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ANNOTATED

SUPREME COURT JUDGMENTS

1939

Vol. I

EDITED BY

ARNOLD M. APELBOM

LI. B., BARRISTER AT LAW, ADVOCATE

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CIVIL APPEAL No. 231/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :

Abdel Raouf Jaber Shahin, in his personal capacity and on behalf of the heirs of Mohammad Jaber Shahin. APPELLANT.

v.

Yehuda Blum. RESPONDENT.

Time to lodge appeal — Application for exemption from Court fees — Time within which to apply for extension — No extension of time when default consists in non-payment of fees — C. P. R. 324, 333.

In dismissing an appeal from a judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated the 20th June, 1938 :—

HELD : 1. An application for extension of time should be made within 30 days after the expiration of the period of appeal. *Vide* Rule 324. The application was, therefore, out of time.

2. The Court has no power to grant an extension of time, when the default consists in non-payment of the prescribed fees.

ANNOTATIONS : *Cf.* C. A. 75/38 (1938, 1 S. C. J. 264) and annotations. See also Misc. A. 63/38 (10.1.39) and annotations.

FOR APPELLANT : Elia.

FOR RESPONDENT : Wilner.

JUDGMENT:

In this case a preliminary objection has been taken, that the appeal was lodged out of time.

The judgment in the District Court was given in the presence of the parties on 20th June, 1938, and the appeal should have been filed not later than 20th July. On 18th July an application was filed by the Appellant with the Chief Registrar for exemption from Court fees, and on that day 28 days from the date of judgment had already

passed. The Chief Registrar heard the application on 12th September, 1938, refused it and his decision was served on the parties on 17th September. On 18th September, an application was made to the Supreme Court for exemption from fees, and that makes a total of 29 days. On 12th October, 1938, the Supreme Court refused the application for exemption.

On the 15th October the appeal fees were paid, that is after 32 days, and it would appear, therefore, that the appeal is out of time.

An application has been made to us now to extend the time for paying the fees of the appeal. This application should have been made within 30 days after the expiration of the period of appeal, for an extension of time see Rule 324 of the Civil Procedure Rules 1938. By Rule 333 the Court has no power to grant an extension of time, when the default consists in non-payment of the prescribed fees.

The appeal, being out of time, is therefore dismissed with costs and advocate's fees assessed at LP. 10.—.

Delivered this 5th day of January, 1939.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 63/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPLICATION OF :

1. Jacob Minzberg,
2. Tova Minzberg. — APPLICANTS.

v.

1. Moshe Kreizer,
2. Hava Kreizer. — RESPONDENTS.

Application for extension of time — Failure to raise money for fees not a reasonable excuse for delay.

In dismissing an application under Rule 324 of the Civil Procedure Rules, 1938, for an extension of time to lodge notice of appeal from a judgment of the Land Court of Haifa, in its appellate capacity, dated the 15th October, 1938 :—

HELD : 1. Inability to raise the necessary sum for payment of fees on appeal is not a reasonable excuse for delay.

2. There had been ample time for making the necessary arrangements for getting the money for the fees.

ANNOTATIONS :

1. *Vide* C. A. 231/38 (5.1.39).

2. *Vide* C. A. 23/38 (1918, 1 S. C. J. 146) and note 2 ; Misc. A. 48/38 (P. P. 16.ix.38) ; Misc. A. 56/38 (P. P. 16.xi.38).

FOR APPLICANTS : Krongold (by delegation).
FOR RESPONDENTS : Eisenberg (by delegation).

ORDER:

We need not trouble you Mr. Eisenberg.

We all agree that this application fails. In our opinion inability to raise the necessary sum for payment of fees on appeal is not a reasonable excuse for delay. We would also observe that the judgment of the District Court is dated the 14th October, 1938, and the order by the Presiding Judge granting the present Applicants leave to appeal is dated the 17th November. Therefore there was ample time for making the necessary arrangements for getting the money for the fees for lodging the appeal, and the contention that the ten days allowed for filing the appeal are insufficient does not count.

The application is therefore dismissed with costs assessed at LP. 10, to include advocate's fees.

Given this 10th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL No. 242/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

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

v.

Abdul Fattah Haj Daoud Jayousi. RESPONDENT.

Claim against Railways Administration — Damage to crops by sparks — Railway Ordinance, sec. 41 — Position of boundary — Fire starting beyond boundaries — Liability of Railway administration — Burden of proof where abnormal emission of sparks — Interest — Costs.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 31st October, 1938 :—

HELD : 1. The District Court had found that the fire started at a distance of twenty metres from the boundary line and held that this suggested an abnormal emission of sparks and cinders from the engine. This fact shifted the burden of proof upon Appellant to prove that reasonable precautions had been taken so as to discharge him from liability under sec. 41 of the Railway Ordinance.

2. The judgment of the District Court regarding interest must be disallowed as interest had not been claimed in the original statement of claim.

ANNOTATIONS : Previous proceedings in this case (C. A. 97/37) are reported in 1937, 1 S. C. J. 317 ; 1 Ct. L. R. 76, P. P. 15.vii.37.

1. For cases against the Railway Administration, *vide* C. A. 200/38 (1938, 2 S. C. J. 146) and cases set out in annotation 1 thereto.

For cases on the onus of proof see note to C. A. 198/38 (1938, 2 S. C. J. 154).

2. *Vide* C. A. 213/37 (3 Ct. L. R. 13).

FOR APPELLANT : Wa'ari.

RESPONDENT : In person.

JUDGMENT:

When this case first came on appeal before this Court, it was not clear from the record where the boundary of the Railway actually lay. It was essential to know this, because if the fire which destroyed the Respondent's crops had started at a point within eight metres from the boundary of the Railway, then under Sec. 41(1) of the Railway Ordinance, Cap. 125, the Appellant would not be liable for the damage. The case was therefore remitted to the District Court to make a finding as to the position of the boundary, and at the same time to hear the evidence of an additional witness whom the Appellant wished to call.

It is, I think, clear from the first judgment of this Court that the only point at issue, in our minds, was where the fire started in relation to the Railway boundary. The District Court reopened the case, and has found that there were boundary marks, and that the fire started at a distance of more than eight metres outside those marks. The Court also heard the evidence of the fireman of one of the locomotives of the Railways and found that his evidence was of no use as to the identity of the locomitive which caused the fire. With these findings we agree.

Section 41(2) of the Railways Ordinance provides that the railway administration shall not be liable for any damages done by sparks or cinders emitted from an engine used on the railway, unless it is

proved that the administration failed to take reasonable precaution to prevent such emission.

The District Court in its first judgment, which it confirmed when the case was heard the second time, found that the fire started at a distance of about twenty metres from the rail, and that it spread to the Respondent's crops which were some seventy metres from the railway. It was not disputed that the fire was caused by sparks or cinders emitted from an engine used on the railway. The District Court held that the fact that the fire started at a distance of twenty metres from the line suggested an abnormal emission of sparks and cinders from the engine, that the fact of such an emission from such a distance shifted the burden of proof unto the Appellant to prove that reasonable precautions were taken to prevent emission. In our opinion, the fact that sparks or cinders were emitted from the engine to such a distance raises a presumption that reasonable precoutions were not taken by the railway administration and that the District Court rightly held that the burden of proof was thereby shifted. That burden the Appellant in no way discharged and the District Court were right therefore in finding for the Respondent.

The appeal is dismissed as regards the sum of LP. 90.— but the judgment for interest which the District Court passed must be disallowed, as the Respondent did not claim it in the original statement of claim. The Respondent will have all the costs incurred by him and awarded in the District Court and he will have also LP. 20, (to include advocate's fees) to cover the costs of the two appeals to this Court in which in the result he has been successful.

Delivered this 10th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL No. 239/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khayat, JJ.

IN THE APPEAL OF :

Joseph Sayegh & Frères. APPELLANTS.

V.

D. N. Tadros, Nimmo & Co. RESPONDENTS.

Breach of contract — Damages for short delivery — Interpretation of contract — Evidence of damage.

In allowing an appeal from a judgment of the District Court of Jaffa, dated the 13th day of October, 1938, and in setting aside the part of the judgment against Respondent :—

HELD : 1. The demand for delivery made by Respondent was not reasonable. The short delivery before the end of January was not due to Appellants' fault.

2. There had been no evidence before the lower Court that the 922 cases were of inferior quality.

3. There had been no evidence before the lower Court that the action of Respondents had caused any damage to Appellants.

FOR APPELLANTS : Eliash.

FOR RESPONDENTS : Turtledove.

JUDGMENT:

In this case, in pursuance of an agreement in writing, the Appellants undertook to sell to the Respondents 10,000 cases of oranges. The oranges were to be delivered between the 20th of November, 1936, and the end of January, 1937. The place of delivery was specified to be vessels at Haifa according to the instructions for shipment given from time to time by the Respondents. Towards the end of December, 1936, the Respondents alleged that there had been an oral understanding that in the event of conditions making shipment at Haifa impracticable, the Appellants should make delivery on nominated vessels at Jaffa. This alleged oral undertaking was immediately denied by the Appellants. The Respondents then issued instructions to the Appellants to ship 500 cases of oranges on all steamers leaving Haifa in January for the ports of London or Glasgow. The Appelants considered this demand unreasonable but endeavoured to comply with it as far as possible, but the result was that at the end of January there was a deficiency in the delivery of 3,027 cases. The Respondents took action in the District Court of Jaffa claiming damages for breach of contract and claiming also a further sum as per Account Sales between the parties. The Appellants filed a defence denying that they had broken the contract in any way and alleging that it was the Respondents who had broken the contract, and at the same time they counterclaimed for damages. The District Court gave judgment in favour of the Respondents. It found that a breach of contract had been committed by the Appellants. No reasons were given for this finding nor were the terms of the contract analysed in the judgment in order to show which

party had been at fault. The counterclaim of the Appellants was dismissed and the Court below held that whatever claim the Respondents had in respect of Account Sales should have been made the subject of a separate action. In assessing the damages the Court below allowed not only for the 3,027 cases which had not been delivered by the end of January, but allowed also for 922 cases which had been delivered but which it was alleged were of inferior quality.

The Appellants have appealed against this decision and we have no doubt that the conclusion come to by the Court below was erroneous. The cases of oranges were to be delivered on board vessels at Haifa according to the instructions for shipment given from time to time by the purchasers. Clause 7 of the agreement, which fixes the damages, states that if the vendors fail to ship the full quantity of the fruit as notified on any one steamer as specified by the purchasers, the vendors shall be liable to damage as agreed on. From this we hold that it was the duty of the Respondents to instruct the Appellants of the name of each ship on which the cases were to be delivered, and that therefore it was the business of the Respondents to see that the requisite space on such ship was available for the shipment. We consider that it was an entirely unreasonable demand on the part of the Respondents to issue instructions to deliver 500 cases on board every vessel leaving Haifa during January for London or Glasgow. No such demand could have been contemplated by the parties when the agreement was entered into.

We are of opinion that whatever short delivery there was before the end of January was not due to the fault of the Appellants and it is obvious that the Respondents had no claim whatever to damages for non-delivery as regards the 922 cases already referred to. With regard to these cases there was no evidence before the Court below that the oranges contained in them were of inferior quality.

We find that there was no breach of contract on the part of the Appellants. In the Court below they produced no evidence to show that the action of the Respondents had caused them any damage. It is therefore unnecessary to interfere with that part of the judgment of the Court below which dismissed the counterclaim. Our order is that the appeal be allowed with costs here and in the Court below. The judgment of the Court below in favour of the Respondents will be set aside and we certify a fee of LP. 15 for attendance at the hearing.

Delivered this 12th day of January, 1939.

Senior Puisne Judge.

CRIMINAL APPEAL No. 89/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. APPELLANT.

v.

Mr. Rousseau, Ticket Cashier of the "Aviv" Taxi Service, Jerusalem. RESPONDENT.

Charge under Road Transport (Routes and Tariffs) (Amendment) Rules, 1937, 11A — No penalty imposed by rules — Road Transport Ordinance, sec. 18 — "Ordinance" under the Interpretation Ordinance — "This Ordinance" more restrictive than "Ordinance" — Interpretation Ordinance, sec. 7(b) — Criminal Code Ordinance, sec. 382.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 8th day of July, 1938, whereby Respondent was acquitted of the charge brought against him under Rule 11A of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1937, (Rule 6 thereof) in charging less than the fares laid down thereunder :—

HELD : 1. The rule under which Respondent was charged provided no penalty. Section 18 of the constating Ordinance provided a penalty for offences against "this Ordinance" and, notwithstanding the definition of "Ordinance" in the Interpretation Ordinance, which applies when the word is used in a general sense, the expression "this Ordinance" particularly having regard to its context, did not include rules made under the ordinance.

2. Nor was any penalty imposed by Section 7(b) of the Interpretation Ordinance.

3. *Quaere* whether Section 382 of the Criminal Code Ordinance is applicable.

ANNOTATIONS : In previous proceedings before the Supreme Court (CR. A. 69/38, 1938, 2 S. C. J. 43) the reasonableness of the bye law was argued.

1. On the interpretation of the word "ordinance", *vide* H. C. 74/36 (P. P. 9,30.viii.36) ; C. A. 4/37 (1937, 1 S. C. J. 228 ; P. P. 3.vi.37, 2 Ct. L. R. 146) ; CR. A. 121/37 (P. P. 24.xi.37 ; Ha. 23.xii.37, 2 Ct. L. R. 163).

FOR APPELLANT : Salant.

FOR RESPONDENT : Levitzky.

JUDGMENT:

This is an appeal by the Attorney-General from a decision of the District Court, Jerusalem, discharging the Respondent who was alleged

to have committed an offence against Rule 11A of the Road Transport (Routes and Tariffs) Rules, 1934, which is set out in Rule 6 of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1937, the Court holding that because there was no penalty imposed there was no offence.

The rule in question was made by the High Commissioner by virtue of the powers conferred upon him by the Road Transport Ordinance, Cap. 128, and it does not expressly provide a penalty for its breach.

It is argued that the provisions of Section 18 of the Ordinance cover this case. That section provides — "Any person who (a) fails to comply with any of the provisions of this Ordinance... is guilty of an offence, and is liable to imprisonment for one month... "And it is urged by Mr. Salant for the Appellant — that "this Ordinance", by virtue of the provisions of the Interpretation Ordinance, Cap. 69, includes rules made thereunder.

That Ordinance defines "Ordinance" as meaning :—

> "...any enactment by the legislature of Palestine, and includes orders by the High Commissioner in Council, orders of the High Commissioner, and regulations or orders made under an Ordinance; and an Ordinance may be cited for all purposes by its short title, if any".

and by it "regulations" includes rules and bye laws.

When the word "Ordinance" is used in a general sense this wide meaning clearly applies, but we do not think the expression "this Ordinance" in the relevant section of the Road Transport Ordinance includes rules made under the Ordinance, particularly having regard to its context. We do not think, therefore, that any penalty is expressly imposed by the Road Transport Ordinance.

In the District Court an argument was based on Section 7(b) of the Interpretation Ordinance, but it is clear that no penalty was imposed under that section.

It may be that the provisions of Section 382 of the Criminal Code Ordinance are applicable to this case, but as to that we express no opinion.

The appeal is dismissed. No order as to costs.

Delivered this 12th day of January, 1939.

Chief Justice.

CIVIL APPEAL No. 237/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Max Guttman. APPELLANT.

v.

Max Wallach. RESPONDENT.

Arbitration — Award made in favour of third party — Severability — Costs.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 30th October, 1938, and in setting aside the second part of the award :—

HELD : The award was divisible, the second part thereof being a nullity.

ANNOTATIONS : As to awards being made in favour of strangers, *vide Digest,* vol. II, p. 475, Nos. 1189 *sqq*. As to severability of awards, *vide ibid.*, p. 513, Nos. 1520 *sqq*.

FOR APPELLANT : Nussbaum.

FOR RESPONDENT : No appearance — served.

JUDGMENT:

In this case the Appellant complained that he had been slandered by the Respondent. The matter was referred to arbitrators, one selected by each party, and a third selected by these two arbitrators. The result of the arbitration was that the arbitrators unanimously found that whatever words had been used by the Respondent concerning the Appelant were justified. The arbitrators, however, went beyond this finding and ordered the Appellant to pay LP. 10 to the Jewish National Fund. The Appelant then sought to have the award set aside before the District Court.

The District Court mistakenly came to the conclusion that the Jewish National Fund should have been a party to the application and consequently dismissed it. The Appellant obtained leave to appeal to this Court, and the only order we propose to make is that that part of the award which orders LP. 10 to be paid to the Jewish National Fund should be set aside. The award is clearly divisible ; in fact only the first part of it has been legally made, the second part being a nullity ; and no argument has been addressed to us making it necessary to interfere with the first part.

The appeal is therefore allowed. The second part of the award is set aside, but in the circumstances we make no order as to costs.

Delivered this 16th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 247/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Syndicate Eretz Israel Lebinian Ltd. (The Palestine Building Syndicate Ltd.). APPELLANT.

v.

Fishel Breitman. RESPONDENT.

Arbitration — Consecutive awards — Second award a nullity — S. C. J. O. 64 r. 14 — Court takes cognizance of nullity even though application to set aside is out of time — Correction of clerical mistakes — Arbitration Ordinance, sec. 8 — Must be on award itself — Discretion of Court to call arbitrator as a witness — Or to remit award

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 31st October, 1938 :—

HELD : 1. The second award was in law a nullity and, the moment the Court had cognizance of how the second award was made, it must hold that it was not an award at all, and no application to set it aside was required.

2. Sec. 8 of the Arbitration Ordinance does not empower an arbitrator to cancel his first award and to issue a second award. Any clerical error or accidental slip or omission should have been corrected or remedied on the award itself.

3. The lower Court had a discretion as to whether to call the arbitrator as a witness or whether to remit the second award.

ANNOTATIONS :

1. An arbitrator cannot alter his award once it is made (*Digest*, Vol. II, p. 530, No. 1664), such as by altering amounts (No. 1665), being *functus officio* (No. 1667, and C. A. 208/38 — 1938, 2 S. C. J. 106 and annotations). The second award is a nullity (*Digest* Vol. II, p. 530, No. 1667).

See *per contra* H. C. 65/38 (1938, 2 S. C. J. 189) wherein it was held that the amendment of a judgment by an ecclesiastical court did not amount to a new judgment.

"Where an award is void, & nothing can be done upon it without suit, the Court will not interfere to set it aside..." (*Digest*, Vol. II, p. 553, No. 1846).

2. *Op. cit.* p. 521 *sqq.* sec. 13, sub-secs. 1 & 2.

3. On non-interference with discretion of Court, *vide* H. C. 58/38 (1938, 2 S. C. J. 82), and annotations, H. C. 68/38 (*ibid.* 219).

FOR APPELLANT : Krongold.
FOR RESPONDENT : Amikam.

JUDGMENT:

We need not trouble you Mr. Amikam.

This appeal arises out of the following facts. There was a dispute between the parties as to the cost of the building of a house and the dispute was referred to a single arbitrator. The arbitrator made his award on the 9th of November, 1937. After making his award, something occured which made him think that he had not awarded a sufficient amount to one of the parties, and he issued a second award on the 21st of November, 1937. We have no doubt that in law this second award was a mere nullity and entirely ineffective. The present appeal arises out of an application to set it aside, and it was contended by Mr. Krongold for the Appellant, that this application was out of time and he referred the Court to Order 64 Rule 14 of the Rules of the Supreme Court Judicature. On the view we take the moment the Court has cognizance of how the award of the 21st of November came to be made, it must hold that it was not an award at all, and no application should be necessary to have it set aside.

It was argued by Mr. Krongold that in publishing the award of the 21st November, the arbitrator was merely exercising his powers under Section 8 of the Arbitration Ordinance which empowers him to correct any clerical error or any accidental slip or omission in the award. These powers are quite clearly given to arbitrators, but if they exercise them it must be clear to the Court that they did exercise them by amending the award in whatever way it needs amendment. The Section does not empower an arbitrator to cancel his first award and to issue a second award. In the present case the award published on the 9th of November, 1937, was the arbitrator's award and if he wished to correct a clerical error or to remedy any accidental slip or omission, that should have been on the award itself.

A further ground urged by Mr. Krongold was that the arbitrator should have been called as a witness by the Court below and another ground was that the Court below should have remitted the award to

the arbitrators. It was entirely within the discretion of the Court below as to whether the arbitrator should have been called as witness, and we think that on the facts no useful purpose could have been served by so calling him. If the Court below could have made any order as to remitting this ineffective document to the arbitrator, that also was a matter for its discretion, and no appeal can succeed on a ground of this kind.

For these reasons we think that the judgment of the Court below was correct. The appeal is dismissed, the Respondent will have the costs and we certify a fee of LP. 15.— for attendance at the hearing.

Delivered this 18th day of January, 1939.

Senior Puisne Judge.

CRIMINAL APPEAL No. 85/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. APPELLANT.

v.

Ya'acov Ben Yehiel Melnik (Kimhi) RESPONDENT.

Bigamy — Criminal Code Ordinance, sec. 181 *— Criminal Procedure (Trial Upon Information) Ordinance, sec.* 28(5)(*a*) *— Jurisdiction in matters of personal status — P. O. in C. Arts.* 47, 51, 53 *— Chief Rabbis' opinion.*

In dismissing an appeal from the judgment of the District Court, sitting at Tel-Aviv, dated 6th October, 1938, whereby the Respondent was acquitted from a charge of bigamy contrary to Section 181 of the Criminal Code Ordinance, 1936:—

HELD : There was a doubt as to whether, according to Jewish law, the second marriage of the Respondent was valid. It being a criminal prosecution, the Respondent was entitled to the benefit of that doubt.

ANNOTATIONS : The judgment of the Magistrate (CR. M. T. A. 15803/37) was reported in Ha. 3.ii.38. The judgment of the District Court (CR. D. C. T. A. 71/38) was reported in P. P. 14.x.38).

FOR APPELLANT : Salant, J. G. A.

FOR RESPONDENT : No appearance — served.

JUDGMENT:

This is an appeal by the Attorney-General from a decision of the District Court, Tel-Aviv, whereby the Respondent was acquitted of a charge of bigamy contrary to section 181 of the Criminal Code Ordinance, which provides —

> "Any person who, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years. Such felony is termed bigamy ;
>
> Provided that it is a good defence to a charge brought under this section to prove :
>
> (a) that the former marriage has been declared void by a court of competent jurisdiction or by a competent ecclesiastical authority ; or
>
> (b) the continuous absence of the former husband or wife, as the case may be, at the time of the subsequent marriage, for the space of seven years then last past without knowledge or information that such former husband or wife was alive within that period ; or
>
> (c) that the law governing the personal status of the husband both at the date of the first and at the date of the subsequent marriage allowed him to have more than one wife".

The Accused had previously been discharged by the Magistrate, and he was committed by the Attorney-General by virtue of his powers under section 28(5)(a) of the Criminal Procedure (Trial Upon Information) Ordinance.

Article 51 of the Order-in-Council gives an exclusive jurisdiction in matters of personal status — which include marriage and divorce — in certain circumstances to Religious Courts, and Article 53 amplifies this and gives to the Rabbinical Courts of the Jewish Community an exclusive jurisdiction in marriage and divorce to members of their community other than foreigners.

The Respondent is an *Ashkenazi* Jew and is not a foreigner.

Article 47 of the Order-in-Council provides :—

> "Where in any civil or criminal cause brought before the Civil Court a question of personal status incidentally arises, the determination of which is necessary for the purposes of the cause, the Civil Court may determine the question, and may to that end take the opinion, by such means as may seem most convenient, of a competent jurist having knowledge of the personal law applicable."

Although evidence as to the law applicable was taken before the District Court we thought fit to take the opinion of Chief Rabbi

Herzog in this matter. While strongly deprecating the result, he expressed the view that according to the law applicable the alleged bigamous marriage was not void by reason of its having taken place during the life of another wife.

Before the District Court the Chief Rabbi of Tel-Aviv and Jaffa expressed the opinion —

> "In accordance with the excommunication of Rabbi Gershon it is prohibited for a married Jewish man, whose marriage was not dissolved by divorce or otherwise, to marry another woman."
> "In this case I would not hesitate to allow the woman to remarry without a divorce."

but he explained this and stated later :—

> "In this case I would hesitate to allow the woman to remarry without a divorce."

We have had a long and interesting argument from Mr. Salant as to the precise effect of Jewish Law. So far, however, as this Court is concerned, there is obviously a doubt in the matter, and this being a criminal prosecution the Respondent is entitled to the benefit of that doubt, and the appeal is dismissed.

Delivered this 19th day of January, 1939.

Chief Justice.

Frumkin, J.: The Accused is a Palestinian Jew. His case is governed by Jewish Law. The position under Jewish Law is clearly stated in the comprehensive decision of the learned Investigating Magistrate. The crucial point is whether or not the marriage in respect of which the Accused was brought to trial is void for the reason of its taking place during the life of his previous undivorced wives. There was evidence before the District Court that the marriage was not so void. This evidence is borne out by the opinion of the learned Chief Rabbi Herzog. It is clear, therefore, that there can be no conviction under section 181 of the Criminal Code Ordinance and the appeal must fail.

It is much to be regretted to my mind that the Accused should, because of a virtual technicality, escape the hands of the law for his deplorable act, which involves the welfare of several women, and is looked upon with great abhorrence by the entire community, including that of which he happens to be a member.

It is true that polygamy was recognised by Biblical Law, but for nearly a thousand years the vast majority of Jews namely the *Ashkenasim* who comprise over 90% of the entire Jewish people all over the globe, adopted the monogamous system. Among that portion of

Jewry originating from Spain and Portugal, generally known as *Sephardim,* who have not submitted to the ban imposed by *Rabbenu* Gershon, styled the *Lumière* of the *Diaspora* (A. D. 960—1040), it is only some culturally very backward communities, in Asia and Africa, like those of Kurdistan and Yemen, who still adhere to polygamy. But even members of those communities, when they come to Palestine and assimilate in the Renaissance of the Jewish People, gradually give up the practice of polygamy, although it is not prohibited to them. Again, *Sephardic* Jews in European countries and America long ago adopted monogamy because bigamy is considered an offence by the law of their respective countries.

I think, therefore, I am justified in stating that bigamy is considered a sin and looked upon unfavourably by most of the Jews, and it will certainly meet the demands of the Jewish Community in this country if it is treated as an offence also as regards Jews, by making it punishable not only when the marriage is void by reason of its taking place during the lifetime of a wife, but also when, as in the present case, the marriage although not void, is prohibited by the national law of the community of which the party is a member.

The remedy for this lies with the Legislature.

Delivered this 19th day of January, 1939.

Puisne Judge.

CIVIL APPEAL No. 240/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :

Pro-Palestine Bank Ltd. APPELLANT.

v.

Registrar of Companies, RESPONDENT.

and

"Egged" Co-operative Society Ltd. OPPOSER & RESPONDENT.

Alteration of memorandum of association — Petition to sanction alteration — Alteration of main object — Cloak to evade provisions of Banking Ordinance — Discretion — Companies Ordinance, sec. 20.

Appeal from a judgment of the District Court of Haifa, dated the 31st October, 1938, dismissed.

On the 18th July, 1938, the Appellant Company applied to the District Court, Haifa, under Section 20(1) of the Companies Ordinance for the confirmation of a special resolution altering the provisions of the Company's Memorandum of Association, passed in accordance with the Banking Ordinance, 1936—1937.

On the 21st September, 1938, opposition to the petition was filed on behalf of the Opposer and Respondent who were the holders of a number of shares in the Company under Section 20(3) of the said Ordinance. Since the filing of the petition the Petitioner had changed its name from Pro-Palestine Bank, Ltd., to "Kupah Lema'an Eretz-Yisrael (*i. e.*, from "Bank" to "Fund").

Although no affidavits were filed either by the Applicants or Opposer the District Court gave the Applicants the benefit of any doubts which might have arisen as to the facts of the case and held that everything that had been alleged an behalf of the Applicants would be assumed as correct.

The District Court held that the confirmation of the proposed alteration would necessitate the formal abandonment of one of the real objects of the Appellant Company, namely that of carrying on the ordinary and normal business of banking. It was admitted in the Lower Court that, by retaining as its main objects several of the enterprises and businesses more commonly associated with ordinary banking, while constituting itself into a Loan Fund, the Applicant hoped to carry on its former business activities as far as possible and to evade the provisions of the Banking (Amendment) Ordinance, 1937. While expressing no opinion as to whether the contemplated changes were within the scope of Section 20(1)(c) of the Companies Ordinance, the District Court held (following *In re* Scientific Poultry Breeders Association Ltd.), that it had a discretion in this matter supposing the alteration did fall within the ambit of para. (c). But in view of the fact that the alterations would defeat the real object and purpose of the Memorandum of Association and might act as a cloak for defeating the express intention of the legislature as set out in Section 4 of the Banking Ordinance, 1937, the Appellants' petition would not be acceded to.

HELD : There was no reason to interfere with the discretion of the District Court which had not been unreasonably excercised.

ANNOTATIONS : As to the discretion of the District Court, *vide Digest*, Vol. IX, pp. 653 *sqq.*, Nos 4329 *sqq.* ; as to non interference with the discretion of the District Court, *vide* note 3 to C. A. 247/38 (*ante*, p. 13).

FOR APPELLANT : Sharf.

RESPONDENT : In person.

FOR OPPOSER AND RESPONDENT : Shapiro.

JUDGMENT.

We need not trouble either of the Respondents.

In this case the District Court of Haifa has given a long and very comprehensive and able judgment and we entirely agree with it, and see no reason to interfere with it. There is nothing in the arguments

to induce us to think that the District Court has unreasonably used the discretion vested in it in the matter.

The appeal is therefore dismissed with costs to include advocate's fees assessed at LP. 15 to the second Respondent, the first Respondent having waived his claim to costs.

Given this 5th day of January, 1939.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 14/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

Mohammed, Omar and Mustafa, sons of Haj Khalil Mohammed Taha, in their capacity as heirs of their late father. APPLICANTS.

v.

Ali Hassan Skeirek. RESPONDENT.

Privy Council — Application for leave to appeal — No point of public importance.

In refusing an application for leave to appeal to the Privy Council from a judgment of the Court of Appeal, dated November 22, 1938 :—

HELD : No point of great general or public importance was involved.

ANNOTATIONS : The judgment in respect of which application for leave to appeal was made (C. A. 232/38) is reported in 1938, 2 S. C. J. 163.

FOR APPELLANTS : Koussa.

FOR RESPONDENT : Cattan.

ORDER :

The Court, after hearing Mr. E. Koussa, counsel for Applicants, and not calling upon Mr. Cattan, counsel for Respondent, holds that no point of great general or public importance is involved and orders that the application be refused with costs LP. 10 to include advocate's fees.

Delivered this 11th day of January, 1939.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 15/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

Yeshua Hankin. APPLICANT.

v.

1. Zaki Rashid Shanti,
2. Muhammad Amin Rashid Ash Shanti,
3. Farid Rashid Ash Shanti,
4. 'Abd Ar Rauf Rashid Ash Shanti,
5. Ribhi Rashid Ash Shanti,
6. Fauzi Rashid Ash Shanti,
7. Zarifa Rashid Ash Shanti,
8. Fatma Mahmut Al Hassan. RESPONDENTS.

Privy Council — Application for leave to appeal — Cannot be granted if judgment not final — P. C. L. A. 4/35.

In refusing an application for conditional have to appeal to the Privy Council from a judgment of the Court of Appeal, dated the 24th November, 1938 :—

HELD : Conditional leave could not be granted as the judgment was not final, since it remitted the case for a new trial before the Land Settlement Officer.

FOLLOWED : P. I. C. A. & an. *v.* Infiat (V. S. C.) P. C. L. A. 4/35 (2 P. L. R. 423, C. of J. 1934—6, 688, P. P. 2.xii.35).

ANNOTATIONS : The judgment of the Court of Appeal (C. A. 215/38) is reported in 1938, 2 S. C. J. 177.

FOR APPLICANT : Eliash.

FOR RESPONDENTS : Cattan, Germanus.

JUDGMENT:

In this case conditional leave must be refused since the judgment of this Court from which it is desired to obtain leave to appeal is not a final judgment since it remitted the case for a new trial before the Settlement Officer. See Palestine Jewish Commission (*sic*) Association and another *v.* Village Settlement Committee Arab Infiat. P. C. L. A. 4/35 (P. L. R. II, 423), where exactly the same point arose.

Mr. Eliash for the Applicant has stated that he is afraid that if and

when the case should again come up, and if he should have to ask for leave to appeal, he may not be able to raise the points of law before the Privy Council which he may desire to do. So far as we can see, that fear is not justified — it seems to us that he will be able to raise any point he may wish which has already been taken before this Court, or which may be taken if there should be another appeal, since the first judgment of this Court was not a final judgment, as it did not finally determine the rights of the parties.

The application for leave to appeal is therefore refused with LP. 10.— costs (to include advocate's fees) to the Respondents.

Delivered this 11th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL No. 248/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Philip Mayer & Co. APPELLANTS.

v.

Max Levin. RESPONDENT.

Bankruptcy — Receiving order — Loan to partnership secured by mortgage — Prima facie no ground for allegation of usurious interest — Failure to comply with agreement confirmed as Order of Court — Bankruptcy notice — Application to set aside — Time within which to take proceedings — Extension of time — Effect of collateral security.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 5th day of December, 1938 :—

HELD : 1. The effect of the note made by the Relieving President, District Court, was to extend the period within which proceedings might be taken and the receiving order had, therefore, been made in time. 2. The receiving order could be made notwithstanding the existence of a collateral security. The Lower Court had heard evidence as to the value of the security and it could not be suggested that the Court had exercised its discretion wrongly.

ANNOTATIONS : *Vide* C. A. 240/38 (*ante* p. 18) and note.

FOR APPELLANTS : Gavison.

FOR RESPONDENT : Shapira.

JUDGMENT:

This is an appeal from a decision of the District Court, Haifa, whereby a Receiving Order was made against the Appellants.

In August, 1935, an agreement was entered into between the Appellants, a registered partnership, and Mr. Max Levin, — the petitioning creditor and the Respondent before us.

By the agreement Mr. Levin was to advance to the partnership a sum of six thousand pounds in order that he might have an interest in certain land transactions, and the agreement provided for the re-payment of this sum together with interest and profits.

The firm also gave Mr. Levin a mortgage on certain properties as collateral security.

This was an agreement between business men for the purpose of a business transaction, which, at that time, there was every reason to suppose would prove profitable. There was no suggestion of a money-lender lending money to a necessitous borrower. I mention this, as in the course of the proceedings a suggestion was made that usurious interest had been charged. *Prima facie,* I see no ground for that suggestion.

The firm failed to comply with its obligations under the agreement, and proceedings were instituted in the District Court, Haifa. The parties reached an agreement, and on the 16th of February, 1937, that agreement was made an Order of Court. By it the firm agreed to re-pay the amount due, with interest. There was then no suggestion of usurious interest.

The Appellants failed to comply with the judgment, and a bankruptcy notice was issued on the 16th of March, 1938. An application was made to set aside this notice, which was dismissed, but it is said by the Appellants that no extension of time was granted by the Court for complying with the notice, and that the three months, within which proceedings should be taken, had expired before the Receiving Order was made.

The matter came before the Court on the 29th of April, when the Appellants undertook to make certain payments, and the learned Relieving President noted on the record as follows :—

> "Failing any one of these conditions this application to set aside the bankruptcy notice will be dismissed and the notice confirmed. Adjourned to a date to be fixed by Registrar after 5.6.38, with liberty to Respondent to apply for earlier hearing."

We are of opinion that the effect of this was to extend the period.

The Appellants failed to comply with the conditions and the Receiving Order was made.

The Appellants also contended before us that by reason of the collateral security which had been given it was inequitable that the Receiving Order should be made. The rights of a secured creditor are clearly set out in the Bankruptcy Ordinance. In so far as the Court should take into consideration the question of security when making a Receiving Order, it is clear that in this case the Court heard evidence, which was conflicting, as to the value of the security, and we do not think it can be suggested that the Court exercised its discretion wrongly.

The appeal is dismissed with costs which we assess at an inclusive figure of LP. 15.

Delivered this 17th day of January, 1939.

Chief Justice.

CIVIL APPEAL No. 246/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Maria Theresa Serra du Cassano, in her own Capacity and on behalf of the Estate of the late Alfred Sursock, her husband, and as guardian of her daughter Ivonne Sursock. APPELLANT.

v.

1. Georges Neggiar, on behalf of his late mother Labibeh, daughter of Mussah Sursock, wife of the late Antoine Neggiar,
2. Gabriel F. Debbas on behalf of the Estate of his late mother Rosa, daughter of Mussah Sursock, wife of Fadallah Debbas. RESPONDENTS.

Order allowing evidence to be led after conclusion of case — Appeal from interlocutory order.

In allowing an appeal from an order of the Land Court of Haifa, dated the 24th May, 1938, and in remitting the case to the Lower Court :—

HELD : After closing their cases and after final submissions by the advocates, fresh evidence should not have been allowed.

ANNOTATIONS : *Vide* C. A. 139/37 (2 Ct. L. R. 97) and *cf.* CR. A. 1/38 (1938, 1 S. C. J. 54) and annotations ; C. A. 93/38 (*ibid.* 294) ; C. A. 127/38 (*ibid.* 384).

FOR APPELLANT : Weinshall.

FOR RESPONDENTS : No appearance — Service at office of advocate held good.

JUDGMENT.

This is an appeal from the Land Court of Haifa. In the hearing in the Court below both parties closed their cases and final submissions were made by the advocates on each side. The Court below then made an order that the Respondents should be allowed to call evidence to prove a particular issue. The Appellant has appealed against that order on the ground that the case was completed and that all that remained was for the Court to deliver judgment in accordance with the evidence and the arguments of the advocates.

We are in agreement with the contention of the Appellant. Whatever issue had to be proved by the Respondents it should have been proved by them when they had the opportunity when leading their evidences. We think that the Court below erred in giving the Respondents a further opportunity of filling in something that had been omitted.

The appeal is therefore allowed, the interlocutory order of the Court below is set aside, and the action is remitted to the Court below to deal with it according to the law.

The Appellant will have the costs and we certify a fee of LP. 15.— for the attendance at the hearing.

Delivered this 18th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 243/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge and Copland, J.

IN THE APPEAL OF :

Samuel Wolf Aaronson. APPELLANT.

v.

1. The Palestine Import & Export Co. Ltd. in liquidation,
2. Mr. Mendel Chaikin in his capacity as liquidator of the said Company,
3. Mr. Benjamin Louis Deichovsky,
4. Mrs. Hanna Chaikin,
5. Mr. Zodek Chaikin,
6. Mrs. Bertha Lea Deichovsky,
7. Mrs. Bertha Rosenstein,
8. Dr. Bernard Homa,
9. Mr. Jack Homa. RESPONDENTS.

Winding up — Application for change of liquidator and for winding up under supervision — Order for additional liquidator — Weight and consideration of evidence — Liquidator not disqualified for having been consulted in professional capacity.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 3rd day of November, 1938 :—

HELD : 1. The Lower Court, while refusing to consider allegations which did not form part of the evidence, had taken the evidence into account and its findings would not be interfered with.

2. The fact that the liquidator appointed by the Lower Court had been consulted in his capacity as an advocate, by Appellant, did not necessitate his removal.

3. The Lower Court was acting in the exercise of its discretion when it refused to remove the liquidators.

FOR APPELLANT : Goitein.

FOR RESPONDENTS 1—4 : Levy.

FOR RESPONDENTS 5—9 : Amdur.

JUDGMENT.

This appeal arises out of an application made by the Appellant to the District Court sitting at Tel-Aviv, in which application he asked

that the liquidators of the Palestine Import & Export Co. Ltd. should be removed and that new liquidators should be appointed, and that the liquidation should be carried out under the supervision of the Court. At the close of the proceedings the District Court made an Order that the liquidation should be carried out under the supervision of the Court and that an additional liquidator named Horowitz should be appointed, but it refused to make an Order removing the liquidators.

The Appellant has appealed against this Order and asks this Court to overrule the Order of the District Court refusing to remove the liquidators and to appoint some person other than Horowitz as an additional liquidator. Mr. Goitein, who argued the appeal, took as a first point that in the Court below there had been numerous allegations tending to show that the existing liquidators were not fit to be liquidators of the Company, and his argument was devoted principally to the fact that the Court below when giving judgment did not take into consideration these allegations. He was able to point out a passage in the judgment which ran as follows :—

> "With regard to all the various allegations made during the proceedings by the present Applicant against the liquidator and the advocates, we have not in making our Order been in any way influenced by these allegations and we have not taken them into account."

Both Mr. Levy and Mr. Amdur in resisting the appeal referred us to another passage in the judgment in which the Court said that it had taken into consideration all the evidence which it had heard and all the exhibits. In reply to that Mr. Goitein said that the Court had only said this when deciding that a supervision order should be made but had not considered all the evidence when deciding that the liquidators should not be removed.

Our view with regard to this is that when the Court below referred to the various allegations made by the Appellant it was referring principally to allegations which did not form part of the evidence, and that if such allegations were a matter of evidence it found that they had not been proved. The litigation in connection with this Company has admittedly risen out of family disputes and we think that the Court below by ordering that the liquidation should be carried out under the supervision of the Court and by appointing an additional liquidator has dealt adequately with the situation and has provided against the occurrence of any irregularities.

With regard to the objection to the appointment of Horowitz as a liquidator, the only objection is that at some time or another he was

consulted by the Appellant in his capacity as an advocate, and we do not think that on this ground it is necessary to alter the order of the Court below by appointing any person in his place.

Finally we think that the Court below was acting in the exercise of its discretion when it refused to remove the liquidators and we have not been persuaded that this part of the order should be interfered with. The result will be therefore that the appeal is dismissed and the order of the Court below is affirmed. The Respondents will have the costs of this appeal and we certify a hearing fee of LP. 10 in respect of each advocate.

Delivered this 24th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 245/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

Gan Shmuel Kvuzat Poalim
Lehityashvut Shitufit Ltd. — APPELLANTS.

v.

Local Council, Hedera. — RESPONDENTS.

Admission of indebtedness — Liability of Local Council for debts of Village Committee — Date of commencement of functions of Local Council.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 20th day of October, 1938, and in remitting the case to the lower Court with directions :—

HELD : 1. Whatever else the letter sent by the Village Committee of Hedera to the Appellants, it constituted a clear admission of indebtedness.

2. Whether the Respondents were liable depended upon the date when they assumed their functions as a Local Council.

FOR APPELLANTS : Bar Shira.

FOR RESPONDENTS : Miss Frumkin and Izenberg.

JUDGMENT:

Whatever else the letter of the 4th February, 1936, sent by the Village Committee of Hedera to the Appellants, may be, whether it is or is not a transfer of indebtedness under the *Mejelle,* or an assignment of a debt under the Debt (Assignment) Ordinance, Cap. 47, it is not necessary for us to decide, because we are unanimously of opinion that it is a clear admission of indebtedness by the Village Committee to the Appellants. The words in the letter — "We have credited the account of Gan Shmuel (the Appellants) in the above sum" — *i. e.* the amount of LP. 86.700, make this clear beyond any doubt.

Whether the Respondents, the Local Council of Hedera, are responsible for this liability of the Village Committee of Hedera depends upon the date when the Local Council commenced to function, and nobody can tell us what that date is. If the admission of the 4th February, 1936, was given after the date when the Local Council assumed office, then clearly the latter will not be liable. If it were given before the Local Council assumed office, then the debt would be a liability of the Village Committee, and the admission of indebtedness would have been validly given, and the Respondents would be liable thereon.

The appeal must be allowed and judgment of the District Court set aside. The case is remitted to the District Court to ascertain the above date and to give a fresh judgment, in view of the rulings given by this Court on this appeal. Costs to abide the result of the fresh judgment.

Delivered this 30th day of January, 1939.

British Puisne Judge.

HIGH COURT No. 2/39.

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

BEFORE : The Chief Justice and Frumkin, J.

IN THE PETITION OF :

Milian Daniel. — PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Hans Epstein. — RESPONDENTS.

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Execution proceedings — Exchange — Currency — Points which should be raised before the Court and not in execution — Judgment in Execution Office must be satisfied in Palestinian currency — Levy v. Ottoman Bank.

In refusing an application for an Order to issue to the first Respondent to show cause why his Order, dated 19.12.38, should not be set aside and execution proceedings in file No. 3822/38, should not be discontinued.

HELD : 1. If the Petitioner thought that the basis of calculation of the amount claimed was incorrect, that was a matter which he should have sought to have decided in Court.

2. (Distinguishing C. A. 163/32). If a judgment passes to the Execution Office it must be satisfied in Palestinian currency. Even if the Petitioner was right in his contention that the judgment could be regarded as being in terms of German bank notes, he should have paid in their equivalent value in Palestinian currency.

DISTINGUISHED : Levy *v.* Ottoman Bank, C. A. 163/32 (2 P. L. R. 83, P. P. 17.v.34, C. of J. 1049).

ANNOTATIONS : See the following cases on currency : C. A. 72/22 (C. of J. 644) ; C. A. 129/22 (C. of J. 170) ; L. A. 64/24 (C. of J. 646) ; C. A. 98/25 (P. L. R. 84, C. of J. 650) ; P. C. 121/26 (P. L. R. 275, C. of J. 652) ; P .C. 18/30 (P. L. R. 617, C. of J. 1021) ; C. A. 25/30 (C. of J. 657) ; C. A. 39/32 (C. of J. 658, P. P. 27.vi.33) ; C. A. 78/32 (C. of J. 1048, P. P. 22.ii.33) ; H. C. 78/32 (C. of J. 663, P. P. 24.i.33) ; C. A. 85/32 (C. of J. 664, P. P. 14.vii.33) ; C. A. 163/32 (*supra*) ; C. A. 70, 90/36 (1937, 1 S. C. J. 127 ; C. of J. 1934—6, 307) ; C. A. 72/36 (1937, 1 S. C. J. 156, 1 Ct. L. R. 59, C. of J. 1934—6, 558) ; C. A. 79/36 (1937, 1 S. C. J. 164, 1 Ct. L. R. 55).

FOR PETITIONER : Landau.

FOR RESPONDENTS : No. 1 not present — served.
No. 2 Amdur.

ORDER.

This is a return to a Rule *Nisi* issued by this Court directing the Chief Execution Officer of Jerusalem to show cause why certain execution proceedings should not be discontinued.

The matter arises from proceedings taken before the Chief Magistrate in respect of rights under a contract made abroad between the parties.

The Plaintiff asked in his claim for "2259 Reichs Marks equivalent to LP. 188.250" which was roughly at the rate of 12 Reichs Marks per pound. There is further a reference in the statement of claim to "LP. 40 or the equivalent of 480 RMs" which had been paid to the Plaintiff. Here again the pound is valued in the neighbourhood of 12 Reichs Marks.

It is quite clear that the Plaintiff (2nd Respondent) based his claim on Reichs Marks, the equivalent value of which in Palestine was about 12 Marks per one pound. It seems to me, that if the Defendant thought that the basis of calculation of the amount claimed was incorrect, that was a matter which he should have sought to have decided by the Chief Magistrate, or which he should have raised in the later stages of the case when it went to successive appeals.

The Chief Magistrate, in making his decree, said :

> "I accordingly give a decree against Defendants jointly and severally for 2055.052 Reichs Marks, or the equivalent value thereof in Palestine pounds at the ordinary rate of exchange at the date of payment."

When he was asked to explain his decree, the Chief Magistrate stated:

> "The rate of conversion is the ordinary rate accepted by bankers and in the ordinary way of commerce based on the usual Foreign Exchange quotations. Unless there is a considerable fluctuation in the meantime, it may be presumed that the actual rate of exchange will be somewhere in the neighbourhood of 12 Marks to the pound."

Prima facie there is no doubt that if a judgment passes to the Execution Office it must be satisfied in Palestinian currency. It is true that there is a Palestinian authority, *i. e.*, the case of Solomon Enoch Levy *v.* The Ottoman Bank, reported in Vol. II, Palestine Law Reports, page 83, to the effect that the debt could be discharged in francs or their equivalent in Palestinian currency, but no question seems to have arisen in the execution thereof. The Defendant sought to discharge his liability by presenting a bundle of German bank notes to the Execution Office. Even if he was right in his contention that the judgment could be regarded as being in terms of German bank notes (not free Reichsmarks) he should have paid in their equivalent value in Palestinian currency.

As I have said, I think it is clear that the Plaintiff claimed Reichs Marks the equivalent value of which was in the neighbourhood of 12 RMs to the pound, and I think that the judgment was given therefor and should be executed in Palestinian currency on that basis.

The Order is therefore discharged, with costs assessed at an inclusive sum of LP. 5.

Delivered this 30th day of January, 1939.

Chief Justice.

CRIMINAL APPEAL No. 1/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

William Edward Thomas Wood. APPELLANT.

v.

The Attorney General. RESPONDENT.

Attempted manslaughter — Firing at an escaping prisoner — Firing at a man lying down — "Manslaughter" in English and in Palestine law — C. C. O. secs. 212, 30(1), 29(b) — Identification — Weight of Evidence.

In dismissing by a majority (Copland, J. *dissentiente*) an appeal from the judgment of the Court of Criminal Assize sitting at Jerusalem, dated the 11th day of January, 1939, whereby the Appellant was convicted of the offence of an attempt to commit manslaughter contrary to Sections 212 and 30 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, and in reducing the sentence : —

HELD : 1. The term "manslaughter" has a different meaning in the Criminal Code of this country from that which it has in English law. It is possible to convict, in Palestine, for attempted manslaughter.
2. (Copland, J. *dissentiente*). The findings of fact of the Trial Court would not be interfered with.
Referred to in dissenting judgment : R. *v.* John Reuben Parker, 6 C. A. R. 285.

ANNOTATIONS : *Vide* Mansell *v.* A. G., CR. A. 5/39 (*post*).

FOR APPELLANT : Goitein.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

Greene, J. : This is an appeal from the judgment of the Court of Criminal Assize, dated 11th January, 1939, whereby the Appellant was convicted of an attempt to commit manslaughter and sentenced to imprisonment for three years.

The only grounds of appeal we are concerned with in this appeal are — (1) The offence of attempted manslaughter is one unknown to the law and (2) There was no evidence upon which the Appellant could have been found to have fired a shot while the deceased was on the ground.

The other grounds of appeal have been dealt with in Mansell's appeal decided on Monday the 23rd.

Now as regards (1) the offence for which the Appellant has been convicted of is clearly provided for in Section 212 and 30(1) and 29(b) of the Criminal Code and this ground of appeal fails.

The other ground of appeal — that there was no evidence upon which the Appellant could have been found to have fired a shot while the deceased was on the ground.

Mr. Goitein argues that even if Appellant did fire a shot, which he denies, he did not hit the deceased as deceased was lying on his back when the alleged shot was fired and the medical evidence shows that all the wounds on the deceased were in the back and that the firing of this shot did not constitute the offence with which the Appellant has been convicted of. In my opinion this argument cannot stand. One has to consider what was the intention of the accused when he fired the shot. Did he intend to frighten deceased, or to keep people away or to hit him ? The accused denies firing the shot which the Trial Court found as a fact he did fire, and in the absence of any explanation as to the contrary intention the presumption must be that he fired with the intention of hitting, and with regard to intention it is immaterial whether he hit or missed the deceased.

There is conflicting evidence as to how many shots were fired. The accused himself admits to five. A number of witnesses state that after the first firing one of the police went forward and shot at the deceased man again while he was lying on the ground.

The Trial Court believed these witnesses and found as a fact that the policeman who fired at close range at the man while he was lying on the ground already hit, was Wood the Appellant and that in so doing there could be no question of firing to prevent his escape. This is a finding of fact and with this finding this Court will not interfere.

The appeal fails and conviction is confirmed.

Delivered this 26th day of January, 1939.

British Puisne Judge.

Frumkin, J. : In addition to the shots fired at the prisoner as soon as his escape was noticed, a further shot was fired when the prisoner was already lying on the ground wounded. As regards this last shot the finding of the Assize Court is as follows :—

> "...We hold that Wood fired at close range at the man while he was lying on the ground already hit".

and further :—

> "We cannot be reasonably certain if Wood fired a fatal shot or even hit the deceased, but we are satisfied that to fire at so close a range, at a wounded man lying on the ground, constitutes an attempt to commit manslaughter."

The first ground of appeal of this finding, namely, that the offence of attempted manslaughter is unknown to the law, can be disposed of easily, as by the clear provision of section 29(b) of the Criminal Code Ordinance, attempted manslaughter is a punishable offence.

The objections taken by the defence as regards the merits of the finding were twofold, firstly that Wood did not actually fire the shot, and secondly, that if he did, he did so without any intention of hitting the prisoner.

The first objection must certainly fail. We are faced with a finding of fact supported by direct evidence believed by the Court of Trial, and I can see no reason for interfering with this finding. It is true that some witnesses connected the accused with overalls which he was, according to their testimony, wearing at that time, while there was also conflicting evidence to the effect that he was wearing not overalls but grey flannels.

The Court of Trial need not have accepted either version and could have given the accused the benefit of the doubt, but it was nevertheless entitled, upon weighing the evidence to believe, as it did, the version of one set of witnesses and act upon it. The Court of Appeal cannot go behind such a finding.

As regards the second objection, for a moment it seemed to me that there might be some force in Mr. Goitein's argument. Let me put it this way : intention is clearly an unavoidable element in an attempt to commit any offence, the attempt is really the effort made to carry out the intention — that is why an attempt is considered an offence notwithstanding the failure of the person contemplating it to commit the actual offence contemplated ; he is punished for his evil intention so that where there is no such intention there can be no attempt amounting to an offence. In the present case, Mr. Goitein argues that there was no such intention as there could be no such intention : Wood is a man trained in the use of fire-arms, presumably also in aiming, he was standing near the prisoner who was lying on the ground, he was shooting at close range, he could not possibly have missed had he intended to hit.

I am afraid I cannot accept this theory in the present case if only for one reason, namely, that there is no explanation why this shot

was ever fired at all. Wood who went into the witness box denied having fired this shot, but, as I have said, we are bound to hold that he did fire it. For what purpose? Certainly not to prevent escape. It was not fired in the air where one might presume it was fired to keep people away, so that the only possible explanation is that he did intend to hit the prisoner. All sorts of reasons might account for his failure — his hand might have trembled, the wounded man lying on the ground might have moved. The Court of Trial was therefore right in coming to the conclusion that by firing this shot the accused committed the offence of attempted manslaughter and the conviction must stand.

As regards the sentence, it was imposed on the basis of the accused having firing two shots. In respect of the shot which might have hit the prisoner and might even have caused the fatal wound he was discharged by this Court. The sentence of three years' imprisonment must therefore be reduced. A period of 18 months' imprisonment will to my mind be an adequate sentence, the period to run from the date of arrest.

Delivered this 26th day of January, 1939.

Puisne Judge.

Copland, J.: In this appeal by William Edward Thomas Wood, the Court has already stated that in its opinion the Appellant together with the other Police Constables who were with him, were justified in the circumstances then present in firing at an escaping prisoner. It is now necessary to deal with the second incident in which this Appellant is concerned, namely, the conviction for attempted manslaughter by firing on the prisoner who was lying on the ground.

Several minor points taken by Mr. Goitein on his behalf have already been dealt with in Mansell's appeal, but there is one further point which I will dispose of now, and that is the proposition by the defence that there is no such offence known to the law as attempted manslaughter. Manslaughter is defined in the Criminal Code Section 212 as causing death by an unlawful act or omission. Attempted manslaughter is thus attempting to cause death by an unlawful act or omission, and this is obviously an offence. I think that some confusion has arisen owing to the fact that the term "manslaughter" has a different meaning in the Criminal Code of this country from that which it has in English law, since in Palestine the term manslaughter covers forms of killing which in England would rightly be charged and dealt with as murder.

To turn now to the main case. It is to my mind a case of very great difficulty, because there was evidence before the Assize Court, upon which, if properly directed, it could act. Wood's guilt depends upon two factors — (1) was a shot fired when the prisoner was lying on the ground and (2) if so — did Wood fire it? As to the first, there was a considerable amount of evidence given by a number of witnesses that the prisoner Mohammad Haddad was fired at when lying wounded. It is true that the manner in which this evidence was obtained — one might almost say canvassed for — detracts somewhat from its value, and it is also true that other evidence given by some of these same witnesses, as to certain facts stated by them which would have proved that the prisoner was deliberately murdered, was rejected by the Court of Trial on the ground that it would be unsafe to draw any inferences therefrom, in view of a conflict in the various tales told, a circumstance which again would throw some suspicion on their veracity in other parts of their evidence. Lieut. Clerke also, a trained observer, states that there were not more than five shots — in a burst of fire — with no pause before the last one. It is also clear that the deceased could not have been hit by such a shot, because there is practically uncontradicted evidence that when the alleged shot was fired, he was lying on his back, and from the medical evidence it is proved that all the shots which hit him were fired from behind him, and it is difficult to believe that if a shot were fired at the man, lying on the ground at a range of one metre that it would have missed him. There was, however, evidence upon which the Court of Trial even with these considerations in mind could come to the conclusion that a shot was fired at the deceased when lying wounded on the ground even if it did not hit him, and that finding cannot be interfered with.

As to the second factor, namely, did the Appellant fire the shot, that depends entirely upon whether he was at the time wearing brown overalls or not, and here there is a very grave conflict of evidence Lieut. Clerke of the 1st Bn. Beds and Herts Reg. who was on the scene within two minutes of the firing, states that the Appellant whom he knew previously, was dressed in a grey police shirt and grey flannel trousers. Police Sgt. Brown who was in charge of the "G" Squad, to which the Appellant belonged says that Wood that morning was dressed in a blue shirt and grey flannels. Police Constables Ainsworth, Entwistle and Wilkes, all of whom saw Wood, either immediately before or immediately after the shooting, say the same — that he was wearing grey flannel trousers. No question arises as to

the credibility of these witnesses, three of them were called by the prosecution, and the Court of Trial never mentioned their credibility or the reverse.

On the other hand P. Sgt. Collings stated that Wood was wearing brown overalls, though in cross-examination he qualified this by adding "to the best of my recollection". Other witnesses say that the driver was wearing overalls or brown overalls. The vital importance of the question of what clothes the Appellant was wearing will be realised when it is remembered that no one witness actually identified Wood personally as the man who shot. They all variously described the person who fired as the "one wearing red clothes, the constable in mechanic's overalls, the man wearing working clothes, or the driver". One prosecution witness said that the "man repairing the machine was the one dressed in brown, not the man who fired". Other witnesses could not describe the dress of the man who fired.

There is no proof, not even suggestion that Wood was ever issued with overalls, nor that he had ever worn them on any other occasion — he denies both things.

The Trial Court dealt with this conflict of evidence on the subject of the way in which Wood was dressed in these words :—

> "Before dealing with it there is a point to be considered — this is — how was he (Wood) dressed at material times ? As to this there is a conflict ; he himself says he was wearing grey flannel trousers ; this is supported, *inter alia,* by Lt. Clerke and Sgt. Brown. On the other hand Sgt. Collings says he was dressed in brown overalls. Sadik says the driver was dressed in "red" ; Abu Khadder says — driver ... wearing deep brown overalls. Reinhardt — the driver dressed in red-brown overall trousers. Upon this we hold that he was not wearing grey flannel trousers, but some kind of overalls."

This part of the judgment is a model of brevity, but hardly, if I may say so with respect, of adequacy. As to this conflicting evidence the Court below seems to have thought that it was bound to make a finding one way or the other. It gave no reasons for this finding. It clearly did not base its finding on this point on the demeanour of the witnesses. The proper direction in such a case is not — "which set of witnesses do we believe ?" — but — "on this conflicting evidence have we a reasonable doubt as to whether Wood was wearing overalls ?". If the Court below had directed itself in this way, and there is not the slightest indication that it did, it is in my view highly probable, that such a direction would have resulted in the acquittal of the Appellant on the ground that it was very doubtful whether Wood was wearing overalls, or, to put it at its lowest, I cannot say that the

Court below must inevitably and certainly have come to the same conclusion. In my view, there was a misdirection, or a want of direction, on a vital matter, which may have resulted in a miscarriage of justice, and I am therefore compelled to come to the conclusion that the trial was unsatisfactory. There is in my opinion a grave doubt in this case as to the accuracy of the judgment, and the Appellant should have the benefit of that doubt.

As to the power of a Court of Criminal Appeal to take such a view, this is clearly laid down in Rex *v.* John Reuben Parker, 6 C. A. R. 285, where a conviction was quashed where in the opinion of the Court, the jury had not given Defendant the benefit of a grave doubt. In that case, curiously enough, the identification of the Defendant depended upon the fact whether he was at the time of the crime wearing blue overalls.

I would therefore allow this appeal and quash the conviction.

British Puisne Judge.

The result is that the appeal of William Edward Thomas Wood against conviction is dismissed by majority. In the circumstances the sentence is reduced to one of 18 months' imprisonment with special treatment. The period of imprisonment to run from the date of arrest.

Delivered this 26th day of January, 1939.

British Puisne Judge.

CRIMINAL APPEAL No. 5/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

John Mansell. APPELLANT.

v.

The Attorney General. RESPONDENT.

Attempt to do grievous harm — Firing at escaping prisoner — Jurisdiction of Assize Court — Power of Court to convict for smaller offence — Criminal Procedure (Trial Upon Information) Ordinance, sec. 52 — Identification — Post Mortem — Circumstances in which police are entitled to use firearms — Dangerous state of insecurity in Jaffa.

In allowing an appeal from the judgment of the Court of Criminal Assize, sitting at Jerusalem, dated the 11th day of January, 1939, whereby the Appellant

was convicted of the offence of an attempt to do grievous harm contrary to Section 238 & 30 of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment, and in discharging the Appellant :—

HELD : 1. Although the Assize Court would have had no jurisdiction to try a person who was charged before it with causing grievous harm the Appellant was triable before the Assize Court as he was charged with the offence of premeditated murder and Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance gives power to any Court to convict of any lesser offence the necessary ingredients to prove which are covered by the facts proved before it.

2. A police constable is entitled to use all reasonable means to prevent the escape of a criminal who has been charged with a serious offence. If firing is the only means or reasonable means available, then he is entitled to fire. Circumstances must be such that if this last resort of firing be not taken then there is a reasonable probability of the prisoner escaping.

3. In view of all the circumstances, Appellant had been justified in firing low at the escaping prisoner while he was escaping.

ANNOTATIONS : See also CR. A. 1/39 (*ante*) and CR. A. 7/39 (*post*).

FOR APPELLANT : Goitein.
FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

The two Appellants in this case were convicted by the Assize Court sitting at Jerusalem. The Appellant Wood was convicted of attempted manslaughter and sentenced to 3 years' imprisonment. The Appellant Mansell was sentenced to one year's imprisonment for an attempt to inflict grievous harm and has appealed by leave.

The two Appellants together with two other police constables were detailed by their superior officer to bring a prisoner, one Mohammad Haddad, from Tel-Aviv to Jaffa in order to be charged with the offence of carrying fire-arms and ammunition. The prisoner was duly charged in Jaffa and the same four men were then ordered to take him back to the lock-up in Tel-Aviv in which he was detained for reasons of public security. On the way back the car in which they were travelling broke down and by some means or other the prisoner got out of the car unobserved and had proceeded for a distance of about 20 metres before the fact was discovered by any of the four police officers in charge. When his absence was discovered, from the evidence which was accepted by the Trial Court, a warning shot was fired by Constable Mansell, and when the prisoner did not stop moving towards the German Colony

in Jaffa, Mansell and the other men with him opened fire once each — two with pistols and two with rifles which they were carrying. The man fell to the ground — I am leaving for the moment consideration as to whether the second shot of the firing took place later after the man had fallen to the ground and I am dealing now purely with the first incident. The man was later put on a truck and taken to the Jaffa Municipal Hospital where he eventually died as a result of the wounds which he received in his attempt to escape.

It is, I think, implicit from the evidence of the Assize Court that the prisoner was attempting to escape. No question therefore arises on that.

I am dealing now first with the appeal of constable Mansell. Mr. Goitein has taken a considerable number of points, but his principal point in defence on the appeal is that Mansell was justified in firing, in the circumstances, to prevent the escape of this prisoner.

I will just deal with the other points. First is the question of jurisdiction — that the Assize Court had no jurisdiction to convict a prisoner of causing grievous harm. I agree that the Assize Court would have had no jurisdiction to try a person who was charged before it with such an offence. Of course the jurisdiction is confined, with certain exceptions as to circumstances which do not arise here, to try persons charged with offences that are punishable by death. The Appellants were properly triable before the Assize Court because the Appellants were charged with the offence of premeditated murder, but section 52 of the Trial Upon Information Ordinance undoubtedly gives power to any Court, including an Assize Court to convict of any lesser offence, the necessary ingredients to prove which are covered by the facts proved before them.

Another point is that the Appellant was wrongly convicted of an attempt to cause grievous harm, because it was impossible to say that the shot fired by him had caused any grievous hurt to the man who was killed, and because one of the wounds was merely a bruise on an ankle. There is nothing in that point and I do not think I am doing Mr. Goitein an injustice in saying that I do not think that he thought there was.

With regard to the question of the non-identification of the deceased we think that argument fails because there is no doubt on the evidence that the body of the man who had been shot by these four men was the body which was delivered by the police to the hospital and was the body on which the *post mortem* was performed by the doctor, and in respect of which the doctor gave his evidence before the Assize

Court. Neither is there any real prejudice to the Appellant by reason of the fact that the coroner may or may not have been negligent in his duties. As I said the main point on which the appeal is to be decided is the question whether the police were justified in firing at the escaping prisoner, bearing in mind all the circumstances which surrounded them.

Now, in spite of the somewhat depreciatory remarks that we have heard made with regard to the amendment of the Police Manual, we think that on the whole it gives a very fair *resumé* of the circumstances in which a police officer is entitled to use fire-arms. It may not have been put in strict legal language but it certainly does give them a guide, and a more or less correct guide, as to what they can do or should not do. There is practically no English Law on the subject, and what there is, as has been pointed out by Mr. Goitein, is derived from comments of learned judicial personalities who have been dead for some hundreds of years. There are no modern examples to be found from the Law Reports of England. Putting it generally a police constable is entitled to use all reasonable means to prevent the escape of a prisoner who has been charged with a serious offence such as was the case here, and if firing is the only means or reasonable means available to him, then he is entitled to fire — but the means must be reasonable — circumstances must be such that if this last resort of firing be not taken then there is a reasonable probability of the prisoner escaping. That I think is a fair summary of the law derived from the text books.

From this it is apparent that every case has got to be considered on its own merits, with regard to the surrounding circumstances. Now the Appellant, and the others who were charged with him, stated in justification of what they did in firing — that the man Haddad had got a start before his escape was observed, that it would have been dangerous in the circumstances to follow him, and if he could have gone a further distance of some 30—40 metres it would have taken him to a quarter which would have brought him to the Mustaqim Quarter,and in all probability he would have got away.

The Assize Court arrived at the following conclusion : They stated that fully to understand these arguments it was necessary to bear in mind that at the time in question a section of the population in Jaffa was in revolt — the administration was seriously handicapped and the Government Forces were inadequate to deal with the situation ; that, if I may say so, seems to me to be a somewhat mild view of the situation in Jaffa. They based their opinion on the evidence given by Mr.

Broadhurst, who was second in command of the police in Jaffa, and that of Sgt. Brown who was also stationed in that place. The evidence of those two police officers is very illuminating ; it comes to show that in Jaffa from May 1st to October 24th (when the prisoner was shot) eight members of the Police Force had been shot and killed in daylight in public places, and there had been six attempted murders of police-men, all within the course of that comparatively short time, while in two months, September and October, and it must be remembered that this offence into which the Assize Court was inquiring took place on October 24th, there had been 24 murders in Jaffa and 31 cases of attempted murder — a record which I think it would be hard to equal in any town which pretends to call itself civilised. In addition, shortly before October 24th, two prisoners had escaped from police custody, one being the accomplice or suspected accomplice of this Haddad, and had not been caught. Both these police officers say that it was not safe for policemen to run after an escaping Arab in the Salameh Road, and it would have been dangerous if they would have done so.

Presumably the Appellant together with those who were with him must have known of the state of affairs in Jaffa. They knew that two prisoners had already escaped from police custody — they were in this dangerous neighbourhood, and the course of action, that of firing at the prisoner, which they had to take had to be determined in a second or two, rightly or wrongly. They had no time within which to think how to decide what their rights or liabilities were, they had, if I may say so, no time such as we sitting in this Court have in deciding the matter, to adjourn if necessary and write reserved judgments. They had to act on the spur of the moment bearing in mind also, as they were undoubtedly entitled to do, that it was not part of their duty to run unnecessary risks to themselves. By the nature of their calling policemen are always liable to some risks, but they had to decide, in this case in a moment of time, what they would do, knowing that they might be called upon later to justify their actions.

Justification as to firing is entirely a question of law to be considered on the circumstances surrounding each case, taking into account inferences to be drawn from facts and the facts proved.

Taking all the circumstances of the case into consideration, bearing in mind the appalling conditions prevailing in Jaffa at this time, bearing in mind the escape already of two prisoners from police custody, we are satisfied that the Appellant Mansell, and in this respect the

other Police Constables who were with him are also placed in the same position, was in the circumstances justified in firing low at the man, in view of the likelihood or probability of the prisoner escaping, and that if he had escaped, the possibility of re-arresting him would have been problematical.

We do not want it to be taken that the police are always justified in firing, and we do not want to have anything said in this judgment to be taken as laying that down. In the circumstances of this case we think that they were justified, and that it was the only reasonable means open to them considering all the circumstances to prevent the prisoner's escape. It was unfortunate that the prisoner was killed, but for that the Appellants cannot be blamed.

We have dealt so far solely with the first shots fired. We have left out considering the further shot that Wood is alleged to have fired, when the prisoner was lying wounded on the ground.

In these circumstances we allow the appeal of John Mansell and quash the conviction, and order him to be discharged.

With regard to the appeal of Wood we propose to take a little further time to consider our judgment in that case. We are able to do this because the two appeals are separate appeals. What we have stated on the first appeal only applies to Wood in respect of the shot fired by him together with the other men.

We therefore propose to give judgment in the case of Wood on Thursday next at 11 o'clock.

Delivered this 23rd day of January, 1939.

British Puisne Judge.

CRIMINAL APPEAL No.7/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

1. Philip Crossley,
2. George Archy Crossley. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Attempt to do grievous harm — Justification — Carelessness in allowing prisoner to escape — CR. A. 5/39.

In allowing an appeal from the judgment of the Court of Criminal Assize sitting at Jerusalem, in Criminal Assize Case No. 28/38, dated 11.1.39, whereby the Appellants were convicted of attempting to cause grievous bodily harm contrary to Sections 238 and 30 of the Criminal Code Ordinance, 1936, and bound over own recognizance of LP. 50.— each to be of good behaviour for one year, and quashing the convictions :—

HELD : (Following CR. A. 5/39) Appellants were justified in firing, particularly in view of the fact that Mansell was in charge and that they followed his example.

ANNOTATIONS : *Vide* CR. A. 5/39 (*ante*).

FOR APPELLANTS : Goitein.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT.

In our opinion these two present Appellants are in the same position as Mansell was, in fact in perhaps an even more favourable position, because Mansell was in charge, and if he fired they merely followed the example of their leader. In this case, as I said previously in Mansell's case, justification must be dealt with on its own merits and the surrounding circumstances. We therefore see no reason to differentiate between these Appellants, and following our judgment in Mansell's case the appeals of both Crossleys are allowed, and their conviction quashed.

There is only one remark which I would like to make and that is that we all of us agree that it was a piece of very great carelessness to have allowed the prisoner get out of the car and proceed some distance before he was observed, particulalry in view of the fact that he was charged with one of the most serious offences known to the law.

Delivered this 26th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL No. 244/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

1. Heinz Graetz,
2. Elsie Graetz. APPELLANTS.

v.

Hanna Weiller. RESPONDENT.

Claim for money deposited — Payment of interest not inconsistent with bailment — Finding regarding privity of contract — Corroboration.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 3rd November, 1938 :—

HELD : 1. The fact that interest was paid on the amount of the deposit did not disprove Respondent's allegation of bailment.

2. The Lower Court, having given judgment against Appellants, must be deemed to have disbelieved the contention that there was no privity of contract.

3. The evidence of Respondent had been corroborated.

ANNOTATIONS : On bailment see also C. A. 220/37 (1938, 1 S. C. J., 9).

FOR APPELLANTS : Kouriansky, Ussishkin.

FOR RESPONDENT : Levanon.

JUDGMENT.

We need not trouble you, Mr. Levanon.

In this case the Respondent took action in the District Court of Jerusalem against the Appellants claiming that she had deposited with the female Appellant a sum of LP. 900 to be delivered on her behalf to the male Appellant. She alleged that LP. 600 of this amount had been returned to her and she claimed the balance of LP. 300. The answer of the Appellants was a complete denial. They said they received no monies from the Respondent and that they never had any relations of any kind with her. Evidence on behalf of both parties was heard by the District Court.

The District Court came to the conclusion that the Respondent had made out her case and judgment was given in her favour for the amount claimed. The Appellants have appealed and Mr. Ussishkin on their behalf has urged that the judgment of the District Court is erroneous on three grounds.

The first ground was that the Respondent claimed this amount as a deposit, that it could not have been a deposit because when she received back the LP. 600 she received another LP. 100 as interest. Mr. Ussishkin says that the fact that interest was paid shows that the amount was not a deposit. We see no reason why the bailee of a deposit should not pay interest on it, if he wishes to do so, and we do not think that the fact that interest was paid disproves the truth of the Respondent's story.

The second ground of appeal was that there was no finding by the Court below on the issue of privity of contract between the parties. The fact that the Court below after hearing evidence gave judgment in favour of the Respondent shows that the Court below did not believe the contention of the Appellants that there had never been any relations between the parties.

The third ground of appeal is that the statement of the Respondent was uncorroborated and that, therefore, she could not succeed in the action. We are satisfied that the evidence of the witness called from the Anglo Palestine Bank was sufficient to corroborate the statement of the Respondent. None of the grounds of appeal are successful.

The appeal will therefore be dismissed with costs and a certified fee of LP. 15 for attendance at the hearing.

Delivered this 12th day of January, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 237/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. — APPELLANT.

v.

The heirs of Prince Mohammed Selim, son of the late Sultan Abdul Hamid II of Turkey. — RESPONDENTS.

Claim to share in land registered in name of Government by heirs of predecessor — Disagreement of judges — Burden of proof — Rules under the Land Courts Ordinance — Rule 2 not ultra vires or incon-

sistent with subsequent legislation — Land Courts Ordinance — Establishment of Courts Order — Interpretation of statutes — Constitution of Land Court — "May", Power coupled with a duty — Inconsistent arguments used by party in Court of Trial and on appeal — That rule inconvenient or leads to delay immaterial — Revised Edition of the Laws — Statute Law Revision Ordinance, sec. 2 — Revised Edition of the Laws Ordinance, sec. 8 — Interpretation Ordinance, "Ordinance" — Invalidity of judgment not given in compliance with rule — Onus of proof where Defendant is registered owner.

In allowing an appeal from a judgment of the Land Court of Jaffa, dated the 18th November, 1937, and in remitting the case with directions for a new trial :—

HELD : 1. Rule 2(2) of the Land Courts Rules was made to meet the case of a disagreement between the Judges when the Land Court consists of two judges. Under the Estahlishment of Courts Order a Land Court may still be constituted of two judges and the necessity for the rule remains.

2. No legislation must be taken to be impliedly repealed unless it is manifestly inconsistent with some subsequent legislation.

3. Rule 2 is not so inconsistent : The Establishment of Courts Order prescribes for the original constitution of Land Courts and there is nothing inconsistent in providing, as the rule does, for a different class of judicial officers in case of a disagreement.

4. The word "may' in the rule is used to express the conferring of a power but it is a case of a power coupled with a duty and it is intended that the power is to be used in case of a disagreement.

5. The interpretation of the rule is a question of law and the Attorney General was entitled, whatever position he took in the Court below, to argue that the rule was not discretionary.

6. The fact that a rule is inconvenient and leads to delay cannot be held to abrogate the law.

7. By the combined effect of the Interpretation Ordinance and Section 8 of the Revised Edition of the Laws Ordinance, the fact that the rule appears in the Revised Edition of the Laws defeats the plea that the rule is no longer law.

8. In view of the fact that the rule was valid and of full effect it was the duty of the Land Court to comply with the procedure laid down in the rule and failure to do so meant that the judgment given was not in accordance with law.

9. In view of the fact that Appellants were registered owners, the onus of proof should have been placed on Respondent.

ANNOTATIONS : The proceedings in the Land Court (L. 35/35) are reported in P. P. 26—28.x ; 1—2.xi.37 (*dissenting judgments*) and in P. P. 30.xi.37 and 2.xii.37 (*final judgment for plaintiff*).

It was held in C. A. 18/38 (1938, 1 S. C. J. 209), following L. A. 33/36 (1937, 1 S. C. J. 351; 1 Ct. L. R. 27, P. P. 22.x.37) that the Land Court Rules

are still applicable to Land Courts and in the event of a disagreement between two judges, a third judge should be called in to decide the issue. This principle seems also to be implied in C. A. 217/37 (3 Ct. L. R. 60).

This does not apply to cases in the District Court: C. A. 74/28 and C. A. 37/31 (*ubi infra*), C. A. 79/25 (C. of J. 701).

As to the procedure after remittal *vide* C. A. 69/38 (1938, 1 S. C. J. 262) and annotations. See also L. A. 20/23 (C. of J. 482).

As to the effect of a disagreement by two judges where no third judge is called "it must be held that Plaintiff has failed to satisfy the Court with regard to his claim and judgment should be entered for Defendant". (C. A. 74/28 — P. L. R. 350, C. of J. 499. And see the subsequent proceedings in this case: C. A. 37/31 — C. of J. 430). See also C. A. 86/30 (C. of J. 507).

On the interpretation of the word "Ordinance", see CR. A. 89/38 (*ante*, p. 10) and annotations; and on interpretation of statutes generally, see C. A. 234//37 (1938, 1 S. C. J. 26) and annotations, CR. A. 160/37 (*ibid.*, p. 103); CR. A. 51/38 (*ibid.*, p. 367); CR. A. 69/38 (1938, 2 S. C. J. 43).

As regards the word "may", "There is no doubt that 'may' in some instances, especially where the enactment relates to the exercise of judicial functions, has been construed to give a power to do the act, leaving no discretion as to the exercise of the power when the facts are such as to call for it". (*Per* Blackburn, J. in Bell *v.* Crane, *Digest*, Vol. XLII, p. 717, No. 1364). The interpretation of this expression is generally dealt with on the same page, Nos. 1355—1366.

On the interpretation of bye laws see CR. A. 69/38 (1938, 2 S. C. J. 43) and annotations.

FOR APPELLANT: The Attorney General, Kantrovich (J. G. A.).
FOR RESPONDENTS: Weinshall.

JUDGMENT:

1. The land in dispute in this case was in the year 1932 registered in the name of the High Commissioner for Palestine in trust for the Government of Palestine under the Land (Settlement of Title) Ordinance. In the year 1934 a predecessor in title of the Respondents took action in the Land Court of Jaffa claiming a declaration that he was entitled to a share in the land. This predecessor died and the action was continued in the names of the Respondents. The case was heard before a Court composed of the President of the District Court and a Judge of the District Court. Separate judgments were delivered on the 30th of July, 1937. The President delivered judgment in favour of the Respondents, the Judge delivered a judgment dismissing the action. They then decided that as the burden of proof was on the Government of Palestine, the consequence was that the Respondents succeeded in the action.

2. The Attorney General for Palestine has appealed on behalf of

the Government and the first question that arises is as to the procedure to be adopted when a Land Court is constituted of two Judges and they differ in their conclusions. Rules had been made under the Land Courts Ordinance shortly after it became Law in 1921. These rules are to be found on p. 2368 of Volume III of the Laws of Palestine. Rule 2 reads as follows :—

> "2(1) The land court shall, save as hereinafter provided, consist of a British judge as president and a Palestinian member.
>
> (2) In case of disagreement, the Court may call in any magistrate or member of the district court or a *kadi* as a third member."

The effect of this rule was considered by the Court below and it came to several conclusions. Firstly, that it was *ultra vires* ; secondly, that it had become obsolete ; thirdly, that the procedure under it was discretionary ; and fourthly, that it was inconvenient in its application. The Attorney General has cited to us certain decisions of this Court in which it was decided to remit the action for the rule to be complied with when the two judges of a Land Court had disagreed. Dr. Weinshall for the Respondents has cited a case in which this Court in similar circumstances refused to remit the action as it found it could decide the issues itself. This however is the first occasion on which the question of the validity and interpretation of the rule has been fully argued.

3. The rule in question was made by the Legal Secretary by virtue of powers conferred on him by Section 1 of the Land Courts Ordinance. No argument has been addressed to us to the effect that the Legal Secretary exceeded his powers in making the rule. We are of opinion that no case has been made out either by the Court below or by the advocate for the Respondents for treating the rule as *ultra vires*. The argument of Dr. Weinshall for the Respondents is in reality a contention that the rule has been impliedly repealed by subsequent legislation. The argument may be divided into two parts. By the Establishment of Courts Order which came into force on the 23rd of January, 1937, it was provided that a Land Court may be constituted by a President or Relieving President of a District Court and one or more Judges of a District Court. There can be no doubt that the effect of this part of the Order was to repeal by implication Rule 2(1) of the Land Courts Rules. Dr. Weinshall says that in repealing the first part of the rule the order must of necessity be taken to have repealed the second part. The second part was enacted to deal with eventualities that might arise from the constitution of the Court as prescribed in the first part and if the first part has disappeared owing to subsequent legislation the second part must follow it. *Cessante ratione, cessat lex.*

4. We are unable to agree. Rule 2(2) was made to meet the case of a disagreement when the Land Court consists of two judges. Under the Establishment of Courts Order a Land Court may still be constituted of two judges and the necessity for the rule remains. No legislation must be taken to be impliedly repealed unless it is manifestly inconsistent with some subsequent legislation. Rule 2(2) is not so inconsistent and provides a method of obtaining a majority decision in land disputes.

5. The second part of Dr. Weinshall's argument may be put as follows : — The Establishment of Courts Order prescribes the description of judicial officers who may sit on a Land Court. They must be Presidents or Relieving Presidents or Judges of a District Court. Under Rule 2(2) of the Land Courts Rules a magistrate or a *kadi* may be called in to adjudicate, and this makes the rule inconsistent with the Order. As to this, we take the view that the Order prescribes in what manner a Land Court is to be constituted when it sits to hear a land dispute, and that the rule provides what is to be done when a Land Court properly constituted of two members cannot agree. The Order provides for the original constitution of the Court and there is nothing inconsistent in providing for a different class of judicial officers in case of a disagreement. Dr. Weinshall's argument in fact goes too far and if it were adopted would make Rule 2(2) inconsistent with Rule 2(1) of the Land Courts Rules.

6. It is next said that the procedure laid down in Rule 2(2) is discretionary. Stress is laid on the fact that the word used is "may". We are of opinion that this is an inaccurate interpretation. The main consideration is the object of the rule. Its meaning is that in the case of a disagreement it is necessary that a method should be prescribed to ensure that there shall be a majority decision. Power has to be conferred on the Court to call in a third member and the word "may" is used to express the conferring of the power. It is a clear case of a power being coupled with a duty and it is intended that the power is to be used in case of a disagreement.

7. Dr. Weinshall objected to the Attorney-General arguing before us that the rule was not discretionary on the ground that in the Court below he had admitted that it was discretionary. The interpretation of the rule is a question of law and whatever position the Attorney General took up in the Court below cannot preclude this Court from declaring the proper construction of the rule, once it is necessary to decide the procedure that should have been adopted in the circumstance. The opinion of the Court below had to be considered, and the Attorney

General fulfilled a duty by putting before us the arguments which might prevail against Dr. Weinshall's contention.

8. Lastly it is said that the rule is inconvenient and leads to delay and expense. The answer to this is that considerations of this kind cannot be held to abrogate a law.

9. An attempt has also been made to show that the rule is no longer law as it did not appear in a compilation of the Laws of Palestine made in 1926. This compilation was unofficial and of no legal effect. Recent legislation shows that the rule is still in force. Section 1 of the Land Courts Ordinance under which the rule was made was repealed by the Statute Law Revision Ordinance in 1934, but it was provided that the repeal should not affect any rules made under it. The rules are published in the revised edition of the Laws of Palestine and Section 8 of the Revised Edition of the Laws Ordinance enacts that the revised edition is to be the sole authentic text of the Ordinances of Palestine in force on the 31st of December, 1933. By the Interpretation Ordinance the word Ordinance includes any regulations made under an Ordinance, and therefore includes these rules.

10. We are therefore of opinion that Rule 2(2) of the Land Court Rules is not *ultra vires*, that it has not been impliedly repealed, that it is not discretionary and that there are no other grounds for deeming it to have been otherwise than of full force and effect when the judgments of the Land Court were delivered on the 30th of July, 1937. In these circumstances it was the duty of the Land Court to comply with the procedure laid down in the rules and its failure to do so meant that the judgment delivered in favour of the Respondents was not according to law.

11. By arrangement no argument was addressed to us on the merits of the dispute but both the Attorney-General and Dr. Weinshall argued the question as to the burden of proof. The Court below placed this on the Appellant. The Appellant was registered as the owner of the land in the new register set up by the Land (Settlement of Title) Ordinance. The Respondents were seeking to have this registration annulled and to have their names registered as owners. We desire to say as little on the merits as possible but we have no doubt that in the circumstances the burden of proof was on the Respondents. A person in possession of land by a registered title in the new register is entitled to retain his possession and his *status* of owner until some other person adduced facts making out a *prima facie* case for the annullment of the registration, and it may result in injustice if the person who has been declared the owner after the investigation of a

Settlement Officer is forced into the position of a Plaintiff claiming the land. We think that the Court below fell into an error on this point and that this is another ground for making the order we propose to make.

12. The Land Court Rules were repealed in 1938 and we cannot, therefore, remit the case for Rule 2(2) to be complied with, but for the reasons mentioned we think there should be a new trial and we express the opinion that it would be advisable that the Land Court trying the case should consist of a President or Relieving President and two Judges of the District Court. We therefore order that the appeal be allowed, that the judgment of the Court below in favour of the Respondents be set aside and that there be a new trial. The costs both here and in the Court below will abide the event, and we certify a fee of LP. 15 for attendance at the hearing.

Delivered this 12th day of January, 1939.

Senior Puisne Judge.

HIGH COURT No. 66/38.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

Isser Malmoud. — PETITIONER.

v.

1. Chief Execution Officer, Haifa,
2. Irgun Ephraim,
3. Itzhaq Levy. — RESPONDENTS.

Execution — Judgment confirming provisional attachment — No mention of amount — Name of third party not mentioned in statement of claim or in judgment.

In refusing an application for an order to issue to the Second Respondent directing him to show cause why his order in Execution File, Haifa, No. 5007/37, dated the 21st September, 1938, should not be set aside :—

HELD : 1. The judgment could not be executed against the Second Respondent as no mention of the Second Respondent was made either

in the statement of claim or in the judgment and the judgment did not say against whom the provisional attachment was confirmed. 2. So also the judgment mentioned no amount.

FOR PETITIONER : Nishri.

FOR RESPONDENTS : No. 1 — No appearance — served.
No. 2 — Levitzky.
No. 3 — No appearance — served.

JUDGMENT.

Many points have been taken by the 2nd Respondent in this return to the order *nisi* previously granted by this Court, but in the view that we take of the case, it is only necessary to deal with two of them.

The first of these two points is that this judgment cannot be executed, because there is no mention of the 2nd Respondent either in the Statement of Claim or in the Judgment as a 3rd party in the action, that is to say, the judgment itself states that the Defendant, one Isaac Levy is to pay the sum of LP. 75 plus costs and interest and confirms a provisional attachment and its expenses. It does not say against whom this provisional attachment is confirmed and it does not state its amount.

The second point is really included in the first, that is, that no definite sum is mentioned in the judgment, and therefore no Execution Officer knows what he is to execute. On both these grounds, therefore, we think that the rule will have to be discharged. The 2nd Respondent will have costs assessed at LP. 10.— to include advocate's fees.

Delivered this 30th day of January, 1939.

British Puisne Judge.

CIVIL APPEAL No. 2/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Spinney's Ltd. — APPELLANT.

v.

Ibrahim Rushdi. — RESPONDENT.

Time for appeal by leave — Judgment of District Court in appellate capacity — Motion for leave to appeal — Decision given in presence of advocate — Magistrates Courts Jurisdiction Ordinance, sec. 7(2) — No further notice is necessary if leave to appeal is given in presence — C. P. R. 321 not applicable to judgment governed by Magistrates Court Jurisdiction Ordinance.

In dismissing an appeal from a judgment of the District Court of Jaffa, sitting as a Court of Appeal, dated the 18th day of October, 1938 :—

HELD : 1. The Appellant's advocate was present when leave to appeal was granted by the Presiding Judge and no further notification was required. By virtue of Section 7(2) of the Magistrates Courts Jurisdiction Ordinance the Appellant had ten days to appeal but had allowed 24 days to elapse before filing the appeal which was, therefore, out of time.

2. Rule 321 of the Civil Procedure Rules, 1938, is not applicable to any decree or judgment governed by the Magistrates Court Jurisdiction Ordinance.

ANNOTATIONS : It was held in C. A. 148/38 (1938, 1 S. C. J. 447) that Rules 313 to 333 did not apply to appeals to District and Land Courts.

FOR APPELLANT : Papo.

FOR RESPONDENT : Levitzky.

JUDGMENT:

In this appeal several preliminary objections have been taken by Mr. Levitzky on behalf of the Respondent. The first of these objections is that the appeal is out of time. There had been an action before the Magistrate's Court and an appeal from that Court to the District Court. The Judges of the District Court had disagreed and then made an order that the appeal should stand dismissed.

The Appellant applied to the Presiding Judge for leave to appeal and he applied by way of motion and was represented by his advocate when the Presiding Judge granted leave to appeal. It is laid down in the Magistrates' Courts Jurisdiction Ordinance in Sub-Section 2 of Section 7 — "that within 10 days from the date upon which notification of leave to appeal is made to the Applicant, the Applicant shall comply with the ordinary provisions of the law relating to appeals as to the payment of fees, furnishing security and otherwise."

Mr. Levitzky's point is that the order granting leave to appeal was dated the 13th of December, 1938, and the appeal was not filed until the 6th of January, 1939 — a period of 24 days — while only 10

days are allowed by the Section of the Magistrates' Courts Jurisdiction Ordinance to which we have referred.

We are in agreement with Mr. Levitzky's point that when an Applicant appears before the Presiding Judge and moves for leave to appeal, and leave to appeal is then and there granted that this is a notification of leave to appeal to the Applicant and that no further service of any notice is necessary. It is clear, therefore, that this appeal was not filed within 10 days after notification of leave. The only reply made by Mr. Papo for the Appellant on this point is that he was unaware of the right procedure and that he thought the matter was governed by Rule 321 of the Civil Procedure Rules, 1938. We find it difficult to understand how Mr. Papo fell in this error, as Rule 321 clearly is not applicable to any decree or judgment governed by the Magistrates' Courts Jurisdiction Ordinance. We think that the point taken by Mr. Levitzky is a good one and is fatal to the appeal being heard by this Court, and it is unnecessary to say anything with regard to the other preliminary objections raised on behalf of the Respondent.

The appeal will be dismissed with costs, and we certify a fee of LP. 15.— for attendance at the hearing.

Delivered this 6th day of February, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 4/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

1. Nahum Wilbush,
2. Eliyahu Abraham Berligne. — APPELLANTS.

v.

Russian Ecclesiastical Mission. — RESPONDENTS.

Land Settlement — Prescription — Nothing on record to justify finding that there was an admission — Reference to area and boundaries in kushan negatives assumption that title applies to buildings only.

In allowing an appeal from the judgment of the Land Court of Haifa, sitting as a Court of Appeal, dated the 13th day of December, 1938, and in remitting the case to the Land Settlement Officer with directions :—

HELD : 1. There was nothing in the record of the Land Settlement Officer to warrant his finding that the Respondents' possession during the period of prescription had been admitted by the Appellants.

2. The finding of the Land Settlement Officer that Appellants' title was for buildings only, was unjustified in view of the fact that the *kushans* produced by them referred to a certain area of land and to boundaries.

ANNOTATIONS : On the binding effect of the record of the Land Settlement Officer, *vide* C. A. 242/37 (1938, 1 S. C. J. 51). See also annotations thereto and CR. A. 2/38 (*ibid.* p. 60).

For cases where an appellate court will interfere with findings of fact made by a trial court, *vide* C. A. 83/38 (1938, 1 S. C. J. 283) and annotations, C. A. 127/38 (*ibid.* p. 384) ; C. A. 160/38 (*op. cit.* Vol. II, p. 11).

FOR APPELLANTS : Eliash and Shoham.
FOR RESPONDENTS : Cattan.

JUDGMENT:

This appeal arises out of a disputed claim to land near the Sea of Tiberias. Before the Settlement Officer, the present Respondents succeeded on the ground that they had been in possssion of the disputed land without interruption for the period of prescription. In coming to that conclusion, the Settlement Officer based his decision on the fact that the Respondents' possession was acknowledged. If the Settlement Officer meant by this that the Respondents' claim to possession for the period was admitted by the Appellants, then there was nothing on the record to justify this conclusion. The Settlement Officer did not consider it necessary to hear any evidence from the Respondents and it is possible that he may have meant that on the evidence before him he was satisfied as to the Respondents' claim to adverse possession, but he has not said this, and we do not feel justified in assuming that he meant to say it. Based as it is on an unwarranted deduction, his decision cannot stand. There had been an appeal from the Settlement Officer to the Land Court, but this point was not dealt with in the judgment of the Land Court dismissing the appeal. It may also be remarked that the *Kushans* produced by the Appellants refer to a certain area of land and to certain boundaries, and therefore we think that the Settlement Officer's finding that the Appellants' title was for building only, and not for land, was unjustified.

For the first reason mentioned, namely the incorrect assumption by the Settlement Officer that the Respondents' claim to adverse possession was acknowledged, we think that the case must be sent back. The

judgment of the Land Court and of the Settlement Officer will be set aside, and the dispute will be remitted to the Settlement Officer to hear the evidence of the Respondents on the question of their adverse possession of the land. The appeal is allowed, and the costs will abide the event. We certify a fee of LP. 15.— for attendance at the hearing.

Delivered this 7th day of February, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 1/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, the Senior Puisne Judge and Khayat, J.

IN THE APPEAL OF :

The Administrators of the late Saul Levy. APPELLANTS.

v.

1. Messrs. Russell & Co.,
2. M. S. Hazan,
3. Mr. R. Hazan,
4. Mr. S. Nahmias. RESPONDENTS.

Experts' fees — Evidence on Commission Rules, Rule 5 — H. C. 38/38 — Increase of experts' fees in the absence of the parties — C. P. R. proviso to Rule 1 — Order of the District Court not appealable without leave under Rule 317 — C. P. R. 221—223, enquiries into accounts — Point taken by Court.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 6th day of December, 1938 :—

HELD : 1. The Order of the District Court (headed "judgment") was not appealable without leave and the leave to appeal had not been obtained.

2. The Lower Court was entitled to assess the fees and to direct by whom they should be paid.

3. Enquiries into accounts can now be ordered under Rules 221—223.

ANNOTATIONS : The former proceedings H. C. 38/38 are reported (1938, 2 S. C. J. 24).

FOR APPELLANTS : King.
FOR RESPONDENTS : Gavison for No. 1.
Marein for Nos. 2—4.

JUDGMENT.

In certain proceedings before the District Court, Jerusalem, a so-called judgment was given on 9.7.34, which recited that both parties had agreed to submit the matter to three experts in order to audit the accounts and settle the dispute. Each of them nominated an expert and the election of the third expert was left in the hands of the Court. This order was presumably made under Rule 5 of the Evidence on Commission Rules, Laws of Palestine, Vol. III, page 2330. Paragraph 4 of this judgment provided :—

> "That the Defendants should deposit LP. 150 with the District Court on account of fees for the three experts, which fees shall be subsequently estimated by the Court."

The Court appointed Messrs. Russell & Co. as the third expert.

It appears from the record of the proceedings that on 19.11.36 the Court ordered :—

> "Experts to go into these books and say if possible whether they would come to a different conclusion after inspecting same. Costs to be borne by the Plaintiff if no result."

No question now arises in regard to this.

It seems that on the same date the question of the allocation of the deposit on account of fees was discussed by the Court in the presence of the parties. From the record it appears that Mr. Young, on behalf of Russell & Co., asked for LP. 100 ; Mr. Kisselman asked for LP. 65 ; Mr. Cohen LP. 100. The Court reserved its decision, and the next entry in the record shows that on 19.11.35 (clearly a mistake for 36) the Court awarded Mr. Young LP. 65, Mr. Kisselman LP. 50, Mr. Cohen LP. 45. It will be seen that the original sum of LP. 150 which was deposited had been increased by LP. 10. I can find no explanation of this in the English record. From the Arabic record it appears that Mr. Auster, on behalf of the Defendants, had deposited the additional LP. 10.

The next entry in the record, which is dated 18.12.36, is as follows :—

> "On further consideration it is decided to allow Russell & Co. an increased fee in view of the fact that his (*sic.*) office and staff were used for most of the auditing. Fee to be increased from LP. 65 to LP. 120."

Later it appears that Mr. Young complained that his fees had not been paid in full, and on 18.6.37 the Court ordered :—

"The Plaintiff to pay the fees due to Russell & Co."

Upon that order Russell & Co. sought to recover the balance of their fees through the Execution Office, but the High Court (in H. C. No. 38/38) decided that the Order of the 18th of June, 1937, was null and void, as the parties had not had an opportunity to argue which of them was liable to pay the balance of Russell & Co.'s fees.

The matter went before the District Court again, and on the 6th December, 1938, upon a motion by Russell & Co., the Court decided that the Plaintiff in the action should pay the balance of the fees. Against that Order (which is headed "judgment") the Plaintiff in the action now appeals.

It is unfortunate that the amount of Russell & Co.'s fees should have been increased in the absence of the parties after they had been discussed in the presence of the parties on the basis of the claim first made on behalf of Russell & Co., but in my judgment the Court was entitled to assess the fees and to direct by whom they should be paid, either under the original "judgment", which was in effect an agreement between the parties, or under Rule 5 of the Evidence on Commission Rules, which I think could still be applied by reason of the proviso to Rule 1 of the Civil Procedure Rules, 1938, although now repealed.

Mr. Gavison informed us that he did not wish to take the point that the District Court's Order of the 6th December, 1938, was not appealable without leave, and no leave had been obtained, as Messrs. Russell & Co. were only anxious to have the matter determined. In my view that Order was not appealable under the Rule 317 of the Civil Procedure Rules without leave.

It may be well to point out that enquiries into accounts can now be ordered under Rules 221 and 223 of the Civil Procedure Rules, and that the cost thereof will be included in the costs of the action.

In the result, in my judgment this appeal should be dismissed. The Respondents will have the costs and we certify a fee of LP. 15 for each advocate for attendance at the hearing.

Delivered this 8th day of February, 1939.

Chief Justice.

HIGH COURT No. 4/39.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Eisig Gottesman. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Eisig Rottenberg,
3. David Teitelbaum. RESPONDENTS.

Execution proceedings — Application made only after final order of sale — Laches.

In dismissing an application for an order to issue to the above Respondents directing them to show cause, if any, why the execution proceedings in Execution File No. 14135/37, Tel-Aviv should not be stayed and the order for sale made by the first Respondent on 25.1.39 should not be set aside ; and for an order of interim stay pending the determination of this petition :—

HELD : Petitioner although he had had ample time to do so beforehand applied to the High Court only after a final order of sale had been made and it would be contrary to the practice of the High Court, in the circumstances, to grant the petition.

ANNOTATIONS : To the same effect : H. C. 32/38 (1938, 1 S. C. J. 330) ; H. C. 73/37 (*ibid.* p. 5) and note.

On the effect of laches, *vide* H. C. 60/38, (1938, 2 S. C. J. 96) and annotation 1 thereto.

FOR PETITIONER : Shershevsky.

FOR RESPONDENTS : *Ex parte.*

ORDER.

In this case on the Petitioner's own admission he knew as early as September 1938, that his property was being sold in satisfaction of this mortgage debt, liability to pay which is not disputed by him. He took no steps then, either before the Chief Execution Officer or in this Court, to protect his interests, and it was not until after the final order for sale was made that he has come to this Court.

It would be contrary to the established practice of this Court if we were, in these circumstances, to grant the petition, and the application for an order *nisi* must therefore be refused.

Given this 8th day of February, 1939.

British Puisne Judge.

CRIMINAL APPEAL No. 3/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Mohammad Rasheed Abdullah. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal against sentence — Family feud — Reconciliation — Indiscriminate shooting.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 10th day of January, 1939, whereby the Appellant was convicted of attempted murder contrary to Section 222 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment :—

HELD : Notwithstanding the fact that the offence arose out of a family feud and that the parties thereto had been subsequently reconciled, the offence had occurred as a result of indiscriminate shooting in the village and the sentence was, therefore, not excessive.

FOR APPELLANT : Kamah and Ousta.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

In this appeal the Appellant was convicted of attempted murder and sentenced to five years' imprisonment. The actual conviction is not challenged, but an appeal has been made to this Court to reduce the sentence because the offence arose out of a family feud, the parties to which have subsequently been reconciled, and it is said that a reduction of sentence will lead to a continuation of peace in this particular part of the country.

We give full weight to these considerations, but we cannot shut our eyes to the facts of the case which show that the offence occurred as a result of indiscriminate shooting in this village. In the circumstances we do not consider that the sentence of five years is excessive.

The appeal will be dismissed and the conviction and the sentence will be confirmed.

Delivered this 9th day of February, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 241/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

David Yochels. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal on findings of fact — Yearly Practice of the Supreme Court — Immigration deposit — Application for return of deposit after termination of stay — Extension of term of visa — Onus of proof — Failure to plead written contract — Denial of signature on bond — Immigration Regulations.

In allowing an appeal from a judgment of the District Court, Jerusalem, dated the 28th day of October, 1938, and in entering judgment for the Plaintiff (Appellant) :—

HELD : In civil cases an appellate tribunal, although it should make allowances for the fact that it has neither seen nor heard the witnesses, is entitled to differ from the court of trial on findings of fact.

2. The Respondent never pleaded the contract in writing and could therefore not rely upon the document except for purposes of cross-examination. *Quaere* what would have been the position had the Respondent pleaded and proved the document in writing.

3. There was no sufficient evidence to justify the view that Appellant had signed the document.

4. The period of three months referred to in the Immigration Regulations may be extended and it does not, therefore, necessarily follow that the deposit must have been made on the basis of the traveller's leaving the country within three months.

ANNOTATIONS : On signatures, *vide* C. A. 64/38 (1938, 1 S. C. J. 241) and annotations ; C. A. 232/38 (Vol. II, p. 163).

As to appeals on findings of fact, *vide* C. A. 223/37 (1938. 1 S. C. J. 23) and note 2 ; C. A. 16/38 (*ibid.* p. 114) ; C. A. 55/38 (*ibid.* p. 250). Etc., etc.

FOR APPELLANT : Eisenberg and Levy.

FOR RESPONDENT : Salant.

J U D G M E N T.

This case involves the question as to how far a civil Court of Appeal (criminal appeals are regulated by Ordinance), is justified in differing from a finding of fact made by a Court of First Instance. I think

that the principles that should guide us are well stated in the Yearly Practice of the Supreme Court (England) for 1939, at page 1244, as follows :—

> "Great weight is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled as well on questions of fact as on questions of law to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect".

Bearing in mind these principles I think we are entitled to differ from the Court of Trial and allow this appeal. The facts of the case are simple, and with one important exception, are not in dispute.

On 1st May, 1935, the Plaintiff in the action, who is the present Appellant, deposited LP. 120 with the Immigration Authorities in respect of the entry into this Territory of a Mr. and Mrs. Yochels as travellers. Permission to remain longer was not granted to these persons during the first three months of their stay here, but they were subsequently given two extensions, and eventually they left.

On 16.1.38 the Appellant applied for the return of the LP. 120 on the ground that Mr. and Mrs. Yochels had left the country, and was given permission by the High Court (*sic*) to sue Government therefore.

In a Statement of Defence filed before the commencement of the Civil Procedure Rules the Government denied liability on the ground that Yochels should have left before the 16th September, 1935, which, admittedly, they had not done.

The matter come before the District Court on 15.7.38. The Plaintiff produced the receipt for the LP. 120 and stated that it was stipulated, presumably on the payment of the deposit, that if Benzion and his wife left the country the sum would be refunded.

Counsel for the Government admitted the receipt of the LP. 120 and denied the Plaintiff's claim, and put him to proof thereof. The Court ordered as follows :—

> "Whereas both parties agree that the sum was paid in as a deposit, it is for the Plaintiff to prove the condition for the refund of the sum claimed by him, that is to say, to prove that he is entitled to get back the sum at any time the guaranteed persons, Mr. and Mrs. Yochels, leave Palestine".

Apparently, on 8th June, 1938, the parties agreed as follows :—

> "The parties have agreed upon the following issue of fact (*sic*) to be tried :—
>
> Was the plaintiff entitled to a refund of the deposit if M. and Mrs. Yochels left Palestine more than three months from the date of of their entry ?"

It will be seen that neither in the pleadings, nor before the Court when the issue was framed, nor in the agreed issue did the Government suggest that the contract had been reduced into writing.

At the hearing on 15.7.38 the Plaintiff gave evidence and stated :—

> "I asked the official as to when I can take back the money. He answered me that as soon as the guaranteed persons leave the country I shall get it back. He did not fix for me a specific time for that".

He was then shown a document, Exhibit J., which he denied having signed.

The Plaintiff's wife said :—

> "When the sum was paid I did not see my husband signing any paper or undertaking. My husband asked as to when he can receive back the sum and he received a reply that he will get it back after the guaranteed persons leave the country."

A witness called by the Plaintiff, Mayer Pardo, substantiated the story.

Exhibit J. was a bond in common form alleged to be signed by the Plaintiff, whereby it was stipulated that if the Yochels did not leave within three months of their entry the deposit of LP. 120 would be forfeited.

The case was adjourned, and at a subsequent hearing the Plaintiff called an expert to say that the writing on the bond was not the Plaintiff's.

The Government called no witness who saw the Plaintiff sign the bond, or who contradicted his story as to what took place when the deposit was made — nor was any other handwriting expert called to prove that the writing on the bond was the Plaintiff's.

The onus was clearly on the Plaintiff to prove his case, which, if he was believed, he did. The Government never put forward any substantive defence. As I have pointed out it never pleaded the contract in writing, which was never proved except in so far as it was produced by an official of the Immigration Department, and in those circumstances the Government could rely upon the document only for purpose of cross-examination, to show that the Plaintiff should not be believed.

The Court of Trial in the course of a careful judgment held :—

> "Both parties adduced their evidence on this point in dispute, and the Government produced also an undertaking dated 1.5.35 on which is signed the name of the Plaintiff in proof of the stipulation for the refund of the amount of the security. According to this undertaking, the Government is entitled to confiscate the amount of the deposit if Benzion and his wife Jana do not leave the country within the three months from the date of their entry to Palestine. But the Plaintiff has denied the signature appended on this undertaking to be his, and he brought an expert to prove his denial. However, the Court is satisfied from the material evidence before it, including the fact that the signatures agree with one another, that the undertaking is signed by him. Even regardless of this undertaking, the Court is convinced by all the evidence before it that the return of the deposit is dependent on the condition that the said two persons shall leave the country within three months ; this is evident from the visa which was granted to both of them on their passport for a period of three months only, and Regulation 2 of the Migration Regulations, supplemented to the Schedule of the Migration Ordinance (Laws of Palestine, Chapter 67) supports it".

In effect this was a finding that the Court did not believe the Plaintiff, firstly, because it was of opinion that the signature on the bond was his signature, and secondly, because the visa given to the travellers was for three months, and the Regulations provide for admission for three months in the first instance.

As to the signature, I do not think there was sufficient evidence to justify this view. As to the other matter, it is quite clear that the period of three months may be extended, and it does not therefore necessarily follow that the deposit must have been made on the basis of these travellers leaving within three months.

I am of opinion therefore that there was no sufficient reason to disbelieve the Plaintiff, and that he was entitled to succeed, and that this appeal should be allowed. The judgment will be set aside and judgment entered for the Plaintiff for LP. 120, with costs here and below, and we certify a fee of LP. 15 for attendance at the hearing.

I express no view as to the position which would have been created if the Government had pleaded and proved that the Plaintiff had signed the bond.

Delivered this 16th day of February, 1939.

Chief Justice.

CRIMINAL APPEAL No. 2/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :

Paltiel Novik. APPELLANT.

v.

Attorney General. RESPONDENT.

Offence against sec. 276(b) C. C. O. — No allegation of fraud made — Definition of stealing imports the element of fraud — Date of offence need not be given precisely — Record of evidence to be looked at as a whole.

In dismissing an appeal from a judgment of the District Court of Jaffa, sitting at Tel-Aviv, (Cr. D. C. T. A. 91/38), dated the 22nd December, 1938, whereby the Appellant was convicted of stealing money entrusted for certain purposes, contrary to Section 276(b) of the Criminal Code Ordinance, 1936, and sentenced to a fine of LP. 40 or in default to three months' imprisonment :—

HELD : 1. Although the description of the offence might have been more correct if fraud had been alleged, this was not a ground for quashing the conviction. The definition of stealing, for which Appellant was convicted, imports the element of fraud. The District Court found that the Appellant had fraudulently converted a certain sum of money to his own use, and this indicated that the Court had directed their attention to the fact that fraud was an ingredient of the offence.

2. It was incorrect to say that the court did not contain a reference to the date as it stated that the offence occurred on some day in September, and this was sufficient.

3. The evidence in criminal cases is to be looked at as a whole, and it was clear that the Court below were fully justified in coming to the conclusion that the Appellant had been entrusted with a sum of money for certain purposes and that he had fraudulently converted that money to his own use.

FOR APPELLANT : Ben-Yamini and Vorchheimer.

FOR RESPONDENT : Salant (J. G. A.).

JUDGMENT:

1. In this appeal the Appellant was convicted by the District Court, sitting at Tel-Aviv, in respect of an offence against Section 276(b) of the Criminal Code Ordinance, and was sentenced to pay

a fine of LP. 40, or in default, three months' imprisonment. He has appealed against this conviction, and the first point taken by his advocate, Mr. Ben-Yamini, is that no fraud was alleged in the relevant count of the information.

The cases which Mr. Ben-Yamini cited to support his argument all refer to trials in which appeals succeeded, because the Judge, in charging the jury, had omitted to draw the attention of the jury to the element of fraud necessarily involved in such an offence.

In the present case the District Court have clearly found that the Appellant fraudulently converted a certain sum of money to his own use, and this indicates that the Court directed its attention to the fact that fraud was an ingredient of the offence. Mr. Ben-Yamini objects to the conviction merely on the ground that fraud is not alleged in the information. The count on which the Appellant was convicted was a count for stealing money, and the definition of stealing in the Criminal Code Ordinance imports the element of fraud.

In the description of the offence it might have been more correct if it had been said that the sum of money was fraudulently converted, instead of simply saying that it had been converted, but we do not think that this is a ground for quashing the conviction.

2. The second point taken by Mr. Ben-Yamini is that the count contained no reference to the date of the offence. This is incorrect. The count does contain a reference to the date, as it says that the offence occurred on same day during the month of September, 1937. There must be numerous cases in which the prosecution is unable to state the precise date on which an offence is alleged to have occurred, and in such cases it is sufficient if the date is stated as it has been in this information, as long as no question of limitation arises. The cases cited by Mr. Ben-Yamini from the English Criminal Appeal Reports deal with cases where persons were charged with a general deficit, and have no application to the point which he has taken.

3. The third point which Mr. Ben-Yamini urges refers to a passage in the cross-examination of the principal witness for the prosecution in which he said : "I do not care what he did or how he did it so long as he produced to me the LP. 90. I did not subsequently instruct him to lodge an action in Court or make an attachment." It is always dangerous to extract isolated passages from the record of the evidence, and especially isolated passages from the cross-examination. The evidence in criminal cases is to be looked at as a whole, and looking on it as a whole it is clear that the Court below were fully

justified in coming to the conclusion that the Appellant had been entrusted with the sum of money for certain purposes, and that he had fraudulently converted that money to his own use. This disposes of the grounds urged against the conviction of the Appellant.

The conviction and sentence will be confirmed and the appeal dismissed.

Delivered this 9th day of February, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 236/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :

Elazar Eliashar. APPELLANT.

V.

Wardeh Khayat. RESPONDENT.

Agreement to sell unascertained share in immovable property — Damages for failure to transfer — Whether agreement void for uncertainty, Halsbury, Vol. XIV — Damages and penalties — Assessment of damage — C. P. R. 342 — Trial Court should refer to authorities relied upon.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 4th day of October, 1938, and in remitting the case to the lower Court to assess the amount of the damages :—

HELD : 1. The contract was not illegal and was not a gaming or wagering transaction.

2. Defendant's (Respondent's) agent should have offered to transfer the property subject to the mortgage.

3. The provision for the payment of LP. 500 was a penalty and damages should be assessed. The measure of damages was the difference between the contract price and the price at the date of the breach, regard being had to the mortgage.

ANNOTATIONS : On penalties and on the measure of damages, see authorities collated in annotations to C. A. 217/38 (1938, 2 S. C. J. 221).

FOR APPELLANT : B. Joseph.

FOR RESPONDENT : Levitzky.

JUDGMENT:

By a contract in writing, dated 16.10.33, Mrs. Wardeh Khayat sold to Mr. Eliashar for LP. 100, then paid, half her interest in the estate of Assad Khalil el Khayat, deceased. The contract further provided that she would appoint one, Mr. Mizrahi, her attorney, to transfer the property when it was obtained. It further provided that she was liable for LP. 500 as damages for any breach.

By a judgment Mrs. Khayat's share of the property was ascertained, and on 31st January, 1936, Mr. Eliashar attended at the Land Registry Office, Jerusalem, in order that it might be transferred to him, but Mr. Mizrahi contended that he was unable to effect the transfer owing to some mortgage encumbering the shares.

Mr. Eliashar therefore brought an action in the District Court, Jerusalem, claiming the repayment of the LP. 100, and LP. 500 damages.

On 21st July, 1936, that Court held :—

> "The Plaintiff's claim must be dismissed. The agreement being void for uncertainty."

The Plaintiff appealed, and on 27th May, 1937, this Court held :—

> "Appeal allowed. — We cannot see any uncertainty in the contract whatsoever. But we remit the case to the District Court for them to state what is the uncertainty which they find, to determine which, if either, of the parties have committed a breach or breaches (if any) and generally to give a judgment on the whole action.
>
> Costs to await retrial."

And the matter went back to the District Court. The facts were simple, and if they could not have been agreed could have been easily ascertained, and one would have thought that the argument could have been completed at one hearing. The matter, however, came before the Court on six occasions and was spread out from 21.10.37 to 21.7.38, when the decision was reserved, and it was not until 4.10.38 that judgment was delivered.

I hope that with the aid of the Civil Procedure Rules, Presidents of District Courts and Registrars will be able to prevent such prolongation of proceedings.

In its second judgment, after setting out the facts and arguments, the Court held :—

> "We are of opinion that the contract is illegal because it relates to the sale of an undefined share which at the time it was not clear whether it was going to be adjudged to her or not."

I do not think there was anything illegal in the contract. The Defendant stated that she had an interest in an estate, half of which she sold. Her interest turned out to be subject to a mortgage — but there was no difficulty in transferring half of it. As the District Court itself points out, she in fact sold it to someone else. I do not think the contract is a gaming or wagering transaction — see Halsbury, 2nd Edition, Volume 15, pp. 468—469, and the cases there cited.

In my judgment there was no reason why the Defendant's agent should not have transferred on 31st January, 1936, or at least have offered to transfer, half that which the Defendant received from the estate, *i. e.* a mortgeged share, which she in fact transferred to someone else, and the Plaintiff is entitled to succeed.

In the course of argument we asked the advocates before us if they could agree as to the amount of damages, in the event of our being of opinion that damages were payable, but although it appears from the record that attempts to settle have been made they were unable to do so.

We are of opinion that the provision for the payment of LP. 500 was a penalty and that damages should be assessed.

In order that this matter may now be disposed of with the least possible delay, by virtue of Civil Procedure Rule 342, we remit the case to the District Court to determine the question of fact — "what was the value on the 31st of January, 1936, of half the Defendant's share in the estate of As'ad bin Khalil el Khayat (deceased), regard being had to the mortgages? Additional evidence should be taken which should be returned to this Court, together with the findings thereon and the reasons therefor. The question of costs will be reserved.

We would point out that where, as in this case, Courts of first instance propound propositions of law, the parties and this Court would be greatly assisted if reference is made to the authorities upon which such Courts rely.

Delivered this 16th day of February, 1939.

Chief Justice.

HIGH COURT No. 7/39.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

Yacoub Yair. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Kedem Bank,
3. Mr. Eliashar,
4. Bank der Tempelgesellschaft,
5. Mr. Steinberg,
6. Hathya Bank,
7. Banco di Roma,
8. Central Bank,
9. Metropolin Bank,
10. Barclay's Bank,
11. Bank Hashkaot. RESPONDENTS.

High Court — Jurisdiction discretionary — Non interference with discretion of C. E. O. unless he has disregarded the law.

Application for an Order to issue to the first Respondent directing him to show cause why his order, dated 28.10.38 in the Execution file No. 2517/38, refusing Petitioner's application for payment of 150 mls per month in each of the 20 files wherein Petitioner is judgment-debtor, should not be set aside and an Order substituted therefor that the Petitioner be allowed to pay 100 mls per month in the said files, that the attachment on Petitioner's domestic chattels be removed, and the attachment order in file No. 1472/36 wherein the Petitioner is judgment-creditor made in favour of the 2nd Respondent, be removed, and the proceeds thereof distributed among other of the Petitioner's creditors.

HELD : The High Court is not a Court of Appeal from the Chief Execution Officer and will not interfere with his discretion unless he has disregarded the law — an allegation which had not been made in this case.

ANNOTATIONS :

1. See annotations to H. C. 58/38 (1938, 2 S. C. J. 82) ; H. C. 68/38 (*ibid.*, p. 219).

2. In H. C. 56/38 (1938, 2 S. C. J. 83) the High Court described itself as a Court of Appeal from the C. E. O.

PETITIONER : In person.

FOR RESPONDENTS : *Ex parte.*

ORDER:

The application must be refused. The jurisdiction of the High Court is purely discretionary, and we will not interfere with the discretion of the Chief Execution Officer unless the latter has disregarded the law. There is no such allegation here, and the High Court is not a Court of Appeal from the Chief Execution Officer.

The application for an order *nisi* is therefore refused.

Given this 16th day of February, 1939.

British Puisne Judge.

CIVIL APPEAL No. 234/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

1. Yousef Khalil Najjar,
2. Nikhail Khalil Najjar,
3. Yacoub Khalil Najjar,
4. Naim Tewfiq Najjar,
5. Elias Tewfiq Najjar. — APPELLANTS.

v.

Wardeh Khalil Najjar. — RESPONDENT.

Succession — Application to two Courts for order of succession — Estoppel — Succession Rules, rule 26 — Finding made by Court of Appeal, C. P. R. 341 — Costs.

In allowing an appeal from an Order of the District Court, Haifa, dated the 20th day of January, 1938, and in remitting the case to the lower Court with directions: —

HELD: The lower Court had made no finding on the question of estoppel and in virtue of Rule 341, the Court of Appeal could find that there was no estoppel.

FOR APPELLANTS: Goitein.

FOR RESPONDENT: Koussa.

JUDGMENT.

It seems that some time ago Wardeh Khalil Najjar obtained from the Court of the Catholic Melkite Community a Certificate of Suc-

cession in respect of the estate of her deceased father, who was said to have died in 1917. The other heirs were not parties to this application.

In an action brought in the Land Court, Haifa, in 1934, Wardeh, as Plaintiff, claimed a share of certain land from the other heirs. She then pleaded that the testator died in 1917. The other heirs set up a deed against her and she failed in her action. She appealed to this Court, but failed on technical grounds.

In November, 1937, she applied to the District Court, Haifa, under the Succession Ordinance, for an Order of Succession in respect of her father's estate.

At the first hearing on 4.2.38, the President formulated the issues as follows :—

"First issue — Is Petitioner estopped from applying to this Court for the order prayed, since she has obtained an order of succession of Ecclesiastical Court already and has acted upon it, *e. g.* in Land Court case No. 111/34 ?

Second issue — Is the Order of Ecclesiastical Court dated 6.10.1933 valid in the circumstances stated by the parties ?

Third issue — If this Court has jurisdiction, what then was the date of the death of the Testator concerned ?"

and on the 26th of February, 1938, ruled :—

> *"Ruling.* I think on the facts admitted and statements of the parties, the Petitioner is not estopped from applying to this Court in the circumstances here, unless (o) there was positive consent either direct or implied by all the heirs to the jurisdiction of the Ecclesiastical Court — then the latter was not properly seized with the matter.
>
> Again, since there is no suggestion or allegation that Petitioner has acted with fraud or intent to deceive, I think I am entitled to assume that she has acted *bona fide* in coming to this Court. As to whether there may be any estoppel against her in regard to the evidence which she may wish to adduce as regards the date of the Testator's death — I will not express any opinion at this stage.
>
> In the circumstances I rule in favour of Petitioner on the first two issues."

It would seem that there remained to determine the simple question of fact — when did the testator die ? Subject to possible argument as to estoppel.

The matter came before the President on several occasions, and evidence was taken and argument was heard. However, attention seems eventually to have been drawn to Rule 26 of the Succession Rules, and on 17.5.38 the President gave the following ruling :—

> "In the circumstances, therefore, I direct the trial before the competent Court of the issue. — "Did Khalil Ibrahim El Najjar, the alleged father of Wardeh Khalil Najjar die on or about the 27th day of November, 1916, and if not when did he die ?"
>
> I direct further that the Petitioner here shall be Plaintiff, and the Respondent here shall be the Defendant in such trial subject to the rights or powers of the competent Court upon proper application made to it to make any further order as regards the parties and procedure as it may deem just and necessary in accordance with the rule of procedure applicable to the proceedings in such trial."

On the 20th of July, 1938, the Court, consisting of the President and His Honour Judge Shems, sat to try this issue of fact, but instead of deciding it they accepted further argument and ruled as follows :—

> "*Ruling.* These proceedings having been filed after the Civil Procedure Rules, 1938, came into force, we hold that the said Rules must be followed. We consider, however, having regard to the proceedings already pending before the same parties, out of which this action has arisen, and to the framing of the issues already made by the Court in P. R. No. 62/37, given on 17th of May, 1938, (of which copy filed in these proceedings), we see no sufficient reason why this action should not proceed in its present form (*Cf.* Rule 123). As regards the question of the suggested issue of estoppel — this question, apart from what we have said before, was dealt with expressly by the other Court in its ruling of 26/2/38 — and finally by the Court in its issue referred in its order of 17/5/38 — which must be taken to have confirmed the order of 26/2/38 and overruled impliedly also any question of estoppel. This Court Order is final (of 17/5/38) now as it was never appealed. We rule therefore as above, and that the issue now framed already and the course is to proceed from such stage in accordance with Civil Procedure Rules."

I am glad to think, that the question whether the Civil Procedure Rules apply to such a reference is for the future of academic interest only, as Rule 26 has been amended to simplify the procedure. In my opinion, the present case should have raised no difficulty. Pleadings are obviously unnecessary, as there is only one issue which has already been formulated. The parties should summon their witnesses, the Plaintiff would begin, the evidence would be given and recorded in the ordinary way, and the Court would give the answer to the question.

As to the second part of the ruling, it is clear that on the 26th of February the Court expressly did not decide if there was any estoppel with regard to the date of the testator's death, and the ruling of the 7th of May gave no express decision on the point.

It is argued that if the President had been of opinion that there

was an estoppel he would not have given the ruling of the 17th of May. On the other hand it is said, the President merely referred to the appropriate tribunal the question of fact for determination, and that that tribunal should determine that question in accordance with the ordinary laws of evidence, and that an estoppel — estoppel being a law of evidence — should be regarded by that tribunal, just as for example, rules as to hearsay evidence would be regarded.

The Court does not appear to have decided the question whether there was an estoppel but to have taken the view that it was not open to it. As to this I think our powers under Civil Procedure Rule 341 are sufficient to enable us on the admitted facts to decide the question.

It is admitted by the Appellants here that when the Religious Court gave the Certificate of Succession they had not consented to those proceedings and were not parties thereto. They now state that subsequently they were willing to consent to that jurisdiction and accept the certificate. I do not think that they can give a Religious Court jurisdiction by so doing, and in consequence the order of that Court cannot raise an estoppel.

It is not suggested that the Appellants here have in any way acted upon the Respondent's representation, so that it would be inequitable that she should be allowed to seek to alter what she said.

I am of opinion, therefore, that there is no estoppel as to the date of the testator's death.

The case will be remitted to the District Court to decide the question — when did the testator die? The representations which were made by Wardeh in the Land Court are matters which no doubt the Court will consider when she furnishes her explanation as to why she now alleges that the death took place on a date other than that which she first alleged.

When the Court has decided this issue of fact the matter will go back to the learned President, and I trust that he will then be able to dispose of it without further delay.

This being a succession matter, and having regard to all the circumstances, we make no order as to costs.

Delivered this 23rd day of February, 1939.

Chief Justice.

I concur.

British Puisne Judge.

I concur.

Puisne Judge.

CRIMINAL APPEAL No. 6/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Manning, S. P. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :

Odeh Sirriyeh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal Procedure — C. C. O. Secs. 275, 337, 340, 344 — *Conviction for offences not included in the charge — Evidence of amount in offences under Sec.* 275 — *Evidence of accomplice — Corroboration — Reading of depositions inadmissible in absence of proof of absence — Evidence Ordinance, Sec.* 10 — *Rehearing case de novo and failure to notify advocate thereof — Charge against Government official, Trial Upon Information Ordinance, Sec.* 74 — *Preliminary examination held in two places in same district — Sufficient evidence to support information although additional evidence heard on trial — Sentencing after conviction not to the detriment of accused — Sentence.*

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 13th day of January, 1939, whereby the Appellant was sentenced to two years' imprisonment, on the charges of forgery contrary to Section 344(a) and of stealing, contrary to Section 275 of the Criminal Code Ordinance, 1936, and in dismissing the appeal from the conviction of uttering a cheque contrary to Section 340 :—

HELD : 1. The Court of trial could not convict the Appellant under Section 344 if, on the facts before it, it acquitted him of the offence charged under Section 337.

2. There was no evidence before the lower Court as to the value of the stolen cheque apart from the paper on which it was written. The conviction under Section 275, which requires proof that the value of the property involved exceeded LP. 50 could not, therefore, be sustained.

3. The evidence of the accomplice on the charge of uttering had been corroborated.

4. In the absence of proof that a witness was absent from Palestine at the time of the trial, evidence of his deposition before the examining Magistrate was inadmissible. Having regard, however, to the provisions of Section 10 of the Evidence Ordinance and to the fact that there had been other sufficient evidence to support the conviction, the wrongful reception of the evidence did not invalidate the conviction.

5. It would have been fairer had the Court informed Appellant's advocate that the case would be reheard *de novo* but as the only

evidence heard in the absence of the advocate was the inadmissible evidence above referred to, the Appellant was not prejudiced in any way.

6. The instructions given by the Attorney General in pursuance to Section 74 of the Trial Upon Information Ordinance substantially covered the matters upon which the Appellant was subsequently charged.

7. There was nothing in the objection that the preliminary investigation was held partly in Jerusalem and partly in Bethlehem, both places being in the same district.

8. The information was based upon evidence heard in the preliminary inquiry. The evidence of the accomplices was led in order to strengthen certain evidence given at the preliminary enquiry and did not amount to the introduction of new facts on which to charge the Appellant.

9. By postponing the sentence of the Appellant the Court of trial was acting in a manner more favourable to the Appellant than otherwise.

ANNOTATIONS :

1. *Cf.* CR. A. 45/38 (1938, 1 S. C. J. 272) and annotations ; CR. A. 54/38 (*ibid.*, p. 340) ; CR. A. 53/38 (*ibid.*, p. 333).

2. See also CR. A. 150/37 (1938, 1 S. C. J. 11).

3. See notes to CR. A. 46/38 (1938, 2 S. C. J. 239).

4. *Vide* CR. A. 5/38 (1938, 1 S. C. J. 63) and note.

FOR APPELLANT : Goitein.

FOR RESPONDENT : Salant (J. G. A.).

JUDGMENT:

The Appelant had been charged before the District Court of Jerusalem in an information containing 10 counts. At the end of the trial the Court acquitted him on 8 of these counts but convicted him on the 5th count on a charge of stealing and on the 7th count on a charge of uttering a false document. In addition the Court convicted the Appellant of two offences under Section 344 of the Criminal Code with which he had not been charged. The Court purported to convict him of these charges in lieu of two charges under Section 337 of the Code and one of the grounds of appeal is that it was not open to the Court below to take this action. We are in agreement with this contention. We do not see how the Court could convict the Appellant under Section 344 if on the evidence before it it acquitted him of the offence charged under Section 337. With regard to the conviction of stealing under Section 275 of the Code it was urged on behalf of the Appellant that the

property involved must be shown to exceed in value the sum of LP. 50 for a conviction under that section to be valid and that there was no proof before the Court below that the value of the property in question exceeded this sum. The property was a cheque for the payment of LP. 100 and we are of opinion that there was no evidence before the Court below as to the actual value of this cheque apart from the paper on which it was written. For these reasons we think that the convictions under Section 344 and Section 275 cannot be sustained.

The last conviction was one under Section 340 of the Code for uttering a false document and against its validity it was urged that the conviction depended upon the uncorroborated evidence of an accomplice. The evidence of the accomplice went to show that the Appellant had forged the name of another person as an endorsement on the cheque and had then given the cheque to the accomplice to dispose of. We are of opinion that this evidence was corroborated by the evidence of witnesses who testified that the endorsement on the cheque was in the handwriting of the Appellant, and we find therefore that the accused was rightly convicted on this charge.

Another objection raised by Mr. Goitein for the Appellant to all the convictions was that certain inadmissible evidence had been accepted. This evidence consisted of the deposition made by Jiries Yusef Farah at the preliminary investigation and it was allowed to be read as evidence on the ground that he was absent from Palestine and could not be produced to give evidence. The only evidence before the Court below to prove these facts was that Farah had shown to a certain person a ticket for America. We need hardly say that this piece of evidence does not show that Farah had ever left Palestine or that if he did he was absent from Palestine at the time of the trial. This evidence was therefore clearly inadmissible but having regard to the provisions of Section 10 of the Evidence Ordinance we are of opinion that the wrong reception of the evidence does not invalidate the conviction of the Appellant under Section 340 of the Criminal Code as there was other sufficient evidence to support the conviction.

Another ground urged by Mr. Goitein was that on the 13th of December, 1938, without any notice to him, a differently constituted Court sat to hear the case and commenced the proceedings *de novo*. Mr. Goitein says that he should have been informed of this fact. Owing to not having been informed he was absent from the Court when the accused was newly charged and when he pleaded and while

the evidence of a witness was being taken. Mr. Goitein says he would have been present if he had been aware that proceedings were to be commenced *de novo*. We are of opinion that it would have been fairer had the Court informed Mr. Goitein of the change that was to take place but as the only evidence heard in the absence of Mr. Goitein was the inadmissible evidence to which we have already referred in connection with the deposition of Farah we do not think that the Appellant was prejudiced in any way.

Some further minor objections were made by Mr. Goitein. The first of these is concerned with Section 74 of the Trial Upon Information Ordinance which renders instructions from the Attorney General necessary when a charge is preferred against a Government Official in respect of any act relative to his functions. The Appellant in this case was an employee of the Government and the charges related to certain acts relative to his duties as a clerk in the Department of the Palestine Posts and Telegraphs. Mr. Goitein says that the Attorney General's instructions related to one kind of offence and that the Appellant was charged with different kinds of offences. We are satisfied that the instructions given by the Attorney General substantially covered the matters upon which the Appellant was subsequently charged.

Another objection was that the preliminary investigation was held partly in Jerusalem and partly in Betlehem. Both of these places are in the same district and we see no point whatever in this objection.

Another point taken by Mr. Goitein was that the Information was not supported by the evidence taken at the preliminary inquiry. In support of this he said that a witness who had not been called at the preliminary inquiry gave evidence at the trial of the Information. With regard to this we are of opinion that this witness, who was in fact the accomplice, was only called in order to strengthen certain evidence given at the preliminary inquiry, and that his being called did not mean the introduction of any new facts on which to charge the Appellant.

Further, Mr. Goitein said that the Court below committed an error by not sentencing the Appellant at the same time as it convicted him. We are of opinion that when the Court below postponed the sentence of the Appellant it was acting in a manner more favourable to the Appellant than otherwise. It was quite possible that a longer sentence might have been imposed had sentence been pronounced at once.

This exhausts the various points taken by Mr. Goitein on behalf of the Appellant, and for the reasons stated in the earlier part of this judgment we upheld the conviction under Section 340 of the Criminal Code and quash the convictions on the other charges of which the Appellant was found guilty. The Court imposed a sentence of two yaers' imprisonment as a general sentence on all the charges of which it found the Appellant guilty. In view of the Appellant's position and the seriousness of his offence we do not propose to interfere with this sentence. So far as his appeal against his conviction under Section 340 is concerned, the appeal is dismissed and the conviction and sentence are affirmed. The Appellant's appeal is allowed on the other charges to which we have referred.

Delivered this 24th day of February, 1939.

Special treatment allowed. Sentence to date from 9th February, 1939.

Senior Puisne Judge.

HIGH COURT No. 6/39.

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

BEFORE : Copland, Khayat, JJ.

IN THE APPLICATION OF :

Matityahu Greenbaum. PETITIONER.

v.

1. Chief Execution Officer, Magistrate's Court, Haifa,
2. Moshe Rosenblum, Haifa. RESPONDENTS.

Imprisonment for debt — Debt (Imprisonment) Ord., Sec. 2 — Sworn evidence required before order can be made.

In allowing an application for an Order to issue against First Respondent to show cause why his Order dated 6.2.39 in File No. 436/37 of the Execution Offie, Haifa, refusing to annul the Order for imprisonment of the Petitioner, dated 15.12.38 should not be reversed :—

HELD : Under sec. 2(c) of the Debt (Imprisonment) Ordinance, before an order for imprisonment can issue for a judgment debt, except in cases falling under Sections 2(a) and (b), the Chief Execution

Officer must be satisfied by sworn evidence of the facts on which the order is sought.

ANNOTATIONS : See also H. C. 23/38 (1938, 1 S. C. J. 229).

FOR PETITIONER : Yahuda.

FOR RESPONDENTS : No appearance — served.

ORDER.

The order *nisi* already granted is made absolute, and the order for imprisonment made by the Chief Execution Officer is cancelled, on the ground that, under Section 2(c) of the Debt (Imprisonment) Ordinance, Chap. 48, before an order for imprisonment can issue for a judgment debt, except in cases falling under Section 2(a) and (b), the Chief Execution Officer must be satisfied by sworn evidence, oral or written, of the facts on which the order is sought. No such evidence was heard in this case, and the order of imprisonment therefore cannot stand.

The Petitioner will have the costs of this application to be paid by the Respondent assessed at LP. 10.— to include hearing fee.

Given this 27th day of February, 1939.

British Puisne Judge.

HIGH COURT No. 3/39.

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

BEFORE : Copland and Khaldi, JJ.

IN THE APPLICATION OF :

Anna Dauber. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Shalom Shemuel Shitreet. RESPONDENTS.

Sale of mortgage — Provision in mortgage deed that failure to pay instalment of interest crystallises loan — Extension of time granted upon payment of interest — Tender of interest after expiration of time — Discretion of C. E. O.

Application for an order *nisi* to issue to the Respondents to show cause, if any, why the order made by the first Respondent in Execution File No. 5023/38,

Jerusalem, should not be set aside and an order for sale of the mortgaged property in question be substituted therefor, refused.

Petitioner, the mortgagee of the second Respondent's property, applied to the first Respondent for the sale of the mortgaged property on the ground that the second Respondent had failed to pay an instalment of interest due under the mortgage and that, in accordance with the provisions of the mortgage, the entire amount of the loan fell due upon failure to pay an instalment of interest.

On the 4th November, 1938, the first Respondent made the following order :—

> "Delay until 1st January, 1939, to pay interest due failing which order of sale will be made. Costs. Adv. LP. 2 of day."

Upon the second Respondent failing to comply with the order regarding payment of interest, the Petitioner again applied to the first Respondent for an order of sale.

On the day of hearing of the application the second Respondent tendered the amount of interest due and asked for an extension of time. The Petitioner submitted that he was entitled to an order of sale on the basis of the mortgage conditions and of the order made by the first Respondent. The first Respondent then made the following order :—

> "Under circumstances sale order is delayed provided that judgment debtor pays all interest today and continues to pay interest when due."

The Petitioner then applied to the High Court and submitted the following grounds in support of his application :—

1. that there was no evidence before the first Respondent under which he could have ordered a postponement under Sec. 14 of the Land Transfer Ordinance (*vide* H. C. 66/37 (1938, 1 S. C. J. 15) ;

2. that the first Respondent should not have granted an extension for a longer time than prayed by the second Respondent ;

3. that the order of the first Respondent was bad in law as it did not provide for a reasonable postponement (*vide* H. C. 64/38 (1938, 2 S. C. J. 169) ;

4. that the order of the first Respondent constituted a validation of the mortgage deed of which a breach had already been committed ;

5. that the said order constituted a new agreement between the parties, which agreement the first Respondent had no authority to make ; and

6. that the said order was bad as it purported to make the debt due from the second Respondent payable in instalments, as the interest formed part of the mortgage debt (*vide* H. C. 50/32 P. L. R. 764, C. of J. 1525).

Petitioner also referred to C. A. 137/24 (P. L. R. 32, C. of J. 292) ; C. A. 213/37 (3 Ct. L. R. 13) and 227/38 (1938, 2 S. C. J. 176).

HELD : The application should be refused.

ANNOTATIONS : This case is an extreme example of the principle that the High Court will not interfere with the discretion of the Chief Execution Officer. See H. C. 7/39 (*ante*, p. 71) and note 1 thereto.

FOR APPLICANT : Bruchstein.

FOR RESPONDENTS : *Ex parte.*

ORDER:

The Court, after hearing Mr. Bruchstein on behalf of the Petitioner, orders that the application for an order *nisi* be refused.

Given this 13th day of February, 1939.

British Puisne Judge.

HIGH COURT No. 1/39.

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

BEFORE: Manning, S. P. J., and Frumkin, J.

IN THE APPLICATION OF:

Matatyahu Grunbaum. — PETITIONER.

v.

1. The Chief Execution Officer, Haifa,
2. Shimon Oppenheimer. — RESPONDENTS.

Sale of mortgage — Application to cancel proceedings — Technical irregularities — Discretion of High Court not to interfere where no prejudice.

In refusing an application for an order to issue against the first Respondent to show cause why his order dated 30.11.38, refusing to cancel the proceedings in Execution File No. 4894/36 should not be reversed:—

HELD: The technical irregularities alleged had not prejudiced the Petitioner. The jurisdiction of the High Court is discretionary and the remedies which it can grant are not given unless they are necessary in the interests of justice.

ANNOTATIONS: See also H. C. 3/39 (*ante*) and annotations.

FOR PETITIONER: Yehuda.

FOR RESPONDENT No. 2: Sharf.

ORDER:

This return to a rule *nisi* is concerned with what is in effect an application to cancel all the proceedings in connection with the sale of a mortgaged property.

The Petitioner has alleged certain irregularities in the proceedings. We are of opinion that these alleged technical irregularities have not

prejudiced the Petitioner in any way. The jurisdiction of this Court is discretionary and the remedies which it can grant are not given unless they are necessary in the interests of justice. This is a case in which it is unnecessary to make any order.

The rule *nisi* will be therefore discharged. The second Respondent will have his costs and we certify a fee of LP. 15.— for attendance at the hearing.

Given this 1st day of February, 1939.

Senior Puisne Judge.

CIVIL APPEAL No. 249/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE CASE OF :

The Attorney General on behalf of the Government of Palestine. APPELLANT.

v.

Ezra Zakai. RESPONDENT.

Customs duty — Value of goods re-assessed on basis of price obtained by vendor in Germany through Haavara — Payment under protest — Customs Ordinance, Secs. 131, 132, 154.

In dismissing an appeal from a decree of the District Court, Haifa, in Civil Case No. 47/38, dated the 29th November, 1938 :—

HELD : Section 131 of the Customs Ordinance refers to the price which an importer would give, not to that which he has actually paid. The District Court had decided that the original assessment was right and there was evidence upon which it could so decide.

FOR APPELLANT : Bell (Crown Counsel).

FOR RESPONDENT : Werner.

JUDGMENT:

I am of opinion that this appeal should be dismissed.

In October, 1937, the Respondent imported certain cotton goods from Germany, and import duty thereon, amounting to LP. 73.602 mls, was assessed and paid. This was on the basis of the purchase price being Reichs Marks 3629.72.

It seems that by reason of certain financial arrangements made by what is known as *Haavarah,* the vendor in Germany received an amount in excess of that sum, and the Customs Authorities claimed that the duty had been under-assessed, and re-assessed it on the basis of the amount actually received by the German vendor. The Respondent paid under protest, and brought an action in the District Court to recover the additional amount so paid. The District Court decided in his favour and the Attorney General appeals to this Court.

The matter turns upon the interpretation of the Customs Ordinance. The goods in question were liable to assessment for duty upon an *ad valorem* basis, and Section 131 provides :—

> "The value of any article for the purpose of assessment of *ad valorem* duties shall be taken to be the price which an importer would give for the article if the article were delivered, freight and insurance paid, in bond at the port or place of importation and, subject to the provisions of section 153, duty shall be paid on that value as fixed by the Director."

It should be observed that this section refers to the price which an importer would give, not which he actually gives. It does not refer to the amount which the vendor receives if this should be some other amount.

Where there is an open market and an honest invoice, no doubt the invoice price gives a fair criterion upon which to base the price for the purpose of the section, and section 132 contemplates that the Director may have regard to an invoice, but I do not think that either he or the importer is necessarily bound thereby.

Section 154 makes it clear that the value fixed by the Director is not conclusive, and where duty has been "paid under protest" an action may be brought against Government in respect thereof. When such action is brought the Court has to decide the c.i.f. price which the importer would give at the place of importation.

In this case the Court decided that the original assessment was right, there was evidence as to the value of the goods upon which it could so decide, and the appeal will be dismissed with costs. Costs to include LP. 15 for attendance at the hearing.

Delivered this 14th day of February, 1939.

Chief Justice.

CIVIL APPEAL No. 8/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPEAL OF :

N. V. Philips Gloeilampenfabrieken. APPELLANTS.

v.

1. Alexander Kremener,
2. M. Gafny and Co., M. Gafny and E. Gafny. RESPONDENTS.

Choice of jurisdiction by contract—C. P. R. rules 4, 203, *C. A.* 46/38— *Disagreement of Judges, Courts Ordinance, Sec.* 11(3)(a) — *Third judge need not be called but action should be dismissed — Interpretation of statutes — Voluntary submission to the jurisdiction of the Courts of foreign country —Dicey's Conflict of Laws — Arbitration Ordinance, Sec.* 5 — *Voluntary submission — Point raised only on appeal — Choice of court in a foreign contract not a submission to arbitration — Bad faith — Suing on a judgment — C. A.* 145/38 — *Plea of greater convenience cannot set aside agreement.*

In dismissing an appeal from a decree of the District Court of Tel-Aviv, dated the 21st December, 1938 :—

HELD : 1. (Following C. A. 46/38). The two judges in the lower Court had disagreed on the point of whether there was a right to sue and the action was properly dismissed.

2. Rule 4 of the Civil Procedure Rules merely lays down which Court in Palestine shall have jurisdiction, if any Court here has jurisdiction, but the Rule is not exhaustive and nothing in it can prevent the parties, as they had done in the present case, from making an agreement that all disputes shall be referred to any competent Court in another country.

3. Contracts are to be construed with reference to the time, place and circumstances in which they were made.

4. A choice, in a German contract, of a German tribunal did not constitute a reference to a foreign tribunal and did not, therefore, amount to a reference to arbitration. This point had not, in any event, been raised in the lower Court or in the grounds of appeal.

5. The allegations of bad faith had not been made out by Appellant and the fact that the first Respondent could rely on a defence of limitation in Germany did not necessary imply bad faitb.

6. (following C. A. 145/38) Although there was no reciprocity between Germany and Palestine so that a German judgment could not be enforced in Palestine, by *exequatur* there was nothing to prevent an action being brought here on the judgment of a German Court.

FOLLOWED: C. A. 46/38 (1938, 1 S. C. J. 227); C. A. 145/38 (1938, 2 S. C. J. 67).

ANNOTATIONS: On the disagreement of judges, see in addition to C. A. 46/38 (*supra*) and annotations, the annotations to C. A. 237/37 (*ante*, p. 46) at p. 48 — 2nd paragraph.

As regards choice of tribunal, *vide* C. A. 194/37 (3 Ct. L. R. 26, Ha. 23.iv.38).

For the principle that a point not taken in the Court of trial cannot be raised on appeal, *vide* C. A. 90/38 (1938, 1 S. C. J. 286) and note 3 thereto, C. A. 129/38 (*ibid.* p. 386).

For cases on foreign judgments see annotations to C. A. 145/38 (*supra*).

FOR APPELLANTS: Smoira.

FOR RESPONDENTS: No. 1. — Werner.
No. 2. — No appearance.

JUDGMENT:

Copland, J.: This is the considered judgment of the Court.

The facts of the case, so far as they are relevant to this present appeal, are as follows. By a contract dated 10th/20th September, 1933, and executed in Tel-Aviv and Berlin, the firm of G. Kaerger Machinery Factory A. G. of Berlin or their assignees agreed to consign certain machinery to the firm of M. Gafny & Co. of Tel-Aviv or their assignees. The only clauses of this contract with which we are concerned in this present appeal are Clause 9, whereby Mr. Alexander Kremener of Berlin, the first Respondent in this appeal, guaranteed all obligations of the firm of M. Gafny & Co. which might result from this contract, and Clause 10, whereby the parties agreed that all disputes resulting from this contract should be within the exclusive jurisdiction of the Berlin Mitte Court. It is not disputed that at the time of making the contract the first Respondent was resident in Berlin but is now living in Palestine. Certain machines were duly consigned to M. Gafny & Co., but disputes arose and the accounts were not paid. Later, on the 20th July, 1937, and the 10th August 1937, G. Kaerger purported to assign their claims against M. Gafny & Co. and the first Respondent to the firm of N. V. Philips Gloeilampenfabrieken of Eindhoven, Holland, the present Appellants and the Plaintiffs in the District Court. The validity of this assignment was contested in the proceedings in the District Court, but that Court made no finding thereon, and we therefore say nothing about it, but for the purposes only of this present appeal, we assume that it was valid. In the meantime M. Gafny & Co. have been declared bankrupt, a part of the claim against them has been paid out of the proceeds of the bankruptcy, leaving

the amount of RM. 5386.62 still unpaid, and the Appellants sued for this amount in the District Court sitting at Tel-Aviv against M. Gafny & Co. and the first Respondent. Gafny & Co. entered an appearance but did not defend at the trial.

A number of points were raised in the pleadings and five agreed issues were drawn up for determination, the first of them being — had the Court jurisdiction to entertain the case. On this issue the learned Judges of the District Court found themselves unable to agree, the Relieving President, Judge Curry, holding that in view of Clause 10 of the contract the parties had agreed to the exclusive jurisdiction of a German tribunal, and Judge Korngrun being of opinion that Rule 4 of the Civil Procedure Rules, 1938, allowed the action to be properly brought in Palestine, and that any judgment of a German Court was valueless as it could not be executed in Palestine. The District Court thereupon dismissed the action. Hence this appeal.

The Appellant has argued before us that Rule 203 of the Civil Procedure Rules, 1938, lays down that a judgment must either be unanimous or by majority, and that, when a Court is composed of two Judges and they disagree, there is no majority and therefore no proper judgment, and that a third Judge should have been called in and the case reargued. Alternatively he has urged that since the first Respondent raised the plea of lack of jurisdiction, the burden was on him to prove it, and since he failed to satisfy the Court, the plea should have been over-ruled. Here however there is no question as to the burden of proof — there was no dispute as to the facts — the only argument was, as the first Respondent rightly says, as to the proper interpretation and the legal consequences of Clause 10 of the contract ; in other words whether, under Clause 10, the Appellant had the right to bring an action in Palestine. An almost exactly similar question arose in this Court in Shlomo Fried *v.* Aaron Zelig Volansky, C. A. 46/38, where also the two Judges in the lower Court had disagreed on the point of whether there was a right to sue and this Court held that, in such a case, the action was properly dismissed. And in the present case following this previous decision, we equally think that, in view of the nature of the disagreement, the Court below had to dismiss the action. And with regard to the first argument, that the case should have been reheard by three Judges, the Courts Ordinance, Cap. 28. S. 11(3)(a), as amended, states that a civil action in which the claim does not exceed five hundred pounds "shall be tried" by two Judges. No provision is made in the event of the two Judges disagreeing, and we think that, the old Ordinance of March

1920 having been specifically repealed by the Trial Upon Information Ordinance 1924, all amendments to it must also be taken to have been repealed by the same Ordinance, since the amendments without the original Ordinance are largely meaningless. It may well be that in some cases it would not necessarily follow that an action should be dismissed because the two Judges disagreed, but that is not the case here, where the disagreement was on a point of law, which this Court can itself decide.

The next argument by the Appellants is that Rule 4 of the Civil Procedure Rules allows this action to be brought in the Courts of this country, and that Clause 10 of the contract cannot take away this right.

The first Respondent replies that Rule 4 merely lays down which Court in Palestine shall have jurisdiction, if any Court here has, that the Rule is not exhaustive and that nothing in it can prevent the parties making an agreement that all disputes shall be referred to any competent Court in another country. With this argument of the first Respondent we are in agreement. In Dicey's Conflict of Laws 5th Edition p. 32, the principle is laid down that the Courts of any country have a right to exercise jurisdiction over any person who voluntarily submits to their jurisdiction, with certain exceptions, such as divorce, and it is pointed out that submission may take place in various ways, and one of these ways is where a party has made it a part of an express contract that he will, if certain questions arise, allow them to be referred for decision to the Courts of a given country. The reason for this is that parties must be held to be bound by their contracts.

The Appellants further argue that since by English Law a reference to a foreign tribunal is deemed to be a reference to arbitration, then under S. 5 of the Arbitration Ordinance, Cap. 6, the first Respondent should have applied to the District Court to stay proceedings, or have entered an appearance under protest, and that since he did neither of these things, but entered an unconditional appearance and also applied for further time to deliver his defence, he must be deemed to have submitted to the jurisdiction of the District Court and could not therefore raise a plea of lack of jurisdiction. The first Respondent's answer to this is that this point was never raised in the Court below and was not included in the agreed issues, and neither was it raised in the grounds of appeal, since the laconic statement in para. 7 of the appeal, that "even if English Law were applicable, Respondent No. 1 could not succeed in his plea of lack of jurisdiction", does not even faintly suggest this point. We think that this contention of the

first Respondent is right but, even if it were not so, we still think that the Appellants' arguments would fail for these reasons : In construing this contract we must do so by reference to the time and place and circumstances in which it was made. When this contract was entered into, the assignors of the Appellants and the 1st Respondent were both Germans and resident in Germany, the contract would fall to be governed by German Law, and the reference to the Berlin Mitte Court was not a reference to a foreign tribunal, but the parties' national tribunal, and therefore the Courts of Palestine cannot hold that English Law applies and that the reference is one to arbitration. The legal character of a contract cannot be changed because one of the parties thereto changes his residence and takes up his abode in another country. Holding this view, as we do, the Appellants' next point, that a clause to agree to submit disputes to arbitration cannot under English Law be assigned, does not arise. In any case this point again was not raised in the Court below nor in the grounds of appeal.

We now come to the Appellants' last arguments in support of the appeal, namely that the plea of lack of jurisdiction is not made in good faith, because the first Respondent has no property in Germany, and is only endeavouring to evade liability, that the first Respondent being a Jew cannot appear in a German Court to defend, and that a German judgment, even if obtained, cannot be executed in this country, owing to there being no reciprocity between the two countries in respect of execution of judgments.

The allegation of bad faith is strongly denied by the first Respondent who says that one of his reasons for preferring the German forum is that he can take advantage there of the German Law as to limitation of actions, and that under the German Civil Code this action would be barred. One cannot say that there is necessarily bad faith here, unless to defend an action is *ipso facto* an act of bad faith.

As to the point that the first Respondent could not defend the action in a German Court, that is one which might be raised by him, but hardly by the Appellants. And finally, whilst the Appellants could not apply in the Courts of this country to enforce a German judgment by *exequatur*, there is nothing to prevent them bringing an action on a judgment here. Many foreign judgments cannot be enforced in Palestine by *exequatur*, since this procedure is only available where there is a treaty or convention between two countries for the reciprocal enforcement of judgments, or where such judgments are made enforceable in Palestine by Ordinance. See Calamari *v.* Abdallah C. A.

145/38 (C. L. R. IV p. 61). But there is nothing to prevent in such circumstances an action being brought here on the judgment of a German Court.

There may be circumstances where the Courts of Palestine would assume jurisdiction, but those circumstances do not arise in this case. There is nothing to prevent the Appellants instituting proceedings in Germany, as provided for in the contract, and, to adopt the words of the learned Relieving President, we do not consider that a plea of greater convenience is sufficient to entitle the Court to ignore the agreement of the parties.

For all these reasons we think that this appeal fails and must be dismissed with costs to include LP. 15.— fees for attending the hearing, to the first Respondent.

Delivered this 23rd day of February, 1939.

British Puisne Judge.

I concur.

Senior Puisne Judge.

I also concur.

Puisne Judge.

CIVIL APPEAL No. 7/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :

1. David Pochas,
2. Hilel Saphir,
3. Ya'acov Pinchasi,
4. Yosef Gatzler. — APPELLANTS.

v.

Nissan Ahronovitz. — RESPONDENT.

Deposit for appeal — Delay in paying — No good cause shown.

In dismissing an appeal from a judgment of the District Court, Tel-Aviv, dated the 20th December, 1938 :—

HELD : The Appellant had not shown good cause for his failure to deposit the security for costs within the time fixed by the Chief Registrar.

ANNOTATIONS : The deposit was tendered one day after the expiration of the time fixed and it was pleaded that this could not have been done earlier

in view of the state of insecurity. See and *cf.* C. A. 192/38 (1938, 2 S. C. J., 230).

FOR APPELLANTS : Goldman.
FOR RESPONDENT : Abramovsky. (By delegation).

JUDGMENT:

We are not satisfied that the Appellant has shown good cause for his failure to deposit the security for costs within the time fixed by the Chief Registrar.

The appeal will therefore be dismissed and the Respondent will have his costs assessed at LP. 5, to include attendance at the hearing of the motion.

Delivered this 27th day of February, 1939.

Chief Justice.

CIVIL APPEAL No. 12/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPLICATION OF :

1. Joseph Ziman,
2. Eliahu Lager,
3. Joseph Zimberknopf. APPLICANTS.

v.

Moshe Shwarz. RESPONDENT.

Arbitration — Leave to appeal from a decision of remittal — Fresh award given in the meantime.

In refusing an application under Section 15(3) of the Arbitration Ordinance for leave to appeal from the judgment of the District Court, Tel-Aviv, dated the 21st December, 1938 :—

HELD : There would be no useful purpose in granting leave to appeal as the District Court had remitted the proceedings to the arbitrators and a fresh award had been given.

ANNOTATIONS : *Cf.* C. A. 208/38 (1938, 2 S. C. J. 106) where the Court refused to interfere with an arbitrator's refusal to state a case, a final award having already been delivered.

As regards appeals from remitting judgments, *vide* C. A. 76/38 (1938, 1 S. C. J. 266) and annotations.

FOR APPLICANTS : Kolodny.
FOR RESPONDENTS : Hatchwell.

ORDER:

This is an application for leave to appeal from the judgment of the District Court in an unfortunate arbitration case which has been dragging on for some time. The Applicants applied for the award to be set aside, alleging misconduct on technical grounds, and they admit that their application to set aside the award was not filed until eight months after its publication.

The District Court remitted the case to the arbitrators to make a fresh award, and we understand that a fresh award has been given in the meantime. We therefore see no useful purpose in granting leave to appeal. The Applicants may now, if they desire, take the appropriate action against the second award.

Leave to appeal will therefore be refused and the application dismissed. The Respondent will have his costs assessed at LP. 6, which sum shall include the fee for attendance at the hearing.

Delivered this 27th day of February, 1939.

Chief Justice.

CRIMINAL APPEAL No. 8/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :

George Ibrahim Elias. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal against sentence — Accused pleading guilty but no opportunity given to advocate to address the Court — Criminal Procedure (Trial Upon Information) Ordinance, sec. 47 — Prisoner assisting prosecution — Excessive sentence — Age.

In allowing an appeal against sentence from a judgment of the District Court, Jerusalem, dated the 16th February, 1939, whereby the Appellant was convicted on the charge of uttering a false document contrary to Section 340 of the Criminal Code Ordinance, 1936, and on the charge of receiving stolen property

contrary to Section 309 of that Ordinance, and sentenced to three years' imprisonment and in changing the sentence from three years' imprisonment to a recognizance to be of good behaviour :—

HELD : 1. There was no note on the record that the provisions of Section 47 of the Criminal Procedure (Trial Upon Information) Ordinance had been complied with. In view of the fact that the Appellant was represented by an advocate, notwithstanding the fact that the section allowed the prisoner or his advocate to be heard, the advocate should have been given an opportunity of being heard.

2. Although some members of the Court had tried offenders engaged in the same transactions, this was insufficient to give the Court knowledge of the facts beyond what appeared from the information.

3. The prosecution did not press the case and pointed out that the Appellant had helped them. Had the Appellant's advocate been present he would have pointed out in detail the assistance which the prisoner had given and would have drawn the attention of the Court to English authorities.

4. The Appellant had been sentenced more severely than the principal offender and the Attorney-General's representative had associated himself with the Appellant's plea for a reduction of sentence. Moreover the age of the Appellant and his assistance to the prosecution should be taken into account.

ANNOTATIONS : On the effect of the prisoner assisting the police, in mitigation of sentence, *vide Digest,* Vol. XIV, p. 474, Nos. 5112—4. See also CR. A. 28/38 (1938, 1 S. C. J. 228).

FOR APPELLANT : Elia.

FOR RESPONDENT : Salant (J. G. A.).

JUDGMENT:

The Appellant pleaded guilty before the District Court to uttering a forged document and receiving stolen property. He now appeals against his sentence.

Several other persons were engaged in the same transactions, and sentence was deferred until after the disposal of the other cases.

After the other cases were heard the Appellant was, without proper notice, brought before the Court for sentence, and owing to this shortness of notice his advocate was absent.

It is not disputed that the other cases were tried by a Court constituted differently to that which tried the Appellant, and that an individual described as the principal offender was sentenced to two years' imprisonment.

When the Appellant was brought before the Court for sentence the provisions of Section 47 of the Criminal Procedure (Trial Upon In-

formation) Ordinance applied. There is no note on the record that they were complied with. This Court has in other cases drawn attention of Courts of trial to the desirability of such a record.

Sub-clause 2 provides that the Court shall, before passing sentence, hear the prisoner or his advocate on his behalf. It is true that these are stated in the alternative, but it is obvious that if a prisoner has an advocate he should be given the opportunity of being heard.

In the present case the Court had no knowledge as to the facts beyond what appeared from the information. It is true that some members of the Court had tried the other offenders, but that is clearly insufficient.

The prosecution stated that they did not press the case and pointed out that the prisoner had helped the prosecution. Had the prisoner's advocate been present, he would no doubt have pointed out in detail the assistance which the prisoner had given — which he indicated to us — and would have drawn the attention of the Court to certain relevant *dicta* in English cases which he cited to us. These are matters which clearly might have influenced the Court had they been before it.

In the result the Appellant was sentenced to three years' imprisonment, that is, one year more than the so-called principal offender. The Attorney-General's representative associates himself with Mr. Elia's plea for a reduced sentence.

Having regard to the irregularities at the trial, and taking into account the age of the Appellant, who is stated to be only 20, and the assistance which he rendered to the police and the prosecution, we set aside the sentence of three years' imprisonment and direct that he be bound over with one surety for LP. 100 to be of good behaviour for one year.

Delivered this 28th day of February, 1939.

Chief Justice.

CIVIL APPEAL No. 16/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPLICATION OF :

The Syndic in Bankruptcy of the Firm "S. N. Khoury" of Haifa. APPLICANT.

v.

Mr. Woolf Slavouski. RESPONDENT.

Application for leave to appeal from interlocutory order — Motion heard on grounds not stated therein, C. P. R. 307 — Order to pay value of property made against person not in possession of entire property — Offer to transfer — Specific performance — Purchase price — Applicant not prejudiced.

In dismissing an application for leave to appeal under Rule 317 of the Civil Procedure Rules, 1938, against the interlocutory order of the District Court of Haifa, dated 18th January, 1939 :—

HELD : 1. Applicants were not prejudiced and there was nothing in the point that the motion which was the foundation of the present proceedings did not state specifically the grounds on which it was based and that the Land Court heard arguments on other grounds.

2. The Applicant would not be prejudiced by complying with the order of Court to pay into Court the value of the property concerned inasmuch as he had applied for specific performance of the contract to sell the property.

ANNOTATIONS : For previous proceedings in this case, *vide* L. C. Ha., 28/37 (P. P. 10.v.38) ; C. A. 132/38 (1938, 1 S. C. J. 387) and see annotations thereto.

FOR APPLICANT : Sanders & Atallah.

FOR RESPONDENT : Shapiro.

ORDER:

This is an application for leave to appeal from an Order of the Haifa Land Court, given on the 18th of January, 1939, whereby the Applicants, who were Plaintiffs in the Court below, were ordered to pay into Court the sum of LP. 5,750 within one month before their action of specific performance would be proceeded with. The Land

Court refused leave to appeal from this Order and the Applicants have now come to this Court.

Two points have been raised in support of the application, the first one being that in the motion of the 1st December, 1938, which was the foundation of the present proceedings now in this Court, the Respondent did not state specifically the grounds on which this motion was based and the Land Court heard arguments on other grounds, whereas they should not have done so under Rule 307 of the Civil Procedure Rules. We do not think that there is anything in this point. We cannot say that the present Applicants were in any way prejudiced and the procedure seems to have been correct.

A second point is that no order for payment into Court of the value of the property concerned can be made unless the person who is ordered to pay is in possession of the whole property. But it must be remembered that in this case the action was brought by the purchaser claiming specific performance. It is said by the Applicant that the Respondent has made no offer to transfer the property to him, whereas in paragraph 10 of the Respondent's motion of the 1st of December, 1938, he does make an offer to transfer subject to the deposit of the purchase price mentioned in the option, or, if the amount of the purchase price cannot be agreed upon, then the undisputed amount should be paid in, and if such a course be adopted he offers at the same time to withdraw all defences other than that relating to the amount of the purchase price. The Applicant assures us that he is only too willing to purchase this property if he can get a transfer.

It seems to us in these circumstances a little difficult to realise why he is showing such an extreme dislike to pay the money into Court, in a case such as this where, if the money is paid into Court, the only point in dispute would be the amount of the purchase price. It seems to us that the Applicant will in no way be prejudiced but in fact the purchase on which he has apparently set his heart will be considerably expedited.

In these circumstances we do not think leave should be given and the application is therefore refused. The Respondent will have the costs to include LP. 15.— fees for attendance at the hearing.

Given this 6th day of March, 1939.

British Puisne Judge.

PRIVE COUNCIL LEAVE APPLICATION No. 13/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Manning, S. P. J., Copland and Khayat, JJ.

IN THE APPLICATION OF :

1. Jaber Elias Kotia,
2. Sami Elias Kotia. APPLICANTS (RESPONDENTS).

v.

Katr Bint Jiryes Nahas. RESPONDENT (APPELLANT).

Application for leave to appeal to Privy Council — Affidavit as to value of property involved — Whether question of value involved — Succession to immovable property — Power of Court to grant stay of execution, Art. 7 Palestine (Appeal to Privy Council) O. in C. notwithstanding — Guarantees.

In granting an application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court sitting as a Court of Appeal, dated the 31st October, 1938 :—

HELD : 1. A question of amount was involved in the appeal and the amount was in excess of LP. 500.

2. The judgment in this case did not require Appellants to pay money or perform a duty but, notwithstanding the provisions of Art. 7 of the Palestine (Appeal to Privy Council) Order in Council, 1924, this Court must have an inherent power to preserve the rights of parties intact pending an appeal to His Majesty in Council.

ANNOTATIONS : Earlier proceedings : C. A. 220/38 (1938, 2 S. C. J., 151) ; P. C. L. A. 13/38 (*ibid.*, p. 228).

FOR APPLICANTS : Eliash.

FOR RESPONDENT : Goitein.

ORDER:

When this petition for leave to appeal to His Majesty in Council came before this Court on the 7th of December last, it was said that certain property was involved, and that this property was valued at over LP. 500. There was no proof before the Court as to the value of the property alleged to be involved and the Court accordingly ordered the Petitioners to file an affidavit as to the description and value of the property within ten days.

That order was complied with and affidavits were filed creating a *prima facie* presumption that the value of the property alleged to be

involved was over LP. 500. The Respondents had been granted a period of ten days within which to file a counter-affidavit. No such affidavit was filed within the period and we have decided to pay no attention to the affidavits which were afterwards filed. For the same reason we make no order as to the cross-examination of the deponents who have sworn to the affidavits on behalf of the Petitioners.

Mr. Goitein for the Respondent has taken the point that no question of value whatever arises in this matter, since the Respondent applied to the District Court for a certificate of succession. There was no mention of any property and the question is merely one of personal status.

We think that this argument ignores the realities of the case, because it was clear both in the Court below and in the appeal to this Court that the whole reason of the dispute was with respect to property which had been left by the deceased, and how the shares in that property were to be distributed. The District Court had made an order giving a quarter share to the Respondent and three eighths to each of the Petitioners. That order was varied by this Court and a half share was given to the Respondent and a quarter share to each of the Petitioners. It is, therefore, obvious that the dispute does indirectly involve a question with regard to the value of the property left by the deceased. The affidavits which have been filed convince us that the amount which will be in dispute in any appeal to His Majesty in Council will be well over LP. 500. and therefore the Petitioners are entitled as of right to appeal to His Majesty in Council.

Mr. Eliash for the Petitioners has asked for a stay of execution. Mr. Goitein for the Respondent has called the Court's attention to Article 7 of the Palestine (Appeal to Privy Council) Order in Council, 1924, in which the question of a stay is said to arise only where the judgment appealed from requires the Appellant to pay money or perform a duty. The judgment in this case does not require the Appellants to pay money or perform any duty, but we think that this Court must have an inherent power to preserve the rights of parties intact pending an appeal to His Majesty in Council.

We have therefore decided to grant the Petitioners leave to appeal on condition : —

(a) that within two months they enter into good security to the satisfaction of this Court, (the security to take the form of a Bank Guarantee) in the sum of LP. 300 for the due prosecution of the appeal and the payment

of all such costs, as may become payable to the Respondent in the event of the Petitioners not obtaining an Order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Petitioners to pay the Respondent's costs of the appeal (as the case may be) ; and

(b) that the Petitioners within the said period of two months do take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England.

With regard to what might be called the execution of the decree of the Court, we divert that the Respondent is at liberty to register her interest in one quarter share of the property of the deceased and that she may register her interest in another quarter of the property if she enters into a Bank guarantee for the sum of LP. 1000 for the due performance of such order as His Majesty in Council will think fit.

Given this 31st of day of January, 1939.

Senior Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 9/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPLICATION OF :

Haj Hassan Hammad. — APPELLANT. (RESPONDENT)

v.

Mgr. Louis Barlassina, Latin Patriarch of Jerusalem. — RESPONDENT. (APPLICANT)

Privy Council Appeal — Application for certificate of non-prosecution — Palestine (Appeal to Privy Council) Order in Council, Art. 24.

In allowing Respondent's application under Art. 24 of the Palestine (Appeal to Privy Council) Order in Council, 1924, for the grant of a certificate that the appeal had not been effectually prosecuted by the Appellant and that consequently the said final leave to appeal be revoked and the appeal should stand dismissed for non-prosecution ; and in granting a certificate of non-prosecution :—

HELD : There had been much too great delay by the Appellant who had not shown any real will to prosecute the appeal.

ANNOTATIONS : Previous proceedings in this case : L. A. 1/36 (P. P. 30.x ; 1—5, 8.xi.36 ; C. of J. 1934—6, 340) ; P. C. L. A. 9/36 (1937, 1 S. C. J. 472 ; P. P. 17.viii.37).

See also P. C. L. A. 5/36 (1938, 2 S. C. J., 97).

FOR APPELLANT : Goitein.

FOR RESPONDENT : Elia.

ORDER.

This is an application by the Respondent under Article 24 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, for the grant of a certificate of non-prosecution of an appeal to His Majesty in Council.

On the 28th of January, 1937, this Court gave the present Appellant conditional leave to appeal on condition that the Appellant entered into good and sufficient security in the form of a Bank guarantee in the sum of LP. 300 and that the Appellant prepared within six weeks of that date a list of documents for the preparation of the record. Final leave to appeal was granted on the 3rd of May, 1937.

Matters, at any rate in so far as we in this Court were concerned, remained in abeyance until January, 1938, when the record apparently was settled. The record which has been produced was not of a particularly voluminous character, and it is a little difficult to understand why so long a time was taken in its preparation. Nothing further again was done until the 14th of December, 1938, when the Chief Registrar made enquiries of the Appellant as to what he intended to do. Now there had been certain negotiations between the parties to this appeal with a view to seeing whether or not the matter perhaps might be compromised, but it must have been obvious between January, 1938, and December, 1938, in fact very much before December, 1938, that negotiations did not show any prospect of reaching a successful conclusion. It seems to us that there has been much too great delay by the Appellant in this case, and that he has not shown any real will to prosecute this appeal.

For these reasons we think that the Respondent's motion before us has succeeded. Under Article 24, therefore, of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, we grant a certificate of non-prosecution that the appeal shall be deemed, as from to-day's

date, to stand dismissed for non-prosecution without express order of His Majesty in Council. The costs of the appeal including those of the settlement of the record and for leave to appeal to His Majesty in Council, and the costs of this present application, shall be paid by the Appellant to the Respondent. These costs to include LP. 10.— for attendance at the hearing of this application.

Delivered this 8th day of March, 1939.

British Puisne Judge.

CRIMINAL APPEAL No. 88/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Municipality of Nablus, APPELLANT.

v.

Rashad Anis el-Maslamani. RESPONDENT.

Infringement of bye law — Appeal by A. G. — Selling fruit outside a market — Nablus Municipal bye laws, bye law 3 — Whether bye law ultra vires the Municipal Corporations Ordinance — How far affected by the Trades and Industries Ordinance — Ambiguity of finding of fact — Respondent not represented.

In dismissing an appeal from a judgment of the District Court of Nablus (Appellate Capacity) whereby the Respondent was acquitted of the charge of selling fruit within the Municipal area, other than in the Municipal Fruit Market, contrary to By-Law 3 of the Nablus Municipal By-Laws, 1935 :—

HELD : Several points of importance were involved in the appeal but Respondent was not represented and in view of the ambiguous finding of fact, the Court did not feel justified in convicting him, whatever the law might be.

ANNOTATIONS : On the construction of bye laws, *vide* last paragraph in annotations to C. A. 237/37 (*ante, p.* 46).

On accused not being represented, *cf.* 8/39 (*ante*, p. 93).

FOR APPELLANT : Crown Counsel (Bell).

RESPONDENT : In person.

JUDGMENT.

This is an appeal by the Attorney-General. The Respondent was charged before the Magistrate, Nablus, with an offence against By-law 3 of the Nablus Municipal By-laws, 1935, which provides —

> "No person shall sell any fruits, fresh cheese or vegetables within the municipal area except in the municipal fruit, fresh cheese and vegetable market."

in that he was alleged to have sold oranges in his shop which was in the Municipal Area but not in the market.

He was discharged on the grounds —

> (a) "Section 3 of the By-laws does not apply to the case against the accused, because, to my mind, it applies to large quantities of vegetables which are brought from outside the municipal area by sellers for the purpose of selling the same to dealers in vegetables, in the municipal market place".

and (b) on the ambiguous finding that the accused did not sell his commodities within the Municipal Area, but he purchased them from outside the Municipal Area and brought them into his shop and sold them in retail.

The prosecution appealed to the District Court which held —

> "In our opinion the aforesaid by-law merely prohibits persons who are not the possessors of shops from hawking their vegetables about the streets and enacts that they sell them in the Municipal market."

and dismissed the appeal.

When the case first came before this Court it was alleged that the Respondent had a licence issued under the Trades and Industries Ordinance, and we adjourned the case in order to verify this. It is now clear that he has been granted a licence under that Ordinance as a vegetable salesman.

Several points of importance are raised in this appeal, particularly, is the By-law *ultra vires* the power conferred on the Corporation by the Municipal Corporations Ordinance, 1934 ? And assuming that it is not, as to which we express no opinion, how far are the provisions of the By-law modified by the Trades and Industries Ordinance ? By-laws made by Municipal Corporations under the Ordinance are not uniform, and as a matter of interest it may be observed that the Beit Jala By-laws expressly refer to the Trades and Industries Ordinance.

The Respondent, who appears in person, is unable to assist us with argument on these points, and having regard to the ambiguous finding of fact we do not feel that we could convict him whatever the law

may be. We therefore dismiss the appeal and award the Respondent LP. 2.— for his costs.

No doubt the legal advisers to the Municipal Corporations, possibly with the assistance of the Attorney-General, will wish to consider these points now that they have been raised.

Delivered this 9th day of March, 1939.

Chief Justice.

CIVIL APPEAL No. 9/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

Israel Beit-Eli. APPELLANT.

v.

1. Joseph Rahamin Azar,
2. Itzhak Shaul Huri. RESPONDENTS.

Sale of Land — Agreement to sell land including parcels to be subsequently acquired — C. A. 246/37 — Same land sold to different parties — Construction of contract — Different parties — Whether res judicata — False representation in contract — Assignment of rights not vested in assignor — Void obligation — Severability — Performance.

In dismissing an appeal from a decree of the District Court, Jaffa, sitting at Tel-Aviv, dated the 2nd December, 1938 :—

HELD : 1. (Following The New Brunswick Railway Co. *v.* The British & French Trust Corporation Ltd.) The action was not *res judicata* as the parties in this case and in C. A. 246/37 were different and as the construction of a contract can never be the subject of *res judicata.*

2. (Following C. A. 246/37) The second part of clause 1 of the contract, which purported to assign certain rights, created no obligation and became a void agreement in view of the fact that the Municipality of Tel-Aviv had no rights to the land therein referred and there were consequently no rights which could be transferred by the Appellant to the Respondents.

3. The contract had not been performed in its entirety.

4. Repudiation of part of the contract could be pleaded by Respondents as the contract was severable.

FOLLOWED : The New Brunswick Railway Co. *v.* The British & French Trust Corporation, Ltd. (1938, 4 All. Eng. L. R. 747 ; 160 L. T. R. 137).

C. A. 246/37 (1938, 1 S. C. J., 40).

ANNOTATIONS : *Vide* C. A. 246/37 (*supra*) and annotations.
On *res judicata, vide* C. A. 6/39 (*post*) and annotations.

FOR APPELLANT : Olshan.
FOR RESPONDENTS : Fellman.

JUDGMENT:

This is the considered judgment of the Court.

This is an appeal from the judgment of the District Court sitting at Tel-Aviv, declaring that a part of a contract between the two parties to sell land was void, and ordering the return of the purchase money paid in respect of the void part. The facts are as follows :

On the 23rd of October, 1934, the Appellant sold to the Respondents land of two categories : A., the first part, consisting of a plot, the area of which was 409.1 square metres ; and B., certain smaller plots which were known during the proceedings as the completion plots, and which will be referred to as such in this judgment, amounting to a total of 263.5 square metres. The total area of the plot sold was stated in the contract to be 672.6 square metres, and the price at the rate of LP. 1.150 mls per Tel-Aviv square pic, making a total of LP. 1366.775 mls. The whole of the purchase money was paid to the Appellant, and the plot of catagory A. was duly transferred to and registered in his name.

By clause 1. of the contract —

> "The vendor undertakes hereby to sell to the purchaser and the latter agrees to buy from him the a/m plot which belongs to him as a member of the group "22" by virtue of a title deed from the Jaffa Land Registry No. 3339/33 and in accordance of the parcellation plan confirmed by the sub-committee of the Town Planning Commission of Tel-Aviv on 2.8.34.
>
> "The share of the vendor in the said general title deed is 2/44, but according to the casting lots and parcellation plan of the said group, and in virtue of the contract existing between the vendor (as a member of the said group) and the Tel-Aviv Municipality, dated the ..... the vendor possesses the right over the complementing parcels to the said plot, as specified in clause (b) above, so that the total area of the plot belonging to the vendor will amount to 672.6 sq. m. as aforesaid."

Clause 3. of the contract is in these terms :

> "The vendor undertakes to produce to the purchasers a confirmation from the committee of the Group "22" to the effect that it has no objection to the transfer of the rights the vendor has in the Group over his plot to the said purchasers.
>
> "With reference to the complementing portions to the said plot, as specified in clause (b) above, it was agreed that the vendor shall transfer his rights to the name of the purchasers and shall procure to the purchasers a confirmation from the Municipality of Tel-Aviv to the effect that it will transfer the portions in question to the purchasers pursuant to the terms of the contract existing between the Municipality and the said Group, so that the purchasers should substitute the vendor in regard to the conveyance of the said rights and also in regard to the fulfilment of the obligations referred to in the said contract."

By a prior contract dated 17th January, 1934, made between the Municipality of Tel-Aviv of the one part, and twenty-two persons, including the Appellant, of the other part, the Municipality undertook to acquire the completion plots from the owners either by negotiation or by expropriation and to transfer them into the names of the twenty-two persons comprising the second party or their order. Various arrangements were made in case the Municipality were unable to acquire these plots, and, in fact, up to this day the completion plots have not been so acquired by the Municipality.

By another contract the Respondents undertook to sell this same land, including the completion plots, to one Palatnik. The Respondents failed to transfer the completion plots to Palatnik, and the latter thereupon brought an action against the Respondents for the amount of the purchase price paid by him to the Respondents for the non-transferred plots. This action was dismissed in the District Court, but an appeal to this Court, Civil Appeal No. 246/37, was made. The judgment of the District Court was reversed and judgment was entered in Palatnik's favour declaring that that part of the contract referring to the land of category B. should be rescinded, and judgment should be entered for him for the amount of the purchase price paid in respect of the land in this category.

The Respondents thereupon brought this action in the District Court against the Appellant claiming from him the amount paid by them to him for the completion plots.

Mr. Olshan, for the Appellant, has argued that this Court is not bound by the judgment in Palatnik's case and there can be no question of *res judicata* seeing that the parties are different, and in any case the construction of a contract can never be the subject of *res judicata*.

That is so, and this principle was laid down in the case of the New Brunswick Railway Co. *v.* The British & French Trust Corporation Ltd., (All England Law Reports, 1938, Vol. 4, p. 747 ; Law Times Reports, Vol. 160, p. 137). He has further argued that the two contracts differ in very material degrees, and that therefore the same construction cannot be applied to both of them. In particular he has argued that whilst in Palatnik's contract the present Respondents state that the completion plots were held by the Municipality as agents for them, in the present contract the Appellant merely said that he was the owner of a right in the completion plots, and that he never held himself out as being the owner of the completion plots themselves. He says that clause 1 of the present contract merely contains an assignment of rights, and nothing more, and that therefore there is no misrepresentation by him and no fraud.

It is true that there are differences in the respective clauses 1 and 3 of the two contracts, but we do not think, as the District Court also held, that these differences are material. If we look at the present contract we see that the area of the property stated to be sold consists of a total area of 672.6 square metres, and this clause 1 states that the "share of the vendor in the said general title deed is 2/44", and that "the total area of the plot belonging to the vendor (that is the Appellant) will amount to 672.6 square metres".

Looking at this clause as a whole it seems to us that this representation that the share of the vendor is 2/44, and that the total area of the plots belonging to the vendor will be of the amount as stated, is not a true one, because the completion plots did not, and still do not, belong to the vendor, and there is no immediate prospect of his ever being in a position to acquire them. It seems to us that much of the judgment of this Court in the Palatnik case (*supra*) is equally applicable to this present case, particularly where the Court then said — "If the Municipality of Tel-Aviv had no rights in the land in category B., any order to them by the Respondents in respect of that land would be merely a barren order, and of no avail to the Appellant." The Municipality of Tel-Aviv has still no rights to the land in category B. There was therefore no right which could be transferred by the Appellant to the Respondents under the present contract, and as equally held by the Court in the Palatnik case (*supra*), the second part of clause 1 of the present contract can create no obligation, and that part of clause 1 merely becomes a void agreement.

It is clear to us that there was a misrepresentation, and the same

results therefore must follow. It is incorrect to say, as the Appellant has argued, that the contract has been performed. Part of it has not been performed, and cannot be, since the completion plots are owned by three separate owners, and have not been acquired by the Municipality.

With regard to the Appellant's argument that the Respondents could not claim repudiation of a part of the contract, we regard this present contract as being obviously divisible, in the same way as Palatnik's contract, into two separate parts, and we can see no reason why, if one separate part be held to be void, that part of the contract should not be rescinded. We are not impressed by the argument that the Appellant could not get back his assignment of rights. If the Municipality had no rights in the land there was nothing to assign.

In conclusion it seems to us that this present contract cannot in the result be distinguished from the Palatnik contract, and that the judgment of the District Court was correct.

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

Delivered this 9th day of March, 1939.

British Puisne Judge.

CIVIL APPEAL No. 6/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

Nabiha bint Michael El-Bahu,
widow of Bandali Adas on behalf
of her husband's estate. APPELLANT.

v.

Elias El-Bahu. RESPONDENT.

Res judicata — C. A. 51/32 — Finding by the Land Court that case of action and subject-matter of claim same as in a previous action — Interpretation of judgment — Appellate Court should dismiss original action or otherwise after allowing appeal — Estoppel by record.

In dismissing an appeal from a judgment of the Land Court, Haifa, dated 21st December, 1938 ;—

HELD : Whether the action brought in the Land Court was *res judicata* or not depended on the interpretation of the judgment given by the Court of Appeal in C. A. 51/32 and the proper interpretation of that judgment was that the Court of Appeal had dismissed the original claim brought in the Land Court and had not left it in suspense. The action was therefore *res judicata.*

ANNOTATIONS : On *res judicata, vide* first paragraph of annotations to C. A. 195/38 (1938, 2 S. C. J. 157) ; C. A. 9/39 (*ante*).

FOR APPELLANT : Salah (by delegation).
FOR RESPONDENT : Weinshall.

JUDGMENT:

In this appeal from the judgment of the Land Court, Haifa, the only point for determination is whether the subject matter of the claim before the Land Court is or is not *res judicata,* bearing in mind the judgment of this Court in Civil Appeal No. 51/32 — Naim El Bahu and another *v.* Nabiha bint Mikhail El-Bahu, widow of Bandali Adas, on behalf of her husband's estate.

The Land Court held that the cause of the action, the subject matter of the claim, and the parties were the same in the action before them as they were in a previous action, which culminated in Civil Appeal 51/32. The solution to this question depends entirely upon the interpretation of the previous judgment given by this Court. In that judgment, this Court held that the witnesses who were heard by the Land Court, other than the Plaintiff and Defendant, did not give any evidence against the Appellant Elias, who is the Respondent in this present appeal. This Court went on to say that, Naim's half share being undisputed, the appeal must be allowed and the judgment of the Land Court set aside with costs. Do these words mean that the claim entered in the Land Court was dismissed or not ? We think on this wording that this Court dismissed the original claim brought in the Land Court and that the matter was not left suspended, as one may say, in mid-air, calling for the action to be re-entered in the Land Court for rehearing. It is of course usual, and if I may say so with respect, the better practice, in dealing with an appeal, after allowing it, to dismiss the original action or otherwise as the case may be.

On the wording in this case we are satisfied that the present Appellant's claim against the Respondent is *res judicata,* by reason of estoppel on the record, and that the Land Court therefore was right in refusing

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

Delivered this 13th day of March, 1939.

British Puisne Judge.

HIGH COURT No. 8/39.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

1. Subhi Khoursheed,
2. Ishak Khoursheed. — PETITIONERS.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Moshe Smilansky. — RESPONDENTS.

Sale of Mortgage — H. C. 35/38 — Security Mortgage — Application to competent Court required — Injunction to restrain mortgagee from enforcing security.

In dismissing an application for an Order to issue directing the First Respondent to show cause why he should not refrain from executing his order dated 11.1.39 in the Execution File of Tel-Aviv No. 9768/38, and why it should not be set aside, and alternatively, why Petitioners should not be granted an extension of one year for the payment of the sum included in the mortgage deed ; and in granting the Petitioner a temporary stay to enable him to apply to the competent Court :—

HELD : (Following H. C. 35/38) The Petitioner alleged that the mortgage was a security for the fulfilment of the terms of an agreement between the parties. His proper remedy was to go to a competent Court and obtain a judgment to that effect, when he would be entitled to an injunction restraining the Respondent from enforcing the security until the liability was established.

FOLLOWED : H. C. 35/38 (1938, 1 S. C. J., 296).

ANNOTATIONS : *Vide* annotations to H. C. 35/38 (*supra*) which was also followed in H. C. 59/38 (1938, 2 S. C. J. 84).

FOR PETITIONERS : Germanus.

FOR RESPONDENTS : No. 1 — Not present — served.
No. 2 — Scharf (by delegation).

ORDER:

This is a return to an order *nisi* granted by this Court calling upon the Respondent to show cause why an order of the Chief Execution Officer, Tel-Aviv, granting a petition for sale of certain mortgaged property, should not be set aside.

The case is a very simple one and is in our opinion governed by the principles laid down by this Court in Hassan and another *v.* Chief Execution Officer, Tel-Aviv and others — H. C. No. 35/38, C. L. R. Vol. III, p. 235. In that case, as here, the Petitioners alleged that the mortgage was a security for the fulfilment of the terms of an agreement between the parties. In the above quoted case we said that the Petitioners' proper remedy was to go to a competent Court and obtain a judgment that this mortgage in respect of which an order for sale has been made was a security, and that if that could be established to the satisfaction of that Court, then the Petitioners would be entitled to an injunction restraining the Respondent from enforcing the security until the liability was established.

These words apply with equal force to the case now before us, and we do not think that we can usefully add anything to what we then said. We grant a temporary stay of ten days from to-day to enable Petitioners to take this course, if they so wish. Subject to that, the rule is discharged with costs to include LP. 10.— for attending the hearing.

Given this 13th day of March, 1939.

British Puisne Judge.

HIGH COURT No. 12/39.

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

BEFORE: Copland and Khayat, JJ.

IN THE APPLICATION OF:

1. Eliahu Berman,
2. Baruch Berman,
3. Todros Berman,

4. Arie Berman,
5. Moshe Berman. PETITIONERS.

v.

1. The Chief Execution Officer, Jerusalem,
2. Henryk Huppert. RESPONDENTS.

Sale of mortgage — Extension of time after final order of sale — Mortgagor abroad — Discretion of C. E. O.

In dismissing an application for an order to issue directing the First Respondent to show cause why his Order in Execution File of Jerusalem, No. 4152/37, dated 3.3.39 should not be set aside and why he should not direct the Land Registrar of Jerusalem, to register the sale of the mortgaged property in the name of the highest bidder in accordance with his previous Order dated 1.2.39 :—

HELD : The Chief Execution Officer has a discretion to extend times for payment. The discretion was not improperly exercised in this case since the mortgagor was resident abroad and two months' time seemed to be a reasonable period in the circumstances.

ANNOTATIONS : On the discretion of the C. E. O., *vide* H. C. 3/39 (*ante*, p. 81) and note.

FOR PETITIONERS : Marein.

FOR RESPONDENTS : *Ex parte*.

ORDER:

In this case an application is made to this Court to set aside an order of the Chief Execution Officer, Jerusalem, granting two months' time for payment by mortgagor as from the 13th February, 1939, after final sale notice has been given.

We think that the Chief Execution Officer has a discretion to extend times for payment, and we cannot say that that discretion has been improperly exercised in this case, since the mortgagor is resident abroad and two months' time seems to us to be a reasonable period in the circumstances. For these reasons the application for an order *nisi* is refused.

Given this 13th day of March, 1939.

British Puisne Judge.

CRIMINAL APPEAL No. 9/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF :

Muhammad Sayed Yusef. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Receiving stolen goods — 309 C. C. O. — Prosecution to prove theft, receiving and guilty knowledge — Isaac Schama v. Jacob Abramovitch — Matters to be taken into account in deciding on guilty knowledge — No finding of theft — Criminal Procedure (Trial Upon Information) Ordinance, sec. 51 — No evidence that goods found with accused were stolen.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 15th February, 1939, whereby the Appellant was convicted on a charge of wilfully receiving stolen property, knowing the same to have been stolen, in a manner which constituted a felony, contrary to Section 309 of the Criminal Code Ordinance, 1936 ; and in quashing the conviction and discharging the Appellant :—

HELD : There was no finding by the District Court that the goods found had been stolen ; there was no evidence that the goods identified as stolen were those found in Appellant's possession and there was no evidence, so far as Appellant was concerned, as to the date when the goods were stolen.

CONSIDERED : Isaac Schama *v.* Jacob Abramovitch XI Cr. App. Rep. at p. 49.

ANNOTATIONS : And *vide Digest* XV, pp. 960 *sqq.*, Sec. 14 — *Receiving Property.*

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

This case has caused us great difficulty. The Appellant was convicted of receiving stolen goods, knowing the same to have been stolen contrary to Section 309 of the Criminal Code Ordinance.

It is necessary for the prosecution to support such a charge to establish :—

(a) that the goods were stolen ;

(b) that the accused person received them ;

(c) that he knew they were stolen.

In such a case it is frequently difficult to prove the knowledge of an accused person, but when the goods have been recently stolen, he may in some circumstances be convicted. The principle is stated by Reading L. C. J. in Isaac Schama *v.* Jacob Abramovitch, Vol. XI, Criminal Appeal Reports, at page 49, as follows :—

> "Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not ; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution. That is the law ; the Court is not pronouncing new law, but is merely restating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases."

The length of time between the theft and the finding of the goods and the nature of the property stolen, and whether or not it is likely to pass readily from hand to hand, are matters to be taken into account.

In this case the District Court found : —

> "The evidence against the accused is that a large quantity of cloth goods were found in a private house in his sole occupation at the time of their discovery. There is evidence that the house had been in his possession for some days before. The policeman who found the goods says that accused admitted him to the premises, and we believe him in this too, in spite of accused's story that he only returned to the premises after Friday. From the large quantity and the character of the goods, we have no doubt that accused, when he received them into his premises and possession, must have known that they were stolen goods. We therefore find him guilty of the offence charged."

It will be observed that there is no finding that the goods found had been stolen, or of the date when they were stolen.

Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance provides : —

> "Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction is based ;
>
> Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case."

We have to look, therefore, to see if the necessary facts are sufficiently established from the evidence.

Police Constable Hollander stated :—

> "I remember 27.12.38. On patrol in Kingsway. Watchman came and gave information. I went to Jaffa Street, saw 1st Accused standing by a house — Rosenfield beside him. I went into house on someone's suggestion — sack was beside house. Halfway upstairs was closed door. I knocked, 2nd Accused (Appellant) opened. I then went up to top of stairs. Saw 3 sacks and blanket on threshold of door. 2nd Accused only person in the house — searched all. The place is a known brothel and 2nd Accused lives there. Sacks contained cloth produced."

Assuming this to mean that both the sacks and their contents were produced to the Court, there is no record that the cloth was an exhibit in the case.

The first witness, Quannu, said :—

> "My shop was burnt — in part. Insurance Co. received keys. I received information and went to police station. At station I saw goods there — varied colour"

he than enumerates the goods and goes on :—

> "All are my goods, most have my stock label attached still. Saw goods and knew these. Value before fire LP. 150, now LP. 20—30. I have not been paid insurance. The goods were left to Insurance Co. when I gave over keys. There was theft before the fire — I handed over the keys shop — then a fire and a subsequent theft. These goods were in shop when I handed over to Insurance Co."

The second witness said :—

> "Agent Yorkshire Insurance Co., Haifa. I know last witness — his shop insured with us, general policy. We had claim for theft and later for fire. We took charge of shop after fire. We received keys. I got information of police — went and found Yale padlocks broken — 2 locks — 2 doors. I took inventory after fire. I saw goods produced in shop. I was called to station and saw all these goods there. I checked goods in shop and I know them — they smell of smoke too. Goods are property of Insurance Co.".

We cannot be certain that the goods found in the sacks were the goods to which Hollander referred. There is no evidence to show that the goods at the police station were the goods found in the Appellant's possession.

Another man was charged with the Accused with having stolen Quannu's goods on the 26th December, *i. e.* the day before the sacks were found — and he pleaded guilty — but he was not called as a witness, and this alone is not evidence aginst the Appellant. So far

as the Appellant is concerned, therefore, there is no evidence as to when the goods were stolen.

In these circumstances we feel that the conviction cannot stand. It is therefore quashed, and the Appellant discharged.

Delivered this 9th day of March, 1939.

Chief Justice.

CIVIL APPEAL No. 20/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

Government of Palestine. APPELLANT.

v.

Greek Catholic Church of Haifa. RESPONDENT.

Construction of rule 197, C. P. R. — "Judge", whether includes "judges" — Interpretation Ordinance, sec. 3 — Evidence heard before coming into force of the C. P. R., rule 1 — "Under the foregoing rules" — No rule of automatic adjournments, cf. O. 36, r. 17, R. S. C. — Desirability of note being made in record when judge prevented from concluding the trial — Costs.

In allowing an appeal from an order of the Land Court, Haifa, dated the 15th February, 1939 :—

HELD : 1. In view of the Interpretation Ordinance and of the wording of the Rule, the words "any judge" in Rule 197, mean also "any judges".

2. The words "may deal with any evidence taken down under the foregoing rules" mean that evidence taken after the coming into force of the Civil Procedure Rules, 1938, is covered by rule 197, but evidence taken before the coming into force is not so covered, and therefore before a Court can take such evidence into consideration is must be reheard by the newly constituted Court.

3. There is, in this country, no rule providing for the automatic adjournment of a case set down for a particular day to the succeeding day, if time should not permit of it being taken on the first day.

ANNOTATIONS : Former proceedings, where the case was remitted to the District Court, are reported in C. A. 40/38 (1938, 1 S. C. J. 211).

In interpretation of statutes *vide* note 2 to C. A. 232/38 (1938, 2 S. C. J. at p. 165).

FOR APPELLANT : Hogan.
FOR RESPONDENT : Cattan (by delegation).

JUDGMENT:

This appeal from an interlocutory order of the Land Court, Haifa, raises a simple but interesting point under Rule 197 of the Civil Procedure Rules 1938. The main argument in the Court below was centered on whether the word "Judge" in Rule 197 could be held to include Judges. Mr. Hogan for the Appellant does not now dispute that it does, and we are in agreement with that view. It is quite clear to us that the words "any Judge" in Rule 197 mean also "any Judges", both from the wording of the Rule and from the Interpretation Ordinance, Cap. 69, Section 3.

The point taken on this appeal is that Rule 197 cannot be applied in this case, because much of the evidence already heard by the Land Court was so heard before the coming into force of the Civil Procedure Rules in May, 1938. The Rule reads as follows :—

> "197. Where any Judge is prevented by any cause from concluding the trial of an action, another Judge may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down or heard by him, and may proceed with the action from the stage at which his predecessor left it."

Mr. Hogan argues that the evidence, if it can be taken into consideration by the new Judge, must have been taken down under the Civil Procedure Rules.

Mr. Cattan, for the Respondent, argues that by Rule 1 the new rules are entirely retroactive and that any evidence previously heard may be taken as evidence heard by the new Court. He further goes on to argue that in any case the rules, under which the previous evidence was heard, did not differ in any material respect from the new rules under the Civil Procedure Rules 1938.

We are of opinion that the words "may deal with any evidence taken down under the foregoing rules" mean strictly what they say, that is, that evidence taken after the coming into force of the Civil Procedure Rules of 1938 is covered by Rule 197 but evidence taken before the coming into force is not so covered, and therefore before a Court can take such previous evidence into consideration it must be reheard by the newly constituted Court. The new rules contain certain important provisions which did not appear in the Ottoman

Civil Procedure Code, which was in force when the original evidence was taken.

Two further small points have been taken by the Appellant with which we think we may as well deal in order to regularise procedure, though they do not affect the result of this appeal. There is, in this country, no rule providing for the automatic adjournment of a case set down for a particular day to the succeeding day, if time should not permit of it being taken on the first day. There is no counterpart in the Rules of procedure in this country of Order 36 Rule 17 of the Rules of the Supreme Court in England.

The next point is a very small one, that there should be some note made on the record of a case where a judge is prevented by any cause from concluding the trial of an action begun before him. We agree that it is desirable that a note in such terms should be made on the record in order to complete the record.

It is of course unfortunate that this long delayed case is going to be still further delayed but we have no option. We must allow the appeal and set aside the order of the Land Court and send the case back to the Land Court to be dealt with in accordance with the Rules and with our foregoing observations on those Rules.

After hearing counsel for the Appellant and for the Respondent, the Court makes no order as to costs.

Delivered this 20th day of March, 1939.

British Puisne Judge.

CIVIL APPEAL No. 15/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF :

Abraham Kalazan. APPELLANT.

v.

Stawri Slihit. RESPONDENT.

Sale to land and agreement to sell — Land Transfer Ordinance Section 11 — Disposition — Construction of contract — Contract to be subsequently made between the parties.

In allowing an appeal from the District Court Jerusalem, (Appellate capacity)

dated 10th January, 1939 and in setting aside the judgment of the District Court and restoring the judgment of the Magistrates Court :—

HELD : There had been no sale in accordance with the requirements of the Land Transfer Ordinance. The receipt stated that the property was sold and the document comtemplated that further conditions were to be inserted into the contract which was to be drawn up subsequently and the intention of the Respondent could not have been to expect payment upon any conditions which the Appellant migbt have seen fit to embody in the contract.

ANNOTATIONS : The last case on this subject is C. A. 9/39 (*ante*, p. 104) and see note thereto.

FOR APPELLANT : M. Levanon.
FOR RESPONDENT : Mizrahi.

JUDGMENT:

Section 11 of the Land Transfer Ordinance makes it clear that a disposition of land to be binding must comply with certain formalities, and that money paid under a disposition which is null and void may be recovered. The Courts have, however, recognized agreements to sell, but these must contain the essential terms, and generally, *inter alia*, contain provisions for the carrying out of the necessary formalities.

In this case there were negotiations between the parties for the sale of two shops, but it is quite clear there was no sale in accordance with the requirements of the Ordinance. The only document in the case is headed "Receipt", and states :—

> "It is a fact that I, the undersigned, Mr. *Stawri Slihit*, hereby confirm that I have sold to Mr. *Abraham Kalzan* two shops Nos. 73, 74, situate at Beth Israel beside the Hungarian houses, as per the general plan approved by the Municipal Corporation of Jerusalem, for the sum of LP. 440.— the said two shops numbered as above, and have received from Mr. *Abraham Kalzan* — as a start payment the sum of LP. 20.— in cash. The remainder of the payment will be paid in accordance with the conditions and the contract which Mr. *Abraham Kalzan* will arrange.
>
> "In witness whereof I have hereunto set my hand this 7th December, 1937, Jerusalem.
>
> (Here follows a sentence in Arabic which reads — Received LP. 20.— by me as per this receipt).
>
> (Sgd.) *Stawri Slihit*.
> (Across stamp for 7 mils).
> 8.12.37

The District Court took the view that this was an agreement to

sell and therefore not void. With all respect to the District Court, I cannot agree with this view, as the document clearly contemplates that further conditions are to be inserted in a contract which is to be drawn up, and I can hardly think that it was the intention of Mr. Slihit to accept payment upon any conditions which the purchaser might see fit to embody in the contract.

The judgment of the District Court is set aside and in the result that of the Magistrate restored, with costs assessed at an inclusive sum of LP. 15. I must not be taken as agreeing with all the reasoning of the learned Magistrate.

Delivered this 21st day of March, 1939.

Chief Justice.

MISCELLANEOUS APPLICATION No. 5/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPLICATION OF :

Aama Bawab. APPLICANT.

v.

1. Emile Khattar,
2. Nazira Bawab, wife of Elias Khattar,
3. Karmella Bawab, wife of Emile Khattar,
4. Julia Bawab. RESPONDENTS.

Application for exemption from Court fees — Court Fees (Amendment) Rules (No. 2), r. 19(2) — Affidavit of poverty should be obtained from Mukhtar.

In dismissing an application for exemption from payment of Court fees :—

HELD : Applicant had not satisfied the Court that she was short of means to pay the Court fees of the appeal.

The affidavit of poverty should have been obtained from the *Mukhtar* of the place of residence of the Applicant.

ANNOTATIONS : On applications to sue in *forma pauperis* and for exemption from Court fees, *vide* Misc. A. 41, 48, 53 and 56 of 1938 (1938, 2 S. C. J. 247 & *sqq.*)

APPELLANT : In person.

FOR RESPONDENTS : No. 1 — In person.

Nos. 2, 3 & 4 — Absent served.

ORDER:

We are of the opinion that the application for exemption from payment of Court fees under Rule 19(2) of the Court Fees (Amendment) Rules (No. 2), 1938 should not be granted. After hearing the Applicant and Respondent No. 1 we are not satisfied that the Applicant is short of the means to pay the Court fees of the appeal. We do not understand why the Applicant obtained an affidavit, to prove her poverty, from a person called Bishara El-Issa of Haifa, instead of getting the same from the *Mukhtar* of her place of residence where she is presumably better known.

Therefore we order that the application for exemption from payment of Court fees be refused.

Given this 22nd day of March, 1939.

British Puisne Judge.

CRIMINAL APPEAL No. 11/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

The Attorney-General. — APPELLANT.

v.

Theodore Saliba Sa'ad. — RESPONDENT.

Appeal by Attorney General against sentence — Conviction under 349(1) C. C. O. — Maximum penalty — Sentence.

In allowing an appeal against sentence from the judgment of the District Court, Jerusalem, dated the 14th February, 1939, whereby the Respondent was sentenced to two years' imprisonment on the charge of uttering notes purporting to be bank notes, knowing them to be forged, contrary to Section 349(1) of the Criminal Code Ordinance, 1936 and in increasing the sentence:—

HELD: It was clear from the maximum penalty, which is imprisonment for life, that the Legislature took a serious view of this offence and a sentence of two years was inadequate.

ANNOTATIONS: Sentences increased on appeal: CR. A. 48/38 (1938, 1 S. C. J. 274); CR. A. 66/38 (1938, 2 S. C. J. 41); CR. A. 73/38 (*ibid.* p. 79); CR. A. 77/38 (*ibid.* p. 89); CR. A. 84/38 (*ibid.* p. 227).

FOR APPELLANT: Crown Counsel (Hogan).

FOR RESPONDENT: Atallah.

JUDGMENT:

This is an appeal by the Attorney General. The Respondent was convicted by the District Court of uttering forged bank notes under Section 349(1) of the Criminal Code Ordinance and sentenced to two years' imprisonment.

The view which the Legislature took of this offence is clear from the maximum penalty, which is imprisonment for life.

Having regard to the seriousness of this offence we consider that the sentence of two years was inadequate, and we increase it to one of three years' imprisonment.

We are told that this has not been a common offence in this Territory, but we should like to make clear that persons who commit this offence may well find themselves condemned to long terms of imprisonment.

Delivered this 23rd day of March, 1939.

Chief Justice.

HIGH COURT No. 15/39.

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

BEFORE : Copland, Greene, JJ.

IN THE APPLICATION OF :

Jacob Nissim Mizrahi. — PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Sassoon Ezra Sassoon,
3. Menashe Yehezkiel Aslan,
4. David Beracha,
5. Hayim Beracha. — RESPONDENTS.

Sale of Mortgage — C. E. O. not empowered to appoint a receiver in execution proceedings — Long practice notwithstanding.

In granting an application for an order to issue to the Respondent directing him to show cause why his order dated 10th March, 1939, in execution file No. 14210/38 of Tel-Aviv should not be withdrawn and the appointment of Mr. Nazim Menashe Aslan as receiver of the said property be cancelled :—

HELD : There was no power for the Chief Execution Officer to appoint a receiver in execution proceedings. Although it had been the practice in past years to adopt such a procedure, it was only in these proceedings that the procedure was challenged.

ANNOTATIONS : On the effect of a long line of decisions, *vide* C. A. 142/38 (1938, 1 S. C. J. 404) & note 1 thereto. See, *per contra*, C. A. 177/38 (1938, 2 S. C. J. 54) — subsequently overruled in C. A. 158/38 (*ibid.* p. 126).

FOR PETITIONER : Goitein.

FOR RESPONDENTS : Nos. 1, 2 & 3 — served.
Nos. 4 & 5 — Eisenberg.

ORDER:

This is a return to the Order *nisi* which we think must be made absolute.

It appears at this late period, that there is no power for the Chief Execution Officer to appoint a receiver in execution proceedings. Although it has been the practice in the past years to adopt such a procedure, it is only in these proceedings that this procedure has been challenged and alleged to be wrongly exercised.

Therefore the order *nisi* must be made absolute. Petitioner to get his costs and LP. 10 fees for attending the hearing from Respondents Nos. 2 and 3. We also award the 4th and 5th Respondents their costs and LP. 10 fees for attending the hearing from Respondents Nos. 2 and 3.

Given this 31st day of March, 1939.

British Puisne Judge.

HIGH COURT No. 9/39.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

"Yakhin" Agricultural Contracting, Cooperative Association Ltd. PETITIONERS.

v.

1. The Chief Execution Officer, Haifa,

2. Halvaah Vehisahon, Hedera,
   Cooperative Society Ltd.,
3. Abraham Raplanski,
4. Feiga Raplanski,
5. Zvi Butkovski. RESPONDENTS.

Priority of judgment and debts — Registration of charges — judgment based on promissory notes and admission of the Defendant — Law of Execution, Art, 130 *— Operative part of decree to be looked at — No finding ultra petita.*

In discharging a rule *nisi* for an Order to issue to the first Respondent to show cause why his order dated the 17th January, 1939, Haifa Execution file No. 294/38, should not be set aside and why a fresh order should not be given that the Petitioner enjoys a right of priority over the debt of the second Respondent and that the money should be paid to the Petitioner : —

HELD : When the Chief Execution Officer executes a judgment, everything depends on the operative parts of the judgments, and on these operative parts it was clear that no preference could arise in relation to the judgment of Petitioner.

ANNOTATIONS : As to preference in judgments generally, see annotation to H. C. 31/38 (1938, 1 S. C. J. 304).

FOR PETITIONER : Goldman.

FOR RESPONDENTS : Nos. 1, 3—5 — served — no appearance.
No. 2 — Agranat.

ORDER:

The question to be decided on this return to an order *nisi* granted by this Court is whether the order of the Chief Execution Officer of Haifa, dated the 17th of January, 1939, deciding that neither of two judgments has priority over the other, was correct or not.

The Petitioner obtained judgment in the Magistrate's Court against the 3rd and 4th Respondents for a certain sum of money. That judgment was dated the 10th March, 1938, and was amended in certain respects by the District Court, on appeal, on the 14th of April, 1938. The amendment by the District Court was to the effect that the Magistrate had no power to decide questions of priority on attachments, and that part of his judgment was therefore set aside and a provisional attachment originally granted by the Magistrate and discharged by him was restored.

The 2nd Respondent obtained judgment against the same defendants in the Magistrate's Court on the 27th of January, 1938. That judg-

ment gave the 2nd Respondent preference on the ground that they had filed a registered charge and it confirmed the original attachment on the same property as was comprised in the judgment obtained by the Petitioner.

The Petitioner contends that on his registered charge he is entitled to priority over the other creditor, the 2nd Respondent, on the ground that the latter's charge was never properly registered in time.

Now the Chief Execution Officer's duty is to execute judgments and it is therefore important to see what exactly these various judgments said and what they were based on. Both the judgment of the Petitioner and the judgment of the 2nd Respondent are stated to be based, in the first case, on promissory notes and the admission of the defendants, and in the second case, on a promissory note. That is all that the Chief Execution Officer can regard when asked to decide this question of priority between the parties. This is clear from Article 130 of the Execution Law which says : —

> "In order to establish a right of preference the character of the debt must be clearly set forth in the decree. Claims which contradict the contents of the decree or which are made only at the Execution Office will not be heard."

As the advocate for the 2nd Respondent has said, everything depends on the operative parts of the judgments, and on these operative parts it is to our minds quite clear that no preference can arise in relation to the judgment of Petitioner, and we think, therefore, that the Chief Execution Officer was right in his order. Holding this view the further question as to the refund of moneys already paid does not arise.

I have refrained from mentioning or making any remarks on the point that the judgment of the 2nd Respondent purports to give him a right of preference based on his registered charge. That judgment I may say was never appealed and has become final. In these present proceedings, however, the 2nd Respondent cannot claim that he is entitled to preference over the Petitioner and, since possibly other proceedings may arise, we make no finding and make no comments upon that point.

The order *nisi* must be discharged with costs to include LP. 15.— for attendance at the hearing.

Given this 23rd of March, 1939.

British Puisne Judge.

HIGH COURT No. 69/38.

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

BEFORE : Trusted, C. J., Greene and Frumkin, JJ.

IN THE APPLICATION OF :

The Dental Manufacturing Co., Ltd. PETITIONERS.

v.

1. The Registrar of Trade Marks,
2. Vita Zahnfabrik, H. Rauter O. H. G. RESPONDENTS.

Trade Marks — Application to restrain registration of Mark "Lumin" — Trade Marks Ordinance, 1938, secs. 8(f), 14(1) — Applicability of old law to opposition in respect of application anterior to enactment of Ordinance — "Lumin" whether descriptive of artificial teeth — "Lumin" and "lumine", whether "Lumin" an invented word — Whether luminosity a quality of artificial teeth — Eastman Photographic Materials Co. v. The Comptroller-General of Patents, Designs and Trade Marks ; word must have reference to the character or quality of goods.

In dismissing an opposition to the registration of the word "Lumin" as a trade mark in class 11 in respect of artifical teeth in the name of the second Respondents in pursuance of their application which was advertised under No. 4868 in Supplement No. 3 to the Palestine Gazette No. 790 of the 16th June, 1938, page 64 :—

HELD : Assuming that luminosity is a quality of artificial teeth, words such as "luminous" or "luminant" might offend against Section 8(f) of the Trade Marks Ordinance, but the rare word "lumin", with or without the "e" cannot be said to bear direct reference to the character or quality of artificial teeth, although it might perhaps be near the line.

FOLLOWED : Eastman Photographic Materials Company *v.* The Comptroller-General of Patents, Designs and Trade-Marks, 1898, A. C. 571.

ANNOTATIONS : And *vide, Digest* XXXXIII, pp. 139—41 nos. 28 *sqq.* — *Words having no direct reference to character or quality* ; pp. 181—2 nos. 327 *sqq.* — *Fancy words.*

Palestine authorities on trade marks : — C. A. 110/33 (P. P. 14.v.34 ; C. of J. 1773 ; 2 P. L. R. 101) — *Opposition by unregistered owner ;* C. A. 44/34 (2 P. L. R. 382 ; C. of J. 1934—6 803 ; P. P. 2.x, 27.xi.35) — *Cancellation ;* H. C. 93/35 (2 P. L. R. 385 ; P. P. 8.x.35 ; C. of J. 1934—6 812) ; C. A. 4/32 (P. L. R. 786 ; P. P. 23.ii.33 ; C. of J. 1771) ; C. A. 84/34 (P. P. 8.x.35 ;

C. of J. 1934—6, 805) ; H. C. 10/38 (1938, 1 S. C. J. 178) — *Opposition ;* C. A. 2/24 (P. L. R. 16 ; C. of J. 1763) — *User ;* M. A. 29/27 (P. L. R. 260 ; C. of J. 1766) — *Offences ;* C. A. 15/29 (P. L. R. 453 ; C. of J. 1769) — *Mark calculated to deceive ;* C. A. 11/24 (P. L. R. 53 ; C. of J. 1764) ; H. C. 22/37 (1937, 1 S. C. J. 427) ; H. C. 24/37 (1937, 1 S. C. J. 429) ; H. C. 84/36 (P. P. 7.iii.37 ; C. of J. 1934—6 823) ; H. C. 96/35 (P. P. 10.iv.36 ; C. of J. 1934—6, 813) ; H. C. 24/36 (P. P. 19.xi.36) ; H. C. 14/36 (P. P. 1.vii.36 ; C. of J. 1934—6, 822) — *Similarity ;* C. A. 141/24 (C. of J. 1765) — *Imitation ;* C. A. 15/33 (P. P. 26.iv.33 ; C. of J. 1772) — *Words capable of registration ;* H. C. 104/36, 105/36 (C. of J. 1934—6, 829) — *Historical names ;* H. C. 103/35 (P. P. 10.iii.36 ; C. of J. 1934—6, 818) ; H. C. 110/35 (P. P. 30.iii.36 ; C. of J. 1934—6, 820) — *Descriptiveness ;* H. C. 13/38 (1938, 1 S. C. J. 187) *Distinctiveness.*

FOR PETITIONERS : Wittkowsky.

FOR RESPONDENTS : Smoira.

JUDGMENT:

This is an application under the Trade Marks Ordinance for an order that the Second Respondents shall not be permitted to register a certain trade mark which, from a notice, No. 4868 in Supplement 3 of the Gazette 790 of 16th June, 1938, it appears they desire so to do, which in my judgment should be dismissed. The mark in question is the word "Lumin", and the Second Respondents seek to register it in respect of artificial teeth.

On the 21st November, 1938, an Ordinance entitled the Trade Marks Ordinance, 1938, was promulgated, which repealed the Trade Marks Ordinance, Chapter 144, and made some change in the law. In particular the procedure in opposition to registration is altered, but it is submitted by the Petitioners that by reason of the proviso to Section 14(1) the procedure under the old Ordinance applies to this opposition, and the Second Respondents do not dispute this.

The Petitioners contend that the word "Lumin" cannot be registered by reason of the provisions of Section 8(f) of the Ordinance, which provide that the following, *inter alia,* are not capable of registration :—

> "(f) marks consisting of figures, letters or words which are in common use in trade to distinguish or describe goods or classes of goods or which bear direct reference to their character or quality ; words whose ordinary signification is geographical or a surname, unless represented in a special or particular manner ; provided that nothing herein contained shall be deemed to prohibit the registration of marks of the nature described in this paragraph which have a distinctive character within the meaning of subsections (2) and (3) of section 7".

It may be noted that this wording differs slightly from that of the old Ordinance which reads :—

> "(e) marks consisting of figures, letters or words which are in common use in trade to distinguish or describe goods or classes of goods or which are directly descriptive of their character and quality ; and words whose ordinary signification is geographical."

It is obvious that manufacturers of artificial teeth should seek to obtain what may be described as a bright and lively appearance of the teeth rather than a dull, artificial or dead appearance.

In an affidavit filed by the Petitioners a patent agent says :—

> "That the aforesaid invention claims to solve the problem, which has hitherto existed, of manufacturing artificial teeth which have the luminous appearance of natural teeth even in artificial light and that luminosity is one of the coveted qualities of artificial teeth."

It will be seen that he uses the word "luminosity" (according to the Oxford Dictionary "the quality or condition of being light") to describe a quality of artificial teeth.

The word "lumin" is said to be not an invented word but merely a misspelling of the word "lumine", which, according to the Oxford Dictionary, is now rare or obsolete, but was in use as a transitive verb having the meaning "to light up, to illumine".

It is argued before us that in dental circles which must be assumed to have acquaintance with the Latin tongue, lumin imports the idea of light and hence has reference to the character or quality of luminosity.

The Respondents reply by referring to their patent specification, and their patent agent in his affidavit says :—

> "That as regards the optical appearance of artificial teeth the said Vita Zahnfabrik H. Rauter O. H. G. are the registered proprietors of *i. a.* Palestinian Patent No. 932, wherein it is described and claimed that artificial teeth are made of a block of non-shrinking porcelain material upon which a transparent ceramic material is fired, which is coloured to correspond with the natural teeth."

This hardly deals with the allegation that luminosity is a quality of artificial teeth.

The principles underlying this kind of legislation were discussed by the House of Lords in the Eastman Photographic Materials Company *v.* The Comptroller-General of Patents, Designs, and Trade-Marks, 1898, Appeal Cases, page 571, the material words of the English Act

being "has reference to the character or quality of the goods". Lord Herschell, at page 580, says :—

> "The vocabulary of the English language is common property : it belongs alike to all ; and no one ought to be permitted to prevent the other members of the community from using for purposes of description a word which has reference to the character or quality of goods.
>
> "If then, the use of every word in the language was to be permitted as a trade-mark, it was surely essential to prevent its use as a trade-mark where such use would deprive the rest of the community of the right which they possessed to employ that word for the purpose of describing the character or quality of goods."

and Lord Macnaghten, at page 583, says :—

> "The object of putting a restriction on words capable of being registered as trade-marks was of course to prevent persons appropriating to themselves that which ought to be open to all. There is a "perpetual struggle" going on, as Fry L. J. has observed, "to enclose and appropriate as private property certain little strips of the great open common of the English language." "That", he added, "is a kind of trespass against which I think the Courts ought to set their faces."

Assuming that luminosity is a quality of artificial teeth it is clear that words such as "luminous" or "luminant" might offend against the section, but does the rare word "lumin", with or without an "e", do so ? It may perhaps be near the line, but I do not think it can be said to bear direct reference to the character or quality of artificial teeth. I certainly do not think that its registration would deprive the rest of the community of the use of a word that they would be likely to employ for the purpose of describing the character of artificial teeth.

The Petitioners will pay the second Respondents their costs assessed at a sum of LP. 15 inclusive.

Delivered this 23rd day of March, 1939.

Chief Justice.

MISCELLANEOUS APPLICATION No. 11/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :

Levi Ben Yoav Gul Babayoff. — APPLICANT.

v.

Oholiav Gul Shauloff. — RESPONDENT.

Application for leave to appeal in forma pauperis — Court Fees (Amendment) Rules (2), 1938 r. 19(2) — Payment of fees after refusal of application — Insufficient material that application has reasonable grounds for appeal.

In refusing an application for exemption from payment of Court Fees :—

HELD : The Court was not satisfied, on the material before it, that the Applicant had reasonable grounds of appeal.

ANNOTATIONS : The application in these proceedings was supported by a *mukhtar's* certificate — *vide* Misc. A. 5/39 (*ante*, p. 120) and annotations.

FOR APPLICANT : M. Levanon and Abramovsky.

FOR RESPONDENT : Geichman.

ORDER:

We are of opinion that leave to appeal without payment of Court fees under Rule 19(2) of the Court Fees (Amendment) Rules (No. 2), 1938, should not be granted. Application is sometimes made by a person alleged to be a pauper, and later, when the application is refused, the fees are paid by him. We content ourselves with saying that we are not satisfied, on the material before us, that the Applicant has reasonable grounds of appeal.

We therefore order that leave to appeal without fees be refused. Respondent to have LP. 5.— to include his costs and attendance at the hearing.

Delivered this 20th day of March, 1939.

British Puisne Judge.

CIVIL APPEAL No. 22/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

The Attorney General, on behalf of the Government of Palestine. APPELLANT.

v.

Rebecca Notrica Bouenos. RESPONDENT.

Immigration — Deposit made in connection with traveller's visa — Conditions endorsed on receipt — Renewal of visa — Acquisition of Palestine citizenship by traveller through marriage prior to expiration of renewed visa — Action for refund of deposit — No estoppel by failing to reply to letter — "Within the period authorised by the Palestine authorities" — Construction — C. A. 36/37, C. A. 241/38 — Whether contract in existence — Notarial notice — Variation of terms of contract — Currency — Point not taken on appeal.

Appeal from a judgment of the District Court, Jerusalem, (C. D. C. Jm. 142/38), dated the 7th February, 1939, dismissed.

Respondent applied to the British Consul in Rhodes for a traveller's visa to enter Palestine and, on the 30th July, 1935, deposited with him the equivalent, in Italian currency, of £60, against receipt.

The receipt provided that the amount of the deposit would be forfeited should the Respondent fail to satisfy the Consul, before the 2nd December, 1936, that she had departed from Palestine within the period authorised by the Palestine authorities, but that the deposit would be returned to her if she satisfied the Consul, before that date, that she had complied with the above condition.

The Respondent arrived in Palestine and, before the expiration of the time mentioned in the visa, obtained an extension of stay until May, 1936, and a subsequent extension which expired on the 10th July, 1936.

On the 28th June, 1936, Respondent married a Palestinian and she was granted a Palestine passport which bore the date of the 10th July, 1936.

Respondent then applied for the refund of her deposit and, on this being refused, sued Appellant in the District Court, Jerusalem, and obtained judgment.

HELD : 1. The question of whether a deposit is returnable or not depends on the terms of the contract between the parties in connection with which the deposit was made. Since the period of permitted residence may be extended, a deposit is not necessarily forfeited if the holder of a traveller's or a tourist's visa does not leave within the period stipulated in the visa.

2. No notarial notice was required as Appellant was not suing Respondent for the amount and as no bond had been executed by the Respondent in favour of Appellant.

3. The conduct of Appellant did not make it impossible for the Respondent to leave Palestine before the 2nd December, 1936.

4. The receipt of the 2nd September, 1935, constituted a contract between the two parties. Respondent had knowledge of the contents of that document.

5. The deposit was made on the basis that Respondent should leave Palestine before the period authorised by the authorities, not necessarily by any date fixed at the time of making the contract. The Government, by issuing to the Respondent a Palestine passport, in full knowledge of the facts, have authorised her to remain in Palestine permanently. The authorised period has therefore been indefinitely extended, and the Government have themselves varied the terms of the contract, making the condition with regard to the return of the deposit inoperative.

6. *Quaere* whether Appellants were under an obligation to return LP. 60 or the equivalent of the amount of deposit in Italian lire. The point had been raised in the written defence of Appellant but not taken any further and the Court could not deal with it at this stage.

FOLLOWED : Yochels *v.* A. G. — C. A. 241/38 (*ante*, p. 62).

DISTINGUISHED : Battat *v.* A. G. — C. A. 36/37 (1937, 1 S. C. J. 102).

ANNOTATIONS : *Cf.* H. C. 1/37 (P. P. 15—17.ii.37 ; 1937, 1 S. C. J. 405) *Marriage to a* Palestinian ; C. A. 241/38 (*supra*).

As regards No. 2 — *cf.* C. A. 128/32 (C. of J. 439 ; P. P. 5.xi.33) holding that a notarial notice is required in the case of a forfeiture.

As regards No. 6 — *vide* C. A. 8/39 (*ante*, p. 86) and annotations.

FOR APPELLANT : Crown Counsel (Hogan).

FOR RESPONDENT : Margolith.

JUDGMENT:

This is an appeal by the Attorney General from a judgment of Judge Shaw sitting in Jerusalem, in which he ordered the Palestine Government to return to the Respondent the sum of LP. 60, the amount deposited by her on her being granted a traveller's visa to enter Palestine for three months.

The facts are as follows. The Respondent, who was then unmarried, and residing in Rhodes, applied to the British Consul there for a traveller's visa to enter Palestine for three months. On the 30th July, 1935, she deposited with the British Consul the sum of Italian lire 3637.80, being the then equivalent of £ 60 sterling. Apparently the British Consulate at Rhodes is not allowed to retain

money or issue visas, and the deposit was forwarded to the British Consul in Venice, who thereupon granted the visa and at the same time issued a receipt, Ex. L. B. 6, on the 2nd September, 1935, in these terms :—

"PALESTINE DEPOSIT".

Italian Passport No. 383954

Endorsement No.

Visa No. 2710 of Sept. 2nd, 1935, to Rebecca Notrica.
issued on July 30th, 1935, at Rhodes.

I acknowledge the receipt of (a) Lire 3,637.80 deposited with me as the Agent acting for and on behalf of the Government of the Mandated Territory of Palestine by Miss Rebecca Notrica subject to the condition that, if she fail to satisfy me either by personal call or other evidence before (b) December 2nd, 1936, that she has finally departed from Palestine within the period authorised by the Palestine authorities, the said sum shall be forfeited to the Government of Palestine, but upon condition also that, if and when the said Miss Rebecca Notrica shall satisfy me, not later than (b) December 2nd, 1936, that she has complied with the above condition, the said sum shall be repaid her upon her request.

British Consulate
Venice sgd. *Acting British*
Sept. 2, 1935. *Consul.*

(a) £60 sterling, or, where local regulation preclude this, the equivalent in local currency of £60.

(b) a date 15 months after the date of this receipt."

The Respondent arrived in Palestine in November, 1935. Before the expiration of the time mentioned in the visa, in February, 1936, she applied for and obtained an extension of three months, which would expire in May, 1936. Having meanwhile become engaged to be married she was granted on that ground a further extension, which expired on the 10th July, 1936. She was duly married on the 28th June, 1936, and on the 3rd July, 1936, her husband forwarded to the Immigration Office in Tel-Aviv his own passport, his wife's Italian passport, the marriage certificate, and an application for the issue to his wife of a Palestine passport, which latter was granted, and the new passport was received back on the 14th July, 1936. It is to be noted that the new passport of the Respondent bore the date of the 10th July, 1936, the date on which the second extension to her tourist visa expired.

Application was then made for the return of the deposit of LP. 60, which was refused by the Department of Immigration, and

correspondence on the subject continued until the end of November, 1936, with no result. The Respondent did not leave Palestine either by the 10th July, 1936, or by the 2nd December, 1936, or at all. No bond was signed by the Respondent, agreeing to forfeit the deposit of £ 60 sterling, if she should remain for longer than the period mentioned in her visa.

The Respondent then sued the Appellant for the return of the deposit in the District Court and obtained judgment. The Court found that she was fully aware of the contents of Ex. L. B. 6, and that the fact that the Appellant did not answer the further letters of the Respondent did not estop the former from alleging that the terms of that exhibit had to be strictly complied with by the Respondent. With those findings we agree. The learned Judge then went on to ask the question, were the words "within the period authorised by the Palestine authorities", occurring in Ex. L. B. 6, good notice to the Respondent that her deposit would be forfeited even if she were authorised by the Palestine authorities to remain permanently as an immigrant ? He came to the conclusion that the Respondent could not have read such a meaning into that document, and that since she had been authorised by the Palestine Government to remain permanently in Palestine she was entitled to recover her deposit, and gave judgment accordingly.

The statement of appeal filed by the Appellant submits first, that the Court below wrongly construed the terms of the contract beyond the clear and unambigous terms thereof, and secondly, that having found that the Respondent knew the contents of the contract, Ex. L. B. 6, and in view of the admission that she had not left Palestine, she must be deemed to have failed to comply with the terms and conditions of the contract, and that therefore judgment should have been given against her.

Before discussing the arguments which have been addressed to us, it may be convenient at this point, to refer to two cases which have been cited in the course of the hearing. The first is Battat *v.* The Attorney General, C. A. 36/37. In that case the appellant had paid a deposit to the Government of LP. 100 as a guarantee that a woman traveller would leave Palestine within the one month allowed to her on a tourist visa, and he had signed a bond also to the same effect. Within the one month the woman married a Palestinian, and had her name entered on her husband's passport, and did not leave the country. The appellant brought an action claiming the return of his deposit on the ground that the woman,

being then of Palestinian nationality, was entitled to remain in Palestine, but this Court dismissed his appeal, holding that on the terms of the bond executed by him the money was forfeited, since the bond clearly stated that the woman must leave within the one month, and that the bond did not state, as it might well have done, that the deposit should be forfeited if she remained illegally in Palestine for longer than one month.

The second case is Yochels *v.* The Attorney General, C. A. 241/38. There the appellant had deposited LP. 120 with the Government as a guarantee that two travellers, man and wife, would leave the country within three months. Two extensions of residence were granted, but it was not until after the last extension had expired that the travellers finally left Palestine. The Government refused to refund on the ground that the travellers had left the country after the permitted period of residence. The District Court endorsed that view, but on appeal this Court reversed the decision and gave judgment for the return of the deposit on the ground that there was insufficient evidence that the bond had been signed by the appellant, that it was never pleaded that there was a contract in writing, and that since it was clear that the period of three months could be extended it did not necessarily follow that the deposit must have been made on the basis of the travellers leaving within the three months.

The principle which can be deduced from these two cases seems to be this — that the question of whether a deposit is returnable or not depends on the terms of the contract between the parties in connection with which the deposit was made, but that since the period of permitted residence may be extended, a deposit is not necessarily forfeited if the holder of a traveller's or tourist visa does not leave within the period stipulated in the visa.

In this present appeal, Mr. Hogan, for the Appellant, bases his main argument on the simple and attractive proposition, that all that the Appellant promised to do was to return the money, if the Respondent satisfied their agent that she had finally departed from Palestine by the 2nd December, 1936, and that since she has never left the country, the Government are under no legal obligation to return the deposit. The Respondent's advocate contends that there was no contract, since the Respondent never signed the receipt Ex. L. B. 6, and that she did not know the contents of this document since she did not know English. Secondly, he argues that if there were a contract, then there was no breach on her part, since all the time she has been in Palestine lawfully, and that the intention of

both parties underlying the contract was that the Respondent should not remain in Palestine unlawfully, which she did not do. Alternatively he pleads that the Appellant is estopped from relying on the breach, if any, since they issued a passport to the Respondent, and that by their own conduct they made it impossible for the Respondent to leave Palestine within the stipulated time. And finally he says that the Appellant should have sent a notarial notice to the Respondent to leave Palestine, and that since they did not do so, they cannot retain the deposit, since this deposit is in the nature of damages.

To take the last point first, it is quite clear that in this case no notarial notice is necessary. In the first place the Appellant is not suing the Respondent for the amount, but the Respondent is suing the Appellant, and in the second place, no bond has been executed by the Respondent in favour of the Appellant. And we equally reject the Respondent's contention that the conduct of the Government made it impossible for her to leave Palestine before the 2nd December, 1936. The Government never asked her to forward her Italian passport — they put no hindrances in the way of her leaving, and whilst it might have been more courteous and businesslike to have replied to her letters, lack of courtesy, reprehensible though it may be, cannot create an estoppel.

We think that the receipt of the 2nd September, 1935, Ex. L. B. 6, constitutes a contract between the two parties, and as we have already intimated, we agree with the learned Judge when he found that the Respondent had knowledge of the contents of that document. By the terms of that contract, the Respondent was entitled to the return of her deposit if she satisfied the Appellant's agent at Venice, before the 2nd December, 1936, that she had finally departed from Palestine within the period authorised by the Palestine Authorities. The deposit, therefore, was made on the basis that she should leave the country within the period authorised by the authorities, not necessarily by any date fixed at the time of making the contract. Supposing, for the moment, that the Respondent had not married, but had obtained an extension or series of extensions of residence, authorising her to remain in Palestine beyond the 2nd December, 1936. In view of the decision in Yochels *v.* The Attorney General (*supra*) we do not think that it could have been argued with any success, that she would not have been entitled to the return of her deposit, if she had finally departed within the authorised period, even if the departure were after the 2nd December, 1936. Here, the Government, by issuing to the Respondent a Palestine passport,

in full knowledge of all the facts, have authorised her to remain in Palestine permanently. The authorised period has therefore been indefinitely extended, and the Government have themselves varied the terms of the contract, making the conditions therein with regard to the return of the deposit inoperative, since the Respondent need never leave Palestine. The case of Battat *v.* The Attorney General (*supra*) is distinguishable from the present case because there was a condition in the bond that the traveller should leave within one month, not, as here, within the period authorised by the authorities, and also because in the present case there is no bond.

There is one further point raised by the Appellant, and that is that the Government, if liable to repay the deposit to the Respondent, are only under an obligation to return the amount of the deposit in Italian lire, and not in any case the sum of LP. 60. This point, though mentioned in the defence filed by the Appellant in the District Court, was not raised in Court at the trial, so far as can be discovered from the record, and unfortunately it was not raised in the grounds of appeal, and therefore we are unable to deal with it at this stage. We say "unfortunately" because it seems to us, without expressing any definite opinion on the matter, that it might have met with a certain amount of success, though not perhaps to the full extent hoped for. We only mention it now because we do not want this present case to be taken as an authority for the proposition that, where a deposit is made in a foreign currency in a foreign country, the sum returnable in Palestine is the nominal value in Palestine currency of the amount of foreign currency at the rate of exchange at the time of deposit. That point must remain open.

In the result we think that the learned Judge was right in giving judgment for the Respondent, and this appeal must be dismissed with costs to include LP. 15 fee for attending the hearing.

Delivered this 30th day of March, 1939.

British Puisne Judge.

HIGH COURT No. 20/39.

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

BEFORE : Copland and Greene, JJ.

IN THE APPLICATION OF :

Rabbi Aaron Teitelbaum. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Haim Nathanel. RESPONDENTS.

Sale in execution — Misdescription of property sold — Cannot be raised after final order of sale in the absence of very strong grounds — Allegation of wrongful exercise of discretion — When High Court will interfere.

In refusing an application for an order to issue to the first Respondent directing him to show cause why his final order of sale in Tel Aviv Execution File No. 15716 should not be set aside and why a new seizure and/or valuation and/or enlargement of time of sale and/or further advertisements in the said Execution File should not be made :—

HELD : 1. The first point regarding misdescription was an old point which should have been taken at once when the description of the property was published.

2. The High Court is reluctant to interfere witb the exercise of discretion by the Chief Execution Officer, who must of necessity have had all the facts before him and who must know the conditions in his District much better than the High Court can possibly know them. Unless he has misdirected himself in law, or unless he has failed to direct his mind to the question of discretion, the High Court will not be able to interfere.

It could not be said that the Chief Execution Officer had wrongly exercised his discretion in not granting a further extension.

ANNOTATIONS : This case was considered and applied in H. C. 16/39 (*post*). "This Court is always reluctant to interfere with the orders of the Chief Execution Officers, who know much more of the conditions in their Districts than this Court can know." (H. C. 50/38, 1938, 2 S. C. J. at p. 51). Last decision on C. E. O.'s discretion : H. C. 12/39 (*ante*, p. 111) and *vide* annotations thereto.

In H. C. 55/32 (P. L. R. 779, C. of J. 858) a final order of sale was set aside on similar grounds. Distinguished in H. C. 30/33 — *not reported*).

FOR PETITIONER : R. Z. Fellman.

FOR RESPONDENTS : *Ex parte.*

ORDER.

This is an application for an order *nisi* to issue to the Chief Execution Officer, Tel-Aviv, to show cause why his final order for sale in these sale proceedings should not be set aside.

Mr. Fellman for the Petitioner advanced two grounds, first, that there were mis-descriptions in the particulars of the property to be sold, in its locality and in the state of the property, but the Applicant mainly rests his claim on the second ground, that the Chief Execution Officer wrongly exercised his discretion in not advertising the extension of the auction for a longer period than he did.

As regards the first points regarding mis-description, these are old points that should have been taken at once when the description of the property was published. It is too late, as so many people do, to come to this Court after a final order for sale has been made, and to complain that a description of the property to be sold, issued several months before, was wrong. This practice, if allowed, would inflict a great hardship on judgment creditors or on mortgagees. If we countenance these applications by granting orders of stay on these grounds, the whole of the time and money spent by the judgment creditors or by the mortgagees before final order for sale has been granted would be thrown away and would have to be re-incurred. There must be, therefore, very strong reasons before we would grant an order *nisi* on such grounds and those reasons do not appear in the present case.

To take the question of the discretion being wrongly exercised, again this Court is reluctant to interfere with the exercise of discretion by the Chief Execution Officer, who must of necessity have had all the facts before him and who must know the conditions in his District much better than we in this Court can possibly know them, and unless he has misdirected himself in law, or unless he has failed to direct his mind to the question of discretion we are never inclined to interfere.

Here the auction proceedings, and it is not alleged to the contrary, have been carried out exactly as the law lays down. A complaint has however been made, that further extension of the auction should have been granted. This is a difficult question, but I do not think we can say that the Chief Execution Officer has wrongly exercised his discretion in not granting a further extension, and we do not think that we should grant the order asked for. Therefore the application must be refused.

Given this 31st day of March, 1939.

British Puisne Judge.

HIGH COURT No. 16/39.

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

BEFORE : Copland and Greene, JJ.

IN THE APPLICATION OF :

1. Joseph Tischler,
2. Hanna Tischler. PETITIONERS.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Samuel Simelson,
3. "Aetan" Co. Ltd. RESPONDENTS.

Sale of Mortgage — Misdescription — Delay — H. C. 20/39 — New considerations regarding sale to be placed before C. E. O.

In refusing an application for an order to be issued to the first Respondent directing him to show cause why his orders dated the 3rd February, 1939, and the 21st March, 1939, in Execution File, Tel Aviv, No. 1424/37, should not be set aside :—

HELD : It is not right to come to the High Court alleging misdescription of the property after final order of sale has been given.

CONSIDERED : H. C. 20/39 (*ante*).

ANNOTATIONS : See annotations to H. C. 20/39 (*ante*).

FOR PETITIONERS : B. Joseph.

FOR RESPONDENTS : *Ex parte.*

O R D E R.

This is again an application for an order *nisi* to issue to the Chief Execution Officer, Tel-Aviv, to show cause why a final order of sale made by him with regard to a sale of mortgaged property should not be set aside.

In this case sale proceedings started in October, 1937. It is said that after this date there were certain delays by consent, money paid on account, and that sale proceedings were not pressed, and that it was not until December, 1938, when I suppose it was seen that negotiations for settlement would not be successful, that the sale proceedings started in real earnest.

It is not quite correct to say that no steps were taken between October, 1937 and December, 1938, because, and I am taking all

these dates from the Petitioner's own statement to us as we have no other data to go on with, in April, 1938, a description of the property to be sold was published. It was not until the 2nd of December, 1938, that is to say some eight months later, that the Petitioner applied to the Chief Execution Officer to set aside proceedings up to date, on the ground that the property was misdescribed. That petition, it is said, was never dealt with, except indirectly, when on the 3rd February, 1939, the Chief Execution Officer ordered final sale, thereby showing that the petition of the 7th December, 1938 was not granted. I should mention also, as alleged in the petition, that on the 2nd May, 1938, Petitioners called the attention of the Chief Execution Officer to some of the irregularities of the proceedings, and the Chief Execution Officer granted a period of two months' delay, and on the 29th September, 1938, ordered the continuation of the said proceedings.

Now much of what we have said in High Court Application No. 20/39, which came before us this morning, applies to this case ; it is not right to come to this Court alleging misdescription of the property after final order of sale was given. Whether or not there were negotiations for settlement it is quite clear that these negotiations for settlement ended in September, 1938, and it was therefore at that date, at the very latest if not sooner, that this question of description should have been tackled, and if the Chief Execution Officer had not given a favourable answer, it was the duty of the Petitioner to put the question at once before this Court. It is too late, after a final order for sale has been made, to come to this Court alleging irregularities which the Petitioner knew of ten months ago. That I think covers the arguments tendered in this case.

It has been alleged that the Petitioner has found a purchaser, and signed a contract for the sale of this property at a considerably higher price than has been realised in the execution proceedings. If this be so, then we can see no objection to his putting the matter afresh before the Chief Execution Officer who may see his way to vary his order in the light of those circumstances — We express no opinion as to what the Chief Execution Officer should do. We as a High Court cannot interfere, and the application for an order *nisi* must be refused.

Given this 31st day of March, 1939.

British Puisne Judge.

CIVIL APPEAL No.17/39.
No.19/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

The Gan Shlomo Company, Ltd. — APPELLANT.

v.

Abraham Meir Weisbord. — RESPONDENT.

AND OF :—

Abraham Meir Weisbord. — APPELLANT.

v.

The Gan Shlomo Company, Ltd. — RESPONDENT.

Agreement to plant and cultivate grove — Claim for damages for alleged breach by non payment — Counterclaim for return of money paid — Findings of fact — Interpretation of contract — Laches—Claim for damages fails if plaintiff in default — Registered letter not necessary to claim return of money for failure to carry out works — Breaches enumerated — Estoppel — Interest.

In dismissing an appeal and cross appeal from the decree of the District Court of Jaffa, sitting at Tel-Aviv, dated the 20th January, 1939 :—

HELD : 1. Respondent was in default in not paying the balance due under the agreement, as he was under the obligation, if the Company failed to fulfil its undertaking, of settling all accounts for work already done by the Company, and since no action as to the deficient work was taken by him until after the expiration of the four years' term, he was liable for the amount claimed for cultivation.

2. The Company was in default in not carrying out all the terms of the agreement (as witness their failure to give Respondent title to the well and the missing trees) and their claim for liquidated damages must consequently fail.

3. The amounts claimed in the counterclaim were not in the nature of damages, but were for the return of money paid by the Respondent to the Company in respect of services not rendered and of work not done by them, as contracted for by them. It was consequently not necessary for Respondent to send a registered letter under clause 17 of the contract.

4. There was no estoppel on the counterclaim. Respondent did not waive his rights either by conduct or by negligence or in any other way.

5. Appellant was entitled to interest on the amount of the judgment from the date when the action was filed.

ANNOTATIONS: For the principle that no damages may be claimed when both parties are in default, *vide* C. A. 131/38 (1938, 1 S. C. J. 409) and annotations.

As regards interest *vide* C. A. 215/37 (1938, 1 S. C. J. 85); C. A. 10/38 (*ibid.*, p. 182) and last paragraph of annotations.

FOR The Gan Shlomo Co., Ltd.: P. Goldberg.
FOR Abraham Meir Weisbord: S. Gratch.

JUDGMENT:

We have already intimated that in our opinion both appeals fail, except in regard to one matter, and our reasons for so holding are the following.

These appeals are in effect an appeal and a cross appeal from a judgment of the District Court at Tel-Aviv dismissing the Appellant's claim for damages and the greater part of the Respondent's counterclaim against the Appellant in the same action.

By an agreement between the parties dated the 5th February, 1933, subsequently extended by a further agreement dated 22nd February, 1934, the Plaintiff Company undertook to plant, cultivate and manage for the Respondent an orange grove of approximately 110 dunams in area upon certain terms contained in the agreement. The work to be done by the Company was set out in the schedule to the agreement of 5th February, 1933 and also in what is called a technical specification. The agreement was for a period of four years, and the Respondent undertook to pay the Company at the rate of LP. 64.— per dunam, payment being spread over the four years. It was agreed that any party in default should pay to the other liquidated damages assessed at LP. 15.— per dunam, and the necessity for a notarial notice was waived. By clause 5 if the Respondent's expert objected to the manner in which the Company were carrying out their work, he had to notify the Company to this effect by registered letter.

The Respondent failed to pay the amounts due in the fourth year, amounting to LP. 1435, and the Company thereupon entered an action in the District Court claiming this sum and also LP. 1655.775 mils as liquidated damages for breach of contract. The Respondent filed a counterclaim against the Company for LP. 5870.— being the amount paid by him to the Company under the agreement. The District

Court gave judgment for the Company for LP. 1435.— dismissing the further claim for liquidated damages, and on the counterclaim gave judgment for the Respondent for LP. 1,257.760 mils and disallowed the remainder. As a result, the Company obtained judgment for LP. 177.240 mils, no costs being given to either side. It is from this judgment that the present appeal and cross-appeal have been brought.

The case was tenaciously fought at great length in the District Court, some ten days being occupied in the hearing, and a large amount of evidence was heard. The District Court, in a detailed and well reasoned judgment, went carefully into the dispute, and made certain findings of fact on the evidence heard by them, and we agree with those findings and the conclusions which the Court drew from them. There is no doubt that the Respondent was in default in not paying the balance due under the agreement, since by clause 7 of the agreement he was under the obligation, if the Company failed to fulfil its undertakings, of settling all accounts for work already done by the Company, and since no action as to the deficient work was taken by him until after the expiration of the four years' term, he is liable for the amount claimed. It is equally clear that the Company was in default in not carrying out all the terms of the agreement, and their claim for liquidated damages must consequently fail.

This disposes of the appeal on the Company's claim in the District Court except in regard to one item which we will deal with later, and we now come to the counterclaim. The first argument of the Company is that all the counterclaim should have been dismissed, since the Respondent did not send them a registered letter as provided for in clause 17 of the agreement. But the amounts awarded on the counterclaim were not in the nature of damages, but were for the return of money paid by the Respondent to the Company in respect of services not rendered and of work not done by them, as contracted for by them, and a registered letter was therefore unnecessary.

To take the individual items, first the well. The Company was under an obligation to give the Respondent a title to the well — this they have not done — and it is no excuse to say that they need not do so because the Respondent did not pay the last instalments. The District Court have assessed the value of the right to the well at LP. 500, and we see no reason to differ from that. As to the item for the missing trees on 1½ dunams, there was sufficient evidence to support the finding of the lower Court, and the same applies to the other items in the judgment on the counterclaim — they are

supported by the evidence. It has been urged that the damages were not properly assessed by the District Court. The answer to that is first, that the amounts awarded are not damages, and secondly, that the District Court based its figures on the evidence before it as to the value of the various items, and was entitled to accept that evidence if it so saw fit.

Finally, we hold that, on the action of the parties, and on the terms of the contract between them, there is no estoppel on the counter-claim, and that neither by conduct nor by negligence, nor in any other way did the Respondent waive his rights. Both parties were in default, and we think that the District Court came to a correct conclusion, and an eminently fair and equitable one, as to their respective rights and liabilities, and nothing in the arguments of either party leads us to think that they were wrong in their appreciation.

There is however one point with which the District Court did not deal, and which they appear to have overlooked, doubtless owing to the complicated and voluminous nature of the respective claims, and that is the question of interest on the sum of LP. 1435 awarded to the Appellant Company. The Respondent admits that the Company is entitled to interest on the balance due to them. We think that they are clearly entitled to interest on the sum of LP. 1435 at the rate of nine *per centum per annum* from the date when the action was filed in the District Court, and we give judgment accordingly for that amount.

In the result, subject to the above variation, we think that both appeal and cross appeal should be dismissed. Each side must pay their own costs.

Delivered this 30th day of March, 1939.

British Puisne Judge.

CIVIL APPEAL No. 14/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Greene and Khayat, JJ.

IN THE APPEAL OF:

Keren Kayemeth Leisrael Ltd. — APPELLANT.

v.

1. The Members of the Arab Nazareeb Tribe,
2. The Villagers of Ma'lul. — RESPONDENTS.

Cultivators protection — Cultivators Protection Ordinance, sec. 19 — Cultivators (Special Commission) Appeal Rules, r. 3 — Object of sec. 19 and the Rules is to prevent frivolous appeals — Civil Procedure Rules, Part XXII — Case stated by Commission — Form of case stated — Halsbury, Vol. XXI, Para. 1257 — Applicant should make a draft of the case — Formulation of the points of law — Argumentative justification of Commission instead of case stated — Material on which case should be settled.

In allowing an appeal from the judgment of the Land Court of Haifa, dated the 19th January, 1939, and in returning the case to the Land Court to dispose of the points of law involved: —

HELD: 1. The object of Section 19 of the Cultivators Protection Ordinance and rule 3 of the Cultivators (Special Commission) Appeal Rules, is to prevent frivolous appeals, and the combined effect of those provisions is that when the Court is satisfied that there is a *prima facie* point of law to be considered leave should be given and the case prepared in accordance with the Civil Procedure Rules, Part XXII.

2. The Civil Procedure Rules provide the form and procedure for stated cases which should contain all the points which it is desired to raise.

3. Although the Rules do not provide for it, there is much to be said for the case being drafted by the party asking for it, and there is no reason why parties should not make a draft in the first instance for the consideration by the Commission and other parties, if they wish.

4. Having regard to the fact that leave to appeal had been given in the form of an order of the Court, setting out the points of law, and that the parties had taken no part in the preparation of the case, there was some justification for the Commission not properly setting out the question of law which the parties desired to argue.

5. In order to overcome the difficulty the parties should formulate the questions of law which they wished to argue on the basis of the facts found by the Commission and the documents which were before the Commission, and the record of the Commission.

6. The Commission had misunderstood what was required of them and their replies were surplusage. The Land Court was (not?) unduly influenced by them and they did not prevent the Court from dealing with the matter in the manner indicated.

FOR APPELLANT: Horowitz & Feiglin.

FOR RESPONDENTS: No. 1. Muhammad Hussein El Khalaf Mukhtar of Arab el Mazareeb..

No. 2. Yusef Muhammad El Abbas and 'Awad Elias El Khalil — Mukhtars of Ma'lul village.

JUDGMENT.

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

Early in 1937 an Arab tribe and certain Arab villagers claimed certain rights over land, the property of the Keren Kayemeth. The matter came before the Commission, who gave its finding on 23.3.37.

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

In my judgment the object of the section and the rules is to prevent frivolous appeals, and the combined effect of those provisions is that when the Court is satisfied that there is a *prima facie* point of law to be considered leave should be given and the case prepared in accordance with the Civil Procedure (Special Case) Rules, 1935, now replaced by Civil Procedure Rules, Part XXII.

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

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

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

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

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

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

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

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

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

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

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

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

to submit further questions, if any, that he wishes raised. By this I do not mean that he need submit his arguments on the points the Appellants raise.

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

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

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

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

Appellant does not apply for costs, therefore no order.

Delivered this 30th day of March, 1939.

Chief Justice.

CIVIL APPEAL No. 217/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Manning, S.P.J., Greene, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Yacoub Nakashian. — APPELLANT.

v.

Salim Abdo Nassar. — RESPONDENT.

Damages for breach of contract to sell land — Difference between contract price and value of land at the time of repudiation.

In setting aside the original judgment of the District Court, dated the 30th July, 1938: —

HELD: The District Court had made a finding, in accordance with directions, that the difference between the value of the land at the time of the breach and the contract price was LP. 147 and judgment would therefore be entered in favour of Appellant for this amount.

ANNOTATIONS: The case was remitted to the District Court on the 22nd December, 1938 (1938 2 S. C. J. 221 and see annotations therein).

FOR APPELLANT: Cattan and Germanus.

FOR RESPONDENT: Elia.

JUDGMENT.

This case has previously been before this Court, and in our judgment we specifically held, that —

> "He (the Appellant) succeeded in inducing the Respondent to offer LP. 300 for it. The Respondent repudiated the agreement, and if at the time of this repudiation the land was worth less than LP. 300 the Appellant lost the benefit of his bargain. This would be a direct loss and the Appellant would be entitled to be compensated for it. The amount of this compensation can be determined and an appropriate method of determining it would be to award the Appellant the difference between the contract price and the value of the land at the date of the repudiation."

We therefore referred the case back to the District Court to determine this issue, and that Court has done so.

There was clearly sufficient evidence before the District Court upon which it could arrive at the conclusion it did. In the result it decided that LP. 153 was the value of the land when the breach was committed. The difference, therefore, between the contract price of LP. 300 and this, amounts to LP. 147.

We therefore set aside the original judgment of the District Court and give judgment for the Appellant for LP. 147.

The Appellant will have his costs both here and below. Costs in this Court are assessed at an inclusive figure of LP. 20.

Delivered this 30th day of March, 1939.

Chief Justice.

CIVIL APPEAL No. 5/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF:

1. Muhammad Saleh Asha,
2. Fatmeh Asha,
3. Saleh Ben Yusef Saleh Asha,
4. Mahmoud Asha,
5. Said Ben Yusef Saleh Asha,
6. Jamileh Bint Yusef Asha,
7. Nimeh Bint Yusef Asha,
8. Azizeh Bint Yusef Asha,
9. Rakieh Bint Yusef Asha. APPELLANTS.

v.

1. Moshe M. Dahan,
2. Moshe Nahman,
3. Ephraim Baruch,
4. Emmanuel Baruch. RESPONDENTS.

Inspection — Appeal on findings of fact — Possession — Inspection carried out in similar action — No request to call rebutting evidence recorded.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 20th December, 1938 : —

HELD : 1. Practically the only points raised were questions of fact, and the Court below had heard evidence, and believed one set of witnesses rather than the other set.

2. Respondents duly proved, to the satisfaction of the Court, that their predecessors in title had been in possession of the land. A co-owner was also proved to have been in possession of one-sixth share therein.

3. The Land Court had not erred in refusing an inspection, as the same land had been inspected in the course of proceedings involving the co-owner and its identity had been established. There was no reason to suppose that a second inspection would have led to any different result.

4. There was nothing in the record to show that a request to call rebutting evidence was ever made to the Land Court, and such a request could not be inferred.

ANNOTATIONS : As regards the inspection *cf.* C.A. 163/38 (1938, 2 S.C.J. 16). Cases on inspection are collated in the annotations to C.A. 247/37 (1938, I S.C.J. 95) and *vide* C.A. 134/38 (*ibid.* p. 403) and annotations.

Concerning the request to call rebutting evidence, see also first paragraph of annotations to C.A. 4/39 (*ante* at p. 56).

FOR APPELLANTS: Elia.

FOR RESPONDENTS: Mizrahi.

JUDGMENT.

This appeal from a judgment of the Land Court of Jerusalem fails. Practically the only points raised are questions of fact, and the Court below heard evidence, and believed one set of witnesses rather than the other set.

The Appellants rest their case principally on the question of possession. The Land Court asked the Respondents, who were the Plaintiffs before them, to prove their possession, and the Respondents duly proved, to the satisfaction of the Court, that their predecessors in title were in possession of this land. Naphtali Baruch, who was a co-owner of the Respondent's predecessors in title, in another action was equally proved to have been in possession of a one-sixth share in this same land.

We do not think that the Land Court erred in refusing an inspection. This same land had been inspected in the course of the proceedings in the above mentioned previous action, and its identity had been established. We have no reason to suppose that a second inspection would have led to any different result.

Finally, complaint has been made by the Appellants that they were not allowed to call rebutting evidence. There is nothing on the record to show that such a request was ever made to the Land Court, and we cannot infer that a request was so made.

For these reasons the appeal must be dismissed with costs, and LP. 15 for attending the hearing.

Delivered this 3rd day of April, 1939.

British Puisne Judge.

CIVIL APPEAL No. 3/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

Abd Mustafa Khalaf on behalf of himself and on behalf of the Estate of Musallam Khalaf of Jericho. APPELLANT.

v.

1. Said Muhammad Said El-Ja'ouni,
2. Majida Fauzi Ali El-Ja'ouni,
3. Wijdan Fauzi Ali El-Ja'ouni. RESPONDENTS.

Land settlement appeal — Land (Settlement of Title) Ordinance, sec. 63(3) overrides rule 334 C.P.R. — Construction of Statutes — Discretion of Court whether appeal is to be heard in chambers or in open Court hearing — Court to be properly constituted — Admissability of application for open Court hearing being granted.

In allowing an appeal from a judgment of the Land Court of Jerusalem (in its appellate capacity), dated the 10th December, 1938, and in remitting the case to the lower Court with directions: —

HELD: 1. Under Section 63(3) of the Land (Settlement of Title) Ordinance, the Court has an entire discretion as to whether it shall hear an appeal in chambers or in open Court, but when an application to hear an appeal in open Court is made by one of the parties, it is essential that the Court as a Court should direct its attention to considering the application and should deal with it.

2. In the present case, the application for an open Court hearing was considered and refused by the President, but there was nothing to show that it had been considered by any other judge and, for the purpose of the trial of this particular appeal, the President and one judge constituted a Court.

3. Rule 334 of the Civil Procedure Rules, insofar as it conflicts with the clear provisions of the Land (Settlement of Title) Ordinance must be held to be inoperative, for it is a recognised canon of law that a rule cannot amend an Ordinance.

4. It is usually desirable that applicatioins for open Court hearings should normally be granted, unless there should be any particular reason to the contrary, or unless the appeal is on its face a frivolous one or unless it is clear that no apparent purpose would be served by hearing it in open Court rather than in chambers.

ANNOTATIONS: I. For the proposition that rules of Court cannot override

the provisions of an Ordinance, *vide* C.A. 145/38 (1938, 2 S.C.J. 67) and note 2 at p. 68.

As regards 2, see and compare C. A. 211/38 (1938, 2 S.C.J. 118).

As regards 3, note that C.P.R., rule 334 has been subtituted in rule 6 of the C. P. (Am.) Rules, 1939, *Gazette* No. 875 at p. 256.

FOR APPELLANT: Cattan.

FOR RESPONDENTS: No. 1, 2 — Kamal.
No. 3 — Served — not present.

JUDGMENT.

In this appeal a short point has been raised by the Appellant with which it is advisable to deal first.

By Section 63, sub-section 3 of the Land (Settlement of Title) Ordinance Cap. 80 —

> "An appeal shall be decided in chambers unless the Court, of its own motion or on the application of any party, shall otherwise direct: at any such appeal in chambers no party shall be heard.

Now it has been argued by Mr. Cattan for the Appellant that this clause is obligatory on the Court, that is to say, when an application to hear an appeal in open Court is made by one of the parties, then that application must be granted. We do not agree. We think that on the wording it is quite clear that the Court has an entire discretion as to whether it shall hear an appeal in Chambers or in open Court, but when an application to hear an appeal in open Court is made by one of the parties, it is essential that the Court should direct its attention to considering this application, that is to say, that before it can exercise its discretion, the Court as a Court must consider and deal with this application.

Now in the present case there is nothing to show that the Court as a Court did consider the application. The application was considered and refused by the President, but there is nothing to show that it was considered by any other judge, and for the purpose of the trial of this particular appeal the President and one judge constituted the Court. If at the beginning of their judgment they had said — "We refuse to hear this appeal in open Court" — everything would have been well, but so far as we can discover on the record, there is no decision of that Court on this point. For that reason, therefore, this judgment appealed from cannot stand.

Rule 334 of the Civil Procedure Rules, which purports to give the right to a party to have an appeal heard in an open Court, insofar as it conflicts with the clear provisions of the Land (Settlement of Title) Ordinance must be held to be inoperative, for it is a recognised canon of law that unless specific power to that effect be given, a rule cannot amend an ordinance. The appeal must therefore be allowed, the judgment of the Land Court set aside and the case remitted to be dealt with as suggested in this judgment. Costs to await the result of the retrial.

We would express the opinion that when an application to hear an appeal in open Court is made it is usually desirable that that application should normally be granted, unless there should be any particular reason to the contrary, or unless the appeal is on its face a frivolous one, or unless it is clear that no apparent purpose would be served by hearing it in open Court rather than in Chambers.

We wish to make it clear that this judgment refers only to appeals from Land Settlement Officers, under the Land (Settlement of Title) Ordinance, and not to other appeals to the District or Land Courts, to which other and possibly different considerations might apply.

Delivered this 5th day of April, 1939.

British Puisne Judge.

CRIMINAL APPEAL No. 10/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Green and Frumkin, JJ.

IN THE APPEAL OF:

The Attorney-General. APPELLANT.

v.

1. Abraham Azari,
2. Haim Libovsky. RESPONDENTS.

Town planning offence. — Appeal against acquittal — Town Planning Ordinance, secs. 35, 41, Town Planning (Amendment) Ordinance, 1938 sec. 11 — Failure to set out sub-section in charge sheet — Charges must be stated with clarity — Penalty sections — Practice of submitting written pleadings to be discouraged — Safeguards of legislature

in favour of subject to be observed — Scheme in force prior to the enactment of the Ordinance — Publication of scheme in Gazette — Interpretation Ordinance, secs. 3, 7 (d) — "Regulations" and "orders" — Plural imports the singular — Construction of Statutes — Duty of prosecution before securing a conviction — Burden of proof.

In dismissing an appeal from a judgment of the District Court of Haifa (in its appellate capacity) dated the 25th January, 1939, whereby Respondents were acquitted on a charge of contravening Section 35 of the Town Planning Ordinance of 1936—8: —

HELD: 1. There are no rules regulating the form of charges but it is obvious that they must be stated with sufficient clarity to enable an accused person to know what charge he has to meet. The charge fell under Section 35 (1) (h) of the Town Planning Ordinance, 1936, as enacted by section 11 of the Town Planning (Amendment) Ordinance, 1938, which is a penalty section. The charge was, therefore, not bad although it would have been better had it been clearer.

2. The practice of allowing parties in the Magistrate's Court to submit arguments in writing, instead of in open Court, should be discouraged.

3. Under any system of town planning the liberty of the individual must to some extent be sacrificed for the benefit of the public, and Courts must be careful to see that the safeguards which the legislature has imposed are observed.

4. Section 41 of the Ordinance preserves town planning schemes in force at its commencement. The present scheme was not published in the *Gazette* but came into force by virtue of a notice in the *Gazette* of the 15th February, 1934. The scheme had not been proved before the Magistrate.

5. In order to obtain a conviction it is necessary for the prosecution to show —

a) that the property in question was within the town planning area; and

b) that there was a town planning scheme lawfully made, the contents of which would have to be proved; and

c) that the provision of the scheme upon which reliance was placed, if challenged, was *intra vires* the Ordinance; and

d) that work had been done for which a permit was required, and that such work had been done otherwise than in accordance with the material provision of the scheme.

ANNOTATIONS: Penal statutes should be construed in favour of the subject: *Digest* Vol. XXXXII pp. 726 seqq., Sec. 2 sub-secs. 1—2. Palestine authorities on Town Planning: H.C. 81/27 (P.L.R. 243; P.P. 30.I.35; C. of J. 1756); C.A. 79/30 (P.L.R. 559, C. of J. 1757); H.C. 33/31 (C. of J. 1759); M.A. 19/33 (P.L.R. 823, C. of J. 1761; P.P. 30.VII.33); C.A. 25/35 (C. of J. 1934—6, 799, P.P. 21.III.35); M.A. 13/34 (P.P. 28.IX.34; 2 P.L.R. 173; C. of J. 1934—6, 612); H.C. 62/34 (P.P. 17.X., 19.XII.34, 2 P.L.R. 208; C. of J. 1934—6, 615); H.C.

72/34 (P.P. 18.X., 16.XII.34, 2 P.L.R. 221, C. of J. 1934—6, 796); H.C. 17/36 (P.P. 6.IX.36); CR.A. 76/37 (2 C.L.R. 41, P.P. 19.X.37); CR.A. 55/38 (1938, I S.C.J. 417).

FOR APPELLANT: Crown Counsel (Hogan).

FOR RESPONDENTS: Salomon.

JUDGMENT.

This is an appeal by the Attorney-General. The Respondents were charged before the Magistrate, Haifa, with an offence against the Town Planning Ordinance but were discharged. The Attorney-General appealed to the District Court, which upheld the decision of the Magistrate, but for different reasons.

The charge sheet set out that the offence took place in Hashomer Street in July, 1938, and stated the offence as follows: —

> "Contravening Art. 35 of the Town Planning Ordinance, 1936-38 in that: —
> they have opened the plinth, thus rendering the height of building four storeys, contrary to the approved plan and restriction of the Outline Scheme for the Zone in which the building of the above accused is located."

The evidence for the prosecution was scanty. Two witnesses only were called, Mr. Khalphon, who said —

> "At the end of July, 1938, I visited the Hashomer Street and found that in the building of the accused the foundation was being opened. It is a house of three storeys erected on a high foundation. The house was built according to a permit. The accused have opened the walls around the foundation, *i. e.* they demolished them and lowered the ground in the foundation in a way that a hollow place was formed beneath the three storeys so that the house became composed of 4 storeys. According to the Town Planning Ordinance it fixes the height of the storeys in this zone at three storeys."

and Mr. Joseph Cohen who said —

> "I have visited the building of the accused, I visited it even yesterday. I knew the building before they opened the foundation. Before its opening it was Sokol's building facing the street beneath the ground floor, approximately 3½ metres high. Outside there was a wall. There were three storeys in the building. After they have opened I inspected it. There is an open Sokol supported by columns and this gives 4 storeys. In that zone only three storeys are permissible."

The Magistrate's record concludes with a note —

> "It is decided to inspect the place and give the attorney for accused the opportunity of submitting oral pleadings. Case adjourned to 28.11.38."

The Magistrate, in his judgment, first criticizes the citation of the Ordinance, in that it did not particularise the sub-section or paragraph, and states — "This, in itself, is a sufficient ground for dismissing the present action."

There are no rules regulating the form of charges but it is obvious that they must be stated with sufficient clarity to enable an accussed person to know what charge he has to meet. Section 35 of the Town Planning Ordinance 1936, as enacted in Section 11 of the Town Planning (Amendment) Ordinance, 1938, — which may conveniently be so cited — is a penalty section. There is no reference in the charge sheet to a permit, or to By-laws or Rules, but only to the outline scheme for the zone. I think it is clear, therefore, that the charge must have been under sub-section (1) (b) which provides —

> "(b) carries out any such work or non-conforming use" (*i.e.* by para. (a) work for which a permit is required) "otherwise than in accordance with any by-laws, rules or town planning schemes made under the provisions of this Ordinance, or any Ordinance repealed by this Ordinance."

I do not think the charge was in consequence bad, but it would have been better had it been clearer.

The Magistrate then dealt with the facts, and said —

> "Generally the two persons may not be convicted of a criminal charge on the evidence of the 2 witnesses."

I take this to mean that the evidence was insufficient.

We are told that written arguments were submitted to the Magistrate's Court. I would say that the practice, if it exists, of allowing parties to submit arguments in writing, instead of in open Court, is to be discouraged.

The District Court dismissed the appeal on the ground that the outline town planning scheme had not been published in the *Gazette* and that it came within the purview of section 7 of the Interpretation Ordinance.

Under any system of town planning the liberty of the individual must to some extent be sacrificed for the benefit of the public, and

however much one may sympathise with the objects of town planning on the grounds of health and amenity, Courts must be careful to see that the safeguards which the legislature has imposed are observed.

The basic law of town planning in this Territory is now to be found in the Town Planning Ordinance, 1936, as amended. Section 41 of that Ordinance preserves schemes lawfully in force at its commencement, and the provisions of that Ordinance apply thereto, as if such schemes had been put into force under it. By-laws, rules and orders are also saved until revoked.

In the present case we are concerned with a scheme which came into force before 1936. We have to ascertain, therefore, if it was lawfully in force under the then law — *i. e.* the 1921 Ordinance, as amended — for which it is now convenient to refer to Drayton, Vol. II, page 1437. A town planning area was declared for Haifa, the limits of which were set out in the *Gazette* in 1921, and re-defined by an order in the *Gazette* of 1st August, 1931.

Where any question arises before a Court it is clearly necessary formally to prove that property concerned is within the area. In the present case it is recorded that the Magistrate intended to inspect the property — but it is not clear if he did so. No doubt, in some circumstances, a Court could satisfy itself by inspection that the property was within the area.

The law originally provided for one scheme, which was first published as a draft. In 1929 the law was amended (see Sections 11—13 in Drayton) to provide for an outline scheme "in respect of all lands within the town planning area, with the general object of securing proper conditions of health, sanitation and communication, and amenity and convenience in connection with the laying out and use of the land," and for a detailed scheme with reference to any land within the area. The detail scheme had to be within the general compass of the outline scheme, but, as its name implied, it dealt with matters not included in the outline scheme.

An outline town planning scheme is said to have been brought into force in Haifa, and it is that scheme with which we are concerned. As I have said, the District Court took the view that it was invalid because it had not been published in the *Gazette,* and relied on Section 7 of the Interpretation Ordinance, the material paragraph of which is (d), as follows:

"(d) all regulations and orders, save where otherwise provided,

> shall be published in the *Gazette*, and shall have the force of law upon such publication thereof or from the date named therein."

Admittedly the scheme was not so published.

Two questions arise, therefore: (a) is it a regulation or order; (b) are there other provisions applicable to it. "Regulations" is defined only as including rules and by-laws; "Orders" is not defined.

No doubt some of the provisions of the scheme are in the broad meaning of the word regulations, and I doubt if the obligation to publish in the *Gazette* what are in effect regulations can be avoided by calling them by another name.

The particular law applicable to schemes is set out in Section 21 of the Ordinance in Drayton, sub-section (3) provides —

> "The scheme shall come into force fifteen days after the publication of such notice in the *Gazette* unless some other date be fixed in the order of approval."

A notice was published in the *Gazette* of 15.2.34, bringing the scheme into force fifteen days after the publication of the notice.

Some difficulty may arise from the section referring to the scheme, whereas the law as amended by the 1929 Ordinance contemplated two schemes. The explanation is that the publication section was not amended in 1929. In my view this is an example of the application of the rule in Section 3 of the Interpretation Ordinance, that words in the singular include the plural.

With all respect to the District Court, which expressed some doubt as to its own conclusion, I am of opinion that the express provision of the Town Planning Ordinance applied, and that the outline scheme was lawfully in force.

The scheme not having been published in the *Gazette*, it would be necessary to satisfy the Court as to its contents. It would also be necessary to show that the provision relied upon was *intra vires* the section of the law under which it was made.

The scheme was not proved before the Magistrate, but as some argument was addressed to us upon it, it may be convenient to consider it.

The provisions of the 1929 Ordinance, appearing in Drayton as Section 11 (2) (e), are as follows:

> "(e) the imposition of conditions and restrictions in regard to the open space to be maintained about buildings and the par-

ticular height and character of buildings to be allowed in specified areas."

The scheme provides that the height of buildings to be erected or altered shall be in accordance with Zoning Table II (Density), *i. e.* it shall not exceed for residential districts a stated number of storeys. It is argued that this is inconsistent with the definition of "height" in the scheme, but in my opinion the express provision should prevail, and I am of opinion that it is *intra vires* the Ordinance.

Comprehensive provisions as to permits are now continued in the 1936 Ordinance.

In order to obtain a conviction it was necessary for the prosecution to show —

(a) that the property in question was within the town planning area; and

(b) that there was a town planning scheme lawfully made, the contents of which would have to be proved; and

(c) that the provision of the scheme upon which reliance was placed, if challenged, was *intra vires* the Ordinance; and

(d) that work had been done for which a permit was required, and that such work had been done otherwise than in accordance with the material provision of the scheme.

It is clear from the evidence that the prosecution did not comply with these requirements. The appeal therefore will be dismissed.

The Respondents will have their costs assessed at an inclusive sum of LP. 5.

Delivered this 6th day of April, 1939.

Chief Justice.

CIVIL APPEAL No. 35/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., and Khayat, J.

IN THE APPEAL OF:

"Aviron" Palestine Aviation Co. Ltd. APPELLANTS.

v.

F. Hauptmann. RESPONDENT.

Appeal from order refusing interlocutory injunction — Damages sufficient remedy for breach — Whether order final — Grant of interlocutory injunction is discretionary — Costs.

In dismissing an appeal from the Order of the District Court of Jaffa, sitting at Tel Aviv, dated the 29th March, 1939 : —

HELD : The grant of an interlocutory injunction is discretionary, and the Appellant had not satisfied the Court that the lower Court had failed to exercise its discretion properly.

ANNOTATIONS: See the following Palestine authorities on injunctions: H.C. 49/25 (C. of J. 995); H.C. 17/25 (P.L.R. 38, C. of J. 884); L.A. 76/25 (P.L.R. 87, C. of J. 1472); C.A. 161/23 (C. of J. 1582); H.C. 32/27 (C. of J. 997); L.A. 20/27 (P.L.R. 139, C. of J. 725); L.A. 73/28 (P.L.R. 359, C. of J. 998); C.A. 35/31 (C. of J. 1811); C.A. 66/32 (P.L.R. 780, P.P. 5.1.33, C. of J. 1357); H.C. 57/32 (C. of J. 1000); H.C. 99/32 (P.L.R. 802, P.P. 16.11.33, C. of J. 1001); H.C. 25/33 (P.P. 9.7.; 2.8.33, C. of J. 1720); H.C. 15/33 (C. of J. 55); L.A. 45/34 (2 P.L.R. 459, C. of J. 1934—6, 840); H.C. 79/35 (P.P. 29.10.35, C. of J. 1934—6, 647); C.A. 74/35 (P.P. 26.8.36, C. of J. 1934—6, 209); H.C. 35/38 (1938, 1 S.C.J. 296) ; C.A. 170/38 (1938, 2 S.C.J. 51).

As regards the discretion of the Court in interlocutory injunctions, see *Digest*, Vol. XXVIII pp. *seqq*. Sec. 1.

FOR APPELLANTS: Smoira.

FOR RESPONDENT: Seligman.

JUDGMENT.

This is an appeal from the Order of the District Court, Tel-Aviv, refusing an application for an interlocutory injunction. As it may be that the parties will proceed further with the action, I express no views as to its merits.

In their statement of claim the Plaintiffs pleaded a contract, and prayed for an injunction to restrain the Defendant from working for any other concern. On the 27th of March, the Plaintiff's advocate applied to the Court for an interlocutory injunction on the ground that the matter was very urgent and that irreparable and serious harm would be caused to the Plaintiff if that application was not granted. The matter came before the District Court, when Mr. Bar-Shira stated that it was not a question that the Defendant was joining a rival company, but that the Plaintiffs objected to the treatment and breach of the agreement, and stated that the Plaintiffs were held up for eight weeks, with overhead expenses still going on. Upon that the

Court held that damages could be a sufficient remedy for the breach, and refused the interlocutory injunction.

This was described as an order, not as a judgment.

The Plaintiffs desired to appeal to this Court and applied for leave so to do. The District Court appears to have been in some doubt as to whether they had given a final order, and so granted leave to appeal. We are satisfied that they did not give a final judgment, but dealt only with the interlocutory application.

It is clear that the grant of an interlocutory injunction is discretionary, and the Appellant has not satisfied us that the Court failed to exercise its discretion properly. The appeal, therefore, will be dismissed.

It seems that an application was made to this Court for an interlocutory injunction pending the hearing before us, but that this was refused, and the question of costs reserved.

The Respondent will have the costs of this appeal and the application to this Court for an interlocutory injunction, which together we fix at a sum of LP. 10.

Delivered this 17th day of April, 1939.

Chief Justice.

HIGH COURT No. 14/39.

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

BEFORE: Copland and Frumkin, JJ.

IN THE APPLICATION OF:

Ruth Chudakov. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. David Cohen. RESPONDENTS.

Sale of Mortgage — Service of notice on wife of deceased mortgagor — Application made after final order of sale — Special circumstances in which it may be granted — Equity — Execution Law Art. 115 — Interests of justice — Sale proceedings void ab initio.

In granting an application for an order to issue to the first Respondent directing him to show cause why all the proceedings in Tel-Aviv Execution File No. 9056/38 should not be cancelled, and in cancelling the proceedings: —

HELD: 1. This was an exceptional case as the only person who could test these proceedings was the present Petitioner, a young girl without any advice and it would not be fair and equitable to apply in all strictness the rule laid down by this Court that facts known to a petitioner, which would upset execution proceedings, must be brought to the knowledge of the Chief Execution Officer at the earliest moment, and that if the Chief Execution Officer refuses to comply with the application, then the matter should be tested in the High Court without delay.

2. The sale proceedings were void *ab initio* as the second Respondent had not communicated to the Chief Execution Officer the fact that one of the mortgagors was dead and by that initial fault the President of the District Court was unable to direct his mind to this important question, that there were minor children interested in the proceedings of the sale and he was therefore unable to consider the exercise of his discretion in their favour by granting a postponement of the sale.

Bearing in mind the initial fault, it was in the interests of justice that the sale proceedings should be declared void *ab initio*.

ANNOTATIONS: This rare instance of the cancellation of a final order of sale in exceptional circumstances must not be taken as a variation of the rule that applications for cancellation of execution proceedings should be made at the earliest opportunity. See, *e.g.* H.C. 17/39 (*post*).

Note also that there was in the present case a combination of two sets of facts neither of which would, alone, have sufficed to support the application for cancellation.

FOR PETITIONER: Dickstein.

FOR RESPONDENT No. 1. Not present — served.
No. 2. Ruda.

ORDER.

This is a curious and exceptional case. One Abraham Chudakov, now deceased, and his wife Haya Chudakov, jointly entered into two mortgages with the 2nd Respondent in this case, both of which mortgages have now fallen due. Abraham Chudakov died on the 19th October, 1937.

On the 9th of June 1938, the 2nd Respondent applied to the President District Court sitting at Tel-Aviv, for an Order of Sale of

these properties. Summonses were issued and the summons addressed to the late Abraham Chudakov was returned by the process server endorsed with a remark that it had been served upon his wife at his place of residence. No question arises as to the service on the wife.

The applications for sale duly came on before the President District Court, and on the 14th of June 1938, an Order for Sale on the usual terms was made, the mortgagors not appearing. The execution proceedings were carried out and on the 15th of November, 1938, final order of sale of the properties was given for the sum of LP. 630.

On the 23rd December, 1938, the present Petitioner, who is the daughter of the late Abraham Chudakov and Haya Chudakov, applied to the Chief Execution Officer explaining the circumstances of the case, and asking for cancellation of the proceedings. The Chief Execution Officer refused to cancel the proceedings but ordered that the properties should again be put up to auction and as a result a higher bid of LP. 950 was obtained. The matter again came before the Chief Execution Officer on the 9th of March, 1939, when he again refused to cancel the proceedings but gave ten days delay for an application to the High Court.

Now the only point with which we propose to deal in this present application is this question of the alleged service of the notice to the deceased Abraham Chudakov on his widow. It is not disputed that it was not until the 23rd December, 1938, that the Chief Execution Officer became aware of the death of Abraham Chudakov. There is no evidence that the President of the District Court ever knew of his death.

It is admitted that the Petitioner knew of the Order for Sale on or about the time it was made, but it is urged on her behalf that being only just 18 years of age, that her mother was mentally unsound, even if not certified as such by the competent authority, that her father was dead, that she had the responsibility of the care of young minor children with nobody to advise her, that in these circumstances she could not be expected to take steps to test the legality of the order of sale at an earlier stage. The 2nd Respondent has referred us to Article 115 of the Execution Law which says that any application disputing the possession of immovable property must be made to the Execution Office before final order for sale is given.

On many occasions this Court has held that when facts are known to a Petitioner which would upset execution proceedings they must be brought to the knowledge of the Chief Execution Officer at the earliest

possible moment and that if the Chief Execution Officer refuses to comply with the application, then the matter should be tested in this Court without delay.

As I said at the commencement of this judgment this is a curious and exceptional case. The only person who could test these proceedings was the present Petitioner, a young girl without any advice, and, therefore, we think that this is one of those exceptional cases when it would not be fair and equitable to apply in all strictness the rule laid down by this Court which I have just quoted. And there is this further reason, that there is no doubt that these sale proceedings were wrong *ab initio*. It was known to the mortgagee that one of the mortgagors was dead and he never communicated that intelligence to the President District Court, when asking the latter to order sale proceedings. If there had not been that initial fault then I think it unlikely that we should have been prepared to consider the present petition, but seeing that there was initial fault in the citation of the parties by the 2nd Respondent and that by that initial fault the President District Court was unable to direct his mind to this important question, that there were minor children interested in the proceedings of the sale and therefore the President was unable to consider the exercise of his discretion in their favour by granting a postponement of the sale whether on terms or not, bearing in mind, as I have said, this initial fault, we think that it would be in the interests of justice that this rule *nisi* should be made absolute and that the sale proceedings taken by the 2nd Respondent should be declared to be void *ab initio*.

In view of the fact that there was delay, though to a certain extent excusable on the part of the Petitioner, but that delay has led the 2nd Respondent into costs which have been thrown away, we think that we should make no order as to costs on this petition.

Given this 17th day of April, 1939.

British Puisne Judge.

I fully agree.

Puisne Judge.

HIGH COURT No. 17/39.

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

BEFORE: Copland and Frumkin, JJ.

IN THE APPLICATION OF:

1. Hafzibah Bukai,
2. Joseph Douer. PETITIONERS.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. David Rosenberg. RESPONDENTS.

Sale in execution — Notice of sale purporting to give clear title — Claim to hut — Acquiesence — Applications to the High Court to be made immediately — Laches.

In dismissing an application for an order to issue to the first Respondent directing him to show cause why his order dated the 19th March, 1939, in Execution File No. 1433/35, Tel-Aviv, should not be set aside, and why the second Respondent should not apply to a competent Court to prove his title: —

HELD: The application was made too late. Petitioners should have applied to the High Court immediately after the rejection of their application to the first Respondent on the 24th October, 1938. The fact that they had not done so entitled the second Respondent to assume that their claim would no longer be pursued and, if the application were granted, it would cause him damage for which he would be in no way responsible.

ANNOTATIONS: See H. C. 20/39 (*ante*. p. 138) and annotations.

For a relaxation of the rule in exceptional circumstances see H. C. 14/39 (*ante*).

FOR PETITIONERS: Machlis.

FOR RESPONDENTS: No. 1. Not present — served.
No. 2. B. Cohen.

ORDER.

This is a return to an order *nisi* calling upon the Chief Execution Officer, Tel-Aviv, to show cause why his order of the 19th March, 1939, should not be set aside and why the second Respondent should not be

ordered to apply to a competent Court to prove his title to certain property in dispute.

Proceedings in the sale of the property have given rise to this present position. The dispute began several years ago, and last year the property was put up for sale and eventually was purchased by the second Respondent. In the Notice of Sale it was stated quite clearly in the Schedule that the property was sold free of all incumbrances and claims.

In the petition to this Court the Petitioners say that they knew that the property they now claim was being included in the sale proceedings, and they knew that at the end of July, 1938, and it is in fact evidenced in the return of the Chief Execution Officer in his inspection report of the property on the 6th of May, 1938, that one of the Petitioners was present, and it is therefore clear that from that date she knew that the property was to be sold. It was not until the 19th of August, 1938, that is to say, some three months and a half after that one of the Petitioners knew of the sale proceedings, that their first application was made to the Chief Execution Officer claiming possession of a hut situated on the land to be sold. The Chief Execution Officer after hearing the parties made an order on the 21th of October, 1938, that the proceedings should continue so long as the Applicants, that is the present Petitioners, did not bring an order from a competent Court. Subsequently to this final order for sale was made, and the second Respondent obtained registration of the property on the 26th January, 1939. Later still, on the 22nd of February, 1939, the Petitioners again applied to the Chief Execution Officer to stay eviction proceedings which had been commenced against them by the second Respondent, and on the 19th of March, 1939, the Chief Execution Officer decided to continue the proceedings of eviction, giving the Petitioners fifteen days to apply to a competent Court. It is from this last order that the present application is made.

To our minds the critical date in this case is the 24th of October, 1938, when Petitioners' application to the Chief Execution Officer alleging that they were entitled by possession to this hut was rejected by him. There was nothing to prevent Petitioners coming straight away to this Court to test that order of the Chief Execution Officer, and, by not doing so then, their behaviour led the second Respondent to think that their claim which they had made to possession, and which claim had been rejected by the Chief Execution Officer, would no longer be pursued.

The second Respondent, in the circumstances, when he paid for this

property and obtained registration of it in his name, was entitled to assume that there were in fact no claims to the property, as had been stated in the notices of sale. If we were to grant the present petition, it would cause damage to the second Respondent for which he would be in no way responsible. This present application is, as is the case with so many applications to this Court, made too late, and for that reason, following our invariable rule, we cannot grant it. The rule *nisi* must, therefore, be discharged with costs to the second Respondent of LP. 10 to be paid by the Petitioners.

Given this 18th day of April, 1939.

British Puisne Judge.

CIVIL APPEAL No. 225/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Nimer Ahmad Hinawy. APPELLANT.

v.

Subhi As'ad Shahruri. RESPONDENT.

Appeal on findings after the remittal — Prior purchase.

In dismissing an appeal from the decree of the Land Court of Nablus, dated the 12th September, 1938: —

HELD: On the findings formulated by the Land Court, the appeal should be dismissed.

ANNOTATIONS: The remitting judgment is reported in 1938, 2 S.C.J. 167.

FOR APPELLANT: In person.

FOR RESPONDENT: Khammash.

JUDGMENT:

This case comes back to us from the Land Court of Nablus, sitting at Haifa, with their findings on the issue of fact which we formulated to them in our judgment dated the 23rd November, 1938. Having considered those findings, we dismiss the appeal and confirm the original judgment of the Land Court of Nablus, with costs which we fix at an inclusive amount of LP. 15.

Delivered this 27th day of March, 1939.

Chief Justice.

MISCELLANEOUS APPLICATION No. 10/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland and Frumkin, JJ.

IN THE APPLICATION OF:

Yasin Zitawi. APPLICANT.

v.

Moshé Motzman. RESPONDENT.

Application for exemption from fees for appeal — Applicant to prove that he is unable to pay the fees and that he has reasonable grounds for appeal — Applicant detained in Acre — No reasonable grounds for appeal — Court Fees Rules 19.

In refusing an application for exemption from payment of Court fees on appeal: —

HELD: To obtain exemption under Rule 19 of the Court Fees Rules an applicant must satisfy the Court on two matters, that he is unable through poverty to pay the fees, and that he has reasonable grounds for appeal.

There were, in the present case, no reasonable grounds for challenging the decision of the District Court and no useful purpose would be served by having the Applicant brought before the Court, particularly since he was under detention and to hear the application would involve Respondent in costs which he could not possibly recover.

ANNOTATIONS: As regards the first requirement see Misc. A. 5/39 (*ante*, p .120) and annotations. For the second, see Misc. A. 11/39 (*ante*, p. 130).

ORDER.

The Applicant in this case is, and has been for some months, detained in Acre Prison under the Emergency Regulations. He brought an action in the Haifa District Court and that action was dismissed, the Court holding that there was no binding agreement between the parties, the agreement being only a step in the negotiations undertaken, and being bad for uncertainty.

The Applicant being desirous of appealing to this Court has put in a written application to be exempted from paying the appeal fees under Rule 19 of the Court Fees Rules. To obtain exemption under that Rule he must satisfy the Court on two matters, that he is unable

through poverty to pay the fees, and that he has reasonable grounds for appeal.

We have read and carefully considered his application and we are satisfied that no reasonable grounds whatever exist on which the District Court judgment could be challenged, and this being so, we do not think that any useful purpose would be served by having the Applicant brought before us, particularly since he is detained elsewhere under an order of the Military Authorities, and to hear this application in Court would involve the Respondent in costs, which he could not possibly hope to recover.

The application for leave to appeal without payment of fees is therefore refused.

Dated this 18th day of April, 1939.

British Puisne Judge.

CIVIL APPEAL No. 23/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

1. Joseph Weinberg,
2. Perl Brakha Elke Weinberg. APPELLANTS.

v.

The Palestine Jewish Colonisation Association,
The Village Settlement Committee of Kfar Saba. RESPONDENTS.

Land Settlement — Claim to parcel already sold — Registration in unofficial land books of colony — Acts of possession — Evidence — Finding of fact — Lack of corroboration — Credibility — Points not raised in grounds of appeal — C.P.R. 316 — Prescriptive title — Date of inception of prescription — Appeals from Land Court limited to questions of law — Existence of evidence to justify finding of fact is a question of law — Date of entry of Respondents as claimants — Onus of proof — What amounts to acts of possession — Calculation

of period of prescription — Land Law (Amendment) Ordinance, 1933, sec. 7 — Land Code, Art. 20 — C.A. 184/37.

In dismissing an appeal from a judgment of the Land Court of Tel-Aviv, dated the 13th February, 1939: —

HELD: 1. The claim by Appellants to ownership of the fourth parcel was palpably false, since they were entitled to three building sites only, and they already had those three sites.

2. There had been no corroboration of the evidence of the first Appellant, whom the Settlement Officer had not believed, regarding alleged acts of possession in 1922.

3. The first Appellant had been cross-examined on the facts in the former proceedings and his answers had been unsatisfactory. There were, moreover, ample grounds to justify the Settlement Officer in disbelieving his evidence, where unsupported.

4. The allegation that the Settlement Officer wrongly relied on proceedings in another case, to which the first Appellant was a party, in disbelieving the first Appellant had not been raised in the appeal and had not been set out in the grounds of appeal filed in the Supreme Court.

5. The practice of advancing grounds on the hearing of an appeal, which have not been set out in the grounds of appeal filed in Court, without any application being made to submit further grounds under Rule 316, would be discouraged. The whole reason for filing the grounds of appeal is that the Respondent may have notice of the points to which he may have to reply and this object is entirely defeated if additional grounds are advanced without leave of the Court.

6. The Respondents should be deemed to have entered as claimants in the case as from the 19th January, 1938, when they were cited by the Settlement Officer as third party, and not from the date of their first appearance before the Settlement Officer.

7. It was for Appellants to prove that they entered into possession and the date on which they entered into possession. Ploughing of the part claimed, and fencing amount to acts of possession. The further act of planting is not an essential part of possession in such a case.

There was no evidence that the fencing was set up until some time after the expiration of two months after the 29th March, 1928, and there was absolutely no evidence as to how long after.
There was no evidence before the Settlement Officer on which he could reasonably arrive at the conclusion that ploughing had begun on the 29th May, 1938.

8. Ten lunar years had not expired between the 28th May, 1928, and the 19th January, 1939. The plea of prescription therefore failed.

The period of prescription should, moreover, have been calculated

in accordance with Gregorian Calendar years, in accordance with Section 7 of the Land Law (Amendment) Ordinance, 1933, which applied at the date when the claim arose.

CONSIDERED: Khanun *v.* Shukeiri, C.A. 184/37 (Ct.L.R. 219).

ANNOTATIONS: On the calculation of the period of prescription see, in addition to C.A. 184/37 (*supra*) C.A. 204/37 (2 Ct.L.R. 153).

As regards 4, *vide* C.A. 8/39 (*ante*, p. 86) and annotation.

Regarding the inception of an action for determining the period of prescription sec. C.A. 233/37 (1938, 1 S.C.J. 129) and annotations; C.A. 133/38 (*ibid.* p. 414) and annotations.

FOR APPELLANTS: Scharf (by delegation).

FOR RESPONDENTS No. 1. G. Minkovitch.

JUDGMENT:

This is an appeal from a judgment of the Land Court sitting at Tel-Aviv, dismissing an appeal from the Ramleh Settlement Officer.

The Appellants, who were Defendants in the settlement proceedings, were originally the owners of four rural plots and four building sites in Kfar Saba. One of the rural plots together with its building site was subsequently sold by them to one Orloff, and, at settlement, though the Appellants claimed all four plots, the sale of Orloff was confirmed, both the Settlement Officer and the learned president of the Land Court, to whom application for leave to appeal was made, stating that the claim of the Appellants to Orloff's plot was a false one.

It appears, as found by the Settlement Officer, that one building site was appurtenant to every rural plot, but that the building sites were selected by purchasers at a later date on the principle of "first come, first served". It would seem, therefore, that, being entitled to three rural plots only, the Appellants could only claim three building sites. In the present case, however, they filed a claim to four building sites, namely parcels 12/8, 12/9 (which is a double site) and 12/10. Parcels 12/8 and 12/9 are already registered in their names, and the present dispute centres round parcel 12/10. The Settlement Officer has found as a fact that parcels 12/8 and 12/9 give the approximate area of building sites to which the Appellants were entitled on the strength of their ownership of three rural plots, holding that the area of 5 dunums assigned to a building site was only approximate, since roads had to be deducted from it, and any small shortage in area was thereby explained.

The Appellants' claim was that the parcel in dispute was registered in their names in the unofficial Land Books of the Colony, and that they had been in undisputed possession of it since 1922. The claim of ownership is palpably false, since they are entitled to three building sites only, and those three sites they already have, and nothing more therefore need be said about that part of the claim. The only point for determination by this Court is whether the Appellants are entitled to be registered as owners of parcel 12/10 by prescription. They alleged that they took possession of the parcel in 1922 and erected a fence round parcels 8, 9 and 10 in that year. The Settlement Officer found that there was no evidence to support this allegation except that of the male Appellant, whom he did not believe, and that no acts of possession in any of parcels 8, 9 or 10 were taken until some time in May 1928, and that therefore prescription would not commence to run until this latter date. On the appeal, the Land Court confirmed this view, and I will deal with this part of the appeal first.

In this Court, the advocate for the Appellants has argued, first, that the corroborative evidence as to possession by the Appellants since 1922 has been wrongly disregarded, and he has put forward as corroboration certain remarks endorsed by the Asst. Settlement Officer on the particulars of claim, and the evidence of a Mr. Hamburger, who was heard as a witness. Of course, there is not a *scintilla* of corroboration — the remarks of the Asst. Settlement Officer are not evidence and Mr. Hamburger could give no dates whatever as to the alleged acts of possession by the Appellants — he could not say, to quote his own words, "whether it was 7, 8, 9 or 12 years" before, and further on being shown the plan, he could not say whether the Appellants had fenced parcel No. 10, the one now in dispute.

It is then argued that the Settlement Officer wrongly relied on proceedings in another case, to which the male Appellant had been a party, in disbelieving the male Appellant in this case. The Settlement Officer said in his judgment that the proceedings in this other case, which concerned the plot sold by the Appellants to Orloff, to which I have already referred, "did not inspire one with confidence in the male defendant, and I unhesitatingly reject his unsupported evidence that he erected a fence round the parcel in dispute in 1922." Apart from the fact that this ground of appeal was never raised in the appeal to the Land Court, nor in the grounds of appeal filed in this Court, and therefore it cannot now be considered, it must be remembered that the attention of the male Appellant was called

at the trial to the proceedings in the Orloff case, and he was cross-examined on them, and his answers were most unsatisfactory, as in fact was much of his evidence, and if it were necessary I should be prepared to hold that there were ample grounds, apart from the one given by him, to justify the Settlement Officer in disbelieving the evidence of the male Appellant, where unsupported.

Here, perhaps, I might call attention to a practice, a reprehensible practice, which is creeping in, and should be discouraged, and that is, the advancing of grounds on the hearing of an appeal which have not been set out in the grounds of appeal filed in Court, without any application being made to submit further grounds under Rule 316. It should be unnecessary to point out that the whole reason for filing the grounds of appeal is that the Respondent may have notice of the points on which he may have to reply, and that this object is entirely defeated if additional grounds are advanced without leave of the Court. I trust that this practice will cease.

I come now to what is the main ground of appeal, namely, that the Appellants have acquired a prescriptive title, having been in undisputed possession of the parcel in dispute at any rate since some date in 1928, either in April or May of that year.

In support of this proposition, it is submitted on behalf of the Appellants that on the 8th *Nissan* 5688, which corresponds to the 29th March, 1928, they entered into a contract with a Mr. Druyan to plough and plant an area of 14 dunums, subsequently extended to 16 dunums, that this contract covered parcels 8 and 9 and also a part of parcel 10, and that possession must be deemed to commence when this contract was entered into. They say that the Settlement Officer was wrong in holding that prescription began to run from the 28th May, 1928, since even if the part of parcel 10 was the last place to be ploughed, the ploughing in that part must have commenced some time before this latter date, and that ploughing is a sufficient act of possession in itself without planting, the Settlement Officer having fixed the 29th May, 1928, as the date when planting was completed, and consequently the date from which the period of prescription would fall to be calculated.

Now Mr. Druyan stated definitely that he planted 14 dunums, that the planting was not completed until about two months after signing the contract, and that it was afterwards that he erected a fence round parcels 8, 9 and 10. He said that he believed that the 14 dunums entered into parcel 10 a little on the northern part, but that

he knew that the Appellants were not the owners of parcel 10. His evidence is somewhat vague, and in cases of prescription it is necessary that the dates must be determined with certainty.

The Respondents, in reply to the Appellants' arguments, say, first, that there is no evidence that there was any ploughing in parcel 10, and that they do not admit any encroachment in that parcel, until the end of the two months' period of the ploughing and planting under the contract, and secondly, that it is not for them to say how much was ploughed or what particular area was encroached upon. They also say that the date of the first act of possession is a question of fact, that the Settlement Officer having found as a fact that it was the 29th May 1928, that finding cannot be queried in this Court, where appeals are limited to questions of law. This last proposition, however, is subject to this consideration, that is a question of law whether there was evidence to justify the finding of fact.

It may be as well at this point to dispose of one further question which was raised in the grounds of appeal to this Court, but has not been further pursued here, and that is the date when the Respondents should be deemed to have entered as claimants in this case. The Settlement Officer decided that the date was the 19th January 1938, when he cited them as a third party. The Appellants submitted that the correct date was the 31st January, 1938, when the Respondents made their first appearance before the Settlement Officer. I think that the Settlement Officer was right, because the citation of the Respondents by the Settlement Officer is equivalent to the entry of a claim in an ordinary civil action, and a party is a claimant in an ordinary action from the date of filing the action, not from the date of his first appearance in Court.

Now it is an axiom that a party alleging a fact must prove it. In this case the Appellants alleged that they entered into possession of parcel 10, and it is for them to prove that fact, and also the date on which they entered into possession, and by proof, I mean definite proof, not mere supposition or guess work. I am of opinion that ploughing would be an act of possession, of at any rate the actual part ploughed, and that the further act of planting is not an essential part of possession in such a case. Fencing would also be an act of possession. The question of fencing in this case can be disposed of at once, because there is no evidence that the fencing was set up until some time after the expiration of two months after the 29th March, 1928, and there is absolutely no evidence as to

how long after. This question of the date of ploughing in parcel 10 depends entirely on the evidence of Mr. Druyan, and that evidence amounts to this, that he *believes* that he went a little into parcel 10, he does not state it definitely as a fact that he did, that he did not commerce ploughing parcels 8 and 9, and possibly a little in parcel 10, until after the date of the contract, 29th March 1928, and that he completed the ploughing and the planting about two months later. "About two months later" is extremely vague — it may mean a little more or a little less, it is impossible to say. This was all the evidence before the Settlement Officer on which he could rely. The Settlement Officer has apparently found, or, perhaps it is more correct to say, assumed for the purpose of his judgment, though he does not perhaps say so directly, that there was some encroachment in parcel 10. He might equally well on this evidence have found that there was none. Be that as it may, I cannot see that on this evidence, vague and intermediate as it was, that he was under any obligation to take the date most favourable to the Appellants, who were making the claim to a prescriptive title, and whose duty it was to prove, if possible, the exact date. It was not for the Settlement Officer to guess when ploughing began, if it did begin, in parcel 10. In the absence of any specific date he was entitled, if not compelled, to take a date the most favourable to the Respondents, which date is in fact the only one which can be said to be reasonably definite and which does not involve speculation, and I am not prepared, on consideration of the evidence before him, to say that he was wrong in finding the date to be the 29th May, 1928. I agree with the learned Judges in the Land Court that there was evidence before him on which he could reasonably arrive at such a conclusion.

I have dealt with this question of dates at some considerable length, because, whilst on the view of this case, as will be seen presently, it is not material, yet on another view, the exact date is of vital importance, a few days one way or the other giving possibly different results.

This brings us to the question whether the calculation of the time of prescription was accurate. The Settlement Officer found that the first act of possession was at or about the end of May 1928, that the Respondents became claimants on the 19th January, 1938, and taking the Moslem Calendar as the basis, and seeing that it was well known that the Moslem year was some 11 days less than the Gregorian year, it was clear that in 10 years the difference would be about 110 days. Since between even the 31st January 1938 and the end of May 1928,

the difference is some 120 days, ten years even on this calculation had not expired and so the plea of prescription failed. If the 19th January 1938, which I think is the correct date, should be taken, then the difference would be some 130 days.

The Land Court, on appeal, went into this question in somewhat greater detail. It found, and that finding has not been challenged, that the 29th May, 1928, corresponds to 10th *Zil Hija* 1346 and the 19th January, 1938, to 17th *Zil Kahdi* 1356, making it clear therefore beyond any doubt that ten lunar years had not expired and therefore the period of prescription had not elapsed. I agree both with the Settlement Officer and with the Land Court that the plea of prescription fails.

The Respondents at the end of their reply raised the point which they had also taken in the Land Court, but which that Court did not deal with as it was unnecessary to do so in the view it took of the case, that the period of prescription should be calculated not in lunar years, but in years according to the Gregorian Calendar, on the ground that since their claim was deemed to be lodged in 1938, the provisions of section 7 of the Land Law (Amendment) Ordinance, Cap. 78, applied. This Ordinance came into force on the 23rd August, 1933, and section 7 is as follows —

> "In every provision of the Ottoman Land Code and any other Ottoman Law concerning immovable property in Palestine fixing the period within which any action may be heard or any right may be exercised, the terms "month" and "year" shall be deemed to refer to a calendar month or year respectively according to the Gregorian calendar."

The effect of this clause therefore is to make the period of prescription ten calendar years for *miri land,* since the "ten years" referred to in Art. 20 of the Land Law must now read "ten calendar years".

In Fahima Khanum *v.* Sheikh Assa'ad Shukeiri, C.A. 184/37, Manning *J.* held that this section was not retrospective in its action, that it "must be regarded as an amendment of the law applicable in 1933, and as such cannot affect any proceedings pending at that date." He further says "that the law in force when the action was commenced is the law applicable." So far as the present Respondents are concerned, these proceedings were not commenced until 1938, when the Settlement Officer cited them as claimants. Following the above authority it seems to me that in these present proceedings, which were commenced after the Land Law (Amendment) Ordinance came into force, the period of

prescription must be calculated in calender years, and on this basis the ten year period again has not been completed. Prescription is a right given to a person, who has for ten years been in undisputed possession of land, to retain possession as against the registered owner in an action for recovery by the latter. The right does not come into being until the ten years have been completed; during the ten years, no right is in existence, there is only the possibility of a right arising in the future. Disregarding the claim of ownership, the Appellants' case was divided into two parts, first, that they had been in possession for ten years since 1922, and secondly, that at any rate they had been in possession for ten years since 1928. This second part of the claim could not have been made before 1938 at the earliest, and therefore must fall to be determined under the law applicable in 1938.

For all these reasons I think that this appeal fails and should be dismissed. I would only add, that, even if I had been of the contrary opinion, I should have held that the case would have had to go back to the Settlement Officer to determine the exact date of encroachment, if any, in the parcel in dispute, and further, if there were any such encroachment, to determine whether the ploughing or planting of trees in a part only of the parcel could be deemed to be possession of the whole parcel.

British Puisne Judge.

I concur

Puisne Judge.

Frumkin, J.:

I am in agreement that the Appellants failed to make out a case based on sufficient evidence that they were in possession prior to 1928. The evidence of one of the Appellants the Court below did not believe, at least not without some corroborative evidence, and there was no such corroboration.

As regards possession since 1928, I propose to deal first with the point taken last by the Respondents, namely, that the period of prescription should be calculated on the basis of calendar years, because if that is the case it will not be necessary to enlarge on minute calculations as to days.

Now the period of prescription is ten years. They were lunar years up to the 23rd of August, 1933, when the Land Law (Amendment) Ordinance was passed, and became calendar Gregorian years since that

date. In Fahima Khanum *v.* Sheikh Assa'ad Shukeiri, Civil Appeal 184/37, Manning J. held that in an action brought prior to the said amending Ordinance, the period is to be calculated by lunar years. This is obvious. If when an action is brought the defendant has a legal right to bar the action of his opponent by proving that he was in possession for a certain period, if subsequently to lodging the action the period is enlarged by legislation, such enlargement could not be retrospective in so far as it affects the right of a party to rely on a shorter period.

In the present case the action of the Respondent was not entered until same time in 1938, long after the amending Ordinance, enlarging the period of prescription by the difference between lunar and solar years. The Appellants could therefore only succeed in defeating the action of the Respondents by lapse of time if they could prove their possession for a period as provided by the law in force in 1938, namely ten calendar years, and not ten lunar years.

It has been suggested that in determining the question whether the period of prescription should be calculated under the old or new law, attention should be paid not so much to the law in force at the commencement of the action, but to the law in force at the time when the step was taken giving rise to prescription. In other words, the period should be fixed in accordance with lunar years, because that was the law in force in 1928, when the Appellants encroached upon the property in dispute.

The answer to that contention is this. Taking possession does not in itself confer any right; it is the completion of a period prescribed by law which confers on the possessor the privilege of retaining possession, not so much because he has acquired a right, but because his opponent is considered to have forfeited his right. So that in 1928 the Appellants had no right whatsoever, nor had they any right in 1933, at the time of the promulgation of the amending Ordinance, at which time the Appellants could rely on no period of possession exceeding ten years.

From the date of the promulgation of the amending Ordinance they came under the new law, and in order to succeed they had to satisfy the Courts below that when the action was brought they were already in possession for a period exceeding ten calendar years.

This they failed to prove, even taking all the dates in their favour, namely, that the period of prescription began on the 29th of March, 1928, when they entered into the contract, and not on the 29th of May, 1928, when the period of the contract was deemed to have been

concluded, and expired on the 31st of January, 1938, when the present Respondent first appeared before the Land Settlement Officer, and not on the 19th of January, when the Settlement Officer decided to cite the Respondent as claimant in the action. Ten calendar years have not been completed, and Respondent's action was therefore not barred by lapse of time.

Having arrived at that conclusion it is not necessary for me to deal with the other factors which would be of relevance only if lunar years were applicable, and I express no opinion as to that. The appeal should therefore be dismissed with costs.

Delivered this 27th day of April, 1939.

Puisne Judge.

The appeal will, therefore, be dismissed with costs to include LP. 15 fees for attending the hearing to the first Respondent.

Delivered this 27th day of April, 1939.

British Puisne Judge.

CIVIL APPEAL No. 2/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J. and Khayat, J.

IN THE APPEAL OF:

Spinney's Limited. APPELLANT.

v.

Ibrahim Rushdi. RESPONDENT.

Taxation of costs — Application for review of an order of taxation by Chief Registrar — Whether proceedings argued on appeal or by motion.

In dismissing an application to review a taxation order of costs by the Chief Registrar in proceedings before the Court of Appeal whereby Appellant's appeal from a judgment of the District Court of Jaffa, dated October 18th, 1938, was dismissed: —

HELD: The proceedings were by way of appeal and not motion, as the Court went into the matter and dismissed the appeal with costs.

ANNOTATIONS: The judgment on appeal is reported *ante*, p. 53.

FOR APPELLANT: Krongold.

FOR RESPONDENT: Rand.

JUDGMENT.

This is an application to review a taxation of costs by the Chief Registrar in proceedings before this Court.

It is argued that the proceedings were not an appeal, but a motion. It is quite clear, however, that the Court went into the matter and dismissed the appeal with costs. The present application is therefore dismissed, with costs fixed at an inclusive sum of LP. 2.

Delivered this third day of April, 1939.

Chief Justice.

CIVIL APPEAL No. 36/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Khayat, JJ.

IN THE APPLICATION OF:

1. Anna Agop Brounsouzian,
2. Levontine Shukri Brounsouzian,
3. Miriam Manouk Brounsouzian,
4. Osqui, daughter of Agop Mouradian,

and Khatoum Brounsouzian. APPLICANTS.

v.

Adele Apkarien. RESPONDENT.

Succession — Succession rules 25(1) — Application for leave to appeal from order — Effect of judgment of Turkish Courts — Judgment not necessarily conclusive.

In dismissing an application for leave to appeal from an interlocutory order of the District Court, Jaffa, dated 6th April, 1939: —

HELD: The Turkish Judgment was not necessarily conclusive.

FOR APPLICANTS: Olshan.

FOR RESPONDENT: Germanus (by delegation) and Sassoon.

ORDER.

After prolonged litigation an order, declaring succession, was made in what is known as the Murad case.

An application has now been made under Rule 25(1) of the Succession Rules for an alteration of that order, and a ruling has been given by the President of the District Court, Jaffa, against which the present Applicants, who were the successful parties in the original proceedings, now seek leave to appeal.

The question turns upon the effect of a judgment given by the Turkish Courts, which is referred to as the *Marash* judgment, and the learned President held:

> "After full consideration therefore, I have come to the conclusion that although the *Marash* judgment may be used by the successful heirs as evidence of a fact relevant to the issue now before me, namely who are the true heirs entitled to the Palestine Estate, it cannot be treated as a conclusive judgment estopping the Petitioners from proceeding with their claim.
>
> "I hold, therefore, that this Court is empowered to enquire into the petition on its merits, and I accordingly call upon the Petitioners to prove their claim."

It appears to us that the *Marash* judgment is not necessarily conclusive, and without expressing any opinion as to the effect of that judgment upon the present proceedings, we refuse the application for leave to appeal.

The application is dismissed with costs, which we fix at an inclusive sum of LP. 5.

Delivered this 18th day of April, 1939.

Chief Justice.

CRIMINAL APPEAL No. 15/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Copland and Frumkin, JJ.

IN THE APPEAL OF:

Attorney General. — APPELLANT.

v.

1. Nicolai K. Ivanoff,
2. Michael Klagin. — RESPONDENTS.

Criminal appeal — Sentence — Absence of one Respondent.

In dismissing an appeal, as against the first Respondent, from a judgment of the District Court of Jerusalem, dated the 16th March, 1939, whereby Respondents were convicted of breaking and entering a shop contrary to Section 297 of the Criminal Code Ordinance, 1936, and were discharged conditionally upon entering into a bond in the sum of LP. 15 to be of good behaviour for two years: —

HELD: Although the accused was treated leniently by the Court below, there was no reason why the sentence should be increased. The accused had been fortunate in receiving a light sentence but it did not follow that if other persons were convicted of that crime they would not receive a heavier sentence.

ANNOTATIONS: On increase of sentence, *cf.* CR.A. 11/39 (*ante*, p. 121) and cases in the annotations thereto.

Other cases on sentence: CR.A. 8/39 (*ante*, p. 93) — *decrease of sentence*; CR.A. 6/39 (*ante*, p. 76) — *postponement of sentence;* CR.A. 3/39 (*ante*, p. 61) — *appeal by prisoner against sentence.*

FOR APPELLANT: Crown Counsel (Hogan).

FOR RESPONDENTS: No. 1 — In person.
No. 2 — Absent — not served.

JUDGMENT.

From the circumstances of this case it may appear that this accused was treated leniently by the Court below. On the other hand there is no good reason given why the sentence should be increased. The accused may be fortunate in receiving a light sentence, but it does not follow that if other persons are convicted of this crime they will not receive a heavier sentence.

The appeal as far as the present accused is concerned is dismissed.

Delivered this 20th day of April, 1939.

Chief Justice.

CRIMINAL APPEAL No. 16/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Copland and Frumkin, JJ.

IN THE APPEAL OF:

Benjamin Nahum Mizrahi. — APPELLANT.

v.

The Attorney-General. — RESPONDENT.

Murder — Appeal from conviction — T.U.I. Ord., Secs. 41, 63, 65 — C.C.O. Sec. 216 — Premeditation — Adjournment refused — Duty of counsel for defence to proceed with the case — Insanity should be pleaded — Medical evidence — No affidavit in support of application to hear evidence on appeal.

In dismissing an appeal from a judgment of the Court of Criminal Assize sitting in Tiberias, whereby the Appellant was convicted of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death: —

HELD: 1. There was evidence on which the lower Court could lawfully find the facts which it found.

2. Premeditation under Section 216 of the Criminal Code Ordinance is a question of degree and in the present case the Court was justified in finding that the Appellant had killed the deceased with premeditation. Appellant's advocate had ample time to examine the records and to get experts to examine the accused. When counsel for an accused person makes an application, which is refused, or a submission, which is not accepted, it is his duty to defend his client.

3. Persons are assumed to be sane until they are shown to be insane, and insanity is a plea which should be put forward by the defence. In this case the witnesses for the prosecution were not cross-examined and no plea of insanity was put forward. The doctor called by the Court certified that the Appellant was normal.

4. Application had been made during the hearing of the appeal for further medical evidence, but no indication was given by affidavit or otherwise as to the nature of the evidence.

ANNOTATIONS: On premeditation *vide* Digest, Vol. XV, p. 770, No. 8247. On insanity as a defence, *vide Digest,* Vol. XIV, pp. 55 *seq.*, sub-sec. 2, and on onus of proof *ibid,* p. 59, sec. C.

FOR APPELLANT: Hoter-Ishay & Ben-Haviv.

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

The Appellant appeals against his conviction by the Court of Criminal Assize for murder.

The powers of this Court are statutory and are set out in Section 63 of the Criminal Procedure (Trial Upon Information) Ordinance. In the first place we have to consider, was there evidence on which the Court could lawfully find the facts which it found. The material facts of the case are set out on page 7 of the judgment, as follows:

> "Accused and deceased quarrelled outside the office and cursed one another, but no one seems to have heard the actual words used. Two shots were then fired by the accused from a shot-gun at deceased, and one at least of these shots hit deceased in the chest. Witness Zeltz ran out on hearing the shots and saw accused re-loading his gun. This witness made an effort to take the gun from accused but failed to do so, and accused fired at this witness and wounded him in the leg. Accused then fired a second shot at witness Zeltz. He then re-loaded his gun for the second time and proceeded to the office where deceased had escaped to. Accused then fired again at deceased from very close range hitting him in neck and head, causing immediate death."

I am satisfied that there was evidence upon which the Court could so find.

We have next to consider, do these facts constitute the offence on which the Appellant was charged. Where there is a quarrel, and at some stage one of the parties runs away, and the other subsequently follows him and kills him, it may be that the requirements of Section 216 of the Criminal Code Ordinance are complied with. It is a question of degree, and each case must be taken on its merits. I am satisfied that in this case the Court was justified in its finding that the Appellant killed the deceased with premeditation.

It is said that there has been some irregularity of procedure in connection with the trial, and this brings me to a somewhat difficult question. Mr. Ishay, who appears for the Appellant, was appointed by the Court to defend him. He was appointed seven days before the trial. When the case was called on, Mr. Ishay asked for an adjournment to enable him to call medical evidence as to the sanity of the accused, before the accused was asked to plead. The Court heard the Medical Officer, Haifa, and upon his evidence it decided that the Appellant was fit to plead. Mr. Ishay then said that he was unable to defend the accused, as he had no time to examine the records, or get experts to

examine the accused. In my opinion he had ample time for both these purposes. I would point out that where counsel for an accused person makes an application, which is refused, or a submission, which is not accepted, it is his duty to continue to defend his client.

As has been said in the course of this appeal, persons are assumed to be sane until they are shown to be insane, and insanity is a plea which should be put forward by the defence. In this case the witnesses for the prosecution were not cross-examined, and no plea of insanity was put forward. But, no doubt owing to the question being raised as to the capacity of the Appellant to plead, the Court, exercising the power given to it by Section 41 of the Criminal Procedure (Trial Upon Information) Ordinance, called the doctor of the colony, who was in Court, who said that he had known the accused for the past few years, that he had attended him on many occasions for ailments, that he was a normal labourer, and that he had seen no sign of mental derangement. Upon that evidence the Court, — although, as I have said, the issue of insanity was never strictly raised by the defence, — said that it was satisfied that the accused was sane at the time he committed the offence.

In the course of the hearing an application was made to us to hear further medical evidence, but as no indication was given to us by affidavit or otherwise, as to the nature of this evidence, the application was refused.

The Appellant has not satisfied me that any of the grounds of Section 65 apply, and in my judgment the appeal should therefore be dismissed.

Delivered this 20th day of April, 1939.

Chief Justice.

CIVIL APPEAL No. 26/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:

Levi Ben Yoav Gul Babayoff. APPELLANT.

v.

Oholiav Gul Shauloff. RESPONDENT.

Succession — Registration in nam musta'ar by non-Turkish subject — Deed of re-transfer — Point taken by Court in its own motion — Proof of consent to transfer.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated 10th February, 1939:

HELD: 1. No injustice had been done by the Court taking, on its own motion, the point that the consent of the Appellant's father was necessary in order to validate the transfer.

2. The evidence did not show that the Appellant's father had consented to the transfer.

ANNOTATIONS: Earlier proceedings in this Appeal (Misc. A. 11/39) are reported *ante*, p. 130.

FOR APPELLANT: Levitsky, M. Levanon.

FOR RESPONDENT: Geichman.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem in which they ordered the registration, in favour of the Appellant, of a share of the property in dispute, such share to be calculated according to a certificate of succession of the Appellant's father, and rejected his claim to the remaining part of the land.

The property was bought many years ago by the father of the Appellant. Since the latter was not a Turkish subject he could not get registration of this property in his own name, and he therefore caused it to be registered in the name of the Respondent's father, in order to avoid this difficulty.

In the year 1907 the father of the Respondent executed the document, which has been referred to in these procedings as Exhibit P. 2, by which he purported to transfer the property to the present Appellant. As Mr. Levitsky, for the Appellant, remarks, it is a very detailed document. It purports to be a document of sale of the property, in return for the sum of 320 French napoleons, and, at the time the document was executed, the present Appellant made a declaration in which he says that the father of the Respondent bought the property for his, the Appellant's father, and taking the wording of this document which has been put in by the Appellant, the property is said to have been bought for the Appellant's father, and that with the consent or permission of the

Appellant's father they gave a deed before the Rabbinical Court. He also goes on to say —

> "and whenever I shall desire to separate from my father and brothers, this deed of *Beth-Din* mentioned above, shall be null and void, and it shall be deemed as before when I had no such deed."

There were somewhat lengthy proceedings in the Land Court and certain issues were framed, but, needless to say, the real point of dispute was not amongst those issues, and it was not until the termination of the proceedings that this was realised.

The one and only point in this case is this — on these documents did Exhibit P. 2 operate as a transfer of the whole interest in this property to the Appellant or not? Mr. Levitsky, for the Appellant, has argued as the first ground of appeal, that it was wrong for the Land Court to have taken the point, of its own motion, that the consent of the Appellant's father was necessary in order to validate the transfer. We do not think, however, that any injustice has been done by this, and as I have said, it is the one and only point in this case, the answer to which is decisive in the case.

The second point is, that there was sufficient evidence as to the consent to the transfer by the Appellant's father. That consent is said to be shown by Exhibit L.B. 1, by the evidence of the original Plaintiff and Defendant in the Land Court, and by the fact that the other heirs of the Appellant's father are not claiming the property. Now neither Exhibit P. 2, nor Exhibit L.B. 1, have been signed by the Appellant's father. Exhibit L.B. 1, on which reliance is placed, is executed by the Plaintiff himself, and cannot in our opinion prove the consent of his father. In addition, the document itself nullifies the idea of the sale when it says that if the Appellant should leave his father and brothers the sale would be null and void, showing quite clearly that the sale, purported to be effected by Exhibit P. 2, was a fictitious one. The fact that the other heirs are not claiming the property in these present proceedings proves nothing. They may well have thought they would leave it to the present Appellant to prove it or not on their behalf, and that it was not for them to waste their own money in the matter.

The evidence of the Appellant carries the case no further and there is evidence that, during the ten or twelve years until his death, the Plaintiff's father remained in occupation of the premises now in dispute; and there is again Exhibit L.B. II(a), a letter written some twenty-seven years after Exhibit L.B. 1, in which the present Appellant refers to the property as the property of his father.

For all these reasons we think the judgment of the Land Court is a correct one, and the appeal fails, and must be dismissed with costs to include LP. 15, fee for attending the hearing.

Delivered this 26th day of April, 1939.

British Puisne Judge.

Puisne Judge.

CIVIL APPEAL No. 31/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

The Waqf Department of Jaffa. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Waqf — Registration of property as State Domain — Written waqfieh — Property taken over by Municipal Corporation for a road — Claim for Compensation.

In allowing an appeal from a judgment of the Land Court of Jaffa dated the first of March, 1939, and in remitting the case to the Land Court with directions: —

HELD: 1. If the Appellant could establish his claim to the property *prima facie,* he might be entitled to compensation either from Government or from the Municipal Corporation of Jaffa.

2. The case would be sent back to the Land Court for the Appellant to join the Municipal Corporation of Jaffa as a Defendant and for the Court to adjudicate on his rights. Should the Court decide as to the disputed rights to the land, there should be no difficulty as to the compensation, if any, to which Appellant was entitled.

FOR APPELLANT: Mr. Haikal *(Ma'mour Awkaf)* of Jaffa.

FOR RESPONDENT: Wa'ari.

JUDGMENT.

This is an unfortunate case which has been pending for a long time. The parties directly concerned are the *Ma'mour Awkaf* of Jaffa and the

Government of Palestine, the Municipal Corporation of Jaffa is indirectly interested. It seems a pity that they could not come to some agreement rather than indulge in prolonged litigation.

It appears that certain property in Jaffa is registered as State Domain in the name of Government in the Land Registry. We have a certified copy of the entry but it does not give us much assistance except that, *prima facie*, the property which is claimed is registered as State Domain.

The *Ma'mour Awkaf* apparently claims, by virtue of a written *wakfich* going back to the Turkish time, that the property is *wakf*.

The action was commenced in Jaffa in 1929, but for some reason or other the hearing was delayed, and meanwhile the actual property itself is said to have been taken by the Municipal Corporation of Jaffa, in order to be used for public purposes as a road, so that when the matter came before the Land Court in March of this year the Court held —

> "It seems to us that the correct action to bring is one claiming compensation against the Municipality, as this Court cannot issue a judgment in respect of property which no longer exists. In our opinion, therefore, the present action is misconceived and cannot be heard. We therefore strike it out."

It is clear that in the physical sense the property must still exist, but it may be that the Court had in mind that they could not issue a judgment in respect of land vested in someone else presumably by operation of law. It has not been explained to us precisely what the Municipal Corporation has done, or whether any and what steps were taken before the land was converted into a road.

If the Plaintiff (Appellant) in this case can establish his claim to the property *prima facie* he may be entitled to compensation from somebody — either Government or the Municipal Corporation. As to that we express no view; it depends on whether or not he can establish his claim to the property in dispute.

It seems to us that the most satisfactory way of dealing with this matter is to send back this case to the Land Court of Jaffa, for the Plaintiff to join the Municipal Corporation of Jaffa as a Defendant, and for the Court then to adjudicate upon the Plaintiff's rights, and as Government and the Municipal Corporation are concerned, if the Court decides as to the disputed rights to the land, we feel that there should be no difficulty as to the compensation to which he is entitled, if any.

The Judgment of the Land Court is set aside, and the case remitted accordingly. The costs of this appeal will be costs in the cause.

Delivered this 26th day of April, 1939.

Chief Justice.

CRIMINAL APPEAL No. 19/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Khayat, JJ.

IN THE APPEAL OF:

1. Abdullah El Hussein El-As'ad,
2. Suleiman El-Hussein El Mohammad. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Criminal Appeal — Young offenders — Formulation of sentence — Juvenile Offenders Ordinance, 1937, Sec. 14 — Variation of sentence by Appellate Court.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 5th April, 1939, whereby the Appellants were convicted of attempt to murder contrary to Section 222(a) of the Criminal Code Ordinance, 1936, and the first Appellant was sentenced to four years inprisonment and the second Appellant to three years in the Reformatory, and in varying the sentence against the second Appellant: —

HELD: The wording of the sentence should be made in conformity with the law as laid down in Section 14 of the Juvenile Offenders Ordinance, 1937, which provides that after sentence is passed the young offenders shall be detained in such a place and under such conditions as the High Commissioner may direct, and whilst so detained shall be deemed to be in legal custody.

ANNOTATIONS: On Young Offenders, *vide* also CR.A. 61/38 (1938, I S.C.J,. 420).

FOR APPELLANTS: Salah (By delegation).

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

We are satisfied that there was evidence in the Court below to warrant the findings of fact.

As to the wording of the second Appellant's sentence, it should be made in conformity with the law as laid down in Section 14 of the Juvenile Offenders Ordinance, No. 2 of 1937, which provides that after sentence is passed the young offender shall be detained in such a place and on such conditions as the High Commissioner may direct, and whilst so detained shall be deemed to be in legal custody.

The appeal is dismissed and the judgment of the Court below is confirmed, the sentence upon the second Appellant being varied accordingly, *i. e.* detention for three years in such place and upon such conditions as the High Commissioner shall direct.

Delivered this 27th day of April, 1939.

Chief Justice.

CIVIL APPEAL No. 25/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Khayat, JJ.

IN THE APPEAL OF:

Naim Abu Sham. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Trespass — Prescription — Trespass a continuing offence — O.P.C. Art. 252 and addendum — Action for dispossession — L.A. 57/36 — Magistrates' Law Art. 24 — Binding effect of judgment in Criminal case on civil proceedings — C.A. 201/38.

In dismissing an appeal from a judgment of the District Court of Haifa (Appellate Capacity) dated 31st March, 1939: —

HELD: 1. (Following L.A. 57/36). In both the criminal and civil proceedings the parties were the same and, there having been no wrong conclusion in law, the criminal proceedings were conclusive evidence not only of the conviction of the Appellant for trespass, but also of the facts on which that conviction was based. Neither the conviction nor the facts could be queried in this case.

2. The necessary elements for a conviction under the addendum to Article 252 of the Ottoman Penal Code are first, that the land trespassed on should have been in the possession of the prosecutor; and secondly, encroachment without authority.

3. The Appellant was found guilty in 1934 of committing an offence in the earlier part of that year. An act of encroachment in any year is liable to be prosecuted, and in that sense trespass is a continuing offence.

4. (Following C.A. 201/38). The finding of the Magistrate regarding possession for "a long time" was vague and, being irrelevant to the issue which was whether the offence was prescribed, was superfluous and therefore not binding in other proceedings.

5. It was admitted that the Government had a *kushan* for the land and the District Court judgment proved the other necessary ingredients required by Article 24 of the Magistrates' Law.

FOLLOWED: Keren Kayemeth Leisrael Ltd. *v.* Hillel & ors., L.A. 57/36 (C. of J. 1934—6, 882).

Sliheet *v.* The Orthodox Patriarchate of Jerusalem, C.A. 201/38 (1938, 2 S.C.J. 122).

ANNOTATIONS: On the effect of a conviction in a criminal prosecution on civil proceedings between the same parties, see also *Digest*, Vol. XXI, pp. 195 *seqq.*, Sub-sec. E — *Convictions and orders in criminal and quasi-criminal proceedings.*

On continuing offences, *vide* CR.A. 62/38 (1938, 1 S.C.J. 422).
Vide C.A. 194/38 (1938, 2 S.C.J. 103) on Art. 24 of the Magistrates' Law.

FOR APPELLANT: Sanders.

FOR RESPONDENT: Eliash.

JUDGMENT.

The following are the facts which give rise to this appeal. The dispute is about certain lands in *Belad al Sheikh,* near Haifa, and after protracted litigation between the Government and other parties, who claimed the ownership of certain parts of this land, in some of which proceedings the present Appellant was a party, the Government prosecuted the Appellant for trespass before the Magistrates' Court, Haifa. The learned Magistrate found that the offence of trespass was prescribed, and acquitted the Appellant, but on appeal the District Court reversed the Magistrate's judgment, holding that the offence of trespass was a continuing offence, and that since the Appellant had ploughed the land in 1934, and the charge had been laid against him later in that year, he had committed an offence under the addendum to Article 252 of the Ottoman Penal Code, and they thereupon convicted and fined him. Leave to appeal to this Court was refused. That judgment is therefore final.

In spite of having been convicted of trespass the Appellant refused to vacate the land trespassed on, and the Government was forced to bring an action against him for dispossession in the Magistrates' Court. This action was in fact the renewal of an original action which had

been stayed until the result of the criminal proceedings against the Appellant was known. The learned Magistrate held that he was bound by the principles laid down by this Court in Keren Kayemeth Leisrael, Ltd., *v.* Hillal and others, Land Appeal 57/36, and gave judgment in favour of the Government. The Land Court dismissed an appeal made to them, but gave leave to appeal to this Court.

In this appeal counsel for the Appellant has raised three points: (1) assuming that the judgment of the District Court in the criminal appeal was correct, what is the proper application of the principles laid down in Hillal's case, Land Appeal 57/36; (2) is the judgment of the District Court in the criminal appeal binding in civil proceedings, or can it be queried; (3) did the Government show a good cause of action under Article 24 of the Magistrates' Law in the dispossession proceedings.

It will be simplest to take the second point first, because on the answer to that depends the answers to the other two points. In both the criminal and civil proceedings the parties were the same, and following Hillal's case *(supra)*, there can be no doubt that the criminal proceedings were conclusive evidence not only of the conviction of the Appellant for trespass, but also of the facts on which that conviction was based, and neither that conviction nor the facts can be queried in this case.

The necessary elements for conviction under the addendum to Article 252 are — first, that the land trespassed on should have been in the possession of the prosecutor; and secondly, encroachment without authority. The judgment of the District Court, convicting the Appellant, is proof therefore of those facts, and is binding in all subsequent proceedings between the same parties — it is conclusive proof of the facts necessary to establish the conviction. It is true that, if the District Court had come to a wrong conclusion in law, then this Court would not be bound by it, but we cannot see that there was any error in law.

The Appellant was found guilty in 1934 of committing an offence in the earlier part of that year. An act of encroachment in any year is liable to be prosecuted, and in that sense trespass is certainly a continuing offence.

Counsel for the Appellant has argued that in the civil proceedings, the finding of the learned Magistrate in the criminal case, that the Appellant had been in possession of the land for a long time, must also be considered to be binding. Apart from the vagueness of the term "a long time", this finding by the Magistrate was irrelevant to the issues in the proceedings before him. The only question before the

Magistrate was whether there was an offence, and was that offence prescribed. As held by this Court in Sliheet *v.* The Orthodox Patriarchate of Jerusalem, Civil Appeal 201/38 (P.L.R., Vol. 5, p. 477) any finding irrelevant to those issues is superfluous, and is not binding in other proceedings.

As to the last point, it is admitted that the Government has a *kushan* for the land, and the District Court judgment proves the other necessary ingredients required by Article 24 of the Magistrates' Law.

This disposes of the appeal, *mutatis mutandis,* and very little mutation is necessary, this case is on all fours with Hillal's case *(supra),* and we think that the learned Magistrate was right. We are at a loss to understand how leave to appeal was ever given, seeing that the case was so clearly covered by authority.

The appeal fails and is dismissed with costs to include LP. 15 for attending the hearing.

Delivered this 28th day of April, 1939.

British Puisne Judge.

Puisne Judge.

HIGH COURT No. 13/39.

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

BEFORE: Copland and Khayat, JJ.

IN THE APPLICATION OF:

1. Samy Bey Kabbany,
2. Fauzy Bey Kabbany,
3. Khairy Bey Kabbany,
4. Shafik Bey Kabbany,
5. Suleiman Bey Kabbany,
6. Khairiyah Abdul Ghani Pasha Kabbany. PETITIONERS.

v.

1. The Chief Execution Officer, Jaffa,
2. Nasri Eff. Nasser,
3. Fatmeh El Kabbany. RESPONDENTS.

Prescription — Application by adverse possessors in sale in execution — Laches — Laches by Respondent — Land Law (Amendment) Ordinance 1933, 2(1) — Possession by co-heirs — H.C. 91/36 — Effect of lease.

In dismissing an application for an order to be issued to the first Respondent directing him to show cause why the sale proceedings in Jaffa Execution File No. 6776/36 should not be stayed and the attachment in respect of the said land be released: —

HELD: 1. Both Petitioners and the second Respondent had been guilty of delay but the Petitioners were considerably the more negligent, and since that negligence had prejudiced the second Respondent, this ground should alone be sufficient for refusing the application.

2. (Distinguishing H.C. 91/36). All the parties were in possession and it was therefore not necessary for the third Respondent to bring an action for ownership.

3. The lease had been produced showing that the Petitioners were the lessees and the third Respondent lessor. One of these leases had been confirmed by a judgment of the Magistrate Court.

4. The Chief Execution Officer was right in directing the Petitioners to Court to prove their claim.

DISTINGUISHED: Othman *v.* C.E.O., Jm. & ors., H.C. 91/36 (P.P. 29.III.37).

ANNOTATIONS: On possession by co-heirs, *vide*, C.A. 228/37 (1938, 1 S.C.J. 99) and annotations; C.A. 111/38 (*ibid*, p. 312).

FOR PETITIONERS: Cattan.

FOR RESPONDENTS: No. 1 — Not present — served.
No. 2 — Goitein.
No. 3 — Not present (Deceased).

ORDER.

This case at first sight seems to be a complicated one, but when once the essential facts are seen in their true perspective, then it becomes quite simple.

The shares in certain lands in *Wadi Kabbani* belonging to the 3rd Respondent, were put up for sale in satisfaction of a judgment debt due to the 2nd Respondent. The Petitioners are opposing the sale alleging that they are the owners of the land by reason of adverse possession as against the 3rd Respondent for a period exceeding the period of prescription.

The Chief Execution Officer after hearing arguments, on the 25th October, 1938, held that there was a dispute as to ownership, and gave

the Petitioners a delay of fifteen days, subsequently extended, in order to obtain an order from the Court for suspension of the sale proceedings. The present petition to this Court was filed on the 16th March, 1939.

The first ground advanced here by the second Respondent is that there has been undue delay on the part of the Petitioners in exercising their alleged rights. Judgment was given on the 26th March, 1936, and on the 4th April, 1936, attachment of the shares of the third Respondent was applied for. On 19th June, 1937, the Execution Officer took possession of the property, the first Petitioner, who holds a power of attorney from the other Petitioners, being present. On the 2nd November, 1937, the Registrar ordered sale of the property and it was not until the 28th September, 1938, that the Petitioners applied to the Chief Execution Officer to cancel that order. It is clear from these dates that there has been great delay on the part of the Petitioners. They knew, since their representative was present, on the 19th June, 1937, that the shares of the debtor in this land were attached by the Execution Officer. They never then made any attempt to have that attachment cancelled. Their explanation is that they were living in Syria, and that communications with Palestine were difficult, but their authorised representative was in Palestine in June, 1937, and it would have been possible and easy then to have applied for cancellation of the attachment. And even in October, 1938, when their belated application was heard, they would seem to have been extraordinaily negligent in complying with the conditions laid down in the order. The advocate, who appeared for them then, should have been properly instructed, and it is difficult to see any reasonable grounds for the delay in complying with the order, especially after the extension of six weeks which was subsequently granted.

But, on the other hand, the judgment creditor, the second Respondent, has also been guilty of delay in following up the execution, particularly after the provisional order for sale was given.

On balance there can, we think, be no doubt that the Petitioners were considerably the more negligent, and since that negligence had prejudiced the second Respondent, we should on this ground alone be justified in refusing the application.

But we do not decide the case on this ground alone.

The second Respondent bases his further arguments on Section 2(1) of the Land Law (Amendment) Ordinance, 1933, Cap. 78. The effect of this sub-section is that occupation of land by co-heirs to the

exclusion of other co-heirs raises a presumption to the effect that the occupant holds the land on behalf or as agent of the other co-heir or co-heirs not in occupation, but that such presumption may be rebutted.

The land in this case is *Mesha'a* and certain shares are registered in the names of the Petitioners and of the 3rd Respondent by inheritance from a common ancestor. The parties were therefore both co-heirs and co-owners.

The effect of Section 2(1) of the Land Law (Amendment) Ordinance is that any possession by the Petitioners raises the presumption of constructive possession by the third Respondent. The third Respondent therefore had not only the registered title, but was also presumed to be in possession, and it seems to us that it would be contrary to all reason and principle to compel a person who had both the registered title and possession to bring an action for ownership against a person whose claim is based only on alleged adverse possession. In such circumstances we do not think that the principles laid down in Taha Salem Othman *v.* Chief Execution Officer and others — H.C. 91/36, can apply, since both parties are in possession and not merely one of them — the basis of that decision, and of the earlier ones of the same nature, is that the person not in possession is the one to bring the action, and is therefore clearly not applicable here.

In addition, there have been produced to us certified copies of leases in which one or other of the Petitioners are stated to be lessees and the lessor was the third Respondent. There is also a copy of a judgment of a Magistrate's Court, confirming the validity of one of the leases.

The only point for us to determine is whether the learned Chief Execution Officer was right in directing the Petitioners to go to Court to prove their claim. We are satisfied that he was right and the rule *nisi* must therefore be discharged. The Petitioners will pay the costs of the second Respondent to include £P. 10 for attending the hearing.

Delivered this 28th day of April, 1939.

British Puisne Judge.

HIGH COURT No. 19/39.

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

BEFORE: Trusted, C.J., and Copland, J.

IN THE APPLICATION OF:

Bank Nurok-Idelsack Ltd. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. The Equity and Law Life Assurance Society,
3. Mr. Shlomo Wollstein. RESPONDENTS.

Receivers — Appointment of receiver by C.E.O. on mortgaged property — Application by assignees of the rents of the mortgaged property to appointment of receiver — Whether order given by C.E.O. or by P.D.C. — P.D.C. acting in capacity of C.E.O., H.C. 4/38 — Land Transfer Ordinance, Sec. 14 — Land Transfer (Amendment) Ordinance, 1938 — C.P.R. 1938 do not apply to proceedings before C.E.O. — Applicability of Ottoman Law of Execution, Arts. 51, 94 — Established practice — Third parties' rights cannot be defeated by agreement between mortgagor and mortgagee — Appointment of receiver — A judicial act — Practice cannot override the law — Powers of C.E.O. regarding movable property — H.C. 15/39 — Authority of ex parte decision.

In granting an application for an order to issue to the first Respondent directing him to show cause why his order dated the 17th March, 1939, in Execution File No. 2891/39, Tel-Aviv, should not be set aside; and in setting aside the order of the first Respondent: —

HELD: 1. (Following H.C. 4/38). When making an order under Section 14 of the Land Transfer Ordinance a President of the District Court is acting as a Chief Execution Officer. The Land Transfer (Amendment) Ordinance, 1938, has not altered the position. The first Respondent had correctly ruled that he would hear the application in his capacity as Chief Execution Officer and that he had no power to hear it as a judge unless and until an action was commenced in the District Court.

2. The Civil Procedure Rules, 1938, do not apply to proceedings before the Chief Execution Officer and the appointment of a receiver must be made, if at all, under the Ottoman Law of Execution.

3. Article 51 of the Law of Execution should be read with Article 94, and it may be possible that in certain circumstances the Article might be held to give power to appoint someone to manage or

preserve the mortgaged property ordered to be sold. *Quaere* how far Article 94 could ever be used to appoint a receiver.

4. In the present case there was no question of the application of Article 94 since it was not suggested that the three Respondents had been guilty of any of the acts or omissions set out in the proviso of the said article, nor was it suggested that the alleged agreement with the Petitioners was executed after default had been made on the mortgage with the second Respondents.

5. The appointment of a receiver is a judicial act which cannot be performed by a Chief Execution Officer, but can only be exercised by a Court or Judge unless specific authority is given by statute to the contrary. Nor does Article 51 of the Law of Execution give the Chief Execution Officer power in respect of immovable property. Practice and convenience cannot take the place of statutory authority.

6. The present case must be considered on these merits and H.C. 15/39 was not an authority as the application had not been contested.

FOLLOWED: Abu Leila *v.* C.E.O. & an. H.C. 4/38 (1938, I S.C.J. 91).

CONSIDERED: Mizrahi *v.* C.E.O. & ors. H.C. 15/39 (*ante*, p. 122).

ANNOTATIONS: See H.C. 15/39 *(supra)* and annotations. See also annotations to H.C. 4/38 *(supra)*.

On the effect of a long line of decisions, *vide*, H.C. 15/39 (*ante*, p. 122) and annotations.

FOR PETITIONER: Ben Jaminy.

FOR RESPONDENTS: No. 1 — Absent — served.
Nos. 2, 3 — Seligman.

ORDER.

Copland, J.:

This is the considered opinion of the Court.

In this case the second Respondents are the mortgagees and the third Respondent is the mortgagor of certain property. The mortgagor being in default in repayment of the loan secured by the mortgage, the second Respondents applied to the President District Court, Tel-Aviv, for an order of sale, and the second and third Respondents jointly applied for the appointment of a receiver to manage the mortgaged property.

The Petitioners, who claim to be the assignees of the rents of the mortgaged property for two years by virtue of an agreement dated the 16th March, 1938, made between them and the third Respondent, whilst not objecting to the order of sale, opposed the application for the appointment of a receiver. The Chief Execution Officer, after hearing all parties, came to the conclusion that he had the power to appoint

a receiver and proceeded to do so. The Petitioners have now come to this Court asking for an order to set aside that order of the Chief Execution Officer.

The Respondents' first objection in this Court to the petition is that the matter was dealt with by he learned Judge as President, District Court, and not as Chief Execution Officer, and that therefore this Court has no jurisdiction to hear the petition. The answer to that is that the learned Judge ruled that he would hear the application in his capacity as Chief Execution Officer and also that he had no power to hear it as a judge unless and until an action was commenced in the District Court. In that we think that he was right. In any event, he heard the application in his capacity of Chief Execution Officer and the only question which we have to decide is whether it is within the powers of a Chief Execution Officer to appoint a receiver of mortgaged property when an order for sale in respect of that property has been made. Furthermore there is a long series of decisions of this Court, culminating in Amneh Mohammad Abu Leila *vs.* Chief Execution Officer and another — H.C. 4/38, in which it has been held that a President, District Court, when making an order under Section 14 of the Land Transfer Ordinance, Cap. 81, is acting in his capacity of Chief Execution Officer, and we cannot see that the Land Transfer (Amendment) Ordinance, 1938, has in any way altered the basis of those decisions. This ruling is settled law, and has been such for many years, and it is useless now to endeavour to contest it.

To come now to the main question. The Chief Execution Officer held, in our opinion correctly, that the Civil Procedure Rules, 1938, do not apply to proceedings before the Chief Execution Officer and that any appointment of a receiver must be made, if at all, under the Ottoman Law of Execution. He came to the conclusion that Art. 51 of that law, which makes provision for the appointment of a guardian to safeguard movable property that has been attached, could be applied, by analogy, to immovable property. The Respondents support that view, and further argue that it has been the established practice for receivers to be appointed by Chief Execution Officers, and that the property must be protected, and that no one's rights are prejudiced. In addition they say that the Petitioners have no standing in the matter, since both mortgagor and mortgagees agree to the order, and that they have no rights, and therefore cannot be parties. But the Petitioners have put forward a claim basing themselves on their agreement with the mortgagor, and that claim cannot be adjudicated upon by a Chief Execution Officer — it can only be dealt with by a Court. *Prima facie*,

they have an interest in the mortgaged property and the determination of that interest cannot be defeated merely because the mortgagor and mortgagees agree to the order.

The Petitioners in reply submit that under Section 14, as amended, of the Land Transfer Ordinance all that a President, District Court, acting as Chief Execution Officer can do is to order the sale of mortgaged property, or if certain conditions are fulfilled to postpone sale, and that the section gives him no power to appoint a receiver. Further they say that the appointing of a receiver is a judicial act, and a Chief Execution Officer is not a judicial officer, which is true — also that Art. 51 of the Execution Law gives him no powers with regard to immovable property and cannot be applied by analogy, and finally, that even if there were a practice as alleged, which they deny, that practice cannot override the law.

There is, of course, Art. 94 of the Execution Law, to which no reference has been made in the course of the arguments before us. This Article is in these terms: —

> "The judgment debtor may be left in possession of the immovable property pending the result of the action. Provided that if he damage the attached property, or cause any diminution in its value or refuse to allow intending bidders to inspect, the President may order his ejectment."

It may possibly be, though on this we express no opinion, that in certain circumstances this Article might be held to give power to appoint someone to manage or preserve mortgaged property ordered to be sold. But there is no question of the application of this Article to the present case, since it is not suggested that the mortgagor has been guilty of any of the acts or omissions set out in the proviso to the said Article, nor is it suggested that the alleged agreement with the Petitioners was executed after default had been made on the mortgage with the second Respondents, which might be held, though again we do not decide this point, to constitute an act of damage or diminution to the attached property, and in any case the Chief Execution Officer based his decision not on Art. 94 but on Art. 51. As we have said, we must not be taken to express any opinion as to how far, if at all, Art. 94 could ever be used to appoint a receiver, and that question may well wait to be decided until the necessity for so doing should arise.

Taking into consideration the facts of this case and the arguments addressed to us, we agree with Petitioners' contention and we are of opinion that neither under Section 14 of the Land Transfer Ordinance

nor under Art. 51 of the Law of Execution is there any power given to a Chief Execution Officer to appoint a receiver of immovable property. And we do not think that such a power can be implied by analogy with the powers possessed by a Chief Execution Officer in respect of movable property — the two things are quite different, and it would have been easy to say so in Art. 51, if it had been intended that the same power should apply in cases both of movable and of immovable property. The appointing of a receiver is a judicial act, and as such can only be exercised by a Court or Judge, unless specific authority is given by Statute to the contrary, which is not the case here, and practice and convenience cannot take the place of statutory authority.

It seems perhaps curious that this question of appointment of receivers has only recently been raised in the Courts, but it is a fact that only one previous decision on the point has been found, and that was a case decided only this month, Jacob Nissim Mizrahi *vs.* Chief Execution Officer, Tel-Aviv, and others — H.C. 15/39. In that case it was held that a Chief Execution Officer had no power to appoint a receiver, but unfortunately that case was not contested by the Respondents cited in it, and therefore, as an authority, it is not of great value, and we have approached the consideration of this present case, entirely untrammelled by the fact that there was such a decision, preferring to regard the question as not covered by authority.

In conclusion, whilst we find it difficult to appreciate why the Petitioners think that they will be prejudiced by the appointment of a receiver, unless they regard the appointment as an attempt by the mortgagor and mortgagees to prevent them exercising their alleged rights under the agreement of the 16th March, 1938, we think that the rule must be made absolute and that the order of the Chief Execution Officer, Tel-Aviv, dated the 17th March, 1939, appointing a receiver, should be set aside. The Petitioners will have the costs of the petition assessed at LP. 10 to include fees for attending the hearing, to be paid by the 2nd and 3rd Respondents jointly and severally.

Delivered this 28th day of April, 1939.

British Puisne Judge.

I concur.

Chief Justice.

CIVIL APPEAL No. 87/32.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:

Benzion Bravermann. APPELLANT.

v.

1. Shmuel Rozov,
2. Zeev Ben Arieh. RESPONDENTS.

The Palestine Electric Corporation Ltd. THIRD PARTY.

Correction of judgment — C.P.R. 358 — Correction of clerical errors or accidental slips or omissions may be allowed — Interest — Questions not argued — Payment of interest does not follow in each case — Retroactivity — Costs.

In allowing, as to part thereof, an application for correction of a judgment, and in amending the judgment accordingly: —

HELD: 1. Mention of the sum of LP.300 was accidentally omitted, because without that sum the judgment would be largely meaningless.

2. In the case of the interest, it could not be said that this was an accidental ommission as the question was not argued and interest is not necessarily awarded in every case.

3. The present application was made after the coming into force of the Civil Procedure Rules, 1938, and rule 358 consequently applied.

ANNOTATIONS: The judgment the subject matter of this application is reported in P.P. 24.VII.33, C. of J. 256. For cases on the amendment of judgements, see *Digest Pleadings Practice etc.*, pp. 472 *sqq.* sec. 2.

Regarding interest, *cf.* C.A. 17/39, 19/39 (*ante*, p. 142) and note.

FOR APPELLANT: Hofmann.

FOR RESPONDENT No. 1 — A. Levin

No. 2 — Not present — not served.

THIRD PARTY: — Not present — not served.

JUDGMENT.

This is an application under Rule 358 of the Civil Procedure Rules 1938, to correct a judgment given by this Court on the 24th July, 1933.

In the District Court, from which the case emanated, the action had been dismissed, the Plaintiff appealed and this Court reversed the District Court, and to adopt the actual words of the judgment on appeal "the appellant is therefore entitled to succeed on both points and the judgment of the District Court must be set aside. As against the first Respondent, judgment will be entered for the Appellant with costs here and below."

The action in the District Court was on a promissory note for the sum of LP. 300, together with interest, and the Appellant now asks us to correct this judgment, by inserting the words "for LP. 300 and interest as from March 20th, 1931." Rule 358 allows correction of judgments where there has been a clerical mistake, which does not arise here, or where there is an error arising from any accidental slip or omission. I do not think we can say that this is a case of an accidental slip, what we have to consider is whether it is a case of accidental omission. There is no dispute that the capital sum involved was LP. 300 and we think that, as to the judgment of this Court, one may say that judgment was intended to be entered for the Appellant for LP. 300 with costs, and the sum of LP. 300 was accidentally omitted, because, without that sum being mentioned, the judgment would be largely meaningless.

Regarding the question of interest, however, the matter rests on a rather different footing. The question of interest was never argued in the Court below nor in the Court of Appeal, no finding was made on the point in the Court below, and neither was the point taken in the grounds of appeal in this Court. The payment of interest, it is needless to remark, does not necessarily follow in every case, and it is quite impossible for us to say whether this Court intended to give a judgment for interest or not. Balancing the probabilities, if one may indulge in a little speculation, it may quite possibly be that they did not intend to include interest. That being so we think that the judgment of this Court should be amended by the insertion, after the words "judgment will be entered for the Appellant" in the penultimate paragraph thereof, of the words "for LP. 300." The remaining part of the application will be refused. In the circumstances we think there should be no costs to either side.

I would only mention one further point which I should have mentioned at the beginning of this judgment, and that is Mr. Levin's argument that the rules are not retroactive. Rule 1 states that the rules shall come into force in all future proceedings and in every pending proceeding at the stage at which the proceedings had arrived at the time the rules became law. This present application before us was made after the

coming into force of the Civil Procedure Rules, 1938, and we think that the Rules therefore, including Rule 358, clearly apply to it.

Delivered this 15th day of May, 1939.

British Puisne Judge.

HIGH COURT No. 27/39

HIGH COURT No. 28/39.

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

BEFORE: Copland and Greene, JJ.

IN THE APPLICATION OF:

1. E. Karwassarsky as Curator of the estate of Mustafa Sakijha, interdicted person. PETITIONER.

v.

David Moyal. RESPONDENT.

2. E. Karwassarsky as Curator of the estate of Sheikh Tewfic Dajani, interdicted person. PETITIONER.

v.

David Moyal. RESPONDENT.

Application for change of venue — Security — Indecision in changing place of trial — H.C. 48/38 distinguished — No real danger.

In refusing an application for the change of venue of Jaffa District Court Civil Cases Nos. 110/37 and 59/35 to Tel-Aviv District Court: —

HELD: The Court was not satisfied that there would be real danger to the Petitioner in appearing in the Jaffa District Court.

DISTINGUISHED: Marine Trust Ltd. v. Cohen & ors. H.C. 48/38 (1938, 2 S.C.J. 14).

FOR PETITIONERS: Linderman.

FOR RESPONDENTS: *Ex parte.*

JUDGMENT:

In these two cases application has been made for an order *nisi* to issue to the Respondent to show cause why Petitioner's application for a change of venue should not be granted for the trial of two civil cases in Tel-Aviv instead of in Jaffa.

The Petitioners and the Respondents are the same in both applications and in each case the application is made on grounds of security, that is, that it is not safe for Jewish advocates to appear in the District Court sitting at Jaffa. In both these civil cases there seems to have been a certain amount of uncertainty as to the place of trial inasmuch as the cases were first listed for trial in Jaffa, were then transferred to be tried in Tel-Aviv, and later again at the instance of the Respondent were re-transferred back for trial to Jaffa. It would be as well if orders for transfer, when given, should in normal circumstances be adhered to, as it is rather confusing when cases are first transferred to another place for trial and then transferred back again to the original place. This shows a certain amount of indecision which is to be regretted.

To take these present applications, the Petitioner has strongly urged that the conditions in Jaffa are such that it is not safe for him to appear, and to appear personally he must, and that he would not feel at ease in what he describes as a hostile atmosphere, though he modified his statement by saying that it does not refer to the Court but to the surroundings.

In the Marine Trust Ltd. v. Cohen and others, H.C. 48/38, which came before this Court in July last year, we granted a similar application on the ground that in July last year conditions in Jaffa were very bad indeed, and the case involved the attendance of not only Jewish parties, but a considerable number of Jewish witnesses. Each case of course of this nature must be decided on its own merits. At the present moment it is a matter of common knowledge that conditions in Jaffa are vastly improved compared with what they were a year ago. Further, the Court house in which the District Court sits has been transferred from what was doubtless a dangerous neighbourhood to a new position in King George Avenue, within fifty meters of Police Headquarters, and the Court house itself is under Military guard both day and night.

Cases in which we would grant a change of a place of trial should not be encouraged, and we would only grant it provided we are satisfied that there would be real danger in asking the Petitioners to appear in the original place. We are not satisfied that there would be that danger here now. The President of the District Court, Judge Cressall, gave as

his reasons for refusing to transfer cases back again for trial to Tel-Aviv, that Judge Edwards would be going away on leave shortly, and whilst he appreciated the Petitioner's reluctance to come to Jaffa, yet he could always apply for Police escort if he considered it unsafe to come without one. We are sure that if conditions of security should deteriorate, which we do not anticipate, the President will deal sympathetically with any other application which may be made to him.

In the present case, as I have said, we do not think it is a proper case in which to grant the applications and they must both be refused.

The Petitioner will at any rate be fortified by the knowledge that in encountering the dangers and perils which he anticipates that he will meet, those dangers and perils will be shared in the same degree by his friend Mr. David Moyal. That will, I am sure, prove to be a great consolation to him.

Delivered this 16th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL No. 21/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., and Frumkin, J.

IN THE APPEAL OF:

1. Isgohui Aghadjanian,
2. Cirpouhi Aghadjanian,
3. Haroutune Aghadjanian. — APPELLANTS.

v.

1. May Annie Paul Merguerian,
2. May Pauline Merguerian. — RESPONDENTS.

Succession — Evidence — Objection to heir — Withdrawal of objection — Obligation on petitioner to prove his case, Succession Rules, r. 23 — Judgment cannot be enforced in favour of persons who did not constitute themselves petitioners — Effect of certificates of birth and marriage given in India, Lyell and Kennedy, Westmacott v. Westmacott — Effect of certificate of birth where the name of the mother is not given — Admissability of a statement of deceased relative in matters of pedigree — Exception to hearsay rule — Berkeley Peerage case, Thayer on

Evidence, Plant v. Taylor, Dyke v. Williams, Rex v. St. Marylebone (Inhabitants), Crispin v. Doglioni, Smith v. Tebbitt, Hitchins v. Eardley, Rex v. Perton — Refusal to allow adjournment for evidence on commission — C.P.R. 183, Stewart v. Gladstone — Evidence of a witness called by the Court, Enoch and Zaretzki, Bock & Co. — Public officer as a witness, Coulson v. Disborough — Liberty to cross-examine — No objection taken to hearsay evidence.

In allowing an appeal from a judgment of the District Court of Jerusalem, dated the 7th February, 1939 and in remitting the case to the District Court: —

HELD: 1. Rule 23 of the Succession Rules makes it incumbent upon a petitioner to prove his case. The fact that an opposition is made and subsequently withdrawn, or that the Court does not accept the substantial allegations of an objector, does not relieve him of that obligation.

2. Certificates, such as birth or marriage certificates, made by public officers, are *prima facie* evidence of the facts which they record, on the ground that, where the law has entrusted a person to act for a specific purpose, it will trust him to act under his authority.

3. In the case of foreign records, they are receivable in evidence as to those matters which are properly and regularly recorded in them, when it sufficiently appears that they have been kept under the sanction of public authority, and are recognised by the tribunals of the country where they are kept, as authentic records.

4. No authority was cited for the proposition that the statutory authority applicable in England, regulating the production of Indian records, extended to Palestine and there was no evidence that the Indian marriage certificate or the Indian birth certificate produced complied with the requirements.

5. To raise the presumption that the second Respondent was the lawful child of the marriage it was necessary to show that she was the child of the wife, and the Indian certificate did not even give the mother's name. The certificate given by the Patriarchate did not give the father's name and carried the matter no further.

6. Declarations made by deceased persons as to pedigree may be exceptions to the hearsay rule. A declaration made *ante litem motam* by a deceased father may be used as evidence that the individual referred to is his lawful daughter. The weight of the evidence is for the Court to determine.

7. The District Court was justified, on the evidence, in dismissing Appellant's opposition. When the case would be further considered by the District Court Appellants could continue their opposition.

8. A Court of trial has a discretion to adjourn a case in order that further evidence may be obtained. In considering such an application it is entitled to take into consideration the time when it is made. The opposers might have been justified in anticipating

that the widow would give evidence, but on the first occasion on which the matter was before the Court they could have enquired. The application to take the widow's evidence on commission was not made until two months later.

9. There may be occasions when a Government official or a public officer can usefully give evidence as to a fact, the knowledge of which has come to him in his official capacity, and he may well be anxious not to appear to associate himself with either party to the dispute by giving evidence for him. In such a case the ends of justice are served by the judge calling him provided that if his evidence is adverse to one of the parties, that party may cross-examine the witness upon his answers.

This principle of English law is applicable in Palestine.

The witness Mr. Nurian had been cross-examined and his evidence regarding the birth certificate was admissible.

10. The latter part of the witness's evidence, of facts which came to his knowledge outside his official capacity, should not have been accepted had objection been taken. There was no record of any such specific objection.

CONSIDERED: Lyell and Kennedy, 14 A.C., p. 448—9; Westmacott *v.* Westmacott, 1899, P., p. 183; Plant *v.* Taylor, 5 L.T.R. (1861), 318; Dyke *v.* Williams, 6 L.T.R. (1862), 726; Rex *v.* St. Marylebone (Inhabitants) (1863) 27 J.S., 423; Crispin *v.* Doglioni, 8 L.T.R. (1863), 91; Smith *v.* Tebbitt, 1 L.R.R. and D. (1867), 354, 15 L.T.R., 594; Hitchins *v.* Eardley, 25 L.T.R. (1871), 163, and Rex *v.* Perton, 53 L.T.R. (1886), 707; Stewart *v.* Gladstone, 7 Ch.D., 394; Enoch and Zaretzky, Bock & Co., 1919, 1 K.B.D., 327; Coulson *v.* Disborough, (1894) 2 Q.B.D., 318.

ANNOTATIONS: Cases on the admissibility of evidence relating to pedigree are collated in *Digest*, Vol. XXII, pp. 117 *sqq.*, sub-sec. 5.

FOR APPELLANTS: Shereshewsky and Amdur.

FOR RESPONDENTS: Gavison.

JUDGMENT.

This is an appeal from an order of the District Court made under the Succession Ordinance whereby succession was granted to Mrs. Annie Paul Merguerian, as the widow, and Miss May Pauline Merguerian, as the daughter, of Lazarus Paul Merguerian, deceased.

The Petition stated that the deceased died on 8th August, 1938, that he left him surviving his widow and daughter, and that he was a Palestinian and a member of the Armenian Community.

This was supported by the affidavit by the daughter, which also set out that the deceased was intestate, and by affidavit of Mr. Horowitz,

who said that he had known the deceased personally and professionally for fifteen years, and that he understood that he had a wife and one child, the daughter — May Pauline, and that he believed the deceased to have died intestate.

The matter came before the Court, and objections was raised by other members of the family on the ground that Annie Paul is not the widow of the deceased, and that May Pauline is not the daughter of the deceased and Annie Paul, this latter allegation being based on the opinion of certain members of the family, and the fact that the parties had been married for twenty-five years before the date when the child is alleged to have been born, and that at that time Annie Paul was some forty-three years old. The issue was complicated by the daughter having been born in India, in which country the deceased had employment.

The objection to the widow's application was withdrawn, and as to the objection to the daughter's claim the Court held —

> "that there is no evidence to support the opposition put forward by the opposers which is based merely upon most unfounded and unpleasant insinuations which do not even spare the reputation of their near relative and are brought in the hope of disinheriting, to their own advantage, the widow and daughter of the late Lazarus Paul Merguerian."

Rule 23 of the Succession Rules provides as follows: —

> "(1) The petitioner shall be required to prove the facts stated in the petition, or such other facts as the court shall direct, by the evidence upon oath of the petitioner and witnesses cognizant of the facts and by a *mazbata* of the *mukhtar* of the place in which the deceased had his last usual residence in Palestine, but the court may, by its order, dispense with the evidence of the petitioner and the production of the *mazbata* from the *mukhtar*.
> "(2) If the court be not satisfied as to the truth of any fact or facts required to be proved, the proceedings may be adjourned until sufficient proof be given."

There is clearly a primary obligation upon a petitioner to prove his case, and the fact that an opposition is made and subsequently withdrawn, or that the Court does not accept the substantive allegations of an objector, does not relieve him of that obligation.

The notice of appeal concludes with the following prayer:

> "It is humbly prayed that this appeal be allowed, the judgment appealed from be set aside, the petition of second Respondent be dismissed, and judgment be entered in favour of the Appellants."

There is no appeal against the order in favour of the widow, and we

are not therefore concerned with it, and it is clear that judgment cannot be entered in the Appellant's favour, as they have never properly constituted themselves petitioners.

We have to consider, therefore, if the daughter, May Pauline, was entitled to succeed.

The case turns upon the application of a number of points of evidence and, subject to the qualification to which I will later refer, English principles must be applied.

She herself gave evidence stating that she was the daughter of the deceased, and she produced a birth certificate obtained in India, and another birth certificate from the Armenian Patriarchate, and a marriage certificate of Lazarus Paul and May Annie Paul.

Generally speaking certificates of this kind, made by public officers, are *prima facie* evidence of the facts which they record, on the ground that, where the law has entrusted a person to act for a specific purpose, it will trust him to act under his authority, and the extent of the extension of that principle to foreign records is set out by Lord Selborne in Lyell and Kennedy, 14 Appeal Cases, at pages 448—9, as follows:

> "Foreign registers of baptisms and marriages, or certified extracts from them, are receivable in evidence in the Courts of this country, as to those matters which are properly and regularly recorded in them, when it sufficiently appears (in the words of Mr. Hubback's learned work on Evidence) that they 'have been kept under the sanction of public authority, and are recognised by the tribunals of the country' (*i. e.* of the country where they are kept) 'as authentic records'."

In England there are statutory provisions regulating the production of Indian records (see Westmacott *v.* Westmacott, 1899 P., p. 183), but no authority has been cited for the proposition that they extend to this Territory.

There is no evidence hat the Indian marriage certificate or the Indian birth certificate produced comply with the requirements which I have stated.

In the course of the hearing the District Court held —

> "There is a marriage certificate which is not disputed and further the parties were living together at the time, and the presumption therefore is that the child referred to in the Indian Birth Certificate produced is the lawful child of the said marriage until the contrary is proved."

To raise this presumption it is necessary to show that the child is

the child of the wife, and even if a birth certificate properly proved is sufficient *prima facie* evidence of that fact, it could only be so if it gave the mother's name, and the Indian certificate produced does not do so.

The certificate given by the Patriarchate stated that —

> "Miss May Pauline Lazarus Paul Merguerian, daughter of Lazarus Paul Merguerian and of his lawful wife, May Anna Merguerian, was born in Bangalore (India) on 14th July, 1909."

Mr. Garabed Nurian, an official of the Patriarchate, stated that this was given on the strength of a document supplied by Lazarus Paul, dated January 13, 1910, signed by an Armenian priest in India, as follows: —

> "Bombay, January 13th, 1910.
>
> To Mrs. May Annie Lazarus Paul Merguerian was born a daughter in Bangalore, India, on the 14th of July, 1909, who was baptised in Bombay by me, Father Thateos Alexandrian, in the Church of St. Peter, on the 13th of January, 1910, and was named MAY PAULINE.
>
> I have written this according to the sacred law of Baptism."

It will be observed that this does not contain the father's name. I do not think that the certificate given by the Patriarchate carries the matter any further.

The Appellants objected to the calling of Mr. Nurian, and I will deal with that objection later.

The Petitioner also called Mr. Horowitz, who said that the deceased often spoke of her (the Petitioner) as his daughter, and that he approved of a draft deed in which she was described as the daughter of the settlers (*i. e.* Lazarus Paul Merguerian and his wife May Annie Paul Merguerian) but the deed was never produced. Mr. Nurian also said that the deceased habitually referred to the Petitioner as his daughter.

This evidence was presumably tendered under the rule that where a question of pedigree is in issue a statement of a deceased relative is admissible in evidence.

It is clear that declarations by deceased persons as to pedigree may be exceptions to the hearsay rule. The law is to be found in a series of old cases.

It is referred to by Mansfield, C.J., in the famous Berkeley Peerage case, and in the note on the learned Chief Justice's judgment in Thayer on Evidence, an American text book, at page 374, it is stated —

> "Compare Lord Chancellor Erskine's statement in Vowles *v.* Young, 13 Ves. 140, 147 (1806): "The Law resorts to hearsay of relations upon the principle of interest in the person, from whom the descent is to be made out..." Also Lord Chancellor Eldon's statement in Whitelocke *v.* Baker, *id.* 511, 514 (1807): "It was not the opinion of Lord Mansfield, or of any Judge, that tradition, generally, is evidence even of pedigree: the tradition must be from persons, having such a connection with the party, to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that: declarations in the family, descriptions in Wills, descriptions upon monuments, descriptions in Bibles, and Registry Books, all are admitted upon the principle that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth"."

Channell, B., delivering judgment in Plant *v.* Taylor, in the Court of Exchequer, 5 L.T.R. (1861) 318 at 320, said —

> "The Defendant was called as a witness to prove declarations by his father with respect to his first marriage. Before a declaration can be admitted in evidence the relationship of the declarant de jure by blood or marriage must be established by some proof independent of the declaration itself. See the cases cited in Taylor on Evidence, Vol. 1, p. 526, note 4. Slight evidence no doubt, would be sufficient; there was no proof of any relationship de jure between the declarant and the defendant. The proof was the contrary. Perhaps the learned Judge was right in rejecting the evidence, on the ground that any declaration made by Thomas Taylor, the father, on the subject, although not made post litem motam, or after disputes as regards the property had arisen, would be a declaration by a person whose mind could not be free from bias."

In Dyke *v.* Williams, 6 L.T.R. (1862) 726, the question was considered in a bastardy issue, and the head note to that case reads —

> "In such a case evidence of declarations made by a deceased person, other than the deceased in the cause, is inadmissible, unless the relationship is proved *aliunde;* but evidence of declarations made by the deceased in the cause is admissible."

In Rex *v.* St. Marylebone (Inhabitants) (1863) 27 J.S., 423, it was held that a statement by a father that he had never married affected the position of his daughter, on the ground that it was a case of pedigree about the father's family, and the father was a member of his own family.

The principle is referred to in Crispin *v.* Doglioni, 8 L.T.R. (1863) 91, and was considered at length by Sir J.P. Wilde in Smith *v.* Tebbitt,

1 L.R.R. and D. (1867), 354 (also reported with a slight variation in 15 L.T.R. 594). The question involved was the relationship between the Defendant and a deceased lady to whom the Defendant claimed to be a lawful sister. The deceased lady had executed a deed and had therein described the Defendant as "her sister". The learned judge stated —

> "Now, one of the rules of evidence that govern courts of law — and it is very familiar as a rule of evidence in pedigree cases — is, that the statement of a deceased relative of the family is evidence of pedigree. That rule is subject to some conditions. The first condition is, that the statement must have been made *ante litem motam*. Another condition is, that the person making the statement must be a person who is dead; but a prior condition to both of these is, that it should be proved and by some source of evidence independent of the statement itself, that the person making the statement was related to the family about which she spoke. It seems to me that all these conditions are satisfied in the statement made by Mrs. Thwaytes in that deed; for, to begin with the first, of course she must have been a member of her own family. She is the person to whom relationship is to be proved, and every person must be a member of their own family, and therefore there was no objection to be made on that head. It was made *ante litem motam*. There is no question, thirdly, but that she is dead, and therefore it is the statement of a deceased person. It seems to me, therefore, that there is in that deed a piece of evidence which is perfectly legitimate for the proving of the defendant to be the sister of the deceased person. And I may go further at once, and say, that it is not only legitimate evidence for the purpose, but that it entirely satisfies me of the fact.
>
> "But then it is suggested, she may have been the illegitimate sister, and that the sister says nothing in the deed about legitimacy. That is quite true; but I think that that is a fault or a vice in the statement, which would probably apply to almost all the statements that have been admitted at all times under this head of evidence, because when people speak of a man or woman as their brother or sister, son or daughter, unless they say something to the contrary, I think the meaning is the legitimate son or daughter, brother or sister, and therefore I think that objection fails."

The principle was again referred to in Hitchins *v.* Eardley, 25 L.T.R. (1871) 163, and Rex *v.* Perton, 53 L.T.R. (1886) 707, but I have been unable to find any more modern authority.

The result of these authorities seems to me to be that a declaration made *ante litem motam* by a deceased father may be used as evidence that the individual referred to is his lawful daughter. The weight of the evidence is for the Court to determine.

Dealing with Mr. Horowitz's evidence the Court said "disregarding .... and the evidence of Mr. Horowitz with the settlement produced

by him." I agree that evidence could not be given as to the contents of the deed, but it is not clear if the Court considered his evidence as referring to a declaration by the deceased in the light of the authorities I have cited. In this connection Mrs. Nazouhi Merguerian, a witness for the opposers who gave evidence on commission, stated — "Lazarus Paul said this is our daughter", and the Court, in dealing with the evidence, expressed no view as to this.

There is a further matter in connection with the Petitioner's case to which I should refer. The witness, Anna Merguerian, called by the opposers, said —

> "I went with my uncle L. Paul. We went straight to India. I did only stay there a few months, 3 or 4. I returned to my old mother. I remained away 4 to 5 months. I know that L. Paul and Mrs. had a child, a girl, she is alive, Pauline, born in India, Bangalore, in the hospital. I was at the time in India, but I did not go to the hospital. I returned 1st from India."

This, if believed, seems to me to help the Petitioner's case, but the Petitioner herself, in cross-examination, said —

> "I know Anna Merguerian, she lives with me. She has lived in India. I came to Palestine when a year old, I believe. I have not been back to India. I came with my mother and father then. Anna was in Palestine. She had not been living with L. Paul in India before my birth. She came to Palestine over a year before I was born, I believe."

and in re-examination she said —

> "Anna left Bangalore about a year before I was born."

She clearly could not know this of her own knowledge, and one would have expected her to say so.

The District Court, in its judgment, referred to Anna's evidence, but expressed no view about it. In the circumstances I do not feel that I can weigh its worth.

I would point out that there is no record that the Court formally dispensed with the production of a *mazbata* of the *mukhtar* as required by the rule.

For these reasons I cannot be satisfied as to the grounds on which the Court found in favour of the daughter's claim, and I think the case should go back to the District Court to enable it to consider the evidence further in the light of this judgment. I think that having regard to Rule 23 (2) of the Succession Rules, she should be allowed to call further evidence if she wishes to do so.

As to the Appellants' opposition, as the case stands at present no medical evidence was tendered, the evidence which was given was in some instances conflicting, and some of the statements recorded were not evidence in that they did not comply with the requirements of declarations as to pedigree to which I have referred. In my judgment the District Court was justified in dismissing it, but if the case is further considered the opposers may continue their opposition if they wish.

Two matters were argued before us to which I should refer. In the course of the opposers' case it seems that an application was made by them to have the widow's evidence taken on commission, and that this was refused, and that this refusal is now a ground of appeal.

A court of trial has a discretion to adjourn a case in order that further evidence may be obtained (see Civil Procedure Rule 183) but in considering such an application it is entitled to take into consideration the time when it is made, *cf.* Stewart *v.* Gladstone, 7 Ch. D., 394.

In the present case, having regard to the Succession Rules, the opposers may have been justified in anticipating that the widow would give evidence, but on the first occasion on which the matter was before the Court, *i. e.* 25.11.38, they could have enquired. The application to take the widow's evidence was not made until two months later. I do not think therefore that we should interfere with the exercise of the Court's discretion.

Objection was taken by the opposers to the evidence of Mr. Nurian on the ground that he was called by the Court, and reliance is placed upon the case of Enoch and Zaretzky, Bock & Co., 1910, 1 K.B.D., 327. Strictly speaking that case is only an authority respecting the conduct of arbitrators, but the learned Lords Justices discuss the intriguing question as to how far a Judge, in the interests of justice may call a witness. Whatever the common law of England may be, it is clear that it can be applied here, subject to such qualifications as local circumstances render necessary. In my opinion, there may be occasions when a Government official or a public officer can usefully give evidence as to a fact, the knowledge of which has come to him in his official capacity — the circumstances in which the certificate was given by the Patriarchate in this case seem to me an excellent example — and he may well, having regard to local circumstances, be anxious not to appear to associate himself with either party to the dispute by giving evidence for him. In such a case I think the ends of justice are served by the judge calling him, with the corollary, which I would express in

the words of the Master of the Rolls, in Coulson *v.* Disborough, (1894), 2 Q.B.D., 318, that "if what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted."

In the present case Mr. Shereshewsky, on behalf of the opposers, was permitted to cross-examine Mr. Nurian, and I am of opinion that that witness's evidence as to the birth certificate was admissible. I do not think that the latter part of his evidence, when he speaks of the relationship of the deceased and his daughter, which came to his knowledge outside his official capacity, should have been accepted if objection was taken to it by the opposers, but there is no record of any such specific objections.

In the result the Order declaring succession in favour of May Pauline Merguerian will be set aside, and the case remitted to the District Court. The Appellants having succeeded in part and failed in part, no order will be made as to costs.

Delivered this 8th day of May, 1939.

Chief Justice.

I concur and have nothing to add.

Puisne Judge.

CIVIL APPEAL No. 33/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland and Khayat, JJ.

IN THE APPEAL OF:

Wakfs Commission. APPELLANT.

v.

Rushdi Bey El Imam El Husseini. RESPONDENT.

Waqf Commission — Employment of architect to repair mosques — Defence (Moslem Awkaf) Regulations, 1937 — Succession to Supreme Moslem Council — Admissibility of unstamped copy of contract — Privity of parties.

In dismissing an appeal from a judgment of the District Court of Jerusalem dated 8th March, 1939: —

HELD: 1. The action had properly been brought against the *Wakf* Commission as the successors of the Supreme Moslem Council and the general *Wakf* Committee in respect of the subject matter of the action.

2. The objection that the copy of the contract, produced in Court was not stamped and was not the original and had not been properly proved, failed as the contract had been identified by the *Mudir Awkaf el Asm* in evidence.

3. It was not necessary to consider whether the contract of the 13th August, 1922, was entered into by Kamal Eddin Bey on behalf of himself and of the other members of the Professional Board engaged by him — among whom the Respondent — nor whether the contract had been cancelled by Kamal Eddin Bey in 1925, or by his death later in that year, as it was clear from the correspondence that in any case the remaining members of the Professional Board continued to work on the same terms as are contained in the contract of the 13th August, 1922, with the approval of the Supreme Moslem Council.

4. On the correspondence produced there was material on which the District Court could find that the work had not been completed by the 1st October, 1928.

FOR APPELLANT: Cattan.

FOR RESPONDENT: Boudeiri.

JUDGMENT.

The circumstances out of which this appeal arises are the following. By a contract dated 13th August, 1922, between Kamal Eddin Bey, a Turkish Architect, and the Supreme Moslem Council, the former was appointed as professional adviser to the Council to supervise the reparations of the *Sakhra* and *El Akssa* Mosque in the *Harem es Sheriff*, Jerusalem. By the terms of this contract, Kamal Eddin Bey was under the obligation to design the restorations, prepare the necessary maps and carry out the work accordingly. He was also given power to engage and employ other architects and expert workmen, who would work under his supervision. His salary was fixed at an annual sum of LE. 2000, and it was further stipulated in the contract, that if any obstacle should prevent the completion of the restoration works for any reason, the Council would pay the salaries to Kamal Eddin Bey and to the other members of the Professional Board for two months. The Council also guaranteed payment of salaries to those members of the Professional Board who should be engaged by Kamal Eddin Bey and it is admitted that they did pay the salaries themselves.

The present Respondent, Rushdi Bey el Imam el Husseini, was one

of the members of the Professional Board engaged by Kamal Eddin Bey, and in fact his name appears in the schedule to the abovementioned contract of the 13th August, 1922, and his salary is shown at a sum of LE. 840 per annum and LE. 70 per month. The Respondent entered on his duties on the 1st October, 1922, and worked for several years as a member of the Professional Board. Some time in 1925, the Supreme Moslem Council being apparently apprehensive as to the length of time which the repairs were taking and also as to the expense involved, summoned Kamal Eddin Bey for an interview. What took place at that interview is not quite clear, but Kamal Eddin Bey shortly afterwards retired from his post as Chief Architect together with two other members of the Professional Board, and the Respondent and one Nihad Bey continued the work of the Professional Board. Kamal Eddin Bey died in 1925. In 1927 the repairs having not yet been completed, a letter was sent by the Supreme Moslem Council to the Architect in charge of the repairs of the *Harem es Sheriff*, that is, to the present Respondent Rushdi Bey, signed by the President of the Supreme Moslem Council, and dated the 30th of January, 1927 (Exhibit A), in which they called attention to the fact that it had been promised that the repairs of the *El Akssa* Mosque would be completed in that month and that, since they had not been completed, the Council asked that repairs should be completed before the forthcoming *Ramadan*. Again on the 25th of April, 1928, another letter was sent by the President of the Council (Exhibit B), in which the attention of the Respondent was called to the fact that his last and final promise was to complete repairs in the *El Akssa* Mosque in April, and that promise had not been kept. The Council therefore requested the completion of the repairs by all means on the first day of *El Adha* feast and intimated that they would in no circumstances agree to any expenses on the present repairs after that feast. Then on the 25th of September, 1928, there comes a very important letter (Exhibit SH. 3) signed by Jamal Husseini, for the President of the Council, and addressed to the Professional Board in which it is stated as follows: —

> "The repairs of the first part of the scheme for repairing *Harem esh Sharif*, having been completed, the Council has decided to terminate the services of your professional board including all its employees, as from the first of October, 1928, thanking you for your professional services rendered with both care and diligence until the conclusion of the first part of this important scheme."

It will be noted that twice in this letter it is stated that he *first part* of the scheme of repairs had been completed. And there is another letter dated the 17th April, 1929 (Exhibit R.I.), which is in the form of a

certificate signed by Haj Hamin el Husseini, President of the Supreme Moslem Council, in which it is stated that the Respondent was appointed an Architect for the repair of the Mosque of Omar on the 1st October, 1922, and that he remained in his work until the 25th September, 1928, "as the first part of the scheme of repairs had been completed and the work stopped." It is also stated that his last monthly salary was LP. 70. It should again be noted that it is the first part of the scheme of repairs which is stated to have been completed.

Matters then remained in abeyance until the 11th January, 1931, when the Respondent wrote to the Supreme Moslem Council making a claim for two months' salary as compensation for the cessation of the repairs, and a further claim to his salary for six months for the period of leave to which he claimed that he was entitled, with which latter claim we are not in this present case concerned. A reply was sent on the 10th May, 1931 (Exhibit P.M. 2), signed by Saad Eddin el Khatib, the Secretary, for the President of the Council, in which the following passages occur. After stating that the Council has studied the letter and the contract and the correspondence on the subject, the letter goes on to say:

> "The clause set out in the contract, on which you rely in your claim to the salary of two months in the event of an obstacle occurring to prevent the continuance of the repairs, provides that the term is dependent upon the commencement of the scheme for the repairs, the subject matter of the contract, and the continuance of the work — in that in the event of an impediment arising and leading to the discontinuance of the work before the repairs are completed the stipulation accrues due.
>
> "Now, if we refer to the decision of the Council, dated the 18th of September, 1928 (No. 1016), which was communicated to the Technical Commission in a letter dated the 10th *Rabi' El Thani* (25th September, 1928, No. 1086), we shall find, expressly stated therein, that the repairs had been completed, and not stopped, and that having thus been completed the function of the Technical Commission had ended. This is corroborated by the letter sent to the said Commission dated the 6th *El Thil Qi'deh*, 1347 (25th April, 1928, No. 5158), the text of which reads as follows: —
>
> > 'You promised to complete the repairs at *El Aqsa* in April, 'and now April has also expired and the repairs have not 'been completed. The Council therefore requires that these 'repairs be completed and inaugurated on the first day of the 'feast of *El Adha*. The Council would like to assure you that 'it would not agree to any further expenses connected with 'the present repairs to the *Aqsa* after the feast, and considers 'this letter as final in the matter.'

> "The Council then celebrated the occasion of the completion of the repairs, and the celebration was attended by the neighbouring Moslem Countries."

At the end of the letter the Council regretted that it could not agree to his claim.

The Respondent thereupon entered, in 1932, an action against the Supreme Moslem Council, in the District Court, claiming a sum of LP. 140, being the two months' salary stipulated for in the contract. The case dragged on for some considerable time, and as a matter of fact came before this Court in Civil Appeal 172/33, but finally on the 8th March, 1939, the District Court gave judgment in favour of the Respondent. From that judgment the present appeal has been taken.

A large number of points have been taken by Mr. Cattan for the Appellants, who are the *Wakf* Commission, the first one being that the *Wakf* Commission is not a proper party in this case. The *Wakf* Commission was established by an order dated the 18th October, 1937, by virtue of the Defence (Moslem *Awkaf*) Regulations, 1937, issued on the 16th October, 1937, under the Palestine (Defence) Order-in-Council of that year. Clause 5 of these Regulations states, *inter alia*, that the Commission "shall have all or any of the powers vested in the Supreme Moslem *Sharia* Council and the General *Wakf* Committee by the Supreme Moslem *Sharia* Council Regulations dated the 20th December, 1921, and the Supreme Moslem *Sharia* Council Ordinance, 1926," for "the purpose of controlling and managing" the Moslem *Awkaf* Funds, cash, securities and deposits. The Commission has the power, (a) to require all persons indebted to the *Awkaf* to pay the amount of such debt and, (b) to issue receipts or discharges in respect of sums receivable or payable by the *Awkaf*. It has been argued by Mr. Cattan that these Regulations did not give any power to the *Wakf* Commission to sue or to be sued and in the course of his argument he has cited to us the terms of the Orthodox Patriarchate Commission Ordinance of 1928. We do not think that such a comparison is of very much value because the two matters dealt with are entirely separate and have no connection with one another, and the powers of the *Wakf* Commission must be determined by what is contained in the Regulations appointing them, and not by what is contained in another Ordinance appointing another Commission, and not in the Defence Regulations. We think that the wide terms of the Defence (Moslem *Awkaf*) Regulations, vesting in the Commission all powers appertaining to the Supreme Moslem Council and the General *Awkaf* Committee, for controlling and managing the Moslem *Awkaf* funds, must include by necessary implication the power

to sue, as this is a necessary accompaniment of the power given to them to require payments of debts due to them, and if they have the power to sue we can see no good reason why there should not also be the power to sue them. We think, therefore, that the action has been properly brought against the *Wakf* Commission as the successors to the Supreme Moslem Council and the General *Wakf* Committee in respect of the subject matter of this action.

Further points taken by Mr. Cattan are that the copy of the contract produced in Court was not stamped and was not the original and was not properly proved. These objections fail because Abdullah Eff. Mukless — *Mudir el Awkaf el Aam,* Jerusalem, who gave evidence in the District Court, identified the copy produced to him as a copy of the contract concluded between Kamal Eddin Bey and the Supreme Moslem Council, for the restoration of buildings in the *Harem es Sheriff.*

The next points taken by the Appellants are that the Respondent was not a proper party inasmuch as he had no power to sue because he was not a party to the contract entered into between Kamal Eddin Bey and the Supreme Moslem Council, since it is a well recognised and universal rule of law, that only parties to a contract can sue on it — further, that the contract was cancelled by Kamal Eddin Bey in 1925 and again, that, in any case, the contract was cancelled by he death of Kamal Eddin Bey in this latter year. We will deal with all these points together, because on the facts of this case we think that all depends upon what contract, if any, the Respondent was serving under after 1925. From the correspondence which has been produced, signed on behalf of the Supreme Moslem Council, it is quite clear that the latter considered that the contract of the 13th August, 1922, between Kamal Eddin Bey and the Council, was still in force up to October, 1928, insofar as the Respondent was concerned, and governed the conditions of employment of the Respondent until that date. This is abundantly clear, not only from Exhibit P.M. 2, in which the Council admit that the claim is based on this contract and in which they did not repudiate the contract nor did they state that it is no longer in existence but merely held that, as the works had been completed, and not stopped, the condition for two months' salary did not apply, but it is also evident from Exhibit SH. 3 and Exhibit RI. Exhibit SH. 3 in particular states that the Council decided to terminate the services of the Professional Board as from the 1st October, 1928, showing beyond all doubt that the contract of employment was considered by them to continue until that date, and if the contract is considered to be in force until then, all its terms must equally be considered to be in force including the

term that the members of the Professional Board were entitled to two months' salary as compensation in case the work was stopped before completion. It is not necessary, therefore, for us to consider whether the contract of the 13th August, 1922, was entered into by Kamal Eddin Bey on behalf of himself and of the other members of the Professional Board engaged by him, nor whether the contract was cancelled by Kamal Eddin Bey in 1925, or was cancelled by his death later in that year, because it is clear from the correspondence that in any case, as we have said, the remaining members of the Professional Board after 1925, including the Respondent, continued to work on the same terms as are contained in the contract of the 13th August, 1922, with the approval of the Supreme Moslem Council.

The only remaining point is the argument of the Appellants that the work had been completed by the 1st October, 1928, and therefore two months' salary in addition was not payable. Whether the work was completed or not is entirely a question of fact. On the correspondence produced there was material on which the District Court could find that the work was not completed on that date, and we see no reason to interfere with that finding, with which we are in agreement.

For all these reasons, we think that the District Court came to the correct conclusion both in fact and in law and the appeal therefore fails, and must be dismissed. The Respondent will have the costs of this appeal assessed at LP. 15 to include fees for attending the hearing.

Delivered this 11th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL No. 37/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:

1. The partnership of Mahmoud and Darwish el Daoudi,
2. Darwish el Daoudi,
3. The heirs of Sheikh Mahmoud el Daoudi: his widow Hikmet daughter of Haj Abdul Muhein el Daoudi and his children Abdin,

Hussein, Ali, Suleiman, Fatmeh and Adeeleh represented by their guardian the said Darwish el Daoudi. APPELLANTS.

v.

Messrs. E. R. and F. Turner Limited. RESPONDENT.

Interlocutory appeal from interlocutory order — Application for evidence on commission — Order that evidence should be given in Palestine to allow cross-examination — Lawson v. Vacuum Brake Co., Berdan v. Greenwood, re Boyse — Cause for being unable to attend — Credibility of witness — Delay in making the application — Further opportunity to enable the witness to attend.

In allowing an appeal from the interlocutory order of the District Court of Jerusalem, dated 31.3.39: —

HELD: 1. In deciding whether evidence should be heard on commission each case has to be considered individually. The presence of the witness in Court is important to enable the Court to judge his credibility by observing his demeanour and his precise answers to the questions put to him. The Respondent should also be given an opportunity to cross-examine.

2. The Appellants had not shown that the witness could not be reasonably expected to come to Palestine.

3. The application for the issue of the commission had been made too late.

CONSIDERED: Lawson *v.* Vacuum Brake Co. (1884) 27 Ch. D. at 143. Berdan *v.* Greenwood, Re Boyse (1881—2) 20 Ch. D. at 766.

ANNOTATIONS: For evidence on commission, *vide Digest* XXII, pp. 566 *sqq.* Part VIII Generally.

JUDGMENT.

This is an interlocutory appeal from an interlocutory order of the District Court of Jerusalem, dated the 31st March, 1939, by which the District Court refused the application by the present Appellants, who were defendants before that Court, for the issue of a commission to take the evidence of one Leon Israel in Egypt. It is not disputed, in fact it is admitted by both parties and found by the District Court, that this person is a very material witness. He was at one time the representative of the Respondent firm in Egypt, and acted on their behalf in Palestine; at any rate, the present action in the District Court arises partly out of his activities in Palestine. His evidence is sought by the present Appellants, and both sides say

that they would prefer that his evidence should be given before the Court in this country, but the Appellants say that if they cannot get him here they would like his evidence taken on commission in Egypt, whereas the Respondents insist that his evidence, if it is to be heard at all, should be heard in Court here. The District Court made this finding and I read the first part of its judgment: —

> "Taking into consideration the part that Leon Israel has played in this case as revealed by the evidence already heard before us, we are satisfied that it is in the interest of justice that he should be given an opportunity of cross-examining this witness in Court. We do not consider therefore that permission should be granted for hearing the evidence of Leon Israel on Commission."

The District Court then goes on to quote authority, and says further that it is not satisfied that this witness is unable to came to this country in view of the fact that he was willing earlier in the proceedings to come, and has disclosed no valid reason why he cannot do so now. Every case of this nature, in the words of Cotton L.J. in Lawson *v.* Vacuum Brake Co. (1884), 27 Chancery Division, on page 143, depends on the circumstances of each individual case. There is a great difference between a plaintiff and a mere witness to be examined abroad, but it is admitted that this witness's evidence is very material, and we think that the words again of Cotton L.J. in Berdan *v.* Greenwood, reported in the footnote *in re* Boyse (1881-2), 20 Chancery Division, on page 766, are material and should guide us in deciding this case. Cotton L.J. said: —

> "I am very unwilling to express any opinion upon the question which has been so much argued, the credibility of General Berdan, but, in considering whether the examination of a witness should be taken by commission, we must have regard, at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness it is hardly material whether he gives his evidence *viva voce* in Court or before a commission, or by affidavit, or in any other form. But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury, or the Court which has to decide the question, should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross-examination are answered."

The District Court have held that, in view of the evidence already heard in the case as to the part played by this witness, it was in the interests of justice that the examining of this witness and cross examination should take place before the Court. Though we are of course in a position to take a different view, yet we should be

reluctant to do so in view of the finding made by the District Court. After all it is the District Court which has to try this case, it is the District Court which has to value the evidence given before it, and taking into consideration that it is not merely what the defendants' case requires but what justice to the plaintiff as well as the defendants requires, it seems to us that it is eminently important that the demeanour of the witness should be seen and his precise answers to the questions put to him should be heard by the Court which has to decide the case, and that the Respondents in this appeal should have the fullest opportunity of cross-examining him, they being really only able to do this effectually, when the witness is in Court.

Further we are not satisfied that the Appellants have shown that this witness cannot be reasonably expected to come here. From the letters read to us, he was apparently quite willing to come here in December 1938, and his reasons given for not coming now are not convincing.

For these reasons we think that the District Court was right in refusing the application for the commission to issue. Further points have been taken that the application for the issue of the commission was made too late and not within a reasonable time. The issues were settled in June, 1938, the application for a commission to issue was not actually made in terms until February, 1939. There had been a certain amount of discussion that the evidence of this witness was essential but there is nothing in the record which shows that an application was made for a commission to issue until, as I have said, in February 1939.

On this ground also we think that the District Court was right in refusing the application to issue the commission. The appeal must therefore be dismissed and the Respondents will have the costs of the appeal, to include hearing fees, fixed at a total sum of LP. 15.

We note that in the last paragraph of its judgment, the District Court as an indulgence granted the present Appellants an adjournment of about three weeks in order to secure the attendance of this witness. We have no doubt that the District Court will equally be prepared to fix this case on a date which will give the Appellants the opportunity of making a further attempt to secure the attendance of this witness in Jerusalem, and we suggest that perhaps three weeks' notice should be given, as was previously done.

Delivered this 15th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL No. 29/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Khayat, JJ.

IN THE APPEAL OF:

Keren Kayemeth Leisrael Ltd. — APPELLANT.

v.

The heirs of Habib Musa el Kutt:

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

Case stated — Appeal from decision on case stated to the Land Court — Cultivators (Protection) Ordinance — C.A. 14/39 — Grounds of appeal or reply thereto not required in case stated.

In dismissing an appeal from a judgment of the Land Court of Haifa, in its appellate capacity, dated the 28th February, 1939: —

HELD: Upon an appeal by way of special case there is no need to furnish to the Land Court grounds of appeal or a reply thereto.

CONSIDERED: C.A. 14/39 (*ante*, p. 145).

FOR APPELLANT: Feiglin.

FOR RESPONDENTS: Bustani.

JUDGMENT.

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

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

The special case as drawn was adequate to enable the Land Court

to come to a conclusion upon the points raised, and in the result we think that that Court came to right conclusions.

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

Delivered this 17th day of May, 1939.

Chief Justice.

CRIMINAL APPEAL No. 17/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Khayat, JJ.

IN THE APPEAL OF:

The Attorney-General. APPELLANT.

v.

Eliahu Haim Spitzer. RESPONDENT.

Wireless set licence — Mistake by Post Office as to date of licence — District Courts (Summary Trials) Rules, R. 27 — C.C.O. Sec. 12 — Mistake of fact and mistake of law, Phillips v. Evans — Benefit of doubt.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 15th March, 1939, whereby the Respondent was discharged of the offence of being in possession of a wireless set without a licence contrary to Section 2(1), 3(1) and 5(1) of the Wireless Telegraphy Ordinance: —

HELD: If the Respondent had failed to obtain a licence or to renew his licence, not because he was under an honest and reasonable mistake as to the date when his prior licence expired, but because he thought he had a justifiable claim to a licence for a longer period, there was no defence.

As there was an element of doubt as to the findings of the District Court, the Respondent was entitled to the benefit of the doubt.

CONSIDERED: Phillips *v.* Evans (1896) I Q.B. 305.

ANNOTATIONS: On the accused being entitled to the benefit of the doubt, see also CR.A. 85/38 (*ante*, p. 15).

As to how far mistakes of law and mistakes of fact afford a defence in criminal actions, *vide Digest*, XIV, pp. 47 *sqq*. Sec. 4, sub-sec. 1 — *Ignorance of Law*, sub-sec. 2 — *Ignorance or mistake of fact.*

FOR APPELLANT: Crown Counsel (Hogan).

FOR RESPONDENT: Not present — served.

JUDGMENT.

This is an appeal from a decision of the District Court, Haifa, exercising a summary jurisdiction, dismissing a charge against the Respondent of being in possession of a wireless set without a licence.

The case appears to have been inadequately put before the Court of trial.

A post office official stated that the Respondent had a licence which expired on 31.10.38, and that on 9.12.38 he visited the Respondent's home and found a set there.

The Respondent gave evidence and said that a statement which he had made to the police was correct.

The effect of that statement was that for some years prior to 1937 he lived at Kfar Gideon where he had a licensed set. That in October, 1937, he moved to Haifa, that he did not bring his set with him but sold it and notified the Post Office. That in April, 1938, he bought a new set and applied for a licence, and that he obtained a licence, No. 41373, which he thought was for one year. He went on to say that at the time of making the statement he understood that the official made a mistake and wrote that it was valid only until 31.10.38, and that in the result he thought he had a licence until April, 1939. He said that he did not remember if he received a warning.

These matters were not put to the Post official who was not cross-examined.

Upon this the Court found: —

> "In the case the defence has always been that the Post Office made a mistake in the date inserted in the original licence of April, 1938. The Post Office seems to have taken up the attitude that there could be no mistake, and under threat of prosecution accused seems to have taken out a second licence. The defence is now repeated that he had a justifiable claim to a licence running to April, 1939. The Post Office have not taken the trouble even to produce the former licence which, if in the ordinary form would acknowledge the receipt of 500 mls, the fee for a whole year. The case is dismissed and accused is discharged."

These findings of fact are not clear and would hardly seem to comply with the District Courts (Summary Trials) Rules, 1938, Rule 27, but the effect of them would seem to be that the Respondent was without a licence at the material time but that as there was

a mistake by the Post Office the Respondent was not guilty of the charge.

The licence No. 41373, which has found its way back to the Post Office has been produced to us. It is in the prescribed form (see Annual Volume, 1936, III, p. 1015). It is dated 28th April, 1938, is stated to expire on 31.10.38, and acknowledges the payment of the fee of 500 mls.

The explanation given to us by the Crown Counsel is that when a licence has expired and a new licence is given, or the licence is renewed to the same licensee, the new licence is given for a year from the expiration of the old licence, and that that was what was done in this case. This clearly involves issues of fact in this particular case, which the Court below did not expressly determine.

If the Court believed the Respondent's statement when he said —

> "In April, 1938, I bought a new radio set from my friend Shelomo Better of Afule, and on 28.4.38 I obtained a licence, No. 41373, and thought that the licence was for one year."

it is possible that it acquitted him under Section 12 of the Criminal Code Ordinance. I would observe that this is a section which must be applied with care, having regard to the facts established in the particular case, and *prima facie* a Court would require strong evidence to satisfy it that an individual was under an honest and reasonable mistake as to the date of expiration of a licence, when that date is clearly stated in a prominent place on the document itself.

If, however, the Court took the view that the Respondent had failed to obtain a licence, or renew his licence, not because he was under an honest and reasonable mistake as to the date when his prior licence expired, but because, although he knew his prior licence had expired, he thought he had a justifiable claim to a licence for a longer period than that for which the prior licence had been granted to him, I do not think that there is any defence.

A somewhat similar point arose in Phillips *v.* Evans, (1896) 1 Q.B., 305, where it was held that a claim to exemption from duty in respect of a dog licence, although possibly well founded, was no excuse for not taking a licence.

Having regard to the facts and the form of the judgment there may be an element of doubt as to the grounds on which the proceedings were dismissed by the District Court, and I think the Respondent should have the benefit of that doubt.

We have had a long discussion about the grant of licences under the Wireless Telegraphy Ordinance and the rules made thereunder, which I hope may result in some of the provisions being made clearer.

The appeal is dismissed accordingly.

Delivered this 17th day of May, 1939.

Chief Justice.

HIGH COURT No. 23/39.

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

BEFORE: Copland and Khayat, JJ.

IN THE APPLICATION OF:

Bank Atid Limited. PETITIONER.

v.

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

Pledge — Priority in execution — C.E.O. has no power to inquire into the legality of pledges — Person to be referred to the competent Court — Res judicata.

In making absolute an order *nisi* directed to the first Respondent to show cause why his orders dated 22nd March, 1939, and 29th March, 1939, in Execution File, Tel-Aviv, No. 16682/38, should not be set aside, and why an order for a right of preference should not be made in favour of the claim of Petitioner: —

HELD: 1. The duty of the Chief Execution Officer was limited to executing the judgment of the District Court and he should not have inquired into the validity of the pledge. He had also erred by referring the pledgee to the competent Court instead of referring the Respondents.
2. The Petitioner was entitled to priority, as pledgee.

ANNOTATIONS: Authorities on pledges: C.A. 130/26 (C. of J. 1452); C.A. 29/27 (P.L.R. 196, C. of J. 1454); C.A. 74/27 (C. of J. 1458); C.A. 85/31 (C. of J. 1467); H.C. 14/31 (C. of J.1641); C.A. 105/32 (P.L.R. 810, P.P. 14.XII.32, 8.V.33, C. of J. 1172); C.A. 45/30 (C. of J. 1299); C.A. 34/31 (P.P. 12.V.33,

C. of J. 978); C.A. 80/29 (P.L.R. 560, C. of J. 350); H.C. 93/36 (C. of J. 1934—6, 412, P.P. 4.XII.36); C.A. 74/38 (1938, 1 S.C.J. 296); H.C. 34/38 (*ibid.* 306); H.C. 31/38 (*ibid.* 305); C.A. 101/38 (*ibid.* 317); C.A. 96/38 (1938, 2 S.C.J. 232).

FOR PETITIONER: Koenigsberger.

FOR RESPONDENTS: Nos. 1-4 — Served — not present.
Nos. 2-3 — Lebel.

ORDER:

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

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

The District Court declined to deal with the question of priority saying that that was a matter for the Chief Execution Officer. The 2nd and 3rd Respondents, who are also judgment-creditors of the 4th Respondent Malamud, appeared before the Chief Execution Officer on the petition by the present Petitioner, the Bank, in order that the question of priority should be decided. The Chief Execution Officer by his first order of the 22nd March, 1939, said this — "it appears from the judgment of the District Court that their intention was that the Chief Execution Officer should deal with the question of the pledge, and decide the matter of priority by inquiring into the legality of the pledge". The Chief Execution Officer then held

that he could not decide that the Bank had priority unless the Bank satisfied him that it was a legal pledge.

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

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

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

The effect of this decision is that the Petitioner is entitled to priority over the proceeds of the sale of the articles pledged. The Respondents of course are not debarred from going to the competent Court and proving, if they can do so, that there is no pledge over these goods, because though the matter of pledge is *res judicata* as between the Petitioner and the 4th Respondent Malamud, it is not

a matter of *res judicata* as between the Petitioner and the 2nd and 3rd Respondents, the latter not having been parties to the action between the Petitioner and the 4th Respondent.

Given this 17th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL No. 48/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Khayat, JJ.

IN THE APPLICATION OF:

John (Hanna) Awad Sifri. — PETITIONER.

v.

Benyamin Boutagy. — RESPONDENT.

Leave to appeal from District Court in Appellate Capacity — Refusal by Presiding Judge to grant leave — Court of Appeal cannot grant leave — C.P.R. 317, 313, – 333, 334, and Amendment – C.A. 148/38 – Magistrates' Courts Jurisdiction Ordinance, Sec. 6.

In dismissing an application for leave to appeal from the judgment of the District Court of Haifa (in its appellate capacity), dated the 23rd March, 1939: —

HELD: (Following C.A. 148/38). An appeal to the Court of Appeal will not lie after refusal by the Presiding Judge to grant leave to appeal. In view of the express provisions of Section 6 of the Magistrates' Courts Jurisdiction Ordinance, the amendment to Part XXXI of the Rules, which makes it applicable to District and Land Courts does not alter this principle.

FOLLOWED: C.A. 148/38 (1938, 1 S.C.J. 447).

ANNOTATIONS: See the above decision and the note thereto, and see C.A. 2/39 (*ante*, p. 53).

FOR PETITIONER: Atallah.

FOR RESPONDENT: Germanus (by delegation).

ORDER.

This is an application for leave to appeal to this Court from a decision of the District Court, Haifa, upon an appeal to it from the Magistrate's

Court, the presiding Judge of the District Court having refused such leave.

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

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

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

A similar application was made in Civil Appeal 148/38, P.L.R., Vol. 5, p. 389. This was refused on the ground that Rules 313 to 333 of the Civil Procedure Rules did not apply to District and Land Courts, and that therefore Rule 317 did not apply in the case of appeals to the District and Land Courts. This decision was based upon the interpretation of Rule 334, and that rule has now been amended to make clear the scope of Part XXXI of the Rules. The question still remains, however, whether an application can be made for leave to appeal when an order refusing leave to appeal has been given by the presiding Judge.

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

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

Given this 22nd day of May, 1939.

Chief Justice.

CIVIL APPEAL No. 41/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Moshe Eliezer Pilosoff. APPELLANT.

v.

The Assicurazioni Generali. RESPONDENT.

Insurance — Claim for loss by fire — C.A. 188/38 — Construction of policy — Existence of abnormal conditions — Failure to discharge onus of proof that loss was independent of abnormal conditions — Ottoman Additional Law on Insurance Operations, 1323, Art. 19 — Lex dispositiva.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 2nd March, 1939: —

HELD: 1. (Following C.A. 188/38). The Appellant had failed to discharge the onus legally placed upon him by clause 6 of the policy that the damage had occurred independently of the abnormal conditions prevailing at the time in Haifa.

2. No authority was quoted in support of the contention that an insured and an insurance company cannot except by agreement whatever risks they wish so to except, Article 19 of the Ottoman Additional Law on Insurance notwithstanding.

FOLLOWED: Assicurazioni Generali *v.* Levy, C.A. 188/38 (1938, 2 S.C.J. 214).

ANNOTATIONS: See the above decision and note thereto.

FOR APPELLANT: Weinshall.

FOR RESPONDENT: Levin.

JUDGMENT.

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

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

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

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

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

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

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

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

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

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

Delivered this 23rd day of May, 1939.

British Puisne Judge.

I concur.

Puisne Judge.

CRIMINAL APPEAL No. 22/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Copland and Frumkin, JJ.

IN THE APPEAL OF:

The Attorney-General. APPELLANT.

v.

Nissim Yousef Aboutboul. RESPONDENT.

Demurrer — Amounts to an admission of facts and plea that information is bad or that no offence has been committed — C.C.O. Secs. 275, 276 — Object of Sec. 275 is to increase liability of servant.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 5th of April, 1939; and remitting the case to the District Court for trial:

HELD: 1. A plea of demurrer is made upon an admission that the facts stated in the information are true but that either no offence has been committed or that the information is bad. *Quaere* whether it applies in Palestine.

In the present case there had only been an argument as to whether the Respondent could be charged under Section 276(b) of the Criminal Code Ordinance.

2. The object of Section 275 of the Criminal Code Ordinance is to increase the liability of a servant. It does not operate to decrease the liability of an agent who also happens to be a servant, who is charged under Section 276.

ANNOTATIONS: Other cases on Section 275 of the Criminal Code Ordinance: CR.A. 150/37 (1938, 1 S.C.J. 11); CR.A. 6/39 (*ante*, p. 76).

On demurrer, *vide Digest*, XIV, pp. 254 *sqq.*, Sub-sec. 5.

FOR APPELLANT: Crown Counsel (Bell).

FOR RESPONDENT: Maman.

JUDGMENT.

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

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

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

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

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

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

Delivered this 31st day of May, 1939.

Chief Justice.

Copland, J.

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

British Puisne Judge.

CRIMINAL APPEAL No. 20/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

Shamuel Bernstein. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Town Planning offence — C.C.O. secs. 23, 391; Criminal Law Amendment Ordinance, Sec. 3 — Retroactivity — Period of appeal for A.G. — No injustice to accused.

In dismissing an appeal from a judgment of the District Court of Haifa (in its appellate capacity), dated the 15th March, 1939, whereby Appellant was convicted of contravening Section 35(1) of the Town Planning Ordinance, 1936, and ordered to remove the unauthorised structures made in his building and fined also LP. 5, and in case of default, one month's imprisonment: —

HELD: 1. By the application of Section 391 of the Criminal Code Ordinance, read together with Section 3 of the Criminal Law Amendment Ordinance the Appellant could be rendered liable for the additions to his building carried out on his behalf.

2. There was no injustice in the fact that the Attorney-General has a longer period to appeal than the accused, as in the case of an appeal by the Attorney-General it is possible for the convicted person to satisfy the Court that he should not have been convicted in which case it was unlikely that the penalty would be increased and, in proper cases, it might be reduced.

ANNOTATIONS: On legislation with retroactive effect *vide* CR.A. 160/37 (1938, 1 S.C.J. 103) and note 2—3 thereto. *Cf.* C.A. 232/38 (1938, 2 S.C.J. 163).

FOR APPELLANT: Shapiro and Amikam.

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

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

At the first hearing the Magistrate found —

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

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

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

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

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

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

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

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

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

The appeal is dismissed.

Delivered this 31st day of May, 1939.

Chief Justice.

HIGH COURT No. 11/39.

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

BEFORE: Trusted, C.J., and Frumkin, J.

IN THE APPLICATION OF:

Ya'cob Hazan. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Mrs. Margalith Hazan. RESPONDENTS.

Rabbinical Courts — Whether judgment may be given by a judge sitting alone — High Court may inquire into competency of Religious Courts — Competency includes constitution — H.C. 27/36 — "Hoshen Hamishpat", Judge mumhe lerabim — Consent cannot be presumed.

In making absolute a rule *nisi* in an application for an order to issue to the First Respondent directing him to show cause why his order for the attachment and sale of the rights and interests of the Petitioner's immovable property situated at 9 Hatham Sofer Str., Tel-Aviv, Block 55, Parcel 22 (Tel-Aviv Execution File No. 11544/37) should not be set aside, and to refrain from any further proceedings on the strength of the judgment of the Chief Rabbinate, Jaffa—Tel-Aviv District, dated Menahem-Av 6th, 5697 (14.7.37), case No. 540/5697. Alternatively, for an order to issue to the First Respondent to reduce the amount due for execution to LP. 22: —

HELD: 1. (Following H.C. 27/36). A Rabbinical Court must be composed of at least three judges.
If a party to a judgment issued by a Rabbi sitting alone takes objection to its execution, the Execution Officer must refrain from executing it.
2. Consent to a Rabbi sitting alone, especially in the case of a defendant, is not a matter to be presumed but proved. There had been no evidence of consent.
3. The High Court has power to inquire into the competency of Religious Courts. This includes constitution of the Court.
An appeal from the judgment of the Rabbinical Court to the Rabbinical Court of Appeal had failed on technical grounds and this was the only opportunity for Applicant to oppose the judgment when it was put into execution.

FOLLOWED: Hary *v.* Hary H.C. 27/36 (C. of J. 1934—6 745; 1937, 1 S.C.J. 386).

ANNOTATIONS: On the question of consent to the jurisdiction of a Religious Court, *cf.* H.C. 44/38 (1938, 1 S.C.J. 405) and see note 2 thereto and the following decisions: C.A. 112/36 (C. of J. 1934—6 750, 1 Ct.L.R. 12); H.C. 70/28 (P.L.R. 342, C. of J. 1606); H.C. 49/32 (C. of J. 1610); C.A. 41/26 (P.L.R. 105; C. of J. 1599); C.A. 51/38 (1938, 1 S.C.J. 224).

Instances of the High Court inquiring into the constitution of religious Courts: H.C. 55/33 (P.L.R. 873, P.P. 15.ix; 20.xii.33, C. of J. 1613); H.C. 27/36 (*supra*); H.C. 28/38 (1938, 1 S.C.J. 373); *Cf.* H.C. 63/38 (1938, 2 S.C.J. 108).

FOR PETITIONER: Kaufman.
FOR RESPONDENTS: E. Shereshevsky.

ORDER.

Frumkin, J.:

The Respondent in this case put into execution what purports to be a judgment of the Rabbinical Court of Tel-Aviv, signed and delivered by Chief Rabbi Uziel sitting alone. It is one of the grounds taken by Petitioner, in opposing the execution of the said judgment, that a Rabbinical Court in order to be properly constituted, must be composed of not less than three judges.

It is clear that this Court has power to go into matters of competency of Religious Courts. If a Religious Court is not competent to deal with a certain matter, any decision given by it is not capable of execution. The constitution of a Court is a matter of competency and we are called upon to decide whether or not a Rabbinical Court composed of one Rabbi or Judge sitting alone is properly constituted.

Neither in the Palestine Order in Council nor in the Religious

Communities (Organisation) Ordinance or Regulations made thereunder nor indeed in any other Palestinian Legislation is there any provision as regards the number of Judges required to constitute a Jewish Rabbinical Court.

In Hary *v.* Hary — H.C. 27/36, this Court acting upon an opinion given by the Chief Rabbi of Palestine, Rabbi Jacob Meir, decided that a Rabbinical Court, sitting as a Court of Appeal, must be composed of at least three Judges and ordered the non-execution of a judgment delivered by two Rabbis only. In the same case this Court expressed the view that "it is a well known rule in Jewish Law that any Rabbinical Court, even sitting in first instance, must always be composed of three Judges."

The authority in Jewish Law as regards the number of Judges is to be found in "Hoshen Hamishpat", a compilation of Jewish Civil Law, where it is laid down in 3(1) that no Court can be composed of less than three Judges. So far as I know there are no special rules as regards the composition of Courts of Appeal, and if Chief Rabbi Meir in Hary v. Hary referred to Courts of Appeal only, it was due to the fact that the question involved was the composition of a Court of Appeal. So that in my view this Court was justified in its *dictum* that even a Court of first instance is to be composed of no less than three Judges.

It is true that there are certain exceptions to the rule. In 3(2) *ibid.* it is provided that a judgment issued by less than three Judges is not valid even if they have not erred, unless the Judge has been accepted by the parties or he is "recognised by the public as an experienced Judge" *(Mumhe Lerabim)*. The first exception does not arise because there is nothing to show consent on the part of the Petitioner to accept the Judge sitting alone.

As regards the second exception, I am not competent to say what exactly are the requirements of the term "Mumhe Lerabim". If I were to act on my own judgment I would not hesitate in stating that Rabbi Uziel with his wide learning and experience has all claims to be "recognised by the public as an experienced Judge." But in the same sub-section quoted above we find the observation that in present times it is not customary even for Rabbis of that category to sit alone against the will of any person. In my view consent, especially in the case of a defendant, is not a matter to be presumed but proved. As said before, there was no evidence of consent.

Again we find in sub-section 3 of the said section that although it is

allowed for a Rabbi recognised by the public as an experienced Judge to sit alone, it is commended by the Wise to join others to sit with him.

It is unfortunate that this Court should have to deal wiht the niceties of Jewish Law relating to the composition of a Rabbinical Court of First Instance, a matter which in the ordinary course of events should have been brought before the Rabbinical Court of Appeal for determination. We understand however that an appeal lodged by the Petitioner failed on a technical ground. So that his only opportunity to oppose the judgment was when it was put into execution.

On the authorities cited above, I feel justified in holding that if a party to a judgment issued by a Rabbi sitting alone takes objection to its execution, the Execution Officer must refrain from executing it.

This being the case it is not necessary to deal with the other objections raised by the Petitioner, and the order will be made absolute with costs, fixed at an inclusive sum of LP. 5.

Delivered this 8th day of May, 1939.

Puisne Judge.

I concur.

Chief Justice.

CIVIL APPEAL No. 18/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

The Attorney-General. — APPELLANT.

v.

Moses Blam. — RESPONDENT.

Claim against Railways Administration — Failure to provide gates and to warn against passing of train — Prima facie plea of negligence — Contributory negligence — Crown Actions Ordinance, Sec. 3 — Applicability of local law, C.A. 88/30 — Blam v. A.G., Government Railways Ordinance, 1936, Sec. 12, Railways Ordinance, Cap. 125, Sec. 42 — C.P.R. 67(2) — C.A. 200/38 — Claim based upon the Crown Actions Ordinance, not upon negligence — Public Authorities Protection Act — Gregory v. Torquay Corporation — Statutory limitation as

weapon of defence not used by defendants — Halsbury, Vol. XX. — C.P.R. 113, marginal note thereto is misleading — P.O. in C., Art. 46, Akel v. Alayyan, C.A. 191/37 — Lacuna in local law — Municipality of Haifa v. Khoury — C.C.O., Art. 43, CR.A. 96/37 — Failure to erect gates gives no cause of action.

In allowing an appeal from a decree of the District Court of Tel-Aviv, dated the 29th January, 1939, and in setting aside the judgment of the District Court: —

HELD: 1. There was nothing in the Railways Ordinance to prevent an action based on negligence being brought if such action could have been brought against a company. The action was, however, not framed in negligence and there had been no finding of negligence by the District Court.

2. The statutory defence of limitation was open to the Appellants by virtue of Section 12(4) of the Government Railways Ordinance, 1936, as the petition to the High Commissioner had been received in the District Court some two weeks after the expiration of the statutory period of six months.

Such a defence does not extinguish the cause of action and the Appellants had not made use of it.

3. (Distinguishing Municipality of Haifa *v.* Khoury). Failure to erect gates gave no cause of action to the Respondent under Palestine Law nor was it necessary to refer to English Law as there is no principle of the English Common Law whereby the Respondent could recover by means of the absence of gates; the obligation to fence railways and to erect gates in England being statutory.

CONSIDERED: Meshek Gesher *v.* Palestine Railways, C.A. 200/38 (1938, 2 S.C.J. 146); Akel *v.* Alayyan, C.A. 20/38 (1938, 1 S.C.J. 350); C.A. 191/37 (2 Ct.L.R. 169, PP. 6—9.xii.37, Ha. 23.xii.37); Municipality of Haifa *v.* Khoury, C.A. 88/30 (P.L.R. 724, C. of J. 1343); Zwanger *v.* Scheinzwit, CR.A. 96/37 (not 20/37 as stated in the judgment — P.P. 28.ix., 15.x.37); Palestine Mercantile Bank *v.* Freyman & an., C.A. 240/37 (not 140/37 as stated in the judgment — 1938, 1 S.C.J. 148); Gregory *v.* Torquay Corporation (1912), 1 K.B. at 442.

ANNOTATIONS: Note the corrections above for cases mentioned in the judgment.

For cases against the Railway Administration, *vide* C.A. 200/38 *(supra)* and note 1 thereto, C.A. 242/38 (*ante*, p. 5) and note.

On claims for compensation under Palestine Law generally, see also C.A. 2/27 (P.L.R. 229, C. of J. 1337); M.A. 1/32 (C. of J. 1351); C.A. 128/34 (2 P.L.R. 451, P.P. 31.xii.35, C. of J. 1934—6 684).

An application for leave to appeal to the Privy Council is pending.

FOR APPELLANT: Salant.

FOR RESPONDENT: Spindel.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel-Aviv, in an action brought by the Respondent as Plaintiff against the Railways Administration.

The Plaintiff's claim arose out of a collision between a motor vehicle, in which he was a passenger, and a train, at the level crossing on the main Jerusalem—Jaffa road, east of Lydda. In his petition to the High Commissioner, which took the place of a statement of claim, he stated —

> "The place where the car crossed was open, there was no signal that the train was about to pass, and no signals were given by the train when it came near to the car.
>
> "Hence it is clear that the blame for the collision rests on the railways, and the Plaintiff will adduce further evidence to prove that the damage caused to him was solely the guilt of the Railways."

This is *prima facie* a plea of negligence, the particulars being that no warning was given that the train was about to pass.

The Defendant denied the negligence, and pleaded contributory negligence.

The Plaintiff adduced evidence that the train did not whistle, and that there were no gates at the crossing. The latter fact is common knowledge to users of the road. The Defendant's witnesses stated that the train whistled.

The District Court made no finding as to the whistling, presumably not being satisfied by the Plaintiff's evidence as to this, but decided the case on the fact that there were no gates, stating —

> "We are satisfied that the accident was mainly due to the fact that the Railways Administration failed to provide the level crossing with a gate or a bridge. This constitutes a negligence on the part of the Railways Administration. It is true that the said level crossing is an open terrain, but that does not constitute a sufficient protection in a highway like the Jerusalem—Jaffa highway, with its very heavy traffic, specially at night and in winter time."

Although not pleaded, the Defendant submitted at the hearing —

> "(a) Under Crown Actions Ordinance such a claim cannot be made against Government (Section 3).
>
> (b) The Plaintiff must sue the train driver, under the local law, *i. e.*, the *Mejelleh*.
>
> (c) Under the *Mejelleh* there is room for an action on damage of property and not bodily damage (C.A. 88/930)."

Submission (a) is based on the form of the action which was Moshe

Blam *v.* The Attorney-General. Section 12 of the Government Railways Ordinance, 1936, (reproducing with some modification section 42 of the Railways Ordinance, Cap. 125), is as follows: —

> "12. (1) All actions which, if a railway were the property of a company registered in Palestine, might be brought by or against such Company may be brought by or against the administration.
>
> Provided that before any action against the administration is prosecuted the written consent of the High Commissioner authorising the claimant to bring the action shall have been obtained in tbe manner prescribed by the Crown Actions Ordinance, 1926.
>
> (2) In any action by or against tbe administration the General Manager shall be the nominal plaintiff or defendant, as the case may be.
>
> (3) Any petition, statement of claim, notice or other document required or authorised to be served on the administration may be served by leaving the same or sending it by registered post addressed to the General Manager at the principal office of the administration.
>
> (4) No action shall be brought against the administration unless the same be commenced within six months after the cause of the action arose.
>
> (5) Subject to the provisions of this section, the Crown Actions Ordinance, 1926, shall apply to any action brought by or against the administration."

It is clear that the action should have been brought under the Railways Ordinance, and in answer to the Defendant's submission, the Court decided — "to continue the case in its present form and allow the necessary amendment in the correct form". This was presumably done under Civil Procedure Rule 67(2) — it would have been better if the citation of the action had been changed.

In this connection it is well that I should refer to the judgment of this Court in Meshek Gesher *v.* The General Manager of the Palestine Railways, Civil Appeal 200/38, P.L.R., Vol. 5., p. 510, to which I was a party. In that judgment it is stated —

> "the Plaintiff was given leave by the High Commissioner to sue under the provisions of the Crown Actions Ordinance. It should be noted that the claim was not, and could not have been based on negligence."

It now appears that the action was brought under Section 42 of the Railways Ordinance, Cap. 125, in the manner prescribed by the Crown Actions Ordinance. There was nothing in that Ordinance to prevent an action based on negligence being brought if such action could have been brought against a company, but it is quite clear that that action was not

framed in negligence, and it is also clear from the judgment of this Court that there was no finding of negligence by the District Court.

While dealing with the requirements of the law in this kind of action, I may point out that sub-section (4) imposes a limitation similar to that imposed by the Public Authorities Protection Act in England. In this case the accident occurred on 6.12.36. The petition to the High Commissioner was undated, but the original appears to have been received in the District Court, Tel-Aviv, for submission to the High Commissioner, on 20.6.37, that is, some two weeks after the expiration of the period of six months. It is clear from the judgment of Cosens-Hardy, M.R., in Gregory *v.* Torquay Corporation, 1912, 1. K.B., 442, that the provision of section 12(4) is a statutory limitation. Such limitations are weapons of defence which a defendant may use if he wishes — they do not extinguish the cause of action — see authorities cited in Halsbury, 2nd Ed., Vol. XX p. 777. In this case the Defendant has not employed the weapon.

It may be useful to observe that in England such a defence has to be pleaded. At the time when this action was commenced the Civil Procedure Rules were not in force, but we now have Rule 113, the marginal note to which is misleading.

Submissions (b) and (c) raise once again the problem presented by Article 46 of the Order-in-Council. In Akel *v.* Alayyan, P.L.R., Vol. 5, p. 319, I considered the authorities and expressed the view that they laid down the proposition that a *lacuna* or ambiguity in any branch of the law of this Territory can be made good by resort to English Common Law, subject to the proviso to the article. The other judges in that case, and another division of this Court in Civil Appeal 191/37, seem to me to have extended that proposition, and while I have followed the decisions of this Court as to liquidated damages and penalty — as I am bound to do — I still adhere to the view which I expressed.

The law of this Territory was discussed at length in the Municipality of Haifa *v.* Khoury, P.L.R., Vol. I, p. 724. It has to some extent been amplified by Section 43 of the Criminal Code Ordinance, and although that Ordinance repealed the Ottoman Penal Code, *diyet* has since its promulgation been awarded — see Application for provisional attachment, Cr. Ap. 20/37, Nechama Zwanger and another *v.* Reuben Scheinzwit.

In the Haifa case this Court held —

> "The District Court found as a fact that the Municipality dug the trench and that Dr. Khoury fell into it. They also found that

there was a liability upon the Municipality to make arrangements to protect the public from any danger, which they did not do.

"There was evidence before the District Court upon which they could lawfully find the facts they did., and Appellants' appeal against these findings must fail."

and this Court was presumably satisfied that there was a liability on the Municipality.

In the result I take the District Court to have held that the present case does not fall within the authority of the Municipality of Haifa v. Khoury, and I agree that the failure to erect gates gives no cause of action to the Plaintiff under Palestinian law. Is there any *lacuna* which should be filled by reference to English Common Law? It may be that there is, but it does not seem to me necessary to consider the question now, as I know of no principle of the English Common Law whereby the Respondent could recover by reason of the absence of gates, the obligation to fence railways and to erect gates in England being statutory.

In my judgment the appeal should be allowed, and the judgment of the District Court set aside.

Delivered this 10th day of May, 1939.

Chief Justice.

JUDGMENT.

Frumkin, J.

The Plaintiff in this case sued for damages caused to his person at a collision between a car in which he was travelling and a train run under the control of the General Manager of Railways. He succeeded in the Court below, and the Attorney General, on behalf of the Railways Administration, appealed.

The Junior Government Advocate, instead of facing the Plaintiff's claim on its merits put up a number of technical objections mainly to the effect that English law does not apply and that Plaintiff has no remedy under the law of Palestine.

The first argument on this line is that under the Mejelle no damages can be awarded for damages caused to the person. This is so. As more fully set out in my judgment in Haifa Municipality *v.* Khoury, (C.A. 88/30, P.L.R., Vol. I, p. 728), the *Mejelle* does not deal with damages of that nature. But this argument goes against the Appellant. If the Mejelle does not apply to the case and if there is no other

Palestine law on the subject, that is just a good reason for introducing English law.

I fail to appreciate the further argument that under the Mejelle it is the driver of the train who is liable and no the General Manager of Railways. Whatever principles there are contained in the Mejelle relating to vicarious liability, it could affect liability to damages to property but not to damages to the person not dealt with at all in the Mejelle.

The Junior Government Advocate then submitted that if the Respondent has no remedy under the Mejelle he could sue for Dyet, another reason why to his mind English Law should not be resorted to. The reply to this argument is twofold.

Firstly there are at present only two references to Dyet, as distinct from compensation in lieu of Dyet, in the law in force in Palestine, neither of them conferring the actual right for an award of Dyet.

The first reference is to be found in Section 6(1) of the Civil and Religious Courts (Jurisdiction) Ordinance which confers upon Civil Courts jurisdiction in certan cases of applications for Dyet. But that is all what this sub-section does: conferring jurisdiction. In order to enable the Civil Court to exercise its jurisdiction, a party claiming Dyet will have to rely on substantive law conferring upon him a right to be awarded Dyet. Such rights as existed in the Ottoman Penal Code has been extinguished with the repeal of the Code.

The second reference to Dyet is to be found in the Criminal Code Ordinance, 1936, where it is said in Section 43(c): "Nothing in this section shall affect rights to Dyet", again, a right to Dyet has to be established by some substantive law applicable in the Civil Courts of this country conferring such rights. As more fully set out in Haifa Municipality *v.* Khoury and Palestine Mercantile Bank Ltd. *v.* Fryman and others (C.A. 140/37 P.L.R. 5, p. 165) Moslem law as such is not a part of the legal system of Palestine and only such parts of it became applicable as have been embodied in the Civil Legislation by special Imperial Trade or otherwise.

The second answer to the argument as regards Dyet is that even under Moslem law the question of Dyet does not arise at all in this case. Dyet in Moslem law is a short of indemnity awarde to the heirs of a deceased person against the person who caused his death. In its broader sense this term would include also "Irsh" meaning indemnity

awarded for the loss of a member. But the indemnity sued for by the Respondent is not for the loss of a member of his body, but for damages for temporary inability to work of a general character.

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

But in order to succeed under Common Law the Respondent must prove negligence on the part of the Railways. This he failed to do. The only negligence on which the Judgment of the Court below is based is failure on the part of the Railway Authorities to erect gates. In England this is a statutory duty. There is no similar statutory obligation in Palestine. On the contrary in so far as the Palestine Legislature deals with the duty to take care in avoiding a collision between trains and cars such duty is rightly or wrongly imposed upon drivers of cars and not upon the Railway Administration. Rule 18(2) of the Road Transport Rules (Cap. 128) provides that —

> "The driver of a motor vehicle shall, before passing over any railway level crossing not protected by a gate or barrier, cause such motor vehicle to stop.

True the Respondent was not himself driving the car, but this fact does not shift the duty on the Railway Authorities.

The Appeal must therefore be allowed and the Judgment of the District Court set aside.

Delivered this 10th day of May, 1939.

Puisne Judge.

CIVIL APPEAL No. 39/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF:

1. Theodore Iskander Knesevich,
2. Henry Iskander Knesevich,
3. Nimer Abu Khadra in his capacity an heir of, and on behalf of the estate of, Hassan Hassan. APPELLANTS.

v.

1. His Excellency the High Commissioner of Palestine,
2. Al Khoury Nimatallah El Maurani. RESPONDENTS.

Land Settlement Appeals — Non payment of fees — Land (Settlement of Title) Procedure Rules, 1928, rule 20 — Court Fees Rules, item 37 — Fees payable at latest before appeal is heard — Competence of Court where not paid, C.A. 15/30, C.A. 254/23, C.A. 141/35, C.A. 113/38, C.A. 20/38, C.A. 113/38, C.A. 155/38.

In dismissing an appeal from a judgment of the Land Court of Jaffa (in its appellate capacity) dated the 18th March, 1939: —

HELD: 1. Fees are payable on appeals from Land Settlement Officers, under Item 37 of the Court Fees Rules.

2. There is no period set out within which the fees should be paid. They must, though, at the latest, be paid before the appeal is heard and possibly at the time the appeal itself is lodged.

3. (Following C.A. 254/23, C.A. 15/30, C.A. 141/35, C.A. 113/38; distinguishing C.A. 20/38,. C.A. 155/38). The Land Court was correct in dismissing the appeal on the ground that the proper fees had not been paid.

FOLLOWED: Muzaffar *v.* Dirhalli, C.A. 15/30 (P.L.R. 625, C. of J. 910; Taji *v.* Hakib, C.A. 254/23); Kantorowitz & ors. *v.* Mizrahi, C.A. 141/35 (1 Ct.L.R. 15, Ha. 15.x.36); Hilou & ors. *v.* Haski, C.A. 113/38 (1938, 1 S.C.J. 360).

DISTINGUISHED: Akel *v.* Alayan, C.A. 20/38 (1938, 1 S.C.J. 350) minority judgment. Ramadan & an. *v.* Katteb & Bros., C.A. 155/38 (1938, 2 S.C.J. 63).

ANNOTATIONS: See also C.A. 36/38 (1938, 1 S.C.J. 246) and annotations, and on land settlement appeals generally, C.A. 3/39 (*ante*, p. 153).

FOR APPELLANTS: Atallah.

FOR RESPONDENT No. 1 — Akel.

No. 2 — Not present — not served.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jaffa, dated 18th March 1939, dismissing an appeal from the Land Settlement Officer on the ground that no fees had been paid on the appeal to that Court and therefore there was no valid appeal before it.

Leave to appeal was granted by the Settlement Officer and LP. 1 was paid by the Appellants on lodging the application for leave. No further fees have been paid since.

Several interesting points arise in this case, and I will deal with them in turn. First of all Mr. Atallah for the Appellants has argued that under the rules in force when the appeal in the Land Court was heard, there was no period fixed within which the appeal should be made, and therefore, there was no period within which fees, if payable at all, should be paid. He says that the Civil Procedure Rules of 1938 were not applicable, and in that we agree, and that there is nothing in the Civil Procedure Rules of 1936 nor in the Land Settlement Ordinance which prescribes any period within which an appeal should be made.

His next point is that no fees are prescribed at all for appeals from Land Settlement Officers to the Land Court, and no scale of fees is laid down for appeals under the Land Settlement Ordinance, and that under the Court Fees Rules of 1935 the only item which could be applied is Item 37, and he says that that item is not in fact applicable.

Now Mr. Akel for the Attorney General has called our attention to Rule 20 of the Land (Settlement of Title) Procedure Rules of 1928 which are to be found in volume 3 Drayton, p. 1803.
Rule 20 states —

> "Where leave to appeal is granted and no valuation of the land claimed has been made under section 69(2) of the Land (Settlement of Title) Ordinance, the Commissioner of Lands shall, upon the application of the appellant, estimate the value of the land: fees of appeal shall be paid upon the value as estimated."

It seems to us beyond doubt that fees on appeals from Land Settlement Officers are in fact payable, and that such fees should be assessed under Item 37 of the Schedule to the Court Fees Rules of 1935, since no valuation has been made.

This item reads —

> "On lodging notice of appeal (or cross appeal) where the value of the subject matter of the judgment appealed from is not expressed in money"

and the fees laid down in the Schedule for appeals to District and Land Courts is LP. 2.

It is clear to us, therefore, that a fee of LP. 2 was payable in respect of the appeal to the Land Court. As for the period within which the fees should be paid we agree that there was no period set out within which the fees should be paid. They must, though, at the latest, be paid before the appeal is heard, at any rate before the appeal should be heard, and possibly at the time the appeal itself is lodged. It is immaterial in this

case to decide which of these two theories is the correct one, since the correct fee has in any case not been paid up till now.

We now come to the point that the prescribed fee not having been paid in time, was the Land Court correct, therefore, in dismissing the appeal? There are a large number of cases on this point and until recently it was always decided that if the proper fees had not been paid the case could not be heard. The first reported case is Sheikh Abdel Qader el-Muzaffar *v.* Abdel Hamid Dirhalli — Civil Appeal 15/30 P.L.R. 1, p. 625. This was a case in which the last day for entering the appeal and paying the fees was a Friday. In Jaffa on Fridays the offices and the Cash Registers of the District Court were closed. A clerk who was not authorised to receive money took the money for the fees and paid them over to the Chief Clerk or Cashier on a subsequent date. It was held that the fees had not been paid in time, and therefore the appeal was not made within time. That case refers to another appeal which it adopts, namely, Ibrahim Hakki El-Taji *v.* Ali El Nakib — Civil Appeal 254/23. The next case is Elazar Kantarowitz and others *v.* Shalom Yohanan Mizrahi — Civil Appeal No. 141/35. Following Muzaffar *v.* Dirhalli this Court held that the correct fees not having been paid within the prescribed time the appeal must be dismissed. Again in Fatmeh Bint Ahmad Mustafa el Hilou and others *v.* Jacob Haski — Civil Appeal 113/38 — this Court following Civil Appeal No. 141/35 again held that where the correct fees have not been paid within the prescribed period the appeal must be dismissed.

We now come to Akel *v.* Abu Alayan — Civil Appeal 20/38 where the learned Chief Justice in a minority judgment said that he did not think that because fees had not been collected the Court had no jurisdiction. The other learned judges composing the Court did not deal with the point. In that case however the original action had been struck out and the learned President in ordering it to be re-instated ordered that it should be restored without payment of fees. This he had no power to do since only a Court can give this order. We think that this case is distinguishable therefore from the other cases to which we have referred in this judgment on the ground that it would be inequitable to penalise a party who had acted upon the order of a President in good faith, when in fact the President was wrong in his application of the law.

Finally we come to Abdul Rahman Ramadan and another *v.* Jabbour Hanna el Katteh and Bros. — Civil Appeal 155/38. In that case this Court, which incidentally included my brother Abdul Hadi and myself, followed the judgment of the Chief Justice in Civil Appeal 20/38 —

Zahra Yehia Akel *v.* Khalil Ibrahim Abu Alayan, and held that non payment of fees did not deprive the Court of its jurisdiction. This case however resembles Civil Appeal 20/38 inasmuch as the case had originally been struck out and fees were not paid when the action was renewed, and the same consideration should apply, and the point also was not necessary for the decision of the appeal which was dismissed on other grounds.

We think therefore that, following this long series of decisions dating back to the year 1923, under the law applicable when this appeal was before the Land Court of Jaffa, that the Land Court was correct in dismissing the appeal for the grounds given by it, namely that proper fees had not been paid.

For these reasons we think that this appeal must be dismissed with costs to the first Respondent, to include LP. 15 fees for attending the hearing.

Delivered this 16th day of May, 1939.

British Puisne Judge.

CIVIL APPEAL No. 49/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Mrs. Hanna Glueck. — APPELLANT.

v.

Leo Glueck. — RESPONDENT.

Maintenance — Foreign law to govern case where parties are foreign nationals — Austrian law — Physical and mental ill treatment — Evidence.

In allowing an appeal from a judgment of the District Court of Jaffa sitting at Tel-Aviv, dated 17th day of March, 1939, and in remitting the case to the District Court with directions: —

HELD: There had been evidence before the lower Court that the Appellant had been ill treated by her husband and no evidence to the contrary was adduced by the Respondent. This constituted physical ill treatment which entitled the Appellant, in accordance to Austrian law, to maintenance.

ANNOTATIONS: See the following decisions on maintenance: H.C. 28/38 (1938, 1 S.C.J. 373) and annotations, H.C. 44/38 (*ibid.* 405) and annotations.

FOR APPELLANT: Smoira.

FOR RESPONDENT: Kleinzeller.

JUDGMENT.

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

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

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

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

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

In the result we think that the appeal will have to be allowed, and

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

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

Delivered this 23rd day of May, 1939.

British Puisne Judge.

CIVIL APPEAL No. 27/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

Ihud Regev Aguda Cooperative Lehovala Ltd. APPELLANT.

v.

Eliahu Hihinaschvilli. RESPONDENT.

Appeals — Hearing appeals from Magistrate's — to District Court — C.P.R. 337(c) — On failure of appellant to appear, Court may adjourn or hear the appeal but not dismiss it — Discretion of Court to grant adjournment upon failure of advocate to appear — Practice — Application to Registrar to fix amount to be paid into Court in lieu of bond — Need not be made by motion — Other party may move the Court — C.R.R. 327, 305, 329.

In allowing an appeal from a judgment of the District Court sitting in Tel-Aviv, in its appellate capacity, dated the 23rd of February, 1939, and in setting aside the judgment of the District Court: —

HELD: 1. The appeal having been listed for hearing in open Court and the Respondent having appeared, two courses were open to the Court in the absence of the Appellant: either to hear the appeal or to adjourn it.

2. Rule 305 of the Civil Procedure Rules applies only when there is no express provision and rule 327 contemplates an application in writing and not a motion. A Respondent can then move the Court, if he so desires under Rule 329.

ANNOTATIONS: Compare C.A. 155/38 (1938, 2 S.C.J. 63) where it was held that an application for extension of time must comply with Rule 306; and C.A. 191/38 (1938, 2 S.C.J. 141) C.A. 235/38 (*ibid.* 231) — application for leave to appeal must be made by motion.

In C.A. 192/38 (*ibid.* 144, where the Appellant's advocate failed to appear, the Respondent's advocate was heard on the written grounds of appeal.

On the discretion of the Court to grant or refuse an adjournment, *vide* C.A. 139/37 (2 Ct.L.R. 97); C.A. 192/38 (*supra* and at p. 230) and C.A. 222/38 (*ibid.* 184) and note 1 thereto.

FOR APPELLANT: Polonsky.

FOR RESPONDENT: M. Goldberg (by delegation).

JUDGMENT.

This is an appeal by leave from a decision of the District Court sitting at Tel-Aviv, dismissing an appeal from a decision of a Magistrate's Court. It appears that the appeal had been listed for hearing in open Court and that Respondent appeared, but the Appellant's advocate did not appear as he was engaged elsewhere.

Under Civil Procedure Rule 337(c) two courses were open to the Court, *i. e.* to hear the appeal or to adjourn it. The Court, however, dismissed the appeal without hearing it; this it had no power to do.

I would like to take this opportunity to observe that if an advocate does not appear on an appeal, it is a matter for the Court's discretion, having regard to the circumstances, if an adjournment should be granted.

An important point of practice has been raised by the Respondent before us. It appears that an application was made to the Chief Registrar, under Civil Procedure Rule 327, to fix the amount to be paid into Court, and the Registrar acted under that rule. It is argued that as that rule speaks of the notice of appeal being accompanied by an application, Rule 305 applies, and that the Appellant should have proceeded by motion. That rule clearly only applies when there is no express provision, and I think Rule 327 clearly contemplates an application in writing. No hardship to a respondent can arise from this interpretation, as he can, if he so desires, move the Court under Rule 329.

This point therefore fails, and the appeal will be allowed, and the

judgment of the District Court set aside. The costs of this appeal will be costs in the cause.

Delivered this 10th day of May, 1939.

Chief Justice.

CIVIL APPEAL No. 162/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

1. Louis Mubarak Jabrish,
2. Heirs of the late Mary Mubarak Jabrish:
   (1) Louis M. Jabrish,
   (2) Anton M. Jabrish. — APPELLANTS.

v.

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

Contract for sale of land — Default by vendor — Measure of damages, C.A. 217/38 — C.A. 46/35, C.P.C. Art. 112, Mejelle 86, C.A. 122/36, C.A.101/36, interest and damages.

In allowing an appeal from a judgment of the District Court of Jerusalem, dated the 19th May, 1938, and in entering judgment for the Plaintiff (Appellant) on the amount paid and interest thereon:

HELD: 1. There was no evidence in the District Court that the value of the land at the date of the breach exceeded the contract price by 60 mils per square pic; on the contrary, the evidence showed that there was no change in value.

2. (Folowing C.A. 46/35, C.A. 122/36, C.A. 101/36). Where money bas been paid on account of the purchase price of land, and the

Court orders it to be repaid, it will, in the absence of express agreement, carry interest at the legal rate from the date of action brought — but where a sum is awarded as damages, such sum will not carry interest.

FOLLOWED: C.A. 217/38 (1938, 2 S.C.J. 221 & *ante*, p. 149). C.A. 46/35 (C. of J. 1934—6 474, P.P. 25.III.36, Ha. 11.VI.36). C.A. 122/36. C.A. 101/36 (1937, 1 S.C.J. 195, C. of J. 1934—6 875).

FOR APPELLANTS: Levitsky.

FOR RESPONDENTS: Budeiri.

JUDGMENT.

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

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

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

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

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

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

In Civil Appeal 46/35, reported in Rotenberg, Vol. VIII, p. 474, where the purchasers had deposited certain sums on account of the price of land, and the vender had refused to complete, and there

was a stipulation for the payment of a fixed sum as damages, this Court held —

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

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

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

> "We enter judgment for the Plaintiff for the sum of LP. 7,600.— being the amount of the consideration stated in the contract, and for the sum of LP. 20.000 being the stipulated damage, together with interest at 9 per centum on both these sums as from date of action."

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

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

> "Another point in the cross-appeal is that the Respondent is entitled to interest on the amount paid by him from the date of his counter-claim. I held that on this point he must succeed, as this amount is not damages but money actually paid. To this extent only the cross-appeal will be allowed and the judgment varied by ordering the Appellant to pay to the Respondent LP. 160, plus interest at the rate of 9%, from 28th July, 1935, until date of payment."

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

The appeal will be allowed, the judgment of the District Court varied by entering judgment for the Plaintiffs for LP. 156, with legal

interest from 19.1.35 until payment with costs, and Court fees on that amount with advocate's fees LP. 5.

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

Delivered this 23rd day of May, 1939.

Chief Justice.

Frumkin, J.:

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

Puisne Judge.

Abdul Hadi, J.:

I concur with the judgment of the Chief Justice.

Puisne Judge.

HIGH COURT No. 8/39.

IN THE SUPREME COURT

BEFORE: L. A. W. Orr (Chief Registrar).

Moshe Smilansky. — APPLICANT.

v.

1. Subhi Khursheed,
2. Izhak Khursheed. — RESPONDENTS.

Taxation — Chief Registrar — No scale of costs applicable to High Court.

In dealing with an application for the taxation of costs awarded to the Applicant against the Respondent in this case: —

HELD: In the absence of a scale of costs to apply to the High Court, costs could not be taxed as the scale under the Civil Procedure Rules could not be "borrowed". Only disbursements could therefore be allowed.

ANNOTATIONS: Earlier proceedings, p. 110, *ante*.

FOR APPLICANT: Scharf.

FOR RESPONDENTS: Cattan, Germanus.

ORDER:

Although I am taxing officer of the Supreme Court as a High Court, I am not given any "machinery" with which to tax. That is to say, in the absence of a scale of costs which apply to the High Court I cannot tax the costs, as taxing means checking the items with a scale of costs and on being satisfied that such items are correct and the services have been performed, giving a certificate of taxation or reducing items if incorrect and giving a certificate of taxation for the reduced amount. I obviously cannot "borrow" the scale from the Civil Procedure Rules, 1938, as Mr. Scharf suggests. I therefore rule that I can only tax the disbursements in this case.

Item 3 of disbursements I disallow: it is a convenience.

Cattan objects item 4 disbursements. Could be charged in taxation. As it was necessary to serve Chief Execution Officer to show him that Rule *Nisi* had been discharged I allow this. Cattan objects to last item of disbursements, unnecessary could have been endorsed on judgment. Sharf: Court Fees Rules allow item for filing application for taxation of costs.

I allow the item.

I certify that costs taxed and allowed at LP. 2.320; (*sic*)

Mr. Scharf will, of course, be entitled to his LP. 10 for appearing in the High Court, although I have deducted it as there was no necessity to include it in the bill.

Delivered this 10th day of May, 1939.

Chief Registrar.

CIVIL APPEAL No. 236/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

Elazar Eliashar. APPELLANT.

v.

Wardeh Khayat. RESPONDENT.

Assessment of damages.

Judgment in favour of Appellant, on appeal from a judgment of the District Court, Jerusalem, dated the 4th day of October, 1938, after assessment by the District Court of the amount of the damages.

ANNOTATIONS: This case concludes the proceedings reported *ante*, p. 68.

JUDGMENT:

This case came back to us from the District Court after it had determined the question of fact as put forth to it by this Court. Upon hearing the advocates for both parties at considerable length, we allow the appeal, set aside the judgment of the Court below and give judgment for the Appellant in the sum of LP. 600.— with costs here and below and LP. 25.— fees for attending the hearing on both appeals.

Delivered this 27th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 52/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Barclays Bank (D. C. & O.). APPELLANT.

v.

1. Afifeh Odeh Hallak,
2. Katrina Abou Risek,
3. Malek Elias Hallak,

4. Ragi Elias Hallak,
5. Badia Elias Hallak,
6. Julia Elias Hallak,
7. Izsat Amin Elias Hallak,
8. Odeh Hanna Hallak,
9. Younis Hanna Hallak,
10. Tewfik Hanna Hallak,
11. Izmiraghada Hanna Hallak,
12. Bughdama Hanna Hallak,
13. Mari Hanna Hallak,
14. Nijmeh Hanna Hallak. RESPONDENTS.

Interpleader — No action brought.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 14th March, 1939: —

HELD: The District Court was correct in dismissing the Appellants' application by way of interpleader as no action had been brought against them and the District Court was not satisfied that any action would be brought against them in that Court.

ANNOTATIONS: On interpleader, see *Digest*, Vol. XXIX, pp. 450 *sqq*.

FOR APPELLANT: Weinshall.

FOR RESPONDENTS: No. 1 — Atallah & Naser.
Nos. 2–14 — not present — served.

JUDGMENT.

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

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

Delivered this 12th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 40/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland and Khayat, JJ.

IN THE APPEAL OF:

The Syndic in Bankruptcy of the Firm

S. N. Khoury APPELLANT.

v.

Woolf Slavousky. RESPONDENT.

Specific performance — Readiness and willingness — Failure to comply with order of Court — C.A. 16/39 — Readiness and willingness must be at time when claim is made — Ex gratia extension of time by Land Court not too short.

In dismissing an appeal from a judgment of the Land Court of Haifa, dated the 21st March, 1939: —

HELD: 1. It had already been held in C.A. 16/39 that the Land Court was entitled to make the order to pay money into Court.

2. When a person states that he is ready and willing to pay money when claiming a certain piece of land, he must be ready and willing at the time that he makes the claim, not on some future date.

3. The extension of one month granted by the Land Court within which to pay the money was an *ex gratia* extension of time, as Appellant should have been ready and willing to pay the money when the claim was made. This period could therefore not be held to be too short.

FOLLOWED: C.A. 16/39 (*ante*, p. 96).

ANNOTATIONS: For previous proceedings in this case, *vide* C.A. 16/39 (*supra*) and annotations thereto.

FOR APPELLANT: Sanders.

FOR RESPONDENT: Shapiro.

JUDGMENT.

We need not trouble you, Mr. Shapiro.

This is an appeal from a judgment of the Land Court of Haifa dismissing an action brought by the present Appellant, on the ground that, by non-compliance with a previous order of the Land Court to pay into the Court the sum of LP. 5.750 in an action for specific performance, the Appellant was not ready and willing to perform the contract and therefore the action failed. This case came before us on two previous occasions. On the second occasion the present Appellant applied for

leave to appeal against the order of the Land Court ordering him to pay this sum of money into Court before proceeding with his action. This Court after a full argument refused leave to appeal. The case then went back to the Land Court which gave judgment, as I have previously stated, dismissing the Appellant's claim.

Three points have been raised in this present appal. The first one is that the Land Court was not entitled to make the order to pay the money into Court, but that point has already been decided in The Syndic in Bankruptcy of the Firm S. N. Khoury *v.* Woolf Slavousky, Civil Appeal 16/39, between the same two parties in which this Court confirmed the order of the Land Court.

The second ground of appeal is that the Appellant is ready and willing to pay the money, not however at the time ordered by the Land Court, but at his own convenience, if I may say so, if and when transfer should be effected. This of course is not the readiness and willingness which the law requires. When a person states that he is ready and willing to pay money when claiming a certain piece of land, he must be ready and willing at the time he makes the claim, not on some future date, one month, six months, one year hence. That point fails.

The third and last ground of appeal is that the order of the Land Court giving the Appellant one month in which the Appellant should pay the sum into Court, was too short, in view of the present conditions in Palestine. This ground I am afraid has no more substance in it than the other two grounds. It introduces again the question of readiness and willingness to pay. If people are claiming certain land they should be prepared to pay the price at the time they make that claim. One month was an *ex gratia* extension of the time and we cannot, under any circumstances, say that the period was too short. The Land Court might well have made an order to pay between 5 days or 7 days, and that might have been equally right. The result therefore is that the appeal must be dismissed and the Appellant must pay the costs of the appeal to the Respondent to include a fee of LP. 15— for attending the hearing.

Finally we would express the hope that this long drawn out bankruptcy should be brought to an early determination, so that some sum will be available to be distributed among the numerous creditors.

Delivered this 13th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 57/39

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

Abd Mustafa Khalaf, on behalf of himself and on behalf of the Estate of Musallam Khalaf. APPELLANT.

v.

1. Said Muhammad Said El-Ja'uni,
2. Majida Fawzi Ali El-Ja'uni,
3. Vijdan Fawzi Ali El-Ja'uni. RESPONDENTS.

Land settlement — Proof of possession — Appeal to Court of Appeal only on questions of law — Land (Settlement of Title) Ordinance, Sec. 64(2) — Limitation of judgments — Judgment may be used in evidence.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, in its appellate capacity, dated the 6th May, 1939: —

HELD: The principle of limitation relating to judgments is that after a certain period a judgment cannot be put into execution or sued upon. But there is nothing to prevent a party in an action to produce in evidence an old judgment bearing upon the rights claimed in that action.

ANNOTATIONS: Earlier proceedings: C.A. 3/39, *ante*, p. 153.

FOR APPELLANT: Cattan.

FOR RESPONDENTS: Kamal.

JUDGMENT:

Frumkin, J.:

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

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

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

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

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

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

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

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

Delivered this 27th day of June, 1939.

Puisne Judge.

I concur.

Chief Justice.

I concur.

Puisne Judge.

HIGH COURT No. 22/39.

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

BEFORE: Trusted, C.J. and Frumkin, J.

IN THE APPLICATION OF:

Zussman Shtark. PETITIONER.

v.

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

Matter of marriage, S.T. 1/28, C.A. 62/37, Warrender v. Warrender, Hyde v. Hyde, Wilson & Wilson, Niboyet v. Niboyet, P.O. in C.53, 54, 55. Execution of judgment of Rabbinical Court — Constitution of Rabbinical Court of Appeal, Jewish Community Rules, 4(2), 7, H.C. 27/36, H.C. 11/39 — Rabbis must be members of the Rabbinical Council — Existence of marital relations — P.P. in C. 51, 53, C.A. 62/37, meaning of "marriage" — Sanctification and subsequent cohabitation may give rise to obligations in Jewish Law — Test to determine whether marital relations exist — Uncertainty in judgment — Quaere as regards estoppel.

In dismissing an application for an order to issue directed to the first Respondent to show cause why he should not refrain from executing the judgment of the Rabbinical Court of Appeal, dated the 21st *Iyaar*, 5698, in Execution file No. 10337/38, Tel-Aviv: —

HELD: 1. (Following H.C. 27/36, H.C. 11/39). Under Jewish Law, a minimum number of three judges is necessary to form a quorum of a Rabbinical Court, whether sitting in first instance or on appeal. The signatories of the judgment were members of the Rabbinical Council.

The judgment in question was therefore a judgment issued by the Rabbinical Council in its capacity as Rabbinical Court of Appeal.

2. (Not following C.A. 62/37). The first point in issue before a Religious Court in determining a dispute as to marriage between the parties within their jurisdiction, would be to decide whether or not there was a marriage contracted between the parties, according to the law applicable before that Court. The English Law meaning of "marriage" was therefore irrelevant.

3. The Appellant sanctified the Respondent and cohabited with her. Although the procedure of sanctification was not performed in the presence of a Congregation and was not followed by a *ketuba*, the relationship gave rise to certain rights under Jewish Law.

The Rabbinical Courts have jurisdiction to determine whether there has been a marriage. One of the tests to be applied is whether or not the ties between the parties can be dissolved otherwise than by a divorce and in the present case the Rabbinical Courts found that a divorce was necessary. The Rabbinical Courts therefore acted within their jurisdiction in this matter.

4. The judgment was not void for uncertainty.

Per Trusted, C.J.:

1. (Following Warrender *v.* Warrender, Hyde *v.* Hyde, Wilson Wilson (*dictum* of Lord Penzance) Niboyet *v.* Niboyet). The Order in Council when it refers to marriage as a matter of personal status, means marriage in accordance with the law of the community concerned.

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

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

FOLLOWED: Hary *v.* Hary, H.C. 27/36 (1937, 1 S.C.J. 386, C. of J. 1934—6 745). Hazan *v.* Hazan, H.C. 11/39 (*ante*, p. 245).

NOT FOLLOWED: Haddad *v.* Haddad, C.A. 62/37 (2 Ct.L.R. 133, P.P. 6.VIII.37).

CONSIDERED: C.A. 62/37 *(supra);* Alpert *v.* C.E.O. & an., S.T. 1/28 (P.L.R. 395, C. of J. 126); Warrender *v.* Warrender, *Digest*, XI, p. 333, No. 218; Hyde *v.* Hyde, *ibid*, XXVII p. 461, No. 4803; Wilson *v.* Wilson, (*dictum* of Lord Penzance) *ibid*, XI, p. 422, No. 884; Niboyet *v.* Niboyet, *ibid*, p. 423, No. 894.

ANNOTATIONS: See annotations to H.C. 11/39 *(supra)*, and H.C. 49/32 (C. of J. 1610), C.A. 49/39 (*ante*, p. 258).

FOR PETITIONER: Goitein.

FOR RESPONDENTS: No. 1 not present — served.
No. 2 Gorodissky.

JUDGMENT:

Trusted, C.J.:

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

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

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

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

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

> "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon all the parties, in all cases, referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the cases which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. The honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

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

As Articles 53 and 54 of the Order-in-Council draw a distinction

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

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

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

Delivered this 6th day of June, 1939.

Chief Justice.

Frumkin, J.:

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

> "Whereas it was found by us through the evidence produced by witnesses that there was sanctification (*Kiddushin*) in accordance with our religion between these two and that the neighbours took them to be husband and wife; and whereas it was found on the other hand that there was no completed marriage (*Nissuin Gemurim*) between the two, now therefore we decide:
>
> a) to recognise the Plaintiff Mrs. Hanna Shtark, the daughter of Abraham Sokol, as the betrothed of the Defendant Mr. Zussman Shtark.
>
> b) to hold the Defendant liable to pay to the said Plaintiff at the time of her receiving the bill of divorcement from him the sum of LP. 10.— as damages.
>
> c) a delay of one month is given to the Defendant Zussman Shtark to deposit the sum of LP. 10.— in our office to the

credit of his said betrothed mentioned in paragraph b) of this decision and to deliver to her the bill of divorcement.

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

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

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

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

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

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

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

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

Rule 7 reads as follows:

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

No rules have been issued, at any rate, in the sense that they have been brought to the notice of the public.

It is admitted that had all the eight members of the Council signed the judgment, it would be a good judgment in spite of its being headed

Chief Rabbinate and not Rabbinical Council, the Chief Rabbis being the heads of the Rabbinical Council. Two questions, therefore, arise:

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

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

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

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

The next point taken by Mr. Goitein on behalf of the Applicant is that the Rabbinical Courts, whether the Court of first instance of Tel-Aviv or the Court of Appeal of Jerusalem, have no jurisdiction in the matter in dispute between the parties since there was no marriage proper between them. A marriage is either complete or non-existent. The Rabbinical Courts derived their jurisdiction from the Palestine Order-in-Council 1922, Section 53, and in considering whether or not the Court has jurisdiction in a matter of marriage it must, it is argued, consider "marriage" as understood in English Law. By analogy he referred to Haddad *v.* Haddad, C.A. 62/37, where the Court, in dealing with article 51 of the Palestine Order-in-Council 1922, accepted the terms of alimony and maintenance in the meaning of English Law.

I am unable to accept this proposition. There is certainly a difference between maintenance and alimony which provide for monetary relief and marriage which goes to the root of the matrimonial relations between the parties. If it will be said that Religious Courts have jurisdiction

in matters of marriage only when there is marriage within the meaning of English Law, it would result in the fact that Religious Courts would hardly be in a position to deal with matters of marriage at all; they certainly have no jurisdiction to deal with, say, civil marriages. The first point in issue before a Religious Court in determining a dispute as to marriage between the parties within their jurisdiction, would be to decide whether or not there was a marriage contracted between the parties, contracted obviously according to the law applicable before that Court. It must to my mind, therefore, be left to the Court of the Community to decide whether under the law of the Community there was a marriage or not.

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

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

The Rabbinical Courts have certainly no jurisdiction when no marriage at all took place between the parties but whether or not there was a marriage, complete or incomplete, is a matter for the Rabbinical Court to decide. One of the tests applicable in determining the question whether or not a marriage subsists between two parties is, whether or not the ties between them can be dissolved otherwise than by a divorce. In this case the Rabbinical Courts have found that a divorce is necessary. Hence there was a marriage, and I am, therefore, of opinion that the Rabbinical Courts, both the Court of First Instance and the Court of Appeal acted within their jurisdiction in this matter.

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

I do not think there is anything uncertain in the judgment. The effect of the judgment is that the Applicant was given two alternatives, either

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

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

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

Delivered this 6th day of June, 1939.

Puisne Judge.

CIVIL APPEAL No. 53/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland and Khayat, JJ.

IN THE APPEAL OF:

Zahara Haybi. — APPELLANT.

v.

Habiba Levy Bassani. — RESPONDENT.

Claim to land — Relinquishment of claim to parcel of land supported by consideration, not an illegal disposition — Evidence against kushan — Equitable rights to land, Land Courts Ordinance, Sec. 8(2).

In dismissing an appeal from a judgment of the Land Court of Jaffa, sitting at Tel-Aviv, dated the 20th April, 1939 : —

HELD: Land Courts are directed by Section 8(2) of the Land Courts Ordinance to have regard to equitable as well as legal rights to land. In this case the Appellant received LP. 10 in relinquishment of her right to the 16 square metres. She accepted that situation and as between her and the Respondent that transaction could not be upset. The provisions of the Land Transfer Ordinance did not apply.

FOR APPELLANT: Persitz.

FOR RESPONDENT: Wiesel.

JUDGMENT.

We need not trouble you, Mr. Wiesel.

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

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

Delivered this 14th day of June, 1939.

British Puisne Judge.

HIGH COURT No. 32/39.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF:

Fahimeh Fakhri Bey. — PETITIONER.

v.

1. The President District Court Haifa, acting as Chief Execution Officer,
2. Giuseppe Sinigaglia,
3. Guillermo Feldman. — RESPONDENTS.

Sale of Mortgage — Extension — Proper Court to grant extension — Proceedings revived after expiration of extension — No need for further publications.

In dismissing an application for an order to issue to the first Respondent calling upon him to show cause why his order dated the 10th of June, 1939, should not be set aside, and why the Petitioner should not be given a period of three months in order to enable her to conclude certain negotiations being made in Syria for receiving a loan for the purpose of discharging the mortgage debt: —

HELD: 1. The first extension had been given to Applicant to enable her to apply to the Land Court. Had she so applied, it is the Land Court which would have the power to order postponement and the High Court will not assume jurisdiction when another Court has jurisdiction.

2. After the expiration of the postponement granted by the High Court the matter revived at the same stage at which it left off and there was, therefore, no reason, no legal liability on the Chief Execution Officer to issue any further notice whatsoever.

ANNOTATIONS: Earlier Proceedings in this case (H.C. 64/38) are reported in 1938, 2 S.C.J. 169.

On the refusal of the High Court to interfere where another remedy is open to Applicant, see H.C. 47/38 (1938, 2 S.C.J. 49) and annotations, H.C. 60/38 (*ibid.* 96) and notes 2—3.

FOR PETITIONER: Moghanam & Elia.

FOR RESPONDENTS: *Ex parte.*

ORDER:

We both unanimously agree that no further extension can be given by this Court.

The Petitioner had six months granted to her in November last for the purpose of deciding the validity of the assignment of the mortgage in the Land Court. So far as we know, though Mr. Moghanam has told us that she has made an application, no effective steps seem to have been taken in the Land Court. If she has in fact made an application to the Land Court, then it is the Land Court which has the power to order a postponement of the sale and it is the rule in this Court not to assume jurisdiction when another Court has jurisdiction.

With regard to the points raised that the procedure of the Execution Office is irregular, we find that they fail. In November last, when this case came before us, the final order for sale had been given and the only thing required was the order of registration of the property. This Court postponed the sale for six months from November, that means, that at the expiration of six months the matter revives at the same stage at which it left off six months previously. There was therefore no reason, no legal liability on the Chief Execution Officer to issue any further notice whatsoever.

So far as this present application to us is concerned, there is nothing to show that the Chief Execution Officer has wrongly directed himself in law and we do not think that a further stay beyond the six months, which the Petitioner has already had, can possibly be granted, in the absence of any application to the Land Court. The petition must therefore be dismissed.

Given this 19th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 60/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF:

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

v.

I. The Estate of Zvi Strachilevitz, through the Administrators Messrs.

1. Dr. V. Gruenwald,
2. S. Turtledove,
3. Moshe Strachilevitz,
4. J. Papo.

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

Bankruptcy — Application for administration of an estate in bankruptcy — Bankruptcy Ordinance, Sec. 112 — Power of Court discretionary — Reasonable exercise of discretion.

In dismissing an appeal from a judgment of the District Court of Jaffa, sitting at Tel-Aviv, dated the 22nd May, 1939: —

HELD: The Power of the District Court to administer an estate in bankruptcy is one that is entirely discretionary.
It was not possible to say, on the material before the Court, that the District Court had not acted judicially in refusing the order for administration, or that it had wrongly exercised its discretion.

FOR APPELLANTS: Linderman.

FOR RESPONDENTS Nos. I(3) and II: P. Joseph.

Nos. I(1), (2), and (4): Not present — served.

JUDGMENT:

We need not hear you, Mr. Joseph.

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

The estate is apparently a large one and it is stated that the assets at the present valuation come to LP. 68,000; the liabilities to the sum of LP. 78,000. The administrators were appointed to the estate by the District Court on 6th March, 1938, and those administrators were added to and substituted at later dates in that year. The Order of administration was taken out apparently one week ago. The petitioning creditors, who are the Appellants before us, are creditors

for the amount of roughly LP. 8,000, one of them being the creditor for LP. 146 of this amount. The District Court heard a considerable amount of evidence, including that of two of the administrators of the estate, and they came to the conclusion that, taking all points into consideration, it would not be in the general interest of all concerned to impose upon the estate, at the present time, the extra costs of bankruptcy administration. The power of the District Court to administer in bankruptcy an estate, is one that is entirely discretionary, but, as has been remarked so many times, that discretion must be exercised judicially and not capriciously; it must be based, in order to be judicial, on legal reasons.

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

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

Delivered this 21st day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 61/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

Mahmoud Atallah el Sourouri. APPELLANT.

v.

El Hajjeh Mahboubeh bint Nour el Danaf. RESPONDENT.

Wakfs — Evidence — Dedication.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 4th May, 1939: —

HELD: It was clear that the dedicator of the *wakf* dedicated 19 *kirats* as *wakf*, and that the remaining 5 *kirats mulk* mentioned in the *wakfieh* were properties of the dedicator's sisters. The Appellant admitted in

the lower Court that neither he nor his predecessors in title had ever been in possession of the said shares, but that the Respondent and her ancestors were in possession of that land.

APPELLANT: In person.

FOR RESPONDENT: Nephew, Abdel Rahim el Danaf.

JUDGMENT.

We do not need to hear the Respondent.

The appeal of this present Appellant is the result of a previous appeal to this Court by him, and that first appeal had been allowed on the ground that the Land Court had not gone into the question of the five *kirats mulk* claimed by the Appellant. The Land Court therefore at the second trial went into this question and found that the present Appellant's claim to these five *kirats mulk* failed.

Now, it is quite clear that the dedicator of this *wakf*, one Abu Bakr, dedicated 19 *kirats* as *wakf*, and the remaining 5 *kirats mulk* he stated in the *wakfieh* were properties of the dedicator's sisters. In the Court below, at the second trial, the Appellant admitted that neither he, nor his predecessors in title, had ever been in possession of the said shares, but that the Respondent and her ancestors were in possession of that land.

That being so, the judgment of the Land Court was perfectly correct, and nothing that has been addressed to us, in support of this appeal, induces us to say that the judgment of the Court below was wrong.

For these reasons the appeal will be dismissed with costs.

Delivered this 21st day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 42/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

American Engineering Supply Co.,
Yitzhaq Shertok. APPLICANT.

v.

Heiman Zabludovsky. RESPONDENT.

Arbitration — Jurisdiction of court based upon amount of submission — Application for enlargement of time — Power of arbitrators to extend time, when signing required — Time may be extended by majority of arbitrators — Exercise of Court's discretion under Sec. 10 Arbitration Ordinance where delay caused by negotiation for settlement.

In dismissing an application for leave to appeal from a judgment of the District Court of Tel-Aviv, dated the 2nd March, 1939: —

HELD: 1. The submission to arbitration referred to a claim and counterclaim amounting together to LP. 600. No counterclaim was filed so that the amount involved in the arbitration proceedings was within the jurisdiction of the District Court and that Court could, therefore, entertain an application for enlargement of time within which to make an award.

2. When arbitrators extend the time for the arbitration, it is sufficient if the agreement to extend is made within the time and the decision signed later.

3. There had been sufficient evidence before the District Court to hold that a good part of the delay was covered by negotiations between the parties for an amicable settlement. This being so, the Court rightly used its discretion under Section 10 of the Arbitration Ordinance.

ANNOTATIONS: 1. On enlargement of time for the arbitration, *vide* C.A. 93/35 (C. of J. 1934/6 48) and see *Digest*, Vol. II, pp. 415 *sqq.*, Sec. 4: *Enlargement of Time.*

2. Earlier proceedings in this case are reported in P.P. 5. V. 1939.

FOR APPLICANT: Levanon.

FOR RESPONDENT: Nahmani.

JUDGMENT.

We are of opinion that this application for leave to appeal must be refused.

The first point raised by the Applicant is that it was not within the jurisdiction of the Court below to entertain an application for the enlargement of the time within which to make an award, and that the case should have been tried by the Magistrate's Court. It was stated that the case originated from proceedings taken before the Magistrate, but the submission to arbitration refers to a claim and counterclaims which amount together to LP. 600. No counterclaim was filed by the Applicant in the Magistrate's Court at the time, and therefore it is clear that the amount involved in the arbitration proceedings was one falling within the jurisdiction of the District Court. This point will therefore fail.

The second point raised is that the arbitrators had no power to extend the time. That point also fails. The last date for the extension of the

time by the arbitrators was 31st December, 1937. On that date the arbitrators agreed orally to an extension for a further three months, and two of them signed it on the very same day, while the third arbitrator added his signature later. In our opinion it is sufficient if the agreement to extend be made within time, and that decision is signed later. But further, in any case two of the arbitrators had power to give judgment by majority, and it is childish to suggest that if a majority can give a valid judgment, they cannot validly give an interlocutory decision.

The third point is that there was no evidence before the Court below to support the finding that a good part of the delay was caused by negotiations between the parties for an amicable settlement. From the extracts of the record read to us, it is clear that there was evidence to that effect. If so, the Court rightly used its discretion under Section 10 of the Arbitration Ordinance.

For the above reasons the application fails and leave to appeal is refused with costs to include LP. 10 fees for attendance at the hearing.

Delivered this 2nd day of May, 1939.

British Puisne Judge.

HIGH COURT No. 26/39.

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

BEFORE: Copland and Greene, JJ.

IN THE APPLICATION OF:

Jiryes Turjman. — PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Fadwa Turjman, in her personal capacity and as guardian over her minor children Michail and Juliette as heirs of the late Elias Turjman. — RESPONDENTS.

Debtor's dwelling house — Execution Law, Art. 90 — Sale of debtor's part of house which cannot be partitioned — Proceeds are protected and must be re-invested for the benefit of the debtor — No delay by debtor — Execution Law, Art. 122.

In refusing an application for an order to issue directed to the first Respondent

to show cause why his order dated the 24th April, 1939, in Execution File No. 1735/34 should not be set aside, and why he should not order the eviction of the second Respondent from Petitioner's house: —

HELD: 1. The sale of the house was effected on an order of the Court in a partition action, and the Chief Execution Officer therefore had no power to stop the sale of the second Respondent's share. If the property could have been partitioned, the debtor's share would have been protected by Article 90 of the Execution Law. The same applies when the property cannot be partitioned.

2. The money derived from the sale of the judgment debtor's share is protected in exactly the same way as a partitioned share would have been. It should be re-invested in the purchase of a suitable dwelling house.

3. There had been no delay by the judgment debtor in asserting her rights as it was only after the sale of the property that she could apply for the proceeds of her share to be exempted from seizure, which she immediately did.

4. The set off made by the Execution Officer was wrong, and resulted in money belonging to the judgment debtor being wrongly paid over to the judgment creditor, which exactly fits the wording of Article 122 of the Execution Law. The first Respondent was therefore right in ordering the refund to the estate.

ANNOTATIONS: For cases relating to debtors' dwelling houses, see H.C. 67/37 (1938, 1 S.C.J. 46).

On laches, see H.C. 17/39 (ante, p. 167) and annotations.

FOR PETITIONER: Bruchstein.

FOR RESPONDENTS: *Ex-parte.*

O R D E R.

The second Respondent in this case is the judgment debtor of the Petitioner and the main point in this application is whether the purchase price of a share in a house which has been found to be the necessary dwelling house of the second Respondent is protected by Art. 90 of the Execution Law in the same way as the house itself would be. It is not necessary to set out the facts which have been given very fully by the Chief Execution Officer in his order, and as to which no dispute arises. Art. 90 is as follows: —

> "The dwelling house of the judgment debtor, if suitable to his position, and if not mortgaged or sold with a condition of right to re-purchase, is left for the judgment-debtor".

In the first place it must be remembered that the sale of the house was effected on an order of the Court in a partition action, and the Chief Execution Officer therefore had no power to stop the sale of the

second Respondent's share — he had to carry out the order of the Court. If the property could have been partitioned then there is no doubt that the partitioned share of the judgment debtor could not have been sold, and we cannot see why she should be in a worse position because the property could not be partitioned. We agree with the learned President that the money derived from the sale of the judgment debtor's share is protected in exactly the same way as a partitioned share would have been — and that it should be re-invested in the purchase of a suitable dwelling house. It has the same characteristics as where a large house is sold, and part of the proceeds re-invested in the purchase of a smaller house suitable to the judgment-debtor's position, which is also frequently done under Art. 90.

We do not think that there has been any undue delay by the judgment debtor in the action taken by her to protect her interests and those of the minors of whom she is the guardian. She could no have stopped the sale of the property, which, as we have pointed out, was in compliance with a judgment of the Court, and it was not until the sale was completed in December, 1938, that she could apply for the proceeds of her share to be exempted from seizure, which she immediately did. And finally the set off made by the Execution Officer was wrong, and resulted in money belonging to the judgment debtor being wrongly paid over to the judgment creditor, which exactly fits the wording of Art. 122 of the Execution Law. The learned President was therefore right in ordering the refund to the estate.

The application for an order *nisi* must be refused.

Delivered this 12th day of May, 1939.

British Puisne Judge.

HIGH COURT No. 24/39.

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

BEFORE: Trusted, C.J., and Greene, J.

IN THE APPLICATION OF:

The Attorney-General. PETITIONER.

v.

The Palestine Building Syndicate Ltd. RESPONDENT.

Change of venue — Consent.

In granting an application for change of venue of Civil case No. 22/39 pending in the Jerusalem District Court to the District Court at Tel-Aviv: —

HELD: The order would be granted as both parties agreed to the change of venue.

ANNOTATIONS: See H.C. 27/39, 28/39 (*ante*, p. 207 and annotations).

FOR PETITIONER: Hogan.

FOR RESPONDENT: Krongold.

ORDER.

Both parties agreeing to the change of venue of the trial of Civil Case No. 22 of 1939, from the District Court of Jerusalem to the District Court of Jaffa sitting at Tel-Aviv, the Court orders accordingly.

Given this 4th day of May, 1939.

Chief Justice.

CIVIL APPEAL No. 32/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

Theodor Heilbronner. APPELLANT.

v.

Mordechai Beinish. RESPONDENT.

Stamping — Action based upon unstamped undertaking not produced in Court of trial.

In dismissing an appeal from the District Court of Haifa, dated the 1st March, 1939: —

HELD: The Appellant relied in his statement of claim upon an undertaking which turned out to have been unstamped, and which was not produced in the Magistrate's Court; he could not therefore succeed.

ANNOTATIONS: See and *cf.* the folowing two decisions: C.A. 83/34 (2 P.L.R. 285, P.P. 12.iv.35, C. of J. 1934—6 773); C.A. 12/36 (P.P. 5.vii.37, 1937, 1 S.C.J. 89, 1 Ct.L.R. 47, C. of J. 1934—6 752).

FOR APPELLANT: Werner.
FOR RESPONDENT: Toister.

JUDGMENT.

Upon hearing the Counsel for the Appellant, we are satisfied that no grounds have been shown to vary the judgment of the Court below. The Appellant relied in his statement of claim upon an undertaking which turns out to have been unstamped, and which was not produced in the Magistrate's Court; he could not therefore succeed.

The judgment of the District Court is confirmed with costs assessed at an inclusive sum of LP. 10.

Delivered this 10th day of May, 1939.

Chief Justice.

HIGH COURT No. 25/39.

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

BEFORE: Trusted, C.J., and Frumkin, J.

IN THE APPLICATION OF:
Crossley Brothers Ltd. PETITIONERS.

v.

1. Chief Execution Officer
Magistrate's Court, Jaffa,
2. Daoud Dadis,
3. Bandali Zaccharia. RESPONDENTS.

Preference in Execution — Execution Law, Art. 123.

In allowing an application for an Order to issue directed to the First Respondent calling upon him to show cause why his order, dated 18.4.39, in Jaffa Execution File No. 2060/37, should not be set aside, and in lieu thereof an order be made restoring the attachment in favour of the petitioners, and ordering the partition of the moneys attached in accordance with Article 123 of the Execution Law: —

HELD: The order should be granted, as prayed, for the restoration of Petitioner's attachment and for the partitioning of the moneys in accordance with the provisions of Article 123 of the Execution Law.

ANNOTATIONS: As to preference in execution, see H.C. 29/38 (1938, 1 S.C.J. 304).

FOR PETITIONERS: Elia.
FOR RESPONDENTS: No. 1, 3 — not present — served.
No. 2 — Salah.

ORDER.

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

Given this 30th day of May, 1939.

Chief Justice.

CIVIL APPEAL No. 47/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

1. Yehuda Cohen,
2. Yehia Zarus. APPELLANTS.

v.

Abraham Bass. RESPONDENT.

Vendor and purchaser — Finding of fact — Failure to deliver land after receipt of purchase price — Unregistered and illegal associations — Individual members of non registered association may be sued — Questions of law and of fact.

In dismissing an appeal from a judgment of the District Courtof Jaffa sitting at Tel-Aviv (in its appellate capacity) dated the 23rd February, 1939: —

HELD: 1. The Magistrate was correct in finding that the relationship between the parties was that of vendors and purchaser; that appeared

sufficiently from the wording of the receipts produced and it was therefore for the Appellants to establish, if they could do so, that the relationsbip was one of agency and that the only duty of the Appellants was to account for the money received by them.

2. The so called committee of which Appellants were two of the members was not an illegal association as its objects were not illegal. It could not sue or be sued as it was not registered but there was nothing to prevent the individual members of the committee being sued.

3. *Quaere* whether the appeal involved questions of law.

ANNOTATIONS: *Vide* C.A. 215/37 (1938, 1 S.C.J. 85) where similar questions arose.

FOR APPELLANTS: P. Joseph.
FOR RESPONDENT: Livay.

JUDGMENT.

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

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

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

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

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

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

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

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

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

Delivered this 1st day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 46/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Y. Trachtengut. APPELLANT.

v.

Palestine Copper Industry "Nechushtan" Ltd. RESPONDENT.

Leave to appeal from District Court in appellate capacity — Presiding judge to state points of law on which leave is granted — C.A. 191/38, Magistrates Courts Jurisdiction Ordinance, 1935, Sec. 6, C.A. 87/37.

In dismissing an appeal from a judgment of the District Court, Jaffa, sitting at Tel-Aviv (in its appellate capacity) dated the 20th of February, 1939: —

HELD: The presiding Judge must satisfy himself that there is a point of law involved in order to enable him to grant leave, and if he is not satisfied and in effect states so, he cannot grant leave. No point of law had been shown here by the presiding Judge on which leave to appeal should be granted and there was, therefore, no appeal proper before the Court.

FOLLOWED: Rubin *v.* Kaufman, C.A. 191/38 (1938, 2 S.C.J. 141).

DISTINGUISHED: Blumenfeld *v.* I.C.I., C.A. 87/37 (P.P. 2, 3.viii.37, 1937, 2, S.C.J. 15, 2 Ct.L.R. 19, Ha. 7, 21.x.—4.xi.37).

ANNOTATIONS: See the annotations to C.A. 191/38 (*supra*) and *cf.* C.A. 195/38 (1938, 2 S.C.J. 157).

FOR APPELLANT: P. Joseph.

FOR RESPONDENT: Bar-Shira.

JUDGMENT.

In this appeal, which is stated to be by leave from the District Court, from an appellate judgment of the District Court on a judgment from the Magistrate's Court of Tel-Aviv, a preliminary point has been taken by the Respondent that there is no appeal proper before this Court, and the ground of that objection is that the Presiding Judge of the District Court has not stated the point or points of law on which he granted leave to appeal.

This point has come before us on several occasions lately, and in Rubin *v.* Kaufman, Civil Appeal 191/38, reported in the Law Reports of Palestine, Vol. 5, p. 506, we stated, as we then thought quite clearly, what the law required, but apparently we failed to impress upon some presiding judges with sufficient clarity what was meant.

Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1935, is in these terms: —

> "The decision of the District or Land Court in any appeal from a Magistrate's Court shall be final, but the presiding judge of the court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law".

Now in Rubin *v.* Kaufman *(supra)* we said that it was clear that following a long line of previous decisions the Presiding Judge must state the point or points of law on which he grants leave to appeal. That opinion has been the consistent opinion of this Court from the date of the promulgation of the first Magistrates' Courts Jurisdiction Ordinance in the year 1924, and so far as I am aware there is only one case in which that *dictum* has been queried, that was the case of Blumenfeld *v.* Imperial Chemical Industries, Civil Appeal 87/37. In Rubin *v.* Kaufman *(supra)* we dealt with that case and distinguished it, and we do not think we can usefully add anything further to what we have said there. So long as the law remains as it is, however inconvenient or objectionable a Presiding Judge may find it so to do, he must state the point or points of law on which he grants leave, and it is irrelevant to say that here is no power in existence to compel him to state a case. He must follow the law as it has been laid down by this Court for a period exceeding 10 years.

In the case before us the Presiding Judge has written a long judgment giving reasons why he should not state a case, and the result of that judgment, as we read it, is this, that he is not satisfied that there is any point of law put forward to him by the applicant as a ground on which he should grant leave, but that in order not to embarrass the applicant and not to embarass the Supreme Court in dealing with the appeal, he granted leave.

We do not think that this is sufficient. The Presiding Judge must satisfy himself that there is a point of law involved in order to enable him to grant leave, and if he is not so satisfied and in effect states so, he cannot grant leave. Following once more these previous decisions of this Court, we trust that this judgment, at any rate, may make it quite clear now what the law requires. As no point of law has been shown by the Presiding Judge on which leave to appeal should be granted, we agree with the contention of the Respondent that there is no appeal proper before this Court.

In the result the application must be dismissed with costs to include LP. 15 fees for attending the hearing.

Delivered this 1st day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 51/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., an Khayat, J.

IN THE APPEAL OF:

Zvi Lebel. APPELLANT.

v.

1. Yohanan Mattias,
2. Ahron Rosenfeld. RESPONDENTS.

Bond for appeal — Failure to pay deposit — Application for enlargement of time after appeal listed for dismissal, C.P.R. 327 (as amended), 361.

In refusing an application for enlargement of time to pay the deposit under Rule 327 (as amended), in an appeal from a judgment of the District Court, Jaffa, sitting at Tel-Aviv, dated the 6th April, 1939, and in dismissing the appeal: —

HELD: The application was made after the appeal had been listed for dismissal. The Appellant had had ample opportunity to apply for extension and had no adequate excuse for not doing so.

ANNOTATIONS: See also C.A. 7/39 (*ante*, p. 91) and annotations; C.A. 231/38 (*ante*, p. 3) and annotations; Misc.A. 63/38 (*ante*, p. 4) and annotations.

FOR APPELLANT: Lebel.

FOR RESPONDENTS: No. 1 — Gorodisky.
No. 2 — absent — not served.

JUDGMENT.

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

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

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

Delivered this 5th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 30/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPEAL OF:

The Agudath Netaim Co. Ltd. APPELLANTS.

v.

The Arab El Fuqara Tribe, represented by the Mukhtar, Sheikh Muhammad El Hilou. RESPONDENTS.

Cultivators (Protection) Ordinance — Case stated, parties bound by the findings of fact made by the Commission, both in case stated and on appeal — Claim of ownership and of grazing rights, Sliheit v. The Orthodox Patriarchate, C.A. 201/38 — Existence of 'dispute' to be referred, Secs. 19, 20, rules, K.K.L. v. Kutt Heirs, C.A. 29/39, no time limit within which the dispute may be referred — Res judicata.

In dismissing an appeal from a judgment of the Land Court of Haifa (in its appellate capacity), dated the 26th January, 1939: —

HELD: 1. In an appeal by way of case stated, the parties are limited to the findings of fact made by the Commission in the Special Case.

2. The question of setting aside a special area for grazing instead of granting grazing rights in the whole area did not arise out of the case stated.

3. (Following Sliheit *v.* The Orthodox Patriarchate, C.A. 201/38). By claiming ownership before the Land Settlement Officer, Respondents were not barred from claiming grazing rights in other proceedings, for this question lay within the exclusive jurisdiction of the Special Commission, and any finding by any body, other than the Special Commission would be superfluous and of no effect.

4. (Applying Keren Kayemeth Leisrael *v.* Heirs of Kutt, C.A. 29/39). There is nothing in section 19 of the Cultivators (Protection) Ordinance which, in any way, limits the time within which a dispute may be referred to a Special Commission. The dispute arose when the Respondents claimed protection under the Ordinance, and the question of grazing rights was not *res judicata* since the question had not been determined up to then by the competent statutory authority.

FOLLOWED: Sliheit v. The Orthodox Patriarchate, C.A. 201/38 (1938, 2 S.C.J. 122).

APPLIED: Keren Kayemeth Leisrael *v.* Heirs of Kutt, C.A. 29/39 (*ante*, p. 229).

ANNOTATIONS: See also C.A. 14/39 (*ante*, p. 145).

FOR APPELLANTS: Eliash.

FOR RESPONDENTS: Atallah.

JUDGMENT.

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

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

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

The second point of the Appellants is that the Respondents, having claimed ownership before the Settlement Officer, cannot now in other proceedings claim grazing rights under the Cultivators (Protection) Ordinance. The Land Court found that in dealing with the prescriptive and possessory title to the land the Settlement Officer did not deal with the issue of grazing rights under the Cultivators (Protection) Ordinance, for this question lay within the exclusive jurisdiction of the Special Commission, and any finding by any body, other than the Special Commission, would be superfluous and of no effect. In this respect the Land Court, in dismissing the appeal to it based itself upon a judgment

of this Court, Slihiet *v.* The Orthodox Patriarchate Jerusalem, Civil Appeal 201/38 (5 P.L.R. p. 477).

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

We come now to the last point, which as I said is an interesting one, and that is, whether in order to give the Commission jurisdiction there must be a dispute "to be referred". Section 19 of the Cultivators (Protection) Ordinance states that any dispute as to various matters defined in the section, shall be referred to a Special Commission to be appointed by the High Commissioner. No mention is made in the Ordinance as to who shall make the reference, but in the rules and regulations published under Section 20 of the Ordinance and made by the High Commissioner, it is stated that "any person, desiring to refer any dispute, may apply etc." It is argued in this case that there is now no dispute on which a reference can be made by reason of the following circumstances. The Respondents of this appeal claimed, before the Land Settlement Officer, certain rights of ownership in this land. The Land Settlement Officer found against them and ordered their eviction from this land. That eviction was duly carried out. It was not until after eviction had been completed that the present Respondents applied for the appointment of a Special Commission to hear their claim as to grazing rights. There was a somewhat similar case before this Court, Keren Kayemeth Leisrael *v.* Heirs of Habib Mussa el Kutt, Civil Appeal 29/39, where a Magistrate had ordered eviction of certain property and during the course of the eviction proceedings, the persons in possession of the land made an application to the Special Commission on the grounds that they were statutory tenants and so could not be evicted. In that case however, though judgment had been given for their eviction, the process of eviction had not been completed. It seems to us that, in order to invoke the Cultivators (Protection) Ordinance, there must be a dispute and it seems equally to us that a dispute may be said to have arisen when one party claims a certain thing and the other party contests that claim. There is nothing in Section 19 of the Cultivators

(Protection) Ordinance which, in any way, limits the time within which a dispute may be referred to a Special Commission. In this case we think that the dispute arose when the Respondents claimed the protection of the Cultivators (Protection) Ordinance and the question of grazing rights was not *res judicata*, since that question had not been determined up to then by the competent statutory authority.

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

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

Delivered this 22nd day of June, 1939.

British Puisne Judge.

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

Puisne Judge.

CIVIL APPEAL No. 58/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Copland and Frumkin, JJ.

IN THE APPEAL OF:

Shukri Naser Hanna Bahous. — APPELLANT.

v.

Tewfiq Hanna Bahous. — RESPONDENT.

Succession — Failure to prove existence of the de cujus.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 10th May, 1939: —

HELD: Appellant had failed to prove the existence of the *de cujus* and his claim for a certificate of succession must fail.

FOR APPELLANT: Koussa.

FOR RESPONDENT: Bernblum.

JUDGMENT.

Copland, J.:

I agree that this appeal fails. The onus was on the Appellant to give *prima facie* proof at any rate that the person referred to in this appeal as Ibrahim No. 1, the alleged brother of Petitioner's great grand-father, did exist. The learned President found that there was no evidence to show where he was born or lived or resided or died, or even the date of his death. The Appellant says that there was such evidence, but has been unable to point it out to us in Court when asked to do so.

I agree with the learned President that the Appellant had failed entirely to prove his case or even the existence of his alleged ancestor, and the appeal should therefore be dismissed.

Delivered this 23rd day of June, 1939.

British Puisne Judge.

This is an appeal from an order of the President of the District Court, Haifa, refusing an application for an order of succession.

The President held that the Petitioner had entirely failed to prove his case or even the existence of the alleged ancestor — the *de cujus.*

We see no reason to interfere, and the appeal will be dismissed with costs, and advocate's fee for attending the hearing fixed at LP. 15.

Delivered this 23rd day of June, 1939.

Chief Justice.
Puisne Judge.

CIVIL APPEAL No. 50/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., and Khayat, J.

IN THE APPEAL OF:

Rafoul Hakim. — APPELLANT.

v.

Leon Levy. — RESPONDENT.

Set-off. — Counterclaim — Magistrates' Courts Jurisdiction Ordinance, Sec. 2(1) (e) — Clerical error in judgment — C.A.99/34 — Counterclaim of greater value than claim must arise from same subject matter — Judgment for balance of counterclaim — Clerical error in judgment.

In allowing an appeal from a judgment of the District Court of Haifa (in its appellate capacity) dated the 23rd March, 1939, and in entering judgment for the Appellant: —

HELD: 1. By Section 2(1)(e) of the Magistrates' Courts Jurisdiction Ordinance, the jurisdiction of Magistrates' Courts in counterclaims is restricted to the same value or amount as in the original actions, and cannot be unlimited, unless the counterclaim arises from the same subject — matter or circumstances as the original action — which was not the case here.

The Chief Magistrate Court therefore should have reduced the counterclaim to LP. 250 to bring it within his jurisdiction.

2. (Distinguishing C.A. 99/34). The Appellant did not ask the Court to ratify his previous act of set-off, but asked that the amount claimed by the Respondent and admitted by the Appellant should be deducted from the counterclaim, and prayed for judgment for the balance.

3. The difference of LP. 10 was a clerical error.

DISTINGUISHED: Ottoman Bank *v.* Mulki, C.A. 99/34 (2 P.L.R. 292, P.P. 8.v.35, C. of J. 1934—6 766).

ANNOTATIONS: On set-off, see also C.A. 37/37 (1937, 1 S.C.J. 264, 1 Ct.L.R. 52).

FOR APPELLANT: A. Levin.

FOR RESPONDENT: Ginzberg.

JUDGMENT.

Khayat, J.:

A summary of the facts of this case is as follows: —

The Plaintiff (Respondent) brought an action in the Chief Magistrate's Court, Haifa, against the Appellant (Defendant) claiming the sum of LP. 233.072 mls, being his share in the rent of certain properties owned jointly by him, the Appellant, and Khoury and his brother, which amount the Appellant collected himself.

The Appellant admitted the said amount, but brought a counterclaim in the sum of LP. 459, being rents due from the Respondent in respect of certain properties co-owned by them, and asked for set-off.

The Plaintiff, in reply to this counterclaim, stated that a sum of LP. 1,577.553 mls was due to him from the Defendant, and that he reserved his right in respect of this amount to claim it in the competent Court.

The Chief Magistrate took the view that the Plaintiff had no right to bring a counterclaim against a counterclaim, and gave judgment in favour of the Defendant (Appellant) in the sum of LP. 225.928 mls after deducting the amount claimed by the Plaintiff.

In a second action, the same Plaintiff claimed the sum of LP. 191.236 mls; the Defendant admitted the sum of LP. 161.722 mls and brought a counterclaim in the sum of LP. 215.

The Plaintiff admitted a sum of LP. 33.032 mls, and after making an account there remained to the Plaintiff the sum of LP. 105.242 mls, for which sum judgment was given in the Plaintiff's favour.

The result of the Magistrate's Court's judgment, after deducting the amounts due to the Plaintiff from that due to the Defendant, was a judgment in the sum of LP. 120 in favour of the Defendant.

An appeal against the above judgment was lodged in the District Court, and on the 23rd March, 1939, Plaintiff obtained judgment in his favour in the sum of LP. 122.386 mls. The District Court did not deal with the second case, but took the view that the Defendant had no right to ask for set off from the Plaintiff and that he only had the right to counterclaim the sum of LP. 215.928 mls mentioned in his statement of claim.

Application for leave to appeal to the Supreme Court against the judgment of the District Court was granted. Hence this appeal.

Counsel for the Appellant asks this Court to set aside the judgment of the District Court on the following grounds: —

(1) That in accordance with section 2(1) (e) of the Magistrates' Courts Jurisdiction Ordinance, 1935, he has the right to counterclaim the sum of LP. 459, and that after making a set off he has the right to obtain a judgment for the balance.

(2) That the Court erred in drawing up the account which amounted to LP. 215, whereas the difference is LP. 225, and that the mistake of LP. 10 is a clerical error, as is apparent from the statement of claim.

(3) That the District Court erred in following Civil Appeal No. 99/34, The Ottoman Bank, Haifa, *v.* Elias Mulki, Palestine Law Reports, Vol. II, p. 292, as the facts of that case do not tally with the facts of the present case, and that his claim is based on the counterclaim, and asked that the judgment of the Chief Magistrate be confirmed.

Counsel for the Respondent asked that the judgment of the District Court be confirmed for the reasons stated in the said judgment and did not stress the point as regards the LP. 10 resulting from the clerical error.

In my view the Chief Magistrate went wrong in accepting the counterclaim in the sum of LP. 459, because section 2(1) (e) provides as follows: —

> "Counterclaims to the same value or amount as in original actions:
> "Provided that where the counterclaim arises from the same subject-matter or circumstances as the original action, the magistrate may try such counterclaim whatever may be the amonut claimed in it."

From the above provision it is clear enough that the jurisdiction of the Court in counterclaims is restricted to the same value or amount as in the original actions, and cannot be unlimited, unless the counterclaim arises from the same subject-matter or circumstances as the original action.

Here the counterclaim arises out of subject-matter other than the subject-matter in dispute, and has no relation to the original action, and the counterclaim for the sum of LP. 459 should not have been dealt with by the Chief Magistrate unless and until it was reduced to LP. 250 to bring it within his jurisdiction.

As regards the question of set off referred to in the judgment of the District Court in which that Court relied on Civil Appeal No. 99/34 *(supra)* I am of opinion that the above appeal cannot be followed in this case as the Appellant here did not apply to the Court to ratify his previous act of set off, but asked that the amount claimed by the Plaintiff and admitted by him (the Appellant) be deducted from his counterclaim, and prayed for judgment for the balance. In the case of the Ottoman Bank, the Bank alleged that it had the right to effect a set off, and that in fact it made such set off as it had no right to bring a counterclaim owing to the lapse of time.

As regards the difference of LP. 10 I see no reason to go into this question as it is a clerical error. In the result I am of opinion that both judgments of the District Court and of the Chief Magistrate should be set aside and judgment entered in favour of the Appellant for the balance after deducting LP. 233.072 from LP. 250 that is the sum of LP. 16.928 mils and after deducting the latter amount from the sum of LP. 105.242 mils which is not disputed, there remains the sum of LP. 88.314 mils in favour of the Respondent in this action, for which judgment will be entered. As regards the other points raised the appeal will be dismissed.

Each party will bear his own costs of this appeal.

Delivered this 23rd day of June, 1939.

Puisne Judge.

Trusted, C.J.:

I agree in substance with the judgment of my brother Khayat J. and would only add that where Defendant files a counterclaim and the amount so claimed exceeds the amount of the claim I know of no law or rule which prevents the Court entering judgment in his favour for the balance. In C.A. 99/34 P.L.R. Vol. II, p. 292 to which reference has been made the Defendant lodged no counterclaim.

Delivered this 23rd day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 67/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Copland and Frumkin, JJ.

IN THE APPEAL OF:

Michael Keiner. — APPELLANT.

v.

Sara Keiner. — RESPONDENT.

Onus of proof — Article of law relied upon — Mejelle, Art. 1771 — Finding of fact.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 26th April, 1939: —

HELD: 1. The onus of proof lay upon the Appellant who had failed to prove his case.

2. The claim was not based on any article of law other than Article 1771 of the *Mejelle*, which did not apply. It was a question of fact whether, having regard to the arrangements in this matrimonial home, the Appellant was entitled to the sum claimed.

FOR APPELLANT: Fellman and Felman.

FOR RESPONDENT: Dunkelblum.

JUDGMENT.

Trusted, C.J.:

This is an appeal from a decision of the District Court sitting at Tel-Aviv. The Appellant, who was the Plaintiff, claimed LP. 1745. In his statement of claim he pleaded —

> "Defendant procured Plaintiff to register in their joint names a certain building. This building was subsequently sold and Defendant has taken and retains to this date the sum of LP. 1,745 which belongs to Plaintiff."

and upon the Defendant's application, further particulars of the claim were given.

The parties are husband and wife who came to this country some years ago, and the husband appears to have been successful in business and to have made money.

At the hearings there was much argument as to what had happened to various sums of money, but it is clear that the onus was upon the Plaintiff to show that he was entitled to the LP. 1745 which he claimed.

The claim is not based on any article of law other than Art. 1771 of the *Mejelle,* which I do not think applies. It seems to me, therefore, to be entirely a question of fact as to whether, having regard to the arrangements in this matrimonial home, the Plaintiff was entitled to the sum claimed.

The Court of Trial, having heard the parties, considered that the Plaintiff had failed to prove his case and decided against him, and I do not think we should interfere with the decision of that Court, and the appeal will be dismissed with costs and advocate's fees for attending the hearing fixed at LP. 15.

Delivered this 29th day of June, 1939.

Chief Justice.

Copland, J.:

I agree. The case from the beginning was based on surmise, suppositions and hypothetical assumptions and figures. From the manner in which it was conducted in the District Court it was a hopeless case, and it was even more hopeless in this appeal. The District Court, in its judgment, analysed the evidence and came to the conclusion that it did not support the Appellant's case. I think that that conclusion is the right one; it was for the Appellant to prove his case, and that he has failed to do.

For these reasons and for those given by the Chief Justice I agree that the appeal must be dismissed.

British Puisne Judge.

Frumkin, J.:

I agree. Much of the confusion in this case is due to the fact that the double relationship between the parties both as husband and wife and

as co-owners of jointly owned immovable property, have been mixed up together. In his argument before us Counsel for Appellant tried to base his claim on joint ownership, and it might very well be that as co-owner he might have had a legitimate claim for a proper accounting as regards the purchase price of a jointly owned property received by his co-owner. But looking at his statement of claim, and the way the case was conducted in the Court below, it is clear that the Appellant in fact based his claim on his relationship as the husband of the Respondent, and as such I agree he failed to prove his claim for the amount sued, or indeed for any other amount, and the appeal must therefore fail.

Puisne Judge.

CIVIL APPEAL No. 38/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Khayat, JJ.

IN THE APPEAL OF:

The Attorney-General. APPELLANT.

v.

1. Ali Khalil Ali,
2. Deeb El Omer,
3. Said Ayoub El Yusef,
4. Abd el Fayer,
5. Deeb el Omer,
6. Mohammad Ali,
7. Ayed el Ahmad,
8. Awad Abdallah Shukri,
9. Mufaddi Barjas,
10. Abdallah Husein,
11. Abed Mustafa Hayim,
12. Ali Dgheidi,
13. Ali Khalil,
14. Mohammad Ali,
15. Mahmoud el Kasem,
16. Ahmad Mustafa Abu Ayadeh,
17. Khalil Ali Kafri,
18. Ibrahim el Khader.

All of Kufr Misr, Beisan Sub-District. RESPONDENTS.

Declaration of ownership — Plaintiff registered owner — C.P.R. 338, right to have appeal reheard.

In allowing an appeal from a judgment of the Land Court of Haifa, dated the 18th March, 1939, and in granting to Appellant a declaration of ownership: —

HELD: There was *prima facie* no reason why Appellant should not be entitled to a declaration of ownership in respect of the lands for which he held kushans.

Quaere, however, whether there were any cases in point and note the right of Respondents to apply for a rehearing of the appeal under Rule 338 of the Civil Procedure Rules.

ANNOTATIONS: The form of action in such cases is usually for an order to restrain Defendant from interfering with the possession of the registered owner — *vide* C.A. 48/37 (1937., 1 S.C.J. 279, 1 Ct.L.R. 66) and cases quoted therein.

FOR APPELLANT: Crown Counsel (Hogan).

FOR RESPONDENTS: Not present Nos. 6 and 14, deceased.

JUDGMENT.

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

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

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

The Land Court held that as the Government had a *kushan* and was the registered owner nothing that it (the Land Court) could say would strengthen Government's position, and that the action was misconceived, and dismissed it.

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

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

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

and the appeal will be allowed accordingly.

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

Delivered this 20th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 62/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

Tewfiq Feidi El-Nablusi. APPELLANT.

v.

Badrieh Bint Hassan Sandoukah in her capacity as guardian of her two minor daughters Rabina and Zahiyah. RESPONDENT.

Guardianship — Oath of trustee not binding after his removal — Mejelle, Art. 1774.

In dismissing an appeal from a judgment of the District Court of Jerusalem (in its appellate capacity) dated the 29th April, 1939: —

HELD: Article 1774 of the *Mejelle*, whatever its effect, did not apply in this case as Appellant was no longer a trustee. He was in the same position as any other person regarding the value to be attached to his evidence.

FOR APPELLANT: Ousta.

FOR RESPONDENT: Aweidah.

JUDGMENT.

We need not trouble you, Mr. Aweidah.

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

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

Delivered this 19th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 55/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Greene and Frumkin, JJ.

IN THE APPEAL OF:

Jacob Cohen. APPELLANT.

v.

The Mizrahi Bank, Ltd. RESPONDENTS.

Security notes — Collateral security given by transfer of mortgage — "Damaging" security, Mejelle Arts. 98, 690, 741, 746 — Test to be applied.

In dismissing an appeal from a judgment of the District Court of Haifa (in its appellate capacity) dated the 3rd April, 1939: —

HELD: The security given by Appellant to Respondent, consisting in the transfer of a mortgage to them, had not been "damaged" within the meaning of Article 741 of the *Mejelle* by the Respondents agreeing to the transfer of the property subject to the mortgage, as the security could be handed back "undamaged" by retransfer to the Appellant and the undertaking given by the mortgagors to the Respondents could be assigned to Appellant.

CONSIDERED: Trustee of Ellis & Co. *v.* Dixon-Johnson, 1925, A.C. 489.

ANNOTATIONS: For authorities on pledges, see annotations to H.C. 23/39 (*ante*, p. 233).

FOR APPELLANT: Tovbin.

FOR RESPONDENTS: Levitsky.

JUDGMENT:

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

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

> "On 17.3.1937 the Defendant, Mr. Jacob Cohen, had assigned to the Plaintiff Bank as further security a mortgage for LP. 500.— executed in his favour by Messrs. Henigman and Epstein under

> a mortgage deed. The date of maturity of the said mortgage deed had to be 20.4.1938. The principal debtors under the said mortgage deed wanted to sell their property to Meonot Yalag Co. Ltd. The Plaintiff was sure that upon the transfer of the property either he or the Bank would be paid the amount of mortgage due to him. The Plaintiff Bank agreed to the transfer of the property in question from the principal debtors Epstein and Henigman to the Meonot Yalag Co. Ltd. and left the mortgage in force without getting the consent of Mr. Yaacov Cohen in writing, but, in accordance with an agreement entered into between Messrs. Epstein and Henigman, Meonot Yalag Co. and the Bank, the Bank had, furthermore, taken from Messrs. Epstein and Henigman a separate guarantee in writing by which they remained liable to the Bank for the payment of LP. 500. The property in question was transferred at the Land Registry in the name of Meonot Yalag Co. Ltd. on 30.3.38, that is twenty days before the maturity of the mortgage transferred (assigned) by the Defendant Jacob Cohen to the Plaintiff."

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

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

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

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

applied.

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

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

In the present case the mortgage on the same property could have been re-transferred, and the undertaking by the original debtors,

Henigman and Epstein, could have been assigned to Cohen. I do not see, therefore, how the security was "damaged", and in my opinion the appeal should be dismissed.

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

Delivered this 27th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 43/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

Benjmin Mashoieff. APPELLANT.

v.

Peter Deuel. RESPONDENT.

Misrepresentation and fraud — Action for repayment of money — Admissibility of finding in Criminal Court relating to forgery of documents — Omission to raise a point in notice of appeal — Discretion of Court of trial relating to adjournments — Party comprising more than one person, whether all need be sued, C.A. 157/35 — Restitution not possible before Plaintiff returns what he obtained.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 23rd March, 1939, and in amending the judgment of the District Court: —

HELD: 1. Irrespective of what the action was called it was an action for the repayment of money paid over on the misrepresentation and fraud of the Appellant, so that the statement of claim disclosed a perfectly good cause of action.

2. The District Court were entitled to rely on the judgment of the Criminal Court finding that the power of attorney and the certificate of succesion were forged — it was a judgment of a competent Court — and the Appellant had in fact been a party to that criminal case and was aware of the fraud, though he was acquitted of the charge made against him — whilst several of his co-defendants were convicted.

3. The question that there was no proof that the sum awarded had in fact been paid to the Appellant was not included in the grounds of appeal and leave to amend would not be granted.

4. The Appellant was to blame for not having been represented

by an advocate in the lower Court, as he had taken it for granted that an adjournment would be granted and he had several days within which to appoint an advocate.

The question of adjournment is a matter for the discretion of the Court of trial and an appellate Court would only interfere with the exercise of that discretion very rarely.

5. (Distinguishing C.A. 151/35). It was only the Appellant who was alleged to have made the false representations and to have been guilty of fraud, though one Mulki signed the contract with him. Mulki took no acting part in the transaction and there was, therefore, no legal necessity to join him as a Defendant in the original action. If the Appellant had so wished, he could have taken steps to have joined Mulki in the case.

6. The land had been registered in the names of nominees of the Respondent. No order for restitution of the purchase price would be made before the land was restored — and the Court could not make an order affecting the nominees who were not parties to the action.

The judgment of the District Court would therefore be amended to the effect that upon Respondent causing the land to be transferred to the name of the Appellant, the Respondent would be entitled to the amount awarded to him by the District Court.

DISTINGUISHED: C.A. 151/35 (C. of J. 1934—6, 182, P.P. 24.v.37, 1937, 1 S.C.J. 43).

ANNOTATIONS: For the latest English authority on rescission of a contract on the ground of misrepresentation, see Spence *v.* Crawford, (1939), A. Eng. L.R. Vol. III, p. 271 with note and cases cited therein.

On the discretion of the Court to grant an adjournment, *vide* C.A. 27/39 (*ante*, p. 260) and note. See also C.A. 68/39 (14.vii.39).

On the effect of a finding in a criminal suit *vide Digest* XXI, pp. 159 *sqq* Sec. 3 — EFFECT OF RES JUDICATA.

FOR APPELLANT: Levitsky.

FOR RESPONDENT: Weinshall.

JUDGMENT.

This is the considered judgment of the Court.

This is an appeal from a judgment of the District Court, Haifa, in favour of the Respondent who was Plaintiff in the Court below, for LP. 1826.500 with interest at 9% per annum from date of action. The claim was for the return of money paid by the Respondent to the present Appellant in respect of the purchase of certain lands on

Mount Carmel and it was alleged that the Respondent was induced to enter into the contract for purchase by misrepresentation and fraud on the part of the Appellant. It was alleged that the Appellant showed the Respondent certain lands which he alleged were the lands to be comprised in the contract, whereas in fact they were not the same lands, and that the transfer by the Appellant into the name of the Respondent's nominee was effected by means of a forged power of attorney and certificate of succession and that such transfer was worthless. The District Court found that the Respondent's allegations were true and gave judgment accordingly.

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

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

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

We do not agree that the proper course for the Respondent to have adopted would have been to institute an action in the Land Court, for cancellation of the *kushan,* prior to bringing an action for recovery

of the money paid. He was suing for money paid owing to the fraud and misrepresentation of the Appellant, and the fraud at any rate was amply proved.

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

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

The Appellant relies on Safwal el Sheikh Mahmoud Shaheen *v.* Mahmoud Ali Abu Jaradeh and others, C.A. 151/35, which lays down the ruling that where more than one person is comprised as a party to an agreement, all such persons comprising the party must sue on the agreement, and that some of them alone cannot sue. From that he argues that if one of two persons cannot sue, then equally one of two persons cannot be sued. But in the present case, as the Respondent points out, it was only the Appellant who was alleged to have made the false representation and to have been guilty of fraud. Mulki made no representation, Mulki never showed the land to the Respondent, Mulki took no part in the transaction leading to the transfer, neither did he receive any of the purchase price from the Respondent. It was Mashoieff alone, who signed the undertaking, Ex P.D. 2, to take the land back from the Respondent if not sold. In fact, all through Mulki took no part in the transaction.

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

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

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

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

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

The registered owners are holding the land as his nominees, and it is for him to see that the land is restored. Seeing that it was the Appelant who purported to sell the land, and it was he who caused the land to be transferred into the names of the present registered owners, we think that it is he who is entitled to have the land restituted to him, upon payment of the sum adjudged. We are not concerned in this case with any other persons who may have been defrauded in these transactions, and they have their remedy or remedies against the Appellant.

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

Delivered this 16th day of June, 1939.

British Puisne Judge.

HIGH COURT No. 33/39.

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

BEFORE: Copland and Frumkin, JJ.

IN THE APPLICATION OF:

Talhami Brothers Films and
Cinema Company Limited. PETITIONERS.

v.

1. The Chief Execution Officer, Magistrate's Court, Jerusalem,
2. Metro Goldwyin Mayer of Egypt Inc. RESPONDENTS.

Attachment of debts — Execution Law, Art. 80 — Agreement to pay judgment awarded against another person — C.E.O. & H.C. may not query legality of agreement — Competent courts — C.E.O. not concerned with internal management of Company — Proper parties — Laches.

In dismissing an application for an order calling upon the first Respondent to show cause why his order in Execution File No. 1594/38, Jerusalem, dated March 29, 1939, ordering the Petitioner to pay to the second Respondent the sum of LP. 217 with costs and interest, should not be set aside: —

HELD: 1. There was no need to cite the judgment debtor of the second Respondents as he was not called upon to pay anything.

2. Each case has to be examined separately and in the circumstances of this case the Petitioners had not taken an unreasonable time in applying to the High Court.

3. The Chief Execution Officer, and consequently also the High Court, could not deal with the legality of the agreement between the Petitioners and the judgment debtor of the second Respondents.

4. The Chief Execution Officer is not concerned with the internal management and the internal affairs of the Petitioning company. Mr. I. Talhami was apparently sufficiently competent to sign on behalf of the Company when served with the notice of attachment and he appeared before the Chief Execution Officer in answer to the summons on the Manager of the Company. His evidence must be held to be sufficient to bind the Company.

ANNOTATIONS: Normally, the High Court will not make an order affecting the rights of persons not cited as Respondents: *Vide* H.C. 94/36 (1937, 1 S.C.J. 394, 1 Ct.L.R. 56). In the present case, however, the judgment debtor of the second Respondent was not affected by the proceedings. *cf.* C.A. 43/39 (*ante*, p. 315).

On the limitation of the powers of the Chief Execution Officer see H.C. 23/39 (*ante*, p. 233) — cannot inquire into the validity of pledges; H.C. 2/39 (*ante*, p. 29) — nor inquire into the basis of calculating foreign exchange, etc. The High Court will not decide any matter which the Chief Execution Officer cannot decide: H.C. 56/38 (1938, 2 S.C.J. p. 83).

On the effect of delay, see H.C. 4/39 (*ante*, p. 60) and annotations, H.C. 17/39 (*ante*, p. 167), H.C. 13/39 (*ante*, p. 196) and H.C. 26/39 (*ante*, p. 288).

As regards the internal management of the Company, *cf.* Royal British Bank *v.* Turquand, *Digest* ix. p. 97, No. 406.

FOR PETITIONERS: Abu Shaar.

FOR RESPONDENTS: No. 1 — Not present — served.
No. 2 — Olshan.

ORDER:

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

The Chief Execution Officer made an order against the Petitioners to pay a certain sum of money, alleged to be a debt due by them to one Gottlieb Bauerle, to the second Respondents. Several points were taken against the rule. The first one is that the judgment-debtor should be cited in these proceedings. We do not think there was any necessity to cite him as he himself is not called upon to pay anything.

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

To deal now with the merits of the application. The Chief Execution Officer had before him an agreement dated the 9th August, 1937, made between Mr. Bauerle and the Petitioners. This agreement was one of lease for certain premises known as the Orient Cinema, German Colony, Jerusalem. The lessees, who were the Talhami Brothers Co., undertook to pay the rent and agreed, *inter alia*, to keep, preserve and maintain the cinema and inventory in good repair and order,

and to use it exclusively for holding therein cinemas, theatrical or musical performances, and to pay the rent of LP. 625.— *per annum*, and by Clause 3(g) the Talhami Brothers Company agreed that they were bound to pay the lessor "any sum the lessor may be liable to pay to the Metro Goldwyn Mayer of Egypt Inc. by virtue of a judgment to be obtained by the said Metro Goldwyn Mayer of Egypt Inc. against the lessor in the case pending before the Chief Magistrate's Court, Jerusalem, File No. 1904/37, dated February, 1938".

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

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

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

The same Ibrahim Talhami who is admitted to be a director of the Company, appeared on the summons before the Chief Execution Officer, and when put on oath admitted that when they signed the agreement to which I have referred, they knew of the case between second Respondents and the judgment-debtor. He admitted that one of the conditions of the agreement was that they should pay any sum found due by Bauerle to the second Respondents. He also admitted that they knew that judgment had been given against Bauerle and that they had not paid the second Respondents as had been agreed upon. The Chief Execution Officer therefore ordered Petitioners to pay a sum of LP. 217.— with costs.

Now it has been argued on behalf of the Petitioners that they dispute the legality of this agreement — that was not a matter with which the Chief Execution Officer could deal, and *ipso facto* not a matter with which we can deal. If the legality of the contract is queried there are Courts competent to decide that question. We in our present capacity are not that Court. The Chief Execution Officer had before him an agreement containing this undertaking to pay such amount as should be found due from Bauerle to the second Respondents. One of the directors of the Petitioners admitted signing

the agreement, admitted he knew of the conditions of the agreement, admitted he knew the sum had been found due from Bauerle, admitted that they had not paid that sum, and admitted by implication, if not in exact words, the liability of the Company under the agreement.

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

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

Delivered this 30th day of June, 1939.

British Puisne Judge.

CRIMINAL APPEAL No. 24/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Copland and Abdul Hadi, JJ.

IN THE APPEAL OF:

Nicolas Kiafas. APPELLANT.

V.

The Attorney-General. RESPONDENT.

Immigration offence — Transfer of case, Defence (Amendment) Regulations (No. 5), 1939, Reg. 3 — "person charged" — Immigration Ordinance, secs. 5(1)(h), 12(2), 12(2)(a) — Proof of offence —

Magistrate has no discretion regarding confiscation of ship — Sentence.

HELD: 1. Regulation 3A of the Defence Regulations as enacted in Regulation 3 of the Defence (Amendment) Regulations (No. 5), 1939, which gives power to the Attorney General to transfer the case to the jurisdiction of another magistrate than that normally having jurisdiction, refers to a person charged. A person against whom a charge is made, although the hearing of the case has not begun, is a person charged until he is convicted or acquitted.

2. There was evidence that persons had entered Palestine in contravention of Section 5 of the Immigration Ordinance and the Appellant was rightly convicted under the section, as it was not necessary to prove a completed offence under Section 12(2).

3. Section 12, as amended, gives no discretion in the matter, and there was therefore no reason why the magistrate should not have ordered the confiscation of the ship.

ANNOTATIONS: On the second ground *cf.* CR.A. 51/38 (1938, 1 S.C.J. 367); CR.A. 62/38 (*ibid* 422); CR.A. 29/39.

FOR APPELLANT: Weinshall and Shapiro.

FOR RESPONDENT: Toukan.

JUDGMENT:

This is an appeal from a decision of the District Court, Haifa, supporting a decision of the Magistrate whereby the Appellant, as captain of a ship, was convicted of offences, under the Immigration Ordinance and the Ports Ordinance.

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

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

Secondly, it is said that to convict the Appellant of the offence charged, *i.e.* aiding and abetting persons acting in contravention of Section 5(1)(h) of the Immigration Ordinance, those persons must

have been guilty of the completed offence under Section 12(2) of the Ordinance. Section 12(2)(a) clearly refers to a foreigner contravening Section 5, although it may be that he is not guilty of an offence until he is found. There was evidence that persons entered Palestine in contravention of Section 5, and I think the Appellant was rightly convicted.

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

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

Delivered his 28th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 59/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

Tewfiq Sanadiki. APPELLANT.

v.

Tewfiq Renno. RESPONDENT.

Stamping — Inadmissibility of unstamped document in evidence — Time to stamp document.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 1st May, 1939: —

HELD: The lower Court had correctly refused to allow the production in evidence of a document which had not been stamped. Appellant should have applied to have it stamped, if possible, before attempting to use it in Court.

ANNOTATIONS: See also C.A. 83/34 (2 P.L.R. 285; P.P. 12.IV.35; C. of J. 1934—6 773).

FOR APPELLANT: Sayhoun.

FOR RESPONDENT: Gavison.

JUDGMENT.

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

This is an appeal from a judgment of the District Court of Haifa in which that Court dismissed the Appellant's action for the price of certain land alleged to have been purchased by the Respondent, on the ground that there was no agreement in writing before the Court and therefore no evidence of any agreement. A document Exhibit A, alleged to be an agreement, was produced in Court and the Court refused to admit it on the ground that it had not been stamped. This document was known to the Appellant because it was produced in support of his case; he must therefore have known that it was not stamped and, before he attempted to use it in Court, he should have applied to get it stamped properly, if possible. This he did not do. The District Court, rightly in our opinion, rejected this document as evidence, and without this document there is of course no evidence of any agreement between the parties.

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

Delivered this 19th day of June, 1939.

British Puisne Judge.

I concur.

Puisne Judge.

I concur.

Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 2/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Abdul Haid, JJ.

IN THE APPLICATION OF:

Moses Blam. PETITIONER.

v.

The Attorney-General. RESPONDENT.

Privy Council appeal — Application in forma pauperis — Palestine (Appeal to Privy Council) Order in Council, Art. 6 — Walker v. Walker — Bentwich's Privy Council Practice.

In refusing an application for leave to appeal *in forma pauperis* to the Privy Council from a judgment of the Court of Appeal, dated the 10th May, 1939: —

HELD: 1. The Court of Appeal has no power to grant leave to appeal to the Privy Council *in forma pauperis*.

2. The applicant had correctly applied to the Court of Appeal first, as otherwise, the Judicial Committee would have refused leave when he applied later.

CONSIDERED: Walker *v.* Walker, 1903, A.C. 170.

ANNOTATIONS: The judgment of the Court of Appeal (C.A. 18/39) is reported on p. 247, *ante*.

FOR PETITIONER: Spindel.

FOR RESPONDENT: Salant.

ORDER:

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

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

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

This application must therefore be dismissed. No costs.

Given this 26th day of June, 1939.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 213/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., and Khayat, J.

IN THE APPLICATION OF:

Mahmoud Es-Salameh. — APPLICANT.

v.

Hafax Ahmad El-Hamdallah, in his capacity as guardian of the minors of Fuad El-Hamdallah. — RESPONDENT.

Privy Council appeal — Dismissal for non-prosecution — Judicial Committee Rules, 1925, R. 34

Termination of proceedings for non-prosecution of the appeal before the Privy Council.

ANNOTATIONS: Earlier proceedings (C.A. 213/37) are reported in 3 Ct.L.R. 13.

FOR APPLICANT: Kehaty.

FOR RESPONDENT: Absent — served.

ORDER.

The Appellant has taken no steps to prosecute his appeal before the Privy Council within the prescribed period of two months since the date of the arrival of the record in England, and by virtue of Rule 34 of the Judicial Committee Rules, 1925, the appeal stands dismissed for non-prosecution as from 17th April, 1939, and the bond filed by the Appellant is discharged.

Given this 5th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 54/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., and Khayat, JJ.

IN THE APPEAL OF:

Hussein Khalil Daoudi. APPELLANT.

v.

1. Moshe Levy,
2. Kalman Cohen,
3. Meir Efrima,
4. Israel Levy. RESPONDENTS.

Judgment by default — Magistrate may not postpone payment of Court Fees — Court Fees Rules, 1935, r. 19 — Opposition may not be allowed conditionally, judgment by Default (Magistrates' Courts) Rules, r. 4(3).

In dismissing an appeal from a judgment of the District Court of Jerusalem (in its appellate capacity) dated the 19th December, 1938: —

HELD: 1. As it is clear that under the Court Fees Rules the Magistrate had no power to postpone the payment of fees his order must be taken to have allowed the opposition to be lodged without fees. Rule 19(2) which provides for subsequent collection of fees, was in effect applied later.

2. There is no power to allow an opposition conitionally and the effect of the Magistrate's judgment must be that he was satisfied that the opposing parties had good cause for non appearance at the original hearing.

ANNOTATIONS: As to payment of Court Fees, see C.A. 39/39 (*ante*, p. 254) and annotations. On oppositions, C.A. 225/37 (1938, 1 S.C.J. 14).

FOR APPELLANT: Goitein.

FOR RESPONDENTS: Mizrahi.

JUDGMENT:

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

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

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

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

On this the Magistrate noted —

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

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

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

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

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

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

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

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

He then discusses a number of points arising under the Bills of Exchange Ordinance, and concludes his judgment by finding —

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

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

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

The terms of that judgment are obscure.

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

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

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

Delivered this 20th day of June, 1939.

Chief Justice.

CIVIL APPEAL No. 66/39.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Trusted, C.J., Copland and Frumkin, JJ.

IN THE APPEAL OF:

Dresdner Bank. — APPELLANT.

v.

Ludwig Bing. — RESPONDENT.

Foreign judgments — Exequatur or action upon the judgment — Foreign Judgment Rules — Undertaking not supported by consideration does not give rise to new cause of action.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 30th May, 1939: —

HELD: 1. Under the Foreign Judgments Rules, a foreign judgment may be made executory in Palestine either by action thereon before a District Court, or by the grant of an *exequatur* issued by a District Court. In this case the Appellant brought an action upon the judgment, but admittedly did not comply with the rules.

2. There had been no consideration for the undertaking to pay the foreign judgment by instalments as by it the defendant only undertook to do what he was already liable to do. No fresh cause of action could therefore be based upon it.

ANNOTATIONS: See C.A. 145/38 (1938, 2 S.C.J. 67), C.A. 173/38 (*ibid.* 72).

FOR APPELLANT: Linderman.

FOR RESPONDENT: Wittkowski.

JUDGMENT:

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

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

Alternatively, the Plaintiff based a claim upon an undertaking to pay the foreign judgment by instalments. There appears to be

no consideration for this undertaking, and by it the Defendant only undertook to do what he was already liable to do, and I do not think that any fresh cause of action can be based upon it.

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

Delivered this 29th day of June, 1939.

Chief Justice.

HIGH COURT No. 31/39.

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

BEFORE: Copland and Khayat, JJ.

IN THE APPLICATION OF:

1. H. G. G. Goddard,
2. Max Seligman. PETITIONERS.

v.

Attorney General. RESPONDENT.

Application to see depositions in police file — Mandamus — H.C. 33/37, convenience — CR.A. 162/28 — Mohadeo v. The King — Defenec entitled to call for production of statements made to the police — Difference in the case of summary trials — No mandamus in absence of statutory obligation, H.C. 40/38 — Mandamus may not be demanded as of right, Short & Mallor's Crown Office Practice — Mandamus will not be against crown or officer of the Crown acting as such.

In dismissing an application for an order to issue commanding the Respondent to show to Petitioners or their Counsel the statements of the witnesses to be called by the Respondent at the trial of the Petitioners, or in the alternative, to hand over to the Petitioners or their Counsel summaries of such statements: —

HELD: 1. The defence are always entitled to call for the production at the trial of statements previously made by prosecution witnesses. CR.A. 162/28 and H.C. 33/37 have extended this rule which does not apply in England, to production of statements before the trial.
There are, however, certain differences in summary trials and it would be inadvisable to extend the rule any further.

2. (Following Slutzki *v.* Ramat Gan Local Council & ors., H.C. 40/38). There is no statutory obligation upon the Attorney General to allow the Petitioners' claim and a *mandamus* will not be issued against an

officer whose office and duty are prescribed by statute, for an act not clearly provided for by that statute.

The writ of *mandamus* is discretionary, and the person applying for the writ must show that he has a real interest in the subject matter and a specific legal right to enforce.

3. A *mandamus* will not lie against the Crown nor the officers of the Crown acting as such.

CONSIDERED: Sheinzwit *v.* Inspector General of Police, H.C. 33/37 (P.P. 12.VII.37).

Abu Rashid *v.* A.G., CR.A. 162/28 (P.L.R. 348, C. of J. 603). Mahadeo *v.* The King, P.C.A. 79/35 [1936] 2 All. E.R. 813.

FOLLOWED: Slutzki *v.* Ramat Gan Local Council & ors., H.C. 40/38 (1938, 1 S.C.J. 400).

ANNOTATIONS: See also CR.A. 7/33 (P.P. 14.III.33). On *mandamus*, see *Digest* XVI, pp. 276 *sqq*.

FOR PETITIONER No. 1 — Goitein.
No. 2 — Levitzky.

FOR RESPONDENT: *Ex parte*.

ORDER.

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

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

The Petitioners base their claim relying, partly upon the judgment of this Court in Sheinzwit *v.* Inspector General of Police, H.C. 33/37, but principally on the question of convenience and also the serious prejudice to which they will be subjected if they do not know the names

of the witnesses to be called and do not know at any rate the gist of the evidence to be given by them.

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

In the Sheinzwit case *(supra)* an application was made to this Court for an Order *Nisi* against the Inspector General of Police, based upon Criminal Appeal 162/28, which I have just quoted, and this Court granted that application on the ground that "having regard to the difficulties caused by the conditions in this country, particularly the need for translation, we think that the balance of convenience decrees that such access should be given before rather than at the trial."

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

There are however certain differences in summary trials. There is no information, there are no names therefore on the back of the information, and it has been held by this Court in the Sheinzwit case (*supra*) that

the facility of inspecting police statements is limited to the names appearing on the back of the information and cannot be extended to statements of any person not on the information, whom the police may have interrogated during the course of their investigations. In a summary trial it may well be that the police do not know when it will be taken, if at all, nor whom they will intend to call, and we think that it would be inadvisable to extend the rule any further than it has been extended up to now. There is this further consideration that there is no statutory obligation, no legal duty upon the Attorney-General, to allow what the Petitioners' claim and it is the rule that a *Mandamus* will not be issued against an officer, whose office and duty are prescribed by statute, for an act not clearly provided for by that statute, although it may be highly convenient and desirable that such an act should be done by him. See Slutzki *v.* President Local Council Ramat Gan & others. 5 P.L.R. p. 357. The writ of *Mandamus* is entirely discretionary and cannot be demanded as of right. The person applying for the writ must show that he has a real interest in the subject-matter and a specific legal right to enforce, see page 201 Short and Mellor's Crown Office Practice, 2nd Ed., and the cases therein cited. There is no legal right here which can be enforced.

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

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

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

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

We are not insensible of the fact that there are cases now under the Criminal Code which it is undesirable should be tried summarily. Under the law as it at present stands, however, no misdemeanour can be tried upon information. It is true that in such complicated

cases the defendant may suffer considerable disability, but we are here to administer the law as we find it, not as what we think it might be. We are, however, quite sure that the District Court when trying this case will bear these considerations in mind and will exercise every care to ensure that the defence will not be prejudiced owing to the summary nature of the proceedings. We have, however, in our opinion no power to issue the writ asked for. The application must therefore be refused.

Given this 14th day of June, 1939.

British Puisne Judge.

CIVIL APPEAL No. 226/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:

1. Fatmeh Bint Ahmed El-Haj Mahmoud,
2. Amineh Bint El-Sheikh Hassan Soufan. APPELLANTS.

v.

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

Land Settlement — Re-entering case which has been struck out is a continuation of proceedings and not a new action — Court Fees Rules r. 13, Judgment by Default (District and Land Courts) Rules, r. 2, C.A. 50/37, C.A. 146/38 — Land (Settlement of Title) Ordinance, S. 6.

In allowing an appeal from a judgment of the Land Court of Nablus dated the 25th April, 1938, and in remitting the case to the Land Court to be heard on its merits: —

HELD: (Following C.A. 50/37, C.A. 146/38). Section 13 of the Court Fees Rules speaks of an action being "restored" when filed again after being struck out for non-appearance. These rules are later in date

than the Judgment by Default (District and Land Court) Rules. The restoration of an original action can only mean that the action when re-entered became a continuation of the original action. The present action did not therefore fall under Section 6 of the Land Settlement of Title) Ordinance.

FOLLOWED: Fahoum *v.* Khalaf, C.A. 50/37, (1937, 1 S.C.J. 281, P.P. 29.vii.37, 3 Ct.L.R. 18). Najia *v.* Bitar, C.A. 145/38 (1938, 2 S.C.J. 7).

FOR APPELLANTS: Atalla.

FOR RESPONDENT No. 1: In person.
No. 2: Not present — deceased.
No. 3: Hamburger.

JUDGMENT.

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

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

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

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

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

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

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

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

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

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

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

It seems to us equally that the same principles, which are laid down in these two cases which I have cited, apply to this present case. The Court Fees Rules which are later in date speak of an action being

"restored". The restoration of an original action can only mean that the action when re-entered becomes a continuation of the original action. That being so it seems to us that the Land Court was wrong in dismissing this present action.

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

Delivered this 13th day of June, 1939.

British Puisne Judge.

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