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CIVIL APPEAL No. 309/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Dr. Nasouh Nabulsi. — APPELLANT.

v.

Naif Yousef Ashour. — RESPONDENT.

Promissory notes — Allegation of illegality of consideration — Effect of illegality, Roscoe's Evidence in Civil Actions, Hailsham — Material alteration, B/E Ord., sec. 64 — Onus of proof, sec. 63(3), Evidence Ord. sec. 6, C. A. 84/42 — Corroboration, C. A. 106/33, CR. A. 77/40, R. v. Everest — Knill v. Williams, Commercial Bank v. Paton. Procedure — Failure to give address and occupation of respondent, C. P. R. 314(b), C. A. 72/40 — "If known", effect of same deficiency in statement of defence.

Appeal from the judgment of the District Court of Jaffa, dated 26th June, 1944, in Civil Case No. 10/43, allowed:—

1. When a defendant admits signing a promissory note and receiving money (albeit in connection with an illegal but executory contract) the burden of proof that the note was materially altered lies on him.

2. That onus cannot be discharged without strict corroboration of the defendant's evidence. Disbelief of the plaintiff's evidence and the inconclusive evidence of an expert witness are not sufficient.

3. The requirement for the defendant's address and occupation to be stated in the notice of appeal discussed.

(*A. M. A.*)

DISTINGUISHED: C. A. 72/40 (7, P. L. R. 334; 1940, S. C. J. 456; 8, Ct. L. R. 10).

FOLLOWED: C. A. 106/33 (2, P. L. R. 94; 3, C. of J. 821); CR. A. 77/40 (7, P. L. R. 438; 1940, S. C. J. 257; 8, Ct. L. R. 57); R. *v.* Everest, 1909, 2 Cr. A. R. 130 C. C. A., 73 J. P. 269.

REFERRED TO: C. A. 84/42 (9, P. L. R. 417; 1942, S. C. J. 399; 12, Ct. L. R. 94); Knill *v.* Williams, 1809, 10 East 431, 103 E. R. 839, 6 E. & E. Digest 375 No. 2471; Commercial Bank *v.* Paton, 1837, 15 Court of Session 1202, 6 E. & E. Digest 375 footnote (*i*).

ANNOTATIONS :

1. The judgment of the District Court is reported in 1944, S. C. D. C. 253.

2. On P/N.s given in connection with illegal considerations see C. A. 99/44 (1944, A. L. R. 777) and note.

3. See Halsbury, Vol. 7, pp. 174 *et seq.*, para. 249 and pp. 291 *et seq.*, paras. 404 & 406 for the right to claim back money paid under illegal contracts.

4. As regards the preliminary objection note that the point has already been decided in C. A. 339/43 (1944, A. L. R. 291) where C. A. 72/40 (*supra*) was likewise distinguished.

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Sassoon.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa dismissing an action by the present Appellant for LP. 550 on a promissory note signed by the Respondent to the order of the Appellant. At the hearing of this appeal the Respondent's advocate took the formal preliminary objection that no proper appeal was before me because the statement of appeal did not contain the address and occupation of the Respondent, as required by rule 314(b), Civil Procedure Rules, 1938, and in support of his objection he cited Civil Appeal 72/40, Vol. 7, P. L. R. p. 334. It appears, however, that the statement of appeal gave the Respondent's name and address and designation exactly as the Respondent himself had furnished them in his statement of defence in the Court below. As regards Civil Appeal 72/40, in that case the Appellant was guilty of a number of failures to comply with the rules, and it does not appear from the report whether, if the highly technical objection mentioned in Civil Appeal 72/40 had been the only omission of the Appellant in that case, the Court would have arrived at the same conclusion. In any event, I think that the facts of this case are sufficiently distinguishable from the facts in Civil Appeal 72/40, as to enable me to hold that, in this case, the Appellant has done all that could reasonably be required of him. Moreover, the purpose of the requirement of rule 314(b) is to enable process to be served on the Respondent. This, of course, has been done. I also emphasize the words "if known" in rule 314(b). The preliminary objection fails.

As regards the facts of this case, the Appellant alleged in his statement of claim that the Defendant being in need of money he (Appellant) agreed to buy Defendant's grove of thirty *dunums* for LP. 60 a

dunum and made part payment of LP. 550 in advance. The promissory note was given to Appellant as security in the event of Respondent eventually selling to another purchaser. On the promissory note were written the words "part of the price of my share of all the groves of Ras-el-Ain". The Respondent alleged that these words were not on the note when he signed it and that the LP. 550 was given to him by Appellant with which to buy a kilogramme of cocaine. The Respondent admitted the receipt of the money but said that he had been robbed of the cocaine, a story which the learned trial Judge disbelieved, as he also disbelieved the story that he had ever purchased the cocaine. The part of the defence relying on the illegal purchase for which the Plaintiff paid the LP. 550 was rejected on the principle of law that money is recoverable as money had and received to the use of the party paying it although the purpose of the contract was illegal if the contract remained executory. (Roscoe's Evidence in Civil Actions, 20th Edition, Vol. I, p. 579).

Although it was not necessary for the Respondent to lodge a cross appeal against that part of the judgment, nevertheless his advocate — as he was entitled to do — contended that it was wrong. I prefer, however, the contention of the Appellant's advocate to the effect that notice was, in fact, given by the Plaintiff who met the Defendant and at the meeting made a claim (Hailsham Vol. 7, p. 174 para. 249). This, of course, was an alternative argument in the event of this Court holding that the Court below were right in regarding the contract as illegal. The Court below believed that the LP. 550 had been given for the purchase of cocaine and also found that the words about the "shares of all the groves" had been added by the Plaintiff and that accordingly there was a material alteration which avoided the note under section 64, Bills of Exchange Ordinance. Mr. Cattan has invited me to reverse both those findings. As regards the first finding, he points out that, while the Court below disbelieved the Plaintiff, there is no clear finding that it believed the Defendant. I think, however, that it follows that, as the Court held, as a fact, that the money had been given for the purchase of cocaine, it must have believed the Defendant on this point, at any rate. The question remains, however, whether there was sufficient corroboration of Defendant's story. It must be remembered that, as the Defendant admitted signing the note and the receipt of the money, the onus was clearly on him to prove this tale. I refer to section 6, Evidence Ordinance, and section 63(3), Bills of Exchange Ordinance, and Civil Appeal 84/42, P. L. R. Vol. 9, p. 417.

Apart from the Defendant's own evidence, there was only the evidence of a Mr. Siksik, whom the Court below believed. Mr. Siksik is an advocate consulted by the Defendant about this very affair. He arranged a meeting between parties. It is unnecessary for me to detail what happened at that interview beyond saying that I have carefully perused this evidence, and in particular page 8 of the typed record supplied to me, and in it I am unable to find either any admission by the Plaintiff that the Defendant's story of the cocaine was true or any conduct at the interview from which it could be inferred that he was guilty or afraid of being questioned by the C. I. D. On the contrary, the inference to be gathered is that he insisted on getting his money back and that he was most stubborn. Indeed, Mr. Siksik said "When I spoke to Plaintiff, he neither admitted nor denied story of cocaine. He merely said 'I am not going to give up the money; let him (Defendant) do what he pleases'." I am unable to understand how it can be said that Mr. Siksik's evidence is corroboration of the Defendant's story of the cocaine deal. I hold that the part of the judgment holding that Defendant had established the truth of the cocaine story cannot stand.

To deal now with the alleged alteration to the promissory note by the supposed addition of the words "part of the price of the share of the grove", Mr. Cattan criticizes the finding of the Court below on the ground that there was insufficient evidence to support it. It is not easy from the judgment to ascertain whether the Court below believed the Defendant on this point. The Court below certainly did not believe the Defendant's story about being robbed of the cocaine, but it seems implicit from the judgment that the Court below could not have relied on the Defendant's evidence even on this part of the case, but that they did rely solely on their disbelief of the Plaintiff and their acceptance of the evidence of a certain expert, a retired officer of the Palestine Police. Even although it can be said that the trial Court believed the Defendant's story, strict corroboration was required as has been pointed out in Civil Appeal No. 106/33, Rotenberg's Collection of Judgments, Vol. III pages 821 and 823. Now, the learned trial Judge quite frankly admitted that the evidence of the expert was not by itself conclusive. He went on to say that it was corroborated by other evidence. He thought that the Defendant whom he considered an intelligent person would not have signed the note if the words in question had been on it at the time. He reached this conclusion because he, (the learned trial Judge), found that there had been no question of sale of land, this finding being apparently based

on his disbelief of the Plaintiff. Although the onus was on the Defendant, the Court below seems to have relied chiefly on their disbelief of the Plaintiff. Although they are both criminal cases, the *ratio decidendi* in Criminal Appeal 77/40, P. L. R. Vol. 7, p. 440, and R. *v.* Everest, Vol. 2, Criminal Appeal Reports, p. 132, seems equally to apply to proof in civil cases, at any rate, so far as the matter of corroboration is concerned.

In view of the judge's own finding that the evidence of the expert is not conclusive, I find it unnecessary to deal with Mr. Cattan's able analysis of the technical aspects of the handwriting and condition of the paper. I would merely say that I agree that the paper does not appear to have been clean when the Defendant admittedly signed the promissory note and that it was probably folded in which case ink might well have penetrated the fabric. There was evidence that the form had not been torn out of a clean book of forms and there was, in fact, the evidence of the Defendant himself that the two ends of the paper had been held together in other words, that the paper had been folded. Mr. Cattan also says that more pressure may be put at a particular time by one person writing with a pen than by another person, and he also truly says that one letter of the alphabet may be written with greater pressure than others. Mr. Cattan contends further that the evidence did not show when the ink had run into the fabric of the paper. The expert himself in cross-examination said that it was possible that the fold may have been broken only at one place and that therefore all the lines, including the last line, may have been written at the same time. On this evidence I do not think that the Court below was entitled to hold that the Defendant had discharged the onus of proof which clearly rested on him to prove that the words had been added after signature. I accordingly deem it unnecessary to deal with the further argument of Mr. Cattan that, even if these words had been added, they do not amount to a material alteration. Mr. Sassoon, for the Respondent, referred to the case of Knill *v.* Williams, E. & E. Digest, Vol. 6, p. 375, No. 2471. Mr. Cattan retorts that that case dealt with the Stamp Law, the only authority on the point being the case reported at the same page of the Digest, in Note 2, No. 2471(1): Commercial Bank *v.* Paton (1837) 15 Court of Session, 1202. But I need not consider this point.

For the foregoing reasons I allow this appeal and set aside the judgment of the 26th June, 1944, and enter judgment for the Appellant in the sum of LP. 550 with costs here and below. Costs of this appeal

to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 15.

Delivered this 13th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 338/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Shalom Yehuda. APPELLANT.

v.

Zakiya Shreim & 14 ors. RESPONDENTS.

Land settlement — Application by owner to cancel registration in his name made by fraud — Jurisdiction of L. S. O., L. S. Ord., secs. 6(1), 10(1), 33(4), *C. A.* 21/41 — *Court to decide validity of mortgage, C. A.* 117/29, *H C.* 74/32, *L. A.* 53/34, *L. A.* 50/36, *C. A.* 154/40, *C. A.* 214/40, *"Land" (sec.* 2).

Appeal from the decision of the Land Settlement Officer, Jaffa Settlement Area, dated 14th July, 1944, in case No. 69/Jaffa, allowed and case remitted:—

A settlement officer is competent to decide the validity of a mortgage allegedly made as the result of a fraud.

(A. M. A.)

NOT FOLLOWED: C. A. 21/41 (1941, S. C. J. 135; 9, Ct. L. R. 107).

FOLLOWED: C. A. 117/29 (1, P. L. R. 585; 3, C. of J. 946); H. C. 74/32 (1, P. L. R. 782; 3, C. of J. 1127); L. A. 53/34 (2, P. L. R. 465; 9, C. of J. 842); L. A. 50/36 (8, C. of J. 497 *sub* No. *C. A.* 50/36; 3, Ct. L. R. 6; 1937, S. C. J. (N. S.) 155); C. A. 154/40 (7, P. L. R. 467; 1940, S. C. J. 334; 8, Ct. L. R. 91); C. A. 214/40 (7, P. L. R. 564; 1940, S. C. J. 550; 8. Ct. L. R. 169).

ANNOTATIONS: The effect of this judgment seems to be that the jurisdiction of the L. S. O. in land under settlement is the same as that of the Land Court under ordinary circumstances. This does not seem to have been the practice up to now; *cf.* C. A. 206/40 (8, P. L. R. 30; 1941, S. C. J. 11; 10, Ct. L. R. 241) — *as to change of category of land;* C. A. 133 & 136/41 (9, P. L. R. 101; 1942, S. C. J. 122; 12, Ct. L. R. 39) — *as to nature of rent paid;* C. A. 217/42 (1943, A. L. R. 205) — *as to awarding land on payment of bedl el misl;* C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R. 509) — *as to revival of mortgages.*

(H. K.)

FOR APPELLANT: Michaelowsky.

FOR RESPONDENTS: Nos. 1 & 2 — Ben-Jamini and Eisenberg.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Jaffa, who had dismissed a claim by the present Appellant against the first two Respondents on the ground that he had no jurisdiction to decide what he considered to be an allegation of fraud.

The Appellant had applied for (1) cancellation of the transfer to himself of 65 shares in certain land, and, (2) the cancellation of a mortgage for LP. 702. The Land Settlement Officer held that the parties were proper claimants at land settlement He then proceeded to consider whether he had jurisdiction to deal with the two heads of claim. The Appellant had alleged that Respondent No. 2, the husband and agent of Respondent No. 1, in February 1943, offered to sell to Appellant for the sum of LP. 1,170 a building of two stories and 65 sq. metres of land and to transfer the said properties to the Appellant after partition. It was alleged that the Respondents, at that time, well knew that they would not be allowed by the Land Registry to make such a partition and that they had already contracted to sell the building to others. It was also alleged that the Respondents purported in the presence of the Appellant to make measurements on the land and to represent to him that this was done for the purpose of making a plan for partition. It is also alleged that the Appellant was then induced to believe that he had become the owner of the building and of the 65 sq. metres, and that he was further induced to grant a lease to the second Respondent of the said property for ten months, to part with money, and to carry out the transactions in the Land Registry which he now seeks to set aside. By the time the said transactions were carried out in the Land Registry the Appellant was already the owner of 271 other undivided shares in the parcel, that is, of the same number of shares in the building because the building was not and could not be registered separately from the land.

The Land Settlement Officer, in his decision, said that he had never previously had before him an application in which a registered owner wished to divest himself of title on the ground of being defrauded into purchasing land, and he concluded that it was doubtful whether he had jurisdiction.

The Land Settlement Officer admitted that the Appellant could not go to a Land Court because the land was still under settlement and

under the provisions of section 6(1), Land (Settlement of Title) Ordinance, as amended by Ordinance No. 48 of 1939, he could not file a statement of claim in the Land Court until after the relevant Schedule of Rights had been published. He then went on to hold that if the Appellant could, before a competent court, prove fraud, he could then go to the Land Settlement Officer in connection with the title and cancellation of the mortgage provided he did so before the relevant Schedule of Rights is published, or provided that he takes the course set out in section 33(4), Land (Settlement of Title) Ordinance as amended. In other words, the Land Settlement Officer held that he was not the competent authority before whom an allegation of fraud could be proved. He therefore dismissed the application of the present Appellant until such time as fraud is proved before the competent authority. In arriving at this decision he was largely influenced by the judgment of this Court in Civil Appeal No. 21/41 (Annotated Supreme Court Judgments, 1941, Vol. 1, p. 135).

The Appellant's advocate has argued that there is a long line of decisions by this Court, the effect of which is to show that a Land Court or, as in this case, a Land Settlement Officer, is the sole Court which has jurisdiction to decide the validity of a mortgage. They are:—

Civil Appeal No. 117/29, P. L. R. Vol. 1, p. 585.

High Court No. 74/32, P. L. R. Vol. 1, p. 782

Land Appeal No. 53/34, P. L. R. Vol. 2, p. 465.

Land Appeal No. 50/36, Levanon's Current Law Reports, Vol. 3, p. 6.

Civil Appeal No. 154/40, Levanon's Current Law Reports, Vol. 8, p. 91.

Civil Appeal No. 214/40, Levanon's Current Law Reports, Vol. 8, p. 169.

We think that we have here ample authority for the proposition that, if a mortgage is attacked on the ground of fraud, the Land Court (or the Land Settlement Officer) is the tribunal before which such an issue should be tried.

As we have said, the jurisdiction of the Land Court in the case before us is at the moment ousted. Having regard to the definition of "land" in section 2 of the Land (Settlement of Title) Ordinance and having regard to section 6 and section 10(1) of the same Ordinance, we think that there can be no doubt that the Land Settlement Officer

is the only person who has jurisdiction or is competent to decide the question of the validity of this mortgage. Notwithstanding the statement in Civil Appeal No. 21/41, Annotated Supreme Court Judgments, 1941, Vol. 1, p. 135 at p. 136, which must now be regarded as *obiter*, we consider that the Land Settlement Officer has jurisdiction to try this matter.

We accordingly set aside the decision of the Land Settlement Officer of 13th July, 1944, and remit the matter to him to hear and decide the claim of the present Appellant The costs of this appeal will abide the event; but, in order to facilitate the final arrangements, we certify an advocate's attendance fee at the hearing of this appeal of LP. 15.

Delivered this 29th day of January, 1945.

British Puisne Judge

CIVIL APPEAL No. 300/44.

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

BEFORE: FitzGerald, C. J. and Plunkett, A/J.

IN THE APPEAL OF:—

Salem Salman Abu Daiyeh. — APPELLANT.

v.

El Barrawi Lutfi el Akkawi. — RESPONDENT.

Arbitration — Jurisdiction of District or Land Court — "Court" as defined (sec. 2) — "In all other cases" — "Magistrate's Court" sitting as Land Court — Land Courts Ord., sec. 11(1)(3).

Appeal from the judgment of the Magistrate's Court, Beersheba, sitting as a Land Court, dated the 21st day of June, 1944, in Land Case No. 44/44, dismissed:—

In determining the Court with jurisdiction to confirm an award, regard must be had only to the value of the submission. If, by such standard, the Magistrate's Court has jurisdiction and if the award relates to land, that Court will sit as a Land Court.

(*A. M. A.*)

ANNOTATIONS:

1. The decision in this case seems to enlarge the statutory jurisdiction of Land Courts as the Land Courts Ordinance (sec. 3) does not vest the Land Court with jurisdiction to enforce awards unless the matter was referred to arbitration by the Land Court itself under sec. 6. Sec. 11 of the Ordinance only prescribes the constitution of Land Courts without conferring any additional jurisdiction whilst sec. 3(b) of the Magistrates' Courts Jurisdiction Ordinance

speaks of jurisdiction in actions concerning immovable property "in accordance with the provisions of the Land Courts Ordinance."

2. On the meaning of "Court" in the Arbitration Ordinance see Annotated Laws of Palestine, Vol. 2, pp. 57 *et seq.*

(*H. K.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Nashashibi.

JUDGMENT.

Two points have been raised in this appeal both going to the question of jurisdiction. It was argued that the only Court which had jurisdiction to confirm an award was the District Court. Reference was made to the definition of "Court" in Section 2 of the Arbitration Ordinance. It was submitted by Mr. Nazzal that paragraphs (a) and (b) of that section do not refer to land and that in order to bring land within the ambit of the section we must fall back on the words "in all other cases" in paragraph 3. We are unable to agree with this contention. It appears to us that under the provisions of (a) and (b) it is immaterial whether the claim is in respect of an oxen or a house, or land, provided the amount of the claim does not exceed the statutory monetary limitation of the section. In this case the amount of the claim was LP. 100, it therefore does not exceed the monetary limitation of 2(a).

I come now to the second point which is that under the provision of 2(a) "Magistrate's Court" means Magistrate's Court in what I may call its purely civil capacity, whereas it appears from the record that in this case, the Magistrate's Court of Beersheba was sitting as a Land Court. Now, the Magistrate's Court sits in various capacities. In a criminal case it sits in its criminal capacity, but it does not thereby cease to be a Magistrate's Court. In civil cases other than land, it sits in its civil capacity but it does not thereby cease to be a Magistrate's Court. In land cases it sits by virtue of the jurisdiction conferred by Section 11(1) of the Magistrates' Courts Jurisdiction Ordinance * but it does not thereby cease to be a Magistrate's Court. Indeed this opinion would appear to be fortified by the wording of subsection 3 of Section 11 which refers to the Magistrate's Court constituted as a Land Court. In fact, the capacity in which the Magistrate's Court sits is determined by the subject-matter of the cause before it whether it be criminal, civil or concerned with land, but it

* Should be: Land Courts Ordinance (as enacted in the Land Courts (Am.) Ord., 1939).

(*Ed.*)

is always a Magistrate's Court. It follows that both points raised by Mr. Nazzal must, in our opinion, fail. The appeal is dismissed with inclusive costs of LP. 10.—.

Delivered this 23rd day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 193/44.

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

BEFORE : Rose, J.

IN THE APPEAL OF :—

Abul Faraj Salim Abdul Hamed Issa & an. APPELLANTS.

v.

1. Heirs of Rashid Darwish es-Salti through Suheil Rashid es-Salti, in his capacity as one of the heirs of his late father Rashid Darwish es-Salti and on behalf of the said estate,
2. The Keren Kayemeth Leisrael Ltd. RESPONDENTS.

Parties on appeal — Service on a number of Respondents dispensed with by B. P. J. — Revision of decision on appeal. — Adjournments.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated the 20th day of March, 1944, in Case No. 2/Ein Zeiteem, adjourned *sine die*:—

Ruling by B. P. J. to dispense with service of the appeal on a number of Respondents varied.

(*A. M. A.*)

ANNOTATIONS: On dispense with service on some respondents see C. A. 252/43 (10, P. L. R. 516; 1943, A. L. R. 811) and notes 1 and 2 thereto in A. L. R.

(*H. K.*)

FOR APPELLANTS: F. Atalla.

FOR RESPONDENTS: No. 1 — Feiglin.
No. 2 — Absent — served.

ORDER.

In this case Counsel for the 1st Respondent takes the point that the Appellants were wrong in persuading Mr. Justice Edwards to dis-

pense with Respondents 95—119 in the application before the Judge. It is, of course, difficult for me at this stage to decide what substance there is in that point. But in view of the fact that the learned Judge appears to have considered it necessary for Respondent No. 120 — the Keren Kayemeth Leisrael Ltd. to be cited, it seems to me, as Mr. Feiglin points out, that there is no distinction in principle between them and the other 25 persons who according to their claims were entitled to 1549 shares out of 3000 shares — the Keren Kayemeth claiming the remaining shares. The mere fact, of course, that one claimant is interested in a smaller share in no way means that he is not entitled to be represented at the hearing of the appeal. It is unfortunate that this course results in loss of time, but in the interests of the parties I feel it desirable not to proceed with the case as otherwise I may, later, find it necessary to adjourn for these persons to be brought into the case.

That being so the appeal will be adjourned *sine die* to enable the Appellants to cite those Respondents I have mentioned. The costs of this appeal will be in the cause and to simplify the final arrangements, the costs of this appeal will be on the lower scale to include the sum of LP. 10.— for advocate's attendance fee. If the Appellants ultimately succeed there will be only one set of costs and one advocate's attendance fee.

Delivered this 23rd day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 97/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Jacques M. Sonsino. APPELLANT.

v.

David Avni. RESPONDENT.

Specific performance — District Court competent, C. A. 153/41 — Whether damages are adequate compensation, C. A. 287/43, Greene v. West Cheshire Rly. Co. — Construction of contract, mutuality — In re Scott & Alvarez's Contract — Arbitrary unilateral rescission;

In re Deighton & Harris' Contract ; Starr-Bowkett Building Society & Sibun's Contract; In re Dames and Wood; Quinion v. Horne.

Appeal from the judgment of the District Court, Haifa, dated the 21st day of February, 1944, in Civil Case No. 82/43, dismissed:—

1. The District Court is competent to determine a claim for specific performance which does not relate to the actual ownership of the land. Where registration of an equitable title is claimed, the action should be brought in the Land Court.

2. Irrespectively of whether an amount payable as damages is agreed, if the intention of the contract is to bind the parties, specific performance may be decreed; if it allows them the alternative of paying an amount in discharge, damages will be awarded.

(*A. M. A.*)

FOLLOWED: C. A. 153/41 (8, P. L. R. 377; 1941, S. C. J. 398; 10, Ct. L. R. 101).

REFERRED TO: C. A. 287/43 (10, P. L. R. 642; 1943, A. L. R. 786); Greene *v.* West Cheshire Rly. Co., 1871, L. R. 13 Eq. 44, 41 L. J. (CH.) 17, 25 L. T. 409; Scott and Alvarez's Contract, *in re*, 1895, 2 Ch. 603, 64 L. J. (CH.) 821, 73 L. T. 43, 11 T. L. R. 471; Deighton and Harris' Contract, *in re*, 1898, 1 Ch. 458, 67 L. J. (CH.) 240, 78 L. T. 430; Starr-Bowkett Building Society & Sibun's Contract, 1889, 42 Ch. D. 375, 58 L. J. (CH.) 459, 60 L. T. 811, 5 T. L. R. 440; Dames and Wood, *in re*, 1885, 29 Ch. D. 626, 54 L. J. (CH.) 771; 53 L. T. 177; Quinion *v.* Horne, 1906, 1 Ch. 596, 75 L. J. (CH.) 293.

ANNOTATIONS:

1. It is difficult to reconcile the various judgments of the Supreme Court on the question of jurisdiction on claims for specific performance. *Cf.*, on the one hand, C. A. 40/39 (6, P. L. R. 338; 1939, S. C. J. 269; 5, Ct. L. R. 251), C. A. 207/42 (9, P. L. R. 861; 1942, S. C. J. 861) & C. A. 404/43 (11, P. L. R. 341; 1944, A. L. R. 695) and, on the other hand, C. A. 153/41 (*supra*) and this case. See the fourth paragraph of the judgment in C. A. 207/42 (*supra*) from which it would appear that there is concurrent jurisdiction in Land- and District Courts.

2. On the vendor's right of rescission see Halsbury, Vol. 29, *pp.* 288—9, para. 380.

3. See annotations in A. L. R. to C. A. 287/43 (*supra*) on the question of damages as sufficient alternative remedy.

4. Note also that in this case the purchase price had not yet been paid and contrast C. A. 157/43 (10, P. L. R. 315; 1943, A. L. R. 482), C. A. 79/44 (1944, A. L. R. 492) and C. A. 219/44 (*ibid.*, p. 786).

(*H. K.*)

FOR APPELLANT: Goitein and Toister.

FOR RESPONDENT: A. Levin and Weinshall.

JUDGMENT.

This is an appeal against the judgment of the District Court of Haifa dated 21st February, 1944, in Civil Case No. 82/43 whereby

the Respondent, there the Plaintiff was granted specific performance of a contract entered into between himself and the Appellant.

The facts are very fully set out in the judgment of the learned President and he makes very definite findings as regards these facts. The first being that as regards jurisdiction the District Court has jurisdiction to hear and determine a claim for specific performance which does not relate to the actual ownership of the land. With this finding I entirely agree. In C. A. 153/41 at p. 377 Vol. 8, 41 P. L. R., it is very clearly stated:—

> "We are clearly of opinion that this particular claim for specific performance is within the jurisdiction of the District Court since it is not a claim strictly speaking to the ownership of the land but is to obtain the fulfilment of a contract; we hold therefore that the District Court has jurisdiction to deal with the application, *etc.*"

The second finding is that the agreement "P. 8" is a binding agreement between the parties. The 3rd finding is that the LP. 100.— paid by the Plaintiff was paid on account of the purchase price and that the Appellant knew and approved of this fact. The fourth and last finding is as regards the granting of specific performance; the Court found that damages would not be an adequate compensation for the wrong done, that there was no undue hardship upon the Appellant and that the only damages which the Respondent might be entitled to recover would be the return of LP. 100.— with interest which he had paid in advance. The only apparent reason for the Appellant backing out of the contract was that he considered he might get a better price later on. The learned President in support of this finding refers to C. A. 287/43 Annotated L. R., part 50, p. 786 and in particular the passage there cited from Greene *v.* West Cheshire Rly. Co., L. R. 13 Eq. 44. For the foregoing reasons the learned President grants specific performance.

For the Appellant it is submitted that there is no agreement and that specific performance cannot be stretched to cover a case like this. Specific performance is only granted in cases involving land where full purchase price has been paid and possession for some time has been proved and that the land has been used, whereas here there was no possession and only a LP. 100.— was paid and the 10 days have not elapsed before the Appellant refused to proceed, and it is not a case for specific performance but only for damages. That where damages are an adequate remedy specific performance is not granted. "P. 8" is at most an agreement to agree. Ruppin had not a power of attorney at any time and not power to make an agreement, and this was known to the Respondent. The land is mortgaged and the mortgagee was not

a party and cannot get specific performance without his consent, clearly the mortgagee wanted his money back but agreed afterwards not to press, there is no hardship on the Respondent. Sonsino makes Kaizerman his agent and not Ruppin. The case is one for the Land Court and not the District Court, a question of ownership is involved. Mr. Goitein refers to the case of Greene *v.* Cheshire Rly. Co., this case does not apply because in this case everything has been done by the Plaintiff and the Respondent had refused to carry out the terms of the agreement, namely to build a siding for the benefit of the Plaintiff as also in C. A. 287/43, whereas in this case nothing has been done and the LP. 100.— advanced was mere caution money. In Palestine specific performance cannot be granted unless there is mutuality. There was none in this case. This can be seen from the contract "P. 8". LP. 100.— was a measure of damages, the land was a mere desert area and the Court has to exercise its discretion properly and is not given powers to grant specific performance where there is no binding agreement, no mutuality, and no power of attorney to the agent.

Mr. Levin for the Respondent submits that mutuality should exist when the contract is entered into and that it did so exist in this case. This can be seen from exhibit "P. 8". Here there is a flagrant breach by the Appellant, he cancelled the contract before the 10th January. In fact on the 5th and in any case if the date of the contract is taken from the 25th December, when the Respondent signed, from that date to the 10th January, he was bound and there was mutuality and either party could sue for specific performance before the 10th. There was no alternative remedy provided for after the 10th so Sonsino could not take back the money neither could Avni. All that the Appellant wanted was a higher price, he never denied that Ruppin was his agent and had authority to make "P. 8" There is no hardship on the Appellant, the mortgage matured years ago and can be redeemed at once, it was sufficient to prove that the Respondent had need of the land and it was not necessary to show that damages are not a sufficient remedy. Mr. Goitein repeats previous arguments and concludes with that specific performance cannot be enforced:—

1. As there was very much to be done.
2. Agreement allowed for withdrawal after the 10th.
3. There was no money paid on account of principal.
4. No binding agreement.
5. There was an alternative remedy in damages and that the Court exercised its discretion capriciously.

As I have already stated, I agree that the District Court had juris-

diction and that a District Court has power to order specific performance of a contract to sell land where the claim is to enforce a contract as opposed to a claim for registration based on equitable title due to the full payment of purchase price, possession, and cultivation *etc.* This latter is a matter for the Land Court. The granting of specific performance is a matter of discretion for the Court, and like all similar powers must be judicially exercised.

To quote the words of Lopes, C. J., in *Re* Scott & Alvarez's Contract:—

> "Now the foundation of the doctrine of specific performance was this, that land has quite a character of its own, that the real meaning between the parties to a contract for sale of land was not that there should be a contract with legal remedies only and that the purchaser should get the land and should not be put off in an ordinary case by offering him damages."

There is no doubt that Ruppin was authorised to act as agent for Sonsino and to negotiate a sale of Sonsino's property in Palestine and that he could enter into an agreement for that purpose, without any power of attorney. A power of attorney would become necessary to effect the redemption of a mortgage or to transfer in the Land Registry.

From the correspondence exhibited in this case and from the evidence it is clear that Sonsino gave Ruppin the fullest authority to act as his agent, to sell the property which Sonsino was at first extremely desirous of doing, and that he was moreover very anxious not to lose opportunity of the sale to Avni and that he approved of all the terms of the contract P/8. I do not think it is necessary to discuss this agreement further than to say I consider that it is a perfectly good agreement between the parties, and binds the vendor to sell and the purchaser to buy from 20.12.42 to the 10.1.43. The parties could have made any conditions they desired, it is also clear that LP. 100 was paid and accepted in part payment of the purchase price. From the words of the agreement, it is evident that the parties were mutually bound to carry out the terms of the agreement up to the 10th of January, 1943, and after that date all the Respondent could claim was the return of LP. 100, whereas the Appellant could retain the LP. 100 if the Respondent refused to complete the contract. In fact what actually took place was that the Appellant was not satisfied to wait until the 10th of January, but rescinded the contract on the 5th of January during the period when the parties were mutually bound to carry out the agreement, can he do this or is he acting arbitrarily without a reasonable cause? From the comparison of various English

cases, it can be seen that the rescission cannot be arbitrary or unreasonable. In Deighton and Harris' contract 1898 1st Chancery, p. 458, the vendor was held entitled to rescind as he had no title. In Stars and Bonnet Society, Sabines Contract, 1898 *, 1st Chancery Division, page 375, there was a special condition of the contract that if the purchaser should make a petition to a requisition on title which the vendor should be unwilling to remove *etc.* the vendor might put in a notice in writing annulling the contract. In Davis ** *v.* Wood 2 Chancery Division 1885 again there were special terms in the contract. However in Quinion *v.* Horne 1906 Chancery Division, page 603—4, the vendor's rescission was held to be arbitrary and unreasonable, and to quote the words of Farwell, J., at page 603 and 4, "now it is said that the vendor is not to act capriciously, I rather prefer the word arbitrarily which I take it to mean with unreasonable cause, that is the test which was applied". True, specific performance will not be enforced if payment of a sum of money would be an adequate remedy, the principle will be the same whether the contract leaves the amount of damages unliquidated or whether it specifies a sum by way of penalty or liquidated damages. A stipulation in the event of non-performance of contract a certain sum of money will be paid, this fact is not conclusive, the answer is to be found in considering the intention of the parties that is, whether the party bound to performance has an alternative choice given to him by the contract to perform or pay the agreed sum or whether he is bound to do a certain thing with a penal sum by way of liquidated damages attached as security.

The facts in this case are strong and the intention of the parties is abundantly clear. The Appellant was extremely anxious to sell and was very willing at the time the contract was made to sell at the price arranged by Ruppin with Avrii on his behalf. He deliberately rescinded the contract arbitrarily without reasonable cause. I am in full agreement with the decision of the learned President and the judgment of the District Court is confirmed and the appeal is dismissed with costs and LP. 30 advocate's fees.

Delivered this 2nd day of February, 1945.

A/British Puisne Judge.

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* Starr-Bowkett Building Society and Sibun's Contract, 1889.

** Dames. (*Ed.*)

CIVIL APPEAL No. 175/44.

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

BEFORE: Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Omar Muhammad el Jureidi & 32 ors. APPELLANTS.

v.

Othman Fouad Abdel-Rahman el Yousef & 2 ors. RESPONDENTS.

Land settlement — Claim accepted late and dismissed without hearing evidence on the ground that it was filed by false pretences — Comments on conduct of advocates.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated the 5th of February, 1944, in Case No. 21/Arab esh-Shamalina, allowed and case remitted:—

After accepting a claim the Land Settlement Officer should proceed to hear it and should not dismiss it without hearing evidence on the ground that it was based on false pretences and lying information.

(*A. M. A.*)

FOR APPELLANTS: F. Atallah.

FOR RESPONDENTS: No. 1 — Shuqairi.
No. 2 — Asst. Government Advocate — Paglin.
No. 3 — Absent — served.

JUDGMENT.

This is an appeal from the decision of the Settlement Officer of the Safad Settlement Area, dated the 5th of February, 1944, in case No. 21/Arab esh-Shamalina.

The subject-matter of the dispute is pieces of land situated in the bend of a river and referred to as islands in this case. Othman Fouad Eff. Yousef, here Respondent No. 1, and the Murad family, here Respondents No. 3, entered a claim before the Settlement Officer within due time for parcels Nos. 13627/16 and 17. Both parties claimed ownership of these islands by registration and possession. After hearing, decision was given in favour of the Plaintiff, the Murad family, against the Defendants at the Dekka villages of Syria. The latter have not appealed against this decision.

The present Appellants, who were late in making their claim, ap-

plied to the Settlement Officer to grant them leave to claim on the ground that they were ignorant people and were living in Syria and were not aware of the Settlement proceedings. The Settlement Officer acceded to their request and allowed their claim, No. 102, to be submitted and they were cited as Defendants No. 3.

Before the hearing of the case on the 5th January, 1944, the Settlement Officer was presented with a copy of a letter from Mr. Atallah to the Chief Secretary complaining against the conduct of the Syrian Police Authorities against his clients, who were claiming rights of land settlement and who are living on the lands. This latter statement, if true, was a direct contradiction of the previous statement of their advocate that his clients were Syrians and living far away. The Settlement Officer, on enquiry into the matter, was satisfied that Defendants No. 3 lived on the lands for years, and that not only were they aware of the Settlement proceedings being in full swing, but they were present and working on the land during the Settlement proceedings, and that they pointed out the same lands to the officials as the property of the Plaintiff and his family ; that they were and still are cultivators of the family of the Plaintiffs and that they were incited to make this claim; that there is an enquiry pending regarding the letter written to the Chief Secretary, and that the enquiry and this decision should be taken in conjunction. In the meantime the Settlement Officer dismissed the claim of the Appellants for the above reasons, and because the claim was based on false pretences and lying information.

In appealing from this decision it is submitted that:—

(a) The Land Settlement Officer dismissed the claim of the Appellants without hearing any of their witnesses, which evidence was available in Court;

(b) That the finding of the Land Settlement Officer is not supported by evidence; and

(c) That the Appellants' claim is based upon possession, and their evidence as to possession should have been heard.

The Appellants' claim, having been accepted, should have been heard, and on the 29th December, 1943, the Appellants applied in writing for a number of witnesses, who were in fact waiting to be heard at the enquiry. Such findings as there are, are not supported by evidence, and clearly the Settlement Officer was annoyed and prejudiced by what he considered a misrepresentation. There was only one witness who gave evidence for the Plaintiffs, on whose sole evidence the Settlement Officer relied.

The Respondents submitted that the Settlement Officer found that the islands in question were within the Murad *kushan,* and that the boundaries were not disputed by the Appellants. There had been nothing else for them to prove. The Appellants' advocate, at page 11 of the record, states that he does not wish to call any further evidence. There was no request to have evidence in the other claim heard. If the Appellants' claim was wrongly dismissed, he had other remedies.

We consider that the Appellants' claim having been accepted by the Settlement Officer, evidence should have been heard and the decision come to on the merits after hearing the evidence. Comments in a decision upon the conduct of advocates are highly undesirable, and are both unfair and out of place. We agree with the argument of the Appellants.

The decision is set aside and the case remitted to a Settlement Officer to hear and determine the Appellants' claim. Costs will be costs in the cause, and to facilitate final arrangements we award LP. 10.— inclusive costs, to the ultimately successful party.

Delivered this 21st day of December, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 315/44.

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

BEFORE: FitzGerald, C. J. and Plunkett, A/J.

IN THE APPEAL OF:—

Eliezer Krevitzky. APPELLANT.

v.

The Estate of Moshe Yankelevitz & 6 ors. RESPONDENTS.

Rights to land — Rectification of Land Register — Land Settlement Ord., sec. 66 *— Equitable title to land — Relief under Mejelle* 906 *— Fraud — Failure to disclose other persons' rights, L. S. Ord., sec.* 33(4) *— Equitable title claim defeated by alternative remedy — Construction of pleadings.*

Appeal from the judgment of the Land Court, Haifa, dated the 29th day of June, 1944, in Land Case No. 11/42, partly allowed:—

1. Fraud is a serious allegation and the plea will not be accepted unless the facts warrant it.

2. A person who failed to exercise his remedy under sec. 33(4) of the Land (Settlement of Title) Ordinance cannot claim equitable title.

(*A. M. A.*)

ANNOTATIONS:

1. On the plea of fraud *vide* annotations in A. L. R. to C. A. 9/43 (10, P. L. R. 102; 1943, A. L. R. 100) and C. A. 375/44 (1944, A. L. R. 630).

2. On the strict requirements of sec. 66 of the Land (S. of T.) Ord. see C. A. 106/43 (1943, A. L. R. 188) and note 3; *cf.* C. A. 409/43 (11, P. L. R. 358; 1944, A. L. R. 700).

3. For authorities on Art. 906 of the *Mejelle* see note 1 in S. C. J. to C. A. 68/40 (7, P. L. R. 224; 1940, S. C. J. 126; 7, Ct. L. R. 181) and C. A. 62/42 (9, P. L. R. 413; 1942, S. C. J. 393; 12, Ct. L. R. 51).

(*H. K.*)

FOR APPELLANT: M. Goldenberg.

FOR RESPONDENTS: Nos. 1—6 — D. Feinberg.
No. 7 — Absent — served.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the District Court of Haifa sitting as a Land Court. In that Court the Appellant who was Plaintiff, claimed to have transferred to him an area of one *dunum* of land in Balfouria Parcel 1 of Block 16719. It appears that he had erected on this land a mill of some substantial value. The land, however, is owned by the Respondents who are the Appellant's relations-in-law. It is quite clear that there would have been no dispute were it not for a break in family relationship. Exhibits P. 11 and P. 4 clearly indicate that the Respondents admitted the rights of the Appellant to this mill. In those exhibits they undertook to have the Appellant's rights legally safeguarded. The first Exhibit P. 4 was executed before land settlement but P. 11 was not drawn up until after settlement. P. 4 is not so precise in defining the area which was to be allocated to Appellant as P. 11, but we are satisfied that each of those documents contained an admission that the Appellant was entitled to the land on which his mill stood. Such briefly are the facts.

The appeal which is now lodged, is based on three grounds, *viz.*:

(1) It is prayed that the Land Register be rectified under the provisions of section 66 of the Land (Settlement of Title) Ordinance, on the ground of fraud of the Respondents.

(2) A request for a declaration of specific performance of the alleged equitable rights of the Appellant, and

(3) A prayer for relief under Article 906 of the *Mejelle*.

Dealing first with (1), the allegation of fraud is founded on the fact that when the first Respondent signed, as it is admitted he did

sign, the memorandum of claim under the Land (Settlement of Title) Ordinance, he did not disclose the rights which the Appellant had in the mill; rights which, the Appellant alleges, there was a particular obligation on him to disclose in view of the contents of P. 11. Fraud is a serious allegation and before the Court will accept it as a plea it must be satisfied that there was an intention to commit a fraud on the Petitioner. The only allegation of fraud here was the failure on the part of the Respondent to notify the Settlement Officer. But the Appellant himself was aware that land settlement proceedings had been instituted in regard to this area yet he submitted no claim. The schedule of rights had been posted, he had ample opportunity under the provisions of Section 33(4) of the Ordinance, of avoiding the consequences of the Respondents' failure to notify the Settlement Officer. Indeed, his failure to submit any memorandum of claim might raise in the minds of the Respondents a not unreasonable presumption that he had abandoned his claim. For these reasons we hold that fraud has not been established.

Turning now to ground (2), the equitable claim to specific performance is founded on the same reasons as those advanced under the first ground and we are of opinion that that claim must fail for the same reason which is, that the Appellant himself had an alternative remedy under Section 33(4) of the Ordinance which he failed to exercise.

There remains for consideration the claim under Article 906 of the *Mejelle*. The article provides that if buildings have been erected or trees planted on a piece of land under the belief that there was some legal justification for so doing, the owner of the buildings and trees may claim to be vested with the ownership of the land upon payment of the price thereof. The price of the land affected in this case is LP. 7.500 mils which the Appellant says he is willing to pay. The learned Judges in the Court below refused to consider the claim under the Article on the ground that it was not contained in the statement of claim. We think that on this issue the Court below erred. It is true that the statement of claim did not in specific terms ask for this remedy but it appears to us that the gist of the claim made in the statement of claim was for the transfer of this plot to the Plaintiff. It was a prayer to enforce the Respondents to carry out their undertaking to the Appellant which was to transfer to him half *dunum* of land upon which his mill is situated. It seems to us that this would cover a claim for a transfer within the meaning of Article 906 of the *Mejelle*.

In these circumstances we will remit the case to the lower Court solely on the issue to determine whether the Appellant has a claim

to be vested with the ownership of the half *dunum* of land upon which the mill is situated, upon paying the price thereof in accordance with the provisions of Article 906 of the *Mejelle*. Two thirds of the costs of this appeal will be paid by the Appellant to include LP. 5 advocate's attendance fee.

Delivered this 19th day of February, 1945.

Chief Justice.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 215/44.

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

BEFORE : Edwards, J. and Shaw, A/J.

IN THE APPEAL OF :—

Amin Muhammad el Khadra. APPELLANT.

v.

Yehoshua Blum Ya'cov & 7 ors. RESPONDENTS.

Parties to appeal — Separate appeals from Land Settlement where separate parcels claimed — C. A. 386/43.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated 13th March, 1944, in case No. 3/Ayelet Hashahar, dismissed : —

Separate appeals should be filed against persons who claimed separate parcels in land settlement.

(*A. M. A.*)

FOLLOWED: C. A. 386/43 (11, P. L. R. 307; 1944, A. L. R. 581).
ANNOTATIONS : see C. A. 386/43 (*supra*) and cases therein cited; *cf.* C. A. 8/44 (11, P. L. R. 487; 1944, A. L. R. 568).

(*H. K.*)

FOR APPELLANT: Nakkarah.

FOR RESPONDENTS: Nos. 5 & 6 — Feiglin.
Nos. 7 & 8 — Gavison.
Rest — Absent — served.

JUDGMENT.

At the hearing of this appeal a preliminary objection has been taken that separate appeals should have been lodged. Respondent No. 6 is concerned merely with parcels 14 and 15 of Block 13828. Respondent

5 is concerned solely with parcel 15 of the same block, while Respondent No. 8 claims in entirety parcel 11 of block 13829. It is said that Respondents Nos. 5 and 6 never laid any claim to parcel 11. The advocate for Respondents 5 and 6 contends that separate parcels were claimed by different persons and that the Respondents mentioned have no common interest (Civil Appeal No. 386/43, Vol. 11 P. L R. p. 307). The Appellant's advocate replies that all the cases cited in Civil Appeal 386/43 deal with cases in which an appeal was lodged by more than one appellant. This, of course, was not the case in Civil Appeal 386/43 where there was only one appellant. We think that the rule in Civil Appeal 386/43 should apply here and that the preliminary objection therefore must be sustained. The appeal is accordingly dismissed with costs to Respondents 5 and 6, fixed costs of LP. 15 and costs to the Respondents 7 and 8, fixed costs of LP. 5.

Delivered this 4th day of January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 281/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF :—

Hassan Said Salameh & an.
Personally and on behalf of the estate of the late deceased Zeinab Hassan Salameh. APPELLANTS.

v.

Darwish Yousef Heidar,
Personally and on behalf of the estate of his father Yousef Heidar. RESPONDENT.

Land Courts — Land Courts (Amend.) Ord., 1939, *sec.* 6, *proviso — Application under C. P. R.* 213 *falls within the proviso.*

Appeal from the judgment of the Magistrate's Court Acre sitting as a Land Court dated the 31st May, 1944, in Land Case No. 17/42, dismissed:—

When dealing with an application under r. 213 to set aside an *ex parte* decree or order the Land Court cannot be said to be *functus officio* and the application therefore falls within the saving provision of sec. 6 of the 1939 amending Ordinance.

(*A. M. A.*)

ANNOTATIONS: For decisions on similar questions see C. A. 226/38 (6, P. L. R. 334; 1939, S. C. J. 337; 6, Ct. L. R. 96) where earlier authorities are reviewed, and C. A. 228/42 (9, P. L. R. 741; 1942, S. C. J. 991) and note 1 thereto in S. C. J.

(*H. K.*)

FOR APPELLANTS: H. Atalla.

FOR RESPONDENT : Elia.

JUDGMENT.

The issue which emerged in this appeal is whether the action comes within the provisions of section 6 of the Land Courts (Amendment) Ordinance, 1939. Now it was disclosed during the hearing that there is, in fact, before the Land Court of Haifa, an application under Rule 213 of the Civil Procedure Rules, by the Appellant for the setting aside of an *ex parte* decree or order made by that Court. From this it is abundantly clear that the Land Court is not *functus officio*. It is seized of a cause in which the issue is the revival of the original action. That Court therefore, in so far as this case is concerned, comes within the saving provisions of Section 6 of the Land Courts (Amendment) Ordinance, 1939.

For these reasons the appeal must be dismissed with inclusive costs of LP. 10.

Delivered this 23rd day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 126/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

El-Haj Mohammad ben el-Haj Salem Abu Mahfouz. APPELLANT.

v.

Sam'an Farah & an. RESPONDENTS.

Magistrates' Courts — Appeals — Action dismissed on the ground that it should have been filed in Land Court — Appeal lies to District Court.

Appeal from the judgment of the Magistrate's Court, Beersheba, dated the 8th day of March, 1944, in case No. 293/43, dismissed:—

Where an action is dismissed by a Magistrate's Court on the ground that it should have been filed in a Land Court constituted by a Magistrate, an appeal lies to the District Court, not to the Supreme Court.

(*A. M. A.*)

ANNOTATIONS: Note that only appeals from decisions of Magistrates' Courts in actions "brought in accordance with the provisions of the Land Courts Ordinance" (M. C. J. O., sec. 11(4)) lie directly to the Supreme Court, not generally from "decisions of the Magistrate's Court in actions concerning immovable property" as stated in the judgment. Not only does an appeal lie to the District Court in matters of partition and recovery of possession, but in the present case the action in the Magistrate's Court did concern immovable property and was for that very reason dismissed by the Magistrate. The test to be applied is not the subject matter of the action, but whether the action was filed in the Magistrate's Court or in the Land Court constituted by a Magistrate.

(*H. K.*)

FOR APPELLANT: F. Shawa.

FOR RESPONDENTS: No. 1 — In person.
No. 2 — W. Salah.

JUDGMENT.

This is an appeal from the Magistrate's Court in which the Magistrate ruled that the matter was not properly brought before him and was a matter within the jurisdiction of the Magistrate sitting as a Land Court. The action was dismissed. From this ruling the Appellant appeals to this Court.

Respondent No. 2 raised a preliminary objection that the Appellant should have appealed to the District Court as only appeals from decisions of the Magistrate's Court in actions concerning immovable property lie to the Supreme Court. With this contention I agree. Objection is upheld and appeal dismissed with costs fixed at an inclusive sum of LP. 10 to be shared equally by both Respondents.

Delivered this 4th day of October, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 153/44.

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

BEFORE: Rose, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Palestine Land Development Co. Ltd. APPELLANT.

v.

1. Muhammad Musa Saleh Mansour,
2. Keren Kayemeth Leisrael Ltd. & 5 ors. RESPONDENTS.

Awlawiyeh — Share to be awarded to each claimant — Land Code, Arts. 41, 48 — *Effect on Mortgage — Non registration of Claimant's title.*

Appeal from the judgment of the Land Court, Jerusalem, dated 27.3.44, in Land Case No. 24/43, dismissed:—

1. A person may be a co-owner within the meaning of Art. 41 of the Land Code although his share, arising from succession, has not been registered.

2. Where more than one co-owner are claiming the right of *awlawiyeh*, the land is divided among them in equal shares and not proportionately to their shares.

3. The property is acquired free from mortgage, if any.

(*A. M. A.*)

ANNOTATIONS:

1. See H. C. 76/44 (1944, A. L. R. 494) for other proceedings in this case.
2. On *awlawiyeh* generally see C. A. 226/44 (*post*, p. 30) and note 2.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENTS: No. 1 — Ghussein.
No. 2 — Olshan.

JUDGMENT.

Plunkett, A/J.: This is an appeal from the judgment of the Land Court of Jerusalem, delivered on 27.3.44, in Land Case No. 24/43, in an action for prior purchase (*awlawiyeh*), by which judgment Respondent No. 1 was granted the right to obtain transfer of certain shares in 4 parcels of land against payment of certain consideration.

The Appellant submits that the Respondent at most is entitled to a proportionate share in accordance with article 48 of the Land Code. The Appellant is a registered owner with much larger share and not a stranger. Respondents No. 2 are mortgagees and the judgment cannot be executed against them. The first Respondent was not a registered owner at the time of the purchase and should have registered within twelve months, succeeding to his share in the land.

The first Respondent submits that he has a certificate of succession and only the co-owners who were selling registered. He can claim *Awlawiyeh* whether he is a registered owner or not, according to Article 41 of the Land Code. He has proved that he is a co-owner, and

his notice was lodged months before the mortgage was made, and he submits that there is no necessity for him to redeem the mortgage and that there is nothing to support the appeal.

We agree with the argument of the Respondent that he is entitled to claim and receive one half of the share purchased by the Appellant and not a share only proportionate to his share in the whole land.

The judgment of the Land Court is confirmed, but varied in respect of the mortgage, and the Land Registrar will be informed to alter the registration in favour of the first Respondent, as ordered by Land Court for his now declared share, and to register this share free of the mortgage. The Respondent will pay the sum ordered by the Land Court into the Court to enable due settlement to be made between the mortgagor and the mortgagee of that portion of the land released from the mortgage. The appeal is dismissed with costs to include the sum of LP. 10 advocate's attendance fee.

Delivered this 29th day of January, 1945.

A/British Puisne Judge.

Rose, J.: I agree that the appeal should be dismissed, with the usual consequences.

British Puisne Judge.

CIVIL APPEAL No. 226/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Clara Levy. — APPELLANT.

v.

1. Itzhak Klein & an.,
3. The General Mortgage Bank of Palestine Ltd. — RESPONDENTS.

Awlawiyeh — Land Code, Art. 41 — Who may claim — Khalit — Allegations that servitudes shared considered — Effect of common wall — At what price property should be offered to claimant — Whether right applies to property in towns — Construction, Art. 45, L. A. 36/27, L. A. 64/32 — Mejelle, 1012.

Appeal from the judgment of the Land Court of Haifa dated the 12th day of May, 1944, in Land Case No. 11/43, dismissed:—

1. A common wall is not sufficient to give rise to a right of *awlawiyeh* as *khalit*.

2. The property proposed to be sold may be offered to the person entitled to *awlawiyeh* at a price different from that paid by the purchaser, if the price is not unreasonable.

3. (*Per Frumkin, J.*): The right should be strictly and narrowly construed. *Quaere* whether it applies to *miri* property inside towns.

(*A. M. A.*)

FOLLOWED: L. A. 36/27 (1, P. L. R. 149; 4, C. of J. 1531); L. A. 64/32 (1, P. L. R. 784; 3, C. of J. 1098).

ANNOTATIONS:

1. For other instances of *awlawiyeh* claims by alleged *Khalits* see L. A. 15/27 (1, P. L. R. 159; 4, C. of J. 1531), L. A. 42/35 (8, C. of J. 487), C. A. 37/38 (5, P. L. R. 122; 1938, 1 S. C. J. 115; 3, Ct. L. R. 113) and C. A. 127/40 (7, P. L. R. 357; 1940, S. C. J. 440; 8, Ct. L. R. 189).

2. On the right of *awlawiyeh* generally see note 1 in A. L. R. to C. A. 389/43 (11, P. L. R. 214; 1944, A. L. R. 272).

3. *Cf.* C. A. 70/44 (11, P. L. R. 367; 1944, A. L. R. 426) on the inappropriateness of the *shufa* provisions to conditions prevailing in modern towns.

(*H. K.*)

FOR APPELLANT: J. Levy.

FOR RESPONDENTS: Nos. 1 & 2 — Eliash and Weinshall.
No. 3 — Bileski.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from a judgment of the District Court of Haifa in which the Court dismissed a claim by the Appellant that the Respondents had joint interest of certain property within the meaning of Article 41 of the Ottoman Land Code.

I find myself so completely in agreement with the judgment of the learned President and with the reasoning upon which the judgment was founded that I can deal with the issue very briefly. The facts are: — A plot of land belonged to Zvi Rabinovitch who caused two houses to be built on it. The Appellant now occupies one house and the first two Respondents the other. These houses were originally occupied by Rabinovitch and his son-in-law. A partition of the plot was made, but Rabinovitch and his son-in-law did not worry much about it as they lived on friendly family terms. It was only when Rabinovitch and his son-in-law each sold their houses to strangers, *i. e.* the Appellant and the first two Respondents, that trouble arose. It is alleged that there is joint ownership within the meaning of Art.

41 of the Ottoman Land Code because there was a joint stairway to the roof; but it is clear from the evidence and it has been so found by the learned President that, in fact, the stairway originally belonged to Rabinovitch's house and that his son-in-law only used it with his consent. It follows that this cannot be regarded as a joining link. It is said that there is a joint entrance because there is in the middle of the path a post through which cars enter in one way; but it is clear from the map, as the learned President so found, that the intention was that the passage should be divided. This can easily be accomplished by removing the post. It is further urged that the two houses have a servitude in common in the sense that they are supplied with water from the same branch pipe; but if this fact were to make ownership joint within the meaning of Art. 41 of the Ottoman Land Code most of the modern built houses would come under the restrictive provisions of that article, and I agree with the learned President that this equally forms no joining link. Finally, it is claimed, and it is admitted, that the two houses have a common wall which could not have been partitioned. In this connection I would only remark that most of the modern houses in the towns of Palestine have a common wall and I see no reason why there should not be a theoretical partition line through that wall. I, therefore, agree with the learned President that there is no joint interest within the meaning of Art. 41 of the Ottoman Land Code.

An alternative defence was raised that, in fact, the first two Respondents did offer the Appellant the right of prior purchase as provided in Art. 41 of the Code. The facts in this connection were that although the two Respondents were offered LP. 3,200 for the house they offered it to the Appellant for LP. 2,800. The learned President found this as a fact and, in my opinion, he was amply justified in so finding. The learned President further came to the conclusion that this was not unreasonable and that in offering the house at this price they were complying with the provisions of Art. 41 of the Ottoman Land Code. In this I also agree with the learned President.

For these reasons the appeal must be dismissed with costs on the lower scale to include a sum of LP. 25 advocate's attendance fee.

Delivered this 8th day of January, 1945.

Chief Justice.

Frumkin, J.: This appeal turns round the construction of Art. 41 of the Ottoman Land Code and its application to the property in dispute which consists of one of two semi-detached houses built on *miri* land located on Mt. Carmel, Haifa

The Appellant is the owner of one semi-detached house and the Respondents the owners of the adjoining one acquired by recent purchase. The Appellant claims to have the right to it by prior purchase under Art. 41.

In the course of argument I expressed my doubts as to whether Art. 41 and the subsequent articles of the Ottoman Land Code dealing with prior purchase, being originally intended to *miri* land proper, agricultural or otherwise, could at all be applied to land in its wider sense, as defined in our Land Legislation so as to include *miri* property situated in towns.

One can see the reason and logic in the case of land proper when, for instance, an agricultural estate composed of one unit has passed to two heirs of one deceased and one of the heirs is transferring his share to a stranger, that the co-owner would have an understandable claim to take the place of the stranger and keep all the estate for himself. The application of this institution of prior purchase to Urban Property could not have been in the mind of the Ottoman Legislature because at that time there was hardly any *miri* land in towns and in so far as there was such land within the limits of a town, if any houses were built on it, the land followed, to certain extents at least, the law governing the houses and not *vice versa*. For urban property, being mostly *mulk*, the pre-emption provisions of the *Mèjelle* apply.

It appears that as regards Art. 45 of the Ottoman Land Code which deals with prior purchase of people in need of land as against strangers it was already held that it does not apply to towns (see C. A.* 36/27, 1 P. L. R. p. 149), and it was also held that no distinction should be drawn between Art. 45 and 41 (see L. A. 64/32, 1 P. L. R. p. 784). But as I said before, this point was only raised by me in argument, and this case could not be decided on that basis. But be it as it may, both as regards prior purchase in *miri* land and pre-emption in *mulk* property, it has always been the tendency in this Court, in order to protect the liberty of the subject in disposing of his property in the way he likes, to stick to the letter of the law giving it the most strict and narrow construction.

Now, in the present case the Appellant bases her claim firstly on the ground that she was a co-owner of the property in dispute, by the fact that she and the vendor to Respondents had a joint wall owned in co-ownership. We need not decide whether the wall does, in fact, belong to both parties in joint ownership or each of them owns half

* Should be: L. A.

(*Ed.*)

of the wall at a line cutting its width as shown in the Land Registry, because even if we will accept that the wall is the joint property of the parties they are just co-owners of the wall and not co-owners of the house. It is true that section 1012 of the *Mejelle* provides that a co-owner in one of the walls of the house is to be considered as a co-owner in the entire house; but this relates only to pre-emption in *mulk* property and cannot be extended to prior purchase in *miri* property.

Next the Appellant claims to be entitled to prior purchase as an owner of a servitude, a *khalit*, and she puts her rights under this claim as follows: Firstly, that she and her neighbour, *i. e.* the Respondents, are the co-owners of the iron water supply pipeline used for the two houses, and she compares it to joint ownership of a water channel under the *Mejelle*. In my opinion this would be too far-fetching because the provisions of the *Mejelle* dealing with water channels cannot apply to pipelines of the said nature.

Secondly, that they have a joint passage leading to their houses. It is, however, clear that in whatever form the owners of the two semi-detached houses might hitherto have used that passage, according to the Land Registry the Appellant has got about two thirds of the width of the passage and the Respondents the other third and they are, therefore, not co-owners but adjacent owners. If anyone is to be prejudiced by keeping to the registration it would be the Respondents and not the Appellant; and one has to bear in mind that any arrangement made between the parties or their predecessors for the joint use of the passage is of recent origin and not *"ab antiquo"*. The same consideration applies to the third sort of servitude relied upon by the Appellant, namely, the staircase.

For these reasons I am of opinion that the Appellant failed to establish a claim of prior purchase either as co-owner or as owner of joint servitude under Art. 41 of the Ottoman Land Code and the appeal must be dismissed and the judgment of the District Court confirmed, with costs on the lower scale to include LP. 25 advocate's attendance fee.

Delivered this 8th day of January, 1945.

Puisne Judge.

CIVIL APPEAL No. 161/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Muhammad Salim Mahmoud Shamma
& 2 ors. APPELLANTS.

v.

Abd er Raouf Husni Abdallah el Khadra
& 9 ors. RESPONDENTS.

Land settlement — Refusal by L. S. O. to hear witnesses — Manner in which evidence should be tendered — Settlement of Title (Procedure) Rules, r. 6.

Appeal from the decision of the Land Settlement Officer, Tiberias Settlement Area, dated 4th March, 1944, in case No. 7/Tabgha, allowed and case remitted:— Advocates who wish to call evidence should not confine themselves to a general statement that they are prepared, if necessary, to call evidence. They should name the witnesses, call them to the box and ask the Settlement Officer to administer the oath and hear the witnesses' testimony.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 177/41 (8, P. L. R. 470; 1941, S. C. J. 467) and C. A. 37 & 38/42 (9, P. L. R. 362; 1942, S. C. J. 416).

(*H. K.*)

FOR APPELLANTS: Shamma.

FOR RESPONDENTS: Nos. 2 & 3 — Kassab.
Rest — Absent.

JUDGMENT.

At the hearing of this appeal some preliminary objections have been taken by the advocate for the Respondents; but I think that there is no substance in them.

The first ground of appeal is that the Land Settlement Officer refused to hear evidence which the Plaintiffs' advocate was prepared to tender. From a perusal of the record one is left in some doubt as to whether the Plaintiffs' advocate did specifically ask the Land Settlement Officer to hear a particular witness or witnesses or whether the advocate merely intimated to the Land Settlement Officer that he was prepared to tender evidence if necessary. As I have pointed out in a previous case it is the duty of all advocates who wish to tender evidence before

a Land Settlement Officer definitely to ask the Land Settlement Officer to hear the evidence of a particular witness or witnesses and not merely to inform the Land Settlement Officer that he is prepared, if necessary, to call evidence. (See Rule 6, Settlement of Title (Procedure) Rules). In this case, however, the Land Settlement Officer in his decision, said:—

> "Proof is offered of receipt of monies and produce on that account. I pointed out the impossibility of establishing a claim to benefits of this kind, *etc.*"

It would, therefore, appear as if the Land Settlement Officer had intimated in advance that whatever evidence was tendered it would not likely avail the Plaintiffs.

With some hesitation I have come to the conclusion that the case must be remitted to enable the Plaintiffs to adduce such evidence as they are advised; but I would again emphasize that it is the duty of advocates appearing before Land Settlement Officers very definitely to ask the Settlement Officer to tender the oath to a particular witness or witnesses — in other words, the advocate must call the witness to the witness-box and ask the Land Settlement Officer to administer the oath and to allow the witness to be examined as is provided for by rule 6. It is undesirable that I should deal with any of the other arguments adduced before me by the advocate for the Respondents.

The decision of the Land Settlement Officer of the 4th March, 1944, is set aside and the matter is remitted to him to hear such evidence as the present Appellants wish to adduce. Costs of this appeal will abide the event; but, in order to facilitate the final arrangements, I certify an advocate's attendance fee at the hearing of this appeal of LP. 10.

Delivered this 2nd January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 124/43.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mamour Awqaf of the Northern District at Acre, in his capacity as *Qaim Maqam Mutawalli Waqf* Nabi Sa'in. APPELLANT.

v.

1. The Government of Palestine,
2. Farha Assad Khalil Matar & 73 ors. RESPONDENTS.

Waqf — When kadi sher'i should be invited by L. S. O. to advise, L. S. Ord., sec. 11(3) *— Effect of old registration — Sale under Art.* 3 *of the Law of Disposition — Werko receipts as evidence of ownership.*

Appeal from the decision of the Land Settlement Officer, Nazareth Settlement Area, dated the 14th day of July, 1942, in cases Nos. 4/Um Qubei and 1/Nazareth, dismissed:—

1. It is not necessary to invite the *kadi sher'i* to sit in land settlement proceedings under sec. 11(3) of the Ordinance unless a *prima facie* case has been made out that the property is *waqf*.

2. *Werko* receipts are not sufficient, in themselves, to prove ownership.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* L. A. 60/33 (2, P. L. R. 265; 9, C. of J. 895 *sub* No. C. A. 99/34). Note that where the L. S. O. does invite the *Kadi* to advise him on *waqf* law he is bound by that advice — C. A. 107 & 108/41 (8, P. L. R. 398; 1941, S. C. J. 400; 10, Ct. L. R. 104).

2. The ruling on the second point is in accordance with a long line of authorities going back to L. A. 39/24 (2, C. of J. 765); see further C. A. 90/38 (1938, 1 S. C. J. 286) and note 2, and C. A. 39/40 (7, P. L. R. 167; 1940, S. C. J. 387; 7, Ct. L. R. 131).

(*H. K.*)

FOR APPELLANT: Khadra.

FOR RESPONDENTS: No. 1 — A. G. A. — (Wa'ari).
No. 3 — Amineh Tabbar.
No. 25 — Rev. Father August.

JUDGMENT.

Abdul Hadi, J.: This is an appeal by the *Ma'mour el Awqaf el Islamieh* of the Northern District, Acre, in his capacity as acting *Mutawalli* of the *Maqam* of *Nebi Sa'een* in Nazareth, against a decision of the Settlement Officer, Nazareth Settlement Area, whereby the Appellant's action for the registration of all the land claimed as *Waqf Sahih* for the *Maqam* of *Nebi Sa'een,* was dismissed and only the *Maqam* (shrine) itself was registered as *miri,* with a courtyard, as shown in the plan of the block in question.

The Appellant relied in his appeal on three main grounds to show that the Settlement Officer's decision was wrong. These grounds briefly are, (1) the failure of the Settlement Officer to invite the *Sharia Kadi* to sit with him to advise him regarding the claim of the *waqf;* (2) that the Settlement Officer failed to consider and give effect to the *Tabu*

entry No. 1 of the year 1313, and the *werko* entry No. 3, which support the Appellant's case; and (3) that he erred in granting the Respondents possession for the period of prescription.

As regards the first ground of appeal, the Settlement Officer in his decision said: "I did not grant the application for the *Sharia Kadi* to sit till such time as it should be shown that there was a *prima facie* case for the *Awqaf*". We think that as the first point which had to be determined was whether there was or was not sufficient evidence to prove the *Waqf Sahih*, which was eminently a matter for the Settlement Officer himself to decide, rather than a matter concerning the *waqf* itself, the advice of the *Sharia Kadi* in accordance with section 11(3) of the Land (Settlement of Title) Ordinance, Cap. 80 of the Laws of Palestine, was not really necessary; as the Appellant failed to prove that the whole land was *waqf* land, no question of the law of *waqf* became involved.

As regards the second ground of appeal, it appears that the *Tabu* entry No. 1 of 1313 gives the category of the land as *miri* and the owner as the 'local Branch of the Education Department in Nazareth", and states that the land was described thus because of a *mazbata* given by the Local Education Authorities, No. 43, dated the 28th April, 1313, to the effect that the said local authority had acquired it and possessed it because the land is of the category of the *Awqaf Munderessah*. It also seems from the column of particulars in this entry, that the *Dafter Khaqani*, on the 24th July, 1318, ordered annulment of the registration in the name of the Education Branch and directed sale by public auction of the piece of land, because the said land belonged to the *Daftar Khaqani* and was not of the category *Awqaf Munderessah*. The *werko* entry No. 3 refers to property in the Nazareth District of an area of 41 *dunums* and 200 *pics*, registered in the name of the *Waqf* of *Nebi Sa'een*, the date of this registration being in the year 97.

The Appellant's contention is that the registration No. 1 of 1313 proves his claim and that the *Daftar Khaqani* had no authority to annul the registration, and that there was an order by the *Waqf* Department of the Jerusalem *Mutassarefieh*, Exhibit 'C', which deemed the land to be of the category of *Awqaf Munderessah* of *Nebi Sa'een* and that the *werko* entry No. 3 also supports his claim. The registration No. 1 of 1313, on which the Appellant relies, describes the land as being *miri* and gives the owner as the local Education Branch in the Nazareth District, there being no mention whatsoever of the *Waqf* of *Nebi Sa'een*. This being so, the Appellant's claim that the land is

Waqf Sahih for *Nebi Sa'een* is not proved by such registration. Furthermore, the *Daftar Khaqani,* on the 24th of July, 1318, ordered cancellation of this entry in the name of the Education Branch and also cancelled the sale by public auction because it belonged to the *Daftar Khaqani* and was not of the category of *Awqaf Munderessah.* We must therefore assume that such an order was given under the authority conferred by Article 3 of the Law Regulating the Right to dispose of Immovable Property.

Coming now to Exhibit 'C', namely, the order of the *Waqf* Department, to which the registration does not refer, although it did refer to one order of the *Daftar Khaqani,* we find that this was merely an attempt by the said *Waqf* Department to induce the *Daftar Khaqani* to correct the registration by making it in the name of *Waqf el Nebi Sa'een,* for the reasons mentioned therein. There being before us nothing to show the result of this attempt, we cannot hold it to be valid evidence sufficient to support the claim; neither does the *werko* entry No. 3 support the Appellant's claim, because (firstly) *werko* entries are not in themselves sufficient evidence to prove ownership, and (secondly) there is nothing in the *Tabu* entry No. 3 to show that it concerns the land claimed. For these reasons we think that the registration No. 1 of 1313, and the *werko* entry No. 3 cannot be held to be evidence sufficient to support a judgment in favour of the Appellant, to the effect that the land claimed is *Waqf Sahih* for *Nebi Sa'een.*

It is unnecessary to deal with the third ground of appeal, namely, the possession of the Respondents by prescription. My finding on the second ground of appeal, namely, that the Appellant has not proved his claim, is sufficient to enable this Court to dismiss the appeal.

For these reasons I would dismiss the appeal and order the Appellant to pay the Respondents' costs to be taxed on the lower scale.

Delivered this 31st day of January, 1945.

Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge

CIVIL APPEAL No. 139/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Sarkis Izmirlian. APPELLANT.

v.

Israel Margolis. RESPONDENT.

C.i.f. contract — Party entitled to sue — Contract conditioned in obtaining import licence — Failure to obtain licence — Notarial notice — Austin Baldwin & Co. v. Wilfred Turner & Co., Andrew Millar & Co., Ltd. v. Taylor & Co. Ltd. — Damages.

Appeal from the judgment of the District Court of Tel-Aviv, dated 12th March, 1944, in Civil Case No. 263/42, allowed:—

1. A c.i.f. contract made with sellers or "substitute people" may be sued upon by endorsees of the sellers.

2. If a notarial notice is sent to give the addressee another chance to comply with the contract and the time allowed by the notice is too short, the addressee should apply for a longer time.

3. A purchaser who cannot obtain an import licence should not repudiate the contract on that score before waiting a reasonable time to see whether the licence cannot be obtained.

4. The measure of damages for a breach of a c.i.f. contract by the purchaser is the difference between the contract price and the price obtained after the breach.

(*A. M. A.*)

REFERRED TO: Austin, Baldwin & Co. *v.* W. Turner & Co., Ltd., 1920, 36 T. L. R. 769; A. Millar & Co., Ltd. *v.* Taylor & Co., Ltd., 1916, 1 K. B. 402, 85 L. J. (K. B.) 346, 114 L. T. 216, 32 T. L. R. 161.

ANNOTATIONS:

1. On fixing of time by notarial notice and on reasonableness of the time so fixed see note 1 to C. A. 59/43 (1943, A. L. R. 203).

2. On the third point see Halsbury, Vol. 7, pp. 218—9, footnote (*k*); *cf.* Taylor & Co. *v.* Landauer & Co., 1940, 4 All E. R. 335, 57 T. L. R. 47.

3. The ruling as to the measure of damages is in accordance with that in C. A. 124/25 (4, R. 1627, *sub* No. 149/26) — also a case of a c.i.f. contract. Note, however, that a vendor has the alternative remedy of suing for the purchase price; C. A. 100/38 (5, P. L. R. 309; 1938, 1 S. C. J. 316; 3, Ct. L. R. 275), distinguishing C. A. 149/26 (*supra*).

(*H. K.*)

FOR APPELLANT: Goitein and Gluckman.

FOR RESPONDENT: Lebel.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Tel Aviv, dismissing an action brought by the present Appellant for breach of a c.i.f. contract.

On 1st March, 1942, at Alexandria, Egypt, the present Respondent, as buyer, entered into a contract with the seller, Charles Schlick, of Alexandria, "or substitute people from Sudan", under which the buyer undertook to buy one thousand tons of Sudanese cotton seeds at £E. 12 per ton. The destination was Haifa or any Palestine port, and shipment was to be by sea or rail at seller's option from Port Sudan c.i.f. Palestinian ports or rail stations, and delivery was to be during March until 31st August, 1942, from Port Sudan, in one or four lots shipment. The contract was to be subject to the seller's export licence and to the buyer's import licence.

The Court below dismissed the action principally on the ground that the competent authorities had refused an import licence and that therefore the contract became void. The District Court rejected one of the defences of the present Respondent, namely that the present Appellant was not the proper person to sue. We think that this defence rightly failed, because when one looks at the reverse of the contract one finds the words "Order Mr. Sarkis Izmirlian with recourse Khartoum, Sudan, Charles Schlick". This Mr. Izmirlian was obviously a substitute person from the Sudan, properly appointed in accordance with the contract.

On the 24th March, 1942, the competent authorities wrote a letter refusing to grant a licence, but on the 22nd April, 1942, a licence was offered by the Food Controller, who said that if he were informed of the buyer's name, he would then request the appropriate Import Licensing Authority to issue an import licence. In the letter of the 22nd April, 1942, the Food Controller suggested that the consignment be offered to Messrs. Shemen or Messrs. Itzhar, Ltd.

On the 30th April, 1942 (Palestine *Gazette* No. 1190, p. 513), Government notified that oil seeds, including cotton seeds, could not be imported from certain countries, one of which was the Sudan, but that in exceptional circumstances import licences might be issued to private importers. In this connection we might say that there is no difference in law between the present Respondent and Messrs. Shemen or Messrs. Itzhar, Ltd., *vis-à-vis* the Government, because all these three persons would be regarded as private importers.

On the 5th May, 1942, a notarial notice was sent on behalf of the Appellant to the Respondent; but it is to be remarked that by letter

dated 26th March, 1942, the Respondent had already intimated his intention to repudiate the agreement on the ground that it was impossible to obtain an import licence. In that letter he categorically stated "I wish to be free". On the 5th May, 1942, as we have said, a notarial notice was sent to the Respondent, to which he did not reply.

It is argued on behalf of the Respondent that the notarial notice gave him only twenty-four hours in which to comply, and that it was given on a Friday afternoon, and the next day being his Sabbath it was impossible for him to take delivery of the goods. To this the Appellant's advocate replies that the notarial notice was merely given with the obejct of affording the Respondent another chance, and he also said that if he felt that a period of twenty-four hours was insufficient, he could have replied to the notarial notice by asking for an extension of time, which he did not do. With this contention we agree. Much has been made by the Respondent's advocate of the fact that there was no evidence that an import licence was in fact ever granted to the Respondent, it being said that the licence would only be granted to Itzhar Ltd. or Shemen Ltd., and was in fact later issued to Shemen Ltd.

We think that there is nothing in this point, because had the Respondent waited until the 31st August, 1942, as he should have done, he might have obtained an import licence. In this connection Mr. Goitein, for the Appellant, has called our attention to the case of Austin Baldwin & Co. *v.* Wilfrid Turner & Co., Ltd., English & Empire Digest, Vol. 12, page 398, No. 3225, and Vol. 36 T. L. R., 769, and to the case of Andrew Millar & Co., Ltd., *v.* Taylor & Co., Ltd. (1916) K. B. pages 402, 414 and 416, where Swinfen Eady, L. J., held at page 415 that it was the duty of the Plaintiff's to have waited a reasonable time for the purpose of seeing whether it were possible to fulfil their contract, and it was said that if they had waited, the contract could have been carried out as usual without any difficulty. In our view, the parties before us expressly provided for such a period in the contract itself. We therefore consider that the Respondent should have waited till the 30th August, 1942, and we accordingly hold that the Respondent was not justified in breaking the contract.

For the foregoing reasons we set aside the judgment of the District Court and enter judgment for the Plaintiff for damages. As to damages, the cotton seed was sold for LP. 8.500, but the purchase price was £E. 12 per ton. As to the measure of damages, a point was taken on behalf of the Respondent that Izmirlian sold the seeds to Schlick for LP. 9 per ton, and the damages should be assessed on the basis

of the difference between that sum and LP. 8.500, but this is a matter between Schlick and Izmirlian, and has nothing to do with the Respondent, who bought the seeds for £E. 12. The damages will be calculated at the difference between LP. 8.500 and £E. 12, multiplied by 1000, to be paid in Palestine currency. We do not think that the Appellant is entitled to any further sum.

The Respondent must pay the Appellant's costs here and in the Court below. The costs of this appeal will be taxed on the lower scale and will include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 12th day of December, 1944.

British Puisne Judge.

Frumkin, J.: I agree.

Puisne Judge.

CIVIL APPEAL No. 146/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Subhi el Ayoubi. — APPELLANT.

v.

The Arab Bank Ltd. — RESPONDENT.

Advocates — Claim for remuneration under agreement or by quantum meruit — Advocates Ord. (Cap. 2), secs. 21, 22 and (1938) sec. 24 — "Order" of Court explained — Construction of agreement — Application of quantum meruit in Palestine — Mejelle, 563—4, P. O. in C., Art. 46 — Merrel v. Loft, Scott v. Pattison, C. A. 83/42; C. A. 177/35, Sinclair v. Brougham, Halsbury, Digest, Bullen and Leake — C. P. R. 52.

Appeal from the judgment of the District Court of Jaffa, dated the 30th day of March, 1944, in Civil Case No. 113/43, allowed and case remitted:—

1. An agreement as to professional fees made in 1931 comes under the former Advocates Ordinance (Cap. 2).

2. The order of Court allowing to enforce the agreement should be obtained elsewhere than in the action claiming payment.

3. The doctrine of *quantum meruit* may be applied in Palestine under Arts.

563—4 of the *Mejelle*, read together with Art. 46 of the Palestine Order in Council.

4. The Court before which action is brought on a *quantum meruit* can decide in regard to fees on litigation conducted in other Courts.

(*A. M. A.*)

REFERRED TO: C. A. 83/42 (9, P. L. R. 415; 1942, S. C. J. 485; 12, Ct. L. R. 64); C. A. 177/35 (2, P. L. R. 416; 7, C. of J. 26); Merrel *v.* Loft, 1895, 13 N. Z. L. R. 739, 12 E. & E. Digest 166 footnote (*f*); Scott *v.* Pattison, 1923, 2 K. B. 723, 92 L. J. (K. B.) 886, 129 L. T. 830, 39 T. L. R. 557; Sinclair *v.* Brougham, 1914, A. C. 398, 83 L. J. (CH.) 465, 111 L. T. 1, 30 T. L. R. 315.

ANNOTATIONS:

1. See Annotated Laws of Palestine, Vol. 1, pp. 194 *et seq.*, particularly headings *"Enforcing the Agreement"* and *"Quantum Meruit."*

2. As to the inadequacy of the *Mejelle* in cases of this nature see C. A. 14/40 (7, P. L. R. 255; 1940, S. C. J. 150; 7, Ct. L. R. 185).

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Beiruti.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Jaffa, dismissing an action by the present Appellant for the sum of LP. 951.585 representing fees due to him as an advocate in respect of cases conducted by him on behalf of his former clients, the present Respondents.

On the 10th July, 1931, the parties entered into an agreement, clauses 1, 4 and 5 of which are in the following terms, namely:—

> "1. First party pays to the Second Party 7½% of the amount claimed in every case he pleads before the Civil and Religious Courts on behalf of the first party as advocate's fees, provided that the amount claimed in that case should not exceed LP. 500 and in case the amount exceeds LP. 500, first party shall pay the second party 5% up to LP. 1,000. In case the amount claimed in any one case exceeds LP. 1,000, first party shall pay to the second party 5% only in consideration of his fees, pleadings and execution of judgments and any other legal proceedings relating thereto.
>
> 4. The second party shall be entitled to the fees set out in Clause 1 of this agreement in respect of every case in which the judgment is completely satisfied in the Execution Office, whether by payment of the amount by the debtor or by his imprisonment or by any other means which are allowed by law.
>
> 5. Second party undertakes to apply for attachment of movables and immovables which will be discovered after the imprisonment of the debtor and the receipt of the fees by second party according to Clause 4 of this agreement and to carry on all legal measures necessary for same without fees."

The learned Relieving President of the District Court held that whether Section 22 of the Advocates Ordinance (Cap. 2) or Section 24 of the Advocates Ordinance, 1938, applied, the Appellant had failed to show that he had obtained either an order of the Court before which the particular actions or proceedings took place or a certificate as required by the 1938 Ordinance.

The first question which we have to decide is whether the Advocates Ordinance, (Cap. 2) or the 1938 Ordinance applies. I think that, as the contract was made in 1931, the Advocates Ordinance (Cap. 2) applies. It is clear that there has been no compliance with Section 21, Cap. 2 for the reasons that the Plaintiff was unable to produce any orders from the Courts before which the actions or proceedings took place.

Mr. Elia for Appellant strenously argues that by bringing this very action in the District Court, the subject-matter of this appeal, he was in reality asking for the order contemplated by line 5 of Section 21 of Cap. 2. I do not agree. I think that what is contemplated by the word "order" in line 5 of Section 21 is an order of the Court before which the litigation is taking place made in the particular case file of that litigation at or before or shortly after the commencement of that litigation and I further hold that none of the cases cited by Mr. Elia covers this point or in any way rules that what I am now holding is incorrect. It follows, therefore, that the Appellant cannot rely on the agreement.

The only question remaining for decision is whether the Appellant can sue on a *quantum meruit*. The learned Relieving President in his judgment said:—

> "That which it was necessary to do in order to legalize the agreement in the present case was not done, and it appears to me that the object of the agreement before me is an illegal object. That is quite a different matter from a contract being merely unenforceable by action. In the latter case a plaintiff may come into Court and say: "I agreed with the defendant to do so and so for him, and I have actually done this thing. Owing to some defect of form the law of procedure does not allow me to sue upon the contract I made with him for the consideration named in that contract. But it was at his request I acted; I have done all that he requested me to do; and he must pay me a reasonable remuneration for doing it".
>
> In the present case, however, when the Plaintiff says: — "I want a reasonable remuneration for what I have done at the request of the Defendant", he is at once met with the answer: "Yes, but what you did at his request, as clearly appears from the agreement you have filed, was illegal, namely, you conducted contentious

> business on the basis that your remuneration should be conditional upon the success of the Defendant's action. Your action cannot be heard, since no man may base a cause of action on his own wrong, even though it be by way of *quantum meruit*".
> In my view, that is a complete answer to the Plaintiff's claim. But I hope that the Plaintiff if he is not satisfied, will take this matter to appeal, as there appears to be no authority on this point, and the matter may quite possibly be of fairly general importance."

The matter is, of course, as the learned Relieving President seemed to feel, not free from doubt. The original contract is in Arabic; but no objection appears to have been taken to the English translation of Clauses 1, 4 and 5, set out in this judgment. It is (with all respect to those who drafted it) a most ambiguous document and one from which it is not easy to ascertain the precise intention of the parties. As I read it, however, the contract did not provide, as the District Court seems to have held, that remuneration to the Appellant was conditional upon the success of his clients in the various cases. As I read the contract I think that what the parties intended was that, whatever eventually happened, the Appellant would, in the long run, receive the remuneration provided for in clause 1; but that, before he was entitled to receive remuneration, he should prove that he had used every endeavour in the Execution Office to extract the fees from the unsuccessful litigant against the Arab Bank. If this view be correct then I do not think that the object was an illegal one. I, therefore, think that the Appellant is entitled to succeed on the basis of a *quantum meruit*. I think that the Appellant's contention that the doctrine of *quantum meruit* may be applied in Palestine is sound. The doctrine may be applied by the combined effect of Articles 563 and 564 *Mejelle* and Article 46 Palestine Order-in-Council, 1922. Mr. Elia has referred us to the English and Empire Digest Volume 12 page 166 footnote (f) — Merrel *v.* Loft (1895) 13 New Zealand L. R. 739, and to Hailsham Vol. 31 page 81 paragraph 126 and page 95 paragraph 144 and page 97 paragraph 145 and to Scott *v.* Pattison 2 K. B. (1923) page 723.

Mr. Beirouti, for the Respondents, cited C. A. 83/42 Vol. 9 P. L. R. page 415, C. A. 177/35 Vol. 2 P. L. R. page 416. English and Empire Digest Vol. 42 page 131 Nos. 1247, 1248 and 1249. Sinclair *v.* Brougham (1914) A. C. Pages 398, 440 and 452, English and Empire Digest Vol. 12 page 433 No. 3512. Halsbury 1st Edition Vol. 31 Page 170 paragraph 203 and to Bullen and Leake (9th Edition) page 330. The only matter which has given me pause has been whether the Appellant was or is entitled to sue in the District Court for fees due to him for cases conducted in the Magistrate's Court. I have come to the conclusion that he is. It seems to me that Rule 52 Civil Procedure

Rules, 1938, is in point. It may be argued that a Magistrate would be in a better position to judge what fees (on the basis of a *quantum meruit*) an advocate should receive for litigious business conducted in a Magistrate's Court. This may be; but I see no reason why a judge of a District Court should not, after hearing evidence adduced before him, be able to arrive at a just decision or fair estimate. I would point out that it is a mere coincidence that the District Court of Jaffa is the same Court for the purposes of Section 21 of Cap. 2 as the Court in which the litigation took place in respect of which the Appellant now sues for fees.

As I have found that the Appellant cannot sue or rely on the contract but that he can recover on the basis of a *quantum meruit*, it seems to me to follow logically that in his action before the District Court he can include in the sum sued for, fees for work performed in cases in which the Appellant appeared in the Magistrate's Court as well as in the District Court of Jaffa.

I would, therefore, set aside the judgment appealed from and remit the case to the District Court for hearing and adjudication on the whole claim of LP. 951.585. The District Court will apply its mind to the question whether in each of the cases in which the Appellant appeared for the Respondent both in the District Court and in the Magistrate's Court the sum which the Appellant now claims as fees is reasonable, and the District Court will, of course, have full power to reduce any particular sum or sums.

The costs of this appeal will abide the event but, in order to facilitate the final arrangements they will be taxed on the lower scale and we certify an advocate's attendance fee at the hearing of this appeal of LP. 15.—.

Delivered this 18th day of January, 1945.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CRIMINAL APPEAL No. 137/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Rabbi Jacob Joseph Katzenellenbogen. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal to Supreme Court from judgment of District Court remitting criminal case to Magistrate for retrial — Powers of District Court in its appellate capacity.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated 30th day of July, 1944, in Criminal Appeal No. 78/44, dismissed:—

District Court in its appellate capacity, like Supreme Court sitting as Criminal Appeal Court after summary trial in District Court, has power to remit criminal case to Magistrate for retrial.

(*M. L.*)

FOLLOWED: Cr. A. 109/40 (7, P. L. R. 590; 9, Ct. L. R. 31; 1940, S. C. J. 423).

ANNOTATIONS: See Cr. A. 109/40 (*supra*) and cases distinguished therein.

(*A. G.*)

FOR APPELLANT: Sussman.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

This case arises out of an appeal from the Magistrate's Court to the District Court and by leave to this Court. The powers of the District Court in its appellate capacity are not specifically detailed and the only issue that now arises is whether those powers include the power to remit a case for retrial. We are of the opinion that this point has already been decided by this Court in Criminal Appeal No. 109/44 * where the Supreme Court remitted the case to the Magistrate's Court for retrial. It is true that powers of the Supreme Court sitting as a Court of Criminal Appeal are specified under section 72 of the Criminal Procedure (Trial Upon Information) Ordinance, but the appeal in the Criminal Case No. 109/44 * was brought under the provisions of Section 12 of the Magistrates' Courts Jurisdiction Ordinance which equally is silent as to the exact powers of the appellate Court.

The appeal is therefore dismissed.

Delivered this 15th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 127/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

* Should read 109/40.

(*Ed.*)

Iskandar Aziz & an. APPELLANTS.

v.

Eliahu Spector. RESPONDENT.

Cancellation of sale — Mejelle, Arts. 310, 351 — *Sale en bloc or separately — Offer to return — Parties, C. P. R.* 67(2) — *Attachment.*

Appeal from the judgment of the District Court of Jerusalem dated the 18th day of March, 1944, in Civil Case No. 107/43, dismissed but judgment varied:—

Where no loss is incurred by the separation, a plaintiff is not debarred from applying for the cancellation of the sale in respect of one of more objects sold *en bloc* (*Mejelle* 351).

(*A. M. A.*)

ANNOTATIONS: On Art. 351 of the *Mejelle* see also C. A. 15/31 (5, C. of J. 1638).

(*H. K.*)

FOR APPELLANTS: H. Atallah.

FOR RESPONDENT: F. Nazzal.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, ordering the present Appellants to pay LP. 402.500 mils with costs.

The present Respondent, who was the Plaintiff in the Court below, had purchased from the Appellants two sows on the understanding that both were gravid. The learned Relieving President found on the evidence that one of the sows was not gravid, and, relying on Articles 351 and 310 of the *Mejelle*, gave judgment in favour of the Plaintiff for the return of the purchase price, namely LP. 400. Against this judgment the Appellants now appeal.

The first ground of appeal is that the learned Relieving President did not deal with one of the issues, namely, whether the sale was to three persons or to the Plaintiff alone, the Defendants having contended that the sale was to three persons. It seems to us implicit from the judgment of the learned Relieving President that he must have had this in mind otherwise he would not have given judgment in favour of the Plaintiff. In any event, the Appellants could have during the pendency of the action moved the trial Court under rule 67(2) Civil Procedure Rules but they did not do so.

The next ground of appeal is that the learned Relieving President was not justified in finding that there were separate sales, the Appellants contending that the evidence goes to show that there was merely one sale of two sows. The trial Judge said:—

> "I would add that even if my finding as to separate sales is not supported by the evidence, as I believe it to be, and it would be more correct to say that the two sows were the subject matter of a sale *en bloc*, the Plaintiff would still not be debarred in view of Art. 351, for no loss is incurred by the separation."

With this statement we agree and we think that the first paragraph of the example appended to Article 351 applies to the facts of this case.

The only remaining ground of appeal is that there was no evidence of any offer by the Respondent to return the sow to the Appellants. The answer to this seems to be in the following part of the evidence of the Plaintiff:—

> "I never dropped my right to claim back money in respect of this sow. I only bought sow on condition it would be pregnant, otherwise I would not have bought it. Defendants told me this sow was pregnant for 65 days when I bought it. I visited the farm at Bethlehem twice after 19.7.43. I saw there agents of Defendants. I told them the doctor told me all the time the sow was not pregnant. He (agent) said *"Mush mumkin"* — it is impossible — "When you bought the sow it was already 65 days pregnant."

It appears, therefore, that the Plaintiff, after the 19th of July, twice visited the farm at Bethlehem which was the place at which the sale had been effected. He seems to have done all that could reasonably be expected of him with a view to getting in touch with the Defendants so as to return to them the sow. The Statement of Claim was filed on the 23rd September, 1943, and we do not think that the Respondent can be said to have lost his option because of undue delay. Along with the Statement of Claim the Respondent filed an application for provisional attachment of the sow; in other words, he then placed the sow at the disposal of the Court. Paragraph 9 of the Defence which was filed on 1st November, 1943, was in the following terms:—

> "Plaintiff laid an attachment on the sow belonging to Mary Jamil Khoury as being the property of the Defendants. They deny that the sow is their own."

It is clear that the Defendants knew on that date where the sow was and they also knew that it had been attached. If they now feel that they have a grievance because of the drop in prices between November, 1943, and the present date, they have only themselves to blame because they could have in November, 1943, asked for the sow to be sold. We accordingly hold that the last ground of appeal fails. Judgment was delivered on the 18th March, 1944, and we are told that the sow in question was sold about a month ago by the Execution Office for the small sum of LP. 35.

The appeal is dismissed but we vary the judgment by adding to the words "The provisional attachment is confirmed" the following namely,

"the amount realised by the sale of the attached property will be deducted from the decretal amount". The Appellants must pay the Respondent's costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 10.

Delivered this 22nd day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 362/44.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Belpetrole (Egypt) S. A. APPELLANTS.

v.

Sami bin Sheikh Ali El Jamai and 47 ors. RESPONDENTS.

Court fees — Reference from order of Chief Registrar — Court Fees Rules, items 36, 37, *Registrar's Ord., Sec.* 17 — *"Action, matter or proceeding", "Registrar" — Effect of C. P. R.* 330 — *Items* 36 *and* 37 *compared.*

Application by Respondents 7 to 23 under Rule 330 of the Civil Procedure Rules, 1938, to decide whether fees should be paid on cross-appeal under item 36 or 37 of the Court Fees Rules, 1935, dismissed:—

The words "action, matter or proceeding" in sec. 17 of the Registrars Ordinance, include appeals, so that the Chief Registrar's decision in matters of fees on appeals are final.

(*A. M. A.*)

ANNOTATIONS:

1. On the question whether the word "proceedings" includes an appeal see Misc. Appl. 48/38 (1938, 2 S. C. J. 250; 4, Ct. L. R. 157) and C. A. 143/41 (8, P. L. R. 467; 1941, S. C. J. 456; 11, Ct. L. R. 210); *cf.* note 5 in A. L. R. to P. C. 1/42 (10, P. L. R. 271; 1943, A. L. R. 408) as to the soundness of these decisions.

2. See C. A. 159/42 (8, P. L. R. 637; 1942, S. C. J. 960) and note 2 in S. C. J. on remedies against decisions of Registrars.

3. On assessment of Court fees on appeal *vide* C. A. 34/44 (11, P. L. R. 133; 1944, A. L. R. 392).

(*H. K.*)

APPELLANTS: *Ex parte.*

FOR RESPONDENTS: Nos. 7—25 — Mrs. Gluckman (by delegation from Goitein).

ORDER.

This is a reference from the order dated 2nd November, 1944, of the Chief Registrar in which he held that certain Respondents for whom Mr. Goitein appears must pay fees under item 36 of the Court Fees Rules and not under item 37.

The question arises as to whether, in view of section 17 of the Registrars Ordinance No. 62/36, this matter can be brought before me at all. That section provides that "any question as to the assessment of Court fees on any action, matter or proceeding shall be referred to the Registrar, whose decision shall be final".

Mrs. Gluckman, who appeared by delegation from Mr. Goitein, has submitted that the words "action, matter or proceeding" do not include an appeal, and that therefore a decision by the Chief Registrar as to the assessment of Court fees on an appeal is not final.

The term "Registrar" in section 7, Ordinance 62/36, includes a Chief Registrar (see Ordinance 20/43, section 2). I find it impossible to hold that the legislature intended to exclude the assessment of Court fees on appeals from the scope of section 17. The question of assessment of Court fees on an action is not less important than the assessment of such fees on an appeal, and I can see no reason why a Registrar should have the final decision in one case and not in the other. In my judgment the words "action, matter or proceeding" in this section were intended to include and do include an appeal. If that is so then there is no appeal from the Chief Registrar's decision, and I so hold. I do not find that the provisions of section 17 were in any way abrogated by the provisions of rule 330 of the Civil Procedure Rules.

But on the merits I think that the Chief Registrar's decision was correct. I do not consider that the present case is analogous with a claim for prior purchase. In the latter case the party is claiming a right that is given to them by law, and which has no relation at all to the value of the property claimed. He is given the right whether the value is small or great. Rule 37 can only be applied "where the value of the subject matter does not admit of being expressed in money". In the present instance, these Respondents having obtained a right of payment at a certain rate per metre are asking for that rate to be increased. Clearly it is a money claim, and the only way in which they can reduce the Court fees is by reducing their claim.

Given this 16th day of January, 1945.

British Puisne Judge.

HIGH COURT No. 132/44.

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

BEFORE : Rose, J.

IN THE APPLICATION OF :—

Salem Khalil Ayoub & 2 ors. PETITIONERS.

v.

1. Adib Salem Mas'ad, on behalf of the heirs of the late Salem Mas'ad,
2. Chief Execution Officer, Nazareth. RESPONDENTS.

Sale in execution — Joint and several debts — Powers of C. E. O. — May not adjust contribution.

Return to a rule *nisi*, issued on the 16th of November, 1944, directed to the Respondents calling upon them to show cause why the order of the second Respondent, dated the 25th October, 1944, in Execution file No. 54/39, Execution Office, Nazareth, should not be set aside, and why he should not refrain from, paying the sum of LP. 201.536 mils to Respondent No. 1, and to pay the same to the Petitioners; order made absolute:—

The Chief Execution Officer cannot make adjustments of contribution among joint and several debtors, out of the proceeds of the sale of property belonging to one debtor.

(*A. M. A.*)

ANNOTATIONS: The C. E. O. is not a Court; *cf.* H. C. 64/38 (5, P. L. R. 572; 1938, 2 S. C. J. 169; 4, Ct. L. R. 213) and H. C. 22/44 (1944, A. L. R. 234 at p. 236).

(*H. K.*)

FOR PETITIONERS: A. Atalla.

FOR RESPONDENTS: No. 1 — Elia.
No. 2 — Absent — served.

ORDER.

In this case it appears that the three Petitioners and the first Respondent were jointly and severally liable together with four other persons in respect of certain debts due to Barclays Bank (D. C. & O.) amounting in all to the sum of LP. 1197.430 mils.

In the early part of 1944 certain lands belonging to the first Respondent were sold in respect of debts due to Barclays Bank and other creditors, and by arrangement with the other creditors a sum of LP. 338.642 mils in excess of the sale was appropriated to these particular

debts to which I have referred. It is clear, of course, that this sum of LP. 338.642 mils was not sufficient to extinguish the debts of LP. 1197.430 mils, and therefore some further lands belonging to the three Petitioners were sold some months later, realising a price of approximately LP. 3000.

The Execution Officer appears to have attempted to take an equitable view of these debts and ordered the refund of the balance of this sum to the various parties, according to what he thought to be the shares of their contributions to the debt, taking into consideration their rights of contribution between themselves and between the remaining debtors. In my view he was not entitled to do this. It seems to me that on the face of it his duty was to take the LP. 338.642 mils from the first Respondent, and then to take the balance remaining from the debt, *i. e.* some LP. 860, from the three Petitioners, and to refund the balance to the three Petitioners out of the LP. 3000. It follows of course from this that all these three Petitioners and the first Respondent are entitled to contribution as against the other four persons, and of course an adjustment must naturally be made in regard to the particular position of the first Respondent. If, as I am told from the Bar, these four debtors are persons of straw, that is of course unfortunate, but it seems to me that it is not a matter with which the Execution Officer is enttiled to concern himself.

For these reasons the rule must be made absolute, with costs which I assess at an inclusive sum of LP. 10.

Given this 6th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 428/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

Jacob Sonnenberg. APPLICANT.

v.

"Cluson" Steel Works Ltd., Haifa Bay. RESPONDENT.

Amendment of statement of claim — C. P. R. 125, O. 28, r. 1 R. S. C. — Discretion — Alleged deviation from settled practice — Evans v.

Bartlam, Budding v. Murdock, Roe v. Davies, Steward v. North Metropolitan Tramways Co., Tildesley v. Harper.

Application for leave to appeal from the order of the District Court of Haifa in Civil Case No. 50/44 dated 27.10.44 (Motion No. 424/44), refused:—

1. Leave to amend a statement of claim is within the discretion of the Court of trial who should not, however, deviate from the settled practice.

2. The settled practice in England (and it should be applied locally) is to allow an amendment not made *mala fide* and not likely to injure the opponent in a manner which cannot be compensated by costs.

3. On the above principle leave to amend is properly refused in an action based on a written undertaking, where the amendment sought is intneded to introduce a verbal agreement.

(*A. M. A.*)

REFERRED TO: Evans *v.* Bartlam, 1937, A. C. 473, 2 All E. R. 646, 106 L. J. (K. B.) 568, 53 T. L. R. 689, 157 L. T. 311; Budding *v.* Murdock, 1875, 1 Ch. D. 42, 45 L. J. (CH.) 213; Roe *v.* Davies, 1876, 2 Ch. D. 729; Steward *v.* North Metropolitan Tramways Co., 1886, 16 Q. B. D. 556, 55 L. J. (Q. B.) 157, 54 L. T. 35, 2 T. L. R. 263; Tildesley *v.* Harper, 1878, 10 Ch. D. 393, 48 L. J. (CH.) 495, 39 L. T. 552.

ANNOTATIONS: See Halsbury, Vol. 25, pp. 258 *et seq.*, para. 425; for Palestinian authorities *cf.* C. A. 193/43 (1943, A. L. R. 597) and note 2, C. A. 317/43 (11, P. L. R. 42; 1944, A. L. R. 146) and note 3 in A. L. R., and C. A. 375/44 (1944, A. L. R. 630).

(*H. K.*)

FOR APPLICANT: Werner.

FOR RESPONDENT: A. Levin.

JUDGMENT.

This is an application for leave to appeal from the decision of the District Court of Haifa refusing certain amendments to the Statement of Claim in the case of Jacob Sonnenberg *versus* "Cluson" Steel Works Ltd., Haifa Bay.

Power to amend pleadings is given by Rule 125 which is as follows:—

> "The Court, Judge or Registrar may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

It will be observed that to grant or to refuse the request to amend the pleadings is entirely within the discretion of the Court, Judge or Registrar. The rule follows the corresponding English rule which is Order 28, Rule 1 of the Rules of the Supreme Court.

Many cases were cited to illustrate the reluctance of an appeal Court to interfere with the exercise of a discretion of a lower Court. The

principles that should guide an appellate Court on this issue have long been well established; as a general rule, the Court will only interfere when it is satisfied that the discretion has been exercised capriciously, arbitrarily or unreasonably.

In this connection I would point out that it does not necessarily follow that the exercise is unreasonable merely because it does not conform to the decision of another Judge on another occasion, but if in its exercise the Judge disregarded a long list of authorities and deviated from long settled practice, the appeal Court would consider itself entitled to interfere.

Now in my opinion, the question as to whether or not pleadings should be amended is one peculiarly within the discretion of the Judge charged with trying the issues. It follows that I would not be prepared to interfere with that discretion save in the most exceptional circumstances.

The application for amendment was before the Court at a separate hearing, and it was argued for some hours. In the result the Court allowed some amendments and refused others giving reasons for their refusal in each case. In these circumstances I do not hesitate to hold that the Court acted neither arbitrarily nor capriciously. I proceed to examine whether the refusal was unreasonable on the grounds advanced by Dr. Werner that the learned Judges deviated from long settled practice.

That practice is indicated in Evans *v.* Bartlam 1937 Appeal Cases; Budding *v.* Murdock 1 Ch. Div. (1875—76); Roe *v.* Davies 2 Ch. Div. (1875—76); Steward *v.* North Metropolitan Tramways Coy. 16 Q. B. (1886).

In my opinion the practice is conveniently summarized in the quotation in the Annual Practice from Bramwell, L. J. in Tildesley *v.* Harper "My practice" said the Lord Justice "has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide,* or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

In this case *mala fides* is not alleged, and the test is could the amendment be made without injustice to the other side. The Court were of opinion that it could not because in their opinion the Applicant could not show that it was connected with the cause of action.

At this point it is necessary to refer, very briefly will suffice, to the facts. The Applicant had a claim against the Respondents. According to the Statement of Claim it arose out of a contract dated 2nd May, 1940, a copy of which is attached as an exhibit. The amendment

sought was to insert an alternative plea of an agreement orally or by conduct. Dr. Werner has argued that the alternative plea arises out of the same cause of action. This was contested by Mr. Levin on behalf of the Respondents. It seems to me that the Respondents' view on this issue is correct. The first was a claim that stood or fell by the terms of a written agreement. All that the Defendants had to meet was that agreement. The alternative claim raised a totally new cause of action which had to be sustained or resisted by very different evidence from that necessary to establish the claim as embodied in the Statement of Claim.

This being so I am not prepared to say that the Court acted unreasonably in holding that to admit it would cause injustice to the other side that could not be compensated for by costs or otherwise.

For these reasons the application for leave to appeal must fail with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 5th day of February, 1945.

Chief Justice.

CIVIL APPEAL No. 327/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Jacques Santiago Agiman. — APPELLANT.

v.

Henry Perez & 2 ors. — RESPONDENTS.

Specific performance — Damages as an alternative remedy — Specific performance to be decreed where no agreement to sell — Partition by consent judgment — Partition may defeat attachment.

Appeal from the judgment of the District Court of Tel-Aviv, sitting as a Land Court, dated the 28th day of July, 1944, in Land Case No. 34/44, dismissed:—

Specific performance is the proper remedy when an obligation to transfer arises otherwise than from an agreement to sell.

(*A. M. A.*)

ANNOTATIONS: On damages as an alternative remedy to specific performance (in cases of contracts for sale) see C. A. 97/44 (*ante*, p. 14).

(*H. K.*)

FOR APPELLANT: Linderman.

FOR RESPONDENTS: No. 1 — Moyal and Yifrach.
Nos. 2 & 3 — Absent — served.

JUDGMENT.

The only point which emerges from this appeal is whether the Court should have granted a decree of specific performance or should have contented itself with an award of damages, as it is not denied that there was an obligation between the Appellant and the Respondent. In the event the Court made an order which, in effect, amounted to a decree of specific performance. It is therefore necessary to examine the negotiations between the parties in order to arrive at a conclusion as to whether such an order was justified.

The Appellant and the Respondent had bought a plot of land together. It is registered in the name of the Appellant, who was brother in-law of the Respondent. In order to carry out his obligations to the Respondent the Appellant granted a Power of Attorney to his sister, who is the first Respondent's wife, the effect of which would have been to enable the Respondent to participate in his share of the plot. Owing, however, to an attachment on the property, the Power of Attorney could not be executed.

The Appellant argues that he was unable to carry out the terms of his agreement because of this attachment. We are unable to agree. When the Appellant negotiated the consent judgment which, in fact, amounted to a partition, he could have joined the Respondent and then the Court would undoubtedly have associated the Respondent with the Appellant in the partition.

For these reasons we are of opinion that the Court below rightly decided that the question of damages, as an alternative to specific performance, did not arise because there was no contract of sale between the Appellant and the Respondent.

The appeal must therefore be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fees.

Delivered this 18th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 294/44.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad el Farah el Sa'adeh. APPELLANT.

v.

Jabali Muhammad Abdallah el Awwad
on behalf of the heirs of his father's
estate. RESPONDENT.

Declaratory judgments — May be given by a Magistrate's Court sitting as a Land Court; Land Courts Ord., sec. 3(d) — Further remedy.

Appeal from the judgment of the Magistrate's Court, Nablus, sitting as Land Court dated the 13th day of June, 1944, in Land Case No. 13/43, allowed and case remitted:—

A Magistrate's Court sitting as a Land Court may give a declaratory judgment as to rights on land, particularly when the claim is coupled with a request that the land be handed over to the Plaintiff.

(*A. M. A.*)

ANNOTATIONS: Note that the question whether a Magistrate — sitting otherwise than as a Land Court — can give a declaratory judgment "pure and simple" is still undecided; see C. A. 92/42 (9, P. L. R. 503; 1942, S. C. J. 501; 12, Ct. L. R. 229).

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Kirreh.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Nablus sitting as a Land Court, dismissing an action by the present Appellant because the Magistrate considered that the Appellant was asking for a declaratory judgment which, in the Magistrate's view, was a matter within the sole jurisdiction of the District Court. It appears, however, from the statement of claim that the Plaintiff asked that he be declared the owner of certain shares of the land in suit. In view of the terms of section 3(d) of the Land Courts Ordinance, we think that the Plaintiff was entitled to ask that this claim be entertained by the Land Court.

It is also to be noted that the Plaintiff further asked that the land be handed over to him.

We hold that the Magistrate sitting as a Land Court had jurisdiction.

We therefore set aside the judgment of the 13th June, 1944, and remit the case to the Magistrate for him to hear the case on the merits.

Costs of this appeal will abide the event; but in order to facilitate final arrangements, we certify that the costs will be taxed on the lower scale to include LP. 5 advocate's attendance fee at the hearing of this appeal to the ultimately successful party.

Delivered this 15th day of January, 1945.

British Puisne Judge.

CRIMINAL APEAL No. 120/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Muhammad Mahmoud Shamma. APPELLANT.

v.

The Attorney General. RESPONDENT.

Maximum sentence — When it may be imposed — Considerations to be taken into account by trial Court — Reduction of sentence on appeal — Age — Pending sentence.

Appeal from the judgment of the District Court of Haifa, Criminal Case No. 148//44, allowed and sentence reduced:—

Maximum sentences may be imposed when there are no redeeming features. (*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 58/39 (6, P. L. R. 567; 1939, S. C. J. 512) for another instance of the Court of Appeal reducing the sentence below the maximum imposed by the trial Court.

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: Assistant Government Advocate — (Akel).

JUDGMENT.

This is an appeal against sentence only. The Accused was convicted of burglary, and the learned President, after due consideration of the previous convictions, imposed the maximum penalty of fourteen years.

Now when the Legislature does impose by legislation a maximum penalty, it is of course not to be treated as a dead letter, and the presumption is that, if there are no redeeming features, it is necessary for the protection of society to impose that penalty.

There are indeed very few redeeming features in this case, but there is one, and that is the age of the prisoner and the fact that he is already undergoing a long sentence of imprisonment. In these circumstances, although I confess with some reluctance, we have decided that the sentence should be reduced to one of ten years' imprisonment instead of fourteen.

Delivered this 18th day of October, 1944.

Chief Justice.

CIVIL APPEAL No. 412/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hans Behrend. APPELLANT.

v.

Dr. Kurt Lipovski. RESPONDENT.

Constitution of Court — Palestinian Judge sitting alone, Defence (Judicial) Regs., 1943, *reg.* 4(1); *C. A.* 7/44 — *General or specific order — Defence (Judicial) Regs. (No.* 2), 1942, *regs.* 2, 3, 4 & 5 *compared — Construction of statutes.*

Appeal from the order of the District Court, Tel-Aviv, dated 1st October, 1944, in Civil Case No. 21/44, dismissed:—

Reg. 4(1) of the Judicial Regulations enables a P. D. C. to constitute a Court by one judge sitting alone either generally or for the purpose of a particular action.

(*A. M. A.*)

REFERRED TO: C. A. 7/44 (1944, A. L. R. 531).

ANNOTATIONS: On the effect of omissions in later enactments *cf.* CR. A. 108/42 (9, P. L. R. 469; 1942, S. C. J. 534) and CR. A. 168/42 (*ibid.*, pp. 760 & 892, resp.) — *Dangerous Drugs Ord., Sec.* 16; H. C. 68/42 (9, P. L. R. 450; 1942, S. C. J. 629; 12, Ct. L. R. 104) — *Defence (Entry and Departure of Persons) Order;* C. A. 225/42 (*ibid.*, pp. 769, 750 & 164, resp.) — *Rent Restrictions (B. P.) Ord., sec.* 4(1)(*b*).

(*H. K.*)

FOR APPELLANT: Koenigsberger.

FOR RESPONDENT: Linderman.

JUDGMENT.

This is an appeal by leave from an interlocutory order of the District Court of Tel-Aviv repelling an objection to the jurisdiction of the Court which was constituted by one Palestinian Judge sitting alone under regulation 4(1), Defence (Judicial) Regulations, 1943.

It is admitted that the sum sued for in the District Court was under LP. 500, being LP. 371 odd. The Appellant's advocate has argued that, notwithstanding the decision of this Court in Civil Appeal No. 7/44, Annotated Law Reports (1944)p. 531, he is entitled to raise the point that under Regulation 4(1) as properly construed the President

of a District Court has power only to make a general order for the trial of all civil actions in which the value of the subject matter or amount of damages claimed does not exceed LP. 500: but that he has no power to constitute his Court by one Judge sitting alone for the trial of any particular case. The argument is that if one looks at previous regulations such as the Defence (Judicial) Regulations (No. 2), 1942, Regulations 2, 3, 4, and 5, one sees that whenever the High Commissioner wished to give power to judicial authorities to constitute Courts in a particular way, he used the words "either generally or for the hearing of any particular case or class of cases", and that when considering Regulation 4 of the 1943 Regulations one should have regard to the way in which the 1942 Regulations were drafted. We think, however, that Regulation 4(1) of the 1943 Regulations is clear and general in its terms, and that there is nothing in it to prevent the President of a District Court constituting his Court by one Judge sitting alone for the trial of any particular civil action on the general principle that words in the singular include words in the plural and *vice versa*. This would seem to dispose of the appeal; but we think that we ought to say that we have been told that when the case first came on for hearing on the 4th June there was no written order by the President although the Palestinian Judge sitting on that occasion assured parties that he had been ordered to sit alone. It is not suggested that what this judge said was otherwise than in accordance with the facts, and if this is so, a written order was not necessary. Nevertheless, with a view to putting matters on a proper footing a written order was made and signed on the 20th June, 1944, and the case, by consent of parties, was heard *de novo* on the 16th July, 1944, although the advocate for the present Appellant said that while he had no objection to the Court hearing the case anew he would argue the matter of the case being tried by one Judge. The matter was accordingly argued and on the 1st October, 1944, the Judge then hearing the case dismissed the objection to jurisdiction and it is against that dismissal that this appeal has been brought.

As we have said, we do not think that the power of the President of the District Court is limited to his making a general order. If it were so limited, one would have the rather startling result that if thereafter, in any particular case, he desired that more than one Judge should sit he would be debarred from arranging his Court accordingly. In any event, we think that Regulation 4(1) does enable the President of a District Court to constitute his Court by one Judge sitting alone for the trial of any particular civil action in which the subject matter claimed or involved does not exceed LP. 500.

For these reasons the appeal is dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 10.

Delivered this 23rd day of January, 1945.

British Puisne Judge.

HIGH COURT No. 129/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF:—

Mahmoud El Mari' El Jazara & an. PETITIONERS.

v.

1. His Worship Ibrahim Eff. Mas'ad, Magistrate Jenin in his capacity as Examining Magistrate,
2. The Attorney General. RESPONDENTS.

Application to High Court to prohibit a second preliminary inquiry — Scope of sec. 7(d), Courts Ordinance, 1940.

Return to a rule *nisi,* issued on 10.11.44 directed to Respondents calling upon them to show cause why the first Respondent should not refuse to proceed with the Preliminary Enquiry in File No. 1774/44 Jenin, dismissed:—

1. Sec. 7(d), Courts Ordinance — not so wide as to enable High Court to prohibit a preliminary inquiry being held.

2. Question whether a second preliminary inquiry may be held in respect of same charge against same person is eminently one for decision by a Criminal Court.

3. Person committed for trial upon a second preliminary inquiry may raise the matter by way of plea in bar before District Court and if Court rejects that plea and convicts he can raise the matter before Court of Appeal.

(*M. L.*)

ANNOTATIONS:

1. On non interference of H. C. in case an alternative remedy exists see H. C. 69/44 (11, P. L. R. 371; 1944, A. L. R. p. 746) and annotations thereto.

2. The newspaper report referred to in the judgment reads as follows:—

The Judicial Committee of the Privy Council recently held that the High Court at Lahore had no power under Section 561A. of the Code of Criminal Procedure, to quash all proceedings taken by the police in pursuance of two first-information

reports, which charged the Accused with cognizable offences, under which the police were entitled to inquire without a Magistrate's order. By Section 561A:—

Nothing in this code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Lord Porter, delivering the judgment of the Board, said that it was of the utmost importance that the judiciary should not interfere with the police in matters which were within their province and into which the law imposed on them the duty of inquiry. The functions of judiciary and the police were complementary not overlapping, and the combination of individual liberty with a due observance of law and order was only to be obtained by leaving each to exercise its own function always, of course, subject to the right of the Court to intervene in an appropriate case when moved to give directions in the nature of *habeas corpus*. In such a case as the present, however, the Court's functions began when a charge was preferred before it, and not until then.

3. On plea of *autrefois acquit* see Cr. A. 144/43 (10, P. L. R. 619; 1943, A. L. R. p. 781) with annotations thereto in the A. L. R.

(A. G.)

FOR PETITIONERS: Nazzal.

FOR RESPONDENTS: Assistant Government Advocate — (Touqan).

JUDGMENT.

The sole question arising in this petition is whether a second preliminary inquiry under section 13 of the Criminal Procedure (Trial Upon Information) Ordinance may be held in respect of the same charge against the same person. Because of the view I take of this matter it is unnecessary and undesirable for me to state or even refer to the facts alleged. I am in effect being asked to issue an order prohibiting the Magistrate of Jenin from holding what I am told will be a second preliminary inquiry. Were it not for the provisions of section 7(d) of the Courts Ordinance, 1940, I would have no hesitation in coming to a decision. This sub-section has, however, made me pause. It is in the following terms, namely:—

> "The High Court of Justice shall have exclusive jurisdiction in the following matters: (d) Applications for orders directed to a Magistrate in regard to the conduct of any preliminary enquiry held under the provisions of the Criminal Procedure (Trial Upon Information) Ordinance."

Faiz Eff. Nazzal, who has ably argued this matter on behalf of the Petitioners, contends that the wording of section 7(d) is wide enough to enable me and indeed even to require me in an appropriate case to issue an order prohibiting a Magistrate from holding a preliminary inquiry.

Although the matter is not free from doubt, I am of the opinion that

the words are not so wide and so clear as to enable me to prohibit an inquiry being held, or, to put it in another way, to quash in advance an order of committal. I consider that Section 7(d) is meant to provide for such matters as:—

(a) Change of venue of preliminary inquiry.
(b) Ordering a Magistrate to hear the inquiry *in camera*.
(c) Ordering him to take evidence of a particular witness in advance, for the purpose of preservation of testimony.
(d) Ordering the Magistrate to proceed and examine the *locus*, and
(e) other such like matters.

I am glad to be able to place this interpretation on section 7(d), because the question raised is eminently one for decision by a criminal Court. I need scarcely say that I am not deciding the real point in this petition, namely, whether a second preliminary enquiry can be held.

The present Petitioners will have an alternative remedy. They can, if committed for trial, raise the matter by way of plea in bar before the District Court. If the District Court rejects that plea and proceeds to try them and if either or both are convicted they can raise the matter before the Supreme Court sitting as a Court of Criminal Appeal.

I feel that I am acting in consonance with the spirit of the law as laid down in a very recent case in the Judicial Committee of the Privy Council dealing with Section 561A of the Indian Code of Criminal Procedure, reported in the Times Weekly Edition of the 1st November, 1944, a copy of the newspaper report of which I attach to this judgment *. The matter raised in that case is, of course, by no means on all fours with the facts of the present petition.

For the foregoing reasons the petition is dismissed and the order *nisi* discharged with fixed (inclusive) costs of LP. 2.

Delivered this 13th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 356/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Margarete Linz née Springer. APPELLANT.

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* See annotations, *supra*.

v.

The Electric Wire Company of Palestine Ltd. RESPONDENT.

Cancellation of allotment of shares — Plea of failure of consideration — Effect of transfer of shares by claimant — Effect of valid shares forming part of the consideration — Cancellation of share certificates — Constructive notice of memorandum and articles of association.

Appeal from the judgment of the District Court of Haifa dated 28.7.44 in Civil Case No. 117/43, dismissed:—

1. When valid shares are issued for cash together with invalid shares, there cannot be said to be a total failure of consideration.

2. A person who has parted with shares against valuable consideration cannot claim from the company the return of the consideration for the shares on the allegation that their issue was not authorised.

(*A. M. A.*)

FOR APPELLANT: Shreuer.

FOR RESPONDENTS: J. Salomon and L. Rabinowitz.

JUDGMENT.

The Respondent is not called upon to reply.

This is an appeal from the judgment dated 28.7.44 of the District Court of Haifa in Civil Case 117/43, dismissing the claim of the Appellant for the recovery of money paid to the Respondent Company. The case for the Appellant was that she did not receive the consideration which she bargained for or any consideration.

The Appellant has been represented by Dr. Shreuer and the Respondent Company by Mr. Salomon and Mr. Rabinowitz.

Several grounds of appeal have been argued before us, and most of these raise, in one form or another, the question of the validity of the shares which were described as preference shares. Dr. Shreuer has argued strongly that the Company had no power to issue the 775 6% cumulative preference shares which it purported to allot to the Appellant in 1935, and he has advanced various reasons why the company could not do so. Having heard Dr. Shreuer, we have come to the conclusion that the question whether the preference shares were valid or not is one that we need not decide, because in our judgment the appeal must fail, in any event, on other grounds which we shall state.

The facts which led up to the present case have been fully outlined in the judgment of Judge Shems, and we do not consider it to be necessary to set them out at length. Briefly, the position was that the Appellant, who wished to transfer funds from Germany to Palestine, made an arrangement whereby she should hand over, in Germany,

Reichsmarks to the credit of a body known by the name of "Haavarah", and obtain in exchange preference shares of the Respondent Company in Palestine. The Reichsmarks were to be converted into Palestine currency at a certain rate of exchange, and the Appellant was to be charged 9% on account of transfer fees. In accordance with this arrangement, the Appellant paid the sum of RM. 11,039.24, and the Defendant Company purported to allot to the Appellant 775 preference shares in respect of which she had made an application on 19.4.35. The case for the Appellant is that these so-called preference shares were absolutely valueless because the Respondent Company had no power to issue them, and that she has received no consideration at all for the money which she paid in Germany.

Paragraph 10 of the Appellant's amended statement of claim contains the following passage:—

> "Plaintiff claims now the refund to her by the Defendant of the countervalue of the sum of Reichsmarks 11,039.24 paid by her in respect of the said alleged 775 preference shares since she did not receive the consideration which she bargained for, or any consideration."

And Issue No. 8 of the agreed issues is as follows:—

> "Did Plaintiff receive the 775 6% cumulative preference shares and 50 ordinary shares in full satisfaction of all amounts she paid to Defendant?"

The 50 ordinary shares referred to in this Issue were made up of two lots of 38 and 12 ordinary shares respectively. The 38 ordinary shares were allotted on the same date as the 775 preference shares, in order to refund to the Appellant an additional 5% charged by Haavarah in respect of transfer fees. The Appellant's case is that the 38 shares were a gift to her, but the Court below held, and we agree with that finding, that this formed part of the consideration for the money which the Appellant had paid in Germany, and that they were allotted to her in order that the charge on account of transfer fees should not exceed what she had been told that it would be, namely, 9%. The other 12 ordinary shares were purchased by the Appellant, and they form no part of the consideration.

It is clear that if the Appellant received valuable consideration for her Reichsmarks, she cannot succeed in her claim. It is admitted that the Appellant in 1939 sold the 775 preference shares to the Palestine Independent Trust Association Ltd. for the sum of LP. 125. She also sold the 50 ordinary shares to Dr. Sigmer Bromberger for LP. 5. The share certificates of the Appellant, in respect both of the 775 preference shares and of the 50 ordinary shares, were cancelled. So the Appellant is no longer in possession of the share certificates, and she is not in

a position to return them to the Respondent Company.

Now, whether or not the preference shares were validly issued, the fact remains that the Appellant transferred them for value. It is not suggested that the Company was acting deceitfully when it issued the share certificates. Their issue was approved by all of the shareholders of the Company without any exception. Nor is it suggested that the Company did not intend to honour the share certificates. Had the Company been wound up, the holder of such share certificates would have been able to claim as a creditor. In 1941, when a certain Regina Schlesinger questioned the validity of preference shares which had been allotted to her by the Respondent Company, and sued the Company, the case was settled and Regina Schlesinger obtained payment. If the Appellant had not parted with the share certificates, it is admitted that she could now have obtained for them considerably more than she gave.

The Appellant must be held to have had constructive notice of the Memorandum and Articles of Association of the Company, and we consider that if she wished to take exception to the share certificates, the time to do so was before she accepted them, or at least while they were still in her hands. Having negotiated them for value she cannot now say that she received no consideration. The consideration may have been different to that which she expected to get, but it was nevertheless valuable consideration. So far as the 38 ordinary shares are concerned, they, in any case, were validly issued, and formed part, although only a small part, of the consideration. We feel a great deal of sympathy with the Appellant, who has received so little in exchange for her Reichsmarks, but in law she has no case, as she did receive consideration which she accepted in full satisfaction of the amounts paid by her to the Respondent Company. The Appellant having based her claim on the lack of consideration, and as we have found that there was consideration, it is not necessary to deal with the other grounds of appeal in regard to the issue of the preference shares.

We dismiss the appeal with costs to the Respondent Company on the lower scale, to include LP. 15 advocate's fees for attendance at the hearing.

Delivered this 7th day of February, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 119/44.

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

BEFORE: FitzGerald, C. J., Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Kamel Ahmad Hussein el Majdoub. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder allegedly provoked by horror at illicit sexual relations of victim.

Appeal from the judgment of the Criminal Assize Court, sitting at Acre, dated the 2nd of October, 1944, in Criminal Assize Case No. 31/44, whereby Appellant was convicted of murder, contrary to Section 214 of the Criminal Code Ordinance and sentenced to death, dismissed:—

Horror aroused by infringement of "family honour" by a relative having illicit sexual relations does not in itself amount to provocation contemplated by sec. 216, Criminal Code Ordinance.

(*M. L.*)

ANNOTATIONS: As regards proof of provocation see CR. A. 199/42 (10, P. L. R. 2; 1943, A. L. R. 4); for a similar ruling see C. A. 4/42 (1942, S. C. J. 19; 9, P. L. R. 44). On premeditation being negatived by provocation see CR. A. 33/42 (9, P. L. R. 203; 1942, S. C. J. 246; 11, Ct. L. R. 143).

(*A. G.*)

FOR APPELLANT: A. Atalla.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal from the judgment of the Court of Criminal Assize sitting at Acre, at which the Accused was convicted of the murder of his aunt, Jamal Majdoub. The Appellant does not ask this Court to acquit him. His prayer is that the conviction should be reduced to one of manslaughter. In fact, the sole issue argued before us resolved itself into this question, whether there was such provocation as would bring the case outside the ambit of Section 216 of the Criminal Code Ordinance, 1936.

Certain facts can be stated immediately because they were not in dispute. It is not contended that the Accused did not strike the blows which caused the death, nor were the reasons that actuated his motive seriously in dispute. They were, that this aunt of his had had illicit sexual relations, which brought dishonour on the family. What was in

dispute was the manner in which the knowledge of those illicit relations came to the Accused. As to this, there were two versions available. There was the statement, which it is not denied was a free and voluntary statement, made by the Accused to the police very shortly after the commission of the offence. And there was the further statement made some seventeen days later, also to the police, and confirmed by the evidence which the Accused elected to give in his own defence at the Court of trial.

I refrain from making any pronouncement as to whether there would be any difference in law as to the effect which either statement would have had on the guilt of the Accused. Suffice it to say, that the Court of trial accepted the first statement in preference to the other two. We are of opinion that the Court was fully justified in so doing. The relevant part of that statement reads as follows:—

> "Today I returned from work and reached the village at about 5.30 *p. m.* As soon as I reached the village I understood from people that my aunt Jamal had committed acts of dishonour, and that her husband, Muflih Nayef al Majdoub, two days before, had found with her at home Kasem el Said committing acts of sexual intercourse with her, and that her husband beat Kasem el Said on his head and wounded him in the head. I, when I understood this from the people, lost my head, and went to her house and struck her with the dagger, and continued to stab her."

It is not denied that it was as a result of those stabs that the woman died. It has been argued with intensity before us that "family honour" constitutes a ruling code in the Arab way of life, and any infringement of it is an offence which arouses horror. This is a fact of which we are very well aware, and it is far from the purpose of the Courts of this Territory to undermine this laudable sentiment of Arab culture. But, however intensely felt, and however praiseworthy their origin, those sentiments cannot be accepted as a justification for the taking away of human life.

We do not hesitate to agree with the trial Court that the facts even as established by the statement which was accepted by the Court, were not such as would amount to the provocation contemplated by Section 216(b) of the Criminal Code Ordinance.

The appeal must therefore be dismissed.

Delivered this 2nd day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 322/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Izat Salameh Dudin. APPELLANT.

v.

Muhammad I'layyah 'Abdin & an. RESPONDENTS.

Prescription — When it may be pleaded — Land Code, Art. 20 — Illegal disposition — Onus of proof.

Appeal from the judgment of the Magistrate's Court of Hebron, sitting as a Land Court, dated 31st July, 1944, in Land Case No. 18/44, dismissed:—

It is for the person setting up the illegality of the transaction to prove that a lost document constituted a sale and not an agreement to sell.

(*A. M. A.*)

ANNOTATIONS:

1. An invalid disposition cannot be the basis of an equitable title: — C. A. 38/44 (11, P. L. R. 274; 1944, A. L. R. 335).

2. On the prescription point *cf.* C. A. 408/43 (11, P. L. R. 316; 1944, A. L. R. 628).

(*H. K.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENTS: W. Salah.

JUDGMENT.

Frumkin, J.: In this case the Appellant brought an action before the Magistrate's Court sitting as a Land Court, claiming the restoration of a certain plot of land which was in his possession and ownership years ago until he parted with it in favour of the Respondents in consideration of LP. 60 paid and received. A document was prepared at that time which was however not produced in Court and while it is alleged by the Appellant that that document was a deed of sale, the Respondents maintain that it was an agreement to sell. The case of the Appellant is that whereas the document was a deed of sale and hence contrary to the Land Transfer Ordinance, it transferred no title equitable or otherwise to the Respondents. The Magistrate held in favour of the Appellant on this point but found that since the Respondents were in possession of the land, which is *miri* land, for a period exceeding ten years, the action is barred under Article 20 of

the Ottoman Land Code, and on this ground dismissed Appellant's action. Hence this appeal.

It is not contested that the period of possession exceeded ten years but the argument of the Appellant on this point is that the Respondent having first claimed to be entitled to the land by equitable title, he is barred from pleading prescription. It is not necessary in this case to decide and in fact it is impossible to decide whether the unproduced document purporting to transfer the land to the Respondent was in the nature of a deed of sale or of an agreement to sell. The Magistrate seemed to have taken the view that the onus of proof that the document was an agreement to sell rested on the Respondents, and failing the production of the deed he took the view presented on behalf of the Appellant that it was a deed of sale. It is true that as a rule the document would be in the hands of the purchaser or the transferee, but the Appellant relying on the illegality of the document wishing to take advantage of his own wrong, the onus of proof must rest on him. This onus he could have discharged in a manner other than by the production of the deed. Be that as it may, the Appellant failed to prove the main point upon which he bases his claim, and on this ground alone he must fail. But he must also fail on the ground of prescription. Article 20 of the Ottoman Land Code applies, and the Respondents never admitted that they came into possession of the land wrongfully.

For these reasons the judgment of the Magistrate's Court is confirmed and the appeal dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 8th day of January, 1945.

Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

CIVIL APPEAL No. 387/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hussein Abdul 'Al el Nadi. APPELLANT.

v.

Ahmad Hassan Fodeh. RESPONDENT.

Grounds of defence — Point not taken in defence, effect on appeal — Plea of material alteration — Practice in Magistrates' Courts.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, dated 19.7.44 in Civil Appeal 63/44, allowed:—

When a defendant loses an action defended on the ground that he did not sign a note, the appellate Court should not allow the appeal on the ground of material alteration.

(*A. M. A.*)

ANNOTATIONS: Points not raised in the defence cannot be pleaded on appeal: — C. A. 330/43 (11, P. L. R. 170; 1944, A. L. R. 245).

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: H. Atalla.

JUDGMENT.

This is an appeal from the judgment, dated 19.7.44, of the District Court, Jaffa, in Civil Appeal 63/44, whereby the District Court set aside the judgment, dated 29.3.44, of the Magistrate, Jaffa, in Civil Case 1182/41, and ordered the case to be remitted with certain directions.

The case before the learned Magistrate has a very unhappy history. It was filed on 26.7.41, and came to trial on 7.5.42. The hearing of evidence concluded on 10.8.42, and the case was adjourned for the hearing of arguments. Thereafter the Magistrate appears to have been transferred, and the case was heard *de novo* by another Magistrate; but that Magistrate did not conclude it. Finally, the original Magistrate having returned to Jaffa, the case came once more before him, and the parties submitted written arguments, and the Magistrate gave his judgment on 29.3.44, that is to say, nearly three years after the case had been filed, and about nineteen months after it had been adjourned for the hearing of arguments.

We feel strongly that a case of this kind ought not to have dragged on in this way, and that when it had reached the stage of arguments, every effort ought to have been made to finish it without further delay. We do not intend these remarks to be interpreted as being a censure upon the Magistrate as there may have been some special reason why he could not finish the case in 1942. But we hope that all Magistrates will take steps to avoid leaving to their successors cases in which a substantial amount of work has been done. It is most unsatisfactory to the parties, and a waste of time of the Courts, if a case has to be reheard in such circumstances. When they know that they are shortly

being transferred, Magistrates should concentrate upon finishing their part-heard cases as far as possible.

Three grounds of appeal have been raised. We need not deal with the second as Mr. Elia quite rightly said that he could not press it. The first ground of appeal is that the defence of material alterations had not been raised before the Magistrate, and that the District Court therefore erred in deciding the case on that ground. The third ground of appeal is that the District Court was wrong in law.

Having considered the proceedings in the Magistrate's Court, we are unable to find that the defence of material alteration was specially pleaded as it ought to have been if the Respondent (Defendant) wished to raise it. The defence put forward was that the Defendant knew nothing about the promissory note, and that he had not signed it. The question of alteration was not raised at all until the cross-examination of the last witness for the Plaintiff, who had been called to give rebutting evidence after the Defendant's witnesses had been heard.

In the circumstances we think that evidence in regard to alterations could only be considered in so far as it had any bearing upon the defence. If the Magistrate had been in doubt whether the signature was genuine, he might have resolved that doubt in the Defendant's favour if he was satisfied that the note had been tampered with. In the present case, however, the Magistrate found as a fact that the Defendant had signed the promissory note. And in his judgment he mentions the witness (Yacoub Eff. Hanna) who had given such evidence as there was in regard to alterations. So we think we must take it that in spite of what had been brought out in the cross-examination of that witness, the learned Magistrate was still satisfied that the Defendant had signed the promissory note. That is essentially a finding of fact, and it cannot be said that there was no evidence to support it. And that finding of fact was fatal to the Defendant's case which was that he had never made such a note.

In the circumstances we think that the District Court erred in allowing the appeal on a ground which gave the Defendant the benefit of a defence which he had not pleaded, and which he ought to have specifically pleaded if he wished to rely upon it.

The appeal must therefore be allowed and the judgment of the District Court must be set aside with fixed costs of LP. 15 (fifteen) to include the costs in the District Court.

Delivered this 30th day of January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 122/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Haim Cohen. APPELLANT.

v.

Rachel Ludmirer. RESPONDENT.

Maintenance — Illegitimate child — P. O. in C. arts. 47, 51 — C. A. 80/31, 11/41, 195/43, H. C. 5/42, C. D. C., Jm. 278/33, Russell v. Russell, Stafford v. Kidd — Stateless Jew in Palestine, Membership of Jewish Community, Jewish Community Rules — Proof of Jewish Law — Proof of previous marriage — Admission of paternity.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 3rd March, 1944, Civil Case No. 204/43, dismissed:—

1. Maintenance of an illegitimate child may be claimed under Art. 51 of the Palestine Order in Council.

2. Jewish law is the personal law of a stateless Jew in Palestine whether or not he is a member of the Jewish Community.

(*A. M. A.*)

FOLLOWED: C. A. 80/31 (1, P. L. R. 662; 1, C. of J. 300); C. A. 243/41 (9, P. L. R. 90; 1942, S. C. J. 119; 12, Ct. L. R. 167); C. A. 195/43 (10, P. L. R. 405; 1943, A. L. R. 395).

REFERRED TO: Russell *v.* Russell, 1924, A. C. 687, 93 L. J. (P.) 97, 131 L. T. 482, 40 T. L. R. 713; Stafford *v.* Kidd, 1937, 1 K. B. 395, (1936) 3 All E. R. 1023, 106 L. J. (K. B.) 193, 156 L. T. 75, 53 T. L. R. 169; C. A. 11/41 (8, P. L. R. 241; 1941, S. C. J. 230; 11, Ct. L. R. 238); H. C. 5/42 (9, P. L. R. 191; 1942, S. C. J.161; 11, Ct. L. R. 65); C. D. C. Jm. 278/33 (1, C. of J. 140).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1944, S. C. D. C. 148.

2. On the meaning of the word "maintenance" in Art. 51 of the Order-in-Council see note 1 in A. L. R. to H. C. 146/42 (10, P. L. R. 24; 1943, A. L. R. 22); *cf.* H. C. 144/42 (*ibid.*, pp. 4 and 210, resp.).

3. Stafford *v.* Kidd (*supra*) has been overruled in Ettenfield *v.* Ettenfield, 1940, P. 96, 1 All E. R. 293, 109 L. J. (P.) 41, 162 L. T. 172, 56 T. L. R. 315.

4. Note that C. D. C. Jm. 278/33 (*supra*) quoted in the judgment was upheld on appeal in C. A. 65/34 (2, P. L. R. 348; 8, C. of J. 581).

5. On membership in the Jewish Community see also H. C. 124/43 (11, P. L. R. 54; 1944, A. L. R. p. 21).

(*H. K.*)

FOR APPELLANT: Hake.

FOR RESPONDENT: Stein.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, ordering the present Appellant to contribute the sum of LP. 5 a month towards the maintenance of the three-year-old illegitimate daughter of the present Respondent, of which child the Appellant is said to be the putative father.

The first ground of appeal is that the maintenance of an illegitimate child is not a matter of pesronal status within the meaning of maintenance under lines 6 and 7 of Article 51 of the Palestine Order-in-Council, 1922.

Speaking for myself, were I untrammelled by authority, I should have found it difficult to hold that maintenance of an illegitimate child is maintenance of the nature contemplated by Article 51. I should have thought that maintenance under Article 51 was limited to maintenance of a spouse or children born in wedlock. The position in English Law of the father of an illegitimate child is described in Hailsham, Vol. 2, page 579, paragraph 798.

The matter, however, seems in Palestine to be covered by authority, namely, Civil Appeal 80/31, P. L. R. Vol. 1, page 662, and Civil Appeal 243/41, P. L. R. Vol. 9, page 90. The latter case in any event clearly leaves the matter in no doubt. This ground of appeal fails.

The next ground of appeal is that, if the Courts are to apply Jewish Law to the Appellant, who is not a Palestinian but a stateless Jew, then the Courts will in effect be making law which is not contemplated by Article 47 of the Palestine Order-in-Council. Ingenious as this argument may be, I consider that the matter is concluded by the judgment of this Court which I have cited.

It is also urged that the learned Relieving President of the District Court was illogical in holding that so far as Jews are concerned Jewish Law must be deemed to be a part of the law of Palestine, and yet allowing the Respondent to lead evidence, namely the evidence of Rabbi Auerbach, to explain what the Jewish Law was. I agree that the leading of evidence as to law is usually confined to evidence of foreign law. I do not, however, think that Rabbi Auerbach's evidence can affect the result of this appeal, in view of the judgments of this Court which I have cited. There is therefore nothing in this second ground of appeal.

Another ground of appeal is that at the time of the child's birth the mother (Respondent) was already married to a man other than the Appellant, a marriage which had not been dissolved, and that in consequence the rule in Russell *v.* Russell (1924) A. C. 687, should have

applied. The learned Relieving President found that the Respondent entered Palestine from Poland as an immigrant in 1931 or 1932, and that, in order to deceive the immigration authorities, she had gone through a fictitious marriage in Poland, and that the Plaintiff proceeded to a Rabbi, who gave her a certificate stating that she was married. In that state of facts the learned Relieving President held that the marriage had not been strictly proved. Mr. Hake, for the Appellant, contends that the mere fact that in 1935, when in Palestine, the Respondent found it necessary to obtain a divorce from the man whom she is said to have married in Poland in 1931 or 1932, sufficiently proves that the marriage of 1931 or 1932 was valid. This is a powerful argument, and it may well be that the marriage of 1931 or 1932 was a good one, although it was entered into with a view to obtaining an immigration permit for the woman, and although the parties at the time of the marriage may have had an understanding that they would get a divorce in Palestine as soon as they conveniently could. On the whole, however, especially in view of the fact that there was nothing before the learned Relieving President but the Respondent's own word, and no certificate or certified copy of a certificate or of any entry in a register of marriages in Poland. I am not prepared to hold that the learned Relieving President's finding that the marriage had not been sufficiently proved is one that should be interfered with. It therefore becomes unnecessary to discuss either the effect of the divorce performed in 1935 before Rabbi Potash, or the effect of High Court 5/42, or whether the rule in Russell *v.* Russell or the rule in Stafford *v.* Kidd (1937) 1 K. B. 395, applies.

Mr. Hake further argued that there was not sufficient evidence before the District Court of the means of the Appellant so as to justify an award of LP. 5 a month. I myself, however, pointed out to Mr. Hake that the Appellant, who had been asked in the statement of claim to pay LP. 9 a month, could have given evidence as to his means but chose not to do so; he therefore could not evry well complain that the learned Relieving President had made this award which was as fair as he could on the material before him. Mr. Hake accordingly dropped this ground of appeal.

Another ground of appeal is that the Appellant never recognized the child. There is a judgment of the District Court, Jerusalem, reported at page 140 of Volume 1 of Rotenberg's Collection of Judgments to the effect that in Jewish law a putative father cannot be ordered to contribute towards the maintenance of an illegitimate child unless he (the father) recognizes the child. I wish to say that that judgment

is not binding on this Court and I wish to guard myself against expressing any view on this point, especially in view of the fact that, for the purposes of this appeal, Mr. Stein, Respondent's advocate, was prepared to accept this proposition of law and has argued that, in any event, there was evidence before the learned Relieving President to show that the father (the Appellant) had in fact recognized the child. I agree that there was, apart from the evidence with regard to what happened before the Rabbinical Court (which it seems was not properly constituted and had no jurisdiction), evidence of witnesses and evidence of an admission by the Appellant to one of his friends that the child was his and also other evidence, which all went to show that the Appellant had in fact recognized the child. With the finding of the learned Relieving President on this branch of the case I am not prepared to interfere.

The final and really substantial ground of appeal is that, while the Appellant is a stateless person and a Jew, he is not a member of the Jewish Community (Jewish Community Rules) Laws of Palestine, Volume 3, page 2132, and that in consequence the communal law of Jews in Palestine does not apply to him. In support thereof reliance is placed on the judgment of Mr. Justice Khayat in Civil Appeal 11/41, Volume 8 P. L. R. page 251, which reads as follows:—

> "The Jewish law is not a common law in Palestine applicable to all persons, but it is a personal law affecting only members of that community."

Mr. Hake argues that the words "members of that community" must be limited to Jews who are members of the Jewish Community, as provided for in the definition of "community" in Rule 2 of the Jewish Community Rules. It is admitted that the Appellant is not a member of the Jewish Community under the Jewish Community Rules. Mr. Hake seeks to distinguish the present case from Civil Appeal 195/43, Vol. 10, P. L. R. page 406, on the ground that in that case the parties had arranged a collusive divorce before a Rabbi, and that therefore they must be regarded as having submitted to Rabbinical law. I do not think that this case can be distinguished from Civil Appeal 195/43, because in the case now before me the parties had also gone before the Rabbinical Court in connection with this child, but, in any event, I have no doubt that the statement in the penultimate paragraph of page 406 of Volume 10, P. L. R., was intended to apply to all Jews in Palestine, whether or not they have registered themselves as members under the Jewish Community Rules. To hold otherwise would be in effect to decide that a stateless Jew, who comes to Palestine and refrains from registering under the Jewish Community Rules, would have no

personal status which could be recognized by the Civil Courts of Palestine. It is not necessary to interpret the law so as to lead to such an absurd and unsatisfactory result.

For all these reasons the appeal fails and is dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 15.

Delivered this 27th day of October, 1944.

British Puisne Judge.

CIVIL APPEAL No. 49/44.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Sheikh Abdul Kader el Muzaffar. APPELLANT.

v.

The Municipal Corporation of Jaffa. RESPONDENT.

Construction of statutes — Rating — Calculation of rateable value, Municipal Corporations Ord., sec. 104(3), *deductions from hypothetical figure, may be made "otherwise" — Rules under sec.* 99 *making no provision for deductions.*

Appeal from the judgment of the District Court, Jaffa, dated the 22nd day of January, 1944, in Civil Case No. 114/42, dismissed:—

Sec. 104(3) of the Ordinance provides for the rateable value to be assessed by deducting a certain sum from the amount of the estimated rental value. The proviso enables the assessment to be made otherwise. This includes the power to assess on the basis of the estimated rental, without deductions.

(*A. M. A.*)

ANNOTATIONS: Municipal by-laws should, wherever possible, be regarded as *intra vires*; see C. A. 197/43 (1943, A. L. R. 674) and notes.

(*H. K.*)

FOR APPELLANT: Ghussein.

FOR RESPONDENT: Goitein.

JUDGMENT.

This appeal raises a single point. Section 104 of the Municipal Corporations Ordinance, 1934, provides in the second proviso to sub-section 3 that a municipal council may, by by-laws made in accordance with

the provisions of the Ordinance, provide for the calculation of the rateable value of buildings within the municipal area otherwise than in accordance with the provisions of the sub-section. Now, the sub-section itself, which is referred to here, makes provision for certain deductions from a hypothetical amount to be estimated as representing the rent for which a building might be expected to let. In pursuance of their powers under section 99 of the Ordinance, the Municipal Council of Jaffa made certain by-laws in 1937 by which they provided that there should be no deductions from that hypothetical figure.

It is argued by Fawzi Bey that is a misuse of the powers provided by the word "otherwise". While we are alive to his client's grievance, we were not referred to any authority which would appear to support that grievance by any decision of this or indeed any other Court, and we think that, on the ordinary meaning of the words, this by-law that they passed was fully within their power and competence to make.

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

Delivered this 4th day of December, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 146/44.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

George Henry Thompson & an. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Criminal procedure — Omission of words "as amended" in charge section — Construction of statutes — Slight error of procedure — Case of irregularity by plea of guilty — Drug offences — Policeman accused.

Appeal from the judgment of the District Court of Haifa, dated the 4th of November, 1944, in Summary Trial 215/44, whereby Appellants were convicted of unlawful possession of dangerous drugs, contrary to Sections 7 and 16 of the Dangerous Drugs Ordinance, 1936, and sentenced to three years' imprisonment, dismissed:—

1. The omission of the words "as amended" following the section of the Law is not fatal to the validity of the charge.
2. A plea of guilty may cure minor irregularities of procedure.

(*A. M. A.*)

ANNOTATIONS: "A repealed Act, in the absence of saving clauses, must be considered as if it had never existed": Halsbury, Vol. 9, pp. 560—1. *Cf.* also sec. 6 of the Interpretation Ordinance.

(*H. K.*)

FOR APPELLANTS: Eliash and Eisenberg.

FOR RESPONDENTS: Asst. Government Advocate — (Gavison).

JUDGMENT.

We are of opinion that this appeal must fail. The only point of substance raised by the Appellants was the omission of the words "as amended" in the charge section. It has been argued that the effect of the omission of these words was to throw the Accused back on the original section. We are unable to agree, because in our opinion since the date of the amendment, the section, as originally drafted, is dead. It is a canon of construction that when a statute is amended, the amendment takes the place of the amended words, and the section must be construed accordingly, unless there is a specific saving of the original provision for certain purposes. Counsel for the Appellant has been able to refer us to a great number of cases in which the charge always contained the words "as amended". It may well be that this is desirable as extra precaution, but it is quite unnecessary.

One other point has been raised by the counsel for the Appellant, that is that Rule 2 of the rules made under the Courts Ordinance has not been strictly complied with. Be that as it may, the trial Court appears, from the record at all events, to have followed as closely as possible the usual procedure of the criminal Courts. It is clear that the object of this rule was to ensure that the Accused knew exactly the charge to which he was pleading, and any deviations, if indeed there were any substantial ones, would be cured by his plea of guilty, particularly since the Accused was defended by an experienced advocate.

As regards sentence, we are fully conscious of the consequences of this crime upon the Accused and their families. The first Accused was a policeman, whose duty it was to protect the people from the consequences of the pernicious drug traffic. We cannot avoid taking cognizance of the fact that this heinous traffic is on the increase between Palestine and Egypt.

The case does not reveal any mitigating circumstances, and any reduction of the sentence imposed by the trial Judge would be wholly unjustified.

Delivered this 6th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 135/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF :—

Itzhak Rokach. APPELLANT.

v.

Afkaris Zahlan & an. RESPONDENTS.

Recovery of possession — Requirements for actions under the first, or the second part of Art. 24 Magistrates' Law — Uninterrupted possession — Exhibits in pending land case may be produced — Delay, C. A. 66/44 — Judgment of possession is without prejudice to action for ownership.

Appeal from the judgment of the District Court in its appellate capacity, dated the 4th February, 1944, in Civil Appeal No. 176/43, allowed:—

In an action under the first part of Art. 24 of the Magistrates' Law the requirements in the second part of the Article need not be established. Nor need action be taken at once.

Uninterrupted possession by the plaintiff need not be proved.

(*A. M. A.*)

REFERRED TO: C. A. 66/44 (11, P. L. R. 310; 1944, A. L. R. p. 590).

ANNOTATIONS: See note 2 in A. L. R. to C. A. 66/44 (*supra*) and *cf.* C. A. 351/43 (1944, A. L. R. p. 386) and C. A. 128/44 (1944, A. L. R. p. 619).

(*H. K.*)

FOR APPELLANT: A. Levin and Lipschutz.

FOR RESPONDENTS: Hazou.

JUDGMENT.

This is an appeal by leave to appeal granted on 1st June, 1944, from the judgment of the 4th of February, 1944, of the District Court of Haifa sitting as a Court of Appeal, whereby the District Court dismissed the appeal from the judgment of the Magistrate's Court, Haifa, of the 28th July, 1943.

The facts briefly are that the Appellant sued the Respondents for trespass on the grounds that the Respondents interfered with his workmen when they were about to erect a fence around the land in dispute. The Appellant claims that he is the owner of this plot of land in Bat-Galim plot No. 88, registered in the Land Registry of Haifa Vol. 19, Folio 73 area 861 metres. That was about the 12th March, 1942, the

Respondents wrongfully drove the Appellant's agent from this plot and refused to allow Appellant or his agent to resume lawful possession of this plot which has at all times been in his possession.

The Respondents claimed that this land was possessed by their common testator together with some adjacent land and since the latter's death they have been in possession uninterruptedly and that the Appellant never possessed this land. The learned Magistrate inspected the land. In his judgment he states that the Appellant's evidence tends to show that his possession consists of fencing, selling sand from the land and leasing it to the Military Authorities in 1939, whereas the Respondents' evidence tends to show that ever since the death of their common testator Nichola Zahlan, some years ago, they were in possession and planted vegetables thereon. That the army did not remain on the land for any length of time.

The Appellant produced a *Tabu* extract and maps which showed the land in dispute as parcel No. 88 on the extreme western edge of the Bat-Galim lands. The learned Magistrate does not find that the maps are satisfactory nor that they represent the land for which they are meant. He refers to the judgment of the Land Court of Haifa in Land Case No. 25/38 but considers that this judgment is not favourable to the Appellant (P. 5, second part). As regards the *Tabu* extract of the Appellant's land, it is noteworthy that the western boundary is shown as *Wadi Shibeh* which from his inspection does not appear on the western side of the land in dispute. That the Land Court further held that the Bat-Galim land is situated on the eastern side of the *Wadi Shibeh*. *Wadi Shibeh* being a considerable distance from the land in dispute. The learned Magistrate is not, he states, influenced by this judgment of the Land Court but that for the Appellant to succeed he should prove that:—

(a) This extract applies to or covers the land in question;

(b) That he was actually in possession until the Respondents encroached thereon.

(c) That the Respondents' possession is fresh and wrongful.

From the evidence he is not in a position to hold that the Appellant did discharge the onus of proof in this regard. He did not show that he was actually in possession uninterruptedly of this very plot, until the time when the Respondents are alleged to have interfered.

The Respondents' evidence proves that they were in possession for a number of years regardless of whether or not they had a right to take possession, and that the land showed signs of cultivation although sandy and grass grew thickly over it. That there are traces of poles

of some kind but there is nothing to satisfy the Court that they are necessarily the remains of those said to be erected at some time by the Appellant and which some of the witnesses say were removed during the disturbances in 1936—39.

Accordingly the learned Magistrate, regardless of who the owner of the land in dispute may be, dismissed the Appellant's case.

On appeal to the District Court, the learned A/Relieving President in his judgment considers that the findings of fact of the Magistrate are not always very clear, but nevertheless it seems from the evidence that he was entitled to find that the Appellant had not discharged the onus of proof which it was for him to do, and with these findings of fact the District Court cannot interfere. The appeal was dismissed.

Before this Court it is argued on behalf of the Appellant that he purchased the land in dispute in 1924 and fenced it. The plot adjoins the tennis court and has always been known as the property of Rokach. He sold sand in 1939 and leased the plot to the Army for six months.

I might be prepared more easily to agree with the Magistrate's decision were it not for the judgment of the Land Court which was before the Magistrate; he states this judgment does not influence him in his decision but, as can be seen from the second last paragraph on page 3, he did give it some consideration. I do not agree with his interpretation of the Land Court judgment, but I shall refer to this later.

There is no reason why the Magistrate should not have asked to see exhibits which have been produced in Land Court case even if that case was at hearing.

The Appellant points out that in Land Court Case No. 25/38 it was decided at page 4 of the judgment that the lands to the west belong to the defendants Zahlan, the Respondents in the present case, and that the Government's land was to the east of the tennis court. He refers to the judgment of the Magistrate and to exhibit P. 4 and that the Plaintiff's land is the triangular plot to the western end of the map. Having succeeded against the Government, the Respondents are now coming in on the east and claiming more land. The Land Court judgment held that *Wadi Shibeh* was further to the east but that the Bat-Galim Society had encroached over Government Land up to the line west of the tennis court. That the Appellant was most recently in possession and has leased to the army for six months without protest from Zahlan, that this action is for trespass under article 24 of the Magistrates' Land Law. The Magistrate misdirected himself as regards this article (a) he stated that the Plaintiff must prove that he is the owner and that he has had uninterrupted possession; (b) he must

further prove that Defendants' possession is fresh and wrongful; in other words, he refers to the second paragraph of article 24 and that is was the holder who ejected the trespasser by force; and (c) that the *Tabu* extract does not apply to the land. There is no evidence as to this, and the Magistrate was wrong in holding that the Appellant did not prove this fact. It is clear from P. 5, a map accepted by and acted upon by the Land Registry, that plot 88 is the same as 52 block 18. The Appellant has proved prior possession to the Respondents and Respondents had not, in any case, proved any since the lease by the Appellant to the military. The Magistrate was wrong in holding that it was necessary for the Appellant to take proceedings or possession at once. This proviso would refer to the second paragraph of article 24, but in any case action was taken at once at the beginning of June, 1942.

The Magistrate further was wrong in holding that uninterrupted possession was necessary as the Appellant is claiming as registered owner and not by possession. He was wrong in refusing to allow exhibit from the Land Case to be produced. The judgment was produced but P. 4, the map of the western end, was not put in.

For the defence it is admitted that it is a case brought under article 24 and that a person suing must show that he is the owner and that the extract produced applies to the land. There are findings of fact by the Magistrate that the *Wadi Shibeh* was the western boundary but that the Bat-Galim Society jumped over it. There is no plan accompanying the claim. The Appellant has not proved his title. The boundaries in the extract do not agree, especially the eastern boundary. The definite findings of fact cannot be interfered with on appeal. The Appellant has not come into possession recently. As regards the lease to the military, the Respondents objected when the military came on the land. He refers to Civil Appeal No. 66/44, P. L. R. Vol. 11 p. 312, that the Appellant has slept on his right for seven months and cannot avail himself of the temporary relief under section 24. The Respondents have proved that they have been in possession for a number of years. The Appellant, further, submits that at the westerly point of Bat-Galim, the boundary should have been *Wadi Shibeh;* but it was held in the Land Case that the Bat-Galim Society had shifted to the eastern boundary up to the Appellant's land. (see paragraph 4(1) of the judgment). From the beginning in the Land Case Respondents claimed their land included the tennis court but did not mention the Land in dispute (para 1 of judgment). All proof necessary is here that this is the land and no question of mistake. The Magistrate's judgment

deals entirely with the second half of article 24 which does not apply to this case.

At first I was inclined to think that there was a question of ownership and that the Magistrate should have referred the parties to the Land Court, but having read the Land Court's judgment in case No. 25/38, I consider that due to the findings therein and the exhibits produced in this case that although perhaps this is a line ball case the Magistrate rightly proceeded to hear the case under section 24 of the Ottoman Magistrates' Law. It is necessary here to note that Land Case No. 25/38 in which judgment was delivered on the 17th April, 1943, was an action between the Attorney General and the *Mutawalli* of the Khader *Wakf* and 4 others. The present Respondents were Defendants Nos. 2 and 3 in that case. It appears from the judgment in that case that the dispute was between the Government and the Zahlan family in respect of a piece of land, triangular in shape and situated in the extreme western corner of the map, P. 5, and the Land described as the western boundary of the Bat-Galim land and mentioned in the judgment to contain huts and an unused tennis court. There seems to have been no suggestion during the proceedings in that case that any of the Defendants claimed land to the east of this boundary. It is clear, however, that this judgment dismissing the Government's claim to the extreme westerly triangular piece of land establishes the fact that the western boundary of the Bat-Galim Society lands should have been *Wadi Shibeh*; but that there had been an encroachment of several hundred yards (see paragraph 4 of the judgment) which embraced the land registered in the name of the Government, namely, from the west of *Wadi Shibeh* up to the land across to the west of the tennis court which form the eastern boundary of the Zahlan land. This judgment is, in my opinion, very relevant to the present case because from the plans produced of the Bat-Galim land, plot 88 or parcel 52 is situated in the extreme western corner of the Bat-Galim lands and appears to be clearly identified as the plot in dispute.

The question as to whether the Bat-Galim Society had a right to the ownership of this particular plot or not and to sell it to the Appellant is not one which arises in the present case. I cannot agree, therefore, with the Magistrate that the land in dispute is not sufficiently identified and I am not prepared to speculate as to what might be the result of an action in the Land Court between the Government and the Bat-Galim Society. It appears to me from the Magistrate's judgment that he directed his mind towards the question of ownership rather then to trespass contrary to paragraph 1 of section 24 of the Magis-

trates' Land Law. I agree with the learned A/Relieving President that the findings of fact of the Magistrate are not always very clear, in fact, I will go further to say that they do not amount in most cases to findings of fact — and such as they are they are based on misconception as to the meaning of the first paragraph of article 24 which alone is applicable in this case.

The Appellant has produced as evidence of his title an extract from the *Tabu* in which the western boundary is shown as *Wadi Shibek*; but this is explained in the judgment of the Land Court and does not preclude the land in question from being identified as parcel 88 and the land in dispute. The Appellant has produced evidence that he exercised the most recent possession by leasing the land to the Military, whereas from the record there does not appear any evidence that the Respondents were in possession since that time. He was under no obligation to prove uninterrupted possession. The wording of article 24, first paragraph, is "and proves by title deed that he is the actual possessor and by other evidence that he has been in possession of the property". There is further evidence that he paid *werko* and there are remains of fencing poles on the land. The only evidence of possession by the Respondents is their statement that they at some time cultivated part of this land. The Magistrate seems to take this evidence plus the signs of some old cultivation covered with grass as conclusive in their favour. I consider that the fact that the Respondents, in the land case, which was being tried at the same time, did not claim that their boundary extended any further than the eastern side of the tennis court, must certainly be taken into consideration and is not in their favour in the present case.

For all the above reasons the appeal must succeed and the Magistrate's judgment and that of the District Court must be reversed and judgment entered for the Appellant ordering the Respondents to refrain from tresspassing on parcel 88 as shown in exhibit P. 5.

This judgment is without prejudice to any action for ownership which the Government or either of the parties may choose to institute before a competent Court.

The order of costs in the lower Courts will be reversed, and costs in this Court to be on the lower scale and to include the sum of LP. 15 advocate's attendance fee.

Delivered this 21st day of November, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 82/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Itzhaq Israel. APPELLANT.

v.

Lipman Levinson & 2 ors. RESPONDENTS.

Claim that at time of transaction seller was of unsound mind — Court dismissing case without hearing Defendant's witnesses.

Appeal from the judgment of the Land Court of Jaffa, dated the 2nd day of March, 1944, in Land Case No. 37/43, dismissed:—

Rule 189, Civil Procedure Rules does not prevent Court informing Defendant, after Plaintiff's case closed and all his witnesses heard, that Plaintiff failed to make out his case.

(*M. L.*)

REFERRED TO: Birken *v.* Wing (1890), 63 L. T. R. 80; 33 Digest p. 128, item 45; Jenkins *v.* Morris (1880) 14 Ch. D. 674; 42 L. T. R. 817, C. A.; 33 Digest p. 144, item 216; C. A. 67/38 (5, P. L. R. 283; 3, Ct. L. R. 213; 1938, 1, S. C. J. 254); C. A. 274/40 (9, Ct. L. R. 199; 1941, S. C. J. 85).

ANNOTATIONS:

1. On question of validity of act done by person of unsound mind see the English Cases referred to and C. A. 53/43 (1943, A. L. R. 112) and annotations thereto.

2. On power of Court to refuse hearing further evidence — see cases referred to and annotations thereto.

(*A. G.*)

APPELLANT: In person.

FOR RESPONDENTS: Nos. 1 & 2 — Eliash and Sharf.
No. 3 — Absent — served.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jaffa, whereby an action by the present Appellant was dismissed.

The Appellant had sought to set aside the transfer of his one half share in an orange grove to the present first two Respondents on the ground that he was of unsound mind at the time of the transfer. The case which occupied thirteen days in the Court below was tried with great thoroughness by the learned Relieving President who delivered a typewritten judgment extending to seventeen pages. In the result the Court below held that the Plaintiff had failed to establish that he was

of unsound mind at the time of sale, and that he had also failed to establish any claim to equitable relief on any other ground. The action was accordingly dismissed. Against that dismissal the Appellant now appeals to this Court. Before me he conducted his own case with ability and propriety. One of his grounds of appeal was that the learned trial Judge did not comply with rule 189, Civil Procedure Rules, 1938, in that, after the first Defendant had given evidence, the learned trial Judge informed the Defendants' advocate that it was unnecessary for him to call any further witnesses or to address him on the case. The basis for the Appellant's complaint is that his advocate in the Court below had information that a certain witness whom he, *i. e.* the Appellant, had intended to call, was on the list of witnesses whom the Defendants intended to call. The Appellant's advocate told the Appellant that he preferred not to call this particular witness but would rather avail himself of the opportunity of cross-examining him. In the event, however, it was unnecessary for the Defendants to call witnesses, apart from the first Defendant and the Plaintiff accordingly did not have an opportunity of cross-examining this particular person. This may be regrettable; but I do not think that there is anything in rule 189 to prevent the trial Court informing an advocate for a Defendant, after the Plaintiff's case has been closed and after all the Plaintiff's witnesses have been heard, that the Court is of the opinion that the Plaintiff has not made out his case.

The next ground of appeal is that the Court below refused to admit in evidence certain notes made by a medical practitioner who is now unfortunately dead, namely, Dr. Pappenheim. In his judgment the learned Relieving President mentioned that the Appellant's advocate in the Court below (Dr. Philip Joseph) agreed that the ruling excluding these notes could not be impeached. Before me Dr. Eliash, for the Respondents, cited Phipson on Evidence (8th edition) p. 284, and Civil Appeal 274/40 Levanon's Current Law Reports Vol. 9, p. 200.

Many other objections to the judgment were urged before me by the Appellant, most of which were directed to the fact that the learned trial Judge was not impressed by certain witnesses whom the Appellant assures me he (the Appellant) knows to be honest men. As these matters were entirely matters for the Court of first instance it is impossible for me to interfere, unfortunate though this may be for the Appellant.

Other complaints which the Appellant makes are really directed against the way in which his then advocate conducted his case in the Court below and in particular his calling certain persons as witnesses

whom the Appellant himself did not consider should be called as witnesses.

The medical evidence called on behalf of the Appellant in the Court below was that of Dr. Rosner, whose evidence was that from March until May, 1942, the Appellant was suffering from syclothymia which does not indicate a state of mania. There was, in fact, no evidence of any mania. Dr. Rosner also said that, if the Plaintiff had been in the same condition on the 31st July as he was in April, he would have understood that he was selling his grove and parting with ownership and receiving the purchase price. This doctor went on to say that there was nothing abnormal in the fact of the Plaintiff selling his grove.

As Dr. Eliash contends, (and I think rightly contends), having regard to this evidence and the provisions of Articles 944 and 955 * of the *Mejelle*, and the cases mentioned in the English and Empire Digest Vol. 33, p. 128, item 451 **, and p. 144, item 216, the learned trial Judge came to a correct conclusion in holding that the Plaintiff had failed to make out his case. I would merely add that Dr. Eliash also referred to Civil Appeal 67/38, 5 P. L. R. p. 285, especially paragraph 5 of the judgment.

The learned trial Judge in the Court below said that he sympathized with the Appellant; with that expression I agree. The appeal, however, fails and is dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee of this hearing of LP. 10.—.

Delivered this 8th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 279/44.

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

BEFORE: FitzGerald, C. J. and Shaw, J.

IN THE APPEAL OF:—

Antoine Saleh Sahyoun. APPELLANT.

v.

Itzhak Garfein. RESPONDENT.

Illegality — Undertaking by vendor to obtain necessary permits — Rule of favourable construction.

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* Should read 945.
** Should read 45.

Appeal from the judgment of the District Court of Haifa, dated 5th June, 1944, in Civil Case No. 214/43, allowed and case remitted:—

Unless illegality is specifically proved the Court will presume the object of an agreement to en legal.

(*A. M. A.*)

ANNOTATIONS: *Cf.* the principle that *omnia praesumuntur rite et solemniter esse acta* which was invoked in CR. A. 57/44 (11, P. L. R. 184; 1944, A. L. R. 440).

(*H. K.*)

FOR APPELLANT: Sahyoun.

FOR RESPONDENT: Shreuer.

JUDGMENT.

This is an appeal from the District Court of Haifa, who dismissed a claim and counterclaim on the ground that as the transactions which gave rise to the action were tainted with illegality, the Court would assist neither party. Now, if we were satisfied beyond doubt that the transaction was, in fact, tainted with illegality, we would agree with the decision of the learned Relieving President, but after a careful perusal of the documents and the evidence, we are unable to arrive at this conclusion in so far at all events, as the activities of the Appellant were concerned.

The facts are that the Appellant agreed to buy from the Respondent a car for the sum of LP 260 on the understanding, as was alleged by him, that the Respondent would procure the necessary licenses to enable him to use the car van for commercial purposes. It seems to us that there was nothing unusual about this arrangement. It is not uncommon for the buyer to stipulate that the seller shall obtain or at least help to obtain for him the permits demanded by the various war controllers. The learned Relieving President appears to have come to the conclusion that there was something sinister behind the document P. 1, particularly the last sentence which stated that if any trouble arose the Respondent would repurchase the car. It is a well known rule of construction that the Court will presume that the objects of an agreement are legal until it is specifically proved to the contrary. We are unable to say that the evidence, particularly the cross-examination of the Respondent, precludes us from holding that the arrangement between them was a perfectly genuine one. That arrangement was that the Respondent should obtain a permit. It does not follow that the intention was that he should resort to bribery or to any other illegal method in order to get that permit. The trouble referred to in P. 1 might very well mean nothing more than the trouble which would be

whom the Appellant himself did not consider should be called as witnesses.

The medical evidence called on behalf of the Appellant in the Court below was that of Dr. Rosner, whose evidence was that from March until May, 1942, the Appellant was suffering from syclothymia which does not indicate a state of mania. There was, in fact, no evidence of any mania. Dr. Rosner also said that, if the Plaintiff had been in the same condition on the 31st July as he was in April, he would have understood that he was selling his grove and parting with ownership and receiving the purchase price. This doctor went on to say that there was nothing abnormal in the fact of the Plaintiff selling his grove.

As Dr. Eliash contends, (and I think rightly contends), having regard to this evidence and the provisions of Articles 944 and 955 * of the *Mejelle*, and the cases mentioned in the English and Empire Digest Vol. 33, p. 128, item 451 **, and p. 144, item 216, the learned trial Judge came to a correct conclusion in holding that the Plaintiff had failed to make out his case. I would merely add that Dr. Eliash also referred to Civil Appeal 67/38, 5 P. L. R. p. 285, especially paragraph 5 of the judgment.

The learned trial Judge in the Court below said that he sympathized with the Appellant; with that expression I agree. The appeal, however, fails and is dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee of this hearing of LP. 10.—.

Delivered this 8th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 279/44.

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

BEFORE: FitzGerald, C. J. and Shaw, J.

IN THE APPEAL OF:—

Antoine Saleh Sahyoun. APPELLANT.

v.

Itzhak Garfein. RESPONDENT.

Illegality — Undertaking by vendor to obtain necessary permits — Rule of favourable construction.

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* Should read 945.
** Should read 45.

Appeal from the judgment of the District Court of Haifa, dated 5th June, 1944, in Civil Case No. 214/43, allowed and case remitted:—

Unless illegality is specifically proved the Court will presume the object of an agreement to en legal.

(*A. M. A.*)

ANNOTATIONS: *Cf.* the principle that *omnia praesumuntur rite et solemniter esse acta* which was invoked in CR. A. 57/44 (11, P. L. R. 184; 1944, A. L. R. 440).

(*H. K.*)

FOR APPELLANT: Sahyoun.

FOR RESPONDENT: Shreuer.

JUDGMENT.

This is an appeal from the District Court of Haifa, who dismissed a claim and counterclaim on the ground that as the transactions which gave rise to the action were tainted with illegality, the Court would assist neither party. Now, if we were satisfied beyond doubt that the transaction was, in fact, tainted with illegality, we would agree with the decision of the learned Relieving President, but after a careful perusal of the documents and the evidence, we are unable to arrive at this conclusion in so far at all events, as the activities of the Appellant were concerned.

The facts are that the Appellant agreed to buy from the Respondent a car for the sum of LP 260 on the understanding, as was alleged by him, that the Respondent would procure the necessary licenses to enable him to use the car van for commercial purposes. It seems to us that there was nothing unusual about this arrangement. It is not uncommon for the buyer to stipulate that the seller shall obtain or at least help to obtain for him the permits demanded by the various war controllers. The learned Relieving President appears to have come to the conclusion that there was something sinister behind the document P. 1, particularly the last sentence which stated that if any trouble arose the Respondent would repurchase the car. It is a well known rule of construction that the Court will presume that the objects of an agreement are legal until it is specifically proved to the contrary. We are unable to say that the evidence, particularly the cross-examination of the Respondent, precludes us from holding that the arrangement between them was a perfectly genuine one. That arrangement was that the Respondent should obtain a permit. It does not follow that the intention was that he should resort to bribery or to any other illegal method in order to get that permit. The trouble referred to in P. 1 might very well mean nothing more than the trouble which would be

caused to both the buyer and the seller by the perfectly legitimate refusal of the Controller of Road Transport to give a permit. Much has been made of Exhibit P. 2, but we think that this can also be fitted in with an innocent construction of the agreement. It purported to be a deed of sale between the two. It is true that a permit to sell had not yet been obtained, but in view of the correspondence and P. 1 and the evidence adduced at the trial, we think it quite reasonable to infer that what was in the minds of both those people at the time when the deed of sale was drawn up was, that this deed of sale was to be subject to the proviso that the permit would be granted, particularly in view of the fact that, *prima facie,* the onus was on the seller to get the permit. We do not regard the fact that the Appellant actually drove the car before he received the permit as evidence that the original agreement between them was designed to circumvent the war control legislation.

For all these reasons we have come to the conclusion that the contract was not tainted with illegality and we return the case to the learned Relieving President to be dealt with on the merits in the light of this decision. Costs to be in the cause but to simplify the final arrangements we certify the costs of this appeal to be on the lower scale to include a sum of LP. 10.— for advocate's attendance fee.

Delivered this 30th day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 129/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Mary Khayat. APPELLANT.

v.

1. Nasrallah Salim Khoury,
2. Nasrallah Salim Khoury on behalf of the heirs of his late brother Youssif. RESPONDENTS.

Privity — Res judicata — Action for interest on P/N in P. C. 1/42 — O. C. C Arts. 119, 141, 305 *and* 91—2 *of Addendum, Bills of Exchange (Protest) Ord. — "Demande en justice".*

Appeal from the judgment of the District Court of Haifa, dated the 7th of March, 1944, in Civil Case No. 181/43, dismissed:—

Effect of P. C. 1/42 considered so far as relating to a plea of *res judicata* in proceedings arising therefrom.

(*A. M. A.*)

CONSIDERED: P. C. 1/42 (10, P. L. R. 271; 1943, A. L. R. 408).

ANNOTATIONS:

1. See the previous proceedings between Appellant and second Respondent: C. A. 17/40 (7, P. L. R. 191; 1940, S. C. J. 100; 7, Ct. L. R. 157) and P. C. 1/42 (*supra*).

2. On the meaning of "demande en justice" *cf.* C. A. 40/30 (3, C. of J. 1028).

3. On the requirements of a plea of *res judicata* see C. A. 63/44 (11, P. L. R. 392; 1944, A. L. R. 715) and notes in A. L. R.

(*H. K.*)

FOR APPELLANT: A. Atallah and P. Margolin.

FOR RESPONDENTS: No. 1 — A. Levin and Catafago.
No. 2 — Sanders.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Haifa, dismissing an action by the present Appellant for interest on certain promissory notes. The matter has already been the subject of previous litigation culminating in Privy Council Appeal No. 1/42, P. L. R. Vol. 10, p. 271. Eight issues were framed in the District Court which delivered a careful judgment extending to fifteen type-written pages, prepared by Judge Shems and concurred in by Judge Nasr, who decided in favour of the Appellant on all points except one, namely, the effect of the non-protest of the bills of exchange. It was admitted that the bills of exchange had not been protested. The advocates appearing for the Respondents have, as they were entitled to do without filing a cross-appeal, attacked those parts of the judgment which were not in their favour. We have listened to lengthy arguments on questions of *res judicata,* prescription, privity of parties and other matters, and the advocates for both parties have cited many authorities and text books in different languages on both the Ottoman Commercial Code and on the French Commercial Code. I am, however, of opinion that it is unnecessary for us in this Court to discuss these matters. I think that the District Court came to a correct conclusion on all the matters before them, and no useful purpose would be served by my adding in any way to their judgment, as I consider that their reasons also are sound.

The only matter on which I have some doubt is the question of *res judicata* and the effect of the words in the judgment of their Lordships of the Judicial Committee, namely:—

"This judgment to be without prejudice to any future claim for interest under article 305 of the Code."

On the whole, however, I think that we must not read into that judgment any suggestion that it was intended to debar the present Appellant from bringing any action against Nasrallah Khoury personally, even although Nasrallah Khoury did not take — and it is admitted that he has not taken — action under article 305 of the Ottoman Commercial Code. It is, however, desirable that I should deal at greater length with the effect of non-protest. I consider that all reference to article 141 of the Ottoman Commercial Code and to the Bills of Exchange (Protest) Ordinance, 1924, is irrelevant because these statutory provisions of law apply only when there has been a protest. In my view the relevant provisions of law are Articles 91 and 92 of the *Addendum* to the Ottoman Commercial Code. It is admitted that no protest or other similar official document was ever served on Nasrallah Khoury as required by Article 92 of the *Addendum*. It was strenously argued by Mr. Margolin and Mr. Atallah that the claim which they presented to the *Juge-Commissaire* and to the Syndic was a *"demande in justice"* and as such a compliance with article 92. Whatever force that demand may have had as against the Syndic and the *Juge-Commissaire*, I do not think it can be said to be binding in these proceedings against Nasrallah Khoury himself. After all the Appellant cannot have it both ways. She succeeded in convincing the Court below that there was no privity and that there is no *res judicata* and also that the bills were not prescribed. Why has she succeeded on all those grounds? Simply because she convinced the Court that the Syndic and Nasrallah Khoury himself were two entirely different legal persons or legal entites. It is therefore quite illogical and unreasonable for her, now to rely on the demand addressed to the Syndic as being equivalent to the official document which had to be served on Nasrallah Khoury himself as required by Article 91 and 92. I accordingly agree with the reasoning of the District Court in paragraphs 51—54 at p. 13 of their judgment, and in particular with the remarks with regard to article 119 of the Ottoman Commercial Code.

For all these reasons I would dismiss this appeal with one set of costs to be taxed on the higher scale and to include an advocate's attendance fee at the hearing of LP. 25.

Delivered this 14th day of February, 1945.

British Puisne Judge.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEALS Nos. 313/44 & 314/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEALS OF :—

Civil Appeal No. 313/44:—

Zahra Bint Awad Khoury & 2 ors. APPELLANTS.

v.

Nimeh Awad el Khoury in his personal capacity and in his capacity as administrator of the estate of Said Awad el Khoury & an. RESPONDENTS.

Civil Appeal No. 314/44:—

Assad Awad Khoury & 5 ors. APPELLANTS.

v.

Nimeh Awad el Khoury, in his personal capacity and in his capacity as administrator of the estate of Said Awad el Khoury & an. RESPONDENTS.

Promissory notes — Cancellation — Onus of proving cancellation — Destruction of notes — Admission of indebtedness — Mejelle, arts. 79, 1588.

Appeals from the judgment of the District Court of Haifa, dated 29.6.44 in Civil Cases Nos. 151/43 and 154/43, dismissed:—

Where it is admitted that promissory notes have been destroyed by the holder, it is not upon the maker to prove cancellation, but upon the plaintiff to prove that the destruction of the notes was not intended in cancellation.

(*A. M. A.*)

ANNOTATIONS: See C. A. 92/32 (4, C. of J. 1385) where in an action for the return of a loan the fact that promissory notes had been returned to the defendant maker was in the circumstances of the case held not to be conclusive proof that the debt had been extinguished.

(*H. K.*)

FOR APPELLANTS: A. Atallah.

FOR RESPONDENTS: No. 1 — Koussa & G. Salah.
No. 2. — Absent — served.

JUDGMENT.

This is an appeal from the District Court of Haifa which dismissed the claim of the Appellants for £E. 2,000 due on promissory notes. In the course of his judgment the learned President said that he did not propose to deal at any length with the oral evidence for the simple reason that practically all the witnesses lied to such an extent that it was almost impossible to say what happened. There appears to be ample reason for the Judge's conclusion which forced him, as it has forced us, to rely almost entirely on such documentary evidence as is available. It is admitted that at one time in 1927 the first Respondent Nimeh and his brother Said made two promissory notes of LE. 1,000 each in favour of their brother Saleem. Saleem was murdered in 1928 and the promissory notes which at the time of his death were in his possession, disappeared. It was alleged by the Respondents that the notes were cancelled by Said before his death. The Appellants, who are the heirs of Saleem, contend, on the other hand, that they were stolen on the night of his death by the Respondents. Mr. Atalla argues that the onus is on those claiming cancellation to prove the cancellation. I quite agree if the notes were produced and if they did not on the face of them contain any evidence of cancellation. What the Appellants appeared to have overlooked is the finding of fact, admitted by all, that the notes were destroyed. Now, it appears to me that the destruction of the notes is, to put it at its mildest, strong *prima facie* evidence that they were cancelled. At all events this fact would certainly, in my opinion, shift the onus on to the Appellants to prove that they had not been cancelled. I cannot avoid the conclusion that the Appellants have not discharged that onus, perhaps for the simple reason that they based the whole of their case on the assumption that the onus was on the Respondents to prove the cancellation. The case cannot, however, be decided on this issue alone because, as the learned President appreciated, he was confronted with the provisions of article 79 of the *Mejelle,* which is to the effect that a person is bound by his own admissions. A further article No. 1588 stipulates that no person may validly retract an admission with regard to a private right. Those articles are relevant because there was evidence, which was accepted, that Nimeh, the first Respondent, admitted that when Said died he remained indebted to him for the sum of £E. 2,000 as he, Nimeh, was guarantor. At the same time he denied liability for it. Nimeh explains this somewhat ambiguous admission by saying that the action was brought against Said vindictively and that owing to a feud which existed between the families he had lent himself to the action. It was

admitted by the advocate that there were, in fact, constant disputes between the parties. The learned President had serious doubts as to how he should decide the issue with which he was then confronted, but in the event he accepted Nimeh's explanation, particularly as he emphasized the fact that the heirs never lodged any action against the estate of Said in respect of this debt. I cannot help sharing the doubts of the learned President, but I see no reason to differ from the conclusion at which he had arrived after fully directing his mind to the issue.

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

Delivered this 10th day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 448/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mahmoud bin Taha I'naih. APPELLANT.

v.

Fatmeh bint Awad el Haj Abdallah Awad. RESPONDENT.

Hearing the evidence — Res judicata — Plea not to be considered without hearing the evidence — Inspection by the Court — M. C. P. R. 139 *sqq.*, 149.

Appeal from the judgment of the Magistrate's Court of Majdal, sitting as a Land Court, dated the 14th of November, 1944, in Land Case No. 334/44, allowed and case remitted:—

An action should not be dismissed on a plea of *res judicata* before allowing the plaintiff to lead evidence.

(*A. M. A.*)

APPELLANT: In person.

RESPONDENT: In person.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court, Majdal, sitting as a Land Court, dismissing an action by the present Appellant, who is the husband of the Respondent.

The Appellant's case was that originally he owned one room and a yard in a certain house, and that the Respondent also owned a room and yard, and that in a certain Land Court case the Respondent was confirmed in the ownership of her one room and yard. He now complains that as a result of the judgment now under appeal before us, the Respondent has obtained ownership of the whole house, including his room and his yard.

The main ground of appeal is that the Magistrate did not hear the case and that he assumed that the matter was *res judicata,* and that the property in dispute in the present case was exactly the same as the property, the subject-matter of Land Case No. 18/44.

It is clear that the judgment of the Court below cannot stand, because there has been no compliance with Rule 139, Magistrates' Courts Procedure Rules, 1940. The judgment of 14th November, 1944, is set aside and the case remitted for retrial by the Magistrate in accordance with Rule 139. If the Plaintiff wishes to produce evidence (documentary or evidence of witnesses) he cannot be deprived of an opportunity to do so, and the Magistrate must comply with Rules 139 *et seq.*

If it is not too inconvenient for the Magistrate to inspect the property, which we understand is quite near the Court House, the Magistrate may be disposed to exercise the powers given to him by Rule 149; but we leave this to the discretion of the Magistrate.

The costs of this appeal will abide the event, but in order to facilitate the final arrangements, we certify fixed costs of LP. 2 to the ultimately successful party.

Delivered this 13th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 337/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Saba' Mohammad Hammdan Abu Halimeh & an. — APPELLANTS.

v.

Hilmi Atalla Tarazi & an. — RESPONDENTS.

Equivalent rent — Cultivation by co-owner — Share in the produce or equivalent rent — Provisional Law of Disposition, Art. 14.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, dated 15.5.44 in Civil Appeal 47/44, allowed:—

A co-owner to land who has not cultivated is entitled to a share of the fruits of the trees but only to equivalent rent and not to a share of the produce.

(*A. M. A.*)

ANNOTATIONS: On Art. 14 of the Disposal Law *cf.* C. A. 94/41 (1941, S. C. J. 275; 10, Ct. L. R. 130), C. A. 115/41 (8, P. L. R. 296; 1941, S. C. J. 292; 10, Ct. L. R. 222) and C. A. D. C. Jm. 72/44 (1944, S. C. D. C. 391).

(*H. K.*)

FOR APPELLANTS: Dajani.

FOR RESPONDENTS: Hawari.

JUDGMENT.

This is an appeal by leave from the District Court of Jaffa which in its appellate capacity dismissed an appeal from the Magistrate's Court of Gaza.

In our opinion it does not present any great difficulty because the case is amply covered both by statute and authority. The dispute concerned a parcel of land in the Gaza area. There are many conflicting claims to it, including those of the Appellants and Respondents. There is no doubt in our minds that both the intention and effect of the Settlement Officer's order was that the Respondents were equally with the Appellants entitled to possession of a share. The Appellants cultivated the land and this being so, it seems to us that the learned Magistrate did not give full consideration to the effect of the provisions of Art. 14 of the Provisional Law Regarding the Right of Disposal of Immovable Property. It is true that the Respondents would be entitled to their share of the fruits of the trees; but in regard to the produce of the land they would only be entitled to the equivalent rent, not to a share of the produce.

In the event we agree with Judge Aziz Daoudi that the case should be remitted to the learned Magistrate to assess the share in accordance with this judgment.

It follows, therefore, that the appeal must be allowed. The Appellant will have his costs in this Court, which will be inclusive costs of LP. 10.—.

Delivered this 14th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 470/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF :—

Isaac N. B. Mizrahi. APPELLANT.

v.

Joseph Hassoun & an. RESPONDENTS.

Powers of attorney — Whether specific or general — Advocates Ord., sec. 21(4) — Notarial execution — Each document to be considered on its merits — "Sue in my action against" — C. A. 401/43.

Appeal from the order of the District Court of Jerusalem, dated 6.11.44, in Civil Case No. 31/44 (Motion No. 159/44), dismissed:—

A power of attorney to "sue in my action against .....", though general in wording, is given in connection with a particular suit for the purpose of sec. 21(4) of the Advocates Ordinance.

(*A. M. A.*)

REFERRED TO: C. A. 401/43 (11, P. L. R. 97; 1944, A. L. R. 212).

ANNOTATIONS: See the judgment of the District Court, reported in 1944 S. C. D. C. 429, wherein the text of the power of attorney is set out in full.

(*H. K.*)

FOR APPELLANT: T. Cohen.

FOR RESPONDENTS: Lewinstein.

JUDGMENT.

This is an appeal by leave from an order of the District Court, Jerusalem, dismissing an application to strike out a statement of claim on the ground that the Power-of-Attorney in favour of the Plaintiff's advocate was a general and not a special Power-of-Attorney.

The learned Relieving President seems to have inclined to the view that the Power-of-Attorney, which had been drawn up privately, was a general one, and as such, under Section 21(4) of the Advocates Ordinance, should have been drawn up before a Notary Public. The learned Relieving President however felt himself bound by Civil Appeal No. 401/43, P. L. R. Vol. 11, page 97, and he went on to express the hope that this Court might lay down some test for guidance, so that the distinction between general and specific Powers-of-Attorney might the more readily be observed.

We regret that we are unable to lay down any general principles,

because we feel that Courts must be guided by the wording of each particular Power-of-Attorney. We think that in the present case the learned Relieving President came to a correct conclusion, because it is clear from the terms of the Power-of-Attorney that the Plaintiff limited the right of his advocate to "sue in my action against". This clearly referred to one law suit. In other words, the instructions limited the right of the advocate to appear in a specific proceeding.

For these reasons the appeal is dismissed, with fixed or inclusive costs of LP. 5.

Delivered this 15th day of February, 1945.

British Puisne Judge.

CIVIL APPEALS Nos. 360/44 & 361/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEALS OF :—

Civil Appeal No. 360/44:—

Shafik Kawar, in his capacity as guardian of Said and Farid, children of Elias Kawar & 2 ors. APPELLANTS:

v.

Muhammad Abdallah Muhammad Abdel Razek & 5 ors. RESPONDENTS.

Civil Appeal No. 361/44:—

Shafik Kawar, in his capacity as guardian of Said and Farid, children of Elias Kawar & 2 ors. APPELLANTS.

v.

Abdel Karim Yousef Muhammad Abdul Razik & 5 ors. RESPONDENTS.

Equivalent rent — Provisional Law of Disposition, Art. 14 *— Posession and cultivation without the consent of the owner — Cultivation and possession.*

Appeals from the judgment of the District Court, Haifa, dated the 28th day of July, 1944, in Civil Cases Nos. 218 and 219 of 1942, dismissed:—

Possession without cultivation is insufficient to establish a claim for equivalent rent under Art. 14 of the Provisional Law of Disposition.

(*A. M. A.*)

ANNOTATIONS: On Art. 14 of the Disposal Law *cf.* C. A. 337/44 (*ante*, p. 98) and note.

(*H. K.*)

FOR APPELLANTS: F. Atalla.

FOR RESPONDENTS: (In C. A. 360/44): Lipschitz.
(In C. A. 361/44): Wittkowski.

JUDGMENT.

This is an appeal from the District Court of Haifa. In the appeal as in the lower Court, the two cases, Nos. 218/42 and 219/42 — have been consolidated. The Appellants, who live at Nazareth, bought up in the Execution Office shares in lands in Tamara village. The claim in the lower Court and in this Court is one solely for equivalent rent under the provisions of Article 14 of the Provisional Law regulating the Right to Dispose of Immovable Property. A claim preferred under Article 14 falls to be decided upon a question of fact which is whether the person against whom the claim has been preferred has taken possession of and cultivated land without the consent of the owner. In this case the Appellants allege that the Respondents did take possession and did cultivated this land. The Court found as a fact that they had not cultivated. The Appellants contend that such a finding was unreasonable in that it was quite inconsistent with the claims advanced by the Respondents at land settlement. We are of opinion that the claim submitted by the Respondents at land settlement is not inconsistent with the finding of fact by the Court. In this connection it seems to us that the Appellants have failed to distinguish between cultivation and possession. This was *masha'a* land, and at land settlement proceedings the Respondents rightly claimed possession. They never denied or intended to deny the Appellants' rights in the land. But possession, even if the Respondents had in fact taken possession within the meaning of Article 14, was not sufficient; it was necessary for the Appellants to prove also cultivation. There was no evidence, or at least no sufficient evidence, to satisfy the Court below that the Respondents had cultivated this land. We see no reason to differ from the conclusion arrived at by the Court on this issue. It follows that the claim for equivalent rent under Article 14 of the Provisional Law fails. The appeals must therefore be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee in each case.

Delivered this 13th day of February, 1945.

Chief Justice.

CIVIL APPEAL No. 490/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Louis Mubarak Jabrieh. APPELLANT.

v.

Odeh Salem Mustafa Al Malhi. RESPONDENT.

Service of process — C. P. R. 33, 328 — Service on daughter under 18 — Appeal listed for dismissal reinstated.

Appeal from the judgment of the District Court, Jerusalem, dated 30.11.44, in Civil Case No. 42/44, relisted:—

Service cannot be made on a daughter of a party if she is less than 18 years old.

(*A. M. A.*)

ANNOTATIONS: For authorities on defective service see C. A. 246/42 (9, P. L. R. 799; 1942, S. C. J. 865) and note 1 in S. C. J., C. A. 301/43 (1944, A. L. R. 156), C. A. D. C. T. A. 85/39 (1939, T. A. Reports 74) and C. A. D. C. T. A. 224/42 (1941/2, T. A. Reports 136).

(*H. K.*)

FOR APPELLANT: Assal.

FOR RESPONDENT: Hadad.

JUDGMENT.

This appeal was listed for dismissal because the Appellant failed to comply with the order of the Assistant Registrar dated 8th January, 1945, in that he did not pay the deposit within the time limit. Upon hearing counsel for Appellant I am satisfied that the notice to pay the deposit was served upon the daughter of the Appellant, who is under the age of eighteen. And I consider that such service is not proper and rules 328 and 35 of the Civil Procedure Rules have not been complied with. I order that the appeal will be relisted.

Given this 22nd day of February, 1945.

A/British Puisne Judge.

CIVIL APPEAL No. 357/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Immanuel Kaltenbach & an. APPELLANTS.

v.

The Custodian of Enemy Property & an. RESPONDENTS.

Dissolution of partnership — Enemy partner — Trading with the Enemy Ord., sec. 4(1)(b) — Existence of partnership — Schmitz v. Van der Veen & Co, Stockholms Bank v. Schering Ltd. — When partnership becomes unlawful, "partner", "partnership" (Partnership Ord., secs. 2, 40) — Whether Custodian may sue under sec. 43 — Custodian Order, sec. 9(1)(b) — Lindley — Discretion of trial Court to appoint a receiver.

Appeal from the order of the District Court of Haifa, dated 21st July, 1944, in Motion No. 316/44, dismissed:—

A partnership may be dissolved when one of the partners becomes an "enemy".

2. The Custodian of Enemy Property may sue, as the representative of an "enemy" partner, under sec. 43 of the Partnership Ordinance.

(*A. M. A.*)

REFERRED TO: Schmitz *v.* Van der Veen & Co., 1915, 84 L. J. K. B. 861; 112 L. T. 991; Stockholms Enskilda Bank Antiebolag *v.* Schering, Ltd., 1941, 1 K. B. 424, 1 All E. R. 257, 110 L. J. K. B. 229, 165 L. T. 19.

ANNOTATIONS :

1. On the position of the Custodian of Enemy Property *cf.* C. A. 300/43 (11, P. L. R. 121; 1944, A. L. R. 376).

2. As regards the Stockholms Bank case referred to in the judgment see also the decision of the House of Lords in 1943, 2 All E. R. 486.

(*H. K.*)

FOR APPELLANTS: Schaal.

FOR RESPONDENTS: No. 1 — Werner.
No. 2 — Absent served.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court, Haifa, ordering the dissolution of a partnership and appointing a receiver. The Partnership (the second Respondents to this appeal) consisted of three partners, one of whom is residing in Germany and is

thus an enemy within the meaning of section 4(1)(b) Trading with the Enemy Ordinance, 1939. It is said that the other two partners are in a detention camp in Australia.

The first ground of appeal is that section 40 of the Partnership Ordinance does not apply to the facts of this case. The material parts of section 40 are "a partnership shall in every case be dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership".

Mr. Schaal, for the Appellant, admits that in England it would be unlawful but he argues that, as in Palestine a partnership is an entity distinguishable from the individual partners, the position is different. He also relies on cases decided in England for the proposition that mere receipt of money does not constitute trading (see Schmitz *v.* Van der Veen & Co., Law Journal Reports (1915) Volume 84, pages 863 and 865, and Stockholms Bank *v.* Schering Ltd., All England Law Reports (1941) Volume 1 page 268.

It is also argued that, if trading with the enemy were involved, the partnership might become unlawful, but that this is not the position here.

In my view, however, the continued existence of the contractual relationship with one partner who is admittedly an enemy constitutes unlawfulness for the purposes of section 40. I refer to the definition of "partner" and "partnership" in section 2 of the Partnership Ordinance.

This ground of appeal fails.

The next ground of appeal is that the Custodian of Enemy Property is not entitled to sue under section 43 of the Partnership Ordinance. It is said that he is not a representative of any partner. The Respondents' advocate replies that the Custodian is in a special position accorded to him by statute, namely, Vesting Order No. 2, made by the High Commissioner under section 9(1)(b) of the Trading with the Enemy Ordinance, 1939, Laws of Palestine (1940) Volume 2, page 23.

In my view this contention is sound and should prevail. The second ground of appeal therefore also fails. The third ground of appeal is that, even if the District Court had powers, in the circumstances of this case it was unnecessary to appoint a receiver. Reference has been made to Lindley on Partnership (9th edition) page 645.

The learned President, District Court, was, however, satisfied that it was desirable and necessary that a receiver should be appointed and

no good grounds have been advanced why this Court should interfere with that decision.

The appeal accordingly fails and is dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 15.

Delivered this 8th day of February, 1945.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 459/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Elizabeth Schneider. APPELLANT.

v.

Mrs. Haya Basis & an. RESPONDENTS.

Lease of musha — Allowed in the case of miri — Mejelle 429 inapplicable to miri — Land Code, art. 8, Tute, Provisional Law of Disposition, L. A. 16/32.

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, sitting as a Land Court, dated the 29th November, 1944, in Land Case No. 2396/44, dismissed:—

The *Mejelle* does not deal with immovable property of the *miri* category and Art. 429 thereof does not, therefore, apply to *miri* lands. A lease of *musha* in *miri* is consequently possible.

(*A. M. A.*)

FOLLOWED: L. A. 16/32 (1, P. L. R. 767; 1, C .of J. 26).

ANNOTATIONS: See, however, the following statement at p. 182 of Goadby & Doukhan's Land Law of Palestine; "We may safely assume that the rules governing contracts for the hire of land contained in the *Mejelle* apply as well to hire of *Miri* as of *Mulk*. No distinction is suggested and the provisions purport to regulate contracts for hire in general". Note also that C. A. 16/32 (*supra*) was a case of wrongful appropriation for which, in the case of *miri* land, special rules are provided in the Ottoman Law of Disposition.

(*H. K.*)

FOR APPELLANT: Schneider.

FOR RESPONDENTS: Scharf.

JUDGMENT.

Dr. Schneider has argued this appeal on one ground only. He has submitted one question only to this Court which is whether Article 429 of the *Mejelle* deals with *miri* land as well as with *mulk*. It appears to me that the inferences to be drawn from Article 2 of the Land Code, and Tute's comments thereon, and from the specific provisions of the Provisional Law relating to Immovable Property, and also from the decision in Land Appeal No. 16/32, that there was ample authority for the Magistrate's decision that section 429 of the *Mejelle* covers immovable property of the *mulk* category because the *Mejelle* does not deal with immovable property of the *miri* category. This being so it follows that the appeal must be dismissed with LP. 5 inclusive costs.

Delivered this 16th day of February, 1945.

Chief Justice.

CIVIL APPEAL No. 225/44.

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

BEFORE : Rose, J.

IN THE APPEAL OF:—

Selim Khalil Bamieh. APPELLANT.

v.

Ali Hassan Sheikh Ali. RESPONDENT.

Shuf'a — Mejelle, 1028 *ff.* — *C. A.* 109/42; *C. A.* 115/43; *C. A.* 70/44 — *Rigorous compliance with the law required — Wording to be used — Delay in bringing the claim — Oath of Istizhor, Mejelle,* 1746.

Appeal from the judgment of the Magistrate's Court of Jaffa sitting as a Land Court, dated the 3rd June, 1944, in Civil Case No. 964/43, dismissed:—

1. A case for *shuf'a* may be made out if the procedure is strictly followed.

2. When the claimant has given evidence denying waiver, the Court of appeal will not remit a case for the sole purpose of administering the *Istizhor* oath.

(*A. M. A.*)

REFERRED TO: C. A. 109/42 (9, P. L. R. 435; 1942, S. C. J. 664; 12, Ct. L. R. 173); C. A. 115/43 (10, P. L. R. 252; 1943, A. L. R. 381); C. A. 70/44 (11, P. L. R. 367; 1944, A. L. R. 426); Romano *v.* Skoullou, 1922, 11 Cyprus Law Reports 17.

ANNOTATIONS: This seems to be the only case of the Supreme Court upholding a judgment in favour of a *shufa'* claimant.

Authorities on *shufa'* are collated in the notes in A. L. R. to C. A. 115/43 (*supra*).

(H. K.)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Elia.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Jaffa sitting as a Land Court.

This is one of those rather difficult cases which depend upon the interpretation of articles 1028 onwards of the *Mejelle* relating to claims by way of *shuf'a*.

The most recent cases of this Court on these matters are Civil Appeal 109/42, 9 P. L. R. p. 435; Civil Appeal 115/43, 10 P. L. R. p. 252; and Civil Appeal 70/44, Annotated Law Reports, 1944, at p. 426. The effect of those cases is to lay down that a plaintiff claiming by way of *shuf'a* must expect to have his claim rigorously examined and must expect to meet with disappointment even if he has failed only technically to comply with the provisions of the relevant articles of the *Mejelle*. But that, of course, is not inconsistent with a plaintiff, who is in fact able to satisfy these stringent requirements, succeeding in his action; otherwise, as counsel for the Respondent points out, it would be tantamount to this Court barring a remedy which is provided by law; and that clearly is not the duty of the Court of Appeal, but of the legislature, should it think fit to amend the substantive law. Counsel for the Respondent was able to refer me to several cases in Courts of first instance in which a plaintiff in such a claim has been successful.

Many points were raised by the Appellant in this case, but the only substantial point, with respect to Mr. Cattan, was that the requirements of Article 1030 were not complied with in that the form of words specified in that article was not used by the Plaintiff. As to that, he referred me to a Cyprus case which is also referred to in Civil Appeal 70/44 (*supra*) in which the District Court of Nicosia dismissed an action by a claimant by way of *shuf'a* on that very ground. On appeal to the Supreme Court the District Court's judgment was upheld and the Supreme Court set out the words which, in their opinion, should have been stated, and agreed that the learned President was correct in saying that in the absence of those words, the claim was misconceived.

It is to be noted also that Civil Appeal 115/43 was again a case in which the Court of Appeal upheld a decision of the District Court dismissing a claim on a technical ground. While fully alive to the difficulties which in these modern days should rightly be put in the way of a plaintiff in this class of action, it seems to me that in the present case the Appellant is met with a difficulty because the learned Magistrate clearly and fully applied his mind to these relevant provisions, and specifically made a finding that the three requirements of Article 1028, which are elaborated in the subsequent articles, were complied with. It is true that if one consults the record itself, one does not find in it the precise words contained in the Cyprus case. It must be borne in mind, however, that at the trial before the Magistrate a considerable portion of the contest — in fact, the principal portion of the contest — appears to have been directed to another aspect of the case, and that is, that the Plaintiff — the Respondent here — was aware previously of this sale, and indeed, as Mr. Cattan said in opening his appeal, that was one of the points which, on the face of it, without explanation, would seem to be a difficulty in the Plaintiff's way in that the sale was registered on the 13th October, 1941, and the claim was only filed on the 4th July, 1943. That matter, however, was gone into at length by the Magistrate, and for reasons which he accepted and with which I see no reason to disagree, he decided that there was an adequate explanation of that apparent delay. And he found as a fact, on evidence which seems to me to justify him in so finding, that the Plaintiff only discovered this sale when he was visited by the process server on the 20th June, 1943, and he then filed his action within the statutory month on the 4th of July, 1943. It may be, having regard to that, that the learned Magistrate may somewhat have telescoped his note as to the actual words used by the witnesses in regard to this matter, but having regard to his finding specifically that he is satisfied on the evidence that these strict requirements of the *Mejelle* have been complied with, it seems to me that I should be stepping altogether beyond the province of a Court of Appeal, were I to upset his judgment on this point. And I repeat that this decision that I am giving now is, in my opinion, in no way in conflict with the Cyprus case, because there the contest was on the precise form of words used, and the District Court having decided that the wrong form of words was used, the Supreme Court declined to upset their finding.

A further point was taken that under Article 1746 sub-section 4 of the *Mejelle* at the close of the proceedings the Court should have required the Respondent to take an oath that he had not waived the

right of pre-emption in any way whatsoever. It is clear, of course, from the evidence of the Respondent himself, that he had already covered this matter in his evidence. But even assuming, and for the sake of argument I am prepared here to accept Mr. Cattan's argument, that in regard to these rather archaic matters the Court should still have asked this man to take an oath, it then seems to be for me to consider what steps I should take in the matter. The matter could obviously be solved by remitting the case to the Magistrate to administer the oath, in which case, no doubt in view of the evidence which he has already given, the Respondent would then take the necessary oath, and judgment would then be given for the Plaintiff, the Respondent in this case. The only possible effect, therefore, of my remitting the matter to the Magistrate would be to increase the costs which would be payable by the Appellant, because it is obvious that the costs of this appeal could then have to be in the cause. There are no merits in the point, and I decline to accede to the request to remit on that matter.

For these reasons the appeal is dismissed and the Magistrate's judgment confirmed. The Respondent will have the costs of this appeal on the lower scale to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 21st day of November, 1944.

British Puisne Judge

CIVIL APPEAL No. 445/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF :—

Shihadeh Ibrahim Hannoun. — APPELLANT.

v.

Jiriyes Issa Abdallah. — RESPONDENT.

Trespass — Would-be purchaser entering into possession — Findings of Defendant's title irrelevant to action.

Appeal from the judgment of the Magistrate's Court Ramallah, sitting as a Land Court, dated 18.10.44 in Land Case No. 104/44, dismissed:—

A would-be purchaser who enters into possession before transfer, by consent of the owner, commits no trespass.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 221/38 (5, P. L. R. 543; 1938, 2 S. C. J. 161; 4, Ct. L. R. 252).

(H. K.)

FOR APPELLANT: Ousta.

FOR RESPONDENT: Cattan.

JUDGMENT.

This is an appeal against the judgment dated 18.10.44 of the learned Magistrate Ramallah sitting as a Land Court in Case No. 104/44.

It is clear from the statement of claim that the Appellant (Plaintiff in the original case) based his action upon a trespass. Paragraph 2 of the statement of claim reads as follows:—

> "On 15.11.43 or about this date the Defendant encroached on the two plots by taking possession thereof and preventing the Plaintiff from disposing thereof and interfered with his ownership."

It is also clear from the judgment of the learned Magistrate, that he found that there had been no trespass, but that the Respondent had purchased the two plots of land and had been in possession of them since 1940.

The Magistrate observed in his judgment that the Respondent had acquired an equitable title to the two plots, but it was quite sufficient for him to find that there had been no trespass. That is a finding of fact with which we cannot interfere, as we are unable to say that it is not supported by the evidence, and on that finding the Magistrate was bound to dismiss the action. The case was one of trespass and the trespass was not proved. The appeal fails and we dismiss it with costs in the fixed sum of LP. 10. (Ten pounds).

Delivered this 22nd day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 282/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF:—

The Municipal Council of Jerusalem. APPLICANTS.

v.

Habib George Homsi, in his personal capacity

and representing his mother and brothers,
heirs of George Habib Homsi (deceased)
of Jerusalem & 10 ors. RESPONDENTS.

"Slip Rule" — Amendment of judgment to include interest — Whether may be made under the "slip rule", C. P. R. 305, C. A. 87/32 — Whether a decree or order — Application for leave to appeal, C. P. R. 2, 317.

Application for leave to appeal from the Order of the Land Court, dated the 9th June, 1944, in Motion No. 186/44 (Land Case No. 21/42), dismissed:—

1. A decision, given after judgment adding interest to the judgment, is a decree and not an order.
2. *Quaere* whether such decision may be applied for under the "slip rule".

(*A. M. A.*)

REFERRED TO: C. A. 87/32 (6, P. L. R. 268; 1939, S. C. J. 205; 5, Ct. L. R. 207).

ANNOTATIONS:

1. An "order" which is "an interpretation of the original judgment ..... formed an integral part of that judgment and, therefore, no leave to appeal from it is necessary" — C. A. 96/41 (8, P. L. R. 256; 1941, S. C. J. 346; 9, Ct. L. R. 188).
2. On "decrees" and "orders" generally see notes to C. A. 121/44 (1944, A. L. R. 785).
3. Interest may not be added under the slip rule: C. A. 2/42 (1942, S. C. J. 860) and C. A. 202/42 (10, P. L. R. 85; 1943, A. L. R. 192).

(*H. K.*)

FOR APPLICANTS: S. Said.

FOR RESPONDENTS: No. 1 — Goitein.
Nos. 2—10 — H. Atalla.
No. 11 — Asal.

JUDGMENT.

This is an application for leave to appeal presumably under the second paragraph of rule 317, Civil Procedure Rules, 1938.

The present Applicants were the Plaintiffs in an action under the Land Expropriation Ordinance (Cap. 77) in which judgment was delivered on the 31st July, 1943, awarding the present Respondents compensation in respect of certain land expropriated by the present Applicants. It is said that in these proceedings the question of interest on the amount of compensation to be awarded was not raised. In any event, in April, 1944, the first Respondent applied to the Land Court, Jerusalem, by motion under rule 305, for interest to be added. All the parties were present at the hearing of the motion and the learned President of the Court below made the following order:—

> "When I gave the judgment dated 31.7.43 in Land Case No. 21/42 I overlooked the question of interest. If anybody had mentioned interest at that time it would have been allowed. It is an accidental omission which can be remedied under Rule 358."

He then awarded the present first Respondent interest at 6% on the amount due to him as from the 1st August, 1942, to the date of judgment and thereafter at 9% until payment. He refused leave to appeal to this Court and the present Applicants now ask us for leave to appeal.

Mr. Goitein, for the first Respondent, has argued that although the document of 9th June, is headed 'order" it is really a decree within the meaning of rule 2, Civil Procedure Rules, and not an order as contemplated by the definition of the word "order" in the first line of the second paragraph of rule 317. We think that this argument is sound and must be sustained. It is true that the original judgment of 31st July, 1943, could also at the time have properly been regarded as a decree; but we think that when the learned President on the 9th June, 1944, made this radical alteration, namely, compelling the present Applicants to pay what we are told is a very large sum in respect of interest this was a matter which, at any rate, as regards interest, determined the rights of the parties. We also think, although we are not dealing with the merits of the application, that the interest could not be added under rule 358 and that the learned President was wrong in saying that it was an accidental omission which can be so remedied. There is authority for this view, in Civil Appeal No. 87/32, P. L. R. Vol 6, pp. 268 and 270.

We, therefore, hold that the Applicants had an appeal as of right under the first paragraph of rule 317 and the application must be refused. The Applicants must pay the first Respondent his costs of this application, namely, fixed (or inclusive) costs of LP. 5.

Delivered this 28th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 442/44.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Lea Goldin. APPLICANT.

v.

Daoud Omar ed-Dajani. RESPONDENT.

Summary procedure — Rr. 241, 242, whether action properly brought under r. 241 — C. A. 268/40.

Application for leave to appeal from the order of the District Court of Jerusalem, dated the 15th September, 1944, in Motion No. 284/44 (Civil Case No. 80/44), refused:—

C. A. 268/40 is distinguished in this case.

(*A. M. A.*)

DISTINGUISHED: C. A. 268/40 (8, P. L. R. 1; 1941, S. C. J. 228; 10, Ct. L. R. 230).

(*H. K.*)

FOR APPLICANT: Mizrahi.

RESPONDENT: Absent — served.

ORDER.

This is an application under the proviso to Rule 317, Civil Procedure Rules, 1938, for leave to appeal from an order of the District Court of Jerusalem, which had granted leave to defend under Rule 242.

The present application is made by the Defendant, whose advocate has contended that the matter does not come within (a) or (b) or (c) of Rule 241. The learned Relieving President of the Court below held that it did, and it is against that decision that the Applicant now seeks to appeal.

We think that the facts of this case are distinguishable from the facts in Civil Appeal 268/40, P. L. R. Vol. 8, page 1. In that case the District Court had definitely held that the claim did not come within (a) or (b) or (c) of Rule 241; nevertheless they decided to proceed with the hearing of the case, and this Court held that once the Court below had decided that the case was not properly within Rule 241, it should have struck out the case, as the provisions of Rule 359 could not be called in aid. In the present case we are not disposed to grant leave to appeal.

The application is therefore refused.

Delivered this 13th day of February, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 152/44.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Abdo Spiro Sa'adeh. APPLICANT.

v.

The Attorney General. RESPONDENT.

Accomplices — Evidence of police informer — Corroboration — CR. A. 77/40 analyzed.

Application for leave to appeal from the judgment of the District Court of Haifa, dated the 2nd day of November, 1944, in Crime No. 190/44, whereby Applicant was convicted of being in possession of dangerous drugs contrary to section 7 of the Dangerous Drugs Ordinance, 1936, as amended in 1941, and sentenced to nine months' imprisonment, refused:—

An *agent provocateur* is not an accomplice and his evidence does not require corroboration.

(*A. M. A.*)

REFERRED TO: CR. A. 77/40 (7, P. L. R. 348; 1940, S. C. J. 257; 8, Ct. L. R. 57).

ANNOTATIONS: *Cf.* CR. A. 124/41 (8, P. L. R. 473; 1941, S. C. J. 451; 11, Ct. L. R. 229). See also CR. A. D. C. Jm. 110/43 (1944, S. C. D. C. 267) and the English cases cited at p. 270.

(*H. K.*)

FOR APPLICANT: Eliash.

FOR RESPONDENT: Assistant Government Advocate — (Gavizon).

JUDGMENT.

This is an application for leave to appeal from the conviction and sentence passed by the District Court, Haifa. In accordance with the usual practice, we treat the application for leave as an appeal itself. Briefly stated the facts are as follows:—

The Accused was charged with being in possession of forty-two kilos of *hashish* contrary to section 7 of the Dangerous Drugs Ordinance. A man named Baruch Gentsiock gave evidence to the effect that he met the Accused with two other persons at an hotel in Hadar Hacarmel on the evening of the 13th April. Those people discussed with him the transport of some *hashish* from Zeeb village to Latrun. The witness says he reported the matter to Corporal Sacks of the Palestine Police. It is not contested that the part he played throughout thereafter was

played upon the instructions of Corporal Sacks, and for the purpose of entrapping the Accused. The whole argument of the Appellant centered round the question whether this witness was an accomplice, and whether, as such, his evidence required corroboration. The question arises because of an interpretation which the Appellant sought to give the judgment in Criminal Appeal No. 77/40, P. L. R. 7, p. 438.

The learned President of the District Court came to the conclusion that the witness Baruch Gentziuk was a police informer, and indeed, in my opinion, it would have been impossible for him to come to any other conclusion on the evidence before him. He further held that as such he was not an accomplice for the purpose of the rule requiring corroboration. I agree with the learned President that all the cases and authorities are to the effect that a police *agent provocateur* or informer is not an accomplice for the purpose of the legal rule that requires the evidence of an accomplice to be corroborated.

I turn now to examine the decision in Criminal Appeal No. 77/40 and consider how it applies to the facts in this case. In the first place there is this great difference in that the Court of trial, in Criminal Appeal No. 77/40, found as a fact that the witness was an accomplice, and they then proceeded to look for the necessary corroborating evidence. The sole issue before the Court of Appeal was whether that additional evidence was present. In the result they came to the conclusion that it was not and they quashed the conviction. In the case now before us the learned trial Judge came to the conclusion that the witness was not an accomplice. The real question at issue of Criminal Appeal No. 77/40 did not, therefore, arise.

A certain amount of confusion undoubtedly emerges if, as it seems to me has happened during the course of the able arguments before us, an extract is taken from that judgment and unduly emphasized away from its context. That extract reads as follows:—

> "As the District Court pointed out, it is clear that Ahmad and another prosecution witness, one Hamad Samour, who deposed that he acted as an intermediary between Ahmad and the Appellant, were accomplices in the crime with which the Appellant is charged."

If Ahmad and Hamad Samour were no more than police informers, a fact which is by no means certain as the evidence available in the Court in Civil Appeal 77/40 is not before us, then it would appear, as Mr. Eliash has argued, that the Court of Appeal associated themselves with the apparent opinion of the District Court that a police informer was, in fact, an accomplice. If this were so, I can only say with great respect that I would feel compelled to disassociate myself

with that expression of opinion. I do not, however, myself believe that the Court intended that any such interpretation should be given to their judgment. As I have pointed out, the question as to whether a police informer was an accomplice was not an issue before them. They never directed their minds to this question. I think that the sentence I have quoted above, which appears in the judgment, was intended to be nothing more than a recital of certain passages from the judgment of the District Court preliminarily to dealing with a totally different issue, to the issue in this case, *i. e.* the nature and adequacy of certain evidence which it was alleged was corroborating evidence.

For these reasons the application for leave to appeal must be refused and the conviction and sentence confirmed.

Delivered this 4th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 435/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Yousef Amhad Shurab. — APPELLANT.

v.

Awwad Hamdan es-Shami & 3 ors. — RESPONDENTS.

Certified copy of judgment — Who may certify, C. P. R. 326 (a) — Facts relied upon on appeal to be supported by affidavit — C. A. 32/36, C. A. 118/36, C. A. 181/43, C. A. 337/44.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, dated the 24th July, 1944, in Civil Appeal 41/44, allowed and case remitted:—

1. An appeal will not be dismissed on the highly technical point that the copy of the decree was certified by a clerk and not by the Registrar or Chief Clerk.
2. Facts relied upon in an appeal should be verified by affidavit.

(*A. M. A.*)

REFERRED TO: C. A. 32/36 (1, Ct. L. R., rep. 31); C. A. 110/36 (1, Ct. L. R., rep. 32); C. A. 181/43 (10, P. L. R. 424; 1943, A. L. R. 618).

FOLLOWED: C. A. 337/44 (*ante*, p. 98).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1944, S. C. D. C. at p. 364.

2. Contrast C. A. 249/43 (10, P. L. R. 549; 1943, A. L. R. 651) where the appeal was dismissed on the ground that the non-enemy declaration was made before the Assistant Registrar of the Supreme Court who was not then authorised to take such declarations.

(*H. K.*)

FOR APPELLANT: Hawari.

FOR RESPONDENTS: 'Azar.

JUDGMENT.

The point for decision in this appeal is whether a copy of a judgment for service can be certified by any person other than the Registrar or Chief Clerk of the Court which gave the order. The rule in question is Rule 326(a) of the Civil Procedure Rules, 1938.

The copy in this case was certified by a clerk named Ibrahim Muhtadi, and it is said that he certified it because it was Sunday, when the Chief Clerk of the Magistrate's Court of Gaza does not come to work.

It is true that there was no affidavit before the District Court in support of these facts, but I do not think it is seriously disputed that they are as stated, and I think that we can accept them as true. At the same time we would say that in future cases all relevant facts should be supported by affidavit.

Mr. 'Azar, who appeared for the Respondent, has relied on Civil Appeal No. 32/36 (C. L. R. Vol. 1, Report No. 31), and Civil Appeal No. 110/36 (C. L. R. Vol. 1, Report No. 32). He pointed out that in those days the rule in regard to certificates was the same as it is at present, although, of course, the Civil Procedure Rules, 1938, were not then in force. The corresponding 1935 rule provided for certification in the same manner as the present Rule 326.

As far as Civil Appeal No. 32/36 goes it is not possible from a perusal of the judgment to say whether the uncertified copy was exactly like the one in the present case. The judgment merely says that an uncertified copy of the judgment appealed from was served on the Respondent. It is quite possible that there was no certification of any kind, and that there was not even the stamp of the Court on the copy.

As regards Civil Appeal No. 110/36 the judgment states that a certified copy of the judgment appealed from was not served on the Respondent until seven months after the appeal had been lodged. Here again it is not possible to say in what way the uncertified copy (if any) of the judgment was defective.

Mr. Hawari, for the Appellant, has referred us to Civil Appeals Nos.

181/43 and 337/44. We have seen the files of those cases, but unfortunately they do not contain any record as to the orders made upon such objections as may have been raised. In Civil Appeal 337/44, however, Mr. Hawari says that it was he who appeared and objected, and it happens that Mr. Justice Abdul Hadi was sitting on that appeal, and he recollects that the point was raised, and that it was dismissed on the ground that it was too technical.

Having regard to the circumstances we feel that we can follow the decision in Civil Appeal 337/44. We consider that it would not be just for an appeal to be dismissed on so completely technical a ground as this.

We therefore allow the appeal and remit the case to the District Court of Jaffa for hearing on the merits. Fixed costs in the sum of LP. 10 will follow the event.

Delivered this 8th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 224/44.

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

BEFORE: Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Mudallaleh Hussein Ibrahim el Haj Yunis. APPELLANT.

v.

Amneh bint Ali Makkawi, personally and as guardian over her minor children, Abdul Rahman and Khaula, the children of Ahmad Muhammad Darwish & an. RESPONDENTS.

Copies for service on appeal — C. P. R. 328 — Separate copies of documents to be supplied for each defendant.

Appeal from the judgment of the Magistrate's Court, Majdal, sitting as a Land Court, dated the 10th day of May, 1944, in Land Case No. 398/42, dismissed:—

Appeal dismissed for failure to comply with the provisions of r. 328.

(A. M. A.)

ANNOTATIONS: *Cf.* C. A. 147/42 (9, P. L. R. 786; 1942, S. C. J. 945) and C. A. 95/43 (1943, A. L. R. 262).

(H. K.)

FOR APPELLANT: Dajani.
FOR RESPONDENT: Hawari.

JUDGMENT.

The wording of Rule 328 Civil Procedure Rules is very clear and is not discretionary. "The Respondent or each of the Respondents, if more than one, shall be served with:—

(a) one copy of the notice of appeal;
(b) a certified copy of the decree or order appealed against;
(c) (i) a copy of the bond; or
(ii) a notification of the amount, if any, paid in or security approved and given under the last preceding rule."

There are two Respondents in this case and only one copy served. For this reason the appeal is dismissed with inclusive fixed costs of LP. 5.—.

Delivered this 20th day of November, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 326/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Dr. Friedrich Reichenstein. APPLICANT.

v.

The Near East Publishing Co. Ltd. RESPONDENTS.

Counter-claim — C. P. R. 95 "make such order as shall be just" — Discretion of trial Court to order separate trial — Causes of action — East Anglian Rlwy. Co. v. Lythgoe, Gray v. Webb, O. 21, r. 15, Osenton & Co. v. Johnston.

Application for leave to appeal from the order of the District Court, Tel-Aviv, dated 30.5.44 in Civil Case No. 74/44, refused:—

1. The Supreme Court will not interfere with the discretion of the Trial Court in ordering the separate trial of a counter-claim when the claim and the counter-claim do not appear to have arisen from the same contract.

2. The proceeds of the judgment (if any) on the main claim may be deposited into Court to await the result of the counter-claim.

(*A. M. A.*)

REFERRED TO: East Anglian Railways Co. *v.* Lithgoe, 1851, 20 L. J. (C. P.) 841, 16 L. T. (O. S.) 487; Gray *v.* Webb, 1882, 21 Ch. D. 802, 51 L. J. (CH.) 815, 46 L. T. 913; Osenton & Co. *v.* Johnston, (1941) 2 All E. R. 245, (1942) A. L. 130, 110 L. J. (K. B.) 420, 165 L. T. 235, 57 T. L. R. 515.

ANNOTATIONS:

1. For previous proceedings between the parties see C. A. 277/44 (1944, A. L. R. 482) and H. C. 93/44 (*ibid.*, p. 508).

2. On exclusion or stay of counter-claims see Halsbury, Vol. 29, pp. 513—4, sec. 2.

(*H. K.*)

FOR APPLICANT: Scharf.

FOR RESPONDENT: Witkowsky and Zisman.

JUDGMENT.

This is an application for leave to appeal from an interlocutory order of the District Court of Tel-Aviv, made under rule 95 of the Civil Procedure Rules, 1938, ordering that a certain counter-claim be heard as an independent claim. It does not appear from the order of the District Court that they excluded the counter-claim, and we accordingly infer that they intend to hear the counter-claim at a later date. That they have power to do so seems implicit from the last seven words of rule 95, namely, "make such order as shall be just". The present Respondents are Plaintiffs in an action against the present Applicant, who was an employee of the present Respondents under a service agreement.

The case for the Applicant is that by the terms of that service agreement the parties stipulated for accounts to be made up between them once a month and in the form customary in the business. The Applicant's advocate has argued that, while his client has admitted that a sum of LP. 220.646 rightly appears on one side of the account as a credit item in favour of the present Respondents, the Applicant nevertheless does not admit that he owes this sum, and he maintains that the two items in the counter-claim amounting to LP. 260 are, in fact, part of a running account and cannot be separated one from the other, and that it would be unjust for judgment to be entered against his client for LP. 220 while he has a counter-claim for LP. 260. He has cited East Anglian Railways Co. *v.* Lythgoe, mentioned in the English and Empire Digest, Vol. 34, p. 67, No. 446. That case, however, was decided in 1851, whereas the Respondent's advocate has cited Gray *v.* Webb (1882) 21 Chancery Division, 802, mentioned in the Yearly Practice (Red Book) 1940, p. 363, in the commentary to order 21, rule 15. Mr. Wittkowsky, for the Respondents, denies that the Ap-

plicant claims from his clients anything arising out of the agency agreement, and contends that the cause of action is entirely different.

It is to be noted that the sum of LP. 220.646 does seem to be a sum collected by the Applicant in the course of his duties under the service agreement, whereas the sum of LP. 260 claimed is made up of two items, namely, LP. 140 as damages in lieu of salary for two months instead of notice, and LP. 120 being compensation.

Mr. Scharf, for the Applicant, in contending that we can interfere with the discretion of the District Court, has cited the case of Osenton & Co. *v.* Johnston (1941) 2 A. E. R. p. 245, and he has also referred to cases mentioned in the English and Empire Digest, Vol. 40, pages 413 *et seq.*

We do not think that the Applicant has made out a case for our interfering with the discretion exercised by the District Court under rule 59, and the application for leave to appeal must therefore be refused. We would merely add that, if the present Applicant pays into the District Court the sum of LP. 220.646, that money should not be paid out to the present Respondents until the present Applicant's counter-claim has been heard and decided.

The Applicant will pay the Respondent's costs of this application to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 18th January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 132/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Hamoudeh Diyab el-Baba. APPELLANT.

v.

Fattoum Abdul Mu'ti el-Masri. RESPONDENT.

Construction of contract regarding sale of land — Specific performance — Damages.

Appeal from the judgment of the Magistrate's Court, Ramleh, sitting as a Land Court, dated the 9th day of March, 1944, in Land Case No. 812/43, allowed and remitted for fresh decision:—

1. When construing documents regarding sale of land the intent and not the form alone is to be regarded.
2. Specific performance of agreement for sale cannot be awarded when damages are an appropriate remedy.

(*M. L.*)

FOLLOWED: C. A. 15/38 (5, P. L. R. 237; 3, Ct. L. R. 149; 1938, 1 S. C. J. 204); C. A. 195/40 (7, P. L. R. 531; 10, Ct. L. R. 3; 1940, S. C. J. 491, 572); C. A. 2/43 (10, P. L. R. 75; 1943, A. L. R. 71); C. A. 201/42 (9, P. L. R. 701; 1942, S. C. J.737); C. A. 132/38 (5, P. L. R. 378; 4, Ct. L. R. 25; 1938, 1 S. C. J. 387).

ANNOTATIONS: See cases followed and annotations thereto in A. L. R. See also C. A. 219/44 (1944, A. L. R. 786) and annotations thereto.

(*A. G.*)

FOR APPELLANT: Ghazaleh.

FOR RESPONDENT: 'Akel.

JUDGMENT.

This is an appeal from the judgment of the Magistrate's Court, Ramleh, sitting as a Land Court.

Plaintiff claimed that the Defendant made a contract with her whereby he undertook to sell to her 89 shares in a certain plot of land. She paid to Defendant LP. 30, the purchase price, and he undertook to register the said shares in the name of the Plaintiff at any time. Further, he allowed her to take possession, which she did, but allowed Defendant (her husband) to continue possession in her name and on her behalf.

Plaintiff served Defendant on 20.9.42 with notice to transfer within two weeks, *etc.* This notice was served on Defendant on 29.9.42, but was never answered by him, nor did he take any further action.

Plaintiff asks that Defendant be ordered to effect registration of the said shares in the name of the Plaintiff. Defendant submits no statement of defence. At the hearing the Plaintiff produces the contract, Exhibit 1/X, and has no objection to Defendant's defence being heard.

Defendant admits placing his thumb-print to Exhibit 1/X and admits receiving LP. 30 from Plaintiff. He alleges, however, that this is a mortgage transaction, and he asks that Plaintiff be asked to take oath to this effect, and that he will be satisfied with her oath alone that the transaction was a sale and not a mortgage, and does not want her to give evidence as a witness.

The Plaintiff on oath swears that the transaction was one in respect of contract of sale and not a mortgage. The learned Magistrate in his judgment holds that the document Exhibit 1/X is an agreement to

sell, as it evidently purports to be, and that Defendant produced no documents to the contrary, nor did he give names of any witnesses to support his claim that this transaction was not a sale but a mortgage.

In the light of the very definite wording of the document 1/X, especially paragraph (1), I consider that the Magistrate directed his mind rather to deciding whether the transaction was one of sale and not of mortgage, and neglected, once he had decided this point in my opinion quite rightly, that it was one of sale and not of mortgage, to consider the further and most important question: is 1/X intended to be an agreement to sell or one of sale outright? In this respect it has been held on many occasions by this Court that when construing documents of this nature, the intent and not the form alone is to be regarded. (C. A. 15/38, Vol. 5, P. L. R. 237; C. A. 195/40, Vol. 7, P. L. R., 531; C. A. 2/43, Vol. 10, P. L. R. 75). Whether the damages provided in the agreement are sufficient to warrant the refusal of specific performance. It is a rule of equity that specific performance cannot be declared when damages are an appropriate remedy. See C. A. 201/42 Vol. 9, P. L. R. at p. 701 C. A. 328/38 * Vol. 5, P. L. R. p. 378.

For the above reasons the Magistrate's judgment is quashed and the case returned to the Court below to hear further evidence, if necessary, and make a fresh decision.

Costs to follow cause. To facilitate final arrangements I certify the sum of LP. 10 inclusive costs to the ultimately successful party.

Delivered this 12th day of October, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 404/44.

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

BEFORE: FitzGerald, C. J. and Plunkett, A/J.

IN THE APPEAL OF:—

Keren Kayemeth Leisrael Ltd. & 3 ors. APPELLANTS.

v.

Ali Muhammad el Loubani & 3 ors. RESPONDENTS.

C. P. R. 333 — *Discretion not extending to filing notice of appeal or payment of fees — Rr.* 328, 313, *C. A.* 95/43 — *What is a notice of appeal.*

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* *Should read* 132/38.

Appeal from the order and judgment of the District Court, Haifa, in its appellate capacity, dated the 9th of May, 1944, and the 18th of July, 1944, respectively, in Civil Appeal No. 189/43, dismissed:—

The Court has a discretion, under r. 333, to extend the time for doing any act other than payment of fees on appeal and filing the notice of appeal refered to in r. 313.

(*A. M. A.*)

FOLLOWED: C. A. 95/43 (1943, A. L. R. 262).

ANNOTATIONS: See, in addition to C. A. 95/43 (*supra*), C. A. 147/42 (9, P. L. R. 786; 1942, S. C. J. 945) for another case wherein the Court assumed the possibility of invoking rule 333 to remedy an omission to serve all parties.

(*H. K.*)

FOR APPELLANTS: Feiglin.

FOR RESPONDENTS: No. 1 — Hamoudeh.
Nos. 2—4 — Absent — served.

JUDGMENT.

This is an appeal allowed by leave of the Chief Justice from the District Court, sitting in its appellate capacity from the Magistrate's Court. The District Court, purporting to exercise a discretion which was vested in it by Rule 333 of the Civil Procedure Rules, granted an extension of time to enable the Appellants to serve certain copies of the Notice of Appeal.

It is admitted that in the original service all the Respondents were not served with copies in accordance with the provision of Rule 328. It has been argued by Mr. Feiglin that there was, in fact, no such discretion vested in the District Court under Rule 333, and it was solely on this point that the appeal was argued in this Court. Mr. Feiglin says that that discretion is excluded from Rule 333 by virtue of the words "other than filing a Notice of Appeal or payment of the prescribed fees."

The question that appears to us to arise for determination is what is the Notice of Appeal referred to in Rule 333. Mr. Feiglin argues that it was the Notice in accordance with 328. It appears to us, however, that the Notice referred to in 333 is the form of appeal in Rule 313, which rule, it will be observed, uses similar words, *i. e.* filing a Notice of Appeal, to those used in Rule 333. In a word, when the appeal is filed in the Registry, that constitutes a Notice of Appeal. All the other Rules which follow can be regarded as subsidiary to that Rule, and they mainly deal with procedure. Moreover, this interpretation would appear to be in accordance with the decision in Civil Appeal No. 95/43.

We are of opinion, therefore, that there was a discretion in the District Court to make the order which it did make.

For these reasons the appeal must be dismissed, with costs on the lower scale to include LP. 5 advocate's attendance fee.

Delivered this 13th day of February, 1945.

Chief Justice.

CIVIL APPEAL No. 437/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hamdan Ahmad Hamdan Abu Jazar. APPELLANT.

v.

Amneh Massoud el-Yassin, widow of Ahmad Hamdan Abu-Jazar & 9 ors. RESPONDENTS.

Specific performance — Discretion of trial Court, C. A. 157/43 — Effect of laches, of attachment, of improving the land.

Appeal from the judgment of the Magistrate's Court of Tulkarm, sitting as a Land Court, dated 12th October, 1944, in Land Case No. 27/44, dismissed:—

In the circumstances of this case, as outlined in the judgment, the Court of Appeal refused to interfere with the discretion of the Court of trial. (*A. M. A.*)

REFERRED TO: C. A. 157/43 (10, P. L. R. 315; 1943, A. L. R. 482).

ANNOTATIONS: See, on laches, C. A. 19/43 (1943, A. L. R. 27) and note 2. (*H. K.*)

FOR APPELLANT: Abu Khalil.

FOR RESPONDENTS: No. 9 — Jayyousi.
The rest — Absent — served.

JUDGMENT.

This is an appeal from the judgment of the learned Magistrate, dated 12th October, 1944, in Land Case No. 27/44. The Appellant had asked for specific performance of an agreement to sell a certain piece of land, and the learned Magistrate dismissed his claim.

The facts, as stated before us by the Appellant's advocate, are that by virtue of an agreement, dated 8.9.37, the father of the Appellant agreed to sell to the Appellant certain land situated in Zeita, and this land was delivered to the Appellant on the date of the agreement. In

1942 the father of the Appellant died, leaving the land still registered in his own name. It is stated that the Appellant had tried to get his father to transfer the land to him, but his father had never done this. In 1943 Respondent No. 9, who was a creditor of Respondent No. 5, sued the latter on a promissory note and got judgment against him, and attached the shares of the Respondent No. 5 in this land. The attachment was made on 8.8.43. Some negotiations took place with a view to settling the debt of Respondent No. 9, but they came to nothing, and on 6.6.44 the Appellant filed his action in the Magistrate's Court for specific performance. Those are briefly the facts which led up to the case.

Now we think that this is essentially a case in which it was for the Magistrate to decide whether he should grant specific performance or not, and if he has used his discretion properly we cannot interfere. This principle was referred to in Civil Appeal No. 157/43 (10 P. L. R. page 315). At page 316 the following passage appears in the judgment:—

> "Whether or not specific performance on a contract should be granted, or one party who feels himself injured should sue for damages for breach of contract, is a matter of discretion for the judge who tried the case in the first instance, but of course it is true that the discretion must be exercised on certain lines and not arbitrarily."

Well, the Appellant for all these years failed to take steps to have the land transferred to his name, and in the meantime this creditor (Respondent No. 9) has put an attachment upon it, and there is no proof of any collusion between him and Respondent No. 5.

Although we do not say that it is necessary, in order to obtain an order for specific performance, for the person claiming to show that he has improved the land in any way, we think that it was open to the Magistrate, in this case, to take into consideration the fact that the Appellant had done very little to the land. He had not built a house on it, or planted any trees. He appears at the most to have ploughed it and cleaned it.

In these circumstances the conclusion that we reach is that the learned Magistrate did not exercise his discretion arbitrarily, and that we cannot interfere with his judgment.

The appeal must therefore be dismissed, with costs on the lower scale to include the sum of LP. 10, advocate's fee for attendance at the hearing.

Delivered this 8th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 284/44.

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

BEFORE: Plunkett, A/J. and Frumkin, J.

IN THE APPEAL OF:—

Zeev Milner. APPELLANT.

v.

Lipa Soslovitz. RESPONDENT.

Penalty and liquidated damages — Pleadings — Allegation of penalty should be pleaded, C. A. 85/40 — Forfeiture — Construction of contract.

Appeal from the judgment of the District Court Tel-Aviv, dated the 31st of May, 1944, in Civil Case No. 295/43, allowed:—

A plea that damages claimed constitute a penalty should be specifically pleaded.

(*A. M. A.*)

FOLLOWED: C. A. 85/40 (7, P. L. R. 304; 1940, S. C. J. 474; 8, Ct. L. R. 62).

ANNOTATIONS: See, on the other hand, C. A. 80/43 (1943, A. L. R. 222) wherein it was held that the Plaintiff was not "under any obligation to plead that clause 7 was a penalty clause, since it was the Defendants who were relying on this clause and who had to plead that it was damages."

(*H. K.*)

FOR APPELLANT: Gratch.

FOR RESPONDENT: Bedolach.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv in Case No. 295/43 dated the 31st May, 1944.

The Plaintiff, here the Respondent, claimed the return of two sums of money, one of LP. 85 paid in cash and the other of LP. 92.125 mils in respect of 11 instalments of 36 promissory notes, each for LP. 8.375 mils, from the sum of LP. 255 plus 9% interest, amounting in all to LP. 171.125 mils.

The contract was made on 4.11.34, the last instalment of which was paid in 1935. Action was brought in August, 1943. According to paragraph 4 of the contract the purchaser is entitled, after he has paid 50% of the price, to claim transfer of the land. He claimed in his action that he had paid 50% of the price and he was thus entitled to the transfer of the land. He says that he had committed no breach of contract, and that the price of the land was LP. 340 as set out in the first paragraph of the contract.

The Defendant, here the Appellant, maintained that the price of land, if paid all in one sum, may have been LP. 340 but this was not done and that it was agreed by the contract that the price by instalments for the land was LP. 85 paid in cash and 36 promissory notes in the amount of LP. 255 by monthly instalments of LP. 8.375 mils, the last of which was to be paid by the 5th December, 1937, and that, in fact, the Respondent paid the LP. 85 in cash and only 11 instalments amounting to LP. 92.125 mils, a total of LP. 177.125. This does not amount to 50% of the purchase price which amounts to LP. 386.500 mils were all the instalments paid. That assuming the purchase price was LP. 340 from each instalment the interest must be deducted, each instalment included a sum of LP. 7.082 mils capital and LP. 1.293 interest and collection fees, as provided for in paragraph 3 of the contract. Therefore the 11 notes included LP. 77.902 capital and LP. 14.223 interest and collection fees, add to this the capital sum of LP. 85 cash which was paid when making the contract then we find that an amount of LP. 162.902 mils only has been paid, this sum does not amount to 50% of the purchase price. In either case therefore the Respondent has not paid 50% of the purchase price and that having stopped payment as he did in November, 1935, the Respondent committed a breach of the contract and in accordance with paragraph 3 of the contract he forfeited his right to reclaim the amount of money paid by him and the Appellant was entitled to sell the plot of land to another. The Respondent has here raised the point that this was a penalty but it is quite clear from the Statement of Claim and the issues framed that this point was not raised in the Court below and according to Civil Appeal 85/40 P. L. R. No. 7, p. 305, wherein it was held in paragraph 3:—

> "A plea that a sum claimed as liquidated damages is a penalty must be specifically pleaded."

For the above reasons the judgment of the Court below must be set aside and the Plaintiff's claim dismissed; the Plaintiff having failed in his main action his cross-appeal for interest automatically fails. The Appellant will have his costs here and below to include LP. 10 advocate's attendance fees for his appearance in this Court and LP. 5 for the adjournment on 29th November, and the advocate's attendance fees of LP. 10 in the Court below will be reversed.

Delivered this 15th day of December, 1944.

A/British Puisne Judge.

HIGH COURT No. 127/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF:—

Abraham Mordechai Weingarten & an. PETITIONERS.

v.

1. The Assistant Chief Execution Officer, Jerusalem,
2. Dr. Gertrud Neumann. RESPONDENTS.

Indemnity for lost B/E — B/E Ord., sec. 70 — Indemnity submitted to Court and initialled by the Judges — Whether forms of indemnity should be set out by the Court — Alternative remedies — Failure to appeal — Whether judgment conditional and therefore incapabale of execution — Orders to be made only on application under C. P. R. 305 — No loss incurred to the Petitioner.

Return to a rule *nisi* issued on the 17th day of November, 1944, directed to the first Respondent, calling upon him to show cause why his order, dated 29.10.44 in Execution file No. 171/44 of the District Court, Jerusalem, should not be set aside and why he should not order the stay of execution proceedings in the said file on the ground that the judgment given in the Civil Case No. 40/43 District Court of Jerusalem, dated 5.4.44 is incapable of execution; rule *nisi* discharged:—

1. A judgment providing against execution before an indemnity is given, is capable, upon satisfaction of the condition, of being executed.
2. Judges should not, unless sitting as execution officers, make consequential orders on judgments unless properly moved under C. P. R. 305 *sqq.*

(*A. M. A.*)

ANNOTATIONS:

1. For another instance of a conditional judgment being upheld see C. A. 206/42 (9, P. L. R. 757; 1942, S. C. J. 937).
2. On the second point *cf.* C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326) — error in judgment not to be corrected unless parties summoned to attend.

(*H. K.*)

FOR PETITIONERS: Caspi.

FOR RESPONDENTS: No. 2 — Weyl and Rosenbaum.

ORDER.

This is the return to an order *nisi* directed to the Assistant Chief Execution Officer, Jerusalem, calling upon him to show cause why he should not be ordered to refrain from executing the judgment of the District Court of Jerusalem in Civil case No. 40/43, the concluding paragraph of which was in the following terms, namely:—

> "In the circumstances and upon Plaintiff giving indemnity against claims of any other person upon the note in question, we give judgment for Plaintiff against the Defendants jointly, for the amount of LP. 289.375 mils .....".

The indemnity was apparently ordered under Section 70, Bills of Exchange Ordinance although the advocate for the second Respondent has informed me that the present Petitioners (Defendants in the District Court) did not allege that the bill had been lost. I must, however, assume that the District Court acted under Section 70.

It will be observed that the words of Section 70 are "provided an indemnity be given to the satisfaction of the Court or Judge". It seems that the advocate for the second Respondent instructed his client to file the indemnity in the Execution Office. This advocate was cross-examined before me by the advocate for the Petitioner and he swore that he never gave any instructions for an indemnity to be submitted to the Judges who had decided the case for initialling by them. It seems, however, that the indemnity was, in fact, submitted to the actual Judge who delivered the judgment in the civil case and it is of interest to note that the first Respondent to this petition was one of the two Judges who decided the civil case. As I have said, the indemnity was submitted to them and both the Judges who decided the case seem to have initialled it. It is not disputed that the initials are theirs nor is it disputed that neither of the Defendants was given an opportunity of appearing before the Judges when these Judges were dealing with an initialling the indemnity. I am satisfied that only one construction can be put on the act of the Judges in initialling the indemnity and that is that they were thereby declaring their satisfaction therewith. I am not here sitting as a Court of Appeal from the District Court or from the Judges of that Court sitting as Judges of first instance in civil cases.

The present Petitioners' complaint and argument before the first Respondent was that because the District Court had made no mention in its judgment of the contents or nature of the indemnity to be given, the judgment was incapable of execution.

Dr. Weyl, for the second Respondent, argued before me that if this were the true complaint of the Petitioners — and I must take it that it was — then the Petitioners had various alternative remedies. The judgment was delivered in open Court on the 5th April, 1944, in the presence of the advocates for both parties and either or both of those advocates could have, at the time when judgment was delivered, drawn the attention of the Judges to any omission. There were also various other methods mentioned by Dr. Weyl by which the Petitioners could

have had the matter rectified. One thing is clear, namely, that the Petitioners did not appeal from the judgment. They were apparently satisfied with the justness of the result of the litigation. It must be assumed that parties to a litigation who have a right to appeal and who have not appealed from a judgment are satisfied with the justice of that judgment and it is then for them to obey it.

Mr. Caspi, for the Petitioners, has argued that the judgment was conditional and as such could not be executed. I do not agree. I think that it is clear that what the Judges meant was that no decree should issue or that no execution should take place until the indemnity was given. It is clear that that indemnity was given and it is also clear that the two Judges who composed the Court who gave the judgment were satisfied with the indemnity. Under these circumstances I am quite unable to agree that the Acting Chief Execution Officer could have done otherwise than execute the judgment. I wish, however, to say very definitely that the practice of Judges of District Courts making any orders or doing any acts in civil cases off the bench except when they are properly moved under rule 305 Civil Procedure Rules is a most undesirable one and should cease. In this case I do not think that any hardship has been caused as the petition has no merits. The Petitioners' advocate has frankly admitted to me that, when he was before the Assistant Chief Execution Officer, he did not argue that there was anything intrinsically wrong with the indemnity. I am perfectly certain that had he done so the Assistant Chief Execution Officer would have dealt with the mater if he had thought that he could or would, at any rate, have referred the matter to the Court properly constituted with an opportunity for the Petitioners' advocate being heard by that Court. I hope, however, that this petition will have served a useful purpose if only it brings to the notice of Judges of District Courts the utter undesirability of their signing any document or making any order or doing any act consequent upon or arising out of a civil action except when properly moved under rule 305. I except, of course, acts done by any particular judge in his capacity as Chief Execution Officer or as Assistant Chief Execution Officer to which other considerations and other provisions of procedural law apply.

For the foregoing reasons the petition is dismissed and the rule *nisi* discharged. As I consider that the second Respondent is partly to blame for some of the irregularity of procedure in this matter there will be no costs of this petition.

Given this 22nd day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 220/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Abdul Rahman Ahmad Ibrahim el Dasuqi & 2 ors. APPELLANTS.

v.

Hassan Mohd. al Aiswi & 13 ors. RESPONDENTS.

Prescriptive title — Possession after order of dispossession — C. A. 25/39.

Appeal from the decision of the Assistant Settlement Officer, Jaffa Settlement Area, dated 26.2.44, in case No. 26/Jaffa, dismissed:—

No title can be granted in Land Settlement on the ground of possession if there has been a judicial order for dispossession during the period of prescription.

(*A. M. A.*)

REFERRED TO: C. A. 25/39 (6, P. L. R. 216; 1939, S. C. J. 193; 6, Ct. L. R. 224).

ANNOTATIONS: *Cf.* C. A. 288/42 (10, P. L. R. 317; 1943, A. L. R. 477) — no prescriptive title where possession was admittedly obtained arbitrarily.

(*H. K.*)

FOR APPELLANTS: E. Rubinstein.

FOR RESPONDENTS: No. 1 — Elia.
Nos. 2, 6, 11 & 13 — A. Daoudi.
Rest — Absent — served.

JUDGMENT.

This is an appeal from the decision of the Assistant Land Settlement Officer, Jaffa, who had dismissed a claim by the present Appellants concerning certain land consisting of two houses and a vineyard or *karm*.

The claim of the present Respondents was based on an old registration or on inheritance from the registered owners, while the claim of the present Appellants was based on prescription.

The Appellants' advocate contended that the Settlement Officer erred in treating the property in dispute as one unit instead of as three different ones. I think that this point fails because the Respondents produced before the Land Settlement Officer a judgment against all

the three Appellants evicting them from the whole of the land in question. This judgment was confirmed on appeal by the District Court of Jaffa, Land Appeal No. 38/36. The fact that this judgment was given in 1936 shows that the three present Appellants must have wrongly encroached on the land, and I agree with the Respondents' advocate's argument that the Appellants' claim based on possession must fall to the ground. It would, of course, be open to the Appellants to bring an action for ownership if they could prove that the Respondents' title deed was defective or fraud or that the title deed does not apply to the land in question. I refer to Civil Appeal No. 25/39 P. L. R. Vol. 6, p. 216. It is to be noted that all the three present Appellants were the unsuccessful Defendants in the dispossession action of 1936. I have no reason to believe that the property of which they were ordered to be dispossessed was not the same as the property in dispute in the present litigation.

Much was made by the Appellants' advocate of the fact that there is no clear finding by the Land Settlement Officer on the question of possession. In view, however, of the fact that the Appellants were ordered to be dispossessed in 1936, it seems to me impossible for them to base their claim on possession, because it is clear that they were held to have wrongfully encroached on this land in that year.

Several other matters were argued before me; but I do not deem it necessary to deal with them in this judgment. The Appellants clearly had to satisfy the Land Settlement Officer as to their claim to this land and this they failed to do. I see no reason to interfere with the decision of the 16th February, 1944. The appeal is accordingly dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 15.

Delivered this 7th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 228/44.

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

BEFORE: Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Abdul Rahman Abdul Kader Ismail. APPELLANT.

v.

Mohammad Shehadeh Abdul Kader Ismail & 3 ors. RESPONDENTS.

Equitable title — Possession under contract providing a limited time for transfer — Penalty and liquidated damages.

Appeal from the judgment of the Magistrate's Court, Majdal, sitting as a Land Court, dated the 27th day of May, 1944, in Land Case No. 368/43, dismissed:—

1. An equitable title may be established by payment and possession although the contract provides for transfer within a specified period which has expired.

2. When the contract provides for the payment of a penalty in the event of default, damages are not an adequate alternative remedy to specific performance.

(*A. M. A.*)

ANNOTATIONS:

1. On time being of the essence of the contract see C. A. 7/42 (9, P. L. R. 247; 1942, S. C. J. 449; 12, Ct. L. R. 101) and note 2 in S. C. J. See also L. C. Jm. 23/44 (1945, S. C. D. C. 8).

2. The requirements of an equitable title are set out in the notes in A. L. R. to C. A. 38/44 (11, P. L. R. 274; 1944, A. L. R. 335).

3. On the last point *cf.* C. A. 97/44 (*ante*, p. 14) and note.

(*H. K.*)

FOR APPELLANT: W. Salah.

FOR RESPONDENTS: Hawari.

JUDGMENT.

This is an appeal from the judgment of the Magistrate's Court of Majdal, sitting as a Land Court, dated 27th May, 1944.

The facts are that the Appellant entered into an agreement on 20.12.37 for sale of certain lands, with the Respondent, an area of 12 *dunums* 321 metres, block No. 1042 parcel 11, at the price of LP. 9.520 each *dunum*, and he undertook to transfer in the Land Registry within 12 months. The full purchase price LP. 47.500 was paid to the Appellant who further undertakes to admit receipt of the amount in the land Registry and transfer free of any incumbrance and pay all *werko* and taxes due on the land *etc.* The Plaintiffs and their testator have been in possession since the date of sale.

The learned Magistrate found that the Respondents had established an equitable title to the land, they and their testator had been in possession since the agreement was made, full purchase price had been paid, and they had been cultivating the land. He therefore ordered the registration of the said shares in the name of the Respondents. For the Appellant it is contended that time was of the essence of the contract as he was bound to transfer in Land Registry within 12 months and the contract was not performed in time and nothing to show that

he was asked and refused to go to the *Tabu*. With this submission I do not agree, the Appellant cannot make use of his own breach of the contract to oust the Respondents from the land for which they have paid the full price and been in possession since 1937.

He argues further that where damages are an adequate relief specific performance will not be ordered. That may be so but in this case a penalty only has been provided for and further the Respondents proved to the satisfaction of the Magistrate that they had established an equitable title and have been in possession, and cultivated lands for seven years and paid the full price. Respondents rely upon the terms of the agreement, the fact that Appellant admits their possession since 1937 and that they have cultivated the lands and paid the full purchase price. I do not consider that it is necessary to discuss the matter any further in view of the terms of the agreement, possession, cultivation and payment of full purchase price and evidence of Appellant himself.

The appeal is dismissed and judgment of the Magistrate confirmed with costs and advocate's fees inclusive fee LP. 15.—.

Delivered this 21st day of December, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 460/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Keren Kayemeth Leisrael Co. Ltd., & an. APPELLANTS.

v.

Ahmad Mahmoud Abu Dayeh. RESPONDENT.

Jurisdiction of Court — Point may be raised at "any time" — Whether this includes the beginning of the trial — C. A. 230/41, C. A. 28/41; C. A. 94/43, C. P. R. 21(a), 136 sqq., 188.

Appeal from the Order of the Land Court of Nablus, dated 21st November, 1944, in Land Case No. 42/43, allowed and case remitted:—

When the question of jurisdiction is raised, the Court should try that issue at once, whether or not application is made under r. 21(a).

(*A. M. A.*)

REFERRED TO: C. A. 28/41 (8, P. L. R. 127; 1941, S. C. J. 133; 9, Ct. L. R. 96); C. A. 230/41 (9, P. L. R. 86; 1942, S. C. J. 115; 11, Ct. L. R. 145); C. A. 94/43 (1943, A. L. R. 152).

ANNOTATIONS: See the cases cited and the notes thereto in S. C. J. and A. L. R. For an example of the point of jurisdiction being raised by way of Rule 21 of the C. P. R. see C. A. 143/43 (1943, A. L. R. 375).

(*H. K.*)

FOR APPELLANTS: Eliash.

FOR RESPONDENT: George Elia.

JUDGMENT.

This is an appeal by leave from an interlocutory order of the Land Court of Nablus, refusing to try as a separate preliminary point the question as to whether the Court had jurisdiction. The Court below rightly pointed out that the question of jurisdiction can be raised at any time. Dr. Eliash, for the Appellants, says that if this is so then "any time" must include the beginning of the case, and that there is therefore no reason why the question of jurisdiction should not be decided at the beginning.

Mr. Elia, for the Respondent, cited C. A. 230/41, P. L. R. Vol. 9, p. 86; C. A. 28/41, P. L. R. Vol. 8, p. 127; and C. A. 94/43, Annotated Supreme Court Judgments (1943), p. 153.

Dr. Eliash retorts that all that those judgments decide is that in cases where it is undisputed that the Court has jurisdiction then such Court must try all the issues together but that until it is clear that the Court has jurisdiction the Court is not in a position to allow the case to proceed under rule 188; nor has the Court power to try any of the issues which have been framed under Rules 136 *et seq.*

Mr. Elia contends that the Appellants should have in the Court below made application under Rule 21(a). The answer to this, of course, is that a statement of claim may well disclose a cause of action, but that action cannot be tried except in a particular Court. From the point of view of convenience it is obviously desirable that the question of jurisdiction should be tried at the commencement, otherwise much time and expense may be incurred by reason of a lengthy trial which is subsequently found to have been abortive owing to lack of jurisdiction in the trial Court.

The only matter that has caused us anxiety is the question whether we are not ourselves usurping the function of the rule making authority by deciding that the question of jurisdiction should be decided at the outset. On full consideration, however, we do not think that we are. It is surely fundamental that, before a Court proceeds with the trial

of a case in accordance with these procedure rules, it must be satisfied that it has jurisdiction. We are, of course, bound by previous decisions of this Court; but we consider that the judges who decided them contemplated that the Court trying any particular case had jurisdiction. In short, we think that we are neither making rules nor refusing to follow those decided cases when we hold that a Court not only has power but should, if its jurisdiction is queried, decide that matter at once.

For these reasons we set aside the order of the Land Court of 21st November, 1944, and remit the case with directions to decide the question of jurisdiction as a separate matter before proceeding further. The Respondent must pay the Appellants' costs of this appeal, namely, fixed (or inclusive) costs of LP. 10.

Delivered this 19th day of February, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 160/44.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Yeshayahu Ben Anshel Hershkovitch. RESPONDENT.

Firearms — Firearms Ord., secs. 1, 3, — "Part of a firearm" — M. A. 7/30 — How far Supreme Court bound by previous decisions in criminal appeals.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 13th day of November, 1944, in Criminal Appeal No. 118/44, allowed and case remitted:—

1. A firearm for the purpose of the Firearms Ordinance includes any part of a firearm.

2. The Supreme Court is not bound to follow its own decisions given in criminal appeals.

(*A. M. A.*)

OVERRULED: M. A. 7/30 (1, P. L. R. 469; 3, C. of J. 913).

ANNOTATIONS:

1. Compare this decision with the principles stated in C. A. 158/38 (5,

P. L. R. 488; 1938, 2 S. C. J. 126; 4, Ct. L. R. 169) and H. C. 30/44 (1944, A. L. R. 249) wherein it was said that "it is on the ground of judicial comity that an appellate Court bows to its own decisions." This principle would seem to make the absence of an appeal as of right to the Judicial Committee in Criminal Cases irrelevant.

2. The Court of Criminal Appeal has up to now felt itself bound by its own previous decisions "whether or not ..... they were rightly decided" — CR. A. 119/41 (8, P. L. R. 442; 1941, S. C. J. 559); see also CR. A. 111/41 (8, P. L. R. 403; 1941, S. C. J. 378; 10, Ct. L. R. 125) and *cf.* Adm. 2/40 (8, P. L. R. 339; 1941, S. C. J. 503) wherein it was held that "the Admiralty Court is bound to follow the opinion expressed by the Court of Criminal Appeal, which is at least a Court of equal standing".

(*H. K.*)

FOR APPELLANT: Assistant Government Advocate — (Salant).
FOR RESPONDENT: Levitzky.

JUDGMENT.

This is an appeal by the Attorney General from the judgment of the District Court of Tel-Aviv sitting in its appellate capacity, which Court upheld the decision of the Chief Magistrate that the Respondent had no case to answer.

The facts were that the Respondent was charged under Section 3 of the Firearms Ordinance of being illegally in possession of part of a rifle, to wit a bolt, and parabellum. It is clear that the Chief Magistrate and the learned Judge of the District Court felt that on these facts the Accused should be convicted; but they rightly considered themselves bound by the decision of this Court in Misdemeanour Appeal No. 7 of 1930, Vol. 1 P L. R, p. 469, in which the Court expressed the opinion that Section 1 of the Firearms Ordinance had but one interpretation which was that the words "part of a firearm" only included a part from which any shot, bullet or any other missile could be discharged. We are unable to accept this interpretation of the law, which, in fact, would involve holding that the only part of a firearm which came within the definition of firearm in section 2 would be the barrel of the firearm. In our opinion the definition of "firearm" in Section 2 leaves no room for doubt as to the intention of the legislature which, with respect to the Court which decided Misdemeanour Appeal No. 7 of 1930, we consider is clearly expressed. The definition states that the term "firearm" shall include every part thereof. It has been argued that this would lead to the absurdity that even a screw of a firearm would be included. Be that as it may, this Court is not concerned with the consequences that will flow from an enactment of the legislature. The duty of the Court is to give effect to the words of a

statute where those words are not open to ambiguity. Nor indeed is there any need to fear that any absurdity will arise granting the normal common sense which is exercised by the prosecuting authority.

It has been argued that this Court is bound by the decision of the Court in the case to which I have referred. I am unable to accept this contention. When this Court sits in its capacity as a Court of Criminal Appeal it is the final Appeal Court of the territory. In this respect its status is different from that which it occupies when it sits as a Court of Civil Appeal from which there is a statutory appeal to the Judicial Committee of the Privy Council. I bear in mind that there is an appeal to the Privy Council in Criminal Cases by way of special petition; but that is in the nature of the exercise of the fundamental constitutional privilege of every citizen of the Empire to petition the King; it is not an appeal as of right. I cannot accept the position that a decision, however obviously wrong it might be, must stand for ever — except, of course, if altered by legislation — because of a theory that this Court cannot alter or modify previous decisions. It is, of course, a very sound rule that the Court will not lightly depart from its previous decisions, and will certainly rarely if ever interfere with decisions which have stood the test of time, and which have been accepted as settled law. But where a decision has been plainly wrong, and especially where the weakness of the reasoning upon which it was based can be patently disclosed, this Court must weigh the admitted impolicy of disturbing a previous decision against the paramount consideration of doing justice.

In the result the case will be remitted to the learned Magistrate for disposal in the light of this decision.

Given this 13th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 468/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Azar Mina Ghandour. APPELLANT.

V.

Faiz Odeh Elias. RESPONDENT.

Extension of time under C. P. R. 333 — Failure to comply with requirements of C. P. R. 328(c)(2) — Adjournments — Certified copies of decree — H. C. 97/43 — "May" (M. C. P. R. 156).

Appeal from the judgment of the District Court of Jerusalem, sitting in its appellate capacity, dated the 12th of October, 1944, in Civil Appeal No. 57/44, allowed:—

1. When there is a technical defect in an appeal and the Appellant contends that he complied with the procedure, an adjournment should be granted in order to enable the Appellant to acquaint the Court with the facts necessary to enable it to exercise its discretion under r. 333.

2. When an appellant applies for a certified copy of decree objection should not be taken to the form of the document issued to him under M. C. P. R., r. 156.

(*A. M. A.*)

REFERRED TO: H. C. 97/43 (10, P. L. R. 569; 1944, A. L. R. 41).

ANNOTATIONS:

1. See notes in A. L. R. to C. A. 311/43 (11, P. L. R. 72; 1944, A. L. R. 73) on discretion in respect of adjournments. *Cf.* C. A. 59/44 (11, P. L. R. 347; 1944, A. L. R. 594).

2. On the second point see note 5 in A. L. R. to H. C. 97/43 (*supra*).

(*H. K.*)

FOR APPELLANT: Smoira.

FOR RESPONDENT: Nazzal.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem, dismissing an appeal from a judgment of one of the Magistrates of Jerusalem.

When the appeal came on for hearing before the District Court, the advocate for the Respondent took some preliminary objections, one being that the notification required under Rule 328(c)(2), Civil Procedure Rules, had not been served in accordance with law, and another being that no certified copy of the decree of the Court below had been served. When these objections were taken the advocate for the Appellant, who was apparently taken by surprise, as he had every reason to believe that the practice in his office was to see that such matters were in order, asked for an adjournment with a view to investigating the circumstances as to the payment of the deposit and the filling in of the notification. The advocate for the present Respondents objected to an adjournment, whereupon the learned Relieving President, without assigning any reason, declined to grant an adjournment and proceeded to deliver judgment dismissing the appeal on these preliminary points.

While this Court is always reluctant to interfere with the discretion of a lower Court in the matter of granting an adjournment, it seems to us that this was clearly a case in which a very short adjournment might have been granted. Until the facts were clear, it was impossible for the Court to decide whether it should exercise its discretion under Rule 333.

For this reason alone the judgment of the 12th October, 1944, cannot stand. It is therefore set aside and the case will be remitted to the District Court to hear the appeal *de novo*. This will not prevent the present Respondent from again raising such preliminary points as he is advised, but the Appellant or his advocate should be given every opportunity to reply.

We wish to say that High Court No. 97/43, P. L. R. Vol. 10, pages 569 and 573, was a case dealing with a matter of execution. Rule 328(b) Civil Procedure Rules, 1938, requires a certified copy of the decree or order appealed against to be served. If, in fact, the intending Appellant applies for a decree to the offices of the Magistrate who gave the judgment, and if he is given a certified copy of a document which purports to be or is, in fact, the only document which has been drawn up in the offices of the Magistrate's Court under Rule 156, Magistrates' Courts Procedure Rules, 1940, we think that the Appellant has done all that can be expected of him. We would point out that the word "may" appears in the second paragraph of Rule 156.

The Appellant is entitled to his costs of this appeal, namely fixed (or inclusive) costs of LP. 10.

Delivered this 15th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 303/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF :—

Suleiman Salim Haj Muhammad Abu Taha & an. APPELLANTS.

v.

Salim bin Taha Salim Abu Taha & 3 ors. RESPONDENTS.

Waqale dawriyeh — Age of donee — Need not be of age if mumayyiz — Cancellation of power by restoring rights secured to third party — Position where donor is ancestor.

Appeal from the judgment of the Land Court of Jaffa, dated 29th June, 1944, in Land Case No. 52/43, dismissed:—

1. A person who is *Mumayyiz*, though not adult, may be appointed under a *wakale dawriyeh*.
2. A *wakale dawriyeh* may normally be reached by returning to the third party the rights intended to be secured. But this cannot be done where rights of succession are intended to be secured.

(*A. M. A.*)

ANNOTATIONS:

1. See, on the first point, Art. 1458 of the *Mejelle*.
2. On the irrevocability of powers of attorney executed to secure rights of third parties see Halsbury, Vol. I, pp. 309—310, para. 497; *cf. Mejelle*, Art. 1521 and P. C. 57/38 (7, P. L. R. 261; 1940, S. C. J. 402; 8, Ct. L. R. 185).
3. *Quaere* how far the expedient of irrevocable Powers of Attorney may be restored to in order to evade the law of succession? *Cf.*, as regards *miri* land, the express prohibition in sec. 21 of the Succession Ordinance.

(*H. K.*)

FOR APPELLANTS: Elia.

FOR RESPONDENTS: Siksek.

JUDGMENT.

Frumkin, J.: The Appellants in this case are the sons of one Muhammad Abu Taha, deceased, who was the owner of a house in Jaffa. The Respondents are his grandchildren. Their father died in the lifetime of their grandfather. The grandchildren were minors at the time of death, and at that time were, and to the present moment are still, in occupation of a part of the house in dispute.

Some time prior to his death the grandfather of Respondents and father of the Appellants — whom we might, for convenience sake simply call the grandfather — executed a power of attorney in favour of one, Omar, authorizing him to transfer one half of the house in dispute to the Respondents. This was in the year 1933. Omar did not act on this power of attorney for a very long period, during which the Respondents remained in undisturbed possession of the property. The power of attorney admits the receipt of a sum of LP. 100 as purchase price. It was not until the year 1943, when the said Omar intended to make use of his power of attorney and transfer the property in the name of the Respondents, that the Appellants brought the present action before the Land Court of Jaffa seeking certain relief, the main object, in so far as the Respondents are concerned, being to obtain a declaration by the Court invalidating the power of attorney.

The first ground was that at the time of the execution of the power of attorney Omar was not of age. The learned Judge found that although not of age, Omar was sufficiently qualified under the *Mejelle* to act as an agent, being a *Mumayyiz,* and with this finding I am not inclined to interfere.

The other ground for upsetting the power of attorney is that while admitting that the power of attorney is an irrevocable one, securing the rights of third parties, it might, it is argued, still be revoked upon restoring such rights of the third parties as were secured by the power of attorney In this case the Appellant maintains that the rights of the third parties are the LP. 100 which the grandfather, in his power of attorney to Omar, declared to have received, and being prepared to refund this sum the agent can be dismissed with the result that he should no longer act under that power of attorney.

Now it is established law that when an irrevocable power of attorney intends to secure rights of third parties, it may become revocable upon restoring the rights secured thereby. Thus, when a principal authorised a person to sell his property and pay a certain debt out of the proceeds, he could, upon himself paying off the debt, discharge the agent. There might also be cases where a person sells his property in consideration of a given amount and appoints an agent to transfer that property, where the mere refund of the price to the so-called purchaser is the only right involved in the power of attorney, so that upon refund, the power of attorney might become revocable. But each case has to be considered on its own merits.

In the present case the question arises whether the amount of LP. 100 mentioned in the power of attorney is the sole right secured by the Respondents. We know that the Respondents were the grandchildren of the ancestor of the Appellants. They were minors at the time. If not for the fact that their father died during the life-time of their grandfather, they would in due course become entitled to a share in the property by inheritance through their father. There can be no doubt that all that the grandfather intended to do at the time was to safeguard their rights in spite of the fact, or perhaps because of the fact, of the death of their father. These, to my mind, are the rights intended to be secured by the power of attorney, and those rights could not be discharged just by the repayment of a sum which might or might not have been the adequate value of the property many years ago.

I am therefore of opinion that the power of attorney could not be cancelled by the Appellants, that it is still valid and that Omar could

not be prevented from acting under it. Since the other reliefs sought by the Appellants rest on the cancellation of the power of attorney, and having failed on that, they do not arise.

For these reasons the judgment of the Land Court is confirmed and the appeal dismissed with costs on the lower scale to include LP. 15 advocate's attendance fee.

Delivered this 30th day of January, 1945.

Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

CIVIL APPEAL No. 5/44.

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

BEFORE : Rose and Frumkin, JJ.

IN THE APPEAL OF:—

Milad Abed Khayat. APPELLANT.

v.

Issa Abed Khayat. RESPONDENT.

Partnership — Evidence to establish existence of — Presumption of continuation — Interference on appeal with findings of fact — Share of each partner — Presumption of equality.

Appeal from the judgment of the District Court of Jaffa, dated the 21st day of December, 1943, in Civil Case No. 94/43, allowed and case remitted:—

1. Finding that there had been no partnership between the parties set aside as being against the weight of evidence.
2. There is a presumption, in the absence of other evidence, that partners hold equal shares.

(*A. M. A.*)

ANNOTATIONS :

1. See the second paragraph of annotations to C. A. 237/42 (1943, A. L. R. 266) on the position of the Supreme Court in dealing with findings of fact made by the lower Court. *Cf.* C. A. 102/44 (1944, A. L. R. 712).

2. Note that the presumption as to all partners holding equal shares, though laid down in sec. 24(1) of the English Partnership Act, does not apply in Palestine as sec. 31(i) of the Ordinance creates a presumption "in proportion to the amount of capital which (the partners) have agreed to subscribe.

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Scharf.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa. The Appellant and the Respondent are brothers, and the Appellant alleges that he and his brother were partners generally for some twenty years, and in particular (from 1929 onwards) as regards an agency from the Shell Co. of Palestine, until the partnership was terminated in June 1943 It was not seriously disputed before us that the two brothers had been, in fact, partners in various matters, such as purchases and sales of land; a grocery business; and an agency for Litwinsky Bros. for the sale of oil, petrol and kerosene. The Litwinsky agency came to an end in 1929 owing to the fact that the Litwinsky Bros. themselves lost their Shell agency. The Respondent thereupon obtained in his name an agency from the Shell Co. naming his brother the Appellant as guarantor. The Appellant, in fact, became the guarantor of his brother in a substantial sum.

It is to be noted that both before and after 1929 the brothers used common premises, worked together in those premises; used, admittedly, until 1936, letter-heads on note-paper and invoices carrying the names of the two brothers as partners; and appeared in the telephone directory together. There was also a considerable body of evidence from impartial and authoritative persons of the Ramleh community to the effect that the two brothers were generally regarded as partners; that they worked together; and that there was no visible change in their relationship after the year 1929. The learned Relieving President, however, came to the conclusion that the Appellant's claim was a "brazen-faced" attempt to persuade a Court of Law that he is his brother's partner, based upon his presence in his brother's office, the fact of their previous partnership, and what the learned Relieving President describes as "such lucky circumstance" as the heading of the note-paper with their two names. He also seems to have been considerably influenced by the fact that the Shell Co. regarded only one brother as agent, the other being the guarantor. And he completely dismisses the evidence of the persons of Ramleh on the ground, apparently, that it was not sufficiently specific.

While it is quite true that in order to prove a partnership a plaintiff must do more than adduce evidence that a partnership was commonly believed to exist — because, as counsel for the Respondent rightly pointed out, particularly in the case of members of the same family, two or more persons might readily be presumed by their friends and business associates to be partners when, in fact, they were nothing of the sort, but merely happened to be engaged from time to time in joint

ventures — it nevertheless seems to us that the matter is completely different when, as in this case, there was admittedly a partnership subsisting between the two brothers for a considerable number of years. In such a case there is a presumption that the partnership continues, and therefore such evidence as that given by members of the Ramleh community, which the learned Relieving President disregarded, is, in our opinion, of great importance as indicating that the relations existing between the brothers up to 1929 continued after that date.

Further, as to the letter heading on the invoices and other office papers, it seems to us that the Respondent's explanation that these were the remnant of previously printed papers, is unacceptable. These invoices were admittedly used by the Respondent as late as 1936, that is to say, seven years after he alleges that the partnership came to an end. Further, it is apparent upon examination of the papers in question (used between 1929—1936) that there have been several reprints. We consider, therefore, that the learned Relieving President should not have accepted the Respondent's explanation on this point.

As against the Appellant's contentions, which we have summarized above, the Respondent's case seems to have rested upon two matters which proved to be conclusive in the mind of the learned Judge. In the first place the Judge was greatly impressed by the fact that the Shell Co. themselves only regarded the Respondent as their agent. This, however, seems to us, upon investigation, to be a point of little substance, because it was stated in evidence, and was not disputed in this Court, that it is the practice of the Shell Company only to accept one person as their agent. Not only, therefore, does it seem to us to be in accordance with the probabilities that the two brothers agreed that one of them should be the agent and the other the guarantor, and that they should continue in partnership as regards the profits of the agency, but we consider that any other conclusion is unreasonable, having regard to the fact that there was no suggestion that as early as 1929 there were any difficulties or disputes between the brothers, and no explanation was afforded in the Court below or by learned counsel for the Respondent before us as to why the Appellant should have given up his share in what was obviously a lucrative agency without obtaining any corresponding benefit. It was tentatively suggested by Mr. Scharf at one point in his argument that the Shell agency at that time was of no great value. This point, however, is obviously untenable as it is contradicted not only by the actual returns but by the size of the guarantee demanded by the Company. As we have said, it seems to us to be inconceivable that the Appellant should have abandoned his position without obtaining any corresponding benefit; and we repeat

that no explanation was put forward either in the Court below or before us as to why he should have taken this unusual course; nor is the matter even adverted to in the judgment.

In the second place, the learned Judge formed an unfavourable view of the personality of the Appellant as compared with that of the Respondent. It may well be that the Appellant is less educated and less presentable than his brother, but having regard to the weight of the evidence as a whole, which seems to us to be overwhelming, we are of opinion that the learned Judge attached too much importance to this matter of the personality of the two brothers. It is, of course, only with the greatest reluctance that a Court of Appeal interferes with the decision of a lower Court on questions of fact. But this is not one of those cases in which we feel a doubt as to whether the learned Judge came to a right conclusion, but one in which, with the greatest respect to him, we are satisfied that his conclusion is against the weight of the evidence and cannot reasonably be supported.

As regards the terms of the partnership there is, of course, a presumption, in the absence of any other evidence, that the two partners hold equal shares. Further — although in view of the presumption this is, perhaps, of minor importance — the Appellant specifically states, at page 18 of the record, that he holds a half share.

The appeal must therefore be allowed and the matter remitted to the District Court to grant the necessary reliefs on the basis that there was a partnership subsisting between the two brothers for the period alleged, terminating on the 1st of June, 1943. The Appellant will have the costs of this appeal on the lower scale to include the sum of LP. 25 for advocate's attendance fees.

Delivered this 17th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 373/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Chaim Leib Rosenstrauch. APPELLANT.

v.

Wolf Niwes & an. RESPONDENTS.

Onus of proof — Action for return of loan — Finding of deposit — Comments on findings of fact — Rate of exchange, H. C. 62/43 — Judgment not to exceed amount claimed.

Appeal from the judgment of the District Court of Haifa, dated 25.7.44, Civil Case No. 72/41, allowed:—

When the Defendant admits having received money from the Plaintiff but denies receipt as a loan and contends that it was by way of deposit, the onus of proof is upon the Defendant to establish deposit.

(*A. M. A.*)

FOLLOWED: H. C. 62/43 (10, P. L. R. 364; 1943, A. L. R. 418).

ANNOTATIONS: *Cf.* Halsbury, Vol. 13, pp. 542 *et seq.*, especially pp. 543—4. For Palestinian authorities on similar questions see C. A. 242/38 (6, P. L. R. 6; 1939, S. C. J. 5; 5, Ct. L. R. 45), C. A. 31/42 (9, P. L. R. 273; 1942, S. C. J. 342; 11, Ct. L. R. 202) and note in S. C. J., C. A. 87/42 (9, P. L. R. 401; 1942, S. C. J. 408; 12, Ct. L. R. 109) and C. A. 233/43 (10, P. L. R. 593; 1943, A. L. R. 734).

(*H. K.*)

FOR APPELLANT: Perles.

FOR RESPONDENT: Slonim.

JUDGMENT.

Frumkin, J.: Both Appellant and Respondents who are cousins were in 1937 residing in Vienna. The Appellant claims to have, at the time, handed over to the Respondents the sum of 41,000 Austrian shillings out of which he received back 13,000. The remainder part, namely, 28,000 Austrian shillings he alleges to have lent to the Respondents, it having been agreed between them that this sum should be repaid in Palestine, after five years, as £ 1,000 sterling. It was, so it was alleged, further agreed that this loan should be secured by a mortgage of a house owned by the Respondents in Haifa, and a document was written stating the conditions of the said loan, one condition being that the loan should carry interest at the rate of 5% *p. a.*

The first Respondent was residing in Haifa at the time of filing the action, but did not choose to give evidence. He later left the country for the United States. Evidence on commission was taken from the second Respondent, the wife of the first Respondent, in which she admitted that the Plaintiff deposited with her and her husband 41,000 Austrian shillings out of which 13,000 shillings have been returned. She maintains that the balance, namely, 28,000 shillings were taken by the Germans when they took over Vienna. So that the dispute between the parties boils down really to one point, namely, whether the 28,000 Austrian shillings were kept by the Respondents as a loan or as a deposit.

Now, evidence was heard by the learned President who tried the case in the first instance, as to the existence of the document of the loan and its destruction. It was the evidence of the Plaintiff himself and of his brother-in-law. The learned President did not believe them. He gave his reasons for that and although we do not necessarily agree with his reasoning we are not inclined to interfere with his discretion arrived at after hearing and weighing the evidence so that we accept the fact that no document ever existed between the parties showing that the 28,000 Austrian shillings were a loan and under what conditions they were to be secured and repaid. But that is not the end of the matter.

The learned President, in dealing with the evidence, says:—

> "... generally I have obtained the impression that the money was merely deposited with Defendant — probably for the transfer by the latter if possible to Palestine — and that the real trouble between the parties is over the question of the amount to be repaid. The Plaintiff demanding sterling and the Defendant insisting on repayment at a very different rate of exchange".

He then comes to the conclusion that:—

> "This action was not for the return of money deposited for safekeeping, and therefore I can enter no judgment in respect thereof, as clearly a different defence would arise".

With this proposition we are unable to agree. The Defendants having admitted to have received the money delivered to them by the Plaintiff and having denied his contention that it was a loan the onus of proof shifted on them to show that it was not a loan but a deposit. This onus they failed to discharge. Furthermore there was evidence other than the Plaintiff's and his brother-in-law's, to support the Plaintiff's contention that the money was kept by the Respondent as a loan. In his judgment the learned President refers to the evidence of two other witnesses called by the Plaintiff but makes no comment as to their evidence. Those witnesses are, one — A. Scheg who in his evidence says that he was requested by the parties to negotiate in their dispute and in the course of negotiations the Defendant admitted the loan of 28,000 Austrian shillings and said he wanted to repay them. The second witness, Y. Hoffman, states that the Defendant had told him that he owes £ 1,000 sterling to the Plaintiff and he is going to settle it amicably but it, however, appears from his evidence that when the Defendant was approached about this loan he said: "If you speak of pounds I don't want to speak at all. I want to settle with you but if you speak about pounds there is nothing doing". The first witness, Scheg, in his evidence also deals with interest.

It follows, therefore, that not only did the Defendants fail to prove their contention that the money received by them was in the nature of

a deposit and not a loan, but that even if we take it that there is no document drawn between the parties there was independent evidence to prove that the money received and kept by the Respondents was in the nature of a loan and not a deposit and the Appellant is, therefore, entitled to succeed.

Now, what should the form of the judgment be? If no document ever existed between the parties the Appellant would be entitled to the repayment of 28,000 Austrian shillings. In the absence of an official rate of exchange for Austrian shillings, the rate must, in accordance with the decision of this Court in H. C. 62/43 be the rate fixed by the High Commissioner in the Trading with the Enemy Ordinance, 1939, Order No. 87 of 1940, namely, 26 Austrian shillings to the Palestine Pound. This, however, would bring up the total amount as regards capital to more than claimed. In his Statement of Claim the alternative claim of Plaintiff was for the sum of LP. 1000 and he is entitled to no more. As regards interest there was no conclusive evidence to show that there was any undertaking to pay interest from the date of loan.

As a result the appeal is allowed, judgment of the District Court set aside and judgment entered for the Appellant against the Respondents jointly and severally for LP. 1,000, plus interest from the date of action at the rate of 6% with costs here and below. Costs for this Court to be fixed on the lower scale to include LP. 15 advocate's attendance fee.

Delivered this 22nd day of February, 1945.

Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 7/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Ali Hussein Jurwan & an. — APPELLANTS.

v.

Ya'coub Hussein Jurwan & an. — RESPONDENTS.

Muhaya — Jurisdiction of Magistrate's Court, M. C. J. O., sec. 3(d) — Land Court has no jurisdiction — Award on partition — Settlement accepted by unauthorised attorney.

Appeal from the judgment of the Magistrate's Court of Ramleh, sitting as a Land Court, dated 19.12.44 in Case No. 153/44, allowed:—

A Magistrate's Court constituted as a Land Court has no jurisdiction to order *muhaya*.

(*A. M. A.*)

ANNOTATIONS:

1. The decision in this case marks a return to the practice of keeping the separate capacities in which Magistrates exercise jurisdiction strictly apart. A more lenient tendency could be discerned recently, *e. g.* in C. A. 201/44 (11, P. L. R. 556; 1944, A. L. R. 682) and in C. A. 300/44 (*ante*, p. 11). See note 1 in A. L. R. to C. A. 201/44 (*supra*) as to the artificiality of the distinction in view of recent legislation.

2. On the proper time to raise a point of jurisdiction see C .A. 302/44 (1944, A. L. R. 756) and note 1.

(*H. K.*)

FOR APPELLANTS: Dajani.

FOR RESPONDENTS: Malak.

JUDGMENT.

This is an appeal from the judgment dated 19.12.44 of the learned Magistrate, Ramleh, in case No. 153/44.

The case has been argued with admirable brevity and clearness by Sheikh Ragheb Eff. Abu El Su'ud El Dajani for the Appellants, and Mr. Peter Malak for the Respondents.

The first point argued by Sheikh Ragheb Eff. is that as this was a case of partition, the Magistrate had no jurisdiction to hear it when sitting as a Land Court.

Mr. Malak has objected to this point being taken on appeal, as it was not argued in the lower Court owing to the fact that the learned Magistrate gave judgment on the basis of an award modified by an agreement between the parties. Mr. Malak also submits that the Appellants did not specify it (in their summary in para. 5 of the statement of appeal) as one of the points upon which they were relying for the purposes of the appeal. This point was, however, mentioned in para. 4 of the statement of appeal, and in view of that fact, and of the facts that it was raised in the defence, and that it is a question of jurisdiction, I consider that the Appellants are entitled to raise it now.

The claim was undoubtedly one for partition. It was so headed. The land is not owned by the parties — it is only leased by them on a continuous lease. But they were asking for what was, in effect, *muhaya* — a partition of usufruct limited by place, as referred to in Article 1179 of the *Mejelle*. Actions for *muhaya* must be filed in a Magistrate's Court, as provided in Section 3(d) of the Magistrates' Courts Jurisdiction Ordinance, 1939. This action was clearly filed in

the wrong Court, and the appeal must be allowed on that ground. It is not necessary for me to deal with the further point that the modification of the award had not been agreed to by the Appellants and that the power of attorney of Sheikh Ragheb Eff. did not enable him to agree to such a settlement on their behalf.

The appeal is allowed with fixed costs in the sum of LP. 5 (five pounds).

Delivered this 6th day of March, 1945.

British Puisne Judge.

INCOME TAX APPEAL No. 8/44.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Renno, Abuzeid and Co., Ltd. APPELLANTS.

v.

The Assessing Officer, Haifa. RESPONDENT.

Income tax — Depreciation for wear and tear, sec. 11(1)(*c*) *— Assessment of property assigned by partnership to limited company — Whether Court may assess at market value under sec.* 53(3), *"annul" — Secs.* 22(2) *and* 53(2)(A), *verbal evidence and written evidence — Fictitious or colourable transaction.*

Appeal from the assessment made by the Respondent, dated the 15th March, 1944, in Assessment No. A/156, dismissed:—

In the facts of this case, as outlined in the judgment, the Appellant was held not to have satisfied the Court that the assessment was excussive for failing to allow depreciation as claimed by the Appellant.

(*A. M. A.*)

FOR APPELLANTS: A. Atalla.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is an appeal under Section 53(1) Income Tax Ordinance from an assessment by the Assessing Officer, Haifa, whereby that officer refused to accept a figure of LP. 74.000 as the value of tugs and lighters belonging to the Appellant Company as at 23rd June, 1942, but insisted

that the correct figure was LP. 30,750. The matter is of importance because of the provisions of Section 11(1)(*c*) as to wear and tear.

Shortly stated, the facts are that in 1938 the partners of a certain partnership resolved by an agreement (Ex. A. 1) to form themselves into a private limited liability company. Clauses 4, 5 and 6 which are the relevant clauses of that agreement are in the following terms:—

> "4. The capital of the company is LP. 32,000.000 mils, Thirty two thousand Palestine Pounds divided in shares as follows:—
> 630 Ordinary shares à fifty pounds each,
> 420 Ordinary shares à one pound each,
> 80 Founders shares à one pound each.
>
> 5. The shares of each of the partners in the present firm Reno—Abu Zeid and Company will be assessed and its owner will be given for each fifty one Palestine Pounds ordinary shares for fifty pounds and one founder share, and in this way all the assets of the present firm Reno-Abu Zaid and Co. become the property of the firm Reno—Abu Zaid & Co. Ltd. *i. e.* the property of the New Company and all the members undertake to carry out the necessary transactions for the transfer of all the rights of the present company to the newly formed company as soon as it is registered and have authorized advocates Jacob Levy and Jacob Gavison or any one of them to prepare the papers and transactions for this purpose.
>
> 6. The properties and rights purchased from Rais Tewfik Reno enumerated in schedule No. 1 at LP. 5,500.000 mils (Five Thousand and five hundred Palestine Pounds) and the rights belonging to Rais Kamel Abu Zaid enumerated in schedule No. 2 at LP. 4,145.000 mils (Four Thousand One Hundred and Forty Five Palestine Pounds) and that each of the owners of these rights shall be entitled to receive in its stead ordinary and founders shares as stated above *i. e.* for each fifty one Palestine Pounds ordinary shares for fifty pounds and one founders share and undertake to carry out all the necessary transactions for the transfer of all their rights in these properties to the New Company as soon as it is registered and have accordingly authorized advocates Jacob Levy and Jacob Gavison or any one of them to prepare the papers and transactions for this purpose".

For various reasons the Company was not incorporated until 23rd June, 1942. It is said that an agreement was drawn up at the end of July, 1942, between the Appellant Company and the partnership for the sale of the assets of the latter to the former. By this agreement the purchase price of the assets was fixed at a sum of LP. 74,000. For certain reasons this agreement was not signed until the 22nd August, 1943, nor were the necessary entries made in the Company's books until October, 1943. The suggestion of the Respondent is that the true value was LP. 30,750 and that the idea of valuing them at LP. 74,000 was an afterthought of the Appellants who were advised that this would help them with regard to income tax. It will be readily understood, there-

fore, that the question for me to decide is whether, in fact, the valuation was not made till 1943.

Before going into this matter I would mention that Mr. Wittkowski, for the Respondent, in his final speech said that he was not raising the question whether the value of the assets of a partnership which merely reorganises itself by forming a limited liability company are the same as the share capital of the Company and he also said that the question here is not one of the true or real market value of these assets at the time in question. I particularly stress the latter point because of a suggestion made by Mr. Atallah, advocate for the Appellants, at the close of his final speech, that this Court might make a revision of the assessment on the basis of the true value of the tugs and lighters. Even if I wished to do so I doubt whether under Section 53(3) I have the power; but I leave the matter open. It may be that it follows as a necessary corollary of the word "annul" that I have that power; but I prefer not to decide the matter in this case. I think that it would, in any event, be wrong for me to order a revision because the whole case was fought on the footing that the figure of LP. 74,000 which is said to have been arrived at towards the end of June, 1942, was correct. By that the Appellant must stand or fall.

Mr. Wittkowski has pointed to the provisions of Section 22(2) and Section 53(2)(A)of the Ordinance. I have perused Ex. A. 2 which is the list of tugs and lighters as on the 23rd June, 1942. It is admitted that, at least, two of the original partners did not sign this list until 1943; but even those who are said to have signed it in 1942 have been unable to give the dates on which they signed so that it is impossible for me to know whether they, in fact, signed it in 1942. A significant fact is that the words on the carbon copy "as on the 23rd June, 1942" have obviously been typed in afterwards. It is equally significant that the balance sheet as on the 23rd June, 1942, showed the value of the lighters and tugs as being LP. 30.750.

I am not prepared to attach too much significance to the letter of 20th March, 1944, to the Assessing Officer written on behalf of the Appellants by Messrs. Russell & Co., Chartered Accountants, Haifa, nor do I think it should be regarded as detrimental to the Appellants' case. I think that no useful purpose will be served by a comparison of the relative value of the evidence of the respective expert witnesses for the Appellant and the Respondent, namely, Mr. Simons and Mr. Saba. The plain fact remains that the document of July, 1942, was not signed till 1943, and Ex. A. 2 was not signed until 1943. These documents were really not in existence until 1943. We have also the fact

that the entries did not pass the books of account until October, 1943. I am, therefore, left with the verbal evidence of Mr. Said Kamel Abu Zaid and Mr. Kayello, the former, of course, being an interested party. I do not suggest that Mr. Kayello, who is said to be a prominent ship builder in Haifa, should not be believed; but he admitted that he was speaking from memory and that he does not know how to write much Arabic. He accordingly made no note in his handwriting at the time when he made the valuation.

As against the overwhelming documentary evidence I am unable to hold that this verbal evidence alone is sufficient to fulfil the requirements of Section 53(2)(A).

Mr. Shomer, Appellant's accountant who was called by them as a witness, admitted that he only wrote the entry in the ledger (Ex. A. 11) in October, 1943. I have been unable to obtain from an inspection of the so-called 'special book', Ex. A. 10 anything which would assist me in coming to a conclusion as to when the entries were actually made. As the Appellant has failed to discharge the onus laid on him by Section 53(2)(A) the appeal is dismissed with costs, fixed (inclusive) costs of LP. 30.

Delivered this 27th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 485/44.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Fathi Abdul Mud'i Qaradara. RESPONDENT.

Appeal signed on behalf of Attorney General — Absence of authority — Estoppel — Adjournments as regards preliminary points — Law of Procedure (Amend.) Ord., C. A. 274/42.

Appeal from the judgment of the District Court of Jerusalem, dated 2nd day of December, 1944, in Civil Case No. 6/44, dismissed:—

1. In the absence of specific authority, the Assistant Government Advocate cannot sign an appeal on behalf of the Attorney General.

2. The fact that the Attorney General was represented in the lower Court and that no objection was taken to such representation at the time does not act as an estoppel.

3. No adjournment would be granted to consider that preliminary objection.

(*A. M. A.*)

FOLLOWED: C. A. 274/42 (10, P. L. R. 105; 1943, A. L. R. 133).

ANNOTATIONS:

1. See note 2 in A. L. R. to C. A. 274/42 (*supra*).

2. On the question of adjournment see, on the other hand, C. A. 468/44 (*ante*, p. 140).

(*H. K.*)

FOR APPELLANT: Assistant Government Advocate — (Gavison).

FOR RESPONDENT: Cattan.

JUDGMENT.

Mr. Cattan for the Respondent has taken the preliminary point that there is no appeal before this Court in view of the fact that the appeal has been signed not by the Appellant, who is the Attorney General, but by Naim Bey Toukan, Assistant Government Advocate, who had no authority to sign it.

Mr. Gavison for the Appellant has replied that as the Attorney General did not appear in person to defend the action in the District Court, and as no objection was then taken to his being represented by someone else, the Defendant is estopped from raising this objection now. I can find no merit in this submission, and I hold that there is no estoppel.

So the question remains whether the appeal has been signed by a person who was authorised to sign it. It is not suggested that Naim Bey Touqan holds a power of attorney from the Attorney General to act for him in this appeal. It is clear from the judgment in C. A. 274/42 (10, P. L. R. 105, see page 108), that Section 6 of the Law of Procedure (Amendment) Ordinance, No. 21/34, does not enable the Attorney General himself to file an appeal — his only right under that section is to intervene in an existing appeal. In the same case the following appears in the judgment (at page 108):—

> "The notice and grounds of appeal are signed by Issa Akel, Junior Government Advocate, for Crown Counsel, for Attorney General. It is not contended, for one moment, that Mr. Akel had been specially authorised to appear for the Attorney General in this appeal, though Mr. Rigby has been so authorised, and it cannot be argued that because a Junior Government Advocate is one of the Attorney General's representatives as defined in the Ordinance, that takes the place of the special authorisation laid down in the proviso to section 6. The second point also must succeed because the grounds of ap-

peal were signed by somebody who had no authorisation under the law, as it exists, to sign them".

In the present case I would say that in the absence of a power of attorney, or of some provision of law, enabling Naim Bey Touqan to sign the notice and grounds of appeal on behalf of the Attorney General, who is the Appellant, he has no authority so to sign. No law has been shown to me by virtue of which he could sign. Mr. Gavison has asked that in the event of my finding that there is no estoppel, he should be given a short adjournment in order to consult his superiors and prepare an argument in reply. He says that he has been taken by surprise by Mr. Cattan's submission. Although I would be prepared to grant an adjournment if it appeared that Mr. Gavison could reasonably say that he has been taken by surprise, I consider that it would be a bad precedent to allow an adjournment in a case like this. If a person who has no authority to sign an appeal does sign it then I think that the Appellant can and should anticipate that objection will be taken by any competent advocate appearing for the Respondent.

In the circumstances I consider that the request for an adjournment should not be entertained. In the result the objection succeeds as there is no appeal before this Court, as the notice and grounds of appeal have been signed by somebody who had no authorisation to do so. The appeal must therefore be dismissed with costs on the lower scale to include LP. 10 (ten pounds) advocate's fees for attendance.

Delivered this 6th day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 289/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Ahmad Daoud el Obeid & 2 ors. — APPELLANTS.

v.

El Haj Hassan el Ahmad. — RESPONDENT.

Sale of land — Equitable title — Whether may arise from void sale, C. A. 288/42, C. A. 356/43 — Admission interrupting period of prescription, C. A. 139/40 — Land Code, Art. 20, C. A. 89/38, C. A. 322/44 — Allegation not raised in grounds of appeal.

Appeal from the judgment of the Magistrate's Court of Nablus, sitting as a Land Court, dated 11.6.44, in Land Case No. 70/43, dismissed:—

Possession during the period of limitation bars an action by the registered owner. This defence may be set up under Art. 20 of the Land Code although the possession may have arisen as the result of an illegal disposition.

(*A. M. A.*)

REFERRED TO: C. A. 356/43 (11, P. L. R. 94; 1944, A. L. R. 150); C. A. 139/40 (7, P. L. R. 376; 1940, S. C. J. 505; 8, Ct. L. R. 196); C. A. 288/42 (10, P. L. R. 317; 1943, A. L. R. 477).

FOLLOWED: C. A. 89/38 (not reported); C. A. 322/44 (*ante*, p. 71).

ANNOTATIONS: Note that the decision in this case is based on Art. 20 of the Land Code and does in no way affect the principle that an equitable title will not be recognised where possession (for a period of less than ten years, *i. e.* less than the period of prescription) was obtained as a result of an illegal disposition; see note 1 to C. A. 322/44 (*supra*).

(*H. K.*)

FOR APPELLANTS: Hammoudeh.

FOR RESPONDENT: Nimer.

JUDGMENT.

This is an appeal from a judgment of the Magistrate of Nablus, sitting as a Land Court, whereby he dismissed an action by the present Appellants for a declaration of ownership in certain land called El Barraka in the lands of Sourra. The Plaintiffs claimed that the said land had developed upon them from their father and that the other half of the plot belonged to their uncle Abdallah el Daoud and that his son Issa sold his share (that is the half of the second half) to the Respondent about three or four years ago and that the said Issa continued to possess the Appellants' share in the said land and to pay them their share of the produce until his death which took place about two years ago, and that thereafter the Defendant (Respondent) refused to pay the Appellants their share of the produce in consequence of which failure they brought the present action asking for a declaration that they own the share in suit in the said land which is equal to one share out of two shares. They relied on a *Tabu* Extract and a certificate of succession. The Magistrate heard witnesses including the Defendant who swore that he bought the land for LP. 40 by virtue of an ordinary deed, that is to say, by a sale outside the Land Registry in 1348 *A. H.* which is about 1929 *A. D.* Such a sale, of course, was void by reason of Section 11 of the Land Transfer Ordinance. The Magistrate, however, believed the Defendant's evidence that he had improved the land and that it had been registered in the Tax Registers in his name and that he had been in possession of the whole land in suit for a period

exceeding the period of prescription, and notwithstanding the fact that the Appellants hold a *kushan* for half of the land in suit he dismissed the Plaintiffs' action as they had failed to rebut the evidence of the Defendant that he had been in possession for a period exceeding the period of prescription.

Before me the Appellants' advocate argued (a) that the Appellants are in any event entitled to succeed because notwithstanding the fact that the Respondent may have been in possession for a period exceeding ten years, nevertheless no rights whatsoever could accrue to the Respondent by reason of a void sale. In support of this argument he cited Civil Appeal 356/43 Annotated Law Reports (1944) page 150 and (b) alternatively, if the first argument is not acceptable, the Magistrate failed to make any finding of fact on certain evidence, namely, that of the Plaintiffs and a witness called by them, namely, Shehadeh Ibn Ibrahim Mustafa, with regard to a certain person who was an agent of the Respondent admitting a mortgage of the land for the sum of LP. 25.

Yehya Eff., for the Appellant, argued that if this evidence is believed then we have an admission which would interrupt the period of prescription (see Civil Appeal 139/40 Vol. 7, P. L. R. p. 376).

Before I deal with the alternative argument it is necessary first to consider whether the main argument is sound and should be upheld. Yehya Eff. contended that an equitable title cannot be acquired by reason of an illegal sale, and in support thereof he cited C. A. 288/42 P. L. R. Vol. 10, p. 317. The question, however, which I have to decide is whether, although it cannot be disputed that the Respondent has been in undisturbed possession for over ten years, the fact that what led up to his commencement of the possession was a sale outside the Land Registry, renders him no longer able to rely on Article 20 of the Ottoman Land Code.

In Civil Appeals 89/38 and 322/44 a similar matter was raised, but apparently not argued at length, and only slightly touched on in the respective judgments; but I think that what can be gathered from the judgments in these cases is that this Court felt that in such a case an action is barred under Article 20 of the Ottoman Land Code. I am therefore unable to interfere with the judgment of the Magistrate which is in the following terms:—

> "Whereas I am satisfied from the evidence of the Defendant's witnesses that the Defendant is in possession of the whole land in suit for a period exceeding the period of prescription, and whereas the Plaintiffs did not rebut these witnesses' evidence and did not prove their possession as alleged by them, despite the fact that they hold

a *kushan* in respect of half of the land in suit to be registered in their testator's name, therefore I dismiss Plaintiffs' action ...".

With regard to the second ground of appeal relating to the alleged mortgage for the sum of LP. 25, this forms no part of the statement of claim and is not raised in the grounds of appeal. The matter arose solely from the evidence given before the Magistrate by one Shehadeh Ibn Ibrahim Mustapha but, as it forms no part of the present Appellant's case, I do not propose to deal with it.

The appeal is accordingly dismissed with costs, *i. e.* fixed (or inclusive) costs of LP. 10.

Delivered this 13th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 192/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Abdel Hafiz Saleh Hammad. APPELLANT.

v.

Rajab Yassin Taha. RESPONDENT.

Judgment for specific performance of contract of sale — Matters to be considered by Court when dealing with question of specific performance — Court of Appeal setting aside judgment for specific performance and ordering return of purchase price and payment of liquidated damages.

Appeal from the judgment of the Magistrate's Court of Majdal, sitting as a Land Court, dated the 26th April, 1944, in Land Case No. 420/43, allowed:—

1. (*Obiter*): Specific performance cannot be granted where document relied upon not an agreement to sell but an out and out sale of land.

2. One of matters to be considered by Court when dealing with question of specific performance — whether party complaining could adequately be compensated by damages.

3. (*Semble*): Court of Appeal in reversing a judgment for specific performance may in some cases order vendor besides returning purchase money also pay the sum mentioned in contract for sale as liquidated damages though such sum is treble the purchase price and bears marks of a penalty.

(*M. L.*)

REFERRED TO: C. A. 38/44 (11, P. L. R. 274; 1944, A. L. R. 335).

APPLIED: C. A. 157/43 (1943, A. L. R. 482; 10, P. L. R. 315).

ANNOTATIONS:

1. As to point 1 see case referred to and annotations in A. L. R.

2. As to point 2 see case applied (*supra*) and annotations in A. L. R. See also C. A. 97/44 (*ante*, p. 14) and annotations.

(*A. G.*)

FOR APPELLANT: F. Dajani.

FOR RESPONDENT: Hawari.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court, Gaza, sitting as a Land Court, ordering specific performance of a so-called agreement for sale dated 10th July, 1939. We might, at the outset, say that we consider that the Plaintiff (Respondent) was fortunate in obtaining from the Magistrate a finding that the document was an agreement for sale and not a document of sale, because, had it been found to be an out and out sale, the matter would have been covered by Civil Appeal 38/44, P. L. R. Vol. 11, p. 274. As, however, the matter was not in issue in the Court below and has not been raised by the Appellant in this Court, we do not think that we would be justified in interfering with the finding of the Magistrate on this head. The land in question was registered in the Land Registry by virtue of an order made by the Land Settlement Offcer, Gaza, this fact being set out in the document of 10th July, 1939, (Ex. A.), Clause 5 of which is in the following terms:—

> "If first party committed a breach of one of the stipulations of this agreement or if he refuses to effect registration and transfer in the Land Registry of Gaza, or if he goes back on his admission that he did receive the purchase price mentioned above in this agreement, the first party, undertakes to pay as liquidated damages the sum of LP. 35 with no necessity to have the notice served upon him, and further to pay back the purchase price received by him in cash."

Notwithstanding that clause, the Magistrate ordered specific performance and ordered registration of the parcel of land in the name of the Plaintiff. In Civil Appeal 157/43, Annotated Law Reports 1943, p. 482, this Court approved of a statement that one of the matters to be considered by a Court when dealing with the question of specific performance was whether the party complaining could be adequately compensated by damages, and this Court went on to make certain observations as to the danger of extending the doctrine of specific performance in Palestine in certain circumstances. In view of the fact that the purchase price of the land was only LP. 12.400 mils, we think that LP. 35 damages is ample compensation. We are, moreover, influenced by the fact that the present Respondent has been in possession

for only about 5 years and does not seem to have spent much money on improvements such as planting trees. In fact, he said in evidence: "I planted no trees nor have I erected any building thereon".

In these circumstances we set aside the judgment of the Magistrate ordering specific performance, and we enter judgment for the Respondent (Plaintiff in the Court below) for LP. 12.400 mils and LP. 35. The Respondent must pay the Appellant's costs of this appeal, namely, fixed or inclusive costs of LP. 10.

Delivered this 15th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 164/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

'Ali Mustafa Ali Mi'ari & an. APPELLANTS.

v.

Hijla 'Ali 'Abdallah el Mi'ari & 52 ors. RESPONDENTS.

Evidence in land settlement — Case decided on pleadings and production of documents.

Appeal from the decision of the Settlement Officer, Safad Settlement Area, dated 6.3.44, in Case No. 1/'Akbara, allowed and case remitted:—

If the parties agree to dispense with evidence, the fact and the reasons therefor should appear in the record.

(*A. M. A.*)

ANNOTATIONS: A Settlement Officer must deal with claims submitted to him in a judicial manner: C. A. 135/41 (8, P. L. R. 509; 1941, S. C. J. 526; 10, Ct. L. R. 183); see also C. A. 185/43 (1943, A. L. R. 538).

(*H. K.*)

FOR APPELLANTS: Levitzky & Feiglin.

FOR RESPONDENTS: Nos. 1 & 2 — Nakara.
No. 31 — McFee.

JUDGMENT.

The Land Settlement Officer has decided this case after hearing the statement of the advocates only and the production of some documents.

There are no findings of fact and no hearing of evidence without which it seems impossible for the Land Settlement Officer to come to the conclusion he did. Had evidence been dispensed with this should have been recorded with reasons. The appeal is allowed and the judgment of the Land Settlement Officer set aside, and the case returned to the Land Settlement Officer for retrial. Inclusive costs of LP. 15 to the ultimately successful party.

Delivered this 27th day of February, 1945.

A/British Puisne Judge.

CIVIL APPEAL No. 102/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Moshe Feldberg. APPELLANT.

v.

Itzhaq Trachtengut. RESPONDENT.

Landlord and tenant — Dispute re amount payable as monthly rent — Circumstantial evidence.

Appeal from the judgment of the District Court Tel-Aviv, dated the 29th February, 1944, in Civil Case No. 156/43, allowed:—

Where tenant was for several years making monthly payments lesser than initial rent and receipts make no mention that these were only part payments and no evidence of any demand by landlord for allegedly outstanding amount nor of any payment by tenant of interest on such amount, landlord's claim that rent remained unaltered must fail.

(*M. L.*)

ANNOTATIONS:

1. On circumstantial evidence in Cr. Cases see Cr. A. 123/43 (1943, A. L. R. 725; 10, P. L. R. 539) and annotations in A. L. R.

2. On value of circumstantial evidence in Civil Cases see Phipson, 8th edition p. 667, 2, 32.

3. On admissibility of evidence of system in Civil Cases see C. A. 375/43 (1944, A. L. R., p. 673) and annotations in A. L. R.

4. On circumstantial evidence in Cr. Cases see also the chapter on pages 142—145 of Cases on Evidence by Kantrovitch.

5. In C. A. 179/40 (7, P. L. R. 493; 8, Ct. L. R. 138; Gorali 38; 1940, S. C. J. 358) the Supreme Court ruled as follows "I am, however, of opinion that the figure of LP. 14.— is binding upon the Appellant as an equivalent rent agreed

upon by conduct, for the simple reason that he regularly accepted this sum knowing that it was the only sum the Respondent was willing to pay".

(*A. G.*)

FOR APPELLANT: Polonsky and Nochimovsky.

FOR RESPONDENT: Levitzky.

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv. The District Court awarded Itzhaq Trachtengut LP. 270 in respect of rent due to him by one Moshe Feldberg, the Appellant in this case.

The case unfortunately discloses the low standard of commercial morality prevailing in certain circles, particularly in regard to the leasing of houses. There can be no doubt in the minds of either the Appellant or the Respondent as to what was the real intention of the agreement between them. This litigation started in the lower Court and found its way to this Court solely because the parties failed to reduce their contract to writing, and in consequence each side puts forward the contention that suits his own interests.

The Respondent's case against the Appellant in the lower Court was that in the year 1937 he made a lease of a shop for one year at the rate of LP. 6 per month. After a few months, owing to the disturbances and the bad state of business, the Appellant found he was unable to pay this rent, and the Respondent says he allowed him to pay it by instalments of LP. 2.500 mils a month. The Appellant on the other hand says that it was an entirely new lease under which the rent was reduced to LP. 2.500. On the expiration of twelve months the Appellant, so the Respondent says, remained on under the provisions of the Rent Restrictions (Business Premises) Ordinance. In this contention the Respondent is certainly wrong and his statement misleading, as at the expiration of the first year of lease the rent restriction measures were not yet extended to business premises which only came into force in 1941 with the promulgation of the Rent Restrictions (Business Premises) Ordinance, 1941.

Now, it has been proved beyond doubt that the Appellant has remained in these premises for some five years, and during the whole of that period he had paid the sum of LP. 2.500 per month only. There was no evidence of any demand being made by the Respondent for the amount he alleges was outstanding, nor of any payment being made by the Appellant by way of interest on this outstanding amount. Furthermore the Appellant produced one receipt which makes no mention of it being in respect of a part payment only. It is not denied that

he had other receipts but these could not be produced because apparently he acquiesced in the Respondent issuing unstamped receipts and thus avoiding the revenue laws. We cannot but think that these facts were quite inconsistent with the Respondent's version of the deal, but they do fit in with the Appellant's contention that after his representations that he could not carry out the original agreement there was an entirely new deal under which the rent was to be LP. 2.500.—. For these reasons we are of the opinion that the appeal must be allowed, the judgment of the District Court set aside, and Plaintiff's (Respondent's) action dismissed with costs here and below, the costs of this appeal to be on the lower scale to include the sum of LP. 5 advocate's attendance fee.

Delivered this 14th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 422/44.

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

BEFORE: Edwards, J. and Shaw, A/J.

IN THE APPEAL OF:—

Jacob Shuster & an. — APPELLANTS.

v.

Pinchas Rundstein & an. — RESPONDENTS.

Action before District Court for declaration that judgment of Magistrate Court for eviction is a nullity — District Court granting interim injunction — Question of striking out statement of claim.

Appeal from the Order of the District Court, Tel-Aviv, dated the 28th day of July, 1944, in Civil Case No. 238/44, dismissed:—

There is no other method whereby a case can be struck out at an early stage than an application under Rule 21, Civil Procedure Rules, 1938.

(*M. L.*)

REFERRED TO: C. A. 118/43 (1943, A. L. R. 346).

ANNOTATIONS: On striking out statement of claim see C. A. 321/43 (1944, A. L. R. 489) and note 3 thereto. See also case refered to (*supra*) and annotations thereto.

(*A. G.*)

FOR APPELLANTS: Michaelowsky.

FOR RESPONDENTS: E. Z. Fellman.

JUDGMENT.

This is, in effect, an appeal from an order of the District Court of Tel-Aviv, granting an interim injunction in an action for a declaration that a judgment of the Magistrate's Court, ordering the eviction of this present Respondent from certain premises, is a nullity.

The Appellants' advocate has argued that the District Court had no jurisdiction to hear the action in the particular circumstances in which the judgment was given and he has relied on Civil Appeal No. 118/43. We think, however, that if we were going to deal with this argument we would be deciding the case in advance.

It is further argued that the District Court had inadequate material on which to proceed before granting the interim injunction. As to this, however, we are not satisfied that it has been proved before us that the District Court exercised its discretion wrongly. We cannot however help feeling that the present Appellants have mistaken their remedy. It seems to us that they could have, at an early stage of the proceedings in the District Court, made an application for the Statement of Claim to be struck out under Rule 21(a), Civil Procedure Rules, 1938. They did not do so. So far as we know there is no other method whereby a case can be struck out at an early stage. We naturally refrain from expressing any opinion as to the merits of the action in the District Court or as to whether the present Appellants could or should succeed in any application under Rule 21(a).

For these reasons the appeal is dismissed with costs (inclusive or fixed) of LP. 15.

Delivered this 8th day of January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 107/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Haj Muhammad Ahmad Abu Laban. APPELLANT.

v.

Haj Hamed Ahmad Abu Laban & 5 ors. RESPONDENTS.

Partnership — Orange grove business, contracted by dry goods firm — Objects, custom — Authority of a partner to bind the firm — Partner mortgaging share of co-partner in grove — Admission by partner to other partner — Res inter alios acta as regards mortgagee — H. C. 26/31.

Appeal from the judgment of the Land Court, Tel-Aviv, L. C. No. 9/42, dismissed:—

1. The Court refused to interpret narrowly the articles of a dry goods partnership so as to exclude the acquisition of an orange grove as an object of the partnership — the grove having been acquired at a time when most traders in Jaffa dabbled in orange groves.

2. Taking local conditions into consideration, coupled with the fact that one partner, knowing that his share of the grove had been mortgaged and the moneys used by the firm, had remained quiescent and had in fact admitted his liability under the mortgage, for a number of years, the validity of the mortgage on his share could not be contested.

3. Admissions by partners *inter se* do not affect strangers.

(*A. M. A.*)

ANNOTATIONS: For previous proceedings in this "continuous litigation" see C. A. 105/37 (1937, S. C. J. (N. S.) 173) and note. (*H. K.*)

FOR APPELLANT: Goitein and Gorodissky.

FOR RESPONDENTS: Nos. 1—2 — Cattan.
Nos. 3—4 — Beirouti.
Nos. 5—6 — Kehaty.

JUDGMENT.

This is an appeal from the Land Court of Tel-Aviv. The Plaintiff and the first three Respondents were members of a partnership known as Abu Laban and Sons of Jaffa. It appears that the partnership had a stormy existence, and there was friction between the members from the first. In 1927 the Appellant purported to retire from it. His right to retire was contested by the other partners, and the High Court decided in H. C. 26/31 that his resignation was bad and that he remained a member of the partnership.

At this point it is convenient to examine the deed of partnership. In it the general nature of the business was stated to be "Dry Goods". The deed provided, *inter alia*, that the first three Respondents could bind the partnership by their signature. In 1924 the four members, *i. e.* the Appellant and the three Respondents, bought an orange grove from the Ottoman Bank, and registered it in the name of the partnership. In 1930 the grove was mortgaged to the 4th Respondent, Mira Tayan, for LP. 4500: and in 1931 a second mortgage of the grove was effected for LP. 6000 in favour of the 5th and 6th Respondents. In 1934 the partnership was finally dissolved. In 1935 the grove was

registered as *masha'a* in the name of the four partners, *i. e.* the Appellant and the first three Respondents. In 1937 the Court of Appeal confirmed the right of the Appellant to 1/4 of the land. In 1942 the grove was partitioned and the Magistrate held that the mortgage on the land applied proportionately to the Appellant's share of 1/4. He contested this. It is, in fact, the issue in this case. He contested it firstly on the ground that as the partnership was purely for textiles, it did not cover the operations in connection with this grove. Now, it is true that the Appellant did not sign the mortgage deed which was executed by the three Respondents but it will be recollected that they were empowered to bind the partnership. There is, moreover, clear evidence that the money raised by the mortgage on this grove was applied for the benefit of the partnership operations, and therefore for the benefit of the Appellant. It is also true that the partnership deed mentioned that the general nature of the business to be carried on was that of dealing in Dry Goods, but it is common knowledge that every Arab trader of substance at that particular period dabbled in orange groves. Indeed, there was scarcely a business in the Jaffa area that did not include speculation in the orange boom amongst its operations. It must be borne in mind that we are not dealing with conditions such as prevail in England where commerce has been so organized that to a great extent each business concern specializes in a particular line and confines its operations to that line. For these reasons I do not feel inclined to interpret narrowly the objects of the partnership as they are disclosed in the certificate of partnership. There is no doubt in my mind that the Appellant was perfectly well aware that this mortgage was executed for partnership purposes, and was applied to those purposes, and he took his gains from it. Taking into consideration the conditions prevailing in this country, with the limited opportunities for investment, I cannot see any practical distinction between a firm of textile merchants in Jaffa investing their loose cash in orange groves, and a firm of, say, cloth merchants in London investing their surplus cash in war loan. Furthermore, by the deed of partnership the Appellant had given full authority to the first three Respondents to conduct all the partnership business. He was, as I have said, well aware of this partnership investment, and taking local conditions into consderation, I am not prepared to say it was altogether outside the intended scope of the partnership. I therefore agree with the District Court that he cannot now run away from the consequences of his actions over those years. Indeed, I find it hard to credit how he can argue that this mortgage was incurred without his consent. In the beginning of 1935 he made, as the District Court finds, a clear written

admission of his knowledge in a letter addressed to the Director of Lands, in which he actually undertook to pay off the mortgage himself and recoup himself from his partners. The mortgages were for substantial sums, and I cannot accept the explanation of Mr. Goitein that he made those damning admissions against his financial interests merely in order to get his part of the property registered in his name.

The Appellant placed great reliance on the result of Supreme Court Appeal Case No. 286 of 1943, in which he was Appellant and the present third Respondent was the Defendant, where it was held that the Plaintiff was conclusively released from any debt connected with the partnership of Ahmad Hassan Abu Laban and Sons, by reason of a written admission to that effect by the third Defendant. But, as the learned Relieving President remarks, however binding that admission may be as between the Plaintiff and the third Defendant in respect of their relations *inter se*, it cannot bind the other Defendants who were not parties to that appeal.

For these reasons I think that the judgment of the learned Relieving President was correct, and that the appeal must be dismissed, with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 15th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 462/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF :—

Abdul Hafez Yousef Khalil Othman. APPELLANT.

v.

Abdul Muhsen Abdul Aziz Abdul Qader. RESPONDENT.

Arbitration — Failure by arbitrator to keep record of proceedings — Arbitrator illiterate — Findings of fact.

Appeal from the judgment of the Magistrate's Court, Ramle, sitting as a Land Court, dated 5th November, 1944, in Case No. 956/43, dismissed:—

If parties chose an illiterate arbitrator, they cannot complain if he does not keep a written record of the proceedings.

(*A. M. A.*)

ANNOTATIONS: On the arbitrator's duty to keep a proper record see Annotated Laws of Palestine, Vol. 2, pp. 87 and 139.

(*H. K.*)

FOR APPELLANT: Taji.

FOR RESPONDENT: Anabtawi.

JUDGMENT.

This is an appeal from the judgment dated 5th November, 1944, of the learned Magistrate of Ramleh in Case No. 956/43, whereby he confirmed an award which had been given in favour of Respondent.

Various grounds of appeal have been raised of which two are the most important. One is that the arbitrator kept no record of the proceedings.

The parties had agreed to the appointment of this arbitrator, and they must have known that being illiterate it would not be possible for him to keep a proper record himself. We do not think that the fact that no written record was kept is sufficient ground for upsetting the proceedings if they are otherwise apparently satisfactory.

The other and even more important ground is the allegation that the Appellant had never been called to the arbitration proceedings. The Appellant stated on oath that he had not been called. On the other hand the arbitrator and the Respondent stated on oath that the Appellant was present when the arbitration proceedings took place. The Magistrate having heard the evidence on both sides came to the conclusion that the Appellant was present. We think that if the Appellant has made an incorrect assertion on this point (and the Magistrate so finds) it throws doubt on his *bona fides* as a whole.

We do not consider that we need deal with the other grounds which have been raised. Having heard the arguments of both parties we do not find that any of these grounds would afford a reason for interfering with the Magistrate's judgment.

In the result this appeal must be dismissed with inclusive costs in the sum of LP. 10.

Delivered this 27th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 178/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad Bey Abbas. APPELLANT.

v.

Elias Shamy. RESPONDENT.

Eviction order on account of subletting reversed on appeal — Court of Appeal restoring Magistrate's order in absence of a finding as to a positive act showing acquiescence on part of landlord.

Appeal from the judgment of the District Court of Haifa, sitting as a Court of Appeal, dated 27.3.44 in Civil Appeal No. 33/44, allowed:—

Tenant's infringement of clause prohibiting subletting without landlord's written consent makes him liable to eviction, if there is no positive act showing acquiescence on part of landlord.

(*M. L.*)

FOLLOWED: C. A. 287/42 (1943, A. L. R. 225).

REFERRED TO: C. A. 94/43 (1943, A. L. R. 152).

ANNOTATIONS: See cases followed and referred to with annotations.

(*A. G.*)

FOR APPELLANT: A. Lifshitz.

FOR RESPONDENT: Hamid.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa in its appellate capacity, which had reversed a judgment of one of the Magistrates of Haifa ordering the eviction of the present Respondent from a flat occupied by him by virtue of a contract of lease. The Rent Restrictions (Dwelling Houses) Ordinance applies to the premises in question.

One of the conditions of the lease was that the contract should become null and void in the event of the Respondent being transferred from Haifa to Jerusalem. We are told that this clause was inserted at the request of the Respondent.

The learned Relieving President of the District Court, in his judgment, said:—

> "The Magistrate heard evidence and ordered the eviction of the Appellant on the ground:—

(4) that the lease is repealed by the transfer of the Defendant to Jerusalem which transfer the Magistrate found was known to the Respondent."

A scrutiny of the judgment of the Magistrate, in Arabic, however, shows that the words used by the Magistrate were:—

"and he, that is to say the Plaintiff, did not know that he was being transferred to Jerusalem. Had he known that, the presence of this expression would have been meaningless. Therefore, and so long as it has been agreed upon expressly between the two contracting parties that the lease will be rescinded when the Defendant is transferred from Haifa, and whereas this transfer has been proved, the lease must be held to have been rescinded."

We do not, however, decide the appeal on that point because there is another ground on which we think the Appellant must succeed.

It is not disputed that there is in the contract a clause prohibiting subletting without the express consent, in writing, of the landlord (present Appellant). We have been referred to Civil Appeal No. 94/43, Annotated Law Reports (1943), p. 152 and Civil Appeal No. 287/42, Annotated Law Reports (1943), p. 225. It is common ground that the premises were sublet to tenants other than members of the family of the Respondent.

The learned Relieving President said in his judgment that it was quite clear that the present Appellant knew that the sub-tenant, Naim Matar, had been in occupation since 1942 and he also said:—

"This knowledge of a long existing sublease is a good defence to the claim for eviction and the Magistrate was wrong in granting eviction because there was no consent in writing by the landlord."

With this expression we are unable to agree. Moreover, it is clear that there was no finding by either Court of any positive act showing acquiescence and there is no finding even by the learned Relieving President of the District Court that the Appellant knew of the subletting to one Said Abboud to whom besides Naim Matar, part of the premises had been sublet. Because of the clause prohibiting subletting without express consent in writing of the landlord and of the absence of any finding with regard to a positive act showing acquiescence on the part of the Appellant we think that the appeal must succeed. We refer to Civil Appeal No. 287/42 (Annotated Law Reports (1943), at p. 229).

The appeal is accordingly allowed, the judgment of the District Court set aside and the judgment of the Magistrate of 25th January, 1944, restored. The Respondent must pay the Appellant's costs in the District Court and in this Court which we assess as fixed (inclusive)

costs of LP. 3 in the District Court and fixed (inclusive) costs of LP. 10 in this Court.

Delivered this 13th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 456/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Zvi Friedman. APPELLANT.

v.

Zalman Yerushalmi. RESPONDENT.

Evidence of partnership — C. A. 155/44 — Documentary evidence.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 31st October, 1944, in Civil Case No. 308/41, dismissed:—

The existence of a partnership cannot be established by oral evidence.

(*A. M. A.*)

FOLLOWED: C. A. 155/44 (11, P. L. R. 204; 1944, A. L. R. 368).

ANNOTATIONS: See C. A. 155/44 (*supra*) and C. A. 5/44 (11, P. L. R. 562; *ante*, p. 145).

(*H. K.*)

FOR APPELLANT: Miller.

FOR RESPONDENT: Rosenfeld.

JUDGMENT.

In view of the arguments advanced, and the finding of the Court below that the Respondent actually bought this factory, I think it is desirable to consider at the outset what was the true nature of the claim before the District Court of Tel-Aviv. It was a claim for dissolution of partnership and for the appointment of a receiver to wind up the partnership business. The whole issue, therefore, resolved itself round the question, was there a partnership? The Appellant says that there was. This was contested by the Respondent. It is admitted by the Appellant that he had no deed of partnership in the sense that the partnership agreement was not reduced to writing. He contended, however, that he could produce oral evidence to prove the existence of

the partnership. This the Court refused to allow, the learned Judge holding that no foreign evidence could be introduced. The only evidence which they considered as relevant was the evidence of the parties themselves, and the documents which they were in a position to produce. In arriving at this decision the learned Judges of the Court below purported to follow the decision in Civil Appeal No. 155 of 1944. In my opinion the purport of that decision leaves little room for doubt. The case was similar to this case in that it was an allegation of partnership and a counter-allegation that no partnership existed. The judgment states:—

> "We cannot help feeling that it will be most dangerous for us so to interpret section 2(2) of the Partnership Ordinance as to mean that a partnership which may last and continue for years or even for the life-time of the parties can be proved without a document within the meaning of Article 80 as explained by Article 72 of the Ottoman Code of Civil Procedure."

The only inference one can draw from this decision is that he who alleges a partnership must prove it by a document of partnership. This the Appellant admittedly was unable to do. It seems, therefore, that no useful purpose could possibly have been served by allowing the Appellant to lead the evidence he desired to adduce.

For these reasons we are of opinion that this appeal must be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fees.

Delivered this 16th day of February, 1945.

Chief Justice.

CIVIL APPEAL No. 297/44.

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

BEFORE: Rose, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Jacob Heitner. APPELLANT.

v.

The Tabor Jerusalem Brewery and Malt Factory Ltd. & 3 ors. RESPONDENTS.

Dispute between Directors of Company as to calling an extraordinary

general meeting — Articles of Association providing for arbitration — Arbitrator resigning and subsequently withdrawing his resignation.

Appeal from the order of the District Court Jerusalem, dated the 7th June, 1944, in Civil Case No. 22/44 (Motion No. 117/44), dismissed:—

1. Where Articles of Association provide for arbitration in case of disagreement or dispute between Directors, disagreement between them as to whether an extraordinary general meeting should be held can and should be referred to arbitration.

2. Sec. 6(1)(b), Arbitration Ordinance (arbitrator refusing to act) cannot be invoked where arbitrator tendered his resignation and later, upon request by both parties, expresses his readiness to continue.

(*M. L.*)

ANNOTATIONS:

1. On effect of arbitration clause contained in the articles of association see Palmer's Company Law, 17th Edition p. 34 and Hogg on Arbitration p. 23.

2. On cases in respect of sec. 6(1)(b) of the Arbitration Ordinance see Annotated Laws of Palestine, Vol. 2, p. 93 and *seq.*

(*A. G.*)

FOR APPELLANT: Cohn.

FOR RESPONDENTS: No. 1 — Bernstein.
Nos. 2, 3, 4 — Selikson.

JUDGMENT.

This is an appeal from an order of the President of the District Court of Jerusalem, ordering a stay of certain proceedings brought by the present Appellant against the four Respondents. The Appellant and the 2nd, 3rd and 4th Respondents are directors of the first respondent company, and it appears that disputes have arisen between them.

Clause 13 of the Articles of Association of the company provided that certain alterations should be made to clause 86 of table 'A' contained in the 3rd Schedule to the Companies Ordinance at page 348 of Volume I of the Revised Edition. And the substitution contained in the clause is as follows:—

> "All decisions of the Board of Directors shall be unanimous. Failing unanimity or in case of disagreement or dispute in any matter connected with the business of the company or in case of an equality of votes the matter shall be referred to the arbitration of Mr. Daniel Auster, advocate of Jerusalem, as sole arbitrator, whose award shall be final and binding all directors."

The Appellant argues to-day that that should be limited to disputes between the Directors themselves and not to matters which affect the company as such. It seems to us that the answer to that is contained

in an observation of the learned President himself made in his order, when he pointed out that the question whether an extraordinary general meeting should be held — which, I would say in passing, appears to be the principal bone of contention between the present directors, is one for the directors to decide, and he refers to clause 47 of the same table 'A' appearing at page 344 of Volume I. We agree with his view that if there is a disagreement between the directors on that matter, that is a point which can and should be referred to the arbitrator for decision. And it was in pursuance of that power that the learned President ordered a stay of the Appellant's action under section 5 of the Arbitration Ordinance.

The Appellant further urges that this is a case where section 6(1)(b) of the Arbitration Ordinance must be invoked, and he relies on a letter from the arbitrator himself, dated 30th December, 1943, in which he, apparently irritated by the importunities of the directors in this matter, tendered his resignation as the arbitrator. But at the motion before the learned President, Mr. Auster himself gave evidence and said that it is true that he tendered his resignation but he was subsequently asked to withdraw this and to continue as arbitrator; and he says that the present Appellant, Jacob Heitner, was one of those who asked him to continue; and he states that he then decided and agreed to continue. Whether his account of the events is true or not is purely a question of fact for the learned President. And the learned President finds that Mr. Auster only tendered his resignation and that he withdrew it when asked to do so by the Directors, including Mr. Jacob Heitner. That, of course, is tantamount to a finding that he believes Mr. Auster's evidence on those material points.

We are of opinion, therefore, that the learned President was right in coming to the conclusion that Mr. Auster is not a person who has refused to act as an arbitrator; and it appears that at the relevant date, which was the date of the filing of the action, Mr. Auster was willing, prepared and competent to be the arbitrator.

For these reasons we think that the Appellant's action was properly stayed.

The appeal is therefore dismissed with costs on the lower scale to each set of Respondents (the first Respondent in one group and the 2nd, 3rd and 4th Respondents together in another group) to include an advocate's attendance fee of LP. 10 to each group.

Delivered this 13th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 434/44.
CIVIL APPEAL No. 438/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

C. A. 434/44:—

El Haj Amin el Taher. APPELLANT.

v.

Dr. Elias Sabbagha & an. RESPONDENTS.

IN THE APPEAL OF:—

C. A. 438/44:—

Dr. Elias Sabbagha. APPELLANT.

v.

El Haj Amin el Taher & an. RESPONDENTS.

Interest on mortgage — Interest paid in advance — Usurious Loans Ordinance, sec. 2(4), *C. A.* 49/40 — *Function of Court and of Execution Office.*

Appeals from the judgment of the District Court of Jaffa, dated 14th October, 1944, in Civil Case No. 99/43, appeal allowed in C. A. 438/44 and dismissed in C. A. 434/44:—

Circumstances in which interest on a mortgage was paid considered in the light of the Usurious Loans Ordinance.

(*A. M. A.*)

FOLLOWED: C. A. 49/40 (7, P. L. R. 199; 1940, S. C. J. 108; 7, Ct. L. R. 152).

ANNOTATIONS:

1. On the question whether the Usurious Loans Ordinance is retroactive see also C. A. 7/43 (10, P. L. R. 395; 1943, A. L. R. 623) and note 1 thereto in A. L. R.

2. Interest may not exceed the capital sum; C. A. 257/41 (8, P. L. R. 70; 1942, S. C. J. 141) and note 4 thereto in S. C. J. at p. 144.

(*H. K.*)

C. A. 434/44:—

FOR APPELLANT: Eliash.

FOR RESPONDENTS: Cattan.

C. A. 438/44:—

FOR APPELLANT: Cattan.

FOR RESPONDENTS: No. 1 — Eliash.
No. 2 — Absent — served.

JUDGMENT.

These are appeals from judgments of the District Court of Jaffa in actions for declarations arising out of a mortgage. They have, by consent, been heard together.

We shall, first of all, deal with Civil Appeal 438/44. The Respondent to this appeal, who was the mortgagor, brought an action in the District Court of Jaffa for a declaration that he had been charged excessive interest in a particular mortgage, namely, interest at 15%. The learned trial Judge rejected the contention of the Plaintiff that he had been charged 15% and the Appellant's advocate now says that the learned trial Judge should then have at once dismissed the Plaintiff's action, instead of doing which he went on to discuss a matter which (it is said) was never raised in the Court below. The mortgagee swore, and his evidence seems to have been accepted, that the principal sum for which the mortgage had been given was LE. 580. The mortgage was for three years with simple interest of 9% *per annum*. At the time of the granting of the mortgage the parties agreed that the interest should be paid in advance, and the mortgagor received LE. 580 less LP. 156.600 mils interest; in effect the mortgagor had in his pocket LP. 423.400. The learned trial Judge went on to hold that the capital sum which the mortgagor had borrowed was only LP. 423.400 mils and he calculated interest on this sum and arrived at a particular figure, and in the result made a declaration on this basis. The sole question for the decision of this Court is whether the parties were at liberty to agree at the time when the mortgage was granted that the mortgagor should at once pay off the interest for the three years. It is not suggested that the capital sum borrowed was not LE. 580; nor can it be suggested that the interest was excessive or usurious; neither is there any suggestion of fraud or bad faith or duress. There was evidence that the mortgagee in fact delivered the sum of LE. 580 to the mortgagor, and that thereafter the mortgagor handed back the amount of the interest for the three years at 9%, namely LP. 156.600. The parties were prepared to agree to this transaction and they must be held to their contract.

Dr. Eliash, who has argued the case for the Appellant with his customary vigour, has suggested that the mortgagor did not receive LE. 580 and that he went away from the Land Registry not with the LE. 580 in his pocket but with that sum less the amount of interest paid in advance. He posed the rather unusual case of a person, who has granted a mortgage for 10 years at 9% *per annum* interest, paying the mortgage interest for the whole ten years in advance, and he suggested that

if the mortgage is for LP. 100 the mortgagor receives by way of loan only LP. 10. The answer to this seems to be that if parties agree to such an unusual transaction, that is their own affair.

During the course of the argument I asked Dr. Eliash whether there was any difference between what had happened in the case before us and the case of a mortgagor receiving the full amount of the loan on one day and then coming back the following day and paying the interest for the three years in advance. So far as I can recollect, Dr. Eliash was unable to convince us that there was any difference. There was considerable argument with regard to the Usurious Loans Ordinance, and as to whether or not it was retroactive or retrospective. This matter seems to be concluded by authority, namely, Civil Appeal 49/40, P. L. R. Vol. 7, 199. In any event, once it was established that the transaction was not harsh or unconscionable, any reference to this Ordinance seems to be irrelevant. We accordingly think that the action of the Plaintiff in the case of El Haj Amin as Plaintiff, should have been dismissed.

With regard to Civil Appeal 438/44, we allow the appeal and set aside the judgment of the Court below and order that the Plaintiff's case be dismissed with costs here and below.

With regard to Civil Appeal 434/44, the Appellant is the same mortgagor, namely, Haj Amin El Taher, and his appeal is directed against that part of the judgment of the Court below dismissing his action as against the second Defendant, who was the wife of the Appellant in C. A. 438/44. The Court below dismissed the Plaintiff's action against the second Defendant on the ground that she was protected by section 2(4) of the Usurious Loans Ordinance.

While it is, perhaps, doubtful whether section 2(4) of the Usurious Loans Ordinance is really in point, no good reasons have been advanced for our setting aside the judgment of the Court below, and we accordingly dismiss the appeal, that is to say, C. A. 434/44. Dr. Eliash said that his client was afraid that at the end of the day it might appear that he had been compelled to pay in interest more than the amount of the capital which is of course forbidden by law. That is, however, a matter not for the Court but for consideration when accounts are being taken in the Execution Office.

With regard to the costs of both appeals, we grant one set of costs as against Haj Amin El Taher, to be taxed on the lower scale and to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 16th day of February, 1945.

British Puisne Judge.

HIGH COURT No. 118/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF:—

Zeev Poms & 4 ors. — PETITIONERS.

v.

1. District Commissioner, Lydda District,
2. Mordechai Gileady. — RESPONDENTS.

Requisition — Reg. 48 — C. A. 164/41; H. C. 79/42; H. C. 78/43; H. C. 119/43 — Belief of requisitioning Authority in a state of affairs existing at the time of the requisition — Discretion — Counter affidavits by Petitioner allowed by leave — Hailsham, Short & Mellor's Crown Office Practice.

Return to an order *nisi* issued to the first Respondent calling upon him to show cause why his order of requisition should not be set aside; order *nisi* discharged:—

The High Court refused to set aside a requisitioning order made within the discretion of the requisitioning authority, where the grounds stated in the return showed that he might have been misled as to the state of affairs he believed to exist at the time of the order. (*A. M. A.*)

REFERRED TO: C. A. 164/41 (8, P. L. R. 423; 1941, S. C. J. 390); H. C. 79/42 (9, P. L. R. 543; 1942, S. C. J. 548); H. C. 78/43 (10, P. L. R. 526; 1943, A. L. R. 631); H. C. 119/43 (11, P. L. R. 12; 1944, A. L. R. 85).

ANNOTATIONS:

1. The requisition order was made as a result of the judgment for eviction given against second Respondent in C. A. 396/43 (11, P. L. R. 389; 1944, A. L. R. 383).

2. See, in addition to the cases cited, H. C. 58/44 (11, P. L. R. 428; 1944, A. L. R. 522), H. C. 90/44 (11, P. L. R. 483; 1944, A. L. R. 525) and H. C. 78/44 (11, P. L. R. 471; 1944, A. L. R. 685). (*H. K.*)

FOR PETITIONERS: Eliash.

FOR RESPONDENTS: Solicitor General — (Griffin).

ORDER.

Edwards, J.: This is the return to an order *nisi* calling upon the first Respondent to show cause why an order requisitioning a certain flat of two rooms on the second floor of a particular building in Tel-Aviv, should not be set aside. It cannot be disputed that the flat is properly required by the District Commissioner in order to house the second Respondent, who is a medical officer of a mental hospital administered by the Government. The maintenance of a mental hospital is obviously a service essential to the life of the community.

The question of discretion in these matters has been considered in High Court 78/43, Vol. 10, P. L. R., page 526, and in High Court 119/43, Annotated Law Reports, 1944, page 86, and it is unnecessary to deal further with the legal aspect. This would be quite a straightforward case were it not for the fact that the first Respondent, in his affidavit in reply to the petition, has stated:—

> "My decision to select the flat at No. 10 Hebron Street aforesaid to be taken into possession under Defence Regulation 48 was influenced by the consideration that at the date of my decision the said flat had been vacated of its previous tenant, one Mr. Herman Blum, and was unoccupied as evidenced by the affidavit of Mr. Abraham Hayon annexed hereto and marked 'A'."

In reply to this statement the Petitioner was allowed to file additional affidavits, from which it would appear (although this is not admitted by the learned Solicitor General) that it is not accurate to say that the present Petitioner had vacated the flat. It seems that the present Petitioner, in order to recover possession of his own flat, had to pay LP. 425 as compensation to his previous tenant, who only left it on this condition. In other words, he would only give up his right as a statutory tenant on payment of this sum. It is said that at the time when the first Respondent's deputy or delegate visited the flat the present Petitioner was in process of moving into it.

Dr. Eliash, for the Petitioner, has argued that, if the District Commissioner had been in possession of the true facts, he might or would have acted differently, and that in requisitioning the flat as he did he took into consideration matters which, as it turns out, were incorrect. Dr. Eliash has referred to Hailsham, Vol. 9, page 768, paragraph 1301, and to Civil Appeal 164/41, Vol. 8, P. L. R., pages 423 and 425, and High Court 119/43, Vol. 11, P. L. R., page 12, and to High Court 79/42 Annotated Supreme Court Judgments, 1942, Vol. 2, page 548, and to Short and Mellor's Crown Office Practice, 2nd Edition, page 200. In my view, however, the fact that the District Commissioner has fairly and courteously given his reasons for choosing this particular flat to requisition instead of any other flat cannot enable this Court to interfere. It may be that it is now realised that the state of affairs which he believed to be in existence when he made the order of requisition, at any rate so far as the present Petitioner's position is concerned, was not the true state of affairs. This, however, seems to me to be immaterial. Suppose, for a moment, that the District Commissioner in his affidavit in reply had merely said, "I required this flat for a doctor who will be medical officer in charge of a mental hospital, and who will require to live near the hospital", could this Court have interfered?

I do not think so. Nor do I think that the mere fact that he added his reasons for choosing this particular flat in preference to others can make any difference. This Court has been informed that great hardship will be caused to the Petitioner and his family and female relatives if he has to leave the flat in question. This may be so, but it cannot enable us to interfere.

I would, however, point out that the first Respondent was apparently influenced by the statement of Mrs. Gileady, who in her affidavit swore that the flat had been offered to her by a Mr. Julius Stahl, a land and house agent, who demanded from her LP. 750 as "key money". Mr. Stahl, however, has sworn an affidavit to the effect that it was a Mr. Herman Blum who commissioned him to find a person interested in his flat at 10, Hebron Street, and Mr. Stahl has also sworn that he never received any instructions or commission in connection with this flat from any of the present Petitioners, or in fact from anyone other than Mr. Blum. I feel that, since the first Respondent must now realise that the true position was not known to him — and this is clear from the last sentences of paragraph 7 of his affidavit — he may feel disposed to re-consider his notice of requisition of 8th September, 1944.

In my view the order *nisi* must be discharged with LP. 10 costs (fixed or inclusive costs).

Delivered this 21st day of November, 1944.

British Puisne Judge.

Frumkin, J.: I agree.

Puisne Judge.

CIVIL APPEAL No. 140/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF :—

Haj Nimer Haj Naji Dandis. — APPELLANT.

v.

Abdel Salam Haj Naji Dandis. — RESPONDENT.

Partition by consent — Separate possession by each party for over 20 years without having partition registered — Plea of prescription.

Appeal from the judgment of the British Magistrate's Court, Hebron, sitting as a Land Court, dated the 1st day of April, 1944, in Land Case No. 227/43, dismissed:—

After many years of separate possession based on partition by consent party who refused to register cannot claim that partition is null and void because not registered nor that other party's action for non-interference with his share and registration of it is barred by prescription.

(*M. L.*)

FOLLOWED: C. A. 210/41 (8, P. L. R. 556; 1941, S. C. J. 537).

ANNOTATIONS:

1. See case followed and annotations.

2. On nature of such partition see also C. A. 138/44 (1944, A. L. R. 722) and annotations.

3. On plea of prescription in similar circumstances see C. A. 322/44 (*ante*, p. 71) and annotations.

(*A. G.*)

FOR APPELLANT: Eisenberg and Perlmutter.

FOR RESPONDENT: T. Cohen.

JUDGMENT.

This is an appeal from the judgment of the Magistrate's Court Hebron sitting as a Land Court, dated 1st April, 1944. By this judgment the Defendant here the Appellant, was ordered not to interfere with the Plaintiff's half of the land and registration of the said land in the name of the Respondent.

It appears from the record that Plaintiff and Defendant are brothers and that they owned jointly certain properties amongst which is the plot in dispute. Some 25 years ago a partition was entered into by consent between the parties by Deed of Partition which is produced exhibit (P. 1) and that both parties entered into possession of their respective shares and built houses thereon. This land is registered in the names of Plaintiff and Defendant and Defendant refused to go to the *Tabu* and have the registration altered.

The Appellant alleges that the Respondent's action is barred by prescription in accordance with Art. 1660 *Mejelle*. I must say here that this point does not seem to have been raised in the Court below and no ruling was made regarding it and further that by his refusal to register and subsequent acquiescence in the terms of the partition, even if Art. 1660 *Mejelle* applies, which I very much doubt, Defendant has, in any case, forfeited any rights he may have had, by his own conduct. The Appellant further alleges that the provisions regarding Partition as set out in the Provisional Law of Partition Art. 17, have not been complied with, the partition was by consent and should have been produced to the Land Registrar in accordance with Article 4 of the Law of Partition. The learned Judge and A/Chief Magistrate has found

in his judgment that there was a partition by consent in 1921 and a Deed drawn up between the parties. That since then both parties have been in possession of their respective shares from which and from the record it is clear that the Partition Deed "P. 1" was acted upon by the parties both of whom occupied their separate plots since 1921 and built houses thereon and that the Appellant failed to prove that this partition deed was cancelled. With these findings I agree but there is the further question raised by Appellant namely, that the provision of Art. 4 of the Partition Law were not complied with and that the partition is therefore null and void. There is a distinction to be drawn between Partition by consent, by judgment of a Court and I will add by the Land Settlement Officer. Although it appears from the Provisional Law of Partition Art. 17 and note (1) Art. 17 at pages 21 and 22 Tute and Art. 4 of the Ottoman Law of Partition, that in the case of partition by consent certain requirements must be complied with and registration in the *Tabu* effected but there is evidence in this case that the Appellant refused to register, is he to be allowed after over 20 years separate possession to come now and claim that the partition is null and void? I do not think he is, neither is he entitled to raise the objection that the Respondent's action is barred by prescription. In the words of Copland, J. in C. A. No. 210/41, P. L. R. Vol. 8, p. 558, "people who agree to a partition cannot come forward and say 'If this partition has not been registered it is void', just because they do not like it later on".

For these reasons the judgment of the A/Chief Magistrate is confirmed and the appeal dismissed with costs and LP. 10 for advocate's attendance fee.

Delivered this 30th day of November, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 409/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Hilweh Daoud El-Issa & an. — APPELLANTS.

v.

Ata Hussein El-Issa. — RESPONDENT.

Establishment of Courts Order, 1939, clause 3(3) — Jurisdiction of Magistrates' Courts — M. C. P. R., 23, C. A. 117/41, C. A. 200/43 — Transfer of action from one Court to another.

Appeal from the judgment of the Magistrate's Court of Ramleh, sitting as a Land Court, dated 7.10.44, in Land Case No. 760/44, allowed and case remitted:—

Magistrates in the same District may sit in one or another locality within that District. Their competence is co-extensive *ratione materiae* but not *ratione loci*. A case filed in the wrong Court should be transfered to the Court of a Magistrate with local jurisdiction.

(*A. M. A.*)

REFERRED TO: C. A. 117/41 (8, P. L. R. 293; 1941, S. C. J. 286; 10, Ct. L. R. 32).

FOLLOWED: C. A. 200/43 (10, P. L. R. 497; 1943, A. L. R. 664).

ANNOTATIONS:

1. *Cf.* C. A. 201/44 (11, P. L. R. 556; 1944, A. L. R. 682) and notes.

2. In addition to C. A. 117/41 (*supra*) see C. A. 156/40 (7, P. L. R. 434; 1940, S. C. J. 545; 8, Ct. L. R. 113) and C. A. 175/40 (7, P. L. R. 454; 1940, S. C. J. 305; 8, Ct. L. R. 114) on the meaning of "appropriate Court".

3. Land Courts should be careful "not to entertain suits affecting land outside their jurisdiction": C. A. 98/42 (1942, S. C. J. 655; 12, Ct. L. R. 118).

4. On the effect of contradictions between the Establishment of Courts Order and Rules of Court see also P. C. 21/40 (8, P. L. R. 181; 1941, S. C. J. 334) and note 3 in S. C. J.

(*H. K.*)

FOR APPELLANTS: Salameh.

FOR RESPONDENT: Elia.

JUDGMENT.

This is an appeal from the judgment dated 7.10.44 of the learned Magistrate, Ramleh, in Land Case No. 760/44, dismissing the Appellant's claim on the ground that he had no jurisdiction to deal with it.

It is admitted that the land is situated in the village of Rantia which is in the administrative sub-district of Jaffa. It has been submitted for the Appellant that the Magistrate had jurisdiction to deal with the case by virtue of clause 3(3) of the Establishment of Courts Order, 1939 (Volume 3, Laws of Palestine, page 1496) which reads as follows):—

> "Every Magistrate sitting in any Magistrate's Court shall have jurisdiction over the whole of the judicial district within which such Court is situated".

In our judgment this clause simply means that a Magistrate who is posted, say, to Jerusalem, can sit in any of the Magistrates' Courts within the area of the Judicial District of Jerusalem. He can sit, for

instance, in the Magistrates' Courts at Ramallah or Bethlehem. It does not mean that a case which ought to be filed at Ramallah can be filed in Jerusalem, or *vice versa*.

Clause 3(1) provides for the establishment of Magistrates' Courts in various sub-districts including the sub-district of Ramleh, and clause 4 provides that Magistrates' Courts shall be Land Courts for the areas served by them. The area served by the Magistrate's Court at Ramleh is quite clearly the sub-district of Ramleh only.

Section 3 of the Magistrates' Courts Procedure Rules, 1940, provides that actions in respect of immovable property shall be instituted before the appropriate Court of the place where the property is situated. The appropriate Court in the present instance is the Magistrate's (Land) Court, Jaffa, as the value of the land is within the jurisdiction of a Magistrate's (Land) Court, and the property is situated in the sub-district of Jaffa. In Civil Appeal No. 117/41 P. L. R. Vol. 8, p. 293 it was held that nothing in the Establishment of Courts Order could in any way conflict with the Magistrates' Courts Procedure Rules. The construction which we place on Clause 3(3), however, does not bring it into conflict with Rule 3 of the Magistrates' Courts Procedure Rules.

In Civil Appeal No. 200/43 (10 P. L. R. 497) it was held that in a judicial district there is only one Land Court, which can be constituted in different ways according to the value of the subject matter of the dispute. Following the decision in that case the position, as we see it, is this — there is what we may call a parent Land Court in Jaffa which has branches in the sub-districts of Jaffa and Ramleh. Those branches have a smaller pecuniary jurisdiction than the parent Court, and each of them has jurisdiction only within the boundaries of its own sub-district. In the present case the action was instituted in the Magistrate's (Land) Court of Ramleh when it ought to have been instituted in the Magistrate's (Land) Court of Jaffa, but as these two Land Courts are each of them branches of the parent Court we think that the Magistrate of Ramleh ought to have remitted the case to the Magistrate's (Land) Court of Jaffa instead of dismissing it.

We therefore allow the appeal and quash the order of dismissal dated 7.10.44, and remit the case to the Magistrate's (Land) Court of Jaffa.

As the Appellant was at fault for instituting the case in the wrong branch of the Land Court, he must pay the costs of this appeal which we fix in the sum of LP. 10 (ten pounds).

Judgment delivered this 15th day of February, 1945, in the absence of the parties, duly notified.

British Puisne Judge.

CRIMINAL APPEAL No. 140/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF :—

Yekutiel Berkovitz. APPLICANT.

v.

The Attorney General. RESPONDENT.

Sentence — Leave to appeal, when will be granted on sentence only — CR. A. 29/44.

Application for leave to appeal from the judgment of the District Court of Tel-Aviv, appellate capacity, allowed:—

Although reluctant to interfere with the sentence imposed by the Court of trial, leave to appeal was granted in this case where the sentence of LP. 70 fine imposed by the Magistrate had been increased by the District Court to LP. 1000.—.

(*A. M. A.*)

FOLLOWED: CR. A. 29/44 (1944, A. L. R. 203).

ANNOTATIONS: See note 1 to CR. A. 29/44 (*supra*) and *cf.* CR. A. 120/44 (11, P. L. R. 507; *ante*, p. 60) and note.

(*H. K.*)

FOR APPLICANT: Olshan.

FOR RESPONDENT: Malchi.

ORDER.

Normally I am most reluctant to grant leave to appeal on the question of sentence, but a precedent has been quoted to me, namely Criminal Appeal No. 29/44. Were it not for the substantial increase of sentence in this case from LP. 70 to LP. 1000, I would not have granted this application. Leave to appeal is granted solely on the point of sentence.

Delivered this 16th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 367/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF :—

Nuzha Bint el-Haj Suleiman Abu Khadra. APPELLANT.

v.

Haj Ibrahim Saleh el-Helou & 3 ors. RESPONDENTS.

Delivery of judgment — Presence of advocate's clerk — Courtesy extended by Bench to Bar — Whether appeal filed on time, C. P. R. 321.

Appeal from the judgment of the Land Court of Jaffa, dated the 23rd day of July, 1944, in Land Case No. 45/43, dismissed:—

The period of thirty days within which an appeal should be filed under r. 321 begins to run from the date of notification of judgment to a clerk sent for that purpose by the advocate of the party appealing.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 88/38 (1938, 1 S. C. J. 279; 3, Ct. L. R. 239) — *service on advocate's clerk,* and C. A. 22/41 (1941, S. C. J. 94; 9, Ct. L. R. 93) — *delivery in presence of Secretary of Municipal Corporation.*

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENTS: No. 1 — Hawari.

Nos. 2—4 — Absent — served.

JUDGMENT.

A preliminary point has been taken by the Respondent that this appeal is out of time. It is admitted that the appeal was not filed within thirty days from the date of the delivery of judgment in accordance with Rule 321 of the Civil Procedure Rules, 1938.

Mr. Elia contends that the date does not run from the date (23.7.44) upon which Judge Daoudi delivered judgment, because he argues that judgment was not delivered in the presence of the parties or their advocates, in accordance with the said Rule 321.

In regard to this the last sentence of the judgment reads:—

> "Judgment delivered on 23.7.44 in presence of the Plaintiff in person, and absence of the attorney for the Defendants, who did not appear but sent his clerk".

From this we infer that the Judge satisfied himself that the clerk was authorised to represent the attorney for the purpose of hearing judgment, and in accordance with the usual courtesy extended by the District Court Bench to a busy lawyer, who was probably engaged in another Court, he accepted that representation.

We are satisfied that the Rule was sufficiently complied with. It follows that the appeal is out of time and must be dismissed. We make no order as to costs.

Delivered this 30th day of January, 1945.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 17/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPLICATION OF :—

Chaim Cohen. APPLICANT.

v.

Rachel Ludmirer. RESPONDENT.

Order of monthly payments of LP. 5 as maintenance of illegitimate child — Question of appealability to Privy Council.

Application for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court sitting as a Court of Civil Appeal, dated 27.10.44 in Civil Appeal No. 122/44, refused:—

1. To satisfy requirements of Art. 3(a) Palestine (Appeal to Privy Council) Order in Council an indirect liability must be capable of being estimated with a degree of certitude when judgment appealed against is given, *e. g.* if judgment was for payment by instalments over a period of years, which would eventually reach a total of LP. 500 or upwards.

2. If a person is ordered to make comparatively small monthly payments towards maintenance of a child, contingency which might involve him in payments totalling LP. 500 or more — too remote to bring the matter within Art. 3(a) Palestine (Appeal to Privy Council) Order-in-Council.

(*M. L.*)

ANNOTATIONS: See P. C. L. A. 7/44 (11, P. L. R. 388; 1944, A. L. R. 548) and annotations thereto in A. L. R.

(*A. G.*)

FOR APPLICANT: Elkayam.

FOR RESPONDENT: Stein.

ORDER.

This is an application for leave to appeal to the Privy Council from a judgment of the Supreme Court, confirming a judgment of the District Court which awarded LP. 5 per month against the Petitioner, in respect of maintenance of his illegitimate child.

The only question that arises is whether there is an appeal as of right under the provisions of Article 3 of the Palestine (Appeal to the Privy Council) Order-in-Council. I am of opinion that no question of great or general importance or otherwise is involved and therefore there is no appeal under Article 3(b).

I turn now to consider whether there is an appeal as of right under

Article 3(a). It has been argued that under Jewish Law there is an obligation on the Petitioner to pay maintenance until the child reaches the age of sixteen years. The child was born in 1941, so that if she did in fact reach the age of sixteen years, the total amount paid under the maintenance order would amount indirectly to LP. 500 or upwards. Now in my opinion, in order to satisfy the requirements of Article 3(a) the indirect liability must be capable of being estimated with a degree of certitude when the judgment appealed against is given; for instance, if the judgment was for payment by instalments over a period of years, which would eventually reach a total sum of LP. 500 or upwards. It appears to me that the contingency which might eventually involve the Petitioner in payments of maintenance which would amount to LP. 500, is too remote to bring it within the ambit of Article 3(a) of the Order.

For these reasons I am of opinion that there is no appeal as of right, and the application must be refused.

Given this 29th day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 299/44.

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

BEFORE: FitzGerald, C. J. and Plunkett, A/J.

IN THE APPEAL OF:—

Joseph Hassoun. APPELLANT.

v.

Shimon Diskin. RESPONDENT.

Arbitration — Staying proceedings under sec. 5 — Construction of contract — Heavy burden laid on Plaintiff to prove that claim is not included in submission.

Appeal from the judgment of the District Court of Jerusalem, C. C. 49/44, allowed:—

When the Defendant applies for stay of proceedings under sec. 5, a heavy burden is laid on the Plaintiff if he seeks to avoid the arbitration: the Court always leans in favour of stay.

(*A. M. A.*)

ANNOTATIONS: On sec. 5 of the Arbitration Ordinance see Annotated Laws of Palestine, Vol. 2, pp. 89 *et seq.*

(*H. K.*)

FOR APPELLANT: Rand.

FOR RESPONDENT: Caspi.

JUDGMENT.

This is an appeal from the District Court, Jerusalem, which has made an order under section 5 of the Arbitration Ordinance, staying the proceedings pending the arbitration.

In accordance with the general practice, this Court will always lean towards referring proceedings to arbitration where the parties themselves have agreed to the arbitration and we are in an entire agreement with the District Court that a heavy burden is laid on the person seeking to avoid the arbitration; nevertheless, the Court must be careful to give effect to contractual relations entered into by the parties.

In a painstaking judgment the Judges of the District Court came to the conclusion that the sums of money which are in issue in this case were not excluded from the obligation to submit to arbitration. Now there is a contract between the parties, clause 17 of which contains the arbitration clause. It is not a general arbitration clause because it specifically excludes certain matters which are stated to be the payments under clauses 10 and 16 of the contract.

I agree with Mr. Caspi that clause 10 deals with a specified amount of money and it is possible that the money now in dispute does not come within the ambit of clause 10. But we must now turn to clause 16 of the contract. Having done so, we cannot avoid the conclusion that the amounts in dispute are covered by it. The clause refers to payments due under the contract. It will be noted that the clause is not limited to payments due under clause 10. Whatever else the argument may be about these sums of LP. 400 and LP. 138.413 there is no doubt that the debt, if it arises at all, arises out of the contract and consequently is covered by clause 16.

It follows that the appeal must be allowed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 27th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 382/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ismail Ibrahim Abu Harbid. APPELLANT.

v.

Ruqiyah bint Es-Sheikh Abdul Hamid. RESPONDENT.

Specific performance — Agreement for sale of land — Subsequent sale of part to other parties — Specific performance of musha part instead of area bargained — Court cannot alter contract — Point taken by Court of Appeal.

Appeal from the judgment of the Magistrate's Court of Gaza, sitting as a Land Court, dated 11.9.44, in Land Case No. 347/43, allowed:—

In an action for specific performance the Court cannot order transfer of part of the land agreed to be sold, in *musha*, even though the Defendant may have, since the date of the contract, divested himself of the remainder of the land.

(*A. M. A.*)

ANNOTATIONS: See Halsbury, Vol. 31, pp. 396—7, para. 459.

(*H. K.*)

FOR APPELLANT: Zein Ed-Din.

FOR RESPONDENT: Budeiri.

JUDGMENT.

This is an appeal from the judgment dated 11.9.44 of the learned Magistrate of Gaza, in Land Case No. 347/43, whereby he ordered the transfer to the Respondent's (original Plaintiff's) name, from the name of the Appellant (original Defendant), of one out of two shares in parcel No. 15 of Block 584 of the lands of Beit Hanoun.

The Respondent had asked for specific performance of two contracts dated 29.12.37 (Exh. A) and 23.4.41 (Exh. B). Those contracts referred to specific areas of land, in parcel No. 15, of which the boundaries were set out.

When the case was heard, it was found that sales had been effected of *musha'a* shares to other persons in 1942 and 1944 (that is to say after Exhibits A and B had been made), and that there only remained an area of 12 *dunums* 769 sq. metres, which is less than the aggregate area of the two plots referred to in Exhibits A and B. The Magistrate

proceeded to give judgment for the Respondent for this area, and he remarked that the Respondent could have recourse against the Appellant for the difference in price.

The first point raised by the Appellant is that the Magistrate gave a judgment for something other than the Respondent had claimed. It is clear from the facts stated above that the Magistrate had done so. Instead of ordering specific performance, by the transfer of two defined plots he has ordered the transfer of *musha'a* shares of a different aggregate area.

The Magistrate's decision may be substantially a just one, but in effect he has made a new contract between the parties. It is a fundamental rule of law that the Court cannot make a new contract between the parties; it can only enforce the contract which they have made themselves. A further point that occurs to us, although it was not taken by the Appellant, is that the *musha'a* shares which the Magistrate awarded to the Respondent may be of greater value than the specific plots referred to in the contracts.

We see no reason to differ from the findings of the Magistrate that the two contracts were agreements to sell and not sales, and that the price was paid, in each instance, but those findings do not affect the result.

We find that the appeal succeeds, and we quash the Magistrate's judgment. The Appellant must have his costs in the fixed sum of LP. 10 (ten pounds).

Delivered this 15th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 451/44.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Ahmad Abdul Salam El Jaouni & 2 ors. APPELLANTS.

v.

Kadouri David Bilbul & 2 ors. RESPONDENTS.

Parties to appeal — Parties suing in personal capacity and on behalf of estate — Estate should be joined on appeal, C. P. R. 313 *— Extension*

under r. 333, carelessness is not good cause, C. A. 203/42, C. A. 291/44 — Failure to comply with C. P. R 314(a).

Appeal from the judgment of the Land Court of Jaffa, dated 23.10.44 in Land Case No. 36/43, dismissed:—

1. When parties in the Court of trial are suing personally and in a representative capacity on behalf of an estate, the estate should be joined as a party to the appeal.

2. The name and address of an advocate are sufficient for compliance with para. (d) of rule 314, but not with para. (a) thereof.

3. Carelessness is not good cause for an extension of time under r. 333, but an extension may be granted thereunder for a trivial technical omission.

(*H. M. A.*)

FOLLOWED: C. A. 203/42 (10, P. L. R. 17; 1943, A. L. R. 259); C. A. 291/44 (11, P. L. R. 506; 1944, A. L. R. 794).

ANNOTATIONS:

1. On the second point *cf.* C. A. 339/43 (1944, A. L. R. 291) and C. A. 309/44 (*ante*, p. 3) wherein it was held that failure to set out the address of the respondent (not, as here, of the appellant) is not fatal.

2. See, on the third point, C. A. 291//44 (11, P. L. R. 506; 1944, A. L. R. 794) and note in A. L. R.

3. On trivial irregularities *vide* C. A. 301/44 (11, P. L. R. 610; 1944, A. L. R. 747).

(*H. K.*)

FOR APPELLANTS: Nos. 1 & 2 — Nakhleh.
No. 3 — Germanus.

FOR RESPONDENTS: Nos. 1 & 2 — Eliash.
No. 3 — Many.

JUDGMENT.

Mr. Eliash for Respondents Nos. 1 and 2 has raised three preliminary objections on which Mr. Many for Respondent No. 3 also relies. In the first place he submits that rule 313 of the Civil Procedure Rules has not been complied with, as in the lower Court the three present Appellants were also suing on behalf of the estate of Zuhra Abdul Salam Al Jaouni. That is to say, he submits that the estate of Zuhra was a Plaintiff in the Court below, but that it has not been cited either as Appellant or Respondent in this Court.

Mr. Nakhleh for Appellants Nos. 1 and 2 submits that the fact that the three present Appellants were described as acting on behalf of the estate of Zuhra did not constitute them a fourth party. With Mr. Nakhleh's contention I cannot agree. The estate of Zuhra was undoubtedly a Plaintiff in the Court below, and it ought to have been made an Appellant or Respondent in this Court.

The question then arises whether I ought to allow the statement of appeal to be amended under the provisions of rule 333. Has any good cause been shown? The only cause, so far as I can see, is that the person who drafted the statement of appeal was careless. All he had to do was to copy what had been written in the amended statement of claim in the lower Court.

In C. A. 203/42 (10 P. L. R. 17) the learned Judge, after observing that non-joinder of a party to the original action was fatal to the appeal, went on to say:—

> "It seems to me that the omission of this name is really due to forgetfulness and could, and should, easily have been checked by the person responsible for drafting the appeal, by merely comparing the original names ..... I am of opinion, therefore, that good cause has not been shown, and on that ground alone this appeal would have to be dismissed".

In C. A. 291/44 (11 P. L. R. 506) it was held that the negligence of an advocate (to pay a deposit) was not such good cause as would justify the granting of an application for extension of time.

These two cases clearly lay down the rule that forgetfulness and negligence do not constitute good cause, and I can see no sufficient ground for departing from the rule in the present instance.

In view of my finding on this point, it is not really necessary for me to deal with the other two objections, but I will say briefly that so far as the objection in regard to non-payment of fees is concerned, I am not satisfied that the proper fees have not been paid, so that objection fails.

As regards the objection that Rule 314 has not been complied with in that the addresses and occupations of the Appellants have not been given — I consider that the objection is good. I have been shown no authority for the proposition that it is sufficient for the purposes of Rule 314(a) to give the name and address of an advocate. I think that the address of the party should be given. The name and address of an advocate is, of course, sufficient for the purpose of Rule 314(d). I also consider that the occupation of the party should be given. Had these been the only omissions I would not, perhaps, have considered them sufficient to justify the dismissal of the appeal. I would have been inclined to allow them to be remedied under Rule 333.

In the result the appeal must be dismissed with costs on the lower scale to include LP. 5 (five pounds) advocate's fees for attendance at the hearing to each of the Respondents' advocates.

Delivered this 22nd day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 124/44.

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

BEFORE: Rose and Frumkin, JJ.

IN THE APPEAL OF:—

Aharon Spivak. APPELLANT.

v.

The Mayor, Councillors and Townsmen of Tel-Aviv (also known as Municipal Corporation Tel-Aviv). RESPONDENTS.

Landlord receiving rent in excess of standard rent — Assessment of rateable value according to the rent actually paid — Interpretation of sec. 104(3), Municipal Corporations Ordinance.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 10th day of March, 1944, in Civil Case No. 450/43, dismissed:—

Any voluntary payment in excess of standard rent can be taken into consideration in assessing rateable value of premises.

(*M. L.*)

FOLLOWED: Metropolitan Borough of Poplar *v.* Roberts (1922) 2 A. C. 93, 38 T. L. R. 499; 127 L. T. 99 English and Empire Digest Vol. 38, p. 520, para. 698.

ANNOTATIONS:

1. Leave to appeal was given to Appellant in C. A. 124/44 (1944, A. L. R. 199; 11, P. L. R. 153.

2. See case followed and annotations in the English and Empire Digest (*supra*).

(*A. G.*)

FOR APPELLANT: Goitein.

FOR RESPONDENTS: Eliash.

JUDGMENT.

Rose, J.: This is an appeal from a judgment of the District Court of Tel-Aviv.

Mr. Eliash, for the Respondents, raised a preliminary objection that no appeal lay. He relied upon section 111(4) of the Municipal Corporations Ordinance, 1934. Whatever the merits of his argument on this matter, however, I feel that I am bound by the judgment of Edwards, J., in this same file and relating to this very matter, during the hearing of which the precise arguments were adduced which have again been adduced before us. I am of opinion, therefore, that the preliminary objection fails.

The matter to be determined is the interpretation to be put upon

section 104(3) of the Municipal Corporations Ordinance, which provides that the rateable value of any building shall be the rent for which such building "might be expected to let from year to year", after making certain deductions. It appears that in the present case the landlord, the Appellant, received from his tenant a rent in excess of the standard rent. The Respondents took this factor into consideration in assessing the rateable value of his premises; and the Appellant now argues that they were wrong in so doing, having regard to the fact that, owing to the provisions of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, any amount paid by the tenant in excess of the standard rent may, within a period of six months, be recovered by him. Mr. Goitein, for the Appellant, argues that the reasonable interpretation of the words "the rent for which such building might be expected to let" must exclude any sums which are legally unenforceable from the tenant. There is much logic in this view-point. The majority of the Court of Appeal and one of the members of the House of Lords adopted that line of reasoning in the case of the Metropolitan Borough of Poplar *v.* Roberts, 1922, 2 A. C. 93. The fact remains, however, that the majority of the learned Law Lords took a different view, preferring the reasoning of Bankes, L. J., who delivered a minority judgment in the Court of Appeal. The material part of his judgment is as follows:—

> "It cannot, in my opinion, be asserted as a matter of law ... that the highest gross value which can be assigned to and placed upon the hereditament in question ... is the standard rent plus any statutory addition allowed by the Act ... The conclusion at which I have arrived upon the whole case is that although the Rent (Restrictions) Act 1920 may affect the rateable value of these premises, it does not fix the rateable value; and that any voluntary payment for the occupation of the premises in excess of the standard rent which a tenant might be excepted to make, can be taken into consideration in arriving at what the gross and rateable value of the premises should be."

Mr. Goitein suggested that the authority of the Poplar case should be limited to its particular facts. Having regard, however, to the treatment which this case has subsequently received in the text-books, I cannot accede to that argument. It seems to me that the reasoning adopted in the Poplar case is applicable, *mutatis mutandis*, to the present matter, and I feel bound to adopt it. Once one has accepted the principle that the Respondents are entitled to take into consideration any such voluntary payment, then I am of opinion that nothing has been urged in the present instance to show that they erred in arriving at their figure, it being borne in mind that each assessment is special

to the particular building concerned, and is primarily a matter for the Assessment Committee.

For these reasons I am of opinion that the appeal must be dismissed with costs on the lower scale to include the sum of LP. 25 for advocate's attendance fee.

Delivered this 16th day of December, 1944.

British Puisne Judge.

Frumkin, J.: Apart from the legal points involved in this appeal, on the merits this case seems to be one of choice between the easiest of two wrongs. On the one hand, where it is provided by statute that rent should not exceed a certain standard or maximum it does not sound fair for a municipal council, itself a creation of statute, to levy a rate on excess rent, thus recognizing the possibility of collecting rents higher than permissible by law, thereby encouraging the public so to do; on the other hand, facing facts as they are, if landlords do charge more than the ceiling rents, it would be in the nature of awarding them a premium by not collecting rates on such excess.

Weighing one wrong against the other, it seems to me that there is neither reason nor justification for disregarding excess rents for the purpose of assessment of rates. There is, of course, one factor of which assessing authorities must be on their guard, and that is, that in assessing what is the rent "for which the property might be expected to let from year to year" excess rent should not affect law abiding landlords who keep to the statutory scale. This difficulty could, however, be overcome by generally accepting the statutory rent as the expected rent which in many cases would coincide with the permissible rent. When, however, as in the present case, a landlord is letting for a higher rent, so far as he is concerned this fact in itself is to be regarded as the best evidence as to what was the rent for which he is expected to let.

I am not unaware that such a procedure would interfere with the uniformity of rates, but as a matter of fact such uniformity does not always exist. Indeed, the standard rent is fixed not according to locality or area but according to standards prevailing in previous years. Such standards may thus vary as regards different flats situated in one and the same building; and as a matter of fact, we are told that rates are assessed individually.

For these reasons, in addition to those given by my learned brother, I concur with the judgment which I have just delivered on his behalf.

Puisne Judge.

CIVIL APPEAL No. 384/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Muhlim Abdel Fattah Hamdan & an. APPELLANTS.

v.

Burhan el Din Taher el Husseini & 8 ors. RESPONDENTS.

Dispossession, Magistrates' Law Art. 24 — Eviction under M. C. J. O., sec. 3(c), C. A. 66/44 — Failure to mention correct provision of the law on which dispossession is claimed — Payment of rent, Mejelle, Art. 1453 — Unregistered lease, sec. 11 L. T. O.

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity, dated 19.7.44 in Civil Appeal No. 15/44, dismissed:—

The powers of a Magistrate's Court to order eviction under sec. 3(c) of the Magistrates' Courts Jurisdiction Ordinance are in addition to these given under Art. 24 of the Magistrates' Law.

(*A. M. A.*)

FOLLOWED: C. A. 66/44 (11, P. L. R. 310; 1944, A. L. R. 590).

ANNOTATIONS: See C. A. 66/44 (*supra*) and note 2 thereto in A. L. R.; *cf.* C. A. 128/44 (1944, A. L. R. 619) and C. A. 135/44 (*ante*, p. 82).

(*H. K.*)

FOR APPELLANTS: Yifrach.

FOR RESPONDENTS: Nos. 1 & 8 — Absent — served.
Nos. 2, 3, 4, 5, & 6 — Elia.
Nos. 7 & 9 — In person.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, in its appellate capacity, allowing an appeal from the Magistrate of Rehovoth, who had dismissed an action by the present Respondents for the eviction from certain land of the present Appellant.

It was common ground that the Appellant had been in possession of the land in dispute since 1936; but the contention of the Respondents was that they were in possession by virtue of an illegal document of lease granted by one of their brothers who was not only not a party to the action, but who was not a co-owner. The case proceeded in the Magistrate's Court on the footing that Article 24, Ottoman Magistrates'

Law, applied; and as the Magistrate found that the Plaintiffs had not proved the existence of those matters which they required to prove in accordance with a long series of decisions of this Court he dismissed the action.

The Respondents' advocate has argued before us that because the Plaintiffs' then advocate in the Magistrate's Court mentioned the words "Art. 24, Ottoman Magistrates' Law" their case seems to have been confined by the Magistrate to that branch of the law but that on appeal they should not be prevented from showing that the District Court came to a correct conclusion in view of what transpired in the Magistrate's Court. It cannot now be disputed that a Magistrate has power under Section 3(c), Magistrates' Courts Jurisdiction Ordinance, 1939, to order eviction in cases other than cases arising out of the circumstances mentioned in Art. 24. We refer to Civil Appeal No. 66/44, P. L. R. Vol. 11, pp. 310—313. We do not think that the mere mention of Art. 24, even if incorrectly mentioned, can prevent the Plaintiffs from recovering possession, if the District Court, having studied the record of the Magistrate's proceedings, were properly satisfied that the Defendants had no right to remain on this land. We would add that it appears that the so-called agreement of lease does not cover the land in dispute but was in respect of other land and that subsequently thereto the person who purported to grant the lease allowed the present Appellants to be on other land, namely, the land in dispute; but this of course, was without the permission of the Respondents. As the Appellants could rely neither on prescription nor on any valid lease, we think that the District Court came to a correct conclusion in setting aside the judgment of the Magistrate and ordering eviction.

Mr. Yifrach, for the Appellants, relied to some extent on a finding by the Magistrate that his clients had paid rent to the owner in the form of a proportion of the crop and he contends that Art. 1453 of the *Mejelle* helps his case. There is, however, no finding that the present Respondents Nos. 2—6, ever accepted rent in such a way as to enable the Court to find that they ever ratified the lease. In any event, a lease executed outside the Land Registry for an indefinite period is void under the Land Transfer Ordinance (see definition of "disposition" in Section 24 and Section 11).

For these reasons we dismiss the appeal with costs, namely, fixed (or inclusive) costs of LP. 10.

Delivered this 7th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 137/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Adel Bey el-Tourjman in his capacity as *Mutawalli* of the Sheikh Mohammad el Khalili *waqf*. APPELLANT.

v.

Amin Bader. RESPONDENT.

Certified copy of a Waqfieh — Chief clerk of Sharia Court called as witness to testify authenticity of certified copy — Evidential value of certified copy from public register.

Appeal from the judgment of the Land Court of Jerusalem, dated 11th day of March, 1944, in Land Case 43/43, allowed and case remitted:—

1. According to invariable practice of Palestine Courts a certified copy from archives of a Court — *prima facie* evidence; not necessary to call in addition Chief Clerk of such Court as witness.

2. Wherever trial Court has reason to fear a certified copy produced from a public register may be a forgery or that the original was tampered with or is in other ways defective, it may call for production of original register.

(*M. L.*)

REFERRED TO: C. A. 64/43 (1943, A. L. R. 507).

ANNOTATIONS :

1. As to following practice of Courts see C. A. 230/44 (11, P. L. R. 586, *post*, p. 211) and annotations.

2. As to point 2 see case followed and annotations.

3. The judgment of the District Court is reported in 1944, S. C. D. C. 175. For subsequent proceedings see *ibid.*, p. 374.

(*A. G.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Nazzal.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem dismissing an action brought by the present Appellant.

The ground on which the learned Relieving President dismissed the case was that there was insufficient proof of the existence of a *waqfieh*. It was conceded by the Court below that a register of the *Sharia* Court is a public register or a public document. The learned Relieving President seems to have felt that because there were no rules relating to

the archives of *Sharia* Courts similar to the Archives Rules 1935 or the Registrars Rules 1936, the English Common Law rule had to be resorted to. He accordingly held that there was nothing in evidence to show that the document was an examined copy. In this Court it has been said by Dr. Eliash, and we think rightly said, that the copy produced is a certified copy. The copy itself bears the words:—

> "A copy extracted from the guarded register existing at the time of Hassan Eff. the then *Qadi* in Jerusalem from page 333, Register 188 after due comparison."

Then appears the signature of the Chief Clerk of the *Sharia* Court and the stamp or seal of the *Sharia* Court of Jerusalem. For some reason the Plaintiff found it necessary to call, as a witness in the Court below the present Chief Clerk of the *Sharia* Court who was not the Chief Clerk in 1933 who had certified the true copy. It seems that the learned Relieving President was affected by the fact that the present Chief Clerk had himself not compared the copy of the original register. In our view it was unnecessary for the Plaintiff to call the present Chief Clerk. It would lead to a ridiculous result if, whenever anyone produced a certified copy with the seal of a Court, he had in addition to call the present Chief Clerk of such Court as a witness. It has been the invariable practice of these Courts to accept as *prima facie* evidence such certified copies. We, therefore, think that the Plaintiff produced sufficient *prima facie* evidence of the document and that the action should not have been dismissed at the very outset on this ground. We need scarcely say that, if a Court of trial has reason to fear that because of some evidence or because of some serious allegation made by the other side a certified copy produced may be a forgery or that the original register has been tampered with or is in other ways defective, it is always open for that Court to call for the original register and, we have no doubt, as happened in Civil Appeal No. 64/43 Annotated Law Reports (1943) Vol. 2, pages 507 and 509, that the authorities of the *Sharia* Court would allow the register to be sent to the Court of trial in proper custody.

The Respondent's advocate has argued that the learned Relieving President in any event felt that no sufficient evidence had been tendered to prove the category of the land. It is impossible, however, for a Court to deal with this matter unless and until the certified copy of the *wakfieh* is before it.

For the foregoing reasons the judgment of the Court below is set aside and the case remitted for completion.

We think that the Appellant is entitled to the costs of this appeal

which will be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Delivered this 3rd day of November, 1944.

British Puisne Judge.

CIVIL APPEALS Nos. 292 & 293/44.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

(*Civil Appeal No.* 292/44):—

Anis Shami & an. — APPELLANTS. (*Original Plaintiffs*).

v.

Vve. Bost et Fils & an. — RESPONDENTS. (*Original Defendants*).

Action for account — Claim by previous employee against firm — Application for order that a mortgage is discharged — Registrar's order for accounts, Registrars Ordinance, sec. 6(e)(10) *— Findings of fact based on auditor's report and testimony.*

Prescription on P/N — P/N given as guarantee — Effect of action by maker for an account.

Master and servant — Private servant must be "ready to work" — Cannot claim wages during illness — Mejelle, 425 *— Inapplicability of English decisisons — Baz & Ali Haider commentaries on the Mejelle.*

Security mortgage — Declaration of amount due thereon — Costs.

Appeal from the judgment of the District Court of Jaffa dated the 15th day of June, 1944, in Civil Case No. 53/41, partly allowed:—

1. An order for an account can properly be made in cases where there have been commercial dealings between the parties over a period of years.
2. An action for an account does not stop the period of prescription on a note made by the Plaintiff in favour of the Defendant.
3. An employee cannot claim wages for periods during which he was unable to work due to illness.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1944, S. C. D. C. 210.

2. On actions for an account see note 1 in S. C. J. to C. A. 236/37 (1938, 1 S. C. J. 29; 3, Ct. L. R. 29); *cf.*, as to jurisdiction, C. A. 48/42 (9, P. L. R. 346; 1942, S. C. J. 682; 12, Ct. L. R. 138).

See also C. P. R., rule 221 for the power of the Court to "direct any necessary ... accounts to be ... taken."

3. English law is inapplicable where there are express provisions in Ottoman law; C. A. 240/37 (5, P. L. R. 159; 1938, 1 S. C. J. 148; 3, Ct. L. R. 104), C. A. 126/38 (5, P. L. R. 369; 1938, 1 S. C. J. 428; 4, Ct. L. R. 34), C. A. 233/38 (5, P. L. R. 565; 1938, 2 S. C. J. 192 and note 2; 5, Ct. L. R. 4), C. A. 238/41 (9, P. L. R. 115; 1942, S. C. J. 134), H. C. 37/44 (11, P. L. R. 249; 1944, A. L. R. 293) and C. A. 13/44 (*ibid.*, pp. 252 & 350). See also note 3 in A. L. R., to P. C.1/42 (10, P. L. R. 271; 1943, A. L. R. 408).

(*H. K.*)

(*C. A.* 292/44):—

FOR APPELLANTS: Lange.

FOR RESPONDENTS: Cattan & Gorodissky.

JUDGMENT.

These are an appeal and a cross appeal against the judgment, dated 15.6.44, of the District Court of Jaffa in Civil Case No. 53/41. In that case the Plaintiffs were Anis Shami and Tewfiq Shami, and the Defendants were Vve. Bost et Fils and Antoine Boutros Bost. In order to avoid confusion, I shall use the terms Plaintiffs and Defendants.

In the action in the District Court the first Plaintiff (Anis Shami) asked for an order, against the first Defendant (Bost et Fils) for an account of all moneys due from first Defendant to first Plaintiff, and *vice versa*, and for an order for the payment by first Defendant to first Plaintiff of the amount found due. The Plaintiffs also asked for a declaration that all moneys due under a mortgage in the sum of LP. 600, registered under deed No. 5407 of 1933 in the Land Registry of Jaffa, upon five out of six shares in a property registered in volume 45, page 143, of the same Registry, had been paid, and for an order for the discharge of the said mortgage. The second Plaintiff appears in the case only because of his interest in the mortgaged property. The District Court found that a balance of LP. 33.518 mils was due to the first Plaintiff, and it gave judgment in his favour for that amount. The Court also held that the discharge of the mortgage was essentially not a part of the case, and it made no order in regard to it.

The first Plaintiff had been an employee of the firm of Bost et Fils for a period of about 34 years — from 1906 until October 1940 when he was dismissed. In the Statement of Claim the first Plaintiff described himself as a clerk and commercial manager of the first Defendant,

and Mr. Cattan for the Defendants has stated that the first Plaintiff was the firm's cashier from 1932.

The action was filed on 19.5.41, and on 30.6.41 the Registrar of the District Court, Jaffa, after perusing the claim and hearing two witnesses on behalf of the Plaintiffs, made an *ex-parte* order against the Defendants, directing them to furnish an account of all of their dealings and transactions with the first Plaintiff from 2.4.28 to 25.9.40.

On 14.11.41 both parties asked for an auditor to be appointed by the Court, and Messrs. Saba & Co. were appointed, and were directed to submit a report on the accounts in reference to the claim and defence as appearing in the books. On 24.6.43 nine issues were agreed. On 12.10.43, after the auditors had submitted their first report (Exhibit S/1), the Court directed them to submit another more clear and precise report. The auditors did this, and it is Exhibit S/2.

Witnesses were called on 1.3.44 and subsequently. Various points have been raised in these appeals, and I shall deal with these.

It has been submitted by Mr. Cattan, for the Defendants, that the Plaintiffs' action was misconceived, and that the Defendants were not liable to an action for an account. The Registrar's order was made by virtue of his powers under section 6(e)(10) of the Registrars Ordinance No. 62/36, but the report (Exhibit S/1) was made in compliance with the Court's order dated 14.11.41, and the second report (Exhibit S/2) was made in compliance with the order dated 12.10.43. It is clear that an account was necessary, and the books which had to be examined for the purpose were the firm's books and in their possession as the first Plaintiff was no longer in the firm's service. As there had been dealings between the parties (which may be described as mutual dealings) over a period of years, and involving deductions from the first Plaintiff's wages, I consider that the order for an account was one which could, in the circumstances, be made against the Defendants, and that the action was therefore not misconceived.

The second submission for the Defendants is that the Court below erred in not holding the first Plaintiff liable for the balance of LP. 2,292–533 appearing in the firm's books. The General Cash Books of the firm had been written up by various persons, and it was not till 1.3.32 that an entry appeared in the handwriting of the first Plaintiff showing a cash balance of LP. 1,978–914 with the words "Solde Caisse Anis". Mr. Cattan has submitted that the District Court did not itself decide, but adopted the decision of the auditors, that the liability of the first Plaintiff for the sum of LP. 2,292–533 had not been established. It appears to me, however, that the learned Judges did

apply their minds to the point, and did form their own judgment. They did not only have before them the report of Messrs. Saba & Co. They heard such evidence as the parties wished to call, including the evidence of an accountant auditor (Mr. Abraham Harari) who had been called by the Defendants, and who expressed an opinion contrary to that of Messrs. Saba & Co. In the circumstances I cannot upset the finding of fact of the lower Court that the liability of the first Plaintiff has not been established in respect of this item.

The next point raised by Mr. Cattan is that the Court below erred in crediting the first Plaintiff with deductions effected from his salary prior to 5th September, 1933, when the mortgage was created, but in my judgment these credits were properly made.

Mr. Cattan further submits that the Court below erred in holding that the promissory note for LE. 400 (LP. 410) which was made on 25.8.27 and fell due on 25.8.28, was barred by prescription. In my judgment the period of prescription applying to this promissory note was 15 years. But the second Defendant stated in Court that this promissory note resulted from an account, and it appears to be most probable that it was only given as security and that it was taken into consideration when the mortgage was made. If this were not so, I think that the firm would have taken action on it long ago. Further, I do not consider that the filing of the action by the first Plaintiff stopped time from running against the promissory note. If the firm had filed an action on the promissory note before the expiry of 15 years, that would have been a different matter, but they did not do so. Consequently I find that at the date of judgment (15.6.44) this promissory note was prescribed.

Mr. Cattan further submits that the Court below erred in allowing the first Plaintiff LP. 192.500 as salary for a period of 11 months when he did not attend his work owing to sickness. The case for the first Plaintiff was that he had been shot while working in the firm's office in December, 1938, during the disturbances, because the firm had refused to give money to the rebels. The Defendants do not object to paying the first Plaintiff's salary for the month of December, but they submit that he has no legal claim to any further salary during his absence. They do not accept the first Plaintiff's explanation of the shooting, and there is no evidence to support that explanation.

In arriving at its decision in regard to this item, the lower Court relied on English cases. I find that the Court erred in so doing. Matters in respect of which there is specific provision in the *Mejelle* must be decided according to the *Mejelle* and not according to English

Common Law. The first Plaintiff was a private employee and Article 425 of the *Mejelle* is applicable to his claim. Under that article wages are due if the employee is ready to work during the period for which his services were hired. My reading of the phrase "ready to work" is that it means that the employee is "able to work". The first Plaintiff was clearly not able to work while he was ill. He did not present himself for work during that time. The Commentaries of Baz (see third edition, page 239), and Ali Haider (see page 387) both support the view that the employee is not entitled to wages when he is unable to work owing to illness.

The first submission of Dr. Lange, for the Plaintiffs, is that the District Court erred in not dealing with the question of the discharge of the mortgage. Mr. Cattan has agreed that if there were really a balance due in the favour of the first Plaintiff he would be entitled to a declaration that the mortgage debt had been paid. The Court below ought to have given such a declaration, in view of its finding, and it should have further declared that the first Plaintiff was entitled to have the mortgage discharged.

With regard to Dr. Lange's submission that the first Plaintiff was entitled to allocate payments to the discharge of the mortgage debt, I find that the mortgage was a general security, and that the Defendants were entitled to hold it until all of the debts in respect of which it had been given had been fully discharged.

With regard to the eighth ground of the Plaintiffs' appeal, I find that the District Court rightly credited the Defendants with the sum of LP. 478.064, because the first Plaintiff had admitted owing this amount, and it had not been mentioned separately in the Defendant's accounts only because it was believed to be included in the balance of LP. 2,292.533.

I find that the District Court's decision was correct in connection with the points raised in the ninth, tenth and eleventh grounds of the Plaintiff's appeal.

As regards the rate of salary of the first Plaintiff, although the District Court did not state in so many words that his salary was LP. 17.500 *per mensem*, it did, by implication, so decide, and I am unable to interfere with that finding of fact.

The net result of my findings is that there is a balance of LP. 141.482 in the favour of the Defendants. There must be judgment against the first Plaintiff for that sum. When the first Plaintiff has paid this balance, together with such costs (if any) as he may be ordered to pay, he will be entitled to have the mortgage discharged. Before making

any order regarding costs, I would like to hear the submissions of Mr. Cattan and Dr. Lange.

Delivered this 21st day of February, 1945.

British Puisne Judge.

Mr. Wittkowski for Anis & Tewfic Shami.

Mr. Cattan for both Respondents.

Mr. Witkowski: Substantially Shami was successful.

Mr. Cattan: All that Shami has been successful in was engaging both Courts in accounts. Net result is that Shami is indebted to Respondents. His action was not justified. All costs should be borne by him. He is the loser. Unless we get our costs we will lose our credit balance.

ORDER.

Anis Shami must pay half of the Respondents' costs in both Courts. The costs in this Court to be on the lower scale and to include LP. 10 advocate's attendance fee.

Given this 21st day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 152/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ayisha Mustafa Khalil Hadida & an. APPELLANTS.

v.

Ayisha Ibrahim Khalil Hadida & 11 ors. RESPONDENTS.

Telegraphic application of advocate, followed by a medical certificate to adjourn — L. S. O. refusing application on holding that neither party asked for adjournment on account of illness — Court of Appeal remitting case to L. S. O.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated the 21st day of January, 1944, in Case No. 3/Khirbet el Hiqab, allowed and remitted for rehearing:—

While Court of Appeal does not normally interfere with trial Court's discretion in connection with adjournments, they will remit on finding that the circumstances of the case were such as justify adjournment.

(*M. L.*)

ANNOTATIONS: See C. A. 59/44 (11, P. L. R. 347; 1944, A. L. R. p. 595) and annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANTS: Cattan, Zu'bi & Shamma.
FOR RESPONDENTS: Nos. 1—6 — Shuqeiri.
Nos. 7—11 — Absent — served.
No. 12 — In person.

JUDGMENT.

The Appellants were two of the parties who now say that they are adversely affected by the decision of the Land Settlement Officer, Safad Settlement Area, given on the 21st January, 1944.

When the matter was before the Land Settlement Officer it seems that that officer had received a telegraphic application for an adjournment on the ground of the illness of the advocate whom the first Appellants had briefed to appear for them. The Land Settlement Officer admits that a medical certificate had actually arrived after the case had opened and during the hearing of the case. It is not suggested that the medical certificate was false. The Land Settlement Officer, in his order refusing leave to appeal to this Court, seems to rely on the fact that neither of the parties asked for an adjournment on account of illness. We think, however, that it was implicit from the telegram received by him and from the very fact that the medical certificate was sent to him, that an adjournment was being desired, and there is nothing to show that the advocate was acting without authority.

As we have said, the Land Settlement Officer refused to grant an adjournment, and the sole ground of appeal here is that the Appellants were unable to produce their documents, which were in their advocate's office in Haifa, and it is of course also complained that they were deprived of the services of an advocate, who could have placed their case before the Land Settlement Officer.

While this Court does not normally interfere with the discretion of a Land Settlement Officer with regard to adjournments, we think that in the peculiar circumstances of this case the Land Settlement Officer should have granted an adjournment. The interests of the other side could have been safeguarded by awarding them the costs of the day, in any event.

We accordingly set aside the decision appealed from, and we remit the matter to the Land Settlement Officer for a rehearing. Costs of this appeal will abide the event, but, in order to facilitate the final arrangements, we certify an advocate's attendance fee for today's hearing of LP. 10 to the ultimately successful party.

Delivered this 11th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 230/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Dr. Adalbert Farkas & an. — APPELLANTS.

v.

Dr. Oscar Spiegler & an. — RESPONDENTS.

Magistrate ordering successful Defendant in an action for eviction to pay costs and advocate's fees — Question of appealability or otherwise of simple order to pay costs.

Appeal from the judgment of the District Court, Jerusalem, sitting in its appellate capacity, dated the 19th May, 1944, in Civil Appeal No. 8/44, dismissed:—

1. a) Costs are not the subject matter of an action, within meaning of sec. 11(6), Magistrates' Jurisdiction Ordinance.
b) There is no reason to depart from many years' practice of Court of Appeal (which is in line with the practice in England) to regard costs for purpose of jurisdiction in appeals as merely accessories.
2. No appeal against simple order to pay costs, whatever the amount.

(*M. L.*)

FOLLOWED: C. A. 358/43 (11, P. L. R. 212; 1944, A. L. R. 389) Onslow *v.* Commissioners of Inland Revenue (163 L. T. R. 513).

ANNOTATIONS:

1. See cases followed and annotations in A. L. R.
2. On desirability of following a long established practice see CR. A. 119/43 (1943, A. L. R. 732) and H. C. 42/42 (11, Ct. L. R. 181; 1942, S. C. J. 310) with annotations.
3. On other instances of applying English Practice see C. A. 428/44 (*ante*, p. 55) and annotations.

(*A. G.*)

FOR APPELLANTS: Weyl.

FOR RESPONDENTS: Frank.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem, in its appellate capacity, dismissing an appeal from an order of one of the Magistrates of Jerusalem, requiring the successful Defendants in an action for eviction to pay the costs of the unsuccessful Plaintiffs.

The order of the Magistrate was that the Defendants jointly and

severally pay to the Plaintiffs the costs of the case including LP. 15 advocate's fees (additional).

The learned President of the District Court held that the order was not a judgment at all, and that therefore no appeal lay under any of the provisions of Section 11, Magistrates' Courts Jurisdiction Ordinance, 1939.

Dr. Weyl, for the Appellants, has argued that it is not disputed that the amount of costs incurred by the Plaintiffs to the action including LP. 15 advocate's fees, and a sum of money as costs ordered by the Magistrate during the pendency of the action to be paid by the present Appellants in any event, amounted to over LP. 20, and that in consequence his clients have an appeal as of right under Section 11(6); nor is it disputed that no leave to appeal was obtained under Section 11(8). In the alternative Mr. Weyl argues that Section 11(5) applies because the matter comes within Section 3(c) of the Ordinance. He argues that his clients had been ordered to pay his costs and he points to the definition of "judgment", "judgment debtor", "decree" and "decree holder" in Rule 2 of the Magistrates' Courts Procedure Rules, 1940. He says that in England the reason why there is no appeal against costs alone is because of the statutory provisions of the Judicature Act, 1925 (see Annual Practice (1943) p. 1423).

Dr. Frank, for the Respondents, has referred to Hailsham, Vol. 11, p. 230, para. 446, and to Civil Appeal No. 358/43, Vol. 11, P. L. R. p. 212 and to the case of Onslow *v.* Commissioners of Inland Revenue, Vol. 163, L. T. R. p. 513. Dr. Frank contends that costs are not the subject-matter of an action within the meaning of Section 11(6). We think that this is clearly so. He also says that the costs ordered by the Magistrate cannot be the amount for which judgment is given within the meaning of Section 11(6) inasmuch as no judgment was given at all in favour either of the Plaintiffs or Defendants. We think that this argument is also sound. While there is certainly something to be said for the argument of Dr. Weyl that his clients have been ordered to pay money and that that order is capable of execution, nevertheless we think that it has been for many years now the practice of this Court to regard costs for the purposes of jurisdiction in appeals, as merely accessories, and we see no reason for departing from that practice now. We also think that the same principle must apply in considering whether there can be an appeal against a simple order to pay costs. While we realise that the matter in England is regulated by statute, and while the matter cannot be said to be altogether free from doubt, we think that the practice over a long period of years and the balance of con-

venience and the interests of justice all require that we should fall in line with the practice in England.

For these reasons we think that the learned President came to a correct conclusion when he held that the order was not a judgment against which an appeal lies. The appeal is accordingly dismissed with costs, namely, one set of fixed (or inclusive) costs of LP. 10.

Delivered this 29th day of November, 1944.

British Puisne Judge.

HIGH COURT No.102/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

The Mayor, the Councillors and the townsmen of the Municipal Area of Tel-Aviv, (Municipal Corporation of Tel-Aviv). PETITIONERS.

v.

1. The Chief Execution Officer, Magistrate's Court, Tel-Aviv,
2. The Magistrate, Tel-Aviv,
3. The Registrar of Lands, Tel-Aviv

& 3 ors. RESPONDENTS.

Action for partition of land — Magistrate ordering sale according to Execution Law — Letters "C. E. O." instead of "Magistrate" below Magistrate's name — Belated application to High Court to set aside or to stay execution proceedings.

Return to an order *nisi* issued on the 4th of August, 1944, directed to the Respondents calling upon them to show cause why the first Respondent's order, dated 14.4.43, and all other proceedings in Execution File No. 1863/43, Tel-Aviv, should not be set aside or stayed, and why the second Respondent's decision, dated 11.7.44, in the said Execution File should not be set aside or revoked, and why the third Respondent should not refrain from complying with the decision of second Respondent, dated 11.7.44, and refrain from registering Parcel 28 in Block 6960 in the name of the fourth Respondent, discharged:—

1. a) In partition proceedings all acts must be performed by Magistrate himself.

b) Actual sale at very end of partition proceedings must be conducted in Execution Office.

2. High Court will not exercise its discretionary jurisdiction when there has been undue delay in applying.

(*M. L.*)

FOLLOWED: H. C. 51/43 (1943, A. L. R. 525); H. C. 17//43 (1943, A. L. R. 190).

ANNOTATIONS:

1. As to point 1 see C. A. 140/44 (*ante*, p. 183) and annotations.

2. On laches in applying to H. C. see H. C. 121/44 (1944, A. L. R. 771) with annotations.

(*A. G.*)

FOR PETITIONERS: Katzenelsohn and Olshansky.

FOR RESPONDENTS: Nos. 1—3 — Absent — served.
Nos. 4—5 — Hutory.
No. 6 — A. Levin.

ORDER.

This is the return to an order *nisi* calling upon the first Respondent to show cause why an order made by the second Respondent on the 11th July, 1944, directing that certain property be transferred in the Land Registry in the name of the fourth Respondent, should not be set aside.

Many matters were argued before me, but, in my view, the matter can be decided on one short point. On the 21st April, 1941, Mr. Kantrovitch, Magistrate, Tel-Aviv, gave judgment in an action under the Ottoman Law of Partition of Joint Immovable Property, ordering a certain plot of land to be sold by public auction to the highest bidder. In that action the present fifth Respondent was the Plaintiff, while the present Petitioners and the present sixth Respondent were the Defendants. It will be noted, therefore, that the present Petitioners took an active part in the partition action and were apparently satisfied with the judgment of the Magistrate.

It has been laid down by this Court that in partition proceedings all the acts must be those of the Magistrate himself, (see High Court No. 51/43). In the present case it seems that all the acts leading up to the sale were, in fact, performed by the same Magistrate, Mr. Kantrovitch. Trouble, however, has arisen by reason of the fact that on the 14th April, 1943, this same Magistrate, Mr. Kantrovitch, made an order in the following terms:—

"Sale according to law of execution: and publication in newspapers."

He then signed his name, and below his name appeared the letters "C. E. O.", *i. e.* Chief Execution Officer.

The Petitioner's advocate has frankly admitted that this order of 14th April is the crucial order. Were it not for the unfortunate fact that the words "Chief Execution Officer", instead of "Magistrate" appeared, I do not think that the present Petitioner could have argued the case at all, because I am satisfied that all the acts of Mr. Kantrovitch were performed by him in his capacity as Magistrate. In view of the judgment in High Court No. 51/43, there can be no question but that the actual sale at the very end must be conducted in the Execution Office. It is, for example, absurd to except the Magistrate himself to conduct the actual bidding.

The Petitioner's advocate has contended that an aggrieved party to a partition action cannot appeal to the District Court from the Magistrate's judgment until the Magistrate has completed the last magisterial act in the partition proceedings. This may be so, but the complaint of Petitioners is directed against this order of the 14th April, 1943, which was, on the face of it, made by the Chief Execution Officer. In my view, the Petitioners should, on getting to know of the order of 14th April, 1943, have at once come to this Court and complained that the Chief Execution Officer had purported to make an order which should have been made by the Magistrate in the Magistrate's Court. No good reason has been adduced why the Petitioners have waited for sixteen months (the present petition is dated 4th August, 1944). In this connection I follow the judgment in High Court No. 17/43, Annotated Law Reports (1943) page 190 at page 191, namely:—

> "This Court will not exercise its discretionary jurisdiction when there has been undue delay in applying."

It is unnecessary for me to deal with the other matters argued before me, although I think that there is much to be said in favour of some of the arguments of Mr. Hutory for Respondents Nos. 4 and 5 and Mr. Levin for Respondent No. 6.

The order *nisi* is discharged. The Petitioners must pay one set of costs to Respondents Nos. 4 and 5, which I assess at LP. 10 fixed (or inclusive) costs, and one set of costs to Respondent No. 6, which I assess at LP. 10 fixed (or inclusive) costs.

Delivered this 8th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 369/44.

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

BEFORE: Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Abdul Hadi Abdul Ghani Sarrawi. APPELLANT.

v.

Haj Sulaiman Al Kukhun & 2 ors. RESPONDENTS.

Case transferred by order of District Court from one Magistrate to another — Other Magistrate continuing to hear the case — Fruitless complaint on appeal of having had no opportunity to further cross-examine some of the witnesses.

Appeal from the judgment of the Magistrate's Court, Nablus, sitting as a Land Court, dated the 14th day of August, 1944, in Land Case No. 17/42, dismissed:—

Where a partly heard case was transferred to another Magistrate and it is quite clear from his judgment that he did not believe Appellant's witnesses, Appellant's complaint that Magistrate ought to try the case *de novo* and that Appellant had no opportunity further to cross-examine some of the witnesses — of no avail.

(*M. L.*)

ANNOTATIONS: On re-hearing of partly heard case see: C. A. 16/44 (11, P. L. R. 262; 1944, A. L. R. 401) and annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Hamoudeh.

FOR RESPONDENTS: Zu'eitar.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Nablus, sitting as a Land Court. For the Appellant it is argued that after the evidence for the Plaintiff has been heard a petition was submitted to the President of the District Court to have the case transferred to another Magistrate, that the District Court granted the application but that when the case came up for hearing before another Magistrate, this Magistrate decided not to hear the case *de novo* but to continue the hearing of the case, that the Appellant's case is prejudiced as he wished to further cross-examine some of the witnesses. That there is nothing in Exh. 6(b) to show that Appellant was in any way connected with it and that he did not admit being present and there was no proof that the thumbprint was his. That taking this with the

evidence of Yousef Sarawi the conclusion must be that Yousef Sarawi was in possession of one half only and the Appellant in possession of the other half and that there is no evidence to support the Magistrate's finding.

We do not consider that it is necessary to call upon the Respondent to reply. It is quite clear from the Magistrate's judgment that he did not believe the evidence of the Appellant's witnesses which he was quite entitled to do and we find no grounds in the argument advanced by the Appellant to warrant our interfering with the decision come to by the learned Magistrate.

The appeal is dismissed and the judgment of the Magistrate's Court confirmed with costs and inclusive advocate's fee of LP. 10.

Delivered this 19th day of December, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 335/44.

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

BEFORE: Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Mariam bint Muhammad Hassan Abu Khadra. APPELLANT.

v.

Muhammad Mansour el Alleh & an. RESPONDENTS.

Claim for return of purchase money plus difference between purchase price and value as assessed — Court awarding as damages sum provided for in contract of sale — Court of Appeal holding sum a penalty and not liquidated damages.

Appeal from the judgment of the District Court, Jaffa, dated the 30th day of July, 1944, in Civil Case No. 112/43, allowed:—

Where Court of Appeal finds that sum mentioned in contract of sale is a penalty and not liquidated damages, it will upset trial Court's judgment awarding that sum as damages and will remit case to ascertain exact amount of damages actually suffered.

(*M. L.*)

ANNOTATIONS: On the distinction between a penalty and liquidated damages see C. A. 204/43 (1943, A. L. R. 739) and note 3 thereto.

(*A. G.*)

FOR APPELLANT: Elia.

FOR RESPONDENTS: Daoudi.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa delivered in the 30th July, 1944, in Civil Case No. 112/43 ordering the Defendant to pay the Plaintiffs' money advanced in the sum of LP. 187 and the damages agreed upon that is LP. 150 with costs and LP. 5 advocate's fees. The Appellant alleged in that case that the Respondents did not claim liquidated damages, they sued for a penalty due to bad faith and fraud of the Appellant and that they claimed the difference between the purchase price and the price of the land as valued by the Respondents' valuer, namely the difference between LP. 4 and LP. 10. That paragraph 6 of the agreement is a penalty clause, a fixed penalty clause and not an estimated difference of value. It is payable in respect of a breach of any clause over and above his other losses and costs. The Respondents had failed in their cause of action and should have been dismissed. They did not claim any alternative claim and fall back upon Clause 6 of the agreement. In any case this clause is obviously a penalty clause. The Respondents, however, argue that the contract was made on 1.6.42 and they paid the full value for the land and went into possession and that a notarial notice was sent on 16.3.43 warning them that there was a danger of prior purchase and that Appellant therefore did not wish to proceed with the registration and further that by the Notarial Notice P. 4 of 30.3.43 that the contract was invalid under the Land Transfer Ordinance and also that the land was under settlement. They refer also to the evidence of the Appellant and that it is sufficient in law that the land was wanted by him and clearly the Court below believed that the Appellant acted in bad faith. Whatever might have been in the minds of the District Court the judgment is clearly for LP. 150 as inclusive damages. We agree with the argument of the Appellant that the Respondents in their statement of claim claimed only the difference between the purchase price of LP. 4 and LP. 10 the price arrived at by their valuer and other costs and expenses and that their claim has been based on the Appellant's fraud and deceit in accordance with Article 110 of the Civil Code of Procedure. The Court below found that there was no fraud or deceit but awarded LP. 150 damages this would appear to have been based on paragraph 6 of the agreement. We are satisfied that the LP. 150 mentioned in paragraph 6 is in addition to all other costs and expenses and is clearly a penalty therefore the Respondents should have proved what damages they actually suffered. For the above reasons the appeal is allowed, the District Court's judgment is set aside and the case is returned to the Court below to ascertain the exact amount

of damages suffered and to give judgment accordingly. Costs on the lower scale in this Court and LP. 10 advocate's attendance fee for the Appellant.

Delivered this 18th day of December, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 1/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Sheikh Muhammad Salah. APPELLANT.

v.

Sheikh Adel Salah & an. RESPONDENTS.

Certification of copy of decree — Copy for one of the Respondents not certified by Registrar or Chief Clerk, C. P. R. 326 — Service upon advocate of more than one respondent, C. P. R. 328 — Application for extension, C. P. R. 333 — Attitude of Supreme Court to preliminary objections.

Appeal from the judgment of the District Court of Nablus, dated 25.9.44, in Civil Appeal No. 27/44, allowed and case remitted:—

Appeal dismissed by the District Court for failure to comply with a minor requirement of C. P. R. 326, remitted for trial.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* C. A. 435/44 (*ante*, p. 117).

2. Note that preliminary objections of this nature have been practically abolished by the re-enactment of rule 333 of the C. P. R.: See rule 18 of the C. P. (Am.) Rules, 1945, P. G. 1406 of 3.5.45, Spl. 2, p. 496.

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENTS: Nakhleh.

JUDGMENT.

This is an appeal from the judgment dated 25.9.44 of the learned President of the District Court of Nablus dismissing an appeal from the Magistrate's Court Nablus on the ground that the copy of the decree served upon one of the Respondents was not certified either by the Registrar or Chief Clerk as required by Rule 326 of the Civil Procedure Rules.

The facts are that the fees had been paid on that copy, and it had been certified as "compared" by one of the clerks in the office of the Court, but owing to some oversight this copy was not certified when the other two were so certified. It is not suggested that it is not, in fact, a true copy.

There was some argument on the point whether service of a single copy upon an advocate who had represented, and is still representing, more than one Respondent, is sufficient for the purposes of Rule 328, but as in the present case the service was upon the Respondents personally we need not deal with that point.

The learned Judge found that no good cause had been shown which would support his making an order under Rule 333. This is another of those cases in which we feel that the objection is so completely technical and lacking in merit that it would be unjust to allow an appeal to be dismissed on the strength of it. We would like to see a more co-operative spirit among the members of the Bar in these matters. We think that advocates ought to agree among themselves not to raise objections which completely lack any merit and which the interests of justice do not at all call for. It is, indeed, much more in the interests of justice that Courts of law should not be asked to spend their time dealing with such utterly trivial matters, but that they should be able to devote their time to dealing with cases on the merits.

The appeal will be allowed with fixed costs in the amount of LP. 10 (ten pounds), and the case will be remitted for trial on the merits.

Delivered this 15th day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 221/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Abdul Rahman Qasem Agha El-Hindi & 5 ors. APPELLANTS.

v.

The Jewish Colonization Association. RESPONDENTS.

Appeal from Land Settlement Officer — One Appellant claiming to represent other Appellants, who failed to appear, but producing no power

of attorney — Failure to cite as Respondents all original parties in Land Settlement proceedings.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated the 31st day of March, 1944, in Case No. 7/Mishmar Hayarden, dismissed:—

1. While Court of Appeal will recognise and tolerate a certain looseness of procedure in Land Settlement proceedings, where in an appeal from a Settlement Officer some of Appellants failed to appear and one who appeared purports to represent the others but holds no proper power of attorney, absents' appeal cannot be entertained.

2. If Appellant from Land Settlement Officer has not cited as Respondents all parties to settlement proceedings, appeal will be dismissed.

(*M. L.*)

FOLLOWED: C. A. 8/4/4 (11, P. L. R. 487; 1944, A. L. R. 568); C. A. 89/40 (7, P. L. R. 258; 8, Ct. L. R. 150; 1940, S. C. J. 152).

ANNOTATIONS: See cases referred to and annotations thereto.

(*A. G.*)

FOR APPELLANTS: No. 3 — In person.
No. 4 — In person and on behalf of all Appellants.

FOR RESPONDENTS: Wittkowski.

JUDGMENT.

In this case a preliminary point has been raised that there is no proper appeal before this Court in that the fourth Appellant was the only person who has appeared. He has appeared in person, but he has produced no proper authority to enable him to appear before this Court on behalf of the other Appellants whom he seeks to represent. We need only refer to Civil Appeal No. 8/44 and add that the cases already decided by this Court are too overwhelming to leave any room for doubt as to what our decision should be. It has been emphasized before that a certain looseness of procedure will be recognized and tolerated by this Court in regard to proceedings at Land Settlement. It must however be borne in mind that this is a Court of Appeal. Certain rules are made to enable it to discharge its functions in its appellate capacity. If those rules, which are dictated by experience, are not complied with, this Court has no guarantee that justice will be done in the hearing of an appeal from a trial Court. We regard it as particularly important that the rules should be complied with in appeals to this Court from Land Settlement; otherwise a disgruntled and stubborn litigant could by appearing for persons from whom he had no

authority, prolong litigation indefinitely, to the prejudice of those who were prepared to accept the Land Settlement Officer's decision.

For these reasons we are forced to hold that there is no proper appeal before this Court on the part of those persons whom the Appellant purports to represent. The Appellant himself must fail also for the same reasons as those given in Civil Appeal 89/1940, in that he has not cited the other parties to the settlement proceedings as Respondents in this case.

The appeal is dismissed with costs on the lower scale to include LP. 10 for advocate's attendance fee.

Delivered this 4th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 358/44.
(INCOME TAX APPEAL No. 25/43).

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

The Consolidated Near East Company Limited. APPELLANT.

v.

The Assessing Officer, Haifa. RESPONDENT.

Income tax — Case stated under sec. 53(5) *— Deduction of U. K. excess profits tax — Sec.* 13(g) *as amended in* 1943 *— Whether deduction may be claimed as of right — Secs.* 62 *and* 63 *— List of deductions in sec.* 11 *not exhaustive — Union S/S Co. of N. Z. v. Robin, construction of statutes, A. G. v. Lamplough — Amounts "wholly and exclusively incurred by it in the production of its income" — L. C. Ltd. v. G. B. Olivant Ltd. — When the deduction will be allowed — Income received in Palestine* (*sec.* 5).

Case stated for the opinion of the Supreme Court under section 53(5) of the Income Tax Ordinance, in Income Tax Appeal No. 25/43; decision of British Puisne Judge affirmed:—

1. The effect of the amendment to sec. 13(g) is that the Assessing Officer now has a discretion, in proper cases, to allow the deduction of U. K. excess profits tax.
2. The payment of that tax cannot be said to be an expenditure incurred "wholly and exclusively in the production of income".

3. A deduction under sec. 13(g) is properly refused when the income accrues in Palestine.

(*A. M. A.*)

REFERRED TO: Union Steamship Co. of New Zealand, Ltd. *v.* Robin, 1920 A. C. 654, 89 L. J. (P. C.) 119, 123 L. T. 145; *Re* G. B. Ollivant & Co., Ltd.'s Agreement, L. C., Ltd. (in voluntary liquidation) *v.* G. B. Ollivant & Co., Ltd., 1942, 2 All E. R. 528 (C. A.) and 1944, 1 All E. R. 510 (H. L.).

DISTINGUISHED: A. G. *v.* Lamplough, 1878, 3 Ex. D. 214, 47 L. J. (Q. B.) 555; 38 L. T. 87.

ANNOTATIONS:

1. The judgment under appeal is reported in 11, P. L. R. 229 and 1944, A. L. R. 287.

2. On the effect of repeals of negative provisions see Halsbury, Vol. 31, p. 561, para. 759 and Maxwell, 8th ed., p. 33.

(*H. K.*)

FOR APPELLANT: Smoira.

FOR RESPONDENT: A. Levin.

JUDGMENT.

This matter has come before us as a case stated by Edwards, J., under the provisions of Section 53(5) of the Income Tax Ordinance, No. 23/41. It comes before us for our opinion sitting as a Court of Appeal, so it is in effect an appeal.

The question before Edwards, J., was whether the Appellant company was authorised in law to deduct United Kingdom excess profits tax for the purpose of ascertaining its income chargeable in respect of Palestine income tax. The position is that if this deduction can be made the Company will have to pay no Palestine income tax at all, and if it cannot be made the Company will have to pay the sum of LP. 9620.321. Edwards, J., held, in his judgment dated 31.5.44 in Income Tax Appeal 25/43, that the deduction could not be made. The following questions are put to us for our opinion:—

> "The questions upon which the opinion of the Court is desired are whether upon the above statement of facts I came to a correct determination and decision in point of law. In particular the questions to be decided are:—
>
> (a) Is the deductibility of the United Kingdom Excess Profits Tax, introduced into the Palestine Income Tax Law by the Income Tax (Amendment) Ordinance No. 10 of 1942?
>
> (b) Is the amount paid by the Company in respect of United Kingdom Excess Profits Tax an outgoing wholly and exclusively incurred by it in the production of its income? and is it deductible for the purpose of ascertaining the chargeable income of the Company?"

We shall deal first with Question (a).

Before the amendment of 1942 Section 13(g) of the Income Tax Ordinance 23/41 provided that for the purpose of ascertaining the chargeable income, no deduction should be allowed in respect of United Kingdom excess profits tax. By the Income Tax (Amendment) Ordinance, No. 10/42, the words "United Kingdom excess profits tax" were deleted from Section 13(g), and by Section 3 of the amending Ordinance it was provided that this amendment should be deemed to have come into operation on 1.9.41.

We have first to ask ourselves what is the effect of this amendment. If the effect is clear on the face of it we need not have recourse to any authorities in regard to construction or interpretation.

Now it is clear, and indeed Mr. Levin, who appeared for the Respondent, agrees, that the amendment did inaugurate a change. It could not be otherwise, because there would be no point in saying that a condition of "no change" came into operation on a particular date. Mr. Levin, however, submits that the amendment simply means that the absolute embargo which was imposed by Section 13(g) has been lifted, and that in a proper case United Kingdom excess profits tax may be deducted. It would be for the Assessing Officer to decide what is a proper case.

Dr. Smoira for the Appellant, on the other hand, submits that the amendment of Section 13(g) means that every person can, as of right, deduct United Kingdom excess profits tax, and he submits that it would in any case be wrong if the decision as to what was a proper case were to be left to the Assessing Officer, and that it cannot be supposed that the legislature intended to put so much responsibility upon the Assessing Officer.

Can we, upon a consideration of this amendment, come to a clear conclusion as to its effect? We think that we can. Section 13(g) contains a similar provision in respect of United Kingdom income tax and Empire income tax, but relief in respect of those taxes is specially provided for in Sections 62 and 63 respectively of the Ordinance. Before the amendment no relief at all was allowed in respect of United Kingdom excess profits tax, and it is not difficult to imagine that occasions might arise in the case of firms which do business both in the United Kingdom and in Palestine, where circumstances would call for the deduction of United Kingdom excess profits tax. But it is not at all easy to see why every person should have the benefit of such a deduction. If that were the case we would not have excepted the legislature to impose an embargo in the first instance. On the contrary we would

have expected the legislature to say, in terms, that United Kingdom excess profits tax was deductible. Moreover, when the Ordinance was amended, it would have been a simple matter for the legislature to have provided for the deduction of United Kingdom excess profits tax in every case. It did not do so.

We think that the only reasonable conclusion is that the legislature intended the United Kingdom excess profits tax to be deducted only in cases where such deduction would be warranted, and although the duty of deciding when a deduction should be allowed may involve the exercise of a very high degree of responsibility by the Assessing Officer, we do not think that the legislature could therefore not have intended to entrust this duty to him. We would observe that the list of deductions in Section 11 of the Ordinance is not exhaustive, and presumably the Assessing Officer can allow deductions in analogous cases where they appear to be warranted.

But if we go to the authorities on interpretation the result is the same. In the case of Union Steamship Co. of New Zealand Ltd. *v.* Mary Robin ((1920) A. C. 654), to which we have been referred by Mr. Levin, the Court held that the mere omission in a later statute of a negative provision contained in an earlier one, cannot by itself have the result of a substantive affirmation, and that it is necessary to see how the law would have stood without the original provision, and the terms in which the repealed sections are subsequently re-enacted.

Dr. Smoira has referred us to the case of the Attorney General *v.* Lamplough (3 Exch. Div. 1877—8, p. 214), but we think that the present case can be distinguished from that case. In the present case Mr. Levin is not trying to bring United Kingdom excess profits tax into a general clause providing for "non-deduction" in respect of taxes generally. His case is that the income from which the excess profits are taken is income which is taxable by virtue of Section 5 of the Ordinance.

Our reply to Question (a) is that the amendment of Section 13(g) changed the position in this respect — that as from 1.9.41 United Kingdom excess profits tax may be deducted in cases where the Assessing Officer is satisfied that good grounds exist for the deduction, but the deduction cannot be claimed as of right.

We shall now deal with Question (b).

In regard to this question we will say at once that in our judgment the proposition put forward by the Appellant is wholly untenable. The proposition is that the amount paid by the Company in respect of United Kingdom excess profits tax is an outgoing "wholly and exclu-

sively incurred by it in the production of its income". That is to say, that the payment away of part of the profits actually produces profits. Obviously that is not so. The payment away of profits — the very cream of the profits — far from producing profits, reduces them.

None of the cases which have been cited by Dr. Smoira affords us any ground for holding otherwise. But it is interesting to note what has been said on this point by persons whose opinions we are bound to treat with the greatest respect. In the case of L. C. Ltd. (in liquidation) *v.* G. B. Olivant Ltd. and others ((1944) A. E. L. R. Vol. 1 p. 510), a case to which Dr. Smoira has referred, Lord Simon, L. C., says (at page 514):—

> "Excess profits tax is not an expediture incurred in the earning of profits. It is an impost which has to be paid as a portion — and a very large portion in many cases — of the profits which the company has made."

And at page 517 of the same case, Lord MacMillan says:—

> "I agree with Scrutton, L. J., when he said that 'profits mean profits after deducting the expense of earning them'..., though I entirely disagree with his view that excess profits duty (the tax with which he was concerned) was an expense of earning the receipts..' It seems to me unintelligible that the payment of a tax levied on profits after they have been earned should be construed to be a payment made in order to earn these profits."

And in the same case ((1942) A. E. L. R. Vol. 2 p. 528) Lord Greene says (at page 532):—

> "I do not find it necessary, having regard to the view which I take, to express a concluded opinion upon that point, but I should have thought myself, at first sight, that the excess profits tax was not expenditure attributable to the working of the business, but expenditure which falls to be charged after the results of the working of the business have been ascertained; however, I need say no more about that."

We do not really feel that we need say anything more on this point, and we answer Question (b) in the negative.

Finally, we have to consider whether, upon the facts in this case, we can find that the Assessing Officer failed to use his discretion properly when he decided that the Appellant Company could not have the benefit of the amendment of Section 13(g). In his assessment dated 13.1.43 the Assessing Officer, Haifa, stated:—

> "Section 13(g) as far as excess profits tax is concerned, is applicable only in the case of a company resident in Palestine and trading in the United Kingdom. The profits of your company have been made in Palestine."

The Company was incorporated in England on 16.9.32 and was registered as a foreign company in Palestine on 6.3.33. The activities of the Company are being carried on both in the United Kingdom and in Palestine. The London Office of the Company deals in particular with the following matters:—

"(i) to purchase goods;

(ii) to obtain export permits and to make the necessary shipping arrangements;

(iii) to settle the accounts with the suppliers of goods. This settling of accounts requires sometimes negotiations and adjustments to be made by the Directors in London."

The Palestine Office is engaged in the sale of goods. The funds of the Company are kept in England, and the money realised from sales in Palestine, after certain deductions for current expenses in Palestine, are transferred to England.

Dr. Smoira has urged that the Company is trading in England just as much as in Palestine, since the purchasing is done in England and good buying obviously affects the profits when the goods are sold.

Even if we regard the Company as trading both in the United Kingdom and in Palestine, the fact remains that Palestine provides the market where the profits are collected, and it seems quite reasonable that Palestine should have its market dues in the form of income tax. The income of the Company in Palestine is certainly subject to tax in accordance with Section 5 of the Ordinance — it is received in Palestine. We think that this is a case in which the Appellant should pay the Palestine income tax and then ask in the United Kingdom for remission of an equivalent part of the excess profits tax. Of course the Appellant would prefer to be exempted from payment of income tax here as he will not recover it once it has been paid, whereas he looks forward to getting back a proportion of the United Kingdom excess profits tax after the war. But that is not a point that we can take into consideration.

In the result, we come to the conclusion that Edwards, J., came to a correct decision and that he rightly dismissed the appeal.

The Respondent must have fixed costs in the sum of LP. 30 (thirty pounds).

Delivered this 15th day of February, 1945, in the presence of Dr. Smoira for Appellant and Mr. Levin for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 165/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Fuad Haider & 2 ors. in their capacity as heirs of Mrs. Raoufa bint Sayyid Abdul Majid Malakha. APPELLANTS.

v.

Abdul Raouf El Haj Abdul Rahman Abu Laban, Mutawalli over the wakf of Hajjeh Raquiyeh bint El Haj Mohammad Malakha & an. RESPONDENTS.

Waqf — Failure to register — Waqf created in 1877—8 *— Effect of partition — Lack of execution — Art.* 144 *Execution Law — Prescription and laches — Effect of proceedings on prescription — Buildings on waqf, Mejelle* 906.

Appeal from the judgment of the District Court of Jaffa, sitting as a Land Court, dated the 8th April, 1944, in Land Case No. 16/37, dismissed:—

1. A *waqf* created in 1877 or 1878 on undivided land, and the land being subsequently partitioned to separate the *waqf*, is not void for non-registration.

2. There is no need to execute a *waqf*: Dedication and approval by the *Sharia* Court suffice.

3. A claim under Art. 906 of the *Mejelle* should not be raised by way of defence, but should be specifically claimed.

(*A. M. A.*)

ANNOTATIONS:

1. On proof of ancient *waqfs* see C. A. 25/40 (7, P. L. R. 138; 1940, S. C. J. 91; 7, Ct. L. R. 104), C. A. 55/40 (7, P. L. R. 291; 1940, S. C. J. 483), C. A. 107 & 108/41 (8, P. L. R. 398; 1941, S. C. J. 400; 10, Ct. L. R. 104), C. A. 133 & 136/41 (9, P. L. R. 101; 1942, S. C. J. 122; 12, Ct. L. R. 39), C. A. 64/43 (1943, A. L. R. 507) and C. A. 126/43 (10, P. L. R. 447; 1943, A. L. R. 559).

2. Different considerations apply where the *waqf* was created after the enactment of the Land Transfer Ord.; see C. A. 251/43 (10, P. L. R. 646; 1944, A. L. R. 104).

3. A *waqfieh* is not a "judgment"; C. A. 251/43 (*supra*) at pp. 117 & 123 of the report in A. L. R.

(*H. K.*)

FOR APPELLANTS: Moyal.

FOR RESPONDENTS: No. 1 — Dajani.
No. 2 — Absent — served.

JUDGMENT.

This is an appeal from the District Court of Jaffa sitting as a Land Court. The case dragged on in the Jaffa Court for years. Finally judgment was given in April 1944. After the prolonged hearings in the course of which numerous documents were examined, and many witnesses heard, it can, I think, be taken for granted that all the facts which were capable of being disclosed have now been disclosed and certain findings have been recorded by the lower Court. The issue before the appeal Court is therefore capable of being confined within narrow and well defined limits. There are 14 grounds of appeal, but apart from the first purely technical ground which can be dismissed straightaway as being of no importance and which was not pressed, the whole case revolves round the question is there an existing *waqf* in respect of the land and property claimed?

This action has its roots in transactions which took place over 60 years ago. It is probable that the matter would never have found its way to the Courts were it not for the phenomenal rise in price of land in that part of Jaffa where this property is situated.

The claim concerns an orange grove at Tawahin Road Jaffa. Originally the land was held by the family of Malakha. It was divided into 24 shares. Of these

7	belonged	to	Ali Ibn Haj Mohammad Malakha
$10\frac{1}{4}$	„	„	Abdul Majid Malakha
$3\frac{3}{4}$	„	„	Bakriyeh Malakha
3	„	„	Rakiyeh Malakha.

Ali dedicated his seven shares as *Wakf Sahih* in 1869. This at least appears to be accepted by all parties and it is not open to dispute.

With the passing years there were the usual deaths and the changes brought about by inheritance. The state of the property in 1872 according to a *Sharia* Court judgment, which apparently was based on an existing Land Registry, appears to have been as follows: — The land had been divided into 96 shares. Of these Bakriyeh held 24 shares. Raoufeh held 23 shares and Rakiyeh held 21 shares. The remaining 28 shares were absorbed in the *Waqf* which Ali Malakha dedicated in 1869. Rakiyeh disposed of 8 of her 21 shares leaving her a balance of 13 and whatever rights of participation she had in the *waqf* of Ali Malakha. It is Rakiyeh's interest in the property which is the subject matter of the present claim. The Claimant (now the Respondent) says that Rakiyeh's share was dedicated as *waqf* and he claims as *Mutawalli*. The Defendant denies it. That is the first

issue. The claim is that it was dedicated as *waqf* in 1877 or 1878. Evidence was called by each party and many documents were produced. Having seen the witnesses in the box under cross-examination and having examined the documents, the Land Court decided that a *waqf* had been created. Apart from the fact that this appeal Court would be reluctant to upset a finding of fact arrived at after a most exhaustive enquiry. I am of opinion that this conclusion of the trial Court was fully justified by the judgment of the *Sharia* Court in 1880 — a copy of which Ex. P. 5 in the case clearly indicates that the grove and buildings had been dedicated as *waqf*. I see no reason to differ from the conclusion arrived at by the Court that the land which was the subject matter of the *Sharia* Court judgment in 1880 is the land which is claimed in this case.

I come now to the next point raised by the Appellant which is that the *waqf* was void for non-registration. The 96 shares of this land were registered in the *Tabu* in 1878. I have been referred to no law which at that time provided for special registration of *waqf*. Furthermore, after Rakiyeh's death in 1902 the *Mutawalli* with the remaining share owners partitioned the grove, and this partition was approved by the *Sharia* Court. The ancestors of the present Appellants were present when the *Sharia* Court approved of the deed of partition which was registered at Jaffa. In these circumstances I agree with the Land Court that the *waqf* cannot be said to be void for lack of registration.

The Appellant further argues that even granting that there was a *waqf* it is void for lack of execution. In this connection he refers me to Article 144 of the Execution Law. I fail to see what bearing this Article has on the matter. It deals with a prescriptive period within which a person must apply to have decrees which are deposited with the Execution Office executed. The deed of *waqf* was not deposited in the Execution Office, nor was there any reason to do so. There was, in fact, nothing to execute. Once the deed of dedication had been approved by the *Sharia* Court it was complete.

Failing these grounds, the Appellant pleads prescription and laches. I agree with the Land Court that laches must fail. There was ample evidence that the *waqf* asserted their rights in this plot from time to time. In 1912 the *waqf* leased a plot of this land and there was evidence that there has been a dispute over produce which has kept the *Mutawalli* in and out of Court for many years past.

As to prescription, in the case of this *waqf* the period would be 36 years. There was evidence that the *Sharia* Court gave judgment to which the *Mutawalli* was a party in 1912 so that even taking this date

the period of prescription has not run. Apart from this I fail to see how prescription could arise seeing that the Court found as a fact, which I accept, that the Appellants failed to establish adverse possession which is a condition precedent to the plea.

There remains for consideration the implications arising from Article 906 of the *Mejelle*. The argument as to this is contained in ground 10 of the Grounds of Appeal which reads:—

> "The Court below erred in not deciding the point whether Appellants are not entitled to be registered as owners of the land in dispute under Article 906 of the *Mejelle* and rules of equity because their intestate had erected buildings and built shops on the said property in good faith and the value of the said buildings and shops exceeds the value of the land. The Court below erred in holding that this point has to be subject of a counterclaim or separate action; for it was raised as a point of defence against Respondent's No. 1 claim and had to be decided as such."

As to this the Land Court said:—

> "That the Defendant did not enter a counterclaim or institute a separate action but merely includes this as part of his defence. But I do not propose therefore to make any finding on this point, and the Defendant is at liberty to institute any action regarding the additional buildings which he may choose to bring before an appropriate Court."

It seems to me that I would serve no useful purpose by speculating as to why the Land Court did not deal with this aspect and so close this prolonged litigation. It left any claim that may exist under Article 906 of the *Mejelle* still open and the Appellant is, in the words of the Court, still at liberty to institute such an action.

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

Delivered this 20th day of March, 1945, in the presence of the first Appellant and in the presence of the first Respondent.

Chief Justice.

CIVIL APPEAL No. 370/44.

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

BEFORE: Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Wasef Abdul Qader el Sharif & an. — APPELLANTS.

v.

Haj Suleiman el Kukhun & 5 ors. — RESPONDENTS.

Consent judgment for registration of land in an action for return of money — Consent judgment between A and B invoked as defence to an ownership claim by C — Non-interference with findings of fact of trial Court.

Appeal from the judgment of the Magistrate's Court, Nablus, sitting as a Land Court dated the 19th day of August, 1944, in Land Case No. 10/43, dismissed:—

A consent judgment for registration of a certain plot in name of A in his action against B for return of money paid under an agreement of sale cannot affect C's claim to ownership of that land.

(*M. L.*)

ANNOTATIONS: See C. A. 166/42 (9, P. L. R. 713; 1942, S. C. J. 803) with annotations.

(*A. G.*)

FOR APPELLANTS: Hamoudeh.

FOR RESPONDENTS: Zu'eitar.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court, Nablus, sitting as a Land Court, dated the 19th August, 1944, in Land Case No. 10/43, whereby the Land Court declared the ownership of the Respondents to 42 shares out of 252 shares in the portion in dispute in the land known as Wa'ret Hillaleh.

Appellant No. 2 states that he and his sister Safieh inherited this land from their father and that in 1929 he acquired and possessed the share of Safieh by way of a power of attorney and that he possessed the share of Fatmeh by way of purchase. On the strength of this agreement he parcellated the land and sold one parcel to Wasif Abdel Qader the first Appellant. It is argued that by a judgment of the District Court dated 12.1.43, this parcellated plot was ordered to be transferred to Wasif and that therefore the Magistrate erred in disregarding that judgment which was a judgment of a competent Court. It must be pointed out that this judgment of the 12th January, 1943, was a judgment given by consent of both parties in an appeal from a judgment by the Magistrate's Court in favour of Wasif, Appellant No. 1, in an action brought by him, the said Wasif, for the return of money paid by him under the said agreement of sale on the ground that there was a failure of transfer on the part of Appellant No. 2 of the plot under agreement. This judgment does apparently instruct the Land Registrar to register the said plot in the name of Appellant No. 1, but with all respect to the learned President, he was not sitting as a Land Court and that neither the ownership was decided in this judgment. We think that the Magistrate was justified in disregarding the said judgment.

The Appellant further argues that the findings of fact arrived at by the Magistrate regarding the possession of this land were contrary to the weight of evidence. On this point the learned Magistrate says on page 2 of his judgment:—

> "I was not satisfied with the evidence of the witnesses of the Defendant Abdel Hadi el Sarrawi, brother of Safieh, that he was in possession of the land in dispute independently of Safieh's shares, in view of the existence of *Tabu Kushans* in the hands of the Plaintiffs."

He further adds that he was not satisfied with the evidence of the witness of the Defendant Abdel Hadi El Sarrawi, brother of Safieh, that he was in possession of the land in dispute independently of Safieh's share in view of the existence of *Tabu kushans* in the hands of the Plaintiffs.

We see therefore no reason to interfere with the findings of fact of the Magistrate who had an opportunity of seeing the witnesses and hearing their evidence.

For these reasons the appeal fails and must be dismissed. The judgment of the Magistrate must be confirmed with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 19th day of December, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 423/44.

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

BEFORE: FitzGerald, C. J. and Plunkett, A/J.

IN THE APPEAL OF:—

Masha Kraus, née Rembach & an. APPELLANTS.

v.

Jacob Weisman. RESPONDENT.

Partnership — Effect of death of a partner on cause of action — Partnership Ord., sec. 39 — Option clause to continue partnership — Construction.

Appeal from the Order of the District Court, Jerusalem, dated the 21st day of September, 1944, in Motion No. 304/44 (Civil Case No. 26/42), dismissed:—

If the partnership articles give the personal representative of a deceased partner the option of continuing or of dissolving the partnership and the

clause is not acted upon, the partnership is deemed to be dissolved on the death of one of the partners.

(*A. M. A.*)

ANNOTATIONS: On dissolution of partnership by death of a partner see Halsbury, Vol. 24, pp. 494—5, sub-sec. 3.

(*H. K.*)

FOR APPELLANT: Abramovsky.

FOR RESPONDENT: M. I. Levy.

JUDGMENT.

This is an appeal from the judgment of he District Court of Jerusalem concerning a partnership action. The second Appellant withdrew her appeal and was joined as Respondent No. 2. The facts can be briefly stated. There was a disagreement between the partners which resulted in litigation, but before the litigation was concluded one of the Plaintiff partners died. The issue before the District Court was whether the cause of action survived. The Court held that the partnership was dissolved and accordingly no cause of action could survive.

It is clear that in the absence of any specific agreement between the parties, Section 39 of the Partnership Ordinance provides that every partnership shall be dissolved as regards all the partners by the death or bankruptcy of any partner. In this case there was an agreement, clause 11 of which reads as follows:—

> "In the event of the death of one of the partners while the partnership is still in existence, the surviving partners may either elect to liquidate the partnership or may decide to continue the partnership; the legal heir of the deceased partner or the person designated by such party in his last will, shall have the option either to continue in the partnership, or to withdraw and ask the surviving partners to purchase his share."

The Appellant contends that this agreement was sufficient to keep the partnership alive. It is not in dispute that nothing had been done under that clause, there had been no decision by the surviving parties either to liquidate or to continue the partnership. It will be observed, that this clause was not an agreement to continue the partnership. The relevant clause was what I might call "an option clause", and in my opinion in the absence of the exercise of the option, the partnership was dissolved by operation of law by virtue of Section 39 of the Partnership Ordinance. The Appellant contended that as the first Respondent did not exercise the option to liquidate the partnership continued. In this I think that he was wrong. I am of opinion that the onus of exercising the option given by the clause was on the Appellant. The insertion in clause 11 of an option to liquidate was, in my view, quite

superfluous, because in the absence of any exercise of the option to continue, the partnership was automatically liquidated. As the Appellant did not exercise the option to continue, I agree with the learned President of the District Court that the partnership was dissolved and no cause of action survived.

For these reasons the appeal must be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fees.

Delivered this 6th day of March, 1945.

Chief Justice.

CIVIL APPEAL No. 471/44.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Amneh Shalabi, widow of Abdallah Mahmoud Yousef El Muwais, in her capacity as one of the heirs of her late husband and on behalf of his estate & 7 ors. APPELLANTS.

v.

Odeh Elias el Radi. RESPONDENT.

Non-enemy declaration — Clerical error — Rule 2 of the 1944 (*No.* 2) *Regulations — C. A.* 14/31 *retroactivity of procedure rules — C. P. R.* 359.

Appeal from the judgment of the District Court of Nablus, in its appellate capacity, dated 25th day of September, 1944, in Civil Appeal No. 26/44, allowed and case remitted:—

The Defence (Courts Applications) Regulations are rules of procedure and they therefore apply with retroactive effect.

(*A. M. A.*)

FOLLOWED: C. A. 14/31 (3, C. of J. 1067).

ANNOTATIONS: On retroactivity of laws of procedure see Halsbury, Vol. 31, pp. 517 *seq.*, sub-sec. 3) and for a recent authority *vide* Barber *v.* Pigden, 1937, 1 K. B. 664, 1 All E. R. 115, 106 L. J. (K. B.) 858, 156 L. T. 245, 53 T. L. R. 246.

For Palestinian cases see, in addition to C. A. 14/31 (*supra*), C. A. 8/24 (1, P. L. R. 15; 3, C. of J. 1036) and CR. A. 123/42 (9, P. L. R. 548; 1942, S. C. J. 558).

(*H. K.*)

FOR APPELLANTS: Kassab.

FOR RESPONDENT: Odeh.

JUDGMENT.

This is an appeal from the judgment dated the 25th September, 1944, of the learned President of the District Court of Nablus in Civil Appeal No. 26/44, dismissing the appeal which had been filed by the present Appellant on the ground that the non-enemy declaration was defective. In that non-enemy declaration the attorney for the Appellants referred to his clients as Amineh Shalabi and associates, that is to say he did not set out the names of all of his clients.

A further defect appeared in the second paragraph of the non-enemy declaration where the word "client" was used instead of the word "clients", but so far as that defect goes it seems to me that there is no doubt that it was a purely clerical error.

Farid Eff. Kassab, for the Appellant, has submitted that he is entitled to rely on the proviso to rule 2 of the Defence (Courts Applications) Regulations (No. 2) 1944 (at page 897, Supplement 2 of 1944). Under that proviso it is not necessary for an Appellant to file a declaration if one has already been filed by either party in the proceedings in the Court below. That is what had happened in the present instance. The Respondent in the District Court had filed a non-enemy declaration when he appeared as a Plaintiff before the Magistrate.

It is true that the appeal had been filed before the coming into force of the new regulations, but Farid Eff. Kassab has referred me to C. A. No. 14/31 (Vol. 3, Rotenberg, p. 1067). In that case the Court stated: "In our opinion the general principle is that a rule of procedure comes into operation as soon as it is enacted and has a retrospective effect". I think that these regulations can be regarded as rules of procedure and that this principle applies to them. So I find that Farid Eff. Kassab's submission succeeds, and that he was entitled to take advantage of the new regulations, that is to say, he need not have filed a non-enemy declaration at all for the purpose of the appeal.

It is not perhaps necessary for me to deal with other grounds which have been put forward, but I consider that the objection was a highly technical one in view of the fact that the names of all the Appellants had been set out in the copy of the judgment of the Magistrate and in the copy of the statement of appeal. There could, I think, be no doubt at all as to who were the persons described associates. At most it was a defect which could have been remedied immediately in Court under the provisions of Rule 359 of the Civil Procedure Rules.

In the result I find that this appeal succeeds, and the case must be remitted to the learned President of the District Court for hearing on

the merits. The Appellants will have their costs in the fixed sum of LP. 10.

Delivered this 28th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 332/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF :—

Itzhak Trachtengott. APPELLANT.

v.

Dr. Werner Sommerfeld in his capacity as liquidator for Amiel Bros. Ltd. in liquidation & an. RESPONDENTS.

Liquidators — Application for appointment of additional liquidators — Companies Ord., sec. 162(1)(*b*), (3)(4).

Appeal from the Order of the District Court of Jaffa, dated 6th July, 1944, in Civil Case No. 169/43 (Motion No. S/13/44), dismissed:—

Although, formally, the Court cannot appoint an additional liquidator (except in a voluntary winding-up), it may remove the existing liquidator and appoint two or more liquidators.

(*A. M. A.*)

ANNOTATIONS: See the previous proceedings in this case, C. A. 159/44 (11, P. L. R. 220; 1944, A. L. R. 352) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANT: Abcarius and Levitzky.

FOR RESPONDENTS: No. 1 — Rosenblueth.
No. 2 — Wolf.

FOR OFFICIAL RECEIVER: Eliash.

JUDGMENT.

This is an appeal from an order of the District Court of Jaffa dated 6th July, 1944, refusing an application for the removal of a liquidator in a winding-up by the Court and refusing also an alternative prayer that an additional liquidator be appointed to act with the present liquidator.

The matter has already been before this Court in Civil Appeal No. 159/44 when this Court remitted the matter for the hearing of certain evidence. The learned Relieving President of the District Court has now heard a considerable body of evidence and has delivered a lengthy and careful judgment.

Mr. Levitzky, for the Appellant, has frankly admitted to-day that his client has merely suspicions against the liquidator; but he says that those suspicions were intensified because of the liquidator's consistent refusal to agree to the appointment of an additional liquidator. The Court below held that the Appellant's suspicions were unfounded, and we see no reason to upset that finding. It is true that the learned Relieving President said:—

> "It appears to me that Mr. Trachtengott has some justification for suspecting that Dr. Amiel has not been entirely correct in his conduct as a Director of the Company, but Mr. Trachtengott is suspicious of many other persons."

This part of the order of the District Court does not, of course, affect the liquidator. We would only add that there was evidence before the District Court to justify the finding that the liquidator had done all that could reasonably be expected of him, in particular with regard to the allegations against Dr. Amiel. It is impossible for us to disturb the finding of the District Court that the liquidator should * be removed.

The only other matter with which we must deal in this appeal is the question whether an additional liquidator should be appointed. Dr. Eliash says that, except in a voluntary winding-up, the Court cannot appoint an additional liquidator. This may be technically true; but under section 162(4) of the Companies Ordinance it would be possible for us to revoke the original appointment and to make a fresh appointment under section 162(3) appointing the original liquidator plus another person. This would get over the formal or technical difficulty.

The Respondents contend that once the Court decided, and this Court has upheld the decision, that the liquidator should not be removed, there is no basis for an application for the appointment of an additional liquidator. The Court below held that, if this were done, the position would be unworkable. As was pointed out in the order of the Court below of 10th March, 1944, it would be impracticable to appoint a Committee.

We have the advantage of hearing Dr. Eliash, on behalf of the Official

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* *Scil.*: not.

(*Ed.*)

Receiver, who is quite satisfied with the work of the present liquidator and with the manner in which the liquidation is being carried out and who strongly opposes the application either for the removal of the liquidator or for the appointment of an additional liquidator. We refer to the provisions of Section 162(1)(b) of the Companies Ordinance.

We agree with the Court below that it would be impracticable and unworkable if an additional liquidator were appointed. It seems clear that, if an additional liquidator were appointed even by the Court without regard to the wishes of either Mr. Trachtengott or Dr. Amiel, either or both those persons would make constant applications or complaints to the Official Receiver against one or other of the liquidators. We cannot leave this case without expressing our regret that Mr. Trachtengott does not seem prepared to accept the decision of the Court.

This appeal is dismissed. The Appellant must pay the costs of the liquidator, of the Official Receiver and of the second Respondent, *i. e.* costs to be taxed on the lower scale in each case to include an advocate's attendance fee at the hearing of the appeal of LP. 25 in the case of the liquidator, LP. 25 in the case of the Official Receiver and LP. 15 in the case of the second Respondent.

Delivered this 2nd day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 376/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Menashe Rokatli-Shwili. APPELLANT.

v.

Moshe 'Ami-Hai & an. RESPONDENTS.

Land settlement — Relief by way of specific performance — Agreement made to defraud creditors — C. C. O. 304(b), L. T. O., sec. 5(1)(2) — Kearley v. Thompson & an., Gascoigne v. Gascoigne, Bowmakers Ltd. v. Barnet Instruments Ltd. — Assistance of the Court cannot be sought — Costs.

Appeal from the decision of the Land Settlement Officer, Jaffa Settlement Area, dated 4.8.44, in Case No. 64/Jaffa, dismissed:—

1. A person who parts with his property in order to defraud his creditors will not have the assistance of the Court in getting it back.

2. The sanction for a breach of sec. 5(1) of the Land Transfer Ord. (registration in the name of a nominee) is to be found in sec. 5(2). There is nothing in that Ordinance about altering the registration to the name of the principal.

(*A. M. A.*)

REFERRED TO: Kearley *v.* Thomson, 1890, 24 Q. B. D. 742, 59 L. J. (Q. B.) 288, 63 L. T. 150; Gascoigne *v.* Gascoigne, 1918, 1 K. B. 223, 87 L. J. (K. B.) 333, 118 L. T. 347, 34 T. L. R. 168; Bowmakers, Ltd. *v.* Barnet Instruments, Ltd., 1944, 2 All E. R. 579.

ANNOTATIONS:

1. On the maxim that "He who comes into Equity must come with clean Hands" see Halsbury, Vol. 13, pp. 85 *et seq.*

2. On the question of the return of money paid in connection with illegal contracts see notes in A. L. R. to C. A. 356/43 (11, P. L. R. 94; 1944, A. L. R. 150).

3. On nominees in the Land Registry *cf.* C. A. 255/42 (10, P. L. R. 34; 1943, A. L. R. 177) and notes in A. L. R.

(*H. K.*)

FOR APPELLANT: Olshan.

FOR RESPONDENTS: Goitein & Ahronov.

JUDGMENT.

This is an appeal from the judgment dated 4.8.44 of the learned Settlement Officer in Case No. 64/Jaffa.

The facts are briefly these: On 1.2.42 the Respondents claimed at settlement (under claim No. 42/Jaffa) the ownership in equal shares of what is now final parcel No. 30 in block No. 7060. The basis of their claim was registration under deed No. 4500 of 25.6.35. On 3.9.43 the Appellant claimed half of the same parcel on the basis of an alleged agreement (Exh. P/1) with the Respondents, and of possession. At the same time the Appellant admitted the registration in the names of the Respondents. It may be mentioned that the Respondents are the brother-in-law and sister, respectively, of the Appellant. The agreement sets out that although the property (consisting of a plot of land and a house of four rooms with all conveniences) was registered in the names of the first party (the present Respondents) each party bought the land and built the house with their own money in equal shares; that the first party undertook to transfer half of the property to the second party in the Land Registry whenever called upon to do so; that whenever the second party (the present Appellant) desired transfer he would send the first party a registered letter and give

them three days within which to comply; and that if the first party failed to effect transfer within the time fixed in the letter the first party would have to pay LP. 100 as damages without the necessity of a notarial notice.

The Settlement Officer observed that the date on Exhibit P/1 was 28.12.34, but he found that the last figure had originally been a "6", and that something else appeared to have been originally written under the figures "1934". The signatures on Exh. P/1 are not witnessed, but the Appellant swore that the agreement was signed in his presence. The Respondents, on the other hand, swore that they did not sign the document, and that it was a forgery. No hand-writing expert was called, but the Settlement Officer made a comparison of the signatures on Exhibit P/1 with a number of genuine signatures of the Respondents, and he came to the conclusion that their signatures on Exhibit P/1 were genuine.

The Settlement Officer found, however, that the date 28.12.34 could not possibly be correct, as the document contained a reference to the land as being registered under deed No. 2097/36 of the Land Registry of Jaffa, whereas in 1934 the land had not yet been registered in the Respondents' names, and it was never registered under any such deed as No. 2097/36. The Settlement Officer therefore concluded that the document might have been signed on 28.12.36 or latter. The Appellant told the Settlement Officer that he had allowed his half of the property to be registered in the names of the Respondents because from about 1934 to about the end of 1938 he was in debt, and feared that his creditors might obtain attachment against any property registered in his name. The Appellant had gone into occupation of his (alleged) share from about the end of 1939.

The Settlement Officer heard many witnesses for the Appellant, and he came to the conclusion that his allegations were essentially correct as to the facts. That is to say, the Settlement Officer was satisfied that the Appellant had paid for half of the land and house. The Settlement Officer found that in order to conceal his assets from his creditors the Appellant had allowed his shares to be registered in the names of the Respondents as nominees or trustees, and that although the Appellant had actually paid off his debts in 1938 his action was tainted with the intention of defrauding the creditors, who might have got their money back more expeditiously if the property (as to one-half) had been registered in the Appellant's name.

After considering the law on the subject, and the maxims that "he who comes into equity must come with clean hands", and that "delay

defeats equity", the Settlement Officer came to the conclusion that he could not give effect to the Appellant's claim for registration.

With regard to Exhibit P/1, the Settlement Officer held that the sum of LP. 100 was intended to be damages for breach of the contract itself and not merely for delay in transferring, and that (assuming that his reasons for dismissing the Appellant's claim were wrong) the Appellant's remedy was to sue for the LP. 100. The Settlement Officer further held that Exh. P/1 was in any event tainted with illegality, as it formed the second part of the illegal agreement — the first part having been (as shown by the evidence) an oral one with the Respondents to have the Appellant's property registered in their names. He therefore held that Exh. P/1 could not be enforced by an order for specific performance.

I think it may be concluded that if the Settlement Officer had not been convinced of the illegality of the agreement between the parties he might nevertheless have refused to grant the Appellant relief because he had slept on his rights for so long. If that is so I think that the learned Settlement Officer would have exercised his discretion wrongly. A Court of Appeal ought not to interfere if a discretion is exercised reasonably, but in this case it would, in my judgment, have been wrong to refuse specific relief. In the first place the Appellant was in possession of his (alleged) share, and in the second place the Respondents had not been prejudiced by the delay. They were the immediate parties, and they knew the facts. And, of course, the Appellant's claim was well within the period of prescription which, in the case of *mulk* property, is fifteen years.

As for the maxim that "he who comes into equity must come with clean hands", I agree with Mr. Olshan that it could not apply in the present case — it would only be applicable *vis-à-vis* the Respondents, and obviously it has no force in that sense in the present circumstances. There is no question of the Appellant not playing fair so far as the Respondents are concerned. If the Settlement Officer had found that the agreement was a forgery he might then, I think, have applied the maxim.

As for the finding that according to the Appellant's own account of the matter the agreement was tainted with fraud, I find myself in complete agreement with the learned Settlement Officer. The Appellant draws attention, with legitimate satisfaction, to the fact that he did pay off all his creditors in full. But he did not pay them off till the end of 1938, having closed his business in 1933. That is to say, some at least of his creditors had to wait five years for their money. We do

not know whether the Appellant managed to pay off his creditors as a result of good fortune or good management. It is clear that he did not require the land and house for his own immediate accommodation, as it was not till 1939 that he went into occupation, when there was no longer any need to conceal from creditors the fact that he owned property. The Appellant said that the land and building cost LP. 650. If his half share had been made available for his creditors they might have been paid off very much earlier.

A Court can never countenance conduct of this kind. A cashier who borrows money from his employer's safe and uses it for his own purposes is not absolved from guilt if he puts the money back. To countenance such conduct would open the door wide to dishonesty. Can one suppose that if the creditors had got wind of what had happened, and had attached the property, the Appellant would have made a clean breast of the matter? Is it not much more likely that he would have told the creditors that the property was not his? In this way his action might have led to lying and even to perjury.

Section 304(b) of the Criminal Code Ordinance provides that any person who, with intent to defraud his creditors, or any of them, makes, or causes to be made, any gift, delivery or transfer of, or any charge of his property, is guilty of a misdemeanour. That is to say, he is punishable with imprisonment for three years, or with a fine of LP. 100, or both. If his creditors had foreclosed on him in 1935, and had the facts then come to light, the position of the Appellant would have been more than delicate.

The learned Settlement Officer takes the view that the date on Ex. P/1 was altered from 1936 to 1934. With great respect it seems to me that the alteration (and there is no question at all but that there has been an alteration) was the other way — from 1934 to 1936. I think that this document (whether genuine or a forgery) was intended to look like a record of the oral agreement of 1934. But the reference to the 1936 registration made it patently obvious that it had not been made in 1934, so the date had to be altered to 1936. It is interesting to note that when the application was made to the District Court, Tel-Aviv, the document was referred to as bearing the date 1934. In any case, whenever it was made, it was not a new agreement accompanied by fresh consideration. It was only the old oral agreement reduced to writing. Mr. Goldberg, who appeared for the Appellant before the Settlement Officer, stated the case correctly when he said (see the top of page 3 of the typed record) — "The agreement of 28.12.34 is only a piece of evidence".

I would call Exh. P/1 a highly unsatisfactory piece of evidence. There is no apparent reason why the Respondents should have made a mistake in regard to the number of the deed; there are no witnesses; there is no mention of an existing mortgage upon the land; there is no expert evidence in regard to the signatures; and there is the obvious tampering with the date. Of course it is conceivable that the Respondents made the document in this way in order to be able to say later that it was a forgery. And again, even if it be a forgery by the Appellant that does not prove that his case is not true. It is an unfortunate fact that a party who has a true case sometimes tries to make it stronger by means of false evidence. If he does so he runs the grave risk, if the falsity is discovered, of having his true evidence disbelieved.

The agreement of 1934 was tainted with illegality in another material respect. Section 5(1) of the Land Transfer Ordinance (Cap. 81) provides as follows:—

> "If the application for registration is made by an agent or nominee on behalf of a principal, the agent or nominee shall make full disclosure in his petition of the principal for whom he is acting, and the immovable property disposed of shall be registered in the name of the principal."

On his own showing the Appellant had connived at a breach of those provisions.

I come now to the all important question whether these illegalities disqualify the Appellant from asking for his share of the property to be registered in his own name. Several cases have been referred to by Mr. Olshan for Appellant and by Mr. Goitein for Respondents, and I find the rule to be this — that if there has been a substantial part-performance of the illegal agreement, the party who parts with his property will not have the assistance of the Court in getting it back.

That is the rule as it appears in the case of Kearley *v.* Thomson and another (24 Q. B. D. 742). In that case Fry, L. J., said (see p. 747):—

> "I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back."

This was a case of the year 1890.

The case of Gascoigne *v.* Gascoigne (1918 1 K. B. 223) has certain points in common with the present case. In that case a husband took a lease of land in his wife's name, and built a house upon it with his own money. He used his wife's name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. In an action by him against his wife for a declaration that she held the property as trustee for him

it was held that he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, and that she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud.

In the present case the Appellant got the Respondents to register the property in their names in order to protect it from his creditors. In fact, the Respondents gave him the protection of their name, and it was a material part of the bargain that they should do so.

In addition to the ethical basis for the rule that a party cannot recover where there has been a substantial part-performance, there is also a very practical basis. For if a person knows that a Court will not help him to get his money or other property back, he will be deterred from parting with it. He will have to ask himself whether he is prepared to run the risk of putting himself absolutely into the hands of the other party.

Great reliance has been placed by Mr. Olshan upon the case of Bowmakers *v.* Barnet Instruments Ltd. (A. E. L. R., Annotated, of 16.12.44, p. 579), so I must consider that case closely. The Editorial note to that case says:—

> "The point of this decision is that the Plaintiffs' claim was wholly independent of the alleged illegal contracts, and therefore no question of applying the maxim *ex turpi causa non oritur actio* arose. *Prima facie* a man is entitled to his own property and his right will be enforced against a party who is detaining it, or has converted it, even if it came into the possession of that party as a consequence of an illegal contract. There may be exceptions to the rule, as for example, where it is illegal to deal in the particular property at all, but the rule is clear."

This note seems to me to state the effect of the decision correctly. The facts in that case were as follows:—

> "The Appellants hired machine tools from the Respondents under three written agreements. The tools were the property of one Smith, who sold them to the Respondents in order that the Appellants might ultimately obtain possession of the tools provided the hire-payments were made regularly to the Respondents. After making some only of the agreed payments, the Appellants converted the tools to their own use by selling them. The Respondents, thereupon, terminated the contract and claimed the return of the tools or, alternatively, damages for conversion. For the Appellants it was contended: (i) that the sale between Smith and the Respondents was illegal in that it contravened the Control of Machine Tools Order, 1940, resulting in the agreements between the Appellants and the Respondents being affected by the illegality arising from the original sale; (ii) that the Respondents' claim, therefore, should not be entertained on the ground of public policy. The Respondents, whilst

> not relying on the hiring agreements, claimed that the property in the tools still remained in them at the date of the conversion."

Those facts appear to me to be quite different to the facts in the present case. If the Respondents sold this property to another person, and claimed the price from that person, then it seems to me that Bowmaker's case could be relied upon by them if the purchaser refused to pay on the ground that the Respondents had come by that property illegally. The Respondents could say to the purchasers — "How we got the property has nothing whatever to do with our sale to you. We are not relying on our agreement with the Appellant. That is antecedent, and it has nothing at all to do with our contract to sell to you. We are the holders of the legal title, and we have made a perfectly good contract to sell to you — a contract untainted by any illegality".

That is not at all the position in the present case. The Appellant and Respondents are the original parties. The condition that the property should be registered in the name of the Respondents was an integral and very important part of the agreement. If the Respondents had said to the Appellant — "We are prepared to buy the property with your money, but we shall register it in your name", the Appellant would obviously have said — "No, thank you. That is not at all what I want, because my creditors will then be able to see that the property is mine".

The registration of the property in the names of the Respondents was a substantial part-performance of the agreement. The stage was set, as the Appellant intended it to be, to deceive the creditors. It seems to me to make no difference at all that the Settlement Officer came to know of the illegality because the Appellant told the truth. If the Court is not advised of the illegality of course it cannot apply the rule. But once the illegality is made to appear, the Court must apply the rule. It cannot reward the Appellant for telling the truth by not applying it.

Where the enquiry is before the Settlement Officer the ethical considerations are the same as in the case of a Court, and the practical basis for the rule, to which I have referred above, is equally valid in settlement proceedings.

The only other point that I need consider is whether the provisions of section 5(1) of the Land Transfer Ordinance make it incumbent upon the Settlement Officer to alter the registration from the names of the Respondents to the name of their principal — the Appellant. Is the Settlement Officer acting in breach of the provisions of this Ordinance if he does not alter the registration?

Section 5(2) provides the sanction for a breach of section 5(1), and

it does not say anything about changing the names. In the circumstances I consider that the Settlement Officer could not alter the registration.

The Settlement Officer has not, and could not, turn the Appellant out of possession. Whether the Respondents will be able to profit by their breach of faith to the extent of ejecting the Appellant from possession is a matter that will have to be settled in the future. In view of their undoubted breach of faith I am not prepared to award any costs or advocate's fees to the Respondents. Each party will pay its own costs and advocate's fees.

Delivered this 8th day of March, 1945.

British Puisne Judge.

HIGH COURT No. 142/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF :—

Pinchas Goozner. PETITIONER.

v.

The Food Controller, Jerusalem. RESPONDENT.

Food controller refusing permit to continue production in factory — Exercise of discretionary powers — Interference and non-interference of High Court.

Return to a rule *nisi* issued on the 22nd day of December, 1944, directed to the Respondent, calling upon him to show cause why a permit should not be granted to Petitioner to continue production of bacon, ham and sausages in his factory situated at Beit Jala in Jerusalem sub-district and/or why his instructions to Petitioner to cease production of bacon, ham and sausages in his above-mentioned factory should not be reversed and/or revoked, discharged:—

1. High Court will not interfere with Public Officer's discretion provided he acted within his statutory authority, even if entirely disagreeing with him and with the motives that actuated him; they will only enquire whether he applied his mind to exercise discretion and will only grant relief if he acted with *mala fides* or capriciously or without regard to rules or reason and justice.

2. Provided a competent authority has statutory authority to do an act which in his opinion is necessary for the better prosecution of the war, High Court will not enquire why he considered it necessary.

(*M. L.*)

ANNOTATIONS:

1. As to principles guiding the High Court in complaints against Public Officers see H. C. 78/44 (11, P. L. R. 471; 1944, A. L. R. 685) and annotations in A. L. R. See also H. C. 118/44 (11, P. L. R. 57; *ante*, p. 181) and H. C. 138/44 (*post*, p. 257).

2. On principles governing exercise of jurisdiction by High Court see H. C. 116/44 (1944, A. L. R. 769) and annotations.

3. On non-interference of High Court with discretion in matters under Defence Regulations see H. C. 100/44 (1944, A. L. R. 825; 11, P. L. R. 431); H. C. 97/44 (1944, A. L. R. 814; 11, P. L. R. 442); H. C. 78/44 (*supra*) and H. C. 118/44 (*supra*).

(*A. G.*)

FOR PETITIONER: Gorali.

FOR RESPONDENT: The Solicitor General — (Griffin).

ORDER.

This is a return to an order *nisi* calling upon the Respondent to show cause why a permit should not be granted to the Petitioner to continue production in his factory situated at Beit Jala in Jerusalem, and why his instructions to Petitioner to cease production in his factory should not be revoked.

The learned Solicitor General has appeared to show cause. The Deputy Food Controller has sworn an affidavit, and furthermore, at the request of the Petitioner, he has appeared and been cross-examined on his affidavit.

Although at this date, after some five years of war legislation and in the light of the numerous decisions in England and in this Court, it would appear to be mere tautology, I am forced, in view of the arguments advanced, to state once again the position of these Courts when they are moved by way of prerogative writ to grant relief against some order of the various "control authorities" which the legislature deemed fit to create for the better prosecution of the war and the protection of the life of the community.

In the first place I wish to repeat what has been emphasized in numerous cases, that this Court will not usurp the functions of the Food Controller or any other controller, nor will it arrogate to itself a discretion which the legislature has vested in another person. A long list of authoritative cases has circumscribed the extent to which it will intervene. It will intervene to compel the authority to perform a statutory duty, or to restrain him from doing acts for which he has no statutory authority. Where a discretion has been vested in him it will not attempt to review that discretion, provided he has acted within the four walls of his statutory authority. It will, however, enquire whether

he has applied his mind to the exercise of that discretion, and if, but only if, it comes to the conclusion that in the exercise of that discretion he has acted with *mala fides* or capriciously, or without regard to the rules of reason and justice, it will grant relief against the consequences of the order that flows from the exercise of the discretion. It will not interfere merely because the Court itself would not, having considered all the circumstances, have come to the same conclusion as the controller. It may, indeed, entirely disagree with him and with the motives that actuated him, but that is not sufficient it must be shown that his motives were, if not of a malevolent nature, at least beyond those which would have actuated a reasonable and honest man.

In deciding this case, therefore, I confine myself to the issue — was there *mala fides*, or, putting it most favourably for the Petitioner, did the Respondent act capriciously? Allowing for the over-emphasizing which one would expect, the whole of the Petitioner's affidavit can be accepted. It can be agreed that he has suffered and is still suffering great loss by the action of the Food Controller; that his normal trading rights have been prejudiced; that he and his advocate for some twelve months have left no stone unturned to move the Food Controller to grant him this licence, but without success. But those are all consequences that flow from war controls. Repugnant as it may be to our normal ideas, the trader who, during war-time is unable to co-operate, indeed I might say submit to, the war controls, is in no better position than the manager of a business who, during peace-time, is unable to see eye to eye with his Board of Directors.

One fact appears to me to be overwhelmingly established by legal authority, and that is, that provided a competent authority has statutory authority to do an act which in his opinion is necessary for the better prosecution of the war, this Court will not enquire why he considered it necessary.

According to the affidavit and the sworn evidence of the Deputy Food Controller, Mr. Tours, full responsibility for investigating this case and for making the order appealed against, is accepted by Mr. Tours himself. The reasons why he refused to grant the permit are given in paragraph 7 of his affidavit. He was cross-examined at great length, but he was not shaken on his main facts. He admitted, as was urged with emphasis on behalf of the Petitioner, that the final tender was given to a person whose tender in respect of one "group" was higher than the Petitioner's, but he explained that the reason was that the tender of the successful trader in respect of the whole group was lower.

He elaborated this point by explaining the great technical difficulties

of food control; one of the expedients adopted by the Controller to eliminate waste of articles in short supply was to concentrate production. With this end in view, the control brought pressure by means of the permit system to bear on traders, to force them to rationalization. This may well have operated harshly on efficient traders such as the Petitioner appears to be, and to the benefit of the less efficient members of the commercial community, but it is a matter of common knowledge that it was a method used in England, and used with considerable success, to enforce rationalization of trades whose commercial incentive previously had been competition.

This being the case, I cannot discover a scintilla of evidence that Mr. Tours was actuated by *male fides;* nor can I conclude that his use of the permit system, however arbitrarily it may have affected the Petitioner, to enforce rationalization, was capricious or in any degree outside the limits of the object intended by the legislature.

Apart from this, some vague suggestion was made about sinister influences working behind the scenes. If this be so, it is a matter for regret that the nature of this influence was not mentioned in the affidavit, so that it could be probed and either established or refuted. This action must be determined on this affidavit and on the evidence adduced.

It may well be that as a result of the arguments before this Court and of this judgment, the Petitioner may become more alive to the necessity of co-operation, even to the extent of a heavy sacrifice on his part with the Food Control, in which case this Court feels confident that the Food Controller will do his utmost to ensure that this man does not lose irretrievably what is presumably a large part of his life's savings.

For the reasons which I have given, the order *nisi* must be discharged, with fixed (inclusive) costs of LP. 10 to the Respondent.

Given this 17th day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 190/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ahmad el-Dalu. APPELLANT.

v.

Amneh Abu Samaha & 5 ors. RESPONDENTS.

Inspection after close of case and before judgment — Who to pay necessary expenses for inspection — Irregularities in hearing evidence of witnesses.

Appeal from the judgment of the District Court of Nablus in its appellate capacity, C. A. 23/43, dismissed and case remitted to Magistrate's Court:—

1. Magistrate has power, at any time before judgment, even of his own motion, to make an inspection notwithstanding that there is no express consent of both parties.

2. (*Obiter*): Where Court finds an inspection necessary, Plaintiff should be called upon in first instance, to deposit a reasonable sum towards expenses and should be informed by Judge, Magistrate or his clerk that, until such deposit is made, he cannot expect any judgment to be given.

3. If Court, without parties' express consent, called in course of inspection witnesses not heard before, failed to record their evidence and was influenced by that evidence, judgment — cannot stand.

(*M. L.*)

ANNOTATIONS:

1. On time for objection to accept inadmissible evidence see C. A. 276/44 (1944, A. L. R. 752 and annotations).

On calling of evidence by the Court see C. A. 3/41 (8, P. L. R. 93; 1941, S. C. J. 255; 10, Ct. L. R. 232).

2. *Cf.* C. A. 253//40 (8, P. L. R. 130; 1941, S. C. J. 104; 10, Ct. L. R. 243) and note 2 in S. C. J. on the admission of evidence after the case has been closed.

On discretion of Court to order inspection see C. A. 204/42 (1942, S. C. J. 914). On inspection by L. S. O. see C. A. 226/42 (1943, A. L. R. 463 and note 4; 10, P. L. R. 302).

FOR APPELLANT: Zu'eiter.

FOR RESPONDENTS: A. Salah.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Nablus, in its appellate capacity, allowing an appeal by the present Respondents, who were the unsuccessful Plaintiffs in a possessory action under Article 24 of the Ottoman Magistrates Law.

The ground on which the learned President of the District Court allowed the appeal was that there had been an irregular inspection of the land, conducted after the close of the case but before judgment was given.

The facts shortly stated are that after the Magistrate had heard evidence, and after the parties' advocates had filed written statements in lieu of final oral addresses, the Magistrate realised that the matter

was difficult and that his doubts could not be resolved without resort to an inspection of the land.

We think that on a sound construction of Rule 149, Magistrates' Courts Procedure Rules, 1940, the Magistrate has power, at any time before judgment, even of his own motion, to inspect property or an article, notwithstanding the fact that there is no express consent of both parties. This course is, for obvious reasons, frequently desirable, and even necessary, at any rate in land cases. In the case before us, however, it is clear that on the 30th June, 1943, the Magistrate intimated to the advocates for both parties that he intended to inspect the land on the 15th August, 1943. This declaration of intention he notified in open Court on 30th June, and neither of the parties' advocates objected. On the 15th August, the inspection duly took place, in the presence of the Defendants in person, and in the presence of Abdul Muneim Eff. Kamhieh, who was admittedly one of the advocates for the Plaintiffs.

Up to this point no objection can be advanced to the order of the Magistrate, and we therefore do not agree with the broad statement in the judgment of the learned President, namely, "After a case has been finished and before judgment ..... the Court cannot inspect premises except by consent". If the Judge or Magistrate feels that he cannot decide the case without inspection, Rule 149 gives him power, and if the Plaintiff refuses to deposit a *reasonable* sum towards the expenses of the inspection, the Judge or Magistrate or his clerk should inform the Plaintiff, that, until that deposit is made, the Plaintiff cannot expect any judgment to be given. We therefore think that the Magistrate was wrong at that stage in requiring each party to deposit half of the costs of the inspection. It is the Plaintiff who moves the Court and who should be called upon in the first instance, if he wants judgment to be given, to deposit the necessary fees.

As we have said, the inspection took place. Now, had the Magistrate at the inspection confined himself to inspecting the land and recalling any or all of the witnesses who had previously given evidence in Court, in order that they should point out to him the land, there could have been no objection because both those matters are covered by Rules 148 and 149; but in this case he seems to have erred in two directions, namely, (a) he called and heard witnesses other than those who had already given evidence in Court, and these new witnesses he called without the express consent of the parties or their advocates. We do not think that in the circumstances the matter is covered by Rule 146, and (b) the Magistrate did not record the evidence of these new witnes-

ses (see Rule 143, Magistrates' Courts Procedure Rules). Because of those two irregularities we think that the learned President was justified in allowing the appeal and ordering a retrial.

It is clear from the judgment that the Magistrate was influenced by the evidence of these fresh witnesses, because in his judgment he says:—

> "I am satisfied from the evidence of the Defendant's witnesses and from the inspection which I carried out and from the witnesses who gave evidence at the inspection that the Defendant did not trespass upon the land in question."

For these reasons alone this appeal must be dismissed. In the District Court the learned President awarded costs to the present Respondents but did not mention any figure or whether the costs were to be taxed. We think that the costs in the District Court should be LP. 3 fixed (or inclusive) costs and the Appellant should pay the present Respondents' costs of this appeal, namely, fixed (or inclusive) costs of LP. 5. We so order.

Delivered this 14th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 436/44.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ahmad Hassan Haddad. APPELLANT.

v.

Ahmad Ibrahim Yousef Rinno. RESPONDENT.

Oral contract of lease — Failure to pay rent in advance as agreed — Rent Restrictions Ordinance and Mejelle.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity dated 13.10.44 in Civil Appeal No. 121/44, allowed:—

1. Rent Restrictions Ordinance — intended to apply to all lettings whether by oral or written contracts of lease.
2. Tenant cannot claim protection if he fails to continue to pay rent not only at agreed rate, but in accordance with the provisions of his lease, oral or written, and if intention of parties was that in case of such failure tenancy was to come to an end and he would have to vacate.

3. Where Rent Restrictions Ordinance applies, question whether notice had been given on termination under various articles of *Mejelle* — irrelevant.

(*M. L.*)

REFERRED TO: Brewer *v.* Jacobs (1923) 1 K. B. 528; 128 L. T. R. 687; Cruise *v.* Terrel (1922) 1 K. B. 664 & 673; 126 L. T. R. 750; 38 T. L. R. 379; Remon *v.* City of London Real Property Company (1921) 1 K. B. pp. 49, 55 and 57; 123 L. T. R. 617; 36 T. L. R. 869; Aston *v.* Smith (1924) 2 K. B. 143 and 146; 131 L. T. R. 565; 40 T. L. R. 576; C. A. 179/40 (7, P. L. R. 493; 8, Ct. L. R. 138; 1940, S. C. J. 358).

ANNOTATIONS:

1. As to point 1 and the requirement of a written contract see The Law Relating to Lease of Immovable Property, Article 1 and Goadby & Doukhan "The Land Law of Palestine", p. 190—191.

2. As to point 2 see cases referred to.

3. As to point 3 see C. A. 287/42 (1943, A. L. R. 225).

4. a) Eviction was granted in this case upon an implied proviso for re-entry in case of non-payment of rent. It is the first case of this kind in which eviction was granted although there was no written clause for re-entry in case of breach.

b) For decision as to Rent Restrictions Ordinance not augmenting rights of landlords see the following District Court Cases: C. A. 141/41 Jerusalem (Gorali, p. 159); C. A. 30/44 Haifa, Selected Cases, 1944, p. 79; C. A. 43/44 Haifa, Selected Cases, 1944, p. 102; this point was also raised, but not decided in C. A. 64/44 (1944, A. L. R. p. 535).

c) In this connection see English and Empire Digest pp. 460—462, Nos. 6077—6092; Redman, Landlord and Tenant pp. 400—402; Woodfall's Law of Landlord and Tenant pp. 911—918 — on the requirement of a clear proviso for re-entry and the construction of such a proviso.

5. For other cases in the matter of "continues to pay rent" see C. A. 139/43 (1943, A. L. R. 386) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Cattan and Shamma.

FOR RESPONDENT: Nazzal, Yehya and W. Atallah.

JUDGMENT.

This is an appeal from the District Court of Haifa in its appellate capacity, setting aside a judgment of one of the Magistrates of Haifa who had ordered the eviction of the present Respondent from a certain dwelling house on the ground of failure punctually to pay rent in advance.

In the Statement of Claim the rent was said to be LP. 6 per month to be paid in advance. In paragraph 1 of the Statement of Defence the present Respondent's then advocate admitted the fact stated in clause 3 of the Statement of Claim, that the rent had to be paid in advance. Faiz Eff. Nazzal, for the Respondent, says that that admission was made in inadvertence. It is however now too late to raise this, as it was not dealt with in either of the Courts below.

The Magistrate found as a fact that the rent for February, 1944, which should have been paid in the beginning of February, was not tendered until the end of the month, when it was tendered to the Plaintiff's mother who refused to accept it. The Defendant thereupon continued to send the rent by post. The rent in respect of February was paid on the 3rd March, and the March rent on the 26th of March, the April rent on the 20th April, and the May rent on the 23rd of May. There was therefore a clear failure to pay rent in advance.

The Magistrate in his judgment said that there appeared to be in existence no written lease, although there may originally have been one. Nevertheless, it was not disputed that the Defendant had been tenant of the Plaintiff for three or four years, nor was it denied that the monthly rent had to be paid in advance, the Magistrate finding that parties had agreed orally to this when the tenant entered into possession. There has been and there can be no serious criticism of this finding of the Magistrate.

The District Court on appeal held in effect that the Rent Restrictions (Dwelling Houses) Ordinance, 1940, did not apply to oral leases but that the *Mejelle* did. When one looks, however, at the word "let" in the second line of section 3(1) of the Ordinance, it is clear that the Ordinance is intended to apply to all lettings whether by oral or written contracts of lease. We therefore think that this part of the judgment of the District Court cannot stand. The Court relying on Articles 494 and 593 also held that in the case of an oral lease the landlord is not entitled to institute proceedings for eviction on the ground of failure to pay rent unless he has first demanded rent. The learned President of the District Court held that there must be a clear decision by the landlord to terminate the lease and that mere refusal to receive rent which has been paid too late is not sufficient. We think that the sole protection given to a tenant is that given by section 8 of the Ordinance. The meaning and intention of section 8 is that if a tenant fails to continue to pay rent not only at the agreed rate, but in accordance with all the provisions of his lease, oral or written, he cannot claim protection at all. If, however, he does comply with the provisions of the lease as to payment of rent he cannot be evicted unless on one of the four grounds set out as (a), (b), (c) and (d) of section 8(1).

Mr. Cattan has referred us to the cases of Brewer *v.* Jacobs (1923) 1 K. B. 528; Cruise *v.* Terrell (1922) 1 K. B. 664 and 673; Remon *v.* City of London Real Property Company (1921) 1 K. B., pages 49, 55 and 57; and Aston *v.* Smith (1924) 2 K. B. 143 and 146. In Brewer *v.* Jacobs at p. 531 Bailhache, J., said:—

> "I think that that contention arises from a misapprehension of the position of a statutory tenant. But for the Increase of Rent *etc.* (Restrictions) Act, he would not be a tenant at all, and he is only in possession as long as he complies with the provisions of that Act. One of those provisions is that he shall pay his rent, and another is that he shall observe the covenants in his lease. He must find his protection, if any, within the Act, and other acts do not apply at all."

Applying this *dictum* to Palestine it would seem that the *Mejelle* does not apply. This seems logical because if the Rent Restrictions (Dwelling Houses) Ordinance, 1940, does not apply and the *Mejelle* does apply, then the tenant would be in a precarious position because, irrespective of whether he complied with all the conditions of his tenancy or not, that is to say, even if he continued to pay rent and even if he did not commit one of the faults set out in sub-sections (a) and (b) of section 8(1), and even if the premises were not reasonably required under (c) or (d) of section 8(1), the contract (if, as in this case, it is a monthly contract) could be terminated by the landlord himself under Articles 494 and 593. This cannot have been the intention of the Legislature.

Faiz Eff. Nazal has argued that there was nothing in the oral lease to show that the Plaintiff was entitled to eject the tenant on non-payment of rent. We think, however, that, in view of the findings of the Magistrate, the intention of the parties was that, should the tenant fail to pay the monthly rent in advance, the tenancy was to come to an end with the necessary consequence that the tenant would have to leave the premises. Once it is realised that the tenants' protection is to be found in the Ordinance then any discussion as to whether notice had been given on termination under the various articles of the *Mejelle* seems to be irrelevant. The failure to pay rent in advance was equivalent to failure to continue to pay rent within the meaning of section 8(1). The mere fact that the rent was tendered late does not mean as Respondent's advocate suggests, that the tenant did, in fact, continue to pay the rent.

The Respondent's advocate has cited C. A. No. 179/40, Vol. 2 Annotated Supreme Court Judgments (1940), p. 358. In that case it was held that the Appellant could not rely on the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935, since that Ordinance was not in force in Tel Aviv at the beginning of the third tenancy, namely, the year 1936.

We would refer to the judgment of Swift, J., in Aston *v.* Smith (1924) 2 K. B. p. 146, where his Lordship said:—

> "If the tenant was a statutory tenant, no further notice to quit is

necessary for it would have no effect. Having become a statutory tenant the tenant can only be dispossessed by the act of the Court, and not by any act of the landlord."

Although Faiz Eff. Nazzal tried to distinguish the English Act from the 1940 Ordinance, it is clear that section 8 requires an order of the Court before any person can be evicted. If the *Mejelle* were to apply then a tenant would be liable to have his tenancy terminated at the end of any month, at the option of the landlord, under Article 494. Keeping that short statement in view, the relevance of the words of Swift, J., at once becomes clear.

For these reasons we allow the appeal and set aside the judgment of the District Court of Haifa and restore the judgment of the Magistrate of 17th July, 1944, with costs here and below. The costs of this appeal will be fixed (or inclusive) costs of LP. 10 advocate's attendance fee.

Delivered this 22nd day of February, 1945.

British Puisne Judge.

HIGH COURT No. 138/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Muhammad Abdul Karim Hab Rumman. PETITIONER.

v.

Acting District Commissioner, Jerusalem. RESPONDENT.

Requisition of premises under Defence Regulations — Undue delay in petitioning High Court — Petitioner failing, having had an alternative remedy — Non-interference of High Court with order made by Public Officer in proper exercise of his discretion.

Return to an order *nisi* issued on 21.12.44 directed to the Respondent calling upon him to show cause why Petitioner should be called upon to leave his business premises and to deliver the same to Fred Kaiser of Jerusalem, and why the order of requisition dated 18th July, 1944, should not be set aside and the said premises be delivered to Petitioner, discharged:—

1. a) High Court will not entertain a petition if Petitioner had an alternative remedy.

b) Person aggrieved by service upon him of a business accommodation notice or by operation of such notice served upon him can apply to committee under Regul. 72B(9), Defence Regulations 1939, hence not to High Court.

2. (*Obiter*): High Court will not interfere if Petitioner fails to prove that in making his order Public Officer did not act in good faith and in honest exercise of his discretion.

(*M. L.*)

REFERRED TO: H. C. 78/39 (7, P. L. R. 35; 7, Ct. L. R. 45; 1940, S. C. J. 25); H. C. 142/44 (*ante*, p. 247; 12, P. L. R. 39); H. C. 73/44 (11, P. L. R. 424; 1944, A. L. R. 519).

ANNOTATIONS:

1. As to point 1 see H. C. 116/44 (1944, A. L. R. 769) and H. C. 129/44 (*ante*, p. 63; 11, P. L. R. 636).

2. As to point 2 see annotations in A. L. R. to H. C. 142/44 (*supra*) and to H. C. 73/44 (*supra*).

3. On effect of laches in applying to High Court see H. C. 102/43 (1943, A. L. R. 831) and note 3 in A. L. R. and H. C. 121/44 (1944, A. L. R. 771).

(*A. G.*)

FOR PETITIONER: W. Salah.

FOR RESPONDENT: The Solicitor General — (Griffin).

JUDGMENT.

This is a return to an order *nisi* dated 21st December, 1944, calling upon the Respondent to show cause why the Petitioner had been called upon to leave his business premises and deliver them to Fred Kaiser of Jerusalem, and why the order of requisition dated 18th July, 1944, should not be set aside.

The facts as they appear from the petition and from the affidavit and cross-examination of the Respondent, Mr. Newton, then Acting District Commissioner of Jerusalem, are these. The Petitioner was by virtue of a lease concluded between him and the Municipal Corporation, Jerusalem, entitled to occupy the first three shops in a building consisting of four shops owned by the Municipal Corporation and situated on Mamilleh Road, Jerusalem. The Petitioner leased the three shops with the intention of using them as a garage for repairing and keeping cars and trucks. The Petitioner had spent more than LP. 300 in order to make the premises suitable for his business. Prior to 18th July 1944 the Petitioner was called to the District Commissioner's Office, and informed that the competent authorities wanted him to vacate the premises and deliver them to the said authorities. He gave his reasons for objecting to the requisition, and informed the authorities about

the damage that he would sustain, in addition to the money already spent, if he had to vacate. He also explained that it would be impossible for him at that time to find alternative accommodation. The authorities would not listen to his objections, and warned him that he would be liable to punishment if he failed to comply with the requisition. On or about 18th July, 1944, the Petitioner received a notice, issued under Regulation 72B of the Defence Regulations, 1939. Exhibit 1 attached to the petition is a copy of that notice. In protest against that notice the Petitioner sent a letter dated 19th July, 1944, of which Ex. P/2 is a copy, to the Acting District Commissioner of Jerusalem, and subsequently the Petitioner approached three of the District Officers but without success. Since that date the Petitioner had endeavoured to find alternative accommodation but without success. Finally on 2nd December, 1944, the Petitioner filed the present petition.

From the affidavit of Mr. Newton it appears that in his capacity as a competent authority he had, on 5th May, 1944, requisitioned a garage and appurtenances occupied by Mr. Fred Kaiser, and had authorised the Assistant Director of Hirings, Hq. Palestine, to enter into possession as from 15th May, 1944. Mr. Griffin, Solicitor General, has informed the Court that that requisition was made under Regulation No. 48 of the Defence Regulations, 1939, and it is not disputed that it was made lawfully. Mr. Newton's affidavit sets out that he gave the matter his personal attention, and made careful enquiries and considered all possibilities and representations made to him, and came to the conclusion that the most suitable and appropriate premises to place at Mr. Kaiser's disposal in order to enable him to carry on his garage business was the accommodation which is the subject matter of these proceedings. Mr. Newton's affidavit avers that he came to his conclusion and decision in good faith.

Mr. Newton was cross-examined on his affidavit, and he stated that he did not know that the Petitioner was a garage owner, and that he thought that he dealt in furniture. Mr. Newton understood that the Petitioner had had a laundry in the premises, and that the laundry was no longer in operation. He understood that the Petitioner had some furniture in one of the four rooms, and concluded that he could therefore spare three of them.

It may be observed here that the Petitioner alleges that the whole of the premises occupied by him in that building have been requisitioned, but it is certainly not possible to ascertain from the evidence before us that the Petitioner was not the lessee of the fourth shop (or room) in that building. Mr. Newton in cross-examination stated that

he was under the impression that the Petitioner was in occupation of the four shops, and that he is not prepared to say that this was a false impression. He said that if he had been satisfied that the Petitioner had only three rooms he would have requisitioned two of them, but he was definitely informed that the Petitioner occupied four rooms and had furniture stored in one of them. Mr. Newton said that he would not have used his powers under Regulation 72B in order to evict a person from the whole of his premises, as he would consider such action to be unfair. Mr. Newton further expressed the view that Mr. Kaiser's business was not connected with the considerations referred to in Regulation No. 48(1). He had come to the conclusion, however, that the Petitioner was not making the fullest possible use of the premises.

It may also be observed that a perusal of Exh. P/2 does not give rise to the belief that the Petitioner had already established a garage in the premises. Paragraph 4 of that letter refers to "the premises in question which he (*i. e.* the Petitioner) intends to use for keeping cars".

Mr. Griffin has resisted this petition on three grounds. In the first place he submits that there has been undue delay in the filing of the petition. As we have already observed, the notice was served on or about the 18th July, 1944, and the petition was not filed until over four months later, on 2nd December, 1944. Mr. Griffin has referred us to H. C. 78/39 (7, P. L. R. 35).

Wadie Eff. Salah, who has appeared on behalf of the Petitioner, has urged that the delay in this case is fully explained by the fact that his client was engaged in trying to persuade the Respondent to revise his decision, and in trying to find other premises. He submits that his client's evident unwillingness to commence these proceedings is an indication of his good will.

We think that the Petitioner ought to have been able to come to the conclusion, at a very much earlier date, that the Respondent had no intention of rescinding the order. So far as alternative accommodation is concerned he had himself stated in his petition that prior to 18th July, 1944, he had made it clear to the authorities that it was not possible for him to find alternative accommodation. So we think that he ought to have made less delay in bringing these proceedings, and that the delay is at least enough to cause us considerable hesitation about allowing the petition.

The second reason put forward by the Solicitor General is that the Petitioner had an alternative remedy. Regulation 72B(9) provides for the constitution of committees for the hearing of the complaint of any person aggrieved by the service upon him of a business accom-

modation notice or by the operation of a business accommodation notice served upon him. This regulation provides that "upon hearing the complaint, the committee may cancel or vary the business accommodation notice as the committee thinks fit". It is not disputed that the Petitioner did not make any complaint to the committee, but Wadie Eff. has argued, in our opinion quite ineffectively, that the Respondent ought to have referred the Petitioner's complaint (and particularly Exh. P/2) to the committee. It is, of course, quite obvious that the Respondent was under no such obligation. It is for the person "who is aggrieved" to make the complaint, and the Respondent was not that person. It is the well established practice of this Court not to entertain a petition of this kind if the Petitioner had an alternative remedy as he had in this instance, and in our judgment this concludes the matter.

In the circumstances it is not really necessary for us to deal with the further submissions of the parties, but as they have been argued at some length, we will refer to them briefly.

The Solicitor General has submitted that the Petitioner has failed to establish that Respondent used his discretion *mala fide*, and he has referred us to H. C. No. 142/44 — Goozner *v.* The Food Controller, Jerusalem. We find that the Petitioner has failed to show that the Respondent did not act in good faith and in the honest exercise of his discretion. We also accept the Solicitor General's proposition that it is not for this Court to take into consideration the question of hardship. It is unfortunately true that in such cases hardship is often quite unavoidable.

It has been strongly argued by Wadie Eff. that Regulation 72B must be read in the light of section 1(1) of the Emergency Powers (Defence) Act, 1939, and that the premises cannot be commandeered unless one of the considerations referred to in that section is shown to exist. The Solicitor General, on the other hand, argues that Regulation 72B(1) is not subject to such considerations, and that it is designed to enable the competent authority to ameliorate the condition of a person who has been entirely dispossessed under Regulation 48.

Wadie Eff. has referred us to H. C. No. 73/44 (11, P. L. R. 424) where it was held that "Regulations 2 and 48 of the Defence Regulations, 1939, must be read together, with the result that when Regulation 48 deals with services essential to the life of the community it means such services which have been previously declared to be essential by order of the High Commissioner under Regulation 2 of the Defence Regulations, 1939. It followed, therefore, in the absence of an order by the High Commissioner under Regulation 2 declaring the services

of banks in general, or the services of the Ottoman Bank in particular, as essential to the life of the community, that the notice given by the District Commissioner to the Petitioner did not come within the four walls of Regulation 48, and the District Commissioner, as competent authority, had no power to issue it."

In that case the requisition was made under Regulation 48 and not under Regulation 72A.

The words "for maintaining supplies and services essential to the life of the community" are capable of a wide interpretation, and we are not prepared to say that in a country which depends so largely for its food supply upon an efficient system of road transport the maintenance of sufficient garages is not one of the purposes within the purview of section 1(1) of the Emergency Powers (Defence) Act, 1939. On the other hand, it would be difficult to maintain the proposition that every garage in Palestine is necessary for maintaining supplies or services essential to the life of the community. This must remain a matter for argument in some future case.

In the result the petition fails and must be dismissed, and the order *nisi* discharged with fixed costs to the Respondent of LP. 10.

Given this 15th day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 359/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Dr. Oscar Mohrus. APPELLANT.

v.

1. I. Roskin Levy in his capacity as liquidator of the "Romipal" Roumanian Palestine Trading Corporation, Limited,
2. Zadoc A. Chelouche. RESPONDENTS.

Companies Winding Up — Misfeasance summons — Secs. 226 and 78 of the Companies Ordinance — Liability of directors for misfeasance not under all circumstances joint — Difference between crediting and paying — Costs.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 24th July, 1944, in Civil Case No. 276/42, allowed and judgment of lower Court varied:—

1. A director is not liable jointly with a co-director in misfeasance proceedings for a debt due from the co-director only.

2. A debt due to a Company from a director under a mortgage should be recovered under sec. 14, Land Transfer Ordinance, and not under sec. 226, Companies Ordinance.

(*A. M. A.*)

ANNOTATIONS:

1. For the facts of this case see the judgment of the District Court in 1944, S. C. D. C. 536.

2. The decision in this case is based on the English case of Walsh *v.* Bardsley and another (1931, 47 T. L. R. 564) where it was held that if one of the directors is compelled to repay money used for an unauthorised purpose, he cannot recover contribution from the other director if the money has been applied for the sole benefit of the director claiming contribution even if the other director has concurred in the authorisation to its being so used. *Cf.* Halsbury, Vol. 5, pp. 333—4 and footnote (*r*) at p. 334; Palmer's Company Law, 17th ed., p. 203. In the present case the principle laid down in the above case has been applied to a company trying to compel from the beginning both directors to refund moneys so used.

3. One of the grounds of appeal was that the Appellant had been deprived of his costs against Respondent No. 1 and it was successfully argued that although costs are in the discretion of the Court, such discretion is a judicial discretion which must be exercised on fixed principles and where a party successfully enforces a legal right and in no way misconducts himself he is entitled to costs as of right. See Annual Practice, 1943, page 1411 and cases quoted therein; for Palestinian authorities see notes to C. A. 103/43 (1943, A. L. R. 180) and *cf.* C. A. 386/43 (11, P. L. R. 307; 1944, A. L. R. 581).

(*H. K.*)

FOR APPELLANT: Schifter.

FOR RESPONDENTS: No. 1 — Kirschner.
No. 2 — Apelbom.

JUDGMENT.

I am not prepared to interfere with the finding of the District Court of Tel-Aviv that there had been an unnecessary overpayment to the second Respondent. As regards the second Respondent I accept Mr. Apelbom's alternative plea that judgment against his client should be for LP. 36.250. The second Respondent will pay his own costs here and below. The decree of the District Court will have to be set aside and another decree substituted therefore in terms of this judgment in accordance with Rule 352, Civil Procedure Rules, 1938. I think that the appeal of the Appellant must succeed. I declare that

he is entitled to receive LP. 489.080 from the Company and I find that he cannot be made jointly liable for the debt due by the second Respondent. As regards the mortgage given by the second Respondent it follows, from what I have said, that the Company must be left to recover any sums under the mortgage in the usual manner, that is, under section 14, Land Transfer Ordinance. The Appellant is entitled to receive from the first Respondent his costs here and below. Costs in the Court below will be fixed (inclusive) costs of LP. 10 and costs of this appeal will be taxed on the lower scale, to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 30th day of April, 1945.

British Puisne Judge.

CIVIL APPEAL No. 317/44.

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

BEFORE: Rose and Abdulhadi, JJ.

IN THE APPEAL OF:—

Sa'ada Salameh Hweishel. APPELLANT.

v.

Haj Salem Sweilem Abu Janb & an. RESPONDENTS.

Oral evidence — Land Court not bound by Art. 80, *O. C. P. C. — Land Courts Ord., sec.* 8(2), *L. A.* 50/36.

Appeal from the judgment of the Land Court of Jerusalem, L. C. 7/44, allowed and case remitted:—

A Land Court is not bound by the prohibition set out in art. 80 of the Code of Civil Procedure regarding oral evidence. Oral evidence may therefore be heard by a Land Court to contradict a written admission.

(*A. M. A.*)

FOLLOWED: L. A. 50/36 (8, C. of J. 497, *sub* No. *C. A.* 50/36; 3, Ct. L. R. 6).

ANNOTATIONS:

1. Plaintiff alleged that she had mortgaged a plot of land to Defendant 1 outside the Land Registry, that later she sold the said plot outside the Land Registry to Defendant 2 by virtue of a written contract which was produced in Court and that Defendant 2 had assigned the said contract to Defendant 1.

Although the contract contained an admission that Plaintiff had received the purchase price from Defendant 2 she claimed that she had not in fact received it and she therefore asked for judgment declaring her ownership of the land and restraining Defendants from interfering with her rights. On objection being taken against the calling of witnesses to prove that Plaintiff had not received the purchase price the Land Court (*cur.* JJ. Hasna & Bardaky) sustained the objection. Plaintiff appealed.

2. Note that one of the grounds of the decision in L. A. 50/36 (*supra*) was that the parties were brothers and thus came within the ambit of Art. 82 of the Ottoman C. P. C.

3. See note 3 to C. A. 94/43 (1943, A. L. R. 152) on the admissibility of oral evidence against written admissions.

4. On the effect of sec. 8(2) of the Land Courts Ord. see, in addition to L. A. 50/36 (*supra*), C. A. 182/37 (5, P. L. R. 195; 1938, 1 S. C. J. 163; 3, Ct. L. R. 132) and note thereto in S. C. J. and C. A. 225/38 (5, P. L. R. 551; 1938, 2 S. C. J. 167; 4, Ct. L. R. 217).

(*H. K.*)

FOR APPELLANT: Kamleh.

FOR RESPONDENTS: 'Asal.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem dismissing an action brought by the present Appellant concerning the ownership of certain land.

The main point in this appeal is whether the Land Court was correct in refusing to hear oral evidence to contradict an admission contained in Exhibit P/1. Having regard to the proviso to section 8(2) of the Land Courts Ordinance (Cap. 75) and Land Appeal 50/36, which held that a Land Court is not bound by Article 80 of the Ottoman Code of Civil Procedure, we are of opinion that the appeal must be allowed and the case remitted for the hearing of such evidence as the parties may desire to call on this matter. Costs will be in the cause. To simplify the final arrangements we certify that the costs of this appeal will be on the lower scale to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 20th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 308/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Ali Abdul Rahman. APPELLANT.

v.

Mohammad Hussein Abu Shalbak. RESPONDENT.

Action for recovery of possession — Scope of part 1 and part 2 of Art. 24, Ottoman Magistrates' Law.

Appeal from the judgment of the District Court of Jerusalem, sitting as a Court of Civil Appeal, dated 17th day of June, 1944, in Civil Appeal No. 17/44, dismissed:—

1. Even if a man has a valid title he cannot himself use force to dispossess a wrongful possessor, once wrongdoer has achieved effective possession.

2. If a rightful owner, *i. e.* possessor of a title deed, attempts by force to oust the wrongdoer, latter, although having no title deed, can appeal to Court to maintain *status quo* until alleged rightful owner applies to Court under first part of Art. 24, Magistrates' Law on basis of title deed and prior possession.

(*M. L.*)

ANNOTATIONS: On requirements of action under Art. 24 of Magistrates Law see C. A. 135/44 (*ante*, p. 82) with annotations.

The judgment of the District Court is reported in 1944, S. C. D. C. 197.

(*A. G.*)

FOR APPELLANT: Awni Abdul Hadi.

FOR RESPONDENT: Hammoudeh.

JUDGMENT.

Although in this case it makes no difference to the final result, which is that the appeal must be dismissed, we are of opinion that perhaps the learned President went too far in giving the impression, as he appears to have done in his judgment, that the production of a title deed is a condition precedent to any application under either part of Article 24 of the Ottoman Magistrates' Law.

It seems to us that the second part of Article 24 does nothing more than embody a principle accepted in the Land Law of England and many countries. It is that even if a man has a valid title he cannot himself use force to dispossess a wrongful possessor, once the wrongdoer has achieved effective possession. Under the second part of Ar-

ticle 24, if the rightful owner, *i. e.* the possessor of the title deed, attempts by force to oust the wrongdoer, then the wrongdoer, although he has no title deed, can appeal to the Court to maintain the *status quo* until the alleged rightful owner applies to the Court under the first part of the article by way of an action for the restitution of his possession supported by title deed, and an avernment that he has been in possession of the property previous to the trespasser.

In this case Awni Bey argued that his client fell within the second part of the article. But it is clear from the evidence that he comes within the first part. This being so, he must, if he is to succeed under this article, base his claim upon a title deed and prior possession.

As he has not done so, his claim must fail and the appeal must be dismissed, with costs on the lower scale to include LP. 10.— advocate's attendance fee.

Delivered this 17th day of January, 1945.

Chief Justice.

CRIMINAL APPEAL No. 151/44.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Strati Foto. APPELLANT.

v.

The Attorney General. RESPONDENT.

Uncertainty of dates of commission of offence — Witness present at scene of crime alleged to be an accomplice.

Appeal from the judgment of the District Court of Haifa in CR. C. 66/44 dismissed :—

1. While there are cases where time of happening of offence goes to very root of charge, there may be particular types of charges where time is not of essence.

2. a) Mere presence of a witness at scene of offence does not make him an accomplice, though it rouses suspicion so as to call for greater caution before accepting his evidence as that of an independent witness.

b) If witness gives a reasonable explanation for his presence on place when the criminal act was committed, his evidence is admissible as corroboration.

(*M. L.*)

FOLLOWED: Rex *v.* W. Hartley, 28 CR. A. R. 15.

ANNOTATIONS:

1. As to point 1 see CR. A. 143/44 (*post*, p. 291; P. L. R. 2). On defect of charge sheet see CR. A. 146/44 (*ante*, p. 80; 11, P. L. R. 611).

2. As to point 2 see: CR. A. 152/44 (*ante*, p. 115) and annotations. See also CR. A. 64/35 (3, P. L. R. 27 and cases cited therein).

3. The case was previously on appeal in CR. A. 106/44 (11, P. L. R. 461; 1944, A. L. R. 485).

(*A. G.*)

FOR APPELLANT: Asfour.

FOR RESPONDENT: Government Advocate — (Salant).

JUDGMENT.

This is an appeal from the District Court of Haifa in Criminal Case No. 66/44, at which the Accused was convicted of an offence contrary to section 152(1)(c), Criminal Code Ordinance, 1936.

The appeal is based on two main points. The first as to the uncertainty of the dates of the offence given by the principal witness Steiner. The second was that the witness, Friedman, was an accomplice, therefore, his evidence could not amount to corroboration.

Now, as to the first point. It is true that there are cases where the time of the happening of the offence goes to the very root of the charge; but in this particular type of offence, time is not of the essence. In so far as the evidence of the Crown witnesses as to time was concerned the learned President did not exaggerate when he said that it was vague. However, the evidence of the sergeant and of the doctor makes it quite clear that an act of sodomy on this boy was committed within the time laid in the information, but I bear in mind that that evidence did not necessarily connect the Accused with that offence. In so far as the evidence was concerned the discrepancy as to time did not, in my opinion, amount to such as to make the evidence unworthy of belief. It must be borne in mind that the evidence was given in Hebrew and that the boys thought in terms of the Hebrew and not the Gregorian Calendar.

I turn now to the consideration of the second point raised by Mr. Asfour. It is true that the witness Friedman was on one occasion present in the room when this act took place. That in itself would not make him an accomplice; but it would certainly rouse suspicion, and the Court would be doubly careful before accepting that evidence as the evidence of an independent witness. It is, therefore, necessary to examine in detail the conduct of the boy. Having done so, I cannot but come to the conclusion that he gave a reasonable explanation of his presence in the room. He said that he stayed there because he could not open the door, and that he was very pleased when he did

get out. He added that if he had gone previously people might have seen what was done to witness No. 2 who was his friend and whom he wished to shield. That in my opinion was the natural reaction of a boy especially of a boy of his tender years, but it is a long way from making that boy an accomplice. Having come to the conclusion that he was not an accomplice his evidence is clearly admissible as corroboration in accordance with the decision in the case of Rex *v.* W. Hartley.

It follows, therefore, that both points raised must fail and the appeal must be dismissed.

As to the sentence, it will suffice if I say that the Court is unable to agree that the sentence was excessive.

Delivered this 13th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 398/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Zaki Abadi. APPELLANT.

v.

Eliahu Rom. RESPONDENT.

Action for eviction — Question of alternative accommodation — Onus of proof — Finding not supported by evidence — Wrong exercise of discretion.

Magistrate's judgment under sec. 8(1)(c), *Rent Restrictions (Dwelling Houses) Ord., cannot stand if he did not exercise his discretion correctly by misdirecting himself on an important point as to alternative accommodation.*

Appeal from the judgment of the District Court of Jerusalem, in its appellate capacity, dated 28.7.44, in Civil Appeal No. 48/44, dismissed:—

1. (*Obiter dicta*): Where landlord offers tenant another flat in same house, even if it has one room less than tenant's flat, he may be regarded as having discharged his duty of showing alternative accommodation; onus then on tenant to show why that accommodation not suitable for him.

2. Accommodation is not available if tenant would have to pay for it a rent beyond his means or if it gives him quite inadequate space.

(*M. L.*)

ANNOTATIONS: On questions of alternative accommodation and discretion of Magistrate under sec. 8(1)(c) of Rent Restriction (Dwelling Houses) Ordinance, see C. A. 272/44 (11, P. L. R. 582; 1944, A. L. R. p. 739) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: W. Salah.

FOR RESPONDENT: S. T. Cohen.

JUDGMENT.

This is an appeal from the judgment dated 28.7.44 of the Jerusalem District Court in Civil Appeal No. 48/44, in which the District Court allowed an appeal from the Magistrate's Court. The Magistrate had ordered the eviction of the Respondent under the provisions of section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance (No. 44) of 1940.

The Appellant (landlord) has raised three grounds of appeal. The first is that the District Court in its appellate capacity erred in interfering with the judicial exercise of discretion by the Court of trial; the second is that the Court erred in interfering with the suitability or otherwise of the alternative accommodation to the tenant; and the third is that the Court erred in its application of the principles of onus of proof in rent restrictions cases.

It is certainly the law that the landlord must show that there is alternative accommodation available for the tenant. It is a question of fact in each case whether the alternative accommodation is truly available for the tenant. Obviously it is not available if it is accommodation for which the tenant would have to pay a rent beyond his means, or which gives the tenant quite inadequate living space.

In the present instance the landlord offered the tenant the ground floor flat in the same building. It is true that the ground floor flat had one room less than the one upstairs, but on the whole I think that in offering the lower flat the landlord did discharge his duty of showing that there was alternative accommodation available for the tenant. So the onus was on the tenant to show why that accommodation was not suitable for him.

The tenant is a Rabbi, and he made it very clear that as a Rabbi he needed a room in which he could meet people who came to visit him for consultation. In giving evidence in the Magistrate's Court he stated, "I did not agree to exchange places with Plaintiff because

I need a special room for visitors". It seems to me that that was a reasonable condition for the tenant to make for himself in this particular case. The Magistrate, however, in paragraph 5 of his judgment, said:—

> "It is clear from this evidence that Defendant does not now use a room specially for consultation, and he cannot therefore correctly be said to require a room for this purpose".

I am unable to find, on perusing the record, that there was evidence to justify such a conclusion by the learned Magistrate, and I think that it was an important point on which he misdirected himself. There was some evidence too that the tenant and his wife are not in very good health, although it is true that the doctor had not examined the wife for over a year. The doctor stated that the wife was then suffering from rheumatism and from withering of the nerves, and he observed that the upper flat was, of course, healthier than the lower one. That evidence may not have been very cogent, but I think that the learned Magistrate gave it less consideration than it deserved.

There is another point which appears to be material in this case — the fact that in 1940, when the tenant proposed to leave the upstairs flat, the landlord induced him to stay by reducing the rent. Now I think that the landlord ought at that time to have considered the possibility that he would need the flat for his own use later on. It was probably easier for the tenant to find other accommodation at that time, and it does not seem reasonable for the landlord to induce a tenant to stay by lowering the rent and then turn him out when it no longer suits his convenience to keep him.

In the result I think that this case is one in which I may say that the Magistrate did not exercise his discretion correctly, and in which he misdirected himself on an important point — upon the question whether the tenant had special need of a room for consultation.

That being so, I find that this appeal fails and it must be dismissed with fixed costs in the amount of LP. 10.

Delivered this 25th day of January, 1945.

British Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 305/44.

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

BEFORE: Rose and Abdulhadi, JJ.

IN THE APPEAL OF:—

Izzat Tewfic Saqallah. APPELLANT.

v.

Hazkiel Yousef El-Baghdadi. RESPONDENT.

Claim for eviction for making unreasonable profit by taking in lodgers — Interference of appellate Court with findings of Court of trial.

Appeal from the judgment of the District Court of Tel-Aviv (appellate capacity) in C. A. 81/44 allowed and judgment of Magistrate restored :—

1. An appellate Court should not intervene on a point of fact which was not argued before Court of first instance.

2. District Court in its appellate capacity should be most cautious in upsetting a finding of fact made by Magistrate under sec. 8, Rent Restrictions (Dwelling Houses) Ord., unless fully satisfied that he had not applied his mind to the relevant considerations or that there was insufficient evidence to support his findings.

(*M. L.*)

ANNOTATIONS:

1. As to point 1 see C. A. 387/44 (*ante*, p. 73) and annotations, and C. A. 86/43 (1943, A. L. R. 107; 10, P. L. R. 204).

2. This is the 1st eviction case under sec. 8(1)(b) which reached the Supreme Court. For decisions of District Courts on question of unreasonable profit see C. A. District Court, Jlm. 36/42 (Gorali, 177) and C. A. D. C. T. A. 112/42 (Gorali, 231).

3. On discretion of Magistrate under sec. 8(1)(c) see C. A. 272/44 (1944, A. L. R. 739; 11, P. L. R. 582) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: Hawari.

FOR RESPONDENT: Hatchwell.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv, sitting in its appellate capacity.

The sole point to be considered is whether the District Court were right in upsetting the learned Magistrate's finding that the Appellant, who was the Plaintiff in the Court of first instance, had satisfied him that in accordance with section 8(1)(b) of the Rent Restrictions (Dwel-

ling Houses) Ordinance, 1940, the tenant had, by taking in lodgers, made an unreasonable profit.

It appears that the Appellant let to the Respondent and has been letting to him for a term of four years a house consisting of five rooms and two shops or stores, that in one of these two stores the Respondent erected an oven in which he conducted a bakery business. For the first three years of that term the rent for the whole house was LP. 22 *p. a.*, for the fourth, last, year of the term it was raised to LP. 45 *p. a.*, and it appears that the Respondent himself during the last year was occupying one of the five rooms for himself and his family and the two stores including the bakery business. The remaining four rooms he sublet to various persons for the sum of LP. 69 a year. There is evidence on the record supplied by these sub-tenants themselves that they were, in fact, paying this sum of LP. 69. The question, therefore, which the Magistrate had to consider was whether this sum of LP. 24 profit, having regard to the fact that the Respondent himself still occupied the two stores and one of the five rooms, was unreasonable.

The learned Magistrate, as is clear from his judgment, applied his mind to this precise consideration and he came to the conclusion that that was, in the circumstances of the case, an unreasonable profit. It is to be noted that in this Court and in the District Court the Respondent took the point that these sub-tenants did not pay municipal and water rates which usually devolved upon the tenant himself to pay. That point was not taken before the Magistrate. It is true that it was mentioned in the evidence of one or two of the tenants without figures and without detail, but the Magistrate took a careful note of the proceedings and a careful note of the final speeches of both advocates, and I notice that in neither the speech of counsel for the landlord nor in that of the tenant was this point about water rates raised, and it seems to me, therefore, that it is quite unfair for an appellate Court to intervene on a point of fact which was not argued before the Court of first instance. We would repeat once again, which has been repeated often in this Court, that the District Court sitting in its appellate capacity should be most cautious in upsetting a finding of fact made by the Court of first instance in accordance with section 8 of this Ordinance, unless they are fully satisfied that the Magistrate who tried the original case had not applied his mind to the relevant considerations or that there was insufficient evidence to support his findings.

For these reasons we are of opinion that the appeal must be allowed, the judgment of the District Court set aside and the judgment of the Magistrate restored. The Appellant will have the costs of the pro-

ceedings before the District Court, and the Magistrate's Court and also the costs of this appeal. The costs of this appeal will be on the lower scale and will include the sum of LP. 10 for advocate's attendance fee.

Delivered this 7th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 482/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF :—

Sara Greiber. APPELLANT.

v.

Isidor Baumhall. RESPONDENT.

Raising rent after expiration of tenancy up to standard rent — Similarity of principles underlying Palestine and English legislation regarding rent restriction.

Appeal from the judgment of the District Court of Tel-Aviv in its appellate capacity, dated the 24th of November, 1944, in Civil Appeal No. 20/44, dismissed:—

1. When lease expired and tenant holds over under provisions of Rent Restrictions Ordinance, landlord can raise rent from lower figure to standard rent.

2. Notice to statutory tenant to raise rent up to standard rent as from expiration of lease can be made even before expiration.

3. Clause providing for an increased rent per day after expiration of lease — a penalty clause, not an option for renewal clause.

4. Primary object of Palestine Ordinances regarding rent restriction — similar to that of English Acts: to freeze rents at the point at which they stood on a specified date.

(*M. L.*)

REFERRED TO: C. A. D. C. Tel-Aviv 24/42 (Gorali, 213; Law Reports of D. C. of Tel-Aviv, 1941—2, p. 74); Glossop *v.* Ashley (1922) English and Empire Digest Vol. 31, p. 565, para 7125; 125 L. T. R. p. 842.

FOLLOWED: Phillips *v.* Copping (1935, 1 K. B. D. 15 and 152 L. T. R. 175; English and Empire Digest Supplement, Vol. 31, para 7140(*a*); Skinner *v.* Geary (1931) 546; 145 L. T. R. 675; the English and Empire Digest Supplement Vol. 31, para. 7103(*e*).

ANNOTATIONS:

1. This is the 1st decision of the Supreme Court on the question whether a

landlord is entitled to raise the agreed rent up to the standard rent. In addition to the case of the D. C. of Tel-Aviv, referred to (*supra*) also the D. C. Haifa gave two decisions with the similar effect, *viz.* C. A. D. C. Haifa 104/42 (Gorali, p. 201) and C. A. D. C. Haifa 146/42 (Gorali, p. 204).

2. The Supreme Court followed Phillips *v.* Copping (*supra*) which overruled the judgment in Dufty *v.* Palmer (*infra*). In order to prevent confusion the following remarks might be relevant:—

The case of Glossop *v.* Ashley was given in the 1st instance by McCardie, J. (K. B. D.) and was confirmed on appeal by the Court of Appeal (Bankes, Scrutton and Atkin, L. JJ.). The question of raising rent up to the standard rent was dealt with in this case by way of *obiter* only. McCardie, J., expressed an opinion that a landlord may require the increase of rent up to the standard rent. This view was upheld on appeal by Scrutton, L. J., Atkin, L. J., took the opposite view while Bankes, L. J., did not comment on the point at all.

In Dufty *v.* Palmer (1924, 2 K. B. 35; 131, L. T. R. 401) the Court decided that a landlord cannot increase the rent up to the standard rent. This decision was arrived at upon interpretation of Glossop *v.* Ashley, which the Court of Appeal in Phillips *v.* Copping held to be erroneous.

In Phillips *v.* Copping the a/m cases are surveyed and the Court of Appeal came to a decision that the view of McCardie, J., in Glossop *v.* Ashley in the matter of increase of rent up to the standard rent was the correct view.

3. The case of Skinner *v.* Geary (*supra*) was referred to in other cases of the Court of Appeal, see annotations in A. L. R. to C. A. 319/43 (1944, A. L. R. 454). See also C. A. 441/44 (*post*, p. 289) which analyses and follows that case.

4. On nature of statutory tenancy see cases followed and the notes 2 and 3 of the annotations in A. L. R. to C. A. 319/43 (*supra*).

5. In other cases the Supreme Court drew a distinction between the conditions in England and in Palestine in respect of the question of alternative accommodation under sec. 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, *viz.* C. A. 265/42 (1943, A. L. R. 10; 10, P. L. R. 60) and C. A. 141/43 (1943, A. L. R. 318; 10, P. L. R. 289). See also C. A. 40/43 (1943, A. L. R. 39; 10, P. L. R. 170) in which the case of Skinner *v.* Geary was distinguished.

6. The judgment of the District Court is reported in 1944, S. C. D. C. 459.

(*A. G.*)

FOR APPELLANT: Sussmann.

FOR RESPONDENT: A. Levin and E. Z. Fellman.

JUDGMENT.

This is an appeal by leave from the judgment of the District Court of Tel-Aviv sitting as a Court of Appeal from the judgment of the Magistrate's Court. The case undoubtedly raises an important point of law concerning the interpretation of the Rent Restrictions (Dwelling-Houses) Ordinance, 1940. The Appellant was the lessee of a flat from the Respondent under an agreement which expired on the 30th of September, 1943. The agreement which was an exhibit in the case, provided for a rent of LP. 3.250 mils per month. Four days before the expiry of the agreement the Respondent informed the Ap-

pellant in writing that as from the 1st of October, 1943, she would be required to pay the standard rent which the Respondent alleged was LP. 3.500 mils per month. The Appellant did not reply specifically to this letter but on the 7th of October she sent a letter to her bank, (the Kupat Milveh of the Workers Tel-Aviv Ltd.) authorising them to pay the rent of LP. 3.250 mils to the order of the Respondent. She also executed in his favour eleven promissory notes for LP. 3.250 mils each. This method of payment was in accordance with the terms of the agreement. The bank duly sent the copy of the instructions to the Respondent. The learned Magistrate found as a fact, and I am satisfied that he was amply justified in so finding, that the rent paid for this flat on the 1st of April 1940 was LP. 3.500 mils per month. I might here remark that on that date the Respondent was not the landlord nor was the Appellant the tenant. It follows that under the provision of section 2 of the Rent Restrictions (Dwelling-Houses) Ordinance the standard rent of this flat was LP. 3.500 mils per month.

The main question for determination is whether when a lease has expired and the tenant holds over under the provisions of the Ordinance, the landlord has the right to raise the rent from a figure below the standard rent up to the standard rent. In other words, in this case whether he had the right to increase the rent by 250 mils per month.

Before issue was joined on this main ground, alternative submissions were made by the Appellant and it will be convenient if I dispose of them first. Dr. Sussmann argued that the letter from the Respondent to the Appellant was not a proper demand. It failed he says, on two grounds, firstly that there was no indication that the new rent the Respondent was demanding was the standard rent. As to this, it will suffice if I say that apart altogether from the question as to whether there was an onus on the Respondent to state specifically that the rent he was demanding was the standard rent, I fail to appreciate how this argument can be sustained seeing that the opening lines of the letter are "Whereas I demanded from you to pay me the standard rent in the amount of LP. 3.500 mils per month". Surely this was a perfectly clear indication that what the Respondent was demanding was an increase up to the standard rent. This ground must therefore fail.

The second ground upon which he challenged the notice was a somewhat farfetched one. It is void, he contends, because it was given before and not after the expiration of the lease. His argument was apparently based on what purported to be an extract from the judg-

ment in Phillips *v.* Copping, Law Reports, King's Bench Division Vol. 1, 1935, which was quoted in Civil Appeal No. 24/42 in the District Court of Tel-Aviv as an authority for the proposition that "a landlord of a dwelling-house may raise to the standard rent the rent which was hitherto below the standard rent provided that on terminating the tenancy the notice of his intention to raise the rent to the standard rent has been given to the tenant". I cannot find those actual words in the Law Report of the case but probably what the District Court of Tel-Aviv had in mind was the extract from the judgment of McCardie, J., in the case of Glossop *v.* Ashley which in the case referred to was quoted with approval by Scrutton, L. J., and which was as follows:—

> "If therefore a landlord after due notice of claim and after expiration of the common law tenancy demands the standard rent from the statutory tenant then I think that the tenant must be held liable in law to the higher rent."

In my opinion this is no authority for the proposition advanced by Dr. Sussmann that a notice duly sent as in this case before the expiration of the tenancy but which it is stated is not to take effect until after the expiration of the tenancy, is not the due notice contemplated by McCardie, J., and accepted by Scrutton, L. J., in the case quoted.

Before proceeding to the main issue it may tend to clarify matters if also at this stage I dispose of one defence raised by the Respondent. It was contended by Mr. Levin that Clause (f) of the agreement was an option to continue at an increased rent of 300 mils per day after the expiration of the lease. It follows, he argues, that the rent payable by the tenant under the agreement now amounts to something like LP. 9 a month and the only right the tenant can claim under the Ordinance is to have it reduced to the standard rent which is LP. 3.500 mils per month. I am unable to accept this line of argument. I think that Dr. Sussmann is right when he says that this Clause (f) is a penalty clause. Be that as it may I am satisfied that it is certainly not an option for renewal clause.

I come now to the main point of the appeal. Can the landlord raise the rent to the standard rent? Dr. Sussmann who, if I may say so, argued the case with great ability, says he cannot and he relies on section 8(3) of the Ordinance which provides that the agreement shall continue in force. He refers to section 8(1) and he emphasizes the words "as modified by this Ordinance". These words, he argues, are an authority for saying that the rate agreed upon in the expired lease can only be altered if the Ordinance specifically provides for alteration, there is, he goes on, no such provision in the section. It

is clear that we cannot take one section alone, we must look at the Ordinance as the whole. To quote the words of Scrutton, L. J., in Skinner *v* Geary, Law Reports K. B. D. 1931.

> "The history of the Rent Restriction Acts shows that there has been a very gradual feeling of its way by the Court with regard to the principles upon which these Acts are to be worked. When they were drawn there is no evidence that Parliament or the draftsman ever thought out what rights they were giving to the tenant of a house to which the Acts applied."

Again the same L. J. in Phillips *v*. Copping:—

> "The Act was passed during the war at a time when increases of rent were being made, sometimes to an enormous extent over the rents which were being paid before the war, and the object of the Act was to prevent increases beyond the pre-war rent".

It seems to me that the object of the Palestine Ordinance was likewise to prevent increases beyond the rent prevailing on what I may call the zero date which was the 1st of April, 1940. In regard to the freezing of the rent, I consider that the principles underlying the Palestine Ordinance were similar to those embodied in the English Act. Dr. Sussmann has attempted to argue that the Palestine Act was designed to meet totally different conditions and that it cannot be interpreted in the light of the numerous authoritative decisions which have interpreted the English Act during the 25 years of its existence. With this contention I am unable to agree. It is quite true that conditions in Palestine may be different and these will call for variations in the detail of the structure of the Palestine legislation, but, as I have said, the primary object of both acts was the same; it was to freeze rents at the point at which they stood on a specified date. Having disposed of the argument which was founded on the alleged difference in principle between the English and Palestine Legislation, I turn to compare the facts in this case with those established in the English case of Phillips *v*. Copping. In that case the tenant under an agreement of lease with the landlord was paying a rent lower than the standard rent. The lease expired in 1922 but the tenant held over under the provisions of the Landlord and Tenant Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. His right to increase the rent which was payable under the expired lease up to the Standard Rent was upheld by the Court. In delivering judgment Maugham, L. J., said:—

> "In my opinion this right of a landlord on the expiration of a legal tenancy to raise the rent to the standard rate was his right at common law and it has not been interfered with by the Act".

As to this, Dr. Sussmann argues that the Lord Justice was referring

to the common law of England which he says does not apply to Palestine. Apart altogether from the provisions of Article 46 of the Palestine Order-in-Council, it appears to me that the principle of common law ennunciated by the Lord Justice which is no more than a restatement of the right of a person to dispose of his property as he wishes provided he does not infringe in law, is equally part of the fundamental law of Palestine.

I will now consider what limitations, if any, the Palestine Ordinance imposes on the exercise of this Common Law or fundamental law right. It imposes in the first place prohibition against reletting so long as the tenant chooses to remain in possession. That statutory prohibition may be said to be offset by certain statutory obligations on the part of the tenant. Those are contained in section 8(3) of the Ordinance. The question of rent is specifically dealt with which is not surprising seeing that the principal object of the legislation was to deal with rent. Section 8(1) which imposes a restriction on ejectment is the kernel of the legislation. It provides that a judgment for eviction shall not be enforced if the tenant pays rent "at the agreed rate as modified by this Ordinance". There is nothing in the section which restricts the modifications to those in favour of the tenant. What then are the modifications in regard to rent. They are not difficult to ascertain. The Ordinance concerns itself with one rent and one rent only, that is the standard rent, but that standard rent can be ascertained by two different methods. It can be computed by reference to the zero date or in accordance with the provisions of section 5 and 6. Dr. Sussmann has sought to draw a distinction between the words "any rent lawfully due" which are the words used in the corresponding section of the English Act and the words "rent at the agreed rate as modified by this Ordinance" which are the words used in the Palestine Legislation. It is my opinion that both expressions mean the same thing. The rent lawfully due, if I may be permitted to say so, is the rent due by virtue of the provision of a law. It is not due under the agreement because that has expired; it can only be due therefore in so far as it is provided for in the Act of 1920. Similarly in this case the rent of LP. 3.250 mils cannot be recovered under the agreement because that agreement has expired; the only rent which is lawfully due is the rent provided for in the Ordinance and as I have pointed out the only rent with which the Palestine Ordinance has concerned itself is the Standard Rent. It follows that the Respondent can increase the rent up to the standard rent.

The appeal must therefore fail with costs on the lower scale to include LP. 15.— for advocate's attendance fees.

Delivered this 27th day of March, 1945, in the absence of Appellant and in the presence of Mr. A. Levin for Respondent.

Chief Justice.

CIVIL APPEAL No. 319/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

1. Director General of Awqaf,
2. Municipal Corporation of Haifa. RESPONDENTS.

Action by Director General of Awqaf without formal direction from Commission — Scope of Defence (Moslem Awqaf) Regulations, 1937.

Appeal from the judgment of the District Court of Haifa in C. C. 149/42 allowed :—

1. a) Director General of *Awqaf* has no right to sue without prior reference to the Commission appointed under Defence (Moslem *Awqaf*) Regulations, 1937.

b) Judgment given in an action brought by Director General of *Awqaf* while he had no right to sue cannot stand.

2. Verbal consent of direction by Chairman of *Awqaf* Commission — not sufficient, even if subsequently confirmed by a letter; there must be a formal delegation of authority formally resolved, formally recorded and formally conveyed to Director General of *Awqaf*.

(*M. L.*)

FOLLOWED: C. A. 218/43 (10, P. L. R. 517; 1943, A. L. R. 615).

ANNOTATIONS: See case followed and annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Assistant Government Advocate — (Touqan).

FOR RESPONDENTS: No. 1 — Husseini.

No. 2 — No appearance.

JUDGMENT.

In our opinion this appeal must be decided on the first ground — that the learned District Court erred in holding that the Plaintiff had a right to sue. It is regrettable that this is so because the learned Judges of the District Court most carefully weighed the evidence and in a painstaking judgment they summed it up with lucidity. But the first ground of the appeal is no mere technicallity. It goes to the very root of the Defence (Moslem *Awqaf*) Regulations, 1937. By those regulations the administration of *Awqaf* affairs was taken away from the Supreme Moslem *Sharia* Council and the General *Awqaf* Committee. The object, *inter alia*, was to tighten up that administration by the enactment of certain restrictive provisions in regard to the disbursement of *Awqaf* funds. Regulation 3 provided that in some cases the General *Awqaf* Committee could institute legal proceedings subject to such directions as the Commission appointed by the Regulation might give. The Commission did, in fact, direct that the General Director of *Awqaf* could take legal proceedings in matters effecting the financial interest of the *Awqaf* — the case which is now under appeal would undoubtedly be included within that direction — but the Commission's direction was subject to the proviso that legal proceedings should not be instituted without prior reference to the Commission. It will be obvious that this was a very necessary proviso if the Commission were to carry out the obligations laid in them by the Regulations.

In this case there is no legal evidence before us that the Director General of *Awqaf*, who is the first Respondent, ever made prior reference to the Commission before embarking on litigation. We are unable to discover any difference even in detail between the facts of this case and those decided in Civil Appeal 218/43. We quote from that appeal:—

> "The regulations constituting the Commission provide for the conduct of its business at a meeting at which one member is present, in addition to the Chairman. It is obvious that when the Commission delegates its authority, as it is empowered to do, such should be done at a formal meeting of the Commission and be recorded. This applies particularly to such important matters as instituting legal proceedings. Verbal consent by the Chairman is not sufficient, even though vaguely confirmed by him subsequently in writing."

That paragraph applies word for word with one exception to the facts of this case. That exception is the use of the terms "vaguely", because in this case there is a letter which might be interpreted as a clear indication that the Chairman did confirm what purported to be the previous

verbal direction by him. In our opinion this makes no difference; the gist of the decision in the case from which we are quoting is that there should have been a formal delegation of authority formally resolved, formally recorded and formally conveyed to the Director General of *Awqaf*. It is only in this manner that effect could be given to the overriding control which it was the unequivocal intent of the Defence Regulations to vest in the Commission.

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

Delivered this 11th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 12/45.

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

BEFORE: Plunkett, A/J. and Frumkin, J.

IN THE APPEAL OF:—

Asher Selig Kushnir. APPELLANT.

v.

Dr. Joseph Rotenberg. RESPONDENT.

Claim by guarantor — Whether request by person guaranteed is necessary, Mejelle Art. 657 *— Art.* 621 *inapplicable.*

Appeal from the judgment of the District Court, Tel-Aviv, dated 22nd December, 1944, in Civil Case No. 249/42; allowed:—

A guarantor has no right of recourse against the person guaranteed unless the guarantee was undertaken at the latter's request.

(*A. M. A.*)

ANNOTATIONS:

1. A contract of guarantee is governed by the *Mejelle*: C. A. 240/37 (5, P. L. R. 159; 1938, 1 S. C. J. 148; 3, Ct. L. R. 104) unless the guarantee is in the form of an *aval* on a bill or note: C. A. 206/41 (8, P. L. R. 494; 1941, S. C. J. 597; 10, Ct. L. R. 173) and annotations in S. C. J.

2. On the right of contribution see C. A. 64/41 (8, P. L. R. 197; 1941, S. C. J. 177; 9, Ct. L. R. 147).

3. *Cf.* C. A. 52/38 (5, P. L. R. 273; 1938, 1 S. C. J. 236; 3, Ct. L. R. 175) — no remuneration for an agent's services unless there was a request for such services.

(*H. K.*)

FOR APPELLANT: Olshan & Kadoury.

FOR RESPONDENT: Tori.

JUDGMENT.

Frumkin, J.: This is an action for the recovery of money allegedly paid by a guarantor. The facts as far as they are relevant to this case are shortly thus:—

In 1936 the Respondent in this case mortgaged his property to one of the banks of Tel-Aviv, which is not a party to this case. As a result of this mortgage the Respondent paid a certain amount of money to that Bank and he instituted the present action against the Appellant on the ground that that mortgage was given in order to secure monies due from the Appellant to that Bank. The Appellant was not a party to the mortgage, although his name is mentioned in the mortgage deed, clause 4 of which says "that the present mortgage will serve the lender as an additional security to secure loans given or which may be given by it to Mr. A. Z. Kushnir in the form of a debitor current account or in any other form whatsoever, together with interest and expenses". The attitude of the present Appellant, who was the Defendant in the Court below, was all through a denial that this mortgage has been given at his request. In paragraph 2 of the statement of defence he makes it clear when he says:—

> "The Defendant has never asked the Plaintiff to sign the mortgage deed which he has made in favour of the Bank of Discount, Ltd., and if he did this on his own account, he has no right of claim against the Defendant".

The first point which therefore arises is whether in a claim for recourse by a guarantor from the debtor, request is necessary. The *Mejelle* applies, and the only reference as regards right of recourse is to be found in Article 657. This article deals essentially with the form of recourse, but starts off by stating that, "If someone says to another 'be surety for any debt which I owe such a one', and that person becomes a surety", and then proceeds to deal with the nature of recourse. The construction put on this article is that the first two lines of the article are imperative, and that it is only when the person has asked the guarantor to be surety that there is a right of recourse against him; in other words, the right of recourse depends upon request.

Was there a request in the present case?

As I have said it is denied by the Appellant. There was certain evidence which, if proper attention were paid to it, might lead to one way or another. There is first of all direct evidence by the Plaintiff (Respondent) who from the box said that it was upon the specific request of the Appellant that he entered into the mortgage in favour of the Bank to secure the account of the Appellant. There is also the evidence

of the Assistant Manager of the said Bank to the effect that the Respondent gave the security in favour of Appellant. There is also mention of the Appellant in the mortgage deed. If the Court below would have accepted all this evidence to show request, on behalf of the Appellant, it would be difficult to interfere with the conclusion so arrived at. We would have a direct request, supported as it is by substantial surroundings such as knowledge, but the Court did not make any findings as to that. Nor could it be said that the matter of request was not in the mind of the Court below, because they dealt with the matter of request in their judgment, the penultimate paragraph of which reads as follows:—

> "As to Defendant's attorney's plea that there is no proof in writing that Defendant asked Plaintiff to guarantee him, the provisions of Article 621 of the *Mejelle* afford an answer to this".

They then go on to deal with that matter, relying upon an article, which however has nothing to do with this case. Article 621 to which the Court refers, reading it as I always do from Tyser's translation, provides that — "by the offer of the surety alone a suretyship becomes a concluded agreement and enforceable, but if the claimants wish, they can reject it". Apparently the Court misconceived this article, taking it to mean as dealing between the guarantor and the person guaranteed, not the person in whose favour the guarantee is made. All that this article provides is that it is not necessary for an acceptance of a guarantee and that a guarantee is binding upon a guarantor on his word, but the person in whose favour it is given, in this case the Bank, could refuse to accept it, and that as long as there is no such refusal the guarantee is binding, notwithstanding the fact that it was never accepted. How this article, however, has anything to do with the request on behalf of the person to be guaranteed, I fail to understand.

It follows, therefore, that according to the judgment of the Court below there was no evidence accepted by the Court to show that the mortgage entered into and executed by the Respondent in favour of the Bank, was so executed upon the request of the Appellant to secure his indebtedness to the Bank. We must therefore come to only one conclusion possibly, merely that the Respondent has no right of recourse against the Appellant.

The appeal must therefore be allowed and the judgment of the District Court set aside, with costs of LP. 15.

Delivered this 12th day of April, 1945.

Puisne Judge.

CIVIL APPEAL No. 290/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Fakhry Ayyas. APPELLANT.

v.

The Attorney General. RESPONDENT.

Forfeiture of goods under Import, Export and Customs Powers (Defence) Ord. — Interpretation of "other place" in sec. 5(1)(b) of said Ord.

Appeal from the judgment of the District Court of Haifa in C. C. 210/43 allowed :—

1. A mere attempt to import or export goods into or from Palestine does not involve forfeiture.

2. Words "other place" in sec. 5(1)(b), Import, Export and Customs Powers (Defence) Ordinance, 1939, must be interpreted in accordance with *ejusdem generis* rule as referring to some place near or close to or part of a water side.

(*M. L.*)

REFERRED TO: C. C. District Court Jaffa 25/43 (unreported); King *v.* West Riding Justices (1900) 1 Q. B. 291; Young *v.* Gratteridge, (1868) 4 Q. B. p. 266, 25 Digest, p. 110, No. 339; William L. Allen *v.* John Emerson and others (1944), 1 A. E. R. 344.

ANNOTATIONS :

1. See cases referred to.

2. On *ejusdem generis* rule, see C. A. 240/43 (10, P. L. R. 584; 1943, A. L. R. 699) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: A. Atalla, Goitein and Gluckman.

FOR RESPONDENT: Assistant Government Advocate — (Touqan).

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, dismissing the present Appellant's claim for an order requiring the Defendant to deliver to him certain silk, cotton and woollen goods set out in a notice under section 6 of the Import, Export and Customs Powers (Defence) Ordinance, 1939, Palestine *Gazette* No. 1231 (Suppl. No. 2) 29th October, 1942, Annual Volume of Laws for 1942, Vol. 3, page 1644. I shall hereinafter in this judgment refer to that Ordinance as the "Import Ordinance".

The facts, as found by the learned President of the District Court, shortly are that the Plaintiff was a merchant of Beirut, who frequently visited Palestine and Trans-Jordan. In September, 1942, he came to Palestine and bought goods to the value of some LP. 12,000, which goods he intended to export to Syria. The Court below also found that the Plaintiff knew that it was necessary to obtain an export licence. The Plaintiff proceeded to purchase goods and did not trouble to submit an application for permission to export the goods which he placed in a store belonging to one 'Izzat Muheish. The Plaintiff intended going to Beirut and returning to Palestine after ten days, then selling the goods locally in order to make a profit. He made no arrangements to pay Muheish any storage charges. The Plaintiff said that after completing his business in Jaffa he came to Haifa about the 17th or 19th September and stayed there with his cousin Rashid Haj Ibrahim. Whilst there, about the 19th or 20th some merchants informed him of the fact that his goods had been seized at Samakh. He was astonished to hear this because he had left the goods in store in Jaffa. The learned President went on to find that the evidence established that the goods were on 18th September loaded on two lorries and that they proceeded to Affuleh and thence to Yamma. On the way the drivers stopped on the order of one Taher who was with them; and they then waited until a taxi arrived. Taher spoke with the persons in the taxi and the lorries then went on following the taxi. They arrived at Samakh after nightfall. Instead of going through the town, where there is a Customs Post, they by passed the town; but eventually at 1 *a. m.* they were stopped by the Police on the east side of Lake Tiberias at a distance of about 100 metres from the Syrian border and taken back to Samakh where the goods were seized. The Plaintiff, on hearing of the seizure, went to Samakh where he met and spoke to Mr. Hattoum — a Customs Officer — who had been specially sent by the Director of Customs to investigate the matter. The Plaintiff alleged that Hatoum promised to release the goods provided he (Plaintiff) helped to find the smugglers. The Plaintiff went to Haifa where he again saw Hatoum and finally on 24th September he went to Acre to consult his advocate, Ahmad Eff. Shukeiri. The Plaintiff said that, as a result of this consultation, a letter of claim was written and signed by Ahmad Eff. Shukeiri, and given to the Plaintiff who in due course posted the letter to the Director of Customs. The learned President disbelieved the evidence of the Plaintiff and we have been invited by the Appellant's advocate to say that, at any rate, in some respects the learned President was not justified in disbelieving some of the assertions of the Plaintiff.

The Plaintiff's case was that the goods were transported towards the Samakh frontier without his knowledge and that there was a conspiracy between some officers of the Customs Department and of the Police, with a view to certain persons receiving rewards as informers. The Respondent in paragraph 3 of his statement of defence claimed that the forfeiture was in accordance with the provisions of section 188 of the Customs Ordinance as well as the provisions of section 5 of the Import Ordinance. It is common ground that a mere attempt to import or export does not entail forfeiture; the Customs Ordinance therefore does not apply and it is accordingly unnecesary to decide whether the learned President was justified in his finding that the letter which Ahmad Eff. Shukeiri had written was not despatched by the Appellant.

The controversy in this case centres round the question whether the words "other place" in line 1 of section 5(1)(b) can be held to mean any place of land. The contention of the Appellant is that the words "other place" must be interpreted in accordance with the *ejusdem generis* rule — in other words that "other place" in this connection must mean a place connected with water, *e. g.* jetty, pier, landing stage, wharf, slip, *etc.* We are asked to note that the words "or other place" appear sandwiched in between the words "quay" and "or water-borne".

Naim Bey Touqan, for the Respondent, relies on section 27, Interpretation Ordinance, which provides that the words "or otherwise" must be construed disjunctively. He has also quoted the case of William L. Allen *v.* John Emerson and others, Vol. 1, A. E. R. (1944) part II, p. 347. The Appellant retorts that section 27 does not provide that the words "or other" must not apply to the *ejusdem generis* rule. The present enactment uses the words "or other" not "or otherwise". It is also said that in section 5(a) and (b) the word "or" is used disjunctively and no order has been made preventing persons from bringing goods to a quay or frontier for the purpose of exportation. The argument is that export does not include an attempt to export and that no order has been made forbidding persons carrying goods for the purpose of export. Reference is made to the Licensing of Exports Order, 1940, paragraph 2, to be found in the Palestine *Gazette* No. 1024 of 23rd June, 1940 (Suppl. No. 2), p. 820. It is said that the word "other" first appeared in English Law when the Sabbath Day Observance Act was pased, *i. e.* Lord Tenderden's Act, 1677, where the words "other such like persons" were held not to include an attorney. It is also said that the case of Allen *v.* Emerson does not help the Respondent. The Appellant argues that the Import Ordinance has been taken from the corresponding English Act and he suggests that because England, Wales

and Scottland are an island it is impossible to import or export goods into or from Great Britain except by sea and possibly also by air. We have been referred to Maxwell's Interpretation of Statutes (8th Edition) p. 294, and to the case of Young *v.* Gratteridge, 4 Q. B. (1868) p. 166. It is said that the words "or other place" do not apply to a genus. We have also been referred to the preamble to the Import Ordinance which lays stress on the words "coastwise and shipment" and which constantly uses the words "shippers" and "forfeiture of ship" (section 5(1)(b) and section 5(2)). We are reminded that section 189 of the Customs Ordinance does in terms include means of conveyance other than ships and boats and we are also told that in section 7(4) of the Import Ordinance "aircraft" is specifically included although trucks, motor-cars and lorries are omitted. It is also said that in section 10 the words "said vessel or goods" appear.

We have also been refererd to Maxwell pp. 289 and 290, and to the case of King *v.* West Riding Justices (1900) 1 Q. B. p. 291 and to Stroud's Judicial Dictionary (2nd Edition) pp. 1363, 1468 and 1488, and to the words "other place" in the Bills of Sale Act, 1882. There is a judgment which is not binding on us, namely, District Court of Jaffa, Civil Case No. 25/43 which was concerned with the question whether a plaintiff could be regarded as having guilty knowledge of the removal of goods. We have already said that it is not denied that an attempt to import or export does not involve forfeiture. We think that the words "other place" must refer to some place near or close to or part of a water side. This being so, and in view of the fact that section 188 cannot be said to apply to the facts of this case, the appeal succeeds and the Plaintiff is entitled to the judgment asked for in paragraph 6 of the statement of claim.

We accordingly set aside the judgment of the Court below and enter judgment for the Appelant (Plaintiff) in terms of paragraph 6 of the statement of claim. The Respondent must pay costs here and below. The costs of this appeal will be taxed on the lower scale and will include an advocate's attendance fee at the hearing of LP. 15. The advocate's attendance fee in the Court below will be the same amount as awarded to the present Respondent.

Delivered this 1st day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 441/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Antoine F. Albina. APPELLANT.

v.

Jamileh Issa El-Ama & an. RESPONDENTS.

Lessee transferring lease to another person — Sublease by second lease to a 3rd person — Protection of tenant under English Act and Palestine Rent Restrictions (Dwelling Houses) Ord. — Scope of sec. 8(3), Rent Restrictions (Dwelling Houses) Ord.

Appeal from the judgment of the District Court of Jerusalem, in its appellate capacity, dated the 29th of September, 1944, in Civil Appeal No. 38/44, dismissed:—

1. The fundamental principle underlying both the English Act and the Palestine Rent Restrictions (Dwelling Houses) Ordinance is to protect the resident in a dwelling house, not a person who is not a resident.

2. "Continues in occupation of any dwelling house" in Rent Restrictions (Dwelling Houses) Ordinance means in actual occupation of that dwelling house.

(*M. L.*)

FOLLOWED: C. A. 482/44 (*ante*, p. 274); Skinner *v.* Geary (1931) 546; 145, L. T. R. 675; The English and Empire Digest Supplement Vol. 31, para. 7103(e); Haskins *v.* Lewis (1931, 2 K. B. 1; 144, L. T. R. 378).

ANNOTATIONS:

1. See the cases followed and the annotations in A. L. R. to C. A. 482/44 (*supra*).

2. The decision in this case taken together with decision in C. A. 223/44 (1944, A. L. R. 741; 11, P. L. R. 599) creates thus the following position: A lawful subletting of the whole premises takes the tenant out of the protection of the Rent Restrictions Ordinance and brings within this protection the lawful subtenant.

3. It is important to point out that in Skinner *v.* Geary the Court found that the tenant gave up residence in the premises in question and did not desire to return there. Scrutton, L. J., says: "I exclude the cases of temporary absence".

(*A. G.*)

FOR APPELLANT: Olshan.

FOR RESPONDENTS: No. 1 — Nakhleh.

No. 2 — Absent — served.

JUDGMENT.

This is an appeal by leave from the District Court of Jerusalem sitting as an appeal Court from the Magistrate's Court. The facts are: — The first Respondent owns a house in Katamon the subject-matter of this claim. She leased it to one Major Peters in 1941 for one year. The tenant transferred his lease, as he was entitled to do, to the present Appellant who sub-let to Mr. Jardine (the 2nd Respondent). The original lease by the first Respondent expired on the 14th April, 1942. Various subsidiary points were raised during the course of the case, one being whether there was a proper assignment from Major Peters to the Appellant Mr. Albine. The Magistrate decided that there was. The District Court agreed with him and I see no reason to differ. I endorse the view of the District Court that the only point which called for determination was whether or not the Appellant, Mr. Albina, was a statutory tenant within the meaning of the Rent Restrictions (Dwelling-Houses) Ordinance, 1940. It is admitted by the Appellant that he has never occupied this house, his profession is that of land and house agent; he furnished this house and let it at a profit as he was perfectly entitled to do as part of his professional business. In so far as case law is a guide to the proper decision in this dispute, it would be difficult to find two cases in which the facts in each are more closely connected than they are in this case and in that of Skinner *v.* Geary, Law Reports K. B. D. 1931. In that case it was admitted that the tenant had not occupied the house the subject-matter of the claim, but had sub-let it to another person. Dealing with the issue that arose the Court held that the fundamental principle of the Act was to protect the resident in a dwelling-house and not to protect a person who is not a resident in a dwelling-house but is making money by sub-letting it. That appeal confirmed the decision in an earlier case in Haskins *v.* Lewis. In fact the only point raised in the appeal was whether the decision of Haskins *v.* Lewis would cover a case without the qualifying words "but is making money by sub-letting it" used by L. J. Scrutton in Haskins *v.* Lewis. In this case it is admitted that the tenant (the Appellant) was making money by sub-letting the flat. The only question that arises, therefore, is whether the decisions in Skinner *v.* Geary and Haskins *v.* Lewis apply. If they do I shall consider myself bound by them. Mr. Olshan argues that they do not. He contends that the Palestine Ordinance was designed to meet totally different conditions to those prevailing in England and that the decisions of the English Courts in interpreting the Landlord and Tenant Increase of Rent and Mortgage

Interest (Restrictions) Act, 1920, cannot be applied to the interpretation of the Palestine Ordinance. I am unable to accept this. In Civil Appeal No. 482/44 I said that although details in the structure of the legislation may be different, the fundamental principle underlying the English Act and the Palestine Ordinance is the same. That principle is to protect a person who is a resident in a dwelling-house and not to protect a person who is not a resident. Mr. Olshan has argued that there is a difference between Section 15 of the English Act and Section 8(3) of the Palestine Ordinance which is the corresponding provision. The distinction, he says, lies in the fact that where the English Ordinance uses the words "retains possession of a dwelling house", the Palestine Ordinance says "continues the occupation in a dwelling-house". I think if anything, the words in the Palestine Ordinance weigh more heavily against Mr. Olshan. If the Court in Haskins *v.* Lewis and in Skinner *v.* Geary felt impelled to construe the words "in possession of any dwelling-house" in Section 15 of the English Act as meaning in actual occupation of that dwelling-house I cannot but construe the words "continues in occupation of a dwelling-house" in Section 8 of the Palestine Ordinance as meaning in actual occupation of that dwelling-house. In actual occupation of, the Appellant admittedly was not.

For these reasons the appeal must fail, with costs on the lower scale to include LP. 10.— for advocate's attendance fees.

Delivered this 27th day of March, 1945, in the presence of Mr. Olshan for Appellant and in the presence of Issa Eff. Nakhleh for Respondent.

Chief Justice.

CRIMINAL APPEAL No. 143/44.

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

BEFORE: FitzGerald, C. J., Shaw, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Yousef Cattan. RESPONDENT.

Specification of time of offence in Information.

Appeal from the judgment of the District Court of Jaffa in Criminal Case No. 71/44, allowed:—

Where prosecution are unable to state with precision exact date and time of happening of offence, it is enough if they state it with sufficient particularity as near as they can ascertain it, so as to enable the Accused to identify the acts constituting the offence.

(*M. L.*)

REFERRED TO & EXPLAINED: CR. A. 118/42 (9, P. L. R. 479; 12, Ct. L. R. 97; 1942, S. C. J. 472).

ANNOTATIONS: On element of time of offence see also CR. A. 151/44 (*ante*, (p. 267; 11, P. L. R. 629).

(*A. G.*)

FOR APPELLANT: Assistant Government Advocate — (Salant).

FOR RESPONDENT: Dajani.

JUDGMENT.

In this case we wish to make it clear that we do not concern ourselves with the merits.

This appeal has been brought by the Attorney General on one issue only, namely, that the learned Relieving President of the District Court, in quashing the Information, erred in thinking that Criminal Appeal 118/42 was an authority which was binding upon him for holding if an Information failed to specify the particular date of the occurrence of the alleged offence, it was defective. We are unable to agree that the case quoted was an authority for such a proposition. What, in fact, Criminal Appeal No. 118/42 did was merely to reiterate the law in regard to the filing of Informations, which is, *inter alia*, that the date must be given with sufficient particularity so as not to embarrass the Accused in his defence. It is, of course, impossible for the Crown in all cases to state with precision the exact time of the happening of an offence. In such cases it is sufficient if the date and time is given as near as the prosecution can ascertain it, and it is given with sufficient precision to enable the Accused to identify the definite acts which it is alleged constitute the offence.

For these reasons the appeal must be allowed and the case remitted to the Relieving President to be dealt with on the merits.

Delivered this 3rd day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 274/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Liselott Posner. APPELLANT.

v.

Charles David Mundorff. RESPONDENT.

Application to District Court for a declaratory judgment that a certain religious marriage ceremony was never a marriage — Distinction between marriages which are void because of lack of formalities and marriages which may be declared null owing to lack of capacity — Jurisdiction of District Court.

While District Court cannot grant a decree of nullity *ab initio* owing to lack of capacity, it has jurisdiction to declare that a certain religious ceremony was never a marriage at all because of lack of form.

(*M. L.*)

FOLLOWED: C. A. 9/40 (7, P. L. R. 228; 7, Ct. L. R. 173; 1940, S. C. J. 184); C. A. 11/41 (8, P. L. R. 241; 11, Ct. L. R. 238; 1941, S. C. J. 230).

REFERRED TO: De Wilton *v.* Montefiore (1900) 83 L. T. 70; 2 Ch. 481 at p. 492; White *v.* White (1937), 1 All E. R. pp. 708, 709.

ANNOTATIONS: See cases followed with annotations.

(*A. G.*)

FOR APPELLANT: Levitsky.

FOR RESPONDENT: No appearance.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem dismissing an application for a declaratory judgment that a so-called marriage celebrated between the parties in Beirut in 1939 was a nullity. This Court on 7th November, 1944, made an order for substituted service on the Respondent. We are satisfied that service has been effected in accordance with that order and that when the case was called on for hearing to-day the Respondent has not appeared.

At the hearing before the District Court on the 2nd June, the Attorney General's representative appeared but asked to be dismissed from the case, and an order to that effect was accordingly made. There was before the District Court an affidavit sworn by the Petitioner (the present Appellant) from which it appears that she is a Jewess who in

1939 met the present Respondent in Palestine and that the latter invited her to proceed to Beirut where they went through a so-called religious marriage in the Presbyterian Church, which ceremony she now claims to have been invalid because it did not comply with the proper legal formalities of marriage. It is important to note this because she does not ask that a *marriage* be declared null; she is merely asking for a declaration that a so-called ceremony was never a marriage at all because of lack of form. Soon after the marriage the Respondent left her and disappeared from Palestine and the Appellant knows nothing of his whereabouts. The learned President of the District Court said that it was at least doubtful whether he had jurisdiction and he also said that he could see no reason why the Appellant could not go before the Courts in the Lebanon. We think, however, having regard to the decisions in Civil Appeal No. 9/1940, P. L. R. Vol. 7, p. 228, and Civil Appeal 11/41, P. L. R. Vol. 8, p. 241, that the District Court has jurisdiction. We would again emphasize that the Petitioner, who is a foreigner, did not ask the Court to pronounce a decree of dissolution of marriage but merely asked the Court to declare that a certain ceremony was never a marriage at all. The distinction is pointed out in the case of De Wilton *v.* Montefiore, Law Reports, 2 Chancery (1900), p. 481 at p. 492, on which latter page the distinction is drawn between marriages which are void because of lack of formalities and marriages which may be declared null owing to lack of capacity. The Appellant seems to have resided in Palestine at least since 1938, and keeping in view the decision in White *v.* White (1937) Vol. 1 All England Reports pp. 708 and 709, we see no reason why the District Court should not entertain and hear her action. We accordingly set aside the order of the District Court of 2nd June, 1944, and remit the case for rehearing. The District Court may dispense with further service on the Respondent.

Delivered this 20th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 310/44.

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

BEFORE: FitzGerald, C. J. and Plunkett, A/J.

IN THE APPEAL OF:—

Jacob Gesundheit. APPELLANT.

v.

The Assessing Officer, Tel-Aviv. RESPONDENT.

Income tax — Assessment in respect of occupation of premises — "Used for the purpose of residence" sec. 5(1)(c) — "Occupation" in rating cases inapplicable — Associated Cinema Properties v. Borough of Hampstead; R. v. St. Pancras Assessment committee — Sub-sec. (1)(c) subordinate to "income of any person accruing in, derived from" (sub. sec. (1)) — "Net annual value" indicates basis of assessment.

Case stated for the opinion of the Supreme Court under section 53(1)(c) of the Income Tax Ordinance, 1940, in Income Tax Appeal No. 2/44; case remitted to the British Puisne Judge:—

1. Rating cases are inapplicable to construe "occupation" in the Income Tax Ordinance as the meaning of that term is artificially extended in rating statutes. (Compare the similar extension of "income" in the Income Tax Ordinance).

2. "Used for the purpose of residence" in sec. 5(1)(c) means actual residence.

(*A. M. A.*)

REFERRED TO: Associated Cinema Properties *v.* Mayor of Hampstead, 1943, 2 All E. R. 696, affirmed by the Court of Appeal in 1944, 1 All E. R. 436; R. *v.* St. Pancras Assessment Committee, 1877, 2 Q. B. D. 581, 46 L. J. M. C. 243, 37 L. T. 126.

ANNOTATIONS:

1. The judgment of the British Puisne Judge is reported in 11, P. L. R. 265; 1944, A. L. R. 614.

2. On the applicability of English rating cases in Palestine see I. T. A. 19/43 (10, P. L. R. 487; 1943, A. L. R. 584) and note 2 in A. L. R.; *cf.* C. A. 345/43 (10, P. L. R. 678; 1944, A. L. R. 50).

(*H. K.*)

FOR APPELLANT: Smoira.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is an appeal by way of case stated by a British Puisne Judge under section 53(1) of the Income Tax Ordinance, 1941. The admitted facts are as follows:—

(a) The Appellant owns two houses, one at Tel-Aviv and another one, a summer villa, on Mount Carmel, Haifa;

(b) For the purposes of the Urban Property Tax Ordinance the net annual value of the house on Mount Carmel has been fixed for the year 1943/44 at LP. 168;

(c) In the year 1942/43 the Appellant lived in the house on Mount

Carmel for a period of nine months only. This house was not given on lease to anybody during the remaining period, but it was furnished and ready for habitation throughout the year;

(d) The Assessing Officer assessed the annual value of the house on Mount Carmel for the purposes of section 5(1)(c) of the Income Tax Ordinance upon the full net annual value thereof, *viz.* LP. 168.

It was contended on behalf of the Appellant that he should be assessed in respect of the net annual value of the house on Mount Carmel on a *pro-rata temporis* basis, and that he should pay three quarters only, *i. e.* that he is not liable for tax under section 5(1)(c) of the Income Tax Ordinance, in respect of the three months that he was not residing in the house. The learned Judge stated that he found some difficulty in the matter but in the result he decided in favour of the Appellant on the grounds, *inter alia,* that the Court should try to interpret the Palestine Income Tax Ordinance as far as possible untrammelled by English Authority and further that if there was an ambiguity he should lean towards the Tax Payer by not extending the provisions of section 5(1)(c) of the Ordinance beyond what he understood to be its ordinary meaning. I am of opinion that the questions submitted should be answered as the Judge has answered them, but in coming to that conclusion I do not find it necessary to deviate from what I conceive to be the English Authorities. The whole case for the Assessing Officer is based on a series of English decisions in rating cases. Those decisions were largely concerned with elucidating the meaning of the word "occupation". It has been argued by the Appellant that these decisions not only can be, but ought to be imported for the purpose of the interpretation of the Income Tax Ordinance. On the other hand, it has been contended by Dr. Smoira that English rating cases do not apply to Palestine Income Tax law. It seems to me that the proposition whether or not the decisions quoted by Mr. Wittkowski are applicable is not capable of being answered in such a precise and simple manner as either party would have us suppose. I agree with Mr. Wittkowski that there is no reason why what I may call rating cases decisions of the English Courts dealing with the interpretation of various terms should not be accepted as authoritative in the interpretation of the same terms in Palestine Law. But to this expression of opinion I add the very important proviso that the term which is the bone of contention must be used in the same context as it is employed in the English Statute.

I have studied all the cases cited. I do not propose to analyze them

individually because although they establish general principles which point the road to the correct line of reasoning, none of them deals exactly with the issue raised in this appeal which must be decided in the light of the facts of this particular case. The main case relied on by Mr. Wittkowski was the Associated Cinema Properties Ltd. *v.* The Mayor, Aldermen and Councillors of the Metropolitan Borough of Hampstead. In that case great reliance was placed on an extract from the judgment of Lush, J., in R. *v.* St. Pancras Assessment Committee which reads:—

> "It is not easy to give an accurate and exhaustive definition of the word 'occupier'. Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against anyone who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year".

Mr. Wittkowski contends that the last sentence exactly covers his case. I agree with him that the facts in so far as the house being ready for habitation and enjoyment are the same and if the other surrounding circumstances in this case were similar to those governing the Associated Cinema Properties Ltd. *v.* The Mayor, Aldermen and Councillors of the Metropolitan Borough of Hampstead, the judgment of Lush, J., would clinch the matter in his favour. But, argues Mr. Wittkowski, the facts in the two cases are analogous because section 5(1)(c) of the Income Tax Ordinance stipulates that the assessment of income under the sub-section shall be in respect of the net annual value and rateability in England — which was the issue raised in the case quoted — is equally based on the net annual value. I think that in this he attempts to carry his analogy too far. It is tantamount to regarding paragraph (c) of sub-section 1 of section 5 as complete in itself whereas in my view the sub-section must always be subordinate to the governing words of section 5(1) which are "income of any person accruing in, derived from". The whole liability for income tax is based on the assessment. In my opinion the words "net annual value" were inserted in the sub-section in order to indicate the basis on which the assessment should be made. Before that assessment is made the further question arises how much of it is income in respect of which he is chargeable?

The difficulty experienced in an attempt to reconcile the various decisions, arises because of the artificial meaning which has had to be

given to the term "occupation" in different statutes according to the purpose for which they were enacted and the equally artificial meaning which has had to be given to the word "income" in income tax law. In rating statutes the interpretation of the term "occupation" is artificially extended beyond the normal meaning of the word. Similarly in the Income Tax Ordinance, the definition of "income" is extended beyond what the ordinary person would include within the term "income". The dictionary meaning of "occupation", "residence", "use", "enjoyment" and kindred phrases remains the same no matter the statute in which they occur, but the artificial meaning given to them by a particular statute is correlated to that statute and care must be taken not to import that meaning into another statute unless the terms are employed in a similar context.

In "rating cases" the special definition of the terms "occupation", "use and enjoyment" is governed by the underlying purpose of the statute, which is the ascertainment of the rateable value of the property for the purpose of the rates it should carry. This value may indeed bear no relationship to the income of the individual who owns it. But the same terms used in the Income Tax Ordinance may have a very different connotation. Here the special definition of the terms is governed by the part they play in the income of the individual who owns the house; the object is not so much to ascertain the value of the house as to gauge the part it plays in the making up of the sum total of his income. In interpreting the provisions of an Act I cannot ignore the "general scheme" of the Act. I stress this aspect before I proceed to interpret section 5(1)(c) of the Ordinance.

The object of the sub-section, as I conceive it, was to prevent a person from erecting a house with capital and then living in it rent free thereby obviating the necessity of earning income, which would be taxable, with which to lease it. To achieve this objective the Legislature has by the sub-section given to the occupation of a house for the purpose of residence, the artificial meaning of income.

Now in the words of Lord Macnaughten, Income Tax is a tax on income. There is nothing to prevent a person from squandering or investing his capital in marble blocks or houses, but whatever other tax his whim may subject him to, it does not make him liable for income tax unless it brings him in income. The governing factor of income tax law is that something must accrue due. I have not answered the question that arises in this appeal when I have ascertained the net annual value of the house; the issue cannot rest at that because I cannot oust from my mind the cardinal fact that the tax is a tax on

income. What then accrues due here? This forces the further question upon me what part of this net annual value represents income in so far as the assessee is concerned? It seems to me that what accrues due is the benefit to be derived from occupation, and that benefit measured in terms of income within the meaning of the sub-section is the saving effected by not having to pay rent. A person cannot live in two houses one hundred kilometres apart at the same time. If he is not living in his house at Haifa he is not saving rent because he has to live elsewhere and pay rent which is taxable, in which case, if the argument of the Appellant were accepted, we would have double taxation in respect of the same source of income, that source being the artificial income created by virtue of section 5(1)(c).

I therefore come to the conclusion that "used for the purpose of residence" within the meaning of section 5(1)(c) of the Income Tax Ordinance must be interpreted as actual residence in the house. The answers to the questions submitted by the learned Puisne Judge are as follows:—

Question 1. Must a dwelling house which is furnished and ready for habitation, though not resided in by the owner during any part of the year in question, be regarded as being used by such owner during such part of the period for the purpose of residence or enjoyment within the meaning of section 5(1)(c) of the Income Tax Ordinance?

Answer. No.

Question 2. Are the definitions laid down in various English cases on the law of rating with regard to the meaning of "occupation" binding and/or relevant authorities for the purpose of interpreting the aforesaid words in section 5(1)(c)?

Answer. In this particular case, for the reasons set out in my judgment, they do not appear to me to govern the point in issue.

Question 3. What is the legal and/or the ordinary meaning of the words "used for the purpose of residence or enjoyment" in section 5(1)(c) in connection with a dwelling house which is furnished and ready for habitation at any time but not actually resided in at the time?

Answer. They mean actual residence in the house by or on behalf of the owner.

The case is remitted to the learned Judge accordingly. Costs to be costs in the cause.

Delivered this 6th day of March, 1945.

Chief Justice.

CIVIL APPEAL No. 481/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Kahat Ben Benyamin Hameiri. APPELLANT.

v.

Dr. Alexander Salomon. RESPONDENT.

Principal and agent — Evidence — Authority.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 7th day of December, 1944, in Civil Case No. 141/43, allowed:—

To establish the liability of the principal for a loan taken by an agent, evidence, other than that of the alleged agent, should be adduced to show express or implied authority to pledge the credit of the principal.

(*A. M. A.*)

ANNOTATIONS:

1. On the extent of an agent's authority see Halsbury, Vol. 1, pp. 212 *et seq.*, particularly pp. 217—222 and Bowstead on Agency, 10th ed., pp. 46 *et seq.*, particularly pp. 51—60.

2. On proof of agency by oral evidence *cf.* C. A. 89/42 (9, P. L. R. 439; 1942, S. C. J. 444; 12, Ct. L. R. 53).

(*H. K.*)

FOR APPELLANT: Koenigsberger.

FOR RESPONDENT: Tori.

JUDGMENT.

This is an appeal from the judgment of the District Court at Tel-Aviv.

The facts in so far as they are capable of being ascertained in an obviously shady business transaction, appear to be as follows: The Respondent, who was the Plaintiff in the Court below, claimed the sum of LP. 380 plus 9% interest and LP. 10 storage charges from the Appellant. He obtained judgment for LP. 150 and interest from the date of action at 9%.

The evidence disclosed some very suspicious transactions. To start off the Judge felt compelled to reject one *prima facie* relevant document on the ground that he could not avoid the conclusion that it was forged. He felt that he could not rely on another document that purported to throw light on the matter because he strongly suspected that it also

contained forged entries. He had to rely therefore to a great extent on the oral evidence which also in his opinion was highly unreliable. His suspicions as to the forgeres and his comments as to the unreliability of the oral evidence were, in our opinion, well-founded, and this being the case we do not feel disposed to interfere with his findings of fact which were based on the weight of credibility he assigned to the witnesses who gave evidence before him. These findings he recorded as follows: A person named Kalman Feuerstein borrowed from one Dr. Leon a sum of LP. 150 on behalf, so Feuerstein said, of the Appellant. When the date for payment arrived, the Appellant could not pay up. Dr. Leon pressed for his money and it is at this point that the Respondent comes into the picture. Feuerstein now went to the Respondent and borrowed from him the sum of LP. 380, out of this he repaid Dr. Leon LP. 150 which he had borrowed together with interest. The remainder he invested in his own business. The learned Judge found as a further fact that the Appellant was aware that Feuerstein had to raise from someone LP. 150 which he had borrowed from Dr. Leon to accommodate the Appellant. He thereupon gave judgment against the Appellant not for the LP. 380 claimed but for the LP. 150 on the grounds that in borrowing it, Feuerstein was acting as agent for the Appellant. Now accepting, as I do, all the findings of fact by the President, which involves accepting the highly suspicious evidence of Feuerstein, I cannot see how the Appellant could be held liable as principal. To establish the relationship of principal and agent it must be shown that the agent had some authority express or implied to pledge the credit of the principal. The mere word of the self-styled agent cannot by itself be sufficient. In this case I cannot see that there was any adequate evidence, other than the mere word of Feuerstein which was highly suspicious, which in law would entitle the Court to hold that Feuerstein was the agent of the Appellant in his (Feuerstein's) dealings with the Respondent. For these reasons the appeal must be allowed, the judgment of Court below set aside and the Plaintiff's action dismissed, with costs on the lower scale to include LP. 15 advocate's attendance fees.

Delivered this 27th day of March, 1945, in the presence of Mr. Jacobi for Appellant and in the absence of Respondent.

Chief Justice.

CRIMINAL APPEAL No. 158/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Nayif Suleiman Mahmoud & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Point taken for first time on appeal that Acting Judge's appointment not gazetted — Question of compliance or otherwise of judgment with provisions of sec. 51, Criminal Procedure (Trial Upon Information) Ord.

1. Point not taken in trial Court and not appearing in Grounds of Appeal cannot be taken on appeal.

2. Judgment, even if very short, complies with provisions of sec. 51, Criminal Procedure (Trial Upon Information) Ordinance, if it sets out the facts forming basis of conviction with sufficient precision and in adequate detail.

(*M. L.*)

DISTINGUISHED: CR. A. 30/42 (11, Ct. L. R. 206; 1942, S. C. J. 221).

ANNOTATIONS:

1. As to point 1 see C. A. 387/44 (*ante*, p. 72) and annotations.

2. As to point 2 see case distinguished (*supra*) and CR. A. 130/43 (1943, A. L. R. 774; 10, P. L. R. 578).

(*A. G.*)

FOR APPELLANTS: Nazzal.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from the judgment of the District Court of Nablus where the two Accused were convicted of robbery contrary to sections 287 and 288(1) of the Criminal Code Ordinance, 1936.

Two grounds of appeal were urged, one was that the trial is a nullity because the appointment of the Acting Judge was not gazetted. The second was that the judgment of the Court below was inadequate and gave no clear indications as to what the Court found as facts.

As to the first point the objection was not taken in the Court below, it does not appear in the grounds of appeal. It is advanced now for the first time, and it amounts merely to a suggestion that the appointment of the Acting Judge was not gazetted. We consider it too late to take a point of this description at this stage.

As to the second ground, it is true that the judgment of the learned Judges was a short one. We are in agreement with Mr. Nazzal as to the necessity of setting out in his judgment every relevant fact on which the judge came to his conclusion but a judgment does not necessarily gain in authority because it is extended over several pages, if the main facts can be marshalled and issues stated precisely in lesser space. We were referred to Criminal Appeal No. 30/42, but, in fact, the circumstances of the two cases are very different. In this case the sole issue before the trial Judges was whether they believed the witnesses who gave direct evidence that those are the men who came armed and by force took their goods away. The defence was an *alibi*. Now, an *alibi* if established is the best of defences; but if it fails it rebounds with vigour against the Accused. A simple issue, therefore, emerged. — Did the trial Court believe the witnesses for the Crown or the evidence of the Accused and the other witnesses called on their behalf? In the event they accepted the evidence of the Crown witnesses, and in a judgment of half a page they gave their reasons. That they carefully weighed the value of that evidence against each of the Accused is clear from the fact that they acquitted some of them. We are of opinion that the facts upon which the learned Judges came to their conclusion are set out with sufficient precision and in adequate detail to comply with the provisions of section 51 of the Criminal Procedure (Trial Upon Information) Ordinance.

The conviction is, therefore, confirmed. As to the sentence counsel for the Accused urges that it was an unusual robbery and that it was in pursuit of a fassad. It was a robbery with arms at night against defenceless boys and we are unable to see any reason to reduce the sentence which is confirmed.

Delivered this 13th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 461/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Aharon Arpad Tolnai through his guardian *ad litem* Mrs. Katharina Tolnai. APPELLANT.

v.

Fathi Nabulsi & an. RESPONDENTS.

Illegality — No cause of action can be maintained if tainted with illegality — C. C. O. 106, 109, 110 — *Pollock, Chitty, Art.* 64 *O. C. C. P., Nash v. Stevenson Transport, Ltd. — Action by guardian ad litem, M. C. J. O., sec.* 19(1).

Appeal from the judgment of the District Court of Nablus, dated 12th November, 1944, in Civil Case No. 19/44, allowed:—

The Courts will not assist a party who has entered into an illegal transaction — neither to enforce an obligation nor to recover money paid.

(*A. M. A.*)

REFERRED TO: Nash *v.* Stevenson Transport, Ltd., 1936, 2 K. B. 128, 1 All E. R. 906, 105 L. J. (K. B.) 527, 154 L. T. 420, 52 T. L. R. 331.

ANNOTATIONS: For recent decisions on similar questions see C. A. 356/43 (11, P. L. R. 94; 1944, A. L. R. 150), C. A. 99/44 (*ibid.*, pp. 533 & 777), C. A. 309/44 (*ante*, p. 3), C. A. 279/44 (12, P. L. R. 62; *ante*, p. 90) and C. A. 376/44 (*ante*, p. 239) and the annotations thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: H. Cohen.

FOR RESPONDENTS: Hijab.

JUDGMENT.

Mr. Cohen, we do not need to call upon you to reply.

This is an appeal from a judgment of the District Court of Nablus, which had ordered the present Appellant to pay to the Respondents the sum of LP. 385.111 mils.

The facts are simple. The Respondents are a partnership carrying on business as textile and soap manufacturers, and they have for some time been interested in the erection of electrical textile machinery for a factory in Nablus. They had for some time been pressing the Controller of Heavy Industries to grant them permits for the release of controlled materials. The present Appellant was at that time an inspector employed at Haifa by the Controller of Heavy Industries. In April, 1944, the Plaintiffs (Respondents) in their statement of claim alleged that the Defendant (Appellant) represented to them that he had authority to issue permits for controlled materials, and that in order to expedite matters he would pay for the materials himself at controlled prices from advances to be paid to him for that purpose. The Respondent agreed to this and paid him a total sum of LP. 540,

of which the Appellant repaid only LP. 154.889 mils. The Appellant failed to pay for further materials and also failed to return the balance of the money representing the figure of LP. 385.111 mils sued for. In paragraph 5 of the Statement of Claim the Respondents alleged that it transpired in May, 1944, that the Appellant had no instructions from his superiors and that his sole duty was to inspect and report on articles required for the Plaintiffs' factories.

We are told that the Appellant is now detained under the provisions of section 19(1), Magistrates' Courts Jurisdiction Ordinance, 1939, and that the appeal has been lodged by his wife as guardian *ad litem*.

At the hearing of the appeal before us an objection to the jurisdiction of the District Court of Nablus was taken by the Appellant's advocate, but we think that it is unfounded.

The main ground of appeal is that the claim is tainted with illegality. This was the fifth issue framed by the Court below, but the learned trial judge merely said in his judgment that he could not discover any illegality in it, although it appears from the record that the advocate then appearing for the Defendant addressed him at length on this matter. When one has regard to sections 106, 109 and 110, Criminal Code Ordinance, it is clear that the present Respondents must well have known that they were paying this money not to Government but to the present Appellant personally, in the hope that he would show them favour in obtaining for them the release of controlled materials, and they must have been aware that the Appellant had no right to receive money from the Public. If the Respondents were anxious to secure permits for the release of controlled materials and were unable to do so, they should have made representations to the Controller of Heavy Industries. Had they been successful they would have received a permit to go themselves to some store, not to a Government store but to the store of some person who was entitled, on production of the necessary permit, to sell.

Mr. Cohen, for the Appellant, has cited Pollock on Contracts (11th Edition) page 349, 350, 353 and 355; and Chitty on Contracts (19th Edition) pages 76, 77 and 296; and Article 64 of the Ottoman Code of Civil Procedure; and the case of Nash *v.* Stevenson Transport, Ltd. (1936) L. T. R. Vol. 153, page 280. It may be that the Respondents have been deceived by the Appellant, but they have only themselves to blame for entering into such an arrangement with him.

The Respondents' advocate has argued that his clients did not sue on contract but were suing for the recovery of money. We do not

think that that makes any difference, because the Courts cannot lend their aid to persons who enter into illegal transactions, such as this obviously is. Were the Courts to give aid to people like the Respondents, they would be encouraging breaches of the Criminal Law. If it is suggested that the Appellant has benefited, the answer is that he can be, and presumably was, charged with a criminal offence.

For these reasons we think that the judgment of the District Court must be set aside and the action of the Respondents dismissed, with costs here and in the Court below. Costs in this Court will be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 10.

Delivered this 5th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 406/44.

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

BEFORE: FitzGerald, C. J. and Edwards, J.

IN THE APPEAL OF :—

Ayesheh bint Said Yousef Hajir & 5 ors. APPELLANTS.

v.

Amin Za'id Mahmoud Ziad. RESPONDENT.

Entry of value in Land Registers — Value is binding for purpose of jurisdiction of Courts — Magistrates' Courts jurisdiction, Land Courts (Am.) Ord., sec. 5.

Appeal from the judgment of the Magistrate's Court, Nazareth, sitting as a Land Court dated 30.9.44, in Land Case No. 4/44, allowed and case remitted:—

Although a person is not bound by an entry in the Land Register regarding the value of land, that entry, until rectified, will determine the jurisdiction of Courts in actions relating to that land.

(*A. M. A.*)

ANNOTATIONS :

1. *Cf.* C. A. 123/42 (9, P. L. R. 565; 1942, S. C. J. 566; 12, Ct. L. R. 223) and note 1 thereto in S. C. J.

2. The Court of Civil Appeal remitted the case to the appropriate Court, *i. e.* the Land Court of Haifa, in accordance with the principles laid down in C. A. 200/43 (10, P. L. R. 497; 1943, A. L. R. 664) and the cases therein followed; see also C. A. 201/44 (11, P. L. R. 556; 1944, A. L. R. 682).

(*H. K.*)

FOR APPELLANTS: Hamid.
FOR RESPONDENT: H. Atalla.

JUDGMENT.

The first point taken in this Court is that the Magistrate had no jurisdiction to try the case in that the value of the land was LP. 281 whereas his jurisdiction is limited by law to LP. 250. It is clear from the *Tabu* entry, which was an exhibit in the case and which we have seen, that the value of the land as entered in the Registry is LP. 281. This evidence was also before the Magistrate but despite it he heard the parties and he came to the conclusion that the true value of the land was in the neighbourhood of LP. 200. It is true that a person is not estopped in regard to the value of land by an entry in the Land Registry. It must, however, be borne in mind that any person aggrieved by an entry in the Registry can have it rectified and, in our view, until that entry is rectified the value as entered in the Registry should be accepted as the value for statutory purposes. It is, in our opinion, the value contemplated by section 5 of the Land Courts (Amendment) Ordinance.

We decide, therefore, to remit this case to the appropriate Court, which is the Land Court of Haifa, for retrial, with LP. 5 inclusive costs to the Appellant.

Delivered this 7th day of May, 1945.

Chief Justice.

CRIMINAL APPEAL No. 141/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Aziz Issa Khalaf. APPELLANT.

v.

The Attorney General. RESPONDENT.

Possession of stolen property — Scope of sec. 311, *Crim. Code Ord.*

1. In cases of possession of stolen property like in many other offences, Police have a right to elect to prosecute under a minor in preference to a major provision, *i. e.* under sec. 311, Criminal Code Ord., instead of sections dealing with receiving stolen property.

2. a) Reasonably suspected in sec. 311, Criminal Code Ord. does not mean suspected by person in possession of the property but by some one else.
b) Element of suspicion in sec. 311 — not destroyed by evidence of witness, of knowledge, not mere suspicion, an his part that the property was stolen.

3. In a charge under sec. 311, if Court accepts evidence as to existence of suspicion and is satisfied of its reasonableness, and if it is established that the property was in possession of accused, it is up to him to discharge the onus laid on him by the section.

(*M. L.*)

REFERRED TO: CR. A. D. C. Jlm. 37/44 (1944, Selected Cases, p. 161).

ANNOTATIONS: See CR. A. 49/44 (11, P. L. R. 221; 1944, A. L. R. 226) and annotations in A. L. R. See also case referred to (*supra*) and authorities cited therein.

(*A. G.*)

FOR APPELLANT: Ancor.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

There are no merits in this appeal, and I should have been prepared to dismiss it with these words were it not for the hope expressed by the learned Relieving President that this Court would clear up the many doubts which he conceived existed in regard to the interpretation of section 311 of the Criminal Code Ordinance. Having perused all the cases to which I have been referred, I cannot myself avoid the conclusion that the difficulty in interpretation has in some part been due to the jurists' dislike, which I appreciate and share, of this provision because of the considerable inroad it makes into the fundamental principle of British criminal law that the onus is on the prosecution to prove their case before the Accused is called upon for his defence. That difficulty has been enhanced by certain judgments of the Supreme Court of Cyprus which the District Courts in this country have tended to follow. It is my misfortune, for reasons which I shall presently state, to differ from certain propositions of law which can be deduced from the Cyprus decisions. The implications of section 311 have been examined at great length, and set out with characteristic lucidity by the learned Relieving President Bourke, J., in District Court Criminal Appeal No. 37/44. But that judgment has in the main accepted the Cyprus decisions. Those decisions all flow from a judgment by Chief Justice Strong in Neodis Haralambous and Stefanis Yanni, reported in Vol. 14 of the Cyprus Law Reports in the course of which he said:—

"I nevertheless take it upon me to say for guidance, although it is *obiter* as regards the present case, that in my opinion a prosecution

> under section 297" (which corresponds with Palestine Section 311) "will not lie where either at or before the point of time when the Police formally charge the accused person it is known that certain property has in fact been stolen and it is known also that the property seen or found in the possession of the person so being charged is that self-same property or forms part of it. In such circumstances as these it is manifest that at the time the accused person is formally charged, suspicion that the property in his possession has been stolen is non-existent inasmuch as it is known for a fact that the property has been stolen, and knowledge is quite distinct from and incompatible with suspicion and its accompanying uncertainty".

With this appreciation of the law I am unable to agree. I concede that if at the time when the Accused is charged, the Police know as a fact that the property in question was actually stolen property one might well wonder why they did not proceed under the more precise sections of the code dealing with receiving stolen property, but if my interpretation of section 311 is correct, it seems to me that the Police have in the case of this type of offence, as they have in the case of many other offences under the code, a right to elect to prosecute under a minor in preference to a major provision.

I turn now to examine the wording of the section. It is, if I may so describe it, unique in that the gist of it is not so much to fasten guilt on to an individual as to an inanimate object. It attaches the taint of crime to property, and in my view the purport of the section is that the taint should follow the property all through its course until it has been removed, in so far as the Accused is concerned, in the manner provided by the section; this manner being the successful discharge of the onus placed on him by the section. The whole foundation of the provision is the existence of reasonable suspicion that the property has been stolen. In this connection I will say immediately that I agree with that part of the Cyprus judgment and that of Judge Bourke which decided that the words "reasonably suspected of being stolen property" must be construed as referring not to any suspicion of the property being stolen which the person in possession of it might have, but to a suspicion entertained by some one else. In my opinion that other person must testify to the fact that he entertained the suspicion and he must satisfy the Court that he entertained it reasonably. The reasonableness of the suspicion is an issue which must, of course, be determined by the Judge in the light of the circumstances of each case, but it seems to me that the most convincing evidence a witness could give in support of the reasonableness of the existence of the element of suspicion in his mind was evidence of knowledge on his

part of the fact that the property was stolen property. It is in this that I part company with the learned Chief Justice of Cyprus who considered that knowledge was incompatible with suspicion. In my view both those elements represent a state of the human mind. If in that mind suspicion ripens into knowledge, and there must always be suspicion, even if it were only for the flash of a second, before knowledge, the suspicion is not thereby destroyed. It may be merged in the larger element of knowledge, but it still exists.

If the Court accepts the testimony of the witness as to the existence of suspicion and is satisfied as to its reasonableness, and if it is established that the property was in the possession of the Accused, then he should be placed on his defence to discharge the onus laid on him by the section.

In this case all the requirements of the section for forcing the Appellant on his defence to discharge the onus were fully satisfied. He failed to discharge that onus and he was rightly convicted. The appeal is dismissed and the conviction and sentence are confirmed.

Delivered this 13th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 432/44.

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

BEFORE: FitzGerald, C. J. and Edwards, J.

IN THE APPEAL OF :—

Guggenheim Ltd. — APPELLANTS.

v.

Joseph Ginzburg. — RESPONDENT.

Frustration of contract — Construction — Jacobs v. Crédit Lyonnais; F. A. Tamplin S/S Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.; Taylor v. Caldwell; Baily v. De Crespigny; Horlock v. Beal; Nickoll v. Ashton; Atkinson v. Richie — English and Ottoman law; O. C. C. P., Art. 108, basis thereof, Roman law — Procedure, refusal to allow evidence on commission — C. A. 98/34, "causes outside his control" — Measure of damage, C. A. 217/38, C. A. 69/42, Art. 109 — Notarial notice, Art. 106, C. A. 12/33.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 11th day of October, 1944, in Civil Case No. 290/42, dismissed:—

1. The defence of frustration may be established when the occurrence causes the foundation of the contract to disappear and the contract consequently to vanish.

2. This same principle underlies Art. 108 of the Ottoman Civil Procedure Code and influenced the decision of English cases.

3. (*Per Edwards, B. P. J.*): Principles regarding the despatch of notarial notice discussed.

(*A. M. A.*)

FOLLOWED: Jacobs *v.* Credit Lyonnais, 1884, 12 Q. B. D. 589, 53 L. J. (K. B.) 156, 50 L. T. 194; F. A. Tamplin Steamship Co., Ltd. *v.* Anglo-Mexican Petroleum Products Co., Ltd., 1916, 2 A. C. 397, 85 L. J. (K. B.) 1389, 115 L. T. 315, 32 T. L. R. 677; Taylor *v.* Caldwell, 1863, 32 L. J. (Q. B.) 164, 8 L. T. 356; Baily *v.* De Crespigny, 1869, L. R. 4 Q. B. 180, 38 L. J. (Q. B.) 98, 19 L. T. 681; Horlock *v.* Beal, 1916, 1 A. C. 486, 85 L. J. (K. B. 602), 114 L. T. 193, 32 T. L. R. 251; Nickoll and Knight *v.* Ashton, Eldridge & Co., 1901, 2 K. B. 126, 70 L. J. (K. B.) 600, 84 L. T. 804, 17 T. L. R. 467; Atkinson *v.* Ritchie, 1809, 10 East 530, 10 R. R. 372; Paradine *v.* Jane, 1647, Aleyn 26; C. A. 98/34 (2, P. L. R. 319; 9, C. of J. 857); C. A. 217/38 (5, P. L. R. 606; 1938, 2 S. C. J. 221; 4, Ct. L. R. 242); C. A. 12/33 (2, P. L. R. 259; 2, C. of J. 449).

DISTINGUISHED: C. A. 69/42 (9, P. L. R. 422; 1942, S. C. J. 420; 12, Ct. L. R. 106).

ANNOTATIONS:

1. See, on frustration, Pollock on Contracts, 11th ed., pp. 232 *et seq.* and p. 574; for English authorities after the Fibrosa Case *vide* Leightons Investment Trust, Ltd. *v.* Cricklewood Property & Investment Trust, Ltd., 1943, 2 All E. R. 97; *Re* Schebsman, 1943, 2 All E. R. 768; Egham & Staines Electricity Co., Ltd. *v.* Egham Urban D. C., 1944, 1 All E. R. 107; and Denny, Mott & Dickson, Ltd. *v.* J. B. Fraser & Co., Ltd., 1944, 1 All E. R. 678. For Palestinian cases see C. A. 61/43 (10, P L. R. 228; 1943, A. L. R. 145) and notes 1 & 2 thereto in A. L. R.; *cf.* C. A. 139/44 (*ante*, p. 40) and C. D. C. Jm. 137/44 (1945, S. C. D. C. 22).

2. On the question of the Notarial Notice see note 1 to C. A. 59/43 (1943, A. L. R. 203), C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326) and C. A. 139/44 (*ante*, p. 40).

3. See C. A. 96/43 (1943, A. L. R. 273) on the measure of damages and the effect of the decisions in C. A. 217/38 and C. A. 69/42 (*supra*); *cf.* C. A. 125/44 (11, P. L. R. 502; 1944, A. L. R. 661) and J. Leavey & Co., Ltd. *v.* G. H. Hirst & Co., Ltd., 1943, 2 All E. R. 581. Different considerations apply where the purchaser is the defaulting party: C. A. 139/44 (*ante*, p. 40) and note 3.

(*H. K.*)

FOR APPELLANTS: A. Levin & Sommerfeld.

FOR RESPONDENT: Sussmann.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the District Court, Tel-Aviv. The facts as disclosed by the evidence and correspondence are as follows:—

The Appellants and Respondent entered into a contract in May, 1941, under which the Appellants undertook to supply the Respondent, f.o.b. Bombay with 400 lbs. of sacharine, and to despatch it by air from India to Palestine. A copy of the contract was an exhibit in this case. It was drawn up in English and apart from the fact that it is obvious that English was not the mother tongue of the parties, its terms are quite clear. It is in ordinary commercial form. The Respondent undertakes to open a letter of credit in favour of the Appellants and the Appellants, in their turn, contract to produce and ship goods to the Respondent. Clause 4 of the contract provides:—

> "*Force majeure*, including strike, fire *etc.* in your manufacturer's works, in wartime whole or partial destruction of same, evacuation or other Government's or enemy's acts, blockade *etc.* exempt you from total or partial failure of delivery, without recourse for indemnity and/or damages on my/our part".

From the beginning trouble was experienced in fulfilling the contract. This is not surprising since the impediments were primarily due to wartime conditions. The progress of events is ascertainable from the correspondence. Here I may say that in so far as that correspondence discloses, the Appellants in their dealing with the Respondent, appear to have acted throughout with complete candour. It may well be that their business organisation and efficiency were not of the highest standard, but I have no reason to think that they were not genuinely anxious to fulfil the contract. For the purpose of procuring the sacharine in India the Appellants immediately got in touch with their Bombay representatives or correspondent, Messrs. Vyas & Co., an admittedly respectable Indian firm. After some initial difficulty about the letter of credit which was rectified, the sacharine was procured, and an export permit in respect of it obtained from the Government. Messrs. Vyas & Co. advised the Appellants that the sacharine had been sent to, and in fact had reached, Karachi, the port from which the airline left for Palestine. There was difficulty at Karachi with the Indian Government's Customs Department, because apparently the warehousing rules did not provide for a re-shipment of warehoused goods to a foreign port by air. Messrs. Vyas & Co. advised the Appellants to this effect by letter on the 11th August, 1941. Eventually that difficulty was overcome; but as the goods had not been received, the Appellants

wired to Messrs. Vyas & Co. on the 19th August, informing them that the sacharine had not arrived and asking them to cable immediately where it was. I pause here to remark that surely that is a clear indication that at that time the Appellants were concerned to abide by their contract. Messrs. Vyas & Co. cabled in reply that the goods were lying in the bonded warehouse at Karachi and that the despatch was imminent. Another deadlock was encountered at the last moment because the sacharine cases were too big to go on the plane. To meet this, Messrs. Vyas & Co. instructed Messrs. Thomas Cook & Co. in Karachi, the well-known British firm who were arranging the transport, to have the cases repacked in accordance with air transport regulations in the presence of the Customs' officials. This was on 30th August, 1941. At this point the final difficulty arose. The exact nature of that difficulty is disclosed neither in the correspondence nor in the evidence, but on the 28th September, 1941, Messrs. Vyas & Co. wrote to the Appellants explaining that owing to trouble in connection with the extension of the export licence they could do no more and they cancelled the indent in question. They added a postscript to the effect that they enclosed a letter from Messrs. Thomas Cook & Co. as further evidence showing that the goods could not be sent. It is quite clear from the nature of correspondence which had recently passed between Messrs. Vyas & Co. and the Appellants that the Indian firm had for some time been tired of the whole affair. They were dissatisfied with the business method of Messrs. Guggenheim Ltd. and were anxious to wash their hands of any further part. Meanwhile the Appellants, Messrs. Guggenheim Ltd., had made further efforts to get the sacharine shipped from Karachi and to this end they had cabled to Volkart Brothers, the agents of the K. L. M. Airline, with a view of arranging shipment by them. What happened between Messrs. Thomas Cook and the K. L. M. Airline is not known. It is suggested that Messrs. Vyas & Co. instructed Messrs. Thomas Cook to hand over the sacharine to the K. L. M. Be that as it may, the sacharine was never despatched. On the 5th November, 1941, the Respondent sent the Appellants a notarial notice informing them that unless they received the sacharine or transport documents relating thereto, within twenty days of the receipt of the notice, they would be considered to have committed a breach of the contract. The Appellants did not remedy the breach. They allege that they were unable to do so. The Respondent purchased the sacharine locally and the claim for LP. 1261.887 mils as damages which was awarded in the lower Court was in respect of the difference between the contract price for the sacharine with the Appellants and

the price he had later to pay to the Tel-Aviv firms from which he was compelled to buy it on the Appellants' default.

There were various grounds of appeal advanced but the main one was that the Appellants were not liable because the contract became frustrated. The question I have now to consider is whether, in fact, there has been frustration in this case. The principles that govern the determination of this question have been indicated in numerous cases. In applying those principles it must be borne in mind that the Court has no power to absolve a contractor from liability. The sanctity of contract is a keystone of British Law. The obligations of a contractor are not discharged by a change in status or conditions, which to some degree at all events are inevitable in human affairs, or by an alteration which makes the performance of the contract more onerous than the parties ever anticipated. To concede any such grounds of discharge would be an inroad into the sanctity which the British Law accords to contracts. A sanctity which is well emphasized in the case of Jacobs *v.* Crédit Lyonnaise (1884) 12 Q. B. D. by Bowen, L. J., when he states:—

> "Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*".

In considering whether the contract is frustrated the test to be applied by the Court consists of an examination of the contract itself with a view to ascertaining whether the Court can read into it an implied condition that if the parties anticipated the happening of the events which are alleged to have caused the frustration, they would have agreed that the contractual relations between them should cease. This is the principle which I conceive to have been enunciated by Earl Loreburn in the case of F. A. Tamplin Steamship Company Ltd. *v.* Anglo-Mexican Petroleum Products Co. Ltd., 2 A. C. 1916 (p. 403) which is as follows:—

> "When a lawful contract has been made and there is no default a Court of law has no power to discharge either party from the performance of it unless either the rights of someone else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist and if they must

> have done so then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree".

An old but authoritative case on the subject, the decision of which has been followed and to a considerable degree extended, was that of Taylor *v.* Caldwell (3 B. & S. 826). Giving judgment in that case Blackburn, J., said (K. B. D. 1901, Vol. 2):—

> "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor".

Those cases must be considered in conjunction with Baily *v.* De Crespigny where Hannen, J., said:—

> "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible or to pay damages for the non-performance and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But, where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens".

Indeed this case reiterated the point emphasized also in the case of Taylor *v.* Caldwell by Blackburn, J., when he said:—

> "Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it although in consequence of unforeseen accidents performance of his contract has become specifically burdensome, and even impossible".

Here again we find emphasis on the sanctity of contractual relationship and the limits within which the doctrine of frustration should be

applied. This doctrine was considered in many cases during the last war. I would refer to Horlock *v.* Beal, A. C. 1916, Vol. 1, where Lord Shaw of Dunfermline, citing Vaughan Williams, L. J., in the well-known case of Nickoll *v.* Ashton, says:—

> "Whatever may have been the limits of the Roman law, the case of Nickoll *v.* Ashton makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract".

This, in my mind, in no way extended the principle inherent in Atkinson *v.* Richie, decided in 1809, where Lord Ellenborough said:—

> "The rule laid down in the case of Paradine *v.* Jane, Aleyn 26, has been often recognised in Courts of law, as a sound one; *i. e.* that 'when the party by his contract creates a duty or charge upon himself, he is bound to make it good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract".

From these cases it seems to me that in order successfully to establish frustration the occurrence itself, as was emphasized by Viscount Haldane in the case of F. A. Tamplin Steamship Co. Ltd., *v.* Anglo-Mexican Petroleum Products Co. Ltd., 2 A. C. 1916, must be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. The doctrine cannot be invoked to counteract the effects of a commercial speculation that has gone wrong, or to balance the consequences that may flow from lack of commercial acumen. In so far as Palestine is concerned recognition of the doctrine is given in Article 108 of the Ottoman Code of Civil Procedure which provides that failure or delay due to causes outside a person's control shall preclude an action for damages. In my view the same principle underlies Article 108 and influenced the decisions in the reported English cases. The Article is an adaptation of the French Law and both the French and English doctrine of frustration of contract is derived from the Roman Civil Law regarding failure of the *certum corpus* which is discussed in Digest 45. I feel, therefore, that I must interpret the causes outside control referred to in the Article in the light of the decisions in the cases I have examined.

Now, what are the impediments which the Appellants allege frustrated this contract? It is obvious that difficulties were encountered, but I find it impossible to say that they were such as could not have been

foreseen when the parties entered into the contract. Indeed, all the difficulties appear to me to be inherent to the conditions prevailing in wartime. The contract was made in May, 1941, when the war was well-advanced, and at a time when commercial people were only too painfully aware of the impediments to trade imposed by the various wartime controls. I think that the very essence of the contract made by Messrs. Guggenheim Ltd. was that they were in a position to overcome those encumbrances and to get the necessary permits to effect the transport of this sacharine. There was no absolute prohibition of the export from India of sacharine. If there were I would have said that there was frustration due to operation of law. The drug could be exported by permit, and as far as we know, it can still be exported by permit. Messrs. Vyas & Co. had a permit for the export of this sacharine, although it is true that it expired during the period covered by the various mishaps that attended their efforts to despatch it to Palestine. There is no evidence before me that there was any inherent difficulty in renewing the permit. Indeed all the evidence leads to the inference that the permit was not renewed because Messrs. Vyas & Co. were tired of the whole business and were not disposed to exert themselves further in the matter. Even if there were no laches on the part of the Appellants or their Indian representatives, I would feel constrained to hold that part of the Appellants' contractual undertaking with the Respondent was that they could and would get this permit and their failure to do so would not, in the absence of a statutory prohibition enacted since the making of the contract, absolve them from the consequences of their breach. The only other impediment pleaded to the shipping of the sacharine in fulfilment of the contract was the failure of the airline to take the cases because they were too large. But this, in my view, could not absolve the Appellants any more than a firm which contracted to send, say oil, by railway would be absolved because the Railway Co. refused to transport it on the grounds that the oil drums were not packed in accordance with their rules or bye laws.

As I have indicated, I do not consider that there was any *mala fides* or sinister motive behind the Appellants' failure. They appear to me to have done their best to carry out their contract, but I cannot resist the conclusion that their failure to do so was due to accidents which could have been foreseen or which even if they were unforeseen would not amount to that frustration, which in law would entitle them to be discharged from the contract.

The other grounds of appeal can be disposed of briefly. A further

argument of Mr. Levin, as I understood it, was that a combination of clauses 4 and 19 afforded a defence. Clauses 4 and 19 anticipate certain delays including delays in shipping due to war conditions; I find it unnecessary to decide whether, in fact, the delays that did occur, came within the ambit of the clauses because I am forced to draw the same inference as the learned President, that the later conduct of the Appellants indicated that they had abandoned the contract or at least that the Respondent was fully justified in drawing that conclusion.

A further ground of appeal was that the learned President refused an application by the Appellants for the taking of evidence on commission in India. I do not doubt that such evidence would have been helpful in that it might have cleared up the point which has been left vague as to the action taken by Messrs. Cook & Co. when they were instructed to hand over the packages of sacharine to the K. L. M. Be that as it may the question as to whether evidence on commission should be taken is primarily one for the trial Court. The learned President stated his grounds for refusing, and I cannot say that they were unreasonable. Apart from this, if I am right in my appreciation of the principles that underlie the doctrine of frustration, it is unlikely that any evidence that Messrs. Thomas Cook & Co. could give would help the Appellants on this issue.

The last two points to be dealt with concern the damages and the alleged insufficiency of the time limit given in the notarial notice. As to these, I have had the advantage of reading the judgment which Mr. Justice Edwards is about to read and I desire only to say that with respect I concur in the opinion expressed by him.

For these reasons I am of opinion that the appeal must be dismissed with costs on the lower scale to include LP. 20 advocate's attendance fee.

Delivered this 7th day of May, 1945.

Chief Justice.

Edwards, J.: There can be no doubt that the Appellant failed to perform his contract and the judgment of the learned President of the Court below, in so far as it decides that the contract was broken, can in no way be attacked.

The first question which I think falls to be decided is whether in the circumstances damages can at all be awarded to the Plaintiff (Respondent). The law in Palestine on the subject is to be found in Art. 108 Ottoman Code of Civil Procedure (see section 2 Civil Procedure Ordinance, 1938). The decided case which is most relevant to

the facts of the appeal now before us is, in my view, C. A. No. 98/34, P. L. R. Vol. 2, p. 319. I quote from p. 320 of the report.

> "In these circumstances, the Appellants maintain that the proviso to Art. 108 of the Civil Procedure Code is applicable and hence they are not liable for damages.
>
> The Appellants, however, had contracted to sell parcellated plots. They had foreseen the possibility that the parcellation scheme might be amended and had provided for this contingency in the contract. It must equally have been within their contemplation that approval of the scheme might be withheld for a period exceeding the six months within which they had agreed to transfer: and it was open to them to frame the contract so as to protect themselves from liability in such event".

I therefore think that there is an identity between the Palestine Law and the English Law relating to frustration. Without pretending to lay down any definition of the words "cause outside his control" in Art. 108, I think that we must exclude from them circumstances which could reasonably have been anticipated by parties when they entered into the contract. This contract was entered into two or three years after the outbreak of War and the parties must then have foreseen that there might be difficulties or delays. I, therefore, think that Palestine Law does not excuse the Defendants.

The learned President held that there was no bad faith. In these circumstances, under Art. 109, the damages to be awarded against the Defendant must be equivalent only to the direct and determinate loss suffered by the Plaintiff owing to such non-performance. The leading case on this branch of the law is C. A. 217/38, P. L. R. Vol. 5, p. 606, in which it was held that the direct and determinate loss was the difference between the contract price and the value of the land at the date of the Respondent's repudiation. The measure adopted by the learned President in the case now under appeal was the difference between the contract price and the price which the Respondent had to pay in January 1942. As to the measure of damages in the case of failure to deliver goods such as sacharine, Palestine law is not different from the law of England. I quote from Mayne on Damages (10th Edition) p. 167:—

> "The measure of damages is the difference between the contract price and the market price of goods of a similar description at the time when they ought to have been delivered".

I therefore think that the judgment of the Court below was correct both as to measure and *quantum* of damages.

It has been argued that C. A. 69/42, Annotated Supreme Court

Judgments (1942), p. 420 has altered the law. I do not think that C. A. 69/42 is inconsistent with previous decisions of this Court because in C. A. 69/42 the would-be purchaser had not bought other land in substitution for the land which the vendor contracted to sell him. In other words, in C. A. 69/42 the purchaser had suffered no loss at all other than out-of-pocket expenses. Had he proved that he had had to buy other land of a similar nature and in a neighbouring locality, it is not unlikely that the judgment of this Court would have been different.

The only other point with which I deem it necessary to deal is that of the notarial notice required by Art. 106 of the Ottoman Code of Civil Procedure. In C. A. No. 12/33 P. L. R. Vol. 2, p. 259 at p. 261, it was held that the question whether the time given in a notarial notice is reasonable or not is a question of fact and that the finding of the District Court on such a fact is not to be disturbed by this Court unless there is evidence that the finding was perverse. The learned President of the Court below held that since the goods were ready for despatch and all formalities completed and no valid reason given why they were not despatched or could not be despatched within twenty days of the receipt of the notice, the notice was valid. This finding has been attacked by the Appellants' advocate who alleges that all the formalities were not completed inasmuch as the export licence had expired. It is not clear whether in the Court below the Defendants' case was that twenty days was not a long enough period within which either to despatch by air from India shipping documents in order to show that the sacharine had been obtained and was on its way or whether twenty days was not sufficient time for the Defendant to be able to purchase sacharine in Palestine. There was evidence that in November, 1941, he could not have obtained sacharine within twenty days except from Egypt and Syria. This, however, is an implied finding that he could have obtained sacharine within twenty days from Egypt or Syria. I think that there was evidence to support the contention of the Respondent's advocate that twenty days was sufficient within which to despatch shipping documents from India which would have shown that the contract had been complied with and that the sacharine had been despatched and was on its way to Palestine. The purpose of a notarial notice is to give a person a further chance to perform the terms of the contract and on failure to comply with the notice within a reasonable time default is then established.

From whichever angle one looks at the matter, keeping in view the judgment in C. A. 12/33, I do not think that the finding of the District

Court with regard to the notarial notice should be set aside. On the other aspects of the case I respectfully agree with the opinions expressed by the learned Chief Justice and I agree that the appeal should be dismissed with costs.

Delivered this 7th day of May, 1945.

British Puisne Judge.

CIVIL APPEAL No. 364/44.
CIVIL APPEAL No. 365/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Civil Appeal No. 364/44:—

Yacoub Barazani. APPELLANT.

v.

Nasra Ahmed Muhammad Yousef & 2 ors. RESPONDENTS.

Civil Appeal No. 365/44:—

David Rothenfeld. APPELLANT.

v.

Nasra Ahmed Muhamma Yousef & 2 ors. RESPONDENTS.

Awlawiyeh — Land Code, art. 41 — *Transfer by Defendant pendente lite — Interpretation of judgment, L. A.* 61/27, *C. A.* 245/40, *Land Law (Am.) Ord., sec.* 6(2), *C. A.* 236/42, *Bellamy v. Sabine — Conservatory attachment or caveat may be asked when claiming awlawiyeh, O. C. P. C. art.* 294 — *Lease of miri, Mejelle, Art.* 429.

Appeals from the judgment of the Land Court of Nablus, dated 28th July, 1944, in Land Case No. 6/43, allowed:—

1. When claiming land by *awlawiyeh* a *caveat* or a conservatory attachment may be applied for on the land claimed.
2. If no attachment is levied the Defendant may transfer the land *pendente lite.*
3. In cases of such transfer it is not sufficient to add the purchaser as a defendant: a fresh action should be instituted against him within the statutory period.

(A. M. A.)

REFERRED TO: L. A. 61/27 (1, P. L. R. 298; 4, C. of J. 1533); C. A. 245/40 (8, P. L. R. 8; 1941, S. C. J. 65; 9, Ct. L. R. 151); C. A. 236/42

(10, P. L. R. 383; 1943, A. L. R. 509); Bellamy *v.* Sabine, 1857, 26 L. J. (CH.) 797, 30 L. T. (O. S.) 68, 118 R. R. 235.

ANNOTATIONS:

1. Note that in C. A. 229/43 (10, P. L. R. 510; 1943, A. L. R. 644) the Court of Civil Appeal had approved the joinder of the Appellants in this case as additional Defendants "particularly in that there has not arisen any new cause of action". The Court went on to say that "if the Plaintiff had to take a fresh action against these 2 Defendants or any other person in the event of further transfers, there might be unnecessary endless litigation".

2. The possibility of entering a *caveat* in the Land Registry is provided for in sec. 49 of the Land (S. of T.) Ordinance which gives such power to "any Court". It has also been held in L. C. T. A. 14/40 (not reported) that the Land Court has inherent power to give such orders.

3. The question of the applicability of Art. 429 of the *Mejelle* to *miri* lands has been answered in the negative in C. A. 459/44 (*ante*, p. 106); *cf.* the note to that case.

(*H. K.*)

C. A. 364/44:—

FOR APPELLANT: Eliash.

FOR RESPONDENTS: No. 1 — Hammoudeh.
No. 2 — Ben Shemesh.
No. 3 — Eliash.

C. A. 365/44:—

FOR APPELLANT: Eliash.

FOR RESPONDENTS: No. 1 — Hammoudeh.
No. 2 — Ben Shemesh.
No. 3 — Eliash.

JUDGMENT.

These appeals have been by consent of parties consolidated for the purpose of hearing.

The facts are that the first Respondent, Nasra, was the Plaintiff in Land Case No. 6/43, Land Court, Nablus, in which case the statement of claim had been filed some time before June, 1943. As lodged, the action was only against Hamanuta Limited, the claim being one for *awlawiyeh*, under Article 41, Ottoman Land Code. The case was apparently set down for hearing on the 8th June, 1943, but on the 7th June, 1943, Hamanuta Limited transferred their shares to a Mr. David Rothenfeld, who in turn granted a lease for twenty-nine years to Yacoub Barazani Ben Yehuda. On the 6th July, 1943, the Plaintiff's advocate filed an amended statement of claim, adding Rothenfeld and Barazani as second and third Defendants respectively. The learned

President of the Land Court, on 28th July, 1944, gave judgment in favour of Nasra (Plaintiff). Against that judgment Barazani and Rothenfeld now both appeal.

Dr. Eliash, for the Appellants, has taken a preliminary point, namely, that the judgment of the 28th July, 1944, was worded in such a way as to be no longer of any effect. The argument is that the Court below ordered the land to be registered in the name of Plaintiff after payment at the rate of LP. 20 *per dunum* within three months. It is said that, as the land was not registered within three months from the 28th July, 1944, the matter is now at an end, the authority for this proposition being Land Appeal No. 61/27, P. L. R. Vol. 1, page 298.

This Court in Civil Appeal 245/40 (Levanon's Current Law Reports, Vol. 9, p. 152) decided that there was a duty on the trial Court to order transfer within a specified time. While we are bound by that decision, we would say that section 6(2) Land Law (Amendment) Ordinance, as amended, seems only to deal with the case where a Court *has* ordered security. It seems tolerably clear that when the legislature altered the original sub-section (2) they did not realise that by their amendment they were limiting sub-section (2) to the case where security had been ordered.

It has been a long established practice for Land Courts, in dealing with cases under Article 41, to order payment into Court within a specified period. In view of the wording of sub-section (2) of section 6 as amended, I would not be disposed to interfere with this practice, notwithstanding the statement in Civil Appeal No. 245/40 that the Court should order actual transfer within a specified time. It is true that the learned President, in his judgment of 28th July, 1944, did not order the actual transfer within three months, but merely ordered payment into Court within three months. In view of the long established practice we think that this was a sufficient compliance with the requirements of the law, and this ground of appeal accordingly fails.

It is clear that the Court below were influenced by the judgment of this Court in Civil Appeal 236/42, P. L. R. Vol. 10, page 383 at page 394, where this Court had occasion to refer to the case of Bellamy *v.* Sabine, Revised Reports, Vol. 118, page 235. I would say, however, that this Court merely referred to the case of Bellamy and cited a paragraph from it.

Dr. Eliash has referred to Hailsham, Vol. 19, pages 345 and 346, paragraphs 711, 713 and note (*a*) on pages 345 and 346. In England, however, today there is the system known as registration of pending actions under the Act of 1925.

In Civil Appeal 236/42 it would seem that the purchaser had notice of the litigation. I am of opinion that in Palestine we have provisions such as *caveat*, or an application for a conservatory attachment under the Ottoman Code of Civil Procedure (*e. g.* Article 294). I consider that Nasra, when filing her statement of claim, should at the same time have obtained an order of conservatory attachment or a *caveat*. She did not do this. I am accordingly of the opinion that the sale to Rothenfeld was a good sale, and that the judgment of the Court below on this point cannot be upheld.

What then is the effect of this finding? I agree with Dr. Eliash that Nasra's remedy was a claim for *awlawiyeh* against Rothenfeld, and I do not think that the mere adding of Rothenfeld as a defendant can be regarded as a proper substitute for the claim contemplated by Article 41. It is obvious that more than one year has elapsed, and I consider that Nasra has now lost her right against Rothenfeld. It is therefore unnecessary for this Court to decide the other point, namely, whether the lease by Rothenfeld to Barazani was bad because it was made without the consent of Nasra — in other words, we need not decide the interesting question whether Article 429 of the *Mejelle* applies to leases of *miri* land as well as to leases of *mulk*. (See Messrs. Goadby and Doukhan's Land Law of Palestine, 1935, p. 182).

I would accordingly set aside the judgment of the Land Court of Nablus of the 28th July, 1944, and dismiss Nasra's action with costs here and below. We shall hear parties' advocates on the question of costs.

Delivered this 28th day of February, 1945.

British Puisne Judge.

Having heard parties' advocates on the question of costs, we award costs to be taxed on the lower scale to each of the two Appellants, but there will only be one set of advocate's instruction fees and one set of advocate's attendance fee being certified by us at LP. 15.

Delivered this 28th day of February, 1945.

A/British Puisne Judge.

CIVIL APPEAL No. 440/44.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Chaya Rivka Kuker. APPELLANT.

v.

Israel Kuker. RESPONDENT.

Arbitration — Questions of divorce may not be adjudicated by arbitrators as within exclusive jurisdiction — Whether person may under Jewish Law be compelled to give or to accept a divorce, C. A. 22/34, 22/42 — P. O. in C., Art. 53 — Uncertainty in award — Severability of award — Stamping, C. A. 225/40.

Appeal from the judgment of the District Court, Jerusalem, Civil Case No. 32/44, allowed:—

1. Matters of marriage and divorce which are within the exclusive jurisdiction of the Rabbinical Court cannot be submitted to arbitration.

2. According to Jewish law a person can neither be forced to give nor to accept a divorce.

(*A. M. A.*)

FOLLOWED: C. A. 22/34 (2, P. L. R. 365; 8, C. of J. 558); C. A. 22/42 (9, P. L. R. 328; 1942, S. C. J. 259; 12, Ct. L. R. 3).

REFERRED TO: C. A. 11/40 (7, P. L. R. 91; 1940, S. C. J. 248; 8, Ct. L. R. 156); C. A. 225/40 (7, P. L. R. 601; 1940, S. C. J. 542; 8, Ct. L. R. 225).

ANNOTATIONS :

1. See Annotated Laws of Palestine, Vol. 2, pp. 76 *et seq.*, heading *"What may be referred"* and *ibid.*, pp. 150—1, heading *"Award incapable of execution"*.

2. In C. D. C. 77/45 (1945, S. C. D. C. 210) the District Court of Tel-Aviv granted an injunction ordering a Jewish husband to give his wife a divorce. *Quaere* how far that decision, so far as it compelled the husband to grant a divorce, is affected by the instant judgment.

3. For the proposition that there is no appeal against an order rejecting a stamp objection see, in addition to the cases cited, C. A. 169/41 (8, P. L. R. 438; 1941, S. C. J. 410) and C. A. 140/42 (9, P. L. R. 615; 1942, S. C. J. 680; 12, Ct. L. R. 163).

(*H. K.*)

FOR APPELLANT: Ben Aharon.

FOR RESPONDENT: Eisenberg and Perlmutter.

JUDGMENT:

This is an appeal from a judgment of the District Court of Jerusalem confirming an award of arbitrators.

The Appellant, who was the wife of the Respondent, had apparently been accused by the latter of misconduct, and they then decided to submit their matrimonial disputes to three gentlemen who happened to be Rabbis although they sat in their personal capacity and did not pretend to sit as members of any Rabbinical Court.

The arbitrators issued an award dated 8th *Shwat,* 5704, the effect of which I may summarize as follows, namely, the Respondent had to give his wife (the Appellant) a divorce which she must at once accept and the husband had to pay her *ketuba,* namely, LP. 15, whereupon she would be entitled to take with her her clothes and belongings but must leave the house and that in the event of her choosing to accept the divorce her husband would deposit the *ketuba* and would thereupon be released from any obligation to pay her maintenance and from any other obligations of a husband towards his wife.

The husband thereupon applied to the District Court for the enforcement of this award under section 14 of the Arbitration Ordinance and after hearing arguments by advocates for both parties Judge Bardaky rejected the contentions of the present Appellant's advocate that the award could not be enforced and accordingly ordered its enforcement. It is against that judgment that the Appellant now appeals to this Court.

The first ground of appeal is that no Civil Court can enforce an award concerning the giving or acceptance of a divorce because, according to Jewish Law, a person cannot be forced to give or accept a divorce for which proposition reliance is placed on C. A. No. 22/34, Vol. 2, P. L. R. p. 365, and C. A. No. 22/42 Vol. 9, P. L. R. p. 328. In C. A. No. 22/34 this Court said:—

> "There is no way of enforcing such a judgment except by using moral, religious and social pressure on the parties to obey the order, and notwithstanding any order of the Rabbinical Court to that effect...".

If this is the law (and we must accept and hold that it is) with regard to the powers of a Rabbinical Court, how much less can unofficial arbitrators give an award which cannot be enforced. I think that this ground of appeal succeeds; but, although the matter was not argued before us, I am of opinion that there is a much more fundamental reason for the District Court refusing to enforce such

an award and that is Article 53 of the Palestine Order-in-Council. It is admitted that both the parties are Palestinians. If the District Court were to purport to enforce such an award as is now before us, it seems to me that the Civil Courts would be entirely defeating the object of Article 53 which, at any rate, so far as Palestinians are concerned, is to give the Rabbinical Courts exclusive jurisdiction with regard to matters of marriage and divorce.

Other matters were argued before us, such as the fact that the arbitrators dealt with matters not included in the submission. I do not think it necessary to deal with this point, but I agree with the Appellant's advocate that part of the award cannot be executed on the ground of uncertainty. It is obvious that there would, in the nature of things, be considerable dispute as to what, in fact, were the clothes and belongings which the present Appellant would be entitled to take with her.

Mr. Ben-Aharon, for the Appellant, has cited Russell on Arbitration (11th Edition), p. 309, as authority for the proposition that, if the whole of the award cannot be enforced, a part of it only cannot be enforced. He argued this point on the ground that, as the leaving by the wife of the flat was bound up with her acceptance of the divorce, it was impossible to say that she could be forced to leave the flat without the question of acceptance of the divorce being considered. Mr. Ben-Aharon also mentioned, but did not press, a point relating to the stamping of the original submission; but C. A. No. 11/40, Vol. 7, P. L. R., p. 91, and C. A. No. 225/40, Vol. 7, P. L. R., p. 601, seem to be against his contention.

I would accordingly allow this appeal and set aside the judgment of the District Court of Jerusalem of 1st October, 1944, with costs here and below. Costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Delivered this 27th day of February, 1945.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 36/45.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF :—

Itzhak Trachtingot. APPELLANT.

v.

1. Dr. Werner Sommerfeld liquidator for Amiel Bros., Ltd. in liquidation,
2. Dr. Eliezer Amiel,
3. The Official Receiver. RESPONDENTS.

Winding up — Sale by liquidators, Execution Law (Art. 1) does not apply — Companies Ord., secs. 2(2), 166(2), 173(4), 174(4); Companies Act, sec. 191(2) — Sale by tender — Necessity to insert in conditions of tender provision as to licence under Control Regulations.

Appeal from the order of the District Court of Jaffa dated 21st December, 1944, in Civil Case No. 169/43 (Motion) No. S/8/44, consolidated with Motion No. S/10/44, dismissed and order of Court below varied:—

1. The District Court may order sale in winding up without invoking the Law of Execution.
2. Manner in which the sale should be held described.

(*A. M. A.*)

ANNOTATIONS:

1. See the previous proceedings in this liquidation; C. A. 159/44 (11, P. L. R. 220; 1944, A. L. R. 352) and C. A. 332/44 (*ante*, p. 237).

2. On the effect of provisions similar to sec. 2(2) of the Companies Ordinance see C. A. 155/44 (11, P. L. R. 204; 1944, A. L. R. 368) and note 1 thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: Abcarius and Levitzky.

FOR RESPONDENTS: No. 1 — Rosenbluth.
No. 2 — S. Wolf.
No. 3 — Eliash.

JUDGMENT.

This is an appeal from an order of the District Court of Jaffa, dated 21st December, 1944, in Civil Case No. 169/43, Motions Nos. S/8/44 and S/10/44.

Shortly stated, the effect of that order was to give certain directions

with regard to the sale of a diamond factory and diamonds in winding-up by the Court.

Mr. Levitzky, for the Appellant, contends that section 166(2) of the Companies Ordinance differs from section 191(2) of the Companies Act, 1929, as amended. The argument is that, if the liquidator under section 166(2) or section 174(4) of the Companies Ordinance desires to sell, he must do so under the Ottoman Law of Execution, any order of sale being such an order as is contemplated by Article 1 of the Execution Law. Dr. Eliash has, however, referred to sections 2(2), 166(2) and 173(4) of the Companies Ordinance and to Hailsham Vol. 5, p. 604, para. 993. We think that the Execution Law does not apply and that the District Court had power to order sale in the manner in which it did. The only alteration or rather addition which we intend to make to the order of the District Court to which alteration or addition all parties have agreed, is that paragraphs 5(b)(iii), 5(c) and 5(d) will be varied to the effect that tenderers should write their names and addresses on the envelopes and that, on the expiry of the time limited for submitting tenders, the liquidator should give all tenderers notice of the day, hour and place on and at which he will open the envelopes and that they will be entitled to be present at the opening and that, after all the tenders have been read out, it will be open to any of the tenderers to make a higher bid than the highest received in the envelopes. Mr. Trachtengot and Dr. Amiel may be present at the opening of the tenders.

Mr. Levitzky has asked that paragraph 5(b)(1), the terms of which are "it be notified in the said advertisement that any intending purchaser must be the holder of a valid permit from the Controller", should be deleted. We are unable to agree because the Control Regulations make it incumbent that anyone purchasing diamonds should be in possession of a permit from the Controller of Light Industries. Paragraph 5(b)(i) will therefore stand.

Subject to the foregoing addition or alteration the appeal is dismissed. No costs of this appeal.

Delivered this 2nd day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 26/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Sallam Jmei'an El-Sheikh Eid. APPELLANT.

v.

Ahmad Mahmoud El-Sheikh Eid. RESPONDENT.

Unregistered land — Presumption of possession by title — Danger of relying on oral evidence to prove mortgage, C. A. 233/40 — Lack of corroboration, Evidence Ord., sec. 6 — Finding against weight of evidence set aside.

Appeal from the judgment of the Magistrate's Court of Beersheba, sitting as a Land Court, dated 3.1.45 in Land Case No. 29/43, allowed:—

When a party is in possession of unregistered land there is a presumption that he has title thereto. If it is alleged that he holds the land as mortgagee the evidence of a single witness is insufficient to establish the mortgage.

(*A. M. A.*)

APPROVED: C. A. 233/40 (8, P. L. R. 20; 1941, S. C. J. 27).

ANNOTATIONS:

1. Where neither party has a registered title ownership may be inferred from possession: C. A. 238/43 (1943, A. L. R. 638) and annotations; see also C. A. 309/43 (1944, A. L. R. 676).

2. On oral evidence to prove a mortgage *cf.* C. A. 201/44 (11, P. L. R. 556; 1944, A. L. R. 682).

(*H. K.*)

FOR APPELLANT: Zein Eddin.

FOR RESPONDENT: F. El-Ghussein.

JUDGMENT.

This is an appeal from the judgment dated 3.1.45 of the learned Magistrate, Beersheba, in Land Case No. 29/43, whereby he gave a declaration of ownership of certain land in favour of the estate of Mahmoud el Sheikh Eid (father of the Plaintiff who is the present Respondent), and ordered the Defendant (present Appellant) to refrain from opposing the estate.

The learned Magistrate found as facts that Mahmoud el Sheikh Eid had died 15 to 20 years ago, and that he had mortgaged the land to

Hajjeh Mani'a (who was the Respondent's grandmother, and step-mother of the Appellant) for three French gold pounds. The learned Magistrate also found that Hajjeh Mani'a had died 3 or 4 years ago, and that the Appellant had taken possession of the land from Hajjeh Mani'a by virtue of a deed of sale outside the Land Registry, and had been in possession by virtue of that deed for a period of eight years.

Now it is clear from the evidence, and particularly from that of the Respondent's witness Hussein Ismail el-Sheikh Eid, that Hajjeh Mani'a must have been in possession for at least 17 years. It is admitted that the Respondent has never had possession at all except on the occasion when, after Hajjeh Mani'a's death, he ploughed the land and was successfully sued by the Appellant in a possessory action before the Tribal Court of Beersheba in 1943.

The land is admitted to be *miri*. Like so much of the land in the Beersheba area, it is not registered in the Land Registry, and in the absence of registration a natural deduction to be drawn from the fact of long possession by Hajjeh Mani'a is that she was the owner. That being so it was, from the Respondent's point of view, very necessary to prove the mortgage in order to defeat this presumption.

In his statement of claim the Respondent had averred that his father, Mahmoud el Sheikh Eid, had mortgaged the land to Hajjeh Mani'a by an ordinary *sanad*. But the only witness (Hussein Ismail el-Sheik Eid), who gave evidence as to the making of the mortgage, stated that no *sanad* was drawn. This witness also stated that he was the only person who was present when the mortgage was made. The original parties to the alleged mortgage are both dead. In Civil Appeal No. 233/1940 (8 P. L. R. 20) to which Said Eff. Zein Eddin for the Appellant has referred, the Court observed:—

> "There is not a scrap of documentary evidence to support the existence of such a contract, and it is obviously dangerous to rely on oral evidence of an oral contract, when one of the alleged parties is dead and cannot contradict it".

A similar danger exists in the present instance where not only one but both of the original parties are dead. Moreover, the mortgage is denied by the Appellant, and the only evidence of it is that of a single witness which, by virtue of section 6 of the Evidence Ordinance, is insufficient to support a judgment.

In my view there was no evidence upon which the learned Magistrate could find that a mortgage of this land was made by Mahmoud el-Sheikh Eid. If a party waits until witnesses who could have given evidence as to the true facts have died, he must not be disappointed

if the Court does not assume that those witnesses would have given evidence in his favour.

In the result I have come to the conclusion that the judgment of the learned Magistrate is against the weight of the evidence, and that the appeal must be allowed. The judgment is set aside with costs to the Appellant in both Courts. The costs in this Court will be in the fixed sum of LP. 10.

Delivered this 23rd day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 446/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ibrahim 'Abdul Hamid el Hussein. APPELLANT.

v.

Amneh Yussef Suleman on behalf of the estate of her late husband Deeb el-Ali. RESPONDENT

Mortgage — Effect of unregistered deed — Available to establish ownership but not to prove mortgage — Land Transfer Ord., sec. 11.

Appeal from the judgment of the Magistrate's Court of Nablus, sitting as a Land Court, dated 30.10.44 in Land Case No. 31/44, dismissed:—

An unregistered mortgage, although it cannot be used to establish the transaction which contravenes sec. 11 of the Land Transfer Ordinance, may be used as an admission contradicting a future claim of title by the mortgagee to the land mortgaged.

(A. M. A.)

ANNOTATIONS:

1. *Cf.* C. A. 26/45 (*ante*, p. 330).

2. On the question how far void documents may be used in evidence see C. A. 182/37 (5, P. L. R. 195; 1938, 1 S. C. J. 163; 3, Ct. L. R. 132) and C. A. 187/43 (10, P. L. R. 615; 1944, A. L. R. 6).

(H. K.)

FOR APPELLANT: Hijab.

FOR RESPONDENT: Nimer.

JUDGMENT.

Abdul Hadi, J.: This is an appeal from the judgment of the Magistrate's Court of Nablus sitting as a Land Court, whereby it declared the ownership of the Respondent (Plaintiff in the Court below) on behalf of the estate of her testator Deeb El 'Ali in the land of Kaffet Abu El Shok, in accordance with the boundaries stated in her statement of claim dated 3rd July, 1944, and ordered the Appellant (Defendant in the Court below) to refrain from interferring with her ownership and possession in the said land.

The Respondent's claim on behalf of the estate of her testator Deeb El Ali is shortly that the land claimed namely, Kaffet Abu El Shok, which was owned by the testator, Deeb, was mortgaged to the Appellant, in accordance with a mortgage deed (Exhibit 1), that at the beginning of January 1943 the said mortgage was released and possession taken of the land, and that, owing to the recent death of her husband, Deeb, the Appellant started denying their right to the land, whereupon the Respondent instituted this action and asked for the Appellant to be ordered to refrain from opposing her. In support of her claim she relied on the mortgage deed as well as on other evidence.

The Appellant, in reply to the Respondent's claim, states that there is no land called Kaffet Abu El Shok, and that he is in possession of land named Marah El 'Irbas which devolved upon him by inheritance from his father thirty years ago.

The Magistrate heard the evidence of both parties and believed the Respondent's witnesses, holding that their evidence was corroborated by the deed. He also believed the evidence of the Respondent herself but disbelieved the Appellants' witnesses and finally came to the conclusion that the land claimed, the boundaries of which were stated in the statement of claim, had been mortgaged to the Appellant and his cousins, that the mortgage was later released and that the absence of any reasonable explanation by the Defendant for the presence of the mortgage deed in possession of the Plaintiff supported this conclusion as well as corroborating the evidence of the Plaintiff which he believed. In the result he found in favour of the Plaintiff and declared her to be owner of the land.

We consider that the evidence on which the Magistrate relied was sufficient to establish the Plaintiff's claim and we see no reason for interfering with the findings of the Magistrate in this respect.

It is further argued on behalf of the Appellant that the Magistrate erred in relying on the mortgage deed (Exhibit 1), because the mortgage

was not registered in the appropriate department and therefore reliance thereon contravened section 11 of the Land Transfer Ordinance, 1920.

We think that this submission might have been of weight had the dispute between the parties concerned the correctness or otherwise of the mortgage transaction, in which case such a transaction, being a disposition of immovable property, would be governed by the Ordinance. The dispute in this case, however, centres around the ownership of the land claimed, and we see no reason why the deed should not be taken as valid evidence to prove ownership inasmuch as it constitutes an admission by the Appellant as mortgagor of the ownership of the Respondent's testator in the land claimed to have been mortgaged with him.

For all these reasons we dismiss the appeal with fixed (inclusive) costs of LP. 10.

Delivered this 29th day of March, 1945, in the presence of Mr. S. Hijab for Appellant and in the presence of Tewfic Eff. Nimer for Respondent.

Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 153/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF :—

Naftali Brender. APPELLANT.

v.

The Attorney General. RESPONDENT.

Theft — C. C. O. 263 — Intention permanently to deprive the owner — Inference of intention.

Appeal from the judgment of the District Court of Tel-Aviv (appellate capacity) in CR. A. 123/43, dismissed:—

Intention, in most offences, may be inferred from the surrounding circumstances.

(A. M. A.)

ANNOTATIONS:

1. On 17.1.43 the "Palcost" Co., Ltd., of which Appellant was the manager,

hired a typewriter with a right of purchase after certain payments; the typewriter was delivered at the Company's office into Appellant's hands and on the same day Appellant had it pawned with a right of redemption within one month. Appellant did not redeem it and the Magistrate was satisfied that he had obtained the typewriter by fraudulent means and that he had no intention of redeeming it when handing it to the pawnbroker. Appellant was convicted of theft contrary to sec. 270 of the C. C. O.

2. On what amounts to an intention permanently to deprive the owner see Halsbury, Vol. 9, pp. 498—9, para. 857.

(*H. K.*)

FOR APPELLANT: Safier.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

The only point raised in this appeal is that the intention permanently to deprive the owner of the typewriter was not present and that therefore it did not come within the ambit of section 263 of the Criminal Code Ordinance.

Now, intention is an element which in most cases must be inferred from the circumstances surrounding the charge. It is quite clear that the learned Magistrate was well aware of what had to be proved to sustain a charge of theft. He came to the conclusion that the intention was present from the very beginning, and he gave the reasons upon which he based this conclusion. In our opinion those reasons are both justified and adequate. It follows, therefore, that the appeal must be dismissed.

Delivered this 21st day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 6/45.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF :—

Amin Bader. — APPELLANT.

v.

Adel Bey El-Tourjman, in his capacity as *Mutawalli* of the *Waqf* of Sheikh Mohammad el Khalili. — RESPONDENT.

Evidence — Putting in a waqfieh — Defendant calling no evidence — Evidence of forgery tendered by Defendant on action being remitted — Certification of waqfieh — New point taken on appeal, C. P. R. 125, 342, 350, Riding v. Hawkins, Alexander v. Rayson.

Appeal from the judgment of the Land Court, Jerusalem, dated 8th December, 1944, in Land Case No. 43/43, dismissed:—

After the Defendant states that he will call no evidence he cannot do so even if the action has in the meantime been remitted by the Court of Appeal.

(*A. M. A.*)

REFERRED TO: Riding *v.* Hawkins, 1889, 14 P. D. 56, 58 L. J. (P.) 48, 60 L. T. 869; Alexander *v.* Rayson, 1936, 1 K. B. 169, 105 L. J. (K. B.) 148, 154 L. T. 205, 52 T. L. R. 131.

ANNOTATIONS:

1. See the previous proceedings in this case: L. C. Jm. 43/43 (1944, S. C. D. C. 175), C. A. 137/44 (*ante*, p. 202) & L. C. Jm. 43/43 (1944, S. C. D. C. 374).

2. Parties will not be given a second opportunity to prove their case: C. A. 307/43 (11, P. L. R. 151; 1944, A. L. R. 411).

(*H. K.*)

FOR APPELLANT: A. Levin and Nazzal.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jerusalem, in Land Case No. 43/43, delivered on 8th December, 1944.

The matter has already been before this Court in Civil Appeal 137/44 when this Court on 3rd November, 1944, set aside the judgment of the Land Court and remitted the case for completion. This Court then held that the present Respondent had produced sufficient *prima facie* evidence of a *wakfieh*, and that consequently the Land Court should not at that stage have dismissed the case. When the case again came before the Land Court the advocate for the Defendant (now Appellant) asked permission to call witnesses to prove that the *wakfieh* was a forgery. The Land Court then informed the Defendant's advocate that that was the first occasion on which any allegation of forgery had been made, and, after hearing both parties' advocates, refused to allow the Defendant to re-open his case or to call further evidence, the reason being that at the original trial, at the close of the case for the Plaintiff, his then advocate said: "I call no evidence".

At the retrial the learned Relieving President, having refused to hear further evidence, heard parties' advocates argue on every aspect

of the case including the effect of the *wakfieh*. The Court then reserved judgment and finally gave a lengthy judgment dealing with all the points raised upholding the *wakfieh* and entering judgment for the Plaintiff. Against that judgment the Defendant now appeals to this Court.

One of the various grounds of appeal with regard to the *wakfieh* itself is that at the original trial the *wakfieh* was never really proved because the Court below, when the witness who was producing it was about to produce it, heard an objection by the Defendant's advocate and a reply by the Plaintiff's advocate, and then ruled as follows, namely:—

> "I will allow document in provisionally and mark it "B". The matter can be more fully argued later, if necessary. You agree, Mr. Nazzal?".

Mr. Nazzal, *i. e.* Defendant's advocate, agreed. The evidence of the Plaintiff was then heard and, as I have said, at the close of that evidence Mr. Nazzal said that he called no evidence. It is quite clear that the Plaintiff closed his case, Mr. Nazzal saying that he was calling no evidence. The *wakfieh* was then before the Court and if the Defendant's then advocate had wished the Court not to look at the document when considering its judgment, he should have obtained a definite assurance from the trial Judge to that effect. He did not do so but chose to call no evidence. It is impossible for us, therefore, to say that the *wakfieh* was not properly before the trial Court. It is implicit from the judgment of this Court in Civil Appeal 137/44 that the matter was remitted for the Land Court to consider the effect of the *wakfieh*.

The question now arises whether the learned Relieving President was correct in refusing on the 6th December, 1944, to allow the Defendant's advocate to call witnesses. In his judgment he says:—

> "The case was returned for completion and that meant in the circumstances that this Court had to consider the terms of the *wakfieh* proved by means of a certified copy and to give a fresh judgment with that paper before it. The case was set down and the advocate for the Defendant asked to call witnesses to prove that the certified copy was a forgery. Objection was taken by the other side, and rightly, for the Defendant had previously elected to call no evidence in defence and took the course and risk of seeking a direction in his favour at the close of the Plaintiff's case, which he obtained, wrongly, as it turned out. Moreover, as I have said, there has been no hint or suggestion whatsoever up to this late moment of forgery or the like. The document was in provisionally from the very beginning and the Defendant was aware of its contents".

We are of opinion that the learned Relieving President rightly appreciated the effect of the judgment of this Court in Civil Appeal 137/44, and this ground of appeal accordingly fails.

The Appellant's advocate further contends that, after the *wakfieh* had been put in as an exhibit before the Land Court in the original action, the Plaintiff, during an adjournment, obtained the *wakfieh* from a clerk in the Registry of the Land Court and had a certain certification added by the present Chief Clerk of the *Sharia* Court. The answer to this is to be found in the judgment of the learned Relieving President when he says:—

> "However, the date when the document was certified as a copy did not affect the question arising and determined as to whether upon objection taken it could properly be admitted as legal proof of the contents of the original register. The matter in this paragraph is mentioned by the way".

The Appellant's advocate has informed us at the Bar that what he wishes to prove is that the original document (not the certified copy of the *wakfieh*) was a forgery. This point does not seem to have been taken before. It is quite obvious that, when the case was originally before the Land Court, the Defendant's then advocate could, when the *mutawalli* 'Adel Bey El Tourjman was about to exhibit the certified copy of the *wakfieh*, have asked for an adjournment to enable him to have the document examined. He did not do so, nor did he allege forgery. He took the point that a certified copy could not be received in evidence and that the original should have been produced on the ground that primary evidence should be received. The point, therefore, seems an entirely new one and we are not prepared to remit the case for further evidence on it, notwithstanding Mr. Levin's reference to the Annual Practice (1944) p. 481, and to Civil Procedure Rules, rules 125, 342 and 350, and to the cases of Riding *v.* Hawkins, 14 P. D. p. 56, and Alexander *v.* Rayson (1936) 1 K. B. pp. 178 and 180.

The next ground of appeal is that there was no proof that the land was *mulk* and that it was never made *waqf*. The learned Relieving President, however, dealt with both these matters and he also had evidence before him which he was entitled to accept and which satisfied him on both points. He, in fact, devoted more than two typewritten pages of his judgment to these two points, and nothing has been adduced before us to show that this Court should interfere.

For the foregoing reasons the appeal is dismissed with costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 15th day of May, 1945, in the presence of Mr. A. Levin for Appellant and in the presence of Mrs. Rubenstein for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 449/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Benyamin Joseph Weisserberg & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Prescription — Action by Government claiming title by purchase — Whether Defendant's plea falls under Art. 20 or Art. 78 of the Land Code — C. A. 167/42, effect of payment of rent by Defendant's predecessor.

Appeal from the judgment of the Magistrate's Court of Haifa, sitting as a Land Court, dated the 23rd of October, 1944, in Land Case No. 6/43, dismissed:—

1. Prescription may not be pleaded if the possessor's predecessor by exchange paid rent to the Plaintiff's predecessor by purchase.

2. *Quaere* whether art. 20 or art. 78 of the Land Code applies to a plea of prescription where the Plaintiff is the Government suing as purchaser of the land by private treaty.

(*A. M. A.*)

DISTINGUISHED: C. A. 167/42 (9, P. L. R. 701; 1942, S. C. J. 715).
ANNOTATIONS: See note 1 in S. C. J. to C. A. 167/42 (*supra*) and *cf.* C. A. 408/43 (11, P. L. R. 316; 1944, A. L. R. 628).

(*H. K.*)

FOR APPELLANTS: Goitein and Argaman.

FOR RESPONDENTS: Crown Counsel — (Rigby).

JUDGMENT.

Frumkin, J.: The land in dispute is, since the year 1936, registered in the name of the High Commissioner, for the time being, in trust for the Government of Palestine. The Government has obtained this land by way of purchase from P. I. C. A. The present action was brought on behalf of Government against the Appellants for the decla-

ration of ownership and for an order entitling Government to take immediate possession of the land. The Appellants never disputed the ownership of Government, but relying on Article 20 of the Ottoman Land Code, claimed to have acquired a prescriptive right to the land, being in undisturbed possession for a period exceeding ten years. They had not disclosed any reason how they have come to the possession of the land nor do they admit being there in the nature of a *jadduli*.

On behalf of Government it has been argued that Article 78 of the Ottoman Land Code applies and not Article 20, thus putting it upon the Appellants to show the grounds under which they claimed title to the land.

On behalf of the Appellants it was argued that Article 78 does not apply because Government has obtained registration to the land as a private party by way of purchase and not as representing the State.

Because of the conclusions we are arriving at it is not necessary to decide this point which, in so far as this case is concerned, is only of academic interest. The conclusion we are arriving at is that the Appellants have not been in undisturbed possession of the land during the prescriptive period. There was evidence before the Magistrate sitting as a Land Court to prove that the present Appellants took possession of the land from one Dargawitz who paid rent for the land to the predecessors in title, of the Respondent, at least until the year 1934. The said Dargawitz allowed the Appellants to enter into possession of the land in exchange of other land under their control which they, the Appellants, handed over to the said Dargawitz. The Magistrate heard evidence to this effect, believed the evidence, and gave good reasons for so believing it, and we see no ground to interfere with this finding of fact. It follows, therefore, that for so long as Dargawitz was paying rent to the then owners of the land the Appellants were standing in his shoes and could claim no prescriptive right for such period.

The present action was brought in 1942 and less than ten years had elapsed since the time when Appellants could claim to be on the land without rent being paid by them or on their behalf and without any other interference.

Mr. Goitein has referred us to Civil Appeal 167/42, 9 P. L. R., p. 701, in which it was held, if not in so many words, that it is not enough that rent be paid to the owner but that rent must be paid by the person in actual possession. The present case is, however, distinguishable from the case cited in that in this case there is a connecting link between the persons in possession, namely the Appellants, and

the tenant who has paid the rent, in that they took over from him in exchange of other land.

It is for this reason that we hold that the Land Court was right in its conclusion that the Appellants have not proved their defence as to prescription and the appeal must be dismissed and the judgment of the Court below confirmed with costs on the lower scale to include LP. 10 advocate's attendance fee for this hearing.

Delivered this 24th day of April, 1945.

Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

CIVIL APPEAL No. 312/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Dr. Joseph Gliksman. APPELLANT.

v.

Dr. Alexander Salomon & 3 ors. RESPONDENTS.

Failure to pay deposit — Appeal listed for dismissal, C. P. R. 327 — Failure to summon Respondent — Application to reduce amount of or extend time for making deposit to be by motion.

Appeal from the judgment of the District Court of Tel-Aviv, dated 30th June, 1944, in Civil Case No. 23/43, dismissed:—

In the absence of an order extending the time for paying the deposit, proceedings taken subsequently to the expiration of time are a nullity.

(*A. M. A.*)

ANNOTATIONS:

1. When the appeal came before the Court for the first time on being listed for dismissal the Appellant was granted an extension of time to pay the deposit upon an oral application to that effect. Appellant thereafter successfully applied to the Assistant Chief Registrar for a reduction of the amount of the deposit. The matter was reopened upon Respondent No. 1 showing that he had not been summoned for the hearing of 14.12.44.

2. *Cf.* C. A. 291/44 (11, P. L. R. 506; 1944, A. L. R. 794) and C. A. 462/44 (*ante*, p. 170).

3. On failure to proceed by motion see note 1 to C. A. D. C. T. A. 162/44 (1945, S. C. D. C, 162).

(*H. K.*)

FOR APPELLANT: Hagler.

FOR RESPONDENTS: No. 1 — Tory.
Nos. 2—4 — Absent — served.

JUDGMENT.

On 14.12.44 this appeal came before the Court for an order of dismissal under Rule 327 of the Civil Procedure Rules. On that occasion the Respondents were shown as "absent, served". But it now appears that the notice of hearing had not been served upon the advocate (Mr. Tory) of the 1st Respondent till 14.12.44, at Tel-Aviv, so the 1st Respondent was shown as "absent, served" owing to a misapprehension. It further appears that on 14.12.44 there was no application before the Court asking for an extension of time within which to make the deposit. That application ought to have been made by motion, but it is evident that the Appellant had taken no steps either to obtain an extension or to have the deposit reduced before the case was listed for dismissal. Had the 1st Respondent been present he would doubtless have brought these points to the notice of the Court. We consider that as the order of 14.12.44 was made under a misapprehension of the true facts the extension was not warranted. In the absence of any valid order allowing an extension the subsequent proceedings before the Assistant Registrar of the Supreme Court were a nullity, and we need not deal with the question whether he was entitled to revise his own order by reducing the amount of the deposit.

In the result, as the deposit of LP. 75 was not made in time, the appeal must be dismissed with fixed costs of LP. 10 (ten pounds).

Delivered this 16th day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 431/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF:—

Abdul Hamid Abdul Aziz el Umeiri — APPLICANT.

v.

Jamileh Salameh Muhammad Mustapha el Umeiri & an. — RESPONDENTS.

Appeal in absence — Failure of appellant to appear, appeal dismissed, C. P. R. 337, 338 — Rehearing.

Application under Rule 337 of the Civil Procedure Rules, 1938, for the re-admission of the appeal which was dismissed by this Court on the 6th day of February, 1945, dismissed:—

The proviso to r. 337 does not apply to cases where the appeal is heard in the Appellant's absence (r. 337(c)) and dismissed.

(*A. M. A.*)

ANNOTATIONS: On rules 337(c) & 338 of the C. P. R. *cf.* the following authoriteis: C. A. 192/38 (1938, 2 S. C. J. 144; 4, Ct. L. R. 163 and *ibid.*, pp. 230 & 255), C. A. 197/38 (1938, 2 S. C. J. 175; P. P. 14.12.38), C. A. 27/39 (6, P. L. R. 255; 1939, S. C. J. 260; 5, Ct. L. R. 239), C. A. 74/39 (6, P. L. R. 502; 1939, S. C. J. 432; 7, Ct. L. R. 31), C. A. 226/38 (7, P. L. R. 153; 1940, S. C. J. 373; 7, Ct. L. R. 111), C. A. 44/40 (7, P. L. R. 372; 1940, S. C. J. 448; 8, Ct. L. R. 193) and C. A. 7/44 (1944, A. L. R. 531).

(*H. K.*)

FOR APPLICANT: Ghazaleh.

FOR RESPONDENT: Gad.

RULING.

The appeal was *not* struck out on 6.2.45. It was dismissed. So that the proviso to Rule 337 does not apply. The present application is misconceived and must be, and hereby is, refused. It is clear that the Court on 6.2.45 acted under Rule 337(c).

As to Rule 338, we do not consider that the present Applicant (the Appellant in the appeal) has satisfied us that he *was* prevented by sufficient cause from appearing when the appeal was called on for hearing.

The application is refused.

Given this 26th day of February, 1945.

British Puisne Judge.

HIGH COURT No. 126/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Matityahu Rabinowitz. PETITIONER.

v.

1. Chief Execution Officer, Haifa,
2. Abraham Nudelman. RESPONDENTS.

Execution — Eviction order — Alternative accommodation no longer available at the time of execution — Judgment may not be varied in execution — M. C. P. R. 156; *C. A.* 45/44, 51/44, 265/42, *H. C.* 97/43.

Return to an order *nisi* calling upon the first Respondent to show cause why he should not proceed with the execution of a judgment delivered on 23.5.43 whereby second Respondent was ordered to be evicted from a certain house:—

A judgment ordering eviction, *inter alia* on the ground that the tenant has alternative accommodation, cannot be varied in execution if the alternative accommodation is no longer available; the judgment must be executed.

(*A. M. A.*)

REFERED TO: C. A. 265/42 (10, P. L. R. 60; 1943, A. L. R. 9); H. C. 97/43 (10, P. L. R. 569; 1944, A. L. R. 41); C. A. 45 & 51/44 (11, P. L. R. 320; 1944, A. L. R. 340).

ANNOTATIONS:

1. The Supreme Court judgment restoring the Magistrate's order for eviction (C. A. 331/43) is reported in 1944, A. L. R. 154.

2. On the C. E. O.'s power to postpone execution of eviction orders see H. C. 50/43 (1943, A. L. R. 320), H. C. 65/43 (10, P. L. R. 351; 1943, A. L. R. 467), H. C. 88/43 (10, P. L. R. 494; 1943, A. L. R. 542), H. C. 97/43 (*supra*), H. C. 35/44 (11, P. L. R. 158; 1944, A. L. R. 217) and H. C. 20/44 (11, P. L. R. 77; 1944, A. L. R. 272).

(*H. K.*)

FOR PETITIONER: Gross.

FOR RESPONDENTS: No. 2 — Eliash.

ORDER.

This is the return to an order *nisi* directed to the Chief Execution Officer of the Magistrate's Court, Haifa, calling upon him to show cause why he should not proceed with the execution of a judgment delivered on the 23rd May, 1943, ordering the second Respondent to be evicted from a certain house.

The history of the litigation is that on appeal the District Court on 30th July, 1943, set aside the judgment and dismissed the Plaintiff's action. This Court, however, sitting as a Court of Civil Appeal in C. A. 331/43 on 2nd March, 1944, restored the judgment of the Magistrate. On 28th July, 1944, the Execution Officer, who happened to be the very Magistrate who gave the judgment of 23rd May, 1943, refused to execute the judgment which he himself had delivered, his reason being that, when he gave the judgment ordering eviction, he did so on the basis of his belief that there was available for the Defendant (now the second Respondent) alternative accommodation, namely, in the premises at the time of the judgment being occupied by the

Plaintiff (now Petitioner) although those premises were owned by one Mr. Tasler. In the Magistrate's Court Mr. Tasler had given evidence some time before the 23rd May, 1943, when he swore that he was prepared to allow the Defendant to be his tenant in place of the Plaintiff. Because the Magistrate was satisfied that the Plaintiff required, for his own use, the flat which the Defendant was then occupying and as he was also satisfied that there was available for the Defendant (now second Respondent) the accommodation in Mr. Tasler's house, he ordered eviction. On the 20th June, 1944, Mr. Tasler informed the Chief Execution Officer that having changed his mind he was no longer prepared to give the flat to the second Respondent because of a certain reason which he gave, which reason I need not and do not wish to set out in this judgment. In his order of 25th July, 1944, the first Respondent said:—

> "The judgment itself, as pointed out above, states two causes for the eviction: (a) the original offer made at the time of filing the action; (b) the readiness of the owner of the alternative accommodation (as it appears from his testimony under oath) to give the free flat to the debtor. And whereas the owner of the alternative accommodation refuses to give the flat to the judgment debtor, namely the same flat which is to-day occupied by the judgment creditor and which in accordance with the judgment the judgment creditor had to exchange with the judgment debtor, I am not prepared to evict the judgment debtor from the flat as long as the alternative accommodation has not been delivered to him.
>
> I would like to add some words with regard to the claim of the Plaintiff being unjustified. If his view were correct then every plaintiff claiming eviction under section 8(1)(c) could offer alternative accommodations and call the owners of those accommodations to testify under oath that they are prepared to give the flat to the Defendant and thus an order of eviction would be issued and, at the time the judgment debtor will be called upon to vacate, the owner of the alternative accommodation who showed "generosity" during the proceedings, may come and say that he changed his mind — and this is exactly what happened in our case.
>
> I, therefore, rule not to execute the order for eviction until and after the judgment debtor is given the opportunity to get the alternative accommodation mentioned in the judgment being the flat now occupied by the Plaintiff himself".

Dr. Eliash, for the second Respondent, supporting that statement of the Chief Execution Officer, has argued that it was the only fair and reasonable attitude to adopt.

Dr. Gross, for the Petitioner, has argued that the Assistant Chief Execution Officer cannot now vary the judgment of the Magistrate. It is a coincidence that the Chief Execution Officer happens to have been

the very person who was the Magistrate giving judgment on the 23rd May, 1943.

It was also argued that under rule 156 of the Magistrates' Courts Procedure Rules, 1940, all that the Petitioner had to take to the Chief Execution Officer was a decree (form No. 4 of Schedule 1) and such decree would merely have contained an order to eject the tenant but would not have given any reasons. Dr. Gross has also said that this Court has already decided, possibly in conflicting judgments, what the crucial date is with regard to the availability of alternative accommodation but that whichever judgment we choose the latest date that can be regarded is the date of adjudication which in this case was 23rd May, 1943, (see C. A. 45/44 and 51//44, Vol. 11 P. L. R. p. 320, and C. A. 265/42, Vol. 10 P. L. R. p. 60, and H. C. 97/43, Vol. 10 P. L. R. pp. 569 and 575).

Dr. Gross says that if the second Respondent had been prepared to go into Mr. Tasler's house on the 23rd May, 1943, he could have done so and he could have even entered those premises earlier, namely, when Mr. Tasler was giving evidence. He has also pointed out that the present Petitioner is not the landlord of the flat in which is available the alternative accommodation. Mr. Tasler is the landlord of that flat and the Petitioner cannot control Mr. Tasler's actions. In my view, the Chief Execution Officer could not possibly refuse to execute the judgment of 23rd May, 1943, however attractive may be the reasons set out in the paragraphs of his order of 28th July, 1944, which I have quoted and however much hardship may be caused to the second Respondent. It seems to me that it would be a most dangerous principle to allow Execution Officers to interfere with judgments which are quite clear in their terms and to do so would be to introduce a most undesirable state of uncertainty not only into the law but into judicial proceedings. If the law ought to be altered that is a matter for the Legislature. Some people may think that the law should be altered so as to enable a Magistrate when ordering eviction — in the circumstances in which eviction was ordered on the 23rd May, 1943, — to order that the judgment or decree lie in the office (*i. e.* be not executable) for a period of so many months or perhaps to adjourn the hearing to give the Magistrate a chance of satisfying himself that not only was the alternative accommodation available, but also that it was immediately practicable for the displaced tenant to enter into occupation therein. That is, however, a matter for the Legislature and not for the Courts. It may well be that the reasons why the Magistrate ordered eviction on the 23rd May, 1943, were that he was satisfied that alternative accommo-

dation was available and that now he has been disappointed. His judgment, however, was quite clear and unequivocal and subject to no conditions and not suspended in any way. I, therefore, think that the Execution Officer had no option but to execute it.

The rule *nisi* is made absolute with costs, *i. e.* fixed (or inclusive) costs of LP. 10.

Given this 22nd day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 283/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Yehuda Blau. APPELLANT.

and

In the matter of the succession to the estate of Fruma Blau, deceased. RESPONDENT.

Succession — Interests of minors, who may represent — Powers of Registrars as regards orders of succession — Registrars Ord., sec. 11, *Succession Ord., sec.* 26(2).

Appeal from the judgment of the Registrar of the District Court Jerusalem, delivered on 30th May, 1944, in Succession Appl. No. 89/44, allowed:—

1. Registrars may make orders of succession in unopposed cases where no difficulties arise.

2. In other cases the matter should be referred to the President District Court.

3. Where the interests of minors conflict with those of the natural guardians, the Court should appoint a guardian *ad litem*, there being no Government official to represent the interests of minors.

(*A. M. A.*)

ANNOTATIONS: The appeal was previously before the Supreme Court when the papers were ordered to be served on the Attorney General; see 1944, A. L. R. 799.

(*H. K.*)

FOR APPELLANT: Perlmutter.

FOR RESPONDENT: Assistant Government Advocate — (Gavizon).

JUDGMENT.

This is an appeal from a purported judgment given by the Registrar of the District Court, Jerusalem, under section 11, Registrars Ordinance, 1936.

The Appellant had applied for a certificate of succession to his deceased wife, claiming that according to Jewish Law he was the sole heir to the exclusion of the son of the marriage who is a minor and was not represented before the Registrar. The Registrar did not grant a certificate of succession in accordance with the wishes of the Appellant but ordered that the estate of the deceased whether movable or immovable be distributed in accordance with the provisions of the Ottoman Law as contained in Articles 1 & 6 of the 2nd Schedule to the Succession Ordinance. Against this judgment the Appellant now appeals to this Court.

Mr. Beham, Assistant Government Advocate, at the request of the Court, appeared with a view to assisting us on the point whether there was available any Government Official whose duty it might be to represent the interests of the minor which interests, of course, clearly conflicted with that of his father (present Appellant). It seems, however, that no such official exists.

Dr. Perlmutter, for the Appellant, urges that the Registrar has no power to refuse but only power to issue declarations of succession. We think that, on a sound construction of section 11 Registrars Ordinance, what is intended is to give power to Registrars to make declarations of succession in terms of the application in cases where there is no opposition and in cases where he sees fit to make the grant and has no doubts or qualms of conscience about doing so. It seems tolerably clear that in this case the Registrar (doubtless with the best of intentions) himself assumed the role of guardian *ad litem*. But once he himself had decided to oppose the petition for a declaration it could no longer be regarded as an unopposed case. It seems to us, therefore, that he should have submitted the matter to the learned President of the District Court who could then have ordered the matter to be heard by the Court properly constituted under section 26(2) Succession Ordinance.

The order of the Registrar of 30th May, 1944, is accordingly set aside and the matter remitted to the District Court to be heard by them under section 26(2) Succession Ordinance. They will have to decide among other matters the following questions, namely, the nationality of the Appellant, the nationality of the deceased, the law

applicable, and, if Jewish Law applies, what is the Jewish Law on the matter, and if the 2nd Schedule to the Succession Ordinance applies what articles of that Schedule. They should appoint a guardian *ad litem* to safeguard the interests of the minor son, and we would suggest that their choice should fall on an advocate known to them as one versed in this branch of the law. His fee will ultimately be paid out of the estate in any event. No costs of this appeal.

Delivered this 11th day of May, 1945.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 37/43.

IN THE PRIVY COUNCIL.

BEFORE: Lord Wright, Sir Madhavan Nair and Sir John Beaumont.

IN THE APPEAL OF:—

Shafiqa Bint Jamal Eddin Dasuki. — APPELLANT.

v.

Sadr Eddin Et-Tibi & an. — RESPONDENTS.

Denial of admission made in Notarial deed and in Land Registry — Scope of Art. 1589 of Mejelle.

Appeal from the judgment of the Supreme Court of Palestine, sitting as a Court of Civil Appeal (C. A. 168/41), allowed:—

1. Legal effect of admissions in Palestine is to be found in *Mejelle*, whose express enactments as to admissions are not over-ridden by sec. 14, Evidence Ordinance.

2. Where an admission in writing is denied and person who made it is unable to prove fraud he is entitled to demand from other party specific decisive oath in terms of Art. 1589 of *Mejelle*, even though latter has given evidence and denied adversary's allegation.

3. Admissions in official documents are not excepted from operation of Art. 1589 of *Mejelle*.

(*M. L.*)

FOLLOWED: P. C. A. 23/38 (6, P. L. R. 534; 7, Ct. L. R. 205; 1940, S. C. J. 19).

REFERRED TO: C. A. 2/38 (5, P. L. R. 187; 3, Ct. L. R. 122; 1938, 1, S. C. J. 165).

OVERRULED: C. A. 306/20 (1, P. L. R. 1, 3 C. of J. p. 1129).

ANNOTATIONS:

1. The judgment appealed from is C. A. 168/41 (8, P. L. R. 563; 11, Ct. L. R. 214; 1941, S. C. J. 642).

2. On the first point see case followed with annotations thereto and also C. A. 168/41 (*supra*) with annotations thereto.

3. On decisive oath see C. A. 128/43 (1943, A. L. R. 295) with annotations thereto.

4. On the third point see case referred to and annotations thereto.

(*A. G.*)

JUDGMENT.

Beaumont, J.: This is an appeal from a judgment of the Supreme Court of Palestine dated the 8th December, 1941, setting aside a judgment of the District Court of Nablus dated the 27th July, 1941.

The Appellant, as Plaintiff in the suit, claimed from Defendant No. 1 and Defendant No. 2, the sum of LP. 650. Her case was that she and her sister Aisha agreed to sell their shares in certain lands to Defendant No. 1 through their uncle, Defendant No. 2, who was acting as an intermediary, for the sum of LP. 1.350; that the sisters only received LP. 50, leaving a balance of LP. 650 due to each sister. The objection that the sister of the Plaintiff was a necessary party to the suit was abandoned at the trial. The Plaintiff and her sister had executed before the notary public a power of attorney (Exhibit B), appointing three persons as their attorneys to effect the transfer of the land, and such power of attorney contained an admission in the following terms: —"We received the whole price in cash and in advance from the hands of the said purchaser at the time of signing this power of attorney".

In her statement of claim the Plaintiff alleged, in effect, that a fraud was perpetrated upon her and her sister in so framing the power of attorney as to enable three persons to act "jointly and severally", and in the conduct of one of the attorneys who completed the transfer on behalf of the vendors by production of a copy of the power of attorney and without receiving the balance of the purchase money.

In their defence, the Defendants relied on the admission in the power of attorney, and later by the agent in the Land Register, that the money had been paid in full, and claimed that such admission was conclusive. The alleged admission of the agent in the Land Register forms no part of the record.

At the trial, the District Court of Nablus heard the evidence of Plaintiff and Defendant No. 1, and, considering that from such evidence it was doubtful whether the purchase money had been paid, decided

to hear further evidence on a later date. Further evidence was accordingly heard, and the Court decided that the Plaintiff had not proved the fraud alleged though the Judges considered the circumstances of the transfer suspicious. They held, however, on the evidence, that only LP. 50 had been paid to the Plaintiff and her sister and relied, in their judgment, on a statement by Defendant No. 1 that he had paid part of the purchase money to the Plaintiff and the rest to Defendant No. 2, "without authority of Plaintiff", words which their Lordships do not find in the transcript of the evidence of Defendant No. 1. In the result the Court gave judgment against Defendant No. 1 for LP. 650 with costs, and dismissed the suit against Defendant No. 2 without costs.

Defendant No. 1 appealed to the Supreme Court of Palestine, which allowed the appeal with costs. The view of the Supreme Court was that the Plaintiff having failed to prove fraud was bound by her admission of the receipt of the purchase money in power of attorney, and that the lower Court was wrong in allowing evidence to be given on the question whether the amount had been paid.

The question before the Board is whether the decision of the Supreme Court was right and, in that connection, certain provisions of the *Mejelle* are relevant. Their Lordships take the translation of Mr. Tyser. Article 79 provides that by his admission one is condemned. Article 1588 provides: "It is not lawful to go back from the admissions concerning the rights of people, so that after someone has said 'I owe so many piastres to such an one' if he say 'I go back from my admission' no attention is paid to it. He is judged by his admission". Article 1589 provides: "If anyone maintains that he has not spoken the truth in an admission which has been made, the person in whose favour the admission was made is made to take an oath that it is not false, for example, after a person has given a final voucher which says: 'I borrowed so many piastres from such an one' if he says 'Although in truth I gave a voucher which says I borrowed those piastres, I have not received from him the sum of money mentioned up to the present time', the person in whose favour the admission is made is made to take an oath that there has not been falsehood in the admission of the person".

It is clear from other portions of the *Mejelle* that great importance is attached to the taking of the oath. Book XV., chapter 3, deals with the administering of the oath to one of the parties. The oath has to be administered in a special form (Article 1743). It must be taken only in the presence of the Judge or his representative (Article 1744).

The oath is only administered on the application of a party except in four instances which are not relevant to this case (Article 1746). In Civil actions when the oath is proposed to a person, who is bound to take the oath and he refuses, the Judge gives judgment based on his refusal (Article 1751).

It was argued before the Board that these provisions of the *Mejelle* were over-ridden by the Evidence Ordinance 1924, section 14, which provides "In a civil case either party may give evidence on his own behalf or be summoned to give evidence for the other party". Their Lordships are satisfied that the express enactments of the *Mejelle* as to admissions are not over-ridden by so general a provision, and, indeed, the contention to the contrary is inconsistent with the statement in the judgment of this board in Apostolic Throne of St. Jacob *v.* Saba Said (1939), Palestine Law Reports page 528, that the legal effect of admissions in Palestine is to be found in the Turkish Code (the *Mejelle*), which provides in article 79 that "a person is bound by his own admission" and in Article 1588 that "no person may validly retract an admission made with regard to private rights".

Their Lordships think that there was some irregularity in the proceedings in the District Court. The Court had to consider not only the effect of the admission of the Plaintiff, but also the plea of fraud raised by her. If that plea had succeeded the admission by her would have been displaced, either on the general principle that fraud vitiates every transaction, or under Article 1610 of the *Mejelle*. But when the Plaintiff failed to establish fraud, the Court was left with her admission of the receipt of the money and, in their Lordships' view, the binding character of that admission could only be displaced by the Plaintiff requiring the Defendant to take an oath under Article 1589 that the admission in its exact terms was true. No doubt Defendant No. 1 did give evidence which suggests that the admission was not true, but their Lordships are not satisfied that he was ever asked to swear specifically as to the truth of the admission under Article 1589. Their Lordships have not forgotten that it was for the Plaintiff to demand the oath, which she omitted to do, but this may well have been because the Supreme Court of Palestine had held in Khadijeh Ismail Abu Khadra *v.* Amneh Khalil Abu Khadra (1920) Palestine Law Reports I that an admission in an official document did not come within the meaning of Article 1589 of the *Mejelle*, and that the Defendant could not therefore be called upon to take the decisive oath to the effect that the Plaintiff's admission acknowledging receipt of money before the Land Registrar was not false. This case is re-

ferred to in the judgment of the Supreme Court in Zvi Gaber *v.* Migdal Insurance Company Limited (1938), Palestine Law Reports 187, as of somewhat doubtful authority, though it is stated to have been followed. Their Lordships think that the decision was wrong. There is no exception in Article 1589 of admissions made in official documents, nor do their Lordships see any reason why there should be. That an admission is made in an official document may afford some guarantee that it is genuine, but not that the facts admitted are true. This would depend on evidence not generally available to the Public Officer concerned.

In these circumstances, their Lordships think that the fairest course is to remit this case to the District Court of Nablus with directions to allow the Plaintiff an opportunity of requiring the Defendant to take the special form of oath under Article 1589 of the *Mejelle* that the admission made by the Plaintiff and her sister that they received the whole price in cash and in advance from the purchaser at the time of signing the power of attorney (Exhibit "B") is not false. If that oath is taken no evidence to prove the admission false will be admissible, and the suit will fail. If it is not taken, the Court will be free to act on the view which it formed upon the evidence and judgment will go against Defendant No. 1.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and that the case be remitted to the District Court of Nablus with the directions which their Lordships have indicated. The costs of the appeal to His Majesty in Council must be paid by the Respondents. The costs of the proceedings in Palestine will follow the event.

Delivered this 18th day of April, 1945.

CIVIL APPEAL No. 336/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abed Rabbo Abu Malash. — APPELLANT.

v.

Jubrail Abu Malash. — RESPONDENT.

Prescription — Land taken in pursuance of void sale — Not arbitrarily or by force within Land Code, Art. 20 — C. A. 322/44 — Pleading prescription, M. C. P. R., r. 98 — Minority — Amendment of Pleadings.

Appeal from the judgment of the Magistrate's Court of Hebron, sitting as a Land Court, dated 31.7.44, in Land Case 80/44, dismissed:—

1. If the Defendant admits having taken possession pursuant to a void deed of sale, this does not amount to an acknowledgment of forcible or arbitrary seizure.

2. If a party deliberately elects to make an averment which he knows to be false, he will not be allowed to amend his pleadings when his prevarication has been discovered.

(*A. M. A.*)

FOLLOWED: C. A. 322/44 (12, P. L. R. 14; *ante*, p. 71).

ANNOTATIONS:

1. In addition to C. A. 322/44 (*supra*) see C. A. 408/43 (11, P. L. R. 316; 1944, A. L. R. 628) and C. A. 289/44 (*ante*, p. 158).

2. See C. A. 243/41 (9, P. L. R. 90; 1942, S. C. J. 119; 12, Ct. L. R. 167) for an exceptional case where a party was allowed to withdraw a deliberately false allegation in the S/C.

(*H. K.*)

FOR APPELLANT: Tunik.

FOR RESPONDENT: H. Atalla.

JUDGMENT.

This is an appeal from a judgment dated 31.7.44 of the learned Magistrate of Hebron sitting as a Land Court in case No. 80/44.

Three grounds have been raised:—

(a) that there could be no prescription in this case;

(b) that the Magistrate ought not to have dealt with the question of prescription as it had not been raised, and

(c) that as the Magistrate found that the sale had taken place about 10 to 12 years ago, he was bound to hold that the Appellant was then a minor and that there was no prescription.

The Appellant (original Plaintiff) pleaded in his statement of claim (which was filed on 18.2.44) that he was the owner and possessor of the land, and that he had been in possession of it for more than the period of prescription without any interference. He also averred that a deed of sale outside the Land Registry had been prepared four years before the case was filed; that the Respondent had paid only LP. 2.500 on account of the purchase price of LP. 25; and that Respondent had taken possession of the land two years before the action. The statement of claim goes on to say — "Whereas the said sale outside the

Tabu is null and void and the Defendant failed to pay the rest of the price, the Plaintiff requests *etc., etc.*" So it is clear that the Appellant was trying to upset the sale transaction on the ground that it was void.

The Respondent in his defence pleaded that he had contracted with the Plaintiff and his sister Latifeh for the purchase of the land, and he averred that he had been in possession for ten years without interference by the Appellant. He also averred that he had improved the land and had spent money on it, and that the price of the land had been paid ten years ago. It is agreed that the land is *miri*.

Mr. Tunik, who appeared by delegation from Faiz Eff. Nazzal on behalf of the Appellant, has argued the second ground of appeal first, and we shall therefore deal with it first.

Having considered the defence we hold that the Respondent intended to raise, and did raise, the question of prescription as required by Rule 98 of the Magistrates' Courts Procedure Rules. The Respondent filed the defence personally and not by advocate, and we think that his reference to the period of ten years was a clear indication of his intention to plead prescription as the land is *miri*. We find, therefore, that the learned Magistrate was entitled to deal with this point, and that the second ground of appeal fails.

With regard to the first ground of appeal, we find that by stating that he had contracted with the Appellant and his sister for the purchase of the land, the Respondent did not admit that he had arbitrarily (*fouzouli*) taken possession of the land. The learned Magistrate concluded, from the fact that it had not been produced, that the deed by virtue of which the Respondent had obtained the land was an absolute sale and not an agreement for sale, and that it was therefore void.

The facts in this case were in many respects similar to those in Civil Appeal 322/44. In that case the Appellant alleged that the document (which was not produced) was a deed of sale made outside the Land Registry and hence contrary to the Land Transfer Ordinance, and the Magistrate held in the appellant's favour on that point, but found that as the respondents were in possession of the land for a period exceeding ten years the action was barred under Article 20 of the Ottoman Land Code. The judgment contains the following passage:—

> "The Magistrate seemed to have taken the view that the onus of proof that the document was an agreement to sell rested on the Respondents, and failing the production of the deed he took the view presented on behalf of the Appellant that it was a deed of sale. It is true that as a rule the document would be in the

> hands of the purchaser or the transferee, but the Appellant relying on the illegality of the document wishing to take advantage of his wrong, the onus of proof must rest on him. This onus he could have discharged in a manner other than by the production of the deed. Be that as it may, the Appellant failed to prove the main point upon which he bases his claim, and on this ground alone he must fail. But he must also fail on the ground of prescription. Article 20 of the Ottoman Land Code applies, and the Respondents never admitted that they came into possession of the land wrongfully".

The position in the present case is similar. Even if the learned Magistrate was right in deciding that the sale was null and void, no authority has been produced which would enable us to hold that if a person takes possession of land by virtue of a deed which is null and void he is taking possession of it arbitrarily (*fouzouli*).

We therefore find that the Respondent was entitled to rely upon the plea of prescription, and the first ground of appeal also fails.

With regard to the third ground of appeal — we find that it fails for two reasons. In the first place the learned Magistrate was not satisfied that the Appellant was a minor at the time of the sale. That is a finding of fact, and we see no sufficient ground for upsetting it. In the second place the Appellant did not, in the first instance, plead minority. He only raised the plea as a reply to the Magistrate's finding that the transaction had taken place not four years ago but more than ten years ago. There was evidence to support that finding, and we must accept it. So the position is that the Appellant having averred untruthfully that the transaction had taken place only four years ago, now seeks to extricate himself by averring that the transaction took place over ten years ago when he was a minor. If he wished to plead minority the Appellant should have pleaded it in the first instance. If a party deliberately elects to make an averment which he knows to be false he must not expect to be allowed to amend his plea when the prevarication has been discovered. If such amendments were allowed it would be an incentive to parties to make false averments. The Appellant made the false averment in the present instance with the evident intention of anticipating and defeating a plea of prescription on the part of the Respondent.

In the result the appeal fails, and it must be dismissed with costs on the lower scale to include a sum of LP. 10 on account of advocate's attendance fees.

Delivered this 15th day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 280/44.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Farid Salim Haj Abdallah. APPELLANT.

v.

Kamel Aref Abu Rub & 3 ors. RESPONDENTS.

Awlawiyeh — Co-owner refusing to participate in action and then suing successful Plaintiff for a share — Order of dismissal against a number of defendants should be appealed — Land Code, Art. 42 applies to voluntary transfers.

Appeal from the judgment of the Land Court, Nablus, dated the 29th May, 1944, in Land Case No. 2/43, allowed:—

Art. 42 of the Land Code applies only to voluntary transfers and not to transfers ordered by the Court, such as resulting on a successful *awlawiyeh* action. Art. 42 makes the provisions of Art. 41 apply to cases of a co-possessor transferring the whole of his holding to another co-possessor.

(*A. M. A.*)

ANNOTATIONS: On *awlawiyeh* generally see note 2 in A. L. R. to C. A. 226/44 (12, P. L. R. 10; *ante*, p. 30).

(*H. K.*)

FOR APPELLANT: A. Levin.

FOR RESPONDENTS: No. 1 — W. Salah.
Rest — Absent — served.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Nablus which had found in favour of the present first Respondents in an action for *awlawiyeh*.

The first Respondent (Plaintiff) and the first Defendant (Appellant) and the vendor were joint owners with many others of block 8136, parcel 6, and block 8137, parcel 5, on the main Tel-Aviv—Haifa road, a little North of Khirbet Beit Lidd. The abovementioned vendor sold his shares to certain Jewish buyers against whom the present Appellant lodged an action for *awlawiyeh* inviting the present first Respondent to join with him in the action. The Respondent refused. The Defendant who then proceeded as sole Plaintiff was successful in his claim. The value of the land was finally held by this Court to

be LP. 80 per *dunum* in May, 1942, when the present Appellant's action was commenced. In January, 1943, the first Respondent sued the Appellant (the successful Plaintiff in the case against the Jewish buyers) claiming priority and demanding his share in the property which the Appellant had recovered in his (Appellant's) previous action.

When the Statement of Claim, in the action now under appeal, was filed, there were three other Defendants, *i. e.* in addition to the present Appellant; but it seems (although it is not very clear) that the learned President himself struck them out because at p. 3 of the typed copy of the record we find a note "Therefore they, *i. e.* the Defendants Nos. 2, 3 and 4, are not now parties".

We agree with Mr. Levin, for the Appellant, in his contention that, if the present first Respondent had been dissatisfied with that order of the learned President of the Land Court, he should have appealed or asked for leave to appeal.

Mr. Levin argues that in the Court below the Respondent's claim was based solely on Art. 42, Ottoman Land Code. We think that this is clear from p. 1 of the typewritten record of proceedings where the Respondent's advocate in terms admitted that his claim was based on Art. 42.

The main ground of appeal is that Art. 42 applies only to voluntary transfers and not to a transfer through the Court. We think that this contention is sound and must be upheld.

Mr. Levin also argues that the Plaintiff's action is premature in that until the Appellant is about to dispose of his share (or, rather, is about to transfer his share) no right of action arises. It is admitted that the present Appellant has not yet transferred his share. It is clear from Art. 42 that the provisions of Art. 41 apply to the case where one co-possessor disposes of the whole of his share to one of the other co-possessors.

The learned President of the Court below held that the Respondent's failure to join in the action brought by the Appellant did not amount to a waiver of his right to claim priority. We think that it is unnecessary, in view of our findings on the other matters, to deal with this point or, indeed, with any of the other points raised in the appeal.

For the foregoing reasons the judgment of the Land Court of Nablus, delivered on 29th May, 1944, is set aside and the action of the Plaintiff (Respondent) dismissed with costs here and below. The costs of this appeal will be taken on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.—.

Delivered this 29th day of March, 1945, in the presence of Mr. G. Elia, for Mr. Levin for Appellant and in the presence of nobody for Respondent No. 1.

British Puisne Judge.

CIVIL APPEAL No. 27/45.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Eva Shanti. APPELLANT.

v.

Leib Abramovitz. RESPONDENT.

Construction of contract — Special conditions forming part of agreement — Incorporation by reference — Arbitration clause.

Appeal from the judgment of the Land Court of Jaffa, dated 14.7.44 in Land Case No. 26/43 (Motion No. 5/43), dismissed:—

On the construction of the special conditions annexed to a mortgage, it was held that they incorporated by reference a submission to arbitration set out in a separate contract.

(*A. M. A.*)

ANNOTATIONS: See Annotated Laws of Palestine, Vol. 2, pp. 60 *et seq.*

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Sassoon.

JUDGMENT.

The Respondent is not called upon to reply.

This is an appeal from the order dated 14.7.44 given by the learned R/President of the Land Court of Jaffa in motion No. 5/43 arising out of Land Case No. 26/43.

The short point to be decided is whether the special conditions which appear in the mortgage dated 5.11.42 merely identify that mortgage with the agreement dated 2.11.42 or whether they embody the terms and conditions of that agreement, and particularly the condition that disputes should be referred to arbitration.

The special conditions in the mortgage read as follows:—

"This mortgage is not transferrable in any way to anybody. This

mortgage is subject to the terms and conditions of the contract made between Mr. Sharif Shanti and Mr. Leib Abramovitz, dated 2.11.42, as mentioned in article 4 thereof".

Having considered the terms of these special conditions, we have come to the conclusion that the learned Relieving President was right in saying that they did import the conditions of the contract including the condition in regard to reference to arbitration. We think that the words "as mentioned in Article 4 thereof" mean "and this is the mortgage mentioned in Article 4 thereof".

In the result this appeal fails and is dismissed with fixed costs in the sum of LP. 10.

Delivered this 12th day of March, 1945.

British Puisne Judge.

HIGH COURT No. 30/45.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPLICATION OF :—

Hedy Strehle & 2 ors. PETITIONERS.

v.

1. A/District Commissioner, Lydda District,
2. A/Assistant District Commissioner, Lydda District, Tel-Aviv. RESPONDENTS.

Requisition of premises — When High Court may interfere with an order of a competent authority.

Return to a rule *nisi* issued on the 5th of March, 1945, directed to the Respondents calling upon them to show cause why the notice of requisition dated 28.2.45 issued by the 1st Respondent and the letter No. T. A. 10952 dated 1.3.45 issued by the second Respondent requesting Mr. A. Shtrille to give immediate possession of the premises of Adolf Strehle of 16, Trumpeldor Street, Tel Aviv, should not be set aside and/or they should not be ordered not to give effect to them, or act thereon — discharged:—

1. High Court will not substitute its own discretion for that of competent authority.

2. High Court can only interfere with an order of a competent authority if satisfied that in exercise of his discretion he acted with *mala fides* or capriciously or without regard to rules of reason or justice.

(*M. L.*)

REFERRED TO: H. C. 110/43 (10, P. L. R. 644; 1944, A. L. R. 791); H. C. 142/44 (12, P. L. R. 39; 1945, A. L. R. 247); H. C. 118/44 (11, P. L. R. 574; 1945, A. L. R.181); H. C. 78/43 (10, P. L. R. 526; 1943, A. L. R. 631).

ANNOTATIONS: See cases referred to with annotations thereto in A. L. R. (*A. G.*)

FOR PETITIONERS: Gorali.

FOR RESPONDENTS: Solicitor General — (Griffin).

ORDER.

Shaw, J.: This is the return to an order *nisi* dated 5.3.45 calling upon the Respondents to show cause why a notice dated 28th February, 1945, and a letter dated 1st March, 1945, requisitioning certain premises at 16, Trumpeldor Street, Tel-Aviv, should not be set aside. The original Petitioner was Hedy Strehle, but two other petitioners, namely Adolf Strehle and the Union of the Musicians in Palestine, Tel-Aviv Branch, have joined as additional petitioners, and they are all represented by Mr. Gorali, advocate. Mr. Griffin, K. C. Solicitor-General, has appeared on behalf of the Respondents who are the Acting District Commissioner, Lydda District, and the Acting Assistant District Commissioner, Lydda District, Tel-Aviv.

The notice of requisition was issued under Regulation 48 of the Defence Regulations, 1939, as amended by the Defence (Amendment) Regulations (No. 9) 1944, (at p. 981 of Suppl. No. 2 of 1944), and it has not been submitted that the requisition was one which could not validly have been made.

Mr. Gorali's main submission is that when the Acting District Commissioner issued the order of requisition he was acting under the mistaken belief that the premises were being used as a Bridge Club, whereas in fact they are used as a Café, and as a meeting place for the members of the Musicians Union.

Mr. Gorali has submitted that the affidavits show that the Acting District Commissioner failed to exercise a proper discretion, and he has referred us to H. C. No. 110/43 (10, P. L. R. p. 644). In that case, which arose out of the refusal of the Food Controller to issue an import licence, the following paragraph appears in the judgment:—

> "In order to succeed in getting this order made absolute the Petitioner has to show us, one, that there is a statutory duty on the Food Controller to grant the licence for lentils; secondly, that in his refusal to issue the Petitioner with a licence he has failed to exercise a proper discretion; and thirdly, a further ground would be that the refusal was made *mala fides*".

Mr. Gorali has also referred us to H. C. 142/44 where the parties are Pinchas Goozner *v.* The Food Controller, Jerusalem. In that case the learned Chief Justice observed in his judgment:—

> "In the first place I wish to repeat what has been emphasized in numerous cases, that this Court will not usurp the functions of the Food Controller or any other controller nor will it arrogate to itself a discretion which the legislature has vested in another person. A long list of authoritative cases has circumscribed the extent to which it will intervene. It will intervene to compel the authority to perform a statutory duty, or to restrain him from doing acts for which he has no statutory authority. Where a discretion has been vested in him it will not attempt to review that discretion, provided he has acted within the four walls of his statutory authority. It will, however, enquire whether he has applied his mind to the exercise of that discretion, and if, but only if, it comes to the conclusion that in the exercise of that discretion he has acted with *mala fides* or capriciously, or without regard to the rules of reason and justice, it will grant relief against the consequences of the order that flows from the exercise of the discretion. It will not interfere merely because the Court itself would not, having considered all the circumstances, have come to the same conclusion as the controller. It may, indeed, entirely disagree with him and with the motives that actuated him; but that is not sufficient; it must be shown that his motives were, if not of a malevolent nature, at least beyond those which would have actuated a reasonable and honest man".

The learned Solicitor General has referred us to H. C. No. 118/44 (11, P. L. R. p. 574) where the Court observed that:—

> "It may be that it is now realised that the state of affairs which he believed to be in existence when he made the order of requsition, at any rate so far as the present Petitioner's position is concerned, was not the true state of affairs. This, however, seems to me immaterial".

He has also referred us to H. C. 78/43 (10, P. L. R. p. 526) where the Court held that as the first Respondent, the District Commissioner, was duly constituted a competent authority as referred to in Regulation 48 of the Defence Regulations, 1939, and as he had personally exercised the discretion vested in him by the Regulation in question, after due consideration and enquiry, and as he acted in good faith, it was not for the High Court to substitute its discretion for the discretion of the competent authority, nor was it for the High Court to enquire into the reasons which influenced the competent authority in exercising such discretion, nor to hear evidence thereon.

Mr. Gorali has stated that in England a public authority cannot be

attacked provided it is shown that it has acted *bona fide* and within the law, but he submits that in this country the High Court can and should enquire into the reasons which influenced the competent authority in exercising its discretion. The High Court is of course acting in the exercise of its powers under the Courts Ordinance, No. 31/1940, section 7(b), in these matters.

In our judgment the true position is that the Court can only interfere when, as the learned Chief Justice has stated, it comes to the conclusion that "in the exercise of that discretion he has acted with *mala fides* or capriciously or without regard to the rules of reason or justice", and we do not think that the Court in H. C. 110/43 intended to lay down that this Court should substitute its discretion for that of the competent authority. In the present case we are unable to find that the A/District Commissioner acted with *mala fides* or capriciously or without regard to the rules of reason or justice. Even if he was not fully advised of the facts when he issued the order of requisition he has since been fully advised. He has seen the affidavits of the three Petitioners and, as his affidavit shows, he has made a personal inspection. He has stated that his decision to requisition these premises was based not on the fact that they were being used as a club for playing cards, but rather because they were not being used as living quarters, and he has stated his reasons why the alternative premises offered by Mr. Strehle are not adequate to the requirements of those whom it is intended to accommodate. We find no evidence of *mala fides* or capriciousness. Doubtless in this, as in other cases, some or possibly very considerable hardships will be involved, but that is not a factor which we can take into consideration. We can feel sympathy with those who suffer, but unfortunately we cannot assist them.

In the result we find that this petition fails, and we dismiss it with fixed costs in the sum of LP. 10. The order *nisi* is discharged.

Given this 24th day of May, 1945, in the presence of Mr. Rosovsky advocate for Petitioners and in the presence of Mr. Griffin, S. G. advocate for Respondents.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 175/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Subhi Abedlo. APPELLANT.

v.

The Attorney General. RESPONDENT.

Evidence of accomplice — Corroborating evidence of witness who failed to identify accused.

1. Evidence of an accomplice — not necessarily false; if acceptable, it may be accorded same weight as any other evidence, but to be accepted it must be corroborated.

2. Court may accept the corroborating evidence of a witness who failed to identify the Accused, if he gives a satisfactory explanation of this failure. (*M. L.*)

ANNOTATIONS: See CR. A. 151/44 (*ante*, p. 267; 11, P. L. R. 629). (*A. G.*)

FOR APPELLANT: Salameh.

FOR RESPONDENT: Assistant Government Advocate — (Touqan).

JUDGMENT.

This is one of those cases where the whole issue depends upon the weight to be attributed to the evidence adduced in the Court below. Now, there was clear evidence that this Accused was identified by the principal witnesses, but it is true that these witnesses were accomplices. It must be borne in mind that the evidence of an accomplice is not necessarily false; in fact if it is acceptable, there is no reason why it should not be accorded the same weight as any other evidence. The law however demands, in regard to such evidence, this safeguard — that before it is accepted it must be corroborated. The corroborating evidence here was the evidence of Hanania Natanoff. I am in complete agreement with Mr. Salameh as to the necessity for great care in accepting that evidence, because in one respect it was defective, in that the witness failed to identify the Accused at an identification parade. But that need not necessarily cause his evidence to be rejected, in fact it might support the contention that he was a particularly honest man. He gave an explanation as to why he did not identify the Accused at

the parade, and the Court of trial accepted the explanation.

Now had the Court of trial not directed its mind to this aspect of Hanania's evidence, it might have caused some uneasiness in our minds, but it is eminently clear from the judgment that the Judges were fully alive to the significance of the failure to identify at the police parade. In the event they were satisfied with the witnesses' explanation, and this Court sees no reason to interfere with their discretion, exercised as it was after due consideration of all the relevant factors.

In these circumstances the conviction must be confirmed. In our view the sentence cannot be said to be excessive.

Delivered this 4th day of January, 1945.

Chief Justice.

CRIMINAL APPEAL No. 169/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Ahmad Muhammad Shurafa. APPELLANT.

v.

The Attorney General. RESPONDENT.

Tendering evidence in mitigation of sentence — Discretion of trial Court.

Hearing or refusing to hear evidence tendered in mitigation of sentence — entirely within discretion of trial Court. The Court of Appeal will not interfere.

(*M. L.*)

ANNOTATIONS: On discretion on matter of sentence see CR. A. 140/44 (11, P. L. R. 561, *ante*, p. 188) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Ghussein.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

The only point raised in this appeal is that the Court below erred in refusing to hear evidence which counsel for the defence wished to tender in mitigation of sentence, after a conviction had been recorded.

This is a matter entirely within the discretion of the trial Court, and we will not interfere with the exercise of that discretion.

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

Delivered this 4th day of January, 1945.

Chief Justice.

CRIMINAL APPEAL No. 173/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Mustafa Abdallah Bheej. APPELLANT.

v.

The Attorney General. RESPONDENT.

Attack with stick — Fatal stabbing with dagger allegedly in self-defence.

Amount of force necessary to constitute a defence under sec. 18, Criminal Code Ordinance, — a question of fact to be determined in the light of the particular circumstances of each case.

(*M. L.*)

ANNOTATIONS:

1. On non-interference with finding as to self-defence see CR. A. 151/42 (12, Ct. L. R. 21; 1942, S. C. J. 710) and annotations.

2. On discretion in imposing sentences see CR .A. 169/44 (*ante*, p. 365; 12, P. L. R. 6).

(*A. G.*)

FOR APPELLANT: Asfour.

FOR RESPONDENT: Assistant Government Advocate — (Touqan).

JUDGMENT.

The only point of substance in this appeal is the effect of section 18 of the Criminal Code Ordinance as the defence to a charge. Section 18 of the Criminal Code Ordinance is nothing more than a codification of one of the most ancient of English laws, that every man born under the Crown is entitled to use force to repel force in defence of himself, his property, and those people under his protection. But the Courts

throughout the ages have been very careful to ensure that this provision shall not be used to substitute the rule of violence for the rule of law. In England it would be difficult to conceive of the use of a dagger with fatal results being accepted as permissible to repel violence not by a lethal weapon. Nevertheless, it behoves us to take into account the different conditions prevailing in this country, and deplorable as it may be, we must recognise the fact that some of the people of this territory have not yet reached the state of civilization where the dagger becomes the most abhorrent of all lethal weapons. The Court must therefore consider the circumstances to ascertain whether the violence used by the Accused was justified.

Now the question as to the amount of force necessary to constitute a defence under section 18 is, in my opinion, a question of fact to be determined in the light of the particular circumstances of each case. In this case the evidence available, which has been accepted, is that the deceased, who was the original attacker, assaulted the Accused with nothing more than a stick. He also threw a stone, which did not hit the Accused. The Accused is a hefty man, and I see no reason to differ from the conclusion of the Court below that in the circumstances the use of a dagger was entirely unjustified to repel the attack made on him.

For these reasons the conviction is confirmed.

With regard to sentence, we are of course fully alive to the youth of the Accused, but there is another consideration which is also present in the minds of the Court, and that is our duty to protect the public from violence of this nature. In this case two experienced Judges of the Court below, who heard all the arguments ably advanced by Mr. Asfour in favour of the Appellant, came to the conclusion that eight years was not an excessive punishment. We can discover no reason for interfering with the sentence.

The conviction and sentence must be confirmed.

Delivered this 4th day of January, 1945.

Chief Justice.

CRIMINAL APPEAL No. 157/44.

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

BEFORE: FitzGerald, C. J., Shaw, A/J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Suleiman Muhammad Rujub & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Trial on information — Witnesses named in the information not called by prosecution and not tendered for cross-examination — Practice initiated by CR. A. 39/43; P. C. 66/43, CR. A. 97/44; Knowles v. R.; R. v. Bertrand; Nazir Ahmad v. R.

Application for leave to appeal from the judgment of the District Court of Jerusalem, dismissed:—

1. The prosecution has a discretion whether or not to tender for cross-examination witnesses whose names appear on the back of the information and who have not been called.

2. Decisions of the Privy Council in criminal appeals are binding in Palestine.

(*A. M. A.*)

FOLLOWED: P. C. 66/43 (11, P. L. R. 237; 1944, A. L. R. 465).

REFERRED TO: Knowles *v.* The King, 1930, A. C. 366, 99 L. J. (P. C.) 108, 143 L. T. 28, 46 T. L. R. 276; R. *v.* Bertrand, 1867, L. R. 1 P. C. 520, 16 L. T. 752, 35 L. J. (P. C. 51); Nazir Ahmad *v.* The King Emperor, 1936, W. N. 27, 154 L. T. 362.

NOT FOLLOWED: CR. A. 39/43 (10, P. L. R. 212; 1943, A. L. R. 357); CR. A. 97/44 (11, P. L. R. 445; 1944, A. L. R. 478).

ANNOTATIONS:

1. On appeals to the Judicial Committee in criminal cases see Halsbury, Vol. 11, pp. 231—2, para. 447. *Cf.* also Seneviratne *v.* The King, 1936, 3 All E. R. 36; Mahlikilili Dhalamini *v.* The King, 1943, 1 All E. R. 463; Galos Hirad *v.* The King, 1944, 2 All E. R. 50; P. C. of 1930 (4, C. of J. 1544).

2. See note 3 in A. L. R. to P. C. 66/43 (*supra*).

(*H. K.*)

FOR APPELLANTS: Nazzal.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

FitzGerald, C. J.: There would be no merit in this appeal were it not for the first ground which involves an apparent conflict between a decision of the Privy Council and a recent judgment of this Court. The issue raised was whether there was any obligation on the Crown to tender for cross-examination by the defence, witnesses whose names were on the information but who had not been called by the Crown.

In Criminal Appeal No. 39/43 the Court in the course of its judgment stated that it "desires to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in

all Courts". The practice was admittelly not followed in this case, and it is now urged that failure to do so vitiates the conviction.

Criminal Appeal No. 39/43 went to the Privy Council by special leave, and the Board recorded their opinion, which I will analyse later, on the rule of practice as it was interpreted by the Court of Appeal. The matter however did not end there. The question again came before the Court of Criminal Appeal in Criminal Appeal No. 97/44. In the course of its judgment the Court stated:—

> "It would appear from the note of the presiding Judge that he was under the impression that as a result of Lord Thankerton's judgment in Privy Council Appeal No. 66/43, Adel Mohammad Dabbah *v.* The Attorney General, the practice which hitherto has been observed of the prosecution submitting for cross-examination by the defence those witnesses whose names appear on the back of the information but who have not been called by the Crown, should be discontinued".

They proceeded to analyse the Privy Council judgment and they then recorded their conclusion in the following terms:—

> "We would add that, apart from the generality of the practice both in this country and in England, the practice is one which operates in favour of an accused person, and for that reason also we consider that it should not be discontinued. We are aware of no recent judgment of the Court of Criminal Appeal in England referring to this point of practice, and we have no reason, therefore, to assume that that authoritative Court takes a different view of the prevailing practice from that adopted by Hilbery, J.
>
> We would add that we have no doubt that Lord Thankerton himself would not wish his observations to be construed as a direction to us to vary the practice of these Courts. In the first place, his observations are not in themselves inconsistent with the continuance of such a practice, and secondly, we would refer to a passage in the judgment of Lord Dunedin in a Privy Council Appeal of Knowles *v.* The King, 1930, A. C. p. 371, which reads as follows:—
>
> 'Before dealing with the question of the evidence, their Lordships think it necessary emphatically to repeat what has been said on many occasions, that they do not sit as a Court of Criminal Appeal. To allow criminal proceedings to be reviewed, to use the words of Lord Watson in Dillet's case, there must have been "substantial and grave injustice ..... done".'
>
> He then goes on to quote with approval a dictum of Lord Summer in the case of Ibrahim *v.* The King, 14 A. C. p. 599, that the Privy Council only interfere if the procedure adopted 'deprives the Accused of the substance of fair trial'. 'It follows', continues the judgment of the Court of appeal, 'of course, from these observations of Lord Dunedin that it would not be for their Lordships of the Privy Council to prescribe for the Criminal Courts of Palestine what practice should be followed on a matter of this kind, unless,

> of course, such practice operated to the substantial detriment of an accused person".

In my opinion this must be interpreted, as the Court probably intended it to be interpreted, as an expression of opinion by the most authoritative Court in Palestine for the guidance of the prosecution in criminal cases. It could not purport to take away from the Crown the discretion which in my opinion the Board definitely said was in it, nor could it lay down as positive law that their Lordships of the Privy Council are not empowered to decide for the Criminal Courts of Palestine the practice that should be followed in criminal cases. I would observe that the practice which the Appeal Court in Criminal Appeal No. 97/44, which was heard after the judgment of the Privy Council, decided should continue is the same practice as that dealt with in Criminal Appeal No. 39/43. But that practice was one of the grounds of appeal before the Privy Council. It was considered by their Lordships as contention (c) of the Appellant which read as follows:—

> "(c) That the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the Appellant's right to a fair trial".

After a lengthy analysis of the historical and legal origin of the practice particularly of the remarks of Lord Hewart, C. J., in Rex *v.* Harris, their Lordships recorded their opinion that the Palestine Court of Criminal Appeal did not sufficiently recognise that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion unless perhaps it can be shown that the prosecutor has been influenced by some oblique motive; and finally they came to the conclusion in dealing with the remarks of Lord Hewart in Rex *v.* Harris that "the learned Chief Justice could not have intended to negative the long established right of the prosecutor to exercise his discretion to determine who the material witnesses are ..... This last contention of the Appellant, therefore, also fails". It appears to me that this is as clear a finding as could be conveyed by words that in the opinion of the Privy Council there was no such rule of practice. It follows that I am unable to accept the argument of the Appellant that failure to observe the practice can be urged as a successful ground of appeal, if the Privy Council judgment is to be accepted as binding. This forces me to consider that part of the judgment of the Court of Appeal (which probably was intended to be nothing more than *obiter*) which states:—

> "It follows, of course, from these observations of Lord Dunedin that it would not be for their Lordships of the Privy Council to prescribe for the Criminal Courts of Palestine what practice should be followed on a matter of this kind, unless, of course, such practice operated to the substantial detriment of an accused person".

With great respect I doubt whether Lord Dunedin intends that his observations should lead to the conclusion drawn by the Court of Appeal.

The observations which were made in the appeal of Knowles *v.* The King, 1930, A. C. p. 371 seem to me to have been intended solely to emphasize once again the position of the Privy Council in regard to criminal appeals.

In my view, once the Privy Council has become seized of a criminal appeal by virtue of the grant of special leave, the Board's pronouncements on all legal issues dealt with by them must be given effect to in all Colonies which are subject to the jurisdiction of the Privy Council. The position is not dissimilar to that of the House of Lords when they entertain a criminal appeal by virtue of the fiat of the Attorney General. It surely could not be contended that the decision of the House in the particular appeal in respect of which the fiat was granted was not binding as case law on the lower Courts of Great Britain and Northern Ireland. If case law or judiciary law is recognized as authoritative in the Colonies, and it is, then the decision of the Privy Council in a specific case must serve as grounds of decision in future and similar cases that come before the Courts of those parts of the Empire that are subject to the jurisdiction of the Privy Council. It has never, so far as I am aware, been contended that the decisions of the Privy Council in its civil appellate capacity are not binding as case law on all subordinate Courts. It seems to me that once the Privy Council entertain an appeal in a criminal matter the same results must flow from its decision in that matter. I would emphasize that the civil and criminal jurisdiction of the Privy Counci is derived from the same source. The principle is well illustrated in the judgment of the Judicial Committee in R. *v.* Bertrand (L. R. 1 P. C. (N. S. W. 1867)) which is as follows:—

> "It seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the

> Crown, duly considered, is at least as great in these respects in criminal as in civil cases; but the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by Her Majesty in Council in criminal cases is likely, in so many instances, to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its officers on behalf of itself or by individuals. The instances of such appeals being entertained are, therefore, rare. When the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted or diverted into a new course, which might create a precedent for the future, and also where there is not other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal, if referred to it for its decision".

It follows, I think, that the Board function in the same capacity in each case, and their judgment in the one cannot be more restricted in its effect than in the other. What their Lordships did emphasize in R. *v.* Bertrand was that the instance of criminal appeals being entertained was rare, and this in my opinion was also the substance of Lord Dunedin's observations in Knowles *v.* The King. Again, in a more recent case, Nazir Ahmad *v.* King-Emperor (1936) (Law Times Reports 1936, Vol. 154), the Board entertained a criminal appeal solely in order that "doubt and difference of opinion should be finally resolved". The following extract from the judgment of Lord Blanesburgh seems to me to be conclusive:—

> "Their Lordships desire to reaffirm in this case the very exceptional circumstances in which alone they will humbly advise His Majesty to grant leave to appeal in a criminal case. They would not have it supposed that the advice which they propose to tender to His Majesty in this case indicates any weakening on their part of the most salutary judicial rule which prevents this Board from entertaining such applications, the Board not being a Court of Criminal Appeal except in the most exceptional circumstances".

The well known practice of the Board is once more emphasized, but it follows from this judgment that when the most exceptional circumstances, which are a condition precedent to the granting of leave, do exist, the Board does function as a Court of Criminal Appeal and as such, I apprehend that its decisions must have the same effect within the area of its jurisdiction as the decisions of the Court of Criminal Appeal in England have in Great Britain and Northern Ireland.

Indeed taking the case of R. *v.* Bertrand and Nazir Ahmad *v.* King-Emperor alone, I find it difficult to appreciate how a precedent for the future could be prevented in the one case, or doubts finally resolved in the other, if the decisions of the Board in each of those cases were

not to be accepted as binding in all future cases raising similar issues.

The application for leave to appeal is refused.

Chief Justice.

Shaw, J.: I concur.

British Puisne Judge.

Abdul Hadi, J.: The main issue in this case is the failure of the Crown to tender for cross-examination by the defence one of its witnesses whose name appeared on the back of the Information but who had not been called by the Crown.

I agree with the result arrived at by the learned Chief Justice that leave to appeal in this case should be refused so long as their Lordships of the Privy Council have recorded their opinion in Privy Council Appeal No. 66/43 that the prosecution has a discretion as to what witnesses should be called for the Crown. In this case the prosecution did not see fit to exercise this discretion.

However, I am still of the opinion which I have expressed as *obiter* in Criminal Appeal No. 97/44 that it is desirable that the prosecution should continue the practice, which hitherto has been followed in the Criminal Courts of Palestine since their establishment, of tendering its witnesses, whom they do not desire to call, for cross-examination by the defence, as I am satisfied that the judgment of the Privy Council would not preclude the Crown from tendering those witnesses.

Delivered this 7th day of February, 1945.

Puisne Judge.

CIVIL APPEAL No. 411/44.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Boris Ivenski. APPELLANT.

v.

Baruch Maisel. RESPONDENT.

Claim of eviction — Question of upsetting findings of fact made by trial Court.

Appeal from the judgment of the District Court Tel-Aviv, sitting in its appellate capacity, dated 6th October, 1944, in Civil Appeal No. 78/44, allowed:—

1. Court of appeal will not uphold Magistrates' finding if they think such finding was repugnant to the evidence before him.

2. Where a Magistrate in an eviction case applied his mind to the relevant considerations and it cannot be said there was insufficient evidence to support his findings, the District Court should not interfere.

(*M. L.*)

FOLLOWED: C. A. 305/44 (11, P. L. R. 613; *ante*, p. 272).

ANNOTATIONS: See case followed and annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Eliash, Schifter and Scharf.

FOR RESPONDENT: Karwassarsky & Linderman.

JUDGMENT.

Edwards, J.: This is an appeal by leave from a judgment of the District Court of Tel-Aviv, in its appellate capacity, which had reversed the judgment of the Magistrate of Tel-Aviv, who had dismissed an action for eviction.

Some confusion has arisen because of misapprehension by the District Court of the findings of the Magistrate on the question whether the landlord had proved that he reasonably required the premises for occupation by himself. The District Court seemed to think that the Magistrate had made a finding of fact that the landlord had proved this matter. A scrutiny of the judgment of the Magistrate, however, reveals that the Magistrate merely held that the Plaintiff had not proved that he required the premises, but that the highest at which his case could be put was that it was more desirable that the Plaintiff should now live in the rooms at present occupied by his tenant. We, however, think that this finding of the Magistrate was not justified, because, on any view of the evidence, it is clear that the Plaintiff had established that he reasonably required the premises for occupation by himself.

We therefore (although for different reasons) are not prepared to disturb the finding of the District Court on this point.

The District Court then went on to discuss that part of the Magistrate's judgment which dealt with the question whether the landlord had proved that he had offered suitable alternative accommodation to the tenant. The Magistrate held that he had failed to prove this, but the District Court set aside his finding and ordered the eviction of the present Appellant. We think that the District Court erred in inter-

fering with the finding of the Magistrate. We quote from Civil Appeal 305/44, P. L. R. Vol. 11, page 613 at page 615:—

> "We would repeat that a District Court, sitting in its appellate capacity, should be most cautious in upsetting a finding of fact made by a Court of first instance, in accordance with section 8 Rent Restrictions (Dwelling Houses) Ordinance, 1940".

In our view, the Magistrate in the case before us applied his mind to the relevant considerations, and it cannot be said that there was insufficient evidence to support his findings. We would only mention one matter, namely, that the premises from which the present Appellant was being evicted consisted of three rooms, while the alternative accommodation offered consisted only of one room and a hall.

For these reasons we set aside the judgment of the District Court and restore that of the Magistrate.

The Respondent will pay the Appellant's costs here and below, the costs in this Court to be fixed (or inclusive) costs of LP. 10.—.

Delivered this 24th day of May, 1945.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 22/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Issa Abed Khayat. APPLICANT.

v.

Milad Abed Khayat. RESPONDENT.

Appeals to Privy Council — Application for conditional leave — Palestine (Appeal to P. C.) O. in C., Arts. 3(a)(b), 31 — Whether judgment final, P. C L. A. 4/35, 11/38, 15/38, 6/41 — "Judgment", O. in C., Art. 2, C. A. 174/43, P. C. L. A. 6/41 — "Final determination of the rights of the parties", Smith v. Davies — Value of judgment to amount to LP. 500.

Application for leave to appeal to the Privy Council refused:—

1. The judgment in C. A. 5/44, which decided that there was a partner-

ship but remitted the case for consequential orders, was a final judgment for the purpose of appeal to the Privy Council.

2. But that judgment could not be brought under Art. 3(a) as the amount in dispute could not be shown to be of LP. 500.

(A. M. A.)

REFERRED TO: C. A. 174/43 (10, P. L. R. 402; 1943, A. L. R. 531); P. C. L. A. 4/35 (2, P. L. R. 423; 8, C. of J. 688); P. C. L. A. 11/38 (1938, 2 S. C. J. 93; 4, Ct. L. R. 135); P. C. L. A. 15/38 (1939, S. C. J. 21; 5, Ct. L. R. 10); P. C. L. A. 6/41 (1941, S. C. J. 171; 9, Ct. L. R. 159); Smith *v.* Davies, 1886, 31 Ch. D. 595 C. A., 55 L. J. (CH.) 496, 54 L. T. 478 C. A.

ANNOTATIONS:

1. The judgment which it was sought to appeal (C. A. 5/44) is reported in 11, P. L. R. 562 and *ante*, p. 145.

2. See also P. C. L. A. 6/43 (1943, A. L. R. 252) and notes.

(H. K.)

FOR APPLICANT: Eliash.

FOR RESPONDENT: Cattan.

JUDGMENT.

This is an application for conditional leave to appeal to His Majesty in Council, under Article 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924.

The judgment from which it is sought to appeal was delivered by this Court on 17th November, 1944, in Civil Appeal No. 5/44, and it set aside a judgment of the District Court of Jaffa which latter Court had dismissed an action for dissolution of partnership. The District Court held that the Plaintiff had failed to prove the existence of a partnership. This Court, however, holding that a partnership had subsisted between the parties who are brothers, remitted the matter to the District Court with directions to grant the necessary consequential reliefs. From a perusal of the statement of claim, it seems that the necessary reliefs contemplated by this Court were an order of winding up and an order to take accounts of the partnership. The relevant provisions of law are to be found in sections 45 and 47 *et seq.* Partnership Ordinance. Mr. Cattan, for the Respondent to this application, contends that the judgment of this Court of 17th November, 1944, is not a final judgment and in support of his contention has cited the following: Privy Council Leave to Appeal Applications to this Court, namely, 4/45 *, 11/38, 15/38 and 6/41, the last of which is reported in Annotated Supreme Court Judgments (1941), Volume 1, pages 171 and 172, where it was held that the test for the purpose of the interpretation of Article 3 of the Order-in-

* Should, *semble*, be "4/35".

Council as to whether or not a judgment is final is whether it finally determines the rights of the parties.

Dr. Eliash, for the Applicant, contends that this Court on 17th November, 1944, did not remit the case to the District Court for further findings of fact, but finally decided the sole issue, namely, whether there was a partnership, and then merely required the District Court to give effect to the order declaring that there was a partnership. In other words, his contention is that all that the District Court has now to do is to set in motion the machinery of winding up, *i. e.* take accounts, *etc.* and possibly appoint a receiver.

Dr. Eliash contends that, if accounts are taken, his client might not be able to dispute their correctness and that there might be no object in his coming back to this Court. His argument is that the only question before the Court was the existence of a partnership and that that has now been finally determined against his client.

Dr. Eliash has stated that in P. C. L. A. 15/38, Annotated Supreme Court Judgments (1939) Volume 1, page 21 the case was remitted for a new trial before a Land Settlement Officer. In my view, having regard to the terms of section 43 of the Partnership Ordinance, until the District Court has distributed the surplus according to the rights of the persons interested — in this case the parties to this application — it cannot be said that the rights of the parties will have been finally determined.

Dr. Eliash, however, referred me to the definition of "judgment" in Article 2 of the Order-in-Council and he has also cited C. A. 174/43 P. L. R. Volume 10 page 402, and Hailsham Laws of England, Volume 19, page 207, note to paragraph 508 "a judgment or order which determines the principal matter in question is final". He has also referred me to the English and Empire Digest Vol. 30, page 133, item 112 Smith *v.* Davies (1886) 31 Chancery Division 595.

The problem is a difficult one and it appears to me to resolve itself into a question as to what meaning should be given to the words "final determination of the rights of the parties" in line 5 of the Order in P. C. L. A. 6/41. Does it mean that until the actual sum which the District Court after taking accounts has decided should be paid to one of the partners, or has decided which particular corporeal assets should be delivered to or be kept by one of the partners, there is no final judgment, or does it mean that, if the principal matter in question has been determined, then the judgment is final? I think that the combined effect of paragraph 508, Volume 19 Hailsham, page 206, and the definition of "judgment" in Article 2 of the Order in Council and the case of Smith *v.* Davies is to afford some grounds for believing that

Dr. Eliash's contention is correct. In a foreclosure action, until accounts have been taken, it is not known how much money the mortgagor must pay before he can redeem the property. In the case of Smith *v.* Davies, however, the amount which the Defendant (mortgagor) had to pay had already been determined and certified and it was not till after that had been done that the Defendants served notice of appeal. Nevertheless what the Defendants appealed from was an order *nisi* dated 5th December, 1884, and the certificate of the Chief Clerk showing the amount due was not issued till 19th February, 1885. It is to be noted that the Defendants served notice of appeal from the order *nisi* of 5th December, 1884, on 30th October, 1885, and it was not until 2nd November. 1885, that the foreclosure order was made absolute. On 5th November, 1885, the appeal was entered. In this state of facts the Court of Appeal in England held that the order *nisi* of 5th December, 1884, was not an interlocutory order for the purpose of determining the time within which an appeal had to be lodged.

I quite realise the force of the argument that there is a difference between the judgment in the instant case and a judgment remitting a case for a rehearing or a retrial. In the latter case it cannot be said who has "won" (to use a popular word) whereas in the case now before me the present Applicant has already "lost" in the sense that this Court has definitely decided against his contention that there was no partnership. I also realise the force of Dr. Eliash's contention that he may not be able again to appeal to this Court against a finding of the District Court on accounts, as he says that he may not be able to contest the correctness of the accounts. That is just the difficulty. I think, however, that unless and until his client can show that, as a result of the taking of accounts, he has lost partnership assets worth at least LP. 500 or that he has failed to recover partnership assets to the value of LP. 500, which he thinks he ought to have and of which he has been deprived by reason of the combined effect of the judgment of this Court and the consequential taking of accounts and the subsequent approval by the District Court of any report on the accounts he cannot bring himself within the four corners of Article 3(a).

Whether he can or should now act under Article 31 is for him to decide. All I say is that, in my view, he is not in a position to ask me now to act under Article 3(a) Palestine (Appeal to Privy Council) Order-in-Council, 1924. The application is refused with costs, fixed (or inclusive) costs of LP. 5.

Delivered this 5th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 100/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Nasrat Nassar. APPELLANT.

v.

Raji and Rahjat El Issa. RESPONDENTS.

Slip-rule — C. P. R. 358—9 — Addition to appeal jjudgment of remitting clause — Court functus officio — C. A. 244/42.

Appeal from the judgment of the District Court of Haifa, Civil Appeal No. 200/43, allowed:—

Once an appeal is allowed and the judgment appealed set aside the Court cannot add a clause remitting the case for rehearing, allegedly under the slip-rule.

(*A. M. A.*)

FOLLOWED: C. A. 244/42 (10, P. L. R. 46; 1943, A. L. R. 175).

ANNOTATIONS:

1. See note 1 in A. L. R. to C. A. 244/42 (*supra*) on the conflicting judgments regarding the necessity or otherwise of appealing a remitting judgment; *cf.* also C. A. D. C. T. A. 158/44 (1945, S. C. D. C. 13).

2. For authorities on acts done after the Court became *functus officio* see H. C. 74/43 (10, P. L. R. 467; 1943, A. L. R. 527) and cases cited in note 3 thereto in A. L. R.; see also H. C. 80/43 (1943, A. L. R. 610) and note 2, CR. A. 130/43 (10, P. L. R. 578; 1943, A. L. R. 772) and H. C. 24/44 (11, P. L. R. 117; 1944, A. L. R. 243).

3. Authorities on the slip rule are collated in the annotations to C. A. 277/42 (1943, A. L. R. 108) and to C. A. 258/42 (*ibid.*, p. 140).

(*H. K.*)

FOR APPELLANT: Wittkowski and Catafago.

FOR RESPONDENTS: Elia.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, in its appellate capacity, dated 25th February, 1944, dismissing an appeal from one of the Magistrates of Haifa, who had ordered the eviction of the present Appellant from certain premises.

The litigation has had a most unfortunate history. In 1943 the present Respondents (Plaintiffs) obtained an *ex parte* judgment against

the present Appellant who thereupon applied to the Magistrate to set it aside. The Magistrate having heard this application refused it and thereupon the Appellant appealed to the District Court in Civil Appeal No. 52/43. The District Court, on 13th May, 1943, delivered judgment in the presence of parties' advocates, allowing the appeal and setting aside the judgment of the Magistrate. It is to be observed that the District Court made no order of remittal and did not order a retrial. The effect of the judgment of 13th May, 1943, therefore, was to dismiss the Plaintiffs' action.

On the 21st May, 1943, one of the Plaintiffs (now Respondents) appeared in chambers before the Judges who had delivered the judgment of 13th May and orally applied to them to add to the judgment the words "and the case remitted to the Magistrate". The Judges added these words after the words "must be set aside with costs" both Judges initialling this addition and adding the words in the margin of the original typed copy of the judgment "amended on 21.5.43". It should be noted that all this was done in the absence of the present Appellant.

There is before me a letter from the Registrar of the District Court of Haifa dated 10th November, 1944, enclosing a report from one of the Judges who made the addition. The Judges apparently considered that this addition was consequential upon the setting aside of the judgment of the Magistrate. The Judges agree that the order was not read in Court.

On the 16th June, 1943, the present Appellant filed a notice of motion served on the present Respondents asking that the order of the 21st May, adding the words "and the case remitted to the Magistrate" be set aside. The motion was heard in the presence of parties' advocates on 2nd July, 1943, and was dismissed, the District Court holding that they had power to rectify the omission; in other words, power to add these words under Rules 358 and 359, Civil Procedure Rules, 1938. The case was then remitted for retrial on the merits before the Magistrate. The Magistrate duly reheard the case and gave judgment on the 3rd November, 1943, ordering the present Appellant to be evicted. The present Appellant then appealed to the District Court which, as I have already said, dismissed the appeal on 25th February, 1944.

One of the grounds of appeal before the District Court in February, 1944, was that the District Court was no longer seized of the matter because the effect of the judgment of 13th May, 1943, was to dispose of the litigation as the judgment in favour of the Plaintiffs had been

set aside and no order of remittal or retrial made. It is argued that the act of the Judges in adding fresh words on 21st May, 1943, was an entire nullity and should be disregarded.

The same argument has been advanced before me and it is said that the litigation came to an end on the 13th May, 1943, when judgment was in fact given by the District Court in favour of the present Appellant.

I think that the District Court were *functus officio* after they had delivered the judgment of 13th May, 1943. I do not think that the purported amendment or addition of 21st May was one that could possibly be regarded as coming within Rule 358, Civil Procedure Rules. The result of the judgment of 13th May as it stood was that the present Appellant had — to use a popular phrase — "won", he having been entirely dismissed from the action. The effect of the so-called addition of 21st May, however, was to make him again a defendant and to compel him to defend a case in the Magistrate's Court. Apart, therefore, from the irregularity in making this addition without notice to the present Appellant, I think that the addition was in itself a nullity, and having regard to the decision of this Court in Civil Appeal No. 244/42, P. L. R. Vol. 10, p. 46, I consider that the Appellant is entitled, even at this stage, to attack the so-called judgment of the 21st May, 1943. The addition of 21st May having been a nullity, the trial in the Magistrate's Court, following thereon, was also a nullity and the litigation must be regarded as having terminated with the judgment of 13th May. Whatever the learned Judges of the District Court may have intended, that judgment was clearly in favour of the present Appellant. Both parties' advocates were present in open Court on 13th May when the judgment was delivered and it was clearly the duty of the advocate then appearing for the present Respondents to draw the attention of the Judges, when he heard the judgment being delivered and before the Judges left the Bench or went on to another case, to the omission "to remit the case". He did not do so and one can naturally not blame the advocate for the present Appellant remaining silent because the judgment was clearly in his client's favour.

I would, however, point out that one of the reasons given by the Judges for setting aside the earlier judgment of the Magistrate was that the record did not show that the Plaintiffs had produced any evidence to prove their case. It was, therefore, not surprising that the learned Judges should then have entirely allowed the appeal without making any order for a remittal or for a retrial. Although the learned Judges on the 21st May, 1943, may then have realized that the judg-

ment of 13th May did not express their intention inasmuch as they had failed to order a retrial, I am by no means dismayed at the result of this appeal. There must clearly be limits to litigation and, as I have said, the advocate then appearing for the present Respondents could have on the 13th May tried to induce the Judges at the time to make the consequential addition to their judgment before it was too late.

For the foregoing reasons the appeal must be allowed and the judgment of the District Court as it stood on 13th May, 1943, must be restored with the effect, of course, that the Plaintiffs' action is dismissed. The Respondents must pay the Appellant's costs here and in the Courts below; the costs here, as the hearing before me has occupied two days, will be fixed (or inclusive) costs of LP. 20.

Delivered this 6th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 2/45.

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

BEFORE: FitzGerald, C. J., Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Moshe Poisek. APPELLANT.

v.

Batia Davidovitz. RESPONDENT.

Time of availability of alternative accommodation.

Appeal from the judgment of the District Court Haifa in its appellate capacity dated 24.10.44 in C. A. 108/44, allowed and case remitted:—

1. Unlike time of requirement of premises by landlord under sec. 8(1)(c), Rent Restrictions (Dwelling Houses) Ord., the provision dealing with alternative accommodation does not fix any time at all at which such accommodation should be available.

2. Once Magistrate is satisfied that the premises are reasonably required by landlord, he can order eviction if landlord has proved that alternative accommodation was available at or reasonably near to time when notice to quit was given, — not necessary to prove alternative accommodation at time of adjudication or time of commencing the action.

(*M. L.*)

APPROVED: C. A. 265/42 (10, P. L. R. 60; 1943, A. L. R. 9).

ANNOTATIONS: See C. A. 45/44 & 51/44 (11, P. L. R. 320; 1944, A. L. R. 340) with annotations thereto in A. L. R. and case approved (*supra*).

The judgment of the District Court is reported in 1944, S. C. D. C. 468.

(*A. G.*)

FOR APPELLANT: Geiger.

FOR RESPONDENT: Herman.

JUDGMENT.

Edwards, J.: This is an appeal by leave from a judgment of the District Court, Haifa, in its appellate capacity, dismissing an appeal from one of the Magistrates of Haifa, who had dismissed an action for eviction on the ground that the landlord (Plaintiff) had failed to establish that alternative accommodation was available for the tenant (Defendant) at the time of adjudication.

The substantial question of law falling for decision is what is the relevant time at which alternative accommodation should be made available within the meaning of section 8(1)(c), Rent Restrictions (Dwelling Houses) Ordinance, 1940? We have been informed at the Bar that, owing to certain judgments of this Court which appear to be conflicting, a definite decision on this point will be welcome. I think that it would only make confusion worse confounded if in this judgment I were to analyse or even discuss the various English Acts or the various decisions of the King's Bench Division in England or even decisions of this Court.

As I said in a previous case, I consider that one is not paraphrasing section 8 if one says that its meaning is that, so long as the tenant continues to pay rent at the agreed rate and performs the other conditions of the tenancy, he cannot be evicted; but that he can be evicted if the landlord proves that he reasonably requires the premises for occupation by himself and also establishes that he had offered to the tenant suitable alternative accommodation which the tenant has unreasonably refused to accept. If and when the landlord proves both those matters the prohibition on the Court to order eviction is removed. In the case before us it was established, to the satisfaction of the Magistrate, that the landlord reasonably required the premises for himself. Once the landlord has proved, to the satisfaction of the Court, that he reasonably requires the premises for occupation by himself he must then establish that he has offered the tenant suitable alternative accommodation. I at once dismiss the suggestion that the landlord should prove that alternative accommodation was available at the time of adjudication by the Magistrate. There are obvious reasons, which it is

unnecessary to discuss, why in Palestine this would be quite impracticable. I also reject the argument that it must be proved that the alternative accommodation was available at the time of commencing the action. A little reflection will show why I do so. Suppose for example that on the expiration of a tenancy the landlord reasonably requires the premises for himself and gives the tenant notice to quit, at the same time offering him suitable alternative accommodation, and suppose further that the tenant refuses to leave and unreasonably refuses to accept the alternative accommodation. In such a case it may well be that the landlord being patient delays taking proceedings in order to give the tenant an opportunity of changing his mind. Suppose further that, during the period between the offer of the alternative accommodation and the landlord filing his statement of claim, the alternative accommodation is secured by someone else and is then no longer available for the tenant, why should the landlord suffer? I am, however, glad to know that the view which I take is substantially the view which appears to have been taken by this Court in C. A. 265/42, P. L. R. Vol. 10, p. 60. I quote from p. 61:—

> "The Magistrate, having complied with the requirements of this paragraph and having found the facts to be as stated, made an order in terms thereof. He also found as a fact that at the expiration of the tenancy there was alternative accommodation available of which fact the landlord had notified the tenant".

It is to be noted that the words in section 8(1)(c) are "after considering all the circumstances of the case including especially the alternative accommodation available for the tenant". I pause here to note that neither the word "is" nor the word "are" nor the present nor the future tense nor the past tense nor indeed any tense indicative of time appear when the Legislature deals with the question of alternative accommodation. This is different from the question of the time when the premises are reasonably required because then the word "are" appears. I would, therefore, lay it down that once a Court of trial is satisfied that the premises are reasonably required by the landlord for occupation by himself the Court must then, before ordering eviction, be further satisfied that the landlord at or about the time of the expiration of the tenancy not only gave notice to quit, but also demonstrated to the tenant that suitable alternative accommodation was available, which alternative accommodation the tenant unreasonably refused to accept. In other words, the alternative accommodation should be available at or about or reasonably near to the time when notice to quit is given. The landlord should also prove that after this unreasonable refusal on the part of the tenant, he (the landlord) did not

unduly delay in filing his Statement of Claim applying for eviction. I would accordingly set aside the judgments of the District Court and of the Magistrate's Court on this ground alone.

The Appellant's advocate took a further point, namely, that the Magistrate unreasonably refused to hear one of his witnesses on the question of alternative accommodation. I think that this ground of appeal also succeeds.

The Respondent's advocate at the Bar asked that, in the event of the appeal being allowed his client should be given an opportunity of leading evidence before the Magistrate to show that the landlord no longer reasonably required the premises for himself. I think that it is now too late in this case to allow such a proceeding.

I think that the proper order for this Court to make will be to set aside the judgment of the District Court and of the Magistrate's Court and to remit the case to the Magistrate for a new trial on the question only of the availability of suitable alternative accommodation. At this re-hearing both parties should be allowed to lead evidence and the Magistrate, after having heard such evidence, should give a fresh judgment in the light of the principles just enunciated. The Respondent should pay the Appellant's costs of this appeal namely, fixed (or inclusive) costs of LP. 10.

Delivered this 22nd day of May, 1945, in presence of Mr. Stoyanovsky for Appellant and Mr. Bachrach for Respondent.

British Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

Frumkin, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 320/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Omar Barakat & an. — APPELLANTS.

v.

The Attorney General & an. — RESPONDENTS.

Customs forfeiture — "Seized" (sec. 190) and "seized as forfeited" (sec. 188) — "Seize and carry away" (sec. 186(1)) — Notice of forfeiture under sec. 188 — Need not be sent if owner present.

Appeal from the judgment of the District Court of Jerusalem, dated 21st day of July, 1944, in Civil Case No. 27/44, allowed:—

1. There is a difference between the word "seized" in sec. 190 and the expression "seized as forfeited" in sec. 188. When sec. 186 is relied upon a notice under sec. 190 should be sent and the provisions of sec. 188 do not apply.

2. In confiscations under sec. 188, where the owner is present at the time of the confiscation, the customs officer need not give written notice but the owner is not relieved from the requirements of sending a notice under that section.

(*A. M. A.*)

ANNOTATIONS:

1. On forfeiture under the Customs legislation see H. C. 93/43 (10, P. L. R. 622; 1943, A. L. R. 797) and cases cited in the note thereto in A. L. R.; *cf.* also H. C. 115/44 (1944, A. L. R. 734) and C. D. C., Jm. 6/44 (1944, S. C. D. C. 439).

2. Different words in the same statute should be given different meanings: P. C. 34/41 (10, P. L. R. 517; 1943, A. L. R. 800) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANTS: Goitein.

FOR RESPONDENTS: Assistant Government Advocate — (Gavison).

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Jerusalem, dismissing an action by the present Appellants for the return of certain goods, or in the alternative, their value, namely, LP. 449.500 mils.

The goods had been seized from the Appellants' shop in the Suk el Bazaar, Old City of Jerusalem, it being believed that they were goods which had been imported into Palestine in contravention of the Import, Export and Customs Powers (Defence) Ordinance, 1939, Palestine *Gazette*, Supplement No. 1, No. 968, of 11th December, 1939, p. 163, section 3(1); and Palestine *Gazette*, Supplement No. 2, of 18th July, 1940, p. 965.

The learned President of the District Court decided against the Appellants' claim both on grounds of fact and for reasons of law. The Appellants' advocate has confined his argument before us to points of law. The learned President held that, as the Plaintiffs (Appellants) had failed to give the notice required by lines 12 and 13 of section

188 Customs Ordinance within the proper time, section 190 never came into play.

Mr. Goitein, for the Appellants, submits that section 188 never applied at all because it is admitted that the owner was present at the seizure. In my view, however, what section 188 means is that if the owner is present at the seizure, the seizing officer need not give notice in writing of the seizure. The reason for this seems obvious and would appear to be a matter of practical common sense because, if the owner is present at the seizure, he knows that his goods have, in fact, been seized as forfeited. I am therefore against Mr. Goitein's contention on this head.

I come now to a much more difficult question, and that is whether the goods were, in fact, seized as forfeited. If they were not, of course section 188 has no application. It is to be noted that in the second line of section 188 the words used are "seized as forfeited" while in the second line of section 190(1) the word used is simply "seized". The Legislature must have intended a distinction to be drawn.

Mr. Goitein contends, and I think rightly, that, on the facts of this case, what happened was that the proper officer entered the premises and searched them and seized and carried goods away under section 186(1). This is borne out by the evidence of Mr. Kamal Khoury, the Surveyor of Customs, at the bottom of page 58 of the typed record of evidence, where he says "I had the right to sieze goods under the Customs Ordinance — Article 184 I think — Article 186. I suspected that they were smuggled because they were concealed". Then again at p. 59 he says: "I told Omar Barakat to produce his documents later at the Customs House. I think that was fair. It was not possible to verify, on the spot, whether any of the goods were covered by Ex. 3A & B and Ex. 4A & B". I am clearly of the opinion that there is a vast difference between the act of seizing and carrying away under section 186 and the situation contemplated by section 188. Section 186 deals with the case where it is suspected that goods have not paid duty or that they have been otherwise illegally imported, and it is desired to carry them off with a view to conducting enquiries and making an inspection. Section 188, on the other hand, deals with an entirely different state of affairs. I think that what section 188 was intended to cover was the case of a ship arriving at a port. It is abundantly clear then to a Customs Officer, such as a Baggage Examiner, that the goods have newly arrived at the port and could not possibly have paid duty. He opens a box or a bag while the owner may be present or he may be temporarily absent during the inspection. The Baggage Examiner finds that an article imported is clearly contraband, that is, prohibited from

entering the country even although duty might be offered, or it may be that the passenger had already signed a declaration form omitting to include therein the article on which Customs duty had to be paid. In such a case the Baggage Examiner would have powers to seize the goods as forfeited. In other words, they were already forfeited. It was then a thing of the past. It was so obvious that the articles were there in contravention of the law that no further enquiries were necessary. I, therefore, am unable to agree with the interpretation put on the words "seized as forfeited" by the learned President of the Court below, who said in his judgment:—

> "I have come to the conclusion that these words mean seized in such circumstances that they will be forfeited to Government if they are not duly claimed within one month from the date of seizure".

I think that section 186 and not section 188 applies to the facts of this case. It therefore follows that section 190 also applies. It is admitted that no notice as required by section 190(1)(a) was sent by the collector to the person claiming the goods requiring him to institute a suit within two months from the date of notice, and it is also admitted that the collector did not himself cause a suit to be instituted under section 190(1)(b).

The question now arises, what is the consequence of the failure to give notice or to cause a suit to be instituted, under section 190? I think that the only consequence is that the judgment of the Court below must be set aside and judgment entered for the Appellant in terms of paragraph 12(b) of the statement of claim with one set of costs to be taxed on the lower scale to include an advocate's atendance fee at the hearing of the appeal of LP. 15. I would so order.

Delivered this 15th day of February, 1945.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 475/44.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

The Estate of the late Habib E. Salem, represented by the Executors, Jamil

Salem, Anton Cattan and Mrs. Nour Salem. APPELLANT.

v.

Messrs. Hanna Asfour and Adeeb Jeadah, Trustees in Bankruptcy of Bishara Bandar and Trustees in Bankruptcy of Eugenie Hallasso. RESPONDENTS.

Currency — Mortgage repayable in foreign currency at mortgagee's option — Date of conversion of exchange, P. C. 1/42 — Feist v. Société Intercommunale Belge d'Electricité — Effect of change in the law — Sawyer v. Windsor Brace Ltd. — Recovery by action of money overpaid in execution — Voluntary payments.

Appeal from the judgment of the District Court Haifa, dated 27.11.44 in Civil Case No. 107/43, allowed:—

1. P. C. 1/42 altered the law of Palestine relating to the date of conversion of foreign currency: It had formerly been taken as at payment; it is now taken as on maturity.

2. Payments made under the former law before the Privy Council decision were therefore properly made and cannot be challenged on the ground of the change in the law.

(*A. M. A.*)

REFERRED TO: H. C. 91/41 (8, P. L. R. 497; 1941, S. C. J. 445; 10, Ct. L. R. 179); P. C. 1/42 (10, P. L. R. 271; 1943, A. L. R. 408);; Feist *v.* Société Intercommunale Belge d'Electricité, 1934, A. C. 161, 103 L. J. (CH.) 41, 50 T. L. R. 143, 150 L. T. 41.

APPLIED: Sawyer & an. *v.* Windsor Brace, Ltd., 1942, 2 All E. R. 669, (1943) 1 K. B. 321, 167 L. T. 367, 59 T. L. R. 43.

ANNOTATIONS:

1. The finding of the Disrict Court (Judge Shems) on the issue of jurisdiction was as follows:—

> 6. This Court has jurisdiction, both general and local, to entertain this action. As to general jurisdiction the claim is for money had and received, and the relief is for an order to recover such money. No claims to rights in or over land are involved in this action and consequently the proceedings were filed in the proper forum; see in this respect the judgments of the Supreme Court in Civil Appeal 70 of 1939, 6 P. L. R., 397; and C. A. 75 of 1941, 8 P. L. R., May 1941, 214.
>
> 7. As to the local jurisdiction of this Court, the act of having and receiving the excess money claimed was made at the execution office in Haifa, and consequently the action was properly instituted in the appropriate Court, *vide* Rule 4(e) of the Civil Procedure Rules, 1938. This is clearly shown from paragraphs 7 and 8 of the Statement of Claim, and the objections of the Defendants in that the Plaintiffs did not comply with Rule 7(1)(g) of the Civil

Procedure Rules, 1938, cannot be upheld, for it is sufficient if the statement of claim contains facts showing that the Court has jurisdiction.

2. On the question whether the payment effected by the C. E. O. was a bar to Respondents' action the District Court held as follows:—

8. The payment of the money to the Defendants by the Execution Officer by virtue of the order of the Chief Execution Officer does not bar the mortgagor from disputing any excessive payment made to the mortgagee by reason of such order and from claiming its recovery. The fact that the deeds of mortgages are defunct is immaterial. The decision of the President under section 14 of the Land Transfer Ordinance, Cap. 81, as amended by the Amendment Ordinance, 16 of 1938, in the execution proceedings for the sale of the mortgaged property in satisfaction of the mortgage is not a judicial decision determining the rights of the parties thereunder. He acted in his capacity of Chief Execution Officer; see in this respect the judgments of the Supreme Court in High Court Case No. 16 of 1927, 1 P. L. R. (1920 to 1933), 126; Civil Appeal 117 of 1929, 1 P. L. R. (1920 to 1933), 585; High Court 127 of 1934, 2 P. L. R. (1934 to 1935), page 226; High Court 65 of 1937, 5 P. L. R. (1938), page 47; High Court 66 of 1937, 5 P. L. R. (1938), page 16; High Court Case 4 of 1938, 5 P. L. R. (1938) page 91; High Court 35 of 1938, 5 P. L. R. (1938), page 305; High Court Case 64 of 1938, 5 P. L. R. (1938), page 572; and High Court Case 19 of 1939, 6 P. L. R. (1939), page 224.

9. The matters in controversy between the parties were not determined in judicial proceedings, and a party is entitled to apply to the Court for an adjudication on any claims raised by him. See in this regard the judgment of the Supreme Court in High Court 77 of 1933, 2 P. L. R. (1934 to 1935), page 103. There is further no point in the submission of Counsel for the Defendants in that the action should have been brought within the time limit of one month mentioned in the order of the President, for the time limit was in respect of stay of execution proceedings merely, and not a limitation of the time for filing the action.

— — — — — — — — — — —

23. The fact that the mortgage proceedings have been concluded does not debar the Plaintiffs from claiming the recovery of any excess payments. The issues between the parties were not determined at any stage before, and the Plaintiffs are entitled to claim what is due to them until the action becomes prescribed. The payment to the Defendants was not made voluntarily by the mortgagors but was the result of the forced sale of the mortgaged properties in execution proceedings.

3. On the general rule that monies paid *voluntarily* under a mistake of law are not recoverable see Halsbury, Vol. 23, pp. 166 *et seq.*, sec. 2; see *ibid.* for the meaning of "voluntary" in this context and *cf.* Stroud's Judicial Dictionary, 2nd ed., Vol. 1, p. 2201.

4. Note that the decision in P. C. 1/42 (*supra*) cannot strictly speaking, be

said to have altered the law in Palestine as "Their Lordships ..... must determine what should be, *or more precisely, is* the rule in Palestine". (10, P. L. R. at p. 279; 1943, A. L. R. at p. 415 — italics supplied). *Cf.* Editorial Note in All E. R. to Sawyer & an. *v.* Windsor Brace, Ltd. (*supra*).

(*H. K.*)

FOR APPELLANT: Levitsky and T. Cohen.

FOR RESPONDENTS: A. Levin.

JUDGMENT.

This is an appeal from the District Court of Haifa which had given judgment in favour of the present Respondents for the sum of LP. 4333.536 mils with interest and costs in an action brought for the recovery of certain money said to have been overpaid by the President of the District Court sitting as Chief Execution Officer under section 14 Land Transfer Ordinance.

Many matters were argued both in this Court and in the Court below. Because of the view which we take, we deem it unnecessary to go at length into the facts or to give a narrative of the events leading up to the various transactions.

Briefly stated, the position is that the Appellants are the executors of one Habib E. Salem, who, as mortgagee, held mortgages from two mortgagors, namely, Bishara Bandar and Eugenie Hallasso, both of whom subsequently became bankrupt, the present Respondents being the trustees in their respective bankruptcies.

The mortgagors failed to pay off the mortgage debt at maturity, that is, 1st August, 1938. On 19th January, 1940 the mortgagee applied under section 14 of the Land Transfer Ordinance for the sale of the mortgaged property. Clause 6 of the special conditions of the mortgage deeds gave the mortgagee the right to recover his debt in four different currencies, namely, Palestine pounds, English pounds, U. S. A. Dollars at the rate of 4.94 dollars per Palestine Pound or in French Francs at the rate of 128.75 Francs per Palestine Pound.

The present Appellants in their application of 19th January, 1940, demanded payment at the Execution Office "in dollars to be calculated at the rate of 4.94 American dollars for each pound which total amount in dollars calculated as aforesaid in accordance with the said deeds of mortgage should be payable either in dollars of U. S. A. or in Palestine pounds at the buying rate on New York of the said total amount of dollars on the date of payment".

We would here observe that, throughout the whole course of the execution proceedings and indeed until some time after the present action was brought, the only complaint of the mortgagors was not that the

date of payment was not the correct time at which the conversion had to be calculated, but that Clause 6 gave the mortgagees the right to demand payment in Palestine pounds or English pounds or U. S. A. dollars or French francs and that if (as was the case owing to the currency restrictions in force on account of the War) it was impossible in 1940 to pay in dollars or francs or English pounds the mortgagee would have to be content with payment in Palestine pounds pure and simple without any question of conversion. That is, of course, still one of the grounds of complaint of the Respondents but at no time until after April, 1942 when the present action was instituted did they ever suggest that their complaint was that the Execution Officer was in error in taking the date of payment and not the date of maturity as the correct date for calculating the exchange or converting the exchange. Final orders of sale of the mortgaged property were made in the latter part of 1941, although execution proceedings had commenced on the 19th January, 1940. The mortgagors had ample opportunity to apply to the High Court for an order against the Chief Execution Officer. They did in fact proceed in High Court Case 91/41 in which an order was made by this Court sitting as a High Court of Justice on 18th November, 1941, but it is to be noted that it was no ground of the petition to the High Court that the error made or about to be made by the Chief Execution Officer was in regarding the proper date of conversion as the date of payment. As we have said, the present action was commenced in April, 1942 and it is common ground that it was not until July, 1943 that the decision in Privy Council Appeal 1 of 1942 (Vol. 10 P. L. R. page 271 at page 280) became known in Palestine. After the judgment in Privy Council Appeal No. 1 of 1942 became known, the Respondents applied to the District Court for an amendment of their statement of claim by which they added the following words "and in any event the Defendant is only entitled to convert the U. S. A. dollars into Palestine currency at the rate of U. S. A. dollars in Palestine Currency on 1st August, 1938". The Appellant's advocate has argued that the District Court was not entitled to allow this amendment; but, having regard to the decision to which we are coming, we think it unnecessary to deal with this point, nor do we deem it necessary to deal with some of the other points argued before us, such as whether the action was an action for money had and received. We would, however, say that we think that the District Court came to a right conclusion in holding that they had jurisdiction to entertain the action, as it is abundantly clear that the Chief Execution Officer is not a Court and we also think that the District Court came to a right conclusion in holding (on the authority of the

case Feist *v.* Société Intercommunale Belge d'Electricité (1934) A. C. 500 at page 562), that the mortgagee was entitled to demand conversion into American dollars. In its judgment the District Court said "It is true that the mortgagor could not in 1940, or subsequently, have obtained such dollars at the Bank or in the market in order to pay the mortgage debt to the mortgagee, but in any event inasmuch as a dollar has an international value which could be easily ascertained, the Chief Execution Officer was entitled to order payment of the amount of dollars by translating them into Palestine currency. Clause 6 of the Special Conditions of the deeds of mortgage was intended to afford a definite standard of measure of value and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of a lesser value than that prescribed *". With this statement we agree. The Court below, however, considered that the Chief Execution Officer erred in law in taking as the date of payment the date of the rate of exchange or date of conversion. It is here that we must part company with the Court below. We think that there can be no doubt (and it is clear that the Respondents themselves had no doubt at the time) that when the Chief Execution Officer was functioning between 1940 and 1942, the law in Palestine did regard the rate of exchange prevailing at the actual date of payment as the proper rate. This is implicit from a perusal of page 279 P. L. R. Vol. 10. We think it well, if only to remove doubts, to say that we assume that their Lordships of the Judicial Committee of the Privy Council (although it is true that they were in P. C. 1/42 dealing with section 72(4), Bills of Exchange Ordinance) were laying down the rule that the date of maturity should be the date for calculating the rate of exchange or for converting the exchange not only in the case of Bills of Exchange, but for all purposes or rather for all types of payment or for the payment of all obligations in which a question of rate of exchange is involved.

We therefore think that the District Court were wrong in holding that the Chief Execution Officer erred in not taking the date of maturity as the proper date. We would at this stage point out that it was not the Respondents (that is, the mortgagors) who paid or made the payment, but the Chief Execution Officer. We must not be taken as necessarily holding that after a Chief Execution Officer has paid out money any party aggrieved cannot recover by action from the person to whom it has been paid. This question may give rise to very serious argument, and a ruling on such a point must abide an appropriate case. We do not think it necessary to decide the question whether this pay-

* Quoted from Feist *v.* Société Intercommunale Belge d'Electricité (*supra*). (*Ed.*)

ment was a voluntary payment or not. In any event, it was a payment not made by the mortgagors, but by the Chief Execution Officer who, of course, was certainly under no threat or compulsion. We must, however, say that if it had occurred to the mortgagors that the Chief Execution Officer was about to make an error with regard to the time of converting the rate of exchange they could well have petitioned the High Court and obtained a stay of proceedings to enable them to go to the appropriate Court for a declaration; but they did not do so. We think that this is a case to which the following words of Croom-Johnson, J. in Sawyer *v.* Windsor Brace Ltd. (1942) 2 All E. R., p. 669 at p. 671 apply:—

> "I really can see very little difference between this case and the familiar case where a decision of the Court has been subsequently over-ruled by another decision and it has been held that this does not give rise to a claim by people who have paid under the previous decision".

For these reasons we consider that the District Court erred in paragraph 25 of their judgment which is in the following terms:—

> "The rate of exchange which should have been adopted is the rate of exchange prevailing on the date of the maturity of the mortgage debts. The Execution Officer overvalued the dollar by the difference between its value on the date of payment and on the date of maturity, *viz.* 44.64 mils. The value of the dollar on the date of payment was 248.48 mils, its value on the date of maturity was 203.84, the difference is 44.64 mils. The Execution Officer over calculated 44.64 mils for each dollar of the mortgage debts. The amount of the mortgage debts was 97077.42 dollars, consequently the excess amount in Palestine currency over-charged by the Execution Officer is LP. 4333.536 mils".

We accordingly set aside the judgment of the District Court awarding the Respondents LP. 4333.536 mils.

There is also before us what is in effect a cross-appeal by the Respondents against that part of the judgment of the District Court refusing a claim by the Respondents for refund of certain monies said to have been included in a new mortgage. The argument of the Respondents was that the capital in the new mortgage was in effect interest on a previous mortgage and it is said that the result is that there is compound interest and that we thus have here a case of usurious interest.

The District Court carefully considered the evidence led on this point and we also have perused the record of evidence but we see no grounds for interfering with the finding of the Court below. In the result the appeal is allowed, that part of the judgment of the District Court awarding the Respondents LP. 4333.536 mils is set aside and the action of

the Plaintiffs is dismissed. The cross appeal is also dismissed. The Respondents must pay the Appellants their costs here and below, the costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 25.—. The costs in the Court below will be fixed (inclusive) costs of LP. 50.—.

Delivered this 31st day of May, 1945, in the presence of Messrs. Abramovsky & Cohen for Appellant and in the presence of Messrs. Levin & Wittkowski for Respondents.

British Puisne Judge.

CRIMINAL APPEAL No. 18/45.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Ahmad Muhammad Al Hazeem & an. RESPONDENTS.

Amendment of information — Discrepancy in dates — Discharge of Accused on account of discrepancy — T. U. I. Ord., secs. 31, 72(1)(c), *R. v. Dossi — "Shall" (sec.* 37(1), *Indictment Act,* 1915, *sec.* 5.

Appeal from the judgment of the District Court of Nablus (Criminal Case No. 137/44) allowed and case remitted for new trial:—

At the close of the case for the prosecution, when it is too late for the latter to apply for an amendment of the information, the Court should, if the information is defective, amend the information of its own motive provided no injustice is caused to the Accused.

(*A. M. A.*)

FOLLOWED: R. *v.* Dossi, 1918, 87 L. J. (K. B.) 1024, 34 T. L. R. 498, 13 CR. App. Rep. 158.

ANNOTATIONS:

1. As to the necessity of specifying the date of the alleged offence see CR. A. 106/44 (11, P. L. R. 461; 1944, A. L. R. 485) & CR. A. 143/44 (12, P. L. R. 2; *ante,* p. 291) and notes to these cases in A. L. R.

2. "Where ..... it appears to the Court that an indictment is defective, the Court *must* make such order for the amendment of the indictment as the Court thinks necessary ....., unless ..... the required amendments cannot be made without injustice": Halsbury, Vol. 9, p. 139, para. 182 (italics supplied).

3. On the interpretation of the word "shall" see also C. A. 50/37 (1937,

S. C. J. (N. S.) 155; 1, Ct. L. R. (N. S.) 116) and cases therein cited, C. A. 224/41 (9, P. L. R. 58; 1942, S. C. J. 77; 11, Ct. L. R. 34) and CR. A. 138/43 (10, P. L. R. 592; 1943, A. L. R. 764).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENTS: G. Salah.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Nablus discharging the two Respondents who were being tried on an Information alleging that they had committed manslaughter. During the hearing of the evidence of the witnesses for the prosecution, a doctor who had examined the body on the 15th September, 1944, agreed that the act which caused the injuries resulting in death might have been committed two days previously. Two other witnesses swore that they had seen the Accused hit the deceased on the 13th September while the Information alleged that the Accused had on the 15th September unlawfully caused death.

At the close of the case for the prosecution, the Accuseds' advocate submitted that there was no case to answer because the Information alleged that the date of the offence was the 15th whereas the evidence showed that the crime had been committed on the 13th. Thereupon the District Court delivered judgment holding that there was no case to answer, relying apparently on the fact that the prosecutor had not chosen to ask for the Information to be amended. It is clear, however, that it would have then been too late for the prosecutor to ask for an amendment of the Information. The prosecutor could, of course, have attracted the attention of the Court to the provisions of section 31(1) of the Criminal Procedure (Trial Upon Information) Ordinance. The fact that he did not do so did not relieve the trial Court of their duty, if they thought that the Information was defective, at any rate to consider whether they should act under section 31(1).

Quite apart from the matter of section 31 we do not think that the Court at that stage should have held that there was no case to answer. On that ground alone we think that the appeal should succeed. Mr. Rigby, for the Appellant, has cited Archbold's Criminal Practice (31st Edition) p. 34 and the case of R. *v.* Dossi Criminal Appeal Reports Volume 13 pp. 158 and 160.

The next question is whether the trial Court should, if they had considered the Information to be defective, have acted under section 31(1).

Mr. Salah, for the Respondents, contends that the word "shall" in line 3 of section 31(1) does not mean that the Court is bound to order

an amendment. In support of his contention he has referred to section 5 of the Indictments Act 1915 and to Archbold (29th Edition) p. 48. It may well be that, strictly speaking, this contention is correct; but the matter for us as a Court of Criminal Appeal to decide is whether the failure of the Court in this particular case to exercise the powers given to it by section 31(1) was unreasonable. We think that it was because it is clear that the necessary amendments could have been made without injustice being done. We accordingly allow the appeal, set aside the order of discharge of the 20th December, 1944, and remit the case to the District Court for a new trial under the provisions of section 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, the wording of which will doubtless be noted by the trial Court.

Delivered this 28th day of February, 1945.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 14/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Hassan Omar el Zeideh. APPLICANT.

v.

Rose Alexander & an. RESPONDENTS.

Appeal to Privy Council — Value of claim in dispute — Art. 3(a) Palestine (Appeal to P. C.) O. in C. — Stay of execution, P. C. L. A. 13/38.

Application for leave to appeal to His Majesty in Council granted:—

The result of the judgment in C. A. 329/43 was to enable the successful party to recover possession of land exceeding LP. 500 in value. An appeal therefore lay under Art. 3(a).

(A. M. A.)

FOLLOWED: P. C. L. A. 13/38 (6, P. L. R. 69; 1939, S. C. J. 98; 5, Ct. L. R. 97).

ANNOTATIONS:

1. The judgment which it is sought to appeal is C. A. 329/43 (11, P. L. R. 414; 1944, A. L. R. 809).

2. *Cf.* P. C. L. A. 13/44 (11, P. L. R. 469; 1944, A. L. R. 550) where the judgment was one for eviction.

3. On the ruling in P. C. L. A. 13/38 (*supra*) see note in A. L. R. to P. C. L. A. 3/44 (11, P. L. R. 394; 1944, A. L. R. 663).

(*H. K.*)

FOR APPLICANT: Wittkowski.

FOR RESPONDENTS: Hiller.

ORDER.

The advocate for the Respondents to the application who opposes the grant of conditional leave to appeal to His Majesty in Council contends that, although he does not dispute the fact that the value of the land in question is over LP. 500, nevertheless the ownership is not in dispute, and that, therefore, the matter does not come under Article 3(a), Palestine (Appeal to Privy Council) Order-in-Council, 1924. The fact is, however, that this Court held that his clients were entitled to recover this land from the present Applicant. In my view, there can be no doubt that the result of the judgment of this Court of 28th July, 1944, was to enable the present Respondents to recover the possession of land worth over LP. 500. I hold, therefore, that an appeal lies under Article 3(a).

The Applicant's advocate has applied for stay of execution pending the appeal. In view of the decision of this Court in P. C. L. A. No. 13/38, Vol. 6, P. L. R. p. 69 at p. 72, I think that I am entitled to grant a stay.

The judgment of this Court of 28th July, 1944, will accordingly be stayed.

Delivered this 27th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 45/45.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Joseph Kaiserman. APPELLANT.

v.

Hapeles Co. Ltd. RESPONDENT.

Awlawiyeh — Effect of land settlement on prior purchase proceedings — L. S. Ord., secs. 6(1), 10(1); *Land Code, Art.* 41.

Appeal from the judgment of the Magistrate's Court of Haifa, sitting as a Land Court dated the 15th January, 1945, in Land Case No. 15/44, dismissed:—

Sec. 6(1) of the Land (Settlement of Title) Ordinance freezes all actions concerning rights to land in the area under settlement.

A claim for *awlawiyeh* is included as it is a claim concerning land.

(*A. M. A.*)

ANNOTATIONS: An action for *awlawiyeh* must be brought within the time limit prescribed in sec. 6 of the Land Law (Am.) Ordinance.

As it was held in L. A. 14/36 (1937, S. C. J. (N. S.) 58; 1, Ct. L. R. (N. S.) 43) that the Settlement Officer has no jurisdiction to hear a claim for *awlawiyeh* it seems that, as a result of this judgment, a claimant for *awlawiyeh* may be deprived of his right in case the prescribed period of one year should expire between the date of the notification of settlement and that of the posting of the Schedule of Rights.

(*H. K.*)

FOR APPELLANT: Abramovsky.

FOR RESPONDENT: Feiglin.

JUDGMENT.

This is an appeal from the judgment of the Magistrate of Haifa sitting as a Land Court which decided that he had no jurisdiction to hear the claim because of the provisions of section 6(1) of the Land (Settlement of Title) Ordinance. The claim of the Appellant was for a right of *awlawiyeh* under Art. 41 of the Ottoman Land Code. It is admitted that the claim was preferred after notification of settlement had been published but before publication of the Schedule of Rights.

It is argued by the Appellant that section 6(1) of the Land (Settlement of Title) Ordinance must be interpreted as limiting only the listing of those actions which the Settlement Officer is authorised to determine under section 10(1), *i. e.* dispute with regard to the ownership and possession of the land, and a claim under Art. 41 does not, he says, constitute a dispute as to ownership. It is true that a claim under Art. 41 of the Land Code is not a dispute as to ownership but we are of opinion that the terms of section 6(1) are far wider than the Appellant contends. The section freezes all actions concerning rights to land in any village. It cannot, in our opinion, be denied that a claim under Art. 41 is a claim concerning a right to land. We are of opinion, therefore, that the Magistrate's decision was correct. The appeal must be dismissed with LP. 5 inclusive costs.

Delivered this 11th day of June, 1945.

Chief Justice.

HIGH COURT No. 136/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Moshe Smilanski. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Darwish Abdul Razak Daoudi & 7 ors. RESPONDENTS.

Lack of provision in mortgage deed as to rate of interest — Notarial Notice demanding payment of mortgage debt plus 9% interest — Application of Art. 112 of the Ottoman Civil Procedure Code.

Where mortgage deed mentions no rate of interest and mortgagee served upon mortgagor notarial notice demanding capital plus 9% interest, he is entitled to 9% as from date of notice.

(*M. L.*)

REFERRED TO: C. A. 75/34 (8, C. of J. 600); H. C. 71/42 (9, P. L. R. 452; 12, Ct. L. R. 261; 1942, S. C. J. 546) Wallingford *v.* Mutual Society (1880) 5 C. A. pp. 685 & 702; Wallis *v.* Smith, 21 Ch. D. pp. 243 & 261.

ANNOTATIONS: See cases referred to and annotations and see also H. C. 5/37 (1, Ct. L. R. (N. S.) 35; 1937, S. C. J. (N. S.) 193) and H. C. 75/34 (1, Ct. L. R. (N. S.) 44).

(*A. G.*)

FOR PETITIONER: Caspi.

FOR RESPONDENT: Husseini.

ORDER.

This is the return to an order *nisi* directed to the first Respondent, calling upon him to show cause why an order requiring the other Respondents to pay interest on a mortgage at the rate of 6% *per annum* should not be set aside and another order substituted requiring interest to be paid at 9% *per annum*.

The deed of mortgage itself is in common form, namely partly printed and partly typed, and it requires interest to be paid but the rate is left blank.

On the 14th January, 1944, the advocate for the present Petitioner asked for an order of sale and pointed out to the learned Chief Execution Officer that although the mortgage provided for the payment of interest, there was no provision as to rate, and he accordingly applied for interest at 9%.

On the 28th February, 1944, parties' advocates appeared before the learned Chief Execution Officer, when the advocate for the present Petitioner said that the parties had arrived at a settlement on certain conditions, one of which was that on failure to pay any of the specified instalments on due date, the mortgagor should pay 9% *per annum* instead of 6% *per annum* on the remaining sum. The learned Chief Execution Officer specifically recorded the fact that the second Respondent agreed to those terms; but it has been argued before me by the advocate who appeared for Respondents 3 and 4, as well as for the second Respondent, that there is nothing to show that Respondents 3 and 4 agreed. This, however, seems to me to be immaterial, because on the 27th June, 1944, all the parties appeared before the learned Chief Execution Officer, and were there represented by advocates, the advocate for the present Petitioner stating that, as nothing had been paid by the mortgagor, he was compelled to ask for an order of immediate sale, with interest at 9% on the principal debt of LP. 9000, from the date of notarial notice, 12th May, 1943. The learned Chief Execution Officer made an order accordingly, but stated that the order of sale should include interest at 6% on the principal sum (LP. 9000) as from 12th May, 1943. The present Petitioner now comes to this Court and asks that the order should be amended so as to require interest to be paid at the rate of 9%.

Muhammad Eff. Yunis, the advocate for the 2nd, 3rd and 4th Respondents, contends that 9% is a penalty, and has cited the "Law of Mortgages" by Hanbury and Waldock (1938) page 97, and the case of Wallingford *v.* Mutual Society, (1880) Vol. 5, A. G., pages 685 and 702.

Mr. Caspi, for the Petitioner, has referred to the Ottoman Code of Civil Procedure, Article 112 of which is still in force in Palestine, and to the Ottoman Law of Interest, 9 *Rajab*, 1304, and to Hailsham, Vol. 23, page 179, paragraph 260, and to Civil Appeal 75/34, Rotenberg's Supreme Court Judgments Vol. 8, p. 600 and to H. C. 71/42, Vol. 9 P. L. R., page 452, and to Wallis *v.* Smith, Vol. 21 Chancery Division, pages 243 and 261.

In my view the mortgagee is entitled to rely on Article 112.

The order *nisi* will accordingly be made absolute, and the order of the learned Chief Execution Officer varied by substituting the word "9%" for the word "6%". The Respondents must pay one set of costs to the Petitioner, namely, fixed or inclusive costs of LP. 10.

Given this 8th day of January, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 176/44.

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

BEFORE: FitzGerald, C. J., Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Feiga Zipora Lasker. APPELLANT.

v.

Dov Mishel. RESPONDENT.

Knocking continuously on neighbour's door with intention to intimidate, insult or annoy — Meaning of "enter" in sec. 286, Criminal Code Ordinance.

"Enter" upon property in sec. 286, Criminal Code Ordinance, must be given the ordinary English interpretation, *i. e.* establishing physical contact with the property.

(*M. L.*)

FOR APPELLANT: Michaelowsky.

FOR RESPONDENT: Henigman.

JUDGMENT.

The whole of this appeal turns upon the interpretation which is to be given to section 286 of the Criminal Code Ordinance. The facts may be taken as admitted.

The Appellant knocked continuously on the door of the Respondent, — we can assume with the intention to intimidate, insult or annoy, within the meaning of the section. We have had a long and learned argument as to the meaning of the word "enter" from the point of view of the common law of trespass. It is a fact that the word "enter" has been given an artificial meaning for the purpose of various statutes; for instance, in the case of entering a house for the purpose of burglary it has a more restrictive meaning than the ordinary English sense of the word. We think that possibly in this case there has been too great a tendency to probe the artificial meaning of the word "enter", and too little attention has been paid to the actual wording of the section itself.

Now section 286 in itself creates an offence. The words used are not only "enter into" but "enter upon property". We would emphasize that the section refers not only to the entry into a room or into a house but an entry on all property generally, which might belong to the person

aggrieved. As no specialised meaning has been assigned to the word "enter" in section 286, I take it that the interpretation to be given to it must be the ordinary English interpretation of the word, which means establishing physical contact with the property. This being so, I find it impossible to imagine how a person could knock on this door with his hands, unless he had established physical contact with it.

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

Delivered this 24th day of January, 1945.

Chief Justice.

HIGH COURT No. 1/45.

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

BEFORE: Plunkett, A/J. and Frumkin, J.

IN THE APPEAL OF:—

Hassan Atallah Hassan & an. PETITIONERS.

v.

The Magistrate, Jerusalem & an. RESPONDENTS.

Trial on information — No refusal by police to prosecute — T. U. I. Ord., sec. 5, M. C. J. O., sec. 17; M. C. P. R. 242.

Return to an order *nisi* calling upon the first Respondent to show cause why his decision in Criminal Case No. 12060/44 of the Magistrate's Court, Jerusalem, should not be set aside and why he should not proceed with the preliminary enquiry in that case; order made absolute:—

Once a Magistrate issues a summons under sec. 5 of the Trial Upon Information Ordinance, the inquiry must proceed and the complainant may conduct the proceedings. Sec. 17 of the Magistrates' Courts Jurisdiction Ord. has no application in such cases.

(*A. M. A.*)

ANNOTATIONS: Petitioners had filed a complaint against Respondent No. 2 charging him with a felony, namely an offence against sec. 276(b)(c) & (e) of the C. C. O.

(*H. K.*)

FOR PETITIONERS: Ghussein and Michaeli.

FOR RESPONDENTS: No. 2 — Elia.

JUDGMENT.

Plunkett, A. J.: This is a return to an order *nisi* issued on the 12th of January, 1945, directed to the first Respondent, the Examining Magistrate of Jerusalem, calling upon him to show cause why the decision of 13th December, 1944, in Criminal Case No. 12060/44 should not be set aside.

The Magistrate held that the Petitioner was premature in bringing his complaint before the Examining Magistrate under section 5 of the Criminal Procedure (Trial Upon Information) Ordinance and that he should have first of all brought his complaint to the Police who may refuse to prosecute *vide* section 17 of the Magistrates' Courts Jurisdiction Ordinance, 1939, and then if they came to him he could proceed under section 5 of the Criminal Procedure (Trial Upon Information) Ordinance. The Respondent submits that the Magistrate's decision is correct and that section 17 of the Magistrates' Courts Jurisdiction Ordinance should be read in conjunction with Rule 242 of the Magistrates' Courts Procedure Rules, 1940, and further that section 5 of the Law of Procedure (Amendment) Ordinance is also subject to the provisions of section 17 of the Magistrates' Courts Jurisdiction Ordinance and therefore the complaint should first be made to the Police. The Applicant complains that the Magistrate ought to have proceeded with the preliminary enquiry under section 5 of the Criminal Procedure (Trial Upon Information) Ordinance, and further that section 5 of the Law of Procedure (Amendment) Ordinance indicates that the complainant may himself or by his advocate prosecute any proceedings before a Magistrate, in connection with making his complaint under the provisions of section 5 of the Criminal Procedure (Trial Upon Information) Ordinance.

We do not agree with the proposition put forward by the Respondent; neither do we consider that it was necessary for the public prosecutor to be represented in a matter of this kind before the Examining Magistrate. We hold that the provisions of section 5 of the Criminal Procedure (Trial Upon Information) Ordinance are clear and the Examining Magistrate should have gone into the complaint, and either committed or refused to commit.

The order *nisi* is therefore made absolute with LP. 10 fixed (inclusive) costs.

British Puisne Judge.

Frumkin, J.: I agree that the order be made absolute. The complaint lodged is clearly triable upon information, and obviously section 5 of the Criminal Procedure (Trial Upon Information) Ordinance ap-

plies. The Magistrate might have, upon considering the complaint, refused to issue a summons, leaving it for the complainant to take such steps as advised. The Magistrate, however, issued the summons. He could not thereafter rely on section 17 of the Magistrates' Courts Jurisdiction Ordinance, which has no application to offences triable upon information.

Given this 23rd day of February, 1945.

Puisne Judge.

CRIMINAL APPEAL No. 1/45.

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

BEFORE: FitzGerald, C. J., Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Nimer Hassan Abu Samra. APPELLANT.

v.

The Attorney General. RESPONDENT.

Conviction and sentence upon information not including all charges on which Accused was committed — Question of retroactivity or otherwise of Amendment of Criminal Procedure (Trial Upon Information) Ordinance.

1. a) In certain circumstances mere amendments of procedure have retroactive effect.

b) Amendment of Criminal Procedure (Trial Upon Information) Ordinance enabling attorney General or his representative to include in information any charge or charges arising out of the evidence taken at commitment proceedings is more than amendment of procedure and, as it confers on Attorney General a right which was not previously vested in him, cannot have retroactive effect.

2. All proceedings based on an Information filed prior to amendment of Criminal Procedure (Trial Upon Information) Ordinance and not including all charges on which Accused was committed for trial a mere nullity.

(*M. L.*)

FOLLOWED: CR. A. 24/44 (11, P. L. R. 201; 1944, A. L. R. 361).

REFERRED TO: Case of William Crane, 15 CR. A. R. 26.

ANNOTATIONS:

1. On retroactivity of laws of procedure see C. A. 471/44 (*ante*, p. 235) and

annotations. See also C. A. 434/44 (*ante*, p. 178; 12, P. L. R. 130) and C. A. 78/44 (1944, A. L. R. 623; 11, P. L. R. 528).

2. As to point 2 see case followed and annotations in A. L. R.

(*A. G.*)

FOR APPELLANT: Ghussein.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

In this case counsel for the Accused has taken the preliminary objection that following the decision in Henry Hanna Mansour *v.* The Attorney General in Criminal Appeal No. 24 of 1944, the information was defective and the whole proceedings were a nullity. It is not denied by the Crown that if in fact the decision in the case I have quoted does apply to this case the conviction cannot stand, because the principle involved in both cases on this issue is clearly the same. The facts are that the Accused was committed by the Committing Magistrate on four charges, *viz.*:—

(1) Entering a dwelling house with intent to commit the offence of theft contrary to section 296 of the Criminal Code Ordinance.
(2) Attempted murder contrary to section 222(a).
(3) Possession of firearms of military value, and
(4) possession of ammunition without a licence contrary to section 36(2)(a) of the Firearms Ordinance, 1922.

(It is admitted that there was an error in quoting the particular paragraphs of the section but this does not affect the issue). The information before the District Court was framed in respect of the first three charges only. At this stage we mention that we find it difficult to follow the reasoning of the District Court which led them to the conclusion that there was no commitment by the Magistrate on the fourth charge. We have had the original commitment order before us and there is no doubt in our minds that the Magistrate committed on this count equally with the other three. The decision in Criminal Appeal No. 24/44 leaves no room for doubt. It will suffice if I quote the relevant part of the judgment which reads:—

> "For the foregoing reasons, we hold that the information was bad and that the proceedings which followed thereon were a nullity".

The foregoing reasons being that an information against the Accused was filed by the Government Advocate in respect of only one of the several charges on which he was committed. Following the decision in Criminal Appeal No. 24/44, the Criminal Procedure (Trial Upon Information) Ordinance was amended to enable the Attorney General or his representative to file an information against an accused person in the Court of Criminal Assize or in the District Court, as the case

may be, and to include in that information any charge or charges arising out of the evidence taken at the proceedings for commitment. If this law were in force it follows that there could be no objection to the information as it was filed in this case.

Mr. Salant has argued that as this amendment was an amendment dealing with procedure it had retroactive effect and consequently covered this information. It is true that in certain circumstances mere amendments of procedure can have retroactive effect, but in this case it is unnecessary to consider whether the requisite circumstances do exist because we are of opinion that the amendment was something more than amendment of procedure. Certainly it did in part regulate the procedure of the Court, but it also conferred a right on the Attorney General's representative which had not previously been invested in him and in these circumstances we conclude that it could not have had retroactive effect. It follows that the decision in Criminal Appeal 24/44 applies to this case. This being so, it is impossible to avoid the conclusion that the whole trial was a mere nullity. We must treat the verdict and sentence as a nullity and the Accused must be discharged. Following the procedure in the case of William Crane, (Criminal Appeal Reports, Vol. 15 p. 26), the formal order of the Court will be that the verdict and the sentence are expunged from the record and the Accused is discharged.

Delivered this 31st day of January, 1945.

Chief Justice.

HIGH COURT No. 135/44.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPLICATION OF :—

Sheikh Subhi Khaizaran. PETITIONER.

v.

Supreme Moslem Council, Jerusalem, and members thereof. RESPONDENTS.

Supreme Moslem Council — Dismissal of qadi — Procedure in Ottoman Law of 19 Jamad el awwal, 1331 — Proceedings contrary to natural justice — S. M. C. Sharia Regulations 8(1)((*f*).

Return to an order *nisi* calling upon Respondents to show cause why they should not be ordered to cancel their decision dismissing the Petitioner from his post as *Qadi* of the *Sharia* Court at Gaza, order *nisi* discharged:—

> The Supreme Moslem Council may dismiss a *qadi* and the only requirement of procedure to be complied with is that a notice must be sent to Govern ment, stating the reasons for the dismissal.

(*A. M. A.*)

ANNOTATIONS :

1. Note, however, that in H. C. 48/30 (1, P. L. R. 501; 5, C. of J. 1693) and in H. C. 61/31 (5, C. of J. 1701) similar petitions were successful on the grounds of non-compliance with Reg. 53 of the Ottoman Law relating to the Appointment of Religious Officers; the Court held in both these cases that Reg. 53 was not superseded by Reg. 8(1)(f) of the Supreme Moslem Council Regulations.

2. See also H. C. 74/42 (9, P. L. R. 540; 1942, S. C. J. 555; 12, Ct. L. R. 221) where it was held that the proper remedy in such cases is an action in the appropriate Court for damages for wrongful dismissal.

(*H. K.*)

FOR PETITIONER: Cattan.

FOR RESPONDENT: The Solicitor General — (Griffin).

ORDER.

This is the return to an order ***nisi.*** The Petitioner was *Qadi* of the Moslem *Sharia* Courts until 1943 when he received a notice from the Supreme Moslem Council stating that his appointment had been terminated but he was awarded a pension in accordance with the provisions of the Pensions Ordinance. At the request of the Petitioner Sheikh Yousef Eff. Tahboub and Sheikh Muhyiddin Eff. Abdul Shafi, members of the Supreme Moslem Council, were called for cross-examination. In my opinion the whole case of the Petitioner can be conveniently and indeed briefly considered under the two headings which appear in paragraph 11 of the petition. Those are (1) that the Supreme Moslem Council had no power to dismiss a *Qadi* or if they had such power, that they did not follow the procedure set out in the Ottoman Law of the 19 *Jamad el Awwal* 1331; (2) that no inquiry was ever made into the alleged conduct of the Petitioner; that he was never given an opportunity to defend himself and that in consequence the decision to dismiss him was a denial of justice.

Mr. Cattan, who appeared for the Petitioner, practically placed the whole of his case under (1) on the Ottoman Law referred to. The Solicitor General, who appeared for the Supreme Moslem Council, relied on the Supreme Moslem Council *Sharia* Regulations published in the *Gazette* of 20th December, 1921, particularly on 8(1)(f) of these regulations, which reads as follows:—

> "To dismiss all *Waqf* and *Sharia* officials and all officials employed in any Moslem Institutions maintained from *Waqf* Funds. When any official is dismissed, notice thereof shall be sent to the Government with the reasons for dismissal".

In the first place, I find it necessary to inquire into the source of and the reason for these regulations. It will be borne in mind that prior to the British conquest, the Moslem Religion was the State Religion of Palestine. The Sultan was not only the Administrative Head of the Empire, but he was also the Religious Head in his capacity as the *Caliph*. It is quite clear that at the advent of British Administration, the whole machinery set up under the Ottoman Empire for the administration of Moslem Religious Courts and Moslem *Awqafs* was no longer applicable. It was for these reasons that in 1920 the Council of *Muftis, Ulamas* and Moslem Notables were summoned for the purpose of consultation and submitting of proposals for the constitution of a Supreme Moslem *Sharia* Council, which in future would be charged with the administration of Moslem *Awqafs* and *Sharia* affairs. As a result of those deliberations, the regulations dated 20th December, 1921, were promulgated with statutory authority. It is my opinion that these regulations superseded the old laws of the Ottoman Empire in so far that the subject matters with which they purported to deal were concerned. 8(1) of these regulations declared, *inter alia,* that it should be the duty of the Supreme Moslem Council to administer and control Moslem *Awqaf*. If this administration is to be effective it appears to me that it must include the right to appoint and terminate the appointment of all officials, servants, *etc.,* of the Supreme Moslem Council. There is, moreover, a specific provision in 8(1)(f) authorising the Moslem Council to dismiss all *Awqaf* and *Sharia* officials. It has been argued that this power was confined to officials maintained from *Waqf* funds. I am unable to accept this contention. It seems to me that the limitation that such officials should be maintained from *Waqf* funds applies only to officials of Moslem Institutes who themselves are maintained from *Waqf* funds. Once the *Sharia* Council has been given power to appoint an official, it has the power to dismiss him.

I turn now to consider the question of the procedure to be followed. In so far as the regulations are concerned, the only procedure obligatory on the Council is to send a notice to the Government stating the reasons for the dismissal. This, admittedly, had been done. I am of opinion, therefore, that the Council had the power to dismiss this *Qadi,* and that they complied with the statutory procedure specifically imposed upon them by the regulations.

There remains for consideration the issue raised in (2). It must,

I think, be conceded that the Supreme Moslem Council dealt with this *Qadi* in a peremptory manner. Once again this Court is compelled to repeat that it is a matter for regret that the Council (in dealing with their officials) do not see fit to adopt the procedure set out in Colonial Regulations for terminating the appointments of public servants. However, failure on the part of the Council to follow that procedure would not entitle the Petitioner to the remedy he seeks, unless this Court were satisfied that he had been denied justice. We are not so satisfied. It is quite clear from the affidavits that, in the opinion of the Council, this *Qadi's* work has been unsatisfactory for years. He had been warned in 1931; as a result of a report furnished by an Inspector on the working of his Court, he had again been warned in 1941, and his increment had been stopped, although it is true it was later returned to him. He was well aware of the complaints the Supreme Moslem Council had against him. He had ample opportunity over a period of years to comply with the wishes and directions of the Council, but he did not do so. We cannot avoid the conclusion that he was one of those men who are wedded to their ways and are unable to change. At a formal meeting of the Council his case was fully discussed, and after mature deliberation the Council decided to dismiss him.

In these circumstances, we cannot say that there was such a denial of justice or disregard of form as would entitle him to the relief he seeks in this Court. The rule *nisi* must be discharged with inclusive costs of LP. 10.

Given this 12th day of February, 1945.

Chief Justice.

HIGH COURT No. 144/44.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF :—

Salim Sam'an Ziadeh. — PETITIONER.

v.

1. Yusef Mohammad el Khatib,
2. Chief Execution Officer Ramallah. — RESPONDENTS.

High Court practice — Setting aside ex parte order — H. C. 40/44,

Courts Ord., sec. 7 — Failure to file affidavit in reply, H. C. Rules, r. 6.

Return to an order *nisi* on a petition to set aside the orders *nisi* and absolute in H. C. 110/44; order *nisi* discharged:—

Application may be made to the High Court to set aside an *ex parte* order. But the application will not be entertained unless the applicant has filed an affidavit in reply following upon the rule *nisi*.

(*A. M. A.*)

APPROVED: H. C. 40/44 (11, P. L. R. 226; 1944, A. L. R. 310).

ANNOTATIONS:

1. See H. C. 40/44 (*supra*).

2. On failure to file in time the affidavit in reply see H. C. 13/44 (11, P. L. R. 83; 1944, A. L. R. 155) and note 1 in A. L. R.

(*H. K.*)

FOR PETITIONER: G. Salah.

FOR RESPONDENTS: No. 1 — Sa'adeh.

ORDER.

This is a return to an order *nisi* dated 3.1.45. The Petitioner is asking to set aside an order *nisi*, dated 12.9.44, and an order absolute, dated 18.10.44, in High Court No. 110/44. A preliminary objection has been taken by Ibrahim Eff. Sa'adeh, advocate, for Respondent No. 1, that section 7 of the Courts Ordinance (No. 31 of 1940) does not apply because the Petitioner has not approached the 2nd Respondent calling upon him to do anything.

George Eff. Salah, advocate for the Petitioner, replies that his application is not under section 7 of the Courts Ordinance and he relies on H. C. 40/44 where it was held that there was nothing in law to prevent the High Court from setting aside an order made by it in the absence of the Respondent, and that if the High Court Rules 1937 are defective in this respect then the High Court must fall back on the English practice under Article 46 of the Palestine Order-in-Council.

I find that that objection fails and that the application is one which can be made.

A further objection has been taken by Ibrahim Eff. Sa'adeh on the ground that the order *nisi* dated 18.10.44 ordered the Respondent in that case (the Applicant in the present case) to file his reply within 8 days of service, and this he did not do. George Eff. Salah admits that no affidavit in reply was filed at all. Ibrahim Eff. submits, therefore, that if the Petitioner had appeared in H. C. 110/44 he would not have been entitled to be heard in opposition to the petition. So the position is that not only did the Petitioner fail to appear on 18.10.44, when the

return to the order *nisi* was heard, but he failed to take the step necessary to enable him to be heard in opposition. In the circumstances I think that the objection succeeds. Rule 6 of the High Court Rules 1937 gives clear directions as to what a respondent must do if he wishes to be heard in opposition. I also observe that the order absolute was made on 18.10.44, and the present application was not filed till 20.12.44, after a delay of two months.

The order *nisi* dated 3.1.45 must be set aside, and the first Respondent must have fixed costs in the sum of LP. 10 (ten pounds).

Given this 14th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 433/44.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

The Hadera Local Council. APPELLANT.

v.

The Palestine Jewish Colonization Association. RESPONDENTS.

Summary procedure — C. P. R. 213, 250 — Application to set aside ex parte order made after refusal of leave to defend — C. A. 45/42 Jurisdiction of single Judge Courts Ord., sec. 12(3)(a) — "Good cause" (C. P. R.) 250 Noscitur a sociis — C. A. 78/42 — When leave to defend should be granted.

Appeal from the order of the District Court Haifa, dated 15th October, 1944, in Civil Case No. 224/43 (Motion No. 52/44), dismissed:—

1. It is for the Court or Judge who made an *ex parte* order to decide whether it should be set aside under rule 213.

2. A single Palestinian Judge may enter judgment in favour of the Plaintiff under Summary Procedure after refusing leave to defend — this does not constitute a trial.

3. Rule 250 has no application if leave to defend has already been refused.

4. Dismission of the principles underlying the grant of leave to defend.

(A. M. A.)

REFERED TO: C. A. 187/44 (11, P. L. R. 386; 1944, A. L. R. 442).

FOLLOWED: C. A. 45/42 (9, P. L. R. 289; 1942, S. C. J. 287; 11, Ct. L. R. 201).

APPROVED: C. A. 78/42 (9, P. L. R. 376; 1942, S. C. J. 383; 12, Ct. L. R. 169).

ANNOTATIONS:

1. See the previous proceedings (C. A. 187/44 — *supra*) and the note thereto.

2. On rule 213 of the C. P. R. see the remarks of Edwards, J., in C. A. 246/42 (9, P. L. R. 799; 1942, S. C. J. 865).

3. In addition to the cases cited in the judgment see C. A. 51/40 (7, P. L. R. 157; 1940, S. C. J. 93; 7, Ct. L. R. 122), C. A. 218/41 (8, P. L. R. 544; 1941, S. C. J. 533; 10, Ct. L. R. 162) and C. A. 158/42 (9, P. L. R. 690; 1942, S. C. J. 958).

(*H. K.*)

FOR APPELLANT: Goitein and Harari.

FOR RESPONDENTS: Eliash, Scharf and Ruthberg.

JUDGMENT.

This is an appeal from the Order, dated 15.10.44, of the District Court of Haifa, in Motion No. 52/44 arising out of Civil Case No. 224/43, whereby the District Court refused to set aside what has been referred to as the second order (*i. e.* a judgment to pay LP. 6164.979 mils) given by His Honour Judge Baradey on 6.1.44.

In Civil Case No. 224/43, which was brought by way of summary procedure, the Hadera Council, who are the present Appellants, applied for leave to appear and defend the action, which had been filed on 5.11.43. The application was heard by Judge Baradey, who dismissed it on 6.1.44, and on the same day entered judgment for the present Respondents for the sum of LP. 6164.979 mils, with interest at 9% from 19.10.37 until 5.11.43, and at 9% from the date of action till final settlement. That judgment was reduced to the form of a decree which was served on the Appellants on 16.1.44.

On 19.1.44, the Appellants filed in the District Court an application for leave to appeal against the first Order of Judge Baradey, and this was refused on 7.5.44. On 17.5.44 an application for leave to appeal from Judge Baradey's first Order was filed in the Supreme Court. The Supreme Court held, on 21.7.44 in Civil Appeal No. 187/44 (11, P. L. R. 386), that the proper course for a dissatisfied party, where leave to appear and defend has been refused and where the resulting decree has been served, is to appeal against that decree. The application for leave to appeal was accordingly dismissed.

On 1.2.44, the Appellants had filed in the District Court an application to set aside the judgment dated 6.1.44, and alternatively they asked that the execution of the said judgment be stayed. In that application the Appellants did not specify the rule under which the ap-

plication was being made, but Mr. Goitein who represents the Appellants in these proceedings relies both on Rules 250 and 213 of the Civil Procedure Rules.

So far as Rule 213 is concerned I find that for two reasons it has no application. In the first place, it was held in C. A. 45/42 (9 P. L. R. 289, see top of page 291) that the question whether a decree or order given *ex parte* should be set aside or not under Rule 213 of the Civil Procedure Rules 1938 is a matter for the Court or Judge who gave the order. The application in this instance was not to Judge Baradey who gave the order but to the Court, and indeed exception was taken to Judge Baradey's sitting as a member of the Court.

In the second place Rule 250 and not 213 is the appropriate Rule.

Mr. Goitein has submitted that Judge Baradey had no jurisdiction to enter judgment because the Order-in-Council 1922, and the Courts Ordinance, do not enable a single Palestinian Judge to try a case. He has referred to section 12(3),(a) of the Courts Ordinance, No. 31/40. That is true, but the answer is that this was not a trial. Indeed it was the denial of a trial. Judge Baradey decided that no trial was necessary as the Appellants had no defence. In my judgment Judge Baradey had jurisdiction to enter judgment forthwith.

It has been submitted by Mr. Eliash for the Respondent that Rule 250 only applies where there has been no actual hearing upon the issue whether leave to appear and defend should be given. This point is really the crux of the appeal, and having given it close consideration I have come to the conclusion that the submission is correct, and that the words "good cause" must be interpreted in the light of the words immediately preceding. I refer to the words "if satisfied that the service of the summons was not effective". I do not think that the legislature intended to empower the Court to sit as Court of Appeal against its own order (or the order of one judge) after an actual hearing but only where there has been no hearing. Any other construction would produce this result that the Court could be asked to revise its own order again and again, assuming that the applications could be made within the period of one month. I am unable to believe that there was any such intention. In my judgment where there has been a hearing then the remedy is by way of an appeal to the Supreme Court.

In the result I find that this appeal fails. The result is unfortunate for the Appellant, because in my view this was a case in which leave to defend ought to have been given. In view of my finding I need not now enlarge upon this point, but I would quote from the headnote in C. A. 78/42 (9 P. L. R. 376) which reads as follows:—

"In summary procedure proceedings, leave to defend should be given

> if a defendant shows that he has a fair case for defence, or a fair probability of a defence, or a plausible suggestion of a defence, or if he shows facts which might constitute a defence or which raise a plausible dispute".

It cannot possibly be said that there was no plausible suggestion of a defence in this case. The Summary Procedure Rules are not designed to enable the Court to give a summary judgment by a process of prognosis. The Judge or Court cannot dismiss the application for leave to defend merely because he or it feels convinced that the Defendant is likely to lose the case.

The only other point about which I wish to say something is in regard to the question whether a Judge who has already dealt with a matter should sit upon a hearing of an application in the nature of an appeal against his order, if one of the parties objects to his so doing. It goes without saying that a Judge should not sit unless he feels quite sure that he can take an unbiassed view of the matter. This is particularly necessary where the Court to which the application is made is composed of only one or two Judges. The reason is obvious, for if the Judge who has already dealt with the matter adheres to his original view the application is bound to be dismissed. But there is a further point, and it is an important one. It is important that no party should have cause for leaving the Court with a feeling of injustice. Although the Judge himself may be sure that he can take an unbiassed view, and that he will, if necessary, be prepared to reverse his earlier decision, the party may not be equally convinced. Of course cases may occur in which an objection is taken not at all in good faith but merely capriciously, and in such cases the Judge would be fully justified in overruling it.

In the result this appeal is dismissed with fixed costs in the sum of LP. 15 (fifteen pounds).

Delivered this 13th day of April, 1945, in the presence of Mr. Harari, advocate, for Appellants and in the presence of Mr. Podhortzer, advocate, for Respondents.

British Puisne Judge.

CIVIL APPEAL No. 401/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hanna Kuperstock & an. APPELLANTS.

v.

Raji El Issa & an. RESPONDENTS.

Summary procedure — Appeal from order refusing leave to defend, C. P. R. rr. 2, 242, 244, 317 — Claim for rent falls under the procedure, C. P. R. 241, 243 — Constitution of Courts, P. O. in C., sec. 12(3)(a) Courts Ord., C. A. 433/44, C. P. R. 250.

Appeal from the judgment of the District Court of Haifa, dated 25.7.1944 in Civil Case No. 124/44, Motion No. 293/44, allowed:—

1. Once judgment has been entered after refusal of leave to defend, an appeal lies without leave and includes the refusal to defend.

2. A claim for rent may be made under Summary Procedure.

3. Rule 250 applies only when there has been no actual hearing on the issue of grant of leave to defend.

4. A Palestinian Judge sitting alone may enter judgment.

(*A. M. A.*)

FOLLOWED: C. A. 78/42 (9, P. L. R. 376; 1942, S. C. J. 383; 12, Ct. L. R. 169); C. A. 433/44 (*ante*, p. 412).

ANNOTATIONS:

1. For previous proceedings between the parties see C. A. 341/43 (1944, A. L. R. 545).

2. On the first point *cf.* C. A. 187/44 (11, P. L. R. 386; 1944, A. L. R. 442).

(*H. K.*)

FOR APPELLANTS: Eliash and Scharf.

FOR RESPONDENTS: A. Levin and Geiger.

JUDGMENT.

Edwards, J.: This is an appeal from an order made by a Palestinian Judge of the District Court of Haifa, refusing to give leave to defend an action brought under summary procedure, the learned Judge having apparently acted under Rule 244 of the Civil Procedure Rules, 1938. At the hearing of the appeal before us Mr. Levin, advocate, for the Respondents, took the preliminary objection that no appeal lay. In my view, however, having regard to the fact that the word "decree" is the last word to be found in Rule 242, one must look at the definition of "decree" in Rule 2 and then look at the word "decree" in line 2 of Rule 317. The Appellant has in effect been ordered to pay the sum of LP. 487.958 and there can be no doubt that the effect of the decree was conclusively to determine the rights of the parties within the meaning of the definition of a "decree" in Rule 2. The preliminary objection fails.

I now turn to the grounds of appeal, the first of which is that the

claim being for rent did not come within any one of (a), (b), and (c) of Rule 241. Having regard, however, to the wording of Rule 241 and to the appearance in Rule 243 of the word "lease", I think that this ground of appeal fails.

The next ground of appeal is that the particular circumstances of this case did not render it a fitting one to be tried under Part XXI of the Civil Procedure Rules. I think that there is nothing in this argument, which fails.

The third ground of appeal is that a single Palestinian Judge of a District Court could not enter judgment because the Palestine Order-in-Council 1922 and the Courts Ordinance 1940 make no provision for the trial of an action by a single Palestinian Judge, (see section 12(3) (a) Courts Ordinance, 1940). This matter, however, was decided against Dr. Eliash's argument by this Court, differently constituted, in Civil Appeal 433/44 as recently as the 13th April, 1945 and I think that we are bound by that decision. This Court in Civil Appeal 433/44 held that Rule 250 applies only where there has been no actual hearing upon the issue whether leave to appear and defend should be given.

The last and substantial ground of appeal is that in the circumstances of this case leave to appear and defend should have been granted. The question of course arises whether there can be an appeal against a refusal to appear and defend. As I have held that an appeal lies from a decree issued consequent on an order refusing to grant leave to appear and defend, I think that the Appellant is entitled to ask this Court to examine every act of the judge leading up to the decree. I accordingly consider that the Appellant is entitled now to ask this Court to examine, and if need be reverse, the setting aside of the refusal. The sole question therefore remaining for decision is whether in the circumstances of this case the learned judge was justified in refusing to grant leave to appear and defend the action. It is, for obvious reasons, undesirable that this Court should deal with the facts and merits of the claim. Suffice it to say that, while this Court is always reluctant to interfere with the discretion of a Judge of first instance, yet having regard to what we have been told at the Bar and having regard to the complicated documents and history of this matter, I think that this is peculiarly a case in which the words of this Court in Civil Appeal No. 78/42 (Vol. 9 P. L. R. 376) apply:—

> "In summary procedure proceedings, leave to defend should be given if a defendant shows that he has a fair case for defence, or a fair probability of a defence, or if he shows facts which might constitute a defence or which raise a plausible dispute. The grounds, therefore, on which leave to defend are given, are obviously very wide ones".

For the foregoing reasons I think that the appeal must be allowed and the order refusing leave to defend set aside, and the case remitted for trial on the merits. Respondent must pay to Appellants the costs of this appeal to be taxed on the lower scale and to include an advocate's attendance fee at the hearing of LP. 15.

Delivered this 2nd day of May, 1945, in the presence of Mrs. Rubinstein for Appellants, and in the presence of Mr. A. Levin for Respondents.

British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

HIGH COURT No. 14/45.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPLICATION OF:—

Shlomo Sheinfeld. PETITIONER.

v.

Officer Commanding No. 3 Court Martial and Holding Centre 21 Area, M. E. F. RESPONDENT.

Court martial — Power of King in Parliament to legislate for Palestine — Army Act, secs. 95(2), 176(9), 187(A), *Covenant of the League of Nations, Art.* 22, *Mandate, Art.* 1, *Macleod v. A. G. of N. S. W., R. v. Ketter.*

Return to an order *nisi* calling upon Respondent to produce the body of the Petitioner and to show cause why Petitioner should not be released from detention; order *nisi* discharged:—

The Imperial Parliament may enact legislation applying to Palestine.

(*A. M. A.*)

REFERRED TO: Macleod *v.* A. G. for New South Wales, 1891, A. C. 455, 60 L. J. (P. C.) 55, 65 L. T. 321; R. *v.* Ketter, 1939, 1 All E. R. 729, (1940) 1 K. B. 78, 108 L. J. (K. B.) 345, 160 L. T. 306, 55 T. L. R. 449, P. P. 17.3.39.

ANNOTATIONS: On the rule against extra-territorial legislation see Halsbury, Vol. 11, pp. 84 *et seq.*, para. 147; see also Army Act, sec. 187(c) and *cf.* CR. A. 63/39 (7, P. L. R. 1; 1940, S. C. J. 5; 7, Ct. L. R. 4).

(*H. K.*)

FOR PETITIONER: Levitsky, S. T. Cohen and Brandhendler.

FOR RESPONDENT: The Solicitor General — (Griffffin).

ORDER.

At the return to this writ, which is in the nature of *habeas corpus*, only one substantial matter has been argued on behalf of the Petitioner. It does not seem to be denied that, subject to the matters with which we shall deal later, the Petitioner is a person who comes under the category stated in section 176, sub-section 9 of the Army Act. He has signed an agreement, in paragraph 17 of which he admits that he understands that, when employed by, or in the service of, or accompanying, His Majesty's Military Forces whilst on active service, he will be subject to military law under the Army Act. It is true, as Mr. Levitsky has stated, that mere agreement cannot in itself confer jurisdiction on a Court — in this case a Court Martial. The Petitioner is serving a sentence passed upon him by a Court Martial.

The first ground of complaint by the Petitioner is that Imperial Acts of Parliament cannot be applied to the mandated territory of Palestine by an Act of Parliament itself, but that an Order-in-Council or a local Ordinance is necessary before such Imperial Act can be applied. It is said that, in the vast majority of cases in which it has been considered desirable to apply Imperial Acts of Parliament to Palestine, this has been done by Order-in-Council. We see no reason for holding that the King in Parliament has not got the power to legislate. Section 187(A) of the Army Act states:—

> "This Act shall apply (a) in relation to any territory in respect of which a mandate on behalf of the League of Nations is being exercised by His Majesty's Government in a like manner as it applies to a British protectorate".

Had section 187(A) not appeared in the Army Act it would, no doubt, have been necessary to promulgate an Order-in-Council or enact a local Ordinance before the Act could have effect here. The learned Solicitor General reminded us of the fact that Article 1 of the Mandate for Palestine gives His Britannic Majesty full powers of legislation. He also quoted Article 22 of the Covenant of the League of Nations, and we agree that nowhere do instructions or directions seem to have been given to His Majesty as to how he should exercise that legislation. We therefore think that this objection fails.

Mr. Levitsky, for the Petitioner, says that while he admits that the British Parliament has power to legislate for all sorts and conditions of people in Great Britain and possibly also for British subjects in mandated territories, the position is different with regard to foreigners in the mandated territory of Palestine. He says that, so far as Palestinians

in Palestine are concerned, their position is assimilated to that of natives of a protectorate and he goes on to say that such natives are foreigners and a protectorate is a foreign country from which country the operation of Imperial legislation is excluded. He has quoted several cases, such as the cases of Macleod *v.* the Attorney General, New South Wales (1891) A. C. 455, and Rex *v.* Ketter, All England Law Reports (1939) Vol. 1, p. 729.

It may be perfectly true that Palestinians are not British subjects, and it may also be perfectly true that the Judicial Committee of the Privy Council has laid down certain propositions in cases like the Macleod case. But, of course, the position has been very much changed, at any rate, since the Mandate with regard to what are now known as mandated territories.

Mr. Levitsky further argues that section 187(A) is limited in the sense that it can only be applied to Palestine in the same manner as that in which the Army Act is applied in relation to a British protectorate; and he points to section 95, sub-section 2 which, however, deals with the subject of enlistment. The argument then proceeds that Palestine is not a part of the British Empire, and Palestinians are foreigners. If the Army Act applies universally to people in places outside the United Kingdom then why was section 95(2) necessary? The contention is that unless a person enlists (and the Petitioner has not enlisted) the Act does not apply to foreigners. The answer to that seems to be that section 95 deals with enlistment. We would also point out that it is clear that the Army Act does not apply to everybody. It only applies to such persons as come within its terms. It is not contended that the Petitioner comes within section 95, but he does come within section 176(9). Mr. Levitsky also argues that, while a British subject cannot question a United Kingdom Act even while he is out of Britain, nevertheless a foreigner who is not in Britain can so question it. In this connection he refers to Craies on Statute Law (4th Edition) p. 419, para. 3, and he argues that, if no Order-in-Council has been promulgated, the Army Act does not apply.

We think that we sufficiently dealt with this matter when we ruled that the King in Parliament could properly pass section 187(A). We would also add that section 187(A) is in no way limited. We mean that it is not expressed as applying only to certain classes or races or persons. Section 187(A) is of as much effect as section 95(2); so, also, has section 176(9) as much effect as section 95(2); but, in any event, we think that section 95(2) merely dealt with enlisted persons. It is well-known that the Army Act is renewed annually by what is

known as the Army and Air Force (Annual) Act of any particular year. Mr. Levitsky suggests the fact that there is need for such an annual act to be passed is a point in his favour, because otherwise the original act in force when 187 was passed alone would apply to Palestine. We think that this is fallacious because, once the annual act is applied in any one year, it must automatically carry with it section 187(A).

For all these reasons the order *nisi* is discharged with fixed costs of LP. 10.

Given this 16th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 467/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Sheikh Abdul Kader el Muzaffar. APPELLANT.

v.

Hilmi Atallah & 3 ors. RESPONDENTS.

Claim of eviction — Allegation of subletting in breach of contract.

Appeal from the judgment of the District Court of Jaffa, sitting in its appellate capacity, dated the 28th October, 1944, in Civil Appeal No. 90/44, dismissed:—

> Mere allowing other persons to work in the business premises does not necessarily involve breach of term of agreement precluding any lease or sub-lease without lessor's consent. Court must scrutinize whether there has or has not been any sub-lease or assignment of lease.
>
> (*M. L.*)

ANNOTATIONS:

On question whether subletting has been proved and whether it was lawful see C. A. 178/44 (1945, A. L. R. 172) and C. A. 133/44 (1944, A. L. R. 646; 11, P. L. R. 520) and annotations in A. L. R. See Woodfall on Landlord & Tenant 24th Ed. p. 585 *et seq.* and Redman on Landlord & Tenant 9th Edition, p. 479 *et seq.* and 31 Digest, p. 370 *et seq.*

(*A. G.*)

FOR APPELLANT: H. Atalla.

FOR RESPONDENTS: Elia.

JUDGMENT.

We do not require to call upon the Respondents.

This is an appeal from a judgment of the District Court of Jaffa, in its appellate capacity, setting aside a judgment of one of the Magistrates of Jaffa, who had ordered the eviction of the present Respondents from a certain shop. The District Court had remitted the case for hearing and giving a fresh judgment.

The facts, shortly stated, are that the Appellant let a certain shop to two individuals (the first two Respondents). It is said that he let the premises to them personally, although it would seem that he knew that they were going to carry on the business of grocers. The premises leased had a board on which appeared the words "Family Grocery", but the Magistrate found as a fact that the Plaintiff did not know that the words "Family Grocery" meant a partnership. Subsequently, the first Respondent appears to have resigned from the partnership, and the third and fourth Respondents were assumed as partners in his place. It is complained that this was a breach of the tenancy agreement, which precluded any lease or sub-lease of the premises without the consent of the lessor. It seems to us, however, that Mr. Atallah and Mr. Georgiades continued to be the only tenants and remained responsible for the rent. It does not appear that the mere allowing other persons to work in the shop necessarily involved a breach of the tenancy agreement.

We accordingly do not feel disposed to disturb the judgment of the District Court. We would merely add that the Magistrate, in carrying out the instructions of the District Court, should also consider the point whether there has been any assignment of the lease to the third and fourth Respondents, and also whether the third and fourth Respondents ever became tenants or sub-tenants without the consent of the present Appellant.

The appeal is accordingly dismissed, with fixed (inclusive) costs of LP. 5.

Delivered this 15th day of February, 1945.

British Puisne Judge.

CIVIL APPEAL No. 466/44.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad Mahmoud Mukhalalati. APPELLANT.

v.

Saif Eddin Zeid el-Kaylani. RESPONDENT.

Action for eviction filed before expiry of lease year — Landlord requiring premises for himself — Allegation that tenant not in actual possession.

Appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal, dated 21st October, 1944, in Civil Appeal No. 79/44, dismissed:—

1. (*Obiter*): a) Action for eviction filed before end of lease year without stating date when tenant should be evicted — not premature.
b) Where action for eviction is concluded before end of lease year, Court may order eviction and direct it to take place at the expiry of the year.

2. (*Obiter*): Not necessary for landlord suing under sec. 8(1)(c), Rent Restrictions Ordinance to satisfy Court that he badly needs the premises, sufficient if he shows that he reasonably requires them for his own use.

3. Court of Appeal will not upset a finding of fact unless they are convinced that trial Court could not reasonably reach the conclusion it did.

4. Where a contract of lease is made by a person on his own behalf and for accommodation of persons closely related to him whose interests are same as his own, he cannot be said not to be in actual possession and therefore not entitled to protection of Rent Restrictions Ordinance.

(*M. L.*)

REFERED TO: Skinner *v.* Geary (145, L. T. R. 675).

ANNOTATIONS:

1. As to dwelling reasonably required by landlord see C. A. 223/44 (11, P. L. R. 599; 1944, A. L. R. 741) with annotations thereto in A. L. R.

2. On discretion of Magistrate in cases under sec. 8(1)(c) of R. R. Ord. see C. A. 272/44 (11, P. L. R. 582, 1944, A. L. R. 739) with annotations thereto in A. L. R.

3. On applicability of Skinner *v.* Geary see C. A. 441/44 (*ante*, p. 289; 12, P. L. R. 217).

(*A. G.*)

FOR APPELLANT: Nakhleh.

FOR RESPONDENT: A. 'Aqel.

JUDGMENT.

The Respondent has not been called upon to reply. This is an appeal from the judgment dated 21st October, 1944, of the District Court of Jaffa, in Civil Appeal No. 79/44, dismissing an appeal from the judgment dated 27th April, 1944, of the learned Magistrate of Gaza, in Civil Case No. 673/43. In that case the Magistrate dismissed an action for eviction which the Appellant had brought against the Respondent.

The facts are briefly these. In September, 1941, the Appellant leased the premises to the Respondent for a period of four months ending 17.1.42. A further lease was made for the year ending 7.1.43 at a rental of LP. 25. After 7.1.43 the Respondent held over by virtue of the Rent Restrictions (Dwelling Houses) Ordinance, No. 44/40. On 2.12.43 the Appellant filed the action for eviction in the Magistrate's Court. He based his action upon two grounds:—

(a) that he needed the premises for his own use; and
(b) that the Defendant had committed a breach of the lease by allowing other persons to reside in the premises.

The 1st *Muharram* was on 28.12.43, that is to say the action was filed twenty-six days before the end of the current lease year.

Mr. Nakhleh, who appears for the Appellant, has first of all submitted that the District Court erred in holding that the action had been filed prematurely. The District Court was of opinion that the action should not have been filed until the current lease year had ended.

We think that the District Court erred in taking this view. When he filed his action the Appellant did not state from what date he wished the Respondent to be evicted. If the action had been concluded before the end of the lease year, and if eviction had been ordered, the Court would presumably have directed eviction to take place at the expiry of the year.

With regard to the question whether the Appellant reasonably required the premises for his own occupation, we think that the learned Magistrate misdirected himself when he said in his judgment that the Plaintiff had not persuaded him that he badly needed the premises. Under section 8(1)(c) of the Ordinance it is sufficient if the landlord shows that he reasonably requires the premises for his own use.

Mr. Nakhleh has submitted that the District Court did not deal with the evidence regarding alternative accommodation. The learned Magistrate had considered that evidence, and he found that there was no alternative accommodation available for the Respondent. Mr. Nakhleh has referred us to the evidence, and having considered it we are unable to find that the Magistrate could not reasonably have

reached the conclusion that there was no alternative accommodation available for the Respondent. It is not for us, sitting as a Court of Appeal, to upset the learned Magistrate's finding on a question of fact unless we are convinced that his finding was wrong. We can come to no such conclusion in the present instance.

With regard to the question whether the Respondent had broken the lease by allowing other persons to reside in the house, it is admitted by Mr. Nakhleh that there was no evidence of sub-letting. The Respondent, who was called as a witness by the Appellant, stated that he had originally rented the house for his mother and brothers, and for his own use during the school vacation. He was described, at any rate in the second lease, as being the Principal of the Majdal school. The Appellant gave evidence that it was only lately that he had come to know that persons other than the Respondent were residing in the premises. But he must have known that the Respondent was working at Majdal, and that he would not ordinarily be residing in the premises, and there was no concealment of the fact that it was the Respondent's mother and brothers who were in actual occupation.

Mr. Nakhleh has referred to the case of Skinner *v.* Geary (L. T. R. Vol. 145, p. 675). In that case the tenant of a dwelling house, within the scope of the Rent Restrictions Acts, had ceased to reside there for ten years, and had lived elsewhere with his wife, permitting first relatives of his wife and then his sister to reside at the dwelling house. On a claim for possession by the landlord the trial judge found that the tenant was not in actual possession of the dwelling house, and that the purpose of the relative residing there was not to preserve the house as a residence for the tenant. There was not evidence that the tenant intended to return and again reside in the house. The Court of Appeal upheld the judgment of the trial judge:

The facts in the present case are quite different, as the persons for whom the Respondent originally rented the premises are still residing there, and in our judgment the Respondent is entitled to the protection of the Ordinance. It was a perfectly valid agreement of lease made by him on his own behalf and in the interests of persons closely related to him whose interests are identified with his own.

As there was no alternative accommodation available, and as the Respondent had not broken the lease, we find that this appeal fails, and we dismiss it with costs on the lower scale to include a sum of LP. 10 advocate's fees for attendance at the hearing.

Delivered this 8th day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 137/45.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Haj Mohammad Suleiman Ahmad Daoud. APPELLANT.

v.

Itzhak Quatinsky & an. RESPONDETS.

Dismissal of action — M. C. P. R. 134 *— A decree, not an order — "Adjourn the case generally", C. A.* 285/42; *"adjourn", Stroud's Judicial Dictionary — Who may move to dismiss — Art.* 24 *Palestine (Appeal to P. C.) O. in C. compared.*

Appeal from the Order of the Magistrate's Court, Jerusalem, dated the 4th of March, 1945, in Motion No. 5/45 (Land Case No. 332/43), allowed and case remitted:— ..

1. M. C. P. R. 134 comes into play only in cases adjourned generally. This does not include a case adjourned without a specified date being fixed but with the understanding that the parties should agree a date.

2. (*Obiter*): The procedure under that rule should be set in motion by the Court, not by a party.

(*A. M. A.*)

REFERRED TO: C. A. 285/42 (10, P. L. R. 26; 1943, A. L. R. 29).

ANNOTATIONS:

1. Note that the English Rules of the Supreme Court do not make provision for cases to be "adjourned generally".

2. *Cf.* C. A. 366 & 367/43 (11, P. L. R. 85; 1944, A. L. R. 100) and C. A. 191/44 (*ibid.*, pp. 292 & 574) and notes thereto in A. L. R. on the question whether the decision was a "decree" or an "order".

(*H. K.*)

FOR APPELLANT: Cattan — by delegation from Budeiri.

FOR RESPONDENTS: M.Gratch.

JUDGMENT.

This is an appeal from what is termed an "order" of the 4th March, 1945, made by one of the Magistrates of Jerusalem sitting as a Land Court. The order which purported to be made under Rule 134, Magistrates' Courts Procedure Rules, 1940, in effect dismissed the Plaintiff's action, which was one for *awlawiya*.

It seems common ground between the parties that on 7th June, 1944, the parties' advocates appeared before the Magistrate, when an adjournment was granted by consent, the Magistrate making the following note on the record:—

> "On application of both parties the case is adjourned to another date to be agreed upon by them".

Neither of the parties' advocates appears to have done anything until 22nd December, 1944, when the Defendant's advocate filed a notice of motion in Form 20 to Schedule 1 (Rule 238) calling upon the Plaintiff to show cause why the action should not be dismissed. In the result the application of the Defendants was granted, and the Plaintiff's action was, as I have already said, dismissed. Against that dismissal the Plaintiff (Appellant) now appeals to this Court.

The advocate for the Respondents to this appeal has drawn my attention to the fact that the Magistrate, when making the order of dismissal of 4th March, 1945, said:—

> "The case not being dismissed on the merits, the Plaintiff can of course renew it on payment of the usual fees".

This, however, is not so because Rule 134 does not provide that the action should be struck out, but that it should be dismissed, and I am of opinion that the purported order of 4th March, 1945, dismissing the action was clearly a "decree" within the definition of that word in Rule 2. I therefore hold that an appeal lies as of right.

The first ground of appeal is that Rule 134 has no application inasmuch as the case was on 7th June, 1944, not adjourned generally. I have found this matter not easy to decide because there seems to be little authority either in England or in Palestine to guide one in deciding when a case has or has not been adjourned generally. The words "adjourn the case generally" are to be found in Civil Appeal No. 285/42, P. L. R. Vol. 10, page 26 at page 27. The word "adjourn" is considered in Stroud's Judicial Dictionary (1931) page 40. It is to be noted that the case was a part-heard one, and a certain amount of evidence for the Plaintiff had already been led. I think that the test is, "what was in the mind of the Magistrate when he made the order of 7th June, 1944?" Mr. Gratch, for the Respondents to this appeal, argues that if the hearing had not been adjourned generally, the Court itself would have fixed a date for the hearing of the action, but in this case the Magistrate left it to parties' advocates to agree a date, presumably after consultation with the Registry or Clerk of the Magistrates' Court. Mr. Cattan, for the Appellant, contends that Rule 133(2) does not mean that, if a date is not fixed at the time by the Court itself, it must necessarily be assumed that the case was adjourned generally. Giving the best consideration which I can to the matter, I feel that the Magistrate did not intend on the 7th June, 1944, to adjourn the case generally, and I also consider that, had it

not been for the willingness of both parties' advocates to agree a date for the resumed hearing, the Magistrate would himself have fixed a date. In other words, the Magistrate hoped and believed that the parties' advocate would, soon after leaving the Court on the 7th of June, have come together and agreed a date. I therefore think that the adjournment of the 7th June was not a general adjournment. Holding thus, I do not think that Rule 134 ever came into play.

Mr. Cattan has raised another point and I think that I should deal with it. It is that Rule 134 gives no power to the Plaintiff, or indeed to any party, to apply to have the action dismissed, but is a rule giving the Court itself power to control its own list. I think that Mr. Cattan's contention is correct, because had the rule-making authority wished to give a party the right to make application, the rule would have been worded in something like the following terms:—

> "The Court may, on the application of the Defendant, and having heard the Plaintiff, dismiss the action, unless the Plaintiff shows good cause to the contrary".

The words of Rule 134 are clear. They are — "the Court may give notice" — the procedure being quite different from that laid down by Article 24 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, which specifically provides for an application by a respondent to an appeal to His Majesty in Council. It is obvious, of course, that the Defendant or his advocate, by bringing the matter informally to the notice of the Registrar or Clerk of the Magistrate's Court, could well set in motion the machinery prescribed by Rule 134. Although the point was not taken in the Court below I have deemed it desirable to deal with it as it goes to the root of the jurisdiction of the Magistrate when he made his purported order of 4th March, 1945.

It is of interest to note that the advocate for the Respondents to this appeal, when he made his application purporting to be under Rule 134, in terms said that the case had been adjourned *sine die*. I wish to make it clear, however, that I decide this appeal solely on the ground that I do not think that the hearing was adjourned generally.

In the result the appeal succeeds and the so-called order of the 4th March, 1945, is set aside, and the case is remitted to the Magistrate, with a direction that he should continue the hearing from the stage which it had last reached. As the Applicant was certainly dilatory I think that the proper order to make will be "no costs of this appeal".

Delivered this 19th day of July, 1945, in the presence of Mr. Cattan for Appellant and Mr. Gratch for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 70/45.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mamduh Abdul Latif Nabulsi. APPELLANT.

v.

Futna Abdul Latif Nabulsi. RESPONDENT.

Partition — Res judicata — Minor coming of age — When issue of ownership raised against registered title, who should apply to the Land Court.

Appeal from the judgment of the District Court, Nablus, in its appellate capacity, dated the 30th January, 1945, in Civil Appeal No. 3/45, dismissed:—

So long as two or more persons are registered as co-owners in *musha* shares, a Magistrate may hear a claim for partition even though the same property has been the subject-matter of a previous partition case.

(*A. M. A.*)

ANNOTATIONS:

1. For other proceedings in respect of this property see H. C. 74/43 (10, P. L. R. 467; 1943, A. L. R. 526).

2. On the *res judicata* point *cf.* note 2 in A. L. R. to C. A. 63/44 (11, P. L. R. 392; 1944, A. L. R. 715).

(*H. K.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Hijab.

JUDGMENT.

This is an appeal from the judgment of the District Court of Nablus which sitting in its appellate capacity allowed an appeal against a decision of the Magistrate's Court of Nablus that it had no jurisdiction to try the issue in this case. It appears that the Respondent who was a minor in 1941 owned a share in a house. It is not denied that at the present moment the Appellant owns 8/9 shares of the shares in that house. It was equally admitted that the Respondent is still the registered owner in the *Tabu* of her one share. When the Respondent came of age she applied for dissolution of the joint property. The Magistrate held that the case was *res judicata* because of a previous decision in regard to partition. It appears that there was a judgment which partitioned this property. But whatever the effect of the partition on the eight shares may have been the fact remains that one

share still remains registered in the name of the Respondent. The Appellant queries her title in spite of that registration. This being the case, the onus was upon him to go to the Land Court to prove his title. We are of opinion that while the registration in the *Tabu* lasts the Magistrate had jurisdiction to hear the claim for dissolution of joint ownership.

For these reasons we are of opinion that the appeal must be dismissed and the judgment of the District Court confirmed. The Respondent will have LP. 10 inclusive costs.

Delivered this 11th day of June, 1945.

Chief Justice.

CIVIL APPEALS Nos. 389—397/44.

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

BEFORE: Edwards, J. and Plunkett, A/J.

IN THE APPEAL OF:—

Reuven Lev & 12 ors. — APPELLANTS.

v.

Yossef Forer. — RESPONDENT.

Occupation of flats bought on instalment system — Occupants successfully alleging voidness of agreement relied upon by seller — Seller suing for equivalent rent — Applicability of Art. 472, Mejelle.

Appeals from the judgment of the District Court of Tel-Aviv, dated 11th September, 1944, in Civil Case No. 283/43, dismissed:—

1. Where a branch of juristic remedies is dealt with in Ottoman Law, there is no place for invoking English authorities.
2. Person occupying premises under an agreement which he successfully alleged in Court to be void can be sued for equivalent rent under Art. 472, *Mejelle.*

(*M. L.*)

REFERRED TO: Howard *v.* Shaw (1842) Vol. 58 Revised Reports, p. 641; C. A. 240/37 (5, P. L. R. 159; 3, Ct. L. R. 104; 1938, 1 S. C. J. 148).

ANNOTATIONS:

1. On the first point see C. A. 13/44 (11, P. L. R. 252; 1944, A. L. R. 350) and note 1 thereto in A. L. R.
2. On equivalent rent see C. A. 337/44 (*ante*, p. 99).
3. As to a claim of rent in connection with a void lease see C. A. 99/44 (11, P. L. R. 533; 1944, A. L. R. 777).

(*A. G.*)

FOR APPELLANTS: Eliash.
FOR RESPONDENT: Goitein.

JUDGMENT.

These appeals have, by consent of parties' advocates, been consolidated for hearing, as they all arise out of what is substantially one judgment delivered by the District Court of Tel-Aviv on 11th September, 1944, in Civil Cases 289—291 inclusive of 1943.

Shortly stated, the facts are that the present Respondent (who was the Plaintiff in the Court below) owned a block of flats in Tel-Aviv, and entered into agreements with various persons for what may be called the sale of those flats on the instalment system. A Magistrate subsequently held those agreements to be void. The Respondent then requested the Appellants to pay equivalent rent for the period during which they had been in occupation. This the Appellants refused to do, whereupon the Respondent brought these actions in the District Court. The learned A/Relieving President of the District Court considered it unnecessary to decide whether the agreements were in fact void, although he went on to say that he entirely agreed with the finding of the Magistrate that they were void. He also held that the *Mejelle* definitely applied to an action for equivalent rent, but he also considered on the authority of the case of Howard *v.* Shaw (1842) Vol. 58 Revised Reports 641, that in English Law also the landlord would in such circumstances be entitled to recover equivalent rent.

Dr. Eliash, advocate for the Appellants, tells us that on 21st December, 1944, the Land Court held that these agreements were void and that there are pending in this Court Civil Appeals Nos. 16—24 inclusive of 1945 in which the correctness of that judgment will be queried.

The first question, which in my view we have to decide, is whether the *Mejelle* applies. Although the Respondent's advocate argued that the *Mejelle* does not apply, nevertheless the Court below which decided the cases in his favour held that the *Mejelle* did apply. With this part of the finding of the Court below I am in agreement. It is clear that the Respondent asked for equivalent rent, and provision for such a remedy is found in the *Mejelle*. There is here no question of any local Ordinance passed on the lines of an English Act of Parliament such as the Rent Restrictions Ordinance coming into play or interfering with the rights of landlords and tenants. In my view, we have here an Ottoman Law dealing with this branch of juristic remedies. The *dictum* in Civil Appeal No. 240/37, P. L. R. Vol. 5, page 159,

especially at the bottom of page 163, is in point. In spite of Mr. Goitein's citation of English authorities, I think that we must confine ourselves within the four walls of Article 472 of the *Mejelle*. The question arises whether the Respondent is entitled to recover rent under Article 472. Now, whichever translation of the *Mejelle* is relied upon, I consider that it is essential for the landlord to prove user of his premises without his (the landlord's) permission. Mr. Goitein's argument is that, although his client gave permission, it was only given on the understanding that the tenant would be on the premises as a result of the conclusion of a valid contract.

Paragraphs 4 and 5 of the statement of claim in the District Court in Civil Case 291/43, are in the following terms:—

> "4. Plaintiff has instituted eviction proceedings against the Defendants in the Magistrate's Court, Tel-Aviv, and in accordance with the decision dated 21st July, 1943, judgment for eviction in favour of Plaintiff should be entered upon his depositing in Court the amount received from the Defendants under the said agreement, which was found void and of no effect. Plaintiff has complied with this decision and has deposited the said amount and the judgment for eviction is about to be entered".
>
> "5. Under the circumstances, the Plaintiff is entitled by law to recover from the Defendants estimated rent in respect of the flat and store occupied by them".

Even assuming that the Appellant did originally use the premises with permission, yet as soon as he himself in 1941 set up the defence that the contract was void, there was therefore no longer any valid contract, and the character and nature of his occupation changed, and it is clear that the Respondent had ceased to allow the Appellant to use the premises, this fact being obvious from the Respondent's conduct in bringing an action for eviction. The Appellant could therefore no longer be regarded as using the premises with the Respondent's permission. In my view, therefore, the learned Relieving President came to a correct conclusion in holding that Article 472 *Mejelle* applies.

The reasons given above apply to all the appeals, which are therefore all dismissed with costs to be taxed on the lower scale, to include one advocate's atendance fee at the hearing of LP. 15.

Delivered this 13th day of April, 1945, in the presence of Dr. Eliash for the Appellants and Mr. Goitein for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 362/44.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF :—

Belpetrole (Egypt) S. A. APPELLANT.

v.

Sami bin Sheikh Ali El Jamai & 47 ors. RESPONDENTS.

Land expropriation — Procedure to be followed under the Ordinance, secs. 5(3), 14(1)(2), 10, 15 — *Costs — Whether interest may be awarded — C. P. R.* 76, 130, 138, 206; *C. A.* 10/38; *Clark v. Toronto Rlwy Co.; R. v. L. & N. W. Rlwy Co.; Caledonian Rlwy. Co. v. Carmichael, C. A.* 34/43 — *H. C.* 15/39, 19/39, 42/43; *C. A.* 229/38 — *Person in whose favour expropriation made should apply to Court — C. A.* 282/44; *C. A.* 284/43; *C. A.* 131/42; *Pigott v. G. W. Rlwy Co.; Inglewood Pulp & Paper Co. v. New Brunswick Electric Power Commission — Concessions, transfer of rights approved by High Commissioner.*

Appeal from part of the judgment of the Land Court, Jerusalem, dated 28.7.44, in Land Case No. 11/43, dismissed:—

In awarding compensation under the Land (Expropriation) Ordinance, a Land Court may award interest in addition to a capital amount.

(*A. M. A.*)

FOLLOWED: C. A. 34/43 (1943, A. L. R. 337).

REFERRED TO: C. A. 10/38 (5, P. L. R. 226; 1938, 1 S. C. J. 182; 3, Ct. L. R. 144); C. A. 229/38 (5, P. L. R. 560; 1938, 2 S. C. J. 181; 5, Ct. L. R. 11); C. A. 131/42 (9, P. L. R. 752; 1942, S. C. J. 722); C. A. 284/43 (11, P. L. R. 26; 1944, A. L. R. 169); C. A. 282/44 (11, P. L. R. 584; *ante*, p. 111); H. C. 15/39 (6, P. L. R. 168; 1939, S. C. J. 122; 5, Ct. L. R. 155); H. C. 19/39 (6, P. L. R. 224; 1939, S. C. J. 200; 5, Ct. L. R. 185); H. C. 42/43 (10, P. L. R. 239; 1943, A. L. R. 257); Clark *v.* Toronto Railway Co., 1909, Ontario L. R. 628 (E. & E. Digest, Vol. II, p. 187, note (*j*)); R. *v.* London & North Western Railway Co., 1854, 3 E. & B. 433, 23 L. J. (Q. B.) 185; Caledonian Railway Co. *v.* Carmichael, 1870, L. R. 2 Sc. & Div. 56; Pigott and Great Western Railway Co., *in re*, 1881, 18 Ch. 146, 50 L. J. (CH.) 679, 44 L. T. 792; Inglewood Pulp and Paper Co. *v.* New Brunswick Electric Power Commission, 1928, A. C. 492, 97 L. J. (P. C.) 118, 139 L. T. 593.

ANNOTATIONS: In addition to the cases cited and the notes thereto see also C. A. 39/42 (1942, S. C. J. 364; 11, Ct. L. R. 232) and C. A. 386/43 (11, P. L. R. 307; 1944, A. L. R. 581); *cf.* Halsbury, Vol. 23, pp. 174 *et seq.*

(*H. K.*)

FOR APPELLANT: Eliash & Scharf.
FOR RESPONDENTS: Goitein & Caspi.

JUDGMENT.

Edwards, J.: These are an appeal and cross-appeal from a judgment of the Land Court, Jerusalem, which has awarded compensation to the Respondents under the Land (Expropriation) Ordinance, Revised Laws of Palestine, Cap. 77. The facts are that on 16th April, 1930, the Belpetrole Societé Anonyme Ltd., who were co-owners in *musha'a* shares with the Respondents of the land in question, obtained from His Excellency the High Commissioner an Expropriation Certificate concerning a certain plot of land situated within a larger part of that in which, as we have said, the company were co-owners. Notices to treat were sent on the 12th of November, 1930; but several years passed during which period none of the Respondents treated or consented to treat with the Belpetrole Societé Anonyme or with their successors (the Appellants). The expropriating company took possession of the land fifteen days after the Expropriation Notice had been published in the Palestine *Gazette* of 12th November, 1930. The present action was not brought until 1943. The Appellants do not complain of the amount of compensation assessed by the Land Court but they do complain of two matters namely, (a) that costs were awarded against them, and (b) that the sum awarded bears interest at 6% *per annum* from 1st November, 1930, until payment.

With regard to costs Dr. Eliash, for the Appellants, argues that the company did everything that the law required them to do, for example, they sent out notices to treat to all the reputed owners none of whom came forward or made any offer to treat. He contends that under section 5(3) and section 14(1) and section 14(2) the claimant is the person who asks for compensation. Dr. Eliash contends that costs ought to be awarded to his clients.

With regard to the interest, the Appellants' contention is that the Court had no power to award interest at all whether or not claimed by anyone. We have been referred to section 10 of the Ordinance and to Rules 76, 130, 138 and 206, Civil Procedure Rules, 1938, and to Civil Appeal 10/38, Vol. 5, P. L. R. p. 226, and to Hailsham Vol. 6, p. 84 para. 79, and p. 88 para. 83, and p. 95 para. 94, and to p. 135 para. 151, and to the English and Empire Digest Vol. 11, p. 187 note (j), Clark *v.* Toronto Railway Co. (1909) Ontario L. R. 628, and to English and Empire Digest Vol. 11, p. 185 Item 655 R. *v.* London and North Western Railway Co. (1854) 3 E. & B. 443 and to p. 187 Items 670 and 671, Caledonian Railway Co. *v.* Carmichael.

It is argued that interest can be awarded only by virtue of contract or where the principal has been wrongly withheld. As regards Civil Appeal 34/43 Annotated Law Reports 1943, pp. 338 and 343, Dr. Eliash replies that the matter does not seem to have been argued in that case, and that once a practice is challenged the Court is bound to inquire into it. (H. C. 15/39, Vol. 6 P. L. R. 168, and H. C. 19/39, Vol. 6 P. L. R. p. 224, and H. C. 42/43, Vol. 10 P. L. R. p. 239). He also refers to sections 8 and 10 of the Ordinance and argues that, as certain of the Respondents did not claim interest, they are not entitled to it, (Civil Appeal 10/38, Vol. 5 P. L. R. p. 226, and C. A. 229/38, Vol. 5 P. L. R. p. 560). Our attention has been called to sections 14 and 15 of the Ordinance.

Mr. Goitein, for some of the Respondents, contends that compensation must include the value of the land plus interest and that here we have a case of people (the Appellants) who entered into possession in 1930, and took from the Respondents the use and produce of the land from 1930 onwards. The argument proceeds that the Court is entitled to fix compensation so as to include interest from the time of taking possession. Mr. Goitein says that his clients were not Plaintiffs who filed a statement of claim. He refers to C. A. 282/44, Annotated Law Reports (1945) p. 111, and C. A. 284/43, Vol. 11, P. L. R. p. 26, and to C. A. 131/42, Vol. 9 P. L. R. p. 752, Pigott *v.* G. W. Railway, Vol. 18 Chancery p. 146, and Inglewood Pulp and Paper Co. *v.* New Brunswick Electric Power Commission, (1928) Appeal Cases p. 492.

With regard to the main appeal we do not think that the judgment of the Land Court can be disturbed for two reasons, namely — (a) Civil Appeal 34/43 is clear authority for the inclusion of interest in arriving at the amount of compensation, and (b) in this case, although it is strictly true that the Respondents were not claimants, it was obviously the duty of the Appellants in 1930 or early in 1931 to apply to the Land Court under section 8 Cap. 77. The sole reason why the Appellants or their predecessors did not do so apparently was because they were in possession. Had the Respondents refused to treat (as they did) and had the Appellants or their predecessors not been in possession, it is obvious that the Appellants or their predecessors would have had to apply to the President of the Land Court under the proviso to section 7 Cap. 77. The Appellants cannot complain if, in assessing compensation, the Land Court included interest. The appeal, therefore, fails.

Because of the view we take of the appeal it is unnecessary to discuss the point taken by Mr. Goitein, namely, that the Appellants' appeal is out of time.

Turning now to the cross-appeal, the first ground of which is that the present Appellants were not the proper parties to sue, Mr. Goitein's argument is that the persons to whom the concession to carry out the undertaking under section 2 of the Ordinance was granted were the Belpetrole Societé Anonyme whereas the Plaintiffs were the Belpetrole (Egypt) S. A. B., the latter title being the one used in the amended Statement of Claim. Mr. Goitein says that the "B" has since been dropped. The Land Court dealt with this matter at pages 11 and 12 of the typed copy of their judgment and we see no reason to differ from the conclusion at which they arrived. Much was made of the fact that His Excellency the High Commissioner never actually granted a licence to the successors of the original Belpetrole Societé Anonyme. We are satisfied, however, from a scrutiny of Exhibit P. 13, which was a letter from the Chief Secretary, that Government had been informed of the position, and the only inference is that Government had agreed to the concession being transferred to the Plaintiffs. The Chief Secretary is the Chief Staff Officer to the High Commissioner, and we think that the only inference to be drawn from Exhibit P. 13 is that the High Commissioner continued the concession in favour of the present Plaintiffs. On this ground the cross-appeal must fail, notwithstanding the interesting arguments of Mr. Goitein and Mr. Caspi respectively on behalf of the Respondents.

The only other substantial ground of cross-appeal was that the Land Court should have awarded compensation on a more generous scale. It is said that the assessment of compensation at the rate of LP. 1.500 mils per square metre based on the value of the land as at 1930 was against the weight of evidence. The matter is not altogether free from difficulty; but, on the whole, we are not satisfied that the Land Court applied wrong principles in dealing with this matter which was peculiarly within their province. The cross-appeal therefore also fails.

We are not prepared to disturb the finding with regard to the costs in the Court below. As regards the costs of the appeal and cross-appeal we think that a fair order to make will be "no costs".

Delivered this 27th day of July, 1945, in the presence of Mr. Eliash for the Appellants, and Mr. Goitein for the Respondents.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 462/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Abdel Hafez Yousef Othman. APPLICANT.

v.

Abdel Muhsen Abdel Qader. RESPONDENT.

Deposit for appeal — Extension of time — Applicability of C. P. R. 333 — Good cause.

Application under rule 333 of the C. P. R. to extend the time for payment of the deposit allowed:—

Rule 333 applies to extensions of time to pay the deposit for the appeal.

(*A. M. A.*)

ANNOTATIONS:

1. Applicant had failed to pay the deposit for Respondent's costs in time and the appeal was consequently listed for dismissal. Applicant thereupon moved the Court for an extension under Rule 333 on the grounds that the heavy rains and the consequent disruption of communications had made it impossible for him to sell his mule in time which sale was the only way open to him to realise the necessary sum.

2. In allowing the application the Court overruled Respondent's submission that Rule 333 was inapplicable in view of the express provisions of Rule 327 and reliance was placed on the words "except where otherwise expressly provided by these rules" appearing in Rule 361.

3. See C. A. 156/43 (10, P. L. R. 335; 1943, A. L. R. 582) and note 2 thereto in A. L. R. on the requirements of "good cause"; see now C. P. (Am.) Rules, 1945.

4. The appeal itself is reported at p. 170, *ante*.

(*H. K.*)

FOR APPELLANT: Taji.

FOR RESPONDENT: Anabtawi.

ORDER.

We think that Rule 333 does apply and we also think that Applicant has shown good cause. We extend the time for paying the deposit of LP. 15.— till 12 noon to-day. Applicant must pay Respondent's costs of to-day in any event, *viz.* fixed (or inclusive) costs of LP. 2.—.

Delivered this 17th day of January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 77/45.

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

BEFORE: FitzGerald, C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

The Supreme Moslem Council Waqf Jami' el Joucandary Safad. APPELLANT.

v.

Muhammad Yusuf Muhammad Kureidi & 5 ors. RESPONDENTS.

Findings of fact — Evidence should be dealt with — Refusal to accept evidence should be motivated — Appeal in Land Settlement.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated the 21st of November, 1944, in Case No. 17/Safad, allowed and case remitted:—

The Court should indicate in its judgment that it has dealt with the evidence. If any item of evidence is rejected, reasons should be given.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 43/43 (1943, A. L. R. 154) and CR. A. D. C. Ha. 60/45 (1945, S. C. D. C. 355).

(*H. K.*)

FOR APPELLANT: Nahawi.

FOR RESPONDENTS: No. 1 — Bernblum.

Nos. 2—6 — Absent — service on them dispensed with.

JUDGMENT.

This is an appeal from the decision of the Settlement Officer of the Safad Settlement Area. The only issues raised on the appeal are concerned with findings of fact by the Settlement Officer. It is true that this Court will not lightly interfere with the findings of fact by a lower Tribunal, but it will require to be satisfied that those findings are reasonable and only arrived at after every relevant item of evidence has been taken into consideration.

In this case we are confronted with the difficulty arising out of an exhibit marked by the Settlement Officer "G". That is a document signed by a certain number of inhabitants of the village including the *Mukhtar*, which would, if the facts set out therein were accepted, establish the Appellant's claim. We do not say that it should be accepted, but we require to be satisfied that the Settlement Officer who examined

it did weigh it with all other evidence and if he rejects it we would expert him to state his reasons therefor. Now on perusing the learned Settlement Officer's judgment I note that exhibit "G" is not mentioned except in connection with Balqis' transaction. According to my translation the learned Settlement Officer only referred to Exhibit "G" as in the following passage:—

> "But from then (1326 *A. H.*) onwards, there is no proof of or statement about the *waqf* ownership until 1942, when Balqis, Defendant 4, agreed to buy the *waqf* share in the produce (Exhibit G)".

But I cannot find in Exhibit "G" as tendered to me any reference whatever to Balqis or any indication that that document had anything to do with Balqis' agreement to buy a share of the produce. It may be that the reference to Exhibit "G" by the Settlement Officer is a mistake and that Exhibit "P" was intended.

Another document which seems of importance to us is Exhibit "L", but again there is no reference to this document in the Settlement Officer's otherwise very careful judgment.

In these circumstances there seems no course open to us except to set aside the judgment and remit the case back to the Settlement Officer to consider the implications of Exhibits "G" and "L". As we are sending it back we suggest that the Settlement Officer might deal in greater detail with the issue of possession. The costs will abide the event but to simplify the final arrangements the costs of this appeal will be taxed on the lower scale to include LP. 10.— advocate's attendance fee.

Delivered this 3rd day of July, 1945.

Chief Justice.

CRIMINAL APPEAL No. 29/45.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Cyril Earp Parker. APPLICANT.

v.

Attorney General. RESPONDENT.

Criminal procedure — Charge laid before British Magistrate and then

before District Court — M. C. J. O., sec. 6(2); CR. A. 24/39 — Charging a person — Variation between verbal and written judgment.

Application for leave to appeal from the judgment of the District Court of Tel-Aviv, CR. C. 9/45, whereby Applicant was convicted of an offence contrary to sec. 250 of the C. C. O., 1936, and sentenced to pay a fine of LP. 20.— or three months' imprisonment in default; application refused:—

A person is not charged with an offence until arraignment and reading of the charge to him. Until that time the Attorney General may avail himself of the provisions of sec. 6(2) of the Magistrates' Courts Jurisdiction Ordinance.

(*A. M. A.*)

DISTINGUISHED: CR. A. 24/39 (6, P. L. R. 383; 1939, S. C. J. 323; 6, Ct. L. R. 107).

ANNOTATIONS:

1. "A criminal charge is made when the Accused answers an accusation against him before a competent Court, even though he be informally brought before it": Stroud's Judicial Dictionary, Vol. 1, pp. 290—1.

2. On discrepancies between the written judgment and that delivered orally see P. C. 66/43 (11, P. L. R. 237; 1943, A. L. R. 465).

(*H. K.*)

FOR APPLICANT: Hake.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an application for leave to appeal from the judgment of the District Court, Tel Aviv, which sitting in a summary capacity found the Accused guilty of assault contrary to section 250 of the Criminal Code Ordinance, and sentenced him to pay a fine of LP. 20 or in default three months' imprisonment.

The appeal falls to be considered under two heads. The first will cover the purely technical point raised and the second will deal generally with the other issues.

Taking the first: It has been contended on behalf of the Accused that the Court below had no jurisdiction to try the charge. It appears that originally the charge was laid in the Court of a British Magistrate but before any summonses were served on the Accused or anyone else, the Attorney General elected to charge the Accused before a District Court in accordance, as he alleges, with the provisions of section 6(2) of the Magistrates' Courts Jurisdiction Ordinance.

It was contended by Mr. Hake for the Appellant that, as the Magistrate's Court was seized with the case, the Attorney General's right of election had elapsed. We are unable to accept this contention. It appears to us that for the purpose of section 6(2) a distinction must

be drawn between charging a person with an offence and charging a person before a Magistrate. It may be that a person is charged with an offence the moment the complaint is laid before the appropriate authority, as to this we make no pronouncement because it appears to us that it does not arise. Section 6(2) refers not only to a person being charged with an offence but to a person being charged before a British Magistrate or a District Court. We are satisfied that a person is not charged before the Magistrate or Court until he is arraigned before the Magistrate or Court and the charge is read out to him. There was no arraignment in this case and in consequence we are of opinion that the Attorney General's right of election had not lapsed.

In support of his contention the Appellant's advocate referred us to Criminal Appeal No. 24/1929 * where in the course of the judgment the learned Chief Justice expressed the view that a person against whom a charge is made is a person charged until he is convicted or acquitted. The sentence was taken from its context and it is necessary to study the whole case in order to appreciate what the learned Judge intended to convey. In any case he was dealing with a person who was charged with an offence, whereas, as we have pointed out, we are dealing with a case of a person charged before a Magistrate.

Turning now to the second point, the learned counsel argued for some hours before us, but we cannot avoid the comment that practically the whole of his argument was devoted to an attempt to stage a retrial before this Appeal Court.

We analyse his argument solely for the purpose of ascertaining whether he has satisfied us that the conclusion arrived at by the learned President proceeded from faulty reasoning or that the conviction was wholly unsupported by evidence. His contention was that the verdict was against the weight of evidence. He based this contention on the fact that the learned Judge did not accept some evidence particularly that of certain police witnesses. In this connection we need only point out that there is scarcely a criminal trial in which it does not fall to the Judge to decide on the rejection of some evidence and on the acceptance of other. In this case having seen the witnesses in the box the learned Relieving President decided to reject part of the evidence of three police witnesses. He did so because, as he states, he formed the opinion that they were endeavouring to shield the Accused who was their superior officer. It is sufficient to say that this

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* *Should be*: CR. A. 24/39.

appears to us to have been quite a reasonable exercise of judicial discretion and we are not prepared to interfere with it.

It was further contended that the evidence of Solomon Rosenstein who is the Assistant Superintendent of Police and an officer of the highest integrity was inconsistent with the evidence of the person who complained against the Accused. Taking this in its most favourable aspect, Mr. Hake, for the Accused, has had to admit that the inconsistency boils down to a difference of three minutes in estimating the time. We are of the opinion that this difference could be accounted for in many different ways, such as a mistake in the watch of Mr. Rosenstein or a slight mistake in the recollection of Mr. Trachtengot. It most certainly is not such an inconsistency as would justify the rejection of the evidence of the prosecution. In regard to that part of the appeal, we are of the opinion that the evidence adduced was ample on which to convict the Accused.

Finally it was argued that certain matters were omitted in the judgment of the learned Judge. The judgment is a most careful one, covering some four typed written pages. It is of course not to be expected that in the course of his judgment a Judge must refer to every detail of the evidence that has been adduced, and every suggestion made by counsel for the prosecution or defence; indeed it would be highly undesirable that he should do so. Apart from this, says Mr. Hake, the judgment is defective in that it differed from that delivered orally. As to this we have only an affidavit put in by the Accused himself. But here again, taking the argument most favourably towards the Accused, it is clear that the variations, if indeed there were any, were of no substance, and could have had no real influence on the inference which must inevitably have been drawn from the evidence adduced.

For all these reasons the application for leave to appeal must be refused.

Delivered this 15th day of March, 1945.

Chief Justice.

HIGH COURT No. 13/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPLICATION OF:—

Nasuh Assad Es-Sayeh (Hamameh) & an. PETITIONERS.

v.

District Commissioner, Nablus. RESPONDENT.

Crime Prevention — Summons to appear — Secs. 3(*b*), 5(4).

Return to an order *nisi* calling upon the Respondent to show cause why his order dated 15.1.45 in respect of Petitioners' entering into a bond, *etc.* should not be set aside; order *nisi* discharged:—

Variation between summons and charge considered insufficient to cancel an order under the Crime (Prevention) Ordinance.

(*A. M. A.*)

ANNOTATIONS:

1. See Halsbury, Vol. 9, pp. 236 *et seq.* as to the provisions of the Prevention of Crime Act, 1908.

2. On intervention of the High Court in like cases *cf.* H. C. 102/43 (1943, A. L. R. 830) and note 1. See also H. C. 75/30 (1, P. L. R. 496; 2, C. of J. 713) — a case under the Prevention of Crime Ordinances 1920—1929.

(*H. K.*)

FOR PETITIONERS: Salah.

FOR RESPONDENT: Solicitor General — (Griffin).

ORDER.

Frumkin, J.: This is a return to an order *nisi* directed to the District Commissioner of Nablus calling upon him to show cause why his order dated 15th January, 1945, ordering the Petitioners to give security for good behaviour for a period of one year and to reside at Salfit village for a period of three months, should not be cancelled.

A number of irregularities have been suggested on behalf of the Petitioners to have taken place during the proceedings before the Assistant District Commissioner which, in the opinion of counsel, should invalidate the proceedings.

The first alleged irregularity is that the first summonses served on each of the two Petitioners, written in Arabic, were not signed and issued by an officer in authority. This is admitted and the Solicitor General does not rely on those summonses.

As regards another set of summonses served on the Petitioners, written in English, two objections were taken. One is that the Petitioners do not understand the English language, and that on serving the summonses upon them they were told that their contents were the same as the summonses in Arabic, which, in fact, were not. It has, however, been established that when those summonses were served upon the Petitioners they were told by the constable who served them that they were required to appear for trial under the Crime (Prevention) Ord-

inance, so that the Petitioners were fully aware as to what they were summoned for.

The other objection as to the summonses is that they were only served about twenty-four hours prior to the hearing before the Assistant District Commissioner. This is so, but no objection was taken before the Assistant District Commissioner as to the short notice and no request was made for an adjournment.

A more vital objection relates to the contents of these summonses. According to them the Petitioners were informed that they were to answer a charge that "they are likely to have taken part in burglaries which have been committed in Nablus Town". Before the Assistant District Commissioner, however, they were charged in the words of section 3(b) of the Crime (Prevention) Ordinance that they were by habit robbers or thieves or receivers of stolen property, or habitually protecting or harbouring thieves or aiding in the concealment and disposal of stolen property.

On this point, counsel for Petitioners bases his objection on proviso (a) to section 5(4) that "no charge other than that revealed by the information contained in the summons shall be framed".

Upon considering this point, however, it appears that taking part in burglaries is a common way of expressing habitual offences of that sort. The fact that the charge included other offences like harbouring of thieves or aiding in the concealment and disposal of stolen property is not, in so far as the Petitioners are concerned, an inclusion of new charges, because we are told they were directed against other Accused who were simultaneously with the Petitioners brought before the Assistant District Commissioner in the same trial.

The Petitioners were well aware of what they were charged with, they were given ample opportunity to bring forward any defence they liked. They have not asked for an adjournment in order to obtain legal advice and we do not see any reason to interfere with the order of the Assistant District Commissioner. This being so it is unnecessary to deal with the points taken by the learned Solicitor General as regards alternative remedy and that the Petitioners did not in their petition disclose certain relevant facts.

In the result the order is discharged with costs against the Petitioners in the amount of LP. 10.

Given this 8th day of March, 1945.

Puisne Judge.

CIVIL APPEAL No. 4/45.

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

BEFORE: FitzGerald, C. J. and Edwards, J.

IN THE APPEAL OF:—

David Schaerf. APPELLANT.

and

Abraham Selzer. RESPONDENT.

Arbitration — Setting aside the award — Presumption in favour of validity of award — Record of arbitrators — Arbitrators asking party to swear affidavit — Irregularity causing no injustice — Cross-examination of deponent after withdrawal of affidavit — Uncertainty in the award.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 7th of November, 1944, in Civil Case No. 319/43, dismissed:—

1. A discretion must be left to the arbitrators as to what they will embody in the record.

2. It is no misconduct if the arbitrators refuse to allow cross-examination on an affidavit objected to and withdrawn.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1944, S. C. D. C. 276.

2. There is a presumption in favour of the validity of an award: Annotated Laws of Palestine, Vol. 2, p. 147.

3. On the first point *cf.* C. A. 462/44 (12, P. L. R. 150; *ante*, p. 170).

4. See Annotated Laws of Palestine, Vol. 2, pp. 123 *et seq.* on setting aside of awards on the ground of misconduct.

5. Conditional leave to appeal to Privy Council granted.

(*H. K.*)

FOR APPELLANT: Sommerfeld.

FOR RESPONDENT: Wolf.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv, which refused an application under section 13 of the Arbitration Ordinance for the setting aside of an award. The arbitration arose out of a legal dispute between the Appellant and the Respondent. A civil case pending between them was withdrawn on their mutually voluntary decision to submit the issues to arbitration.

The arbitrators were three in number — one, Dr. Eliash, was the advocate for the Appellant, the other, Dr. Philip Joseph, was the advo-

cate for Respondent, and the third person, who was not a lawyer, was Mr. Herman Kern. According to the deed of submission the disputes submitted for arbitration were:—

> "(a) A claim of Mr. Selzer against Mr. Schaerf for the amount of LP. 7360, as set out in his statement of claim in the aforementioned civil case, and a claim for an account of the profits and losses of the businesses transacted by Mr. Schaerf in Palestine and to which Mr. Selzer claims to be a partner, and for such amount as may be found due to Mr. Selzer upon taking such account.
>
> (b) Claims of Mr. Schaerf against Mr. Selzer for the aggregate amounts of:—
>
> a. LP. 6346.918, and
>
> b. Lei 3,358.333.
>
> claimed to arise out of their joint participation in the firm Bradul Carpatin S. A. R. and of an account kept in the name of Mr. Selzer with Messrs. Glyn Mills & Co., London".

The arbitrators held some eighteen sittings, and they issued a unanimous award in the following terms:—

> "1. In respect of the claims of Abraham Selzer as described in para. 5(a) of the submission, David Schaerf shall pay Abraham Selzer the sum of Palestine Pounds Four Thousand One Hundred and Eighty-Seven and nine hundred and ten mils, LP. 4187.910.
>
> 2. We further declare that out of the amounts in Roumanian Lei standing to the credit of David Schaerf with the Bradul Carpatin S. A. at Roumania an amount of Lei 2420654, Two Million Four Hundred and Twenty Thousand Six Hundred and Fifty-Four Lei, belongs to Abraham Selzer, with any interest that may be payable thereon by the said company as from 1.7.40.
>
> 3. The claim of David Schaerf as described in para. 5(b) of the submission is dismissed.
>
> 4. We declare that to David Schaerf belongs one-third of any amount payable by the Bradul Carpatin S. A. to Abraham Selzer by virtue of an assignment from one Gustav Adlersberg, and this in pursuance to David Schaerf's claim under 5(b) of the submission.
>
> 5. We order David Schaerf to pay Abraham Selzer interest at the rate of five percent *per annum* on the amount awarded under para. 1 (one) hereof from the date of lodging the statement of claim in civil case No. 44/42 in the District Court of Tel-Aviv until day of actual payment.
>
> 6. We order David Schaerf to pay Abraham Selzer Two Hundred Palestine Pounds in respect of all costs, arbitrators' fees and advocates, both in the District Court and before us.
>
> 7. Our fees have been paid by the parties and each party is entitled to a copy of this award gratis, upon payment of half the Stamp Duty".

The Plaintiff, David Schaerf, who is the Appellant in this case, attacked the award on several grounds. It was denounced in the District Court on eighteen grounds. After a lengthy hearing of eight days, of which three were devoted to the final addresses of counsel, the learned Relieving President dismissed every one of the grounds of objection, and refused the application to set the award aside. Against that refusal an appeal is made to this Court.

The grounds of appeal are eighteen, and they are the same as those on which the arbitration was attacked in the lower Court. It is an accepted principle that the Courts will whereever possible lean towards the upholding of the award of arbitrators. It will be obvious, therefore, that the circumstances of this case, which absorbed so many lengthy hearings and which has already lasted for three and a half years, do not tend to ease the Appellant's task in this Court. Nevertheless, if legal misconduct can be established, the Appellant is quite entitled to bring this appeal, in which event he would of course be entitled to judgment, regardless of the fact that it may prolong this dispute for many years more.

During the course of the hearing the learned counsel for the Appellant abandoned many of the grounds of his appeal. The first ground abandoned was ground No. 1, which was that the Court below erred in not upholding his objection in regard to the stamping of the document. His next ground of appeal was that the Court erred in holding that the record kept by the arbitrators was sufficient in law. His objection on this point is based on the fact that the record did not contain the dates of the majority of the hearings, that it was not signed by the arbitrators, that all the parties did not attend at each hearing, and that all the arguments and objections of counsel are not recorded. In regard to this we need only say that we would not expect the record of arbitrators to contain every word and argument used during the course of lengthy proceedings. The learned Relieving President came to the conclusion that the record contained all the necessary data to enable the arbitrators to arrive at their conclusion. In agreeing with him we need only remark that a discretion must be left to the arbitrators as to what they will embody in the record, otherwise the final record might contain a mass of irrelevancies which would tend only to confuse the issue.

The main ground of objection and the one which was argued at great length before this Court was an alleged act of legal misconduct, namely that, having heard all the evidence, including that of the Defendant himself, the arbitrators demanded that the Defendant should

make an affidavit confirming his evidence. It can be admitted that the circumstances of the swearing of this affidavit were unusual. The affidavit was demanded after Mr. Selzer had already given his evidence and had been cross-examined on it. At the hearing of 3rd August the arbitrators apparently considered it would be of advantage if they could get Mr. Selzer to reswear in the form of an affidavit the evidence he had already given. They themselves prepared this affidavit, which was based on his evidence, and they tendered it to him for swearing before the District Court. It is alleged, and aparently it was believed by the District Court, that Dr. Eliash, the lawyer who represented the Appellant in the civil case and who was his nominee in the arbitration proceedings, actually prepared the affidavit. Be that as it may, it is clear that it was the unanimous wish of the arbitrators that the affidavit should be sworn. On this date, *i. e.* 3rd August, the Appellant did not object to this procedure. This is disputed, but the learned Relieving President was satisfied that he did not. There is, however, no doubt that on the 8th August, when the affidavit which had been duly sworn before the District Court on the 4th August was tendered to arbitrators, Dr. Schifter, for the Appellants, immediately objected. The objection was overruled by the arbitrators on the ground which they state as follows:—

> "Inasmuch as the context of the affidavit has been read publicly to the parties by the arbitrators prior to its execution and it was made clear to the parties that it was to serve in lieu of an oath to be taken before the arbitrators, and neither of the parties raised any objection thereto, and the context of the affidavit is the same as read to the parties, it is decided to accept the affidavit and to allow Dr. Schifter to inspect the same and to take a copy thereof".

It is not easy for this Court to gauge what could have been the motive of the arbitrators in asking for this further affidavit. It possibly had some connection with a principle subscribed to in this part of the world, that if a person reswears before a Judge facts to which he had already attested, it added weight to the credibility of his evidence. But whatever may have been in the minds of the arbitrators, we are satisfied — as the District Court was — that there was no *mala fides* on their part. At the most it seems to us the action amounted to no more than a wish on their part to make assurances doubly sure. Unusual it certainly was — it may have been irregular — but as the learned Relieving President of the District Court has pointed out, it is difficult to see what possible injustice could have resulted from it.

Pressed on this point, Dr. Sommerfeld suggests that as we cannot say with precision what effect it had on the minds of the arbitrators, we must hold that it amounted to legal misconduct. As to this we need only say that if the affidavit contained nothing more than the substance of what had already been sworn to, and we are satisfied that it did contain no more, it could have added nothing to the effect that had already been created on the minds of the arbitrators by the evidence that had been properly adduced. For these reasons we agree with the learned Relieving President that this point must also fail.

A further point stressed by Dr. Sommerfeld during the course of this appeal was an allegation of legal misconduct arising out of the affidavit of a certain Mr. Mizrahi, an expert on Roumanian law. The Appellant complains that the Respondent was allowed to withdraw this affidavit without permitting him to cross-examine him * on it. It is, of course, settled law that when a person has made and filed an affidavit he cannot avoid cross-examination on it. It becomes necessary, therefore, to enquire into the circumstances of this affidavit.

It has been established that on the 8th August Dr. Schifter filed an application objecting to the admissibility in evidence of this affidavit. In other words, as the learned Relieving President pointed out, he asked for the withdrawal of the affidavit. The arbitrators allowed it to be withdrawn in the following order made by them:—

> "Inasmuch as Dr. Wolf, on behalf of Mr. Selzer, withdraws the above (*i. e.* the affidavit) and Dr. Schifter on behalf of Mr. Schaerf, asks the arbitrators not to admit the same in evidence".

Once the affidavit had been withdrawn by order or permission of the arbitrators it formed no part of the proceedings; we fail to see, therefore, what point there could have been in cross-examining on it. We agree with the learned Relieving President that this objection must also fail.

The last point seriously contested by the Appellant was that the award failed for uncertainty, in that it did not deal in precise terms with the various items of the submission to the award. The award was for a lump sum of LP. 4187.910 mils. According to the submission, two claims were submitted — one was a claim for LP. 7160, the other was a claim for LP. 6346.918 mils and 3358333 Lei.

Turning now to the award, it will be observed that the relevant paragraph states that:—

> "In respect of the claims of Abraham Selzer as described in para. 5(a) of the submission, David Schaerf shall pay Abraham Selzer the sum of Palestine Pounds Four Thousand One Hundred and Eighty-Seven and nine hundred and ten mils — LP. 4187.910".

* *i. e.* Mr. Mizrahi.

It seems to us that it is a perfectly clear finding by the arbitrators that the LP. 4187.910 mils was in respect of the claim described in paragraph 5(a) of the submission. Paragraph 5(a) of the submission sets out the only claims which the Appellant made against the Respondent, and we cannot see what possible uncertainty there was about it.

For these reasons we are of the opinion that the appeal must fail, with costs here and below to be taxed on the lower scale to include LP. 25 advocate's attendance fee.

Delivered this 26th day of July, 1945, in the presence of Dr. W. Sommerfeld for Appellant, and Dr. S. Wolf for Respondent.

Chief Justice.

CIVIL APPEAL No. 208/44.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF :—

Shifra Komornik & an. — APPELLANTS.

v.

Mordechai Komornik. — RESPONDENT.

Landlord and tenant — Possession by married couple — Lease in husband's name — Possession — Gett — Art. 24 Magistrates Law, C. A. 66/44 — Jurisdiction of Rabbinical Court, C. A. 22/34, C. A. 22/42.

Appeal from the judgment of the District Court of Haifa sitting in its appellate capacity (C. A. 32/44), dismissed:—

A contract of lease in the husband's name may not be transferred to the wife by order of a Rabbinical Court, in connection with a *Gett*, except with the husband's consent.

(A. M. A.)

REFERRED TO: C. A. 22/34 (2, P. L. R. 365; 8, C. of J. 558); C. A. 22/42 (9, P. L. R. 328; 1942, S. C. J. 259; 12, Ct. L. R. 3); C. A. 66/44 (11, P. L. R. 310; 1944, A. L. R. 590).

ANNOTATIONS:

1. *Cf.* H. C. 26/42 (9, P. L. R. 217; 1942, S. C. J. 205) on a wife's rights to her husband's property.

2. On Art. 24 of the Magistrates' Law see C. A. 135/44 (*ante*, p. 82), C. A. 384/44 (12, P. L. R. 87; *ante*, p. 200) and C. A. D. C. Jm. 73/44 (1945, S. C. D. C. 287) and notes to these cases.

3. See C. A. 110—116/44 (11, P. L. R. 422; 1944, A. L. R. 576), H. C. 63/44 (1944, A. L. R. 792) and Mo. Jm. 186/45 (1945, S. C. D. C. 281) on jurisdiction in respect of ancillary matters.

4. The judgment of the District Court is reported in 1944, S. C. D. C. 586.

(*H. K.*)

FOR APPELLANT: D. Cohen.

FOR RESPONDENT: Goiten.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the President of the District Court of Haifa, setting aside a judgment of the Magistrate's Court, Haifa. The facts, as set out clearly in the President's judgment, are as follows:—

The Respondent and the first Appellant are husband and wife. Disputes arose between them, and the Appellant started divorce proceedings in the Rabbinical Court. At that time the parties were living in a flat which was leased to the Respondent for a period of thirteen months as from 1.6.42. Both parties were working, and the Magistrate found as a fact that they put their money in a joint cash-box and the rent was paid from it.

The Respondent is of Czech. nationality, and it is not denied that therefore both husband and wife are foreigners. The proceedings before the Rabbinical Court terminated in the separation of husband and wife by a *Gett*. The order for *Gett* embodied certain orders in regard to the distribution of the property and particularly the possession of the flat. It appears that this possession was given to the wife, but the husband alleges that it was only to be given in certain circumstances. He alleges that in fact what he agreed to was that if he paid the *Ketuba* of LP. 20, which he did, the wife was to forego possession of the flat. Now there was considerable argument as to the effect of this *Gett*, but it seems to have been generally accepted that in any case there was no valid divorce. I confess that I do not find the same difficulty which the other Courts seem to have experienced in coming to a conclusion in this case, probably because of the very comprehensive analysis of the issues involved by the learned President in the course of his judgment.

I turn immediately to the terms of the contract of lease. It was signed by the Respondent only. According to the contract he alone became the tenant and he alone was entitled to possession. The fact that the wife paid part of the rent would not alter the terms of this contract. How then was the wife in possession? From the legal

point of view it appears to me that she was in possession solely by the consent of the husband, which consent he could withdraw at any time. The fact that that consent may have been given because of certain proceedings before the Rabbinical Court is, in my opinion, immaterial. It seems clear to me that a Rabbinical Court of itself could not alter the terms of the contract or the relationship between the Respondent and the person from whom he leased the flat. As it is clear that Respondent has withdrawn his consent to the wife's residence in the flat, if indeed he ever gave such consent, it follows that the husband is entitled to possession.

Some further argument was raised as to the effect of Article 24 of the Ottoman Magistrates Law on this case. In regard to this point it will suffice if I say that I agree with the learned President that the Respondent had produced a sufficiently good title for the purposes of the Article.

For these reasons the appeal must be dismissed and the judgment of the learned President confirmed. Costs will be on the lower scale to include LP. 10 advocate's attendance fee.

Chief Justice.

Frumkin, J.: This case caused considerable difficulty to both Courts below, apparently for the reason that although it was in essence a case for eviction, it was complicated by the fact of matrimonial relations between the first Appellant and the Respondent.

They are both Jews, of Czechoslovakian nationality. Divorce proceedings were instituted before the Rabbinical Court of Haifa, which culminated by an order, dated 14th *Shwat* 5703, issued by the Court, under which the husband was to give a bill of divorce (*Gett*) to his wife. A few weeks later, on 9th *Adar* 1, the couple submitted a formal application to the Chief Rabbinate, Haifa, asking to execute a bill of divorce under Jewish law. Although in that application form the parties declared that they were willing to be divorced from one another after having obtained Palestine nationality, there is an indorsement at the foot of the application bearing the same date, to the effect that the divorce has been executed and duly delivered to the wife.

The *"Gett"* having been duly executed, delivered and received, from the point of view of Jewish Law the parties are considered duly and properly divorced. Whether or not the civil Courts of this country will recognize this divorce depends upon the fact whether such divorce would be recognized by the national law of the parties, namely Czechoslovakian law. But this is of no material relevance to this case, which is purely and simply a case for eviction.

Under the Religious Law the parties are no longer husband and wife, and that is not contested by either of them. It is obvious that they cannot share the same flat any longer, and in fact no one claims the right to joint occupation of the flat — but each of both husband and wife claim exclusive right of occupation.

This point was, *inter alia*, part of the dispute before the Rabbinical Court during the divorce proceedings. No mention was given to this point in the original order of the Rabbinical Court, dated 14th *Shvat*, but in an addendum dated 20th *Adar* 1, the Rabbinical Court directed that the first Appellant should stay in the flat.

Because of the conclusion I am arriving at, it is not necessary for me to deal with the effect of the addendum on the original order. The question is whether or not the Rabbinical Court had at all jurisdiction to deal with this matter.

Now Religious Courts have, as a rule, no jurisdiction in monetary disputes or other material matters, such as possession and eviction, but in the course of dealing with matters of personal status within its jurisdiction, such as divorce, a Religious Court may have to decide upon pecuniary matters ancillary to the divorce, such as the distribution of the property between the couple about to be divorced, *etc.*, so that if the Rabbinical Court in this case had jurisdiction over the parties in the main matter of divorce, a decision as to which of them should remain in the flat might fall within its jurisdiction as ancillary to the divorce proceedings. But the parties are foreigners, over whom the Rabbinical Court can exercise no jurisdiction, and having no jurisdiction over them in the divorce proceedings, obviously there can be no question as to ancillary jurisdiction. It does not follow that because of lack of jurisdiction the parties had not been, at least from the point of view of Religious Law, properly divorced. In this matter the Rabbis, in executing and supervising the divorce, acted not in a judicial but in a rabbinical capacity, as more fully set out in Civil Appeal 22/34 (2, P. L. R. 365) followed in Civil Appeal 22/42 (9, P. L. R. 335).

Two things therefore emerge — (a) that the Appellant and the Respondent canont occupy the same flat, because they are no longer husband and wife; and (b) that the order of the Rabbinical Court has no binding effect on the point as to which of the parties is to remain in sole possession.

The learned Magistrate decided this latter point on the basis of Article 24 of the Ottoman Magistrates Law. The learned President also dealt at great length with the conditions of this Article. As how-

ever more fully stated in Civil Appeal 66/44, this Article has no applicability to a case of this nature. The only thing which remains, therefore, is to approach the case on the basis of general principles governing eviction matters.

Now the contract of lease is in the name of the husband, who was always in possession, and there can be no reason why he should not continue possession. The Appellant stayed with him so long as she was his wife. It may very well be that she used to contribute from her earnings towards the payment of rent, but even if it were so, now that she is no longer the wife of the statutory tenant, she cannot stay with him, and even less so can she take over the flat from him. The second Appellant has certainly no rights of her own and must follow her sister.

It is for these reasons that I hold that the judgment of the District Court must be confirmed and the appeal dismissed, with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 6th day of March, 1945.

Puisne Judge.

CRIMINAL APPEAL No. 25/45.

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

BEFORE: FitzGerald, C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Muhammad Mahmoud Ghazzawi. APPELLANT.

v.

Attorney General. RESPONDENT.

Finger prints — Evidence — Conviction based on finger print evidence alone — English law, Archbold.

Appeal from the judgment of the District Court of Tel-Aviv, CR. C. 143/44, whereby Appellant was convicted of an offence against sec. 297(a) of the C. C. O., 1936, and sentenced to three years' imprisonment, dismissed:—

A conviction may be based on the sole evidence of a finger print expert.

(*A. M. A.*)

ANNOTATIONS: The case referred to is R. *v.* Castleton, 1909, 3 Cr. App. Rep. 74, C. C. A.; see also R. *v.* Bacon, 1917, 11 Cr. App. Rep. 90, both quoted in Halsbury, Supplement to Vol. 13, para. 669.

(*H. K.*)

FOR APPELLANT: Michaeli.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

In this appeal only one point emerges. It is admitted that the conviction of the Accused rested solely on the evidence of a fingerprint expert. We are satisfied that the person who gave evidence in regard to these fingerprints was an expert. The question, therefore, arises whether the accused person can be convicted on this evidence alone. There is ample authority in the English Law in favour of this proposition, and we need only refer to the case quoted in Archbold, the 31st Edition, page 329.

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

Delivered this 13th day of March, 1945.

Chief Justice.

CIVIL APPEAL No. 150/45.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mohammad Ali Ahmad Saleh. APPELLANT.

v.

Fatmeh bint Ahmad Saleh. RESPONDENT.

Sale of land — Construction of contract of sale — Specific performance of a void contract.

Procedure — Point taken in final address only.

Appeal from the judgment of the Magistrate's Court Jaffa, sitting as a Land Court dated 5.4.45 in Land Case No. 194/44, dismissed:—

1. Specific performance will not be granted in respect of a void disposition.
2. This is a point which the Court should take *proprio motu*, but the parties should be allowed to be heard thereon.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* C. A. 38/44 (11, P. L. R. 274; 1944, A. L. R. 335); C. A. 322/44 (12, P. L. R. 14; *ante*, p. 71) and C. A. 192/44 (*ante*, p. 161).

2. A point of illegality may be taken by the Court of its own motion — C. A. 148/43 (10, P. L. R. 310; 1943, A. L. R. 366); *cf.*, however, C. A. 192/44 (*supra*).

(*H. K.*)

FOR APPELLANT: Farouki.
RESPONDENT: In person.

JUDGMENT.

We do not consider it to be necessary to call on the Respondent to reply.

This is an appeal from the judgment dated 5.4.45 of the learned Magistrate of Jaffa in Land Case No. 194/44 whereby he dismissed an action for specific performance on the ground that the contract (Exhibit 1 dated 25.1.35) was a contract of sale and not an agreement to sell. There is no doubt that if this was a contract for sale it was void because it had not been registered in the Land Registry, and in that case the Magistrate's judgment was clearly a proper one. No question arises upon the point whether the Appellant could rely upon long possession, because at the date when he filed his action (1.2.44) he had not been in possession for 10 years. So the only question with which we need deal is whether the Magistrate was right in dismissing the action because the contract was a void one.

Hikmat Eff. Taji Farouki, who has appeared for the Appellant, has submitted that this point had not been taken in the written statement of defence and that is true. It was, however, taken by the advocate for the Respondent when he made his final address in the lower Court.

Even if this point had not been taken at all by the Respondent we think that it is the duty of the Court to see that the provisions of the Land Transfer Ordinance are not transgressed but the Court before it takes such a point of its own motion ought to hear the parties.

In this case, however, it was the Respondent's advocate who took the point, and the Appellant's advocate made the final speech, so he had an opportunity of dealing with it.

Having considered the contract we find that no other reasonable conclusion could have been reached than that it was a final sale. The contract opens with words showing that it was one of "sale and purchase", and clause 1 and 2 make this still more clear. We do not consider that the mere inclusion of a penalty to be suffered by the vendor if he failed to effect the transfer in the Land Registry when called upon to do so makes the contract an agreement to sell. The vendor did not die till over 4 years after the contract had been made, and during that time no attempt was made to effect registration.

It is true that not only the form of the contract but the intentions of the parties are to be considered in deciding whether the contract is

one of sale or an agreement to sell. One of the parties (the vendor Raquiyeh) is dead, so she could not tell the Court what her intention was. But the Appellant himself in cross-examination stated that he had purchased the land from his grandmother four years before her death, and Qasem Al Qaddourah and Mahmoud Moussa Al Tharir (who were two of the Appellants' witnesses and who were called to prove the contract) said that Raquiyieh had stated that she had "sold" the land and that she had received the value. Another witness Hijjeh Naim gave similar evidence. So there was evidence apart from the contract itself upon which the Magistrate could find that it was a sale. We find that the appeal fails and we dismiss it with inclusive costs in the fixed sum of LP. 2 (two pounds).

Delivered this 31st day of May, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 21/45.

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

BEFORE: FitzGerald, C. J. and Frumkin, J.

IN THE APPEAL OF:—

Muhammad Mabruk Ahmad. APPELLANT.

v.

Attorney General. RESPONDENT.

Justifiable homicide — C. C. O. 19(a) — Policeman killing in discharge of duty.

Appeal from the judgment of the District Court of Jaffa, Cr. C. 179/44, whereby Appellant was convicted of an offence against sec. 212 of the C. C. O., 1936, and sentenced to five years' imprisonment, allowed:—

> When a policeman kills a man who has committed a felony, in an attempt to apprehend him, it is justifiable homicide if the Court find that the policeman did what was reasonable in the circumstances to apprehend the criminal.

(*A. M. A.*)

ANNOTATIONS: See and compare the following cases: CR. A. 1/39 (6, P. L. R. 51; 1939, S. C. J. 32; 5, Ct. L. R. 66), CR. A. 5/39 (*ibid.*, pp. 40, 38 & 61), CR. A. 7/39(1939, S. C. J. 43) and CR. A. 38/44 (11, P. L. R. 140; 1944, A. L. R. 173).

(*H. K.*)

FOR APPELLANT: Ghussein.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

In this case the Accused was a policeman duly sworn as a member of the Police Force. At the time of the incident he was performing a duty assigned to him by his superior officer. For the purpose of effectively carrying out that duty he was lawfully carrying a lethal weapon — a rifle. He discharged that rifle while still on duty, and killed Abdul Karim Abu Ayyadeh. He was charged with manslaughter under section 212 of the Criminal Code Ordinance.

In the first place we find it necessary to stress the findings of fact by the learned President. Those findings are to the effect that the Accused was guarding a number of sacks which had been taken from a wreck, that the deceased came up to him, warned him to clear away, and as he did not do so fired at him. There was no doubt that in this the deceased had committed a felony. The learned Judge also came to the conclusion that the Accused was justified in the belief that the deceased came for the purpose of stealing the sacks which would also have been a felony. It emerges therefore that the decased was armed, that the constable saw him in such circumstances as caused him reasonably to believe a felony was about to be committed, that in fact a felony had been committed seeing that the deceased did fire at the constable; that in order to avoid arrest the deceased fled and he continued to flee until he was shot down. The law on the subject is clear and it is as the learned President stated it — "Where an officer, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flees and is killed by the officer in the pursuit; if the offence with which the man was charged were a felony, and he could not otherwise be apprehended, the homicide is justifiable".

Only one question therefore arises, could the man have been otherwise apprehended? This is a question of fact. The man was armed and fleeing and unless he threw down his arms or surrendered — it is reasonable to assume in the police constable's favour that he called upon him to surrender — it is clear that the police constable would have risked his own life if he closed in on him. We are of opinion that the belief of the Accused that this man was still armed was, in the circumstances, a reasonable belief, and this being so we are of opinion that he was entitled to use his firearms to effect the arrest. Having arrived to this conclusion we consider that the other findings regarding the time of the day and the place, *i. e.* near the grove, all of which obviously influenced the learned President in his finding of guilty, were irrelevant to the true issue which was raised in this case.

For these reasons we are of opinion that the appeal must be allowed, the conviction quashed and the Accused set at liberty unless he is detained on some other charge.

Delivered this 7th day of March, 1945.

Chief Justice.

CIVIL APPEAL No. 33/45.

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

BEFORE: Plunkett, A/J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Isaac David Mann & an. APPELLANTS.

v.

1. Wafa Youssef Wafa el Dajani,
2. Registrar of Lands of Nathanya. RESPONDENTS.

Awlawiyeh — Land Code, Art. 41 — *Claim by co-owner and Khalit — Refusal to purchase from prior owner, Mejelle* 51; *C. A.* 15/44 — *Definition of Khalit, Mejelle* 858, 1219, *Goadby and Doukhan, Tute — Effect of Tabu Regulations No.* 11 — *Valuation — Fixtures.*

Appeal from the judgment of the Land Court of Nablus, dated 22.12.44, in Land Case No. 28/43, dismissed:—

1. A co-owner who refuses to exercise his right of *awlawiyeh* in connection with a certain sale may exercise it subsequently in connection with another sale.
2. A *khalit* as regards water does not include the co-owner of a well entitled to carry water over the adjoining land.
3. Fixtures are included when estimating the price.

(*A. M. A.*)

REFERRED TO: C. A. 15/44 (11, P. L. R. 489; 1944, A. L. R. 788).

ANNOTATIONS:

1. On the first point *cf.* C. A. 280/44 (*ante*, p. 357).
2. See note 1 in A. L. R. to C. A. 226/44 (12, P. L. R. 10; *ante*, p. 30) for authorities on *awlawiyeh* claims by *Khalits*.

(*H. K.*)

FOR APPELLANTS: Eliash.

FOR RESPONDENTS: Dajani.

JUDGMENT.

This is an appeal from the Land Court of Nablus in Land Case No. 28/44, dated 22.12.44 whereby the Appellant's claim for prior purchase was dismissed.

The Plaintiff's claim was for prior purchase *awlawiyeh* of 4 parcels 43, 44, 45 and 47 and further that they are *khalits* together with the Defendants in parcels 46, 39 and small adjoining parcels 40, 41, 42 and consequently entitled to prior purchase of these parcels also.

The history of the case is as follows: — The shares in the parcels now owned and registered in the Defendants' name, namely, parcels 46, 39, 40, 41 and 42, which are parcels adjoining parcel 46, are wholly registered in the name of Defendants, that all these parcels were in 1940 similarly registered in the name of one Hafkin. The Plaintiffs at the same time were the registered owners of parcel 38. Hafkin in 1940 was apparently in financial difficulties and had mortgaged his share to the Palestine Mortgage Bank, he was unable to pay the interest or redeem the mortgage and offered the property to the Plaintiffs. The Plaintiffs refused at that time to purchase, and the property was consequently put up for public auction by the Palestine Mortgage Bank. The Plaintiff did not bid at the public auction and the property was sold to the bank. The bank then took the place of Hafkin and became the registered co-owner of parcels 43, 44, 45 and 47 with the Plaintiff and another and sole owner of parcels 46, 39, 40, 41 and 42. This situation remained unchanged until 1942, when the bank sold the parcels in question to the Defendants, whereupon the Plaintiffs instituted these proceedings for prior purchase. As regards parcels 43, 44, 45 and 47 he claims that as co-owner, he is entitled to prior purchase and as regards parcels 45, 39 and also parcels 40, 41 and 42, that since he is a co-owner in parcels 43, 44, 45 and 47 with the Defendants, he is a *khalit* in respect of the property of parcels 39, 46, 40, 41, 42. I would here mention that the parcels 43, 44, 45 are in fact the private road registered in the name of Plaintiffs and Defendants and another and that this road is the only road which leads to a well parcel 47, which is similarly registered in the name of the Plaintiffs and Defendants and another. All the parcels of the Plaintiffs and Defendants were previously owned as *musha'a* but were subsequently partitioned and by this partition Hafkin obtained the land registered in his name and the Plaintiffs likewise their share.

The learned R/President in page 4 of his judgment made the following findings:—

> (a) The Plaintiffs having previously effected partition of the lands they held in *mush'a* with others, cannot subsequently claim *awlawiyeh* from the successors in title to their previous partners in these lands.
> (b) That the Plaintiffs are not *Khalits* in respect of parcels 39 and 46 nor of parcels 40, 41 and 42, for they have no joint right of running water over these plots together with the Defendant, but

only separate registered encumbrance over the Defendants' parcels in respect of a right of way for water for irrigating their groves from the well parcel 47.

(c) That any right they may have had to claim *awlawiyeh* over Defendants' parcels was extinguished by the sale by auction in the Execution Department of those parcels, and it did not revive as against the successors in title to the purchaser in that sale. They could, had they so wished, bid in the auction and thus obtained the parcels.

(d) Having been offered these parcels by their former owner Hafkin and not having accepted that offer their right of preferential purchase was lost and could not revive. That which fails cannot be revived. *Mejelle* Article 51.

(e) Parcels 43, 44 and 45 are a private road and registered as such as separate parcels. No question of being *khalit* arises in respect of these parcels for each registered co-owner has the right of user of the property so registered as a road irrespective of who may purchase the shares sold by one of the registered owners. Not only this but this road affords access only to the well, and not to any other property of the Plaintiffs.

Mr. Eliash for the Appellants submits that although the Appellant may have been offered and refused to purchase the parcels in question by the previous owner Hafkin prior to 1941, and although the bank purchased these parcels by public auction in 1941 and were duly registered as co-owners in parcels 47, 43, 44 and 45, and that the Appellants may have lost their right to prior purchase as regards transfer by Hafkin to the bank yet once the bank became registered owner any new sale transactions by the bank to another party revives the Plaintiffs' right of prior purchase. As regards his claim to be *khalit* and therefore to prior purchase of parcels 46, 39, 40, 41, 42, he submitted that he is a *khalit* due to his ownership and right of passage over a private road and also to his part ownership in the well parcel 47 and encumbrance, namely, to carrying of water through parcel 46 and that therefore as *khalit* he is entitled to claim prior purchase of parcels 46, 39, 40, 41 and 42 which adjoin the private road.

Mr. 'Auni Dajani for the Respondent submits that the right to carrying of water from a joint owned well over adjoining land does not constitute a *khalit* which can only arise where there is right to take water from a running stream. Here there is no *khalit* with water. Parcels 39 and 46 are therefore in no sense *khalit*. Right of way is defined in article 858 *Mejelle* and 1819, unless parcels 39 and 46 are entitled to use the private road they are not *khalit*, they have no right of way over the road. If sold to a stranger he would have no right to use the road

— parcel 38 has no right of way only a right to carry water over parcel 46.

The private road is for passage only and the water is dealt with in the *kushans,* owners of 39 and 46 have no right to use the private road. The owners of parcel 47, however, have such a right not by virtue of a right of way but as *musha'a* owners of parcels 47, 43, 44, 45. Reference is made to Goadby and Doukhan page 218, 219.

> "The private right of way must be distinguished from the private road to which rights of preemption attach (Article 1008 *Mejelle*). Such private roads are apparently cases of joint ownership in the soil of the road. A person may also own or be joint owner of a roadway which crosses land of another or others and this state of things is distinguishable and distinguished from the abstract right of way".

In order to claim *khalit* the claimant must be a co-owner in the land and therefore all the encumbrances mentioned in the *kushans* have no bearing on the question. These encumbrances are for right of way for water and not to take water from the well, and parcel 39 has no such encumbrance *vis-à-vis* parcel 38. Only the shareholders in the well parcel 47 have a right to use the road and they can sell to-morrow and the adjoining owners can have no remedy. The well was made a separate parcel by partition in 1939 and none of the other parcels have a registered right to take water from parcel 47. Therefore, neither the owner of 39 nor 46 is a *khalit* in the private road or private right of water which means a private right to running water and cannot apply to still water which is situated on other land. See Article 1145 and 1168 *Mejelle.*

As regards the Appellant's claim to prior purchase in parcels 47, 43, 44, 45 on the ground that he is a co-owner — Firstly, Hafkin offered these parcels to the Appellant prior to 1941 when they were sold in execution to the bank. Secondly, Appellants allowed these parcels to be sold by public auction to the bank and he cannot now prevent the bank from selling to anyone he wishes. See Article 51 *Mejelle* and Selim Baz commentary p. 40. He has lost his right similar to a right of way and cannot revive it — See C. A. 15/44 P. L. R. II, p. 489 (Aug.) Appellant has lost his right for ever to claim *awlawiyeh.*

In reply Mr. Eliash further submits that if the Respondent wishes to avoid this action he or the bank could have followed *Tabu* Regulation No. II and informed the co-owner of the intended sale.

Article 1008 *Mejelle* example is of joint irrigation of a garden. Surely as co-owner Appellant is in even a stronger position. Parcel 47 is co-

owned and belongs to a limited number of persons, the word flowing does not exclude a well. The tenth finding of fact in the judgment parcels 38, 39, 46 all irrigated from parcel 47, joint usage of the water. See Goadby and Dukhan end of page 218. The co-ownership in parcels 43, 44, 45 and 47 which adjoin parcels 39, 46, 40, 41, 48, constitutes a *khalit* and gives right to *awlawiyeh* of these lands. The right of *awlawiyeh* arises on each separate sale by a co-owner, nothing to show it does not survive to a further sale. Appellant is not bound to accept a new partner. See Art. 51 *Mejelle,* also Articles 1561 and 1562 which refer to Article 51.

As regards valuation the findings in the judgment includes the machinery and the well.

The almost archaic and complicated provisions of Article 41 of the Land Code and especially those dealing with "*khalit*" must be very strictly applied.

Due to the fact that the Appellants and Respondents are registered co-owners of parcel 47, well and 43, 44, 45 private road, one might be misled by the persuasive argument for the Appellants that as co-owners of the well and private road this constitutes them *khalit* in respect of parcels 46, 40, 41, 42 and 39. We must, however, look somewhat further to ascertain what is the true position.

To claim prior purchase as *khalit,* claimant must be a person "jointly interested" who shares a right — see Article 41 Land Law — Tute Note 3.

There is a difference between the mere right to carry water over land, right of aquaduct *i. e.* right to lead water through another's land which is a right similar to a right of way and where the person over whose land the water is being carried or flows has a right to share in that water, he would then be sharing in a servitude. There is in fact no registered right in any of the *kushans,* to take water from parcel 47 or anywhere else. There is only an encumbrance registered in favour of some of the parcels to carry water over parcel 46. Parcels 46 and 39, however, have no registered rights whatever, as regards any of the other parcels, no right to take or carry water.

Now to be considered a *khalit* there must be a co-sharing in a right affecting the lands being sold.

It will be more convenient to deal with the Land Court judgment and arguments on appeal under separate headings.

(1) What if any is the effect in this case of the partition in 1939, on the question of claim for *awlawiyeh* under Article 41, Land Code,

as co-owner and *khalit*. We hold that this does not affect the sale by the bank who is a stranger to the partition.

(2) What if any is the effect on the present claim for *awlawiyeh* and as *khalit* of the offer to the Appellants to purchase, made by Hafkin prior to 1941 and the subsequent sale in 1941 by public auction to the bank. We hold that the present claims are not affected as the sale by the bank, a co-owner is a fresh sale.

(3) Is the claim as *khalit*, affected by the registered encumbrance to carry water over parcel 46. We hold that as owner of parcels 46, 39 Respondent does not share any registered right whatever with the Appellant.

For all these reasons the judgment of the Land Court as regards the claim for *awlawiyeh* in respect of Respondent's share in parcels 47, 43, 44, 45 must be reversed and judgment entered in favour of the Appellants accordingly giving the Appellants right of prior purchase of the shares registered in the name of the Respondents in these parcels.

As regards Appellants' claim that as *khalit* he is entitled to *awlawiyeh* of parcels 46, 39, 40, 41, 42. The Appellants' claim fails and the judgment of the Land Court in respect to this portion of the claim is confirmed and the appeal dismissed.

As regards the valuation, the learned Relieving President in his judgment relies upon the evidence of Saad Eddin Abbassi. This witness gives evidence only as to the value of the pump LP. 300 and engine LP. 2400. The value of the Defendants' share in the water and buildings has not been ascertained. The case is therefore remitted to the Land Court to ascertain and fix the total value of the machinery, pump, water and buildings. The order as to costs in the Court below to Defendants is cancelled and the Appellant is awarded half of his costs on the lower scale here and below, and LP. 15 advocate's fees in the Court below.

Delivered this 4th day of May, 1945, in the presence of Mr. Eliash for Appellants and Awni Eff. Dajani for Respondents.

A/British Puisne Judge.