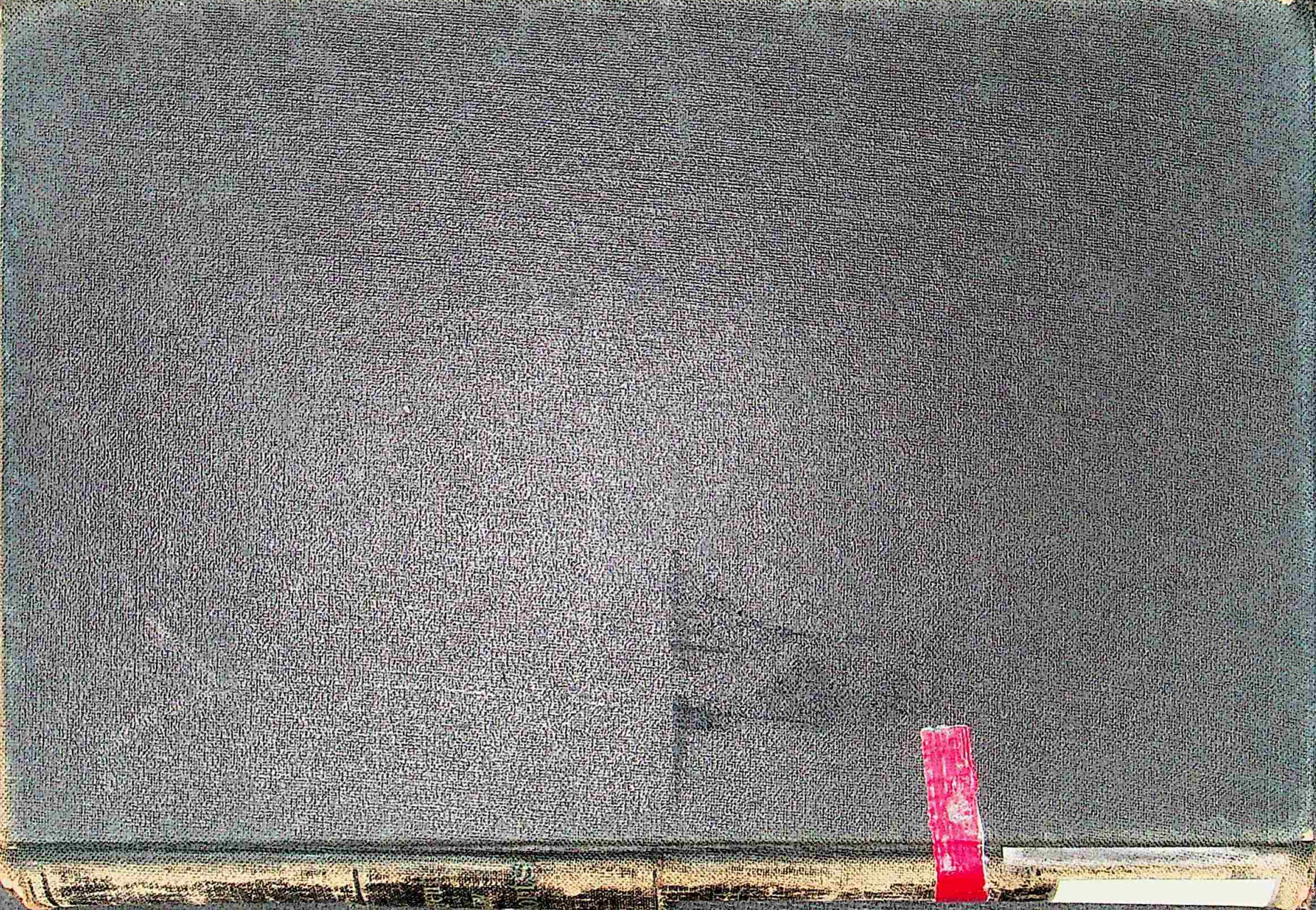

Current Law Reports

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CIVIL APPEAL NO. 109/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the Appeal of :—

Dr. Simon Benzion — Appellant.

v.

Hilel Kastenberg — Respondent.

Agreement to pay fixed amount against discharges to be produced within fixed period from various creditors — Assignment of obligation not for liquidated sum.

Obligation, whether regarded as debt or as claim, not for a crystallised amount or liquidated sum — not assignable.

Eliash for Appellant.

Argaman for Respondent.

Appeal from judgment of District Court, Haifa (Appellate Capacity), dated 29th of September, 1939.

JUDGMENT

This is an appeal, by leave, from the judgment of the District Court, Haifa, dismissing the appeal from a judgment of the Magistrate's Court ordering the appellant to pay to the Respondent the sum of LP. 119 with interest and costs.

The facts out of which the action arose are as follows.

The Appellant entered into an agreement dated 12.11.37 with the Itan Cooperative Society whereby in order to be freed from the vexation of certain actions and claims being brought against him personally by various creditors of the Society in respect of things supplied or work done in connection with certain buildings operations of which he was the supervisor, he undertook to pay to the Society the sum of LP.140 on condition that within six months from the date of the agreement discharges in writing from the various creditors should be prod-

uced to him by the Society.

There was a further provision that from the sum of LP.140 there should be deducted any amount which should be found, on an account being taken, to have been paid by the Appellant himself in respect of any of the claims referred to in the agreement.

On the 8.2.38, the Society purported to assign this sum of LP. 140 to the Respondent, who, in due course, instituted the present action against the Appellant.

At the end of the period of six months provided for in the agreement, at least two of the seven discharges had not been produced to the Appellant. It would seem, therefore, that the Society had failed to comply with a material condition of the contract and that, therefore, the Appellant's obligation under the agreement to pay the sum of LP.140 has never arisen. While, therefore, the Society may be entitled, in an action against the Appellant, to a *quantum meruit* payment, it seems clear that their claim is not one which is assignable.

Apart from this, whether the obligation arising from this agreement is regarded as a debt or as a claim, we are of opinion that in either event it is not assignable in that it is apparent from the terms of the agreement itself that it is not for a crystallized amount or for a liquidated sum.

For these reasons the appeal must be allowed ; the judgments of the District Court and the Magistrate's Court must be set aside and judgment entered for the (Defendant) Appellant. The Appellant is entitled to his costs here and in the Courts below. The costs of this appeal to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 22nd day of December, 1939.

British Puisne Judge

CRIMINAL APPEAL NO. 63/39.

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 :—

Attorney General — Appellant.

v.

Vladimir Nikolaiovitch and 15 others. — Respondents.

Charge of aiding and abetting illegal immigration — Offence committed outside territorial limits of Palestine — Immigration Ordinance, 1933 — 1939.

1. Aiding and abetting, where specifically prescribed as an offence *per se*, — only punishable if committed within territorial limits of Palestine.

2. (*Obiter dictum*). If legislature had intended the wider construction to be given to sec. 12(3) of Immigration Ordinance (i.e. that aiding and abetting punishable in Palestine even if committed outside its territorial limits), it would have been beyond its jurisdiction to have enacted such a law.

Crown Counsel (*Hogan*) for Appellant.

Shapiro for Respondents.

Appeal from judgment of District Court of Jaffa, dated the 3rd November, 1939, whereby the respondents were convicted of being found in Palestine without permission contrary to Section 5(1) (G) and (H) of the Immigration Ordinance, 1933 and section 12(2)(A) of the Immigration Ord. 1933, together with section 7 and 7(3)(C) of the Immigration (Amendment) Ordinance 1937, and section 3 of the Immigration (Amendment) Ordinance, 1939 and setenced to one month's imprisonment each.

JUDGMENT

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

any of the accused was within the territorial limits of Palestine.

Against this decision the Attorney General now appeals.

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

> "In that each of the accused persons during the night of 21/22. 8.39 at a place off the Tel-Aviv coast, aided and abetted 800 Jewish Immigrants who had not in their possession, in addition to a valid passport or similar document as required by paragraph (G) (H) of Section 5(1) of the Immigration Ordinance 1933, an Immigration Certificate or permit granted by the Director of the Department of Immigration, to enter Palestine."

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

As, however, considerable argument was addressed to us on the point as to whether in order to establish that a person is guilty of "aiding and abetting" within the meaning of Section 12(3) of the Immigration Ordinance it is necessary to show that such aid was actually given within the three mile limit, we feel that it may be useful if we express our opinion on the matter.

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

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

vention of the Ordinance had been committed by the said 800 Jewish immigrants, the fact remains that the aiding and abetting by the accused persons had been completed outside these limits.

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

The appeal must therefore be dismissed.

Delivered this 4th day of January, 1940.

Chief Justice

CRIMINAL APPEAL NO. 68/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the Appeal of :—

Aaron Yosef Levi — Appellant.

v.

Attorney General — Respondent.

Premeditated murder — Corroboration of evidence of accomplice — Intent inferred from facts — Criminal Code Ordinance, sec. 214(b).

Accused's pointing out place where victim buried, after denying been there and having any knowledge of the crime, — ample corroboration of evidence against him.

A/Solicitor General (*Bell*) for Respondent.

Eliash for Appellant.

Appeal from judgment of Criminal Assize Court sitting at Tel-Aviv, dated the 12th day of December, 1939, whereby the appellant was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936 and sentenced to death.

JUDGMENT

We need not hear you, Mr. Bell.

The appellant was charged before the Assize Court sitting at Tel-Aviv with the premeditated murder of his infant child, aged five days. He was convicted and sentenced to death. The Assize Court in convicting him relied principally upon the evidence of one Ozeri. The Assize Court came to the view that Ozeri was an accomplice and that his evidence therefore had to be corroborated. They found that there was sufficient corroboration which would enable them to convict the appellant.

The principal point taken in this appeal on behalf of the appellant was that there was no proof of the time when the child died, whether it died on the way to the beach or whether it did not die until it was actually buried in the sand on the beach. Dr. Eliash argues that if it died on the way, than whatever else the appellant may be guilty of, he cannot be guilty of murder.

Now, the facts of this case are important in order to determine this question. The child was a perfectly normal healthy child, so the nurse said, when she handed the child to the father, the present appellant, at the gate of the hospital. The child was wrapped by the nurse in a blanket when she handed it over. Outside the hospital the child was handed over by the appellant to Ozeri, who says that, when he received the child, it was wrapped in a blanket and a newspaper. Ozeri says that the appellant told him to go to the corner of Hayarkon Street in Allenby Street, a place near the sea, and wait for him there until he would join him. Ozeri did as he was told and in a very short space of time he was joined by the appellant. They then proceeded together to Hayarkon Street and thence on to the beach where, Ozeri said, the appellant made a hole in the sand and buried the child.

Now, on the facts of this case the Court below was entitled to find on the evidence that there was the intent to murder this child. The actions of the appellant and of the accomplice Ozeri are consistent, from the moment they have left the hospital to the moment when the child was buried in the sand, with this intent and inconsistent upon any reasonable view with any other intention. The moment at which the child died, we hold, on the facts of this case to be immaterial. The intent being to bury the child and suffocate it, it is immaterial whether the actual moment of suffocation was advanced, prior to the burial, or not. The intent was to bury and suffocate and if, in the continuous chain of events leading up to that burial, the child was suffocated by the act of the appellant or the accomplice before it was actually buried, in our view this is immaterial; it is still murder.

A considerable amount of argument has been addressed to us on the question of who wrapped the child in the newspaper. To our minds it is not material except in one sense. The object of wrapping the child in a newspaper was to disguise, as Ozeri stated, the nature of the parcel, and which of the two wrapped it in newspaper is immaterial, since the two were acting in concert.

With regard to the point that Ozeri's evidence was equally consistent with non-premeditated murder we do not agree. The conduct of the appellant was totally inconsistent with the theory that he had a sudden change of mind. The tale that the intention was to take the child to a Mission in Jaffa, leaving it there, is so improbable that no Court could have believed it. There is no evidence of any intention to take the child to a Mission. In fact the evidence is all to the contrary since they were proceeding in an entirely opposite direction from Jaffa with the child. The actions of the appellant in fact, as I said at the commencement of this judgment, from the very beginning showed no intention of taking the child to a Mission, but the whole intention from the start was that of murder. The suggestion that the intention might have been to leave the child at some other institution is guess work and obviously an afterthought; it was never advanced in the Court below. Lastly, though the point of corroboration was not touched upon by the appellant in this appeal, it was referred to in the Court below. There was ample corroboration of the evidence of Ozeri which would enable the Trial Court to accept his evidence. There could be no better corroboration, to take one instance alone, than that of the appellant pointing out the place, where the body was buried, to the police, though he had denied having been there at

the time when the child was buried, and had denied having any knowledge of the murder.

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

Delivered this 22nd day of December, 1939.

British Puisne Judge

CIVIL APPEAL NO. 110/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the Appeal of :—

Gustav Gershon Kalinhoff — Appellant.

v.

Walter Loewenheim — Respondent.

Claim for compensation in view of dismissal — Contention that lesser sum was due than claimed and was paid — Onus of proof — Objection to form of oath — Mejelle.

1. Where defendant contends that lesser sum was owing than claimed from him and was paid by him, burden of proof as to payment of that lesser sum on him, as to difference on plaintiff.

2. (a) Administration of oath as provided in Mejelle — now that parties can be called and examined and cross-examined as witnesses — largely obsolete.

(b) Parties cannot always have oath tendered in exact form they suggest or in form most advantageous to them.

3. A matter not arising on any of points of law on which

leave to appeal was given cannot be taken in Court of Appeal.

Smoira for Appellant.

Levin for Respondent.

Appeal from judgment of District Court, Haifa, (Appellate Capacity), dated 18th October, 1939.

JUDGMENT

This is an appeal by leave from an appellate judgment of the District Court of Haifa, dismissing an appeal from the Magistrate's Court, whereby the Magistrate gave judgment in favour of the present respondent who was plaintiff before the Magistrate, for the sum of LP. 100.936 mils, together with interest and costs.

The District Court gave leave to appeal on three points. The first point was whether the Magistrate was correct in holding that the onus of proof rested on the present appellant. The second and third points concern the form of the oath which the Magistrate ordered and whether the Magistrate was right in so ordering. The claim before the Magistrate was for a sum of LP. 75.936 mils on account of commission to the end of the year 1937, for LP.15 commission during 1938 and for LP. 10 salary for February 1939. There was a further claim for LP. 40, compensation in view of dismissal, which the Magistrate disallowed and no appeal was taken from that.

The main dispute arises as to the basis of the claim before the Magistrate. The present respondent alleged that the total sum due to him as commission was LP. 156.772 mils of which the sum of approximately LP. 81 was admitted to have been received, whereas the appellant said that on the 1st January, 1938, the sum of approximately LP. 123 only was due, not LP. 156, but alleged that the LP. 123 had been paid by him with the exception of about LP. 3. The Magistrate held that the burden of proof of this payment rested upon the present appellant in respect of the whole claim, that is to say LP. 156.

Now, it is abundantly clear throughout the proceedings, both in the Court below and in the Statement of Appeal addressed by the present appellant to the District Court, that he did admit that on the 1st January, 1938, the sum of LP. 123 was owing, and claimed that he had paid that sum or most of it. The Magistrate was, therefore, entirely correct in saying that the onus of proof rested upon the pre-

sent appellant to prove that payment. There was the admission that on a fixed certain date the sum of LP. 123 was owing and as the present appellant contends that the sum owing has been paid, the burden is on him to prove payment. No question, therefore, can arise with regard to the sum of LP. 123, but we think that the Magistrate went wrong with regard to the difference between LP. 156 and LP. 123, that is to say LP. 33 odd. There was no admission by the appellant that he owed the sum of LP. 156. There was no proof tendered by the present respondent with regard to this sum; in the Court below the present respondent relied entirely upon the books and the admission of the appellant. Therefore, whilst the Magistrate correctly laid the burden with regard to the LP. 123, he placed it wrongly upon the present appellant with regard to the balance of LP. 33 and that amount will therefore have to be allowed off the sum awarded by the Magistrate.

The other points taken were with regard to the oath; the oath administered in the way laid down in the Mejelle is now of course largely obsolete. The parties can be called as witnesses and it is for the opposing side to extract admissions from them, cross-examine them, and the administration therefore of an oath is largely superfluous. In any case, we agree that the Magistrate and District Court in forming the oath, in the circumstances, were correct, and parties of course cannot always have the oath tendered in the exact form suggested by them in the form most adventageous to themselves.

With regard to the point that there was no evidence at all with regard to the sum of LP. 15 that really does not arise on any of the points of law on which the District Court gave leave. It was not referred to, or if it was, was barely touched upon in the District Court and I do not think it is a point which can be taken here. That I think disposes of the appeal.

The appeal fails of course on the majority of the claim but the sum of LP. 33.666 mils must be allowed off the amount awarded by the Magistrate. The orders as to costs made by the Magistrate and by the District Court will stand, but as regards this appeal, each side must bear their own costs.

Delivered this 12th day of December, 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 Appeal of :—

David Moshe Levy — Appellant.

v.

1. Eliazar Sirkis
2. Haim Posnerson. — Respondents.

Agreement to sell plot of land and house thereon — Claim of damages for breach of contract — Finding of fact regarding a point not pleaded and not arising from agreed issues — Reversal by Court of Appeal of finding of fact — Claiming damages without having actually suffered damage.

1. Court of Appeal may find from exhibits and evidence in trial Court that latter erred as to facts, especially where finding of trial Court regards a point not pleaded by party and not arising from agreed issues.

2. Party not entitled to damages for breach of a clause of contract, even where contract provides for a liquidated sum to be paid in case of breach, if he actually suffered no damage.

Levitzky and *Eisenberg* for Appellant.
Buxbaum for Respondents.

Appeal from judgment of District Court of Jerusalem, dated 28th June, 1939.

JUDGMENT

This matter has been before the Courts for some time and emphasizes the necessity for the clear framing of issues so that the par-

ties and the Courts may know what has to be considered and decided.

By a contract in writing Mr. David Levy (the present Appellant) agreed to sell and transfer, and Messrs. Sirkis and Posnerson (the present Respondents) agreed to buy a plot of land and a house thereon. The price was LP. 3200 — LP. 800 (apparently for some reason actually LP.600) being paid on the signing of the contract.

The vendor undertook to transfer free from all objections, and partitioned in the Land Registry.

The vendor further undertook —

> "to furnish the Parcellation plan, which he shall make on his expences, within 3 days (sic) from the date of signature of this contract which plan shall be signed by all neighbours and by the Municipality, and all kinds of documents which are required in connection with the parcellation of the said house and to register the said house (inshaat) in the Land Registry of Jerusalem and to furnish all documents required in connection with the said transactions at any time he will be required to do so by a letter of Dr. M. Buxbaum, advocate, in order that the transfer of the said property may be carried into effect Mafrooz and clear from all objection, encumbrance, demands, claims and mortgages."

Possession was to be given not later than 1 Muharram, 1936.

The contract also provided, inter alia, that —

> "In the event of one of the parties repenting, not fulfilling or breaking the clauses of this contract in whole or in part, then he will have to pay to the fulfilling party the amount of LP. 800 (eight hundrer Pal. pounds) as liquidated damages without the service of notarial or other notices being required, and in the event of the party in default being the vendor then the vendor shall have to pay to the purchasers besides the sum of LP. 800 (eight hundred Pal. pounds) as liquidated damages as aforesaid also the amount of LP. 800 which he received from the purchasers on account of the price of the said plot and house."

The contract was not completed and the purchasers brought an action in the District Court, Jerusalem, against the vendor. In a statement of claim dated 31st May, 1936, they set up the contract, referred to clause 5, i. e. the clause to which I have referred whereby the Defendants undertook to furnish a parcellation plan signed by the neighbours, etc., and clause 15, i. e. the damages clause, and alleged that the —

> "Defendant did not furnish the parcellation plan as stipulated and thereby committed a breach of the contract."

They prayed for LP. 800 liquidated damages and the return of LP 600 paid on account of the purchase price.

To this the Defendant (vendor) pleaded as to the alleged breach —

> "To put it briefly : the undertaking to procure the map signed by the Municipality and the neighbours so far from being a term of the contract was only a description of the means of complying with the terms of the contract. This being so, it depended on its being necessary and if the terms of the contract could be complied with without such plan, it could not serve its purpose, and was impliedly dispensed with. The signature of the Municipality proved unnecessary ; the Defendant was and is still able to transfer the property in Plaintiffs' name Mafruz and free of all claims and encumbrances without it."

In the alternative he alleged that the Plaintiffs had waived the undertaking and were precluded from setting forward its non-fulfilment, as they (the Plaintiffs) had let the house and received the rent.

In the further alternative the Defendants made some point as to the payment of LP. 600 instead of LP. 800.

The issues than raised seem fairly clear. The Relieving President took the view that the time for producing the plan was extended, the Defendants being granted twenty-four hours from 21.4.36, but in fact they never produced it, and he was of opinion that there was no waiver.

In the result His Honour Judge Ali Hasna took the view that the Plaintiff could not succeed as there was no notarial notice.

There being a disagreement in the Court the case was dismissed.

An appeal was brought to this Court (C.A. No. 174/38)*) which held that no notarial notice was necessary, and as it dealt with other matters I will quote the judgment. At page 2 it states —

> "I should mention that in clause 15 of the contract notarial or any other notices are dispensed with. The first point then arises, was a notarial notice necessary? We are satisfied that it was not, and that here there was an extension of the time of the contract — it was not a new contract in the strict sense of the word, it was a mutual extension of time and therefore no notice was required, but it was nevertheless necessary to give some indication of a definite date on which to comply with the contract. If these letters of April had not been sent, then the three months' period during which the parcellation plan had to be filed would have expired on the 23rd May, 1936. When these letters were sent in April, they introduced a considerable amount of doubt in the mind of anyone as to what the total extension

* 4 CtLR p. 113.

was and what was the last date on which to perform the contract. We therefore think that, from this point of view, the action would be premature, inasmuch as no definite date of completion had been fixed.

"This, however, does not dispose of the case. This disposes of the particular point on which this appeal was brought, but there are various other arguments which were raised, such as, the point that it was not necessary to fix any date at all, because there was an anticipatory breach and the contract was impossible of fulfilment and so on.

"We think therefore that the best plan would be to allow this appeal and remit the case to the District Court to deal with the various points raised by both parties and to give a fresh judgment."

The case went back to the District Court, and it became necessary to reformulate the issues, and by agreement they were stated as follows :

"(1) Is the Defendant entitled to treat the fact that Plaintiff paid LP. 600 and not LP. 800 in advance as a breach of a condition precedent to the contract disentitling the plaintiff to recover damages ?

(Onus on Defendant)

(2) Did Defendant commit any (and if so what) anticipatory *or other* breach of the contract which rendered unnecessary the giving of notice by the plaintiff ?

(Onus on Plaintiff)

(3) Did Plaintiff, by granting leases or otherwise impliedly waive the breach ?

(Onus on Defendant)

(4) Was plaintiff ready and willing at all material times to pay the balance of the purchase price and take delivery ?

(Onus on Plaintiff)

(5) Is the sum of LP. 800 referred to in clause O of the contract liquidated damages or a penalty ?

(Onus on Plaintiff)

(6) If it is a penalty then what is the amount of damages to which Plaintiff is entitled ?"

(Onus on Plaintiff)

These must presumably be read in conjunction with the earlier pleadings, as alone they are not clear.

The Court heard evidence and argument and gave judgment on 28th June, 1939, for the Plaintiff for LP. 600, less certain sums, and

the Defendant appeals to this Court.

As to the first issue, no point arises.

Although the second issue is in general terms the Court seems to have treated it as referring to clause 2 of the contract. That clause was as follows :—

> "The vendor hereby declares that the building concerned has been built in accordance with the plan and building licence which have been approved by the Town Planning Commission of the Jerusalem Municipality and that there is no demand or complaint or claim on the part of the Municipality in connection with any building work in contravention of the Town Planning regulations."

That clause was never mentioned in the ariginal pleadings nor when the matter was first before the Court. In order that there may be no misunderstanding I will quote the Court's judgment, as follows : —

> "It appears from the evidence before us that the contraventions existed almost entirely in the eastern portion of the building whereas the subject matter of this case is the western portion. But at the time when this suit was filed the Plaintiffs could not have been sure that they would not be bying a prosecution if they accepted the western portion, and it was clear that the statements in clause 2 of the contract were untrue.
> "In our judgment these warranties went to the root of the contract, and we find that Plaintiffs had good and legal cause for rescinding the contract if they so wished."

and later, after discussing the question of damages —

> "We find the Plaintiffs are clearly entitled"

and judgment was given accordingly.

Firstly I would point out that this was a finding of misrepresentation or fraud, which had not been pleaded as required by Rule 109, and no such question arises from the agreed issues.

Whatever view the Plaintiffs may have had when they launched their action, — and as I have stated they never relied upon any breach of clause 2, — I think it is clear from Ex. A. and the evidence of Yehuda Barenbaum, the Senior Engineering Assistant in the City Engineering Department, Jerusalem, when recalled (p. 26 of the typed record) when he states "I have since ascertained that Ex. A. was correct", that the Court was under a misapprehension as to the facts.

From the above view it follows that I am of opinion that the Plaintiffs cannot rely upon any breach of warranty under clause 2, and

that they are not entitled to rescission of the contract.

Although there is no finding as to this, assuming — although I do not so hold — that there was a breach of clause 5 of the contract as alleged by the Plaintiff, what damage have they suffered? Clause 15 clearly provides for a penalty, and they cannot recover under that. It appears that the Plaintiffs actually suffered no damage. 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, and in fact, although only a part of the purchase price had been paid, the Plaintiffs went into possession and received LP. 312 in rents.

In my opinion the appeal should be allowed and the judgment set aside, and the Plaintiffs' claim dismissed, with costs to the Defendant here and below and on the first sppeal to this Court, with advocate's fee for attending this hearing fixed at LP. 15..

Delivered this 26th day of October, 1939.

Chief Justice

CIVIL APPEAL NO. 112/39.

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 :—

The Government of Palestine — Appellant.

v.

1. Sheikh Deeb Mohammad Deeb of Tireh Village
2. Ibrahim Sahyoun — Respondents.

Claim for possession by Government — Proof of previous possession of land — Magistrates Law, Art. 24.

c 1. Art. 24 of Magistrates' Law (recovery of possession) also applies to claims for possession by Government.

2. In an action under art. 24 of Magistrates' Law Plaintiff

*) Edit. Note : see C.A. 95/39 6 CtLR 178.

must prove actual possession of the land previous to Defendant taking possession.

Toukan for Appellant.
Sahyoun for Respondents.

Appeal from judgment of Land Court, Haifa (in its appellate capacity), dated the 11th of October, 1939.

JUDGMENT

The only point in this appeal is whether or not Article 24 of the Magistrates' Law applies to claims for possession by Government.

We are of opinion that it does — the only authorities cited to us are conflicting authorities, both given by the Land Court, Haifa.

In this case Government did not allege recent possession in its précis of claim, and the Magistrate found that Government failed to prove actual possession of the land previous to the Defendants taking possession.

In the result the appeal will be dismissed with costs on the lower scale. We certify LP. 15 for attending the hearing.

Delivered this 21st day of December, 1939.

Chief Justice

CRIMINAL APPEAL NO. 67/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :—

Keitoun Khorozian — Appellant.

v.

Attorney General — Respondent.

Charge of unlawful sexual intercourse with an imbecile female — Evidence of complainant not on oath — Criminal Procedure (Trial Upon Information) Ord. sec. 34.

Evidence not on oath —even if given by a person having the mentality of a young child and not understanding the nature of an oath — cannot be accepted in a criminal case.

Salah for Appellant.
Acting Solicitor General (Bell) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the 6th day of December, 1939, whereby the appellant was convicted of rape contrary to section 153 of the Criminal Code Ordinance 1936 and sentenced to three years imprisonment.

JUDGMENT

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

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

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

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

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

Delivered this 4th day of January, 1940.

Chief Justice.

CRIMINAL APPEAL NO. 73/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Izhak Baroukheil — Appellant

v.

The Attorney General — Respondent.

Forging and uttering cheque—Credibility of witness—Evidence sufficient for conviction of forgery — Hearing of further evidence by Court of Appeal.

1. Question of credibility of witness — a matter for trial Court only.

2. Evidence of handwriting expert corroborated by that of witness as to presentation by acused of document in question — sufficient to support conviction of forgery.

3. Power of Court of Appeal to hear further evidence only exercised in very special circumstances, never when existence of the evidence was known and the evidence was available at time of original trial.

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

Levitzky for Appellant.

Crown Counsel (*Hogan*) for Respondent.

JUDGMENT

We need not trouble you, Mr. Hogan.

The Appellant was convicted by the District Court Jerusalem on

a charge of forging two cheques of LP. 10.— and LP. 25.— respectively, and of uttering one of those cheques, and was sentenced to two years' imprisonment.

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

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

Application has been made here for the evidence to be heard of a Mr. Elkes, who is a handwriting expert of some experience. The fact that Mr. Elkes had examined these cheques was known to the appellant at the time of the original trial, and therefore, if the evidence of Mr. Elkes was required, the proper place in which to have called him was the District Court. It is true that this Court has power to hear further evidence on appeal, but that is a power which is only exercised in very special circumstances. I think I am safe in saying it is never exercised when the existence of the evidence was known, and the evidence was available, at the time of the original trial. We cannot see that there is any grave doubt such as appears to Mr. Levitzky. To us it seems a very clear case of forgery. We do not think that the sentence of two years is too much. We think that the appeal should be dismissed.

Delivered this 11th day of January, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 118/39

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 :

The Royal Italian Consul-General, on behalf of the Royal and Imperial Italian Government and on behalf of the Governo Generale dell'Africa Orientale d'Italia. Appellant.

v.

1. Azzaz Kabbada Tesema
2. Dedjasmatch Makonen
3. Alamou Chekol Respondents.

Action regarting ownership of house — Application for appointment of receiver to collect rent of property in dispute — Objection to terms of order appointing receiver.

Where plaintiff's actual claim is that defendant should be restrained from interfering with immovable property in dispute and that the property should be registered in his (plaintiff's) name he cannot object to terms of appointment of receiver providing for rent to be utilised in certain stated ways.

Appeal from the interlocutory order of the Land Court of Jerusalem, dated the 28th day of November, 1939.

Abcarius for Appellant.
Marein for Respondents.

JUDGMENT

This interlocutory appeal arises out of a claim by the Royal and Imperial Italian Government to certain property of Jerusalem.

I desire expressly to guard against saying anything which may prejudice the trial.

The Plaintiff applied to the Land Court for a receiver of the property to be appointed pending the deecision of the Court, in order to manage, protect and preserve the property, and to receive the rents thereof pending the determination of the case.

The order was granted, but Abcarius Bey, on the Plaintiff's behalf, now objects to its terms, in particular on the ground that it

provides that the rent shall be utilised in certain stated ways.

It is only necessary to say that the Plaintiff's actual claim is as follows:—

> "Wherfore it is prayed that the Defendants be restrained, themselves and their agents from interfering any further with the building, the subject matter of this action, and be also ordered to deliver all contracts, keys, or otherwise which they may have in respect of this building. And that the registration from the names of the R. Imperial Ethiopian Government be altered and registered in the name of the Italian Government or in the name of the "Governo Generale dell 'Africa Orientale Italiana" and that the defendants be ordered to pay all costs and advocate fees."

upon which I do not think objection can be taken to the terms of the order which was obtained.

The Defendants on the 18th December, gave notice under Rule 339 that they intended to submit to this Court that the appointment of a receiver was not just and convenient. The hearing of this application has been accelerated by request, in order that it might be disposed of before the Christmas vacation. Under the rule we are entitled to deal with the matter, and we do not accept that submission.

In the circumstances we see no grounds for holding that the Land Court exercised its discretion wrongly, and this appeal is dismissed without costs.

We would add that in our view it is in the public interest that the matter should be disposed of as soon as possible. We trust therefore that the Land Court will be able to arrange an early hearing, and that the parties will do their best to avoid any unnecessary delay.

Delivered this 21st day of December, 1939.

Chief Justice.

CIVIL APPEALS NOS. 102/39 and 104/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J. and Rose, J.

In the appeal of :

C.A. 102/39.

Edward Haddad — Appellant.

v.

George Khadder, in his capacity as Liquidator of Damiani and Haddad Partnership. — Respondent.

C.A. 104/39.

George Khadder, in his capacity as Liquidator of the Partnership Barnabé Damiani and Edouard Haddad. — Appellant.

v.

Edward Haddad — Respondent.

Action by liquidator of partnership against partner for money due from him to partnership — Interest on money due from partner to partnership.

1. Action by liquidator against a partner for money due from him to partnership — not premature, where only one doubtful claim unsettled.

2. In an action against a partner for money due from him to partnership legal interest payable as from date he received the money, not as from date of action.

C.A. 102/39.
Shehadeh for Appellant
Nasr and *Elia* for Respondent.

C.A. 104/39
Nasr and *Elia* for Appellant.
Shehadeh for Respondent.

Appeal from Judgment of District Court, Jerusalem, dated 20.7.39

JUDGMENT

In these two consolidated appeals from a Judgment of the Disttrict Court, Jerusalem, the first appeal is by Edward Haddad, a member of the firm Damiani and Haddad, against the liquidator of the firm, and the second appeal is by the liquidator against Edward Hadad.

The partnership was formed on the 22.9.34, its object being the sale of beer, subsequently extended to include the sale or other liquors. Disputes arose between the parties, and on 7.12.36, Damiani instituted proceedings against his partner Haddad claiming an account —

and eventually on 19.3.38 the District Court ordered the partnership to be wound up and Mr. G. Khadder was appointed liquidator. The liquidator, basing himself on the auditor's report on the accounts of the partnership, entered an action in the District Court claiming from Haddad the sum of LP. 706.882 mils being the amount alleged to be due by Haddad to the partnership. After a lengthy and careful trial, the District Court gave judgment in favour of the liquidator against Haddad for LP. 391.668 together with interest at 9 per cent from 31.10.38 the date of instituting the action and a lump sum of LP. 60 for costs. Against this judgment both Haddad and the liquidator have appealed.

Haddad v. Khadder.

We will deal with Haddad's appeal first. A large number of points have been taken in many of them there is no substance, and they can be disposed of in a few words. It is argued that the Court in giving directions erred, since Damiani was not a party, and therefore no orders could be given to him, and that part of the judgment could not be executed. Whatever substance there might have been in this point loses all force, since it has been stated in Court that Damiani is wiling to give Haddad a power of attorney to collect any debts and in fact offered a power, which Haddad refused.

By clause 10 of the partnership agreement it was provided that all debts accruing in Haifa and Jaffa from sales of beer should be payable in cash immediately by Haddad from his own pocket. The clause may be a hard one, but Haddad entered into it voluntarily and its object was to ensure that there should be no bad debts owing to the partnership. The District Court went exhaustively into this question and we agree entirely with their judgment on this point, and with their reasons. There was no waiver by Damiani, and Haddad was rightly debited with the sum of LP. 373,980 mls. under this head.

With regard to the items for breakages and travelling expenses, the District Court came to the conclusion that a large part of Haddad's claim was not bona fide, and we agree with what the District Court said. The same applies to the claim by Haddad for LP. 104.— commission for Nejib, employed by him in the store — the transaction was not bona fide, and was rightly disallowed. But the sum of LP. 104.— was wrongly debited to Haddad, as is admitted, since it is not claimed that it was paid from partnership funds. It must therefore be deducted from the amount awarded by the District Court.

The next item is one for LP. 156, being the cost of two consignments ordered by Haddad from one Gellat, with which Haddad con-

tends he is entitled to be credited. The District Court disallowed the claim and we agree both with its decision and the reasons therefor.

Next is the question of costs. In the first place the LP. 60, costs awarded in this case by the District Court, are properly payable by Haddad since they cannot be regarded as costs of the winding up of the partnership. The liquidator partially succeeded in his claims against Haddad, and we do not think that LP. 60 is too much for the costs, in view of the length of the case and the complexity of the proceedings. As to the sum of LP. 55, costs of the audit which was necessary, we think that this is clearly part of the costs of the winding up of the partnership, and should be debited to the latter. The necessary adjustment (if any) must be made in the accounts.

We come now to the only really substantial point in the appeal and that is that the whole action is premature since the winding up has not yet been completed and all debts have not yet been collected. The only outstanding question is a claim for commission alleged to be due by Gellat to the partnership. This is a highly problematical claim, and it is disputed also whether Hadad has any interest at all in it. No other debts are owing with the exception of sums for which Haddad is liable. In these circumstances we do not think that the action is premature, as it would be inequitable to hold up the settlement of accounts because one claim, which may be illusory, is not settled.

In Hadad's appeal therefore, the sum of LP. 104 must be deducted from the amount awarded by the District Court and a possible adjustment in Haddad's favour of the half of the audit fee of LP. 55.— i.e. LP 27.500 mils. From the District Court's judgment is it not clear whether the audit fee was recorded as a partnership expense.

Khaddar v. Haddad.

In this second appeal, a large number of unsubstantial points have also been raised and they will be dealt with first.

We think that the District Court was right in assessing Nejib's salary at LP. 8 per month and not LP. 5 and that it was within its competence to do so. We think equally that the District Court came to a correct decision with regard to the rebate of LP. 13.020 mils — the item of LP. 89.620 mils, and the item of LP. 26.160 for the reasons given by it These items are entirely a question of evidence. The same applies to the disallowance of the Court expenses in the previous case between Damiani and Haddad — they were expenses incurred in a different case between different parties. The only question is with regard to the LP. 20, deposited by Damiani in

Court on account of the liquidator's remuneration. Since Haddad equally had to deposit LP. 20 and apparently did not do so, Damiani is entitled to his LP 20 in full. It is not clear whether the District Court's judgment effects this — if it does not the necessary adjustment must be made.

With regard to the claim for interest, we think that the liquidator is right. Under Section 31(iii) of the Partnership Ordinance a partner is entitled to interest at 9 per cent per annum on all advances made by him as from the date of payment of such advance. The accounts must be adjusted accordingly.

The last question relates to the sum of LP. 344.729 mils representing the surplus of income over expenditure in the Jaffa office of the partnership. The District Court has stated quite frankly, in a judgment on a motion made to it on the 4th October, 1939, that it had not dealt with this question. The amount is admitted, but Haddad states that there are certain expenses to be deducted therefrom. From the way in which the accounts have been presented, to us, and from the auditor's report, we are unable to say whether these expenses have been allowed for elsewhere, as claimed by the liquidator, or whether they should be deducted from this sum. It may be necessary to hear the auditor's evidence on this point, and that we think should be done by the District Court.

In the result we make the following order. Haddad's appeal is allowed on the question of LP. 104, and the amount due from him is reduced to LP. 287.668 mils together with the interest and costs awardedd by the District Court. The appeal is also allowed on the question of LP. 55, audit fee, and the case remitted to the District Court to make the requisite adjustments, if any, in view of our observations above. On all other points Haddad's appeal is dismissed. The liquidator's appeal is allowed on the question on the LP. 344.729 mils and also on the question of the amount of interest due and of the LP. 20, deposit made by Damiani. It is dismissed on all other points.

The case is therefore remitted to the District Court to deal with in accordance with our above remarks and findings, and to give a fresh judgment.

With regard to the costs, we think that on Haddad's appeal, each side should pay their own costs. On the second appeal, the liquidator will have his costs and LP. 15 hearing fee.

Delivered this 10th day of October, 1939.

British Puisne Judge.

CRIMINAL APPEAL NO. 75/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Hans Nouestein — Appellant.

v.

Attorney-General — Respondent.

Appeal from the judgment of the District Court of Jaffa sitting at Tel-Aviv dated the 21st day of December, 1939, whereby the appellant was convicted of rape contrary to section 152(1) of the Criminal Code Ordinance, 1936, and sentenced to two years imprisonment

Conviction of rape largely based on complainant's evidence — Complainant's conduct pointing to considerable measure of consent — Statement of accused in Police station consistent with his guilt — Court of Appeal quashing conviction upon considering facts as appearing from evidence — Criminal Code Ordinance, sec. 152(1)

1. Court of Appeal may set aside findings of facts and quash conviction upon considering facts as appearing from evidence in trial Court.

2. Cases of rape call for most anxious scrutiny on part of Court. Where complainant's conduct consistent with consent, not safe to rely upon a statement made by accused in Police station which may be said to be consistent with his guilt.

Henigman and *Goitein* for Appellant.
Crown Cousel (*Hogan*) for Respondent.

JUDGMENT

Rose, J.

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

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

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

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

The accused in the witness box told a coherent story which agreed in the main with that of the complainant, with the vital distinction

that, in his version, the physical connection was by consent and not by force. He also stated that their mutual conduct in the sea was such as to leave neither of them in any doubt as to what was the purpose of their subsequent appointment.

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

It appears that on the night of the 17th of August, 1939, after he had gone to bed, the accused was arrested and taken to the police station, where he was prevailed upon to make a statement at about one o'clock in the morning. This statement, which was surprisingly detailed, can be said to be consistent with the guilt of the accused. Having regard, however, to the consideration to which we have already referred, we do not consider that it is safe to rely upon this statement.

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

Delivered this 15th day of January, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 74/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Rose, J. and Khayat, J.

In the appeal of :

Bertha Schlang — Appellant

v.

1. Haim Schlang
2. Jonina Papirmayster (Schlang) Respondents.

Appeal from judgment of Land Court of Jaffa sitting at Tel-Aviv, dated 15th May, 1939.

Hearing of appeal in absence of appellant — Admission made by wife on husband's will that property registered in her name in fact belonged to him.

A written admission wherever made must be given effect to, if no evidence of fraud or undue influence adduced. *)

Appellant and Respondent No. 2 — absent.
Levitzky for Respondent No. 1.

JUDGMENT

This is an appeal from the Land Court of Tel-Aviv. The Appellant has made no appearance and counsel for Respondent has therefore asked for the appeal to be proceeded with in accordance with Rule 337(c) of the Civil Procedure Rules. We accede to this request the more readily in that this is a second occasion on which the Apellant has failed to appear in time before this Court. The Court below decided that there is only one short point falling for decision in the case, namely, whether effect should be given to an admission of the late Mrs. Goldeh Schlang, whose estate is represented in these proceedings by the second defendant, admission which purported to be signed at Jaffa before the Chief Rabbi of Jaffa and Tel-Aviv, reads as follows :—

"I the undersigned Golda daughter of Chaim, wife of the a/m Shlomo Ben Abraham Schlang, the houses, shops and whole court mentioned above being registered in my name at the Tabo, according the Koushans mentioned above, confess hereby that they belong to the property of my husband Shlomo Ben Abraham Schlang and I have no other privileges to them than ordered by this testament and I must comply with the testament

*) Ed. Note One of the grounds of appeal was that the admission which was written on a will made by appellant's husband, of american nationality, is of no effect, as the will has not been probated.

of my said husband without any objection from my part or from anyone else.

Signed by me at Jaffa, on Sunday the 25th Marcheshvan.

Golda Schlang.

In our presence, the undersigned witnesses signed the woman Golda Schlang with her own hand and accepted it.

Signed by me at Jaffa on the 25th Marcheshvan Tarpad.

Josef Rabbi

Nachum Wajnshtein.

Certified that the testament was signed by the late Shlomo Ben Abraham Schlang and the witnesses Messrs. Joseph Rabi and Nachum Wajnstein as well as the confession of Mrs. Golda Schlang and the witnesses and after we made certain we registered it in the testament register under No. 73 — 8 Ab Tarpad.

(Sgd.) "*Ben-Zion Usiel.*"
Chief Rabbi of Jaffa ——
and Tel-Aviv District".

No evidence of fraud or undue influence appears to have been adduced in the Court below, and in the absence of any argument on behalf of the Appellant, we can see no good reason for disturbing the judgment of the Land Court.

The appeal must therefore be dismissed with costs to include LP. 15.— attendance fee.

Delivered this 6th day of October, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 114/39.

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 :

1. M. Chaikin & Co.,
2. Mendel Chaikin
3. Benyamin L. Daichowsky — Appellants.

v.

1. The Anglo-Palestine Bank Ltd.
2. S. Aaronson & Co. — Respondents.

Promissory note made payable at particular place and not presented — Question whether place of payment inserted in body or in margin or at foot of promissory note — Bills of Exchange Ordinance, sec. 88(1) *— Bills of Exchange Act, sec.* 87(1).

Where words showing particular place of payment found by Court to be part of body, not in margin nor at foot as distinguished from body, of promissory note, failure of presentation, in absence of waiver, fatal to claim.

Agranat for Appellants.

Levin & Lifshitz for Respondent No. 1.

Appeal from judgment of District Court, Haifa (sitting as a Court of Appeal), dated the 2nd day of November, 1939.

JUDGMENT

The Appellants are an English partnership who were sued in the Magistrate's Court, Haifa, as the makers of a promissory note, payable to Aaronson & Co., by the Respondents, the Anglo Palestine Bank, as holders.

A number of defences were raised, but the substanstial defence was that the note in its body was made payable at a particular place and that it had not been presented as required by Section 88(1) of the Bills of Exchange Ordinance.

The Plaintiffs maintained that the place of payment mentioned in the bill was not in the body thereof, but was only a memorandum. Alternatively, that the bill had been presented, or presentation waived.

In his judgment of 29th July, 1938, the learned Magistrate dealt with these matters at some length, and decided them in favour of the Defendants.

The matter went on appeal to the District Court, which on 31st

October, 1938, after some argument, ordered —

> "By consent of both parties the Court hereby directs that the judgment of the Magistrate herein be set aside and the case be remitted to him to enquire into and to hear the evidence produced by both parties in regard to the circumstances generally in which the words 'the payment is in Jerusalem, Romema, Mr. Chaikin' were inserted in the said promissory note and by whom and in whose presence, and for a fresh judgment to be given.

We are told now that this was to ascertain the intention of the Appellants. If this was so, it seems strange that the Court did not say so. The language used seems to me clearly to contemplate an enquiry as to whether the words in question were inserted properly in the note, but in the light of the subsequent evidence this distinction does not appear to be of any consequence.

The case went back to the Magistrate, who heard only one witness, S. Aaronson, a son-in-law of one of the Defendants who did business with the Defendant partnership but was not their agent. It is now suggested that he was called by the Plaintiff Bank, but he was examined by the Defendants' advocate and is stated by the Magistrate to be a witness for the Defendants.

This again is not of consequence, as I understand both sides to accept his evidence. Certainly the Bank called no evidence to contradict it.

The witness stated that he actually wrote the bill, except the signature and some figures, and he stated that he wrote the words "payment in Jerusalem" "because Daichowsky (one of the partners) gave me permission to add in where the payment is, and the Bank demanded this" and he amplified this account. I think it is clear that the words were properly inserted, with the intention that the bill should be payable in Jerusalem.

The Magistrate then referred to his earlier judgment and went on to say that, having complied with the District Court's order, and having heard the only witness called, he saw no reason to change his opinion.

The case then went back to the District Court, which, on 2nd November, 1939, held —

> "We think the conclusion arrived by the Magistrate here in regard to the words "payment at Jerusalem, Romema, Mr. Chaikin" was wrong. If any doubt could arise on the oral testimony of the one and only witness S. Aaronson — on this point — the balance must be decided by the documents themselves — their form and contents, viz. Exhibits P/1 and P/2,

and reference also to P/5 and P/3.

"We therefore set aside the judgment of the Magistrate and hold that the said words are not a part of the body of the note and therefore the note need not be presented at a particular place in order to render the respondents (maker and endorser) liable on it."

With all respect to the District Court, I find this difficult to follow.

There are a number of English cases under Section 87(1) of the Bills of Exchange Act, which is similar to our sub-section. It would appear that the place of payment must be inserted in the body of the note, and not in the margin nor at the foot, as distinguished from the body. In this case the words are written in a convenient place. underneath a statement as to consideration — the first words of the lines being level with the lines above them. They cannot, therefore, be said to be in the margin. There is no undue space between the words in question and the words above them, and the last line is roughly level with the signature on the opposite side of the bill. I do not think, therefore, the words can be said to be at the foot.

At the first hearing, in my opinion, the Magistrate was certainly entitled to come to the conclusion that the words were in the body of the note, and I can see nothing in the evidence of Aaronson to cause him to alter that view.

We heard Mr. Levin, for the Respondents, at some length in order that we might dispose of this unduly prolonged litigation. I think it is clear that the Magistrate was right in holding that there was no presentation, or waiver of presentation.

The Magistrate, at the end of his second judgment, stated that he dismissed the action with regret, and Mr. Levin sought to introduce a measure of prejudice against the Appellants. I need only say that they are entitled, as others have done before them, to shelter themselves behind the provisions of the law.

The appeal will be allowed, and the judgment of the District Court set aside, and that of the Magistrate restored, and the Appelants will have the costs of the first hearing before the District Court (no sum was certified for attending that hearing), the costs of the second appeal before the District Court — when the sum of LP. 3 was certified for attending the hearing, — and as against the first Respondents, the Anglo Palestine Bank, the costs of this appeal on the lower scale, with LP. 15 for attending the hearing.

Delivered this 12th day of January, 1940 .

Chief Justice.

CRIMINAL APPEAL NO. 70/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

Yacoub Toukan — Appellant.

v.

Attorney General — Respondent.

Conviction of breaking into dwelling house and stealing therein — Mistake in procedure corrected by trial Court — Insufficiency of evidence — Evidence wrongly excluded.

1. Where trial Court corrected mistake in procedure made by them and no injustice was caused, point as to irregularity of procedure — bad.

2. If nobody identified accused and witnesses merely said they had seen a person resembling him and there is no other material evidence, this is not sufficient to support conviction.

3. Cross-examination as to character of complainant—in most cases material, and should not be stopped.

Hutory for Appellant.
Crown Counsel (*Hogan*) for Respondent.

Appeal from the judgment of the District Court of Jaffa sitting at Tel-Aviv dated the 6th day of December, 1939, whereby the appellant was convicted of breaking and entering a building with intent to steal contrary to section 295(a) of the Criminal Code Ordinance, 1936, and sentenced to three months imprisonment.

JUDGMENT

The Appellant was charged before the District Court siting at Tel-Aviv with breaking into a dwelling house and stealing therein. He was convicted and sentenced to three months' imprisonment. On appeal several points have been taken, one of them bad and two of them good. The point as to the irregularity of procedure is obviously a bad one because the District Court corrected on their own motion

the mistake in procedure which they had made and no injustice could possibly have been caused.

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

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

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

Delivered this 11th day of January, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 3/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

1. Mohammad Hussein Ali el Yazbaky
2. Sami Mohammad Abder Rahman — Appellants.

v.

Attorney General — Respondent.

Urging on appeal from death sentence that there are new facts to be considered — Challenging identification of accused — Request of an X-ray examination in notice of appeal.

1. In an appeal from a death sentence Court of Appeal will be prepared to consider any relevant new fact brought to light.
2. Fact that witnesses did not say they have recognised accused at first parade does not vitiate subsequent identification, if they give an honest and sufficient reason for not saying that they identified accused at first parade.

Nuweihid for Appellant No. 1.
Budeiri for Appellant No. 2.
Crown Counsel (*Hogan*) for Respondent.

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

JUDGMENT

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

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

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

> "Several of the witnesses at the first identification parade said that although they recognised the 1st accused, they did not say so. They have given as their reasons for this the fact that they were in terror of their lives owing to the state of insecurity then prevailing in the town, and because many of the principal rebels were at that time still at large. We have heard and seen these witnesses before us. They have not been shaken in cross-examination. They have given what in our opinion is an honest and sufficient reason for not saying that they identified the accused at the first parade. We believe them and are satisfied that they have told the truth. We do not believe the two accused when they say they were not there."

It is clear that that Court carefully considered this point.

In his notice of appeal to this Court the Second Appellant alleged that his age did not exceed 17 years, and requested an X-ray examination. This was made, and the Government Radiologist estimated

his age between 20 and 21, and this point was dropped at the hearing. This Appellant also questioned the identification.

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

Delivered this 25th day of January, 1940.

Chief Justice.

CRIMINAL APPEAL NO. 6/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Hammad Ateyyeh Havamleh — Appellant.

v.

The Attorney General — Respondent.

Receiving stolen property — Proof of guilty knowledge.

Statement made by accused to Police and put in before Court containing admission that property was stolen when he received it — sufficient proof of guilty knowledge.

Appellant in person.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the eleventh day of January, 1940 whereby the appellant was convicted of receiving stolen property contrary to section 309 of the Criminal Code Ordinance, 1936, and sentenced to eighteen monts imprisonment.

JUDGMENT

The Appellant was convicted in the District Court of receiving stolen property knowing it to be stolen and was sentenced to eighteen months' imprisonment.

On reading the papers it seemed that there was no proof of guilty knowledge on the part of the Appellant that the property had been stolen, but the statement made by the Appellant to the Police, and

which was put in before the District Court, shows that he admitted that the property was stolen when he received it. That disposes of the appeal.

In view of a recent previous conviction for the same offence, the sentence of eighteen months' imprisonmnt is not too much. The appeal is therefore dismissed.

Delivered this 31st day of January, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 8/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Moshe Gershon Washbein — Appellant.

v.

The Attorney-General — Respondent.

Appeal from death sentence — Test of legal insanity — Finding that murder committed in cold blood not specifically mentioned in judgment.

1. Mental depression, neurasthenia or the like — not legal insanity within meaning of sec. 14 of Criminal Code Ordinance, so no defence.

2. Omission to state in judgment that crime was committted in cold blood not fatal to conviction of premeditated murder, if this finding implicit, following from all other findings.

Hoter Ishay & *Ben Haviv* for Appellant.
Crown Counsel for Appellant.

Appeal from judgment of Court of Criminal Assize sitting at Tiberias, dated the 9th of January, 1940, whereby the Appellant was convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT

The appellant was convicted of the murder of his brother-in-law, Abraham Washbein, and was sentenced to death. He has now appealed to this Court and asks us to say that this verdict is wrong. A

very large number of points has been taken by the Appellant's advocate, most of which were possibly very good points to be brought before the Court of Trial, but are not points with which a Court of Appeal can deal.

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

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

> "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

This test has been substantially enacted in Section 14 of the Criminal Code. Now the evidence before the Trial Court upon which the Appellant asks us to say that he was insane is this :— There is the evidence of persons who have known him and who said that he had been depressed and used to cry, and that he seemed peculiar. There is the evidence of a doctor who was called by the defence and who said that he had treated the Appellant at the time immediately before the crime, and had found that he was suffering from neurasthenia. There is no word whatever in the doctor's note-book that this man was insane. It is true that the doctor said in cross-exami-

nation that he thought that the Appellant was mental, but he did not say that he was suffering from a mental disease. The test that is laid down in Macnaughton's case was not put by the defence to the doctor. We cannot see that there was any evidence on which any Court could find that the Appellant was insane. It is true, that in its judgment the Court said, "It is not suggested by the defence that the Appellant was insane." What they might have said was that it was not seriously suggested. The meaning in any case is quite clear, and there was no evidence to suggest that he was insane.

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

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

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

Delivered this 30th day of January, 1940.

British Puisne Judge

HIGH COURT NO. 2/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :

Anis Hunaykati — Petitioner.

v.

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

Allegation that Chief Execution Officer exercised his discretion improperly — Non-interference of High Court.

High Court will not interfere with a discretionary order of Chief Execution Officer if it does not find that he exercised discretion improperly, even though perhaps it might not have come to same conclusion as his.

Gavison for Petitioner.
Koussa for Respondent No. 2.

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

ORDER

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

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

Given this 22nd day of January, 1940.

British Puisne Judge.

HIGH COURT NO. 78/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :

Gedaliah Havkin — Petitioner

v.

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

Charge of defalcations of Government moneys — Affidavit by Police Officer that moneys held by accused in Bank are property taken by theft — Order by Examining Magistrate to make a search in Bank and seize moneys of accused deposited therein — Seizure of accused's motor car without warrant — Jurisdiction of High Court as compared with that of Supreme Court of England — Jurisdiction of High Court as defined by statute and as established by practice — Criminal Procedure (Arest & Searches) Ord. Sec. 16 — Palestine Order in Council 1922, Art. 43 — Courts Ord. sec 6.

1. High Court exercises a wider jurisdiction than that of Supreme Court of England, but jurisdiction discretionary and remedies will not be given unless necessary in interest of justice.

2. If a public officer's duties are defined by statute, High Court will not order him to do something outside those duties.

3. Where exercise of discretion is vested in a public officer High Court will not be inclined to interfere unless he has misdirected himself in law or has failed to direct his mind to question of discretion.

4. High Court will not assume jurisdiction when some other remedy existed.

5. High Court will not make an order which cannot be effective.

6. High Court will not exercise its discretion when petitioner has been guilty of delay.

7. Order by Magistrate under Arrest and Searches Ordinance may, by analogy with proceedings against Execution Officers, be questioned before High Court, but if not prima facie

bad will not be interfered with.

8. Order under Arrest and Searches Ordinance to seize moneys belonging to accused deposited in a bank does not authorise attachment on money standing to his credit in a deposit account with the bank.

Goitein for Petitioner
Crown Counsel (*Hogan*) for Respondent No. 1.
Marein for Respondent No. 3.

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

JUDGMENT

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

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

> "I know that the accused, the said Mr. Gedalia Havkin, holds the sum of LP. 2850 in the Anglo-Palestine Bank, Jerusalem, and the sum of LP. 19.870 in the Kupat-Am Bank, Jerusalem, and I have sufficient reason to believe that these monies are the property which he took by theft from the Government in connection with the offences which I am investigating against him at present, and that these monies are necessary for me for the purposes of investigation and for their production in Court, therefore I apply to Your Worship with a request that you give me an order for search in accordance with Section 16 of the Criminal Procedure (Arrest & Searches) Ordinance, Chapter 33, Drayton, Volume I, so that I may seize the said sums in the Anglo-Palestine Bank and the Kupat-Am Bank."

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

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

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

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

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

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

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

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

> "The High Court of Justice shall have exclusive jurisdiction in the following matters —
>
> (a) applications (in the nature of habeas corpus proceedings) for orders of release of persons unlawfully detained in custody;
>
> (b) orders directed to public officers or public bodies in regard

> to the performance of their public duties and requiring them to do or refrain from doing certain acts."

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

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

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

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

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

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

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

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

I think it is clear that this Court will exercise a wider jurisdiction,

conferred upon it by law, than that of the Supreme Court in England, but that jurisdiction is discretionary, and remedies will not be given unless they are necessary in the interest of justice, see H.C. 1/39 [1], P.L.R., Vol. VI, p. 53, and is subject to certain limitations.

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

> "We have to consider whether the Commandant of Police is in breach of any statutory duty in refusing to allow such examination.
> "The duty of the Commandant of Police vis-à-vis unconvicted prisoners is set out in Secs. 254, 257, 258, and 259 of the Prison Regulations 1925, and since we can find no statutory duty imposed upon him of the nature claimed by the Petitioner, the Rule must be discharged."

and this principle was approved in three recent cases, H.C. 40/38 [2], P.L.R. Vol. V, p. 357, H.C. 57/38 [3], P.L.R. Vol. V, p. 450, and H.C. 31/39 [4], P.L.R. Vol. VI, p. 340.

Secondly. Where the exercise of a discretion is vested in a public officer this Court will not be inclined to interfere unless he has misdirected himself in law or has failed to direct his mind to the question of discretion, H.C. 20/39 [5], P.L.R. 6, p. 171.

Thirdly. This Court has been careful not to assume jurisdiction when some other remedy existed, — examples will be found in H.C. 81/27, P.L.R. Vol. I, p. 243, H.C. 15/30, P.L.R. Vol. I, p. 455, H.C. 74/32, P.L.R. Vol. I, p. 782.

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

The basis of the order in the last case is not altogether clear, as from the report it would appear that the petitioners were asking the

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[1] 5 CtLR 85.
[2] 4 CtLR 105.
[3] 4 CtLR 136.
[4] 6 CtLR 61.
[5] 4CtLR 143.

Court to order that the cost of twelve ghaffirs should not be collected, whereas the Court dealt with the matter as an application to cancel the appointment of the ghaffirs.

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

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

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

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

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

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

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

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

As I have stated, I think that the order which was made by the Magistrate was not prima facie bad. The question is, therefore, did

Mr. Soffer act properly under it?

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

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

Delivered this 29th day of January, 1940.

Chief Justice

HIGH COURT NO. 3/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

In the application of :—

Miriam Rabikoff ((Stargitsky) Petitioner.

v.

1. District Officer, Tel-Aviv,
2. Chairman of Assessment Committee, Urban Property Tax, Tel-Aviv.
3. The Assessment Committee, Urban Property, Tax, Tel-Aviv. Respondents.

Application by person aggrieved by assessment in valuation list — Notice of valuation received several months after posting of valuation list — Urban Property Tax Ordinance, sec. 12, 15(1).

No objection to assessment of urban property tax can be made after expiry of 30 days of posting valuation list, even though statutory notice of valuation not received by reputed owner until some months after posting of list.

Apelbaum for Petitioner.

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

ORDER

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

Given this 22nd day of January, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 65/39.

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 :

Baruch Muradoff — Appellant.

v.

The Attorney-General — Respondent.

Contravening conditions of building permit — Order to pay a fine and demolish parts of building — Relevant legislation as to building without permit.

Whether By-Law 3 of Town Planning Permits (Jerusalem District) By-Laws, 1937 ultra vires or not, Court right in convicting a person who contravened sec. 11 of Town Planning Ord. as amended (re necessity to obtain permit for erecting, pulling down etc. a building) and ordering him to demolish all parts of building not included in permit.

Ben-Aharon for Appellant.
Saba Said for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the 4th of October 1939, whereby the Judgment of the Magistrate's Court, Jerusalem, dated the 19th of July, 1939, convicting the Appellant under Section 35 of the Town Planning Ordinance, 1936, as amended by the Town Planning (Amendment) Ordinance, No. 8 of 1938, and sentenced him to pay a fine of LP. 3, and in default, to undergo two weeks' imprisonment, and also ordered him to demolish all parts of the building not included in the permit, was confirmed.

JUDGMENT

The Appellant was convicted by the Magistrate in that he —

"contravened the conditions of his permit, by building a front

wall, and the roofs of some of the shops, and also a big part of the first floor without a permit."

The District Court upheld the conviction and gave leave to appeal to this Court on the following points of law :

"1. In view of the provisions of Section 41 of the Town Planning Ordinance, 1936—38, do the Model By-Laws of the Central Town Planning Commission (published at page 520 of the Official Gazette, dated 1.11.25) still remain in force."

"2. Are the provisions of By-Law 3 of the Town Planning Permits (Jerusalem District) By-Laws 1937 (at page 663, Volume 3 of the Laws of Palestine 1937) contrary to and of greater force than the provisions of the Model By-Laws of 1925 ?"

It does not appear to me that the answers "yes" or "no" which are contemplated by these questions, would dispose of the matter, but it is unnecessary for me again to express my view as to Section 6 of the Magistrates' Courts Jurisdiction Ordinance as that provision will be replaced as from the 1st January next.

The case appears to present no difficulty if the relevant legislation is followed.

The Town Planning Ordinance, No. 28/36, as amended by No. 58 of 1936, provides in Section 11(b) :

"No building shall be erected, pulled down or reconstructed, and no alteration, addition or structural repair (other than non-structural internal repairs) shall be made to any building without a permit to that effect first obtained from the Local Commission."

Section 4 gives power to make by-laws, prescribing the conditions of the application for and the grant of permits, and saves by-laws, etc., lawfully made under the old Ordinance until amended, varied or revoked by by-law made under the Ordinance.

By the Town Planning (Amendment) Ordinance, No. 8 of 1938, building is defined as including "any foundation wall, roof, chimney, verandah, balcony, cornice or projection or part of building...'

The Town Planning Permits (Jerusalem District) By-Laws, 1937, which appears in Volume III for that year at page 663, replaced within the Jerusalem District The Town Planning (Permits) Rules, except the schedules, — which will be found in Volume III of Drayton at page 2242.

Section 11 of the Ordinance requires a permit to be obtained in accordance with the By-Laws before buildings can be erected, pulled down, reconstructed or altered.

By definition, building includes walls, roofs, etc. It seems clear, therefore, that the Appellant not having obtained a permit, was rightly convicted, and the appeal is dismissed.

It is not necessary to express any opinion whether By-Law 3 of the Town Planning Permits (Jerusalem District) By-laws, 1937, is ultra vires, but the authorities concerned might consider this.

Delivered this 19th day of December, 1939.

Chief Justice.

CIVIL APPEAL NO. 119/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Pessia Nuchim Leibovna Shwalboim. Appellant.

v.

Hirsh (Zvi) Shwalboim. Respondent.

Claim of maintenance in District Court against Palestinian Jew — Claim of maintenance for the past — Personal law of Palestinian Jew — Basis for fixing amount of maintenance .

1. Court right in refusing to grant maintenance for the past if no authority in law to that effect quoted.
2. Personal law of a Palestinian Jew in matters of personal status — Rabbinical law, not English law.
3. When fixing amount of maintenance to be awarded Court to consider defendant's present means and exercise discretion.

Bar Shira for Appellant.

Weissman for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 30.11.39.

JUDGMENT

This is an appeal from a judgment of the District Court Tel-Aviv, in a maintenance case. The learned President after a patient trial, occupied mostly with long speeches by counsel, gave judgment against the present respondent largely on his own admission, that he was prepared to pay monthly a sum of money, LP. 2, as from the 1st December, 1939. The case is a peculiar one because, except for the evidence of the respondent, there is not one little scrap of evidence in the whole

proceedings to prove the claim of the present appellant who was the plaintiff in the Court below. The learned President refused to grant maintenance for the past on the ground that nobody had quoted any authority in law to prove that maintenance for the past could be granted and that he was not going to do so unless somebody quoted some such law. In that we think that he was right.

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

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

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

Delivered this 23rd day of January, 1940

British Puisne Judge.

HIGH COURT CASE NO. 76/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :

Abir Company, Ltd. — Applicants.

v.

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

Abolition of route for which a permit to operate omnibus was given — Application to High Court for directions to Licensing Authority under Road Transport (Routes and Tariffs) Regulations to grant in future sufficient number of permits — Discretionary powers of Licensing Authority.

1. Owners of omnibuses have no vested rights to renewal of their permits to ply on certain routes, if such routes were abolished.
2. Licensing Authority under Road Transport Ordinance must act impartially, but High Court will make no order so directing him unless satisfied that he was proposing not to do so.

Goitein for Petitioner.
Crown Counsel (*Bell*) for Respondent No. 1.
B. Joseph and *Levitsky* for Respondent No. 2.

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

JUDGMENT

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

Here, under the Road Transport Ordinance and the Rules, we have

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

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

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

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

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

> "On the introduction of the New G. 1 route and guided by the fact that one of the brothers Kornstock had told me in the presence of the General Manager of the Egged Omnibus Cooperative Society, Ltd., that Kornstock Brothers (the name under which the Applicants then traded) had agreed to amalgamate their bus services with those of the Egged Omnibus Cooperative Society, Ltd., which would have had the result of leaving no other applicants for permits on the new route, I allocated the maximum number of permits, namely 79, to the Egged Omnibus Cooperative Society, Ltd.
> "I was later informed that this amalgamation had not in fact taken place and that negotiations for it were not proceeding favourably. Kornstock Brothers were granted special permits by virtue of Rule 10(2) of the Road Transport (Routes and Tariffs) Regulations, 1934, to enable them to continue to operate the services operated by them before the introduction of the new G. 1 route.
> "To the best of my knowledge and belief, the grant of these special permits prevented any interruption of the services operated by the Kornstock Brothers prior to the allocation of the 79 permits to the Egged Omnibus Cooperative Society, Ltd.
> "I was eventually informed that the negotiations between these

parties had reached an apparent deadlock, in consequence the 79 permits were re-allocated, 76 being granted to the Egged Omnibus Cooperative Society, Ltd., and 3 to the Kornstock Brothers.

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

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

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

It is manifest that in the exercise of a statutory duty he must act impartially in the future, and we should make no order so directing him unless we were satisfied that he was proposing not to do so, and there is nothing before us to justify any such conclusion.

The rule will be discharged.

Delivered this 29th day of January, 1940.

Chief Justice.

CRIMINAL APPEAL NO. 7/40

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Attorney General — Appellant.

v.

Eliahu Lalo Respondent.

Commital by Magistrate for trial before District Court — Acquittal by Court on ground that depositions disclose no offence — Proper procedure in trials upon information.

Unless information discloses no offence at all — not even prima facie — Court bound to try case and hear witnesses, it cannot dispose of case on depositions alone.

Crown Counsel (*Bell*) for Appellant.
S. Felman for Respondent.

Appeal from judgment of District Court, Jaffa, dated the twenty-third day of November, 1939, whereby the Respondent was acquited of the charge of perjury contrary to section 117 of the Criminal Code Ordinance, 1936.

JUDGMENT

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

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

Delivered this 31st day of January, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 5/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

1. S. Cohen and Company
2. Isaac Levy — Appellants.

v.

Abraham Capun — Respondent.

Claim of compensation or gratuity on dismissal from employment — Recognition of custom by Palestine Law — Disagreement of two Judges of District Court sitting as a Court of appeal — Point dealt with in judgment though not argued by parties — Question of insufficiency of evidence — Applicability of articles of Mejelle referring to custom — Elements of custom under Mejelle.

1. Whether a certain point was or was not argued in trial Court, leave to appeal on it can validly be given, if it forms basis of judgment.

2. Whether evidence sufficient or not — a question of law, not of fact.

3. Where two Courts in succession have held that there was sufficient evidence, Supreme Court on a further appeal will not be inclined to differ from Courts below.

4. Introductory articles of Mejelle regarding customs are substantive law, of general application and tests to be employed in determining existence of a custom, not only if established at time of promulgation of Mejelle and not only in those cases in which Mejelle specifically refers determination of certain matters to existing custom.

5. Custom being a creation of long growth, a few instances in a few years — insufficient to establish it.

6. In custom — presemption of knowledge not enough, actual knowledge necessary.

7. Where proof of a custom necessary, evidence must be produced as to time when that practice began and as to number of cases since its beginning and intervals between those cases.

Goitein and *Pardo* for Appellants.

Smoira and *Usiel* for Respondent.

Appeal from judgment of District Court, Tel-Aviv (in its appellat capacity), dated the 30th of November, 1939.

JUDGMENT

Copland, J.

This is an appeal by leave from a judgment of the District Court

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

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

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

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

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

to review.

With regard to the appeal itself, I do not agree with the appellant's contention that those of the first hundred articles of the Mejelle which refer to customs, at any rate, are only maxims and are not of general application and must be read subject to the remainder of the articles. When one reads those articles such as Articles 36, 41, 43 and 45, it is clear, I think, that they amount to substantive law, and further there is nothing in them from which one could say that only customs in existence at the time of the promulgation of the Mejelle are recognised. The Articles are perfectly general, and are, to my mind, the tests to be employed in determining whether the existence of a custom has been established. If the alleged custom passes these tests, then it will be enforced by the Courts of this country. In essentials those provisions do not differ greatly from the provisions of English Common Law, to be found in the Laws of England, Hailsham Edition, Vol. 10, though, generally speaking, the former are somewhat less stringent than the English law. With all respect, therefore, I cannot agree with the opinion of Judge Edwards in his interpretation of the Mejelle, and I think that Judge Cressall in Gardlin v. Amirov (C.A. D.C. T.A. 327/38[1]) correctly sets out the law on this point.

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

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

British Puisne Judge.

Rose, J.

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

Frumkin, J.

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

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

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

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

red to in that article.

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

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

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

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

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

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

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

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

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

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

Secondly, the custom even if adopted as above must be notorious (Article 42). The same principle is embodied in Article 43 and 44.

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

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

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

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

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

a) When did this practice begin?

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

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

d) What was the proportion of compensation paid in each case. Was it one month's salary for each year of service notwithstanding the number of years or perhaps one month's salary for the first year or a few years, and less for subsequent years? Is the gratuity paid according to the wages in the different years of ser-

vice or of the wages at time of dismissal. What is the position withe regard to portions of a year?

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

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

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

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

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

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

Delivered this 22nd day of February, 1940.

Puisne Judge

HIGH COURT NO. 42/39.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :—

Engineering Corporation of Palestine Ltd. Petitioner.

v.

1. C. E. O. Jaffa

2.Sheikh Abdul Kader Muzaffar Respondents.

Order of Chief Execution Officer releasing attachment on moneys of judgment debtor — Judgment debtor getting part of released moneys — Reinstatement by High Court of attachment renewed by Chief Execution Officer.

1. High Court cannot set aside or reverse an order by a public officer which has already been executed.

2. Wrong order of Chief Execution Officer releasing attachment on money of judgment debtor will be set aside by High Court if money still lying in Execution Office.

Polonsky (*by delegation*) for Petitioner.
Nuweihid for Respondent No. 2.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his order made in Execution File No. 15/39 dated the 15th, July, 1939, releasing the attachements made in favour of the Petitioner by the Execution Office, Tel-Aviv, in Execution File No. 6442/38, on the sum of LP. 720.422 belonging to the second respondent and ordering the paying over of the said amount to the second respondent should not be set aside, both as regards the sum of LP. 620.422 mils which sum was lying in the Execution Office, Tel-Aviv and why he should not be directed to order the second Respondent to repay into Execution Office, Jaffa the amount of LP. 620.422 mils.

O R D E R

In this case the Chief Execution Officer released the attachment, on the application of the 2nd respondent on two sums of money — one, an amount of approximately LP. 800 which has already been paid over to the 2nd respondent, and the sum of LP. 100 which is still lying in the Execution Office Tel-Aviv. The 2nd respondent

is a judgment-debtor jointly and severally with four other persons for a sum of LP. 1,030.200 mils. His responsibility therefore is for a sum personally of LP. 206 and a few mils and as guarantor for the shares, at any rate, of the other four co-judgment-debtors. He can of course be called upon to pay the whole of the judgment-debt but in that case he would have a right of recourse against his four co-defendants for the amounts which he had paid on their behalf. The petitioning company, who are the judgment-creditors, have come to an arrangement with regard to two of the judgment debtors as a result of which attachments which had been placed on certain properties of heirs, have been released. It is not however correct to say that they had been released from responsibility for the payment of their shares of the debt.

This present application concerns the sum of LP. 100 only. The LP. 800 which has been paid out already to the 2nd respondent, whether rightly or wrongly, cannot now be recovered as a result of proceedings in this Court, because we cannot set aside or reverse an order by a Chief Execution Officer which has already been executed. With regard to this sum of LP. 100 we think that the Order will have to be made absolute. The 2nd respondent is personally responsible for more than LP. 100, at any rate; it is his share of this joint and several debt and the release of the attachment of this LP. 100 by the Chief Execution Officer was therefore wrong.

We say nothing about the fact that the case is further complicated by a provisional attachment placed by the District Court on property belonging to the second respondent. On the view we take of the case it is unnecessary to do so. The Order of the Chief Execution Officer with regard to releasing the attachment of the LP. 100 was therefore wrong. The Order Nisi must be made absolute. The petitioner will have the costs of the application to include LP. 10 fee for attending the hearing.

Given this 29th day of August, 1939.

Acting Chief Justice.

HIGH COURT NO. 6/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :—

Menachem Cohen Petitioner.

v.

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

Municipal Council refusing to enter into contract with occupier of part of a building to supply him with water — Duties of Municipal Council as regards waterworks — Absence of By-laws regarding terms and conditions of water supply — Meaning of "House" in Municipal Corporations (Sewerage, Drainage and Water) Ordinance, 1936.

Occupier of a part of a building not entitled to demand a contract for separate supply of water from Municipal Council.

Eisenberg for Petitioner.

S. Said for Respondents.

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

JUDGMENT

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

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

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

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

Section 23 provides —

"It shall not be lawful in any municipal area for the owner

> of any house which may be erected after the date of the commencement of this Ordinance, or any house which after that date may be pulled down to or below the ground and rebuilt, to occupy the same, or cause or permit the same to be occupied unless and until he has obtained from the Municipal Council of the area a certificate that there is introduced into the house such an available supply of wholesome water as may appear to such authority, on the report of the Medical Officer of the Department of Health and of the engineer, to be sufficient for the consumption and use for domestic purposes of the immates of the house.

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

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

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

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

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

We are not now concerned with the obligations of the owner of the house.

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

Delivered this 28th day of February, 1940.

Chief Justice.

CIVIL APPEAL NO. 116/39.

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 :

Julia, daughter of the late Tannous Nasr — Appellant.

v.

Fatmeh, Bint Mohammad Abu Azim and 10 others. — Respondents.

Land Court dismissing action under sec. 66 of Land Settlement Ordinance concerning land registered by Settlement Officer —

Pleadings and arguments disclosing no cause of action on ground of fraud — Scope of sec. 66 of Land Settlement Ordinance.

1. If in a case concerning land registered by Settlement Officer fraud only alleged at hearing but not in statement of claim or in issues, and pleadings and arguments also contain no particular allegation of fraud, Court right in holding that there was no cause of action on ground of fraud.

2. Sec. 66 para 1 of Land Setlement Ord. as to "a right recorded in the existing registers which has been omitted or incorrectly set out in the register" has no application when that right has been varied by Settlement Officer or by Court on appeal from a Settlement Officer under provision of the Ordinance.

Yunis (*by delegation*) for Appellant.
Dunkelblum for Respondent No. 5.
Nijim for the other Respondents.

Appeal from judgment of the Land Court, Jaffa, dated the 8th of November, 1939.

JUDGMENT

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

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

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

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

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

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

At the hearing the Plaintiff's advocate submitted —

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

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

There remained therefore the alternative claim. In considering Sec-

tion 66 of the Land Settlement Ordinance this Court held, in Civil Appeal No. 141/37, Current Law Reports, II, page 130, —

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

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

The appeal will be dismissed on these grounds, which differ somewhat from those of the Court below set out in the judgment, with costs on the lower scale. We certify LP.10 for attending the hearing, which will be divided between the Respondents, represented by the advocates who appeared. As to half, to those represented by Ibrahim Eff. Nijim, and half to those represented by Dr. Dunkelblum.

Delivered this 24th day of January, 1940.

Chief Justice.

CIVIL APPEAL NO. 4/40.

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 :

The Anglo-Palestine Bank, Ltd. Appellants.

v.

Dr. Paul Berg Respondent.

Guarantee to Plaintiff contingent on Court of First Instance issuing judgment in his favour — Judgment for Plaintiff after case dismissedd and retried following appeal — Construction of guarantee —Written pleadings in Magistrate's Court.

1. Guarantee for sum of money in case judgment given by Court of First Insurance in favour of a party to proceedings — not limited to a judgment in first instance in sense of firstly given, it also includes judgment given after retrial.

2. Most undersirable that either party should be able to put forward arguments or statements which other party has not had opportunity of hearing and answering.

I. Levin for Appellants.

Zakheim for Respondent.

Appeal from judgment of District Court, Tel-Aviv (in the appellats capacity), dated the 21st of November, 1939.

JUDGMENT

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

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

The guarantee was to remain in force for a year.

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

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

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

In the course of his judgment the Magistrate referred to a dictum of mine in Criminal Appeal No. 10/39 [1], in which I said written submission by advocates should be discouraged, and he complains that oral arguments are sometimes oppressive. In my opinion it is most undesirable that either party should be able to put forward arguments and possibly statements which the other party has not had an opportunity of hearing and answering, but when the Magistrates' Courts procedure Rules are brought into operation, which I trust will be shortly, it should be possible easily to ascertain what are the issues, and for advocates to confine themselves to them and thus prevent hearings before Magistrates' Courts, which are generally busy Courts, becoming unduly prolonged.

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

Delivered this 6th day of February, 1940.

Chief Justice

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[1] 5 CtLR 177.

HIGH COURT NO. 4/40

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :—

Zuhra bint Ibrahim Radwan — Petitioner.

v.

1. The Chief Execution Officer, Majdal.
2. Mohammad Ibn Mohammad Abdul Fattah Hammoudeh

Respondents.

Order by Chief Execution Officer to excute — Subsequent order cancelling previous decision — Delay of several years in applying to High Court.

1. Chief Execution Officer cannot cancel order made by him, if already executed, and in case he does so, High Court will set aside his decision, even if petitioner in very great delay in applying to High Court and even though delay may have caused damages to Respondent.

Petitioner in person.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his orders dated 13.1.36 and 13.1.40 in Execution File No. 303/35, Majdal wherein he refused to execute the judgment, dated 5.12.35 should not be set aside and why he should not order the execution of the above judgment.

ORDER

We think that the Chief Execution Officer in this case was clearly wrong, because, having given an order to execute on 12.1.36, and that order having been executed, he, on the 13.1.36, reversed his previous decision and ordered delivery of possession to be cancelled. He did this without any application having been made to him on the subject by the judgment debtor. We do not think that he can cancel a completed execution in this way.

The only point which has troubled us is the length of time which the petitioner has taken to come to this Court. But in spite of the delay, we feel that it would not be just to allow the second decision of the Chief Execution Officer to stand. It is true that the delay may have caused damages to the second Respondent, but that is another matter. The order nisi must therefore be made absolute, and execution of the judgment must proceeed. But in view of the delay we do not think that the petitioner should have her costs.

Given this 19th day of February, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 3/40

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Fakhri el Din el Ansari on behalf of the estate of his father, the late Sheikh Mahmoud Jawdat Daoud el Ansari — Appellant

v.

Awkaf Commission — Respondents.

Dismissal of employee held by High Court to be not in compliance with Regulations — District Court dismissing case of employee for arrears of salary — Remittal of case to trial Court to hear evidence of oral agreement — Point that Court did not hear evidence of witnesses which it had decided to hear.

1. High Court judgment that employee was improperly dismissed and should be re-instated in his office, if not dealing in terms with question of salary, does not prevent lower Court from deciding what salary employee was entitled to.

2. If no mention in record that party asked witnesses to be heard and that Court refused to summon or hear them, although it has previously decided to hear them, he cannot afterwards complain that Court did not hear those witnesses.

Khoury for Appellant.

Abu Sha'ar for Respondents.

Appeal from judgment of District Court of Jerusalem, dated the 16 of December, 1939.

JUDGMENT

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

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

The facts are shortly as follows: The late Sheikh Mahmoud Ansari was appointed to a post as Curator of the Mosque of Omar by a Bara't of the late Sultan of Turkey. In that Bara't his salary was fixed at 200 Turkish Piastres. Subsequently that salary was raised

by the Supreme Moslem Council to LP. 5 monthly, and again later on to LP 8 monthly. The last increase of LP. 3 was stated to be as compensation in lieu of the gratuities which the Sheikhs had previously been in the habit of receiving from visitors. Later on in 1929 disputes arose and the Supreme Moslem Council reduced the salary of Sheikh Machmoud to LP.4 monthly. He was afterwards dismissed from his office but as a result of an application to the High Court that Court ordered that he should be re-instated. The salary was still paid to him at the rate of LP. 4 monthly and subsequently that was again reduced to the sum of LP. 3.200. Sheikh Mahmoud then in 1934 entered an action in the District Court claiming arrears of salary on the basis of the diffeerence between the LP. 8 which he claimed he was entitled to and the sums actually paid to him. The District Court, after hearing the parties, gave a decision dismissing the claim; it was appealed, as I have said before, to this Court, sent back to the District Court who heard the evidence of Abdallah Eff. Mukhlis, the Chief Administrator of the Awkaf, and as a result the District Court again gave a decision dismissing the claim.

Appeal has now been made to this Court. The main basis of the appeal is, if I may say so, that the High Court Case No. 61 of 1931 [1] decided that the apepllant should be re-instated in his office and his original salary paid to him. Now what the High Court case decided is this, that the Sheikh had been dismissed improperly from his office because the terms of Art. 53 of the Ottoman Regulations of 1329 had not been complied with and therefore he should be re-instated.

No mention is made in the judgment of the question of salary beyond the words in the opening paragraph, saying that the action was one to show cause why the petitioner should not be reinstated in his substantive office and his original salary paid to him. There is nothing to show, even supposing that the judgment did deal with the question, there is nothing to show what the term "original salary" means. The original salary might well mean the sum of 200 Turkish Piastres, which was in fact the original salary which he received. We do not however think that the judgment does in terms deal with the question of salary at all but merely with the question of dismissal from his office.

The second main point is that the Court, which had previously given a decision that certain witnesses should be heard, when the case actually came on for hearing did not hear the evidence of those witnesses. Now, we have looked through the record and we find that the advocate for the appellant asked for the evidence of Abdallah Eff. Mukh-

[1] 5 C of J p. 1701.

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

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

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

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

Delivered this 5th day of February, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 122/39

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 :

Keren Kayemeth Leisrael, Ltd. Appellants.

v.

1. The Members of the Arab Mazareeb Tribe
2. The Villagers of Malul Respondents.

Points of law carried to Land Court upon findings of Special Commission under Cultivators (Protection) Ordinance — Proceedings brought, heard and determined in name of a tribe or inhabitants of a village — Meaning of "person" in Cultivators (Protection) Ordinance — Rules of construction and interpretation — Description of land over which rights are claimed — Pitching of tents or inha-

biting a locality whether amounting to "beneficial occupation" under Cultivators (Protection) Ordinance — Variation by Court of Appeal of a finding of fact — Judicial body intimating its opinion as to case in middle of procedure — Mejelle Art. 1645,1646, 1815.

1. Rights in nature of profits à prendre — not necessarily individual, a profit à prendre may be exercisable in common with others.

2. (a) Meaning of "person"—not uniform throughout Cultivatros (Protection) Ordinance, and sec. 19(1)(d) thereof govenened by Interpretation Ordinance (defining "person" as including any association or body of persons corporate or unincorporate).

(b) An Arab village or tribe — a body of persons unincorporate within definition of Interpretation Ordinance.

3. Characteristic of "beneficial occupation" in sec. 19(1) of Cultivators (Protection) Ordinance — something taken from land, it does not extend to pitching tents or inhabiting a locality.

4. Court of Appeal may vary finding of lower Court by striking out certain words.

5. Observation by judicial body in middle of proceedings, even if made in writing, that party wishing to call further evidence need not do so, his case having already been proved beyond doubt, — not fatal to its final decision, if no injustice done to other party.

Horowitz and *Feiglin* for Appellants.

Bustani for Respondents.

Appel from judgment of Land Court, Haifa (sitting in its appellate capacity), deted the 30th of November, 1939.

JUDGMENT

Certain disputes between the Appellants, the Keren Kayemeth, and the Respondents, the Arab Mazareeb Tribe and the villagers of Malul, were referred to a special commission under the Cultivators (Protection) Ordinance. The matter came before this Court in March of last year in Civil Appeal 14/39 [1], when it appeared that there were irregularities in the case stated as required by Section 19 of the Ordinance — as amended — and in order to dispose of the matter in the special circumstances which were explained, this Court ordered the case to be returned to the Land Court that it might deal with points of law which were raised by the advocates, on the basis of the facts found by the Commission, the documents which were before the Commission, and the record of the Commission.

This has been done and the matter again comes before us.

I may observe that the actual points of law with which we are concerned were raised and formulated by the present appellants.

[1] 6 CtLR p. 6.

The paragraph under which the proceedings were brought provides—

"Any dispute —

. . . . . .

(d) as to whether any person has exercised continuously any practice of grazing or watering animals or cutting wood or reeds or other beneficial occupation of a similar character by right, custom, usage or sufferance,

shall be referred to a special Commission",

which paragraph implements Section 18 of the Ordinance.

The first question of law raised is whether the proceedings could be brought, heard and determined in the name of indefinite and fluctuating bodies of persons, vis. a tribe or the inhabitants of a village.

The Commission, relying upon the Interpretation Ordinance which defines person as including any association or body of persons, corporate or unincorporate, and Articles 1645 and 1646 of the Mejelle, held that the proceedings were properly brought, and that there was no need for every person to prove his claim. They went on to say —

"The proceedings of the hearing of the Commission begin with the words:

'Claimants (I) The members of the Arab Mezareeb Tribe represented by Muhammad Hussein Khalaf.

(II) The vilagers of Malul represented by Awad Elias and Yusuf Muhammad Abbas.'

"These words read out to both parties as the chairman of the Commission wrote them in the proceedings. No objection of this representation was made by the appellants at any time during the proceedings."

The Land Court took the view —

"It is too late now for the appellant to argue that the inhabitants of a village, or members of a family or tribe have not in Palestine been treated as forming a legal entity enjoing rights of tenancy or use of land. Mahmud Ahmad and other v. Saleh Ibrahim Ismail, Land Appeal 121/36, in Palestine Law Reports, 234, Jallad v. Jallad, Nablus Land Case No. 15/30; Odeh v. Odeh, Nablus Land Cases 35/30 and 12/33; and Agudat Netaim Co. Ltd. v. Arab El Fuqara Tribe, Law Reports of Palestine, Volume VI, page 363. In these cases moreover strict proof of admission to membership of the unincorporated body does not seem to have been given. This case was not brought in a Court of law but before a special commission intended to deal with claims of peasants, and was we think properly brought."

In the last case cited, which also arose out of a reference to a special commission under the Ordinance, an Arab tribe was Respondent, but this point was not raised. Mr. Horowitz argues that the rights contemplated by the section are in the nature of profits à prendre, and in consequence are individual, but I do not think that argument

is sound, a profit à prendre may be exercisable in common with others.

In construing the section it does not seem to me that there is anything in the context which prevents the application of the Interpretation Ordinance. It is argued that in the definition of "statutory tenant", Section 2 of the Ordinance, the words, "person, family or tribe", impart an individual meaning to the word "person", and that if this be so the same meaning should be given throughout the Ordinance. The principle invoked is well stated in Maxwell, 7th Edition, page 272, as follows:—

> "It has been justly remarked that, when precision is required, no safer rule can be followed than always to call the same thing by the same name. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. Accordingly, in ascertaining the meaning to be attached to a particular word in a section of an Act, though the proper course would seem to be to ascertain that meaning if possible from a consideration of the section itself, yet, if the meaning cannot be so ascertained, other sections may be looked at to fix the sense in which the word is there used."

But on closer examination one finds in Section 19(1)(c) the question, whether any person is a landlord — there the word person clearly must have the wider meaning. Assuming therefore the argument on Section 2 is well founded, upon which I expressly reserve my opinion, it is clear that the meaning of the word is not uniform throughout the Ordinance, and I think the Interpretation Ordinance should apply to Section 19(1)(d). When it is applied the question arises, is an Arab village or tribe a body of persons unincorporate. Having regard to local circumstances I am of opinion that each is within the definition.

This disposes of the first point.

The second point is set out in paras. 2 to 5 of the points of law, and shortly is, whether or not the Respondents gave sufficient particulars of the land over which they claimed rights.

On 24.1.39 the village Mukhtar and elders wrote to the Assistant District Commissioner as to their rights in the land which the Jews had annexed to the King George Forest.

The Mukhtar of the Mazareeb wrote in similar terms.

The summons issued to Mr. Pausner (representing the Keren Kayemeth) stated —

> "The inhabitants of Malul and Arab Mazareeb claiming water, grazing and settlement rights in the Forest Area belonging to the Keren Kayemet known as King George Forest."

In the special case the Commission recorded —

> "It is submitted that the term "King George Forest" is sufficient to fulfil the requirements of this Regulation as it is a matter of common knowledge that the Forest is called in full "King George V. Jubilee Forest"
>
> "The Commission at their first sitting asked the claimants to give a description of the land which had been briefly described in their application.
>
> "The land was then described by the claimants, in detail, and the appellants raised no objection or query as to its boundaries or name. It is submitted that the "brief" description in (b) above, when supplemented by the detailed description given verbally by the respondents, was sufficient to keep the appellants at all times well informed of the land concerned in the dispute.
>
> "Although the applications of Malul named the land as "the Jubilee Forest" and that of Mazareeb as "the King George Forest" both applications contained the secondary names of "Waaret Mazareeb" and "Sammunieh site" respectively. In order to make the description of the land clear to both parties the Commission not only questioned the Registrar of Lands as to the nomenclature but also inspected the land, and in the presence and with the assistance of both parties, marked the boundaries on a map attached to the proceedings. They further held that for the purpose of the dispute, the land should be called "King George V. Jubilee Forest".

The Land Court held —

> "We do not think it desirable that claims before a special commission should be subject to undue formality. Before the hearing began the claimants were required and did define clearly and indicated by reference to a map the land claimed. The appellants were offered adjournments to enable them to meet any variation or amendment there might seem to be in the claim and to prevent their being taken unawares."

The actual land over which the rights were claimed must be a questions of fact, but I have set out the proceedings at some length to make clear that there was no sort of injusice to the Appellants such as I gathered Mr. Horowitz was inclined to allege.

I do not think there is anything in this point.

Mr Horowitz agrees that with Civil Appeal 30/39, P.L.R., Vol. 6, p. 363 [2], against him, which was decided after these points of law were drawn up, he cannot argue his point of law — no. 6. — but he desires to reserve it.

The next question is —

> "Whether the Special Commission was not wrong in holding that the pitching of tents and inhabiting a locality or area is or can be a "beneficial occupation" within the meaning of s. 18 of the Cultivators (Protection) Ordinance."

This appears to me to be a simple question of construction. The

[2] 6 CtLR p. 65.

actual words in Section 19(1), which is the section under which the Commission acts, are —

> "any practice of grazing animals or cutting wood or reeds or other beneficial occupation of a similar character."

The characteristic is something taken from the land, and I do not think extends to pitching tents or inhabiting a locality. The Land Court seems to have taken the view that camping may be ancillary to grazing, and so protected. As a matter of common knowledge, grazing can be carried on without camping, and I do not think the words of the section justify that construction.

The Commission's finding of 23.3.37 will be varied by striking out the words —

> "The Commission further finds that the inhabitants of Arab Mazareeb have exercised for a similar period a beneficial occupation by pitching of tents and inhabiting of the same area."

It appears that at the close of the claimants' evidence the Commission recorded —

> "The Malul people wish to call further evidence.
>
> "The Commission is of opinion that there is no doubt that both claimants have in fact grazed their animals in the Forest for the past five years, and the Arab Mazarib have exercised the beneficial occupation of pitching their tents on the land for this period. No further evidence is therefore required from claimants."

Mr. Horowitz invites us to say that this offends against the general principles of the administration of justice and is therefore a ground of appeal under the section. He does not, however, assist us with any authorities.

The Land Court held that it had no jurisdiction to deal with this matter on an appeal by case stated on a point of law.

I feel considerable doubt if this is a point of law within the section, but be that as it may, I do not think there was any injustice. The observation was unfortunate in its terms, but it is clear that the Commission were indicating that a prima facie case had been made out. It was made in the middle of the proceedings, and there is no suggestion that after making it the Commission refused to hear the Appellants or their witnesses, and there is no reason to assume that the final decision was given without due consideration of the case which the Appellants put forward, and which the Commission recorded.

The appeal fails on all the points raised except the variation of the finding as to pitching tents and inhabiting the area.

The Respondents, who are represented by one advocate, will together have a fixed sum of LP 10 in respect of all costs.

Delivered this 15th day of February, 1940. *Chief Justice.*

CRIMINAL APPEAL NO. 9/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of :

The Attorney General — Appellant.

v.

1. H. Sherf & Co.
2. Haim Sherf
3. Shmuel Sherf. — Respondents.

Charges under Merchandise Marks Ordinance and Trade Marks Ordinance — Defendant electing to be tried by District Court — Dismissal of case on ground that complainant not a person authorised to prosecute before District Court — Attorney General appealing in proceedings instituted by private complainant—Question whether Rules 11 *and* 15 *of District Court (Summary Trials) Rules,* 1938 *ultra vires art.* 1 *of Ottoman Criminal Procedure Code — Private complainant's right to prosecute without authority of Attorney-General.*

1. Attorney General's right to appeal from a decision of a Magistrate or of a District Court exercising summary jurisdiction — a statutory right in general terms and extends to all cases properly brought under Magistrate's Courts Jurisdiction Ordinance, sub ject to limitations therein.

2. Rules 11 and 15 of District Court (Summary trials) Rules, 1938, — intra vires; a private complainant or his advocate may prosectue in a summary trial before a District Court.

Bell (Crown Counsel) for Appellants.
Levin for Respondents.

Appeal from judgment of District Court, Jerusalem, dated the 15th day of December, 1939, whereby the Respondets were charged of :

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

goods bearing a mark contrary to Section 38(b) of the Trade Marks Ordinance, 1938.

3. Falsly applying to goods a mark so nearly resembling a trade mark, contrary to Section 3(1) (b) and (c), and Section 3(2) of the Merchandise Marks Ordinances.

and the case was dismissed.

JUDGMENT

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

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

> "The Complainant is not a person authorised by Ordinance to institute proceedings before the District Court. The complainant has authority to lay his complaint before the Magistrate only, in accordance with Section 10 of the Magistrates Courts Jurisdiction Ordinance, No. 16 of 1935.
>
> "The accused, however, when brought before the Magistrate had the right to elect to be tried by the District Court according to Section 3, Magistrates Courts Jurisdiction Ordinance, but this article does not give authority to a private complainant to prosecute before a District Court without authority from the Attorney-General.
>
> "The District Court (Summary Procedure) Rules, Section 18 (sic) referred to, merely sets out who may address the Court, a matter of procedure and cannot in any way be taken as giving an authority to a complainant to prosecute who is not authorised so to do by Ordinance."

The Attorney-General appeals to this Court.

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

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

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

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

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

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

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

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

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

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

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

As I have said, in 1935 the Magistrates Courts Jurisdiction Ordinance was amended, and an accused person was given the right to

elect summary trial by a District Court, which brings us to the point for decision — if he does so can the private complainant prosecute.

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

It is argued they are ultra vires because they are contrary to Article 1 of the Ottoman Criminal Procedure Code, but as I have already said, in my opinion the express provision of the Magistrates' Law giving a private individual the right to lay complaint, must supersede that article.

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

In my opinion the rules are intra vires and apply, and a private complainant or his advocate may prosecute in a summary trial before a District Court.

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

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

Delivered this 15th day of February, 1940.

Chief Justice.

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* Appeal by the Attorney-General against that judgment was dismissed on a technical ground. (C.A. 31/39 6 CtLR p. 103).

CIVIL APPEAL 84/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before :— Copland, J. and Khayat, J.

In the appeal of:—

La Fonciere Fire Insurance Company — Appellant.

v.

The Arab Industrial Co. Ltd. — Respondent.

Question whether loss or damage happened independently of abnormal conditions existing at time of fire — How can insured discharge onus of proof?—Payment of costs by Insurance Company when losing case.

1. C.A. 188/38* — correct view of clause 6 in fire insurance policies now issued in Palestine (re non-liability of insurance company for loss or damage occasioned by or contributed to certain abnormal conditions).

2. Alternative to proving exact cause of fire is to lead evidence upon which the Court can lawfully draw inferences such as surrounding circumstances, conditions of the building, general state of security at particular time in neighbourhood and so on.

3. Usual rule that loser pays costs to be followed also in cases of insurance companies unsuccessfully putting as a defence clause which exempts them from liability.

Olshan for Appellant.

Abcarius and *Atalla* for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the 14th June, 1939.

JUDGMENT

This is an appeal from the District Court Jerusalem, holding that the Appellants, an Insurance Company, are liable to pay LP. 2485.566 with costs and interest to the Respondents in respect of a fire which occurred in the Respondents' premises in October, 1937.

The appeal is confined to this question; whether the loss or damage must reasonably have happened independently of abnormal conditions which existed at the time of the fire. The case of Assicurazioni Generali v. Levy, Civil Appeal 188/38 *, is the ruling case, and has been followed, to my knowledge, at least twice in the last few months, and must, therefore, be taken to be the correct view of this clause 6 which is contained apparently now in all fire insurance policies issued in Palestine. This case lays down the correct view, unless and until it is set aside by a higher tribunal.

In the present case the question is entirely one of evidence. The

* 4 CtLR p .224.

District Court heard a large amount of evidence, and, whilst not putting ourselves in their position, we think that their judgment was a correct judgment. We think that the Respondents were successful in proving that the loss or damage happened independently of abnormal conditions. All these cases must depend on the facts proved in each case. The insured may sometimes be able to prove the exact cause of the fire; in that case he has discharged the onus placed upon him completely. That can very seldom be done, since the fire, in most cases, if burning for a considerable time destroys the traces of its origin. The second alternative is to lead evidence upon which the Court can lawfully draw inferences such as the surrounding circumstances, condition of the building, the general state of security at that particular time in the neighbourhood and so on.

We think, in this case, there was evidence before the District Court, which justified the view they took, that the abnormal conditions were not responsible for, and did not cause, this fire.

With regard to the argument that the abnormal conditions, such as curfew, contributed to the fire, we do not think that they did. We cannot say that if there was no curfew the fire would not have taken place at that time. It is all in realm of speculation and speculation should not be allowed to creep in so far.

With regard to the question of costs, the appellants argue that they were not responsible and, at any rate, should not have to pay costs. I am afraid the insurance companies rely on clause 6 to be put as a defence, and put the insured to prove practically every case. From the point of view of the company it may be justified in doing so, but there is no reason why they should indulge in theories at the expenses of the insured. If they lose, the usual rule must follow in most cases, the loser pays the costs.

We think that the District Court came to the correct conclusion on the evidence, and the appeal must, therefore, be dismissed with costs and LP. 15.— fees for attending the hearing.

Delivered this 2nd day of October, 1939.

British Puisne Judge.

CIVIL APPEAL NO. 21/40.

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 :

Assad Awad Khoury and 18 others. Appellants.

v.

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

Respondents

Refusal of Court to dismiss adminstrators — Non-interference of Court of Appeal in matters of discretion.

Matters such as refusal to dismiss administrators of an estate — largely for discretion of District Court; Court of Appeal will always be reluctant to interfere unless District Court had gone wrong in law.

Boustany for Appellants.
Walid Saleh for Respondent No. 2.

Appeal from judgment of District Court, Haifa, dated the 13th day of January, 1940.

JUDGMENT

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

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

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

Delivered this 7th day of March, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 22/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

1. Rimeh daughter of Abdalla Issa Iddini of Nazareth.
2. Naameh daughter of Abdalla Issa Iddini of Beisan.

Appellants.

v.

Father Naim Abdalla Issa Iddini Respondent.

Question of consent of parties to jurisdiction of Religious Court in matters of succession — Effect of statement in certificate of succession of Religious Court regarding consent of parties.

Consent in matters of personal status giving jurisdiction to Religious Court must be a definite consent by parties themselves; statement in Certificate of Succession that parties had so consented — not sufficient.

Edit Note: see C.A. 12/37 1 CtLr p. 44.

Boustany for Appellants.

Hakim for Respondent.

Appeal from judgment of District Court, Haifa, dated the 2nd day of Februady, 1940.

JUDGMENT

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

Costs to await the result of the retrial.

Delivered this 7th day of March, 1940.

British Puisne Judge

CRIMINAL APPEAL NO. 10/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of :

The Attorney General — Appellant.

v.

Alexander Glinsky — Respondent.

Appeal by Attorney General from dismissal of charge of aiding and abetting illegal landing in Palestine — Failure of prosecution to prove contravention of Immigration Ordinance.

Conviction of aiding and abetting persons acting in contravention of Immigration Ordinance cannot stand if Court after consideration declines to form opinion that those persons or any of them intended to enter Palestine in contravention of provisions of that Ordinance.

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

Appeal from judgment of District Court, Haifa, dated the 15th day of December, 1939, whereby the Respondent was acquitted of the charge of aiding and abetting persons whom he knew were acting in contravention to section 5(1)(h) of the Immigration Ordinance, 1933, and section 12(c) of the Immigration (Amendment) Ordinance No. 2, 1939; contrary to section 12(3) as amended by section 7(8) of the Immigration (Amendment) Ordinance 1937 and section 2 of the Immigration (Amendment) Ordinance, No. 4 of 1939.

JUDGMENT

Trusted, C. J.

I agree with the judgment which my brother is about to deliver.

In the course of argument it was stated that it was not known if the requirement of the Royal Instructions as to Ordinance relating to immigration had been complied with in certain cases. It is well, therefore, that I should read the following letter from the High Commissioner, in which he states. —

"I confirm that I had received instructions thereupon from His

Majesty's Secretary of state for the Colonies before I promulgated the Immigration (Amendment) Ordinance, 1937, the Immigration (Amendment) Ordinance, No. 2 1939, the Immigration (Amendment) Ordinance, No. 3 1939 and the Immigration (Amendment) Ordinance No. 4, 1939.

Delivered this 26th, day of February, 1940.

Chief Justice.

JUDGMENT

Rose J.

This is an appeal by the Attorney General from a judgment of the District Court of Haifa dismissing a charge against Respondent of contravening Section 12(3) of the Immigration Ordinance (Chapter 67 of the Revised Edition, as amended).

The Respondent at the material time was the captain of the steamship S.S. Noemijulia and it appears that on the 19th of September 1939, this ship entered the port of Haifa with a large number of Jews on board, most, if not all, of whom were without the necessary papers which would have entitled them to land in Palestine.

The story which the Trial Court appears to have accepted is, in substance, that while it was the original intention of the Respondent to transfer his passengers to small boats outside the territorial waters of Palestine with a view of their being landed illegally in Palestine, he subsequently (partly out of humanitarian motives and partly under pressure of the passengers themselves) altered this intention and brought them instead, openly and without concealment to Haifa.

The point to be decided is a short one, namely, whether the prosecution succeeded in proving that there had been a contravention of the Ordinance on the part of these passengers or any of them. In view of Section 12(c) of the Ordinance, it would have been sufficient for the prosecution had the Trial Court formed the opinion that any of the passengers was on board the steamship Noemijulia with the intention of entering Palestine in contravention of Section 5 of the Immigration Ordinance. The learned Relieving President, however, having, as is clear from his judgment, applied his mind to the relevant considerations, declined to form this opinion; a decision with which we see no reason to interfere. The appeal therefore fails and must be dismissed.

Delivered this 26th day of February, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 32/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Avigdor Engelman — Appellant.

v.

Zalman Zohar — Respondent.

Contract with group of workmen for a certain construction, carried out by another group — Award of arbitrator under Workmen's Compensation Ordinance — Question of law decided by President District Court against claimant of compensation under Workmen's Compensation Ordinance — Question whether employee an "undertaker".

1. Whether employer of a workman who undertook by a written contract to do for him a certain piece of work comes within definition of "undertaker" in sec. 2(1) of Workmen's Compensation Ordinance tantamount to question whether employee was a workman or a contractor — or, in terms of that Ordinance, an "undertaker" and is a question of fact, not of law.

2. Where Court cannot say there was no evidence before arbitrator upon which he could find on a question of fact as he did, they will not disturb his finding, though it may well be that on the evidence as a whole he might have come to another conclusion.

Bar-Shira and *Kollenscher* for Appellant.

Lebel for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated the 5th of January, 1940 *.

JUDGMENT

This appeal arises out of an arbitration under the Workmen's Compensation. The Respondent desired a cesspit and entered into a contract in writing with three men for its construction. By that contract the price was agreed, the size and materials of the pit were stipulated, and the materials, except certain iron, were to be supplied by the three men, and the pit was to be constructed in a stated time.

According to the finding of the learned arbitrator,

> "These three men were members of the cesspit diggers section of the Labour Union. In accordance with the rules and practice of the union this contract was carried out by another group of cesspit diggers whose turn it was to carry out the next piece of work required."

* C.A. DC Tel-Aviv 265/39 7CtLR p. 98 infra.

and later in his judgment he stated —

> "I find that the Respondent had some knowledge, though perhaps not a detailed knowledge, of the system under which work is distributed by the Labour Union. He had seen and spoken to the Claimant while working there and had not objected to his doing the work."

In the result I think the learned arbitrator must be taken to have found that the substituted men were in the same position as the men who signed the contract. One of the substituted men met with a serious accident in the course of the work and claimed compensation.

The arbitrator found "that this accident arose out of and in the course of the employment of the Claimant and that there was no negligence on his part".

On the application of the Respondent he formulated five questions to be submitted to the District Court. I will deal firstly with question (E).

As the learned R/President points out, it is involved, but I think the arbitrator was justified on the evidence in finding — as in the result he did — that the claimant was substituted for one of the original three men, and that he was in the same position as they would have been. I incline to the view that this is really one factor in the main question to which I am about to refer.

This is obviously one of these cases where the question is — was the applicant a workman or a contractor — or, in the terms of our Ordinance, an "undertaker".

There is no doubt that that is a question of a fact. Willis's Workmen's Compensation, 30th Edition, at page 145, states —

> "The task of determining between a case of independent contract and the relationship of master and servant is often one of great difficulty, especially where the remuneration is based upon the amount of work performed. In such cases the power of control will generally prove to be the decisive test. The existence of a document describing the arrangement as a "contract" is not conclusive, but the real meaning of the arrangement is to be considered.....
>
> "The question is one of fact for the arbitrator, and the Court of Appeal will not interfere with his finding unless there has been misdirection or there is no evidence to support it. It must not be supposed that in the cases cited below the arbitrator was bound to find as he did, or that the Court of Appeal would have come to the same conclusion on the facts."

and the principle was accepted by this Court in Civil Appeal 34/38, P.L.R., Vol. 5, p. 234 *.

* 3 CtLR p. 147.

That being so, although the functions of the Court of Appeal in England are no doubt as set out above, the position here is rather different. Under Section 8(1)(b) of the Arbitration Ordinance the Court has to give a decision upon the points of law reserved. In my view questions A., B., C. and D. did not reserve any points of law, and the answers to them are questions of fact, and I think the District fell into an error in trying to answer them.

This I think concludes the matter, but in order to avoid leaving the case in an unstatisfactory state, I would add that it seems to me that the only question which could be formulated on this point would be in effect, "Can I (the arbitrator) upon the evidence hold that the applicant was a workman?" The arbitrator did not actually find as a fact that the applicant was a workman, but that he did so must be inferred from his decision, question D., and the circumstance that C.A. 34/38 was brought to his attention.

I have looked at the proceedings and I find that the applicant stated inter alia, —

"Before accident he knew I was in his employ."

"Respondent told me personally to come and work on the day he started work."

"We are not contractors, we agreed to finish the pit, we undertook to do the work."

"He said, 'Do You work for me?' I said, 'Yes'.'

"We are not contractors, we are labourers, Histadruth work is (?) or piece work."

It is true that the Respondent said —

"They undertook to dig."

"They contracted to finish work."

"They assumed all responsibility."

"I didn't employ claimant."

"I am not building contractor, nothing to do with labour; understood they do (sic.) work for me as contractors."

It may well be that on the evidence as a whole the arbitrator might have come to another conclusion, but I do not think it can be said that there was no evidence upon which he could find as he did.

The appeal, therefore, will be allowed, and the award confirmed. The Appellant will have his costs here and below — costs here on the lower scale, to include LP. 10 fee for attending the hearing.

Delivered this 1st day of April, 1940.

Chief Justice.

CIVIL APPEAL NO. 265/39.

IN THE DISTRICT COURT AT TEL-AVIV

Before :— His Honour, the R/P W. Clive Curry

v.

Between :— Avigdor Engelman — *Workman* (Appellant)
Salman Zohar — *Employer* (Respondent)

DECISION

Five questions of Law have been submitted for my decision by the Chief Magistrate Commander Bodilly in his capacity as Arbitrator in the proceedings between Avigdor Engelman, Appellant, and Zalman Zohar, Respondent.

The five question have been lettered A—E and for convenience I propose to deal with question C first :

Question C. Can the Respondent be considered at all as an undertaker in view of the conception in s. 2(1) of the Workmen's Compensation Ordinance ?

The Arbitrator found that the Respondent entered into a written contract with a group of 3 persons to dig a cesspit on his premises. And the Arbitrator appears to me to have found that owing to the existence of a certain custom wrereby although one group entered into the contract another group might undertake the work and that this custom was known to the Respondent. He acquiesced in a group other than the one which had signed the contract doing the work — therefore the group that did the work were in the same relative position with the Respondent as the group which actually signed the contract.

It is perfectly clear from the contract and the evidence that the group not only undertook to dig a cesspit but more correctly undertook to construct a cesspit. The Respondent did not decide to construct a cesspit and in furtherance thereof employ a man to blast, another to dig, another as a mason — no, the group of 3 men were to construct it. It may be noted that the Respondent was a bus driver, and therefore hardly likely to have much time to construct a cesspit.

In Jerusalem Civil Case 36/39 it was held that an undertaker was one who entered upon or undertook the construction of a building. With that definition I agree but the facts in that case differ very essentially from those in this. There the Respondent was building a house and employed the Applicant to do the blasting and excavating for the purpose of laying the foundation of the building, the construction of which was undertaken and entered upon by the Respondent. In

this case, however, the Respondent did not employ the men to blast and excavate for the purpose of making a cesspit the construction of which he, the Respondent, had undertaken or entered upon. Clearly here the 3 men entered upon and undertook the construction of a cesspit as a finished piece of work. The fact that they undertook to build a cesspit instead of a house makes them nonetheless the undertakers.

There is no finding that the Respondent could dismiss any of those men, nor that he in any way controlled the hours they worked. On the contrary, the evidence shows they came and went as they saw fit — as obviously they must for they were responsible for the construction within a definite period of time.

I hold, therefore, that the Respondent was not an Undertaker within the meaning of the definition in the Workmen's Compensation Ordinance Cap. 154.

Question A. Can the Respondent in this matter be considered as an Undertaker and/or Employer of Claimant despite the existence of a contract in writing between the Respondent and messrs. Soltus, London and Jacobson for the digging and construction of the pit?

I have already held that on the findings of the Arbitrator the Applicant was in the same position in re the Respondent as Messrs. Soltus, London and Jacobson but that the Respondent was neither an Undertaker nor an Employer for the contract was one for services and not for service.

Question B. Can the Respondent be considered as an Undertaker and/or Employer notwithstanding the fact that Claimant had never been hired by Respondent.

This question in another form has already been answered. The Respondent is neither an Undertaker nor Employer but in view of the findings of the Arbitrator he must be held to be in the same relative position with Claimant as with the 3 persons who signed the contract, viz. that of one who has contracted for services i.e. the construction of a cesspit — see Willis 31st ed. at p. 146.

Question D. Is the Claimant a workman within the definition of sec. 2(1) of the Workmen's Compensation Ordinance, and should not the work of digging and constructing the pit be considered as temporary work which is not for the purpose of the busines or trade of the Respondent?

This is a very composite question and must be broken into parts.

I hold that the employment was not by way of a casual nature.

I hold that the work was not for the purpose of the Respondent's trade or business.

I hold that the Applicant had not entered into and was not working under a Contract of Service.

I, therefore, hold that the Claimant was not a workman within the definition of sec. 2(1) of the said Ordinance.

Question E. Is oral evidence which stands in contradiction with a signed document (contract) admissible and in this case, can the statement of Claimant who alleges that Respondent was informed of the workmen working on behalf of the Labour Exchange, despite the contract being signed personally and making no mention at all of the Labour Exchange, be taken into consideration.

This is another very involved question which should be broken up into a series of questions.

However, in view of the previous decisions I only propose to deal briefly with it.

Oral evidence is not admissible to contradict a document, but it is admissible to explain the surrounding circumstances in which the contract was made. In this case I consider the oral evidence was admissible to show the existence of a custom whereby although a certain group signed the contract, other groups of that Union might undertake the work and that Respondent was aware of the custom and agreed to it.

I allow fee of LP. 3 to Mr. Lebel.

R/President.

5th January, 1940.

HIGH COURT NO. 8/40.

IN THE SUPREME COURT SITTING AS A COURT OF JUSTICE

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

In the application of :—

1. Hanna Obeid Azar and 6 others. Petitioners.

v.

1. The Chief Execution Officer, Haifa.
2. Yousef Insallam.
3. Ronnie Limited. Respondents.

Sale of land by public auction by order of Chief Execution Officer — Offer, after final order of transfer brought to notice of Land Registrar, to pay judgment debt — Moment when transaction of land transfer deemed completed.

1. In ordinary cases of land transfer by consent of parties transaction completed at moment parties appear before Land Registrar, acknowledge transfer and pay prescribed fees. Registrar may then proceed with further transactions (such as mortgage etc.) relating to same property without awaiting actual inscription of transfer in Registry book.

2. Order of Chief Execution Officer for transfer duly given and duly brought to notice of Land Registrar, coupled with payment of prescribed transfer fees — equivalent to acknowledgment in a consent transaction, and offer by judgment in a consent transaction, and offer by judgment debtor at that stage to pay debt — too late.

F. Attalla for Petitioners.
J. Salomon for Respondent No. 3.

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

JUDGMENT

Frumkin, J.

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

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

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

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

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

Delivered this 4th day of March, 1940.

Puisne Judge *Puisne Judge* *British Puisne Judge*

CIVIL APPEAL NO. 29/40

IN THE SUPREME COURT OF PALESTINE

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

In the application of :—

1. Nu'man Selim Saleh el Jammal
2. Tewfik Selim Saleh el Jammal — Applicants

v.

1. Wadi'a Selim Saleh el Jammal
2. Yousef Amin Saleh el Jammal — Respondents.

Document purporting to embody surrender by certain heirs of their shares in favour of other heirs — Settlement Officer disregarding deed of surrender on being doubtful whether parties wished to surrender their shares and whether they received valuable consideration etc. — Question of interpretation of deed carried before Court of Appeal.

Where in proceedings before Land Settlement Officer whole question whether certain heis surrendered their shares in favour of other heirs or not turns upon interpretation of deed of surrender and its effect, Court of appeal will grant leave to appeal.

Hawa for Applicants.
Nakkara for Respondent No. 2.

Application for leave to appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated 30th December, 1939.

ORDER

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

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

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

> "The evidence given orally was that certain heirs had transferred their shares, but as stated in my decision I found there was doubt as to the true intentions of the parties, and perusal, of document D/348, and the statements of Wadi'a Salim Saleh el Jamal, dated the 3rd of February, 1938, and the 10th March 1938, will show them to be contradictory."

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

Given this 29th of February, 1940. ***Chief Justice.***

CIVIL APPEAL NO. 25/40.

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 :

Keren Kayemeth Leisrael Ltd. Appellants.

v.

Mudir El Awqaf Al'am,, in trust for the Cemetry of Arab Li'miriyyeh Respondent.

Claim before Land Settlement Officer for registration as waqf of land described in Defendant's Kushan as miri — Lawful presumption of Settlement Officer that land, though described as miri, was properly constituted as waqf.

Where land had been used as a cemetry and quietly enjoyed as such for a period going back long before Ottoman Land Law was promulgated, Land Settlement Officer justified in presuming that land, though described now in kushan as miri, had been properly constituted as a cemetry, as waqf, in accordance with then existing law.

Feiglin for Appellants.
Khamra for Respondent.

Appeal from decision of Land Settlement Officer, Haifa, dated the 5th of January, 1940.

JUDGMENT

Copland, J.

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

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

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

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

Delivered this 21st day of March, 1940.

Puisne Judge *British Puisne Judge* *Chief Justice*

CRIMINAL APPEAL NO. 15/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of :

Sadeq Hamed Hilal Abu Heit — Appellant.

v.

The Attorney-General — Respondent.

Conviction of attempt of premeditated murder — Failure to include finding of fact in judgment — Fact covered by evidence.

Where fact justifying conviction as made by trial Court clearly stands out from evidence given by prosecution witnesses, failure to include finding of that fact in judgment of no material importance.

Ankar for Appellant.
Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of District Court of Nablus dated the 26th day of February, 1940, whereby the Appellant was convicted of attepting unlawfully to cause the death of another person contrary to section 222(a) of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment.

JUDGMENT

The Appellant was tried before the District Court of Nablus for attempted murder and was convicted and sentenced to ten years' imprisonment. On appeal the point has been taken that with regard to the doctor, who was called for the trial, no notice of his calling was given to the defence. Even if no such notice were given, we are satisfied that there was not the slightst miscarriage of justice or injustice done to the Appellant. On further enquiry, however, it has been discovered that such a notice was in fact served on the Appellant in prison, and we think that it is most improper for an advocate to make such a statement, without being sure that it is true.

It is further argued on his behalf, that in the judgment of the Court of Trial, there was no definite finding of fact on the question of premeditation. From the evidence given by the two prosecution eye-witnesses, the facts stand out so clearly that this was a case of attempted murder, that failure to include such a finding in the judgment is of no material importance, because it is covered by the proviso to Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance.

The appeal fails and is dismissed. We do not think that the sentence of ten years in a deliberate crime of this nature is exessive.

Delivered this 21st day of March, 1940.

British Puisne Judge

CIVIL APPEAL NOS. 34, 35, & 36 OF 1940.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of:—

CIVIL APPEAL NO. 34/40.

1. Usha, Kvutzat Poalim Lehityashvut Shetufit Ltd.
2. The Erez-Isarel Palestine Foundation Fund Keren Hayesod Limited. Appellants.

v.

Keren Kayemeth Leisrael Limited Respondents.

CIVIL APPEAL NO. 35/40.

1. Ramat Yohanan, Kvuzat Poalim Lehityashvut Shetufit Limited.
2. Palestine Agricultural Settlement Association Ltd.
3. The Erez-Isarel Palestine Foundation Fund Keren Hayesod Limited. Appellants.

v.

Keren Kayemeth Leisrael Limited Respondents.

CIVIL APPEAL NO. 36/40.

1. Kvuzat Kfar Hamacabi, Kvuzat Poalim Lehityashvut Shetufit Limited.
2. The Erez-Isarel Palestine Foundation Fund Keren Hayesod Limited. Appellants.

v.

Keren Kayemeth Leisrael Limited Respondents.

Consolidated appeals not opposed to by Respondents in which same point arises — Land Settlement Officer refusing to enter in Schedule of Rights undisputed claims consisting of mortgages of leasehold interests.

Land Settlement Officer may include in Schedule of Rights all undisputed claims, whether previously registered in Land Registry or not and whether based on dispositions within meaning of sec. 11(1) of Land Transfer Ordinance or not.

Horovitz for Appellants.
Salomon for Respondents.

Appeal from the decision of Land Settlement Officer, Haifa Settlement Area, dated the 28th of December, 1939.

JUDGMENT

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

These appeals come before us and there is no opposition whatsoever raised by the Respondents. In the absence of any explanation of the reasons which animated the Land Settlement Officer, the reasons given in his letters do not appear to us to be sound ones. We therefore allow the appeals and remit the cases to the Settlement Officer with instructions to include in the Schedule of Rights all undisputed claims lodged by the Appellants in respect of these properties as appear in the Schedule of Claims.

No order as to costs.

Delivered this 12th day of March, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 41/40.

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 :

Eliahu Saporta — Appellant.

v.

Malka Meyuhas Saporta — Respondent.

Claim for maintenance against foreigner — Judgment for maintenance without evidence as to law applicable and facts required by that law — Proper procedure in trying matters of personal status affecting foreigners.

1. In an action against a foreigner regarding a matter of personal status Court must apply parties' personal law, and if any difficulty arises President may invite assistance of Consul to advise upon law concerned. If Court did not deal properly with the matter and gave judgment without following this procedure case will be remitted for re-hearing.

2. Decision of Court ordering to pay maintenance — a decree, not an order.

P. Joseph and *El-Kayam* for Appellant.
Hamburger for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated the 31st January, 1940.

JUDGMENT

This case has gone wrong from the beginning.

The Plaintiff claimed, inter alia, maintenance from her husband who, it now appears, is a foreigner. Prima facie Article 64 of the Order-in-Council applied. The statement of claim should have set out this fact, alleged the law applicable and the facts required by that law.

The defence could have dealt with the matters raised and proper issues could have been framed.

The issues as framed ignore these matters.

In his judgment the learned President said —

> "In this case the Defendant has not been represented by an advocate and the Plaintiff's advocate Mr. Hamburger, has argued, the case in his final address all through as if English Law applied. The English Law on the matter is entirely statutory, namely, the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, which do not apply here. It seems that the Defendant is a Spanish Jew from Salonica. He himself holds a passport issued at Madrid; he apparently is in hereditary Spaniard. Now, no evidence of Spanish Law has been laid before me. It is not, in my view, a function of a Civil Court, of its own motion, to call for evidence. I admit, hovewer, that the position is very peculiar in view of the provisions of Article 64(2) and Article 64(3) of the Order-in-Council, and in view of the fact that the Defendant in this case has not been represented by an advocate. I do not think that this matters very much. I am satisfied that the law of any civilized country would not refuse to order a husband to pay appropriate maintenance for his wife and infant child in a proper case."

It is clear that the Court must apply the law for which provision is made in the Order-in-Council, and if any difficulty arises as to that law, Article 64 provides that the President may invite the assistance of the Consul for the purpose of advising upon the law concerned.

The Defendant appeals, and the only question is, must judgment be entered for him or can the case be sent back to the District Court.

Dr. Philip Joseph, who now appears in the case for the first time, urges that the case should not be remitted, but having regard to the provisions to which I have referred, I think it is clear that the Court did not deal properly with the matter and that the judgment should be set aside and the case remitted to the Court to re-hear it.

It was argued that the appeal was out of time, as it was from an order and not a decree. We hold that the decision appealed from was a decree and the appeal is in time.

Costs to be costs in the cause, and we certify LP. 10 for attending this hearing.

Delivered this 21st day of March, 1940.

Chief Justice

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 Ahmad El Haj Mahmoud
2. Amineh Bint Sheikh Hassan Soufan. Appellants.

v.

1. Mohammad Ibn Mustafa El Hussein
2. Yunis Hassan Abu Kandeel
3. Yachin Agricultural Society Ltd. Respondents.

Application to Court of Appeal to delete a certain passage from its judgment — Scope of slip rule — Civil Procedure Rules, rule 358, 338.

Words in a judgment not due to any clerical mistake or accidental slip or ommission but expressing what Court wished to say cannot, on ground that they do not correspond with facts be corrected under slip rule.

Application by Mohammad Yunis Hassan Abu Kandeel, one of the heirs of the Second Respondent, praying that the judgment of the Supreme Court sitting as a Court of Appeal, in the above appeal be set aside, that the case be reheard and that the passage in the said judgment of the Court of Appeal which declares that 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 First and Third Respondents be excluded.

Shehadeh for Respondent No. 2.
Hamburger for Respondent No. 3.

ORDER

We do not want to hear the Appellants and Respondents one and three.

This is an application by a respondent in an appeal which was heard before us on the 13th June, 1939, asking that a certain paragraph or certain words in the judgment of this Court should be deleted on the

ground that they do not correspond with facts as alleged by the applicant. These words, however, expressed what the Court in its judgment wished to say. They are not due to any clerical mistake or accidental slip or omission and a correction cannot therefore be made under Rule 358 which is commonly known as the slip rule. It is possible that the applicant might have proceeded under Rule 338 which allows the rehearing where the appeal has been heard ex parte, but he did not chose to do so but came to this Court with an application for which no authority whatever can be found under any of the Rules.

We have, therefore, no alternative but to dismiss his application. The second Appellant will have LP. 1.— travelling expenses. The first respondent will also have LP. 1.— travelling expenses. The Third respondent will have his costs and LP. 2.— hearing fees.

Given this 4th day of April, 1940.

British Puisne Judge.

HIGH COURT NO. 23/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :—

Yoseph Haim Kosowsky — Petitioner.

v.

Mahmoud el Kurdi — Respondent.

Jewess nearly 18 going through a cermony of marriage with a Moslem according to Moslem rites — Change of Religious Community by minor without consent of parents.

1. Marriage between a Jewess and a Moslem — a nullity according to Jewish law.
2. Person under age of 18 cannot without consent of his parents change Religious Community.

Gavison for Petitioner.

A. Gavison for Petitioner.

Application for summons to issue directed to the Respondent,

calling upon him to produce Esther Bracha Kasowsky on a day to be fixed, and to show cuse why he should not hand over the said Esther Bracha Kasowsky to the Petitioner.

JUDGMENT

The facts of this case are not in dispute. A Jewess, Esther Kasowsky, who is under the age of eighteen years, has gone through a ceremony of marriage with a Moslem, according to the Moslem rites. It is said, and we think rightly, that according to Jewish law she is not married, and the provisions of the Religious Community (Change) Ordinance cannot be invoked without the consent of the parent or guardian of the girl, and that consent has not been obtained.

On the particular facts of this case the matter is difficult, because the young woman is nearly eighteen years of age, and there are only a few weeks to go before she can decide the matters finally for herself. We have to determine what is right to be done in the meantime in her interest. It is quite clear that the policy of the civil law, particularly having regard to Sections 172 and 182 of the Criminal Code Ordinance, is to protect young people. We are not concerned with the position of people over the age of eighteen, who marry outside their own communities.

We are satisfied that this young woman should not, in the circumstances, remain with the man with whom she is living. A further question arises as to whether or not she should, in the circumstances, return to her parents. In the ordinary way the parents are the best people to whom a young person or a child should go, but in this case the young woman does not want to return to them, and as there is only so short a time before she is eighteen, we have obtained the assistance of Miss Thompson, the Government Welfare Officer, who is prepared to take Esther, and with whom, she (Esther) is prepared to go, in order to make arrangement for her until she is eighteen.

The order will be made absolute except that it will provide that Esther go with Miss Thompson.

Should any further difficulty arise Miss Thompson may apply to this Court.

Delivered this 2nd day of April, 1940.

Chief Justice

CIVIL APPEAL NO. 47/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

Before:— Copland, J., Khayat, J., and Abdul Hadi, J.
In the appeal of :
Anton Ibrahim Bakhiet on behalf of the Estate of deceased
Sultaneh bint Abdallah Salameh. Appellant.
v.
Mrs. Sultaneh Hana Maroum. Respondent.

Conflicting evidence as to possession — Matter not claimed and not included in statement of claim.

1. Court after hering two conflicting sets of experts as to signature and after inspecting the signature — fully entitled to appreciate evidence and to come to one conclusion or another.
2. Where there was evidence on which trial Court could hold as it did, its findings on those points cannot be upset on appeal.
3. Plaintiff cannot complain that trial Court did not deal with a certain matter, when he himself had not claimed it.

F. Haddad for Appellant.
Ousta for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated the 8th day of February, 1940.

JUDGMENT

In this appeal from the judgment of the Land Court of Jerusalem, given after the case had been before the Courts for some six years, three points have been taken on appeal.

The first point is that the Court was wrong in not holding that the signature of Sultaneh Rahil was a genuine one. The signature was first considered by a commission of experts who had decided, by a majority, that the signature was not a genuine one. For certain reasons that opinion was set aside and a second body of experts considered it and by a majority came to the conclusion that the signature was a genuine one. This second set of experts was heard in Court as witnesses together with another gentleman Mr. Elkes and the Court, as it was fully entitled to do, after inspecting the signatures, came to the conclusion that the signature was not that of the respon-

dent. The question was one entirely of appreciation of evidence. There was conflicting evidence and the Court chose one set in preference to the other after investigation, as it was fully entitled to do.

Again, as to the question of possession, the evidence also was conflicting. The Court accepted one set of witnesses and rejected the testimony of the others and came to the conclusion that it was not satisfied that the plaintiff had been actually in sole possession of half the land claimed. There was evidence on which the Court could hold as it did on these two points and those findings cannot now be upset on appeal.

The last point is in connection with some buildings said to have been erected by the appellant on this land. Now in the Statement of Claim, the appellant, who was then plaintiff, never made any claim to these buildings. All he asked for was that 20 out of 40 shares in the land should be registered as his. He never claimed the buildings and it is too late now to complain that the Land Court did not deal with the point when he himself had not claimed it. The advocate for the respondent in Court has offered to agree to the buildings, said to be erected by the appellant, remaining as his together with the actual ground on which the buildings are erected as part of his share. We express the hope that this offer will be accepted and carried out in order to put an end to this much too long protracted litigation.

In the result the appeal will be dismissed with costs and LP. 15 hearing fees.

Delivered this 3rd day of April, 1940.

British Puisne Judge.

HIGH COURT NO. 25/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :—

Fatmeh, wife of Mohammad Ibn Hussein Ibn Ibrahim el Kharraz, known as El-Hils — Petitioner.

v.

1. The Attorney-General
2. Officer i/c Jaffa Lock-up — Respondents.

Extradition of person convicted by default in Transjordan while in Palestine — Warrant of extradition issued by High Commissioner declared by High Court ineffective.

Person tried and acquitted in Transjordan and subsequently while in Palestine, convicted and sentenced by an appellate Court — not a person charged with an offence who may be delivered for trial, and a warrant of extradition issued by High Commissioner does not justify detention of such person.

Hogan (*Crown Counsel*) for Respondents.

Application for summons to issue to the Second Respondent, directing him to produce Mohammad el Kharraz, Petitioner's husband, in this Court, and calling upon him to show cause why the said person should not be released from detention.

JUDGMENT

This is the return to an order nisi in the nature of habeas corpus. One, Ibrahim el Kharraz, (known as El-Hils of Jaffa) was tried before a Court of first instance in Trans-Jordan and acquitted. There was an appeal and the appellate Court reversed the decision and convicted him and sentenced him to imprisonment.

At the time of this conviction he was in Palestine, and application was made to the High Commissioner for his extradition.

Section 23 of the Extradition Ordinance provides —

> "Notwithstanding anything in this Ordinance, the High Commissioner may, either in accordance with any arrangement made with the Government of Transjordan or in any particular case, authorise the arrest in Palestine of persons charged with any offence committed in Transjordan and the delivery of such persons to the Government of Transjordan for trial."

A warrant issued by the High Commissioner expressly referring to that section, and requiring the Palestine Police to arrest Kharraz, "accused of the commission of the offence of manslaughter", and stating that evidence in support of the charge had been produced.

On the facts of this case it is quite clear that he is not a person charged and that his extradition is not required in order that he may be tried.

I desire to make clear that we are not exercising any jurisdiction over the High Commissioner — we only say that the document issued by him in the circumstances does not justify the detention of Kharraz, and he may be released.

Delivered this 10th day of April, 1940.

Chief Justice

CRIMINAL APPEAL NO. 14/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of :

1. Khalid Ibn Haj Hassan Suleiman
2. Saleh Ibn Mehyideen Ahmad Juma'a — Appellants.

v.

The Attorney-General — Respondent.

Conviction of two accused of premeditated murder — Credibility of witness — Facts justifying inference of premeditation.

If A and B after a minor quarrel with C go away and return in half an hour's time, A carrying a rifle, and at instigation of B, without any word, shoots C — all requirements of sec. 216 of Criminal Code Ordinance (ingredients of premeditation) — fulfilled.

Abassi for Appellants.

Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of Criminal Assize Court sitting at Tiberias, dated the 5th March, 1940, whereby the Appellants were convicted of murder contrary to sec. 214(b) of the Criminal Code Ordinance, 1936 and sentenced to death.

JUDGMENT

We need not trouble you, Mr. Bell.

The Appellants were convicted of the murder of a woman, sister of one of them and the stepmother of the other, and they were sentenced to death.

The evidence of the prosecution consisted of four persons, who described what they said they had seen happen. The Trial Court accepted their evidence, having heared them, and making allowances for such minor inconsistencies as might have occurred in their respective stories. That being so, it is not for us to say that those witnesses should not have been believed.

With regard to the question of the ingredients of Section 216, it is quite clear that the murder was committed half an hour after there had been a minor quarrel over the picking of some olives. The Appellants had gone away and returned in half an hour's time to the scene, one of them carrying a rifle, and Saleh, at the instigation of Khalid, thereupon, without any word, shot the unfortunate woman.

It is obvious that on these facts all the requirements of Section 216 have been fulfilled.

There is nothing in these appeals. They are therefore dismissed, and the sentences of death confirmed.

Delivered this 21st day of March, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 11/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of :

Sarkis Y. Mar'ashli — Appellant.

v.

The Attorney General — Respondent.

Armenian marrying in Latin Church a member of Latin (Catholic) Community — Grant by Latin Court of separation from Armenian husband providing that spouses had no claim against one another — Evidence by President Latin Court that according to Latin law couple not divorced and no right to re-marry — Court of Appeal asking for written opinion of Armenian Patriarch on question of personal status — Test of bigamy.

Test of bigamy — whether marriage for which accused brought to trial is void for reasons of its taking place during life of his previous undivorced wife.

G. Salah for Appellant.

Salant (Junior Government Advocate) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the 8th February, 1940, whereby the Appellant was convicted of bigamy contrary to Section 181 of the Criminal Code Ordinance, 1936, and sentenced to pay a fine of LP. 5, or one month's imprisonment.

JUDGMENT

The Appellant was convicted by the District Court, Jerusalem, of bigamy. In its judgment that Court said :

"The Court finds as a fact that the accused was married voluntarily, in accordance with the Latin religious rites, and that accordingly he cannot obtain a divorce but he obtained a sepa-

> ration only and was not entitled by this to remarry. He however did in fact re-marry a second time, while his first wife was living, and he has failed to prove that his first marriage was declared void by a competent Court."

In Criminal Appeal 85/38, P.L.R. Vol. 6, p. 34 *, this Court clearly laid down that the test is whether the marriage in respect of which the Accused is brought to trial is void for the reason of its taking place during the life of his previous undivorced wife. That case also draws attention to Article 47 of the Order-in-Council which provides that where a question of personal status incidentally arises the opinion may be taken of a competent jurist having knowledge of the personal law applicable.

That case does not appear to have been brought to the notice of the District Court, and it is not clear if it directed its mind to the relevant considerations.

The Accused is an Armenian. He was married in the Latin Church, Nazareth, to a member of the Latin Community. The marriage was not a successful one, and the wife obtained from the Latin Court a separation which provided that the wife had no claim whatever from the husband, and the husband had no claim of interference in the wife's business.

The president of the Latin Religious Court gave evidence and said that there was no divorce and no right to re-marry according to Latin law.

The Head of the Armenian congregation said he was given a document by the late Patriarch, which was not produced or accounted for, which he said authorised him to marry accused to another woman, and that he did so. To the Court he said :—

> "If an Armenian, married in a Catholic Church, comes to us, we cannot re-marry him. He cannot do so unless he gets divorce. Whether the divorce must be by the Court of religion of first marriage or not, he is not prepared to say."

From this evidence it is difficult to discover if the second marriage is regarded by the community concerned, i.e. the Armenian, — as the accused was always an Armenian, — as void.

I therefore addressed the Armenian Patriarch as follows :—

> "I have the honour to refer to Article 47 of the Palestine Order-in-Council, and to request that you would be good enough to give me your opinion on the following questions of personal status which have incidentally arisen before a Civil Court.
>
> '1. If a male member of the Armenian Community is married to a woman who is a member of the Latin Community

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* 5 CtLR p. 125.

in a Latin church by a Latin priest, is such marriage recog nized by the Armenians as valid and binding upon the man.

"2. If such marriage is so binding, will the Armenians marry the man again during the life-time of his first wife if the marriage has not been declared null or invalid by the Courts of the Latin Community.

"3. If they will so marry, in what circumstances will they do so.

"4. In particular, will they do so if the Latin Church has ruled that the wife has no claim whatever from her husband, and the husband has no right of interference in his wife's business."

to which he replied —

"In answer to your letter No. C/64/59 and dated the 19th February, 1940, I have the honour to give my opinion on those questions of personal status in reference.

"1. If an Armenian lives in a place where there is not an Armenian Church or an Armenian priest, and gets married to a woman who is a member of the Latin Cammunity, the Armenian Church recognizes such a marriage which is binding.

"2 & 3. The Armenian Church will not marry the man again during the life-time of his first wife unless the first contracted marriage be declared null or invalidated by the Church where it was celebrated.

"If however, both parties submit to the jurisdiction of our Courts, then the case will be heard and determined according to our Canonical Law which allows divorce in certain cases, namely:

1. Adultery.
2. An incurable or contagious disease.
3. Absence of either party for a period of over seven years.
4. Incompatibility of character (sometimes).

"4. If the Church where the marriage was celebrated releases one spouse from the other as having no claim whatsoever against one another and no right of interference with one another, the Armenian Church may, on that ground, consider that the marriage was put to an end and allow the man to re-marry."

As in Criminal Appeal 85/38, there is obviously a doubt if the prosecution has proved its case, and the appeal must be allowed, and the judgment of the District Court set aside.

The result is deplorable, and I hope the matter may be brought to the attention of the Legislature.

Delivered this 1st day of April, 1940.

Chief Justice

CIVIL APPEAL NO. 14/40.

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 :

Rashid Ahmad Abu Laban — Appellant.

v.

The Jaffa Orange Company — Respondent.

Court official advising appellant, on strength of financial instructions, to pay Court fee into Bank — Impossibility on last day for entering appeal to pay fees on ground of curfew — Appeal out of time.

If person seeking to appeal on penultimate day of time for entering appeal did not pay fees into proper place on that day and on following day, too, owing to general reasons beyond his control, failed to do so, appeal out of time.

Moghannam for Appellant.
G. Elia for Respondent.

Appeal from judgment of District Court, Jaffa (sitting as a Court of Appeal), dated the 2nd of November, 1939.

JUDGMENT

The facts in this case are exceptional. The Appellant sought to appeal from the decision of the Magistrate to the District Court, Jaffa. On the penultimate day of the time for entering the appeal in the District Court the Appellant sought to enter his appeal, but owing to financial instructions, due to the then disturbed state of the country, the official of the Court refused to accept the fee and informed the Appellant that he must pay it into the Bank. He did not do so on that day, and on the following day — being the last day for entering the appeal — there was a curfew in Jaffa and nothing could be done.

In these circumstances the District Court held that the appeal was not entered within the time prescribed and we think that they were right in so holding, and the appeal is dismissed with costs on the lower scale. We certify LP. 2 for the hearing of the application for leave to appeal and LP. 5 for the hearing of the appeal.

Delivered this 9th day of April, 1940.

Chief Justice

CIVIL APPEAL NO. 51/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Rashikah bint Hassan Saleh el Dahnous. Appellant.

v.

Saleh Ibn Hassan Saleh el Dahnous. Respondent.

Application for leave to appear and defend (in a case under Summary Procedure Rules) — Grant of leave to defend on condition of producing security for whole amount of claim — Wrongful refusal of application to give, in lieu of security, a written undertaking not to dispose of, or deal with any property devolved by inheritance.

Judge granting leave to defend (in a case under Summary Procedure Rules) should never impose condition to bring a security for whole amount of claim, unless he thinks defence so vague and unsatisfactory that it is practically certain that Plaintiff is entitled to judgment.

G. Elia for Appellant.

Moyal for Respondent.

Appeal from Order of the District Court of Tel-Aviv, dated the 26th of February, 1940.

JUDGMENT

This is an appeal from a decision of Judge Korngruen, in the District Court of Tel-Aviv, granting leave to defend in a case under the Summary Procedure Rules, but attaching thereto a condition that the Defendant should provide a sufficient and adequate security for the whole amount of the claim to be produced within fourteen days. That decision was given on the 26th of January 1940. On the 7th of February 1940, the Defendant applied again in the District Court for leave to appear and defend unconditionally on the ground that she could not provide the security which the learned Judge had ordered on the 26th of January, and the Defendant offered to give an undertaking not to sell, or dispose of, or deal with, in any way, any of the properties, which devolved upon her by inheritance, before the case should be finally decided. That application was heard on the 26th of February by the learned Judge and he refused the application of the 7th February, but granted the Defendant leave to appeal against that decision. The Defendant has now appealed to this Court and her grounds are that the condition to file security for the full amount

of the claim is a harsh condition and in effect deprives her of any right to make a defence at all. She says that she has a substantial defence, and on the papers, we cannot say that her defence is a frivolous one. It may not be a successful defence if the case would come to trial but that is not the point. The point is whether she should get leave to appear and defend conditionally or unconditionally.

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

Now, with regard to the condition imposed by the learned Judge granting leave to defend, according to the Red Book, the Yearly Practice of the Supreme Court, 1938 Edition, page 164, it is stated that a condition such as this to bring a security for the whole amount of the claim, should not be made, except in cases where the Defendant consents to it, or where the defence is so vague and unsatisfactory that it is practically certain that there is no defence at all, because of the hardship and the injustice of imposing any such condition on a Defendant.

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

We therefore allow this appeal and leave is given to the Appellant to appear and defend, on her giving a written undertaking within seven days from to-day not to dispose of, or deal with, in any way, any of her properties as offered by her in her application dated the

7th February 1940. In the circumstances, we do not think either side should have any costs.

Delivered this 9th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 37/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Shihadeh Ibn Muheissen El Kadi — Appellant.

v.

Ali Ibn Khalil Abu Loz — Respondent.

Contract by two co-owners for sale of their land — Claim by one of co-owners who wished to cancel contract as regards his share — Question of jurisdiction.

In a claim by one of several co-owners regarding his share in land, value of that share, not of whole land for which all co-owners contracted, determines jurisdiction.

Malla for Appellant.

Barbari for Respondent.

Appeal from judgment of Magistrate's Court, Beersheba, dated the 31st of January, 1940.

JUDGMENT

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

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

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

Costs to await the result of the re-trial.

Delivered this 12th day of March, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 18/40

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of :

Abder-Raouf el Haj Hamid Jubran — Appellant.

v.

The Attorney-General — Respondent.

Conviction of premeditated murder — Arguments as to credibility of witness — Premeditation inferred from circumstances.

When a person is stabbed when sleeping, with no suggestion of any immediate provocation, elements of premeditation can be inferred.

Haddad for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of Criminal Assize Court sitting at Jerusalem, dated the 11th day of March, 1940, whereby the Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT

We need not hear you, Mr. Hogan.

The Appellant was convicted before the Court of Criminal Assize of the premeditated murder of his brother. The principal witness for the prosecution was an old Bedu woman, who gave a detailed account of how the crime was committed. According to her tale the deceased man, his brother, the present Appellant, the father and this woman, were outside the hut. Three of them were asleep, the woman Salha was not asleep. She says that in the night she saw this Appellant strike his brother with a dagger. The medical evidence is that the deceased man had several stab wounds, either of two of which would have proved fatal. The Trial Court had the advantage of hearing this witness, believed her tale, and said that what she had said was in their opinion a substantially true account of what had in fact happened that night.

The appeal is devoted to the argument that this witness was old and should not have been believed, and that she could not have seen what she said she saw. It is also argued that there was only this one witness, who was not coroborated, but was contradicted by other

witnesses. Those are arguments which could well have been addressed, and which, in fact, were addressed to the Trial Court, but are not arguments with which we can deal in this Court. There was sufficient evidence before the Trial Court, which evidence was accepted by them, and which is sufficient to justify the conviction, and it is perfectly clear, as the learned Chief Justice said in delivering judgment, that when a person is stabbed when sleeping, with no suggestion of any immediate provocation, the elements of premeditation as required by Section 216 can be inferred. There are no reasons whatsoever for interfering with this conviction. The appeal is dismissed and the conviction and sentence of death are confirmed.

Delivered this 10th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 42/40

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

Ali Ahmad Hamdan and 9 others — Appellants.

v.

Mohammad el Haj Saleh, on his own behalf and on behalf of the heirs of his father, El Haj Saleh and 5 others — Respondents.

Dispute regarding ownership of unregistered land — Claim that land in dispute is included in Kushans belonging to Defendants — Evidence in regard to claim of ownership of unregistered land — Inference of ownership from possession.

Where land unregistered, evidence of possession may be given justifying inference of possession.

To make or to refuse such inference — a matter purely for trial Court based on the evidence before it.

Goitein for Appellants.

M. Levanon for Respondents.

Appeal from judgment of Land Court, Jerusalem, dated the 9th of February, 1940.

JUDGMENT

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

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

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

Bearing these findings and the necessary corollary in mind, we now come to the first ground of appeal. The recent trend of judicial opinion in this country has been to enlarge the admission of evidence in regard to claims of ownership of unregistered land, and it seems now to be settled law that where land is unregistered, evidence of possession may be given from which an inference of ownership may be made. A Court may refuse to draw such an inference — it is a matter purely for the Trial Court based on the evidence before it. We would refer in particular to Abu Khousah and Others v. Abu Sweireh and Others, C.A. 195/37 [1], Soufan and Others v. El Dukke, C.A. 244/37 [2], and Khalil v. Mohammad and Another, C.A. 238/37 [3], which lay down this principle in very clear terms.

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

Delivered this 16th day of April, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 19/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

[1] 2 CtLR p. 41. [2] 2 CtLR p. 48. [3] 2 CtLR p. 63.

In the appeal of :

Haji Yusef Mohammad Yousef — Appellant.

v.

The Attorney General — Respondent.

Conviction and death sentence on evidence uncontradicted by defence — Suggestion on appeal on behalf of defence that there may be some further evidence.

Court of Appeal will not consider suggestion, without formal application, of Appellant's attorney that there may be some further evidence, if appellant, while represented at trial by an experienced advocate, did not give evidence himself and called no other witnesses.

Abu Shaar (*by delegation*) for Appellant.

Crown Counsel (*Hogan*) for Respondent

Appeal from judgment of the Criminal Assize Court sitting at Nablus, dated the 18th March, 1940, whereby the Appellant was convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT

No good grounds of appeal were shown.

On the evidence, which was uncontradicted by the defence, the Court was entitled to come to the conclusion which it did, and the appeal is dismissed.

It is suggested that there may be some further evidence, but no formal application is made to us and we do not know what it may be. At the trial the Appellant was represented by an experienced advocate, and the Appellant did not give evidence himself, and he called no other witnesses.

Delivered this 10th day of April, 1940.

Chief Justice

CIVIL APPEAL NO. 31/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

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

In the appeal of :

The Union Fire, Accident and General Insurance Company Limited. — Appellant.

v.

1. Mrs. Haya Rachel Szycgal, in her capacity as Administratrix of the Estate of Sender Szycgal, deceased.
2. Yehiel Nachtigal. Respondents.

Renewal of Insurance Policy — Agent of Insurance Company accepting promissory note on account of premium not containing all requisite signatures — Constructive waiver of stipulation regarding payment of premium and coming into force of policy.

If Court finds on facts of case that Insurer's agent was authorised to accept payment of premium in form in which he did, it may hold Insurer to have waived stipulation that policy would only come into force upon payment of premium in full.

Kahna for Appellant.
Barshira for Respondent No. 1.
Eckar for Respondent No. 2.

Appeal from judgment of District Court of Tel-Aviv, dated the 29th day of January, 1940.

JUDGMENT

This is an appeal from the judgment of the District Court of Tel-Aviv ordering the Appellant to pay to the first Respondent the sum of LP. 400 with interest and costs, and dismissing the first Respondent's claim against the second Respondent.

The first Respondent is suing in her capacity as administratrix of the estate of the late Sender Szycgal, who, she alleges, at the time of his death, was insured with the Appellant.

It appears that the deceased Szycgal had been insured with the Appellant from the 3rd of May 1938, the policy expiring on the 2nd of May 1939. His insurance premium had been paid on his behalf by his employers, the Galim Co-operative Society, to the second Respondent, who was found by the Court below (a finding from which we see no reason to dissent) to have been the agent of the Appellant. It also appears that the second Respondent was in the habit of granting credit to the Galim Society in respect of the payment of the premiums of the policies taken out by its employees.

On the 3rd of May 1939, the deceased desiring to renew his insurance for another year, the second Respondent handed to the deceased a document called "Renewal of Policy" to date from the 2nd of May, 1939, to the 2nd of May, 1940, at the foot of which appeared the following note :—

> "The insurance renewed by this Receipt will enter in force only upon payment of the corresponding total premium. The receipts of the premiums are valid when presented separately upon official printed receipts of the Company, and are signed by the Management".

On the 21st of May 1939, a represetative of the Galim Co-operative Society gave to the second Respondent a promissory note for LP. 3, on account of the premiums of the deceased and one Maslo another employee of the Society. This promissory note did not contain all the requisite signatures and therefore the second Respondent, when accepting the note, himself undertook to obtain them. The date of maturity of the note was the 25th of July 1939. On the 25th of May a further LP. 1.400 mils in cash was handed to the second Respondent by a representative of the Galim Co-operative Society on account of the deceased's premium. The amount of the premium was LP. 2.920 mils and it is common ground that, as far as the amount is concerned, the deceased's premium was covered by these payments.

On the 26th of May 1939, the deceased met with a fatal accident, the second Respondent not yet having obtained the necessary signatures on the promissory note. He obtained them, however, immediately after the accident, but the Appellant Company refused to accept the note.

On the facts of this case the Court below held (and we see no reason to disagree with them) that the second Respondent was authorised by the Appellant Company to accept payment in the form in which he did and we consider therefore that the Appellant must be held to have waived the stipulation that the policy would only come into force upon the payment of the premium in full. In this connection it is relevant that the Court of trial found as a fact that the Appellant Company had no account in its books either in the name of Szycgal or in the name of Galim Co-operative Society; but only in the name of the second Respondent.

For these reasons we are of opinion that the judgment of the District Court was right. The appeal must therefore be dismissed, the first Respondent to have her costs, to include the sum of LP. 15 for advocates attendance fee.

Delivered this 11th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 39/40

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Yacoub el Herbawi — Appellant.

v.

1. Balkis Said Dajani, wife of Raafat Abul Filat.
2. Raafat Abul Filat. — Respondents.

Claim that land should be registered in judgment debtor's name and attached — Ground of appeal that judgment of Trial Court unreasonable — Estoppel by behaviour, actions or want of action.

1. Where there is evidence to support judgment of Trial Court, Court of Appeal will be very careful not to put itself in position of a Court trying case in first instance.

2. Court of Appeal will not set aside a judgment on ground of it being unreasonable, unless it can be said with certainty that Trial Court, had it properly addressed its mind to the evidence before it, must necessarily have come to opposite view.

3. Fact that werko registration was left in name of A and that registration in Land Registry was never changed from that of original vendor, C, into name of B does not estop A and B from claiming that true owner of the land — B.

Olshan and *Eisenberg* for Appellant.

Atalla and *Hannania* for Respondents.

Appeal from judgment of Land Court of Jerusalem, dated the 7th of February, 1940.

JUDGMENT

This is an appeal from a judgment of the Land Court of Jerusalem, in which that Court dismissed an action brought by the present appellant claiming that the previous judgment given by the Land Court, should be set aside, and the land in dispute be registered in the name of the second respondent, and to be attached by the appellant.

Two grounds in substance have been advanced by the appellant: The first one is that the judgment of the Land Court is unreasonable, and that there was no evidence to support the view taken by that Court. Now, as Mr. Olshan very frankly admitted, that is a very difficult plea to put forward to a Court of Appeal, because where there is evidence which can support the judgment of the Trial Court, a Court of Appeal has to be very careful not to put itself in the po-

sition of a Court that is trying the case in first instance. We do not think that a judgment should be set aside on the ground of it being unreasonable, unless it can be said with certainty that the Trial Court, if it had properly addressed its mind to the evidence before it, must necassarily have come to the opposite view.

Now, in this case, we do not think that we can say that such would have been the case. It is true that there was a very large amount of evidence, which, if accepted by the Court below, would have supported the views advanced by the appellant. It is quite possible, but we do not wish it to be taken as a fact, that if we had been trying this case, we might have come, I do not say we should have come, to a conclusion different from that which commended itself to the Land Court. That however is not the point. There was evidence which would support the view taken by the Land Court, and we therefore do not think that we should disturb that view.

The second point is that the respondents are estopped by their behaviour, by their actions, or their want of action, from now alleging that the first respondent is the owner of this property. It is said, that for a long time, they left the werko registration in the name of the second respondent, and by that action, coupled with the fact that the registration in the Land Registry was never changed from that of the original vendor, who is not a party to these proceedings, into the name of the first respondent, they cannot now allege that the first respondent is the owner. This argument would have had more effect if the land registration had been in the name of the second respondent, because we think, that then, if the land registration had been in his name, it would have been very difficult for the first respondent and for the second respondent to have alleged that the first respondent was the true owner, if, for years, registration had been in such a form, but, as we have said, the registration in the Land Registry was in the name of a third person, and that old registration certainly had not been holding out the second respondent as being the owner in preference to the first respondent. The werko registration, of course, is not a document of title, and it is a matter of common knowledge, that werko registration is very often different from the land registration. We do not think therefore that the plea of estoppel can succeed.

For these reasons therefore the appeal will have to be dismissed and the appellant must pay the respondents' costs together with LP.15 fee for attending the hearing.

Delivered this 15th day of April, 1940.

British Puisne Judge.

HIGH COURT NO. 18/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :—

The General Mortgage Bank of Palestine, Ltd. Petitioners.

v.

1. The President, District Court, Tel-Aviv, sitting as Chief Execution Officer.
2. Kiryat Avoda, Aguda Shitufit, Ltd.
3. Arye Rosental and Brakha Rosental. Respondents.

Regnstration of mortgage and lease of mortgaged property — Effect of final order of sale of mortgaged property on lease granted after creation of mortgage.

Lease granted after creation of mortgage — liable to be determined simultaneously with mortgagor's own interest; once such interest extinguished, as in case of a final order of sale transferring mortgaged property to purchaser, lease automatically determined without any further order being necessary.

Bilesky for Petitioner

Respondents absent.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his orders, dated 15th December, 1939, 2nd January and 23rd January, 1940, in Execution file No. 10991/38, Tel-Aviv, should not be set aside and an order should be made for the transfer of the property registered in the Land Registry of Jaffa, Block No. 7122, Parcel No. 157, in the name of the Petitioner free from any encumbrances, including the right of lease registered in the name of Respondent No. 3.

JUDGMENT

In these proceedings the Petitioners are the mortgagees of certain immovable property registered in the name of the Second Respondents as owners, and mortgaged by the latter to the Petitioners. The

mortgage deed contains a clause by which the Second Respondents are not entitled to let the property except with the consent of the Petitioners. Being desirous of letting the property on a 99-year lease to the Third Respondents, the Second Respondents asked for and obtained the requisite consent of the Petitioners, and at the same time as the mortgage was registered in the Land Registry the lease was also registered and an agreement was filed in the Land Registry signed by all parties by which the consent of the Petitioners to the lease was notified, subject to the condition that the rights of the Petitioners should have priority to the rights of the lessees, the Third Respondents. It was further agreed, that, in case of the sale of the mortgaged property by the Execution Office, the lease would become automatically cancelled. We think that the effect of this agreement is to make it clear, so as to avoid dispute in the future, that the lease was to be deemed to have been executed subsequently to the mortgage, and that on the sale of the mortgaged property, on default being made by the mortgagors, the lease would come to an end automatically at the time of the sale.

Default was made by the Second Respondents as mortgagors, sale proceedings were commenced, and the final order of sale was given in October, 1939.

The Land Registry then raised the question of what was to happen to the lease, and the Chief Execution Officer or his substitute made a series of orders, on repeated applications by the Petitioners, that he had no power to cancel the lease, and that transfer was to be made subject to the lease. The Petitioners then applied to this Court and an order nisi was issued directing the President of the District Court, as Chief Execution Officer, to show cause why his orders should not be set aside and registration effected in the name of the Petitioners free of the lease.

Unfortunately on the return day, neither the Second nor the Third Respondents appeared, and we have not had the advantage of such arguments as they might have addressed to us in answer to those of the Petitioners' advocate. After considering the case we have reached the conclusion that the Petitioners are entitled to succeed. In Rothstein and Another v. Chief Execution Officer, Jerusalem, and Another, H.C. 13/28 (1 P.L.R. 292), it was held that "any lease granted after the creation of the mortgage is liable to be determined in the same manner and at the same time as the mortgagors' own interest." This case has been followed ever since. The effect of it is that when once the mortgagors' interest has been extinguished, as it is extinguished when the final order of sale is given, the interest of any lessee

under a lease subsequent to the mortgage is automatically determined without any further order being necessary. It is not a question of the Chief Execution Officer, under the Land Transfer Ordinance, having no power to cancel a lease. His final order of sale transferring the mortgaged property to the purchaser in itself serves to determine the lease. The determination of the lease is by operation of law, and no order by the Chief Execution Officer for specific cancellation is necessary.

In this case the lease is deemed to be subsequent in date to the mortgage, and the usual results must follow.

We have not dealt with the further arguments as to the effect of the Credit Banks Ordinance, Section 10. As at present advised we are not sure that these arguments are correct, but in the view we take of the case it is not necessary to determine the point.

In the result, the rule nisi must be made absolute, the orders of the Chief Execution Officer dated 15.12.39, 2.1.40 and 23.1.40 set aside, and an order is directed to issue to the Land Registry that the property comprised in the mortgage be registered in the name of the Petitioners free of any encumbrances, including the lease executed by the Second Respondents in favour of the Third Respondents.

The Petitioners will have their costs of this application, but no hearing fees, since the proceedings have not been contested.

Delivered this 16th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 45/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

1. Ahmad Hassan Abdulnabi
2. Husein Abdulnabi
3. Haj Mussa Hassan Abdulnabi — Appellants.

v.

1. Mohammad Mustafa Awad
2. Khalil Abed
3. Abdul Rahman Ahmed Subh
4. Mohammad Saleh Salah. Respondents.

Dispute as to extent of grazing land — Claim by villager on behalf of village.

Villager claiming that certain land occupied by Defendants was grazing land common to both parties and to all other inhabitants can properly sue on behalf of village.

Ousta for Appellants.
H. Atalla for Respondent No. 1.
Respondents 2, 3, 4 in person.

Appeal from Judgment of Land Court, Jerusalem, dated 7.2.1940.

JUDGMENT

This is an appeal from a judgment of the Land Court of Jerusalem, in regard to a dispute as to the extent of the grazing land of Sharafat village. A very large amount of evidence was heard by the Land Court. Early in the proceedings an inspection was made of the land and the Land Court in a reasoned judgment reached a conclusion in favour of the Plaintiff who was suing on behalf of the village. We are of opinion that the Plaintiff could properly sue on behalf of the village since it was claimed that certain land, which the Defendants had occupied, was grazing land common to both the Plaintiff and the Defendants and all other inhabitants.

After considering the evidence and after listening carefully to the arguments advanced by advocates of both sides, we are not prepared to disturb the result arrived at by the Land Court. The case deals almost entirely with questions of fact and there was sufficient evidence, perhaps not a great deal of evidence, but there was sufficient evidence to justify the conclusion at which the Land Court arrived.

That being so this appeal fails and is dismissed. The first respondent will have the costs and LP. 15 hearing fees and respondents 2, 3 and 4 will have LP. 1 travelling expenses each.

Delivered this 16th day of April, 1940.

British Puisne Judge.

HIGH COURT NO.21/40 & 22/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

Before:— Copland, J., Khayat, J., and Abdul Hadi, J.
In the application of :

HIGH COURT NO. 21/40 —

Abdul Rahman Mohammad Ali Bakri — Petitioner.

v.

1. The Chief Execution Officer, Nablus.
2. Director of Orphanage, Nablus.
3. Mamdouh Abdul Latif el Nabulsi — Respondents.

HIGH COURT NO. 22/40 —

Hamdi Mohammad Ali Bakri — Petitioner.

v.

1. The Chief Execution Officer, Nablus.
2. Director of Orphanage, Nablus.
3. Mamdouh Abdul Latif el Nabulsi — Respondents.

Acknowledgement of debt given in addition to registered mortgage deed and containing undertaking to pay interest — Scope of Chief Execution Officer's powers as regards execution of documents.

Chief Execution Officer has no power to execute deeds not specifically authorised to be executed by law or documents not filed before him.

Salah for Petitioner.

Zueiter for Respondents Nos. 2 & 3.

Application for an order to issue directed to the Respondents calling upon them to show cause why the orders of the First Respondent, dated the 9th of March, 1940, in Execution Files Nos. 112/40 and 111/40 should not be set aside, and order be given for sale of the properties in question in satisfaction of the balance of the principal sum due without interest.

O R D E R

In these cases, the petitioner is asking us to set aside an order made by the Chief Execution Officer in which he ordered sale after delay of a month on certain terms. The facts are that certain money was borrowed from the Orphans Funds on two separate Deeds of Mortgage.

In these Mortgage Deeds no mention is made that interest is payable. We are informed that in accordance with their usual practice the Orphans Administration took, in addition to the Mortgage Deeds, acknowledgments of debt from the two borrowers and in those acknowledgments we are informed there is an undertaking to pay interest. These acknowledgments were not filed in the Land Registry or annexed to the Mortgage Deeds at the time the mortgages were executed. The Chief Execution Officer had not those acknowledgments before him when he made his order.

It has been laid down on many occasions, that the duty of a Chief Execution Officer is, first, to execute judgments of Courts, and, secondly, to execute such other deeds as are specifically authorised to be executed by the law, such as mortgages and certain notarial deeds. He has, however, no power to execute registers of accounts, he has equally no power to execute a document which was not even filed before him. We express no opinion as to whether the Chief Execution Officer could have executed these acknowledgments of debt, that is to say, whether they come into the same category of documents, such as mortgages, which the Chief Execution Officer may execute without judgment, because they were not even filed for execution.

In these circustances the rule must be made absolute with costs and LP. 2 hearing fees in each case.

Given this 16th day of April, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO 22/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of :

Falek Novick — Appellant.

v.

Attorney General — Respondent.

Conviction by Magistrate in general terms on all counts of charge — District Court in its appellate capacity finding there was sufficient evidence to support conviction — Admission of Crown Coun-

sel, on appeal from judgment of District Court, that evidence insufficient.

Conviction in general terms on articles or counts of charge not sustained by sufficient evidence cannot stand.

Wilner for Appellant.

Crown Counsel (*Bell*) for Respondent.

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

JUDGMENT

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

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

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

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

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

Delivered this 18th day of April, 1940.

Chief Justice.

CIVIL APPEAL NO. 57/40.

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 :

The Attorney General — Appellant.

v.

Hasan Yusef Fityan and 14 others. — Respondents.

Claim before Settlement Officer of title to land by usucapio — Elements of acquisitive prescription under Ottoman Land Law — Art. 78, Ottoman Land Law.

To establish title under art. 78 of Ottoman Land Law (re acquisitive prescription) claimant must prove both possession and cultivation; judgment for claimant without finding that he in fact cultivated the land cannot stand.

Salant (*J.G.A.*) for Appellant.
Haddad for Respondents.

Appeal from decision of Settlement Officer, Haifa Settlement Area, dated the 12th of January, 1940.

JUDGMENT

Rose, J.

This is an appeal by the Attorney-General from a decision of the Land Settlement Officer, Haifa Settlement Area, in which he held that the Respondents were entitled to certain land in accordance with the provisions of Article 78 of the Ottoman Land Code.

The point of appeal is a short one, namely, that in order to establish a title under Article 78 it is necessary for the claimants to prove both possession and cultivation, and that in the present case not only is there no finding of cultivation but there is an inference from the wording of the decision that the land was actually uncultivable.

The wording of the Article is quite clear and unambiguous, and we consider that the absence of a finding that the land was in fact cultivated is sufficient to decide this appeal.

The appeal therefore must be allowed, the decision of the Settlement Officer set aside, and the land registered in the name of Government as miri land. In the circumstanecs there will be no order as to costs.

Delivered this 16th day of April, 1940.

I concur — *British Puisne Judge*
Chief Justice
Puisne Judge

CIVIL APPEAL NO. 58/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Charles Tadros — Appellant.

v.

1. Trade and General Development Trust Ltd.
2. Max Seligman, purporting to act as agent of Receiver appointed by a debenture holder of Respondent number one. — Respondents.

Barclays Bank (D.C. & O.), Tel-Aviv. — Third Party.

Claim of damages for wrongful dismissal from a company in liquidation — Object of notarial notice — Cases in which notarial notice unneccessary.

1. Salary cannot be claimed in respect of a period not expired at time of bringing claim.

2. To claim damages from a company in liquidation for wrongful dismissal not necessary to aver in statement of claim readiness and willingness to serve.

3. Object of notarial notice — to give person to whom it is addressed chance of remedying a breach and also to fix definitely fact of breach of contract.

Where circumstances such that notarial notice would be useless, damages may be claimed without such notice.

Polonsky and *Kost* for Appellant.
Sussmann for Respondents.
H. Choumla (*Officer of the Bank*) for Third Party.

Appeal from judgment of District Court, Tel Aviv, dated 23.2.1940.

JUDGMENT

This is an appeal from a judgment of the District Court of Tel-Aviv rejecting a claim by the appellant for salary and damages for wrongful dismissal. The appellant was engaged by the first respondent

company by means of a letter dated the 7th of December 1938. According to that letter he was engaged at the salary of LP. 35 per month as from the 1st of November 1938, for one whole year. On the 28th of February, 1939, the first respondent, through the second respondent, purporting to be the agent of a Receiver appointed in respect of the first respondent, addressed a letter to the Appellant saying —

> "I have been instructed by the Receiver to inform you that owing to the winding up of the Company your services are no more required."

and the letter goes on to ask him to hand over the cash in hand, the books of the company, keys of the safe and so on, which were apparently handed over on the same day according to a receipt which was filed in Court Exhibit C.T.3.

On the 28th April, 1939, the appellant filed an action against the present respondents claiming eight months' salary. Alternatively, he claimed damages for wrongful dismissal.

The District Court held that the claim of the appellant was one for damages for wrongful dismissal and, the appellant not having served a notarial notice on the respondent, the claim must fail. The appellant thereupon appealed.

Various points have been taken on appeal, but the case really turns on this point, whether in the circumstances of this case, a notarial notice was necessary. It is, we think, quite clear that the claim of the appellant was one for damages for wrongful dismissal. It could not be a claim for salary because he could not claim salary in respect of a period which had not expired at the time when the claim was brought.

We come therefore to consider the case on the basis that it was a claim for damages for wrongful dismissal. The respondent has sought to argue that the company is not in liquidation, but we think from the letter written by the respondents that they are estopped from raising that plea. In that letter they admitted this, that the company was in liquidation, and that was the reason for the discharge of the appellant. The respondents go on to argue that a notarial notice should have been served because, if they had received such a notice, they would have been able to remedy the breach by re-employing the appellant. In our opinion however this is one of those cases in which a notarial notice is not necessary. It would be useless in a case of this nature to call upon a company, admitted to be in liquidation, to re-employ somebody whom they have discharged. The object of a notarial notice is to give the person to whom it is addressed the chance of remedying a breach and to fix definitely the fact that there is a breach of contract. It is also in our opinion un-

necessary that the appellant in his statement of claim should have alleged that he was ready and willing to continue his employment. If the company had been a company that was functioning normally, it is quite possible that such an allegation would be necessary, but it seems to us to be unnecessary to aver that one is willing to serve a company which is in the stage of dissolution.

For these reasons, therefore, we think that the appeal will have to be allowed, the judgment of the District Court set aside, and the case remitted to be tried on its merits. The appellant will have the costs of this appeal together with LP. 10 hearing fees in any event, from the first and second Respondents.

Attachment to continue pending trial of action.

Delivered this 22nd day of April, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 54/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

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

v.

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

Claim of share in land described as "miri planted" in registration prior to 1331 *— alleged admissions found, after explanation, not to amount to admission — Land Code, Art.* 20.

1. Where Plaintiff claimed land as miri, mere fact that Defendant pleaded, as defence, prescription for 10 years not tantamount admission that land miri.

2. Mere entry in Land Registry of distribution in accordance with miri succession of land registered before 1331 as "miri planted" does not necessarily amount to admission of non existence of plantations at time of entry, i.e. that land reverted into miri.

3. Appellant estopped from raising on appeal point not raised in Court below.

Edit. note : as to 1 see, C.A. 129/36 1 CtLR Rep. 45; as to 3 see, C.A. 8/39 5 CtLR p. 106 and Edit. note thereto.

Sahyoun for Appellants.
Weinshall for Respondent.

Appeal from judgment of District Court, Haifa, dated 1.3.1940.

JUDGMENT

This is the second time [1] that this case has come before this Court on appeal. In the first trial in the Land Court that Court decided, after both parties had closed their case, that further evidence should be called upon a certain question. On appeal by the defendant (respondent) that order was set aside, and the case was remitted to the Land Court to give judgment on the material already before it. The case went back and, since the Court was differently constituted, it was re-argued and the Land Court came to the conclusion that, on the material before it, the plaintiffs had failed to prove their case. That case depended upon proving that the land in question was miri because it is admitted that if it was mulk, then the appellants had no share.

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

Now, though this point stood out in our opinion with startling

1 See C.A. 246/38 5 CtLR p. 54.

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

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

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

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

Delivered this 24th day of April, 1940.

British Puisne Judge.

HIGH COURT NO. 19/40

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J. and Khayat, J.

In the application of :

1. Hilde Joseph
2. Rosa Wertheimer
3. Robert Nachmann — Petitioners.

v.

1. President, District Court, Haifa, acting as Chief Execution Officer
2. Shimshon Brochmann and 12 others — Respondents.

Order of stay of proceedings for 6 months subject to certain conditions — Non-interference of High Court with discretion of Chief Execution Officer — Land Transfer Ord. sec. 14.

High Court always reluctant to interfere with orders made by Chief Execution Officer in exercise of his discretion.

Werner for Petitioners.

Weinshall for Respondent No. 2.

J. Solomon for Respondents Nos. 4—14.

Application for an order to issue directed to issue directed to the First Respondent calling upon him to show cause why his order, dated the 5th of February, 1940, in Haifa Execution file No. 2/1938, should not be set aside, and there should be substituted therefore an order for final sale of the mortgaged properties or such other order as the Court may deem fit.

JUDGMENT

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

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

The Petitioners, as I have said, are the mortgagees, the 2nd and 3rd Respondents are the mortgagors, and Respondents 4 to 14 are said to be persons interested in the mortgaged property inasmuch as they have entered into agreements of sale with the 2nd and 3rd Res-

pondents in respect of flats erected on the property which they agreed to purchase.

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

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

The point which we have to decide is this, is the Chief Execution Officer, in accepting this plan and making it an order, exercising properly the discretion vested in him by the Land Transfer Ordinance, Section 14. All questions of discretion are difficult, and this case is no exception to that rule. It is always difficult for this Court to interfere with the discretion of the Chief Execution Officer, who, in that capacity, is in an infinitely better position to decide, and can better appreciate the conditions and circumstances obtaining in his district than we, sitting in the seclusion of this Court, can possibly do, — we are always reluctant to interfere, and taking all the circumstances into consideration we do not think that we can say that the Chief Execution Officer has improperly exercised his discretion. The Respondents 4 to 14 are persons who have, one might say, a vital interest in the properties. By this proposal they make themselves responsible for the due repayment of the mortgage monies, they guarantee the repayment, and if the repayment does not take place, of course there is little doubt that proceedings will be resumed.

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

Delivered this 25th day of April, 1940.

British Puisne Judge

HIGH COURT NO. 26/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J., and Khayat, J.
In the application of :
1. Abed Abdel Fattah Yacoub
2. Tewfik Abdel Fattah Yacoub
3. Ahmed Abdel Fattah Yacoub — Petitioners.

v.

1. Isaac Yousef Balaile
2. The President, District Court, Haifa — Respondents.

Sale proceedings in respect of property encumbered with three separate mortgages — Consolidation and amalgamation of execution files.

Where there is more than one mortgage in respect of same property, execution files may be consolidated; separate valuation etc. in respect of each mortgage not necessary.

F. Atallah for Petitioners.
J. Gavison for Respondent No. 1.

Application for an order to issue directed to the Respondents calling upon them to show cause why the sale proceedings in Execution File No. 282/39, District Court, Haifa, should not be declared void, and why Respondent No. 2 should not be ordered to re-open proceedings in accordance with law starting by valuation and taking possession.

JUDGMENT

In this case the Petitioners are the mortgagors, and the 1st Respondent is the mortgagee in respect of certain property mortgaged on the 4th of February, 1936. This mortgage — which I will call Mortgage A. — was for as sum of LP 1.500 payable as to LP. 500 in January, 1938, and as to the balance, LP. 1000, in January, 1939. Interest was payable quarterly in advance.

At the same time as Mortgage A. was executed, another mortgage — which I will call Mortgage B. — was executed to rank pari passu with Mortgage A. This was for the sum of LP. 2000, and was to be paid in two instalments. The mortgagee in this case was Mr. Hara. No instalments on capital were paid in either case, and no interest has been paid for over two years.

In September, 1939, both mortgagees in Mortgages A. and B. applied for sale, and an order of sale was given in respect of both files in October, 1939.

On this same property there was another mortgage executed after Mortgages A. and B. — the first and second mortgages — for LP. 5.600, which was equally overdue and has not been paid. Proceedings of sale in respect of this third mortgage were commenced in Tel-Aviv. The proceedings in Mortgages A. and B. were entered in Haifa, and the proceedings in the third mortgage were transferred to Haifa, and the proceedings would appear to have been continued in respect of all three files, at the same time and on the one file — the original Tel-Aviv file.

Now it has been argued before us on behalf of the Petitioners that the proceedings in respect of Mortgage A. — which is the only one with which we are concerned in these proceedings — were irregular in respect of the taking possession, valuation and auction proceedings, which ought to have been commenced de novo in respect of this mortgage, and that they should not have been amalgamated and consolidated with the proceedings in respect of the third Tel-Aviv mortgage file.

A case has been quoted to us, No. 50/28, Petro Abella v. Chief Execution Officer, Haifa, 1 P.L.R. 344, which is said to be in the Petitioner's favour. This was a case where there were four distinct properties, mortgaged by four distinct deeds. Only on order of sale was made, and the sale was advertised and carried out as though all the properties were sold as one united property. The High Court held that this was irregular; that where there were properties mortgaged by separate mortgage deeds, the properties must be advertised separately, and separate bids made for each of the mortgaged properties. In this present case, however, there is only one property, which is the subject matter of three separate mortgages, and we do not think, therefore, that the case cited to us is of any assistance in determining this point. No authority has been quoted to us by either the Petitioners or the Respondent in support of or against the theory of consolidation or amalgamation, such as I have described had taken place in this case. The matter is therefore free from any authority.

It seems to us that where, as here, there are three mortgages in respect of one and the same property, the Petitioner is in no way being prejudiced by the fact that the valuation and taking possession of this property had not been repeated three times. A separate valuation

of Mortgage A., a separate valuation in respect of this mortgage, and separate auctions would have had no effect whatsoever on the situation. The mortgagors in respect of Mortgage A., and in respect of Mortgage B., had the opportunity of objecting to the sale, which was the only matter which concerned them, since the property had been valued and possession taken in respect of the third mortgage, and we think therefore that there is no such irregularity of proceedings, or in fact any irregularity at all, which would justify us in ordering a separate valuation and separate sale proceedings in respect of Mortgage A.

It seems to us a complete waste of time, and unnecessary, to repeat the same operation three times in respect of the same property, and therefore we hold that such a course would be unnecessary. That being so, we think that the order of the Chief Execution Officer is correct, and the order nisi is discharged, with LP. 10 fees for attending the hearing.

We would add that we are glad to be able to arrive at a solution such as this, as a contrary one would have violated all one's feelings of common sense.

Delivered this 25th day of April, 1940.

British Puisne Judge.

HIGH COURT NOS. 27/40 and 28/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT

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

In the application of :—

Afif Canan, and his six brothers, all sons of Ragheb Canan — Petitioners.

v.

1. Chief Execution Officer, Nablus
2. Director of Orphanage, Nablus
3. Haj Mamdouh Abdul Latif Nabulsi. — Respondents.

Consolidated applications in High Court — Dispute as to whether interest payable on overdue mortgage — Constructive under-

taking to pay interest on mortgage debt — Supreme Court departing from recent precedent.

1. Where mortgage deed provides that interest payable during currency of mortgage or, where no such provision, parties agree that sum stated in mortgage deed includes interest during period for which mortgage stated to run, interest runs until final payment of mortgage debt effected.

2. Supreme Court may after further consideration and in view of further arguments put forward to them take view opposite to that taken by them in a previous case on same question of law.

W. Salah for Petitioners.

Zuieter for Respondents Nos. 2 & 3.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his orders in Execution file No. 376/40 and in Execution file No. 377/40 both dated 9.3.40 should not be set aside and an order given in each of the said files for the sale of the properties in question in satisfaction of the balances of the respective principal sums due without interest.

ORDER

These two applications have been consolidated but the facts are the same in each. Each is for an order directed to the Chief Execution Officer of Nablus to show cause why his order dated the 9th March, 1940, should not be set aside and an order be given for the sale of the property in question in satisfaction of the balance of the principal sum due without interest. The whole dispute between the parties centres round this point, whether interest is or is not payable on these two mortgage deeds.

Now, the mortgage deeds are the same in each case. They are stated to be for the sum of LP.118 payable in three annual instalments. Blanks are left in the clause regarding the payment of interest, in these forms. It is however, agreed between the parties that this sum of LP. 118 is made up of LP. 100 principal together with interest at 9% on the balances outstanding at the end of the three years on payment of the annual instalments. At the same time as these mortgage deeds were executed, or within a day or two, supplementary deeds were also executed before the Sharia Court, in which certain stipulations were made with regard to the payment of interest. In both cases the instalments due under the two mortgages not having been paid, application was made in July, 1933, to the Chief Execution Officer to order sale. That application came on for hearing in Sep-

tember of that year and on the present petitioners stating that the situation was very bad, that they had not any money or any work, the applications were adjourned until the 14th December, 1933, the Chief Execution Officer stating that at that time all sums due would have to be paid.

Now, it is beyond dispute that when in an ordinary mortgage deed it is stated that interest at so much percent is payable during the currency of the mortgage, interest goes on being payable after the term of the mortgage until final payment has been effected. It seems to us, after further consideration, that these mortgage deeds in these two cases contained an admission that interest was payable, or an undertaking to pay interest, because it is admitted by the parties that the sum of LP. 118 in fact included LP. 18 interest during the three years for which the mortgage deed was stated to run. That being so, it is not necessary for us to discuss the question whether this sup plementary deed of debt is or is not executable, and we do not, therefore, propose to do so. There is of course unfortunately a conflict between this judgment which we are giving now and the one we gave two weeks ago in regard to similar mortgage deeds, but after further consideration and in view of the further arguments which were put forward to us by the advocate for the respondents, we think that the present solution is the correct one and the former cases H.C. 21/40 and HC. 22/40 [1] must therefore be considered as not binding. The orders nisi granted must be discharged with costs to include LP. 2 hearing fees in each case.

Given this 30th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 49/40

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

In the appeal of :

Khalid El Azem — Appellant.

v.

Raja El Rayis — Respondent.

Action for declaration of a certain sum as excessive interest under Ottoman Law of Interest — Dismissal of action on ground that Court had no power to issue a declaratory judgment — Claim for

[1] 7 CtLR p. 137.

repayment of sum as usurious interest under Usurious Loans Ordinance — Plea of res judicata — Interpretation of second part of art. 6 of Ottoman Law of Interest — Receipt by creditor of whole sum claimed by him and severance of relation with debtors.

1. Where appellate Court, dealing only with one of grounds of lower Court's judgment, sets aside judgment and remits case for completion, the other grounds still undecided and no question of res judicata arises.

2. Usurious Loans Ordinance cannot affect rights which existed prior to its enactment.

3. Where whole claim of creditor satisfied prior to Usurious Loans Ordinance — too late for debtor to claim that what he already paid or what creditor already received (without debtor's consent) in respect of claim included excessive interest, unless payment effected during pendency of an action entered by debtor disputing account.

Per Khayat, J.

Last paragraph of art. 6 of Ottoman Law of Interest only applies where debtor paid debt willingly and relations between parties severed by an act of debtor, not by an act of creditor.

Goitein and *Moghannam* for Appellant.

Weinshall for Respondent.

Appeal from judgment of District Court, Haifa, dated the 9.2.40.

JUDGMENT

This unfortunate litigation commenced in the year 1932, and has already been on two occasions on appeal to this Court. The previous history has been very fully set out in the judgment now under appeal, and I do not propose to repeat it here. The salient features are, that in July, 1932, the Respondent brought an action concerning LP. 1360.076 mils asking that this sum be declared to be excessive interest, and the Supreme Court held, in Civil Appeal 76/33*, that a District Court had no power to issue a declaratory judgment. Thereupon the Appellant took out the above sum, which had been attached with the sub-accountant.

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

After long delays both before and during the trial, the retrial was

* 3 C. of J. p. 1052.

finished, and judgment was given on the 9th February, 1940, in favour of the Respondent for the amount claimed. The present appeal is from this last mentioned judgment.

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

In the first place there are certain matters that can be disposed of, as to which, to my mind, no uncertainty exsists. One is the argument that that part of the judgment of the District Court, which the Supreme Court in C.A. 59/35 did not refer to, was not set aside, and is therefore still binding as not having been upset on appeal. This argument is not a sound one; though the Supreme Court only dealt with one of the grounds on which the District Court based its decision,this Court set aside the judgment of the District Court — the whole judgment — and the other grounds in the judgment set aside still, therefore, remain undecided, and no question of res judicata arises.

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

Further, the Respondent's argument that his action, whatever it might be called, was for the balance of an account, is not correct — his action, all through, from the abortive action of 1932 to the present day, was based on the allegation that the amount was for the repayment of excessive interest. This is incontrovertible both from the Statements of Claim and from the arguments in Court.

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

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

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

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

In this present case, the amount of the debt has been paid — it was paid when the Appellant took the sum of LP. 1360.076 mils from the sub-accountant, when the attachment on the monies was released when the 1932 action failed. I think that it is reasonably clear that the amount of the debt was agreed at the above figure, that is to say, that the amount in dispute was agreed by the parties, since in the statement accompanying the application of the Respondent, dated the 17th July, 1932, for provisional attachment, and again in his Statement of Claim dated the 27th July, 1932, and further again in the Statement of Claim in this present case, the above figure is stated by the Respondent to be the correct account as alleged by him, and this figure has been expressly agreed to by the Appellant in the course of his arguments on this appeal. In a sense I suppose it can be said, that when once the amount in dispute has been agreed upon, and that amount has been paid, then the accounts between the parties have been closed — but the position here is not quite so simple as that. The amount was not paid by the Respondent, but was taken out by the Appellant on the release of the provisional attachment to which it was subject. The 1932 action, also, had not been dismissed on its merits, but because it was wrong in form, inasmuch as it asked for a declaratory judgment which at that time the District Court were not empowered to give.

On the other hand, it must be remembered that after the judgment of this Court in Civil Appeal 76/33, the position was that the Respondent was in the position of having brought an action challenging the account which had failed and that the amount of the disputed

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

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

In the result, the appeal is allowed by majority, with the consequences indicated by me above. The Appellant will have all his costs both here and below in respect of all the trials, to include, for this Court, hearing fees of LP. 10 in respect of the first appeal, and LP. 15 in respect of the second appeal.

Delivered this 25th day of April, 1940.

British Puisne Judge.

Alan Rose, J. I concur. *British Puisne Judge.*

JUDGMENT

Khayat, J.

I agree with His Honour the Presiding Judge on the facts and legal points stated in his judgment, but in my view, the intention of the last paragraph of Article 6 of the Ottoman Law of Interest

is to disallow the hearing of claims in cases where the debtor has paid the amount of the debt willingly, but not where the creditor has deducted the debt from the price of property that is registered in his name in the Land Registry. It is not within the power of the debtor to prevent him from deducting the debt except by instituting an action against him (the creditor).

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

The legislator was not satisfied with the words "payment of the debt" only, but made it a condition that the relationship between the creditor and the debtor must also be cut, that is I think, that there should be no question as to the validity of the payment of the debt.

I am therefore of the opinion that the appeal must be dismissed, and the judgment of the Court below be confirmed, with such variation to bring it within the provisions of Article 6.

Delivered this 25th day of April, 1940.

Puisne Judge

CIVIL APPEAL NO. 17/40.

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

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

In the appeal of :

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

v.

Mary Khayat. Respondent.

Claim on promissory notes made payable in Turkish Gold Pounds

— Conversion of a debt into Palestine currency whether to be made at rate of exchange as at date of maturity or of actual payment — Ottoman Commercial Cod, art. 145.

1. Sums payable in foreign currency in Palestine have to be paid at rate of exchange prevailing on date of payment.

2. Supreme Court reluctant to reverse a principle recognised by the Courts of Palestine since 7 or 8 years.

Sanders for Appellant.
Dr. Cohen for Respondent.

Appeal from judgment of District Court, Haifa, dated the 17th day of January, 1940.

JUDGMENT

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

The second defendant was dismissed from the action at an early stage of the proceedings, but judgment was given for the plaintiff against the first defendant, who now appeals to this Court on two grounds. First, that the Trial Court erred in holding that the documents in question were promissory notes within the meaning of Article 145 of the Ottoman Commercial Code. Secondly, that, whether the documents were promissory notes or undertakings to deliver bullion, the Trial Court erred in holding that they should be converted into Palestine currency at the rate of exchange prevailing at the date of payment.

As to the first point, it is common ground that the law as to promissory notes, which is applicable to this case, is contained in the Ottoman Commercial Code. Article 145 therof reads as follows :

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

We agree with the Trial Court that these documents satisfy the requirements of this Article and are in fact promissory notes, and

we have nothing to add to the judgment of the Trial Court on this point.

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

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

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

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

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

In Milian Daniel v. Chief Execution Officer, Jerusalem and Hanns Epstein*), Palestine Law Reports volume 6 at p. 65, the Supreme Court do not seem to have criticised, or even to have been invited by either party to criticise, the Chief Magistrate's decree insofar as it stated that the conversion of a number of Reichsmarks into Palestine currency should be at the rate of exchange prevailing at the date of payment.

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

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

The point as to the date of conversion was never taken by either

*) C.A. 110/38 4 CtLR p. 17.

party, either at first instance or on appeal, and the view of the District Court on this matter is inferentially accepted both by the Supreme Court and the Judicial Committee of the Privy Council.

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

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

Delivered this 24th day of April, 1940.

British Puisne Judge.

CIVIL APPEAL 59/40 and 60/40.

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

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

In the appeals of :

Civil Appeal 59/40 —

General Manager Palestine Railways. — Appellant.

v.

Salim Matalon — Respondent.

Civil Appeal 60/40 —

General Manager Palestine Railways. — Appellant.

v.

Joseph Albina — Respondent.

Consoloditation of appeals — Question of liability of General Manager Palestine Railways for damage to goods delivered for conveyance — Liability of master for act or commission of his servant — Wording of stipulations absolving from liability — By-law 25 of Railway By-laws.

1. A man cannot by stipulation excuse himself from wrongful act of his servants, unless he does so in plain and unambiguous language; if language ambiguous it must be construed against him.

2. Stipulation exempting liability for loss and damage "from act of God, King's enemies, fire, accidents and all other dangers and accidents of whatever nature and kind" does not absolve from liability where accident due to negligence.

3. Stipulation that party "not responsible for any loss, damage, injury, delay or detention, by whatsoever cause or in whatsoever manner these matters may be occasioned" protects party from results of negligence or even willful misconduct of his servants.

Salant for Appellant.
Friedenberg and *Marein* for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the 11th March, 1940.

JUDGMENT

Rose, J.

In these consolidated appeals the facts of both cases are similar. The (Plaintiffs) Respondents in both cases delivered certain goods to the Defendant for conveyance and claim the value of these goods on the ground that they were not in fact delivered to the respective consignees, having been destroyed in an accident which was due to the negligence of the defendant or his servants. The value of the goods was agreed between the parties and the only point for the Court to decide was therefore the question of liability.

The Defendant pleaded, first, that he was exempted from liability by By-Law 25 of the Railway By-laws. Secondly, that in any event there was no negligence on the part of any servant of the railway.

The invoices under which the goods were booked had the following words printed on them :

> "The goods are accepted subject to the regulations and general conditions of Tariff in force."

By-law 25 is one of the regulations referred to and therefore becomes one of the terms of the contract. This By-law reads as follows:—

> "The railway administration shall not be liable for loss or damage of or to animals or goods booked for carriage by railway, or partly by sea and partly by railway, from the act of God, King's enemies, fire, accidents, and all other dangers and accidents of whatever nature or kind".

Pickford J. in Marriott v. Yeoward Brothers 1909 2 K. B. at page

944 refers with approval to "The principle that a man cannot by stipulation excuse himself from the wrongful act of his servants unless he does so in plain and unambiguous language". He goes on to say that "If the language is ambiguous it must be construed against him, and whether particular language is ambiguous or not is a matter which it is not always easy to determine". The learned Judge then went on to consider the particular facts of his case, in which the condition which he had to interpret began as follows : — "The owners..... are not responsible for any loss, damage, injury, delay, detention..... by whatsoever cause or in whatever manner the matters aforesaid may be occasioned". The learned Judge added that if the condition ended there, there could be no doubt that it was meant to protect and did protect the defendants from the results of their negligence and even of their wilful misconduct.

By-law 25 contains no such provision; nor does it contain any clear statement that the Railway is to be absolved from liability in cases where the accident is due to the negligence of its servants. This being so, we consider that By-law 25 is of no avail to the Appellant.

The question of negligence then arises. The admitted facts of these two cases are that the accident occurred as a result of the breaking of a coupling, and we agree with the Trial Court that this is eminently a case which falls within the principle enunciated by Erle C.J. in Scott v. Landau and St. Katharines Docks Co. (3 H & C 596) which was quoted with approval by Cave C.J. in Ballard v. N.B. Railway (1923) S.C. (H.L.) 43, namely,

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the managment of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

The learned Relieving President went on to say —

> "The operation in the course of which this accident occurred was under the sole control of the Railway servants, and it was an operation which could be carried through in perfect safety if ordinary care was exercised. Presumably many goods trains had passed safely over this section of line in the past, and although snatching (or jerking) is a feature of goods-train working, I cannot find that the breaking of a perfectly sound hook was anything but a very abnormal occurrence. So I find that the maxim res ipsa loquitur applies in this case, and that the onus of showing that there was no negligence is on the Defendant. The Defendant has

failed to show that the very severe snatch which broke the hook was not due to negligence".

Whether or not the Defendant satisfied the onus which was upon him of disproving his negligence is a question of fact, upon which we see no reason to dissent from the finding of the Trial Court.

The appeals in both cases must therefore be dismissed with costs, to include in each case the sum of LP. 10 for advocate's attendance fee.

Delivered this 17th day of April, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 29/40.

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

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

In the appeal of :

Ahmad Mohammad el Haj Ishak — Appellant.

v.

The Attorney-General — Respondent.

Witnesses giving evidence against a person not mentioned in complaint to Police — Court entertaining doubt as regards one accused and convicting other upon evidence of same witnesses.

Court may, while entertaining some doubt as to truthfulness of statement of witnesses regarding one accused, find evidence of very same witnesses sufficient to convict other accused.

Asal for Appellant.

Crown Counsel (*Bell*) for Respondent.

Appeal from the judgment of the District Court of Jerusalem, dated the 10th of April, 1940, whereby the Appellant was convicted of causing grievous harm to a person, contrary to Section 238 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, and the complainant was awarded LP. 30 by way of satisfaction and compensation.

JUDGMENT

Apart from the question of sentence there is one unusual point in this appeal.

Two witnesses before the Court below stated that the first accused before the Court, that is the grand-father of this Appellant, was present when the crime was committed. The Court of its own motion called a Police Inspector to enquire as to the first complaint which was made. Any complaint made to the police not in the presence of the accused is not evidence unless it falls within the provisions of Section 7 of the Evidence Ordinance as being a statement by a person who is himself a witness. In this case the complaint was made by a man subsequently called as a witness. He complained against the son — i.e. the Appellant — and the Appellant's father, who has not been tried, but he did not complain against the grand-father who was the first accused at the trial. Upon this the Court of trial said —

> "We think it to be of importance the fact that the father of the injured boy, Ibrahim, did not in making his first official complaint to the police mention the name of the Accused No. 1 to them, in the story of his (Accused No. 1's) son and grandson, if in fact he, Accused No. 1, had actually participated as is now alleged in the offence and was at the actual scene of it. It is quite possible that the name of the first Accused was included as an after-thought. Although the actual fact may be otherwise, nevertheless we entertain some doubt as to this and to the benefit of this doubt the Accused El Haj Ishak is entitled. He is therefore acquitted and discharged."

It is argued for the Appellant that the Court did not believe the evidence of the two eye-witnesses when they saw the grand-father at the scene of the crime, and that they should not therefore have believed the same witnesses against the Appellant (i.e. the grandson) as they did.

This may appear to be an attractive argument, but we have to enquire if there was evidence on which the Court could lawfully find the facts necessary to support the judgment, and there was such evidence. Moreover, in this case the Court did not say they actually disbelieved the witnesses when they spoke of the grandfather — they said they entertained some doubt. I do not think there is anything in this point.

We see no reason to interfere with the sentence. The appeal is dismissed.

Delivered this 6th day of May, 1940.

Chief Justice

CIVIL APPEAL NO. 66/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

Before :— Copland, J. and Rose, J.

In the appeal of :

The Palestine Ashrai Bank, Ltd. — Appellant.

v.

1. Ali el Mustakim
2. Mohamad el Mustakim
3. Rose T. Wolfe — Respondents.

Order granting stay of action pending determination of a case in another Court — Interpretation of "postpone" or "adjourn" and "stay" in Civil Procedure Rules — Inherent jurisdiction of Court — Art. 46 of Palestine Order in Council and introduction of English Rules of Procedure.

1. Words "adjourn", "postpone", "stay" in Civil Procedure Rules, especially in same Part of the Rules, have different meanings and cannot be presumed to be used indiscriminately to mean same thing.

2. Where there are elaborate Rules giving certain powers to Court in a specific matter one cannot invoke inherent jurisdiction of Court to do things outside those Rules or art. 46 of Palestine Order in Council to authorise introduction of English Rules of Procedure.

3. No power given to Court under Civil Procedure Rules or under any inherent jurisdiction to stay proceedings except in special circumstances laid down in Rules.

P. Joseph and *Karwassarsky* for Appellant.
Cattan for Respondent No. 1.
Sassoon for Respondent No. 2.

Appeal from ruling of District Court, Tel-Aviv, dated the 21st February, 1940.

JUDGMENT

This is an appeal from an Order made by Judge Curry, granting stay of an action filed in the District Court of Tel-Aviv. The arguments on this appeal have ranged over a somewhat wide ground, but the two points to be considered are, first, has a Court power to stay proceedings under the rules or otherwise; and secondly, if the answer

to that is in the affirmative, was the Order for stay granted in this case correctly made.

Now the Civil Procedure Rules in this country lay down a very large number of provisions with regard to the conduct and trial of actions, and the rules really which may throw a little light on this problem are Rules 6 and 183—186. Rule 6 gives power to the Chief Justice in certain circumstances to "stay" proceedings in an action. Rule 183 gives a Court power, if it thinks it expedient for the interest of justice, to "postpone or adjourn" a trial. Rule 186, which is the same part as Rule 183, (Part XIV) talks about a "stay" of proceedings. I think one must presume that where the words "adjourn" or "postpone" or "stay" are used in the Rules, especially when they are used in the same part of the Rules, they have different meanings; one cannot presume that they are used indiscriminately to mean the same thing. It seems to me that "postpone" or "adjourn" and "stay" are not the same, and where, as in these Rules, there is a certain rule giving power to stay, and other rules give power to adjourn, I do not think that under the Rules there is any power to stay except as laid down in those Rules. There is nothing in the Rules themselves which give a Court inherent jurisdiction to stay, and where you have elaborate Rules giving certain powers to a Court to stay, than I do not think that you can invoke an inherent jurisdiction to do things outside those Rules, nor can you invoke Article 46 of the Palestine Order-in-Council to authorise the introduction of English Rules of Procedure, which have not been embodied possibly for very good reasons, in the Rules in force in this country.

It has been argued before us that the learned Judge in using the word "stay" really meant "adjourn". I do not think that that can be so, because in his Order granting leave to appeal the learned Judge says that Dr. Joseph, who was appearing for the present Appellants, argued that — "Although the Court has inherent jurisdiction to adjourn or postpone a case, it has no inherent jurisdiction to stay proceedings save in special cases, none of which arise in this case." The learned Judge goes on to say, "I therefore grant leave to appeal as to whether this Court has power to grant the stay."

It is obvious from the wording of this Order that the learned Judge had in his mind the difference between "adjourning" and "staying", and if in his original Order he had said "stay" when he meant "adjourn", than, when he made his Order granting leave to appeal, that moment would, I think, have been the correct moment to indicate what he really meant. I am therefore of opinion that there is no power given to the Court under the Rules or under any inhe-

rent jurisdiction to stay proceedings except in the special circumstances laid down in the Rules.

That disposes of this appeal, but I would add that, even if I had thought that the Court had inherent jurisdiction to stay, I do not think that this jurisdiction would have been properly exercised in this case. I can see no reason why the District Court case should be stayed pending the determination of the Land Court case, and at any rate the reasons given by the learned Judge are not sound ones. As Dr. Joseph remarked, a prospective fear of what may possibly occur in the future is no ground for granting a stay now. If the circumstances in the future should show the necessity for a stay, than that future moment would be the correct one on which to grant such an application.

I think, therefore, that the appeal should be allowed and the Order made by the learned Judge to stay further proceedings in the District Court case should be set aside, as there was no power to make it. The appellant is entitled to his costs and LP. 15 fee for attending the hearing.

We would like to express the opinion that we think it is highly desirable that this present action, which is the only one with regard to which an appeal lies before us, should be disposed of at the earliest possible moment.

Delivered this 7th day of May, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO 23/40.

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

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

In the appeal of :

1. Abdallah Naser Salem Abu Wady
2. Ahmad Abdallah Faraj
3. Ibrahim Saleh Salah
4. Hussein Mahmoud Haj Hamad — Appellants.

v.

The Attorney-General — Respondent.

Discrepancy between evidence given at trial and evidence at preliminary enquiry — Deposition taken by Examining Magistrate.

1. A discrepancy between evidence given by witness at trial and his evidence at preliminary enquiry should be put to him in cross-examination, and if earlier statement denied, deposition may be put in evidence.

2. Depositions taken by Examining Magistrate do not form part of case unless properly put in evidence.

Appellants 1—3 in person.
Hutory for Appellant No. 4.
Crown Counsel (*Bell*) for Respondent.

JUDGMENT

Appeal from the judgment of the District Court of Jaffa, dated the 18th of March, 1940, whereby the Appellants were convicted of robbery contrary to Section 288(1) and 23 of the Criminal Code Ordinance, 1936, and sentenced the first three Appellants to eight years' imprisonment, and the fourth Appellant to seven years' imprisonment.

We think there was evidence upon which the Court below could convict as it did. There is, however, one point submitted to us to which I would refer.

It has been suggested by counsel for the forth Appellant that there was a discrepancy between the evidence of the first witness given at the trial and the evidence he gave at the preliminary enquiry. It should be clearly understood that if there is any such discrepancy it should be put to the witness in cross-examination, and if the earlier statement is denied, the deposition may be put in evidence. The depositions taken by the examining Magistrate do not form part of the case unless they are properly put in evidence.

It is also submitted that the sentence is excessive. We do not think that this is so.

The appeal is therefore dismissed.

Delivered this 6th day of May, 1940.

Chief Justice

CIVIL APPEAL NO. 78/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

Before :— Copland, J., Frumkin, J. and Abdul Hadi, J.
In the appeal of :
1. Zuhdi Abu Jibain

2. Banco-di-Roma. Appellants.

v.

Benjamin Friedman Respondent.

Award of money for breach of contract — Contract providing for approval of parcellation scheme by competent authorities — Meaning of "disposition" in Land Transfer Ordinance.

1. Director of Land Registration has no power to approve or disapprove a parcellation scheme.

2. Disposition means a disposal of ownership or possession; a parcellation — not a disposition unless and until effect given to it by registration of the various plots in names of the new owners.

Goitein for Appellants.
Silberg for Respondent.

Appeal from judgment of District Court, Tel-Aviv (sitting as a Court of Appeal), dated the 23rd February, 1940.

JUDGMENT

This is an appeal by leave from the District Court of Tel-Aviv, sitting as a Court of Appeal, when that Court dismissed an appeal from the Magistrate's Court, awarding the present respondent a sum of LP. 100 for breach of contract.

This case arises out of the use of the term "competent authorities" in the contract without specifying what the parties meant by that term. Now, the contract between the parties provides that the approval of the competent authorities to the parcellation, which was in contemplation should be given within twelve months from the date of signature of contract, and that registration of the particular plot purchased by the respondent should be effected within a further four months. It is admitted, quite frankly, by the Respondent, that there is nothing in the Town Planning Ordinance which says that the Director of Land Registration must approve a parcellation scheme, and equally, that there is nothing in the Town Plannig Ordinance which says that a parcellation scheme must be approved by the Department of Surveys. To determine what is meant by the term "approval by the competent authorities", I think, we must refer to the Town Planning Ordinance, and it seems to me that the approval required in the contract must be the approval of the bodies specified in that Ordinance. This view is borne out by the fact that the contract allows a further four months for the registration of the

plot purchased in the name of the purchaser, and, therefore, contemplates a distinction between the approval of the parcellation scheme and the completion by the registration of the plot purchased in the name of the purchaser. There is nothing in any ordinance which gives a Director of Lands power to approve or disapprove a parcellation scheme. We are of opinion that a parcellation scheme is not a disposition, since a disposition, as Mr. Goitein has correctly argued, means a disposal of ownership or possession, and a parcellation, is not such a disposition, unless and until effect is given to it by registration of the various plots in the names of the new owners. There is no difference to our minds between a parcellation and a parcellation scheme. The only approval that is required is the approval of a parcellation scheme, and, as we find, that approval was given within the twelve months laid down in the contract.

The appeal must therefore be allowed, and the judgments of both the lower Courts set aside, and the action of the respondent, plaintiff in the Magistrate's Court, must be dismissed. The appellant will have all his costs both here and below to include LP. 10 hearing fees for the appeal to this Court.

Delivered this 15th day of May, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 48/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of :

Shabetai Yona — Appellant.

v.

Menashe Noah Cohen — Respondent.

Practice of submitting questions in arbitration proceedings for opinion of Court—Meaning of "undertaker" in Workmen's Compensation Ordinance — Appointment by Chief Secretary of arbitrator in workmen's compensation proceedings.

1. Better practice in arbitration proceedings that questions formulated for opinion of Court should be submitted by arbitrator together with record and findings, without further comment.

2. Whether defendant in arbitration proceedings under Workmen's Compensation Ordinance was an undertaker within meaning of the Ordinance — a question of fact in each case.

3. Fact that defendant was never asked by workman claiming compensation under Workmen's Compensation Ordinance to agree to an arbitrator does not vitiate appointment by Chief Secretary of an arbitrator under paragraph 2(1) of 3rd Schedule to the Ordinance.

M. Levanon & Mazover for Appellant.
Krongold for Respondent.

Appeal from decision of District Court, Jerusalem, dated the 7th July, 1939.

JUDGMENT

This appeal arises out of proceedings under the Workmen's Compensation Ordinance.

The learned Chief Magistrate who acted as Arbitrator formulated four questions for the opinion of the District Court. To these he added some matters of comment. It is the better practice that the questions should be formulated and submitted alone, together with his record and findings, without further comment.

Mr. Levanon argues that "undertaker" means a contractor. I do think that this is necessarily so. I am of opinion that it is a question of fact in each case if the respondent to the arbitration was an undertaker within the meaning of the Ordinance.

Secondly, he argues that the appointment of the Arbitrator was bad because his client had not been asked to agree to an arbitrator. There was in fact no agreement. I do not think therefore that the appointment was bad under paragraph 2(1) of the Third Schedule to the Workmen's Compensation Ordinance.

The third question was —

> "Are or are not receipts of Saleh Aaron and the sworn evidence of the witnesses conclusive evidence that Saleh Aaron was the contractor who undertook to do the work?"

In absence of some rule of law, and none is suggested, it is difficult to say that any evidence is, or is not, "conclusive", and I certainly do not think that that is the test. The test is, was there any evidence upon which the Arbitrator could properly find as he did.

Mr. Levanon does not pursue the other question.

The appeal will be dismissed with costs on the lower scale, with a fee of LP.10 certified for attending the hearing.

Delivered this 11th day of April, 1940.

Puisne Judge

I concur.

Puisne Judge

CIVIL APPEAL NO. 83/40.

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

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

In the appeal of :

Mohammad Ahmad El Khatib — Appellant.

v.

Ismail Mahmoud Hamoudeh — Respondent

Denial of signature and examination by experts — Identification of signature by attesting witnesses on deed.

Only reason for witnesses on a deed — to prove signature if denied or if formal proof necessary; where signature denied, Court should hear witnesses who signed deed and not send deed to be examined by experts.

I. Nasser for Appellant.

Respondent in person.

Appeal from judgment of District Court, Jaffa (Sitting as a Court of Appeal), dated the 2nd March, 1940.

JUDGMENT

This appeal will be allowed. The Magistrate declined to hear the witnesses who signed the deed and sent the deed to be examined by experts who found out that the thumbprints alleged to be those of respondent on the deed are too blurred and so unsuitable for identification. The only reason for witnesses on a deed is to prove the signature if denied or if formal proof should be neccessary. We think, therefore, that the Magistrate and the District Court were wrong in refusing to hear those witnesses.

The Appeal will be allowed, the judgment of the Mgistrate and the District Court will be set aside and the case will be remitted to the Magistrate to hear the witnesses who signed the deed. Costs to await the result of retrial.

Delivered this 15th day of May, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 9/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of :

Eliahu Bichovsky — Appellant.

v.

Nitsa Lambi-Bichovsky — Respondent.

The Attorney-General — Third Party.

Civil marriage in Cyprus between a Palestinian Jew and a non-Palestinian non-Jewess — Question of nationality of a non-Palestinian woman marrying abroad a Palestnian Jew in civil form — Personal law applicable in Palestine as regards a marriage between a Jew and a non-Jewess — Question of jurisdiction of Court to pronounce decree of nullity of marriage contracted between a Palestinian Jew and a non-Palestinian non-Jewess — Palestine Order-in-Council art. 47, 64, *— Palestine Citizenship Order-in Council,* 1925 *art.* 12 *— Civil Procedure, Ruels, Rule* 341.

.1 Question of validity of marriage of a Palestinian who is a member of a recognised religious community — determinable by his religious law.

2. (Per Frumkin and Khayat J.J.)

For purposes of jurisdiction wife of a Palestinian citizen must be considered as a Palestinian citizen, as long as marriage has not been declared invalid by a competent Court.

Silberg for Appellant.

Respondent — absent, served.

Attorney-General in person.

Appeal from judgment of District Court, Tel-Aviv, dated the 9th January, 1940 *).

JUDGMENT

The Appellant, as Plaintiff in the District Court, asked for a decree declaring his marriage null and void. The Respondent — his putative

*) C.C.D.C. Tel-Aviv, No. 351/38, infra.

wife — although served, did not appear before the District Court or this Court.

The District Court found the following facts : —

> "Petitioner is a Palestinian Jew domiciled in Palestine, and he married the Respondent in Civil Form in Cyprus in 1935.
>
> "Respondent at one time was apparently a member of the Greek Orthodox Church, but a few days before the marriage she made a Declaration in writing that she was no longer a member of that Church. According to the evidence submitted she did not accept any other religion."

An experienced Rabbi gave evidence that Jewish law does not recognize a marriage between a Jew and a non-Jew, no matter where the marriage takes place nor the form of the marriage.

The District Court appears to have accepted this evidence and found that the marriage was void ab initio, and concluded its judgment as follows:—

> "I find it impossible to hold in one and the same judgment that a person acquired Palestinian Citizenship as a result of an act which I am asked to hold to be void.
>
> "It therefore follows that by virtue of Article 64 this Court has no jurisdiction to pronounce a decree of nullity. Application, therefore, dismissed."

The case involved questions of general importance, and we have had the assistance of argument by the Attorney-General.

The jurisdiction of the Civil Courts is conferred by the first paragraph of Article 47 of the Order-in-Council. That Article is subject to the provisions of that part of the Order-in-Council, and also itself imposes certain limits on the exercise of the jurisdiction. That part deals with the jurisdiction of the Religious Courts, and by Article 64, which deals with the personal status of foreigners, provides that the District Court shall have no jurisdiction to pronounce a decree of disolution of marriage of foreigners.

A foreigner is any person who is not a Palestinian citizen. By Article 12 of the Citizenship Order-in-Council as in force at the time of this marriage, the wife of a Palestinian citizen was deemed to be Palestinian citizen.

Before the Court can consider a matter of personal status it has first to consider if it has the necessary jurisdiction. This was appreciated by Dr. Silberg, who has appeared throughout for the Appellant, in his admirably clear statement of issues, the first of which is, "Are the parties Palestinian citizens" and I think the first question to be decided in order to ascertain the jurisdiction was — is the Respon-

dent the wife of the Plaintiff within the meaning of the Citizenship Order-in-Council, and it seems to me that the District Court confused this issue with the possible result of the proceedings.

As to this it may be that there is a conflict of laws and that the Courts of Cyprus might not give the same answer as the Courts of this Territory.

The Attorney-General, basing himself on Dicey's Conflict of Laws, puts forward the proposition that a marriage which is prima facie good in the country in which it is celebrated will be regarded as good and binding here for the purpose of determining whether a woman is the wife of a Palestinian citizen. He admits, however that this proposition may not be of universal application.

Owing to its nature the question is difficult, and there are a number of cases in the reports of the English Courts which I have consulted in the hope of finding some underlying principle to assist in the present enquiry.

In Brook v. Brook (1861) House of Lords Cases 193, it was held that a marriage with a deceased wife's sister, both parties being domiciled in England, though legal in the foreign country in which it was celebrated, was void in England, and the general principle was enunciated that a marriage abroad of English subjects domiciled in England, if contrary to English notions of public policy, e.g. polygamous or incestuous, would not be recognized in England.

In Scottomayer v. De Barros (1879) 5 P. at page 105, the learned President stated —

> "Of the cases cited on the argument the only one which I think necessary to mention is that of Mette v. Mette, where Sir C. Cresswell held that a domiciled English subject could not marry his deceassed wife's sister at the place of her domicile, although by the law of that place the marriage would be good. But Sir C. Cresswell had himself pointed out in Simonin v. Mallac the difference between controversies arising in the country where the marriage was celebrated and those arising elsewhere; and his judgment in that case shewed that he considered that the law of the place of celebration must prevail before the tribunals of that place."

In Bethell v. Hildyard (1888) 38 Ch. D., at 234, Stirling, J. said —

> "I conceive that, having regard to these authorities, I an bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence 'the voluntary union for

life of one man and one woman to the exclusion of all others'."

These authorities have been referred to in a number of cases, but I do not find any doubt thrown upon them. On the other hand, in Banister v. Thompson, 1908 P., a case dealing with church discipline, the Dean of the Arches held that a marriage of persons of English domicile celebrated in Canada, though valid there, was in England null and void; and in De Wilton v. De Wilton, 1900, 2 Ch. D. 481, Stirling, J. held that persons of the Jewish faith domiciled in England, who contracted a marriage abroad, which was valid according to the law in force where the marriage was celebrated and also valid by Jewish law — provided that at the time of the ceremony both parties were of the Jewish faith — were not lawfully married in England if such marriage offended against the English Law as to prohibited degrees of relationship.

From these authorities the proposition seems to emerge that the English Courts, in considering the marriage of an Englishman domiciled in England celebrated in another country, will not regard such marriage as valid if it was contrary to the law of England or contrary to the Christian conception of marriage.

There are a number of authorities dealing with the view the English Courts will take when the marriage was celebrated in England; they no doubt would be of assistance to the Courts of Cyprus in considering the present matter if they had occasion and authority so to do, but I do not think that they influence our view.

There is another line of authorities to which I should perhaps refer, as at first sight it may appear to complicate the question — that is, those based on Salverson v. Administrator on Austrian Property, 1927, Appeal Cases 641. That case seems to me to decide that where a marrriage celebrated in England is declared null and void by a competent Court of the country of the domicile, in the absence of fraud or collusion, the English Courts will accept such judgment as determining the status of the parties, which has no application to the present enquiry.

There is one other case to which I would refer, that is, White v. White, 1937, Probate 111, also reported in All England Reports, 1937, Vol. 1. In some of its aspects this decision may be open to criticism, but insofar as it decided that a woman, domiciled in England, may obtain a decree of nullity of a marriage contracted in Australia on the ground that such marriage was bigamous, it would seem to be in favour of the proposition that I have stated.

I come to the conclusion, therefore, that on general principles we

have to enquire if this marriage was lawful according to the law of Palestine — not that of Cyprus. By that I mean a marriage which the Appellant could lawfully contract, not lawful as regards mere form.

I am of opinion, owing to the provisions of the Order-in-Council, that as marriage is a matter of personal status, any question whether a Palestinian who is a member of a recognized religious community is married, or if a woman is his wife, must be answered in accordance with the law applicable, that is, the religious law which for such purpose, when ascertained, forms part of the law of Palestine.

I am fortified in this view by the well-known passage at page 152 of Dr. Goadby's "International and Inter-Religious Private Law in Palestine", as follows:—

> "The validity in substance of a marriage contracted by Palestinians, whether in Palestine or abroad, depends, it is submitted, upon the personal (religious) law of each party. This is in accordance with Ottoman and Oriental tradition. Thus a marriage contracted abroad though valid according to the Lex loci celebrationis both in form and substance might be held invalid in Palestine on the ground that it was substantially unlawful by the religious law of one or both of the parties. In Egypt it has been held that the marriage of an Egyptian Moslem woman with a foreign Christian is bad under Moslem Law and consequently invalid. The same conclusion appears to follow in Palestine. And it is the religious law which must determine the substantial validity of foreign marriages contracted by Palestinian Jews or Christians."

Upon that view the question now arises, can the Civil Courts grant the relief for which the Plaintiff asks under Articles 47 and 64 of the Order-in-Council. I should have felt disposed to consider that question under the provisions of Civil Procedure Rule 341, but the other members of the Court are of opinin that the case should be returned to the District Court.

The judgment of the District Court is therefore set aside, and the case returned to that Court for further consideration. It is unnecessary to make any order as to costs.

Delivered this 15th day of May, 1940.

Chief Justice

Frumkin, J.

The Appellant in this case, who was the Plaintiff in the Court below, is a Palestinian Jew who married a non-Jewess in Cyprus before the civil authorities there. He instituted these proceedings before the District Court, Tel-Aviv, asking for a decree declaring the marriage

null and void, his ground being that under Jewish law, which according to his submission is the law applicable to this case, a marriage between a Jew and a non Jewess is nul and void. The Court below, without entering into the merits of the claim, dismissed it on the ground that it had no jurisdiction to maintain the claim because one of the parties was not a Palestinian.

The matter of jurisdiction is, to my mind, the only question with which we, as a Court of Appeal, are at present concerned. If the Court below was right in its decision, that is the end of the matter. If not, the case will have to go back for trial on the merits.

There are a number of questions of great importance involved in this action : Is a marriage between a Jew and a non-Jewess invalid ? Whicch is the law applicable, Palestinian law or the law of the country in which the marriage took place ? Is the jurisdiction of the religious Courts ousted when one of the parties to a marriage is not a member of the community concerned ? Can a civil Court issue an order of nullity or dissolution of marriage when one party only is a foreigner and the other a Palestinian ? I would be loath to decide points like those on appeal without such points being first dealt with and decided by a Court of first instance.

Now the Court below, in dismissing the claim for lack of jurisdiction, incidentally in fact held that the marriage was invalid: It had no jurisdiction because the wife was not a Palestinian; the wife was not a Palestinian because the marriage was invalid. I do not think that view could be right, even if the plaintiff himself took up that attitude. In the first stage the Court should have considered the position of the parties as it appeared to be at the time of the action. The marriage took place in Cyprus. It is not contested that under the law of Cyprus the marriage was good. The wife of a Palestinian becomes a Palestinian by marriage. The immigration authorities were therefore right in including the wife in the passport of her husband, and for the purposes of jurisdiction, I am of opinion that as long as the marriage has not been declared invalid by a competent Court, the wife is entitled to be considered as Palestinian citizen.

The appeal must therefore be allowed, the judgment of the District Court set aside, and the case remitted for the Court to assume jurisdiction as if both parties were Palestinian citizens.

Delivered this 15th day of May, 1940.

Puisne Judge

Khayat, J.

In my view this appeal involves the following point of law.

There was a request to the Court for the disolution of a contract

of marriage that was entered into and registered according to the Civil Law of Cyprus on the ground that it is contrary to the Mosaic Law which is deemed to be the Law governing matters of personal status affecting Jews in Palestine and therefore conflicting with two bodies of laws.

I think this point, until decided by a competent Court, does not in any way change the relations between the parties according to the Law of Palestine which recognizes the wife as a Palestinian, especially if it is borne in mind that the result to which the Court may arrive will be that the contract of marriage was valid according to the Law of Cyprus, but it cannot be considered as valid if it is established that it is contrary to the Palestine Law.

I therefore think that the judgment of the Court below should be set aside and the case remitted to be decided on its merits.

Delivered this 15th day of May, 1940.

British Puisne Judge.

CIVIL CASE NO. 351/38.

IN THE DISTRICT COURT OF TEL-AVIV.

Before:— The R/President (Curry, J.) and Korngrun, J.

In the case of:—

Eliyahu Bichovsky — Plaintiff.

v.

Nitsa Lambi-Bichovsky — Defendant.

JUDGMENT

The facts in this case are as follows:

Petitioner is a Palestinian Jew domiciled in Palestine and he married the Respondent in Civil Form in Cyprus in 1935.

Respondent at one time was apparently a member of the Greek Orthodox Church, but a few days before the marriage she made a Declaration in writing that she was no longer a member of that Church. According to the evidence submitted she did not accept any other religion. On marriage she became a Palestinian. In 1938 they separated by agreement and the husband now applies for a decree of nullity on the ground that a Jew cannot contract a valid marriage with a non Jew.

This case raises several legal problems which are of some difficulty and the Court is very grateful to Mr. Silberg for the assistance he has been able to afford us as a result of his extensive research into the subject.

I think that the first and most difficult point to decide is whether or not the Respondent is a Palestinian.

The Respondent acquired Palestinian Citizenship as a result of her marriages to the Petitioner. In other words she acquired Palestinian Citizenship as a result of an act which we are asked to declare to have been null and void.

Petitioner argues that according to the Palestinian Citizenship Order 1925 a woman who acquires Palestinian Citizenship as a result of her marriage does not lose it on dissolution of marriage and that it was held in Civil Appeal 186/37*) that dissolution of marriage in its ordinary meaning includes a decree of nullity. That may be so and with due respect I agree with the judgment in Civil Appeal 186/37 but that does not mean there is never any difference between the phrase "dissolution of marriage" and a decree of nullity. There is of course one clear distinction between the two viz, one dissolves something without in any way impugning its legality up to the time of dissolution whereas the other goes much further — it does not dissolve the marriage — there is nothing legal to dissolve but pronounces its illegality. Moreover in the present case it is not a question of the marriage being voidabde but being void ab initio.

The Petitioner has also sought to support his argument on the analogy of the question of domicile under the English Law. Unfortunately, however, it appears to me to leave the question open. It is true that Dicey (5th Edition) at page 298 at first says "a marriage must be assumed to be valid and to have full effect until it is declared to be a nullity by a Competent Court"; on the making of such a declaration the woman will regain her former domicile but until then she must be held to have that of her husband, in every case at any rate where the marriage is voidable e.g. on the ground of impotency and not void ab initio e.g. on the ground of bigamy and even in the latter case a woman may well acqure the domicile of the apparent husband by residence with him at his domicile.

In this case, however, it is void ab initio and the woman cannot possibly acquire the nationality of her husband by mere residence with him.

I find it impossible to hold in one and the same judgment that a person acquired Palestinian Citizenship as a result of an act which I am asked to hold to be void.

It, therefore follows that by virtue of Article 64 this Court has no Jurisdiction to pronounce a decree of Nullity — Application, therefore dismissed.

9.1.1940. *Judge* *R/President.*

*) 2CtLR p. 132.

CIVIL APPEAL NO. 68/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of :

Mrs. Miriam widow of Anton George — Appellant.

v.

Assaf Wahbeh — Respondent.

Agreement between adjoining neighbours as to boundary between their respective parcels — Action for demolition of wall deviating into neighbour's land — Land Court giving monetary compensation to owner of land encroached upon — Mejelle, art. 906.

If A built a wall on boundary agreed between him and B and as a result of a mistake wall slightly deviated into B's land, Land Court right in holding that A acted under belief of some legal justification and in giving B monetary compensation and not ordering demolition of wall.

Appellant in person.

Atalla for Respondent.

Appeal from judgment of Land Court, Jerusalem, dated the 21st March, 1940.

JUDGMENT

The Appellant and Respondent are owners of adjoining land, and the Respondent was minded to build a wall to enclose his land. It seems that one boundary mark was missing and the boundary between the two parcels was marked out by agreement between a builder representing the Respondent and the sons of the Appellant representing her, and the wall was built on that boundary. Later it was discovered that a mistake had been made, and in consequence, the wall deviated slightly into the Appellant's land.

The Appellant then brought her action in the Land Court asking for an order that the wall be demolished. That Court applied Article 906 of the Mejelle and gave her monetary compensation.

The only question that arises is, was that Court right in so doing?

The Respondent having built his wall in accordance with an agreed boundary, I think the Land Court was right in holding that he did so under the belief that he had some legal justification for so doing.

As to the amount awarded, the Land Court came to its decision after hearing evidence, and I see no reason to interfere. There is no appeal from the Land Court's order as to costs.

The appeal will be dismissed. The Respondent will have costs on the lower scale, and we certify LP. 15 for attending the hearing.

Delivered this 8th day of May, 1940.

Chief Justice

CIVIL APPEAL NO. 56/40.

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

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

In the appeal of :

Shlomo Shapira — Appellant.

v.

The Attorney-General — Respondent.

Assessment of Urban Property Tax on additions made to existing building prior to April 1935 *— Claim of exemption for* 3 *years for addition to existing building — Effect of Urban Property Tax Ordinance upon Ottoman Land and House Tax (Werko) Law — Scope of sec.* 8(1) *of Urban Property Tax Ordinance regarding exemptions.*

1. Ottoman Law on Land and House Tax of no effect in area declared by Order of High Commissioner under sec. 3(1) of Urban Property Tax Ordinance to be subject to Urban Property Tax.

2. Amendment to Urban Property Tax Ordinance (given effect to as from April 1st 1935 and exempting additions to buildings from tax) — not retrospective.

3. Sec. 8(1) of Urban Property Tax Ordinance refers to general exemptions such as enjoyed by charitable institutions, religious bodies and Consular Corps or the like.

E. Z. Fellman for Appellant.
Salant for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated the 23rd February, 1940.

JUDGMENT

This appeal raises an interesting point on the construction of Section 8 of the Urban Property Tax Ordinance, Cap. 147. The appellant was assessed to three years' Urban Property Tax on certain additions that he made to an existing building, which additions were completed and assessed to taxation in December 1934. On the 1st of April, 1935, which is the opening day of the new financial year, the property would normally be liable to pay taxes. In October 1935 an amendment to the Urban Property Tax Ordinance was brought into force, in particular of Section 8, and this amendment is said to have come into force on the 1st of April 1935. The relevant sections of the original Ordinance as found in Vol. II, Laws of Palestine Cap. 147 are as follows : —

S.3(1) "The High Commissioner may, by order published in the Gazette, declare that, in place of the house and land tax payable at the date of such order, there shall be payable annually from the date specified in the order by the reputed owners of house property and land within the area described in such order (in this Ordinance called "the urban area") a tax which shall be assessed and paid in accordance with the provisions of this Ordinance".

S. 8(1) "Any person who would have enjoyed under the law for the time being in force exemption from, or abatement in respect of, house and land tax if an order under this Ordinance had not been made shall enjoy the like exemption or abatement in respect of the tax imposed hereunder."

S. 8(3)(i) "Subject to the provisions of section 5(4), where a building is being newly constructed at the time of assessment or revision, the reputed owner of the house property shall not be liable to pay the tax for the year for which the assessment is made and for two years following such assessment:

Provided that the reputed owner shall give notice to the district commissioner of the nature of the building which he desires to construct within two months from the date of the commencement of the construction or, where the construction was begun prior to the date of an order under this Ordinance, within two months from the date of the application of the Ordinance."

S. 8(3)(iii) "Nothing in this subsection shall be deemed to extend to any addition made to an existing building."

The appellant has argued first that under the true construction of the Urban Property Tax Ordinance, as amended by the 1935 Ordinance, he is entitled to exemption for three years for the additions

to his existing. He further argues that if this is not correct, than by reason of Section 8(1) of the Ordinance, the exemptions which he would have enjoyed under Ottoman Law are preserved, and under the Ottoman Law , additions to existing buildings were exempt for a term of two years, and his last argument is that the Ottoman Law with regard to werko and musaqqafat has never been repealed.

It will be convenient to deal with the last point first. We are of opinion that when the High Commissioner by Order under Section 3(1) of the Ordinance has declared that the Urban Property Tax is in force in a certain area, the Ottoman Law on werko and musaqqafat is thereupon impliedly at any rate, repealed, and has no effect in such an area. We are also of opinion that the amendment to the Urban Property Tax Ordinance of 1935 cannot be relied upon by the appellant in this case because, it is not retrospective prior to its enactment, and indeed, so far from being retrospective, this Section is limited and is stated to have come into force on the 1st of April, 1935.

With regard to the argument that the exemptions enjoyed under Ottoman Law are still preserved under Section 3(1) of the Ordinance, it is true that this sub-section does allow to a person who would have enjoyed under the Ottoman Law exemption from, or abatement in respect of, house and land tax if an order under this Ordinance had not been made such enjoyment in respect of taxes imposed under this Ordinance, but we feel that the whole of Section 8 should be read together.

Section 8(1) would seem to refer to general exemptions such as these enjoyed by charitable institutions, religious bodies and Consular Corps, or the like, whereas sub-section 3 of section 8 refers in specific terms to newly constructed buildings. In any case, we think, that sub-section 3 is in the nature of a qualification of sub-section 1, and as I have said, the whole clause must be read together. In sub-section 3 it is provided by paragraph (iii) — "Nothing in this sub-section should be deemed to extend to any addition made to an existing building".

It seems to us that under this subsection (iii) the Government were entitled to charge in this particular case Urban Property Tax on these additions and that the appellant cannot claim the exemption to which he has urged that he is entitled.

For these reasons we think that this appeal should be dismissed with costs to include LP. 10 hearing fees.

Delivered this 22nd day of April, 1940.

British Puisne Judge

CIVIL APPEAL NO. 74/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of :

Abdel Lateef Bey Saleh — Appellant.

v.

Kasem Ahmad Abu Ez Zalaf — Respondent.

Agreement in writing with advocate regarding his remuneration — Part payment in advance of professional fees — Action by client against his advocate for recovery of fees paid to him — Assessment by Court of work by advocate and order to return sum received in excess — Scope of sec. 21 of Advocates Ordinance — Mejelle Art. 443.

1. If client settles his action before advocate received any payment under contract with him, advocate can sue client upon a quantum meruit in respect of any work done by him.

2. Client cannot recover money paid by him to advocate on account of his remuneration under contract with him, unless there is a total failure of consideration.

Abcarius and *Cattan* for Appellant.

Siksek for Respondent.

Appeal from judgment of District Court, Nablus, dated the 21st March, 1940.

JUDGMENT

By an agreement in writing with the present Respondent, whom I will call the client, engaged the Appellant as his advocate in connection with a substantial claim which he was proposing to prosecute. From the agreement it is clear that the advocate was to act in the preliminary proceedings and to appear at the trial. His remuneration was to be LP. 600 — LP. 250 of which was paid on the signing of the agreement, the balance being payable under a promissory note.

It appears that the client settled his dispute, and he than sued the advocate for the return of the LP. 250 paid under the agreement. No question arises before us with regard to the promissory note.

The District Court held that the terms of the agreement had not ben varied, that the advocate had not ben negligent, and that he had done work under the contract the value of which it assessed at Lp. 125, and it gave judgment for the client for the sum claimed (i.e. LP. 250) less this amount, basing itself on the following proposition:—

> "The relation between advocate and client is one of trust and we feel that the Advocates Ordinance is intended to cover those relations. Neither the Mejelle nor the ordinary laws of contract are applicable in this case. The Court, therefore, in enforcing this agreement, must apply section 21 of the Advocates Ordinance (Laws of Palestine, Vol. 1, Cap. 2) (sic.) This section applies whether it is the advocate who is seeking to enforce the agreement or whether the client is seeking relief."

In deference to the arguments which were addressed to us I would say that the provisions of the Mejelle, in particular Article 443, with its homely examples, are inadequate to decide this case.

Firstly it is necessary to consider the contract. I do not think that any implied term can be read into it whereby the client could not settle his action, thereby preventing the advocate from performing his part of the contract. When this was done, if no payment had been made under the contract, no doubt the advocate could have sued upon a quantum meruit in respect of any work done by him, but where money has been paid somewhat different considerations arise, and I do not think it can be recovered unless there is a total failure of consideration. Clearly there was no such failure here, as the advocate had done work the value of which the Court assessed at LP. 125.

I do not think the Advocates Ordinance can be extended, as it was by the District Court, under any doctrine of equitable construction as suggested by the Respondent. If legislature had intended to give the Court power to open every transaction between an advocate and a client it would have done so, as it did in the case of usurious loans.

The appeal succeeds and the judgment of the District Court will be set aside, and judgment entered for the Defendants in the action. The Appellant will have costs of the action with LP. 7 for attendance fee and costs of the appeal on the lower scale with LP. 15 fee for attending the hearing.

Delivered this 27th day of May, 1940.

Chief Justice

HIGH COURT NO. 12/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of :

Itschaq Rogenaky — Petitioner.

v.

Local Council of Raanana — Respondent.

Petition to Local Council for a licence to carry on a pharmacy — Refusal to issue licence unless and until arrears of rates paid — Limits of discretion — Trades and Industries (Regulation) Ordinance.

Refusal by Local Council to issue a licence for carrying on a certain classified trade unless and until petitioner pays arrears of rates — not a proper exercise of discretion, or an exercise thereof for a legal reason.

B. Cohen for Petitioner.
Harari for Respondent.

Application for an order to issue to the Respondent calling upon him to show cause why he should not sign and issue to the petitioner a licence (or renew the present licence) to keep a pharmacy in the house and premises of the Petitioner at Raanana Colony for the year 1940.

JUDGMENT

This is a return to an order nisi issued by this Court calling upon the Respondents, the Local Council of Raanana, to show cause why they should not sign and issue a licence to the Petitioner to carry on a pharmacy.

The power is found in the Trades and Industries (Regulation) Ordinance, which provides for the issue of licences for certain trades, a pharmacy being one of them. Section 4, Sub-section (2) provides, inter alia, —

> "A licence shall be issued —
> (a) where the classified trade is carried on within the municipal area, by the municipal council;"

and by the definition "municipal area" includes the area of a local council, and "municipal council" includes a local council constituted

under the Local Councils Ordinance. Raanana was so constituted.

It is argued that the Local Council has a discretion in the issue of these licences, and our attention has been called to authorities, in particular High Court No. 34/31, reported in the Palestine Law Reports, Vol. I, at page 595, followed in H.C. 8/36, Rottenberg IX, p. 831, and H.C. 7/36, Rottenberg IX, p. 907.

These authorities are clear, but I may perhaps say that in their absence — apart from the sale of intoxicating liquors, as to which there are special provisions — I should have doubted the existence of this discretion, but that point has not been argued.

It is admitted by Mr. Ishar Harari for the Respondents that there are limits to the exercise of the discretion, and the last authority cited speaks of legal reasons for the refusal of a licence.

In their affidavit the Respondents do not allege that they considered the matter and exercised their discretion, they merely allege that the applicant owed them a substantial sum as arrears of rates, which he could and should have paid.

Mr. Harari relies upon paragraph 7 of the applicant's affidavit in which he says —

> "On the 27/12/39, when petitioner had had his letter returned, he came again personally to the respondent with his application and fee, and this time petitioner was informed that the local council had considered his case and that the decision and instructions were to refuse to accept the application and fee unless and until petitioner paid to respondent the various rates alleged to be due from the petitioner to the respondent as local council, rates which have nothing to do with the present application."

The position is, therefore, that the Respondents maintain that they were justified in refusing to issue the licence unless and until the arrears of rates were paid.

We do not consider this a proper exercise of the discretion or, to use the phrase in H.C. 7/36, an exercise thereof for a legal reason. I may point out that if rates are in arrear the law provides a method for their collection.

The order will be made absolute and the Applicant will have an inclusive sum of LP. 5 for his costs.

Delivered this 7th day of March, 1940.

Chief Justice

CIVIL APPEAL NO. 77/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of :

The Attorney General — Appellant.

v.

1. Joseph Forty
2. Wasila Boulos
3. Anton Khabbaz — Responndents.

Variation by Land Court of decision of Land Settlement Officer — Non-interference by Court of Appeal although they might prefer view of Land Settlement Officer — Land Settlement Ordinance, sec. 64.

Supreme Court, though they might perhaps prefer view taken by judge whose decision was varied on appeal, will not intefere, if they cannot say that appellate Court was not entitled upon evidence to take the view which it did.

Toukan for Appellant.
Weinshall for Respondents.

Appeal from judgment of Land Court, Haifa (in the appellate capacity) dated the 19th April, 1940.

JUDGMENT

Naim Eff. Toukan has assisted us with a full argument.

This is an appeal from a decision of the Land Court varying a decision of a Settlement Officer. The case falls to be considered under Section 64 of the Land Settlement Ordinance, as it was before it was amended by No. 48/39, whereunder an appeal lies to this Court on a point of law.

The Settlement Officer took one view of the facts and the Land Court took another. The point of law would appear to be whether there was evidence upon which the Land Court could find as it did.

It might be that we should prefer the view of the Land Settlement Officer, but we cannot say the Land Court on a matter of law was not entitled upon the evidence to take the view which it did.

The appeal is therefore dismissed with costs on the lower scale. We certify LP. 15 for attending.

Delivered this 9th day of May, 1940.

Chief Justice

CIVIL APPEAL NO. 90/40.

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

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

In the appeal of :

1. Mahmoud Hamdan Alayan El-Masri.
2. Mohammad Hamdan Suleiman El-Masri Appellants.

v.

Abdel Rahman El-Farra as Mayor of Khan Yunis.

Respondent.

Document filed by Appellant as a security for costs of appeal — Objection by Respondent that there was no proper security — Failure to apply to Registrar for approval and settlement of security — Civil procedure Rules, Rules 325, 327.

1. If Appellant offers a security in lieu of a bond to cover costs of appeal he must make application to Registrar to settle and approve security.

2. Upon objection being taken by Respondent that there was no proper security for costs of appeal Appellant can apply to Court to allow him file further securtiy.

Moghannam for Appellants.
Naser for Respondent.

Appeal from judgment of District Court of Jaffa (sitting as a Court of Appeal), dated the 11th April, 1940.

JUDGMENT

This is an appeal from a judgment of the District Court of Jaffa sitting as a Court of Appeal. The point raised is a simple one, on the true construction of Rules 325 and 327 in the Civil Procedure Rules, 1938. There is no doubt, when looking at the document which is said to be a security, that it was not intended to be a bond under Rule 325. Rule 327 says that if an appellant does not wish to file a bond he can, inter alia, apply to give other reasonable security to the satisfaction of the Registrar, and if he should so desire, then a notice of appeal shall be accompanied by an application to settle and approve the security offered.

There was no application as provided for by Rule 327 to the Registrar to settle and approve the security offerred, if this document was in fact intended to be a security and not a bond. The appellant, when the objection was taken that there was no proper security for the costs of the appeal, could have applied to the Court to allow him file further security. He did not do so, instead of which, he comes to this Court on appeal against the judgment of the District Court.

For these reasons we think that this appeal must fail and be dismissed with costs and LP. 10 fees for attending the hearing.

Delivered this 23rd day of May, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 81/40

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of :

Salim Khalil el Salfiti — Appellant.

v.

1. Bishop Keladion, Metropolite of Acre and Haifa, and Locum Tenens of the Greek Orthodox Patriarchate of Jerusalem.

2. Archimandrite Costandios, A/Metropolite of Acre and Haifa, on behalf of the Greek Bishopric of Acre. Respondents.

Action on promissory note signed by "acting Metropolite of Acre and Haifa and District thereof" and sealed "Greek Orthodox Bishopric of Acre" — Bishopric sued as a juristic person.

For a party to action to be treated as juristic person there must be evidence that he is such a person.

Ousta for Appellant.
Said for Respondents.

Appeal from judgment of District Court, Jerusalem (sitting as a Court of Appeal), dated the 15th February, 1940.

JUDGMENT

This action was commenced in the Magistrate's Court, where the Plaintiff sought to recover upon a promissory note. The note was signed "Archimandrite Prokhorious. Acting Metropolite of Acre, Haifa, and the District thereof", and there was added the seal of the Greek Orthodox Bishopric of Acre.

The Defendants to the proceedings were Bishop Keladion Metropolite of Acre and Haifa, and Archimandrite Costandios, Acting Metropolite of Acre and Haifa, on behalf of the Greek Orthodox Bishopric of Acre. It will be seen Archimandrite Prokhorious was personally made a party.

In effect the Plaintiff was seeking to treat the Bishopric of Acre as a legal entity, or what has been termed a juristic person. If it were such a person it could and should be so sued, but apart from this there is no evidence that it is such a person, and I think the appeal should be dismissed.

Costs will be on the lower scale, and we certify LP. 10 fees to the Respondents for attending the hearing.

Delivered this 5th day of June, 1940.

Chief Justice

CIVIL APPEAL NO. 86/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of :

1. Mr. Dov Rosenstein
2. Mrs. D. Rosenstein
3. Miss A. Geller — Appellants.

v.

1. The Official Receiver, in his capacity as such and also as liquidator of King Solomon Bank, Ltd.
2. Mr. Mordekhai Levanon — Respondents.

Motion by Official Receiver and Liquidator to appoint member of Inspection Committee — Court appointing nominee of minority of contributories — Question whether order appointing member of Inspection Committee appealable as of right — Discretion of lower Court queried in Court of Appeal — Banking Emergency Ordinance, sec. 6 — *Companies Ordinance, sec.* 148 — *Civil Procedure Rules, Rule* 317 — *C.A.* 243/38.

Order of Court appointing a member of Committee of Inspection in winding up proceedings — appealable like a decree.

Edit. Note:— Miss. G. was elected at the first meeting of contributories. The Court accepted the objection taken to her appointment, and a fresh meeting was held in order to elect another nominee, but the majority (consisting of the Director of the Bank, his wife and her sister, Miss G.) again elected Miss G. Mr. H. was elected at this meeting by a minority.

Scharf and *Eliash* for Appellants.
Respondent No. 1, absent — served.
Respondent No. 2 in person.

Appeal from order of District Court, Jerusalem, dated the 1st April, 1940.

JUDGMENT

On the 5th of January of this year, the High Commissioner, by virtue of his powers under Section 6 of the Banking Emergency Ordinance ordered the winding up of the King Solomon Bank Ltd.

The Companies Ordinance thereupon applied as though an order for winding up had been made by the Court under Section 148 of that Ordinance.

Steps were taken to set up a Committee of Inspection and application was made to the Court to approve the committee. Objection was taken to one nominee, and eventually the Court ordered as follows:—

> "I do not find that the Court is bound to accept the original nominees of the contributories. Having heard the Official Receiver I consider that it is better that Miss Geller should not be a member of the Committee of Inspection, and I appoint Mr. Harutz, subject to his holding or obtaining a general power of attorney."

Against this order appeal is now brought.

For the Respondents it is objected that no leave to appeal has been obtained as required by the second paragraph to Rule 317, this being an order and not a decree, and that it is now too late to obtain leave.

In Civil Appeal 243 of 1938 *), a somewhat similar point arose in connection with the appointment of a liquidator. Following that authority, I think that this objection fails.

In the circumstances I do not think the Court was justified in appointing Mr. Harutz, but in so holding I wish to make clear that I am in no way casting any reflection upon that gentleman individually. I think the order of the District Court should be varied as suggested by the Appellant in his notice of appeal, by directing that instead of the appointment of Mr. Harutz it should direct that a fresh meeting of the contributories should be held to elect somebody to the Committee of Inspection who is not a Director of the Bank in liquidation.

The Appellant will have an inclusive fixed sum of LP. 5 as costs of this appeal, which will be paid out of the funds of the liquidation.

Delivered this 5th day of June, 1940.

Chief Justice

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*) 5 CtLR p. 75.

HIGH COURT NO. 36/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before :— Copland, J., Rose, J. and Khayat, J.
In the Application of:
Tovia Z. Miller — Petitioner.
v.
Registrar of Lands, Jaffa. — Respondent.

Sale of land in partition proceedings — Order by Magistrate to Land Registrar to register in name of purchaser — Land Registrar declining to register land without being served with copy of order through Execution Office — Duties of Magistrate and of Execution Office in partition proceedings — Law of partition, Articles 6, 9 — *H.C.* 10/27.

1. Nothing in law which justifies Land Registrar declining to act upon order of Court in partition proceedings unless and until served with copy of order through Execution Office.
2. All duties in connection with partition proceedings are given by law to Magistrate, not to Execution Officer.

D. Moyal for Petitioner.
Crown Counsel (*Hogan*) for Respondent.

Application for an order to issue directed to the Respondent calling upon him to show cause why he should not comply with the order of the Magistrate, Ramleh, dated 21.3.38, and why he should not register in the name of Petitioner Block No. 3084, Parcel 2, lands in Moghar village consisting of 86.512 dunums, which Petitioner purchased at auction sale.

ORDER

The Petitioner was the co-owner of certain lands in Moghar village, owning about 8/9, the other 1/9 being owned by over one hundred other persons. He brought partition proceedings, and the Magistrate ordered the sale of the lands by public auction, at which the Petitioner purchased the whole property. The purchase price was paid into court, and the money has been distributed between all the co-owners. Thereupon the Magistrate wrote to the Land Registrar, Jaffa, directing him to register the shares of the other co-owners in the name of the Petitioner. The Registrar declined to do so, on the ground that he must be served with a copy of the order through the Execu-

tion Office. It is this decision of the Land Registrar which has now been queried in this case.

On the return, Mr. Hogan, for the Registrar, has quoted to us a judgment of this Court, H.C. 10/27 *), Mohammad Hussein Ali and others v. The Attorney-General, which, he says, supports the action of the Registrar. The Court held that the effect of Article 6 of the Law of Partition was that the Magistrate's judgment was sent to the Land Registry for information only, and should not be acted upon until a copy had been served on the Land Registrar through the Execution Office. No reasons were given for this decision, and it is a little dificult to see the reasoning which prompted it. Article 9 of the Law of the Partition was never brought to the attention of the Court, and the circumstances of that case are different from the one now before us. In H.C. 10/27 the action was brought by certain persons claiming to be registered owners of land which they alleged had been collusively partitioned by other parties, and further alleging that they had been ignored in the partition proceedings. In this present case there is no such dispute — the land has already been sold by public auction and the proceeds distributed to the co-owners. It seems to us that Article 9 is the correct one to be applied here, and not Article 6, and as Mr. Moyal correctly remarks, all duties in connection with such partition proceedings are given by law to the Magistrate and not to the Execution Officer. The correct translation of the last sentence of Article 9 is — "The delivery and evacuation of the property sold to the purchaser shall, if necessary, be effected by the Execution Officer." This seems to show that the Execution Office is only concerned in a case such as the present one, if the purchaser cannot obtain possession of the property purchased by him, and there in nothing in Article 9 which says that the Execution Office must notify the Registrar.

For this reasons we think that the Land Registrar should act on the order of the Magistrate, and the order nisi must therefore be made absolute.

With regard to costs — the Registrar had considerable justification for his action, since he was acting on instructions, and those instructions were based on a judgment of some years' standing, though its exact effect had not been properly understood. In these circumstances we think that the fairest order will be no costs to either side.

Given this 31st day of May, 1940.

British Puisne Judge.

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*) 1 PLR p. 124.

CRIMINAL APPEAL NO. 42/40.

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

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

In the appeal of :

Juma' Mohammad Abu El Enain — Appellant.

v.

The Attorney-General — Respondent.

Appeal by person who pleaded guilty — Necessary caution of trial Court when there is a plea of guilty.

1. Appeal by person who pleaded guilty may be entertained if*) he did not appreciate nature of charge or of plea, or if upon admitted facts he could not in law have been convicted of offence charged.

2. Where an accused person unrepresented, trial Court should be satisfied that he understands what he is doing when pleading guilty; a suitable note to this effect upon record — desirable.

3. Where aggravating fact does not necessarily follow from plea of guilty and no evidence called to support it, Court to give accused benefit of doubt when meting out punishment.

*) Ed. Note. Obviously not to the exclusion of the grounds mentioned in sec. 65(1)(d) and (e) (irregularity of procedure and excessive judgment, respectively) of Criminal Procedure (Trial upon Information) Ordinance.

Siksek for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated the 14th May, 1940. whereby the Appellant was convicted of causing grievous harm contrary to Section 238 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment.

JUDGMENT

In the Court of trial the appellant pleaded guilty and asked for mercy. As appears from Rex v. Fordo, L.T. 128, p. 798, an appeal may be

entertained when there is a plea of guilty if it appears —

> "1. That the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or
> 2. that upon the admitted facts he could not in law have been convicted of the offence charged."

I do not think in this case that the appellant did not know what he was doing, or did not understand the nature of his plea.

I would, however, point out that where an accused person is unrepresented it is important that the court of trial should be satisfied that he understands what he is doing when he pleads guilty, and it would be of assistance to this Court if a suitable note to this effect could be made upon the record.

As regards sentence, it does not appear from the record that any evidence was called to support the finding of permanent injury, which does not necessarilly follow from the plea, and in these circumstances we have some doubt as to the nature of the injury. We therefore reduce the sentence from two years' to one year's imprisonment to run from the date of conviction.

Delivered this 6th day of June, 1940.

Chief Justice

CIVIL APPEAP NO. 80/40.

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

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

In the appeal of:

Deeb Badran — Appellant.

v.

Edward Khalil Haddad — Respondent.

Eviction sought against a statutory tenant under Landlords and Tenants (Ejection and Rent Restriction) Ordinance, 1934 — Effect of condition in contract of tenancy that tenant should give landlord promissory notes in respect of rent for full period of tenancy.

Where a statutory tenant failed to comply with condition of original contract of tenancy to give landlord promissory notes in respect of rent for full period, landlord entitled to recovery of possession even though tenant pays rent punctually.

Koussa for Appellant.
Abcarius for Respondent.

Appeal from judgment of District Court, Haifa (in its appellate capacity), dated the 29th February, 1940.

JUDGMENT

Rose, J.

This is an appeal, by leave, from a judgment of the District Court of Haifa dismissing an appeal from a judgment of the Magistrate's Court, Haifa.

The Respondent was the tenant of a dwelling house, the property of the appellant, under an agreement for a period of one year which terminated on the 30th of November, 1939. The Respondent held over as a statutory tenant under the Landlords and Tenants (Ejection and Rent Restriction) Ordinance, 1934, and it is claimed by the appellant and conceded by counsel for Respondent that the tenant should be treated as being a tenant for a period of one year to date from the termination of the original agreement. This being so, we are treating the matter on this basis and expressly refrain from deciding the point, which has not been argued before us, as to whether a statutory tenant stands in the same position in all respects as if he held under a subsisting lease for a term.

Section 4(1)(b) of the Ordinance provides that no Court shall make any Order for the eviction of a tenant from a dweling house, notwithstanding that such tenant's contract of tenancy has expired, unless such tenant has failed to comply with any term of any agreement of tenancy in respect of such dwelling house. Section 4(2) provides that where by reason of the provisions of this section any tenant continues in occupation of any dwelling house after the expiration of any contract of tenancy the terms and conditions of such contract of tenancy shall, in so far as they may be applicable, be deemed to apply to such occupation. There is also a proviso that in certain circumstances the rent may be increased.

Apart, therefore, from the fact that the rent had been slightly increased, the terms and conditions of the original agreement survived.

Now, one of the terms of the original agreement was that the Respondent should pay the first month's rent in advance and should at

the same time give the appellant eleven promissory notes, payable at monthly intervals, in respect of the rent of the remaining months. It is common ground that the Respondent failed to comply with this condition. The Magistrate's Court and the District Court seemed to think that this condition was unimportant and, provided that the rent was paid punctually, might properly be disregarded.

While the matter is not free from difficultly, I cannot agree with this view. But for the Ordinance, the Respondent would not be a tenant at all and he is only entitled to remain in possession so long as he complies with its provisions. While it is unnecessary for this Court to weigh the comparative advantages for the landlord of receiving his rent monthly in advance or, at the outset of the term, receiving promissory notes for the full period, it may perhaps be pointed out that in the latter case the landlord might well be able to discount the notes forthwith. Be that as it may, payment by promissory notes was a term of the contract of tenancy.

For these reasons the appeal must be allowed; the judgment of the Magistrate's Court and the District Court set aside and an order of eviction be made in favour of the appellant against the respondent. The appellant will have the costs of this appeal and of the proceedings in both Courts below. As far as this appeal is concerned the costs will include the sum of LP. 15 for advocate's attendance fee.

Delivered this 14th day af June, 1940.

British Puisne Judge.

I agree *Chief Justice*

I concur *Puisne Judge*

CRIMINAL APPEAL NO. 56/40.

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

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

In the application of:

George Salim Dick — Applicant.

v.

The Attorney-General — Respondent.

Fraudulent appropriation of electric power — Conviction on uncorroborated evidence of an accomplice.

Conviction on evidence of an accomplice cannot stand if no sufficient corroboration.

Edit. Note: See Cr. Ass. A. 2/30 1 PLR 441; Cr. A. 160/37 3 CtLR 97.

Malak for Applicant.

Salant for Respondent.

Application for leave to appeal from judgment of District Court, Jaffa, dated the 17th June, 1940, whereby the applicant was convicted of fraudulent appropriation of electric power contrary to section 285(1) of the Criminal Code Ordinance, 1936 and sentenced to three months' imprisonment.

JUDGMENT

The Court after granting leave to appeal proceeded with the hearing of the appeal.

The appellant was convicted of the fraudulent appropriation of electric power contrary to Section 285 of the Criminal Code Ordinance and was sentenced to three months' improsonment.

The principal point taken on appeal is that he has been convicted on the uncorrobrated evidence of an accomplice. The evidence against him was given by a co-accused who was herself convicted and fined. In her evidence she said that it was this accused that did the tampering with the meter. It is suggested by Mr. Salant, that corroboration can be found in the fact that this tempering could not have taken place except by the use of a seal, which is given to the Electric corporation employees, and that this appellant had the opportunity of access to the seal. We do not think this is sufficient corroboration or indeed any corroboration at all. A mere possibility of access is not sufficient to comply with the law regarding corroboration of an accomplice.

For these reasons the appeal must be allowed and the conviction quashed.

Delivered this 24th day of June, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 71/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of:

Kamel El-Mobasher — Appellant.

v.

1. Haj Ali Abu Dabousa
2. Mustafa Doula
3. Ahmad Sabah. — Respondents.

"Contract of lease and agreement of sale" — Bills stating value to be price of machinery, subject matter of agreement — Purchaser failing to pay agreed instalments and seller claiming payment and restoration of property — Effect of art. 64 of Ottoman Code of Civil Procedure.

Where by terms of contract parties agreed that until full settlement of agreed value ownership of property shall continue to vest in seller, who shall be entitled to take property back whenever purchaser commits breach of contract and especially whenever he fails to pay agreed instalments, parties bound by such terms, no matter whether contract considered a sale by way of hire or hire by way of sale.

Edit. Note: Compare C.A. 24/39 6 CtLR p. 79; see C.A. 94/38 3 CtLR p. 268 and Edit. Note thereto; C.A. 98/38 ibid 270.

Appellant in person.

Elia (*by delegation*) for Respondents.

Appeal from judgment of District Court, Jaffa, dated the 21st March, 1940*).

JUDGMENT

We need not trouble you, Mr. Elia.

This appeal raises only one point and that is whether the agreement is to be considered an agreement of sale or a hire-purchase agreement. The District Court, who had all the facts before it, reached a conclusion that it is a hire-purchase agreement. With this we see no reason to interfere.

The appeal is therefore dismissed with costs to include LP. 15 for attending the hearing.

Delivered this 14th day of May, 1940.

British Puisne Judge.

CIVIL CASE NO. 119/38.

IN THE DISTRICT COURT OF JAFFA.

Before: Daoudi, J. and Touqan, J.

JUDGMENT

The facts of this case are :—

1 Both Parties made an agreement for installation of an en-

*) C.C.D.C. Jaffa No. 119/38, reported infra.

gine and its accessories in the orange grove of the Defendant by virtue of the produced contract dated 1/9/35, which bears the signatures of both Parties, and which contains printed and written conditions. At the top of the said contract there are in print the words "Contract of lease and agreement of sale", and the value of the object which the Plaintiffs were going to install in the orange grove of the Defendant was mentioned to be LP. 485, payable by specified instalments namely LP. 10 on the signing of the contract, LP. 115 at the time of receipt of the property, and the balance will be payable by three equal instalments of LP. 120 each, in bills, which the Defendant signed and delivered to the Plaintiffs.

2. In the bills signed by the Defendant and delivered to the Plaintiffs, the value is stated to be the price of the machinery sold to him in the contract dated 1.9.35.

3. When the Defendant became in default of payment of the instalments, on maturity, in accordance with the contract, this case has been instituted by the Plaintiffs for recovery of the value of the first bill falling due namely LP. 120 and for restoration of the engine and its accessories which have been installed in the orange grove of the Defendant, basing their claim on the ruling held by the Supreme Court in Civil Appeal No. 98/38, in the case of Selim Sabti and others which is similar to this case.

4. The defence put in by the Defendant is materially limited to his contention that he is a purchaser and not a hirer, and that this is proved by the fact that it is expressly mentioned in the bill subscribed by him and delivered to the Plaintiffs and in the receipt taken by him from them that the value is the price of the machinery and is not a rent thereof.

5. Later, on 10.6.39, both Parties agreed that a judgment be given against the Defendant for the value of the bill arising from the produced contract, and that the question of ownership of the engine and its accessories be postponed until sometime later, provided that if this value be not paid within four months, the Plaintiffs will be entitled to renew this case for determination of the ownership of the engine and its accessories. The Court gave judgment accordingly.

As the value awarded in the said judgment has not been paid within the prescribed period, this case has been renewed for completion of arguments concerning the ownership of the engine and its accessories.

6. The Defendant asked to call two witnesses, the signature of one of whom is affixed at the bottom of the contract, to clarify

*) 3 CtLR p. 270.

the intention of both parties at the time of conclusion of the contract as to whether it was a sale or by way of a hire.

7. Counsel for the Plaintiffs objected to the hearing of any witness other than the litigants in this case, stating that this is repugnant to the express terms of the contract.

In the light of the oral pleadings of both parties and of the inference it has drawn from the documents produced, the Court finds:—

(i). That both parties had agreed that the Plaintiffs should install in the orange grove of the Defendant an engine and its accessories for a price, on which they both mutually agreed, payable by specified instalments, and at the same time according to the terms of the contract (1) the Plaintiffs were given the right to continue their ownership of the engine and its accessories until full settlements of all the value agreed upon and (2) the Plaintiffs were given the right to take back the engine and its accessories when the Defendant commits breach of his undertaking, and particularly when the Defendant fails to pay the instalments or any part thereof as provided in clause 12,13 and 14 of the contract.

(ii). That a contract of this Nature may be regarded as a contract of hire, and in the result this contract may be construed as a contract of sale with specific terms agreed upon by both parties, and that both of them are bound by the terms mutually agreed upon by both of them in the contract, and in these circumstances the Defendant is not entitled to evade his commitments whether the contract is deemed to be a sale by way of a hire or a hire by way of a sale. Unless and until the Defendant carries out the terms of the contract by effecting payment, such sale cannot be deemed to be a perfect sale. Whereas such agreement relates to movable properties, they should be precisely observed by virtue of Art. 64 of the Civil Procedure Code, and whereas the Defendant has committed a breach of one of the stipulations of the contract by his failure to pay the value on the appointed times, therefore what he had agreed to should be enforced, namely, the handing back of the engine and its accessories.

Therefore it is hereby decided to give judgment for the return of the engine and its accessories, which are installed in the orange grove of the Defendant at Majdal village, to the Plaintiffs, with costs and LP. 3 to counsel for the Plaintiffs. Judgment in presence and subject to appeal, delivered in open Court in the presence of counsels of both parties this 21.3.40.

(Translated by Court interpreter).

PRIVY COUNCIL APPEAL NO. 23/38.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

Before:— Viscount Sankey, Sir Lancelot Sanderson and Sir Philip Macdonell.

In the appeal of:

Apostholic Throne of St. Jacob — Appellant.

v.

Saba Said — Respondent.

Debt bond expressed in French liras — Payment of interest on basis of gold rate — Dispute as to whether contract a gold or money contract—Constructive admission — Mejelle, Art. 79, 1588.

Defendant's conduct over several years in paying interest on basis of gold rate on a loan contract which not sufficiently clear whether gold or money contract — tantamount (capable of being displaced by rebutting evidence) that loan was gold.

Stoneham & Sons for Appellant.

L. T. Wilson & Co. for Respondent.

(*Appeal from judgment of the Supreme Court sitting as a Court of Appeal, C.A. No.* 72/36 1 *CtLR Rep.* 59).

Viscount Sankey. JUDGMENT

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

The question raised by the appeal is the extent of the defendant's liability to the plaintiff as representing the estate of Yakoub Giries Said, deceased, on a bond dated Aug. 16, 1916. The plaintiff submits, and both the Palestinian courts have so held, that the defendant was bound under the bond to pay the value on the date of repayment in Palestine currency of 1,000 French gold napoleons, with interest from Aug. 21, 1931. The defendant admits liability to repay the principal of the loan and interest thereon from Aug. 16, 1931, as sums of Palestinian currency — that is to say, (i) for the principal, LP. 791.282, and (ii) for the interest LP. 55.385 per annum.

The bond refferred to was in the following terms:

The Apostolic Throne of St. Jacob, Jerusalem.

Aug. 16, 1916.

No. 107. French L. 1,000.

DEBT BOND.

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

SEAL (Signed) The Chief of the Holy Throne
David Wartabet Derderian

It will be observed that the bond provided for interest at the rate of 4 per cent., but, by agreement between the parties, the rate of interest was increased in 1918 to 6 per cent., and a year later to 7 per cent. Interest was paid from time to time either in Turkish liras, Egyptian liras, French liras, Egyptian piastres and Palestine pounds, and the payments were indorsed on the back of the bond. No interest was paid after Aug. 21, 1931. On Oct. 28, 1935, the plaintiff commenced proceedings for the recovery of the amount due to him, and by para. 4 of his statement of claim he alleged:

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

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

The hearing in the District Court of Jerusalem took place on Apr. 9, 1936, the plaintiff contending that the bond indicated a debt of 1,000 gold napoleons, and he argued that the defendant was estopped by his own conduct from claiming that the debt was in other than gold napoleons. He drew attention to the payments made for interest and indorsed, as stated above, on the bond. The case was adjourned for a short time to enable the defendant to search the Turkish records for the exact text of the law enacted by the Ottoman government during the period of the Great War substituting paper currency for gold in Turkish dominions. The judgment of the court was given on May 25, 1936. It was brief, and in the following terms:

> The defendant is bound by the loan document and his subsequent admission by payment of interest on the basis of gold loan.
> Following decision in C.A. No. 85/32, the judgment must be given for plaintiff, amount of debt 1,000 gold napoleons at the rate of exchange upon date of payment, with interest from Aug. 21, 1931;

as agreed, to date of payment, provided the interest does not exceed the principal.

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

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

Their Lordships were referred, in an appendix to the case for the appellant, to various extracts from the Turkish, Egyptian and Palestinian currency laws, decrees and ordinances, but it is not necessary to set them out at length. By art. 1 of a draft decree concerning Turkish coinage in 1296 (1881), which was subsequently passed by the Chamber of Deputies, It is provided that the Turkish monetary unit is the gold pound of 100 piasters. By a Turkish ordinance of Aug. 22—24, 1914, it was provided that the Ottoman Bank would be exonerated of its obligation to redeem bank notes in gold for as long a period as that law should be in force. By a decree relating to the monetary system of Egypt, dated Oct. 18, 1916, it was provided in art. 1 that the monetary unit of Egypt is the Egyptian pound. The Egyptian pound is divided into 100 piastres. After the occupation of Palestine by the Allies, a notice was issued on Nov. 23, 1917, making Egyptian coins and bank notes legal tender. On Jan. 18, 1918, a notice was issued relating to acceptance of certain coins for purposes of receipts and payments, and it was provided as follows:

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

(2) Turkish coins:
L. Turkish (Gold) — 87.75 P.T. (Egyptian).

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

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

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

> The case came before the District Court on Apr. ,9 1936. The plaintiff's case was that the defendant was estopped from saying the transaction was not gold by the payments which were made and accepted on account of interest, these showing that the parties must have treated the loan as gold. This was done by showing that the payment of interest was calculated at the tariff rate under a public notice, dated Dec. 12 1918, on the basis that the interest was payable on a gold loan.
>
> The defendant argued that the transaction could not have been gold as there was then no gold coin in circulation ,and that, if it was in gold, the transaction was void, gold transactions being forbidden by law. He went on to say there was a definite issue of fact between the parties as to whether the transaction was gold.

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

> I think that the fact that interest had been paid for a number

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

Counsel for the defendant argued before their Lordships that the loan was repayable in any currency legal at the time of repayment. He contended that the two questions for determination were (i) did the bond by itself show that the contract was, to put it briefly, a gold or a gold value contract? and (ii) did the payment of interest show that the bond was a gold or a money contract? Several cases were referred to, including Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co., Ltd. (1), Feist v. Société Intercommunale Belge D'Electricité (2) and Ottoman Bank of Nicosia v. Chakarian (3), but none of these authorities was in point in the present case, for reasons which will appear later.

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

If the bond stood alone, and if attention were directed to the bond only, it might have been successfully contended that the contract was a currency contract as distinguished from a gold one. However, the bond did not stand alone. The payments of interest were sometimes in Egyptian liras at the tariff rate for gold coins, sometimes actually in French liras, sometimes in Egyptian piastres equivalent in amount and value to gold napoleons, sometimes in Palestine pounds with the necessary adjustment between the gold value of the Palestine pound and the Egyptian pound. These were admissions by the defendant by which he was bound.

The legal effect of admissions in Palestine is to be found in the Turkish Code (the Mejelle) which provides in art. 79 that a person is bound by his own admission, and, in art. 1588, that no person may validly retract an admission made with regard to private rights. It is clear, as was held by both of the courts below, that these payments of interest show that the defendant, by his conduct over a number of years, admitted that the loan was one of 1,000 gold napo-

leons, and consequently he was prevented by such admissions from claiming that he could discharge his liability other than by the payment of the amount claimed.

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

21.11.1939.

CRIMINAL APPEAL NO. 20/40.

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

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

In the appeal of :

Moshe Yehezkiel — Appellant

v.

The Attorney-General — Respondent.

Order by Magistrate for demolition of certain property without stating who should carry out order — Failure to carry out order of demolition within specified period — Indication by trial Court in subsequent judgment as to who should carry out original order of demolition — Town Planning Ordinance, sec. 35 — *Magistrates' Court, Jurisdiction Ordinance, sec.* 11(2).

1. Court directing demolition of a building under Town Planning Ordinance 1936—38 without indicating whether this should be done by convicted person or by Town Planning autho-

rities — entitled to explain in a subsequent judgment who should carry out original order of demolition.

2. Appellate Court may quash part of judgment relating to conviction and penalty or a charge under Town Planning Ordinance 1936—38, sec 35(2) (non compliance with order) and confirm part of judgment which directs demolition by Town Planning authorities.

Ginio for Appellant.
Said for Respondent.

Appeal from judgment of District Court, Jerusalem (sitting as a Court of Appeal),*) dated the 17th January, 1940, whereby the Magistrate's judgment, dated 5.12.39, convicting the Appellant of failing to comply with the order of the Magistrate, Jerusalem, dated the 26th of January, 1939, in Criminal Case No. 508/39, was set aside but the order of demolition to be carried out by the Jerusalem Local Town Planning Commission was confirmed.

JUDGMENT

On 26th January, 1939, the Magistrate made an order for the demolition of certain property if in the interim the Defendant did not obtain a permit from the proper authority. Against this there was no appeal.

No permit was obtained and the property was not demolished. Further proceedings were therefore taken against the Defendant under Section 35(2) of the Town Planning Ordinance, 1936—38.

The Magistrate fined him LP. 1, and ordered demolition. Against that order the Defendant appealed to the District Court. The District Court remitted the fine and quashed the conviction, but held —

> "As to the part of the judgment of the Magistrate directing that the demolition of the building originally ordered should be carried out by the Jerusalem Local Town Planning Commission, we consider that the Magistrate was entitled to explain his order of 26.1.39 as to who should carry out the order of demolition, and we see no reason to interfere with this part of the judgment."

The Defendant now appeals to this Court.

It may be that the judgment of the District Court is open to some criticism, but we think that this is a case to which the proviso to Section 11(2) of the Magistrates' Courts Jurisdiction Ordinance, 1939, may be applied, and we do not think any miscarriage of justice has actually occurred.

The appeal is therefore dismissed.

Delivered this 20th day of May, 1940.

Chief Justice

*) Cr.A.D.C. Jm. No. 58/39, reported infra.

CRIMINAL APPEAL NO. 58/39
DISTRICT COURT OF JERUSALEM.

Before:— Atalla, J. and Bardaki, J.

In the appeal of :

Moshe Yehezkel, Jerusalem — Appellant.

v.

The Attorney-General — Respondent.

JUDGMENT

This is an appeal from judgment of the Magistrate, Jerusalem, dated 5.12.39 in a criminal case No. 10113/39, whereby he convicted the Appellant under Section 35(2) of the Town Planning Ordinance 1936—38 on his plea and sentenced him to a fine of LP. 1.— and ordered that the demolition of the building in respect of which the contravention was committed to be carried out by the Local Town Planning Commission.

This building was originally ordered to be demolished within six months by a Judgment of the Magistrate's Court, Jerusalem, dated 26.1.39 in Criminal Case No. 508/39 which judgment became final. The building was not demolished within this period and the Appellant was thereupon charged before the Magistrate of neglecting to comply with the order of the Magistrate contrary to Section 35(2) of the Town Planning Ordinance 1936—38. At the Trial he is recorded to have pleaded guilty to the charge but following the plea there is a statement by the Appellant that he did not understand what he had to do i.e. under the first order. Nevertheless the Magistrate treated this as a plea of guilty and fined him LP. 1 or imprisonment to 14 days.

The first order does not indicate (as it should have in accordance with the provisions of Section 35(1)(c) whether the building was to be demolished by the Appellant himself or by some other person.

In the circumstances we think the Appellant might have been misled as to whether he or the Local Town Planning Commission or some other person should have carried out the demolition. On these facts we find that he is not guilty of the charge.

As to the part of the Judgment of the Magistrate directing that the demolition of the building originally ordered should be carried out by the Jerusalem Local Town Planning Commission, we consider that the Magistrate was entitled to explain his order of 26.1.39 as to who should carry out the order of demolition, and we see no reason to interfere with this part of the judgment.

The conviction under Section 35(2) is quashed and the fine of LP. 1 is remitted.

17.1.1940.

Current Law Reports

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LIST OF ABBREVIATIONS

AG, Attorney General
Applt, Appellant
CA, Court of Appeal
Co, Company
CPR, Civil Procedure Rules
Cr. Criminal
CXO, Chief Execution Officer
DC, District Court
Dfdt, Defendant
Eccles, Ecclesiastical
HC, High Court
Jdgt, Judgment
Jurisd, Jurisdiction
LC, Land Court
L Reg, Land Registry — Registrar
LS Ord. Land Settlement Ordinance
LSO, Land Settlement Officer
Mag, Magistrate
MC, Magistrate's Court
OCCP, Ottoman Civil Procedure Code
O. in C., Order in Council
OLL Ottoman Land Law
Ord, Ordinance
P/A, Power of Attorney
Pal Palestine, Palestinian
PC, Privy Council
PDC, President District Court
Pltf, Plaintiff
P/n, Promissory Note
Proc, Procedure
Reg. Regulation
Respdt, Respondent
SC, Supreme Court
UPT Urban Property Tax
WC Ord. Workmen Compensation Ordinance
XO, Execution Office, — Officer

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a. = another; o. = others.

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