final order of sale need not be served personally on judgment-debtor, if he was properly served with application for sale and then left the country and further notices have been served at his address.

2. Where Chief Execution Officer has ordered sale of mortgage seeing that it fell due many months ago and no security whatsoever, if an extension granted, that debtor will then pay the debt, High Court will not interfere nor grant postponement of sale.

Marein for Petitioner.

Ex Parte.

Application for an order to issue directed to the first Respondent calling upon him to show cause why his order in Jerusalem Execution File No. D.C. 165/38 dated 24.7.39 should not be set aside and that he should direct the second respondent to effect proper service on the husband of the petitioner of the notice under Article 107 of the Execution Law by applying Rule 38 or Rule 49 of the Civil Procedure Rules, 1938, or alternatively that the first respondent be directed to exercise his discretion properly in accordance with the provisions of the Land Transfer Ordinance and under Article 14(1)(b) of the Land Transfer (Amendment) Ordinance, 1938, or, alternatively that this Court order the postponement of the Order of sale for three months.

ORDER.

This is one of the usual applications by mortgagors when the payment of the mortgage debt has fallen due, and I am afraid it will meet with the fate of the majority of such applications. The mortgage debt fell due some ten months ago; the mortgagors were duly served with the notice required. The money has not been repaid and the President of the District Court has made a final order of sale. It is argued that this final order must be served personally on the judgment-debtor. The judgment-debtor, apparently in May 1st, proceeded on a long trip Central America. It is said that that final notice must be served upon him and with that we do not agree. It is not disputed that he had been properly served with the application for sale and if he then wishes to go away and further notices have been served at his address, that is proper service; there is no necessity for the judgment-creditor to follow him all over the world.

It is further argued that the Chief Execution Officer has not exercised his discretion properly, the ground apparently being that he did not exercise it in petitioner's favour, and therefore it must be wrong. This argument equally fails. The Chief Execution Officer granted the order for sale of the mortgage which fell due ten months ago and the mortgagor had ample time to go to Centrale America and arrange affairs if he wished during all that time and there is no security whatever, if an extension is granted, that the debtor will pay the debt in three months' time any more than it has been paid now. We think the Chief Execution Officer exercised his discretion properly and well and no fault can be found with it. The application for an Order Nisi must therefore be refused.

Given this 14th day of August, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 78/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

General Palestine Bank, Ltd. — Appellant.

v.

1. Moshe Salomon of Kaunas, Lithuania
2. Hat Factory Bruckmann
3. Willy Bruckmann
4. Sami Soon — Respondents.

Magistrate's Court judgment declaring that Plaintiff's claim was privileged — Third party opposition by a creditor of defendant against part of judgment declaring Plaintiff's claim to be privileged — Question of priority of claim for rent based on contract of lease stamped after a long lapse of time — Civil Procedure Code, Art. 161 — Magistrate's Law, Art. 53 — Execution Law, Art. 127 — Stamp Duty Ordinance, sec. 17.

1. Where Magistrate in his judgment for A against B decided that A's claim was privileged and C, another creditor of B, denies such privilege thus claiming equal shares with A, this is sufficient for C to enter a third party opposition.

2. A document stamped by Stamp Commissioners a long time after its execution cannot be an authenticated document within scope of art. 127 of Execution Law.

Dickstein for Appellant.

Zakheim for Respondent No. 1.

Appeal from judgment of District Court, sitting at Tel-Aviv (in its appellate capacity) dated 27.3.1939.

JUDGMENT.

This appeal, in spite of the lenghty arguments addressed to us, raises the simplest of points. The Magistrate gave judgment in favour of the Respondent, and in his judgment said that the debts were privileged. The present Appellant, being also a creditor of the debtors of the Respondent, entered a third party opposition before the Magistrate, not disputing that the debts were owing, but claiming that there was no privilege in these debts. The Magistrate held there was privilege, and on appeal to the District Court that Court held that the appeal raised purely questions of fact, but nevertheless gave leave to appeal to this Court on points of law.

The Respondent has argued, on the hearing of this appeal, that the Appellant, as third party opposer, had no standing in this action, inasmuch as he had no right to enforce against either of the parties

to the action before the Magistrate. We do not agree. The right which the Appellant had to enforce was the right of claiming equal shares with the other debtors of the Respondent, and we think this sufficiently complies with Article 161 of the Civil Procedure Code and Article 53 of the Magistrates' Law.

The main ground raised by the appeal, and in the view which we take of this case, the only one we need take into consideration, is the stamping of the lease which was the basis of the action before the Magistrate.

It was admitted by the Respondent that the lease was signed on the 10th January, 1936, — the term of the lease is from the 24th March, 1936, to the 24th Mach, 1937. The lease was not registered with the Municipality, but was presented to the Commissioners of Stamp Duty on the 3rd February, 1937. Section 17 of the Stamp Duty Ordinance provides that this lease must be stamped within thirty days. This lease was not stamped for thirteen months after its execution. Whatever may be the effect of stamping by the Commissioners of Stamp Duty with regard to the authentication of a document, we are of opinion that a document stamped out of time by over one year cannot possibly be an authenticated document such as is required by Article 127 of the Law of Execution.

That being so, we think that the Magistrate and the District Court were both wrong. The judgments of the Courts below must therefore be set aside, and we declare that the debt, the subject-matter of this action owing to the Respondent, is not a privileged debt.

The Appellant will have all costs here and below to include LP. 15 fee for attending the hearing in this Court.

Delivered this 13th day of September, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 90/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:—The Acting Chief Justice (Copland, J.) and Abdul Hadi, J.

In the appeal of:—

Khalil Malas — Appellant.

v.

The Government of Palestine — Respondent.

District Court refusing to refer dispute to arbitration in accordance with special clause of agreement between parties — When must party apply for proceedings being stayed and dispute re-

ferred to arbitration. — Meaning of "after appearance" in sec. 5 of Arbitration Ordinance — Non-interference of High Court in matters of adjournment in trial Court — [English] Rules of the Supreme Court, Order 14.

1. Party wishing proceedings in Court to be stayed and dispute referred to arbitration in accordance with arbitration clause of agreement must not take any step in litigation but must apply to Court as early as possible after entering appearance; if he filed defence or applied for leave to defend, though mentioning arbitration clause in his defence, this is a step in litigation and stay will be refused.

2. Matters of adjournment — mainly matters for discretion of trial Court, appellate Court will always be reluctant to interfere.

Moghannam for Appellant.

Hogan (Crown Counsel) for Respondent.

Appeal from decree and order of District Court, Haifa, dated 22.6.1939.

JUDGMENT.

The first point in this appeal is whether in an interlocutory judgment of the 26th of June, 1939, the District Court were wrong in refusing to refer a dispute to arbitration in accordance with Clause 6 of the lease between the parties.

The law on this subject is very strict, and the reason for it is this, that where there is an agreement to refer to arbitration parties are not necessarily compelled to go to arbitration unless one of them so wishes, but that if they do so wish, they must draw the attention of the Court to this provision and make the application to stay proceedings at the earliest possible moment, and they must not take any other step in the litigation, since this may involve the other side in unnecessary expenses. To apply for leave to defend and file a defence in which such an application is made is useless. According to English law, under Order 14, Rules of the Supreme Court and the case reported in Russell, 15th Edition, p. 93, in a case under the summary procedure where a defendant applied for leave to defend, and asked for arbitration, the stay was refused on the ground that the application for leave to defend was a step in litigation.

Section 5 of the Arbitration Ordinance, Cap. 6, makes the point clear. After appearance and, "after appearance", with regard to this particular case, must mean after the entering of an appearance, because the Civil Procedure Rules were in force when appearance was entered, the next thing which the present Appellant should have done was to apply straight away for a stay of proceedings in view of the arbitration

clause. This he did not do, but he filed a defence. It is true that in that defence he mentions that there was an arbitration clause. In our opinion this is not enough, and we think therefore that the interlocutory judgment of the District Court war right.

With regard to the final judgment of the District Court, we agree entirely with what it says, and we do not think that we can usefully add much to it.

Matters of adjournment are matters mainly for the discretion of the trial Court — the appellate Court will always be reluctant to interfere

The argument of the Appellant with regard to the property (materials) placed on the ground by him, and his reference to Part III, clause 2 of the lease, I am afraid I do not understand. Clause 16 of Part II is very clear, and I not think I need say any more.

The appeal is dismissed with costs to include LP 15 hearing fees.

Delivered this 13th day of September, 1939.

Acting Chief Justice.

CRIMINAL APPEAL NO. 33/39. 34/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Acting Chief Justice (Copland, J.), Curry Ag. J. and Abdul Hadi, J.

In the appeal of:—

Attorney General — Appellant.

v.

Markus Baden — Respondent.

Charge of stealing by accused of proceeds of property entrusted to him for sale — Evidence element in offence of stealing by agent etc. of proceeds of entrusted property.

Not necessary in a charge under sec. 276 of Criminal Code Ordinance (stealing by agents etc.) that accused should have handed over the actual monies he received merely essential that their equivalent should be handed over.

Crown Counsel (*Hogan*) for Appellant.

King for Respondent.

Appeal from judgment of District Court, Jerusalem, (78/39) dated 12.7.1939.

JUDGMENT.

These are two appeals by the Attorney-General against acquittals of the respondent by the District Court of Jerusalem. In the first case the respondent was charged in a first count with stealing a chair, contrary to Section 276 (b) of the Criminal Code Ordinance, 1936.

He was acquitted after hearing the prosecution evidence and the defence, and no appeal has been brought against that acquittal.

In the second count he was charged with stealing the proceeds of certain other articles which had been entrusted to him for sale, contrary to Section 276 (c) of the Criminal Code. He was acquitted on that count also, the Court finding that "there was no evidence of an agreement between the parties that the accused, (that is, the respondent), would hand over the actual monies that he received on account of the sale on commission. It follows therefore that the accused cannot be charged with stealing that money."

In the second case the respondent was charged on two counts, the charges in each being laid under Section 276 (c) and the Court, basing itself on the judgment in the first case, discharged the accused on the ground that the information did not disclose any offence.

Now for their opinions, the District Court unfortunately gave no authority. On the appeal, Mr. Hogan has quoted to us from Russell on Crimes and gave the case, In re Bellencontre (1891) 2 Q.B., p. 122, where Mr. Justice Wills, at page 142, held that it was not necessary in a charge under the particular section of the Larcency Act, which in all essentials corresponds almost exactly with section 276 of the Criminal Code, that the actual monies should be handed over but that it was merely essential that the equivalent of the monies received should be handed over.

On this authority it seems to us, that the District Court has misdirected itself in law and both these appeals will have to be allowed. With regard to the first appeal the District Court must hear the defence. It may quite well be, of course, that the respondent will be able to discharge the onus placed on him by the prosecution evidence and be able to prove that there was no fraudulent intention, but we express no opinion.

With regard to the second case, the witnesses for the prosecution and, if necessary, those for the defence, must be heard. We would only say one thing, and we again express no definite opinion because the point has not been taken before us, and that is that it should be considered whether charges under Section 276 (c) can really stand, and it may quite possibly be that the correct section is 276 (b). As I have said, these two appeals must be allowed, the judgments quashed and the two cases must be remitted to be dealt with by the District Court as laid down in this judgment.

Delivered this 14th day of August, 1939.

Acting Chief Justice.

HIGH COURT CASE NO. 39/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of:—

Joseph Weinberg — Petitioner.

v.

1. The District Commissioner, Jerusalem District
2. The Commissioner of Lands
3. Chairman and Members of the First Urban Property Tax Appeal Commission
4. Na'im Abdul Hadi — Respondents.

Questioning qualifications of members to a Committee appointed by High Commissioner — Order of appointment by High Commissioner certified under hand of Chief Secretary — Appeals against assessment of Urban Property Tax Asesement Committee by landlord and by Inspector of Valuation — Party to appeal remaining in same room as tribunal — Urban Property Tax Ordinance, sec 10 — Interpretation Ordinance, sec. 10 — Palestine-Order-in-Council — Courts Ordinance, sec. 6.

1. There must be a statutory duty on public officer before High Court can direct to him an order in regard to it.

2. Qualifications of persons appointed by High Commissioner to sit on Assessment Committees under Urban Property Tax Ordinance — not a matter for High Court to determine.

3. Appointment of members of Assessment Committee need not be by warrant under hand and seal of High Commissioner; order of appointment by High Commissioner duly signified under hand of Chief Secretary — sufficient.

4. Party to appeal cannot remain in same room as tribunal when tribunal deliberating on its judgment, while opponent excluded; if he did remain, no matter whether or not be took any part in deliberations, judgment of tribunal cannot stand.

5. Where an official body, of a semi-judicial character, deals with a case, it should make every effort to ensure that at any rate proceedings are conducted in a judicial spirit.

6. In a petition to High Court regarding revision by Appeal Commission of assessment or urban property tax — not

necessary to join Inspector of Valuation (who was a party to appeal).

Gluckmann for Petitioner.

Hogan (*Crown Counsel*) for Respondents Nos. 1, 2 and 4.

Respondent No. 3: absent,, not served.

JUDGMENT.

This is a return to an order nisi granted to the petitioner, one Joseph Weinberg, a reluctant taxpayer of Jerusalem, against the District Commissioner, Jerusalem District, the Commissioner of Lands, The Chairman and Members of the First Urban Property Tax Commission, and one, Nai'm Eff. Abdul Hadi, Inspector of Valuation.

The petitioner asks four things — as against the 1st Respondent:

(a) why a Revenue Certificate addressed to the Land Registry on the proper form to the effect that the petitioner has duly paid urban property tax on his property should not be given to the petitioner against payment by him of the sum of LP.14.600 mils.

as against all four Respondents:

(b) Declaring the assessment of the petitioner's property made by the sixth Urban Property Tax Assessment Committee for the Jerusalem Urban Area in the year 1939—1940 assesment to be null and void, and setting aside the said assessment; or

(c) *alternatively to* (*b*)
Declaring the decision of and the proceedings before the 3rd Respondent in the appeal brought before it by the Petitioner to be null and void, and setting aside the said decision and proceedings; and

(d) Granting alternative relief as to this Court may seem just and proper.

The first point taken by the Crown Counsel, who is appearing on behalf of the 1st, 2nd and 4th Respondents, is that there must be a statutory obligation on the Respondents towards the Petitioner, and that here there is no statutory obligation on the District Commissioner towards the Petitioner. It is true that there must be such a statutory duty, but we think that the statutory duty is this, that the District Commissioner should only collect taxes or rates lawfully imposed, and that if such a rate or valuation has been made unlawfully, and the District Commissioner acts upon it, by doing so he does not dis-

charge his statutory duty.

The next point to be dealt with is the constitution of the Assessment Committee. Section 10 of the Urban Property Tax Ordinance allows the High Commissioner to appoint such assessment committees in any urban area as he may think fit, and provides that each committee shall consist of two official members, one of whom will be a revenue officer, and two non-official members.

It is said here that the official members appointed to this Assessment Committee are not properly qualified, but the fact remains that these two gentlemen were appointed by the person who has the right and power to appoint officials — the High Commissioner —and we have an affidavit that one of them so appointed was an officer of the Revenue Section of the District Commissioner's office. There is nothing in the law which says that temporary officials cannot be appointed, and when appointed cannot sit on assessment committees. The qualifications of those persons appointed are not a matter for this Court to determine. The High Commissioner must be presumed to appoint fit and proper persons. We think, therefore, that the constitution of the Assessment Committee was a proper one.

It is further said that the members were not properly appointed inasmuch as they were not appointed by the High Commissioner by warrant under his hand. They were appointed by an order of the High Commissioner, duly signified under the hand of the Chief Secretary, in accordance with Section 10 of the Interpretation Ordinance. There is nothing in the Urban Property Tax Ordinance which says that the members of assessment committees should be appointed by warrant under the hand and seal of the High Commissioner. In this case the High Commissioner made an order of appointment, and that order was properly certified under the hand of the Chief Secretary.

This same point was taken with regard to the members of the Appeal Commission, and the same reasoning therefore applies in both cases.

It has been further said that the High Commissioner has no power to appoint more than one appeal commission. What was actually done, I understand, was to make four alternative constitutions for an appeal commission, inasmuch as the two members were the same in each case, but the third member was varied. The effect of this is that there is only one Appeal Commission, but the third unofficial member was capable of being changed. There is a rota from which members can be chosen, and whatever they call these first or second appeal commissions, there is in fact only one appeal commission.

With regard to the proceedings in the assessment of this property, the previous yearly assessment was LP. 146. At the new valuation the property was assessed by the Assessment Committee at the sum of LP. 400, but on objection being made, the Assessment Committee reduced its assessment to LP. 200. Both the Petitioner and the 4th Respondent, who was, as I have said, the Inspector of Valuation, appeared before the Urban Property Tax Appeal Commission, which proceeded to hear the parties, and the decision of the Appeal Commission was to increase the assessment to LP. 260. Objection is taken to the decision of the Appeal Commission on this ground — that the Inspector of Valuation, who was a party to the appeal, being Respondent in regard to the Petitioner's application, and an Appellant with regard to the increase of the assessment valuation, took part in the procedings in respect of the decision of the Commission, inasmuch as, when the arguments had been heard, the Petitioner was requested to leave the room, but the 4th Respondent remained in the room and took part in the deliberations of the Appeal Commission.

Mr. Hogan, on behalf of the 4th Respondent, has admitted that the 4th Respondent did in fact remain in the room, but that he is unable to say what part, if any, this person took in the deliberations.

It has been said on many occasions, and I suppose it will continue to be said on many more occasions, that it is not only important that justice should be done, but that justice should manifestly seem to be done, and it is obvious that a party to an appeal cannot remain in the same room as the tribunal, when the tribunal is deliberating on its judgment, — when his opponent is excluded from the tribunal. For that proposition there is a very large number of authorities, all of which are on those lines. It having been admitted, on the part of the 4th Respondent, that he was present, it is quite immaterial whether or not he took any part in these deliberations.

For example, Lord Hewart C. J., in Rex v. Assessment Committee (N.E. Surrey) ex parte Woolworth, 1933, I K.B. 776, at page 785 said —

> "I do not question any statement contained in the affidavit of Mr. Lake (a country valuation officer) but it is undoubted that he was present while the assessment committee were considering their decision. The mere fact that he was so present, though, no doubt, only for the purpose of obtaining information which might be of use to him in his general capacity as county valuation officer, is enough to invalidate these proceedings of the Assessment Committee."

In Middlesex County Valuation v. West Middlesex Assessment Area Assessment Committee, 1937, I All E.R. 403, Lord Wright, M.R., said, at p. 410:—

> "The decision which the assessment committee is arriving at is the decision of the committee itself. The county valuation committee has nothing whatever to do with the formulation of the decision, which is purely the function of the assessment committee itself as a judicial body, and it would be most improper, on general principles of law, that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision."

Romer, L.J., adds, at page 412:—

> "The presence of the valuation officer with the committee on such an occasion would infringe one of the fundamental principles of law relating to the administration of justice in this country."

and in R. v. Essex J.J., ex parte Perkins, 1927, 2 K.B. 475: Swift applies to test —

> "Might a reasonable man suppose that there had been an interference with the course of justice?"

We would like to call the attention of the members of this tribunal who have not been able to appear before us, and in fact of all similar tribunals, to the impropriety of this procedure. We are quite prepared to believe that the 4th Respondent being there may have been an oversight. It may possibly be that he took no part whatsoever in the deliberations of the Appeal Commission, and that he never opened his mouth. That, however, is immaterial. The point is, that he was present in the room, and the Petitioner was excluded whilst the Commission was deliberating on the decision of the appeal, and it is quite obvious that the decision of the Appeal Commssion cannot in any circumstances stand.

We have gone into the facts of this case in considerable detail, because it strikes us as an important one, and it is very important that where an official body, of a semi-judicial character, is dealing with an appeal, it should make every effort to ensure that those proceedings are carried out in a proper manner, notwithstanding that the members themselves are not judges and not bound by any specific procedure, that at any rate the proceedings are conducted in a judicial spirit.

As we have said, it may be entirely without conscious intention or knowledge on the part of the Appeal Commission, but the damage was done the moment the 4th Respondent remained in the room during the deliberations.

With regard to the order which we should make on this petition, we have had a certain amount of argument as to the alleged conflict between the provisions of the Order-in-Council and those of the Courts Ordinance. Section 6 of that Ordinance, sub-section (b) gives the High Court exclusive jurisdiction in regard to orders directed to public officers or public bodies with regard to the performance of their public duties, requiring them to do or refrain from doing certain acts. We think that the terms of that section are sufficiently wide to enable us to make an order, the exact terms of which I will state later, as to the 1st Respondent, the District Commissioner. We do not think that it was necessary to join the Commissioner of Lands, nor was it necessary to join the 4th Respondent. In our view, the only person who can act in regard to this assessment valuation is the District Commissioner.

We do not, however, think that we can make the declarations in the manner asked for by the Petitioner in this matter. Our jurisdiction is limited to orders directed to public officers, to do or refrain from doing certain things. The gist, however, of the application is, that the 1st Respondent should be restrained from collecting any urban property taxes on an assessment valuation greater than LP. 146, which was the previous valuation. The Assessment Committee, however, have raised that amount to LP. 200, and by the Urban Property Tax Ordinance, Section 23, that assessment stands even when an appeal against it is pendig.

We think, therefore, that the proper order in this case would be that the District Commissioner, the 1st Respondent ,refrain from collecting any urban property tax in excess of the amount properly chargeable on the sum of LP. 200, pending the proper determination of the appeal against that assessment, and to that extent the order nisi is made absolute. It is discharged with regard to the other matters and persons.

We have not dealt with the other points which were raised, as for example that the Appeal Commission should have stated a case when called on to do so, since on the view that we take of the case it is not necessary to do so.

In the circumstances, we think that the Petitioner should have the sum of LP. 4 total costs, as against the 1st Respondent, but no advocate's fees and no other costs to either side.

Delivered this 27th day of July, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 89/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of: —

1. Ali Ismail Najjar
2. Mahmoud Ismail Najjar — Appellants.

v.

1. Moshe Valero
2. Gavriel Valero
3. Nissim Valero
4. Simha and Rachel Valero on behalf of the estate of Jacob Valero — First Respondents.

and

1. Yussef Mohammad Abdallah on behalf of the Estate of Ni'meh Awad
2. Aysheh Awad Badir, on behalf of the Estate of Awad Badir
3. Nuzha Hussein Awad Badir, on behalf of the Estate of Hussein Awad Badir
4. Mohammad Ismail Najar
5. Mustafa Ismail Najjar — Second Respondents.

Failure to cite in notice of appeal one of Defendants in trial Court — Insufficiency of appeal fees and discretion of Court of appeal to grant extension to complete — Automatic failure of cross-appeal — Civil Procedure Rules, Rule 313, 328, 333.

1. Failure without good cause shown, to cite as Respondent in notice of appeal one of Defendants in trial Court may be fatal to hearing of appeal.

2. If notice of appeal filed and some prescribed fees paid, fact that notice defective and amount of fees insufficient does not oust discretion of Court of Appeal under Rule 333 of Civil Procedure Rules (regarding grant of extension of time to fulfil condition precedent to hearing of appeal).

3. Where appeal dismissed because bad in form, cross-appeal automatically fails.

Elia for Appellants.

S. Mizrahi and *Olshan* for Respondents No. I.

Respondents No. II: 1 and 4 in person,

2, 3 and 5 not present — not served.

Appeal from judgment of Land Court, Jerusalem, dated 19.6.1939.

JUDGMENT.

In this case the counsel for the Respondents took a preliminary objection that in view of Rule 313 of the Civil Procedure Rules the notice of appeal was not in proper form. The notice of appeal neglected to cite one of the Defendants in the Court below, and in addition to that three other Defendants in the original action had not been served and were not in fact present in Court.

We consider that Rule 333 of the Civil Procedure Rules is however applicable to this case as we think that if a notice of appeal has been filed and if some prescribed fees have been paid, the fact that the notice is defective and the amount of the fees is insufficient does not oust the discretion of the Court under the above Rule. The question therefore for us to decide is whether good cause has been shown for the failure to comply with Rule 313 and Rule 328.

After having heard the explanation of counsel for the Appellants we are reluctantly of opinion that no good cause has been shown. Of the three people who have failed to be served, one of them is abroad in England. No steps were taken by the Appellants or their counsel to apply to the Court for substituted service. We are therefore of opinion that this appeal should be dismissed.

The appeal is therefore dismissed with costs and LP. 10 fee for attending the hearing for the First Respondents.

The appeal having been dismissed, the cross-appeal automatically fails.

Delivered this 21st day of September, 1939.

British Puisne Judge.

HIGH COURT NO. 46/39.

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

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

In the application of:—

Marco Harari — Petitioner.

v.

1. President, District Court Jaffa, in his capacity as Execution Officer.
2. Marco Geffen — Respondents.

Chief Execution Officer granting further long extension to pay mortgage debt — Non-interference of High Court with discretion exercised by Chief Execution Officer — Discretionary decision based on wrong assumption of fact.

While High Court will not interfere with discretion judicially exercised by Chief Execution Officer, it will so do, where latter acted, even if not exclusively, upon a wrong assumption of fact.

Gorodissky for Petitioner.
Olshan for second Respondent.

ORDER.

This is an application to set aside an order made by the Chief Execution Officer, Jaffa, allowing a further period of one year to a mortgagor within which to pay the debt and interest secured by the mortgage. The Chief Execution Officer, in exercising his discretion to grant this further extension, has stated the reasons which animated his decision. Among those reasons, and the first one stated by him, is the statement that the mortgagee has been lucky enough to purchase a security of the face value of LP.16,000 bearing interest, for LP.4000, that is one quarter of its real value. Later on the Chief Execution Officer again refers to the fact, that the mortgagee had purchased a security of the face value of LP.16,000 for a quarter of its value.

Now, in matters of discretion, this Court has always acted on certain principles, and we are not inclined to interfere with the discretion judicially exercised by a Chief Execution Officer, unless it can be shown either that he has taken into consideration things which he

should not have taken into consideration, or he has not taken into consideration things which he should have so taken, or that he has acted upon a wrong assumption of fact.

Now, it seems to us that the statement that the mortgagee has purchased the security of LP.16,000, for one quarter of this value, is not a statement justified by facts. It is clear from consideration of the mortgage deed, that the mortgagee advanced to a third person the sum of LP.4,000 and took from that third person this mortgage for LP.16,000 as security, but the mortgagee is not entitled to retain out of this security more than LP.4,000 advanced by him, together with interest and costs. It seems to us, therefore, that the Chief Execution Officer has taken into consideration something which he regarded as a fact, but which is not a fact.

In these circumstances, we think that the best course would be to allow the order asked for, to make the rule absolute, and return the case to the Chief Execution Officer for him to reconsider his decision, neglecting this ground, on which, amongst other grounds, he based his original order. The petitioner will have his costs to include LP.10 fee for attending the hearing.

Delivered this 26th day of September, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 81/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Munira bint Haj Mustafa Barkouni — Appellant.

v.

Said Haj Rashid Barkouni — Respondent.

Defendant entering appearance and filing defence in Land Court — Striking out of case by Registrar on account of Plaintiff failing to prosecute — Re-institution of action without serving afresh documents upon Defendant — Judgment against Defendant by default — Application to set aside default judgment — Dismissal of application upon disagreement of two judges of Land Court.

Where after Defendant had entered appearance and filed defence case was struck out by Registrar and re-instituted by Plain-

tiff praying for its being renewed and previous file with documents attached to it, Court should not proceed without giving Defendant opportunity to defend. Default judgment will not stand even if upon renewal of action Defendant entered an appearance and failed to file a fresh defence.

Parties appeared in person.

Appeal from judgment of Land Court, Haifa, dated 27.5.1939.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Haifa, in which the two learned Judges composing the Court disagreed and the application before them was therefore dismissed. That application was to set aside a judgment issued against the present Appellant in default.

We have considered the judgments of the two learned Judges, and we find ourselves entirely in agreement with the opinion expressed by Judge Baradey, which we think is the correct view to take of the case. While it is desirable that rules of procedure should be observed, yet it is equally desirable that the Appellant should be given an opportunity to defend the action brought against her, and we agree with Judge Baradey that she has shown sufficient cause to set aside the judgment in default.

The appeal must be allowed, the judgment in default entered in the Land Court set aside, and the cause remitted for retrial. Costs to await result of the retrial. The Appellant will have LP.2, the expenses of the abortive hearing in this Court of the 19th September, 1939, in any event.

Acting Chief Justice.

Motion 59/39.

IN THE DISTRICT COURT, HAIFA.

JUDGMENT.

Baradey, J.:

This is an application to set aside a judgment issued against applicant by default on 8.2.39. To decide this application I find it necessary to deal with the proceedings right from the beginning thereof.

Respondent had brought an action against Applicant and another lady (see land action No. 11 of 1938) in which applicant had entered an appearance and filed a defence within the periods laid down, but the action had been struck out by order of the Registrar on 30th July, 1938, the Plaintiff (Applicant) having failed to prosecute his action.

The Respondent, in re-instituting his case (under No. 33 of 1938) filed a statement of claim in which he made the following statement :—

"I hereby renew my previous action and pray that the said action, together with annexures, be attached to the present action."

Respondent paid half fees due on the subsequent proceeding, it being a restored action and not a fresh one under Rule 13 of the Court Fees Rules, 1935. Respondent did not withdraw the documents from the previous action (No. 11/38) and served them on the Applicant afresh, but merely asked that the previously filed documents be annexed to the restored action, closing his statement of claim with the prayer that Applicant be summoned for trial. Although Applicant on being served with a copy of the fresh statement of claim and summons to enter appearance, under Rule 18 of the Civil Procedure Rules, 1938, entered an appearance to the action, yet she did not file her defence within the time limited for the purpose, nor was she summoned to appear at the trial in accordance with the Respondent's prayer. The case was then brought to Court for judgment under Rule 134(a) of the Civil Procedure Rules, on Respondent's application and the Court entered judgment by default against Applicant on 8.2.39 and it is this judgment that Applicant is now seeking to set aside under Rule 213 of the said Rules.

Applicant was undoubtedly negligent in not having filed her defence within the time fixed therefor. However, I am of the opinion that she had an excuse for not doing so, for the phraseology used by Respondent in his Statement of Claim viz. :

"(1) I hereby renew my previous action and pray that the said action be annexed to this action, together with the documents filed therewith, and,

(2) Respondent's prayer that applicant be summoned for trial, and the fact for Respondent's failing to serve Applicant with copies of the documents he had filed in the previous action, tended to mislead Applicant into believing that there was no necessity for her to file afresh defence, she being under the impression that the defence she filed in the previous action would be placed in the file of the renewed action and that the action would proceed from the point it had reached in the previous proceedings (this having been the procedure before the present Civil Procedure Rules came into force).

I am therefore of the opinion that there is justification for the belief which Applicant entertained and that Applicant has thereby shown sufficient cause wherefor the judgment entered against her by default should be set aside, it being in the interests of Justice that Applicant should be given an opportunity to defend an action the object of

which is to obtain rescission of Applicant's registered title property which she alleges was bought by her in good faith and which was accordingly registered in her name. For these reasons I am of the opinion that the application should be granted and the default judgment be set aside.

CIVIL APPEAL NO. 88/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:—The Acting Chief Justice (Copland, J.) and Abdul Hadi, J.

In the appeal of:—

1. Ali El Mustakim
2. Mohamed El Mustakim — Appellants.

v.

1. Palestine Ashrai Bank Ltd.
2. Rose T. Wolfe — Respondents.

Claim in District Court of money together with interest due on a mortgage transferred to claimant — Transferee of mortgage applying by motion for appointment of a receiver of the mortgaged property — Who may make an order for appointment of a receiver? — Scope of sec. 20 of Courts Ordinance—Rejecting application for evidence to be heard—Opposition by mortgagor to appointment of receiver — Object of appointment of a receiver and discretion of Court or judge to grant or not to grant the remedy.

1. Rule 297 of Civil Procedure Rules (regarding appointment of receiver) — not ultra vires or inconsistent with sec. 11 of Courts Ordinance (re composition of Courts) nor in excess of rule-making power of Chief Justice for regulating pleadings, practice and procedure in various Courts, hearing of motions being "a matter of practice and procedure".

2. (a) Where an action is instituted asking for appointment of a receiver the order of appointment must be made by a Court composed of two judges, or a President and one judge.

(b) In an already existing action a single judge of District Court has power on application by way of motion, where it appears to be just and equitable, to appoint a receiver.

3. A receiver may be normally appointed (1) to enable persons possessing rights over property to obtain the benefit of those rights, (2) to preserve property from some danger which threatens it, and (3) generally where appointment

necessary to enable applicant to obtain that to which he is entitled.

4. Appointment of a receiver — an equitable remedy, hence Court or judge has an entire discretion to grant or not to grant it. This discretion must be exercised with caution and governed by a view of all the relevant circumstances.

5. Where judge of opinion that certain allegation irrelevant, he is right in rejecting application for evidence to be head in proof of it.

Cattan for First Appellant.
Sassoon for Second Appellant.
Ph. Joseph for first Respondent.

JUDGMENT.

This is the considered judgment of the Court. The following are the relevant facts.

The first Respondent in this case brought an action on the 24th April, 1939, in the District Court sitting at Tel-Aviv, against the Appellants, claiming from them the sum of LP.21,550, together with interest thereon, alleged to be due on a mortgage given by the Appellants in favour of one, Mrs. Rose Wolf, and transferred by her to the first Respondents. A land action had previously been instituted in the Jaffa Land Court by the Appellants against the first Respondents, claiming that the transfer of the mortgage was defective, that the mortgage moneys had been repaid, and various other defences. This action is still pending.

In the meantime the first Respondents applied by motion on the 19th May, 1939, in the District Court for the appointment of a receiver of the mortgaged properties. The motion was heard by one of the judges of that Court, Judge Korngrun, who on the 9th July, 1939, made on order of appointment of a receiver as prayed on the ground that the Appellants were denying the existence of the mortgage, that they had failed to pay the interest, and had failed to prove that they had insured the mortgaged properties against fire and riots, in accordance with the terms of the mortgage deed, and that there was danger that the value of the mortgaged properties would diminish.

It is from this order that the present appeal has been brought.

The first ground of appeal is that a single judge had no power to appoint a receiver. Rule 297 of the Civil Procedure Rules, 1938, gives power to the Court or a judge, where it appears to be just and convenient, to appoint a receiver.

It is argued that this Rule, insofar as it purports to give such a power to a judge, is ultra vires, first, because it is inconsistent with Section 11 of the Courts Ordinance, as amended, which lays down the composition of Courts, and secondly, because it is in excess of

the rule making power granted by Section 20 of the Courts Ordinance, paragraph (b) of which gives a general power to the Chief Justice, with the concurrence of the High Commissioner, to make rules for regulating the pleadings, practice and procedure of various Courts.

We do not think that this argument is a sound one. It must be remembered that the application to appoint the receiver was made by motion, in an already existing action, and there is no question of the Rule purporting to alter the composition of the Court as laid down by Ordinance. If an action had been instituted asking for the appointment of a receiver than we agree that the order would have had to be made by a Court, composed of two judges, or a President and one judge. But this was an application by way of motion, and we do not think that the Rule is inconsistent with Section 11 of the Courts Ordinance.

Neither do we think that it is in excess of the rule making power given by Section 20 — a provision for the hearing of motions comes within the term "a matter of practice and procedure."

This argument as to jurisdiction therefore fails.

Similarly, with regard to the ground of appeal that the application for evidence to be heard was wrongly rejected, we do not think that there is anything in this. The mortgage provided for insurance in an English company, and it is admitted that no such insurance has, been effected. Evidence as to the value of the property seems to us to be irrelevant, and we do not agree with the argument that a receivership would injure the property and not protect it. We think that the learned judge was right in refusing to hear evidence as irrelevant.

The main grounds of appeal raise, however, much more difficult questions. The Appellants argue that it is not just and convenient to make the appointment, on the ground that both under clause 8 of the mortgage deed and under article 6 of the Provisional Law of Mortgages, the Appellants, that is the mortgagors, are entitled to the rents and benefits of the properties mortgaged, unless and until that property is sold — that a receiver will not be appointed for an improper purpose, for example, for something which the mortgagees are not entitled to by law, and that here the mortgagors are entitled to retain the property.

The Respondents reply that clause 8 of the deed only applies so long as the mortgagors are not in default, and that since they are in default, the equitable remedy of a receivership becomes available to the Respondents. They further say that the receivership is necessary

to preserve their rights as mortgagees, that they have obviously an interest in the property in dispute, that the interest is in arrear, and that that fact alone justifies the appointment of a receiver, and that they are asking for their principal and interest to which they are entitled, and that the property is threatened and in danger, since it is not insured and the taxes on it have not been paid. Finally they allege that an attachment or any other remedy is ineffective, since an attachment would not permit the insurance premium and the taxes now owing to be paid.

The object of appointing a receiver is the safeguarding of the property for the benefit of those entitled to it. A receiver may be normally appointed, (1) to enable persons who possess rights over property to obtain the benefit of those rights, and (2) to preserve property from some danger which threatens it. An order may also be made where the appointment is necessary to enable the applicant to obtain that to which he is entitled.

The appointment of a receiver is an equitable remedy. As an equitable remedy, the Court or judge has an entire discretion as to whether it should or should not be granted. This discretion must be exercised with caution and must be governed by a view of all the relevant circumstances. No definite rule can be laid down as to those circumstances in which the Court will or will not exercise its discretion. Besides protecting the rights of a plaintiff, the Court or judge must exercise care not to do a wrong to the defendant, which might be irreparable. The question is one of degree as to which, therefore, it is impossible to lay down any precise or unvarying rule.

In this case before us, the principal and interest are alleged to be over-due, there is no proper insurance, the taxes are over-due and not paid, and being in default, the mortgagors cannot claim the benefit of clause 8 of the mortgage deed. All cases of discretion are difficult, and this case is no exception to the rule. Each such case must be decided on its own particular facts and merits.

Taking all the circumstances into consideration — bearing in mind the rights of the first Respondents and those of the Appellants, we think that it is just and convenient that a receiver should be appointed, and we think, therefore, that the learned Judge came to a right decision.

The appeal must be dismissed with costs, with LP.15 fee for attending the hearing.

Delivered this 27th day of September 1939

Acting Chief Justice

CIVIL APPEAL NO. 101/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Joshua Ziman — Appellant.

v.

Abraham Makleff, Executor of the Estate of the late Albert Zyman. — Respondent

Application to Court of Appeal for exemption from fees being really one for extension of time to pay fees — Application to Chief Registrar for extension of time — Application to fix deposit in lieu of security not made by motion on notice.

1. Where after filing notice and grounds of appeal fees paid within time extended by Chief Registrar and application made to fix deposit in lieu of security, — not necessary to file fresh grounds of appeal, nor is application regarding deposit out of time.
2. Application to fix deposit in lieu of security need not be made by motion on notice.

S. Felman for Appellant.

Ben-avi and *Turtledove* for Respondent.

Appeal from Judgment of District Court,sitting at Tel-Aviv, dated 17th May, 1939.

JUDGMENT.

This is an appeal from the District Court sitting in Tel-Aviv, on a most complicated question of accounts extending over a period of many years.

The District Court went most carefully and thoroughly into the dispute — some thirty issues were framed — and after a lengthy

hearing, extending over a large number of days, the Court gave a detailed judgment dealing with each item separately, and awarding a sum of LP. 1306.323 with interest and costs to the Respondent. The Appellant (Defendant has appealed in regard to nine of the issues.

Before dealing with the appeal itself the Respondent raised a series of preliminary objections — most of them were frivolous, and we over-ruled all of them, but with regard to two of them we may perhaps say a few words.

The Appellant on the 14th June, 1939, filed a notice and grounds of appeall, and at the same time applied for exemption from Court fees. This was refused in this Court on the ground that the application was really one for an extension of time. Application was then made to the Chief Registrar for an extension of time in which to pay the fees. This was granted, and within the time allowed the Appellants paid the fees. On the same day the notice and grounds of appeal were transferred from the Miscellaneous Application file, which contained the application for exemption from fees, into the appeal file of this case, and at the same time he applied to the Chief Registrar to fix the amount of deposit in lieu of filing security. It has been argued by the Respondent that the Appellant should have filed fresh grounds of appeal. This is not so — the notice was filed, and when the fees were paid, and the grounds of appeal transferred to the appeal case, this is the equivalent of filing a notice or grounds of appeal, and Rule 327 has therefore been duly complied with, and the application to fix a deposit was filed in correct time.

The second point is that the application to fix a deposit in lieu of security should be made by motion on notice. In view of the terms of Rule 328(c)(ii), we do not agree that this is necessary.

The main appeal can be disposed of in a few words. The issues involved are almost entirely questions of fact. There was ample evidence to support the findings of the District Court, except in one particular, and we adopt the reasons given by that Court in dealing with the issues under appeal, and it would be superfluous to say in other language that which has already been so adequately expressed. Issues 1 and 11 deal entirely with questions of fact, which are supported by the evidence. In regard to issues 2 and 9, in spite of Mr. Felman's arguments, we agree with the District Court that the Appellant's transactions as disclosed therein were clearly fraudulent and dishonest. Issues 12, 21 and 24 are again purely questions of fact, and with regard to issue 22, we do not think that we can improve upon

the ruling given by the District Court on page 2 of its judgment. In short, with the sole exception of issue 3, the judgment under appeal is unimpeachable, and it is a most careful, sound and adequate one. We would also endorse the remarks of the District Court as to the excellent report drawn up by the accountant, Mr. Krasutzky.

It is only in regard to issue 3 that we think that the District Court made a slip, and that slip is more in the nature of a clerical error, which is not surprising in a case of this length and complexity.

On this issue the Court found that the sum of LP. 1200 was paid for goodwill to the Appellant, who undertook to pay, out of this sum, certain debts of the previous lessees of the property, and that this undertaking was on behalf of the partnership. The Court held further that it was for the Appellant to prove that he had spent the whole of this sum, as, if the whole had not been spent, he would have derived a benefit from any unpaid balance for himself. With these findings we agree. The Court then found that the Appellant had proved payment of LP. 435, and deducting this from the LP. 1200, found that there was a balance of LP. 765 unaccounted for. But the Court forgot that the Respondent was only contesting LP. 935 out of the LP. 1200, and that LP. 265 was admitted by the Respondent to have been paid properly. The LP. 435 should therefore have been deducted from LP. 935, not from LP. 1200. We agree with the District Court that the payment to Novikoff of LP. 500 was not proved. An adjustment must consequently be made, and half of the sum of LP. 265, viz. LP. 132.500, deducted from the sum found due under the judgment.

This disposes of the appeal. As we announced at the termination of the hearing, the appeal is allowed partially on issue 3 only, and dismissed on all the other issues. The sum awarded to the Respondent will be reduced by LP. 132.500 to LP. 1173.823, and the provisions as regards interest, costs, disbursements, and advocates fees will stand. As regards the costs in this Court the Appellant must pay the Respondent's costs and the Respondent will also have LP. 20 fee for attending the hearing, less LP.5 allowed off for the costs in respect of issue 3.

Delivered this 4th day of October, 1939.

Acting Chief Justice

CIVIL APPEAL NO. 83/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Acting Chief Justice (Copland, J.), and Rose, J.

In the appeal of:—

Kaliopi N. Patlacos, wife of Yousef Awad. Appellant

v.

The Greek Orthodox Patriarchate. Respondent.

Application for a certificate of succession to deceased Archimandrite of Eastern Orthodox Church — Opposition by Orthodox Patriarchate to issue of certificate of succession claiming that deceased was trustee of all properties for Patriarchate — Claim that monk incapable of owning property in his own name — Locus standi of opposer to issue of certificate of succession — Rider to certificate of succession that it should not be acted upon pending decision as to ownership by competent Court — Nature and scope of a certificate of succession — Application for a certificate of succession after period of prescription — Question of costs of successful applicant — Purpose of serving copy of judgment appealed from.

1. Court issuing a certificate of succession may, if it thinks fit, add a rider that it should not be acted upon pending decision as to ownership by competent Court.

2. Person whose rights might be affected by issue of certificate of succession as applied for — proper party to oppose application.

3. Issue of probate, administration or certificate of succession does not depend on whether or not there are assests to distribute.

4. District Court sitting in exercise of its probate jurisdiction has no power to decide whether or not deceased was the owner of any property movable or immovable.

5. A claim to be declared as heir of a deceased — not limited in point of time; plea of prescription can only be raised if and when question as to ownership arises.

6. Where Court issuing a certificate of succession adds a rider that no action should be taken on it pending decision as to ownership it should not exempt any property outside Palestine this being a matter to be decided by tribunal of foreign country where property found.

7. (a) Costs are in discretion of Court.

(b) According to general rule costs follow event.

(c) A person's silence for over 20 years in applying for a certificate of succession may be sufficient reason for depriving him of his costs.

8. Purpose of serving judgment appealed from — to inform other party what is the judgment, hence not necessary for cross-appellant either to file copy of judgment or to serve it on other side.

Cattan for Appellant.
Abcarius for Respondent.
Appeal from order of District Court, Jerusalem, dated 13.6.1939.

JUDGMENT.

The facts of this case, so far as they are relevant, are as follows :—

One Eftimios Patlacos, an Archimandrite of the Eastern Orthodox Church and a member of the confraternity of the Holy Sepulchre, Jerusalem, died in the year 1917. It would seem that a considerable amount of property was registered in his name in the Land Registry, or was in his possession, at the date of his death.

The Appellant, who claimed to be the heir of the deceased, applied on the 22nd February, 1938, for a certificate of succession to the deceased, who was her uncle.

The Respondent, the Greek Orthodox Patriarchate of Jerusalem, (hereinafter referred to as the patriarchate) entered an opposition claiming that all the property of the deceased was vested in them, as the deceased was trustee of the properties for the patriarchate, and being a monk, was incapable of owning any property in his own name.

The District Court, Jerusalem, sitting in exercise of its probate jurisdiction, heard a considerable amount of evidence, and on the 13th of June, 1939, gave judgment declaring that the Appellant was one of the heirs of the deceased, but added a rider that, in view of the arguments advanced by the parties during the hearing of the application, as regards any movable or immovable property of which the deceased was possessed at the date of his death, no action in respect of the certificate of succession should be taken pending the decision as to ownership by a competent Court. The Appellant has appealed to this Court asking that the rider should be removed, and the pat-

riarchate has entered a cross-appeal alleging that no certificate of succession can be issued in respect of the heirs of a deceased monk.

With regard to the appeal, we think that it fails. This certificate of succession is a document which can be used to effect a change in the registration of immovable property in favour of the Appellant. There is a dispute as to whether the deceased could have owned any property, and until that dispute has been settled we think that the learned President was correct in adding this rider that the certificate should not be used. No authority has been quoted to us by the Appellant in support of her contention that a rider cannot be added to a certificate of succession. The Appellant has also appealed on the question of costs which the District Court did not allow to her. Costs are in the discretion of the Court, and the general rule is, of course, that costs follow the event. In this case the District Court ordered that no action should be taken in respect of the certificate for the time being, and the Court may well have thought that the silence of the Appellant for over twenty years in making her application was a sufficient reason for depriving her of her costs. The appeal in our opinion fails on both points.

Turning now to the cross-appeal. A preliminary objection has been taken that there is no cross-appeal before the Court, because a copy of the judgment was not filed by the Patriarchate and was not served on the cross-respondent in accordance with Rule 326 of the Civil procedure Rules. In our opinion, Rule 339 covers the case, and it is not necessary in the case of a cross-appeal either to file a copy of the judgment or to serve it on the other side. The purpose of service is to inform the other party what is the judgment against which the appeal has been brought. In this case the cross-respondent, in filing her main appeal, was fully aware of the judgment, and for the cross-appeallants to file and serve a second copy in our opinion would be both unnecessary and superfluous.

It is further argued that the Patriarchate, as opposer to the original application in the District Court, had no locus standi. We do not agree. The Patriarchate's claim was that the deceased owned no property to which the Appellant could succeed, inasmuch as all this property belonged to the Patriarchate. The Patriarchate was obviously interested in the application and in the appeal and cross-appeal, as the issue of a certificate of succession might affect its rights, and we think it was a proper party.

Abcarius Bey, for the Patriarchate, has put forward an interesting and attractive argument, which may be divided into two parts. In

the first place, he says that a Court cannot issue a certificate of succession in any case in which there is no property to be inherited. In the second place, he says that no certificate of succession can be issued in this case because the deceased was a monk, and by virtue of various firmans and berats of the old Imperial Ottoman Government, a monk could own no property in his own right, as he was, in respect of property in which he might be in possession, merely a trustee for the Patriarchate. Abcarius Bey says that succession means property that can be disposed of or which can descend by way of inheritance. If this latter argument were right it would destroy itself, because, if the matter in dispute is one of ownership of immovable property, a probate Court would not be the proper tribunal to decide such a question, which would have to be decided by a Land Court. Also in respect of movable property it would be equally incapable of deciding, and the matter would have to be determined by the District Court sitting in exercise of its civil, not its probate, jurisdiction. We do not think, however, that his argument is a correct one. The functions of a Probate Court are to issue probate of wills or issue orders of administration, and to issue in this country what are known as certificates of succession. A certificate of succession does not in any way purport to decide what property is comprised in the estate. A certificate of succession merely declares who are the heirs, if any, of the deceased. It frequently happens in respect of a will in which probate is granted or in respect of an estate in which administration is ordered, that the debts may exceed the assets, in which case there will be no property to distribute under the will or under the administration order. But the issue of probate or administration is still valid and does not in any way depend on whether or not there are assets to distribute. In just the same way, when a certificate of succession is issued, there may be no property to distribute, but that does not say that the Appellant is not an heir of the deceased. The District Court, sitting in exercise of its probate jurisdiction, in our opinion had no power, as the learned President so held, to decide whether or not the deceased was the owner of any property movable or immovable, and in this present appeal we equally have no power to decide this question. It is a matter which can only be decided by a Land Court or by the District Court in its ordinary civil jurisdiction.

With regard to the argument as to prescription to the Appellant's claim, it is clear that there can be none as regards the issue of a certificate of succession, which does not in any way affect the ownership of property unless that property is a part of the estate. A claim to be declared an heir of a deceased person, by its very nature, is not one

that can be limited in point of time. It can be brought at any time, though if the claim be delayed it may be found that the certificate of succession will be ineffective. This is a plea which can only be raised if and when the question as to ownership comes to be determined.

Finally, the Appellant has asked that we should vary the judgment of the District Court by saying that the rider should not be applied to any property outside Palestine. We do not think that we should do this, because that is a matter which falls to be decided by the tribunals of any foreign country in which there may be property which was vested in the deceased.

It follows that both the appeal and the cross-appeal fail and must be dismissed. In these circumstances, each side will pay their own costs.

Delivered this 22nd day of September, 1939.

Acting Chief Justice

CIVIL APPEAL NO. 93/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the Appeal of :

Jamileh Charabli — Appellant.

v.

Hanna Salim Aillabouni — Respondent.

Court directing inquiry to be made into accounts etc. — Evidence heard by referee — Discretion of Court in awarding costs.

1. Power of Court to direct necessary inquiry and give directions as to manner of holding the inquiry includes power to hear such evidence on the matters referred as referee may think necessary.

2. Court may always, if it thinks fit, summon witnesses heard by referee and hear their evidence if there is any doubt thereon.

3. (a) Costs are in discretion of Court, but discretion must be excercised judgicially and not capriciously.

(b) When awarding costs difference between sum claimed and sum awarded should not be lost sight of.

Shapiro for Appellant.
F. B. Atalla for Respondent.

Appeal from judgment of District Court, Haifa, dated 21.6.1939.

JUDGMENT.

In our opinion both appeal and cross-appeal fail, except for one minor matter, which I will deal with at the end of the judgment.

The main ground of appeal is that the Court in appointing a referee, and I call him a referee although that word does not appear in the Rule, has no power to direct that referee to hear evidence. It is said by the Appellant that neither Rule 221 nor Rule 222 allow this to be done. Rule 221 says that the Court or Judge may direct any necessary inquiries or accounts to be made or taken and may give such instructions with regard to the making of inquiries or the taking of account as may seem fit. It seems to us that the power to direct any necessary inquiry and give directions as to the manner in which the inquiry shall be held must include, in order to be effective, the power to hear such evidence on the matters referred as the referee may think necessary. It is noteworthy with regard to the official referee in England, that his powers to hear evidence, are derived not from Statute, but from the powers given to the Court.

This question which was referred to Mr. Antablian was entirely a question of what work was done, by whom, and what work was left undone, by whom ; and the question seems to us to be a question of accounts and we do not think, in any way, this rule contravenes the Evidence Ordinance. It is a matter of practice and procedure as it is always open to the District Court, if it should think fit, to summon the witnesses heard by the referee and to hear their evidence if there should be any doubt thereon.

The second point raised on the appeal is the question of costs. The District Court awarded LP. 25.— out of LP.30.— said to be the total cost of the action — together with LP. 10.— hearing fees to the Respondent. The Appeallant said that, since the original claim was for over LP. 300.— and Respondent only obtained a judgment for LP. 114.219 this amount of costs awarded to him is excessive. Generally speaking we think, of course, costs are in the discretion of the Court but that discretion must be exercised judicially and not capriciously. We think that the award by the District Court, in view of the difference between the sum claimed and the sum awarded by them is excessive and we think that the fair figure would be LP. 15.— instead of LP. 25—; the hearing fees still stand.

With regard to the cross-appeal, that can be dealt with in a very few words. There is even less in it than in the main appeal. The questions are entirely questions of fact and they are dealt with satisfactorily by the District Court. There was evidence on which they could come to the conclusion to which they did come and we need say no more about it.

In the result the appeal and the cross-appeal will be dismissed, except that the costs are reduced, as I have already said before, from LP. 25.— to LP. 15. Each side will pay their own costs in this appeal and cross-appeal.

Delivered this 27th day of September, 1939.

Acting Chief Justice

CIVIL APPEAL NO. 98/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before : Copland, J., Rose, J. and Khayat, J.

In the appeal of :

Government of Palestine — Appellant.

v.

The Greek Catholic Church of Haifa — Respondent.

Declaration of ownership to piece of land forming part of a public road — Onus of proof when seeking to defeat kushan — Objection not raised in trial Court — Contention that Plaintiff not a legal entity.

1. A kushan (registered title deed), though not indefeasible, — best prima facie evidence of a right to be registered and carries presumption of ownership shifting onus to other side to prove, by an action for cancellation of kushan, that it was obtained by mistake or fraud.

2. Objection not made in trial Court cannot be taken in Court of Appeal.

3. Point that Plaintiff not a legal entity must be raised at first possible moment, in any case not at a late stage of trial.

Hogan (*Crown Counsel*) for Appellant.

Asfour for Respondent.

Appeal from judgment of Land Court, Haifa, dated 14.7. 1939.

JUDGMENT

This is the third time that this case has come before this Court on appeal, as a result of a series of misfortunes, though the case itself is a comparatively simple one.

The dispute relates to the ownership of an area of some 770 square

metres situated in Haifa, and now apparently forming part of a public road, but which originally, before the reclaimed area at Haifa was formed, was on the seaward side of the old railway line. The respondent to this appeal produced a kushan which he claimed covered the land in dispute, and the Land Court heard a number of witnesses, and found as a fact that the land was comprised in the kushan and gave a declaration of ownership in favour of the respondent. Hence this appeal. An application at a late stage by the appellant to file a counterclaim asking for the cancellation of the kushan, was rejected by the Land Court, in our opinion correctly, and no appeal has been taken against that decision.

We have had a lengthy argument in regard to the burden of proof from the appellant. He puts forward the propositions that a kushan by itself is not sufficient — that a kushan is not a document of title, that the Land Registry is merely an office for the registration of deeds and not of titles, that it must be shewn that the kushan was properly obtained. We do not agree with these contentions. As the Land Court rightly remarked a kushan is proof of registration, and registration is the best prima facie evidence of a right to be registered. By producing evidence of registration, the onus of proof is shifted to the appellant to prove that the registration was improperly obtained, and the correct way to do that is to bring an action asking for the cancellation of the kushan. We agree that a registered title is not indefeasible — there is no guarantee to that effect, but when once a person produces evidence, by a kushan, that he is the registered owner, the onus is on the other side to prove that the kushan was obtained by mistake or fraud, and this must be done in an action to set aside the registered title. A registered title carries a presumption of ownership (See L.A. 137/23 *), and this general rule has been applied for many years in the Courts of this country.

It is further argued that a hijjeh of ancient date does not refer to the same land, as the boundaries given do not coincide with those shewn in the kushan. In the former the sea is shewn as the eastern boundary, whereas in the kushan the sea is shewn as western. The boundary, as a matter of fact, runs approximately from North West to South East, and therefore both West and East are equally inaccurate or equally accurate.

The point that the respondent had never proved his possession was raised apparently as an afterthought, and there is, in any case, nothing in it. There is evidence on which the Court below could find that there was possession, and the boundary was fixed after hearing the evidence of persons who

*) 1 PLR. 13

knew the property, and the position of the old sea wall. There was evidence from which the Court below could lawfully find that the old sea wall was the boundary.

Objection was taken to the plan produced by the respondent on the ground that it did not comply with Rule 106. This objection was never made in the Court below, and cannot now be taken here.

Other points with regard to the description of the land may well be relevant in an action to cancel the kushan — they can have no place in the present action.

The appellant further contends that the respondent is not a legal entity. This litigation was commenced in 1935 — this point was never raised until the third trial in the Land Court, after the case had been on two successive occasions in this Court. It is obviously an afterthought because it is a matter that should have been raised at the first possible moment. In the application for the fiat under the Crown Actions Ordinance the present respondent was described as "The Greek Catholic Church of Haifa represented by His Grace Bishop G. Hajjar." The original action in 1935 was instituted in the name of "His Grace Bishop Gregorius Hajjar in his capacity sa General Mutewalli of the Greek Catholic Church of Haifa." This description seems to us to be entirely in order, since a firman has been produced appointing Bishop Hajjar in this capacity. In any case, it is not a point which we would be disposed to allow, when it is only raised over three years after the commencement of the litigation.

Finally it is said that the Land Court was wrong in issuing a declaration of ownership in favour of the respondent. This argument comes strangely from a Government which, in a case in which it suited them, Attorney General v. Ali Khalil Ali and others, C.A. 38/39, *) sought and obtained a declaration of ownership, based on the fact that they were the holders of a kushan, though it is true that that case was undefended in this Court.

In our opinion this appeal fails on every point, and it is dismissed.

With regard to costs, those of the second appeal have been already dealt with. We have therefore to deal with the costs of the first appeal which were ordered to abide the result, and of this appeal. The respondent having won he is entitled to the costs of the first appeal and of this appeal, to be taxed. He will also have a total sum of LP. 25 as fees for attending the hearings for those two appeals.

Delivered this 16th day of October, 1939.

British Puisne Judge.

*) 6 CtLR. 59.

CIVIL APPEAL NO. 96/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

1. Sarah Weisman
2. William Weisman — Appellants.

v.

La Foncière Insurance Co. Ltd. — Respondent.

Claim from insurance company in respect of fire which occurred during the disturbances in Palestine — Policy excluding from its scope a series of abnormal conditions and placing onus upon insured to prove that loss or damage not occasioned by or connected with such conditions — Nature and extent of proof required from insured.

Where Fire Insurance Policy provides that insurers not liable in certain abnormal conditions and places burden of proof upon insured, latter must prove not another possible cause of the fire, but that the abnormal conditions could not reasonably have caused or contributed to the fire.

Edit. Note:— See C.A. 188/38 4 CtLR. 223; C.A. 41/39 6 CtLR. 37.

Machlis for Appellants.

Wittkowsky for Respondent.

Appeal from Judgment, District Court, Tel-Aviv dated 2.7.1939.

JUDGMENT

Copland, J.

This is an appeal from a judgment of the District Court sitting in Tel-Aviv, dismissing a claim by the Appellants against the Respondents, the La Foncière Insurance Co., Ltd., in respect of a fire which occurred on the 7th August, 1938, in the premises of the Appellants at Ras el Ein.

The Insurance Policy contains a clause — clause 6 — which appears now to be common form in all fire insurance policies issued by companies in Palestine. By this clause the Respondents are not liable for any loss or damage happening during the existence of abnormal conditions, whether, physical or otherwise, directly or indirectly, proximately or remotely, occasioned by or contributed to by, or arising out of or in connection with any of certain occurrences, such as earthquake and other disturbances of nature, or war, invasion, act of a foreign enemy, riot, civil commotion, insurrection, rebellion, conspiracy, mili-

tary or usurped power and so on, and any such loss shall be deemed not to be covered by the policy, except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions. The burden of proving that loss or damage is covered, is upon the insured.

The construction of this clause has come before this Court on several occasions, and the ruling case on the subject is Assicurazioni Generali Co. v. Levy, Civil Appeal 188/38. *) In that case the principle was laid down that the burden or proof was on the insured to prove that abnormal conditions did not exist at the time of a fire, but that if they did so exist, it was for the insured to prove that abnormal conditions could not reasonably be held to have caused, or contributed to, the fire, in other words, that the fire happened independently of the existence of such abnormal conditions.

There are two ways of adducing such proof. In the first place the insured can show, if he can, the origin of the fire, such as arson by a particular person from motives of private revenge, for example. Such proof would definitely discharge the onus placed upon him. Or the insured can produce evidence, short of actual proof, of how the fire originated, showing that abnormal conditions could not reasonably have caused the fire. Such proof may be obtained from evidence showing the surrounding circumstances before and at the time of the fire, the condition of the building, and so on, — this may be called negative evidence.

To turn now to the facts of this case. I do not think that there can be any doubt that abnormal conditions were existing in August, 1938, not only in the vicinity of the scene of this fire, but also throughout Palestine. Abnormal conditions, such as riots, civil commotion and rebellion have been existing in Palestine now for over three years, as is a matter of common knowledge. The whole country is under the Emergency Regulations, and what in continental countries would be called a modified state of siege. The jurisdiction of the criminal Courts in certain cases had been transferred to Military Courts, and stringent regulations had been promulgated to deal with the general state of lawlessness. In fact, in August, 1938, the situation became so increasingly bad that in the following month the Military Authorities took over the problem of security from the Civil Government, and Military Commanders were appointed in every district to take charge. In this particular locality where this fire occurred, there was a permanent Police guard day and night on the pumping station of the Jerusalem Water Supply — elo-

*) 4 CtLR. 223.

quent testimony to the existence of abnormal conditions there.

Abnormal conditions existing in the locality of the fire, the Appellants are thrown back into their second line of attack — that these abnormal conditions could not reasonably have caused or contributed to the fire. The Appellants say that they have discharged the onus placed upon them by the evidence which they led.

The gist of that evidence is that no signs of any armed gang were seen by the police on duty at the time at the pumping station, which is about 300 metres from the scene of the fire, and no shots were heard by them. Another Police sergeant who investigated the crime, gave it as his opinion, that the fire was not connected with the disturbances, since he found no traces of footsteps at the scene and there were no shots.

This evidence is not particularly impressive, because the Appellants' arguments founded on it are, I think, based on a misconception.

It is not necessary to bring the fire within the exceptions clause, that it should have been caused by an armed gang, advancing and firing shots. It is much more likely that in the vicinity of a Police post care would be taken to move quietly so as to avoid attracting attention, and a fire may well have been occasioned by abnormal conditions, even if only one or two persons were responsible for it, and not a gang, whether armed or otherwise.

Evidence which had much more bearing on the matter was that given by Moshe Taboury, the head of the Fire Brigade, a man of considerable experience, who was on the scene soon afterwards. He says that the fire started in the ground floor, and was wilful, that nothing was broken — the windows were closed and everything was in order. Another witness, the second Appellant, said that when he visited the factory a day or two after the fire, there were sacks soaked in oil below the entrance, and the fire must have been started by someone who knew the place well, since a stranger would have broken his neck in getting into the place.

The evidence of A.S.P. Schiff, the only witness called by the defence, is not of any assistance on this point, since it was merely concerned with the existence of abnormal conditions, though he did say that he suspected the watchman on the permises as a possible culprit.

On this evidence the District Court held that what the Appellants had succeeded in proving was that there was no shooting and no breaking at the time of the fire, and that therefore it did not think that this completely negative evidence was sufficient to satisfy the Court that the abnormal conditions could not in any reasonable probability have caused or contributed to the fire.

After considerable consideration and hesitation, I think that the trial Court was right. It is not sufficient for an insured to prove another possible cause of the fire — he must exclude, within reasonable probability, that the fire was due to the existent abnormal conditions. This I agree, is in most cases a very difficult, if not impossible, task, but that is the law as laid down by this Court. I do not think that the evidence proved that the abnormal conditions could not reasonably have caused or contributed to the fire, or that the fire happened independently of those conditions.

I think that the District Court came to a right conclusion on the evidence before it, and that being so, I think that this appeal should be dismissed, with costs and LP. 15 fee for attending the hearing.

Delivered this 29th day of September 1939.

Puisne Judge. *Acting Chief Justice.*

Frumkin, J.

In my view the appeal must be allowed.

The onus of proof which rests upon an insured in the existence of abnormal conditions could be discharged not only by proving the source of the fire, but it would be sufficient to prove that the abnormal conditions could not in any reasonable probability have caused or contributed to the fire. The Court below seems to be of the view that negative evidence is inadmissible in this case. This of course is not so. The Court below was also wrong in holding that all that the Appellants succeeded in doing was to prove by such negative evidence that there was no shooting and no breaking at the fire. There was, however, evidence that at a distance of some 300 metres from the place where the fire took place there were four supernumerary policemen watching all night, that although their real duty was to watch the water supply it was also their duty to inform the police had they observed anything suspicious. And they have seen nothing suspicious. There was enough light.

There was also evidence that the fire broke out from within, that the windows were shut. There was also evidence that suspicion fell on a disatisfied watchman, at one time in the service of the insured, and there was nothing to show that this discharged watchman had any connection with riot bands.

In these circumstances, I hold that the Appellants succeeded in proving that the abnormal conditions could not in any reasonable probability have caused or contributed to the fire.

The judgment of the District Court in my opinion should therefore be set aside and judgment entered for Appeallants.

CIVIL APPEAL NO. 97/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the Appeal of :

Dr. Arieh Haboinik — Appellant.

v.

The Trustee in the Bankruptcy of Dr. Arieh Haboinik, Mr. Henry Meir Chelouche — Respondent.

Monthly allowance out of bankrupt's earnings for his and his family's maintenance — Order impounding income of a professional man adjudged bankrupt — Judge ordering bankrupt to give trustee an account of his income — Bankruptcy Ordinance, 1936, *sec.* 2, 37, 49.

1. (a) After bankruptcy and before his discharge whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support.

(b) Eearning of a professional man adjuged bankrupt — not exempted from being impounded.

2. Trustee in bankruptcy or Judge entitled to settle sum reasonably necessary for maintenance of bankrupt and his family.

Schwatzman for Appellant.

Gershman for Respondent.

Appeal from judgment of District Court sitting at Tel-Aviv, dated 14th July, 1939.

JUDGMENT

This is an appeal from the District Court at Tel-Aviv, sitting in Bankruptcy, from an order or Judge Many, whereby the learned Judge ordered the bankrupt, Dr. Haboinik, to give to the trustee in bankruptcy an account of —

(1) his income and expenditure as from the 23rd January, 1939, until the 1st July, 1939; and

(2) his monthly income as from 1st July, 1939, and allowing the

bankrupt LP. 25 monthly for his and his family's maintenance, and ordering the payment of any balance of income to the trustee.

The advocate for the Appellant, the bankrupt, argues that the income of a medical practitioner is not income within the meaning of the Bankruptcy Ordinance, 1936.

Section 37(3)(a) of his Ordinance is as follows : —

"(a) all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge."

"Property" is defined in section 2 in these terms :—

"property" includes money, goods, claims, land; and every description of property, whether movable or immovable, and whether situate in Palestine or elsewhere; also obligations, easements and every description of right, interest and profit present or future, vested or contingent, arising out of or incident to property as above defined."

The other subsections of Section 37 provide certain exceptions to this general rule, and Section 49 deals with the question of fixed income or salary, but there in nothing in these sections or elsewhere which provides any exemption for the earnings of a professional man, and indeed, in Re Roberts 81 Law Times Reports 467, is a direct authority to the contrary. Lindley, M.R., in that case said :—

"After bankruptcy and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support."

The case or Re Hutton, ex parte Benwell (51 L.T.R. 677 : 14 Q. B. Div. 301) relied upon by the Appellant was dealt with and distinguished in In Re Roberts, and insofar as it purported to lay down a contrary view, it was over-ruled.

The first part of the order of the learned Judge is therefore correct, and no question can arise about it.

With regard to the second part, it is true, as the Appellant argues, that the future earnings of a professional man, by his own personal exertions, cannot be impounded. But the income, as and when received, becomes the property of the trustee, except the proportion which is necessary for the maintenance of the bankrupt and his family. It is the duty of the bankrupt to keep accounts of his income and expenditure, and the trustee or the Judge is entitled to settle what sum is reasonably necessary for the bankrupt's maintenance. If the bankrupt

should exceed his authorised expenditure then he will be guilty of a bankruptcy offence and will be liable to be dealt with accordingly. Any surplus income when received is the property of the trustee, and must be paid to the latter.

No order has been made in this case for the payment to the trustee of any fixed sum monthly. If the trustee can prove the receipt of any surplus income, he is entitled to demand payment of it to him.

As regards the first part of the order the appeal is dismissed. As to the second part, it must be varied to the effect that the bankrupt do render an account of his income and expenditure monthly as from 1st July, 1939 — the trustee to be entitled to claim any sums in excess of the amount of LP. 25 monthly allowed for personal expenditure, together with any necessary amounts expended in connection with the exercise of his profession. Costs of all parties (including LP. 10 for advocates on each side) to come out of the bankruptcy estate.

Delivered this 4th day of October, 1939.

Acting Chief Justice

CIVIL APPEAL NO. 80/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Khalaf Kirret — Appellant.

v.

1. Silmi Ghannam El Saneh
2. Sabbah Ghannam El Saneh. — Respondents.

Sale and delivery of possession of land with right of redemption unlimited as to time — Attempt after an interval of 20 years to exercise right to redeem — Implied rejection by Court of documents produced by both parties — Finding that Defendant was in possession of land by way of mortgage — Constructive possession of land — Discretion of Court to infer ownership from fact of possession.

1. Where Land Court orders land to be delivered to Plaintiff, it may be assumed, even if no express finding to that effect, to have found that ownership of the land was vested in Plaintiff.

2. Where neither party has a document of title to land in dispute, evidence of possession may be adduced, and Court may, in its discretion infer ownership from fact of possession.

Edit. Note: —See: C.A. 239/37 3 CtLR 47, L.A. 13/34 2 PLR 352; C.A. 244/37 3 CtLR 49; C.A. 195/37 ibid 41; L.A. 76/35 1 PLR 87.

Germanus for Appellant

Respondents in person.

Appeal from judgment of the Land Court of Jerusalem sitting at Beersheba dated 6th June, 1939.

JUDGMENT

This is an appeal from a judgment of the Land Court of Jerusalem, ordering the Appellant to deliver to Respondents certain land against payment by the Respondents of a sum of 35½ Napoleons.

The Respondents alleged that some 25 years ago their father, whose property they have since inherited, sold the land in question to the Appellant with a right of redemption which was unlimited as to the time within which it should be exercised. The Appellant thereupon entered into possession of the land. In 1934 (i.e. after an interval of some 20 years, a delay which the Respondents contend is by no means unusual in the Beersheba District) the Respondents attempted to exercise their right to redeem and profferred to the Appellant the prescribed amount, namely, the sum of 35½ Napoleons ; but the Appellant refused to accept it on the ground that he was in fact the true owner of the land and was in possession by virtue of his ownership and not by way of mortgage.

In the Court of Trial the Respondents produced two documents in support of their contention. The Appellant challenged the authenticity of both these documents and himself produced another document which purported to show that he had bought the land outright from the father of the Respondents. The Respondents in their turn challenged the authenticity of this document.

The Court appears to have thought it unsafe to rely on any of these documents and seems to have come to its decision upon oral evidence adduced as to possession. In the result it found that the land in ques-

tion had not been sold to the Appellant as he alleged, and that "he was in possession thereof by way of mortgage". In other words, the Court found, in effect, that the Respondents were in constructive possession of the land. We think that there was evidence upon which it could properly so find. Further, in view of the order of the Court that the land should be delivered to the Respondents, it seems to us that, even in the absence of an express finding to this effect, it is only reasonable to assume that the Court must have inferred from this fact of constructive possession that the ownership of the land was vested in the Respondents.

The question then arises as to whether the Court was entitled to draw this inference. The Court made no finding as to whether either party has a registered title to the land, but by reason of the implied rejection by the Court of the documents produced by both parties, and of the nature of the documents themselves, we must assume that neither party has. This being so, we think that we should follow the case of Issa and others v. Shehadeh and another Land Appeal No. 13/1934 * in which it was held that where neither party has a registered title, evidence of possession may be adduced, and ownership may be inferred from the fact of possesion. This case was approved and followed by this Court in Mohammad and others v. Saad and others — Civil Appeal 239/37, ** and we respectfully agree with the observation of Manning, J. in that case that — "This seems to be the only fair course to adopt in Palestine where disputes frequently occur as to the ownership of land which is not registered and as to which no documents of title exist."

It would seem that, in such cases, the Court has a discretion. It is not bound to infer ownership from the fact of possession, but it may do so if it wishes. On the facts of this case we have no reason to suppose, nor is there any evidence to suggest, that the Court acted unreasonably in drawing this inference.

For these reasons we think that the judgment of the Land Court should not be disturbed.

The appeal is therefore dismissed with costs and LP. 2.— travelling expenses to each Respondent.

Delivered this 24th day of October, 1939.

British Puisne Judge.

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*) 2 PLR 352. **) 3 CtLR 47.

CIVIL APPEAL NO. 64/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before : The Acting Chief Justice (Copland, J.) and Abdul Hadi, J.

In the appeal of :

1. Said Itayyem
2. Salim Khalil Ayyoub — Appellants.

v.

Barclays Bank (D. C. & O.), Nazareth — Respondent.

Agreement with bank that legal interest shall be debited monthly — Bank charging compound interest — Defence not raised in trial Court.

1. Not illegal for a bank to make agreement that interest shall be calculated at rate of 9% per annum debited monthly in current account at compound interest.

2. If party failed in trial Court to raise defence and call evidence, appellate Court right in refusing to deal with defence, even though it might be a substantial one.

Edit. Note:— As to 1 see C.A. 240/37 3 CtLR 108, 110.

Atalla for Appellant No. 1.
Appellant No. 2 in person.
Zu'bi for Respondent.

Appeal from judgment of District Court, Haifa (in its appellate capacity), dated 29th April, 1939.

JUDGMENT

In this appeal two points are raised. First, that the account of the bank discloses excessive interest and compound interest, and secondly, that certain cereals which were pledged to the bank and sold by them had not been brought into account. In the agreement between the parties which the Appellants made with the bank it is distinctly stipulated that the interest shall be calculated at the rate of 9% per annum debited monthly in current account at compound interest, and there is nothing illegal for the bank in making such agreements and charging compound interest.

The second point with regard to the cereals. No evidence was called

to that in the Magistrate's Court, and the District Court, rightly in our opinion, refused to deal with the question when it came before them. It might, as the District Court remarked, be a substantial defence but a defence must be raised by the parties, and the parties should not stand still and silent in the Court. As I have remarked in the course of the argument, it is not the duty of the Court to conduct the case for the parties ; it is the duty of the parties to conduct their case and produce whatever material evidence they have.

The appeal is a waste of time and is dismissed with costs to include LP. 15 hearing fees to be paid jointly and severally by the Appellants.

Delivered this 21st day of September, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 100/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted, C. J.) and Frumkin, J.
In the appeal of :

1. Pesach Horowitz
2. Esther Braunstein
3. Leo Horowitz
4. Benjamin Horowitz
5. Anna Trachtenberg being the heirs of the late Mrs. Lea Sobelsohn of Jerusalem — Appellants.

v.

1. Esther Sobelsohn-Tugendreich
2. Rabbi Eliezer Yehezkelsohn, being executors of the will of Mr. Pinkas Sobelsohn, late of Jerusalem. — Respondents.

Construction of a clause in a will by explaining its first part in light of second part — Legatee dying before legacy paid to him — When does legacy vest in legatee.

A legacy (where not therwise provided in Will) vests in legatee at date of testator's death; if legatee dies before receiving it, it can be sued for by his heirs as part of his estate.

Eliash for Appellants.
Ben-Aaron for Respondent No. 2.
Appeal from Judgment of District Court, Jerusalem, dated 13.7.39.

JUDGMENT

This appeal raises a very simple point — so simple that it is difficult to see how any two opinions could exist upon it.

The case turns upon the construction of clause 14 of a will made by one, Pinkas Sobelsohn, who died on the 19th September, 1934. Probate was finally granted, and after probate, the widow died on the 5th October, 1935. Clause 14 of the will is as follows :

> I order my Administrators to give to my wife Lea the amount of LP. 95. This amount is to be given only to herself and does not pass by inheritance or other delivery, and in case she will die God beware, before me, then his amount of LP. 95 shall be distributed among my eight children (the sons and the daughters) in equal shares".

The Appellants, who are the heirs of the widow, claim they are entitled to this sum of LP. 95, bequeathed to the widow under clause 14.

The District Court held that since the widow died before the money was paid to her, it could not be sued for as part of her estate. To our mind, the sole point to consider is, when did this legacy vest in the late Mrs. Sobelsohn. We do not think that Jewish law or Austrian law have very much to do with it, but even if Austrian law has, it is quite clear that from the wording of this clause this legacy vested at the date of the testator's death. The condition that the amount is to be given only to her, and was not to pass by inheritance or other delivery, must be read with the second part of this sentence which explain the meaning of the first part of that clause, that if she should die before the testator then the amount bequeathed to her goes to the testator's own children.

The appeal must therefore be allowed with costs and LP. 10 hearing fees to Appellants. Costs of all parties to be paid out of the estate.

Delivered this 22nd day of September, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 79/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before : Copland, J., Frumkin, J. and Khayat, J.

In the appeal of :

1. Isaac Zvi Rackovsky
2. Abraham Epstein — Appellants.

v.

Joseph Danon — Respondent.

Purchase money appropriated by vendor towards damages for breach of contract — Purchaser tendering amount under protest — Receipt of money after expiry of contract alleged to constitute waiver of damages — Contract with new purchaser taken by Court as basis for assessment of damages — Rent appropriated by purchaser claimed by vendor as part of damages — Who is liable for municipal taxes? — Brokerage and werko claimed as part of damage caused by breach of contract.

1. Party to contract disputing certain items may tender amount under protest and this will be a valid compliance on his part.

2. Receipt of money after expiry of contract — not a waiver of claim to damages for breach of contract, if payment made merely in view of negotiations which ultimately proved fruitless.

3. In assessing damages payable by B to A, viz. difference between contract price and market value on date of repudiation of contract, a later contract made between A and C on or about time of repudiation in respect of same property may be taken as basis, unless B proves it to be a fictitious one and the property to be worth more.

4. Where contract broken by purchaser and property, subject matter of contract, remained in his possession, not necessary to bring a separate action for the income during period of possession; claim may be included in action for damages.

5. Municipal taxes, unless a stipulation to the contrary in contract, — payable by owner.

6. Purchaser repudiating contract cannot be made liable

in damages for brokerage paid by vendor in respect of that contract, nor for werko (urban property tax) paid by him for period after repudiation of contract.

Levitsky for Appellant No. 1.
Abramovsky for Appellant No. 2.
Toister for Respondent.

Appeal from judgment of District Court, Haifa, dated 22.5.1939.

JUDGMENT

The dispute between the parties to this appeal arises out of a contract dated 4th March, 1935, Exhibit J.D. 1, subsequently extended by various supplementary agreements, J.D. 2, J.D. 3 and J.D. 4. The sale contemplated in the contract did not take place, and each side brought claims against the other in respect of the failure to transfer the property.

This is the third time that this case has come before this Court on appeal. As a result of the second appeal to this Court the claim for damages for breach of contract brought by the Appellants against the Respondent was finally dismissed. But that part of the judgment of the District Court allowing the counterclaim for damages brought by the Respondent was quashed, and the Respondent was ordered to file an independent action for damages. He duly did so, and the District Court found that the sum of LP. 2500 stipulated in the contract as liquidated damages was not liquidated damages but a penalty, and proceeded to assess the actual damage suffered. In the result the District Court found that the damages came to LP. 1403, and deducting therefrom the sum of LP. 1305, being the amount received by the Respondent on account of the purchase price of the property, and appropriated by him towards the amount of damages, gave judgment for LP. 98, together with half costs and advocate's fees. It is from this judgment that the present appeal has been brought.

At the opening of the hearing before us the advocate for the Respondent, urged apparently by an impulse which few advocates seem able to resist, put forward the usual crop of preliminary points. None of them needed any reply, and they were over-ruled. It will perhaps be kinder to draw a veil over this part of the proceedings, and to

leave it at that.

The first ground of appeal is, that to recover damages the party must prove that he was willing and able to perform the contract, and that, if a vendor claims more money than he is entitled to, he is not ready and willing to perform his part. In support of this contention the Appellant has referred us to the evidence given by the Respondent in the cross-examination and to several exhibits, R.E. 1 and R.E. 2, and J.D. 17, from which he has endeavoured to show that a considerably greater sum than LP. 1305 has been received by the Respondent on account of the purchase price of the property. On the other hand, it has been pointed out to us that on three successive occasions the Appellants have admitted in writing that the balance of the purchase price remaining due at the time of default was LP. 895. This appers from Exhibit J.D. 3, dated 23rd September, 1936, being a supplementary agreement to the original agreement J.D. 1. In Exhibit J.D. 3 also the Appellants admitted that the sum of LP. 1305 had been paid on account of the purchase price up to 23rd September, 1936. Again, in exhibit J.D. 4, a further supplementary agreement dated 10th November, 1936, the Appellants admitted that the sum still due on account of the purchase price was LP. 895, and lastly in J.D. 24, dated 10th December, 1936, only four days before the date fixed for completion, the Appellants again admitted in writing that the sum of LP. 895 was owing. All these exhibits — J.D. 3, J.D. 4 and J.D. 24 — are subsequent in date to the exhibits relied upon by the Appellants — R.E. 1, R.E. 2, and J.D. 17.

It is true that in his cross-examination in Court the Respondent admitted that he had received sums in excess of the sum of LP. 1305, but there is nothing in his evidence which could be taken as showing that such extra sums received were on account of the balance of the purchase price, i.e. LP. 895. In this we confirm the finding of the District Court. It is equally clear that on the 10th of December, 1936, in Exhibit J.D. 24, the Appellants admitted that a sum of LP. 1047,750 was due from them to the Respondent. It is now argued that some of the items in Exhibit J.D. 24 were not in fact due, but there is no reservation whatever by the Appellants in Exhibit J.D. 24, and if the Appellants were disputing any of these items they could have tendered the amount under protest, and this would have been a valid compliance on their part. No tender of any kind, however, was made on 14th December, 1936. The Appellants have tried to argue the point again, that the Respondent granted an extension of time for completion after the 14th December, 1936. This point, however, was decided definitely against them in the second appeal to this Court,

and the matter as between the present parties is therefore res judicata. It is clear that the Appellants were in default on the 14th of December, 1936.

The next point raised by the Appellants is that since the Respondent received money after 14th December, 1936, he must be held to have waived his claim to damages in the contract. This point is really mixed up with the question of extension of time, and it is difficult to see how, if there were no extension, there could be any waiver. I think that the payment, as evidenced by Exhibits J.D. 18 and J.D. 19, was made merely in view of negotiations for a further extension, which proved to be fruitless, and that such acceptance by the Respondent does not in any way amount to a waiver by him. Negotiations which do not reach a successful conclusion cannot in my opinion be regarded as a waiver of any kind.

A further point raised by the Appellants is that the Respondent was not prepared on the 14th December, 1936, to return to them bills given by them in respect of the balance of the purchase price. There is nothing in the contract, so far as I can see, which says that these bills should be returned on that date. Equally, there is nothing in their contention that the Respondent was not willing and able to comply because the mortgagee was not present in the Land Registry on the 14th December, 1936. His presence had been dispensed with by the Land Registry, and since the Appellants did not appear the point fails.

We now come to the question of damages which the Appellants allege have been assessed on the wrong basis. The District Court, applying the principles laid down by this Court in Yacoub Nakashian v. Salim Abdo Nassar, Civil Appeal 217/38 *) held that the damages due to the Respondents were the difference between the contract price and the estimated value of the property on or about the date of breach of the contract, that is, 14th December, 1936. In arriving at the value on the date of repudiation they took into consideration the Respondent's evidence that he had contracted with a certain Mr. Azriel on the 23rd December, 1936, to sell him the same house for the sum of LP. 3465. The Appellants say that the Azriel contract was a fictitious one, that the value of the house was considerably more. It was for them to prove this allegation in the Court below. They never attempted to do so. In my opinion, to take the actual price received for the same property on or about the time of the repudiation of the contract is as good an assessment of the value of the property as can be made. Property is worth what it fetches, and valuation by

*) 4 CtLR 242.

experts would in reality have been merely guess work, whilst the contract price is a definitely ascertained sum. The District Court, however, made an error — that the difference was LP. 765 instead of LP. 735,— but this error makes no difference in the sum of LP. 1403 found due in the judgment, when the various items are added up.

The second item of damages claimed by the Respondent, under the head of direct loss due to the breach of contract, was the rent of the house for two and a half years. It is provided in the contract that interest payable by the Appellants was to be regarded in lieu of rent so long as the contract was subsisting, but this claim for rent is in respect of rent after the breach, i.e. for two and a half years from 14th December, 1936. It is to be remarked that the Appellants are still in possession of this property, and have been enjoying it for a very considerable time, in spite of the fact that they never carried out the contract of purchase. This is clearly a direct loss suffered by the Respondent, and the District Court based their estimate of the rent payable, on the admission of the Appellants that the rent would be LP. 180 a year, making a total of LP. 450. The District Court was right in awarding this sum, and it is not necessary that it should have been sued for in a separate action. The District Court, however, allowed the Respondent re-imbursement for three years' werko, which he paid in respect of the house for the years 1936, 1937 and 1938, totalling LP. 60; also for municipal taxes at LP. 48 and LP. 10, and for the sum of LP. 100 paid by the Respondent to a broker in respect of the sale. I do not think that the Appellants can be made liable for these sums, except for werko for the year 1936. Municipal taxes, unless a stipulation to the contrary is inserted in the contract, are payable by the owner, and the Respondent would in any case have been liable to pay the LP. 100 commission out of the purchase price received by him. The amount which is put in as commission is in respect of the sale to the Appellants, not in respect of the sale to Mr. Azriel.

In J.D. 24 the Appellants admitted that they owed the sum of LP. 30 in respect of werko. This sum is therefore allowed to the Respondent instead of the LP. 60 awarded by the District Court, and the items of LP. 48, LP. 10 and LP. 100 are disallowed. The total sum therefore to be awarded as damages come to LP. 1215, and the Respondent is entitled to appropriate this amount to himself out of the sum of LP. 1305 received by him on account of the purchase price. I think, therefore, that the judgment of the District Court should be varied in the sense indicated, but [the appeal] should otherwise be dismissed.

With regard to the question of costs, it must be remembered that,

as a result of this protracted litigation between the parties, the Appellants' claim for damages had been dismissed, and that the Respondent has been held entitled to a sum of LP. 1215 for damages sustained by him. I think, therefore, that the sum awarded by the District Court for costs and LP. 5 advocate's fees should stand, and with regard to the costs of this appeal I think that the fairest thing to do would be to award a total sum of LP. 20 to include all costs and advocate's fees. Since the Appellants contested that any damages were payable, this sum for costs may also be appropriated out of the sum of LP. 1305 retained by the Respondent, insofar as it is available.

Delivered this 18th day of October, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 92/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before : The Chief Justice (Trusted, C.J.), Rose, J. and Frumkin, J.

In the appeal of :

1. Ali Hussein el Ibrahim and 54 others — Appellants.

v.

The Palestine Land Developement Co., Ltd. — Respondents.

Registered owner going to Land Court as Plaintiff — Question of necessity to prove possession by registered owner —

No need for plaintiff in a land action suing upon a kushan (registered title deed) to plead and prove possession.

Abcarius for Appellants Nos. 1, 4, 28, 32, &47.
F. Atalla for the remaining 50 Appellants.

Eliash and *Feiglin* for Respondents.

Appeal from judgment of Land Court, Haifa, dated 30.6.1939.

JUDGMENT

Some years ago the Palestine Land Development Company purchased certain land known as Hartieh. Their kushan showed the boundaries as North — Harbaj, South — Tel Kaiss, East — Taboun, West — Mukattaa River and Assefia lands. They were involved in disputes with various people, some of which went to the Courts, and in the result, in 1935, they sought to take possession of the property, but owing to breaches of the peace the District Commissioner applied the Land Disputes Possession Ordinance, and the company went to the Land Court as Plaintiff, and fifty-five villagers from adjacent lands were Defendants.

After prolonged argument two issues seem to have emerged; firstly, what land was included in the Plaintiff's kushan; secondly, had the Plaintiffs possession of the lands in dispute in 1924—1926.

The Land Court decided in favour of the Plaintiff Company, and the Defendants appealed to this Court.

The first issue seems to be essentially a matter of fact for the Land Court, and I see no reason to inferfere with its decision.

The second raised a point of great importance. Abcarius Bey, for the Appellants, submits, as a matter of law, that a plaintiff in a land action suing upon a kushan must, in addition to producing his kushan, prove that he has had possession of the land, and further submits that the finding of fact in paragraph 18 of the judgment, as follows: "The Plaintiffs marked the boundaries of the area claimed by them and in 1925—8 cultivated some parts thereof", is insufficient to satisfy the requirement.

Abcarius Bey has only called our attention to one authority to support his general proposition. That is a judgment of the Land Court, Haifa, in the case of Abdel Fattah Miri Samara and Others v. Jacub Samsonoff and Others. From the judgment it appears that the Plaintiffs were in possession, the Defendants produced a title deed, and the Court held that registration alone, without actual possession, did not affect the acquired rights of the Plaintiffs. Whatever view one may take of this judgment it does not seem to affect the point with which we are concerned. It is true that the judgment was affirmed by this Court, but the matter came only on the question of a third party opposition.

I know of only one authority which supports Abcarius Bey's contention, that is a judgment of this Court, Civil Appeal NO. 150/38, reported only in Apelbom's Reports, Volume II, Part II, July, 1938,

page 22 *. In that case the facts were exceptional, and the question does not seem to have been fully argued.

Dr. Eliash submits that in a claim to Miri land based upon a kushan — unless the Defendant is the Government, when the incidents of Miri tenure may require a plea of possession, or possibly, more strictly, cultivation — a plea of possession is unnecessary, but he points out that in many cases the Plaintiff pleads possession in order to anticipate a defence of possession.

In my judgment the latter is the right view, and I do not think there is any need for a plaintiff in an action based upon a kushan to plead and prove possession.

The appeal will be dismissed with costs, with advocate's fee of LP. 15 for attending the hearing.

Delivered this 18th day of October, 1939.

Chief Justice.

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*) Ed. N.: This is the judgment referred to :

CIVIL APPEAL NO. 150/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the case of:

1. Salomon Salomonovitz
2. Levik Salomonovitz
3. Maurice Besser
4. Shalom Prepert. — Appellants.

v.

Ibrahim Issa Sahyoun. — Respondent.

Weinshall for Appellants.
Sahyoun for Respondent.

JUDGMENT:

We need not trouble you Mr. Sahyoun.

The Appellants' attorney frankly admitted in his arguments before us that his clients had never been in possession of the land in question. He further admitted that he could not prove that his clients' predecessor in title had also been in possession.

We are of the opinion that these two admissions on the part of Appellants' attorney dispose of the appeal, and the appeal is dismissed with costs fixed at LP. 10.— and LP. 5. hearing fees.

Delivered this 4th of July, 1938.

Acting Chief Justice.

CIVIL APPEAL NO. 82/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— The Chief Justice (Trusted, C. J.) and Frumkin, J.
In the appeal of :

Takouhi Aghadjanian — Appellant.

v.

1. May Annie Paul Merguerian
2. Miss May Pauline Merguerian — Mrs. F. Marroum.
3. Isgouhi Aghadjanian
4. Cirpouhi Aghadjanian
5. Haroutune Aghadjanian — Respondents.

Application for an order of succession and opposition thereto — Objection by a new objector after order of succession set aside and case remitted — Time within which objection to order of succession may be made — Power of Court in certain circumstances to dismiss objection without fully considering it — Opposition to order of succession by person whose objection to issue of the order was dismissed — Succession Rules, Rules 24, 25 — *Civil Procedure Rules, Rule* 350.

1. After order of succession set aside and case remitted for further consideration, objection under Rule 24 of Succession Rules by a new person claiming an interest in estate — prima facie in time.

2. Where Court was already dealing with objections to issue of order of succession, it may dismiss objection of a new objector without fully considering it, if admitted that his interests and case substantially same as those of original objectors, that he is represented by same advocate and that throughout he has been in same town as trial Court and must have known what was going on.

Obiter dictum.

Dismissal of objection to issue of an order of succession — no bar to subsequent opposition under Rule 25 of Succession Rules (re opposition after order has been issued).

Shereshevsky for Appellant.
Horowitz for Respondents No. 1 and 2.

Appeal from order of District Court, Jerusalem, (Probate 89/38) dated 9.6.1939.

JUDGMENT

Some time ago an application for order of succession to the estate of one Lazarus Paul Marguerian, was made to the District Court, Jerusalem, by his widow and daughter, to which objection was made by three relations. That application and objection were considered by the District Court, and the matter came to this Court on appeal *) and was returned to the District Court for further consideration, and in the result the objection has failed.

On the second occasion on which the matter was before the District Court the present Appellant for the first time lodged objection to the daughter's application. This objection has not been fully considered, but I understand it to have been admitted before us that the objector's interests and case are substantially the same as those of the original objectors, that she was and is represented by the same advocates, and that throughout she has been in Jerusalem and must have known what was going on.

Rule 24 of the Succession Rules provides —

> "At any time before an order declaring the succession of a deceased person is made, objection may be made by any person having an interest in the estate of the deceased."

In dealing with the application the District Court ruled —

> "Court has decided that the new opposition is refused on the grounds the time for opposing has passed, date being the 25th of November, 1938, and this opposition cannot now be entertained."

At the time when the application was made this Court had set aside the order originally granted in favour of the daughter. No valid order of succession had therefore been made, and prima facie the objection was in time. No suggestion has been made to us that there is any materiality in the date relied upon by the District Court.

Having regard to the matters to which I have referred, I feel that this is a case in which we may properly exercise the jurisdiction vested in this Court by Civil Procedure Rule 350, and dismiss the objection : I do so with the greater confidence owing to the provisions of Rule 25 of the Succession Rules under which the objector can proceed if she has any genuine grounds for so doing.

The appeal will be dismissed, but as it was heard together with Civil appeal No. 91/39 **), without costs.

Delivered this 31st day of October, 1939.

Chief Justice.

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*) C.A. 21/39 5 CtLR 225.

**) 6 CtLR 167 (next page).

CIVIL APPEAL NO. 91/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted, C. J.) and Frumkin, J.
In the appeal of :

1. Isgeuhi Aghadjanian
2. Cirpouhi Aghadjanian
3. Haroutune Aghadjanian — Appellants.

v.

1. May Annie Paul Merguerian
2. Miss May Pauline Merguerian — Mrs F. Marroum — Respondents.

Remittal of case to trial Court for further consideration — Complaint that Court did not allow to call further evidence — Alleged inconsistency in two judgments of Court of Appeal regarding requirements of declarations as to pedigree.

If after case remitted to trial Court plaintiff does not call fresh evidence and defendant does not tender any actual witness or indicate that he had any fresh facts to place before Court, defendant cannot complain that he was not allowed to call further evidence.

Shereshevsky for Appellants.
Horovitz for Respondents.

Appeal from judgment of District Court, Jerusalem, (Probate 89/38) dated 19.6.39.

JUDGMENT

This matter has already been before this Court, and a report of the proceedings will be found in Volume 6 of the Law Reports of Palestine, page 231. *)

It arose out of an application for an order of succession to which opposition was lodged. In the first instance the District Court granted the order, relying to some extent upon an Indian birth certificate, and it dismissed an objection which had been made. This Court held

*) C.A. 21/39 5 CtLR 225.

that the certificate was inadmissible, but it expressed an opinion as to the admissibility of certain statements made by the deceased, and also called attention to certain discrepancies in the evidence which the District Court had not in terms considered, and returned the matter to the District Court for further consideration.

Although, as will appear later, the District Court had expressed its view of the opposition in no uncertain terms, it seemed only right that if the Petitioners should have an opportunity of arguing the matter further, the opposers should have a similar opportunity, and this Court so ordered.

The District Court has now considered further the evidence, and again found in the Petitioners' favour, and in my judgment it was entitled upon the evidence so to do.

The opposers again come as Appellants to this Court. Their first complaint is that they were not allowed to call further evidence. No fresh evidence was called by the Petitioners and the opposers did not tender any actual witness or indicate that they had any fresh facts to place before the Court. I am of opinion that the complaint is not well founded.

The Appellants' second ground is a little difficult to follow and seems to turn upon a consideration of the evidence for the objectors, and this Court's comments thereon.

After considering that evidence, when the matter was first before it, the District Court held —

> "there is no evidence to support the opposition put forward by the opposers which is based merely upon most unfounded and unpleasant insinuations which do not even spare the reputation of their near relative and are brought in the hope of disinheriting, to their own advantage, the widow and daughter of the late Lazarus Paul Merguerian."

Upon that this Court said —

> "As to the Appellant's opposition as the case stands at present no medical evidence was tendered, the evidence which was given was in some instances conflicting, and some of the statements recorded were not evidence in that they did not comply with the requirements of declarations as to pedigree to which I have referred."

On the second occasion when the case was before the District Court it found —

> "The whole of the opposition, as I have already remarked in

my previous judgment, is in the nature of a fishing expedition and has not been sustained. The opposition is dismissed."

In effect it would seem that the Appellants are asking us to review our own judgment where we stated that certain evidence did not comply with the requirements of declarations, on the ground that it expressed a view different from that expressed by this Court in C.A. 192/35.*)

It is quite clear that we cannot review our own judgment, but as the matter has been argued I may say a word in explanation. As appears from the report, and as the Appellants' advocate admits, when the matter was first before us it was argued on the basis of English law, which law we applied, and if there is any inconsistency in the two judgments of this Court it must be considered when opportunity arises.

This appeal will be dismissed with costs, Advocate's fee for attending the hearing fixed at LP. 15.

I may add that it is agreed that during the proceedings the second Petitioner has married, and that her name is now Mrs. Fritz Marroum.

Delivered this 31st day of October, 1939.

Chief Justice.

CIVIL APPEAL NO. 86/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before : Copland, J., Frumkin, J. and Khayat, J.

In the appeal of :

M. Calamaro, administrator, acting for the heirs of Charles Shamash. — Appellant.

v.

Algazi and Duenias — Respondents.

Action on foreign judgment — Defendant denying in his reply service of process in foreign Court — Statement in foreign judgment that defendant was duly cited — Application to Court of Appeal for time to produce evidence of service — Foreign Judgments Rules, Rule 7 (1)(c).

1. Statement in foreign judgment that defendant was duly cited — not prima facie evidence of service of process, no matter whether he was ordinarily residing within or outside jurisdic-

*) Hitherto unreported. ("Murad Case").

tion of foreign Court, and if service denied and no proof that it had been effected, action on judgment must fail.

2. Where plaintff had full notice that certain defence might be raised, he must guard against it, and, since not taken by surprise, Court of Appeal will not grant him time to produce, either there or in trial Court, evidence in rebuttal of defence.

Goitein for Appellant.
Papo for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 12.6.39.

JUDGMENT

This is an appeal from a judgment of the District Court sitting in Tel-Aviv in which that Court dismissed an action brought by the present appellant, asking for judment against the respondents, on the ground of a judgment issued by the Tribunal de Commerce of Marseilles.

Several points have been raised on this appeal by Mr. Goitein, with his customary skill, but all in effect boil down to one point and that is, that the Courts of this country must accept at the face value a judgment of a foreign Court and that no statement in that judgment can in any way be queried here. The District Court mainly based their judgment dismissing the case on the ground that there was no proof that the respondents had been served with a notice to appear before the French Court. Mr. Goitein has argued that because the judgment of the French Court states that the respondents were duly cited that statement cannot be queried in the Courts of this Country. If we were to agree with him it would make our Foreign Judgments Rules largely inoperative. Rule 7 (1) (c) says that the Court before which application is made for execution or enforcement of a foreign judgment shall reject such application if it is not satisfied that the judgment-debtor was duly served with the process of the original Court. To my mind the last sentence in that rule "not withstanding that he was ordinarily resident within the jurisdiction of the Court" does not mean that it applies only to persons who are ordinarily resident or carrying on business within the jurisdiction, but that it applies to all persons both those within and those ordinarily residing outside the jurisdiction because it is difficult to see why a distinction should be made between these two classes of persons in such an essential matter as the service of the original process, and there is nothing in the wording to justify such a distinction. One would have thought that it would apply even more strictly in the case of a person ordi-

narily resident outside the jurisdiction who would not have the same opportunities of becoming aware through private means whether a process had been issued. In this particular case this defence of non service was raised in the reply of the respondents; so one cannot say that the appellant was taken by surprise. He was given notice that this defence might be raised and he should therefore have guarded against the possibility of it actually being raised. We cannot accept the theory that the French judgment is prima facie evidence of service, because, as I said at the begining of this judgment, so to hold would render Rule 7(1)(c) largely nugatory. It is not necessary in the view that we take of this case to deal with the other points. We think that since it is denied that the service has been effected, there was no proof that service had been effected and the District Court therefore came to a correct conclusion.

We had been asked by the appellant to grant him time to produce, either here or in the District Court, evidence that service was effected. We do not think that we should do so for the reason, as I have already stated, that he had full notice that this defence might be raised and it was therefore his duty to guard against it.

It follows that the appeal is dismissed. The respondent will have his costs to include LP. 15.— fee for attending the hearing.

Delivered this 31st day of October, 1939.

British Puisne Judge.

HIGH COURT NO. 51/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J. and Frumkin, J.

In the application of :—

Itzhak Leifer — Petitioner.

v.

1. The Chief Execution Officer, Tel-Aviv.
2. Alexandra Luria, individually, and as administratrix of the Estate of Meyer Kreinin. — Respondents.

Claim that immovable property was wrongly or irregularly sold in execution — Order complained of already executed — Prin-

ciple consistenly followed by High Court for many years.
Where order of Chief Execution Officer for transfer of property in Tabu already executed, neither Chief Execution Officer nor High Court have jurisdiction to cancel or change registration.

Machlis for Petitioner.
Ex parte.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his Order dated 19.10.39, in Execution File No. 14130/38 of Tel-Aviv should not be set aside and why the execution proceedings in the said file should not be nullified ; that an attachment be made on the property of the second respondent pending the hearing of this application.

ORDER.

In essence, this application is one to ask us to order the Chief Execution Officer to direct the Registrar of Lands to effect a change in the registration of certain property which the petitioner claims was wrongly or irregularly sold in execution. The only relevant fact is that the property was transferred to the 2nd Respondent in the Land Registry Office on the 4th September, 1939. The Chief Execution Officer, when application was made to him on the 19th October, 1939, made the following Order :

> "I have no jurisdiction to cancel a transfer already made at the Tabu."

That is a perfectly correct order. The Chief Execution Officer has no jurisdiction to cancel a transfer in the Tabu, and if the Chief Execution Officer has no such jurisdiction, then, we equally, sitting as a High Court, have no jurisdiction either. It may be that the Petitioner will have a remedy in another Court, it may be that he has no remedy at all ; but whatever the case may be, it is quite certain that this is not the Court that can give him any remedy, and this principle has been laid down since 1925 in High Court No. 17/25, Said Darwish & others v. District Officer Jerusalem, (I. P.L.R. p. 38), and so far as I am aware, it has been consistently followed in the last fourteen years at least.

Given this 30th day of October, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 75/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C. J.) and Rose, J.

In the appeal of :

1. Akmel Kharpoutli of Beirut, acting on behalf of the estate of the late Ahmed Kher el din Kharpoutli.
2. Raja Rayes, acting on behalf of the estate of his late father, Salim Bey Rayes.
3. Yousef Ibn Shlomo Dayan.
4. Sylvie Bostros of Beirut, acting on behalf of the estate of her late husband. Appellants.

v.

1. Mohammad, son of the late Haj Khalil Taha.
2. Omar, son of the late Haj Khalil Taha. Respondents.

Application to make legal representatives of deceased defendant parties to action — Question of survival of cause of action — Claim to declare land in dispute plaintiff's property — Time for application to substitute deceased defendant by his legal representatives.

1. Action to declare land in dispute plaintiff's property not a personal action which ceases when defendant dies, it continues, and plaintiff may apply to make deceased's representatives parties to action.

2. Application to substitute deceased defendant by his legal representatives — not limited to periods mentioned in Rules 137, 141, 184 of Civil Procedure Rules *).

*) Ed. N. These are the periods referred to by counsel for Respondents in this case. The defendant died in 1936, the application to make the Respondents as legal representatives of the deceased defendant parties to the action was lodged in January 1939.

Weinshall for Appellants.
Kousa for Respondents.

Appeal from interlocutory order of Land Court, Haifa, dated the 7th day of February, 1939.

JUDGMENT

This is an appeal from an order of the Land Court, Haifa, refusing the Appellants leave to make the Respondents as legal representatives of a deceased defendant parties to an action.

The matter turns on Rule 226 of the Civil Procedure Rules. It is necessary to enquire, therefore, whether the cause of action survives or continues.

In the statement of claim the Plaintiff asked that a judgment be given declaring that the land in dispute was the property of the Plaintiff, and without expressing any view as to the eventual result of the action it seems to me that this is a cause of action which does continue, and is not a personal action which ceases when the defendant dies.

That being so, it becomes necessary to enquire whether the Plaintiff made his application to substitute the new defendant in time. There may be some doubt as to what is meant by the time limited by law, to which reference is made in sub-rule (3) of the rule, but I do not think that it has reference to any of the periods to which Mr. Kousa referred, and I am of opinion that the application was made in time.

I think that the appeal should be allowed, and that the action shall proceed, and that the costs of this appeal should be costs in the cause.

Delivered this 9th day of October, 1939.

Chief Justice.

CIVIL APPEAL NO. 85/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

1. Haj Akel Yassin,
2. Ali Ismail el Najjar,
3. Ahmed el Haj Mohammad Omar,
4. Haj Khader Shehadeh. In their capacity as Mukhtars and previous Mukhtars of Lifta village and on behalf of the villagers of Lifta. Appellants.

v.

1. Israel Rabinovitz Teumim.
2. Anglo Palestine Bank Ltd.
3. Menachem Ettinger.
4. Raisel Sappir, as heir and on behalf of the Estate of Benjamin Sappir.
5. Anna, Sylvia and Sara, as heirs and on behalf of the estate of Salomon Lamport.
6. Rivka, Haim (Nitali) and Abraham (Albert) Salmona, as heirs and on behalf of the estate of Raphael Salmona. Respondents.

Judgment of Land Court ordering defendant not to interfere with land — Correction of area — Non- compliance with departmental instructions of Director of Lands and Surveys — Mazbata and plan signed by Mukhtars — Claim by villagers that land must have become Mahlul — Question of possession by registered owner — Application for an adjournment to call one further witness.

1. Correction of kushan not invalidated by non-compliance with departmental instructions of Director of Lands and Surveys for guidance of his staff.

2. Villagers instituting proceedings many years after the Mukhtars of their village signed mazbata and plan both supporting case of person seeking to correct his kushan must be presumed to have known of the correction.

3. Claim by defendant that land in dispute must have become Mahlul if neither party was ever in actual possession of it — of no avail, if Government has taken no action and made no claim on this head.

4. Fact that plaintiff suing on a kushan unable to establish his possession — no bar to his success; in such action unneccessary for plaintiff to plead and prove possession.

5. (a) In matters of adjournment Court of trial has a discretion, which, if reasonably exercised, will not be interfered with by appellate Court.

(b) Where there had been protracted litigation and various adjournments Court cannot be said to act unreasonably in refusing adjournment to enable party to call one more witness on a point on which it already has ample material to form a judgment.

Cattan for Appellants.
Eliash for Respondents No.1, 2, 3, 4 and 5.
Amon for Respondent No. 6.

Appeal from judgment of Land Court, Jerusalem, dated 19.6.39.

JUDGMENT

This is an appeal from a judgment of the Land Court of Jerusalem, ordering the appellants not to interfere with the lands of the respondents. The respondents, the plaintiffs in the Court below, based their claim on a kushan which in its original form related to an area of seven dunams, this area being corrected in 1925 to 24 dunams.

The appellants raised a number of points, the first being that the plot of land, known as Katalet el Jou, actually claimed by the respondents, was not that described in the kushan. Upon this point the Land Court, who inspected the area in dispute after having heard a considerable body of evidence, made a finding of fact adverse to the appellants. With this finding we see no reason to disagree.

The appellants next contended that the correction of the kushan in 1925 was irregular and they referred to a quantity of evidence called in the Court below which tended to show that certain departmental instructions, issued in 1924 by the Director of Lands and Surveys for the guidance of his staff, had not been complied with. There can be no doubt that these instructions, however excellent they may be from an administrative point of view, have not the force of law and it follows therefore that a breach of these would not, ipso facto, invalidate a transaction ; a fact, incidentally, which the Director of Lands himself, who was called as a witness in the case, admitted. Further, if one looks at the circumstances attending this particular correction, it appears that the Mukhtars of the village signed a mazbata and also a plan, both of which support the respondents' case. It was argued on behalf of the appellants that these actions of the Mukhtars should be disregarded since, vis-a-vis the inhabitants of the village generally, an act of this nature on the part of a Mukhtar has no authority and can therefore have no legal effect.

Whatever the exact position of a Mukhtar may be, we consider that on the facts of this case, the Mukhtars should at least be regarded as a channel of communication with the villagers themselvs nad that therefore the villagers must be presumed to have known in 1925 of the correction of the kushan. In fact they took no action until the present proceedings were instituted by the respondents in 1937. For these reasons we think that the appellants have failed to establish that the correction of the kushan was invalid and this point of the appeal therefore fails.

The appellants next contended that the Land Court was wrong in holding that the appellants were not in possession of the land in dispute. This is a pure question of fact, upon which the finding of

the Land Court was that the land was rocky and uncultivated and that the appellants had never been in possession. The Court expressly referred in its judgment to certain transactions between the Mukhtars and the Palestine Electric Corporation, and the Mukhtars and the Director of Education, and held that these transactions did not establish possession on the part of the appellants. We see no reason to dissent from these findings of fact.

The Court also held that the respondents had never been in actual possession of land. Upon this finding the appellants based an argument that the land must have become Mahloul. As to this, it is clear from the record that Government has taken no action and made no claim on this head, so this point cannot help the appellants. Moreover, the fact that the respondents were unable to establish their own possession of the disputed land is no bar to their success. The law on this point is, in our opinion correctly stated in Civil Appeal No. 92/39 *) in which it was held that in an action based upon a kushan it is unnecessary for the plaintiff to plead and prove possession.

Finally, the appellants contend that the Land Court wrongly refused an adjournment to enable a witness, who was alleged to be sick, to attend and give evidence. In matters of this kind the Court of Trial has a discretion and it is necessary therefore to look at the circumstances to see if this discretion was reasonably exercised. It appears from the record that counsel for the appellants in the Court below stated that the witness in question was able to testify on two matters. First, that the witness himself had worked on the land and that in fact an unsuccessful criminal prosecution had been brought against him at the instance of the respondents, under Article 130 of the Ottoman Penal Code. Secondly that the appellants had been in possession of the land. As to the first point, the Court allowed a copy of the Magistrate's judgment to be put in evidence. This indulgence, in our opinion, removes any ground of complaint which the appellants might have had on this head. As to the second point, it must be born in mind that the Court had heard a quantity of evidence on this particular matter and had also inspected the land, coming to a conclusion that it was rocky and uncultivable and that neither the appellants nor the respondents had ever been in actual possession. In view of this and of the fact that, as the Court remarked, there had been for various reasons a number of adjournments since the beginning of this protracted litigation, we do not think that the Court acted unreasonably in refusing to grant an adjournment to enable the appellants to call yet one more witness on a point on which the

*) 6 CtLR p. 162.

Court already had material upon which to form a judgment.

This point, therefore, also fails.

For these reasons the appeal is dismissed with costs to include the sum of LP. 25.— as attendance fee.

Delivered this 25th day of October, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 95/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C. J.), Frumkin, J. and Khayat, J.

In the application of :—

1. Eliezer Sirkis
2. Haim Posnerson — Applicants. (Respondents)

v.

David Moshe Levy — Respondent. (Appellant).

Mistake in judgment as to person giving evidence — Application of slip rule.

> Rule 358 of Civil Procedure Rules (re correction of slips etc.) must be applied with caution. Court not to make any alteration in its judgment by rectifying a misstatement of fact, no matter whether mistake has or has not affected the judgment.

Buxbaum for Applicants.

Levitsky for Respondent.

Application under Rule 358 of the Civil Procedure Rules, 1938.

JUDGMENT

In a judgment dated 26th October, 1939, in Civil Appeal No. 95/39, this Court stated —

> "It is true, Dr. Buxbaum their advocate, who gave evidence on their behalf at page 6 of the typed record, says he had offers for the premises but he does not remember the names of the persons who made them."

The Respondents in the proceedings now move this Court under Civil Procedure Rule 358 to amend the judgment on the ground that this was a mistake, and Dr. Buxbaum, who still represents them, points out that it is a mistake which might reflect upon him in that an advocate might be expected to record matters affecting his clients' business.

That the finding is a mistake is clear from the record of the pro-

ceedings, and as I am primarily responsible for it I may explain that it arose in this way.

Dr. Buxbaum had at the first trial given evidence. As stated in our judgment the passage quoted is at page 6 of the typed record, and on looking back to verify who was giving this evidence my eye caught the name of Dr. Buxbaum underlined on page 5. This actually was the record of an interruption by him, but by inadvertence I fell into the error of thinking his name appeared as the witness. On further examination it is however clear that the evidence was given by Eliezer Sirkis, one of the Plaintiffs, who purchased the house — not by Dr. Buxbaum.

The material question being whether the Plaintiffs had suffered damage, the basis of our judgment would not be affected if an offer for the property had been made, or had not been made to one of them, and not, as we stated, to their advocate.

Although in this case there was clearly a mistake in our judgment, and a mistake which does not effect the ratio decidendi of our judgment, I do not think it would be right to make any alteration under the slip rule. It is a rule which must be applied with caution, and it might well be that such a mistake as has been made here might have affected the judgment, and it certainly would not be right to vary a judgment under the rule. Moreover, I desire to guard against setting up any precedent which might lead to any relaxation of such caution.

There is no reflection on Dr. Buxbaum, and if the reporters see fit to report this case they will no doubt add this judgment, not only as an authority on the slip rule, but to make clear the facts.

We grant no costs of this motion.

Delivered this 29th day of November, 1939.

Chief Justice.

CIVIL APPEAL NO. 95/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— The Chief Justice (Trusted, C. J.), Frumkin, J. and Khayat, J.

In the application of :

David Moshe Levy — Applicant. (Appellant).

v.

1. Eliezer Sirkis
2. Haim Posnerson — Respondents. (Respondents).

Court allowing costs to successful party without determining sum— Notice by motion for determination of costs filed some time after delivery of judgment — Proper time for applications re costs etc.

All applications to Court regarding costs or any other matter which can then be made should be made immediately upon delivery of judgment, and advocates should be prepared to make or resist such applications.

Application for determining attendance fees.

Levitsky for Appellant.
Buxbaum for Respondents.

JUDGMENT

On 26th October, 1939, this Court gave judgment in Civil Appeal No. 95/39 allowing the appeal and dismissing the Plaintiffs' claim 'with costs to the defendant here and below and on the first appeal to this Court."

The scale of costs in Schedule III to the Civil Procedure Rules provides that for attending on trial of case and attending at hearing of appeal there shall be allowed such sum as the Court shall certify.

When judgment by this Court was given no application was made by the successful Appellant for a sum to be allowed in respect of two trials before the District Court and the first appeal to this Court, but on 8th November he gave notice that he proposed to move this Court to determine the amount to be paid, and he now does so.

Some doubt may exist as to the practice, particularly having regard to the decision of this Court in a motion arising out of Civil Appeal No. 70/39, i.e. whether such an application should be made at once when judgment is delivered, or whether it may be made by motion. We therefore grant the application and certify a sum of LP. 5 respectively for attending the trials before the District Court, and LP. 10 for attending the first appeal, that is a total of LP. 20.

We desire to make clear, however, that all applications to this or any other Court, with reference to costs or any other matter which can then be made, should be made immediately upon the delivery of judgment, and advocates should be prepared to make or resist such applications.

We grant no costs of this motion.

Delivered this 29th day of November, 1939.

Chief Justice.

HIGH COURT NO. 44/39.

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

Before : The Acting Chief Justice (Copland, J.) and Abdul Hadi, J.

In the application of :

Estella Glickson-Rovner — Petitioner.

v.

1. Chief Execution Officer, Haifa.
2. Socony-Vacuum Oil Company. — Respondents.

Notice of sale by Execution Office omitting certain particulars contained in possession report — Amendment of notice of sale.

Where upon certain particulars of property having been omitted in notice of sale by Execution Office an amended notice is ordered to be inserted, no room for fresh valuation etc. nor for new first notice of sale.

Marein for Petitioner.

Application for an order to issue to the 1st Respondent, directing him to show cause why his orders in Execution File no. 1971/36, dated respectively 2nd May, 1939, 13th June, 1939, and 17th July, 1939, should not be cancelled, and why he should not order a new valuation and taking of possession, and/or in the alternative, why he should not order the publication of a new first notice of sale containing an accurate description of the property mortgaged ; and for an order to stay the execution proceedings pending the determination of this petition.

JUDGMENT

We do not think this is a case in which an order nisi should be granted. The possession report definitely states that there were trees on the property and that the valuation was made taking into account the fact that there were such trees. When the notice of the Chief Execution Officer was called to the fact that mentioning of the trees had been

omitted in the notice of sale, he ordered that an amended notice should be inserted. We see no reason why this is not a perfectly proper proceeding.

For these reasons the application is refused.

Delivered this 11th day of September, 1939.

Acting Chief Justice.

HIGH COURT NO. 52/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J. and Khayat, J.

In the Application of :

Isaac S. Isaacs — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem.
2. Rev. Father G.B. Canale, in his capacity as Superior of Pia Societa Salesiana on behalf of the said Order, and in addition as Attorney of Sister Mercede Rosin. — Respondents.

Mortgage in favour of a representative of a society in his private name — Person applying after death of mortgagee both as new representative of society and as attorney of sole heir of deceased — Limits of competence of Chief Execution Officer — Prima facie evidence as to succession — Order of payment into Execution Office of sum admitted.

1. Execution Officer can only act on what actually appears before him on the documents submitted. Thus where mortgage deed does not state that mortgagee is acting on behalf of society of which he is a member, he has no standing in execution proceedings other than in his private capacity.

2. No payment to be made by Chief Execution Officer to a person on prima facie evidence that he is an heir or sole heir of deceased judgment creditor; a certificate of succession must be produced.

3. Where mortgagor alleges that lesser sum due from him than that claimed by mortgagee,

a) Chief Execution Officer right in ordering payment into Execution Office of sum admitted,

b) for mortgagor to go to Court to prove correct amount owing.

Ben Aharon for Petitioner.
Cattan for Respondent No. 2.

Application for an Order to issue directed to the first Respondent calling upon him to show cause why his order in Execution File No. 229/39, Jerusalem dated 3rd day of November, 1939, should not be set aside. *And alternatively* : That the second part of the said Order be varied as to the proof of the sum which remained due from the mortgagor and that the mortgagee should go to a competent Court to prove the amount still due under the mortgage. *And alternatively again* : That the time allowed to the mortgagor to go to a competent Court be prolonged.

ORDER.

This is in application by a mortgagor asking that an Order, made by the Chief Execution Officer Jerusalem, should be set aside. The facts so far as they are relevant are shortly as follows :

On the 10th May, 1933, one Reverend Don Rosin Mario, a member of the Pia Societa Salesiana, agreed with the present petitioner to sell to the latter certain plots of land in Jerusalem for a small cash payment, the balance of the purchase price, LP. 15,000, being allowed out on mortgage, subject to annual instalments being paid. A certain sum has been paid off but a balance remains, which the respondent to the petition says is in the neighbourhood of LP. 3,000 but which the petitioner himself says is only LP. 1,070.

The final payments not having been made the present Superior of Pia Societa Salesiana, Rev. G.B. Canale, made an application to the Chief Execution Officer under Section 14 of the Land Transfer Ordinance for sale of certain of the mortgaged property in satisfaction of the balance of the mortgage debt. The original mortgage was made in the name of the late Father Don Rosin Mario who was not stated in the mortgage deed to be acting on behalf of the Society of which he was a member. Don Rosin Mario being now dead, Father

Canale made his application both in his capacity as Superior of the Society and also as attorney for Sister Mercede Rosin, a sister of the deceased Don Rosin Mario, and stated to be his sole heir.

Several points have been taken by Mr. Ben-Aharon for the petitioner ; the first of which, with which we must deal, is that there is no proof that Don Rosin Mario, when he made this mortgage, did so on behalf of the Society. It is I suppose necessary to repeat, and perhaps this stage is as convenient a moment as any, that the Chief Execution Officer can only act on what actually appears before him on the documents submitted, and we, when we review his decisions, are similarly bound. Possibly the respondents may be able to prove in a Court that Don Rosin Mario, when he made this mortgage, was the Superior of this Society and was acting on behalf of the Society. That proof at the moment does not appear on the mortgage submitted to the Chief Execution Officer and therefore Father Canale, in his capacity as present Superior of the Society, has no standing in the proceedings before the Chief Execution Officer.

We must now consider him in his capacity as attorney for the heir of the deceased Father. A Notarial document has been produced made at Turin in which Sister Mercede Rosin, sister of the deceased Father, and four witnesses, declared on oath thet Sister Mercede Rosin was the sole legitimate heir of the late Don Rosin Mario. The Chief Execution Officer when he made his Order said that no payment should be made to the applicant, that is the present respondent, until the certificate of succession for the late Don Rosin Mario was produced. We think that the Order of the Chief Execution Officer was, in the circumstances, a correct one. There is prima facie evidence that this lady is the sole heir or at any rate, an heir of the deceased Father and as such of course she would be fully entitled to bring any action in his name, to recover monies owing to him. On the face of the documents at any rate, the mortgage would seem to have been made by the late Father in his private capacity, though as I said it may quite possibly be proved in Court that he was in fact acting on behalf of the Society. We say nothing further as to this in the present proceedings. We think that the Order of the Chief Execution Officer that LP. 1,070 be paid into the Execution Office was also a correct one. Also his order was correct in which he stated that the mortgagor was the person who had to go to Court, to prove what the correct amount owing was, if he disputed the facts. We say nothing as to whether the actual amount due is LP. 3,000 or LP. 1,070. The respondent in his reply did not ask to vary the sum of LP. 1,070 but merely asked that the petitioner's application be

dismissed with costs and advocates fees and so we say nothing about what the actual amount is.

We come now to the last point — that we should give the petitioner an extension of time to go to the correct Court. We are prepared to do so but we are only prepared to do so on terms, that is to say, that the sum of LP. 1,070 being the amount admitted to be due be paid into Court within one week from to-day and that petitioner may then have a further three days after the expiration of these seven days to enter an action in such Court as he seems fit but unless the LP. 1,070 is paid into Court within seven days he will not have leave for any further extension of time in which to go to Court.

We therefore discharge the rule and confirm the Order of the Chief Execution Officer with the above amendment with regard to the payment and the prolongation of time. The respondent will have his costs and LP. 10 advocates fees.

Given this 4th of December, 1939.

British Puisne Judge.

HIGH COURT NO. 75/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— The Chief Justice (Trusted, C. J.) and Copland, J.

In the application of :

The Agricultural Mortgage Co. of Palestine, Ltd. Petitioner.

v.

1. The President of the District Court, Jaffa
2. The heirs of Mohammad Tewfik el Ghossein (by Fawzi Bey Ghossein, one of the heirs)
3. Yacoub Tewfik el Ghossein, formerly of Wadi Henein
4. Souraya, bint Abdel Fattah Enseby
5. Arab Bank, Ltd. Respondents.

Order of sale in respect of one of 3 mortgaged properties — Application to President, District Court, for appointment of a

receiver of mortgaged properties — Refusal to appoint receiver — High Court and matters of discretion.

Appointment of a receiver under sec. 14(4) of Land Transfer Ordinance — a matter of discretion, and High Court will not interfere, if no grounds for conclusion that President, District Court, has not exercised discretion properly in legal sence.

Horowitz for Petitioner.

Application for an order to issue directed to the first Respondent calling upon him to show cause why his Order, dated 24th November, 1939, in Jaffa Execution files Nos. 159/39, 160/39 and 161/39, should not be set aside and that an order be made appointing Mr. N. E. Crewe, General Manager of the Petitioner, as Receiver of the several mortgaged properties; that an order commanding the first Respondent not to appoint a Receiver in respect of any of the mortgaged properties pending the determination of this application, or alternatively, such other or further order and directions be made in the premises as this Honourable Court may deem just and proper.

ORDER.

This is an application for an order to issue directed to the President of the District Court, Jaffa, calling upon him to show cause why his order, dated 24th November, 1939, in Jaffa Execution files Nos. 159/39, 160/39 and 161/39, should not be set aside and an order be made appointing Mr. N. E. Crewe, General Manager of the Petitioner, as Receiver of the several mortgaged properties.

It appears that the Applicants are interested in three mortgages on three separate properties, but that each property, in addition to being security for the amount advanced upon it, with interest and other charges, is also expressly declared to be collateral security to secure the other two mortgage debts.

The Applicants applied for an order of sale in order to realise their security, and the President of the District Court ordered that one property which, prima facie, is of more than sufficient value to discharge the three debts, should be sold as soon as possible. He however stated that should that property not realise the full amount of the debt due to the Applicants he was prepared to consider the immediate sale of one of the other properties mortgaged to them.

I may perhaps point out that in making this order he stated that

Counsel (who appeared for the present Applicants) had definitely stated that the sole object was to sell the property as soon as possible in order to realise the debt.

The present Applicants complain that the President has not appointed a receiver pending sale, which he is enabled to do by Section 14(4) of the Land Transfer Ordinance, enacted in No. 39 of 1939.

The appointment of a receiver under this section is primarily a matter of discretion. It is clear that the President considered the question and the Applicants have put forward no grounds which could justify us in coming to the conclusion that the President has not exercised his discretion properly in the legal sense.

The application for a rule nisi is therefore refused.

Given this 30th day of November, 1939.

Chief Justice.

CRIMINAL APPEAL NO. 54/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— The Chief Justice (Trusted, C.J.), Copland, J. and Khayat, J.

In the appeal of :

1. Suleiman Hussein Haj Ghanem
2. Khalil Musallam Abu Ijeiyan — Appellants.

v.

The Attorney-General — Respondent.

Witnesses named by defendant before Examining Magistrate not called at trial — Judge's record silent as to question of defence witnesses — Duty of presiding Judges to record all evidence etc.

Ground of appeal that defence witnesses named by defendant before Examining Magistrate were not called at trial — unavailing, where it later appears (in absence of any explanation in Judge's record as to what happened) that witnesses did not attend and trial Court after consideration did not find necessary to issue warrants to compel their attendance.

Appellants in person.
Ghussein for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the 9th of November, 1939, whereby the Appellants were convicted of robbery contrary to Sections 288(1) and 23 of the Criminal Code Ordinance, and senteced to five years' imprisonment each.

JUDGMENT

The first Appellant, who appears in person and was not defended by an advocate at his trial, appeals on the ground that witnesses for the defence, whom he named before the examining Magistrate and whose names appear on the back of the information, were not called at his trial.

Fawzi Bey, who appears for the Attorney-General, did not prosecute in the Court below and was therefore unable to tell us what occurred, and there was nothing upon the Judge's record explaining what had occurred. We adjourned the case and Fawzi Bey now informs us that he has made enquiries and that it appears that the question of the non-attendance of these witnesses was considered by the Court, and in the circumstances which were explained, it was not found necessary to issue warrants to compel their attendance.

The first appeal will be dismissed.

The second Appellant, who also appears in person, puts forward no good grounds for his appeal, which is also dismissed. The sentence of both appeals will run from the date of arrest, that is the 24th of June, 1939, as was so directed by the District Court.

I would take the opportunity to draw the attention of Judges who preside at trials upon information, to the provisions of Section 35(1) of the Trial Upon Information Ordinance, which requires that they shall record in writing all the evidence taken at the trial, any objections raised to the evidence or information, if material, and all rules and orders made during the trial. It is essential that this statutory requirement should be complied with.

Delivered this 30th day of November, 1939.

Chief Justice.

HIGH COURT NO. 37/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J. and Frumkin, J.

In the application of :

Keren Kayemeth Le Israel Ltd.

v.

1. The Chairman and Members of the District Town Planning Commission, Jerusalem.
2. The Chairman and Members of the Local Town Planning Commission, Jerusalem. Respondents.

Requirement by District Town Planning Commission, Jerusalem, that all buildings comprised in development scheme should be stone-faced — Service on public body — Functions of Local Town Planning Commission — Competence and duty of District Town Planning Commission.

1. Where summoning of a public body by service on Chairman only was pursuant to order of Court, service must be held sufficient.

2. Functions of Local Town Planning Commission purely consulative or advisory — its recommendations do not bind District Town Planning Commission.

3. District Town Planning Commission bound by bye laws dealing with town planning matters, it cannot vary them by an ad hoc decision in any particular case, or impose conditions which, though perhaps very desirable, are not covered by any law or bye law.

4. A public body owes duty to petitioner to deal with his application in accordance with the law as it exists.

5. Section 17 of Town Planning Ordinance (re objections to schemes) does not apply where objection is that Town Planning authority is proposing to exceed its legal powers.

B. Joseph for Petitioners.

Crown Counsel (*Hogan*) for Respondent No. 1.

Saba Said for Respondent No. 2.

Application for an Order to be issued to the Respondents calling upon them to show cause why they should not approve and be required to approve the development scheme submitted to them by the Petitioners in conjunction with the Jerusalem Land Development Co. Ltd. and the Palestine Land Development Co. Ltd., in respect of land in the Neveh Shaanan Quarter of Jerusalem, without imposing a condition that the building which may be erected by the Petitioners in the area of the said development scheme should be stone-faced and not othewise.

ORDER.

The facts giving rise to this case are not in dispute and can be stated quite shortly.

The Town Planning Area of Jerusalem is subject to the provisions of an outline scheme of town planning. The petitioners, being desirous of developing certain lands of which they are the owners deposited with the Local Town Planning Commission a detailed scheme of development for those lands. The Local Commission duly considered the scheme and made certain suggestions on it, which were duly passed on, together with the detailed scheme, to the District Town Planning Commission, with which body lies the power to approve any scheme. The District Commission again considered the scheme, and made certain modifications in it. These modifications with one exception were assented to by the petitioners. The exception was a requirement by the District Commission that all buildings on the lands comprised in the

scheme should be stone-faced. Correspondence ensued between the petitioners and respondents but the latter refused to withdraw the condition objected to, and on the 29th June, 1939, the detailed scheme, containing the said condition, was published in the Gazette by the District Commission. On the 28th June, 1939, the petitioners lodged this petition alleging that the respondents had no power to impose the condition complained of, as there was no law or bye law in force that stone-faced building is obligatory in the Jerusalem Town Planning Area, and asked for an order to the respondents to show cause why they should not approve the detailed scheme without the said condition.

Several preliminary points have been raised by the respondents, in showing cause against the rule, and I will first deal with them.

In the first place, I do not think that the Local Commission is concerned. From the provisions in the Town Planning Ordinance 1936, its functions would seem to be purely consultative or advisory, and it has no power of approval or disaproval. When the Local Commision has considered a scheme it forwards it to the District Commission with such recommendations as it may think advisable, but these recommendations do not bind the latter, which is free to adopt or reject them. In fact, in this present case I understand that the Local Commission had no objection to concrete faced buildings and said so in its report, and that it was the District Commission which objected. In these circumstances I think that the rule nisi granted against the Local Commission should be discharged.

Mr. Hogan, on behalf of the District Commission, has taken the point that service of the summons on the Chairman only is insufficient, and that the members of the Commission should have been served by name, or at any rate a quorum, that is three members. This Court however on granting the rule nisi had ordered that service should be effected on the Chairman only. We may have been wrong, but for that the petitioners are in no way to blame since they served in the way ordered by the Court. Apart from this however, it must be remembered that the District Commission is composed of representatives of certain Government Departments, such as a representative of the District Commissioner's office, a representative of the Attorney-General's Department, someone from the Departments of Health and Public Works and so on.

This body is a statutory body, but its actual members may vary

from day to day — their names are never published, the sittings of the District Commission are not held in public, its minutes, if any, are not open to inspection, and it is therefore impossible for anyone to determine who, at any particular time, are the members of the Commision. In these circumstances, I think that to cite "the Chairman and Members" of the District Commission and to serve the chairman is sufficient, and in fact the only possible course, and no injustice can possibly arise.

Mr. Hogan's main ground of objection to the rule is this — that under Sec. 14(1) of the Ordinance the District Commission has complete and uncontrolled discretion and may reject or approve any scheme with or without such modifications as it may think fit, though later he conceded that the Commission must keep within the terms of Sec. 14(2). The proposition as originally stated is one which I do not think any Court could possibly support, for it would put the District Commission above the law, and enable it to insist upon any condition which fancy or caprice or interest might dictate. It is no answer to say that it must be presumed that public bodies will act reasonably — experience unfortunately teaches one that, in this country, and in other countries too, public bodies are just as apt to act unreasonably as reasonably. The public may have very few rights, but they are entitled to protection at any rate for those rights which they may possess.

Sec. 14(1) cannot possibly bear the wide interpretation as to the power of the District Commission which the 1st respondents seek to put upon it, and it is necessary therefore to look elsewhere to find out what exactly the powers of the District Commission are.

First of all, it may be stated as a general proposition that the powers of the District Commission are governed by the provisions of the Ordinance. Sec. 12(2) gives a District Commission power to require a Local Commission to make provision for certain matters in an outline scheme. Sec. 14(2) gives the District Commission power in regard to certain further matters to be included, if so desired, in a detailed scheme. Sec 4(1) gives a District Commission power to make bye-laws in respect of any town planning area in its District, but such bye-laws do not come into force until they have been confirmed by the High Commissioner, under Sec. 4(2). What are known as the Town Planning Model Bye-Laws, drawn up by the now defunct Central Town Planning Commission, were published in the Gazette of the 1st November, 1925, and were brought into force in the Town Planning Area of Jerusalem, with certain modifications, which do not con-

cern the present case, by notice in the Gazette of 1st September 1927. Rule 3 of Section 9 of the bye-laws provides for the construction of external walls of new buildings, and allows several alternative methods of construction, including concrete as well as stones.

Now if no bye-laws on this subject had been made, it is possible, though I express no definite opinion, that the present action of the District Commission might be covered by Sec. 14(2)(i) of the Ordinance which allows it to make provision for the external appearance of buildings. It is under this provision, presumably, that Rule 3 of Section 9 of the bye-laws was made.

But here bye laws dealing with this subject of external construction have been made by the District Commission and the question for decision is whether, when bye laws have been made, the Commission is bound by those bye laws, or can vary them, if it so wishes, by an ad hoc decision in any particular case. I am quite clearly of opinion that it cannot do so. The existing bye laws allow concrete to be used for external walls, and if it is desired to make the use of stone compulsory than the present bye laws must be amended in that sence. It may be very desirable that all buildings in Jerusalem should be stone-faced — probably most people, with the exception of persons contemplating building, would agree that that is so — but however desirable it may be, it is not yet the law that all buildings should be so constructed, and the District Commission cannot anticipate, and bring into force, a provision that in the circumstances can only be made by an amendment of the present bye laws. See Reg. v. Bowman & others, 1898 I.Q.B. 663. This would seem to have been realised at one time, by the District Commission itself, when one reads the extract of the minutes of the 12th May 1939 and the extract from a report by the District Commission on this scheme (File A/35). The Local Commission was clearly of opinion that a regulation or bye law with regard to stone facing was neccessary, before such a condition could be applied, and in my opinion it rightly appreciated the position. But if there is no infringement of the present bye laws, than it follows that the District Commission is not entitled to withhold its approval. See Robinson v. Local Board of Barton Eccles (1883) S.A.C. 798, where Lord Selbrone, L.C. said (at p. 802) :— "We have still to give effect to the words of the empowering clause that bye laws may be made with respect to the following matters. The manner of making bye laws is this : they must be made by the local authority, and they must be approved by the Local Government Board. The mere act or volition of the local

authority is not sufficient, it must receive the sanction of the central authority also."

And later on he says (at p. 808) :— "But without having made such a bye law, and having no such bye law to appeal to (of course if such a bye law had been proposed it could only have been made with the consent of the central authority) the local board has taken upon itself to define a building line, and it has expressed in writing the ground of its disapproval of the plan which was submitted to it, that it is "disapproved on the ground that the houses will contravene building line"..... and that this was done "under the impression that they could prescribe a building line in a case in which they had no bye law on that subject. I think that they could not do so."

It seems to me that these words exactly fit the present case.

If the Commission were entitled in any particular instances to disregard its own bye laws by imposing conditions not provided for in those bye laws, then I can see very litle use in issuing any bye laws at all. The condition which the Commission is endeavouring to enforce is not covered by any bye law, it has not been approved by the High Commissioner under Sec. 4(2) of the Ordinance as it would have to be, if in a bye law, and the Commission has therefore at present no power to enforce it.

This really disposes of the case, but there are one or two minor matters to which reference has been made, and it is necessary to deal with them. It is said that the District Commission owes no duty towards the petitioners, and that the latter have no right to enforce. This is not so — the Commission owes to the petitioners the duty of dealing with their application in accordance with the law as it exists at the present time, and not in accordance with what the Commission would like it to be, and the petitioners' right is to insist that the application is so dealt with. It is also not correct to say that the petitioners are trying to compel the District Commission to introduce certain bye laws — what the petitioners are doing is just the reverse, for they are endeavouring ta restrain the District Commission from enforcing something which is not a bye law.

It is further argued that the petitioners have other remedies available, under Sec. 17 of the Ordinance, and that they should make their objections to the scheme in the manner therein laid down. But the District Commission has already considered their objections and has refused to give effect to them. Sec. 17 cannot, I think, be held to

apply where the objection is to the legal competence of the District Commission to do something which it proposes to do. Here the objection is that the District Commission is proposing to exceed its legal powers.

Holding as I do, the opinion which I have expressed, it is not necessary for me to consider the final arguments of the petitioners that the discretion, if any, of the District Commission was improperly exercised or rather not exercised at all, because it did not deal with the petitioners' application on its merits, but enforced a general rule which it wished to lay down. The question does not arise on the view which I take of the case.

And lastly, I wish to make this quite clear — this Court is not concerned with the merits or demerits of any particular scheme. We are not town planning experts. A scheme may be a good one, or it may offend every aesthetic consideration, — that is no concern of this Court. But what we are concerned with is that public bodies such as The District Commission should exercise their very wide powers strictly in accordance with the law, and not merely in accordance with what they think is desirable, and that they do not exceed their legal powers.

In this case the District Commission has done something that it had no power to do ; it has no power to impose the condition which it sought to impose, and it is not entitled to withhold approval of the scheme unless this condition be included in it.

In conclusion I think, though not without some regret, that the rule nisi must be made absolute against the first respondents and discharged as against the second respondent.

The first respondents will pay to the petitioners their costs, to include disbursement and also a fee of LP. 15 for attending the hearing, and the second respondents are entitled to their costs as against the petitioners, to include LP. 5.— fee for attendance.

Delivered this 14th day of July, 1939.

British Puisne Judge.

JUDGMENT

Frumkin, J.

I entirely agree and have nothing to add except that as regards the

expression of regret by my learned Brother I wholeheartedly associate myself with it. As a Jerusalemite I always looked with natural dislike to the increasing number of concrete buildings croping up, feeling that stone buildings are much more suitable to the dignity of this ancient and historic city which is surrounded by inexhaustible resources of a most beautiful variety of stone. There is also an economic aspect. The exploitation of these resources is due to increase the wealth of the city and create more scope for employment.

The difference in price of construction between concrete and stone walls, of course involves the owner of a building, for once, in an additional expense. The difference, is to my mind, by far not so great as submitted by counsel for petitioners. This initial additional expenditure is in the long run due to compensate the owner by saving him the continuous expense of repair, replastering and repainting necessitated in concrete buildings by length of time. But whatever be the sacrifice, it is not one which, if only warranted by law, should not be expected from a citizen of Jerusalem, in consideration of his privilege to add to the beauty and wealth of this city. The law however is as yet in favour of the Petitioners.

Puisne Judge.

P.C.L.A. NO. 4/39
(Criminal Appeals Nos. 35 and 36 of 1939).

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the application of :

Basile Vucashinovitch — Applicant.

v.

The Attorney General — Respondent.

Application for leave to appeal to Privy Council in a criminal matter.

Supreme Court has no power to grant leave to appeal to Privy Council in any criminal cause or matter.

Application for leave to appeal to His Majesty in Council from judgment of Supreme Court sitting as a Court of Appeal, dated 14th day of August, 1939.

ORDER.

There is no power given to the Supreme Court of this teritory under the Palestine (Appeal to Privy Council) Order-in-Council, 1924, or elsewhere, to grant leave to appeal to His Majesty in Council in any criminal cause or matter. That being so, we have no jurisdiction and the application is refused.

Given this 29th day of September, 1939.

Acting Chief Justice.

HIGH COURT NO. 47/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before : The Acting Chief Justice (Copland, J.) and Frumkin, J.

In the application of :

B. Rosenkrantz — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Leopold Blint
3. Mantashef Company
4. Yitzhak Chaplick
5. Ahuva Chaplick

Respondents.

Application for extension of time to pay amount bid in Execution Office.

No extension of time can be given to a bidder in Execution Office to pay amount bid by him.

Rand for Petitioner.

Application for an order to issue to the First Respondent, directing him to show cause why his order dated the 5th September, 1939, in Execution File No. 17566/37, refusing to grant Petitioner an extension of time to purchase the immovable property, should not be cancelled and why he should not grant the Petitioner reasonable time to pay the amount bid by him.

ORDER.

We do not think this is a case in which the application should be granted.

The duty of a purchaser is to be prepared with his own money sufficient to buy the property, if and when called upon to do so. It is no good saying I have a contract with someone to give me money and that one cannot give it to me.

We cannot see anything in this application at all and it must be refused.

Given this 27th day of September, 1939.

Acting Chief Justice.

CIVIL APPEAL NO. 107/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Shlomo David Gvirtz — Appellant

v.

Eliahu Lamdan — Respondent.

Court releasing provisional attachment, confirmed by its judgment, on property of one of several defendants — Parties to appeal from ruling made after judgment — Good cause within meaning of Procedure Rule 333 — Joint and several liability — Inconsistency in judgment given by consent — Alteration of judgment.

1. He only must be made responsible in appeal who was a party to proceedings in which the ruling appealed from was given.

2. Where in an appeal from a ruling of District Court appellant cited only one of more defendants to original action, Court of Appeal will be prepared to hold that there was good cause within meaning of Procedure Rule 333, if respondent himself in the proceedings which resulted in that ruling failed to summon the other parties in original action.

3. Where slip rule inapplicable Court has no power to make a substantial alteration in its own judgment.

Frank for Appellant.
Linderman for Respondent.

Appeal from the ruling of District Court sitting at Tel-Aviv, dated 27th January, 1939.

JUDGMENT

This is an appeal, by leave, from a ruling of the District Court of Tel-Aviv, ordering that the provisional attachment laid on the immovables of the Respondent be released upon payment of one quarter of the sum of LP.500 plus interest and costs.

The Respondent took a preliminary objection that the Appellant had failed to comply with Rule 313 of the Civil Procedure Rules. We do not consider, however, that this Rule is applicable as the appeal before us is from a ruling given by the District Court in which proceedings the only parties were the present Appellant and Respondent. In any event, even had this Rule been applicable, we should have been prepared to hold that there was good cause within the meaning of Rule 333 because Respondent who took initiative in the proceedings which resulted in the above ruling himself failed to summon the three other Defendants in the original action. The preliminary objection therefore fails.

The facts upon which the ruling, which is the subject of this appeal, was based are as follows :—

The Appellant instituted an action against four Defendants, of whom the Respondent was one, alleging that each of them was jointly and severally liable upon a promissory note for the sum of LP.500. In respect of this sum a provisional attachment was laid on the property of three of the four Defendants. Subsequently, on the 14th December 1937, the Plaintiff (Appellant) obtained a judgment before the District Court in the following terms :—

> "By consent judgment for Plaintiff for LP. 500; said sum to be paid by 15.5.38 with costs and legal interest from date of maturity and LP. 2 advocate's fees. Provisional attachment is confirmed."

No steps to execute this judgment have been taken and on the 24th of January, 1939, the Respondent applied to the District Court for cancellation of the provisional attachment laid on his property upon payment of what he alleged to be his share of the debt. As stated at the beginning of this judgment his application was successful.

The Respondent's case is that, whatever his original position may have been, under the terms of the judgment he is no longer jointly and severally liable for the sum of LP. 500 and it is, therefore, only reasonable that the provisional attachment should be cancelled on payment of his share of the debt. The Appellant, on the other hand, contends that it was the intention of the parties that the joint and several liability of each of the defendants should be retained and that this is corroborated by the fact that it is expressly stated in the judgment that the provisional attachment on the property of three of the defendants should be confirmed.

Whatever the parties themselves may have intended, it would certainly appear that there is a substantial inconsistency in the judgment. The position is one for which, the judgment being by consent, the parties themselves must bear the responsibility.

In effect the District Court varied that part of its judgment which reads :—

"Provisiond attachment is confirmed".

We are of the opinion that the Court had no power to do this, the slip rule being clearly inapplicable to a substantial alteration of this nature. It is probably unnecessary to add that the judgment itself is not the subject of appeal.

The appeal must therefore be allowed with costs to include LP. 10 advocate's fee for attendance ; the ruling of the District Court dated the 27th of January, 1939, must be set aside and the original judgment dated the 14th of December, 1937, restored.

Delivered this 5th day of November, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 106/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

1. Emil Taub
2. Hermine Taub — Appellants.

v.

Hanotaiah Ltd. Colonisers and Orange Grove Planters. — Respondents.

Leave to appeal from decision of District Court to send case back to Magistrate's Court — Application to file additional grounds of appeal — Other party agreeing to filing of additional grounds of appeal.

1. Agreeing to other party filing additional grounds of appeal does not destroy right to demur to contents.

2. Party appealing — not to be allowed to raise fresh defences of fact, nor should appellate Court remit case to Court of trial to hear additional defences.

3. Decision of District Court in its appellate capacity to remit case to trial Court — appealable by leave.

Rosenblueth for Appellants.
Eisenberg for Respondents.

Appeal fron judgment of District Court, Tel-Aviv, sitting in its appellate capacity, dated 11th day of July, 1939.

JUDGMENT

This is an appeal, by leave, from a judgment of the District Court of Tel-Aviv allowing an appeal by the Respondents from a judgment of the Chief Magistrate of Tel-Aviv.

The only point upon which leave to appeal was granted was as to whether the District Court was right in remitting the case to the Magistrate to hear defences on the merits which were not raised at the original hearing. In granting leave to appeal the learned Relieving President himself expressed doubt as to the correctness of his earlier judgment.

The history of the matter, so far as it affects this Court, is as follows : The Plaintiffs (Appellants) claimed the sum of LP.240 from the Defendant Company which they alleged was due under an agreement. At the hearing before the Chief Magistrate, which was of an exhaustive nature and occupied two days, the Defendants attacked the validity of this document and of another subsidiary agreement, also raising points as to their proper construction. In the first paragraph in his judgment the Chief Magistrate stated :

> "There is no disagreement on the facts and the decision depends solely on the construction of the two documents."

Further, in the record of the proceedings, there appears the following note by the Chief Magistrate :

> "No evidence probably required; solely case of construction of documents. Both sides agree on that."

In the event, the Chief Magistrate on the 23rd January, 1939, gave judgment for the Plaintiffs for the amount claimed, interest and costs.

On the 1st February 1939, the Respondent filed a notice and grounds of appeal in which no fresh question of fact was raised. The Appellants filed a reply on the 23rd of February 1939.

It was not until the middle of June 1939, about five monts after the original judgment, that the Respondents applied to the District Court for leave to submit additional grounds of appeal in which, for the first time, certain defences on the merits where raised. These addit-

ional grounds of appeal were filed on the 4th of July and on the next day the Appellant filed a reply objecting to the remission of the case for the hearing of further evidence.

Some confusion of thought seems to have been caused by the fact that, at the hearing of the application to submit additional grounds of appeal counsel for the Appellants appears to have agreed to the filing of these additional grounds. We accept the Appellants' contention that this agreement merely implied consent to the filing itself and reserved the right of the Appellants to demur to the contents. We think therefore that the alleged consent of the Appellants is immaterial to the point which we have to decide.

In our opinion this is eminently one of those cases in which it would be unreasonable to allow an unsuccessful defendant to raise, at the eleventh hour, fresh defences of fact. We think therefore that the District Court erred in remitting the case to the Magistrate to hear additional defences.

The Respondents raised the point that the appeal was not properly before us in that no appeal lies from a decision of the District Court in its appellate capacity except from a final judgment. The learned Relieving President himself also expressed doubts on this matter. In our opinion it is quite clear from the language of Section 6 of the Magistrates Courts Jurisdiction Ordinance 1935, that such an appeal does lie, this section merely providing that the decision itself of the District Court is final, subject to the granting of leave in certain cases.

The appeal must therefore be allowed with costs; the judgment of the District Court dated the 11th of July, 1939, must be set aside and the judgment of the Chief Magistrate dated the 23rd January 1939, restored. The costs will include those of the proceedings before the District Court and also the sum of LP.10 for advocate's attendance fee before the Court of Appeal.

Delivered this 5th day of December, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 9/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J., Green, J. and Khayat, J.

In the appeal of :

Israel Beit-Eli — Appellant.

v.

1. Joseph Rahamin Azar
2. Itzhak Shaul Huri. — Respondents.

Part performance of contract to sell land — Contract of sale partly valid and partly void — Construction of contract — Res judicata — Holding out as owner — Misrepresentation — Divisibility of contract.

1. Construction of a contract cannot be subject of res judicata.
2. Declaration by vendor of land to be owner while having no rights in it nor immediate prospect to acquire any — a misrepresentation rendering agreement of sale void.
3. Where contract divisible into two separate parts, part held void can be rescinded.

Edit. Note: see C.A.246/37 3 CtLR 52.

Olshan for Appellant.
E. Fellman for Respondents.

Appeal from Decree of District Court, Jaffa, sitting at Tel-Aviv, dated 22.12.38.

JUDGMENT

This is the considered judgment of the Court.

This is an appeal from the judgment of the District Court sitting at Tel-Aviv, declaring that a part of a contract between the two parties to sell land was void, and ordering the return of the purchase money paid in respect of the void part. The facts are as follows :

On the 23rd of October, 1934, the Appellant sold to the Respondents land of two catagories : A., the first part, consisting of a plot, the area of which was 409.1 square metres ; and B., certain smaller

plots which were known during the proceedings as the completion plots, and which will be referred to as such in this judgment, amounting to a total of 263.5 square metres. The total area of the plot sold was stated in the contract to be 672.6 square metres, and the price at the rate of LP. 1.150 mils per Tel-Aviv square pic, making a total of LP. 1366.775 mils. The whole of the purchase money was paid to the Appellant, and the plot of category A. was duly transferred to and registered in his name.

By clause 1. of the contract —

> "The vendor undertakes hereby to sell to the purchaser and the latter agrees to buy from him the a/m plot which belongs to him as a member of the group "22" by virtue of a title deed from the Jaffa Land Registry No. 3339/33 and in accordance of the parcellation plan confirmed by the sub-committee of the Town Planning Commisssion of Tel-Aviv on 2.8.34.
>
> "The share of the vendor in the said general title deed is 2/44, but according to the casting lots and parcellation plan of the said group, and in virtue of the contract existing between the vendor (as a member of the said group) and the Tel-Aviv Municipality, dated ..... the vendor possesses the right over the complementing parcels to the said plot, as specified in clause (b) above, so that the total area of the plot belonging to the vendor will amount to 672.6 sq. m. as aforsaid."

Clause 3. of the contract is in these terms :

> "The vendor undertakes to produce to the purchasers a confirmation from the committee of the Group "22" to the effect that it has no objection to the transfer of the rights the vendor has in the Group over his plot to the said purchasers."
>
> "With reference to the complementing portions to the said plot, as specified in clause (b) above, it was agreed that the vendor shall transfer his rights to the name of the purchasers and shall procure to the purchasers a confirmation from the Municipality of Tel-Aviv to the effect that it will transfer the portions in questoin to the purchasers pursuant to the terms of the contract existing between the Municipality and the said Group, so that the purchasers should substitute the vendor in regard to the conveyance of the said rights and also in regard to the fulfilment of the obligations referred to in the said contract."

By a prior contract dated 17th January, 1934, made between the Municipality of Tel-Aviv of the one part, and twenty-two persons, including the Appellant, of the other part, the Municipality undertook to acquire the completion plots from the owners either by negotiation or by expropriation and to transfer them into the names of the twenty-two persons comprising the second party or their order.

Various arrangements were made in case the Municipality were unable to enquire these plots, and, in fact, up to this day the completion plots have not been so acquired by the Municipality.

By another contract the Respondents undertook to sell this same land, including the completion plots, to one Palatnik. The Respondents failed to transfer the completion plots to Palatnik, and the latter thereupon brought an action against the Respondents for the amount of the purchase price paid by him to the Respondents for the non-transferred plots. This action was dismissed in the District Court, but an appeal to this Court, Civil Appeal No. 246/37 *), was made. The judgment of the District Court was reversed and judgment was entered in Palatnik's favour declaring that that part of the contract referring to the land of category B. should be rescinded, and judgment should be entered for him for the amount of the purchase price paid in respect of the land in this category.

The Respondents therupon brought this action in the District Court against the Appellant claiming from him the amount paid by them to him for the completion plots.

Mr. Olshan, for the Appellant, has argued that this Court is not bound by the judgment in Palatnik's case and there can be no question of res judicata seeing that the parties are different, and in any case the construction of a contract can never be the subject of res judicata. That is so, and this principle was laid down in the case of The New Brunswick Railway Co. v. The British & French Trust Corporation Ltd., (All England Law Reports, 1938, Vol. 4, p. 747 ; Law Times Reports, Vol. 160, p. 137). He has further argued that the two contracts differ in very material degrees and that therefore the same construction cannot be applied to both of them. In particular he has argued that whilst in Palatnik's contract the present Respondents state that the completion plots were held by the Municipality as agents for them, in the present contract the Appellant merely said that he was the owner of a right in the completion plots, and that he never held himself out as being the owner of the completion plots themselves. He says that clause 1 of the present contract merely contains assignment of rights, and nothing more, and that therefore there is no misrepresentation by him and no fraud.

It is true that there are differences in the respective clauses 1 and 3 of the two contracts, but we do not think, as the District Court also held, that these differences are material. If we look at the present contract we see that the area of the property stated to be sold

*) 3 CtLR p. 52.

consists of a total area of 672.6 square metres, and this clause 1 states that the "share of the vendor in the said general title deed is 2/44", and that "the total area of the plot belonging to the vendor (that is the Appellant) will amount to 672.6 square metres."

Looking at this clause as a whole it seems to us that this representation that the share of the vendor is 2/44, and that the total area of the plots belonging to the vendor will be of the amount as stated, is not a true one, because the completion plots did not, and still do not, belong to the vendor, and there is no immediate prospect of his ever being in a position to acquire them. It seems to us that much of the judgment of this Court in the Palatnik case (supra) is equally applicable to this present case, particularly where the Court then said — "If the Municipality of Tel-Aviv had no rights in the land in category B., any order to them by the respondents in respect of that land would be merely a barren order, and of no avail to the Appellant." The Municipality of Tel-Aviv has still no rights to the land in category B. There was therefore no right which could be transferred by the Appellant to the Respondents under the present contract, and as equally held by the Court in the Palatnik case (supra), the second part of clause 1 of the present contract can create no obligation, and that part of clause 1 merely becomes a void agreement.

It is clear to us that there was a misrepresentation, and the same results therefore must follow. It is incorrect to say, as the Appellant has argued, that the contract has been performed. Part of it has not been performed, and cannot be, since the completion plots are owned by three separate owners, and have not been acquiried by the Municipality.

With regard to the Appellant's argument that the Respondents could not claim repudiation of a part of the contract, we regard this present contract as being obviously divisible, in the same way as Palatnik's contract, into two separate parts, and we can see no reason why, if one separate part be held to be void, that that part of the contract should not be rescinded. We are not impressed by the argument that the Appellant could not get back his assignment of rights. If the Municipality had no rights in the land there was nothing to assign.

In conclusion it seems to us that this present contract cannot in the result be distiguished from the Palatnik contract, and that the judgment of the District Court was correct.

The appeal must therefore be dismissed, with costs to include LP. 15 for attending the hearing.

Delivered this 16th day of March, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 59/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C.J.), Rose, J. and Khayat, J.

In the appeal of :

Iskander Ka'war — Appellant.

v.

The Attorney-General — Respondent.

Beating — Magistrate convicting of offence other than that charged. — Criminal Code Ordinance Sec. 149, 150 — *Criminal Procedure (Trial Upon Information) Ordinance, Sec.* 52 — *Magistrates' Courts Jurisdiction Ordinance* 1939, *Sec.* 20.

1. Up to 1.1.1940 no legislation and no settled practice whereby a Magistrate could convict of an offence other than that charged.

2. Where there is doubt as to whether Court has power to convict of an offence other than that charged, accused entitled to benefit of it.

F. Atallah for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court of Haifa (sitting as a Court of Appeal) dated 31st day of October, 1939, confirming the judgment of the Magistrate's Court of Nazareth, dated the 29th of September, 1939, whereby the Appellant was convicted of beating contrary to Sections 250 and 23 of the Criminal Code Ordinance, 1936, and sentenced to pay a sum of LP. 10, or two weeks' imprisonment.

JUDGMENT

Mr. Atallah asks us, in the first place, to say that the Appellant was justified in doing what he did.

It seems that there was a dispute between the Appellant and the complainant, his sister-in-law, over a sack of wheat, and according to the Magistrate's finding he beat her on the head. There are no further findings. On that we cannot say that he was justified. Prima facie, members of a family are not entitled to use force when disputes arise as to property.

Mr. Atallah also submits that as the Appellant was charged under Section 250 of the Criminal Code Ordinance, the Magistrate had no power to convict him — as he did — under Section 249.

There is no local legislation giving a Magistrate power to convict of an offence other than that charged similar to Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, and the practice in the past seems to have varied. There is a doubt therefore as to whether this can be done, and the Appellant is entitled to the benefit of it.

I may add that the question is now of no general importance, as the Legislature has appreciated the difficulty and Section 20 of the Magistrates' Courts Jurisdiction Ordinance, 1939, which comes into operation on the 1st of January next, deals with the point, but it should be noted, in different terms to the Trial Upon Information Ordinance.

The appeal is allowed, and the Appellant is entitled to the refund of the fine if he has paid it.

Delivered this 7th day of December, 1939.

Chief Justice.

CIVIL APPEAL NO. 111/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Pardess Co-Operative Society of Orange Growers Ltd. — Appellant.

v.

1. Misrad Kablani, Haifa Workmen's Co-operative Society Ltd.
2. Palestine Building Syndicate Ltd. — Respondents.

Appeal from judgment of District Court in an arbitration matter without obtaining leave — Conflicting judgments of Supreme Court — Construction of sec. 15 of Arbitration Ordinance it its revised from — Arbitration Rules, Rule 7 — Civil Procedure Rules.

No appeal from District Court lays in an arbitration matter except by leave of District Court or of Court of Appeal.

Harari for Appellant.

S. Friedman (by delegation) for Respondent No. 1.

Heinsheimer for Respondent No. 2.

Appeal from judgment of District Court of Tel-Aviv, dated the 19th day of October, 1939.

JUDGMENT

In this appeal in an arbitration matter a preliminary objection has been taken that there is no appeal proper before this Court since no leave to appeal has been obtained.

Section 15(3) of the Arbitration Ordinance says —

> "An appeal shall lie from an order of a magistrate's court to the district court of the District in which the magistrate's court is situated, and the decision of the district court shall be final: no appeal shall lie from the order of a district court, except by leave of the court or of the Court of Appeal."

It is admitted in this case that no leave has been obtained. The point for decision is whether leave is necessary in all cases where it is desired to appeal from a judgment of the District Court or whether leave is only necessary in the matters set out in Section 15(2) of the Ordinance.

Now there have been decided a very large number of cases, some of which have held one view, and some of which have held another view. In some of the cases it has been held that leave is only necessary for the matters contained in sub-section (2), other and later cases held that the necessity to obtain leave is general. I think possibly the difference in this opinion is due to the fact that before the Revised Edition of the Laws of Palestine commonly known as the Drayton Edition came out, Section 15 was in a somewhat different form. In all the earlier cases decisions were given on the construction of Section 15 in its original state and not in its present form. When we come to the later cases the view of this Court seems to be that the necessity to obtain leave to appeal is general and is necessary in all cases under the Arbitration Ordinance. It seems to us that the last case is The Labour Council of Tel-Aviv and Jaffa v.

David Illgovsky, C.A. 164/37, *) in which it was quite definitely held that leave to appeal was necessary. In Shehadeh Suleiman v. Michael Bernesco, C.A. 15/37,**) the Court held again that no appeal lay in an arbitration matter except by leave of the District Court or of the Court of Appeal, and we do not think that the one later case that has been cited to us, namely, Steelo Awad v. Dounie and others, C.A. 142/38, ***)lays down anything contrary to the views expressed in the two cases I have just cited.

On the review of the authorities cited we think that the earlier cases which held the contrary view can be distinguished for the reasons which I have given, and that the law is as laid down in C.A. 164/37 and 15/37, namely, that in all cases under the Arbitration Ordinance, where it is desired to appeal, leave must be obtained either from the District Court or from the Court of Appeal. Holding this view it is not perhaps necessary that we should deal with the other points raised, since Rule 7 of the Arbitration Rules lays down that, unless otherwise specifically provided, the Civil Procedure Rules are applicable.: in this case other provisions have been made, and our opinion is that there is no proper appeal before this Court.

The appeal must be dismissed since no leave has been obtained. Respondents will have their costs and LP. 10 advocate's attendance fee to each respondent.

Delivered this 13th day of December, 1939.

British Puisne Judge.

Frumkin, J.

I agree that under the law as at present laid down both by the recent Judgments referred to by my learned brother and mainly bv the form Section 15 of the Arbitration Ordinance has taken in the last official version of the Laws of Palestine, the words in subsection (3) :

> "No appeal shall lie from the order of a district Court, except by leave of the Court or of the Court of Appeal."

must be taken to refer to any order of the District Court given in arbitration proceedings and not only to orders given upon the applications mentioned in subsection (2) of the said section.

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*) 2 CtLR p. 194.
**) 2 CtLR p. 13.
***) 4 CtLR p. 23.

As no leave has been obtained the appeal must be dismissed.

Puisne Judge

Khayat, J.
I concur

Puisne Judge

MISCELLANEOUS APPLICATION NO. 22/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J. and Frumkin, J.

In the application of :—

Mala Meierovitz, through her guardian Das Jugendamt der Synagogengemeinde, Cologne. Applicant.

v.

Israel Zvi Meierovitz. Respondent.

Application on behalf of infant for exemption from Court fees — Affidavit by guardian's advocate that infant a pauper.

Where infant applies through guardian for leave to sue or to appeal in forma pauperis — not sufficient to prove that infant without means, next friend must also prove that he is without means.

Frank (by delegation) for Appellant.
S. Gratch for Respondent.

Application for exemption from payment of Court fees on appeal.

ORDER

In this case an infant plaintiff is applying through her guardian for leave to enter an appeal in forma pauperis against a judgment given by the District Court, sitting at Tel-Aviv. Under Rule 19 of the Court Fees Rules 1935, as amended, an applicant must, in the first place, prove that he is unable to pay the Court fees through poverty and secondly that there are reasonable grounds for appeal.

In this case an affidavit has been filed by the advocate appearing

for the infant stating various reasons why he is satisfied that the infant is a pauper. The applicant however is suing through her guardian or next friend, and in this particular case I think we can regard the body appointed by the German Court, Das Jugendamt der Synagogengemeinde of Cologne, as the next friend.

We think therefore that in such a case it is not sufficient to prove that the infant plaintiff or appellant is without means but that the next friend must also prove that he is without means, and of that fact there is not any proof even tendered. For these reasons we think that the application must be refused. The respondent has asked for costs against the advocate responsible for filing the application, that is, Dr. Spindel. In the absence of this gentleman, we do not think we can deal with this application. We make no order as to costs.

Given this 6th day of July, 1939.

British Puisne Judge

MISCELLANEOUS APPLICATION NO. 23/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J. and Frumkin, J.

In the application of :—

Yoshua Zyman — Applicant.

v.

Abraham Makleff, Executor of the Estate of the late Albert Zyman. — Respondent.

Application for exemption from Court fees.

Where on application for exemption from fees on appeal applicant states that he will be able to pay later and he is still in time to apply for extension of time for filing appeal, application will be dismissed.

S. Felman for the Applicant.
Respondent in person.

Application for exemption from payment of Court Fees on appeal.

ORDER

This is an application for exemption from payment of Court fees under Rules 19(2) of the Court Fees Rules, 1935, as amended by the Court Fees (Amendment) Rules (No. 2), 1938. On consideration the application is dismissed on the ground that applicant stated before us that he will be able to pay later and he is still in time to apply for extension of time for filing his appeal under Rule 324 of the Civil Procedure Rules, 1938. We order costs to the respondent fixed at LP. 1.500 mils.

Given this 6th day of July, 1939.

British Puisne Judge.

HIGH COURT NO. 74/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— The Chief Justice (Trusted, C.J.) and Abdul Hadi, J.

In the application of :—
Ibrahim Abed Shihadeh — Petitioner.

v.

1. The Chief Execution Officer in the District Court of Jaffa.
2. Amneh Mahmoud Abu Leila — Respondents.

Desistment by last bidder in public sale proceedings and also by bidder next below him — Property put up for public auction several times — Liability of withdrawing purchaser.

Where there were two or more auction sales in Execution Office of same property, last declared purchaser failing to pay

amount offered by him liable only to make good amount between his bid and highest bid at second auction sale.

Shehadeh for Petitioner.

Homsi for Respondent No. 2.

Application for an order to issue directed to the first Respondent calling upon him to show cause why his order in Jaffa Execution File No. 1991/35, dated 10th November, 1939, should not be set aside, and an Order substituted therefore limiting the liability of Petitioner under Article 109 of the Execution Law to the extent of LP. 40, being the difference between his bidding of 29.1.37, amounting to LP. 140, and that of the next bidder succeeding him, namely, Ahmad Shikh Ali who offered LP. 100 and who desisted thereafter.

Or alternatively : that his liability be limited to the extent of LP. 87.500 mls, being the difference between his bid for LP. 262.500 mls and that of the next bidder succeeding him, made by Radwan el Hallac for LP. 175.— who desisted after the final order of sale was given to the latter.

ORDER

This is a return to a rule nisi issued by this Court on the 4th of December, 1939, calling upon the Chief Execution Officer, Jaffa, to show cause why the Petitioner's liabllity should not be limited under Article 109 of the Execution Law.

That liability arises out of auction sale proceedings in the Execution Office of Jaffa, in file No. 2992/35. The property of the second Respondent was put up for sale five times. On each occasion the last bidder failed to pay the amount he offered, and the property was put up again for sale. Finally the property was sold to the judgment creditor at a low price, and it was sought to charge the Petitioner with the difference between his bid at the first auction and that price. He now invokes Article 109 of the Execution Law, which reads as follows :

> "If the bidder in whose favour transfer has finally been ordered refuse to purchase or fail to pay the whole price, and the bidder next below him consent to purchase the property for the price which he bid, transfer will be made in favour of the lower bidder for the said price, and the difference between the two prices will be recovered by the Execution Office from the security deposited by the defaulting bidder, or, if that be insufficient, from his other property.
>
> Should the first purchaser persist with his desistment in this case the goods in question shall be put to public auction for a

term of fifteen days; and the difference between the two auctions shall be collected by the Execution Office from the second purchaser."

We think that the law is clear, and the Petitioner is liable only to make good the amount between that which he offered as the last bidder in the first auction sale, and the amount offered by the highest bidder at second auction sale.

The rule is therefore made absolute accordingly, with costs to include LP. 10 for attending the hearing.

Given this 18th day of December, 1939.

Chief Justice.

CIVIL APPEAL NO 50/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C.J.) and Khayat, J.

In the appeal of :

Rafoul Hakim — Appellant.

v.

Leon Levy — Respondent.

Action before Chief Magistrate for sum not exceeding LP. 250 — Counterclaim by Defendant for amount over and above LP. 250 — Counterclaim against counterclaim — Right to ask set-off —Magistrates' Courts Jurisdiction Ordinance, 1935, *sec.* 2(1)(*e*) *C.A.* 99/34 2 *PLR* 292.

1. Where defendant files a counterclaim exceeding amount of claim nothing prevents Court entering judgment in his favour for balance. (Per Trusted, C.J.).

2. Chief Magistrate*) has no jurisdiction to deal with counterclaim of over LP. 250 not arising from subject matter in dispute and having no relation to original action, unless counterclaim reduced to LP. 250.

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*) Edit. Note: The same rule will certainly also apply mutatis mutandis, to a Magistrate whose jurisdiction is limited to LP. 150.

3. While A cannot set off a debt due to him from B upon one account against a debt due from him to B on a separate account, he can, on being sued in Court by B, claim his debt by way of counterclaim, when, if he succeeds, a set-off may be ordered by Court.

Levin for Appellant.
Ginzberg for Respondent.

Appeal from judgment of District Court, Haifa (in its appellate capacity), dated the 23rd March, 1939.
Khayat J.

JUDGMENT

A summary of the facts of this case is as follows : —

The Plaintiff (Respondent) brought an action in the Chief Magistrate's Court, Haifa, against the Appellant (Defendant) claiming the sum of LP. 233.072, being his share in the rent of certain properties owned jointly by him, the Appellant, and Khoury and his brother, which amount the Appellant collected himself.

The Appellant admitted the said amount, but brought a counterclaim in the sum of LP. 459, being rents due from the Respondent in respect of certain properties coowned by them, and asked for set off.

The Plaintiff, in reply to this counterclaim, stated that a sum of LP. 1,577.353 was due to him from the Defendant, and that he reserved his right in respect of this amount to claim it in the competent Court.

The Chief Magistrate took the view that the Plaintiff had no right to bring a counterclaim against a counterclaim, and gave judgment in favour of the Defendant (Appellant) in the sum of LP. 225.928 after deducting the amount claimed by the Plaintiff.

In a second action, the same Plaintiff claimed the sum of LP. 191.236; the Defendant admitted the sum of LP. 161. 722 and brought a counterclaim in the sum of LP.215.

The Plaintiff admitted a sum of LP. 33.032, and after making an account there remained to the Plaintiff the sum of LP. 105.242, for which sum judgment was given in the Plaintiff's favour.

The result of the Magistrate's Court's judgment, after deducting the amounts due to the Plaintiff from that due to the Defendant, was a judgment in the sum of LP. 120 in favour of the Defendant.

An appeal against the above judgment was lodged in the District

Court, and on the 23rd March, 1939, Plaintiff obtained judgment in his favour in the sum of LP. 122.386. The District Court did not deal with the second case, but took the view that the Defendant had no right to ask for set off from the Plaintiff and that he only had the right to counterclaim the sum of LP. 215.928 mentioned in his statement of claim.

Application for leave to appeal to the Supreme Court against the judgment of the District Court was granted. Hence this appeal.

Counsel for the Appellant, asks this Court to set aside the judgment of the District Court on the following grounds :—

(1) That in accordance with section 2(1)(e) of the Magistrates' Courts Jurisdiction Ordinance, 1935, he has the right to counterclaim the sum of LP. 459, and that after making a set off he has the right to obtain a judgment for the balance.

(2) That the Court erred in drawing up the account which amounted to LP. 215, whereas the difference is LP. 225, and that the mistake of LP. 10 is a clerical error, as is apparent from the statement of claim.

(3) That the District Court erred in following Civil Appeal No. 99/34, the Ottoman Bank, Haifa, v. Elias Mulki, Palestine Law Reports, Vol. II, p. 292, as the facts of that case do not tally with the facts of the present case, and that his claim is based on the counterclaim, and asked that the judgment of the Chief Magistrate be confirmed.

Counsel for the Respondent asked that the judgment of the District Court be confirmed for the reasons stated in the said judgment and did not strees the point as regards the LP. 10 resulting from the clerical error.

In my view the Chief Magistrate went wrong in accepting the counterclaim in the sum of LP. 459, because section 2(1)(e) provides as follows :—

> "Counterclaims to the same value or amount as in original actions: "Provided that where the counterclaim arises from the same subject-matter or circumstances as the original action, the magistrate may try such counterclaim whatever may be the amount claimed in it."

From the above provision it is clear enough that the jurisdiction of the Court in counterclaims is restricted to the same value or amount as in the original actions, and cannot be unlimited, unless the counterclaim arises from the same subject-matter or circumstances as the original action.

Here the counterclaim arises out of subject-matter other than the

subject-matter in dispute, and has no relation to the original action, and the counterclaim for the sum of LP. 459.— should not have been dealt with by the Chief Magistrate unless and until it was reduced to LP. 250.— to bring it within his jurisdiction.

As regards the question of set off referred to in the judgment of the District Court in which that Court relied on Civil Appeal No. 99/34 (supra) I am of opinion that the above appeal cannot be followed in this case as the Appellant here did not apply to the Court to rectify his previous act of set off, but asked that the amount claimed by the Plaintiff and admitted by him (the appellant) be deducted from his conterclaim and prayed for judgment for the balance. In the case of the Ottoman Bank, the Bank alleged that it had the right to effect a set off, and that in fact it made such set off as it had no right to bring a counterclaim owing to the lapse of time.

As regards the difference of LP. 10.— I see no reason to go into this question as it is a clerical error. In the result I am of opinion that both judgments of the District Court and of the Chief Magistrate should be set aside and judgment entered in favour of the Appellant for the balance after deducting LP. 233.072 from LP. 250.— that is the sum of LP. 16.928 mils and after deducting the latter amount from the sum of LP. 105.242 mils which is not disputed, there remains the sum of LP. 88.314 mils in favour of the Respondent in this action, for which judgment will be entered. As regards the other points raised the appeal will be dismissed.

Each party will bear his own costs of this appeal.

Delivered this 23rd day of June, 1939.

Puisne Judge

Trusted, C.J.

I agree in substance with the judgment of my brother Khayat J. and would only add that where Defendant files a counterclaim and the amount so claimed exceeds the amount of the claim I know of no law or rule which prevents the Court entering judgment in his favour for the balance. In C.A. 99/34 P.L.R. Vol. II, p. 292 to which reference has been made the Defendant lodged no counterclaim.

Delivered this 23rd day of June, 1939.

Chief Justice.

CIVIL APPEAL NO. 68/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C.J.) and Abdul Hadi, J.

In the appeal of :

Khalil Mustafa Abu Sirriya — Appellant.

v.

1. Sakina
2. Halima

daughters of Hassan Warrad el Ghazawi.

3. Ali Muhammad Mustakim.
4. El Azar Aliashar.
5. Mustafa Muhammad Abu Sa'ad.
6. Muhammad Hussein Abu Eita.
7. Sa'ad Muhammad el Khuzandar. — Respondents.

Plea of prescription by adverse possession — Settlement Officer prepared to hear new defences but not to adjourn case — Claim of usurpation followed by contention of partnership and lease — Application for adjournment of case — Duty of counsel, claiming or defending.

1. Claim that defendant usurpated land — not contradictory to contention that he was in possession by way of partnership and lease, if he stopped payment of rent for a certain period before action was brought.

2. Court, while prepared to hear new defences, may refuse advocate's application to adjourn case for that purpose.

Counsel, whether claiming or defending, must be ready to submit his claim or defence and whatever documents he has, especially when he has had sufficient time to prepare all that.

Goitein (by delegation) for Appellant.

Rubinstein (by delegation) for Respondents Nos. 1 & 2.

Appeal from judgment of Land Court, Jaffa (sitting as a Court of Appeal), dated the 11th May, 1939.

JUDGMENT

Trusted, C.J.

The judgment which I am about to read is that of Abdul Hadi, J., and with it I agree.

In cases of this sort, involving village lands, settlement Officers have a dificult task to perform. In this case there was a long and careful hearing, and although it may be as we are told, that the Settlement Officer was going on leave at the end of the hearing, he gave a detailed judgment. It is quite clear that he considered the relationship existing between the parties and weighed such evidence as there was.

Delivered this 14th day of july, 1939.

Chief Justice.

Abdul Hadi, J.

This action was originally brought before the Settlement Officer by the first and second Respondents, as Plaintiffs, against the Appellant and the third and fourth Respondents and others as Defendants, and the fifth, sixth and seventh Respondents, as Third Party. They claimed their shares in certain holdings they inherited from their father and which are registered in their names. The Appellant's defence was a plea in bar of prescription alleging that he was in adverse possession of the shares claimed for a long period which barred the hearing of the action.

2. The Settlement Officer heard the pleadings of both parties, the evidence of witnesses, scrutinized the documents produced, and was prepared, at the last sitting, to hear other defence, but refused to adjourn the case for the purpose of hearing these other defences to some other time. In the result he came to the conclusion that the Appellant's possession of the land in dispute was by way of partnership and lease and that that possession was not adverse as contended by him, and rejected the defence of possession over the period of prescription, and gave judgment in favour of the first and second Respondents for the shares claimed.

3. The Appellant appealed against the judgment of the Settlement Officer to the Land Court at Jaffa. That Court dismissed his appeal and he lodged an appeal to this Court against the said judgment of the Land Court which is the present appeal before us.

4. Counsel for the Appellant has raised several points In the first place, he submitted that, as the first and second Respondents

in their claim before the Settlement Officer stated that the Appellant was in possession of their shares in the land in dispute contrary to their will, they could not abandon that claim and contend that the Appellant's possession was by way of partnership and lease, as the latter statement contradicts their contention of usurpation. I do not agree with this view because the Respondents were correct when they contended that the Appellant's possession of the land in dispute at the date when the action was brought was by way of usurpation so long as the rent was not paid to them since the death of Muhammad Beidas, and therefore, the possession of the land, after the stoppage of the payment of the rent, in spite of claiming the same, became usurpation.

5. Counsel for the Appellant submitted that there was not sufficient evidence before the Settlement Officer to prove the partnership and the lease, but after perusal of the record and of the judgment of the Settlement Officer, it becomes clear that there was evidence before the Settlement Officer sufficient to arrive to the conclusion to which he arrived, and that the possession by the Appellant was not adverse possession.

6. Counsel for the Appellant also submitted that the Land Court was wrong in agreeing with the action taken by the Settlement Officer refusing the submission of a new defence other than the defence of adverse possession, but it appears from the record that the Settlement Officer was prepared, at that sitting, to hear other defences but refused to adjourn the case to another date for that purpose. Accordingly the Land Court was not wrong in confirming the procedure adopted by the Settlement Officer as it is the duty of a counsel, whether he is claiming or defending, to be ready to submit his claim or defence and whatever documents he has, especially when he has had sufficient time to prepare all that.

7. Another point raised by counsel for the Appellant is that there is a mistake in the judgment as regards the shares. I am not satisfied as to this and I do not consider that the judgment should be varied in this respect.

For these reasons the appeal will have to be dismissed with costs and LP. 15 fee for attending to the first and second Respondents.

Delivered this 14th, day of July, 1939.

Puisne Judge

CIVIL APPEAL NO. 25/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— Copland, J., Green, J. and Khayat, J.

In the appeal of :

Naim Abu Sham — Appellant.

v.

The Attorney-General — Respondent.

Conviction by District Court, after acquittal by Magistrate, of trespass — Civil action against trespasser for dispossession in Magistrate's Court — Effect of conviction in criminal case upon subsequent proceedings between same parties — Elements of trespass under Ottoman Penal Code — Encroachment on land a continuing offence — Effect of superfluous and irrelevant finding of fact.

1. Judgment of conviction by competent Court — conclusive evidence of facts on which conviction based and binding in all subsequent proceedings between same parties.

2. Necessary elements for conviction under addendum to art. 252 of Ottoman Penal Code: 1) land trespassed on should have been in possession of prosecutor, 2) encroachment without authority.

3. An act of encroachment in any year — liable to be prosecuted; in that sense trespass a continuing offence.

4. Finding by Court if superfluous and irrelevant to issues in proceedings before it, — not binding in other proceedings.

Sanders for Appellant.
Eliash for Respondent.

Appeal from judgment of District Court, Haifa (Appellate Capacity), dated 31.5.38.

JUDGMENT

The following are the facts which give rise to this appeal. The dispute is about certain lands in Belad al Sheikh, near Haifa, and after protracted litigation between the Government and other parties, who claimed the ownership of certain parts of this land, in some of which proceedings the present appellant was a party, the Government prosecuted the appellant for trespass before the Magistrate's Court

Haifa. The learned Magistrate found that the offence of trespass was prescribed, and acquitted the appellant, but on appeal the District Court reversed the Magistrate's judgment, holding that the offence of trespass was a continuing offence, and that since the appellant had ploughed the land in 1934, and the charge had been laid against him later in that year, he had committed an offence under the addendum to Article 252 of the Ottoman Penal Code, and they thereupon convicted and fined him. Leave to appeal to this Court was refused. That judgment is therefore final.

In spite of having been convicted of trespsas the appellant refused to vacate the land trespassed on, and the Government was forced to bring an action against him for dispossession in the Magistrate's Court. This action was in fact the renewal of an original action which had been stayed until the result of the criminal proceedings against the appellant was known. The learned Magistrate held that he was bound by the principles laid down by this Court in Keren Kayemeth Leisrael, Ltd., v. Hillal and others, Land Appeal 57/36 [1], and gave judgment in favour of the Government. The Land Court dismissed an appeal made to them, but gave leave to appeal to this Court.

In this appeal counsel for the appellant has raised three points: (1) assuming that the judgment of the District Court in the criminal appeal was correct, what is the proper application of the principles laid down in Hillal's case, Land Appeal 57/36; (2) is the judgment of the District Court in the criminal appeal binding in civil proceedings, or can it be queried; (3) did the Government show a good cause of action under Article 24 of the Magistrates' Law in the dispossession proceedings.

It will be simplest to take the second point first, because on the answer to that depend the answers to the other two points. In both the criminal and civil proceedings the parties were the same, and following Hillal's case (supra), there can be no doubt that the criminal proceedings were conclusive evidence not only of the conviction of the appellant for trespass, but also of the facts on which that conviction was based, and neither that conviction nor the facts can be queried in this case.

The necessary elements for conviction under the addendum to Article 252 are — first, that the land trespassed on should have been in the possession of the prosecutor; and secondly encroachment without authority. The judgment of the District Court, convicting the appellant, is proof therefore of those facts, and is binding in all sub-

[1] 2 CtLR p. 6.

sequent proceedings between the same parties — it is conclusive proof of the facts necessary to establish the conviction. It is true that, if the District Court had come to wrong conclusion in law, then this Court would not be bound by it, but we cannot see that there was any error in law.

The appellant was found guilty in 1934 of committing an offence in the earlier part of that year. An act of encroachment in any year is liable to be prosecuted, and in that sense trespass is certainly a continuing offence.

Counsel for the appellant has argued that in the civil proceedings, the finding of the learned Magistrate in the Criminal case, that the appellant had been in possession of the land for a long time, must also be considered to be binding. Apart from the vagueness of the term "a long time", this finding by the Magistrate was irrelevant to the issues in the proceedings before him. The only question before the Magistrate was whether there was an offence, and was that offence, prescribed. As held by this Court in Sliheet v. The Orthodox Patriarchate of Jerusalem, Civil Appeal 201/38 [2] (P.L.R., Vol. 5 p. 477) any finding irrelevant to thos issues is superfluous, and is not binding in other proceedings.

As to the last point, it is admitted that the Government has a kushan for the land, and the District Court judgment proves the other necessary ingredients required by Article 24 of the Magistrates' Law.

This disposes of the appeal. Mutatis mutandis, and very little mutation is necessary, this case is on all fours with Hilal's case (supra), and we think that the learned Magistrate was right. We are at a loss to understand how leave to appel was ever given, seeing that the case was clearly covered by authority.

The appeal fails and is dismissed with costs to include LP. 15 for attending the hearing.

Delivered this 28th day of April, 1939.

British Puisne Judge.

---

* 4 CtLR p. 150.

CIVIL APPEAL NO. 67/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before :— The Chief Justice (Trusted, C. J.), Copland, J. and Frumkin, J.

In the appeal of :

Michael Keiner — Appellant.

v.

Sara Keiner — Respondent.

Action by husband against wife for his share in proceeds of sale of co-owned immovable property — Failure to discharge onus of proof — Mejelle, art. 1771.

Court of Appeal will not interfere with judgment dismissing claim, if they find it entirely a question of fact as to whether Plaintiff entitled to what he claimed and trial Court, having heard evidence, considered that he failed to prove his case.

E. Fellman and *S. Felman* for Appellant.
Dunkelblum for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 26th, April 1939.

JUDGMENT

This is an appeal from a decision of the District Court sitting at Tel-Aviv. The Appellant, who was the Plaintiff, claimed LP. 1745. In his statement of claim he pleaded.

> "Defendant procured Plaintiff to register in their joint names a certain building. This building was subsequently sold and Defendant has taken and retains to this date the sum of LP. 1745. — which belongs to Plaintiff."

and upon the Defendant's application, further particulars of the claim were given.

The parties are husband and wife who came to this country some years ago, and the husband appears to have been successful in business and to have made money.

At the hearings there was much argument as to what had happened to various sums of money, but it is clear that the onus was upon the

Plaintiff to show that he was entitled to the LP. 1745 which he claimed.

The claim is not based on any article of law other than 1771 of the Mejelle, which I do not think applies. It seems to me, therefore, to be entirely a question of fact as to whether, having regard to the arrangements in this matrimonial home, the Plaintiff was entitled to the sum claimed.

The Court of Trial, having heard the parties, considered that the Plaintiff had failed to prove his case and decided against him, and I do not think we should interfere with the decision of that Court, and the appeal will be dismissed with costs and advocate's fees for attending the hearing fixed at LP. 15.

Chief Justice.

Copland, J.

I agree. The case from the beginning was based on surmise, suppositions and hypothetical assumptions and figures. From the manner in which it was conducted in the District Court it was a hopeless case, and it was even more hopeless in this appeal. The District Court, in its judgment, analysed the evidence and came to the conclusion that it did not support the Appellant's case. I think that conclusion is the right one; it was for the Appellant to prove his case, and that he has failed to do.

For these reasons and for those given by the Chief Justice I agree that the appeal must be dismissed.

British Puisne Judge.

Frumkin, J.

I agree. Much of the confusion in this case is due to the fact that the double relationship between the parties both as husband and wife and as co-owners of jointly owned immovable property, have been mixed up together. In his argument before us Counsel for Appellant tried to base his claim on joint ownership, and it might very well be that as a co-owner he might have had a legitimate claim for a proper accounting as regards the purchase price of a jointly owned property received by his co-owner. But looking at his statement of claim, and the way the case was conducted in the Court below, it is clear that the Appellant in fact based his claim on his relationship as the husband of the Respondent, and as such I agree he failed to prove his claim for the amount sued, or indeed for any other amount, and the appeal must therefore fail.

Delivered this 29th day of June, 1939.

Puisne Judge

Current Law Reports

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

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OF JUDGMENTS PUBLISHED IN THE

"CURRENT LAW REPORTS"

VOLUME VI.

(1st July, 1939 — 31st. December 1939)

Copyright by M. Levanon

Weiss Press, Jerusalem

Price 150 mils

LIST OF ABBREVIATIONS

AG, Attorney General
Applt, Appellant
AszC, Assize Court
CA, Court of Appeal
Co, Company
Coop, Cooperative
CPR, Civil Procedure Rules
Cr. Criminal
CXO, Chief Execution Officer
DC, District Court
Dfdt, Defendant
Eccles, Ecclesiastical
HC, High Court
J/C Judgment Creditor
J/D Judgment Debtor
Jdgt, Judgment
Jurisd, Jurisdiction
LC, Land Court
L Reg, Land Registry — Registrar
LSO, Land Settlement Officer
Mag, Magistrate
MC, Magistrate's Court
OCCP, Ottoman Civil Procedure Code
O. in C., Order in Council
Ord, Ordinance
P/A, Power of Attorney
Pal, Palestine
PC, Privy Council
PDC, President District Court
Pltf, Plaintiff
P/n, Promissory Note
Proc, Procedure
Reg. Regulation
Respdt, Respondent
SC, Supreme Court
XO, Execution Office, — Officer

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