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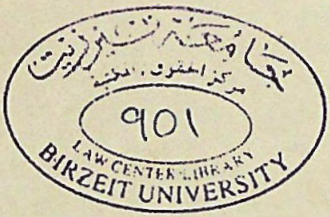

Weiss Press, Jerusalem

CIVIL APPEAL NO. 114/40.

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 case of:—

Ahmad Ibrahim Issa El Akki and 3 others. Appellants.

v.

1. Keren Kayemeth Leisrael Ltd.
2. Haifa Bay Developmeent Co., Ltd. Respondents

Correction of Land register by Settlement Officer — Allegation that ownership and possession of land were taken secretly and without any legal or equitable title or interest — Inference of good title drawn by Settlement Officer from undisturbed possession over a number of years — Belated application by Appellant regarding constitution of Court of Appeal — Courts Ordinance.

Parties desiring to avail themselves of rights under sec. 5(1) as amended of Courts Ordinance as to constitution of Supreme Court should do so at proper time.

Hassan Hawa for Appellants.
Eliash for Respondents.

Appeal from decision of Settlement Officer, Acre Settlement Area, dated the 3rd of April, 1940.

JUDGMENT

The Appellants' argument turns chiefly upon the effect of a correction of the Land register, as to which in their notice of appeal they say —

> "It is also submitted that the transaction of correction which was carried out in 1925 was irregular, fraudulent and destitute of any legal and/or equitable title and interest."

In this connection the Settlement Officer said in his decision —

> "The Plaintiffs suggest the Defendants secretly secured a title and arbitrarily took possession of the land but the fact should be recorded that the Defendants purchased a considerable area in the vicinity of this land in the years following 1925, and that the father of the Plaintiffs sold property to them in 1932 by a sale carried through the Land Registry. I discredit the allegation that ownership and possession were taken secretly and am quite satisfied that if Haj Ibrahim Issa Akki, who was a man of standing in Acre, had any claim to this land, he would have objected and taken steps to preserve his rights.

As it was, no objection was raised, and the possession of the defendants was undisturbed until land settlement proceedings in 1938."

It is clear that the Settlement Officer directed his mind to the point and dealt fully with it, and we agree with his conclusions.

The appeal is dismissed with costs on the lower scale. We certify LP. 15 for attending the hearing.

I may add that at the opening of this case I stated that I had received two applications from the Appellants as to the constitution of this Court. The second proviso to Section 5(1) of the Courts Ordinance, as enacted in Section 3 of the Courts (Amendment) Ordinance (No. 2) 1939, gives parties certain rights, but if they desire to avail themselves of them they should do so at the proper time.

Delivered this 27th day of June, 1940.

Chief Justice

HIGH COURT NO. 41/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the appication of:

Shlomo Salem Levy esh Sheikh (called also Salomon Alsheikh). Petitioner.

v.

Ayshe Abdul Halim Ghanyem of Tireh. Respondent.

Application for an order to produce body of child before High Court and to hand it over to petitioner.

High Court will not interfere in a question regarding custody of a child, where Respondent undertakes not to allow removal of child from place where it is for a certain period to give petitioner opportunity to institute proceedings in appropriate Court.

Argaman for Petitoiner.

Fauzi Abdul Hamid for Respondent.

Application for a summons to issue directed to respondent calling upon her to produce the body of the Child Malka Alsheikh before this Court on a date to be fixed and to show cause why she should not hand over the said Malka Alsheikh to the Petitioner.

ORDER

This is eminently not a matter in which this Court should interfere. The Respondent having undertaken not to allow the child to be re-

moved from the place where she is for a period of three months to give the Petitioner an opportunity to institute proceedings, if he so wishes, in the appropriate Court, the Rule is discharged with costs to include LP. 10 for advocate's attendance fee.

Given this 18th day of June, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 52/40.

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:

1. Taleb Ali Rb'a
2. Hussein Zabn Sweiti — Appellants.

v.

The Attorney-General — Respondent.

Conviction of robbery and sentence of 15 years imprisonment — Necessity of proving allegation of previous convictions — Criminal Procedure (T.U.I.) Ord., sec. 71.

Where previous convictions alleged they must be proved by evidence as to their nature and their dates.

A. Darwish for Appellant No. 1.
Appellant No. 2 in person.
Crown Counsel (Hogan) for Respondent.

JUDGMENT

In this case the first Appellant was convicted of robbery and sentenced to fifteen years' imprisonment. Probably the Court below was influenced by the fact that he had "five or six convictions already by the Court for robbery", but it does not appear from the record that these convictions were proved, and no details regarding them are given.

We think, therefore, that under Section 71 of the Criminal Procedure (Trial Upon Information) Ordinance as amended, this case should go back to the Court below, with direction to hear evidence as to the nature of these previous convictions and their dates.

As regards the second Appellant, no good grounds were shown why we should interfere, and his appeal is dismissed.

Delivered this 6th day of June, 1940.

Chief Justice

HIGH COURT NO. 42/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of:

Khamis Ibn Suleiman Abu Hasirah Petitioner.

v.

The Mayor and Municipal Councillors of Gaza Respondents.

Conviction for selling fish otherwise than in public market — Petition to High Court to prohibit Municipal Corporation from collecting fees under Bye-law.

1. Person petitioning High Court to order public officer or public body to refrain from doing a certain act must first show that such officer or body does or did such act.

2. Seashore as an open space — covered by Municipal Bye-laws prohibiting sale of specified commodities in open spaces.

Sheikh M. Mallah for Petitioner.

Ex parte.

An application for an order to issue directed to Respondents calling upon them to show cause why they should not be stopped from collecting municipal fees on fish sold at Gaza Seashore.

ORDER

This petition fails. The Petitioner was convicted by the Magistrate of selling fish, otherwise than in the public market of Gaza, contrary to the Gaza Municipal Bye-laws, 1935. In his petition to this Court he asks us to prohibit the Municipal Corporation of Gaza from collecting fees from him under the Bye-law. In the first place, there is nothing whatever in the papers before us to show that the Municipal Corporation have asked fees from the Petitioner. In the second place, the Bye-law seems to us to be perfectly in order, because the seashore on which the Petitioner sold fish is an open space, and, as such, is covered by clause 2 of the Bye-laws. Thirdly, the Petitioner has come to the wrong Court, because if he thought he had been wrongly convicted he should have applied for leave to appeal to the President of the District Court from the conviction of the Magistrate, and, if he got leave, tested the validity of the By-law in the District Court.

For these reasons the petition must be dismissed.

Given this 11th day of June, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 91/40.

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

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

In the appeal of:

Abbas Beidas — Appellant.

v.

Meir Pelyi — Respondent.

Promissory note made by interdicted prodigal and negotiated by payee — Action on promissory note against maker who is an interdicted person — Mejelle, Art. 990, 994, 1002 — *Bills of Exchange — Ordinance, sec.* 21.

1. Interdiction of a prodigal (a Moslem) under art. 990 of Mejelle — a matter within jurisdiction of Religious Court.

2. Person having no capacity to contract incurs no civil liability by signing a negotiable instrument, even if his act be a fraud which might give rise to criminal proceedings.

Moyal for Appellant.

Ben Shemesh for Respondent.

Appeal from judgment of District Court, Tel-Aviv (sitting as a Court of Appeal) dated the 23rd day of March, 1940.

Rose, J. JUDGMENT

This is an appeal from a judgment of the District Court of Tel-Aviv confirming a judgment of the Magistrate's Court of Tel-Aviv in favour of the Plaintiff (Respondent), who brought an action against the Appellant on a promissory note.

It appears that at the time of the signing of the note by the Appellant he was in fact an interdicted prodigal within the meaning of Article 990 of the Mejelle. The question as to whether or not that interdiction was good is not one with which we can deal. In my opinion that clearly is a matter which falls within the jurisdiction of the Religious Court concerned. It follows, therefore, that this case must be regarded on the basis of the appellant being an interdicted prodigal.

Now the drawer of the bill was a man called Spaak who endorsed it, and in the course of time the note came into the hands of the respondent who subsequently brought an action on it. Whereupon he was met with the defence that the note was invalid owing to the fact that the drawee was an interdicted prodigal.

Now the relevant provisions of the law are contained in articles 990 and 994 of the Mejelle. Article 994 says:

"An admission made by an interdicted prodigal of a debt due to another is absolutely invalid, that is to say, any admission made

> in respect to property in existence at the time the interdiction was declared, or accruing thereafter, is without effect."

It has been argued that, whatever the position may be under the Mejelle, under the Bills of Exchange Ordinance a holder in due course is not barred by such a defence. I am unable to accept this proposition in view of Section 21(1) of the Bills of Exchange Ordinance which expressly states that capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Subsection 2 of that section states:

> "Where a bill is drawn or indorsed by a person having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

The question therefore is whether the appellant on the material date had the capacity to contract and the answer to that seems to me to be contained in Article 990 of the Mejelle which says —

> "An interdicted prodigal is, as regards his civil transactions, like a minor of perfect understanding."

In this case no question has arisen as to whether all or any of the money which was advanced to the Appellant was for necessaries, and the reason for that is, no doubt, that the action was brought on the promissory note. If the action had been for money lent for the purpose of buying necessaries, the position might have been different; but that is not the case which we are trying.

The question remains to be considered whether the fraud, if any, of the Appellant affects his civil liability. In my opinion, even if he was fraudulent, that cannot affect his civil liability, which must depend on his capacity to contract; although his fraud might give rise to criminal proceedings. As the Appellant had no capacity to contract it follows that his signature on the promissory note cannot operate to fasten liability upon him.

We were referred in argument to article 1002 of the Mejelle, but this specifically refers to bankrupts, to which special provisions apply. Having regard to the special provisions for interdicted prodigals set out in Section 3 of Book IX of the Mejelle, we do not think that Article 1002 is relevant to this case.

The appeal must therefore be allowed, the judgment of the Magistrate's Court and the District Court set aside, and judgment entered for the defendant. The appellant will have the costs of both Courts below, and of this appeal, the latter to include the sum LP. 10 for advocate's attendance fee.

Delivered this 20th day of June, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 112/40.

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

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

In the appeal of :

Joseph Aboulafia — Appellant.

v.

1. Palestine Copper Industry "Nechushtan" Ltd.
2. Aharon Brizel Liphshitz. — Respondents.

Action against indorser of promissory notes with "bon pour aval" thereon containing no statement on whose account aval given — Letter by indorser of notes revealing his intention with regard to his guarantee.

1. Legal presumption that aval is given on account of drawer of bill (or first indorser of promissory note) may be rebutted by proving that it was on account of acceptor of bill (or maker of note).

2. Letter written by one business man to another stating he attaches "a promissory note, together with his guarantee thereon, from one of his good clients who pays in perfect order" — conclusive evidence that he intended to guarantee the maker.

Maman for Appellant.

Agranat for Respondent No. 1.

Appeal from judgment of District Court, Haifa (in its appellate capacity), dated the 8th day of March, 1940.

JUDGMENT

In this case the Appellant was sued by the first Respondent on five promissory notes which were made by the second Respondent and endorsed "Bon Pour Aval" by the Appellant. The point in the case is a very short one, namely, whether the Appellant should be considered as a guarantor of the maker or merely of himself.

The magistrate, relying apparently on Civil Appeal 222 of 1937 *), reported in the Law Reports of Palestine, Vol. 5, page 84, has stated the law as being that an aval on a promissory note is deemed to be given for the endorser and not for the maker unless the contrary is proved. In the proceedings before the Magistrate the Appellant denied that he intended to guarantee the maker, but the following letter from

*)3 CtLR p. 57.

him to the first Respondent was produced

Joseph D. Aboulafia,
Tiberias.
4th December, 1938.

Nechushtan Ltd.,
Haifa.

"Gentlemen,

Attached hereto are five promissory notes from one of my good clients who pays in perfect order, together with my guarantee thereon.

Promissory note due on				20.1.39	LP. 10.
"	"	"	"	20.2.39	LP. 10.
"	"	"	"	1.3.39	LP. 8.
"	"	"	"	15.3.39	LP. 8.
"	"	"	"	1.4.39	LP. 8.
			Total amount		LP. 44.

Please credit my account with the above consideration and furnish me with a general account of what is due from me up to date.

With many thanks,
(Sgd.) Joseph Aboulafia."

Upon this evidence the Magistrate held that there was no sufficient proof that the Appellant intended to guarantee the maker. On appeal, however, to the District Court, the learned Relieving President said:

> "To my mind, the Respondent's letter of the 4th December, 1938, as written by one business man to another, is capable of only one meaning".

Ientirely agree with this opinion and think that the only reasonable conclusion which a Court can draw is that the Appellant intended to guarantee the maker of the notes. I think therefore that the learned Relieving President was right in setting aside the judgment of the Magistrate and entering judgment for the first Respondent.

The appeal must therefore be dismissed with costs to include, as far as the first Respondents are concerned, a sum of LP. 10 for advocate's attendance fee. The second Respondent having been served, and not having entered an appearance, will have no costs.

Delivered this 2nd day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 72/40.

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

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

In the appeal of :

1. Fanny Elkunin

2. Daniela Elkunin
3. Nehama Elkunin. Appellants.

v.

Malka Reisel Elkunin and 11 others.
The Registrar of the Land Registry, Jaffa. Respondents.

Limitation of generality of Power of Attorney as to appearance before various Courts by written words in instrument—Requirements under Rule 314 *of Rules of Court* (*contents of Notice of Appeal*) *as to indication of Respondents — Civil Procedure Rules, Rules*

1. General words in Power of Attorney such as "to appear in various Courts which have jurisdiction in Palestine including Supreme Court in Jerusalem" insufficient to confer power to appeal, if instrument contains other words which limit its scope.
2. If addresses and occupations of some of Respondents unknown, this must be stated in Notice of Appeal.

24, 26, 314.

Goitein and *Gorodissky* for Appellants.

Eliash for Respondent No. 1.

Appeal from judgment of Land Court, Tel-Aviv, dated the 13th of March, 1940.

JUDGMENT

In this appeal from a judgment of the Land Court of Tel-Aviv, two preliminary points have been taken by the first Respondent. The first point is that there is no appeal before this Court because the Notice of Appeal is not signed either by the party appealing or by the advocate duly appointed to act on his behalf, as provided for in Rule 24 of the Civil Procedure Rules, 1938. The Notice of Appeal is signed by Mr. Goitein purported to act under a delegation for Mr. Gorodissky whereby Mr. Gorodissky transferred his power of Attorney to Mr. Goitein; it is therefore necessary to turn to the power given to Mr. Gorodissky. This power includes practically everything that can be done in the course of legal proceedings but not, curiously enough, anything about a power to appeal. It has been argued that certain general words give that power, but with this we do not agree. The power is made out enabling Mr. Gorodissky and another advocate to act in proceedings against one of the respondents, that is to say "in file No. 80/34 of the Land Court Tel-Aviv, in our capacity as defendants." It is true that the power enables the advocates to appear in the various Courts which

have jurisdiction in Palestine including the Supreme Court in Jerusalem, but in our opinion these written words must be held to limit whatever generality there may be in the words "the Supreme Court in Jerusalem." This appeal is not file No. 80/34, it is not a case in the Land Court in Tel Aviv and the person lodging the appeal is no longer in his capacity as defendant. It seems to us that any one of these objections would be fatal and the combination of the three makes it disastrous for the appellant. Nor is Rule 26 of any help to the appellants because the Rule cannot enlarge or vary a Power of Attorney. That disposes of that particular point, I think.

Another point that has been taken is that in the Notice of Appeal, which does not even say that it is a Notice of Appeal — it merely says that it is a Notice — the addresses and professions of the various respondents are not stated, contrary to Rule 314. Now, it is true, of course, that the addresses and professions or occupations of several of these respondents are not known. Substituted service had to be made in the Land Court and their addresses remained apparently unknown but, at any rate, as to the first respondent Malka Elkunin, her address is known because Dr. Eliash is appearing for her in this Court. With regard to other people, three others of these respondents also were served and their addresses apparently therefore were known and should have been stated. With regard to those who are not served, and if their actual addresses were unknown, then the fact should have been so stated in the Notice of Appeal, so that all parties should know the true position when they receive the notice and from the point of practice of course it is desirable and essential that the Registrar should know what the position is with regard to service, whether the appeal should be set down or whether substituted service is necessary before the hearing takes place. For all these reasons, therefore, the appeal will be dismissed.

There is no proper appeal before this Court and it must be dismissed. We would like to say that we have read the papers and we have read the proceedings and we have read the Notice of Appeal, and we think that in spite of whatever persuasive arguments Mr. Goitein might have addressed to us the result would have been the same, if that is any comfort.

The appeal will be dismissed with costs and LP. 15 fee for attending the hearing to the first respondent.

Delivered this 25th day of June, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 99/40.

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

Before :— Copland, J. and Rose, J.
In the appeal of :
Jacob Pravda — Appellant.

v.

L'Union Fire, Accident and General Insurance Co., Ltd. — Respondent.

Action for recovery of money under fire policy — Onus of proof that fire happened independently from existence of abuormal conditions — Waiver by insurer of nondisclosure of a previous fire — Double insurance.

1. Where insurance policy made by its terms not to cover damage by fire arising out of abnormal conditions and Court casts onus of proof upon Plaintiff — not enough for him to show that probability is that fire did not arise from abnormal conditions, he must prove there was no resonable possibility of it arising out of those abnormal conditions.

2. Court should be extremely slow to allow a plaintiff to escape consequences of not disclosing a material fact to insurer.

3. No double insurance unless at least a substantial part of same risk covered by both insurances.

Wittkovski for Appellant.
P. Joseph & Kost for Respondents.

Appeal from judgment of District Court, Tel Aviv, dated the 11th of April, 1940.

JUDGMENT

Rose, J.

This is an appeal from a judgment of the District Court of Tel Aviv. The plaintiff (appellant) took out a fire insurance policy with the defendants and, a fire having taken place on the 6th of October 1939, he instituted an action to recover under his policy.

Three main defences were raised the first of which was that the plaintiff failed to satisfy the onus cast upon him by clause 6 of the policy, which reads as follows :

> "This insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely occassioned by or contributed to by any of the following occurrences or which either in origin or extent directly or indirectly, proxi-

mately or remotely arises out of or in connection with any of such occurrences, namely:—

(1) Earthquake, volcanic eruption, typhoon, hurricane, tornado, cyclone, or other convulsion of nature or atmospheric disturbance.

(2) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) mutiny, riot, civil commotion, insurrection, rebelion, revolution, conspiracy, military, naval, or usurped power; martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.

Any loss or damage happening during the existence of abnormal conditions, whether physical or otherwise directly or indirectly, proximately or remotely occassioned by or contributed to by or arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions".

The Court below said that it was fully satisfied that at the time of the fire abnormal conditions did exist in the country and in the vicinity of the insured premises. Having regard to the position of the insured premises and the material date, we see no reason to dissent from this finding. The onus therefore fell upon the plaintiff to prove that the fire happened independently of the existence of such abnormal conditions. It seems to me that in deciding this question the Court below applied its mind to the proper considerations. After referring to evidence the effect of which went to show that the fire was probably caused by arson, the Court below went on to say —

"The fire took place at 6.30 — 6.40 p.m. in the evening, this evidence in our opinion tends to indicate a greater probability of the fire being started by someone in the building who remained behind when the office was shut.

On this evidence whilst we are of the opinion that the proba- other fires within a radius of 500 metres during the period May — September, 1939.

On this evidence whilst we are of the opinion that the probability is that the fire did not arise from the abnormal conditions existing, yet we must hold that the Plaintiff has failed to prove there was no reasonable possibility of it arising out of those abnormal conditions".

I am not prepared to say that the District Court was wrong in finding that the plaintiff had failed to satisfy the onus which was upon him and this is sufficient to dispose of the appeal.

I will however deal with the remaining two points. First, the defen-

dants allegend that the plaintiff failed to communicate a material fact, that is, that he had suffered a previous fire. The plaintiff in reply alleged that the defendants have waived this non-communication. The Court held that both the plaintiff's agent, a Mr. Oxman, and the local manager of the defendants company, a Mr. Halpern, were informed by the plaintiff of his previous fire. Now, while it is clear that a Court should be extremely slow to allow a plaintiff to escape the consequences of nondisclosure by an allegation of waiver on the part of the insurer, I think, that on the facts of this particular case the District Court was justified in coming to its conclusion that the defendants had in fact waived the plaintiff's nondisclosure.

Finally the defendants raised the defence of double insurance. The decision of this point has caused me some difficulty. It appears that the plaintiff, in addition to his fire policy with the defendants, had also taken out what is popularly known as a "riot" policy with Lloyds, which policy covered damage arising from riots, civil commotion and malicious damage, the last term including damage by fire.

Macgillivray in his book on Insurance Law (second edition) at page 875 says —

> "There is no double insurance unless at least a substantial part of the same risk is covered by both insurances".

In this case I am of opinion that the risk of damage by fire was covered by both these policies and it follows, therefore, that the defence of double insurance is established.

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

Delivered this 21st day of June, 1940.

British Puisne Judge.

HIGH COURT NO. 47/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of:

1. Abdel Raouf Barakat
2. Zaki Barakat
3. Hassan Barakat

Applicants.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Abdul Hamid Bibi
3. Henri Fogel & Yehiel Shugerman, Administrators

of the Estate of the late Haim Shugerman
4. Barclays Bank, Tel-Aviv
5. Ashrai Bank, Tel Aviv. Respondents.

Sale of immovable property in satisfaction of mortgage — Final order of sale and final 3 days' notice to debtor — Powers of Chief Execution Officer to re-open public sale of land.

Chief Execution Officer has power to accept higher bid for immovable property being sold in execution of judgment or satisfaction of mortgage even after expiry of prescribed 3 days' notice to debtor upon final order of sale.

Elkayam for Applicants.

ORDER

This is an application for an order to the Chief Execution Officer Tel-Aviv, to show cause why an order made by him allowing a sale of mortgaged property to be re-opened after the expiry of the final three days mentioned in Article 110, should not be set aside. Final Order for Sale in respect of the property has been given on the 24th of June, 1940, in the sum of LP. 10,000 to the petitioners. Incidentally the valuation of the property is LP. 23,000. On the 28th of June a new bidder appeared and offered the sum of LP. 12,500.— in advance, in other words, of 25% on the amount realised at the previous sale. This offer was accepted by the Chief Execution Officer. The Petitioners, who were the purchasers for LP. 10,000, object to the postponement and to the acceptance of this further bid on the ground that it is illegal and that the Chief Execution Officer had no power to accept the bid after the expiry of the final three days' notice. We are of opinion that the action of the Chief Execution Officer is covered by the provisions of Section 14 sub-section 1(b) as amended, of the Land Transfer Ordinance. That section gives thePresident of the District Court, who is of course the Chief Execution Officer, power to postpone sale of mortgaged prperty if, inter alia, having regard to all the circumstances of the case, it would involve undue hardship to sell the property. In our opinion it would involve undue hardship on the debtor if the property were sold for LP. 10,000 when it could be sold for LP. 12,500. It is unnecessary to say more. The application for an order is therefore refused.

Given this 4th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 113/40.

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

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

In the appeal of:

1. Mordechai Sherman
2. Palestine Electric Corporation Ltd. — Appellants.

v.

Feivel Danovitz — Respondent.

Claim of damages against employer and employee by person injured in running-down accident — Award of damages by application of English Common Law of Torts — Import and scope of art. 46 of Palestine Order in Council — Limited remedies in Palestine for injuries to person — Damage to property and damage to person — When findings of Criminal Court conclusive in ensuing civil action — Uncontradicted evidence.

1. English Law of Torts cannot be introduced into Palestine under art. 46 of Palestine Order in Council, except in certain minor matters; it cannot be applied in cases of damage to person through negligence.

2. If Criminal Court awards compensation up to LP. 100 to person injured as result of criminal act, it must do so immediately after conviction.

3. Loss of time and damage to business due to incapacity to work — personal injuries, not damage to property.

4. Findings of fact by Criminal Court only conclusive in a subsequent civil action where parties the same.

5. If evidence as to a certain fact in no way contradicted, Court right in making a finding accordingly.

(*Per Frumkin, J. dissenting*).

English Common Law of Torts applicable in Palestine, to extent provided in art. 46 of Palestine Order in Council, in all cases not covered by Palestinian Law.

Henigman for Appellants.
Friedman for Respondent.

Appeal from judgment of District Court, Tel-Aviv (sitting as a Court of Appeal), dated the 12th of April, 1940.

JUDGMENT.

Copland, J.

This is an appeal from a judgment of the District Court, Tel-Aviv, dismissing an appeal from the Chief Magistrate who had awarded damages for LP. 193.400 against both the Appellants jointly and severally, and for LP. 5 against the first Appellant only.

The first Appellant is a motor driver in the employment of the second Appellants, the Palestine Electric Corporation Ltd. A truck driven by the first Appellant was involved in a running-down accident on the Petach-Tikva road, in which the Respondent was seriously injured and was unable to work for a considerable time. He sued both the Appellants before the Chief Magistrate, asking for LP. 5 loss of clothing — medical expenses LP. 3.400 — traveling expenses LP. 5, and for "loss of time, and working capacity and damage to business" LP. 185.000. The Chief Magistrate gave judgment in his favour, holding that the English Common Law applied in the absence of any provision in Palestine Law for damage to the person, and this judgment was confirmed by the learned President on appeal, apparently with some doubt.

This appeal raises the question whether the English Common Law can be applied in cases such as this of damage to the person through negligence. There have been several cases in the lower Courts of this country, where it has been held that the Law of Torts is applicable in this country under the provision of Article 46 of the Order-in-Council, but there has hitherto been no definite judgment of this Court to this effect. In the Attorney-General v. Blam, C.A. 18/39 [1]), (6 P.L.R. 247), the point was raised, but the Chief Justice held that on the facts of that case it was unnecessary to consider it, since the act of negligence alleged was failure to erect gates at a railway level crossing, and since the obligation to erect gates was in England a statutory one, no question of the Common Law arose, and the other judges concurred.

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[1]) 5 CtLR, p. 241.

Again in Georg Jacobovitz Building Ltd. and others v. Jawittz, C.A. 62/40 [2]), which was a case of libel, the District Court had held that since there was no civil remedy for libel in Palestine the English Law could be imported, but no argument on the point was addressed to this Court, so this case cannot be an authority on the subject, since this Court expressed no opinion on this point.

It is common ground that the Mejelle provides no remedy for injuries to the person, the reason possibly being that the Ottoman Cri minal Code contained certain provisions dealing with cases of conpensation where a person was injured. These provisions have now been repealed, and the only provisions now are, first Section 43 of the Criminal Code, which allows a Criminal Court to award compensation up to LP. 100 where a person has been injured as the result of an act for which the perpetrator hes been convicted. This is a very limited remedy, since the Criminal Court which tried the criminal case must award the compensation immediately after the conviction. There is again the Civil and Religious Courts (Jurisdiction) Ordinance, Cap. 18, Section 6 of which allows a Criminal Court to award compensation in lieu of diyet — again a limited remedy. The Respondent's case rests, therefore, entirely on whether the English Law can be imported, and that depends on the applicabillity of Article 46 of the Order-in-Council. This article is as follows:

> "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdiction and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.
>
> Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

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[2]) Reported infra, p. 25.

Now what is the Common Law? In the sense in which it is used in the Order-in-Council it means, I think, customary law as opposed to statute law, and it includes rules of law derived from decided cases and other authorities — see Odgers on the Common Law, Vol. I, p. 1. What is this customary law? It is the law founded on the customs and habits of the English people, developed and extended over many generations, but all the time based on *their* customs and *their* habits. And the customs and habits, mode of life, mode of thought, and character of the English people are very different from those of the inhabitants of Palestine. This in itself would make it difficult to apply the English Law of Torts in its entirety to this country. It would be a grave injustice to force on another country a customary law which is founded on the totally different customs and habits of a totally different race. But there in another and a graver objection, to my mind, and that is that hardly anyone in this country knows what the Common Law is. The Law of Torts is contained in various textbooks, and in hundreds of decided cases, which the large majority of the people in this country cannot even read, because they are in English, and the same applies to a considerable number of the Judges and Magistrates,who would be called upon to enfore and apply it. It is not right or possible in my opinion to create a liability which may affect a large proportion of the population, when that population has no means of knowing what the extent of that liability is. It is a fundamental principle that people must have an opportunity of knowing what the law is.

Again, the English Law of Torts has been largely amended by statute— if the Courts of this country were therefore to enforce it, we should have to apply only the Common Law, since we cannot apply any statutory amendements — in other words we should apply, in its original customary form, a law which has been found unsatisfactory in certain respects in England — another injustice.

I am not unmindful of the fact that certain provisions of the Common Law and doctrines of equity have been applied in this country, but they have been applied only to a minor degree. We now have, rightly or wrongly, the differences between a penalty and liquidated damages — the doctrines of specific performance and equitable title can now be invoked, and the Common Law rules of evidence are largely applied in the trial of cases in the Courts. But it is a very different matter to apply the whole Law of Torts by this method. If it is desired to introduce a Law of Torts in this country, then it should be done by Ordinance, when everyone will then, in theory at any rate, know what it is. Such a revolutionary change in the law of this country must be

made by legislation. If the Courts were to introduce it, then we should in effect be acting as law-makers — whereas our duty is to interpret laws, not to make them. For many years the Courts of this country were reluctant to act on Article 46, in my opinion wisely, since the difficulties of introducing the Common Law were too apparent — the doctrines of equity are more easy to bring into force, since they are aimed at removing hardships, and ensuring fair play.

For these reasons I do not think that the English Common Law of Torts can be introduced into this country by means of Article 46, except in certain minor matters, since, in the words of the proviso, the circumstances of Palestine and its inhabitants do not permit this course to be adopted.

It follows therefore in this case that the second Appellants are under no liability towards the Respondent, and neither is the first Appellant except for the amount of LP. 5, being the cost of a suit of clothes.

There were two further matters which were argued before us, and which, I think, should be dealt with. One is that there was no proof of special damage, and that the statement of claim does not disclose any allegation of pain and suffering. I think that the claim is sufficient, though it might have been better if it had been shewn in the claim how the item in para. 5(e) had been made up. At the time when the claim was lodged, the new Magistrates Courts Procedure Rules were not in force, it must be remembered, and the evidence of the plaintiff as regards damage was uncontradicted by any other evidence. And in any case, I doubt whether the distinction between special and general damages obtains in Palestine.

The second point is that loss of time and damage to business due to the incapacity of the plaintiff is damage to property. It is quite clear that, on the authority of English cases, this is not so — such items are properly classed as personal injuries.

There is one more point which I would mention. The Chief Magistrate, basing himself in his judgment on the judgment in Keren Kayemeth Leisrael v. Hillal, L.A. 57/36 [3]), held that he was bound by the findings of the Magistrate in the criminal case. In this I think that he was wrong, because the parties in the criminal case were not the same as those in the civil case before him.

The law on this point was further considered in Abu Sham v. Attorney-General, C.A. 25/39 [4]), (6 P.L.R. 216) and it was there laid

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[3]) 2 CtLR, p. 1.
[4]) 6 CtLR, p. 224.

down that the findings of fact by the Criminal Court are only conclusive in a subsequent civil action where the parties are the same — that was not the case here. The Chief Magistrate should have based his finding of negligence on evidence heard by himself.

I mention this in order to put the matter straight, though in this particular instance the error made by the Chief Magistrate is not of importance in the result. As the evidence laid before the Chief Magistrate was in no way contradicted, the Chief Magistrate was right in his finding of negligence, though he gave the wrong reason. In any event, from the facts of this case, mainly, that the Respondent was walking on his left side of the road and was overtaken from behind by a motor car, well over on its wrong side of the road, this in itself is prima facie evidence of negligence on the part of the driver, and the doctrine of res ipsa loquitur applies.

I think, therefore, that this appeal should be allowed in respect of the sum of LP. 193.400 adjuged to be paid by the two Appellants jointly and severally, and the judgments of both Courts below in this respect set aside, and the claim of the Respondent (Plaintiff) in respect of this amount should be dismissed.

With regard to the amount of LP 5 therefore, awarded against the first Appellant singly, the appeal must be dismissed.

The Appellants will have three-quarters of the costs in all Courts, both here and below, and LP. 10 fee for attending the hearing in this Court.

Delivered this 12th day of July, 1940.

British Puisne Judge.

I concur.

Puisne Judge.

JUDGMENT.

Frumkin, J.

On previous occasions I expressed at some length my views as to the main points of law involved in this appeal. In Haifa Municipality v. Khoury (C.A. 88/30, 1 P.L.R. 724) it was for the first time laid down that the Mejelle applies only to claims for damages to property, and not to claims for damages to the person, and why. In Attorney-General v. Blam (C.A. 18/39 [5]), (6 P.L.R. 247) I explained why, to

[5]) 5 CtLR, p. 241.

my mind, the law of Palestine provides no relief for a claim in the nature of the present one as against an employer. In another case, Khoury v Slavousky (C.A. 132/38 [6]), (5 P.L.R. 378) I stated my views as to when and under what circumstances Section 46 of the Palestine Order-in-Council is to be invoked, and in Attorney-General v. Blam (supra at p. 254) involving a principle similar to the one of this appeal, I came to the conclusion that —

> "...neither the Mejelle nor any other law contemplated in the first part of Section 46 of the Palestine Order-in-Council does extend or apply to the present case. There is nothing which calls for the application of the qualifying proviso of the said Section, and this case may therefore be decided in conformity with the common law and doctrines of equity in force in England."

It follows, therefore, that both the Chief Magistrate and the District Court were to my mind right in invoking Section 46 of the Palestine Order-in-Council and in holding that the English Common Law of Torts applies to this case.

It remains, therefore, for me to consider whether under common law the Chief Magistrate was right in the conclusions he arrived at. Since I remain in the minority, and the judgment of the learned Chief Magistrate will be set aside because my learned Brothers are of the opinion that common law does not apply at all, I will deal with the alternative grounds of appeal very shortly. The Chief Magistrate relied on the criminal proceedings in so far as it was necessary to establish the facts of the accident, which in any case were not disputed. As to the amount of damages, he himself heard evidence in the civil proceedings at which both the Appellants were represented, and on that evidence he was justified in his findings. For the purpose of this case it does not much matter whether the claim was for special or general damages, and in any event I would not be inclined to upset the judgment on these technical grounds alone. In my view, therefore, the appeal should be dismissed, and the judgment of the lower Courts confirmed.

I wish, however, if I may say so, to approve of one argument advanced by my learned Brother, Copland, in pointing out the difficulties in introducing the Common Law of Torts into this country, and that is that the common law has been amended by statute, and such amendments this Court would not be in a position to apply. If an institution could not be made use of in its entirety, it may perhaps be better not

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[6]) 4 CtLR, p. 25.

to make use of it at all.

But regard should also be given to the other side of the picture. My brother considers it an injustice from several points of view to introduce the English Common Law of Torts into this country, but what about the injustice to which any member of the public is subjected if he has the misfortune to be the victim of an accident, especially when that accident was caused by a negligent employee?

Not only has he no relief whatsoever against the employer even if the employer was the cause of the negligence, but even as regards the person directly causing the accident he may claim for torn clothes but has very little relief for damages caused through injuries to the person, such as, surgical expenses and incapacity to work. He has certainly no relief whatsoever before a civil Court distinct from a criminal Court.

Of course it would be much better if the legislation had enacted a complete code to cover all aspects of the law of Torts, but pending such legislation I am tempted to turn to a very wise maxim of the Mejelle —

"The smaller of two harms is chosen" (Art. 29).

Rather than leave the citizen without an effective relief it would, in my humble opinion, be better to invoke Article 46 of the Order-in-Council, which in the words of Lord Atkin enriches the jurisdiction of the Courts of Palestine, and apply the Common Law of Torts, incomplete as it may be, which was however good enough for the English people for centuries without the recent statutory improvements, and leave it to the legislature of this country to introduce such improvements by statute as it had already done with the Workmen's Compensation Ordinance.

But as the majority of the Court is against me, the entire remedy now lies with the legislature.

Delivered this 12th day of July, 1940.

Puisne Judge.

CIVIL APPEAL NO. 62/40.

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:

1. George Jacobovitz Building Ltd. 2. Dr. Hans Jacobovitz.
3. Georg Jacobovitz. Appellants.

v.

Zwi Jawitz. Respondent.

Civil action for libel — Claim of damages against a company and a director thereof — Import of English Law as to civil libel under art. 46 of Palestine Order in Council — Director of company joined as defendant after he answered interrogatories on behalf of company — Answers to interrogatories referred to by parties though not put in evidence.

1. (a) A party intending to rely upon answers to interrgoatories should put them in evidence; Court not entitled to rely upon them merely because they are on file.

(b) Where answers to interrogatories repeatedly referred to by parties Court entitled to treat them as being before it.

2. Answers to interrogatories given by a person in capacity of representative of a corporation — not admissible against him, if he later becomes a party to the proceedinngs, as answers to interrogatories. As admissions they may be evidence against him, but have to be proved as any other admission.

Grunwald for Appellants Nos. 1 & 2. *Seligman* for Appellant No. 3. *Sassoon* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 4.3.40.

JUDGMENT.

The Respondent as Plaintiff in the District Court began an action on 1st June, 1938, against George Jacobovitz Building Ltd. and Dr. Hans Jacobovitz, a director thereof, claiming damages for libel. The libel was said to be contained in two circulars, copies of which were attached to the Statement of Claim, and which were alleged to have been published in or about February and March, 1938. The first was dated 14th February, 1938, was addressed to the Ashrai Bank, and was as follows:—

"Our firm has erected a building at 57, Pinsker Street, for Mr. Zvi Javitz (address: Agrobank, Tel-Aviv).

"We beg to inform you that we shall willingly give you any information about Mr. Javitz, on the basis of our experience with him in the above deal.

"The above information will be given by us confidentially."

The second was headed Tel-Aviv, date as post-mark, and began "In-

formation re Zvi Javitz", and then followed some allegations about a building transaction, and other matters. The innuendo was that the plaintiff was a dishonest business man.

In the defence dated 21st July, 1938, the first Defendant (the Company) admitted writing and sending circular No. 1, but denied that it was libelous, and said that the allegations of fact were true. They denied that they wrote or published circular No. 2.

The second Defendant pleaded —

> "Defendant (i.e. No. 2) denies that he ever wrote and published circular No. 1 or circular No. 2 attached to the statement of claim, and whilst circular No. 1 is known to him in his capacity as member of the Board of Directors of Defendant No. 1, circular No. 2 is wholly unknown to him."

The parties submitted agreed issues on 11th November, 1938.

It may be noted that apart from the question whether an action for libel would lie, the only issue as to circular No. 2 as regards both Defendants was, was it published generally, not to any particular person or at any particular date?

Next came interrogatories to be answered by Georg Jacobovitz, a director of the company, on behalf of the first Defendant, and by the second Defendant.

In his answer Georg Jacobovitz said that he dictated and had posted circular No. 1, and that it was sent to several persons, that it was followed by circular No. 2, which he authorized and dictated, but "that circular No. 2 was posted and despatched without my authorization, and to my knowledge without my signature, by a mistake in my office. I do not know to whom it was posted."

Dr. Hans Jacobovitz said that circular No. 1 was authorized and composed by Georg at the office of the company, and "that as far as I remember I was informed on or about February, 1938, by Mr. Georg Jacobovitz that circular No. 2 was posted without his signature and without his authorization."

After these answers Georg was joined as a Defendant, and on 20th March, 1939, issues between him and the Plaintiff were approved by the Court.

There then followed certain applications with regard to the adequacy of the pleadings, which could have been more conveniently considered before the issues were framed.

After delays, for which each side blames the other and to which local conditions may have contributed, the action came before the Court on 5.4.39.

It was firstly argued that there is no civil remedy for libel in Palestine, but the District Court decided that English law could be im-

ported under Article 46 of the Order-in-Council, and no argument has been addressed to us upon the point.

Then there followed further argument as to the adequacy of the pleadings. Again it is obviously convenient that such matters should be considered before the issues are settled. After much time had been wasted, on 31.5.39, Mr. Sassoon for the Plaintiff submitted that the Defendants had admitted the publication of the circulars, and the Court pointed out with admirable clarity that in the issues as agreed "publication of circular No. 2 is denied by Defendant No. 1, while No. 2 denies publication of both circulars. Defendant No. 3 denies publication of both circulars."

The Plaintiff then gave evidence. He said he got circular No. 2 from different persons. He said, apparently without objection being taken, —

> "When I heard about these circulars I thought it was a joke at first. I did not take them seriously. When they were repeated however many people called me up on the 'phone and asked me what I had done to the defendants to warrant the statements they were making."

He also denied the allegations as to the building transactions.

On behalf of the first and second Defendants he was not cross-examined as to the publication.

In answer to Mr. Seligman for the third Defendant he said —

> "When I first got the circular it conveyed no particular meaning and I treated it as a joke. Subsequently I changed my mind and brought this action because people asked me several times what I had done to defendants as if I had robbed him or done him something wrong.... The arbitration negotiations took place before the publication of the circulars.
>
> "I received a number of copies of Z.Y. from different people. I can't remember them all. I may have shown the document to persons. I am sure persons brought me the documents. Mr. Cohn Amdursky shewed me the document. I am not sure if I shewed it to Amdursky first."

It will be seen that there is no cross-examination as to the date of publication.

A witness, Otto Kohn, said he received a copy of circular No. 2 about October, 1938, and another, Jacob Amdursky, said he saw it in the Defendants' office, and that Hans Jacobovitz gave it to him to read. In cross-examination by the third Defendant he said —

> "It may have been in November, or in October, or in December. I used to see the parties nearly every day. The first person who told me about the circular was Hans Jacobovitz."

He then referred to a meeting and said — "This meeting was after the circular had been published." In re-examination he said —

> "Defendant (presumably Hans) said to me I have written this

> circular and I am shewing it to you now. He did not say he had just written it. I don't remember the month. It was in the rainy season."

and to Court he said —

> "He told me he had written the circular because plaintiff had caused him inconvenience and he wanted to tell his friends to be careful with their dealings with Mr. Jawitz. He said it was his intention to send the circular out."

There was other evidence as to the building, and the Plaintiff closed his case. He did not formally put in the answers to the interrogatories.

The Defendants submitted that no case was made out, but the Court rejected the submission.

An advocate was called who dealt with the building transaction, and in cross-examination he said —

> "I did not advice the firm about the circulars but on the contrary young Jacobovitz (Hans) said his father was about to send a circular about the plaintiff and he asked me to speak to his father and advice him not to. I spoke to the father about it and he said he would not send the circulars. I deny that I hold them anything about the chamber of commerce."

and two engineers gave evidence about the building.

On 24.11.39 it was said that Defendant No. 3 (Georg) was on his way to Palestine, and that Defendant No. 2 (Hans) was also out of Palestine, and an adjournment was sought and granted. On 15.12.39 it was stated that Georg was still away but would be back in January, and that Hans was in England, and an application was made to take his evidence on commission. The application for a commission was refused, but a final adjournment was granted until January.

In the result no further evidence was produced by the defence.

In their final address to the Court the Defendants took the point that the answers to interrogatories had not been put in. The position with regard to them was that they were on the file of the Court, and that on 23.2.39, before the third Defendant had been joined, his answers on behalf of the Company had been referred to, and on 20.3..39, after the third Defendant had been joined, Mr. Sassoon for the Plaintiff said —

> "In answers to interrogatories Defendants admit that the circulars were posted by them to various persons. Third Defendant says although he authorized the printing he did not authorize the posting. He admits that he dictated the letter to his clerk. That is 'publication'."

to which Mr. Seligman for third Defendant replied —

> "No. 3 Defendant has made no admissions in his personal capacity. He has not replied to interrogatories in his personal capacity."

The District Court found the documents to be defamatory and untrue,

and then went on to consider publication. It found that the circulars had been published, and that all three Defendants were liable, and awarded the Plaintiff LP. 300 as damages. In so doing the Court stated —

> "The answers to the interrogatories form part of the record of the proceedings, and as such it is competent for the Court to consider them in their entirety as part of the evidence in the case."

There can be no doubt that the words were defamatory, and the Court held that they were untrue — the onus of proving they were true clearly being upon the Defendants — and I do not think there are any grounds upon which we should interfere with the amount of the damages. There remains the question of publication.

Having regard to the issues, and the Plaintiff's evidence — apart from the answers to the interrogatories — I think the Court was entitled to find that the libel was published before action brought, — who then published it? to answer which question brings me to consideration of the answers to interrogatories. A party intending to rely upon such an answer should put it in evidence, — the Court is not entitled to rely upon it merely because it is on the file. As I have said, however, in this case the answers were referred to several times, and I think the Court was entitled to treat them as being before it.

As to the Company, — on Georg's answers, without further explanation there can be no question that the Court was entitled to hold that that Defendant published the libel. Hans, in his answers, to some extent supports the case against the Company, but there is no admission by him in his personal capacity, and, for what it is worth, to show his state of mind, there is the answer of the advocate, but I think the Court was justified — taking Amdursky's evidence as a whole — in holding Hans liable.

As to George — his answers were given as a director of the Defendant Company, not in his personal capacity, before he became a party to the proceedings. They never could become admissible against him as answers to interrogatories. As admissions they might be evidence against him, but they would have to be proved as any other admission. This was not done, and I do not think they were even made evidence against him in his personal capacity. Neither do I think that Hans's answers to interrogatories were evidence against Georg.

I see no reason, particularly having regard to the delay in making the application, to interfere with the discretion exercised by the District Court in refusing to order Hans's evidence to be taken on commission.

In my judgment the appeal by Georg Jacobovitz succeeds, and the judgment against him should be set aside. The appeals by Georg

Jacobovitz Building Ltd. and Hans Jacobovitz fail, and are dismissed.

In the circumstances of this case, Dr. Grunwald on behalf of all the Appellants, and Mr. Sassoon for the Respondent, agree that no order should be made as to costs.

Delivered this 23rd day of May, 1940. *Chief Justice*

HIGH COURT NO. 43/40.

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:

1. Dr. Jacob Sheinkermann
2. Nissan Ruda — Petitioners.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Itzchak Machniss. — Respondents.

Sale of mortgaged property through Execution Office — Chief Execution Officer ordering mortgagee making a bid to pay deposit or furnish bank guarantee — Controversy of practice in different Districts of Palestine re deposit when mortgagee makes a bid — Proper interpretation of art. 103 *of Ottoman Execution Law.*

Judgment Creditor bidding in sale of debtor's immovable property — need neither pay prescribed deposit nor file bank guarantee, if he agrees to a corresponding charge on moneys payable to him out of proceeds.

Ruda for Petitioners. *Salant* for Respondent No. 1.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his order, dated the 31st of May, 1940, in Tel-Aviv Execution File No. 13704/37, whereby he refused to allow Petitioners to make a bid for the purchase of the mortgaged properties if they failed to deposit in the Execution Office in cash 10% of the amount assessed, or furnish a bank guarantee in a like sum, should not be set aside. Alternatively, that the First Respondent be ordered to accept from Petitioners a personal or notarial guarantee in the said sum against security of the money invested in the mortgage (in other words, that transfer of the mortgages of the Petitioners be not allowed pending the final sale in the said file).

O R D E R.

This is a return to an order nisi directed to the Chief Execution Officer, Tel-Aviv, to show cause why his order, requiring the mortgagee to pay a deposit on a bid he had made in the sale of the mortgaged

property, or to file a bank guarantee for that sum, should not be set aside.

We have had the assistance of Mr. Salant, who appeared for the Chief Execution Officer.

Article 105 of the Ottoman Law of Execution, which came into force in 1914 as translated, requires that bidders on offering their bid must pay a deposit of ten percent of the estimated value of the property. The interpretation of this provision depends on the meaning that must be given to the word deposit.

There was some controversy as to the practice prevailing in the different districts in this matter. We made inquires, and it seems deposit has been taken to include a bank guarantee, and in many cases an undertaking such as is contemplated in the order nisi.

We therefore make the order absolute subject to its being made clear that the bidders' liability, if any, shall be a change on moneys received on account of the mortgage debt.

Subject to this, Applicant is entitled to the order for which he asks, and it is made absolute.

Delivered this 23rd day of July, 1940. *Chief Justice*

CIVIL APPEAL NO. 146/40.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

in the case of:

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

v.

Isaac Bernstein. Respondent.

Criminal charge of rash and careless driving causing injuries and damages — Civil claim attached to criminal case — Acquittal from criminal charge without mentioning attached civil claim — Civil action against acquitted defendant — Res judicata.

Facts on which conviction or acquittal based — res judicata as between same parties and cannot be queried in civil case.

Crown Counsel (*Bell*) for Appellant. *Ben-Haviv* for Respondent.

Appeal from judgment of District Court, Haifa (appellate capacity), dated the 30th May, 1940.

JUDGMENT.

We need not trouble you, Mr. Ben-Haviv.

The facts out of which this present appeal arises are the following. The respondent was prosecuted on a criminal sharge before the Magsitrate of driving a lorry rashly and carelessly, by reason of which rash-

ness and carelessness he collided with a trolley car on the Palestine Railway, as the result of which several persons were injured and considerable damage was done apparently to the railway trolley. The Magistrate heard the evidence and found as a fact that the respondent was not negligent but that the accident was due to careless driving on the part of the man in charge of the railway trolley. Attached to the criminal case there was a civil claim lodged on behalf of the General Manager of the Railways claiming a sum of LP. 144.450 mils. The Magistrate, after his finding that there was no negligence on the part of the respondent, dismissed the criminal charge but failed to make any mention of the fate of the civil claim. Thereupon, nothing daunted, the Attorney-General filed a civil action before the Magistrate claiming this same sum of LP. 144.450 mils, alleging that the General Manager had suffered damage due to the wilful and improper driving of the respondent. The Magistrate who heard the case held that he was bound by the findings of fact in the criminal case, since the parties were the same in both the criminal and civil cases, and dismissed the action on the ground that it was res judicata. On appeal to the District Court, that Court dismissed the appeal and gave leave to the appellant, the Attorney General, to come here.

In our opinion the learned Magistrate was correct in holding that he was bound by the findings of fact made in the criminal case. Following Civil Appeal No. 25/39 *), Abu Sham v. Attorney-General (6 P.L.R. 216), it is settled law that criminal proceedings are conclusive evidence, as between the same parties, not only of the conviction, and the same applies also to acquittals, but also of the facts on which that conviction or aquittal was based. Neither the conviction or aquittal can be queried in a civil case. The basis of the present appellant's claim is negligence of the respondent. It has already been found in the criminal proceedings between the same parties that the respondent was not negligent. The question of negligence therefore is res judicata, as between the two parties to this action; it is in that sense, and not perhaps in the wider sense as held by the learned Magistrate that the matter is res judicata. Even though, under the Mejelle, responsibility for damage may be wide, yet a plaintiff cannot sue a defendant for damage due to his, the plaintiff's, negligence, as was the case here.

For these reasons we think that this appeal fails and must be dismissed. The respondent will have his costs on the lower scale and LP. 10 fee for attending the hearing.

Delivered this 23rd day of July, 1940.

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*) 6 CtLR p. 224.

HIGH COURT NO. 40/40.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of:

Nahum Perlmutter — Petitioner.

v.

1. The Chief Execution Officer, Tel-Aviv.
2. Eliezer Hazav. — Respondents.

Action for return of goods or their value and provisional attachment of the goods — Judgment for return of goods claimed and confirmation of provisional attachment — Order to realese attachment of goods upon payment of whole sum due — Order to return released goods to Execution Office and order to use force if necessary — Verbal explanation by Judge issuing judgment as to effect of his judgment — Order to release attachment of goods and deliver to purchaser and subsequent belated order to detain delivery — Re-seizing goods after completion of execution — Non-interference of High Court after execution completed.

1. Explanation by Judical Officer of ambiguity in Judgment under art. 6 of Execution Law must be in writing.

2. Once attached goods, subject matter of judgment, released and delivered to purchaser execution completed, and order of Chief Execution Officer to re-seize same goods illegal.

3. When execution completed, whether rightly or wrongly, High Court will not interfere.

Wolf on behalf of *Hofmann* for Petitioner.
Wilner for Respondent N. 2.

Application for an order to issue directed to the Respondents calling upon them to show cause why the orders of the First Respondent in Tel-Aviv Execution File No. 1621/40 dated 3.5.1940, 8.5.40 and 10.5.40 should not be set aside.

ORDER.

This is a return to an order nisi directed to the respondents calling upon them to show cause why certain orders of the Asst. Chief Execution Officer, Tel-Aviv, should not be set aside. The facts in the proceedings are complicated but, I think, they can be summarized sufficiently as follows.

The Petitioner brought an action in the Chief Magistrate's Court, asking for the value of certain goods alleged to be detained by the second respondent or for the return of the goods, and for provisional attachment on the goods. The provisional attachment was granted and the Chief Magistrate tried the case and gave judgment in the following terms, after making various remarks, of a not too complimentary nature, against the defendant (second respondent) :—

> "I give judgment for Plaintiff against defendant for return of the goods claimed and costs and advocates' fees LP. 10.— provisional attachment confirmed."

This judgment was put in execution and the notice issued from the Execution Office served upon the respondent was to pay the sum of LP. 140 and the costs or to return the goods. This was the first mistake because the judgment was for the return of goods and no mention was made in the judgment of any sum of money. The second respondent then offerred to pay the money and the Asst. Chief Execution Officer, on the 3rd of May last, ordered release of the attachment upon payment of the whole sum due. Another application was made to the Asst. Chief Execution Officer on the 5th of May with the same result. On the 6th of May, the sum of LP. 159.645 mils was paid into the Execution Office, and on a further application, after some difficulty had apparently been met with, the Asst. Chief Execution Officer ordered the return of the goods and ordered force to be used if necessary. A further application was made to the Asst. Chief Execution Officer and finally, on the 8th of May, the Chief Magistrate was interviewed by the parties, and the Asst. Chief Execution Officer then wrote a minute in which he said that he applied to the Chief Magistrate in accordance with article 6 of the Execution Law to get an explanation of the judgment and the Chief Magistrate had expressed the opinion that there was no ambiguity in the judgment and that the goods were attached only to secure the debt.

Now, with regard to that, I would like to remark that when an application is made under article 6, it is the duty of the Judicial Officer, who is referred to, to give his explanations in writing as the law demands and not in conversations with various people. It is

clear in this case that the Chief Magistrate's memory had completely misled him as to what his original judgment was. That is another mistake in the series of mistakes made in these proceedings, due to irregularity in procedure. After expressing this opinion, the Asst. Chief Execution Officer ordered the release of the attachment and the goods were then released and handed over to the purchaser.

We come now to an even more startling episode, namely, the action of the Registrar of the District Court of Tel-Aviv. After the goods had been released an application was made by the petitioner to the President of the District Court, which was entirely in order. He had every right to make it and no complaint can be made on that score, but his petition was dealt with by the Registrar, who had no right to do so, who endorsed on it the following:

> "Asst Chief Execution Officer.
>
> Before placing this application before H.H. the president District Court, and having regard to the urgency of this matter, I forward this application to you for any action you may deem necessary to protect the rights of both sides."

I desire to speak with moderation but, it seems to me that this action of the Registrar merits enquiry, which I trust will be forthcoming. I say no more on that point. When the Asst. Chief Execution Officer received this communicaton, if not an order, from the Registrar, he himself made the following order:

> "To detain the delivery of the goods to the purchaser pending new decision in the presence of the parties tomorrow."

This order was too late because the goods had already been delivered to the purchaser, and were no longer in the custody of the Execution Officer. Having found this out the Asst. Chief Execution Officer made the following further instruction —

> "To stop goods and to use force if necessary",

and upon that order the goods were taken back by the Execution Office clerk and were again locked up in the store. On the 9th of May, and it is noteworthy that all these proceedings had taken place in a record time, a further application was made to the Asst. Chief Execution Officer who maintained his previous decision of accepting money in lieu of the goods, and refused to refer the matter again to the Chief Magistrate and he again ordered release. Now, it is difficult to imagine any case in which a greater number of people could have made a greater number of mistakes. The action of the Asst. Chief Execution Officer in re-seizing the goods which he had already realesed has no justification whatsoever in law. When once the goods had been released, and handed over to the purchaser, execu-

tion had been completed, and there were no further execution proceedings then pending. The seizure after release was completely illegal.

It is the rule in this Court that when execution has been completed, whether rightly or wrongly, this Court will not interfere. There are a series of cases which lay that down which are well known, see for example H.C. 42/39 [1] (6 P.L.R. 449) and H.C. 78/39 [2] and the cases therein cited. Even though the original order of the Asst. Chief Execution Officer was wrong, we cannot interfere now, execution having been completed.

The rule nisi must therefore be discharged and the goods returned to the purchaser, Moshe Shimoni, and the money paid in by the purchaser will, of course, be paid out to the petitioner. In view of the unfortunate proceedings, we do not think that this is a case in which any costs should be allowed to either side.

Given this 31st day of May, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 132/40.

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

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

In the appeal of:

The Attorney-General — Appellant.

v.

1. Victor Kahler
2. Anglo-Palestine Bank, Ltd. — Respondents.

Defendant asking for, and Plaintiff making no objection, to,

[1] 7 CtLR p. 69. [2] 7 CtLR p. 45.

Custodian of Enemy Property being summoned as Co-Defendant — Question as to whether Custodian of Enemy Property a Government Department within meaning of Crown Actions Ordinance.

1. Whether an organisation is a Government Department — a mater for Government to decide; notification of such decision may be made either by Gazette or by Chief Secretary informing Chief Registrar for guidance of Courts.

2. Office of Custodian of Enemy Property — not a Government Department (for purposes of Crown Actions Ordinance).

Bell (*Crown Counsel*) for Appellant.
Levison for Respondent No. 1.
Persitz for Respondent No. 2.

Appeal from order of District Court, Tel-Aviv, dated the 30th April, 1940.

JUDGMENT.

In this case the Plaintiff sued the Anglo-Palestine Bank claiming a declaration to certain debentures, or their return — or their value, and damage for their detention.

Before the District Court the Defendant asked that the Custodian of Enemy Property might be summoned as a defendant. The Plaintiff raised no objection and the Court so ordered. Prima facie, apart from third party procedure, one would hardly expect the Defendant to concern himself to add another Defendant, but, be that as it may, when a Defendant is added Rule 67(4) provides that the Statement of Claim shall be amended, and when practicable I would point out the advantage of the proposed amended Statement of Claim being submitted to the Court before the Order is made, so that the Court may appreciate exactly what is to be done. In this case the Statement of Claim was amended by the addition only of the name of the Custodian of Enemy Property, and the Plaintiff's advocate admits before us that there is no plea upon which he could recover against the Custodian. The whole question is therefore academic.

An application was made to strike out the Custodian, and the District Court in its order stated —

> "It is argued on behalf of the Crown Counsel that the Custodian of Enemy Property is a Department of the Government

> of Palestine and that the High Commissioner's consent is necessary for the bringing of an action against him in conformity with the Crown's Action Ordinance.
> "On consideration, the Court finds that the Crown's Action Ordinance does not apply in this case, in as much as there is no claim of any kind against the Custodian of Enemy Property. The Custodian was formally joined as Defendant in order to enable him to defend the interests of his Department, if any, in the action between the Plaintiff and the principal Defendant.
> "The joining of the Custodian of Enemy Property was made in conformity of Rule 67(2) of the Civil Procedure Rules, 1938, and this Court is satisfied that the presence of the Custodian is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in this action.

Against that order appeal is made to this Court. As will be seen, the circumstances in which the Custodian was joined are not wholly clear, but as several points have been argued by the Crown Counsel I will deal with them.

Firstly, is the Custodian a Department of the Government. If he is, and the Crown Actions Ordinance applies, I do not think the provisions of that Ordinance can be circumvented by joining him in this way.

Whether an organization is a Government Department is a matter for Government to decide, notification can be made by the Gazette or the Chief Secretary can inform the Chief Registrar in order that the Courts may comply with the Crown Actions Ordinance. In this case neither of these steps has been taken, and before us the Crown Counsel did not find himself at liberty to state that the Custodian Office is a Government Department. I see nothing upon which this Court can be satisfied that it is.

Our attention has been drawn to the Trading with the Enemy (Custodian) (Amendment) Order (No. 4), 1940; this order may be open to criticism, but it is unnecessary to consider it now as, as I have stated, the Plaintiff makes no claim against the Custodian, and third party procedure has not been invoked.

The appeal is dismissed. Each Respondent will have an inclusive sum of LP. 5 as costs.

Delivered this 3rd day of July, 1940.

Chief Justice.

CIVIL APPEAL NO. 115/40.

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

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

in the case of:

Subhi Aweida — Appellant.

v.

Father Augustin Galanti Procureur Mont Carmel. — Respondent.

Claim for rent secured by promissory notes — Allegation of payment to Plaintiff's agent — Plaintiff denying that payments by Defendant in respect of rent claimed — Admissibility of oral evidence in proof of nature of payment.

Where actual payment by Defendant not disputed but question arises as to what matter it related to, Court to hear any oral evidence parties may adduce as to facts, even where Plaintiff sues on promissory notes.

Salah for Appellant.

Hawa for Respondent.

Appeal from judgment of District Court, Haifa (Siting as a Court of Appeal), dated the 13th day of April, 1940.

JUDGMENT

Rose, J.

This is an appeal from a judgment of the District Court of Haifa, setting aside a judgment of the Magistrate's Court of Haifa.

The plaintiff (respondent) brought an action against the appellant on twelve promissory notes for the sum of LP. 91.660 mils and interest. These promissory notes had been given in respect of rent of premises leased by the respondent to the appellant, and the appellant alleged, inter alia, that certain sums had already been paid on account of this rent to the agent of the respondent, one Jamil Abyad, and that therefore the respondent was, at the most, only entitled to judgment for the balance.

The respondent denied that the said Jamal Abyad was his agent to receive rent and further alleged that, if Jamil received any monies

from the appellant, such monies were not in respect of rent.

A Power of Attorney was produced in evidence authorising in the widest terms the said Jamil Abyad to act on behalf of the respondent in various matters. The learned Magistrate found, in my opinion rightly, that this Power of Attorney authorised Jamil to receive rent on behalf of the respondent. The learned Magistrate also found that the said Jamil received the sum of LP. 35 from the appellant on account of rent of the premises in question. There appears to have been evidence on which the Court could properly so find and, as this is eminently a question of fact for the Trial Court to decide, I see no reason to disagree with its finding.

The learned Relieving President, after criticising this finding of fact of the Magistrate, proceeded to hold that the Magistrate was wrong in law in hearing oral evidence which went to show that some payments had been made in reduction of the debt due on the promissory notes. In my opinion there is no substance in this contention. Civil Appeal No. 62/31 (reported in Vol. II of Rotenberg's Collections of Judgments at p. 794) is direct authority for the proposition that, in a case such as this present where actual payment is not disputed but a question arises as to what matter the payment related to, the Court may, and in fact should, hear such oral evidence as the parties choose to adduce as to the facts.

I would add that the only question raised before us by the appellant was whether or not he should be given credit for this sum of LP. 35.

There being, as I have said, no reason to disagree with the findings of fact of the learned Magistrate, it follows that the appeal must succeed on this point. The judgment of the District Court must therefore be set aside and judgment be entered for the respondent for the sum of LP. 56.660 mils with interest at 9% from the date of action, the amount to be paid into the Execution Office, Haifa. The appellant will have the costs of this appeal on the lower scale and of both Courts below, the costs of this appeal to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 31 day of July, 1940.

British Puisne Judge

I concur

I concur *Chief Justice.*

Puisne Judge.

CIVIL APPEAL NO. 118/40.

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. Harry Friedman
2. Samuel David Fried
3. Itzhak Magali — Appellants.

v.

1. Mohammad Ali Sheikh Ali
2. Mordecai Talithman — Respondents.

Promissory note carying guarantees (avals) but no indorsements — Question on whose account avals given — Issues and findings.

1. Where bill carries aval but no indorsements and no statement on whose account aval given, legal presumption that that aval is for first indorser cannot apply and question on whose account — must be decided by evidence.

2. Better course for Court dismissing case not to do so on one issue only but to make findings on all relevant issues.

Wilner for Appellants.
G. Elia (by delegation) for Respondent No. 1.
Olshan & Scharf for Respondent No. 2.

Appeal from judgment of District Court, Tel-Aviv, dated the 8.5.40.

JUDGMENT

The Appellants were the payees named in a promissory note for LP. 700, dated 16th February, 1933, on the face of which appear the names of the two Respondents as guarantors, in these words — "I guarantee. (Sgd.) M. Talithman", and "Guarantor on and after maturity. (Sgd.) Mohammad Ali Sheikh Ali." Since no time for payment is expressed in the note, the note is one payable on demand, see Section 9(1)(b) of the Bills of Exchange Ordinance, Cap. 10. The maker of the note was one, Jacob Bechor, who is not a party to these proceedings. The note carries no indorsements. The Appellants sued

the two Respondents in the District Court for the amount of the note. Issues were framed, eight in number, and as usual were disregarded by the Court. Evidence was heard of Bechor, and of the two Respondents, and the learned Judges held that "the guarantee on the note was given in favour of the plaintiffs and not in favour of the maker of the note", and dismissed the claim, finding that the Appellants (Plaintiffs) had not proved their case.

The main point in this appeal is this — when there is no indorser, what is the effect of Section 57(2) and Section 90 of the Bills of Exchange Ordinance? We are informed by advocates on both sides that this is the first time that this point has come before this Court sofar as can be discovered. We assume for the purposes of this judgment, but without expressing any opinion as to the correctness or otherwise of this view, that the guarantees are avals, since neither side is prepared to dispute it.

Now, the guarantees do not state on whose account they are given, and in the absence of such a statement the effect of Sections (57(2) and 90, as interpreted by previous judgments of this Court, is that they are deemed to be given for the first indorser. As already stated, there is here no first indorser. It is argued by the Respondents that in such a case, a guarantee must be a nullity. With this we do not agree. The guarantees were obviously given and taken with the idea that they should be effective, and we think that in such a case as this, where the legal presumption cannot apply — and Section 57(2) merely creates a presumption in law, which can be rebutted by evidence — the question on whose account the guarantee was given, is a matter to be decided by evidence.

The District Court heard evidence on this question, and we must now examine it.

Bechor's evidence at any rate is perfectly clear. He said — "I signed the bill for LP. 700. ...There were two guarantors to the bill — the two defendants in this case. I asked the first defendant (Mohammad Ali Sheikh Ali) to sign as a guarantor, and he signed voluntarily. I do not think the first defendant knows the plaintiffs. As regards the signature of the second defendant, I obtained it through the medium of a friend." In cross-examination he said — "I was in need of a guarantee in order to obtain money." Bechor, at any rate, was in no doubt as to why and for what purpose the guarantees were given — they were given for him, as without them he could not obtain the LP. 700.

The first Respondent, Mohammad Ali Sheikh Ali, was also very frank. He said: "I signed as a guarantor. Mr. Bechor brought the

bill to me and asked me to sign. ... I do not know in whose favour I guaranted. I guaranted the bill." The only possible construction to be given to these words is that he guaranteed the payment of the note, and by the person who had to pay the note, that is the maker, at whose request he had signed, and who was the only person whom he knew.

The judgment of the District Court, so far as it concerns the first Respondent therefore, cannot stand since it is entirely contrary to the evidence. Incidentally, the judgment shows signs of carelessness, since it speaks of "the guarantee", whereas in fact there were two guarantees.

Mr. Talithman admitted his signature and said that he was asked by a friend to sign, and he goes on — "I signed in favour of one of the plaintiffs, Friedman. I know Mr. Bechor well. I did not intend to guarantee Bechor."

The effect of this evidence is more difficult to ascertain. In one place Mr. Talithman said that he signed in favour of one of the plaintiffs, Friedman, which might easily mean that he guaranteed that Friedmann should be paid, and then he says that he did not intend to guarantee Bechor. The evidence is utterly self-contradictory, and we find it difficult to see on what material the District Court came to the conclusion to which it did. As the case has to go back in any event with regard to Sheikh Ali, we think that the District Court should be given an opportunity of reconsidering their judgment re Talithman in the light of our remarks in regard to both Respondents.

If it should be proved that the note was given in relation to the alleged contract, which is one of the issues still to be determined, then it seems clear beyond doubt that the note was given to secure the repayment of the LP. 700 advanced to Bechor, and equally clear that the guarantees were given to ensure that payment by Bechor to the plaintiffs.

The cases that have been quoted to us are not of any assistance, since in every one there was an indorser of the bill or note, and the present point did not arise.

We think, therefore, that as regards both Respondents the appeal must be allowed, the judgment of the District Court set aside, and the case remitted to the District Court for a determination of the other issues involved, and to state definitely on what evidence they rely with regard to the non-liabillity of the second Respondent. We say nothing about the plea that the note is prescribed, since the District Court, though that point was clearly one of the issues framed, neglected to make any finding on it. This case is another example of the undesirability of the practice of dismissing a case on one issue

only. The course of justice would be expedited if District Courts would be good enough to make findings on all relevant issues, and not only on one, in case the Court should be wrong on that one, as has unfortunately happened here. The costs of all parties to await the result of the retrial.

Delivered this 26th day of July, 1940.

British Puisne Judge

HIGH COURT NO. 44/40.

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

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

In the application of:

1. Kefar Vitkin Moshav Ovdim Cooperative Ltd.
2. Neemanim Ltd. Petitioners.

v.

1. The Director of Land Registration
2. The Director of Land Settlement
3. The District Commissioner, Samaria District. Respondents.

Effect of Order altering fees enacted during period between registration of interest (in land under Settlement) in Schedule of Claims and registration in Register of Rights.

Fees payable on registration of an interest in land are the fees in force at date of registration of right, not of claim.

Heinsheimer for Petitioners

Respondents: Ex Parte.

Application for an order to issue directed to the Respondents calling upon them to show cause why they should not be ordered to reduce the charge of registration fees from LP. 69.300 to LP. 0.050 mils in respect of the mortgage No. 441 of LP. 6930.— registered in favour of the 2nd petitioner on the leasehold interest of the 1st Petitioner in Block 8353 Parcel 45.

ORDER.

In this application the following facts emerge. A mortgage was filed with the Settlement Officer on the 20th of April, 1939, being a new mortgage to replace a previous one. On that date in April, the mortgage was entered in the Schedule of Claims. In October 1939, it was entered in the Schedule of Rights and in November 1939, the

mortgage was registered in the Register of Rights to land. In September 1939, the fees payable under the Settlement of Title (Registration Fees) Order, 1932, were altered. The Land Registry are claiming the fees under the amendment of September 1939. The petitioner says that they are not so entitled but, that at the time that he made the mortgage, 20th April, 1939, the fees that would than have been payable are the fees now to be taken from him. Unfortunately the words in the Order are — "That the fees are payable on registration in the Register of Rights to land." Entry in the Schedule of Claims is not registration in the Register of Rights. A claim is not a right, it is merely a possible right that may become a real right in the future. It is perfectly clear that the fees payable on registration are the fees in force at the date that registration is made, and there is, in our opinion, no possible queston of this amendment to the law being retrospective. There is nothing of the sort. The order nisi must therefore be refused.

Given this 1st day of July, 1940.

British Puisne Judge

CIVIL APPEAL NO. 145/40.

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

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

In the application of:

Raji and Bahjat El Issa — Applicants.

v.

The Syndic in the Bankruptcy of Selim Nasralla Khoury. — Respondents.

Order allowing Defendants to produce evidence as to usurious interest and reserving to Plaintiff right to argue that even if usurious interest proved Defendant not entitled to any set off — Refusal of application for leave to appeal for reasons of better procedure and principally on ground that trial Court came to no decision.

1. Where Defendant, raising question of usurious interest, applies for opportunity to bring evidence and Plaintiff argues that even if usurious interest proved, Defendant not entitled to a set off, better procedure to hear evidence and reserve to Plaintiff right to argue his point later.

2 Court of Appeal will refuse application for leave to appeal, where trial Court came to no decision.

Abcarius for Applicant No. 1.
Geiger for Applicant No. 2.
Hazou for Respondents.

Application for leave to appeal from the order of the District Court of Haifa, dated the 28th day of February, 1940.

ORDER.

This is an application for leave to appeal from an interlocutory order of the District Court of Haifa. The order was to give the defendant an opportunity to bring evidence with respect to two sums. The District Court said in its order:

> "We have decided to give Mr. Asfour an opportunity of bringing evidence as to usurious interest as to both sums of LP.1,324 and LP. 2,750. We shall reserve to the Plainitiffs the right to argue, after all evidence has been heard, whether or not, even if usurious interest is proved, the defendant is entitled to any set off".

This much is quite clear, that the District Court came to no decision and the question of whether there is set off or not is still to be argued. We are in no way questionnng the principle laid down in C.A. 49/40 * — neither has the District Court done so in its interlocutory order. As I remarked it is very dangerous for us to stop the hearing of evidence which might be found, if heard, to be of, importance. When all the evidence is heard the District Court will say whether it is admissible or not and then if the case comes before the Court of Appeal there will be no necessity to remit it for hearing further evidence as might otherwise easily happen. The District Court in arriving at its final decision will no doubt carefully consider the principle laid down in C.A. 49/40.

The application is therefore refused principally on the ground that the District Court came to no decision. The respondent will have his costs to include LP. 10 for attending the hearing, to be paid in any event.

Given this 13th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 140/40

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

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

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*) 7 CtLR p. 152.

Latifeh Bint As'ad Lawan — Appellant.

v.

Kamleh bint Khalil Laman in her personal capacity and on behalf of the Estate of Jamileh bint Salim Laman wife of As'ad Lawan. — Respondent.

Certificate of succession not opposed to by interested person for several years — Failure of party to make question of validity of certificate of succession a clear issue.

Party knowing of issue of certificate of succession and taking no steps for several years to have it set aside and not even making it clearly an issue wheter cetificate valid and whether Court should act on it — cannot attack judgment based on that certificate of succession.

G. Elia (*by delegation*) for Appellant.
Sahyoun for Respondent.

Appeal from judgment of Land Court, Haifa, dated the 27th day of February, 1940, and the order dated the 25th day of May, 1940.

JUDGMENT.

This is an appeal from the judgment of the Land Court, Haifa, in regard to certain property passing on succession.

Two issues, originally settled by the Registrar, were discarded by the Land Court and two fresh issues framed. One issue was whether the land in dispute was mulk or miri, the second was, if it were mulk then, was the Respondent an heir. The Land Court found that the property was mulk then proceeded to order registration of the property on the basis of the certificate of succession issued by the District Court showing that the Respondent was one of the heirs. That certificate was issued in June, 1936, the fact of its issue was referred by the Respondent to the Appellant who took no steps to oppose or, in any way, to have that certificate set aside and in fact never clearly made it an issue whether this certificate of the District Court was not a valid one or whether the Court should have acted on the certificate issued by an Ecclesiastical Court shortly before.

In these circumstances we think that the Land Court had no option but to take the course which it did. We can find nothing wrong in its judgment.

The appeal must be dismissed with costs to include LP. 10 hearing fees.

Delivered this 18th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 119/40.

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

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

In the appeal of:

Ali Sharaf el Kadri Mutawali of Sidna Yacoub Waqf Appellant.

v.

1. Salim Muslih el Adham
2. Najib Muslih el Adham. Respondents.

Trial Court believing or disbelieving witnesses — Appeal turning entirely on questons of fact.

Useless to appeal if trial Court not satisfied with evidence of witnesses.

If no point of law involved, appeal nugatory.

Kamleh for Appellant.

El Nimar for Respondent No. 1.

Respondent No. 2 in person.

Appeal from judgment of Land Court, Nablus, dated the 27.4.40.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Nablus dismissing a claim by the Mutawalli of the Side Jacob Mosque to a certain plot of land. The learned Judges of the Land Court heard several witnesses and there were various documents and maps in front of them, and they came to the conclusion that they were not satisfied with the evidence of the plaintiff's witnesses. In other words, they did not believe the evidence of those witnesses and they gave judgment naturally dismissing the plaintiff's claim. In spite of that very clear judgment the plaintiff has appealed to this Court.

Now, only yesterday, I had to call attention to the fact that it is useless to appeal on questions of the belief or disbelief of witnesses. One day, I suppose, that will sink into the minds of litigants but I repeat again, it is useless to appeal when the Court of Trial says that it is not satisfied with the evidence of the witnesses. This appeal is entirely on questions of fact, not one single point of law is involved. The appellant therefore would have been better advised to have taken the advice of his advocate and to have dropped the appeal. That was wise advice, if I may say so. The appeal is dismissed with costs to include LP. 10 fee for attending the hearing to the first respondent.

Delivered this 4th day of July, 1940.

British Puisne Judge.

HIGH COURT NO. 52/40.

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

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

In the application of:

The Colnoa Company Ltd. (in Hebrew: Hevrath Colnoa Beeravon Mugbal). Petitioners.

v.

1. The Chief Execution Officer (President District Court) and the Assistant Chief Execution Officer, District Court, Tel-Aviv.
2. Moshe Nathaniel and Esther Nathaniel. Respondents.

Lease containing undertaking by lessee to execute a security — Enforcement through Execution Office of security attested by Notary Public — Operation of art. 72 of Notary Public Law.

Where a security executed in compliance with an undertaking given in another instrument the two documents must be regarded as one for purposes of art. 72 of Notary Public Law.

Goldberg for Petitioners.

Ex parte.

Application for an order to issue directed to the Respondents calling upon them to show cause why the three decisions of the First Respondent dated 20.5.40, 5.7.40 and 14.7.40 respectively in Execution File of Tel-Aviv No. 4576/40 be not set aside and the application of the second respondent dated the 7th July, 1940, for the enforcement of the pledge be not refused, and an order be made staying the decisions of first respondent pending the issue of an order absolute.

ORDER.

This is an application for an order against the Chief Execution Officer, Tel-Aviv. The Chief Execution Officer had ordered execution of a security which had been attested by the Notary Public under Article 72 of the Notary Public Law. The petitioner tried three times various Execution Officers and Assistant Execution Officers, all of whom declined to assist him and has now come to this Court.

The principal point taken by the petitioner and the only one we find it necessary to refer to is this: that under the provisions of Article 72 the security must be embodied in the lease. In this particular instance the lease contained an undertaking to execute the security and in carry-

ing out that undertaking this particular security was subsequently executed. We are of opinion that in a case such as this where a security is executed in compliance with an undertaking given in the lease the two documents must be regarded as one for the purposes of Article 72 of the Notary Public Law, and the proceedings are therefore quite regular.

The application must therefore be refused.

Given this 26th day of July, 1940.

British Puisne Judge.

HIGH COURT NO. 49/40.

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

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

In the application of:

Badi Jubran Sambar — Petitioner.

v.

Denis Antippa, in his capacity as Chairman, of the Greek Club "Hermes", Haifa. — Respondent.

Application to High Court for an order to chairman of a club to show cause why petitioner should not continue to enjoy membership in club.

High Court cannot issue an order nisi to other than a public officer or public body.

Sa'adeh for Petitioner.

Ex parte.

Application for an order to issue directed to the Respondent calling upon him to show cause why the Petitioner should not continue to enjoy the membership of the Greek Club "Hermes" since there is no ground to preclude him in the letter of discharge nor is the said letter a legal one since it was not signed by a responsible person and since no member of the Club could be discharged unless he fails to pay the subscription of three consecutive months.

ORDER.

I do not think we can give you your order. The respondent is not a public officer and is not a public body and therefore, in this country at any rate, we cannot make the order required. The application must therefore be refused.

Given this 22nd day of July, 1940. *British Puisne Judge.*

CIVIL APPEAL NO. 106/40.

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

Before: Copland, J., Rose, J. and Frumkin, J.
In the appeal of:
1 Moses Rashkovitz (David)
2. Isaac Ben Benjamin Diskin. Appellants.
v.
Moise D. Silberstein. Respondent.

Probate of a will made in civil form — Meaning of "incapable" in para (b) of sec. 12 of Succession Ord. — Testamentary dispositions contrary to testator's personal law.

1. Sole meaning of incapacity under para (b) of sec. 12 of Succession Ord. — incapacity to make a will at all (minor age, mental infirmity), not incapacity to make certain dispositions which may be contrary to testator's personal or religious law.

Edit Note: It may probably be queried whether this point in judgment of the Court of Appeal is not in the nature of an obiter dictum, in view of the fact that practically the whole ratio decidendi of the judgment appealed from (infra) is based on matters of form only, and in fact the appeal is already disposed of and decided in the first half of this judgment of the Court of Appeal.
see also C.A. 85/28 5 C of J 1870.

2. In case of a will made in civil form in accordance with sec. 12 of Succession Ord. only point where question of personal or religious law of testator comes in — is as to capacity under para (b) of said section.
3. Validity of a will in civil form — in no way limited or restricted by provisions of testator's personal or religious law as to testatmentary dispositions.
4. Point not raised in trial Court cannot be taken on appeal.

Gluckmann for Appellants.
Margalith for Respondent.

Appeal from judgment of District Court, Tel-Aviv (Probate 16. 7. 39) *), dated the 29th April, 1940.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-

*) infra p. 53.

Aviv dismissing a petition for probate of a will made by the late Leib Ben Dov Ber Silberstein. The District Court, whilst apparently holding that the will was in civil form according to Section 12 of the Succession Ordinance, nevertheless held that certain formal provisions of the Jewish Religious Law with regard to the promulgation of the will and other matters had not been complied with and, decided therefore that this will of the deceased could not be admitted to probate.

Now, it seems to us, that the learned Judge was wrong and that the whole question, the one and — only question is this — is this will a will in civil form in accordance with Section 12 of the Succession Ordinance. The will is in writing, it is signed by the testator in the presence of two witnesses at least (in this case there were three witnesses, because the Notary Public was present) and no point has been raised as to the capacity of the witnesses who attested the will.

With regard to paragraph (c) of Section 12, there was an allegation of fraud or undue influence made by the present respondent but this was rejected by the Court below which had sufficient evidence on which to do so. The question of the testator being incapable of making a will depends upon what is meant by the word "incapable". We hold that the question of capacity under paragraph (b) of Section 12 is the capacity to make a will at all, and does not refer to the capacity to make certain dispositions which may be contrary to the religious law. It has not been suggested that the testator was under the age of eighteen, in fact he was about the age of eighty. It is not suggested that he was suffering from mental infirmity to prevent him from understanding what he was doing. That is the sole meaning of paragraph (b) of Section 12, and we therefore hold that this will is a good and valid will in accordance with the civil form.

It is said that a will, being made in civil form, cannot be a valid will if it contains provisions or dispositions against the personal law, in this case the Jewish Rabbinical Law. With this we do not agree. The only point at which the question of the religious law comes in, in a case suuch as this, is as to the capacity, under paragraph (b) of Section 12, of a testator to make a testamentary disposition. In our opinion, Section 12 is intended to provide an alternative method of making a will to that provided under the law governing the personal status of a testator; in other words, to enable a testator, if he so wishes, to avoid the restriction of his personal or religious law, with regard to the dispositions which he may wish to make — that is to say, a person can make a will according to his personal law or his religious law, but, on the other hand, if he makes a will according to the provisions of Section 12, that is equally valid, and is an alternative method

of testamentary disposition. And we do not think that Section 11 in any way limits or restricts the provisions of Section 12. And Section 12 contains no restriction as to the dispositions which a testator may desire to make.

It is unnecessary to say anything about the argument which the respondent sought to advance that the Succession Ordinance is ultra vires the Order-in-Council of 1922. This point was never raised in the Court below and cannot now be taken on appeal.

For these reasons the appeal must be allowed and the judgment of the District Court set aside and we order probate to be granted of this will of the deceased, Leib Ben Dov Ber Silberstein, dated the 16th Nissan, 5699, 5th April, 1939. The appellant will have his costs both here and below to include a sum of LP. 15, for attending the hearing in this Court, and the costs will be paid by the respondent personally.

Delivered this 19th day of June, 1940.

British Puisne Judge.

PROBATE NO. 167/39

IN THE DISTRICT COURT OF TEL-AVIV.

Before: Curry, J.

In the matter of the Estate of Leib Dov Silberstein, deceased.
Moshe (Rashkovitz) David, and
Isaac Diskin, represented by
Gluckman & Frumkin, Advocates, Jerusalem, Petitioners.

v.

Moise Silberstein, represented by
H. Margalith Advocate, Jerusalem, Opposer.

JUDGMENT.

The Respondent in the first place alleges that the will was made as a result of undue influence or fraud. The Respondent has failed to satisfy me on this point, however; I therefore overrule his objection on this ground.

The Respondent then attacks the will on several grounds.

He alleges that the words of bequest to the wife denote a bequest by way of inheritance and not by way of gift.

The testator uses the words "The whole of this mortgage I command to my wife". The question at issue is whether those words de-

note a bequest by way of inheritance or by way of gift.

Both parties have produced experts on Jewish Law who of course express contrary opinions and I must admit after a study of the law itself I find these questions difficult to decide. However I was very impresed by the reasoning of the expert Dr. Eisenshtadt who appeared to me to have a very thorough knowledge of the subject after years of study and I am of the opinion that he is much more trained in the Jewish Law than either of the experts called by the Petitioner. I therefore accept his contention that the wording denoted a bequest by way of inheritance to a non heir and is therefore invalid.

I will not stop there, however, in case this matter should go to appeal as even if the bequest is by way of gift, the Respondent alleges it is bad.

Now the validity of a gift depends, as to the necessity of compliance with certain formalities, upon the condition of the testator's health at the time when he makes it and it consequently becomes an issue in the case whether the testator was a "sick man" as defined by Jewish Law at the time when he made his will.

I find as a fact that at the time the testator made his will he was suffering unknown to himself from cancer. He was not in bed but merely confined to his house.

The wife in her evidence says "the deceased only said to me that as we were getting old he was going to make a will". And all the witnesses agree that he was in good spirits when he made the will and joked with them.

There is nothing in the wording of the will itself to indicate that deceased anticipated death.

It is true that when a testator bequests his entire property a presumption arises in some cases that he has given it on account of his anticipated death and therefore it is a death bed bequest — but in my opinion that presumption only arises where he is a "sick man", I am satisfied that the testator had no immediate fear of death and that he was not a sick man within the definition of the Jewish Law and was not confined to his bed but could walk about the house.

I am further satisfied that the ceremony of "Kinyan" did not take place. I am of the opinion that it was necessary.

We next come to the question of publication Experts allege that the signing in the presence of 2 witnesses and N.P. constitutes publication — whereas the Respondent's expert maintains that as the "formula wording" regarding publication was not made in accordance with art. 242(3) of the Hoshen Mishpat actual publication by making the will known to a number of persons was necessary and the fact that

it was not even known to deceased's brother who was with him to the time of his death is evidence of non publication.

I am of the opinion that as the formula was not employed the mere saying before witnesses in all the circumstances was insufficient to constitute publication.

It was further alleged that the will was bad because one of the witnesses was related to the widow. This however was not proved. Nor am I prepared to hold that because one of the witnesses who also drafted the will was paid, that he can therefore be held to have derived a benefit under the will and consequently that his attestation was invalid.

It finally appears that there was a formula of security which was not complied with.

It apeared to me however that the Jewish Religious Law, which abounds in cermonies and formules, is very jealous that all those requirements of old should be complied with in modern times and no law was cited to me recalling what was admitted to be the Jewish code on the subject.

Petitioner sought to argue that these formulae were only a question of form and so long as sec. 12 of cap. 135 was complied with that was all that was necessary. I am unable to agree however with this contention. If the Jewish Law required a bequest to be made in a certain manner with certain words then those formalities must be complied with. Section 12 only concerns the actual writing, signing and attesting of the will.

For the foregoing reasons I dismiss application with disbursements.

(Signed) *W. Clive Curry.*

HIGH COURT NO. 48/40.

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

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

In the application of:

Marc L. Gorodissky — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv,

2. Zillah Barsky. Respondents.

Order of Chief Execution Officer to pay into Execution Office monies attached with Plaintiff by order of Court obtained by himself.

Chief Execution Officer has no power to vary an order given by a Court.

Goitein for Petitioner.
Padro for Respondent No. 2.

Application for an order to issue directed to the First Respondent calling upon him to show cause why his order dated the 21st day of June, 1940, made in Execution File No. 12014/38 should not be set aside.

ORDER.

I do not think we need trouble you in reply, Mr. Goitein.

This is an application directed to the Chief Execution Officer Tel-Aviv to show cause why an order made by him ordering certain monies in the hands of the petitioner to be paid into the Execution Office shall not be set aside. These monies in the hands of the petitioner are attached in his hands by an order of provisional attachment of the Magistrate's Court obtained by himself. This may seem a rather peculiar proceeding but we are not concerned with it here at the present moment. The petitioner has argued that this order of the Chief Execution Officer varies an order given by a Court, which the Chief Execution Officer has no power to do. We agree with that contention.

The order nisi must therefore be made absolute with costs and LP. 5 hearing fees.

Given this 22nd day of July, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 77/40.

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 application of:

Elias Bawwab — Applicant.

v.

The Attorney-General — Respondent.

Charge of bribe against Police Officer — Evidence by person giving bribe and person acting as intermediary — Conviction on evidence of two accomplices without sufficient corroboration.

Evidence of two accomplices, without substantial corroboration, insufficient for conviction.

Edit. Note: See Cr.A. 6/39 6 CtLR 101; Cr.A. 46/38 4 CtLR 203 and Edit Note thereto.

Cattan and *Shehadeh* for Applicant.

Crown Counsel (*Hogan*) for Respondent.

Application for leave to appeal from the judgment of the District Court of Jaffa dated the 8th day of August, 1940, whereby the applicant was convicted of official corruption contrary to section 106 of the Criminal Code Ordinance, 1936, and sentenced to six months imprisonment.

JUDGMENT.

Rose, J.

The appellant was convicted by the District Court of Jaffa of receiving corruptly the sum of LP. 3 from one Ahmad Hassan Itbil, Mukhtar of the village of Khasas, contrary to section 106 of the Criminal Code Ordinance, 1936.

At the material time the said Ahmad was himself lying under a charge of corruption and the appellant was the police officer in charge of the prosecution.

The story of the prosecution is that the appellant accepted the sum

of LP. 3 as an instalment of a bribe which was to be paid by Ahmad in order that the appellant should secure the withdrawal of the charge against him. Ahmad had previously told Mr. Scott, Assistant Superintendent of Police, Gaza, of the proposed transaction. Mr. Scott thereupon provided Ahmad with three marked one pound notes with instructions to hand them over to the appellant. This was duly done and subsequently the appellant was found in possession of the marked notes.

As the District Court pointed out, it is clear that Ahmad and another prosecution witness, one Hamad Semour, who deposed that he acted as an intermediary between Ahmad and the appellant, were accomplices in the crime with which the appellant is charged. The question to be decided, therefore, is whether there was sufficient corroboration of the evidence of these two witnesses to justify a conviction. The trial Court obviously appreciated that this was the principal issue in the case and made the following finding:

> "We hold there is ample corroboration of the Mukhtar's evidence that the sum of LP. 3 was given to the accused by him as a bribe in connection with the accused's duties as a police officer."

But unfortunately the Court did not proceed to specify the facts upon which it relied in coming to this conclusion.

In fact, apart from statements made by Ahmad to Mr. Scott, which amount to no more than corroboration of an accomplice by himself, and the fact that the case was adjourned on two occasions at the request of the prosecution, no evidence being adduced to show that there was anything irregular in such request, the only substantial matter which can be adduced as corroboration is the payment to the appellant of the marked notes.

The appellant did not deny that he received the notes and the question for us to decide is therefore whether the fact of the payment of these notes by Ahmad to the appellant necessarily connects the appellant with the crime with which he is charged. Although the matter is not free from difficulty, we have come to the conclusion that it does not. Clearly such a transaction might well have an innocent explanation and the fact that the trial Court disbelieved the particular explanation which the appellant elected to give is not realy material to the consideration of the matter which we have to decide.

Although therefore there are strong grounds for suspicion in this case and although, to put it at its lowest, it is most unfortunate for a police officer in charge of a prosecution to have financial transactions with the person charged, we think that there is a flaw in the

case for the prosecution of which the appellant is entitled to avail himself.

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

Delivered this 5th day of September, 1940.

British Puisne Judge.

I concur

Chief Justice.

I concur

Puisne Judge.

CRIMINAL APPEAL NO. 64/40

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:

Salah As'ad Hamameh — Appellant.

v.

The Attorney-General — Respondent.

Witness giving false information in course of investigation by a Police Officer — Meaning of sec 123(1) *of Criminal Code Ordinance — Conviction under wrong provision of law.*

1. If Court finds accused guilty of an offence but convicts and sentences him under wrong provision of law, conviction and sentence will, on appeal, be quashed.

2. A person who, in course of an ordinary investigation, was interrogated as a witness by a Police Officer, who took down his statement in writing cannot, on statement being found false,

be convicted under sec. 123(1) of Criminal Code Ordinance.
Edit. Note: See Cr.A. 59/39 6 CtLR 209;

Tahsin Kamal for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court of Nablus, in its appellate capacity, dated the 16th of May, 1940, whereby it confirmed the judgment of the Magistrate's Court of Nablus, dated the 11th of May, 1940, who convicted the Appellant of giving false information, contrary to Section 123 of the Criminal Code Ordinance, 1936, and sentenced him to nine months' imprisonment.

JUDGMENT.

The Appellant has been convicted of giving false information contrary to Section 123 of the Criminal Code Ordinance, 1936, Section 123(1) reads as follows:—

> "Any person who gives to the Attorney-General or to a Police Officer, or any other officer entitled to institute a criminal prosecution written information which he knows to be false of the commission of an offence punishable by law, is guilty of a misdemeanour."

As I understand the section it means that the information must be given by the person to an officer entitled to commence criminal proceedings, with the object of setting the law in motion. There are other provisions of the law dealing with the giving of false information to an investigating officer.

The facts in this case, as they appear on the record, are that the appellant, in the course of an ordinary investigation, was interrogated as a witness by a Police Officer, who took down his statement in writing, which was alleged to be untrue. That being so he has been convicted under the wrong provision of the law.

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

Delivered this 2nd day of September, 1940.

Chief Justice.

HIGH COURT NO. 45/40.

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

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

In the application of:

Moshe Levy — Petitioner.

v.

Joseph Kuperman, Returning Officer, of the Municipal Elections of Petah Tiqva, 1940. — Respondent.

Application for order to Returning Officer of Municipal Elections to allow nomination of candidate without requiring latter to make deposit at time of nomination — Time for making deposit by candidate for office of councillor — Fatal delay in application to High Court.

1. Candidate for office of councillor must at time of nomination (i.e. when nomination paper delivered to Returning Officer) deposit prescribed sum with Returning Officer.
2. High Court will refuse application regarding elections if, without good reason why not made a few days previously at least, made too late, so that, if granted, would entail postponement of elections.

Seligman for Petitioner.

Ex Parte.

Application for an order to issue directed to the Respondent calling upon him to show cause why he should not afford the Petitioner an opportunity to nominate candidates without requiring him to make any deposit in connection therewith, and that an interlocutory order be issued directing the Respondent to postpone the elections pending the determination of this application.

ORDER.

This is an application for an order to issue to the Returning Officer for the Municipal Elections of Petah Tiqva to show cause why he should not allow the petitioner to nominate candidates for election without requiring the candidates to make deposits at the time of nomination.

Section 1(1) of the Eighth Schedule says that —

"Each candidate shall be nominated in writing on a separate nomination paper etc., etc."

The nomination paper shall be delivered to the returning officer etc., etc."

Section 2(1) of the same Schedule says —

> "Every candidate for the office of councillor who shall be nominated therefore shall deposit with the returning officer the sum of twenty-five pounds'.'

Now, a candidate is nominated when his name is written on the nomination paper and handed to the returning officer. That follows, I may say, from the only possible construction of Section 1(1). The candidate therefore is nominated at the time the nomination paper is handed to the returning officer, and it seems to me that Section 2(1) of the Eighth Schedule must be read with Section 1(1) of the same Schedule, that is to say, that the candidate who shall be nominated shall deposit with the returning officer at the time of nomination the sum of twenty-five pounds; giving the only logical construction, the only sensible construction, this is what the section seems to me to mean that at the time of the nomination it is the duty of the candidate to deposit with the reurning officer the sum demanded, otherwise great difficulties and endless confusion will be caused in voting, and in the conduct of the elections.

In any case, apart from these reasons, we should refuse this application because it has been made too late. The nomination day was fixed for the 21st of June, and it was not until the 28th of June that the application was made to this Court. If, for the sake of argument, we would have been prepared to grant an order nisi, it would have resulted in the postponement of the elections which, I understand, are fixed for the 3rd of July. There is no reason why this application should not have been made four days previously, at least.

The application must therefore be refused.

Given this 1st day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 85/40.

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

Before: Copland, J., Rose, J. and Khayat, J.

In the appeal of:

Jamil Abyad — Appellant.

v.

1. Issac Ancona

2. Yom Tov Rofe. Respondents.

Action for return of deposit and payment of damages — Point that sum claimed is a penalty and not liquidated damages not specifically pleaded — Allegation that claimant was unable to complete contract — Meaning of uncontradicted evidence — Application of art. 111 *of Civil Procedure Code — Interest on deposit and interest on damages.*

1. Point that sum claimed as liquidatd damages — a penalty must be specifically pleaded.
2. Art. 111 of Civil Procedure Code still in force, though qualified by rule that Court may have to determine whether sum mentioned in contract — liquidated damages or penalty.
3. Evidence uncontradicted when neither denied in pleadings nor contradicted by other evidence; a mere statement by counsel that evidence not accepted — not sufficient to contradict it.
4. (*a*) Interest can be awarded on sums paid by way of deposit,
(*b*) Interest not to be awarded on sums given as damages.

Edit. Note:
As to 1 & 2 see: C.A. 236/38 5 CtLR 86 and Edit. Note thereto; C.A. 217/38 4 CtLR 243;
As to 4 see: C.A. 69/39 6 CtLR 19 and Edit. Note thereto; C.A. 162/38 ibid 25; C.A. 46/35 8 C of J 474; C.A. 122/36; C.A. 101/36 9 C of J 875.

Asfour for Appellant.
Levin and *Lipshitz* for Respondents.

Appeal from judgment of District Court, Haifa, dated the 19.3.40. (Civil Case 199/38).

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa ordering the return of LP. 440, being the amounts of deposits paid on two contracts for the sale of land, and for payment of LP. 1,100 being the sums of LP. 300 and LP. 800 respectively, damages for breach of these two contracts. We think that the judgment of the District Court is correct and that there is very little else which we can add to the reasons that Court gave for its decision which reasons we adopt for ourselves.

Perhaps one should say, that we do not agree with the argument of the present appellant that the contract of the 13th December, 1933, has in any way been extinguished by the Power of Attorney given

to the Plaintiff.

With regard to the point taken by the appellant that when he denied that he was liable to pay liquidated damages, that plea also included a plea that if he were liable to pay damages, then the sum mentioned as liquidated damages was a penalty. We do not think that this is so. That a sum is a penalty must be, at any rate, specifically pleaded, otherwise a plaintiff will be put in the position of not knowing whether it is necessary to bring evidence as to the nature of this sum, and if he did not do so he would be unable to call rebutting evidence if the Defendant would bring evidence to prove that it was a penalty.

With regard to the question of readiness and willingness to pay, evidence as to this, as the District Court remarked, is often a very formal matter. Readiness and willingness on the part of the plaintiff was never put in issue; it was never pleaded by the appellant in his defence that the respondent was unable to complete, and there was evidence before the District Court from which it could find that the plaintiff was ready and willing. We do not think that the fact that some seven or eight months after the times fixed for completion the plaintiff went bankrupt necessarily implies that he was unable to complete at the times fixed for transfer.

As to the question of evidence being uncontradicted, we think that that means that it must be either denied in pleadings or that it must be contradicted by other evidence and that a mere statement by counsel that evidence is not accepted is not sufficient to contradict it.

With regard to the Article under which these damages were claimed, as the District Court remarks, any argument as to Art. 110 is beside the point, since the contracts sued upon come under Art. 111; this is so, and we do not think we need add anything more to that. Art. 111 has been somewhat attenuated, if I may say so, by the rule that it may have to be determined whether the sum mentioned in the contract is liquidated damages or a penalty, but otherwise we think the Article still remains in force.

With regard to interest, it is clear that interest can be awarded on sums ordered to be returned, which had been paid by way of deposit but that interest it not awarded on sums given as damages. This is the effect of the latest decisions on this point.

For these reasons, in addition to those given by the learned Judges of the District Court, we think that this appeal fails and it must be dismissed. The Respondent will have his costs together with LP. 15 fee for attending the hearing.

Delivered this 19th day of June, 1940.

British Puisne Judge.

PRIVY COUNCIL APPEAL NO. 34/39

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE

Before:— Lord Thankerton, Luxmoore, L.J. and Sir Philip Macdonell.

In the appeal of:

Samuel M. Levy, Appellant.

v.

Assicurazioni Generali Respondent.

Fire insurance — Loss by fire during disturbances in Palestine which started on 19.4.1936 *— Specified occurrences freeing insurer from liability — Onus of proof — Meaning of civil commotion.*

1. Parties may, by express terms of agreement, validly place on either of them onus on proving any particular fact or its non-existence.

2. Civil commotion means an insurrection of the people for general purposes; elements of turbulence and tumult essential, but an organised conspiracy to commit criminal acts, where no tumult or disturbance until after the acts, does not amount to civil commotion.

Valentine Holmes for Appellant.

Tristram Beresford, K.C., and *W. Baker Welford* for Respondents.

Appeal from the judgment of the Supreme Court of Palestine [1]) dated Dec. 8, 1938, setting aside a judgment of the District Court of Jaffa, dated June 16, 1938.

JUDGMENT.

Luxmoore, L.J.: On Nov. 13, 1936, the appellant entered into a contract of insurance against loss or damage by fire with the respondent company in respect of a stock of merchandise deposited in a warehouse situate in the commercial centre, Jaffa. The terms of the contract are embodied in a policy of insurance issued by the respondent company to the appellant. The only condition material to be considered in this appeal is condition 6, which is in the following terms:

> This insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely occasioned by or contributed to by any of the following occurrences or which either in origin or extent directly or indirectly, proximately or remotely arises out of or in connection with any of such occurrences, namely: (1) Earthquake, volcanic eruption, typhoon, hurrican, tornado, cyclone, or other convulsion of nature or atmospheric disturbance. (2) War, invasion, act of

[1]) C.A. 188/38 4 CtLR p. 223.

> foreign enemy, hostilities or warlike operations (whether war be declared or not) mutiny, riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military, naval, or usurped power; martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.
>
> Any loss or damage happening during the existence of abnormal conditions, whether physical or otherwise directly or indirectly, proximately or remotely occasioned by or contributed to by or arsing out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.
>
> In any action suit or other proceeding where the company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance the burden of proving that such loss or damage is covered shall be upon the insured.

On Dec. 14, 1936, a fire occured in the warehouse containing the insured stock, and damage was caused thereto to an extent which was subsequently fixed by agreement between the parties at LP. 1,900. The appellant claimed payment of this sum from the respondent company, but the latter refused to pay, alleging that the appellant's claim was not covered by the policy because one or other of the occurrences specified in condition 6(2) existed at the time when the fire occurred.

On Mar. 30, 1937, the appellant instituted proceedings against the respondent company in the District Court of Jaffa claiming payment by the respondent company of the sum of LP. 1,900, with interest and costs. In the course of these proceedings, a preliminary question was raised for the determination of the District Court — namely, whether the onus of proving the existence of one or other of the occurrences specified in condition 6(2) of the policy lay on the appellant or on the respondent company. On Jan. 27, 1938, the District Court held that the onus of proof was on the respondent company. As the result of this ruling, when the action subsequently came on for hearing on June 1, 1938, counsel for the respondent company called as a witness on behalf of that company the assistant district superintendent of police at Tel-Aviv. No other witness was called on behalf of either the respondent company or the appellant, and, after hearing argument by counsel on behalf of both parties, the District Court reserved judgment. On June 16, 1938, the District Court ordered the respondent company to pay to the appellant the sum of LP. 1,900 with interest and costs. The basis of this decision, as appears from the written judgment of the District Court, is that the respondent company had not discharged the onus of proving that abnormal conditions existed at the date

of the fire in the area where the warehouse was situate, the court holding that the question whether the conditions were abnormal must be decided by comparing the conditions existing at the date when the policy was issued with those existing before April 19, 1936, when certain emergency regulations under the Palestine (Defence) Order in Council, 1931, were made by the High Commissioner for Palestine.

On July 12, 1938, the respondent company appealed to the Supreme Court of Palestine from the order of the District Court of Jaffa. On Dec. 8, 1938, the Supreme Court allowed the appeal and set aside the judgment of the District Court, entering judgment for the respondent company with costs in the Supreme Court and in the District Court. The appellant has appealed to His Majesty in Council from the judgment of the Supreme Court with the leave of that court. The Supreme Court held that, upon the true construction of condition 6 of the policy, if abnormal conditions were alleged by the respondent company to have existed at the date of the fire, the onus of proving that the loss was covered, and was not excluded, by condition 6, was on the insured, and not on the respondent company. The Supreme Court dealt with this question in the following passage:

> In the third paragraph of the clause (condition 6), the parties have expressly agreed as to the onus of proof, and I know no reason why they should not do so. It is true that the primary object of a fire policy is to insure against fire, that it is often difficult to prove how a fire emanates, and that the compapny draws up the policy, and, in consequence, where there is an ambiguity courts are inclined to construe it in favour of the insured, but there seems to me to be no ambiguity in the paragraph. "Allege" does not mean "prove" and I would point out, with all respect to the court below, that, if its interpretation is applied, this paragraph would appear to be surplusage. In the result, when the company relies upon the third paragraph, it is upon the insured to prove either the absence of the exception or that, if the exception existed, it did not occasion or contribute to the loss, and that the loss did not arise out of it, o. that the loss or damage, in cases where abnormal conditions existed, happened independently of the existence of such abnormal conditions.

Their Lordships think that this criticism of the ruling of the District Court with regard to onus of proof is well-founded, and that the District Court was in error in holding that the onus of proving that one or other of the occurrences specified in condition 6(2) existed at the time of the fire was on the respondent company. It was placed upon the appellant by the express terms of the contract. There can be no doubt that, as a matter of agreement between parties, the onus of proof of any particular fact or of its non-existence may be placed

on either party, in accordance with the agreement made between them: Re Hooley Hill Rubber & Chemical Co., Ltd., and Royal Insurance Co. Ltd. (1920) [2]) per SCUTTON L.J., at page 273. The Supreme Court, having thus disposed of the question of onus, proceeded to consider what the insured must prove if the court is satisfied that abnormal conditions existed at the date of the fire, and pointed out, no doubt rightly, that in that case the insured must prove positively what was the cause of the fire, or that the abnormal conditions could not in any reasonable probability have caused the fire. The position is summed up by the Supreme Court in these words:

> Bearing in mind, as I have said, that the object of a fire insurance is to insure against fire, and that it is common knowledge that in many cases it is difficult if not impossible, to prove the cause of a fire, and that the condition does not provide that the insured shall prove the cause of the fire, I am of opinion that the insured can discharge the onus of showing that the abnormal conditions could not reasonably have caused or contributed to the fire. In the result, subject to the shifting to and fro of the onus of proof in order that the plaintiff (the appellant) may recover, it is necessary for the court to be satisfied either that there was no abnormal condition joined by a chain of causation to one of the events set out in the earlier part of the condition or that if there was that condition of affairs, it did not affect the fire.

Their Lordships see no reasoon to disagree with this summary if by the phrase "no abnormal condition joined by a chain of causation to one of the events set out" in condition 6 nothing more is meant than the non-existence of any one of the occurrences enumerated in subclause (1) or subclause (2) of the condition, for it seems plain as a matter of construction that the abnormal conditions referred to in condition 6 are not abnormal conditions generally, but are such conditions as arise out of, or in connection with, any of the occurrences enumerated in the two subclauses. However, the Supreme Court do not appear to have considered whether, on the evidence before the District Court, it was possible to hold that any one of the specific occurrences mentioned in subclause 2 existed at the date of the fire, because, when criticising the judgment of the District Court, they state that the court below:

> ..does not appear to have decided if conditions were abnormal in the general sense but to have decided that they were normal within the contemplation of the parties in that the state of affairs when the policy was issued is the statndard of normality to be applied.

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[2]) 1 KB 257; 121 LT 270.

The attitude of the Supreme Court is made clearer by this later passage in the judgment:—

> At the date of the fire, the emergency regulations (made by the High Commissioner under the Palestine (Defence) Order in Council, 1931) were in force. In itself, that would seem to be an abnormal condition other than physical, but it could hardly be suggested that the loss did not happen independently of that.

It is to be observed that the passing of emergency regulations is not one of the occurrences specified in either of the subclauses of condition 6. The Supreme Court called attention to the evidence of the assistant district superintendent of police in detail, the facts noticed being (i) that, after the removal of the curfew in the Jaffa area on Oct. 26, 1936, fires took place frequently in that area, (ii) that enmity existed between Jews and Arabs at the time of the fire, (iii) that there existed a boycott which prevented Arabs from buying Jewish goods, and vice versa, (iv) that it would not be safe for Jews to walk in the quarter where the warehouse was situated at 6.45 p.m. on Dec. 14, 1936, (v) that police patrols were carrying rifles at that date, and (vi) that there were a number of outrages in Dec., 1936, in Jaffa, and a number of bombs were thrown. In addition to the evidence set out above, it was admitted by the parties that an official communique, was printed in the Palestine Post of Oct. 16, 1936, under the heading Official Communique, Thursday, Oct. 15:

> There are no incidents to report since moon yesterday. The public is informed that owing to order having been restored and the absence of acts of violence, in future official communiques will be issued only when the occasion demands and the daily issue of an official communique as a matter of routine is being discontinued.

No doubt, considered apart from any other occurrence, the facts stated might lead to the conclusion that the conditions in the area were abnormal at the material date, but, with all respect to the judgment of the Supreme Court, this is not the point. The point is whether or not the evidence establishes that one of the occurrences mentioned in subclause (2) existed on Dec. 14, 1936. Their Lordships invited counsel for the respondent company at this Board to state which of the occurrences enumerated in condition 6(2) he alleged were in existence at that date. He stated quite frankly that he did not think that he could succeed except under the heading "civil commotion" and he argued that the evidence established that such a condition, at the date of the fire, in fact existed. It is stated in Welford and Otter-Barry's Fire Insurance, 3rd Edn., at p. 64.

> Civil commotion, this phrase is used to indicate a stage between a riot and civil war. It has been defined to mean an

> insurrection of the people for general purposes, though not amounting to rebellion; but it is probably not capable of any precise definition. The element of turbulence or tumult is essential; an organised conspiracy to commit criminal acts, where there is no tumult or disturbance until after the acts, does not amount to civil commotion. It is not, however, necessary to show the existence of any outside organisation at whose instigation the acts were done.

This statement appears to their Lordships to be accurate, and to be borne out by the several authorities cited in the notes to the text. In their Lordships' judgment, the proved facts in this case fall far short of those which were held in Cooper v. General Accident, Fire & Life Assurance Corp. Ltd. [3]) (1923) and in Motor Union Insurance Co. Ltd. v. Boggan, Ltd.[4]) (1923) respectively, to be sufficient to satisfy the phrase "civil commotion." Their Lordships are satisfied that, on the facts proved, there was no civil commotion in existence at the date when the fire occurred, and their Lordships so hold. Having regard to this finding, and to the admission made by counsel already mentioned, their Lordships are bound to proceed on the footing that none of the occurrences specified in condition 6(2) existed at the material date, and to hold that the respondent company's reliance on condition 6 fails. Their Lordships are consequently of opinion that the Supreme Court of Palestine was in error in holding that the appellant was not entitled to recover under the policy. In the result, their Lordships are of opinion that the judgment of the Supreme Court ought to be set aside and the judgment of the District Court of Jaffa restored, and that the respondent company should pay to the appellant his costs here and in the Supreme Court. They will, therefore, humbly advise His Majesty accordingly.

June 3, 1940.

HIGH COURT NO. 65/40.

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

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

In the application of:—

Ignaz Kerpner — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv
2. Dov Goradesky — Respondents.

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[3]) 128 LT 481.

[4]) 130 LT 588.

Public sale of mortgaged property — Extension of time after final order of sale — Discretionary powers of Chief Execution Officer.

Chief Execution Officer has discretionary power to stay execution even after final order of sale and after execution proceedings had been protracted for a considerable period; he should not, however, grant further delays, which would amount to a moratorium.

Edit. Note: The relevant facts in this case besides those set out in this Order are as follows:

The application for the sale of the property was first heard on 23.7.38. Two months later sale was ordered, the proceedings not to commence before 24.1.39. On 23.1.40 i.e. a year later, final sale was ordered but registration postponed till after 6 months. An application made on 22.7.40 for a further extension was refused, but on 13.8.1940 on another application a delay of 6 months was granted, subject to payment of interest due.

Fellman for Petitioner.

Ex parte.

ORDER.

In this case we do not think that the application for rule nisi should be granted. It is true that in this case the execution proceedings had been protracted for a considerable period. It is stated in the last order of the Chief Execution Officer that:

"Execution stayed provided that the mortgagor pays LP.85,650 mils interest due by 14,8.40 and all future interest when due up to the 10th of February, 1941.

Failing which Execution will proceed."

This we hold, is within the discretion of the Chief Execution Officer to make. We do not think, however, that a further delay should be granted when the period expires, because the Chief Execution Officer will be in effect granting a moratorium and assuming the duty of the legislature.

The rule nisi will, therefore, be refused.

Given this 5th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 163/40.

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

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

In the appeal of:—

Municipal Commission of Haifa — Appellant.

v.

Anisseh daughter of Issa Matta — Respondent.

Land Court awarding compensation to be paid by Municipality for land belonging to Plaintiff — Statement of advocate unchallenged by other party, in support of his client's claim.

A statement made by an advocate, even where not challenged by other party's advocate — not evidence of fact.

Weinshall for Appellant.

Koussa for Respondent.

Appeal from the judgment of the Land Court of Haifa, dated the 28th day of June, 1940.

JUDGMENT.

This is an appeal from a judgment given by the Land Court, Haifa, awarding the respondent who was plaintiff in the Land Court the sum of LP.8.138 mils, compensation for land belonging to her deceased husband. The Land Court gave judgment basing themselves on a letter from the Municipality dated the 19th October, 1927, written by the Mayor of Haifa to the present respondent, and also on a statement made by Mr. Koussa who was appearing for the plaintiff, which the Court said was not challenged by the defendant's advocate. Now, the plaintiff's claim in the Court below must have been based on one of these two factors. First, the plaintiff's claim must have been brought under the Land (Expropriation) Ordinance or secondly, it must have been based on an agreement between the parties. It is common ground that the Land (Expropriation) Ordinance does not apply and the plaintiff is therefore confined to the question of agreement.

With regard to the statements which apparently the Land Court have relied upon, it is unnecessary to remark that statements made by advocates are not evidence of facts and, therefore, Mr. Koussa's statement that the Municipality took an undertaking from Nakhle Aboud is not evidence. There is no evidence whatever in this case to support that statement.

The only other point relied upon in support of the claim is this letter of the 19th October, 1927. I am afraid that I cannot see that this letter in any way contains any undertaking by the Municipality of Haifa to pay the plaintiff or anybody.

That being so, the whole basis of the respondent's claim goes. The result is that the appeal is allowed with costs here and below on the lower scale to include LP. 10 fee for attending the hearing of this appeal.

Delivered this 10th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 150/40.

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

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

In the case of:

The Attorney-General — Appellant.

v.

Ernest Schaumberg — Respondent.

Attorney-General claiming on behalf of British Forces in Palestine Question — whether British Forces part of Government of Palestine.

British Forces in Palestine — not a Government Department nor part of Administration of Palestine; Attorney General cannot sue on their behalf.

Crown Counsel (*Hogan*) for Appellant.

H. Cohen for Respondent.

Appeal from judgment of District Court, Jerusalem (sitting as a Court of Appeal), dated the 28th day of May, 1940.

JUDGMENT

This appeal raises an interesting point, namely, whether a body called the "British Forces in Palestine" is a part of the Government of Palestine. The point apparently has come before the lower Courts on several occassions and it nearly arrived on a former occasion in this Court but unfortunately fell out on a technical point there.

The Magistrate held, on the preliminary point being taken before him, that the Attorney-General had no power to sue on behalf of the British Forces in Palestine, that these forces were not a Government Department and presumably therefore not a part of the administration. I agree with the submission of Mr. Hogan that there is no particular magic in the word "Department"; it may mean a department of the administration or "a part of" the administration.

To turn to the particular point. In the first place, the British Forces in Palestine consist or may consist of elements of the three various armed services of the Crown in England, that is to say, the Royal Navy, the Army, and the Royal Air Force. These are three separate entities in England, and in any case it would seem difficult in one of the Colonies or Territories of the British Empire to make them one composite whole. Turning to the Army with which we are really concerned in this case, the damage sued for was damage to a War Department vehicle and loss of services and cost of medical treatment to two soldiers.

It is not disputed that the British Army in Palestine is maintained, administered and moved entirely at the will of the Army Authorities, that is to say, the Secretary of State for War, or, with regard to local movements, the General Officer Commanding in Palestine. Whilst the question of pay or administration might not be decisive in itself, it seems to us that the Government of Palestine have no control over any of the essential features of administration with regard to the Army. The only trace of nominal authority is that contained in the fact that the High Commissioner is also, by virtue of his office, Commander in Chief in Palestine. It is true that there is at the present moment very close co-operation between the civil authorities and the Armed Forces but close co-operation cannot, we think, constitute the Armed Forces a part of the Government of Palestine and, of course, questions of discipline, questions of administration and movement are subject entirely to the jurisdiction and authority of the Army itself, and the civil administration has no control whatsoever. In addition the Civil Administration is responsible to the Secretary of State for the Colonies, while the Army is administered by the Secretary of State for War.

For these reasons we think that the learned Magistrate was right in his judgment and that the learned President was correct in dismissing the appeal to him. The respondent will have his costs of this appeal on the lower scale and LP. 10 fees for attending the hearing.

Delivered this 26th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 173/40

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

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

In the appeal of:

The Attorney-General — Appellant.

v.

Faris Abdul Qadir Beidas and 6 others. — Respondents.

Government claiming land disputed between two parties — Order by Settlement Officer giving Government interim possession of land in dispute between parties — Appellate jurisdiction of Land Court as regards decision of settlement Officer — Land (settlement of Title) Ord. sec. 10, 63.

1. Land Court has no jurisdiction to hear appeal from decision of Settlement Officer not regarding any right to land.
2. Decision with regard to interim possession of land — not

decision regarding right to land.

3. Order by Settlement Officer with regard to interim possession of land — in accordance with discretion vested in him and Land Court not to interfere.

Crown Counsel (*Hogan*) for Appellant.

R. Dajani for Respondents Nos. 1, 2, & 3.

Respondents Nos. 4, 5, 6 & 7 Absent— served.

Appeal from judgment of Land Court, Jaffa (in its appellate capacity), dated the 13th day of July, 1940.

JUDGMENT

This is an appeal from a decision of the Land Court of Jaffa on an interlocutory appeal from a Settlement Officer. The facts of the case are quite short. There is a dispute with regard to certain land in Sheikh Muannis. The Settlement Officer heard a certain amount of evidence and came to the conclusion that the best thing to do would be to give temporary possession to the Government who were also claiming the land. The present respondents thereupon appealed by leave of the Land Court to the Land Court and that Court reversed the decision of the Settlement Officer and sent the case back to him to hear further evidence. Government has thereupon come to us.

The first and main point taken by the appellant is this, that under the law, there is no right of appeal to the Land Court in this case. By Section 63 sub-section 1 of the Land (Settlement of Title) Ordinance, an appeal only lies from a decision of the Settlement Officer as to any right to land. Now, in this case, we do not think that any decision has been made by the Settlement Officer as to any right to land. The right to land is not in any way interfered with and awaits the final determination of the case by the Settlement Officer, and that being so, the judgment of the Land Court given on appeal was made without jurisdiction and is therefore void. It is interesting to note that the learned Settlement Officer refused to grant leave to appeal on the ground that in this case no right of appeal existed, thereby rightly interpreting the law.

The appeal will therefore have to be allowed. Even if we had not taken this view with regard to there being no right of appeal, we feel that the Land Court was not justified in this case in interfering with the Settlement Officer with regard to interim possession. Such an order was within the powers of the Settlement Officer to make under Section 10 sub-section 4 of the Ordinance. He heard such evidence as he considered necessary for the purpose of coming to the decision for this interim point and the order which he made, was made, we think, in accordance with the discretion vested in him, and it should not have

been interfered with.

The appeal must therefore be allowed and the judgment of the Land Court quashed as having been made without jurisdiction and the judgment of the Settlement Officer is restored. The first three respondents must pay the costs in this Court and in the Land Court on appeal, to include LP. 10 fee for attending the hearing in this Court.

Delivered this 17th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 171/40.

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

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

In the appeal of:

Jamileh Hassan Haj Khalil Abu Ikweik Appellant.

v.

1. Amneh bint Ali el Fayoumi.
2. Fatmeh Abdel Hamid Maymeh.
3. Abdel Fattah Mahmoud Abu Ikweik, in his capacity as guardian for Ma'oud and Rasmiya Abu Ikweik. All on behalf of the estate of Hasan Abu Ikweik.

Respondents.

Endorsement by Registrar on application of amount to be paid as deposit by appellant — Service on respondent of copy of application with endorsement of Registrar without notification that deposit actually paid in. — Civil Procedure Rule 328.

Failure to notify respondent that amount fixed as deposit had actually been paid and failure to remedy defect after attention called — fatal to appeal.

G. Elia for Appellant.

Germanus for Respondents Nos. 1 & 3.

Respondent No. 2 absent — served.

Appeal from judgment of District Court, Jaffa (in its appellate capacity), dated the 24th day of June, 1940.

JUDGMENT

This is an appeal from a judgment of the District Court of Jaffa dismissing an appeal to them on the ground that no notification of the amount of the deposit paid in, as required by Rule 328, had been served on the respondents. The facts are that the Registrar endorsed on the application itself the amount to be paid and that copy was

stamped with the receipt by the Cashier that the amount had actually been paid. Unfortunately, the copies of her application which were served on the respondents, bore only the endorsement of the Registrar of the amount fixed, and not a notification that the amount had actually been paid. The point of course is a highly technical one and it does not appear that any great prejudice has been caused to the respondents by this failure but it is worthy of notice that the attention of the appellant was called to this omission to serve the notification of payment in and she was given the chance of remedying the defect. Legally speaking we cannot say that the District Court came to a wrong decision in law and with much regret we have to hold that the appeal will have to be dismissed with costs on the lawer scale and LP. 10 fee for attending the hearing to the first and third respondents.

Delivered this 11th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 28/40.

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

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

In the appeal of:

Mudir El Awqaf el Islamyeh El'Am — Appellant.

v.

1. Keren Kayemeth Leisrael Ltd.
2. The Attorney-General — Respondents.

Claim that parcel of land used as a cemetry is a holy place within scope of Palestine (Holy Places) Order in Council — Application of Palestine (Holy Places) Order in Council.

1. To apply Holy Places Order-in-Council there must be some evidence that place in question has been regarded as a Holy Place by a number of people for a period of time or, alternatively, that character of place so well known that Tribunal may take notice of it.

2. A cemetry not a Holy Place within meaning of Holy Places Order-in-Council unless there are special facts to make it so.

Muhtadi for Appellant.

Ben Shemesh for Respondent No. 1.

Crown Counsel (Hogan) for Respondent No. 2.

Appeal from decision of Settlement Officer, Tulkarm Settlement Area, dated the 21st of November, 1939.

JUDGMENT

In the circumstances we do not think this case should be remitted to the Settlement Officer.

We are left with the question whether part of the land in question comes within the provisions of the Holy Places Order-in-Council.

We are of opinion that before that Order applies there must be some evidence tha the place in question has been regarded as a Holy Place by a number of people for a period of time or, alternatively, that the character of the place is so well known that the Tribunal may take notice of it. I do not think that the decision in civil Appeal 25/40 *) is an authority against this view. In that case the parties dropped the point, and this Court had no reason to think the place was holy in the sense of the Order-in-Council.

In the case now before us the lands in question are cemetries. Although a cemetry may be holy in the sense that it is consecrated ground or is so regarded by the friends and relations of those buried in it, we do not think it is a Holy Place unless there are special facts to make it so. There was no evidence of such facts in this case, and we have no knowledge of the places concerned.

The Appeal is dismissed. The Respondents will respectively have costs on the lower scale, and we certify LP. 15 for attending the hearing for each of them.

Delivered this 23rd day of May, 1940.

Chief Justice.

CIVIL APPEAL NO. 158/40.

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

Before:— Copland, J. and Rose, J.

In the appeal of:

Mohammad Bakir — Appellant.

v.

Amineh widow of Ibrahim Kleibo on behalf of the estate of Ibrahim Kleibo. — Respondent.

Claim against estate of deceased on several promissory notes — Evidence that some of notes sued on are forged — Finding not supported by sufficient evidence that all notes forged.

1. In an action on a promissory note as soon as note produced and signature proved (or admitted) onus shifts to defendant.
2. Reasonable grounds for suspecting that note sued on is forged cannot warrant dismissal of claim, if no sufficient evidence that note in fact forged.

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*) 7 CtLR p. 104.

A. G. Kamleh and *Kehaty* for Appellant.
Haddad for Respondent.

Appeal from judgment of District Court, Jerusalem, dated the 25th day of June, 1940.

Rose, J.

JUDGMENT

In this case the appellant sued the widow of one Ibrahim Kleibo on behalf of his estate, on twelve promissory notes maturing on different dates.

The Trial Court found that five of them, namely Exhibites 3, 5, 10, 11 and 21 were forged. There was evidence on which the Court could properly so find and we do not differ from its conclusion.

As to the remaining seven notes the evidence of both expert witnesses was that no irregularity could be found. The Trial Court appreciated this fact but, in view of the surrounding circumstances, namely that the other five notes were forged and that no claim was made until after the death of Kleibo, it inferred that these seven notes were also forged.

Now, in an action on a promissory note, as soon as the plaintiff has produced his note and, when necessary, proved the signature thereon, the onus shifts to the defendant. While in this case there are reasonable grounds for suspecting that these seven notes, or some of them, are also forgeries, we have reluctantly come to the conclusion that there was insufficient evidence to support the finding of the Trial Court that they were in fact forged.

For these reasons we are of opinion that the appellant is entitled to succeed as far as Exhibits 1, 2, 4, 6, 7, 8 and 9 are concerned.

The judgment of the District Court is therefore set aside and judgment entered for the appellant for LP. 154.500 plus legal interest from the date of action. In the peculiar circumstances of this case there will be no order as to costs either here or below.

Delivered this 10th day of September, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 76/40.

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:—

Yusef Fares Daoud el Abed — Appellant.

v.

The Attorney-General Respondent.

Count of robbery, being armed, and count of carrying arms — Finding of Not Guilty on charge of armed robbery and Guilty on count of carrying arms — Burden of proof as to question of licence to carry arms.

In prosecutions under Firearms Ordinance prosecution must prove that accused has no licence, or prove some admission by him making other proof unnecessary.

Appellant in person.

Crown Counsel (*Hogan*) for Respondent.

Appeal from the judgment of the District Court of Jaffa, dated the 5th August, 1940, whereby the Appellant was convicted under Section 36(12)(a) of the Firearms Ordinance, and sentenced to two years' imprisonment.

JUDGMENT.

The appellant was charged before the District Court with robbery, being armed, — that is an offence punishable with imprisonment for life. In a second count he was charged with "carrying arms" (the correct phrase is "has in his custody or possession") contrary to Section 36(2)(a) of the Firearms Ordinance. The District Court found —

> "We are satisfied that accused had a rifle and ammunition in his possession without authority. We find that there is no evidence to connect him with the actual robbery, however. We find him Not Guilty on the first count and guilty on the second."

What precisely the District Court meant by this is not clear, it may be that they were misled by the form of the information, but it is not suggested by the Crown Counsel that there was any evidence that the Appellant had no licence.

I am quite satisfied that in prosecutions under the Firearms Ordinance the prosecution must prove that the accused person has no licence — or they must prove some admission by him making other proof unnecessary, and in my view the Appellant is clearly entitled to succeed in his appeal.

The other members of the Court feel some doubt whether the absence of a licence might not be inferred from the facts of this case, but being a criminal matter they agree that the Appellant should have the benefit of that doubt.

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

Delivered this 5th day of September, 1940.

Chief Justice

HIGH COURT NO. 55/40 and 57/40.

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

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

H.C. 55/40.

Pastor D.V. Oertzen, the Executor of the Will and Codicils of the late Otto Paul Fischer — Petitioner.

v.

1. The Chief Execution Officer, Haifa
2. Shakib Bader — Respondents.

Gavison for Petitioner.
Respondent No. 1: Absent — served.
Asfour for Respondent No. 2.

Application for an order to issue directed to the Respondents calling upon them to show cause why the part of the order of the 1st Respondent dated 16.7.40 in Haifa Execution File No. 5881/39 ordering the sale of all mulk properties of the late Otto Paul Fischer (except the property in the German Colony) to proceed should not be set aside, and the attachment of the said mulk properties and sale proceedings thereof at the instance of First Respondent should not be cancelled.

H.C. 57/40.

Charles Fischer — Petitioner.

v.

1. The Chief Execution Officer, Haifa
2. Shakib Bader — Respondents.

Atalla for Petitioner.
Respondent No. 1: Absent — served.
Asfour for Respondent No. 2.

Application for an order to issue directed to the first Respondent calling upon him to show cause why his order dated the 29th day of July, 1940, should not be set aside.

Issue by Registrar of Certificate of Succession during pendency of proceedings for probate of Will — Failure to register probate of Will — Failure to register probate of Will in Land Registry — of Will in Land Registry — Attachment and order of sale regarding

share of an heir at instance of his creditor — Service of notice from Execution Office on judgment debtor — Question of place of residence of plaintiff, an enemy subject — Jurisdiction of Probate Court.

1. Registrar — a probate officer for purposes of Succession, Ordinance he being an officer of Probate Court and empowered to issue probates and certificates of succession.

2. Where Will affects mulk land, officer granting probate must register it forthwith in Land Registry, and executor bound to see that this is done.

3. (a) Issue of Certificate of Succession — a judical act and discretionary; Court not bound to issue one if position uncertain.

(b) Where Will submitted for probate no Certificate of Succession regarding mulk property should be issued until probate proceedings terminated.

4. Service of notice from Execution Office, unless substituted service ordered, must be personal, on judgment debtor himself, or on some member of his family living with him; service on person living in same house as judgment debtor but not being a relative or a partner of debtor — bad, and all consequent proceedings void.

5. If no proof that judgment debtor knew that his property was to be sold, he cannot be said to be in delay when seeking remedy by applying to High Court.

6. Where Will has been admitted to probate all mulk property left by testator vests from date of his death in executor and executor alone; creditor of an heir or of a beneficiary cannot attach or sell share of heir or beneficiary vesting in executor.

7. Where attachment and sale proceedings started at instance of a creditor of an heir's or beneficiary's share, matter being purely one of execution, Probate Court cannot interfere, its functions being limited to granting probate and dealing with executors and administrators.

8. Where plaintiff admittedly an enemy subject, parties' attorneys disputing as to whether or not he resides in enemy territory, and affidavit filed to that effect on behalf of defendant but without stating grounds for belief or means of knowledge, Court may, upon consideration that plaintiff's advocate has the better means of knowing where his client is, decide that plaintiff not an enemy within meaning of Trading with Enemy Ordinance.

ORDER.

In the first of these petitions, the petitioner is the Executor of the will and codicils of Otto Paul Fischer, deceased — in the second petition, the petitioner is Charles Fischer, a son and one of the heirs of Otto Paul Fischer. In each case the respondents are the same, namely, the Chief Execution Officer Haifa and one Shakib Bader, who is a judgment creditor of the above-named Charles Fischer. The two

petitions have been heard together because the main point for determination in each is the same.

Otto Paul Fischer died at Haifa on or about the 19th October, 1936. He had been of German nationality but at the time of his death he was of undefined nationality and a member of the Protestant Community. He left a Will and codicils which were contested, and it was not until the 11th April, 1938, that probate of the said Will and codicils was granted by the District Court Haifa to the executor named therein, Pastor D. V. Oertzen. The estate was of considerable value, being sworn at LP. 40,000 approximately, equally divided between the mulk and miri property. By his Will and codicils, the testator inter alia gave his house in the German Colony Haifa for the use and benefit of his daughter, and bequeathed several lagacies amounting in the aggregate to approximately LP. 2,000 to various charitable institutions, and at the same time ordered that these legacies should not be payable until two years after his death. The mulk immovable property consists of three parts. First, there is the house in the German Colony which has been valued, so it is stated, at LP. 13,000, but as above mentioned this house has been devised for the use of the testator's daughter, and is therefore not available for the payment of the legacies or the testamentary expenses, unless the remaining property should prove to be insufficient.

The remaining mulk property of which the value is about LP.7,000 consists of house property in the Old Suk in Haifa, which at the present moment is said to be unsaleable, and property in Allenby Street. With regard to this latter, Mr. Gavison wro appears for the executor has told us that one half of it belongs to a Mr. Brugger, residing in Switzerland, and was registered in the name of the testator as nominee only. He states that as the result of enquiries which have been made, they are fully satisfied that this is true, and that the heirs have agreed that this is so. We are also informed that the only debt owing by the estate is some LP.600 for probate fees. It is a little startling that this item should still be owing nearly four years after the death of the testator. It is also stated that the executor has been paying certain sums, as directed by the Will, for the upkeep of the daughter and has also made certain advances to the heirs on account of their shares in the residuary estate.

On the 10th March, 1938, by consent of all the heirs, a certificate of Succession was issued by the Registrar of the District Court Haifa, ordering that the movable property, mulk immovable property and miri immovable property of the testator should be distributed between his three heirs, stated to be, Charles William Fischer his son (one of

the present petitioners), Emile Martin Fischer his son and Sofie Christianne Fischer, his daughter, in equal shares. To this certificate the Registrar appended the following note:—

> "This order has not the effect of a grant of Letters of Administration or Probate. It is a declaratory order as to the heirs of the deceased and their respective shares in the estate. Provisional administrators have been appointed and proceedings for probate are pending. The heirs are not to dispose of the mulk property until further order of this Court".

I shall have something to say about this certficate later.

This is the background which it is necessary to bear in mind when we come to examine the details of the present dispute to which these petitions relate.

Charles Fischer is indebted to Shakib Bader for the sum of LP.179. 550 mils together wit h interest and costs. Execution proceedings were commenced against him on the 16th June 1939, and attachment of all his share in the mulk and miri properties of the testator was ordered on 2nd July 1939. Assessment was made on the 25th January 1940, and on 18th March, 1940, a notice was issued calling on the debtor to show cause why his property should not be sold in satisfaction of the above debt and of the amounts owing in participating files. On the 23rd March 1940, this notice was served on a Mr. S. Adler who signed "for Mr. Ch. Fischer". An order for sale was given on the 5th April 1940, publication for the purposes of sale was made on the 7th May, 1940. Both petitioners state that it was not until some time in June that they became aware of these execution proceedings. The executor on the 24th June 1940 thereupon filed an objection to the sale and Charles Fischer also filed an objection. After considering the objections, the Chief Execution Officer on the 17th July 1940 ordered final sale of the Allenby Street property and the final order was thereupon issued. At the same time an extension of thirty days was granted in respect of the other properties. On the application of the petitioners the Chief Execution Officer ordered stay of registration on the 29th July 1940, for fifteen days to enable the petitioners to come to this Court.

I should mention that the one-third share in the Allenby Street property was valued at LP. 1,600 and the last bid was for LP. 1,400

Now much of this present trouble would never have arisen but for two serious mistakes in procedure. The probate was never registered at the Land Registry as required by Section 14(4) of the Succession Ordinance Cap. 135. This sub-section provides:—

> "In any case in which the will affects mulk land, the probate officer shall forthwith, upon probate being granted, register the

probate at the land registry and such registration shall have the effect specified in section 9(2)".

If the probate had been registered then by Section 9(2) of the same Ordinance the effect would have been that the Director of Lands would have been restrained from making any entries in the register in respect of the interests of persons in the mulk property of the estate except by order of the President of the District Court. Consequently no attachment could have been made in execution. Owing to this failure to observe the law, an attachment has got on the register, which never should have been there. We are informed by Mr. Gavison that there appears to be some doubt in the Haifa District Court as to who the probate officer is and no one was willing to act. With all respect to those who find a difficulty in this, I am afraid that I cannot see where the difficulty lies. The wording may be somewhat unfortunate but I should have tought that a probate officer was an officer of the Probate Court, and since the Registrar is empowered to issue probates and certificates of succession, it seems to me obvious that he is a probate officer. Though the duty is mandatory, yet the executor cannot altogether be acquitted of all blame — he should have taken steps to see that the requirements of the subsection were duly complied with and he could have compelled compliance by an application to this Court. This omission might well have proved fatal to the executor's case, but is not decisive in this case, which turns on other grounds.

The second matter is the question of the Certificate of Succession. This certificate was entirely in order with regard to the miri property, which can in no case be affected by a Will, but it was entirely wrong with regard to the mulk property. It was known to the Registrar that there was a Will, which purported to deal with the mulk, and that probate proceedings were pending.

It is wrong to issue a Certificate of Succession in such a case, because if probate is granted the certificate may be useless, and in any case there is a grave danger of it being misleading as has happened in this case. The certificate was wrong because the heirs were not entitled each to an one-third share in the mulk property left by the deceased, but to an one-third share in the *residue* of the mulk property which remained undisposed of by the Will, a very different thing. And it is impossible to say what that share in residue is until the probate fees and the legacies have been paid, and the property necessary for those payments has been realised. On the sworn valuation of the estate an one-third share of the mulk properties in the estate would be about LP. 6,660 — when the property has been distributed according to the Will and expenses paid an one-third share of the undisposed of residue of the mulk properties, on that valuation, would come to but little

more than LP. 1,400, even assuming that the whole of the Allenby Street property belongs to the estate. The certificate in respect of the mulk property should have been limited to the residue (if any) of the mulk, though it should never have been issued at all until the probate proceedings were terminated, and until it was known how much of the mulk property remained undisposed of. The issue of a Certificate of Succession is a judicial act and discretionary, and a Court is not bound to issue one, if the position is uncertain — on the contrary, in such a case it should not issue one. See C.A. 103/40 — Iddini v. Iddini.

To come now to the petitions. The main question which is common to both of them, is this — can a creditor of a beneficiary or an heir under a Will attach and sell mulk property which is vested in the executor without the consent of the executor? I will now deal with each case separately, dealing with the above main point on the last case.

H.C. 57/40

Fisher v. Chief Execution Officer, Haifa.

In this case the petitioner has argued that he had no notice of the execution proceedings at all and in particular that the notice calling on him to show cause why his property should not be sold in execution was never served on him. This notice was in fact served on a Mr. S. Adler who signed "for Ch. Fischer". Mr. Adler is stated to be living in the same house as the judgment debtor, but he is not a relative, and it is not alleged and certainly not proved that he is a partner of the debtor. The second respondent in reply has said that since the property was attached in July 1939, and was assessed in January 1940, the debtor must have had knowledge of these proceedings. One would have thought that if such were the case, than an extract from the execution file shewing service of some notice could have been forthcoming. But the only evidence produced is this service on Mr. Adler. This is clearly insufficient. Unless substituted service is ordered, service must be personal, on the judgment debtor himself, or on some member of his family living with him. Neither of these conditions has been fulfilled here — the service is therefore bad and all proceedings subsequent to this are void. And it cannot be said that there has been such a delay in applying to this Court as to deprive the petitioner of his remedy. There is no proof that he knew his property was to be sold before June 1940, and in that month he made an application to the Chief Execution Officer which was rejected. The order nisi in this case must therefore be made absolute on this ground alone.

H.C. 55/40

Oertzen v. Chief Execution Officer, Haifa.

The decision in the first case covers this one also, but in case there should be further proceedings it is necessary to deal with all the points raised.

A preliminary objection has been taken by the second respondent that the petitioner is an enemy subject residing in enemy territory and he is therefore an enemy within the meaning of the Trading with the Enemy Ordinance, 1939. He is admittedly a German, and the second Respondent alleges that he is residing in Italian territory. On the other hand Mr. Gavison, for the petitioner, tells us that he is residing in Switzerland, and that he has recently been in telegraphic communication with him there. The affidavit filed on behalf of the second respondent does not state the grounds for the belief or the means of knowledge, and the petitioner's advocate obviously has the better means of knowing where his client is. I am not satisfied on the facts produced to us that the petitioner is an "enemy", and so disentitled to bring proceedings here.

The main ground of objection, common to both cases, is that the execution proceedings are irregular from the start, that there was no power to attach and sell this property at all. I do not think that it can be disputed that where there is a Will, which has been admitted to probate, all the mulk property left by the testator vests in the executor from the date of the testator's death. And an executor has power to sell such of that mulk property as may be necessary in order to pay the testamentary expenses and to provide for the payment of legacies. The legal estate vests in the executors and in them alone — if this were not so, then it would be impossible to administer the estate and to carry out the terms of the Will. It follows from this that where there is a Will an heir has no legal estate in the mulk — all that he has is an interest in the residuary estate or such part of it as has not been disposed of in carrying out the terms of the Will. There is therefore no share in the estate which can be sold — all that an heir has is a residuary interest. And an executor has an entire discretion, subject to the terms of the Will, as to which property or properties he will sell. If a creditor of an heir or of a beneficiary could atttach and sell properties vested in an executor, he would be usurping the functions of an executor for his own purposes, and thereby nullifying the administration of the estate. Such a creditor is not in the position of a creditor of the estate.

Much of what I have said in the first case applies to this one too,

and vice versa. I think that the attachments and sale proceedings were wrong from the start. In any case they could never have been in order with regard to the house in the German Colony, which is specifically devised for the use of the testator's daughter, and in which Charles Fischer, the debtor, has no interest whatever, residuary or otherwise, and never did have. I think that the learned Chief Execution Officer must have failed to appreciate that the second respondent's claim was not one against the estate but against an heir of the estate.

In my opinion, all the attachments and sale proceedings in respect of the mulk property must be cancelled. The executor has stated that he has no objection to an attachment on the residuary share of the debtor in the mulk property. I think that such an attachment should be substituted for the orders of attachment made by the Chief Execution Officer. Subject to the above, the order nisi in this case must also be made absolute.

During the course of the arguments I had some doubt whether another Court might not have had jurisdiction but I am now satisfied that that is not so — the Probate Court would have no power to interfere, since its functions are limited to granting probate and dealing with executors or administrators, and I do not see how the Land Court could decide this question — it is purely a matter of execution.

In conclusion I would suggest that it is highly desirable that steps should be taken to wind up this estate at the earliest moment. Nearly four years have elapsed since the testator's death and very little would appear to have been done. The executor is abroad, and will be unable to act for some time, and I suggest that steps should be taken to appoint administrators in his place by an application to the Court. The present state of affairs is obviously most unsatisfactory. Many of the legacies would appear to be due to enemy institutions, and the Custodian of Enemy Property should be consulted. The time for their payment has long since passed, and until they are paid or provided for, the residuary shares of the children of the testator cannot be ascertained or paid.

It cannot be said that the Allenby Street property is unsaleable — what appears to be a very fair price was obtained in the execution auction.

As for costs, each of the petitioners is entitled to his costs, and LP. 10.— fee for attending the hearing, to be paid by the second respondent.

Dated this 5th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 166/40.

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

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

In the appeal of:

Salim Sam'an Ziadi — Appellant.

v.

1. Abraham Izhak Shrem
2. Shlomo Mashiah — Respondents.

Claim of commission for assistance to dispose of land — Proof of custom as to brokerage fee in absence of express agreement — Brokers Ordinance, Cap 11 — *C.A.* 121/34 — *C.A.* 5/40.

1. Land broker not a broker within meaning of Brokers Ordinance.

2. Where statements of witnesses affirming existence of a custom were not challenged in cross-examination and other party neither denied their accuracy in his own evidence nor called any evidence in contradiction and custom appears to be reasonable, Court right in finding accordingly.

Moghannam and *Abcarius* for Appellant.

Amdur for Respondent No. 1.

Shereshewsky for Respondent No. 2.

Appeal from judgment of District Court, Jerusalem, dated 9.7.40. dated the 9th day of July, 1940.

JUDGMENT

Rose, J.

In this case the respondents claimed the sum of LP.450 as commission for work done as brokers in assisting the appellant to dispose of his land to a third party.

Two main questions arise. First, did the respondents do the work which they allege? In other words did they earn their commission? This is eminently a question of fact, upon which the Trial Court made a finding in favour of the respondents. There was clearly evidence on which the Court could properly so find and we see no reason therefore to differ from its conclusion.

Secondly, did the respondents adduce sufficient proof of the alleged custom that, as regards immovable property and in the absence of express agreeement, a brokerage fee of 2% of the value of the land is chargeable. We were referred to two Palestinian authorities. The first, Civil Appeal No. 121/1934 Vo. 2 P.L.R. 436, is merely authority for the proposition, which I accept, that in a case such as the present the Brokers Ordinance Cap. 11 of the Revised Edition is inapplicable and that a claim may properly be brought outside its provisions altogether. It the second case Civil Appeal 5/1940 *), Frumkin J. lays down, in our opinion correctly, the ingredients which are necessary in order to prove a custom. It must be borne in mind, however, that in that case the main issue was whether the custom had been proved sufficiently and conflicting evidence was called by the parties. In the present case the main contest was as to the earning of the commission and the point as to custom, which was treated as subsidiary, was proved by four witnesses, the first three of whom were not challenged at all on this matter and the fourth, who may have been cross examined perfunctorily on this question (from the record it is not quite clear whether he was or not), remained quite unshaken.

Mr. Shrem one of the respondents said — "In accordance with the practice we (land brokers) got 2% from such party".

Mr. Rechtman, who was called as an expert in the trade said — "I live in Jerusalem. I am a land broker and a house broker; the custom of the trade is that the buyer and seller of land should each pay 2% on account of the brokerage".

Neither of these two statements was challenged in cross-examination and the appellant neither denied the accuracy of them at his own evidence nor called any other evidence in contradiction.

This being so and the custom appearing to us to be reasonable, we think that the Trial Court was right in concluding that the custom had been adequately proved.

For these reasons the appeal is dismissed with costs to include a sum of LP.15 for advocate's attendance fee.

Delivered this 12th day of September, 1940.

British Puisne Judge.

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*) 7 CtLR pp. 61—68.

CIVIL APPEAL NO. 154/40.

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

Before:—Copland, J. and Rose, J.

In the appeal of:—

1. The Palestine Ashrai Bank Ltd.
2. Rose T. Wolfe

v.

1. Ali el Mustakim
2. Mohammad el Mustakim Respondents.

Disputed validity of assignment of mortgage — Jurisdiction of Land Court — Joinder of assignor of mortgage as party in action between assignee and mortgagor — Meaning of "judgment" in art. 43 of Palestine Order in Council — Practice of entering appearance under protest — C.A. 117/29 L.A. 136/26 — C.A. 179/38 — Land Transfer Ordinance — Palestine Order-in-Council, Art. 43 — Civil Procedure Rules, Rule 317 — Rules of the Supreme Court, Order 12, Rule 1.

1. Question whether a mortgage valid or not — a question of title to land and within sole jurisdiction of Land Court.

2. Assignment of mortgage — a registrable right in land and disposition within meaning of Land Transfer Ordinance. Question of validity of assignment — not a question of contract alone but one of title to land and therefore within sole jurisdiction of Land Court.

3. Any person whose rights over property in dispute may be affected if Court decides in certain way — a proper party to be joined to action.

4. "Judgment" in art 43 of Palestine-Order-in-Council used in wide sense and includes interlocutory orders; hence Civil Procedure Rule 317 regulating appeals in interlocutory orders — not ultra vires.

5. Practice that where defendant did not enter appearance under protest he cannot at any subsequent stage object to jurisdiction, not being laid down definitely in any English Rule nor contained in any local Rule, — not applicable in Palestine.

6. Successful respondent may be disallowed costs, if all preliminary points he raised failed.

P. Joseph, Linderman and *Polonsky* for Appellants.

Goitein for Respondent No. 1.

Sassoon for Respondent No. 2.

Appeal from the Order (Ruling) of the Land Court of Jaffa dated the 9th day of May, 1940.

JUDGMENT

This is an interlocutory appeal by leave of the learned President of the Jaffa Land Court from an order holding that the Land Court had jurisdiction to entertain the claim. Various preliminary objections were taken by the respondents but we decided to hear the merits of the appeal and we will deal with the merits first.

The main argument on behalf of the appellants is that the causes of action do not disclose any claim that it is within the competence of the Land Court to try. The respondents are the mortgagors of certain property in Jaffa and the second appellant Mrs. Wolfe is the mortgagee. She purported to assign that mortgage to the first appellant and the first cause of action alleged is that this assignment is invalid. Dr. Joseph has strenuously urged that the assignment of a mortgage is an assignment of a contract. We are of opinion that this point is governed by the principle laid down in Tweig v. Mavashoff and others C.A. 117/29, P.L.R. 585, where, following L.A. 136/26 Abdel Rahim and another v. Mamur Awqaf Nablus, it was held that the question whether a mortgage is or is not valid is a question of title to land, and that that was a matter in which the Land Court alone had jurisdiction. This being so, it seems to us that the question of the validity of an assignment of a mortgage is equally within the sole jurisdiction of the Land Court. It is unnecessary to say anything about the other causes until the Land Court has decided whether it has the power to try them or not. We do not agree that this is a question of contract alone. The assignment of a mortgage is a disposition of land within the meaning of the Land Transfer Ordinance and an assignment is a registrable right in land We think that the Land Court was right.

Equally the Court below was right in holding that Mrs. Wolfe was a proper party to be joined, as if the mortgage were cancelled, her rights over the mortgaged property would be affected — it is obvious, as the Land Court remarked, that she is a proper party.

This disposes of the appeal, but with regard to the preliminary points raised by the respondent we think that the first one, namely, that Rule 317 is ultra vires when it purports to regulate appeals in

interlocutory orders, fails. This point is governed by authority — Gutman v. Palestine Building Syndicate Ltd. C.A. 179/38 *) (5 P.L.R. 441) where this Court held that the word "judgment" in Article 43 of the Palestine Order-in-Council was used in a wide sense and included an interlocutory order and that Rule 317 of the Civil Procedure Rules was therefore not ultra vires and that case is binding on us.

The second point is that since the defendants did not enter an appearance under protest, they cannot at any subsequent stage object to the jurisdiction and reference is made to O 12 r.l. of the Rules of the Supreme Court. This practice is not laid down definitely in any English Rule, neither is it contained in our Rules here. We think that it would be difficult to introduce such a practice here without a supporting Rule, however desirable it may be, and there may be difficulties in framing such a Rule here, in view of the Articles concerning jurisdiction in the Order-in-Council.

And the third point also fails. It is true that the order of the 9th May, 1940, refers to the order of 11th October, 1939, but the first order was to deal solely with the question of a stay of execution, whilst the order of the 9th May dealt with the question of the issues which the Court had jurisdiction to try. The appeal on the second order is therefore not too late.

The appeal fails and must be dismissed. Each side to pay their own costs since the respondents raised three preliminary points which failed.

Delivered this 17th day of September, 1940.

British Puisne Judge.

HIGH COURT NO. 50/40.

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

Before:—Trusted, C. J. and Rose, J.

In the application of:—

Bank der Tempelgesellschaft (Bank of the Temple Society) Ltd. in winding up, by the Official Receiver and Liquidator — Petitioner.

v.

Registrar, District Court, Tel-Aviv — Respondent.

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* 4 CtLR p. 67.

Purchase through Execution Office of mortgaged property by mortgagee —Payment by mortgagee of 2½% collection fee in respect of mortgaged property purchased by him through Execution Office — Order by Registrar for refund of collection fee to purchaser and subsequent counter-order upon direction by President District Court — Powers of Registrar and of President District Court — Non-liability of mortgagee to pay collection fee when purchasing property mortgaged to him — Registering Ordinance.

1. After ordering refund of Court fees Registrar functus officio.

2. No direction can be made by President District Court to Registrar while latter performing his duties under appropriate section of Registrars Ordinance.

3. No collection fee payable by mortgagee purchasing through Execution Office property mortgaged to him.

Karwassarsky for Petitioner.
Crown Counsel (*Bell*) for Respondent.

Aplication for an order nisi to be issued, calling upon the Respondent to show cause why his order deciding to refund the sum of LP. 87 being 2½% collection fees paid in Execution File No. 16611/38, Tel-Aviv, particulars whereof are hereinafter set out, should not be restored and the second order refusing to refund, dated July 8, 1940, should not be set aside.

ORDER.

On 23.6.40 the Registrar, Tel-Aviv, directed the refund of certain court fees which had been paid by the applicant. On the 8th July, 1940, however, he indicated that he had been directed not to grant the refund, in consequence this rule was obtained.

We think that the first order made by the respondent was a good and binding one which it was within his powers to make. The second order is bad and must be considered ineffective for three reasons. Firstly, the first order was a good and lawful one; secondly, once the Registrar had given his first order he was functus officio, and thirdly; no direction can be made to him by the President of the District Court while he is performing his duties under the appropriate section of the Registrars Ordinance.

We are grateful to the Crown Counsel who has assisted us by his argument. We consider the first order as final and within the competence and jurisdiction of the respondent to make. It will, therefore, be restored and the second order will be set aside and the rule nisi will be made absolute. The petitioner will have his costs which

we fix at an inclusive sum of LP.5.—.

Delivered this 30th day of July, 1940.

Chief Justice.

CIVIL APPEAL NO. 103/40.

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

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

In the appeal of :

1. Rimeh, daughter of Abdalla Issa Iddini
2. Naameh, daughter of Abdalla Issa Iddini — Appellants

v.

Father Naim Abdalla Issa Iddini — Respondent.

District Court giving certificate of succession with regard to miri and refusing to give one with regard to mulk property — Will made some decades ago and certified by Ecclesiastical authorities — Discretionary nature of issue of order of succession — Award of costs by Trial Court.

1. Issue of certificate of succession — a matter of discretion in that it is a judicial act, not an automatic administrative act.

2. Court faced with a Will appearing to be a genuine document and certified by proper Ecclesiastical authorities — right in refusing to issue certificate of succession with regard to mulk property, as long as Will not set aside by Ecclesiastical Court competent to decide as to its validity or otherwise.

3. Award of costs being entirely in discretion of Trial Court, it may disallow it where Plaintiff lost majority of his case.

Bustani for Appellants.

Hakim for Respondent.

Appeal from judgment of District Court, Haifa, dated 27.4.1940.

JUDGMENT.

We do not need hear you, Najib Eff.

When this case was originally before this Court we allowed the appeal and sent it back to the District Court, to deal with the question of consent or lack of consent, with the proceedings before the Ecclesiastical Court, it having been alleged by the appellants, that they had not consented to the jurisdiction of the Ecclesiastical Court in issuing a

certificate of succession. The case came back before the District Court, and when there, the question of consent was waived and it was not contested that the District Court had jurisdiction to deal with the case. The learned President in giving judgment, gave a certificate of succession with regard to the miri property, but refused to give one with regard to the mulk, not being satisfied apparently as to the facts of the case, and he also held that the issue of a certificate of succession was a matter for discretion and not merely a ministerial act. The appellants have appealed again to this Court asking that the certificate of succession should be issued with regard to the mulk.

The respondent had put forward a will which he said had been dully made and executed by his late father in the year 1906, thirty four years ago. The appellants argue that the question of the validity of this Will should have been decided by the District Court, which was wrong in refusing to do so. They deny that the testator ever signed the Will, and say that they never knew of its exeistence till a few months ago. Now, whether the dispositions contained in the Will are valid or not is a matter which does not concern us in these proceedings. The Will is apparently a genuine document, it has been certified by the then Metropolitan of Nazareth, on the 26th of July 1906. It is, as I have said, some thirty-four years old. It having been certified by the proper Ecclesiastical authorities, the only Court which is to decide as to its validity is the Ecclesiastical Court of the community oncerned. The learned President was quite correct in the decision at which he arrived. That being so, the learned President was equally correct in refusing to issue a certificate of succession with regard to mulk as long as this Will is in existence and has not been set aside.

We would only say one thing with regard to the question of the issue of a certificate of succession being a matter of discretion. What we think the learned President meant by discretion is that it was a judicial act and is therefore a matter for discretion, not an administrative act when in such a case issue would be automatic.

With regard to the complaint that the District Court did not award any costs, the only answer is that the question of costs is entirely in the discretion of the Trial Court. They came to the conclusion that the appellant should not have any costs seeing that he lost the majority of his case.

The appeal must therefore be dismissed. With regard to the costs of this case, the respondent will have his costs of this appeal together with a sum of LP. 15, hearing fees.

Delivered this 28th day of June, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 90/40.

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

In the appeal of:

Hanna Abdo el Saffouri — Appellant.

v.

The Attorney-General — Respondent.

Conviction of juvenile offender of parricide — Unproved allegagation of self defence — Appeal in case of sentence of detention during High Commissioner's pleasure — Indication by Trial Court when sentencing accused that he had right to appeal treated as a granting of leave to appeal.

1. If self defence or any other defence in a criminal trial proved to such extent as to instil a reasonable doubt in mind of Court, accused should be acquitted.

2. No appeal as of right from sentence of detention during High Commissioner's pleasure in conformity with sec. 13 of Juvenile Offenders Ordinance 1937; leave to appeal must be obtained by application to Trial Court or, if refused or not made there, to Court of Criminal Appeal.

3. Where appellant was notified by Trial Court that he had right to appeal, Court of Criminal Appeal may treat indication as a granting of leave to appeal.

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

Appeal from judgment of Criminal Assize Court, sitting at Haifa, dated 18.9 1940, whereby appellant was convicted of murder contrary to section 214(a) of the Criminal Code Ordinance 1936, and sentenced to be detained during the High Commissioner's pleasure under section 13 of the Juvenile Offenders Ordinance, 1937.

JUDGMENT.

The appellant was charged with the murder of his father by stabbing him with a dagger. There was his own statement that he did so stab him made to the Police and in Court. There was also the evidence of a man, Ahmad Kassim, who arrested him on the day of the commission of the offence and to whom the appellant said that he killed his father because he was a lunatic, and the Trial Court believed that evidence. The defence was that the killing was commited

in self defence. Now, this point was clearly before the Trial Court and the Trial Court, on the evidence, found that the accused did not commit the offence in self defence. The evidence undoubtedly supports that view of the Trial Court. A plea of self defence, like any other defence, must be proved. If the defence are able to instil a reasonable doubt in the mind of the Trial Court, then the Trial Court should acquit accused. The Trial Court here had no reasonable doubt and I do not see why they should have had any doubt. It is no good to say that this plea of self defence must be accepted if there is not a tittle of evidence to support it.

The appellant was, being under the age of eighteen, sentenced to be detained during the High Commissioner's pleasure, in conformity with Section 13 of the Juvenile Offenders Ordinance 1937. It should be noted that in such a case there is no appeal as of right to the Court of Criminal Appeal as in a case of imprisonment for one year or more. In future, if it is desired to test a judgment of this nature, application should be made for leave to appeal either to the Court of Trial or, if refused or not made there, to the Court of Criminal Appeal. In this case the appellant was notified that he had the right to appeal. We therefore treat this indication as a granting of leave to appeal. The appeal is dismissed.

Delivered this 9th day of October, 1940.

British Puisne Judge.

HIGH COURT NO. 72/40.

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

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

In the application of:—

Egged Kvuza Cooperativit Ltd. — Petitioner.

v.

1. Director of Land Registration
2. Registrar of Lands, Tel-Aviv — Respondents.

Amalgamation of two cooperative societies — Payment of transfer fees on transfer of land from name of amalgamating societies into that of amalgamated society.

1. Amalgamation of two or more cooperative societies involves transfer of property of amalgamating societies to amalgamated society.

2. Transfer fee (3%) — payable on transfer in Land Registry of immovable property from name of amalgamating societies into that of amalgamated society.

Iszajewicz for Petitioner.
Ex parte.

Application for an order nisi to issue to the Respondents calling upon them to show cause why the decision of the First Respondent, dated March 8, 1940, that the correction of the registration of ownership of parcels 74, 75, and 76 in Block 6532 Raanana village from the name of Hasharon Hameuhad Agudat Nahagim Hadadit Ltd. into the name of the Petitioner under Section 13(1) of the Cooperative Societies Ordinance should be registered as a transfer and a fee of 3% on the value of the property should be paid should not be cancelled and why the Respondents should not treat the said correction of registration as a mere correction of the register and exempt it from fees accordingly.

JUDGMENT.

This application for an order nisi raises quite a short point. Two cooperative societies have amalgamated, and the amalgamated society now wishes the property which belonged to the individual societies to be vested in that amalgamated society. With that end in view they proceeded to the Land Registry and asked for a change in registration. The Director of Land Registration says, this is a transfer, and you must therefore pay the fees attendant upon a transfer. The argument of the Petitioners is, that this is not a transfer but is a mere combination of two societies, making the combined societies into one whole.

It seems to us that the true construction of Section 13(1) of the Cooperative Societies Ordinance involves a transfer of the property of two original societies to the amalgamated society. The relevant part of Section 13(1) reads —

> "the resolution of the societies concerned shall, on such amalgamation, be a sufficient conveyance to vest the assets and liabilities of the amalgamating societies in the amalgamated society."

It seems to us that a sufficient conveyance must be a transfer of interest. For these reasons we think the Director of Land Registration was right. The application for an order nisi will be refused.

Delivered this 16th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 197/40.

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

Before: Copland, J. and Rose, J.

In the appeal of:

Ceasar Abyad and 4 others. Appellants.

v.

Nasrallah Salim Khoury and 6 others. Respondents.

Order of Court closing bankruptcy — Application by some of creditors of bankrupt to be admitted as party to proceedings — Addressing Court in capacity of amicus curiae — Application for certain remedy left without any order or ruling by Court. — Appeal on different, not joint claims.

1. Where no order or ruling made by Court on application to be admitted as party to proceedings, applicant, even if heard by Court some time after application and even if Court dealt with certain points raised by him, cannot be held to have been admitted as party but to have been merely in position of amicus curiae.

2. No appeal if appellant was not explicitly admitted (or excluded) as party in proceedings before Trial Court.

3. Court may include in its judgment direction for execution not to issue before certain date.

Koussa for Appellants.

Salomon and *Catafago* for Respondent No. 1.

Asfour and *Sahyoun* for Respondent No. 2.

Schimmell for Respondent No. 7.

Appeal from order of District Court, Haifa, dated 27.9.1940.

JUDGMENT

This is an appeal by five creditors of the estate of Nasrallah Khoury, a bankrupt, asking that an order of the District Court closing the bankruptcy should be set aside. The first respondent, who is the bankrupt himself, has raised a preliminary objection or rather a series of preliminary objections, which we must deal with first.

The first point is that this Court is not seized of any appeal and the reason given for that allegation is that Mr. Koussa's five clients were not parties to the original motion before the District Court. The original parties in that case were Nasrallah Khoury, bankrupt, and the Syndic. Now judgment was given by the learned President on the 19th of July, 1940, in which he dealt with various points that were raised, made an order that a certain sum of LP. 5,244.082 mils should be paid into Court by the bankrupt, and that an attachment should be made on certain immovable properties of the bankrupt, and when that had done, the bankruptcy should be closed. On the 27th July, 1940, Mr. Koussa, representing his five clients, appeared in Court and applied to be admitted as a party to the proceedings. No order or ruling would appear to have been given by the Court on this application and it is not in fact contended by the appellant that any such order admitting him or otherwise was made. It seems to us that there is no reason why we should infer that leave was given to the appellants to take part in the proceedings, and therefore, although Mr. Koussa did in fact address the Court after the 27th of July last, and the Court in its second order of the 27th of September dealt with certain points which had been raised by Mr. Koussa, there is again no reason to infer that he was heard by the Court in any capacity other than that of amicus curiae. We are supported in the view that we take by a judgment recently delivered by this Court on the 9th October this year in the case of David Moyal v. E. Karwassarsky — Civil Appeal 162/40 *), where an action had been brought by the appellant for damages of breach of contract. Later on during the hearing of the case the appellant tried to amend his claim by putting in a petition asking for specific performance. This petition was never considered apparently by the Court and no ruling was given, fortunately as it happened for the appellant, and we held therefore that on the mere asking for a remedy, and no ruling having been given by the Court on that claim, the position was not affected by such a proceeding. As I said, therefore, in this case, it seems to us that Mr.

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*) Reported on p. 105, & seq. infra.

Koussa was not a party to the order appealed from and was merely in the position of amicus curiae.

In our opinion also the judgment of the 19th July, 1940, was a final judgment. It is true that the learned Judge said at the end:—

> "In view of a possible appeal to the Supreme Court sitting as a Court of Appeal, no formal order will issue from this Court on any of these findings of mine of today until after 8th September, 1940, but this will not affect my order, that the sum of LP. 5244.082 mils be paid in cash into Court on or before 29th July, 1940".

By "no formal order" we think the learned Judge must have meant that no execution was to issue before the 8th of September, 1940, in other words, that the direction which he gave in his judgment was that the order should lie in the office until that date. That is a perfectly legal order to make and one that is frequently made, otherwise, if this were not his meaning there could of course have been no appeal from that judgment of the 19th July and the direction would have been meaningless.

It seems, therefore, to us that Mr. Solomon's first preliminary objection is a valid one and disposes of this present appeal. Holding this view we do not propose to deal with other points raised by him. We are the less reluctant to come to this decision since the bankruptcy proceedings have been lasting for ten years and the vast majority of all the claims have been settled in full, and security would appear to have been giving for the settlement of all legitimate claims that may be outstanding.

We would mention one further point that arises, though nobody seems to have thought of it, and we therefore do not decide it, and that is that it is questionable whether there should not have been five appeals because the five appellants have different claims and those claims are not joint ones.

The appeal must, therefore, be dismissed and the provisional stay given cancelled. The first, fourth and the seventh respondents will have their costs on the higher scale to include in respect of the first respondent LP. 15 fee for attending. Regarding the seventh respondent he should have LP. 10 fee for attending the hearing. The fourth respondent appearing in person, though an advocate, is not entitled to hearing fees.

Delivered this 21st of October, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 91/40.

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

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

In the case of:

1. Mahmoud Abdel Rahim Hamdan
2. Mohammad Hamid Abdallah. Appellants

v.

The Attorney-General Respondents.

Charge and conviction of premeditated murder — Evidence of alleged accomplice — Report typed after identification parade used for refreshing witness's memory when giving evidence.

Report typed by officer after identification parade and subsequently destroyed after typing may properly be used for refreshing officer's memory when giving evidence.

Asfour for Appellants.
Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of Criminal Assize Court sitting at Nablus, dated 25.9.1940, whereby the appellant were convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT.

Copland, J.

The two appellants were convicted in the Court of Criminal Assize sitting at Nablus of the murder of Police Inspector Selim El Bitar on the morning of 11th July, 1938, at Tulkarm, and were sentenced to death. Selim El Bitar was leaving the shop where he used to go for a shave every morning when he was wounded by one or more revolver shots. He went back into the shop calling upon the barber for assistance and then a man called Mustafa el Ousta, who has since been killed, from the doorway of the shop fired further shots at him from the result of which he died.

The principal ground of appeal is that there was no evidence on which either of these appellants could have been convicted of murder — that at the most, they should only have been convicted of being accessories after the fact. There was evidence which the Court believed that these

two appellants together with Mustafa El Ousta met the previous evening in the village of Anabta near Tulkarm, that they then proceeded in a taxi with one Hamid Kattoot of Tulkarm, alighting just outside the town, and all spent the night together. In the morning, shortly before the murder took place, these two appellants and Mustafa El Ousta were seen sitting together in a café which is very close to the barber's shop where the murder took place. The taxi driver had been told to wait for them at a point some 100 metres from the shop. The shots were fired and a witness Abdul Latif Boustani says, that after the shots were fired he saw the first appellant coming out of the shop with a revolver in his hand crying out, "This is the punishment of traitors". He also states that at the same time he saw the second appellant running and carrying a revolver. Further evidence incriminating the second appellant is that when he and Mustafa El Ousta and others got into the car after the murder he was heard to say "It was Mustafa who fired. My revolver jammed".

Now, whether Kattoot was or whether he was not an accomplice is really immaterial in this case. It can be seen from the judgment that the Court of Trial considered the facts as to whether he was an accomplice. They say they believe his evidence which is corroborated in part by Wajeeh. And neither of the appellants was convicted on the evidence of Kattoot alone.

There is lastly further evidence that revolver bullets of two different sizes were found inside the shop showing that two revolvers at least had been used. On all this evidence it is quite clear that there was ample material on which the Court of Trial could find both these appellants guilty of murder.

The only remaining point arises out of the identification parade when the officer who conducted the identification refreshed his memory when giving evidence from a typed report made after the parade had finished. This typed report was typed by him from notes made by him at the time, the rough notes being subsequently destroyed after the typing. We know of no rule of law by which this course could be held to be irregular and we find that the proceedings were conducted in a proper manner and that the report had properly been used for refreshing the officer's memory.

There are no reasons for interfering with the convictions and it follows that both appeals must be dismissed and the convictions and sentences of death confirmed.

Delivered this 10th day of October, 1940.

Chief Justice.

CIVIL APPEAL NO. 162/40.

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

Before:— Copland, J. and Rose, J.
In the appeal of:
David Moyal — Appellant.
v.
Elhanan Karwassarsky as Curator of the properties of Sheikh Tewfik Dajani, interdicted. — Respondent.

Effect of expression of intention to repudiate contract before time of performance of contract — Alternative remedy of damages or specific performance — Petition to amend claim not dealt with by Court — Powers and duties of curator in civil bankruptcy under Mejelle.

1. If, before time arrives at which party bound to perform contract, he expresses intention to break it, this of itself. entitles other party, at his election, to act upon such expression of intention as renunciation of contract, to treat it as breach of contract and sue for breach forthwith or to wait until time for performance and then sue.

2. A repudiation of contract — a breach thereof entitling injured party to elect whether he will sue for damages for breach, or insist on specific performance.

3. If a plaintiff entered an action in which he claimed damages for breach of contract and later on asked to amend his claim by asking for specific performance, but his petition was never dealt with this cannot affect the position.

4. a) Powers and duties of a curator in a civil bankruptcy — defined in Mejelle; no connection whatever between interdiction or civil bankruptcy under Mejelle and a bankruptcy under Bankruptcy Ordinance.

b) Nothing in Mejelle which says that curator of interdicted person cannot repudiate a contract without leave of Court.

5. Where sum mentioned in contract as liquidated damages payable in case of breach is found to be a penalty, Court must assess damages.

Appellant in person and *Goitein*.
Eliash for Respondent.
Appeal from judgment of District Court, Jaffa, 28.6.1940.

JUDGMENT

This is the second time that this case has come on appeal to this Court, and though it has been argued at considerable length, the only point for determination is a simple one, namely, has the respondent committed a repudiation of the contract, so that the appellant is entitled to sue him for damages for breach thereof.

The District Court found that there could be no repudiation of something which could not at the moment of repudiation be performed and therefore the claim for damages was premature. This is clearly a wrong view of the law, for if we turn to Chitty on Contracts, 18th Ed. p. 839, we find the following under the heading of repudiation: —

> "If before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, this, of itself, entitles the other party, at his election, to act upon such expression of intention as a renunciation of the contract, to treat it as a breach of the contract and to sue for the breach forthwith, as was held in Hochster v. De la Tour, where a travelling courier sued his employer*) or alternatively to wait until the time for performance and then sue. But if he does not treat the renunciation as a breach but continues to give the party renouncing an opportunity of performing his contract, then the latter will be discharged should anything subsequently occur to excuse its peformance. Moreover only a definite refusal to perform a contract amounts to a renunciation".

A repudiation of a contract is therefore a breach thereof entitling the injured party to elect whether he will sue for damages for the breach, or insist on specific performance.

In this case we are of opinion that the respondent early in 1935, by his letter D. M. 14, committed a clear breach of the contract by definitely repudiating it, since he refused to deliver the land which was the subject matter of the contract.

We are also clearly of opinion that though the appellant may have, so to speak, wobbled in his ideas as to what he should claim, yet by entering this action on 20th March, 1935, in which he claimed damages for breach, he definitely elected to treat the repudiation as putting an end to the contract. He certainly later on asked to amend his claim by asking for specific performance, but, as Mr.. Goitein remarked,

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*) Edit. Note. — This reference appears on p. 156 of the *9th Ed. of "Chitty on Contracts" with the following amplification after the word "employer":

> ...who wrote before the time for performance that he should not require his services. The courier sued for damages at once and it was held he was entitled to do so. Alternatively the other party may wait...

fortunately for him this pettition was never dealt with and it cannot therefore affect the position.

The powers and duties of a curator in a civil bankruptcy are defined in the Mejelle and we cannot agree with Mr. Eliash that the provision of the Bankruptcy Ordinance should be applied by analogy to this case — there is no connection whatever between interdiction or civil bankruptcy under the Mejelle, and a bankruptcy under the Bankruptcy Ordinance, and there is nothing in the provisions of the Mejelle on this subject which says that a curator cannot repudiate without leave of the Court.

The appellant is therefore entitled to succeed, but since the sum claimed as damages, £.E. 10,000, is clearly a penalty, the case must go back to the District Court to assess the amount of damages payable. Since the case has to go back, it would be inadvisable to express any opinion at this stage on the merits of the case, and we refrain from doing so.

The appeal is allowed, and so much of the judgment of the District Court as rejected the claim for damages must be set aside and the case remitted for the District Court to assess the damages.

Costs to be costs in the cause.

Delivered this 9th day of October, 1940.

British Puisne Judge.

HIGH COURT NO. 80/40

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

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

In the application:

Dr. Moshe Lehrer — Petitioner.

v.

1. The Chief Execution Officer, Tel-Aviv.
2. The Custodian of Enemy Property in Palestine.
3. Jona Kuebler. — Respondents.

Order of provisional attachment on property previously claimed by Custodian of Enemy Property — Vesting Order by High Commissioner regarding enemy property affecting property attached — Confirmation of provisional attachment by judgment given after Vesting Order — Effect of attachment on ownership of property — Execution sought after issue of order vesting property in Custodian.

1. Point not taken in petition to High Court on which the order nisi was granted cannot be raised on return.

2. Provisional attachment does not change ownership in property attached.

A prior provisional attachment does not affect operation of a Vesting Order subsequent in date.

3. Any execution proceedings commenced after date of Vesting Order illegal.

Eliash & *Fraenkel* for Petitioner.
Respondent No. 1: Absent — served.
Crown Counsel (*Hogan*) for Respondent No. 2.
Respondent No. 3: Absent — served.

Application for an order to issue directed to the first respondent calling upon him to show cause why he should not continue the execution proceedings in Tel-Aviv Execution File No. 11509/40, why he should not sell the goods in conformity with the Law of Execution and he should not pay out of the proceeds the amount adjudged.

ORDER.

The facts giving rise to this petition are as follows. The Petitioner was the agent in this country of the firm of Schoering A. G. of Berlin, but sometime before the outbreak of war with Germany he ceased his connection with that firm, and it is stated that Mr. Jona Kuebler the third respondent was appointed as agent in his place.

On the outbreak of war the Trading with the Enemy Ordinance No. 36 of 1939 was passed, and on the 1st November 1939, the High Commissioner made an order under Section 9 of the Ordinance, called hereafter the Cutodian Order, by which certain moneys, otherwise payable to an enemy, were directed to be paid to the Custodian of Enemy Property, and certain provisions were made for conserving enemy assets and regulating execution.

On the 16th November, 1939, the Custodian informed Mr. Kuebler that the property of Messrs. Schoering A.G. in his possession was claimed as enemy property. On the 18th December, 1939, an order of provisional attachment was issued from the District Court, Tel-Aviv, addressed to Mr. Kuebler, attaching all the goods of Messrs. Schoering in his possession in satisfaction of a claim brought by the petitioner against the Company. To this Mr. Kuebler replied that the goods in question had been claimed by the Custodian and were in his custody under the control of the latter.

On the 11th January, 1940, there appeared in the Gazette an order made by the High Commissioner under Section 9(1)(b) of the Ordinance, (Hereinafter referred to as the Vesting Order), vesting in the Custodian, inter alia, all goods held for the purposes of sale, belonging to, or held or managed on behalf of, an enemy within the meaning of Section 4(1) of the Ordinance.

Judgment was entered in default of appearance in favour of the petitioner, on the 28th June, 1940, Mr. Kuebler, the then agent, having no power to contest the claim on behalf of Schoering A. G. and this judgment was put in execution.

Mr. Kuebler then proceeded to sell some of the goods, since they were urgently required in the local market, and also in order to save the heavy storage fees involved in keeping them. On this being brought to the notice of the Chief Execution Officer, the latter wrote to Mr. Kuebler instructing him to refrain form effecting the sales, but latter on the Chief Execution Officer, with some hesitation apparently, decided to allow the sales by Mr. Kuebler to continue. The petitioner has now come to this Court asking for an order to the Chief Execution Officer to continue the execution and to sell goods according to the Execution Law and to pay out the proceeds to the petitioner.

On the return, Crown Counsel, on behalf of the respondents, has argued that the petitioner could not sell the goods himself and take the proceeds, and that consequently the Custodian cannot pay him, and he bases this argument of paras. 5(1) and 5(3) of the Custodian Order. Para 5(1) directs the Custodian to hold all money paid to him under this Order and any property vested in him under a Vesting Order, until instructions are received from the High Commissioner as to its disposal. Para 5(3) states:— "Any money paid to the Custodian under this Order, and any property in respect of which a Vesting Order has been made shall not be liable to be attached or otherwise taken in execution."

Crown Counsel also has taken other points, that the attachment was bad, under para 6(1) of the Custodian Order, and that an attachment does not affect the ownership of the property which remains legally in the debtor untill sale. He has referred to Halsbury's Laws of England Vol. 14 p. 55.

The petitioner's reply is that there was no order vesting the property specifically of Messrs. Schoering in the Custodian and that a general vesting order of all enemy property in the Custodian is bad and ineffective. Further he has argued that no property can be in two separate custodies and that an enemy in Palestine cannot have more

rights than a Palestinian. This point was never taken in the petition on which the order nisi was granted — on the contrary it was assumed in the petition that the vesting order was a good one but that its effect was nullified by the previously granted order of provisional attachment. This point, therefore, cannot be raised now, and we do not deal with it.

The real point in this case is this — does a prior provisional attachment affect the operation of a vesting order subsequent in date. In my opinion it does not, since a provisional attachment does not change the ownership in the property attached, and in this case the ownership is changd by the operation of a law, see para 4(3) of the Custodian Order. The property therefore becomes vested in the Custodian as from the date of the vesting order but remains subject to the attachment already subsisting. The position on the 28th June, 1940, thus was that the property was vested in the Custodian, and that there was a confirmed attachment on the property. It must be remembered that up to this date there were no execution proceedings.

After judgment had been given the judgment was put in execution and it is at this point to my mind that para 5(3) of the Custodian Order comes into operation. This lays down that no property in respect of which a vesting order has been made shall be attached or "otherwise taken in execution". The last words of this para — "otherwise taken in execution" — seem to me to be a complete bar to any execution proceedings commenced after the date of the Vesting Order, as is the case here, and therefore any execution proceedings in this case are illegal. It seems that the Custodian already holds the sum of LP. 500 approximately, proceeds of the sale of some of the goods, which is more than sufficient to cover the amount of the petitioner's judgment, and in Exhibit B, attached to his affidavit, the Custodian has undertaken that the proceeds of sale will be treated by him as being subject, in precisely the same way as the goods were, to any rights which the petitioner may have under the attachment. The interests of the petitioner are therefore protected, but the Custodian cannot be compelled to pay over any money to the petitioner unless the provisions of paras 5(1) and (2) of the Custodian Order have been complied with.

In my opinion the rule nisi should be discharged with costs to include LP. 10 fee for attending the hearing.

I wish to guard myself in regard to one further point. It may well be that the confirmation of a provisional attachment by a Court, after a vesting order has been made, is contrary to the provisions of para 5(3) of the Custodian Order, but that is a matter which is not within

our jurisdiction, but must be taken by way of appeal from the Court confirming the attachment. I only mention it because I do not wish anything in this judgment to be taken as confirming the validity of the confirmation of such an attachment if at any time the point should be raised in any other proceedings.

Given this 30th day of October, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 165/40.

IN THE SUPREME COURT SITTING AS A COURT OF

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

In the appeal of:—

"Harish" Agricultural Co-operative Society Ltd.

Appellant.

v.

1. Abdul Salem Daoud of Majdal, Gaza
2. The Attorney-General

Respondents.

Service upon Government Department of provisional attachment on moneys due to debtor — Effect of third party raising no objection to attachment — Paying attached moneys to debtor by mistake — Procedure when claiming from Government Department under art. 282, *Ottoman Civil Procedure Code.*

1. If third party, whether a private individual or a Government Dapartment with whom moneys due to debtor attached, raises no objection, attachment — confirmed.

2. Where third party, being a Government Department, does not comply with provisional attachment and pays attached moneys to debtor, resulting proceedings between creditor and third party under art. 282 of Ottoman Civil Pocedure Code — governed by Crown Actions Ordinance.

Kaddouri for Appellant.

Respondent No. 1. — in person.

Crown Counsel (*Hogan*) for Respondent No. 2.

Appeal from judgment of District Court, Tel-Aviv, in its appellate capacity, dated 21.6.1940.

JUDGMENT.

The present Appellant, the Harish Agricultural Co-operative So-

ciety, claimed in the Magistrate's Court, Tel-Aviv, from one, Abdul Salam Daoud, a sum of money, and served upon the Public Works Department, Jerusalem, as Third Party, provisional attachment for a sum of LP. 99.348 mils, plus costs.

The Director of Public Works raised no objection to this attachment; on the contrary, departmental instructions were issued that effect should be given to it, and a copy of the departmental instructions was returned to the Court. By a mistake, however, the money was paid to the debtor, and on the return day, the Attorney-General's representative appeared before the Magistrate and argued that, for various reasons, no order could be made against the Public Works Department. The Magistrate, however, took the view that these arguments were not well founded, and confirmed the provisional attachment.

The Attorney-General appealed to the District Court of Tel-Aviv, which held that since the Magistrate found as a fact that the attachment was not effective, he was wrong in confirming it, and added that the creditor was at liberty to sue the Government after obtaining the fiat of the High Commissioner in pursuance of the Crown Actions Ordinance. The creditor appeals to this Court.

If the third party, whether a private individual or a Government Department, raises no objection, the attachment is confirmed. Where, however, the third party does not comply with the provisional attachment, Article 282 of the Ottoman Code Civil Procedure applies; and it seems to me that the only question for us to decide now is, that when that article applies, and the third party is a Government Department, are the resultant proceedings between the creditor and the third party such as fall within the ambit of the Crown Actions Ordinance, and I think that they are.

Admittedly no proceedings have been taken under that Ordinance, and the appeal will be dismissed.

In the circumstances, I refrain from expressing any opinion upon the other points which have been raised.

Chief Justice.

Costs on lower scale, with LP.15 for attending the hearing to the second respondent.

Delivered this 19th day of September, 1940.

Chief Justice.

CIVIL APPEAL NO. 156/40.

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

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

In the appeal of:—

Na'im Shehadeh — Appellant.

v.

1. Gavriel Selig Shurik
2. Yousef Erlichman
3. Menachem Sankowsky
4. Edward Zvi Fellman
5. Jeoshua Trachtengott — Respondents.

Action entered in District Court jaffa against defendants residing in Tel-Aviv — Meaning of "appropriate Court" and "place" in Rule 4 of Civil Procedure Rules — Concurrent jurisdiction of two Courts in same District.

1. Where there are two Courts having concurrent jurisdiction in one District including two towns, each of them — an appropriate Court within meaning of Civil Procedure Rule 4, no matter in which of the two towns defendants reside.

2. In Civil Prcedure Rule 4 "place" — not limited to mean a town only, it can include an area in a Distrcit, and "appropriate Court" means "Court having jurisdiction".

3. An action properly entered in an appropriate Court must be tried by that Court.

Moyal for Appellant.
S. Felman for Respondents No. 1 & 2.
Polonsky for Respondent No. 3.
Edward Z. Fellman for Respondents No. 4 & 5.

Appeal from judgment of District Courts, Jaffa, dated 31.5.40.

JUDGMENT.

This is an interlocutory appeal from an order made by the learned President of the Jaffa District Court declaring that the Jaffa District Court was not an appropriate Court, within the meaning of Rule 4 of the Civil Procedure Rules, for the trial of an action duly entered in that Court. It is not disputed that the District Court of Jaffa and the District Court of Tel-Aviv have concurrent jurisdiction in an area which includes the towns of Jaffa and Tel-Aviv and in fact includes the area now known as the Lydda

District. The Defendants in this case reside in the town of Tel-Aviv. The Plaintiff apparently is non-resident in Palestine. It seems to us that the words "appropriate Court" as used in Rule 4 must mean "the Court having jurisdiction" and since it is not disputed that the Defendants reside in the Lydda District, the District Court of Jaffa is the appropriate Court for the trial of this particular action. There is also of course another appropriate Court, that is to say, the District Court of Tel-Aviv, but an action which is properly entered in an appropriate Court must be tried by that Court. "Place" is not limited to mean a town only — it can include an area in a district. .

The appeal must therefore be allowed and the Order of the learned President set aside. The appellant will have his costs on the lower scale and LP.10 fee for attending the hearing, to be paid by the fourth and fifth respondents. With regard to the other three respondents, we do not think they should either get or pay costs.

Delivered this 4th day of September, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 175/40.

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:

M. Miller & Co. Appellant.

v.

1. Yehezkiel Steimatzky
2. Firm Literaria — Books and Newspaper Centre in liquidation. Respondents.

Proceedings before Disrtict Court regarding arbitration and subsequent proceedings regarding same arbitration before other District Court in same district.

1. Where there are two District Courts in same district application under Arbitration Ordinance may be made to either of them *).

2. When proceedings in connection with arbitration have

*) Ed. Note. This applies probably also to other matters than arbitration and to other Courts than District Courts.

been before one District Court of same district, subsequent proceedings should, as a matter both of convenience and common sense, be brought in same Court *).

Wilner for Appellant.

Weinshall for Respondent No. 1

Respondent No. 2 absent — served.

Appeal from order of District Court, Jaffa, dated the 24th day of June, 1940.

JUDGMENT

Some time ago the parties to this appeal entered into a contract. There were disputes between them and the question arose whether the contract contained an arbitration clause. The matter was taken to the District Court, Tel-Aviv, which decided that there was an arbitration clause, and by consent, an arbitrator was appointed.

The matter went to arbitration, and the present Appellant desired that the arbitrator should state certain points of law for the opinion of the Court, and he was minded to move under Section 8(2) of the Arbitration Ordinance. Instead, however, of returning to the District Court of Tel Aviv he applied to the District Court of Jaffa, and that Court held that it was not the appropriate Court within the meaning of the Civil Procedure Rules.

The Arbitration Rules of 1937 provide that any matter under the Arbitration Ordinance may be brought, inter alia, "in the court in the district of which the arbitration took place." It is clear that in the Lydda District there are two District Courts, and that if the matter were starting de novo, application might be made to either of them — see decision of this Court in Civil Appeal 156/40**). But it seems to us that it is a matter both of convenience and common sense that when proceedings in connection with an arbitration have been before one of these Courts, subsequent proceedings should be brought in the same Court.

In this case, after the Jaffa Court had refused to entertain the matter, the Respondent applied to the Disrict Court of Tel-Aviv, making, in effect, a similar application to that made by the Appellant to the Jaffa Court. This was entertained by the Tel Aviv Court, and no appeal has been made from its order.

It is clear, therefore, that the legal points will be ventilated before a competent Court, and apart from the view which we have expressed above, no practical purpose will be served by allowing this appeal.

*) See remark on p. 114, supra.

**) Reported on p. 113, supra.

It will therefore be dismissed with costs, which we asses at an inclusive figure of LP. 5.— to the first Respondent.

Delivered this 13th day of September, 1940.

Chief Justice.

CIVIL APPEALS NOS. 95, 96, 97 and 138 of 1940.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of:—

Civil Appeal 95/40.

The Palestine Jewish Colonization Association — Appellant.

v.

The Attorney-General on behalf of the Government of Palestine — Respondent.

Civil Appeal 96/40.

The Palestine Jewish Colonization Association — Appellant. (Originally Defendant)

v.

1. Village Settlement Committee of Jaba, through 'Ali Ziyadi, Mukhtar of Jaba Village
2. Village Settlement Committee of Sarafand

First Respondents. (Originally Third Party)

3. The Attorney-General on behalf of the Government of Palestine

Second Respondents. (Originally Third Party)

Civil Appeal 97/40.

The Palestine Jewish Colonization Association — Appellant.

v.

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

First Respondent. (originally Defendant).

2. Village Settlement Committee of Jaba through 'Ali Ziyadi, Mukhtar of Jaba Village
3. Village Settlement Committee of Sarafand

Second Respondents.

(Originally Third Party).

Civil Appeal 138/40.

The Attorney-General on behalf of The Government of Palestine — Appellants.

v.

1. The Palestine Jewish Colonization Association
2. The Village Settlement Committees of Jaba and Sarafand — Respondents.

C.A. 95/40 Appeal from the decision of the Settlement Officer in Settlement Case No. 16/Atlit, dated 20.3.1940.

C.A. 96/40 Appeal from the decision of the Settlement Officer in Settlement Case No. 19/Atlit, dated 20.3.1940.

C.A. 97/40 Appeal from the decision of the Settlement Officer in Settlement Case No. 20/Atlit, dated 20.3.1940.

C.A. 138/40 Appeal from the judgment of the Land Court (in its appellate capacity) in Land Appeal No. 145/39, dated the 20th May, 1940.

Claim of uniterrupted possession — Wasteland forming one of boundaries — Decision of Mejliss Idara based on report and plan regarding definition ad fixing of boundaries between neighbouring villages — Settlement Officer ordering land to be registered in name of Government as unregistered unassigned stateland.

1. Settlement Officer on finding that land in dispute unregistered and that there had been no effective and exclusive possession by Plaintiff may assign land to Government under sec. 29 of Land (Settlement of Title) Ordinance, even where Government led no evidence and were not represented at hearing.

2. Where boundary stated to be wasteland, edge of wasteland should be taken as boundary line, not some arbitrary line in centre of wasteland.

Horowitz and Farragi for the Palestine Jewish Colonization Association
Hogan (*Crown Counsel*) for the Attorney-General.

JUDGMENT.

These four consolidated appeals are all from the Land Settlement Officer and concern certain parcels in the southern part of the Athlit Village lands. There were other claimants at settlement whose claims were all dismissed and no appeals have been entered in respect of those, so the present dispute is between the Palestine Jewish Colonization Association, commonly known as the P.I.C.A., and the Government of Palestine. In appeal No. 138/40, the Settlement Officer ordered

the parcels in dispute in cases 14/— 18/— and 21/Athlit to be registered in the name of the Government as unregistered unassigned stateland. On appeal to the Land Court, that Court allowed the appeal and ordered registration in the name of the P.I.C.A. The Government have now appealed. In the other three appeals, it is the P.I.C.A. which is the Appellant, the cases having come direct to this Court and not via the Land Court.

Leaving on one side for the moment the question of the effect of the decision of the Mejliss Idara of 1323 in respect of the Athlit lands, on which the P.I.C.A. mainly base their case in all four appeals, Appeals Nos. 95, 96 and 97 can be easily disposed of so far as the other evidence is concerned. The parcels in dispute are all on or near the seashore. The Settlement Officer inspected the parcels, and insofar as the P.I.C.A.'s claim was based on kushans he was unable to identify any of the lands as falling within the boundaries of the kushans and with those findings, based as they are on several close inspections of the land, I do not think that we can interfer. Insofar as the P.I.C.A.'s claim is based on uninterrupted possession the Settlement Officer found on the evidence that there had been no acts of possession in the way of fencing, cultivation, or otherwise, for any continuous period. The claim therefore by possession, as the Settlement Officer held, must also fail.

In case No. 138, the dispute is as regards the ownership of rocky land lying along the eastern boundary of the Athlit lands in its southern portion where it adjoins the lands of Igzim village

Six localities are concerned — in three of them the E. boundary is shown on the kushans to be a road — in the three others this boundary is shown as wa'ar (waste land). The Settlement Officer held that this wasteland was within the boundaries of Athlit and took its western edge as the eastern boundary of the parcels. The P.I.C.A. argue that he should have taken the middle line of the wasteland, or the watershed which is the boundary shown in the map of 1323 as the eastern boundary of Athlit village lands. The Settlement Officer found that the rocky land was unregistered, and that there had been no effective and exclusive possession by the P.I.C.A., and therefore ordered the land to be registered in the name of the Government under Section 29 of the Land (Settlement of Title) Ordinance, Cap. 80.

Mr. Horowitz for the P.I.C.A. has complained that, since Government led no evidence and were not represented at the hearing, there is something inequitable in assigning the land to it. Personally I canot see anything unfair in Government taking land to which no

other title has been made out, neither can I see any reason why such land should go to adjoining registered owners rather than to Government, but whatever one's personal views may be is immaterial since this course is prescribed by Section 29, and there is no alternative, so long as the law remains as it is.

I leave for the moment deciding whether the Settlement Officer was right in his decision, because before that can be done the judgment of the Land Court on appeal must be considered, and before considering that, it is I think now the place to deal with the decision of the Mejliss Idara of 1323, on which rests, as I have already stated, the main case of the P.I.C.A. in all four appeals.

Turning to this report and decision, we find that it is headed "The result of our investigations for the definition and fixing of boundaries between Athlit Village and the neighburing villages", and the five sub-heads of the report are all concerned with "boundaries" of villages. In one instance where the report makes certain proposals with regard to some cisterns and water supply, these proposals were not approved by the Mejliss Idara in its decision, which pointed out that these matters were for the Courts to decide. This is in fact a strong argument in favour of the Government's contention that the report was concerned only with the fixing of the Athlit Village land boundaries. I do not think that it is necessary to consider the exact powers of the Mejliss Idara in regard to questions of ownership, because on carefully reading the report I can find nothing to suggest that that body dealt with any question of private ownership or attempted in any way to settle them. It is true that there are certain passages in the report which refer to lands in the possession of Mr. Frank, who was the predecessor in title of the P.I.C.A. and to certain differences between the people of Tira village and Mr. Frank, but I cannot find anything from which it can be inferred that the whole of the lands of Athlit belonged to Mr. Frank nor that the lands included in the groups of kushans in case 138 extended eastward as far as the watershed, which is the eastern boundary of the Athlit village lands. The report in fact, and the accompanying decision which is based on it, are exactly what they are declared to be, namely, "the definition and the fixing of the boundaries between Athlit Villages and the neighbouring villages". The learned Settlement Officer in case No. 138 says:

> "So far as the Report discloses and from the evidence of the plaintiffs' witness it appears that the Mejliss Idera were concerned at the time with the definition of the village boundaries and I do not find that the Report contains any decision that in effect

amounted to a settlement of the title to the land within the boundaries so defined".

With that conclusion I respectfully agree.

Turning now to the judgment of the Land Court in case 138, that Court held that the Settlement Officer was wrong in his view in saying that the Report and plan were concerned only with village boundaries as the contents of the report showed that the boundaries were fixed on the basis of accepted private tenancy.

For the reasons already given I cannot accept this view, and I think that the Land Court misconstrued the effect and contents of the Report.

Coming back to the evidence before the Settlement Officer in case 138 and to the conclusion and inferences which he drew with regard to the eastern boundaries of the P.I.C.A'S kushans, I think that he came to a correct conclusion for the reasons given by him and I see no reason for interfering.

In particular it seems to me that the Settlement Officer was right in holding that, where a boundary is stated to be wasteland, the edge of the wasteland should be taken as the boundary line, and not some arbitrary line in the centre of the wasteland. To adopt the view advanced by the P.I.C.A. would be contrary to all the accepted principles of construction, and to common sense.

As to possession of the P.I.C.A., I do not think that the erection of walls and the digging of trenches in 1906 by their predecessor in title are by themselves evidence of effective and exclusive possession, and it is worthy of note that Mr. S. Levy, who was the P.I.C.A's manager in Palestine, when giving evidence said that the P.I.C.A. had no kushans for the rocky land.

Holding as I do that the Report of the Mejliss Idara and the plan cannot bear the interpretation placed on them by the Land Court, it follows that in my opinion the judgments of the learned Settlement Officer were right in every respect.

I would therefore dismiss the appeals by the P.I.C.A. in cases No. 95, 96 and 97 and allow the appeal by Government in case No. 138 and restore the judgment of the Settlement Officer in this latter case.

The Government will have their costs in all four appeals to this Court, and their costs in the Land Court in case No. 138 in all instances on the lower scale, to include LP. 15 hearing fees in this Court for all the appeals.

Delivered this 26th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 141/40.

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

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

In the appeal of:

'Abd el Wahhab Ali el Wahhab el 'At'ut & 2 others — Appellants.

v.

Mohammad Sha'ban ez Zibda & 3 others — Respondents.

Attachment on land held by adverse possessor without prescriptive title — Order by Settlement Officer to register land on ground of undisputed possession but subject to preservation of attachment — Subsisting effectiveness of attachment which was good ab initio.

Attachment laid on land when adverse possessor thereof had no prescriptive title remains effective and must be preserved on subsequent registration of that land by order of Settlement Officer on ground of undisputed possession.

Scharf for Appellants.

Moghannam for Respondents Nos. 1 & 2.

S. Saiyid for Respondent No. 3.

Respondent No. 4 in person.

Appeal from decision of Setlement Officer, Tulkarm Area, dated the 25th day of May, 1940.

JUDGMENT

It appears that in 1929 and 1930 attachments were laid by the respondents on land registered in the name of one Abd el Fattah. Land settlement took place in 1940 and the Settlement Officer ordered the registration of the land in question in the name of the appellants subject to the preservation of the above attachments. The ground on which the Settlement Officer so ordered was that the appellants were in undisputed possession. The appellants contend that in 1929 and 1930, the years of the attachments, they had already obtained a pres-

criptive title by possession for the prescribed period and they ask that the case should be remitted to the Settlement Officer to make a finding of fact on this point. It appears that the Settlement Officer has already made such a finding. He says —

"I am not satisfied that defendants 7, 8 and 9 (the appellants in the present appeal) have been in possession of the parcel under such conditions as would preclude an action of recovery of possession by Abd el Fattah, if he were alive".

It would seem that he based this finding largely upon the fact that in 1931 the appellants brought an action claiming the ownership of the land on the ground of purchase from Abd el Fattah and asking that Abd el Fattah should be restrained from interfering with the land. Abd el Fattah, on oath, denied the sale and, in the event, judgment was given in 1933 for the defendants and the attachments were confirmed. Abd el Fattah died in 1934. The Settlement Officer therefore stated that in his view adverse possession against Abd el Fattah began, at the earliest, after the judgment of the Court in 1933.

We consider that there was material upon which the Settlement Officer could properly so find and it follows that, if when the attachments were laid the appellants had no prescriptive title, the attachments were good ab initio and must still be regarded as effective today.

The appeal will therefore be dismissed with costs to include, as far as the first and second respondents are concerned, a sum of LP. 10 for advocate's attendence fee. The third and fourth respondents will each have a sum LP. 1 for travelling expenses.

Delivered this 18th day of September, 1940.

British Puisne Judge.

HIGH COURT NO. 51/40.

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:

Dr. Selig Eugen Soskin — Petitioner.

v.

1. Alexander Sauber.
2. Moshe Gelbermann.

3. Joseph Azriel. Respondents.

Publication of matter calculated to prejudice proceedings pending before Court — Allegation that sec. 4 of Contempt of Court Ordinance impliedly repealed by Criminal Code Ordinance — Liability of Responsible Editor and of printer — Contempt of Court Ordinance, Cap. 23, sec. 4 — Criminal Code Ordinance, Sec. 126—Palestine-Order-in-Council, Art. 43—Press Ordinance.

1. Section 4 of Contempt of Court Ordinance—of far wider scope than sec. 126 of Criminal Code Ordinance and not impliedly repealed by latter, nor ultra vires Art. 43 of Palestine Order in Council.

2. Person appointed Responsible Editor of newspaper responsible for anything published in it, irrespective of extent of his actual control.

3. No good defence for printer charged under Contempt of Court Ordinance to say that he owns a considerable press and cannot be expected to know himself what his employees actually print.

Werner for Petitioner.

Seligman for Respondents.

Application for an order to issue to the Respondents directing them to show cause why they should not be punished in accordance with Section 4 of the Contempt of Court Ordinance, 1929, for publishing a certain writing on the 22nd Sivan 5700, (28th June, 1940).

ORDER.

Rose, J.

This case concerns the interpretation of section 4 of the Contempt of Court Ordinance, Chapter 23 of the revised edition. The question to be decided is whether the article complained of is intended or calculated to prejudice certain proceedings pending before the Courts.

It was suggested in argument by Mr. Seligman that such words could not be held to be calculated to prejudice the proceedings because the question to be decided by the Court was one of law. This, however, does not seem to be accurate. When one looks at the pleadings it is clear that an issue of fact is raised as to the receipt of the money and either party is at liberty to call evidence as to that. This being so, it seems to me to be clear that the article is calculated to prejudice the proceedings.

It was further argued that since the enactment of the Criminal Code Ordinance, 1936, Section 4 of the Contempt of Court Ordinance

became ultra vires article 43 of the Palestine Order-in-Council, since an alternative remedy is provided by Section 126 of the Criminal Code Ordinance. Alternatively, it is contended that Section 4 of the Contempt of Court Ordinance is impliedly repealed by the Criminal Code Ordinance.

The Schedule to the Criminal Code Ordinance contains a list of the Ordinances which were repealed, including the Contempt of Court Ordinance, 1930[1]. No mention is made of Section 4 of Chapter 23. This being so, it ts, in my opinion, unreasonable to assume that this section has been impliedly repealed. Further, a compensation of the above section with section 126 of the Criminal Code Ordinance shows that the former is of far wider scope. It cannot, therefore, be held that Section 126 stands in the way of a litigant availing himself of the older section.

It remains to decide which, if any, of the three Respondents should be held to be responsible. The first Respondent, who states that he is the publisher and proprietor of the paper, accepts responsibility on behalf of all three Respondents. This settles the matter as far as he is concerned.

The second Respondent is described in the paper itself as the Responsible Editor. The Press Ordinance requires that every paper should have a Responsible Editor and, in my opinion, a person so appointed must be held to be responsible for anything pulished in the paper, irrespective of the extent of his actual control.

The third Respondent is the printer, who contends that, as he owns a considerable printing press, he cannot be expected to know himself what his employees actually print and can, therefore, not be liable for their errors. I am unable to accept this argument and consider that he must also be held liable.

I, therefore, find the Respondents guilty of contempt of Court and there remains the question of the penalty that should be inflicted. It seems to me that justice will be met by inflicting a fine of LP. 15 on each of the first and second Respondents and of LP. 10 on the third Respondent.

The Petitioner will have the costs of this petition assessed at an inclusive sum of LP. 15, LP. 5 to be payable by each Respondent.

Given this 3rd day of September, 1940.

Chief Justice.

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*) Embodied in Contempt of Court Ordinance as sec. 10 of Cap. 23 (Drayton).

CIVIL APPEAL NO. 155/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of:—

1. Abdullah el Surani and sons.
2. Mustafa el Surani
3. Yusef el Surani
4. Kasem el Surani — Appellants

v.

Barclays Bank (D. C. & O.) Jaffa. — Respondent.

Order reasons for which reserved till conclusion of case — Preliminary objection by respondent that no appeal lies — Remittal of case to Trial Court to give reasons for its order.

1. On interlocutory appeal from an order reasons for which reserved by Trial Court till conclusion of case, case will be remitted for reasons to be given.

2. Court of Appeal faced with preliminary objection that no appeal lies and remitting case to Trial Court for reasons to be given may decide that respondent may put his objection if and when appeal comes again before it.

Moyal for Appellants.

Papo for Respondent.

JUDGMENT.

Appeal from order of District Court, Jaffa, dated 27.6.1940.

In this case we think that the appeal will have to be allowed. The learned Judge, apparently not anticipating any interlocutory appeal, said in his order, that he would give his reasons at the conclusion of the case. Unfortunately, the case came up on appeal before its conclusion in the lower Court. In these circumstances, we cannot decide the appeal before we know the reasons which prompted the Court to accept the document. The appeal will, therefore, be allowed and the case will be remitted for reasons to be given. The respondent in this appeal will be able to put his preliminary objection in that no appeal lies to this Court, in case the appeal comes again before us. Costs to follow the result of the retrial.

Delivered this 9th day of September, 1940.

British Puisne Judge.

HIGH COURT NO. 74/40

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

Before: Copland, J. and Rose, J.

In the application of:

Elhanan Karawasarsky — Petitioner

v.

Registrar, District Court, Tel-Aviv. — Respondent.

Sale of mortgaged property at instance of mortgagee — Inapplicability of provision regarding collection fee in Execution Office to sale of mortgages — Applicaiton to High Court from decisions of Registrar.

1. Mortgage not a judgment, thus execution fee of 2½% from sums collected from judgment debtor — not payable on sale through Execution Office of mortgaged property.

2. Art. 43 of Palestine Order in Council not excluded by sec. 17 of Registrars Ordinance; decision of Registrar as to assessment of Court fees can be carried to High Court.

Eliash for Petitioner.

Crown Counsel (*Bell*) for Respondent.

Application for an order to be issued calling upon the Responden to show cause why his order in Execution File No. 16703/37, Tel-Aviv, dated September 6, 1940, to collect from the Petitioner a sum of LP. 345.250 mils should not be set aside.

ORDER.

In this case it appears to be common ground that up to the 31st of December, 1939, the fee of 2½% would have been payable. Up to that date the matter was governed by paragraph 3 (8) of the Transfer of Land (Fees) Rules, 1935. On the first of January, 1940, however, the 1935 Rules were revoked by the Land Transfer (Fees) Rules, 1939, from which all reference to the Execution fee payable on the sale of mortgaged property is omitted.

Item 55 of the Schedule of the Court Fees Rules, 1939, reads as follows :

> "On the amount of the judgment at the cost of the judgment-debtor and levied from the sums collected a proportional fee of 2½%."

We agree with the Petitoner that a mortgage is not a judgment and that, therefore, the above item does not assist the Respendent.

Our attention was called by learned Crown Counsel to Section 14 (2) of the Land Transfer Ordinance, but in our view this subsection does not affect the matter as it deals only with procedure and cannot be said to support the proposition that a mortgage is the same thing as a judgment.

In view of our opinion on this matter, it is unnesessary to consider whether there has been a "collection" within the meaning of Item 55.

The Respondent contends that the matter is not properly before us

in view of Section 8(3) and section 17 of the Registrars Ordinance, 1936. With regard to Section 8(3) we are of opinion that, while its language may be open to a wider construction, the better view is that it is limited to matters covered by Section 6 of the Ordinance. It is, therefore, of no avail to the Respondent in this matter.

As regard Section 17, the language used is narrower than that of Section 8 (3). The latter says that the decision of the Registrar shall be final and shall not be the subject of proceedings in any Court. These words would seem to be sufficiently wide to exclude Article 43 of the Palestine Order-in-Council, 1922. Section 17, on the other hand, merely says that the decision of the Registrar shall be final and omits the reference to "proceedings in any Court". We think, therefore, that Article 43 is not excluded by Section 17 and that an application to the Supreme Court, sitting as a High Court of Justice, lies.

Moreover, we are doubtful whether fees payable in execution of a mortgage are "Court fees" at all within the meaning of the Section. But this matter has not been argued before us and we refrain from deciding the point.

For these reasons we are of opinion that there is no authority for the collection of the fee in question and the Rule must, therefore, be made absolute. The Petitioner will have his costs to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 14th day of October, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 196/40.

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

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

In the appeal of :

The Attorney-General on behalf of the Department of Customs Excise and Trade.

v.

Subhi Munib es Sayeh — Respondent.

Claim for recovery of goods seized by a Customs Officer — Onus of proof in proceedings for recovery of goods seized by a Customs Officer — Finding of Trial Court based on insufficient evidence — Customs Ordinance sec. 190, 227.

In proceedings for recovery of goods seized by Customs onus on Plaintiff to prove that duties had been paid or goods lawfully imported.

Finding by Trial Court that seized goods had been acquired by Plaintiff in ordinary course of his trade or business — irrelevant, if he did not discharge onus of proof as prescribed by law.

Crown Counsel (*Hogan*) for Appellant.

T. Kamal for Respondent.

Appeal from judgment of District Court, Nablus, dated 7.9.40.

JUDGMENT.

This is an appeal from a judgment of the District Court of Nablus whereby they gave judgment for the plaintiff, who is now the respondent here, for the return of certain goods which had been seized by the Customs. The only point in this appeal is whether the District Court was right in holding that Section 227 of the Customs Ordinance had a limited effect and did not apply in this particular case. In that we think that they were wrong. Section 227 says, (we read the relevant parts only), "that in any proceedings under Section 190 for the recovery of any goods seized by a Customs Officer, if any question shall arise whether or not the Customs duties have been paid in respect of such goods or the goods have been lawfully imported, the burden of proof that such duties have been paid or that the goods have been lawfully imported, shall be on the plaintiff in the proceedings".

Now, in the Court below, the plaintiff did not discharge that onus. He called as a witness the person from whom he had said he had bought the goods, a merchant called Amin Jiryies, and this witness could not identify the goods — he merely said that they were similar and he could not remember how or from whom he got the goods. Under the law as it exists it is essential that a plaintiff in proceedings for recovery of seized goods must prove that the duties had been paid or the goods were lawfully imported. That onus in this particular case the respondent failed to discharge. The fact that the Diststrict Court held that the goods had been acquired by the respondent in the ordinary course of his trade or business is irrelevant, having regard to the wording of Section 227.

The appeal must therefore be allowed and the respondent's claim in the Court below must be dismissed. The appellant will have his costs on the lower scale both here and below to include LP.5 fees for attending the hearing in this appeal.

Delivered this 23rd day of October, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 117/39.

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. The Shell Company of Palestine, Ltd.
2. The Socony Vacuum Oil Company, Inc.
3. Société du Naphte S.A. Sous La Raison A.I. Mantachieff and Cie. — Appellants.

v.

The Municipal Corporation of Haifa. — Respondents.

Arbitration between Municipal Corporation and 3 separate persons as to liability to, and amount of, betterment tax — Agreement by all parties that arbitrator should hear the three arbitations together — Written decision by arbitrator termed by him "Interim Award" fixing liability to pay betterment tax, amount to be ascertained later — Question as to whether or not application to Court, after Interim Award, for direction to arbitrator to state special case is out of time — Arbitration Ordinance, sec. 8 (2).

1. In absence of express agreement between parties to contrary a submission to arbitration under Arbitration Ordinance presupposes that there is to be only one award unless facts of case justify inference that there has been such agreement between parties as to displace supposition.

2. If document described by arbitrator as Interim Award found to be merely a decision on a preliminary point and arbitration not yet completed, application to Court under sec. 8(2) of Arbitration Ordinance for order to arbitrator to state special case for opinion of Court — not too late.

3. Where there are arbitration proceedings on two or more submissions before same arbitrator and between same claimant and two (or more) different persons and all parties agreed that arbitrations should be heard together — not necessary for those persons when resorting to sec. 8(2) of Arbitration Ordinance to lodge separate applications.

A. Levin for Appellant. No. 1.
Eliash for Appellant No. 2.
Abcarius for Appellant No. 3.
Weinshall for Respondents.

Appeal from order of District Court, Haifa, dated 27.11.39.

JUDGMENT

Rose, J.

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

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

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

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

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

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

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

> "Gentlemen,
>
> On the question submitted to me as to the existence of any liability at all upon the Respondents I have made an Interim

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

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

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

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

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

A further point was successfully taken by the Respondents in the Court below as against the Second and Third Appellants, namely, that they should have lodged separate applications. This matter was

not pressed in argument before us in this Court, and we do not think that there is any substance in it.

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

Delivered this 2nd day of February, 1940.

Chief Justice.
British Puisne Judge.
Puisne Judge.

CIVIL APPEAL NO. 84/40.

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:

Lydia Willner — Appellant.

v.

Salim Barakat — Respondent.

Non-Moslem Waqf constituted before Moslem Court — Judgment of Religious Court ordering payment of certain shares in Waqf — Action in Civil Court against truste of Waqf for payment of sum of money — Meaning of "proceedings concerning administration" — Jurisdiction of Civil and Religious Court — Costs in procedings for determination of cestui que trust by whom payable — Civil and Religious Courts (Jurisdiction) Ordinance, sec. 2, 3(b) — Civil Procedure Rules 278.

1. Proceedings to enforce a judgment issued from a competent Religious Court for a definite sum or for some specific relief which Execution Officer can effect should be taken by way of execution.

2. Judgment of Maronite Court in Palestine in a matter within its jurisdiction — final and executable notwithstanding any eventual appeal by losing party to Maronite Court in Lebanon.

3. Sec. 3(b) of Civil and Religious Courts (Jurisdiction) Ordinance does not oust jurisdiction of Civil Courts.

4. A proceeding concerning administration of a non-Moslem Waqf constituted before a Moslem Court means some action which would call for application of principles of equity, i.e. in nature of an administration action before Chancery Court as distinct from a mere claim for a liquidated sum.

5. A trustee in a case where there is a doubt as to who are his cestuis que trust — entitled to apply to Court for direction, and costs of application payable out of fund; but when question had been decided by competent Court and he appeals in order to displace title of cestui que trust he appeals as an ordinary litigant and, on losing appeal, must pay costs personally.

Goitein for Appellant.
Levin and *Apelbom* for Respondent.

Appeal from judgment of District Court, Tel-Aviv (sitting as a Court of Appeal), dated 23.2.1940.

JUDGMENT.

Some years ago a Waqf, known as the Awad Wakf, which it is admitted is of the category contemplated by Section 2 of the Civil and Religious Courts (Jurisdiction) Ordinance, was constituted. The dedicator was a member of the Maronite Community, and that Community has a Court in Palestine.

In 1936 proceedings were taken before the Maronite Court, which involved the construction of the Waqfieh, and in the result that Court decided that the present Appellant was entitled to a one-third share of certain funds. Other applications were made to that Court but they may be dismissed from consideration as the High Court, in H. C. 36/37, in which the question was whether an appeal lay from the decision of the Maronite Court, held. —

> "This Court (the Maronite Court) on 28.3.36 gave a judgment ordering the payment of certain shares in the said Waqf in common to the 2nd, 3rd and 4th Respondents (2nd Respondent is the prsent Appellant) and on 23.7.36 the Maronite Court confirmed their previous judgment of 28.3.36".

and after considering the possibilities of an appeal to a Maronite Court in the Lebanon the High Court held —

> "and it would therefore be wrong to prevent the 2nd, 3rd and 4th Respondents from executing the judgment which they have already obtained in their favour, and which, so far as the Courts of this Country are concerned, has now become final".

The Appellant complained that the Mutawalli failed to distribute the assets in accordance with the judgment of the Maronite Court, and

in consequence took proceedings in the Chief Magistrate's Court, Tel-Aviv. There is no dispute as to the amount of the fund to be distributed, the only dispute being as to the proportion to which the Appellant is entitled.

Some argument took place before us as to whether an action could be brought upon the judgment of the Religious Court, or whether the Appellant should proceed by way of execution. No doubt, when a judgment is for a definite sum, or for some specific relief which the Execution Office can effect, proceedings should be taken by way of execution, but in the present case, although there was no dispute as to the amount due, subject to the method of distribution, I to not think there was a judgment in a form which could be executed.

The Mutawalli seeks to rely, inter alia, on what he alleged to be binding pronouncements of the Maronite Court, but in my opinion, the judgment of the High Court to which I have already referred prevents his doing so successfully, and I think that the only question which remains for decision is whether or not Section 3 (b) of the Civil and Religious Courts (Jurisdiction) Ordinance ousts the jursdiction of the Civil Courts.

That paragaraph is as follows : —

> "(b) an action or other proceeding concerning the admistration of such a Waqf shall be brought before the Court of the religious community of which the dedicator of the Waqf was a member: if the dedicator did not belong to a religious community, or if there is no established Court of the community, the action or proceeding shall be brought before the civil Court, which shall apply the general principles of equity."

and the question arises, what is meant by an action or other proceeding concerning the administration of a Waqf. When the paragraph is read as a whole it will be seen that when proceedings under it are taken before a civil court that court must apply the general principles of equity. I think, therefore, that one may assume that proceedings concerning administration is meant some action which would call for the application of the principles of equity, that is, an action in the nature of an administration action before the Chancery Courts in England, as distinct from a mere claim for a liquidated amount. The distinction which I draw is well illustrated by the specimen Statements of Claim in Appendix C. to the Yearly Practice of the Supreme Court in England. Compare Section II, No. 10, with Section IV, No. 12.

I think, therefore, that the Appellant is entitled to succeed.

Delivered this 30th day of July, 1940.

Chief Justice.

It was submitted by the successful Appellant that the Respondent should pay the costs personally, and we reserved that question for further consideration. Mr. Levin, for the Respondent, submitted that as Rule 278, that is the general rule as to costs, differs from the English rule, we should consider the matter upon the principles applied in England before the English rule was changed. I express no opinion whether that submission is well founded when the costs of an original proceeding are being considered, as here we are concernd with the costs of an appeal. In Westminster Corporation v. St. George, Hanover Square (1909) 1 Ch. reference was made in argument to Rowland against Morgan, decided in 1849, and In re Earl of Radnor's Will Trusts, decided in 1890, and no distinction was drawn owing to the change of the English rule, and I think that case sets out clearly the principles which should guide us. In particular I would refer to the judgment of Lord Moulton, at pages 615—616, where he states. —

> "Of course a trustee, in a case where there is a doubt as to who are his cestuis que trust, has a right to come to the Court for its direction, and a right that the costs of so applying to the Court should come to him out of the fund. But when that question has once been decided by a competent Court, if the trustee chooses to appeal, he is putting himself in the position of espousing the cause of the person who has been decided not to be the cestui que trust in order to displace the title of the one who has been decided to be that cestui que trust. If so, it would be in an ordinary case most unfair that funds which have been decided, and decided rightly, to belong to that particular cestui que trust should be used to defray the expense of trying to displace him. Therefore as a matter of rule a trustee who under such circumstances appeals, appeals as an ordinary litigant, and if he is unsuccessful he has no right or claim on the Court to direct the costs to come out of the fund".

That seems to me precisely to cover this case. In argument Mr. Levin informed us that his client had received the authority of the religious Court to appeal from the Magistrate's decision, and since the hearing he has submitted a telegram addressed to Mr. Salim Barakat and signed by Bishop El Meoushy, who is stated to be the President of the Maronite Ecclesiastical Court. Without expressing any opinion as to the effect of a direction of a religious Court properly obtained, I am satisfied that this is not such a direction. The Respondent, Mr. Barakat, will pay personally the costs of the proceedings before the District Court which certfied a fee of LP. 10 for attending the hearing, and costs of this appeal on the lower scale, with LP. 15 for attending the hearing.

Delivered this 3rd day of September, 1940. *Chief Justice.*

CIVIL APPEAL NO. 75/39.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

Before:— The R/President (Curry, J.) and Dr. Manni, J.

In the case of:

Salim Barakat — Appellant.

v.

Lydia Wilner — Respondent.

Appeal from Judgment of Chief Magistrate's Court, Tel-Aviv, in file No. 8626/38, dated the 6.3.39, whereby Appellant was adjudged to pay LP. 225.537 and costs.

JUDGMENT.

This is an appeal from the Judgment of the Chief Magistrate. Whilst the case is not simple and one's journl takes one through well wooded country, one's difficulties are considerably lessened if one thinks clearly, looks straight ahead keeping to the main path and avoids the temptation of exploring byepaths into the undergrowth.

In the first place we propose to set out only those facts which are necessary for the consideration of this appeal.

Alexander Howard died having dedicated as waqf his estate for the benefit of his sister and her six children.

Disputes in connection therewith have arisen on two main points:

a) Whether on the death of Bishara — one of those six children — his son should take his share, or his share should go to the surviving brothers and sisters of Bishara.

b) Whether on the subsequent death of two of those surviving children without issue their shares should go to the surviving sisters or whether the son of Bishara should be entitled to a share as representing his deceased father.

These matters came for decision before the Maronite Ecclesiastical Court. That Court gave several judgments — it is not certain whether some of the documents issued under the seal of the Court are judgments, explanatory judgments or mere orders of a Judge to the Mutawalli. There is no doubt however that some of these documents appear contradictory.

The appeal which concerns this Court arises from a claim by one of the surviving children against the alleged Mutawalli Salim Barakat.

Here it is the greatest importance to study carefully the statement of claim.

In brief it says that Competent Ecclesiastical Court has given orders

that the income be divided into three parts whereas the defendant has divided or intendes dividing it into four parts.

The point that arises at this stage is whether the Chief Magistrate had jurisdiction to hear such a claim. The Respondent argues that he is not disputing the judgment of the Maronite Court, for all the Judgments are in his favour and that the documents adverse to his claim are at the best ex parte judgments by single judge and in any event the Court judgment is in support to his claim and therefore there was no necessity for the Magistrate to do mare than ascertain what sum of money the share allatted to him in the last judgment represented.

We do not think however that this argument is sound. It is clear from the statement of claim that the Respondent realized there was a dispute as to the share and not the value thereof. If there had been no dispute regarding the decision of the Maronite Court no doubt the Respondent would merely have filed his judgment in the Execution Office. It is pefectly clear that the dispute between the parties is the interpretation and effect of the various documents emanating from the Maronite Court.

In our opinion therefore this matter did not fall into the Jurisdiction of the Chief Magistrate. It might have been wise for the Chief Magistrate to have adjourned the case whilst one of the parties went to the Maronite Court for an explenaly judgment. Actually as we shall see shortly, the Appellant did adopt that procedure. It may as the Respondent alleges that as the waqf was made before the Sharia Court and not before the Religious Court of the Maronite Community that the Maronite Court for an explanatony judgment. Actually as we shall when both parties have submitted to the jurisdiction of that Court for it to decide on the distribution of the estate this Court cannot assume jurisdiction on matters which have directly or indirectly been decided by that Court — likewise it is not for the Magistrate's Court to decide the effect of documents emanating from the Maronite Court which appear to be contradictory.

There is one further point of importance.

As we have indicated, the Appellant has gone again to the Maronite Court after losing the action in the Magistrate's Court and before the hearing of this appeal and abtained a judgment in his favour.

The Respondent strongly objects to this appellate Court receiving this judgment in evidence.

Although we have decided already that the Magistrate did not have jurisdiction we think it advisable to deal with this point in view of

the likelihood of this case going to a higher Court on appeal.

We are of the opinion that it is within our discretion to admit this judgment of 11th March, 1939, and that it would be foolish for us to ignore it for should our decision regarding jurisdiction be wrong we should only be confusing matters, still futher by refusing to recognise the latest judgment between the parties which disposes of the Respondent's claim.

For the foregoing reasons we hold that the Magistrate had no jurisdiction and that therefore the appeal must be allowed. In view of the work involed in the appeal we award the Appellant disbursements and inclusive advocate's fees of LP. 10.—

In presence of Mr. Apelbom for the Appellant.

R/President Judge.

CIVIL APPEAL NO. 179/40

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

Befor:— Rose, J. and Frumkin, J.

In the case of:

Isaq Trachtengott — Appellant.

v.

Hevrath Haqerem, Tel-Aviv. — Respondent

Question of automatic renewal of contract of lease by continuation of tenant to occupy premises after expiry of original period of lease — Scope of art. 494 of Mejelle — Mistaken belief that restrictions of a certain law still subsist — Binding agreement by conduct — Mejelle Art. 454 — Landlords and Tenants (Ejection and Rent Restriction) Ord. 1935, sec. 10(2).

1. A contract of lease which expired and, not being renewed by consent remained dead for a year cannot subsequently be considered as revived and automatically renewed by consent.

2. Where tenant occupied premises one year under agreement and another year by operation of a law which was not applicable after second year, he can at beginning of third year rely neither on agreement nor on protection of law.

3. Mistaken belief that law still applicaple when in fact it is not — a mistake of law, not of fact.

4. Rate of rent based on decision of Rent Commissioner — not binding after expiration of his legal powers.

5. Regular acceptance by landlord through Bank or otherwise of sum on account of rent which he knows was the only sum tenant was willing to pay — binding upon him as rent agreed upon by conduct.

(*Obiter dictum*) Art. 494 of Mejelle dealing with contracts of lease on a monthly basis cannot be extended by analogy to contracts made for years.

Goitein for Appellant.

Seligsohn for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 26.7.40, in Case No. 28/40 Civil.

JUDGMENT

Frumkin, J.

The dispute in this case arises out of a contract of lease entered into between the appellant as landlord, and the respondent as tenant, some time in 1934, for a period of a little less than one year. The rent was fixed at a monthly rate of LP. 19, payable each month.

When the contract of lease expired on the 1st of Moharam, 1935, the Landlords and Tenants (Ejection and Rent Restriction) Ordinance, 1934, later to be referred to shortly as the Ordinance, was in force and made applicable to Tel-Aviv, where the leased property was situated, by an Order of the High Commissioner in Council, dated 17th April, 1934. No new contract was made between the parties. The respondent continued to occupy the premises and pay LP. 19 monthly. Towards the end of the year he applied to the Rent Commissioner, duly appointed under the said Ordinance, for a reduction of the rent and obtained an order dated 20.12.35, (a few months before the expiration of the second year of lease), reducing the rent from LP. 19 to LP. 14.

The appellant was not satisfied with that order and appealed to the Rents Tribunal, meanwhile refusing to accept the rent, which was however paid in by the respondent to a Bank to the account of the appellant.

At the beginning of the third year the Ordinance was not applicable to Tel-Aviv. Again no fresh agreement was made. The respondent continued to occupy the premises and pay monthly the LP. 14 to the Bank. The appellant, after having first refused to take money from the Bank, changed his mind and received the amounts paid in to his account. He used to acknowledge the receipt in the following form: a printed payment order was made out by the Bank to its

cashier, ordering him to pay to the appellant certain sums representing amounts deposited by the Respondent as rent for given months at the rate of LP. 14 per month, and the appellant signed his name underneath the word in print "I received".

The appellant's claim is, firstly, that the reduction of the rent from LP. 19 to LP. 14 was good only for the last few months of the second rental year, when the Ordinance was applicable to Tel-Aviv, and no more. He is therefore entitled, he claims, to an adjustment of LP. 5 per month for all the months passed since the commencement of the third rental year. And secondly, that since the original contract was made on a yearly basis, and the tenant left the premises in the middle of the fifth year, he claims to be entitled to rent for the entire period of the fifth yaer. He also attempted to make a claim for LP. 2 per diem as a sort of penalty stipulated in the original contract for any day of occupation of the premises after the expiration of the lease, but he did not press that point.

I propose to deal first with the second claim, as on this claim, whether or not the contract was automatically renewed from year to year, will also depend to a certain extent, the amount of rent payable.

Now, Mr. Goitein's argument on behalf of the appellant on this point is twofold.

He first puts it as a general proposition that whenever a contract of lease is made for a certain period, and after such period has expired the tenant stays on in the leased premises, the contract is automati cally renewed for a period equal to the one for which it was originally entered. In this case the contract was originally made for a year, and it is therefore to be considered to have been renewed from year to year on a yearly basis. As authority for that proposition he quotes Article 494 of the Mejelle, of which the relevant part in Tyser's translation reads as follows:

> "If immovable property is let for so many piastres every month, without stating how many months, the contract is good.
>
> But, when the first month is completed, on the first day and night of the second and subsequent months, both the letter and hirer can annul the contract but after the first day and night has passed, he cannot annul it".

The effect of this Article is clearly this, that when a contract is made on a monthly basis, without stating the number of months, the contract is automatically renewed each time when twenty-four hours of a new month have passed without the contract having been annulled by either side. Mr. Goitein argues that "month" in this article means "period",and if a contract is made not for months but for years, as he

alleges was the case in the present case, the contract is automatically renewed for a further year each time a new year begins without the contract being annulled.

The Mejelle very often lays down a principle of law and goes on to illustrate it with an example. Such an example would not be exhaustive, and the principle could be extended by analogy to cases similar to the example. But in this case the Article, and many others, distinctly deals with months, and no other period, and it would be very difficult to read into the article words which are not there. Not only does the appellant ask us to read year for month, but some equivalent might also have to be sought for the "first day and night" mentioned in the article. The first day and night which are considered sufficient for the automatic renewal of a monthly contract, would they also be sufficient for a contract made for years or longer periods?

In this case, however, the matter is purely academic. The article applies only when at the expiration of the month either party could annul it. Not having done so it is assumed that they consented to renew it. Here the landlord was not at liberty to annul the contract, because the tenant was entitled to stay by operation of the law.

Whatever be the effect of this article, it could hardly be maintained that when a contract expired, and was not renewed by consent, and remained dead for a year, it would than be revived and considred as having been automatically renewed by consent.

I now come to the second argument on this point, namely that under the Ordinance the contract is renewed on a yearly basis. Here Mr. Goitein relies on the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935, Section 10(2) of which reads as follows:—

> "Where by reason of the provisions of this section any tenant continues in occupation of any premises after the expiration of any contract of tenancy the terms and conditions of such contract of tenancy shall, insofar as they may be applicable, be deemed to apply to such occupation."

We have, however, to bear in mind that even if "terms" in that section includes "term" in the meaning of period, the Ordinance was not applicable in Tel-Aviv at the beginning of the third tenancy year. The appellant could therefore not rely on this Ordinance for a period in which it was not applicable.

It follows, therefore, that in the first year the tenant occpuied the premises under an agreement and in the second year by operation of the law, and when the third year began he could rely neither on an

agreement nor on the protection of the law. It was open to the appellant to ask for eviction or for an increase of rent, and he has not done so.

At this juncture I might deal with another argument put forward on behalf of the appellant, and that is this: At the beginning of the third year he did not know that the Ordinance was no more applicable in Tel-Aviv; this, it is argued, is not a mistake of law but a mistake of fact, namely that the appellant did not know of the fact that the Ordinance did not apply to Tel-Aviv in 1936. This is obviously a mistake of law and not a mistake of fact. Just as every person is susposed to know what the law is, he is also supposed to know what is not the law. It is common ground that the ordinance was made applicable to Tel-Aviv in 1935 for the period of the validity of the Ordinance generally, namely until 31st March, 1936. It was then again made applicable to Tel-Aviv as from the 8th day of March, 1937. If for one reason or another the appellant was mistaken in believing that the Ordinance applied also during the said interval, he is himself to blame. The fact that the Ordinance was later made applicable to Tel-Aviv, does not change the position.

It remains, therefore, to decide what was the monthly rent, payable since the beginning of the third year, and until the evacuation of the premises which the Court found as a fact took place in Sivan, 1939. Certainly not LP. 19. That sum was agreed for one year, and at the end of the year the agreement expired and was never revived. I am also inclined to accept for the purposes of this case that the sum of LP. 14 insofar as it is based on the decision of the Rent Commissioner is not binding after the expiration of his legal powers. I am, however, of opinion that the figure of LP. 14 is binding upon the appellant as an equivalent rent agreed upon by conduct, for the simple reason that he regularly accepted this sum knowing that it was the only sum the respondent was willing to pay. As said before, during the interval that the Ordinance was not in force in Tel-Aviv he had a free hand, yet he received the rent at the rate of LP. 14. The fact that he received it through a bank and not directly makes no difference.

For these resons the judgment will be confirmed and the appeal dismissed with costs on the lower scale and LP. 15 fee for attending the hearing.

Delivered this 18th day of October, 1940.

Puisne Judge

I concur,

British Puisne Judge

CIVIL APPEAL NOS. 120/39 and121/39

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

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

In the appeal of:

Joseph Zenober — Appellant.

v.

1. Joseph Bernblum
2. Jacob Tenenbaum — Respondents.

Provisional attachment of moneys allegedly held by 3rd party for account of defendant — Opposition by 3rd party to judgment confirming attachment — Dismissal of opposition of 3rd party on grounds that meanwhile defendant became bankrupt — Appeal by 3rd party to Court of Appeal on ground (not mentioned in original opposition) that order of attachment never served on him.

1. If notice of provisional attachment not served on third party attachment cannot be confirmed.

2. Where third person lodges opposition to confirmation of provisional attachment advancing various grounds none of which being a plea that order was not served on him and judgment appealed from states that order was served, Court of Appeal will not deal with this question of fact.

Werner for Appellant.

Gluckmann for first Respondent.

No appearance by Second Respondent.

Appeal from judgment of District Court, Haifa, sitting in its Appellate Capacity (C.A.D.C. 188/37), dated 26.7.1937.

JUDGMENT

These are two appeals which have been consolidated, by leave, from judgments of the District Court, Haifa, in which judgments they dismissed appeals from the Magistrate's Court. The facts are the same in both cases and it is therefore only necessary to deal with one of

them. Judgment had been given against the present appellant as a third party on the ground that he held a certain sum of money for the account of the second respondent here who was defendant in the Magistrate's Court. The first respondent was the plaintiff in the original action. Opposition was made by the present appellant to the Magistrate and in that opposition the appellant stated that he owed no money to the second respondent. The Magistrate dismissed the opposition on the ground that since the second respondent had recently become bankrupt, he had no jurisdiction under which to entertain the action. Appeal was made to the District Court which dismissed the appeal when dealing with it, not on the ground advanced by the Magistrate in dismissing the opposition, but on the ground that the present appellant was out of time inasmuch as he should have entered an opposition within eight days of the service of the notice of provisional attachment upon him and that he had not done so.

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

As we pointed out in the course of the argument, this plea of non-service was never made in the notice of opposition which was lodged in the Magistrate's Court. It was of course a serious ground and is the first ground, if I may say so, which should have been advanced, as, if it is really true that notice was not served, this fact would have been conclusive. The appeal to this Court is unfortunate for the appellant, it being purely on a question of fact. I am afraid that in an appeal to this Court to upset an appellate judgment of the District Court when an appeal lies on point of law only, we cannot deal with the question whether it is a fact or not that an order of attachment was served.

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

Delivered this 23rd day of January, 1940.

British Puisne Judge.

HIGH COURT NO. 87/40

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

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

In the application of:

Shukri Bey Taji el Farouki — Petitioner

v.

Registrar, District Court, Jaffa — Respondent.

Application for refund of sum paid as collection fee on execution of a mortgage — Registrar refusing to order refund of fees collected — Distinction between order of Registrar under sec. 6(e)(4) and order under sec. 17 of Registrars Ordinance.

Application for refund of collection fees paid on execution of mortgage must be made under sec. 6(e)(4) of Registrars Ordiname; Registrar's decision under this secton, unlike a decision under sec. 17, cannot be subject of proceedings in any Court.

Cattan for Petitioner.

Ex parte.

Application for an order nisi to issue to the Respondent calling upon him to show cause why his order in Execution File No. 2222/37, Jaffa, dated October 19, to the effect that the sum of LP. 110 wrongfully collected from the Petitioner in the said file could not be recovered, should not be set aside, and why he should not be ordered to order the refund of the said sum to the Petitioner.

ORDER

This is an application for an Order Nisi directed to the Registrar of the District Court of Jaffa to show cause why he should not return the sum of LP. 110 paid as a collection fee of 2½% on the execution of a mortgage. The application is made on the strength of a judgment of this Court Karwassarsky v. the Registrar of the District Court, Tel Aviv H.C. 74/40 *), where we held that this fee was not now leviable since Item 55 of the Court Fees Rules 1935 did not cover the matter as a mortgage was not a judgment, and the only other povision of the law, a paragraph in the Land Transfer Fees Rules, had been omitted in an amendment of those Rules and nothing had been substituted for it.

Now in this case before us the money was paid and on the strength

*) 8 CtLR p. 125.

of the judgment of this Court No. 74/40, the present petitioner is the first one in the rush to this Court to claim refund. We would remark that in the previous case, in the Karwassarsky case, the application was in regard to the assessment of the fees and that no fees had been paid and no question of refund was therefore involved. In this case the fees have actually been paid and the application for refund must be made under Section 6 (e) (4) of the Registrars Ordinance, 1936. By Section 8, subsection (1) of the same Ordinance, no appeal lies to the Court in respect of any matter dealt with by the Registrar under Section 6(e)(4) and by section 8(3) "In all cases other than those in which a right of application to the Court is hereby given, the decision of the Registrar shall be final, and shall not be the subject of proceedings in any Court". The construction of this section came before this Court in the Karwassarsky case and we held that the words of Section 8(3) were sufficiently wide to exclude Article 43 of the Palestine Order-in-Council, 1922, and therefore to exclude any reference to the High Court in respect of the matters covered by Section 8. I should say that the decision of the Registrar in the Karwassarsky case was made under Section 17 of the Ordinance, and we held that Section 8 (3) could not apply to a decision under that section.

That being so we think that this application must be refused. The law is quite clear and our only duty is to interpret it in the sense that we think right, and the words in section 8 (3) mean that there is no appeal, neither can any proceedings be taken in any Court in respect of an order made by the Registrar under Section 6 (e) (4) of the Registrars Ordinance, whether that decision be right or wrong. We must not be taken as holding that the Registrar was wrong in this case, as it is not necessary to decide this. This may be an unfortunate result but the remedy lies with the legislature and not with us. The application is therefore refused.

Delivered this 30th day of October, 1940.

British Puisne Judge

HIGH COURT NO. 101/40.

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

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

In the application of:

1. Rivka Frank Feinberg
2. Lea Feinberg — Petitioners.

v.

1. President, District Court, Haifa as Chief Execution Officer
2. Esther Bergman Respondents

Execution postponed by consent of parties for a few months — Offer by mortgagor, after final order of sale, to pay one third of debt at once and balance after 6 months — Discretionary powers of Chief Execution Officer to grant or refuse stay of sale proceedings.

1. Not function of Chief Execution Officer to grant indefinite postponements which in effect would be granting a moratorium.

2. If Chief Execution Officer after carefully considering representations made by both sides decided in circumstances not to stay regstration of sale of mortgaged property — he has exercised his discretion and High Court will not interfere.

Eisenberg for Petitioners.

Ex Parte.

Application for an order nisi to issue to the first Respondent calling upon him to show cause why his order in Execution File No. 15/38, Haifa, dated October 30, 1940 should not be set aside and why the proceedings in that file should not be postponed for a period of six months.

ORDER.

Copland, J.

In this case an application was made for an order to issue to the Chief Execution Officer to direct a further postponement of the registration of the property sold in the execution of a mortgage for six months. Execution proceedings were commenced in May 1938. On the 8th of December, 1938, the Chief Execution Officer gave an order for stay of proceedings until the 1st of March, 1939, by consent of the parties. Whereas certain conditions were not complied with an order of sale was granted by the Chief Execution Officer on 10th February, 1939. Execution proceedings seem to have been extremely protracted and it was not until the 12th September, 1940, that an order for final sale was made. Application was made to the Chief Execution Officer on the 7th October for grant of a further six months' stay on certain terms. The petitioners offered to pay to the mortgagee forthwith LP. 100 and to settle the balance of the mortgage debt within six months. The Chief Execution Officer gave a stay until the 6th November, subsequently prolonged until the 21st November, 1940, to enable the mortgagors to come to the High Court. He refused the application saying this —

> "Stay registration till 6.11.40 to enable Mortgagors, if so advised, to go to the High Court. However much one may sympathize with the mortgagors having their property sold for LP. 450, I have no power to grant indefinite postponement. Were I to do so I would (as the High Court recently pointed out *) in effect be granting a moratorium which is within the province not of myself but of the Legislature. In any event I have carefully considered the representations made by Mr. Kitay on behalf of Rivka and Lea Feinberg, Mortgagors, in his memorandum of 7th inst. I have also considered the written reply dated 28th inst. of Mr. Salomon, Advocate for Mortgagee. In all the circumstances I am not prepared to stay registration beyond 6th November."

Now, it is quite true that it is not the function of the Chief Execution Officer to grant indefinite postponements which again I repeat *), in effect would be granting a moratorium. If the Government of this country considers that the economic situation is such that a moratorium should be granted then they should promulgate the necessary legislation and not leave it to the Courts to do something which it is not the function of a Court to do. If the Chief Execution Officer meant by the words "I have no power to grant indefinite postponements" that he had no power to grant a further postponement of course that would not be a correct statement, but I do not read that meaning in his words. The last part of the order in which he says that he has carefully considered the representations made by both sides and in the circumstances he is not prepared to stay registration beyond 6th November, show to my mind that he has exercised his discretion and I do not think that it is a case in which this Court should interfere. I would therefore refuse the application for an order nisi.

Frumkin, J.

To my mind, the Chief Execution Officer went wrong in this case. There is a great diference between a moratorium and a lenient reasonable exercise of discretion and it seems to me that the Chief Execution Officer in this case stretched the line too much to the other extreme. This seems to me to be the most reasonable application of this kind that has been made for years. There was only one adjournment at the beginning for two months and this was by consent of the parties. Final sale was not ordered until September 1940 and for the first time after final sale the mortgagor applied for a postponement offering to pay one third of the debt immediately and the balance after six months. This is certainly not an application for indefinite postponement and it is clearly within the powers of a Chief Execution Officer to grant

*) H.C. 65/40 8CtLR p. 70.

such a postponement. If it were left to me I would certainly have granted the order.

Khayat, J.

I concur with the order of Copland, J.

Delivered this 21st day of November, 1940.

CRIMINAL APPEAL NO. 4/40.

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:

Abraham Amsterdamer — Appellant

v.

The Attorney-General — Respondent.

Frank for Appellant.

Crown Counsel (*Hogan*) for Respondent

Post Officer concealing letters, postal packets etc.—Secreting letters etc. to deprive owners permanently — Reduction of sentence having regard to accused's age.

Officers of Post Office criminally liable when for any purpose whatever they secrete a postal packet; intention to deprive owner thereof permanently — not a necessary element.

Appeal from judgment of District Court, Jaffa, sitting at Tel-Avic (Cr. C. 187/39), dated 7.12.39, whereby the Appellant was convicted of concealing postal packets, contrary to Section 83 of the Post Office Ordinance.

JUDGMENT.

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

It is argued before us that under the section, having regard to the words: "Steals, embezzles, secretes or destroys a postal packet", in order to convict of secreting, an intention to deprive the owner thereof permanently must be shown. We do not think that this is the

true construction of the section. Officers of the Post Office have many opportunities wrongly to deal with letters and other articles entrusted to them, and it is in the public interest that their integrity should be maintained. It is for this reason that the legislature has imposed upon them this criminal liability when for any purpose whatever they secrete a postal packet.

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

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

Delivered this 25th day of January, 1940.

Chief Justice.

CIVIL APPEAL NO. 89/40

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:—

1. Yousef Hassan Salah through his curator
2. Mohammad Hassan Salah
3. Adel Hassan Salah
4. Omar Salah — Appellants.

v.

Aref Abd El Qader ar-Raziq and 37 others. — Respondents

Notice of appeal signed by one of appellants in his personal capacity and as attorney for other appellants — Omission to cite as respondents in notice of appeal some original parties to action.

1. Except where otherwise expressly provided a litigant must act in person or by an advocate; thus a person, not being an advocate, even if he holds from other person a power of attorney in very wide terms cannot properly sign a notice of appeal on behalf of that other person.

2. Omission to cite as respondents in notice of appeal some of original parties to action — fatal to appeal.

3. Mistake in copying wrong list of respondents on lodging appeal — not a good cause within meaning of Civil Procedure Rule 333 (Allowance by Court to fulfil condition precedent to hearing of appeal).

Edit Note. As to 2 and 3 see: C.A.201/38, 4 CtLR 152; C.A. 89/39 6 CtLR 124; C.A. 107/39 ibid 200; C.A. 72/40 8 CtLR 12.

Cattan for Appellants.

1st, 4th, 7th, 20th and 30th Respondents in person.

Goitein for 36th, 37th and 38th Respondents.

No appearance by other Respondents.

Appeal from judgment of Land Court, Nablus, dated 8.4.40, dismissing an appeal from a decision of Land Settlement Officer, Tulkarm Settlement Area, dated 19.5.1938.

JUDGMENT

Rose, J.

This is an appeal from the Land Court, Nablus, sitting as a Court of Appeal from a decision of the Settlement Officer, Tulkarm Settlement Area.

Several preliminary objections have been taken by counsel for Respondents 36, 37 and 38. The first is that insofar as the first three appellants are concerned there is no proper appeal before the Court in that the notice and grounds of appeal were not signed by these appellants in person or by an advocate duly appointed on their behalf. It appears that the fourth appellant signed the notice of appeal on behalf of his fellow appellants and he purported to do this by virtue of the fact that he holds from them a general power of attorney in very wide terms. Counsel for respondents 36 to 38 contends that Rule 24 of the Civil Procedure Rules is fatal to the first three appellants.

Rule 24 reads as follows :

> "Any application to or appearance or act in any Court required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by an advocate duly appointed to act on his behalf: Provided that any such appearance shall, if the Court or Judge so directs, be made by the party in person."

Counsel argues, and we consider with force, that this Rule must be strictly interpreted and that therfore under it a litigant must act either in person or by an advocate duly appointed on his behalf. Counsel for appellants contends that a person who holds a power of attorney

steps into the shoes of the litigant in person. We do not consider that Rule 24 is open to this construction and are stengthened in our view by Civil Procedure Rules 69(1) and Section 4(2) of the Advocates Ordinance, 1938. In both instances an exception is provided to what is evidently regarded as a general rule that a person must conduct his litigation either in person or by an advocate. The inference from this seems to me that in the absence of any such provision the general rule must apply.

For these reasons we consider that the fourth appellant could not properly sign the notice of appeal on behalf of the other appellants. It follows that as regards the first three appellants there is no appeal before this Court.

As regards the fourth appellant the point is taken that he failed to comply with Rule 313 of the Civil Procedure Rules in that he omitted to cite as respondents five of the original parties to the action. In accordance with Rule 333 we have to consider whether good cause has been shown for such omission. In the course of argument the only good cause suggested was that a mistake had been made and that possibly the fourth appellant had copied the wrong list of names. However sympathetic we may feel towards such a mistake we cannot hold that good cause has been shown within the meaning of the Rule. We think therefore that the objection taken is fatal to the fourth appellant.

As we have decided this appeal on these two preliminary points, we do not think that it is necessary to decide a further point raised, namely, whether since the coming into operation of the Land (Settlement of Title) (Amendment) Ordinance, 1939, an appeal lies to this Court at all, as the point is somewhat academic in that it is clear that very soon it will be unnecessary to interpret the saving clause as to proceedings in progress before the coming into operation of the Ordinance.

The appeal is therefore dismissed and the decision of the Land Court dated the 8th april 1940, confirmed. Respondents 36,37 and 38 that is Maurice Litwinsky, Emile Litwinsky and Raymond Litwinsky will have their costs on the lower scale to include LP.15 advocate's attendance fee. Respondents 1,4,7,20 and 30, that is, Aref abd El Qader ar-Raziq, Hassan abd El Qader Raziq, Farid Hanid, Nimer Suleiman Abdebis and Amer Ibrahim As Salim will each have LP. 1 as travelling expenses. The remaining respondents will have no costs. Counsel for respondents 36, 37 and 38 agrees that the travelling expenses for respondents 1, 4, 7, 20 and 30 should be paid first out of the money availabe under the appellants' guarantee, and we so order.

Delivered this 27th day of May, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 26/40.

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

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

In the appeal of:
Alex Levin — Appellant.
v.
1. Liquidator of "Brosh" Cooperative Society Ltd.
2. Leo Feuchwanger
3. Alexander Aron — Respondents.

Application by respondent no increase deposit to be paid as security for costs of appeal — Assumption that facts set out in affidavit, in absence of counter-affidavit, are accurate — Applicability of English practice to order substantial security for costs in case of an absent appellant with no property in the country.

1. If applicant submits an affidavit and no counter-affidavit by respondent, Court will assume that facts set out in applicant's affidavit — accurate.

2. In case of an absent appellant with no property in Palestne a substantial security for costs should be ordered.

Dickstein and *I. Cohen* for appellant.
Iszajevicz for respondent No. 1.
Baker and *Kirschenbaum* for respondent No. 2.
No appearance by 3rd respondent.

Application by Second Respondent under Civil Procedure Rule 329 to increase the amount to be paid into Court by Appellant as security for costs of appeal.

ORDER

This is an application by the 2nd Respondent under Rule 329 of the Civil Precdure Rules, 1938, to increase the amount to be paid into Court by the Appellant as security for the costs of his appeal, such amount having been fixed by the Chief Registrar at LP. 20.

This Court is slow to interfere with the discretion of the Chief Registrar in a matter of this kind, but in this case there are unusual factors which, it would seem, were not known to the Chief Registrar when he made the Order.

The applicant, in his affidavit, states that the Appellant has left Palestine and gone to Holland, and that to the best of his knowledge, information and belief, the Appellant has left no property in Palestine. Counsel for the Appellant admits that the Appellant has no property in this country (apart from expectations arising from the present litigation) but he states that the Appellant's absence from Palestine is only temporary, and that he has the intention of returning in the near future. This statement is unsupported by affidavit, and we must therefore assume, for the purpose of this application, that the facts set out in the Applicant's affidavit are accurate.

We think that this is eminently a case in which we ought to follow the English practice, whereby substantial security for costs is usually ordered in the case of an absent appellant with no property in the country.

In the Court below the 1st and 2nd Respondents were separately represented, there were separate and substantial issues, and each was awarded separate costs, including advocate's attendance fees. For the purpose of this application we must assume that the Court below was right in so dealing with the matter.

In the circumstances we consider that the sum of LP. 20 fixed by the Chief Registrar is insufficient, and we increase the amount to LP. 35 to be paid into Court within one month of this date. In fixing this figure we are omitting from our calculation the amount of costs already incurred in the Court below, which we are informed have not yet been paid. Costs of this application to be costs of the cause.

Delivered this 18th day of March 1940.

British Puisne Judge

CIVIL APPEAL NO. 24/40.

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

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

In the appeal of:—

Mustafa Ahmad Mohammad Abdulnabi and 9 others Appellants

v.

Ibrahim Adam Hassan Husseini Abu el Huda, in his capacity as Mutawalli Wakf Sheikh Abu el Huda. Respondent

Agreement by Mutawalli allowing other party to receive and cultivate Wakf land against a portion of produce and later on to

have a share in land — Claim by cultivator of an equitable right to a share in Wakf land by terms of agreement of alternatively by prescription.

1. Wakf land — not alienable; an unregistered transfer of a share in it creates neither a legal nor an equitable right to such share.

2. No prescription where possession was by consent of owner of the land and possessor in position of a tenant paying rent.

Cattan for Appellants.
Respondent in person.

Appeal from a decision of Land Settlement Officer, Ramleh Settlement Area, dated 19.8.1939.

JUDGMENT

This is an appeal by leave from the decision of the Settlement Officer, Ramleh Settlement Area. The basis of this claim is an agreement given by the predecessor of the present Mutawalli to the predecessor of the present appellants in the year 1312 A.H., that is, more than 36 years ago. In that agreement they were allowed, inter alia, to take possession of the land in dispute, to revive it by ploughing and planting, and in consideration for this they were allowed to take a portion of the produce, and were after twelve years to have a share in the land.

In this appeal Mr. Cattan, on behalf of the Appellants, argues that the agreement is an unregistered transfer of a share in the land, in accordance with which his clients have taken possession of the land and revived it, and he asks for one-third of the land on equitable if not on legal grounds. In the alternative he claims the land by prescription, since the Appellants and their predecessors in title were admittedly in possession for over thirty-six years.

As to the first point, the land being waqf a share thereof could not lawfully be sold, and we do not think there can be any legal or equitable claim to share thereof.

As to prescription, it is clear that the Appellants were in possession by consent of the Mutawalli, and were in the position of tenants paying rent, and this is fatal to the claim.

The appeal will therefore be dismissed with costs which we fix at an inclusive sum of LP. 1.

Delivered this 14th day of March 1940.

Chief Justice.

CIVIL APPEAL NO. 11/40

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 case of:

Arab Bank Ltd. — Appellant.

v.

1. Subhi Meheshem
2. Anis Mudawar — Respondents.

Appeal from Magistrate's judgment admitting in evidence and acting upon a document alleged to be insufficiently stamped — Appeal from appellate judgment of District Court that document not sufficiently stamped and therefore inadmissible in evidence — English principle as regards appeal from decision that stamp upon document sufficient.

No appeal lies from a decision that document sufficiently stamped or that document not dutiable.

Cattan for Appellant.

Ginzbeg for Respondent No. 1.

Respondent No. 2 — absent.

Appeal from judgment of District Court, Haifa, (C.A.D.C. 116/39) dated 19.12.39.

JUDGMENT

Mrs. Ginzberg, who appears for the First Respondent agrees that the only point in the case is whether Exhibit 2, which was admitted in evidence and acted upon by the Magistrate, was properly admitted. This depends upon the sufficiency of its stamp. The District Court dealt with this point at length and came to the conclusion that it was not sufficiently stamped and therefore inadmissible. We are of opinion, however, that the English principle that no appeal lies from a decision that the stamp upon a document is sufficient or that a document does not require a stamp applies.

The appeal will be allowed, the judgment of the District Court set aside, and the judgment of the Magistrate restored with costs on the

lower scale, and LP. 10 for attending the hearing in this Court and a fee of LP. 5 for attending the hearing in the District Court to be paid by the First Respondent.

Delivered this 22nd day of February, 1940.

Chief Justice.

CIVIL APPEAL NO. 186/40.

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

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

In the appeal of:—

The Government of Palestine — Appellant.

v.

George Cattan — Respondent.

Application to Court for direction to arbitrator to state special case for opinion of Court — Arbitration Ord. sec. 8(2). — *C.A.* 117/39.

If, when seized with an application for direction to arbitrator to state special case, Court satisfied that there is a material point of law upon which it should give an opinion necessary direction should be given if award has not been made.

Salant for Appellant.

Cattan for Respondent.

Appeal from judgment of District Court, Jerusalem dated 13.7.1940.

JUDGMENT

In this case an application was made to the District Court under Section 8(2) of the Arbitration Ordinance for a direction that arbitrators should state in the form of a special case for the opinion of the Court three points of law, which were set out in paragraph 11 of the application.

The District Court refused the application. I think it is clear from the decision of this Court in Civil Appeal 117/39*), Shall Co. and others v. Municipal Corporation, Haifa, which had not been published in the official reports when the District Court gave its decision, that if

*) 8 CtLR p. 129.

the Court is satisfied that there is a material point of law upon which it should give an opinion, the necessary direction should be given if the award has not been made.

In this case the award has not been made. We therefore set aside the judgment of the District Court, and direct the arbitrators to state a special case in accordance with Section 8(2) upon the points in question. The arbitrators, if they think it necessary, hear further evidence.

Costs will be costs in the cause.

Delivered this 26th day of September, 1940.

Chief Justice

HIGH COURT NO. 84/40.

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

Before:— Copland, J. and Khayat, J.

In the application of:

Itzhaq Trachtingott — Petitioner

v.

1. The Chief Execution Officer, Tel-Aviv.
2. Itzhaq Milstein — Respondents

Provisional attachment of goods confirmed by judgment of Court — Chief Execution Officer granting instalments in payment of debt and posponing sale of attached goods — Limits of Chief Execution Officer's powers in granting instalments.

Chief Execution Offcer has no power to grant instalments in payment of debt and postpone sale of goods attached by order of Court duly confirmed.

E. Z. Fellman for Petitioner.

Respondent No. 1: Absent — Served.

Y. Herman for Respondent No. 2.

Application for an order to issue directed to the Respondents calling upon them to show cause why the orders of the First Respondent in Tel-Aviv Execution File No. 3779/40 dated 11.6.40, 30,9.40, and 14.10.40 respectively should not be set aside and why the sale of the attached property be not proceeded with and why an order of imprisonment against 2nd Respondent should not be given.

ORDER.

The petitioner in this case is asking for an order to the Chief Execu-

tion Officer of Tel-Aviv, to show cause why orders of the Chief Execution Officer granting instalments in respect of a certain debt should not be set aside and why the sale of the attached property should not be proceeded with and why an order on imprisonment against the second respondent, a baker, should not issue.

The facts so far as they are relevant are very simple. A provisional attachment granted by the Court, that provisional attachment duly confirmed by a judgment of the Court and the goods attached in accordance with the report of attachment. Now, this case, in our opinion, is governed by a decision of this Court in Shlomo Fried v. The Chief Execution Officer Jerusalem and another, High Court Case No. 88/36 *), where it was held that the Chief Execution Officer has no power to postpone sale and to grant instalments in payment of a debt when the goods attached have been so attached by an order of the Court duly confirmed. That case exactly fits the circumstances of the present case and the Chief Execution Officer here had no power to grant instalments in this case, and the judgment creditor had the right to have the attached property sold in satisfaction of the debt.

With regard to the application for an order of imprisonment, that depends upon whether the judgment debtor has in fact disposed of the property which had been attached and placed in his custody. This is not a matter which we can go into but, if he thinks it advisable, the judgment creditor, of course, can go to the Chief Execution Officer with his proofs and place the matter before him.

We therefore refuse to issue any order in respect of imprisonment. The order nisi with regard to the sale will be made absolute with costs and LP. 10 fee for attending the hearing.

Given this 6th day of November, 1940.

British Puisne Judge

HIGH COURT NO. 98/40.

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

Before:— Copland, J. and Rose, J.

In the application of:

Samuel Szczupak — Petitioner.

v.

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*) 8 C of J p. 411.

The Law Council — Respondent.

Alteration of practice in Palestine Law Examination — Scope of sec. 5 of Interpretation Ord. (Repeal of an Ordinance etc. not to affect any right etc. previously accrued).

Where no rule in existence entitling to a certain right but merely a long established practice, mere fact that an alteration in it may cause hardship to any individual — not a matter for High Court.

Goitein and *Gluckman* for Petitioner.
Ex parte.

Application for an order to issue to the Respondent directing to show cause why the petitioner should not be allowed to take one examination only in 1941, namely that in Civil procedure and why he should not be exempted from taking any language test.

ORDER

Rose, J.

We are of opinion that in this case we cannot grant the rule.

This particular candidate entered for the Palestine Law Examination undertaking to endeavour to pass the examination to the satisfaction of his examiners. It is true that at the time when he started taking his examination the requirements needed to satisfy the examiners were different. Now the practice has been altered to the detriment of the candidate.

An argument has been addressed to us based upon section 5 of the Interpretation Ordinance. Section 5(1)(c) says —

> "The repeal of any Ordinance or any provision that an Ottoman of other law shall no longer have effect shall not, unless the contrary intention appear — affect any right, privilege, obligation or liability accrued or incurred under any Ordinance or law so repealed or abrogated;"

Now, this argument must depend on whether there was any rule in existence entitling the petitioners to a certain right. It is admitted that there is no such rule but merely a long established practice. The mere fact that an alteration in the practice may cause hardship to any individual is, in our opinion, not a matter for us but for the Legal Board. The rule must therefore be refused.

Given this 18th day of November, 1940.

British Puisne Judge

HIGH COURT NO. 70/40.

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 Director of Orphanage, Nablus — Petitioner.

v.

1. Shukri Ibn Mohammad Kamhiyyeh.
2. The Chief Execution Officer, Nablus
3. Mamdouh Abdel Latif Nablusi. — Respondents.

Payment of instalments on account of money borrowed out of orphans funds — Question as to whether capital or interest should in first instance be debited by instalments paid on account of debt.

Instalments paid on moneys borrowed from orphan funds must in first instance be debited against interest account; balance, if any, against capital.

Abcarius for Petitioner.

Asal for Respondent No. 1.

Respondent No. 2 — Absent — served.

Respondent No. 3 — In person.

Application for an order to issue directed to the Respondents calling upon them to show cause why the order of the second respondent dated the 8th day of June, 1940, in Execution File No. 198/40, Nablus should not be set aside and or varied to enable petitioner to deduct any amount paid from the interest due in first instance and any balance remainning to deduct from the capital in accordance with the habit of dealing between the parties and in all similar dealings.

ORDER

In this case the Respondent borrowed a certain sum money from the Director of Orphans in the year 1928 by a separate agreement and interest at 9% was payable on that sum in advance. Default was made in payment of the instalments set out in the mortgage deed and an application was, therefore, made for the execution of the mortgage. That was in the year 1932.

The short point for determination in this case is whether instalments

paid on account of the mortgage deed should be debited against the capital or the interest account.

The two primary considerations are: one, that the capital of the orphans should be protected, and, secondly, that the orphans should get an income from the capital invested. The first Respondent argued that the amounts of instalments paid should be deducted in the first instance from the capital and the balance, if any, I need not say that hitherto there is not any balance, should be given to the income account. The Director of Orphans who is responsible for these accounts and for the orphans funds contends that the income account should be credited first, and any balance should be deducted from the capital; at any rate, the first thing is that the orphans should get interest on the money they have invested. That being the object of the investment, we think that the Director of Orphans is right. If instalments were deducted in the first place from capital it would mean that the orphans for some years will get no income at all. To make up that income they have to borrow and pay interest on that, or the Director of Orphans would have to advance from the capital account money with interest. Neither of these is a practicable and reasonable course and in fact it is a wrong course. These are orphans funds, the capital must be protected and the orphans must be provided for. The rule nisi must, therefore, be made absolute and the Execution Office instructed that the payments on account must be credited to the income account first, and only if there is a balance should that balance be credited to the capital account. The Petitioner will have his costs together with LP.5 fees for attending the hearing.

Delivered this 21st day of September, 1940.

British Puisne Judge

HIGH COURT NO. 82/40.

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

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

In the application of:

1. Salman Joffe
2. Ellern's Bank Ltd.
3. Meonoth Hashiloach Be'eravon Mugbal — Petitioners.

v.

The Registrar of Companies, Jerusalem. — Respondent.

Registrar of Companies refusing to register a mortgage created by a Company on ground that application out of time — Actual delivery of deed of mortgage by land Registry several months after it was ready for delivery — Interpretation of sec. 127(1) *of Companies Ord.*

Date of issue for purposes of sec. 127(1) of Companies Ordinance (registration with Registrar of Companies of mortgage on land within 21 days after "the certificate of registration of the mortgage is issued by the Land Registry") — date of actual handing over of mortgage deed, not date on which document was ready for delivery.

Radt for Petitioners.
Salant for Respondent.

Application for an order to issue directed to the respondent calling upon him to show cause why he should not register, under section 127 of the Companies Ordinance, the mortgage registered in the Haifa Land Registry, in Vol. 96, Folio 41, as per deed 664 dated 26.3.40.

ORDER

This case depends upon the interpretation of Section 127(1) of the Companies Ordinance. The matter which we have to decide is what is meant by the words "The issue of a Certificate of Registration of a mortgage by the Land Registry."

Mr. Salant argues that the date of issue is the same thing as the date upon which the document is ready for delivery and he relies in this case on the fact that on the Certificate of Registration there is an endorsement, signed by the Director of Registration, which reads: "Date of issue 18th of April, 1940". In fact the document was handed over to the petitioner on the 12th of July, 1940, and it appears that prior to that date no notification had been sent to the petitioner that the document was ready for him to take out of the office. In a letter addressed to counsel for the petitioner dated the 2nd of August, 1940, the Registrar of Lands says:

"Sir,

I refer to your letter of 30th July, 1940, and have to inform you that deed of mortgage No. 664/40, was ready for delivery on 18.4.1940.

The said deed was issued to you on 12.7.1940."

In our opinion that letter accurately describes the situation. We think that in a case of this kind the date on which the deed is actually handed over to the pettitioner is the date of issue.

That being so, it follows that the petitioner was in time when he asked for registration and the rule must therefore be made absolute with costs to include LP. 5 for advocate's attendance fee.

Given this 13th day of November, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 36/40.

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:

The Attorney-General — Appellant.

v.

Victor Habib Asfour — Respondent.

Charge of obtaining money by false pretences and uttering false document — Evidence that signature on promissory note upon security of which accused borrowed money is not his — Court discharging accused by forming opinion as to his intention, without hearing defence.

If a prima facie case made out against accused, Court — unless it says it does not believe the witnesses — not justified in forming an opinion as to accused's intention and discharging him without calling upon him for his defence.

Crown Counsel (Bell) for Appellant.

Hazou for Respondent.

Appeal from judgment of District Court, Haifa, dated 15.4.40.

JUDGMENT

This is an appeal by the Attorney-General against a judgment of the District Court dismissing a case against the Respondent, in which he was charged under Sections 301 and 340 of the Criminal Code Ordinance, without calling upon him for his defence.

I would call attention to Section 39 of the Criminal Procedure (Trial Upon Information) Ordinance. If the Court had had that section in mind I do not think it would have fallen into the present error.

There was clear evidence that the accused had borrowed LP. 30 upon the security of a promissory note purporting to be signed by him. There was evidence of two witnesses that the signature on the note was not his.

Upon that the Court at the close of the case for the prosecution listened to submissions by the defence and held —

> "There is not sufficient positive evidence before us that the promissory note was not written or signed by the accused to justify the Court in calling upon him to enter upon his defence. We would, however, add that even if it was not in fact his signature which appeared on the promissory note, we think that he had adopted it as his own and it follows therefore that one could not sustain a charge either of obtaining money by false pretences or of uttering a false document. We would add that we do not think that at the time when the accused obtained a loan he had any intention to defraud and it is probable that he may have decided later to deny liability. We accordingly discharge the accused."

As to the first point, the Court does not say it did not believe the witnesses, and there was certainly prima facie evidence as to the signature.

I do not understand the suggestion that the accused had "adopted" the signature, — presumably it means that he explained that the signature was not his but that he would be bound by it, — but whatever it may mean it is not clear upon what evidence it was based.

Where a prima facie case is made out I do not understand how the Court can form an opinion as to the accused's intention without hearing the defence.

The case must go back to the District Court to be completed, heard and determined, but I desire at this stage to say nothing which may influence the eventual result.

Delivered this 29th day of May, 1940.

Chief Justice.

CIVIL APPEAL NO. 6/40

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

Before: Copland, J., Rose, J. and Khayat, J.

In the appeal of:—

Louis Moubarak Jabrieh and 4 others — Appellants.

v.

1. Afifeh Morcos, widow of Bishara Jabrieh

2. Margaruite Issa Jabrieh through her attorney Gibries Bishara Zoughbi Respondents.

Certificate of succession issued by Ecclesiastical Court by consent of all persons concerned — Evidence of President of Ecclesiastical Court that certificate of succession issued by him did not refer to Miri — Competency of District Court to issue certificate of succession regarding such part of estate as to which no actual certificate issued.

Where by consent to its jurisdiction Religious Court issued certificate of succession referring only to property other than Miri, parties entitled to apply to District Court for issue of certificate of succession to Miri.

Levitzky for Appellants.
Elia for first Respondent.
Second Respondent in person.

Appeal from judgment of District Court, Jerusalem, dated 18.12.39.

JUDGMENT

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

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

From the evidence given before the District Court, it is also clear that this document of the 8th February, 1932, in the opinion of the learned Ecclesiastical President, who issued it, and if he does not know, I do not know who does, did not refer to the Miri property and the learned gentleman was of the opinion that a second certificate for the Miri would have to be issued, but he cannot say if that certificate were issued. It is clear, therefore, on the documents before us, that this question of the Miri inheritance was not dealt with in the certificate issued by the Latin Ecclesiastical Court. That being so, the

District Court was entitled to issue the required certificate, since any consent which there may have been was, at any rate, a consent which applies only to property other than Miri, and, before the actual certificate is issued, parties are entitled to come to the District Court.

We are of the opinion that the appeal must therefore be dismissed with costs, to include LP. 10 hearing fee to the 1st Respondent and LP. 2 expenses to the 2nd Respondent.

Delivered this 13th day of February, 1940.

British Puisne Judge.

HIGH COURT NO. 102/40.

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

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

In the application of:

Haj Saadi Khayal — Applicant.

v.

1. The Chief Execution Officer, Jaffa.
2. Haj Fakri Dajani, Jaffa.
3. The Land Registrar, Gaza. — Respondents.

Application by judgment debtor to High Court for order refraining Land Registrar from registering land in purchaser's name in compliance with an order of Chief Execution Officer — Limits of interference by High Court.

1. Order of Chief Execution Officer for transfer duly given and duly communicated to Land Registrar, coupled with receipt by him of prescribed transfer fees — equivalent to acknowledgment in a consent transaction; on these conditions being complied with transfer duly completed.

2. Invariable rule that when once execution completed — High Court will not interfere.

3. Plea before High Court that nobody will be hurt if application granted — irrelevant, Court being only concerned to ascertain whether Public Offcer correctly directed himself in law.

Cattan for Appellant.

Ex parte.

Application for an order directed against the first Respondent to show cause why his order, dated the 15th of November, 1940, in Jaffa Execution File No. 16/39, should not be set aside, and why his order dated 31st October, 1940, should not be restored, and why he should not be ordered to direct the discharge at the Land Registry

of Gaza of the attachment on Petitionr's property made in favour of the second Respondent, and why he should refrain from ordering the registration of the property in the name of the second Respondent.

ORDER

This is an application for an order nisi to issue against the Chief Execution Officer, Jaffa, to show cause why he should not be ordered to direct the discharge at the Land Registry, Gaza, of the attachment on the Petitioner's property in execution, and to refrain from ordering the registration of the property in the name of the second Respondent, the judgment creditor.

It appears to us that this case in similar to the case of Azar and others v. Chief Execution Officer, Haifa, H.C. No. 8/40 *) (7 P.L.R. 121). In that case we held that the order of the Chief Execution Officer for transfer duly given and duly communicated to the Land Registrar, coupled with a receipt by him of the prescribed transfer fees, must be taken to be equivalent to acknowledgment in a consent transaction, and that, on these conditions being complied with, the transfer was duly completed.

Mr. Cattan, with his accustomed persuasiveness, has endeavoured to show us that this case differs from High Court No. 8/40. He argues that the application was made before the prescribed fees were paid, and that there is no mention upon the file that the registration fees had been paid, and that there is no record of consent having been given by the Land Registrar.

The fact in this case is that the object of the execution has been completed, since the amount due by the purchaser has been paid, notice to transfer sent to the Land Registrar, and the transfer fees paid, and it is an invariable rule of this Court that when once execution has been completed we cannot interfere. Apart from that it seems to us that this case is the same as High Court No. 8/40, and that the differences pointed out by Mr. Cattan do not affect the principle laid down in that case.

With regard to the final plea that nobody will be hurt, I wish to point out that we are not a Court of sentiment, but are here to see that the law is properly carried out, that is to say, to ascertain whether the Chief Execution Officer has correctly directed himself in law.

The application is therefore refused.

Given this 23rd day of November, 1940.

British Puisne Judge.

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*) 7 CtLR p. 101.

CIVIL APPEAL NO. 214/40

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

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

In the case of :

'Uthman 'Awad 'Abdul Jabir Abu Shamma and 10 others. Appellants.

v.

Fatmeh 'Abdullah Mustafa Wadi Respondent.

Claim by co-heirs of original owner that transfer of land to name of defendant's predecessor fraudulent — Prescriptive possession by registered owner without any steps taken by persons claiming to be co-heirs — Omission of co-heirs in a Yoklama registration — Inference of fraud.

Where registration of land attacked on ground of fraud only fraud must be proved. Court cannot infer fraud from omission of co-heirs in a Yoklama registration; such registration does not, prima facie, show fraud as it might have done in case of a Land Registry registration.

Cattan for Appellants.
Goitein for Respondent.

Appeal from judgment of Settlement Officer's Court of Ramle Area, dated 11.9.40.

JUDGMENT

This is an appeal from a judgment of the Land Settlement Officer in which he decided that the respondent in this present appeal was the true owner of certain land which was in dispute. This case began in the year 1932. The case was entered in the Land Court of Jaffa and was subsequently transfered to the Land Settlement Officer, since when the case has oscillated between Land Settlement Officers, Land Courts and the Supreme Court with varying result. The facts are not very complicated and are largely undisputed. The property in dispute was originally owned by one Mahmud Salem Wadi. In the

year 1313, the property was registered in the name of Mahmud Wadi's grandson, Abdullah, upon the death of the grandfather. In 1326 the property was registered in the name of Fatmeh, Abdullah's daughter, by way of inheritance from her father. As the Settlement Officer stated, and I am referring to the last hearings before the Settlement Officer Mr. Camp, when the case had to be reopened, since the previous Settlement Officer, who had decided the matter, was then no longer in Palestine, it may be noted that the essence of the claim by the plaintiffs, who are the present appellants, was that the transfer to the name of Abdullah was a fraudulent transfer, and that they, the appellants, as heirs of Mahmud were entitled to share in his estate. There was also an allegation that Abdullah during his lifetime was in possession on behalf of all the heirs during that time.

The Settlement Officer found, after hearing evidence, that Abdullah had been in possession of all the land during his lifetime, that there was no proof that the registration in his, Abdullah's name, was actually obtained by fraudulent means and that even if there had been fraud, twenty years was too long a period for people to sleep on their rights and not to bring an action after they became aware of the registration. He also found that Fatmeh the respondent, alone had been in possession since her father died. On these grounds he found in favour of the present respondent.

On the appeal Mr. Cattan, for the appellants, has argued that he never claimed adverse possession as against the respondent and that in fact there could be no adverse possession since the appellants were co-heirs with the respondent — that no prescription would lie against them as they were co-heirs and that even if there was a fraud that did not deprive them of their status as co-heirs. Mr. Goitein, for the respondent, bases himself on one short ground, that is, that the registration in the name of the respondent was attacked on the ground of fraud only — that the registration in the name of Abdullah might well have been by an arrangement and that it having been alleged to have been obtained by fraud, it was the duty of the appellants to prove that fraud and that they had failed to do. Since they had so failed the registration in the name of the respondent must stand.

We do not think that the numerous cases which have been cited to us by Mr. Cattan really affect this present case. We do not, for one moment, dispute the proposition that there can be no adverse possession as between co-heirs, but in this present case it must be remembered that the registration in the name of Abdullah was a first registration of the land in dispute; that it was a Yuklama registration

which, it is common knowledge, could be obtained without some of the precautions that are necessary and which have to be complied with in the case of land registry registrations; that this registration was obtained 46 years ago and that as the registration in Abdullah's name was stated to be on the ground of the death of his grandfather, it is quite possible and indeed not unlikely, that the registration in his name was a matter of arrangement and compensation between Abdullah and his three sisters, who were the ancestors of the present appellants. There is no evidence of any false document having been produced in order to obtain the registration, and for many years the appellants took no steps to have this registration set aside.

We agree that in the circumstances of this case, where fraud is alleged as the ground for disputing the registration, that fraud, in order that the appellants might succeed, would have to be proved. We cannot infer fraud from the omission of the sisters in such a Yuklama registration, since such an omission, does not, prima facie, show fraud, as it might have done in the case of a Land Registry registration. The Land Settlement Officer found, and we agree with that finding, that there is no proof that Abdullah's registration was obtained by means of fraud and on that ground alone, therefore, we think that the claim of the appellants must fail. That disposes of this appeal.

The appeal must be dismissed with costs on the lower scale, to include LP. 15 fee for attending the hearing on this appeal.

Delivered this 26th day of November, 1940.

British Puisne Judge.

HIGH COURT NO. 92/40.

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

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

In the application of:

Moshe Salamon — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv.
2. The General Palestine Bank, Ltd. — Respondents.

Order made by Assistant Chief Execution Officer varied by

Chief Execution Officer. — Powers of Assistant Chief Execution Officer.

1. Powers of Assistant Chief Execution Officer — delegated to him by Chief Execution Officer, but when so delegated he acts independently.
2. Chief Execution Officer — not an appellate Court from Assistant Chief Execution Officer. uz

Zakheim for Petitioner.
Respondent No. 1 absent — served.
Kolodny for Respondent No. 2.

Application for an ohder to issue directed to the first Respondent, calling upon him to show cause why the order of the Assistant Chief Execution Officer, dated the 13th of September, 1940, in Execution file No. 5500/37 Tel-Aviv, should not be acted upon. Or alternativaly, why the Chief Execution Officer should not take into consideration the fact that the preferential right as regards file No. 7197/37 (where second Respondent failed in his third party opposition) remained in force, when distributing the money attached by second Respondent from the Anglo-Palestine Bank, Ltd., Tel-Aviv.

ORDER

This is an application for an order to issue to the Chief Execution Officer calling upon him to show cause why the order of the Assistant Chief Execution Officer, dated the 13th of September, 1940, in Execution file No. 5500/37 Tel-Aviv, should not be acted upon.

It appears that an order was made by the Chief Eexcution Officer varying this order by the Assistant Chief Execution Officer. The powers of the Assistant Chief Execution Officer are delegated to him by the Chief Execution Officer, but when so delegated he acts independently, and applications to this Court for orders directed to Assistant Chief Execution Officers are not infrequent. The Chief Execution Officer is not an appellate Court from the Assistant Chief Execution Officer.

The rule will therefore be made absolute, and the order of the Chief Execution Officer, dated 26th September, 1940, will be set aside, which will in effect reinstate the order of the Assistant Chief Execution Officer of the 13th September, 1940.

The Applicant will have the costs which we fix at an inclusive sum of LP. 10.

.. Given this 25th day of November, 1940.

Chief Justice.

CIVIL APPEAL NO. 40/40.

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:—

Hanna Eissa Kawas — Appellant.

v.

1. Bishara Elias Kawas
2. George Elias Kawas
3. Jamileh Suleiman Talamas — Respondents.

Certificate of guardianship issued by Ecclesiastical Court to widow over her children — Agreement entered into by guardian on own behalf and on behalf of minor children — Action by heirs of deceased partner for their share in profits of partnership and for account — Invalidity of appointment by Religious Court of guardian over minors.

Appointment of guardian over minor children can only be properly made by Civil Court; appointment by Religious Court — invalid in view of absence of children's consent to Court's jurisdiction.

Abcarius for Appellant.
Smoira and *Krongold* for Respondents.

Appeal from judgment of District Court, Jerusalem, dated 25.8.1938, and 9.2.1940.

JUDGMENT.

Rose J.

This is an appeal from a judgment of the District Court of Jerusalem. The Plaintifs-Respondents are the two children and wife respectively of the late Elias Issa Kawas, brother of the Defendant-Appellant.

There was also a third brother, one Khalil, and on the 10th of November, 1917, the three brothers entered into a partnership agreement in Honduras for the term of ten years. One of the terms of the said agreement was that, unless previously dissolved by mutual agreement of all the partners, the partnership should not be dissolved by the death one of the partners, but should in such event continue under the same commercial name and style with the heirs of the deceased partner. On the 19th of October, 1921, Elias died, leaving the present

respondents as his heirs. The respondents, at all material times, resided in Palestine, and it is alleged on their behalf that neither the widow Jamileh, nor the children, who were minors, knew of the term of the partnership agreement that it should not be dissolved by the death of one of the partners. The claim of the Respondents in the present action is for their due share in the profits of the partnership up to its termination in 1927, and for an account.

The appellant set up in his defence that on the 5th of February, 1925, Jamileh, the third Respondent, obtained a certificate of Guardianship from the Ecclesiastical Orthodox Court of Jerusalem over the first and second respondents, and that in pursuance of this, on the 3rd of March, 1925, she entered into an agreement on behalf of the first and second respondents, by which the respondents purported to receive certain sums in satisfaction of all their claims against the partnership.

The question now arises as to whether the above appointment of Jamileh was valid. Articles 51 and 54(ii) of the Palestine Order-in-Council, 1922, are relevant and, following the decision in District Court (Jerusalem) Civil Case No. 54 of 1929, I consider that even if the matter in question was an action within the meaning of Article 54(ii) the fact of the absence of consent of the minor children is sufficient to invalidate the appointment, which could only properly have been made by the appropriate Civil Court. As the appointment as guardian was bad, it follows therefore that the agreement which Jamileh signed in a representative capacity is of no avail to the appellant as a defence, except insofar as it concerns sums received by Jamileh herself on her own account.

For these reasons the appeal must be dismissed, and the judgment of the District Court confirmed, subject to the following point.

The Trial Court gave judgment for the plaintiffs, the respondents, for a specified sum, with interest at six per cent, with the qualification that from this amount must be deducted the sums "admittedly received by Jamileh."

As it was not quite clear to this Court what the precise amount of these sums was, we remitted the matter to the Trial Court for it to make a finding on this point. On the 19th of June 1940, the District Court made an order in which it stated that the amount to be deducted is LP. 2922.755 mils.

Subject to this amendement, namely the substitution for the words "the sums admittedly received by Jamileh", of the figure and words "LP. 2922.755 being the sums admittedly received by Jamileh", the judgment of the District Court is confirmed.

There is nothing in the cross-appeal calling for any reference in the judgment, and it is dismissed.

The respondents will have the costs of this appeal on the higher scale, to include the sum of LP. 15 for advocate's attendance fee to the first two respondents jointly and similar sum for advocates attendance fee to the third respondent.

Delivered this 31st day of July, 1940.

British Puisne Judge.

I concur *Chief Justice.*

CIVIL APPEAL NO. 210/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the case of:

Raji Bisharat of Aman — Appellant.

v.

Miron el Kouri of Amman. — Respondent.

Application to District Court for enforcement of a judgment of a Trans-Jordan Court — Enforcement in Palestine of judgments issued in United Kingdom and judgments issued elsewhere — Action on foreign judgment.

1. Judgment given in any part of British Dominions outside United Kingdom or in any territory under British protection or mandate — only enforceable if order issued by High Commissoner under sec. 5(1) of Judgments (Receiprocal Enforcement) Ordinance.

Judgments (Receiprocal Enforcement) Rules only lay down procedure when enforcing foreign judgments enforceable in Palestine, but do not by themselves make foreign Judgments enforceable.

2. Action on foreign judgment — action brought for debt and foreign judgment produced in support of claim; statement of claim asking for execution and confirmation of foreign Judgment — not an action on judgment.

Barguthy and *Kirreh* for Appellant.
Asal for Respondent.

Appeal from judgment of District Court, Nablus, dated 30.9.40.

JUDGMENT.

This is an appeal from a judgment of the District Court of Nablus refusing an application for the enforcement of a foreign judgment issued from a Trans-Jordan Court. The District Court refused to grant the application on the ground that no order in respect of Trans-Jordan has been issued by the High Commissioner under Section 5(1) of the Judgments (Receiprocal Enforcement) Ordinance.

Now, in a judgment given by a Court in the United Kingdom itself, the judgment may be registered in Palestine under Section 3 of the Ordinance and when so registered becomes of the same effect as a judgment given in Palestine. For any part of the British Dominions or any territory in respect of which a mandate is being exercised, an order under Section 5(1) applying the provisions of this Ordinance to the judgments of that territory is required. That is the only method of enforcing a judgment in this country of the nature I have outlined. No such order has been issued in respect of Trans-Jordan. Different considerations apply to the enforcement of judgments from Courts in other parts of the world than His Majesty's Dominions or the United Kingdom. The Foreign Judgments Rules do not by themselves make foreign judgments enforceable. Their only function is to lay down the procedure when enforcing foreign judgments that are enforceable in Palestine. That was laid down in the case of Calamaro v. Abdallah, Civil Appeal No. 145/38 (5 P.L.R. 428) *). There is another method indirectly of enforcing a foreign judgment and that is by bringing an action on the judgment in a Court in Palestine, that is to say, the action is brought for the debt and the foreign judgment is produced in evidence in support of the claim but that was not done in the present case. The statement of claim asks for the execution and confirmation of the judgment of the Trans-Jordan Court. That is not an action on the judgment. For these reasons the appeal must be dismissed with costs to include LP. 10 fee for attending the hearing.

Delivered this 21st day of November, 1940.

British Puisne Judge.

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*) 4 CtLR p. 60 (see also Edit. Note, ibid., p. 61).

HIGH COURT NO. 100/40.

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

Before:— Copland, J. and Frumkin, J.

In the application of:

Raji and Bahajat El Issa — Petitioners.

v.

1. The Chief Execution Officer, Magistrate's Court, Haifa
2. Simaan El Tarsha. — Respondents.

Question of participation of judgment creditors in execution — Judgment on notes whose dates not officially authenticated — Object and scope of art. 123 *of Law of Execution.*

1. Object of art. 123 of Law of Execution — to prevent collusion which would diminish rights of legitimate judgment creditors.
2. Where promissory notes were on or about their respective dates of maturity deposited in a Bank for collection there being no suspicion of collusion nor of false dates having been inserted, — dates in notes deemed officially authenticated within meaning of art. 123 of Law of Execution, and judgment creditor on such notes entitled to participate in proceeds of debtor's property.

Abcarius for Petitioners.

H. Atallah 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 grant to petitioners participation in the proceeds of the sale of the immovable property attached in Execution Office file No. 5739/36 by virtue of the judgments in their favour filed in the four Execution Office files Nos. 3641/40, 4544/40, 4534/40 and 3640/40 respectively and that the ruling given by the learned Magistrate in Execution Office file No. 2843/38 be set aside.

ORDER

This application raises one of those questions which are continually cropping up on the construction of article 123 of the Law of Execution, that is to say, that, where there are several documents, in this case promissory notes, whether they can all participate in execution and if the dates of making have been officially authenticated. The petitioners have four promissory notes made and maturing in the years 1936—

1938. The respondent has another promissory note against the same debtor maturing in May 1937. The Chief Execution Officer refused to allow the judgments on the petitioners' promissory notes to participate on the ground that the notes had not been protested or proved before the Notary Public and that therefore they had not been officially authenticated. We are of opinion that that is a much too narrow construction to place upon article 123. The object of this article is to prevent collusion which would diminish the rights of legitimate judgment creditors. In this case it is stated that the petitioners' notes had been deposited in Barclay's Bank for collection. If that be so, then we are of opinion that there can be no suspicion of collusion nor any suspicion of false dates having been inserted on these particular notes, and that the dates would be deemed to have been officially authenticated within the meaning of article 123. This is a question of fact which the Chief Execution Officer should be able to determine himself.

We therefore make the order absolute and order that the petitioners shall participate in the proceeds, subject to the Chief Execution Officer satisfying himself from the evidence in the files or otherwise, that the notes were deposited in the Bank on or about the respective dates of maturity. The petitioner will have his costs, which we assess at an inclusive figure of LP. 10.

Given this 29th day of November, 1940.

British Puisne Judge.

HIGH COURT NO. 99/40.

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

Before:— Copland, J. and Frumkin, J.

In the application of:

Perl Grubner, of Shteinovitz Building, Hapoel Plot, Jerusalem. Petitioner.

v.

District Commissioner, Lydda District, District Commissioner's Office, Jaffa. Respondent.

Difference between "completion of construction" and "completion of the building" in sec. 8(3)(a) of Urban Property Tax Ordinance — Rule of construction.

1. When legislature in same section in same statute or Ordinance with regard to same subject matter uses two different terms it must have intended to mean something different in respect of each of them.

2. Building cannot be completed without a roof, and on evidence that building not completed until a certain date provisions of sec 8(3)(a) (regarding non-liability to pay Urban Property Tax) apply.

Kolodny for Petitioner.

Crown Counsel (*Hogan*) for Respondent.

Application for an order to issue to the respondent commanding him to show cause why he should not refrain from collecting Urban property Tax for the year beginning 1st April, 1940, in respect of the property of petitioner situate in 104 Yehudah Halevi Street, Tel-Aviv, and registered as block No. 7103, parcel No. 134.

ORDER.

This case raises the question of the construction of a certain section in the Urban Property Tax Ordinance, Section 8(3)(a). This subsection is in these terms —

> "Subject to the provisions of section 5(4) of this Ordinance, where the completion of construction of a building took place within two years prior to the date of the first application of the tax to the area in which such building is situated in accordance with section 3(1) of this Ordinance or where the completion of construction takes place at any time after such date the reputed owner shall not be liable to pay the tax prescribed by this Ordinance on the house property of which the building forms part for a period of three years from the commencement of the year next following the completion of the building".

It will be noted that in this subsection there appear these two terms "completion of construction of a building" and "completion of the building". Now, the whole question arises as to what the difference is if any between these two terms. The Finance Authorities in the Lydda District held, basing themselves on a definition in Section 2 of the Ordinance, as amended, that the building was completed in January 1937. The petitioner who is the house owner says that the building was not completed until May 1937 and produces a certificate from his engineer, who was responsible for the construction of the building, to that effect.

The Ordinance goes on to say —

> "'completion of construction' used with reference to a building or addition thereto shall be deemed to be when the building or addition is used or occupied in whole or in part or is roofed whichever shall first occur;"

It seems, if I may say so, a somewhat peculiar definition because it is very hard to imagine that a building is completed if the roof is not there. Be that as it may, the section uses these two phrases "completion of construction" and "completion of the building". When the legis-

lature in the same section in the same statute or Ordinance with regard to the same subject matter uses two different forms of words the legislature must have intended to mean something different in respect of each of those two terms. We think that we cannot say that "completion of construction" means the same as "completion of the building". That being so, and as I said a building cannot be completed without a roof, and on the evidence on behalf of the petitioner that the building was not completed until May, 1937, we think that that is a reasonable construction and the petitioner was correct. I would only say that if "completion of construction" mean the same as "completion of the building" steps should have been taken to say so in the Ordinance and not to use two different phrases. The order nisi must therefore be made absolute with costs and LP. 10 fees for attending the hearing.

Given this 29th day of November, 1940.

British Puisne Judge.

HIGH COURT NO. 96/40.

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

Before:— Copland, J. and Frumkin, J.

In the application of:

Maynards Limited — Petitioner.

v.

1. The Chief Execution Officer, Jerusalem.
2. Shmuel Havilio. — Respondents.

Order of payment by instalments after order of attachment and sale of goods — Effect of attachment ordered by Court and confirmed in its judgment — Discretion of Chief Execution Officer to order sale or grant instalments — Proper procedure on application by judgment debtor to pay by instalments.

1. When goods attached by order of Court duly confirmed in its judgment Chief Execution Officer has no power to grant payment of debt by instalments.

2. Chief Execution Officer, with regard to an execution office attachment, has discretion whether he will proceed with sale of attached goods or grant instalments.

3. Where, after goods attached by Chief Execution Officer, debtor prays to pay by instalments Chief Execution Officer not to make any order without giving creditor opportunity of appaering and stating his objection.

4. Order to pay judgment debt of over LP. 60 (after goods to cover it had been attached in Execution Office) by monthly instalments of LP. 2 given in absence of judgment creditor and without any evidence of inability or otherwise of judgment debtor to pay — not a reasonable one.

Amdur for Petitioner.

King for Respondent No. 2.

Application for an order to issue directed to the first respondent calling upon him to show cause way his order dated the 11th of November, 1940, in Execution Office file No. 5204/40, Jerusalem, shuld not be set aside, and way the execution proceedings for the sale of the attached goods of second respondent should not be continued.

ORDER.

In this case the Chief Execution Officer, having levied an attachment on certain goods, and ordered their sale, later on changed his mind and ordered payment of the judgment debt amounting to about LP.60 by instalments of LP. 2 per month. The judgment Creditor has objected to this and the argument has been an interesting one seeing that unfortunately in the years 1936 and 1937 two contradictory judgments were delivered by this Court based on facts which seem to be the same in each case. The petitioner argues that the Chief Execution Officer, when he attaches goods, must sell those goods and has no discretion to order instalments. That view is supported by the decision of this Court in H.C. No. 88/36, where the Court held that certain powers were given to Chief Execution Officers in connection with mortgages and imprisonment for debt, but the Chief Execution Officer had no power to stay a sale and then make an order for instalments. In H.C.7/37 (and the facts appear to be exactly the same), the Court held that the power of the Court was discretionary and the instalments were reasonable and it refused to alter the order of instalments made by the Chief Execution Officer. In both H.C. 88/36 and H.C. 7/37 the atachment had been levied by the Execution Officer and not by a Court. Later on, earlier this month, the question was again considered in H.C.84/40 *) by this Court which was differently constituted. In that case the Court expressed the opinion that H.C. 88/36 **) had held that the Chief Execution Officer had no power to postpone sale and to grant instalments for payment of a debt when the goods attached had been so attached by an order of the Court duly confirmed. Now that judgment was based upon a misconception of the true facts in H.C. 88/36 but nevertheless we think that when goods have been

*) 8 CtLR p. 158. **) 8 C of J p. 411.

attached by an order of the Court and the Court has duly confirmed that attachment by giving judgment, the ruling in H.C. 84/40 is correct.

The question now arises, does that judgment equally apply to goods where the attachment is one levied by the Execution Office. On that, as I have already related, there are these two contradictory judgments issued some three or four years ago. These two judgments being contradictory, we have therefore to decide which we think is the better one and we think that the better view is that H.C. 7/37 is the one which should be followed, that is to say, that when the attachment is made in the Execution Office the Chief Execution Officer has a discretion whether he will sell the goods attached or whether in all the circumstances of the case he thinks it is fairer and more equitable to proceed in the liquidation of the judgment debt by way of instalments.

As to this particular case, we do not think that, when a judgment debt amounts to over LP. 60, an order of instalments of LP. 2 per month is a reasonable one in the absence of any evidence of the inability or otherwise of the judgment debtor to pay. It must also be remembered that this order for instalments was made without the judgment creditor being given an opportunity of appearing on the motion and stating his objections thereto. This was clearly wrong — a creditor is always entitled to appear in such a case. The result is that we hold that a Chief Execution Officer, with regard to an execution office attachment, has a discretion whether he will proceed with the sale of the attached goods or not, and that the ruling given in H.C.84/40 does not apply in the case of such attachments, but only to attachments made by a Court, but we must make the order absolute on the other ground, that is to say, that the judgment creditor was not given an opportunity of appearing and of raising any objection as to the payment of instalments.

The petitioner will have his costs and LP. 10 fee for attending the hearing.

Given this 29th day of November, 1940.

British Puisne Judge.

HIGH COURT NO. 97/40.

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

Before: — Copland, J. and Khayat, J.

In the application of:

Joseph Raises ..... Petitioner.

v.

1. The Chief Execution Officer, Magistrate's Court, Tel-Aviv.

2. Chevrat Betonit. Respondents.

Order by Chief Execution Officer regarding instalments in payment of debt — Order of imprisonment by Chief Execution Officer — Time to apply to High Court.

Applications in execution matters must be made to High Court at earliest possible moment, or they will be dissmissed.

Gorali for Petitioner.
Gidion for Respondent No. 2.

Application for an order to issue directed to the first respondent calling upon him to show cause why his order of imprisonment dated 22nd October, 1940 in Execution File No. 14830/39, Tel-Aviv of the petitioneh should not be set aside and that the said order be cancelled and revoked.

ORDER

We are of opinion that this rule will have to be discharged. The order objected to, the foundation of these proceedings, was really the order of May 6th 1940. Over six months elapsed since that order was made and no steps have been taken till now to have it tested or set aside. In addition, an order of imprisonment has already been issued on the order of May 6th and even then the judgment debtor never applied to this Court. It is essential and is our rule, which we apply strictly, that applications in execution must be made to this Court at the earliest possible moment and it is not right that either a creditor or a debtor should wait for six months and then come and ask that an order to which they object should be set aside. Nothing has been shown to us to suggest that the circumstances of the judgment debtor have in any way changed since the order of May 6th and, as I have stated, the rule nisi must be discharged with LP. 2 total costs to the respondent.

Given this 27th day of November, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 116/40.

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:

Hussein Mohammad Hussein — Appellant.

v.

The Attorney-General — Respondent.

Conviction of attempted unlawful sexual intercourse with a child — Evidence by child "understanding enough to be sworn and knowing what an oath means more or less" — Corroboration of child's evidence by other evidence and accused's admission to Police.

Evidence of child, even if not sworn, may if believed, support conviction if sufficiently corroborated by evidence of other witnesses and admission of accused to Police.

Appellant in person.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 14.11.40, whereby the appellant was convicted of attempting to have unlawful sexual intercourse with a child contrary to section 154 of the Criminal Code Ordinance and of attempted murder contrary to section 222(a) of the Criminal Code Ordinance and sentenced to ten years' imprisonment.

JUDGMENT.

The appellant was convicted of an attempt to have unlawful sexual intercourse with a young girl and with attempting to murder her. The complainant, being a child, the Court below properly enquired into her understanding of the nature of an oath. It decided "She understands enough to be sworn and knows what an oath means more or less". It is difficult to know what the Court meant by this. But even if the child was not sworn, the court believed her evidence and found there was sufficient corroboration in the evidence of the other witnesses and the admission of the accused made to the police. The appeal against the conviction of attempted rape fails.

As regard the second count of attempted murder, we do not think there was sufficient evidence to support the conviction which should be quashed and we substitute therefor a conviction for inflicting grievous bodily harm.

The maximum penalty prescribed for each of these two offences is seven years imprisonment. We therefore reduce the sentence from one of ten years to one of five years imprisonment.

Delivered this 28th day of November, 1940.

Chief Justice.

PRIVY COUNCIL APPEAL NO. 57/38

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

Before:— Lord Thankerton, Luxmoore L.J., and Sir Philip MacDonell.

In the appeal of:—

Reuven Swatitzky — Appellant

v.

Government of Palestine — Respondent

Lease of land registered in name of Government to inhabitants of Colony for term of 50 years — Obstruction by person in possession of land to its delivery to lessees — Action by lessees of land against person interfering with possession and claim by Government, summoned as 3rd party, for judgment confirming its ownership and ordering non-interference with lessees using the land — Power of attorney to negotiate lease of land from Government precluding claim of prescriptive title by haq qarar — Scope of art. 117 of Ottoman Civil procedure Code (third party proceedings).

1. Signing along with other persons Power of Attorney with a view to negotiate with Government inter alia for lease of land — necessarily implies admission precluding claim of prescriptive title to land by haq qarar.

2. Power of Attorney coupled with an interest — irrevocable.

3. Art. 117 of Ottoman Civil Procedure Code — not limited to joinder as defendant, it contemplates a statement of claim by 3rd party which can be upheld as against either or both parties to suit.

D. B. Buckley for Appellant.

J. M. Gover and *K. Preedy K. C.* for Respondent.

Appeal from judgment of Supreme Court of Palestine (LA 66/25), dated 26/9/25.

JUDGMENT.

Lord Thankerton

This is an appeal from a judgment of the Supreme Court of Pales-

tine, sitting as a Court of Appeal, dated the 26th September, 1925, dismissing the appellant's appeal from a judgment of the Land Court of Jaffa, dated the 4th March, 1925, but varying the judgment of the Land Court, and limiting it to a declaration that the respondent is entitled to remain registered as owner of the lands in suit.

The lands in suit consist of an area of 1895 dunams and 461.95 square pics called the "Bassa", situated in the Jaffa District, at or near the village of Petah Tiqva. The suit arose out of the making of a contract of lease dated the 11th November, 1921, between the Chairman of the Land Commission of Palestine on behalf of the Government of Palestine and certain persons acting under a power of attorney from the inhabitants of the Colony of Petah Tiqva, under which the Government leased to the Colony the land in dispute for a term of 50 years, but under reservation of a portion of about 200 dunams of the said land, which portion might, at the option of the Government, be subsequently included in the land leased.

In the Land Registry Office of Jaffa Turkish Register the Government of Palestine has been registered as the owner of the land in suit as Miri land ever since 1897, and the said lease was duly registered on the 29th May, 1922.

The appellant, who was in possession of the area, obstructed the delivery of possession by the Government to the Colony, and the Colony applied to the Magistrate's Court of Jaffa for dispossession of the appellant, but the Magistrate, on the 25th December, 1922, held that the question of ownership was involved, which placed the matter outside his jurisdiction, and dismissed the application. Thereafter a Local Council of Petah Tiqva was invested with juristic personality, and, as provided in the lease, the benefit of the lease was transferred to the Council, which instituted the present suit in November or December, 1923, against the appellant as defendant. In their statement of claim, which is undated, the Council "requests by virtue of the aforesaid official documents to restore its right as a lawful lessee in respect of this land, to order the Land Department of the Government of Palestine to prove its ownership on this land and after the Government produces proof of ownership that the Court may issue a judgment to the effect that the Government is the owner of the land that the defendant has no right of ownership thereon and that therefore the contract between the Government and the plaintiff stands good and the latter is entitled to cultivate the land in accordance with the provisions of the contract". The Council also asked that the Government should be summoned as a third party. On being so summoned, the Govern-

ment decided to appear, and on the 6th December, 1923, filed a "statement of defence of third party", in which a claim was made that judgment be given confirming the ownership of the Government to the land as per Tabu registration, and that the defendant should be ordered not to interfere with the use of the land by the tenants.

The appellant did not file a written defence, but, while admitting that the land was originally pasture land owned by the State, he claimed that he had been in possession since 1909, with the exception of a period of less than two years during 1918—1920 when he had been deported, that he had brought a considerable part of it into cultivation, and that he had acquired by haq qarar or prescription a right which entitled him to a tapou title from the Government. It is clear that he did make an application for a tapou grant to the Ottoman Government in 1911, and there is evidence that it was recommended, but no such title was given. He bases his claim to prescriptive right on Article 78 or Article 103 of the Ottoman Land Code, according as the land is Mirie or Mevat land. He accordingly challenges the right of the Government to grant a lease to any third party.

But the appellant is faced with a preliminary difficulty by reason of his actings in connection with the lease which he challenges, and both Courts have held that he is precluded by his actings from any challenge of the lease. Their Lordships, after an admirable argument by Counsel for the appellant, are also of opinion that he is so precluded. The evidence of these actings is contained in three documents.

By an agreement dated the 3rd October, 1920, between the appellant and the Colony of Petah Tiqva, the appellant "agrees to support the application of the Colony of Petah Tiqva to lease the bassa swamp lands for 99 years or such other long term as the Government may grant, this support being conditional on the sublease of 30 per cent. of the said land being made by the Colony to Swatitzky, his heirs and assigns, and sanctioned by the Government. The specific area of the said 30 per cent. to be settled by parties by agreement and in default of agreement by arbitration." It is unnecessary to refer to the further provisions except to add that the appellant was to get compensation from the Colony for reclamation and inprovement of the bassa lands made by him from the year 1906 to the year 1918. The appellant admitted his signature and the validity of this agreement.

On the 8th October, 1921, the appellant, along with 240 other inhabitants of Petah Tiqva signed a power of attorney in favour of five members of the committee of the Colony empowering them to negotiate in their names with the Government inter alia for the lease

in question. While the appellant was doubtful as to his signature on this document, his pleader in the Supreme Court admitted his signature. It is also clear beyond dispute that the lands claimed by the appellant are included in the agreement and the lease.

The appellant sought to get same help from the third document, viz., an undated letter by the appellant to the Government (Exhibit 5), in which he objects to the application of the Colony for a lease, and claims a right to the land. It was suggested by the appellant's counsel that this is the letter dated the 19th April, 1921, filed by his counsel as Exhibit 4 on the 27th October, 1924. If that be the true date, it follows that the appellant signed the power of attorney on a subsequent date. In any event, the letter must have been written prior to the grant of the lease on the 11th November, 1921.

In their judgment dated the 4th March, 1925, the Land Court decided that the Colony of Petah Tiqva, never having been in possession, was not a proper party to the proceedings, and dealt with the case as between the Government as third party and the defendant (the appellant) only. While it is not of material importance in the present case, their Lordships desire to express some doubt as to the propriety of not retaining the plaintiffs as a party. Such a conclusion does not seem to be supported by the last part of Article 1637 of the Mejelle, to which the Land Court refers. It held that the appellant could not claim possession and haq qarar of the property owing to the fact he and others applied in the years 1921 and 1922 for the lease of all the property from the Government, as shown by the agreement and the undated letter respectively, the validity of which was acknowledged by defendant himself. It further held that the evidence shewed that he was but a tenant of the land, and therefore could not be entitled to the right of haq qarar. Accordingly the Court ordered the appellant to refrain from interference with the land, with a reservation as to his claim for the 30 per cent. The Government had expressed its willingness to lease to him the 200 dunams reserved in the lease upon the same terms as had been agreed with the Colony.

On the appellant's appeal to the Supreme Court, the Court, by a judgment dated the 26th September, 1925, dismissed the appeal, and varied the judgment of the Land Court by limiting it to a declaration that the Government is entitled to remain registered as owner of the lands in claim.

The appellant maintained, in the first place, that the Government, as a third party, was in the position of a defendant, and that the

Court was not entitled to grant a substantive judgment in their favour. In their Lordship's opinion, this contention is ill-founded, in view of section 117 of the Civil Procedure Code of Palestine, which is made applicable to the proceedings of the Land Court by section 3 of the Land Courts Ordinance, 1921. Section 117 is not limited to joinder as a defendant, and it clearly contemplates a statement of claim by the third party which can be upheld as against either or both of the parties to the suit. There is no reason limiting it to a defence.

As already indicated, their Lordships agree with both the Courts below that the appellant is precluded from challenging the power of the Government to grant the lease to the Colony, the rights of which are now vested in the Local Council of Petah Tiqva. This conclusion may be based on either of two grounds:— Under the agreement of 3rd October, 1920, any equitable claim that the appellant had to the lands in question became vested in the Colony, the appellant, in place thereof, becoming entitled to the consideration which he derived under the agreement; the Government, on notice of the agreement, was bound to refuse to grant to the appellant any right in the lands which would be inconsistent with the agreement, and the appellant's undated letter could not affect this position. Alternatively, it is equally clear that the appellant is precluded by the admission necessarily implicit in the power of attorney of the right of the Government to grant the lease to the Colony. The power of attorney was coupled with an interest and the appellant was not entitled to revoke his part in it; Frith v. Frith, (1906) A.C. 254, per Lord Atkinson at p. 259. His letter could not revoke it.

Accordingly, their Lordships will humbly advise His Majesty that the appeal should be dismissed, and the judgment of the Supreme Court should be affirmed. The appellant will pay the respondent's costs of this appeal.

Delivered this 27th day of May, 1940.

CIVIL APPEAL NO. 127/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the case of:

Radwan Abdul 'Al Abdullah — Appellant.

v.

Atiyah Barakat Atiyah El Farra — Respondent.

Catagory of land planted with trees prior to 1331 — *Claim of land by priority as Khalit.*

No claim of priority can be entertained in respect of miri land planted with trees prior to 1331.

Malak for Appellant.
Nasser for Respondent.

Appeal from judgment of Land Court, Jaffa, (File No. 23/39), dated 30.5.40.

JUDGMENT.

This is an appeal from the judgment of the Land Court of Jaffa, dated the 30th May, 1940, whereby that Court dismissed a claim of priority by the appellant.

In the Court below the appellant claimed a plot of land adjoining his land by way of priority from the respondent who purchased it from a certain Mohammad Abdulla Karim. The land purchased, as was admitted by the appellant, was planted with trees prior to 1331. The basis of his claim was that he is a khalit, but before us his counsel stated that there is a main entrance to the two plots.

It is a matter of law that miri lands planted with trees prior to 1331 devolve on inheritance as mulk. The right of priority is restricted to miri lands and since the trees planted on that particular land are mulk and there is no right of priority to mulk, it is difficult to understand on what authority the appellant relied in claiming his right of priority.

The Land Court in para. 3 of its judgment refers to a decision of the Court of Cassation dated 15.1.1328 in which it was held that no claim for priority could be entertained in respect of miri land planted with trees prior to 1331. With this we are in full agreement.

The question whether or not a party claiming priority should be a co-sharer and a khalit is not necessary for us to decide since the appeal fails on the quotation of the judgment of the Land Court referred to above.

The appeal is therefore dismissed with costs on the lower scale and we certify a sum of LP. 15 for attendance before us.

Delivered this 8th day of July, 1940.

Chief Justice.

CRIMINAL APPEAL NO. 125/40.

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 case of :

Bishara el Halteh — Applicant.

v.

The Attorney-General — Respondent

Information charging with being in possession of stolen goods — Grant of amendment of information by substituting "receiving" for "possession" — Adjournment of trial in view of amendment carrying greater punishment than original information — Procedure when adding a new charge which renders accused liable to greater punishment.

If Court, while considering charge in information as under sec. y (and not sec. x as in information) grants amendment by subsistuting certain words to cure defect and bring information within sec. x, though granting accused adournment as amendment carries greater punishment, information and conviction bad.

Moghannam for Applicant.

Crown Counsel (*Hogan*) for Respondent.

Application for leave to appeal from the judgment of the District Court of Jaffa, dated the 14th November, 1940, whereby the Applicant was convicted of receiving stolen property, contrary to Section 309 of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment.

JUDGMENT.

The Court, after granting leave to appeal, proceeded to hear it.

The Appellant was charged upon an information with being in possession of stolen goods contrary to Section 309, and the particulars there-

in stated that he was found in unlawful possession of various goods, knowing the same to have been stolen.

Section 309 of the Criminal Code Ordinance deals with receiving stolen property. Section 311 deals with being in possession of stolen property.

At the commencement of the trial the prosecution, appreciating that the information was defective, applied to amend it by substituting "receiving" for "possession". The defence submitted that the charge was one of being in possession, and that the proper amendment was to substitute "Section 311" for "Section 309".

The Court ruled —

> "We consider that the amendment can be granted and we accordingly grant the amendment of the charge. At the same time we consider the accused is entitled to an adjournment as the amendment carries a higher penalty than Section 311."

It is clear that the Court considered the original charge as being under Section 311.

The powers of the Court are set out in Section 31 of the Criminal Procedure (Trial Upon Information) Ordinance, as enacted in Section 12 of the amending Ordinance No. 44 of 1939.

In effect, upon the view which it took, the Court added a new charge, which rendered the Appellant liable to a greater punishment than did the information as originally filed. This is contrary to the proviso to Section 31(2).

The information was therefore bad, and the conviction is quashed.

I may point out that the Appendix to the Schedule to the Trial Upon Information Ordinance contains a form of information for receiving stolen property, and that it would be well that whenever possible these forms should be followed.

Delivered this 28th day of November, 1940.

Chief Justice.

CIVIL APPEAL NO. 44/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the application of:

1. Mohammad Suleiman Sabah
2. Masu'deh Ibrahim Abu Shahin
3. 'Ayisheh Khalil Ibrahim Abu Shahin — Applicants.

v.

Mahmoud Ibrahim Wardeh and 7 others — Respondents.

Appellant failing to pay deposit fixed by Registrar, notwithstanding due service of notice on his advocate — Dismissing appeal for failure to pay deposit — Application for rehearing appeal dismissed in absence of appellant.

Dismissal of appeal upon failure to pay deposit within time fixed by Registrar follows automatically; whether appellant's advocate present in Court or not at time of appeal dismissed — immaterial.

El Kirreh for Applicants.
Nasser for Respondents.

Application under Rule 338 of the Civil Procedure Rules, 1938 for the rehearing of an appeal.

ORDER.

This is an application for the rehearing of an appeal under rule 338 of the Civil Procedure Rules, 1938. In the original appeal, a notice for the payment of deposit was served in accordance with law on the advocate for the appellants, who took no steps to pay the deposit within the time fixed by the Chief Registrar. Thereupon another notice was served on the advocate for the appellants informing him that the case was listed for dismissal for non-payment of the deposit. This notice was properly served on him and it was immaterial whether he was present in Court or not at the time the appeal was dismissed because the question was merely formal and dismissal in such cases follows automatically.

In this application, no good cause was shown why we should rehear the appeal and the application is, therefore, refused with costs and LP. 5 hearing fees.

Delivered this 16th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 137/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the application of:

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

v.

The Greek Catholic Church represented by His Grace, Bishop G. Hajjar Respondent

Land Court awarding costs without indicating on what scale — Court refusing application for an order that costs awarded in its judgment should be on higher scale — Taxation of costs by Registrar on higher scale — Application to Land Court for review of Registrar's decision as to scale of costs — Registrar's discretion in absence of order by Court.

1. No appeal from order of Registrar taxing costs.
2. In absence of order by Court as to scale of costs discretion vests in Registrar who may upon proper grounds award costs on higher scale.
3. Parties, both successful and unsuccessful, should make any application they wish in connection with costs when judgment is delivered.

Crown Counsel (*Hogan*) for Applicant.
Asfour for Respondent.

Application for leave to appeal from an order of Land Court, Haifa (251/39), dated June 6, 1940, refusing the Applicant's application

for leave to appeal from its order, dated May 17, 1940, refusing the Applicant's application for a review of the taxation by the Registrar of the Respondent's costs in L Ha 113/35 on the higher scale.

JUDGMENT

After prolonged litigation the present Appellant was unsuccessful before the Land Court, Haifa, and judgment was given against him, but the Court did not indicate on what scale the costs would be paid.

The present Respondent therefore applied to that Court for an order that the costs should be on the higher scale, but that Court held that the application was too late and that the interpretation of the judgment had become a matter for the Registrar on which he should come to a decision himself.

The Registrar gave the Respondent costs on the higher scale, and the Appellant applied to the Land Court for review on the ground that no discretion as to scale of costs was vested in the Registrar. That Court held that such discretion was so vested and refused the application. It also refused the application for leave to appeal to this Court.

The Appellant now applies for leave to appeal to this Court, to which the Respondent replies that no appeal lies by reason of Section 8 of the Registrars Ordinance.

While reserving our decision on this first point, we heard argument on the main issue, in order that we might consider it.

We are of opinion that the Respondent's first argument is well founded and that no appeal lies to this Court. We therefore refuse the application for leave to appeal, but since the other matters have been argued it may be convenient that we should say that in the absence of an order by the Court we are of opinion that the discretion is vested in the Registrar, and that in this case the Registrar exercised that discretion upon the proper grounds.

I should like to add that the provisions as to costs are simple but were intentionally made elastic so that Courts could deal adequately with the question, and that parties, both successful and unsuccessful, should make any application they wish in connection with costs when judgment is delivered.

The Respondent will have the costs of this application, which we fix at an inclusive sum of LP. 10.

Delivered this 25th day of July, 1940.

Chief Justice.

CIVIL APPEAL NO. 139/40.

IN THE SUPREME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the appeal of:

Sami Kutteineh, in his personal capacity and on behalf of the estate of his father, Abdul Hamid Kutteineh

Appellant.

v.

1. Amin As'ad Kutteineh
2. Abdel Latif As'ad Kutteineh Respondents.

Admission in a note book of defendant's testator — Finding of fact based on construction of document — Competence of appellate Court as to construction of document — Judgment against weight of evidence — Mejelle, Art. 1674.

1. A note contained in notebook of defendant's testator that he received from a certain person a certain sum on account of all heirs of his testator — a clear admission of these facts rendering him liable to account to all those heirs for their shares.

2. Construction of a document — a question of law; appellate Court entitled to take view as to correct construction differing from finding of trial Court.

3. Appellate Court may set aside finding of Court below, if of opinion that judgment appealed from was against weight of evidence and that evidence failed to prove that which had to be proved.

Nazzal for Appellant.

Cattan for Respondent No. 1.

Asal for Respondent No. 2.

Appeal from judgment of District Court, Jerusalem (CADC Jm 17/40), dated 24/5/40.

JUDGMENT.

This is an appeal from an appellate judgment of the District Court

of Jerusalem, reversing the judgment of the Chief Magistrate.

Three points were raised on the appeal. First, that a certain document referred to in the proceedings as Exhibit C. does not constitute an admission under Article 1674 of the Mejelle. This document is to be found in Abdul Hamid's notebook, and reads — "I received from Government a sum of three hundred pounds Egyptian as compensation for the land at Bab-el-Wad on account of all the heirs of my late father, As'ad Kutteineh". The Chief Magistrate found that this admission did not comply with the terms of the Mejelle. The learned President, on appeal, held that it was clear admission of liability.

We are of opinion that this is a clear admission that the signatory, Abdul Hamid Kutteineh, received money on account of all the heirs of his father, and this being so he is liable to account to all of those heirs for their shares.

As an alternative plea, the Appellant alleged that the sum had been paid; it rested therefore with the Appellant to prove payment. The learned President held that this the Appellant had totally failed to do. Exhibit C., being dated 1930 or 1935 — more probably 1935 — is a clear admission of liability, which breaks the continuity of the period of prescription.

It was further argued that the action should have been brought on the admission. We cannot see that this would have made any difference whatsoever with regard to the final result.

The Appellant has argued that the District Court on the appeal could not alter findings of fact made by the Chief Magistrate. The construction of a document, as I pointed out, is a question of law. The District Court was therefore quite entitled to its view as to the correct construction.

With regard to the other evidence, we think the judgment of the Chief Magistrate was against the weight of the evidence, and that evidence totally failed to prove that settlement had been effected.

This disposes of the appeal, which is dismissed with costs on the lower scale to include LP. 7.500 to each of the Respondents.

Delivered this 20th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 8/40.

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

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

In the appeal of:

1. Mas'ad Yousef Syegh
2. Taher Ahmad Abu Sultaneh — Appellants

v.

Abdul Rahim Mustafa Abdul Khaleq Matar and 4 others — Respondents.

Appeal to Supreme Court from appellate judgment of Land Court in a Settlement case—Effect of sec. 2 of Land Law (Amendment) Ord. 1933— Adverse possession by co-heir — Judgment by Settlement Officer in favour of a person who has not presented a claim — Effect of Ordinance taking away right of appeal on appeals already lodged.

1. Section 2 of Land Law Amendment Ordinance (occupation of land by co-heirs) — not retrospective in its operation.

2. Where Settlement Officer satisfied that any person not being a party to case, entitled to any right in land he may proceed as if such person were a party.

3. If new enactment does not contain express words taking away right of appeal existing at time judgment appealed from was given, right remains in existence.

Cattan for Appellants.

Linderman for 1st and 2nd Respondents.

No appearance by 3rd, 4th and 5th Respondents.

Appeal from judgment of Land Court, Haifa, dated 8.11.1938.

JUDGMENT.

This is an appeal from a judgment of the Land Court in which that Court set aside a judgment given by the Land Settlement Officer

at Tulkarm. The facts have been very clearly set out both in the judgment of the Settlement Officer and in the judgment of the Land Court. They have been accepted as correct and it is not therefore necessary for us to repeat them.

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

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

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

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

Lastly, the Respondent has taken the point that since the enactment, on the 1st January this year, of the Land (Settlement of Title) (Amendment) Ordinance, no appeal lies to this Court from a judgment given by a Land Court in Settlement cases. We do not think that this is correct. The judgment of the Land Court was given on the 8th of November, 1938 and at that date the Appellants had the right to appeal. In the absence of express words taking away that right we hold that right remains in existence.

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

Delivered this 21st day of February, 1940.

British Puisne Judge.

MISCELLANEOUS APPLICATION NO. 5/40.

IN THE APPELLATE TRIBUNAL APPOINTED UNDER SECTION 20(2) OF THE ADVOCATES ORDINANCE, 1938.

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

In the application of:

Max Seligman — Appellant.

v.

Chairman and Members of the Law Council — Respondents.

Conviction of advocate of conspiracy in connection with illegal immigration — Confirmation by Law Council of finding of its Committee as to "conduct derogatory to the profession of an advocate" and suspension of practising licence for a specified period — Appeal to special appellate tribunal under sec. 20(2) of Advocates Ordinance — Interpretation of "conduct derogatory to the profession of an advocate".

Advocates Ordinance and Law Council Ordinance must be read together; words "conduct derogatory to the profession of an advocate" in latter (sec. 4(1)(h)) — refer to "disgraceful" or fraudulent" conduct and convictions for "offences involving moral turpitude" in former (sec. 20(1)) and do not create an additional offence punishable thereunder.

Appellant in person.
Crown Counsel (*Bell*) for Respondents.

Appeal from a decision of the Law Council, dated 29.1.40.

JUDGMENT

In 1938 two Ordinances were promulgated, the Advocates Ordinance and the Law Council Ordinance, to deal with advocates and to make various provisions in connection with them and the practice of their profession, among which are provisions for enquiry into the conduct of advocates.

Here as elsewhere, advocates are in many respects in a favoured position, and in consequence the law imposes upon them certain liabilities and penalties. The Advocates Ordinance, Section 20, provides:

> "Where any advocate is alleged to be guilty of disgraceful, fraudulent or unprofessional conduct, or where an advocate is convicted by any Court of any offence involving moral turpitude, the Law Council shall enquire into such allegation or into the circumstances of such conviction, and may either warn or reprimand the advocate or suspend such advocate's practising licence for such period as it may think fit or recommend to the Chief justice that such advocate's practising licence shall be cancelled and his name be struck off the roll of advocates, and thereupon the Chief Justice shall direct that the name of the advocate shall be struck off the roll of advocates".

and by Section 4(1)(h) of the Law Council Ordinance that Council is charged with:—

> "Enquiry into the conduct of any advocate or person permitted to practice before the Moslem Religious Courts alleged to have been guilty of unprofessional conduct or conduct derogatory to the profession of an advocate in accordance with the provisions of any Ordinance."

and Rules have been made which provide for such enquiries.

This, so far as I know, is the first occasion on which these provisions of the law have been invoked.

Mr. Seligman, the present Appellant, was convicted before the Courts of certain offences which may be summarized as conspiracy in connection with illegal immigration. That being so, the question as to the applicability of these disciplinary provisions arose, and the matter came before the Law Council. In the ordinary way, complaints of the conduct

of advocates are made to the Council by complainants, and when there is no private complainant Rule 17(3) of the Law Council Rules, which deals with costs, would seem to contemplate the laying of a formal complaint by the Attorney-General or his representative, or a judge or magistrate, but it is not clear if formal complaint was made in this case. Mr. Bell, who was Acting Solicitor-General at the time, has told us what happened when the case first came before the Council.

As I understand the Rules they contemplate that when a complaint is laid before the Law Council, it calls upon the advocate to exculpate himself, and if he does not do so the Council refers the matter to the committee of the Council to enquire into it.

In this case this procedure was not strictly followed, and the Council considered some aspects of the case before receiving Mr. Seligman's reply and before the Committee had submitted its findings, and decided that the criminal offence of which the Appellant was convicted did not involve moral turpitude. We are also told the Council considered whether there was unprofessional conduct, and it apparently came to the conclusion that there was not, as in the result it referred two questions to a committee: (1) was the Appellant's conduct disgraceful; (2) was his conduct derogatory to the profession of an advocate.

Upon that reference the Committee found that there was no disgraceful conduct within the meaning of Section 20(1) of the Advocates Ordinance, but they found that there was "conduct derogatory to the profession of an advocate" within the meaning of Rule 16(1) of the Law Council Rules.

These findings were returned to the Council which, on the 30th January, 1940, through its Chairman, informed the Appellant that these findings had been confirmed and that his practising licence would be suspended for six months, and Mr. Seligman, acting under the provisions of Section 20(2) of the Advocates Ordinance, appeals to this special tribunal against the decision of the Law Council.

There is nothing more in the law with regard to this tribunal and its powers than appears in that sub-section.

The Appellant's main argument is, either there is no such offence as conduct derogatory to the profession of an advocate, or, if there is such an offence, there is no penalty for it. I think it clear that the two Ordinances must be read together. In Section 4(1)(h) of the Law Council Ordinance the words "in accordance with the provisions of any Ordinance" must qualify the words "conduct derogatory to the profession of an advocate".

The Advocates Ordinance and the Law Council Ordinance both

deal with unprofessional conduct, and the former also deals with disgraceful and fraudulent conduct and convictions involving moral turpitude. When the Ordinances are read together it would seem that conduct derogatory in accordance with the provisions of any Ordinance must be a summary reference to disgraceful and fraudulent conduct and convictions for offences involving turpitude, and I do not think, as was submitted by Mr. Bell, that the words create an additional offence which can be read into Section 20 of the Advocates Ordinance so that the penalties in that section may be applied to it.

If this view is accepted the finding of the Committee that the Appellant was guilty of conduct derogatory would be tantamount to a finding that he had been guilty of one or more of the ingredients to which I have referred, but it expressly found that the conduct was not disgraceful — it was never suggested that it was fraudulent, and admittedly the Committee never considered moral turpitude.

In these circumstances Mr. Bell submits formally that we have power to return the case for further enquiry, but as the Attorney-General's representative he most fairly does not ask us to do so, because, as I have said, the Council, before referring the case to the Committee, considered this aspect and decided it in the Appellant's favour.

It follows that the Appellant is entitled to succeed in his appeal, and in the result the decision of the Law Council is set aside. There is provision under Rule 17 of the Law Council Rules as to costs, and the Appellant is entitled to his costs i.e. the actual amount he paid as Court fees.

Delivered this 8th day of February, 1940.

Chief Justice.

CIVIL APPEAL NO. 142/40.

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

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

In the appeal of:

1. Malka Lerner-Ezahi (Krishevsky)

2. Mordechai Ezrahi Krishevsky — Appellants.

v.

1. Abraham Polit
2. Keren Kayemeth Leisrael Ltd. — Respondents.

Nature and effect of oral agreement to transfer long term lease — Court recognizing equitable right to transfer of registrable interest in land — Ineffectiveness of decision of Court as to a matter not relevant to particular issue before it.

1. Court on finding that Plaintiff has an equitable right to transfer of registrable interest in land from Defendant's into his name may order accordingly.

2. Any oral transfer of a registrable interest in land can only be an agreement to transfer by registrattion in Land Registry, thus not null and void in itself.

3. Decision by Court not necessary for determination of issue before it — not binding and cannot create any form of estoppel.

Olshan and *S. Felman* for Appellants.
J. Fraenkel for Respondent No. 1.

No appearance by Respondent No. 2.

Appeal from judgment of the Land Court, Tel-Aviv (20/38), dated 27.5.40.

JUDGMENT

We need not trouble you Mr. Fraenkel.

This is an appeal from a judgment of the Land Court of Tel-Aviv by which it held that the first respondent had established an equitable right to the transfer of a lease into his name and ordered the cancellation of the registration of the lease in the name of the first appellant and ordered registration in the name of the first respondent. It is not necessary to go into the full statement of the facts which are set out in much detail in the judgment of the Land Court. The appeal really rests on the question whether the transaction or arrangement of 1929, which was an oral one, was an agreement to transfer the lease or an actual transfer. This oral arrangement was made between Mr. Polit and Mr. Ezrahi. In our opinion this arrangement was an agreement to transfer and not a transfer. We do not see how there could be such

a thing as an oral transfer. There can be a transfer when it has been completed by registration in the Land Registry.

The next point taken by the appellant is this, that this point, which I have just dealt with, has already been decided in the Chief Magistrate's Court, where it has been held that the agreement was null and void. To that argument all we need say is this, that the question before the Chief Magistrate was solely a question of who should have possession of this particular plot of land, and any finding not relevant to this particular issue is not binding and cannot create any form of estoppel. It was unnecessary for the Chief Magistrate's decision to determine whether the agreement was null and void or not. In any case, I doubt whether he had the power to give that decision, and the Land Court on appeal, of course, had no greater powers than the Chief Magistrate in first instance, sitting in that particular capacity. Being, as we have held, an agreement to transfer it is not null and void or contrary to the Land Transfer Ordinance; this has been decided on many occasions in the past and we agree with the Land Court that in the circumstances of this case there is an equitable right in the first respondent, Mr. Polit, to the transfer of the lease.

The last objection taken was that Mrs. Ezrahi either not having notice of the oral agreement between Mr. Ezrahi and Mr. Polit or having taken the transfer from the Jewish National Fund, who had no notice of the agreement, she therefore took the title of her transferor and her registration cannot be upset. With that we do not agree because the evidence shows that she did have notice of this agreement and that the Jewish National Fund also had notice of this oral agreement, and the two transactions, the release of the lease by Mr. Ezrahi to the Jewish National Fund and this re-grant by the Jewish National Fund to Mrs. Ezrahi, in effect, are realy one transaction which would have been carried out by a transfer by Mr. Ezrahi to his wife with the consent of the Jewish National Fund.

For all these reasons we think therefore that this appeal fails. It will be dismissed with costs on the lower scale and LP. 15 fee for attending the hearing to the first respondent.

Delivered this 29th day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 26/40.

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

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

In the appeal of:

Alex Levin — Appellant.

v.

1. The Liquidator of "Brosh" Cooperative Society Ltd.
2. Dr. Leo Feuchtwanger.
3. Alexander Aaron. — Respondents.

Dickstein for Appellant.
Iszajewicz for Respondent No. 1.
Baker and *Kirschenbaum* for Respondent No. 2.

Respondent No. 3 Absent.

Appeal from judgment of District Court, Tel-Aviv, dated 18.1.40.

Execution on same day of 1st and 2nd mortgage on land by Cooperative Society — Registration of mortgage with Registrar of Cooperative Societies 2 years after execution but within 21days after issue of registration certificate of Land Registry —Failure of 1st mortgage to register his mortgage with Registrar — Application to Court for rectification of register of mortgages lodged after order of liquidation of Cooperative Society — Time for registration of mortgage with Registrar of Companies or Cooperative Societies — Effect of order of liquidation on questions of priority between creditors — Dismissal of appeal instead of remitting case for completion, where case bound to fail anyhow.

1. Period of 21 days for registering with Registrar of Companies (or Cooperative Societies) mortgage of land created by a Company (or Cooperative Society) begins from date of issue of registration certificate by Land Registry, and not from any other date.

2. Certificate of registration of mortgage issued by Registrar of Companies (or of Cooperative Societies respectively) — conclusive evidence that requirements of law as to registration have been complied with.

3. Application under sec. 132 of Companies Ordinance for

rectification of registrer of mortgages — of no use if lodged after order for liquidation of Company (or Cooperative Society).

4. (Obiter dictum) After liquidation has begun priorities can be dealt with only by liquidator.

5. Where Court of Appeal of opinion that Appellant's application or action bound to fail, it may dismiss appeal instead of remitting case for completion (even though irregularity of procedure in trial Court might otherwise call for latter course).

6. Court of Appeal will not listen to a point not specifically pleaded and on which no issue framed in Court below.

Ed. Note: as to earlier proceedings in this case see CtLR Vol. VIII p. 158

JUDGMENT

This is an appeal from a judgment of the District Court of Tel-Aviv.

The Appellant's application in the District Court was for rectification of the register of mortgages in accordance with section 132 of the Companies Ordinance. It appears that, on the 6th of August 1936, the "Brosh" Cooperative Society Limited effected first and second mortgages with the appellant and the second respondent respectively. On 10th of July 1938, the second respondent registered his mortgage with the Registrar of Cooperative Societies, this date being within 21 days after the certificate of registration was issued by the Land Registry. The appellant has never so registered his mortgage.

The appellant complains that the registration of the second respondent's mortgage was irregular in that, inter alia, the time limit imposed by section 127(I) of the Companies Ordinance had expired. The relevant part of section 127 reads as follows:

> "Any mortgage or charge created by a company registered in Palestine———— shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company unless the prescribed particulars of the mortgage or charge———— are delivered to or received by the Registrar of Companies for registration———— (in the case of mortgage of land in Palestine) within 21 days after the certificate of registration of the mortgage is issued by the Land Registry."

In my opinion the language of this sub-section is unambigous and is open to only one construction, namely, that the period of 21 days begins to run from the date of the issue of the certificate by the Land Registry, and not from any other date.

Apart from this, section 127(8) of the Companies Ordinance, (Chapter

22 of the revised edition) states in implicit terms that the certificate shall be conclusive evidence that the terms of the section as to registration have been complied with. Section 127 is applicable to the present case by virtue of section 59 of the Cooperative Societies Ordinance, (Chapter 24 of the revised edition).

The appellant further endeavoured in the Court of Appeal to allege fraud on the part of the second respondent. This was not specifically pleaded, nor was an issue framed on this point, and I do not think that this Court should now listen to such a plea.

On 9th January, 1939, the order for the liquidation of "Brosh" Co-operative Society Limited was made, this being prior to the date of the appellant's application to the District Court. It follows that, on the latter date, the rights of the creditors had already crystallised. Sec. 132 of the Companies Ordinance is similar to Section 85 of the corresponding English Act, upon the application of which section we were referred in the course of argument to a line of English Authorities. The effect of this is that, as a matter of practice, relief is only granted without prejudice to prior creditors and is not granted at all in a case, such as this, where it would be of no practical use to the applicant, owing to his application being subsequent to the order for liquidation.

Further, although it is unnecessary to decide this point in order to dispose of this appeal, I agree with the arguments of counsel for the first and second respondents, that, in view of section 48(3) of the Cooperative Societies Ordinance, as soon as liquidation has begun priorities can be dealt with only by the liquidator.

The question which has caused me the most difficulty is whether this case should be remitted to the District Court for completion. The final entry on the record of the District Court proceedings reads:

"Decision on preliminary objection reserved."

The Court proceeded to give a final judgment and to make certain findings of fact and the appellant has argued at length that he has been prejudiced by this proceeding. After careful consideration, however, I am of opinion that it is unnecessary to remit this case as, for the reasons which I have already given, the appellant's application is bound to fail.

The appeal must, therefore, be dismissed with costs on the higher scale to include, for each of the first and second respondents, the sum of LP. 15 for advocate's attendance fee.

Delivered this 3rd day of July, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 152/40.

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:

Abdul Rahman Abdul Latif el Azzeh and 2 others. Appellants.

v.

1. Ben Manfield
2. The Official Receiver Respondents.

Petition of bankruptcy against 3 debtors, not partners or joint owners of one estate — Receiving Order against separate estates of debtors as if one estate.

Making one Receiving Order, instead of separate Orders, against two or more debtors who are not partners or joint owners of one estate — not a mere technicality but a fundamental error vitiating whole Order.

Elia for Appellants No. 1 and 2.
Abcarius and *Barbari* for Appellant No. 3.
Karwassarsky for Respondent No. 1.
No appearance by Respondent No. 2.

Appeal from judgment of District Court, Tel-Aviv, dated 4.7.40.

JUDGMENT.

In this case a petition of bankruptcy was instituted at the instance of the first respondent against three debtors. They are not partners or joint owners of one estate. The relevant part of the judgment reads as follows:

> "A receiving order is hereby made against Abdul Latif el Azzeh, of Beith Jibrin village, a land owner, and Abdul Rahman Bin Abdul Latif El Azzeh of Beith Jibrin village, a land owner, and Sa'adi El Shawwa of Gaza, a land owner and the Official Receiver of this Court is hereby constituted Receiver of the estate of the said debtors."

Reading this paragraph as it stands, there appears to be only one Receiving Order made against one estate. The facts in this case are, however, that there are three persons and, admittedly, three separate estates against whom it would seem that three separate Receiving Orders should be made. We do not think that this is a matter which can properly be dealt with under Section 123 of the Bankruptcy Ordinance as a

mere technicality, as the error would seem to be a fundamental one. We, therefore, allow the appeal and set aside the order of the District Court. The appellants will have their costs on the lower scale and LP. 15 for advocate's attendance fee to the first two appellants and a similar sum for advocate's attendance fee to the third appellant to be paid by the first respondent.

Delivered this 30th day of July, 1940.

Chief Justice.

CIVIL APPEAL NO. 134/40

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

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

In the appeal of:

1. Boulos A. Atalla
2. Michael S. Kanawati — Appellants.

v.

The "Corner House", Jerusalem — Respondent.

Order of Police to close cafe owing to disturbances — Claim by lessee of pro rata reduction of rent — Question whether lessee entitled to relief or not.

Lessee ordered by Police to close his premises — not entitled to pro rata reduction of rent, if he took no steps to test validity of order or cancel lease or exercise any other option, if he had any.

H. Atalla for Appellant No. 1.
Abcarius for Appellant No. 2.
Eliash for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 23.5.40.

JUDGMENT.

The Appellants are the lessees of property in Jerusalem known as the Marina Cafe. In 1938, owing to the disturbances, they were ordered by the Police to close the cafe, and they now claim a pro rata reduction of the rent by virtue of Article 478 of the Mejelle. The learned Magistrate accepted that view, but the District Court reversed his decision.

Having regard to the general principles laid down in Civil Appeal No. 138/37 *), upon the facts of this case we do not think the lessees are entitled to the relief; moreover they took no step to cancel the lease,

*) 2 CtLR p. 73.

or exercise any other option, if they had any.

Prima facie, I doubt if the order made by Police was valid under Section 21(2) of the Sale of Intoxicating Liquors Ordinance, 1935, and if, in consequence, the Appellants not having taken adequate steps to test it, can rely upon it, but it is unnecessary to decide this point.

The appeal will be dismissed with costs on the lower scale, and LP. 15 for advocate's attendance fee.

Delivered this 30th day of July, 1940.

Chief Justice.

CRIMINAL APPEAL NO. 65/40

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:

The Attorney-General — Appellant

v.

Shehadeh el Mahmoud and 5 others. — Respondents.

Charge with offence against Forests Ordinance — Court discharging accused on proposition that land in question had been used by them as unassigned pasturage.

Use of unassigned pasturage does not create right under art. 105 of Land Code (grazing).

Salant for Appellant.

F. Atalla for Respondents.

Appeal from judgment of District Court, Haifa, dated 21.6.40.

JUDGMENT.

This is an appeal by the Attorney-General from the decision of the District Court, Haifa, which, in the exercise of its summary jurisdiction, discharged the Respondents who were charged with offences against the Forests Ordinance.

That Court, in its judgment is critical of Government's action in the past in connection with the land involved, but it states — "We have not gone into the circumstances of the registration", and its judgment appears to be based on the proposition that the land had been used as unassigned pasturage by the Respondents, and that in consequence a right under Article 105 of the Land Code had been created, which right is

preserved by the Forests Ordinance.

We do not think that the use of unassigned pasturage creates any such right, and we are fortified in that view by the passage on page 51 in Goadby and Doukhan's wellknown treatise on the Land Law of Palestine.

The judgment of the District Court, is therefore set aside and the case returned to that Court for further consideration.

Delivered this 31st day of July, 1940.

Chief Justice

HIGH COURT NO. 63/40.

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:—

Ahmad Mohammad Hirzallah and 3 others — Petitioners.

v.

1. Examining Magistrate, Nablus
2. The Attorney-General — Respondents

Examining Magistrate allowing Attorney General to produce a witness for a second time at preliminary enquiry — Application to High Court to set aside order of Examining Magistrate.

Nothing in substantive law which prevents Examining Magistrate allowing a witness to be recalled.

Nazzal for Petitioners.

Ex parte.

Application for an order nisi to issue to First Respondent calling upon him to show cause why his order, dated 1.8.40, by virtue of which second Respondent sought to produce a witness for a second time at preliminary inquiry being held by First Respondent to give a deposition different from first one which he had given, should not be cancelled.

ORDER.

I do not think you are entitled to your order. There is nothing in the substantive law which prevents a Magistrate allowing a witness to be recalled.

Delivered this 15th day of August, 1940.

Chief Justice

HIGH COURT NO. 67/40.

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

Isweilim Suleiman el Atim and 5 others Petitioners.

v.

1. Mahmoud Hussein Abu Siam
2. Magistrate, Beersheba in his capacity as Chief Execution Officer Respondents.

Judgment of Tribal Court confirmed by judgment of Tribal Court of Appeal — Application to High Court for an order for stay of execution.

High Court will not grant order against Chief Execution Officer on points which applicant should have raised in Court dealing with (or issuing) judgment in question.

Husseini for Petitioners.

Ex parte.

Application for an order nisi to issue to Respondents calling upon them to show cause why Second Respondent should not stay execution of a judgment of Tribal Court, Beersheba, dated 31.10.1939, confirmed by a judgment of Tribal Court of Appeal, whereby Petitioners were adjudged to pay to First Respondent and others LP. 68 as compensation for injury.

O R D E R.

If the applicants had reason to think that the Tribal Court of first instance had given a judgment which they had no jurisdiction to give or was not in accordance with the law or tribal custom then they should have raised these points before the Tribal Court of Appeal. As they failed to do so there I do not think that they are entitled for an order against the Chief Execution Officer. The application must therefore be refused.

Given this day of August, 1940.

Chief Justice

HIGH COURT NO. 60/40

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

Before:— Copland, J. and Frumkin, J.

In the application of:—
Paltiel Novik — Petitioner.

v.

1. Chief Execution Officer, District Court, Tel-Aviv.
2. Lina Wozniansky — Respondents.

Application to Chief Execution to examine Judgment Debtor as to his means — Service of notice in Judgment Debtor's office upon his clerk — Order of imprisonment against Judgment Debtor failing to appear before Chief Execution Officer — Necessity of proof of service.

1. Before proceeding to hear application of Judgment Creditor to examine debtor as to his means Chief Execution Officer must be satisfied that latter properly served.
2. Service of notice in Judgment Debtor's office upon his clerk — no good service.
3. Order of imprisonment against Judgment Debtor who was called upon to appear before Chief Execution Officer and failed to do so, cannot stand, if Judgment Creditor did not prove proper service upon Debtor.

Hake for Petitioner.
No appearance by Respondent. No. 1
Sommerfeld for Respondent No. 2.

Application for an order nisi to issue to 1st Respondent calling upon him to show cause why his order of imprisonment of Petitioner should not be set aside and that said order be cancelled.

ORDER.

We need not hear you Mr. Hake.

In this case the judgment debtor has applied for an order against the Chief Execution Officer to show cause why his order of imprisonment against the petitioner should not be set aside. A notice was issued on behalf of the judgment creditor calling upon the judgment debtor to appear before the Chief Execution Officer to be examined as to his means. Before the Chief Execution Officer can proceed to hear the application of the judgment creditor, he must be satisfied that the judgment debtor has been properly served. This, the judgment creditor failed to prove was done. The notice was served in the office and upon the clerk of the judgment debtor, which is not a good service in accordance with the Rules. In the circumstances, the rule nisi will be made absolute with costs and the sum of LP. 10 for attending the hearing, to be paid by the second respondent, Mrs. Lina Wozniansky.

Delivered this 23rd day of August, 1940.

British Puisne Judge.

HIGH COURT NO. 16/40.

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:—

Dr. M. Smoira and Mr. Habib Homsi Administrators pendente lite of the Estate of Frederich Murad, deceased.

Petitioners.

v.

1. The Registrar, District Court, Jaffa.
2. The Attorney-General

Respondents.

Registrar of District Court refusing application for refund of Court fees paid in error — Question whether refusal of Registrar, based on ground of lack of jurisdiction, to entertain application for refund of Court fees appealable.

No appeal lies against order of Registrar of District Court, whether giving reasons or not, refusing to entertain application for refund of Court fees paid in error, nor will High Court entertain petition against such order.

Olshan for Petitioners.

No appearance for Respondent No. 1.

Crown Counsel (*Hogan*) for Respondent No. 2.

Application for an order to issue directed to 1st Respondent calling upon him to show cause why he shuld not entertain, deal with, and decide, on merits of application dated 14.11.39, submitted to him by Petitioners under Section 6(e)(4) of Registrars Ordinance 1936 *).

ORDER.

We think that in this petition the rule nisi must be discharged. We do not think that the Petitioners have made out a case. Prima facie, no appeal lies against the order of the Registrar of a District Court an application made to him under Section 6(e) paragraph (4), of the Registrars Ordinance, 1936.

It is admitted by the Petitioners that, had the Registrar dismissed the application without giving any reason therefor, no appeal would lie. Here the Registrar has considered the application and refused it

*) Ed. Note. The Registrar based his refusal to entertain the application on the ground that the fees having been paid, and the case in respect of which they were paid having been decided, prior to the enactment of the Registrars Ordinance he had no jurisdiction in the matter.

on certain grounds. In these circumstances we do not think the Petitioners can come to this Court.

We express no opinion as to the applicability of the Crown Actions Ordinance.

The order nisi is therefore discharged with costs assessed at an inclusive figure of LP. 5.—

Given this 8th day of April, 1940.

Chief Justice

CIVIL APPEAL NO. 192/40.

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

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

In the case of:

Odeh ibn Salam Abu Rukbeh — Appellant.

v.

Salim ibn Awwad el Awadaat — Respondent.

Action originally lodged in Land Court and later, on enactment of Land Courts (Amendment) Ordinance 1939, transferred by consent to Magistrate's Court — Magistrate dismissing action for non-compliance with Magistrates' Courts Procedure Rules in instituting it — Alleged prescription with regard to mortgage.

1. Magistrates' Courts Procedure Rules cannot apply in institution of a case originally lodged in Land Court and subsequently transferred to Magistrate's Court for trial.

2. No prescription with regard to mortgage. Once a mortgage always a mortgage.

Shawa for Appellant.

Appeal from judgment of Magistrate's Court, Beersheba, sitting as a Land Court, dated 4.9.1940, in Case No. 220/40.

JUDGMENT.

This is an appeal from a judgment of the Beersheba Magistrate's Court sitting as a Land Court. The action was originally lodged in the Land Court of Jerusalem, but on the enactment of the new Land Courts (Amendment) Ordinance, 1939, it was transferred, with the consent of both parties, to the Magistrate's Court for trial. The Magistrate dismissed the action on two grounds: first, that the Plaintiff, the Appellant here, had not produced with his statement of claim a certificate

of inheritance in accordance with the Magistrates Courts Procedure Rules; and secondly that the claim was prescribed, inasmuch as the Defendant's uncle died eleven years ago and the land was mortgaged eighteen years ago.

It is unfortunate that on both these grounds the Magistrate was entirely wrong. In the first place, the cause was instituted in the Land Court, the Magistrates' Courts Procedure Rules cannot therefore apply in the institution of the case, and in the second place, there is no prescription with regard to a mortgage. Once a mortgage always a mortgage.

That being so, the appeal must be allowed and the case remitted to the learned Magistrate to deal with on its merits. The costs of this appeal to await the result of the retrial and we now fix LP. 10 fee for attending the hearing.

Delivered this 12th day of November, 1940.

British Puisne Judge.

HIGH COURT NO. 104/40.

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

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

In the case of:

Mahmoud Abu Shamat — Petitioner

v.

1. Kadi of Sharia Court, Jenin.
2. Mohammad el Naji — Respondents

Kadi ordering sale of certain commodities belonging to deceased — Deceased's brother petitioning High Court for order nisi — Non-interference of High Court with judicial order.

Order given by Religious Court in an administration matter — a judicial order and as such not subject to review in High Court.

Khamra for Petitioner.

Application for an order nisi to issue to First Respondent calling upon him to show cause why his order dated 25.9.1940 in respect of sale to Second Respondent of certain commodities at Jenin belonging to late Kamel Sa'id Abu Shamat, Petitioner's brother, of whom Second Respondent alleged he was a partner, should not be set aside with directions to him to apply Articles 3, 5, 6, and 7 of the Law relating to Administration of Orphan Properties, dated 4 Rabi' Awal, 1324 A.H.

ORDER.

In this case an application is made to the High Court to grant an order nisi against the Kadi of the Sharia Court of Jenin in respect of an order issued by him in the administration of an estate. I think that this application is based upon a misconception. The petitioner has mixed up the words "administration" and "admnistrative". The order of the Kadi, being given in an administration matter, was a judicial order and as such is not subject to review in the High Court.

The application must therefore be refused.

Delivered this 4th day of December, 1940.

Pritish Puisne Judge.

MISC. APPL. 46/40.

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

Before:— Frumkin, J.

In the application of:—

Suad Moyal — Applicant.

v.

Nadeem Moyal — Respondent.

Application for extension of time within which to lodge appeal — Inability to raise necessary money for payment of appeal fees — Scope of Rule 324, *Civil Procedure Rules,* 1938.

Inability to pay fees — not a reasonable excuse for grant of extension of time within which to lodge appeal.

Applicant in Person.

Ph. Joseph for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 4.9.40.

ORDER.

This is an application under rule 324 of the Civil Procedure Rules, 1938, for an extension of time within which to lodge an appeal from the judgment of the District Court of Tel-Aviv. The only reason given is inability to raise the necessary money for the payment of the appeal fees within the time prescribed and that if the extension is granted the money will be obtained, it is alleged, in France.

Without going into the question whether in law or in fact, under the prevailing circumstances, it would at all be possible to obtain money

in France for use in Palestine, I think I am bound by the decision of this Court in Misc. Appl. 63/38 *) where it was held that inability to pay fees is not a reasonable excuse for the grant of an extension of time. This decision is also supported by analogy by Rule 333 of the Civil Procedure Rules. The application is, therefore, refused.

Delivery this 15th day of November, 1940.

Puisne Judge.

HIGH COURT NO. 64/40.

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

Before:— Rose, J. and Frumkin, J.

In the application of:—

Arieh Leib Merkin — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv
2. and 3. Zehava and Shalom Halevi — Respondents.

Petition to High Court regarding extension granted by Chief Execution Officer — Non-interference of High Court in matters within discretion of Public Officer — Who may and who may not sign affidavit under High Court Rules 1937.

1. Grant of extensions — eminently a matter within discretion of Chief Execution Officer, High Court will not interfere if nothing in petition or affidavit to make them think that discretion exercised unreasonably or that no sufficient material justifying extension.
2. (*Obiter dictum*) Term "Petitioner" in Rule 3 High Court Rules 1937 (affidavits supporting petition) includes his advocate, but — a carless and bad practice, to be discontinued, for advocates' clerks to sign such documents.

Zeiger for Petitioner.

Goitein for Respondents Nos. 2 & 3.

Application for an order nisi issued on 2.9.1940, calling upon First Respondent to show cause why his order in Execution File No. 15400/37, Tel-Aviv, dated 23.7.1940, should not be set aside.

JUDGMENT.

The rule granted by this Court must be discharged. The grant of extension

*) 3 CtLR p. 31.

is eminently a matter within the discretion of the Chief Execution Officer. There is nothing in the petition or in the affidavit to lead us to think that the discretion has been exercised unreasonably, or that the Chief Execution Officer had not before him sufficient material upon which he could have granted the extension.

A preliminary point was raised by Mr. Goitein, namely, that the supporting affidavit should be signed by the Petitioner or his advocate, and not, as in this case, by the advocate's clerk. This Court has already held in High Court No. 67/38 *) (5 P.L.R. 611) that the term Petitioner, in clause 3 of the High Court Rules, 1937, includes his advocate. We see no reason, however, for extending this construction to cover advocates' clerks. It is a careless and bad practice for advocates' clerks to sign such documents, and the practice should be discontinued.

The rule is discharged with costs to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 17th day of September, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 85/40.

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:

Omar Abdallah Isma'il — Appellant.

v.

The Attorney-General — Respondent.

Appellant complaining that trial Court refused to adjourn hearing when his advocate absent, being sick, and that he had not sufficient time to obtain presence of witnesses — Discretion of trial Court in granting or refusing adjournment of criminal trial.

1. Nothing in law providing for adjournment of criminal trials; matter at discretion of trial Court; and Court of Appeal will not interfere unless shown that refusal to adjourn amounted to irregularity of procedure.

2. Where in case of absence of advocate, being sick, another advocate could have undertaken defence, Court of Appeal will

*) 4 CtLR p. 250.

not interfere with discretion of trial Court refusing adjournment.

3. Where no application made to trial Court for summonses to defence witnesses, Appellant cannot complain that Court should have adjourned hearing to enable him to obtain presence of witnesses.

Kamal for Appellant.

Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of District Court Nablus, dated 11.9.40, whereby Appellant was convicted of robbery contrary to section 287 of the Criminal Code Ordinance and sentenced to 4 years imprisonment.

JUDGMENT.

The Appellant complains that the Court of Trial should have adjourned the hearing, because firstly his advocate was absent, being sick, and secondly he had not sufficient time to obtain the presence of certain witnesses, — although it is not clear from the record if the second point was raised in the Court of Trial.

There is nothing in the law providing for the adjournment of criminal trials — the matter must therefore be at the discretion of the Court of Trial, and this Court will not interfere unless it can be shown that the refusal amounted to an irregularity of procedure.

I do not propose to lay down any rule as to when an adjournment should be granted. Each case must be considered on its facts.

In this case we are satisfied that it might have been possible for another advocate to have undertaken the defence, and no application was made to the Court for summonses to the defence witnesses. In these circumstances we do not feel that we should interfere with the discretion exercised by the Court of Trial.

We see no ground to interfere with the sentence. The appeal is dismissed.

Delivered this 7th day of October 1940.

Chief Justice.

HIGH COURT NO. 79/40.

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

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

In the case of:

Zvi Leibowitz — Petitioner

v.

1. Chief Execution Officer, Tel-Aviv.
2. Tova Leibowitz — Respondents.

Wife claiming maintenance, husband counterclaiming, before Religious Court — Religious Court, after numerous hearings, ordering husband to pay maintenance — Husband, discontented with order of Religious Court, invoking lack of jurisdiction — Inference of consent to jurisdiction from appearance of parties.

1. Before Religious Court properly seized of a matter of maintenance consent of parties must be obtained.
2. (*a*) Consent of parties (where necessary) to jurisdiction of Religious Court must be clear and definite.
(*b*) Numerous appearances before Religious Court, without any protest to jurisdiction, — sufficient consent within meaning of Palestine Order in Council (art. 53(ii) and art. 65).

Adelstein for Petitioner.
Linderman for Respondent No. 2.

Application for an order to be issued calling upon the first Respondent to show cause why his order in Ex. File No. 4811/40, Tel-Aviv, dated 19/9/40 should not be set aside.

JUDGMENT.

Rose, J.:

In this case the petitioner and the second respondent are husband and wife. It appears that they had differences and had separated and the wife applied to the Rabbinical Court, which after nine hearings, made an order for the payment of LP. 3 a month, for three months, by the husband.

Now, a point might have arisen as to whether or not this order was in respect of maintenance or alimony. It is however concerned by councel for the second respondent that in fact it was maintenance. It therefore follows that before the Rabbinical Court was properly seized of this matter the consent of the parties had to be obtained. The facts which appear to be admitted by both sides are that there were nine hearings. At no stage during these nine hearings did the husband object to the jurisdiction. So far from objecting to the jurisdiction he actually at one stage put in an application for some counterclaim to be considered by the Court. The point we have to decide is whether on those facts consent has been established. A number of authorities has been cited to us and the earliest of them is Civil Appeal 127 of 1926 P.L.R. Vol. 1, 109 in which the Court says in our opinion rightly, that the consent must be clear and beyond doubt. Then it goes on to say: "in this case there was neither consent in writing nor such conduct on

the part of the parties from which consent can be inferred". It follows that in a proper case it is permissible for the general proposition that consent must always be inferred from the appearance of the parties, we are satisfied from the facts of this particular case that these numerous appearances by the husband, without any protest to the jurisdiction, constituted sufficient consent within the meaning of the Order-in-Council and it is therefore now too late for the petitioner to complain of the order made by the Rabbinical Court. The rule must therefore be discharged and the second respondent will have the sum of LP. 5 inclusive fee for costs. No costs to the first respondent.

Frumkin, J.

In concurring I want to refer to the latest Judgment of the Supreme Court which deals with matters of consent i.e. Civil Appeal No. 22/40 *) (7 P.L.R. 125) where it was said: "the consent in such matters which alone gives to the Ecclesiastical Court jurisdiction must be a definite consent by the parties themselves". In the circumstances of this case in which the Petitioner appeared in nine successive hearings, argued the case on its merits, and even submitted his own claims, it could easily be assumed that there was definite consent on his behalf.

Khayat, J.

I concur with the order of Rose, J.

Delivered this 15th day of October, 1940.

CIVIL APPEAL NO. 199/40.

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

Before:— Copland, J. and Rose, J.

Mutawalli of Shazlieh Waqf — Appellant.

v.

Municipal Council Acre — Respondents.

Claim to a right to water from certain river — Action in Magistrate's Court against Municipal Council for decreasing supply of water and demolishing tank for supply of water to premises — Magistrate dismissing action on ground that matter within jurisdiction of High Court — Competent Court in suits regarding easements.

1. Claim, not to actual ownership of water itself, but to right to take a certain amount of water from particular stream — claim to an easement not concerning immovable property, hence not within

*) 7 CtLR p. 91.

jurisdiction of Magistrate's Court or Land Court but of District Court.

2. District Court has residuary jurisdiction in all civil matters.

3. Court will not, without adequate reason, change normal course that successful party gets costs.

Asfour for Appellant. *Abcarius* for Respondent.

Appeal from judgment of Magistrate's Court, Acre, dated 28.9.40.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court sitting as a Land Court in which the Magistrate declined jurisdiction in the matter before him saying that, in his opinion, the claim was within the jurisdiction of the High Court. The claim is one to a right to water from the Kabri River and it is alleged that the Municipal Council, Acre have interfered with that right by decreasing the supply to a certain degree and also by demolishing a basin which acted as a distributing tank for the supply of water to the premises of the appellant. It seems to us that the right which is claimed is undoubtedly an easement and that it does not involve a claim to actual ownership of the water itself but is the right to take a certain amount of water from a particular stream. The action is not one concerning immovable property since it involves a claim to running water, not made by a riparian owner.

That being so it is quite clear that the Magistrate had not jurisdiction to try this particular action. It is also equally clear that the Magistrate was wrong when he said that the case fell within the jurisdiction of the High Court. This is a claim to an easement and the case falls, we think within the jurisdiction of the District Court, which has the residuary jurisdiction in all civil matters in Palestine. The appeal is therefore dismissed but for different reasons from those given by the learned Magistrate.

After hearing the advocates on the question of costs we do not think is any reason for a change from the normal course that the successful party gets the costs. The appeal is therefore dismissed with the usual consequences, the respondent will get his costs on the lower scale and LP. 10 fee for attending the hearing.

Delivered this 23rd day of October, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 57/40

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

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

Ali ibn Salameh Jadii — Appellant.

v.

The Attorney-General — Respondent.

Charge of premeditated murder — Principal prosecution witness making statement to Examining Magistrate different from that to Police — Credibility of witness — Sufficiency of evidence — Inference of premeditation where no immediate provocation.

1. Court may believe witness and even convict upon his evidence while mindful of fact that witness made a statement to police different from one he made to Examining Magistrate.

2. "In cold blood" in sec. 216(b) of Criminal Code Ord. must be read with "without immediate provocation", thus where no suggestion of "immediate provocation", Court can, when other requirements of section complied with, convict of premeditated murder.

G. Salah for Appellant. *Crown Counsel* (*Bell*) for Respondent.

Appeal from a majority judgment (Trusted, C.J. and Judge Bardaky, Judge Shaw dissenting) of Court of Criminal Assize, Jerusalem, dated 19/6/1940, whereby Appellant was convicted of murder, contrary to Sec. 214(b) of Criminal Code Ord., 1936, and sentenced to death.

JUDGMENT.

The appellant was convicted in the Assize Court sitting in Jerusalem of the premeditated murder of a woman and was sentenced to death. The principal witness for the prosecution was a woman called Fatmeh who had made a statement to the police different from the one which she made to the Magistrate. That fact was present in the minds of the learned Judges of the Assize Court and was in fact referred to by them, and it was their duty to decide whether Fatmeh was speaking the truth to the Court or not. The majority of them decided that she was telling the truth. Fatmeh's evidence alone, if believed, would be sufficient to support the conviction, but there is the evidence given by other women who were there, to the effect that immediately after the attack on this woman who was killed, Fatmeh said that Ali (the present accused) "was the one who had done it". By Section 7 of our Evidence Ordinance those statements are admissible in evidence against the accused.

It is said that the Trial Court had made a mistake in stating that Jamileh, another witness, recognised the accused running away. In her examination-in-chief Jamileh certainly said that she recognised the accused running away. In cross-examination she said "I did not recognise the man". Unfortunately there was no re-examination on this point. Disregarding

Jamileh's evidence as to the identity of the man she saw running away, there was still sufficient evidence for the Trial Court on which to convict if they believed it.

A further argument is that the requirement of the law with regard to premeditation have not been complied with. Premeditation is a question of fact. The woman was attaked in a lonely place and a number of wounds were inflicted upon her. From that the Trial Court could lawfully draw the inference that the appellant intended to kill her. There is no suggestion of any immediate provocation and it is hopeless to suggest as provocation merely the fact that somebody has annoyed one weeks or months ago, and therefore that, when you see him later and kill him, you cannot be convicted of premeditated murder when the other requirements of the Section have been complied with. In our opinion the words "in cold blood" must be read with the words "without immediate provocation" otherwise, of course, it would be next to impossible to convict anybody of murder. As the majority of the learned Judges of the Trial Court held, even though the accused was lawfully carrying a knife, yet if that knife was taken for an unlawful purpose, there is the preparation envisaged in Section 216(c).

There is one further circumstance which I think I should mention. It is true that one of the learned Judges in the Trial Court dissented because he did not find the evidence sufficient. That is not a matter which concerns us sitting as a Court of Criminal Appeal. The verdict of the Trial Court is the verdict of the majority of the Judges, but we think that this a matter which His Excellency the High Commissioner might be disposed to take into consideration when the sentence comes for confirmation.

The appeal is dismissed and the conviction and sentence of death confirmed.

Delivered this 8th day of July, 1940. *British Puisne Judge.*

CIVIL APPEAL NO. 198/40.

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

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

The Attorney-General Appellant.

v.

Mohammad and Mahmoud Qasem Badr Respondents.

Premises leased by Government to private person closed for certain period by order of Military Commander of district—Magistrate and District Court finding that lessee not liable to pay rent on ground that lessor himself, i.e. Government, prevented him from

getting benefit of hired premises — Principle of law as to liability of lessee to pay rent while unable to use the premises — Government acting in various capacities — Liability of lessee to pay rent for period of closure of premises by Government.

1. Unless some defect in premises themselves, lessee compelled to pay rent even if he cannot use the premises.

2. Where Government being lessor, closes leased premises not qua landlord but qua executive power, lessee compelled to pay rent for period of closure.

Salant J.G.A. for Appellant.

Shibel for Respondents.

Appeal from judgment of District Court, Haifa, dismissing an appeal from judgment of Magistrate's Court, Haifa, dated 4.4.1940.

JUDGMENT.

This is an appeal by the Attorney-General from an appellate judgment of the District Court of Haifa. Proceedings commenced before the Magistrate, Acre, who held that Government were not entitled to rental for a period during which the premises of the respondents were closed by order of the Military Commander of the district. Government had leased these premises to the respondents. Later on, during the term of the tenancy, the District Officer of Acre, acting on the instructions of the Military Commander, ordered that these premises which were used as a cafe should be closed from the 18th January, 1939, to be reopened on the 19th of October, 1939, that is to say, it was an order that these premises should be closed as a cafe for a period of nine months. Since the lease contained the stipulation that the premises were to be used only as a cafe for these nine months the premises were therefore quite useless to the respondents. The Magistrate, as I have said found in favour of the respondents that they should not pay rent for this period of nine months on the ground that the lessor, that is the Government, had prevented the lessess from getting the benefit of the leasing of the hired premises. On appeal the two learned Judges in the District Court confirmed the Magistrate's judgment on substantially the same grounds. They held that this present case was distinguishable from the case of Palwoodma v. Tewfiq Majdalani, Civil Appeal 138/37 *), inasmuch as the inability of the respondents to derive any benefit from the premises was a legal impossibility, whatever that may mean.

Government, feeling that the law has been wrongly decided by this judment, has now appealed to this Court and Mr. Salant, for the Attorney-General, has argued that Government must be considered as having two separate capacities (1) the capacity of landlord under which

*) 2 CtLR p. 73.

it purported to lease the premises (2) the capacity as guardian for public security.

Now the leading case on the question whether a lessee who had been deprived of the enjoyment of the premises is still compelled to pay the rent to the landlord is Palwoodma v. Tewfiq Majdalani (supra). In a very long and exhaustive judgment, Mr. Justice Manning went into the law contained in the Mejelle and the English Law on the subject, and also on such cases as had been decided in the Supreme Court on the same matter, and the result of his judgment was that, unless there is some defect in the premises themselves, the lessee is still compelled to pay rent even if he cannot use the premises. This case was recently followed in an appeal of Attalla and another v. The Corner House, Jerusalem, Civil Appeal 134/40 **), where a cafe had been closed by order of the Police and the lessees claimed that they were entitled to reduction of rent for the period of closure. The judgment in that case refers with approval to the Palwoodma case, and decided it on the same lines.

Now if the landlord of these premises had been a private person or somebody other than Government there would have been no doubt whatever that the lessees would have been compelled to pay rent for the period of closure and we do not think, after hearing the arguments addressed to us, that the fact that Government is the landlord makes any difference in the principle of law. The Government in closing these premises was not acting in its capacity as landlord. It was acting in its executive capacity as guardian for public security. The act was done not qua landlord but qua executive power. That being so we think that both the learned Magistrate and the learned Judges of the District Court came to wrong conclusions in point of law.

There is one further point taken by one of the learned Judges in the District Court, and that was that the Director of Lands had agreed to rescind the lease. The Magistrate made no reference to this in his judgment. We are informed that the respondents in the District Court on the hearing of the appeal never referred to it. The respondents on the hearing of this appeal also made no reference to this matter and we are informed by the appellant that the Director of Lands stoutly denies ever having rescinded this lease. There is therefore nothing in this allegation and there is not a scrap of evidence before the Magistrate to support it.

The appeal must therefore be allowed and the judgments of the two Courts below set aside and judgment entered for the Attorney-General for the whole sum claimed in the Magistrate's Court, that is

**) p. 210 supra.

to say, LP. 88.889 mils less, of course, the amount already admitted and paid LP. 35.556 mils. The appellant is entitled to all the costs here and in the two Courts below on the lower scale to include LP. 10 fee for attending the hearing in this Court.

Delivered this 30th day of October, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 225/40.

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

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

In the case of:

Leo Rosenthal — Appellant

v.

Custodian of Enemy Property — Respondent.

Point that power of attorney authorising litigant's advocate to appear not sufficiently stamped — Inappeallable decision regarding stamp duty.

English principle in force in Palestine that no appeal lies from a decision that stamp on a document sufficient, or that a document does not require a stamp.

Rotenstreich for Appellant

Blum for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 20.9.40.

JUDGMENT

This is an appeal from the Magistrate's Court. Two points were raised before us on this present appeal, the first being that the document or power of attorney, authorising the advocate for the respondent to appear, was not properly stamped and therefore there was no appeal before the District Court. This point appears to have been disposed of by a judgment of this Court, Arab Bank Ltd. v. Subhi Mehshem and another *) (C.A. 11/40, P.L.R. Vol. 7 p. 91), where this Court held that the English principle was in force in Palestine, that no appeal lies from a decision that the stamp on a document is sufficient, or that a document does not require a stamp. That decision disposes of the first point.

With regard to the merits of the appeal, on the merits there are none. The allegation made by the appellant that he had sent 500 Reich Marks to the firm in Czechoslovakia is not supported by any evidence and in fact there is no evidence either that this sum was received or accepted in payment by the Czechoslovak firm, it being remembered that the agreement between the parties was that payment was to

*) 8 CtLR p. 156.

be made in sterling. There is no proof that that agreement was varied.

For these reasons the appeal must be dismissed with costs to include LP. 10 advocate's fee.

Delivered this 12th day of December, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 136/40.

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

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

The Attorney-General — Appellant.

v.

Ma'rouf Mustafa and Mustafa Hassan Ali — Respondents.

Proclamation by High Commissioner declaring certain land to be brought under control and management of Government as Forest Reserve — Offence of ploughing land in Forest Reserve — Accused claiming right to plough land as owner thereof — Onus of proof.

Where person charged with ploughing land forming part of Forest Reserve claims right to do so as owner thereof, onus upon prosecution to show that land in question properly included in proclamation declaring area as Forest Reserve.

Crown Counsel (*Hogan*) for Appellant.

W. Salah for Respondents.

JUDGMENT.

In this case the Respondents were charged with an offence under the Forests Ordinance.

By a proclamation issued under Section 3 of that Ordinance, the High Commissioner has declared certain land to be brought under the control and management of Government as Forest Reserve. The Respondents ploughed part of such land, claiming the right to do so as owners thereof.

In these circumstances the only question before us is, upon whom is the onus of proof that the land is private prperty.

The powers given under Section 3 in terms do not apply to private property. We think therefore that the onus is upon the prosecution to show that the land in question is properly included in the proclamation *).

The appeal therefore will be dismissed.

Delivered this 16th day of December, 1940.

Chief Justice.

*) Ed. Note. Compare sec. 21 of Forest Ordinance.

CIVIL APPEAL NO. 172/40

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

Before:— Copland, J. and Rose, J.

Salah Mohammad Ameen Salah personally and on behalf of the estate of his father Haj Mohammad Salah and as representing his heirs and 14 others. Appellants.

v.

1. Members of Village Settlement Committee Attil Village Tulkarm Sub-District
2. Mahmud el Naddaf and 107 others Respondents.

Refusal by Land Settlement Officer of application for leave to appeal — Application to Chief Justice for leave to Appeal 33 days after Settlement Officer's refusal and 28 days after notification thereof — General rule of construction — Time within which to apply to Chief Justice for leave to appeal after refusal by Settlement Officer.

1. Where in same Ordinance Legislature uses two different sets of words such difference must have been intended and must be given effect to by Court.
2. Where Ordinance in one case speaks of notification of a decision and in other of period running from decision, period in latter case runs from decision itself, not from notification thereof.
3. Provisions of Land (Settlement of Title) Ordinance must be strictly adhered to.

Cattan for Appellant No. 1. *Nasr* for other Appellants.

Attil Village Settlement Committee Members in person. Respondents No. 2, 4 and 5 in person.

Polonsky for Respondent No. 93. *Ben-Shemesh* for Respondents No. 94 and 95. Respondent No. 96 in person.

Ph. Joseph for Respondents No. 97 and 98. *Caspi* for Respondent No. 99. *Bushnak* for Respondent No. 100.

Appeal from decision of Land Settlement Officer, Tulkarm Settlement area, dated 16.5.1940.

JUDGMENT.

In this appeal from a judgment of the Settlement Officer, Dr. Joseph acting on behalf of the 97th and 98th respondents, has taken two preliminary points. The first one is that application for leave to appeal to the Chief Justice was made out of time. Section 63(1) of the Land (Settlement of Title) Ordinance says that —

> "The applicant may, within thirty days of such refusal, refer it to the Chief Justice....."

Now the facts in this case are as follows and are not disputed. Leave to appeal to the Supreme Court was refused by the Settlement Officer

on the 8th of July, 1940. The application for leave to appeal from that refusal was filed in the registry of the Supreme Court on the 10th of August, 1940. The notice of the refusal of the Settlement Officer to grant leave was served, at any rate on the first appellant, on the 13th, July, 1940. Dr. Joseph argues that there is a distinction made in the ordinance in Section 63, since in one instance the time of thirty days runs from notification of a certain decision and in other cases the thirty days period runs from the refusal of the application. In other words, there is a distinction between a refusal of the application and notification of the refusal. We think that this contention is correct. The argument is still further borne out by the provisions of Section 63 subsection 2 as amended, where again reference is made to a notification of an act and not merely to the act. It must be assumed, as one of the general rules of construction, that where in the same Ordinance the legislature uses two different sets of words such difference must have been intended and must be given effect to by the Court. In this case, it seems to us, that there is no ambiguity whatsoever in this particular piece of legislation. In one case it speaks of notification of a decision and in the other it speaks of the time running from "thirty days of such refusal." If it would have been intended that the period should run from the notification of the refusal, nothing would have been easier than to have said so. The object of land settlement is to settle land and it is not desirable that legal proceedings, insofar as they may be necessary, should be unduly protracted. As was said in another case where a different section of Land (Settlement of Title) Ordinance came into consideration, L.A. 92/34 *, the provisions of the particular section under review must be strictly adhered to. That, if I may say so, was a case where stricts adherence to the words would inflict greater hardship than would adherence to the words in this particular section. We think therefore, that Dr. Joseph succeeds on his first point.

With regard to the second point, it is not necessary to deal with it in this particular appeal, and it may therefore well be left for decision when the necessity for such decision arrives. The result is that there is no appeal proper before this Court. The appeal must therefore be dismissed with costs on the lower scale, respondents Nos. 2, 4, 5, 7, 8, 21 and 96 are each entitled to LP. 1 traveling expenses. Advocate's fees to be LP. 10 to each of the advocates representing respondents Nos. 97, 98, 93, 94, 95, 99 and 100.

Delivered this 25th day of November 1940.

British Puisne Judge.

*) 2 PLR p. 471.

Current Law Reports

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

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LIST OF ABBREVIATIONS

AG, Attorney General
Applt, Appellant
CA, Court of Appeal
Co, Company
Coop. Cooperative
CPR, Civil Procedure Rules
Cr. Criminal
CXO, Chief Execution Officer
DC, District Court
Dept, Department
Dfdt, Defendant
Eccles, Ecclesiastical
Ex. Execution
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
NP, Notary Public
OCCP, Ottoman Civil Procedure Code
O. in C., Order in Council
OLL Ottoman Land Law
Ord, Ordinance
P/A, Power of Attorney
Pal Palestine, Palestinian
PC, Privy Council
PDC, President District Court
Pltf, Plaintiff
P/n, Promissory Note
Proc, Procedure
Reg. Regulation
Respdt, Respondent
SC, Supreme Court
Soc. Society
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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