SELECTED CASES
OF THE
DISTRICT COURTS OF PALESTINE
WITH ANNOTATIONS

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on formal grounds and as a result of which the Applicants had obtained the release of the said attachment.

Furthermore, the Respondent No. 1 deposed to the effect that the Applicants were actually present in Court throughout all the hearings of the action and that the purchase of the land was effected in complete disregard of the clear notice given to them regarding the dispute over this land.

Applicants have not submitted a counter affidavit to contradict that submitted by Respondent No. 1.

Dealing as we do now, merely with the application to set aside the judgment, we wish to confine ourselves to the observation that the judgment of this Court of the 10.4.46, was not a judgment given by mere default of a party but was rather — and very much so — "a case in which there has been a hearing on the merits in the absence of one party". (See Rackham *v.* Tabrum, (1923), 39, T. L. R., p. 380, cited in Red Book, 1936, p. 601, in connection with order 36, Rule 33, of the Rules of the Supreme Court, which is the equivalent of our Rule 213).

In conclusion, we wish to add that, were we to allow an application of this nature, there would be no end to litigation. In any event, the ground put forward by the Applicants in support of their application, is, in our opinion, baseless, since it was their own lookout to choose the appropriate ways and means to defend their rights at the proper time and in the proper manner and it was their own concern to have taken the risk of relying on the other co-Defendants to protect their interests as they allege.

That being so, we are not prepared to exercise our discretion, under Rule 213.

The application is therefore dismissed, together with costs, to include LP. 3.— advocate's attendance fee.

Delivered this 4th day of February, 1947, in presence of Fayez Eff. Nazzal for Applicants, and Omar Eff. Saleh for Respondent No. 1, and in absence of Respondents Nos. 2 and 3.

CRIMINAL CASE No. 130/45.

IN THE DISTRICT COURT OF TEL-AVIV.

BEFORE: His Honour the R/President Judge Smith.

Attorney General.

v.

Levkovitz. ACCUSED.

Compensation — C. C. O. 43(1) & (2) — Object of the section — Civil Claim — CR. A. 63/28.

The words "If there is a civil claim arising out of ... the offence, charged" in sec. 43 of the Criminal Code Ordinance must have reference to a civil claim which has been filed in the ordinary way in accordance with the Civil Procedure Rules and in respect of which proper fees have been paid.

ANNOTATIONS: For a similar ruling see C. A. D. C. Ha. 88/43 (1943, S. C. D. C. 287).

Compare on the other hand, CR. A. 174/36 (4, P. L. R. 186; 1937, S. C. J. (N. S.) 65).

FOR CIVIL CLAIMANT: Hake.

FOR ATTORNEY GENERAL: Beham.

FOR ACCUSED: Rabinovitch.

ORDER.

The Accused is standing his trial on an information containing five counts, — offences in relation to a plot of land which he is said to have fraudulently passed off as his own. Just before the Accused was asked to plead to the information, Mr. Hake suddenly appeared and asked to be joined as a civil claimant in the criminal proceedings by virtue of the provisions of section 43 of the Criminal Procedure (Trial Upon Information) Ordinance. Mr. Hake explained orally that he represented the Dorfmans who he said, had purchased the plot in question from a vendor who had purchased it from the Accused. I intimated to Mr. Hake that it seemed to me that this method of intervening — merely by giving an oral explanation — was a trifle casual; thereupon Mr. Hake undertook to file a written application which he did later on in the morning.

The application is headed "Application for Joinder as Civil Claimants"; the claimants are said to be Mr. and Mrs. Dorfman; the grounds upon which the claim is based do not appear; the Court is asked to order the Accused to pay the civil claimants such sum as the Court may find to be due; fees amounting to 32 piasters only have been paid in respect of the application.

Mr. Rabinovitch contends that this written application gives Mr. Hake no standing in the criminal case. He argues that the words in section 43 "If there is a civil claim arising out of ... the offence charged" must have reference to a civil claim which has been filed in the ordinary way in accordance with the Civil Procedure Rules and in respect of which the proper fees have been paid. I have come to the conclusion that Mr. Rabinovitch's contention is correct. If A suffers a loss by

reason of a criminal offence committed by B it seems to me that A may, if he seeks to obtain redress, proceed in one of four ways:—

(a) He may apply to the Court which convicts B for compensation under sec. 43 of the Criminal Code Ordinance, 1936. This is an informal way of proceeding and is doubtless intended to apply to the less serious type of case. Compensation is limited to LP. 100. It should be noted that sub-section (2) of section 43 impliedly authorises the Court to award damages exceeding LP. 100 to a person "constituting himself a civil party."

(b) He may claim diyet or compensation in lieu.

(c) He may institute a civil action in the ordinary way which will take its ordinary course and be disposed of independently of the criminal case.

(d) He may file his civil claim in the ordinary way (paying the usual fees) but he may apply that it shall be disposed of contemporaneously with the criminal charge, under the provisions of section 43 of the Criminal Procedure (Trial Upon Information) Ordinance and the Ottoman Code of Criminal Procedure.

The object of section 43 is, as it seems to me, to expedite the disposal of Civil claims arising out of criminal offences. It is clear that many of the witnesses in the criminal case may well be in a position to give relevant evidence in the civil claim; hence provision is made for their examination with regard to the civil claim when they attend Court to give evidence in connection with the criminal charge. Their further attendance at Court is thus obviated.

Since the owner of stolen property may recover it upon the conviction of the thief without the payment of any fees, Mr. Hake argues by analogy that no fees should be paid in respect of a claim for loss arising out of the Accused's criminal conduct. I would point out, however, that there are special provisions in the Criminal Code Ordinance, 1936, — see section 388(1) dealing with the power of the Court regarding the restitution of stolen property. That provision does not seem to me to assist Mr. Hake's present contention.

Section 68 of the Criminal Procedure (Trial Upon Information) Ordinance which deals with the question of appeal by the civil claimant makes it clear to my mind that the civil claim under section 43 is simply and solely an ordinary civil action; the only distinction is that it is heard contemporaneously with a criminal charge. It would indeed be a surprising thing if merely by electing to proceed under section 43 a civil claimant could legitimately avoid payment of the fees which would be payable if the action were tried in the same way as any other civil

suit, that is, independently of the criminal case. Furthermore, the case of Cr. A. 63/28 * reported at 1 P. L. R. 1920—1933, page 295 does suggest that the civil claimant on a criminal charge was not entitled to judgment for damages on the ground that no fees were paid in respect of the claim. The report is, however, rather sketchy on this point.

On the whole the Applicant has not persuaded me — and the onus is upon him to do so — that the application in the form in which he has filed it entitled him to be regarded as a civil claimant under section 43 of the Criminal Procedure (Trial Upon Information) Ordinance.

Accordingly I dismiss the application.

Given this 13th day of January, 1947.

CIVIL APPEAL No. 77/46.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the A/R/President Judge Morgan.

IN THE APPEAL OF:—

Joseph Salant. APPELLANT.

v

Safiyeh Khalil el Halawani. RESPONDENT.

Default judgment — Functus officio — Setting aside — R. 137(c) and 163 M. C. P. R.

An appeal from the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levi) in C. C. 845/46, allowed:—

1. A decision dismissing a Plaintiff's claim because of Plaintiff's non-appearance under Rule 137(c), M. C. P. R., although described as an "order" is in fact a judgment.

2. Once a Magistrate has signed a judgment dismissing a case because of Plaintiff's non-appearance he is *functus officio,* and anything done by him thereafter in relation to that case is a nullity unless and until he is properly moved to set it aside under Rule 163 M. C. P. R.

ANNOTATIONS: *Cf.* C. A. 192/43 (10, P. L. R. 437; 1943, A. L. R. 535) — leave to appeal applied for and granted orally immediately after delivery of judgment.

Vide also CR. A. 130/43 (10, P. L. R. 578; 1943, A. L. R. 772) and note 3 in A. L. R.

FOR APPELLANT: Caspi.

FOR RESPONDENT: Assal.

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* 2, C. of J. 601.

JUDGMENT.

This is an appeal from the Magistrate's Court of Jerusalem. The case — which incidentally is a claim for LP. 10.— only — has had the most unfortunate history.

The case was originally set down for hearing on June 17th, 1946. The Plaintiff did not appear, and the Defendant's representative asked for the dismissal of the case under Rule 137(c).

The Magistrate thereupon made what he called an "order", but which was in fact a judgment, dismissing the Plaintiff's claim and ordering her to pay costs.

Some minutes later the Plaintiff appeared in chambers and the Magistrate having accepted her hard-luck story, as to why she had not been present, purported to set aside the judgment delivered by him a few minutes previously and fixed a date some three weeks later for hearing the evidence (the Defendant being resummoned).

Further stages in the hearing took place, to wit, a Motion to set aside the restoration, which motion was set aside, and then the adjourned hearing proper, where the Plaintiff appeared, but the Defendant did not and after hearing some evidence the Magistrate gave a default judgment against the Defendant.

It is of interest, but nothing more, to note that the Defendant appeared a few minutes after default judgment had been given against him with a hard-luck story why he was late, but the Magistrate did not extend the same accommodation to him as he had done under similar circumstances to the Plaintiff, and this time stood firm on the judgment entered by him a few minutes previously.

The next and penultimate stage was a motion to set aside the default judgment, which motion failed, and the last stage (till now) is an appeal from the default judgment to this District Court of Jerusalem.

The grounds of appeal are given, but fortunately for me, although much argument was put forward and listened to by me on the other grounds, I have only to consider the first ground as after some short consideration it is obvious to me that on this ground alone the Defendant (Appellant) must succeed.

As argued by Mr. Caspi, the Magistrate was clearly *functus officio* on 17.6.46 the moment he had signed his name to the judgment dismissing the Plaintiff's claim because of her non-appearance.

It was open to her to bring her case again, as indeed it is after the judgment which I am giving today, but it was not open to the Magistrate when Rule 163 is expressly provided for cases such as the

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* 2, C. of J. 601.

present one, to reverse his previous judgment after a satisfied defendant has left his chambers and merely on the *ex-parte* unsworn assurances of a delinquent late plaintiff.

Plenty of cases have been cited both for the Appellant and the Defendant on this point. They all appear on my notes and I have read and considered each and every one of them and do not intend to refer to more than one which Shafiq Eff. relies on for Respondent, namely, C. A. 100/39 of the District Court of Jerusalem. This judgment which appeared so shattering at first sight in fact has no bearing whatsoever as it was given at a time when the M. C. P. R. 1940 had not yet come into force. Once a Magistrate has given a judgment dismissing a case under Rule 137(c) for non-appearance of the Plaintiff it does not matter whether it is ten minutes or ten days he can do nothing unless & until properly moved under Rule 163.

As intimated I hold that everything the Magistrate did after signing his 1st judgment on 17.6.46 is a nullity as he was *functus officio* thereafter, and his original judgment still stands dismissing the Plaintiff's claim and ordering her to pay costs. As mentioned earlier, however, she has the right to start all over again.

The appeal is allowed with all costs here and below to the Defendant, together with advocate's inclusive attendance fees of LP. 6.—.

Delivered this 8th day of January, 1947, in presence of Mr. Caspi for the Appellant, and in absence of the Respondent.

LAND CASE No. 12/45.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: Their Honours Judge Bardaky and A/Judge Daoud.

IN THE CASE OF :—

Horieh Haj Khalil Saleh Zumeili & an. PLAINTIFFS.

v.

Rakieh Haj Mohammad Haj Saleh Zumeili & 2 ors. DEFENDANTS.

Res judicata — R. 21A, 106 & 141 C. P. R. — Plan in Land Case — Dismissal in limine.

An action for ownership of land and an order restraining the Defendants from interfering with the land in dispute, dismissed:—

1. *Obiter*: An objection based on a plea of *res judicata* should be raised by motion under Rule 21A C. P. R.

2. *Obiter*: Another judgment cannot successfully be pleaded to create an estoppel by record if given in a case involving different parties.

3. *Obiter*: No *res judicata* is created by a merely formal dismissal of previous proceedings for want of prosecution.

4. An action for ownership of unregistered land, the boundaries of which are in dispute cannot be proceeded with unless a plan duly approved by the Department of Lands is produced in accordance with Rule 106 C. P. R.

5. Such plan must be filed irrespective of whether the action is one for registration or for declaration of title and an order of non-interference.

6. Where the Plaintiff fails to file such plan notwithstanding that his attention was drawn to this deficiency his action will be dismissed.

ANNOTATIONS:

1. On points 1 & 3 *cf.* L. C. Jm. 36/44 (1946, S. C. D. C. 484).

2. *Quaere* whether the action could be dismissed for non-compliance with the provisions of r. 106 without a formal application to that effect in accordance with r. 305.

FOR PLAINTIFFS: Elia.

FOR DEFENDANTS: Ousta.

JUDGMENT.

This is an action for ownership of about 300 *dunums* of unregistered land and a building erected thereon, in the Beersheba district.

Before the opening of the case by counsel for Plaintiffs, counsel for Defendants has raised two preliminary objections to the case being proceeded with, namely:—

(1) That a similar case had already been brought by the Plaintiffs, before the Land Court Jerusalem, which was registered under Land Case No. 6/44, in the District Court of Jerusalem; and, was dismissed, on the application of the Defendants, by order dated 7.11.44, in Motion No. 355/44.

(2) That the action being for ownership of unregistered land the boundaries of which are disputed, by para. 3 of the statement of defence, the case cannot be proceeded with, without the production of a plan duly approved by the Department of Lands and Surveys, as required by Rule 106, of the Civil Procedure Rules, 1938.

Having heard counsel, and having considered the matter, we find as follows:—

(1) As regards the first objection, we think it cannot be sustained for each of the following reasons:—

(a) The proper course for the Defendants was to apply by way

of motion, under Rule 305, to have the case dismissed, on the ground of *res judicata,* under Rule 21A (i).

(b) The parties in the Land Case No. 6/44 were not the same as in this case.

(c) The dismissal of the Land Case 6/44, by the order of this Court, in Motion 355/44, was not on the merits of the case, but merely a formal dismissal, for want of prosecution, under Rule 141.

(2) As regards, however, the second objection, we feel that in view of the fact that the land in question is not registered in the Land Registry; and, the fact that the boundaries of this land are in dispute, the case cannot be proceeded with properly without the production of a plan duly approved by the Department of Lands and Surveys, as required under Rule 106, of the Civil Procedure Rules, 1938. Particularly, when the attention of Plaintiffs was long ago drawn to this deficiency which the Plaintiffs, however, did not see fit to remedy.

It is true that this is not an action for registration but for declaration of title and non-interference. But, in Land Appeal No. 13/34 *, Corrie, J., held that:—

> "Having regard, however, to the terms in which the powers of the Land Court are defined by section 2 of the Land Courts Ordinance, 1921, the proper course is for the Plaintiff to ask in his statement of claim for a declaration of his title; and where he is not already registered in the Land Registry, such a claim should be accompanied by a claim for registration. The practice of asking the Land Court for an order of non-interference should be discontinued."

That being so, we are of the opinion that the action in its present form cannot be proceeded with.

In the circumstances, the action is dismissed on that ground, with costs for the Defendants which we assess at a lump sum of LP. 5 to include LP. 3 advocate's attendance fee.

Delivered this 13th day of January, 1947, in the presence of Mr. Elia for the Plaintiffs, and Zaki Eff. El Ousta for the Defendants.

CIVIL CASE No. 128/45.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour Judge Shems.

IN THE CASE OF:—

Orient Chemical Works "Adif" Ltd. PLAINTIFF.

v.

Kadar Pottery Works Ltd. DEFENDANT.

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* 2, P. L. R. 352; 9, C. of J. 836.

Sale of goods — Breach of warranty — Implied Warranty — Impossibility of Performance — Time and manner of examination of goods by purchaser — Measure of damages — Articles 108 *and* 109, *O. C. C. P. — Direct damages and loss of profits — Notarial Warning.*

1. When a person gives a promise to do an act in the future, he is generally held to have assumed all the risks incident to that performance, unless the thing is absolutely impossible of performance in which case the agreement is considered as void.

2. If the impossibility is known to one party only and the other party in good faith enters into the agreement the contract will give rise to a claim for damages.

3. A purchaser need not examine every piece of goods delivered in great quantities. It is sufficient to examine a large number of them and if a large proportion is not fit, the purchaser may return the whole.

4. The goods may be examined within such time after delivery and in such manner as is reasonable in the circumstances.

5. Profits referred to in Articles 109 and 110, O. C. C. P. mean the speculative profits arising from a change in the price of the goods in the market. The return of dividends on the capital of a company are direct damages which may be claimed under Art. 108.

6. Where goods commonly intended for resale are sold with a warranty it is to be anticipated that the buyer will resell with the same warranty, and any damages which the buyer has become liable to pay to his sub-purchasers through breach of his warranty to them may be recovered by the buyer from the seller as damages naturally flowing from the wrongful act of the latter.

7. There is an implied warranty that a chattel sold is reasonably fit for the purpose for which it is obviously intended to be used, and in such cases, without resort to the doctrine of special circumstances within the contemplation of the parties, the seller is liable for all consequences which directly follow from the unfitness of the chattel.

8. The English rule as to measure of damages is in accord with the principles enunciated in Article 109, O. C. C. P.

9. When a breach has been committed by a covenator it would be futile to serve a notice requesting him to refrain from the commission of an act which he has already performed.

ANNOTATIONS:

1. On impossibility of performance see Halsbury, Vol. 7, pp. 208 *et seq.*, subsec. 5 and Supplement, 1946, pp. 287 *et seq.*; *vide* also C. A. 432/44 (12, P. L. R. 302; 1945, A. L. R. 310) and notes in A. L. R.

2. As regards the time and manner of inspection under a contract for sale of goods under English law see Halsbury, Vol. 29, pp. 145 *et seq.*, sec. 3.

Cf. Mejelle, Art. 310 (option for misdescription), Arts. 320 *et seq.* (option as to inspection), Arts. 336 *et seq.* (option for defect) and Art. 392 (option in case of contract for manufacture and sale).

3. On the fifth point *cf.* C. A. D. C. T. A. 53/45 (1946, S. C. D. C. 205) with cases therein cited and the notes thereto.

4. See, on the sixth point, Halsbury, Vol. 10, p. 129, para. 164.

5. On the seventh point see Halsbury, Vol. 10, p. 127—8, para. 163.

6. On the eighth point see the case cited in note 3, *supra*.

7. See, on the last point, C. D. C. Ha. 138/44 (1946, S. C. D. C. 264) and note 2.

FOR PLAINTIFF: Weinshall.

FOR DEFENDANT: N. Lipshutz.

ORDER.

The Plaintiff is a company which produces perfume waters (Eau de Cologne) and other cosmetics in Ramat Gan near Tel Aviv. The Defendant Company produces pottery works in the Industry Centre of Haifa Bay. During the recent World War when glass bottles were not available in the country, plaintiff Adif ordered ceramic bottles for its products of perfume waters (Eau de Cologne) from the defendant Kadar according to a design furnished to Kadar by a Director of Adif. Adif states that Kadar undertook that the bottles would not leak.

2. The claim of Adif is that the bottles received from Kadar were filled with perfume waters (eau de Cologne), Adif sold the filled bottles to its various customers, but it was subsequently found that the bottles leaked and the perfume waters (eau de Cologne) evaporated. Adif avers that it had to refund to its customers the price of the goods thus sold to them and claims from Kadar damages in respect of this item in the sum of LP. 262.857 mils. A second item of the claim of Adif is the price of the bottles which were returned to Kadar. Adif states that these bottles could not be used for perfume waters (Eau de Cologne) and claims their price in the sum of LP. 38.800. A third item of the claim is the price of the bottles which could not be used by Adif. Adif states that it offered to return these bottles to Kadar, but Kadar refused to retake them and the claim in respect of this item is LP. 76.160 mils. A fourth item in the claim of Adif is the price of special corks which were purchased by Adif to be used to close the bottles. Adif alleges that these corks cannot be used for any other purpose and claims their value from Kadar in the sum of LP. 27.680 mils. The sum total of the amount which Adif claims from Kadar is LP. 405.497 mils.

3. Adif states that on 19th June, 1945, a notarial notice was sent to Kadar, but Kadar did not comply with the demands therein contained nor did it reply to the notice. Hence the present claim.

4. In its defence, Kadar denied that the bottles were ordered to be used for perfume waters (Eau de Cologne) and states that no guarantee was given that they would be proof against leakage, when filled with

perfume waters (Eau de Cologne). The only guarantee was that they would be proof against leakage by liquids. Kadar further denies that the perfume waters (Eau de Cologne) leaked from the bottles and contends that there was no fault whatsoever "in the workmanship, glazing or otherwise production of the bottles", and they were as good as bottles of their kind could be. Kadar also denies the claim of Adif for the returned bottles and contends that none of the returned bottles were leaking. So also does it deny the claim of Adif for the unused bottles and the corks. As to the notarial notice Kadar submits that it received such notice but that it was "not addressed by the Plaintiff".

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19. The only reasonable conclusion to be arrived at in the circumstances is that the bottles were specially ordered to be used for perfume waters (Eau de Cologne) the products of the Adif Company as a substitute for glass, Kadar knew it and in their letter Exh. P/5 Kadar had guaranteed their tightness for the purpose for which they were ordered. In the first part of the second paragraph of Exh. P/5 the phrase "tight against liquid" is used in connection with the samples originally sent to Adif, and Kadar contended that such liquid did not include the perfume waters (Eau de Cologne) of Adif, but simply common water. This submission is misconceived. The perfume water (Eau de Cologne) is also a liquid. It is not a solid nor is it a gas. It contains alcohol which evaporates at a certain temperature quicker than water, and considering the fact that the purpose of the use of the bottles had been communicated to Kadar this guarantee was in respect of the perfume waters (Eau de Cologne) the products of Adif.

20. The second point to consider is whether it was impossible to make the bottles tight for a reasonable period during which the bottles would be in use by the customers.

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26. The defence of impossibility of performance which was not established by the defendants Kadar, seems to be misconceived. Impossibility of performance arises when a person gives a promise to do an act in the future, he is generally held to have assumed all the risks incident to that performance, unless the thing is absolutely impossible of performance in which case the agreement is considered as void. Such agreements are regarded as merely illusory. If the impossibility is known to one party only and the other party in good faith enters into the agreement, the contract will give rise to a claim for damages, and

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* Omitted as dealing with facts only. (*Ed.*)

the claim of the Plaintiff in these proceedings is one of damages. It is not contended that either party had rescinded the agreement on the grounds of impossibility of performance. Adif claims damages for breach of warranty by Kadar as to the fitness of the bottles to be filled with perfume waters (Eau de Cologne). Article 108 of the Ottoman Code of Civil Procedure provides that damages may be awarded against a contracting party for the non performance or delay in the performance of a contract even though he has not acted in bad faith. If, however, such non-performance or delay is due to causes outside his control, damages shall not be awarded against him. The defendant Kadar does not allege the intervention of any such causes outside its control which prevented it from duly performing its obligation towards Adif.

27. It was further contended by Kadar that the cork cover of the bottles put by Adif was not hermetically tight, and that this was a cause for the evaporation of the perfume waters.

28. The allegation was not however, proved. The corks were tight, and the bottles were hermetically closed by Adif after they were filled with perfume waters (Eau de Cologne).

29. Another contention by the defendant Kadar is that Adif waived any claim for tightness in the bottles after it discovered that the bottles were not tight and ordered more of the bottles which it sold to its customers.

30. Adif always insisted that the bottles should be tight and properly glazed so as to avoid leakage. See in this respect the letter of Adif of the 20th January, 1944, Exh. P/20 and the reply of Kadar in Exh. P/21 wherein Kadar declared that it would take the greatest care to glaze the bottles to the satisfaction of the Plaintiff. See also the letter of Adif of the 5th May, 1944, Exh. P/31 and the reply of Kadar in P/32 and P/33. Again on 23rd June, 1944 (Exh. P/37) Adif complained to Kadar that about 35% of the bottles received were leaking; and at no stage did it waive expressly or impliedly the requirement that the bottles should not leak.

31. The allegation of waiver by Adif Company as to the tightness of the bottles has not been established, and Kadar's warranty as to the fitness of the bottles for the purpose for which they were purchased was never waived. Adif did not sell any of the bottles which were found to be leaking. It had only sold them containing its perfume waters (Eau de Cologne) when it was not aware of their leaking defects. The defence of waiver may not, therefore, be maintained.

32. Another contention of Kadar is that not all the bottles which

were or which would be returned have been examined and found leaking, and until each and every one of these bottles has been so checked on the day of delivery, Kadar is not liable for it.

33. The contention is not a sound one; it is enough if a reasonable number has been checked including the bottles which were used by Adif. This has been done in this case, a few were tested by an expert engineer, and many were in fact leaking while in stock at Adif and many more were returned by the customers to whom they had been sold. In such circumstances, it was not necessary to check each and every one of the bottles. See in this respect the case of Heilbutt *v.* Hickson and ors. Law Times Reports, Vol. 27, p. 336. At the left hand side of page 341 the Court said: — "We think it was not necessary that every shoe should be cut open and that the examination which has been made of a large number of them before and since the action was commenced was sufficient to show that a large proportion of them did contain paper; and we think therefore, that the Plaintiffs are entitled to throw back the whole of those which had been forwarded to France upon the Defendants' hands at Lille; that the Defendants were bound to take them back at that place, and that, as the shoes were rejected by the Plaintiffs and due notice was given to the Defendants, the shoes remained at the risk of the Defendants, and were their property, and that they are liable to repay to the Plaintiffs the whole of the price paid for those shoes. We are of the same opinion with respect to the shoes delivered at Fenning's Wharf, and paid for by the Plaintiffs, but not forwarded to Lille, and which were sold by arrangement."

34. The submission was made that the bottles should have been checked on the day of their delivery to Adif. The bottles could only be checked after they were filled with perfume water and did not leak for a reasonable period. This could only be performed upon the bottles being actually filled and used, but Adif might not be prepared to fill all the bottles the day they are received, and it is not presumed that such a liability rests on Adif in this respect, for the bottles ought not to crack for a period of one year and more as found in section 23 above.

35. It was argued for Kadar that if it be held to be liable for damages, the item of LP. 262.857 claimed by the plaintiff Adif includes profits which Adif is not allowed to claim under Article 109 of the Ottoman Code of Civil Procedure.

35(a). This contention is not sound. The profits referred to in Articles 109 and 110 of the Ottoman Code of Civil Procedure do not include the return of dividends on the capital of a Company which in

this case are 1.1%. What Article 109 does not allow is the recovery of speculative profits due to the fluctuation in the price of the goods in the market as a result of the breach of the contract. The return of dividends on capital are direct damages which the plaintiff Company is entitled to claim under Article 108 of the Code.

36. Another argument put forward by the defendant Company is that Adif did not repay to its customers the sum of LP. 262.857 in cash but gave them goods or credit for goods in this amount and that Adif included profits in its sale of these goods.

37. As stated above the profits referred to in Articles 109 and 110 of the Ottoman Code of Civil Procedure mean the speculative profits arising from a change in the price of the goods in the market. The goods or credit for goods which were given by Adif to its customers represented in value LP. 262.875 mils, and it is immaterial if this amount was repaid by Adif in cash or in goods or credit for goods of the same value as a substitute for cash "Where goods commonly intended for resale are sold with a warranty it is to be anticipated that the buyer will resell with the same warranty, and any damages which the buyer has become liable to pay to his sub-purchasers through breach of his warranty to them may be recovered by the buyer from the seller as damages naturally flowing from the wrongful act of the latter." (Halsbury, Laws of England Vol. 10 p. 129). See in this respect Hammoud and Company *v.* Bussey (1887) 20 Q. B. D. 79 C. A. in which the rule of law as to measure of damages in the case of Hadley *v.* Baxendale (9 Ex. 341) was discussed.

38. The Defendant Kadar submitted further that the damages flowing from the breach of the contract should not include the price of the bottles or of the corks, and the judgment of the Supreme Court in C. A. 101/26 * 1 P. L. R. 117 has been referred to in this regard.

39. As stated above, the rule as to award of damages is contained in Art. 109 and 110 of the O. C. of C. Procedure. When the breach of a contract is not due to bad faith, only direct damages caused by the breach are awarded. In case of bad faith, profits which would arise as a result of the transaction would also be awarded. In this case the damages represented in the price of the bottles which were useless and of the corks which could not be used for any other purpose are direct damages which are awarded in case of breach. They are not speculative profits. The judgment of the Supreme Court in C. A. 101 of 1926 (1 P. L. R. 117) referred to has no bearing to this case.

40. The claim of the plaintiff Adif is one of recovery of damages for

* 1, C. of J. 30.

breach of warranty by Kadar as to the quality of the bottles supplied to it. "There is an implied warranty that a chattel sold is reasonably fit for the purpose for which it is obviously intended to be used, and in such cases, without resort to the doctrine of special circumstances within the contemplation of the parties, the seller is liable for all consequences which directly follow from the unfitness of the chattel. (Halsbury's Laws of England, Vol. 10, pages 336 and 337). The English rule as to the measure of damages is in accord with the principle enunciated in Article 109 of the Ottoman Code of Civil Procedure above referred to. See in this respect the cases of Jackson *v.* Watson (1909) 2 K. B. 193 C. A.; Bostock and Company Ltd. *v.* Nicholson (1904) 1 K. B. 725; Wren *v.* Holt (1903) 1 K. B. 610 C. A. Clarke *v.* Army and Navy Cooperative Society (1903) 1 K. B. 155 C. A., Preist *v.* Fast (1903) 2 K. B., C. A. 148; as compared with the case of Ford *v.* Hobbs (1878) 4 App. Cases, 13 where the vendor expressly refused to warrant that the swine sold were free from disease. The swine were in fact diseased and infected other swine, but because the warranty of soundness was expressly excluded in the sale, damages would not be recovered.

41. In the present case Kadar did not exclude the warranty as to the fitness of the bottles sold to Adif for perfume waters (Eau de Cologne) and accordingly it is liable for the damages flowing as a result of the breach of the warranty claimed by Adif from it.

42. Counsel for the parties did not dwell in their address upon the notarial notice (Exh. P. 43). Upon perusing it, it is seen that the second line of it which describes the name of the sender, the Plaintiff Company had omitted the word *Limited.*

43. The omission is not material for the correct name appears above the signature of the manager; and secondly, the notarial notice was not a pre-requisite step to these proceedings. The act complained of, that is to say, the unfitness of the bottles for perfume waters (Eau de Cologne) had already occurred. In the notice Adif did not require the defendant Company to comply with any condition or term of the agreement for this was not anticipated. It merely demanded payment of the money damages. Consequently, Article 106 of the Ottoman Code of Civil Procedure does not apply. See in this respect the judgment of the Supreme Court in Civil Appeal 18 of 1935, where it was held that "when a breach has been committed by a covenantor it would be futile to serve a notice requesting him to refrain from the commission of an act which he has already performed."

44. For the above reasons judgment is hereby entered in favour of the plaintiff Company against the defendant Company in the sum of

LP. 405. 497 mils and costs, to include advocates' fees for instruction and attendance, fixed at LP. 60.

Delivered in open Court this 23rd day of January, 1947, in the presence of Dr. Weinshall for the plaintiff Company and of Mr. N. Lipshutz for the defendant Company.

EXECUTION FILE No. 335/46.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour Judge Nasr.

IN THE CASE OF:—

A. Broido. APPLICANT.

v.

H.Broido. RESPONDENT.

Jurisdiction of Rabbinical Court — Agreement for maintenance of divorced wife dependent on husband's income — Action for account of income and payment accordingly — Art 53, Palestine Order-in-Council.

A claim for accounts arising from an agreement for the maintenance of a divorced wife does not fall within the exclusive jurisdiction of the Rabbinical Court under Art. 53, Palestine Order-in-Council.

ANNOTATIONS: Authorities on similar questions are quoted and discussed in H. C. 2/46 (13, P. L. R. 76; 1946, A. L. R. 170).

FOR RESPONDENT: Avniely.

JUDGMENT.

The order of the Rabbinical Court dated 11.12.46, which the Respondent Mrs. Broido seeks to execute in this Execution File is being questioned by the Applicant Mr. Broido on two grounds: (1) The Rabbinical Court had no jurisdiction to deal with the matter; (2) The Rabbinical Court made the order in the absence of the Applicant who had no notice of the hearing, thereby disregarding the recognised forms of legal process resulting in substantial miscarriage of justice being caused to him.

The facts are that both Applicant and Respondent were divorced as early as the year 1937. An agreement was made between them in consequence of the divorce that Mr. Broido should pay a monthly allowance of LP. 7.500 to his divorced wife. By mutual consent this first agreement was later amended, whereby among other things, the monthly allowance was raised to a minimum of LP. 8.500. It is not suggested

that Mr. Broido committed breach of payment of this monthly allowance.

On 10.12.46 Mrs. Broido filed a Statement of Claim of which an English translation was produced to me at to day's hearing by consent of both parties. In this statement of claim, Mrs. Broido applied for an order restraining Mr. Broido from travelling abroad until an appropriate guarantee was given by him to fulfill certain undertakings and that judgment be given against him for monthly payments in accordance with his undertakings and for payment of costs and fees. Now these undertakings apparently arose from certain provisions in the agreement wherein payment of the monthly allowance which was fixed at a minimum of LP. 8.500 was made dependent on the monthly income of the Applicant. The minimum monthly allowance of LP. 8.500 was subject to increase if Applicant's monthly income increased. Mr. Avniely for the Respondent made it clear in his argument that the object of his claim in the Rabbinical Court was to have the Applicant render an account of his income and to have judgment given in accordance with that account.

The first question which, therefore, presents itself, on these facts is whether the Rabbinical Court could entertain a claim of this nature. Is this a claim which can properly be treated as one falling within the exclusive jurisdiction of the Rabbinical Court in accordance with Article 53 of the Order-in-Council? I think it is not.

The parties as I stated earlier, were divorced some ten years ago. The financial claims of the one against the other were mutually agreed upon. That agreement was reduced into writing. It is this agreement which is now in issue between them. It is true considering the back ground of this agreement, one is bound to say that it arose from a matter of divorce, but, at the present moment, we are not concerned with this background. All we are concerned with is the agreement which the Respondent alleges Applicant has failed to fulfill. It is what the statement of claim comprises which should determine what Court has jurisdiction. On a perusal of the statement of claim before me, I can definitely say, it is not a claim which involves any of the matters which are within the exclusive jurisdiction of the Rabbinical Court. The claim, put in a few words, is one for accounts arising from an agreement. That claim is not one for the Rabbinical Court to adjudicate upon.

In the result, the Applicant succeeds on the first ground. The order will be that the Execution Officer should refrain from executing the order of the Rabbinical Court dated 11.12.46. The Registrar will take steps to cancel his letters of the 11th and 13th of December, 1946, to the Migration Officer and the Inspector General of Police.

Delivered this 28th day of January, 1947.

CIVIL APPEAL No. 188/46.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

Marie S. Eid & ors. — APPELLANTS.

v.

Dr. Jean Sahyoun. — RESPONDENT.

Recovery of possession — Action for dispossession by lessee not yet in possession against Defendants as alleged trespassers — Interim order of Magistrate for possession — Statutory Jurisdiction of Magistrates — Arts. 28 and 29, Ottoman Magistrates' Law — Art. 39, Palestine Order-in-Council — Champerty — Right to recover possession — Section 3(c), Magistrates' Jurisdiction Ord. — Art. 10, Provisional Law of the Disposition of Immovable Property — C. A. 66/44, C. A. 37/45 — Non joinder of necessary party.

1. The jurisdiction of Magistrates is statutory and confined by virtue of Art. 39 of the Palestine Order-in-Council to that assigned to Magistrates by the Ottoman Magistrates' Law as amended, extended or altered by any subsequent law, ordinance or rule.

2. Certain powers are given to a Magistrate under Arts. 28 and 29 of the Ottoman Magistrates' Law. But a Magistrate has no power to make an *interim* order that may amount to a decision on the merits of the case.

3. Art. 20 of the Ottoman Law of Lease of Immovable Property only provides a remedy as between lessor and lessee but confers no powers on a lessor or lessee as against a stranger in possession.

4. Sec. 3 of the Magistrates' Courts Jurisdiction Ordinance does not confer a right on any person to recover possession, it only confers jurisdiction upon a Magistrate to hear and determine a possessory action.

5. A lessee who has never been in possession cannot alone recover from a stranger who claims to be in the premises under colour of right or the protection of the law.

6. The question as to whether the Appellants were trespassers could only have been decided by joining the owner of the premises; for the Appellants were never trespassers *vis-à-vis* the Respondents.

7. The omission of the Plaintiff to join the owner of the premises as co-Plaintiff was not merely a technical lack of joinder but a *sine qua non* in this action without which no judgment of dispossession could have been given.

8. An undertaking by a lessee to obtain delivery of the property leased at his own expense and indemnify the lessor for any expenses he might be obliged to pay is not champertous.

ANNOTATIONS:

1. On the jurisdiction and powers of a Magistrate in recovery actions see the cases cited and the notes thereto in A. L. R.; *cf.* also C. A. 109/46 (1947, A. L. R. 48) and C. A. 324/45 (13, P. L. R. 475; 1947, A. L. R. 204) and notes.

2. See, on the seventh point, C. D. C. Ja. 46/46 (1946, S. C. D. C. 697) and note 1.

3. On the last point *cf.* C. A. 142/37 (4, P. L. R. 319; 1937, S. C. J. (N. S.) 116) and note in S. C. J.

FOR APPELLANTS: Weston Sanders, N. Lipschutz & S. Shamma.

FOR RESPONDENT: F. Atallah.

JUDGMENT.

This is an appeal from the judgment of H. W. Ahmad Bey Khalil, one of the Magistrates of Haifa, whereby he ordered the eviction of the Appellants from two rooms occupied by them in a building belonging to one Mrs. H. Germaine and the delivery of the rooms to the Plaintiffs who are the Respondents to this appeal.

In the statement of claim in the lower Court the Plaintiffs averred that they had taken on lease these two rooms from the said Mrs. Germaine; that the Defendants (Appellants in this Court) had taken possession of them by force, wrongfully and without legal justification. They, therefore, prayed for an order of dispossession to be given against the Defendants. The Plaintiffs also prayed in their statement of claim for an *interim* order of possession to be given forthwith pending the determination of the suit.

The Defendants denied the Plaintiffs' lease and pleaded that it was a void document as being illegal by reason of its being champertous. The Defendants also denied having taken possession by force or wrongfully and pleaded that they occupied the rooms as a member of a partnership firm, or alternatively, as one of the heirs of the deceased Khalil Eid.

The learned Magistrate at the outset of the case and without hearing any evidence (except that an affidavit was filed by the Plaintiffs) made an order of *interim* possession of one of the two rooms sought by the Plaintiffs. The only reason he gave for so doing was that the delivery of one room would help the Plaintiffs to place the instruments of his profession there and that it would not deprive the Defendants in carrying on their business. The learned Magistrate seems to have relied for making this order upon a similar order which he stated he had made in another case and stated that it was upheld by the District Court but failed to state what that case was or the circumstances of that case and what and when was the decision of the District Court, I wish to

say here, that I am unaware of any such decision of this Court, nor am I aware of any law, Ordinance or Rule of Court whereby a Magistrate may make any such *interim* order at all, let alone one which amounts to a decision, in part at least, of the merits of the case and which gives the Plaintiffs part of what he sought without going into the question as to whether the Plaintiff had any right entitling him to possession of this property of which he had never previously been in possession. I am aware that there are certain powers under Articles 28 and 29 of the Ottoman Magistrates' Law given to a Magistrate to make an *interim* order, but they are of quite different nature to the one sought and granted in this case, I am of opinion that the learned Magistrate should never have made such an *interim* order for his jurisdiction is statutory and confined by virtue of Art. 39 of the Palestine Order-in-Council to that assigned to Magistrates by the Ottoman Magistrates Law as amended, extended or altered by any subsequent law, ordinance or rule, and as I have said as far as I am aware, there is no such law, ordinance or rule conferring power on a Magistrate to make such an *interim* order.

There are indeed two strong objections against making such an order: — (1) that the learned Magistrate had, as I said above given the Plaintiff part of what he claimed without an enquiry or hearing evidence as to the right to possession of this room; (2) *such an order cannot be appealed as can an interlocutory order made by a District Court.* Therefore, there is all the more reason why the Magistrate should be loath to grant such an order unless he is satisfied upon the evidence that he has done justice not only to the Plaintiff but also to the Defendant.

The facts of this case are apparently as follows:—

(1) The Defendants' brother Khalil Eid had leased these rooms for business purposes for some years previously to the action by way of yearly contracts, the last of which expired on the 30th July, 1946, made with a Mrs. H. Germaine. It is to be noted that this lady is *not* a party to the present action.

(2) This brother of the first Appellant died on the 25th August, 1946, before a new contract was signed.

(3) There is no doubt that the Defendants (Appellants) have been in partnership with this brother which partnership was registered in the Palestine *Gazette* No. 1417 at page 700 with effect from 1.4.45.

(4) It is also clear from the evidence that the partnership occupied these rooms now in dispute also the lease was signed by one of the partners, the late Khalil Eid. without specifying that it was signed on behalf of the partnership, yet this person was entitled to bind the partnership by his signature. See the Notice in the Palestine *Gazette* referred to above. It is further clear from the contents of the lease

produced in the lower Court that these premises were let for the purposes of carrying on a commission business, which is one of the objects of the partnership as specified in the Notice.

5. There is also no doubt that this partnership was dissolved on the 22.6.46, see P. *G.* No. 1530 of 31.10.46, p. 1057.

6. On or about 28.8.46, the owner of the premises the said Mrs. Germaine entered into a deed of lease with the Plaintiffs which was exhibited in the lower Court as P/4, whereby she leased to the Plaintiffs these self same rooms as had been previously leased to Khalil Eid for the period of one year as from 1.9.46. There are two special conditions to this lease to which I shall advert later when dealing with Appellant's arguments as to its illegality.

7. It also appears from the evidence that Appellant Miss Marie Eid, sent to the landlord, Mrs. Germaine, the rent for August and September, 1946, but was refused, see Exh. P/2.

8. It appears that the Plaintiffs went to Miss Marie Eid and tried to persuade her to vacate but she refused to do so contending that she had a right to remain on the premises.

9. On the 19.9.46, the Plaintiffs filed the present action for dispossession and at the request of the Defendant the partnership of Eid and Co. was joined as a co-Defendant to the action.

The learned Magistrate, as I said above gave judgment for the Plaintiffs and the Defendants now appeal to this Court.

The first ground of appeal raised by Messrs. Weston Sanders and Lipshutz for the Appellants is that the present Respondents (Plaintiffs) cannot maintain an action for dispossession on the ground of trespass for such an action can only be enforced by the legitimate owner of the premises, or a person producing some proof of ownership. They argue that if this action is brought under the jurisdiction conferred on the Magistrate by section 3(c) of the Magistrates' Courts Jurisdiction Ordinance, 1939, then this jurisdiction could only be exercised by the Magistrate by virtue of the powers conferred upon him either by (a) Article 10 of the Provisional Law of the Disposition of Immovable Property of 1329, or (b) Land Courts (Amendment) Ordinance, or (c) the *Mejelle*. All these powers are given to owners and they argue a lessee under a contract is not an owner. They referred to C. A. 37/45 A. L. R. 1945, p. 679, the case on which the learned Magistrate relied on when giving his judgment, and they pointed out that in this case the Supreme Court held that Article 24 of the Ottoman Magistrates Law did not exhaust all the possibilities of legitimate owners to recover possession, but they argue, this is no authority for allowing a lessee under a deed of lease

to *obtain*, possession which he never previously had from a person who is in possession and who claims to be holding over under colour of right and who, furthermore, is a stranger to that lessee.

Fuad Eff. Atallah said in reply and cited Art. 20 of the Ottoman Law of Lease of Immovable Property, Tute Land Laws, p. 175. This Article in my opinion only provides a remedy as between a lessor and lessee and confers no powers on a lessor or lessee as against a stranger in possession.

The second argument advanced in this appeal is that the only person who can sue and obtain possession of these premises is the owner, Mrs. Germaine, and that she should have been joined by the Respondents as a plaintiff and that she is the only person entitled to sue.

They refer to Long *v.* Crossly, 13 Ch. Div. 391, and to Wallcott *v.* Lyons 29 Ch. Div. 585. The reply of the Respondents to this is that it was for the Defendant to join Mrs. Germaine as a plaintiff but Mr. Weston Sanders points out that it is not upon him to add a plaintiff and so rectify the fault of the Plaintiffs themselves who have not joined the proper persons who could sue in the action. Mr. Weston Sanders also argues further on this point that the Rent Restrictions (Business Premises) Ordinance, protects a tenant so long as such tenant pays rent and no order of eviction can be granted so long as the tenant pays rent as provided in section 4(i) of the Rent Restrictions (B. P.) Ordinance and he argues that the only person who could sue for eviction of these premises is the landlord and certainly not the present Appellant who is merely a holder by a lease and that the Defendant must have been presumed to have been tenant until the contrary were properly proved in an action raised by the party or parties competent to institute it. The advocate for the Appellants further argued that the learned Magistrate could not have decided whether the premises were leased by Mrs. Germaine to Khalil Eid or to the partnership unless Mrs. Germaine had been a plaintiff, for she is the sole person from whom an admission could be extracted on the matter and an admission could only have been extracted from her if she were a party and that her giving evidence as a witness in an action brought by another person is quite a different matter from giving evidence as a party from whom an admission might have been obtained.

The third ground of appeal urged in this appeal is that the deed of lease P/4, is clearly void as being champertous and so illegal. The clauses referred to are special clauses 3 and 4, and are as follows:—

> "3. Whereas the premises were leased to the late Khalil Eid, and whereas the heirs of the late Khalil Eid did not vacate the premises, therefore, the lessee undertook to agree himself with the heirs of the late Khalil Eid upon the vacation of the premises amicably

through the Courts and all the costs, expenses and advocate's fees *etc.*, will be borne by the lessee alone, and the lessor will not be bound at all to pay them either in whole or a part thereof; and if the lessor will be obliged to pay any part thereof; she will have the right to claim from the lessee all what she pays in this respect as they will be debt upon the lessee payable to the lessor.

4. Whereas the heirs of the late Khalil Eid have not delivered the leased premises to the lessor, therefore, the lessor will not be responsible for the non-delivery of the premises to the lessee, and the lessee has taken upon himself the responsibility for the taking delivery of the premises from the heirs of the lessee, the late Khalil Eid or from the person who is occupying same at present."

It was argued that these clauses constituted an undertaking whereby the present Plaintiffs as lessees took it upon themselves to defray the expenses of obtaining an eviction of the person at present in occupation of the premises but that the parties shall share the benefit of any profit that will ensue from such eviction — (a) on the lessor's part by receiving rent and having her expenses paid, (b) on the lessee's part by being granted the lease and obtaining possession.

Fuad Eff. Atallah for the Respondents argued that these clauses only amount to an undertaking on the part of the lessee to obtain delivery of the property leased at his own expenses and through his own efforts and that there is in these clauses no attempt to divert the course of justice as Mr. Weston Sanders had argued. Fuad Eff. Atallah then also cited to me C. A. 208/44[1] XII, P. L. R. 163; C. A. 187/37[2] Levanon II, 126; and C. A. 4/43[3] 10, P. L. R. 57; and argues that a Magistrate has wide powers in possessory actions generally under section 3 of the M. C. J. Ordinance, 1939.

Dealing with this last ground of appeal first, I think Fuad Eff. Atallah's argument is correct and it appears to me from the perusal of these two special clauses in Exh. P/4 that they merely constitute an undertaking on the part of the Respondents as lessees, to take upon themselves the burden of obtaining possession at their own expense, of the premises the subject matter of this lease, and a further undertaking that if the lessors incurred any expenses (I suppose an example of this might be if the lessors were cited as a party by the person in possession if possession were sought by action) that expenses would be repaid by the lessees. I do not see that such an undertaking is the champertous maintaining of a suit.

As regards the first two grounds of appeal, which I can deal with

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[1] 1945, A. L. R. 450.

[2] 1937, S. C. J. (N. S.) 400.

[3] 1943, A. L. R. 306.

together, I agree with the Appellants' arguments that the Respondent could not sue alone as Plaintiffs in the action in the lower Court. They should have joined Mrs. Germaine, the owner of the premises, as a plaintiff with them and it was not in my opinion upon the Defendants to rectify this omission of the Plaintiffs which was not merely a technical lack of joinder but in my opinion a *sine qua non* in this action without which no judgment of dispossession could have been given by the lower Court. I am of opinion that a lessee cannot alone recover from a stranger who claims to be there under colour of right or the protection of the law, possession of premises leased "to him" by virtue of a contract of lease. He could, of course, recover possession from a sub-tenant and in that case I think a lease in his hands should be a sufficient document on which to recover possession, but in this particular case the person in possession having no privity of contract with the Plaintiffs, the Plaintiff's remedy is either to cancel the lease for non-delivery of the property leased by virtue of Art. 585 of the *Mejelle* or to join the landlords with them as a co-Plaintiff.

Section 3 of the Magistrates' Courts Jurisdiction Ordinance does not confer a right on *any* person to recover possession, it only confers jurisdiction upon a Magistrate to hear and determine a possessory action but such action must normally be brought by the owner of the property and a lease such as Exh. P/4 does not in my opinion confer any right of ownership *vis-à-vis* the Appellants and, furthermore, it clearly recites that another person is in possession, and, therefore, it does not give an absolute right to possession as against that person. I would here quote C. A. 66/44 A. L. R. 1944, p. 590, and C. A. 37/45 A. L. R. 1945, p. 679 which clearly show that it is a legitimate owner who is the person entitled to sue for possession. The Respondents as I have said before had never been in possession of this property, and, in my opinion, on the pleadings in this case, could not have succeeded alone in an action to recover possession. Furthermore, in my opinion, the Magistrate could not properly have decided and could not further make a finding whether the Appellants were or were not statutory tenants of Mrs. Germaine except upon that lady being joined as a party or having joined in the action herself. There is of course, not the slightest evidence upon the record of the lower Court of the allegation raised in the statement of claim that the Appellants entered upon the premises by force, and the question as to whether the Appellants were trespassers could only, in my opinion, have been decided by joining Mrs. Germaine, for the Appellants were never trespassers *vis-à-vis* the Respondents.

For the above reasons this appeal must be allowed and the judgment

of the Magistrate set aside with costs therein and advocate's fees in the sum of LP. 5.

The order of the Magistrate is of course, also set aside. The Appellants are granted costs of this appeal on the lower scale and I certify advocate's attendance and instruction fees to the two Appellants and each of them in the sum of LP. 15.

Delivered this 31st day of January, 1947, in presence of Messrs. Weston Sanders and Lipschutz for the Appellants and in absence of the Respondents.

CRIMINAL APPEAL No. 122/46.

IN THE DISTRICT COURT OF TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Windham.

IN THE MATTER OF:—

Esther Flint. APPELLANT.

v.

Attorney General. RESPONDENT.

Offence under the Town Planning Ord. — Uncertainty of charge — Charge against one co-accused struck out — References in the charge against remaining (female) accused reading "they" and "he" — Plea of guilty — Objection taken on appeal — Accused not asked to show cause why demolition order should not be made.

1. The erection of different parts of the same house at different dates in non-compliance with the same building permit constitutes one continuous offence, notwithstanding that the erection of the window alone or the balcony alone would have been enough to constitute the offence; nor was it necessary to make any more particular allegation as to time than "during the months of September and October, 1946."

2. Where a charge had originally been brought against a man and a woman for unlawfully building a window and a balcony, and later been struck out against the man, the remaining charge against the woman only reading "*they* built the window" and "*he* built the balcony" was bad for uncertainty.

3. The plea of uncertainty could be taken on appeal notwithstanding the plea of guilty since the accused could not have been convicted as the words "they" and "he" charged her with nothing.

4. A demolition order will be set aside on appeal if the accused was not asked to show cause why it should not be made.

ANNOTATIONS:

1. On duplicity in a charge sheet see CR. A. D. C. T. A. 39/46 (1946, S. C. D. C. 773) and note 2.

2. As regards the continuity of the offence *cf.* CR. A. D. C. Jm. 30/46 (1946, S. C. D. C. 421).

3. On uncertainty in charge sheets see CR. A. 210/45 (13, P. L. R. 16; 1946, A. L. R. 7) and note 1 in A. L. R.; *vide* also CR. A. D. C. Jm. 22/46 (1946, S. C. D. C. 759) and note 1.

4. On the third point *cf.* CR. A. 73/43 (1943, A. L. R. 446) and note 1, and CR. A. D. C. Jm. 134/45 (1945, S. C. D. C. 584) and note 1; *vide* also the case cited in note 1, *supra*.

5. See, on the last point, CR. A. D. C. Jm. 4/46 (1946, S. C. D. C. 227) and note 2.

FOR APPELLANT: Dvorin.

FOR RESPONDENT: Handelsman.

JUDGMENT.

This is an appeal against the conviction of the Appellant for carrying out certain building works for which a permit is required not in conformity with such permit, contrary to section 35(1)(a) of the Town Planning Ordinance, 1936. The Appellant, who was unrepresented, pleaded guilty, and was fined LP. 2.500 and ordered to demolish what she had erected without a licence.

2. The first ground of appeal is that the charge was bad for duplicity. The particulars of the charge alleged that during the months of September and October, 1946, certain building works were carried out not in conformity with the permit, namely the erection of one window and one balcony, in the same house. It is contended that the erection of the window and of the balcony respectively, presumably on different dates, constituted two separate offences, and that they should not therefore have been embodied together in one count. The authorities cited in Archbold, 31st edition, at page 46 are relied on. But it seems clear to me that the two acts in question, namely the erection of different parts of the same house in non-conformity with the same building permit, must be considered as forming parts of one continuous transaction, and accordingly as constituting one continuous offence; and that is so notwithstanding that the erection of the window alone, or of the balcony alone, would have been enough to constitute the offence. The two acts were therefore properly included in one count. Nor, in the case of such a continuous transaction as building a house, was it necessary to make any more particular allegation as to time than "during the months of September and October, 1946".

3. The next ground of appeal is that the charge was bad for un-

certainty. It appears that, before the Appellant answered to the charge, the name of her co-accused (a man) was struck out. The particulars of the charge were not amended, however, and their original wording remained which alleged that "they" (*i. e.* both accused) built the offending window, and "he" built the offending balcony. Read in relation to the Appellant (a woman) this charge was too uncertain; it was not clear whether she was being charged with the erection of the balcony or not. And had it been clear that she was not being charged with erecting the balcony but only with erecting the window, her plea might have been different. Furthermore, this ground is one which may properly be taken on appeal notwithstanding the plea of guilty, since the Appellant could not have been convicted on the facts as set out in the charge sheet, since the words "they" and "he", read in relation to her alone, charged her with nothing; *vide* Criminal Appeal No. 42/40 *.

4. On this ground the appeal is therefore allowed and the conviction quashed. It accordingly becomes unnecessary to consider the alternative ground of appeal, namely that the demolition order was wrongly made in that the Appellant was not asked to show cause why it should not be made. I may say, however, that I would certainly have allowed the appeal against the demolition order on that ground had I not allowed the appeal against conviction.

Delivered in presence of both parties this 2nd day of January, 1947.

CIVIL APPEAL No. 81/46.

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Rigby.

IN THE APPEAL OF:—

Nakhleh Jiries Sansur. — APPELLANT.

v.

Hilweh, widow of Elias Sacca. — RESPONDENT.

Eviction — Sec. 8(1)(c) R. R. (D. H.) Ord. — Alternative accommodation.

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* 1, P. L. R. 285; 1940, S. C. J. 160.

An appeal from the judgment of the Magistrate's Court of Bethlehem (H. W. Mr. S. Daoud), delivered on the 10.9.1946 in Civil Case No. 60/46, dismissed:—

1. The alternative accommodation to be offered to a tenant, the eviction of whom is sought under sec. 8(1)(c) of the R. R. (D. H.) Ord., need not be suitable for him plus the members of his sister's family residing with him.

2. Such sister's family will not ordinarily be protected by the R. R. (D. H.) Ord. nor can the sister be considered a member of the tenant's family and hence protected as a joint statutory tenant.

ANNOTATIONS: *Cf.* C. A. D. C. Ha. 15/44 (1944, S. C. D. C. 136), C. A. D. C. T. A. 113/45 (*"Hamishpat"*, 1946, p. 56 — *in Hebrew*) and C. A. D. C. T. A. 11/46 (*ibid.*, p. 266).

FOR APPELLANT: Abedrabbo.

FOR RESPONDENT: Sacca.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court, Bethlehem in which the learned Magistrate ordered the eviction of the Appellant from the dwelling house then occupied by him in Bethlehem on the grounds that the premises were reasonably required by the landlord (or rather, the landlady) under the provisions of section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940.

2. The facts of the case are clearly set out in the judgment of the learned Magistrate. They are briefly as follows:—

The Appellant entered into occupation of the dwelling house at Bethlehem by virtue of a contract of lease made between himself and the Respondent for one year and dated 15.6.41. It appears from the uncontradicted statement of claim, and from the record itself, that the Respondent was an old lady some 80 years of age. Prior to the making of the contract of lease she herself occupied the dwelling house together with her son. It appears, furthermore, that her son, who is, and was then, employed in the Public Works Department, was transferred to Nazareth. Since she, the Respondent, was unable to continue to live by herself in the dwelling house, she entered into this contract of lease and went herself to live in Jerusalem with her daughter. Subsequently it appears that the Respondent's son was transferred back to Jerusalem and the Respondent, not unnaturally, and in my view entirely reasonably wished to take over again the house which she had let. It seems to me perfectly reasonable that this old lady should wish to live in her own house and in the company and protection of her own son. She therefore gave notice to the Appellant to vacate the premises, and, in accordance with the provisions of section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, sought for, and in fact ob-

tained, alternative accommodation for the Appellant in the same quarter at Bethlehem. The Appellant refused to accept the alternative accommodation offered. It is quite clear from the record that the Appellant admitted that the accommodation was in fact suitable for himself, but said that it was not suitable for — and here I quote his own words — "myself and my sister's family".

3. The learned Magistrate held that there was no privity of contract between the landlord and the rest of the Appellant's family who were residing in the dwelling house and that they were therefore not protected as statutory tenants under the provisions of the Ordinance. In my view the learned Magistrate was right in so holding. The contract of lease was made solely and exclusively between the Appellant and the Respondent. There is nothing to indicate that it was at any time envisaged by the Respondent, or contemplated between the parties, that the contract of lease was to include the Appellant's sister and her husband and children.

4. Mr. Abedrabbo, on behalf of the Appellant, said that the sister is to be considered a member of the family and therefore protected as a joint statutory tenant. I am not aware of any authority to support this proposition nor, on the facts of this case, can I find any substance or justification for arriving at the conclusion that the sister can properly be regarded as a statutory tenant.

5. Mr. Abedrabbo further contended that there was no evidence that the alternative accommodation offered was actually ready. He referred me to the case of Topping *v.* Hughes, an Irish case, reported at page 210 in Blundell's "Rent Restrictions Cases". In that case the alternative accommodation offered to the lessee consisted of certain vacant premises in every respect suitable except that the landlord refused to accept the Defendants as tenants. It was held that the alternative accommodation was not available within the meaning of the ordinance. That seems to me a matter of plain common sense. But the facts of this case are entirely different. There was the uncontradicted and uncontested evidence of the Respondent's son and another witness that alternative accommodation in Bethlehem was sought for and obtained and that the owner of such accommodation was ready and willing to lease the premises to the Appellant.

Further, it appears from the evidence that it was the Appellant himself who asked for this particular house as an alternative accommodation and that when it was found and the owner was prepared to lease it, the Appellant then refused to accept it.

6. As I have already indicated, the Appellant admitted that the pre-

mises were suitable for himself, but unsuitable to accommodate the rest of his family which apparently included his sister, his sister's husband and their children.

7. In my view, the learned Magistrate was correct in his judgment in ordering the eviction of the Appellant under section 8(1)(c) of the Ordinance.

8. This appeal is accordingly dismissed together with costs and advocate's fees fixed in the inclusive amount of LP. 10.

Delivered in presence of Mr. Abedrabbo for the Appellant and Toufiq Eff. Sacca for the Respondent, this 12th day of March, 1947.

MOTION No. 607/46.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour A/Judge Samaan Eff. Daoud.

BETWEEN:—

George Tubbeh. APPLICANT.

v.

Salim Hanna & an. RESPONDENTS.

Interlocutory injunction — Recovery of possession — Jurisdiction — C. A. 215/45 — C. A. 21/46 — Relief — Status quo.

An application for an interlocutory injunction restraining Respondents from denying Applicant access to a bath-room and main-entrance in the dwelling of the parties, refused:—

1. An application of this nature is not envisaged by either the Ottoman Magistrate's Law or the M. C. J. O. and is not in effect an action for recovery of possession. It is hence within the jurisdiction of the District Court.

2. The equitable relief of an interlocutory injunction will not be granted if the right on the basis of which it is sought is in itself in dispute and its existence is the issue in the main action between the parties.

3. Following C. A. 83/46 no interlocutory injunction will issue if its grant will have the effect of giving the sole relief sought in the main action.

4. An interlocutory injunction will not generally issue if it would upset the state of things in which the parties are at the time of litigation and in which they have found themselves for some time preceding it.

ANNOTATIONS: See the cases cited in the judgment and the notes thereto in S. C. D. C. and A. L. R., particularly in 1946, A. L. R., at p. 379.

FOR APPLICANT: Assal.

FOR RESPONDENTS: Nazzal.

ORDER.

The first Respondent Salim Hanna owns a house consisting of four rooms, kitchen, bathroom and a small hall used as the main entrance to the house. The second Respondent Nabihah is the wife of the first Respondent. The two Respondents occupy two rooms and the Petitioner occupies the other two rooms which have been let to him by the first Respondent, some five years ago.

Petitioner claims that according to the terms of the lease he and his family are to have the joint use of the bathroom and entrance with the first Respondent, and that five months before the filing of the action he was denied the use of the bathroom and entrance.

Petitioner filed an action in the District Court Jerusalem (Civil Case 159/46) on 24.12.46 against the two Respondents asking for an order directing them to permit Petitioner and his family the use of the bathroom and main entrance.

In the present application the Petitioner is asking for an interlocutory injunction pending the determination of the main action.

Several defences were put forward against granting the relief prayed for.

The first is that this Court has not jurisdiction to entertain this application. The advocate for Respondents relies on Civil Appeal No. 215/45[1] P. L. R. Vol. 13, 1946, page 143 which lays it down that a mandatory injunction will not be granted where the alternative remedy may be sought in the Magistrate's Court. He argues that the present application is nothing but an application for recovery of possession and this relief lay with the Magistrate's Court under Article 24ff. of the Ottoman Magistrates Law and/or sections 3(c) of the Magistrates' Courts (Jurisdiction) Ordinance, 1939.

I think neither provision of the law is applicable to a case of this nature. The present application is a request for a direction to the Respondents to enable the Petitioner to have access to the bathroom and entrance jointly with Respondents and not to recover the possession of this part of the building. This form of relief is not envisaged in either the Ottoman Magistrates Law or in the Magistrates' Courts (Jurisdiction) Ordinance, 1939.

The second defence was that the equitable relief of injunction will not be given when the right involved is in dispute.

The right claimed in this application is the right to use the bathroom and entrance jointly with Respondents. The claim is founded on the allegation that until five months before the filing of the action, they

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[1] 1946, A. L. R. 182.

have been exercising these amenities on the strength of contracts of lease which, for the first two or three years, provided a stipulation entitling Petitioner the joint use of the bathroom and entrance.

Counsel for Respondents denied that Plaintiffs ever had such a right and relied on the contract of lease produced by Petitioner himself where the description of the leased property is given as "two rooms in a house".

I have no doubt that in view of the wording of the contract of lease on the one hand and the allegation of the Petitioner on the other the right to use the bathroom and entrance is in dispute and the main civil action is an attempt to establish this right. Until that right is established I have no power to grant the relief prayed for.

A similar point was raised in Motion 603/45 (Selected Cases, District Courts, 1945, p. 558) where His Honour Judge Windham refused to give an injunction on this and other grounds.

Another ground raised by the Respondents is this. Where the granting of the relief sought in an application for an interlocutory injunction has the effect of granting the sole relief claimed in the main action the application will not be entertained. There is no doubt that the relief requested in this application and in the main action is the same and on the authority of Civil Appeal 83/46 (Annotated Law Reports, 1946, Vol. I, p. 379) the application will have to be rejected.

A further ground is that the Court cannot upset the state of things in which the parties have been and are found to be at the time of litigation. According to the application and the evidence of Petitioner when the main action for an injunction was brought he had already been for well over four months deprived of the amenities claimed. Respondents' advocate quoted Motion 365/45 reported in District Court Selected Cases 1945, p. 685 in support of this proposition of law. I think the decision in this motion is in point and is good authority for that proposition. A further authority is to be found in C. A. 21/46 [2] P. L. R. 13, 1946, p. 411.

It is to be regretted that in dealing with the above points I was forced to express an opinion on matters which may later have to be considered in the main action and perhaps by a differently constituted Court. In this I have no option.

I need not deal with the remaining grounds of the application which is hereby dismissed with costs.

Delivered this 28th day of February, 1947, in presence of Petitioner and Mr. P. Karmi for Respondents.

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[2] 1947, A. L. R. 123.

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OF THE

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WITH ANNOTATIONS

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CIVIL APPEAL No. 101/46.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Rigby.

IN THE APPEAL OF :—

Dr. S. Solnik. APPELLANT.

v.

Hanna Mansour Zumot. RESPONDENT.

Eviction — Sec. 8(1)(d) R. R. (D. H.) Ord. — Reconstruction — Notice — Building permit — Cause of action — Pleadings — Premature action.

An appeal from the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levi), delivered on the 11.11.1946 in Civil Case 1025/46, allowed:—

1. The term "cause of action" means the entire set of circumstances giving rise to an enforceable claim.

2. The obtaining of the permit referred to in sec. 8(1)(d) of the R. R. (D. H.) Ord. and the expiration of three months' notice in writing to the tenant to vacate the dwelling house are conditions precedent to the institution of eviction proceedings under this subsection.

3. These two conditions form an essential part of the landlord's cause of action and their fulfilment must be pleaded and alleged in the landlord's statement of claim.

4. An action for eviction under sec. 8(1)(d) of the R. R. (D. H.) Ord. is premature if at the time of its institution the requisite building permit had not been obtained or the period of three month's notice had not expired. This defect is not cured if these conditions are fulfilled after the commencement of the proceedings and before the trial.

5. Such action is in such case also premature if eviction is claimed only as from a specified future date which is later than three months from the date of institution of the action. The same applies where the landlord without specifying a future date asks generally for eviction at a period of not less than three months as from the institution of the claim.

ANNOTATIONS:

1. On the first point *cf.* C. D. C. Ja. 34/45 (1946, S. C. D. C. 670, at 672—3).

2. For authorities on sec. 8(1)(d) of the R. R. (D. H.) Ord. see C. A. D. C. Ja. 146/46 (1946, S. C. D. C. 738) and note thereto.

3. On the requirements of a notice to quit *cf.* Halsbury, Vol. 20, pp. 130 *et seq.* and Supplement Volume.

FOR APPELLANT: Spaer and Avshalom Levy.

FOR RESPONDENT: E. Manny.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court, Jerusalem, whereby the learned Magistrate ordered the eviction of the Appellant from the dwelling house occupied by him as a lessee.

2. The application for eviction was originally made to the Magistrate on two separate grounds; firstly, on the ground that the Appellant, as tenant, by taking in lodgers was making a profit which, having regard to the rent paid by him was unreasonable; secondly, on the ground that the premises were required by the Respondent, as landlord, for substantial alteration or reconstruction thereof in such a way as to affect the dwelling house. The learned Magistrate declined to order eviction on the former ground, but granted it on the latter.

3. The main ground of the appeal is that the action is premature. Section 8(1)(d) of the Ordinance enables eviction of a tenant from a dwelling house "on the ground that the premises are required by the landlord for the substantial alteration or reconstruction thereof in such a way as to affect the dwelling house or for the demolition thereof, and the Court, Judge or Execution Officer, after being satisfied that the landlord has obtained the necessary permit for such alteration, reconstruction or demolition, and has given to the tenant not less than three months' notice in writing to vacate the dwelling house, considers it reasonable to give such judgment or make such order".

4. Mr. Spaer, on behalf of the Appellant, has contended that the obtaining of the necessary permit for such alteration, reconstruction or demolition and the expiration of not less than three months' notice in writing to the tenant to vacate the dwelling house are conditions precedent to the institution of proceedings for eviction on this ground. Indeed, he argues that the fulfilment of these two conditions by the landlord form an essential part of his cause of action and, as such, must be specifically pleaded in his statement of claim.

5. It is admitted that the notice to vacate was sent to the Appellant on June 9th, 1946 and the action was instituted on June 26th, 1946.

It is further conceded that the necessary permit from the City Engineer was not obtained until July 18th, 1946 — some three weeks after the action had commenced.

Mr. Manny, for the Respondent, whilst admitting that the notice to vacate was only given 17 days before the institution of proceedings, points out that in the Statement of Claim vacant possession was only asked for as from first of *Moharram* 1946 (25th of November, 1946) — which would be about five months after the ninth of June. He argues that the fact that vacant possession of the premises is not required until five months later complies with the statutory requirement that

three months notice to vacate must be given and that it is unnecessary that that period should have expired before the institution of the claim for eviction. In support of his argument he relies upon C. A. 466/44 * (P. L. R. Vol. 12, page 189). That case appears to me, however, to be readily distinguishable and of no assistance to the Respondent. As I understand it, all that is there decided is that a landlord suing for eviction of a tenant holding over leased premises by virtue of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, — that is to say a statutory tenant — need not wait until the expiration of the lease year before he files his action but may file his action at any time and it is for the Court before which the action is heard, if eviction is ordered, to direct that such eviction shall take place at the expiry of that lease year. It is no authority for that which is to me the novel proposition that a landlord seeking eviction under section 8(1)(d) of this Ordinance can file his action forthwith against his tenant and dispense with the requisite period of three months' notice in writing to quit as long as he specifies a given future date for eviction which date exceeds a period of three months from the date of the institution of his claim or, alternatively, without specifying a given future date, asks generally for eviction at a period of not less than three months as from the date of the institution of his claim.

6. As regards the obtaining of the necessary permit, Mr. Manny argues that on the wording of the section itself, it is unnecessary that a permit should have been obtained prior to the institution of proceedings, but that all he need do is to satisfy the Magistrate, in the course of the case itself, that such permit has in fact been obtained.

7. In my view, there is no doubt whatsoever that the requisite period of three months notice is writing must have been given to the tenant, and must have expired, before the institution of such proceedings for eviction.

I am of the opinion that the giving and expiration of such statutory period does in fact form part of the landlord's cause of action and, as such, requires to be specifically pleaded in his statement of claim.

The cause of action means the entire set of circumstances giving rise to an enforceable claim. It is referred to in the judgment of Lord Esher, M. R., in the case of Read *v.* Brown 1889 22 Q. B. D. page 128, at page 131, as "every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved."

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* 1945, A. L. R. 423.

8. For the same reasons I am of the opinion that the obtaining of the necessary permit from the City Engineer was an essential prerequisite to the institution of the proceedings for eviction; that the fact that it had been obtained formed part of the landlord's cause of action, and as such, should have been specifically pleaded. The permit was not in existence at the time the action was instituted. An essential ingredient of the cause of action was therefore missing and the action was therefore, in my view, premature. The fact that that ingredient became in existence and available after the commencement of the proceedings did not, and does not, in my view, cure the defect and could not, and cannot, be relied upon by the Plaintiff in the action or as Respondent in this appeal.

9. Having arrived at this conclusion it therefore becomes unnecessary for me to consider the Appellant's motion in conjunction with this appeal for the production of further evidence which, it is alleged, the learned Magistrate wrongfully refused to allow the Appellant to call after he had concluded his case.

10. This appeal is allowed and the learned Magistrate's judgment and order of eviction are set aside. The costs and advocate's fees, as ordered by the learned Magistrate in his judgment, will be reversed. The Respondent will further pay the costs of this appeal together, with the Appellant's advocates fees which I fix at LP. 10 (ten).

Delivered in the presence of Mr. Spaer on behalf of the Appellant and Mr. Manny on behalf of the Respondent, this 26th day of March, 1947.

MOTION No. 17/47.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour the R/President Judge Orr.

BETWEEN:—

Mordechai Khojahinoff & an. APPLICANTS.

v.

Ben-Zion Khojahinoff in his capacity as Executor of the will and Administrator of the estate of the late Joseph Khojahinoff & ors. RESPONDENTS.

Sec. 17 Succ. Ord. — Leave to sue an administrator.

An application for leave to file an action under sec. 17(iii) of the Succession Ord., refused:—

1. Sec. 17(iii) of the Succession Ord. applies only to actions concerning the duties of an administrator.

2. The sec. does not prevent one heir, as distinct from the administrator, from instituting proceedings against another heir with regard to the extent of such latter heir's share in the estate without obtaining the leave envisaged by the section.

ANNOTATIONS: For other proceedings in respect of this estate see Pr. Jm. 12/44 (1946, S. C. D. C. 768).

FOR APPLICANTS: Rand.
FOR ADMINISTRATOR: Podhorzer.
FOR OPPOSERS: Goitein and Levanon.

ORDER.

I agree with Mr. Goitein that this application is misconceived and the leave is not necessary. That is to say that section 17 of the Succession Ordinance applies only to actions concerning the duties of the administrator, *i. e.* the getting in of the estate, the payment of the debts, distribution and such other duties. Here, two heirs seek to show that another heir waived his rights. In other words the two heirs seek to show that they should have a greater share in the estate. This has nothing to do with the administration of the estate and even if Mr. Ben Zion Khojahinoff is an administrator having the power of administration of the immovable property not passing under the will, about which there is much doubt, no leave is necessary for the present Applicants to take whatever steps they may be advised to take in the proper Court to oust the shares of the successors of the widow.

Mr. Goitein's clients will have their costs of to-day in an inclusive sum of LP. 10. Mr. Podhorzer's client since he was cited as Respondent in his capacity as administrator will have costs in the sum of LP. 1.

Given this 27th day of January, 1947.

CIVIL APPEAL No. 185/46.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Hill.

IN THE APPEAL OF:—

Haleva Bros. APPELLANTS.

v.

Egged Co-Operative Society, Ltd. RESPONDENTS.

Landlord and Tenant — Equitable Relief, C. A. 326/45 — Tender of rent, C. A. 330/45.

1. Under the R. R. Ordinances the Court in dealing with dwelling houses will grant equitable relief where there have been minor lapses in regard to the payment of rent. The Court will not do so with respect to business premises without substantial reasons.

2. Where the landlord clearly indicates that he wishes to terminate the lease and would not accept rent — the tenant need not tender such rent.

3. The fact that the landlord calls from time to time at the tenant's office to collect the rent after the date on which it became due does not constitute a waiver of the condition to pay in advance.

ANNOTATIONS:

1. On the first point see C. A. D. C. Ha. 74/46 (1946, S. C. D. C. 840) with cases therein cited and the note thereto.

2. On points 2 & 3 *cf.* C. A. 269/45 (13, P. L. R. 178; 1946, A. L. R. 333) and C. A. D. C. T. A. 82/45 (1946, S. C. D. C. 346).

FOR APPELLANTS: W. Salah.

FOR RESPONDENTS: Spaer.

JUDGMENT.

This is an appeal against the judgment of the Magistrate's Court, Haifa, dated 6th December, 1946, refusing to grant an order of eviction against the Respondents and dismissing the Appellants' action.

Mr. Spaer in his reply for the Respondents to Mr. Salah's address first submitted two formal grounds for dismissing the appeal, namely, that the proper names and description of the Plaintiffs (Appellants) did not appear in the statement of claim and that as only an attorney was mentioned in para. 7 of the statement of claim no cause of action was disclosed. It appears that these points were raised before the learned Magistrate but he did not find it necessary to deal with them. The first point is formal and could and should if considered necessary have been dealt with in the Court below by way of amendment.

I cannot agree that because only the attorney is mentioned in para. 7 of the statement of claim no cause of action is disclosed. Failure to pay the rent due is definitely and specifically alleged in the plainest language.

The issue in this appeal is whether in the circumstances as adduced in evidence before the Magistrate equitable relief should have been granted to the Respondents who are statutory tenants.

The principles on which a Court's discretion should be exercised in favour of granting equitable relief are referred to by the Court of Appeal in C. A. 326/45 (A. L. R. 1946, p. 446) in which it is stated:—

"It is true that in cases under the Rent Restrictions Ordinance the Court will grant equitable relief where there have been minor lapses in regard to the payment of rent. This is particularly so in regard to dwelling houses where the main object of the Ordinance is to protect the person in the dwelling. But to establish a ground for equitable relief in the case of business premises which should be conducted on business lines, it appears to us that a more substantial reason than that advanced in this case, *i. e.* that the Appellant was in Syria and he had omitted to take due precaution to ensure that his agent paid the rent, would need to be put forward."

It is well nigh impossible to lay down hard and fast rules regarding the manner in which this discretion should be exercised in favour of tenants of business premises, but it appears to me that where a tenant of such premises has acted carelessly or in an unbusinesslike manner equitable relief should not be extended to him and I propose to apply that principle in deciding this appeal.

The facts of this case are fully set out in the judgment of the learned Magistrate. He decided to grant equitable relief on two grounds: Firstly because he considered that the delay in the offer of payment was not caused by the negligence of the Defendants who were likely to have believed that Plaintiff Jabbour would come and collect the rent as he used from time to time to come to the branch office of the Defendants for that purpose, and secondly, the learned Magistrate held that there was no onus on the Defendants to offer Plaintiff the rent for the June-August months in view of Jabbour's warning to Defendant's branch manager that if he did not receive the signed contract by the end of March he would refuse to accept rent.

To these facts the learned Magistrate applied the ruling in C. A. 330/45 cited by him (A. L. R. 1946, p. 92). The facts in that case were that the landlord informed the tenant that he required the premises for the occupation of herself and she offered alternative accommodation and on those facts it was held that it would have been an empty gesture on the part of the tenant to offer rent.

In the first place, the learned Magistrate seems entirely to have disregarded the statement by the Defendants' Manager Kaminezky, (top of page 6 of the record) that he did not take Jabbour seriously when Jabbour told him that unless the forms were returned signed he would not accept the second instalment.

In view of the Plaintiffs' clear warning not to rescind the contract, but to have it signed in good time, it was clearly the Defendants' duty in my opinion, to comply with his request and to effect payment

on the due date. The fact that from time to time Jabbour called at Defendants' office to collect the rent sometimes after the date on which it became due did not constitute a waiver of the condition as to payment in advance on 1.6.46. I again refer to the judgment in C. A. 326/45.

There is no evidence whatever that the Defendants made the slightest effort to carry out their simple duty towards the Plaintiffs. To do so would have been no empty gesture in the circumstances of this case. In any event, the Defendants were statutory tenants. In point of fact it appears that they made no effort whatever either to get the contract signed or to effect payment of the rent at the proper time. And this, not because they considered it would be an empty gesture on their part to offer the rent to Jabbour as the learned Magistrate held, but because they did not take Jabbour's request seriously.

In my view the Defendant acted in a very unbusinesslike manner, and, applying the principle stated above and that enunciated in C. A. 326/45, I consider that they were not entitled to the ground of equitable relief that was extended to them by the learned Magistrate.

This case does not merely afford an instance where I disagree with the manner in which the learned Magistrate exercised his discretion, but with due respect to him I consider that he has wrongly applied the law to the matter and that his judgment must accordingly be reversed.

The appeal is, therefore, allowed, the judgment of the Court below is set aside and judgment is entered in favour of the Appellants.

The Respondents are ordered to vacate the premises and hand them over to the Appellants.

The Appellants to have the costs of this appeal and in the Court below with an advocate's attendance fee of LP. 10.

Delivered this 31st day of January, 1947, in presence of Mr. Tscherniak for Appellants and of Mr. Wajner for Respondents.

CIVIL APPEAL No. 175/46.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF :—

Hanna Michael el Hamati. APPELLANT.

v.

Naifeh Sa'ad El Abdalla. RESPONDENT.

Landlord & Tenant — Claim for eviction on ground of substantial alterations — C. A. 389/45.

1. A landlord claiming eviction on the ground of his intention to reconstruct or repair the premises should obtain not only a Town Planning permit but also a permit from the Controller of Heavy Industries.

2. Although a Magistrate may inspect any property the subject of an action under r. 149 of the Magistrates' Courts (Procedure) Rules, he may not in his inspection make himself in effect a witness and more especially in a matter in which some sort of expert evidence is required as to whether the alteration will affect the premises.

ANNOTATIONS:

1. On the requirements of sec. 8(1)(d) of the R. R. (D. H.) Ord.. resp. sec. 4(1)(f) of the R. R. (B. P.) Ord., see C. A. D. C. Ja. 146/46 (1946, S. C. D. C. 738) and C. A. D. C. Jm. 101/46 (*ante*, p. 65) and notes.

2. On the second point *cf.* C. A. 190/44 (11, P. L. R. 547; 1945, A. L. R. 250) and last paragraph of annotations in A. L. R., CR. A. 181/45 (12, P. L. R. 501; 1945, A. L. R. 829) and CR. A. D. C. T. A. 171/45 (1945, S. C. D. C. 546); *vide* also the commentaries in the Annual Practice to O. 50, r. 4 of the R. S. C. J.

JUDGMENT.

This is an appeal against the judgment of H. W. Aziz Eff. Jarjoura the Magistrate of Nazareth whereby he ordered the eviction of the Appellant from premises occupied by him on the ground that the landlord required them for essential repairs.

Before the lower Court the Plaintiff (landlord) produced a permit from the Municipality of Nazareth for the opening of a window and demolition of a wall in the leased premises and the question then arose as to whether this was a substantial alteration or reconstruction in such a way as to affect the dwelling house. Evidence was led by both sides as to this and at the close of the evidence the learned Magistrate being apparently unable to make up his mind from the evidence as to whether these alterations were such as to affect the dwelling house and necessitate the eviction of the Defendant decided to go himself and view the premises as he termed it "to enable the Court to prefer the evidence of one party to that of the other"; having proceeded to the building the learned Magistrate thereupon gave judgment holding that in his opinion from what he had seen he preferred the evidence of the Plaintiff and ordered eviction from the premises.

The Defendant now appeals to this Court on two grounds: Firstly, that the licence of the Municipality to effect the alterations was not accompanied by the necessary permits by the Controller of Heavy

Industries. It is clear that no such permit had been obtained by the Plaintiff. Upon perusal of the licence in question I find that the licence was given for some work on condition that no material subject to control shall be used. But in view of the decision of the Supreme Court in C. A. 389/45 *, XIII P. L. R. p. 367, the permit of the Controller of Heavy Industries to reconstruct or repair is essential as provided for in the Defence (Amendment) Reg. No. 9 of 1942, Palestine *Gazette* No. 1203 Sup. II, p. 1023.

The second ground of appeal is that the Magistrate had no right to go and inspect the premises and from his own inspection and from what he saw there come to a conclusion and believe the Plaintiff's evidence as preferable to the evidence of the Defendant, for by doing so, the Magistrate not only made himself a witness but made himself an expert witness in the matter of the demolition of the building. It is the Appellant's argument that if the Magistrate could not make up his mind as to which of the two sets of evidence he believed he should have given judgment dismissing the action, for, under section 8(1)(d) of the Rent Restrictions (D. H.) Ordinance it is upon the landlord who seeks to get eviction of his tenant to show that the premises are required for substantial alterations in such a way as to affect the dwelling house, and that after the Court has been satisfied that the landlord obtained a permit it must consider whether it is reasonable to give such a judgment of eviction or not.

In my opinion this ground of appeal is a substantial ground and also justified the setting aside of the judgment of eviction. Although the Magistrate may, of course, inspect any property the subject of an action under r. 149 of the Magistrates' Courts (Procedure) Rules he may not in his inspection make himself in effect a witness and more especially in a matter in which some sort of expert evidence is required as to whether the alteration will affect the premises.

Therefore, the learned Magistrate was wrong in holding from his inspection that he found that the alterations affected the dwelling house of the Defendant and that the Plaintiff had thereby shown that his evidence was preferable to that of the Defendant. It was the duty of the Magistrate if he was not satisfied that the Plaintiff had clearly proved what was upon him to prove under section 8(1)(d) of the said Ordinance, to have dismissed the action for the Ordinance is a restrictive Ordinance and eviction should not be granted by a Court except under strict compliance with its provisions. Furthermore, the learned Magistrate seems never to have applied his mind to the question whether

* 1946, A. L. R. 752.

it was reasonable for him to give judgment for eviction — this is one of the requirements of the section in question.

For the above reasons the appeal is allowed, the judgment of the lower Court is set aside and the Plaintiff's action dismissed with costs in the lower Court and advocate's fees of LP. 3.

The Appellant is granted costs of this appeal on the lower scale and I certify advocate's attendance fee in this appeal in the sum of LP. 10.

Delivered this 27th day of February, 1947, in presence of Mr. Tscherniak for Appellant and of Amin Eff. Jarjoura for Respondent.

CIVIL APPEAL No. 234/45.

IN THE DISTRICT COURT OF TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE: Their Honours Judge Cheshin and A/Judge Kassan.

IN THE APPEAL OF :—

Ludwig Magnus. APPELLANT.

v.

Nissan and Itzhak Cohen. RESPONDENTS.

Contract for manufacture and sale — Vendor suing for price of manufactured goods which purchaser refused to accept — Articles 124, 388—392 *and* 369, *Mejelle.*

1. A contract for manufacture and sale is to be treated as a sale and not as a contract to sell.
2. An action for the agreed price will lie against the purchaser who refuses to accept the manufactured goods.

ANNOTATIONS: *Cf.* C. A. 100/38 (5, P. L. R. 309; 1938, 1 S. C. J. 316) and C. A. 24/39 (6, P. L. R. 386; 1939, S. C. J 378).

FOR APPELLANT: Vorchheimer.

FOR RESPONDENTS: Feinstein.

JUDGMENT.

It is common ground that our laws distinguish between a sale and an agreement to sell. In the case of a sale the vendor may demand the price, under the provisions relating to sale contained in the *Mejelle,* where the purchaser refuses to accept the subject matter of the sale; whereas in the case of an agreement to sell, the party undertaking to sell is entitled to damages, under the provisions contained in the fifth book of the Ottoman Civil Procedure Code, where the party undertaking

to purchase makes default. The question requiring consideration in the present case is, what is the nature of the relations created between the parties. The learned Magistrate in paragraph 7 of his judgment makes a finding that — "The Defendants (Respondents) ordered shaving brushes by sample", and in paragraph 4 of his judgment he states that — "The brushes were not ready at the time of the making of the agreement, and the intention of the parties was to the effect that the Plaintiffs (Appellants) should manufacture the brushes within the next few weeks". This being so, the contract envisaged was one of manufacture and sale within the meaning of Article 124 of the *Mejelle* and Articles 388—392 are applicable to such contract. These latter articles are included in that book of the *Mejelle* treating of the laws of sale and the conclusion must therefore be that a contract for the manufacture and sale is to be treated as a sale and not as a contract to sell. Now, the first part of Article 392 provides that "After the conclusion of a contract for manufacture and sale, neither party can go back on the bargain they have struck"; the corollary being that once the article ordered has been manufactured Article 369 applies, which provides that the purchaser (in the case of a contract for manufacture and sale — the contractor for manufacture) becomes the owner of the thing sold (the manufactured article) and the vendor (the manufacturer) becomes the owner of the price, and that neither party may retract unless "the object manufactured is not in accordance with the specification" (*vide* the second part of Article 392).

2. The learned Magistrate in the present case came to the conclusion that the relation established between the parties was one arising out of a contract to sell and that the Appellants were therefore entitled to claim damages and not the price agreed upon. With all respect we are of opinion that he came to an erroneous conclusion. Now were this the only issue in controversy the matter could have been disposed of forthwith. It appears, however, that the Respondents (Defendants) had raised several more points which had not been dealt with by the learned Magistrate at all. It will be nothing but fair to both parties to direct the learned Magistrate to give his decision on all issues raised.

The appeal is therefore allowed, the judgment appealed against set aside and the case remitted to the Court below for completion.

Costs to abide the event.

Given in open Court this 14th day of February, 1947, in the presence of Mr. Vorchheimer for the Appellant and Mr. Feinstein for the Respondents.

(*Translated from the Hebrew*).

MOTION No. 23/47.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: Their Honours Judge Bardaky and A/Judge Daoud.

IN THE CASE OF :—

Muhammad Bin El Haj Abed El Hafez Abu Awad & 2 ors. APPLICANTS.

v.

El Haj Abed El Hafez Muhammad Abu Awad. RESPONDENT.

Pleadings — Amendment of statement of claim — R. 125 C. P. R. — Discretion — Delay — Causes of action — Defendant prejudiced.

An application for leave to amend the statement of claim filed by Applicants-Plaintiffs in Civil Case 61/45 partly allowed and partly refused:—

1. An application for leave to amend the statement of claim made only after one plaintiff had already given his evidence and with a view to make the statement of claim tally with such evidence and not made in order to correct a genuine mistake will be refused even though the amendment may not involve a change in the cause of action originally pleaded.

2. An amendment in the statement of claim substituting an allegation of payment in instalments and kind for an allegation of a single cash payment on a specified date will be refused if sought in the circumstances and at the stage aforesaid as likely fundamentally to change the whole course and sequence of the case and gravely to affect the position of the Defendant who, if the amendment were allowed, would have to find and adduce different evidence than that necessary to resist the original claim.

3. The granting of leave to amend pleadings is one peculiarly within the discretion of the trial Court.

ANNOTATIONS:

1. Note that in the two cases quoted in the judgment the amendment sought would have introduced an entirely new issue (substitution of an oral agreement for an expressly pleaded written one in C. A. 428/44; defence of minority in C. A. 336/44).

2. *Quaere* whether the application in the instant case was not covered by the decisions in C. A. 317/43 (11, P. L. R. 42; 1944, A. L. R. 146) and C. A. 338/45 (1946, A. L. R. 67).

3. It should be noted that in the two cases cited in note 2, *supra*, the amendment was also applied for after the Plaintiff had given evidence; on the question of delay generally *cf.* C. A. D. C. Jm. 13/46 (1946, S. C. D. C. 537) and note 1.

FOR APPLICANTS: Eisenberg.

FOR RESPONDENT: Ousta.

ORDER.

This is an application under rule 125, for leave to amend the statement of claim in the main action (Civil Case 61/45), by substituting for clause 4 thereof the following:—

> "The Defendant received from the Plaintiffs the purchase price stipulated in the agreement for sale mentioned in clause 1 hereby by several instalments before the signing of the said agreement, and by the said agreement admitted the receipt by him of the whole of the said purchase price, *i. e.* LP. 2000."

Further, by inserting after clause 5 thereof the following:—

> Clause 6:
>
> "Apart therefrom, the Plaintiffs are entitled to demand the repayment of the sum paid by them as purchase price at any time so long as the transfer of the land, the subject matter of the agreement, has not been effected."

The main action is for the recovery of the amount of LP. 2000 which the Applicants-Plaintiffs — claim they had paid to the Respondent-Defendant — (their father), by virtue of an agreement, dated 17.5.43, whereby the Respondent had undertaken to transfer to the Applicants three plots of land.

The original clause 4 of the statement of claim reads as follows:—

> "The Plaintiffs paid to the Defendant, at the time of the signing of the agreement, the whole price of the lands in question, to wit, LP. 2000; and the Defendant admitted the receipt of the said amount in the said agreement."

Counsel for Respondent objected to leave being granted for the amendment, on the following grounds:—

(a) The power given to the Court, by rule 125 of the Civil Procedure Rules, 1938, is of a discretionary nature; and, in this case, the discretion should not be used in favour of the Applicants, because leave to amend would not serve the purposes of justice, as the whole object of this application is to cover the lies which Plaintiff No. 1 had to disclose when giving his evidence in the main case.

(b) There was undue delay, on the part of the Applicants, in lodging this application; particularly, after the first Plaintiff had already given evidence in the action.

(c) The amendment, if granted, would change the cause of the action.

(d) No affidavit has been submitted to the effect that the original clause 4 of the statement of claim was the result of some mistake having been committed by the previous advocate in the action.

After hearing counsel, and after consideration of the matter, we find as follows:—

The action was lodged on the 4th June, 1945, and, on 29.11.46 the first witness for the Plaintiffs (*i. e.* Plaintiff No. 1) gave his evidence in Court.

On reading the statement of claim, as a whole, one forms the impression that the main — if not the only — basis of the action is an agreement in writing (Exh. P/1). In fact according to clause 3 of the said agreement, the amount of LP. 2000 was to be paid by the Plaintiffs to the Defendant in one single payment in cash. According to clause 24 of the agreement and the addendum thereto, the Defendant had admitted the receipt of the said amount of LP. 2000 in cash.

In his evidence, however, before this Court, in the main action, Plaintiff No. 1 was brought about to admit, in cross-examination, that the amount of LP. 2000, which he alleged he had paid to the Defendant (his father), was not paid to the latter in a lump sum but in instalments, part of which was not in cash, but in jewels and that the words *"addan wa naqdan"* (meaning: in cash) which figure in the agreement, were not true.

Applicants now desire to correct that vital part of the action, regarding the mode of the alleged payment, by putting the claim in the form of an allegation of a payment effected in several instalments, apparently with the intention of covering the evidence already given by Plaintiff No. 1 and thus make it tally with the fresh statement of claim.

Now, "The question as to whether or not pleadings should be amended is one peculiarly within the discretion of the Judge charged with trying the issues ... When the alternative claim raised a totally new cause of action which had to be sustained or resisted by very different evidence from that necessary to establish the claim as embodied in the statement of claim", leave to amend will be refused. (See C. A. 428/44, A. L. R. 1945, Vol. I, p. 54).

Under the corresponding English Rule, which is Order 28, Rule 1 of the Rules of the Supreme Court — "Either party is allowed to make any such amendment as is reasonably necessary for the due presentation of his case, on payment of the costs of and occasioned by the amendment, provided there has been no undue delay on his part ... But if the application be made *mala fide*, or if the proposed amendment will cause undue delay, or will in any other way unfairly prejudice the other party, ... leave to amend will be refused". (See the Annual Practice, 1945 (White Book) Sixty-Third Annual Issue, p. 481).

It was further held by the Supreme Court in C. A. 336/44 (A. L. R. 1945 Vol. I, p. 353), thus:—

> "So the position is that the Appellant having averred untruthfully that the transaction had taken place only four years ago, now seeks to extricate himself by averring that the transaction took place over ten years ago when he was a minor. If he wished to plead minority the Appellant should have pleaded it in the first instance. If a party deliberately elects to make an averment which he knows to be false he must not expect to be allowed to amend his plea when the prevarication has been discovered. If such amendments were allowed it would be an incentive to parties to make false averments."

In the light of all these authorities, and believing, as we do, that this is not a case of a correction of a genuine mistake, it would follow that, if the first part of this application were granted, though it could not be said with certainty that it would necessarily have changed the cause of action, yet it would, in our opinion, fundamentally change the whole course and sequence of the case, in view of the disclosures of the Applicant (Plaintiff No. 1) in his evidence; and, the first part of the application, if granted, would gravely affect the position of the Defendant, in this case.

That being so, we are not prepared to allow the amendment of clause 4 of the statement of claim and this part of the application is therefore refused.

We do, however, grant leave to Applicants to insert a new clause 6, as requested.

The amended pleadings, as above, should be filed within ten days from today; the Defendant to plead to the amended pleading within ten days, of the service on him of the amended pleadings, as above. (Rule 125, 126 and 127).

We award costs for the Respondent, to include LP. 3 advocate's attendance fee.

Delivered in presence of Mr. Eisenberg for Applicants and Zaki Eff. El Ousta for the Respondent this 16th day of January, 1947.

FELONY No. 170/46.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour the R/President Judge Orr.

IN THE CASE OF:—

Ismail Abdul Aziz Ali Abu Zeinah. — ACCUSED. (APPLICANT).

v.

The Attorney General. — RESPONDENT.

Reg. 143(1)(*d*) *Defence* (*Emergency*) *Regulations*, 1945 — *W. D. property* — *Sec.* 311 *C. C. O.* — *Ownership* — *Prima facie case.*

An application to return certain goods seized by the Respondent to the Applicant, granted:—

1. The fact that one person has been convicted of an offence under sec. 311 of the C. C. O. in respect of certain goods does not by itself disbar another person from proving title to such goods by purchase from the person so convicted.

2. A conviction under sec. 311 of the C. C. O. implies only that the person convicted had been found in possession of goods which the police reasonably suspected of having been stolen. It does not necessarily imply that such goods were in fact stolen.

ANNOTATIONS: For other authorities on sec. 388 of the C. C. O. see C. A. 62/46 (13, P. L. R. 399; 1947, A. L. R. 161) and note 3 in A. L. R.

FOR ACCUSED: S. T. Cohen.

FOR RESPONDENT: Khalaf.

JUDGMENT.

This is a most peculiar application. The Applicant was charged before me some months ago with the possession of chattels being the property of the War Department of His Majesty's Government contrary to Regulation 143(1)(d) of the Defence (Emergency) Regulations, 1945. The Applicant was acquitted of the charge on a submission by his counsel that there was no case to answer, the flaw in the prosecution case being that the prosecution had failed to prove that the contents of the boxes were in fact the various items set out in the particulars of offence. In fact nobody had ever troubled to open any of the boxes. A man called Abdul Aziz Ahmud Ussbeigh, was charged jointly with the present Applicant and separate trials were ordered.

At the trial of Ussbeigh the charge sheet was amended to an offence of possession of property reasonably suspected of being stolen property contrary to section 311 of the Criminal Code Ordinance. For this charge Ussbeigh pleaded guilty and was convicted.

Today the Applicant has given evidence before me to the effect that he purchased the goods in Jerusalem in, I may say, remarkably peculiar and suspicious circumstances, and Ussbeigh has given evidence of loading the goods on the Applicant's truck.

The Attorney General has called no rebutting evidence although it seems to me that the boxes might have been opened and if their contents were army property a golden opportunity of calling evidence to this effect has been lost. Had this been done Applicant would have found it difficult to prove his ownership. The result is that there has been

prima facie proof of ownership by the Applicant and no rebutting evidence has been tendered. The fact that Ussbeigh was convicted of possession of goods reasonably suspected of being stolen cannot affect the *prima facie* title made out by the Applicant, as it is the police who have the reasonable suspicion under section 311 of the Criminal Code Ordinance and Ussbeigh therefore pleaded guilty to an offence of being in possession of goods that the police reasonably suspected of being stolen.

Mr. Khalaf asks me to disbelieve this story and hand the goods over to the Government of Palestine. There is at least *prima facie* evidence by the Applicant that the goods are his and no evidence whatsoever that the Government of Palestine has a title to the goods. In the circumstances all I can do is order the goods to be returned to the Applicant, Ismail Abdul Aziz Ali Abu Zeinah.

Delivered this 21st day of February, 1947.

CRIMINAL APPEAL No. 83/46.

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour A/R/President Judge Morgan.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Yehuda ben Yehoshua Slonimsky & an. RESPONDENTS.

A. G.'s authority to sign appeal — Law of Procedure (Am.) Ord. 1934 — CR. A. 18/38 — Interpretation.

An appeal from the judgment of the British Magistrate of Jerusalem (H. W. Mr. J. Azoulai), delivered on the 2.9.1946 in Criminal Case 8970/46, dismissed:—

1. Following CR. A. 18/38 the words "prosecute any criminal proceedings" in sec. 4(1) of the Law of Procedure (Amendment) Ord., 1934, include the filing of appeals.

2. An autbority conferred by the A. G. to prosecute "criminal cases" does not, however, carry with it a right to make or sign appeals in criminal cases as the use of these words must be construed as limiting the provisions of secc. 4(1) of the said Ord. in the case of such authorised officer.

ANNOTATIONS: Note that CR. A. 18/38 referred to in the judgment has been adversely criticised and the word "prosecute" been more restrictively interpreted in CR. A. 96/46 (13, P. L. R. 494; 1946, A. L. R. 620).

FOR APPLICANT: McGrath.

FOR RESPONDENTS: S. T. Cohen.

JUDGMENT.

This is an appeal from an acquittal of the accused by the learned Magistrate in Criminal Case No. 8970/46 of the Magistrate's Court, Jerusalem and the preliminary point has been taken by Mr. Cohen, advocate for the Respondents that there is no valid appeal before this Court as the appeal was signed by one James Haddow Pirie and that the said Mr. Pirie has not got, so Mr. Cohen argues, the Attorney General's proper authority to file appeals within the strict interpretation of the Law of Procedure (Amendment) Ordinance.

It is true that section 4(1) of the said Ordinance specifically provides for appeal and that Criminal Appeal No. 18/38 * interprets the word "prosecute" in the law of Procedure (Amendment) Ordinance, to include the filing of appeals, but Mr. Cohen's argument is that the words "criminal cases" after the words "on my behalf" in the agreed exhibited Authority signed by the Attorney General limit the authority to what it says, namely, to appear in and prosecute criminal cases and that the Court must consider the warrant limited in view of the very narrow and strictly limited powers of the Attorney General on appeal in the country.

Mr. Cohen goes further by saying that this was actually the intended effect of the Authority and that the decision whether to appeal an acquittal or not was rightly not intended to be given to Mr. Pirie who was not a qualified member of the Attorney General's department. Mr. Cohen is prepared to concede that had the authority been without qualification and general in terms section 4(1) would have provided the interpretation and in the light of Criminal Appeal No. 18/38, the appeal would be in order, but he reiterates that additional and unnecessary words were added to the authority and that the Court must assume that the unnecessary words were restrictive rather than supplementary when used by the highest legal officer in the land namely the Attorney General.

Mr. Grath argued in reply most ably and put before the Court as he always does the latest case on the point at issue.

I am persuaded by Mr. Cohen's argument, however, and adopt them *in toto* and hold that the additional and unnecessary qualification used in the Attorney General's authority has the effect of strictly limiting that authority whether the intention was so or not.

For the above reasons there is no proper appeal before the Court and the appeal is struck out.

Given this 18th day of February, 1947.

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* 5, P. L. R. 183; 1938, 1 S. C. J. 156.

CIVIL APPEAL No. 28/46.

IN THE DISTRICT COURT OF TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Windham.

IN THE MATTER OF:—

Israel Cohen — APPELLANT.

v.

Ya'acob Weitman. — RESPONDENT.

Rent Restrictions — Separate Dwelling — Whether Sub-tenant or Co-tenant — Neale v. Del Soto, Cole v. Harris, Krauss v. Boyne, H. C. 28/45, C. D. C. T. A. 60/44, C. A. D. C. T. A. 27/46, C. A. D. C. Ha. 62/46.

1. A kitchen used for taking meals therein should be considered a living room.

2. Common use by subtenant of kitchen and other appurtenances with head tenant deprives flat of its character as a separate dwelling.

ANNOTATIONS: See the cases cited in the judgment and the notes thereto in S. C. D. C.; *cf.* also Kenyon *v.* Walker & Stephenson *v.* Kenyon, 1946, 2 All E. R. 595. C. A. D. C. T. A. 75/46 (Gorali, Landlord & Tenant, pp. 122—3, No. 186) and C. A. D. C. Jm. 91/46 (*ibid.*, p. 123, No. 187a).

FOR APPELLANT: Kolodny.

FOR RESPONDENT: Kobler.

JUDGMENT.

This is an appeal against a refusal by the Magistrate's Court to order the eviction of the Respondent from residential premises occupied by him. The grounds upon which eviction was sought fall under two heads. In the first place it was contended that the Respondent was not entitled to protection under the Rent Restrictions (Dwelling Houses) Ordinance, 1940, because the premises did not constitute a "dwelling house" by reason of the kitchen and other parts of the house being shared in common, certain recent English authorities being relied on. The Appellant having duly given him notice to quit, he had (it was contended) no further right to occupy the premises. The second ground for eviction was in the alternative, namely that if the premises did constitute a "dwelling house", the Respondent had forfeited his right to protection through failure to pay rent and/or certain taxes which he had agreed to pay. In his defence the Respondent denied his liability to pay the rent demanded or the taxes. With

regard to the allegation that the premises did not constitute a dwelling house, this legal conclusion was not accepted, though the common use of the kitchen was admitted in evidence. The main defence, however, as is quite clear on the pleadings, was that the Respondent was a partner of the Appellant in the flat, and not his tenant at all.

2. Now in his judgment the learned Magistrate dealt only with the question of failure to pay the rent or taxes, finding that the Appellant had not proved his case on this ground. With regard to the issue whether there was a protected or unprotected lease on the one hand or a partnership or co-tenancy in the premises on the other, he merely stated — "I do not think that it is fit to give a judgment of eviction on the ground of this cause of action", and he made no findings of fact on the issue. But it seems to me that the action can and must be decided on this issue alone. For if the parties were partners or co-tenants in the premises, then the Appellant's action had to fail, since he had no right to evict the Respondent, both of them deriving their title from a common landlord. If on the other hand the premises did not constitute a "dwelling house", then the Appellant was bound to succeed, since the Respondent was entitled to no protection once the notice to quit had been served on him, as it admittedly was served.

3. Now from the evidence and pleadings and the admissions therein it is quite clear that, if the Respondent was not the partner of the Appellant, then he was his tenant in respect of one room, together with a common use of the kitchen, bathroom and W. C. It is also clear that the parties both took meals in the kitchen. That being so, then I consider that on the authority of the English decisions in Neale *v.* Del Soto (1945) 1 All E. R. 191, Cole *v.* Harris (1945) 2 All E. R. 146, and Krauss *v.* Boyne (1946) 1 All E. R. 543, whose principles have been applied in H. C. 28/45 [1] and by this Court in Civil Case 60/44 [2] and C. A. 27/46 [3], the premises cannot be considered to have been "let as a separate dwelling" and as such to be protected by the Ordinance, since the Respondent was not entitled to the exclusive use of the kitchen, and the kitchen was a living room. It may well be that cases such as this must be decided on their merits; and it may well be that some diminutive forms of kitchen — generally styled kitchenettes — too small to be used for any purpose other than actual cooking, might on the facts be held not to be living

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[1] 12, P. L. R. 455; 1945, A. L. R. 646.

[2] 1945, S. C. D. C. 550.

[3] 1946, S. C. D. C. 510.

rooms; and to that extent I am not prepared to say that C. A. 62/46 [4] of the District Court of Haifa (where a kitchen was held not to be a living room) was wrongly decided. But on the English authorities, coupled with the fact that the kitchen in the present case was used by both parties not only for cooking but for eating in, I think it must be considered as a living room, with the result that there was no protected tenancy in, but only a sharing of, the premises, and that accordingly the Appellant must succeed in his eviction action.

4. This conclusion is, of course, based always on the assumption that there was no partnership or co-tenancy between the parties in respect of the premises; but if there was, then the eviction action must fail. On the question whether the parties were partners or co-tenants in the premises, however, there was conflicting evidence, and it is quite impossible for me to make a finding of fact on the point, where the Court below made none. There is therefore no alternative but for me to remit this case to the learned Magistrate to make a finding on this point and to give a fresh judgment accordingly. If he finds that there was no partnership or co-ownership between the Appellant and Respondent in respect of the premises, then he must give judgment for the Appellant, for the reasons I have set out. If however he finds that such was their relationship then he must give judgment for the Respondent. Costs of this appeal will follow the event; but I certify an advocate's attendance fee here of LP. 9.—.

Delivered in open Court this 25th day of April, 1947.

CIVIL APPEAL No. 5/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

Elia Mazawi. APPELLANT.

v.

Butros Sabbagh. RESPONDENT.

Landlord & tenant — "Discontinuance to pay rent".

Failure to pay rent is not of itself a ground for eviction, under the Rent

[4] 1946, S. C. D. C. 597.

Restrictions (D. H.) Ordinance. The non-payment must amount to a discontinuance. Discontinuance is a question of fact and degree.

ANNOTATIONS: *Cf.* C. A. D. C. T. A. 61/44 (1945, S. C. D. C. 742) and note, C. A. D. C. Jm. 49/45 (1946, S. C. D. C. 83) and note 2, C. A. D. C. Ha. 9/46 (*ibid.*, p. 308), C. A. D. C. Jm. 58/45 (*ibid.*, p. 400) and C. A. D. C. Ha. 185/46 (*ante*, p. 69).

FOR APPELLANT: G. Khoury.

FOR RESPONDENT: G. Mu'ammar.

JUDGMENT.

This is an appeal from the judgment of H. W. Mr. Ahmad Bey Khalil dismissing the Plaintiff's action for eviction. The action was based on the ground of failure to pay rent for two months — of July and August, which was denied.

The learned Magistrate found that at the date of filing the action 3.9.46, the rent for August was not due. As regards the rent due for July he held that there was no discontinuance of payment of rent for July though it was sent only on the 5th September.

Failure to pay rent is not of itself a ground for eviction, under the Rent Restrictions (Dwelling Houses) Ordinance. The non-payment must amount to a discontinuance. Discontinuance is a question of fact and degree.

On the facts found by the Magistrate was there a discontinuance? It is not for the Court to set aside a Magistrate's finding of fact even though this Court might as a Court of trial have come to a conclusion different to that to which the Magistrate came. The findings of fact of the lower Court must be either based on no evidence or clearly contrary to the evidence or the law wrongly applied to these facts. There was evidence in the lower Court upon which the Magistrate could find as he did if he believed that evidence. The appeal is dismissed with costs on the lower scale.

I certify advocate's attendance fee of this appeal in the sum of LP. 10.

Delivered this 27th day of February, 1947, in presence of George Eff. Khoury for Appellant and George Eff. Mu'ammar for Respondent.

CRIMINAL APPEAL No. 116/46.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Orr.

IN THE APPEAL OF:—

Hassan Khalil el Sheikh & an. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Secs. 20 & 31 *T. U. I. Ord.* — *Robbery* — *Assault* — *Sentence.*

An appeal from the Magistrate's Court of Hebron (H. W. Mr. M. Nammar), dismissed, but sentence reduced:—

1. The provisions of the T. U. I. Ord. do not govern a case where the Magistrate after the close of the prosecution's case in a preliminary enquiry before him comes to the conclusion that there is no sufficient evidence to warrant a committal for trial but instead charges and tries the accused in respect of an offence triable in the Magistrates' Courts.

2. In such a case the trial before the Magistrate proceeds on a fresh charge to be formulated after the Magistrate has dismissed the charge in respect of which he conducted the preliminary enquiry. Such fresh charge does not constitute an amendment of the earlier charge.

3. The Magistrate can formulate such fresh charge after dismissing the charge into which the preliminary enquiry was held even though there be no evidence of the offence newly charged before him at the time such new charge is preferred.

ANNOTATIONS: As regards the last point note that sec. 20 of the T. U. I. Ord. requires that "... it shall appear to the magistrate holding a preliminary enquiry that the evidence ... discloses an offence which is a misdemeanour ...".

FOR APPELLANTS: Jad.

FOR RESPONDENT: Khalaf.

JUDGMENT.

The accused appeals against the conviction and sentence.

It would appear from the notice of appeal that it was drafted on false premises as the grounds relate to an amendment of a charge, whereas the Appellants were convicted on their pleas of guilty to a new charge made against them after an earlier charge of a felony had been dismissed under section 20 of the Criminal Procedure (Trial Upon Information) Ordinance.

Mr. Jad, who appeared for the accused, attempted to argue the appeal under section 31 of the Criminal Procedure (Trial Upon Information)

Ordinance by alleging that an error of procedure by the Court contrary to section 31 of the Criminal Procedure (Trial Upon Information) Ordinance had been committed. I pointed out to Mr. Jad that this section is not applicable, as it comes into operation only when the accused has been committed for trial and an information has been filed in the Court of Assize or the District Court. In this case the accused were charged with robbery contrary to section 287 of the Criminal Code Ordinance and at the close of the evidence for the prosecution at the Preliminary Inquiry, the Magistrate came to the conclusion that there was not sufficient evidence upon which to commit the accused for trial and he dismissed the charge under section 20 of the Criminal Procedure (Trial Upon Information) Ordinance and then charged the accused with assault contrary to section 250 of the Criminal Code Ordinance.

Mr. Jad raised a somewhat unusual point by saying that the Magistrate could not charge the accused with an offence under section 250 of the Criminal Code Ordinance if there was no evidence of an offence under that section. I pointed out to Mr. Jad that it is for the Magistrate to decide this in giving judgment and not when he charges the accused but as the accused pleaded guilty to the new charge the Magistrate did not have to consider any evidence. Had the accused pleaded not guilty it would be open to Mr. Jad to attack the conviction in this Court.

Apart from this, however, I am quite satisfied that the Magistrate had before him sufficient evidence of the assault to justify his charging the accused and I am quite certain that the accused understood quite well what they were charged with. The accused were sentenced to three months' imprisonment.

As the accused had no previous convictions and as it seems the assault was not a severe one, I think the three months for the first offence of this nature is on the severe side. I propose to reduce it to one of one month's imprisonment. The sentence will date from the 12th December, 1946, *i. e.* the date of conviction and the accused will therefore be required to serve the balance of one month, if they have already served 15 days before they were released on bail.

Delivered this 20th day of January, 1947.

CIVIL APPEAL No. 159/46.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Hill.

IN THE APPEAL OF:—

David Gruenblatt & an. — APPELLANTS.

v.

The Custodian of Enemy Property. — RESPONDENT.

Landlord & Tenant — Statutory tenant parting with possession of leased property.

A person ceases to be a statutory tenant upon giving up occupation of the premises.

ANNOTATIONS: On the position of non-occupying tenants see C. A. D. C. Ha. 35/46 (1946, S. C. D. C. 408) and note 2.

FOR APPELLANT: Argaman.
FOR RESPONDENT: Shaal.

JUDGMENT.

This is an appeal from the judgment of the Magistrate's Court, Haifa, on 4.10.46, by which the Appellants were ordered to give up possession of a flat at No. 17 Sokolov Street, Haifa.

There are several grounds of appeal and at the hearing they were argued at some length, but very obviously the first question to be considered is that of the status of Heinz Lazar through whom the Appellants claim their right to occupy the flat.

The learned Magistrate held that at the very moment Lazar caused the Appellants to move in he ceased to be a statutory tenant and that accordingly the Appellants occupation was without any legal validity.

It appears that on the death of his father Lazar was recognised by the Respondent as a statutory tenant. The Respondent wrote to Lazar's advocate as follows:—

> "Your client has been considered by me as a statutory tenant provided he lives there permanently."

Though he expressed doubt whether Lazar could be considered a statutory tenant on the strength of the landlord's admission, the learned Magistrate did not attempt to decide this point but preferred to presume that Lazar was a statutory tenant. I think it is unfortunate that the learned Magistrate came to this presumption for I consider it was and is essential in this matter for this question to be decided.

The object of the Rent Restrictions (Dwelling Houses) Ordinance is to protect the dweller or occupier of a dwelling house from eviction. Such a person claiming to be a statutory tenant and as such the protection of the Ordinance must have complied with the terms of his tenancy or of his lease with the landlord and with the law.

Lazar's conduct must be examined in this light. It seems quite clear from the evidence that Lazar's use and occupation of the flat in question was spasmodic and irregular. He had another house of his own and did not reside and live in this flat permanently. It was on condition of permanent residence that the Respondent considers Lazar as a statutory tenant. In my opinion from the moment Lazar failed to comply with this condition he ceased to be a statutory tenant, if indeed he ever became one, and he cannot be regarded as a person entitled to the protection of the Ordinance.

It follows therefore, that the Appellants claiming through him are mere trespassers and I concur with the decision of the Court below.

There remains only one point to which I need refer and that is whether the Respondent was the proper person to bring the action before the Magistrate's Court. As no one else was in either actual or constructive possession of the flat at that time I consider that the action was properly brought by the Respondent.

I therefore dismiss the appeal with costs to the Respondent and an advocate's attendance fee of LP. 10.

Delivered on the 19th day of February, 1947, in presence of the advocates for both parties.

CIVIL CASE No. 187/46.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

The Palestine Land Development Co. Ltd. PLAINTIFFS.

v.

Toba Yalonetsky & an. RESPONDENTS.

Assignment of Debt — Judgment debt not assignable — Nature of transaction between parties — C. A. 135/33 — Mustafa v. Ismail (Cyprus).

1. A debt need only arise out of the trade or business of the assignor and

not necessarily in the course of trade and business as between the assignor and the debtor.

2. The commercial transaction referred to in section 3 of the Debt Assignments Ordinance must be one between the assignor and the debtor and not between the assignor and the assignee in order to effect a valid assignment of debt.

3. The law regulating the assignment of debts in Palestine is the 4th Book of the *Mejelle* and the Moslem law on which the *Mejelle* is based does not recognise the assignment of a debt or claim from a creditor to another person.

4. A judgment debt under the *Mejelle* is not transferable.

5. Nowhere in the Debt Assignment Ordinance is a judgment debt made subject capable of an assignment.

ANNOTATIONS:

1. Note that "the provisions of the Judicature Act, 1873, ... did not create any new rights .... The statutes have not made assignable contracts which were not assignable before": Halsbury, Vol. 4, pp. 427—8. Judgment debts are — as pointed out in the judgment — choses in action (*l. c.*, p. 421) and "from the earliest times Courts of equity have always permitted and given effect to assignments of all kinds of choses in action ..." (*ibid.*, p. 437).

2. Note also that a judgment debt "is the highest of all debts": Stroud's Judicial Dictionary, Vol. I, p. 471, para. 3.

3. On the recognition of equitable assignments in Palestine see C. A. D. C. Jm. 67/45 (1946, S. C. D. C. 396) and cases cited in note 6 thereto; *vide* also L. C. Ha. 46/46 (*ibid.*, p. 638, *sub* title C. C.).

FOR PLAINTIFFS: A. Liphshitz.

FOR RESPONDENTS: No. 1 — Weintraub.
No. 2 — Absent.

JUDGMENT.

In this action the Plaintiffs are suing for a judgment declaring that they are the owners of the legal rights to and the benefits of a decretal debt lodged in the Execution Department of Haifa and which has been vested legally in them and has passed to them since the 28th June, 1945, by virtue of a "Deed of assignment" executed in Plaintiffs' favour by one Mordecay Elkayam whereby he transferred all his rights in the judgment debt due to him from one Khalil Shehadeh Jabbour now being executed in the Execution Office under File No. 1978/35.

The Plaintiffs have produced through his witness the document P/1 which is the "Deed of assignment" referred to in para. 7 of the statement of claim and also the Notice P/2 referred to in para. 8 of the statement of claim. The existence of these two documents is not denied by the Defendants. But the first Defendant argues that as there is no proof of a debt that has arisen in the course of trade or business between

the Plaintiffs and the judgment creditor Elkayam, there is no valid assignment under the Debts Assignments Ordinance, Drayton Cap. 47.

The Plaintiffs replied to this argument by citing C. A. 135/33 *, 2 P. L. R. 110, where it was clearly held by the Supreme Court that the debt need only arise out of the trade or business of the assignor and not necessarily in the course of trade and business as between the assignor and the debtor.

In my opinion the commercial transaction referred to in section 3 of the Ordinance must be one between the assignor and the debtor and not between the assignor and the assignee in order to effect a valid assignment of debt.

The second Defendant denies that there is any valid assignment in this case giving rise to any cause of action. The law regulating the assignment of debts in Palestine is the 4th Book of the *Mejelle* and the Moslem law on which the *Mejelle* is based does not recognise the assignment of a debt or claim from a creditor to another person. See Mustafa *v.* Ismail, VIII. Cyprus Law Reports, 125. Furthermore, under the *Mejelle*, the person who must effect the assignment under the *Mejelle* is the debtor and the consent of the debtor, the creditor and the transferee are all necessary. Again, under section 687 of the *Mejelle* a debt that is capable of being guaranteed may be transferred and no other debt. Therefore, a judgment debt under the *Mejelle* is not transferable.

In addition to the *Mejelle* the only other law regulating assignments is the Debt Assignment Ordinance, Drayton Cap. 47, which does not speak of judgment debts. Judgment debts in English Law are choses in action and in Common Law, were not assignable until the passing of the Judicature Act; this Act has not been brought into force in Palestine and, therefore, unless there is express provision in an Ordinance in force in Palestine only such debts may be transferred as are stipulated in the *Mejelle* and the Ordinance. Nowhere in the Debt Assignments Ordinance is a judgment debt made subject capable of an assignment. In such a case as this where the debt has been merged in the judgment the judgment debtor is entitled to look to one person and one person only and that person is the judgment creditor, for he may be able to come to terms with the judgment creditor in the Execution Department, but a person standing in the shoes of the creditor may exact from the debtor the last pound of flesh contained in the judgment without mercy.

Furthermore, if this, my view of the law of Palestine is not correct, there is nothing in the pleadings or the evidence before me that this

* 2, C. of J. 708.

assignment if indeed it was such, is in the course of the trade or business of the Plaintiff in this action and there is absolutely no evidence that it arose in the course of trade or business of the person making it (Elkayam).

For the above reasons the judgment of the lower Court is quashed and the action dismissed with costs on the lower scale and fees of the advocate for the first Respondent in the sum of LP. 10.

Delivered this 17th day of February, 1947, in presence of A. Liphshitz for Plaintiffs and of Dr. Weintraub for first Respondent and in absence of the second Respondent.

PROBATE CASE No. 25/47.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour the President Judge Weldon.

In the matter of the Succession of Frantisek Adler, Deceased.

Marie Herlitz. PETITIONER.

v.

Hans Adler. OPPOSER.

Succession — Proof of death.

1. A seal of the Court is either an impressed seal or a seal of wax fixed by ribbon to the judgment and stating on the judgment that it is sealed with the seal of the Court. Only such seal may be taken notice of by the Court.

2. Evidence as to death must be led in a Court in this country by witnesses and it is a matter of fact and not of presumption excepting the presumption that may arise from absence of seven years of a person unheard of during that period.

ANNOTATIONS:

1. Sec. 7 of the Evidence Act, 1851, is set out in Drayton, Vol. III, p. 2513.

2. On "certified" and "examined" copies of instruments see C. D. C. Ha. 179/45 (1946, S. C. D. C. 73) (upheld on this point in C. A. 51/46 — 1946, A. L. R. 819) and note.

3. Compare on the second point Pr. D. C. T. A. 179/46 (1946, S. C. D. C. 643) and Cohn, *re* Public Trustee *v.* Cohn, 1945, Ch. 5, 114 L. J. (Ch.) 97, 171 L. T. 377.

FOR PETITIONER: Freund.

FOR OPPOSER: Reuss.

JUDGMENT.

This is an application for the issue of an order of succession in respect of one Frantisek Adler, Pilzen, Czechoslovakia. In order to establish the death of the said person Dr. Freund for the Petitioner has filed what he states to be a certified copy of an order by the Magistrate's Court of Pilzen, Czechoslovakia, declaring the death of Mr. Frantisek Adler. This document is referred to in the affidavit of Dr. Goldsmidt with a sworn translation thereto. Dr. Reuss has opposed the issue of the order on two grounds — firstly that this document cannot be received in evidence in its present state as it is not an examined copy, nor is it a copy authenticated in the manner prescribed in the Evidence Act of 1851 (14 and 15 Vic. Cap. 99) section 7. This is not, he says, authenticated by the seal of the Court, it is merely a document on which a rubber stamp has been put and states it is a certified copy of the judgment. Secondly his objection is that even if this were an admissible document it does not prove the death of this person. Under section 23 of the Succession Rules, the Petitioner is required to prove the facts stated in the petition by evidence on oath of the Petitioner and witnesses and by a *Mazbata*. The death of the person in question must be proved by proper evidence; the method of proof is by the law of the country in which the Court is situated from whom it is sought to issue an order, that is to say, in Palestine, the death must be proved by witnesses or it may be presumed under the presumption that arises in English law, upon absence of seven years or more unheard from of a missing person. The presumption that is raised under the Czechoslovakian law by this document assuming it to be admissible, is not a presumption that will satisfy a Court in Palestine as evidence of death. Therefore, he argues, this Court cannot grant the order sought.

Upon considering these arguments I am of opinion that the objections are well founded. It is clear that the document before me is not an examined copy; section 7 of the Evidence Act requires such a document if not an examined copy to be authenticated by the seal of the Court. In my opinion, there is no seal of the Court upon this document — it is merely a rubber stamp and a seal of the Court, in my opinion is either an impressed seal or must be a seal of wax fixed by ribbon to the judgment and stating on the judgment that "it is sealed with the seal of the Court" whereupon judicial notice may be taken of that fact. I also agree with Dr. Reuss' objection that even if this document were admissible the presumption raised therein as to death is not sufficient to satisfy a Palestinian Court. Evidence as to death must be led in a Court in this country by witnesses and it is a matter of fact

and not of presumption excepting the presumption that may arise from absence of seven years of a person unheard of during that period.

For the above reasons I am not satisfied that the Petitioner has adduced sufficient proof of death and therefore, the order sought must be refused. I award opposer inclusive costs of LP. 10.

Given this 28th day of February, 1947, in presence of Dr. Freund for the Petitioner and of Dr. Reuss for the opposer.

CIVIL APPEAL No. 190/45.

IN THE DISTRICT COURT OF TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Windham.

IN THE APPEAL OF:—

I. Grin. APPELLANT.

v.

A. Malberg & an. RESPONDENTS.

Rent Restrictions — Nuisance and annoyance — Standard Rent — C. A. D. C., T. A. 90/46 — C. A. D. C., T. A. 61/44.

Appeal from the judgment of the Magistrate's Court, Tel Aviv (H. W. Mr. Cukierman), in file No. 54/44, dated 12.10.45, dismissed:—

1. Nuisance and annoyance within meaning of the Rent Restrictions Ordinances must be affecting adjoining or neighbouring occupiers.

2. Mutual quarrels and recriminations between landlord and tenant do not constitute nuisance or annoyance.

3. Nuisance and annoyance may serve as ground of eviction only if Court considers it reasonable in the circumstances to order eviction.

4. Standard rent is rent paid at the time material in law for a separate tenancy, not a proportionate amount of the rent paid for larger premises of which the tenancy in question forms part.

ANNOTATIONS:

1. On the first point see C. A. D. C. Ha. 37/44 (1944, S. C. D. C. 405), followed in C. A. D. C. Jm. 49/45 (1946, S. C. D. C. 83).

2. On the second point *vide* C. A. D. C. T. A. 127/44 (1944, S. C. D. C. 285).

3. See, on the fourth point, note 2 to the case referred to (1946, S. C. D. C., at p. 744).

4. On "discontinuance" to pay rent see C. A. D. C. Ha. 5/47 (*ante*, p. 86).

FOR APPELLANT: Tory.

FOR RESPONDENT: Lustig.

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OF THE

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WITH ANNOTATIONS

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JUDGMENT.

This is an appeal against a dismissal of an eviction action brought by the Appellant against the Respondents in respect of one room, constituting a "dwelling house", together with half a kitchen and the use of appurtenances. I would remark at the outset that it was not argued before me or below that the leased premises did not constitute a "dwelling house" by reason of the Respondents' not having the use of the whole of the kitchen. The eviction was sought on two grounds; first, waste and/or conduct amounting to a nuisance or annoyance on the Respondents' part, under section 8(1)(a) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940; secondly, non-payment of standard rent. The learned Magistrate dismissed the claim on both grounds.

2. With regard to the first ground, the learned Magistrate's refusal to order eviction must be upheld. In the first place, there was no evidence at all that any conduct on the Respondents' part amounted to a nuisance or annoyance *to adjoining or neighbouring occupiers,* as required by section 8(1)(a). Secondly, the Magistrate, finding upon ample evidence that the Appellant and Respondents had been indulging in mutual quarrels and recriminations (as is all too frequent an occurrence between landlord and tenant in these days) stated in his judgment that he did not in the circumstances consider it reasonable to order eviction and thereby to penalize only one side. In this he was quite justified. Section 8(1)(a) requires not only that waste, or nuisance or annoyance to neighbours, be proved, but also that the Court shall in the circumstances consider it reasonable to order eviction. Here the Court on good grounds did not consider it reasonable. This ground of appeal therefore fails.

3. With regard to the contention that the learned Magistrate erred in not ordering eviction on the ground of non-payment of the standard rent, this contention must also fail for two reasons. First, while there was evidence adduced for the Appellant upon which the Court might have held that the standard rent had been shown to be LP. 1.750 per month, — namely that a former lessee of the premises had been paying that figure on 1st April, 1940, the learned Magistrate made it clear in his judgment that he preferred to accept the evidence of that former lessee himself, one Pinchas Zimmer. This evidence was that on 1st April, 1940, the witness and another man (by the name of Blof) were renting the above premises in common, together with another living room, and that the rent payable for the whole was something between LP. 3.— and LP. 3.750 per month. Even taking the figure at LP. 3.500, the fact that LP. 3.500 was the standard rent for premises consisting

of two living rooms plus appurtenances does not fix the standard rent of one of those rooms plus appurtenances at half that figure, namely LP. 1.750 per month. There was no evidence that the two rooms were of equal size or suitability for living in. And although this witness stated that he used to pay the Appellant his proportion of the rent seperately, there was no evidence as to what that proportion was. And even if there had been, there still remained only one tenancy on 1st April, 1940, namely in respect of two living rooms plus appurtenances, and one standard rent in respect of that tenancy. There was on 1st April, 1940, no separate tenancy in respect of one living room plus appurtenances, and thus no standard rent therefor. Upon the Respondents' later becoming tenants of the one room only, the standard rent for it could only be fixed at LP. 1.750 or any other figure by application to the Rents Tribunal under section 5(2) or (3) of the Rent Restrictions (Dwelling Houses) Ordinance,1940. In this connection I would refer to the observations of my brother Cheshin, J., in paragraph 6 of his judgment in C. A. 90/46 [1] of this Court, with which I concur.

4. The Respondents were therefore justified in not paying to the Appellant a monthly rent of LP. 1.750 when he demanded that figure as the standard rent, and in continuing to tender the rent which they had been paying theretofore, namely LP. 1.550 per month. Nor did the Respondents ever agree to pay the figure of LP. 1.750 per month.

5. Secondly, it is to be noted that the LP. 1.750 was first demanded by the Appellant in January, 1943. The Respondents refused to pay it and continued to tender LP. 1.550 per month, which was refused. Nevertheless in May, 1943, they started paying (under protest) the monthly sum of LP. 1.750 into a bank, informing the Appellant of what they were doing. But it was not until February, 1944, that the eviction action was lodged. I would not be disposed to hold, where the learned Magistrate did not hold, that this amounted to a discontinuance, even if LP. 1.750 had been proved to be the standard rent. In this connection I would refer to the general observations in paragraph 6 of the judgment of this Court in C. A. 61/44 [2].

6. On the above grounds, and without deeming it necessary to consider the further defences raised, I dismiss the appeal with costs, to include an advocate's attendance fee of LP. 5.—.

Delivered this 25th day of April, 1947.

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[1] 1946, S. C. D. C. 743; 1946, *"Hamishpat"* 253.
[2] 1945, S. C. D. C. 742.

CRIMINAL APPEAL No. 115/46.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour A/R/President Judge Dickinson.

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

Haj Ismail Ja'ra el Dweik. — RESPONDENT.

Appeal against sentence — Wrong conviction — Town planning — Accused not testifying.

An appeal from the Magistrate's Court of Hebron (H. W. Mr. R. Halazoun), delivered on the 18.11.1946 in Criminal Case 554/46, dismissed:—

1. By the proviso to sec. 35 of the Town Planning Ord. it is the duty of the Court following a conviction for building without a permit to order demolition unless good cause to the contrary is shown.

2. If an appellate Court on an appeal against sentence brought by the Attorney General comes to the conclusion that the Respondent was wrongly convicted without having appealed against conviction it may, following CR. A. 101/46, refuse to increase the sentence even though it may have been the duty in law of the trial Court to impose a more severe sentence.

3. *Obiter*: Following CR. A. 20/46 a conviction will be quashed on appeal if it appears that counsel for the prosecution did in his final address to the trial Court refer to the fact that the accused had not given evidence.

ANNOTATIONS:

1. On the first point *vide* CR. A. D. C. T. A. 122/46 (*ante*, p. 57) and note 5.

2. On the second point see the case cited and *cf.* CR. L. A. D. C. Ha. 142/46 (1946, S. C. D. C. 832) and note 2.

3. On the last point see the note in 1946, A. L. R. 187 to the case cited.

FOR APPELLANT: N. Sha'ar.

FOR RESPONDENT: Perlmutter.

JUDGMENT.

This is an appeal by the Attorney General against the sentence imposed by the learned Magistrate of Hebron on the Respondents in Criminal Case No. 554/46 in which the learned Magistrate convicted the Respondent of erecting 8 stores within the Town Planning area of Hebron without obtaining a licence, and the conviction itself was not appealed against by the Respondent.

I have listened to long and careful arguments by both Najib Eff. Abu Sha'ar for the Attorney General and Mr. Perlmutter for the

Respondent, and the first thing that is clear to me is that had there been an appeal against the conviction it must have succeeded. I need only mention one ground although I think it is probable it would have succeeded on two. The one ground is that counsel for the prosecution in his final address to the trial Court referred to the fact that the accused had not given evidence. This is fatal to a conviction as is shown by Criminal Appeal No. 20 of 1946 *, P. L. R., 1946, p. 59. The Attorney General asks me now to order the demolition of the building under section 35 of the Town Planning Ordinance, an order which the learned Magistrate refused to make. The wording of the proviso to section 35(1)(2) is, I think, mandatory and it is the duty of the Court upon conviction for building without a permit to order demolition unless good cause to the contrary is shown. Mr. Perlmutter has asked me to say that no opportunity for showing good cause has been given to the accused and that if I were to contemplate ordering demolition, I should remit the case to the learned Magistrate to give the accused such an opportunity. I cannot, however, agree with him on that request because it seems to me that in this case the accused not only had an opportunity to show cause but exercised it.

Accordingly it would appear in normal circumstances the duty of this Court to order demolition. But it would seem to me contrary to all principles of justice to impose a punishment far heavier than that already imposed on a man whom I consider to have been wrongly convicted, and I prefer to follow the principles underlying the judgment in Criminal Appeal No. 101/46, A. L. R. 1946, p. 636. I am therefore not prepared to increase this sentence either by way of an order of demolition or otherwise.

It has been suggested that I might reduce the penalty already imposed, but since the accused did not see fit to appeal against that sentence I see no reason to interfere with it.

The appeal of the Attorney General is therefore dismissed and the sentence imposed by the learned Magistrate is confirmed.

Delivered this 26th day of February, 1947.

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* 1946, A. L. R. 186.

LAND CASE No. 28/45.

IN THE LAND COURT OF JERUSALEM.

BEFORE: Their Honours Judge Bardaky and A/Judge Khoury.

IN THE CASE OF:—

Ghuneimeh bint Ayadeh Silmi Abu Idwis, on behalf of the estate of her late husband Salameh Eide Abu Idwis. PLAINTIFF.

v.

Salhah bint Salameh Subh el Arjah on behalf of the estate of her late husband Odeh Ben Sweilem Abu Areid. DEFENDANT.

Joinder & Substitution of parties — Representative capacity of Defendant — Rules 67(2) & 73 *C. P. R.* 1938.

An application to substitute another defendant for the one cited in the original claim, granted:—

1. The primary object of Rule 67 of the C. P. R., 1938, is to enable the addition of Defendants and not the complete substitution of one defendant for another.

2. In the case of a defendant being, however, sued as an heir, *i. e.* in a representative capacity and on behalf of an estate, the Court may, upon it subsequently transpiring that such defendant is not in fact an heir, permit the substitution of other defendants who are heirs for him.

ANNOTATIONS: *Cf.* Mo. L. C. Ha. 135/45 (1946, S. C. D. C. 463) and C. D. C. Ja. 46/46 (*ibid.*, p. 697) and note 1 to the last mentioned case.

FOR PLAINTIFF: Nazzal.

FOR DEFENDANT: Budeiri.

ORDER.

We are alive to the fact that the object of Rule 67(2) of the Civil Procedure Rules, 1938, relied upon by Counsel for Plaintiff, which is the equivalent to Order 16, Rule 11 of the English Rules of the Supreme Court, 1883, is, in the words of Lord Esher, in Montgomery *v.* Foy *, "To bring all parties to disputes relating to one subject-matter before the Court at the same time so that the disputes may be all determined without the delay, inconvenience, and expense of separate actions and trials". The obvious object of this rule would thus appear to be the addition of a defendant or defendants and not the complete substitution of one for the other.

* 1895, 2 Q. B. 321.

The circumstances of this case, however, appear to be somehow of a special nature. This action is brought against the estate of a deceased person, namely, the late Odeh Sweilem Abu Areid, and the defendant Salha is cited in a representative — and not in a personal capacity, as wife of the said deceased and consequently an heir representing the estate.

It appears from the certificate of succession produced by the Defendant, which was accepted and relied upon by the Plaintiff, that, at the time of the death of the said Odeh Sweilim, the present defendant Salha was no longer — if she ever had been — the wife and heir of the deceased. The reasonable inference adduced by counsel for Plaintiff is therefore that the deceased might have divorced Salha a few weeks before his death, without causing such divorce to be made publicly known or recorded in the Registry of the *Sharia* Court, as often happens among the Beduins of the Beersheba District.

That being the case; and, by analogy with the English case of Indigo Co. *v.* Ogilvy (1891 2 Ch. 31, C. A.), where in an action, against a firm, some of the partners in which were abroad leave to amend by substituting the names of the individual partners was given; and, having regard to Rule 73 of the Civil Procedure Rules, 1938, we order that the name of the present defendant Salha Salameh Subhi El Arja, be struck out, and the name of Salameh Ibn Sweilim Ibn Odeh Abu Areid be substituted therefore in his capacity as brother and heir of Odeh Ibn Sweieim Ibn Odeh Abu Areid.

The statement of claim shall be amended accordingly, and amended copies of the summons and of the Statement of Claim shall be filed for service on the new Defendant, within one month from today.

We allow the defendant Salha an inclusive sum of LP. 10, for costs and advocate's attendance fee.

Given this 12th day of March, 1947, in presence of Fayez Eff. Nazzal for Plaintiff, and Hassan Eff. Budeiri for Defendant.

CRIMINAL APPEAL No. 114/46.

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour A/R/President Judge Morgan.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Abraham Pavowicz. RESPONDENT.

A. G.'s right of appeal — Question of law — "Judgment" — Charge-sheet — CR. A. 31/38 — Facts — Sec. 11(3) M. C. J. O.

An appeal from the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levi), delivered on the 19.11.1946 in Cr. C. 9866/46, dismissed:—

1. Following CR. A. 31/38 a decision quashing a charge-sheet amounts to a "judgment" for the purpose of ascertaining the Attorney-General's right of appeal in a criminal case under the M. C. J. O., 1939.

2. The A. G. has no right to appeal from a decision of a Magistrate quashing a charge-sheet on the ground that the section of the law a contravention of which was averred in the charge-sheet does not create an offence.

3. Such a decision is not a wrong application of the law to the facts within the meaning of sec. 11(3)(b) of the M. C. J. O. as unlike in Cr. A. 31/38 no facts whatsoever are involved.

ANNOTATIONS: The following authorities should be compared: CR. A. D. C. Jm. 15/46 (1946, S. C. D. C. 455), CR. A. 27/46 (13, P. L. R. 131; 1946, A. L. R. 259), CR. A. 44/46 (*ibid.*, pp. 292 & 415) and CR. A. 107/46 (*ibid.*, pp. 504 & 671) with notes in S. C. D. C. & A. L. R.

FOR APPELLANT: Salant.

FOR RESPONDENT: S. T. Cohen.

RULING.

This is an appeal from the order of the Magistrate in Criminal Case No. 9866/46 of the Magistrate's Court of Jerusalem, wherein he quashed the charge sheet and discharged the accused.

The Magistrate decided that the rule under which the accused had been charged was not in his opinion a penal law.

In coming to this decision, although I have not heard argument on the point, I consider that the Magistrate was entirely wrong. The reason why I have not heard argument on the point is that preliminary objection has been raised by Mr. Cohen who appeared for the Respondent to the effect that the Attorney General has no right of appeal in the present case.

Mr. Cohen argues that the Attorney General's rights of appeal against a judgment of a Magistrate to this Court are limited to three instances namely: (1) inadequacy of sentence, (2) wrongful admission or exclusion of evidence, (3) misapplication of law to facts.

Mr. Cohen argues: (a) that the quashing of a charge sheet and discharging of an accused do not constitute a "judgment" within the meaning of the Ordinance, and (b) that a decision as to whether a charge sheet is good or bad does not fall within any one of the three instances where appeal by the Attorney General is permissible and

especially so in the present case where the Magistrate decided that there was no penal law.

Mr. Salant for the Appellant has referred me on point (a) to Criminal Appeal 31/38 * and it is clear that whether I agree with that decision or not I am bound by it. As to (b) Mr. Salant again relies on Cr. A. 31/38 as having in effect decided that the word "facts" where used in the third provision of appeal in the Ordinance is wide in meaning and can include facts alleged in the charge sheet or existing for such purposes as deciding jurisdiction *etc.*

For my own part I cannot agree with this proposition and would say without hesitation that this is much too wide a meaning to give to the word "facts" in a limiting provision of an Ordinance but I am of course bound by Criminal Appeal 31/38 and therefore I must see if the present case can be distinguished from that case or otherwise.

I am of the opinion that in the present case the Magistrate merely interpreted the validity or otherwise of a traffic rule and never applied his mind to any facts whatsoever.

It was a sheer interpretation of statute and nothing more and therefore although I disagree most heartily with his interpretation, I have no power to vary it because the Attorney General has no right to appeal from it.

The appeal is therefore struck out as it does not lie.

Delivered this 12th day of February, 1947.

MOTION No. 25/47.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour Judge Nasr.

IN THE APPEAL OF:—

Nakhoul & an. APPLICANTS.

v.

Joubran & an. RESPONDENTS.

Practice — Civil Procedure — Service — C. A. D. C. Ja. 137/45 — *Wright v. Clifford.*

1. The object of service is to bring the fact of the Plaintiff's action to the notice of the Defendant; and any method other than that of personal service is only allowed on the assumption that it is one by which the action

* 5, P. L. R. 206; 1938, 1 S. C. J. 177.

will actually be brought to his notice. Where it is proved that he has in fact received no notice, then he is entitled to come in and defend.

2. Where the decree is of such a nature that it cannot be set aside against one party only, it may be set aside against all or any of the other parties also.

3. Belief that pending negotiations will result in an amicable settlement is sufficient excuse for delay in applying for extension.

ANNOTATIONS:

1. On the first point see note 2 to C. A. D. C. Ja. 137/45 (1946, S. C. D. C. at p. 582).

2. *Cf.*, as to the second point, C. A. 246/42 (9, P. L. R. 799; 1942, S. C. J. 865).

3. *Vide* Mo. L. C. Jm. 296/46 (*ante*, p. 31) and note 1 thereto.

FOR APPLICANTS: Asfour.

FOR RESPONDENTS: Mu'ammar.

JUDGMENT.

This is an application to set aside a judgment in default given on 20.12.46. There are two grounds put forward. (1) First applicant Yousef was not properly served with the summons. Second Applicant, first Applicant's sister, being a nun could not without special permission leave the convent to attend to the case.

(2) There is a good defence to the action.

On the first ground there can be no doubt on the affidavit put in by the first Applicant and on what he stated in cross examination that the documents left on the door of the room he occasionally occupies at Haifa in Garden Street never reached him. The first time he said he had notice of the case was months after it was filed when his sister the second Applicant delivered to him the documents she had received. On the day he received these documents he proceeded to say, he went to Mr. Muammar's office, advocate of the Respondents, who promised to bring the parties to a settlement. No action was thereafter taken by him in the hope that the matter would be settled and it was a surprise to him when he heard that judgment in default had been obtained against him and against his sister.

Now as stated in the judgment in Motion 474/45 C. A. D. C. Jaffa 137/45 S. C. D. C. 1946, p. 581, the object of service is to bring the fact of the Plaintiff's action to the notice of the Defendant, and any method other than that of personal service is only allowed on the assumption that it is one by which the action will actually be brought to his notice. Where it is proved that he has in fact received no notice

then he is entitled to come in and defend. On the evidence of the first Applicant which has in no way been challenged, I am satisfied that the documents affixed by the process server on the outside door of his room had not reached him.

It is argued for the Respondents that first Applicant having on his own admission received from his sister the documents served on her, should have taken steps to apply for extension of time within which to enter appearance and file a defence. In answer to that argument the first Applicant stated in evidence that he did not follow that course because he was under the belief that a settlement would be concluded. This answer seems to me quite satisfactory. The case of Wright *v.* Clifford referred to in the Annual Practice, 1944, p. 642, para. 457 seems to be identical on this point with this case. In that case the fact that Plaintiff's solicitor was under the belief that the negotiations which were pending would result in a settlement and for that reason deferred instructing counsel, was found to be a sufficient ground for restoring the case.

Coming now to the second ground it seems to me on the evidence of the first Applicant that he has a defence to put forward. The issue in controversy between the parties appears to me to be this: The Respondents claim that their ancestor bought properties for the Applicants from his own personal monies for the amount claimed and that this amount has since become a debt owning from them. The Applicants deny this debt and claim that the price of the land bought was defrayed from monies which Respondents' ancestor collected for the Applicants in the course of his management of their property. This issue is, in my opinion one which should be tried before judgment is passed.

A further point was raised by the Respondents' counsel and this is that no case of improper service was established against Sister Vincent, second Applicant, and that if the judgment should be set aside as regards first Applicant, it should be allowed to stand against second Applicant. Rule 213 of the Civil Procedure Rules, is clear on this point. Where the decree is of such a nature that it cannot be set aside against one party only it may be set aside against all or any of the other parties also. The debt, the subject matter of the decree is one and the same. In the event first Applicant succeeds in destroying Respondents' claim it necessarily follows that the claim against second Applicant falls.

For all these reasons the judgment in default against both Applicants dated 20.12.46 is set aside. Applicants are given leave to defend the action. Statement of defence is directed to be filed within fifteen days from this day.

The costs of this application inclusive of LP. 5 advocate's attendance fee at this hearing will abide the result.

Delivered this 17th day of February, 1947, in presence of Mr. Asfour for Applicants and Yousef Eff. Hindi, clerk for M. Mu'ammar for Respondents.

CIVIL APPEAL No. 3/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

Mariam Mahfouz. APPELLANT.

v.

Bahjat El Issa & ors. RESPONDENTS.

Landlord & tenant — Tenancy by conduct — Divorced wife becoming tenant by payments of rent — Mejelle Art. 438 — *C. A.* 436/44 — *Brown v. Draper.*

1. Acceptance by landlord of postal money orders in respect of rent over a long period, from a person who is a mere licensee, creates a tenancy in law.
2. Tenants by oral or written leases are protected by R. R. Ordinances.

ANNOTATIONS:

1. *Cf.* C. A. D. C. Ha. 35/46 (1946, S. C. D. C. 408) and notes 3 & 4 thereto.
2. *Vide* Gorali, Law of Landlord & Tenant in Palestine, pp. 152 *et seq.*, Nos. 289 *et seq.*

FOR APPELLANT: Salah Shamma.

FOR RESPONDENTS: Slonim.

JUDGMENT.

This is an appeal from the judgment of H. W. Mr. Ahmad Bey Khalil one of the Magistrates of Haifa.

Appellant's wife was divorced from her husband in 1944. Since then the wife sent postal orders regularly for two years to the first and second Respondents who did not refuse them, but kept them with them.

In 1945, the first and second Respondents lodged an action for eviction against the husband and the husband appeared and said he had already vacated the flat long previously and was living elsewhere. Judgment was given against the husband on 1st February, 1946. All

this time the Appellant continued to send rent. When eviction was sought to be executed against the Appellant she brought an action under Rule 285 of the Magistrates' Courts Procedure Rules praying to set aside the judgment in so far as she was concerned.

The learned Magistrate found there was no collusion as alleged but that she was not a statutory tenant as there was no previous contract between Appellant and first and second Respondents.

The Appellant has sought to argue firstly that the Appellant as licensee of her husband continued to pay rent and was protected by the Rent Restrictions Ordinance and relied on Brown *v.* Draper, 1944 1 A. E. L. R. 246; but the husband had vacated the premises and was no longer occupying them, therefore the Appellant was not his licensee and so protected as his licensee if he did allow her to reside in the premises as he was no longer himself in occupation and the Appellant could not thus be protected as licensee.

The question remains to be decided — was the Appellant a statutory tenant? In order to be such there must be some tenancy relations created between the Appellant and the first and second Respondents. Were there such tenancy relations created in this case? It is clear from the Appellant's evidence that she sent the postal orders continuously to the first and second Respondents who admitted receiving them and admitted they did not return them but kept them even after the present action was filed. I do not agree with the learned Magistrate when he says there must be some written or previous contract that had expired in order that the tenant may become a statutory tenant. It is clear that the rent was sent and it was not refused. Therefore, by virtue of the sending of the postal orders over a long period there was an offer and under Art. 438 of the *Mejelle* silence is considered as consent and acceptance. There was, therefore, by the actions of the Appellant and the conduct of the 1st and second Respondents by not returning the postal orders or refusing to accept them but keeping them over this long period, created a tenancy in law under the *Mejelle*. Tenants by oral or written leases are protected by the Rent Restrictions Ordinance. C. A. 436/44 A. L. R. 1945, 253 and, therefore, the first and second Respondents' action in law amounted to an acceptance of the Appellant's tender of rent and their explanation as to why they kept the postal orders does not avail them in law. The learned Magistrate misdirected himself in law in finding that the Appellant was not a tenant protected by law.

The appeal is allowed, the judgment of the lower Court is set aside and judgment is entered for the Appellant setting aside the order of

eviction granted in Magistrate's Court of Haifa in case No. 2591/45 in as far as the Appellant is concerned. 1st and second Respondents are ordered to pay to Appellant Court fees paid by her in this Court and in the lower Court. They are also ordered to pay costs in the lower Court and advocate's fees of LP. 3 together with costs of this appeal in a sum of LP. 10.

Given this 28th day of February, 1947, in presence of Appellant in person and of Mr. Slonim for Respondents.

CIVIL APPEAL No. 162/46.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Hill.

IN THE APPEAL OF:—

Yaroslavsky. APPELLANT.

v

Brochstein. RESPONDENT.

Contract — Refund of purchase price — Dies v. British and International Mining Corporation.

In actions for the recovery of purchase price it is not essential to prove a breach of contract. — Repudiation of the contract and/or its failure should however be proved.

ANNOTATIONS: *Cf.* C. D. C. Ha. 28/46 (1946, S. C. D. C. 545) and cases therein cited; see also C. A. 193/46 (1946, A. L. R. 827).

FOR APPELLANT: Herman.
FOR RESPONDENT: A. Gross.

JUDGMENT.

This is an appeal against the judgment of the Magistrate's Court of Haifa on 15.10.46 by which the Appellant's case was dismissed. By this judgment the Court below also dismissed the Respondent's counter-claim for damages and the Respondent has filed a notice under Rule 339.

Very briefly the facts appear to be that Appellant contracted to purchase a house and land at Rosh Pina from the Respondent's father now deceased, and paid the sum of LP. 100 on account of the agreed purchase price of LP. 1,100. This was in January, 1942. The transfer was never effected and in due course the Appellant brought an action

to the Court below for the recovery of LP. 100 advanced. This claim was dismissed by the learned Magistrate; hence this appeal.

A great deal of confusion appears to have arisen due to the fact that Appellant apparently based his claim in the Court below on a breach of contract by the Respondent who had succeeded his father.

Quite clearly, if a claim for the recovery of money is based on the breach of a contract and it is essential to the success of that claim that the breach of contract must be proved, failure to establish that proof must be fatal.

In the present case the learned Magistrate decided that the Appellant had not proved a breach of contract by the Respondent and that, therefore, he could not succeed in his claim.

It is precisely there that, in my opinion, the confusion arose, for it was not essential to the success of Appellant's claim that he should prove a breach of contract. All that he had to prove was the repudiation and/or failure of the contract. The question was not the appropriate form in which to clothe his right but whether or not the right to recover existed and he had this right unless the contract expressly denied it to him, which is not the case.

That this is a well established principle is a question I feel I need not labour, but if authority is needed the case of Dies *v.* British and International Mining Corporation reported at page 398 *et seq.* of the L. J. R. 1939, Vol. 108 furnishes such.

In my opinion, therefore, the Appellant having proved the repudiation and failure of the contract was entitled to judgment for the return of LP. 100.

The judgment of the Court below is set aside, the appeal being allowed, and the Respondent is ordered to pay the amount of the claim, LP. 100, with interest from the date of filing the action. The Appellant to have costs here and below and an advocate's fee of LP. 12.

With regard to the Respondent's cross appeal: The evidence as to damages before the learned Magistrate was somewhat vague, and he was unable to find that the Respondent had suffered any damage. With this finding of fact I agree and the question as to whether the Appellant had or had not breached the contract is, therefore, immaterial.

The Respondent's cross appeal is accordingly dismissed.

Delivered this 14th day of February, 1947, in presence of parties' advocates in open Court.

CIVIL APPEAL No. 192/46.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

Nahman Sulski. APPELLANT.

v.

Mohammad Salem El Hawari & an. RESPONDENTS.

Landlord & tenant — Rent Restrictions D. H. and B. P. Ord. — C. A. 28/44 — Protection of sub-tenant — C. A. 221/42 — C. A. 223/44 — C. A. D. C. Jm. 56/44 — C. A. D. C. T. A. 91/45.

1. The question whether premises are a dwelling house or business premises is a mixed question of law and fact and not a matter for discretion of the Court of trial.

2. It is upon the Plaintiff or the Defendant who claims that the premises he occupies are protected by the R. R. (D. H.) Ord. to show that they are so protected and to show under which Ordinance they fall.

3. Unless collusion is found to exist a subtenant of business p emises is not entitled to protection if his head tenant is evicted.

ANNOTATIONS:

1. On the first point see Gorali, Law of Landlord & Tenant in Palestine, pp. 127 *et seq.*, sub-sec. 4.

2. On the last point see *o. c.*, pp. 106 *et seq.*, sub-sec. 3.

FOR APPELLANT: Maiblum.

FOR RESPONDENTS: S. Shamma.

JUDGMENT.

In the lower Court the first Respondent to this appeal sued for the setting aside in so far as he was concerned of the judgment of eviction given by the Magistrate's Court of Haifa in case No. 2593/45. His action was based on two grounds: firstly that the judgment of eviction was obtained by collusion between the appellant Sulsky and the second respondent Bronstein; secondly, that the Plaintiff, first Respondent was a lawful subtenant of the premises by lease from the second respondent Bronstein and was protected by the Rent Restrictions Ordinance.

The learned Magistrate Ahmad Bey Khalil heard evidence and gave judgment for the Plaintiff setting aside the judgment of eviction in so far as the first Respondent was concerned. The learned Magistrate based his judgment on the finding that the premises were a dwelling

house, and, therefore, the sub-tenant was protected by authority of the Supreme Court in C. A. No. 223/44, 1944 A. L. R. p. 741. (XI P. L. R. p. 559).

The first Defendant in the action in the lower Court now appeals. The second Defendant in this case was cited as Respondent and appeared in this Court and stated he had no interest in the case one way or the other and was allowed to withdraw.

The first ground of appeal is that the learned Magistrate was wrong in holding that the premises fell within the scope of the Rent Restrictions (Dwelling Houses) Ordinance. It was shown by the original lease to the second Respondent by the Appellant that the premises were let as a store and the Magistrate found as a fact that the first Respondent used the room as a laundry but did sleep in it sometimes. The learned Magistrate clearly was in some doubt about this for he stated in his judgment that it was with difficulty that he found it was a dwelling house and held that C. A. 28/44, A. L. R. 1944, p. 578, left it to the discretion of the trial Court to decide whether the premises were a dwelling house or business premises.

With great respect to the learned Magistrate, C. A. 28/44 does not go so far as that. The question as to whether premises are a dwelling house or business premises is a mixed question of law and fact and not a matter for discretion for the Court of trial. The Dwelling Houses Ordinance (*vide* s. 3(1)) applies firstly to a house or part of a house that is let as a separate dwelling and secondly (*vide* sec. 3(2)) to a dwelling house that is also used by the tenant for professional or commercial purposes provided that the Court is satisfied that no substantial part of the rent is payable in respect of the portion so used.

The Business Premises Ordinance applies to premises that are not dwelling houses (*vide* s. 2) and, therefore, in my opinion it was on the Plaintiff to show that his premises were within the definition of a dwelling house as defined in the Dwelling Houses Ordinance, otherwise they must be considered as being business premises. In the instant case there was no evidence that the premises were let as a separate dwelling. There was no evidence led that no substantial part of the rent was paid in respect of the business of the laundry for which the premises were manifestly used by the Plaintiff. The original contract between the Plaintiff and the second Respondent was for use as a store, which is shown by Ex. 1 in Magistrate's Court Case No. 2295 produced in the lower Court. Bronstein admitted this as did the Appellant and the first Respondent that the room was used for work but sometimes he slept there. Therefore, in my opinion the learned Magistrate finding

that the premises came under the protection of the Dwelling Houses Ordinance was wrong and that he misdirected his mind in law. As I have said before, it is upon the Plaintiff or the Defendant who claims that the premises he occupies are protected by the Rent Restrictions (Dwelling Houses) Ordinance to show that they are so protected and to show under which Ordinance they fall.

The learned Magistrate also considered the question if the premises were business premises he held that the first Respondent was protected by that Ordinance, and here we come to the second ground of appeal.

The learned Magistrate held that the sub-tenant was lawfully in the premises and should be protected because "there was a tendency in cases on the subject to protect the subtenant who continues to pay rent". There is, of course, a clear decision in C. A. 223/44 (*supra*) that a subtenant in occupation by lease is protected, but that case refers to the Dwelling Houses Ordinance. As regards business premises, C. A. 221/42 *, IX P. L. R. 775, has decided that the term landlord in the Rent Restrictions Ordinance does not include a tenant who sublets. C. A. D. C. Jerusalem 50/44 S. C. D. C. 1944, 299 has held that a subtenant is only protected as against his immediate landlord under the Rent Restrictions (B. P.) Ordinance. C. A. D. C., T. A. 91/45, S. C. D. C. 1946, 110, has held that though a subtenant is not protected under the Rent Restrictions (B. P.) Ordinance, he is entitled to have a judgment for eviction set aside if it is obtained by collusion with the headlessee by the landlord.

Therefore, it seems to me that it follows from these judgments that unless collusion is found to exist such a tenant of business premises is not entitled to the protection of the Ordinance if his immediate landlord, the head tenant, is evicted. Collusion was alleged in the pleadings of this case but the learned Magistrate did not make any findings of fact that the eviction in case 2293/45 was obtained by collusion between Appellant and second Respondent. The judgment in that case was by default but collusion was denied by the Appellant in the witness box, and there is no evidence before the lower Court that would enable me to make such a finding that that was a collusive case.

For all the above reasons this appeal must be allowed, the judgment of the lower Court is set aside and the first Respondent ordered to vacate the room occupied by him in Appellant's premises in the first floor of 21 Haneemanim Street, New Business Centre, Haifa and to deliver up possession thereof to the Appellant. The first Respondent is ordered

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* 1942, S. C. J. 770.

to pay the Court fees paid by the Appellant in the lower Court and costs of the Appellant therein and advocate's fees. The Appellant is granted costs of this appeal and I certify advocate's attendance fees in the sum of LP. 10.

Delivered this 17th day of February, 1947.

MOTION No. 69/47.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour A/Judge Khoury.

In the matter of the Companies Ordinance, and
Abdul Rahman Abdalla Samara. APPLICANT.

v.

The North West Village Bus Company Ltd.
(Sharikat Basat Qura Shamal Gharb
el Kuds el Mahdudah). RESPONDENT.

Companies — Allotment — Rectification of share register — Nominee shareholder — Secs. 10, 31 & 35 *Companies Ord. — Table "A" — Transfer of shares — C. A.* 342/43 *— Oral evidence — Legal owner.*

An application for the rectification of the share Register of the Respondent Company to the effect that the Applicant is the registered holder of six instead of four shares in the Respondent Company's capital, granted:—

1. Sec. 35 of the Companies Ord. is not exhaustive and does not prevent the Court from altering a company's register in cases other than those specified therein.

2. An application under sec. 35 of the Companies Ord. may be made not only by a person whose name has been altogether omitted from a company's register but also by a person who claims to be entitled to a greater number of shares than those appearing in his name on the register.

3. A company which has adopted table "A" as its articles may not effect and register a transfer of shares without an appropriate instrument in writing executed by the transferor and transferee even though the member, transfer of whose shares the Company has purported to effect and register without such an instrument, may have been registered in respect of his shares only as nominee or trustee for other persons whom the Company has so registered instead.

ANNOTATIONS:

1. On rectification of the register see Annotated Laws of Palestine, Vol. 6, pp. 94—97.

2. On transfer of shares see *l. c.*, pp. 89—93.

FOR APPLICANT: Nazzal.
FOR RESPONDENT: Moghannam.

ORDER.

This is an application by way of motion by one Abdul Rahman Abdalla Samara for the rectification of the Register of Members of the Respondent Company, the North West Village Bus Co. Ltd.

The gist of the application is that on the 2nd October, 1945, the Respondent Company was formed by sixteen persons who subscribed their names to a memorandum of association each having a number of shares. The Applicant who was one of the sixteen subscribers of the memorandum was allotted six out of the 220 LP. 10 shares, the share capital of the Company. A certificate of registration was issued by the Registrar of Companies on the 12th of October, 1945.

On the 24th July, 1946, the Applicant paid up LP. 60, the value of his six shares and was given a receipt by the Treasurer of the Company. On the 25th December, 1946, the Respondent filed with the Registrar of Companies a return of allotments containing the names of 92 persons to whom shares were allotted. The name of the present Applicant was shown as having been allotted four shares. The Applicant now claims that this alteration in the original allotment was wrongfully and arbitrarily made by the Respondent against his will and without any legal justification.

An affidavit has been filed on behalf of the respondent Company by one of its directors wherein it is alleged that the name of the Applicant was recorded in the memorandum of association as the holder of six shares merely as a nominee and in trust for other shareholders whose names do not appear in the memorandum. The Respondent's allegation is that this arrangement was conveniently made on the suggestion of a certain advocate, Mohammad Eff. Younes El-Husseini, to facilitate the registration of the company. It is not averred or even alleged by or on behalf of the Respondent that there was a formal transfer of these shares by the Applicant to any other person. It is however pleaded on behalf of the Respondent that the company by reducing the shares of the Applicant to four and transferring two of the six shares originally registered in his name was only giving effect to the verbal arrangement previously agreed to by the subscribers of the memorandum of association.

A preliminary point was raised by Mr. Mogannam on behalf of the Respondent at the hearing, namely, that section 35 of the Companies Ordinance under which this application is made is inapplicable because,

under this section so it is argued, the application must be made by a person whose name has been omitted altogether from the Register of Members, while Applicant's name does appear in the Register of Members, though only as holder of four shares instead of six.

In my opinion this argument does not hold much water because Applicant's name was admittedly omitted from the Register in respect of two of the six shares he originally held. On the other hand, if the Court has power to order rectification of the register on the application of a person whose name has been wholly removed from the Register in respect of all his shares it is not reasonable to assume that the Court has no power to order rectification on the application of a member who has been deprived of a part of his shares. Illustrations of cases in which the Court can order rectification of the Register are cited in Palmer's on Company Law, 15th edition, pages 122 and 123. There it is stated that section 100 of the English Companies Act (which corresponds to section 35 of the Palestine Companies Ordinance) is not exhaustive and does not prevent the Court from altering the register in cases other than those therein specified. I therefore hold that this objection is untenable in law and is accordingly rejected.

The advocate for the respondent Company desired to call witnesses to prove the verbal arrangement alluded to above, whereby it was allegedly agreed that the Applicant should only be a nominal subscriber for the six shares. Objection was taken by the Applicant's advocate to the calling of such evidence and I shall deal with this point later in this order.

Now, the point in issue in this case is very simple and it is this: Did the Respondent Company act in accordance with the law and its articles of association in taking away and transferring two of the Applicant's shares to some other person or persons? In the first place it must be noted that the company has made no special articles of association and therefore it must be presumed in view of section 10 of the Companies Ordinance, to have adopted the regulations in Table A of the third Schedule to the Ordinance.

Dealing first with the articles of association I can find no provision in Table A empowering the company to transfer any share from one person to another except in pursuance of regulation 17 where an instrument in writing is required to be executed both by the transferor and the transferee. Coming now to the law we find that while subsection (1) of section 31 of the Companies Ordinance provides that the shares or other interests of any member in a company shall be transferable in manner provided by the articles of the company, subsection 3 prohibits

the company from registering a transfer of shares unless a *proper instrument* of transfer has been delivered to the company.

It is not claimed on behalf of the Respondent that the transfer has been made in compliance with either regulation 17 of the articles of association or section 31 of the Companies Ordinance. That Applicant was originally the holder of six shares in the company is not denied but specifically admitted. The Respondent's allegation is, however, that the Applicant was only a nominee. To prove this allegation, counsel for the Respondent desired to call oral evidence. It is not necessary for me to decide whether oral evidence is or is not admissible to prove such an allegation since even if such evidence was admissible it would not affect or change the legal position that here was not proper and legal transfer of the two shares in question by the Applicant by an instrument in writing.

The facts in this case bear some similarity to those in Civil Appeal No. 342/43 * — Awadallah El Zitawi *v.* Muaallem Ibrahim and others except that the position is reversed. There the Plaintiffs, (Respondents), claimed that they were entitled to the registration of certain shares held by a nominee. In the words of the judgment of the trial Court "the claim is for an order that certain shares in the Bus Co. now in the name of the first Defendant, shall be cancelled and be registered in the names of the Plaintiffs, and that the Bus Co. be ordered so to do".

In the present case, the company has made the transfer of two shares and has rectified the register accordingly. In the above cited appeal the Supreme Court held that unless it had been proved or admitted that the Respondents (Plaintiffs) were *the legal owners* of the shares in question the Court below could not have ordered the rectification of the share Register. The Court of Appeal observes, further, that it was clear that the legal title to the shares in question was not established, and that it was admitted that no transfer had ever been executed.

In the present case the Applicant was according to the memorandum of association the legal holder of six shares and was entitled to be registered in the Register of Members as such. In the absence of a legal transfer or any power in the Articles of Association authorizing such transfer the Respondent Co. was not justified in transferring any of the Applicant's shares to others.

I therefore order the Respondent Co. to rectify the Register of Members by restoring the original entry showing the Applicant's name as the holder of six shares.

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* 11, P. L. R. 360; 1944, A. L. R. 344.

The Applicant will have his costs to include LP. 5 advocate's attendance fee.

Delivered this 28th day of February, 1947, in the presence of Mr. Carmi for Applicant and of Mr. Mogannam for Respondent.

CIVIL APPEAL No. 198/46.

IN THE DISTRICT COURT OF TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour A/Judge Kantrovitch.

IN THE APPEAL OF:—

Gitel Frankel & an. — APPELLANTS.

v.

Meir Menashe Barash. — RESPONDENT.

Evidence — Landlord & Tenant — Defence Regulations No. 13 of 1943 — Williams v. East India Co. — Attygalle v. R. — Crown v. Turner — R. v. Oliver.

Appeal from the judgment of the Magistrate of Tel-Aviv (H. W. Mr. Shimel), dated 12th July, 1946, dismissed:—

1. It is the witness who may claim the privilege of asking that he be not compelled to answer criminating questions. Counsel for either party is not entitled to object to such questions being put to a witness but may draw the attention of the Court to the matter.

2. Sufficiency of proof is a matter of a moral certainty "that convinces the understanding, satisfies the reason and directs the judgment. But not amounting to absolute certainty."

3. The general rule is that a civil case is decided by preponderance of evidence, there being no necessity that the Court should be satisfied beyond a shadow of a doubt where in civil cases a question of criminality arises it is doubtful whether the same rule applies.

4. The burden of proof is on the party making an assertion although he may have to prove a negative averment.

5. An accused is under no obligation to prove that he did not commit any criminal offence if he is not required to do so by statute.

6. If a party relies on an omission by the other party and such omission is peculiarly within the knowledge of the other party, the burden of proof shifts on to him.

7. If an offence is imputed to someone of having committed an act without authority, and such accused may exonerate himself by proving that he had obtained authority, it is incumbent upon the accused to show that he is clothed with such authority; otherwise he is presumed not to have it.

8. It is against public policy to enforce a contract the making of which has been expressly forbidden by a defence regulation.

ANNOTATIONS:

1. See, on the first point, Halsbury, Vol. 13, 3rd paragraph on p. 731 and footnote (*c*); but *cf.* Phipson on Evidence, 8th ed., p. 187, *sub* heading *"By whom and when made."*

2. The quotation on the second point is stated in Kenny's Outlines, 15th ed., p. 455, to be *"per* Shaw, C. J., on the trial of Prof. Vebster (an American case), 5 Cushing 295."

3. On the third point see Phipson, *o. c.*, p. 7, para. (4) & Halsbury, Vol. 13, p. 629, from the 4th line from the top.

4. See, on the fourth point, C. A. D. C. Ha. 46/46 (1946, S. C. D. C. 601) and note; *cf.* C. A. D. C. T. A. 47/46 (*ibid.*, p. 659; 1946, *Hamishpat*, p. 243).

5. On the fifth point see the case cited and also Seneviratue *v.* R., 1936, 3 All E. R. 36.

6. See, on the sixth & seventh points, Halsbury, Vol. 13, pp. 545—6, paragraph (2) and Supplement Volume.

7. On the last point see C. D. C. Jm. 16/45 (1946, S. C. D. C. 608) and notes 3—5; *cf.* Halsbury, Vol. 7, pp. 164—5, particularly para. 236, and Pollock on Contracts, 11th ed., pp. 272—4.

FOR APPELLANTS: M. Turbovitch.

FOR RESPONDENT: Ben Harutz.

JUDGMENT.

This is an appeal from the judgment of the Magistrate of Tel Aviv, dated 12th July, 1946, whereby the Defendants (Appellants) were ordered to vacate a dwelling house.

The Respondent claimed eviction on the following grounds:—

(a) The period of lease under a certain contract had expired;

(b) The first Defendant had committed breaches of contract.

As regards the second Defendant; the Respondent (Plaintiff) claimed that he had no right in the property leased but that he was cited as a second Defendant merely to enable him to defend himself.

On the filing of the action, the house was occupied by the second Defendant.

The Defendants filed a defence in paragraph 1 of which they say: "The first Defendant admits having rented from the Plaintiff the house in question for an annual rent of LP. 72 payable for a year in advance ....". The Defendants then denied the several breaches mentioned in the claim and said that the lease was illegal because the lease was made without any assessment of rent by the Rents Tribunal as the house was built after 9.9.43.

Attorney for Defendants mentioned several grounds of appeal and it is advisable to deal with them in view of their importance:—

1. It is argued that the learned Magistrate erred in his decision (recorded on page 3 of the record) whereby he disallowed a question put by the Defendants' attorney to the Plaintiff who was called as a witness. The question was "When did the Plaintiff build the house and whether he had applied to the Rents Tribunal?" Plaintiff's attorney objected to these questions on the ground that they were calculated to incriminate the witness.

It is clear on the authorities that only the witness may claim the privilege of asking that he be not compelled to answer criminating questions. Counsel for either party was not entitled to object to a question although he could draw the attention of the Court to it, and the Magistrate ought not to have disallowed the questions but ought to have explained to the witness, if he thought fit, that he was at liberty to withhold a reply and the answer ought to have been recorded. It follows that the questions ought not to have been disallowed forthwith without hearing the witness as to whether he wished to reply.

2. The next ground of the Appellant's attorney was that there was sufficient evidence to prove his contention that the house was built after September, 1943, and that this was found as a fact by the Magistrate although he stated it differently.

Evidence was heard on this point and the Magistrate in his judgment says thus:—

> "In proof of the contention that the house let was built after 9.9.43 there is the evidence of the first Defendant, which I believe, that ten days before the contract was signed, *viz.* September, 1944, the building was not completed and that there were no slabs when the Defendant first came to see the flat ..... Similar evidence was given by Mrs. Shaltiel which I also believe .....". "After hearing this evidence the Court was morally satisfied that the house was built after 9.9.43 yet this evidence did not amount to sufficient proof beyond a shadow of a doubt."

It is difficult to appreciate the distinction drawn in this case by the Magistrate between moral conviction and sufficient proof after he had believed the evidence on this point. The learned Magistrate must have had in mind the quantity of proof and the legal certainty obtained therefrom (*vide* the first note on page 400 Kenny's Outlines of the Criminal Law). It is, however, worthwhile to quote from page 402 of the same book in which Shaw, C. J., in an English case is reported to have said *:—

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* See annotation 2, *supra*.

> "For it is not sufficient for the prosecutor to establish a probability, even though a strong one according to the doctrine of chances; he must establish the fact to a moral certainty — a certainty that convinces the understanding, satisfies the reason and directs the judgment. But were the law to go further than this and require absolute certainty, it would exclude circumstantial evidence altogether".

In connection with this matter, Appellants' counsel averred that the conviction that the Magistrate had had was quite sufficient and that in civil cases the matter is decided by a preponderance of evidence, there being no necessity that the Court should be satisfied beyond a shadow of a doubt. Generally speaking this is so but it is doubtful whether in a civil case where a question of criminality arises, stronger proof than is ordinarily required in a civil case, should not be called for. Thus it was held in the English case of Williams *v.* East India Co. 1802, reported on page 27 of Cockle's Cases on Evidence, 6th Ed., that where in a civil case, a question of criminality arises, there exists the same presumption of innocence as in a criminal case and there are authorities mentioned in Phipson's book on Evidence that such a matter should be strictly proved as in a criminal case (see Phipson's Manual on the Law of Evidence, 6th Ed. page 18).

3. Under the Defence Regulations, 1943, Amendment No. 13, Palestine *Gazette*, Vol. III, page 633) it is provided as follows:—

> "Where, after the commencement of Defence (Amendment) Regulations No. 13, 1943, any building or any part thereof to which the Rent Restrictions (Dwelling Houses) Ordinance, 1940, is applicable and in respect of the construction of which a licence is required under this Regulation, is constructed, no person shall let such building or part thereof unless and until the rent payable in respect thereof has been fixed by a Rents Tribunal ....."

The Defendants' aim was to prove that the letting was contrary to this regulation. Under this regulation four elements were required to be proved, namely:—

(a) A building or part of a building was constructed after 9.9.43.
(b) That the Rent Restrictions (Dwelling Houses) Ordinance, 1940, applied to it.
(c) That a permit was required under the Defence Regulations for its construction.
(d) That it was let although the rent had not been assessed by a Rents Tribunal.

This judgment has already dealt with (a). The second element was proved by the circumstances and the admission in the statement of claim. The third element is proved by section 46B of the Emer-

gency Regulations (page 60 of Kantrovitch's War Legislation). As to the fourth element Appellants' attorney contended that since the reference to a Rents Tribunal is peculiarly a matter within the knowledge of the Plaintiff, it was incumbent on him to show that he had referred the matter to a Rents Tribunal. As to this principle in the rules of evidence there have been several decisions which may be epitomized as follows:—

(1) The burden of proof is on the party making an assertion although he may have to prove a negative averment (see page 142 of Cockle's Cases on Evidence).

(2) The Accused is under no obligation to prove that he did not commit any criminal offence if he is not required to do so by statute (see the judgment of the Privy Council in the case of Attygalle *v.* Rex, A. E. R. 1936, page 116, Vol. II).

(3) If a party relies on an omission by the other party and such omission is peculiarly within the knowledge of the other party, the burden of proof shifts on to him (see the case of the Crown *v.* Turner mentioned on page 146 of Cockle's book).

(4) If an offence is imputed to someone of having committed an act without authority and such accused may exonerate himself by proving that he had obtained authority, it is incumbent on the Accused to show that he is clothed with such authority otherwise he is presumed not to have it (see the judgment of the Court of Criminal Appeals in England in the case of Rex *v.* Oliver A. E. R. Vol. 2, 1943, page 800).

In this case the law says of a building or part of a building constructed after 9.9.43, that it shall not be permissible to let it unless the rent had been assessed by a Rents Tribunal. According to the authorities mentioned and the wording of the section, the Plaintiff in this case must prove that the rent had been assessed provided the Defendant brings evidence to show that the house was built after the 9th September, 1943.

4. If it is proved that the contract of lease was illegal because the rent was not assessed as required by law, the Plaintiff will not be able to obtain relief from the Court, based on the contract of lease. See pages 338 and 345 of the book on Contracts by Salmonds and Williams, second edition. It cannot be said that the only object here is to punish the delinquent. It would be contrary to public policy to enforce an agreement the making of which has been expressly forbidden by a Defence regulation.

Therefore insofar as the Plaintiff relies on the contract, he will not

be able to obtain relief since the lease was effected contrary to the law in force.

5. However the statement of claim shows that in addition to the grounds based on the contract of lease; the statement of claim discloses a cause of action on other and independant facts, namely, that the Defendants pay no rent and reside in the house without a contract (since the term has expired) and that whoever had rented the house, no longer resides there (see paragraphs 2 and 3 of the statement of claim). Therefore the order of eviction must be confirmed on any of the following grounds:—

(a) If the Appellants are entitled to rely on the contract of lease, the position is that it was proved to the Magistrate that there has been a breach of contract and that part of the judgment is not attacked save for the question of illegality. The second Defendant is there without any right.

(b) If the Appellants are not entitled to rely on the lease, then they are in the house without any right to stay as tenants or otherwise and must redeliver possession.

(c) In any case; the first Defendant who was allowed to move into the house is no longer in the house and is not protected under the Rent Restrictions Ordinance, 1940, and must redeliver the possession obtained from the Respondent and the second Defendant must do so because he had moved into the house without the Respondent's consent.

The appeal is dismissed with costs and advocate's fees LP. 5 inclusive.

Delivered this 30th April, 1947.

MOTION No. 93/46.
(CIVIL CASE No. 457/46).

IN THE DISTRICT COURT OF TEL-AVIV.

BEFORE: His Honour the President Judge Windham.

IN THE APPLICATION OF :—

Abraham Jacob Kornblit. APPLICANT.

v.

J. Freyermauer. RESPONDENT.

Succession — Presumption of death — Presumption of survivorship — C. D. C. T. A. 487/46 — Pr. D. C. T. A. 179/46 — In re Cohn,

Public Trustee v. Cohn — C. A. 60/35 — C. A. 64/43 — Mejelle, Art. 1688 — Hearsay evidence as to death.

1. It is a long established practice to issue orders presuming death upon *ex parte* petitions.

2. The District Courts have by virtue of the Palestine Order-in-Council as well as by long established practice, jurisdiction to make declarations of presumption of death.

3. Polish law as to presumption of death and survivorship is to be applied in respect of Polish nationals domiciled in Poland at the time of their death or at the time when they were last heard of.

4. Presumption of death as well as presumption of survivorship are questions of law and therefore fall to be determined by the national law of the deceased.

5. Evidence of death from a reliable source, although hearsay, is admissible.

ANNOTATIONS:

1. On points 3 & 4 see the cases cited and *cf.* also Pr. D. C. Ha. 25/47 (*ante*, p. 94).

2. On the general inadmissibility of hearsay evidence *vide* C. A. D. C. Jm. 58/45 (1946, S. C. D. C. 400) and note 3 thereto; *cf.* also CR. A. 12/47 (1947, A. L. R. 215) and note 1.

FOR APPLICANT: Michaelovsky.

FOR RESPONDENT: Levit.

JUDGMENT.

This is an application to set aside an order of this Court dated 7th October, 1946, declaring the presumption of death of a certain Froim Kornblit and his wife Zlata. The Applicant is the brother of the deceased man. The application has been argued at some length, and the grounds of objection fall under four heads: — first, that the application upon which the order presuming death was granted was wrongly made in the form of an *ex parte* petition instead of by motion or action citing Respondents or Defendants: secondly, that this Court had no jurisdiction to make the declaratory order; thirdly, that the Polish law as to presumption of death (that being the national law of the deceased) should not have been applied; fourthly, that the evidence upon which the deaths were presumed was hearsay and therefore inadmissible. I will deal with these contentions in turn.

2. First, with regard to the form of the application, it is the long established practice of this Court to issue orders presuming death upon *ex parte* petitions. These petitions are, as the petition in the present case was, supported by affidavits setting out the facts (including

expert evidence of the relevant foreign law if such be applicable) in the light of which the death ought to be presumed. At the same time advertisement is inserted (as it was here inserted) in the press calling upon persons desiring to do so to file opposition to the petition within a stated time. After careful consideration of the arguments of Mr. Michaelowsky on behalf of the opponent I see no good reason why this satisfactory and expeditious mode of procedure should be held bad, particularly at this late stage when, owing to the mass slaughter of Jews in Poland during the German occupation, it is necessary to issue many hundreds of these declarations of presumed death of Jews who have perished in Poland in similar circumstances, in order to facilitate the administration of their estates and for other purposes. If an action were to have to be instituted in each case, immense congestion and inconvenience would result. Bearing these considerations in mind, and there being nothing in the law to prohibit the mode of procedure now being followed, and following the line of approach adopted by me in a recent decision, Civil Case 487/46 [1], wherein procedure by petition in cases of administration of the estates of absentees was similarly held to be proper, I decline to hold that the procedure in the present case was wrong.

3. With regard to the contention that this Court has no jurisdiction to make declarations of presumption of death, I again rely on the long established practice of this Court, and on the conferring upon District Courts by the Palestine Order-in-Council, 1922, of jurisdiction to try matters of personal status affecting foreigners. The deceased were foreigners and they left movable and immovable property in Palestine. In order to obtain a declaration of order of succession to them, it was necessary to obtain first a declaration of presumption of their death. If it were to be held that this Court has no jurisdiction to make such declarations presuming death a complete deadlock would result. This Court clearly has the necessary jurisdiction.

4. Thirdly, it is contended that the Polish law of presumption of death, as to which expert evidence was given by advocate Levit, and which if applicable clearly entitled this Court to presume the deaths in the present case, ought not to have been applied. With regard to this, I hold that the point has already been decided by this Court (sitting in its probate capacity) in Probate 179/46 [2], wherein it was held that the Polish law of presumption of death and presumption of survivorship is to be applied in respect of Polish nationals domiciled

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[1] Not reported.

[2] 1946, S. C. D. C. 643.

in Poland at the time of their death (or at the time when they were last heard of). This decision would appear to be in line with a recent English decision, *In re* Cohn: Public Trustee *v.* Cohn, (1945) 114 L. J. Ch. 97. Mr. Michaelovsky has sought with some ingenuity to draw a distinction between presumption of survivorship (with which those cases were more particularly concerned) and presumption of death, arguing that while the former is a matter of personal status the latter is not. But it is difficult to conceive an event more irrevocably affecting a man's personal status than his death. I also fail to appreciate the argument that while a legal presumption of survivorship is admittedly a question of law, a legal presumption of death is a question of fact. Clearly both presumptions (as contrasted with actual proof of survivorship or death) are questions of law, and therefore fall to be determined by the national law, namely the Polish law.

5. Lastly, it is argued that the affidavit of Dr. Levit as to the facts of the two deaths in Poland is based on hearsay (as it admittedly is) and is therefore inadmissible. The answer to this is that, quite apart from the operation of the presumption of death under the Polish law, this affidavit is founded on information obtained by Dr. Levit from a reliable source, namely the Petitioner himself, who was the brother of the deceased's wife. Since this evidence concerns the issue of the deaths of the two deceased, it is admissible although hearsay, under Article 1688 of the *Mejelle*. That Article is still in force (*vide* C. A. 60/35 [3] and, more recently, C. A. 64/43) [4].

6. For all these reasons the application to set aside the order presuming the death is dismissed with costs, to include an advocate's attendance fee of LP. 8.—.

Delivered this 21st day of April, 1947, in the presence of counsel for Respondent and in absence of Applicant.

CRIMINAL APPEAL No. 105/46.

IN THE DISTRICT COURT OF TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Smith.

IN THE MATTER OF:—

Zvi ben Yitshaq Davidovitz. APPELLANT.

v.

The Attorney General. RESPONDENT.

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[3] 4, P. L. R. 110; 9, C. of J. 909.
[4] 1943, A. L. R. 507.

Criminal Law — Theft by finding — R. v. Hudson.

The question whether a person is guilty of stealing by finding depends upon whether at the time of finding he intended to keep what he had found, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of finding he had means of ascertaining the true owner.

ANNOTATIONS: See the case quoted and *cf.* Halsbury, Vol. 9, p. 500, para. 859.

FOR APPELLANT: Buchhalter.

FOR RESPONDENT: No one for prosecution.

JUDGMENT.

On a Summer's evening in 1944, at about 7 *p. m.*. The Appellant, Zvi Davidovitz, picked up a brooch near the sea shore in Tel Aviv. Four or five hours later he sold it to a restaurant proprietor, Mrs. Tove Gabov, for LP. 4.— and the cancellation of a debt which the Appellant owed to the restaurant; say, for the equivalent in all of nearly LP. 5.—. The brooch belonged to Yehudith Gvitzerstein who had lost it near the beach. About two years later, in the summer of 1946, she recognised it in the possession of a lady who was a stranger to her. The Appellant was convicted of larceny by finding and sentenced to pay a fine of LP. 10.—.

The only point which falls for decision in this appeal is whether the Appellant was rightly convicted bearing in mind the wording of the appropriate definition section. Section 263(2)(a)(iv) of the Criminal Code Ordinance, 1936, reads as follows:—

> "(2)(a) The expression "takes" includes obtaining the possession ... (iv) by finding, there at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps."

Mr. Buchhalter on behalf of the Appellant stresses the words "at the time of the finding". He argues strenuously that at the time of the finding, that is, at about 7 *p. m.* the Appellant merely picked up a brooch which he had no reason to think was of any particular value. There was nothing on the brooch to indicate the owner and in view of the place where he found the brooch and the large crowds which habitually throng there. There was no reason, Mr. Buchhalter argues, for the Appellant to believe that the owner could be found by his taking reasonable steps.

In such cases I think that the real question is: did the finder at the time of the finding intend to keep what he had found, conditionally upon its turning out upon examination to be worth his while to do so,

and whether at the time of the finding he had the means of ascertaining the true owner. I am quoting from a quotation cited in the judgment of Charles, J., in the case of R. *v.* Hudson (1943) 1 A. E. R. 642 at page 644 *.

One can only decide what was in the Appellant's mind at 7 *p. m.* by a consideration of his subsequent conduct. The Appellant himself in his evidence stated that he told Mrs. Gabov later on that evening — at about 11 *p. m.* — that if he could not find the owner he would give the brooch to his mother. I agree with the learned Magistrate that it is a fair presumption for this evidence that the Appellant did at the time of the finding consider the possibility of tracing the owner. As a reasonable man he must have known by taking the reasonable step of reporting the matter to the police that there was a reasonable chance of the owner being traced. The fact that immediately upon discovering that the brooch was of more than trivial value the Appellant sold it only a few hours after he had picked it up seems to me to suggest that at the time of finding the Appellant did intend to keep the brooch if it should turn out to be of sufficient value to be worth his while to do so.

I am of opinion that the Magistrate came to a correct conclusion. The appeal is dismissed.

Read this 2nd day of April, 1947, in the presence of Mr. Buchhalter and in the absence of the prosecution.

CIVIL APPEAL No. 212/46.

IN THE DISTRICT COURT OF TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour A/Judge Kassan.

IN THE APPEAL OF:—

"Migdan" Ltd. of 15 Achad-Haam. APPELLANT.

v.

Ashel Sherl. RESPONDENT.

Eviction — Interference with discretion of lower Court, C. A. 61/42, C. A. 327/43, C. A. 272/44, C. A. 223/44, C. A. 396/43, C. A. 60/44 — Sec. 4(1)(c) R. R. (Business Premises) Ord — "For his own use" — Sec. 8(1)(c) R. R. (Dwelling Houses) Ord. — C. A. 231/43 —

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* *l. e.* from R. *v.* Ashwell, 1885, 16 Q. B. D. 190, *per* Stephen, J., at p. 216.

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SELECTED CASES

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WITH ANNOTATIONS

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"Other premises available", C. A. D. C. Ha. 29/44, C. A. D. C. T. A. 127/44, C. A. D. C. T. A. 27/46 — Time when other premises must be available — Kimpson v. Markham — Inspection.

1. The words "for his own purposes" in sec. 4(1)(c) of the R. R. (Bus. Prem.) Ord. do not include the purposes of a partnership of which the landlord is a partner.

2. "Other premises" within the meaning of sec. 4(1)(c) of the R. R. (Bus. Prem.) Ord. are generally premises other than premises at present occupied by the tenant but each case must be considered on its merits.

3. An order for eviction from business premises cannot be made unless other premises are available at the time of delivery of judgment.

ANNOTATIONS: Most of the relevant authorities are quoted in the judgment, but the following cases may also be compared:—

a) on the first point C. A. D. C. Ja. 79/43 (1943, S. C. D. C. 82) and C. A. D. C. Ha. 85/44 (1944, S. C. D. C. 618);

b) on the second point C. A. 383/46 (1947, A. L. R. 183); and

c) on the last point C. A. D. C. T. A. 138/46 (1946, S. C. D. C. 626) and note 4.

FOR APPELLANT: Y. Fraenkel & Bental.

FOR RESPONDENT: Kost.

JUDGMENT.

Both parties in this action are the proprietors of factories situate close to each other at Giveat Herzl in the "Industry Passage" Tel-Aviv—Jaffa. The Appellant Company is the proprietor of a chocolate factory, while the Respondent, in partnership with his four sons, is the proprietor of a factory of paper bags. The two factories progressed during recent years so that both now insist that the place is too small for them.

2. The subject matter of the action is a store room hired by the Appellant in 1942 from the former landlord, Mr. Josepb Hasson, who in the meantime has sold the building to the Respondent.

3. This action was brought in the Magistrate's Court Tel-Aviv for the recovery of possession of the aforesaid store (File No. 31/46), because the Respondent "desires the aforesaid building, *i. e.* the store, for his own needs, and because the Defendant has a suitable place for a store in a big building belonging to it and situated in the same passage."

4. In the Statement of Defence there is a clear denial of the above mentioned two factors.

5. After the learned Magistrate had heard the evidence adduced by both parties and had also visited the place himself, he allowed the

claim and ordered the Appellant Company on 18.8.46 to vacate the abovementioned store, since he was satisfied that the Respondent proved his case. Hence this appeal.

6. At first sight it may appear that the learned Magistrate in his judgment made findings of facts only, since he had to deal with two questions of fact, namely, whether the Respondent desired the premises for his own purposes and whether there existed another suitable place for the Appellant. If that is the case, it was already decided by the Supreme Court in a number of cases that the Appellate Court will generally not interfere with the conclusions arrived at by the lower Court, unless the Court below erred in a point of law. If it erred in the exercise of its discretion, namely, in a matter which can be interpreted in two ways, the appellate court, as a rule, will not interfere. Indeed it is not at all easy for the Court of Appeal to decide when it should interfere with the discretion of the lower Court. (C. A. 61/42 [1], 9 P. L. R. 428).

7. However, it is clear that the Court of Appeal must inquire whether the lower Court properly exercised its discretion (C. A. 327/43 [2], 11 P. L. R. 456; C. A. 272/44 [3], 11 P. L. R. 582). Indeed the Appellate Court will even exercise its own discretion instead of that of the lower Court, it if finds that the lower Court did not consider all the aspects of the case, (C. A. 223/44 [4], 11 P. L. R. 599) or if it finds that the lower Court took into consideration certain circumstances which are utterly irrelevant (C. A. 396/43 [5], 11 P. L. R. 389); or if the test applied by the lower Court when exercising its discretion was a wrong one (C. A. 60/44, (1944) A. L. R. 390).

8. After perusing the evidence which was adduced before the learned Magistrate in this case, in the light of his conclusions, and after careful consideration I am of the opinion that the learned Magistrate, with all due respect, did not consider all the aspects of the case; while on the other hand he took into consideration matters irrelevant to the issue, and was thus led to depart from the essentials to which he should have directed his mind. It is, therefore, my duty to re-examine the facts.

9. The statement of claim is based on section 4(1)(e) of the Rent Restrictions (Business Premises) Ordinance, 1941, which provides that:—

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[1] 1942, S. C. J. 437.
[2] 1944, A. L. R. 505.
[3] 1944, A. L. R. 739.
[4] 1944, A. L. R. 741.
[5] 1944, A. L. R. 383.

> "No Court or Judge, or Execution Officer, shall give any judgment or make any order for the eviction of any tenant from any premises, notwithstanding that such tenant's contract of tenancy has expired, unless the landlord of such premises desires to occupy them for his own purposes, and the Court, Judge or Execution Officer is satisfied that other premises reasonably suitable for the purpose for which the premises were used are available for the tenant."

10. The first point, therefore, on which the landlord has to satisfy the lower Court is that he desires to occupy the premises "for his own purposes". According to the evidence it is clear that the Respondent is a partner in a registered partnership with his four sons, and that the Respondent does not desire the premises for his own purposes but for the purposes of the factory belonging to the partnership.

11. The Magistrate in para. 7 of his judgment deals with this point and according to him "the requirements of the partnership's factory belonging to Plaintiff (Respondent) and his sons, are also the requirements of the Plaintiff (Respondent)". Furthermore, the Magistrate states that "the law does not say that the requirements must be those of the Plaintiff (Respondent) only, and if therefore the factory is used also for the purpose of the Plaintiff's sons, the partners in the factory, that does not mean that the Plaintiff, being the owner of the premises, cannot rightfully enjoy his rights in the premises according to sec. 4(1)(e) of the above Ordinance.

12. Indeed, it is a question of law and not one of fact. In my opinion the Magistrate erred in his interpretation. The provisions of the above section are as follows: "... the londlord of such premises desires to occupy them for his own purposes". I emphasize the word "own". It is a fundamental rule of interpretation of any law that every word which appears in the law has its reason and explanation, and that its ordinary meaning must be given to every non-technical term. (Maxwell on Interpretation, Eighth Ed. p. 2). It cannot be asserted that the word "own" is superfluous. It is true that the provision will have a meaning even without it, but the legislator wanted to emphasize this requirement and by so doing almost added another requirement which the landlord must prove. And, if that is the case, what actually is the meaning of the word "own"? Kaufman in his dictionary explains this word as meaning "of himself", namely, not simply "the purposes of the landlord", but "his own purposes". The Oxford Dictionary (1929), p. 818, gives the following explanation: "in full ownership, proper, peculiar, individual and not others".

13. It must be admitted that one cannot accept ordinary dictionaries as binding authorities when definition of words for legal purposes are

required, but as I have already stated, the word which concerns us is not a technical term. Lord Coleridge stated in the case of R. *v.* Peters (1886) 16 Q. B. D. 336, 341 as follows: "I am aware that dictionaries are not to be taken as authoritative exponents of the meaning of words used in Acts of Parliament; but it is a well known rule of Courts of Law that words shall be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books". (Cited in Maxwell, *ibid.*, p. 30).

14. In the light of the above explanation I shall try to analyse this idea by an example. In this case the Plaintiff is a partner in a partnership consisting of five partners. He is the lessor of the leased premises. The whole premises belong to the Plaintiff. He claims the leased premises for the partnership. Let us assume that each of the other four partners separately owns property and that such property is let to others. If we allow this Plaintiff to succeed in his action and to evict the Defendant from the premises, why should we not allow every one of the other partners to succeed in their respective actions concerning their property let to other people on a plea that the premises are required for the partnership? It seems to me that it was for this purpose that the legislator added the word "own".

15. My opinion is strengthened after consideration and comparison with a similar provision applying to dwelling houses. There, in sec. 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, the legislator uses the following words: "required by the landlord for the occupation of himself". The difference between these two Ordinances is obvious and some meaning must be given to it. (See Craies on Statute Law, 4th Edition, p. 133 ff.).

16. Furthermore, in C. A. 231/43 (1943, A. L. R. 546) the Supreme Court held that a cooperative society cannot evict a tenant on the sole ground that it wants to house therein one of its members. If this is a correct statement of the law, — how can the Respondent in our case evict the Appellant from the premises wholly belonging to him for the purposes of the partnership of which he is only a member. It should be borne in mind that according to sec. 61(1) of the Partnership Ordinance, a partnership is a legal person as distinct from its partners.

17. Obviously, this question would not have arisen had all the five partners owned the premises jointly, or if the partnership were the owner of the leased premises.

18. On this ground alone I could have set aside the judgment of the Court below, because the first element was not proved; but in case of appeal it is preferable that I should also deal with the other elements of the case.

19. The Respondent had to prove another matter, namely, to satisfy the Magistrate that there are other premises available for the Appellant. I emphasize the two words "other premises". The learned Magistrate in para. 8 of his judgment found that the Appellant Company could restrict itself to its own factory premises and there find enough room which could serve as an "other" store instead of the leased store.

20. And here I have to turn again to the law itself. The law uses an ordinary word which cannot have but one meaning, "other", namely, different, second, another (according to Kaufman's Dictionary), and in the Oxford Dictionary on page 808 we find the following four definitions:—

> "1. Not the same as one or more, or some already mentioned or implied.
> 2. Separate in identity.
> 3. distinct in kind.
> 4. alternative, or further, or additional."

Are any further elucidations necessary?

> "Where the language of an act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the Statute speak the intention of the legislature. If the words of the Statute are precise and unambiguous, then no more can be necessary than to expound these words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law given." (Craies, *ibid.*, p. 68).

21. If my memory does not mislead me the Supreme Court had not as yet had the opportunity of considering the meaning of the requirement of "other premises". But I am aware of two decisions given by this Court and one given by the District Court of Haifa, in connection with this requirement in respect of dwelling houses.

22. Before I consider the above mentioned precedents, it is perhaps advisable to quote here the wording of the requirement in respect of dwelling houses, which is somewhat different from the wording in respect of business premises, as in our case. The wording in connection with dwelling houses is as follows: "... and the Court ... after considering all the circumstances of the case, including especially the alternative accommodation available for the tenant" and the corresponding wording in connection with business premises is as follows: "... and the Court ... is satisfied that other premises reasonably available for the purpose for which the premises were used are available for the tenant."

23. The District Court in Haifa in C. A. 29/44 (1944, S. C. D. C. 456) said: "I consider that alternative accommodation must be accommodation in premises other than the premises at present occupied by the tenant".

24. The second precedent is C. A. 127/44 decided by this Court (Judge Hubbard) (1944, S. C. D. C. 285). There the tenant hired three rooms and sublet one room to a sub-tenant. The lessor was in need of one of the three rooms. The Court ruled that this third room sublet to the subtenant is available for the lessee as an additional third room.

25. The third precedent is C. A. 27/46, also given by this Court (Judge Rigby) (1946, S. C. D. C. 510). He was of the opinion that:—

> "Alternative accommodation offered in the same premises, where such alternative accommodation is protected by an adequate and proper security of tenure, may be sufficient. It is a question of degree depending on the circumstances of each case." (At the end of p. 517).

26. The ruling in 127/44, does not in my opinion apply to this case, as there it was a case of dwelling houses, which is not the case here.

27. Also 27/46 deals with dwelling houses, but it is the last sentence there which is significant, namely, that each case has to be considered on its merits. And this brings me to para. 10 of the judgment of the learned Magistrate.

28. In that paragraph the learned Magistrate dwells on the density in the Appellant's factory and decides that since this state of density was caused by the Appellant Company itself inasmuch as it developed and progressed, there is no reason, in the opinion of the learned Magistrate, why it should refuse to move the store into its factory, and his conclusion is that its refusal is to be attributed only to its desire for further "expansion and more profits". From the next two sentences one can ascertain the learned Magistrate's test, in determining his reasoning. He says: "The attitude of the Defendant is, with all due respect, an attitude of a person with double morals, and I do not think that this is in any way justified. A person may desire to develop his business and increase his profits, but he should not do this at the expense of another".

29. With all due respect, this line of reasoning seems to me to be erroneous. I could have perhaps agreed with it, if the Appellant would have requested the Respondent or anybody else to vacate the building because it requires additional space. That, however, is not the case. It is the Respondent who demands eviction, since he wants to progress and expand. If I follow the same trend of thought I shall have to express the idea thus: "The Respondent may wish to make more profits and expand his business, but he should not do so at the Appellant's expense". In my opinion, therefore, the learned Magistrate erred in the exercise of his discretion when determining that the prevailing con-

ditions in the Appellant's factory should not be considered. Already in 1598 Lord Coke set out the right principles when exercising discretion:—

> "Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glasses and pretences, and not to do according to their wills and private affections." (Craies, *ibid.*, 244).

30. I have now to deal with another point raised by counsel for Appellant Company, namely, when is the other place to be available for the tenant? He maintains that the other place must be available at the time of delivery of the judgment and he emphasized the two words appearing at the end of sec. 4(1)(e) of the Rent Restrictions (Business Premises) Ordinance.

31. This view seems to me to be reasonable and well founded. Here, again I have to point out that my attention was not drawn to any judgments of the Supreme Court, but as far as I remember no such authorities exist. But in C. A. 2/45 [6], (12, P. L. R. 326) the Court deals with dwelling houses, and the Dwelling Houses Ordinance, sec. 8(1)(c) does not contain the word "is" before the word "available". This view is strengthened by the difference between the wording of the Dwelling Houses Ordinance and the Business Premises Ordinance, and the reason for this difference is explained in Kimpson *v.* Markham (124 L. T. 790).

32. I am fully aware of the difficulties that this conclusion might cause to Plaintiffs as well as to the Magistrates' Courts when hearing cases of eviction of business premises, but the Court should not consider the consequences and I cannot disregard the wording of this requirement. The Court has to apply the existing law and not to make new laws. (Craies, *ibid.*, p. 89 ff.).

33. In the present case the learned Magistrate visited the premises in question on 18.6.46, and judgment was given on 18.8.46. Since a request was made to re-visit the place on the ground that conditions have changed in the meantime, it seems to me that the learned Magistrate should have complied with that request, particularly as he had already visited the place once before and had gathered certain impressions.

It is for these reasons that I hold that the appeal must be allowed, that the judgment of the Court below must be set aside, and that the action for eviction must be dismissed.

Respondent to pay to Appellant the costs of the appeal, of the action

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[6] 1945, A. L. R. 382.

in the Court below together with advocate's fee in the amount of LP. 25.— inclusive.

Delivered in presence of both parties, this 31st day of March, 1947.

(*Translated from the Hebrew*).

MOTION No. 546/46.
(CIVIL CASE 332/46).

IN THE DISTRICT COURT OF TEL-AVIV.

BEFORE: Their Honours the President Judge Windham and Judge Cheshin.

IN THE APPLICATION OF:—

Joseph Hendler. APPLICANT.

v.

Jehoshua Choczner. RESPONDENT.

Provisional attachment under Art. 271, Ottoman Code of Civil Procedure — Effect of later legislation on Art. 272, O. C. C. P. — Ex parte application under Ottoman Code of Civil Procedure and Rules 305, 306 and 307, C. P. R. — Applicability of Rule 302, C. P. R. — Requirements of affidavit to justify ex parte application.

1. Art. 272, Ottoman Code of Civil Procedure, is still in force as amended by Rule 7 of the repealed Civil and Commercial Procedure Rules, 1918, and as modified by sec. 6, Registrars Ordinance.

2. In an application for provisional attachment *ex parte* under Art. 271 the requirements of the Civil Procedure Rules, 1938, in particular Rules 305, 306 and 307, must be fulfilled, in addition to the requirements of Art. 272.

3. Art. 271 is confined to applications made before the claim is lodged, and the requirements of Rule 302, C. P. R. need not be complied with, as that rule is confined to applications made after a claim has been lodged.

4. a) An *ex parte* application under Rule 306, C. P. R., will not be granted unless the Judge or Registrar is satisfied from statements in the supporting affidavit that "the delay caused by proceeding in the ordinary way" (*i. e.* not *ex parte*) "would or might entail irreparable or serious harm".
b) These requirements of Rule 306 in the case of applications for provisional attachment under Art. 271 should, in the true interests of justice, be construed loosely, and allegations in the affidavit, being merely expressed to the best of the deponent's knowledge and belief, with no grounds for the belief stated, may be accepted as sufficient.

ANNOTATIONS:

1. On the first point see Annotated Laws of Palestine, Vol. 5, pp. 7—8, heading *"Present Text of Art. 272"*.

2. On the second point see *o. c.*, p. 9, para. (*c*) and note the different practice prevailing in the District Court of Haifa.

3. The ruling on the third point, though in accordance with several earlier cases, contradicts a number of more recent authorities; see *o. c.*, pp. 8—9, para. (*b*).

4. See, as to the different requirements of the O. C. C. P. and the C. P. R. respectively, *o. c.*, p. 10, para. (*e*).

5. On point 4(a) *vide* M. A. D. C. T. A. 243/43 (1944, S. C. D. C. 19 — para. 5 at p. 21).

6. On the last point see the cases cited and *cf.* Mo. D. C. Jm. 320/43 (1943, S. C. D. C. 71).

FOR APPLICANT: Rotenshtreich.

FOR RESPONDENT: Hotori.

DECISION.

This is an application under section 8 of the Registrars Ordinance, 1936, to set aside an *ex parte* order of the learned acting Registrar of this Court ordering the provisional attachment of certain property of the Applicant. The order was made under Article 271 of the Ottoman Code of Civil Procedure, the present Respondent having then not yet filed his statement of claim.

2. Before considering what we hold to be the main ground for setting aside the order it is, we think, desirable to record what, in the opinion of this Court, is the present position with regard to Article 272 of the Ottoman Code of Civil Procedure; for it has been argued that that Article (which briefly prescribes the procedure for attachments under Article 271) is no longer in force. Article 272 in its original form was in 1918 amended by rule 7 of the Civil and Commercial Procedure Rules to read: — "A conservatory attachment may be granted by the President of the Court on presentation of an application in writing by the creditor, who may be ordered to find a surety." The proviso to the Article remained untouched by the amendment of 1918, and reads: "Provided that if the claim be based upon a judgment which is executory, that is, which is not liable to appeal or cassation, there shall be no need for it to be heard and proved afresh, nor for the creditor to provide a surety." In 1938 the Civil Procedure Rules of that year repealed the Civil and Commercial Procedure Rules, which had effected the amendment in 1918. The question whether this repeal had the effect of reviving the original text of Article 272 was, it seems to us,

specifically decided by the Supreme Court in C. A. 194/46 [1], when they held that the repeal did not revive the Article as it stood prior to 1918. They left open, however, the question whether the Article "has in fact completely disappeared or whether it still stands as amended in 1918". Those, then, are the only two alternatives still left open for decision. Now at first sight it might appear that the repeal of the Civil and Commercial Procedure Rules would have the effect of repealing the amended text of Article 272 which they introduced, leaving only the unattached proviso to the Article, which those Rules had not touched. But there is an objection to this view, namely that those Rules were repealed only by subordinate legislation (namely the Civil Procedure Rules, 1938), whereas under superior legislation, namely the Civil Procedure Ordinance, 1938, which repealed a number of other Articles in the Ottoman Code of Civil Procedure, Article 272 was expressly left unrepealed. Since superior legislation prevails over inferior, in the event of discrepancy, this must mean that Article 272 in some form is still in force; and since it would be absurd to hold that the intention of the Ordinance of 1938 was to leave extant only the original proviso to the Article, isolated and meaningless without the corpus to which it had been attached, it must be held that Article 272, as amended in 1918, (together with its unaltered proviso) is still in force, the intention of the Ordinance of 1938 prevailing over the apparent effect of the Rules of 1938; and we so hold. It only remains to add that, as pointed out in C. A. 194/46, the provisions of Article 272 have been modified by section 6 of the Registrar's Ordinance, in that a Registrar may now grant provisional (*i. e.* conservatory) attachments under Article 271.

3. The above points, in our view, needed clarifying. But the crux of the present application to set aside is whether, in an application for provisional attachment *ex parte* under Article 271, the requirements of the Civil Procedure Rules, 1938, in particular rules 305, 306 and 307, must be fulfilled, in addition to the requirements of Article 272. In our view they must, and we need do no more than refer to the decision of this Court on this point in paragraph 3 of the judgment in Misc. App. 243/43 [2], to which we adhere. Although there is nothing in that judgment to justify it, a confusion seems to have arisen as to whether the requirements of Civil Procedure Rule 302 must also be complied with in an application for provisional attachment under Ar-

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[1] 13, P. L. R. 479; 1946, A. L. R. 688.

[2] 1944, S. C. D. C. 19.

ticle 271, in particular, proof that the Respondent is about to remove or dispose of his property with intent to delay or obstruct execution. The answer is no. Rule 302 is confined to applications after a claim has been lodged; Article 271 (owing to Rule 302 having now been made the appropriate provision where a claim has been lodged) is in our view now confined to applications made before the claim is lodged. The two are thus mutually exclusive, and the requirements of the one do not apply to applications under the other. The requirements of Civil Procedure Rules 305, 306 and 307, however, are common to both, since they apply generally to all applications, and these include (as was held in Misc. App. 243/43) applications under Article 271.

4. That being so, it remains to be seen whether the provisions of rules 305, 306 and 307 were complied with here; for it is undisputed that due compliance was made with Article 272, assuming that Article to be still in force (as we have held it to be). We do not consider that there is any substance in the contention that there was non-compliance with Rules 305 and 307; the application was properly made by way of motion supported by affidavit, and the grounds of the application were stated in general terms. But with regard to Rule 306, which deals with *ex parte* applications, it is contended that the learned acting Registrar did not express himself to be satisfied — or alternatively that the supporting affidavit was insufficient to warrant his being satisfied — that "the delay caused by proceeding in the ordinary way" (*i. e.* not *ex parte*) "would or might entail irreparable or serious harm", as required by that rule. Now with regard to the first of these alternative contentions, we hold that the learned acting Registrar, in stating in his order that it was given "in accordance with rule 306 of the C. P. R. 1938", was in effect stating that the requirements of that rule had been fulfilled, *i. e.* that he was satisfied that to proceed otherwise than *ex parte* would or might entail irreparable or serious harm. Turning to the second contention, namely that there were insufficient allegations to justify his being so satisfied, we find in the supporting affidavit an allegation by the present Respondent that "according to the best of my knowledge and belief in the event of failure to lay a provisional attachment on the moneys and movables of the Defendant I shall not be able to receive any moneys from the Defendant since the Defendant, according to my best knowledge and belief, is about to dispose of his property in order to obstruct the execution of a judgment passed against him". Now were it not for a recently reported judgment of the Supreme Court, H. C. 58/46 [3], we would

[3] 13, P. L. R. 501; 1946, A. L. R. 787.

have felt inclined to hold that such allegations, being merely expressed to be to the best of the deponent's knowledge and belief, with no grounds for the belief stated, were too vague and indirect to afford evidence to warrant the registrar's being satisfied of the necessity of an *ex parte* order, and that they vitiated the affidavit by reason of their non-compliance with Civil Procedure Rule 277. This Court has so held on more than one occasion, the most recent being in Motion 916/46, where an *ex parte* attachment order was set aside (*inter alia*) on this ground. But in H. C. 58/46 it was held that the fact of a deponent swearing an affidavit "to the best of his knowledge and belief" is a matter which affects the weight to be attached to the matters verified by the affidavit, and is not, by itself, a reason for rejecting the affidavit. The affidavit in the present case is therefore not to be held bad; and as regards the weight to be attached to the allegations so prefaced, that was a matter within the discretion of the learned acting Registrar, with which this Court will with reluctance interfere. We therefore hold that there were sufficient grounds before him to justify his making the attachment order *ex parte*.

5. We would add that, notwithstanding the ruling in H. C. 58/46, we would still have been disinclined to admit an affidavit of such a vague nature as that in the present case were it not for three considerations: — first, it is impossible, in most cases, for an applicant for provisional attachment to prove by direct and certain evidence that to delay until the application can be heard *inter partes* might cause him serious harm; secondly, to serve the other party with notice of the application does in fact give the latter an opportunity of disposing of his property (and thereby of causing the Applicant serious harm) before the date fixed for the hearing of the application *inter partes;* thirdly, prospective Defendants in this country to whom notice has been given avail themselves all too often of such an opportunity. The requirements of rule 306 in the case of applications for provisional attachment under Article 271 should therefore, in the true interests of justice, be construed loosely.

6. For all these reasons this application to set aside the order of the learned acting Registrar must be dismissed with costs, to include an advocate's attendance fee of LP. 5.—.

Delivered this 21th day of February, 1947.

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[4] *Ante*, p. 22.

MOTION No. 27/47.

IN THE LAND COURT OF HAIFA.

BEFORE: His Honour Judge Baradey.

IN THE MATTER OF:—

Hamad Mahmud Hussein. APPELLANT.

v.

The Palestine Jewish Colonisation Association. RESPONDENTS.

Cultivators (Special Commission) Appeal Rules — Application to extend time for appeal — Rule 324 C. P. R.

In the absence of specific provision in the Cultivators (Special Commission) Appeal Rules, to extend the time fixed in Rule 2 thereof, such time cannot be extended by the Court.

ANNOTATIONS: *Cf.* C. A. 192/46 (13, P. L. R. 354; 1946, A. L. R. 717) and note in A. L. R.; see also C. A. 258/46 (1946, A. L. R. 832).

FOR APPLICANT: S. Khadra.

FOR RESPONDENT: Bechor.

ORDER.

Having considered this matter it appears to me that this Court has no power to grant extension of time as applied for in this application. This application cannot be dealt with by reference to rule 324 of the C. P. R., 1938 which rules are not applicable to matters concerning the Protection of Cultivators Ordinance.

In my opinion, in the absence of specific provision in the Cultivators (Special Commission), Appeal Rules, 1937, enabling this Court to extent the time fixed in Rule 2 thereof for application for leave to appeal, such time as fixed cannot be extended.

The application is therefore refused with costs assessed at an inclusive amount of LP. 3.

Given this 4th day of March, 1947, in presence of Subhi Bey Khadra for Applicant, and Mr. Bechor for Respondent.

CIVIL APPEAL No. 9/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

Saleh Ali El Kurdi. APPELLANT.

v.

El Abed Berens. RESPONDENT.

Practice — Discontinuing an action — Rules 135 and 136 M. C. P. R. — R. S. C., O. 26, r. 1 — "At any time" — C. D. C. Ha. 94/40 — Admiralty 6 & 7 of 1940 — Costs.

The Plaintiff may at any time at or before the hearing discontinue the action, and even after the defence or during the pendency of the action no leave is required from the Court.

ANNOTATIONS: In addition to the Admiralty case cited see also C. A. D. C. Jm. 12/43 (1943, S. C. D. C. 201) and C. A. 261/45 (13, P. L. R. 25; 1946, A. L. R. 204).

FOR APPELLANT: Gross.

FOR RESPONDENT: W. Salah.

JUDGMENT.

This is an appeal against the judgment of H. W. Zaki Bey Tamimi, lately sitting as a Magistrate in Haifa, and it is brought against that part of his judgment whereby he refused to allow the Plaintiff to stay his action, relying upon the Annual Practice of the High Court of Justice in England, Order 26, Rule 1, p. 250 of the 1944 Volume, and upon certain English Cases.

It appears from the record of the lower Court that an action was filed by the Plaintiff against the Defendant in respect of the ownership of a carriage and for damages for breach of the undertaking to hand over the licence of the carriage held by the Defendant. It is not material to this appeal to consider the grounds of the action, for the appeal is only brought against the refusal of the Magistrate to allow the Plaintiff to discontinue his action. It appears that there was a hearing in the lower Court and some evidence was heard by the learned Magistrate. Further evidence was heard at an adjourned hearing and a ruling on the evidence read by the Magistrate and the case was ad-

journed further to 30th November, 1946. It appears that on 29.11.46, the day before this further adjourned hearing, written notice of discontinuance was filed in the Court by the Plaintiff and on the next day the Plaintiff repeated in Court his written application for the action to be discontinued. After some argument the learned Magistrate refused Plaintiff's application and adjourned the case for judgment, and gave judgment which was delivered on 18.12.46 by another Magistrate as Zaki Bey had in the meantime gone on leave pending retirement. Of course, under the Procedure Rules at present obtaining in Magistrates' Courts the Plaintiff had to wait until the judgment was delivered on the merits of the case before he could appeal against the order of the Magistrate.

Now, discontinuance in Magistrates' Courts is governed by Rule 135 of the Magistrates' Courts Procedure Rules which provides as follows:—

> "The Plaintiff or the Defendant in the case of a counterclaim may, at any time, at or before a hearing, by notice in writing wholly discontinue against all or any of the Defendants or Plaintiffs as the case may be, or withdraw any part or parts of his alleged cause of complaint and thereupon he shall pay such costs as the Court may order."

There is, of course, a further provision in Rule 136:—

> "If any subsequent action shall be brought before payment of the costs of the discontinued action, for the same or substantially the same cause of action, the Court may, if it thinks fit, order a stay of such subsequent action, until such costs shall have been paid."

Now, this rule is very different indeed from Rule 1 Order 26 of the Rules of the Supreme Court. Under that rule the Plaintiff may at any time before receipt of the defence or after the receipt thereof, and before taking any other proceeding by notice in writing discontinue the action, and, thereupon, he should pay Defendant's costs of the action. The rule further goes on to say that unless otherwise provided it shall not be competent upon the Plaintiff to discontinue the action without leave of the Court or Judge. So it is apparent from these two rules that the rule obtaining in the Magistrates' Courts of Palestine is in spirit and purposes similar to the old English procedure where the Plaintiff in Common Law could claim a non suit at any time. It seems to me, therefore, that to rely upon English Authorities interpreting Rule 1 of Order 26 is of little use in interpreting Rule 135 of the Palestine Procedure Rules.

Attention has been drawn by the Appellant to a decision of the District Court of Haifa in Civil Case No. 94/40 reported in Cohen's

Law Reports of the District Court of Haifa of May, 1943, (p. 324) where the Court held that it will refuse to discontinue the action and will dismiss Plaintiff's case if application for discontinuance is made after years of litigation and the case has reached a stage where the Court could announce judgment. Now whether this judgment is right or wrong and I would venture to submit with great respect to the learned Judges that it is not correct, the facts in that case and the reasons why the Court refused the application are quite different to the facts in the present case, for in the District Court case, the action had been running for some years, whereas the present case was a recent one; it only had two hearings before the application for discontinuance was filed. A further case was cited by the Respondent against the Appellant and that is Admiralty Cases 6 and 7 of 1940 * 8, P. L. R. p. 285, where the Supreme Court sat as a Court of Admiralty. After hearing of the action, the Court had reserved its judgment and refused to allow the Plaintiff to discontinue. Here again the facts are quite different and with respect to the learned Judge that decision was a correct one, for that was not an application for discontinuance made "at any time" at or before the hearing. In my opinion as I read this rule obtaining in Palestine, it clearly provides that the Plaintiff may at any time at or before the hearing discontinue the action and even if such application is filed after the defence or during the pendency of the action, no leave is required from the Court. It is sufficient for the Plaintiff to file his application, and the case must be discontinued and the remedy for the Defendant in such a case is to ask for costs; there is of course, a further safeguard for the Defendant against the re-institution of the action if these costs are not paid provided in rule 136.

In my opinion, therefore, the learned Magistrate was wrong in refusing discontinuance.

The judgment of the lower Court is set aside and the action in the lower Court is ordered to be discontinued, and the case remitted to the lower Court to hear the parties as to costs and award costs as it may deem fit. Appellant to have costs of this appeal on the lower scale and I certify advocate's attendance fee in this appeal in the sum of LP. 10.

Delivered in open Court this 24th day of March, 1947, in presence of Mr. Gross for Appellant and of Walid Eff. Salah for Respondent.

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* 1941, S. C. J. 488.

CIVIL APPEAL 167/46.

IN THE DISTRICT COURT OF TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour Judge Cheshin.

IN THE APPEAL OF:—

Eliyahu (Elias) Sher. APPELLANT.

v

Herman Boneh & an. RESPONDENTS.

Landlord & Tenant — Tender of Rent — Change in ownership.

Where the tenant does not know about the change in the ownership of the premises let to him or where there is a doubt in his mind as to who is the real owner — he is not deemed to have discontinued to pay rent if he continue to deposit the same in the name of the previous owner.

ANNOTATIONS:

1. On "discontinuance" to pay rent see C. A. D. C. Ha. 5/47 (*ante*, p. 86) and note thereto; *cf.* also C. A. D. C. T. A. 190/45 (*ante*, p. 96).

2. On the effect of depositing the rent in a bank *cf.* C. A. D. C. T. A. 94/45 (1946, "*Hamishpat*" 43) and C. A. D. C. T. A. 65/45 (*ibid.*, p. 115).

FOR APPELLANT: Nochimovsky.

FOR RESPONDENTS: Necheles.

JUDGMENT.

I am of opinion that there is no need to call on the Respondents to reply.

The action was for the eviction from a dwelling-house on the grounds that the Respondents had discontinued paying rent and had changed the object for which the premises had been let. The facts are fully set out in the judgment appealed from and for the purpose of this appeal it is unnecessary to repeat them here in detail. The question which was before the Court below, and which was raised again on this appeal, is whether the Respondents had discontinued paying rent as stipulated in the agreement. The learned Magistrate answered this question in the negative, and I fully agree with him in the circumstances of the case. The original landlord was a man named Shuster and from him the Respondents had taken the premises on lease many years ago. Since March, 1939, the Respondents have been depositing the rent in a bank in the name of Shuster and the latter used to withdraw the money without objection. At the beginning of 1945, Mr. Shuster gave an irrevocable power of attorney to one, Lalo, to transfer the premises

into the name of whomsoever Lalo may desire. This fact being unknown to the Respondents they continued depositing the rent in the bank in the name of Shuster, as they formerly used to do, and Shuster withdrew the sums so deposited. In March, 1945, the property under consideration was transferred to the Appellant, and he gave the Respondents notice of such transfer, notifying them at the same time that rent is to be paid henceforth to him. At about the same time, however, Mr. Shuster notified the Respondents that he had transferred the land and the building thereon to Mr. Lalo. Both Mr. Shuster and the Appellant spoke the truth, as the transfer to the Appellant was effected through Lalo, but neither Shuster nor the Respondents knew of the actual facts. In any event, these two notices, conflicting as they appeared to be, were sufficient to create doubt in the minds of the Respondents as to who was the real owner of the premises.

In order to safeguard their rights the Respondents have acted as any reasonable man would have acted in similar circumstances, namely, they continued depositing the rent in the bank in the name of Shuster, as they had done until then. I do not mean to lay down that had they not deposited the rent in the bank, owing to the confused state of things, their position would have been any worse; but the fact remains that, acting cautiously, they did deposit the rent in the bank. The Appellant did nothing more than notify the Respondents that he had become the new owner, and demanding that rent be paid to him, without at the same time offering any evidence of title or right of ownership. Now, in ordinary circumstances that might have been sufficient to cast the duty on the Respondents to investigate the measure of truth contained in Appellant's statement. The notice which was sent by Shuster, however, came approximately at the same time, and, as was pointed out above, that notice appeared to contradict the alleged ownership of the Appellant. In these circumstances it seems to me that the Respondents cannot be blamed for acting the way they did. I therefore hold that the learned Magistrate was right in concluding that the Respondents have never discontinued to pay rent and in, consequently, dismissing the action.

Mr. Nochimowsky for the Appellant advances also the argument that there was no evidence that the Respondents had actually deposited the rent in the bank in the name of Shuster. It has already been observed above that it is unnecessary to discuss the question whether or not the position of the Respondents would have been any worse had they failed to make such deposit, since the learned Magistrate made a finding that they had done so. Such finding being supported, as it is, by the evidence adduced cannot be upset. Here it must be remarked

that after the action had been filed an additional sum was deposited in Court to cover the amount of rent in full, and the learned Magistrate held that this was a proper case for granting relief against forfeiture on equitable grounds. Mr. Nochimovsky attacks this decision on several grounds. But in view of my above conclusion it is unnecessary to discuss this point here.

The statement of claim contained another cause of action, namely, that the Respondents had used the flat also as business premises in breach of the terms of the lease. Although this contention is also contained in one of the grounds of appeal, Mr. Nochimovsky did not press this point. And there is really no need to discuss it any further. The learned Magistrate has found that the change of user had occurred many years ago and that Mr. Shuster, in whose shoes the Appellant now stands, had waived his right to sue for eviction on that ground. There was ample uncontradicted evidence to support that finding and the learned Magistrate was therefore right in dismissing also the second cause of action.

By reason of the above the appeal is dismissed and the Appellant ordered to pay Respondents' costs to include an exclusive advocate's fee of LP. 10.

Given in open Court this 27th day of January, 1947, in the present of Mr. Shneerson by delegation from Mr. Serlin for the Appellant and Mr. Degani for the Respondents.

(Translated from the Hebrew).

CIVIL CASE No. 134/46.

IN THE DISTRICT COURT OF TEL-AVIV.

BEFORE: His Honour the President Judge Windham.

IN THE CASE OF:—

Itzhak Mondre & an. — APPLICANTS.

v.

M. Prop & M. Okun. — RESPONDENT.

Arbitration — Arbitrator refusing to state a case during arbitration proceedings — Sec. 8(1)(b) and (2), Arbitration Ord. — Arbitrator stating case upon delivery of award without making alternative awards depending on the Court's decision — Statement of claim not recapitulated in full in award — Arbitrator requesting both parties to pay equal

amounts to cover expenses of arbitration but receiving payment from one party only — Construction of submission of dispute which was subject matter of an action in Court — Arbitrator allegedly ignoring admissions by one party in evidence before him — Costs of stating a case and costs of hearing of case stated — Costs of original action — Interest on amount awarded.

1. If an arbitrator is requested by a party to state a case on points of law, he cannot do so before the conclusion of the proceedings, unless otherwise directed by the Court.

2. An arbitrator should, upon the application of a party, adjourn to enable the party to apply to the Court to direct the arbitrator to state the case forthwith.

3. Where an arbitrator, while stating a case, does not make two or more alternative awards depending on the decision of the Court, the case may, if necessary, be remitted to the arbitrator for making an appropriate award in the light of the Court's decision on the case stated.

4. An omission to recapitulate the statement of claim in full in the award does not *per se* constitute misconduct.

5. Where both parties agreed to pay equal amounts towards the expenses of arbitration, the arbitrator may properly issue his award after having received payment from one party only.

6. Where during the hearing of a civil action in the Magistrate's Court the parties agreed "to submit the dispute between them to a single arbitrator", the submission not containing an express reference to the claim as filed in Court, the parties while certainly submitting the dispute which had given rise to the civil action, were not necessarily submitting it in the exact terms set out in the pleadings in that action, and the arbitrator had authority to accept a claim differing in some particulars from that in the civil action.

7. If a party choses to have a case stated on what he considers to be a point of law, he cannot at the same time seek to have the award set aside on the ground that the arbitrator came to a wrong decision on that alleged point of law.

8. Although an arbitrator cannot fix or award the costs of the hearing of a case stated, he can fix and award the costs of stating the case.

9. An arbitrator has power to award costs incurred in a Court action and interest on the amount awarded from the time of filing of that action, where these matters are incidental to the dispute which was the subject of the submission.

ANNOTATIONS:

1. On the first two points see Annotated Laws of Palestine, Vol. 2, p. 105, heading "*Sec.* 8(1)(*b*) *and* 8(2) *compared*" and p. 106, heading "*Reserving a question of law, etc.*"; see also Mo. D. C. Jm. 451/43 (1943, S. C. D. C. 114).

2. As regards C. D. C. T. A. 42/40, referred to in connection with the third point, see *o. c.*, p. 117, heading (*Award not final*).

3. See, on the fourth point, C. A. 171 & 236/46 (1946, A. L. R. 657) and notes 2—4.

4. On the sixth point *cf.* Annotated Laws of Palestine, Vol. 2, pp. 136—7, heading *"Excess of jurisdiction"* and *vide* C. D. C. T. A. 195/44 & 170/45 (1945, S. C. D. C. 535).

5. *Cf.*, in connection with the 7th point, C. D. C. T. A. 424/45 (1946, S. C. D. C. 183).

6. On the last two points *vide* Halsbury, Vol. 1, p. 667, second paragraph of para. 1121, and footnote (*c*).

FOR APPLICANTS: Needer.

FOR RESPONDENT: S. Wolf.

JUDGMENT.

This is an application under section 13 of the Arbitration Ordinance for the setting aside of an award. The dispute submitted for arbitration arose out of an agreement whereunder the Respondent firm claimed to have employed the Applicants over a period of years as distributors in its business of butter marketing, and that the Applicants owed to the Respondents a balance of LP. 141.643 in respect of butter supplied to them for distribution and not returned. The learned arbitrator, Dr. Korngruen (one time Judge of this Court) after numerous hearings eventually gave his award, on 15.3.45, awarding to the Respondents the sum of LP. 141.643 with legal interest as from the date of the filing in the Magistrate's Court of the claim out of which the submission had arisen.

2. A large number of grounds have been submitted and argued for setting aside the award. The first ground is that the arbitrator was guilty of misconduct in refusing, during the course of the arbitration proceedings, to state a case on various points of law upon the written application of the present Applicants, or to allow the Applicants time to apply to the Court to direct the arbitrator to do so. What the learned arbitrator did was to give a written decision stating his reasons for refusing forthwith to state the case. Upon the delivery of this decision the Applicants' advocate did not repeat his application for adjournment for the above purpose, but appears to have accepted the decision, which was that, for the reasons fully set out by the learned arbitrator, he did not propose to state the case then and there, and so interrupt the conduct of the case, but proposed to state it together with his award upon delivery of the latter, after hearing all evidence and addresses of counsel. This the arbitrator in fact did, stating together with his award all the (alleged) points of law exactly as framed by the Applicants' advocate. This I consider was the correct course, and I entirely agree with the reasons given by the arbitrator for adopting it. It is, I conceive, only "if so directed by the Court or a Judge

thereof" that an arbitrator is at liberty to state a case before the conclusion of the proceedings; in such a case the relevant provision of the Arbitration Ordinance is section 8(2). But where, as here, there has been no direction by the Court or Judge, then the arbitrator is only at liberty to proceed under section 8(1)(b), and thereunder to "reserve any question or questions of law arising out of the arbitration for the opinion of the Court". This, I hold, means that he may only state the case under section 8(1)(b) at the conclusion of the proceedings, which is what the arbitrator did when he stated it together with his award. Such an interpretation of section 8(1)(b) is the only reasonable one; for otherwise a party playing for delay might interrupt the hearing of an arbitration for years by perpetually requiring the arbitrator to state a case on a point of law for the opinion of the Court before the conclusion of the hearing, — and this would entail the additional disadvantage, if the application was made before the conclusion of the evidence, that the Court would not have all the facts before it. I can find no direct authority on this point in the decided cases in Palestine, but I note that my view is shared by the learned annotator to section 8 of the Ordinance at page 105 of Volume II of the Annotated Laws of Palestine. Lastly, with regard to the arbitrator's not having allowed the Applicant the opportunity of appealing against his decision not to state the case forthwith, I need only mention again that the Applicants' advocate did not repeat his application for an adjournment, upon the delivery of this decision, nor did he, as he could have done, apply to the Court under section 8(2) to direct the arbitrator to state the case forthwith. He must therefore be taken to have dropped his alternative prayer to adjourn. For these reasons the first ground for setting aside the award fails.

3. — — — — — — — — — —*

4. The next two grounds for setting aside (grounds 3 and 4 in the written application) may be dealt with, as they were argued, together. They amount to this, — that the learned arbitrator, while he submitted the various points of law prepared by the Applicants' advocate as a case stated for the opinion of the Court, did not make two or more alternative awards of amounts due to the Respondents in such a way that, however the Court should decide on the points of law, one of such amounts would be the award appropriate to the Court's decision. For this reason it is argued that the award was not final and should be set aside. But although there is good authority for holding that an award is not final if it does not, as the award in the present case

* Omitted.

(*Ed.*)

admittedly does not, so state a case that, whichever way the Court decides on the points of law stated, one of the alternative decisions of the arbitrator automatically comes into operation, yet I can find no authority for holding that an award ought on those grounds to be set aside. On the contrary, it seems to me that the proper procedure is neither to set aside nor even to remit the award at the present stage or upon the present application, but to await the decision of the Court upon the points of law and then, *if necessary* in the light of that decision, to remit for the arbitrator to make the award appropriate to that decision. There is precedent in this Court (C. D. C. T. A. 42/40, unreported) for remitting an award that is not final; and the course I have suggested is the one most likely to achieve finality in as short a time as possible. Moreover it is the one suggested in the following passage in *Russell on Arbitration*, 13th edition, at pages 287—8:—

> "Where the points of law raised affect the amount to be awarded in more than two ways, it may be difficult for him to make several alternative findings of the amount due in the event of one or more of the points of law being found correct or not. His duty in that case also is to make his award final according to the view he takes of the law, and merely to state, as regards the various other points of law, that he has not given effect to the contentions raised, having regard to the decision already given by his award. If, when the special case is heard, the Court should be of opinion that he should have given effect to any one or more of the various contentions raised, the Court will express its decision, and the award must of necessity be remitted to the arbitrator to find what amount is due, having regard to the decision of the Court. The Court cannot in such a case find what amount is due. It can only decide upon the law and remit the award to the arbitrator to find the amount".

It therefore becomes unnecessary to decide in the present application whether the questions of law framed by the Applicants' advocate and stated together with the award are in fact questions of law or only questions of fact, since that will fall to be considered by this Court in deciding on the case stated. I therefore refrain from deciding at this stage whether all or any of them are in fact questions of law. And this ground for setting the award aside, or even for remitting it at this stage, fails for the reasons I have given.

5. The next ground for setting aside is that the arbitrator, in setting out in his award the terms of the Applicants' statement of claim as submitted to him, omitted (as he in fact did) one sentence and part of another in that claim. As a ground for setting aside the award this is frivolous. There was no obligation on the arbitrator to recapitulate the statement of claim at all in his award, and his doing so was superfluity. Nor is it suggested that the omissions were deliberate.

They therefore constituted no misconduct. This ground accordingly fails.

6. The next ground is that the award was improperly procured in that the arbitrator took LP. 12.500 from the Respondents singly before making his award. As to this, I am entirely satisfied from the explanation of the arbitrator himself in evidence before me that what he did was to demand from each party, in the presence of the other, LP. 12.500 to cover expenses of arbitration. Both agreed, but only the Respondent paid. That was quite a proper thing to do, and in view of the Applicants' agreement to pay they cannot be heard to argue that it constituted misconduct.

7. The next grounds for setting aside the award (grounds 7 and 8 in the written application) may be dealt with together. Ground 7 is that the arbitrator exceeded his authority in accepting, as the dispute submitted, a claim which differed in some particulars from the terms of the statement of claim which had been originally filed in the Magistrate's Court in civil file 2562/43. During the hearing of that case the parties agreed to submit their dispute to arbitration, their submission being in the following terms: — "The parties submit to arbitration the dispute between them of the one against the other party (common disputes) to the single arbitrator Dr. Korngruen who will give award within 10 weeks from today and not after this period". Now from the evidence of its terms and from its absence of express reference to the claim as filed in civil file 2562/43 I take this submission to mean, as the learned arbitrator clearly also did, that while the parties were certainly submitting to arbitration the dispute which had arisen between them and which had given rise to the action in civil file 2562/43, namely the dispute as to what if any monies were owing by the Applicants to the Respondents upon their agreement with regard to the distribution of butter, they were not necessarily submitting it in the exact terms as set out in the written pleadings in that case. The dispute was to be tried *de novo* before an arbitrator, but the arbitrator in my view had full discretion to accept, as he did, pleadings framed differently in some particulars; so long as the new statement of claim remained, as it did, a claim for monies due to the Respondents arising out of the agreement between the parties for distribution, by the Applicants, of butter supplied to them by the Respondents, that was sufficient; and the arbitrator was not exceeding his authority by accepting pleadings which described the actual terms of the agreement somewhat more elaborately. For what was submitted was "the dispute", and the dispute upon which the claim in arbitration was based was obviously the same dispute upon which the claim in the

Magistrate's Court was based. This ground for setting aside the award accordingly fails. The next ground, number 8 is to the effect that the arbitrator was guilty of misconduct in not holding that the Respondents were estopped from making in the claim before him allegations with regard to the terms of the agreement which differed from their allegations in the claim as filed in the Magistrate's Court. This must accordingly also fail; for, as I have said, the new claim did not have to be identical with the old, so long as it remained substantially the same (as it did) and concerned the same dispute. There can therefore be no question of estoppel by reason of the terms of the agreement, as alleged in the original claim, being somewhat different from its terms as alleged in the claim presented to the arbitrator.

8. The next ground (ground 9) alleges misconduct in that the arbitrator ignored certain admissions said to have been made by the Respondents in evidence before him. This, however, is a question of evidence, and is no ground for setting the award aside. There is not the slightest ground to suggest that the arbitrator deliberately ignored any evidence or admissions. Furthermore the matters upon which the arbitrator is alleged to have reached a wrong decision through ignoring the Respondents' admissions are, in so far as they involve (if they do) questions of law, the very matters that are to be dealt with in the case stated. If a party chooses to have a case stated on what he considers to be a point of law, he cannot at the same time seek to have the award set aside on the ground that the arbitrator came to a wrong decision on that alleged point of law. He cannot pursue both remedies. This also disposes of the next ground for setting aside, namely ground 10, which is admitted to be covered by ground 9(d).

9—10. — — — — — — — — —*

11. In ground 16 it is contended that the arbitrator erred in ordering the Applicants to pay (*inter alia*) LP. 7.— costs of stating the case for the opinion of this Court. But in my view the discretion given to an arbitrator as to costs, under section 18 and paragraph (i) of the schedule to the Arbitration Ordinance, is wide enough to cover such an order. There is English authority, it is true, that an arbitrator cannot fix or award the costs of the actual hearing of the case stated; but that does not include the costs of *stating* the case, which must be considered as costs of the reference: *vide* Hogg on Arbitration, page 175, and in particular footnote (2).

12. The last two grounds, 15 and 17, may be considered together. They allege that the arbitrator erred in awarding to the Respondents

* Omitted. (*Ed.*)

(*inter alia*) their costs incurred in the abortive action in the Magistrate's Court, and also interest on the amount awarded as from the filing of the claim there. But I see no reason why both these should not be awarded to the successful party in the arbitration. Not only were they both claimed in the statement of claim in the arbitration (thereby falling within the reference), but they must be considered as incident to the original "dispute" which was the subject of the submission, and therefore as falling within the submission. These grounds for setting aside the award, in part or in whole, accordingly fail.

13. For all these reasons this application to set the award aside is dismissed with costs, to include an advocate's attendance fee of LP. 12.—.

Delivered this 10th day of February, 1947.

CIVIL CASE No. 277/46.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour Judge Nasr.

IN THE APPEAL OF :—

Lishkat Hacarmel. PLAINTIFF.

v.

District Commissioner. DEFENDANT.

Rates & Taxes (Exemption) Ord. — Reputed owner — Charitable Organization — Charitable purposes, sec. 2, Charitable Trusts Ord. — Re Clark's Trust, I. R. C. v. Yorkshire Agricultural Society.

1. To constitute a society a charitable organisation, under sec. 12(c)(b) of the Rates & Taxes (Exemption) Ordinance, its object or purpose must be one that is beneficial to the public or any section of the public.
2. A society formed for the purpose merely of benefiting its own members though that may be to the public advantage is not a Charitable Organisation.

ANNOTATIONS: See Annotated Laws of Palestine, Vol. 3, pp. 195—6 and the passages from Halsbury there referred to; for more recent authorities see the Supplement Volume to Halsbury and *vide Re* Air Raid Distress Fund's Trusts, 1946, 1 All E. R. 501.

FOR PLAINTIFF: Margolin.

FOR DEFENDANT: Pinhasovitch.

JUDGMENT.

The Plaintiff Society claims that they are the reputed owners of a plot of land with a building thereon situated in Bat Galim, Haifa, and

described as parcel 10, Block 10819. This property, they say, is only used as a "Home for Aged Persons", members of their Society and is not one for the purpose of deriving any profit therefrom. Being exclusively maintained for a charitable purpose, they apply for judgment declaring it to be exempt from Urban Property Tax. They further apply that the Defendant be ordered to refund the sum of LP. 70.400 mils paid under protest on 30.7.46.

The Defendant denies that the Plaintiff is the reputed owner of this property and further denies that they are a charitable organisation and that its purposes are charitable.

There were three witnesses called for the Plaintiff. The first Glikin Theodor, an officer of the District Administration testified that the Plaintiff was registered as a Society in their Offices under the Ottoman Law of Societies on 20.3.28. He produced the original Rules of the Society which are Exh/P/1. The other two witnesses, Dr. Israel Abraham Rubin and Jacob Caspi who are members of the Society gave evidence that the property the subject matter of this case, was given away about seven years ago by a certain Mrs. Malca Rotenberg to be used as a Home for Aged Persons. Ever since it was given away, it was used for this purpose. The inmates of the Home are not charged with rent. Light, water and food are provided for them in addition to service. The inmates contribute for the upkeep of the house, but what they contribute does not cover the expenses. The additional expenses are covered from membership fees and donations from non members. The contributions from the inmates vary in accordance with their financial ability. The maximum amount paid by any one per month is LP. 9. One resident does not pay anything but instead does certain services. The Home is managed by a Committee on behalf of the Plaintiff Society and is run on a charitable basis.

Apart from these witnesses, the Plaintiff produced with the consent of the Defendant an extract from the Land Registry Exh. P/2 which went to show that 8/14 shares in the property indicated therein were transferred without consideration by Pinhas Lazar, Zvi and Abraham Rotenberg, heirs of Moshe and Malca Rotenberg to the Carmel Lodge No. 981, Agudat Haim Bnei Brith. It is not disputed that the property shown in the extract is the property the subject matter of this case and it is further not disputed that the Carmel Lodge No. 980 Agudat Haim Bnei Brith is the Plaintiff Society.

Two other letters were produced with Defendant's consent addressed to Mr. Pinhas Margolin, one from the District Officer, (Finance) dated 4.7.46 Exh. P/3, in which it is stated that as ownership in the property is vested in part in the names of private persons, the District Com-

missioner cannot grant exemption. The other, Exh. P/4, from the District Commissioner dated 14.8.46, in which the District Commissioner states that he is not satisfied that the present owners are a Charitable Organisation.

The Defendant did not call any evidence, and I will therefore proceed and decide the case on the Plaintiff's evidence which stands unchallenged.

The Plaintiff's case is based on section 12(c)(B) of the Rates and Taxes (Exemption) Ordinance, No. 18 of 1938.

Section 12 reads:—

> "Notwithstanding anything contained in the Urban Property Tax Ordinance, the urban property tax shall not be levied on any house property or land of which"
>
> (Paragraph (c)):—
>
> "Any charitable organisation is the reputed owner provided that such land is used by such charitable organisation either as"
>
> (Sub-Paragraph (B)):—
>
> "An orphanage or almshouse or Home for indigents".

I think there can be no serious dispute on the evidence before me that the Plaintiff Society is the reputed owner of the property in question; although they are the registered owners of part of that property, they are nevertheless covered by the definition of "owner" in section 2 of the Urban Property Tax Ordinance No. 42 of 1940, which includes reputed owners.

The question which I must next decide is whether on the evidence before me, the Plaintiff is a charitable organization.

In this connection I must examine the objects of the Society which appear in the Rules of the Society, Exh. P/1. They are:—

> "1. To promote the social, moral and public condition of the members of the Society.
>
> 2. To create brotherhood and friendship among the members of the Society.
>
> 3. To take part and support all national, social and human undertakings and charitable institutions existing within the scope of activities of the Society.
>
> 4. To establish new undertakings in accordance with the objects of the Society.
>
> 5. To centralise within the *Lishka*, the best social powers and to influence public life in the spirit of the *Lishka*.
>
> 6. To extend moral and material assistance to the needy.
>
> 7. To support brethren in distress and to look after the widows and orphans of the brethren of the *Lishka*."

Those being the objects and having regard to the allegation in paragraph 2 of the Statement of claim that the Home for the Aged Persons was for members of the Plaintiff Society, it becomes clear that the activities of the Plaintiff Society are confined to its members only.

Now, in order to constitute a Society a charity, its object or purpose must be one that is beneficial to the community. This, I think, is the established principle. "Charitable Purposes" as defined in section (2) of the Charitable Trusts Ordinance, Cap. 14 include all purposes for the benefit of the public or any section of the public. It can in no way be argued that the Plaintiff Society in Haifa, which comprises from 80—90 members constitutes a section of the public. All that can be said about it is that it is a club for the mutual advantage of its members. Such clubs are definitely not charitable organizations. Authority for this is found in *re* Clark's Trust 1 Ch. D. p. 500. In the case of the Inland Revenue Commissioner *v.* Yorkshire Agricultural Society, 1 K. B. 1928, p. 611 the question as to what were charitable purposes was fully gone into and the following passage on page 631 from the judgment of Atkin, L. J., seems to me to be on the point:—

> "First of all it is said: No, this Society was in fact formed for the purpose of giving benefit to its members; It is nothing but a club for the mutual advantage of the members of the club. If that were so, I agree that the claim of the Society would fail, both because it could not be said that the Society was established for a Charitable purpose and "because it certainly could not be said that it was established for a charitable purpose only. There can be no doubt that a Society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the objects that it should benefit its members I should think that it would not be established for a charitable purpose only."

This brings me to the conclusion that on the facts of this case the Plaintiff Society is not charitable organization entitled to the exemption offered to charitable organizations in section 12(c)(B) of Ordinance No. 18 of 1938.

The Plaintiff's case is, therefore, dismissed with costs to the Defendant in an inclusive figure of LP. 20.

Delivered this 20th day of March, 1947, in the presence of T. Margolin for Plaintiff and of Pinhasovitch for Defendant.

CIVIL APPEAL No. 105/46.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Rigby.

IN THE APPEAL OF:—

Yacoub Ibrahim El Kaud. APPELLANT.

v.

Ahmad Taha Hamdan & an. RESPONDENTS.

Sale of land outside land registry — Failure of consideration — Art. 21 Ottoman Magistrates' Law — Best evidence — Estoppel — Prescription — Equitable title.

An appeal from the judgment of the Magistrate's Court of Ramallah (H. W. Mr. S. Daoud), delivered on the 28.11.1946 in C. C. 298/44, dismissed:—

1. Under Art. 21 of the Ottoman Magistrates' Law the duty of the record clerk was to take down the evidence. If a document was produced it spoke for itself and a precis of the contents thereof prepared by the record clerk did not strictly form part of the record of the Court.

2. In the event of the destruction of a document so referred to in the record, any such precis may possibly be admissible under the best evidence rule, but in that case the record clerk who made it should be called to testify as to its accuracy.

3. No estoppel is created in favour of a proposed purchaser of land if the proposed vendor of such land used the agreement of sale as evidence in a case between himself and a third party to which the proposed purchaser was not a party and in which a different issue had to be determined.

4. Money paid on a sale of land, which is void because effected outside the Land Registry, may, under sec. 11 of the Land Transfer Ord., be recovered by the proposed purchaser. Such claim for recovery is prescribed after the lapse of 15 years from the date the money was paid to the proposed vendor.

5. An equitable title to land cannot accrue on the basis of a taking of possession which constitutes an offence.

6. Hence taking possession of land following upon a sale which is void as made outside the Land Registry cannot give rise to an equitable title, as such taking of possession is an offence under sec. 12 of the Land Transfer Ord.

ANNOTATIONS:

1. On the second point *cf.* I. T. A. 19/43 (10, P. L. R. 487; 1943, A. L. R. 584, on pp. 586—7).

2. On the third point *vide* C. A. 88/46 (13, P. L. R. 414; 1947, A. L. R. 105) and note 2, and L. C. Jm. 12/45 (*ante*, p. 38).

3. *Cf.* the following recent cases, with the notes thereto in A. L. R., in the effect of secs. 4, 11 & 12 of the Land Transfer Ordinance: C. A. 16—24/45

(1945, A. L. R. 628), C. A. 40/45 (*ibid.*, p. 667), P. C. 52/44 (13, P. L. R. 271; 1946, A. L. R. 402) and C. A. 113/46 (1947, A. L. R. 255).

4. On the time when prescription begins to run *cf.* L. C. Ja. 10/43 (1946, S. C. D. C. 790) and note 3; see also Annotated Laws of Palestine, Vol. 5, p. 70.

5. On the last two points see C. A. 89/46 (1946, A. L. R. 542) and cases therein cited.

FOR APPELLANT: J. Ancar.

FOR RESPONDENTS: I. Sa'adeh.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court Ramallah whereby the learned Magistrate dismissed the Appellant's claim for the recovery of the amount of LP. 95.— from the Respondents, as successors in title of one Muhamed el Abed Taha Hamdan, now deceased.

The claim was for the refund of the amount of LP. 95.— which the Appellant had paid to the deceased Muhamed el Abed Taha Hamdan as purchase price for a piece of land and in respect of which he alleged there had been a failure of consideration.

2. Briefly the facts of the case are as follows. The Appellant alleged that on 15.1.25 he purchased from Muhamed el Abed Taha Hamdan a piece of land for the amount of LP. 95.— in accordance with a deed (*hijjeh*) and that he entered into, and remained in, possession of the land from the date of purchase till 1930.

In 1930 the first Respondent, Ahmad Taha Hamdan, entered upon the land alleging that he was entitled to twelve out of the twenty-four shares of the land.

Thereupon, Muhamed el Abed Taha Hamdan brought an action in the Magistrate's Court Ramallah against Ahmad Taha Hamdan for recovery of possession. It appears from the Appellant's own evidence before the Magistrate on 28.5.45, when he first instituted these proceedings, that Muhamed el Abed Taha Hamdan instituted that action for recovery of possession at his, the present Appellant's, own request. The Appellant gave evidence in those proceedings for recovery of possession. I will later refer to that evidence.

On the face of it, it appears remarkable that the Appellant, if he was then the owner of the land as he alleges, did not himself bring proceedings for the recovery of possession of the land. It would seem, however, that there are two alternative explanations for his failure to do so.

Firstly, because, as was alleged by Muhamed el Abed Taha Hamdan's counsel in his closing address to the Court in that case (produced

as an exhibit (Exhibit 4) by the present Appellant before the Magistrate in the present case), the sale to the Appellant was a transaction outside the Land Registry and, as such, null and void by reason of section 11 of the Land Transfer Ordinance and Muhamed el Abed Taha Hamdan was therefore still the owner of the land and the person entitled to bring proceedings for recovery of possession.

Alternatively, as Jabra Eff. Ancar, counsel for Appellant, now asks me to hold, the transaction was not an outright sale but simply an agreement for sale and therefore, until the sale was completed, Muhamed el Abed Taha Hamdan was still the proper person to bring proceedings for recovery of possession.

However, the Magistrate dismissed in part Muhamed el Abed Taha Hamdan's claim for recovery of possession, holding that Ahmad Taha Hamdan was entitled to twelve out of the twenty-four shares in the land.

From the date of the delivery of the judgment — according to the Appellant's Statement of Claim — the whole of the land was in possession of Ahmad Taha Hamdan and Muhamed el Abed Taha Hamdan and they refused to let the Plaintiff take possession of the land.

Further, Muhamed el Abed Taha Hamdan — again according to the Plaintiff's Statement of Claim — refused to refund to the Appellant the LP. 95.— he, the Appellant, had paid as purchase price for the land.

In 1942, Muhamed el Abed Taha Hamdan died and Ahmed Taha Hamdan and the second Defendant, as his successors in title, took possession of his whole estate including the piece of land in issue.

3. It is alleged that since 1942 the Defendants have consistently refused to refund the Appellant the LP. 95.— paid by him, and the Appellant, in consequence of their consistent refusals, was compelled to institute these proceedings on 7.12.44.

4. In support of his claim the Appellant attached as an annexure to his Statement of Claim what purported to be a copy of the *hijjeh* or deed of sale made between him and Muhamed el Abed Taha Hamdan in 1925 for the purchase of this piece of land for LP. 95.—.

At the proceedings before the Magistrate the Appellant produced what then purported to be a certified copy of the *hijjeh*.

In proving his claim, in addition to the so-called certified copy of the *hijjeh*, he further relied upon:—

(a) his own oral testimony,

(b) the original *hijjeh* (Exhibit two),

(c) the judgment of the Magistrate's Court in the action for recovery of possession brought by Muhamed el Abed Taha Ham-

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OF THE

DISTRICT COURTS OF PALESTINE

WITH ANNOTATIONS

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(*Consulting Editor*)

and

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dan in 1930 against Ahmed Taha Hamdan (Case No. 1543/30 — Exhibit three),

(d) A certified copy of part of the proceedings of that case — the part being the opening address of advocate Ibrahim Eff. Sa'adeh, Muhamed's el Abed Taha Hamdan's counsel in those proceedings (Exhibit four),

(e) A certified copy of the evidence of Muhamed el Abed Taha Hamdan himself in those proceedings (Exhibit five).

5. During the course of the case it appeared that the original *hijjeh* was in a very badly damaged condition due, as the Appellant then alleged, to the fact that it had been nibbled away by rats. As a piece of documentary evidence it was completely useless.

It further appeared that the so-called certified copy of the original *hijjeh* (Exhibit two) was not a certified copy of that document at all, but was simply a certified copy of an alleged copy of the original *hijjeh* found on the Magistrate's file, there being no indication or marking on the alleged copy to show that it had, in fact, been checked or examined with the original copy or that it was a certified copy of that original.

The explanation for this remarkable state of affairs appears to have been that the present Appellant himself, after the close of the proceedings for recovery of possession before the Magistrate in 1930, applied to the Magistrate for the return of the *hijjeh* which he had produced as an exhibit in the course of the case to show that the land had been sold to him.

The Magistrate allowed the original to be returned to him, ordering that a copy of it be substituted on the file. Due to the negligence and/or inadvertence of those responsible, the copy put as a substitute on the file was not a certified copy.

The result was that the learned Magistrate held, and in my view rightly held, that there was no proper or sufficient evidence before him to establish the Plaintiff's claim and he accordingly dismissed it.

6. The Appellant appealed. In the course of his appeal he relied upon part of the record in the file in Civil Case 1543/30 (the recovery of possession case) which file had been produced by the clerk in charge of the Magistrate's Court Ramallah and which was the file, of course, which contained the uncertified, unchecked and unexamined copy of the original *hijjeh* from which the so-called certified copy (Exhibit one) of the original *hijjeh* upon which the Appellant primarily based his claim had been taken.

The particular part of the record upon which he relied was the evid-

ence of the present Appellant himself. I will refer to it hereafter as Exhibit A. I quote that evidence:—

> "These boundaries I know since the date of occupation till now. If there were other boundaries before the occupation other than these I do not know them at all and this land belongs to the Plaintiff Muhammed el Abed Hamdan who took it from his father and I do not know the way in which he took it from his father. The area of this orchard is 21 *dunums* planted with olives and carobs. It is bounded from four sides by a wall. I am in possession of this orchard since 1925 by the permission of the Plaintiff in consideration for the sum which he is indebted to me. It is in respect of the interest only. I produce the deed drafted between us."

The witness then produced a document. Presumably that document was the original *hijjeh* — now Exhibit two.

The recording clerk — being the person then empowered to record the evidence of witnesses under Article 21 of the Ottoman Magistrates' Law — embodied on the record and in the course of the witness' evidence — an alleged description of that document.

It reads as follows:—

> "The witness produced a deed of sale *'Bay' barrani'* dated 15th December, 1925, containing an admission that Muhammad Abed Hamdan Taha sold the whole of the orchard of *'hreiqa Hamad'* to Ya'coub Ibrahim Qa'oud for 95 pounds being a final sale and it contained his giving up and delivering this locality to the purchaser. He has the right to possession planting and dispossession."

7. The appellate Court, whilst upholding the learned Magistrate's decision that the certified copy of an uncertified copy of an original document was inadmissible, decided, in view of the contents of Exhibit "A", to remit the case to the Magistrate to hear the evidence of both parties "in view of what was mentioned in the copy of the Court proceedings above-mentioned (Exhibit A) and which was produced by the Appellant here and was not seen by the Magistrate...".

8. I quote from the record as to what took place on the resumption of proceedings before the Magistrate:—

> "The judgment of the District Court dated 31.5.46 was read out which reversed the judgment of the Magistrate Court with instructions to hear the evidence of both parties as was shown from the proceedings which was produced in the appellate Court.
> *Jabra Eff.*:—
> I am ready to produce my evidence in accordance with the judgment of the District Court in its appellate capacity. I produce a certified copy of the proceedings in Case No. 1543/30 a mention of which was made in the judgment of the District Court in its appellate capacity. Exhibit 'A'.
> All what I ask the Court is to give the greatest attention to it. If my learned friend insists on its production by the Clerk in charge

of the Registry I will call the Clerk in charge to produce it. If this Court explained the judgment of the appellate Court to mean to hear the whole evidence anew I am ready to produce it.

Ibrahim Eff.:—

I agree for the production of these proceedings in the way my learned friend did and there is no need to call the Clerk in charge.

Jabra Eff.:—

I close my case."

9. The learned Magistrate again gave judgment dismissing the Appellant's claim. He did so on a number of different grounds.

Firstly, he expressed considerable doubt as to the admissibility of the description of the document as recorded by the Magistrate's clerk in Exhibit "A". He further took the view that the clerk should himself have been called to give evidence on oath before him that the description as recorded by him was a true and accurate description of the document produced to him.

Secondly, he expressed doubt as to whether the description of the deed as recorded by the clerk in fact referred to the same deed as that on which the Appellant relied. He pointed out that the description of the deed recorded by the clerk referred to a deed dated 15th December, 1925, whereas the deed referred to in the Plaintiff's Statement of Claim was one dated 15th January, 1925.

Thirdly, he took the view that the mere production of a document by the Appellant, at his own initiative and on his own instance in a case brought by a third party (Muhamed el Abed Taha Hamdan) at his, the Appellant's own request, which document was not cross-examined upon in any way, did not bind the estate of the third party as to the contents of that document in such a way as to create an estoppel.

Fourthly, he held that the claim was prescribed — since the Appellant's cause of action arose from the date he paid over the LP. 95.— on 15.1.25, on a deed of sale which was null and void *ab initio*.

10. In general, I agree with the learned Magistrate on the various grounds on which he dismissed the Appellant's claim.

Under Article 21 of the Ottoman Magistrates' Law the duty of the record clerk was "to take down the statement of the Plaintiff and the Defendant and the evidence of the witnesses". If a document was produced as an exhibit the document itself spoke as to its contents. It was no part of the duty of the recording clerk to interpolate on the record a precis as to the description and contents of that document and any such interpellation does not, in my view, strictly form part of the record of the Court. It may be arguable that, upon proof of the loss or destruction of the document itself, the description and contents of the document as recorded by the clerk would be admissible under the

best evidence rule. But it would only be so admissible if the clerk himself was called as a witness to confirm the fact that the description and contents as recorded by him were true and accurate. This was not done, although it is admitted that the clerk was and is still alive. Jabra Eff. has argued that he understood that Respondent's counsel did not require formal production of Exhibit "A" through the appropriate witness — the Magistrate's clerk in charge of the custody of Court files — and admitted its contents. It appears to me clear from the record, and advocate Ibrahim Eff. Sa'adeh confirms the fact, that he waived the formal production of Exhibit "A" through a witness but he never admitted the accuracy or truth of its contents. Jabra Eff., in the alternative, asks me to remit the case for the recording clerk to be called as a witness. Since I am in agreement with the learned Magistrate as to the other grounds on which he has dismissed the claim, I am not disposed to take this course.

11. In my view the learned Magistrate was right in holding that, even assuming the description and contents of the deed as recorded by the clerk were admissible in evidence, the contents of that document did not in any way create an estoppel so as to bind the estate of the deceased in this present claim.

On his own admission, the action for recovery of possession of the land was brought by Muhamed el Abed Taha Hamdan at the request of the Appellant himself.

The document which he produced in that case purporting to show that he had purchased the land — and upon which he now seeks to rely — was irrelevant to the issue then before the Court. The only issue then before the Court was as to whether or not Muhamed el Abed Taha Hamdan was the owner of the land and entitled to possession as against the alleged trespasser Ahmed Taha Hamdan. The fact that the Appellant, in the course of the case, produced a deed of sale executed outside the Land Registry — and I emphasise these words — purporting to show that Muhamed el Abed Taha Hamdan had sold the land to him, was irrelevant and immaterial for the purpose of establishing whether, in fact, Muhamed el Abed Taha Hamdan was the owner of the land and therefore entitled to sell. As the learned Magistrate further points out, that document was produced by the Appellant on his own initiative and not cross-examined upon — possibly because its irrelevance was apparent to the parties concerned.

12. Lastly, I am in agreement with the learned Magistrate that the Appellant's claim was barred by prescription.

Jabra Eff. Ancar has invited me to hold that the deed of purchase upon which the Appellant bases his claim for the refusal of the purchase

price of LP. 95.— was not an out and out deed of sale but simply an agreement to sell. If, of course, I were to take this latter view the question of prescription would not arise since the Appellant's claim would run as from the date on which he was disturbed in his possession of the land — *i. e.* 1930.

But all the evidence seems to me to point directly to the irresistible conclusion that this was an actual out and out sale outside the Land Registry.

Para. (1) of the Appellant's Statement of Claim states that the Appellant "bought" the land from Muhamed el Abed Taha Hamdan on 15.1.25.

The documents upon which the Appellant seeks to rely all refer to a sale *"bai barrani"* — a sale outside the Land Registry.

Section 11 of the Land Transfer Ordinance is clear and specific. It makes such a disposition null and void but provides that any person who has paid money in respect of a disposition which is null and void may recover such money by action in the Courts. The period for the recovery of such money clearly commences to run as from the date of payment.

Jabra Eff. has ingeniously sought to argue that, even assuming the sale itself was null and void, the Appellant, having paid the purchase price and having entered on to the land, acquired an equitable title and the period of prescription would only commence to run as from the time that equitable title was interfered with, namely, in 1930, when his quiet enjoyment of the land was disturbed. There might conceivably be something in that argument were it not for section 12 of the Land Transfer Ordinance which makes any party to a sale outside the Land Registry, who either enters into possession, or permits the other party to enter into possession, guilty of an offence and liable to a fine of one fourth of the immovable property involved. It is, I think, apparent that one cannot proceed to acquire or claim an equitable title to land by entering into, and remaining in possession of it in express contravention of a declared provision of the statutory law.

13. In my view the Appellant's claim for recovery of the purchase price of the land commenced to run as from 15.1.25 — the date of entering into an agreement which was null and void *ab initio* — and his claim was prescribed when he filed it on 7.12.44.

14. For these reasons this appeal must be dismissed.

The costs and advocate's fees as ordered by the learned Magistrate in the two previous trials before him will be paid by the Appellant.

The Appellant will further pay the costs of this appeal and the pre-

vious appeal (C. A. 57/45) together with advocate's fees in the inclusive amount of LP. 12.— (twelve).

Delivered this 14th day of April, 1947, in the presence of Jabra Eff. Ancar for the Appellant and Ibrahim Eff. Sa'adeh for the Respondents.

CIVIL APPEAL No. 65/46.
(RULING No. 1).

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Orr.

IN THE APPEAL OF :—

Moshe Cohen. APPELLANT.

v.

Mrs. Dora Weiner. RESPONDENT.

Appeals — Notice of preliminary objection — Rule 333 C. P. R. — C. A. 183/45.

An objection to the taking of a preliminary objection by the Respondent to C. A. 65/46, overruled:—

1. Following the decision in C. A. 183/45, no preliminary objection whatsoever to an appeal whether as to form, or the non-fulfilment of a condition precedent, or as to whether an appeal lies, or otherwise, may be heard unless notice of such objection is served under Rule 333 of the C. P. R., 1938.

2. If the preliminary objection sought to be raised concerns a defect which can be cured or the non-fulfilment of a condition precedent to the appeal which can be fulfilled, the notice under Rule 333 C. P. R. must state in clear terms what such defect or non-fulfilment consists of.

3. Where such objection is, however, one as to jurisdiction it is enough if the notice states that an objection will be made to the effect that the appeal does not lie.

ANNOTATIONS:

1. It seems that the attention of the Court was not invited to C. A. 397/45 (13, P. L. R. 210; 1946, A. L. R. 390) wherein the Supreme Court, after following C. A. 183/45 (*ibid.*, pp. 51 & 72), said: "We wish to add, however, that non-compliance by a respondent with Rule 333 does not mean that an appellate Court would entertain ..... an appeal lodged in a matter where no right of appeal exists. It seems to us that when an appellate Court, of its own motion, dismisses an appeal, the respondent who has failed to comply with Rule 333 would not be entitled to his costs."

2. *Vide* C. A. 117/45 (13, P. L. R. 331; 1946, A. L. R. 718) and, generally, for authorities on r. 333 as amended, see C. A. 139/46 (1947, A. L. R. 380) and note 2 thereto.

3. On the second and third points *cf.* C. A. D. C. T. A. 195/45 (1946, S. C. D. C. 507).

4. See the further two rulings in this case, *infra*.

FOR APPELLANT: Caspi & Av. Levy.

FOR RESPONDENT: Frank.

RULING.

Mr. Frank for the Respondent has served a notice on the Appellant under Rule 333 of the Civil Procedure Rules, stating that he will raise "the preliminary point that under the circumstances of this case no appeal lies against the judgment of the Magistrate's Court dated June 28, 1946".

Mr. Caspi for the Appellant has raised a preliminary objection to the preliminary objection, namely that the notice served upon his client is inadequate as it does not state the grounds of the objection, and the object of the rule is to give the party upon whom the notice is served the opportunity of curing the defects, a step he cannot take if he does not know what the defect is.

In reply to Mr. Caspi, Mr. Frank says that he did not require to serve any notice, as his objection is not to a defect in form of the notice of appeal or to the non-fulfilment of a condition precedent to the hearing of the appeal, but is a matter of jurisdiction in so much as he intends to show that no appeal lies and therefore the Court cannot hear such an appeal. Mr. Frank further says that he served his notice only as a precautionary measure and that it is in any event sufficient as it states clearly that his objection is that "no appeal lies" and he does not have to set out in his notice what his objections in law are.

In answer to Mr. Frank's contention that no notice is necessary, Mr. Caspi has referred me to Civil Appeal No. 183/45, Messa *v.* Messa & another, reported in A. L. R. (1946) at pp. 72 & 73.

Had it not been for the judgment in Messa *v.* Messa & another, I would have had no hesitation in saying that Mr. Frank is right and that no notice is required, as I could not have persuaded myself that the Court can be cloaked with jurisdiction to hear an appeal, where no appeal lies, merely because a notice under Rule 333 is not served, for that is what the judgment in Messa *v.* Messa amounts to, however I am bound by this judgment and it follows that no preliminary objection whatsoever to an appeal, whether as to form or the non-fulfilment of a condition precedent or otherwise may be heard unless a

notice under Rule 333 is served. With the greatest respect to the Court of Appeal, this conclusion seems to me to be a stretching of the words of Rule 333 and not the other way about as their Lordships say.

Mr. Frank has served a notice under Rule 333. Is this notice adequate? Had it related to a defect which could be cured or to the non-fulfilment of a condition precedent to the appeal, which could be fulfilled, I would have no hesitation in saying that such a notice must state clearly in terms what the alleged defect is or the condition precedent which the Appellant has failed to fulfil, so that the Appellant could remedy. The notice here, however, relates to jurisdiction and I agree with Mr. Frank that all he need do is to say in his notice that no appeal lies and this allows him to raise his objection and gives him the privilege of speaking before counsel for the Appellant.

Delivered this 21st day of January, 1947.

CIVIL APPEAL No. 65/46.
(RULING No. 2).

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Orr.

IN THE APPEAL OF:—

Moshe Cohen. APPELLANT.

v.

Mrs. Dora Weiner. RESPONDENT.

Appeal against default judgment and/or refusal to set it aside — R. 163 M. C. P. R. — Secs. 11(6), 11(7), 14(1) M. C. J. O. — C. A. 382/45 — C. A. 300/45 — C. A. 272/40 — C. A. 230/38 — Obiter dicta.

A preliminary objection by the Respondent to the hearing of C. A. 65/46, upheld:—

1. The part of the decision of the Supreme Court in C. A. 382/45 which lays it down that a Magistrate's default judgment is not a conclusive judgment but is provisional until the time for moving the Magistrate to set it aside under Rule 163 of the M. C. P .R., 1940, has elapsed, is not *obiter dicta* and hence is binding on the District Courts.

2. Once an application to set aside a Magistrate's default judgment is filed under Rule 163 of the M. C. P. R., the default judgment, whether or not

the time for appealing it has expired, can never be anything but a provisional judgment.

3. Hence once an application under R. 163 of the M. C. P. R. has been filed the default judgment can never be appealed. The only right of appeal thereafter is one against the decision on the application under Rule 163 of the M. C. P. R.

4. A decision on an application under Rule 163 M. C. P. R. is a judgment for the purposes of appeal.

5. On the hearing of an appeal against such a decision the Appellant is at liberty to attack the default judgment on its merits and also to contend that the Magistrate wrongly decided the application under Rule 163 M. C. P. R.

6. If no application is made under Rule 163 M. C. P. R. an appeal may be brought against the default judgment.

ANNOTATIONS:

1. See the cases cited in the judgment and the notes thereto in A. L. R. and S. C. D. C.; *cf.* also C. A. D. C. Ja. 137/45 (1946, S. C. D. C. 581), C. A. D. C. Jm. 67/46 (*ibid.*, p. 846) and C. A. 305/46 (1947, A. L. R. 265).

2. See the previous ruling in this case (*supra*) and the further ruling (*infra*).

FOR APPELLANT: Caspi & Av. Levy.

FOR RESPONDENT: Frank.

RULING.

Mr. Frank for the Respondent has raised a preliminary objection to this appeal on grounds which I shall set out later in this ruling.

The appeal is from a judgment of the Magistrate's Court, Jerusalem, dated the 28th day of June, 1946. This was a judgment in default of appearance by the present Appellant, who was the Defendant. Following upon the judgment, the Appellant moved the Magistrate's Court under Rule 163 of the Magistrates' Courts Procedure Rules to have the default judgment set aside. The learned Magistrate, for reasons which it is not necessary to discuss in this ruling, refused to set aside the judgment. The Appellant thereupon and whilst still within the time allowed to him to appeal by section 14(1) of the Magistrates' Courts (Jurisdiction) Ordinance (which is admitted by counsel for the Respondent) filed in the District Court a notice of appeal against the default judgment of the 28th day of June, 1946, and it is this appeal which is now before me.

Mr. Frank's objection is that once a party invokes Rule 163 of the Magistrates' Courts Procedure Rules and seeks to set aside the default judgment, the order of the Magistrate refusing to set aside the default judgment becomes the final judgment and an appeal lies only against that judgment. In support of this contention, he has referred me to

C. A. 382/1945[1] (13, P. L. R. p. 159) and to C. A. 272/40[2] (8, P. L. R. p. 90), C. A. 235/41[3] (9, P. L. R. p. 4) and to C. A. 230/38[4] (5, P. L. R. p. 563) which was approved in C. A. 272/40. Mr. Frank argues that C. A. 230/38 decided that an aggrieved party has a choice of two remedies, and the Court of Appeal in C. A. 272/40 decided that both remedies cannot be pursued at the same time. These two appeals were referred to and approved, as Mr. Frank points out, in C. A. 382/45, where the Court of Appeal said that the proper procedure is to apply under Rule 163 to have the judgment set aside, and if that course is followed an appeal lies against an order refusing to set aside the judgment. Mr. Frank points out, further, that in this judgment the Court of Appeal went on to say that the default judgment remains provisional until the period within which an application to set it aside may be made has expired, after which it becomes the final judgment of the Magistrate's Court. It follows, according to Mr. Frank, from what the Court of Appeal said in this judgment that when an order under Rule 163 is made it becomes the final judgment of the Court and an appeal lies as of right against it under section 11(6) of the Magistrates' Courts (Jurisdiction) Ordinance. Moreover, Mr. Frank contends, on an appeal against this order, it is open to the Appellant not only to endeavour to have the Magistrate's order under Rule 163 set aside but to go into the merits of the default judgment.

Mr. Caspi for the Appellant, in reply to Mr. Frank, says that he has a statutory right of appeal against the default judgment under section 11(6) of the Magistrates' Courts (Jurisdiction) Ordinance and this right cannot be taken away from him by rule or by judgments of the Courts. Mr. Caspi contends that the *ratio decidendi* in C. A. 382/1945, was whether an appeal lay against an order under Rule 163, the time for appeal against the default judgment having expired, and what the Court of Appeal said about the default judgment being provisional pending the expiration of the time to have it set aside under Rule 163 was nothing but *obiter dicta*. Mr. Caspi has also referred me to C. A. 300/45 (A. L. R. (1946), p. 69, approved in C. A. 382/1945), where the Court of Appeal held that an application under Rule 163 does not preclude an appeal if a right of appeal is given. In referring to C. A. 272/40, Mr. Caspi says that the judgment is not applicable to the present matter, as it was delivered before the repeal of section 11(7) of the Magistrates' Courts (Jurisdiction) Ordinance, which pre-

[1] 1946, A. L. R. 505.
[2] 1941, S. C. J. 79.
[3] 1942, S. C. J. 15.
[4] 1938, 2 S. C. J. 190.

scribed the procedure to be followed by a defendant against whom judgment by default had been given. Mr. Caspi has also referred me to a number of judgments of the District Courts, *viz.*: — (1) C. A. D. C. (Jaffa) 138/44 (Selected Cases of the District Courts (1946) p. 48) in which my learned brother Hubbard said he could see no substantial reason for saying that a person against whom a judgment is given by default, cannot appeal against the judgment as well as move to set it aside, as he can under the English Practice. (2) C. A. D. C. (Tel-Aviv) 17/45 (Selected Cases of the District Courts (1946) p. 52) in which my learned brothers Many and Cheshin held that since the repeal of section 11(7) of the Magistrates' Courts (Jurisdiction) Ordinance in 1942, there is no longer any distinction between a default judgment and a judgment not by default as regards the right of appeal, and that the right of appeal may not be varied or curtailed otherwise than by statute, and that therefore the remedy given by Rule 163 was supplementary to, and not in substitution of, the right of appeal against the default judgment. Mr. Caspi also points out that my learned brothers mentioned specifically that the remedy in appeal and the remedy under Rule 163 differ in substance, in that in an appeal against the default judgment, the latter itself is attacked, whereas in an application under Rule 163 the emphasis is on the reason for the appellant's default. Mr. Caspi concluded his reference to this judgment by calling my attention to the conclusion to which the learned Judges arrived, that is, that an appeal lay against the default judgment, notwithstanding the fact that an application under Rule 163 has been made and rejected.

Mr. Caspi concluded his citations of District Court Judgments with a reference to the judgment of my learned brother Rigby in C. A. D. C. (Tel-Aviv) No. 201/45 (Selected Cases of the District Courts (1946) p. 576). In that judgment, my learned brother reviewed a number of judgments of the Supreme Court and the District Courts on the remedies of a party aggrieved by a default judgment, particularly C. A. 272/40, which followed the *dictum* in C. A. 230/38 "that both remedies could not be pursued at the same time" but the learned Judge, like my brothers Many and Cheshin in their judgment cited above, observed that the judgment in C. A. 272/40 was delivered before the repeal of section 11(7) of the Magistrates' Courts (Jurisdiction) Ordinance. In the result my learned brother decided that there was no right of appeal from a decision of a Magistrate refusing to set aside a judgment by default and that such decision does not conclusively determine the rights of the parties and therefore is an order and not a judgment. I may say here that Mr. Caspi pointed out that my brother Rigby's

judgment was delivered before the publication of any law-reports citing Civil Appeal 382/1945 and he was therefore, it may be presumed, not aware that the Court of Appeal had said that the decision given on the application under Rule 163 was "more final and conclusive in respect of the rights of the Appellant" than the default judgment.

Mr. Frank in reply to Mr. Caspi argues that the judgments of the District Courts cited by Mr. Caspi are not correct expositions of the law in so far as they refer to C. A. 272/40 as the right of appeal against a default judgment did not have to await the repeal of section 11(7) of the Magistrates' Courts (Jurisdiction) Ordinance, as the repealed section stated that "unless and until any rules of Court are made under this Ordinance in respect of any judgment made or given in default of appearance or pleading, no appeal shall lie against any judgment given in default in a civil action ..." and once Rule 163 came into force in 1940, there ceased to be a restriction on an appeal against a default judgment.

It will be observed that I have gone to considerable pains to cite very fully the arguments by counsel in this matter, because the question to be decided is quite obviously not free from doubt, and lest this matter find its way to a higher Court, I feel that it is in the interests of justice to make it clear that this is a question which has given considerable trouble in the past not only to the Court of Appeal, but to the District Courts.

In effect the issue seems to me to be between the decision of my brothers Many and Cheshin in C. A. D. C. (Tel-Aviv) 17/45 read with the decision of my brother Rigby in C. A. D. C. (Tel-Aviv) 201/45 *and* the judgment of the Court of Appeal in C. A. 382/45. If I accept Mr. Frank's interpretation of C. A. 382/45 the matter is at an end and the preliminary objection must succeed.

The preliminary objection in C. A. 382/45 was that the appeal was out of time as it had been filed after the lapse of the period within which an appeal could have been lodged against the default judgment. I have had the opportunity of seeing a copy of the notice of appeal in that appeal and I observe that it is an omnibus document beginning with a statement that the default judgment is the subject of the appeal after which it sets out grounds of appeal against the default judgment and the order under Rule 163 refusing to set aside the judgment, and finishes with a prayer that the default judgment and the judgment (as the Magistrate described it) refusing under Rule 163 to set aside the default judgment, should *both* be set aside. The *ratio decidendi* was clearly — "was the appeal out of time". The argument of counsel for the Respondent was that the "decision" of the Magistrate

refusing to set aside the default judgment under Rule 163 was not a judgment, and as the time for appeal from the default judgment had lapsed before the notice of appeal was filed, the Court could not entertain the appeal. The Court clearly found against the contention and found that the "decision" of the Magistrate refusing to set aside the default judgment was itself a judgment. The term "judgment" is defined in the Magistrates' Courts Procedure Rules as meaning "the statement given by a Magistrate of the grounds of a decree". The term "decree" is defined in the rules as being "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final".

If one looks to section 11(6) of the Magistrates' Courts (Jurisdiction) Ordinance, one finds that an appeal lies as of right against a judgment of a Magistrate's Court, where the amount for which judgment is given is not less than twenty pounds.

If one reads carefully the paragraph of the decision of the Court of Appeal in C. A. 382/45 beginning with the words "There is another point from which the matter may be viewed" one is forced to the conclusion that the reason which prompted the Court to decide that the "decision" of the Magistrate refusing to set aside the default judgment, was itself a judgment was, that it was impossible to decide that the "decision" was not a decree *because* it was more final and conclusive in respect of the rights of the Appellant than was the default judgment. In short, the "decision" was a "judgment" because it was more final and conclusive than the default judgment. Does that mean that the default judgment ceased to be a judgment once the Appellant decided to pursue the remedy under Rule 163? In order to reach the conclusion that the "decision" under Rule 163 was a judgment, the Court had to satisfy itself that it "conclusively determined the rights of the parties with regard to all or any of the matters in controversy", otherwise it could not be a judgment and the Court would not have been able to hear the appeal.

In order to decide this last mentioned question the Court had to eliminate the default judgment as being a final judgment, as there could not be two judgments "conclusively determining the rights of the parties" (except, perhaps, if they were in identical terms or determined identical matters which they did not do), so the Court, therefore, reasoned that the default judgment was provisional until the time for moving the Court under Rule 163 had passed. It seems, therefore, that what the Court said about the default judgment being provisional

was not *obiter*, as Mr. Caspi would have it, because without having decided this, the Court would have been unable to come to the conclusion that the decision "conclusively determined the rights of the parties". I am of opinion, therefore, that the decision of the Court of Appeal to the effect that a default judgment is not a conclusive judgment until the time for moving the Court under Rule 163 lapses, is binding on this Court. It follows that once an application under Rule 163 is filed, the default judgment, whether or not the time for appealing it has expired, can never be anything but a provisional judgment.

In arriving at this decision I am not unmindful of the judgment of the Court of Appeal in England in Vint *v.* Hudspith, 29 Ch. D. 322, as this judgment was referred to in C. A. 272/40, which was considered by the Court of Appeal in C. A. 382/45. I think, however, that Mr. Frank was right when he said that once Rule 163 of the Magistrates' Courts Procedure Rules came into force, the restriction placed upon the right to appeal a default judgment ceased to be of any effect and even if this point was overlooked by the Court of Appeal in Civil Appeal 272/40, the position is not altered and there are separate and not concurrent or consecutive remedies open to a party aggrieved by a default judgment, that is to say, he may appeal the default judgment or rely on Rule 163 and then appeal the judgment of the Magistrate refusing to set aside the default judgment, but he cannot pursue both remedies. Moreover, the result of these findings is that the course of justice will run more smoothly and the rebounding from the remedy under Rule 163 to an appeal against the default judgment will be avoided and this Court, sitting in its appellate capacity will not be forced into sitting as a Court of trial, an undesirable state of affairs which would seem to have caused some apprehension to the Court of Appeal in England in its judgment in Vint *v.* Hudspith.

My views do not seem to be incompatible with the judgment of my brothers Many and Cheshin in C. A. D. C. (Tel-Aviv) 17/45, as the right of appeal given by section 11(6) of the Magistrates' Courts Jurisdiction Ordinance is in no way taken away, in fact it is added to as there are now clearly two rights of appeal, that is, one against the default judgment, provided it is pursued alone, and another against the judgment of the Magistrate on an application under Rule 163. The position as I see it is that once a decision on an application under Rule 163 is made, this becomes a judgment having grafted to it the default judgment and on appeal it is open to the Appellant to attack the default judgment on its merits and to contend that the Magistrate should not have refused to set it aside.

The result is that the preliminary objection succeeds.

Delivered this 22nd day of January, 1947, in the presence of Mr. Caspi for the Appellant and Mr. Frank for the Respondent.

CIVIL APPEAL No. 65/46.
(RULING No. 3).

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Orr.

IN THE APPEAL OF:—

Moshe Cohen. APPELLANT.

v.

Mrs. Dora Weiner. RESPONDENT.

Notice of appeal — Notice of objection under Rule 333 *C. P. R.*

An application by Appellant to treat the notice of appeal filed by him in C. A. 65/46 as a notice of appeal against the Magistrate's refusal to set aside the default judgment appealed against by Appellant, refused:—

1. A notice of appeal directed against a Magistrate's default judgment and not having annexed to it a certified copy of a subsequent decision by the Magistrate refusing to set such default judgment aside under Rule 163 Magistrates' Courts Procedure Rules and also not containing an express prayer for the reversal of such latter decision will not be treated as a notice of appeal against the decision under Rule 163 M. C. P. R., though among the grounds urged in the notice are some directed towards the decision under Rule 163 M. C. P. R.

2. A case in which a notice under R. 333 Civil Procedure Rules is not required set out.

ANNOTATIONS: See the previous two rulings in this case (*supra*) and the notes thereto.

FOR APPELLANT: Caspi & Av. Levy.

FOR RESPONDENT: Frank.

RULING.

Having regard to my ruling that the appeal lies from the judgment of the Magistrate refusing to set aside the default judgment, Mr. Caspi asks me to treat his notice of appeal as being an appeal against the judgment refusing to set aside the default judgment. He refers me to

C. A. 382/45 [1], where the Court of Appeal took this course on an omnibus notice of appeal and to C. A. 272/40 [2] where the Court took a similar course with regard to two notices of appeal. Mr. Caspi points out that in his notice of appeal there are certain grounds relating only to the second judgment and that in his prayer at the end he does not refer to a particular judgment, but merely to a judgment given herein. He admits that his notice of appeal starts with a reference to the first judgment, but he says he had to do this as he must appeal against the judgment which can be executed against him and the second judgment is not capable of execution.

Mr. Frank in reply points out that not only does the notice of appeal make no specific prayer to set aside the second judgment, but that a copy of the second judgment was not served on him or attached to the notice of appeal. In reply to this, Mr. Caspi says that he should have been served with a notice now under Rule 333.

It seems to me that the Court of Appeal went a long way towards shutting its eyes to the strict application of the Civil Procedure Rules, 1938, when it decided to accept the notice of appeal in C. A. 382/45 as being an appeal against the second judgment, but in that case there was a prayer at the end of the notice of appeal, perhaps fortuitously and not by design, relating to the second judgment and there was a copy of the second judgment attached to the notice of appeal, again probably fortuitously.

I do not think I can relax or should say ignore, the rules as Mr. Caspi wishes, and accept his notice as being an appeal against the second judgment.

As regards the contention that Mr. Frank should have invoked Rule 333, I cannot think this is serious as it is obvious from the course these proceedings have taken that Mr. Caspi himself regarded his appeal as being one from the first judgment and it would be asking too much of Mr. Frank to expect him to have contemplated what would happen and to have served a notice under Rule 333.

I rule therefore that the notice of appeal cannot be regarded as an appeal against the second judgment.

Delivered this 22nd day of January, 1947.

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[1] 13, P. L. R. 159; 1946, A. L. R. 505.

[2] 8, P. L. R. 90; 1941, S. C. J. 79.

CIVIL CASE No. 72/45.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: Their Honours Judges Dickinson, Hasna and Bardaky.

IN THE CASE OF:—

Haya Silberger & an. PLAINTIFFS.

v.

Felix Ziebenshein & an. DEFENDANTS.

Disagreement of Judges — Third Judge — Sec. 12(6)(a)(ii) Courts Ord., 1940 — "Judgment".

An objection that a third Judge appointed by the A/President of the District Court under sec. 12(6)(a)(ii) of the Courts Ord., 1940, could not have been so appointed, upheld:—

1. Sec. 12(6)(a)(ii) of the Courts Ord., 1940, applies only to cases of disagreement between two judges as regards the final decision or final judgment of the Court. It cannot be invoked where one or more of the disagreeing judges is not prepared to arrive at a final decision.

2. Hence where two judges disagree on an objection being taken to the Court's jurisdiction no third judge can be appointed under this section.

ANNOTATIONS: *Cf.* the different wording of r. 2(2) of the now repealed Land Courts Rules and *vide* C. A. 236/41 (9, P. L. R. 53; 1942, S. C. J. 33) and note in S. C. J.

FOR PLAINTIFFS: Levanon.

FOR DEFENDANTS: M. Goldberg.

RULING.

Dickinson, J.: I regret that owing to pressure of work in my other capacity this order has been long delayed. I have now had the opportunity to go more deeply into my position and I have come to the conclusion that I have at this stage no power to sit as a member of the Court in this case.

My authority to do so is by virtue of an appointment by the Acting President of the District Court under section 12(6)(a)(ii) of the Courts Ordinance, 1940, as amended in 1946. That section reads as follows:—

> "A district court shall be constituted as follows: — where under the provisions of sub-paragraph (1) any action is tried by two judges and there is a disagreement between them as to the final decision, the President shall appoint a third judge to the Court and the action shall be reheard, unless the Court and all parties to the

proceedings agree to the third judge delivering his judgment upon a perusal of the record and without a re-hearing."

It will be noted that the appointment of a third judge may only be made when there is a disagreement between the two Judges trying the case as to the "final decision", and that the third judge shall rehear the case unless all concerned agree to his delivering his judgment on a perusal of the record. I must again emphasise the use of the word "judgment".

Now what has happened so far in this case. My learned brethren have so far heard no evidence but only an argument as to jurisdiction and it was on that point that they have disagreed. Neither judge has given a final judgment for either side and in my opinion "final decision" must mean "final judgment". My learned brother Ali Bey Hasna has admittedly reached a point in his own mind where he could have proceeded to give a judgment in favour of the Defendants, but my learned brother Bardaky, having come to the conclusion that the Court has jurisdiction, can only reach a final decision after hearing the whole action and it is possible that he also would reach a decision in favour of the Defendants, which would mean that there was no disagreement and therefore no need for the appointment of a third judge.

I must therefore with the greatest respect to the learned Acting President reach the conclusion that my appointment at this stage is of no effect and that I have no *locus standi* in this case and must withdraw from the Bench.

Given this 27th day of February, 1947, in the presence of Mr. Levanon for Plaintiffs & Mr. Carmi by delegation from Mr. Goldberg for Defendants.

CRIMINAL APPEAL No. 17/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Hill.

IN THE APPEAL OF:—

Yousef Ahmad El Jabali. APPELLANT.

v.

The Attorney General. RESPONDENT.

Section 310 *C. C. O.* — *"Receiving or taking upon oneself the control"* — *Duplicity and uncertainty of charge.*

1. Section 310 of the Criminal Code Ord. creates two offences, receiving or taking upon oneself the control or disposition *etc.*

2. A charge that alleges the commission of both these offences is bad for duplicity and uncertainty.

ANNOTATIONS:

1. On duplicity in a charge see CR. A. D. C. T. A. 122/46 (*ante*, p. 57) and note 1.

2. See, as regards uncertainty in charge sheets, *ibid.* and note 3.

FOR APPELLANT: A. Zu'bi.

JUDGMENT.

This is an appeal from the judgment and sentence of the Magistrate's Court Haifa, in C. C. 291/47 convicting the Appellant for an offence contrary to sec. 310 of the Criminal Code Ordinance, 1936 and sentencing him to six months imprisonment.

Mr. Zu'bi for the Appellant abandoned his second ground of appeal.

Section 310 of the Criminal Code Ordinance creates two offences, receiving or taking upon oneself the control or disposition *etc.* Those are two separate and distinct overt acts. Any charge that alleged the commission of both these offences would be bad for duplicity and uncertainty.

The question in the present case to be settled is whether the words "and possession of" in the charge are mere surplusage or must be construed as meaning taking into control.

When the particulars of the offence are read in conjunction with the charge, I find myself in considerable doubt as to what actually was the offence charged. It seems as if it has the intention to charge both offences created by section 310.

A charge must be clear and unambiguous. This is far from the case in the present charge. It is perhaps unfortunate that the point was not taken before the learned Magistrate but I have no alternative but to declare that the charge to which Appellant pleaded was bad for duplicity and uncertainty.

The appeal is, therefore, allowed and the conviction and sentence quashed.

Delivered in presence of parties this 10th day of March, 1947.

CRIMINAL APPEAL No. 15/47.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Rigby.

IN THE APPEAL OF:—

Issa Totah. APPELLANT.

v.

The Attorney General. RESPONDENT.

Jurisdiction — Establishment of Courts Order, 1939—1941 — Magistrates' Courts — Change of venue — Sentence — Profiteering on electric bulbs.

An appeal from the judgment of the A/Chief Magistrate of Jerusalem (H. W. Mr. J. Azoulai), sitting in the Chief Magistrate's Court of Jerusalem delivered on the 14.2.1947, allowed and a cross-appeal by Respondent against sentence, dismissed:—

1. The Establishment of Courts Order, 1939, establishes a Magistrate's Court in Ramallah and the Chief Justice by Notice having directed that such Court shall sit in Ramallah, an offence committed in Ramallah cannot, without an order as to change of venue, be dealt with by the Chief Magistrate's Court of Jerusalem.

2. A plea of want of jurisdiction may be raised at any time, including the hearing of the appeal.

3. Circumstances affecting the adequacy of sentence referred to.

ANNOTATIONS:

1. On the first point compare, as to preliminary enquiries, CR. A. 13/41 (8, P. L. R. 68; 1941, S. C. J. 63) and the case therein followed; see also, on sec. 10 of the M. C. J. O., Mo. D. C. Jm. 366/45 (1946, S. C. D. C. 170) and notes.

2. On the second point *cf.* C. A. 250/42 (10, P. L. R. 32; 1943, A. L. R. 129) and C. A. 7/45 (12, P. L. R. 176; 1945, A. L. R. 151) and notes.

FOR APPELLANT: Mogannam.

FOR RESPONDENT: Stulz.

JUDGMENT.

This is an appeal from the judgment and sentence of the learned Acting Chief Magistrate, Jerusalem, whereby the Appellant was convicted, upon his own plea, of three separate and distinct charges of selling electric light bulbs in Ramallah in excess of the controlled price, contrary to the Defence (Control of Electric Light Bulbs) Order, 1944, as amended.

2. The short point has been taken by Mr. Mogannam, on behalf of the Appellant, that the trial was a nullity on the grounds that the learned Acting Chief Magistrate, Jerusalem, had no jurisdiction to try the case in the Magistrates Court of Jerusalem.

3. It appears that the charge sheet was, in fact, actually lodged in the Magistrate's Court, Ramallah. Thereafter, no doubt as a measure of practical convenience, it was apparently removed to the Acting Chief Magistrate's Court of Jerusalem and there tried by him.

4. The establishment, jurisdiction and venue of various courts, including the Magistrates' Courts, are provided for in the Establishment of Courts Order, 1939, made by the High Commissioner in exercise of the powers vested in him by the Palestine Order-in-Council, 1922.

Paragraph 3 thereof provides that a Magistrate's Court shall be established in the sub-district of, *inter alia*, Ramallah.

Paragraph 3(2) thereof provides that Magistrates' Courts established in sub-districts shall sit at such places as the Chief Justice shall direct. By an Order made by the then Chief Justice on the 1st day of January, 1940, under this sub-paragraph, he directed that "the Magistrate's Court in the sub-district of Ramallah, shall sit in Ramallah".

5. Section 10(1) of the Magistrates' Courts Jurisdiction Ordinance, 1939, confers power upon the Chief Justice or the President of a District Court to change the place of trial in a civil action or any criminal proceeding "from one magistrate's court to another magistrate's court, when it may appear to him expedient so to do".

This section would appear entirely unnecessary or superfluous if a case could be transferred from a Magistrate's Court in one sub-district to another Magistrate's Court in another sub-district at the whim or convenience of the Magistrate or the parties concerned .

6. Again, by an amending Order made by the Chief Justice on the 17th of July, 1941 (P. *G.* No. 1114, 1941, Supplement No. 2, p. 1113) to the Order made by him under sub-paragraph (2) of para. 3 in the Establishment of Courts Order, 1939, the words "the Magistrate's Court in the sub-district of Jerusalem, shall sit in Jerusalem" appearing in the original order, were deleted, and the words "the Magistrate's Court in the sub-District of Jerusalem, shall sit in Jerusalem, Bethlehem and Jericho" were substituted therefor. Clearly this amendment would appear unnecessary if the Magistrate siting in Jerusalem could, of his own motion, hear a charge filed in Ramallah and relating to an offence committed in Ramallah.

7. It has been laid down by a long series of authorities that the plea of want of jurisdiction can be raised at any time, including at the hearing of an appeal.

I am of the opinion that the learned Acting Chief Magistrate, Jerusalem, had no jurisdiction to try this case, and that the proceedings before him were a nullity. I therefore allow this appeal and quash the conviction and sentence imposed. I order that the aggregate fines of LP. 50 imposed upon the Appellant be returned to him.

8. This is, of course, no bar to a subsequent prosecution of the Appellant on the same offence. I may say, however, that on the merits of this case I should have found considerable difficulty in supporting the sentence imposed having regard to the admitted facts as disclosed before me. It appears that the Appellant, at the request of the Chief Clerk — or a clerk — of the District Administration Ramallah, obtained these electric light bulbs and sold them to the District Administration, Ramallah. It is admitted by Dr. Stulz on behalf of the Respondent, that the Appellant was told that the bulbs were urgently required for the District Administration and that the Appellant should procure them at any price.

The Appellant was fined a total of LP. 50 in respect of the three charges preferred against him, involving the sale of some fourteen electric light bulbs in all. It is perfectly true, as Dr. Stulz points out, that the fact that the Appellant was told by a presumably responsible officer of the District Administration to obtain these electric light bulbs at any price, was no defence to the charges preferred against him. But it does seem perhaps unfortunate, to say the least of it, that these facts were not disclosed to the learned Magistrate by the prosecution officer in order to assist him in arriving at a sentence which he might consider appropriate to impose having regard to the facts of the case.

9. The cross-appeal by the Attorney General against the alleged inadequacy of the sentence imposed by the learned Acting Chief Magistrate is dismissed.

Delivered this 13th day of March, 1947, in presence of Mr. Mogannam for the Appellant and Mr. Stulz for the Respondent.

CIVIL CASE No. 186/46.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour the R/President Judge Hill.

IN THE MATTER OF :—

Ellern's Bank Ltd. PLAINTIFF.

v.

Nerco Co. Ltd. DEFENDANTS.

Banker and customer — Commission charged for work done in addi-

tion to legal interest — C. A. 240/37 — Test whether commission is genuine — Reasonableness of commission — Interest charged as from opening of account — Interest on cheques.

1. (Following C. A. 240/37): A bank may charge commission for work done in addition to legal interest.

2. The test as to whether the commission is genuine should be based on a consideration as to whether the amounts charged are commensurate with the work done by the bank arising out of the transaction irrespective of the rate of interest.

3. It is immaterial whether the work was wholly or partly in the interest of the customer, the guiding factor must be whether it was necessary and resulting from the business of the parties.

4. The bank could charge interest as from the opening of advance accounts and not only as from withdrawals therefrom.

5. Interest on cheques should be charged from the date of payment by the bank and not from the date of their issue by the customer.

ANNOTATIONS: *Vide* Halsbury, Vol. 1, p. 869, para. 1408.

FOR PLAINTIFF: Radt.

FOR DEFENDANTS: Werner.

JUDGMENT.

It is not disputed, in fact both Dr. Werner and Dr. Radt emphasised, that the only real issue to be decided in this matter is whether the amounts taken and claimed by the Bank as commission are in fact commission or disguised interest.

That a Bank can charge commission for work done in addition to interest, above the legal rate of 9% *per annum*, is clearly established by English Authorities and locally by C. A. 240/37 * P. L. R. Vol. 5, p. 159. I think the first test as to whether the commission is genuine should be based on the consideration as to whether the amounts charged are commensurate with the work done by the Bank arising out of the transaction irrespective of the rate of interest, and it is on this basis that I propose to consider the question in the present case.

In the first instance it must be borne in mind that in its dealing with the defendant Company the Bank was not concerned in a simple and straightforward money lending deal; of actual security there was little or none. The evidence has disclosed that officials and employees of the Bank were engaged both before and after agreements were signed, with investigations, negotiations, arbitration, financial advising, foreign exchange arrangements with the Controller and Syrian Banks, inspec-

* 1938, 1 S. C. J. 148.

tions and interviews; further it was stated that at times 25% of the Haifa staff were engaged on Nerco business. I accept this evidence.

By no means all of this work was directly for the benefit of Nerco, some of it was exclusively in the interest of the Bank, but all of it appears to have been necessary and arising directly as a result of the transactions between the parties.

In my view it must be immaterial whether the work was wholly or partly in the interest of the Defendants, the guiding factor must be whether it was necessary and resulting from the business of the parties and in this respect I have no hesitation in coming to the conclusion that it was so.

I must therefore next consider whether the amounts charged as commission for this work were reasonable. In C. A. 240/37 referred to above, 1% *p. a.* was maintained reasonable by the Court of Appeal as a charge for clerical work done by the Bank in the usual course of its business. The evidence here has disclosed a volume of work far in excess of that and of an exceptional nature and I do not consider the amounts charged excessive.

The main defence therefore of usurious interest must fail.

The main question remaining is that concerning the manner in which the accounts were kept. The Defendants have contended that by making separate advance and current accounts instead of a unified account interest charges were increased. They also contend that interest should not have been charged as from the opening of advance accounts but on withdrawals from current accounts and that on cheques interest should run from date of payment and not from date of issue and finally that the risk should be half yearly and not quarterly.

As to the first contention, Defendants were well aware of the system accepted by the Bank and even if there was any merit in this contention and I do not consider there is, it is too late for them to raise it now. Moreover, whether they drew the whole or by instalments from current account the whole amount of the loan was at their disposal and its use deferred to the Bank. This disposes of the second contention as well.

I agree that interest should only have been charged from the date of payment of cheques, but I am quite unable to arrive at the overcharge of interest thus involved.

With regard to the third contention, this must be disposed of for similar reasons as the first.

Finally I must say that objections to the form of the statement of claim were purely technical and instantly disposed of by the volume of particulars furnished by the Plaintiff, comprising all their accounts

over a period of years with the Defendants.

At this stage I must pause before writing judgment, for the parties to consider and, if necessary, address me on the procedure, if any is considered desirable, to ascertain the amount of the overcharge of interest on cheques. I should add that I have not been satisfied that the necessity exists for the appointment of a Receiver and this application by the Plaintiff is refused.

Delivered this 3rd day of March, 1947, in presence of Dr. Radt and Dr. Werner.

It is agreed that Mr. L. D. Watts should take accounts with a view to finding the amount of interest overcharged on cheques.

Judgment is entered for the Plaintiff against Defendants jointly and severally for LP. 5140.855 with interest at 9% from date of filing with costs and advocate's attendance fee LP. 30.

CIVIL APPEAL No. 11/47.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Orr.

IN THE APPEAL OF :—

Raphael Graber. — APPELLANT.

v.

Haim Moshe Waksman. — RESPONDENT.

Standard rent — Recovery of excess — Reasonable increase in rent — Sec. 6(1)(a) Rent Restrictions (Dwelling Houses) Ordinance — Cost-of-living — Written evidence.

An appeal against the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levi), delivered on the 30.12.1946 in C. C. 1834/46, allowed:—

1. *Obiter*: The onus to justify an increase over the standard rent under sec. 6(1)(a) of the R. R. (D. H.) Ord. rests on the landlord who must satisfy the Court that the increase is reasonable.

2. Sec. 6(1)(a) of the R. R. (D. H.) Ord. can be invoked only in cases where the landlord has to shoulder a new burden not included in the burdens carried by him at the time the standard rent became applicable. It does not apply if an additional benefit is derived by a tenant without a corresponding burden being imposed on the landlord.

3. Judicial notice will not be taken of the percentage increase in the cost-of-living in Palestine. This should be proved by evidence.

4. Written evidence is not essential to prove that premises were leased on the material date in February, 1940, in order to prove the standard rent.

ANNOTATIONS:

1. On the first point *cf.* C. A. D. C. Jm. 16/46 (1946, S. C. D. C. 728).

2. See, on the second point, C. A. D. C. T. A. 155/44 (1945, S. C. D. C. 300) and C. A. D. C. T. A. 123/44 (1946, S. C. D. C. 115).

3. As regards "notorious facts" of which judicial notice is taken see Halsbury, Vol. 13, pp. 622—4, para. 693 and Phipson on Evidence, 8th ed., pp. 22—3, para. (7).

FOR APPELLANT: Olshan.

FOR RESPONDENT: Tunik.

JUDGMENT.

This is an interesting appeal. The facts are simple. The Appellant had lived in a room as joint tenant with another man Klos until April 1946 when Klos left. The rental paid by these two was LP. 1.500 mils a month. On the 1st July, 1946, the landlord entered into a lease with the Appellant alone at a rental of LP. 3 a month, LP. 27 to be paid in cash and the balance to be paid by a promissory note for LP. 9. In addition to the LP. 27 cash paid in advance, the Appellant paid LP. 9 being the balance of the full rent payable until the 1st July 1946. In the statement of claim the Appellant claimed LP. 18 as excess rent over the standard rent, that is half of the total of LP. 9 arrears of rent paid and the LP. 27 advance rent paid, his argument being that the new rent of LP. 3 per month was in excess by LP. 1.500 mils of the standard rent. The learned Magistrate in his judgment held that the Appellant could not recover the LP. 9, apparently because he had failed to prove that he had paid it on his own account and not paid it for the man Klos who had left, and as regards the half of LP. 27 the learned Magistrate held that this was a reasonable increase of the rent within the meaning of section 6(1)(a) of the Rent Restrictions (Dwelling Houses) Ordinance.

As regards the first point, that is, the half of LP. 9 which the tenant wanted to recover, the Magistrate's finding seems to me to be based on an inference made by him for which there is no evidence. The receipt P/2 does not say that the Appellant was paying the balance of LP. 9 on behalf of Klos and I think, therefore, that in this respect the Magistrate was wrong.

As regards the main ground of the appeal, that is, the finding of the Magistrate that the landlord was entitled to double the rent. It appears that the learned Magistrate interpreted section 6(1)(a) of the Rent Restrictions Ordinance by dividing it into two parts, that is to say, he took the part finishing with a full stop after the word "un-

reasonable" as a part by itself, and he held that he, had discretion to approve of increased rent over the standard rent on any grounds at all if he considers it is not unreasonable. As regards the rest of the section that the Magistrate shall take into consideration any transfer of liability as regards taxes, rates or other burdens which may have taken place between the landlord and the tenant, and any special circumstances in which the relationship of the parties has been a factor in determining the amount of any rent. The learned Magistrate took this to mean that he must take these factors into consideration in any event, if they exist.

I would not be prepared to hold that the Magistrate's interpretation of the section is correct, if I needed to decide this, as the Ordinance is designed for the protection of tenants and the purpose of the Ordinance would be defeated if landlords could at their will, after bringing pressure on tenants, increase rents, and leave it to the tenants to satisfy the Court that the landlords increase is unreasonable. The onus would, I think, be the other way, as it would be for the landlord to satisfy the Court that the increase is reasonable.

Even if the interpretation is wrong, I do not need to interpret the section as the judgment cannot stand for the reason I gave below.

The learned Magistrate decided that the increase was justified because of the increase in the cost of living in Palestine. There was no evidence of this, but assuming that he would take a judicial notice of it, he certainly could not take judicial notice of the extent of such increase which, I venture to say, is anything but common knowledge. It has been suggested that the learned Magistrate was not guided by the increase of cost of living in deciding that the increase of the rent was reasonable but that he was guided by a change of relationship between the parties insomuch as the Appellant now had the exclusive use of his room whereas in the past he had to share it with his joint tenant. I think there is a fallacy in this argument. Obviously the section would allow a landlord only to increase rent to compensate the landlord for a new burden which he is forced to shoulder but not for a benefit which has accrued to the tenant.

I am not impressed by an argument advanced by the Respondent's advocate that it rests with the tenant to prove by some form of writing that the premises were let on the material date in February, 1940, in order to prove standard rent.

It follows that this appeal must be allowed and I accordingly set aside the judgment of the Court below and I give judgment for the Appellant in the sum of LP. 18, that is, half the LP. 36 excess rent

paid by him. I give costs in the Magistrate's Court in the amount of the Court fees plus LP. 5 advocate's fees and in this Court in an inclusive sum of LP. 10.

Delivered this 27th day of March, 1947.

CRIMINAL APPEAL No. 18/47.

IN THE DISTRICT COURT OF JAFFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Smith.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Omar Mohamad Rifa'i. RESPONDENT.

Interference with sentence — Maximum penalty.

Appeal from the judgment of the Magistrate's Court of Ramleh given on 8.2.47 in Cr. Case No. 49/47, dismissed:—

When imposing sentence the Court should not so much be guided by the maximum sentence as by the peculiar circumstances of the case, *i. e.* the Court should consider whether the fine bears some reasonable relation to accused's ability to pay.

ANNOTATIONS:

1. On the consideration to be given to the maximum sentence provided by law in awarding punishment *vide* CR. A. 90/45 (1945, A. L. R. 551).

2. Generally, on the position of an appellate Court in questions of sentence see note 1 in A. L. R. to CR. A. 190/45 (12, P. L. R. 550; 1946, A. L. R. 140).

FOR APPELLANT: Lamm.

FOR RESPONDENT: Debbas.

JUDGMENT.

If the Attorney General appeals against sentence I should expect his representative to be ready in Court with some arguments directed to persuade me that the Magistrate had acted on some wrong principle or that the fine imposed (namely LP. 1 in this case) was in the circumstances ridiculously small. The only real argument that Dr. Lamm put forward is that the maximum penalty prescribed for all offences against food control legislation (including the offence of failing to mark prices) is a fine of LP. 2.500 and/or 5 years imprisonment. The

maximum prescribed penalty is certainly a matter to be taken into consideration in assessing the penalty but it is easy to see why a very heavy maximum penalty is called for in connection with the control of food prices. The well-being of the people under the stress of war depended on effective control and the opportunities of making huge illicit profits were numerous and indeed often seized. This huge maximum penalty does not weigh with me much in this particular case. I should be more interested to know the shop-keeper's position in life, the value of his stock; in fact whether the fine bears some reasonable relation to his ability to pay: that is one relevant test. Dr. Lamm has conceded that the Respondent's whole stock is worth only LP. 40—LP. 50. That being so I don't feel called upon to interfere. I agree entirely with the general remarks in the opinion expressed in Criminal Appeal No. 101/46 by Rogers Acting R/President but that case does not purport to suggest that a minimum fine of LP. 3 should be imposed in all cases of this kind. Incidentally the fine imposed in that case was only one half of the fine imposed here: the learned judge might not have enhanced a fine of LP. 1, obviously there can be no general inflexible rule; each case must be decided on its own facts. Here the Respondent is a man in humble circumstances and it is a first offence. I do not consider that a fine of LP. 1 in the circumstances is so grossly inadequate as to call for interference, bearing in mind the principles upon which the Court of Appeal should intervene.

The appeal is dismissed.

Given this 18th day of March, 1947, in the presence of Dr. Lamm and Mr. Debbas.

MOTION No. 53/47.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour the A/President, Judge Rigby.

IN THE APPLICATION OF :—

Yaacov Gurfinkel. APPLICANT. (COUNTER-CLAIMANT).

v

Albert Tewfic. RESPONDENT. (COUNTER-DEFENDANT).

Pleadings — Extension of time to file defence to counterclaim — C. A. 172/46.

An application for an extension of time to file a defence to a counterclaim, granted:—

1. In deciding upon such an application the Court will take account of the fact that if it be refused Applicant's original statement of claim would be rendered nugatory and valueless.

2. Following the decision in C. A. 172/46 the Court has power to extend the time for the filing of a defence to a counterclaim.

ANNOTATIONS: See note 2 in A. L. R. to C. A. 172/46 (13, P. L. R. 492; 1946, A. L. R. 634).

FOR APPLICANT: Eisenberg.

FOR RESPONDENT: Rabinovitch.

O R D E R.

I am satisfied that grave and substantial injustice would be caused to the Applicant if I were not to grant this application for an extension of time within which to file his defence to the counterclaim brought against him. To fail to grant him such an extension of time would, in effect, render nugatory and valueless his Statement of Claim in the original claim.

2. I accept the Applicant's affidavit as to the reasons why he failed to file his defence to the counterclaim within the requisite period of fifteen days and why he was three days out of time.

3. In spite of the lucid and cogent arguments put forward by Mr. Rabinowitch that I have no power, in law, to extend the time within which to file the defence to the counterclaim, I am of the opinion that, having regard to the decisions in Civil Appeal 172/46, A. L. R. 1946, page 634 and Civil Case 143/43, S. C. D. C. (T. A.) 1943, page 61, I have such power.

4. I consider this a proper case in which to exercise my discretion. I accordingly extend the period of time for the filing of the Applicant's Defence to the Respondent's counterclaim from 15 to 18 days inclusive, that is to say, from the 6th January, 1947, to the 24th January, 1947, inclusive. I order that the said Defence to the counterclaim be deemed to have been filed within the said extended period of time.

The Respondent's *ex parte* application made in Motion No. 53/47, for judgment to be entered in his favour on the said counterclaim in default of the filing of any defence is dismissed.

The Respondent is, however, entitled to his costs, both on this motion made by the Applicant and on the Respondent's own *ex parte* application, in Motion No. 53/47.

I fix such costs and advocate's fees in both motions in the inclusive amount of LP. 10 (ten).

The counterclaimant at liberty to file a reply to the Defence to his counterclaim within a period of fifteen days from today.

Delivered this 26th day of March, 1947, in presence of Mr. Eisenberg, for the Applicant and Mr. Rabinovitch, for the Respondent.

CIVIL APPEAL No. 264/46.

IN THE DISTRICT COURT OF TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour A/Judge Kassan.

IN THE APPEAL OF:—

Della Goldenberg. APPELLANT.

v.

Moshe Goldenberg. RESPONDENT.

Husband and wife — Action by wife against husband and counterclaim by husband against wife for recovery of chattels — Separate trial of claim and counterclaim — Jurisdiction of civil courts in suits between husband and wife — Evidence required for claim under Art. 881, Mejelle — Presumption of ownership of husband — Corroboration — Admission by party in other proceedings — C. A. 24/42 — Value of chattels not proved; Art. 891, Mejelle; C. A. 14/45 — Judicial Notice and personal knowledge of judge.

1. The Civil Courts have jurisdiction to deal with monetary claims between husband and wife, even if there exist disputes concerning personal status, the Religious Courts having jurisdiction only in matters specifically conferred upon them and monetary claims ancillary thereto.

2. In an action for recovery of chattels wrongfully appropriated, the Plaintiff has to prove three elements:—

(a) that he is the owner of the chattels;

(b) that the Defendant appropriated them;

(c) without the Plaintiff's permission.

3. Chattels in the joint flat of husband and wife must be presumed to belong to the husband as long as the wife does not bring evidence that they belong exclusively to her.

4. Evidence by a party given in other proceedings may be used as corroboration of the evidence of the other party.

5. Although no corroboration is required for every point of a case, where there are several causes of action corroboration is necessary on each cause of action.

6. If the Defendant pleads that the value of the subject matter exceeds LP. 250, the action must be dismissed by the Magistrate for lack of jurisdiction, unless the Plaintiff proves that the value does not exceed LP. 250.

ANNOTATIONS:

1. For other proceedings between the parties see H. C. 105/45 (13, P. L. R. 180; 1946, A. L. R. 546), H. C. 84/46 (1946, A. L. R. 795) and S. T. 2/46 (1947, A. L. R. 25).

2. On the jurisdiction of Religious Courts in respect of ancillary matters *cf.* note 3 in A. L. R. to C. A. 208/44 (12, P. L. R. 163; 1945, A. L. R. 450) and H. C. 2/46 (13, P. L. R. 76; 1946, A. L. R. 170).

Vide also C. A. 177/34 (3, P. L. R. 49; 1937, S. C. J. (N. S.) 357) — penultimate paragraph.

3. Note that Arts. 881 *et seq.* of the *Mejelle* will be repealed by the Civil Wrongs Ordinance insofar as inconsistent therewith.

4. On actions for the return of goods or their value *cf.*, in addition to the case cited, C. A. 150/42 (1942, S. C. J. 805) and C. A. D. C. Jm. 53/45 (1946, S. C. D. C. 312).

5. On the effect of admissions made in other proceedings *cf.* also C. A. 33/42 (9, P. L. R. 378; 1942, S. C. J. 401) — *in a Turkish Court*; C. D. C. T. A. 204/43 (1944, S. C. D. C. 148) — *in the Rabbinical Court;* C. A. 297/45 (13, P. L. R. 149; 1946, A. L. R. 227, third last paragraph) — *"in another case"; vide* also C. A. D. C. T. A. 200/45 (1946, S. C. D. C. 851) — *in Rents Tribunal.*

6. For recent cases on corroboration under sec. 6 of the Evidence Ord. see C. A. 92/46 (1947, A. L. R. 325) and note 2.

7. On the judicial notice point see C. A. D. C. Jm. 11/47 (*ante*, p. 185) and note 3.

FOR APPELLANT: Turbowicz and Gitzelter.

RESPONDENT: In person.

JUDGMENT.

The parties to this appeal are husband and wife. The Appellant was married to the Respondent in January, 1945. Their matrimonial life was none too successful and already in September, 1945, the Appellant left her husband's house and since then numerous litigations took place between the parties. In December, 1945, Appellant sued the Respondent in the Magistrate's Court of Tel Aviv (No. 3365/45) for the recovery of furniture, claiming that he, her husband, misappropriated them without her permission and against her will. For the purpose of this appeal the result of the above action is wholly immaterial. The material point here is that the Respondent filed a counterclaim in the above action, but the learned Magistrate, who heard the original action was of the opinion that to try this counterclaim together with the original action might prove to be a burden to the hearing of the original action and decided, therefore, that it is desirable that the counterclaim be heard and determined separately and returned, it seems, to Respondent all the documents concerning the counterclaim.

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WITH ANNOTATIONS

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2. In view of the above decision a file was opened in the Magistrate's Court of Tel Aviv and registered under No. 1161/46, and in this file all the documents concerning the counterclaim were entered and thus it became a separate independent action. In this action the Respondent claimed that the Appellant took from his house divers chattels belonging to him and therefore he claims their recovery in specie or their value according to a detailed list embodied in the Statement of Claim. The Respondent was the only witness; the Appellant (Defendant in this action) called no witnesses at all. On the 24.11.1946 the learned Magistrate held that the Respondent has proved his case and gave judgment against the Appellant ordering her to return the above chattels in kind; hence this appeal.

3. The Appellant in her first five grounds of appeal deals with the separation of the counterclaim from the original action as I mentioned above, and contends that the Court below erred in hearing the counterclaim as a separate action.

4. I do not agree with this contention. It was on the request of the Appellant that the learned Magistrate decided to exclude the counterclaim from the original action. The learned Magistrate neither dismissed nor struck out the counterclaim; when the documents relating to the counterclaim had been separated and put in a separate file, the learned Magistrate again granted the Appellant's request and ordered that an amended Statement of Claim, as an independent action, and also an amended Statement of Defence be submitted. Following this decision a new Statement of Claim was filed and then a new Statement of Defence and on these two new documents the proceedings in the Court below started anew. I cannot find any fault in this procedure.

5. I come now to deal with ground 18 of the grounds of appeal: was the Court below properly clothed with jurisdiction to deal with this action which is between husband and wife? Mr. Turbowicz addressed me at great length on this point and in his view it is only the Rabbinical Court that can dispose of this action in view of C. A. 208/44 (A. L. R. 1945, I, p. 450), H. C. 105/45 [1] (13, P. L. R., p. 180). He particularly emphasized the fact that between the parties to this appeal there exist disputes concerning personal status, as evidenced by the judgment in Special Tribunal Case No. 2/46 (A. L. R. 1947, I, p. 25).

6. I cannot agree on this point with counsel for the Appellant. Generally speaking the Religious Courts have no jurisdiction to deal

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[1] 1946, A. L. R. 546.

with monetary disputes. But when a Religious Court deals with a question of personal status within its jurisdiction, such as divorce, it is very probable that it will also have to decide on monetary questions ancillary to the divorce which is in issue before it, such as for instance — the partition of property between the husband and the wife about to be separated, or the partition of furniture and household effects which were in their common home — as the case is before us now. In other words: the Supreme Court has not laid down in its above quoted judgments that every case of monetary disputes between husband and wife must be referred to a Religious Court. It merely decided that when a Religious Court is clothed with jurisdiction to decide the main dispute in issue between the parties, such as divorce, then a decision on a monetary dispute or other material questions, might be within its jurisdiction as ancillary to the divorce. It follows therefore that had the question of divorce between the parties been heard by a Rabbinical Court, such Court could deal also with the question of furniture and chattels in dispute between them. But this does not prevent a Civil Court from dealing with such an action, which is in its character an action for recovery of chattels only.

7. The next point I have to consider is whether the Respondent has established his claim. The action was for recovery of chattels wrongfully appropriated, that is to say, that the Appellant has misappropriated the chattels of the Respondent and took them without his permission (*Mejelle* 881). The Respondent had to prove the following three elements: — (a) that he is the owner of the chattels, (b) that the Appellant appropriated them; (c) without the Respondent's permission.

8. The Respondent himself gave evidence in the Court below on the question of his ownership over the said chattels. He opens his evidence with the following words: "All the chattels specified in the list embodied in the Statement of Claim are my private property and I never gave permission to the Defendant (Appellant) to take them away from the house and to consider them as her property". This evidence was by no means shaken in cross-examination. The Respondent's answer to the second question was in the following terms: "All the chattels specified in the Statement of Claim — I bought with my money". On re-examination, the Respondent testified that all these chattels were in their flat. The learned Magistrate believed the Respondent's testimony. No rebutting evidence was adduced. Moreover, the chattels were in the joint flat of the husband and his wife, the parties to the action. It must be presumed that they belonged to the husband as long as the wife did not bring evidence that they exclusively

belonged to her. She did not even attempt to do this. It seems to me that on the ground of the Respondent's testimony coupled with the fact that the chattels were in their flat, the learned Magistrate correctly came to the conclusion that the Respondent was the owner of these chattels (Ground 6 of the Grounds of Appeal).

9. Now, has Respondent established the second and third elements which he had to prove, namely, that the Appellant took away these chattels without his permission? The Appellant deals with these questions in Grounds 8, 9, 12 and 13 of her Appeal. Her counsel argues that there was no corroboration for the evidence on this point. I do not agree with this contention.

10. On the request of the Respondent and with the consent of the Appellant's Counsel the learned Magistrate decided to have the case file which I mentioned at the beginning of this judgment namely, file No. 3365/45 produced as an exhibit (p. 4 of the Record). In that case (3365/45) there is on record the testimony of the Appellant, and this evidence could be used, in the opinion of the learned Magistrate, to corroborate the Respondent's testimony. It is the contention of counsel for the Appellant that the learned Magistrate erred in this. I do not think so.

11. What can be corroborative evidence? There is no doubt that an admission made by the Appellant on oath in Court is sufficient corroboration. (C. A. D. C. T. A. 119/43, S. C. D. C. 1943, p. 275). It is true that the Appellant did not give any evidence in this action from which this appeal arose. But she did testify in the action instituted by her, *i. e.* Case 3365/45 as follows: — (I am quoting from the record of the learned Magistrate): — "I took two Persian rugs, size 1.50 × 1.60 mtrs. and the second 70 × 90 cms. ..." (p. 4). And on p. 8 of the Record I read the following words: — "When I got married I did not give the Defendant (*i. e.* Respondent) any money ... I had no money", and again (on p. 10 of the Record) "I took away part of the chattels as for instance suits, I did not take any furniture, I took a lamp, it belonged to the Defendant (that is to say the Respondent)".

12. Now counsel for Appellant argues that the evidence of the Appellant given in another Court and in another case cannot be relied upon. This argument has no sound foundation at all. The law of Evidence is just the opposite: — "When a party sues, or is sued personally any admission made by him on a former occasion ... may be given in evidence against him" (Phipson on Evidence, 7th Edition, p. 223). A very same proposition is to be found in the judgment of the Supreme Court in C. A. 129/36 [2] (4, P. L. R. p. 172). The learned Magistrate

[2] 9, C. of J. 735.

was right, therefore, in finding that the Appellant's testimony in her case against her husband could be used as corroboration in the action of her husband against her.

13. But in para. 8 of his judgment the learned Magistrate states that for a certain part of the Respondent's claim there is no particular corroboration for Respondent's evidence, and goes on to state a principle that there is no need for corroboration in respect of each and every item mentioned in the Statement of Claim; he relies on C. A. 24/42 [3] (9, P. L. R., p. 182). With all due respect to the learned Magistrate I disagree with him on this point. The facts in this case are completely different from the facts in C. A. 24/42, where the subject matter of litigation was a promissory note for LP. 500.— and various witnesses were heard in evidence. There the Supreme Court held that there is no need for corroboration in respect of each and every item of a single cause of action. In the present case, it can be said, that there are 21 different causes of action — like the number of chattels whose recovery the Respondent was claiming. That is to say, the Plaintiff had to prove all the causes of action and it cannot be presumed that if he established that the Appellant took away say the rugs and the coats, that he also established that the Appellant took away the cups and glasses as well. In this respect I agree with ground No. 14 of the grounds of Appeal put forward by counsel for the Appellant.

14. It results from all said above that the learned Magistrate was right in finding that the Appellant took away from the Respondent's flat without his permission the chattels numbered 1—10, 13, 14, 16 and 21 only, because in respect of these chattels there was an admission by the Appellant which could be used as corroboration. In respect of all other chattels there was no corroboration and it cannot be held, therefore, that the Respondent had proved his claim insofar as these chattels are concerned.

15. Finally I have to deal with the question of the value of the above chattels, since the Respondent claimed their return in specie or their value (Grounds 15—17). And at this stage I shall deal also with the cross-appeal. In para. 11 of his judgment, the learned Magistrate held that following the provisions of Article 891 of the *Mejelle* the Appellant must pay the value of the chattels as it was at the time of the misappropriation. The learned Magistrate came to a correct conclusion on this point (C. A. 14/45 [4] — 12, P. L. R. 315).

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[3] 1942, S. C. J. 851.

[4] 1945, A. L. R. 700.

16. But thereafter, the learned Magistrate met with certain difficulties unfortunately, and erred in his final decision. He was aware of the arguments of the Appellant's advocate who in his final address to the Court argued that the value of the specified chattels was not proved. The learned Magistrate was aware that there was a difference between the value of the chattels as specified in the Statement of Claim and between Respondent's evidence. But he held on the ground of his personal knowledge (He took judicial notice) that these differences are not considerable to such an extent as to take out the whole matter from within the limits of his jurisdiction, *i. e.* above LP. 250.—. In this respect, it seems to me, the learned Magistrate erred. There are only certain cases in which the Court is allowed to state a fact from its personal knowledge without additional evidence (Phipson on Evidence, 7th Edition, pp. 19—25) but the fixing of prices is certainly not included in the range of such cases. It is true that a Judge is permitted to utilise his general knowledge in order to state a certain fact, but he then has to give evidence on it on oath (Palmer *v.* Crane 1927) K. B. p. 804).

17. The learned Magistrate further erred in relying on the evidence of the Respondent concerning the value of the chattels without any corroborative evidence. The Appellant has denied in her Statement of Defence the value of the chattels and it was essential, therefore, that the Respondent's evidence on this point be corroborated. I wish to point out that while the Respondent's testimony was corroborated on the question of the misappropriation of the chattels by the Appellant by her own testimony, it was not so corroborated in regard to the value of the chattels, because on this point she did not give any evidence.

18. This fundamental error was followed by a third error: when the value of the chattels was not proved, the learned Magistrate had only one single recourse, namely; to dismiss the action, but instead, he ordered the Appellant to return the chattels in specie, notwithstanding that the Respondent claimed the return of the chattels or payment of their value. Moreover, the Appellant when testifying (in file No. 3365/45) says expressly that she sold all the chattels (bottom of p. 4 of the Record) and it must not be overlooked that the learned Magistrate held that in this case Article 891 of the *Mejelle* applies.

19. Non-proving the value of the chattels is equivalent to non-proving the value of the claim after the Appellant has argued that the value of the chattels exceeds LP. 250.— and on this ground alone I could have allowed the appeal at its very beginning without dealing

with the other arguments. But in case of further appeal it is desirable that I should state my views in relation to all the grounds of the appeal.

For these last reasons the appeal must be allowed and the cross-appeal dismissed.

I set aside the judgment of the Magistrate's Court, dismiss the Respondent's action, and order him to pay the Appellant her costs in this Court as well as in the Court below. In view of the relations between the parties, I order the Respondent to pay the Appellant the amount of LP. 5.— only as advocate's attendance fees (inclusive).

Delivered in presence of Mr. Gitzelter for Appellant and Apellant and in absence of Respondent, this thirtieth day of May, 1947.

CIVIL APPEAL No. 8/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF :—

Goldshmidt. APPELLANT.

v.

Muallem. RESPONDENT.

Eviction from business premises — Premises sublet in whole — C. A. 101/42, C. A. 441/44.

A statutory tenant of business premises who has sub-let the whole of the premises is entitled to the protection of the provisions of the R. R. (Business Premises) Ordinance.

ANNOTATIONS: On the position of non-occupying tenants (under the R. R. (D. H.) Ordinance) see note 2 to C. A. D. C. Ha. 35/46 (1946, S. C. D. C. 408); *vide* also C. A. D. C. Ha. 159/46 (*ante*, p. 90).

FOR APPELLANT: Geiger & Gross.

FOR RESPONDENT: Boustani.

JUDGMENT.

This is an appeal against the judgment of H. W. Mr. Landau, one of the Magistrates of Haifa, whereby he ordered the Appellant to vacate the premises formerly held on lease by them from the Respondents' father and to pay the Respondent the sum of LP. 22.950 as rent for the month of July and August, 1946.

By their statement of claim filed in the lower Court on the 21st

August, 1946, the Respondents (Plaintiffs) averred that the Appellant entered into possession of two shops, two rooms and hall on the ground floor of their premises as far back as 1939 or earlier by virtue of a written contract of lease between the Appellant and the Respondents' ancestor; that there was a prohibition on the right of subletting in general and that there was a special condition in this lease, which was produced in the lower Court as Exh. P/2, which provided that the lessor would not object to the tenant subletting during the period of the lease provided that the tenant undertook to pay the rent according to the contract until the date of its expiry and on condition that the subtenant should undertake to vacate the premises by the end of December, 1939, and that he would have no right to sell the shop. It is not disputed in this present case that no such subletting took place during the year 1939, nor in subsequent years or that anything happened until the second July, 1946. The statement of claim goes on to aver further that on the second July, 1946, the Defendant transferred the licence of his shop from his name to that of a certain Meir Granat and that on the 9th July, 1947, the Defendant left the premises, vacating them and handed over the keys to Granat and that the Defendant has failed to pay rent for July, and August, 1946 monthly in advance as had been provided by the contract.

The Defendant pleaded, *inter alia*, that he was entitled to sublet under the provisions of the lease and if he did sublet the only obligation that was upon him was the liability to pay the rent provided in the lease.

The learned Magistrate dismissed the action for eviction for non-payment of rent as he held there was no proper pleading of the breaching of the contract but granted eviction on the ground that the Defendant was a non-occupying tenant of the premises which he held to be business premises. This ground, of course, was not pleaded in the statement of claim. The learned Magistrate relied on the case of Albina *v.* Amer C. A. 441/44 [1] 12, P. L. R. 217, as one which he should follow and he followed also two previous decisions of the Magistrate's Court of Haifa and went on to distinguish and not follow C. A. 101/42 [2] 9, P. L. R. p. 576 on three grounds: — (1) C. A. 441/44 overruled C. A. 101/42; (2) C. A. 101/42 drew no distinction between business premises and dwelling houses; (3) Section 8(3) of the Rent Restrictions (Dwelling Houses) Ordinance of 1940 and section 4(3) of the Rent Restrictions (Business Premises) Ordinance, 1941, are

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[1] 1945, A. L. R. 289.

[2] 1942, S. C. J. 625.

identical in terms and, therefore, a non-occupying tenant as was the Defendant in the present action was not protected by the Ordinance. The Magistrate granted eviction on this ground and on this ground only.

The Defendant now appeals to this Court and his two main grounds of appeal are: — (1) That the Magistrate was wrong that the Defendant was a non-occupying tenant; (2) that the Magistrate was also wrong in holding that the Defendant was not protected by the Ordinance.

As regards the first ground of appeal it is true the Defendant gave no evidence in the lower Court and the learned Magistrate came to the conclusion, as far as I am able to understand his judgment on this point, that the Defendant had vacated the premises after subletting the whole of them and he based his findings on the Defendant's admissions. Now, if the Defendant vacated the premises upon cessation of all relations between him and the landlord, then there would be no need to proceed with the many arguments advanced in this appeal, for the learned Magistrate would have been perfectly correct and entitled to grant an order of possession in favour of the Plaintiff and also for rent for the months of July and August, for the Defendant had not notified the landlord of his intention to vacate, therefore he was liable for rent. But no cross appeal or notice to vary the Magistrate's finding in this respect had been made and I think the whole appeal turns on one point and that is whether the statutory tenant of business premises who has sublet the whole of the premises is entitled to the protection of the Ordinance so long as he complies with the provisions of the Rent Restrictions (Business Premises) Ordinance. In my opinion, he is so protected and authority for this is C. A. 101/42, 9, P. L. R. (p. 576). That case has never been overruled; the reason pleaded in that case for the eviction of Kassab by the Carmel Convent was that Kassab had breached the condition of the tenancy by subletting not only part but the whole of the premises. The District Court in this case, held definitely that "any part" in the definition of subtenant in the Ordinance then under consideration, which was the Landlords and Tenants (Extension) Ordinance, 1935, included any part or number of parts up to and including the whole premises. It is to be observed that the definition of subtenant in the Rent Restrictions (Business Premises) Ordinance of 1941 is precisely the same as the definition of subtenant in the Landlords and Tenants (Extension) Ordinance, 1935. It is further to be observed that both Ordinances apply to business premises and that C. A. 101/42 and the case in the District Court and the case before the Magistrate concern business premises. Again it should be observed that section 4(3) of the Business Premises Ordinance and section 8(3) of the Dwelling Houses Ordinance

on which the Magistrate relied partly to distinguish C. A. 101/42 are merely a reproduction of section 10(2) of the Landlords and Tenants (Extension) Ordinance of 1935. It is further to be observed that the Rent Restrictions (Business Premises) Ordinance merely replaces the Landlords and Tenants (Extension) Ordinance of 1935, but the object and scope of the two Ordinances are identical. Furthermore, the considerations given to the Dwelling Houses Ordinance as regards a non-occupying tenant are clearly based on the theory that the premises are for living in and you cannot, except perhaps if you are a Moslem, have two dwelling houses and be protected in both. The reason for this is, of course, an attempt to relieve the shortage of dwelling houses and to protect tenants in possession of such dwelling houses so long as they abide by the provisions of the Ordinance. Naturally, such considerations do not apply, or if they apply at all it is not to the same extent, as regards business premises. Not only that, but in the Business Premises Ordinance there is a definition of sub-tenant as a person who occupies any part of any premises of which some other person is a tenant. "Any part" is any part up to and including the whole, as was held previously in C. A. 101/42 by the District Court and was not dissented from by the Supreme Court. Now, C. A. 441/44, on which the Magistrate relied, was decided on the Rent Restrictions (Dwelling Houses) Ordinance, and in my opinion, a correct decision and based on the theory of occupation and possession which I have set out above, but is in my opinion no authority for a decision upon the interpretation of another Ordinance designed to protect tenants in a totally different category of premises. In my opinion, the learned Magistrate's reasons for distinguishing C. A. 101/42 have no real and proper basis and until C. A. 101/42 is disapproved of or not followed by the Supreme Court, it must be taken to be the binding authority in all Courts on the question as to whether a tenant who sublets all the premises is still nevertheless, a tenant and protected by the Rent Restrictions Ordinance so long as he complies with the provisions laid down therein.

In my view, therefore, the finding of the learned Magistrate that these were business premises and that they were sublet *in toto* and that, therefore, the tenant was a non-occupying tenant and not protected by the Ordinance, was wrong. The learned Magistrate was undoubtedly right in ordering him to pay the rent lawfully due at the time the action was filed for the rent for July was due and the rent for August was also due.

For the above reasons the appeal is allowed and the order of the learned Magistrate ordering the eviction of the Appellant is set aside.

The Appellant is allowed costs of this appeal on the lower scale and I certify advocate's attendance fee in this appeal in the sum of LP. 15. I make no order as to costs in the lower Court.

Delivered in open Court this 1st day of April, 1947, in presence of Messrs. Geiger and Gross for the Appellant and of Mr. Boustani for the Respondent.

CIVIL APPEAL (L. to Ap.) No. 38/47.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour the R/President Judge Rigby.

IN THE APPLICATION OF :—

Mendel Frenkel. APPLICANT.

v.

Shlomo Cohen & an. RESPONDENTS.

Leave to appeal — Right of appeal — Third party.

An application for leave to appeal against the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levi) delivered on the 24.3.1947 in C. C. 1043/45, refused:—

A person joined to proceedings as a third party cannot appeal by right or by leave against the judgment given in the proceedings between the original parties.

ANNOTATIONS:

1. Only persons who were parties in the Court of trial may appeal: C. A. 105/45 (1945, A. L. R. 507) and note 1.

2. As regards the joinder of the Appellant in this case *cf.* the case cited in note 1 (*supra*) and C. A. 280/45 (13, P. L. R. 406; 1946, A. L. R. 734).

FOR APPLICANT: Rabinovitch.

FOR RESPONDENTS: No. 1 — No appearance.
No. 2 — Rozovsky.

ORDER.

In this case an action for eviction was brought by the second Respondent against the first Respondent. The Applicant was joined as a third party on the allegation of the first Respondent that he had paid rent to him.

I am of the opinion that the Applicant has no *locus standi* in this case and cannot appeal, whether by leave or by right.

The application is accordingly dismissed. The Applicant will pay the second Respondent's (Weinberg's) costs of this application, which I fix at LP. 6 (six).

Given this 18th day of April, 1947.

MOTION No. 168/47.
(CIVIL CASE No. 41/47).

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour the R/President, Judge Rigby.

IN THE APPLICATION OF :—

Sama'an Akra. — APPLICANT. (PLAINTIFF).

v.

Hemenuta Ltd. & an. — RESPONDENTS. (DEFENDANTS).

Stay of execution — Art. 36 Ottoman Execution Law — Jurisdiction.

An application for a stay of proceedings in Execution File 21/47, granted:—

An application for stay of execution under Art. 36 of the Ottoman Execution Law may be made either to the Execution Officer or to the Court.

ANNOTATIONS: Authorities on Art. 36 of the Execution Law are collated in the notes to H. C. 22/44 (1944, A. L. R. 234); see also C. A. D. C. T. A. 36/45 (1946, S. C. D. C. 89) and note 1.

FOR APPLICANT: Hiller.

FOR RESPONDENTS: No. 1 — Rand.
No. 2 — No appearance.

ORDER.

I am of the opinion that the Applicant may properly rely upon Article 36 of the Execution Law for the order of stay which he seeks. In my view, the Applicant simply says, in terms, "I have paid my debt; I do not owe you any interest. The debt is satisfied". Upon that view of the matter the Applicant is entitled to rely upon Art. 36 and he is entitled to a stay of execution pending the result of the case he has lodged in the competent Court.

My only doubt is as to whether that application for a stay should not be addressed to the Execution Officer rather than to this Court.

Since the article appears to be silent on this point it may be argued that the application may be addressed either to the Execution Officer or to the competent Court before which the action is filed. I incline to this view.

I am satisfied that the application is in proper form and that the notice of motion is in order.

It is abundantly clear that the whole purpose of the Applicant's application for a declaratory judgment would be defeated if I were not to grant this application for a stay. I am satisfied that this is a proper case in which to grant the application sought.

I therefore grant it and order a stay of proceedings in Jerusalem District Court, Execution File No. 21/47 pending the determination of the action in the District Court of Jerusalem in Civil Case No. 41/47.

The costs of this application to follow the result in the above action.

The Registrar of this Court to be requested to expedite the hearing and determination of the action.

Given this 7th day of May, 1947.

MOTION No. 72/47.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour Judge Baradey.

IN THE CASE OF:—

Dr. B. Nathan. APPLICANT.

v

Kupat Milveh. RESPONDENT.

Application to the District Court, Haifa, to set aside an order for provisional attachment made by the District Court of Tel-Aviv — Art. 284, Ottoman Code of Civil Procedure.

The District Court, Haifa, has no jurisdiction to deal with such an application.

ANNOTATIONS:

1. Applicant relied on Art. 284 of the Ottoman C. P. C. and applied to the District Court of Haifa for the setting aside of an order for provisional attachment made under Art. 271 by the District Court of Tel-Aviv.

2. *Cf.* Annotated Laws of Palestine, Vol. 5, p. 8, heading *"Provisional Attachments, etc. compared"* and p. 18, heading *"Any Ottoman Law"*.

FOR APPLICANT: Klug.

FOR RESPONDENT: Erdstein.

JUDGMENT.

In view of section 4 of the Civil Procedure Ordinance, 1938, and of Rule 4 of the Civil Procedure Rules, 1938, and notwithstanding any provision appearing in the last paragraph of Art. 284 of the Ottoman Civil Procedure Code, which Article is still in force, I hold that this Court has no jurisdiction to deal with this application. The application is therefore, dismissed with costs which I assess at an inclusive figure of LP. 5.—.

Delivered this day of April, 1947.

CIVIL CASE No. 281/45.

IN THE DISTRICT COURT OF TEL-AVIV.

BEFORE: His Honour the President Judge Windham.

IN THE CASE OF:—

Benyamin Minkowitz. PLAINTIFF.

v.

Zalman Pishezner & an. DEFENDANTS.

Action for declaratory judgment that judgment debt has been released — Art. 36, Execution Law — Competent Court — H. C. 73/45 — Release of one of several judgment-debtors — English law inapplicable — Arts. 668 & 1561—1571, Mejelle — Merger — Contract of record.

1. H. C. 73/45 decided that nothing in Art. 36, Execution Law, requires the judgment debtor to bring a new case and laid down the manner in which the "application" to the Court which gave the judgment should be made. It is uncertain whether H. C. 73/45 expressly decided that application for a declaratory judgment under Art. 36 *cannot* be made to the District Court.

2. The *Mejelle* and not English law is applicable to determine the question whether the release of one of several judgment-debtors releases the other.

3. The release in the present case was not of the whole judgment-debtor, but of claims against the estate of a particular judgment debtor. Under Art. 1561—1571 of the *Mejelle* this did not release the other judgment-debtor.

4. Art. 668 of the *Mejelle* has no application in the present case; for whether or not the relationship between the judgment-debtors was that of principal debtor and guarantor under the original obligation on the promissory notes, this relationship and this contractual obligation became extinguished and merged in the judgment-debt which sets up a new relationship, a so called "contract of record".

ANNOTATIONS:

1. For authorities on Art. 36 of the Execution Law see Mo. D. C. Jm. 168/47 (*ante*, p. 203) and note; see also C. A. 355/46 (1947, A. L. R. 429).

2. As regards the applicability of the *Mejelle* and of English Law, respectively, see C. A. 233/38 (5, P. L. R. 565; 1938, 2 S. C. J. 192) and C. D .C. Jm. 45/41 (1945, S. C. D. C. 628, at p. 642); *vide* C. D. C. Jm. 147/45 (*ante*, p. 3) with cases therein cited and note 3(a) thereto; the judgment in the latter case has meanwhile been confirmed in C. A. 29/47 (1947, A. L. R. 364).

3. On the third point *cf.* C. D. C. Ha. 153/44 (1946, S. C. D. C. 468) and note thereto.

4. On merger of contracts in judgments see C. A. D. C. Ha. 102/46 (1946, S. C. D. C. 751) and note thereto.

FOR PLAINTIFF: Dickstein.

FOR DEFENDANTS: Kolodny.

JUDGMENT.

The facts in this case are simple and are not disputed. On 19th January, 1936, judgment was given in the Magistrate's Court in file 11656/35 in favour of the present Defendants, in an action upon promissory notes, against the present Plaintiff and one Moshe Prober, ordering them jointly and severally to pay to the Defendants the sum of LP. 147.707 plus costs and interest up to the date of filing of that claim, which made the total claim something less than LP. 250.— Execution proceedings were begun against both judgment debtors. No further action was taken in execution, however, after June, 1938. Shortly afterwards, Moshe Prober died. On 5th June, 1939, the present Defendants (judgment creditors) signed an agreement of release with Prober's father, Mr. Nahman Prober, in the following terms: — "We the undersigned have received from Mr. Nahman Prober for the debt of his late son Moshe the sum of LP. 7.—. We hereby waive and release him of all the claims which we have against him". In 1945 the present Defendants renewed the execution proceedings against the other judgment debtor, the present Plaintiff. The Plaintiff has accordingly brought this action under Article 36 of the Ottoman Law of Execution for a declaratory judgment that the judgment debt has been released, — that is to say released not only against the estate of Moshe Prober (which is of course admitted) but also against the Plaintiff, and that the Defendants are therefore not entitled to proceed with the execution. The original judgment debt of LP. 147.707 plus interest thereon until the date of the present action amounts to more than LP. 250.—.

2. The contention of the Plaintiff is that the release of his co-

judgment-debtor operated to release him also, in accordance with the English law on the subject, which he contends is applicable. In the alternative he argues that, should the *Mejelle* and not the English law be applicable, the same result is reached by virtue of Article 668 of the *Mejelle*, which deals with principal and guarantor, he having been the guarantor and Moshe Prober the principal on the original debt upon the promissory notes. The Defendants contend, first, that the Court having jurisdiction to try this case is the Magistrate's Court and not the District Court; secondly that even if this Court has jurisdiction, the Plaintiff remains liable under the *Mejelle*, which he contends is applicable; thirdly, that under the English law, if that be held to be applicable, (and again assuming that this Court has jurisdiction), the Plaintiff is likewise liable.

3. With regard to jurisdiction, the question in which Court an action for a declaratory judgment under Article 36 of the Ottoman Law of Execution should be brought was considered at length by this Court in C. A. 36/45 [1], where the jurisdiction was held to depend on (a) the nature and (b) the amount of the claim under Article 36. If the test laid down in that decision were applied, this Court would have jurisdiction in the present case. Since that case was decided, however, a judgment of the Supreme Court has been reported, namely H. C. 73/45 [2], which approached the question of jurisdiction on an entirely different footing, and which I am of course bound to follow in preference to my own decision in C. A. 36/45. In H. C. 73/45 it was laid down that the "competent court" to decide applications for a declaration under Article 36, relating to a judgment debt incurred in a Magistrate's Court, is the Magistrate's Court itself, and not the District Court, and that no new case need be lodged even in the Magistrate's Court. I confess that from a reading of this judgment it is not perfectly clear whether the procedure that it lays down was intended to apply where the declaration sought involves a question of law (as here) and not merely the question of fact whether or not the judgment debt had been paid in whole or in part (as there). Nevertheless the following passages in that judgment would seem to be of general application:— "It was faintly suggested on behalf of the second Respondent that the Plaintiff should go to the District Court for a declaration, the District Court being the Court in Palestine having residuary jurisdiction. I entirely dismiss the suggestion that either the Plaintiff or the Defendant should go to the District Court..... In my view, there is nothing in

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1 1946, S. C. D. C. 89.

2 12, P. L. R. 490; 1945, A. L. R. 813.

Article 36 which requires the judgment-debtor to bring a new case". The Court then went on to lay down the manner in which the "application" to the Magistrate should be made, holding that it need not be by lodging a fresh action at all. One thing seems clear from this judgment, namely that the proper procedure under Article 36 is not to lodge a new case in any Court, least of all in the District Court. On this ground alone, therefore, the present claim for a declaration under Article 36 would seem to be misconceived. At the same time I confess that the legal position as there laid down is not entirely clear, for nowhere does the judgment in H. C. 73/45 decide expressly that application for a declaratory judgment under Article 36 *cannot* be made to the District Court (*i. e.* that this Court lacks jurisdiction to hear such an action); it only decides that it *need* not be so made, the Respondent in that case having alleged that it ought to have been so made. I will therefore turn to consider the present claim on its further merits, being, as I say, uncertain as to the scope of the decision in H. C. 73/45.

4. On the question whether the *Mejelle* or the English law is applicable to determine whether the release of one of two joint and several judgment-debtors releases the other, I hold that it is the *Mejelle* which applies. There is a whole chapter of the *Mejelle,* namely Articles 1556 to 1571, dealing with settlement and release of debts generally, and Articles 1561 to 1571 deal entirely with releases. That being so, I think there is no room to import the English law to supplement those provisions. English law can only be imported to cover a field which the Ottoman Law has altogether neglected. It cannot be used merely to fill in the interstices in a branch of the law for which the Ottoman Law has already made ample provision. This general test for the importation of the English common law under Article 46 of the Palestine Order-in-Council, 1922, has more than once been laid down by the Supreme Court; in particular I would mention C. A. 240/37 [3] and C. A. 126/38 [4]. Turning, then, to the Articles of the *Mejelle* which I have mentioned, we find that, while they contain elaborate provisions on the subject of the release of debts, they contain no provision that the release of one co-debtor operates to release the other; and I agree with Mr. Kolodny for the Respondents that the presumption, in the absence of any such provision in the law, is that it does not so operate. Moreover not only is there no such provision here, but on the contrary we find that Article 1561 lays down that "If any person states that he has no claim against ... some other person, or that ... he is no

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[3] 5, P. L. R. 159; 1938, 1 S. C. J. 148.

[4] *Ibid.,* pp. 369 & 428.

longer entitled to anything from him ... he is considered to have released *such person*". And Article 1567 provides that "the persons who are released must be known *and designated*". It will be recalled that the release in the present case was not of the whole judgment-debt, but of claims against the estate of a particular judgment-debtor, Moshe Prober. That being so, I consider that under the above provisions of the *Mejelle* this did not operate to release the other judgment-debtor, the present Plaintiff, who was jointly and severally liable. It has been urged by Mr. Dickstein for the Plaintiff that, assuming that the *Mejelle* applies, the Plaintiff was released by virtue of Article 668, which provides that when a guarantor or a principal debtor comes to a settlement with the creditor in respect of a portion of the debt, both are released, in the absence of a condition to the contrary. But to my mind Article 668 has no application at all in the present case; for whether or not the relationship between Moshe Prober to the Plaintiff was that of principal debtor and guarantor under the original obligation on the promissory notes, this relationship and this contractual obligation became extinguished and merged in the judgment debt, which set up a new relationship, a so called "contract of record", with a new *vinculum juris*, whereunder the relationship of principal debtor and guarantor no longer existed. Accordingly for these reasons also the present claim must be dismissed.

5. Any observations, then, on what would have been the position under the English law become *obiter*. But it is interesting to note that under the English law the release of Prober would have operated to release the Plaintiff. For the rule under English law that the release of one of two joint and several debtors operates to release the other, in the absence of a reservation of rights against that other, applies equally to ordinary contractual obligations and to judgment debts. This was decided in *Re* E. W. A. (1910) 2 K. B. 642, where Collins, L. J., dealing with a case of joint and several liability on a judgment debt, said — "I cannot see any foundation in principle for the distinction, for under any judgment or other obligation creating a joint liability there is only one debt, and, that being so, the rule that the release of one of the joint debtors gets rid of the debt applies equally whether the obligation arises on a judgment or on any other security".

6. For the reasons that I have given, however, this action must be dismissed, with costs, to include an advocate's attendance fee of LP. 8.—.

Delivered in open Court this 6th day of May, 1947, in the presence of counsel for both parties.

CRIMINAL APPEAL No. 107/46.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Rigby.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Theodore H. Preiser. RESPONDENT.

Profiteering — Current market conditions — Reasonable profit — A. G.'s right of appeal — Point of law — Onus of proof — Sentence.

An appeal against the judgment of the Chief Magistrate's Court of Jerusalem (H. W. Mr. Y. Azoulai) delivered on the 31.10.1946 in Cr. C. 4764/46, allowed:—

1. The Anti-Profiteering Regulations are primarily designed to combat current market values and to deflate prices.

2. In deciding under the Anti-Profiteering Regs. whether the profit made on a particular sale is reasonable, regard ought not to be had to current market prices of the commodity sold but only to the cost of the goods sold to the vendor and to the price at which he disposed of them.

3. In determining the cost of the goods to the vendor only the amounts expended on the actual landed cost of the goods, C. I. F., customs duties, landing charges, transport costs, and kindred items of expenditure should be considered. No account should be taken of expenses incurred by the vendor in obtaining an exclusive agency for goods of the type sold or in establishing his business. Nor is the fact that the vendor may not have earned a proper income for some time prior to the sale of the goods in question relevant.

4. It is irrelevant whether the vendor received the goods sold as a gift. The Court should determine whether the sale price as contrasted with the cost of the goods, — whether to the vendor or to those who gave it to him, — would yield an unreasonable profit.

5. The question of what expenses of the vendor the trial Court may take into account in considering the percentage of profit realized is one of law and hence appealable under Reg. 18 of the Anti-Profiteering Regs.

6. Circumstances which should be considered in mitigation of sentence in a case of this nature referred to.

ANNOTATIONS:

1. There are no English authorities on the subject as the Prices of Goods Acts, 1939, and the Goods & Services (Price Control) Act, 1941, specify the permitted additions to the seller's cost price — see Halsbury, Supplement 1946, pp. 1487 *et seq.*

2. Compare, as to "unreasonable profit" within the meaning of sec. 8(1)(b) of the R. R. (D. H.) Ordinance, C. A. D. C. Jm. 2/46 (1946, S. C. D. C. 755) and C. A. 28/47 (1947, A. L. R. 290).

FOR APPELLANT: Shayevitz.

FOR RESPONDENT: Moyal.

JUDGMENT.

This is an appeal, brought in the name of the Attorney General, from a judgment of the learned Acting Chief Magistrate of Jerusalem whereby the Respondent was acquitted of certain charges preferred against him of profiteering contrary to the Defence (Prevention of Profiteering) Regulations, 1944.

2. The charges, three in number, were consolidated upon the application of the defence and with the leave of the Court. They related to the sale by the Respondent on 7.12.45 to Messrs. Hefzi Bah of a considerable quantity of brassieres and elastic girdles at a price which, the prosecution alleged, provided the Accused with more than a reasonable profit on such sales.

3. The goods in question were imported by the Respondent from America. It is quite clear from the record — and indeed conceded by the prosecution — that they were of considerably superior quality to similar goods available in the Palestine market at that time.

It is equally clear that the prices which the Respondent charged Messrs. Hefzi Bah for the goods were much lower than the price for similar — and inferior — goods available on the market at that time. In fact, in the words of a prosecution witness from Messrs. Hefzi Bah "when these girdles were offered to us we almost jumped at the offer because these were the first goods of this kind to arrive from America".

Notwithstanding this fact, however, inquiries were set afoot by the Price Control Department to establish the actual cost price paid by the Respondent for the goods, together with the necessary incidental expenses thereto — such as C. I. F. landing charges, customs dues, transport expenses *etc.* — with a view to ascertaining the actual profit made by the Respondent on these goods.

The original invoices for the goods, produced by the Respondent to the Customs for the purpose of assessing Customs Duty, were produced before the Court.

Subsequently, the Respondent, when he realised the nature of the inquiries being made by the Price Control Department, produced fresh invoices showing an enhanced value of the goods. He alleged that the original invoices had been deliberately undervalued in order to reduce the pro rata value payable as customs duty.

On April 11th the Respondent submitted to the Price Control representative a detailed list of expenses incurred by him. According to that list (Ex. P. R. 15) (to which I shall have to refer again later), the cost of the actual merchandise, freight charges and C. I. F. Haifa, amounted to LP. 587.118 mils. The Customs and Brokers charges (Haifa Shipping Agency) amounted to LP. 209.412 and he had spent

a further sum of LP. 25.— as out of pocket expenses. The total cost of the goods was therefore LP. 821.530 mils. The prosecution produced figures at the trial — undisputed by the Respondent — that he had sold these same goods to Messrs. Hefzi Bah for LP. 2850.600 mils — making a profit of 254% on the girdles and 219% on the brassieres.

These figures appear to have been accepted by the Magistrate — indeed, he refers in his judgment to the fact that "the Accused does not dispute the figures supplied by the prosecution, and which were given in detail by Mr. Weiss (the Price Control Inspector) in his evidence on oath".

On the 12th April, 1946, the Respondent was charged with these offences. He made a statement referring to, and relying upon, "the itemised account" (Ex. P. R. 15) to which I have already referred. In that itemised account (Ex. P. R. 15) the Respondent had included an item of LP. 2,500 being — as he alleged — the "cost entailed in securing exclusive Franchise Middle East at minimum". The Respondent elaborated this item in his sworn testimony. It appears from that testimony that he had — and I quote his own words — "certain rights in a family fund in America which are worth over 10,000 dollars and I agreed to waive my rights over them in consideration of this agency" — that is to say, the exclusive agency in the Middle East to sell these particular brassieres and girdles. Now it seems to me only too obvious that the cost of obtaining a Middle East agency for the exclusive future rights to sell such goods cannot conceivably by any known system of commercial business methods be added on as a capital amount to the immediate charges for one particular consignment of such goods and to the subsequent sale price of such goods.

Further, he included an item of LP. 864.— for "Organisation expenses — time of unemployment at minimum of salary as Food Controller Inspector — LP. 36.— per month × 24 months.

N. B.: I was a 10,000 dollars a year man in the U. S. A."

By the same process of reasoning I am quite unable to comprehend how the length of the Respondent's unemployment, and the estimated amount of salary lost by virtue of such unemployment, provides any conceivable form of basis for adding such estimated loss of salary to the overhead expenses incurred by him on the sale of a particular consignment of goods. The fact that the Respondent may have been a 10,000 dollar — or 100,000 dollar — a year man appears to me utterly irrelevant to the issue.

The Respondent gave evidence on oath. In the course of his re-examination he said "Obviously, I had many expenses in connection with the agency which I was given. I incurred advertisement expenses,

and mainly travelling expenses and entertainment expenses. My relatives in America knew at the time when they sent these goods, that part of the proceeds from these goods will serve as expenses for the establishment of the agency, and this was to their interest and to mine".

4. The learned Magistrate gave judgment acquitting the Accused. He did so on two main grounds. Firstly, that no witness for the prosecution had said that the prices charged were unreasonable and the evidence established that the goods sold were in fact of a superior quality and considerably cheaper in price than those available on the market at that time.

In the words of the learned Magistrate "the criterion to be adopted in the determination of the question as to whether there is a reasonable profit or not is this: Is the price fair and in conformity with the market conditions in respect of goods similar in quality and value to the goods which are sold, or in other words, the profit can be great but will nevertheless remain reasonable, and if the price is reasonable and is not excessive and does not affect the public, then certainly one cannot come and complain against a merchant who succeeded to gain more than another".

With great respect to the learned Magistrate that seems to me a specious but most dangerous theory. Carried to its logical conclusion it places current market prices as the yardstick for deciding what constitutes a reasonable profit on a specific sale. It strikes at the very basis and foundation of these anti-profiteering Regulations and completely nullifies their value. As Mr. Shayevitz, for the Attorney General, has aptly pointed out if the relevant test as to what constitutes "reasonable profit" within the meaning of the Regulations is "what is the current market price" then the Regulations may just as well be revoked. These anti-profiteering Regulations are made for the benefit of the general public.

Regulation 7 provides that "a seller shall not sell or agree to sell or offer to sell any commodity at a price which provides for the seller any more than a reasonable profit on such sale". I emphasise the last six words — "a reasonable profit on such sale".

As I understand the meaning, intention and spirit of that Regulation it is that if a seller is able to buy a particular commodity at a price far below the current market value he must pass on that benefit to the public, selling such commodity on the market below the current market price after having assured to himself "a reasonable profit on such sale".

The Regulation is designed to combat market values and deflate prices. It may be argued that such a restriction puts a curb on the

initiative of the business man to seek for and secure cheaper goods from new sources to the benefit of the general public. A moment's reflection, however, should dispel this view since it should be obvious that the long sighted business man will continue to seek for and secure new and cheaper sources for the goods he puts upon the market and thereby secure the confidence, goodwill and patronage of the general public.

5. I turn now to the other ground upon which the learned Magistrate acquitted the Respondent. It may be summed up in a few words. I quote from the Magistrate's judgment: — "Accused said in his evidence that he incurred expenses in connection with the agency and especially travelling expenses and entertainment expenses; and one must presume that there is some truth in this statement, for after all, one cannot reasonably imagine that it is possible to do business without incurring expenses, and furthermore, at the time of calculation as to whether there is a reasonable price or not, one should obviously take into consideration these expenses too, even though they are not fixed and determinate".

"It is a fact that the Accused worked as a clerk in the Department of the Food Control and earned LP. 36.— per month including the high cost of living allowances. Accused left his job and instead decided to enter into business. At the time when this Court decides to scrutinise the facts and decide as to whether there is a reasonable profit or not this Court must take into consideration the income of the Accused in respect of the work which he is doing, and I presume that if the Accused entered into business and dedicated his time for it then one must conclude that his object was to earn a salary which is more than LP. 36 per month".

With great respect to the learned Magistrate in my view he erred on three different grounds, in taking such alleged expenses into consideration when deciding whether or not the Respondent had made more than a reasonable profit on the sale of the commodities which formed the subject matter of the charge sheets.

Firstly, it is apparent from the Respondent's own evidence and the wording of the Magistrate's judgment, that the expenses to which the Respondent referred were incurred by him in connection with the establishment of the agency for the sale of this particular line of goods. As such, those expenses were overhead expenses in connection with the establishment of his business and were not properly chargeable as expenses incurred in this particular sale to Messrs. Hefzi Bah.

Secondly, in my view, even assuming that these expenses had not been expressly incurred in the establishment of the agency, having regard to the general line of goods sold — girdles and brassieres — enter-

tainment expenses and the estimated loss of income due to the Respondent's unemployment over a period of time — are not items which the Court could or should properly have taken into consideration in assessing whether or not the Respondent had made more than a reasonable profit on such sales — the sales which formed the subject matter of these charges. I do not say that under no circumstances can entertainment and travelling expenses and pecuniary assessment for loss of time spent in negotiating a particular sale, be taken into consideration for arriving at an assessment of reasonable profit. It is my view, however, that where one is considering an ordinary every day market commodity — such as in this case — expenses of the nature accepted by the learned Magistrate ought not to be considered when estimating whether or not a reasonable profit has been made. In my view, having regard to the operative words, 'on such sale', the expenses to be considered must be limited to the actual landed cost of the merchandise, — C. I. F., Customs Duties, Landing Charges, Transport expenses, and kindred items of expenditure.

Thirdly, even assuming for a moment that such alleged expenditure as the Magistrate took into consideration was properly admissible, in my view the evidence adduced by the Respondent was far too vague and unspecified as to shift the burden of proof put upon him by Regulation 14 that he had not contravened Regulation 7 by selling these goods at more than a reasonable profit.

The prosecution had produced clear uncontraverted documentary evidence that the Respondent had bought these goods for LP. 821.530 mils and sold them for LP. 2850.600 mils. On the face of that evidence the Respondent was clearly guilty of gross profiteering. The onus was upon him to rebut that evidence by showing that his expenses were such that he had not in fact made an unreasonable profit on the sale of those goods. In my view he entirely failed to do so. His vague, hazy, indeterminate evidence about travelling, entertainment expenses *etc.*, unsupported by a single written document, or item of account in any ledger or cash book — even assuming that such expenditure might properly be taken into consideration — entirely failed to shift the onus of proof which was upon him.

6. Section 18 of these Regulations provides that no appeal shall lie from the judgment of a Magistrate upon a trial of an offence under these Regulations, except on a question of law to the District Court.

Mr. Moyal, for the Respondent, has sought to argue that in effect the Attorney General is here appealing on questions of fact and not of law. He suggests that the Appellant is simply asking this Court to

substitute its view as to what constitutes reasonable profit in place of that of the Magistrate.

I do not agree. As Mr. Shayevitz concisely put it, the question for consideration is whether a Court is entitled to take into consideration matters extraneous to the sale as the basis on which reasonable profit may be calculated. That surely is a matter of law and depends upon a construction of Regulation 7 itself.

It was for the trial Court first to decide whether the evidence adduced by the Respondent was capable, in law, of discharging the onus of proof on the Respondent, and then to decide whether, in fact, it did so.

In my view the learned Magistrate erred in law in taking into consideration matters extraneous to the sale for the purpose of determining whether or not more than a reasonable profit had been made.

7. There is one last matter to which I would refer. The Respondent appears to have advanced the proposition before the learned Magistrate that the goods which formed the subject matter of these charges were a gift to him from his brother-in-law in America in order to enable him to set up a business here. It appears from the Magistrate's judgment (page 39 of the translated typewritten record) that he viewed this proposition with some suspicion and doubt — as well he might have done having regard to the documents produced, the Respondent's curious hesitancy in disclosing this story until the investigations against him had been completed and he had been charged with these offences, and his remarkable explanation as to why he had not disclosed it earlier — but he was not ready to disbelieve it entirely.

Assuming that the goods were in fact a gift, it seems to me immaterial and irrelevant to the charges.

For the purpose of these Regulations, and bearing in mind their whole spirit and intention, a Court is not concerned with how a seller got his goods; it is only concerned with the value of those goods when he sells them. In Ex. P. R. 15, which the Respondent himself supplied to the Price Control Officer, and to which he referred and relied upon when charged, he fixed the actual value of the goods as LP. 542.240 mils. As I have already said earlier, taking his own figures, the expenses he incurred in connection with the insurance, landing, customs duties, actual out of pocket expenses *etc.*, amounted to a further LP. 278.290. The cost value of these goods and the cost of putting them on the market amounted to LP. 821.530 mils. On that sale the Respondent made a profit of just over LP. 2000.

8. In my view, for the reasons stated, this appeal must be allowed,

the judgment of the Court below acquitting the Respondent set aside, and, on the facts, a conviction recorded and substituted therefor.

Delivered this 17th day of April, 1947, in the presence of Dr. Stultz for Appellant, and Mr. Moyal for the Respondent.

SENTENCE.

I consider that there are many mitigating circumstances in this case.

I regard the case as a test case.

These proceedings have now been in continuance for over nine months.

It is abundantly clear that the goods sold by the Respondent were superior in quality and far cheaper in price than those obtaining on the market at the material time.

There appears to be no doubt that the Respondent could — for that reason — have made a far greater profit if he had wished to do so.

I take into consideration the Respondent's good character and, indeed for purposes of sentence, I cannot disregard the view taken by the Magistrate of the whole circumstances of the case.

I bind the Respondent over in his own recognisance in the sum of LP. 100 for a period of twelve months. I further order him to pay LP. 25 towards the costs of the prosecution in this case.

Delivered this 18th day of April, 1947.

CIVIL LEAVE TO APPEAL No. 209/46.

IN THE DISTRICT COURT OF JAFFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Smith.

IN THE APPLICATION OF:—

Yousef Haj. — APPLICANT.

v.

Fletcher Rogers. — RESPONDENT.

Jurisdiction of Rents Tribunal re new buildings — Mode of assessing rent — Reg. 46B (9A) of Defence Regulations.

Appeal from the decision of the Rents Tribunal of Jaffa given on 27.11.46 in Civil Case No. 148/46, dismissed:—

1. The tenant of a new house may apply to the Rents Tribunal for the fixing of the rent.

2. The Rents Tribunal may delegate some of its members to inspect the house and assess the rent.

ANNOTATIONS:

1. On sec. 9A of the R. R. (D. H.) Ordinance *vide* also C. A. D. C. T. A. 198/46 (*ante*, p. 118).

2. On the second point and the ruling in H. C. 43/46 quoted in the judgment, *cf.* note 2 to C. A. D. C. T. A. 174/46 (1946, S. C. D. C. 611); *vide* also C. A. D. C. Ha. 69/46 (*ibid.*, p. 861) and notes.

FOR APPLICANT: In person.

FOR RESPONDENT: Salameh.

JUDGMENT.

This is an application for leave to appeal, which was treated as the appeal, by Dr. Yousef Haj, a medical practitioner, against the decision of the local Rents Tribunal which fixed the rent of a flat occupied by Mr. Rogers at LP. 12 a month. The flat in question is one of a block of flats which has been only recently built. It was therefore an offence for the landlord to let the flat until the rent had been fixed by the Rents Tribunal — see Regulation 46B(9A) of the Defence Regulations, 1939, as amended by the Defence (Amendment) Regulations (No. 13), 1943, at page 804 of Vol. III of the Legislation for 1943. The landlord did not get the rent fixed by the Rents Tribunal and so Mr. Rogers himself applied to have it so fixed.

The Applicant's main complaint is that the Tribunal did not give him a fair hearing.

The case was fixed for the 19th October, 1946, and Dr. Haj was duly summoned. He failed to appear but sent a medical certificate as an explanation of his non-attendance. The Tribunal decided not to postpone the hearing since the medical certificate was not signed by a Government Medical Officer. I think it was unfortunate that the Tribunal did not adjourn for a few days. There is no indication on the very short record that it was imperative to proceed at once; in my experience, *ex parte* proceedings generally cause a feeling of resentment and lead to trouble. However, Dr. Haj, apart from sending in the medical certificate, appears to have taken no further interest in the proceedings and to have been quite indifferent to their outcome.

On the 19th October, the Tribunal delegated two of their number to inspect the flat and to assess a fair rent. They made a report dated 23rd October, 1946, recommending a rent of LP. 12 a month. Dr. Haj admits that a copy of this report was sent to him but he did not raise a finger in protest or take any step to get in touch with the Tribunal or to find out what was happening. Again Dr. Haj was notified by

summons of the date when the Tribunal would give its decision and he did not appear. At least, Dr. Haj says that his brother may have appeared; he seemed extremely vague about the whole case. If the Applicant's representations were not put before the Tribunal, I think he has only himself to blame.

The Applicant raises one or two other points. He says that there is no provision under the Rent Restrictions (Dwelling Houses) Ordinance, 1940 (No. 44 of 1940) for the tenant to go to the Tribunal in the case of new houses. It is true that there is no specific provision in that Ordinance but the Defence Regulation which I have quoted requires the rent of new houses to be fixed by the Tribunal. If the landlord does not apply to the Tribunal, I think it is only common sense that the prospective tenant should do so.

It was next said that all the five members of the Tribunal should have inspected the flat and the fact that only two of them did so is sufficient to invalidate the Tribunal's decision. No hard and fast rules are laid down governing the procedure of Rents Tribunals. It is largely a matter of common sense and common fairness. In my opinion it was perfectly fair and reasonable for the Tribunal to send two of their number to inspect the flat and then, after serving the report on the Applicant, and in the absence of any representations by the Applicant, to adopt the conclusion reached by the two members.

The decision of the Tribunal was signed by only four out of the five members of the Tribunal. I think it reasonable to hold that a majority of the members of a Rents Tribunal constitutes a quorum in the absence of any express provision to the contrary, *cf.* Adel Ibrahim El Farra *v.* Electoral Committee of Khan Younis A. L. R. (1946) p. 640. I do not think, therefore, that the decision can be attacked on this score.

The appeal is accordingly dismissed with costs. I allow an advocate's fee of LP. 2.—.

Delivered this 1st day of April, 1947, in the absence of both parties.

CIVIL APPEAL No. 30/46.

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Orr.

IN THE APPEAL OF:— APPELLANT.

Moshe Cohen.

v.

RESPONDENT.

Mrs. Dora Veiner.

Sec. 6 R. R. (D. H.) Ord. — Recovery of excess rent paid — Bayley v. Walker.

An appeal against the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. B. Levi), delivered on the 28.2.1946 in C. C. 1307/45, dismissed:—

1. Following the English decision in Bayley *v.* Walker, the term "recover" in secs. 6(2) and 6(3) of the R. R. (D. H.) Ord. includes recovery by way of action and by way of deduction.

2. Hence excess rent paid may under these sections be deducted from later payments by the tenant only within six months from the date of excess payment.

3. Decisions of the English Courts in cases under the Rent Restrictions Legislation will be applied by the Palestine Courts in interpreting similar local provisions.

ANNOTATIONS:

1. See, on the first two points, Halsbury, Vol. 20, p. 328, para. 390 and footnote (*s*).

2. On the last point *cf.* the following authorities: C. A. 141/43 (10, P. L. R. 289; 1943, A. L. R. 318), C. A. 482/44 (12, P. L. R. 212; 1945, A. L. R. 274), C. A. 441/44 (*ibid.*, pp. 217 & 289), C. A. 386/45 (13, P. L. R. 538; 1947, A. L. R. 139, C. A. D. C. Ha. 103/45 (1946, S. C. D. C. 26), C. A. D. C. T. A. 27/46 (*ibid.*, p. 510), C. A. D. C. Ha. 62/46 (*ibid.*, p. 597), C. A. D. C. Jm. 18/46 (*ibid.*, p. 779), C. A. D. C. T. A. 28/46 (*ante*, p. 84) and C. A. D. C. T. A. 209/44 (1947, "*Hamishpat*" 24) and note 2.

FOR APPELLANT: Caspi & Av. Levy.

FOR RESPONDENT: Frank.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court Jerusalem, in which the learned Magistrate (Dr. Benjamin Levi) awarded the Respondent the sum of LP. 42.190 mils with interest and costs.

The facts of this case are set out in the judgment of the learned Magistrate and I do not propose to repeat them here.

The first ground of appeal argued by Mr. Caspi for the Appellant, is that the time limit of 6 months set by section 6(3) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, within which a tenant may recover rent paid in excess of the standard rent, does not apply to the method of recovery by deduction. Counsel's first point is that the word "recoverable" as used in section 6(2) and section 6(3) is used in the technical sense and means recoverable by an action. His second point is that a person does not "recover" by deduction as "recover" connotes getting something back, whereas if a person "deducts" he does not get anything back but only withholds.

With regard to the first point, the learned Magistrate cited Bayley

v. Walker 1925 I. K. B. 447, in support of his interpretation of sections 6(2) and 6(3) of the Palestine Ordinance that the time limit applied to a deduction as much as to any other method of recovery. Mr. Caspi argues (a) that the case cited by the learned Magistrate is no authority in Palestine (b) that the point in question in this appeal was not argued in Bayley *v.* Walker.

Taking (b) first, I do not think Mr. Caspi can have read carefully the report in Bayley *v.* Walker. At page 448, Mr. Earengey for Plaintiff in his argument says "it cannot have been intended that the right of recovery by deduction should be wider than the right of recovery by action". Moreover, Salter, J., in his judgment in the appeal cited (at page 450), after quoting from Swift, J.'s judgment in Algate *v.* Vugler, (1924) 2 K. B. 136) says: "It is obvious that Swift, J., thought that the statute imposed the time for recovery whether by action or deduction". It is clear from these quotations that the Court in Bayley *v.* Walker considered the very point raised by Mr. Caspi in this case.

Taking Mr. Caspi's point (a) he is right that the English decisions on Rent Restrictions are all concerned with interpretation of English Statutes, but the principles of the English decisions have been and are being constantly applied by the Court of Appeal and the District Courts in interpretation of the Palestine Rent Restrictions Ordinance, so I think it somewhat late in the day to advance this argument.

In Bayley *v.* Walker, the Court was concerned with the interpretation of section 14(1) of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, as modified by sec. 8(2) of the Rent and Mortgage Interest Restrictions Act, 1923. The relevant parts of this last mentioned section are identical with section 6(3) of the Palestine Ordinance, and the decision in Bayley *v.* Walker that the six months time limit applies to deductions made by the tenant is therefore applicable in Palestine.

This decision also disposes of Mr. Caspi's second point that a deduction cannot be a recovery as one withholds in deducting and gets something back in recovery.

I can see no merit in the other grounds of appeal argued by Mr. Caspi. The learned Magistrate has written a careful judgment and I agree unreservedly with him in the findings of fact and law he has made.

The result is that I dismiss this appeal. I give the Respondent costs in an inclusive sum of LP. 15.—.

Dated this 6th day of April, 1947.

CIVIL APPEAL No. 28/47.

IN THE DISTRICT COURT OF HAIFA.

BEFORE: His Honour Judge Nasr.

IN THE APPEAL OF:—

Custodian of Enemy Property. APPELLANT.

v.

Gado. RESPONDENT.

Eviction — Sec. 8(1)(b), R. R. (Dwelling Houses) Ord. — "Is making a profit".

1. The profit which a tenant is actually making at the time eviction is demanded gives rise to an action for eviction under sec. 8(1)(b), R. R. (Dwelling Houses) Ord.

2. Past profits were not contemplated to constitute a ground for eviction.

ANNOTATIONS:

1. On sec. 8(1)(b) of the R. R. (D. H.) Ordinance *cf.* note 2 to CR. A. D. C. Jm. 107/46 (*ante*, p. 210).

2. *Cf.* the authorities on the question as to when alternative accommodation must be available to the tenant under sec. 8(1)(d), resp. 4(1)(e); see, on this point, C. A. D. C. T. A. 212/46 (*ante*, p. 128, on p. 135) and note (*c*) to that case.

FOR APPELLANT: Ganon.

FOR RESPONDENT: Shimmel.

JUDGMENT.

— — — — — — — — — — —*

Coming now to the last point, the learned Magistrate found that the Respondent was not making unreasonable profit from sub-tenants at the time the action was filed. This is a finding of fact with which I will not interfere. The Appellant's complaint, however, is that the learned Magistrate erred in not having taken into account profits made some five months prior to the date of the filing of the action in February, 1946, when he ceased to accept rent from the Respondent.

The relevant section in the Rent Restrictions (D. H.) Ordinance is section 8(1)(b) which reads as follows:—

> 8(1) "No judgment or order for the eviction of a tenant from a dwelling house to which this Ordinance applies shall be given or made so long as the tenant continues to pay rent at the agreed rate as modified by this Ordinance, and performs the other conditions of tenancy except:—

* Omitted.

(*Ed.*)

— — — — — — — — — — —

(b) On the ground that the tenant, by taking in lodgers is making a profit which, having regard to the rent paid by the tenant is unreasonable, and the Court, Judge or Execution Officer considers it reasonable to give such judgment or make such order".

I emphasise the words *is making a profit* which appear in the section and point out that *past* profits were not contemplated to constitute a ground for eviction. It is not what profit the tenant has made but what profit he is actually making at the time eviction is demanded which gives rise to an action for eviction under this section. That being my view, I find that the learned Magistrate was right in taking into account only the profit the Respondent was making at the date of the proceedings.

In the result the appeal fails and is dismissed with costs to Respondent assessed in an inclusive figure of LP. 15.

Delivered this 3rd day of April, 1947, in presence of Mr. Ganon for Appellant and of Dr. Shimmel for Respondent.

CIVIL CASE No. 104/45.

IN THE DISTRICT COURT OF TEL-AVIV.

BEFORE: His Honour the President Judge Windham.

IN THE CASE OF:—

I. Trachtingot. — PLAINTIFF.

v,

Abraham Susnovsky & an. — DEFENDANTS.

Practice — Landlord & Tenant — Estoppel — M. C. P. R., rr..38—40, C. D. C., T. A. 431/45 (Motion 611/46) — "Striking out provisionally" — "Discontinuance" — "Withdrawal", M. C. P. R., rr. 133—5.

1. Discontinuance or withdrawal can only be effected if the Plaintiff gives notice in writing to that end.

2. The words "strike out provisionally" cannot have the effect of disposing of the previous action filed by Plaintiff in the Magistrate's Court and that case must be held to be still alive.

3. A party is estopped from suing on the same cause of action forming the subject matter of another pending case.

ANNOTATIONS:

1. On rr. 133—5 of the M. C. P. R. *cf.* C. A. 137/45 (12, P. L. R. 399; 1945, A. L. R. 426), C. A. 261/45 (13, P. L. R. 25; 1946, A. L. R. 204),

C. A. D. C. Jm. 12/43 (1943, S. C. D. C. 201), C. A. D. C. T. A. 21 & 95/44 (1944, S. C. D. C. 351), C. A. D. C. Ha. 26/45 (1945, S. C. D. C. 514) and C. A. D. C. Ha. 9/47 (*ante*, p. 142).

2. See, on the defence of *lis pendens*, Mo. L. C. T. A. 419/46 (1946, S. C. D. C. 746) and note 1.

3. On the meaning of "cause of action" see Annotated Laws of Palestine, Vol. 5, pp. 46—7 and the case cited in footnote (43); *vide* also C. A. D. C. Jm. 101/46 (*ante*, p. 65).

4. On "penalty rent" *cf.* C. A. D. C. Ha. 97/46 (1946, S. C. D. C. 749) and note.

FOR PLAINTIFF: E. Z. Fellman.

FOR DEFENDANTS: Matussewitz.

JUDGMENT.

This is an action by a landlord against two tenants to recover from the latter the sum of LP. 556.— as agreed rent at LP. 1.— per day for the period of 556 days during which the Defendants overstayed the three year period of their tenancy in certain business premises. They admit that they overstayed for that period. Under the written contract, which terminated on 17th September, 1939, the rent was LP. 8.— per month. But the claim for LP. 1.— per day in respect of the period overstayed, namely 17th September, 1939, to 28th March, 1941, is based on clause 6 of the contract, which reads as follows:—

> "6. At the end of the period of lease the tenant undertakes to vacate the hired premises and to deliver the keys to the landlord, and if he shall not vacate at the time fixed in the contract, he shall pay 1000 mils as price of future lease for each day until delivery of the keys of the house to the landlord, apart from whatever he has to pay to the landlord for damages caused by him for delay in vacating the flat."

2. Before making any essential findings of fact on the merits of this case, it is necessary to consider what I hold to be the main ground of defence, namely that the Plaintiff is estopped from lodging this action because a previous action by him against the Defendants on this same contract, for rent in respect of this same period of 556 days overstaying, is still pending in the Magistrate's Court. Now the Plaintiff did lodge such an action, in Magistrate's Court file 513/43. It was against the same Defendants, in respect of the same overstayed period, and it was based on the same contract, the whole of which was there produced and attached to the Statement of Claim. But in this earlier action the enhanced rental of LP. 1.— per day for overstaying provided for in clause 6 was not relied on, but the Plaintiff merely claimed rent at the rate of LP. 8.— per month, which was the amount payable under

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SELECTED CASES

OF THE

DISTRICT COURTS OF PALESTINE

WITH ANNOTATIONS

Edited by:

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(*Consulting Editor*)

and

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the contract in respect of the three years period of the contract. This he described in his statement of claim as "rent as per previous contract as well as equivalent rent". £ 1.— arrears of rent were also claimed in respect of this three year period.

3. Now stopping here, it seems clear to me that in the present case the Plaintiff is suing on the same cause of action as he did in the earlier case, namely for rent in respect of the same 556 day period overstayed, in reliance upon the same contract. In that earlier case he could easily have claimed the enhanced rent provided under clause 6 of the contract which he had attached to his Statement of Claim. Indeed if he ever wanted to rely on that clause, then was the time to do so, in accordance with the requirements of rules 38 to 40 of the Magistrates' Courts Procedure Rules, 1940, which are designed to prevent multiplicity of actions. In connection with my finding that the cause of action was the same, I would refer to my observations on a similar point concerning claims based on one and the same contract, contained in Motion 611/46 * (Civil Case No. 431/45) of this Court.

4. In answer to this, however, it is contended for the Plaintiff that this earlier case in the Magistrate's Court had been what is called "withdrawn", and that it was no longer alive. The best evidence as to what happened to that case is, of course, the record of the learned Magistrate who tried it. From this record it appears that both parties had closed their evidence when the Plaintiff applied for an adjournment to call certain rebutting evidence, which was granted. At the adjourned hearing Plaintiff's counsel immediately applied orally, in Court, to "strike out the case provisionally". Then appears the following entry by the Magistrate: — "Decision. It is ordered to strike out the action provisionally without costs". That is the last entry on the file. Now it is difficult to see from this what the learned Magistrate really thought he was granting. I have ascertained from the Hebrew interpreter of this Court that the Hebrew word translated on the record as "strike out" is the word which is so translated in the Magistrates' Courts Procedure Rules, 1940, and is a different word from those which are respectively the Hebrew equivalents of "discontinued" or "withdrawn" as used in those Rules. Now turning to the Rules, it is clear that they contain no provision for striking out a case either provisionally or at all. All that can be "struck out" under the Rules is matter in written pleadings, under Rule 109. And what do the words "provisionally" mean? Provisionally upon what? As it stands, then, I cannot take

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* Not reported.

the order of the Magistrate as meaning that the case was finally disposed of. It is contended that what the Magistrate really intended to allow was a withdrawal of the case. But here again, what does "provisionally" mean? And in the Rules there is no provision for "withdrawing" a case. Rule 135 speaks of "withdrawing" any part or parts of a claim, but not the whole claim. This same rule speaks of "discontinuing" a claim; but what was done here cannot be held to have amounted in reality to a discontinuance, for under that rule a "discontinuance" or "withdrawal" can only be effected if the Plaintiff gives notice in writing to that end, which he did not do. Nor can the words "strike out provisionally" used by the Magistrate have really meant an adjournment generally, as provided for in Rule 133. And even if they could be so construed, the action was never finally disposed of, notwithstanding there was no application to restore it within six months, for under Rule 134 an action cannot be dismissed in such a case until the Court has given notice to the parties to show cause why it should not be dismissed, and thereafter dismisses it; and this was not done here.

5. I therefore find it impossible to put any construction on the words "strike out provisionally", used by the Magistrate, to enable me to hold that the case before him has been disposed of. It must in my view be considered as still alive. It is not for this Court to decide what those words did mean, or whether they had any legal effect at all; it is sufficient to say that, under the Magistrates' Courts Procedure Rules, 1940, they could not have the effect of disposing of the earlier case. That being so, the present case, being based on the same cause of action, is both premature and vexatious, and must be dismissed on those grounds, leaving the Plaintiff free, if he so desires, to pursue his claim in the earlier action.

6. It only remains to make such brief finding of fact as might be desirable against the possibility of this matter being taken further. Most of the points arising in this case are points of law, and I think it will suffice, as to the facts, for me to say that, where there has been any conflict on the facts, I accept the evidence of the Plaintiff in preference to that of the Defendants and their witnesses.

7. The action is accordingly dismissed with costs, to include an advocates' attendance fee of LP. 20.—.

Delivered this 29th day of April, 1947.

MOTION No. 78/47.

IN THE LAND COURT OF HAIFA.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

The Haifa Acre Omnibus Co. & others. RESPONDENTS.

Expropriation of Land — Interpretation of statutes — Land (Acquisition for Public Purposes) Ord. — Effect of repeal & saving clause — Watson v. Winch.

The 1946 amendment to the Land (Acquisition for Public Purposes) Ordinance, 1943, has in many respects altered the procedure by which the rights of the Government to acquire land compulsorily may be effected and thereby affected the rights of persons claiming interest in the land to be acquired. It has repealed and saved from repeal certain matters but omitted a saving clause with regard to notices to treat issued by virtue of the principal Ordinance. Notices issued under the principal Ordinance are, therefore, of no effect for proceedings under the amending Ordinance, as they have been repealed and replaced by notices of a quite different form.

ANNOTATIONS:

1. Note that the case quoted in the judgment (Watson v. Winch, 1916, 1 K. B. 688, 85 L. J. (K. B.) 537, 114 L. T. 1209, 32 T. L. R. 244) dealt with the abrogation of a by law in consequence of the repeal *in toto* of the Act under which it was made: Maxwell, 8th ed., p. 350, Halsbury, Vol. 26, p. 608, 2nd paragraph.

2. See the Land (Acquisition, *etc.*) Bill, 1947, P. G. No. 1599, Suppl. 3, p. 404, published in consequence of the decision in this case.

3. *Vide* C. A. 228/45 (14, P. L. R. 7; 1947, A. L. R. 55) and note in A. L. R.

JUDGMENT.

At the outset of the hearing of this, the fourth application by the Attorney General praying for the delivery of possession to Government of a piece of immovable property under the provisions of the Land Acquisition for Public Purposes Ordinance No. 24 of 1943, published in Palestine *Gazette* No. 1305, Sup. 1, p. 49, as amended by Ordinance No. 34 of 1946 (P. G. No. 1402 Sup. 1 p. 175), the advocate for the first Respondent, the Haifa Acre Bus Company has raised certain preliminary objections.

The first of these is that the matter is res judicata by reason of the fact that three previous applications brought by the Applicant have

each and every one of them been dismissed. As I indicated at the close of the hearing there is in my opinion no res judicata here for the following reasons:

1. There has been no proof that the former applications were disposed of on their merits and, furthermore,

2. It is conceded that they were all dismissed on preliminary objections; the first two applications because the Court held in Motions 178/45 and 468/45 that the application was not argued by the Attorney General or his representative. An application for leave to appeal was lodged against the decision in Motion 468/45 but was withdrawn. The third application 550/46 came before this Court differently constituted, and it was dismissed as it was held that the Moslem Awqaf Commission was the proper party to appear and had not been cited and served.

Now, this present motion has come before me and the first Respondent's advocate argues that firstly, the application is signed by the Assistant Government Advocate and not by the Attorney General who alone represents the High Commissioner who is the person designated in s. 8 of the 1943 Ordinance to apply to the Court for an order of possession, for proceedings for acquisition were commenced under the 1943 Ordinance and Notice was made in 1944 and published in the Palestine Gazette No. 1357 under s. 7 of that Ordinance. He goes on to argue that the provisions of s. 7 were repealed and re-enacted in a different form and a new form of Notice containing new conditions was prescribed by the amending Ordinance of 1946, and that as there is no saving clause in the 1946 Ordinance in respect of notices made and certificates issued under the principal Ordinance — therefore the old form of notice is repealed and considered non existent.

Ḥassan Eff. Hawa goes on to point out that the principal Ordinance has been amended in very many other important respects (indeed it is clear that this is so for they extend to more than seven printed pages of the Gazette and it would have been easier for reference if the Ordinance had been re-enacted *in toto* with these numerous amendments). He, therefore, argues, that the notices and forms under the 1943 Ord. as repealed and by reason of the absence of this saving clause, such are invalid and inconsistent with the amending Ordinance and that the Petitioner cannot proceed under the amending Ordinance while relying on the old notices. He, therefore, asks that the application be dismissed. He cites Watson v. Wintch, 1916, 1 K. B. 688, and Maxwell on Interpretation of Statutes 7th Edition, p. 345.

Mr. Pinhassovitch for the Attorney General argues that all that

has been changed by the amendments to the principal Ordinance are changes in procedure and that the procedure adopted in respect of the notices served on first Respondent was correct and in accordance with the Ordinance obtaining at the time they were made; he refers to the affidavit sworn to in support of the present motion. He argues that the amending Ordinance does not change the rights of Government and he relies on section 17(2)(b) and 17(2)(c) of the Interpretation Ordinance 1945. He says that there is no doubt that the Assistant Government Advocate is the Attorney General's representative at the present time by virtue of Section 2 of the amending Ordinance. This, of course, is perfectly correct but the point for decision is whether he can rely on the old form of notices prescribed in the principal Ordinance in bringing this application. I am inclined to agree that *he cannot do so*. The amending Ordinance did more than amend procedure; it amended the law in many respects and it may not have amended the rights of Government to acquire land compulsorily, but it has most definitely and in many respects altered the procedure by which such acquisition may be effected and thereby affected the right of persons claiming interest in the land to be acquired. I would, for example refer to sections 5, 7, 9, 13 and 14 of the Ordinance as amended by sections 4, 5, 6, 8, 11, and 12 of the amending Ordinance. Furthermore, there is no saving clause in the amending Ordinance (as there is in the principal Ordinance, saving notices, etc., already issued or made under the previously existing legislation, Cap. 77 and 74 Drayton, Vol. II); such saving clause is replaced in the amending Ordinance and in its place is enacted a proviso saving notices to treat made under Cap. 77 and 74 and any saving clause as to notices made and issued under the Ordinance No. 24 of 1943 has been omitted. Nothing else is saved.

In my opinion, therefore, the notices issued under the principal Ordinance are of no effect for the purpose of these present proceedings for these have been repealed and replaced by notices of quite a different form without any saving of previous notices. These may have been good when they were issued but they have now been repealed and the Attorney General cannot now rely on them, but should issue fresh notices and thereafter proceed under the Ordinance as amended in 1946.

The Interpretation Ordinance cannot avail or help the Attorney General for these notices are a matter provided for by substantive law, and if that law is replaced by an amending Ordinance without a saving clause, the Interpretation Ordinance cannot, in my opinion, be invoked to fulfil the purposes of a saving clause in so far as substantive law is concerned.

The decision which I am bound to come to in this respect may be regrettable in so far as it causes further delay, but the point having been raised by the Respondents is one to which I am forced to accede.

For these reasons, therefore, the objections raised by the first Respondent are upheld and the application must be dismissed with costs in an inclusive sum of LP. 20 awarded to the first Respondent only.

Delivered this 2nd day of May, 1947, in presence of Mr. Catafago for 1st Respondent in absence of second, third and fourth Respondents & their advocates duly notified and in presence of Mr. Pinhasovich for the Attorney General.

CRIMINAL APPEAL No. 18/47.

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Rigby.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Meir Benayahu. RESPONDENT.

Copyright — Non-appearance of the complainant — R. 264 MCPR — Renewal of complaint.

An appeal from the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levy) delivered on the 21.1.1947 in CR. C. 6899/46, dismissed:—

1. The dismissal of a charge under Rule 264 MCPR because of the non-appearance of the complainant at the hearing is no bar to a subsequent prosecution for the same offence as the accused was never in jeopardy.

2. Such a dismissal cannot be appealed on the ground of evidence having been wrongly excluded.

3. An allegation by an appellant that a Magistrate called a case at a time prior than that for which it had been fixed should, if not borne out by the record, be supported by affidavit.

ANNOTATIONS:

1. On the first point *cf.* CR. A. D. C. T. A. 159/45 (1946, S. C. D. C. 232 — upheld in CR. A. 51/46 (13, P. L. R. 315; 1946, A. L. R. 350) and note 3 thereto.

2. On the second point *cf.* Salant, Criminal Procedure and Practice in Palestine, p. 66; see also CR. A. D. C. Jm. 114/46 (*ante*, p. 102) and note.

3. On affidavits to supplement the record *vide* CR. A. D. C. T. A. 152, *etc.* /44 (1945, S. C. D. C. 385) and cases cited in note 1 thereto.

FOR APPELLANT: Khalaf.

FOR RESPONDENT: Yahuda.

JUDGMENT.

This is an appeal, brought in the name of the Attorney General, from a judgment in the Magistrate's Court, Jerusalem, whereby the learned Magistrate dismissed a charge brought by a private complainant against the present Respondent for an offence contrary to section 3(1)(a) of the Copyright Ordinance.

2. The ground for the dismissing the charge was the non-appearance of the complainant when the case was called upon for trial. I am informed by Mr. Khalaf, on behalf of the Attorney General, that the learned Magistrate had fixed the case for hearing at 10.30 a. m. on the morning of the 21st day of January, 1947, but that, presumably due to an oversight, the case was called upon before the Magistrate at 9.15 am. that morning. Upon the non-appearance of the complainant the learned Magistrate dismissed the charge, presumably acting under Rule 264 of the Magistrates Courts Procedure Rules. There is nothing on the record to substantiate the allegation of Mr. Khalaf that the Magistrate had in fact fixed the case for hearing at 10.30 a. m. and it would certainly seem to be desirable that if an allegation of that nature was to be made — as indeed it was made in the Statement of Appeal —, it should have been supported by an affidavit on oath.

3. In my view the appeal is misconceived. The ground of appeal is that the evidence was wrongly excluded. I am of the opinion that such a ground of appeal bears no relation to the facts complained of. In my view the proper remedy was for the complainant to issue a fresh complaint, should he be minded so to do. The Respondent was never in jeopardy, he was never called upon to plead, and it is clear that the dismissal of a charge under Rule 264 of the Magistrates' Courts Procedure Rules is no bar to a subsequent prosecution for the same offence.

This appeal is accordingly dismissed.

Delivered this 1st day of April, 1947.

CRIMINAL APPEAL No. 4/47.

IN THE DISTRICT COURT OF TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Windham.

IN THE APPEAL OF :—

M. Hadomi. APPELLANT.

v.

Attorney General. RESPONDENT.

Municipal by-laws — When confirmation by High Commissioner required — Sec. 99(1) & (4), *Municipal Corporations Ord. — Sec.* 6(1)(*a*), *Intoxicating Liquors Ord. — Sec.* 5(1)(*a*), *Public Entertainment Ord. — Sec.* 25(1), *Road Transport Ord.*

Appeal from the judgment of the Magistrate's Court, dated 31.12.46 in file No. 8741/46, dismissed:—

1. By-laws made by a municipal council are not valid unless confirmed by the High Commissioner if they are made under the Municipal Corporations Ordinance or under any other Ordinance if that Ordinance does not contain independent empowering provision for the making of by-laws and independent provision with regard to what person's or body's consent to or confirmation of such by-laws is necessary.

2. Confirmation by the High Commissioner is not necessary for municipal by-laws made under Sec. 25 of the Road Transport Ordinance which specifically empowers a municipal council to make by-laws and requiring the consent of the district commissioner and the licensing authority to such by-laws.

ANNOTATIONS:

1. On the validity or otherwise of by-laws *cf.* CR. A. D. C. T. A. 59/45 (1946, S. C. D. C. 734) and note 2.

2. *Generalia specialibus non derogant*: Halsbury, Vol. 31, pp. 526—7, paras. 687-7, particularly footnote (*l*).

3. For a recent amendment of the by-laws in question see P .G. No. 1580 of 22.5.47, Supp. 2, p. 770.

FOR APPELLANT: Miller.

FOR RESPONDENT: Olshansky.

JUDGMENT.

The Appellant was convicted for a car-parking offence contrary to by-laws 10 and 15 of the Tel-Aviv Municipal Area (Regulations of Stationary Vehicles) By-laws, 1937, and the only point for decision in this appeal is whether those by-laws are bad by reason of the fact

that they were not confirmed by the High Commissioner, as indeed they were not. The by-laws were made under section 25(1)(b) of the Road Transport Ordinance. Section 25(1) provides that — "A municipal or local council may, with the consent of the district commissioner and the licensing authority, make by-laws in regard to the following matters:—", and paragraph (b) makes provision for the regulation of stationary vehicles; the by-laws in question admittedly fall within paragraph (b). Neither section 25 nor any other section of the Road Transport Ordinance requires that by-laws made under section 25 shall be confirmed by the High Commissioner. The Ordinance (including the part of section 25 which I have quoted) was enacted in 1929. In 1934 the Municipal Corporations Ordinance was enacted, section 99(1) of which provides that — "A municipal council may make by-laws to enable or assist it to carry out any of the matters it is required or empowered to do under this Ordinance *or any other Ordinance or law*....." Section 99(4) of the same Ordinance provides that — "No by-law shall have effect until the same has been confirmed by the High Commissioner.....".

2. It is accordingly argued that the requirements of section 99(4) of the Municipal Corporations Ordinance, 1934, apply to all by-laws made by a municipal council, whether under the 1934 Ordinance or under any other Ordinance, in particular the Road Transport Ordinance. Now I agree that its requirements might well apply to by-laws made by a municipal council to further the carrying out of matters which it was required or empowered to do under some other Ordinance, if that other Ordinance did not contain independent empowering provision for the making of by-laws and independent provision with regard to what person's or body's consent to or confirmation of such by-laws was necessary. The Sale of Intoxicating Liquors Ordinance, 1935, (section 6(1)(a)), and the Public Entertainment Ordinance, 1935, (section 5(1)(a)), have been rightly cited to me as examples of such Ordinances, under which a municipal council is not given specific power to make by-laws, but which merely refer to "such fees as may be fixed by by-laws" made by the municipal council. In such cases the municipal council derives its by-law making power from section 99(1) of the Municipal Corporations Ordinance, 1934, and the provisions of section 99(4) with regard to the High Commissioner's confirmation apply to them. But the case of the Road Transport Ordinance is a far different one. First, it specifically empowers a municipal council to make by-laws, and secondly it contains its own independent provisions regarding what persons' consent to such by-laws is necessary, namely that of the district commissioner and the licensing authority. From this it is clear

that the requirements of the Road Transport Ordinance regarding the making of by-laws must be regarded as self-contained and entirely independent of, and not as subject to, the different requirements of the Municipal Corporations Ordinance, 1934, — and this notwithstanding that the latter Ordinance was a later enactment. I would add that it is hardly likely that the legislature would have intended, on the enactment of the Ordinance of 1934, that by-laws thereafter made under the Road Transport Ordinance should receive not only the consent of the District Commissioner but also the confirmation of the High Commissioner, thereby subjecting them to a double check such as is not required for by-laws made directly under the Municipal Corporations Ordinance itself or for by-laws of the type that I have referred to in taking the example of the Sale of Intoxicating Liquor Ordinance, 1935. Such a result will certainly not be presumed in the absence of specific provision to that effect in the Municipal Corporations Ordinance; sections 99(1) and (4) of that Ordinance are not specific enough for the purpose.

3. I therefore hold that the by-laws under consideration are good. The appeal is accordingly dismissed.

Delivered in open Court this 21st day of May, 1947.

CRIMINAL APPEAL No. 14/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Hill.

IN THE APPEAL OF:—

Abed Muhammad Odeh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Advocate pleading guilty for absent client who had earlier pleaded not guilty — Rule 267(1) M. C. P. R. — Jurisdiction of Magistrate to declare judgment a nullity — Disregarding a void judgment.

1. A plea of guilty by the accused's advocate in the absence of the accused should not be received.

2. Although a Magistrate has no power to declare a judgment of another Magistrate a nullity, his proper course is to disregard it, where he is satisfied that it is null and void.

ANNOTATIONS:

1. The Appellant was charged with building without a permit and pleaded not guilty. At the adjourned hearing his advocate, in Appellant's absence, changed the plea into one of guilty and a demolition order was issued. As the Appellant did not comply with it, the present proceedings were brought. A plea by the Appellant that the judgment was a nullity as the plea of guilty by his advocate should not have been received was rejected by the Magistrate on the ground that he had no power to declare the judgment of another Magistrate a nullity. Appeal allowed.

2. On changing the plea see Salant, Criminal Procedure and Practice in Palestine, p. 55.

3. As regards a plea of guilty by an advocate on behalf of the client see M. A. 9/32 (1, P. L. R. 740, 2, C. of J. 620) and CR. A. 68/38 (1938, 2 S. C. J. 42).

4. On the last point *cf.* (as to civil cases) C. A. 180/46 (13, P. L. R. 552, 1946, A. L. R. 777) and notes 1 & 2 in A. L. R.

FOR APPELLANT: Tsherniak.

FOR RESPONDENT: Ashoush.

JUDGMENT.

This is an appeal from the judgment of the Magistrate's Court, Haifa, in Criminal Case No. 13512/46 on 10.2.1947, convicting and sentencing the Appellant to pay a fine of LP. 5 and to demolish a structure.

At the outset I must state that I entirely agree with the learned Magistrate that the proceedings in Criminal Case 11742/45 were wrong. The plea of guilty by Appellant's advocate in the absence of Appellant should not have been received. Such a situation is not contemplated by rule 267(1) of the Magistrates' Courts Procedure Rules.

Having arrived at such a conclusion regarding this previous judgment, what was the proper attitude for the learned Magistrate to adopt towards it ? I agree with him that he had no power to declare that it was a nullity, but in my opinion as he was satisfied that it was wrong his proper course was to disregard it. Justice and equity demanded that he should do so. Two wrongs cannot make a right and if the first judgment was wrong, which it was, all other judgments enforcing it must be unjust. I allow this appeal. The conviction, sentence and order of the Court below is quashed. The fine paid by the Appellant is to be refunded to him.

Delivered on the day of May, 1947.

CIVIL APPEAL No. 173/46.

IN THE DISTRICT COURT OF HAIFA, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

Edvin Levy. APPELLANT.

v.

Rivka Balas. RESPONDENT.

Eviction — Title of landlord of distinct flat acquired by purchase of musha share in the land and long term lease of that flat, both dispositions being registered in the Land Registry — C. A. 16/45 — Failure to pay rent — Non occupying tenant of business premises — Position of sub-tenant of business premises vis á vis landlord.

1. (Distinguishing C. A. 16/45) The title of landlord with respect of a distinct flat can be acquired by purchase of a *musha'a* share in the land and a deed of "lease" to have exclusive use of a specified part of the building if both dispositions are registered in the Land Registry.

2. (Following C. A. D. C. Ha. 8/47). A non occupying tenant of business premises is protected by the R. R. (Business Premises) Ordinance.

3. A subtenant of a tenant holding over under the R. R. (Business Premises) Ordinance is not protected vis-a-vis the landlord but may be entitled to have a judgment for eviction set aside if it is obtained by collusion between the landlord and the tenant.

ANNOTATIONS:

1. Note that the "Forer case" is now pending before the Privy Council; *vide* P. C. L. A. 46 & 50/45 (1946, A. L. R. 502).

2. On the meaning of the term "landlord" *cf.* Gorali, Landlord & Tenant in Palestine, pp. 73 *et seq.*; *vide* also C. A. 337/46 (1947, A. L. R. 212).

3. On the second point see the case cited and the note thereto.

4. See, on the last point, C. A. D. C. Ha. 192/46 (*ante*, p. 111) and note 2.

FOR APPELLANT: Geiger & Ben-Zeev.

FOR RESPONDENT: Gross.

JUDGMENT.

This is an appeal against the judgment of H W. Mr. Agranat, a Magistrate of Haifa, ordering the Appellant to vacate a flat of three rooms on the third floor of No. 1, Tel-Hai Street, Haifa and deliver possession threof to the Respondent.

In the lower Court the Respondent sued the Appellant and pleaded that she had been granted by virtue of a deed of sale and a deed of

lease both registered in the Land Registry of Haifa (this second deed is Exh. P/2 in the lower Court) the right of exclusive use of this flat for a period of 99 years as from 29th November, 1945, and that at that date the Appellant was a tenant in that flat and had to pay rent in the sum of LP. 7 on the first of every month.

The Respondent then averred that she through her advocate had notified the Appellant (this is Exh. P/3 in the lower Court) that she had acquired the flat and stood in the shoes of the former owner. The Respondent then averred that the Appellant had failed to pay rent for December, 1945, and for January, 1946; that the Appellant did not reside in the flat but had let it out as single rooms to others and that the Appellant was making an unreasonable profit therefrom. For these three reasons the Respondent prayed for an order of possession.

The Defendant pleaded that he was until the end of 1945 and still at the time of the filing of the defence in 1946 a tenant, but a tenant of one Mrs. Hashesman (the former owner). The Defendant went on to deny that the Plaintiff had acquired by the deed of "lease" P/2 any right of exclusive use by the Plaintiff of the premises.

The Defendant admitted receipt of the advocate's letter referred to but pleaded he was not bound by it. Defendant further pleaded that he had offered rent on 1.12.45 and 1.1.46 to Mrs. Hashesman who never confirmed that she had transferred her rights of the flat to the Plaintiff and that at the first opportunity he offered the rent to the Plaintiff. He denied that he was no longer in occupation or that he was making an unreasonable profit.

The learned Magistrate dismissed this last part of Plaintiff's action but held that by virtue of P/2 the Plaintiff had become the landlord of the Defendant; that the Defendant had failed to pay rent and that Defendant was a non occupying tenant, and, therefore, granted an order of possession.

The Defendant now appears and his first ground of appeal is that P/2 is a void document and a mere device to evade the provisions of the Land Transfer (Amendment) Ordinance whereby no separate ownership of a building is registerable in Palestine, but only the land is registerable.

He relies on the Forer Case, C. A. 16/45, A. L. R. 1945, p. 628, and has advanced long arguments in support of this plea that this transaction P/2 is void and that the learned Magistrate was wrong in holding it was a partition of usufruct or partition of benefit.

Now, P/2 is quite clearly a device by which the Respondent's lawyers have most ingeniously tried to circumvent the Land Transfer (Amendment) Ordinance and afford all the advantages and powers of an absolute

ownership in this flat without having the land on which stands that building registered in the Land Registry; this is quite clearly and specifically recited in the second paragraph of the preamble to the executing part of the deed. But the Respondent's advocate points out and points out rightly in my opinion, this disposition is registered in the Land Registry. It is not contrary to public policy or morality and by the fact that it is registered it would not appear to be contrary to the law regulating transfer and dispositions of immovable property. For if it were so it would not have been accepted by the Land Department and registered in the Land Registry as it has been, after the consent of the Director has been presumably obtained.

In my opinion, whether this deed is a lease as it recites it is or whether it is a partition of benefit as the learned Magistrate held it to be in the course of his very lengthy judgment, is immaterial to this appeal. It is a *registered disposition* and unless it is declared by a competent Court to be a void disposition, and being one of immovable property, only a Land Court can do so, one has to look and see whether it confers on the Respondent such rights that would enable him to step into the shoes of the former landlord of the Appellant. It is clear that in paragraph 4 it empowers the Respondent the exclusive use for any lawful purpose not contrary to morality or hindrance to other tenants and in addition to let it to others in part or in whole. Therefore, I think the learned Magistrate was right in holding that the Respondent by virtue of this document had conferred on him the status of a landlord for the purpose of the Rent Restrictions (B. P.) Ordinance.

The Forer case relied upon by Mr. Geiger is not relevant to this appeal for there there was a contract only but here there is a deed registered in the Land Registry and *on the face of it*, valid as such until set aside by a competent Court.

The next ground of appeal is that in any case P/2 must be subject to any tenancy rights of the appellant and this point is really bound up with the next ground of appeal that there was no failure to pay rent.

Now, the Magistrate held that the Rent Restrictions (B. P.) Ord. applied to and regulated the Appellant's tenancy and I agree with this finding for there was no written contract of lease but only a tenancy on a monthly basis created by payment of rent. This is covered by the authority of Renno v. Haddad C. A. 436/44 [1] 12 P. L. R. p. 140. Therefore, if the Appellant wished to be protected by the Rent Restrictions (B. P.) Ordinance, he had to comply strictly with its provisions and one of these provisions is not to fail to pay rent lawfully due.

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[1] 1945, A. L. R. 253.

The learned Magistrate made a finding of fact that the Appellant had so failed both in respect of December, 1945 and January, 1946 towards the Respondent and he further found that the Appellant had not proved he had paid the rent for these months to the former landlord.

The Appellant gave no evidence in the lower Court but certain documents were produced, but I cannot see from a perusal of those documents that the Magistrate made a finding of fact contrary to the evidence in finding that there was a failure to pay rent. The Defendant in the lower Court had notice of the new "landlord" acquiring the premises, but did not pay rent to her but wrote to her former landlord in Tel-Aviv enquiring if this was so. No rent was paid to the Respondent, an offer to pay was made half heartedly and much later in P/6 and P/7. The offer was refused in P/8 and it was not until first February, 1946, that the Appellant sent a money order for those two months by letter P/11 which was refused by the Respondent's advocate in P/12.

There is a clear failure to pay rent lawfully due and, therefore, the Appellant was no longer entitled to the protection of the Rent Restrictions (Business Premises) Ordinance, so whether the transaction in P/2 was subject to the tenancy of the Appellant or not is immaterial for the Appellant was at the time the action was filed no longer entitled to the protection of the Rent Restrictions Ordinance.

This being so, it is really not necessary to deal with the qustion of whether the Appellant was a non-occupying tenant, and, therefore, not entitled to the protection of the Ordinance, except to say that I do not agree with the learned Magistrate when he held that a person who has sublet all his premises that he rented for business is not entitled to the protection particularly when in this case the business he conducted was one of gaining a living by subletting each and all of the rooms composing the premises in question which he had leased for that very purpose.

As held in C. A. 8/47 [2] on this point of non occupation of business premises, C. A. 101/42 [3] 9 P. L. R., p. 576 is authority for holding that a non-occupying tenant of business premises is nevertheless protected and this case has not been disapproved of or set aside by the Supreme Court.

Mr. Geiger had raised one point that an order of possession could not be given as there were persons — lawful sub-tenants — in possession and residing there and he cited Gidden v. Mills, 1925, 2 K. B., 713,

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2 *Ante*, p. 198.

3 9, P. L. R. 576; 1942, S. C. J. 625.

but that case arises out of the English Act which only applies to dwelling houses, and in any case the sub-tenants are not parties to this action and the point is not one necessary to decide for the determination of this appeal. I would merely refer to C. A. 221/42 [4] — 9, P. L. R. 775, and also to C. A. 192/46 of this Court [5] (Cohen's Law Reports, 1947, p. 41) and C. A. 91/45, S. C. D. C. 1946, p. 110, and C. A. 56/44, S. C. D. C. 1944, p. 229, as a result of which it has become clear that a subtenant of a tenant holding over under the Rent Restrictions (Business Premises) Ordinance is not protected by the Ordinance but that he may be entitled to have a judgment for eviction set aside if it is obtained by collusion between the landlord and the tenant.

For the above reasons the appeal is dismissed with costs on the lower scale. I certify advocate's attendance fee in this appeal in the sum of LP. 20.

Delivered this 25th day of April, 1947, in presence of Mr. Ben-Zeev for the Appellant and of Mr. Gross for the Respondent.

MOTION No. 137/47.
(CIVIL CASE No. 127/46).

IN THE DISTRICT COURT OF JERUSALEM,

BEFORE: His Honour the R/President Judge Orr.

IN THE APPLICATION OF:—

Fabian Katz & 6 ors. APPLICANTS.

v.

Izhak Suleiman Taharani. RESPONDENT.

Amendment of defence — Pleadings.

An application by Defendants Nos. 3—7 for leave to amend the defence filed by them in C. C. 127/46, granted:—

Amendments in pleadings should be allowed if necessary in the interests of justice even though owing to Applicants' negligence they are applied for only at a date when, but for unforeseen circumstances, the case would already have been tried without such amendments.

ANNOTATIONS: *Cf.* C. A. 127/47 (1947, A. L. R. 427) and note 2.

FOR APPLICANTS: Wittkowsky.

FOR RESPONDENT: Spaer.

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[4] 1942, S. C. J. 770.
[5] *Ante*, p. 111.

ORDER.

The only matter which causes me to hesitate about granting the prayer is that if it had not been for unforeseen circumstances the case, which was fixed for trial on 2nd March, would in all probability, have been tried without the amendment. I think, however, that the true criterion is to allow amendments if such are necessary in the interest of justice, and it should not be forgotten that the pleadings are just as much for the help of the court as they are for the parties and it does not help the court or the administration of justice if one party may score as a result of the other's negligence. Mass *v.* Malys 33 Ch. p. 603 is not relevant, as in that case the application was made in the course of the trial, in fact after the Plaintiff's case had closed.

I think in Clark *v.* Wray (31 Ch. p. 68) the refusal was not made because of lateness of the application, but because the Defendant in that case set up an entirely new defence.

I propose to allow the amendment. I make no order as to costs.

Given this 1st day of April, 1947.

CRIMINAL APPEAL No. 24/47.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the A/Judge Samaan Eff. Daoud.

IN THE APPEAL OF:—

Mohammad Ahmad Hassan Jabali. APPELLANT.

v,

The Attorney General. RESPONDENT.

Secs. 310 & 311 *C. C. O.* — *Amendment of charge by Magistrate* — *Sec.* 20 *M. C. J. O.* — *R.* 273 *M. C. P. R.*

An appeal from the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. T. Afgany), sitting at Jericho, delivered on the 22.2.1947 in CR. C. 107/47, allowed:—

1. A charge may under Sec. 20 of the M. C. J. O. be amended at any time during the trial provided it is done prior to the Magistrate's judgment. A Magistrate cannot amend the charge in his judgment.

2. When a Magistrate exercises the power to amend a charge under Sec. 20 of the M. C. J. O. he should before proceeding to convict charge the accused with the amended charge.

3. Rule 273 M. C. P. R. must be deemed to permit an amendment of a

charge only at any time before the trial is concluded. In any event this Rule must be read subject to Sec. 20 M. C. J. O. construed as above.

ANNOTATIONS: See the cases cited and *cf.* E. Salant Criminal Procedure & Practice in Palestine, p. 53 & pp. 60—1.

FOR APPELLANT: Hamudeh.

FOR RESPONDENT: Legal Assistant — (Weston),

JUDGMENT.

The Appellant was charged before the Magistrate, Jericho, with possession of stolen property knowing the same to have been stolen contrary to section 310 of the Criminal Code Ordinance, 1936, in that he, on 14.2.47, in Jericho, was found in possession of a silver ring which had been stolen from one Mahdiyeh Salem Ikteish.

The complainant Mahdiyeh claimed in her evidence before the magistrate that four months previously a ring, amongst other articles and cash, kept in a box, were stolen from her house. When produced to her by the prosecution she identified the ring as hers. She recognized it from the soldering that was on it. The other prosecution witnesses testified that they knew the ring and identified it in court as the ring which they had seen with complainant.

The Appellant, however, gave evidence, in his defence to the effect that the ring had been given to him, some six years previously by one Abdallah el Faraj of Atara village in exchange for a cane; that this ring bore the name of Hamideh el Saleh and that there was no one present when this barter was made. Defence witnesses were heard whose evidence was to the effect that, for some years, they used to see Appellant wearing this ring. Abdallah el Faraj with whom the barter was made had since died.

On this evidence the learned magistrate was not satisfied that the prosecution has made out a case under section 310 of the C. C. O. 1936, but found, in his judgment, that a case under section 311 was established and proceeded to amend the charge, convict the Appellant and sentence him on the amended charge. He clearly stated that he did not believe the Appellant's story nor that of his defence witnesses.

In his appeal the Appellant enumerates several grounds of appeal one of which only has any substance.

The gist of this ground is that the magistrate erred in convicting the Appellant in his judgment on the amended charge and that the Magistrate, in amending the charge, should have given the Appellant an opportunity to defend himself and call defence witnesses on the amended charge before he proceeds to convict him.

There appears to be a conflict of opinion on this matter.

In Criminal Appeal 35/44 District Court (Selected Cases) Volume 1944, page 373, Judge Windham has held that Section 20 of the Magistrates' Courts Jurisdiction Ordinance, 1939, does enable a magistrate, even at so late a stage as the judgment, to amend the charge and to find the accused person guilty of the offence charged in the amended charge. In this case, as in our present appeal, the magistrate altered the original charge in his judgment only, and not before, and convicted on the substituted charge.

In a later case, however, Judge Hubbard, in determining an appeal that was before him has held a different view. In Criminal Appeal 170/45 District Court (Selected Cases) Vol. 1946, p. 262, His Honour held that a magistrate has no power to convict without amendment such as is given to the court of trial by the Criminal Procedure (Trial Upon Information) Ordinance. He goes on to say:

> "A charge may be amended at any time during the trial, but when the magistrate begins to write his judgment it is surely obvious that the judgment must deal with the charge with which the accused thought he stood charged at the close of the trial. Apart from this consideration of general principle there is also the second proviso to section 20 by which, if the Court amends the charge it may, if it considers it necessary in the interest of justice to do so, make an order for the postponement of the trial, and although it is not specifically mentioned the Court should also give the defence an opportunity of calling fresh evidence and of re-examining witnesses already heard".

These two conflicting judgments emanate from courts of equal jurisdiction as this Court. It remains for me to decide which of the two rulings makes better law.

The point is governed by section 20 of the Magistrates Courts Jurisdiction Ordinance, 1939, the relevant portions of which read:—

> ".....the Court may amend the charge and find the accused person guilty of the offence *charged* in the amended charge".

I emphasize the word "charged". I understand this provision to mean that when the magistrate exercises his power to amend a charge he should first *charge* the accused with the amended charge before proceeding to convict for if the intention of the legislature was otherwise, the wording of the above provision would have been in such or similar terms:—

> "The court may amend the charge and find the accused person guilty on the amended charge".

This interpretation of the section is further supported by the second proviso to section 20 which provides, in the event of a charge being

amended, for the postponement of, and the resumption of the trial as if it had not commenced.

These considerations lead me to the conclusion that the Ruling of Judge Hubbard is the better ruling and consequently I consider that the learned Magistrate did commit an error of procedure by proceeding simultaneously to amend the charge and convict the Appellant in his judgment.

I am alive to the provisions of rule 273 of the Magistrates Courts Rules, 1940, which provide that the court may, at any time, amend the charge. I understand this rule to mean at any time before the trial is concluded and I do not feel justified in reading in it that the court has power to amend the charge in its judgment. But even if a different construction of the rule is permissible such construction must be read subject to and in the light of section 20 of the Magistrates Courts Jurisdiction Ordinance.

On the authority of the ruling in Criminal Appeal 170/45 above quoted I set aside the judgment of the Magistrate and quash the conviction and sentence.

Delivered this 28th day of April, 1947.

CIVIL APPEAL 43/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour Judge Nasr.

IN THE APPEAL OF:—

Kasmieh. APPELLANT.

v.

Sweid. RESPONDENT.

Appeals — Procedure where appeal determined on record — C. P. R. 334 & 353.

Where in an appeal to the District Court no request is made for the appeal to be heard in open Court it is advisable to make use of the provisions of r. 353 of the C. P. R. and to file written arguments.

FOR APPELLANT: Abbasi.

FOR RESPONDENT: Nakkara.

JUDGMENT.

This is an appeal from the judgment of the learned Magistrate, Haifa, delivered on 5.3.47, whereby Appellant's action was dismissed. I am at some disadvantage in deciding this appeal because no application was made for it to be heard in open Court and the Appellant has not made use of the provisions of Rule 353 of the Civil Procedure Rules which entitle him to file a statement of his arguments with the Notice of appeal. I have therefore, before me the Notice of Appeal only which sets down in very concise form the grounds of objection to the judgment.

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Given this 28th day of May, 1947, in presence of Salah Eff. Abbasi for the Appellant and of Hanna Eff. Nakkara for the Respondent.

CIVIL CASE No. 54/45.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour the R/President Judge Orr.

IN THE CASE OF:—

Hans Peter Satori. PLAINTIFF.

v.

The Jerusalem Automobile Co. Ltd. DEFENDANT.

Action for accounts — Estoppel — C. A. 233/38 — Mejelle — English Common Law — Ottoman Bank v. Menni & an. — Effect of signing receipts — Taking of accounts.

In an action for LP. 1160.364 or alternatively for an account to be taken, held:—

1. The receipt of money as remuneration does not necessarily create an estoppel barring the recipient from afterwards claiming that he has been paid less than due.
2. A case in which no estoppel was held to have been created by such a receipt of remuneration.
3. A case of the Court, upon deciding that the Plaintiff in an action for an account was entitled to an account, referring the file to the Registrar for the taking of such account and giving judgment for any amount which may be found due by the Registrar upon the taking of the account.

ANNOTATIONS:

1. *Vide* Halsbury, vol. 13, pp. 486 *et seq.*.
2. See the subsequent proceedings (*infra*).

FOR PLAINTIFF: Weyl.

FOR DEFENDANT: Frank.

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* Omitted. (*Ed.*)

JUDGMENT.

The Plaintiff who was from 1938 until May 1943 the managing director of the Defendant company, claims that from the 1st June, 1940 until his leaving the company at the end of May 1943, he was underpaid commission on various items of business carried out by the company to which he was entitled under clause 3 of an agreement made between himself and the company on the 31st day of March, 1938 (Exh. P/1). The claim is in a gross amount of £ 1,614.211 mils but the Plaintiff gives credit to the company for certain ex gratia payments amounting to £ 453.847 mils which he says were made to him outside the agreement P/1, and the net amount of his claim is therfore £ 1,160.364 mils. The defendant company has denied that anything is due to the Plaintiff under the agreement P/1 or, alternatively that the Plaintiff is estopped from claiming anything under the agreement P/1. The Plaintiff filed a reply to the statement of defence in which he gave further particulars of his claim, this being a reply to part of the statement of defence which alleged that the statement of claim did not contain particulars as to how the figure of £ 1,614.211 and £ 453.847 mils were arrived at. In the reply the Plaintiff gives these particulars as follows:—

> "(a) Subject to minor adjustments, the amount of £ 1614.211 is reached as follows: By adding up the actual amounts paid in respect of which half of the basic figures appear in the second columns of the accounts sheets, the figures appearing against the items "General Expenses" ('Allg. Spesen.') and those following thereunder being omitted. Whereas it is Plaintiff's case that the said sums received by him constitute only half of what is due to him, he claims the same sum again, plus £ 80.— which amount had been provisionally turned over to an 'insurance fund', and less the amount of £ 453.847. (b) Subject to minor adjustments, the amount of £ 453.847 is reached by adding up the amounts paid to Plaintiff between June 1940 and May 1943, both months inclusive, upon calculating 10% on the alleged item 'General Expenses' (Which item is not admitted) on the salary of the Managing Director, Mr. R. M. Heiman and on the Plaintiff's own emoluments. For the purpose of his main claim only (as distinguished from the alternative claim), Plaintiff is prepared to treat the said payments as "ex gratia payments", and has deducted them accordingly. However, those payments and the amount of £ 50.— specified in para. 2 above were the only payments which could be considered as being in the nature of *"ex gratia* payments".

This method of pleading is, to say the least about it, unusual because in his reply the Plaintiff has given further and better particulars of his claims plus an amount of £ 80.— over and above the figure of £ 1,614.211 mils contained in his statement of claim, and has thus, in effect, amended his statement of claim. It is obvious that the Plaintiff cannot recover more than the net amount he has set out in his statement of claim.

It is common ground:—

1) that the Plaintiff had been employed by the defendant Company as managing director under an agreement dated 31st day of March 1938 (Exh. P/1). That under the third paragraph of this agreement the Plaintiff's emoluments were to be provided for as follows:—

1) A fixed monthly salary of £ 14.—.
2) 1% of the turnover of own (stock) spare parts.
3) 10% of the profit margin upon sale of foreign spare parts.
4) 20% of the garage net profit.
5) 10% of the profit margin upon sale of new and old cars.
6) 10% on all kinds of commissions received except insurances.
7) 20% of insurance commissions received.
8) 10% of profit margin upon outside work.
9) 15% of profit margin of sale of 'Z' parts.

2) that until the 1st day of June, 1940, the Defendant company had an agreement with a company known as the Palestine Automobile Corporation Ltd. under which the latter company sold motor vehicles *etc.* to the defendant Company at cost price plus a percentage of profit, and the defendant Company sold these vehicles *etc.* at prices which gave the defendant Company a profit and the Plaintiff was paid his commission of 10% on this profit.

3) That until the 1st day of June, 1940, the Plaintiff was paid the other commissions in accordance with the third paragraph of Exh. P/1.

4) That on the 1st day of June, 1940, the defendant Company entered into a new agreement with the Palestine Automobile Corporation Ltd., whereby the Defendant Co., could obtain vehicles from the latter company at cost plus charges for assembly and clearance and the Palestine Automobile Corporation Ltd. would be paid half the net profit of the Defendant Company on its balance sheet and would share half the losses of the Defendant Company if any.

5) That after this last mentioned agreement, that is from the 1st day of June, 1940, the method of computing the Plaintiff's emoluments was altered and the figures reached after calculating the various percentage under the third paragraph of Exh. P/1, were halved and the Plaintiff was paid those halves. These calculations are shown in a series of monthly pay sheets marked Exh. P/3/1 to P/3/36.

The Plaintiff claims that the last mentioned method of computing his emoluments was a breach of his agreement P/1. He also claims (a) that he was entitled to commission for sums received for hiring out cars at 10% of the hiring fee. (b) that the items "accessories" tools and "tyres" shown in P/3/1 to P/3/36 should have been included in the category "Foreign Parts" under the third paragraph of Exh. P/1.

(c) that he is entitled to 10% of a sum of £800.— which lay in an insurance reserve, this fund having been built up from credits passed to it from time to time out of the profits from the sale of motor vehicles.

As I said before the defence is a denial with the alternative of estoppel.

I think it is necessary at this stage of my judgment to show what is in issue between the parties and I propose to do this by setting down the issues under serial numbers and consider the evidence and the law as regards each and make my findings.

The issues are:—

1) Did the Defendant commit a breach of the third paragraph of Exh. P/1 by halving the amounts paid to the Plaintiff as shewn in Exhs. P/3/1 to P/3/36.

2) Did the item "Hirings" fall within the category of "profit" margin on sale of new and old cars in the third paragraph of Exh. P/1.

3) Should the items "accessories", "tools" and "tyres" have been included in the category "foreign parts" under the third paragraph of Exh. P/1.

4) Is the Plaintiff entitled to 10% of the amount standing to credit of the insurance fund.

5) In event of my finding in favour of the Plaintiff on the first issue, is the Plaintiff estopped from claiming payment.

Issue Number (1).

This issue depends upon the new arrangement made by the Defendant company with the Palestine Automobile Company on the 1st day of June, 1940, which altered the trading relations between the companies, as I have mentioned earlier in this Judgment, There is no dispute between the evidence for the Plaintiff and the evidence for the Defendant company as to how the Palestine Automobile Corporation made its profits from the Defendant company after this agreement. That is to say that the Palestine Automobile Corporation did not get a profit from the Defendant company on each item of business, but shared the net profits of the Defendant company equally with that company at the end of each year. There is no dispute in the evidence that the Palestine Automobile Corporation drew an advance in cash of 6½% on the invoice price of each vehicle sold to the Defendant company, these advances of 6½% being entered in an "advance of profits account" in the books of the Defendant company, and at the end of the year the Palestine Automobile Corporation received its 50% of the net profits of the defendant Company, less these advances.

Mr. Heimann who is and was the real managing director of the

Defendant company, in which he and his family held the bulk of the shares in his evidence for the Defendant company insisted that the profit sharing arrangement with the Palestine Automobile Corporation was nothing but a new manner of paying the Palestine Automobile Corporation its profits on the cost of the vehicles. The witness adds "Mr. Satori had only a right to commission on my profit. That is half the net profit. He (Mr. Satori) had no right in the profit of the Palestine Automobile Corporation". It was for this reason that Mr. Heimann halved the commissions paid to the Plaintiff after the 1st June, 1940. The question is was he entitled to do so? I am of opinion that the answer to this question must be in the negative as (a) Mr. Satori was not a party to the agreement of the 1st June, 1940, between the Defendant company and the Palestine Automobile Corporation (b) it is clear that as a result of this agreement the two companies were engaging in a joint adventure as the agreement provides that the Palestine Automobile Corporation must also share any losses the Defendant company might sustain. This makes it abundantly clear that the profit share payable to the Palestine Automobile Corporation was not just a deferring of that company's profit on cost. Moreover the agreement provides in terms, and this is borne out by the Defendant company's balance sheets, that the Palestine Automobile Corporation's profit share was not confined only to the profit made on vehicles etc. bought from the company but was 50% of the net profit of all the business of the Defendant company.

I find therefore that the defendant Company committed a breach of the terms of the third paragraph of Exh. P/1 by halving the amounts payable to the Plaintiff under that paragraph.

Issue No. 2; Issue No. 3.

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Issue No. 4.

I must first of all consider the objection made at the trial by counsel for the Defendant company to counsel for the Plaintiff leading evidence on this claim to a percentage of the insurance fund. I agree that this insurance fund is not mentioned in the Statement of Claim, but counsel for the Plaintiff said that it was not necessary for him to plead it specifically as the fund was built up out of the sums taken from the profits of the sales of motor vehicles and as he claimed his percentage on these profits in his statement of claim, it was not necessary for him to set out in his Statement of Claim, that part of these profits had been

* Omitted. (*Ed.*)

put to credit of some other account. I agree that this is so and I therefore overrule the objection.

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Issue No. 5.

The onus is on the Defendant company to show that the Plaintiff is estopped from claiming under the terms of the third paragraph of Exh. P/1.

Mr. Heimann said in his evidence that the Plaintiff accepted the new way of computing his commission which came into effect after the first day of June, 1940, and that he accepted his emoluments without protest and gave receipts for them. It was only after the Plaintiff left the firm, according to Mr. Heimann, that he claimed that the Defendant Coy. was not carrying out the terms of Exh. P/1. Mr. Heimann was examined and cross-examined with regard to two documents. The first of these was Exh. P/4. This is a receipt given by the Plaintiff for his emoluments for June, 1940, to which the Plaintiff added "A/C", meaning that he had received his salary on account only, before he signed it. Mr. Heimann's explanation of this is that the Plaintiff added "A/C" to the receipt because a small adjustment, amounting to 269 mils, would have to be paid to him in the following month in respect of his June emoluments. The witness added that although similar adjustments had to be made every month, the Plaintiff never added "A/C" to any of the later receipts, as after the first month the matter became "routine". The other document about which the witness was cross examined was Exh. P/6. This is a memorandum prepared by Mr. Heimann on the 16th November, 1940, a copy of which was given to the Plaintiff some time later. This memorandum contains details of the Plaintiff's earnings before and after Exh. P/2 and shows that his average earnings for twenty eight months prior to Exh. P/2 were £ 49, odd per month, whereas his average earnings for the six months following Exh. P/2 were £ 76 odd per month. After these figures the document goes on to say, and I quote it:—

> "As the turnover of the J. A. C. against the previous years has declined and the possibility to do profit-bringing business was very much reduced (in view of the increasing scarcity of materials), the above increase of the emoluments of M. S. for more than *fifty percent* must be due to a mistake in tbe calculation. After 1st June, 1940, a new mode of calculation was introduced which was expressly characterised (called) by Heimann for the time being as a *tentative calculation*. It now proves requisite to revise this mode of calculation

* Omitted.

(*Ed.*)

with a view to come to an adjustment to the rates for which the contract of 31.3.38 provides".

Mr. Heimann was cross examined at length about this Exh. P/6. His evidence regarding it was as follows:—

"I do deny that I had the intention to come back to terms of old agreement, but I admit that I considered returning to the final amounts of Exh. P/1.....".

and

"My figures were correct and showed clearly that there must be a mistake in the building of Satori's paysheets and there must be a mistake in the system *i. e.* adjustments of rates not percentages. That means to come to some new agreements so that Satori will not get 50% more than he got before".

and

"I made P/6 as a result of Satori asking for more pay and wanted to satisfy myself if he was right or wrong in asking for an increase of salary. I came to the conclusion that he was wrong as he was highly paid".

Mr. Heimann insisted throughout his evidence that the Plaintiff did not protest about the alteration of the mode of calculating his commissions introduced after the first of June, 1940, but he said that the protests the Plaintiff made were simply that he did not receive sufficient salary. The witness also said that Mr. Seidner could not have overheard the Plaintiff protesting as although Mr. Seidner shared an office with Mr. Heimann, he (Mr. Heimann) usually paid the Plaintiff in the Plaintiff's own office in the garage of the Defendant company. The Plaintiff said in evidence that he repeatedly protested to Mr. Heimann against the alteration made after the 1st June 1940 in the computation of his emoluments. He says that he put the remark "A/C" on Exh. P/4 to show that he did not accept the new computation but that he did not consider it necessary to add the remark in subsequent receipts as having made his protest, Mr. Heimann was well aware that he (the Plaintiff) did not accept this new computation. Mr. Seidner corroborated the evidence of the Plaintiff with regard to the protests made by the Plaintiff.

Although I am prepared to accept Mr. Heimann's evidence that Exh. P/6 was not an admission on his part that the new computation was a breach of the third paragraph of Exh. P/1, I am not prepared to accept his evidence that the Plaintiff went to trouble of putting the remark "A/C" on Exh. P/4 because of an underpayment of a paltry sum of 269 mils, which was to be adjusted in the next paysheet for the Plaintiff. I do not accept Mr. Heimann's evidence that the Plaintiff accepted the new computation silently and I accept the evidence of the Plaintiff and of Mr. Seidner that the Plaintiff constantly protested.

I cannot believe Mr. Heimann's version that the protests were only demands for increase of salary without relation to the change of computation of the Plaintiff's salary after the 1st June, 1940.

In his final address as regards estoppel, Dr. Frank for the Defendant's company, said I need not go into the merits as to whether or not the Plaintiff protested as long as the Plaintiff took the money and signed. Before he said this Dr. Frank referred me to C. A. 233/38 [1] (P. L. R. (1938), p. 570), which he says is an authority that the *Mejelle* and not the common law of England is the law of estoppel here. He then referred me to the Ottoman Bank v. Menni and Mansour (4, A. E. L. R. (1939), p. 9) [2] which, Dr. Frank says, disposes of the matter as once the Plaintiff signed receipts he was estopped from saying that he had not been paid in full.

The Ottoman Bank *v.* Menni and Mansour does not seem to be an authority on the question of estoppel. The articles of the *Mejelle* quoted therein are from "Book XII Settlement and Release" and "Book XIII Admissions" whereas Estoppel, and the Defendant's company has pleaded estoppel and not a release or an admission, appears in Book XIV "Actions". Even if the Ottoman Bank vs. Menni and Mansour was an authority on estoppel, the facts there are so different from the facts here that I would not feel bound to follow it. In the case in question, the Plaintiff protested once, but he did not persist in his protest, and signed unconditioned receipts ..... "for balance of my salaries from February, 1933, until end of November, 1933". Their Lordships in their judgment say after this quotation "this is clearly a release by which his claim is once extinguished, and he can no longer renew it".

In the present case the Plaintiff endorsed the first receipt with the remark "A/C" and I have accepted his reason and not Mr. Heimann's as to why he did this. Moreover, he persistently protested against the breach of the third paragraph of his contract P/1, and it would be impossible in the face of these facts to persuade myself that Mr. Heimann believed that the Plaintiff had acquiesced in the breach, and to hold the Plaintiff is estopped. The result is that I hold that the Plaintiff is not estopped from claiming under the third paragraph of the agreement Exh. P/1.

The Plaintiff succeeds in his claim against the Defendant company. Counsel must appear before the Registrar who will take an account from Exhs.P/3/1 to P/3/36, column headed "half" of the amount due to the Plaintiff under the judgment. The Registrar will exclude from

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[1] 1938, 2 S. C. J. 192.

[2] Allowing an appeal from C. A. 70 & 90/36 (7, C. of J. 307).

his account items for accessories, tools and tyres, but he will give credit to the Defendant coy. for the sums of £ 453.847 and £ 50.— which the Plaintiff conceded in his reply to the Defence should be credited to the Defendant Coy. On the Registrar certifying the account, a decree should be issued in the sum certified by the Registrar or in the sum of £ 1,160.364 claimed, if the Registrar's figure should be higher.

The Plaintiff will have his costs on the lower scale with an advocate's attendance fee of £ 20.— and I award interest in the amount certified by the Registrar at 5% from the time of filing of the statement of claim until payment.

Delivered by me this fifteenth day of April, 1947, in the presence of Dr. Weyl for the Plaintiff and Dr. Wiener for the Defendant Coy.

(Judgment delivered by His Honour Judge Rigby, A/P. D. C.).

CIVIL CASE No. 54/45.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour Mr. F. Saadeh, A/Registrar.

IN THE CASE OF:—

Hans Peter Satori. PLAINTIFF.

v.

Jerusalem Automobile Company, Ltd. DEFENDANT.

Taking of accounts — Registrar's powers — R. 221 C. P. R.

An objection to the taking of an account by the Registrar pursuant to a judgment of the District Court, overruled:—

1. The Registrar cannot entertain an objection to the effect that he has no power to take an account if the taking of such an account by him was directed by the Court.

2. Such an objection should be advanced in the form of an appeal against the direction of the Court directing the Registrar to take an account.

3. A judgment of the District Court granting the Plaintiff an account directed to be taken by the Registrar and ordering that any balance found due on the taking of such account be paid to Plaintiff is not a final judgment as it does not finally determine the rights of the parties.

4. Hence the Court when giving such judgment is not rendered *functus officio* and may, apart from all other powers, appoint the Registrar to take the account so adjudged under Rule 221 of the C. P. R.

ANNOTATIONS:

1. The judgment referring the matter to the Registrar is reported *supra*.

2. See, on action for accounts C. A. 132/46 (13, P. L. R. 483; 1946, A. L. R. 606), upholding C. D. C. Ha. 73/45 (1946, S. C. D. C. 368).

3. *Vide* Mo. D. C. T. A. 33/46 (1946, S. C. D. C. 533).

FOR PLAINTIFF: Weyl.

FOR DEFENDANT: Frank.

ORDER.

This case was referred to me by the Court for taking an account in order to certify what amount is due to the Plaintiff from the Defendant under Exhibits P/3/1 to P/3/36 and thereafter a decree should be issued in the sum so certified by me, or in the sum of £ 1,160.364 if my figure should be higher.

Dr. Frank on behalf of the Respondent Co. objects to the settlement of accounts by me at this stage on the following grounds:—

(a) The Court had no power to refer the taking of accounts after it had given its judgment as it would be no longer seized with the matter. It can do that while the action is pending before it, vide Rule 221.

(b) The Court cannot transfer its process to the Registrar.

(c) The Court seized with the matter should conclude it.

Having heard the arguments of both counsel, I find that the objections of Dr. Frank are untenable and must be overruled. It is not for me to decide whether the Court has erred in its directions or if it had or had not power to refer the matter to me as it did under Rule 221 of the C. P. R. I am here no more than a referee. I am not sitting as a Court of Appeal from the judgment of the District Court. It would be open to Dr. Frank to make this present objection before a higher tribunal where the matter would eventually culminate, if the parties are keen on that.

At present his objections are suprefluous because it is not the right place where to make them. I am forced by an Order of the Court and I feel that it is binding on me and all parties concerned in the absence of any directions to the contrary, be it right or wrong.

If for any reason I am found to be wrong in arriving at the conclusion, I think that the Court acted properly and was not *functus officio* at the time it made its order for accounts. The judgment which it gave on 17.4.47. cannot be regarded as a final judgment, as it does not finally and conclusively determine the rights of the parties with regard to the points in controversy. Consequently the action must be considered to be still pending and therefore the Court has rightly executed its powers under Rule 221 of the C. P. R.

Given this 30th day of April, 1947.

CRIMINAL LEAVE APPLICATION No. 26/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPLICATION OF:—

Sami Abdalla Bahaj. APPELLANT.

v.

The Attorney General. RESPONDENT.

By-Laws — Validity — Ultra Vires — Haifa Hadar Hacarmel Shop Closing Hours By-laws — Kruse v. Johnson, Municipal Corporation of Toronto v. Virgo 1896.

1. The Haifa Hadar Hacarmel Shop Closing Hours By-Laws are unfair and unequal in their application. They apply only to a certain quarter within the Municipal area, a not inconsiderable portion but nevertheless a minority portion. Unless the Municipal Corporation has express powers to forbid between certain hours the opening of shops in a part of its area any such restriction is *ultra vires* the Municipal Corporations Ordinance.

2. *Obiter*: The Municipal Corporation having power to make by-laws subject to the provisions of any order, Ordinance or Law cannot by by-law reduce the hours permitted under the Intoxicating Liquors Ordinance.

ANNOTATIONS: For recent authorities on similar questions see CR. A. D. C. T. A. 5/46 (1946, S. C. D. C. 447) and note 4; CR. A. D. C. Ja. 70/46 (*ibid.*, p. 634), and CR. A. D. C. T. A. 4/47 (*ante*, p. 232).

FOR APPELLANT: Koussa.

FOR RESPONDENT: Ashoush.

JUDGMENT.

I will treat this leave to appeal as an appeal.

The sole question in this appeal is whether the by-law under which the Appellant was convicted and fined is valid or invalid.

The by-law was purported to be made by the Municipal Commission of Haifa in exercise of the powers conferred on them (as the by-law recites) by Section 99 of the Municipal Corporations Ordinance, 1934, and it was published in Sup. 11 of the Palestine Gazette No. 839 of 7th June, 1939, at p. 424; it is known as the Haifa Hadar Hacarmel Shop Closing Hours By-Laws and forbids the keeping open of any shop or carrying on any business or trade therein within the Quarter of Hadar Hacarmel (as delineated in s. 2) between certain specified hours in the evening and certain specified hours in the morning.

This By-law was presumably, though it does not specifically recite so, enacted under the powers conferred on Municipal Corporations by s. 98 of the Municipal Corporation Ordinance, 1934, Palestine *Gazette* Sup. 1 No. 500, p. 78. Article 98 provides that "unless the High Commissioner shall otherwise order in respect of all or any of the following matters and subject to the provisions of this ordinance or of any other ordinance or law it shall be within the power of the Municipal Council within the Municipal Area or within any town planning area which includes the Municipal Area to do and to regulate certain matters" and under sub-section (s) of section 98 as amended by Ordinance No. 11 of 1935, Municipal Corporations were authorised "to regulate and control the opening and closing of shops...".

This Section 98 was in its time repealed and re-enacted by s. 21 of the Municipal Corporations (Amendment) Ordinance, No. 59 of 1946, wherein under sub-section 23 power was conferred on Municipal Corporations "to regulate and control the opening and closing of shops" provided that this paragraph shall have effect subject to such exemptions as may be provided for by Order of the High Commissioner in Council. Under sub-section 27 of this Amending Ordinance there is a saving clause in respect of any by-laws made under the principal (1934) Ordinance in force.

The Appellant who has a shop in No. 10 Herzel Street Haifa, which falls within the delineation of Hadar Hacarmel Quarter as set out in Section 2 of the By-law was prosecuted before the Magistrate's Court of Haifa for keeping his shop open at 7.46 *p. m.* on 2.1.47, was convicted by the learned Magistrate (H. W. Mr. Landau) and fined 500 mils.

Leave to appeal was sought and obtained and the Appellant raises as his main ground of appeal that this By-law was invalid for the following reasons: (1) that it discriminated between the inhabitants of the Quarter of Hadar Hacarmel and the inhabitants of other quarters in the Haifa Municipal Area and the Municipal Commission has no power to legislate by-laws for a portion of the town; it must legislate for the whole Municipal Area; "within the Municipal Area or within the town planning area which includes the Municipal area", as set out in Section 98, can only mean within the whole area as there is no provision in this section providing "within the Municipal Area or any part thereof".

Mr. Koussa for Appellant argues that his client who has a shop on the outskirts of Hadar Hacarmel Quarter is unfairly penalised by having to close his shop between certain specified hours while other shop keepers near-by but outside that quarter but yet within the Muni-

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OF THE

DISTRICT COURTS OF PALESTINE

WITH ANNOTATIONS

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cipal Area are not so restricted as to hours. This by-law, he argues, is unequal in its operation as between the shop keepers (and inhabitants who use to shop in the evening) in other and different quarters of the town. It is therefore unreasonable as being manifestly unequal in its operation. He cites Kruse *v.* Johnson, 1898 (2 Q. B., p. 91).

The next ground of appeal is that this by-law is contrary to another piece of legislation. The regulation made by the Licensing Board of Haifa, under the powers vested in them by section 20 of the Sale of Intoxicating Liquors Ordinance, 1935, whereby the hours during which intoxicating liquors may be sold within the Municipal Area of Haifa are from 8 *a. m.* and 8 *p. m.* see Palestine *Gazette* (1942) No. 1165, Sup. II, p. 209. Mr. Koussa's client is the holder of a licence to sell intoxicating liquors, and he relies on the wording in section 98 of the Municipal Corporations Ordinance — "subject to the provisions of.... any other ordinance or law". This by-law is inconsistent with and contrary to the Regulation and therefore, he argues, invalid.

The third ground of appeal is that the by-law is invalid as it is a general provision for all shops in a certain quarter and there is no specific exemption provided for therein in respect of the rest of the Municipal Area by order of the High Commissioner in Council as laid down in the proviso to sub-section 23 of section 98 of the Ordinance as amended in 1946.

Mr. Ashoush for the Respondent argues that if the Municipal Corporation may make by-laws for the whole Municipal Area they may make such by-laws for part of it, and that the Municipal Corporation know best what is necessary for the need and for the benefit of any part of the community living within the Municipal Area. He says the Court should be slow to hold a by-law invalid and it should support it unless it is manifestly unequitable or unfair.

In my opinion the appeal must succeed on the first ground alone. This by-law is unfair and unequal in its application. It applies only to a certain quarter within the Municipal Area, a not inconsiderable portion but nevertheless a minority portion, and, therefore, shop keepers in that quarter are penalised vis à vis shop keepers outside that quarter but nevertheless within the Municipal Area.

I would refer to the Municipal Corporation of the City of Toronto *v.* Virgo, 1896 Appeal Cases p. 88 where it was held that a statutory power conferred on a Municipality to regulate hawkers does not in the absence of any express power of prohibition confer on the council any right by by-law to prohibit hawkers plying their trade in an important part of the Municipality and thereby make unlawful what is otherwise lawful trade.

Therefore, although the Municipal Commission of Haifa have power conferred on it to regulate by by-laws the opening of shops within the Municipal Area it may not, unless express power is conferred upon it, forbid the opening between certain hours in a part of that area however important the Commission may consider that part. No such express power of prohibition has been conferred and, therefore, the by-law is *ultra vires* the Municipal Corporations Ordinance, in this respect as well as being unfair and unequal in its operation.

The reasoning of the learned Magistrate that these by-laws confer a benefit on certain shop keepers and saved him from becoming the slave of his shop is merely, with respect to him, "begging the question". Nor can such a by-law be supported solely on the ground that the Municipal Commission represent all sections of the population and should be credited with understanding the needs of the population and are the best judge of these needs.

In my opinion a by-law that is intended to regulate the hours during which shops may be open must be applied to the whole Municipal Area in which shops are situated and cannot unless express provision is made by law be applied to a part of such area.

As regards the second ground of appeal. It is not necessary really to decide the point, but in case my decision on the first is not upheld elsewhere, I think there is substance in that also. You cannot have two local bodies each prescribing different laws for the sale of goods as has been done in the Appellant's case — the Municipal Commission has power to make by-laws subject to the provision.... of any other ordinance or law and when under that other law a business is permitted to sell intoxicating liquors in retail between certain hours the Municipal Corporation not being an authority under the Intoxicating Liquors Ordinance cannot by by-law reduce those hours of sale by a retailer who has a shop within a certain quarter only of the Municipal Area.

As regards the third ground of appeal, I think the exemption must mean exemption specifically made by order of the High Commissioner to certain shops or certain classes of shops and not exemption of certain areas within the Municipal Area as argued by Mr. Koussa. I hold that this by-law is invalid and unreasonable.

The appeal is, therefore, allowed, the conviction quashed, and the fine ordered to be remitted.

Delivered this 14th day of May, 1947, in presence of Elias Eff. Koussa for the Appellant and Mr. Ashoush for the Attorney General.

CRIMINAL APPEAL No. 39/47.

IN THE DISTRICT COURT OF HAIFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Weldon.

IN THE APPEAL OF:—

Naji Akkad. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal Law — Interpretation — Public Health (Rules as to Food) Ordinance — Rules made thereunder — Mode of taking samples — Mens rea, Cundy v. Le Cocq, Laid v. Dobell, Parker v. Alder.

1. The rules made by the Director of Medical Services under the Public Health (Rules as to Food) Ordinance 1935 are mandatory in their character and must be strictly complied with and adhered to. They are rules made with a view to instituting criminal proceedings and the compliance therewith is a condition precedent to the institution of a criminal prosecution under the Ordinance.

2. In view of section 2(1) of the Ordinance it is not necessary for a sample taken from a wholesale dealer to be purchased by wholesale.

3. *Mens rea* is not always a necessary ingredient to the commission of an offence that is prohibited by statute.

ANNOTATIONS:

1. On the proper manner of taking samples under the corresponding English legislation and on the effect of non-compliance with those provisions see Halsbury, Vol. 15, pp. 143 *et seq.*, particularly para. 233 on p. 146 and para. 235 on pp. 147—8. For the amendments introduced by the Food and Drugs Acts, 1938—1944, and for recent English Cases see Supplement Volume, 1946, pp. 696 *et seq.*, particularly p. 701; *vide* also Evans *v.* Rogers, 1946, 2 All E. R. 64.

2. On the *mens rea* point see Halsbury, Vol. 9, pp. 11—12, particularly footnote (*n*), heading *"Food and Drug Cases"*.

FOR APPELLANT: Asfour.

FOR RESPONDENT: Hazou.

JUDGMENT.

This is an appeal by a person who was prosecuted and convicted before H. W. Mr. Aghajanian, a Magistrate of Haifa, for an offence under section 10(1)(a) of the Public Health (Rules as to Food) Ordinance, 1935, in that he sold adulterated Samne containing a percentage of fat other than milk fat and was fined LP. 10.

It appears from the evidence of the lower Court that a Public Health

Inspector in uniform went to the shop of the accused and asked for samne and drew a sample of the contents of a large tin, paid for it and informed the brother of the accused who was in the shop that it was for analysis. The analysis showed that the percentage was deficient and thereupon the Appellant was prosecuted. Mr. Asfour for the Appellant has raised four grounds of appeal. The first ground is that the Rules made by Director of Medical Services under section 3(c) of the Ordinance were not properly complied with by the Inspector of Public Health. The learned Magistrate found as a fact that these rules had not been complied with.

Mr. Hazou for the Attorney General has conceded that this was so and conceded this point, I think, very properly, that these Rules are mandatory in their character and must be strictly complied with, and adhered to, and that they are rules made with a view to instituting criminal proceedings, and I agree, furthermore, that they are Rules the compliance with which is a condition precedent to the institution of a criminal prosecution and that no prosecution should be brought for an offence under the Ordinance, unless these rules have been strictly complied with.

This, of course, would dispose of the appeal, but I think it necessary to deal with the other points of appeal raised.

The second ground of appeal raised by Mr. Asfour is that the accused being a wholesaler, the purchase made should have been a wholesale purchase. He says that the samne was contained in large containers and it is probable that by the process of settlement of liquids in the container the sample taken from the top of the container may not have represented the true state and character of the goods. I do not think in view of section 2(f) of the Ordinance that it is necessary that a sample taken from a wholesale dealer is to be purchased by wholesale. One pauses to consider the effect of holding that it should be such purchase; the result might be such that it would be impossible for any inspector to take samples at all. I cite the obvious example that may not occur in Palestine but in England and that is that milk is transported by large motor tank vehicles and it would be simply impossible for the inspector to carry out his duties and take the whole tank. In my opinion, on the proper reading of s. 2(f) taking a sample, and the word sample itself implies a part of the whole, it is not necessary when taking such a sample from a wholesaler that the Inspector should make a wholesale purchase. As regards the point raised regarding the contents of the container, there is no evidence to support Mr. Asfour's submission. He could, if he wished, have produced evidence to this

effect and might, furthermore, have relied on the defence which I shall deal with later under s. 13 of the Ordinance.

The next ground of appeal is that the Appellant was not present and was not responsible.

Here again Mr. Hazou's argument is, in my opinion, a correct one, on this point. One has only to refer to section 10(m) of the Ordinance as amended by the Defence Regulations published in Palestine Gazette No. 1344, Sup. 11 of 20.6.44, and the amending Ordinance No. 30 of 1945 published in Palestine Gazette No. 1436, Sup. 1, of 4.9.45. It will be seen quite clearly that statutory provisions have been made at p. 167 of the Gazette. By the new sub paragraph (m) to Section 10(1) "any person who shall either himself, or by his servant, employee or agent", contravene or fail to comply with any provision of any rule made under this Ordinance, shall be guilty of an offence. It is clear from this, that the person who was present in the shop was, on his own admission a partner of the accused and stated to the inspector that the "owner of the shop and I are as one". Therefore, in my opinion, the Appellant could have rightly been convicted of the offence.

The fourth ground of appeal is that *mens rea* is a necessary ingredient to this offence and the prosecution have not proved it. Mr. Asfour cited to me Archbold 31st Ed., p. 1301. Now, the quotation made by Mr. Asfour from Archbold is a quotation from the common law of selling food or drink with the knowledge that it is dangerous and unfit for human consumption. The offence in this appeal is a statutory offence created by an Ordinance, in this country and not a common law offence. Mr. Hazou argued, and I entirely agree with him, that one has to look at the Ordinance's provisions and see whether from these provisions guilty knowledge is a necessary ingredient for punishment for contraventions of its provisions. When one looks at the Ordinance in question it is quite clear that what is contained in it are certain duties imposed upon certain persons and certain absolute prohibitions of doing certain acts. Therefore, it is quite clear that *mens rea* originally necessary under Common Law of England, is not a necessary ingredient but several judicial decisions on this point have been made as a result of consideration of appeals against convictions of statutory offences. Mr. Hazou quoted to me a number of such decisions and it is sufficient for this Court to quote three of them. Cundy v. Le Cocq 13 Q. B. D. p. 210, Laid v. Dobell, 1906 1. K. B. p. 131; Parker v. Alder 1899, 1. K. B. p. 20, where it has been clearly held that *mens rea* is not always a necessary ingredient to a commission of an offence that is prohibited by Statute. It is to be noted that in the present Ordinance, there is not any mention of "knowingly", "wil-

fully" or "unlawfully". Mr. Asfour has raised in connection with this ground the point that lack of knowledge is a defence; but when one looks at this Ordinance, one sees that there is a statutory defence described by the Ordinance, and that is the defence of warranting set out in s. 13. In this instant case the Appellant did not, as I think he might well have done set up this statutory defence; it is possible that had he done it, he might have succeeded but it is not for this Court to speculate as to what might have happened and I can only deal with the facts upon the record as it appears.

In the result, therefore, the second, third and fourth grounds of appeal are dismissed, but this appeal must succeed and does succeed in my opinion, only on the first ground of appeal for the reasons I have given above. Therefore, the appeal is allowed, the conviction is quashed and the fine is ordered to be remitted to the Appellant.

Delivered this 10th day of May, 1947, in presence of R. Eff. Habiby for the Appellant and of Eissa Eff. Hazou for the Attorney General.

CRIMINAL APPEAL No. 24/47.

IN THE DISTRICT COURT OF TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President Judge Windham.

IN THE APPEAL OF:—

Attorney General. — APPELLANT.

v.

Ester Flint. — RESPONDENT.

Autrefois acquit — Former trial on same charge quashed on appeal on the ground of uncerlainty — Fresh charge brought — CR. A. 100/43 distinguished — R. v. Olivo.

Appeal from the judgment of the Magistrate's Court, Tel Aviv, dated 3.2.47 in file No. 705/47, allowed:—

1. Where a conviction has been quashed on the ground that the charge was bad for uncertainty, the whole proceedings were void *ab initio*, and a plea of *autrefois acquit* could not avail.

2. An accused can never have been in jeopardy in proceedings which were void and not only voidable.

3. The statement in CR. A. 100/43 that the Accused had been in jeopardy by reason of his prison sentence, must apparently be read to mean that he had been in jeopardy in the real but untechnical sense that having ac-

tually suffered imprisonment, he must before that be considered to have been in jeopardy of being imprisoned.

ANNOTATIONS:

1. The first appeal judgment in this case is reported at p. 57, *ante*.

2. On the decision in CR. A. 100/43, referred to in the judgment, see the notes thereto in 1943, A. L. R., at p. 648; *cf.* CR. A. D. C. Jm. 22/46 (1946, S. C. D. C. 759) and note 2; *vide* also CR. A. D. C. Jm. 18/47 (*ante*, p. 230).

FOR APPELLANT: Handelsman.

FOR RESPONDENT: Dvorin.

JUDGMENT.

This appeal raises the question whether the plea of *autrefois acquit* is available where a conviction of the Accused upon his former trial upon the same charge has been quashed on appeal on the ground that the charge was bad for uncertainty. In the present case the Appellant, who pleaded guilty to a town-planning offence, was convicted, but the conviction was quashed by this Court on appeal in Criminal Appeal 122/46 [1] on the ground that the charge-sheet was bad for uncertainty in that, as framed, it charged the Appellant with no offence. This Court accordingly allowed the appeal, using the following words: — "On this ground the appeal is therefore allowed and the conviction quashed". The Court did not go on to say, on the one hand, that the Appellant was "discharged" or "acquitted"; nor, on the other hand, did the Court either remit the case for trial *de novo* or state that the quashing of the conviction was no bar to a further trial should the prosecution think fit. Upon the prosecution charging the Appellant again in the Magistrate's Court upon the same charge (properly framed) the defence of *autrefois acquit* was raised, and the Court accepted it. Against this decision the Attorney General appeals.

2. Now in the first place it is quite clear that where, as in this case, the conviction was quashed on the ground that the charge was bad for uncertainty, that amounted to a decision that the charge was a nullity, although the actual word "nullity", was not used in the judgment. And accordingly the proceedings based upon it were a nullity. That being so, the Appellant was never in jeopardy or peril (the terms are synonymous) in the former trial, for never at any time had there been any charge under which she could have been lawfully convicted. The whole proceedings were void *ab initio*. I emphasize that they were void, and not merely voidable, in which case the plea of *autrefois*

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[1] *Ante*, p. 57.

acquit might have been available. On the distinction, the judgments in Haynes *v.* Davis (1915) 1 K. B. 332 contain some interesting observations. Now the legal position where the proceedings were void, subject to certain recent decisions to which I shall presently refer, is that a plea of *autrefois acquit* upon subsequent proceedings against the Appellant on the same charge (now properly framed) could not avail her. The position is not affected by the fact that this Court, in allowing the former appeal and declaring the charge to have been bad, did not remit the case or expressly state that the prosecution was free to charge the Appellant afresh. For the charge having been declared a nullity, the automatic legal result was that the prosecution was free to charge the Appellant afresh, she having never been in peril; and any statement to that effect by this Court in its judgment could have done no more than draw attention to the legal result of the convictions having been quashed on the ground that the charge was a nullity. It may be that had this Court stated in its judgment that the Appellant was "discharged" that would have made it more clear that it was open to the prosecution to bring a fresh charge, since it appears that the expression "discharged" has been indicated in Criminal Appeal 210/45 [2] as the proper one where an appeal is allowed not on the merits. But the use of that expression was not essential. I may say at this point that it has been the practice of this Court, in allowing an appeal, to use the words "the appeal is allowed and the conviction quashed", and, where the appeal has been allowed on the merits and not on a ground which rendered the proceedings below a nullity, to add the words "and the Appellant is acquitted and discharged". Where this Court *requires* that there shall be a trial *de novo,* and does not merely leave it open to the prosecution to charge afresh should it desire, it will expressly remit the case for trial *de novo*. That, however, is merely the practice of this Court. The real test, where the appellate Court neither expressly remits nor expressly precludes remission, is not so much what words were used by the appellate Court in allowing the appeal, but what were the grounds on which it was allowed. In the present case, as I have said, these were such as to preclude the defence of *autrefois acquit*. With regard to the law on the point I need do no more than refer to Archbold, 31st edition, at page 138, and the cases there cited: and see R. *v.* Kitching 21 Cr. App. Rep. 144.

3. I have been referred, however, to the decision in Cr. App. 100/43 [3],

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[2] 13, P. L. R. 16; 1946, A. L. R. 7.

[3] 10, P. L. R. 492; 1943, A. L. R. 648.

and to the case of R. *v.* Olivo (1942) 2 All E. R. 494 upon which it was expressed to be based. But upon a careful reading of both judgments, I find that no point of law was decided in either. All they decided was that, in the interests of true justice, an accused will not normally be allowed to be tried afresh on a charge where his conviction on the original charge was quashed on the ground that the charge was a nullity but where he has in fact served part (or the whole) of a sentence of imprisonment on that first charge before his appeal was allowed. It was never held in R. *v.* Olivo that he could not as a matter of law be retried in such a case, or that his actual imprisonment constituted jeopardy or peril. And of course logically an accused can never have been in jeopardy in proceedings which were a nullity. In Cr. App. 100/43 it was stated that the Accused had been in jeopardy by reason of his prison sentence, notwithstanding the charge on which he was convicted has been a nullity. With the greatest respect I can only read this to mean, as I feel it was intended to mean, that he had been in jeopardy in the real but untechnical sense that, in so far as he actually suffered imprisonment, he must before that be considered to have been in danger or jeopardy of being imprisoned, — the doubtful logic of holding that a person can only be considered to have been in danger because the anticipated danger was realized being overriden by the common-sense necessity of holding that a man actually imprisoned as a result of criminal proceedings (however void *ex post facto*) must have been in jeopardy, during those proceedings, of being imprisoned. I cannot take the decision in that case to mean that the Accused was in jeopardy in the strictly legal sense. In any event, both Cr. App. 100/43 and R. *v.* Olivo were obviously decided in the light of their facts, the real grounds for not allowing fresh trials there being, as I say, not legal ones, but the humane grounds that the Accused had already suffered enough by their actual and (as it turned out) wrongful imprisonment. The Court in each case was merely exercising a discretion. The decision in Cr. App. 100/43 cannot, I consider, be extended to a case such as the present, where the Appellant on her original conviction, was merely sentenced to pay a fine of LP. 2.500, which was returned to her when her appeal was allowed. The imprisonment was irreparable; the payment of the fine was not. Had Cr. App. 100/43 laid down the strange proposition of law that imprisonment upon a null and void charge constituted legal jeopardy, then no doubt the ruling would have been applicable equally where the Accused had merely paid a fine, there being no logical distinction between the two, so far as such a proposition is concerned. But, as I say, in my opinion it did

not; still less did R. *v.* Olivo. That being so, I find no reason here, either in law or in the interests of justice, why the fresh charge should not be instituted.

4. For these reasons the appeal is allowed, and the case remitted to the Court below for trial on its merits.

Delivered this 19th day of May, 1947.

CRIMINAL APPEAL No. 17/47.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President, Judge Rigby.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Pinhas Ibrahim Mizrahi & an. RESPONDENTS.

A. G.'s right of appeal — Time for filing appeal — Medical certificate — Amendment of charge — Assault — Evidence.

Appeal from the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levi) delivered on the 6.11.1946 in CR. C. 5442/46, allowed:—

1. The time during which the Attorney General may appeal against a Magistrate's Court's judgment given in his absence starts to run as from the notification of such judgment to the A. G., notwithstanding the fact that the judgment sought to be appealed against may have been given in a case on a private prosecution and in the presence of the private complainant.

2. If there is a discrepancy of one day between the date of the offence as proved in evidence and as averred in the charge-sheet, the Magistrate should ordinarily amend the charge-sheet even though no application for such amendment be made, provided no injustice is caused to the accused by such amendment.

3. In an assault case a medical certificate as to the injuries sustained by the complainant can be put in only through the physician who issued it.

ANNOTATIONS:

1. On the first point see the case cited and the notes thereto.

2. On clerical errors in charge sheets see CR. A. 107/46 (13, P. L. R. 504; 1946, A. L. R. 671) and note 3 in A. L. R.

FOR APPELLANT: Khalaf.

FOR RESPONDENTS: Loewenstein.

JUDGMENT.

This is an appeal brought in the name of the Attorney General from a judgment of the Magistrate's Court, Jerusalem, whereby the Respondents were acquitted of the charge of assault brought against them by the complainant, Ibrahim Yousef Mizrahi, in his capacity as a private complainant. The learned Magistrate held that there was no case to answer and dismissed the charge without calling upon the Accused to plead.

2. The point has been taken by Mr. Loewenstein, on behalf of the Respondent, that the appeal itself is out of time. The appeal was lodged by the Attorney General on the 13th February, 1947. The judgment of the learned Magistrate was delivered on the 6th November, 1946. It appears from the statement of appeal that the decision of the Magistrate was notified to the Attorney General — presumably by the complainant himself — on the 4th February, 1947.

Under section 14 of the Magistrates Courts' Jurisdiction Ordinance, an appellant may appeal within thirty days from the date of the delivery of the judgment, if delivered in his presence, or within thirty days of the notification to him of the delivery of the judgment, if delivered in his absence.

3. It has been argued by Mr. Loewenstein, with some merit, that the Attorney General should not be placed in a better position than the person adversely affected by the judgment who wishes to appeal and that the Attorney General should be deemed to stand in the shoes of the person so affected and should have the same period within which to appeal as that person himself. The matter is not free from difficulty, but fortunately I am guided by Criminal Appeal 87/46, reported in the Selected Cases of the District Courts of Palestine, at page 423, in which precisely the same point was raised. In that case the Court held that the Attorney General's right of appeal ran as from the date of the notification to him of the delivery of the judgment, where of course such judgment is delivered in his absence. The *ratio decidendi* of the Court in arriving at that conclusion was that the Attorney General represents the public and his sole interest in an appeal from a judgment in criminal proceeding is motivated by a desire that a decision which has, in his opinion, been made contrary to law, may not remain of binding effect to the detriment of the public. I see no reason to disagree with that decision and I therefore follow it. The objection taken by Mr. Loewenstein that the appeal is out of time is therefore dismissed.

4. I turn now to the merits of the appeal itself. The learned Magistrate dismissed the charge on two grounds: firstly that the charge

sheet itself alleged that the offence had been committed on 13.5.46, a Monday, whereas the evidence related to an offence committed on 12.5.46, a Sunday. In my view the learned Magistrate was wrong in dismissing the charge on this ground. The learned Magistrate had the power to amend the charge under Rule 273 of the Magistrates Courts' Procedure Rules. Clearly no injustice would have been done to the Accused by such an amendment and in my view the failure of the Magistrate so to amend, even though no application was specifically made by the complainant, was unreasonable. Criminal Appeal 18/45, A. L. R. 1945, page 395, appears to me directly in point in this matter.

5. The second ground of appeal for dismissing the charge was that the learned Magistrate considered that there was insufficient evidence adduced by the witnesses for the prosecution to justify him in calling upon the Accused to answer to the charge. It is of course undesirable at this stage to express my opinion on the evidence as it appears on the record. Suffice it for me to say that there was, in my view, sufficient evidence to justify the Magistrate in calling upon both the Accused to answer to the charge.

The particulars of the offence alleged against the first Respondent were that in the course of the assault which took place, he bit the hand of the complainant. On this the learned Magistrate says in the course of his judgment:—

> "With regard to the biting of the hand of the complainant, except for the complainant's evidence, which I do not think is sufficient, there is no evidence that the bite is the act of the first accused".

Now there was evidence adduced by one of the witnesses that in the course of the fight she heard the complainant calling "my hand, my hand". There was the direct evidence of the complainant himself on oath that he was bitten by the second Respondent. It seems to me that on such evidence there was clearly sufficient material to justify calling upon the Accused to answer upon the charge. The Magistrate did not say that having heard the evidence of the complainant he disbelieved it. He simply says "I do not think it is sufficient".

6. There is one other matter to which I would refer. The Magistrate, in his judgment, refers to a doctor's certificate "C. 1", filed in this case". It is not clear to me precisely what the Magistrate means by use of the words "filed in this case". If the certificate was put in as an attachment to the charge, clearly it was inadmissible in evidence. If the certificate was put in by one of the witnesses, similarly it was inadmissible. If evidence was to be given as to the injuries, if any, suffered by the complainant, the proper way was to call the doctor himself to give evidence on oath as to the facts, and it is inadmissible

and incorrect simply for the medical certificate to be tendered in evidence by a witness.

This appeal is allowed and the case is remitted to the Magistrate for completion in accordance with law.

Delivered this 1st day of April, 1947.

CIVIL APPEAL No. 29/47.

IN THE DISTRICT COURT OF JAFFA,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President Judge Smith.

IN THE APPEAL OF:—

Saleh El Madani. APPELLANT.

v.

Ali Ahmad El Halabi & an. RESPONDENTS.

Rent Restrictions (Business Premises) Ord. — Illegality — Regulation 46B(9B) of Defence Regulations, 1939.

Appeal from the judgment of the Magistrate's Court Gaza, dated 19.3.47 in Civil Case No. 710/47 dismissed:—

1. If a contract (of lease) is illegal no party to it can seek the assistance of the Courts to enforce its terms.

2. There is a presumption of legality which requires proof that controlled material was used in the construction of a new building.

ANNOTATIONS:

1. On reg. 46B (9A & 9B) of the Defence Regulations *cf.* C. A. D. C. T. A. 198/46 (*ante*, p. 118) and C. A. D. C. Ja. 209/46 (*ante*, p. 217).

2. See, on the first point, C. A. D. C. T. A. 198/46 (*ante*, p. 118) and note 7 thereto on p. 119.

3. On the last point *vide* C. A. D. C. Jm. 26/46 (1946, S. C. D. C. 625) and note 1; *cf.* also C. A. D. C. T. A. 200/45 (*ibid.*, p. 851) and note 3.

FOR APPELLANT: Salameh.

FOR RESPONDENTS: Shehadeh.

JUDGMENT.

By his judgment dated the 19th March, 1947, the learned Magistrate at Gaza, Rizek Eff. Halazoun, ordered the eviction from a shop situated in Omar El Mukhtar Street, Gaza, of the Appellant/Defendant Saleh

El Madani who was a tenant of the two Respondents/Plaintiffs, Ali Ahmad El Halabi and Nasif Affaneh. The grounds of the eviction were that, contrary to the terms of the lease, Saleh was a party to the removal of a partition wall between his shop and an adjoining shop and that Saleh allowed Hamdi Nabhan, the tenant of the adjoining shop, to use his (Saleh's) shop for the purpose of carrying on business jointly with him (Saleh). In other words, it is said that Saleh and Hamdi knocked down the partition wall and turned the two shops into one and carried on a joint haberdashery business. The Respondents are also taking separate proceedings against Hamdi for eviction from the adjoining shop. The first Plaintiff, Ali Ahmad, himself carries on a drapery business and so it is understandable why he objects to what Saleh and Hamdi are said to have done, for he regarded them as potential rivals.

By his amended statement of defence Saleh pleaded that the contract of lease made between himself and the Plaintiffs was null and void on the ground of illegality. Saleh did not, however, give any evidence in support of his contention. The illegality is said to consist in this. The shop, it is said, is a building to which is applicable Regulation 46B(9B) of the Defence Regulations, 1939, as amended by the Defence (Amendment) Regulations (No. 13), 1943 (page 805 of Volume III of the Annual Volumes for 1943). It is common ground that the shop was let without the rent being fixed by the Rent Commissioner. For this reason the learned Magistrate held that the lease was illegal, but nevertheless he thought that the Plaintiffs were not precluded from suing for eviction for breach of the terms of the lease. I think he was in error here. If the lease is in fact illegal, I think it is clear law that neither party can seek the assistance of the Courts in enforcing any of the terms of the lease. But it seems to me that the learned Magistrate failed to appreciate that Regulation 46B(9B) applies only if the building is one in respect of the construction of which a licence is required under Regulation 46B (in addition to the applicability of the Rent Restrictions (Business Premises) Ordinance, 1941 (No. 6 of 1941)). Now the evidence on this point does seem to me to be extremely vague. A licence is not required, for example, if the building is not constructed of controlled materials. See the Defence (Amendment) Regulations, 1945, at page 158 of Supplement II of the Palestine *Gazette* for 1945. It may well be that no controlled materials were used. There is a doubt on the point anyway. There is a presumption of legality. Saleh sought to set up the illegality; the onus is upon him to prove it and I do not think he has done so. I think, therefore, that the Magistrate was in error in coming to the conclusion that the lease was illegal merely on the ground that there had been no

reference to the Rent Commissioner. But having held it was illegal, I do not think that the Magistrate was correct in holding that the Plaintiff could nevertheless rely on the breach of the terms of an illegal contract, I take the view that the lease was legal, or, at any rate, that it was not proved to be illegal. It remains to see whether the Plaintiffs have proved that Saleh broke the two terms of the lease as alleged. Here I agree with the conclusion reached by the Magistrate. It is true that the evidence was not crystal clear. But the only reasonable presumption is that Saleh at least connived at the demolition of the partition wall and carried on business with Hamdi in breach, at least, of clause 2 of the lease. As to clause 3 there was some doubt as to the correctness of the translation. It reads "a lessee has no right to assign the lease". It was suggested that "relinquish" instead of "assign" was nearer to the original Arabic word. I understood both counsel to agree that they intended the clause to mean that the lessee was not allowed to permit another to occupy the premises without permission from the landlord. I feel some doubt as to this, but in any case there was, in my opinion, a breach of clause 2 clearly established by the evidence.

Even if I am wrong in thinking that the lease is legal and therefore valid, that is if the lease is illegal, I would like to add this. Saleh would then be, in my opinion, a trespasser. Although the action was based on section 4(1)(b) of Ordinance No. 6 of 1941, I do not see why the Plaintiffs should not succeed on the general law, the action being regarded as being one for the recovery of immovable property under section 3(c) of the Magistrates' Courts Jurisdiction Ordinance, 1939 (No. 45 of 1939).

Mr Salameh, on behalf of the Appellant Saleh, half conceded that the landlords might have a valid claim for possession of the premises in other proceedings. At page 2 he says "I don't say Plaintiffs might not have been able to sue for recovery of possession", although he argued that this appeal should be allowed on the narrower ground of illegality or, alternatively, insufficiency of evidence to establish the breach. I do not share this view. I therefore arrive at the same result as that reached by the learned Magistrate although I have proceeded by a different line of reasoning.

In my opinion this appeal should be dismissed with costs and I order accordingly. I allow an advocate's attendance fee of LP. 5..

Delivered this 16th day of June, 1947, in the presence of Mr. Salameh for the Appellant and Mr. Shehadeh for the Respondent.

CIVIL APPEAL No. 123/46.

IN THE DISTRICT COURT OF TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour Judge Cheshin.

IN THE APPEAL OF:—

Meir Chanzinsky. APPELLANT.

v.

Abraham & Chayim Suesselman & an. RESPONDENTS.

Rent Restrictions (D. H.) Ord. — Sec. 8(1)(d) — Meaning of "Landlord".

The term "landlord", used in sec. 8(1)(d) of the Rent Restrictions (D. H.) Ord., does not necessarily mean the person who had given the premises on lease. It may be interpreted as meaning also the registered owner, this is even the more appropriate meaning in cases falling under this particular provision.

ANNOTATIONS: Compare C. A. 264/43 (10, P. L. R. 639; 1943, A. L. R. 751) and C. A. D. C. T. A. 138/46 (1946, S. C. D. C. 626; 1946, *"Hamishpat"* 346 — in Hebrew).

FOR APPELLANT: Lustig.

FOR RESPONDENTS: Gratch.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Tel-Aviv, whereby the Appellant was ordered to be evicted from a hut, used by him as a dwelling, which he had rented from the second Respondent.

2. The action was based on section 8(1)(d) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, and the Court below, after hearing evidence, came to the conclusion that all requirements provided in that section have been complied with and ordered eviction. In his notice of appeal the Appellant advances only two grounds for the setting aside of the judgment *. — — — — — — — — — —

5. The first ground of appeal is that the main requirement under section 8(1)(d) has not been complied with, in as much as the building licence has been issued in the name of Abraham and Chayim Suesselman, whereas the lessor of the hut was the firm Suesselman Brothers. Now, section 8(1)(d) of the Ordinance does not lay down that the licence

* Omitted.

(*Ed.*)

should have been issued to the lessor only. The word "landlord" used in that section does not necessarily mean the person who had given the premises on lease. It has already been held by this Court in a long line of cases that the term "landlord", wherever it appears in the Ordinance, may be interpreted as meaning also the registered owner; and that interpretation is even more particularly appropriate in a case falling under section 8(1)(d). For it is only natural in the sequel of things that a lessor, who is not at the same time the registered owner, has no interest in making substantial alterations on the property of someone else. It is rather the real, *i. e.* the registered, owner who usually makes such alterations. And when the legislator in that section speaks of the "landlord", without indicating an intent to refer to the "lessor" or to the "registered owner", it can in no way be said that he had in mind the "lessor" only. It appeared at the trial that Abraham and Cahyim Suesselman are the registered owners, although they had not given the premises on lease to the Appellant. The lessor, which is the firm composed of these two brothers, has no objection to the alterations being made, and has in fact, joined the application for eviction. The learned Magistrate was therefore right in rejecting the contention that the licence had not been issued in the name of the "landlord", within the meaning of section 8(1)(d) of the Ordinance.

6. The second ground of appeal is that no order for the eviction of the Appellant from the hut should have been made as long as it has not been established that the Respondents were in the possession of all the required licences, including the licence required under the emergency regulations, controlling the acquisition and use of building materials. I do not wish to consider the questions whether those regulations are still to be taken into account in view of the fact that they have since been repealed, and whether a licence from the controller of heavy industry was necessary in this case, there being no evidence whatever that the Respondents intended to use articles which have been placed under control. I do not stop to consider these questions for the simple reason that there is evidence that the Respondents did have the licence required under the emergency regulations. In the body of the licence granted to the Respondents by the local Town Planning Commission of Tel Aviv it is stated that — "The licence has been issued by authority of the controller of heavy industry dated *etc.*". The engineer Shmuel Dov Karis in answer to questions put to him by the Court below said — "There are licences from the Controller of Heavy Industry. These are included in the Municipality licences". The witness was not even cross-examined on this point.

There is therefore no ground for the contention that those licences do not exist.

7. At the end of his argument Mr. Lustig for the Appellant raised the contention that in view of the fact that the time for which the building licence had been granted had already expired when judgment was given in the Court below, as a result of which expiration such licence will be of no avail, the order for eviction cannot stand. This ground has not been included in the notice of appeal. But apart from that a document has been produced by Mr. Gratch, with the consent of Mr. Lustig, at the hearing of this appeal, from which document it appears that the duration of the licence has been extended by the Town Planning Commission. This contention, therefore, also fails. Just as the Respondents were successful in obtaining an extension of time for the purpose of building it may safely be presumed that they will encounter no difficulty in obtaining also an extension for the demolition of the hut at present occupied by the Appellant.

In view of the above the appeal is dismissed and the Appellant ordered to pay Respondents' costs to include an inclusive advocate's fee of LP. 7.

Given in open Court this 14th day of February, 1947, in the presence of Mr. Lustig for the Appellant and the Respondent A. Suesselman in person.

(Translated from the Hebrew).

CIVIL APPEAL No. 42/47.

IN THE DISTRICT COURT OF JERUSALEM,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour A/Judge E. Khoury.

IN THE APPEAL OF :—

El-Haj Odeh El-Basayta & 4 ors. APPELLANTS.

v.

Issa Mussa Et-Taraireh & 13 ors. RESPONDENTS.

Recovery of possession of land — Defence — R. 69 M. C. P. R. — Art. 24 Ottoman Magistrates Law — Sec. 3(c) M. C. J. O. — C. A. 109/46 — Arbitration re land — C. A. 244/45 — C. A. 288/45 — Art. 20 Ottoman Land Code — Joinder of parties.

An appeal against the judgment of the Magistrate's Court, Hebron (H. W. Mr. M. Nammar), delivered on the 16.3.1947 in Civil Case No. 210/46, dismissed:—

1. An appellate Court will not interfere with the discretion of a Magistrate under R. 69 of the M. C. P. R. as to the filing of a defence after the time limited therefor.

2. Recovery of possession may be granted by a Magistrate under sec. 3(c) of the M. C. J. O. and independently of Art. 24 of the Ottoman Magistrates Law.

3. A Magistrate should not consider himself limited by the provisions of Art. 24 of the O. M. L. when a claim is expressly based on sec. 3(c) of the M. C. J. O.

4. Where it appears that a defendant in an action for recovery of possession may have a good defence based on Art. 20 of the Ottoman Land Code against a registered or other owner the latter has to take the case to the Land Court.

5. Joinder of an unnecessary party during the hearing of an action will not be held to vitiate the proceedings by an appellate Court if no prejudice to the other parties was caused by such wrong joinder.

ANNOTATIONS:

1. For other decisions on Rule 69 M. C. P. R., see C. A. D. C. Ha. 13/43 (1942/43, Ha. L. R. 210), C. A. D. C. Ha. 84/44 (1944, S. C. D. C. 617) and C. A. D. C. T. A. 28/45 (1945, S. C. D. C. 492).

2. On the fourth point see in addition to the decisions cited in the judgment C. A. 240/45 (1946, A. L. R. 515) and C. A. 280/45 (1946, A. L. R. 734).

3. On the fifth point see C. A. 231/37 (5, P. L. R. 34; 1938(1) S. C. J. 28).

FOR APPELLANTS: R. Haddad.

FOR RESPONDENTS: Nuseibeh.

JUDGMENT.

This is an appeal from the judgment of the Magistrate's Court, Hebron, dated 16th March, 1947, whereby the Appellants' claim for recovery of possession of a plot of land called El Kola, in the Hebron sub-district, was dismissed.

The grounds of appeal in this case may be summarized as follows:—

(a) That the Magistrate erred in allowing the Defendants (the Respondents) to file a written defence under rule 69 of the Magistrates' Courts Procedure Rules, 1940, after the lapse of the ten days allowed by that rule;

(b) That the Magistrate erred in applying Article 24 of the Ottoman Magistrates' Law in this case when the Appellants clearly stated in Court that they were basing themselves on section 3(c) of the Magistrates' Courts Jurisdiction Ordinance, 1939;

(c) That the Magistrate was wrong in stating that there was a dispute as to ownership; and

(d) That the Magistrate was wrong in admitting the *Awkaf* Department as a party in the case.

To deal with the first point, this Court is not prepared to interfere with the discretion of the learned Magistrate in allowing the Defendants to file a written defence. Rule 69 does not fetter the discretion of the Magistrate with any conditions and I think in a case of this nature the learned Magistrate was justified in allowing the written defence.

With regard to the second ground of appeal it seems that the learned Magistrate when applying Article 24 of the Ottoman Magistrates' Law had in mind what was stated in the first paragraph of the statement of claim where it says that the Defendants in the winter of 1945—46 took possession of the land by force. While counsel for the Respondents does not dispute the fact that the Appellants are not tied up to Article 24, I find in the record before the Magistrate that the Appellant did specifically rely on section 3(c) of the Magistrates' Courts Jurisdiction Ordinance. That it was open for the Appellants to seek their remedy under the latter section is sufficiently clear from the latest judgment of the Supreme Court of Appeal, that has been brought to my notice, namely, C. A. 109/46 (A. L. R. 1947, p. 48), where it is stated that Article 24 does not exhaust all the remedies open to a *legitimate owner* to recover possession nor does it oust the power of the Magistrate to order recovery under section 3(c) of the Magistrates' Courts Jurisdiction Ordinance. (C. A. 37/45, 12 P. L. R. 354).

The learned Magistrate was, therefore, with all respect, wrong in referring to Civil Appeal 190/41 (8, P. L. R. page 484) which dealt with the requirements of Art. 24 of the Ottoman Magistrates' Law when the Appellants specifically based their claim on section 3(c) of the Magistrates' Courts Jurisdiction Ordinance. But this was not the sole ground on which the learned Magistrate dismissed the Appellants' claim.

Coming now to the third ground of appeal that the Magistrate was wrong in stating that there was a dispute as to ownership, we have to see whether the learned Magistrate was justified in holding that this case involved a decision as to title to land. In the first place it should be pointed out that the Appellants did not produce any registration of title. They only claimed that they had been in possession of this piece of land prior to 1942. There is no finding by the learned Magistrate that this was so. According to the evidence tendered before the Magistrate, and this fact is not in dispute, that prior to 1942 there were differences between the parties to this case as to the ownership and boundaries of lands including the plot claimed. These differences were, through the intervention of the Administration, referred to arbi-

tration and the arbitrators awarded the Respondents part of the lands in absolute ownership, namely, 60 *menas* or 150 *dunums* which are now claimed by Appellant and the arbitrators further held that the other part was owned in common by Appellants and Respondents. The Respondents, (and not the Appellants as erroneously stated by the learned Magistrate in his judgment) and this was confirmed by counsel for the Appellants in Court, not being content with the area allotted them, applied to the District Court to have the award set aside on a technical ground that those who had agreed to the arbitration did not represent the whole village. The District Court rejected their application and confirmed the award. The award was however finally set aside by the Supreme Court. This question is very important to show that it was the Respondents and not the Appellants who were not satisfied with the award which gave Respondents possession only of part of the lands they claimed including the piece now in dispute.

Turning now to the evidence led before the Magistrate we find that the Appellants themselves in giving evidence admitted that the dispute in this case was over the ownership of the land and the boundaries. I would refer in particular to the evidence of the first Appellant Haj Odeh El Basaytah. The Respondents produced, furthermore, evidence that they were paying taxes on this land. A number of decisions were given by the Supreme Court on the question of ownership arising in possessory actions. In C. A. 244/45 (P. L. R. Vol. 13, p. 84) the Court in confirming the principle laid down in C. A. 37/45, (P. L. R. Vol. 12, page 354) held that the Magistrate must presume that there is no dispute as to title although a mere allegation of ownership is not sufficient. In C. A. 244/45, the learned Chief Justice in delivering the judgment of the Court said:—

> "Here I must consider the capacity in which the Court sits. If it is constituted as a Magistrate's Court it is precluded from hearing the case as it involves a question of ownership in which event the proper course for the Court is to dismiss the case and leave the Plaintiff to seek his remedy in the Land Court which is the only Court that has jurisdiction to determine the validity of the Defendant's defence".

Again in C. A. 288/45 it was held that where it appears that a defendant may have a good defence based on Article 20 of the Ottoman Land Code against a registered or other owner the latter has to take the case to the Land Court.

Here in this case the Appellants produced no document of title to show that they were the legitimate owners of the land. There is on the other hand an admission on their behalf that this case involves a dispute as to ownership and boundaries. The evidence shows that the

Respondents' claim to the land was confirmed by the arbitrator's award with which the Appellants were satisfied and actually opposed the Respondents' application to have it set aside. The Appellants' claim is merely based on the allegation that they had been in possession of the land before a certain date and there is no finding by the Magistrate that this is so. In so contending, the Appellants do not however seek their remedy under Article 24 but under section 3(c).

In the circumstances I hold that the learned Magistrate was justified in maintaining the *status quo* leaving the Appellants to seek their remedy in the Land Court as there was sufficient evidence before him to entitle him to find that in this case there is a dispute as to ownership and therefore he is precluded from dealing with the present claim before the question of title has been settled by a competent Court.

To deal with the fourth ground of appeal it seems that though the *Awqaf* Department was admitted as a party in this case they were not, as it appears from the record, properly represented before the Magistrate and they did not therefore take an active part in the proceedings. It appears that the land is of the *waqf* Gheir Sahih category where only the taxes are dedicated as *waqf*. This may be inferred from the evidence of the *Mamour Awqaf* of Hebron Fouad Eff. E. Imam. At any rate the admission of the *Awkaf* Department who remained inactive throughout the proceedings has not prejudiced the Appellants.

For the above reasons the appeal must be dismissed with costs to include LP. 5 advocate's attendance fees.

Delivered in the presence of Rashid Eff. Haddad for Appellants, and Anwar Eff. Nuseibeh for Respondents, this 31st day of May, 1947.

MOTION No. 153/47.
(CIVIL CASE No. 31/47).

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour the A/Judge S. Daoud.

IN THE APPLICATION OF:—

Rahamim Zonana. APPLICANT.

v.

Joseph Weisshof & an. RESPONDENTS.

Injunction — Interference with right of possession — Relief — Status quo — Injury — Inconvenience.

An application for an *interim* injunction, refused:—

1. Following the decision in C. A. 83/46, no interlocutory injunction will be granted if that would have the effect of granting the sole relief sought in the main action.

2. Following the decision in C. A. 21/46, no interlocutory injunction will be granted if the effect would be a change in the *status quo*.

3. Mere convenience or inconvenience are not enough to justify a plaintiff to ask for an interlocutory injunction. To obtain such injunction he must show that hardship and/or injury is caused to him if he does not obtain it.

ANNOTATIONS: See in addition to the decisions cited in the judgment: Mo. Jm. 607/46 (1947, S. C. D. C. 62).

FOR APPLICANT: S. T. Cohen.

FOR RESPONDENTS: A. Moyal.

ORDER.

The applicant Rahamim Zonana purchased, on 27.3.44, from one Meir Moshe Levy a house consisting of three rooms and conveniences situated in Mahne Yehuda Quarter, Jerusalem.

At the time of the purchase the first respondent Joseph Weisshof and the second Respondent, his wife, were and are still in occupation of two out of three rooms together with the conveniences by virtue of a contract of lease made with the former owner. The third room was, until 3.3.47, occupied by a Mr. Kurt Moses to whom it was let by the same owner. On 3.3.47, Mordechai Heilprin, an ex-serviceman, moved into this same room by virtue of a billetting notice. It appears that the Applicant who has been living in a room in Zichron Yosef Quarter of Jerusalem, being desirous to live in his own property, has succeeded in getting the billetting notice, issued in favour of Heilprin, amended to apply to Applicant's room in Zichron Yosef Quarter to which Heilprin had been asked to move.

Here I must pause to say that Heilprin swore an affidavit which is in evidence and later confirmed by him in the witness box that he does not wish to vacate the room in question and move into Applicant's room in Zichron Yosef Quarter as its locality, lack of convenience, and the state of cleanliness of that quarter do not appeal to him.

Applicant claims that after he had moved into that room and placed therein some pieces of furniture Respondent No. 1 and others assaulted him and threw him and his furniture out of the room.

This three room flat has been described to have one entrance leading to a corridor and then to the rooms. That access to the room formerly occupied by Kurt Moses and later by Mordechai Heilprin could only be had through this corridor.

Applicant complains that Respondents are not allowing him to get into that room thereby depriving him of the use of his property. He adds that Heilprin's occupation of that room is no hindrance for him to take possession of it; that as soon as the interference of Respondents is eliminated Heilprin would be easily ejected by the force of law and through the billetting authorities.

An action for injunction has been filed by the Applicant against the two Respondents (Civil Case No. 31/47) for an order to the Defendants not to interfere with Plaintiff's rights to the possession of the said room and further for an order not to obstruct the Plaintiff and members of his family from reaching the said room through the corridor.

The present motion is for an *interim* injunction in the same terms as in the main action.

Several defences were put forward against granting the relief prayed for.

The first defence is that where the relief sought in the interlocutory injunction has the effect of granting the sole relief sought in the main action the *interim* order will not be given and I think this is settled law and bears no arguments. See Civil Appeal 83/46 Annotated Law Reports, Vol. 1946, page 379. Many decisions of the District Courts have been based on this ruling. The two reliefs in the main action and motion are not only similar but identical and are the sole relief in both proceedings.

The second defence is that the Applicant is seeking to alter the *status quo*. In other words he is seeking to upset the state of things in which the parties have been and are found to be at the time of litigation. Since the purchase of the house by Applicant he was not enabled to occupy and live in that room nor was he allowed to use the corridor leading to it and on the authority of C. A. 21/46 P. L. R. 13, 1946 page 411 * and Motion 365/45 District Court (Selected Cases) 1945, page 685, the application should be rejected.

The third defence is that the Applicant must show that if the *interim* injunction is not given he will suffer irreparable injury. Applicant has been living in Zichron Yosef Quarter for over two years and I cannot see how and to what degree it is hard and injurious to himself and family to remain in that place until the termination of the main action. It may be more convenient for him to move into his own house but mere convenience or inconvenience is not enough. See Halsbury Vol. 18, page 29, para. 44.

These are the three defences of the Respondent which have been

* 1947, A. L. R. 123.

supported by legal authority. The Applicant has not and I believe, he cannot find any answer to these defences.

The application for an *interim* injunction is dismissed with costs and LP. 5 advocate's attendance fees.

Delivered this 16th day of June, 1947.

CIVIL APPEAL No. 1/47.

IN THE DISTRICT COURT OF JERUSALEM, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the R/President, Judge Rigby.

IN THE APPEAL OF :—

Alexander Eliash & Co. Ltd. — APPELLANTS.

v

Dr. Wilhelm Strauss-Reich. — RESPONDENT.

Promissory notes — Usurious Loans Ord. 1934 — Jurisdiction — Guarantee — Right of appropriation.

An appeal from the judgment of the Magistrate's Court of Jerusalem (H. W. Mr. E. Yedid-Levi), delivered on the 24.12.1946 in Civil Case 1821/45, allowed:—

1. A Magistrate has jurisdiction to entertain a claim for less than LP. 250.— even though adjudication of such claim involves the reopening of a transaction under the Usurious Loans Ord., 1934, and even though the result of such reopening is to show that Defendant owes Plaintiff far more than the sum sued for and than LP. 250.—.

2. A guarantor may not exercise a right of appropriation and direct a receiver of the principal debtor's assets to use specific funds collected by the receiver for payment of the debt guaranteed by the guarantor.

3. Failure by such a receiver to afford a guarantor an opportunity for the exercise of any such right of appropriation does not absolve the latter from liability under his guarantee to the third party entitled to payment.

ANNOTATIONS: As to the first point a contrary decision was given in C. A. D. C. Tel-Aviv 40/42 (1941/42. T. A. 177, Hebrew. *Cf.* also C. A. D. C .Tel-Aviv 132/41 (1941/42, T. A. 208, Hebrew) and H. C. 55/42 (9, P. L. R. 349; 1942, S. C. J. 308).

FOR APPELLANTS: Eliash.

FOR RESPONDENT: Katzenstein.

J U D G M E N T.

This is an appeal from a judgment of the Magistrate's Court, Jerusalem, whereby the learned Magistrate dismissed the appellant com-

pany's claim for the sum of LP. 209.004 mils against the Respondent.

2. The facts of this case are fully set out in the learned Magistrate's judgment. Briefly they are as follows:—

The appellant company's claim was based upon three promissory notes, each for the sum of LP. 69.668 mils, signed by the Respondent, as guarantor *pour aval*, for a company known as "The Precision Co. Ltd.", of which the Respondent was, in fact, a director.

To that claim the Respondent raised the defence that the three promissory notes formed part of one continuous transaction between the appellant company and the Precision Co. Ltd. whereby the appellant company had lent sums of money to the Precision Co. Ltd. at usurious rates of interest. He invoked the provisions of the Usurious Loans Ordinance, 1934, and asked that the whole transaction between the Precision Co. Ltd. and the appellant company be reopened. The Magistrate acceded to this application. The evidence subsequently heard clearly established that there had been a series of financial transactions between the Precision Co. Ltd. and the appellant company, in the course of which, sums of money had been lent to the Precision Co. by the appellant company at compound and usurious rates of interest. The evidence did, however, further establish — and it is referred to and accepted by the learned Magistrate in his judgment — that at the close of the material period the debtor company owed to the appellant company an amount of LP. 1786.792 mils from which an amount of LP. 185.632 mils should be deducted as representing usurious interest. It therefore followed that the Precision Co. Ltd. was indebted to the appellant company in the amount of LP. 1601.160 mils.

On those facts the appellants company's counsel, before the learned Magistrate, pointed out that, the transaction having been reopened, the evidence clearly established that the Appellant was in fact entitled to payment of an amount far in excess than that claimed by the Appellant on the promissory notes, and he therefore asked for judgment on the promissory notes. The learned Magistrate held, however, that since the transactions between the parties exceeded the sum of LP. 250 the claim was outside his jurisdiction.

3. The matter appears to me to be by no means free from difficulty; nor indeed have I been referred by counsel for either party to any authority which might assist me in arriving at a decision.

I am, however, of the opinion that the claim was within the learned Magistrate's jurisdiction. The amount claimed on the three promissory notes totalled LP. 209.004 mils, — a claim within the jurisdiction of the Magistrate. The evidence clearly established that, taking the sum

total of the financial transactions between the parties, the Respondent was liable as a guarantor for at least that amount. The claim was based on promissory notes, complete and separate causes of action from the debt itself. As Dr. Eliash has pointed out, the trial Court did not loss its jurisdiction merely because it was bound to investigate the question of usurious interest.

4. It appears from the evidence that after the debtor company had got into financial difficulties, a receiver was appointed at the instance of the appellant company. The receiver was, in fact, Mr. Alexander Eliash, a director of the appellant company. It further appears that after he had been appointed a receiver a sum of LP. 2860 was paid to him by one Mr. Perle. It is quite clear from the evidence (page 16 of the typewritten translation of the record) that that payment over was in consideration of the sale of certain property which had been sold to Mr. Perle by the debtor company. Those monies Mr. Eliash appropriated for the payment of certain debts owed by the company. Dr. Katzenstein, for the Respondent, has argued at some length that the Respondent, as guarantor, should, at the time of the payment over of those monies to the Receiver, have been given an opportunity to exercise his right of appropriation and direct that those monies, or part of them, be appropriated for the payment of sums due to the appellant company, to satisfy this particular debt. He has further contended that since the Respondent, as guarantor, was deprived of his opportunity to exercise that right of appropriation, he is now in a position to say that he would have asked for those monies to be paid over to the appellant company in satisfaction of the secured debt due to them; that it was not paid over to the appellant company; and that he is therefore now absolved from his debt.

This argument seems to me altogether too far-fetched. Assuming for a moment, however, that the Respondent, as a guarantor should have been given an opportunity by the Receiver to direct that these moneys be appropriated in satisfaction of a particular debt, and that he was not given such an opportunity; I am quite unable to appreciate how a third party — in this case the appellant company — can be penalized for the Receiver's alleged misconduct, to the extent of the guarantor being entitled to say, "I would have directed that this money should have been paid to "X Company"; I was not given an opportunity so to direct; I am therefore absolved of my debt to X Company".

The proposition, as I have said, seems to me altogether too far-fetched.

5. In the result, this appeal must be allowed; the judgment of the learned Magistrate set aside; and judgment given for the appellant

company for the amount claimed — LP. 209.004 mils, — together with interest at the rate of 6% *per annum* as from the date of maturity of each of the said notes, until the date of payment.

The costs and advocate's fees as ordered by the Magistrate will be reversed — *i. e.* the Respondent to pay such costs and advocates fees to the Appellant.

The Respondent will further pay the costs of this appeal, together with the amount of LP. 10.— as advocate's fees.

Delivered this 25th day of April, 1947, in the presence of Mr. Podhorzer for the Appellant and Dr. Katzenstein for the Respondent.

MOTION No. 55/47.

IN THE DISTRICT COURT OF JERUSALEM.

BEFORE: His Honour A/Judge S. Daoud.

IN THE APPLICATION OF:—

Muhammad Abdalla Mutawi'. APPLICANT.

v.

Shamal Gharbi el-Kuds Bus Co. Ltd. RESPONDENTS.

Rectification of Company's Register of Members — Secs. 10, 26, 29, 31 & 35 *Companies Ord. — Action & Motion — Art.* 17 *Table "A" Third Sched. Comp. Ord. — Specific performance — Trustee — Transfer of shares — Delay — Action for damages.*

An application for the rectification of a Company's register of members, granted:—

1. Applications under sec. 35 Companies Ord. for the rectification of a company's register of members may be properly commenced by motion. An action is not necessary.

2. Only the Company whose register is to be amended need be cited as a respondent to such an application. Third parties affected by any order for rectification are thereupon free to take such action as they may think proper to safeguard their rights.

3. An application for rectification centres around the question of the validity of an act of the Company and with that no other parties are immediately concerned.

4. An application under sec. 35 of the Ord. will lie though its grant may in effect amount to an order granting specific performance of a contract to subscribe for shares in the company.

5. Such an application will lie at the instance of a subscriber to the

Memorandum and Articles of the Company who, following its registration, was never included by the Company in its register of members.

6. The fact that an action for damages may lie against the Company at the instance of such subscriber because of such non-inclusion in the register cannot debar him from his right to apply for rectification under sec. 35 of the Ord.

7. A person subscribing to a Company, upon its incorporation, becomes a member thereof entitled to be entered on its register.

8. If a person subscribed to a Company as a Trustee for others the Company may not merely for that reason upon its incorporation register such others as members instead of the Trustee.

9. Registration of such other persons as members instead of the original subscriber whether called substitution or transfer is in effect equivalent to registration of a transfer of the shares so subscribed for.

10. The "sufficient cause" referred to in sec. 35(1)(a) of the Ord. is not afforded by the fact that the original subscriber was intended as a trustee for his *Hamulah* (clan) and that other like trustees had agreed to registration of the shares subscribed for by them in the names of the beneficiaries of their trusts *i. e.* the members of their *Hamulahs*.

11. No legal owner of shares can be omitted from a Company's register of members without a lawful instrument of transfer of such shares.

12. An application under sec. 35 of the Ord. lodged 40 days after the Applicant had an opportunity of examining the Company's register of members cannot be deemed to have been filed after excessive delay.

ANNOTATIONS:

1. On the first point *cf.* Mo. Jm. 154/45 (1945, S. C. D. C. 221).

2. On the seventh point *cf.* Annotated Laws of Palestine, Vol. 6, p. 81.

3. *Cf.*, in connection with the eighth point, C. A. 342/43 (11, P. L. R. 360; 1944, A. L. R. 344).

4. See, on the ninth point, Mo. Jm. 69/47 (*ante*, p. 114).

5. On sec. 35, Companies Ord. generally *vide* Annotated Laws of Palestine, Vol. 6, pp. 94—97.

FOR APPLICANT: A. Nuseibeh.

FOR RESPONDENTS: Merguerian.

O R D E R.

The Applicant Muhammad Abdulla Mutawi of Beit Inan village is applying, under section 35 of the Companies Ordinance, for the rectification of the Register of Members of the respondent company, the North West villages Bus Co. Ltd. from which Register, he claims, his name has been wrongfully omitted.

The respondent company was formed by sixteen persons who subscribed their names to a memorandum of association each having a number of shares. The Applicant who was one of the sixteen sub-

scribers of the memorandum was allotted sixteen out of the 220 ten pound shares, the share capital of the company.

After the registration of this company a Register of Members was opened showing the names of the shareholders and the number of shares allotted to each of them. The Applicant's name did not appear in the Register and other names were substituted therefor.

The Applicant claims that the respondent company's action in omitting his name from the Register of Members is without legal justification and is asking for the rectification of the Register by inscribing his name therein with the shares he subscribed for.

Before dealing with the merits I must dispose of two preliminary objections raised by Respondent at the outset of these proceedings which I then said I will deal with in my final judgment. These are:—

(a) That in view of the complex nature of the claim the relief sought must be claimed by way of action and not by motion.

(b) That persons affected by this application should have been made a party in these proceedings.

As regards the first objection I am not of the opinion that if the proceedings were initiated by an action the matter would be better adjudicated upon. Nor am I of the opinion that this case can be properly described as one involving issues of a complex or difficult nature.

As regards the second objection the issue centres around the validity of the action of the company with which other parties are not immediately concerned. If the Applicant succeeds and the register is rectified then it will be open to those third parties to take legal proceedings to preserve their rights. Apart from this no application was made to me to join other parties. All what the Respondent said was that the application was bad because the persons in whose names the shares in question were transferred were not joined and asked for the application to be rejected on that ground. Again this is not a case where I feel disposed, out of my own accord, to exercise my discretion in joining in these proceedings persons other than the parties.

Turning to the merits of the application it is not disputed that the Applicant subscribed to the memorandum of the Company and under section 26(1) of the Companies Ordinance he has become a member of the Company. Having become a member his name and the number of shares held by him should, according to section 29 of the same Ordinance, be entered in the Register of Members.

Now section 31 of the Ordinance provides that the transfer of shares shall be effected in a manner provided by the articles of the Company. As no such articles were made the Regulations in Table A

of the Third Schedule to the Ordinance are made applicable by virtue of section 10 of the Ordinance.

Under section 31(3) of the Ordinance and Regulation 17 of the Schedule it is provided that it shall not be lawful for a company to register a transfer of shares unless a proper instrument of transfer has been delivered to the Company signed by the transferor and transferee in the prescribed form.

As I have stated the respondent's company does not deny that the Applicant was a subscriber to the memorandum of the company. Nor do they deny the legal position that a transfer of shares from one person to another requires the formal execution of an Instrument of transfer. The respondent company, however, has put up several defences.

(a) That the application is misconceived. That the relief sought is virtually a relief of specific performance and that section 35 never envisaged a remedy such as the one sought in this application. They say further that Applicant should have filed an action for damages.

(b) that the Applicant subscribed to the memorandum of the company as trustee for members of his *Hamuleh*; (he being the *Mukhtar* of that *Hamuleh*) and as such he was not the legal owner of the shares allotted to him in the memorandum.

(c) That by substituting, in the Register, the names of the beneficiaries for the name of the trustee the company was not effecting a transfer within the meaning of the law: Substitution, it is argued, is not the same thing as "transfer" and, therefore, no instrument of transfer is necessary.

(d) that in view of the arrrangement whereby, it is claimed, the subscribers to the memorandum shall hold the shares allotted to them as trustees and in view of the fact that all the heads of the other *Hamules*, who similarly subscribed to the memorandum have agreed and actually parted with their shares to the members of their respective *Hamules* there was the sufficient cause alluded to in section 35(1)(a) to justify the action of the company.

(e) That there was undue delay in making the application for rectification and that such application must be made promptly. That while the company was formed on 12th October, 1945, this application was not made until 5th February, 1947.

I will deal with these points in the order in which they have been set out above.

Regarding (a) I do not agree that the application is misconceived. It is one of numerous similar applications that are being brought be-

fore this Court. District Courts have a statutory power to rectify the Register on the grounds stated in the Companies Ordinance. Section 35 of that Ordinance confers jurisdiction on this Court in clear and unambiguous terms. It provides for the relief sought. Whether such relief, in the result, amounts to a specific performance or not is not important. The authorities quoted on this point by the Respondent relate to facts quite dissimilar to ours and they are not in point. Again I cannot see how can Applicant be expected to forego his right to ask for the rectification of the Register and to be required to file in lieu thereof an action for damages.

Defence (b): By subscribing to the memorandum of the company the Applicant has, under section 26(1) of the Companies Ordinance, become a member of the company whose name ought to have been entered in the Register of Members as required by section 29 with the shares he subscribed for.

The company cannot ignore these provisions and omit Applicant's name from the Register of Members on the ground that he is not the legal owner of the shares but a trustee for someone else. The company ought to have complied with the law leaving it to the aggrieved party to seek his remedy.

Defence (c): It is argued that there was no "transfer" of shares that what actually took place was "substitution" of names and "substitution" is not the same thing as "transfer" which requires the proper legal formalities of transfer. The point was argued at some length which argument is nothing but a mere verbiage.

Defence (d): I hold that the fact that heads of other *Hamulehs* who similarly subscribed to the memorandum have agreed to substitute other names as shareholders for their own does not amount to a sufficient cause for the company substituting Applicant's name for other names. The relation between Applicant and members of his *Hamuleh* may or may not be as that of the other persons. But even if it were this is not the "sufficient cause" intended in section 35(1)(a) of the Companies Ordinance.

Defence (e): It is clear from the list of allotment produced that the allotment of shares was carried out on the 25th December, 1946, when and only then can Applicant ascertain whether his name was or was not entered in the Register of Members. He filed this motion on 5th February, 1947, *i. e.* after a period of about 40 days. I think this is not an undue delay in taking proceeding. Such delay as there was may have been due to negotiations between Applicant and Respondent to settle the matter amicably.