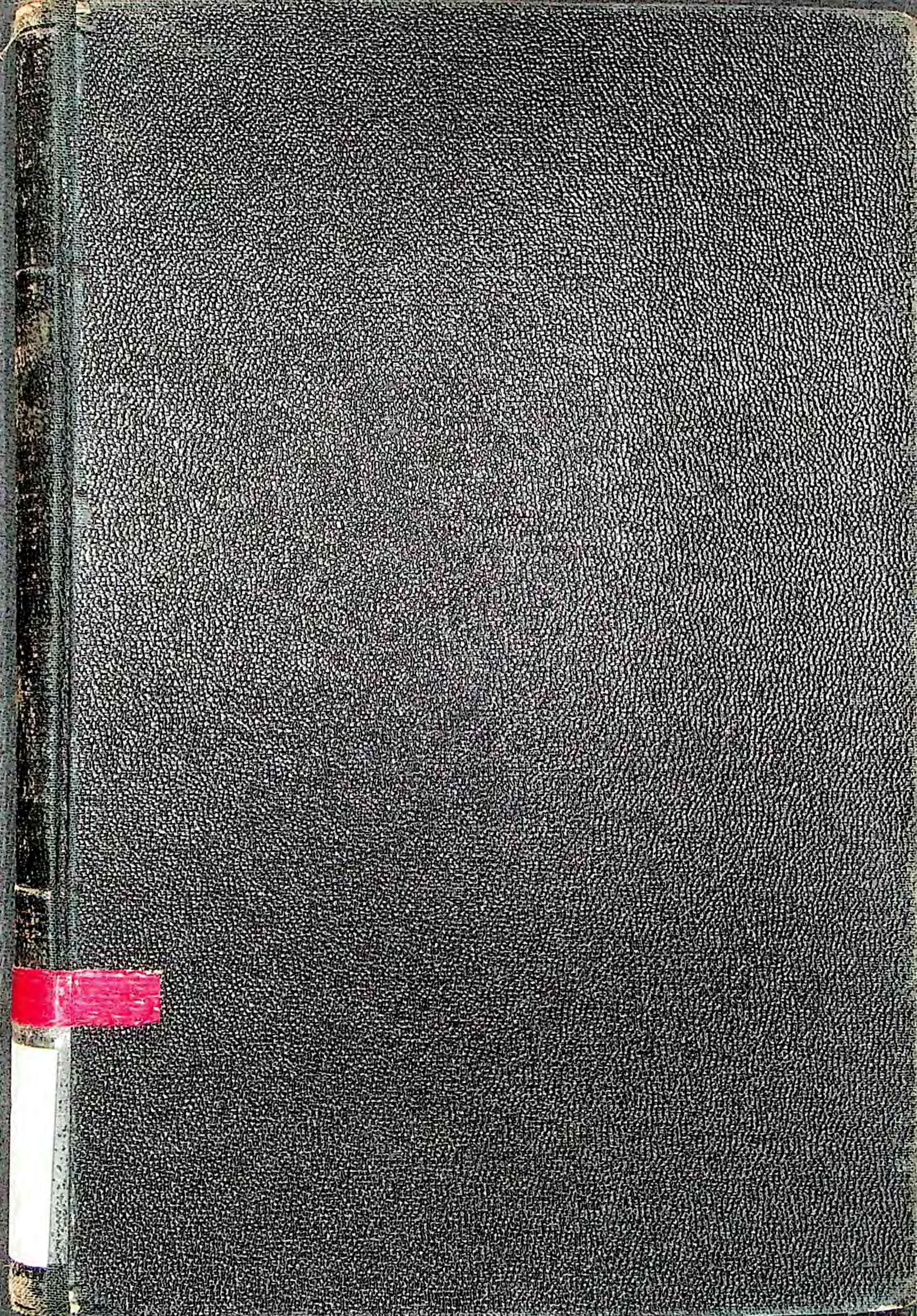

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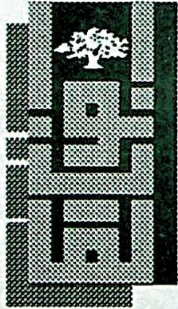

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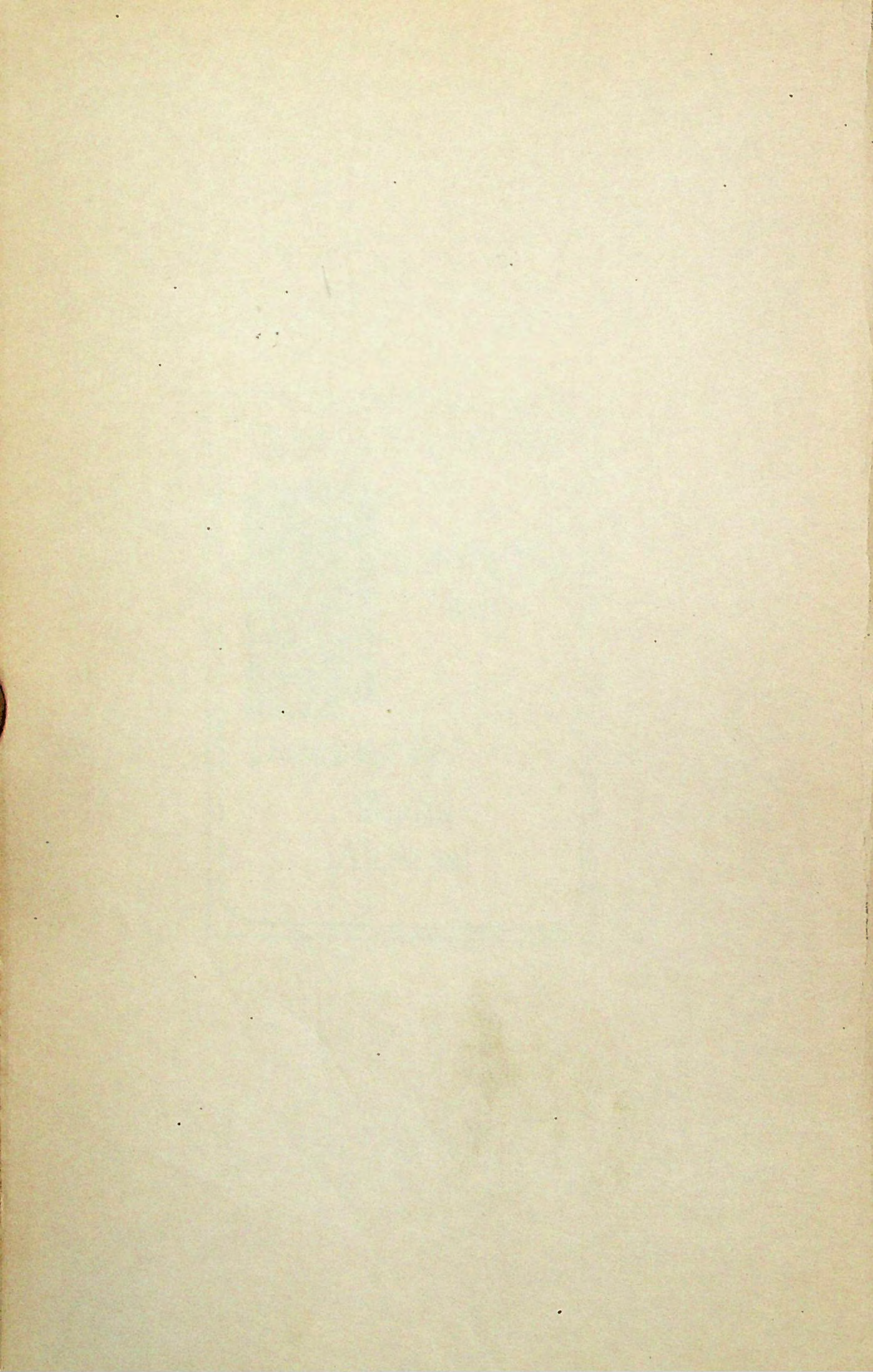

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HIGH COURT NO. 109/40

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

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

In the application of:

Thomas Henry Cowley — Petitioner.

v.

1. Superintendent in Charge of Prison, Acre.
2. Inspector-General of Police and Prisons, Jerusalem.

Respondents.

Trial of police officer before Court of Discipline — Refusal to allow advocate to appear on behalf of accused — Habeas corpus application to High Court — Practice and procedure before Court of Discipline.

Court of Discipline trying a police officer must conform as nearly as may be with practice and procedure applicable to trial of offences by Magistrates' Courts. Refusal by Court of Discipline to admit advocate to appear before it — contrary to Magistrates' Courts Procedure Rules, irregular and vitiates all proceedings in case before it.

Seligman and *Sussmann* for Petitioner.
Bell (*Crown Counsel*) for Respondent.

Application for summons to issue to the Respondents, directing them to produce Thomas Henry Cowley, Petitioner, before this Court on Thursday, the 19th day of December, 1940, at 9.30 o'clock in the forenoon, and calling upon them to show cause why the said Thomas Henry Cowley should not be released from detention.

ORDER.

This is an application for an order in the nature of habeas corpus for the release of Thomas Henry Cowley, who is a British Constable of the Palestine Police Force.

It appears that proceedings were taken against him before a Court of Discipline constituted under Section 18 of the Police Ordinance, as appearing in Section 2 of the Police (Amendment) Ordinance, No. 2 of 1939.

Sub-section 5 of that section provides that such enquiry shall conform as nearly as may be with the practice and procedure applicable to the trial of offences by Magistrates' Courts.

It is admitted that an advocate on behalf of the Applicant sought to appear before the Court of Discipline, but was not permitted to do so. It is quite clear that this is not in accordance with the Magistrates' Courts Procedure Rules, particularly Rule 269, and the procedure was in consequence irregular, and the order is made absolute and the Applicant will be released.

The Applicant will have an inclusive sum of LP. 10 as costs.

Given this 19th day of December, 1940.

Chief Justice.

CIVIL APPEAL NO. 212/40.

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

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

In the case of:

Sa'adi El Shawa of Gaza. Appellant.

v.

Wagner Brothers of Jaffa. Respondent.

Hire-purchase agreement and agreement for sale — Option to purchase by paying additional sum after all rent previously paid.

Agreement giving party option to purchase on paying a further sum after all instalments in payment of rent met — a hire-purchase agreement, not an agreement for sale.

Edit. Note: see C.A. 24/39 6 CtLR 79 and Edit. Note thereto; C.A. 71/40 7 CtLR 201 and Edit Note thereto.

Moghannam for Appellant.
Elia for Respondent.

Appeal from judgment of District Court, Jaffa, dated 23.9.40.

JUDGMENT.

The only question in this appeal is whether the agreement between the parties is an agreement for sale as alleged by the appellant, or a hire-purchase agreement as alleged by the respondent. Mr. Moghannam on behalf of the appellant has argued that since the note of LP. 500

had to be paid in advance, that the appellant could not terminate the agreement and basing himself on Engineering Corporation of Palestine Ltd. v. Casino Bat Galim and others Civil Appeal 24/39*), (6 P.L.R. 386) he said that, taking the contract as a whole, this shows that it was an agreement for sale. The respondent contests this argument by quoting to us another case of a later date, Civil Appeal 71/40 **), and it is a similar agreement to the one in this particular case, and where this Court held this similar agreement to be a hire-purchase agreement. In any case, the difference to our minds, between Civil Appeal 24/39 and the present appeal is this, clause 12 of the contract in this case makes it quite clear, to our minds, that this is a hire-purchase agreement, since the appellant or hirer, was given an option to purchase, after the promissory notes in payment of the hire had been met, on paying a further LP. 205. That is quite clear and such a term would be totally inappropriate in an agreement which was an agreement for sale. It has been argued that the fact that the promissory note for LP. 205 was already in the prossession of the owner, shows that the option to purchase had already been exercised. This, however, is not so if we read clause 15 of the contract which states definitely that the hirer may offer to the owner a note for the LP. 205. It is stated to be a note for the purchase value of the machinery, but that such note, however, if accepted should not be considered as payment for the purchase value which purchase can only be completed if the rent in its totality has been previously paid.

For these reasons, this case is distinguishable from Civil Appeal 24/39 and we have not the least doubt that this is a hire-purchase agreement and the judgment of the District Court is correct. The appeal must therefore be dismissed with costs on the lower scale to include LP. 15 fees for attending the hearing.

Delivered this 3rd day of December, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 223/40.

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

Before Copland, J. and Khayat, J.

In the case of :

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*) 6 CtLR p. 79. **) 7 CtLR p. 201.

Mohamad Sha'ban Appellant.

v.

Ismail Mohamad Tillawi Respondent

Claim of oral agreement regarding repurchase by mortgagor of his property sold in execution — Order by Land Court to return to mortgagor his mortgaged property sold in execution on payment to purchaser of price paid by him together with assessed value of improvements made by him — Court of Appeal reversing finding of fact by trial Court as to existence of agreement on ground that no evidence to support it — Fees payable on cross-appeal.

1. While sale in execution confers on purchaser indefeasible title as against mortgagor, — nothing to prevent former making an agreement with latter to return the property to him on payment of purchase price or as might be arranged.

2. Negotiations for a written agreement do not create oral agreement binding on parties.

3. Full fees payable on cross-appeal.

Nammar, Cattan and *Daoudi* for Appellant.
Seligman and *Appelbaum* for Respondent.

Appeal from judgment of Land Court, Jaffa, dated 29.10.40.

JUDGMENT.

This is the considered judgment of the Court.

In this appeal, the appellant is seeking to reverse the judgment of the Court below, which ordered that a certain house should be returned to the respondent on payment by the latter of LP. 2,500 being the assessed value of certain immprovements made by the appellant together with the sum for which the house had been bought by the appellant.

The house in question had been mortgaged by the respondent to third persons, and default having been made, the property was sold in execution in 1930, and was bought by the appellant, who was not one of the mortgagees, for LP. 800.

In 1932 the appellant paid the respondent a further sum of LP. 100; the appellant alleges that he did so as the respondent was continually alleging that the price at which the house had been sold was too low and he wanted to stop his complaints. This is denied by the respondent. After this the appellant spent considerable sums on the house on improvements which were valued in the course of this case at LP. 1700. Finally the respondent entered an action against the appel-

lant claiming the return of the house on the ground that there was an oral agreement by which the appellant when he bought the house in execution undertook to return it to the respondent after recouping himself for the sums advanced out of the rents over a term of years. The Court found in his favour.

The arguments on the hearing of this appeal have ranged over a wide field but in our opinion the whole case turns upon one simple question — was there or was there not an agreement as alleged by the respondent? The existence of such an agreement is the whole basis of the respondent's claim. Whilst it is true that Section 8 of the Mortgage Law (Amendment) Ordinance, Cap. 95 confers on a purchaser in execution an indefeasible title as against the mortgagor, yet there is nothing to prevent a purchaser making an agreement with the mortgagor to return the property to him on payment of the purchase price or as might be arranged. The respondent has argued somewhat half heartedly that Exhibit I.T.I. is a written agreement to this effect but we find that there is nothing whatever in the contents of this document to support this contention. The question remains whether there was any oral agreement concluded between the parties as alleged by the respondent.

Assuming for the purposes of this case, but without in any way deciding the question, that an oral agreement would be capable of having the effect contended for, we think, with all respect to the learned Judges in the Court below, who took a different view, that there was no evidence before them on which they could hold that an oral agreement had been concluded between the parties. Put at its highest all that the evidence shows in our opinion is that there were negotiations for an agreement, which was not concluded, and that is all. The respondent's evidence is contradicted by that of the appellant, and the evidence of the advocates shows merely that they were asked to draft an agreement, which appears to suggest that a written agreement was in contemplation, and that in itself would negative the idea of an oral agreement. We cannot support the view that negotiations for a written agreement create an oral agreement binding on the parties in this case. It is not in these circumstances necessary to deal with the numerous other points raised by both sides but the preliminary objections must be touched on.

The respondent alleges that the fees payable on the appeal were assessed on a wrong basis by the Chief Registrar. The point is not free from difficulty but on the facts of this case we are not prepared to say that the Chief Registrar was wrong and we think that the view taken by him can be supported.

The appeal must therefore be allowed and the judgment of the Court below set aside and the respondent's claim dismised. In view of this decision the cross-appeal fails. It would have failed in any case because it has been held by this Court in Government of Palestine v. Keren Kayemeth Leisrael and another, C.A. 182/40 following David v. Mizrachi C.A. 98/40 that the full fees are payable on a notice of cross-appeal and no fees at all were paid in this case.

The appellant will have his costs on the lower scale both here and in the Court below to include LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this 19th day of December, 1940.

British Puisne Judge.

HIGH COURT NO. 90/40.

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:

1. Yevgenia Pines
2. Rachel Pines. Petitioners.

v.

The Custodian of the Enemy Property. Respondent.

Application to High Court for order revesting property administered by Custodian of Enemy Property — Assessment of fee payable in respect of Custodian's general administrative expenses.

Fee charged under Trading with Enemy (Custodian) Order as amended in respect of Custodian's general administrative expenses must be reasonable, and High Court competent to enquire whether proposed fee is so.

Eliash for Petitioners.

Solicitor-General and *Blum* for Respondent.

Application for an order to issue directed to the Respondent calling upon him to show cause why he should not revest the property in

Petitioners on payment of fees in the amount of LP. 15 per month, as from 7.3.40 until the date of Respondent's agreement to revest the property.

JUDGMENT.

This is an application for an order nisi directed to the Custodian of Enemy Property.

The application dealt firstly with the revesting of certain property, but that was due to a misunderstanding and is not pursued. Secondly, it requested that certain fees payable be fixed at LP. 15 a month from 7.3.40 until revesting.

The matter turns on Article 9, paragraph (1) of the Trading with the Enemy (Custodian) Order, 1939, as amended by the Trading with the Enemy (Custodian) (Amendment) Order (No. 3) of 1940, and the Trading with the Enemy (Custodian) (Amendment) Order (No.7) of 1940. That paragraph provides for the fees which may be retained by the Custodian, and paragraph (2) of the Article also provides for the repayment of moneys expended by him.

In an ordinary case a fee of five per cent. is payable, but amendment No. 3 inserts the following proviso:—

> "Provided that where any such property is vested in him for period not exceeding one year he may at his discretion retain such fee not exceeding five per centum of the value at the date of vesting as may, in the circumstances, be reasonable."

and amendment No. 7 provides that the fee is in respect of the Custodian's general administrative expenses.

When the power given by the proviso is exercised, as a matter of construction I think it is clear that the fee charged must, in the circumstances, be reasonable, and that it is competent to this Court to enquire whether the proposed fee is reasonable.

In this case the Custodian proposes to fix the fee payable at LP. 400. The applicants suggest that LP. 15 a month from 7.3.40, that is, some LP. 120, would be a reasonable fee. In his affidavit the Custodian does not attempt to show that the fee which he fixed is reasonable, having regard to his general administrative expenses, nor does he comment on the figure suggested by the applicants.

It is obviously dificult for us to assess whether any fee is reasonable, but judging by the experience of the last war, in an ordinary case the Custodian may be called upon to administer the property for a number of years, and no matter how long he may do so his fee is limited to five per cent.

In the circumstances we think the proposed fee of LP. 400 is unresonable, and we make the rule absolute, calling upon the Custodian to fix another reasonable fee in respect of his general administrative expenses. Although, as I have said, we cannot upon the information before us, fix a fee, prima facie the fee suggested by the Applicants seems to us reasonable, and we would request that that expression of opinion be brought to the Custodian's notice.

The Applicants will have their costs fixed at an inclusive sum of LP. 15.

Delivered this 22nd day of November, 1940.

Chief Justice.

HIGH COURT NO. 85/40.

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

Before:— Rose, J. and Khayat, J.

In the application of:

The Eretz Israel (Palestine) Foundation Fund Keren Hayesod Limited. Petitioners.

v.

1. The Director of Land Registration, Jerusalem.
2. The Registrar of Lands, Haifa. Respondents.

Land Registrar refusing to return Mortgage Deeds to mortgagee on ground that requisite registration fees not paid — Failure to file counter affidavit or make counter allegation in affidavit — Question as to whether registration fees payable by mortgagee — Jurisdiction of High Court.

1. Where affidavit filed by respondent or no counter allegation made in his affidavit High Court will assume that petitioner's allegation in his petition and supporting affidavit not disputed by respondent.

2. In absence of special agreement between mortgagor and mortgagee or of some legislative provision, proper person to pay

registration fee — mortgagor; no law imposes this obligation on mortgagee.

3. Settlement Officer and Registrar of Lands under legal duty to return to mortgagee mortgage deeds submitted by him, whether registration fee already collected or not.

4. High Court has jurisdiction to entertain application for an order directing public officer to return document to its owner without demanding from him a fee not payable by him.

B. Joseph and *Caspi* for Petitioners.

Salant, Junior Government Advocate, for Respondents.

Application for an Order to issue directed to the Respondents calling upon them to show cause why they should not deliver to the Petitioners certain mortgage deeds in respect of lands at Kfar Hassidim Blocks Nos. 11132, 11136, 11137, 11139, 11150, 11135, 11141, 11142 and 11151.

ORDER.

This is the return to an order nisi issued to the respondents calling upon them to show cause why they should not deliver to the petitioners certain Mortgage Deeds in respect of certain lands of which the petitioners are mortgagees.

It appears that the Mortgage Deeds in question were transmitted by the Settlement Officer to the 2nd respondent together with the Schedule of Rights to be registered in a new register in accordance with Section 36 of the Land (Settlement of Title) Ordinance Cap. 80 revised edition. Upon the petitioners applying to the 2nd respondent for the delivery to them of the said Deeds of Mortgage, the 2nd respondent refused to do so on the grounds that the requisite registration fees had not been paid. For the same reason the 1st respondent, by letters dated 23rd July and 25 September, 1940, refused to instruct the 2nd respondent to deliver the said Deeds to the petitioners.

In paragraph 7 of their supporting affidavit and in paragraph 7 of their petition, the petitioners allege that the Deeds of Mortgage are affidavit filed on behalf of the 1st respondent and no affidavit having their own property. No counter allegation having been made in the been filed by the 2nd respondent, I assume that this allegation is nct disputed by either respondent.

This being so, the question arises as to what, if any, fee is payable by the petitioners upon the registration of their mortgages. The Setlement of Title (Registration Fees) (Amendment) Order 1939 provides that on the registration of a mortgage the fee payable shall be

that prescribed in the Transfer of Land (Fees) Rules 1935. These Rules have now been replaced by the Land Transfer (Fees) Rules 1939.

Paragraph 3(4) thereof provides that on the registration of a mortgage a fee of one per cent of the amount of the loan is payable. Paragraph (2)d states that unless it is otherwise agreed between the parties, the registration fees in respect of a mortgage are payable by the mortgagor. In view of this, in spite of Mr. Salant's submission that the fee only and not the body of the Transfer of Land (Fees) Rules is referred to, there is in my opinion much to be said for Dr. Joseph's argument that the fee prescribed for such a registration, as far as the mortgagee is concerned, is nil. But even apart from this, it is in my opinion clear and Mr. Salant concedes that, in the absence of special agreement between the parties or of some legislative provision, the proper person to pay the fee is the mortgagor. It is not suggested that there is any law imposing this obligation on the mortgagee. It therefore seems to me that there is no legal justification for the respondents adopting towards the petitioners their present attittude of refusing to return to the petitioners what is admittedly the petitioners' own property until the payment of a fee, which admittedly there is no obligation on the petitioners to pay.

Mr. Salant contends that, apart from the equities of the matter, there is no legal duty on the Settlement Officer or upon the Registrar Of Lands to return the documents. Section 4 of the provisional law for the mortgage of immovable property seems to be an answer to this point.

A question which has caused me some difficulty is whether, having regard to Article 43 of the Palestine Order-in-Council, 1922, this Court has jurisdiction in this matter. Mr. Salant contends that the petitioners have an alternative remedy in the ordinary civil Courts of the country. In all the circumstances of this case, however, I am not persuaded that this is so and I therefore think that the matter falls within the jurisdiction of this Court.

The rule must therefore be made absolute. I come to this conclusion with the less reluctance inthat it would seem that Government's interests are adequately protected by Section 69(3) of the Land (Settlement of Title) Ordinance. The petitioners will have their costs, to include the sum of LP. 10 for advocate's attendance fee, to be paid jointly by the two respondents.

Given this 9th day of December, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 188/40.

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:

Aron Mas'ud and 10 others — Appellants.

v.

1. Nimir Hammad Haj Bakir Hammad and 7 others.

9. The Attorney-General — Respondents.

Application to Land Court to transfer case to Land Settlement Officer — Order by Settlement Officer that Defendants have no claim, without giving them opportunity to produce evidence in support of their case — Remittal of case to Settlement Officer to hear evidence on behalf of Defendants — Land (Setlement of Title) Ordinance Sec. 6.

Finding of fact made on evidence adduced by one party without giving other party opportunity to produce his evidence will, on appeal, be quashed, and case will go back to hear evidence which other party may produce in support of his claim.

Kehaty for Appellant No. 1. & 11.
Amon for Appellants Nos. 2—10.
Respondents: No 1 Deceased. Nos. 2, 3, 5, 6, 7, & 8 — in person.
No. 4 — absent, served.
Bell (*Crown Counsel*) for Respondent No. 9.

Appeal from decision of Settlement Officer, Tulkarm Settlement Area, dated 4.7.40.

JUDGMENT.

It seems that these proceedings began in the Land Court, Nablus, and that when settlement started an application was made to that Court under Section 6 of the Land (Settlement of Title) Ordinance. Under that section an application might be either to withdraw the action, or that it should be transferred to be determined by the Settlement Officer.

It is not clear what was done in this case, as no copy of the Land Court's order was produced, but it is clear from the record that the Appellants were treated as defendants before the Land Settlement

Officer. Part way through the proceedings the Settlement Officer ruled as follows:—

> "I rule at this stage that defendants have no claim. I shall give a reasoned judgment on this and other points. I shall now take formal evidence of possession by plaintiffs."

Later, Advocate Kehaty stated:

> "Settlement Officer's ruling was given without our (defendants) having opportunity to produce evidence in support of my (sic.) claim."

The Settlement Officer again appears to have ruled that they had no claim.

In his judgment, however, the Settlement Officer says:

> "My ruling that defendants have no claim before me, which I hereby confirm was not given before my ascertaining the facts about the tenure of the land involved. They are briefly, that the land has been held from time immemorial in a form of customary village masha' to the complete exclusion of registered owners or their descendants as such."

Before us the Respondents in person very properly and very honestly stated that the only evidence as to occupation was from their witnesses.

We think, therefore, that the case must go back in order that the Land Settlement Officer may hear any evidence which the Appellants may choose to produce as to occupation and possession, and for the Settlement Officer to give a new judgment if necessary.

In the circumstances of this particular case we think that costs should be in the cause.

Delivered this 3rd day of December, 1940.

Chief Justice.

CIVIL APPEAL NO. 209/40.

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, Manufacturer, of 1375 Broadway, New-York, by his attorney Jitzhak Bochner, as per General Power of Attorney of 10.9.39, executed before the Notary

Public, Tel-Aviv, Vol. 87, folio 1979.

2. Samuel David Fried.

3. Itzhak Magali. Appellants.

v.

1. Mohammad Ali Sheikh Ali

2. Mordecai Talithman. Respondents.

Deposit with 3rd person of promissory note by parties to contract — Maker of note deposited with 3rd person failing to complete contract — Payee suing guarantor of deposited note after lapse of 5 years from date when he was entitled to get it from depositary — Legal position of guarantor of note — Bills of Exchange Ordinance, sec. 96.

1. Guarantor on a note stands in same position as maker and his liability commences at same time as liability of maker.

2. Prescription against guarantor on a note begins to run from date when cause of action accrued against maker.

3. Where parties to contract of sale deposit with third person a note payable on demand to secure repayment of sum mentioned therein in case of maker failing to complete contract within fixed period, cause of action arises when period expires without maker completing contract.

4. Where two parties to contract deposit promissory note with third party he becomes agent of both parties; if and when payee becomes entitled to get the note third person deemed his agent, hence payee holder of note within meaning of Bills of Exchange Ordinance.

Ph. Joseph for Appellants.
Elia by delegation for Respondent No. 1.
Olshan for Respondent No. 2.

Appeal from judgment of District Court, Tel-Aviv, dated 22.9.40.

JUDGMENT.

This is the second appeal in the same case from a judgment of the District Court of Tel-Aviv. In the first appeal to this Court we set aside the District Court's judgment holding that the findings were contrary to the evidence and remitted the case for the hearing of the other issues. The action is one based on a promissory note dated the 16th February 1933 and payable on demand for LP. 700 signed by one Jacob Bechor to the order of the appellants, and guaranteed by

the two respondents respectively. The District Court heard further evidence and came to the conclusion that the action on the note was prescribed since five years had elapsed since the date of signature. The present appeal, therefore, concerns solely the question of prescription.

The note had been signed by Jacob Bechor and guaranteed by the two respondents and was deposited with one Mr. Ben-Meir, an advocate of Tel-Aviv. The note was given in connection with a contract for the sale of land by Bechor to the appellants, and was to secure the repayment of the sum of LP. 700 advanced by the appellants to Bechor, in the event of the sale to the appellants not being completed. For this reason the note had been deposited with Mr. Ben-Meir by both parties to the contract, and the contract contained a term that the note was to be handed to the appellants in the event of the vendor Bechor failing to complete. The land had to be transferred within six months from the date of the contract which was the 16th of February, 1933. Transfer therefore was due to be made on the 16th of August, 1933.

Transfer was not made on the due date nor at all. It was not however until 1939 that the appellants obtained the promissory note from Mr. Ben-Meir and filed an action based on it in the District Court Tel-Aviv.

The appellants have argued that in deciding this question of prescription, the test is when did the liability start. Dr. Joseph contends that the guarantee on a note payable on demand comes into effect when the demand is made on the maker, and not before. Further he says that the time of deposit does not count in calculating this period, that the note was not delivered within the meaning of the Bills of Exchange Ordinance, before possession was obtained by the appellants in 1939, and prescription therefore did not commence to run until the appellants received the note from Mr. Ben-Meir in that year. Finally he says that the question is not, when were the appellants entitled to get the note, but when in fact it was issued to them.

On behalf of the respondents it is argued that under Section 96 the cause of action accrued on the signature of the note, or at the latest six months after signature, and that the question to be decided is, when could the appellants first have sued.

We do not think that the cases which have been cited to us are particularly helpful since they refer to what may be called ordinary promissory notes payable on demand which were not subject to the peculiar circumstances connected with the making of the note in the case now before us.

Several important points arise in this appeal. The first one is, when

did the liability of the guarantors on the note arise. In our opinion guarantors on a note stand in the same position as the maker and their liability on the note commences at the same time as the liability of the maker. Section 96 subsection 1 of the Bills of Exchange Ordinance Cap. 10 is in these words:

> "No action on a bill of exchange, cheque or promissory note shall be maintained against any party thereto other than an indorser after the expiration of five years, or against an indorser after the expiration of one year, from the time when the cause of action first accrued to the then holder against such party."

By this section the period of prescription commences to run against any party other then the indorser from the time when the cause of action first accrued to the than holder against such party. It follows from this that prescription against a guarantor will begin to run from the date when the cause of action accrued against the maker. The question therefore arises when did the cause of action accrue against Jacob Bechor. To determine this it is necessary to refer to the contract since this note was given under certain special conditions laid down in this contract. The contract was before the Court, and both parties have referred to it in the course of their arguments, and we are therefore entitled to refer to it also. The period for the conclusion of transfer expired on the 16th of August, 1933, and we are of opinion that the cause of action in respect of the contract accrued against Bechor on that date. On and after that date prima facie the appellants could have sued Bechor for breach of contract and for the recovery of the sums advanced by them.

In this present action a further question now arises, namely, when did the appellants become the "Holders" of the note in accordance with the meaning of that word in the Bills of Exchange Ordinance. In Section 2 subsection 1 of that Ordinance, "issue" is defined as the first delivery of a bill or note, complete in form, to a person who takes it as a holder. "Holder" is defined as the payee or indorsee of a bill or note who is in possession of it or the bearer thereof. It must be remembered that when the note was handed to Mr. Ben-Meir by the parties to the contract, Mr. Ben-Meir became the agent of both parties. After the six months period had expired and default had been made on the contract, Mr. Ben-Meir became solely the agent of the appellants and was under a duty to hand the note over to them. The appellants could have got the note from Mr. Ben-Meir at any time after the six months had expired and the fact that they did not do so does not seem to us to affect the position in determining who was the holder. In our opinion Mr. Ben-Meir being the agent of

the appellants and in possession of the note, the appellants were the holders in just the same way as they would be the holders if they had deposited the note by themselves with Mr. Ben-Meir for the purposes of safe custody. Since the cause of action had accrued to the appellants on the 16th August, 1933, and the appellants were the holders of this note, it follows that the District Court was correct in holding that the action on the note was prescribed as against the respondents.

With regard to the reasons for the decision given by the District Court, which differ from the reasons given by us in deciding this appeal, there may be a great deal to be said for them and we do not wish it to be taken that we think that the reasons of the District Court were wrong, but we think that the case is better decided on the grounds which we have given. The appeal must therefore be dismissed. The respondents will each have their costs on the lower scale in respect of two trials in the District Court and the two appeals in this Court to include the sum of LP. 10 to each of the respondents in respect of each of the appeals to this Court as fees for attending the hearing.

Delivered this 29th day of November, 1940.

British Puisne Judge.

HIGH COURT NO. 108/40.

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

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

In the application of:
Livio Steindler — Petitioner

v.

Inspector-General of Police and Prisons — Respondent.

Application to High Court for order directing Inspector General of Police and Prisons to serve Petitioner, an Enemy subject interned, with notice and form of objection — Proceedings for an order nisi

(regarding a person detained by Police) becoming, by consent, a habeas corpus application — Question of prerogative power to detain person in Palestine — Emergency Powers (Defence) Act, 1939, Sec. 9 — Defence Regulations, Reg. 17 — Restriction and Detention Orders (Objections) Rules, 1939 — Emergency Powers (Colonial Defence) Order in Council, Article 3.

1. Where a person is detained — he should be told why and under what authority he is detained, so that he may take appropriate steps to test his position.

2. Proceedings for an order nisi regarding a person detained by Police may, by consent of parties appearing before High Court, become an application for a rule in nature of habeas corpus.

3. Prerogative power to detain any person in Palestine (if it exists) — modified and restricted by Regulation 17 of Defence Regulations, 1939 and Restriction and Detention Orders (Objections) Rules made thereunder (providing for right to make objection and for case to be brought before Advisory Committee).

Goitein for Petitioner.

Crown Counsel (Bell) for Respondent.

Application for an order to issue directed to the Respondent calling upon him to show cause why he should not serve the Petitioner with a notice and form of objection in accordance with the Restriction and Detention Orders (Objections) Rules, 1939, which by consent, became an application for a rule in the nature of habeas corpus.

JUDGMENT.

This is a return to an order calling upon the Inspector-General of Police and Prisons to show cause why the Applicant, an Italian subject who has been interned should not be supplied with a form of objection in accordance with the Restriction and Detention Orders (Objections) Rules, 1939, made under Regulation 17 of the Defence Regulations 1939.

The Attorney-General's representative does not contend that if the Applicant is detained under Regulation 17 he is not entitled to have his case brought before the Advisory Committee set up thereunder, to which end the form is issued, but he says the Applicant is not so detained but is detained by prerogative powers vested in the High Commissioner.

I think it is clear that the Applicant was not so informed, and I would observe that where persons are detained it is desirable that they be told why they are detained, and under what alleged authority, in order that they may take any appropriate steps which may be open to them to test their position.

If the Applicant is not detained under Rule 17, he is not entitled to be informed of his right to make objection, and technically the rule should be discharged, but Mr. Bell desired to argue the validity of the detention apart from that regulation, and Mr Goitein was agreeable to that course. By consent, therefore, the proceedings became an application for a rule in the nature of habeas corpus.

It does not appear necessary for us to enquire whether there is a prerogative right in His Majesty to detain persons in Palestine, and if so whether that right has been impliedly vested in the High Commissioner, owing to the express terms of the Imperial Legislation and the Order of His Majesty in Council thereunder. Section 9 of the Emergency Powers (Defence) Act, 1939 states —

> "The powers conferred by or under this Act shall be in addition to, and not in derogation of the powers exercisable by virtue of the prerogative of the Crown."

but Article 3 of the Emergency Powers (Colonial Defence) Order in Council, 1939, which extended the Defence Act to Palestine, provides that Section 9 shall not apply here.

The position is, therefore, that if there is any prerogative power to detain any person in this Territory (which question we do not decide) in accordance with the principle that where a limitation has been imposed upon the prerogative, it should not be disregarded, for, if it is, what use would there be in imposing it, which was discussed in the House of Lords in the Attorney-General v. De Keyser's Royal Hotel, Limited (1920 A.C. p. 508) the prerogative power (if it exists) is modified and restricted by Regulation 17 and the applicant was improperly detained, and unless otherwise detained should be released.

Having regard to the course which these proceedings have taken, we think the Applicant is entitled to an inclusive sum of LP. 10 as costs.

Delivered this 27th day of December 1940.

Chief Justice.

CIVIL APPEAL NO. 200/40.

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:

The Century Insurance Co., Ltd. of London Appellant.

v.

The Palestine Copper Industry "Nechushtan" Ltd. Respondent.

Exception clause in fire policy including among excepted risks riot or civil commotion — Effect of supplementary contract described as riot endorsement insuring property against loss or damage directly caused by persons taking part in riots or civil commotion — Finding by Court not covering terms of riot endorsement — Recovering under fire policy inspite of finding that conditions were definitely riotous.

1. Where stipulation in policy or supplementary contract insures, inter alia, against loss or damage to property caused by persons taking part in riots or civil commotion, a mere finding that conditions were definitely riotous — not sufficient to enable insured to recover under stipulaion.

2. (Per Trusted C.J.):
Where fire policy provides that insurance shall not cover loss or damage occasioned by or arising out of or in connection with riot or civil commotion during existence of abnormal conditions and evidence does not show that abnormal state of affairs was joined to any contemporaneous riot or civil commotion insured entitled to recover under policy.

Edit. note: See C.A. 188/38 4 CtLR 223 and P.C.A. 34/39 8 CtLR 65 and cases cited therein see also C.A.41/39 6 CtLR 37.

Goitein for Appellant.

Kaiserman and *Bar-Shira* for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 13.9.40.

JUDGMENT.

Trusted, C.J.

By a policy of insurance, dated 22nd September, 1938, the Appellant company insured the Respondents against damage by fire to their stock in trade, and certain other materials.

The first condition on the back of the policy dealt with misdescription; condition six, which dealt with certain restrictions, is as follows:

> "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 contribured to by any of the following occurences, or which, either in origin or extent directly or indirectly' proximately or remotely, arises out of or in connection with any of such occurences, 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, 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 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.
>
> 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."

and condition eleven dealt with the giving of particulars to the Company in the event of a claim being made.

On the same date the parties entered into a suplementary contract, which is described as a riot endorsement. It refers to the fire policy, and for a further consideration insures the Respondents against loss of or damage to the property insured (including loss or damage due to fire or explosion) directly caused by persons taking part, inter alia, in riots or civil commotions.

By a further endorsement, dated 30th September, 1938, the interest insured against fire was co-insured with two other companies.

On the night of the 9th/10th of October, 1938, a fire occurred at the Respondents' premises, Haifa, and damaged the goods insured by the policy. Notice of the fire was given to the Insurance Company, and on the 11th December, 1938, the Respondents submitted a printed form, headed "Fire Claim", in which they gave certain particulars. and in answer to the question "What was the cause of the fire, and in what circumstances did it occur?" replied, "Unknown to Insured". The sum claimed on that form was consistent with a claim under the riot endorsement, and not under the fire policy, as owing to the co-insurance endorsement the Insurers were liable for a lesser amount on account of fire than on account of riot.

Correspondence took place between the parties, and on the 18th of April, Mr. Kaiserman on behalf of the Respondents, in answer to certain specific questions which had been put by the Appellants, stated:

Question: "Was it a case of ordinary fire?"
Answer: "My clients are inclined to think that it was not."
Question: "Was it a case of riots?"
Answer: "My clients are inclined to think it was a case coming under the common term of riots."
Question: "If so, what is the evidence?"
Answer: "Apart from any evidence to support such contention which might be in the possession of the Police, my clients are relying mostly on the opinion of Messrs. Doyle and Graham, as well as on the fact that the Police Report states the fire to have occurred 'otherwise' than as an ordinary fire, and on the undoubtedly disturbed state of affairs in the area in question during and all through the period since October, 1937, and till now; the number of murders, sniping at omnibuses, fires and other acts of rioters which all took place in the very near vicinity of the premises, all go to support my clients' belief."

and on the 30th of June, 1939, Mr. Paul Krakauer, Managing Director of the Respondent company, stated in an affidavit —

"that to the best of my belief the fire is due to a risk covered by riot endorsement No. 321, issued in respect of the above policy."

The Appellants denied liability both under the fire policy and the riot endorsement, and the Respondents brought their action in the District Court.

From paragraph 17of their statement of claim it is clear that they claimed a certain sum under the riot endorsement; alternatively, a lesser sum under the fire policy.

In their defence the Appellants admitted the fire, and admitted the damage at a certain sum. They denied liability under the fire policy on various grounds, and they denied that the damage was caused by causes covered by the riot policy. Finally they asked that the action of the Plaintiffs might be dismissed, or in the alternative, that the Defendant be ordered to pay the rateable proportion of the loss or damage on the fire policy.

At the trial some time was devoted to enquiring whether there had been a misdescription of the property in which the goods insured were kept. I agree, upon the facts before the Court below, that it could properly have come to the conclusion to which it came.

It was also debated whether the Appellants had given sufficient particulars as required by clause eleven, and I think rightly held that upon the facts of this case that they had.

Further argument took place with regard to an allegation of fraud. That issue was not pressed before us.

The President of the District Court held in the result:

> "In Haifa at the time due to bomb explosions, the conditions were definitely riotous and I must hold that as accident (? has) been negatived and that there is no evidence beyond a mere suggestion that the Plaintiffs deliberately set fire to the premises that the fire was due to the riotous conditions prevailing in Haifa at the time and that the Plaintiffs are entitled to recover against the Defendants under the riot endorsement for the damage caused to their stock insured with the Defendants Company."

There is clearly no finding that the damage was directly caused by persons taking part in riots or civil commotions, and there was no evidence upon which such a finding could be based, and I think that a finding that conditions were definitely riotous is not sufficient to enable the Respondents to recover under the riot endorsement.

No doubt owing to the view he took the President did not consider whether the Plaintiffs were entitled to recover under the fire policy, as to which issue it is a little difficult to appreciate the Appellants' position, as although as I have stated they pleaded the liability alternatively, it appears from the learned President's note of the argument that Mr. Goitein submitted that there were no elements to prove that a riot took place when the fire occurred, and that there was no civil commotion, and that there was no evidence of riot or disturbances near these premises that night, — and he went on to say that there was no claim except on a riot basis.

In argument before us Mr. Goitein admitted that the combined effect of the fire policy and the riot endorsement was to expunge

"riot" and "civil commotion" from condition six of the policy. On that basis, after disposal of the points under conditions one and eleven (i.e. misdescription and lack of particulars), and the allegation of fraud, it becomes, on the fire policy, an undefended action, but this admission, although made by an advocate of great experience, was not a formal admission, and there may have been some misunderstanding, and in my view it does not represent the true position. I should prefer, therefore, to consider the matter further.

I am satisfied upon the evidence that the Respondent could not recover under the riot endorsement, but I think we are entitled to and should, upon the evidence upon which the parties were content that the matter should be decided, enquire whether the Respondents are entitled to recover upon the fire policy.

Condition six, to which I have referred above, is similar in its terms to the condition which was considered by this Court, and subsequently by the Privy Council in Levy v. Assicurazioni Generali, P.C.A. 34/39*). In that case, before us, apart from the question of onus of proof, the main issue was if there were existing abnormal conditions as contemplated by the policy, and as stated in our judgment, P.L.R. 1938 **), at page 602, it appeared to have been assumed that the state of affairs as described was due to one of the matters set out in group two of the clause. Their Lordships, however, while agreeing that the abnormal condition should be joined by a chain of causation to one of the events set out, take the view that the abnormal conditions must exist at the date of the fire. At page 4 of the official copy of the judgment of the Board they say —

> "Their Lordships see no reason 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 sub-clause (1) or sub-clause (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 such conditions as arise out of or in connection with any of the occurrences enumerated in the two sub-clauses. But 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 sub-clause 2 existed at the date of the fire....................".

and see also page 5, where it is stated:

> "The point is does the evidence establish that one of the occurrences mentioned in sub-clause 2 existed on the 14th December, 1936?"

*) 8 CtLR 65. **) C.A. 188/38 4 CtLR 223.

and lower down—

> "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."

With all respect I take this to mean that the occurrence must be contemporaneous with the abnormal state of affairs, and I do not think Their Lordships intended to limit the abnormal state of affairs to occurrences occurring on the same day, as, if they could be joined by a chain of causation to occurrences on the same day, there seems no reason why they could not be joined to occurrences on the next day, or subsequent days, if the chain of causation permitted.

Now in the present case we have the evidence of the Police Sergeant, who stated:

> "I was July to Sept. 38 in Central P.S. Haifa. I remember 6th July, 38, the 1st bomb casualties. Followed by rioting.
>
> "25th July a 2nd, there was another bomb and casualties. State was disturbed. Shooting, fire, stone-throwing. Many fires. No statistics. July many and October next largest. Generally in Jewish premises in Arab quarters, particularly in the Souk, Allenby St., Jaffa Rd. and Stanton St.
>
> "Khamra Sqr., Allenby Rd., Stanton St. was effected by fire. I cannot give the cause. I attended several investigations and my opinion was they were due to the disturbances. I know of one case of arson. Accused received 4 years each from Military Courts — due to disturbances. Very difficult to obtain evidence. Curfew was difficult to enforce in this quarter which was more congested. Present building near Allenby Sqr. end.
>
> *Xm'd.* Hadar Hacarmel is the largest Jewish quarter in Haifa, and bus goes up Stanton St. I was not on duty at time of this fire. At the time the Hadar Hacarmel buses were sent another way.
>
> Condition in October same, still very disturbed. There was a railway coach set on fire same evening." and the Engineer of the Fire Brigade stated:
>
> "I am a civil engineer architect. I was engineer to fire brigade at time. I remember this fire, end 1938. At time when alarm given I was to watch hose connection, and I then went to the fire. I formed no opinion as to origin and cause of fire. There was fire in two or three places. At time there were fires nearly every day. After the bomb throwing. These fires in my opinion were arson fires. We found many signs. Mostly Jewish property in Arab district. Thers were troops there during the fire. Troops were there to protect us and other property. We distinguished several shots of fire.
>
> *Xm'd.* Found no bombs in this building. I was not the first

in this building. No reports of firing, etc."

Upon their evidence, although there may well have been an abnormal state of affairs, such state of affairs is not joined to any contemporaneous riot or civil commotion or other exception in group two, nor does it appear that there was any riot or civil commotion upon the day of the fire. I think therefore the Plaintiff is entitled to recover under the fire policy.

In the course of argument there was a covert suggestion that the Respondent might in some way have been responsible for the fire. I need only say that no such suggestion was pleaded by the Appellants.

In my judgment the appeal succeeds as to the riot endorsement, and the judgment of the District Court should be varied, and judgment entered for the Plaintiffs on the claim based on the fire policy for a sum of Lp. 1509.920, which amount was agreed as being due on that basis.

Delivered this 26th day of November, 1940.

Chief Justice.

JUDGMENT.

Rose, J.

The appellant is an insurance company and on the 22nd of September 1938, the respondent took out with the appellant a policy of insurance covering certain of its stock against the risk of fire. The policy contained an exception clause, which included amongst the excepted risks loss or damage arising from riot or civil commotion. On the same date an endorsement was added to the policy extending the insurance to cover, inter alia, loss or damage directly caused by persons taking part in riots or civil commotions.

On the 9th of October 1938 a fire broke out in the building containning the insured stock and certain of the assured's property was destroyed.

The Respondent claims in the alternative, its contention being that it is entitled to recover either under the endorsement or under the main policy. The appellant denies liability under both the endorsement and the policy.

The damage was agreed between the parties at LP. 3,302.793 under the endorsement and LP. 1,509.920 under the policy.

In the pleadings an issue of fraud was raised by the appellant, but this allegation was not persisted in before this Court and it is, in my opinion, abundantly clear that no such charge has been substantiated by the evidence adduced in the Trial Court.

The appellant further contends that there was a material misdescription of the premises in which the insured goods were housed. As to this, it would appear that in the Proposal Form the premises were

correctly described, but that in the policy itself there is a somewhat different description as far as concerns the roof. The Trial Court dealt with this point at length and came to the conclusion that the variation was only slight and did not serve to invalidate the respondent's claim. I agree with the Trial Court that the misdescription is not material. Moreover it appears that the misdescription emanated from the office of the appellant and that the respondent was not a party to it.

The appellant further contends that the respondent has failed to prove that the loss arose in circumstances entitling it to recover under the riot endorsement. The relevant part of the endorsement reads as follows:—

> "In consideration of the payment of the after-mentioned additional premium it is hereby agreed and declared that notwithstanding anything in the within written Policy contained to the contrary the insurance under (the items of) this Policy shall, subject to the special conditions hereinafter contained, extend to include:—
>
> Loss of or damage to the property insured (including loss or damage due to fire or explosion) directly caused by persons taking part in riots or civil commotions..................".

It must be noted that these words are narrow in their scope and impose an onus which is by no means easy for a claimant to discharge. The respondent has pressed upon us in argument the case of Cooper v. The General Accident Fire and Life Assurance Corporation, 128 L.T. p. 481, but, in my opinion, not only are the words of the endorsement in the present case more stringent than those in the exception clause in the case referred to, but also the proved facts of the present case fall far short of those in Cooper's case. The Trial Court has made no finding that the damage was directly caused by persons taking part in a riot or civil commotion, nor was there any evidence which would have entitled it so to find. Having regard, therefore, to the evidence produced in the Trial Court, I am of opinion, that the respondent has failed to discharge the severe onus which was placed upon it. The appellant therefore succeeds on this issue.

It is now necessary to consider the claim under the main fire policy. The appellant in paragraph 13 of its defence pleads the exception clause (clause 6) of the policy, thereby placing the onus on the respondent to show that the fire did not arise from an excepted risk. The case was contested in the Trial Court and in this Court on the basis that the effect of the riot endorsement was to delete the reference to "riot" and "civil commotion" in clause 6 of the policy, and Mr. Goitein in this Court, in answer to a question from the bench, further

admitted that this was the position. This being so, it is unnecessary to consider what the situation might have been had the appellant adopted the attitude that, the onus of proof being greater in one case than in the other, the respondent had failed in its claim under the endorsement and at the same time was excluded from recovering under the policy by reason of the riot exception.

Clause 6, with the reference to riot and civil commotion deleted, 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, occasioned by or contributed to by any of the following occurences, or which, either in origin or extent directly or indirectly' proximately or remotely, arises out of or in connection with any of such occurences, 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, 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 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.
>
> 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."

It is true that in the Trial Court attention does not seem to have been directed to the question whether the respondent had discharged its onus as regards its claim under the fire policy. But, in my opinion, it is unnecessary to remit the case for the disposal of this issue as in view of the findings of fact of the Trial Court it seems to me that the respondent has amply discharged the onus which was upon it of proving that the loss was caused by fire and was not due to an excepted risk.

Lastly, the appellant relies on clause 11 of the policy and contends

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that it was not supplied with sufficient particulars of the fire. Clause 11 reads as follows:—

> "On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within fifteen days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company.
>
> (A) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.
> (B) Particulars of all other insurances, if any.
>
> The Insured shall also at all times at his own expense, produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.
>
> No claims under this Policy shall be payable unless the terms of this condition have been complied with."

Apart from the question of "riot" and "civil commotion", which is not relevant on this part of the case, I consider that the respondent gave sufficient particulars of the happening of the fire itself. It sent to the appellant a copy of the Police Report and also expressed its personal opinion that the fire was due to riot. Even although the correctness of this opinion may be open to question, I do not think that clause 11 avails the appellant. Further, in its letter of the 25th May, 1939, the appellant repudiated liability under the main policy as well as under the endorsement, so that it cannot now complain that it was unaware that a claim was being made under the fire policy as distinct from the endorsement.

For these reasons I am of opinion that the respondent succeeds in its claim under the main policy. The appeal is therefore allowed, as regards the riot endorsement, the judgment of the District Court is varied and judgment entered for the respondent for the sum of LP. 1,509.920.

Delivered this 26th day of November, 1940.

British Puisne Judge.

JUDGMENT.

Frumkin, J.

I concur with my brother Rose. It is clear to me that, as admitted by Mr. Goitein, the combined effect of the fire policy and the riot endorsement was to expunge "riot" and "civil commotion" from condition six of the policy. I need not therefore consider what the effect would be had those words not been expunged.

Delivered this 26th day of November, 1940.

Puisne Judge

In the circumstances the appellant will have an inclusive sum of LP. 40 as costs of this appeal and the respondent will have the costs of the proceedings in the District Court on the basis of the amount for which judgment is entered.

Given this 26th day of November, 1940.

British Puisne Judge. *Puisne Judge.* *Chief Justice.*

CRIMINAL APPEAL NO. 109/40

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.

Moshe Abraham Oxhorn — Respondent.

Appeal by Attorney-General against acquittal from charge under Trading with the Enemy Ordinance — Payment of money to Bank in respect of goods purchased from Enemy — Court of Appeal,

upon appeal by Attorney-General from judgment of acquittal, remitting case to trial Court.

1. When trying a person under Trading with the Enemy Ordinance for having paid money to a Banker in Palestine in respect of goods purchased by him from Enemy before declared as such, Court to enquire whether money was received by Bank on its own behalf and account or as agent for an enemy principal.

2. Court of appeal hearing appeal by Attorney-General from judgment of acquittal has power to remit case to trial Court to hear evidence and give fresh judgment.

Bell (*Crown Counsel*) for Appellant.
Pomeranz and *Baker* for Respondent.

Appeal from judgment of District Court, Tel-Aviv, sitting in its appellate capacity, dated 30.9.1940, which confirmed the judgment of Magistrate's Court, Tel-Aviv, dated 15.7.1940,whereby Respondent was acquitted of the offence of performing an obligation to and discharging an obligation of the Enemy, contrary to Section 3(1)(b) and 3(2)(a)(iii) of the Trading with the Enemy Ordinance, No. 36of 1939.

JUDGMENT.

The Respondent was charged under Section 3(2)(a)(iii) of the Trading with the Enemy Ordinance, 1939, and acquitted by the Magistrate. The acquital was upheld by the District Court, and the Attorney-General appeals to this Court. It appears that the Magistrate discharged the accused without calling upon him to reply to the charge.

Before the commencement of the present war the Respondent purchased goods from an enemy subject outside Palestine. The goods arrived, but the bill of lading was delayed, and the goods were cleared upon a guarantee being given by the Anglo-Palestine Bank. Later the bill of lading arrived and was in the hands of an institution known as the General Bank. The Anglo-Palestine Bank dropped out, and the Respondent opened negotiations with the General Bank in order to conclude the transaction, and paid a sum of money to that Bank. It seems to me that the only question that arises is, was that sum of money received by the General Bank on its own behalf and on its account, or was it received by the General Bank as agent for an enemy principal.

From the evidence tendered it appears that prima facie the latter was the true position, and that the Respondent should have been called upon.

It is argued by the Respondent that this being an appeal under the provisions of Section 12 of the Magistrates Courts Jurisdiction Ordinance, 1939, this Court has no power to remit the case to the Magistrate, and he relies upon the decision of this Court in Misdemeanour Appeal No. 1/36 *). That case, which arose under the Criminal Procedure (Trial Upon Information) Ordinance, as it then stood, was decided upon two points:

Firstly it was said that the Court of Appeal would not return the case in order that the Attorney-General might have a further opportunity to call evidence. Whether there may be any exceptions to that general proposition it is not for us to decide in this case, as the Attorney-General does not suggest that he desires to call further evidence.

Secondly, the Court decided that as its powers were expressly set out in Section 69 **) of the Ordinance, and those powers did not include a power to remit the case, the case could not be remitted.

Under Section 12, however, to which I have referred, the powers of this Court are not specifically set out and I see no reason why they do not extend to a power to remit a case when it appears proper so to do.

The Magistrate's decision will be set aside, and the case remitted to him to hear any evidence which the Respondent may care to produce, and having considered such evidence to give a fresh judgment.

Delivered this 6th day of December, 1940.

Chief Justice.

CIVIL APPEAL NO. 234/40.

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

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

In the appeal of:

Elias and Abdou Noujaim — Appellants.

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*) P. Post 18.10.1936.

**) Ed. Note: sec. 72 of Revised Edition Cap. 36.

v.

Mehrez and Negri Freres Respondents.

Dismissal of action on bill upon finding that Plaintiff not holder — Fresh action on bill unseccessfully relied on in previous case having subsequently obtained correct endorsement — Dismissal of fresh action on ground that matter res judicata — What necessary for plea of res judicata to succeed.

1. For plea of res judicata to succeed — necessary to show not only that cause of action but also that Plaintiff has had opportunity of recovering and but for his own fault might have recovered in first action what he seeks to recover in second.

2. After claim on bill failed because Plaintiff not holder, fresh case between same parties on same bill on Plaintiff having meanwhile obtained correct endorsement — not entertainable, matter being res judicata.

Sahyoun for Appellants.

A. Levin and *Geiger* for Respondents.

Appeal from judgment of District Court, Haifa, dated 31.10.40.

JUDGMENT.

This present appeal is from a judgment of the District Court of Haifa dismissing the appellants' case on the ground that the matter was res judicate, a judgment between the same parties and on the same subject matter having been given by the Chief Magistrate Haifa. The facts of the previous judgment were that the Chief Magistrate dismissed the appellants' action on the ground that they were not the holders of the bill and therefore were not entitled to sue on it. After that Judgment, the appellants withdrew the bill, proceeded to obtain the correct endorsement to themselves, and then sued in the District Court for a slightly increased, amount bringing it within the jurisdiction of the District Court. The learned President, as I have said, dismissed the second case on the ground that it was res judicata. The appellants, on this appeal, have argued that there is no res judicata here because there was no decision on the merits and that they lost the first case on the ground that they were not the holders and so could not sue but that now being the holders, having perfected their title, so to speak, they are entitled to sue. The respondents' reply to that is that the appellants could have got an endorsement to themselves before they

entered the action in the Magistrate's Court, and that being so, it is too late for them to do so afterwards. He has referred us to various authorities. Quoting from Halsbury second edition, volume 13, p. 411, in these words —

> "In order that a defence of res judicata may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the same parties".

We agree with the respondents' contentions that it is the fault of the appellants that they did not obtain this endorsement prior to entering an action in the Magistrate's Court, and that being so we think that the learned President was correct. That being our united opinion it is not necessary to go into the questions of whether there was an increase in the amount sued for and whether there was any relinquishment of any part of the claim.

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

Delivered this 12th day of December, 1940.

British Puisne Judge.

HIGH COURT NO. 31/40.

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

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

In the application of:

Ottoman Bank, Jaffa. Petitioner.

v.

1. Chief Execution Officer, Jaffa
2. Arab Bank Limited, Jaffa

3. Engineering Corporation of Palestine
4. Sheikh Abdul Kader el Muzaffar — Respondents.

Chief Execution Officer proposing to distribute among judgment creditors sum of money on which provisional attachment put by order of Court — Power to cancel provisional attachment.

Chief Execution Officer cannot cancel, either specifically or impliedly, provisional attachment imposed by a Court, only a Court can.

Edit Note: See H.C. 96/40 8 CtLR and cases cited therein.

Richardson for Petitioner.
No appearance by First Respondent.
Elia for Second Respondent.
Polonsky for Third Respondent.
Fourth Respondent in person.

Application for an order to be issued calling upon the First Respondent to show cause why his order in Execution File No. 15/39, District Court, Jaffa, dated 19.4.1940 should not be set aside and why he should not be directed to withhold the sum of LP. 1,800 until the determination of case No. 2/39 and final judgment is given or, alternatively, keep in Court a proportional amount to which the Petitioner may ultimately be entitled in the distribution of the said monies.

ORDER.

This order will have to be made absolute. The Chief Execution Officer disregarded, not in specific terms but in effect, the order of the District Court imposng a provisional attachment which he has no power whatsoever to do. Only a Court can cancel a provisional attachment — not a Chief Execution Officer. The order nisi will be made absolute. The Petitioner will share in the distribution of the monies and take the proportional amount to which he may be entitled. The second Respondent will pay the Petitioner his costs and LP. 10 fee for attending the hearing.

Given this 14th day of May, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 203/40.

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

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

In the case of:

Haj Hussein Mahmoud Abu Khater — Appellant.

v.

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

Claim for hikr on land forming part of a Waqf — Finding of fact made by trial Court reversed by Court of Appeal — Judgment contrary to weight of evidence — Scope of art. 1 and 9 of Ottoman Law on Inheritance of Immovable Property (regarding "As'hab haq al intiqal").

1. Judgment contrary to weight of evidence cannot stand.

2. Ottoman Law of Inheritance of Immovable Property (regarding miri and wakf land devolving to "as'hab haq al intiqal") does not apply to cases of Waqf Sahih.

3. No law which can be applied in Civil Courts of Palestine dealing with claim of extra rental of Waqf Sahih land.

Edit. Note: As to 1 see C.A. 23/39 5 CtLR 196 and Edit. Note thereto; C.A. 162/38 6 CtLR 26; C.A. 95/39 7 CtLR 13.

A. S. Moyal for Appellant.

Haddad for Respondent.

Appeal from judgment of District Court, Jerusalem, in its appellate capacity dated 11.7.1940.

JUDGMENT.

This is an appeal from the judgment of the District Court given on appeal from the judgment of the learned Magistrate. The respondent here, who was the plaintiff in the Magistrate's Court, claimed

from the appellant the sum of LP. 5.180 being hikr on land which the appellant bought from the Greek Orthodox Convent. This land formed part of the Waqf Sheikh Ahmad el Thawri and the claim was for four years. The claim is based on article 9 of the Ottoman Law of Inheritance of Immovable property of 1331. The learned Magistrae heard evidence and gave judgment for the sum of LP. 4.340 with costs and advocate's fees. On appeal the District Court confirmed the Magistrate's judgment.

We are of opinion that there is no evidence to support the Magistrate's decision that hikr was payable by the appellant in respect of these particular lands in these years. From the evidence given before the learned Magistrate, especially that of Archimandrite Naxos, it is quite clear that Hikr for these lands had been paid by the Greek Convent both in respect of these lands and other lands which they have sold and the lands which they have not yet sold. The Magistrate's judgment, therefore, in so far as it was given for the amount of LP. 4.340, was contrary to the weight of evidence and cannot be supported.

With regard to the claim which is in excess of LP.4.340, we are of opinion that the Ottoman Law of Inheritance of Immovable property, article 9, does not apply. Article 1 of this law states:—

> "On the death of a person the miri and waqf land held by him are transferred to a person or persons according to the following degrees. These are called "ashab haqq al intiqal."

This Law, in our opinion, does not apply to cases of Waqf Sahih. The respondent has stated that this is Waqf Sahih. There is no law which can be applied in the Civil Courts of this country dealing with this claim of extra rental. With regard to this particular claim, therefore, the respondent must take such steps as he may be advised to take.

The appeal must be allowed, the judgments of both Courts below set aside and judgment entered for the appellant who was the defendant in the Magistrate's Court. The appellant will have his costs here on the lower scale and in both Courts below to include a sum of LP. 10 for attending the hearing of this appeal.

Delivered this 30th day of November, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 127/40.

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 appeal of:

The Attorney-General — Appellant.

v.

Paul Wolfe Kantrovitz — Respondent.

Striking out Information for manslaughter on ground that it should have stated further particulars of negligence alleged — Information containing more particulars than required by Form of Information in Appendix to Criminal Procedure (Trial Upon Information) Ordinance—Cr. Code Ord. sec. 212, 213—Para 4 of the schedule to the Cr. Procedure (Trial Upon Information) Ord.

While undersirable that for an offence for which there is a Form of Information in Appendix to Criminal Procedure (Trial Upon Information) Ordinance any other form shall be used, an Information containing more particulars than envisaged by prescribed form — good and should not be struck out.

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

Appeal from judgment of District Court, Jerusalem, dated 14.10.40, in which the Court struck out the Information filed against the Respondent on 14.8.40.

JUDGMENT.

In this case the Respondent was charged with manslaughter, contrary to Sections 212 and 213, and the particulars of the offence were given as follows:—

> "The above-named accused on 7.7.40 on the Jerusalem-Hebron Road, by an unlawful act, namely culpable negligence in the driving of a motor car, caused the death of Miriam Abdallah Ayesh."

The District Court struck out this information on the ground that it should have stated further particulars of the culpable negligence alleged, and the Attorney-General appeals.

Paragraph 4 of the Schedule to the Criminal Procedure (Trial Upon

Information) Ordinance lays down clearly what an information should contain, and it provides that the forms in the Appendix, or forms conforming thereto as nearly as may be, shall be used.

There is a form for manslaughter, and it is undesirable that any other form should be used. This information contained somewhat more than the form. We are satisfied, however, that it was a good information, and that it should not have been struck out.

The appeal will be allowed, and the case remitted to the District Court for trial.

We were told in argument that there had been delay on the part of the Attorney-General. We are not, however, concerned in enquiring into that, but if there has been delay we trust that there will be no further delay.

Delivered this 9th day of December, 1940.

Chief Justice.

HIGH COURT NO. 107/40.

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

Before:— Copland, J. and Frumkin, J.

In the application of:

1. Ibrahim Shawki.
2. Ahmad Shawki as attorney for the heirs of Mohammad El Azab. — Petitioners.

v.

Director of Land Registration, Jerusalem. — Respondent.

Land Registrar refusing to register certain property in name of applicants — Non-interference of High Court in a matter within competence of Land Court — Land Code, art. 78.

Where Director of Land Registration, not satisfied with documents produced or title made out to him, refuses to effect registration unless directed by a competent Court to do so, High Court will not interfere; claim to registration and ownership of land only for Land Court to decide.

Goitein for Petitioners.
Ex parte.

Application for an order to issue directed to the respondent calling upon him to show cause why he should not register the land of the petitioners, situated in Tel-Aviv and known as parcel No. 580, in Block No. 6902, in their names in accordance with law.

ORDER

This is an application by the petitioners asking for an order directed to the director of Land Registration to effect registration of certain property claimed by the petitioners under Article 78 of the Land Code. The Land Registrar, after certain documents had been submitted to him, and correspondence had taken place, refused by a letter of the 26th November 1940, to register the land in these words:

> "I am to inform you that I am unwilling to effect such registration unless directed by a competent Court to do so."

It is quiet clear from this letter that the Land Registrar was not satisfied with the documents produced or the title made out by the applicants because he does not say that he cannot effect the registration, he merely says that he is unwilling unless directed by an order of a Court. We are not a Court that is competent to decide a claim to registration and ownership of land. The only Court that can do so is the Land Court. We are afraid therefore that the petitioners, however unwilling they may be to do so, will have to make their application to the Land Court. This application must therefore be refused.

Given this 9th day of January, 1941.

British Puisne Judge.

CRIMINAL APPEAL NO. 134/40.

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 appeal of:

1. Mohammad Halaby.
2. Khadijeh Mahmoud Halaby. Appellants.

v.

The Attorney General Respondent.

District Court (in its appellate capacity) ordering demolition of structure under sec. 35(1)(a) of Town Planning Ord. — Proper composition of District Court under sec. 35(8) of Town Planning Ord. — Judgment of Court not properly constituted.

> Judgment of District Court in appellate capacity under sec 35 of Town Planning Ordinance constituted of President alone cannot stand.

Edit. Note: Compare Cr. A. 125/37 2 CtLR 191; Cr. A. 97/37 ibid 96.

Salomon for Appellants.

Crown Counsel (Hogan) for Respondent.

Appeal from judgment of District Court, Haifa (in its appellate capacity) dated 31.10.40, whereby the judgment of the Magistrate's Court dated 13.5.40 refusing to order the pulling down or removal of appellant's structure under sec. 35(1)(a) of the Town Planning Ordinance, 1936 was set aside and substituted by an order to pull down and remove the said structure, and the judgment of the Magistrate with regard to the sentence of imposing fine was confirmed.

JUDGMENT.

This is an appeal from the judgment of the District Court, Haifa, sitting as a Court of appeal under the Town Planning Ordinance 1936.

Section 35(8) of that Ordinance provides:

> "For the purposes of this section the District Court shall consist of a President or a Relieving President and one Judge".

In this case the Court consisted of the President alone, and therefore was not properly constituted.

The appeal must be allowed and the judgment of the Court below is set aside.

Delivered this 16th day of December, 1940.

Chief Justice.

CRIMINAL APPEAL NO. 104/40.

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:

Ahmad Attallah Ismail — Appellant.

v.

The Attorney-General — Respondent.

Conviction of unlawful sexual intercourse with an imbecile girl — Evidence of statement made by imbecile girl shortly after offence allegedly committed on her — Finding of fact as to knowledge of accused that victim of unlawful sexual intercourse imbecile — Evidence Ord., sec. 7 — R. v. Lillyman.

1. Evidence of a statement made by an imbecile at time when, or shortly before, or after, an offence allegedly committed on her —inadmissible, as she cannot take oath and be herself a witness.

2. Court convicting a person of unlawful sexual intercourse with an insane or imbecile female must make a finding that he knew victim to be insane or imbecile.

Edit. Note: As to 1 see Cr. A. 116/40 8 CtLR 184; Cr. A. 67/39 7 CtLR 20.

Darwish for Appellant.

Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 22.10.40, whereby Appellant was convicted of rape under Sec. 153 of Criminal Code Ordinance, 1936, and sentenced to four years' imprisonment, and to pay LP. 25 by way of compensation for the injury to the girl, Sheikha, under Sec. 43 of Criminal Code Ordinance.

JUDGMENT.

This is another sad case of alleged sexual intercourse with an imbecile girl.

As was pointed out in argument, the Court must first be satisfied that someone had intercourse with the girl at the time alleged, before they can convict the accused.

In this case the girl's mother gave evidence that she saw her daughter on the ground with her clothes disarranged and bleeding. The Court found —

> "We belive that Halimeh, the mother of the girl Sheikha, saw the incident, at any rate in part, having left her work and the place of the harvesting on account of the cries of her daughter. We think that she did actually see the accused leaving the place of the incident, with his clothes in disorder, and that is probably why the accused lay down on his stomach at the approach of the Mukhtar Shehadeh, who was also approaching the vicinity."

From this we understand the Court only to believe her when she says she saw the accused leaving the place. They go on to say —

> "We are satisfied that both Shehadeh and Halimeh saw the girl Sheikha walking in the direction of the road near the harvesting place and crying out that she had been raped by a man."

The girl was not and could not be a witness, as she could not take the oath — her statements are therefore not admissible under Section 7 of the Evidence Ordinance. Neither are they admissible under the English principle of R. v. Lillyman, as they cannot show consistancy with evidence in the box, as she gave none, and as consent would not appear to be a defence under the Section, the fact that they are inconsistent with her consent is immaterial.

Two experienced Medical Officers gave evidence that the girl was not a virgin, and stated that she had probably not been so for some time. They saw her ten days after the occurrence.

It appears, however, that after the occurrence the mother took the girl to a Jewish woman doctor, who on 23.6.40 — i.e. six days before the other doctors saw the girl, gave a certificate that she had examined the girl and found no signs of rape. This was put in as Exhibit C. Later, to the Police, this doctor explained that when she examined the girl she found her a virgin. No reference is made to this by the Court.

In the view the Court took of the mother's evidence we are satisfied that there was no evidence that there had been sexual intercourse with the girl at the material time. Although there was clear evidence as to the accused's knowledge, we may point out that the Court never found as required by the section that he knew the girl was imbecile.

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

The mother stated in her evidence that she went to Artuf Police but was not allowed to see the police because the accused works there, and later she said she went to Aynab Police Post and complained. It is not for us to comment on this without further enquiry, but I trust the proper authorities will look closely into this unfortunate suggestion.

Delivered this 11th day of November, 1940.

Chief Justice.

CIVIL APPEAL NO. 249/40.

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

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

In the case of :

Moshe and Sara Friedmann Appellants.

v.

"Pearl" Assurance Company, Ltd. Tel-Aviv. Respondent.

Assignment of life policy to Insurance Company as collateral security to mortgage in favour of Company — Breach of conditions of collateral security not registered in Land Registry — Application for sale of mortgaged property for failure to pay premiums of life policy taken and assigned as collateral security — Declaratory judgment that mortgagor in default of payment of a sum certain contrary to conditions of assignment of life policy given as collateral security to mortgage — Construction of contract.

1. A breach of conditions not registered in Land Registry, of a collateral security to a mortgage cannot be considered as a breach of conditions of mortgage.

2. Stipulation in mortgage deed executed in favour of Insurer that mortgagor shall take out with Insurer a policy or policies of insurance as Insurer may direct against fire and such other risks as Insurer shall require to full value of property comprised in mortgage does not include or imply a life insurance.

Eliash for Appellants.

Levison for Respondent.

Appeal from judgment of District Court, Haifa, dated 31.10.40, in Civil Case No. 1/40.

JUDGMENT.

The respondents, the Pearl Assurance Co. Ltd. of London, have a scheme by which persons who wish to buy houses, can obtain the necessary money on mortgage combined with endowment Insurance Policy effected on ther own lives for the amount of the loan. Under this arrangement, the Company advance up to 50 per cent of the amount of their valuation of the property and the mortgagor assigns the life policy to the company as collateral security. The appellants took advantage of this scheme and obtained the sum of LP. 2.450 on a mortgage of their premises on 26th January 1937, and on the same day they assigned the life policy, which had been duly effected, to the company by Exhibit J. which is stated to be supplemental to the mortgage of

the appellants' premises of even date. In the assignment the appellants covenanted, inter alia, to pay regularly all premiums which might become due on the life policy, and the Company retained the power, if default were made in such payment, to keep the policy on foot by adding the amount of such unpaid premiums to the principal sum due under the mortgage. The assignment further provides that —

> That all covenants and other powers and provisions contained or implied in the Mortgage shall extend so far as applicable to the premises hereby assigned, pledged and delivered in the same manner as if such premises had been included in the Mortgage."

Default was made in the payment of the life policy premiums and the Company therupon applied to the Chief Execution Officer for an order of sale under Section 14 of the Land Transfer Ordinance on the ground that there had been breach of the special conditions in the mortgage deed. The appellants disputed that they owed any money under the mortgage and the Chief Execution Officer, very properly, ordered them to go to the competent Court to prove that no such money was due, and gave them one month's stay of execution, subsequently extended by another week, to enable them to do so. The matter then came before the learned President (Judge Edwards) sitting in the District Court. The Company alleged default in three sums — with regard to two of them, the Court found in favour of the appellants, but in regard to the third sum LP. 192.700, premiums on the Life Insurance Policy, the Court found that there had been default and made a declaratory judgment accordingly.

The case on appeal has been well argued by the advocates on both sides, and we are much indebted to them for the conciseness and clarity with which they have put forward their contentions.

Dr. Eliash bases his appeal on this quite short point, that there is no mention in the mortgage deed of the collateral security and that clause 10B of the special conditions can only refer to risks on the property itself — that the undertaking to keep the life policy in force was contained in the collateral security only and that since only the mortgage itself was sought to be executed, the appellants owed no money under the mortgage. He says that the Company's remedy is to sue on the collateral security for breach of contract.

Mr. Levison for the Company in reply, submits that clause 10B is sufficiently wide to include the premiums on the life policy, that it was one of the conditions on which the loan was made that the appellants would take out and keep in force the life policy, and that the mortgage and collateral security must be read as one. He also says

that in an assignment made between the parties on the 14th August 1938, the fourth recital and third clause show that the collateral security was admittedly included in the mortgage and the appellants therefore are now estopped from denying this.

It may be convenient here to set out clause 10B of the special conditions, as in our opinion the case depends on this clause. Its terms are as follows:—

> "To take out and effect with the Company and in its favour (or as it shall otherwise direct) a policy or policies of insurance and cause the same to be endorsed in favour of the Company or as the Company may direct against fire and such other risks as the Company shall from time to time require to the full value as determined by the Company of the property comprised herein and to maintain such policy or policies in force throughout the continuance of this security and punctually pay all premiums in respect thereof and to deposit the policy or policies and all receipts for such premiums with the Company and upon any default by the Borrower of this condition the Company at its option shall have the right (without derogation from other remedies to which it may be entitled) to maintain such insurance policies in force and to recover all money so expended forthwith from the Borrower or at the Company's option to treat same as principal moneys secured hereunder."

In our opinion, unless it can be shown that this clause contains a covenant to take out and maintain the life policy, or that the mortgage is sufficiently wide to include the collateral security, then it cannot be said that a failure to maintain the life policy is a breach of the terms of the mortgage deed. We do not think that the collateral security can be considered as one with the mortgage in the sense that a breach of its conditions would be a breach of the conditions in the mortgage for this reason, that it was not registered in the Land Registry. Neither do we think that clause 10B can be interpreted to contain a covenant to keep in force and pay the premiums on the life policy. The words "fire and such other risks as the company shall from time to time require to the full value....... of the property comprised herein" can refer only to risks affecting the property and by no stretch of words can a life risk be classed as a risk affecting the property. It would have been quite an easy matter to insert in the mortgage deed a covenant that the borrower should effect and maintain a life policy and pay the premiums thereon, and on breach of such a covenant then there might have been a breach of the mortgage deed entitling the Company to realise the mortgage. But there is no such covenant in this deed, and we cannot imply it. The Company might also have been protected if it had been stipulated in the mortgage deed itself that the

collateral security of even date was to be deemed to be a part of the mortgage deed and to be read as one therewith.

It is quite true, as the learned Judge said, that sitting as a Court he was entitled to look at other documents in order to determine whether money was due or not under the mortgage, whilst a Chief Execution Officer is limited to the mortgage deed itself. But the money must be due under the mortgage which is the security which it is sought to execute. In this case the money was due under the collateral security and not under the mortgage. The result may be unfortunate, but we can see no alternative. In England, the result would propably be different, but this case depends on the Law of Palestine.

Holding this view, it is not necessary to deal with the second point in the appeal, namely, that the Company had cancelled the life policy and therefore could not claim premiums on a policy which had been cancelled. In any case it is admitted that one quarterly premium was due and not paid whilst the policy was admittedly in force. Since we hold that no money was due under the mortgage, the question of the amount of premiums owing does not arise.

In the result the appeal must be allowed, and the judgment of the District Court set aside, and declaratory judgment issued that, on the facts of this case, no money was due under the mortgage at the time that the application for sale was made to the Chief Execution Officer. The appellants are entitled to their costs on the lower scale both here and below, to include LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this 17th day of January, 1941.

British Puisne Judge.

CIVIL APPEAL NOS. 182/40 and 185/40.

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

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

In the appeal of:

C.A. 182/40.

The Government of Palestine — Appellant.

v.

1. Keren Kayemeth Leisrael Ltd.
2. The Iraq Petroleum Company Ltd. — Respondents.

Crown Counsel (*Hogan*) for Appellant.

Levin & *Solomon* for Respondent No. 1.

Sanders for Respondent No. 2.

Appeal from judgment of Land Settlement Officer, Haifa Settlement Area, in Case No. 1/Kfar Yehoshu'a, dated 11.7.1940.
C.A. 185/40.

The Iraq Petroleum Company Ltd. Appellant.

v.

1. The Government of Palestine.
2. The Keren Kayemeth Leisrael, Ltd. Respondents.

Expropriation of land — Interpretation of correspondence with regard to grant of right of passage — Disposition within meaning of Land Settlement Ordinance — Gentleman's agreement not imposing legal liability — Fees on cross-appeal.

1. Indication in letter by owner or tenant of land to leaseholder of willingness to make a gentleman's agreement with him concerning reversionary interest in the land such as right of passage etc. — not a disposition within meaning of sec. 2 of Land Settlement Ordinance and does not impose on owner or tenant of land a legal liability capable of registration.
2. Full fees payable on notice of cross-appeal.

Sanders for Appellant.
Crown Counsel (Hogan) for Respondent No. 1.
Levin & Solomon for Respondent No. 2.

Appeal from judgment of Settlement Officer, Haifa Settlement Area, dated 11.7.1940, in case 1/Kfar Yehoshu'a.

JUDGMENT.

In these two consolidated appeals the Appellants are respectively, the Government of Palestine and the Iraq Petroleum Company, Ltd., (hereinafter referred to as the I.P.C.), and the Respondents are the Keren Kayemeth Leisrael, Ltd., (hereinafter called the K.K.L.). The dispute arises out of the acquisition by the Government on behalf of the I.P.C. of a strip of Land extending from Haifa Bay eastwards towards Tiberias, for the purposes of the I.P.C. pipeline. Under the terms of the concession to the I.P.C., the Government had to acquire the land and lease it do the I.P.C. Since the K.K.L., by their Articles of Association, are forbidden to sell any land which they have purchased, or which has become vested in them, the land required had to be obtained by expropriation. These expropriation proceedings were carried out in an amicable spirit, and were completed in the years 1933 and 1934. Negotiations between the Government and the I.P.C. on the one hand, and the K.K.L. on the other, began in the year 1932. The price was agreed upon, and the land to be expropriated was also agreed upon. Owing to the fact that the pipeline ran in a straight line through K.K.L. lands, which had been let by the K.K.L. to numerous tenants, many of these tenants' holdings were divided into two parts, and both the

tenants and the K.K.L., naturally, were concerned about rights of access of the tenants between the two parts of their various holdings. Further negotiations took place, and on the 27th of August, 1932, the I.P.C. sent a letter to the K.K.L. (Exhibit A.) in which the following passages occur:—

> "With regard to the note on your claims reading:
>
> > 'The right of passage for people, animals, roads, water pipes, irrigation and drainage ditches'
>
> we have now pleasure in advising you as follows as regards the attitude we intend to adopt as tenants (from Government, who will be registered owners) of the Pipe-Line strip:
>
> (1) We shall endeavour to cause as little inconvenience to settlers as possible;
>
> (2) Subject to the preservation of our rights of control and the exigencies of the Company's operations, we shall allow access across the strip to settlers, their animals and agricultural vehicles;
>
> (3) We shall respect existing irrigation channels and pipes that come in contact with our strip (or will substitute alternative suitable systems in place thereof) likewise any roads or tracks that our strip traverses;
>
> (4) In event of tracks or irrigation channels or pipes being required to be laid across our strip at some future date, we shall not refuse our permission unreasonably, but this will be dependent on our being satisfied that such schemes will in no way interfere with our operations."

The K.K.L., in their reply to the notices to treat, had claimed a right of passage for "people, animals, roads, water pipes, irrigation and drainage ditches". At the same time as Exhibit A. was written, the I.P.C. sent a letter of even date to the Director of Lands in Jerusalem (Ex. F.), in which they stated that they had advised the K.K.L. of their policy in respect of the right of passage claimed, giving details as set out above, and added a paragraph in which they stated—

> "it is of course understood that we can give no legal undertaking in the matter, and that the lease to be granted to us by Government for the area expropriated will not contain any such restrictive conditions."

The I.P.C., at any rate, made clear what they intended, by indicating the attitude they intended to adopt.

This letter seems to have satisfied the K.K.L. as far as it concerned the attitude of the I.P.C., but they were anxious about what would happen if and when the lease to the I.P.C. fell in, and they thereupon attempted to press the Government to agree to be bound with regard to the reversionary interest.

Finally, after an interview between the parties and the Director of Lands, on the 13th October, 1932, the Director of Lands sent a letter

(Exhibit D.), dated 17th December, 1932, to the K.K.L., in which he stated that he was directed by the Chief Secretary to say, on the subject of rights of passage, etc., across the strip of land expropriated by Government for the purposes of the I.P.C. that in the event of the concession of the I.P.C. terminating, the Government would respect the arrangements made between the K.K.L. and the I.P.C., such arrangements being set out in detail in a letter from the I.P.C. on the 27th August, 1932, (Ex. A.).

It is noteworthy that in the correspondence the K.K.L. were claiming a right of passage, but they never definitely asked for the grant of an easement, and the Government and the I.P.C. never, in so many words, stated that they would grant an easement.

The land was expropriated, and the Government expropriated it outright, that is to say, the vesting order which transferred the land to Government contained no reservation of any right of passage, or other easement whatsoever. It is clear, therefore, that if any such legal right or an easement has been granted, it can only be through the correspondence exchanged between the parties.

By 1934 the land had been acquired as already stated. Nothing seems to have happened for a number of years, and it was not until settlement proceedings began in this area that the K.K.L. lodged a claim for an easement, that is to say, for an entry to be made in the Registers of a right of passage across the I.P.C. strip. The Settlement Officer came to the conclusion that in law and in equity the K.K.L were entitled to the registration of a right-of-way within the limitations contained in item 2 of the letter of 27th August, 1932(Ex.A.), but found that item 1 and item 4 contained nothing capable of registration, and that item 3 did not create any easement. Both the Government and the I.P.C. have appealed against this decision, and the K.K.L. have entered a notice of cross-appeal asking for a declaration that items 1, 3, and 4, did contain rights which were capable of registration. During the course of the hearing of this appeal, however, they have withdrawn their claims in respect of items 1 and 4.

Now, as I have stated already, this question turns entirely upon the interpretation to be put upon the correspondence between the parties, and after going through all the correspondence we have reached the very definite conclusion that neither the letter of the 27th August, 1932, (Ex. A.) nor the letter of the 17th December, 1932 (Ex. D.), nor any of the other letters contained in it, creates a legal liability upon the I.P.C. or the Government respectively. The most that can be obtained from these letters is that the I.P.C. were willing to grant a licence, or, as has been said, they were willing to enter into a gentle-

man's agreement in the terms of their letter of the 27th August, in respect of their lease-holders' interest, and that the Government equally were willing to respect the arrangements between the I.P.C. and the K.K.L. with regard to the reversionary interest to the land. We do not think that such an arrangement as is contained in the correspondence is a disposition of land within the meaning of Section 2 of the Land Settlement Ordinance, and we do not think that it contains anything that is capable of registration. The position may be unsatisfactory in the view of the K.K.L. (but they will have to rely on the others keeping to this gentleman's agreement. There is nothing in the correspondence, in our opinion, which imposes a legal liability on either of the Appellants.

It is not necessary in these circumstances for us to discuss whether there could be such a thing as an easement in the nature of a right of passage in the very wide terms claimed by the K.K.L. This right claimed, if it were an easement, would seem to allow the tenants of K.K.L. to wander at will with their animals and their vehicles across any part of this strip, and prima facie it is difficult to see how such a very wide right could be claimed as an easement. We do not, however, decide this question since it is not necessary to do so.

In the result both appeals will be allowed, and the judgment of the Settlement Officer, insofar as it relates to the order for registration of a right-of-way, within the limitations contained in item 2 of the letter of the 27th August, 1932, will be set aside. It follows that the cross-appeal will be dismissed. The Appellants will each have their costs on the lower scale to include LP. 15 fee for attending the hearing in each case.

Mr. Levin, for the Respondents, has asked us to decide whether, when a notice of cross-appeal under Rule 339 is filed, the full fees should be paid as on a cross-appeal. This point would appear to have been settled in David v. Mizrachi, Civil Appeal 98/40, where this Court held that the fees under the Court Fees Rules, 1935, should be paid in such a case. Delivering the judgment of the Court, Rose, J., said —

> "Rule 339 of the Civil procedure Rules provides that — 'It shall not be necessary for a respondent to give notice of motion by way of cross-appeal', but this would not seem to alter the nature of a cross-appeal contemplated by the rule if in fact such cross-appeal is made."

With that expression of opinion we respectfully agree.

Delivered this 15th day of October, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 267/40.

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

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

In the appeal of:

1. Perl Roman
2. Isaac Roman
3. Israel Aschkenazi in his capacity as Administrator of the Estate of Ania Rosa Segal. Appellants.

v.

Mrs. Johara Farjoun Respondent.

Appeal to Supreme Court from judgment of Magistrate's Court sitting as a Land Court in a claim for Shuffa (pre-emption) — Absence of evidence that claimant of right of Shuffa stated names of purchasers from whom he claims the property—Strict application of provisions of Mejelle regarding Shuffa — Costs of appeal.

1. Always practice of Supreme Court to apply provisions of Mejelle regarding Shuffa strictly.
2. Person claiming right of Shuffa cannot succeed, if no evidence that he mentioned at material time name of purchaser or purchasers from whom he claims property in question.
3. Person appealing along with other appellants, although no necessity for him to do so there being nothing in judgment which affects him, not entitled to costs, nor liable to pay them on appeal being allowed.

Edit. Note: as to 1 & 2 see: C.A. 95/38 3 CtLR 282.

Bernblum for Appellants Nos. 1 & 2.
Eisenberg for Appellant No. 3.
J. Maman for Respondent.

Appeal from judgment of Magistrate's Court, Safad, sitting as a Land Court, dated 20.11.1940.

JUDGMENT.

This is an appeal from the judgment of the Magistrate given in a claim for shuffa. The appeal can be decided on one short point that is, that the provisions of Articles 1029 and 1030 of the Mejelle have not been complied with. Article 1030 in particular says that the person claiming the right of shuffa must state the names of the purchasers from whom he claims this property. There is nothing in the evidence

of any of the witnesses which that the names of the purchasers were mentioned at the material time or in fact at all. It has always been our practice to apply these archaic provisions of the Mejelle strictly. That being so this appeal must be allowed with costs here and below on the lower scale to the first and second appellants together with LP. 10 advocate's fee for attending the hearing of this appeal. As for the third appellant he is not entitled to costs nor will he have to pay them. There was no necessity for him to appeal since there is nothing in the judgment of the learned Magistrate which in any way affects him. The judgment of the Magistrate accordingly must be set aside and the respondent's action dismissed.

Delivered this 24th day of January, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 246/40.

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

Before:— Copland, J. and Rose, J.

In the appeal of:

David Sternberg — Appellant.

v.

Samuel Aaranson. — Respondent.

Unopposed appeal from Ruling of President, District Court, that question whether a person was or was not a member of Jewish Community a matter to be decided by Special Tribunal — Criterion for determinaton of question of membership in Jewish Community — Jurisdiction of Rabbinical Court in matters of confirmation of wills.

1. Any person not on register duly established for members of Jewish Community — technically not a member of that community.
2. Rabbinical Court has no power to give any decision with regard to validity of a will made by a person not a member of Jewish Community, such power vests in District Court only.
3. Where no jurisdiction conferred upon Religious Court by Order-in-Council or Ordinance consent or mistake on part of litigants cannot give Court such jurisdiction.

Eliash for Appellant.
Schwarz (by delegation) for Respondent.

Appeal from ruling of District Court, Haifa, dated 31.10.40.

JUDGMENT.

This is an appeal from a judgment of the learned President, Judge Edwards, in a succession case, where he held that the question whether a person was or was not a member of the Jewish Religious Community was a matter to be decided by a Special Tribunal. He thereupon referred the case to a Special Tribunal. The appeal is not opposed but has to be taken by the appellant in order that he may get his Order of Probate from the Court competent to give it to him.

Dr. Eliash argues that whether a person is a member or not of the Jewish Community is purely a question of fact and he bases his argument on the provisions of Article 51 of the Order-in-Council as amended and the Jewish Community Rules which were made under the Religious Communities Organisation Ordinance which by the amendment to the Order-in-Council, have been declared to be lawfully enacted. It was proved by affidavit, and in fact not disputed, that the deceased was not on the register of members of the Jewish Community. That, as I say, was not disputed in any way and it seems to us that the proof whether a person is or is not technically a member of the Jewish Community must be decided by the fact whether he is or is not on the register duly established for such members.

Under Article 53 of the Order-in-Council, the Rabbinical Courts of the Jewish Community have the exclusive jurisdiction with regard to confirmation of wills of members of their community other than foreigners. It follows that if a person is not a member of the community the Rabbinical Court has no power whatever to give any decision with regard to the validity of a will and no consent or no mistake on the part of litigants can give a Court jurisdiction where that jurisdiction is not conferred by Order-in-Council or by Ordinance. It is clear in this case, that the deceased was not a member of the Jewish Community and that, therefore, the only Court having jurisdiction in this matter of probate was the District Court and the learned President seems to us to have come to a wrong conclusion when he declined jurisdiction and referred the matter to a Special Tribunal. The appeal must therefore be allowed, the rulling of the learned President must be set aside and the case remitted to the District Court to be dealt with in the normal course. The appellant is entitled to his costs both here and below on the lower scale to include the sum of LP. 10 advocate's attendance fee at the hearing of this appeal, to be paid out of the estate.

Delivered this 24th day of January, 1941.

British Puisne Judge.

CRIMINAL APPEAL NO. 3/41.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the application of:

Eliza Ohannes Lireshian — Applicant.

v.

The Attorney-General — Respondent.

Conviction of possession of dangerous drugs — Absence of words in sec. 6 *and sec.* 7 *of Dangerous Drugs Ordinance making possession of dangerous drugs an offence — Accused's right to have benefit of doubt.*

1. Neither sec. 6 nor sec. 7 of Dangerous Drugs Ordinance contain specific words making it an offence to possess dangerous drugs; doubtful whether sec. 8 does.

2. Where doubtful whether or not an offence created by a certain enactment, accused entitled to benefit of doubt.

Elia for Applicant.

Junior Government Advocate (*Ghussein*) for Respondent.

Application for leave to appeal from judgment of District Court, Jerusalem, dated 17.1.1941, hereby applicant was convicted of being in possession of dangerous drugs contrary to Section 7(1) and (2) of Dangerous Drugs Ordinance, 1936, and sentenced to one year's imprisonment.

JUDGMENT.

This is an application for leave to appeal from a judgment of the District court of Jerusalem, convicting the applicant, of an offence under Section 7 of the Dangerous Drugs Ordinance 1936, of possession of cocaine.

The point has been taken by the applicant, that there is nothing in section 7 which makes it an offence to possess dangerous drugs, and the same argument, of course, would apply to an offence under Sec. 6. There are no specific words in either Section creating an offence. The learned Judges of the District Court held that this was a regrettable omission and thereupon proceeded to remedy that omission but, I am afraid, that is in the province of the legislature, not of the Courts. It is argued that Section 8 of the Ordinance makes it an offence to aid, abet or counsel the commission of any offence under Section 7.

The wording of these sections is obscure and the matter, in our opinion, is extremely doubtful. One cannot say definitely that an offence has been created. That being so the applicant is entitled to the benefit of that doubt. The application for leave to appeal is granted, the appeal is allowed and the conviction quashed.

Delivered this 20th day of January, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 242/40.

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:

Yishuv Co. & Co. and 5 others. Appellants.

v.

1. Fishel Weitsman
2. Registrar of Partnerships Respondents.

Partnership contract containing provisions for expulsion of partner who appears detrimental to partnership business — Meeting passing resolution in absence of partner to expel him from partnership — Uberrima fides element in partnership relations — Requirements of common justice with regard to person amenable to jurisdiction of judicial or quasi-judicial tribunal — Effect of partner's failing to avail himself of opportunity to answer at meeting allegations made against him.

1. Clause in partnership contract enabling one partner to expel other can only be relied upon where good faith; where motive really to get undue advantage over other partner by purchasing him out on unfavourable terms, clause not available.
2. Wherever it is sought to expel a person from partnership he must be informed of it and should have opportunity of defending himself.
3. Where a meeting regularly convened for prurpose of expelling a partner and he knows of meeting and its object and, able to attend and answer allegations made against him, does not attend, he cannot complain of resolution passed against him.

Goitein and *Shaoni* for Appellants.

Smoira and *Bar-Shira,* for Respondent No. 1.

Respondent No. 2 absent — served.

Appeal from judgment of District Court, Tel-Aviv, dated 18.10.40.

JUDGMENT

This case raises an interesting point of law and arises out of an agreement of partnership. Article 22 of that agreement provides that—

> "Should a member contravene any of the provisions of this agreement or should he appear to be detrimental to the partnership business by any act or omission, the management shall be entitled to move the general meeting to expel such member from the partnership."

and Article 17 provides for the formalities to be followed to convene a general meeting.

It seems that some of the partners, who are the Appellants before us, desired to invoke clause 22 against the Respondent, and that a meeting was summoned for and held on the 13th of October, for that purpose. At that meeting a resolution was passed excluding the Respondent from the partnership, and in consequence he brought this action before the District Court.

That Court found in his favour, placing reliance upon the judgment of Romer J., in Barnes v. Youngs, 1898, 1 Ch. D., page 414.

Mr. Goitein for the Appellants opened the appeal by stating that that decision was over-ruled by Green v. Howell, 1910, 1 Ch. D., page 495, and it is true that in that report and in another report in another series the head-note so states, but in fairness to the Court below I may point out that Barnes v. Youngs is still quoted as an authority in Hailsham. Vol. 24, pages 496 and 497.

Neither of these cases is strictly an authority in this case, as the terms of the agreements were different, but in Green v. Howell the Judges of the Court of Appeal discussed the principles which a Court should take into consideration when dealing with matters of this kind, in particular at page 504 the Master of the Rolls said —

> "We have had a great deal of discussion upon the mutual obligations and duties of partners. So far as I am concerned, I am disposed to think they may all be embraced in the well-known phrase that a partnership is a contract in which uberrima fides is required. A clause like this enabling one partner to expel the other cannot be relied upon unless there is good faith; it cannot be used if the motive is really to get an undue advantage over the other partner by purchasing him out on unfavourable terms; but that is the root of the principle, so far as I am aware, applicable to partners in these relations. There is also a further principle, not in any way confined to partnership transactions, which is this, that wherever it is left to a judical tribunal, strictly so called, or a quasi-judicial tribunal, to determine whether a person is or is

> not properly excluded, common justice requires that explanation and notice shall be given to the person said to be amenable to the jurisdiction and that he should have an opportunity of defending himself."

and at page 510 Buckley L.J., as he then was, stated:

> "It is familiar to all of us that partnership relations are relations in which the greatest good faith must be observed between the parties. ....It is also a familiar principle, which appeals to all of us as a matter of justice, that a man should never be condemned without being heard."

I would was also draw attention to a passage in the judgment of Jessel M.R., in Russell v. Russell, 14 Ch. D., at page 479, where, speaking of the decision in Blisset v. Daniel, he says:

> "There the Vice-Chancellor was of opinion that even in that limited case, where it was only inter se as regards the partners themselves, yet if the reason, as far as the other partners were concerned, was misconduct, they ought to give the partner sought to be expelled an opportunity of explaining his alleged misconduct......"

I incline to the view that where, as in a case such as this, the partners themselves are to enquire inter se, the second principle tends to merge into the first principle.

To turn to the facts of this case, I think it is clear that the meeting was regularly convened. It is clear that the Respondent knew the object of the meeting, because on that day he left a note at the place in which the meeting was to be held, in which he stated —

> "I request you, therefore, to discontinue these shameful actions and to cancel any discussion as to my exclusion from the partnership."

and although there has been some argument as to the precise interpretation of the agenda, before the Court of Trial he admitted that he knew that his expulsion from the partnership was to be discussed. Had the meeting been fixed for a date when the other partners knew that the Respondent could not attend, it might be said that that offended against one or other of the principles, but that was not the fact. Had the Respondent attended the meeting and not been allowed to answer the allegations which were made against him, or had he attended and asked for an adjournment in order to controvert the allegations by the production of documents or witnesses, and this had been refused, again it might be said that one or both of the principles had been violated. But if he himself, knowing of the meeting and its object, and able to attend, does not attend, he can hardly complain.

From the minutes it appears that the meeting considered this question, among others. (The learned President would seem to be wrong when

he states that all other matters on the agenda, save the expulsion of the Plaintiff, were ignored). The various members present appear to have expressed their view, and a resolution was passed excluding the Respondent.

It is said by Dr. Smoira, on behalf of the Respondent, relying upon the passage in the judgment of Cozens-Hardy, M.R. to which I have referred, that a notice should have been given to the Respondent setting out the allegations against him. I do not think that the learned Judge is really saying anything more than is said by Buckley L.J., when he states that a man should not be condemned without being heard.

In my opinion a partner whom it is sought to exclude from a partnership -by a decision of the other parters, should have an adequate opportunity of defending himself, which must presuppose a knowledge of the allegations against him, but I do not think there is any rule of law that he must be given a written notice. In this particular case the parties had expressly provided that any such question should be raised by the management at a general meeting, and I think it was sufficient if that was done.

In my view there was, in this case, compliance with the principles to which I have referred.

It only remains, therefore, to consider, whether the partners could come to the conclusion to which they came. I have already cited the material part of Arrticle 22 of the partnership agreement. Whether a member is detrimental to a partnership business must be essentially a matter for the partners to decide, and the Court can only look to see if there was any evidence upon which they could reasonably come to that conclusion. In this case the learned President sets out the allegations which were made, and in particular he says —

> "Although the conduct of the Plaintiff in leaving the store may have given rise to some legitimate grounds of complaint, I must hold that the proceedings at the meeting expelling him were entirely irregular."

I think it is clear, therefore, that there were grounds upon which the partners could decide as they did.

The appeal should be allowed, the judgment of the District Court will be set aside, with costs therein to the Appellants, and the Appellants will have costs in this Court on the lower scale, and we certify LP. 15 for attending the hearing, to be paid by the first respondent.

Delivered this 9th day of January, 1941.

Chief Justice.

CIVIL APPEAL NO. 261/40

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

Before:— Copland, J., and Khayat, J.

In the appeal of:
1. Moshe Matalon
2. Moshe Carasso — Appellants.

v.

Zvi Goldberg — Respondent.

Provision of liquidated damages in contract for sale of land — Purchaser failing to complete allegedly owing to currency restrictions by Government of country where his capital kept — Action by purchaser for return of sums paid on account of purchase price less sum stipulated in contract as liquidated damages — Defence that statement of claim discloses no cause of action — Defendant claiming damages as against all sums received and also a further sum to cover deficiency — Interlocutory judgment that Plaintiff in default, no force majeure as claimed by him and damages to be determined — Amendment of statement of claim so as to include sum temporarily excepted in original claim — Final judgment for return of all moneys paid by defaulting purchaser— Distinction between deposit by way of guarantee and part payment of purchase price — Right of defaulting purchaser to claim back all sums paid on account of purchase price subject to deduction of damages as may be found due to vendor — Effect of deficiency in area of land owned by vendor as compared with that to be sold according to contract — Effect of non-appearance in Land Registry on day fixed for completion — Bar to claim of damages by default of party claiming.

1. Where contract provides that in case of breach by purchaser vendor entitled to retain out of sums received on account of purchase price a sum certain as liquidated damages and sum found to be a penalty, vendor must return all he received after deducting, if no default on his part, actual damages suffered, if any.

2. Statement of claim by a defaulting purchaser in which he claims back money paid on account of purchase price alleging that he was unable to complete owing to force majeure discloses

a good cause of action, notwithstanding Court later finding there was no force majeure.

3. Where defaulting purchaser claims back sums paid on account of purchase price less sum which vendor might retain as agreed liquidated damages, expressly reserving however all rights as to it, and vendor claims to be entitled to all sums as damages suffered, purchaser entitled to say that no damages were payable and by amendment of Statement of Claim ask for return of all sums paid.

4. Fact that failure of consideration due to purchaser's default — not sufficient in itself to deprive him from right to recover money paid on account of purchase price.

5. Where both parties in default, neither entitled to damages.

6. Vendor not appearing in Land Registry on day fixed for completion, even where appearance only a formality, — in default and cannot succeed in a claim for damages.

7. If area of land actually owned by vendor less than area of land to be sold according to contract, purchaser entitled to withdraw, even where difference a very small one.

Edit Note: as to 1: Howe v. Smith (27 Ch. D. 89) distinguished; Mayson v. Clouat (1924, A.C. 980) followed.

as to 4: see C.A. 133/38 (4 CtLR 98) distinguished; see C.A. 56/26 1. PLR 131, C.A. 108/38 3 CtLR 279, C.A. 133/38 4 CtLR 98, C.A. 97/38 ibid 101, C.A. 217/38 ibid 242.

as to 5: Privy Council 47/32 (1 PLR 831) followed; see C.A. 131/38 4 CtLR 126 & Edit Note thereto.

as to 7: Compare C.A. 97/35 7 C. Of J 175.

Goitein for Appellants.
Eliash for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 15.11.40.

JUDGMENT

We have already announced that in our opinion this appeal failed, and we now give our reasons for so holding.

The facts are simple and are not in dispute. By a contract dated the 4th October, 1935, the respondent undertook to purchase from the appellants a plot of land in Tel-Aviv, of the area of 710 square metres, the boundaries being given in the contract, for the price of LP. 3,786.750.

The sum of LP. 1,000 was paid on signing. By agreement between the parties a further sum of LP. 400, instead of LP. 900, as stipulated in the contract, was paid by the respondent on the 28th November, 1935, and, by a further addendum, the time for payment of the balance of LP. 500 was extended to the 28th November, 1936, when transfer was to take place. By clause 5 of the contract the sum of LP. 500 was agreed upon as liquidated damages and it was provided that if the respondent should commit a breach of the agreement the appellants should be entitled to retain the amount of LP. 500, out of the sums received on account of the purchase price, the balance of the latter to be returned to the respondent. The respondent further paid LP. 87.915 mils for road-making.

The respondent was unable to complete, and admits this, giving the reason that owing to currency restrictions imposed by the Polish Government he was unable to get the necessary sums from Poland.

On the 11th November 1939, the respondent entered an action in the District Court claiming that the sum of LP. 987.915 should be returned to him out of the sums already paid by him on account of the purchase price, at the same time without waiving his right to the balance of LP..500 but excepting it for the time being in case the appellants should be entitled to damages under clause 5 of the contract on account of his, the respondent's, admitted default. By an amendment of the claim, which was allowed by the Court on the 16th September 1940, he claimed the return to him of this further sum of LP. 500.

The appellants on the 18th February, 1940, filed a statement of defence. This was divided into two parts — the first is headed "I. Denials". — and the second — "II. Defence by way of counterclaim" The main part of the defence appears to be in Part II. They denied that the respondent's claim disclosed any cause of action, they alleged that the respondent had committed a breach of the contract (which had already been admitted), and they further claimed that they had performed all the terms and conditions of the contract to be performed on their part and by the respondent's default they had suffered damages to the extent of LP. 1500. They admitted having received the sum of LP. 1,487.915 mils and counterclaimed for the balance of LP. 12.085mils.

By an interlocutory judgment dated the 19th June 1940, the Court decided that, since the respondent had admitted that he was in default, and holding that the reasons for that default did not amount to force majeure as claimed by the respondent the respondent was not entitled to the return of his money, and that the remaining point for determination was the amount of damages to which the respondent was liable.

The Court held that the sum of LP. 500 mentioned in clause 5 of the contract was a penalty and not liquidated damages and the case was adjourned for hearing evidence, in the first place that the appellants were ready and willing to perform their part of the contract and were not in default themselves and, secondly, on the amount of damages suffered by the appellants.

In a final judgment dated the 15th November, 1940, the Court held that both parties were in default on the appointed date and accordingly gave judgment for the respondent for the return of the LP. 1,400. The sum of LP. 87,915 the balance of the claim, seems to have mysteriously disappeared, but no appeal is made on that point. The Court also held that up to 28.11.38 no damages had been suffered by the appellants.

The arguments on this appeal have ranged over a wide field, but the main ground, I think I am right in saying, is that the respondent's statement of claim disclosed no cause of action. The appellants say, rightly, that a claim and counterclaim are two distinct actions except for purposes of execution and that when once the claim failed, as fail it must, when the respondent had admitted his default, the claim should have been dismissed without any regard to the counterclaim. But I think that it is quite clear that the learned Judge, in the interlocutory order, had in mind the terms of clause 5 of the contract, and that he never intended nor indeed purported to hold that the respondent was liable to forfeit his LP. 1,400 together with a further sum for damages. If he did so intend or purport, then he would obviously be wrong. The LP.1,400 was not paid as a deposit by way of guarantee to be forfeited on failure to complete, but was in part payment of the purchase price, and the case quoted by Mr. Goitein, Howe v. Smith —27 Ch. D. 89, does not apply here as that case referred to a claim to refund of a deposit. Mayson v. Clouet, 1924 A.C. p. 980, lays down quite clearly that whether a claim to refund of the purchase price can succeed depends in the first instance on the terms, if any, of the contract on this point. And clause 5 of this contract here makes specific provision in this regard, for it states that the balance of the money received is to be returned after deduction of LP. 500 as liquidated damages. Since the sum of LP. 500 has been held to be a penalty, and neither side contests this, then clause 5 would have to be amended to provide that the balance of the LP. 1,400 would be returnable after deducting the actual damages suffered, if any. To my mind the statement of claim discloses a very good cause of action, and I think that the amendment to the statement of claim was rightly

allowed, since the respondent, as plaintiff, had expressly reserved all rights in regard to this amount of LP. 500. Since the appellants claimed that they were entitled to LP. 1,500 damages, the respondent wass fully entitled to say that no damages were payable, and the whole of the LP. 1,400 was returnable. The amendment, had to be allowed in order that the rights of the parties might be properly determined.

Mr. Goitein has placed considerable reliance on the case of Hawa and others v. Rayyas and another — C.A. 133/38 *), 5 P.L.R. 363, where the refund of purchase price was refused, there being a failure of consideration due to the purchasers' default, and this Court held that the purchasers could not set up their own default as a ground for recovery. But the circumstances of that case were very different from the present case. There the vendors had given an irrevocable power of attorney to the purchasers, who at any moment could have used that power and obtained the property for which they had paid. This Court held that in such circumstances where the failure of consideration was due entirely to the purchasers' own action, and particularly after a lapse of twenty years, the action for the return of the purchase price must fail. I do not think that that case has any bearing on the present dispute.

The position therefore, as I see it, is this — that the respondent is entitled to claim back the sums he had paid on account of the purchase price, subject to a deduction for whatever amount may be found due to the appellants as damages for the respondent's default. And this brings us to the question as to what damages, if any, are payable. Any party claiming damages must prove that he was willing and able to carry out his part of the contract, and this applies not only to a plaintiff on the main claim, but also to a defendant who seeks to establish a claim to damages on a counterclaim. In this case therefore the appellants, if they claim damages, must establish this vital point, that they were in a position and willing to carry out their part of the contract. The doctrine set out in Chedid v. Tennenbaum Privy Council Appeal 47/32, P.L.R. 831, applies to any claimant's damages. The learned Judge held that the appellants had also made default on the contract and I think that he was right in so holding. The contract stated that the area of the land to be sold was 710 square metres — See the first recital, where the appellants were stated to be the owners of a plot of this area. In fact, according to the Land Registry extract Ex. P. 1, they were actually the owners of only 699 square metres on the 25th July, 1935, which is the last entry prior to the date of the contract.

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*) 4 CtLR. p. 98.

For this reason only, the respondent, according to Article 226 of the Mejelle, could have disclaimed the contract. Also, it is not denied that the appellants did not appear in the Land Registry, on the date fixed for completion. This may be only a formality, but it may at the same time be a very necessary formality. There was, in my opinion, sufficient evidence before the District Court to justify that Court's finding, that the appellants too were in default and that being so, they cannot succeed in a claim for damages. Both sides being in default, neither is entitled to damages. In accordance with the terms of the contract, therefore, the respondent was entitled to the return of the LP. 1,400, part payment by him of the purchase price; and the District Court was right in my opinion in its judgment. Holding this view, the question of the amount of damages does not arise.

The judgment under appeal makes no mention of the result of the counterclaim, but it is obvious that since the Court held that no damages were payable, the counterclaim failed. In this connection it is not quite correct to say that the counterclaim was for LP. 12.085 mils. It was in effect for LP. 1500, that being the amount of damages alleged to have been suffered by the applicants. To the part satisfaction of this sum, they admitted the receipt of LP. 1,487.915 and therefore only actually LP. 12.085 mils, but to succeed for this amount they would have had to establish that they had suffered damages to the amount of LP. 1,500.

There only remains the question of interest on this sum of LP. 1,400. The District Court omitted to award interest though this was claimed in the original statement of claim. By notice under Rule 339 of the Civil Procedure Rules, 1938, the respondent has served notice on the appellants that he intended to ask that the decision of the District Court should be varied by the addition of interest at the rate of 9 per cent per annum on the amount of LP. 900 from the date of action, the 11th November, 1939, and on the amount of LP. 500 from the 16th September, 1940, until payment. We think that he is entitled to this, and the judgment under appeal will be varied accordingly. Subject to this the appeal will be dismissed with costs on the lower scale, to include LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this 14th day of February, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 251/40.

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

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

In the appeal of:

Attorney-General — Appellant.

v.

Said Khamis and 7 others. — Respondents.

Action by Government against several defendants for eviction from land — Defendants invoking arbitration agreement after some of them have taken steps in action — Effect of one of parties to arbitration agreement not taking steps in action — Preference of practice not to split claim into two parts, part to be tried before arbitrator and part before Court.

1. Where agreement between several parties provides for arbitration and in an action brought by a party against all others majority of defendants have taken steps in action while one has not, latter should not lose his right to arbitration merely because of course taken by his fellow defendants.

2. Where defendants who could invoke arbitration agreement omitted to do so and took steps in action while one of them did not, claim against all should go to arbitration if defendants so ask.

Toukan for Appellant.

Respondents Nos. 1, 4 and 7: In person.

Respondents Nos. 2, 3, 5, 6 & 8: Absent — served.

Appeal from judgment of District Court, Haifa (in its appellate capacity), dated 25.9.40.

JUDGMENT

This is an appeal by the Attorney-General from a judgment of the District Court which arises in the following circumstances. The Attorney General brought an action for eviction from certain land against the respondents. The respondents allege that this land is covered by a lease entered into some years ago with Government with regard to

which there was an agreement to go to arbitration in the event of any dispute arising.

The first point to be decided in this case is whether the land now in dispute is the same land, or is part of the land, covered by the lease. It seems to us that that is a matter which the Court of first instance, that is in this case the Magistrate of Haifa, should decide. If he finds as a fact, after hearing evidence, that the land now in dispute is covered by the lease then the question of arbitration of course arises. If, on the other hand, he finds that it is not so covered, he can dispose of the case in the ordinary way.

A point has been taken by the Attorney-General that, in any event, the respondents have lost their right to arbitration by reason of the fact that the majority of them have taken steps in the action. Having regard to the grounds of appeal and also to the finding of the District Court on this matter, we are treating this case on the basis that at least one of the respondents has taken no steps in the action. In the absence of any authority to the contrary, it seems to us inequitable that any respondent who has taken no step in the action should lose his right to arbitration merely because some of his fellow respondents have taken such steps. I suppose, technically, that it might be argued that the Court should proceed to determine the action as against those defendants who have taken steps in the action. This however would mean splitting the claim into two parts; part to be tried before the Arbitrator and part to be tried before the Court. This seems to us to be a most inconvenient course and we therefore think that, assuming that the Magistrate finds the land to be subject to the arbitration agreement, then the claim against all the respondents should go to arbitration. The appeal must therefore be allowed and the case remitted to the Magistrate to make the necessary findings, after hearing such evidence as may be required, and to determine the matter accordingly.

Having regard to all the circumstances of this case we think that the fairest order is that the costs of this appeal and the costs of the preliminary proceedings before the Magistrate and before the District Court, should be in the cause.

Delivered this 14th day of January, 1941.

British Puisne Judge.

CRIMINAL APPEAL NO. 146/40

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of:

Samuel Solomon Sgheir	Appellant.
v.	
The Attorney-General	Respondent.

Charge of being accessory to forgery and uttering false documents — Case for prosecution depending largely on confession allegedly made by accused — Finding by trial Court that confession was free and voluntary—Non-interference of appeal Court where judgment appealed from shows that trial Court applied its mind to all relevant considerations before making its finding.

1. Where judgment appealed from shows that trial Court, before finding that accused's confession was free and voluntary, applied its mind to all relevant considerations, Court of Appeal will not interfere with finding.

2. (Obiter) Not right and not desirable that statements should be taken from persons in custody at late hours of night.

Edit Note: see Cr.A. 75/39 7 CtLR 29.

Goitein and *Wilner* for Appellant.

Junior Government Advocate (*Salant*) for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 16.12.40, whereby the appellant was convicted of being an accessory, contrary to section 23 of Criminal Code Ordinance 1936, to forgery contrary to section 337 of Criminal Code Ordinance and to uttering false documents contrary to section 340 of Criminal Code Ordinance, 1936, and sentenced to two years imprisonment, with special treatment.

JUDGMENT

We need not trouble you Mr. Salant.

The appellant was convicted before the District Court of Tel-Aviv of being an accessory contrary to Section 23 of the Criminal Code

Ordinance, 1936, on counts 1 to 8 of an information of 12 counts, namely, to forgery contrary to section 337, and to uttering false documents contrary to section 340 of the Criminal Code Ordinance. The case for the prosecution depended largely upon statements in the nature of confessions alleged to have been made by the appellant. Mr. Goitein has addressed us at considerable length as to the various reasons why these confessions should not have been believed by the learned Judge who tried the case but when we read the judgment of the learned Judge, it is quite clear that he applied his mind to all the relevant considerations, that he considered all these points and that he found that the confession was free and voluntary as was also the statement of the appellant that LP. 850 was his share.

Now in the face of definite findings of fact, it is always very difficult for an appeal Court to disagree with a trial Court. It seems to us that when the appellant made his statement to the Directors of Barclays Bank he could well have complained then that he had been beaten and that he had been forced to say that he was guilty of these frauds. He did not do so. As I said, we find it very difficult to understand why he did not.

The only point really of interest is whether, if the appellant was wrongly in custody at the time the statement was made, that of necessity makes the statement inadmissible. We do not think that he was wrongly in custody at this particular time and therefore on that ground we cannot find that the statement given was necessarily inadmissible, but we would like to say this that it is not right and it is not desirable that statements should be taken from persons in custody at late hours of the night. It is quite possible that if we had been trying this case in first instance we might not have convicted him but we cannot say that the conviction is wrong on the findings made by the Trial Judge, which findings are supported on the evidence heard by him. There is no appeal against sentence but in the circumstances, having regard to the large amount of frauds amounting to some LP.3000, we do not think that the sentence of two years with special treatment can in any way be termed other than lenient. For these reasons the appeal must be dismissed.

Delivered this 20th day of January, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 5/41

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

Before:— Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:
Haim Gorodisky Appellant.
v.
1. Zalman Forer
2. Ezra Forer
3. Israel Forer of Rehovot Respondents.

Party in whose favour award given failing for 2 or 3 years to take steps to enforce it — Action for setting aside award entered 2 or 3 years after its issue — Application of English law as to time within which to apply for enforcement or for setting aside of award — Qualification of rule as to reasonable time within which to apply for enforcement or setting aside of award — Damage caused by unreasonable delay in applying for setting aside award outweighed by other party's own fault in not asking for its enforcement.

1. As no statutory time limit in law of Palestine, an application to set aside award must be made, following English principles, within a reasonable time after issue of award.

2. Petition to set aside award should not be dismissed on ground that not brought within reasonable time, unless other party, by no fault of his, has suffered damage because of delay.

3. Party in whose favour award given cannot complain that he suffered damage by delay of other party in applying to set aside award, while damage, if any, caused entirely by his own fault in not asking for enforcement of award.

Edit. Note — As to 1: C.A. 75/39 6 CtLR 173; C.A. 93/35 7 C of J 53; As to 2: Atwood v. Chichester (38 L.T. 48) followed; C.A. 247/38 (5 CtLR 39) distinguished.

Iszajewicz for Appellant.
Goitein (by delegation from Felman) for Respondents Nos. 1 & 2.
Respondent No. 3 — absent.

Appeal from judgment of District Court, Tel-Aviv, dated 29.11.40.

JUDGMENT

This is the considered judgment of the Court.

The facts of this case are as follows: Arbitration proceedings took place between the parties to this appeal and the award was dated the

12th November 1937, more or less in favour of the Respondents, who however took no steps to enforce it. Various proceedings between the parties then took place in the Magistrate's and District Court, but it was not until the 22nd July, 1940, that the Appellant entered an action in the District Court seeking to set aside the award. The District Court made no definite findings as to the allegation of misconduct on the part of the arbitrators nor on the point raised that the award was issued out of time, as stated by the Appellant as his grounds for setting aside of the award, but dismissed the petition on the ground that an application to set aside an award must be made within a reasonable time, and that a delay of nearly three years was not reasonable. It is common ground that there is no time limit in the law of Palestine within which an application to set aside an award must be made, such as is to be found in England, in Order 64, Rule 14 of the Rules of Supreme Court.

Before us the Appellant has argued that there is no time limit, whether specific or reasonable, in this country — that an application to set aside an award is an action, and that therefore the general period of limitation of actions only applies, and he relies on sections 14 and 15(1) of the Arbitration Ordinance, Cap. 6. He also relies upon the fact that the Respondents were themselves negligent in not seeking to enforce the award and that if they have suffered damage, it is due entirely to their own fault. He has referred to the Palestine Building Syndicate Ltd. v. Breitmann — C.A. 247/38* (6 P.L.R. 31) as authority for the proposition that there is no necessity to apply to set aside an ineffective award, but that was a case where the award was a nullity on the face of it, which is not the case here. Alternatively he says that if it is a question or reasonable time, then the correct statement of the law is to be found in Atwood v. Chichester (38 L.T. 98 **. That was an action by a married woman to set aside a judgment given against her in default, and which had been entered by her after a long delay. The court held that, in view of the fact that the married woman was under the legal liability in the original state-

* 5 CtLR p. 39.

** The correct page is 48. The relevant passage in Atwood v. Chichester (38 L.T. 48) is as follows:

Per Bramwell L.J.: "It is said that she comes very late to seek relief; so she does. This is an objection which I have vety often heard made, and the rule as to the point is this: Where by coming late the Applicant has done some irreparable injury to the other side, then one of the parties must suffer and it should be the one who does not come in time; but where the mischief is not irreparable the objection of lateness ought not to be listened to." — Ed. N.

ment of claim, an application to set aside, even though made after a long delay, should be granted unless the opposing party had suffered irreparable damage by reason of the delay.

The respondents in reply have argued that the power conferred by s. 13 of the Arbitration Ordinance to set aside an award is discretionary, that the judgment in Benjamin Maschieff v. Fritz Zonnenfeld — C.A. 171/37 (CtLR Vol. 2, p. 137) lays down that the principles of English law and procedure in arbitration should be followed, where not opposed to Palestine law, and that since under English law an application to enforce an award must be made within a reasonable time, by analogy in this country an application to set aside should equally be so made, in the absence of any statutory time limit. They also argue that they have suffered damage since now, owing to the length of time that has elapsed, it is quite impossible to say what really happened in the arbitration proceedings. They also contend that by reason of section 15 of the Ordinance, and rule 305 of the Civil Procedure Rules 1938, an application under section 15(1) is not an action, and therefore the general period of limitation of actions cannot apply.

There is also this further consideration to be borne in mind, that it can be argued that an arbitration award is similar to a judgment (see s. 14) and that a party, seeking to enforce it, should not be so strictly limited as to time, as in the case of a party seeking to set aside a judgment or an award, in other words that what is a reasonable time should be construed more liberally as regards the former, than as regards the latter.

We are satisfied that, in the absence of any statutory time limit in the law of this country, an application to set aside an award must be made, following the English principles, within a reasonable time after the issue of the award, and the question therefore remains whether, on the facts of this case, the District Court was right in dismissing the petition on the ground that it had not been made within a reasonable time. The question is not free from difficulty, but on the whole we think that the principle laid down in Atwood v. Chichester (supra) is the one which the Courts of this country should apply, that is, that the petition to set aside should not be dismissed on the ground that it was not brought within a reasonable time, unless the other side has suffered damage because of the delay. And in this case it cannot be argued that the delay of the Appellant has caused damage to the Respondents. Any damage which they may have suffered has been caused entirely by their own action in not asking for the enforcement of the award, which they could have done at any moment, if they

had so chosen.

For these reasons, we think that the appeal must be allowed and the judgment of the District Court set aside, and the case remitted to the District Court for that Court, after hearing any further evidence which may be tendered, to determine whether the award was made in time or not, and whether there was such misconduct on the part of any of the arbitrators which would justify the court in its discretion in setting aside the award.

Costs to await the result of the retrial. We certify the sum of LP. 15 for advocate's attendance fee on the hearing of this appeal.

Delivered this 21st day of February, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 255/40.

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

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

In the appeal of:

Perl Lider — Appellant.

v.

The Municipal Corporation of Jerusalem. — Respondent.

Claim by buyer in execution for damages done to property after possession taken by Execution Office and before registration in his name — Bidder's remedy in case of deterioration of property — Implied waiver — Execution Law, Art. 112.

Purchaser of immovable property through Execution Office knowing it was damaged after possession taken must be considered as having consented to take it in damaged condition.

Scharf for Appellant.
Saba Said for Respondent.

Appeal from judgment of District Court, Jerusalem (in its appellate capacity), dated 11.10.1940.

JUDGMENT

We need not trouble you Saba Eff. Said.

This is an appeal by leave from an appellate judgment of the Dist-

rict Court of Jerusalem, dismissing a claim for damages done to certain property bought in execution by the appellant, such damage having been inflicted on the property prior to the date when the property was registered in her name. Both Courts below rejected the claim and, in our opinion, rightly so. The appellant has relied upon the provisions of Article 112 of the Execution Law. We do not think that this in any way helps her. The effect of Article 112 is that if there is any dispute about the condition of the property at the time of its transfer then that dispute is determined by reference to its state at the time of taking possession. The meaning of this is perfectly clear. If it is alleged that the property has deteriorated through some act then the fact whether it has or has not deteriorated is determined by reference to the possession report. The appellant's remedy was, when she was aware of this deterioration, this damage to the property, to have withdraw her bidding which she would probably have been fully entitled to do. Instead of that she purchased the property which is now registered in her name. She must therefore be considered as having consented to take the property in its damaged condition.

In these circumstances the action and the appeal were bound to fail. The appeal must be dismissed with costs on the lower scale.

Delivered this 22nd day of January, 1941.

British Puisne Judge.

CRIMINAL APPEAL NO. 138/40.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of:

Mohammad Nimer Obeid — Appellant.

v.

The Attorney General — Respondent.

Conviction on a charge of attempted rape — Requirement of corroboration, as a matter of practice, in cases of sexual offences — Amount of evidence in complaint made by complainant immediately after assault.

1. Corroboration required as a matter of practice in cases of sexual offences.

2. Complaint by complainant immediately after assault only show consistency of complainant's story, also admissible to negative consent, but not corroboration as regards accused.

Edit. Note: R. v. Lillyman (1896 2 Q.B. 167) followed; referred to in Cr.A. 104/40 (9 CtLR 44); see Cr.A. 77/40 8 CtLR 57 and Edit. Note thereto.

Dajani for Appellant.
Acting Solicitor General (*Bell*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated the21.11.40, whereby appellant was convicted of an attempt to commit rape, contrary to Section 154 of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment.

JUDGMENT

The appellant was convicted before the District Court of Jaffa on a charge of attempted rape and was sentenced to one year's imprisonment. On appeal a point has been taken that, as a matter of practice, in these sexual offences there must be corroboration of the complainant's story and that there is no such corroboration to be found in the evidence of this case.

Now, the complainant made a complaint to her husband immediately after the event had taken place. It is quite clear on the authority of several cases begining with Reg. v. Lillyman — 1896 2 Q.B. 167, that such a complaint is not corroboration as regards the accused person but is evidence of the consistency of the complainant's story and also it is admissible in order to negative consent. The only other corroboration that is alleged is that the husband immediately proceeded to the scene and found certain signs of disorder, which seemed to indicate that a struggle had taken place. There is nothing in all this however which in any way implicates the accused as being corroboration of the complainant's story that it was this actual person who assaulted her, or in fact that the assault was in any way a sexual one. As we have said corroboration in these cases is required as a matter of practice and there is no such corroboration to be found here.

The appeal must therefore be allowed and the appellant discharged. The Acting Solicitor General admits that there are not sufficient grounds to support the conviction.

Delivered this 16th day of January, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 18/41.

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

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

In the appeal of:

Abdullah el Surani and 3 others — Appellants.

v.

Barclays Bank (D.C. & O.), Jaffa. — Respondent.

Appeal from ruling as to admissibility of evidence — Scope of Rule 317 of Civil Procedure Rules — Divergence from precedent.

1. Ruling given in course of hearing as to admissibility of a document or other evidence — not an order as contemplated by Rule 317 of Civil Procedure Rules (regarding appeals from decrees and orders) and cannot be appealed from.

2. Court of Appeal may deviate from judgment in a previous similar appeal in same proceedings, if in that appeal point was not taken.

D. Moyal for Appellants.
Papo for Respondent.

Appeal from order of District Court, Jaffa, dated 13.12. 40.

JUDGMENT.

I have no doubt that this appeal should be dismissed. It is in effect an attempt to appeal under Rule 317 against a ruling as to the admissibility of evidence — in this instance a document — given in the course of the hearing, and I am satisfied that that is not an order as contemplated by the rule.

The matter is complicated by the fact that a similar appeal in these same proceedings was entertained by this Court in September last, but I would point out that the Judge's ruling that the document was admissible in evidence was headed "order", which may have misled this Court, and moreover, I understand that the advocate who appeared for the Respondent on that application made certain submissions to the Court as to the effect of the lack of a necessary stamp, but that he did not take the point that no appeal lay from such a ruling.

The Respondents will have an inclusive sum of L.P. 10 costs.

Delivered this 17th day of February, 1941.

Chief Justice.

HIGH COURT NO. 10/41.

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

Before:— Copland, J., Frumkin, J. and Khayat, J.
In the application of:
Rifka Tamara Kaplan — Petitioner.
v.
1. Chief Execution Officer, Haifa.
2. Pinchas Kaplan. — Respondents.

Execution of Judgment of Religious Court directing that son should pass to custody of father. — Application to High Court for order not to execute judgment of Religious Court regarding custody of child on ground that that Court had no jurisdiction — Non-interference of High Court with order of Chief Execution Officer executing judgment which on face of it a good judgment.

High Court will not interfere with Chief Execution Officer's order enforcing judgment of Religious Court concerning custody of child if party attacking judgment for lack of jurisdiction took no steps to have question decided when matter before Religious Court.

Abcarius for petitioner.
Respondent No. 1 : Absent — served.
Eliash (by delegationfrom from *Weinshal*) for Respondent No. 2.

Application for an Order to issue to first Respondent directing him to show cause why his decision dated 24.1.41, in Execution Office File, Haifa, No. 375/40 should not be set aside, and why that part of the judgment of the Rabinical Court, Haifa, filed in the said Execution File, directng that the son of petitioner should pass to the custody of his father, the Respondent No. 2, should not be declared void and not subject to execution .

ORDER.

This is a return to an Order Nisi issued by this Court in a case in which the Chief Execution Officer had decided to execute a judgment given by the Rabbinical Court.

Now, the peittioner says that this is a matter which is not related

to divorce but concerns the custody of a child and was not within the jurisdiction of the Rabbinical Court, that is to say, that the Rabbinical Court had no jurisdiction in the matter unless consent of the parties was obtained. The Chief Execution Officer was faced with what purported to be a perfectly good judgment which he was asked to execute. The question of the jurisdiction of the Rabbinical Court to issue that judgment was one which could and should have been decided when the matter came before the Rabbinical Court, and the petitioner did not take those steps which she should have done in this matter. Even before the Chief Execution Officer, the petitioner declined to ask to refer the matter to the Special Tribunal. And the Special Tribunal is not a Court of Appeal from the Chief Execution Officer nor from any Court.

That being so, we think that the Chief Execution Officer had no option but to execute this judgment which on the face of it was a good judgment. That really disposes of this case. There must be some prima facie ground for saying that the order is wrong. The Chief Execution Officer was under no obligation to refuse to execute merely because certain allegations were made. The Rule Nisi must be discharged with LP. 5 total costs, to the second respondent.

Given this 21st day of February, 1941.

British Puisne Judge.

P. C. L. A. 11/40.
(CIVIL APPEAL NO. 109/40)

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

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

In the application of:

Catherin Bustros, widow of the late Nadra Habib Moutran and 9 others. Applicants.

v.

Najib Habib Moutran and 4 others. Respondents.

Application for leave to appeal to Privy Council — Power to extend time for filing guarantee in connection with application for leave to appeal to Privy Council.

Court of Appeal has no power to extend time for filing guarantee in connection with appeal to Privy Council.

Ossorguine (by delegation from *Weinshal*) for Applicants.
Kehaty for Respondent No. 1; and (by delegation from *F. Atallah*) for Respondents Nos. 2—5.

Application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court sitting as a Court of Civil Appeal in Civil Appeal No. 109 /40, dated 31.7.40.

JUDGMENT.

This Court has no power to extend the time for filing a guarantee. The applicant's motion must therefore be refused and the conditional leave granted on 20th September, 1940, is rescinded.

The Court fixes the sum of LP. 5 to the Respondents for the costs of the hearing.

Delivered this 17th day of February, 1941.

British Puisne Judge.

HIGH COURT NO. 1/41.

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

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

In the application of:

Aron Meier Fridman — Petitioner.

v.

1. Superintendent of Prison of Jaffa.
2. Magistrate, Petach-Tiqva, as Execution Officer.
3. Pessil Bash. — Respondents.

Unsuccessful application to High Court concerning imprisonment for debt — Fresh application to High Court in nature of habeas corpus in same matter.

Fact that an application in nature of habeas corpus has, unsuccessfuly, been made to High Court — not a bar to a second application to same Court, whether differently constituted or not; but application must fail if based upon same facts and same grounds and Court sees no reason to interfere.

Felman. for Petitioner.
Ex Parte.

Application for summons to issue directed to the first and second

respondents calling upon them to show cause why they should not produce the petitioner, Aron Meier Fridman, before this Court on a date to be fixed for the purpose of setting aside the warrant of arrest and releasing the petitioner and to await the further Order of the Court. It is further prayed that an interim Order may be made to release the Petitioner on bail pending the determination of this Petition.

JUDGMENT.

This is an application for an order in the nature of habeas corpus, and it is the second time in which this matter has been brought before this Court.

It is clear that applications for writs of habeas corpus may be made successively to Judges of the Supreme Court in England, but the position is somewhat different here. By the Order-in-Council and the Courts Ordinance the jurisdiction is vested in the High Court, and the High Court consists of not less than two Judges, as the Chief Justice may appoint, provided that at least one Judge shall be a British Judge.

We cannot admit that an applicant has the right to choose the Judges who shall sit upon any particular case, but no doubt he can apply for a writ to the High Court as it may be constituted, but it may be that repeated applications, based upon the same facts, might amount to an abuse of the process of the Court.

This application is based upon the same grounds as an application which was made a short time ago, and it concerns the imprisonment for debt of the Applicant. The matter was argued before a Magistrate, when he heard evidence, and having considered his judgment we see no reason to interfere.

Delivered this 7th day of January, 1941.

Chief Justice.

CIVIL APPEAL NO. 7/41.

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

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

In the case of:

Jawad Sam'an Farah — Appellant.

v.

Ismail Hassan Ikreizim. — Respondent

Partnership formed for purpose of reviving and cultivating an orange grove — Action by partner against co-partner — Scope of Partnership Ordinance.

Partnership Ordinance not applicable to a partnership formed by cultivators for purpose of cultivation of land.

A. Shehadeh for Appellant.

Anebtawi for Respondent.

Appeal from judgment of District Court, Jaffa, dated 20.12.40.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa dismissing the plaintiff's action on the ground that he was suing a partner whilst the partnership was still in existence and that this was contrary to the Partnership Ordinance. Unfortunately the attention of the learned Relieving President would not seem to have been called to the provisions of Section 6 (2) of the Partnership Ordinance. This Section says:—

> "Partnership by way of muzaraa or musakat and, in general, partnerships formed by cultivators for any common enterprise in connection with the cultivation of land shall not be deemed to be partnerships for the purpose of carrying on a trade, profession or industry."

It is quite clear, that there is not the least doubt that this is a musakat agreement. It is stated to be so in Clause 1(a) of the agreement, which is itself headed "Agreement of Musakat Company", and even if it were not an agreement of musakat it would be a partnership formed by cultivators in connection with the cultivation of land, as its whole purport is to revive and cultivate a certain orange grove.

The appeal will, therefore, have to be allowed, the case remitted to the District Court, to be tried on its merits. Costs to await the result of retrial. We certify the sum of LP. 10 Advocate's hearing fee on this appeal.

Delivered this 11th day of February, 1941.

British Puisne Judge.

HIGH COURT NO. 7/41.

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

Before:— Rose, J. and Abdul Hadi, J

In the application of:

Arie Leib Merkin — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Zehava Halevi.

3. Shalom Halevi. Respondents.

Final order of sale of mortgaged property — Chief Execution Officer staying execution of final order of sale for a period of 7 months — Discretionary powers of Chief Execution Officer.

Chief Execution Officer has discretion, even after final order of sale of immovable property, to stay execution for a further period of several months, and High Court will not interfere unless discretion improperly or unreasonable exercised.

Zeiger for Petitioner.
Respondent No. 1: absent — served.
Goitein for Respondents Nos. 2 & 3.

Application for an order to issue directed to the first Respondent calling upon him to show cause why his order dated 3.1.41, in Execution File No. 15400/37 staying for a further period of 7 months, up to July 30th 1941, the execution of the final order of sale already granted on 5.1.40 should not be set aside so as to allow the immediate transfer and registration of the mortgaged property in the name of the petitioner.

ORDER.

The question in this case is eminently concerned with the exercise of the discretion given in law to the Chief Execution Officer. Nothing was said to lead us to think that this discretion was improperly or unreasonably exercised. The rule will be discharged with costs and LP. 5.— advocate's attendance fee.

Given this 24th day of February, 1941.

British Puisne Judge.

HIGH COURT NO. 3/41.

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

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

In the application of:

Aron Meir Fridman Petitioner.

v.

1. Superintendent of Prison, Jaffa.
2. Execution Officer Petah-Tiqva.
3. Pessil Bash. Respondents.

Chief Execution Officer ordering payment of judgment debt by instalments — Imprisonment for failure to pay instalments — New order of imprisonment against defaulting judgment debtor — Habeas Corpus application for release of judgment debtor — Question of examination of judgment debtor as to his ability to pay.

Where after examination of judgment debtor order for instalments made, for him to satisfy Chief Execution Officer that his means altered since that order.

S. Felman for Petitioner.
Respondent No. 1 in person.
Respondent No. 2 absent — served.
Kadury for Respondent No. 3.

Application for a summons to issue directed to the respondents calling upon them to show cause why the petitiner should not be produced before this Court on a date to be fixed for the purpose of setting aside the Warrant of Arrest and releasing the Petitioner.

ORDER.

This is an application in the naure of Habeas Corpus to the Superintendent of the Prison at Jaffa and to the judgment-creditor, to show cause why the judgment-debtor should not be released. The Chief Execution Officer made an order of payment of the judgment debt by instalments, on the 1st October, 1940, the instalments to commence from the 15th of October. Default was made in the October and November instalments and the debtor was duly arrested. When he was about to be released, after the period of twenty-one day's imprisonment, a further Warrant of Committal was issued in respect of the instalment due on the 15th December which was executed on the 15th of January.

It has been argued on the debtor's behalf, that before a warrant is issued in respect of each separate instalment, there must be a fresh examination of the judgment-debtor. We do not agree. When once an examination has been held and an order for instalments made, it is for the judgment-debtor to show cause to the Chief Execution Officer, if he can, that his means have altered since the original order of instalments was given. Habeas Corpus proceedings in such a case as this are totally inappropriate and misconceived. If the judgment-debtor wishes to apply to the Chief Execution Officer he can at any moment. The rule is discharged with total costs at LP. 5, to the third respondent.

Given this 24th day of January, 1941.

British Puisne Judge.

HIGH COURT NO. 9/41.

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

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

In the Application of:
Hanina (Hana) Cohen — Petitioner.

v.

The Chairman and Members of the Local Town Planning Commission, Jerusalem — Respondents.

Structures made by husband without permit from Town Planning Commission in building belonging to wife — Judgment fining accused and ordering him to demolish structures made without permit or demolition to be carried out by Town Planning Commission — Ineffectiveness of order as regards execution by Town Planning Commission if procedure laid down in Town Planning Ordinance not complied with — Order affecting person not heard by Court — Judgment lacking necessary description and specification.

1. No valid order for demolition under Town Planning Ordinance without first hearing person against whom order may be made.

2. Order that demolition of building erected in contravention of Town Planning Ordinance shall be carried out by Town Planning Commission can only be made after person against whom original order of demolition was directed failed to comply with it.

3. Judgment for demolition — not executable if not specifying what building to be demolished and where situate.

Levitsky and *Abramovsky* for Petitioner.

Saba Said for Respondents.

Application for an order to issue directed to the Respondents calling upon them to show cause why they should not refrain from executing the order of the Magistrate's Court, dated 29.8.38, in Criminal File No. 4791/38, and to abstain from demolishing Petitioner's property.

ORDER.

This is an application for an order directed to the Jerusalem Town Planning Commission calling upon that body to show cause why they

should not refrain from executing an order directing the demolition of the Petitioner's property.

The property in question is small, and upon the facts we are not impressed with the merits of the application, but there are several technical points which call for consideration.

The Applicant is the owner of a property in the Nahlat Zion Quarter. Upon this property her husband, without the requisite permission, made certain additions.

In 1937 he wrote to the City Engineer admitting that he had repaired the building, and in his letter he implied that it was his property.

In 1938 proceedings were taken against him, and the description of the offence was as follows:

> "In that the above accused has erected a wall, W.C. alterations and additional building for sanitary accomodation without a permit at Nahalat Zion Quarter.
>
> Application:
>
> Application is hereby made for
>
> 1) the trial and conviction of the above accused on the charge described above;
>
> 2) an order that all buildings erected without a permit should be demolished."

At the hearing there was no evidence as to who was the owner of the property, and the Defendant did not allege that it was not his. The Magistrate in his judgment said —

> "Court orders accused to pay a penalty of 500 mils; in case of non-payment of the fine to be arrested for three days. A period of three months is granted to the accused to arrange the matter with the Municipality or to demolish those parts which were built without a licence, as otherwise the Town Planning Commission will demolish the parts built without a licence on the account of the accused, and declared in open Court on 29.8.38."

The buildings were not demolished.

The provisions of Section 35(1) of the Town Planning Ordinance, which are to be found in Section 11 of the Town Planning (Amendment) Ordinance, 1938, are clear. By paragraph (1) the Court may order the building or structure to be pulled down, and sub-section (2) provides that if the order is not complied with, another offence is committed, and the Court shall (see Section 11(b) of the 1938 amending Ordinance) direct that the order shall be carried out by the Local Commission, or some other person.

It is quite clear that the Magistrate's order did not comply with the Ordinance. Saba Eff. Said seeks to defend it upon the ground that paragraph (i) of (1) of Section 35 provides for pulling down by such person, that is the person convicted, "or some other person", but it is clear not only from the first proviso but also from the general scheme of the section to which I have referred, that some other person does not mean the Town Planning authority. In addition to this defect the judgment does not specify what buildings are to be demolished or where they are to be found.

The owner of the building which it is sought to demolish may therefore well protest that there is no judgment applicable in terms to the building, and that there is no judgment against her personally.

Saba Eff. says this Court should not interfere, as her real remedy was to appeal against the judgment under sub-section (8) of Section 35, but sub-section (1) (ii) proviso makes clear that any person against whom an order may be made is first to be heard, and if they are not heard I do not think they are limited in their remedy to sub-section (8). It is not suggested that the present applicant was heard by the Magistrate. I think, therefore, she is entitled to take these proceedings, and to succeed in them.

The order will therefore be made absolute, with costs which we assess at an inclusive sum of LP. 10.

Given this 28th day of February, 1941.

Chief Justice.

CRIMINAL APPEAL NO. 4/41.

IN THE SUPERME 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.

Yacoub Shlomo Ekes and 4 others. — Respondents.

Appeal against binding over and too lenient sentence in a shop-breaking case — Court of appeal increasing sentence of imprisonment — Question of first offenders.

Courts should give first offenders opportunity to mend their ways, but should satisfy themselves that in all the circumstances it is right to bind them over.

Crown Counsel (Bell) for Appellant.

Respondents Nos. 1 & 2 — in person.
Eliash for Respondent No. 3.
Frank for Respondent No. 5.

Appeal from judgment of District Court, Jerusalem, dated 10.12.40, whereby Respondents were convicted of shop-breaking, contrary to Section 297(a) of Criminal Code Ordinance, 1936, and First, Second, Fourth respondents were released conditionally, upon their each enterning into a bond in the sum of LP. 50, with two sureties each in like amount, to be of good behaviour for two years, and Third Respondent was sentenced to two years' imprisonment, to run from date of his detention, 5.10.40.

JUDGMENT

This is an appeal against sentence by the Attorney-General. The five Respondents pleaded guilty to shop-breaking, contrary to Section 297(a) of the Criminal Code Ordinance. This is a serious offence, for which the maximum penalty is seven years' imprisonment

The third Accused, Manuel Izhak Mazal, was sentenced to two years' imprisonment. In June, 1939, it appears that he was bound over for two years on a charge of theft. Dr. Eliash, on his behalf, informs us that he is the son of respectable professional parents, and that he is a man of some education. This is not a case of a man falling into sudden temptation. He has already been treated with leniency once before, and we can see no excuse in his case. The offence is a bad one, and was deliberately planned and carried out, and we think the sentence should be increased.

We therefore allow the appeal as to this Accused, and increase his sentence to one of three years' imprisonment, to run from the 5th October, 1940.

As to the other Respondents, No. 4 has joined the Armed Forces for the Crown, and is not before us. He, and the First, Second and Fifth Respondents were bound over, as it was their first offence.

We were somewhat surprised to find that the First and Second Accused had been given an opportunity of rehabilitating themselves in the Police Force, but the authorities were no doubt satisfied that it was right to give them this opportunity. The Fifth Accused is working with his father, who is a grocer.

In Criminal Appeal No. 15/39, where the convicted persons were also accused under this section, this Court held:

> "The accused may be fortunate in receiving a light sentence, but it does not follow that if other persons are convicted of this crime they will not receive a heavier sentence".

We are certainly in favour of first offenders being given an opportunity to mend their ways, and we think that on the whole the appeal as to these four Accused should be dismissed, but we should like to make it very clear that this is serious offence, and that Courts of trial should satisfy themselves if, in all the circumstances, it is right that persons convicted of it should be bound over.

Delivered this 3rd day of February, 1941.

Chief Justice.

CRIMINAL APPEAL NO.2/41.

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

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

In the appeal of:
Yousef Said Abu Dourrah — Appellant.
v.
The Attorney-General — Respondent.

Conviction and death sentence by Assize Court of fugitive criminal extradited by Trans-Jordan Government — Querying jurisdiction of Assize Court on ground that extradition proceedings improper—Question of admissibility of evidence of a witness whose statements to police were not among documents forwarded to Trans-Jordan Government — Question of political murder in Palestine.

1. Extradition proceedings under Palestine and Trans-Jordan Extradition Agreement, 1934, cannot be queried in Court, if Government making order for extradition was satisfied that pro-

visions of art. 4, 5 and 6 of Agreement carried out.

2. Not necessary that all evidence available against person whose extradition sought should be forwarded to country in which he is found; sufficient if prima facie case made out.

3. Murder is murder, by whatever motives inspired. Nothing in Palestine law that creates a special offence called political murder, and nothing prevents trial of a man within jurisdiction of Palestine even if crime committed by him might be called political murder.

Moghannam for Appellant.

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

Appeal from judgment of Criminal Assize Court sitting at Jerusalem, dated 1.1.1941 whereby appellant was convicted of murder, contrary to Section 214(b) of Criminal Code Ordinance, 1936 and sentenced to death.

JUDGMENT.

The appellant was charged before the Assize Court in Jerusalem with murder in the Jenin District and was convicted and sentenced to death. On this appeal several legal points have been taken; the facts upon which the conviction was based have not been queried. It is argued, in the first place, that the extradition proceedings were improper and that therefore the Assize Court had no jurisdiction to try the man. Extradition proceedings between this country and Trans-Jordan are conducted under an Extradition Agreement made in the year 1934. By Article 3 of that agreement the fugitive criminal shall be surrendered upon the request for extradition being made in conformity with the procedure set forth in Article 4, 5 and 6 of the agreement. Under this agreement, contrary to the procedure under the Extradition Ordinance, the order for extradition is made by the Government concerned. If the Government concerned is satisfied that the provisions of Articles 4, 5 and 6 have been carried out, that, we think, must be the end of the matter, except that possibly the Courts of this country are not entitled to try the man for an offence different from that on which his extradition was obtained.

Another point taken by the appellant is that the evidence of one of the witnesses was improperly admitted at the trial because the deposition, or statements made to the police, of this witness, were not among the documents forwarded to the Trans-Jordan Government. There is nothing in the law which says that all the evidence available against

this particular person whose extradition is sought has got to be forwarded to the country in which he is found. All that is necessary is that a prima facie case should be made out.

Finally it is said that this is a political offence. Under the law of this country, murder is murder pure and simple, whatever the motives may be which inspired it. We know of nothing in the criminal law of this country or of England that creates a special offence called political murder. In any case, even supposing it were a political murder, nothing prevents the man, if he is within the jurisdiction of this country, from being tried for it.

The appellant was convicted by the Assize Court, upon very clear evidence, of a brutal crime. He was tried with the greatest care and any evidence that was considered possibly not to be admissible was rejected by the Assize Court. We have considered the evidence as a whole and all we can say is that it is the verdict which any Court would have given. The appeal is dismissed and the conviction and sentence of death are confirmed.

Delivered this 20th day of January, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 269/40.

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

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

In the appeal of:
S. Slonim — Appellant.

v.

Solel Boneh Ltd., Central Contracting Office of the Jewish Labour Federation. — Respondents.

Assignment of debt by a Society signed by one officer only instead fo two as required by rules — Document by assignee acknowledging receipt of assignment — Acknowledgment not amounting to acceptance and not creating estoppel.

1. Receipt given by assignee of assignment of a specified sum for payment on the account which will be payable in respect of certain services — not an acceptence creating an estoppel to subsequent claim that assignment defective.

2. Assignment by society signed by one officer instead of two as required by its rules — bad.

Sussmann for Appellant.
Berinson for Respondents.

Appeal from judgment of District Court, Tel-Aviv (in its appellate capacity), dated 31.10.40.

JUDGMENT.

The Appellant, the Respondents and Hameretz Co-operative Society, had business relations together. Had they taken the trouble to incorporate their arrangement into a simple agreement this dispute might have been avoided.

In the course of these dealings the Hameretz Society assigned to the Appellant debts due from the Respondents to the Society. By Section 2(1)(a) of the Debt (Assignment) Ordinance, such assignment must be in writing under the hand of the assignor.

One of those assignments was defective in form in that it was only signed by one officer of the Society instead of two, as required by the rules of the Society.

In consequence the Magistrate and the District Court held that this assignment was bad. It is admitted that the Appellant saw this document, and sent it to the Respondents. The Respondents, on 4.9.38, gave the following document:—

> "Received from Mr. Slonim two assignments of "Hameretz" in the amount of LP. 100 (one hundred) for payment on the account which will be payable in respect of transports September."
>
> "Solel Boneh Ltd."

Dr. Sussman for the Appellant argues that this is such a confirmation and acceptance by the Respondents that, in the circumstances, he is now estopped from saying that the assignment was defective. I do not think that this is anything more that an acknowledgement of the document — the argument, therefore, is not well founded.

The appeal will therefore be dismissed with costs on the lower scale and LP. 10 advocate's fee for attending the hearing.

Delivered this 6th day of February, 1941.

Chief Justice.

CIVIL APPEAL NO. 22/41.

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

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

In the appeal of:

The Municipality of Safad — Appellant.

v.

Jubran Sam'an — Respondent.

Appeal by Municipal Council from judgment delivered in absence of its advocate but in presence of its Secretary — Remittal of case to trial Court to ascertain whether judgment delivered in presence or absence of Appellant — Finding by trial Court that Secretary of Municipal Council heard judgment in his official capacity — Representative capacity of Secretary of Municipal Council.

Where Municipal Council a party to an action and judgment delivered in presence of its Secretary, though in absence of its advocate, judgment deemed in presence of Municipal Council, if Court finds that Secretary was present in his official capacity.

Walid Salah for Appellant.
H. Atalla (*by delegation*) for Respondent.

Appeal from judgment of District Court, Haifa (in its appellate capacity), dated 11.12.41.

JUDGMENT

The Magistrate of Safad upon completing the hearing of this case reserved his judgment and stated that it would be delivered on 30.5.40. On that date the judgment was not ready and its delivery was further postponed to 4.6.40. We heard some argument as to whether the appellant had received notice of this postponement. Counsel for the appellant stated before us, that neither he nor the Municipality was served with a notice but he states that he came later in the day and was told

that the judgment had been delivered and the Secretary of the Municipality was present when it was read.

When the case went to the District Court on appeal the respondent raised the point that the appeal was out of time, as it had been delivered in presence. As it was not clear from the judgment of the Magistrate whether it was delivered in the presence or absence of the Appellant, the case was remitted in accordance with the rules to the Magistrate to hear evidence on this point. Evidence was heard and remitted to the District Court which found —

> "As stated above we do not believe that the Secretary appeared in his personal capacity. The fact that he was present in Court in the morning during Municipality office hours and sitting in the advocates bench, and the fact that he reported judgment of the Court to the Municipal Council on the very same day together with the evidence of the witness Abdul Ghani Eff. Nahawi show clearly that he appeared in his official capacity as representing the Municipal Council."

There was evidence upon which the Court based its findings, that the Appellant Municipality was present through its agent the Secretary of the Council. The judgment was therefore delivered in the presence of the Appellant and the appeal was out of time.

That being so, the appeal will be dismissed with costs on the lower scale and LP. 10 advocate's attendance fee.

Delivered this 10th day of March, 1941.

Chief Justice.

CIVIL APPEAL NO. 12/41.

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

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

In the appeal of:

Yitzhack Arie Karlstadt — Appellant.

v.

Zvi Lites — Respondent.

Building contractor taking a mortgage with interest in payment for building a house — Allegation by mortgagor of usurious interest — Action by mortgagor against mortgagee in Magistrate's Court for sum less than LP. 250 — Proper Court for mortgagor to have amount due by him ascertained.

Mortgagor alleging part of mortgagee's claim to be usurious interest can only go to Court to ascertain amount due by him, and where amount claimed from him exceeds LP. 250 he must go to District Court, even if amount in dispute less than LP. 250.

Edit. Note: Compare C.A. 37/40 7 CtLR 124.

Hoffman for Appellant.
Goitein for Respondent.

Appeal from judgment of District Court, Tel-Aviv (in its appellate capacity), dated 15.11.40.

JUDGMENT

The Respondent, who is a contractor, built a house for the Appellant, and in payment therefor took a mortgage for LP. 450 with interest for a period at 9% payable over two years by seven agreed instalments.

Default was made and the Respondent took foreclosure proceedings before the Execution Officer. The Appellant alleged usurious interest, and the sale was postponed.

It was decided by this Court in High Court No. 65/37 *), 1938 P.L.R. 47, that Article 36 of the Execution Law applies to such a case.

Presumably acting thereunder the Appellant went to the Magistrate's Court, Tel-Aviv.

In his claim he stated —

> "Defendant has brought execution proceedings to foreclose the mortgage (file No. 11587/39) claiming LP. 267, i.e. LP. 71.245 in excess to what is due to him.
>
> "I therefore pray that the defendant may be adjudged to pay LP. 71.245 with costs, advocate's fees and legal interest as from the date of claim."

It will be seen that he alleges that the Respondent was claiming too much. There is no suggestion of excessive interest.

The Magistrate went into the facts, which seem to have turned upon the question of whether certain payments were made by the Appellant in respect of the mortgage debt or in respect of additional work alleged by the Respondent to have been done by him to the house, and held —

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*) 3 CtLR p. 34.

> "It would appear that the matter of additional works came to conceal the excessive interest charged by the defendant or the undue payments."

and gave judgment for the Respondent to pay the Appellant LP. 66.781 with interest.

The District Court set this aside, and the Respondent *) appeals to this Court.

On the facts of this case I cannot see how the claim of excessive interest ever arose. It is not suggested that the building of the house was not a genuine transaction to be paid for as I have stated. The only question seems to me to be how much of the mortgage debt remains unpaid. I fail to see how in any circumstances the Appellant could get judgment for the amount he alleged was over-claimed by the Respondent. His, the Appellant's, object in going to the Court could only be to ascertain the amount due by him under the mortgage, and having regard to the amount involevd — LP. 267 was claimed in the foreclosure proceedings — I think the proper Court was the District Court, not the Magistrate's Court.

It is also argued that there was not sufficient evidence before the Magistrate to satisfy Section 6 of the Evidence Ordinance.

The appeal therefore fails and is dismissed. Respondent will have costs on the lower scale, and we certify LP. 10 for attendance.

Delivered this 7th day of March, 1941.

Chief Justice.

CIVIL APPEAL NO. 28/41.

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

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

In the appeal of:

George C. Sabbagha, as Curator of Badi'a Salim Ankoud — Appellant.

v.

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*) Respondent in the District Court, i.e. the Plaintiff in the Magistrate's Court. Edit. Note.

1. Abraham Lax
2. Rabbi Jehoshua Kaniel (Kanial) and Jacob Meir Richman (Administrators of and on behalf of the estate of Mordechai Eliaxtam)
3. The Registrar of Lands, Tel-Aviv — Respondents.

Issues regarding mental capacity, fraud and compulsion — Decision of Court as to one of two or more issues of fact — Practice as regards interlocutory orders.

1. Separate trials of separate issues should only be granted on special grounds.

2. Decision of one out of two or more issues of fact — not an interlocutory order, and appeal against it will not be entertained by Court of Appeal, even if trial Court granted leave to appeal.

Edit Note: As to 1: Peery v. Young followed. As to 2 see: C.A. 155/40 8 CtLR 125; C.A. 246/38 5 CtLR 55; C.A. 179/38 4 CtLR 67; C.A. 161/38 ibid. 76.

Cattan for Appellant.
Shereshevsky for Respondent No. 1.
Ben-Israel for Respondent No. 2.
Respondent No. 3 absent.

Appeal from order of Land Court, Jaffa, dated 4.11.1940.

JUDGMENT.

In the case there are apparently three issues, i.e. the mental capacity of the Plaintiff, fraud and compulsion.

The Land Court dealt with the first of these in what is called an interlocutory order against which, by leave of that Court, appeal is brought. This is not an interlocutory order by the decision of one issue in the case.

We have no rule similar to the English Rule 7 of Order 36 under which, inter alia, one or more questions of fact may be tried before others, but even in England applications under this rule will only be granted very sparingly. As Jessel M.R., in Peery v. Young, 479, points out, "Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds."

If this practice were allowed there might, in a case such as this, in effect be three trials and three appeals to his Court.

The case must go back to the Land Court to hear and determine it in accordance with the Rules.

As leave to appeal was granted so much of the order giving leave to appeal as deals with costs will be set aside, and the costs of that application will be costs in the cause. The costs of the proceedings in this Court will be costs in the cause — and for that purpose we certify an inclusive sum of LP. 5 for each party represented.

Delivered this 17th day of March, 1941.

Chief Justice.

CIVIL APPEAL NO. 2/41.

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

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

In the appeal of:
Hassan Ahmad Hussein Di'bis and 5 others. Appellants.
v.
1. Keren Kayemeth Leisrael, Ltd.
2. The Government of Palestine. Respondents.

Absence at part of hearing of one of defendants having common basis of claim with co-defendants — Allegation that proceedings before Settlement Officer vitiated by absence of one of defendants at part of hearing.

Where defendant, having same basis of claim to land as co-defendants, gave evidence and all material facts considered by Settlement Officer, absence of that defendant at part of hearing — not an irregularity such as to invalidate proceedings.

M. Yunis Hussayni for Appellant No. 1.
Appellants Nos. 2—6, Absent — served.
Levin for Respondent No. 1.
Salant for Respondent No. 2.

Appeal from decision of Settlement Officer, Acre Settlement Area, dated 6.11.1940.

JUDGMENT

This is an appeal from the decision of the Settlement Officer, in which there were two claimants and two sets of Defendants. These defendants were son and grandchildren of the original testator. The basis of their claim to the land in question is the same. It is said that some irregularity of procedure took place at the hearing, in that the first Appellant was not present at part of the hearing. It is, however, clear that he gave evidence, and that all the material facts were considered by the Settlement Officer. That being so we do not think that there was such irregularity as would invalidate the proceedings.

The appeal will be dismissed with costs to the first Respondents which we fix at an inclusive sum of LP. 6 to be paid by the first Appellant. As regards the second Respondent, there will be no order as to costs.

Delivered this 10th day of February, 1941.

Chief Justice.

CIVIL APPEAL NO. 4/41.

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

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

In the appeal of:

Abdul Hamid Bibi — Appellant.

v.

Jirius Ibn Constandi Zacharia — Respondent.

Power of attorney to pay certain named creditors — Attorney debiting principal with payments to creditors not mentioned in Power of Attorney — Failure to pay fees on cross-appeal.

1. Attorney debiting principal with payments made outside limits of power of attorney — liable to refund moneys so paid.

2. Court of Appeal will not entertain cross-appeal on which no fees paid.

3. (Obiter dictum). Where it appears from record of earlier

proceedings in Court of Appeal that question raised has, inferentially, already been decided in favour of one party appeal or cross-appeal by other party on that question must fail.

Edit. Note: As to 2: C.A. 98/40 and C.A. 182/40 followed.

Richardson & *Berouti* for Appellant.
Goitein & *Malak* for Respondent.

Appeal from judgment of District Court, Jaffa, dated 21.12.40.

JUDGMENT.

Rose, J.

This is an appeal from a judgment of the District Court of Jaffa, in which judgment was given for the respondent for the sum of LP. 149.030 mils and costs.

It would seem that the appellant was empowered by a Power of Attorney to pay certain named creditors of the respondent. In the event payments were made to certain creditors not mentiond in the Power. The appellant contends that he himself made no such payments, the payments in question being made by a third party.

It is admitted in the pleadings that the appellant in fact received certain sums of money for, inter alia, the above purpose and it is apparently undisputed that the appellant debited the respondent with certain amounts paid to creditors not mentioned in the Power of Attorney.

From these facts we are of opinion that the trial Court was right in holding that the respondent is entitled to recover the amount in question, namely, LP. 149.030 mils.

The appeal is therefore dismissed. The respondent, however, endeavoured to bring a cross appeal before the Court. It appears, that no fees were paid on this cross appeal and in view of the decisions of this Court in Civil Appeal No. 98/40 I. S. David v. Ishaya D. Mizrahi and Civil Appeal No. 182/40 Government of Palestine v. Keren Kayemeth Leisrael Ltd. & another *), we are unable to entertain it.

We would add that it would seem that the cross appeal would in any event have been bound to fail as it would appear from the record of the earlier proceedings in this Court that the question raised in the cross appeal has, inferentially, already been decided in favour of the present appellant.

The respondent will have the costs of this appeal to include the sum of Lp. 15 for advocate's attendance fee.

Delivered this 14th day of March, 1941.

British Puisne Judge.

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*) 9 CtLR, p. 48.

CIVIL APPEAL NO. 271/40.

IN THE SUPERME 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:

Fatmeh Bint Hassan Ahmad Eisa — Appellant.

v

1. Mustafa Ali el Asmar
2. Salha Bint Abdul Hadi el Daoud. — Respondents.

Claim of priority to land — Refusal of Court to hear evidence that claimant renounced his right to purchase the land.

Land Court should not refuse to hear oral evidence that claimant renounced right to purchase land in dispute.

Edit. Note:. C.A. 225/38 4 CtLR 217 followed. See L.A. 5/27 4 C of J 1530.

Naser for Appellant.
Tayyeb for Respondent No. 1.
Respondent No. 2 Absent — served.

Appeal from judgment of Magistrate's Court of Ramleh, sitting as a Land Court, dated 23.11.1940.

JUDGMENT

Three points are raised by the Appellant, but it appears to me that there is only one of substance, that is that the Magistrate refused to hear evidence that the Respondent had renounced his right to purchase the land.

It is clear that neither side called the attention of the Magistrate to the decision of this Court in Civil Appeal 225 of 1938, 1938 P.LR. p. 551*).

The judgment will be set aside and the case returned in order that the Magistrate may consider it in the light of that judgment.

The costs of the first hearing and of this appeal will be costs in the cause.

Delivered this 5th day of February, 1941.

Chief Justice.

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*) 4 CtLR, p. 217.

CIVIL APPEAL NO. 276/40.

IN THE SUPERME COURT SITTING AS A COURT OF CIVIL APPEAL

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

In the case of:

Dr. Julius Weissmann — Appellant.

v.

Arie Shmuel Doerfler — Respondent.

Action on contract to export currency from Poland to Palestine — Contract governed by lex loci contractus — Suing in Palestine upon illegal contract made abroad.

1. A contract under which A gave B in Poland Polish currency and gold to take out of Poland for him and pay to a person in Palestine —governed by Polish law and illegal under that law.

2. If contract illegal by lex loci contractus it cannot be sued upon in Courts of Palestine.

Edit. Note: Kleinwort case 1939 2 K. B. 678 followed.

Smoira for Appellant.
Goitein & *Koroth* for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 29.11.40.

JUDGMENT.

We need not hear you Mr. Goitein.

This is an appeal from the District Court of Tel-Aviv dismissing an action brought by the appellant here against the respondent for the value of certain Polish currency and gold which the appellant alleges he gave to the respondent to take out of Poland for him and pay to his brother-in-law in Palestine. It is not disputed that the export of Polish money and gold was and is prohibited under the law of Poland. The contract, therefore, concerned the doing of an illegal act in Poland. The English Authorities all say, including the last one, that if the contract is illegal by the lex loci contractus then it cannot be enforced in the Courts of England.

Now, it is quite clear to our minds, that the proper law of the contract is Polish law. The negotiations took place in Poland. The money was handed over in Poland. The money had to be taken out of Poland by the respondent, or through arrangements made by him, and for these reasons we are quite convinced in our minds, that the proper law of the contract is Polish.

That being so it is clear on the last English Authority, the Kleinwort case 1939 2 K.B. 678, that this action must fail. The contract cannot be sued upon in the Courts of Palestine. The District Court, therefore, came to a correct conclusion and the appeal must be dismissed with costs on the lower scale and LP. 10 advocate's attendance fee.

Delivered this 4th day of February, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 258/40.

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

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

In the appeal of:
1. Dr. Selig Eugen Soskin
2. Sonja Soskin — Appellants.

v.

Dr. Friedrich Ettlinger — Respondent.

Invitation to live in house certain period without paying rent — Question as to liability to pay rent for period over and above invitation.

Where a person invited to live a certain period in a house without paying rent, remained there for a further period, he cannot be charged with rent if not intimated that invitation withdrawn.

Werner for Appellant.

Radt for Respondent.

Appeal from judgment of District Court Haifa (C.A. 67/40) (In its appellat capacity), dated 31.10.40.

J U D G M E N T.

We need not hear you, Dr. G. Radt.

This is an appeal by leave from a judgment of the learned President District Court of Haifa. The dispute concerned a claim of rent for

a house in which the respondent had been allowed to live for two months September and October, 1938, by invitation without paying rent and was for the next three months November and December, 1938, and January, 1939. The owners of the house were away, they never informed the respondent that he would be required to pay rent if he stayed on, and it was not until August, 1939, when the respondent claimed from the appellants LP. 30 interest on the mortgage which he, the respondent held on the appellants' property, that the appellants suddenly bethought themselves of claiming the same amount from the respondent as rent for the house. The Magistrate found in favour of the appellants. On appeal the learned President reversed that decision. We think that the judgment of the learned President is correct. The respondent having been invited to stay had every reason to think that that invitation would continue until withdrawn or until he was told that it was withdrawn. It is admitted that no such intimation was ever given to him and until such intimation was given we do not think that he could in law be charged with rent. As for the merits of the case there are none on either side. The only difficulty we find is how leave to appeal was ever given to this Court.

The appeal is dismissed with costs on the lower scale in all Courts here and below to include LP. 10 advocate's hearing fee in this Court.

Delivered this 31st day of January, 1941.

British Puisne Judge.

CRIMINAL APPEAL NO. 24/41.

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:

Raphael Sabban — Appellant.

v.

The Attorney-General — Respondent.

Conviction of robbery with violence — Evidence of a cumulative character — Circumstantial evidence — Grounds for mitigation of penalty.

1. Evidence in a criminal case may be of a cumulative character, i.e. several matters taken together may provide evidence upon which the Court can properly convict.

2. Where accused of young age and pleads guilty thereby saving public time and respectable people being brought into atmosphere of criminal Court, trial Court entitled to take these matters into consideration in awarding sentence.

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

Appeal from judgment of District Court, Jerusalem, dated 17.2.41 whereby Appellant was convicted of robbery contrary to Section 288(1) of Criminal Code Ordinance, 1936, and being in possession of firearms and ammunition contrary to Section 36(2)(a) and (f) of Firearms Ordinance, 1922, and sentenced to five years' imprisonment.

JUDGMENT.

The Appellant was convicted of robbery with violence, having taken part in what is generaly called a "hold up" of a bank.

The Court of Trial accepted the identification of the Appellant by one of the witnesses. It is argued by Mr. Levitsky on his behalf that it should not have done so, as she, the witness, failed to identify the appellant at an identification parade. This the witness explained by saying that at the parade the Appellant was wearing a hat.

Had this been the only evidence the Court might have felt some doubt if it was safe to convict upon it, as to that we can express no opinion, but it was not, there were two other matters, one, the finding of a bullet in the Appellant's pocket, and the other, the fact that immediately after the robbery the Appellant was seen running away and was subsequently found with a revolver loaded with three rounds.

In a somewhat similar case, Rex v. Cartwright, X. C.A.R. 219, the Lord Chief Justice pointed out that the evidence was of a cumulative character — and that is the position here. We are satisfied that there was evidence upon which the Court could properly convict.

Mr. Levitsky also questions the sentence of five years' imprisonment chiefly on the ground that another prisoner charged together with the Appellant was only given three years. Each case must be considered on its merits, but I may point out, the other prisoner was only twenty years old and he pleaded guilty. When an accused person does so and thereby saves public time, and — as in a case such

as this — saves respectable young women being brought into the atmosphere of a criminal Court, I think the Court in the public interest is entitled to take these matters into consideration in awarding the sentence.

On the facts of this case there is no doubt that the sentence was not excessive.

The appeal will be dismissed.

Delivered this 13th day of March, 1941.

Chief Justice.

HIGH COURT NO. 2/41.

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

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

In the application of:

1. Costandi Habib Hawa
2. Tewfiq Habib Hawa, on behalf of the estate of his late father, Elia Hawa. Petitioners.

v.

1. Chief Execution Officer, District Court, Haifa.
2. Asst. Chief Execution Officer, Haifa.
3. Sleiman and Jamil Nassir Respondents.

Chief Execution Officer refusing execution of judgment regarding possession of land on ground that 15 *Hejra years elapsed since judgment given — Test for calculation of period of limitation. — Execution Law, Art.* 144.

1. Where action founded upon a document bearing a Gregorian date, "year" for purpose of limitation — Gregorian year.

2. Execution of a judgment bearing Gregorian date, even if it regards recovery of immovable property, not barred by limitation before lapse of 15 Gregorian years.

Edit. Note: C.A. 112/31 1 P.L.R. 674 and C.A. 204/37 2 CtLR 153 followed; C.A. 184/37 2 CtLR 219 distinguished.

Abcarius for Petitioner No. 1.

H. Hawa for Petitioner No. 2.

Abu Saba for Respondent No. 3.

Application for an order to issue directed to the First and Second Respondents, calling upon them to show cause why their orders of the 19.12.40, and 1.8.40,respectively, given in Execution file No. 476/40 (Acre), should not be set aside, and why the judgment of 11.12.24 of the Magistrate's Court, Acre, given in favour of Petitioners against the Third Respondents should not be executed.

JUDGMENT

This is the return to a rule nisi directed to the Chief Execution Officer, Haifa, to show cause why he should not execute a judgment dated 11.12.24. Several points were raised, but there is the only point of substance — which is one of general importance — that is, is the period of fifteen years provided for the limitation of executions by Article 144 of the Execution Law to be calculated according to the Hejira or the Gregorian calendar.

In the course of the proceedings it was stated, quoting Manning J. in Civil Appeal 184/37 *).

> "In cases relating to the limitation of actions for the recovery of immovable property, "year" means a Hejira year. I do not agree that Section 7 of Chapter 78, Laws of Palestine, Volume 2, is declaratory and therefore retrospective in its operation."

but this clearly is not such a case. Abcarius Bey, for the Applicants relies upon the decision of this Court in Civil Appeal 112/1931, P.L.R. Vol. 1, p. 674, followed and explained in Civil Appeal 204/1937, Levanon II, p. 153 **).

Those cases lay down the proposition that where an action is founded upon a document bearing a Gregorian date, "year" for the purpose of limitations is to be taken to be a Gregorian year. The document in the present proceedings, i.e. the judgment, bears such a date, and I think therefore that the Gregorian calendar applies, and the rule will be made absolute, with costs fixed at an inclusive sum of LP. 10 to be paid by the third Respondent.

Delivered this 19th day of February, 1941.

Chief Justice.

CIVIL APPEAL NO. 21/41.

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:

Farid Knezevitch — Appellant.

v.

Husni Hashem Khalil Es-Shawwa & 9 others. — Respondents.

Judgment creditor seeking to cause land to be registered by Settlement Officer in debtor's name — Real and so-called Plaintiff before Settlement Officer.

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*) 2 CtLR, p. 219. **) 2 CtLR, p. 153.

Judgment creditor seeking before Settlement Officer to get land registered in debtor's name so that he might then execute upon it — not a claimant within meaning of Land Settlement Ordinance, as he does not claim land or interest in Land.

Cattan for Appellant.

Shawa for Respondent No. 1.

Respondents Nos. 2 & 9 — Absent, served.

Respondents Nos. 3, 4 & 10 — In person.

Respondent No. 5 — In person and representing Nos. 6, 7 & 8.

Appeal from decision of Settlement Officer, Gaza Settlement Area, dated 10.9.40.

JUDGMENT.

This case was originally before the Land Settlement Officer. It went on appeal to the Land Court and is now before this Court.

The Appellant's claim is unusual. Some years ago he obtained judgment against a certain individual but was unable to execute it on certain land of his because that land was unregistered. Before the Settlement Officer the Appellant sought to get that land registered in 'the debtor's name, presumably in order that he might then try and execute upon it. The Land Settlement Officer said —

> "The case as presented seems to me an extraordinary one. So-called plaintiffs do not come before me and say 'We want our rights in land in the parcels in dispute.' What they do demand is for me to force the real owners of the parcel to divide the parcel of land among themselves not as they, the owners, wish, but as they, the so-called plaintiffs, wish. So-called plaintiffs are not real claimants to land as defined in the Land Settlement Ordinance, 1928—33. What so-called plaintiffs really want is money, and that is not my affair. Their claim in reality is in the nature of a protest."........."

There were also allegations of fraud.

I think the Settlement Officer was right in holding that the Appellant was never a claimant within the meaning of the Land Settlement Ordinance, and I do not think the Appellant claimed any land or interest in land as contemplated by that Ordinance, and certainly the Land Settlement Officer was not the right tribunal to try a claim, if there be one, based on fraud.

The appeal will be dismissed. Respondent No. 1 will have costs on the lower scale, and we certify LP. 10 for attendance. Respondents Nos. 3, 4, 5, and 10, who appear in person, will each have an inclusive sum of LP. 1 for attending.

Delivered this 17th day of March, 1941.

Chief Justice.

CIVIL APPEAL NO. 39/41.

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

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

In the appeal of:

Gershon Kleiner Appellant.

v.

Rivka Bat Aga Baba in her name and in the name of her minor children: Rachel, Ezra and Lea. Respondent.

District Court reversing judgment of Chief Magistrate's Court that diyet not payable in Palestine — Sharia rights how far effected by repeal of Ottoman Penal Code — Effect of consistent practice of Courts over a number of years — Ottoman Penal Code, Art. 1, 171, 182 — *Civil and Religious Courts (Jurisdiction) Ord., sec* 6.

1. Diyet and compensation in lieu of diyet — payable in Palestine.

2. Compensation is lieu of diyet can only be awarded against a person liable to pay diyet.

3. Any Court of Appeal should be extremely reluctant to accept a proposition which entails assumption that a consistent practice of the Courts over a number of years has no legal basis.

Edit Note. As to 1 & 2: C.A. 18/39 5 CtLR 241 distiguished; C.A. 118/33 2 P.L.R. 250 and Cr. A. 96/37 2 CtLR 108 referred to; see C.A. 240/37 3 CtLR 104.

As to 3 see: H.C. 65/37 3 CtLR 34; H.C. 4/38 ibid. 71; H.C. 15/39 5 CtLR 155; H.C. 19/39 ibid 185.

Levitsky and *Abramovsky* for Appellant.

Abcarius for Respondent.

Appeal from judgment of District Court, Jerusalem (sitting as a Court of Appeal), dated 14.1.1941.

JUDGMENT

Rose, J.

This is an appeal from the District Court of Jerusalem, setting aside the judgment of the Chief Magistrate of Jerusalem, the latter having held that the Respondent (the Plaintiff in the action) is not entitled to sue for diyet.

Mr. Levitsky, who argued the Appellant's case with commendable

brevity, contends that the reference in Article 46 of the Palestine Order-in-Council, 1922, to "the Ottoman Law in force in Palestine on first of November, 1914," refers only to such laws as on that date formed part of the Ottoman Statute Law. He bases this contention on the dicta of Frumkin J. in the Municipality of Haifa v. Caesar Khoury, Civil Appeal No. 88 of 1930, (1 P.L.R.), at page 730 et seq, and in The Attorney-General v. Blam, Civil Appeal No. 18 of 1939 *), (6 P.L.R.) at page 253, where the learned Judge says:—

> "There are at present only two references to Diyet, as distinct from compensation in lieu of Diyet, in the law in force in Palestine, neither of them conferring the actual right for an award of Diyet.
>
> The first reference is to be found in Section 6(1) of the Civil and Religious Courts (Jurisdiction) Ordinance which confers upon Civil Courts jurisdiction in certain cases of applications for Diyet. But that is all that this sub-section does: conferring jurisdiction. In order to enable the Civil Court to exercise its jurisdiction, a party claiming Diyet will have to rely on substantive law conferring upon him a right to be awarded Diyet. Such right as existed in the Ottoman Penal Code has been extinguished with the repeal of the Code.
>
> The second reference to Dyet is to be found in the Criminal Code Ordinance, 1936, where it is said in Section 43 (c), "Nothing in this section shall affect rights to Diyet"; again, a right to Diyet has to be established by some substantive law applicable in the Civil Courts of this country conferring such rights. As more fully set out in Haifa Municipality v. Khoury, and Palestine Mercantile Bank, Ltd., v. Fryman and others, (C.A. 240/37**), P.L.R. Vol. 5; p. 165) Moslem law as such is not a part of the legal system of Palestine and only such parts of it became applicable as have been embodied in the Civil Legislation by special Imperial Irade, or otherwise."

The Appellant contends that apart from the Ottoman Penal Code, which was repealed on 1st January, 1937, there is no substantive law conferring upon a person a right to be awarded diyet, and that therefore such right died with the repeal of the Code.

The argument is an attractive one and, supported as it is by so experienced a Judge as my brother Frumkin, deserves the closest consideration.

The articles of the Code to which reference was made in argument are 1, 171 and 182, and I rely on Bucknill's and Utidjian's translation from the Turkish text.

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*) 5 CtLR 241.

**) 3 CtLR 104.

Article 1 provides that the operation of the Code shall be "without prejudice in any case to the personal rights prescribed by the Sharia".

Article 171 reads:

> "Whereas the effect of the law cannot defeat the personal rights, if the person killed has heirs the claim for personal rights is referred to the Sharia Court at their instance."

Article 182 reads:

> "If a person kills an individual by mistake or unintentionally becomes the cause of the destruction of his life he is, after satisfaction upon trial of the sharia rights of the person killed, punished with imprisonment for from six months to two years if this affair of killing has arisen from carelessness or unobservance of the laws."

In my opinion these articles do no more than refer to the existence of Sharia rights. They do not confer a positive right to an award of diyet. The references contained in these articles are, in my view, no more conclusive than those in Section 6 of the Civil and Religious Courts (Jurisdiction) Ordinance (chapter 18 of the revised edition), Section 43 of the Criminal Code Ordinance, 1936, and a decree of the Turkish Council of Ministers, dated 1887, which is referred to in the first volume of Young's book on Ottoman Law at page 291, and which appears to have conferred exclusive jurisdiction in matters of diyet on the Sharia Courts.

If I am right in this view it follows that, from the point of view of Mr. Levitsky's argument, the repeal of the Ottoman Penal Code is immaterial, and that his contention that there is no substantive provision of law establishing the right to diyet could have been urged with equal force while the Ottoman Penal Code was still in operation.

On the assumption, therefore, that Mr. Levitsky's argument is correct, it would follow that, in the numerous cases in which either diyet or, more commonly, compensation in lieu has been awarded by the Civil Courts in virtue of Section 6 of the Civil and Religious Courts (Jurisdiction) Ordinance, the Courts were in error.

In my opinion no distinction in this respect can be drawn between an action for diyet and one for compensation in lieu, as the latter can only be awarded to a person who is entitled to diyet. If any authority is needed for what is, in my opinion, so self-evident a proposition, it is provided in Guardians of Shlomo Slonim v. Issa Arafeh and Khalaf el Khatib, Civil Appeal No. 118 of 1933 (2 P.L.R.) at page 250, where Corrie J. says: "If the respondents are not liable to pay diyet they cannot be liable to compensation in lieu."

In fact, as recently as 1937 (i.e. subsequent to the repeal of the Ottoman Penal Code) compensation in lieu of diyet was awarded by

a Court of Criminal Assize and upheld on appeal in the case of Zwanger and Others v. Scheinzwit, Criminal Appeal No. 96 of 1937 *), in which, incidentally, none of the interested parties was a Moslem. I would add that, although counsel of great experience were engaged in the case, the proposition that compensation in lieu of diyet was not payable was not even argued.

It is a well established principle that any Court of Appeal should be extremely reluctant to accept a proposition which entails the assumption that a consistent practice of the Courts over a number of years has no legal basis, and I do not consider that there is in this case any sufficient reason to make an exception to so eminently sensible and convenient a principle.

The appeal will therefore be dismissed, with costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 7th day of April, 1941.

British Puisne Judge. *Puisne Judge.* *Chief Justice.*

CIVIL APPEAL NO. 44/41.

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

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

In the appeal of:

Khalid Saleem Omar, Mukhtar of Majdel Yaba and 5 others. Appellants.

v.

Kamil Abdul Karim Abdel Rachman and 2 others. Respondents

Mukhtars acting as agents of village in land dispute — Representative capacity of Mukhtars — Mejelle.

For Mukhtars to be admitted as agents on behalf of village, Court to satisfy itself that village numbers more than 100 inhabitants.

Edit. Note: See C.A. 56/38 3 CtLR 225 and Edit. Note thereto.

Seligman for Appellant.

Moghannam for Respondent.

Appeal from judgment of Land Court, Jaffa, dated 8.2.41.

JUDGMENT

This is an appeal from the Jaffa Land Court in relation to certain

*) 2 CtLR 108

land in the village of Majdal Yaba. The question in dispute is the position of one of the boundaries of this land. A very large amount of evidence was heard and if it was merely a question of dealing with that evidence on appeal I do not know if we should be able to interfere with the judgment of the Court below, but it seems to us that in two other respects the Land Court went wrong.

The first place is with regard to the question of the first two appellants who are mukhtars of Majdal Yaba whether they could act as agents on behalf of the village with regard to the leasing of village lands. The Land Court dealt with that point rather summarily but the main objection is that there is no proof that the provisions of the Mejelle had been complied with, that is to say, there is no proof that the inhabitants of Majdal Yaba number more than 100 persons.

The second point is with regard to appellants Nos. 3 to 6. They denied in their statement of defence that they quarried any stones on any land belonging to the respondents. That being so it was for the other side to prove that they were in fact trespassing on this land by quarrying stones. There is no proof whatever of this nature. For that reason also the judgment appealed from cannot stand. As I said at the beginning we make no remarks on the question as to evidence. The case will have to go back in any case to be retried and as the learned President who was a member of the Court who gave the first judgment is now no longer in the country, the whole case would have to be reheard de novo. The appeal will therefore be allowed, the judgment of the Land Court set aside and the case remitted for retrial. The appellants will have their costs of this appeal on the lower scale in any event and we certify the sum of LP. 15 advocate's attendance fee costs of this appeal. The costs of the original trial in the Land Court will await the result of the retrail there.

Delivered this 7th day of April, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 31/41.

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

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

In the appeal of:

1. Elias Bishara el Abed
2. Butros Bishara el Abed — Appellants.

v.

1. Keren Kayemeth Leisrael Ltd.
2. Yusef Fein. Respondents.

Action before Magistrate concerning possession of land — Entry in commuted Tithe Registry as evidence of possession — Discretion of Court in believing or disbelieving uncontradicted oral evidence.

1. Entry in commuted Tithe Register — not conclusive evidence as to possession of land.

2. Court not bound to believe oral evidence, even if uncontradicted.

Asfour for Appellants. *Weinshall* for Respondents.

Appeal from judgment of District Court, Haifa, dated 2.1.41.

JUDGMENT

We need not hear you, Dr. Weinshall.

This is an appeal by leave from a judgment of the Haifa District Court given on appeal from the Magistrate's Court. The action before the Magistrate concerned possession of certain land in Al-Hweish area. The case turns entirely upon the evidence as to possession. The Magistrate did not believe the evidence. He said he was not convinced that the plaintiffs were in possession of the land claimed in accordance with the official plan prepared by the Survey Department.

The learned Relieving President on appeal pointed out that the evidence called by the appellant was divided into two types, the official dealing with prosecutions and other evidence dealing with possession.

With regard to the official evidence, the learned Relieving President pointed out that the officials called did not clearly prove that they were on the land then and now and that the land in both disputes is the same, nor could they show on any of the maps the site of these disputes.

With regard to the other evidence, the learned Relieving President said that "this seems to be the usual sort of evidence as to possession which seems to be readily obtainable in villages but much of which is not impressive".

Mr. Asfour's chief complaint seems to be that his evidence should have been believed and that the Magistrate had no discretion in believing or disbelieving it. He says in particular that the entry in the commuted Tithe Register is conclusive evidence of possession. He also says that a judgment of the Magistrate's Court in 1935 discharging a Government prosecution for tresspass also confirmed possession and that evidence of this type was not within the discretion of the Magistrate to say that he disbelieved. The answer to that is that the Magistrate did not say he did not believe it. The entry in the commuted Tithe

Register is certainly not conclusive evidence as to possession and the prosecution in the other case appears to have broken down because the Government claimed the land and they failed to prove that they were the owners of the land and the learned Relieving President remarks that this is in no way inconsistent with the ownership of the respondents' predecessors.

With regard to the other witnesses the learned Relieving President knew of no rule, and neither do we, that oral evidence must be believed just because it is not contradicted.

With regard to the point that the plan was wrongly regarded by the Magistrate we do not think that there is anything in that point. The plan was properly admitted and would be evidence as to village boundaries and assisted the Magistrate to come to a decision on the main point which was that the appellants failed to prove their own possession.

As to the argument that the contract was wrongly admitted, even if it were, we do not think that it influenced the judgment in any way.

For all these reasons, which I trust are sufficiently detailed for the appellant, we think the appeal should fail and it must be dismissed with costs and LP. 10 attendance fee.

Delivered this 28th day of March, 1941.

British Puisne Judge.

HIGH COURT NO. 23/41.

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

Before:— Copland, J. and Khayat, J.

In the application of:

Arnold Gronner — Petitioner.

v.

Director, Department of Immigration — Respondent.

Application for a certificate of naturalisation after residence of several months as traveller and less than 2 years as immigrant — Scope or art 7(1)(a) of Palestinian Citizenship Order in Council regarding qualifying residence for naturalisation as Palestinian citizen.

Qualifying residence for naturalisation under art. 7(1)(a) of Palestine Citizenship Order in Council begins from date of registration as immigrant, casual or temporary residence — not within scope of that article.

P. Joseph for Petitioner.

Ex parte.

Application for an order nisi to issue to the Respondent calling upon him to show cause why an order should not be made directing him to proceed with the Petitioner's application for the issue of a certificate of naturalisation on the basis that the Petitioner has established the qualifying residence in Palestine prescribed under Article 7(1) of the Palestinian Citizenship Order, 1925.

ORDER

The point in this application is the meaning of the word "resided" in Article 7(1)(a) of the Palestine Citizenship Order in Council 1925. This reads as following: —

> "7(1) The High Commissioner may grant a certificate of naturalisation as a Palestinian citizen to any person who makes application therefore and who satisfies him:—
>
> (*a*) That he has resided in Palestine for a period not less than two years out of the three years immediately preceding the date of the application."

The facts are short. The petitioner was in Palestine for two months in 1933 — he again arrived in this country on the 14th February 1939, on a three months' temporary visa which was extended for another month, and on the 28th July 1939 he received permission to remain permanently in Palestine and has remained here ever since. In January 1941, he applied for a naturalisation certificate, which was refused. The petitioner contends that he has "resided" in Palestine since the 14th February 1939, i.e. for two full years in the last three years, whilst the Director of Immigration says that the qualifying residence for naturalisation under Article 7(1)(a) only begins to run from the date of registration as an immigrant, in this case the 12th July 1939, when petitioner received permission to remain permanently in Palestine.

We think, after careful consideration that this latter view is the correct one, and what one might call casual or temporary residence is not included within the scope of Article 7(1)(a). Temporary residence for purposes of travel or health or business cannot be termed residence for the purpose of being naturalised.

The application for an order nisi must therefore be refused, but under Article 7(5) of the Order in Council the High Commissioner can make exception to the general rule in cases of hardship. The petitioner might possibly try this course, as, if his statements are true, there would appear to be certain circumstances meriting consideration. That however is not a matter with which we can deal.

Delivered this 8th day of April, 1941.

British Puisne Judge.

CIVIL APPEALS NOS. 229/40 and 230/40.

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

Before: Copland, J. and Rose, J.

In the appeals of:

C.A. 229/40:

The Arab Agricultural Bank — Appellant.

v.

Keren Kayemeth Leisrael Ltd.

Mahmoud Haj Nassir Jallad and 55 others — Respondents.

Abcarius and *Y. Husseyni* for Appellant.

Eliash and *Ben Shemesh* for Respondent No. 1.

Bushnaq for Respondents Nos. 2—57.

C.A. 230/40:

Mahmoud Haj Nassir Jallad and 55 others — Appellants.

v.

1. Keren Kayemeth Leisrael Ltd.
2. The Arab Agricultural Bank — Respondents.

Bnshnaq for Appellants.

Eliash and *Ben Shemesh* for Respondent No. 1.

Abcarius and *Y. Hussayni* for Respondent No. 2.

Claim by and judgment for 56 villagers to land bought by defendant based on right of preference('Awlawiya) and need for cereal cultivation—Persons claiming right of preference raising assessed value of land by mortgaging that land to an agricultural bank — Two out of 56 plaintiffs in whose favour judgment for right of preference was entered found to be minors — Action in Land Court for setting aside judgment given in claimants' favour on ground that it was obtained by fraud — Question of proper constitution of Land Court — Court of Appeal reversing finding of Land Court that original judgment obtained by fraud.

1. Where action brought in Land Court after amendment of Land Courts Ordinance (re constitution) technically a new one, even though to some extent a continuation of original action heard before that amendment, President (or Relieving President) sitting alone properly constitutes Court.

2. Fact that two out of large number of plaintiffs claiming priority to purchase land ultimately found to be minors does not amount to fraud justifying judgment given for plaintiffs being quashed.

3. Person claiming right of prior purchase need not have purchase money himself, where he gets it — immaterial.

4. Where person claiming in Land Court purchase priority stated he requires the land for cereal cultivation and value assessed on that basis, whereas some years later he appears to intend to use land for plantation — this is not fraud justifying reversal of judgment given in his favour.

Appeal from interlocutory order and judgment of Land Court, Nablus, dated 13.9.40, and 17.10.40, respectively,

JUDGMENT.

In these two consolidated appeals the same points arise for decision. In the first case the Appellants (hereinafter called the First Appellants) are the Arab Agricultural Bank. In the second case the Appellants (hereinafter called the Second Appellants) are some fifty-six persons of Hum Khalid village. The Respondents in each case are the Keren Kayemeth Leisrael, Ltd. This unfortunate litigation has been before the Courts for some nine years, with varying results. The facts are shortly as follows:

In 1931 the Respondents bought some 1400 dunums of land. In 1932, in Land case No. 10/32, the Second Appellants claimed the land in dispute by right of prior purchase under Article 45 of the Land Code. On 28.6.33 the Land Court gave judgment confirming their right to the land, and ordered the value thereof to be assessed, and by a later judgment the Land Court decided that the assessment should be made on the basis that the land was to be used as agricultural land. Assessment was duly made, and the Court held that the value as agricultural land at the time of claim was six pounds per dunum, but that if the land was to be used for citrus production its value would be nine pounds per dunum. Applying the assessment on the basis of the land being agricultural land, the Court ordered that a sum of LP. 8.400 should be paid into Court by the Second Appellants, together with the amount of the value of certain improvements effected by the Respondents. This was duly done, and on the 4th July, 1938, the land was duly registered in the names of the Second Appellants, a share of 1/56 going to each. On the same day fifty-five out of the fifty-six Second Appellants registered a mortgage in the name of the First Appellants for LP. 10.000.

The land was now declared to be within a Settlement Area, and the Respondents applied to the Settlement Officer to set aside the judg-

ment of 1933 on the ground that it had been obtained by fraud. On reference to the Land Court from the Settlement Officer's decision, that Court held that the Settlement Officer had no power to set aside the judgment of the Land Court, which latter Court alone could do so, and this was duly confirmed by the Supreme Court in Civil Appeal 94/39, Keren Kayemeth Leisrael, Ltd., v. Mahmoud Haj Nassir Jallad and Others, (6 P.L.R., p. 493), on the 4th October, 1939. Thereupon, in January, 1940, the Respondents entered an action, Land Case 1/40, against the First and Second Appellants, asking to have the judgment in Land Case 10/32 set aside on the ground of fraud. The learned president, Judge Cressall, sitting alone, decided in their favour. Hence these appeals.

Abcarius Bey, on behalf of the First Appellants, states that the mortgage of his clients was made in good faith for value, that the mortgage was made after the Land Court judgments were final, and his clients had not been parties to these Land Court actions. He complains that no mention was made of the rights of his clients in the judgment now under appeal. He says, rightly, that if the Second Appellants should win the appeal he is not concerned, but that if the Second Appellants should lose, then he asks that the retransfer to the Respondents should be made subject to the money paid into Court being paid out to his clients, and subject also to a charge being entered, for the balance owing on the amounts advanced under their mortgage, on the land. He has raised another point with regard to the constitution of the Court — which is not seriously pressed — and that is, that the Court which gave the judgment now under appeal was improperly constituted by the President sitting alone, and that it should have been composed of the President and one Judge seeing that the action was not a fresh one but in fact a continuation of case No. 10/32. With regard to the Second Appellants he has argued that "need" in Article 45 of the Land Code means need for any kind of cultivation, and that it is immaterial where his clients get the money from, with which to pay the price for the land — that there is nothing in the law which says that they must have the money themselves when they bring an action for right of prior purchase. He further argues that the fact that two of the fifty-six Appellants were minors at the time the original action was brought is immaterial, seeing that the other fifty-four Second Appellants had the right to claim all the land for themselves. There is no suggestion that the First Appellants were parties to the alleged frauds.

Osman Eff. Bushnaq, for the Second Appellants, has pleaded also

that the Settlement Officer has given a judgment ordering the land in dispute to be registered in his clients names, and this judgment has not been appealed, and that therefore this present action cannot be heard. This point can be disposed of straightaway. Whatever the Settlement Officer may have decided cannot affect the present action which has been brought to set aside the judgment of the Land Court given in 1933. The Respondents also contend that the Court was properly constituted because of this action having been entered, and fees duly paid, in 1940, after the amendment of the Land Courts Ordinance came into force. We agree with this contention, and we do not think that the judgment in Civil Appeal 94/39 (supra) is against this view. What the Court said in that case was that an action to set aside the original action was in reality a continuation of an action properly entered originally in the Land Court, and within that Court's jurisdiction, but it is clear that Land Case No. 1/40 is technically a new action.

In his judgment the learned President found that fraud by the Second Appellants was proved for these reasons:

(*a*) that two of the fifty-six Second Appellants at the time the action was instituted were minors, and were therefore incapable of bringing an action themselves, or of executing a power-of-attorney, and that this fact was known to the Second Appellants;

(*b*) that throughout the original proceedings the Second Appellands claimed that they had the money required to purchase the land from their own pockets, and that they allowed the Court to believe that they needed the land as a means of existence, whereas in fact they had no money and had decided to embark on a speculation by borrowing money from a bank; and

(*c*) that the Second Appellants wrongly stated that they required the land for the production of cereals, and that the assessment of value was made on this basis, whereas in truth and in fact they never intended to cultivate it for cereals, but had intended to turn it into an orange grove;

and Dr. Eliash, on behalf of the Respondents, has contended that these conclusions were right. It is to be noted that the learned President, no doubt by inadvertance, omitted to deal with the position of the First Appellants.

We think that the fact that two of the Second Appellants were minors is not sufficient in itself to enable the Court to set aside the original judgment on the ground that it had been obtained by fraud. It is not contested that the other fifty-four Second Appellants were entitled to bring the

action, and we hold that they could have claimed the whole land for themselves. We also do not think that the fact that the Second Appellants had to borrow money to pay for the land, and that they had not disclosed this fact to the Court, is a sufficient proof of fraud. There is nothing in the law which says that a person claiming a right of prior purchase under Article 45 must have the money himself, and we agree with Abcarius Bey that where they get the money from is a matter which concerns only themselves — even though the Second Appellants may have arranged with the First Appellants to advance them the money to purchase the land so far back as 1934, this does not affect the position. They would naturally take steps to be in position to pay for the land, if their right to it were established.

The third ground might have been a sufficient one on which to base fraud but for the fact that the original action was filed in 1932 and the mortgage of the First Appellants was not executed until 1938, after the land had been registered in the names of the Second Appellants, and the first mention of citrus cultivation in connection with this land was not until 1938. A person may very well in 1932 have intended to use the land, if he obtained it, for cereal cultivation, but he could not be held to be bound by that intention for the rest of his life. In 1938, quite possibly citrus cultivation would have provided a better means of livelihood than the cultivation of cereals. It is also a fact, which has not been contradicted, that up to this moment the land has not been used for citrus cultivation. But the fact that it was and is intended to be used for cereals is also borne out when one remembers that the amount of the mortgage is only LP. 10,000, whereas the amount to be paid for the land, including the cost of the improvements, is LP. 9641. Since the amount of the mortgage debt included two years' interest, and each year's interest on the purchase price would come to about LP. 690, it is obvious that no money would be left over, after the purchase price was paid, for developing the land as a citrus estate. It is true that, by the terms of the mortgage, the Second Appellants are under an obligation to make an orange grove, but, if they do not do so, that is a matter between themselves and the First Appellants only.

For these reasons we do not think that the grounds given by the learned President for setting aside the original judgment on the ground of fraud are valid ones, and his decision, therefore, cannot be supported. This result may be an unfortunate one, but the Respondents undoubtedly took a grave risk when they started to develop the land at a time when their ownership of it was in dispute.

Both appeals must be allowed, and the judgment of the learned

President set aside, and the Respondents' action dismissed. The First and Second Appellants are entitled to their costs on the lower scale, both here and below, to include in each case LP. 10 advocate's fee for attending the hearing of this appeal, to be paid by the Respondents, the Keren Kayemet Leisrael, Ltd.; the money paid into Court — LP. 8631.014 — to be paid out to the Respondents.

Delivered this 24th day of January, 1941.

British Puisne Judge.

CRIMINAL APPEAL NO. 29/41.

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

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

In the appeal of:

Tuvia Friedmann — Appellant.

v.

The Attorney-General — Respondent.

Court convicting accused failing to state findings of fact — Court of Appeal upholding conviction on basis of a confession by accused found by trial Court to be free and voluntary — Giving of evidence in a criminal case upon affirmation instead of on oath.

1. Presiding judge of Court must record findings of fact on which conviction or acquittal based.

2. Before a witness in a criminal case gives evidence upon affirmation insted of on oath Court should be satisfied that he is entitled to do so for one of reasons mentioned in sec. 34 of Criminal Procedure (Trial Upon Information) Ordinance; desirable that reason should be recorded.

Goitein for Appellant.

Crown Counsel (Bell) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 25.2.41, whereby Appellant was convicted of conspiracy, contrary to Section 34 of the Criminal Code Ordinance, 1936, to commit a forgery, contrary to Section 338, conspiracy with intent to defraud, contrary to Section 36(f) of the Criminal Code Ordinance, and inducing by false pretences the delivery to another person of something capable of being stolen, contrary to Section 301 of the Criminal Code Ordinance, and sentenced to four years' imprisonment.

JUDGMENT

This Court has on a several occassions called attention to Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance, which is as follows:

> "Upon the conviction or acquittal of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction or acqutal is based:
>
> Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such appear to be sufficiently established by the evidence given in the case."

If this is not copmlied with — apart from the possibility of unfairness to the convicted person — the work of this Court it greatly increased.

In this case there were twenty-three counts — which was too many, and in effect the Accused was charged with conspiracy and fraud in connection with immigration by reason of a number of transactions spread over a period of time.

In such a case one may expect to be able to discover from the judgment at least what the story is and what part the Accused played. There is nothing of the sort here. The Court says:

> "We therefore believe the evidence of the witnesses for the prosecution on all material points and this belief and our unqualified acceptance of the confession by the accused to Insp. Rosenstein is strengthened by the fact that no evidence has been submitted by the accused in these proceedings to contradict the case for the prosecution on any single point or issue.
>
> "As regards the 13 charges of conspiracy alleged in the various counts in the Information ;apart from what we have said before, the strong circumstantial and other evidence with that in particu-

> lar of Mackenzie Turner, Dixie, Arieh Ragolsk and Abdul Nur, which very substantially corroborates on material points that of the accomplices, M. Safieh and others, and stands unshaken and uncontradicted by any other evidence, leave us with no difficulty in drawing the inferences necessary which do establish in our view beyond any doubt the relevant criminal acts done by this accused and his confederate in pursuance of apparent criminal purposes in common between them."

The Court did, however, find that a confession by the Accused was free and voluntary.

The case might well go back for the Court of Trial to furnish fuller findings under Section 71 of the Criminal Procedure (Trial Upon Information) Ordinance, but the Crown Counsel asks us to deal with it upon the basis of the confession, and he admits that this will result in the conviction upon some of the counts not being sustained. He also agrees that the Appellant's antecedents would justify the Court considering the grant of special treatment.

We therefore reduce the sentence to one of three years' imprisonment with special treatment.

There is one other matter to which I would refer. It appears that one witness, Mr. Mendel, gave his evidence upon affirmation. Section 34 of the Criminal Procedure (Trial Upon Infomation) Ordinance provides:

> "Every witness shall be examined on oath except where the court is satisfied that the taking of an oath is contrary to the religious belief of the witness or that he has no religious belief, in either of which cases he may be examined on his affirmation

We are told that Mr. Mendel did not state why he desired to affirm, and there is no note as to this upon the record.

Before a witness gives evidence upon affirmation the Court should be satisfied that he is entitled to do so, and it is desirable that his reason should be recorded.

Delivered this 2nd day of April, 1941.

Chief Justice.

CRIMINAL APPEAL NO. 18/41.

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

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

In the appeal of :

Ahmad Abad Shawish — Appellant.

v.

The Attorney-General — Respondent.

Charge of premeditated murder — Admission in evidence of statement containing confession made by accused — Court deciding in its judgment to disregard confession admitted and heard in evidence — Argument that statement containing confession must have influenced minds of Court.

(Obiter) Where a statement containing confession by accused was admitted and read in evidence, though eventually in its judgment Court decided not to attach any weight to it and to disregard it, it cannot successfully be argued that statement must have influenced minds of Court, there being a considerable difference between a jury and a Bench of Judges.

Asfour for Appellant.

Crown Counsel (Bell) for Respondent.

Appeal from judgment of Criminal Assize Court sitting at Haifa, dated 31.1.1941, whereby Appellant was convicted of murder, contrary to Section 214(b) of Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT

The Appellant was charged at the Haifa Assizes with the premeditated murder of Dr. Anwar Shukeiri on the 8th of June, 1939, at Acre. He was charged incidentally with four other persons. The other four were acquitted, and this Appellant was convicted and sentenced to death. The evidence showed quite clearly that the Appellant went to the house of this doctor, told him that his wife was ill,

and asked the doctor to come and see her. The doctor went out with the Appellant, and in the course of their journey, outside what they call the Casino in Acre, the doctor was shot. There was a mass of evidence which showed beyond any doubt that it was the Appellant who shot, or that, at any rate, he was one of those persons who shot at the doctor and killed him.

Mr. Asfour for the Appellant has raised two main points really. The first one is that the alleged confession made by the Appellant was wrongly admitted in evidence, and, even if disregarded, must have influenced the minds of the Court; and the second, that the statement made by the deceased man in hospital to Sergant Billing, that it was a person called Ahmad who shot him, was inconclusive as a means of identification of the Appellant.

Now a very considerable amount of argument was advanced in the Court of Trial as to whether this confession was admissible or not. After hearing evidence the Court decided that it was admissible, and it was admitted and read. When it came to consider its judgment and the evidence of the defence, the Trial Court decided that no weight should be attached to this statement, and it said "We disregard it."

We think that the confession was clearly admissible. As to the argument that it must have influenced the minds of the Court, even if disregarded, it is not as though the confession had been read to a jury. It was read by a Bench of Judges, which makes a considerable difference. In any case, when the Court said that is disregarded it, it does not mean that it had second thoughts about it and held that it was inadmissible. The statement being, as the Court rightly held, admissible, the point is actually irrelevant.

With regard to the statement made by the dying man that his assailant was Ahmad, this would not, of course, by itself be conclusive, but the fact remains that this present Appellant's name is Ahmad. On the evidence there was ample material before the Court of Criminal Assize upon which to convict the Appellant of what was undoubtedly a most cowardly and despicable crime. To call out a doctor under a false pretence on an errand of mercy, and then to shoot him in cold blood, is an act which it is beyond words to describe in adequate terms of condemnation.

In these circumstances there are no grounds whatever for disturbing the verdict of the Trial Court. The appeal must be dismissed

and the conviction and sentence of death are confirmed.

Delivered this 26th day of February, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 29/41.

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

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

In the appeal of:

Gershon and Ziona Yosselevitch — Appellants.

v.

Emmanuel and Rivkind. — Respondents.

Application for injunction restraining Chief Registrar from recording award given in a workman's compensation matter — Appeal from injunction issued to Chief Registrar to postpone recording of award.

1. Appeal from an order restraining Chief Registrar from recording award given in a workman's compensation matter lies to District Court and thence, by leave, to Court of Appeal.

2. Court seized with action to set aside award in a workman's compensation matter may grant injunction restraining Chief Registrar from recording award pending decision of action, and Court of Appeal will not interfere unless it finds grant of injunction unreasonable.

Smoira and *Bar-Shira* for Appellants.

Wittkowski for Respondents.

Appeal from judgment of District Court, Tel-Aviv (In its appel late capacity), dated 31.10.40.

JUDGMENT

A preliminary objection was taken by the respondents that no appeal lies to this Court. In view of Section 15(3) of the Arbitration Ordinance (Cap. 6 of the Revised Edition) and paragraph 6 of the 3rd Schedule to the Workmen's Compensation Ordinance (Cap. 154 of the Revised Edition), we are of opinion that an appeal from an order of this nature lies to the District Court and thence, by leave, to this Court.

It appears that as a result of certain arbitration proceedings the appellants obtained an award in their favour against the respondents. This award was duly forwarded to the Chief Registrar to be recorded in the Register.

The respondents thereupon filed an action in the Chief Magistrate's Court of Tel-Aviv to set aside the award on certain grounds, with which we are not here concerned, and applied ex parte to the Chief Magistrate for an injunction to issue restraining the Chief Registrar from recording the award pending the decision of the action.

This interim injunction was granted on the 8th of August, 1940. The Chief Magistrate appears to have had doubts as to whether he was right to grant such an injunction ex parte and on the 12th September, 1940, the matter was reargued before him by both parties. The Chief Magistrate then confirmed his previous order. Presumably he was satisfied, after hearing the parties, that the institution by the respondents of these proceedings to set aside the award was bona fide and not merely for the purpose of causing delay.

We are not prepared, therefore, to say that he acted unreasonably in requiring the Chief Registrar to postpone the recording of the award until after the decision of the action.

It is probably unnecessary to add that we have formed no view as to the merits of the pending action, to which the appellants may have good defences both of law and of fact.

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

Delivered this 11th day of March, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 240/40.

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

Before:— Rose, J. and Abdul Hadi, J.

In the appeal of:

Habib Yusef Marroun — Appellant.

v.

Father Augustian Kalanti in his capacity as Agent for the property of the Carmelite Convent. — Respondent.

Agreement for sale of building plot — Purchaser claiming damages found to have committed himself breaches of contract — Contention by defaulting purchaser that vendor committed prior breach — Question as to whether contract to be treated as containing independent promises or concurrent obligations — Condition precedent to claim of damages under a contract containing concurrent obligations.

1. Tendency of Courts — against constructing contracts as containing two independent promises breach of any of which actionable upon mere proof of damage.

2. Where promises of parties to contract amount to concurrent obligations claimant, before he can recover damages for defendant's failure to complete, must prove that he was ready and willing to perform his own obligations under contract.

Goitein for Appellant.

Levin (*by delegation from Mu'ammar*) for Respondent.

Appeal from judgment of District Court, Haifa, dated 26.10.40.

JUDGMENT

This is an appeal from a judgment of the District Court of Haifa.

By an agreement dated the 4th July 1935 the respondent undertook to sell to the appellant a certain plot of land for the purpose of building a house thereon.

The Court below found as a fact that the appellant had committed certain breaches of the agreement and we think that there was evidence upon which it could properly so find. The appellant, however, contends that the respondent committed a prior breach of the agreement in that he failed to comply with clause 4 thereof, which required him to transfer the plot to the appellant upon the completion and approval by the Town Planning Commission of a parcellation scheme which, at the date of the signing of the agreement, was in the course of being carried out.

The first question which we have to decide is whether the respective promises of the parties were independent, the breach of any of which would be actionable upon mere proof of damage, or whether they amounted to concurrent considerations, in which case the complaining party would have to show that he was ready and willing to perform his part of the contract.

The form of the contract is unusual and complicated, and the question therefore is not free from difficulty. As Mr. Chitty points out in his book on Contracts (at page 836 of the 18th edition) the tendency of the Courts is against construing contracts as containing two independent promises, and we consider that, having regard to this tendency and to the tenour of the contract as a whole, we should regard the promises of the parties in this case as giving rise to concurrent obligations.

Before therefore the appellant can recover damages for the respondent's failure to transfer the plot, he must prove that he was ready and willing to perform his own obligations under the contract.

Issue 6 reads af follows:—

> "In the event that the Defendant committed a breach, was the Plaintiff ready and willing to perform his obligation in the contract and therefore entitled to claim the damages ?".

The Court of Trial made a somewhat equivocal finding on this matter and we have felt some hesitation as to whether we should not remit the case for an express finding to be made. However, in dealing with the seventh issue in this case, the Court said as follows:

> "If plaintiff had established to our satisfaction that it was defendant who committed breach of the contract and that he was willing and ready to perform his obligations he would have been entitled to the real and actual damages namely LP. 206........ but he has failed to satisfy us on this point..,"

We take this as meaning that, in the opinion of the Trial Court, the plaintiff failed to prove both that respondent committed a breach and that he (the appellant) was ready and willing to perform his obligations. There was, in our opinion, material on which the Court could properly come to the latter conclusion, especially having regard to the fact that the appellant had not made any considerable effort to comply with his obligations under the contract up to the time when the respondent treated the contract as rescinded, namely, some nine or ten months after the expiration of the two year period contemplated in the agreement.

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

Delivered this 8th day of April, 1941.

British Puisne Judge.

HIGH COURT NO. 18/41.

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

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

In the application of:

I. David Ketter — Petitioner.

v.

1. The President of the Rabbinical Court of Appeal, Jerusalem
2. The General Secretary of the Chief Rabbinate, Jerusalem.
3. Sarah Orah Heller.
4. The Attorney-General. — Respondents

Application by applicant to Rabbinical Court for a declaration that he is married to respondent — Decision of Rabbinical Court that applicant not married to respondent — Rabbinical Court of Appeal refusing to hear appeal from decision of Rabbinical Court that applicant not married to respondent — Application to High Court for an order calling upon Rabbinical Court of Appeal to hear appeal — Competence of High Court to inquire into exercise of jurisdiction by Religious Courts — Inherent right to appeal from all judgments of Rabbinical Courts of First Instance.

1. High Court may in proper cases enquire into exercise by Religious Court of its jurisdiction.

2. Right to appeal inherent in all cases tried before a Rabbinical Court of First Instance.

3. High Court may order Rabbinical Court of Appeal to hear appeal from a judgment of Rabbinical Court given in First Instance.

Edit. Note: H.C. 29/30 1 PLR 462 followed.

Petitioner in person.
Eliash for Respondents Nos. 1 & 2.
Ginzberg for Respondent No. 3.
Bell (*Crown Counsel*) for Respondent No. 4.

Application for an order to issue directed to the First and Second Respondents calling upon them to show cause why they should not be ordered to accept the appeal against the judgment of the Rabbinical Court of First Instance, dated 28.1.41, in the case between the Petitioner and the Third Respondent, and why that appeal should not be put before the Rabbinical Court of Appeal for hearing in due course.

ORDER.

This is the return to an application for an order calling upon the Rabbinical Court of Appeal to hear an appeal from a judgment of a Rabbinical Court.

The Applicant in effect sought a declaration that he was married to a certain lady. Assuming the parties are within its jurisdiction, that is a matter for the Rabbinical Court, and we are not concerned with its merits, but as under the Order-in-Council the judgments of Religious Courts are executed by the Civil Courts, this Court has in proper cases taken upon itself to enquire into the exercise of their jurisdiction.

In his application the Applicant put in a copy of what is described as a judgment; he also put in a copy of a rule of procedure of the Rabbinical Courts which says: "All judgments decided by a Court of first instance may be appealed against", and he put in a copy of a letter from the Chief Rabbinate, saying the judgment was not subject to appeal.

We now have an affidavit from the Secretary of the Chief Rabbinate in which he does not deny that the decision was a judgment, nor does he impugn the Rule of Court, —it would seem, therefore, that the appeal should have been heard. Moreover, in H.C. 29/30, Vol. 1, P.L.R. 462, this Court held that a right to appeal is inherent in all cases tried before a Rabbinical Court of First Instance.

The order therefore will be made absolute.

The Applicant does not ask for costs.

Given this 28th day of March, 1941.

Chief Justice.

HIGH COURT NO. 22/41.

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

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

In the application of:

Binyamin Goldberg — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Kadar Pottery Works Ltd. — Respondents.

Chief Execution Officer ordering debtor to pay debt by monthly instalments according to debtor's undertaking — Order of imprisonment by Chief Execution Officer upon allegation that judgment debtor failed to pay two instalments — Invalidity of order of imprisonment against judgment debtor not based on evidence of his ability and his failure to pay and not indicating period of detention.

1. No order of imprisonment can validly be made against judgment debtor without proof of his ability to pay and his non-compliance with order to pay instalments.

2. Order of imprisonment against judgment debtor must indicate period of detention.

Edit. Note: See H.C. 22/38 3 CtLR 175; H.C. 6/39 5 CtLR 93; H.C. 97/40 8 CtLR 182.

Petitioner in person.

Respondent No. 1 — Absent, served.

Zysman for Respondent No. 2.

Application for an order to issue directed to first Respondent calling upon him to show cause why he should not be restrained from executing his order, dated 12.2.41, in Execution File No. 11209/40, Tel-Aviv, ordering imprisonment of Petitioner.

ORDER.

This rule must be made absolute. The Petitioner undertook to pay his debt by monthly instalments, and this undertaking was confirmed by a formal order of the Chief Execution Officer. It is said that the Petitioner failed to pay two instalments, and the second Respondent applied to the Chief Execution Officer for an order for imprisonment. The order was made, but it does not appear that any evidence was adduced to prove Petitioner's ability to pay or that he had not complied with the order to pay instalments. The actual order was —

"B. Goldberg to be arrested."

This order is clearly improper, as it was not granted upon any evidence or proof concerning the ability of the debtor to pay, and it does not

indicate the period of detention, which it certainly should do.

The rule will be made absolute with costs, and LP. 2 to cover the Applicant's expenses, as he appears in person.

Given this 22nd day of April, 1941. *Chief Justice.*

CIVIL APPEAL NO. 41/41.

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

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

In the appeal of :

The Palestine Mercantile Bank, Ltd. Appellant.

v.

1. Kamel Geadah
2. Dib Badran
3. Elias Issa Sahyoun. Respondents.

Agreement with Bank for overdraft not exceeding specified sum — Guarantee for fulfilment of terms of agreement granting overdraft not exceeding specified sum — Increase of overdraft without guarantor's consent or knowledge — Question as to whether guarantor's liability subsists up to specified sum or extinguished altogether — Disallowance of advocate's fees to successful respondent.

1. Where guarantee was allowed without knowledge of guarantor to draw more than originally agreed between him, creditor and guarantor latter's liability thus altered without his consent discharged altogether.

2. Court of Appeal may, while dismissing appeal on merits, disallow respondent advocate's fees if he made preliminary objections without substance.

Olshan (by delegation from Gross) for Appellant.
Respondent No. 1 — no appearance.
Koussa for Respondent No. 2.
Sahyoun for Respondent No. 3.

JUDGMENT

Appeal from judgment of District Court, Haifa, dated 3.2.41.

This appeal concerns the proper interpretation of an agreement dated the 15th March 1936, made between the appellant bank and the first respondent, and guaranteed by the other two respondents. The important parts of the agreement are the first para and the guarantee endorsed on the document. They are in these terms —

"You have accorded me an Overdraft in Current Account for a total sum not exceeding LP. 300.— (Three hundred Palestine Pounds) which you may allow me from time to time to overdraw

> on the terms and conditions mentioned hereunder which I accept without reservation of any kind, and I hold myself liable to you for the repayment of such amounts overdrawn together with all interest and commission and any expenses that may be incurred in connection with the above account."
>
> "We, the undersigned jointly and severally guarantee the fulfilment of all the paragraphs in full in the above contract and hereby undertake to pay you on your first demand, any sum up to LP. 300 (Three hundred Palestine Pounds) plus interest, commission and any expenses that may be incurred in connection with the above overdraft up to date of settlement of the whole debt due from the abovenamed".

The learned Relieving President found for the second and third respondents, on the ground that the authorised overdraft of LP. 300 had been exceeded and that had altered the liability of the guarantors.

On this appeal, the appellants contend that any restriction in the agreement affects the debtor only, and does not restrict the guarantee, except that the guarantors cannot be liable for more then the LP. 300, that this is a continuing guarantee on a current account, and that more than LP. 300 may be supplied during the continuance of the guarantee. The respondents' answer is that, by allowing the overdraft to exceed LP. 300, the appellants have caused prejudice to them, since they are now called upon to pay more than would have been the case, in other words, that they would have had to pay less than LP. 300, if the limit had not been passed. They further contend that they guaranted the first respondent because they thought he was good for LP. 300 but not for more, and that the alteration was made without their knowledge.

We think that the respondents are right in their view. It is clear to our minds that the wording of the agreement and of the guarantee shows that the guarantee was given on the strength of the clause in the agreement that the credit would not be allowed to exceed LP. 300. It has been so exceeded, and the learned Judge was therefore right in holding that the guarantors were discharged, since their liability had been increased without their consent.

It is unnecessary to say more. The appeal must be dismissed with costs to the second and third respondents on the lower scale.

We do not allow advocate's fees to the second respondent, since he raised two preliminary objections which failed. The most cursory enquiries would have shown that the first one had no foundation and the second one was equally without substance. The third respondent will have LP. 10 advocate's attendance fee. We see no reason to award interest against the first respondent nor to interfere with the discretion exercised by the learned Relieving President as to costs.

Given this 8th day of April, 1941. *British Puisne Judge.*

CIVIL APPEAL NO. 109/40.

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

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

In the case of:

Catherine Bustros, Widow of the late Nadra Habib Moutran, and 9 others. Appellants.

v.

Najib Habib Moutran, and 4 others. Respondents.

Claim by heirs of alleged co-owner to shares in land in possession of Defendants and still registered in name of deceased — Defendants claiming exclusive ownership of land and asking, without formal counterclaim, for order that land should be registered in their names — Dismissal of Plaintiff's claim to share in land and order to register land in name of Defendants — Land Courts Ordinance Sections 4 *and* 8.

Land Court dismissing case for unlawfully preventing Plaintiff from exercising right of ownership in respect of his share in land should not, in absence of a counterclaim and payment of fees therefore, order registration of land in name of Defendant.

Weinshall and *Levin* for Appellants.
Eliash and *Kehaty* for Respondent No. 1.
Atalla for Respondents Nos. 2—5.

Appeal from judgment of Land Court, Nablus, dated 10.5.40, and from an Interlocutory Order, dated 23.11.39.

JUDGMENT

Many years ago a wealthy landowner, Nadra Habib Pasha Moutran, resided at Baalbek. Certain property in Palestine, which is now in dispute, was registered in the names of his five sons, two of whom died unmarried, so that their shares passed to their father and mother.

This land is still registered in the names of the five brothers, but for many years was in the possession of two, Najib and Elias, and since the death of Elias has been and is in the possession of Najib and the heirs of Elias, and the present proceedings were brought in the Land Court by the heirs of two others of them, alleging that the Defendants (i.e. Najib and the heirs of Elias) were unlawfully preventing the Plaintiffs from exercising the right of ownership in respect of their shares in the land.

The first Defendant alleged firstly, that he bought from his parents the shares of his two deceased brothers; secondly, that there was a

partition of the property before the death of his father. The other Defendants alleged that the property was partitioned.

By partition was meant a division during the father's lifetime, and with his approval of his various properties among his children, and that by this division the Palestine property fell to Najib and Elias.

The Defendants also asked the Court to decide that the land should be registered in their names: one half in the name of Najib and the other half in the name of the heirs of Elias, and that the present tapou records should be cancelled; but they made no formal counterclaim, and paid no fees in respect of a counterclaim.

Owing to the division of the land having taken place before the great war, 1914—18, and to the fact that the Moutran family suffered greatley as the result of that war, the parties had difficulty in establishing facts, but the Land Court held —

> "We are convinced that a partition was contemplated and intended. We are also satisfied from the letters referred to, from the oral evidence of old servants and peasants of Baalbek, from the evidence of land registrations in Lebanon, and from the non-claim by any brother in person that a partition was in fact made. We are not certain that a final deed was drawn, and we find that if any deed were drawn it is not the deeds produced by the Plaintiff."

and dismissed the Plaintiffs' claim and ordered the registration of the land in dispute in the names of the first Defendant and the heirs of Elias.

There was a prolonged hearing before this Court, and our attention was directed to all the available material, and a number of authorities cited, but having regard to Sections 4 and 8 of the Land Courts Ordinance, I think the only question for us is whether or not the Land Court was entitled as a matter of law to come to the conclusion to which it came on the material before it. I think it was, but I do not think that the Court, in the absence of a counterclaim and the payment of fees therefor, could direct the registration of the land in the name of the Defendants.

The appeal on the main point will be dismissed, but the judgment of the Land Court varied by striking out the direction that the land in dispute be registered in the names of the first Defendant and the heirs of Elias. The respondents will have their costs on the lower scale and a sum of LP. 10 for advocate's attendance fee to the first respondent and a similar sum for advocate's attendance fee to the other four respondents.

Delivered this 31st day of July, 1940.

Chief Justice.

HIGH COURT NO. 111/40.

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

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

In the Application of:

George Fredric Upfold — Petitioner.

v.

1. Superintendent in Charge of Prison, Acre.
2. Inspector General of Police and Prisons, Jerusalem.

Respondents.

Habeas corpus application for release of member of Palestine Police Force charged and convicted of an offence contrary to good order and discipline — Provision of law dealing with mode of trial of offences but not creating such offences — Police Ordinance Secs. 18, 50, 17 — *Defence (Amendments of Police Ordinance) Regulations,* 1940.

1. Provision of law dealing with mode of trial of an offence while no provision creating such offence — no basis for prosecution.

2. Conviction under sec. 18 sub-sec. (1) para (i) of Police Ordinance ("any offence contrary to the good order and discipline of the Force which the Inspector-General considers should be tried by a Court of Discipline") cannot stand, as no rules made by High Commissioner defining such offences, hence not created.

Edit. Note: See H.C. 109/40 9 CtLR 3.

Seligman and *Sussmann* for Petitioner.

Crown Counsel (Bell) for Respondent.

Application for a summons to issue to the Respondents, directing them to produce George Fredric Upfold, Petitioner before this Court on Thursday, the 19th day of December, 1940, at 9.30 o'clock in the forenoon, and calling upon them to show why the said George Fredric Upfold should not be released from detention.

ORDER.

This is an application for an order in the nature of habeas corpus for the release of George Fredric Upfold, who is a British Constable of the Palestine Police Force.

Section 18 of the Police Ordinance, as appearing in Section 2 of the Police (Amendment) Ordinance, No. 2 of 1939, provides for the constitution of Courts of Discipline for the trial of various offences.

Sub-section (1) of that paragraph has been amended by the addition of paragraph (i), which will be found in the Defence (Amendment) of Police Ordinance Regulations, 1940, (Supplement No. 2 of the Palestine Gazette of 24th October, 1940) as follows: —

> "(*i*) any offence contrary to the good order and discipline of the Force which the Inspector General considers should be tried by a Court of discipline".

The Applicant was charged and convicted under this paragraph.

Section 50 of the Police Ordinance, sub-section 1(e) provides that the High Commissioner in Council may make rules for the defining of offences to the prejudice of good order and discipline. Admittedly no such rules have been made, and the offence in consequence has not been created.

The additional paragraph (1) to which I have referred, particularly having regard to Section 17 of the Police Ordinance, deals with the mode of trial, not with the creation of the offence.

We are satisfied, therefore, that the proceedings were irregular, and the rule should be made absolute, and the Applicant discharged.

The applicant will have an inclusive sum of LP. 10 as costs.

Given this 19th day of December, 1940.

Chief Justice.

CRIMINAL APPEAL NO. 35/41.

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

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

In the appeal of:

Badawi Salman Salhoub	Appellant.
v.	
The Attorney-General	Respondent.

Charge on information with committing robbery on a particular night — Finding by Court not based on any evidence that offence was committed date stated in information — Distinction between cases where time of essence and where not.

1. Where time of essence of offence — essential to insert it in information.

2. Where Court found as a fact, although there was no evidence of it, that offence was committed on date stated in information and date not of essence of offence judgment will on appeal not be disturbed, as no miscarriage of justice actually occurred.

Abu Sha'ar for Appellant.

Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 13.3.41, whereby Appellant was convicted of robbery, contrary to Section 288(1) of Criminal Code Ordinance, 1936, and sentenced to four years' imprisonment.

JUDGMENT

The only point in this appeal is a technical one. It is said that the Appellant was charged on the information with committing the offence on a particular night, namely 15/16 July, 1939. The prosecution failed to prove that the offence was committed on that particular night.

We think the law is well stated in Hailsham, Vol. 9, page 133, as follows:

> "It is usual to insert the date on which the Crime charged is alleged to have been committed, and it is essential to do so where time is of the essence of the offence. In such case, the day of the month or year, and sometimes the time of day, when the alleged offence was committed must be alleged."

In this case the date was not of the essence of the offence.

The Court, however, found as a fact that the offence was committed on that date, and of this there was no evidence. The Court therefore found a fact of which there was no evidence, but we do not think that any miscarriage of justice has actually occurred, and the appeal is dismissed.

Delivered this 1st day of April, 1941.

Chief Justice.

CRIMINAL APPEAL NO. 42/41.

IN THE SUPERME 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:

Afif Abdul Latif Saleh Mansour — Appellant.

v.

The Attorney-General — Respondent.

Manslaughter prompted by consideration of family honour — Mitigating effect of immediate confession.

1. Court cannot recognise family honour as a defence to a charge of manslaughter nor have sympathy with persons taking law into own hands.

2. Court meting out penalty to take into consideration mitigating circumstances such as immediate confession to Police, clean record.

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

Appeal from judgment of District Court, Nablus, dated 22.3.41, whereby Appellant was convicted of manslaughter, contrary to Sections 212 and 213 of Criminal Code Ordinance, 1936, and sentenced by majority of Court to eight years' imprisonment.

JUDGMENT.

This is another case of family honour in which the Appellant pleaded guilty to the charge of manslaughter, and was sentenced to eight years' imprisonment. He now appeals against sentence only.

As I have said in many cases of this kind, this Court does not recognize family honour as a defence, and it can have no sympathy with persons who take the law into their own hands.

But taking into consideration the circumstances of this case, the immediate confession of the accussed to the police and his clean record, we think that the sentence of eight years' imprisonment is on the high side, and we reduce it to one of five years.

Delivered this 2nd day of April, 1941.

Chief Justice.

CIVIL APPEAL NO. 55/41.

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 appeal of:
Mrs. M. Taylor — Appellant.
v.
George S. Shiber — Respondent.

Default clause in contract of lease giving lessor right to terminate contract — Interpretation of terms of contract regarding non-payment of rent — Effectiveness of forfeiture clause in contract of lease.

Where lessee failed to pay one of promissory notes given in respect of rent while contract of lease provides that failure by lessee to pay any instalment or promissory note in time shall give lessor right to terminate contract without further notice and that every undertaking in the agreement shall be considered as of essence of contract and any violation by lessee of any of his undertakings shall be considered a breach of whole contract giving lessee right to terminate it, Court to give effect to such right.

Edit. Note: C.A. 54/38 3 CtLR 208 distinguished.

Asal for Appellant.
Goitein for Respondent.

Appeal from judgment of District Court, Jerusalem, (C.A. 91/40), dated 17.2.41.

JUDGMENT

This appeal arises out of a claim by the Respondent for an order evicting the Appellant from certain premises. That claim is based on the terms of the contract of lease, whereunder the Appellant was the lessee and the Respondent the lessor.

A certain sum was paid in respect of rent when the lease was entered into, and the balance of the rent for the term was payable by two promissory notes. One of these, for sixty pounds, was due on the 30th of July last, and has not been paid.

Clause 3 of the contract provides:

> "If any instalment is not paid on the day fixed in the contract, or if any note is not paid on the date of payment, all the outstanding rent and all notes outstanding shall become immediately

> due and payable together with legal interest . Any such failure to pay in time shall be considered as a breach of the contract giving the lessor the right to terminate the contract without further notice and to claim all the damages as provided for in clause 1."

and clause 19 also provides that —

> "every undertaking in this agreement shall be considered as of the essence of the contract, and any violation by the lessee of any of his undertakings shall be considered a breach of the whole contract, giving the lessor the right to terminate the contract....."

It is argued by the Appellant that the forfeiture under clause 3 does not become operative unless there has been a demand for all the outstanding payments and that this has not been met, but this interpretation seems to me to do violence to the language of the clause. The words "Any such failure to pay in time shall also be considered..." I think clearly must have reference to the non-payment of an instalment or the non-payment of a note.

Our attention has been drawn to Civil Appeal 54/38 reported in the third volume of Levanon, page 208.

Paragraph 7 of that judgment is as follows:—

> "The only obligation imposed upon the Respondent under the contract was to pay the rent. The payment of rent was secured by promissory notes. In strict application of the law there might be no obligation on the Appellant to present the notes for payment to the Respondent who was the maker of the notes. Yet I am not prepared to go so far as to hold that by non-payment of the rent the Respondent has committed a breach of the contract or shown his unwillingness to perform it when the Appellant has taken no steps to collect the rent."

We do not know what were the terms of the contract which the Court was considering in that case, but we do know the terms of the contract in this case, and it seems to me quite clear thereunder that a failure to pay in time gave the lessor the right to terminate the contract.

I think, therefore, the appeal fails, and it will be dismissed with costs on the lower scale, and we certify LP. 10 advocate's attendance fee.

Delivered this 28th day of April, 1941.

Chief Justice.

CRIMINAL APPEAL NO. 30/41.

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

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

In the appeal of:

Isa Abdul Fattah Waswas — Appellant.

v.

The Attorney-General — Respondent.

Conviction of assault occasioning actual bodily harm — Trial Court stating that as no claim, no order for compensation — Court of Appeal considering appeal by convicted person as an application for leave to appeal — Scope of sec. 43(1) of Criminal Code Ordinance (re award of compensation to person injured by offence) — Criminal Code Ord. Secs. 37(d), 43(1).

1. Court of Appeal may, where no appeal as of right lies, consider appeal entered by convicted person as an application for leave to appeal.

2. Court sentencing accused may, on its own initiative, award any sum up to LP. 100 by way of satisfaction or compensation for any loss caused by offence, without waiting for complainant to claim it.

Appellant in person.

Crown Counsel (Hogan) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 10.3.41, whereby Appellant was convicted of having caused, i.e. occasioned actual bodily harm to others, contrary to Section 250 of the Criminal Code O[illegible]nance, 1936, and sentenced to one year imprisonment.

JUDGMENT

You are not entitled to appeal before you obtain leave to appeal. However, we consider your appeal as an application for leave to appeal, and as there is no good cause shown the application is refused.

I am at a loss to understand why the Court below stated, after passing sentence, "No claim therefore no order for compensation." Under Section 37(d) of the Criminal Code Ordinance the Court may punish the accused by ordering him to pay compensation, and under Section 43(1) the Court may, if it thinks fit, award any sum of money not exceeding one hundred pounds by way of satisfaction

or compensation for any loss caused by the offence. This Court recently considered what is meant by loss. I state this as it seems clear that the Court may, on its own initiative, award compensation without waiting for the complainant to claim it if the Court thinks right so to do, and it is most desirable that no wrong practice should spring up.

Delivered this 27th day of March, 1941.

Chief Justice.

CRIMINAL APPEALS NOS. 17/41 & 20/41.

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

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

In the appeals of:

1. Sa'd Hamad Mahmoud alias Abu Jildeh
2. Hamed Mohammad Hussein el Mahmoud — Appellants.

v.

The Attorney-General — Respondent.

Court not allowing advocate to address it previous to its passing sentence — Provision of Criminal Procedure (Trial Upon Information) regarding allocutus, and practice followed in some Courts — Scope of sub-sec. 3 of sec. 42 of Criminal Code Ordinance (regarding tribal custom and interests of public order) — Criminal Procedure (Trial Upon Information) Ord. Sec. 47 — Criminal Code Ordinance Sec. 42(3).

(Obiter) 1. Though no duty upon Court to allow attorney of accused following conviction to address Court after accused himself had opportunity of doing so, approved practice in some Courts to allow both accused and his advocate to address Court at this stage in proceedings if they wish.

(Obiter) 2. Ordinary practice which obtains in Palestine of making peace in disturbed village — not a custom within meaning of sub-sec. 3 of sec. 42 of Criminal Code Ordinance (regarding tribal custom and interests of public order).

M. Irsheid for Appellant No .1.
Abu Khalil & *G. Salah* for Appellant No. 2.
Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of Criminal Assize Court, sitting at Nablus, dated 1.2.41, whereby Appellants were convicted of murder contrary to Section 214(b) of Criminal Code Ordinance, 1936, and sentenced to death.

JUDGMENT

The two Appellants were tried together and convicted of murder. They have entered separate appeals and the appeals have been heard together. The evidence has been discussed at considerable length, but we are satisfied that the Court could properly come to the conclusion to which it came. A novel point has been raised on behalf of the first Appellant. It is said that after judgment and before sentence his advocate was not allowed to address the Court. Section 47 of the Criminal Procedure (Trial Upon Information) Ordinance provides that before passing sentence the Court should hear the prisoner or his advocate on his behalf, if he has anything to say in respect of the sentence to be passed. It will be observed that the section distinctly says "or", and that the first Appellant himself had an opportunity of addressing the Court, but it is a practice in some Courts, and one which I myself follow, of allowing both the accused and his advocate to address the Court at this stage in the proceeding if they wish.

It is said before us that had the advocate had an opportunity of addressing the Court he would have invoked sub-section 3 of Section 42 of the Criminal Code Ordinance, which is as follows:—

> "If the court is satisfied that the accused is a member of a tribe which has been accustomed to settle its disputes in accordance with tribal custom, and it is in the interests of public order that the case should be so settled, the court after sentencing the accused to the penalty prescribed by this Code or any other law, may substitute therefore such penalty not being repugnant to natural justice or morality as is customary under the tribal custom."

and it appears from the evidence of the District Officer, Jenin, that some foundation was laid for this. He says that he tried to make peace in the village, that arbitrators went into the case and settled the matter as far as he knew according to tribal custom. "Village of Tammoun applies tribal custom in these cases. Whole village was fined something." So far as I am aware it has never been suggested that the ordinary practice which obtains in Palestine of making peace is a custom within the meaning of the sub-section, and whether in any circumstances, having regard to the words "in the interests of public order" any Court would apply this sub-section to a case of conviction

for murder, I do not think that it can be applied in this case, as it is quite clear from the evidence that the accused persons were not members of a tribe.

The appeal, therefore, will be dismissed.

Delivered this 26th day of February, 1941.

Chief Justice.

CIVIL APPEAL NO. 64/41.

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

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

In the appeal of:

Maurice Fischer — Appellant.

v.

Mordehai Gefen — Respondent.

Mutual aval guarantee by two persons — One of two givers of aval called upon to pay seeking contribution from co-guarantor — Scope of sub-sec. 3 of sec. 57 of Bills of Exchange Ordinance (regarding right of recourse of giver of aval) — Right to contribution between sureties as result of a general equity arising at inception of a contract of guarantee on ground of equality of burden and benefit — Bills of Exchange Ordinance Sec. 57(3).

Sub-sec. 3 of sec. 57 of Bills of Exchange Ordinance — not exhaustive as to rights of giver of aval, and general proposition that there should be contribution between sureties also applies to this kind of contract of guarantee.

Zakheim for Appellant.
Abrahami for Respondent.

Appeal from judgment of District Court, Tel-Aviv (in its appellate capacity), dated 28.2.1941.

JUDGMENT

This appeal raises an interesting point, which has not before been considered by this Court.

The Appellant and the Respondent both signed an aval upon a promissory note. The note was in printed form, and the aval was in Hebrew, which has been translated —

> "We guarantee mutually by aval for the maker (signor) of the bill."

and in English —

> "Bon pour aval with joint and several liability for maker(s) of note."

Below that there were three dotted lines, upon the first of which the Appellant signed, and upon the second the Respondent.

The Appellant was called upon to pay, and did so, and now seeks contribution from the Respondent. He failed before the Magistrate and before the District Court, which relied upon an earlier decision of that Court, No. 189/37, Smilansky v. Ostrovsky, *) which was not appealed. It would appear that the basis of that decision was Section 57 of the Bills of Exchange Ordinance, which introduces the aval into what is otherwise substantially the English Law of Bills of Exchange, and provides in sub-section 3 that —

> "When the giver of an aval pays the bill he has a right of recourse against the party whom he has guaranteed and against the parties liable to that party."

and the District Court held that that is exhaustive as to the rights of the giver of an aval.

With that contention I do not agree. It is true that there is no English law dealing with the position of givers of avals, but I think the general proposition that there should be contribution between sureties, the right to which "is not founded on contract, but is the result of a general equity arising at the inception of a contract of guarantee on the ground of equality of burden and benefit", (see Hailsham Vol. 16, p. 113) applies.

It is not now necessary to decide the rights under the subparagraph to which I have referred, of any giver of an aval who had been called upon to pay.

The appeal will therefore be allowed, and the judgments of the District Court and the Magistrate's Court set aside, and judgment will be entered for the Appellant in the sum claimed, with costs here and below. The costs in this Court will be on the lower scale, with the sum of LP. 10 for advocate's attendance fee.

Delivered this 8th day of May, 1941.

Chief Justice.

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*) Law Reports of District Court Tel-Aviv, 1937, p. 84.

CRIMINAL APPEAL NO. 27/41.

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:

Kalman Friedenberg — Appellant.

v.

The Attorney-General — Respondent.

Charge and conviction of arson and attempt to obtain goods by false pretences — Judgment only signed by two of three judges constituting Court — Law and practice as regards record of evidence and record of findings of fact — Prosecution calling witnesses not called at preliminary enquiry and failing to give previous notice to accused — Addressing a communication to Court after they adjourned case to consider judgment — Criminal Procedure (Trial Upon Information) Ordinance Secs. 35, 36, 38, 45, 51, 70.

1. Where all three judges constituting Criminal Court were present when verdict given and sentence pronounced fact that judgment only signed by two of them — does not make proceedings a nullity.

2. Where prosecution calls witnesses who were not called at preliminary enquiry be it only for purposes of sec. 36 of Criminal Procedure (Trial Upon Information) Ordinance to explain absence of other witnesses, notice in accordance with sec. 38 thereof must by given to accused or his advocate.

Goitein for Appellant.
Junior Government Advocate (*Salant*) for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 10.3.41, whereby Appellant was convicted of arson, contrary to Section 321 and 23(1)(c)(d) of the Criminal Code Ordinance, and of attempting to obtain money by false pretences, contrary to Sections 301 and 29 of Criminal Code Ordinance, 1936, and sentenced to twelve months' imprisonment.

JUDGMENT

The Appellant and his wife were charged and convicted of arson, in that they set fire to the contents of a furniture shop, and attempting

to obtain goods by false pretences in connection with the fire. The wife does not appeal.

For the Appellant Mr. Goitein has raised a number of points, and I will firstly deal with those which are technical.

The judgment was only signed by two of the three Judges constituting the Court, and Mr. Goitein submits that this makes the proceedings a nullity.

The Criminal Procedure (Trial Upon Information) Ordinance, Section 35, requires the presiding judge to record in writing all evidence and all objections and rulings, and Section 51 requires the presiding judge to record upon his notes the findings of fact on which the conviction or acquittal is based. The marginal note refers to this as "form of judgment". Section 45 provides that the Court shall give a vedict, and Section 70 provides that among the documents to be used on the appeal shall be the judgment. Having regard to the marginal note to 51, I take that to mean the presiding judge's record of the findings of fact. In practice these are frequently typed out and signed, and there would seem to be no objection to this, as 51 does not say — as does 35 — that the presiding judge shall record in writing.

In this case the record was typed and signed by the presiding judge. It is not suggested that the three Judges were not present when the verdict was given and sentenc was pronounced. I do not think there is anything in this point.

It appears that three witnesses, two doctors and one Frontier official, were called at the trial who were not called at the preliminary enquiry. They were called for the purposes of Section 36 to explain the absence of other witnesses, and it is argued by Mr. Salant that Section 38 does not apply to such witnesses, but they give evidence at the trial — although they do not give evidence against the accused. I think, therefore, notice should have been given. This was no doubt an irregularity of procedure, but as the result I do not think any miscarriage of justice has actually occurred.

It appears that when the witnesses for the prosecution had all given evidence, one of them was recalled by the Court. No one doubts that a witness may be recalled to clear up a point, no one doubts that a Court may put questions to a witness, but I think it most unfortunate that a witness should be recalled by the Court, and give additional evidence amounting to a page of typewritten notes, — but I have read this evidence and I can find nothing in it against the Appellant, and in their judgment, insofar as he is concerned, I do not think the Court relied upon it.

We have had considerable argument as to the facts, but we cannot say that there was not evidence upon which the Court of Trial could come to the conclusion to which it came.

There is one other matter to which I should refer. After this case was adjourned in order that we might consider our decision, the Appellant addressed a communication to us. Where cases have been fully argued by experienced advocates it is most undesirable that this should be done.

The appeal is dismissed.

Delivered this 24th day of April, 1941.

The Court directs special treatment.

Chief Justice.

CIVIL APPEAL NO.245/40.

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

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

In the appeal of:

The Palestine Land Development Co., Ltd. Appellants

v.

1. Abraham Mograbi
2. Jacob Mograbi. Respondents.

Claim of prior purchase right in respect of miri land upon which a building constructed — Judgment ordering registration of certain undivided shares of immovable property in name of claimants of purchase priority upon payment by them of value of the shares at time of filing of action — Scope of art. 41 *of Land Code and art* 5 *of Provisional Law Regulating right to dispose immovable property,* 1331 — *Duty of Court to specify time within which successful claimant may enforce right of purchase priority.* — *Land Code Art.* 41 — *Land Law (Amendment) Ordinance, Cap.* 78 *Sec.* 6(2).

1. Art 5 of Provisional Law Regulating the Right to Dispose of Immovable Property, 1331, — not restricted to matters of inheritance and possession but extends also to applications under art. 41 of Land Code (right of prior purchase by co-sharer and Khalit).

2. Land Court ordering transfer of immovable property to person claiming right of prior purchase must specify time within which claimant may enforce his right.

Eliash and *Eisenberg* for Appellants.
P. Joseph and *A. Hamburger* for Respondents.

Appeal from judgment of Land Court, Tel-Aviv, dated 31.10.40.

JUDGMENT

The Plaintiffs claimed a right under Article 41 of the Land Code in respect of certain miri land in Tel-Aviv upon which a building, known as the Mograbi Cinema, has been constructed.

The Land Court found in their favour as follows:—

> "I hold that the Plaintiffs are entitled to succeed in their claim to have the property, namely 7 (seven) out of 24 (twenty-four) shares, transferred to their names in equal shares, upon payment by the Plaintiffs to the Defendant of the value of the said shares at the time of filing of this action."

Dr. Eliash, for the Appellants, firstly urges that the Article in question in unsuitable to modern conditions. That may be true, but we cannot alter the law, and it may be observed that so recently as 1933 the Legislature amended this provision, thereby making it clear that it considered it desirable to retain it as amended.

Dr. Eliash admits that the Provisional Law Regulating the right to dispose of Immovable Property, of 1331, applies to the property in question. He suggests, however, that the generally accepted translation of Article 5 thereof, which states —

> "The rules for 'disposal and transfer' in the manner specified above, of vines and trees, plants (sic) and buildings together with the fixtures and addittions constructed on mirie or waqf land will be the same as for the land itself."

should read "...for inheritance and possession..." we think that this criticism comes somewhat late, as the translation has been accepted for many years, and we hold that the Article extends to applications under Article 41 of the Land Code.

Dr. Eliash also refers to section 6(2) of the Land Law (Amendment) Ordinance, Cap. 78, and argues that thereunder a duty is cast upon the Court to order the transfer within a specified time, with that view we agree. It does not, however, seem necessary to return the case for an order to be made by the Land Court, and we vary the judgment of that Court by directing that the transfer shall be effected by January 31st 1941.

If the Plaintiffs do not complete by that date they will lose their rights under the sub-section, and it would be manifestly wrong that they should have put the Defendants to the expense of fighting an

action and an appeal which by their — the Plaintiff's — own failure they had made abortive. In my view no order should at present be made as to costs either in the Land Court or in this Court. The order of the Land Court as to costs will be set aside, and all questions of costs will be reserved, with liberty to either party to apply to this Court after 31st January, 1941.

Delivered this 9th day of January, 1941.

Chief Justice.

CIVIL APPEAL NO. 244/40.

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

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

In the application of:

Aharon Tcherniavsky — Applicant.

v.

Joseph P. Albina — Respondent.

Refusal of application for leave to administer interrogatories — Non-interference of Court of Appeal with order refusing leave to administer interrogatories.

Granting of leave to administer interrogatories—discretionary.

E. Gavison for Applicant.

J. Gavison for Respondent.

Application for leave to appeal from order of District Court, Haifa, dated 12.11.1940.

ORDER

The application must be refused. The granting of leave to administer interrogatories is discretionary as clear from the wording of Rule 143. We think that the learned Relieving President was right in refusing the applicant leave to administer the interrogatories and in refusing to grant leave to appeal. The applicant will have the opportunity of calling the respondent as witness and of cross-examining him if he wishes to do so.

The application is refused with costs on the lower scale and LP. 10 fees for attending the hearing.

Given this 11th day of December, 1940.

British Puisne Judge.

HIGH COURT NO. 26/41.

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:
Izhak Gabriolovitch — Petitioner.
v.
The Chief Execution Officer, Tel-Aviv and 6 others. — Respondents.

Highest bidder in Execution Office seeking leave to withdraw on ground of delay of transfer and deterioration of the property — Scope of right of bidder in Execution Office to withdraw. — Execution Law Art. 111.

1. Fact that transfer of property put up for sale by Execution Office was delayed for a considerable time and that property was damaged and depreciated in value does not give last bidder a right per se to withdraw.

2. Art. 111 of Execution Law (regarding bidder's right to withdraw if transfer not completed within one month) applies only in case bidder already paid purchase price.

Eliash for Petitioner.
Respondents Nos. 1, 5, 6 and 7 — absent, served.
Siev for Respondent No. 2.
Dinstein for Respondent No. 3.
B. Joseph and *Caspi* for Respondent No. 4.

Application for an order to issue directed to the first Respondent calling upon him to show cause why the Petitioner should not be allowed to withdraw his bid of LP. 5000 in Tel-Aviv Execution Files Nos. 15114/38 and 14810/39, and to substitute therefor a previous bid of LP. 4000 without any liability for the difference, and/or alternatively to order a fresh assessment of the property.

ORDER.

The only question in this application is whether or not the order of the Chief Execution Officer is good or bad. It reads:

> "The bidder must either take the property and pay the price, or be liable for the difference between this and the next bidder to whom the property will be transferred."

In other words, is the Applicant entitled to withdraw his bid without

paying the difference between his bid and the next bidder to whom the property will be transferred.

It is contended by the Applicant that the transfer has been delayed for a considerable time and that certain facts have arisen, and upon these he says he is entitled to withdraw. He says that the property has been damaged in certain ways and depreciated in value. For this it may be he is entitled to be compensated, but it does not give a right per se to withdraw. He also says that a mistake in an advertisement as to the value of the property has misled him. Even if this had decieved him I doubt if it is a good ground for withdrawal, but on the facts of this case I am satisfied he was not in any way misled.

I think the real question is whether the Applicant can withdraw under Article 111 of the Execution Law. This article says:

> "The Execution Officer must complete the transfer of the property to the bidder to whom it has been finally knocked down without delay. If the transfer be not completed within one month the purchaser has the option of cancelling the sale."

This means if the bidder pays the purchase price and the property is not then transferred to him in a month he can withdraw, but that is not the case here, and the purchaser has not paid the purchase money.

In the result the rule will be discharged, and Respondents Nos 2, 3 and 4 will have their costs fixed at an inclusive sum of LP. 10 each.

Given this 1st day of May, 1941.

Chief Justice.

HIGH COURT NO. 32/41.

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

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

In the application of:

Dr. M. Bilesky, advocate, as receiver on behalf of the General Mortgage Bank of Palestine Ltd. — Petitioner

v.

The Assistant District Commissioner, Lydda District — Respondent.

Petitioner in person.

Question of ownership of rents of a house over which a receiver was appointed — Liability of receiver to pay accrued taxes, rates and outgoings — Time in respect of which receiver liable to pay taxes.

1. Rents owing from tenants of mortgaged house over which a receiver was appointed cannot be said not to be due to owner of house and thus not attachable to cover taxes due from him.

2. Duty of receiver to discharge any taxes, rates and outgoings affecting the property including those accrued prior to his appointment.

3. Receiver cannot rely on sec. 24 of the Urban Property Tax Ordinance (providing that a new owner only liable for taxes as from beginning of his ownership) his appointment not involving any change of ownershiip.

Application for an order to issue to the respondent directing him to show cause why his orders of attachments Nos. 15128 and 15130 dated 30.1.1941, in respect of rent due from Baruch Rohde and Zev Reichbach, tenants of the house of Shlomo Mintz, Tel-Aviv, Basel Street, 81, should not be set aside.

ORDER.

In this case the petitioner is asking for an order to the respondent, who is the Assistant District Commissioner in Tel-Aviv, to show cause why orders of attachment made by him under the Collection of Taxes Ordinance on rents due from two tenants of a house of Mr. Shlomo Mintz, of which the petitioner is receiver under the Credit Banks Ordinance, should not be set aside.

In the first place, the petitioner submits that the rents attached are not rents due to the defaulter. This argument cannot stand. They are rents which are due to the owner of the house but which are now collected by the receiver, and if they were not rents due to the owner of the house they could not be collected by the receiver.

The second argument is that the receiver is only liable to pay taxes accruing on and after the date of his appointment. This is also clearly unsound. The duty of the receiver is to discharge any taxes, rates and outgoings affecting the mortgaged property. These taxes now claimed clearly come within the terms of the Credit Banks Receivers Rules, Rule 7.

The third pont is that since under Section 24 of the Urban Property Tax Ordinance a new owner is only liable for taxes as from the beginning of his ownership, a receiver similarly is only liable to pay taxes from the beginning of his receivership. The answer to that is that the appointment of a receiver does not involve any change of ownership and there is no such corresponding provision in the Credit Banks Ordinance.

The application for an order nisi must therefore be refused.

Given this 9th day of April, 1941.

British Puisne Judge.

CRIMINAL APPEAL NO. 45/41.

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 appeal of:

Ali Ibn Mohammad El Naouk — Appellant.

v.

The Attorney-General — Respondent.

Accused pleading guilty to charge of receiving stolen property under sec. 310 *of Crim. Code Ord. — Police Inspector informing Court that property was stolen from several flats in same building — Prosecution failing to show that principal offender committed anything more than simple stealing — Maximum penalty inflictable upon person convicted of receiving stolen property under sec.* 310 *of Crim. Code Ord.*

Person convicted of receiving stolen property under sec. 310 of Criminal Code Ordinance cannot, even if he has numerous previous convictions, receive a greater punishment than would receive principal offender who stole the property.

Appellant in person.

Crown Counsel (*Bell*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 19.3.41, whereby appellant was convicted of being in possession of stolen property contrary to Sectoin 310 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment.

JUDGMENT.

The Appellant was convicted, after pleading guilty, under Section 310 of the Criminal Code Ordinance. That section provides as follows:

> "Any person who, by himself or by an agent, receives or takes upon himself, either alone or jointly with any other person, the control or disposition of any thing, money, valuable security or other property whatsoever, knowing the same to have been unlawfully taken, obtained, converted or disposed of in a manner which constitutes a misdemeanour, is guilty of a misdemeanour and is liable to the same punishment as the offender by whom the property was unlawfully obtained, converted or disposed of."

As the accused pleaded guilty no evidence was called before the Court, and this being a summary trial there were no depositions. A Police Inspector informed the Court that the property was stolen from several flats in the same building.

It will be seen that Section 310 requires that the taking, etc., shall

be in a manner which constitutes a misdemeanour. The principal offence, therefore, could not have been felony, e.g. house-breaking or burglary, and there did not appear to be any facts to show that it was anything more than simple stealing under Section 270.

If that is so the principal offender could only receive a punishment of imprisonment for one year, and by Section 310 the Appellant is liable to the same punishment, and it does not seem that this can be increased by reason of his twenty previous convictions.

The sentence must therefore be reduced to one of one year's imprisonment.

Delivered this 10th day of April, 1941.

Chief Justice.

CIVIL APPEAL NO .37/41.

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 appeal of:

Mordechai Baum — Appellant.

v.

Ahmad Abu Ismail — Respondent.

Appellant failing to notify respondent of payment of deposit as fixed by Registrar — Failure to invoke Rule 333 for enlargement of time.

If appellant failed to notify respondent that he paid deposit fixed by Registrar and also failed to apply for enlargement of time, appeal must fail.

Henigman for Appellant.
Elia for Respondent.

Appeal from order of District Court, Jaffa, dated 30.9.1940.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa. Owing to some inadvertence the Appellant failed to comply with Rule 328(c) of the Civil Procedure Rules, 1938, in that he neglected to give notification of the security approved by the Registrar to the Respondent.

It would seem that the general practice, when a bond is not filed with the notice of appeal, is to file therewith forms in blank which are filled up in the Registry and served in order to comply with Rule 328(c)(ii).

In this case the Appellant was given an adjournment, as the security was not fixed under Rule 327 by the Registrar. On the second hearing the security was fixed, and it was paid, but it is admitted that no notification thereof was given. In such cases the attention of the Court should be invited to Rule 333, which appears to be made expressly to meet such a case, but it was not invoked in the lower Court by the Appellant, and he showed no good cause; therefore he cannot rely on it now. In these circumstances the Court below was entitled to dismiss the appeal.

I may add that in Civil Appeal 171/40, where a similar point arose, Rule 333 was not invoked.

The apppeal is dismissed with costs on the lower scale and LP. 5 advocate's attendance fee.

Delivered this 24th day of March, 1941.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION NO.6/41.

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

Before :— Rose, J. and Abdul Hadi, J.

In the application of:

The Mutawali of the Wakf Jama'i Quisaria Ahmad Hassan Kat-khuda Bushnak. Applicant.

v.

1. Ibrahim Ahmed Charkasi
2. Ismail Ahmad Charkasi, Both heirs of A. M. Charkasi
3. The Government of Palestine
4. The Mamour Awkaf of the Northern Wakf District.
5. Ahmad Bey Hassan Kat-khuda Respondents.

Application for leave to appeal from Supreme Court to Privy Council — Test as to whether Judgment final.

Judgment of Supreme Court remitting case for further findings of fact does not finally determine rights of parties, hence not appealable as of right to Privy Council, even though principal matters already decided.

Abcarius for Applicant.

Sanders for Respondents Nos. 1 & 2.

Crown Counsel (*Hogan*) for Respondent No. 3.

Respondents Nos. 4 & 5 — absent.

Application for Leave to Appeal to His Majesty in Council, from

the judgment of the Supreme Court sitting as a Court of Civil Appeal, dated 20.3.1941, in Civil Appeal No. 33/41.

ORDER

The point to be decided in this case is whether the judgment of the Supreme Court, the subject of this appeal, is a final judgment. It seems to me that the test, for the purposes of the interpretation of Article 3 of the Order in Council, as to whether or not a judgment is final is whether it finally determines the rights of the parties. The authority for that proposition is Privy Council Leave to Appeal No. 15/38 Yehoshua Hankin v. Zaki Rashid Ash Shanti and 7 others, in which the facts were different to those in the present case but the position was the same in that the case had been remitted to a lower Court for further findings of fact. In the present case the rights of the parties before they are finally determined must depend to a certain extent on the decision of the Settlement Officer, even though the principal matters in dispute have already been decided.

That being so I think that the judgment is not a final one and therefore Article 3(a) is not applicable. In the circumstances we feel most reluctant to exercise our discretion under Article 3(b) and we think that the application should be refused with costs to the first group of respondents in an inclusive sum of LP. 10.

Delivered this 7th day of May, 1941.

British Puisne Judge.

HIGH COURT NO. 30/41.

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:

The Attorney-General — Petitioner.

v.

Gershon Agronsky — Respondent.

Magistrate remanding person accused of having committed theft — Publication in newspaper mentioning bad record of prisoner — Prosecution of newspaper editor for contempt of Court — Danger of publication prejudicing trial even where no jury — Question as to whether proceedings pending in Court within meaning of Contempt of Court Ord.

Where accused remanded by Magistrate for certain period pending investigation, proceedings are, for purposes of Contempt

of Court Ordinance, pending.

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

Application for an order to issue directed to the Respondent calling upon him to show cause why he should not be punished in accordance with Section 4 of the Contempt of Court Ordinance, for publishing a writing entitled "Two more arrests in Tel-Aviv theft" in the issue of the Palestine Post dated Wednesday, the 5th of March, 1941, the said writing being calculated to prejudice the proceedings in the case of the Attorney-General v. Abraham Ben Zvi Feigenbaum and Baruch Ben Shaul Rozinel, now pending before the Magistrate's Court, Tel-Aviv.

ORDER.

..This is a petition by the Attorney-General asking that the Editor of the Palestine Post should be committed for contempt of Court by reason of an article in that paper of March 5, 1941. The article, which was headed "Two More Arrests in Tel-Aviv Theft", reported that two men had been arrested, and went on to say:—

> "Both prisoners were remanded for 15 days by the Magistrate, Mr. Rosenzweig, here today.
>
> "One of the suspects,......, has a police record and only recently returned to town from Ekron where he had been deported by an administrative order under the Emergency Regulations. The second prisoner is......, in whose flat...... lived."

It is a basic principle of English justice that so far as possible nothing should be done to prejudice the trial of a person accused of having committed a crime. A statement in the public press that he has a bad record may well do so. No doubt here, where there are no juries, the danger is less than in countries where there are juries, but it still remains.

Mr. Baker, for the Respondent, argues that there was no proceeding pending, as required by Section 4 of the Contempt of Court Ordinance, but it seems to me that where persons are remanded proceedings are pending.

Mr. Agronsky, the Editor of the paper, has filed an affidavit in which he explains how inadvertently the report came to be published, and he expresses his regret and makes apology.

We accept his explanation and apology, and if these proceedings have it clear that such reports should not be published, they will have served a useful purpose.

Given this 25th day of April, 1941.

Chief Justice.

CIVIL APPEAL NO. 60/41.

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

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

In the appeal of:

Mrs. Sima Browar-Glass, of Zurich, Switzerland, by her attorney Dr. Leon Bernfeld — Appellant.

v.

Mayer Socholotzky — Respondent.

Agent instituting bankruptcy proceedings — Construction of power of attorney — Scope of word "proceeding" in provision "to commence and prosecute any action or proceeding".

Where power of attorney entitles attorney to appear in and defend any action or other proceedings and to commence and prosecute any action or proceeding, latter word wide enough to cover an application for a receiving order in bankruptcy; a further provision entitling attorney to prove in bankruptcy or liquidation does not operate as limiting his powers.

Karwassarsky for Appellant.
Bedolach for Respondent.

Appeal from order of District Court, Tel-Aviv, dated 31.3.1941.

JUDGMENT.

The question in this case is whether or not a power-of-attorney which was given by a lady, who is absent from Palestine, to her agent in Palestine, entitles him to institute bankruptcy proceedings, the learned judge of the District Court having held that it did not.

Article 7 of the power-of-attorney is as follows:

> "To appear for me in any Court in any action or other proceeding which may be instituted against me and defend the same or suffer judgment to go against me, and to commence and prosecute any action or proceeding on my behalf in any Court in any matter as my said Attorney shall think fit."

Article 13 and 14 would also appear to be material. They provide —

> "13. If any person, firm or company indebted to me is or shall become bankrupt or be liquidated, to prove in the bankruptcy or liquidation for all debts due to me.
>
> "14. Generally to act in the premises as fully and effectually as I myself could do if personally present and acting."

For the Respondent it is argued that Article 13 limits the powers of the attorney in bankruptcy matters to proving in bankruptcies, but with that view I do not agree. It seems to me clear that Article 7

provides that the attorney may defend actions and may commence and prosecute any action or proceeding, and I think that "proceeding" is wide enough to cover an application for a receiving order in bankruptcy, and if authority is wanted for that proposition it is to be found in Ex parte Wallace, 14 Q.B.D., page 22. Article 13 does not deal with defending and instituting proceedings, which as I have said are dealt with in Article 7, but deals with proving in bankruptcies.

Mr. Karwassarsky informs us that he did not draw the attention of the learned Judge to the authority to which I have referred, and it may be that had he done so a different decision would have been given.

The appeal will be allowed, and the case remitted to the District Court. The Appellant will have an inclusive sum of LP. 10 as her costs.

Delivered this 2nd day of May, 1941.

Chief Justice.

CRIMINAL APPEAL NO. 107/40.

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 appeal of:

Zigmund Rip — Appellant.

v.

The Attorney-General — Respondent.

Charge against two accused of stealing and receiving stolen property respectively — Scope of sec. 309 and 310 of Crim. Code Ord. — Plea of guilty by accused charged with stealing — Accused who pleaded guilty permitted to give evidence though not called as witness either by prosecution or by defence — Court adding a note to its judgment in respect of ownership of property stolen. ....

1. Accused pleading guilty cannot take any further part in proceedings unless called by prosecution as witness against other accused or by latter as witness in his defence.

2. Where Court wrongfully admitted evidence of one accused who pleaded guilty which evidence must have influenced Court's mind, conviction of other accused bad.

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

Appeal from judgment of District Court, Tel-Aviv, (sitting as a Court of Appeal), dated 27.9.40, confirming judgment of Magistrate's Court, Tel-Aviv, dated 11.7.40, whereby Appellant was convicted of being in possession of stolen property and sentenced to pay a fine of LP. 35, or two months' imprisonment.

JUDGMENT

This is an appeal from a decision by a Magistrate of Tel-Aviv, before whom the Appellant was charged with receiving stolen goods, the property of one — Mrs. Rosa Zeeman — contrary to Section 310 of the Criminal Code Ordinance.

The Magistrate in his judgment stated —

> "The second Accused (the Appellant) is found guilty of receiving stolen property, with the knowledge that such property was stolen."

I may perhaps point out that that finding would appear to be a conviction under Section 309 of the Criminal Code Ordinance, and that Section 310 provides for receiving property knowing the same to have been unlawfully taken, etc.

Having regard to the proviso to section 309, there would seem to be no reason why the charge should not have been laid under that section.

The proceedings before the Magistrate took an unusual course. The first Defendant ,who was charged with stealing the property, pleaded guilty. Upon that plea it is clear that he could not take any further part in the proceedings unless he was called as a witness against the Appellant by the prosecution, or was called by the Appellant as a witness in his defence. For some reason, however, his advocate was allowed to cross-examine witnesses called in the prosecution of the Appellant, and after the close of the case for the prosecution of the Appellant it appears from the record —

> "The first accused decides to give evidence",

and he was permitted to do so. This evidence was clearly wrongly admitted, and I think that it must have influenced the mind of the Magistrate in convicting the Appellant.

The Magistrate added a note to his judgment. From that note I think it clear that the Magistrate formd the view that the property did not belong to Mrs. Zeeman, although in the charge it stated that it did.

In these circumstances the appeal must be allowed.

Delivered this 16th day of December, 1940.

Chief Justice.

CIVIL APPEAL NO. 58/41.

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

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

In the appeal of:

Zvi Sederovsky — Appellant.

v.

Zevulun (Zavel) Kwartin — Respondent.

Bankruptcy petition against debtor living outside Palestine — Question as to whether and under what circumstances person holding an orange grove in Palestine may be considered as carrying on business here — Allegation of fraudulent transfer of property under sec. 3(2) of Bankruptcy Ord. (acts of bankruptcy).

1. A person holding plantations in Palestine — not necessarily carrying on business for purposes of sec. 3(1)(c) of Bankruptcy Ordinance; position different if he sells the produce and uses proceeds to pay wages and other expenses.

2. Where alleged act of bankruptcy a fraudulent transfer of property by debtor onus of provng this fact — on petitioning creditor, and unless he discharges it to satisfaction of Court he cannot succeed.

3. Where bankruptcy petition based on allegedly fraudulent transfer of property by debtor and latter proves that property was before and after transfer offered to petitioner to settle debt, Court may infer absence of fraud and dismiss petition.

Levin and *Lipshitz* for Appellant.
Seligman for Respondent.

Appeal from Order of District Court, Haifa, dated 17.3.1941, in Civil Case No. 53/40.

JUDGMENT

In this case there has been considerable dispute between the parties, and the litigation took the form of bankruptcy proceedings, but I under-

stand only the present parties are interested, and that there are no other creditors. The District Court dismissed the petition, and the petitioning creditor appeals.

The first point taken by the debtor, who is not in Palestine, was that the Palestine Courts have no jurisdiction to deal with the matter, as he, the debtor, was not carrying on business in Palestine as required by Section 3(1)(c) of the Bankruptcy Ordinance. It seems to me that this is largely a question of fact. The debtor's primary business is a cantor, but I do not think that he is prevented from carrying on other business. It has been found as a fact by the Court below that the Respondent held certain properties in Palestine, and among them has a banana-orange grove in Migdal.

In our view a man may hold a banana-orange grove and yet not be considered as carrying on business; but it may be that he is carrying on business if he sells the produce and uses the proceeds to pay wages and other expenses. His creditors are entitled to be paid, and it would seem only right that they should have recourse to bankruptcy proceedings if he does not pay them for materials and so on which have been used by him in order to earn, or try and earn, money. In this case the learned Judge found that the debtor was not carrying on business, but upon the evidence I should be disposed to come to a different conclusion. However, the matter is of no great consequence owing to the view which we take on the other point.

The act of bankruptcy alleged was that there was a fraudulent transfer of certain property by the debtor. The onus of proving this fact is on the petitioning creditor. The learned Judge in the tenth paragraph of his order says,

> "The point whether the respondent made a fruadulent transfer of his properties is also not without some doubt."

This seems to show that the learned Judge was not satisfied that the onus had been discharged. It is clear also that the property was transferred to the son of the debtor, who before and after transfer offered to re-transfer the property to Petitioner to settle his father's outstanding debt. In these circumstances we think the learned Judge was entitled to dismiss the petition under Section 6(6) of the Ordinance.

The appeal therefore fails. Respondent will have costs on the lower scale, and we certify LP. 10 for attending the hearing.

Delivered this 20th of May, 1941.

Chief Justice.

CIVIL APPEAL NO. 123/40.

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

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

In the appeal of:

Fahim Ibrahim Isa al Hajibi and 4 others. Appellants.

v.

Shelomo Bahn and 37 others Respondents.

Judgment of Land Court in its appellate capacity, upheld by Court of Appeal, remitting case to Land Settlement Officer to deal with each plot separately — Land Settlement Officer dismissing Plaintiffs' claims because disbelieving their witnesses — Abortive contention on appeal that question of possession of land had already been dealt with previously.

Where Judgment of Settlement Officer reversed and case remitted to him to deal with each case separately and he, after hearing evidence, dismisses Plaintiffs' claims Plaintiffs cannot successfully argue on appeal that it had already been held that they were in possession of the land.

Edit. Note: This judgment was followed in C.A. 121/40 and C.A. 124/40.

Khadra and *Khamra* for Appellant.
Kaiserman for Respondents 6, 7, 11, 13—16, 18—21, 23—27, 30—32, 37
Croun Counsel (*Hogan*) for Respondent 17.

JUDGMENT.

This is one of several cases which were returned by this Court to the Land Settlement Officer. The judgment of this Court, Land Appeal No. 37/33, stated —

> "The Land Court, having personally inspected the lands in dispute in the case, held that it was impossible for the Settlement Officer to arrive at a fair decision without dealing with each plot separately in view of the variation in the catagories and the large area of the lands in question. This is a question of fact for the said Court to determine, and we as a Court of Appeal cannot interfere with such finding."

The following point of law which had been submitted, i.e.:

> "The Court held that the contracts of lease, even if proved to be genuine, affected only the signatories thereto. We have (been?) asked to hold that the contracts, if proved to be valid are operative with regard to all the lands mentioned in the contract."

was also considered, and the Court found, inter alia —

> "In my view, the said contracts cannot be taken in evidence against each individual person unless it is shown in the circumstances of each, from the nature of the cultivation or possession in the case of each separate plot that the particular tenant was in a position to obtain an equivalent rent from the proceeds of the land, had, for example, cereals been grown thereon, and that this would not have been so had the lands been planted with trees."

Upon that I think it was open to the Land Settlement Officer at the re-hearing to enquire fully into the facts. This he did, and came to certain conclusions.

The Appellants now contend that the true position was that it had already been held that they, the Appellants, were in possession of the land, and that the only question was whether they held it by virtue of a contract of tenancy. I do not think that was so, and that was not the case they made before the Land Settlement Officer at the re-hearing.

The Land Settlement Officer found —

> "After considering the oral evidence of the Plaintiffs (i.e. the Appellants) and their witnesses, the manner in which it was given, their replies under cross-examination and the inconsistencies disclosed in the oral evidence, and then that of the Defendants (i.e. the Respondents) and their witnesses, I come to the conclusion that the Plaintiffs' statements are not to be believed."

and later —

> "As the foundation of the Plaintiffs' claim is false and their evidence unreliable, no reliance can be placed on any of their statement or claims, and there is no justification for believing their evidence concerning non-payment of rent or consideration to Hassan es Saiyid or Ali Abdulla Suleiman, the tenants of the colonists."

Upon these findings of fact the appeal fails, and is dismissed with costs on the lower scale, and we certify LP. 10 for attending the hearing to those respondents represented by Mr. Kaiserman.

Delivered this 22nd day of April, 1941.

Chief Justice.

CIVIL APPEAL NO. 122/40.

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

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

In the appeal of:

Mahmoud 'Atiya Hammad — Appellant.
v.
Hedera Founders Association Ltd. — Respondent.

Final judgment as to which lands included in which Kushans — Combined claims of ownership by prescriptive possession to lands included in Kushans — Final judgment of Land Court confirmed by Court of Appeal that each of various claims of prescriptive title should be dealt with separately — Settlement Officer dismissing claim on ground that it was res judicata — Court of Appeal upsetting finding of res judicata.

Where trial Court dismisses a claim on ground of res judicata Court of Appeal will remit case for hearing if Respondent cannot show that it was dealt with and decided finally.

Khadra and *Khamra* for Appellant.
Kaiserman for Respondent.

Appeal from decision of Settlement Officer, Haifa Settlement Area, dated 4.4.1940.

JUDGMENT.

Copland, J.

This case concerns one of the claims to ownership by prescriptive possession to land in the neighbourhood of Hadera, with regard to which several appeals have already been disposed of by this Court during the last two days. The land in this particular case is comprised in an area outlined in blue on the map which was produced before the Settlement Officer, dated the 31st July, 1930.

Now all these Arab en Nufei'at lands were dealt with by the Settlement Officer in Case No. 111/29 Infi'at, in three parts. These judgments decided that the area bounded by red was included in kushans of the Hadera colonists and others, that the area bounded in blue was included in kushans of the heirs of Berman and Slutzkin, and that the area bounded in green was Government land or mewat. Those judgments are final. I should say that in Case 111/29 the judgments were without prejudice to prescriptive claims to any part of the land within those various areas, and particularly, in part II of case 111/29, to the prescriptive claims within the area of the kushans held by Messrs. Berman and Slutzkin.

The next stage in the proceedings was Case 153/32 Infi'at. That case was a continuation of Case 111/29 and in it the Settlement Officer purported to deal with the various prescriptive claims. On appeal to the Land Court this judgment was set aside because he had dealt with all these claims together and the Land Court held that it

would be better if each claim were dealt with separately. This was confirmed by this Court, in a judgment which, with all respect, I find it very difficult to understand.

The whole point in this appeal is whether the prescriptive claim by the present appellant to the Berman and Slutzkin land was in fact decided finally in Case 153/32 or not. The Land Court, in its judgment on appeal in case 153/32, said that that case was a continuation of case 111/29, and its object was to decide the ownership to the area bounded by the red line on the map referred to above. Now the Berman and Slutzkin land is not in the area bounded by the red line but is in the area bounded by the blue line. In this present case which is now on appeal, No. 74/Nufei'at, the Settlement Officer dismissed the claim of the appellant on the ground that it was res judicata. The operative part of his decision was as follows:

> "Later on, the Settlement officer heard claims to ownership by prescription and on the 15th of July, 1932, in his decision in Case No. 153/32 Infi'at he dismissed the plaintiffs' claims and found in favour of the defendants. This decision was in part appealed and in the result was remitted to the Settlement Officer for retrial but the decision insofar as it concerned the land of Berman and Slutzkin was not appealed. The time for appeal has elapsed and the decision of the Settlement Officer that half of the area of Berman and Slutzkin should be set aside an pasturage for the Arab en Nufei'at was the only matter left for further decision."

We have looked through all these cases with considerable care and unfortunately we cannot find anything to show that the prescriptive claim of the present appellant to this land was ever before the Settlement Officer for trial and was ever dealt with by him. It seems obvious that it was not before him in Case 153/32 so far as I am aware, there is no other case, certainly none that has been cited to us, which in any way deals with the prescriptive claim of the present appellant. It is understandable that, in a case of this complication, with so many claims, this particular claim may well have been overlooked, as would seem to be the case here.

In these circumstances the appeal will have to be allowed and the case remitted to the Settlement Officer to hear this claim. It is perhaps an unfortunate result, but in the absence of information the case has to be remitted. The appellant will have his costs on the lower scale for this appeal to include LP. 10 advocate's attendance fee. These costs to be set off against costs awarded in the other cases on appeal, which we have decided, in respect of the same respondents.

Delivered this 23rd day of April, 1941.

Puisne Judge.

CIVIL APPEAL NO. 125/40.

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

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

In the appeal of:

The Village Settlement Committee of Arab en Nufei'at
Appellants.

v.

Aharon Samsonov and 73 others Respondents.

Claim of prescriptive title by possession — Rights of grazing and wood cutting — Pitching tents not amounting to possession.

1. Grazing and wood cutting are rights recognised by law, but their exercise does not give any right to land itself.

2. Pitching tents on a tract of land in most convenient and accessible places and moving them hither and thither according to seasons and occupations at the time cannot establish for tents owners prescriptive title to land.

Edit. Note: This judgment was followed in C.A. 126/40.

Khadra and *Khamra* for Appellant.

Kaiserman for Respondents 1—9, 12, 14, 16, 17, 24, 26, 27, 29—31, 33, 34, 36—39, 46, 50, 57, 59—69.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated 21.3.1940.

JUDGMENT

In this case the Appellants claim certain land by prescription on the ground that for many years they have used the land as common graznig lands, and for wood cutting and camping sites.

It is clear that grazing and wood cutting are rights which are recognized by the law, but I do not think that their exercise gives any right to the land itself.

As to camping, whether or not the pitching of tents on the same spot for many years would give rise to prescriptive rights it is not necessary to determine, as in this case the Settlement Officer found that the tents were pitched in the most convenient and accessible places according to the seasons and occupations followed at the time. I do not think that by moving tents hither and thither over a tract of land the owners of the tents can establish prescriptive title to the land.

I would also point out that the L.S.O. also found —

"It is admitted that the Arab en Nufei'at have lived on the lands without interruption for many years, but that their existence there was permitted as relations between all parties were cordial until this litigation arose. The Arab en Nufei'at moved freely about the lands, were engaged in various occupations in Hadera

> and lived on the very best possible terms with the colonists. The defendants have paid the werko as registered owners, have drained the swamps, planted the eucalyptus and exploited the lumber. Because their possession did not expel the Arab en Nufei'at from the land, it does not follow that possession was abandoned."

The appeal will be dismissed, and Respondents No. 16 and No. 23 will respectively have their costs on the lower scale, and LP. 7.500 each attendance fee. Respondent No. 42 will have LP. 2 as travelling fees.

Delivered this 22nd day of April, 1941.

Chief Justice.

CIVIL APPEAL NO. 61/41.

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

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

In the case of:

George Talames — Appellant.

v.

Saleem Barakat — Respondent.

Claiming liquidated sum of money from partner — Application for amendment of statement of claim after issues settled.

> Where Plaintiff without alleging existence of partnership sues for a liquidated sum and after issues settled seeks by amendment of statement of claim to get an order dissolving partnership, appointing receiver and taking accounts, Court right in disallowing motion.

Shehadeh for Appellant.

Wittkowski for Respondent.

Appeal from Order of District Court, Jaffa, dated 24.1.41.

JUDGMENT

The appellant never alleged a partnership in his original claim.

The relief he asked for was judgment for LP. 1995.816 mils. Now he seeks by amendment of the statement of claim to get an order dissolving a partnership which he never alleged existed, for a receiver to be appointed, and for accounts to be taken, and all this after the issues have been settled. The learned Relieving President was correct in disallowing the motion, for to have permitted such an amendment would have been a gross injustice to the other side.

The appeal is dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered tdis 30th day of April, 1941.

British Puisne Judge.

HIGH COURT NOS. 16/41 and 17/41.

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

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

H.C. 16/41.

"Nehasim" Investment Company, Ltd. Petitioner.

v.

1. Chief Execution Officer, Jerusalem.
2. Marc. L. Gorodisky, in his capacity as receiver of the property of Mordechai Ben Yosef Halbreich, Mortgagor.
3. Gresham Life Assurance Society Ltd.
4. Shlomo Segal, Haim Shalom Segal and Fruma E. Segal
5. Mordechai ben Yosef Halbreich. Respondents.

Eliash and *Gluckmann* for Petitioner
Respondents: No. 1 — absent served; No. 2 — in person.
Ph. Joseph for Respondent No. 3.
Goitein and *Buxbaum* for Respondent No. 4.
Levitsky for Respondent No. 5.

Application for an order to issue directed to the respondents calling upon them to show cause why the order made by the first respondent in Execution File No. 44/38 (joined with Execution Files nos. 154/39, and 437/39) which bears the date of the 27 December, should not be set aside, and the first respondent ordered to direct the second respondent to distribute the balance of monies in his hands accruing from the collection of rentals of the property of the fifth respondent in his capaciy as receiver, and the sums he may receive in that capacity in the future amongst the petitioner, the third respondent and the fourth respondent in proportion to the amount of the mortgage debts owing to them, or according to such pro rata distribution as to this Court may seem fit and proper.

H.C. 17/41.

1. Shlomo Segal
2. Haim Shalom Segal

3. Fruma Esther Segal Petitioners.

v.

1. Chief Execution Officer, Jerusalem.
2. Gresham Life Assurance Society Ltd.
3. "Nehasim" Investment Co. Ltd.
4. Mordechai Halbreich.
5. Marc. L. Gorodsky as receiver of the property of the 4th respondent. Respondents.

Goitein and *Buxbaum* for Petitioners.
Ph. Joseph for Respondent No. 2.
Eliash and *Gluckmann* for Respondent No. 3.
Levitsky for Respondent No. 4.
Respondent No. 5 in person.

Application for an order to issue directed to the first respondent calling upon him to show cause why his order dated 27.12.40, in Execution File No. 154/39, Jerusalem, should not be set aside and to substitute therefor an order that the sum standing in his hands be paid to the petitioners and that similarly the balance of all future sums be paid to the petitioners.

Collection by receiver of rent of property mortgaged to various mortgagees—Question whether order of priority among mortgagees also applies to all proceeds such as rent etc. of mortgaged property.

1. Invariable rule of High Court — not to interfere with order if already executed.
2. Rent of mortgaged property in hands of receiver appointed by Court to take charge of property pending sale must be paid to mortgagees in order of priority irrespective of any mortgage clause as to rent excluding all preceding mortgages.

ORDER

In these cases, the principal point for determination is whether rents collected by a receiver appointed by the Court to take charge of mortgaged property pending its sale are to be distributed pari passu between all the various mortgagees, in this case, three, or whether they should be paid over to the mortgagee who is first in order of priority.

With regard to the money already paid over by the receiver, acting on the direction of the Court, no question arises. It has already been

paid, and acting on our invariable rule we do not interfere in such a case. The present question is in regard to future payments. The learned Chief Execution Officer held that they should equally go to the first mortgagee.

Mr Eliash for the petitioners in the first case argues that the security of the mortgage is only on the immovables, and does not include rents, that the appointment of a receiver does not give additional security and is only a procedural remedy. Mr. Goitein for the petitioners in the second case supports this view, but further claims that under his mortgage clause 7, he is entitled to all the rents from the mortgaged property. It is further argued that the rents are not subject to the mortgages but that the rents belong to all creditors generally, and that the appointment of a receiver is in the nature of an attachment, and that the duty of a receiver is to protect all existing rights.

After careful consideration, we think that the order of the Chief Execution Officer is correct, and sets out the law adequately. The fallacy underlying the petitioners' arguments seem to me to be this, that the receiver was appointed to preserve the property pending sale, and that whilst the mortgagor was in possession it is true that the rents could not be seized, yet now that he is no longer in possession but a receiver has stepped into his shoes, the rents are no longer his. The duty of the receiver is to protect the property for the benefit of the person or persons who will eventually become entitled to it, or to its proceeds when sold, in this case the mortgagees in order of priority, subject of course to priority claims for taxes and so on. And for the reasons given by the learned Chief Execution Officer we think that the principle laid down in Art. 1 of the Ottoman Law of 1328, applies equally to all proceeds such as rents, found in the hands of the receiver, and clause 7 in Mr. Goitein's mortgage cannot affect the rights of the first mortgagee, when these rents are in the hands of a receiver, whatever might have been the position previously.

I do not think that we can usefully add anything further to the exhaustive and carefully reasoned order of the Chief Execution Offiecr.

The order nisi must therefore be discharged with costs, in the first case, against the petitioners estimated at LP. 10 each to the third and fifth respondents and LP 5 to the second respondent, and in the second case against those petitioners, estimated at LP. 10 each to the 2nd and 4th respondents, and LP 5 to the fifth respondent.

Given this 8th day of April, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 75/41.

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 case of:

1. Ahmed Abdel Fatah el Yacoub
2. Tewfiq Abdel Fattah el Yacoub — Appellants.

v.

1. Joseph Halperin
2. A. Hoter Ishay
3. Abed Abdel Fattah el Yacoub — Respondents.

Claim before Land Court for judgment cancelling mortgage — Sale of mortgaged property at instance of first mortgagee during proceedings before Land Court re validity of second mortgage — Question of jurisdiction of Land Court re validity of mortgage after property sold through Execution Office.

1. Land Court cannot give judgment for payment of money.
2. Jurisdiction of Land Court seized of action for cancellation of mortgage — unaffected by mortgaged property having meanwhile been sold by Execution Officer who holds balance of proceeds.

Atalla for Appellant No. 1. *Toister* for Appellant No. 2.
Levitsky for Respondent No. 1.

Appeal from judgment ,Land Court, Haifa, dated 28.3.1941.

JUDGMENT

This case raises an interesting point, and, so far as I am concerned, a novel one. The Appellants went to the Land Court to have a mortgage deed cancelled or set aside. In their original statement of claim they prayed:—

> "that judgment be given cancelling the said mortgage deed in respect of all and every one of the Plaintiffs herein with costs and advocate's fees."

The mortgage in question was a second mortgage. While these proceedings in the Land Court were going on, the first mortgagee obtained an order for the sale of the property, and it was sold by public auction, the first mortgagee being paid, and the balance of the purchase price remaining in the hands of the Execution Officer.

We are not now concerned with the merits of the case, which turn on an allegation of lack of authority by an agent of the Appellants, but with the question if the Land Court was right in dismissing the action on the ground that it no longer had jurisdiction to entertain it. Dr. Joseph, on behalf of the first Respondent, took the point — I am reading here from the record of the President — that

> "The real question in issue has faded out; you cannot cancel the mortgage... The land is gone. The money is just money; it is not land... The Court cannot give a declaration in a matter in which its jurisdiction is excluded by statute..."

The Land Court, accepting the views expressed by Dr. Joseph, gave a judgment saying:

> "We hold that in this case there is and can be at present no dispute as to ownership, mortgage or other registrable rights in respect of the immovable property, the subject matter of this action."

The Land Court accordingly dismissed the action.

Mr. Levitsky, for the first Respondent, fairly and rightly agreed that the action was originally properly brought before the Land Court. Could it continue the case, or must it be brought afresh in the District Court, entailing fresh proceedings and payment of fees?

It is true that the Land Court cannot give judgment for payment of money, see Serouri v. Abu Khatar, C.A. 70/39*, P.L.R. Vol. 6, 397, but in this case it was never asked to do so, and I can see no reason why it cannot still decide whether a mortgage which still exists should or should not be cancelled or set aside. On the result of its judgment may depend the rights in a certain fund into which the land has been converted.

We therefore find that the Appellants are entitled to succeed in their appeal, and the judgment of the Land Court is set aside, and the case remitted for completion.

By agreement the Appellants together will be entitled to costs on the lower scale, and we certify LP. 10 as hearing fees.

Delivered this 21st day of May, 1941.

Chief Justice.

HIGH COURT NO. 24/41.

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:

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* 6 CtLR 73.

Simaan Musa Zaadeh — Petitioner.

v.

1. Chief Execution Officer, Jerusalem.
2. Rosa Simaan Musa (nee Freiha) — Respondents.

Ecclesiastical Court decreeing divorce ordering mother to have custody of child but in event of re-marriage give it up to father — Refusal of Chief Execution Officer to execute conditional order of Ecclesiastical Court of giving him custody of child after mother re-married — Question whether guardianship of minor child connected with an action regarding divorce within exclusive jurisdiction of Court of Religious Community to whom parties belong — Duty of Court before ordering change of custody of child to consider state of affairs then existing — When order of change of cusody of child may be said to be contrary to natural justice — Necessity of appointing a guardian ad litem where question of custody of child arises in Religious Court.

1. Where each parent claims custody of child and neither suggests that other not a fit person to have it, Court to see, within limits of substantive law, that best interests of child are served.
2. Guardianship, even if connected with a case of divorce — a matter of personal status within (concurrent) jurisdiction of Religious Court where all parties to action consent.
3. Where under substantive law applicable Court may order change of custody of child on re-marriage of divorced party it must consider respective homes and surroundings which father and mother can give the child.
4. An order of a Religious Court may be said to be contrary to natural justice if it provides for a change of custody of a child in future without regard to state of affairs then existing.
5. Before Religious Court can deal with custody of child a guardian ad litem has to be appointed.

Abcarius for Petitioner.
Respondent No. 1 — absent, served.
Levitsky for Respondent No. 2.

Application for an order to issue directed to the first Respondent calling upon him to show cause why his orders, dated 6.12.40, and 27.2.41, in Execution File No. 254/40, Jerusalem, should not be set aside, and why the first Respondent should not be ordered to carry out the judgment of the Orthodox Ecclesiastical Court of appeal, in Jerusalem, dated 1.3.40, and that Petitioner be given the custody of the child.

ORDER

This is an application for a rule directed to the Chief Execution

Officer, Jerusalem, and it concerns the guardianship of a young child.

It seems that the Petitioner and his wife, the second Respondent, were divorced by the Orthodox Ecclesiastical Court, which Court ordered that the second Respondent should have the custody of the child, but that if she re-married, the custody was to be given to the Petitioner — the father.

It is said that she has re-married, and the father seeks to execute the conditional order of the Ecclesiastical Court, but the Chief Execution Officer refused to do so.

In cases such as this we are concerned to see, in so far as the substantive law allows us to do so, that the best interests of the child are served. I should make clear that in this case neither party suggests that the other is not a fit and proper person to have the child.

It is argued that in a case such as this guardianship is ancillary to divorce, and therefore falls under paragraph (i) of Article 54 of the Order-in-Council. If this were so, I think it would be expressly included, as is alimony. Guardianship is a matter of personal status by Article 51, and I think it falls under Article 54(ii).

According to the Chief Execution Officer the Byzantine law provided that on re-marriage the Court may order a change of custody, but in order to do so, in my view, they should and no doubt would wish to consider the state of affairs then existing, in particular the home and surroundings which the mother can give the child after her re-marriage, and the home the father can give.

Following the principles laid down by this Court in Civil Appeal No. 40/40 *, 7 P.L.R., 411, I think a guardian ad litem should be appointed, and the matter brought before the appropriate Court to consider the matters to which I have referred.

Our attention was called to a decision of this Court, High Court No. 10/41**, but the question whether the child should have consented through a guardian ad litem to the jurisdiction does not seem to have been argued therein.

Apart from these considerations, on broad grounds I think an order of an Ecclesiastical Court may be said to be contrary to natural justice if it provides for a change of custody of a child in the future without regard to the state of affairs then existing, and I have no sympathy with an order which provides that a young mother, to whom custody of her child has been given, shall lose it merely because she re-marriages.

The order will be discharged with costs, which we assess at an inclusive sum of LP. 10.

Given this 25th day of April, 1941.

Chief Justice.

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* 8 CtLR 173. **9 CtLR 78.

CIVIL APPEAL NO. 13/41.

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:

Ahmad Salameh Khalil Salameh and 11 others Appellants.

v.

1. The Palestine Government
2. The Village Settlement Committee of Leita
3. Director General of the Moseem Waqfs
4. Moshe Smilansky
5. Shafik Asal

Failure, without good cause shown, to cite on appeal all parties to original action.

Failure of appellant to cite all parties to original proceedings — fatal to appeal, unless good cause shown.

Moghannam for Appellants.
Crown Counsel (*Hogan*) for Respondent No. 1.
Eliash for Respondent No. 4.

Appeal from decision of Settlement Officer, Tulkarm Area, dated 30.10.40.

JUDGMENT.

In this case the Appellants have not cited all the parties to the original proceedings.

This Court has decided in Civil Appeal 89/39*, 6 P.L.R. 460, and 89/40 **, 7 P.L.R., 258, that this is fatal unless good cause can be shown under Rule 333, and we do not think any good cause has been shown here.

With reluctance we come to the conclusion that the appeal must be dismissed with costs on the lower scale and LP. 10 advocate's attendance fee to Respondent No. 3. Respondents No. 2, members of the Village Settlement Committee who are ten in number, will have LP. 1 each travelling expenses.

Delivered this 1st day of May, 1941.

Chief Justice.

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* 6 CtLR 123. 8 CtLR 150.

CIVIL APPEAL NO. 38/41.

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

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

Arieh Leopold Zwillinger — Appellant.
v.
Blanka Schuster — Respondent.

Claim for custody of child by mother, a Czechoslovakian national, from father, a Jew and Palestinian citizen, married in Palestine and divorced in Czechoslovakia — Jewish law regarding custody of male child — Trial Court deciding in favour of mother on general principles of interests of child seeing that father remarried and has a child by second marriage.

Where under Jewish law father, not being an unsuitable person, entitled to custody of male child fact that he remarried and has a child by second marriage does not alter position.

Goitein and *Reich* for Appellant.
H. Cohen for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 31.1.41.

JUDGMENT.

The parties to this appeal were married in Palestine about 1930, and a child was born to them, three years later they were divorced in Czechoslovakia. They are now feighting for the custody of the child, which the District Court has given to the mother.

The proceedings were brought under Article 47 of the Order-in-Council. The mother, who was the plaintiff, is said to be of Czechoslovakian nationality; the father and son are of Palestinian nationality. The question now arises, what law is to be applied under the Order in Council. Mr. Goitein submits that whether we take the personal law of the father, who was defendant in the action, or the child, Jewish law applies, as both are Jews, and that is not controverted by the Respondent, who agrees that the Jewish law should apply.

It is said on behalf of the Respondent, that she was not legally married to the Appellant, because at the time of the marriage she was a Christian, and according to the Jewish law such marriage is

null and void ab initio, — consequently the child is illegitimate and the father can claim no parental rights over him, the mother being the only legal guardian. The Court below found as a fact that the Appellant and Respondent were duly married. Furthermore, we have looked at documents, official and otherwise, in which the woman was described before and after marriage as a Jewess.

There was evidence that under Jewish law the custody of a Jewish male child, whose age is over seven years, is given to the father unless he is not a suitable person. The child in question is over seven, and there is no suggestion that the father is in any way an unsuitable person to have the child.

The Disrict Court appears to have decided on general principles that as the father has remarried, and has a child by the second marriage, it is in the interests of the child that he should remain with his mother.

Mr. Goitein, on behalf of his client, the father, informed us that he is willing to give the Respondent, the mother, reasonable access to the child, and we think that that is a right and proper course for him to take.

In the result the judgment of the District Court will be set aside, and we order that the father shall have the custody of the child. No order as to costs.

Delivered this 8th day of May, 1941.

HIGH COURT NO. 94/40.

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

Before:— Copland, J. and Frumkin, J.
In the application of:
Jacob Peremen — Petitioner
v.
1. President District Court, Tel-Aviv.
2. The General Mortgage Bank of Palestine Ltd. — Respondents.

Execution proceedings stayed upon mortgagor lodging action contesting his liability to pay — Auction proceedings in Execution Office remaining suspended for more than one year — Refusal of Chief Execution Officer to take fresh proceedings after interruption of more than one year.

1. If Chief Execution Officer for a legally valid reason stayed execution and stay exceeded one year in extent, judgment debtor right in asking that fresh proceedings be taken in execution file.

2. Execution officers bound to take care in checking up their notices of sale so as to prevent discrepancies between actual description of property and description as published.

Eisenberg for Petitioner.
Bileski for Respondent No. 2.

Application for an order to issue to first respondent directing him to show cause why his order made on 16.10.40, in Execution File No. 11981/36 should not be set aside and substituted by an order that fresh proceedings should to taken in that file, or alternatively by an order that a new valuation and new publications thereafter should be made.

ORDER

This is an application to set aside an order of the Chief Execution Officer with regard to the conduct of execution proceedings. It is not disputed that the execution proceedings were stayed for a period exceeding one year owing to the fact that the judgment debtor brought an action contesting his liability to pay on the mortgage which was the subject matter of the execution. The Chief Execution Officer after the lodging of this action stayed execution proceedings as he was fully entitled to do. That stay was given for a legally valid reason and that is the important point. That the action was afterwards dismissed does not, in any way, affect the validity of the stay which was given. A Chief Execution Officer of course can always refuse to grant stay if he likes. He has entire discretion of the matter.

One further remark — it is alleged in the petition that there are discrepancies between the actual description of the property and the description of it as published. We get too many of these cases coming up. It seems to us that there is lack of care on the part of execution officers in checking up their notices of sale with the actual description of the property. This is a mistake which should never occur and I hope we shall not have any more of this nature. The order nisi must be made absolute with costs LP. 10 hearing fees.

Given this 29th day of November, 1940.

British Puisne Judge

CRIMINAL APPEAL NO. 85/41.

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

Before:— Copland, J., Rose, J. and Abdul Hadi, J.
In the case of:

Mohammad Ibn Abdallah el Ali el Kaddoumi Appellant.

v.

The Attorney-General Respondent.

Conviction of premeditated murder — Submission on appeal that convicted person might be insane.

Insanity of accused must, like any other defence, be proved in Court of trial.

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

Appeal from judgment of Court of Criminal Assize sitting at Nablus dated 10.6.41, in Criminal Assize Case No. 24/41 whereby appellant was convicted of murder, contrary to section 214(b) of Criminal Code Ordinance 1936 and sentenced to death.

JUDGMENT.

The appellant was convicted of premeditated murder committed on the 4th of January, 1941, and was sentenced to death. The appellant, in a statement made after the assault had been committed, admitted what he had done, and there is no doubt as to the correctness of the conviction.

The only point raised by Abcarius Bey on the appeal is the question that the man might be insane. Insanity is a defence and must be proved like any other defence. The place in which to prove it is the Court of trial. On the records of the lower Court there is nothing in this appeal and it must therefore be dismissed and the conviction and sentence of death confirmed.

The Court understands that the appellant is under medical observation. That being so, of course it is needless to say that such medical reports would be given most careful consideration by the authorities responsible for deciding whether the sentence should be carried out or not.

Delivered this 30th day of June, 1941.

British Puisne Judge

CIVIL APPEAL NO. 157/40.

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

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

In the appeal of:
1. Azazh Kebbeda Tesema
2. Dedjasmatch Makonnen
3. Alamau Checol — Appellants.

v.

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

Order of Land Court adjourning until end of war with Italy, but not striking out or dismissing, action on behalf of Italian Government claiming certain property by reason of conquest of Ethiopia — High Commissioner informing Chief Justice of withdrawal of de jure recognition by British Government of Italian conquest of Ethiopia — Change of Plaintiff's position calling for reversal of order of trial Court.

1. Court of Appeal may set aside order of trial Court upon party's position having changed since that order.
2. If de jure recognition by British Government of conquest of certain country by foreign Government withdrawn, any title of such latter Government to property by reason of such conquest can no longer be recognised as existent.

Marein for Appellants.
M. Yunis Hussayni (by delegation) for Respondent.

Appeal from order of Land Court, Jerusalem, dated 3.7.1940.

JUDGMENT

This appeal arises out on an action in which the Italian Government claimed certain property by reason of the conquest of Ethiopia, and is an appeal from an order of the Land Court, dated 3rd July, 1940, adjourning the action, but not striking it out or dismissing it, until the end of the war with Italy. The Court also ordered a change of Receiver.

Abcarius Bey, who appeared for the Italian Government, asked leave

through Mohammad Eff. Yunis Hussayni, to withdraw, which we granted, and having regard to the observations by the Master of the Rolls in Eichengruen v. Mond and others, A.E. 1940, Vol. 3 at page 153, also reported in L.T.R., Vol. 163, page 219, we proceeded to hear the appeal.

Since the Land Court gave its order the position of the Plaintiffs has changed, and by letter dated 30th November, 1940, the High Commissioner informed me, as Chief Justice, as follows:—

> "I have been acquainted by the Secretary of State for the Colonies that the *de jure* recognition by His Majesty's Government of the Italian conquest of Ethiopia has been withdrawn".

On the authority, therefore, of Haile Selassie v. Cable and Wireless Limited, L.T.R. Vol. 160, page 120, it seems clear that the title of the Italian Government to the property in question can no longer be recognised as existent.

The order appealed from will be set aside, both as to the adjournment and the appointment of the Receiver, and the action will be dismissed. The Receiver who has been acting will be discharged upon his furnishing accounts to the satisfaction of the Land Court.

The appellants will have their costs on the lower scale, and we certify the sum of LP. 15 for advocate's attendance fee.

Delivered this 11th day of December, 1940.

British Puisne Judge.

CRIMINAL APPEAL NO. 70/41.

IN THE SUPREME COURT SITTING AS A COURT OF CRIMINAL APPEAL

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

In the appeal of:

Hans Sampter — Appellant.

v.

The Attorney-General — Respondent.

Charge under Criminal Code Ord. of causing injury by negli-

gence and charge under Road Transport Ord. of driving with defective brakes — Allegation that accused punished twice for same offence.

Where offence under Road Transport Ordinance treated as part of negligence leading to conviction under section 243 of Criminal Code Ordinance (causing injury by negligent or reckless driving) accused should not be punished again under that Ordinance*.

Apelbom for the Appellant.
Crown Counsel (*Hogan*) for the Respondent.

Appeal from judgment of District Court, Jaffa (Cr.A. 25/41), dated 15.5.1941.

JUDGMENT

The Appellant was charged under Section 243 of the Criminal Code Ordinance, i.e.:

> "Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person:
> (*a*) drives a vehicle........
> is guilty of a misdemeanour."

That is the basic charge. When he came before the Magistrate he was charged with:

1. Causing injury to another by negligence and recklessness, contrary to Section 243 (1) of the Criminal Code Ordinance, 1936.
2. Driving a car without good brakes, contrary to Section 11 (b) of Part 2, and Section 51 (1) of Part 6 of the Road Transport Rules and Section 18 of the Road Transport Ordinance, 1929.

There was clear evidence upon which the Court could find the accused guilty of the charge of negligence. There was the evidence of an eyewitness who said that the truck was going at a high speed, and there was evidence that the bicycle of the man who was struck was propelled for a distance of about fifty metres. The case does not stop there. There was also the evidence that the brakes were defective.

The only point which now arises is whether the accused has been punished twice — once for causing injury, and secondly for driving a car with defective brakes.

If the evidence of defective brakes is treated as part of the negligence leading to conviction under Section 243, it would not be right that he should be punished again for it under the Road Transport Ordinance.

The sentence is light, and I do not think there is any reason to sup-

* Edit. Note: but not so, it would appear, where treated as independent offence.

pose that he has been punished twice for the same offence.
The appeal is therefore dismissed.
Delivered this 17th day of June, 1941.

Chief Justice

CIVIL APPEAL NO. 96/41.

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

Before:— Copland, J. and Abdul Hadi, J.
In the application of:
Khamis Daoud Bourghal — Applicant
v.
Hassan Abdul Rahman Bourghal, as Mutawalli of Wakf Bourghal. — Respondent.

Application for leave to appeal from order of Land Court interpreting its judgment of some years earlier.

No leave to appeal from order interpreting original judgment and thus forming integral part of it.

Germanus for Applicant.
Respondent: Absent — Served.

Application for leave to appeal from order of Land Court, Jaffa, dated 10.3.41, in Land Case No. 29/32.

ORDER

The Land Court, when the application for leave to appeal was made to it on the 3rd May, 1941, said —

> "In our judgment the order dated 10.3.41, being an interpretation of the original judgment dated 9.3.37 formed an integral part of that judgment and therefore no leave to appeal from it is necessary. But, even if leave to appeal could be granted, we see no sufficient grounds for granting it."

It is unneccessary to say anything more than that we agree with every word of that judgment.
The application is therefore dismissed.
Given this 23rd day of June, 1941.

British Puisne Judge

HIGH COURT NO. 52/41.

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

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

v

1. The Attorney-General
2. The Superintendent of Central Prison, Jerusalem.

Respondents.

Habeas corpus application regarding a person ordered to be surrendered to Egypt — Plea that person whose surrender applied for was a minor when charged and that offence was prescribed — Question of sufficiency of evidence as to identity of fugitive offender.

1. If evidence before trying Judge as to identity of person said to be a fugitive offender found by High Court insufficient, order for his surrender will be set aside.

2. Question as to whether person whose extradition to Egypt sought was a minor or not or whether offence prescribed or not — not for Courts here but for those in Egypt to decide.

Petitioner in person.
Junior Government Advocate (*Salant*) for Respondents.

Application for a summons to issue directed to the second respondent calling upon him to produce the body of Yosef Yehezkiel Hakak, petitioner's husband, in this Court and to show cause why the said Yosef Yehezkiel Hakak is being detained in the Central Prison, Jerusalem, and why he should not be released from custody.

ORDER

This is an application for a writ of habeas corpus made on behalf of one Yosef Yehezkel Hakak. An application was received from the Egyptian Government asking for his extradition on a charge of having caused grievous harm to one Zion Mizrachi, on the 4th December, 1933, contrary to article 204 of the Egyptian Criminal Code. The

necessary documents were all furnished to the learned Judge who took the case in the District Court of Tel Aviv and it appears that Yousef Yehezkel Daud alias Cohen was convicted in default by the Egyptian Criminal Court in Cairo on the 10th December, 1934.

A number of points has been raised and, with the exception of one, they are all futile. With regard to the question that the person charged was a minor and that the offence is prescribed, those questions are not for us but for the Courts in Egypt to decide. From the proceedings before the Egyptian Court it is quite clear who the person injured was and what was the date on which the offence took place.

Extradition proceedings between Palestine and Egypt are conducted under the provisions of the Provisional Agreement between the respective countries and that agreement supersedes entirely the provisions of the Extradition Ordinance, with the exception of the provisions of Section 7 of that Ordinance. By that agreement an extraditable offence is any offence which carries a sentence of one year or more.

The only point really is the question of identity. In the proceedings before the Egyptian Criminal Court he was named Yosef Yehezkel Daoud alias Cohen. In the statement of identity he is said to be Yosef Yehezkel Daoud. In his own passport he has the name of Hakak. Cohen and Daoud are not mentioned. The surname 'Hakak' does not appear all through the proceedings in the Egyptian Court. It is true that a photograph had been sent from Cairo. The photograph might or might not have been the potograph of that person. The picture does not seem to be very clear. A Police Constable from the Petah-Tiqva Police identified this man as the person required by the Egyptian Court but it does not appear that this constable was ever present in Egypt.

It should be realised that the question of the identity of a man in an extradition case is of paramount importance. It is a very serious matter to send a man to a foreign country to be tried for an offence which was committed eight years ago, if he is not the person actually required.

With all respect to the learned Judge who tried the case in Tel-Aviv, we think that the evidence in this respect is very thin. The rule nisi must therefore be made absolute and the person named will be discharged.

Given this 19th day of June, 1941.

British Puisne Judge.

HIGH COURT NO. 39/41.

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:

Zevulun (Zavel) Kwartin Applicant.

v.

1. President, District Court, Haifa.
2. Zvi Sederovsky Respondents.

Chief Execution Officer refusing application to cancel sale proceedings allegedly vitiated by a number of defects — Application to High Court to cancel order of sale on ground of an alleged settlement between parties outside Execution Office — Effect of failure on part of applicant before High Court to set out in his affidavit that he brought alleged fact to Chief Execution Officer's notice.

Application to High Court under art. 36 of Execution Law (re claim by debtor of payment, settlement or compromise outside Execution Office) to cancel Chief Execution Officer's order of sale will fail, if applicant did not set out in his affidavit that he brought alleged settlement to Chief Execution Officer's notice.

Seligman for Petitioner.

J. Salomon 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 revoke the final order of sale made on the 9.5.41, in Execution File No. 162/39, Haifa, as well as his order dated the 13.5.41, and to cancel all sale proceedings subsequent to the order of sale.

ORDER

On the 10th of November, 1939, an order was made for the sale of certain mortgaged property, and steps were taken to give effect thereto.

On the 1st of April, 1941, the mortgagor's advocate made application to the President of the District Court, setting out a number of alleged defects in the proceedings, and praying that the execution proceedings might be cancelled, adding —

> "In the event that Your Honour will not be prepared to grant the above application, then in the alternative it is prayed that Your Honour may grant a stay of the sale proceedings for a substantial period, for good and sufficient reasons which will be adduced at the hearing, which we pray Your Honour to fix for the purpose."

On the 9th of May a final order of sale was made, and the applicant asks for an order calling upon the President of the District Court to cancel the order of sale. We do not think there was any substance in the application to the President of the District Court, and its form was clearly embarrassing.

Before us Mr. Seligman urged that the proceedings should have been stayed under Article 36 of the Execution Law, which provides:

> "When the debtor claims that payment, settlement or compromise has been made outside the Execution Office, if the creditor denies this, the Execution Officer will call for proofs to establish the claim, and if he find the claim capable of proof he will grant sufficient time to the judgment-debtor to apply to a Court having jurisdiction, and if it appear that he has applied to the Court within such time, execution will be stayed pending the result of the case."

As, however, he does not in his affidavit set out that he brought the alleged settlement to the notice of the Chief Execution Officer, he can hardly complain.

The rule will be discharged with costs fixed at an inclusive sum of LP. 10 to the second Respondent.

Given this 27th of June, 1941.

Chief Justice.

CIVIL APPEAL NO. 278/40.

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

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

In the appeal of:

1. Alexander Eliash
2. Elazar Eliachar
3. Rachele, widow of Moreno Eliachar
4. Menache Eliachar.

Appellants.

v.

1. The Government of Palestine

2. Mudir el Awqf el Islamiya el 'Am. Respondents

Appeal from decision of Land Settlement Officer regarding actual area of mortgaged land sold through Execution Office — Court of Appeal admitting in evidence document which was not before trial Court — Old land register endorsements showing decision to grant, upon payment of Badl Misl, certain area of State Land to person who encroached on it — Estoppel created for Government by constructive admission that land was grantee's by their treating it as taxable property and collecting werko and taxes on this basis over long period of many years.

1. Court of Appeal may admit in evidence a document not produced before trial Court, if it is in reply to a statement made by one party after judgment had been reserved, to which other party had no opportunity of replying.

2. If old land register endorsements show decision to grant, upon payment of Badl Misl, certain area of State Land to person who encroached on it and also encroachments and revival for more that 10 years of other plots and entire area ever since treated as taxable property of grantee and werko and rural property tax collected over whole period, Government — having thus admitted by their conduct and actions that land was grantee's — estopped from claiming it as State Land.

Eliash for Appellants.

Akel (*Junior Government Advocate*) and *Alhassid* for Respondent No. 1

Muhtadie for Respondent No. 2.

Appeal from decision of Settlement Officer, Jerusalem, Settlement Area dated 21.10.40.

JUDGMENT

This is another appeal from the Settlement Officer, Jerusalem Settlement Area in which very much the same points arise as in C.A. 227/40*) Fatima bint Mahmud Hassan Abu Ghosh v. Government of Palestine and another, which we heard on the same day.

The dispute concerns the actual area of the land which the appellants bought, in or about the year 1934, when the land was sold as the result of non-payment of a mortgage on it, after being duly advertised by the Execution Office.

The Land originally belonged to the late Fadlallah Maroum. Owing to encroachments made by him, the Mejliss Idara in 1333 held an enquiry, and a fresh registration was made on the 25th August, 1333,

in which the area was stated to be 200 dunums, but an endorsement was made on the register to the following effect:—

> "Fadlallah Marum, an Ottoman subject and of the Latin Community, is in possession, by way of undivided shares, of 79 shares out of 110 shares and though the total area as registered in the Land Registry is 200 dunums and 1457 ziras, the balance which appeared to be in excess of the registered area is therefore 324 dunums and 1457 ziras and whereas it has been established that the excess in area was taken from State Lands by way of encroachment, and whereas by virtue of a decision of the Majlis (dated the 14th of August, 1333, No. 428, based on a certificate of mukhtars) it was decided to grant the said excess in area on payment of Badl Misl and to issue a corrected Title Deed in respect of the other part, therefore, this title deed was issued by correction and exchange."

Other endorsements in regard to other plots show that encroachments were made and revival had taken place for more than ten years.

It is proved by a certificate from the Revenue Authorities, dated the 9th October, 1940, that the appellants and their predecessors in title have paid taxes on the whole of the 543 dunums claimed by them for close upon 30 years. This certificate was not before the learned Settlement Officer but we admit it, since it is in reply to a statement made by Mr. Alhasid before the Settlement Officer after judgment had been reserved, to which the appellants had no opportunity of replying. It is not disputed that the appellants bought in good faith.

The main ground of the Government's case seems to be that there is no proof that the Badl El Misl of LT. 107 was ever paid, and that therefore the appellants or their predecessors in title cannot have acquired any title to the extra area. Apart from the fact that it seems most unlikely that the endorsements in the Mahlul register would ever been made, if Badl el Misl had not been paid, the fact remains that for nearly 30 years the Government have treated the entire area claimed by the appellants as the taxable property of the appellants or their predecessor in title and that the Government have collected werko and rural property tax from them on this basis. If estoppel is to have any meaning at all, we cannot imagine a clearer case. There may or may not be a claim for payment of Badl el Misl — that is another question — but Government, having for this long period by their conduct and actions admitted that the land was the appellants' when it was a question of getting taxes on the basis that the appellants and their predecessor in title were the owners, cannot now deny that ownership, just because it suits them to put in a claim for the land itself.

In these circumstances the judgment of the learned Settlement Officer

cannot stand. The appeal must be allowed, and his judgment set aside, and judgment entered for the appellants in accordance with their claim.

The first respondent must pay the appellants' costs of their appeal on the lower scale to include LP. 15 advocate's attendance fee on the hearing of this appeal. The citation of the second respondent being purely a formal one, he is discharged with no order as to costs.

Delivered this 11th day of March, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 74/41.

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

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

In the appeal of:

Heyrouth Colony — Appellant.

v.

Yousef Hamed el Mansour — Respondent.

Claim before Magistrate of ownership to land on which defendant constructed a road — Question of Magistrate's jurisdiction having regard to value of land claimed plus value of road built thereon without claimant's consent — Consent to road asked to be inferred from claimant not objecting while it was being constructed.

1. In a claim before Magistrate regarding ownership of land on which defendant built a road, subject matter of dispute being the land only, road to be excluded when ascertaining value of subject matter; fact that defendant interested in road does not affect matter.

2. Fact that claimant of land did not object to road while it was being constructed — not sufficient from which to infer consent.

Ben Shemesh and *Eliash* for Appellant.

Shehadeh for Respondent.

Appeal from judment of Magistrate's Court, Tulkarm, sitting as a Land Court, dated 27.3.41, in Land Case No. 4/40.

JUDGMENT

This is an appeal from a judgment of the Magistrate of Tulkarm sitting as a Land Court, in which the Magistrate gave judgment in favour of the plaintiff in the Court below, that the land on which the present appellants had built a road belonged to the plaintiff the present respondent, and he ordered the appellants to refrain from interfering with it.

On appeal seveal points were taken. The only important point is the question of jurisdiction. The appellants allege that the value of the land plus the road is more than LP. 150 and the case is therefore not within the jurisdiction of the Magistrate. It is agreed that the land by itself is worth under LP. 100 but that the land plus the road is more than LP.150. The answer therefore depends upon whether the value of the road must be excluded from that of the land with regard to this present dispute. Now, the question of jurisdiction depends upon what is the value of the land or the subject-matter of the dispute. The claim before the Magistrate was for the land on which the road was built and it seems to us that the subject-matter of the dispute was the land. The respondent was not interested in the road, or at any rate professed not to be interested in the road, and the fact that the appellants were interested in it, in our opinion does not affect the matter. We are satisfied, therefore, that the Magistrate had jurisdiction to take this case.

The only other points were that the respondent had consented to the construction of this road. There was, however, no evidence before the Magistrate as to consent, it was half hearted suggested though that there was an oral consent but the main argument on this point was that the respondent consented by not objecting to the road while it was being constructed. We are not inclined to interfere with the view taken by the learned Magistrate that this is not sufficient from which to infer consent. It was also suggested to us that article 9 of the Law of Disposition should be applied by analogy, but unfortunately we are unable to see where the analogy lies.

For these reasons the appeal fails and must be dismissed with costs on the lower scale together with LP. 15 advocate's attendance fee.

Delivered this 25th day of June, 1941.

British Puisne Judge

CIVIL APPEAL NO. 67/41.

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:

Alfred Sälzmann — Appellant.

v.

Trust and Transfer Office "Haavara" Ltd. — Respondent.

Written undertaking to pay containing reference to some previous writings — Defendant claiming that promise to pay conditonal — Onus of proof — Court crediting Defendant with a sum of money without a special plea of set off in his defence.

1. If written promise to pay has reference to some other agreement — upon Defendant to show that reference made promise conditional.

2. Where Defendant denies liability and fails Court cannot give him credit for a sum of money, if no plea of set off in the defence.

Shereshewsky for Appellant.

Krongold for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 21.3.41.

JUDGMENT

This is an appeal from the District Court of Jerusalem. The Respondents were the Plaintiffs in an action which they based upon what they described as a promissory note, which was a document dated 4.7.39, and in the course of the proceedings became Exhibit A.

The Defendant, who is now the Appellant, in his defence dated 3rd March, 1940, stated that the document filed by the Plaintiffs and designated by them as a promissory note was not a promissory note, as the promise therein contained, to pay the Plaintiffs the amount claimed, is conditional. He goes on to say that the said document in its opening refers to a writing dated 12.6.39, and its body mentions an agreement. The writing referred to on top of the document in turn relates to another writing dated 4.6.39, which in turn is based on a memorandum of 7.9.38 embodying certain conditions under which the payments by Defendant to Plaintiffs of the amounts in question are to be made. He then pleads that there was no consideration for the note, and concludes the pleading by again saying that the sums mentioned in the documents attached to the statement or claim were

to be paid on the fulfilment of certain conditions, which in fact have never been fulfilled, hence the agreement became ineffective and the documents attached to the statement of claim are worthless.

The document itself, i.e. Exhibit A., after referring to the matter as pleaded, said:

> "According to the agreement entered into I pay today to you the sum of LP. 250 in cash, and I undertake to pay another LP. 400 in the following manner..."

and the LP. 400 is to be paid by four separate payments of LP. 100, and it is signed "A, Salzmann".

I think it is clear that if a document which may be a promissory note has reference to some other agreement, by the authority of an old case of Jury and Barker which is reported in Vol. 113 of the Revised Reports, p. 731, it is upon the defendant to show that the promise is conditional, to quote the words of the learned Lord Chief Justice therein:

> "If the words of the note in question make the promise conditional it is on the defendant to show that."

It seems to me that the proper course was taken by the District Court in this case, when they called upon the Defendant to show that the reference in the note made it conditional, and not an unconditional promise to pay, and the Court below having heard evidence and examined the documents came to the conclusion that it was a good and binding promissory note.

Argument was addressed as to whether or not this note was conditional, which was based on the suggestion that the condition is to be found in what is Exhibit D., i. e. the memorandum of an agreement dated 7.9.38, but I think it is abundantly clear that the agreement to which reference is made in the note is Exhibit C. that is a document in writing dated 4.6.39. It is linked up clearly by what was Exhibit B., i.e. the letter of 12.6.39. It is quite true that Exhibit C. has reference to the matters which were discussed in Exhibit D., but it is clear that as a result a definite agreement was reached whereby a sum of LP. 750 was to be paid, LP. 250 of that and LP. 400 of that to be paid precisely in the terms of the promissory note. Exhibit C. which must be the agreement to which reference is made, contains no conditions at all, so there can be no question whatever of a condition applying to this note not being fulfilled, because there were not any, and if one, owing to the difficulties of the translation of documents and so on, had any doubt as to that position, it is entirely removed by subsequent correspondence between the parties.

In a letter dated 22.8.39 addressed to the Appellant, the Respondent wrote:—

> "You expressly stressed that this document had the meaning

> of a promissory note, and we are therefore extremely surprised that in spite of our demand you failed to pay."

In reply to that letter the Appellant never suggested that the document was not a promissory note, but he says,

> "that the dates of maturity agreed with you were fixed on the tacit understanding that I should until then receive all my monies too."

He may say that he was in a difficulty, but certainly did not say that he did not sign a promissory note or that the note was conditional.

It only remains to consider a notice in the nature of a counterclaim which was filed by the Respondents. It seems that the District Court allowed the Defendant in the action a sum of LP. 40 for various reasons which are explained in the judgment, but there is no plea in the defence of set off, there is merely a denial of liability. I do not think, therefore, that the Defendant having failed entirely on his main defence of liability is entitled now to say that if he is liable he is entitled to be given credit for a sum of money for some reason, not having pleaded it, I certainly do not think he should recover it.

The appeal on the main issue fails. The cross-appeal succeeds, and the judgment of the District Court will be varied in so far as it reduced the amount claimed, and the Respondents will have judgment entered in their favour for the total amount claimed in the action, which was LP. 400. The order of the District Court as to costs will stand, and here the Respondents will have costs on the lower scale, and LP. 15 attendance fee. The order of the District Court as to interest will apply to the sum of LP. 400.

Delivered this 5th day of May, 1941.

Chief Justice.

CIVIL APPEAL NO. 274/40.

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

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

In the case of:

Rosa Lewin — Appellant

v.

Frida Zucker — Respondent.

Allegation that deceased was not of sound mind and incapable of understanding what he was doing when signing certain agreements

— Finding of trial Court supported by evidence of specialists obtained from cross-examination by opposite party.

> Where evidence obtained in cross-examination from witnesses called by one party supports contention of other party, who called no witnesses on that issue, appeal against finding made accordingly by trial Court must fail.

Turtledove and *Zandler* for Appellant.

Eliash and *Wittkowsky* for Respondent.

Appeal from judgment of District Court, Tel-Aviv, dated 29.11.40.

JUDGMENT

We need not trouble you, Dr. Eliash.

This appeal raises one of those disagreeable matters wherer certain of the heirs to a deceased person, having made an agreement as to a certain division of the estate, then endeavoured to go back upon what they had agreed in order to obtain a settlement more favourable to themselves. The contention in the District Court was that the mother, Mrs. Minna Ullendorff, now deceased, was not of sound mind and was incapable of understanding what she was doing when she signed two agreements, the first in Marienbad on the 12th August 1937, and the second in Tel-Aviv on the 5th January, 1938. The District Court found that there was not the slightest evidence that when the Marienbad agreement was signed the woman was of bad mental condition, and with regard to the second agreement they found that at the time it was signed she was being advised by her son and by an advocate, that she was capable of understanding what these persons told her and that she was quite capable of appreciating the contents of the documents she signed.

Now, on appeal the appellant, who is the administratix of the estate of the late Minna Ullendorff, has tried to show us that these findings of fact with regard to the mental state of the deceased were not justified by the evidence. Two mental specialists were called by the present appellant. The respondent did not call any medical evidence but relied upon the results of the cross-examination of these two alienists. The most striking evidence was that of Professor Pappenheim where he says in cross examination:—

> "At the beginning of 1938 she was capable of understanding a simple transaction of business. She could recognise people and her son undoubtedly. Such sick persons are inclined to get advice and rely on others. She could understand her son telling her that the contract was drafted by a lawyer and that it is in order."

and the evidence of Dr. Herman is very much to the same effect. It is quite impossible on the face of this evidence to say that the District Court came to a wrong conclusion and that there was no evidence to support its finding that she was capable of understanding. We agree with that finding.

In the circumstances the appeal is bound to fail and it is dismissed. Costs on the lower scale and LP. 15 advocate's attendance fee to be paid by the administratrix personally and not out of the estate. The appeal in our opinion is one which should never have been brought.

Delivered this 24th day of February, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 237/40.

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:
Shafiqa Bint Jamal-ed-Din el Dasouki . Appellant.

v.

1. Sadr-ed-Din etTaibi
2. Sheikh Khalil el Dasouki Respondents

Application by Plaintiff for case to be fixed for hearing — Defendant applying after case fixed by Registrar for hearing, that case be tried by President sitting alone.

After case, as result of Plaintiff's application, fixed by Registrar for trial — too late for Defendant to ask for President sitting alone.

Salah for Appellant.
Frankel for Respondents.

Appeal from judgment of District Court, Nablus, dated 31.10.40

JUDGMENT

The Appellant, Plaintiff in the lower Court, applied to the Registrar

that the case be fixed for hearing. The case was then fixed for trial by order of the Registrar, and the Plaintiff was notified of the date. Subsequently, and on the same date, the Defendants applied that the case be tried by the President sitting alone. The Registrar, relying on Section 12(3) of the Courts Ordinance, 1940, refused the application on the ground that it was made late. When the case came for trial before the Court, again the Defendant applied that the case be tried by the President sitting alone. The Court granted the application.

It seems to us that the Registrar was right, and the order of the District Court was wrong. The case will go back for trial before the Court as originally fixed.

The appeal is allowed, with costs which we fix at an inclusive sum of LP. 5.

Delivered this 18th day of December, 1940.

Chief Justice.

CIVIL APPEAL NO. 164/40.

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

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

In the case of:

1. Raiya Amin Mahmoud el Qasim
2. Arabiya Amin Mahmoud el Qasim — Appellants.

v.

Yusuf Dawud Yusuf el Qasim and 8 others. — Respondents.

Appeal against order of Settlement Officer regarding determination of shares in land — Allegation before Settlement Officer of sale outside Land Registry — Question of approval by Settlement Officer of unofficial sales.

Unofficial disposition of land not approved by Settlement Officer cannot be recorded.

Nazzal for Appellants.

Appeal from judgment of Land Settlement Officer, Tulkarm, dated 21.3.40.

JUDGMENT

This is an appeal from the Land Settlement Officer of the Tulkarm Area. The case had already apparently been before the Land Court and had been sent back to determine exactly the shares which were to be given to certain parties to the action. The Settlement Officer made a fresh order and it is against that order that the present appeal has been brought.

Now the dispute seems to be a complicated one and I am afraid that I have not got a great deal of enlightment from any of the parties concerned. But as I see the case, the appellant alleged that certain of the heirs of Amin El Qasim were wrongly given shares by the Settlement Officer in the distribution when it is alleged that they had sold those shares to the 4th and 5th respondents.

If we read the Settlement Officer's judgment the last paragraph says:

> "Any disposition of shares carried out unoficcially since the dates of the claim in this case, or not approved by me at the hearings, shall not be recorded. The parties can effect such disposition in the Tabu after publication of the final Amending Order".

These sales were obviously unofficial sales otherwise no question of approval would have arisen. For the appellant to succeed, therefore, he must show us that the Settlement Officer had approved these sales. He alleges he has so approved them but he has not satisfied us on this by pointing out any part in the proceedings where this approval had been given. Not having done that, that is fatal to his case.

The appeal must therefore be dismissed with costs on the lower scale. LP. 1 expenses to the 6th respondent.

Delivered this 4th day of December, 1940.

British Puisne Judge.

CIVIL APPEAL NO. 270/40

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

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

In the appeal of:
Charles Fisher . Appellant.
v.
1. Pastor Detwig Von Gerzon
2. Emile Fisher
3. Miss Gertrude Richter Respondents

Application for removal of Executor said to be an enemy subejct and absent from Palestine — Refusal to remove Executor not interfered with by Court of Appeal.

Removal of Executor — a matter of discretion of trial Court, and Court of Appeal will not interfere even if Executor an enemy subject and absent from Palestine.

F. Atalla for Appellant.

J. Gavison for Respondent No. 1.

Respondent No. 2, Absent — served.

Blumberg for Respondent No. 3.

Appeal from order of District Court, Haifa, dated 10.12.40.

JUDGMENT

The appellant applied to the District Court to remove an Executor and to appoint another in his place. It is said that the present Executor is an enemy subject and is absent from Palestine. No rule of law has been quoted to us whereby this Executor should have been removed, and the matter would seem to be one of discretion.

His Honour Judge Evans considered it fully, and I see no reason to interfere with his decision, but I should like to make clear that I do not necessarily think that an enemy subject who is absent from Palestine is a suitable person to be an Executor.

The appeal will be dismissed, with costs to the First Respondent on the lower scale, with LP 10 certified for attending the hearing.

The third Respondent will have an inclusive sum of LP. 5 as costs.

Delivered this 5th day of February, 1941.

Chief Justice.

CIVIL APPEAL NO. 104/41

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:

E. Karwassarsky and B. Azar joint trustees in bank ruptcy of Husni Ramadan Abu Khadra — Appellants.

v.

Husni Ramadan Abu Khadra — Respondent

Court hearing submissions of both parties on motion for declaration of bankruptcy and reserving decision — Application to Court to withhold its reserved decision for a certain period — Scope of sec. 95(2) *of Bankruptcy Ordinance giving Court power to adjourn proceedings.*

Filing a motion for declaration of bankruptcy followed by Court hearing both parties' submissions — a proceeding within meaning of sec. 95(2) of Bankruptcy Ordinance (giving Court power to adjourn proceedings).

Appellants in person.
Machlis for Respondent.

Appeal from order of District Court, Tel-Aviv, dated 23.5.41, in Civil Case No. 17/38.

JUDGMENT

This appeal arises out of bankruptcy proceedings which differ from an ordinary trial.

The facts are that at the end of March, 1941, a hearing took place in the lower Court on a motion, and after both parties had made their submissions the Court reserved its decision. Before decision was delivered an application was made to the Court by the present Respondent to withhold its decision for a period of three months. Prima facie I doubt if this is a proper application to make. In the result the learned Judge made the following order:

> "Now in his motion, dated the 6th of May, 1941, the petitioner asked for a delay of three months in order to enable him to negotiate with a prospective purchaser".

> "Taking into account the present situation in Palestine, and relying on Section 95 (2) of the Bankruptcy Ordinance, I adjourn these proceedings for a period of three months."

Section 95(2) of the Bankruptcy Ordinance, 1936, gives power to adjourn proceedings, and the question would seem to be, was there a proceeding before the Court? We think there was a proceeding before the Court within the meaning of that sub-section, and that that being so the Court was entitled to adjourn it, and the appeal is therefore dismissed.

In the circumstances we make no order as to costs.

Delivered this 1st day of July, 1941.

Chief Justice

CIVIL APPEAL NO. 62/41.

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

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

In the appeal of:

As'ad Bey Chussein — Appellant.

v.

Shafouka bint Hafiz Bey Ghussein — Respondent.

Claim based on admission of indebtedness — Question of jurisdiction in relation to origin of debt — Proof of guardianship.

1. Where claim based on admission of indebtedness question how indebtedness arose — irrelevant in so far jurisdiction concerned.

2. An admission of indebtedness cannot be repudiated for reason that debt originated in dowry and could only be claimed before marriage.

3. Guardianship — a formal act of a Court and must be proved by a certified extract of the Court records; it cannot be proved by oral evidence.

Kamleh for Appellant.

Germanus for Respondent.

Appeal from judgment of District Court, Jaffa (sitting as a Court of Appeal) dated 22.3.41, in Civil Appeal No. 135/40.

JUDGMENT

This is an appeal by leave from a judgment of the District Court of Jaffa given on appeal from a judgment of the Magistrate's Court. Both Courts below gave judgment in favour of the present respondent. The claim is based on an admission of indebtedness dated the 17th of August 1925. The question of jurisdiction therefore does not arise because the claim is on the admission of indebtedness and how that indebtedness arose is not a question before the Courts in any way at all.

With regard to the argument that the advanced dowry can only be claimed before marriage, the answer is the same. The action is based on an admission of indebtedness and admission cannot be repudiated for reasons of this nature.

As to the question whether the late Tewfik Bey El Ghussein was the guardian of the respondent, guardianship is a formal act of a Court and must be proved by a certified extract of the Court records. Obviously it cannot be proved by oral evidence.

The appeal must therefore be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee. It is a little difficult to see how leave to appeal was given and the case seems to have occupied much more time before the Courts than it was really worth.

Delivered this 29th day of May, 1941.

British Puisne Judge.

CIVIL APPEAL NO. 126/41.

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

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

In the application of:

Bishara Odeh Elias — Applicant.

v.

Fayez Odeh Elias — Respondent.

Application to Supreme Court for leave to appeal from order by President District Court on review of a taxation order made by Registrar — Effect of sec. 8 *of Registrars Ordinance (laying down that decision on application for review of taxation order made by Registrar shall be final).*

No appeal, whether by right or by leave, from decision of District Court on review of taxation order made by Registrar.

Applicant in person.

Elia for Respondent.

Application for leave to appeal from order of District Court, Jerusalem, dated 3.6.41, in Motion No. 104/41.

ORDER

This is an application for leave to appeal from a decision given by the learned President of the District Court on review of an order for taxation made by the A/Registrar of the District Court. The case is governed by authority. In Attorney-General v. The Greek Catholic Church, C.A. 137/40 * (7 P.L.R. 387), it was held, in circumstances exactly similar to those before us in this present case, that no appeal lay to the Supreme Court by reason of Section 8 of the Registrars Ordinance, 1936. Sub-section 2 of that section says that when an application for review is made the decison thereon shall be final. "Final" means final, and no appeal lies, therefore, whether by right or by leave from an order made on review by the District Court from an order for taxation made by the Registrar.

The application for leave must therefore be dismissed. The Respondent is entitled to the costs of this application, which we assess at a total sum, inclusive of everything, of LP. 5.

Delivered this 15th day of July, 1941.

British Puisne Judge

CIVIL APPEAL NO. 119/41.

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

Before:— Copland, J. and Frumkin, J.

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* 8 CtLR p. 194

In the appeal of:

Custodian of Enemy Property — Appellant.

v.

1. Jacob Ben Zvi
2. Mordechai Zvi Adler
3. Central Press. — Respondents.

Action in Tel-Aviv against Defendants residing in Jerusalem — Court dismissing case on ground that all defendants reside outside its district — Authority of Court in whose district agreement was made to hear case against party residing in other district — Validity of agreement by parties as to place of trial.

1. Court within whose district agreement made even if signed there by one party only, has authority to hear and decide case againse party to such agreement residing in other district.
2. Parties can effectively agree in choice of Court having jurisdiction in ratio material.

Fleischer for Appellant.

Resner (*by delegation from Margalith*) for Respondents.

Appeal from judgment of District Court, Tel-Aviv, dated 30.5.1941, in Civil Case No. 15/41.

JUDGMENT.

In this case the learned Judges of the District Court dismissed the case before them on the ground that the Court of Tel-Aviv had no jurisdiction to deal with the case because all the defendants were residing in Jerusalem. They also held that the alleged agreement of the parties to the jurisdiction of the Court of Tel-Aviv, even if there were such a consent, was ineffective because no agreement could be made as to the jurisdiction of the Court. On both these points the learned Judges were wrong. Rule 4(b) of the Civil Procedure Rules, 1938, states quite clearly that "An action can be instituted before the appropriate Court of the place where the undertaking is made." The agreement here, prima facie, was made in Tel-Aviv. It was signed by one party, at any rate, in Tel-Aviv. Under the Rule the District Court of Tel-Aviv had authority to hear the case and decide it.

The learned Judges of the District Court are also wrong on the second point. There is nothing in the Rules to prevent parties from making a choice of the appropriate Court. It would not be possible

for parties to agree that a claim for LP. 500 should be taken before a Magistrate's Court, because a Magistrate's Court has no jurisdiction to try cases involving sums of LP. 500, but if parties like to agree, as in this case, that the Court of Tel-Aviv should have the jurisdiction, as that Court has unlimited civil jurisdiction, there is nothing in the law why this should not be allowed.

For these reasons the appeal must be allowed with costs on the lower scale here and below and LP. 10 advocate's attendance fee at the hearing of this appeal. The judgment of the District Court is set aside and the case remitted for trial.

Delivered this 17th day of July, 1941.

British Puisne Judge

CIVIL APPEAL NO. 227/40.

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

Before:— Copland, J., Frumkin, J. and Khayat, J.
In the appeal of:
Fatmeh Mahmoud Hassan Abu Ghosh and 71 others Appellants.
v.
1. The Attorney-General, on behalf of the Government of Palestine.
2. Mudir el Awqaf el Islamiya el 'Am Respondents.

Finding by Settlement Officer in favour of Government that certain land unassigned state land — Court of Appeal reversing Settlement Officer's finding on holding that Government estopped by their conduct from denying category and ownership of land and claiming it as state land.

If a partition scheme of certain land was accepted by Government, Rural Property Tax Distribution lists sent out, taxes levied on that basis, miri Kushans issued for certain plots in centre of that land — Government estopped from denying category of land nor its ownership.

Abcarius for Appellants.
Junior Government Advocate (*Akel*) for Respondent No. 1.
Muhtadie for Respondent No. 2.

Appeal from decision of Settlement Officer, Jerusalem Settlement Area, dated 21.10.40.

JUDGMENT

This is an appeal from a decision of the Settlement Officer in regard to certain village lands of Abu Ghosh. The Settlement Officer found in favour of Government in regard to the majority of the claim, finding that the lands were unassigned state land. The claim of the Mudir el Awqaf al 'Am was dismissed by the Settlement Officer and no appeal on that point has been made.

The case for the appellants can be shortly stated as follows. In 1927 these lands, which were originally pasture for the village, were partitioned on the suggestion of the then District Officer and this partition was completed in 1933. Then the Village was assessed to Rural Property Tax and a map for that purpose was prepared and adopted by Government as a basis for that tax, Ex B, which shows that the land is described as partitioned. On that basis of that map, Rural Property Tax Distribution Lists were sent out, Ex. C, showing the shares of each of the inhabitants and on that basis taxes were levied on such of the lands as were not exempted. In addition, Abcarius Bey has produced a werko extract for 1933/4 Ex. D, which shows that 5700 dunums were described as pasture land and three other areas as cultivated land, all being in the name of all the inhabitants. Further, in some half a dozen instances, plots have been sold, by the persons shown as owners of them, to others, and these transactions have all been duly registered in the Land Registry, without any opposition on the part of the Government. These plots are situated in the middle of the land now in dispute, and are described by Government themselves as miri.

Finally there is the claim that there was an original Yoklama registration of all these lands in the name of three of the inhabitants, presumably on behalf of the village, in 1327. It was stated before the Settlement Officer that these Yoklama Kushans had been lost, together with the Turkish registers, and the learned Settlement Officer disbelieved the fact that there had ever been such a registration, but since his decision a Yoklama kushan date 1319 and issued in 1322, has been discovered and produced by Abcarius Bey, together with another

kushan, stated to be a copy of an earlier one, which would appear to show that the appellants' assertions were correct. A certificate from the Land Registry has also been produced to us to the effect that the Yoklama Registers have in fact been lost. A large amount of evidence was called on behalf of the appellants in support of their claims, and it is entirely uncontradicted by any evidence adduced by the Government.

The respondent's case is that no taxes were paid on this land which were in fact exempted — that the kushans in respect of certain plots were fraudulently obtained — in regard to which there is not the slightest scrap of evidence even tendered. It is admitted that the Land Registry had issued miri kushans, but that this was an error, and that the whole land was never registered in the Tabu, but only in the Werko.

In the face of all these facts, it seems to us clear that Government, by their own conduct, are estopped from denying that they have themselves accepted. They have accepted the partition scheme, and we have never heard of a partition of unassigned state lands, they have themselves issued miri kushans for certain plots in the centre of the disputed lands, thereby clearly approving the sales, and in effect confirming that the vendors had the right to sell these plots, which implies that the vendors were the owners of them, and it is certainly not right for the Government to make allegations of fraud, with no evidence whatever to support it. Government cannot now deny the category of the land nor its ownership. And in addition there is all the uncontradicted evidence led by the appellants. Further there is in fact a Yoklama registration.

For all these reasons we think that the appeal must be allowed, and the judgment of the learned Settlement Officer set aside. The case must be remitted to the Settlement Officer to amend the Schedule of Rights in accordance with the appellants' claims unless there should be any conflicting claims.

The appellants will have the costs for this appeal on the lower scale and LP. 15 fee for attending the hearing of this appeal, against the 1st Respondent. The 2nd Respondent is dismissed from the appeal, as he was only a formal party under the Civil Procedure Rules.

Delivered this 11th day of March, 1941.

British Puisne Judge.

Current Law Reports

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

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OF JUDGMENTS PUBLISHED IN THE
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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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