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CIVIL APPEAL No.383/44.

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

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

IN THE APPEAL OF :—

Wadi'ah Maroun Nassif, on behalf of the estate of Maroun Ibrahim Nassif. APPELLANT.

v.

Abraham Polster. RESPONDENT.

Landlord and tenant — Unlawful subletting — Question whether person a tresspasser or lawful sub-tenant — Subletting to a person prior to execution of contract of lease — Refusal by Chief Justice to grant leave to appeal.

1. If contract of lease confers on the landlord a right to cancel the lease in case of breach by tenant — bringing of an action for eviction clear indication of the landlord's intention to cancel the lease.

2. Sublease to a person after judgment for eviction entered against head-tenant and before execution of new contract of lease between head-tenant and landlord prohibiting a sub-lease makes head-tenant liable to eviction.

3. Refusal by the Chief Justice for leave to appeal under section 12 of the Magistrate's Court Jurisdiction Ordinance, 1939 is no indication that the Chief Justice concurs in the judgment from which the appeal is sought.

ANNOTATIONS:

1. In C. A. 160/44 (not reported) the Chief Justice without assigning reasons refused leave to appeal from judgment of the District Court Haifa in C. A. D. C. Haifa 43/44 (1944, Selected Cases p. 102). In C. A. D. C. Haifa 78/44 (1944, Selected Cases p. 388) Weldon, J., followed his own judgment in C. A. D. C. Haifa 43/44 (*supra*) relying on the fact that leave to appeal was refused in C. A. 160/44 (*supra*).

2. On nature and effect of unlawful sub-letting see C. A. 178/44 (1945, A. L. R. 172) and annotations.

(*A. G.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: N. Lipschitz.

JUDGMENT.

The facts in this case are as stated in the learned Relieving President's judgment. In September, 1943, the present action was filed in the Magistrate's Court. The Magistrate held that, after the judgment of eviction in the year 1942 had been given, the Respondent was a trespasser and the letting of the room to Wolper was the act of a

Jaddouli (*Mejelle* 447), and that this "*purported*" sublease only took effect when the new lease between Respondent and Appellant was signed. The learned Relieving President did not agree with the Magistrate's view, he came to the conclusion that this lease of Wolper was, what I might call, a hang-over from the previous relationship between the parties. The lease executed between the parties is the lease covered by P. 3 and D. 1 which contains the following clause:—

> "The lessee shall have no right to transfer the lease to another nor can he sublet the premises or part thereof without the consent of the lessor in writing on his contract. If the lessee fails to obtain the lessor's consent, or if he does any damage to the premises or if he refuses to pay the rent in accordance with the provisions stated herein, the lessor shall be entitled to cancel the contract and claim for any damage or loss occurred and for all costs entailed thereby".

This is a clause clearly prohibiting subletting.

I am unable to accept the learned Relieving President's view that the lease to Wolper was not a lease in contravention of this clause. It seems to me that after the date of the execution of P. 3 and D. 1, the only title of the Respondent to this house was the title conferred by these documents. After that date any subletting made by the Respondent must flow from that title and the sublease must stand or fall by that title. If in fact the Respondent had sublet to Wolper before the date of the execution of P. 3, that sublease died at the same time as the original lease between the Respondent and the Appellant. It therefore follows that if Wolper has any legal right by way of a sublease in this house, it must flow from P. 3. If it does, it is clearly a contravention of the clause in P. 3 which prohibits subletting.

One point remains for consideration. It is set out in paragraph 4 of the learned Relieving President's judgment which decided that even if this subletting could be deemed to be a breach of the lease the contract itself offered no right of eviction. The only right conferred was a right to cancel the lease and claim damages. The learned Relieving President quotes as an authority a previous decision of his, to this effect, in C. A. No. 160/44, in which the Chief Justice refused leave to appeal. I would here remark that a refusal by the Chief Justice for leave to appeal under section 12 of the Magistrates' Courts Jurisdiction Ordinance, 1939, is no indication that the Chief Justice concurs in the judgment from which the appeal is sought. It only indicates that the Chief Justice is not satisfied that a point of law of sufficient importance has arisen to warrant the special appeal provided for under the section.

It seems to me that if the tenant has committed a breach of one of

the conditions of the contract which would entitle the lessor to cancel the lease, the lessor can sue for eviction. What is to be gained by the lessor going through the formality of writing to the lessee to tell him of his intention to cancel the lease? No clearer indication of the landlord's intention to cancel could be given than the bringing of an action for eviction.

For these reasons I am of the opinion that the appeal must be allowed and the judgment of the District Court must be set aside and the judgment of the Magistrate restored, with costs on the lower scale to include LP. 10 advocate's attendance fee.

Delivered this 5th day of March, 1945.

British Puisne Judge.

CIVIL APPEAL No. 49/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Ibrahim Abu Shandi. APPELLANT.

v.

Raifeh Abu El Huda. RESPONDENT.

Settlement made in Court — How impeached.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, in Civil Appeal No. 142/44, dated 25.1.45, dismissed:—

A settlement made in Court may not be impeached in the absence of evidence of fraud or mistake.

(*A. M. A.*)

ANNOTATIONS: On setting aside of consent judgments *cf.* C. A. 277 & 278/43 (11, P. L. R. 196; 1944, A. L. R. 224) and note in A. L. R.; see also C. A. D. C. T. A. 48/44 (1944, S. C. D. C. 203).

(*H. K.*)

FOR APPELLANT: Malak.

FOR RESPONDENT: Elia.

JUDGMENT.

In our judgment the Magistrate was right in refusing to hear evidence to upset the settlement, dated 3.4.44, which had been made by the parties in Court. If settlements of this kind could be upset in the

absence of any evidence of fraud or mistake, there would be no finality.

The appeal fails and we dismiss it with fixed costs in the sum of LP. 10 (ten pounds). The judgments of the Magistrate and of the District Court are confirmed.

Delivered this 22nd day of May, 1945.

British Puisne Judge.

CIVIL APPEAL No. 200/45.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF :—

A. APPELLANT.

v.

B. RESPONDENT.

Appeals in succession matters — C. P. R. apply — Order under sec. 22 Succession Ord. — "Decree" C. P. R. r. 2.

Appeal from the judgment of the District Court of Jaffa, dated 30th May, 1945, in Civil Case No. 124/41 (Motion No. B/376/44), dismissed:—

An order appointing a guardian under sec. 22 of the Succession Ordinance is not appealable without leave.

(A. M. A.)

REFERRED TO: C. A. 160/42 (1942, S. C. J. 589); C. A. 213/42 (*ibid.*, p. 849).

ANNOTATIONS: *Cf.* C. A. 243/42 (10, P. L. R. 21; 1943, A. L. R. 254) — *order of administration not appealable without leave.* See, on the other hand, C. A. 121/44 (1944, A. L. R. 785) and note 3 thereto.

(H. K.)

FOR APPELLANT: Elia.

FOR RESPONDENT: Eliash and Levontin.

JUDGMENT.

At the hearing of this appeal from a decision of the District Court of Jaffa dated the 30th May, 1945, refusing to vary an order made by that Court on 26th July, 1945, appointing the present Respondent the sole guardian over her minor children, Dr. Eliash, for the Respondent, took the preliminary objection that as leave to appeal should have been obtained and was neither sought nor obtained, no appeal lies. This is

the third occasion on which similar disputes between the same parties have come before this Court (C. A. 160/42, Annotated Supreme Court Judgments (1942) p. 589, and C. A. 213/42, Annotated Supreme Court Judgments (1942) p. 849). It seems that on neither of the two previous occasions was the point taken and this Court heard the appeals although leave to appeal had not been obtained. As, however, the point has definitely been taken before us to-day and as we have heard exhaustive arguments both by Dr. Eliash, for the Respondents, and Mr. Elia, for the Appellant, we must now decide the matter. It seems tolerably clear that the order of the District Court was made under section 22, Succession Ordinance and although the Civil Procedure Rules, 1938, do not apply to proceedings brought in a District Court under the Succession Ordinance, the Civil Procedure Rules do apply to appeals to this Court from judgment in such matters.

Mr. Elia argues that the decision of 30th May, 1945, was a "decree" within the meaning of that word in Rule 2 of the Civil Procedure Rules inasmuch as it conclusively determined the right of the Respondent to be or to remain sole guardian of her minor children, that is to say, that she would be free to act as guardian without having any co-guardians forced upon her. Attractive as this argument may be we do not think that the decision of the 30th May can really be said to come within the definition of the word "decree" in Rule 2. The preliminary objection is, therefore, sustained and the appeal is dismissed. We award the Respondent fixed costs of LP. 10.— to be paid out of the estate.

Delivered this 27th day of July, 1945.

British Puisne Judge.

HIGH COURT No. 139/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPLICATION OF:—

Sheikh Bashir el Juka represented by his son,
Mohammad Said Bashir Juka. PETITIONER.

v.

Chief Execution Officer, Magistrate's Court,
Nablus & an. RESPONDENTS.

Judgment for dispossession of a definite area — C. E. O. giving decree holder a lesser area than ordered in judgment.

Return to a rule *nisi* issued on 13th December, 1944, directed to the first Respondent calling upon him to show cause why his orders, dated 26th August and 7th November, 1944, in Execution file No. 459/44, Nablus, should not be set aside or revoked, and a new order made, ordering the second Respondent to be dispossessed of 306 sq. metres, as ordered by the judgment of the Magistrate's Court, Nablus, in case No. 639/43:—

> Chief Execution Officer is bound to give precise effect to judgment before him, thus where judgment is for dispossession of a specified area he cannot give decree holder a lesser area.
>
> (*M. L.*)

ANNOTATIONS: Chief Execution Officer not a Court of Appeal from Magistrate's Court: H. C. 97/43 (10, P. L. R. 569; 1944, A. L. R. 41) and note 4 thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: S. T. Cohen.

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

ORDER.

This is an application for an order upon the first Respondent (who is the Chief Execution Officer of the Magistrate's Court, Nablus), directing him to dispossess the second Respondent of an area of 306 sq. metres, in compliance with the judgment dated 6.11.43 in Case No. 639/43, and the Applicant also asks that the first Respondent's orders dated 26.8.44 and 7.11.44 be set aside.

It appears to us that when the Chief Execution Officer (who happened to be the Magistrate who had given the judgment dated 6.11.43) was called upon to execute that judgment. He took upon himself the function of a Court of Appeal and amended that judgment by giving the Petitioner a less area. Clearly he could not do this. His duty as Chief Execution Officer is to give precise effect to the judgment dated 6.11.43 whether or not it results in the second Respondent being left with less land than he expected to have.

The order *nisi* is made absolute, and the first Respondent is directed to give full effect to the judgment dated 6.11.43 by giving the Applicant an area of 306 square metres. The first Respondent's orders dated 26.8.44 and 7.11.44 are set aside. The Applicant must have inclusive costs of LP. 15 (fifteen Palestine pounds).

Given this 10th day of January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 188/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Hassan Ali Abu Mahmoud & 9 ors. APPELLANTS.

v.

Ali Sheikh Ali & 13 ors. RESPONDENTS.

Partition — When an appeal lies — M. C. J. O. sec. 3(d), C. A. 378/43.

Appeal from the judgment of the District Court of Jaffa, dated 16th May, 1945, in Civil Appeal No. 16/45, dismissed:—

No appeal lies from the decision of a Magistrate to sell property incapable of partition until the property is sold.

(*A. M. A.*)

FOLLOWED: C. A. 378/43 (11, P. L. R. 234; 1944, A. L. R. 277).

ANNOTATIONS: *Cf.* C. A. 378/43 (*supra*) and the case cited in note 1 thereto in A. L. R.

(*H. K.*)

FOR APPELLANTS: Dajani.

FOR RESPONDENTS: No. 1 — Elia.
Nos. 2—10 and 12—14 — Makoff.
No. 11 — Absent — served.

JUDGMENT.

The Respondents are not called on to reply.

This is an appeal from the judgment dated 16.5.45 of the District Court in Jaffa in Civil Appeal No. 16/45.

The point for decision is whether the Appellants can appeal from a judgment of the Magistrate which ordered certain property to be sold on the ground that it could not be partitioned. The Magistrate's judgment was given in the exercise of his jurisdiction under section 3(d) of the Magistrates' Courts Jurisdiction Ordinance, No. 45/39.

In Civil Appeal 378/43 (11, P. L. R. 234) it was held that a judgment given in partition proceedings is not subject to appeal until the Magistrate giving the judgment has done all the acts he is required by law to do. In the present case the Magistrate has only ordered that the property is to be sold. He still has to sell it. Sheikh Ragheb Eff., who appears for the Appellants, fears that his clients will not have any right to appeal after the actual sale. But it follows from the decision

in Civil Appeal 378/43 that they will, at a later stage, have the right to appeal.

I find that the decision of the District Court is correct. This appeal fails and must be dismissed, with fixed costs in the sum of LP. 10 (ten pounds) to Respondent No. 1, and LP. 10 (ten pounds) to Respondents 2 to 10 and 12 to 14.

Delivered this 25th day of July, 1945.

British Puisne Judge.

HIGH COURT No. 143/44.

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

BEFORE: Shaw, J.

BETWEEN:—

Tatjana Spiwak (Bauer). PETITIONER.

v.

Kvutzat Kfar Hamakabi, Kvutzat Poalim Lehityashvut Shitufit Beeravon Mugbal, Kfar Hamakabi, Emeq Zebulun, near Haifa. RESPONDENT.

and

Tatjana Spiwak (Bauer). PETITIONER.

v.

Captain Jacob Bauer & an. RESPONDENTS.

(by order of the Court dated 16.2.45).

Action before Rabbinical Court for divorce and custody of child — Withdrawal of action on account of lack of jurisdiction — Rabbinical Court issuing an order regarding child — Habeas corpus application — Non interference of High Court.

Return to an order *nisi* dated the 22nd day of December, 1944, directed to the Respondents calling upon them to show cause why they should not produce the body of the infant Ralph Bauer (Spiwak) before this Court on Friday the 16th day of February, 1945, for the purpose of handing him over to the Petitioner, discharged:—

1. An appeal to Rabbinical Court of Appeal on ground that lower Court had no jurisdiction is not an acknowledgement of jurisdiction of either Court to deal with the matter on the merits, as every Court of appeal has power to upset an order made without jurisdiction by Court below.

2. Issue of a writ of *habeas corpus* is discretionary, and High Court will not grant it, if Petitioner has other adequate remedies.

(*M. L.*)

ANNOTATIONS:

1. As to first point see H. C. 33/42 (9, P. L. R. 275; 11 Ct. L. R. 163; 1942, S. C. J. 253) and annotations thereto.

2. On non interference of H. C. in case an alternative remedy exists see H. C. 129/44 (11, P. L. R. 636; *ante*, p. 63) and note 1 thereto in A. L. R.

3. On applications in the form of *habeas corpus* in connection with custody of minor children see H. C. 45/43 (1944, A. L. R. 34) and H. C. 118/43 (1944 A. L. R. 5) with annotations thereto.

(*A. G.*)

FOR PETITIONER: H. Cohn.

FOR RESPONDENTS: No. 1 — B. Joseph.
No. 2 — Hausner.

ORDER.

This is a return to an order *nisi* dated 22.12.44. The petition was originally brought against the second Respondents only, but the first Respondent (Captain Jacob Bauer) has been joined as a Respondent at his own request and with the consent of the Petitioner. The Petitioner is asking for a writ of *habeas corpus* against the second Respondents, who admittedly have the custody of her minor son, Ralph, who is just under three years of age. The first Respondent is Ralph's father.

The Petitioner and first Respondent are Jews, and on or about 15.5.41 they went through a marriage ceremony, and obtained a marriage certificate from the Chief Rabbinate of Palestine, Jerusalem. The child, Ralph, was born of this union on 28.3.42 in Jerusalem. Matrimonial disputes having arisen between the Petitioner and the first Respondent, the Petitioner, on 7.5.44, filed a statement of claim in the Rabbinical Court at Jerusalem, asking for a bill of divorcement from the first Respondent, and further requesting the Court to determine the question of the custody and control of the child Ralph.

At the first hearing, on 21.5.44, the advocate for the Petitioner informed the Rabbinical Court, both verbally and in writing, that she withdrew her statement of claim on the ground that she had heard that the first Respondent was a Polish citizen who had been previously married to another woman and who had not been divorced according to law. The Petitioner submitted therefore that the Rabbinical Court had no jurisdiction to determine either the matter of divorce or the matter of the child. The advocate for the first Respondent informed the Rabbinical Court that the child was in the Armon Yeladim at

Telpioth, and asked the Court to order that the child should remain there.

The Rabbinical Court ruled that it would assume jurisdiction in the matter of the child, and it finally gave an order that until a settlement was made between the parents, the child should remain where he was, and should not be taken out of the home without the consent of both parents.

From this order the Petitioner did not appeal, and Mr. Cohn, who represents her in these proceedings, has submitted that if she had gone to the Rabbinical Court of Appeal the Petitioner would have repeated the mistake which she made in going to the Rabbinical Court of first instance. With this submission I do not agree. If she had appealed to the Rabbinical Court on the ground that the lower Court had no jurisdiction to deal with the matter, that would not have been an acknowledgement of the jurisdiction of either Court to deal with the matter on the merits. It would only have been an acknowledgement of the power of the Rabbinical Court of Appeal to upset an order made without jurisdiction by the Court below, a power which every Court of Appeal clearly has.

At about the beginning of August, 1944, the child was taken out of the Armon Yeladim on the application of both parents, and on or about the 9th September he was again returned to that home. The allegation of the Petitioner is that on the latter date the child was taken away from her clandestinely by the first Respondent and put back into the home. The first Respondent denies having acted either forcibly or clandestinely.

In the meantime (on or about 12.7.44) the Petitioner had filed an application in the District Court of Jerusalem for a declaration that there was no marriage subsisting between her and the first Respondent. Those proceedings are still pending — in Motion No. 297/44.

On 14.9.44 the Petitioner received a summons from the Rabbinical Court of Jerusalem for appearance the same day in a case between herself and the first Respondent. She went to the Court, but found that the case had already been dealt with. A copy of the Court's order is Exhibit 6 attached to the Petitioner's affidavit. This order was to the effect that the child should be taken by the first Respondent from the Armon Yeladim to the Children's House at Kfar Hamakabi (*i. e.* the second Respondents) and that he should not be taken from the latter home except with the consent of both parents and the approval of the Rabbinate.

The present petition was filed on 20.12.44, that is to say over three months after the child had been handed over to the second Respondents.

Now I am not sitting as a Court of Appeal from the Rabbinical Court of first instance, and this is not a writ of prohibition directed to that Court, and I therefore do not think it is necessary for me to decide whether the Rabbinical Court acted properly when it continued to deal with the case after the Petitioner had expressed her wish to withdraw it, or whether it could at all deal with the question of the custody of a child if that question was not ancillary to a matrimonial cause.

The position as I see it is this — the child is in a home where there is no reason at all for believing that he is not happy and well cared for; he has been put into that home at the instance of his father; a case is pending before the District Court for a declaration that the Petitioner and first Respondent are not married, and it is impossible to say what the result of that case will be; the Petitioner is at liberty to bring an action in the District Court for a declaration that she is entitled to the custody of the child, and if she did bring such an action I cannot say what the result would be — possibly the Court might decide that it would be in the best interests of the child that it should be with his father; the Petitioner did not appeal to the Rabbinical Court of Appeal, nor did she apply to this Court, when it was a question of the child being in the Armon Yeladim, she only comes to this Court when the child is put into a home in which it cannot be nearly so convenient for her to visit him; and she is not prevented from going to see the child in the present home — on the contrary, she is said to have made frequent visits to him.

Various cases have been referred to by Dr. Joseph for the first Respondent and Mr. Cohn for the Petitioner, but none of those cases is on all fours with the present case, and I do not think that any useful purpose would be served by discussing them.

The issue of a writ of *habeas corpus* is discretionary, and having considered the circumstances in this case, I do not think that a writ ought to issue. The Petitioner has another remedy, or more than one, and it is not the intention of the law that this high prerogative writ should be used merely as a short cut for the purpose of obtaining relief which can and should be obtained by way of an ordinary action.

If the child were being badly treated, or if he were in bad surroundings, that would be a matter for consideration. But such is not the case here. And I consider that it is most undesirable that he should be subjected to unnecessary changes of custody at his age.

The petition must be dismissed, but in view of the relationship between the Petitioner and the first Respondent, I order that the first Respondent do pay his own costs and also the costs of the second Respondents. Mr. Caspi (for the first Respondent) undertakes to pay the costs of the second Respondents.

Given this 19th day of February, 1945.

British Puisne Judge.

HIGH COURT No. 146/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF :—

Salomon Zakarian. PETITIONER.

v.

1. His Worship Mr. J. Azoulay, in his capacity as the Chief Execution Officer, in the Magistrate's Court, Jerusalem,
2. Wanes Jiries Bannayan. RESPONDENTS.

Parties to action reaching agreement — Approval of agreement by Court constituting a consent judgment.

Return to a rule *nisi* issued on the 22nd day of December, 1944, directed to the first Respondent calling upon him to show cause why his order dated 18.12.44 in Execution file No. 134/44 in Magistrate's Court, Jerusalem, should not be set aside and why an order should not issue for the execution of the judgment dated 15.9.43 in Jerusalem Magistrate's Court, Civil Case No. 1003/43, Rule made absolute:—

Words "I order to approve" (unlike "I certify the agreement") after agreement of parties can only mean that Judge accepted it and made it an order of the Court.

(*M. L.*)

REFERRED TO: H. C. 10/42 (9, P. L. R. 8; 12, Ct. L. R. 57; 1942, S. C. J. 132).

ANNOTATIONS: On consent judgment for eviction see H. C. 42/44 (1944, A. L. R. 300) and note 1 thereto.

(*A. G.*)

FOR PETITIONER: Goitein and Elia.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — D. Mizrahi.

ORDER.

In this case it appears to me that the only ambiguity, if indeed there was any substance in the argument that an ambiguity arises, is due to the translation from the Arabic language in which the judgment was given into English. It now appears that the correct translation of the Order of the Magistrate is: "I order to approve" which, of course, is a very different proposition from that embodied in the copy with which I have been supplied which states: "I certify the agreement". It is quite clear to me that the agreement referred to by the Magistrate was not similar to the agreement in H. C. No. 10/42. It now falls to me to decide what the Magistrate meant and what was the effect of his order. There were only two courses open to the Magistrate — either to accept the agreement between the parties and embody it as a judgment of the Court, or, to refuse to accept. As his order was in these terms: "I order to approve", I can only interpret it as an acceptance of the agreement made between the parties, and as an intention on the part of the Magistrate which, in my opinion, is sufficiently conveyed in his judgment to make it an order of the Court.

For these reasons the order *nisi* must be made absolute. The Petitioner is entitled to his disbursements and to LP. 5 advocate's attendance fees.

Given this 15th day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 8/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Khalil el Sheikh Mohammad el Shamalati. APPELLANT.

v.

Mahrous Es Sayed. RESPONDENT.

Claim of recovery of excess rent — Admission — Question whether increase of rent reasonable.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, dated 9th November, 1944, in Civil Appeal No. 64/44, dismissed:—

If lessor denies increase of rent (above the standard rent) and Court finds

against him, question as to whether increase was or was not reasonable does not arise.

(*A. G.*)

FOR APPELLANT: Sha'ar.

FOR RESPONDENT: Elia.

JUDGMENT.

We do not require to call upon you, Mr. Elia.

This is an appeal by leave from a judgment of the District Court of Jaffa in its appellate capacity, dismissing an appeal from a judgment of the Magistrate, Majdal, who had given judgment in favour of the present Respondent in the amount of LP. 17, being in respect of excess of rent paid by him for premises rented from the present Appellant. In the Magistrate's Court there was produced a certified copy of a statement made by the present Appellant when he was Plaintiff in the Magistrate's Court, Majdal, in Civil Case No. 127/43, in which he said:—

> "I agreed with him (Defendant) last year to pay over to me LP. 20 rent but he only paid LP. 17. I accepted and received the amount from him. But I do not agree to LP. 17 for this year".

This admission was Exhibit 'C' in the case now on appeal from the Magistrate. It has been argued before us that that was an ambiguous admission and that the present Appellant, who was not then represented by an advocate, meant to say that the LP. 17 was in respect of six months only. There seems to us to be no ambiguity about the matter because the sum of LP. 17 must either have been in respect of a year or a month, but, in any event, it is not likely to have been in respect of a broken period such as six months. Be that as it may, the present Appellant had a clear opportunity when before the Magistrate in Civil Case No. 76/44, *i. e.* the case now under appeal, of explaining away Exh. "C". Not only did he not avail himself of such opportunity but we find that in answer to a question he said to the Magistrate:—

> "I admit before the Court that the rent is LP. 17 and that I signed the receipt produced by him for LP. 34 for this year. I say before the Court that I am in need of evicting him from the house in order to benefit therefrom. I have another house also in which I myself reside".

It is next said that not only was the LP. 17 in respect of half a year, but it is also that the whole amount of LP. 34 was in respect of part of the premises only. That was no part of the Appellant's defence before the Magistrate, nor does it seem to have been raised in the District Court.

Another ground taken by the Appellant's advocate at the Bar is that

the Magistrate did not go into the question as to whether the increase was in all the circumstances unreasonable. The answer to this, of course, is that the Appellant never admitted that there was an increase. His defence all throughout Civil Case No. 76/44 was that there had been no increase. That being so, the question as to whether any increase was or was not reasonable never arose and did not require to be gone into. What the Plaintiff was asking to recover was an excess of rent, that is, an over payment.

For all these reasons we do not think that either the Magistrate or the District Court came to any wrong conclusion. We therefore dismiss the appeal with fixed (inclusive) costs of LP. 10.

Delivered this 10th day of April, 1945.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 23/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF:—

Moshe Gaber. APPLICANT.

v.

Mrs. Leopoldine Gaber. RESPONDENT.

Request for exemption from fees on appeal — Affidavit.

Application under Rule 19(2) of the Court Fees Rules, for exemption from payment of Court Fees on appeal, refused:—

In all requests under Rule 19(2), Court Fees Rules there should be filed with the written request an affidavit sworn to by the person himself on the lines laid down in Misc. Appl. 9/42.

FOLLOWED: Misc. Appl. 9/42 (9, P. L. R. 154; 11, Ct. L. R. 98; 1942, S. C. J. 105).

ANNOTATIONS: See Misc. Appl. 37/44 (11, P. L. R. 494; 1944, A. L. R. 596) with annotations thereto in A. L. R. and case followed (*supra*).

(*A. G.*)

FOR APPLICANT: Krongold.

FOR RESPONDENT: Gorali.

ORDER.

We wish to lay it down that in all requests under Rule 19(2), Court

Fees Rules, there should be filed with the written request an affidavit sworn to by the person himself on the lines laid down in Misc. Appl. No. 9/42. In the present case, we do not, however, decide this application on that ground. We have sufficient material before us to decide the matter on both aspects of Rule 19(2). On the whole we are satisfied that the request should not be granted. It is accordingly refused.

Given this 20th day of April, 1945.

British Puisne Judge.

CIVIL APPEAL No. 102/45.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Dr. Sabri Izzeddin Kaddoura. APPELLANT.

v.

Khaled Haj Yousef Kaddoura & an. RESPONDENTS.

Arbitration — Sec. 15(3) — Leave to appeal required if proceedings on statement of claim — C. A. 32/43.

Appeal from the judgment of the District Court of Haifa, dated 21st February, 1945, in Civil Case No. 29/44, dismissed:—

Whether proceedings to enforce or set the award aside are taken by motion or by statement of claim, no appeal lies without leave.

(*A. M. A.*)

REFERRED TO: C. A. 32/43 (10, P. L. R. 181; 1943, A. L. R. 208).

ANNOTATIONS: See annotated Laws of Palestine, Vol. 2, pp. 156—7, heading "*New Law*" and pp. 162—3, headings "*Effect of New Law*" *et seq.*

(*H. K.*)

FOR APPELLANT: F. Atallah.

FOR RESPONDENTS: Shukairy.

JUDGMENT.

This is an appeal from the judgment dated 21.2.45 of the District Court Haifa in Civil Case No. 29/44 refusing an application for the enforcement of an award.

Ahmad Eff. Shukairy for the Respondents has taken the preliminary point that the Appellant has obtained no leave to appeal as required by section 15(3) of the Arbitration Ordinance (Cap. 6).

It has been argued by Fuad Eff. Atallah for the Appellant that in view of the fact that the application to enforce the award was made in the form of a statement of claim the Civil Procedure Rules take precedence over sec. 15(3) of the Arbitration Ordinance, and the Appellant is entitled to come to this Court without leave.

In C. A. 32/43 (10, P. L. R. 181) it was held that the Respondent (who in that case applied to set aside the award) was at liberty to come to the Court either by action (*i. e.* by filing a statement of claim) or by motion.

In our judgment if a party chooses to proceed by action that does not prevent the judgment of the Court from being an order within the meaning of section 15(3) of the Arbitration Ordinance.

If it is an order then the provisions of sub-section 15(3) are perfectly clear, and an appeal does not lie except by leave.

No leave having been obtained in the present instance we find that there is no appeal before this Court, and the application must therefore be dismissed with fixed costs in the sum of LP. 10 (ten pounds).

Delivered this 25th day of June, 1945.

British Puisne Judge.

CIVIL APPEAL No. 202/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

The Palestine Jewish Colonization Association (Edmond de Rothschild Foundation). APPELLANTS.

v.

1. Attorney General on behalf of the Government of Palestine,
2. "Iyon" Cooperative Society of Metulla Ltd.,
3. Ibrahim Ibrahim el Hurani and 245 ors. (as per attached list). RESPONDENTS.

C. P. R. 313 *as amended — Effect of the amendment, r.* 330 *— No order dispensing with service required —* (*C. A.* 95/43, 252/43).

Ex parte application for interlocutory order dismissed:—

Since the amendment of C. P. R. 313, it is not necessary to apply for an order dispensing with service of the appeal on parties not affected thereby.

(*A. M. A.*)

REFERRED TO: C. A. 95/43 (1943, A. L. R. 262); C. A. 252/43 (10, P. L. R. 516; 1943, A. L. R. 811).

ANNOTATIONS: In addition to the cases cited see also C. A. 193/44 (*ante*, p. 13).

(*H. K.*)

FOR APPELLANTS: Wittkowski.

RESPONDENTS: *Ex parte.*

ORDER.

This is an application for an interlocutory order dispensing with service of the Notice and Grounds of Appeal, and other documents in these proceedings, on Respondents Nos. 3—246.

Before Rule 313 of the Civil Procedure Rules, 1938, was amended it was usual to make applications of this nature — see C. A. 95/43, Annotated Law Reports, 1943, Vol. 1, page 262, and C. A. 252/43 in Vol. 2, page 811.

The amended Rule 313 provides that it shall not be necessary to serve parties not affected by the appeal, so I find that it is not now necessary for an order to be made under Rule 330 to enable this appeal to be accepted for filing.

As no order is necessary this application is dismissed.

Given this 9th day of July, 1945, in the presence of Mr. Wittkowski for Appellants.

British Puisne Judge.

CIVIL APPEAL No. 81/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Ibrahim Issa Yacoub Katato & an. — APPELLANTS.

v.

Miriam Hanna Zyadeh. — RESPONDENT.

Religious Courts — Confirmation of will — Court has no jurisdiction unless deceased was a member of the community — Consent — P. O.

in C. 50, 53(1), 54(1); C. A. 246/40; Succession Ord., sec. 7(1) — Misc. A. 28/44 considered — Procedure — Co-heirs.

Appeal from the judgment of the Magistrate's Court, Ramallah, sitting as a Land Court, dated the 12th of February, 1945, in Land Case No. 335/43, dismissed subject to a variation:—

1. A religious Court has no jurisdiction to confirm the will of a person other than a member of the community. Consent of the beneficiaries cannot confer such jurisdiction.

2. Order affecting co-heirs cannot be given *ex parte*.

(A. M. A.)

REFERRED TO: C. A. 8/32 (5, C. of J. 1673); C. A. 246/40 (8, P. L. R. 55; 1941, S. C. J. 17; 9, Ct. L. R. 54); Misc. Appl. 28/44 (11, P. L. R. 396; 1944, A. L. R. 807).

ANNOTATIONS:

1. See the previous proceedings in this case, C. A. 8/32 and Misc. Appl. 28/44 (*supra*).

2. On the first point *vide* also C. A. 279/42 (10, P. L. R. 96; 1943, A. L. R. 88) and note 5 in A. L .R.

3. On the effect of a decision by the Chief Justice under Art. 55, P. O. in C., see H. C. 144/42 (10, P. L. R. 4; 1943, A. L. R. 210).

(H. K.)

FOR APPELLANTS: Naser.

FOR RESPONDENT: Ancar.

JUDGMENT.

This is an appeal from the judgment dated 12th February, 1945, of the learned Magistrate, Ramallah, sitting as a Land Court, in Civil Case No. 335/43, declaring that the Respondent — Miriam Hanna Zyadeh — is entitled to be registered as owner of five out of ten shares in half of the land known as Khallet el Olya, more particularly described in the plan marked Ex. 5.

The first ground of appeal is that the Magistrate erred in over-ruling and ignoring the decision dated 26th July, 1944, of the Chief Justice under the first part of Article 55 of the Palestine Order-in-Council, in Miscellaneous Application 28/44. That application was brought for the purpose of obtaining a decision as to which of the Ecclesiastical Courts — the Latin or the Greek Orthodox — had jurisdiction to confirm the will of Jerius Yacoub Katato, late husband of the Respondent. The learned Chief Justice held that the application was misconceived, but it is submitted for the Appellants that the remark of the Chief Justice that the Respondent "appears to have acquiesced in the jurisdiction of that (*i. e.* the Greek Orthodox) Court" was in effect a decision that that Court had jurisdiction to confirm the will.

With this submission I am unable to agree. Article 54 of the Palestine Order-in-Council 1922 provides that the Courts of the several Christian communities shall have "exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in Article 50".

In Civil Appeal 246/40 (8, P. L. R. 55) it was held that "if a person is not a member of the Jewish Community, the Rabbinical Court has no power whatever to give any decision with regard to the validity of his will, and no consent or no mistake on the part of litigants can give a Court jurisdiction where that jurisdiction is not conferred by Order-in-Council or by Ordinance". That case, it is true, referred to proceedings in a Rabbinical Court, but the provisions of Article 53(1) of the Order-in-Council are identical with those of Article 54(1).

Section 7(1) of the Succession Ordinance (Cap. 7) similarly provides that the Courts of the religious communities shall have exclusive jurisdiction to confirm a will made by any member of the community who is not a foreigner.

The question whether the Greek Orthodox Court — its proper title is the Ecclesiastical Court of the Eastern (Orthodox) Community — could confirm the will, depends upon whether Jerius Yacoub Katato was a member of that community at the date of his death, and I am unable to find that the above-mentioned remark of the learned Chief Justice was intended to be a decision upholding the jurisdiction of the Court of the Eastern (Orthodox) Community.

The second ground of appeal was that the Magistrate erred in dis[illegible] regarding the will and the judgment (Ex. D), dated 18.1.36, of the Eastern (Orthodox) Court confirming the will. The Respondent and Jerius had married each other in the Latin (Catholic) Church in 1901. In 1907 Jerius had obtained a decree of divorce from Miriam in the Eastern (Orthodox) Court. In its judgment (Ex. 1), dated 23.12.31, in Civil Case No. 308/31, the District Court of Jerusalem found that the Eastern (Orthodox) Court ought not to have decreed the divorce, and when that case went to appeal (see C. A. 8/32, Ex. 3), the Appellants being Sara Khoury and Hilweh Katato (who is the present second Respondent (*sic*), the Court observed that — "bearing in mind the fact that the burden was upon the Appellants of establishing the validity of the decree of the Orthodox Court, which involved proof that the Respondent Miriam had notice of its proceedings, I hold that the District Court in the absence of such evidence, was bound to treat the decree as invalid".

It may be observed that the District Court had found as a fact that Jerius was at the time he married, in 1901, a member of the Latin Community, and that his father and mother had been members of the Latin Community. The District Court also found that Miriam had at all times been a member of the Latin Community.

Having considered the submissions of the advocates for the parties, I find that the learned Magistrate was fully justified in holding that at the time of his death Jerius was not a member of the Eastern (Orthodox) Community and that the Orthodox Religious Court had no jurisdiction to confirm the so-called will.

The third ground of appeal was that the Magistrate had found as a fact that the property in dispute was derived from the father (Yacoub Katato) of Jerius, who left seven children, namely, Eisa, Jerius, Hanneh, Katrina, Salma, Hilweh, and Miriam, but that instead of adjudging to the Respondent (as an alleged widow of Jerius) one share out of fourteen shares, he adjudged to her one share out of four shares in the whole property under dispute.

The learned Magistrate states in his judgment:—

> "In the absence of proof of any partition, between Jerius and Eisa, of the properties of their father, I am entitled to presume that Eisa, until his death in 1937, was in possession of the land for himself and on behalf of his brother and later his brother's estate. As no claim has ever been made to the property by the five daughters of Yacoub, who, as I said, died over 40 years ago, nor by the heirs of those of them who since died, I feel justified in disregarding, for the purposes of this action, any claim they or their heirs may have and hold that Jerius was entitled to half of Khallet el Olya shown on the plan (Ex. 5)".

Now although the Magistrate has been careful to use the words "for the purposes of this action", it must be observed that none of the five daughters of Yacoub, or the heirs of those of the daughters who have died, was made a party to the action. If Miriam wished to obtain an order affecting the rights of the five daughters or their heirs, she ought, in my judgment, to have cited them as Defendants. If Miriam is registered as owner of one out of four shares in the land, she will be in a position to sell that quarter share, and if she did so, the rights (if any) of the five daughters would be prejudiced. So I find that the judgment of the learned Magistrate should be varied to this extent, namely, that the Respondent Miriam is declared to be entitled to one share out of seven shares in half of the land known as Khallet el Olya, more particularly described in the plan marked Ex. 5.

There was a fourth ground of appeal alleging that there were irre-

gularities of procedure which have affected the course of justice, but I can see no grounds for interfering with the judgment except to the extent stated above.

With that variation the judgment is confirmed. As each party has been partially successful, I order no costs of this appeal.

Delivered this 4th day of July, 1945, in the presence of Mr. Naser for the Appellants, and Mr. Nakhleh by delegation for the Respondent.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 25/44.

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

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

IN THE APPEAL OF:—

Attorney General. — APPLICANT.

v.

Fakhry Ayyas. — RESPONDENT.

Privy Council — Conditional appeal to Privy Council — Extension of time — Palestine (Appeal to P. C.) O. in C. Art. 6(a) — Practice — Reasons for exercise of discretion.

Application for an extension of 21 days to comply with the conditions of the order granting conditional leave to appeal to the Privy Council, dated 11.1.45, granted:—

> The Court may extend the time (within the statutory period of three months) for complying with the conditions of a conditional order granting leave to appeal to the Privy Council.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment which it is sought to appeal is C. A. 290/44 (11, P. L. R. 602; *ante*, p. 285).

2. For recent cases on the practice regarding Privy Council appeals see P. C. L. A. 7/44 (11, P. L. R. 388; 1944, A. L. R. 548), 13/44 (*ibid.*, pp. 649 & 550), 3/44 (*ibid.*, pp. 394 & 663), 17/44 (12, P. L. R. 60; *ante*, p. 190), 22/44 (*ibid.*, pp. 80 & 375), 14/44 (*ibid.*, pp. 151 & 397) and annotations thereto in A. L. R.

(*H. K.*)

FOR APPLICANT: Solicitor General — (Griffin).

FOR RESPONDENT: Goitein and Gluckman.

ORDER.

This is an application by the Attorney General for an extension of 21 days to enable him to comply with the conditions specified in the order of this Court dated the 11th January, 1945, granting him conditional leave to appeal to the Privy Council under the Palestine (Appeal to Privy Council) Order-in-Council. There was a counter-application by Respondents that the conditional leave granted be rescinded on the ground of failure by the Appellant to fulfil the conditions.

The facts as they appear from the statements of counsel and the affidavits which have been tendered in support of the application and counter-application, are as follows:—

On the 11th January 1945 the Court granted conditional leave to appeal to the Privy Council. Counsel who represented the Attorney General was under the impression that the time fixed by the Judge under Article 6 of the said Order-in-Council was two months. It emerges that in fact the learned Judge, when delivering his decision in Court, specified no definite time limit. He merely stated that conditional leave would be granted on the usual terms. The Registry then entered a time limit of six weeks in the formal order which was presented to the Judge for signature and signed by him. This formal order was not served on the Attorney General nor did he apply for a copy of it. He proceeded to prepare the necessary documents for the appeal on the assumption that he had two months in which to do so. Following his usual practice he got into contact with the office of the advocate for the Respondent with a view to settling the documents that should be filed. Unfortunately, the advocate was ill, and when finally the Solicitor General had the papers ready, the six weeks had lapsed, although he was within two months. He now applies for an extension of 21 days. Two questions arise for a decision: the first is whether the Court has jurisdiction to grant the extension, and the second, whether in the circumstances it should be granted. In regard to fixing the time limit, the relevant part of Article 6(a) of the Palestine (Appeal to Privy Council) Orderd-in-Council reads:—

> "Upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal .....'.

It is clear that subject to the statutory limitation of three months the Court in dealing with the application has a complete discretion in regard to fixing the time within which the conditions imposed must be fulfilled. It appears to me that there is nothing to prevent this Court from reviewing that time limit if good cause has been shown, provided

always that any extension granted shall not, when added to the original time fixed, exceed the three months limitation imposed by the article. We therefore come to the conclusion that within the limits we have set out the Court has power to review its previous order.

The next question to be considered is whether in the circumstances we should review the order and grant the extension requested by the Attorney General. Before we would be prepared to do so, we would have to be satisfied that there were proper grounds in support of the application. In this connection we would remark that generally speaking we would be reluctant to hold that a mistake on the part of an advocate would constitute a proper ground. But in this case there was something more. Undoubtedly there was a slip in the Attorney General's office, but it appears to us that there is also disclosed a lacunae in procedure. Seeing that the Judge did not definitely stipulate the time when he delivered his oral decision, we think that some provision should have been made by which the Registry could notify the Applicant of the definite time embodied in the formal order. There is no ground for holding, as counsel for the Respondent has contended, that in so far as fixing a time limit is concerned, six weeks must be regarded as a usual term. It is true that a time limit of six weeks is the one most often imposed by the Court, but there have been several occasions when a period of two months was granted, and only a few weeks ago this Court allowed a period of three months. There is no doubt in our minds that if the Attorney General in the first instance had asked the Court for two months, or three months, it would have been granted to him.

It is obvious that a decision of the Privy Council is desirable in this case finally to determine a question which affects a considerable number of people in the territory, and it would be somewhat unfortunate if this occurrence, the rectification of which can do no real harm to the Respondent, were to prevent this case from coming before the Privy Council. Taking these circumstances into consideration, we are of the opinion that it is in the interest of justice to grant the application. Accordingly we grant an extension of 21 days from the 14th March, the date upon which this application was set down for hearing.

Given this 19th day of March, 1945.

Chief Justice.

CIVIL APPEALS Nos. 69 & 76/45.

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

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

IN THE APPEAL OF:—

Civil Appeal No. 69/45:—

Yona Dinovitz. — APPELLANT.

v.

Reisel Grinstein & 5 ors. — RESPONDENTS.

Civil Appeal No. 76/45:—

Reisel Grinstein & 5 ors. — APPELLANTS.

v.

Yona Dinovitz. — RESPONDENT.

Equitable rights — Payment of part of purchase price — Deposit in Court — Rabbinical Court — Appointment of administrators — Consent — L. A. 52/35, *P. O. in C.* 53(2) *— Position of minors.*

Appeals from the decision of the Land Settlement Officer, Jaffa Settlement Area, dated 19th January, 1945, in case No. 9/Petah-Tiqva, dismissed:—

1. The conditions requisite to establish an equitable title held to have been satisfied although part of the purchase price was not paid owing to disagreement among vendor's heirs. In such cases the better practice is to deposit the money in a bank or in Court.

2. The Rabbinical Court may, with the consent of all parties, appoint an administrator.

3. The sale of minors' property must be specifically sanctioned by the proper Court.

(*A. M. A.*)

FOLLOWED: L. A. 52/35 (4, P. L. R. 21; 9, C. of J. 740).

ANNOTATIONS:

1. On the first point *cf.* C. A. 97/44 (*ante*, p. 15) and note 4 thereto; see also C. A. 168/43 (10, P. L. R. 371; 1943, A. L. R. 595).

2. On Art. 52 of the Ottoman Land Code and the power of a Religious Court to authorise the sale of the property of minor heirs see C. A. 246/43 (10, P. L. R. 542; 1943, A. L. R. 822) and notes thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: Goitein.
(RESPONDENT)

FOR RESPONDENTS: S. Fellman.
(APPELLANTS)

JUDGMENT.

This is an appeal from the judgment of the Settlement Officer, Jaffa Settlement Area, in Case No. 9/Petah-Tiqva. There are in fact two appeals, Civil Appeal 76/45 and Civil Appeal 69/45. In 69/45 there is one Appellant and six Respondents, and in 76/45 these six Respondents appeal against one Respondent, who was the Appellant in 69/45.

The history of the case is somewhat complicated. The case before the Settlement Officer, which is now under appeal, was in fact a rehearing of Case No. 196/32 Petah-Tiqva, in which in 1936 another Settlement Officer delivered judgment in favour of the Respondents. That judgment was appealed to the Land Court of Jaffa. Before the date of the hearing of the appeal by the Land Court, a judgment had been delivered by the Supreme Court to the effect that the equitable remedy of specific performance was enforceable in Palestine. As the learned Settlement Officer had never directed his mind to this issue, the appeal Court quashed his judgment and remitted the case to him with a direction that he should examine the question of the Appellants' equitable rights. The case was accordingly reheard, the equitable rights considered, and the rehearing resulted in the judgment that is now appealed from. There is in fact an appeal and a cross-appeal.

For the purpose of this judgment I propose to deal with the case under two heads. I accept the division of the land into twenty shares. In the first instance I will consider the fourteen shares which were awarded to the Appellant, and then I will turn to the position of the six shares in respect of which he now appeals.

The basis of the claim of the Appellant was that he purchased land in 1927 from the two administrators of the estate of the late Haim Grinstein. I observe here that at the time of the purchase the Respondents 3 and 4 who were amongst the heirs of Haim Grinstein were minors. The purchase he alleges was confirmed by an agreement between the administrators and the Appellant, the date was the 9th of *Adar*, 5687 (1927), the price agreed upon was 275 Egyptian pounds, but the agreement provided *inter alia* that on payment of LE. 175 the Appellant could enter into possession and he did enter into possession accordingly.

One point made by the Respondents in the appeal was that the Settlement Officer refused to hear evidence on this question of delivery of possession which the Respondents deny had ever been effected. The Settlement Officer gave as his reason for refusal the fact that the Appeal Court in remitting the case stated in the first part of its judgment that the facts were not in dispute. Furthermore he said it was

clear that the first Respondent as administrator agreed to possession, and the others with the exception of 3 and 4 who were minors, acquiesced to it. It is quite clear from clause 3 of the agreement that the administrators did agree to the possession by the Appellant; it is equally certain from the evidence that he was in possession, and we see no reason to upset his judgment on this ground, although his reason for refusing to hear further evidence might be open to challenge.

The agreement was authenticated by the Rabbi in his capacity as President of the Rabbinical Office. The purpose of submitting it for authentication was in order to obtain the approval of the Court to the vendors acting as administrators of Haim Grinstein. It has been contended that the Rabbinical Court had no authority to appoint administrators. It is not denied that all parties consented to this authentication before the Rabbinical Court, and this being so we are satisfied that the Rabbinical Court had jurisdiction to appoint administrators under Article 53(2) of the Palestine Order-in-Council. We are fortified in this opinion by the decision of this Court in Land Appeal No. 52/35.

The Settlement Officer came to the conclusion that the agreement constituted a contract to sell and not an out and out sale. A perusal of the agreement clearly justified this conclusion. We have therefore an agreement to sell, long possession by the Appellant, and payment of purchase money. In regard to this payment of purchase money it is necessary to refer to a point that emerged. It is not denied that the Appellant had only paid LE. 175. It is equally admitted that he was at all times willing to pay the other LP. 100, but he held it over, on account as it were, because he was warned there was disagreement between the heirs. It is true as the learned Settlement Officer stated, that probably the more proper course would have been for the Appellant to deposit the remaining LP. 100 with the Bank or the Court, but we agree with the Settlement Officer that his failure to do so cannot in the circumstances be regarded as fatal to his claim. There are present, therefore, the three conditions precedent which this Court insists upon for the grant of the equitable relief for specific performance of contract, and we agree with the decision of the Settlement Officer granting specific performance in respect of fourteen shares out of the twenty.

Turning now to the remaining six shares which were the property of the minors, the 3rd and 4th Respondents. Mr. Goitein has argued that the Appellant should also have been awarded those shares. His claims for those shares is based on the same agreement, that if that agreement was good in regard to the other shares — and we have held that it was — he argues that it was equally good in respect of the

shares of the 3rd and 4th Respondents. That of course would depend on whether the shares of the 3rd and 4th Respondents were saleable assets. Mr. Goitein realised that there was an obligation on the buyer to satisfy himself that the seller had a right to sell, but as to this he relies on the agreement, the authentication of which by the Rabbinical Court must, he argues be regarded as an authority to the administrators or guardians of the minors to sell their property.

Now the Courts in this country have always regarded themselves as protectors of the interests of minors in regard to the sale of their property, and they rightly insist that administrators or guardians must have the specific authority of the Court of competent jurisdiction to conclude the sale. The mere fact that the Court approved of an instrument by which the administrators purported to agree to sell property which, *inter alia,* included the property of the minors, falls far short of that specific authority with which the Courts insist that the administrators or guardians should be armed before they are empowered to conclude the sale. As the Settlement Officer has indicated, there was no evidence whatsoever that the Rabbinical Court had directed their minds to the specific issue as to whether it was in the interest of those minors that their property should be disposed of. We therefore agree with the learned Settlement Officer that the authentication of this agreement by the Rabbinical Court did not constitute that definite consent which the law required.

For these reasons the judgment of the Land Settlement Officer is upheld, the appeal of the Appellant in Case No. 69/45 in regard to six shares, is dismissed, and the appeal of the Appellants in Case No. 76/45 in regard to the validity of the agreement in so far as it affected the claim for specific performance of the contract of sale in respect of the fourteen shares, is dismissed. As each party failed in their appeal, there will be no order as to costs.

Delivered this 5th day of July, 1945, in the presence of Goitein for Appellant (Respondent), and in the presence of Mr. S. Felman for Respondents (Appellants).

Chief Justice.

CIVIL APPEAL No. 399/44.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Abed Qassem Mohammad Mustafa. APPELLANT.

v.

The Keren Kayemeth Leisrael Ltd. RESPONDENT.

Awlawiyeh — Meaning of "land" — Co-ownership of well and room but not of subadjacent land — Claim as khalit — Tute, C. A. 37/38, C. A. 9/44, L. S. Ord. sec. 43 — What constitutes consent.

Appeal from the judgment of the Land Court of Nablus, dated 25th September, 1944, in Land Case No. 22/43, dismissed:—

1. A claim for *awlawiyeh* in respect of a share in a well cannot be maintained by a co-owner in a room and well who is not registered as co-owner of the subadjacent land.

2. Every time a co-owner sells, a fresh right of *awlawiyeh* accrues.

(*A. M. A.*)

REFERRED TO: C. A. 37/38 (5, P. L. R. 122; 1938, 1 S. C. J. 115; 3, Ct. L. R. 113); C. A. 9/44 (1944, A. L. R. 328).

ANNOTATIONS: *Cf.* C. A. 33/45 (*ante*, p. 459) and notes.

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Eliash.

JUDGMENT.

Shaw, J.: This is an appeal from the judgment dated 25th September, 1944, of the learned President of the Land Court, Nablus, in Land Case No. 22/43, dismissing the Appellant's claim to a right of prior purchase in respect of certain land situated in Calqilia, Tulkarm Sub-District.

The claim affects two separate registrations which both appear in Exhibit P/1. One registration is in respect of 58.650 *dunums* of *miri* land, Parcel 5, lock 7528. The other is in respect of a room and a well registered under the same Block and Parcel numbers.

So far as the land is concerned it is clear that the Respondent is the sole registered owner of the whole area. So far as the room and well are concerned the Respondent is the registered owner of 10/12 shares, while the Appellant is the registered owner of 1/12 shares.

The learned President summarised the position as he saw it in the following words:—

> "Plaintiff claims prior purchase to the (a) 58.650 *dunums*, and (b) to the well site. As regards (a) his claim as co-owner fails as he is not a co-owner in that land, and as regards *Khalit* his claim fails as there is no servitude by the 58.650 *dunums* in favour of Parcel 2.

> As regards his claim to prior purchase of the 10/12 of the well site: Co-ownership of a well gives no right of prior purchase — only co-ownership of land, moreover the owner of the 58.650 *dunums* has a right of water from the well".

Briefly stated, the Appellant's argument in support of his claim as co-owner is that the room and well form a part of the land, and that, as he is a co-owner of the room and well, it follows that he is a co-owner of the land. The reply to this argument, however, is that the whole of the land is registered in the name of the Respondent without any deduction in favour of the room and well. The room and well are registered without any land at all. The registrations which were effected at the time of settlement gave the Appellant no share in Parcel 5 and 1/12 shares in the room and well — without land. If the Appellant had any objection to these registrations he ought to have put forward his objection at that time. These registrations remained unchanged until 1943 when the Respondent bought the whole of the land and 10/12 shares in the room and well. It is true that the room requires the support of the land on which it rests, and the well water flows up through a hole in the land, but the Appellant has no title to any land in Parcel 5. If the well dried up, or if the room were removed, the Appellant would be left with no property at all in Parcel 5.

The right of prior purchase (*awlawiyeh*) is one given by Art. 41 of the Ottoman Land Code, and it is confined to State land, that is to say, to *miri* land. In order to interpret the term "land" for the purposes of prior purchase reference cannot be made to definitions of that term in ordinances such as the Land Courts Ordinance (Cap. 75, Laws of Palestine), the Land (Settlement of Title) Ordinance (Cap. 80), or the Interpretation Ordinance (Cap. 69), because those Ordinances do not define the meaning of the term "land" for the purposes of the Ottoman Land Code.

In my judgment the learned trial judge correctly held that the Appellant's claim as co-owner failed because he was not a co-owner.

I shall next consider whether the Appellant could claim a right of prior purchase of the land on the ground that he was a *Khalit*. Tute, at page 47 of the Ottoman Land Laws (in Note 3 to Art. 41) says:—

> "The *Khalit* is one of the persons 'jointly interested' referred to in the Article. The term is defined in the *Mejelle*, Art. 954. The *Khalit* is a person who shares in a right to a private road or a private water channel, which serves both his property and the land which is the subject of the claim. The two lands need not adjoin. The *Khalit* can claim under precisely the same rules as the co-sharer. A water channel or road are private when the right to use them is limited to a certain number of persons".

No servitude affecting Parcel 5 has been registered in favour of Parcel 2 which is owned by the Appellant. When giving evidence in the Court below the Appellant stated that he had got Parcel 2 for himself in 1933, before settlement. In C. A. 37/38 (S. C. Judgments 1938 Vol. 1, page 115) where the Court found that a right of way was not an ancient right and that it had its origin in Settlement proceedings, the contention of the appellant was that because he had this right of way he and the respondent were co-owners. The Land Court rejected that contention, and the Court of Appeal held that the Land Court was right. The judgment of the Court of Appeal states:—

> "The Appellant's right of way was a mere servitude vested in himself, the land on which the right of way existed belonged to the Respondent in its entirety, and the Respondent could not be said to be a co-owner in any land which belonged to himself alone".

In C. A. 9/44 (Annotated L. R. 1944, Vol. 1, page 328) the following appears in the judgment:—

> "In 1941 there were Settlement proceedings and the Appellants asked for and obtained registration in their names. The Respondent took no steps, did not even attend the proceedings, but sat back until the present action in the Magistrate's Court was instituted ... In the present matter we think that it would have been proper to register this user of these two cellars as a servitude over the parcel had such an application been made. In fact no such application was made ...".

In the present case the Appellant took no steps at the time of settlement to have a servitude registered in favour of Parcel 2, and the Respondent bought without notice of any servitude.

Section 43 of the Land (Settlement of Title) Ordinance, provides that:—

> "Save as provided in this Ordinance, the registration of land in the said register shall invalidate any right conflicting with such registration".

In the circumstances I agree with the learned Judge of the Land Court that the Appellant's claim as *Khalit* fails.

As regards the claim to prior purchase of the 10/12 shares of the room and well site, this fails for the reason that there can be no claim to prior purchase, because the room and well in this case carry with them no rights over land.

Mr. Eliash, for the Respondent company, submitted that the Appellant had consented to the sale and that he was therefore not entitled to claim the right of prior purchase. In view of my findings, which result in the dismissal of the appeal, it is really unnecessary to deal

with this point. But I would say that the fact that Ghalayini sold to the Respondents on the same day that he had purchased from the Appellant's uncle is not evidence that the Appellant consented to the sale to the Respondents, and I agree with the learned trial Judge when he says that:—

> "Every time a co-owner sells a fresh right accrues to the other co-owners of prior purchase irrespective of the period of time between the sales".

In the result I find that the appeal fails and must be dismissed with costs on the lower scale, to include LP. 15.— advocate's fees for attendance at the hearing.

Delivered this 27th day of July, 1945, in the presence of Mr. Elia for Appellant and in the presence of Mr. Eliash for Respondent.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 278/44.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF :—

Afrosini Gaitanapolous & an. — APPELLANTS.

v.

Odeh El Malhi. — RESPONDENT.

Possession by heirs — Action brought against heirs personally where property is alleged to be waqf — Land Law (A.) Ord., sec. 2 not retroactive C. A. 370/43, C. A. 390/43.

Appeal from the judgment of the Land Court of Jerusalem, L. C. 22/42, dismissed:—

1. Even though it be alleged that property is *waqf*, where the alleged *mutawallis* hold themselves out as owners, they may be sued personally in connection with the property.

2. There is only a presumption that possession by an heir is not adverse to co-heirs. Sec. 2 of the Land Law (Amend.) Ord. is not retroactive.

(*A. M. A.*)

REFERRED TO: C. A. 370/43 (1944, A. L. R. 474); C. A. 390/43 (11, P. L. R. 217; 1944, A. L. R. 415).

ANNOTATIONS:

1. On a purchaser's duty to make reasonable enquiries see C. A. 119/42 (1942, S. C. J. 755) and cases therein cited.

2. On the prescription point see the cases cited and the notes thereto in A. L. R.

(H. K.)

FOR APPELLANTS: Goitein and Nashashibi.

FOR RESPONDENT: Eliash and Scharf.

JUDGMENT.

Frumkin, J.: It will be useful to give at the outset a short outline of the history of this case:—

Two adjoining plots of land (admittedly *miri*) were registered originally in the name of one Alexandra, deceased. She was the mother of the two Appellants and another sister of theirs, and the aunt of one Dimitri, the predecessor in title to the Respondent. During her lifetime Alexandra built a house on the two adjoining plots of land. In 1912 Alexandra dedicated the house as a *Sharia Waqf*, nominating her three daughters beneficiaries and *mutawallis* of the *waqf* after her death. She died in 1917. After her death the three daughters were in possession of the house, letting it to various people. Neither the house when constructed, nor the *waqf* when dedicated, were entered in the Land Registry. It was not until 1935, that the three sisters applied for registration of the property in the Land Registry. We know of no particulars as to the nature of this application — whether they wanted the property to be registered in their names as heirs of the deceased mother or in the name of the *waqf*, because the file of the Land Registry, which was opened for that purpose, No. 3435/35, is missing. Later in the year 1935, on the 9th December, Dimitri applied to the Land Registry to have three ninths of the property registered in his name and the balance in the name of the three sisters, relying upon a certificate of succession issued by the Greek Orthodox Ecclesiastical Court. For this purpose file No. 4027/35 was opened in the Land Registry. An objection was made by an outsider to the effect that the property was *waqf*. The objection was considered by the Land Registration Authorities, was overruled and the property was registered according to the application. On the 4th of November, 1936, Dimitri took steps to transfer his share in the property to the present Respondent. File No. 2254/36 was opened. Again an objection was taken on the ground that the property was *waqf*, which was again over-ruled, and registration effected in the name of the present Respondent for three shares out of nine of the property. The Respondent then wanted to derive benefit

from the shares acquired, and he lodged an action before the Magistrate's Court against the tenants of the house, claiming his share in the rent. The present Appellants intervened, disputed the rights of the Respondent in the rent of the house, lost their case and successfully appealed to the District Court, which ordered the Respondent first to prove his title to the property before a competent Court. The present action was then brought before the Land Court against the present Appellants asking for a declaration of ownership as to three shares out of nine shares, and the right of registration, meaning, apparently, thereby to preserve the registration which is already entered in his name and the non-interference by the Defendants in his property. The Plaintiff, the present Respondent, succeeded in his case on two main grounds, first, that there was nothing on the files of the Land Registry to show that the land was *waqf* so as to put him on enquiry; and, secondly, that the Appellants and their sister, although being in possession to the exclusion of their cousin Dimitri, as possession by one heir is to be considered possession on behalf of all the other heirs, no prescription arises. Hence this appeal.

The first ground of appeal is that the parties were not duly constituted in that the action should have been brought against the *mutawallis* of the *waqf*, or, alternatively, against all the three daughters of Alexandra, and not, as it was brought, against only two of them in their personal capacity.

Now the Respondent is a registered owner, if not for the interference before the Magistrate's Court it would not be necessary for him to bring any action at all. The interference as stated before was by the present two Appellants in their personal capacity, and it is thus that it was enough for him to bring his action against them and them only. Of course, we will not thereby express any opinion as to the effect of this judgment upon the sister of the Appellants, who was not represented in this action.

As regards the *waqf*, as it has already been pointed out before, the dedication took place in 1912. Neither the dedicator herself in her life-time nor her daughters had taken any steps for almost a quarter of a century to put the dedication, if a valid dedication it was, on the Land Register. Furthermore, the Appellants and their sister all through considered themselves as the heirs of their mother and not as beneficiaries or *mutawallis* of a *waqf* dedicated by her. This is proved by a number of leases produced before the Land Court all showing that the daughters of Alexandra appeared as lessors in their personal capacity never mentioning any *waqf* at all, and it was in that capacity that they

atacked the rights of the Respondent. It was thus not incumbent upon the Respondent to bring any action against the *waqf*.

To come now to the merits of the appeal. The Appellants are mainly attacking the rights of the predecessor in title of the Respondent on the ground that the land was *waqf* and therefore not subject to succession, and that their cousin could not confer upon the Respondent a title which he had not got himself. Now, the Appellants failed to prove the validity of the alleged *waqf*. It was in relation to the house built on *miri* land and never given effect to by registration, nor treated by the alleged beneficiaries as such. Objections were at the time taken before the Land Registry which were over-ruled and no steps were taken against the order of the Director of Land Registration. Furthermore, the Appellants themselves acted upon a certificate of succession issued by a competent Court in proceedings to which they were parties and accepted registration in their names as heirs. This, to my mind, concludes the matter as regards *waqf*.

They now put up an alternative plea — that they and their sister were in exclusive possession all the time since the death of their mother without any interference on behalf of the cousin. They have thus, they allege, acquired a prescriptive right. This is the most important point in this appeal, and we have to scrutinize it at some detail.

The rule under the Ottoman Land Law that possession by one heir is to be considered possession on behalf of all other co-heirs with no prescription to run between them has been, in practice, varied by a number of decisions of this Court to the effect that the rule is not conclusive as there might be cases when the possession of one co-heir is adverse to his co-heirs and such adverse possession might confer right of prescription.

This practice has been given effect to in the Land Law (Amendment) Ordinance, 1933, section 2, sub-section 1 of which makes it clear that the theory of agency is no more than a presumption which could be rebutted. If a co-heir in possession fails to rebut the presumption, he will have to share possession and ownership with his other co-heirs. If he succeeds he will remain in sole possession and occupation. In order to liquidate family disputes, sub-section 2 of section 2 makes it incumbent upon co-heirs not in possession to bring their action within the period for bringing actions concerning land prescribed by law, such period to run from the beginning of the period of adverse occupation as determined under sub-section 1; in other words, within the period of prescription for bringing actions against strangers.

In the present case the Appellants first endeavoured to rebut the

theory of agency by maintaining that their possession was in the capacity of *mutawallis* or beneficiaries of a *waqf* and not as co-heirs. Had they succeeded in establishing this defence of adverse possession, it would not be necessary for them to avert to the defence of prescription, but on that point they failed. They then tried to establish adverse possession by the fact that it was they who used to let the entire property and to collect the full rent without any interference from their cousin. This, however, is not enough to establish adverse possession. Of course it could, on the one hand, be considered as an admission by the cousin that he has got no rights in the property. It is doubtful whether that in itself would be enough. But it might very well be that for a certain period of years he was not interested to collect his share in the rent, allowing his cousins the benefit of it, but that would not prevent him later taking full advantage of his property by selling it to another. We therefore come to the conclusion that the Appellants have failed to rebut the presumption that their occupation was on behalf or as agents of the other co-heirs.

That really disposes of the matter in so far as the predecessor in title to the Respondent is concerned; and it is not necessary to deal with sub-section 2; but in any event that sub-section does not apply to the present case, as it has been previously held by this Court that this section is not retrospective. I refer to C. A. 370/43 and C. A. 390/43, in which it was held:—

> "We are further of the opinion that the principles of adverse possession referred to in section 2 of the Land Law (Amendment) Ordinance cannot be relied upon as this Court has on several occasions held that this Ordinance is not retrospective".

This action was brought in 1942, less than ten years after the promulgation of the Ordinance.

Having come to this conclusion it is not necessary to deal with the other grounds of appeal intending to attack the rights of the present Respondent since the fact whether he was or was not a *bona fide* purchaser is of no relevance. Once his predecessor in title has acquired a good title against the Appellants, obviously he could transfer his rights to the present Respondent.

For these reasons the appeal is dismissed and the judgment of the Land Court confirmed with costs on the lower scale to include LP. 15 advocate's attendance fees.

Delivered this 12th day of March, 1945.

Puisne Judge.

CRIMINAL APPEAL No. 65/45.

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

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

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

Mohammad Sliman Hamad. — RESPONDENT.

Fine for offence under sec. 272, C. C. O. (stealing cattle) — Non-interference of Court of Appeal.

Appeal from the judgment of the District Court of Jaffa dated the 11th day of February, 1945, in Criminal Case No. 175/44, whereby Respondent was convicted of an offence contra section 272 of the Criminal Code Ordinance, 1936, and sentenced to pay a fine, dismissed:—

Where trial Court had all facts in mind, Court of Appeal will, as a rule, not be inclined to interfere with former's discretion regarding sentence, even where it seems *prima facie* insufficient.

(*M. L.*)

ANNOTATIONS: See CR. A. 52/44 (11, P. L. R. 449; 1944, A. L. R. 816).

(*A. G.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Nashashibi.

JUDGMENT.

My opinion is that while I agree that the sentence *prima facie* seems insufficient, I do not feel justified in interfering with the discretion exercised by the Judges who are experienced in Criminal trials. There was no misconception of law on their part, and there was no fact disclosed before us this morning which was not present in their minds when they arrived at their decision. Generally speaking in such circumstances I would not feel inclined to interfere with the discretion of the Judges. My brother would be in favour of increasing the sentence but as my opinion is in favour of the Accused, he does not wish to record his dissent.

Delivered this 25th day of April, 1945.

Chief Justice.

HIGH COURT No. 11/45.

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

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

IN THE APPLICATION OF:—

Itzhaq Katz, in his personal capacity and for and on behalf of Haim Novik. PETITIONER.

v.

1. Officer Commanding the Polish Forces in Palestine,
2. Officer Commanding the Polish Military Prison, Jerusalem. RESPONDENTS.

Habeas corpus — Who may apply — H. C. 1/41.

Return to an order *nisi* calling upon the Respondents to show cause why they should not produce the body of Haim Novik, a prisoner at the Polish Military Prison, for the purpose of enquiring into the legality of his arrest, *etc.*, and why the said prisoner should not be released from custody; order *nisi* discharged:—

A stranger may not make an application by way of *habeas corpus* unless it is shown by affidavit that the person detained could not himself make the application.

(*A. M. A.*)

REFERRED TO: H. C. 1/41 (8, P. L. R. 2; 1941, S. C. J. 8; 9, Ct. L. R. 80).

ANNOTATIONS:

1. The previous application in this case, H. C. 71/44, is reported at 11, P. L. R. 355 & 1944, A. L. R. 678; it does not seem that the objection taken in this case was raised on that occasion.

2. On the question of successive applications see Halsbury, Vol. 9, p. 727, para. 1239 and particularly Eshugbayi Eleko *v.* Nigeria Government (Administering Officer), 1928, A. C. 459 P. C., 97 L. J. (P. C.) 97, 139 L. T. 527, 44 T. L. R. 632 cited in footnote (*u*) which is the case quoted in H. C. 1/41 (*supra*); *cf.* H. C. 7/42 (9, P. L. R. 126; 1942, S. C. J. 51; 11, Ct. L. R. 86) and H. C. 78/42 (9, P. L. R. 526; 1942, S. C. J. 529; 12, Ct. L. R. 214).

(*H. K.*)

FOR PETITIONER: Wajner.

FOR RESPONDENTS: Cattan.

ORDER.

At the return of this writ, which is in the nature of *habeas corpus*, the Respondents' advocate has taken two preliminary objections to the Court entertaining the petition, the first being that the Petitioner has no interest and is accordingly not the proper person to bring the peti-

tion; and secondly, that the matter has been concluded by High Court No. 71/44 and that no new facts or circumstances have been alleged to be in existence since the 7th July, 1944, when that petition was dismissed.

In support of the second preliminary objection Mr. Cattan has referred to High Court No. 1/41, P. L. R. Vol. 8, p. 2, in which the Privy Council Appeal reported in A. C. (1928) p. 509 was specifically considered.

With regard to the first point the Petitioner, Itzhaq Katz, brings this petition on behalf of one Haim Novik, who is a prisoner detained in the Polish Military Prison at Jerusalem. Paragraph 3 of the petition, which is revealing, is in the following terms:—

> "The Petitioner is a close friend of the prisoner. He is vitally and personally interested that the prisoner be discharged from custody because of personal friendship and because the prisoner is indebted to Petitioner in various amounts of money. The prisoner has no property in Palestine and will be able to repay his debts only if at large".

Mr. Katz's object seems tolerably clear from that paragraph.

In paragraph 4 the Petitioner says:—

> "The prisoner is being confined in the Polish Military Prison in such a manner that he is unable to institute the present proceedings personally or directly and is unable to swear to the affidavit to be submitted at all and in any case without substantial delay".

And in paragraph 5 it is said that:—

> "The prisoner has orally requested and instructed the Petitioner to institute or cause the present proceedings to be instituted".

It is true that in the past this Court has occasionally allowed petitions in the nature of *habeas corpus* to be lodged by persons other than the Petitioner himself; but each case must be determined on the particular facts and circumstances. There is no suggestion here that the Polish Military Authorities are denying anyone access to Mr. Haim Novik. The fact that the prisoner has orally requested the Petitioner seems to indicate that the Petitioner has seen Mr. Novik.

We have been referred to Hailsham, Vol. 9, p. 721, para. 1229, where it is said that "in any case where access is denied to a person alleged to be unjustifiably detained, so that there are no instructions from the prisoner, the application may be made by any relation or friend on an affidavit setting forth the reasons for its being made. A mere stranger or volunteer however, who has no authority to appear on behalf of a prisoner or right to represent him, will not be allowed to apply for *habeas corpus*".

Then again at p. 724, paragraph 1234, note (e) it is said:—

> "An affidavit is absolutely necessary either from the party who claims the writ or from some other person so as to satisfy the Court that he is so coerced as to be unable to make it".

While it is true that in paragraph 4 of the petition, the truth of which has been sworn to by Mr. Katz, it is said that Haim Novik is unable to swear to the affidavit, there is nothing to show that he is so coerced as to be unable to make it, or that Mr. Haim Novik has been prevented from seeing Mr. Katz or anyone else or has been prevented from giving Mr. Katz authority to bring this petition.

For these reasons we sustain the first preliminary objection that Mr. Katz is not entitled to bring this petition. It is therefore unnecessary for us to deal with the other preliminary objection.

The petition is dismissed and the order *nisi* discharged with fixed costs of LP. 10 to be paid by Mr. Katz.

Given this 27th day of March, 1945.

British Puisne Judge.

HIGH COURT No. 38/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPLICATION OF:—

Ahmad Mahmoud Snober. PETITIONER.

v.

Mohammad Abu Younis Hassnein. RESPONDENT.

Change of venue — Tel Aviv—Jaffa — Delay.

Return to an order *nisi* issued on the 3rd day of May, 1945, directed to the Respondent calling upon him to show cause why the proceedings in Civil Case No. 148/44 (District Court, Tel-Aviv) should not be removed for trial from the said District Court to the District Court of Jaffa; order *nisi* discharged:—

Application for change of venue from Tel-Aviv to Jaffa refused.

(*A. M. A.*)

ANNOTATIONS:

1. The facts underlying this petition are set out as follows in Petitioner's application:—

"1) The Respondent has lodged against the Petitioner in the District Court Tel Aviv a Civil Case No. 148/44 claiming the amount of LP. 700 and the case has not yet been heard.

2) The Respondent (Plaintiff in the case) is an Arab and the Petitioner (Defendant in the case) is an Arab and the language of both parties is Arabic, and the contract the subject matter of the case was made in Jaffa in Arabic and the witnesses are Arabs.

3) There is no justification to the lodging of the case to the District Court Tel-Aviv except the fact that the attorney of the Respondent is a non Arab and for the convenience of the said attorney and for my trouble and my witnesses' trouble and in order to compel us to go to Tel-Aviv.

4) The translation in the case will take a double time of the Court time".

2. *Cf.* Misc. Appl. 47/44 (11, P. L. R. 542; 1944, A. L. R. 585).

(*H. K.*)

PETITIONER: In person.

FOR RESPONDENT: Rubinstein-Brenner.

ORDER.

Having considered the facts and circumstances of this case and especially the Petitioner's delay in bringing this petition, we can see no sufficient grounds for ordering change of venue.

The order *nisi* is discharged with fixed costs in the sum of LP. 5.— (five Palestine Pounds).

Given this 13th day of June, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 140/44.

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

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

IN THE APPEAL OF :—

Yekutiel Berkovitz. APPELLANT.

v.

Attorney General. RESPONDENT.

Sentence — Increase of penalty by District Court — Offences under War Control legislation — Standardization of sentences.

Appeal from the judgment of the District Court of Haifa (R/P Judge Weldon), CR. A. 131/44, dismissed:

Standardization of sentences is desirable, but in "war offences" the seriousness of the offence often depends on the ebb and flow of the tide of war and this may be reflected on the sentence.

(*A. M. A.*)

ANNOTATIONS :

1. Appellant had been convicted of an offence against secs. 10 and 10A of the Food Control Ordinance for being found in possession of 46 sacks of white Canadian flour in contravention of paragraphs 2 and 3 of the Concealment and Destruction of Controlled Articles (Prohibition) Order and paragraphs 2 and 3 of the Wholesale and Retail Dealing in Controlled Articles (Limitation) Order.

The Magistrate sentenced Appellant to pay a fine of LP. 70; the Attorney General appealed and the District Court increased the sentence to one of LP. 1,000. Leave to appeal was thereupon granted by FitzGerald, C. J. — see 11, P. L. R. 561 & *ante*, p. 188).

2. On standardization of sentences see CR. A. 29/44 (1944, A. L. R. 203) and note 1 thereto.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Goldschmidt.

JUDGMENT.

The only point in this appeal is the diversity between the penalty imposed by the Magistrate and the amount to which the learned Relieving President of the District Court saw fit to increase it. The learned Magistrate, in the course of his lengthy and lucid judgment, dealt with every aspect of the matter and came to the conclusion that the offence was a serious one, but for some reason or another he formed the opinion that a fine of LP. 70 was sufficient for this serious offence, despite the fact that a few months earlier the legislature saw fit to amend the law so as to increase the maximum penalty to LP. 2,500.

Now, before I proceed to analyze the judgment of the learned Relieving President, it is necessary to say one word on this question of standardization of sentences upon which the Appellant's case is mainly founded. No doubt standardization of sentences is highly to be desired, but it is by no means the only consideration. Obviously there can be no real standardization of sentences for what I may call "war offences". The seriousness of such offences depends to a great extent on the ebb and flow of the tide of war in relation to the country where they are committed.

In regard to the Magistrate's sentence, we feel constrained to say that it bears no relationship to the reality of the situation, and it fails to appreciate the real purport of these war control legislations.

I turn now to consider the sentence imposed by the District Court. It may have been higher than the sentences imposed in the past for those offences, but I confess I am unable to find any flaw in the arguments upon which he relied. Only a few months previous to its commission, the legislature considered that this offence merited a maximum

fine of LP. 2,500. I cannot discover any mitigating circumstances. This Court cannot accept the contention of Dr. Eliash because, in view of the penalties provided, it is obvious that the legislature did not consider that an offence under 10A was less serious than one under section 10. The Court is unable to discover any reason for interfering with the discretion of the District Court.

For these reasons the appeal must be dismissed.

Delivered this 10th day of January, 1945.

Chief Justice.

CIVIL APPEAL No. 105/45.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Max Oppenheimer. APPELLANT.

v.

Herman Rothschild & an. RESPONDENTS.

Appeals — "Third party", M. C. J. O. 3(e), 11(6), 11(8), M. C. P. R. 59, 2; C. P. R. 2, "action" — Claim for remuneration by receiver, M. C. P. R. 224.

Appeal from the judgment of the District Court of Jerusalem, dated 27th February, 1945, given in Civil Appeal No. 5/45, dismissed:—

1. A receiver appointed under M. C. P. R. 224 who has not been made a party to the action cannot appeal.

2. No appeal lies from an interlocutory order of a Magistrate.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point *cf.* C. A. 147/42 (9, P. L. R. 786; 1942, S. C. J. 945) and note 2 in S. C. J.; see also C. A. 17/44 (11, P. L. R. 254; 1944, A. L. R. 381) and note 1 in A. L. R.

2. On the second point *vide* C. A. 196/41 (9, P. L. R. 204; 1942, S. C. J. 190; 11, Ct. L. R. 132). See also C. A. 230/44 (11, P. L. R. 586; *ante*, p. 211).

(*H. K.*)

FOR APPELLANT: Weyl.

FOR RESPONDENTS: No. 1 — Krongold.
No. 2 — Mizrachi.

JUDGMENT.

The first Respondent to this appeal is the Plaintiff and the second Respondent is the Defendant in Civil Case No. 642/43, Magistrate's Court, Jerusalem. The first Respondent sought and obtained an order for provisional attachment on certain cattle, and it seems that (although the first Respondent does not admit that the present Appellant was properly appointed as receiver under Rule 224, Magistrates' Courts Procedure Rules, 1940) the Magistrate's Court left the cattle in the charge of the Appellant during the pendency of the action, which has not yet been decided.

The Appellant applied by motion in Civil Case No. 642/43 to the Magistrate for remuneration under Rule 225. It is, for obvious reasons, undesirable that I should refer at any length to that aspect of the matter. In the result the Magistrate, for various reasons which he set out, refused to make any order. Against that refusal the Appellant not only appealed to the District Court, but also applied under section 11(8), Magistrates' Courts Jurisdiction Ordinance, for leave to appeal. The learned Relieving President did not grant leave to appeal under section 11(8) and with regard to the appeal itself in his judgment said:—

> "I do not think there is a right of appeal in the circumstances on the ground taken by the advocates for the Respondents".

Presumably meaning thereby "for the reasons advanced by the advocates for the Respondents". Against that judgment of the learned Relieving President the Appellant now appeals to this Court.

While the Appellant may have called himself a third party, and while he points out that the first Respondent when applying that he should be made receiver used the word "third party", it is admitted that the Appellant was never made a party under Rule 59.

Mr. Krongold has drawn my attention to the difference between the word "action" as defined in Rule 2 of the Civil Procedure Rules, 1938, and Rule 2 of the Magistrates' Courts Procedure Rules, 1940. With regard to section 11(6) I do not think that the Appellant can be said to be a party to the civil action, namely, Civil Case No. 642/43. It is also clear that judgment in that case has not yet been delivered.

Turning now to the words "the value of the subject matter" in section 11(6), I may say that the Appellant asked for remuneration of about LP. 500. I think that section 11(6) must be read in conjunction with section 3(e). It is undesirable that I should say more than that. I agree with the learned Relieving President in holding that there is no appeal.

The appeal is accordingly dismissed with costs, that is, each Respondent will receive from the Appellant fixed costs in the sum of LP. 5.—.

Delivered this 11th day of July, 1945.

British Puisne Judge.

HIGH COURT No. 4/45.

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

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

IN THE APPLICATION OF :—

Jacob J. Aboutboul. PETITIONER.

v.

The District Commissioner, Haifa & an. RESPONDENTS.

Requisition of premises under Defence Regulations — Petitioner to H. C. alleging that requisition order lapsed as premises are used for other purposes than those for which the requisition order was made — Non-interference of H. C.

Return to an order *nisi* directed to the first Respondent calling upon him to show cause why he should not set aside and/or revoke his notice of requisition dated the 22nd April, 1943, and release the shop situated in the ground floor of 6 Khayat Street, Haifa, and why he should not return possession thereof to the Petitioner, or, alternatively, afford to Petitioner other suitable alternative accommodation, until the said shop is returned to him; order *nisi* discharged:—

1. District Commissioner is for all practical purposes sole deciding authority whether necessary conditions precedent to requisition under Defence Regulations do exist; High Court will not interfere with his discretion unless satisfied that his decision was based on grounds which are untenable.

2. Mere fact that District Commissioner permitted some different business from business originally contemplated by him to be carried on in the requisitioned premises — no ground for assuming that the purposes justifying requisition under Reg. 48, Defence Regulations, have lapsed.

(*M. L.*)

ANNOTATIONS: See H. C. 30/45 (*ante*, p. 360) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Geiger.

FOR RESPONDENTS: No.1 — Crown Counsel — (Rigby).
No. 2 — Goitein.

ORDER.

In this case the Petitioner prays that the requisition order made in respect of premises situated at Khayat Building, Khayat Street, Haifa, be set aside. The requisition order was made by the District Commissioner purporting to act under Regulation 48 of the Defence Regulations. It appears to us that the main question for decision is whether or not the requisition order under Regulation 48 has lapsed. If we decide that it has not lapsed then, in our opinion, it will be unnecessary to consider the effect of the billeting order under Regulation 72. Mr. Geiger has argued that the requisition order has lapsed because the premises ceased to be utilised for the purposes set out in Regulation 48(2) the purposes being those which underlie most of these Defence Regulations. It is a condition precedent to the exercise of the powers vested in him that the District Commissioner must be satisfied that the requisition is expedient in the interest of public safety, defence, or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community. If he is not so satisfied then he would not have acted within the four walls of the Regulations. The question therefore arises who is to decide whether, in fact, the necessary conditions precedent do exist. As to this there is the overwhelming authority of numerous cases. The District Commissioner is for all practical purposes the sole deciding authority. The Court will not interfere with his decision unless it is satisfied that it was arrived at on grounds which are untenable. It will limit itself to an enquiry as to whether he has directed his mind to the issue and having so directed his mind come to a conclusion. It is not suffiicent, as Mr. Geiger has argued, to submit an affidavit of another person, in this instance the Petitioner, to the effect that in his opinion the requisition was not necessary for these purposes. Nor, in our opinion, is it sufficient to aver that the premises are being used for some purposes other than the purposes for which the original requisition was made. In our opinion the mere fact that the District Commissioner permitted some different business from the business originally contemplated by him to be carried on in the requisitioned premises, is no ground for assuming that the purposes which justify requisition under regulation 48 have lapsed.

For these reasons we are of opinion that the rule must be discharged. We make no order as to costs.

Given this 27th day of March, 1945.

Chief Justice.

HIGH COURT No. 24/45.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE MATTER OF:—

William R. Warner & Co. — PETITIONERS.

v.

Registrar of Trade Marks & an. — RESPONDENTS.

Objection to registration of trade mark — Dismissal of objection on ground of unlikelihood of one substance being mistaken for other — Appeal from decision of Registrar of Trade Marks by way of petition to High Court.

Appeal by way of petition from a decision of the Registrar of Trade Marks dismissed: —

1. In a very narrow case of opposition to registration of a trade mark real weight should be given to original determination of Registrar.

2. Registrar right in dismissing objection to registration of trade mark, if the preparations or substances are so very different that there is no likelihood of any person mistaking one for other.

(*M. L.*)

REFERRED TO: Hailsham Laws of England Vol. 32, p. 571 Kerly on Trade Marks (5th Edition), p. 261 McDowell (1927) A. C. 632, 137 L. T. 734.

ANNOTATIONS: See H. C. 47/43 (10, P. L. R. 379; 1943, A. L. R. 404) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONERS: Wittkowski.

FOR RESPONDENTS: Katzenstein.

ORDER.

Although this is the return to an order *nisi* in a High Court petition, it is in reality an appeal from a decision of the Registrar of Trade Marks under Section 14(5), Trade Marks Ordinance, 1938.

The Petitioners are the registered owners in Palestine of the trade mark "Agarol", registered in 1927 in what was then Class III. The relevant reference now is Trade Mark Rules, 1940, fourth schedule, paragraph 5, "Pharmaceutical Veterinary and Sanitary substances, *etc.*" The Registrar dismissed an objection by the Petitioners to the registration of the second Respondent's trade mark, namely the word "Ascarol" in paragraph 5. It does not seem to be disputed that Agarol is a laxative

for sufferers from indigestion, and that it is sold only in liquid form and in large bottles, whilst "Ascarol" is sold either in liquid form in small bottles or in capsule form. "Ascarol" is a poison and is not allowed to be sold without a doctor's prescription, whilst anyone can purchase "Agarol". The learned Registrar of Trade Marks was of the opinion that he did not require to consider the question of the similarity of the two names, and the consequent question as to whether they so nearly resemble each other so as to be calculated to deceive, because he held that the preparations, that is to say, the substances, were so very different that he could not conceive of any person mistaking the one for the other.

Mr. Wittkowski, for the Petitioners, contends that the Court is not bound by paragraph 5 of the fourth schedule, and he points out that both substances are medicines for sufferers from stomach troubles. It seems that "Ascarol" is a pharmaceutical preparation for use against a particular kind of worm called Ascaris, whereas "Agarol" is merely a laxative. Nevertheless, Mr. Wittkowski says that both substances are medicines for people suffering from stomach complaints. He therefore contends that the Registrar of Trade Marks was not justified in saying that the purpose of nature of these two substances was different and he refers to Hailsham, Vol. 32, page 571, footnote (f), saying that in decided cases a distinction has been drawn between oils used for lighting or heating or lubricating, and oils used for medicinal purposes. The argument proceeds that in the present case both the substances are used for medicinal purposes. He also cited Kerly on Trade Marks (5th Edition) page 261, and in particular the passage dealing with the public interest.

I have perused the report of the case of McDowell (1927) A. C., page 632, and in particular pages 638 and 640. It is not easy to find from the decided cases any strict line of demarcation which would serve as a guide or a test. I am of opinion that this is a narrow case, and that that being so the words of Viscount Dunedin, at page 640 of the report of the McDowell case — "I think it is just when it is a very narrow case that real weight ought to be given to the original determination of the Registrar" — are in point. In any event, we have a very important factor in that no one will likely be able to purchase "Ascarol" without a doctor's prescription. It seems, therefore, that "Agarol" is an ordinary medicine which can be sold to anyone, and, as the Registrar said, there is no likelihood of persons being confused or deceived. In this state of facts I do not think that the Registrar erred in refraining from considering the other question, namely, whether the words themselves were so similar as to be calculated to deceive.

For the foregoing reasons I would dismiss the petition with fixed (or inclusive) costs of LP. 10.

Delivered this 27th day of April, 1945, in presence of Mr. Wittkowski for Petitioners and Mr. Katzenstein for Respondents.

British Puisne Judge.

I concur.

Puisne Judge.

HIGH COURT No. 32/45.

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

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

IN THE APPLICATION OF :—

Fanny Miriam Gandz, administratrix of the estate of Leizer (Eliezer) Ebal, deceased. PETITIONER.

v.

The Administrator General & ors. RESPONDENTS.

Petition to High Court regarding act of Administrator General — Non-interference of High Court.

Return to a rule *nisi* issued on the 27th March, 1945, directed to the first Respondent calling upon him to show cause why he should not refrain from selling, whether directly and/or indirectly in any manner whatsoever and/or transfer in the Land Registry in the name of the respective purchaser or purchasers of certain immovable property situated in Magdiel and known as Parcel 20 of Block 6412 and Parcel 15 of Block 6410 and/or sell, transfer, remove, any part thereof and/or any rights and/or interests therein, including property attached to it as fixtures or otherwise belonging to the said immovable property, which is registered in the Land Register in the name of the second Respondent, and to show cause why Respondents should not first obtain from the proper District Court the Vesting Order provided for in the Credit Banks Ordinance (Drayton, Vol. 1, Chapter 29) section 14(4) before being permitted to sell, transfer, and/or remove as above; rule discharged:—

1. High Court will not exercise its discretionary powers, if Petitioner has or had other remedy.
2. Remedy of person aggrieved by act or decision of Administrator General acting as liquidator under Companies Ordinance is to apply to District Court, not petition High Court.

(*M. L.*)

REEFRRED TO: H. C. 147/42 (X, P. L. R. 7; 1943, A. L. R. 35); H. C. 150/42 (X, P. L. R. 19; 1943, A. L. R. 242).

ANNOTATIONS: As to non-interference of H. C. when there is another remedy see H. C. 129/44 (11, P. L. R. 636; *ante*, p. 63) with annotations thereto.
(*A. G.*)

FOR PETITIONER: Warszaviak.

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

ORDER.

This is a return to an order *nisi*. The issue can be dealt with briefly. The Respondent, who is the Administrator General of Palestine, in accordance with the provisions of section 6 of the Banking Emergency Ordinance, was constituted a liquidator for the purpose of liquidating the Bank Der Tempelgesellschaft. He has duly filed an affidavit. Mr. Eliash, on his behalf, has submitted that the Petitioner has an alternative remedy under section 173(5) of the Companies Ordinance, and that following the decisions in High Court Cases Nos. 147/42 and 150/42, this Court will not exercise its discretionary powers unless it is satisfied that there is no alternative remedy.

Now the gist of the Petitioner's case is an objection to an action or decision of the liquidator, which action or decision is published in an advertisement in a daily newspaper offering certain property for sale. It was not contended that he purported to act in any capacity other than that of liquidator by virtue of section 6 of the Banking Emergency (Amendment) Ordinance, 1939, and the various provisions of the Companies Ordinance, particularly Part VI, of which section 6 of the Banking Ordinance specifically applies to him.

It is to be observed that section 173(5) of the Companies Ordinance provides that if any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of. In our opinion that provision affords a clear remedy to the Petitioner to test the validity of the liquidator's decision.

For these reasons we are of opinion that the rule must be discharged, with LP. 10 inclusive costs.

Given this 14th day of May, 1945.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 15/45.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPLICATION OF :—

Reuven Lev & 12 ors. — APPLICANTS.

v.

Yossef Forer. — RESPONDENT.

Application for leave to appeal to Privy Council from one consolidated judgment in consolidated cases.

Application for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court dated 13.4.45 in Civil Appeals Nos. 389—397/44, refused:—

Where cases against various Defendants were consolidated and one judgment was delivered, dissatisfied parties seeking leave to appeal to Privy Council must make separate applications.

(*M. L.*)

DISTINGUISHED: P. C. L. A. 12/45 (12, P. L. R. 271; *post*, p. 537)

ANNOTATIONS:

1. See case distinguished.
2. As to when separate appeals are necessary see C. A. 386/43 (11, P. L. R. 307; 1943, A. L. R. 581) and note 1 thereto in A. L. R.

(*A. G.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENT: Goitein.

ORDER.

This purports to be one application, on behalf of several individual Applicants, for conditional leave to appeal to His Majesty in Council. The facts are that there were nine separate civil cases tried by the District Court of Tel-Aviv. By consent these actions were consolidated for hearing in the District Court and appeals from that Court in all these cases were similarly consolidated for hearing in this Court under Rule 304, Civil Procedure Rules, 1938.

Dr. Eliash, for the Applicants, argues that, as only one judgment was given by this Court under Rule 347, there should be only one appeal to His Majesty in Council in view of the words "final judgment" in line 1 of Art. 3(a) Palestine (Appeal to Privy Council) Order-in-Council, 1924. He relies on Mr. Bentwich's Book on Privy Council Practice, (2nd Edition) p. 143, and P. C. L. A. No. 12/45 of this

Court. Mr. Goitein, who opposes the application, refers to Mr. Bentwich's Book (3rd Edition) p. 92, and he points out that in India there is a special rule which is not applicable here.

We think that the facts of the present case are distinguishable from the facts in P. C. L. A. No. 12/45. While it is strictly true that only one consolidated judgment was delivered by this Court in the consolidated appeals, C. A. 389—397 of 1944 inclusive, yet there can be no doubt that, in the event of any of the successful parties in these cases wishing to execute the judgments delivered in their favour, separate decrees would have to be drawn up under Rule 352.

For these reasons we think that the present application is misconceived and that each of the dissatisfied parties in C. As. Nos. 389—397 of 1944, respectively, must make separate applications under Art. 5 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924. It, therefore, becomes unnecessary for us to discuss the question of value under Art. 3(a) or the other matter argued by Dr. Eliash as an alternative under Art. 3(b).

The application is refused with fixed (or inclusive) costs of LP. 5.

Delivered this 7th day of May, 1945.

British Puisne Judge.

HIGH COURT No. 141/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

S. Toussia Cohen. PETITIONER.

v.

Officer Commanding No. 3 Court Martial and Holding Center 21 Area Middle East Forces. RESPONDENT.

Employment by military authorities — Jurisdiction of Court Martial — Army Act sec. 25(1)(a), 179(9) — Master and servant, Union S/S Co. v. Claridge; Donovan v. Laing; Stone v. Cartwright; Hillyer v. St. Bartholomew's Hospital (Governors); Hibbs v. Ross; Baumwoll Manfg. v. Gilchrest; v. Fumess; Smith v. Bailey; Sammell v. Wright;

Laugher v. Pointer; Jones v. Liverpool Corp.; Jones v. Scullard; Dalton v. Angus; Harris v. Best.

Return to an order *nisi* for a writ of *Habeas Corpus;* order *nisi* made absolute:—

The courts martial have no jurisdiction under the Army Act to punish persons not employed by the military in circumstances giving rise to the relations of master and servant.

(*A. M. A.*)

REFERRED TO: Union Steamship Co., Ltd. *v.* Claridge, 1894, A. C. 185, 63 L. J. (P. C.) 56, 70 L. T. 177; Donovan *v.* Laing, Wharton and Down Construction Syndicate, 1893, 1 Q. B. 629, 63 L. J. (Q. B.) 25, 68 L. T. 512, 9 T. L. R. 313; Stone *v.* Cartwright, 1795, 6 Term Rep. 411; Hillyer *v.* St. Bartholomew's Hospital (Governors), 1909, 2 K. B. 820, 78 L. J. (Q. B.) 958, 101 L. T. 368, 25 T. L. R. 762; Hibbs *v.* Ross, 1866, L. R. 1 Q. B. 534, 35 L. J. (Q. B.) 193, 15 L. T. 67; Baumwoll Manufactur von Scheibler *v.* Gilchrest & Co., 1892, 1 Q. B. 253 C. A., affirmed *sub nom.* Baumwoll Manufactur von Scheibler *v.* Fumes, 1893, A. C. 8, 62 L. J. (Q. B.) 201, 68 L. T. 1, 9 T. L. R. 71; Smith *v.* Baily, 1891, 2 Q. B. 403, 60 L. J. (Q. B.) 779, 65 L. T. 330; Sammell *v.* Wright, 1806, 5 Esp. 263; Laugher *v.* Pointer, 1826, 5 B. & C. 547, 4 L. J. (O. S.) (K. B.) 309; Jones *v.* Liverpool Corporation, 1885, 14 Q. B. D. 890, 54 L. J. (Q. B.) 345, 1 T. L. R. 389; Jones *v.* Scullard, 1898, 2 Q. B. 565, 67 L. J. (Q. B.) 895, 79 L. T. 386, 14 T. L. R. 580; Dalton *v.* Angus, 1881, 6 App. Cas. 740, 50 L. J. (Q. B.) 689, 44 L. T. 844; Haris *v.* Best, Ryley & Co., 1892, 68 L. T. 76, 9 T. L. R. 149.

ANNOTATIONS: See Halsbury, Vol. 22, pp. 112 *et seq.*

(*H. K.*)

FOR PETITIONER: S. Cohen and Levitsky.

FOR RESPONDENT: The Solicitor General — (Griffin).

ORDER.

This is the return to an order *nisi* for a writ of *habeas corpus* issued in respect of a Palestinian Jew named Nuchem Aronowicz who is at present serving a sentence of ninety days imprisonment with hard labour passed on him by a Field General Court Martial for an offence contrary to section 25(1)(a) Army Act, to wit "when on active service in a document signed by him knowingly making a false statement".

It is conceded by the learned Solicitor General, who appeared for the Respondent, that this Court has power to enquire into the matter as the allegation is that Nuchem Aronowicz was not subject to the jurisdiction of the Court Martial. I have been referred to the Manual of Military Law (1929) page 140, paras. 15 and 19, and page 144. It is also conceded that the only provision of the Army Act under which the Court Martial could purport to assume jurisdiction was section 179(9) which is in the following terms:—

> "All persons who are employed by or are in the service of any of His Majesty's troops when employed on active service and who are not under the former provisions of this Act subject to military law".

It is necessary, therefore, for me to decide whether, in fact, Nuchem Aronowicz was at the relevant time employed by or in the service of His Majesty's troops.

Before dealing with the facts I would very briefly set out the law as to who may be said to be employees. This can be conveniently found in Smith's "Law of Master and Servant" 8th (1931) Edition at pages 161, 162, 248 and 250 *et seq.* where the following cases are cited namely, Union Steamship Co. *v.* Claridge (1894) A. C. 185; Donovan *v.* Laing (1893) 1 Q. B. 629; Stone *v.* Cartwright, 6 T. R. 411; Hillyer *v.* Governors of St. Bartholomews' Hospital (1909) 2 K. B. 820; Hibbs *v.* Ross L. R. 1 Q. B. 534; Baumvoll Manufactor *v.* Gilchrest & Co. (1892) 1 Q. B. 253; Baumvoll Manufactor *v.* Fumess (1893) A. C. 8; Smith *v.* Bailey (1891) 2 Q. B. 403; Sammell *v.* Wright, 5 Esp. 263; Laugher *v.* Pointer, 5 B. & C. 547; Jones *v.* Corporation of Liverpool, 14 Q. B. D. 890; Jones *v.* Scullard (1898) 2 Q. B. 565; Dalton *v.* Angus, 6 App. Cases 740 and 829; and Harris *v.* Best, 68 L. T. 76. The test appears to be whether the alleged servant (in this case, Nuchem Aronowicz) remained under the control of the Military Authorities.

Now, what are the facts before me and where are they to be found? They are to be found in a written contract of service between the General Officer Commanding the British Troops in Palestine Base and L. of C. Area and Mr. Sinai Aronowicz, an uncle of Nuchem Aronowicz. (For convenience sake I shall refer to Nuchem Aronowicz as the "Petitioner"). In addition to the written contract I have before me affidavits sworn by the Petitioner and by Capt. Pickthall (Respondent) and Major Jeffrey who was, at the request of the Petitioner's advocate, cross-examined before me on his affidavit. The contract provides *inter alia* that Sinai Aronowicz place at the unreserved disposal of the Military Authorities for a period of three months from 1st June, 1944, a Dodge motor vehicle, registered No. M. 531 A. with an option to the Military Authorities to renew the contract for further periods of three months. Clause 2 is in the following terms: "Owner shall himself drive or employ a driver for his vehicle". This clause is important because it recognises Sinai as being the employer of the driver if he (Sinai) did not drive the vehicle himself. Sinai did not drive it himself. But clause 2 is also important when read in conjunction with that part of clause 3(b) which stipulates "The owner will not be paid

for any day on which his vehicle has not reported for work". This can only mean that it was contemplated that on any particular day Sinai could provide any person to drive, that is, not necessarily Nuchem. There was nothing to prevent Sinai from sending ninety different persons to drive over a period of three months, the only stipulation being in clause 6 which provided that the "owner or driver shall at any time obey the orders of such miiltary personnel as may be placed over him". Supposing that Nuchem Aronowicz had not reported for duty on any particular day I do not think that the Military Authorities could have charged him with absence from duty without leave. There is also clause 7 which provided that "should the owner and/or driver and/or vehicle fail to give satisfaction the Military Authorities shall have the right to terminate the contract immediately". This clause, if anything, would seem to militate against the contention that the driver was considered to be an employee of the Military Authorities, and, as such, subject to the Army Act. Clause 13 which is also important provides that the General Officer Commanding shall not be "liable to the owner by virtue of this contract for any damage, *etc.*" It seems that clause 7 provides the remedy to the Military Authorities should they be dissatisfied with the conduct of any driver supplied by the owner. So much for the written contract.

To turn now to the affidavit sworn by the Petitioner, I would say that the Respondent did not cross-examine the deponent. The Petitioner swore that his uncle employed him to drive the vehicle and that he (Petitioner) did not always drive the vehicle and on days when he could not do so he notified his uncle who procured another driver whom he sent with the lorry. He also swore that at material times he was in the service of his uncle, and that he collected sums from the Military on behalf of his uncle under a written authorisation kept in the files of No. 478 Company. Major Jeffrey, in his affidavit, swore that to the best of his knowledge and belief the Petitioner worked continuously as driver except during the four days in each month "allocated for maintenance of the vehicle", presumably meaning thereby while the vehicle was being repaired. The Petitioner, however, as I have said, was not cross-examined on his affidavit.

Major Jeffrey also swore that the Petitioner received payments from Army funds. This may be so; but I accept the Petitioner's explanation that he received the payments on behalf of his uncle. It is not suggested that Petitioner's name ever appeared on any nominal roll of civilian employees of the Army. I do not think that clauses 6 and 7 had the effect of constituting the Petitioner an employee or servant

of the Military Authorities. The mere fact that he was given a pass to enter camps and that that pass may have been called an identification card issued to "civilian employees of the British Forces in Palestine" does not carry matters further. Nor do I consider that the citations by the learned Solicitor General from Hailsham's "Laws of England" Vol. 22, para. 422, or from Clerk and Lindsell on Torts (9th Edition) pages 66 and 67, help the Respondent's case. The question is one of fact to be determined on the circumstances of each particular case (see Smith 8th (1931) Edition, pages 162 and 248).

On the material before me I find that the Petitioner never was employed by or in the service of His Majesty's troops. In this state of facts it follows that, as the Petitioner is not subject to military law under section 179(9) Army Act, the petition succeeds. It is accordingly unnecessary for me to deal with the other argument advanced by the Petitioner's advocate, namely, that the Army Act does not apply in Palestine to a Palestinian.

For the foregoing reasons the order *nisi* is made absolute.

Given this 10th day of January, 1945.

British Puisne Judge.

CIVIL APPEAL No. 154/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Simcha Binem Zalcman & an. APPELLANTS.

v.

Alfred Mueller & an. RESPONDENTS.

Striking out statement of claim — When may be ordered.

Appeal from the order of the District Court, Tel-Aviv, dated the 28th February, 1945, in Civil Case No. 255/44, dismissed and cross-appeal allowed:—

Whether a plaintiff may or may not succeed in the action, if the statement of claim discloses a cause of action it should not be struck out.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. D. C. T. A. 110/44 (1945, S. C. D. C. 337) and note thereto.

(*H. K.*)

FOR APPELLANTS: Eliash and Kost.
FOR RESPONDENTS: No. 1 — Goitein and Szczupak.
No. 2 — Caspi.

JUDGMENT.

I do not call upon the Respondents to reply.

I do not think it can possibly be said that the statement of claim discloses no cause of action against the Appellants.

The Plaintiff may possibly not succeed in his action, but that is not the point. If he discloses a cause of action he is entitled to have his case heard. I am also unable to find that the action is shown by the statement of claim to be frivolous or vexatious.

As regards the complaint that sufficient details of the fraud alleged have not been given, the Court below has already ordered further details to be given, and I am not at present required to decide whether the second statement of claim sufficiently complies with that order.

I find that the appeal fails, and I dismiss it with fixed costs in the sum of LP. 10 (ten).

I shall now deal with the notice of the first Respondent who contends that the second Respondent should be retained as a party to the action lodged by the first Respondent.

Delivered this 29th day of June, 1945.

British Puisne Judge.

Judgment on the Cross-Notice under Rule 339.

In view of the averments in the statement of claim, of the admitted connection between the two Appellants and the Company, and of the relief prayed for, it appears to me that the Company is an essential party to the proceedings, and that the statement of claim ought not to have been struck out as against the Company.

The order dated 28.2.43 of the District Court is revised to this extent that the Company will remain as a defendant in the action. The first Respondent will have fixed costs of LP. 5 (five) against the Company.

Delivered this 29th day of June, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 94/45.

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

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

IN THE APPEAL OF:—

Helloun Istefan el-Sweid. APPELLANT.

v.

The Attorney General. RESPONDENT.

Fine or in default, imprisonment — Exceeding maximum laid down in sec. 42, C. C. O. — Court of Appeal rectifying sentence.

Application for leave to appeal from the judgment of the District Court of Haifa dated the 11th of May, 1945, in Crime No. 72/45, whereby Appellant was convicted of being in possession of dangerous drugs *contra* section 7 of the Dangerous Drugs Ordinance, 1936, as amended in 1941 and sentenced to pay a fine of LP. 500.— or in default one year's imprisonment, allowed:—

Court sentencing Accused to a fine — not entitled to impose imprisonment in default of payment, exceeding maximum laid down in sec. 42, Criminal Code Ordinance.

(*M. L.*)

APPELLANT: In person.

FOR RESPONDENT: Legal Assistant — (MacFee).

JUDGMENT.

This is an appeal against sentence only. The learned Judge sentenced the Accused to a fine of LP. 500 and in default one year's imprisonment. In law he was not entitled to impose such a sentence because it contravened the provisions of section 42 of the Criminal Code Ordinance. The Attorney General has applied that the sentence be rectified. We therefore quash the sentence imposed by the Court and substitute therefor a sentence of twelve months' imprisonment.

Delivered this 30th day of May, 1945.

Chief Justice.

CRIMINAL APPEAL No. 32/45.

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 Hassan Jaber. APPELLANT.

v.

Attorney General. RESPONDENT.

Receiving stolen property — C. C. O. 310 — Proof that goods were stolen as an element of offence — Inference of knowledge.

Appeal from the judgment of the District Court of Haifa (Judges Shems and Baradey), CR. C. 265/44, whereby Appellant was convicted of an offence contrary to sec. 310 of the C. C. O. 1936, and sentenced to six months' imprisonment, dismissed:—

In a charge under sec. 310 C. C. O., if evidence is led that the goods were in fact stolen, guilty knowledge may be inferred.

(*A. M. A.*)

ANNOTATIONS:

1. On the evidence required to support a conviction under sec. (309 or) 310 of the C. C. O. see CR. A. 57/43 (10, P. L. R. 291; 1943, A. L. R. 450) and CR. A. 140/43 (10, P. L. R. 605; 1944, A. L. R. 96).

2. On proof of guilty knowledge see note 3 to CR. D. C. Ha. 326/44 (1945, S. C. D. C. 197).

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Legal Assistant — (MacFee).

JUDGMENT.

This is a charge under section 310 of the Criminal Code Ordinance. We agree with Mr. Elia that an essential ingredient of the charge is proof that the goods said to have been stolen, were in fact stolen, but it is obvious that the question of knowledge of this fact, which is a question of the state of mind of the Accused himself, has to be inferred from the surrounding circumstances. In the first place there can be no doubt that those goods were obtained in such circumstances as to bring them within the ambit of section 310. The Accused was found in possession of them in circumstances which placed the onus on him to give an explanation as to how he did come into possession. His explanation was that he was helping this other man, who was a friend of his, to carry the goods. That might be a reasonable explanation, but it was a question for the Court below to consider. Indeed, it would appear to be an explanation which, if there were any doubts about it, the benefit might have been given to the accused person. But the Court below had before it something more than this explanation. There was the question of this LP. 10. *Prima facie* this deal concerning the LP. 10 associated the Accused with the first Accused in his dealings with the stolen goods. It was therefore for him to give some reason-

able explanation of this association with the first Accused. The explanation he gave was one which the Court below did not accept, and we must say that there were adequate grounds for refusing to accept it.

In these circumstances we see no reason to interfere with the judgment of the Court below. The conviction and sentence are confirmed.

Delivered this 21st day of March, 1945.

Chief Justice.

CIVIL APPEAL No. 465/44.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Al Abdul Hadi el-Ali on behalf of the heirs of his late father Abdul Hadi el-Ali. APPELLANT.

v.

Mohammad El Haj Ahmad Abi El Rub. RESPONDENT.

Res judicata — Defence not available if matter not adjudicated — Claim for specific performance — Pleadings — C. A. 134/38.

Appeal from the judgment of the Magistrate's Court of Tulkarm sitting as a Land Court, dated 8.11.4, in Land Case No. 44/43, dismissed:—

1. C.A. 134/38 could not be pleaded as *res judicata* in a claim for specific performance of the contract.
2. Although specific performance is not applied for in so many words, the claim is implied if the Plaintiff alleges an equitable title.

(*A. M. A.*)

CONSIDERED: C. A. 134/38 (1938, 1 S. C. J. 403).

ANNOTATIONS:

1. See, on the first point, C. A. 234/40 (7, P. L. R. 603; 1940, S. C. J. 439; 9, Ct. L. R. 33) and the passage from Halsbury therein quoted.
2. On defective pleadings *cf.* C. A. 75/44 (1944, A. L. R. 598) and note.

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Nazzal.

JUDGMENT.

The Respondent is not called up on to reply.

This is an appeal from the judgment dated 8.11.44 of the learned Magistrate, Tulkarm, sitting as a Land Court in Land Case No. 44/43.

There are really only two points in this appeal. The first is the question whether, having regard to the Statement of Claim, the Magistrate could give a judgment which is, in effect, one for specific performance.

Although the advocate, who appeared for the Respondent (original Plaintiff), stated to the Court that the action was not one for specific performance, we think that the Appellant (original Defendant) was not misled, because the Respondent's advocate, in the same sentence, averred that the Plaintiff had acquired an equitable right in the land. We think that the Appellant understood what the claim was that he had to meet — he knew that the claim was based on the contract dated 25.1.27.

The second point is whether the claim was *res judicata* by reason of the judgment dated 25.4.38, in Case No. 66/35 of the Land Court, Nablus, which was confirmed by the judgment dated 21.6.38 in C. A. 134/38.

Having considered these judgments we are unable to find that the matter of the contract, dated 25.1.27, was adjudicated upon. The finding of the Land Court, Nablus, was that a certain *kushan* referred to certain land (including a triangle in dispute). The Land Court did not come to any finding in regard to the contract. The judgment of the Supreme Court, which was a short one, confirmed the decision of the Land Court.

So we think that it was still open to the Respondent to sue on the contract which is what he did.

In the result we find that this appeal fails and we dismiss it with fixed costs in the sum of LP. 10 (ten pounds).

Delivered this 2nd day of July, 1945.

British Puisne Judge.

CIVIL APPEAL No. 455/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Saleh er-Ramali & 10 ors. all of Yajur Village. APPELLANTS.

v.

The Mukhtar for the time being of Yajur Village in trust for Hassan Ahmad Awad, and Ahmad Hamad Hammad & 67 ors. RESPONDENTS.

Land settlement — Application to amend Schedule of Rights, sec. 33(4), L. A. 92/34 — Grounds for amendment.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated 23rd October, 1944, in case No. 4/Yajur, allowed and case remitted:—

1. An application to amend the Schedule of Rights may be filed by a person who has not submitted a memorandum of claim.
2. When a claimant relies on the *mukhtar* to file a memorandum and this is not done, an amendment of the Schedule of Rights should not be refused.

(*A. M. A.*)

FOLLOWED: L. A. 92/34 (2, P. L. R. 471; 9, C. of J. 850).

ANNOTATIONS: Note that the wording of sec. 33(4) of the Land (S. of T.) Ordinance has since the decision in L. A. 92/34 (*supra*) been changed by the Land (S. of T.) (Am.) Ord., 1939.

(*H. K.*)

FOR APPELLANTS: Habiby.

FOR RESPONDENTS: Elia.

JUDGMENT.

This is an appeal from the decision, dated 23rd October, 1944, of the learned Settlement Officer, Haifa, in Case No. 4/Yajur, refusing an application by the Appellants for revision of the Schedule of Rights in respect of parcel 1164/39, corrected to parcel 1164/27. Leave to appeal was granted by the Settlement Officer. An application for revision of the Schedule of Rights was made by the Applicants under the provisions of section 33(4) of the Land (Settlement of Title) Ordinance, (Cap. 80), which reads as follows:—

> "During the period of thirty days in which the Schedule of Rights is posted, any person claiming a right to land may apply to the Settlement Officer and thereupon the Settlement Officer may revise his decision in the Schedule of Rights if due notice is given to any person affected by the application for revision".

The Schedule of Rights was published on 14.2.44, and the application for revision was submitted on 11.3.44, so it was within the period allowed by law.

We think that really the only point for our consideration is whether the learned Settlement Officer exercised his discretion properly when he refused the application. He gave reasons for his refusal, and it cannot be said that those reasons lacked weight. But having considered the submissions of the advocates who have appeared for the parties,

we have come to the conclusion, although not without considerable hesitation, that this appeal ought to be allowed.

The Appellants admittedly submitted no memoranda of claim as required by section 16 of the Ordinance, and they did not apply for their claims to be added under the provisions of section 26. But in Land Appeal 92/34 (P. L. R. 1934—35, page 471) it was held that the operation of this sub-section, *i. e.* 33(4) was not confined to persons who had previously claimed. The Appellants' excuse for their failure to take steps to safeguard their rights is that they trusted the *Mukhtar* of Yajur to present their claims for them. The Settlement Officer in his decision mentions the fact that the Respondents admitted that the Appellants had been living on the land for periods of six to eight years, and the Appellants aver that they can prove that they have been on the land for over ten years. The land is admittedly *miri.*

The Appellants were not parties to the case between the Respondents and other persons, and in view of the fact that the Appellants were actually living on the land, we think that those other persons (namely the Khoury family and Mr. Eliash) who were claiming the Yajur lands, ought to have made them Defendants.

However, in view of the fact that their residence on the land for substantial periods was admitted by the Respondents, we think that the Appellants had some grounds for thinking that their claims would be mentioned by the *Mukhtar* who, we understand, was a member of the Village Settlement Committee, and that the interests of justice require that the Appellants' claim should be heard.

We therefore allow the appeal and direct the Settlement Officer to hear the application.

There have been two hearings before this Court. On the first occasion we found that the Respondents had not been properly served, and with respect to that hearing we order the Respondents to have fixed costs in the sum of LP. 5 (five pounds) in any event. The general costs of the appeal (which we fix in the sum of LP. 15 in the case of the Appellants, and LP. 10 in the case of the Respondents) will follow the event of the hearing before the Settlement Officer. That is to say, if the Appellants succeed they will have LP. 15, less LP. 5, which equals LP. 10 costs, and if the Respondents succeed they will have LP. 10 plus LP. 5 which equals LP. 15 costs.

Delivered this 3rd day of July, 1945, in the presence of Mr. H. Atallah by delegation, for the Appellants, and Mr. Elia for the Respondents.

British Puisne Judge.

CRIMINAL APPEAL No. 34/45.

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

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

IN THE APPEAL OF :—

Mussa Muhammad Harb & an. APPLICANTS.

v.

Attorney General. RESPONDENT.

Sentence — Evidence in mitigation — Discretion of Court to allow.

Application for leave to appeal from the judgment of the District Court of Jerusalem (Judges Hasna and Bardaky), CR. C. 212/44, whereby Applicants were convicted of an offence contrary to sec. 238 of the C. C. O., 1936, and sentenced to six months' imprisonment each; application refused:—

The Court has a discretion, after conviction, to allow or refuse to hear evidence in mitigation of sentence.

(*A. M. A.*)

ANNOTATIONS: CR. A. 169/44 (12, P. L. R. 6; *ante*, p. 365) is to the same effect.

(*H. K.*)

FOR APPLICANTS: G. Salah.

FOR RESPONDENT: Legal Assistant — (MacFee).

JUDGMENT.

Only one point was raised in this appeal. The Accused pleaded guilty and were convicted. Counsel for the Accused then asked permission to adduce evidence in support of a lenient sentence. We are of opinion that there is no doubt as to the legal position in such a case. It was within the complete discretion of the Court to allow the evidence to be given or to refuse to allow the evidence to be given. In this case it has been alleged that the Court was under the impression that it had no such right. They passed a sentence of six months, and we have no reason to think that they would have passed a lesser one, even if we were satisfied that the Court were under a misapprehension as to the correct procedure. We do not think it necessary or desirable to remit the case. The conviction and sentence must be confirmed.

Delivered this 21st day of March, 1945.

Chief Justice.

CIVIL APPEALS Nos. 339—349/44.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF:—

Hasan Masalm As'ad Salama el Uzeib
& 2 ors. APPELLANTS.

v.

Muheimid Ahmad Salama Abu Suweirih
& 122 ors. RESPONDENTS.

Musha tenure — Finding by L. S. O. of ijraz by consent.

Appeals from the decisions of the Settlement Officer, Gaza Settlement Area, dated 27th March, 1944, in cases Nos. 5, 6, 7 & 8/34 Sukreir (combined) and others, dismissed:—

Finding of a partition of village lands upheld by the Supreme Court.

(*A. M. A.*)

FOR APPELLANTS: Elia, Shehadeh, Eliash, Olshan, Yifrach, Moyal.
FOR RESPONDENTS: Zein ed Din & Hawari.

JUDGMENT.

Edwards, J.: These appeals have by consent been consoildated for hearing under Rule 304 of the Civil Procedure Rules, 1938. For convenience they may be placed into four groups as follows:—

Group I: Civil Appeals Nos. 339, 341, 342 and 343/44 which are respectively from cases 8, 7, 6 and 5/1934, Land Settlement (Sukreir) Gaza District.

Group II: Civil Appeal No. 340/44, from Case No. 9/34 (Sukreir).

Group III: Civil Appeals Nos. 344, 345, 346, 347 and 348/44 from Cases Nos. 1, 3 and 11/1934 (Sukreir).

Group IV: Civil Appeal No. 349/44 from cases 10 and 35/34 (Sukreir).

The names of the Appellants in Civil Appeal No. 339/44 are: 1. Hasan Maslam As'ad Salama el Uzeib, 2. Hamad Mahmud As'ad Salama el Uzeib, and 3. Sallam Salama el Ajjuri.

The Appellants in Civil Appeal 341/44 are: 1. Fatima Salim, 2. Fattum Salim, 3. 'Ali Salem, and 4. Ahmad Muhammad.

The Appellants in Civil Appeal 342/44 are: 1. Khalil Hammad 'Ali 'Abdallah, and 2. Mahmud 'Ayish.

The Appellant in Civil Appeal 343/44 is Ali Suleiman Muhammad el Dabbas on behalf of the heirs of Muhammad Muhammad ed Dabbas of Arab Sukreir.

The Appellant in Civil Appeal No. 340/44 is Barham Khalil.

The Appellant in Civil Appeal No. 344/44 is Suleiman Su'ud Darwish Said.

The Appellants in Civil Appeal No. 345/44 are Aysha Suleiman Ali and Wadha Suleiman Ali.

The Appellant in Civil Appeal 346/44 is Maryam Musallam Hasan.

The Appellant in Civil Appeal No. 347/44 is Salim Husein Salim.

The Appellants in Civil Appeal No. 348/44 are: — 1. Salim Hussein Salim, 2. Aisha Suleiman, and 3. Wadha Suleiman Ali.

The Appellants in Civil Appeal No. 349/44 are: — 1. Ayish Salem Mubarak and 2. Hamad Suleiman Mubarak.

Before dealing with each group separately we may say that all the parties are, or at any rate originally were, tribesmen and inhabitants of Sukreir village. They were originally a mixture of two tribes, namely, the Abu Sweirih and the Malalha. The lands in dispute were all registered in the fiscal year 1292, *i. e.* 1876 *A. D.* The registration was in four localities. The Respondents say that the lands are situate near the sea-shore between Yibna and Isdud. Their area exceeds 6000 *dunums*. We are told that the Abu Sweirih came from the Hejaz over one hundred years ago and took over those lands. The Malalha Arabs were shepherds employed by the Sweirih family. The Malalha Arabs came from Sinai in 1292 (1876 *A. D.*). The Turkish authorities wanted to collect taxes on lands in Palestine, and for the first time Government Officers came to survey and register the lands in the names of cultivators or people who wished to cultivate. Certain parcels of Sukreir village were registered in the name of 23 persons individually, the boundaries being different. Each parcel was partitioned. The Respondents contend that the tenure was *mafruz*.

The Appellants, who claim as registered owners, are the descendants of the original registered owners except in the case of the "Al Murra" land which was registered in the names of the heads of the tribe. It is not disputed that the original registered owners were true beneficial owners. The case for the Appellants is that the registration in the four localities was only a nominal registration as to parcels, and that it was in fact a registration of the *musha'a* shares of the various owners. The total registration, it is contended by the Appellants, does not correspond to the actual area.

Both the Appellants and the Respondents, who are the original registered owners, mortgaged the land in 1907, the mortgage being released in 1928. Matters remained in this position till 1932 when Land Settlement operations started. It is said that in 1932 an Assistant Land Settlement Officer went to the village and suggested a partition. The Appellants objected because they were given either no shares or less than their registered shares. This partition was not at the time approved, but the Land Settlement Officer, from whose decision these appeals are now brought, sanctioned it. The Appellants now complain that by reason of this partition they have been deprived of their rights.

It is submitted on behalf of the Appellants that there are 23 *kushans* covering each of the four localities, and that the areas are multiples of a unit area. It is contended that this is obviously not a physical partition of land on the ground, but is clearly a division into *sahms*. In other words, it is a purely nominal registration into parcels. It is further contended that the Land Settlement Officer entirely overlooked this mathematical division of the parcels, and that the boundaries in the *kushans* are fictitious. The Appellants say that they are entitled to the same ratio in the actual areas as the registration bears to the total registered area. They contend that there can be no prescription against their registered title, and that any persons, such as the Respondents, who wish to dispute their rights, must establish adverse possession of individual parcels for a period exceeding the period of prescription. The Appellants' argument proceeds that the Land Law (Amendment) Ordinance, 1933, is not retroactive.

At this stage we may say that the main controversy centres around the question whether the Land Settlement Officer was entitled to hold that the lands were *mafruz* and not *musha'a*. Apart from the matters already set out the contention of the Appellants is that there was overwhelming documentary evidence, such as the payment of *werko* by a Sheikh on behalf of the whole tribe, and written admissions by all parties, going to show that the land was *musha'a*. The Appellants also point to the fact that in the memorandum of claim submitted by the Respondents it is stated that the "taxes are paid together with all the lands". The Appellants also rely on certain documents (Exhibits 19/B and 10A in particular), and on the evidence of the land having been mortgaged by all the parties. It is submitted that all these factors show that the tenure was *musha'a*.

The Land Settlement Officer considered the fact that the land had been described as *musha'a* in a number of documents, but he has observed that practically all village lands, which are described as *musha'a*,

are partitioned to some extent, usually between the *hamuleh* or other sections (the members of which are in various degrees related to each other).

In para. 7(5) of his decision in cases 1, 3 and 11 he says:—

> "These partitions limit the rights of the individual holder to a particular part or parts of the whole lands, but within those parts the individual members have no permanent partition. My experience is that such villages are invariably referred to as *musha'a* villages until such time as each individual (or group of individuals who elect to stay in partnership) have been allotted a parcel or parcels permanently.
>
> Could not then the lands that are in dispute here have been partitioned among the various families, but not between the members thereof, and have been commonly referred to after the custom of the countryside as being *musha'a* because the individual members of the families had no permanent and final parcels? I am of the opinion that it is the only reasonable explanation particularly in view of the absence of the "hall-mark" of true *musha'a, viz.* the periodical distribution of the lands for cultivation purposes on a basis of known shares. The statement in Exh. 34E. to the effect that the "parcels" were cultivated in turn also fits in with this view, as it could well mean that the members of the families cultivated their family parcels in turn".

We are not prepared to hold that this is an unreasonable or fanciful theory.

It should be remembered that the Appellants are not claiming individual specific parcels or plots. The matter of the mortgage would at first sight appear to be a strong point in favour of the Appellants' argument. It seems to be true that the parties did mortgage the lands in 1907, and that the mortgages were discharged in 1928. But there is no documentary evidence to show that any money was paid by the Appellants in redemption of the mortgage in 1928.

It was strenuously contended on behalf of the Appellants that they could not be dispossessed so long as they have title deeds unless the Defendants were able to prove adverse possession for over ten years of specific plots and this they failed to do. The answer to this, however, seems to us to be that if (as we hold) the Land Settlement Officer was entitled to come to the conclusion that the land was *mafruz* then the parties are not co-owners, and the question of there being no prescription as between co-owners does not arise.

It is then submitted that it could not be a mere accident that the areas of the plots are multiples of a unit. Nevertheless this fact does not conclusively prove that the land was *musha'a*.

It seems to us implicit from the decision of the Land Settlement

Officer that he was satisfied that the Defendants or their ancestors had been in adverse possession of specific parcels for more than the period of prescription. We do not think that the Appellants can suddenly alter the basis of their claim which is in respect of *musha'a* shares to one in respect of partitioned shares.

Because of the view we take of the matter as a whole, we deem it unnecessary to deal with the individual claims of the various Appellants, the reason being that we do not think that the decision of the Land Settlement Officer in any of the appeals can be disturbed. We would, however, just make a passing reference to Civil Appeal 340/44 (Case No. 9/34) where a question of minority of the Appellant (Barham) arose. We would say that we think that he was fortunate to be given a specific parcel when he was actually claiming a *musha'a* share.

In the result all of the appeals fail and must be dismissed. We shall hear parties' advocates on the question of costs.

Delivered this 29th day of June, 1945, in the presence of Mr. I. Olshan for Appellants, and in the presence of Said Eff. Zein ed Din for Respondents.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

Coram: Edwards and Shaw, JJ.

After judgment read, Court hears argument as to costs.

ORDER.

Having heard parties' advocates, we order as follows, namely, that the Respondents be awarded one set of costs to be taxed on the lower scale to include one advocate's attendance fee at the hearing of LP. 44, such costs and advocate's attendance fee to be paid by each of the eleven Appellants in equal shares — the Appellants in each appeal to be ordered to pay jointly and severally.

British Puisne Judge.

CRIMINAL APPEAL No. 37/45.

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

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

IN THE APPEAL OF:—

Ahmad Abdul Latif El-Halabi. APPELLANT.

v.

Attorney General. RESPONDENT.

Identification parade — Criminal Procedure (Evidence) Ordinance — Admissibility of statement made by victim — Time within which statement made — Evidence Ordinance, secs. 7, 8,

Appeal from the judgment of the District Court of Tel-Aviv (R/P Judge Windham), CR. C. 85/44, whereby Appellant was convicted of an offence contrary to sec. 238 of the C. C. O., 1936, and sentenced to eight months' imprisonment, dismissed:—

1. The result of an identification parade is admissible in evidence against a person who willingly took part therein, even if he was entitled to refuse.

2. A statement made by the victim of an act of violence is admissible if it directly relates to the case and is made within what the Court of Trial considers, in the circumstances, sufficiently soon after the act.

(*A. M. A.*)

ANNOTATIONS:

1. The facts underlying the first point were that Appellant was taken to an identification parade and identified before he was "charged with any offence" as required by sec. 6 of the Criminal Procedure (Evidence) Ordinance.

2. On the second point see note 2 in S. C. J. to CR. A. 18/42 (9, P. L. R. 168; 1942, S. C. J. 171; 12, Ct. L. R. 69); *cf.* CR. ASS. 54/42 (10, P. L. R. 140; 1943, A. L. R. 45) & note 2 and CR. A. 123/43 (10, P. L. R. 539; 1943, A. L. R. 725).

(*H. K.*)

FOR APPELLANT: Michaeli.

FOR RESPONDENT: Legal Assistant — (MacFee).

JUDGMENT.

In this case two points were raised on behalf of the Appellant. The first is not without interest. Counsel for the Appellant invites attention to the non-compliance with section 6 of the Criminal Procedure (Evidence) Ordinance. That is an Ordinance dealing solely with procedure. Section 6 stipulates the consequences that will flow from the failure of a person who is charged to submit himself to an identification parade. Those consequences are to make him liable to imprisonment for fourteen days. But, this section is not an authority for stating that once a person who had a right to refuse, actually appears at an identification parade, the resulting evidence cannot be tendered at the trial. The only effect of the section is to compel certain persons to submit themselves to an identification parade. In this case the man appeared at the parade, was identified, and evidence to this effect was admissible.

That disposes of the first ground of appeal.

The second point raised on behalf of the Accused concerned the interpretation of sections 7 and 8 of the Evidence Ordinance. Counsel for the Accused objected because the witness Gabriel, who gave evidence as to what the complainant told him, was the second man whom the complainant met. But Cohen, the first person whom he met, also gave evidence, and, in fact, his meeting with Cohen was almost simultaneous with his meeting with Gabriel. All that has got to be proved to enable evidence to be admissible under section 7 of the Evidence Ordinance is, firstly, that it directly relates to the case; about this there can be no shadow of doubt in the present case. Secondly, that the statement of complainant must be made shortly before or after the alleged offence has been committed. This question of the lapse of time is essentially one for the judge to determine in the light of all the circumstances. In some cases a statement made seven hours after the event might be admissible; in other cases it might not be admissible if it was given seven minutes after the event. In the circumstances of this case we are satisfied that the Judge came to a correct conclusion.

The appeal must therefore fail and the conviction and sentence be confirmed.

Delivered this 21st day of March, 1945.

Chief Justice.

HIGH COURT No. 19/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Rashid Ahmad Abu Laban. PETITIONER.

v.

Assistant Chief Execution Officer, District Court, Jaffa & an. RESPONDENTS.

Judgment debtor alleging agreement with judgment creditor — His remedy under Art. 36, *Execution Law.*

Return to an order *nisi* issued on the 21st day of February, 1945, directed to the Respondents calling upon them to show cause why the orders made by Respondent No. 1 on 27.1.45 and 3.2.45 in Execution file No. 45/44 should not be set aside and execution therein stayed, and why the first Respondent should not

admit such evidence as Petitioner may wish to adduce to prove the illegality of the second Respondent and the sale of the judgment-debt to a stranger to the proceedings, discharged:—

Where decree holder denies judgment debtor's allegation of agreement, latter's remedy is to ask Chief Execution Officer for time to go to competent Court, to prove alleged agreement.

(*M. L.*)

ANNOTATIONS: As to Article 36 of Execution Law see H. C. 22/44 (1944, A. L. R. 234) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Berouti.

FOR RESPONDENTS: 'Akel.

ORDER.

Having considered the submission of Mr. George Berouti for the Petitioner and Amin Bey 'Akel for the second Respondents, I have come to the conclusion that there are no grounds for interfering with the orders dated 27.1.45 and 3.2.45 of the Assistant Chief Execution Officer.

Mr. Berouti has submitted that Article 36 of the Execution Law was not complied with as the judgment-creditors (second Respondents) did not specifically deny the alleged agreement made with Shafic Eff. Assal as attorney for the second Respondents. Amin Bey 'Akel, who also appeared on behalf of the second Respondents before the Assistant Chief Execution Officer, has stated before me that he does deny the alleged agreement, and that he is not prepared to accept LP. 288 in full settlement, and the course which the proceedings took before the Assistant Chief Execution Officer and the orders which he made, quite clearly show, in my judgment, that this was a case in which the judgment-creditors were denying the alleged agreement. That being so the remedy of the judgment-debtor (Petitioner) was to ask the Assistant Chief Execution Officer to give him time to go to the competent Court in order to prove the alleged agreement.

In the circumstances this petition must be dismissed and the order *nisi* must be discharged. The second Respondents will have fixed costs in the sum of LP. 10 (ten Palestine Pounds).

Given this 18th day of May, 1945, in the presence of George Eff. Berouti for Petitioner and Amin Bey 'Akel for Respondents.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 12/45.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Nasra Ahmad Muhammad Yousef. APPLICANT.

v.

Hamanuta Ltd. & 2 ors. RESPONDENTS.

Consolidated cases — Leave to appeal judgment delivered in one case — Value of judgment.

Application for conditional leave to appeal to His Majesty in Council granted:—

Leave to appeal to the Privy Council may be granted from one judgment given in two consolidated cases, before delivery of the second judgment.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment which it is sought to appeal is that in consolidated Civil Appeals Nos. 364 & 365/44 (12, P. L. R. 152; *ante*, p. 321).

2. On proof of value of the subject matter for purposes of appeals to the P. C. see P. C. L. A. 24/43 (11, P. L. R. 33; 1944, A. L. R. 237), P. C. L. A. 7/44 (*ibid.*, pp. 388 & 548) and P. C. L. A. 13/44 (*ibid.*, pp. 469 & 550).

3. The decision in this case is distinguished in P. C. L. A. 15/45 (*ante*, p. 515).

(*H. K.*)

FOR APPLICANT: Hammoudeh.

FOR RESPONDENTS: No. 1 — No appearance.
Nos. 2—3 — Scharf.

ORDER.

We grant conditional leave to appeal to His Majesty in Council on the usual terms, namely, Applicant to give security for costs by furnishing a bank guarantee of one of the three recognized banks in LP. 300 within two months and steps to be taken for procuring the preparation and despatch to England of the record within like period.

Mr. Scharf, for Respondents to this application, has raised the point whether conditional leave can be granted in respect of both Civil Appeals Nos. 364 and 365 of 1944. He contends that leave to appeal can only be granted against that part of the judgment dealing with the right to *awlawiyeh* but not with regard to the part of the judgment which deals with the lease. We think, however, that, as both appeals were consolidated for hearing by consent of parties and as one judgment

only was delivered, conditional leave to appeal should be granted against that judgment. It is true that in the affidavit supporting this application there is a mere statement that the matter in dispute is of the value exceeding LP. 500 and while it is desirable that the affidavit should set out how the value is arrived at, there is in this case sufficient material before us to show that the Court of trial treated the land as being worth LP. 20 per *dunum* and it also appears that the area in question is fifty seven *dunums* which gives an amount of LP. 1140. We make no order on the application that the order of attachment should remain.

Given this 19th day of April, 1945.

British Puisne Judge.

CIVIL APPEAL No. 211/45.

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

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

IN THE APPEAL OF:—

Izhak Trachtingott. APPELLANT.

v.

1. The Official Receiver,
2. Dr. Werner Sommerfeld,
3. Former employees of Amiel Bros. Ltd., in liquidation,
4. Mr. Eliezer Amiel & an. RESPONDENTS.

Winding up — Application for stay of winding up under sec. 157 — When Court will refuse — Evidence under C. P. R. 312, 189 — Record.

Appeal from the Order of the District Court, Jaffa, dated 24.5.45 in Civil Case No. 169/43 (Motion No. 157/45), dismissed:—

When fifty per cent of the shareholders refuse to cooperate, the Court should not order a stay of winding up proceedings under sec. 157 of the Companies Ordinance.

(*A. M. A.*)

ANNOTATIONS:

1. For previous proceedings in this matter see C. A. 36/45 (*ante*, p. 328) and note 1 thereto.

2. On stay of winding up proceedings see Halsbury, Vol. 5, pp. 723 *et seq.*, para. 1209.

(*H. K.*)

FOR APPELLANT: Goitein and Abramovsky.

FOR RESPONDENTS: No. 1 — Eliash.
No. 2 — In person.
No. 3 — Krongold.
Nos. 4 & 5 — S. Wolf.

JUDGMENT.

This is an appeal from an order of the District Court of Jaffa, which had refused to stay winding-up proceedings on an application under section 157, Companies Ordinance. The facts are that one Mr. Trachtingott on the one part, and Mr. Amiel, on the other part, entered into an agreement on 8th March, 1945, in which they agreed to apply to the District Court for an application under section 157. By one clause of the agreement it was provided that the present liquidator should transfer the property of the Company to a manager to be appointed by Mr. Ben Ami, President of the Diamond Manufacturers Association in Palestine, and that Mr. Ben Ami who would fix the salary of this person would alone be entitled to dismiss or to replace him. On 20th March, 1945, Mr. Trachtingott, Mr. E. Amiel and Mr. Levy Amiel, swore a joint affidavit which formed the basis of the application under section 157, which written application was signed by all three. When the matter came on for hearing before the District Court on the 24th May, 1945, Mr. Trachtingott was represented by Mr. Levitzky, advocate, while Mr. Wolf, advocate, represented Messrs. Amiel. We are told that the proceedings before the District Court lasted two hours, but the typewritten record which is a copy of the judge's manuscript notes amounts only to six lines. Mr. Goitein, for the present Appellant (Mr. Trachtingott) complains that the record is scanty. This may be so, but Mr. Levitzky merely relied on the agreement of the 8th March, 1945, and on Mr. Trachtingott's affidavit, saying that he reserved his right to call evidence. Mr. Wolf then informed the Court that the partners, presumably thereby meaning his clients and Mr. Trachtingott, were prepared to carry out the agreement, but that Mr. Ben Ami was not prepared to play his part because the controller of Light Industries refused to grant a licence. Mr. Trachtingott owns 50% of the share capital while the two Amiels together own the other 50%. Mr. Wolf, therefore, made it clear to the Court that not only was he not supporting the application for the stay of the winding-up proceedings, but he seems to have opposed it.

Mr. Goitein has complained that there was no evidence before the Court that Mr. Ben Ami was not prepared to act under the agreement,

and he argues that Mr. Wolf should have availed himself of the right to call evidence under Rules 312 and 189, Civil Procedure Rules. This may be so, but there seem to be two answers to this appeal namely (first) that immediately it appeared that half the persons owning the share capital of this Company were refusing to go on with the application for the stay of winding-up proceedings, it was obvious that there could be no co-operation and no cohesion, and that it would be impossible for a Court to say that it was satisfied that all the proceedings ought to be stayed, and (second) that there is nothing on the record to show that Mr. Trachtingott's advocate challenged the statement that Mr. Ben Ami was not prepared to play his part. The learned trial Judge said:—

> "Having perused the affidavits (by this he means the affidavits of the three persons) and having heard both counsel for the Applicants (that is to say Mr. Levitzky for Trachtingott and Mr. Wolf for Messrs. Amiel) I am not satisfied that proof is forthcoming to this effect (meaning thereby to the effect that the proceedings in relation to the winding-up ought to be stayed)".

We think that faced, as he was, with the refusal on the part of Mr. Wolf's clients to continue with the joint application for stay of winding-up proceedings, the learned Relieving President had no option but to refuse to make the order of stay.

For these reasons the appeal is accordingly dismissed. The Appellant must pay LP. 5.— fixed costs to each of the three advocates who have represented parties and LP. 5.— to the liquidator.

Delivered this 22nd day of September, 1945.

Acting Chief Justice.

CRIMINAL APPEAL No. 91/45.

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

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

IN THE APPEAL OF:—

Rachel Stourmak. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Private complaint made under sec. 163 of C. C. O. — Appeal by Attorney General from dismissal of a charge by a private complainant — Payment of money not an ingredient of prostitution.

Appeal from the judgment of the District Court, Tel-Aviv (R/P Judge Windham), in its appellate capacity, dated the 28th February, 1945, in Criminal Appeal No. 84/44, dismissed:—

1. Attorney General has right of appeal from any judgment of a Magistrate's Court in a criminal case, also where prosecution is a private prosecution.

2. Payment of money — not essential in order to establish prostitution.

(*M. L.*)

FOLLOWED: Winter *v.* Wolf, 1 K. B. 1931, 549; 155 L. T. 311.

ANNOTATIONS: As to Attorney General's right to appeal see in such cases — CR. A. 84/44 (11, P. L. R. 515; 1944, A. L. R. 762) and CR. A. 9/40 (7, P. L. R. 67; 7, Ct. L. R. 85; 1940, S. C. J. 72).

The judgment of the District Court is reported in 1945, S. C. D. C., p. 79.

(*A. C.*)

FOR APPELLANT: S. Felman.

FOR RESPONDENT: McFee — Legal Assistant.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv which allowed an appeal from the judgment of the Magistrate of Tel-Aviv, who dismissed the charge by a private complainant against the Appellant brought under section 163 of the Criminal Code Ordinance.

Two points were argued in the appeal. It is contended by Mr. Fellman that since the prosecution is a private prosecution the Attorney General has no right to appeal. In regard to this it is sufficient to point out that the wording of section 11(3) of the Magistrates' Courts Jurisdiction Ordinance appears to us to be all-embracing. It gives the Attorney General the right of appeal from any judgment of a Magistrate's Court in a criminal case. The decision of the Magistrate to convict or to acquit constitutes a judgment. We are therefore of opinion that the first point fails.

The second point was that it must be proved that the premises in question were used for the purpose of prostitution; and Mr. Fellman has argued that prostitution pre-supposes payment to the prostitute for the act of prostitution. Apart altogether from the fact that we are satisfied that there was evidence in this case from which the learned Magistrate might have inferred payment, we are of opinion that the Magistrate erred in law when he considered that the payment of money was essential in order to establish prostitution. We accept the definition of prostitution given in the case of Winter *v.* Wolf, 1 K. B. 1931,

where Avory, J., says: "Prostitution is permitting people of opposite sexes to come there and have illicit sexual intercourse". It follows that, in our view, if the Magistrate came to the conclusion that people did come to this house for the purpose of illicit sexual intercourse, then the Appellant could have been convicted under section 163 of the Criminal Code Ordinance.

For these reasons we agree with the judgment of the District Court and the appeal is dismissed.

Delivered this 30th day of May, 1945.

Chief Justice.

CRIMINAL APPEAL No.81/45.

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

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

IN THE APPEAL OF:—

Mohamad Khalil Jitawi & an. — APPELLANTS.

v.

Attorney General. — RESPONDENT.

Conviction based on confessions of Accused — Question as to whether confessions were free and voluntary — Proper practice in matter of confessions.

Appeal from the judgment of the District Court of Nablus (Judge Shehadeh and A/Judge Khatib), dated 8th April, 1945, in Criminal Case No. 163/44, whereby Appellants were convicted of an offence contra sections 287 and 288(1) of the Criminal Code Ordinance, 1936, dismissed:—

1. Prosecution must prove affirmatively that confessions of Accused, were free and voluntary.

2. While highly desirable that where confession is challenged Court should take evidence on this point forthwith and record decision there and then, failure to follow this practice not necessarily fatal to admission of confession and conviction based thereon, if only it is clear from the established facts that in fact it was free and voluntary.

(*M. L.*)

ANNOTATIONS: See CR. A. 75/45, (*post*, p. 565).

(*A. G.*)

FOR APPELLANTS: Asfour.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

The only point that emerges in this appeal is concerned with the confessions of the Accused. It is not contended by Mr. Asfour that the confessions were inadmissible. The trial Court finally rejected the contention of the defence as to beating, and in our opinion they were justified in so doing. The confessions were therefore admissible. The point that Mr. Asfour stresses is that the confessions were irregularly admitted in that the learned Judges postponed deciding the issue as to whether the confessions were free and voluntary until a later stage of the trial. In this the learned Judges deviated from the practice of these Courts, a practice which we think is highly desirable and which we trust will always be followed, that is where an allegation is made that a confession is not free and voluntary the evidence on this point should be taken forthwith and the Judges' decision on the issue should be recorded forthwith. We are not, however, prepared to say that failure to follow the practice would be fatal to the admission of the confession. It must always be borne in mind that the real question to be decided in regard to the admissibility of confessions is whether they were free and voluntary. Taking the facts as they were established in this case it is abundantly clear to us that had the learned Judges followed this procedure and taken the evidence as to admissibility at the moment the objection was made they must have inevitably come to the same conclusion at which they ultimately arrived that the allegation as to beating and inducement before the confession had been taken could not be sustained.

For these reasons the appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 16th day of May, 1945.

Chief Justice.

CIVIL APPEAL No. 366/44.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Raphael Habib Shalom. APPELLANT.

v.

Sadiqa Khalil Dasuqi & an. RESPONDENTS.

Record of proceedings — Affidavit to contradict record — C. P. R. 189 — C. A. 65/39, C. A. 69/39, C. A. 37/42, CR. A. 132/43 — Acquiescence.

Appeal from the judgment of the Land Court of Nablus (Land Case No. 10/43) dismissed:—

Even if patently irregular in some minor respect, the record of proceedings drawn up by the Court of trial will not easily be questioned by the appellate Court, particularly if there has been acquiescence by the party challenging the record.

(*A. M. A.*)

FOLLOWED: C. A. 65/39 (1939, S. C. J. 354); C. A. 69/39 (6, P. L. R. 374; 1939, S. C. J. 376; 6, Ct. L. R. 19); C. A. 37 & 38/42 (9, P. L. R. 362; 1942, S. C. J. 416; CR. A. 132/43 (10, P. L. R. 583; 1943, A. L. R. 737).

ANNOTATIONS:

1. For other proceedings between the parties see C. A. 125/44 (11, P. L. R. 502; 1944, A. L. R. 661).

2. On the binding force of the record and the admissibility or otherwise of affidavits to contradict or supplement it, see — in addition to the cases cited and the annotations thereto in S. C. J. and A. L. R. — CR. A. D. C. T. A. 71/45 (1945, S. C. D. C. 373) and note 1 thereto.

(*H. K.*)

FOR APPELLANT: Berouti.

FOR RESPONDENTS: Elia and Nijem.

JUDGMENT.

This is an appeal from the judgment dated 27.7.44 of the Land Court Nablus in Land Case No. 10/43, whereby *musha'a* shares in certain lands were ordered to be registered by way of *awlawiyeh* in the names of Respondents equally, upon payment of the price, calculated at LP. 19.200 mils per *dunum,* and LP. 30 inclusive costs.

The principal point raised by Mr. G. Berouti, for the Appellant, is that the record dated 22.11.43 of the Land Court does not show fully what happened on that (first) day of trial. Mr. Berouti alleges that he was not allowed to call certain witnesses whom he wished to call, and that his arguments were not heard. He alleges that he objected very strongly to this procedure, and that he requested that his arguments and objections might be recorded. At the hearing of this appeal he has asked us to take notice of an affidavit which he swore before the Registrar, District Court, Jaffa, on 24.11.43.

The judgment of the Land Court was given on 27.7.44, and this appeal was filed on 11.8.44, and the Respondents point out that Mr. Berouti did not attempt to make any use of his affidavit until the appeal had been filed.

Unfortunately the record dated 22.11.43 of the Land Court is very attenuated. The normal course which a case should take is shown in Rule 189 of the Civil Procedure Rules 1938. When that procedure is not followed the record should show why there has been a departure from it. In the present case the record begins, not with a statement of their case by the Plaintiffs as one would have expected, but with a statement of the advocate (Mr. G. Berouti) for the Defendant. If Mr. Berouti was speaking first because he had been asked to do so by the Court then that ought to have been clear. If on the other hand he was taking some preliminary objection, that ought to have been recorded. But although the record is unsatisfactory in this respect we feel that we must follow the series of judgments of this Court in which it was laid down that the Court of Appeal should accept as being correct the record of the lower Court.

Mr. Elia for the Respondents has referred us to C. A. 65/39 (1939, Apelbom 354), C. A. 69/39 (6, P. L. R. 374), C. A. 37/42 (9, P. L. R. 362), and CR. A. 132/43 (10, P. L. R. 583).

The record of 22.11.43 does not show that Mr. Berouti took any objection to the course which was followed. The record shows that after the Court had ruled that the Plaintiffs' (present Respondents') right to claim priority was established the parties agreed that the value of the land at the date of action should be assessed by experts.

We think that if Mr. Berouti had really pressed the Court to record the fact that he wished his witnesses and arguments to be heard, the Court would at least have made a note to that effect on the record. In the absence of such a note we must conclude that he acquiesced in the course which was followed. So the only matter which remained was for the value of the land to be assessed.

The Court heard evidence as to the value of the land, and after hearing that evidence the learned Judges could not agree as to the valuation. One Judge considered that it should be LP. 22 per *dunum* while the other considered that it should be LP. 19.200 mils. Exception has been taken by Mr. Berouti to that fact that judgment was given at the lower valuation, but we think that the learned Judges could not have followed any other course. Both agreed that the valuation should be not less than LP. 19.200 mils, and only one of them thought that the valuation ought to be higher.

Certain other points have been raised by Mr. Berouti, but as we have held that he must be taken to have acquiesced in the course which was followed we are unable to consider any of them to be a ground

for upsetting the judgment. It may be observed that the question whether the Respondents (original Plaintiffs) were minors was not raised till 28.6.44, when Mr. Berouti asked for an adjournment in order to make inquiries and raise the necessary issue. We think that the Court was justified in refusing an adjournment for that purpose at that stage.

In the result we find that the appeal fails, and we dismiss it with fixed costs in the sum of LP. 10.

Delivered this 13th day of April, 1945.

British Puisne Judge.

HIGH COURT No. 61/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Mahmoud el Haj Hussein. PETITIONER.

v.

Assistant District Commissioner, Hebron. RESPONDENT.

Forfeiture of bonds given under Prevention of Crime (Tribes and Factions) Ord. — Non-interference of High Court.

Return to an order *nisi* issued on the 25th of July, 1945, directed to the Respondent, calling upon him to show the grounds if any, empowering him to impose and collect a fine of Four Thousand Palestine Pounds from Hamulet El Manasirah of Beni Ni'im village, Hebron sub-district, and to show cause, if any, why his said order should not be cancelled and be ordered to refund the amount so collected by force, dismissed:—

1. High Court will interfere with discretion of a public officer if not satisfied that he misdirected himself in law or failed to direct his mind to question of discretion or acted *mala fides* or capriciously or without regard to rules of reason or justice.

2. a) Forfeiture of bonds given under Prevention of Crime (Tribes and Factions) Ord. — independent of any criminal prosecution.

b) Fact of forfeiture of bond — inadmissible as evidence against person accused of the crime.

3. High Court will not interfere where act complained of already completed.

(*M. L.*)

FOLLOWED: H. C. 78/39 (7, P. L. R. 35; 6, Ct. L. R. 45; 1940, S. C. J. 25); H. C. 142/44 (12, P. L. R. 39; *ante*, p. 247).

ANNOTATIONS:

1. On first point see H. C. 30/45 (*ante*, p. 360) with annotations thereto in A. L. R.

2. On the last point see H. C. 17/43 (1943, A. L. R. 190) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Kamal.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is a return to an order *nisi*, dated 25.7.45, calling upon the Respondent to state his grounds for imposing a fine of LP. 4,000 on the Hamouleh of Manassirah of Beni Ni'im village, Hebron sub-district, and to show cause why his order should not be cancelled and a direction given to refund the amount collected.

The facts are briefly as follows: On 28.1.44, three members of the Manasirah hamouleh were murdered by members of the Taraira hamouleh, and this gave rise to a blood-feud between the two hamoulehs. The heads of the families of each of these two hamoulehs were ordered to give bonds under the provisions of section 5 of the Prevention of Crime (Tribes and Factions) Ordinance No. 47/35. Those bonds were each in the sum of LP. 500 with a surety in the same amount. It may be observed that Tahsin Eff. Kamal, who has appeared for the Petitioner, does not criticise the action of the Assistant District Commissioner, Hebron, up to that point.

On 15.7.45 a member of the Taraira hamouleh was murdered, and after he had held an enquiry (at which the eight members of the Manasirah hamouleh who had given bonds, and their sureties, were present and were given an opportunity of cross-examining the witnesses) the Asst. District Commissioner, Hebron, ordered the forfeiture of the eight bonds under the provisions of section 6 of the Ordinance. In his affidavit the Asst. District Commissioner states that he was satisfied that the murder had been committed by members of the Ideis family which belongs to the Manasirah hamouleh. The bonds are in the form prescribed in the Ordinance and no exception can be taken to their form.

Tahsin Eff. has submitted that the Manasirah hamouleh is composed of eight families, and that of those who signed the bonds only Haj Musa Hamad and his surety Yousef Ahmad Hussein are members of the Ideis family. Tahsin Eff. therefore submits that, at the most, only those bonds should have been forfeited. He also submits that no steps should have been taken to forfeit the bonds till the case against the

members of the Ideis family, who are accused of the murder, had been disposed of.

Having considered the affidavits of the parties, and the submissions of their advocates, I am unable to find that the Assistant District Commissioner, Hebron, has misused the discretion which is given to him by the Ordinance. In H. C. 78/39 (7, P. L. R. 35) the Court held that:—

> "Where the exercise of a discretion is vested in a public officer this Court will not be inclined to interfere unless he has misdirected himself in law or has failed to direct his mind to the question of discretion".

Again in H. C. 142/44 (12, P. L. R. 39) the Court stated that:—

> "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 the authority has applied his mind to the exercise of the discretion vested in him, 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 or justice, it will grant relief against the consequences of the order that flows from the exercise of the discretion".

The provisions of the Ordinance are admittedly very drastic, but that fact affords no ground for not enforcing them.

With regard to the submission that the bonds ought not to have been forfeited until the criminal case had been disposed of, it seems to me that the provisions of the Ordinance are quite independent of any criminal prosecution. The fact of the forfeiture of the bonds will not be admissible as evidence against the persons accused of the murder.

Tahsin Eff. has informed me that the whole of the LP. 4,000 has already been collected, and this fact indeed affords a further ground for my refusing to interfere, because the normal rule (as stated in H. C. 78/39) is that — "This Court will not interefre when the act of which complaint was made is already completed or carried into effect".

In the result I find that this petition fails. It must be dismissed and the order *nisi* set aside. No costs.

Given this 27th day of September, 1945, in the presence of — (no appearance) for Petitioner and in the presence of Mr. Rigby for Respondent.

British Puisne Judge.

INCOME TAX APPEAL No. 19/43.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

I. Trachtengot. APPELLANT.

v.

The Assessing Officer, Lydda District. RESPONDENT.

Costs — Interpretation of judgment — Case stated under sec. 53 *I. T. Ord. — Standing of Courts — Functus officio — Law of Execution, Art.* 6 *— "Court".*

Application to fix costs in Income Tax Appeal No. 19/43, dismissed:—

After stating a case under sec. 53 of the Income Tax Ordinance, the judge is *functus officio* and questions of costs before him should be dealt with by the Supreme Court.

(*A. M. A.*)

ANNOTATIONS:

1. The previous proceedings in this case are reported in 1943, A. L. R. 588 (I. T. A. 19/43) and in 11, P. L. R. 373 & 1944, A. L. R. 668 (C. A. 19/44).

2. *Cf.* C. A. 242/42 (1943, A. L. R. 829) where the slip rule was invoked to clear up a similar question in the Court of Civil Appeal.

3. On Art. 6 of the Execution Law see H. C. 40/40 (1940, S. C. J. 157; 8, Ct. L. R. 33) and note 1 in S. C. J.; *cf.* H. C. 97/43 (10, P. L. R. 569; 1944, A. L. R. 41) — fourth paragraph.

(*H. K.*)

FOR APPELLANT: Gluckman — by delegation from Goitein.

FOR RESPONDENT: Wittkowski.

ORDER.

On 29th September, 1943, in I. T. A. No. 19/43, sitting under section 53(1) Income Tax Ordinance, 1941, I dismissed an appeal by Mr. I. Trachtengot at whose request I stated a case under the proviso to section 53(5).

The Supreme Court, sitting as a Court of Civil Appeal, in C. A. 19/44 on 14th July, 1944, allowed the appeal, in the final sentence of their judgment saying:—

> "That being so, it is unnecessary to remit the case to the learned Judge. His judgment will therefore be set aside, and the Appellant will have the costs here and below, the costs of the proceedings in this Court to be an inclusive sum of LP. 20".

I may say that I had awarded the Assessing Officer fixed (inclusive) costs of LP. 40. Mr. Trachtengot's advocate, in the belief that the effect of the judgment of the 14th July, 1944, was to award to his client the sum of LP. 40 which I had awarded to the Assessing Officer and thinking that he was entitled not only to this LP. 40, but to the LP. 20 awarded as the costs of the case stated, applied in turn to various authorities for this sum, but without success. He finally asked the Chief Registrar for an order that the sum of LP. 40 be paid out to him but the Chief Registrar referred the matter to me.

I have heard parties' advocates. Mrs. Gluckman, for Mr. Trachtengot, contends that I should order LP. 40 to be paid out to her client who had to spend about LP. 14 in disbursements, *e. g.* Court fees, and it is said that only about LP. 26 will represent advocate's fees.

Mr. Wittkowski, who contends that I am *functus officio,* points to the words in the judgment of 14th July, 1944 "it is unnecessary to remit the case to the learned Judge ... *etc.*" He also respectfully criticised the wording of the judgment of 14th July, in particular the word "below" when it says "costs here and below", because, as he rightly points out, I am a judge of the Supreme Court, quite as much as are the other judges who decided the case stated so that there can be no question of an inferior Court. Mr. Wittkowski also says that Government is unable to pay out any sum without an order of Court, otherwise queries by the Colonial Auditor will have to be answered. While I appreciate this fact, nevertheless it is clear that the Court, when making the order of 14th July, 1944, contemplated that Mr. Trachtengot should receive the costs of the proceedings before me under section 53(1) in addition to the LP. 20 awarded as costs of the case stated. I have, accordingly, some sympathy with Mr. Trachtengot's advisers, although I cannot help feeling that the proper time to have had the matter clarified was at the delivery of the judgment of 14th July, 1944, that is, before the judges left the Bench. Perhaps one should not hold Mr. Trachtengots' advisers blameworthy because of the doubtless reasonable belief which they may have entertained that the costs below would be in reverse, that is that Mr. Trachtengot would receive the LP. 40 which I had awarded to the Assessing Officer. It is, however, by no means clear that the Court on 14th July, 1944, intended this. I think that I am *functus officio* and have no jurisdiction to give any ruling as to the meaning of the order of 14th July. But clearly the matter cannot be allowed to stand there. It would amount to a denial of justice to Mr. Trachtengot were he to receive nothing in respect of the costs of the proceedings before me. While it is no part of my duty to give legal

advice, it seems to me that there is a remedy. Mr. Trachtengot's advocate should take the judgment to the Execution Officer and ask for an order on the Assessing Officer to pay out LP. 40. If the Execution Officer does not feel inclined to make such an order he can act under Art. 6 of the Ottoman Law of Execution. For the purpose of that Article the "Court" is the Supreme Court sitting as a Court of Civil Appeal and not myself. It is true that the judges who delivered the judgment of 14th July, 1944, are not now in Palestine; but that does not seem to me to matter because the judgment can always be interpreted by any division of the Supreme Court lawfully constituted to sit as a Court of Civil Appeal.

I accordingly make no order.

Delivered this 16th day of July, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 90/45.

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

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

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

Carol Ginsburg. — RESPONDENT.

Accused charged under sec. 24A(1)(*d*), *Defence Regulations* 1939 *pleading guilty — District Court, imposing fine of LP.* 25 *— Court of Appeal increasing sentence to* 12 *months imprisonment.*

Appeal from the judgment of the District Court, Tel-Aviv, (Judge Many and Judge Cheshin), dated the 5th of March, 1945, in Crime No. 24/45, whereby Respondent was convicted of an offence *contra* Regulation 24A(1)(d) of the Defence Regulations, 1939, allowed:—

> Where Court imposes a relatively very lenient penalty they should give their reasons for doing so, or Court of Appeal will increase penalty so as to bring it nearer to sentence provided by legislature.
>
> (*M. L.*)

ANNOTATIONS: On increase of sentence by Court of Appeal see CR. A. 52/44 (11, P. L. R. 449; 1944, A. L. R. 816) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Legal Assistant — (McFee).

FOR RESPONDENT: Hagler.

JUDGMENT.

This is an appeal by the Attorney General against sentence. The Accused was convicted in the District Court of Tel Aviv for being in possession of military property contrary to section 24A(1)(d) of the Defence Regulations 1939. We observe that recently the legislature has seen fit to increase the penalty for this offence to a fine of LP. 2500 or 10 years' imprisonment. The Accused pleaded guilty and he was sentenced to a fine of LP. 25 or three months' imprisonment. A passionate plea was made to us by Mr. Hagler on his behalf, but all the arguments urged by him are really to a great extent irrelevant. This Court has a duty to perform to the public. Its function is not to question the laws but to enforce those the legislature sees fit to enact. The Accused pleaded guilty. There is only one inference which this Court is entitled in law and in conscience to draw from that plea and that is, that he accepts full criminal responsibility for his act. This Court holds in great respect the two learned judges of the District Court but we can only regret that when they passed the sentence so totally at variance with the sentence provided by the legislature, they did not see fit to give their reasons for doing so. In the absence of any such reasons this Court is thrown back on the plea of guilty. Our difficulty then is to discover reasons why the maximum sentence should not be imposed. However, we have decided to follow the precedents in previous cases which were before us this morning and to increase the sentence to one of 12 months' imprisonment.

Delivered this 30th day of April, 1945.

Chief Justice.

HIGH COURT No. 15/45.

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

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

IN THE APPEAL OF:—

Haya Blomberg. PETITIONER.

v.

Officer Commanding, 57 Military Prisons and Detention Barracks, M. E. F. RESPONDENT.

Legislation — Power of Imperial Parliament to legislate for Palestine

—Army Act sec. 95, 176(9), 187, *H. C.* 14/45, *Mandate, Arts.* 1, 5, *sovereignty of Parliament — Army and Air Force Annual Act, sec.* 2(*b*), *"His Majesty's Dominions".*

Return to an order in the nature of *habeas corpus* calling upon Respondent to show cause why he should not produce the body of one Arie Igdalsky before the Court and why the said Arie Igdalsky should not be released from imprisonment; order *nisi* discharged:—

The British Parliament has power to legislate for Palestine, and in the exercise of that power it has applied the Army Act to Palestine.

(*A. M. A.*)

REFERRED TO: H. C. 14/45 (12, P. L. R. 135; *ante*, p. 418).

ANNOTATIONS:

1. See H. C. 14/45 (*supra*) and notes thereto in A. L. R.

2. "Parliament is the Supreme legislative authority, not only in the United Kingdom, but also, subject to the provisions of the Statute of Westminster, 1931, throughout the whole of His Majesty's dominions, and there is no legal limit to its power of making and unmaking laws". — Halsbury, Vol. 24, p. 176, para. 296.

(*H. K.*)

FOR PETITIONER: Levitsky.

FOR RESPONDENT: The Solicitor General — (Griffin).

JUDGMENT.

FitzGerald, C. J.: This is a return to a writ which is in the nature of *habeas corpus*. The issues raised have already been exhaustively examined and determined in High Court Case No. 14 of 1945. I write a considered judgment solely because of the importance of the question and because it has been stated by Mr. Levitsky that certain arguments which he adduced before this Court were not advanced in the previous High Court case.

Mr. Arie Igdalsky, the person on whose behalf the Court is moved, *prima facie* comes within the category of persons referred to in section 176, sub-section 9 of the Army Act.

Two grounds of appeal are advanced in favour of the Petitioner. It is averred that the Imperial Parliament has no authority to legislate for Palestine, which is a Mandated Territory; alternatively, that if it had such authority it has not, in fact, legislated for Palestine. In considering the first point I find it unnecessary to probe to its depths the academic question as to the degree of sovereignty that is vested in a mandatory power. I turn to Article 1 of the Mandate itself, which provides that the Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this Mandate. The only real limitation of this full power of legislation is

to be found in Article 5, which prohibits the Mandatory from ceding or leasing the Mandated Territory. The preamble to the Mandate has constituted His Britannic Majesty as the Mandatory for Palestine. His Britannic Majesty, being a constitutional sovereign, can only exercise legislative powers through the channels permitted to him by the British Constitution. It follows that the full powers of legislation conferred on the Mandatory must be exercised through those channels. It is a fundamental keystone of the British Constitution that the legislative sovereignty of Parliament is supreme. Subject to the limitations to which I will refer in a moment, Parliament can legislate for every territory within the jurisdiction of the British Crown. This legal sovereignty of Parliament has never been successfully questioned. It has been asserted in specific Acts extending over a period of 150 years covering later day Colonial acquisitions. I would refer to the Taxation of Colonies Act, 1778, in which Parliament itself, by an Act passed by itself, limited its power to impose certain duties on the Colonies, but by implication this Act asserted the right of Parliament to legislate for those Colonies. At the other end of the scale there is the recent Statute of Westminster (1931) by which Parliament deprived itself of the right, which until then had been vested in it, to legislate for the self-governing Dominions. It is true that with Colonial expansion Parliament did not as a rule legislate for the Colonies, probably for the very practical reason that it was already overburdened in legislating for the United Kingdom. Mr. Levitsky has referred us to the whole of the Statute Law of Palestine and emphasized that with the exception of this Army Act there is not one instance of the Imperial Parliament legislating for Palestine. I might add that the same argument could equally well be advanced in the case of the other British possessions of the Crown. The reason why an exception is made in the case of the Army Act is not difficult to appreciate. The British Army is responsible for the defence of the possessions of the Crown as well as for the defence of the United Kingdom. The Army Act is an essential part of the machinery which enables the army to give effect to its obligations in regard to this defence. It is understandable that the Army Council would not be prepared to leave the application of that Act to any particular possession to the whim of the legislature of that possession. It is true that most of the legislation of the Colonies is in the form of Orders-in-Council or enactments by local legislatures, but both those sources have their origin in a delegation from Parliament. I come therefore to the conclusion that Parliament is empowered to legislate for all territories within the Empire, save those such as the Dominions

in respect of which it has circumscribed its legislative powers, and by virtue of Article 1 of the Mandate, full powers of legislation are conferred on it in respect of Palestine.

The next question is whether Parliament has, in fact, applied the Army Act to Palestine. Section 187(a) of that Act seems to me to be as clear an indication as Parliament could give that the Act does apply to Mandated Territory. It reads:—

> "This Act shall apply in relation to any territory in respect of which a Mandate on behalf of the League of Nations has been accepted by His Majesty in like manner as it applies in relation to a British protectorate".

Mr. Levitsky argues that the only reference in the Army Act to a British protectorate is to be found in section 95(2), which reads:—

> "Provided that, notwithstanding the above provisions of this section, any inhabitant of any British protectorate, and any negro or person of colour, although an alien, may voluntarily enlist in pursuance of this part of this Act, and when so enlisted shall, while serving in His Majesty's regular forces, be deemed to be entitled to all the privileges of a natural-born British subject".

From this he argues that a non-British subject only becomes subject to the Army Act when he enlists. I am unable to accept this argument. Section 95 deals with only a part of the vast field covered by the Army Act. It regulates enlistments, and sub-section (2) sets out the special conditions applicable to the enlistment of the inhabitants of a British protectorate. The Army Act is not dependant on that sub-section for its authority in British Protectorates; it is applied to British Protectorates by virtue of section 2 of the Army and Air Force Annual Act, paragraph (b) of which states that the Act shall be in force within or without His Majesty's Dominions. His Majesty's Dominions include British Protectorates, and it is by virtue of that section that the whole of the Army Act is applied to British Protectorates. That whole application is, however, limited in regard to enlistments by the specific provisions of section 95. Now, section 187(a) provides that the Army Act shall apply to Mandated Territories in like manner as it applies to a British Protectorate. It follows, in my opinion, that the whole of the Army Act applies to Mandated Territory, subject to the specific limitation in regard to enlistment made by section 95.

I conclude therefore that the British Parliament has power to legislate for Palestine, and in the exercise of that power it has applied the Army Act to Palestine.

The rule *nisi* must be discharged with LP. 10 inclusive costs to the Respondent.

Given this 17th day of April, 1945.

Chief Justice.

Frumkin, J.: I concur.

Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 33/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Perla Cohen. APPLICANT.

v.

Joseph Green & 2 ors. RESPONDENTS.

Privy Council leave to appeal — Proof as to value of land in dispute.

Application for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court, dated the 18th June, 1945, in Civil Appeal No. 37/45, dismissed:—

Statement in affidavit that property in dispute is worth LP. 1000 approximately, even if there is also a report of a land valuer, but not supported by affidavit — not sufficient evidence to enable Court of Appeal to find for purposes of sec. 3(a) Pal. (Appeal to Pr. Council) O. in C. that value is LP. 500 or more.

(*M. L.*)

FOLLOWED: P. C. L. A. 13/44 (11, P. L. R. 469; 1944, A. L. R. 550).

ANNOTATIONS: On Art. 3(a) of Pal. (Appeal to Pr. Council) O. in C. see P. C. L. A. 17/44 (12, P. L. R. 60; *ante*, p. 190) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPLICANT: Hake.

FOR RESPONDENTS: Seligson.

ORDER.

This is an application for leave to appeal to the Privy Council.

The Applicant relies first on section 3(a) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924 (See Vol. 3 Laws of Palestine page 2608), and in the alternative on section 3(b).

So far as section 3(a) is concerned, there is no evidence as to the value of the property in dispute apart from the statement in the affidavit of the Applicant that it is worth LP. 1000 approximately. Following the decision in P. C. L. A. No. 13/44 (11, P. L. R. p. 469) I hold that this is not sufficient evidence to enable me to find that the value is LP. 500 or more.

A report by a land valuer has been produced, but that report is not supported by affidavit. The application must fail so far as section 3(a) is concerned.

As regards section 3(b) I am not satisfied that there is any question of great general or public importance which ought to be submitted to His Majesty in Council for decision, and in any event the Applicant admittedly has another remedy. The application is dismissed with fixed costs in the sum of LP. 10 (ten pounds).

Given this 13th day of September, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 83/45.

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

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

IN THE APPEAL OF :—

Itzhak Zack. APPELLANT.

v.

Attorney General. RESPONDENT.

Offence by servant under Food Control Regulations — Tests for master's liability.

Appeal from the judgment of the District Court of Haifa (Judges Shems and Baradey), in its appellate capacity, dated the 11th of March, 1945, in Criminal Appeal No. 205/44, dismissed:—

1. In offences under Food Control Regulations master often responsible for acts of servant.
2. Where prosecution has discharged onus of proving that servant acted within scope of his employment, onus shifts on to master to prove limited scope of appointment.
3. Test as to what is or is not within general scope of employment — not any mental reservations on part of employer or employee but nature and circumstances of employee's work and inferences which the general public could reasonably draw from them.

(*M. L.*)

ANNOTATIONS: See CR. A. 183/44 Haifa (Selected Cases of the District Courts of Palestine, 1945, p. 30) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Toister.

FOR RESPONDENT: Beer.

JUDGMENT.

This is an appeal, by leave, from the judgment of the District Court of Haifa, sitting in its appellate capacity, on an appeal from the Magistrate. The point concerns the interpretation of Regulation 10 of the Food Control Ordinance No. 42, 1942. In the light of the many arguments which were addressed to us we consider it necessary in the first place, to emphasize what it was that the District Court decided and in consequence what is the true appeal before this Court.

The gist of the case is that the Accused was prosecuted under the provisions of Regulation 10 in respect of an act or offence which admittedly was committed by a servant employed by him. The Magistrate acquitted the Accused without calling upon him for his defence. The Attorney General appealed and the District Court held that the Magistrate erred in dismissing the charge without calling upon the Respondent to answer, on the ground that the Respondent was not liable for the acts of his servant. Now, if in fact the Magistrate did so hold, the District Court was, in our opinion, quite right in remitting the case to the Magistrate because it cannot be denied that in offence of this nature the master is in certain circumstances, indeed one might say in most circumstances, responsible for the acts of his servant. Having come to that decision, the District Court remitted the case to the Magistrate for completion from which we infer that the Court intended that the Magistrate should call upon the Respondent for his defence. It has been argued by Mr. Toister, that the Magistrate based his decision on the premises that it was on the prosecution to prove that the accused person was acting within the scope of his employment. The onus is, of course, always on the prosecution to prove affirmatively the necessary ingredients of any charge, but we think that in this case the Magistrate was wrong in coming to the conclusion that the prosecution had not discharged that onus at least sufficiently to shift it on to the Accused to prove the limited scope of his appointment.

The facts as they emerge from the evidence, are that the Appellant was a butcher, the servant was employed as assistant. He sold meat in his shop. In the course of his evidence he said that he did not need any instructions and he indicated that he could do everything apper-

taining to his master's business. This at least, in our opinion, was sufficient to call on him for his defence to prove that the act which he committed was not within the general scope of his employment. We would add that the test as to what is or is not within the general scope of employment is not to be gauged by any mental reservations on the part of the employer or employee but by the nature and circumstances of the employee's work and the inferences which the general public could reasonably draw from them.

The case will therefore be remitted to the Magistrate for retrial. The Magistrate will consider it anew and having heard the evidence, he will come to a decision as to whether in the particular circumstances the servant can be said to have been acting within the general scope of his employment, bearing in mind the principle we have ennunciated. If he comes to the conclusion that he was so acting then the master would in law be liable for the offence.

Delivered this 24th day of May, 1945.

Chief Justice.

CRIMINAL APPEAL No. 47/45.

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:—

Fahed Raslan Murad. APPELLANT.

v.

Attorney General. RESPONDENT.

Evidence — Criminal case — Evidence by person formerly suspected of the crime — Accepting part of witness's statement — Confession before remanding Magistrate, T. U. I. Ord., sec. 37(2) — Caution — CR. A. 91/42 — Res gestae.

Appeal from the judgment of the Court of Criminal Assize (Mr. Justice Edwards, the P. D. C. Judge Curry, and Judge Nasr), sitting in Haifa (Assize Case No. 7/45) whereby Appellant was convicted of murder contrary to sec. 214 of the C. C. O. and sentenced to death, dismissed:—

1. The fact that a witness has been suspected of committing a crime is no ground for rejecting his evidence against a person accused of committing that crime.

2. A confession made before a remanding Magistrate is admissible against the Accused.

3. If the meaning and purport of the caution are understood, the statutory words need not be used.

4. A statement made by the Accused in reply to a query which accuses him of a crime is admissible under the *res gestae* rule.

(*A. M. A.*)

CONSIDERED: CR. A. 91/42 (9, P. L. R. 406; 1942, S. C. J. 376; 12, Ct. L. R. 61).

ANNOTATIONS:

1. Appellant was arrested and brought before a Magistrate in order to be remanded. He there and then said "I want to confess" and, on being cautioned by the Magistrate, made the statement referred to in the judgment.

2. On the requirements of the caution see CR. A. 30/43 (10, P. L. R. 188; 1943, A. L. R. 308) and note 2 thereto in A. L. R.

3. On the admissibility of statements as part of the *res gestae* see Phipson on Evidence, 8th ed., pp. 51 *et seq.*

(*H. K.*)

FOR APPELLANT: Hazou.

FOR RESPONDENT: Assistant Government Advocate — (Gavison).

JUDGMENT.

The main ground of appeal in this case was that there was no evidence before the Court upon which the Accused could have been convicted. It is quite clear from the record that there was indeed ample evidence on which, if it were admissible and accepted by the trial Judge, a conviction could have been based.

It has been argued by Mr. Hazou that the evidence of the second witness, Ahmad Muhammad Milhem, should be rejected on two grounds, firstly, because that part of his statement in which he alleged that he had seen the Accused outside the door of deceased was rejected by the Court, and, secondly, because he himself had been at one time suspected of the crime. The mere fact that a witness may have had the misfortune to have been at one time under suspicion himself is no ground for rejecting his evidence. We observe that the part of his evidence which was rejected was in favour of the Accused. In any case the fact that the Judge felt unable to accept part of a witness's evidence is no ground for disregarding the whole of his statement.

It has been urged by counsel that the Court founded its conclusion entirely on the evidence of Milhem. Apart altogether from the fact that the evidence of this witness might have justified the Court in its finding, it is clear that it was not the only evidence upon which the Court based its verdict. In addition to it there was the evidence to be adduced from the finding of the bracelets which belonged to the

deceased on the person of the Accused and there was the statement made by the Accused before the Magistrate which was a clear confession of guilt.

Mr. Hazou argues that this statement should be rejected on three grounds. Firstly, because the Accused made a written statement, and that was the only statement admissible under section 37(2) of the Criminal Procedure (Trial Upon Information) Ordinance. The written statement was, in fact, admitted in evidence, and the Magistrate who, it should be noted, was not the Examining Magistrate, was called to give evidence as to the circumstances in which he took the statement. There was nothing irregular in this procedure; indeed, it was desirable so that the Court could assure itself that the taking of the statement conformed to the requirements of the law. It is true that apart from giving evidence as to the circumstances in which the statement was made, the Magistrate referred to what was in the written statement, but as his evidence in this respect was not inconsistent with what appeared in the written statement, we see no objection to it.

The second ground on which Mr. Hazou urged us to reject the statement was that there was no sufficient caution. It is not necessary that the caution given should be in the precise words of the statutory caution, provided that the meaning and purport of the statutory caution is sufficiently conveyed to the person about to make the statement. We are satisfied from the evidence of the Magistrate, which was accepted by the trial Court, that the caution which he did, in fact, administer, sufficiently conformed with the legal requirements.

The third ground on which he impeached the statement was that there was no evidence that the Accused knew the offence with which he was charged. The statement itself which the Accused signed (Exh. 4 in the case) contains a complete averment of the offences.

The final argument in regard to the statement was that it was not admissible because at the time when the Accused was making it he was confronted with the other accused person. Criminal Appeal 91/42 was quoted in support of this argument. It is, however, quite clear from that case that the mere confronting of one accused with another is not sufficient to make a statement of the one inadmissible on the ground that the presence of the other was an inducement to him to make it. There must have been some invitation, express or implied. It is obvious that there was such an implied invitation in Criminal Appeal 91/42. There is no evidence of any such invitation in this case.

For these reasons we are of opinion that the statement made before

the Magistrate was admissible in evidence and was rightly admitted by the Judge.

It has been argued that the statement made by the Accused when he was confronted by the persons on the roof to the effect that "I want to tell you the truth. I am the person who was on that roof, and a sweetheart and lover of the girl is the person who stabbed her" should not have been admissible in evidence. In our view this statement was admissible as part of the *res gestae* and on the principle that a statement made in the presence of an accused person accusing him of a crime upon an occasion which may expect reasonably to call for some explanation or denial from him is evidence so far as he accepts that statement so as to make it, in effect, his own. This was a statement made by the accused person himself by way of answer to a query by other persons which query involved the accusation by them of a crime on his part.

We are pressed to hold that the trial Court was wrong in not accepting the explanation which the Accused gave as to how he came into possession of the bracelets. This was a question of fact pre-eminently for the trial Court to decide, and provided we are satisfied that the grounds on which its conclusion was based were not unreasonable, we would not be prepared to interfere with this conclusion. It appears that the Accused was searched when he came into the Police Station, but the gold bracelets, which admittedly were the property of the deceased and which were on her on the night of her death, were not found in his possession. The explanation as to this was given by Constable Kubti who stated that when the Accused was brought into the Station he was under the impression that the only charge against him was one of stabbing and he contented himself with running his hands lightly over him to ascertain whether he had a knife. Later on, when he was more thoroughly searched, the gold bracelets were found in the pocket of shorts which he wore under his trousers. It is also to be noted that the bracelets were not wrapped up, a fact which is inconsistent with Accused's own story that they were accepted by him from another person under the impression that they were money notes.

For these reasons we are of opinion that the appeal must be dismissed and the conviction and sentence of death confirmed.

Delivered this 10th day of April, 1945.

Chief Justice.

HIGH COURT No. 18/45.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF :—

Yacov Ben Arie & an. PETITIONERS.

v.

Settlement Officer Safad Settlement Area & an. RESPONDENTS.

Jurisdiction of High Court — Application for order calling upon L. S. O. to accept claims filed out of time, L. S. Ord., sec. 26 — Discretion.

Return to an order *nisi* calling upon the first Respondent to show cause why he should not allow Petitioners to file a claim for ownership in respect of certain parcels of land under sec. 26(1) of the Land (S. of T.) Ordinance; order *nisi* discharged:—

1. The High Court confines itself to very narrow limits in the exercise of its powers to interfere with a discretion. If the discretion has been exercised through a misconception of the law, or by the application of wrong principles the High Court may interfere.

(*A. M. A.*)

ANNOTATIONS:

1. On non-interference by the High Court in matters of discretion see note 2 in A. L. R. to H. C. 147/42 (10, P. L. R. 7; 1943, A. L. R. 35); *cf.* H. C. 78/44 (11, P. L. R. 471; 1944, A. L. R. 685) and H. C. 142/44 (12, P. L. R. 39; *ante*, p. 247).

2. Note that the Petitioners will have another chance after the posting of the Schedule of Rights: See Land (S. of T.) Ord., sec. 33(4) and *vide* C. A. 455/44 (*ante*, p. 525).

(*H. K.*)

FOR PETITIONERS: Yehuda.

FOR RESPONDENTS: No. 1 — Assistant Government Advocate — (Salant).

No. 2 — Wittkowski.

ORDER.

This is a return to an order *nisi*.

At the outset I may say that I propose to confine my judgment, as I fear that all the arguments and the affidavits were not confined, to the only issue with which this Court, sitting as a High Court of Justice, is entitled to deal. The Petitioners pray this Court to direct the Settlement Officer to admit under the provisions of section 26 of the Land (Settlement of Title) Ordinance claims which were out of time. The section reads:—

> "26(1). Subject to any provisions prescribed, a settlement officer may add any new claim to the schedule of claims at any time before the claims to rights in the block have been settled, if he is satisfied that there were reasonable grounds for failure to present the claim in due time and that opposition to such claim and the investigation of other claims will not be adversely affected by such addition".

This, as clearly as words could convey it, vests a discretion in the Settlement Officer. Now, it may well be, and in my opinion it is, desirable that Settlement Officers should allow a certain amount of latitude to claimants under this section, for no other reason than to reassure the persons concerned that every point has been considered before the settlement has been decreed. But it must also be borne in mind that the section was obviously enacted by the legislature for the purpose of the efficient carrying out of land settlement operations. This Court sitting as a High Court confines itself within very narrow limits in the exercise of its powers to interfere with a discretion which has been duly exercised. It will not interfere merely because this Court itself may not have come to the same conclusion. It must be demonstrated to us that the conclusion at which the Settlement Officer arrived was due to a misconception of law,.or, to use the words of Mr. Yehuda, "to the application of wrong principles". It is quite clear from paragraph 8 of the affidavit filed by the Settlement Officer that he applied his mind to the issue. It is not submitted that there was any misconception of the law on his part. Mr. Yehuda relies on the fact that the Settlement Officer applied wrong principles in that it appears from paragraph 8 that he went into the merits of the case. We cannot say that this constitutes an application of wrong principles. The Settlement Officer was undoubtedly seized with all the facts of this case when he decided not to allow an extension of time. It appears to us that it was relevant to consider whether the claimant for the extension of time had in fact a good claim which by some misfortune or another he was unable to submit within the statutory time. This being so we are unable to say that the Setttlement Officer applied any wrong principles in arriving at his conclusion.

For these reasons the rule *nisi* must be discharged with inclusive costs of LP. 10 to the second Respondent.

Given this 16th day of April, 1945.

Chief Justice.

CRIMINAL APPEAL No. 75/45.

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

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

IN THE APPEAL OF:—

Ismail Khalil Ismail & 3 ors. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Conviction based on confessions of Accused — Question as to whether confessions were free and voluntary — Proper practice in matter of confessions.

Appeal from the judgment of the District Court of Nablus, dated the 16th of April, 1945, in Felony No. 35/45, whereby Appellants were convicted of robbery contra sections 287 and 288(1) of the Criminal Code Ordinance, 1936, dismissed:—

1. Prosecution must prove affirmatively that confessions of Accused were free and voluntary.
2. While highly desirable that where confession is challenged Court should take evidence on this point fortwith and record decision there and then, failure to follow this practice not necessarily fatal to admission of confession and conviction based thereon, if only it is clear from the established facts that in fact it was free and voluntary.

(*M. L.*)

ANNOTATIONS: As to conviction based on confession see CR. A. 102/44 (1944, A. L. R. 510) and CR. A. 154/43 (10, P. L. R. 1; 1944, A. L. R. 196) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANTS: No. 1 — F. Atallah.
Nos. 2—3 — Hamoudeh.
No. 4 — In person.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

In this case many arguments were advanced which cannot carry weight before a Court of Appeal directed, as they were, to the credibility of witnesses and questions which were peculiarly within the province of a trial Court to determine. The only argument urged on behalf of the Accused (Appellant No. 1) which this Court feels it must consider is the admissibility of these confessions. It is not denied that in the absence of the confessions a conviction could hardly be supported. Mr. Atallah argued that the confessions should have been rejected because at the time when they were tendered the Court did not then and

there hear evidence as to their admissibility, but intimated that they would postpone their decision on the point until they had heard the defence. In Criminal Appeal No. 81/45 in the case of Mohd. Jitewi & an. *v.* A. G., decided by this Court last week, we emphasized, and we repeat the emphasis, the desirability of all Courts following the practice which has grown up, and which has been accepted by the Assize Courts of this country that where an alleged confession is challenged by the Accused, evidence of the challenge should be taken there and then, and the decision, as to whether the confession was admissible in evidence or otherwise, should be taken and recorded there and then. But we intimated that failure to follow this procedure does not necessarily afford a ground for quashing a conviction. The real test in the case of all confessions is whether they were free and voluntary. The Court in this case eventually came to the conclusion that they were free and voluntary, a conclusion which we endorse.

Mr. Atallah's argument was founded on two propositions advanced by him. First he says that there was no evidence on which the trial Court could have come to the conclusion that the confessions were free and voluntary. As to that we only refer to the evidence of Sgt. Abed el Hamid Yunis who swore that the confessions were free and voluntary. Despite the cross-examination, which indeed did not shake him, and other evidence to the contrary effect, the trial Court was exercising a discretion vested in it in deciding to accept the Sgt.s' evidence; we cannot say that that decision was unreasonable and we see no reason to interfere with it.

It was further contended by Mr. Atallah that the Prosecution must prove affirmatively that the confessions were free and voluntary. We agree with Mr. Atallah, but, as Mr. Rigby pointed out, the best proof that could be tendered on this issue is the evidence of the person who took the confessions and who swore that they were free and voluntary. The Court accepted that sworn evidence and again we see no reason to interfere with the conclusion arrived at by them on this point. For these reasons the appeal must be dismissed.

The second and third Appellants have requested that their appeal should be withdrawn and this we order accordingly.

As regards the 4th Appellant no argument has been adduced which would justify us in interfering with his conviction and his appeal must also be dismissed.

Delivered this 23rd day of May, 1945.

Chief Justice.

CRIMINAL APPEAL No. 59/45.

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:—

Abdul Shakour Ahmad Ayesh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Fingerprints — Evidence in criminal cases — Scientific accuracy.

Appeal from the judgment of the District Court, Jerusalem (Judge Bardaky and A/Judge Khoury) (Cr. Case No. 27/45) whereby Appellant was convicted of an offence *contra* sec. 297(a) of the C. C. O. and sentenced to four years' imprisonment, dismissed:—

Fingerprint evidence is so scientifically precise that it may be accepted as conclusive.

(*A. M. A.*)

ANNOTATIONS: The conviction in this case was based solely on the evidence of a fingerprint expert and the case is thus on all fours with CR. A. 25/45 (12, P. L. R. 198; *ante*, p. 454).

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: Assistant Government Advocate — (Gavison).

JUDGMENT.

Fingerprint evidence has now reached such a stage of scientific precision that it is accepted by the Court as conclusive. We therefore cannot say that the Court was not fully justified in coming to the conclusion to which it came in recording a conviction against the Accused.

The appeal is dismissed.

Delivered this 10th day of April, 1945.

Chief Justice.

CRIMINAL APPEAL No. 33/45.

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

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

IN THE APPEAL OF:—

The National Bus Company. APPELLANT.

v.

The Attorney General. RESPONDENT.

Charge under Road Transport Defence Regulations for overcharging fare — Contract with carrier company embodied in ticket.

Appeal from the judgment of the District Court of Jerusalem, in its appellate capacity, dated the 16th of January, 1945, in Criminal Appeal No. 124/45, allowed:—

1. Where a contract is reduced to writing, writing must prevail, whatever the motives actuating the contract may have been and whatever preliminary negotiations may have taken place.

2. Ticket constitutes contract between carrier and passenger for journey shown in it and supercedes any eventual original intention at variance with it.

3. No provision in Rules made under Road Transport Ordinance compels carrier company to take a person to any of the scheduled places.

(*M. L.*)

ANNOTATIONS: On construction of documents and intention of parties to it see C. A. 44/33 (1944, A. L. R. 28) and note 4 thereto.

(*A. G.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

Fitz-Gerald, C. J.: It is true that this is a criminal case, but the question revolves round the contractual rights of this bus company. The facts have been established both in the Magistrate's Court and the District Court, and it is unnecessary to reiterate them here. It seems to me that there have been so many regulations dealing with the transport situation that the basis of the relationship between the carrier and the passenger tends at times to become obscured. The basis of a journey taken in any public or private transport service is a contract between the carrier and the passenger. Freedom of contract, provided it does not infringe any statutory provisions, is a fundamental keystone of British law.

Now what was the contract in this case? In this connection the motives which actuated the contract on either side are not in my view particularly relevant, because if the contract is reduced to writing the writing must prevail. The Court has had the contract before it. It is a written contract, and the written contract is the ticket. Whatever the motives may have been or whatever preliminary negotiations may have taken place, the contract between those two parties in this case

was the ticket, and that ticket constituted a contract between the carrier company and the passenger for a journey from Jerusalem to Jaffa. A ticket was issued in respect of that journey and the proper price was demanded and paid for that ticket.

It is at this point that I think, with all respect, that the learned Judge of the District Court erred in considering that the contract was a contract to take her to Ramle. It seems to me that he based his conclusion on the preliminary negotiations which admittedly were for a journey to Ramle, but unless I am to permit extrinsic oral evidence to vary the terms of this written contract, and no adequate reason has been advanced for so doing, I must infer that her original intention was superseded by her acceptance of the later written contract.

I turn now to the Defence Regulations to examine this contract and enquire whether there has been any infringement of a prohibition imposed by those regulations. Rule 7 of the rules made under the Road Transport Ordinance provides that:—

> "No person shall charge or cause or permit to be charged, in respect of any journey set out in Schedule I, II, III, IV, V, VI, or VII, by any passenger in any omnibus employed on a passenger route service, any fare which exceeds the maximum fare chargeable per passenger for such journey set out in such schedule".

In my opinion the effect of that rule is to preclude the company from entering into a contract which charges fares to those places in excess of the fare set out in the schedule. There is no provision in the rule to compel the company to take a person to any one of the scheduled places. In this case the passenger made a contract to be taken to Jaffa. Whether when she made that contract she was uncertain as to her legal rights, to compel the company to contract with her for a journey to Ramle, seems to me to be immaterial. She made the contract, which is embodied in her ticket and the price charged did not exceed the price set out in the schedule to the regulations for a journey from Jerusalem to Jaffa.

For these reasons I think the appeal must be allowed and the judgment of the Magistrate restored.

Delivered this 11th day of May, 1945.

Chief Justice.

Frumkin, J.: In concurring I wish to stress one point, although already mentioned by my learned brother, and that is that in this case it has not been established that the bus company was under any statutory obligation to carry passengers to the intermediate station of

Ramle, and thus by entering into a contract to carry the passenger to the terminus of Jaffa there was no infringement of the Defence Regulations.

Puisne Judge.

CRIMINAL APPEAL No. 51/45.

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

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

IN THE APPEAL OF:—

Nimer Ali Rabah & 3 ors. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Identification — Question of fact — Non-interference with findings of trial Court — Consecutive sentences.

Appeal from the judgment of the District Court of Nablus (Judge Touqan and A/Judge Ala Eddin) (Cr. Case No. 4/45) whereby Appellants were convicted of offences against:—

a) Sec. 222(a) of the C. C. O. (attempted murder) and

b) sec. 66A(a) of the C. C. O. (possession of firearms) and sentenced to two, resp. one year's imprisonment each on the first count and to one year's imprisonment each on the second count, the sentences to run consecutively, appeal dismissed:—

1. The Court of Appeal will interfere with findings of fact when the administration of justice so demands. This is limited, in accordance with English case law, to the following instances:—

a) Findings based on a wrong appreciation of the law (*e. g.* questions of admissibility of evidence);

b) Conclusions based on faulty reasoning.

It will not interfere merely because it might, on the facts, come to a different conclusion.

2. Although undesirable, it is not illegal to impose consecutive sentences in respect of offences linked together in point of time.

(*A. M. A.*)

ANNOTATIONS:

1. See, on interference with findings of fact, CR. A. 39/43 (10, P. L. R. 212; 1943, A. L. R. 357) and note 6 in A. L. R., and CR. A. 101/43 (10, P. L. R. 506; 1943, A. L. R. 714) and note in A. L. R.; *cf.*, as regards Civil cases, the annotations in A. L. R. to C.A. 237/42 (10, P. L. R. 84; 1943, A. L. R. 266).

2. On consecutive sentences see the cases cited in note 2 in S. C. J. to CR. A. 132/42 (9, P. L. R. 613; 1942, S. C. J. 982).

(*H. K.*)

FOR APPELLANTS: Abcarius.

FOR RESPONDENT: Assistant Government Advocate — (Beham).

JUDGMENT.

In this case apart from the question of whether there was legal possession of firearms, with which I will presently deal, the only substantial point raised on behalf of the Appellants was that there was no sufficient evidence to justify the conviction. I deem it desirable to state as a preliminary observation that Abcarius Bey was placing too great an onus on himself when he apprehended that this Court will never interfere with findings of fact. The Court of Appeal will interfere with findings of fact when the administration of justice so demands, but the circumstances in which they will upset such findings have been circumscribed by the numerous cases decided by the Court of Criminal Appeal since its establishment. It will interfere only when the findings of fact are based on a wrong appreciation of the law such as the admissibility of evidence or in cases where it can be demonstrated that the conclusion arrived at by the Court proceeded from reasoning which was clearly faulty. It will not interfere merely because it might itself have come to a different conclusion.

Applying these principles to this case, there was, if it could be accepted, the clear evidence of Khamis and Zaki identifying the four Accused with this crime. Abcarius Bey has argued that there was evidence that it was a dark night, which is true, and that it would be impossible for those witnesses to identify the four Accused in the manner in which they said they identified them. Now, this is pre-eminently a question for the Court of trial to decide. It does not follow as *res ipsa loquitur* that because the night was dark the witnesses would not be able to identify the Accused. The Court of trial was fully alive to the issue and it was satisfied that the witnesses could identify the Accused. With that finding this Court sees no grounds for interference.

The next point raised by Abcarius Bey was that there was no clear evidence of the possession of firearms. Apart from the evidence of the witnesses that they saw the man with the firearms, there was the evidence of the finding of cartridges and the evidence associating these men with the firing that took place. Every man who took part in the firing was, in the opinion of that Court, in the possession of firearms for the purpose of the section under which they were charged.

We come now to the third point which raised the question of the separate sentences. We agree with Abcarius Bey that it is not in accordance with modern procedure to pass consecutive sentences for

offences which were so closely linked together and we think that the procedure is undesirable; but it is not illegal. We therefore enquire whether the Accused were prejudiced in any way by the imposition of these consecutive sentences. We unhesitantly take the view that they were not. Even the accumulative sentence passed is in no way excessive for one of the offences of which they were found guilty.

For these reasons the appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 11th day of April, 1945.

Chief Justice.

CIVIL APPEAL No. 104/45.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF :—

Yousef Hanna Siryani. APPELLANT.

v.

Nazirah Lorenzo. RESPONDENT.

Illegal disposition — May be raised by Court on its own motion — L. T. Ord., secs. 2, 11, 12, re Mahmoud and Ispahani — Rent Restrictions (Dwelling Houses) does not apply to void dispositions — Construction of leases — Dwelling house leased together with area for cultivation — Equitable title to a lease.

Appeal from the judgment of the District Court, Jerusalem, dated the 21st February, 1945, in Civil Appeal No. 93/44, dismissed:—

1. The Court may, of its own motion, take the point that a contract amounts to an illegal disposition contrary to the Land Transfer Ordinance.

2. The Rent Restrictions (Dwelling Houses) Ordinance does not apply to a dwelling let together with a large stretch of land to be used for cultivation.

3. The protection of that Ordinance does not extend to a person in occupation under an illegal disposition.

(*A. M. A.*)

REFERRED TO: Mahmoud and Ispahani, *Re*, 1921, 2 K. B. 716, 90 L. J. (K. B.) 821, 125 L. T. 161, 37 T. L. R. 489.

ANNOTATIONS :

1. On the first point *cf.* note 2 to C. A. 150/45 (*ante*, p. 455). See also C. A. 461/44 (*ante*, p. 303) and annotations.

2. *Vide* C. A. 99/44 (11, P. L. R. 533; 1944, A. L. R. 777) for a discussion of similar questions.

3. On the second point *cf.* C. A. 240/43 (10, P. L. R. 584; 1943, A. L. R. 699) — a case under the Business Premises Ordinance.

(*H. K.*)

FOR APPELLANT: Hiller.

FOR RESPONDENT: Nakhleh.

JUDGMENT.

Shaw, J.: This is an appeal by leave from the judgment dated 21.2.45 of the District Court Jerusalem, in C. A. No. 93/44, allowing an appeal from the judgment dated 1.12.44 of the Magistrate, Jerusalem, in C. C. 74/44.

This case has a rather unhappy history. It went to the District Court on appeal on two occasions. On the first occasion the District Court sent it back to the Magistrate in order that he might decide whether or not the contract (Exhibit 1) was void as being in breach of the provisions of sections 2 and 11 of the Land Transfer Ordinance (Cap. 81).

The learned Magistrate did not comply with the directions of the District Court because he held that it was not the Plaintiff's cause of action that the contract was void. Whatever view the learned Magistrate may have held on the point I consider that he ought to have complied with the directions given by the District Court. He could, of course, in his judgment, have pointed out that the question whether the contract was void or not, had not been raised by the Plaintiff in her statement of claim.

Another reason which the Magistrate gave for dismissing the Plaintiff's claim was that she had made a statement without being sworn. Having inspected the record I think there is no doubt at all that the Plaintiff had been sworn, and that it was merely owing to an oversight that the Magistrate who tried the case on the first occasion omitted to record the word "sworn".

The question whether the contract was valid or not was a relevant one, and even if it had not been raised by the parties it was a point which the Court could of its own motion take into consideration. It is the duty of the Court to see that the provisions of the Land Transfer Ordinance (Cap. 81) are not disregarded. If it appears to the Court that a lease is one which is, or may be, void because it has been made in breach of the provisions of the Ordinance, the Court ought to call upon the parties to make their submissions upon that point. At page

271 of the English and Empire Digest, Vol. 12, the following quotation from a judgment of Scrutton, L. J., in the case of *Re* Mahmoud and Ispahani (1921, 2 K. B. 716), appears:—

> "It is said that the Court will not listen to a person who says, 'Protect me from my own illegality'. In my view the Court is bound, once it knows that the contract is illegal to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract".

It may be observed that section 12 of the Land Transfer Ordinance provides a penalty to be suffered by a person who gives effect to an unregistered disposition, and it would be obviously wrong if the Court, having notice of such illegality, shut its eyes to it.

The District Court held that the lease was void, and that the Rent Restrictions (Dwelling Houses) Ordinance, No. 44/1940 therefore did not apply to it.

The lease (Exhibit 1) contains two clauses which are at first sight contradictory. Clause 6 provides that the lessee must express his desire to the lessor for the renewal of the lease of the garden three months before the expiry of the period agreed upon, and that the lessor has the option either to terminate the contract or to renew it according to terms to be agreed upon. Clause 10 provides that — "He (and this must obviously refer to the lessee) is entitled to renew the contract for another three years after the expiration of the period".

Mr. Hiller for the Appellant, has submitted that this contract is an agreement to lease and not a lease, and that the lessee had an absolute right to continue in occupation for six years if he so wished. He submits that clause 6 was only to come into operation if the lessee wished to continue in occupation after six years had expired.

Having considered the terms of the lease, and the evidence which the Defendant had himself given at the hearing of 17.7.44, I think that the only possible conclusion is that the contract was, and that the parties intended it to be, a lease for three years in the first instance, and that clause 6 was to come into operation if the lessee wished to renew the lease for a further period of three years.

If, as I hold, the lease was a valid one for three years, the further question arises as to whether the lessee could rely upon the provisions of the Rent Restrictions (Dwelling Houses) Ordinance in order to avoid being evicted.

Having considered the contract, the pleadings, and the evidence given by the parties, I think there is no doubt at all that the object of the lessee was not to provide a dwelling house for himself but to engage in banana growing. The ordinance only applies to a house, or any part of a house, let as a separate dwelling where such letting does not include any land other than the site of the dwelling-house, and a garden or other premises within the curtilage of the dwelling house.

We have been told that the area of the garden in this instance is some seven *dunums*.

I find that the contract was a lease for three years which the lessee had no option to extend without the consent of the lessor, whose right to refuse consent was quite unrestricted. In effect there was no option, so the lease did not require to be registered. I also find that the Rent Restrictions (Dwelling Houses) Ordinance has no application to these premises. It follows that the lease having expired the lessor was entitled to evict the lessee.

In the result I come to the same conclusion as the learned Judges of the District Court although for different reasons.

But if I had found that clause 10 gave the lessee the right to extend the lease for a further period of three years I would in that case have held that the contract was void, as being in breach of the provisions of the Land Transfer Ordinance, since it was not an agreement to lease but a lease the term of which was to commence from a future date. If the contract was void the lessee would clearly have no right to remain in occupation, and he could not in such circumstances claim the protection of the Rent Restrictions (Dwelling Houses) Ordinance. That Ordinance can only be invoked by a tenant who wishes to hold over after the term of a valid lease has come to an end.

Mr. Hiller has submitted, in the alternative, that the Appellant had acquired an equitable title to an extension of the lease. I am unable to agree. It is true that the Respondent (lessor) stated in evidence that she had given the lessee the right to renew, and that in reliance on that right he planted the garden. But this answer must be read in conjunction with the further reply which the Respondent gave in re-examination when she said — "Clause 6 of the agreement provides that the renewal of the lease depends upon my consent".

The position, as I see it, is that the Respondent knew that the Appellant intended to grow bananas but that she did not induce him to engage in this venture. The Appellant was not bound to sign the contract in the form in which it stood. Having signed it in that form he is bound by its terms. It is the duty of the Court to enforce the

contract which the parties have made, provided that there are no legal or other grounds for not enforcing it. It is not the duty of the Court to make a new contract for the parties.

I find that the appeal fails, and that it must be dismissed with fixed costs in the sum of LP. 10. The Respondent will also have her costs in the Courts below.

Delivered this 29th day of June, 1945, in the presence of Mr. G. Hiller for Appellant and in the presence of Issa Eff. Nakhleh for Respondent.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 50/45.

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

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

IN THE APPEAL OF :—

Nehemia Berent. APPELLANT.

v.

Attorney General. RESPONDENT.

Criminal Procedure — Disagreement of Judges on appeal, Defence (Judicial) Regulations, 1942, sec. 6(2) — Sentence under C. C. O. 270 for offence under 263 — Proof of intention.

Appeal from the judgment of the District Court of Haifa, (Judges Baradey and Nasr), CR. A. 172/44, dismissed:—

1. When the Judges sitting in a criminal appeal are equally divided in opinion, the appeal fails.

2. Sec. 270 C. C. O. enables the Court to impose sentence for an offence under sec. 263. Sec. 270 need not be mentioned in the judgment.

3. Criminal intent is incapable of scientific proof, but may be inferred.

(*A. M. A.*)

ANNOTATIONS :

1. The judgment of the District Court is reported in 1945, S. C. D. C. 117.

2. On disagreement of judges under the Defence (Judicial) Regulations see also C. A. 139/42 (1942, S. C. J. 668; 12, Ct. L. R. 160).

3. On failure to quote the penalty section see the judgment of the lower Court and *cf.* CR. A. D. C. Ha. 24/45 (1945, S. C. D. C. 284) and note 2.

4. See, on the last point, CR. A. 153/44 (11, P. L. R. 645; *ante*, p. 334); *vide* also C. A. 375/43 (1944, A. L. R. 673) and CR. D. C. Ha. 326/44 (1945, S. C. D. C. 197) and notes to these cases.

(*H. K.*)

FOR APPELLANT: Maman.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

Three points were raised in this appeal and we would say immediately that everything that could be urged in favour of the Appellant was stressed by the counsel who argued the case for him. The first is that there was a disagreement between the Judges and the benefit of the doubt, counsel argued, should have gone to the Accused and the appeal should have been allowed. But this argument fails to recognise the distinction between a trial Court and an appeal tribunal. The correct procedure when there is a disagreement between two Judges in the Court below is not left in any doubt by the provisions of section 6(2) of the Defence (Judicial) Regulations, 1942. The Court followed that procedure. This point must therefore fail.

The second point taken on behalf of the Appellant was that the conviction by the Magistrate recorded under section 263 of the Criminal Code Ordinance was a nullity. Counsel argues that this is merely a definition section and that no penalty is provided for it and in consequence the conviction under that section was irregular. We are unable to agree. Section 263 clearly stipulates what constitutes the offence of stealing, and if an accused comes within the ambit of this section, we are of opinion that a penalty could have been imposed by virtue of the provisions of section 270.

The third ground of appeal and probably the main ground was that there was no criminal intent. This Court has said time and again that criminal intent represents a state of the mind which is not always capable of scientific proof. It is to be inferred from the circumstances surrounding the alleged offence. In this case the Appellant contracted to take cement to a camp at Bassa but he failed to carry out the terms of this contract. He took the cement to Nahariya and, according to the findings of fact, he dumped it there near a place where a building was being erected. Certainly that fact alone would call for an explanation from him, and the learned Judge Nasr and the Magistrate found his explanation inconsistent with innocence. We are far from saying that that finding was in any sense unreasonable. It was pre-eminently

a question for the Court of trial to determine after they had seen and heard the witnesses in the box.

For these reasons we are of opinion that the appeal must fail and the conviction and sentence confirmed.

Delivered this 18th day of April, 1945.

Chief Justice.

CRIMINAL APPEAL No. 64/45.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ahmad Awad el-Brein. APPELLANT.

v.

Attorney General. RESPONDENT.

Dangerous drugs — Evidence of possession — Guilty knowledge — Failure to cross-examine prosecution witnesses as regards allegations made in defence — Effect of Defendant not testifying in Court — Corroboration, CR. A. 18/44 — Sentence.

Appeal from the judgment of the District Court, Jaffa, dated 29.3.45, in Crime No. 134/44, whereby Appellant was convicted of an offence *contra* section 7 of the Dangerous Drugs Ordinance, 1936, as amended and sentenced to one year's imprisonment and payment of a fine of LP. 100.—, dismissed:—

> The following facts may be taken into account when making a finding as to guilty knowledge: a) that the Accused does not give evidence in Court b) that he told an untrue story to the police when charged.
>
> (*A. M. A.*)

REFERRED TO: CR. A. 18/44 (11, P. L. R. 101; 1944, A. L. R. 158); R. *v.* Blatherwick, 1911, 6 CR. A. R. 282.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from the judgment dated 29.3.45 of the District Court, Jaffa, in Criminal Case No. 134/44, convicting the Appellant of an offence under section 7 of the Dangerous Drugs Ordinance, 1936,

as amended by section 4 of the Dangerous Drugs (Amendment) Ordinance, 1941, and sentencing him to one year's imprisonment, and a fine of LP. 100 or 3 months' imprisonment in default.

Three grounds of appeal have been put forward. The first is that there was no evidence on which the Court could lawfully find the facts to support the judgment. The second is that the facts as found by the Court do not constitute the offence of which the Appellant was convicted. The third is that the punishment was excessive.

The two material questions which arise are whether there was evidence on which the Court could properly find:—

(a) that the Appellant was in possession of *hashish*, and

(b) that he was in possession with guilty knowledge.

There was evidence that after the truck which contained the *hashish* had reached a village in the vicinity of Khan Yunis the first Accused, Hamad Ahmed Khalil Barakeh, who has been convicted on a plea of guilty, went away and returned with the present Appellant. A conversation took place between a person who has been referred to as the informant and the Appellant, after which the Appellant went off to a house not far from where the truck was standing. A few moments later the Appellant came back with a bundle of Palestine notes which he handed to the informant. The Appellant then ordered some persons who were standing beside the truck to unload the truck, and the first Accused and the Appellant took part in this unloading, each carrying a small sack.

This evidence was believed by the trial Court. The Appellant, who gave evidence, stated that he did not carry or attempt to carry any of the sacks, and that he had only changed a fifty pound Egyptian note for the first Accused, giving him fifty one-pound Palestine notes in exchange. He stated that he had the fifty pounds with him, and that he did not go to his house to fetch the money. He stated that he had the money with him in order to pay the workers, and that he threw the fifty-pound Egyptian note to his wife after he had been put into the truck and before it began to move.

The statement of the Appellant in regard to the changing of the fifty-pound Egyptian note was corroborated by the evidence of the first Accused who was called as a witness for the defence, but no attempt had been made to obtain corroboration of this story by questioning the prosecution witnesses about it. Nor was the Appellant's story of having thrown the fifty-pound note to his wife put to any of the prosecution witnesses, although this incident, if it occurred, must have been seen by one or more of them.

The Appellant admitted in cross-examination that in his first statement to the police he had not mentioned the matter of the changing of the fifty-pound Egyptian note for the first Accused.

The trial Court in its judgment recorded a finding that it disbelieved the story about the changing of the note, and the evidence of the first Accused and of the Appellant.

At page 287 of Roscoe's Criminal Evidence (14th edition) the following quotation appears from a judgment of Justice Alverstone, L. C. J.:—

> "Although the fact that Appellant was not called is not of itself corroboration, we think it entitles a jury to act where, perhaps, they would not otherwise have done so".

This passage was referred to in Criminal Appeal No. 18/44 (10, P. L. R. 111) where the Court observed that a *fortiori* if the Appellant puts forward a story which is rejected by the Court that would entitle the jury to act where, perhaps, they would not otherwise have done so.

We think that the fact that the Appellant put forward what the Court found to be an untrue story with regard to the changing of the note was a circumstance which it was entitled to take into consideration, with the other evidence, when determining the question of the Appellant's guilty knowledge.

We find that there was evidence upon which the Court could properly find that the Appellant was in possession of the *hashish* with guilty knowledge. We have been referred to various cases, but we think that no useful purpose would be served by comparing this case with others in which the facts were not the same.

In the result we find that the judgment of the Court was supported by the evidence. It was essentially a finding of fact which the Court came to, after hearing the witnesses, and we can see no grounds for upsetting it.

As regards the sentence — it is true that the Appellant had no previous convictions, but the amount of *hashish* was large. There was no less than 599 slabs. That being so we are unable to find that the sentence was in any way excessive. The appeal is dismissed. The *hashish* must be confiscated.

Delivered this 21st day of June, 1945, in the presence of Mrs. Rubinstein for Appellant and in the presence of Mr. McFee for Respondent.

British Puisne Judge.

HIGH COURT No. 22/45.

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

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

IN THE APPLICATION OF:—

Anatol Ungurian. PETITIONER.

v.

1. Inspector General of Palestine Police,
2. O. C. Polish Troops, M. E.,
3. Officer in Charge of E. A. P. S. Waldheim,
4. Chairman of the Advisory Committee. RESPONDENTS.

Habeas corpus — Detention under Reg. 17(1)(*c*) *— No affidavit as to condition precedent to order required if circumstances clear from order itself — Ex parte Greene — Letter of Chief Secretary notifying Petitioner's advocate of proposed release — Interpretation Ordinance, secs.* 7, 10(1).

Return to an order in the nature of *habeas corpus* calling upon Respondents to show cause why Petitioner should not be released from custody:—

1. If the reasons for the detention are given in the order of detention, it is not necessary, in High Court proceedings challenging the detention, to file an affidavit showing that the High Commissioner was satisfied as to the conditions precedent to the order.

2. An order made by the High Commissioner may be revoked only by the High Commissioner. Though the revocation may be communicated through the Chief Secretary, it is a matter of construction whether that was the intention.

(*A. M. A.*)

DISTINGUISHED: Greene *v.* Secretary of State for Home Affairs, 1941, 3 All E. R. 388, (1942) A. C. 284, 111 L. J. (K. B.) 24, 166 L. T. 24, 58 T. L. R. 53.

ANNOTATIONS:

1. Authorities on Regulation 17 of the Defence Regulations are collated in note 1 in A. L. R. to H. C. 140 & 141/42 (10, P. L. R. 114; 1943, A. L. R. 113).

2. On the effect of sec. 10 of the Interpretation Ordinance *cf.* CR. A. 62/43 (10, P. L. R. 354; 1943, A. L. R. 469).

(*H. K.*)

FOR PETITIONER: Ben Israel.

FOR RESPONDENTS: Nos. 1, 3 & 4 — Solicitor General — (Griffin).
No. 2 — Cattan.

ORDER.

This is a return to a writ which is in the nature of *habeas corpus* on behalf of Anatol Ungurian who is detained under Regulation 17(1)(c), Defence Regulations, 1939, by an order made by the High Commissioner, dated 28th March, 1942. Two points emerged in the course of the arguments advanced on behalf of the Petitioner. The first one was that there was no affidavit by the High Commissioner showing that he was satisfied that the conditions precedent to an order made under the said Regulations existed. Counsel quoted as an authority the well-known case of *ex parte* Greene. It is true that in the case of *ex parte* Greene the Home Secretary did file an affidavit stating that he was satisfied that the person detained was a member of a hostile association which was a condition precedent to the detention under Regulation 18(b) of the English Regulations which corresponds to the Palestine Regulation 17(1). But it seems to me that the necessity for that affidavit apparently arose because of the omission to which Scott, L. J., refers in his judgment when he said:—

> "But the omission of any reference to hostile associations from the general statement at the head of the notice, coupled with the misrepresentation contained in para. (1) of the particulars, was at least likely to confuse the Appellant and handicap him in his appeal".

The Court considered that affidavit and decided that it was sufficient for the Home Secretary to state that he was satisfied as to the presence of the conditions precedent, and that they would not enquire into the reasons why he was so satisfied. There was no such affidavit filed by the Inspector General of Police in this case; but attached to the affidavit he did file was a copy of the actual order made by the High Commissioner. Unlike the case of *ex parte* Greene there was no omission in this order. The preamble clearly stated that the High Commissioner having been satisfied that it was necessary with a view to preventing the Petitioner from acting in a manner prejudicial to the public safety or defence, it was necessary to detain him. These are the only conditions precedent to the making of the order, the existence of which are mandatory on the High Commissioner. It appears to this Court that it would be superfluous to demand an affidavit to the same effect. For these reasons we are of opinion that the first ground fails.

The second ground, undoubtedly, raises a point of importance. On the 20th November, 1943, that is after the date of the order of detention, a letter was addressed from the Chief Secretary's Office to the advocate who is acting for the Petitioner. That letter was to the following effect:—

"Sir,

I am directed to refer to your letter dated the 15th September, 1943, regarding the case of Anatole Ungurian who is at present interned at Latrun Camp, and to inform you that the High Commissioner has now ordered that Ungurian be released from internment to enable him to enlist with the Polish Military Forces.

I am, Sir,
Your obedient servant,
A. G. Dalgleish
for ACTING CHIEF SECRETARY".

It has been argued by counsel for Petitioner that the effect of the letter was to revoke the order made on the 28th March, 1942. Undoubtedly that letter may have indicated, as the Solicitor General concedes, merely an intention to grant a conditional release of the person interned. But the Court must now enquire as to whether, even assuming that there was that intention, legal effect was given to it. We are of opinion that something more than this letter was necessary effectively to cancel the order of the 28th March. Under section 7 of the Interpretation Ordinance, regulations and orders can only be effectively revoked by the same authority and in the same manner in which they are made. Clearly the letter of the 20th November, 1943, was not given by the same authority and in the same manner as the order of the 28th March. It is necessary at this point also to refer to section 10(1) of the Interpretation Ordinance which empowers the Chief Secretary to convey the orders and directions of the High Commissioner. But our interpretation of that section is that an order purporting to revoke an order made under the authority of the High Commissioner must be signified under the hand of the Chief Secretary to the Government, and we are of opinion that the letter of the 20th November, 1943, which was apparently signed by some junior officer in the Secretariat cannot be said to be a signification under the hand of the Chief Secretary.

For these reasons we are of opinion that the rule must be discharged.

Given this 17th day of April, 1945.

Chief Justice.

CRIMINAL APPEAL No. 108/45.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

The Nathanya Diamond Manufacturers Ltd.
& an. RESPONDENTS.

Control of diamonds — Defence (Control of Diamonds) Order, 1943, Reg. 6 — Interpretation of war legislation — "Possession or control".

Appeal from the judgment of the District Court of Tel-Aviv (R/P. Judge Windham), dated 23rd April, 1945, in Criminal Case No. 118 of 1944, whereby Respondents were acquitted of an offence contrary to paragraph 6 of the Defence (Control of Diamonds) Order, 1943, dismissed by majority:—

> A person who has parted with physical possession of diamonds, but retains control over them in such manner that they are at his immediate call, does not commit an offence under the Control of Diamonds Order (Reg. 6). Frumkin, J., *dissentiente*.

(*A. M. A.*)

ANNOTATIONS: The judgment of the District Court is reported in 1945, S. C. D. C. 240.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENTS: Persitz.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the decision of the Relieving President of the District Court, Tel-Aviv, concerning the interpretation of Regulation 6 of the Defence (Control of Diamonds) Order, 1943.

At the outset I would emphasize that in the decision which I am going to pronounce I will confine myself solely to the proposition of law as it emerged in the course of the argument. For this reason I accept certain findings of fact of the Court below, although I might consider that the Accused were fortunate in those findings of fact. The Accused were persons who had in their possession or under their control diamonds within the meaning of the Control of Diamonds Order. A certain number of these diamonds were given to a man called Halpern on an understanding of agreement, the purport of which can be inferred from the following extracts from the evidence of the two Accused as accepted by the learned Relieving President:—

> "He had to ask me if I agreed to the price offered before selling them. At any time I could go to him and take the diamonds back, on returning to him the money that he had deposited as security".

And later on, in referring to what I can only regard as a highly suspicious document, P/4, the learned Relieving President said:—

> "Nevertheless on all the evidence I am not satisfied beyond reasonable doubt that there was such a sale to Halpern; indeed it would be difficult to make a finding to that effect, considering Halpern himself, the main prosecution witness, never stated that there was a sale to him".

The President found as a further fact that Halpern was not an employee of the Company, but an outside worker doing piece work. That being so he goes on:—

> "I think that he must be considered as an independent contractor and not as an agent of the first accused company, with the result that possession of the diamonds by him was not *ipso facto* possession by the company".

The main lines of the alleged agreement between Halpern and the company were that Halpern was to take those diamonds for cleaverage, and to deposit as security the sum of LP. 390. There was an understanding that he could sell the diamonds on behalf of the company, but it was stipulated that before doing so the permission of the company would be required.

Now I come to examine the object of the Regulations. They are a war-time measure, similar to many other war-time measures. They were enacted in the interest of the successful prosecution of the war, and I believe the primary object was to prevent rough diamonds getting into the hands of the enemy. For the purpose of achieving this object the Controller considered it necessary to promulgate Order No. 6, which was to the effect that no person having diamonds in his possession or under his control should agree to remove those diamonds out of his possession or control save under the authority of a permit.

Mr. Rigby has argued that if this regulation were to be interpreted as the learned Relieving President interpreted it, it would stultify the whole Ordinance. If I had come to that conclusion I would not hesitate to disagree with the finding of the learned Relieving President, because with great respect I am unable to accept that part of his judgment which subscribes to the proposition of counsel for the Accused that the Order should not be construed with a view to avoiding the frustration of the presumed purpose of the enactment. I of course accept that well established principle of legal interpretation in regard to normal legislation, but there is overwhelming authority for holding that that principle does not apply to war legislation. War legislation should as far as possible be interpreted so as to give effect to the obvious intention of the legislature even if in so doing the Court has to deviate from the interpretation the legal purist might regard as justified.

I come now to examine the meaning of the words "in possession or control". It seems clear to me that "Possession" cannot mean physical

possession at every minute and hour of the day. I interpret the words "possession or control" to mean at the immediate call of this Company, and by "immediate call" I mean a call subject to the performance by the person who calls of his common law obligations.

Now if I am to accept the findings of fact, as I do, it seems to me that those diamonds were always at the immediate call of this Company, provided they performed their common law obligations. I would illustrate this point by taking the hypothetical case of the owner or possessor of diamonds storing them in the bank for safe custody. It seems to me that provided that owner or possessor has in his possession a deposit receipt for those diamonds, they are at his immediate call sufficiently to enable the Controller to exercise the control which, in my opinion, it was the object of Regulation 6 of the Regulations to give him.

For these reasons I am of opinion that the learned Relieving President came to the correct decision, and the appeal must be dismissed.

Delivered this 27th day of June, 1945.

Chief Justice.

Abdul Hadi, J.: I concur in the result arrived at by my learned brother the Chief Justice.

Puisne Judge.

Frumkin, J.: I associate myself with the observations made by my learned brother in so far as the facts of this case are concerned, and would say no more about it since the facts as found by the Court below have been readily accepted by the prosecution.

So we have before us now only the question of law. I would first of all say that in examining whether possession includes constructive possession, one could not be guided solely by the rules accepted in cases when the offence is being in possession. Then when there is an offence of being in possession of a certain thing, it may still make it an offence even when possession is not physical or actual but constructive. But when the offence is parting with the possession, or in the words of the law, "removing, agreeing to remove, or causing or allowing the removal ... out of his possession", and when not only parting with possession but also parting with control is made an offence, different tests must be applied. In this case the Respondents were charged with committing an offence under Rule 6. We have to observe that the offence is for parting with possession or control of rough or industrial diamonds, not of diamonds generally. Regulation 6 has to be read in the light of Regulation 8, which makes it also an offence to store, agree to store,

or cause or allow the storage of any rough diamonds or industrial diamonds in Palestine in any place other than the places specified in that regulation.

Applying the two regulations to the facts of this case, all that could be put on behalf of the Respondents is that they did not part with control because they could at any time reclaim the diamonds, but they obviously have parted with possession. If we were to say here that possession also includes constructive possession, then control would be entirely superfluous.

It is for these reasons that I think that the Court came to a wrong conclusion in law.

Puisne Judge.

CRIMINAL APPEAL No. 44/45.

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

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

IN THE APPEAL OF :—

Hussein Hassan Baraki. — APPELLANT.

v.

Attorney General. — RESPONDENT.

Confessions — Judges Rules, r. 1 — CR. A. 91/42 — Accused confronted with other accused — Statutory caution.

Appeal from the judgment of the District Court of Haifa (R/P. Judge Weldon), (CR. A. 18/45), dismissed:—

1. The Court may admit evidence that the Accused when first confronted by a police Inspector was asked: "Is this *hashish* yours?" and replied affirmatively.

2. The statutory caution need not be made in the very words of the caution, so long as the import of those words is conveyed.

(*A. M. A.*)

CONSIDERED: CR. A. 91/42 (9, P. L. R. 406; 1942, S. C. J. 376; 12, Ct. L. R. 61).

ANNOTATIONS: See CR. A. 47/45 (12, P. L. R. 227; *ante*, p. 559) and notes thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: Tscherniak.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

The points raised on behalf of the Appellant in this appeal are firstly that there was no proof that the article found was, in fact, *hashish*. There are various means of proving whether an article is *hashish;* undoubtedly the best method of all is the method usually adopted in these cases; that is, to send it to the laboratory in Jerusalem and get a certificate stating that in fact it was *hashish*. In this case the packages were sent to the laboratory in Jerusalem and the reason why a certificate was not produced was because the Accused's counsel rightly objected on technical grounds to the production of the certificate. But there was other evidence. There was the evidence of the Police Inspector that what he saw looked like *hashish*. Later he charged the Accused with being in the possession of *hashish* from which there is only one inference, that at that period he had satisfied himself that it was *hashish*. The learned President of the Court accepted this evidence of the Inspector. He was quite entitled to accept it and we see no reason to interfere with his finding of fact on this point. It is quite true that the evidence of the Inspector was not sufficient to identify the Accused with the possession of the *hashish*. The evidence of this is to be found in the confession.

We come now to deal with the most important issue in this trial, that is the statement and the alleged confession made by the Accused. Now, these statements cover two stages. The first stage is the period of investigating by the Inspector when he confronted the Accused with the camel and the *hashish*. It is true he asked the Accused "Is this *hashish* yours?" but we are satisfied that this was a permissible question under Rule 1 of the Judges' Rules. It has been argued that even if it is permissible on this ground it is inadmissible on another ground, *viz*. because at the time when it was made the Accused was confronted with another person who was certainly suspected if he was not charged. In this connection we were referred to Criminal Appeal No. 91/42. I think there is some mis-conception as to what exactly that Criminal Appeal has decided. It did not decide that the mere fact that one accused was confronted with another makes any statement made inadmissible. What it did decide was that if the Court comes to the conclusion that the confrontation in the particular circumstances held out an invitation to the Accused to make a statement then that statement would be inadmissible. Applying that principle to this case, we cannot say that the confrontation held out any invitation to the Accused. Clearly his reply to the question "Is this *hashish* yours?" was the result not of the confrontation with the other accused man but

of the question put to him by the Police Inspector. We are therefore of opinion that the question was permissible and the answer to the question was duly admissible in evidence.

The real kernel of the case was the confession. It is argued that this confession was inadmissible. The argument as to the admissibility of the confession depends on whether the first statement made in answer to the Police Inspector's question was admissible. Holding, as we do, that it was, the argument that the second confession was inadmissible falls to the ground; but before dismissing this issue, we must refer to one other point in regard to this confession which was raised in favour of the Appellant, which was that there was no proper caution. Now, apart from the fact that the record seems to indicate that the statutory caution was given word for word, we would observe that it is not necessary that the precise wording of the statutory caution should be given. All that is necessary is that the purport of the caution should be conveyed to the Accused in words sufficiently clear to enable the Court to come to the conclusion that he understood it.

For these reasons we are of opinion that the application for leave to appeal must be refused and the conviction confirmed. We see no grounds to interfere with the sentence.

Delivered this 18th day of April, 1945.

Chief Justice.

CRIMINAL APPEAL No. 97/45.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hassan Abu Khadijeh. APPELLANT.

v.

Attorney General. RESPONDENT.

Evidence — Failure to put certain questions to prosecution.

Appeal from the judgment of the District Court, Jaffa, dated 13.5.45, in Crime No. 192/44, whereby Appellant was convicted of burglary *contra* section 295 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment, dismissed:—

The Court may take into consideration, in weighing the evidence, the fact

that no questions were put to the prosecuting witnesses to support the Accused's version of the facts.

(*A. M. A.*)

ANNOTATIONS: On failure to cross-examine see CR. A. 75/43 (1943, A. L. R. 486) and CR. A. 60/44 (1944, A. L. R. 318 at p. 321).

(*H. K.*)

FOR APPELLANT: R. Anabtawi.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

We do not consider it necessary to call upon the Respondent to reply.

The Appellant was convicted under section 295 of the Criminal Code Ordinance and sentenced to two years' imprisonment. The only evidence against him was that his thumbprint was found on a utensil which was in the room from which the property had been stolen. The Court was satisfied from the evidence which it heard that the thumbprint was that of the Appellant, and that is a finding of fact with which we cannot interfere. The advocate who appears for the Appellant agrees that a conviction can rest upon the identification of a single thumbprint.

The explanation given by the Appellant was that food for his dog used to be sent to his house in that vessel, and that his thumbprint came upon the vessel when he handled it. On referring to the record we find that no question was put in cross-examination of the Complainant for the purpose of showing that the vessel was used for that purpose, and when the Accused gave evidence he stated that he did not tell the Police that the food had been sent to his house in this way. He said that he had not mentioned this fact because he had been greatly insulted by the Police.

There was ample evidence to support the conclusion to which the Court came, and there are no grounds for interfering with the verdict.

As regards sentence the Appellant had two previous convictions — one for theft in 1940 when he received a sentence of one month, and one for breaking into a building in 1941 when he received a sentence of three years.

Having regard to the facts of the case, and to the Appellant's record, we can see no grounds for interfering with the sentence. The appeal is therefore dismissed.

Delivered this 7th day of June, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 41/45.

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

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

IN THE APPEAL OF :—

Fatmeh Haj Muhammad Bukhari. APPELLANT.

v.

Muhammad Wasef Haj Khalil. RESPONDENT.

Criminal Appeal — Parties — Attorney General need not be cited in private prosecutions — M. C. J. O. sec. 11.

Appeal from the judgment of the District Court of Haifa (Judge Nasr and A/Judge Shehadeh), CR. A. 126/44, allowed and case remitted to the Court below:—

The Attorney General need not be cited as a party to appeals in cases of private prosecutions.

(*A. M. A.*)

FOR APPELLANT: Hammoudeh.

FOR RESPONDENT: Nazzal.

JUDGMENT.

The only issue raised in this appeal was whether on an appeal to the District Court from a conviction in the Magistrate's Court the Attorney General should be cited as a respondent, the District Court of Haifa having held that he should. We are of opinion that in this case the learned Court erred. This is not a case, as the District Court seemed to be under the impression, of a private prosecution being taken in the District Court. The case reached the District Court by virtue of the provisions of section 11 of the Magistrates' Courts Jurisdiction Ordinance, which gives a right of appeal to the District Court from a conviction in the Magistrate's Court. The issue which was appealable was the issue in the Magistrate's Court. The issue in the Magistrate's Court in this case was Muhammad Wasif El Haj Khalil *v.* Fatmeh Muhammad. The Attorney General had already intimated in writing that he was not interested in the case and I see no reason to join him now as a respondent in the appeal of the same issue.

For these reasons we consider that the District Court erred and that on appeal from a conviction in a Magistrate's Court to the District Court in a private prosecution it is not necessary to cite the Attorney

General as a respondent. The judgment of the District Court must be set aside and the case returned to them for a decision on the merits in the light of the judgment given in this appeal.

Delivered this 18th day of April, 1945.

Chief Justice.

CRIMINAL APPEAL No. 66/45.

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

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

IN THE APPEAL OF:—

Jehuda Janower. APPELLANT.

v.

Attorney General. RESPONDENT.

Appeals in criminal cases — Sec. 54(2) T. U. I. Ord.

Appeal against the judgment of the District Court of Tel-Aviv (R/P. Judge Windham), CR. Case 32/45, dismissed:—

No appeal lies from an order of detention made under sec. 54(2) of the Trial Upon Information Ordinance.

(*A. M. A.*)

ANNOTATIONS: Note that the order in this case was under sec. 54(2), *i. e.* Appellant was found to be "insane so that he cannot be tried"; *cf.* CR. A. D. C. Jm. 30/45 (1945, S. C. D. C. 205) — a case under sec. 19(1) of the M. C. J. O. which corresponds to sec. 54(1) of the Criminal Procedure (T. U. I.) Ordinance.

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

The decision of the Court is that there is no appeal against an order made under section 54(2) of the Criminal Procedure (Trial Upon Information) Ordinance. This application cannot, therefore, be entertained.

Delivered this 25th day of April, 1945.

Chief Justice.

CIVIL APPEAL No. 155/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

The Estate of the Late Aharon Ya'aqov Leizerowitz. APPELLANT.

v.

Jacob Pruzansky. RESPONDENT.

C. P. R. 327, 333 — Deposit, delay in paying — Effect of amendment to Rule 333 — Service.

Appeal from the judgment of the District Court, Tel-Aviv, in Civil Case No. 6/44, dated 26.3.45; preliminary ruling:—

The effect of the new Rule 333 is not to repeal Rule 327.

(*A. M. A.*)

FOR APPELLANT: Rozowsky.

FOR RESPONDENT: Absent — served.

ORDER.

Although I do not consider that Rule 327 of the Civil Procedure Rules, 1938, has been to any extent repealed by the provisions of the new Rule 333, I am satisfied that in the present case the delay in paying the deposit was due to the fact that the notice to pay had been served on the wrong advocate. The deposit has since been paid. I therefore do not dismiss the appeal.

Given this 27th day of June, 1945.

British Puisne Judge.

HIGH COURT No. 25/45.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Moshe Cohen. PETITIONER.

v.

Chief Execution Officer, Haifa & 3 ors. RESPONDENTS.

High Court procedure — Rule 6, affidavits in reply — Not sworn by Respondent, H. C. 66/38; H. C. 64/40 — Additional affidavits.

Return to an order *nisi* in the nature of *mandamus*; additional affidavit by Respondents disallowed:—

1. Affidavits filed in the High Court on behalf of Respondents need not be sworn by the Respondents themselves or their advocates.

2. A respondent cannot ask the Court to accept more than one affidavit.

(*A. M. A.*)

REFERRED TO: H. C. 67/38 (5, P. L. R. 611; 1938, 2 S. C. J. 225; 4, Ct. L. R. 250); H. C. 64/40 (7, P. L. R. 474; 1940, S. C. J. 535; 8, Ct. L. R. 219).

ANNOTATIONS: For authorities on affidavits under the High Court Rules see note in S. C. J. to H. C. 78/42 (9, P. L. R. 526; 1942, S. C. J. 529; 12, Ct. L. R. 214); for later decisions see H. C. 118/43 (1944, A. L. R. 4) and note 1, H. C. 46/44 (11, P. L. R. 208; 1944, A. L. R. 404), H. C. 90/44 (*ibid.*, pp. 483 & 525) and notes 1 & 2 in A. L. R. & H. C. 78/44 (*ibid.*, pp. 449 & 808).

(*H. K.*)

FOR PETITIONER: Weyl.

FOR RESPONDENTS: Nos. 2 and 3 — Wittkowski.
No. 3 — Rosenbaum.

ORDER.

At the return to this order *nisi*, which is in the nature of *mandamus*, Petitioner's advocate has objected to the Court receiving affidavits in reply filed on behalf of the second and fourth Respondents, which affidavits have not been sworn to by the Respondents themselves. He relies on H. C. 67/38, P. L. R. Vol. 5, p. 611; H. C. 64/40, Annotated Supreme Court Judgments, (1940) Vol. 2, p. 534; and contends that the reasoning in these decisions should apply to the affidavit in reply contemplated by Rule 6, High Court Rules, 1937. In my view, different considerations apply to affidavits supporting a petition from those applying to an affidavit in reply. The affidavit in support of a petition must clearly be sworn to by the Petitioner himself or his advocate. The reason for this is obvious, namely, the necessity for holding the Petitioner responsible for the truth of the facts stated in his petition before the Court grants an order *nisi*. What is contemplated by Rule 3 is not an affidavit outside the petition, but an affidavit swearing to the truth of the contents of the petition itself. When one comes to Rule 6, however, one finds no stipulation that the affidavit filed by a respondent should be sworn to by no one but the Respondent or his advocate. I therefore accept the affidavit sworn to by Mr. Bahbout on behalf of the second Respondent, and the affidavit sworn to by Mr. Gross on behalf of the fourth Respondent. Mr. Wittkowski, for the second and

fourth Respondents, wishes me to accept another affidavit which has been sworn to by a Mr. Ravinay on behalf of the second Respondent. The question arises whether in High Court proceedings a respondent is entitled to ask the Court to accept more than one affidavit filed on behalf of any one respondent. In my view the answer is in the negative. I am fortified in coming to this conclusion by the appearance of the word "the" in line 1 of Rule 7. If a respondent complains that his case cannot be properly dealt with unless he is entitled to put in more than one affidavit then, presumably, the answer is that the matter is not appropriate for High Court proceedings and the petition should be dismissed and the Petitioner told to bring an ordinary action for a declaration in the appropriate Court.

I therefore refuse to allow more than one affidavit to be received on behalf of any one respondent.

Given this 17th day of April, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 146/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Haim Aharon Weitz. RESPONDENT.

Criminal appeal — Appeal by A. G. under sec. 67(2) T. U. I. Ord. — "Two months", Interpretation Ord., Migotti v. Colvill.

Appeal from the judgment of the District Court of Tel-Aviv, (Judges Many and Cheshin), dated 24.5.45 in Summary Trial No. 67/45, whereby the Respondent was acquitted of a charge contrary to section 211(a) and 227 of the Customs Ordinance and section 310 of the Criminal Code Ordinance, 1936, dismissed:—

The period of appeal of two months from a judgment delivered on the 24th May, expires on the 23rd July.

(*A. M. A.*)

REFERRED TO: Migotti *v.* Colvill, 1879, 48 L. J. (M. C.) 190, 40 L. T. 747.

ANNOTATIONS: Note that the case referred to dealt with the interpretation

of the term "calendar month"; see Halsbury, Vol. 32, p. 122, para. 176 and Stroud's Judicial Dictionary, 2nd ed., Vol. 1, p. 249.

For recent authorities on computation of time see note 2 in A. L. R. to C. A. 227/43 (10, P. L. R. 514; 1943, A. L. R. 813).

(*H. K.*)

FOR APPELLANT: Junior Government Advocate — (Salant).
FOR RESPONDENT: Hake.

JUDGMENT.

At the hearing of this appeal by the Attorney General under section 67(2) Criminal Procedure (Trial Upon Information) Ordinance, the advocate for the Respondent has taken the preliminary objection that the appeal is out of time. The judgment of the District Court of Tel-Aviv was delivered on the 24th May, 1945, and notice of appeal was lodged on the 24th July, 1945. Section 67(2) requires that in such a case an appeal be filed in the registry of the District Court within two months from the date of the judgment. Mr. Hake, for the Respondent, relies on the fact that there is no provision in the Interpretation Ordinance, 1945, dealing with months such as there is in section 6(a) of that Ordinance dealing with days. He has also cited the case of Migotti *v.* Colvill, L. T. Reports Vol. 40, p. 747 and to Hailsham Vol. 32, p. 120, para. 171. He also stresses the word "within" in section 67(2).

Mr. Salant, for the Appellant, points to the definition of "month" in section 2 of the Interpretation Ordinance and he also says that there is a difference between the phrase "within a month" and the phrase "within the month". We think, however, that if a judgment was delivered on the 24th May the period of two months expires on the 23rd of July and we also think that if an appeal is lodged on the 24th July it cannot be said that notice of appeal has been filed within 2 months from the date of the judgment. The preliminary objection is therefore upheld and the appeal is dismissed.

Delivered this 19th day of September, 1945.

Acting Chief Justice.

CRIMINAL APPEAL No. 46/45.

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

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

IN THE APPEAL OF:—

Hadiyeh Ali Ibrahim. APPELLANT.

v.

Attorney General. RESPONDENT.

Sentence — When Court of Appeal will interfere.

Appeal from the judgment of the District Court of Haifa (R/P. Judge Weldon), CR. A. 18/45, dismissed:—

The Court of Appeal will interfere with a sentence only if it is unlawful or if it was imposed on wrong principles.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. 217.

2. See CR. A. 52/44 (11, P. L. R. 449; 1944, A. L. R. 816) and note in A. L. R. and CR. A. 65/45 (*ante*, p. 501); *cf.* also R. *v.* W. Thomas, 1941, 28 Cr. App. Rep. 21.

(*H. K.*)

FOR APPELLANT: Tscherniak.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

We do not feel justified in interfering with this sentence. To quote from a recent decision of the Court of Criminal Appeal in England. The Court of Criminal Appeal was established to deal with mistakes in point of law and unless it be shown that the sentence passed was either unlawful or based on wrong principles the Court had no power, or at any rate ought not to assume the power, to revise the sentence passed. In this case we are satisfied that the sentence passed by the lower Court was neither unlawful nor based on wrong principles. The appeal must be dismissed and the conviction and sentence confirmed.

Delivered this 18th day of April, 1945.

Chief Justice.

CIVIL APPEAL No. 46/45.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Shmuel Kovel. APPELLANT.

v.

Shraga Brozilovsky & an. RESPONDENTS.

Insurance — Subrogation under Art. 17 of the Ottoman Law of Insurance — Law not repealed — Powers of appellate Court — C. A. 45/42, C. A. 105/42.

Appeal from the judgment of the District Court, Tel-Aviv (Judges Many and Cheshin), in its appellate capacity, dated the 10th November, 1944, in Civil Appeal No. 105/44, dismissed:—

1. Under the Turkish Insurance Law, still applicable in Palestine, the right of subrogation of an insurer excludes any claims by the assured.

2. The appellate Court has a discretion whether to remit the case for additional parties to be joined.

(*A. M. A.*)

REFERRED TO: C. A. 45/42 (9, P. L. R. 289; 1942, S. C. J. 287; 11, Ct. L. R. 201); C. A. 105/42 (9, P. L. R. 432; 1942, S. C. J. 488; 12, Ct. L. R. 82).

ANNOTATIONS:

1. For the facts of this case see the judgment of the District Court which is reported in 1944, S. C. D. C. at p. 555, and wherein the text of Art. 17 of the Ottoman Insurance Law is set out.

2. Note that in C. A. 41/39 (6, P. L. R. 303; 1939, S. C. J. 238; 6, Ct. L. R. 37) an insurance policy was held to be valid although it contravened Art. 19 of the said Law.

3. On discretion in respect of joinder of parties see C. A. 229/43 (10, P. L. R. 510; 1943, A. L. R. 644) and notes in A. L. R.

(*H. K.*)

FOR APPELLANT: Lange.

FOR RESPONDENTS: Henigman.

JUDGMENT.

This is an appeal by leave from the judgment dated 10.11.44 of the District Court, Tel-Aviv, in C. A. 105/44.

The first two grounds of appeal raise the question whether the Ottoman Law of Insurance 1323 is still in force and whether it applies in this case.

It is admitted that when the case was heard before the Magistrate no reference was made to that law. The Respondents, who were the Defendants in the Magistrate's Court, did however deny liability, and it was not incumbent upon them to plead the law. It is unfortunate that these questions were not raised when the case was before the Magistrate, but I do not think that I can say that one party was more to blame than the other for having then failed to realise the existence of the Ottoman Law of Insurance.

When the point was raised at the hearing of the appeal the District Court was bound to apply the law when it was satisfied that it was

still in force. I have been referred to no authority which would enable me to find that that law was repealed before 1.11.1914 which is the relevant date (see Art. 46 of the Order-in-Council, 1922). I must therefore treat it as being in force, and I find that the District Court was right when it said:—

> "It seems to us, therefore, that in the light of section 17 of the said law Respondent is not entitled to demand anything from the Appellants, and if there is any right of claim it exists in favour of the insurance company only".

Dr. Lange, for the Appellant, has submitted that the District Court ought in any event to have remitted the case to the Magistrate's Court in order that the Insurance Co. might be added or substituted as Plaintiff. I am not prepared to say that the District Court could not have made such an order on terms, but it was a matter in which at least the Court had a discretion, and I am unable to find that the exercise of the discretion was so manifestly wrong that I ought to interfere. In this connection Mr. Henigman, for the Respondents, has referred to C. A. 45/42 (9, P. L. R. 289), and to C. A. 105/42 (9, P. L. R. 432).

In the result I find that this appeal fails and I dismiss it with fixed costs in the sum of LP. 10.—.

Delivered this 27th day of September, 1945, in the presence of — (no appearance) for Appellant and in the presence of Mr. I. Henigman for Respondents.

British Puisne Judge.

CRIMINAL APPEAL No. 106/45.

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

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

IN THE APPEAL OF:—

Hanna Odeh Kaldani. APPELLANT.

v.

The Attorney General. RESPONDENT.

Confessions — Age of Accused — Juvenile offenders — Sentence — Probation officer.

Appeal from the judgment of the District Court of Jerusalem, dated the 30th of May, 1945, in Crime No. 64/45, whereby Appellant was convicted of house-

breaking *contra* section 295(a) of the Criminal Code Ordinance, 1936 and sentenced to 3 years' imprisonment in a Reformatory, dismissed:—

Judges should carefully scrutinize a confession made by a person of 12; but if they are satisfied that it is free and voluntary they may base a conviction thereon.

(*A. M. A.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

In this case the only point raised on behalf of the Appellant was that he is 12 years old and that he was convicted solely upon the confession which was made to the Police. Apart from the fact that there was corroborative evidence of the confession, this Court could not lay down as a proposition of law that a boy of 12 was not capable of giving a free and voluntary confession. The trial Judges very properly directed their minds to the question whether the confession was free and voluntary, and having directed their minds to the issue, they came to the conclusion that it was, and in our opinion, from the evidence on the record, the trial Judges were amply justified in coming to that conclusion. It is, of course, highly desirable that youths of this age should not be convicted solely on confessions made to the Police unless the Judge has satisfied himself, after a very careful scrutiny, that the confession has been free and voluntary. That appears to have been done in this case, and we are not prepared to interfere with the conviction.

There remains the question of sentence, which was three years' detention in a reformatory school. It does not appear that the Judges called for a report from the Probation Officer before passing sentence. There was, of course, no legal obligation on them to do so, but we think it desirable that such a report should, where convenient, be furnished so that the Court would have an opportunity of gauging the effectiveness of punishment by detention in a reformatory school.

In these circumstances we adjourn the question of the sentence until the next sitting of this Court, and in the meanwhile we would ask Mr. Rigby if he would be kind enough to get a report from the Probation Officer.

Delivered this 27th day of June, 1945.

Chief Justice.

On this question of sentence we have now before us the report of the Probation Officer from which it seems quite obvious that this is not the

first time that the Accused had been known to the Probation Officer. The boy was once placed on probation and was released on licence, on application by his father, who so far failed in his undertaking to the Probation Officer that he left the boy to associate with elder and undesirable lads which eventually led him to commit this offence. In our opinion this boy needs stricter training and supervision. That being so we are unable to interfere with the sentence.

Delivered this 4th day of July, 1945.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 23/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Haj Mohammad Ahmad Abu Laban. APPLICANT.

v.

Haj Hamed Ahmad Abu Laban & 5 ors. RESPONDENTS.

Stay of execution — Leave to appeal to Privy Council — Revision of former ruling — Art. 7 P. (Appeal to P. C.) O.-in-C.

Application for final leave to appeal to the Privy Council granted but stay of execution refused:—

In the absence of any special cause, if stay of execution was refused by the Supreme Court when ordering conditional leave to appeal to the Privy Council, that order will not be reversed when final leave is granted.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment under appeal is C. A. 107/44 (11, P. L. R. 550; *ante*, p. 167).
2. *Cf.* P. C. L. A. 3/44 (11, P. L. R. 394; 1944, A. L. R. 663).

(*H. K.*)

FOR APPLICANT: Gluckman.

FOR RESPONDENTS: Merguerian and Rubenstein.

ORDER.

The Respondents do not object to the grant of final leave to appeal to His Majesty in Council; but they do object to this Court ordering that judgment be suspended pending the determination of the appeal.

When this Court, differently constituted, on the 25th January, 1945, granted conditional leave to appeal the question of granting a stay of execution was definitely discussed and the Court seemed to be of opinion that there was nothing to stay; but, whether or not this was the reason, the Court made a very clear order that stay of execution be not granted.

It seems from the wording of Art. 7, Palestine (Appeal to Privy Council) Order-in-Council, 1924, that this Court has power, either at the time of granting conditional leave to appeal or at the time of granting final leave to appeal, to direct that the execution shall be suspended. Nevertheless, I consider that, if at the time of granting conditional leave to appeal the question of ordering suspension of execution has been considered and adjudicated upon, it would be wrong for the Court at the time of granting final leave to appeal to reverse the earlier ruling of the Court unless very good grounds were shown. It seems to me that, when this Court dealt with the matter on the 25th January, they had all the relevant material before them. They knew that this Court had dismissed an appeal from the District Court of Tel-Aviv which in its turn had dismissed an action by the present Applicant for a declaration that certain mortgages be cancelled. This Court, therefore, on the 25th January, 1945, well knew that the result of the litigation was that the present Applicant would be compelled to pay money under a mortgage. Nevertheless, after due consideration, this Court on the 25th January refused to grant a stay of execution.

The matters set out in the affidavit of the Applicant's advocate sworn on 21st March, 1945, have not revealed such new matter as would entitle this Court to reverse the order of the 25th January refusing to direct that execution of the judgment be suspended.

Final leave to appeal to His Majesty in Council is granted.

Given this 30th day of April, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 80/45.

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

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

IN THE APPEAL OF:—

Ahmed Salim Ahmad el Ali. APPELLANT.

v.

The Attorney General. RESPONDENT.

Verdict against weight of evidence — Evidence accepted in one respect and rejected in another — Inconsistency.

Appeal from the judgment of the Court of Criminal Assize sitting at Nablus, dated the 17th day of April, 1945, in Criminal Assize Case No. 19/45 whereby Appellant was convicted of murder *contra* section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death, allowed:—

Conviction set aside as being based on inadequate evidence.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 142/41 (1941, S. C. J. 591), CR. A. 46/42 (1942, S. C. J. 207; 11, Ct. L. R. 247) and CR. A. 79/42 (1942, S. C. J. 340).

(*H. K.*)

FOR APPELLANT: W. Saleh.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

In this case, which is an appeal from a conviction of murder by the Court of Criminal Assize sitting at Nablus, three grounds of appeal were urged.

The first was that the verdict recorded was against the weight of evidence. The second that primary evidence which was the evidence given by Amin was the evidence of an accomplice and it was not corroborated in accordance with law. The third ground was that the learned Judges wrongly refused to admit a statement which the Accused's counsel wished to tender. As regards the second ground the Court is satisfied that there was ample corroboration of the evidence of the witness Amin, and as to the merits of the third ground we are of opinion that the Court rightly rejected, on the ground of its irrelevancy, the evidence which counsel for the Accused wished to tender. On both these grounds, therefore, the appeal fails.

There remains for consideration the first ground. Although the learned Judges wrote a lengthy and most painstaking judgment in which every point in favour of the Accused was analysed with scrupulous fairness, the reason why in our opinion that judgment cannot be sustained can be briefly stated.

The main evidence against the Accused was the evidence of two witnesses whom we can call "the two Yousefs" who were the 12th and 13th witnesses. In regard to this evidence the learned Judges, in the course of their judgment, stated, and in our opinion they had ample grounds for so stating, that it was completely weakened by the evidence of other witnesses, particularly the evidence of the Doctor. They added further that the evidence was unsatisfactory. Despite this they recorded a conviction against the second Accused, having acquitted the

first and third Accused. The reason why they found the second Accused guilty was apparently that stated in that part of the judgment which reads:—

> "We are unable to see how the rifle (Ex. N) could have come into the possession of Amin either from the Kteit family or from the Hafiz family. Amin had no personal motive for implicating Accused 2, and his evidence is intended to implicate Naji to whose father Amin had given shelter. Accused 2 had the motive, and he had the opportunity".

Now, if the evidence of the two Yousefs and Fayez Nasr is rejected it becomes the duty of the Court to examine whether there was any further evidence on which the second Accused could have been convicted. At this point it is relevant to turn to the reasons given by the Court as to why the third Accused was acquitted. The reason, they say, was because there was no evidence that he approached the deceased as he lay on the ground, and the evidence that he fired at all was only circumstantial. It is unnecessary to enquire whether these factors would afford a legal defence to the third Accused in the light of the evidence of the two Yousefs. We, however, feel that we must assume from this finding that the Court did in fact, as it was quite entitled to do, reject the evidence of the two Yousefs in so far as it affected the third Accused. Undoubtedly this, as Mr. Rigby has argued, would not preclude the inference that the trial Court had accepted the other part of the evidence of the Yousef witnesses. But now we have to turn to the evidence of witness No. 20 for the Prosecution, Fayez Ali el Nasr. Although the evidence of the two Yousefs distinguished between the part played by the second and that played by the third Accused, in the actual shooting which would enable the Court to accept it in regard to the second Accused and reject it as it affected the third, it is clear that the evidence of the 20th witness, Nasr, does not distinguish in any particular between the part played by the second and third Accused. That evidence was to the effect that he saw the two of them going away with rifles. Now, if the third Accused was acquitted, as he was, this Court of Appeal must here again draw the inference that the trial Court, in acquitting him, rejected the evidence of Fayez Ali el Nasr. It follows that they must also have rejected that evidence in so far as it affected the second Accused. That leaves, as the Court itself appreciated in its judgment, only the evidence concerning the manner in which the rifle came into the hands of Amin and the inference to be drawn from the fact that the second Accused had absconded and had a motive. It will suffice to say that in our opinion that evidence was inadequate to support a conviction.

For these reasons the conviction of the Court below must be quashed and the Accused is discharged unless he is detained on some other charge.

Delivered this 3rd day of May, 1945.

Chief Justice.

CRIMINAL APPEALS Nos. 153/45, 154/45, 155/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Aryeh Shvirtz. APPELLANT.

v.

Attorney General. RESPONDENT.

Statement before sentence — T. U. I. Ord., secs. 47(1)(2), 72(1)(*b*) *— Evidence of Probation Officer, sec.* 37(3) *— Previous convictions — "Hard labour" sec.* 39(1) *C. C. O.*

Appeals from the judgment of the District Court of Tel-Aviv (A/R/P. Judge Hill), given on 20th July, 1945, in Criminal Cases Nos. 125/45, 126/45 & 113/45, whereby the Appellant was sentenced to two years' imprisonment to run concurrently in each of these cases, on the charge of breaking into a building and stealing therefrom contrary to section 297(a) of the Criminal Code Ordinance, 1936, partly allowed:—

1. The record of the Court should show that the Accused was given an opportunity of being heard after conviction and before sentence.

2. A previous conviction which is not admitted should be strictly proved.

(*A. M. A.*)

ANNOTATIONS:

1. On the point of recording the conviction see CR. A. 76/43 (10, P. L. R. 375; 1943, A. L. R. 460) and case therein cited.

2. On sec. 47 of the T. U. I. Ordinance see note 1 in S. C. J. to CR. A. 17 & 20/41 (1941, S. C. J. 57; 9, Ct. L. R. 145).

3. See, on the last point, CR. A. 149/43 (1944, A. L. R. 78) & note 2 and CR. A. 141/43 (10, P. L. R. 602; 1944, A. L. R. 84).

(*H. K.*)

FOR APPELLANT: Matusevitch.

FOR RESPONDENT: A/Solicitor General — (Rigby).

JUDGMENT.

The Appellant, who is 17 years of age and is, therefore, a juvenile adult for the purposes of the Juvenile Offenders Ordinance, 1937, pleaded guilty at three separate trials before the District Court of Tel-Aviv to seven different counts of house-breaking contrary to section 297(a), Criminal Code Ordinance, and in the result was sentenced at each of the trials to two years' imprisonment with special treatment, the sentences to run concurrently. Against those sentences he now appeals to this Court.

It seems that in the trial Court he had made arrangements to be defended by Mr. Matusevitch who has told us that owing to certain circumstances he was not able to be present at the time when the trial Court actually dealt with the Appellant's cases, although he had applied to the Court for an adjournment which application was refused. We are not, however, concerned with the question of whether or not an adjournment should have been granted. It is not denied that the Accused pleaded guilty and there is no suggestion that the trial Court wrongly or improperly recorded pleas of guilty; but it is said that there is no record of a conviction which term we take to mean that a trial Court, on a person pleading guilty, should make a note on the record that the Accused is convicted. We do not think that that is necessary having regard to the combined effect of section 33(1) and section 47(1), Criminal Procedure (Trial Upon Information) Ordinance. There is, therefore, nothing in this ground of appeal.

The substantial ground of appeal, which we think must succeed, is that there is nothing to show that the Appellant, before sentence was passed upon him, was given an opportunity of making any representations and the Appellant's advocate informs us that his instructions are that, in fact, the Appellant was not asked by the Court whether he had anything to say.

Now, whatever may have happened in the trial Court, we think that at a trial upon information when an accused person pleads guilty there should always be a note on the record, however short, sufficient to satisfy this Court that the provisions of sections 47(1) and 47(2) have been complied with. My own practice, when sitting as a trial Judge in cases where a person has been convicted of manslaughter, is to write on the record "section 47(2) Cap. 36 complied with". In these circumstances we have taken it upon ourselves to enquire into the matter of sentence with a view to acting under section 72(1)(b), Criminal Procedure (Trial Upon Information) Ordinance. The Court of trial had, before passing sentence, adjourned the case for the reception of

a report from the Probation Officer. The Appellant's advocate has suggested that that report was not admissible as the Probation Officer should have given evidence on oath. We agree, however, with the learned Acting Solicitor General that the matter is covered by section 37(3), Criminal Procedure (Trial Upon Information) Ordinance. It is unnecessary for us to deal with the substance of the report beyond saying that the Probation Officer came to the conclusion that it was improbable that the Appellant would profit from any supervision, as (apart from other factors) he had in 1942 been sentenced to two years in a Reformatory School for house-breaking.

There is only one matter which has caused us some concern and that is that the learned trial Judge seems to have been influenced by the fact that the Appellant had already been sentenced to imprisonment for admitted house-breaking. It seems that the allegation of the prosecution was that in April of this year he had been sentenced to five weeks' imprisonment by one of the Magistrates of Tel-Aviv. Unfortunately, however, there is no record that this previous conviction was put to the Appellant and that he admitted it. If reliance is placed on previous convictions, the Accused must always be asked whether he admits them, and if he does not, then the Prosecution must prove them strictly. As we are unable to say to what extent the learned trial Judge was influenced by this previous conviction, we think that we ought to reduce the sentence to one year's imprisonment in each of the trials, the sentences to run concurrently. The order for special treatment will stand.

As the learned trial Judge used the term "hard labour" we might refer to the provisions of section 39(1), Criminal Code Ordinance, which reads as follows:—

> "All imprisonment shall be with labour, unless the Court otherwise directs".

Subject to the reduction of sentence as stated the appeals are dismissed.

Delivered this 26th day of September, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 155/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The estate of the late Aharon Ya'aqob Leizerowitz, through the heirs Ben Zion Leizerowitz and Tzwi Leizerowitz. APPELLANTS.

v.

Jacob Pruzansky. RESPONDENT.

Compromise of debt — Assignment of mortgage — Allegation that part of the debt was waived — Oral evidence — O. C. C. P., Art. 80.

Appeal from the judgment of the District Court, Tel-Aviv (Judges Many and Cheshin), dated 26th March, 1945, in Civil Case No. 6/44, dismissed:—

Oral evidence may not be heard as to the effect of a compromise reduced to writing.

(*A. M. A.*)

ANNOTATIONS:

1. On the mortgagor's position *vis-à-vis* an assignee of the mortgagee see C. A. 257/41 (9, P. L. R. 70; 1942, S. C. J. 141) and note 3 in S. C. J.

2. For a recent authority on Art. 80 of the Ottoman C. P. C. see C. A. D. C. Jm. 40/45 (1945, S. C. D. C. 389) and cases therein cited.

(*H. K.*)

FOR APPELLANTS: Lin.

FOR RESPONDENT: Avram.

JUDGMENT.

This is an appeal from the judgment dated 26.3.45 of the District Court, Tel-Aviv, in Civil Case No. 6/44, dismissing the Appellant's claim for a declaratory judgment that only LP. 540 was due from the Appellant on the mortgage under execution in the Execution Office, Tel-Aviv, in file 4962/40. Two issues were settled as follows:—

> "(a) Whether Mr. Mordechai Feinstein has compromised with the Plaintiff, Leizerovitz, to receive LP. 540 in consideration of the mortgage with interest and costs, and whether he waived the remaining balance; and
>
> (b) whether, at the time of the transfer of the mortgage to the Defendant, he knew of the said compromise including the said waiver, and whether the Defendant knew that this was binding on him and affected his rights after the mortgage had been registered in the Land Registry."

At the hearing in the District Court the advocate for the Plaintiffs (present Appellants) objected to the first issue on the ground that the Defendant (present Respondent) had not denied the alleged compromise when he filed his written defence. The District Court dismissed

this objection, and decided that the defence must be taken as being a denial of the compromise.

The Defendant, although he did in his written defence not say in terms that the compromise had never been made, denied all knowledge of it, and we are not prepared to say that the District Court erred in holding that the Plaintiff had to prove the making of the compromise.

The District Court gave a negative reply to both issues. That is to say it found that there had been no compromise, and (as would naturally follow) that the Defendant knew of no compromise.

Two witnesses were called for the Plaintiff. One of these was Mr. Mordechai Feinstein who was the original mortgagee, and the other was one of the Plaintiffs. No witnesses were called by the Defendant who is the person to whom the mortgage was transferred.

The case of the Plaintiffs was that the Defendant was cognisant of the fact that Mr. Mordechai Feinstein had agreed to forego part of the mortgage debt, and that the transfer of the mortgage to the Defendant was not an ordinary transfer of that type, but a step in execution of an agreement which the Defendant had made with two of the heirs for the purchase of the mortgaged property. It may be observed that this agreement (Ex. P/1) was abortive owing to the fact that one of the heirs objected to the sale to the Defendant.

The Appellants submit that the Respondent's remedy is to sue for damages for a breach of the agreement, and that he is not at liberty to recover the full amount of the mortgage debt.

If the District Court was correct in its finding that there was no compromise then, of course, the appeal must fail. The Plaintiff's advocate informed the District Court that he wished to call Mr. Feinstein's wife as a witness in order to prove the compromise which is alleged to have been a verbal one. The District Court, however, ruled that only the parties could be heard.

In this Court Mr. Lin, for Appellants, stated that had it not been for its ruling on this point he would have asked the District Court to hear the evidence also of Messrs. Katz and Barenbaum. He stated that he would have called those two persons, and Mr. Feinstein's wife, to prove both that there was a compromise and that the Plaintiffs knew about it.

Mr. Lin has referred to Hailsham (Old Edition Vol. 21, p. 179) where the following appears:—

> "As reagrds dealings with the mortgage debt subsequent to the creation of the mortgage, the rule referred to above applies, and the

> transferee of the mortgage takes it, when the mortgagor is no party to the transfer, subject to the state of accounts then subsisting between the mortgagor and mortgagee. He must at his peril inquire what is due on the mortgage, and if all or part of the principal has been paid of by the mortgagor, or has been discharged by receipt of rents and profits, the transferee, although he takes without notice, cannot set up again the whole debt against the mortgagor ..... Hence, for the protection of the transferee, it is proper, either to make the mortgagor a party to the transfer, or to obtain an admission from him in writing that the sum claimed by the transferor is really due".

The rule referred to is at p. 177 where the following appears:—

> "So far as the security consists of the mortgage debt, it is a chose in action, and is only assignable in accordance with the rule that a transferee of a chose in action takes it subject to any equities and rights of set-off existing between the debtor and the transferor".

Now, as has already been observed, the alleged compromise was admittedly not reduced to writing, and Art. 80 of the Ottoman Law of Civil Procedure provides that:—

> "..... Every claim disputing liability under a *sanad* shall be proved by a *sanad*, or by the admission or account books of the Defendant".

The District Court was clearly not impressed with the evidence of Mr. Feinstein. It observes in its judgment:—

> "The Court heard Mr. Feinstein, as a witness for the Plaintiff. This witness is old and sickly and his power of remembrance is weak.

Furthermore, Mr. Feinstein stated before the District Court that he told the Respondent nothing when he saw him at the Land Registry, and that he handed over to him the bills for interest. That is to say Mr. Feinstein said that he had not told the Respondent about the compromise, and that he gave the Respondent bills to which the Respondent would not have been entitled if there had really been a compromise.

In the circumstances we think that the District Court rightly refused to hear further witnesses, and we are unable to upset the finding that there was no compromise.

In the result this appeal must be dismissed with costs on the lower scale to include a fee of LP. 10 for the attendance of the Defendant's advocate at the hearing.

Delivered this 27th day of September, 1945, in the presence of Mr. Rozovsky for Appellants and no appearance for Respondent.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 66/38.

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

BEFORE: Lord Wright, Sir Madhavan Nair and Sir John Beaumont.

IN THE APPEAL OF:—

Maurice Litwinsky & ors. — APPELLANTS.

v.

Osman Khamra Saghir & ors. — RESPONDENTS.

Partition of musha'a — Evidence of unofficial partition — Entries in werko registers — Estoppel — Art. 17 Ottoman Law of Partition — Points not taken in lower Court.

Appeal from the decision of the Supreme Court of Palestine, L. A. 82/34, dismissed:—

Entries in *werko* registers may be given in evidence of unregistered partitions.

(*A. M. A.*)

ANNOTATIONS:

1. On the effect of unregistered partitions see C. A. 138/44 (1944, A. L. R. 721) and note 1, C. A. 355/44 (11, P. L. R. 642; 1944, A. L. R. 760), C. A. 141/44 (1944, A. L. R. 773), C. A. 15/44 (11, P. L. R. 489; 1944, A. L. R. 788), C. A. 183/44 (*ibid.*, pp. 619 & 801) and C. A. 140/44 (*ante*, p. 183).

2. On the evidential value of a *werko* registration see note 2 in A. L. R. to C. A. 124/43 (12, P. L. R. 68; *ante*, p. 36).

(*H. K.*)

FOR APPELLANTS: Carr.

FOR RESPONDENTS: No appearance.

JUDGMENT.

(*Sir Madhavan Nair*):

This is an appeal from a judgment dated 27th January, 1936, of the Supreme Court of Palestine, sitting in its appellate capacity dismissing an appeal against a judgment of the Land Court of Haifa, which declared that certain lands formerly held in common by one Hassan Es-Saghir (deceased) and one Ahmad Mansour (deceased) and registered in their joint names (or those of their respective successors in title), as co-owners had been partitioned by the said Hassan Es-Saghir and the said Ahmad Mansour, and made an order confirming the partition and directing the registration in the Land Registry of the share of Hassan Es-Saghir in the name of his heirs.

Appellants 1 to 3 appeared as "third parties" in the action, as persons having an interest in the said lands by reason of their having agreed

to purchase the interests of the heirs of Ahmad Mansour, the Defendants in the action, who are the last named Appellants before the Board — Appellants No. 4.

The first Respondent is the Plaintiff, one of the heirs of Hassan Es-Saghir. The other Respondents are the co-heirs of the first Respondent.

The main question for decision before the Board is whether the partition alleged by the Respondents has been legally proved, or whether the lands are still held in common. The Courts in Palestine came to the conclusion that the alleged partition did in fact take place and there was sufficient evidence of such a nature as would justify them in granting the declaration asked for.

The main argument before the Board was whether, since there was no registered document endorsing the partition as required by the Ottoman Law, the Courts below erred in their decision that the partition was sufficiently proved.

The facts of the case may be briefly stated. The land to which the appeal relates forms part of a larger area which was admittedly registered in the joint names of Hassan Es-Saghir and Ahmad Mansour. As mentioned in the judgment of the Court of Appeal the portion in dispute is the western part marked A, B, C, G, of the larger area shown on the plan, marked A, B, C, D, E, F, G. The case of the Respondents is that about 40 years ago, a partition had been made between the co-owners and the portion marked A, B, C, G, was allotted to Hassan and the remainder to Ahmad Mansour.

In proof of the partition the following evidence was given by the Respondents: — In or about June, 1921, Ahmad Mansour made a statement before a commission consisting of officials in certain proceedings taken with a view to correction of the area included in the registered title, that a partition of the nature now alleged had been made between him and Hassan Es-Saghir and that he and his co-owner had since then occupied and enjoyed the portions allotted to them. The evidence shows that the areas assigned to each, which according to the statement consisted of unequal parts were registered in the *Werko* (Land tax) and Tithe registers, that each co-owner paid his tax to the Government, one independently of the other, and Hassan and his heirs dealt with the part situated in the western portion independently while Mansour and his heirs after him dealt independently with their part on the eastern side. It is not denied that there was no document to show that there was a partition.

Against the above evidence it was urged that the admission made by

Ahmad should not be acted upon in the absence of a document evidencing the partition, that the Respondents are estopped from raising the question of partition as they themselves when dealing with their portion dealt with it as *Musha'a* (undivided) and that the evidence adduced was not sufficient to set aside a title registered in the Land Registry. The last which is of a general nature was the main argument which was urged before the Appellate Court.

As already stated the Courts below held that the evidence was sufficient to prove partition and that none of the facts alleged by the Appellants negatived it. They also pointed out with respect to what was alleged regarding the transactions entered into by the heirs of Hassan Es-Saghir, that they could not have made them in any other way because the land in the *"Tabu"* was still registered as *Musha* and that the conduct on their part did not estop them from raising their present contention.

Before the Board it was raised as a ground of appeal that the admission made by Ahmad Mansour was inadmissible in evidence, but it was not argued by the learned counsel, his main argument being that partition was not proved in the manner required by law. He also contended that the conduct of the Respondents in their dealings with their alleged portion of the land estopped them from raising their present contention. It is true that there is no document evidencing the alleged partition, but the admission of Ahmad Mansour and the whole trend of the evidence given by the Respondents unmistakeably show that their case must be a true one. Their Lordships are very much impressed with the evidentiary value of the *Werko* and the Tithe registers. They are official documents and the inference from them is clear. Would such registration as shown in the *Werko* and the Tithe departments have been made unless the officers concerned were satisfied that a valid partition had been made between the co-owners which they have to recognise and act upon? It may be that they have not to decide whether the co-owners are divided or not when making the registration of the shares in the *Werko* and Tithe registers, but the fact remains that the land in question was registered in two parts. No satisfactory explanation of this significant piece of evidence has been given. Indeed, the whole conduct of both the parties during the past so many years with reference to this property is inexplicable except on the basis of a partition recognised as legaly binding by them and those who dealt with them. Their Lordships find that the materials before them are not, in their judgment, sufficient for them to hold that the Courts in Palestine have come to a wrong conclusion in this case.

In support of his argument, Mr. Comyns Carr the learned counsel drew their Lordships' attention to Art. 17 of the Ottoman Laws which (translated from the French into English) says that — "Partition of land cannot take place without the leave and knowledge of the official, nor in the absence of a possessor or his agent. Every partition which has so taken place is invalid". It is said that this means that the partition is null and void. Some other provisions having a bearing on the point were also referred to by the learned counsel; but it is clear from the judgments of the Courts below that the point in this form was never urged before them. In the Land Court of Haifa the absence of a document — which was not disputed — is referred to in the course of the judgment, and the main argument in the Supreme Court as already noticed was the general one "that the Land Court had not before it evidence of such a nature as would justify it in setting aside a title registered in the Land Registry", which may include the present argument also but there is no reference to it anywhere in the judgment. The questions of law argued in the Supreme Court were whether the admission made by Ahmad Mansour was acceptable in evidence and whether the Land Court had jurisdiction to deal with the case. Neither of those points is now before the Board and it is another point though related to the main question but one on which the Courts below have not expressed their opinion, that is now pressed before the Board. In the circumstances, after careful consideration their Lordships have decided that on the material before them they should accept the conclusion arrived at by the Courts in Palestine. As regards the question of estoppel urged by the learned counsel, their Lordships agree with the view that the land being registered as *Musha'a,* the Respondents had to treat it as such in their transactions. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, but with no costs as the Respondents have not appeared before the Board.

Given this 30th day of April, 1945.

CRIMINAL APPEAL No. 111/45.

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

BEFORE: Edwards, J. and Ali Bey Hasna, Judge D. C. Jerusalem.

IN THE APPEAL OF :—

Khalil Mohammad Ismail & an. APPELLANTS.

v.

Attorney General. RESPONDENT.

Amendment of information — Inclusion of a witness heard before examining Magistrate — Adjournments — Refusal by Court of trial to hear further evidence by prosecution — T. U. I. Ord., secs. 33(4), 72 (1)(*c*) — *Retrial.*

Appeal from the judgment of the District Court of Nablus in Criminal Case No. 83/45, dated the 16th of June, 1945, whereby the Appellant was sentenced to four years' imprisonment on a charge of robbery contrary to sections 287 and 288(1) of the Criminal Code Ordinance, 1936, allowed and case remitted:—

1. The Court of trial may, after amending the information in this respect, hear a witness who testified before the examining Magistrate, but whose name did not appear on the information.

2. Retrial ordered as failure by the Court to hear all the prosecution evidence led to irregularities.

(*A. M. A.*)

FOR APPELLANTS: Barghouti.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal by both Accused against a judgment of the District Court Nablus, whereby they were each sentenced to four years' imprisonment on a charge of robbery contrary to sections 287 and 288(1) of the Criminal Code Ordinance.

The first ground of appeal is a highly technical one. It seems that the name of a witness who gave evidence before the committing Magistrate did not appear on the reverse of the Information. At the trial, however, the Assistant Government Advocate asked the Court to amend the information by adding the name of this witness. The advocate for the defence objected but the Trial Court amended the Information by adding the name of this witness.

We think that the Trial Court were entitled so to amend the Information. We also think that if the defending advocate thought that the Accused were adversely affected thereby all that he could have done was to ask for an adjournment, which he did not do. We do not think that the amendment of the Information and the calling of this witness in any way vitiated the proceedings or that his evidence should have been excluded. This ground of appeal therefore fails.

The next ground of appeal is that there was insufficient evidence to support the conviction. We are assured by Mr. Rigby that he has been informed by the Assistant Government Advocate who conducted the

prosecution in the Court below that he desired to call at the Trial all the witnesses who had given evidence before the Magistrate, but that the learned Judges of the trial Court intimated to him after they had heard the evidence of two witnesses that they did not require to hear further evidence for the Prosecution.

Now while we realise that District Courts are very busy and are often pressed for time and while we also realise that there can be no harm perhaps in a District Court intimating to the prosecutor that he might dispense with the necessity of calling all his witnesses, nevertheless it is obvious that considerable care should be taken by judges of Trial Courts before they allow the case for the prosecution to be closed. The attention of Trial Courts is drawn to section 33(4) of the Criminal Procedure (Trial Upon Information) Ordinance. It was particularly desirable in this case that more evidence should be led, because both eye witnesses admitted that they did not know the Accused before the crime and their identification of the Accused therefore depended almost solely on what they had seen in the dock. We are informed that there was available evidence of an identification parade, and clearly in such circumstances that evidence at any rate should have been allowed to have been led.

When the Appellants came to enter upon their defence their advocate called as defence witnesses two persons who we are informed had given evidence as witnesses for the prosecution in the Magistrate's Court. Now, one of these witnesses, Afif, denied that the Appellants were among the persons who had robbed the witnesses and his companion. It is implicit from the judgment of the Trial Court that they believed the two witnesses who gave evidence in the District Court for the prosecution although they gave no reasons for their preferring the evidence of these two witnesses to that of Afif. Both Accused gave evidence denying participation in the robbery. The whole trial was unsatisfactory. The Accused's advocate assures us that he relied on the evidence of Afif and accordingly did not call other defence witnesses who might have corroborated the evidence of the 1st Accused with regard to some previous enmity between himself and the uncle of the 1st prosecution witness Odeh Masoud. We are told that nine witnesses gave evidence before the Magistrate of whom only two were called before the Trial Court. The circumstances of this case are therefore very peculiar. It seems clear to us at any rate that evidence of the identification parade should have been heard. While this judgment must not be taken as creating a precedent we think that in all the circumstances there should be a retrial. We accordingly allow the appeal and quash

the conviction and remit the case to the District Court of Nablus for a new trial with direction to them to hear all the witnesses tendered by the prosecution. We direct the attention of the Trial Court to the provisions of section 72(1)(c) Criminal Procedure (Trial Upon Information) Ordinance.

Delivered this 18th day of July, 1945.

British Puisne Judge.

CIVIL APPEAL No. 379/44.

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

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

IN THE APPEAL OF:—

Nadeen Markoff. APPELLANT.

v.

Habib George Daoud Homsi, & 7 ors., all heirs of George Daoud Homsi. RESPONDENTS.

Foreigners owning immovable property — Laws of Rajab, 1291, Safar 1284, Rabi el Akhir, 1300 — Right of Succession — Prescription — Laches — Treaty of Peace (Turkey) Ord., Sched. 2, Art. 79.

Appeal from the judgment of the Land Court of Jaffa, Land Case No. 19/42, dismissed:—

1. The effect of the various laws dealing with the rights of foreigners to hold lands in the Ottoman Empire, did not include the right of succession by a foreigner to the lands of an Ottoman ancestor.

2. These laws were revoked by sec. 24 of the Succession Ordinance, but not with retrospective effect.

3. The provisions of the Treaty of Peace (Turkey) Ordinance, do not apply to Russian subjects as Russia was not a party to the Treaty.

(*A. M. A.*)

FOR APPELLANT: Abcarius and Nakhleh.

FOR RESPONDENTS: Eliash, Homsi and Azar.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from the judgment of the President of the District Court of Jaffa sitting as a Land Court. The Appellant, Mrs. Nadeen Markoff, is suing as the executrix and the sole

beneficiary under the will of her late father Alexander Ashiri who died on the 9th May, 1927. She is claiming certain lands situated at Jaffa. The lands originally belonged to Michael Ashiri the father of Alexander. He died in 1895. He left besides his son Alexander a wife Aniseh and a sister Wardeh. In 1887 the son Alexander exchanged his nationality from Ottoman to Russian with the consent of the Ottoman Government. In 1897 or early 1898 the property of Michael which is the subject-matter of this dispute, was registered in the Jaffa Land Registry in 8 shares which were allocated as follows: 6 for the sister Wardeh, 1 for the wife Aniseh and 1 for Alexander. At the same time as the registration 3 of Wardeh's shares were transferred to George Homsi and in 1900 he bought her remaining 3 from Habib Abu Sha'ar to whom they had meanwhile been transferred. The Homsi family allege that they acquired the remaining two shares by purchase one from Alexander and one from Aniseh in 1901. The gist of the Appellant's claim is that this property, or at least that part of it which was inherited by Wardeh, should have been inherited by Alexander and on his death in 1927 it should have descended to her. It will be obvious therefore that if she is to succeed it will involve the setting aside of a registration which is nearly 50 years old and the upsetting of a settlement of land which has descended to the second and third generation. It follows I think that from the outset the Appellant's task is an uphill one. She bases her case on a submission of a mistake of law and an allegation of fraud. In this she was well advised because they are probably the only grounds on which the Court would be prepared to set aside a settlement which has lasted so long. A mistake of law, she says, occurred in the decision as to who were the lawful heirs of Michael Ashiri. At this point I go back to his death in 1895. The property is registered in Jaffa in 8 shares. 7 out of the 8 were registered in the name of Alexander and 1 out of the 8 in the name of the wife Aniseh. Opposite Alexander's name was the marginal note "Russian subject, changed nationality with the consent of the Imperial Government". In accordance with the requirements of Article 8 of the Law of 28 *Rajab*, 1291, a copy of this registration was sent to the Ministry of the *Daftar Khakani* (Ministry of Lands) at Constantinople. It was returned by the Ministry of Lands to the local registry with instructions that the succession of Alexander is cancelled as he is of Russian nationality and is deprived of his right of succession. The order further stated that the land in question should be transferred in succession to Michael's wife Aniseh who was entitled to one-fourth, and to Michael's sister Wardeh who was entitled to three-fourths. That is 2 out of 8 shares to Aniseh, 6 out of 8 to Wardeh.

The Jaffa Registry was altered accordingly. This was in 1898 and that is the registration from which the Respondents derive their title.

It is alleged by the Appellant that the instructions issued by the Ministry of Lands at Constantinople were the result of a fictitious judgment given in Beirut. The Beirut judgment, which concerned a claim for a few piastres, was based on the premise that in law Alexander could not have inherited from his father Michael because of his change of nationality. The Appellant says that this judgment was the result of fraudulent collusion between Wardeh and Daoud Homsi. It is true that Homsi was Wardeh's attorney in the case and the subsequent acquisition by him of Wardeh's share might justify the Appellant's allegation of lack of *bona fides* in the Beirut proceedings, but I am of opinion that the Land Court in Jaffa was right in coming to the conclusion that the Beirut Court interpreted the law correctly whatever their motives for so doing may have been. The fundamental land law of the Ottoman Empire was that a foreign subject could neither hold nor inherit land and Alexander of course became a foreign subject when he changed his nationality in 1887. This old law had however been modified by a law known as the 7 *Safar* 1284 (1867). Article 1 reads as follows:—

> "Foreign subjects are allowed, with the same title as Ottoman subjects and without any other condition, to enjoy the right to possess immovable property, urban or rural, anywhere within the Empire, except the province of the *Hedjaz*, on submitting to the laws and regulations which govern Ottoman subjects themselves, as is hereinafter enacted.
>
> The provision does not apply to Ottoman subjects by birth who have changed their nationality, who will be regulated in this matter by a special Law".

The special law referred to in the proviso is the law of 25 *Rabi el Akhir* 1300 which is to the effect that Ottoman subjects who change their nationality with the permission of the Ottoman Government are in the same position in regard to the possession of immovable property in the Ottoman Empire as foreign subjects. Alexander changed his nationality with the permission of the Ottoman Government; he therefore came within the ambit of this provision. We have had the benefit of a long argument as to the effect of this law from Abcarius Bey and there are a few lawyers more qualified than he is to expound it. I am, however, unable to go the whole distance with him in his interpretation of this law. Relying on Muhammad Kadri Pasha's Book on the Code of Muhammadan Personal Law he says that the fourth Muhammadan impediment to inheritance is that which ousts an alien enemy. Now,

the origins of the law of 7 *Safar* and 25 *Rabi el Akhir* are well known. They were in fact enforced on a weakened Ottoman Empire by the Christian European powers who were desirous of protecting their interests in Palestine. It is difficult to believe that the sole object of these laws was to enable an alien enemy to inherit property seeing that at that period alien enemies, while they remained such even in the Christian States, were accorded very few legal rights. The laws themselves do not mention alien enemies, they refer throughout to foreign subjects. I am satisfied that those laws dealt with foreign subjects in the usual acceptance of the term and that the position of alien enemies in the Ottoman State was regulated as it is in other states by international law.

I have now to consider what new rights were conferred on foreign subjects or what impediments were removed by these laws. They provided that foreign subjects were entitled to possess immovable property. I agree however with the contention of the Respondents that this did not also involve the right to inherit because inheritance was still largely governed by the *Sharia* law and if it was the intention of the Ottoman Government by the law of *Safar* to confer also the right to inheritance I cannot but believe that the law would have specifically so said. Undoubtedly the right to possess gave the right to pass on to his heirs but it did not in my opinion give a foreign subject the right to inherit from his Ottoman ancestors. I am fortified in this interpretation by the judgment of the Beirut Court and by the instructions issued by the Ministry of Lands. The relevant words in the judgment are: "Whereas the said Alexander is a foreigner he does not inherit from him". The Beirut Court was well aware of these laws yet it did not find it necessary to qualify the word "foreigner" in any way. It is clear that in their opinion whatever rights of possession may have been given to foreigners by the recent laws they were given no rights of inheritance from Ottoman ancestors. This judgment was accepted without query by the Ministry of Lands from which I infer that the Ministry had equally little doubt as to the true purport of those laws. The Ministry was the Department which was charged with giving effect to the Land Laws, particularly in so far as they related to foreigners. It can therefore be presumed to have been thoroughly acquainted with the law of *Safar* and 25 *Rabi el Akhir* and it is unlikely that it would allow a patent mistake on the part of the Beirut Court to pass unchallenged. Moreover, there is no question of any collusion between the Ministry and Daoud Homsi. It appears to me, therefore, that the Ministry rightly interpreted the law and that the correction of the register did not involve, as the Appellant alleges, a mistake of law.

Apart from the arguments as to the merits the Respondents pleaded prescription as a defence. In view of the conclusion at which I have already arrived it is unnecessary for me to deal with this defence. I do so briefly because it re-enforces my opinion as to the merits. I do not doubt that in 1898 Alexander must have known of this corrected entry; yet no action has been taken by him until 1925 two years before his death. The Respondents alleged that Alexander was in Palestine in 1901. The Appellant says that he was not, that he was in the Russian Navy. It is common ground that he was here in 1906. He appears to have been treated as a prisoner during the 1914—1918 War. He came to Palestine again in 1919. There is evidence that he applied to the Court for exemption of fees in 1925; that is the only action he took in regard to this property, and in 1927 he was dead. Now, apart altogether from the technical issue of prescription, I cannot avoid asking myself the question, Why did Alexander never take any action? Even assuming he was away from Palestine from 1901 to 1906 we know that he had very influential contacts with the country. He was first secretary at the Russian Legation; he could easily have engaged a lawyer to look after his interests. More extraordinary still is the fact that he took no action between 1906 and 1914 or between 1919 and 1925. I find it difficult to resist the conclusion that the explanation is the one advanced by the Respondents that Alexander was well acquainted with the law in regard to the inheritance. He knew that with the law as it stood he could not successfully advance his claim. It may well be that in changing his nationality in 1887 Alexander did a grave disservice to his heirs including the Appellant with whom one cannot help feeling sympathy. But she is the victim of a law of the Ottoman Empire which, although it may not have conformed to British conceptions of justice, was the law of the country and in fact remained the law under the British Administration until it was revoked in 1923, and then not retrospectively, by the provision of section 24 of the Succession Ordinance. The learned President has taken the period of prescription as running from 1902, the date on which he was satisfied from the evidence of Exhibits D/13 and D/1 that Alexander was in Palestine. This date is certainly very favourable to the Appellant because it appears to me that the evidence justifies the inference that Alexander must have known of the alteration in 1908. It has been argued by the Appellant that she is entitled to claim the benefit of the provision of Article 79 of the Second Schedule to the Treaty of Peace (Turkey) Ordinance. If this is so and the dates taken by the learned Relieving President be accepted her claim would just avoid the prescription barrier. At first sight there

would appear to be substance in this argument because Article 79 is now part of a Palestine Ordinance and the article on the face of it suspends the prescription "in the territory of the High Contracting Parties" whereas the words "as between the High Contracting Parties" would more clearly express the interpretation contended for by the Respondents. The doubts I have had have been resolved by turning to the principal provision of the Ordinance which is section 2. From this I infer that the intention of the Legislature was to apply certain provisions of the Treaty to Palestine in order that the Parties to the Treaty could derive their benefits and fulfil their obligations under the Treaty in this territory. As Russia was not a party to the Treaty I agree with the Relieving President that Russian subjects cannot claim the shelter afforded by the Article.

For these reasons I am of opinion that the appeal should be dismissed with costs on the lower scale to include LP. 10.— advocate's attendance fees.

Delivered this 20th day of April, 1945.

Chief Justice.

Plunkett, A/J.: I concur.

British Puisne Judge.

CRIMINAL APPEAL No. 161/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Moussa Hussein Shawish & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Evidence — Conviction cannot be based on foot-prints only unless inference of guilt is irresistible.

Appeal from the judgment of the District Court, Jaffa, dated 13.9.45, in Criminal Case No. 19/45, whereby Appellants were convicted of attempted murder *contra* sec. 222(a) of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment each, allowed as regards Appellant No. 2:—

Conviction based on the sole evidence that accused passed near the scene of the crime at approximately the time of the crime, set aside.

(*A. M. A.*)

ANNOTATIONS: Opportunity to commit the offence is not proof of guilt nor even corroboration; see CR. A. 56/40 (7, P. L. R. 329; 1940, S. C. J. 241; 7, Ct. L. R. 200) and note 3 in S. C. J.

(*H. K.*)

FOR APPELLANTS: Habayeb.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

Abdallah Abdel Kader Hussein, hereinafter referred to as the second Accused, appeals from a judgment of the District Court of Jaffa, whereby he was convicted of attempted murder and sentenced to five years' imprisonment. Several grounds of appeal were urged by his advocate, one being that the deposition before the Magistrate of British Sgt. Gelman was wrongly admitted in evidence as there was not sufficient proof that he was not in Palestine. Because of the view that we take of this case we do not think it necessary to decide this point. In any event, the prosecution could have dispensed with the deposition of Sgt. Gelman because there was sufficient evidence with regard to the experiments made on the shoes of the second Accused given by a police tracker named Abul Ruz. We think that there can be no doubt that it was proved at the trial that the second Accused had passed near the house towards which shooting took place at some time approximating the time when the offence was committed. There was no evidence whatsoever against him except the fact that marks or traces of the shoes which he was wearing were found at a point three metres from the outside of the *hosh* in which the house in question was situated and at about six or seven metres from the door of the room at which shots were fired. There was evidence that several people had been involved in this shooting. There was nothing to prevent any persons on their lawful occasions from passing within seven metres from the door in question. Had the footmarks led right up to the door one might have said that there was an irresistible inference that the man wearing those shoes, in this case the second Accused, was one of the assailants. In view, however, of the fairly considerable distance from the door of the house at which the footsteps were seen, in view also of the fact that the footsteps were outside the *hosh* and in view also of the fact that there was nothing to prevent any number of legitimate passers by walking near this place, we are unable to hold that the inference that the second Accused was one of the assailants was an irresistible one. The appeal

of the second Accused is accordingly allowed, the conviction quashed and we order him to be set at liberty unless he is detained on another charge.

The first Appellant appeals against severity of sentence only. He was fortunate in not having been arraigned on a charge of murder and it is idle to suggest that the sentence of five years' imprisonment was excessive. His appeal is therefore dismissed.

Delivered this 10th day of October, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 59/45.

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

BEFORE: Edwards, A/C. J.

IN THE APPEAL OF:—

George Mikhail Abu Nassar & an. — APPELLANTS.

v.

Aziz Hanna Milki. — RESPONDENT.

Nature of statutory tenancy — Landlord requiring dwelling house for his own use — Alternative accommodation — Non-interference with finding of fact.

Appeal from the judgment of the District Court of Haifa, given on 27.1.45 in Civil Appeal 133/44, whereby the District Court reversed an order for eviction given against Respondent by the Magistrate's Court of Haifa in Civil Case No. 778/44 on 3.8.1944, allowed:—

1. (*Obiter*): A claim for eviction against statutory tenant under sec. 8(1)(c), Rent Restriction (Dwelling Houses) Ord. need not necessarily be filed on date of expiry of lease.

2. Tenant's right to remain on premises after expiry of tenancy period so long as legislative rent restrictions exist and he complies with the law does not mean automatic renewal of lease for a further equal period.

3. Landlord seeking eviction under sec. 8(1)(c) Rent Restriction (Dw. H.) Ord. must inform tenant that premises are reasonably required for occupation of himself, not necessary that there should be formal notice to quit in usual sense.

4. Time when alternative accommodation should be available not necessarily time when Court orders eviction.

5. Court of Appeal will not interfere with Magistrate's finding regarding alternative accommodation, unless finding unreasonable to extent that it should not be allowed to stand.

(*M. L.*)

ANNOTATIONS:

1. The District Court case appealed from *viz.* C. A. D. C. Haifa 133/44 is reported in the Selected Cases of 1945, p. 101.

2. On nature of statutory tenancy, see annotation to the case and authorities referred to and C. A. 19/43 (11, P. L. R. 270; 1944, A. L. R. 453) with annotations thereto in A. L. R.

3. On time when alternative accommodation should be available, see case followed (*supra*) and annotations in A. L. R.

4. On question of interference of Court of Appeal with finding of Court of trial in a matter under sec. 8(1)(c) of the R. R. (Dwelling Houses) Ord. see C. A. 398/49 (12, P. L. R. 55; 1945, A. L. R. 269) with annotations in A. L. R. Sharpe *v.* Nicolas, 2 All E. R. p. 55.

(*A. G.*)

FOR APPELLANTS: Elia.

FOR RESPONDENT: F. Atalla.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, in its appellate capacity, reversing a decision of one of the Magistrates of Haifa who had ordered the eviction of the present Respondent from a certain house in Haifa. The learned President of the District Court held that the present Respondent must be regarded as a statutory tenant to whom the provisions of section 8(1)(c) Rent Restrictions (Dwelling Houses) Ordinance, 1940, apply, and I accept that finding. The judgment of the District Court was delivered on 27th January, 1945, before Civil Appeal No. 2 of 1945 was reported (Annotated Law Reports (1945) p. 382), otherwise I have no doubt that on certain points the learned President would have come to a different conclusion.

It is not clear from the tenancy agreement (which was an oral one) when the tenancy commenced. Both the learned President and Mr. Atallah, the present Respondent's advocate, seemed to think that there should have been strict proof of the date when the original lease expired and the President also held that the statement of claim should have been filed on the date on which the period of the lease expired. This, however, is not so; but it is really unnecessary to discuss the matter once one realise that we are dealing with a statutory tenancy and once one keeps in view the implications of Civil Appeal 2/45, and the decided cases therein referred to. It is common ground that the original lease in the case before us was for a period of one year, nor is it denied that it was not renewed for another year, nor is it denied that

the Respondent had already been in occupation for over a year before the Appellants informed him that they required the premises for their own occupation. It is erroneous to suggest that after the original period of tenancy had expired, the contract of lease was automatically renewed for a period equal to the period of the original one. There is no renewal of the tenancy although the tenant is entitled to remain on the premises so long as the legislative restrictions of eviction continue to exist and so long as the tenant complies with the law. In this connection I refer to C. A. 179 of 1940 Vol. 7, P. L. R. pages 493 and 496, and to Woodfall on Landlord and Tenant (24th Edition) p. 294, and Hailsham Vol. 20, p. 334 paragraphs 400 and 401, and Aston *v.* Smith (1924) 2 K. B. p. 143. The learned President also thought that the present Appellants should have given the Respondents notice to quit. In this connection I think it desirable that I should refer to the words used by myself in Civil Appeal 2/45 (Annotated Law Reports, 1945, p. 384) when I said the Court must, before ordering eviction, be further satisfied that the landlord at or about the time of the tenancy gave notice to quit. When I said that I did not mean that there should be formal notice to quit in the usual sense. What I meant was that the landlord must inform the tenant that the premises are reasonably required for occupation by himself. I accordingly hold that the District Court was wrong on the points which I have just mentioned. The District Court next held that the time when alternative accommodation should be available was the time when the trial Court gave judgment for eviction. That this is not so is, of course, clear from Civil Appeal 2 of 1945.

There remains to consider the question whether the Magistrate was justified in holding that the landlord (the first Appellant) reasonably required the premises for occupation by himself and his wife and family. It seems not to have been denied that the first Appellant's work is now in Haifa while he was living in Nazareth at the time when he brought the action. In other words, he had daily to make the double journey backwards and forwards from Nazareth to Haifa. It was therefore not unreasonable for the Magistrate to find that the landlord required the premises for occupation by himself.

The sole remaining question is whether the Magistrate was justified in finding that the alternative accommodation offered by the landlord was in fact available and was sufficient for the tenant and that the tenant ought to have accepted it. The Magistrate went to a considerable amount of trouble and inspected not only the premises from which it was sought to evict the Respondent but also the alternative accommoda-

tion offered. He found that the house from which it was sought to evict the Respondent consists of three rooms and a hall and convenience, but he held that one of the rooms was not occupied and he therefore considered that the tenant himself deemed the house to be only a two-roomed house. Mr. Atallah has attacked this finding saying that the tenant was actually occupying this three roomed house and that nothing less than a three roomed house should have been offered to him. As against this there is the finding of the Magistrate which is supported by evidence as to the alternative accommodation offered. Mr. Atallah has suggested that the Magistrate was influenced in his judgment by the fact that the tenant was stubborn when at one time the Appellant asked to be allowed to occupy one room, which request the Respondent refused. I do not, however, think that the Magistrate's finding was perverse or influenced by wrong motives.

Mr. Atallah finally pointed to the fact that his client has a wife and nine children. Now, it may seem a hardship that so large a family should have to live in so small a house but I am faced with the finding of the Magistrate that when the Respondent was in the present Appellant's house he, in fact, occupied only two rooms. There was evidence in regard to the house of one Elias Abboud. This may be a borderline case and it may be that another Magistrate might have found that the alternative accommodation offered was not suitable; but I am not prepared to hold that the finding of the Magistrate was unreasonable to the extent that it should not be allowed to stand. I would add that Mr. Abboud gave evidence from which it appeared that his house was available. There is a clear finding by the Magistrate that Abboud's house consists of two large rooms and that it was reasonable that he should accept it. Abboud gave evidence that, although he asked the present Respondent to visit the house, he refused to do so. I therefore think that the Magistrate was justified in holding that the present Respondent's refusal was unreasonable. In the result I set aside the judgment of the District Court and restore the judgment of the Magistrate. The Respondent will pay the Appellant's costs of this appeal, namely, fixed costs of LP. 10.

Delivered this 8th day of October, 1945.

Acting Chief Justice.

CIVIL APPEALS Nos. 16—24/45.

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

BEFORE: Shaw, J.

IN THE APPEALS OF :—

Bracha Ben Ya'acov & ors. APPELLANTS.

v.

Joseph Forer. RESPONDENT.

Illegal disposition of land — Buildings in common ownership (batim meshutafim) — Impossibility of registering building separately from the land — Purchase of flats — L. T. Ord., secs. 4, 11, 12 *— Enforcement of illegal contracts — Transfer to trustees, H. C.* 77/31, *sec.* 5 *L. T. O. — Rent Restriction protection — Equitable lien.*

Appeals from the judgment of the Land Court, Tel-Aviv, (R/P Judge Hubbard), dated 21.12.44 in Land Cases Nos. 16—24/44 consolidated, dismissed:—

1. A flat cannot be bought by registering in the name of the purchaser a *musha'a* share in the land, and agreeing that he should have exclusive use of a specified part of the building. Such an agreement is illegal and cannot be enforced.

2. Registration in the name of trustee is not possible in Palestine.

3. A purchaser under an illegal agreement is not protected by the Rent Restriction legislation, although he may be paying "equivalent rent".

4. There is no equitable lien for the return of purchase price under an unenforceable agreement.

(*A. M. A.*)

REFERRED TO: H. C. 77/31 (1, P. L. R. 735; 5, R. 1813).

ANNOTATIONS:

1. See the previous proceedings between the parties: C. A. D. C. T. A. 98/43 (1944, S. C. D. C. 108), quashed in C. A. 110/44 (11, P. L. R. 422; 1944, A. L. R. 576) and C. A. 389/44 (12, P. L. R. 240; *ante*, p. 430), leave to appeal refused in P. C. L. A. 15/45 (*ibid.*, pp. 317 & 515) and the notes to those cases in A. L. R.

2. *Cf.* C. A. 231/43 (1943, A. L. R. 546) for another case of a "sale" of a flat in building.

3. On illegal agreements generally see note in A. L. R. to C. A. 461/44 (12, P. L. R. 77; *ante*, p. 303); *vide* particularly C. A. 99/44 and C. A. 376/44 therein cited and notes thereto.

4. On private trusts and the ruling in H. C. 77/31 (*supra*) see also C. D. C. T. A. 125/43 (1945, S. C. D. C. 265 at pp. 269—270) and note 3.

5. The ruling on the third point is in accordance with that in C. A. 104/45 (*ante*, p. 572).

(*H. K.*)

FOR APPELLANTS: Eliash and Scharf.

FOR RESPONDENT: Goitein.

JUDGMENT.

These nine appeals have been consolidated under the provisions of Rule 304 of the Civil Procedure Rules, 1938, but Mr. Eliash has asked that each appeal be dealt with on its merits and that care be taken that no one appeal be allowed to be prejudiced by the demerits of another.

Various points have been taken on appeal, but the real question in each case is whether the contract between the Appellant and the Respondent was void or not. Nine separate actions were instituted in the Court below by the Respondent against the present Appellants. The corresponding numbers are as follows:—

Supreme Court No.	*Appellant*	*Land Court No.*
16/45	Bracha Ben Ya'acov	16/44
17/45	1. Nissim Mirakov Cohen	24/44
	2. Malkiel Mirakov Cohen	
18/45	Dov Guterman	23/44
19/45	1. Bluma Vortman	22/44
	2. Ya'acov Vortman	
20/45	Benjamin Mann	21/44
21/45	Esther Mamnov	17/44
22/45	Reuven Lev	20/44
23/45	Meir Wind	18/44
24/45	Gershon Mabovitz	19/44

Mr. Eliash has given an outline of the circumstances leading up to the present appeal. He has told the Court that the demand for flats which can be owned for life has given rise to the erection of buildings known as *"Bayit Meshutaf"*, which he translates as meaning "a house of common ownership". Such a building is put up by a capitalist contractor, who then proceeds to sell the land and building to purchasers who are each allotted a separate flat and who have the common use of certain parts of the building such as the staircase. Such a building is sometimes erected cooperatively.

It may be observed here that both parties agree that under the present law it is not possible to obtain a title-deed for a particular flat in a building. In other words a building cannot be registered separately from the land on which it stands.

To return to what Mr. Eliash has told the Court — he says that whether the building is erected cooperatively, or by a capitalist contractor, the registration is eventually effected either in the name of a

committee of two or three tenants, or in the name of a cooperative society formed of all the tenants, or each purchaser obtains a registered undivided (*musha'a*) share in the house and land in the ratio which the number of rooms in his flat bears to the total number of rooms in the building. The result aimed at is that each purchaser should acquire a particular flat for life, together with the common use of certain portions of the building.

This, of course, is clearly a device (I do not use the word in any sinister sense) for overcoming the difficulty arising from the fact that the present law does not allow the registration of a building separately from the land on which it stands. It is obviously not morally wrong on the face of it, or against public policy, that anyone should wish to obtain a flat in which he can reside for life. On the contrary, it seems to be a very reasonable ambition. The only question is whether the present Appellants, when they entered into contractual relations with the Respondent for this quite reasonable purpose, made contracts which were valid in law. If the agreements which they made were void then, of course, these appeals must fail, and the Respondent must be held still to be the owner of the land and the building, and entitled to exercise his rights as owner.

As all of the agreements are not in identical terms I think it is advisable for me to refer briefly to their salient features so far as is necessary for the purpose of these appeals.

C. A. 16/45 — *Land Case* 16/44 — *Contract dated* 21.5.39.

The preamble refers to a house of common ownership consisting of 10 flats and containing 26 rooms, and it sets out that the first party (*i. e.* Respondent) has agreed to sell and the second party (*i. e.* Mrs. Bracha Ben Ya'acov) has agreed to purchase a flat.

Art. 1 provides that the first party undertakes to sell and to transfer to the second party a part of the above plot (referred to in the preamble) consisting of an area to be in proportion to the number of rooms to be owned together with the other flat-owners. It further provides that the first party undertakes as well to sell and to hand over to the second party a flat containing three rooms, a kitchen, a bathroom and a W. C., and also, together with the other flat-owners, the staircase, washing-room, the garden and the roof.

Art. 2 states that the price of the above flat has been fixed by both parties at LP. 500, and that the second party undertakes to pay LP. 200 in cash at the time of signing the contract, and LP. 300 in cash at the

time of transfer of the plot and building at the Land Registry Office to the names of two or three of the purchasers of the flats in the above building of common ownership.

Art. 3 states that the second party has seen the flat and has agreed to purchase it.

Art. 4 speaks of the handing over of the flat in good condition, repaired and arranged as requested by the second party.

Art. 5 empowers the second party to sell and hand over the flat to another person without the consent of the first party.

Art. 6 provides that the first party undertakes to transfer the above plot and the whole building thereon to the name of two or three of the purchasers of the flats in the house of common ownership, who will hold it in favour of all the purchasers of the flats in the above house, during 10 days from the day when the request will be made by the purchasers of the flats, and not later than 1.12.39.

It may be observed here that this contract is the last in date.

Art. 8 provides for damages for a breach of the contract.

C. A. 17/45 — *Land Case* 24/44 — *Contract dated* 8.8.38.

The preamble refers to a house of common ownership and to the fact that the second party (Malkiel and Nissim Mirakov Cohen) has agreed to purchase a flat.

Art. 1 provides that the first party undertakes to sell and transfer part of the plot (described) consisting of an area to be in proportion to the number of rooms to be owned together with the other flat-owners. It further provides that the sale includes also part of the building erected on the above mentioned plot, namely, it includes a flat in the third floor consisting of three rooms, a kitchen, bathroom and W. C. and also, together with the other flat-owners, the staircase, washing-room, the garden and the roof, which the first party has to place at any time at the disposal of the purchaser as common owners.

Art. 2 states the price of the flat to be LP. 600 and fixes the instalments.

Art. 3 speaks of the transfer in the *Tabu* of the building in the name of all the purchasers.

Art. 4 speaks of the handing over of the flat at the time required by the second party and not later than two weeks from the signing of the contract.

Art. 5 speaks of the transfer at the Land Registry of the aforesaid

plot and the whole of the building erected thereon to a committee, or to a cooperative society of the house in common ownership, which shall be formed by all the flat-owners, at any time that he (*i. e.* the first party) will be required to do so by any of the flat-owners. It further provides that in the event of such committee or cooperative society not being formed within one year from the day of signing the contract the first party shall transfer to the second party his share in the plot and building as *musha'a*.

Art. 9 provides that the second party shall be entitled to hand over or to sell the aforesaid flat to another without the consent of the first party.

Art. 12 provides for liquidated damages for breach of the agreement.

C. A. 18/45 — *Land Case* 23/44 — *Contract dated* 6.7.38.

The preamble states that the first party has built a house of common ownership and has offered to sell to the second party a flat in the aforesaid house.

Art. 1 provides that the first party undertakes to sell and to transfer to the second party a part of the plot (described) consisting of an area to be in proportion to the number of rooms to be owned together with the other flat-owners. It further states that the contract of sale includes also a part of the building erected on the above mentioned plot, namely, a flat in the second floor consisting of three rooms, a kitchen, a bathroom and W. C., and also, together with the other flat-owners, the staircase, washing-room, the garden and the roof.

Art. 2 fixes the price of the flat at LP. 500 and provides for the manner of payment.

Art. 3 speaks of the handing over of the flat not later than one week from the day of signing the contract.

Art. 4 provides that the first party undertakes to transfer at the Land Registry the aforesaid plot and the whole of the building erected thereon to a committee or to a cooperative society of the house in common ownership, which shall be formed by all the flat-owners.

Art. 9 provides that the second party shall be entitled to hand over or sell the aforesaid flat to another without the consent of the first party.

Art. 11 provides for damages for breach of the agreement.

C. A. 19/45 — *Land Case* 22/44 — *Contract dated* 9.11.37.

The preamble states that the first party builds a house in common

ownership and agrees to sell to the second party a flat in the said house, consisting of three rooms, a kitchen, a bathroom and W. C., that is to say three shares out of 26 shares in which the house is divided, together with the plot of land and three shares out of 26 — to build a fourth floor (*sic*) — in accordance with the plan certified by the Municipality of Tel-Aviv. It further states that the second party agrees to purchase this flat.

Art. 1 provides that the second party undertakes to pay for the said flat LP. 600 and it fixes the instalments.

Art. 4 provides that if the second party breaks the contract by non-payment of the bills the first party will be entitled to sell the flat to another person on account of the second party.

Art. 5 provides that the first party will transfer in the Land Registry all the building in the name of the committee which the partners will elect.

Art. 10 provides that the second party is entitled to hand over or to sell the flat to another.

Art. 11 provides that the second party undertakes to obey the decisions given by the majority of the partners to this house which is owned in common.

Arts. 12 & 13 provide for damages for breach of the contract.

C. A. 20/45 — *Land Case* 21/44 — *Contract dated* 1.2.38.

The preamble states that the first party has built a house of common ownership and agrees to sell to the second party a flat consisting of two rooms, a kitchen, bathroom and W. C.

Art. 1 provides that the second party agrees to pay for the said flat LP. 500 and fixes the instalments.

Art. 8 provides that the second party is entitled to hand over or to sell the flat to another.

Arts. 9 & 10 deal with the question of damages for breach of the contract.

At the end of this contract there is a paragraph which states that the first party will transfer, in the Land Registry, all the building in the name of the committee which will be elected by all the members, at any time required.

C. A. 21/45 — *Land Case* 17/44 — *Contract dated* 26.5.38.

The preamble states that the first party has built a house of common

ownership and has offered to the second party a flat in the aforesaid house which the second party has agreed to purchase.

Art. 1 provides that the first party hereby undertakes to sell and to transfer to the second party part of the plot (described), consisting of an area to be in proportion to the number of rooms to be owned together with the other flat-owners. It further provides that the sale includes also part of the building erected on the above-mentioned plot, namely, it includes a flat in the second floor consisting of three rooms, a kitchen, bathroom and W. C., and also together with the other flat-owners the staircase, washing-room, the garden and the roof, which the first party has to place at any time at the disposal of the purchaser as common owner.

Art. 2 fixes the price of the aforesaid flat at LP. 550, and states the instalments.

Art. 3 speaks of the return of a certain bill to the first party on the day of the transfer in the *Tabu* of the building in the name of all the purchasers.

Art. 4 provides for the handing over of the flat at the time required by the second party and not later than two weeks from the signing of this deed.

Art. 5 provides that the first party undertakes to transfer, at the Land Registry, the aforesaid plot and the whole of the building erected thereon to a committee or to a cooperative society of the house in common ownership, which shall be formed of all the flat-owners, at any time that he will be required to do so by any of the flat-owners. It further provides that in the event that such a committee or cooperative society shall not be formed within one year of the date of signing the deed, the first party shall transfer to the second party his share of the plot and the building as aforesaid *musha'a.*

Art. 9 provides that the second party shall be entitled to hand over or to sell the aforesaid flat to another party without the consent of the first party.

Art. 12 provides for damages in the event of breach of the agreement.

C. A. 22/45 — *Land Case* 20/44 — *Contract dated* 6.10.37.

The preamble states that the first party is building a house of common ownership and has agreed to sell to the second party a flat consisting of two rooms, kitchen, bathroom and W. C.

Art. 1 provides that the second party agrees to pay for the above flat the sum of LP. 500 in the manner stated.

Art. 7 provides that the first party is entitled to sell the flat to another without asking for the consent of the second party, and to pay to the second party the amount which he invested in the flat.

Art. 13 provides that the second party shall be entitled to hand over or to sell the flat to another.

Arts. 14 & 15 deal with the question of damages for breach of the contract.

C. A. 23/45 — *Land Case* 18/44 — *Contract dated* 15.5.39.

The preamble sets out that the first party has built a house of common ownership and has offered to sell to the second party a flat which the second party has agreed to purchase.

Art. 1 provides that the first party undertakes to sell and to transfer to the second party part of the plot (described) consisting of an area to be in proportion to the number of rooms to be owned together with the other flat-owners. It further states that this agreement of sale includes also part of the building erected on the above mentioned plot, namely, a flat in the first floor consisting of three rooms, a kitchen, bathroom and W. C., and also, together with the other flat-owners, the staircase, *etc.*

Art. 2 provides that the price of the flat is fixed at LP. 550 payable in the manner stated.

Art. 3 provides that the first party undertakes to hand over to the second party the above flat not later than three months from the date of the contract and fixes damages in the event of delay.

Art. 4 provides that the first party undertakes to transfer at the Land Registry the above plot and the whole of the building erected thereon to the committee or the cooperative society of the house owned in common, which will be formed by all the flat-owners.

Art. 8 provides that the second party shall be entitled to hand over or to sell the flat to another party without the consent of the first party.

C. A. 24/45 — *Land Case* 19/44 *Contract dated* 17.2.39.

The preamble states that the first party has built a house of common ownership, and has offered to the second party a flat which the second party has agreed to purchase.

Art. 1 provides that the first party hereby undertakes to sell and to transfer to the second party part of the plot (described), consisting of

an area to be in proportion to the number of rooms to be owned together with the other flat-owners. It further provides that the sale includes also part of the building erected on the above-mentioned plot, namely, a flat in the third floor consisting of two rooms, a kitchen, bathroom and W. C., and, together with the other flat-owners, the staircase, *etc.*

Art. 2 fixes the price of the flat at LP. 450 and states the manner of payment.

Art. 4 provides that the first party undertakes to transfer at the Land Registry the aforesaid plot and the whole of the building erected thereon to a committee or to a cooperative society of the house in common ownership, which shall be formed by all the flat-owners, at any time that he will be required to do so by any of the flat-owners.

Art. 8 provides that the second party shall be entitled to hand over or to sell the aforesaid flat to another without the consent of the first party.

Art. 9 provides for damages for breach of the agreement.

Now it is, I think, abundantly clear that in each case the Appellant (purchaser) has agreed to purchase a flat. That was the principal object of the agreement in each instance, and the price was fixed on the understanding that the purchaser was to have a flat which would be his property, and which he could dispose of as he pleased. In no case would the purchaser have been willing to pay the price fixed if he were only to have a *musha'a* share in the house and land with no certainty of getting a flat to live in.

If the purchaser had tried to obtain registration of a flat he would have been told by the Registrar of Lands that such registration was not allowed by law. Section 11 of the Land Transfer Ordinance (Cap. 81) provides that every disposition to which the consent required by section 4 has not been obtained shall be null and void, and section 12 of the same Ordinance provides that:—

> "If any person is a party to any disposition of immovable property which has not received the consent required by section 4 and either enters into possession, or permits the other party to enter into possession, of the immovable property, whether by himself or any person on his behalf, he is guilty of an offence and is liable to a fine of one fourth of the immovable property".

The purchasers told the trial Court, and Mr. Eliash has made it equally clear to this Court, that the purchasers are quite willing to take *musha'a* shares in the land and building without any stipulation as to specific flats. But it is not the case here that the vendor agreed to sell and the purchasers to take, collectively, undivided shares in the whole

of the land. There are nine separate agreements, made on different dates and not in identical terms, and it is not possible now to convert them into one collective agreement.

In Chitty on Contracts (18th Ed.) the following passage appears at p. 740:—

> "Where a contract which can be performed legally is sought to be avoided on the ground that the parties intended to perform it in an illegal manner, it is necessary to show that they knew what the law was and intended to break it. But once the conclusion is reached that the real intention of the parties was illegal the contract will not be enforced. Notwithstanding that there may be in certain events alternative methods of perofrmance which would be legal".

There is no suggestion that the parties did not know that they could not obtain registration of specific flats. If they had thought that they could they would have drafted the contracts differently. The principal object in each instance was to obtain possession of a flat, and such a flat could not legally be transferred without the land beneath it. There was, at best, an intention to effect a registration which would not disclose the real transaction, namely, the transfer of a flat.

With regard to the agreements which visualised a possible transfer to persons who would, in effect, be trustees, the learned trial Judge found that no committee was ever formed with the consent of all the flat-owners, and that is a finding of fact which I find no ground for upsetting. Furthermore, it is agreed that such persons could not, as the law stands at present in Palestine, have been registered as trustees, and I am not impressed by Mr. Eliash's argument that although they could not be registered as trustees they could, in every other respect, be treated as such. It was held in H. C. 77/31 (1, P. L. R. p. 735) that the doctrine of private trusts has not been introduced into the law of Palestine. In my judgment if such persons had asked for registration they could only have done so as nominees, in which case section 5 of the Land Transfer Ordinance (Cap. 81) would have required registration to be made in the name of the principals. But here again I would observe that it is not a case of one agreement to which all of the purchasers are parties but of nine separate agreements. The Appellants cannot, by combining together now, convert nine separate agreements, which were intended to put them into possession of specific flats, into one collective agreement for the transfer of undivided shares in land or into nine identical agreements to each of which each of the Appellants has given his or her consent.

Certain of the agreements speak of a cooperative society, but no such society was ever formed.

The only other point to which I need refer is the submission that the Appellants are entitled to the protection of the Rent Restriction (Dwelling Houses) Ordinance, No. 44 of 1940. On this point I find myself in agreement with the learned trial Judge who said:—

> "They themselves maintain that they are owners, the manifest intention of the agreements was to sell to them and they have never proved or alleged any taking on hire of the flats. The fact that they were adjudged to pay equivalent rent because they were occupying the lands without the consent of the Plaintiff obviously cannot give them the right to maintain that they are tenants".

The Rent Restrictions (Dwelling Houses) Ordinance only applies (see section 3) — "to a house, or any part of house *let*".

I also agree with the trial Judge that an equitable lien for the return of purchase money can only arise when there was an enforceable contract.

In the result, therefore, I find that these nine contracts are all illegal and void. The appeals fail and must be dismissed with one set of costs on the lower scale, to include LP. 50 (fifty) advocate's fees for attendance at the hearing to be paid by the Appellants in equal shares.

Delivered this 26th day of September, 1945, in the presence of Mr. M. Eliash for Appellants and in the presence of Mr. E. D. Goitein for Respondent.

British Puisne Judge.

HIGH COURT No. 58/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Mulhim Abdel Fattah Hamdan & an. PETITIONERS.

v.

The Assistant Chief Execution Officer, Jaffa & 6 ors. RESPONDENTS.

Order of dispossession from land — Declaration by Special Commission that judgment debtor a statutory tenant — Non-interference of High Court.

Return to a rule *nisi*, issued on the 19th of July, 1945, directed to the Respond-

ents, calling upon them to show cause why the order of the first Respondent in Execution File, District Court, Jaffa No. 64/45, dated the 4th day of July, 1945, and the execution proceedings in the said file should not be set aside and the land delivered to the Petitioners, order *nisi* discharged:—

1. Normal and well established practice of High Court not to interfere when act complained of already completed.

2. Delay in applying to special Commission may be fatal to person wishing to remain on land after judgment for dispossession.

3. Where subsequent to execution of dispossession from land judgment debtor obtained a declaration from Special Commission that he is a statutory tenant, he may bring an action to recover possession.

(*M. L.*)

FOLLOWED: H. C. 78/39 (7, P. L. R. 35; 7, Ct. L. R. 45; 1940, S. C. J. 25); H. C. 56/33 (2, P. L. R. 15).

ANNOTATIONS: For former proceedings see C. A. 384/44 (12, P. L. R. 87; 1945, A. L. R. 200); as to the first point see in addition to cases followed, also H. C. 17/43 (1943, A. L. R. 190) with annotations thereto.

(*A. G.*)

FOR PETITIONERS: Yifrach.

FOR RESPONDENTS: No. 1 — No appearance.
Nos. 2—7 — Elia.

ORDER.

This is a return to an order *nisi*, dated 19.7.45 calling upon the Respondents to show cause why the order dated 4.7.45 of the first Respondent, in Execution file No. 64/45 of the District Court, Jaffa, and the execution proceedings in the said file, should not be set aside and the land delivered to Petitioners.

The Petitioners had been unsuccessfully sued for recovery of possession in the Magistrate's Court. The case was appealed to the District Court, Jaffa, which allowed the appeal. The judgment of the District Court contains the following passage:—

> "It was decided to set aside the judgment (of the Magistrate) and to give judgment against them (Respondents in the District Court) for dispossession from the land in dispute. This naturally does not affect their right of cultivation when they will prove it before the said commission even if this judgment becomes final. By mere production by them to the Execution Officer of a proof of their rights of cultivation the Execution Officer shall not be entitled to execute this judgment".

The Petitioners appealed to the Court of Appeal and their appeal was dismissed on 7.2.45 (see Civil Appeal No. 384/44, 12 P. L. R. p. 87). Execution proceedings started on 15.3.45 and the Respondents, Nos. 2 to 7, were put into possession on 16.5.45.

In High Court Case 36/45 the Petitioners had asked, *inter alia*, for a stay of proceedings in Execution file No. 64/45 pending the decision of the Special Commission, but an order *nisi* was refused on 25.5.45.

On 22.6.45 the Petitioners obtained from the Special Commission a declaration that they had been statutory tenants since 1936. They had made their application to the Special Commission on 14.2.45 — that is to say, after judgment had been given by the Supreme Court.

I find that this petition fails for several reasons. In the first place the Petitioners delayed in going to the Special Commission. The District Court gave its judgment on 19.7.45, and it must then have been obvious to the Petitioners that they would have to get a declaration from the Special Commission if they wished to stop execution.

Secondly, the Respondents have already been put into possession and the normal and well established practice of this Court is to refuse to interfere when the act complained of is already completed (H. C. 78/39, 7, P. L. R. p. 35). In H. C. 56/33 (2, P. L. R. p. 15) the Court said:—

> "The order of the Chief Execution Officer had already been carried into effect when this petition was filed. It is not within the discretion of this Court to make an order restoring to the Petitioners possession of the land from which they have been evicted by virtue of that order. The petition is dismissed".

Thirdly, Mr. Elia has submitted, and I at present see no reason for disagreeing with him, that if the declaration of the Special Commission is not set aside on appeal, the Petitioners will be able to bring a fresh possessory action. That is to say they will have another remedy.

I therefore dismiss this petition with fixed costs in the sum of LP. 10. The order *nisi* is rescinded.

Given this 27th day of September, 1945, in the presence of Mrs. Rubinstein for Petitioners and in the presence of Mr. Wittkowsky for Respondents.

British Puisne Judge.

HIGH COURT No. 64/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF :—

Cyla Faigenblatt. PETITIONER.

v.

Assistant Execution Officer, District Court, Tel-Aviv & an. RESPONDENTS.

Rabbinical Court giving mother custody of child — Order by Magistrate under Juvenile Offenders Ord. that child should remain in institution — C. E. O. considering it in interest of child not to execute judgment of Rabbinical Court.

Return to an order *nisi*, issued on the 27th of July, 1945, directed to the 1st Respondent, calling upon him to show cause why his order dated 16th July, 1945, should not be set aside and why he should not execute the judgment of the Chief Rabbinate of Tel-Aviv—Jaffa given on the 10th June, 1945 against the 2nd Respondent, made absolute:—

1. Where Petitioner to High Court did not intend to conceal facts and order *nisi* had to be issued anyhow in view of complication of case and necessity to hear both parties, failure to set out certain facts — not fatal to petition.

2. After having consented to jurisdiction of Rabbinical Court party cannot object to jurisdiction in later proceedings unless these are entirely separate from and not a continuation of earlier case.

3. Chief Execution Officer not entitled to substitute his judgment for that of Rabbinical Court, nor can he refuse execution of judgment of Rabbinical Court given within limits of their jurisdiction and not contrary to natural justice.

(*M. L.*)

ANNOTATIONS:

1. On affidavit concealing relevant facts see H. C. 110/43 (10, P. L. R. 644; 1943, A. L. R. 791).

2. On question of estoppel of party to jurisdiction of Religious Court see Misc. App. 28/44 (11, P. L. R. 396; 1944, A. L. R. 807) and annotations in A. L. R.

3. As to point No. 3 see H. C. 88/43 (10, P. L. R. 494; 1943, A. L. R. 542) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONER: Hochman.

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

ORDER.

This is a return to an order *nisi*, calling upon the first Respondent to show cause why his order dated 16.7.45, should not be set aside, and why he should not execute the judgment of the Chief Rabbinate of Tel-Aviv—Jaffa given on 10.6.45 against the second Respondent.

The facts appear to be as follows. In December 1936, the Petitioner and the second Respondent were married in Tel-Aviv. In 1937 a

daughter (Shlomit) was born of the marriage. Subsequently disputes arose between the couple, but they continued to live together till about the middle of 1944. Then the parties agreed to separate, and they entered into an agreement dated 13.6.44 (Exh. A to the affidavit dated 29.8.45 of the second Respondent) which was, on the same date, made a judgment of the Chief Rabbinate for Jaffa and Tel-Aviv District. The agreement provided, *inter alia,* that the parties should be separated by a bill of divorcement and separation; that they should put the girl into an institution; that all necessary payments for her maintenance, *etc.* should be paid by the second Respondent till she reached the age of eighteen years; that the second Respondent should pay the Petitioner LP. 504 as *"Ketuba"* and in settlement of all her claims against him; and that any disputes between the parties in regard to their daughter should be referred to Mr. Zeev Stern whose decision would be binding upon the parties.

The girl was put into various institutions at different times. The Petitioner made a further application to the Chief Rabbinate in 1944 asking that she should be given the custody of the girl and that the second Respondent should be ordered to pay maintenance for her. The second Respondent was summoned before the Chief Rabbinate, and he appeared on two or three occasions. In his affidavit (see Clause 5) the second Respondent states:—

> "I was asked by the Rabbis whether I agree to transfer the girl Shulamit to another institution, and I said I refused, and that there is no room for argument on this question, after the judgment dated 13.6.1944".

The affidavit sets out that the second Respondent appeared at the Chief Rabbinate on 21.9.44 and on 19.10.44. On 20.11.44 (See Exh. "C" annexed to the affidavit of the second Respondent) Mr. Hochman, advocate for the Petitioner, wrote a letter to the second Respondent which reads as follows:—

> "I am hereby to inform you that Mrs. Cyna Feigenblatt, consents to receive the girl Shulamit, and maintain her on her account, without any payment from your part, this as you have already agreed upon.
>
> For the above, I hereby ask you to come to my office on Thursday 23.11.44 at 6 *p. m.* or to inform me if that time is not convenient for you".

The second Respondent sent no reply to that letter.

In December, 1944, the Probation Officer having been approached in the matter (by whom it is not clear) took action under section 16 of the Juvenile Offenders Ordinance No. 2/37, and this resulted in a

judgment dated 16.3.45 by the Magistrate, Tel-Aviv, in Case No. 10305/44 (see Exh. B). The learned Magistrate took the view that it would be better for the girl to remain (where she then was, in an institution at 'Ein Shemer), and he gave an order accordingly, and further directed that the second Respondent should pay LP. 15 per month for the maintenance of the girl in that institution.

On 27.5.45 the Petitioner took the girl from that institution, and since that date the girl has remained with her.

On 10.6.45 the Chief Rabbinate gave the judgment (Exh. 1 annexed to the petition) which the Chief Execution Officer has refused to execute. That judgment (which was made for a period of one year) directed that the girl should remain with the Petitioner, and that the second Respondent should pay to the Petitioner a monthly sum of LP. 10 for the maintenance and education of the girl. In the course of its judgment the Rabbinical Court stated:—

> "Mr. Shabatai Greifman (*i. e.* second Respondent) after having been summoned three times to appear before us, and having been warned that if he fails to appear we shall hear the case in his absence, has failed to appear before us".

Mr. Livay, for the second Respondent, has resisted the petition on several grounds. The first is that the Petitioner, when she came to this Court, did not disclose important facts. Although it is true that the Petitioner did not set out all of the facts which preceded the judgment of the Rabbinical Court I do not think that she intended to conceal those facts. I think, moreover, that the Court would have had to issue the order *nisi* even if it had been told all of those facts. The matter is a rather complicated one, and it could not have been disposed of without hearing both parties.

The second point raised is that the second Respondent did not consent to the judgment of the Rabbinical Court. In his affidavit in reply the Respondent did not state that he had objected to the jurisdiction of that Court, and he admittedly appeared at least twice before it. Again, when he appeared before the Chief Execution Officer, the second Respondent did not say that he had objected to the jurisdiction of the Rabbinical Court, and the reason given by the learned Chief Execution Officer for not executing the judgment was not that the Rabbinical Court had no jurisdiction, or that the judgment was contrary to natural justice, but simply that it was better for the girl to be in the institution.

I would observe at this point that I am unable to find that such a reason was a good one for refusing execution. The Chief Execution Officer was not sitting in appeal from the judgment of the Chief Rab-

binate. He could not substitute his judgment for that of the Chief Rabbinate.

I cannot find that the second Respondent objected to the jurisdiction of the Chief Rabbinate. When he consented to the judgment of 13.6.44 (Exh. A) he clearly did not object to the jurisdiction of the Rabbinical Court, and it is difficult to regard the later proceedings as being entirely separate from and not a continuation of the earlier ones. I have been informed that before the judgment dated 13.6.44 was given there had been several hearings in the Chief Rabbinate.

The third point is that the Petitioner had an alternative remedy in that she might have proceeded under section 16(4)(f) of the Juvenile Offenders Ordinance. I am not impressed by this submission, and in view of the provisions of section 7(b) of the Courts Ordinance No. 31/40 I consider that it was open to the Petitioner to come to this Court.

In the fourth place Mr. Livay submits that the circumstances of this case do not justify the interference of the High Court. It was, I consider, unfortunate that the matter was brought before the Magistrate while it was *sub judice* in the Chief Rabbinate. In saying that I do not imply any criticism of the learned Magistrate or of the Probation Officer. The Chief Rabbinate had not given any final decision upon the claim which the Petitioner has made in or about September, 1944.

The second Respondent did not submit any appeal from the judgment dated 10.6.45 (Exh. 1) of the Chief Rabbinate. The learned Magistrate himself appears to have held the view that the Chief Rabbinate could modify the judgment dated 13.6.44 (Exh. A) since he says with reference to it:—

> "If the mother wants to annul it she has to apply to the same Court which has fixed the relations between her and her husband".

The Petitioner *had* applied to that Court, and it was for the Rabbinical Court of Appeal to say whether the judgment dated 10.6.45 was good in law, and as I have already observed the second Respondent did not take the judgment to the Rabbinical Court of Appeal.

The only judgment which the Chief Execution Officer had before him was that dated 10.6.45. He was not required to consider the judgment of the learned Magistrate because that was not filed before him for execution. The girl was in the custody of the Petitioner, and had been with her since 27.5.45. The judgment which the Chief Execution Officer was asked to execute was, apparently, a judgment validly given by the Rabbinical Court which decided that the girl should remain with her mother, and that the Respondent should pay maintenance for her.

I cannot suppose that the Rabbinical Court would have given such a judgment without considering what was best for the child, and I do not think that it was open to the Chief Execution Officer to substitute his judgment for that of the Rabbinical Court. His duty was to execute the judgment, and I find that he erred in refusing execution.

I am not at present called upon to deal with the judgment dated 16.3.45 of the Magistrate's Court, Tel-Aviv, but the question whether any, and if so what, action can or ought to be taken to enforce that judgment is one which will call for very careful consideration. The judgment does not set out circumstances which could give rise to action under section 16(1)(g) of the Juvenile Offenders' Ordinance, which is one of the provisions of law under which the learned Magistrate purported to act. That sub-section provides for the bringing before a Juvenile Court of any person apparently under the age of sixteen years who:—

> "Is lodging or residing in a house or the part of a house used by any prostitute for the purpose of prostitution, or is otherwise living in circumstances calculated to cause, encourage, or favour the seduction or prostitution of the child or young person".

I would myself be most averse to taking a girl of eight years away from her mother in the absence of very strong evidence showing that the mother is unfit to have her custody. There has been no suggestion that the girl should stay with her father — the choice is between her mother and an institution. The girl was in Court when I heard this petition. She did not appear to be neglected, and she seemed to be happy with her mother. It is stated that she is being educated. She has been with her mother now for over four months, and it appears to me to be undesirable that she should be subjected to another change of custody if it can reasonably be avoided.

In the result the order *nisi* must be made absolute, and a direction must issue to the first Respondent to execute the judgment dated 10.6.45 of the Chief Rabbinate.

A copy of this order will be sent to the Attorney General for information.

The Petitioner will have fixed costs in the sum of LP. 10 (ten pounds) to be paid by the second Respondent.

Given this 14th day of October, 1945, in the presence of Mr. Caspi (by delegation from Mr. Hochman) for Petitioner and Mrs. Stern (by delegation from Mr. Livay) for Respondents.

British Puisne Judge.

HIGH COURT No. 28/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Shimon Dov Lande. PETITIONER.

v

Chairman & Members of the Rent Tribunal, Lydda District, Tel-Aviv & an. RESPONDENTS.

Question of separate dwelling for purposes of section 3, Rent Restrictions (Dwelling Houses) Ord. — Decision of Rent Tribunal that sec. 3 applies — Scope of sec. 5(5) of the Ord. — Indirect alternative remedy not barring way to High Court.

Return to an order *nisi*, issued on the 23rd of March, 1945, directed to the first Respondents, calling upon them to show cause why they should not cancel their decision, dated 11th February, 1945, in File No. 8/45 and why they should not decline from dealing with the second Respondent's application against Petitioner in the said file, discharged:—

1. a) Before deciding upon question of rent, Rent Tribunal to consider whether premises are premises to which Rent Restrictions (Dwelling Houses) Ord. applies.

b) Any person aggrieved by opinion of Rent Tribunal that Ordinance applies may test validity of that opinion in appropriate Court of law.

c) Only decision of Rent Tribunal which is final and conclusive — decision as to amount of rent.

2. a) Whether for purposes of sec. 3, Rent Restrictions (Dwelling Houses) Ord. premises have been "let as a separate dwelling" or not is a question to be decided by considering the circumstances of each case.

b) Lessor's access to a certain piece of furniture in a leased room does not in itself amount to his sharing the room with lessee.

(*M. L.*)

REFERRED TO: Neale *v.* Del Soto (1945) A. E. L. R. p. 191, Cole *v.* Harris (1945) A. E. L. R. p. 146.

ANNOTATIONS:

1. As to point 1 see C. A. D. C. Jm. 59/43 (1943, Selected Cases p. 158). On application to the High Court against the Rents Tribunal see H. C. 91/44 (1944, A. L. R. 504) and annotations.

2. As to point 2 see cases referred to (This is the first case dealing with the matter of "separate dwelling" which came before the Supreme Court).

(*A. G.*)

FOR PETITIONER: Goitein.

FOR RESPONDENTS: No. 1 — Absent — served.

No. 2 — Caspi and Rotenstreich.

ORDER.

This is a return to an order *nisi*, dated 23.3.45, calling upon the first Respondents to show cause why they should not cancel their decision dated 11.2.45 in file No. 8/45, and why they should not decline from dealing with the second Respondent's application against the Petitioner in the said file.

The decision to which objection is taken is one deciding that the premises, which were the subject-matter of the lease, were let as a separate dwelling for the purposes of section 3 of the Rent Restrictions (Dwelling Houses) Ordinance No. 44/40.

Mr. Caspi, who has appeared for the second Respondent, has submitted that this Court has no jurisdiction, because under section 5(5) of the Ordinance all decisions of a Rents Tribunal are final and conclusive.

Section 5(1) of the Ordinance provides that where any question shall arise as to the rent payable in respect of a dwelling-house the question shall, on the application of either party, be referred to a Rents Tribunal. If the premises were not let as a separate dwelling the Ordinance would not apply, and the Rents Tribunal would have no jurisdiction. Before deciding upon the question of the rent the Rents Tribunal has of course to consider whether the premises are premises to which the Ordinance applies. But in my judgment the only decision of the Rents Tribunal which is final and conclusive is the decision as to the amount of the rent. I do not think that any person who considers himself aggrieved, by reason of the opinion of the Rents Tribunal that the Ordinance applies, is estopped from having the validity of that opinion tested in the appropriate Court of law. So I find that I am not estopped from dealing with the present application because of the provisions of section 5(5).

There has been a great deal of argument upon the point whether the premises in the present case fall within the purview of section 3 of the Ordinance. The lease shows that the premises are being leased for the residence of the daughter and son-in-law of the lessee, after their marriage. Reference is made to certain furniture, and the lease includes the use of furniture, bathroom and W. C., but not the use of the kitchen or any other service. The lease further states that the conditions will be the same as those in the agreement of lease between the lessor and the lessee in respect of a flat in the third storey of the same house. It appears that in order to get to their room the daughter and son-in-law of the lessee had to pass through a lounge which belonged to the

lessor, and in order to reach the bathroom and W. C. they had to pass through the same lounge.

Reference has been made to the case of Neale *v.* De Soto (1945) A. E. L. R. p. 191, and to the case of Cole *v.* Harris (1945) A. E. L. R. p. 146. It is a question to be decided in each case whether the premises have been "let as a separate dwelling". Having considered the circumstances in the present case I cannot find that the daughter and son-in-law of the lessee were only sharing the flat of the lessor. Although it would appear that the lessor used to be allowed access to a cupboard which was in the leased room, it does not seem to me that such access amounted to his sharing the room with the lessee. There was no reservation in the lease with regard to the cupboard.

The lessee had a separate lease to which the provisions of his own lease were made to apply, and he had the separate use of one room and the use, in common with the lessor, of the bathroom and W. C. He had no right to share any of the other living rooms of the lessor's flat nor could he use the kitchen. I do not think any exception can be taken on the ground that the lessee was not living in the room himself. The lessor knew that the lessee was taking the room for the use of his daughter and son-in-law.

It was, in my judgment, a leasing of a separate dwelling, and not merely an agreement to share the lessor's flat with him.

In the result I find that the Ordinance applies. Mr. Caspi has submitted that the Petitioner had in any case an alternative remedy. He submits that the Petitioner could have filed an action in the Magistrate's Court (or in the District Court) for a declaration that the room had not been let as a separate dwelling; or he could have awaited an action by the lessee for recovery of the excess rent; or he could have brought a simple action for eviction. He submits that in any of those actions the question whether the premises had been let as a separate dwelling could have been raised.

Mr. Goitein has referred to Hailsham, Vol. 9, p. 744, para. 1269. The High Court in a matter like this is acting under the provisions of section 7(b) of the Courts Ordinance No. 31/40. The Rent Restrictions (Dwelling Houses) Ordinance does not provide for any appeal from an order of the Rents Tribunal, so the Petitioner had no direct alternative remedy.

Although, as Mr. Caspi has indicated, it would have been possible for the Petitioner to obtain a decision on the point in an indirect way, I do not think that it was unreasonable for the Petitioner to seek a remedy in this Court.

Having found that the premises are premises to which the provisions of the Rent Restrictions (Dwelling Houses) Ordinance apply I see no reason for giving any directions to the Rents Tribunal.

In the circumstances the petition must be dismissed and the order *nisi* set aside. The second Respondent must have fixed costs in the sum of LP. 10.—.

Given this 28th day of September, 1945.

British Puisne Judge.

CIVIL APPEAL No. 41/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Zakia Abdul Salam Jauni & 2 ors. in their personal capacity and on behalf of the estate of their late sister Zuhra Abdul Salam Jauni. APPELLANTS.

v.

Hanna (Annet) Neeman & an. RESPONDENTS.

Settled account — Whether oral evidence may be heard to contradict — Allegation of fraud — O. C. C. P., Art. 80; C. A. 179/41, mistake — Account stated and settled account — P. C. 37/43.

Appeal from the judgment of the District Court, Tel-Aviv, (R/P Judge Windham), dated the 4th January, 1945, in Civil Case No. 179/42, partly allowed:—

Accounts stated may be reopened if shown to be erroneous and if the parties are in fiduciary relationship. Fraud need not be alleged in such cases.

(A. M. A.)

REFERRED TO: C. A. 179/41 (7, P. L. R. 536; 1941, S. C. J. 629); P. C. 37/43 (12, P. L. R. 265; *ante*, p. 349).

ANNOTATIONS:

1. For previous proceedings between the parties see C. A. 156/41 (7, P. L. R. 453; 1941, S. C. J. 583).

2. *Cf.* C. A. 7/43 (10, P. L. R. 395; 1943, A. L. R. 623) and note 2 in A. L. R.

(H. K.)

FOR APPELLANTS: No. 1 — Abcarius.
Nos. 2 & 3 — Nakhleh.
FOR RESPONDENTS: Eliash.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, whereby the Appellants were ordered to pay jointly and severally the sum of LP. 1991.055 mils with interest at the rate of 9% *per annum* from 10th June, 1939, and costs.

The litigation arose out of various transactions such as mortgages, powers of attorney, and an alleged agreement by the Appellants to pay to the second Respondent certain sums in respect of remuneration.

We may say at the outset that the Appellants do not contend that judgment should not be entered against them in the sum of LP. 1164.326 mils. We would also say that the learned trial Judge was satisfied that the Appellants had entirely failed to prove fraud, and we accordingly hold that this question cannot be re-opened.

The main controversy centres round the question whether the Court below was justified in refusing to allow evidence under Article 80 of the Ottoman Civil Procedure Code. The Court below held that Exhibit P/7 and Exhibit P/10 were settled accounts, and that in the absence of fraud they could not be re-opened. (See Civil Appeal No. 179/41, Vol. 7, P. L. R. p. 536 at p. 538). Issa Eff. Nakhleh, for Appellants Nos. 2 and 3, relies on the following statement in Hailsham Vol. 23, paragraph 582, p. 389:—

> "A settled account will be re-opened for fraud affecting the account generally or one or more items; and, in the absence of fraud, it will be re-opened if errors to a considerable extent in amount and in the number of the items are shown; or if the account is shown to be erroneous, and from the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, it appears that the settlement ought not to be taken advantage of by the accounting party. Thus where there is a fiduciary relation between the parties, or the relation of solicitor and client, the account is reopened more readily and on proof of smaller errors than in other cases".

There is *prima facie* evidence that it had been agreed between the parties that no interest was to be charged on the sum of LP. 625, and there is also *prima facie* evidence that interest was due not from 10th June, 1938, but only from 1st January, 1939. In these circumstances, and especially having regard to the fact that this was not a mutual account between the parties in which each side had accounting trans-

actions and in view also of the fact that the Appellants themselves were not supposed to keep accounts and were not paying or receiving money for or on behalf of the Respondents, we think that on two of the grounds stated in Hailsham the Appellants are entitled to have the account reopened; namely, (1) the account has been shown to be erroneous, and (2) the relative situation of the parties, especially the fiduciary relation between the parties, as witness the power of attorney.

The judgment will not be set aside as regards the sum of LP. 1164.326 mils, but it is set aside as regards the balance, namely, LP. 826.629 mils. The case is remitted to the Court below with directions to allow both parties to lead evidence as regards the sum of LP. 826.629 mils and whatever amount of interest on that sum is still claimed by the Respondents.

We would observe that the Appellants do not deny that they are obliged to pay interest on the sum of LP. 1164.326 mils as from 1st January, 1939. We would also point out that we are not discussing the question whether the account is an account stated or a settled account because we are prepared to regard it as a settled account. We merely say that the statement regarding settled accounts at page 538 of the report of Civil Appeal 179/41 must be read subject to the proposition set out in the above cited paragraph of Hailsham. We attract that attention of the Court below to Privy Council Appeal No. 37 of 1943.

Delivered this 26th day of October, 1945.

Acting Chief Justice.

Having heard parties' advocates on the question of costs, we order that costs abide the event, but, in order to facilitate the final arrangements, they will be taxed on the lower scale to include an advocate's attendance fee to each of the advocates engaged of LP. 25.

Acting Chief Justice.

HIGH COURT No. 51/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPLICATION OF :—

Antone Shomali. PETITIONER.

v.

The Chief Execution Officer, District Court, Jerusalem & an. RESPONDENTS.

Protestant woman becoming a member of (Latin) Catholic Community and marrying in Catholic Church — Agreement to separate for life against payment of a certain sum etc. — Judgment of Religious Court of Latin Cath. Community for monthly payments of alimony — Question of change of Relig. Community — Non interference of H. C. with judgment of Relig. Court.

Return to a rule *nisi* issued on the 27th June, 1945, directed to the first Respondent calling upon him to show cause why his order dated 2.6.45 should not be set aside and why he should not refrain from proceeding to execute the order of the Latin Catholic Religious Court dated 17.1.45; order *nisi* discharged:—

1. Protestants not being mentioned in 2nd Schedule to Art. 2, Palestine (Amendment) Order in Council, 1939, do not belong to a Religious Community.

2. Sec. 2(1), Religious Community (change) Ordinance only applies to persons who already belong to one of the scheduled Religious Communities, hence not to Protestants.

3. Persons (not being Foreigners) who at time of their marriage belonged to a scheduled Religious Community come under Art. 54, Palestine Order in Council.

4. High Court cannot question correctness of judgment of Religious Court allowing wife alimony, notwithstanding agreement whereby she would appear to be estopped from such claim.

ANNOTATIONS:

1. As to change of Rel. Community see H. C. 7/44 (11, P. L. R. 128; 1944, A. L. R. 192) with annotations thereto in A. L. R.

2. As to the third point see H. C. 81/44 (1944, A. L. R. 648) with annotations thereto.

3. As to the fourth point see H. C. 49/45 (12, P. L. R. 426; *post*, p. 659). (*A. G.*)

FOR PETITIONER: Germanus.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — 'Asal.

ORDER.

This is the return to an order *nisi* directed to the Chief Execution Officer, District Court, Jerusalem, calling upon him to show cause why he should not refrain from executing an order of the Ecclesiastical Court of the Latin Community.

The facts are that the Petitioner was married on 29th September,

1935, to the second Respondent in the Catholic Church Beit Sahour according to the rites of the (Latin) Catholic Church. After some time disputes arose between parties and on 16th November, 1942, they signed a document agreeing to separate for life in consideration for which the Petitioner agreed to pay to the second Respondent LP. 100 and to return to her the furniture and other goods which she had brought into the matrimonial home. The Petitioner seems to have paid the LP. 100 and returned the articles. On 10th May, 1944 the second Respondent brought an action in the Religious Court of the Latin Catholic Community which Court on the 17th January, 1945, ordered the parties to separate temporarily for 3 years as from 10th May, 1944 and also ordered the present Petitioner to pay to the second Respondent LP. 6.— per month as alimony during the period of 3 years abovementioned. Against this judgment the Petitioner unsuccessfully appealed to the Religious Appeal Court. The Chief Execution Officer decided to execute the judgment ordering the Petitioner to pay LP. 6.— per month and it is of that act that the Petitioner now complains to this Court.

It is common ground that the second Respondent was a Protestant until about one week before her marriage; but it is also common ground that she had become a Catholic before the marriage and that at the time of her marriage she was a Catholic. The Petitioner argues that as she did not comply with section 2(1) Religious Community (Change) Ordinance, Cap. 127, the marriage was invalid. We think that the short answer to this is that, as Protestants are not mentioned in the 2nd Schedule to Art. 2, Palestine (Amendment) Order-in-Council, 1939, they do not belong to a Religious Community. The Religious Communities scheduled are the Eastern Catholic Community, the Latin Catholic Community, the Gregorian Armenian Community, the Jewish Community and the Greek Catholic Community, and a few others. Before it can be said that section 2(1) Cap. 127 applies, a person must already belong to one of the scheduled Religious Communities. We stress the use of the word "change" his religious community. She, in fact, never became a member of any Religious Community till her marriage so it cannot be said that she ever changed her Religious Community. She may have changed her religion, or to put it in another way, she may have became a member of another Church. In our view, therefore, Cap. 127 has no application to the second Respondent. It is not seriously denied that the marriage was valid and once she was married she became a member of the Latin (Catholic) Church and, accordingly, Art. 54(1) Palestine Order-in-

Council 1922 applies. We therefore think that the Latin Ecclesiastical Court had jurisdiction.

Mr. Germanus, for the Petitioner, argues that the second Respondent is estopped by reason of the document of 16th November, 1942, from claiming alimony. The Religious Court seems to have dealt with this matter and it seems to us to be reasonable for a Religious Court to examine any agreement of this nature. Notwithstanding Mr. Germanus' argument that the agreement was one to which Ar. 64, Ottoman Code of Civil Procedure applies, we think that this Court cannot question the correctness of the decision of the Ecclesiastical Court in this matter.

It is finally complained that the order of the Ecclesiastical Court was contrary to natural justice in that the amount awarded was excessive. The amount awarded was LP. 6 per month, which cannot be considered excessive when one remembers that the Petitioner's salary is LP. 21 per month. This ground also fails.

In the result the order *nisi* must be discharged with fixed costs of LP. 10.—.

Given this 24th day of September, 1945, in the presence of Mr. Germanus for Petitioner and in the presence of Mr. S. Asal for Respondents.

Acting Chief Justice.

HIGH COURT No. 137/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF:—

Israel Hochzeit. PETITIONER.

v.

1. The Chief Execution Officer, District Court, Tel-Aviv,
2. The Assistant Chief Execution Officer, District Court, Tel-Aviv,
3. Salomon Tanzer,
4. Controller of Light Industries. RESPONDENTS.

Controller of Light Industries requisitioning goods attached by Chief Execution Officer — Scope of Reg. 51(2), Defence Regulations.

Return to a rule *nisi* issued on the 6th day of December, 1944, directed to the Respondents Nos. 1 & 2, calling upon them to show cause why the order of Respondent No. 2 dated 6.11.44 in Execution File No. 227/44 should not be set aside and the judgment of the District Court, Tel-Aviv, Civil Case No. 156/44 put in the said Execution file, should not be executed and the attached goods should not be sold by public auction in accordance with the provisions of the Execution Law and the Defence (Control of Cloth) Amendment Order, 1944, irrespective of the requisition notice; and why Respondent No. 4 should not be ordered to place at the disposal of the Execution Officer, Tel-Aviv, the attached goods for the purpose of being sold by public auction, order *nisi* discharged:—

1. Attachments are covered by words "other similar obligations" in Reg. 51(2), Defence Regulations; mere fact that they are not specifically mentioned does not mean that legislature intended to exclude attachments.

2. Requisition of property (whether free or attached) under Defence Regulations — a matter within discretion of requisitioning authority and, provided it falls within four corners of relevant regulation, Courts will not interfere.

(*M. L.*)

REFERRED TO: H. C. 37/39 (6, P. L. R. 422; 6, Ct. L. R. 189; 1939, S. C. J. 365); H. C. 97/41 (8, P. L. R. 533; 11, Ct. L. R. 153; 1941, S. C. J. 523); H. C. 73/44 (11, P. L. R. 424; 1944, A. L. R. 519).

FOLLOWED: H. C. 58/44 (11, P. L. R. 428; 1944, A. L. R. 522).

ANNOTATIONS: As to interference of H. C. in matters of requisition see H. C. 4/45 (1945, A. L. R. 509) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Scharf.

FOR RESPONDENTS: Solicitor General — (Griffin).

ORDER.

This is a return to an order *nisi* dated 6.12.44 whereby the Petitioner is requesting that the Respondents be called upon to show cause why the order of Respondent No. 2 dated the 6.11.44 in Execution File No. 227/44 should not be set aside and why the judgment of the District Court, Tel-Aviv, in Civil Case No. 156/44 should not be executed and the attached goods should not be sold by public auction in accordance with the provisions of the Execution Law and Defence (Control of Cloth) Amendment Order, 1944, irrespective of the requisition notice; and why Respondent No. 4 should not be ordered to put at the disposal of the Execution Officer, Tel-Aviv, the attached goods for the purpose of being sold by public auction.

The learned Solicitor General, for the Respondents submits that the essence of the petition is to be found in paragraphs 16—22:—

"1. That goods attached cannot be requisitioned.

2. That Regulation 51(2) Defence Regulations allows only requisition of goods, notwithstanding mortgages, *etc.*, attached goods are not mentioned and cannot be included under mortgage, lien or pledge.

3. 5(2) can only dispose as if he were the owner and the attachment order does not affect the ownership. The judgment debtor is owner still and Requisitioning Authority is in the shoes of the judgment-debtor, and consequently cannot dispose of the goods attached by order of the Court.

Requisitioning Authority cannot compel a judgment-creditor to accept in substitution for his right to sell a claim for compensation to be awarded to the owner of the goods."

The question of delay was raised but the Court does not consider that there is anything in the objection.

Again the Petitioner had an alternative remedy — he could have gone to the District Court against the Controller of Light Industries for unlawful possession and damages — he has another remedy under the Compensation Defence Ordinance Section 15, and if not satisfied with compensation could apply to a special tribunal. Regulation 51(2) of Defence Regualtions — in exercising powers they use or deal with such property. Attachment is a judicial lien. The order is only an enabling order and because it does not deal specially with attachments this does not indicate an intention to exempt them. The matter is one within the discretion of the Controller and the Court should not interfere or place itself in the place of the Controller, in the absence of *mala fides*.

Mr. Sharf, for the Appellant, submits that there was no undue delay and as regard an alternative remedy the Respondent has not taken into account the Crown Actions or Courts Ordinance. C. A. No. 126/42 [1]. Under the Courts Ordinance, Section 7(b). The High Court has exclusive jurisdiction in matters of this kind. In the Crown Actions Ordinance, Vol. I, Dry. p. 502, section 3, this matter is not included in matters to be brought before the Court. Attachment is not a lien. The judgment by consent was in April, 1944 — attachment was in 19.6.44. The Defence (Control of Cloth) (Amendment) Order, 1944, was issued in April, 1944. The Controller was notified of this attachment before this Regulation was published.

Here the attachment is under the Execution Law. There is a difference between an attachment and a mortgage or pledge, *etc.* Regulation 51(2) is not free from any obligation created by the Public Law. Sec-

[1] Erroneous reference.

tion 6(c) of the order provides for further notification of purchases at public auction, *etc.* Only private and contractual relations are covered by the regulations. "Similar obligations" means similar obligations between the parties. Had attachment been intended this could easily have been included. Reference is made to H. C. 37/39, Vol. 6, P. L. R., p. 422 at p. 426 (Here the Town Planning Commission's discretion is governed by Ordinance) H. C. 97/41, Vol. 8, P. L. R., p. 533 at p. 535 (Here the Court held that the Director of Medical Services had no power to requisition part of a building under Public Health Ordinance and indicates as is expressed by the judgment that private rights must prevail unless there is a definite and unambiguous statutory provision to the contrary). The Controller alone has authority and could not delegate to his trade section. The Applicant is entitled to the proceeds of public sales and attached goods could not be requisitioned.

The order should, therefore, be made absolute and the Respondent ordered to return the goods and the sale in execution to proceed.

In my opinion there is one main point to decide, namely, whether or not goods attached by order of Court are covered in section 51(2) by the words "mortgage, lien, pledge or other similar obligation". C. A. No. 110/44 [2] is chiefly relied upon by the Applicant, that case is not, however, on all fours with the present case. In C. A. No. 110/44 [2] the notice of requisition was limited to the interest of public safety and maintenance of service essential to the public and it was held that as it was not a matter of public safety and that "Essential Services" are defined in Regulation 2 of the Defence Regulations, 1939, to be such services as ordered from time to time by the High Commissioner to be of public utility or essential for prosecution of the war or essential to the life of the Community, and that there was no such declaration regarding Banks and so the notice in question did not fall within the four walls of Regulation 48, and District Commissioner had consequently no powers to issue the order he made. It is clear, therefore, that this case does not assist the Applicant.

Section 6(c) Defence Regulation (Control of Cloth) (Amendment) Order, 1944. Paragraph 6B provides for complete return in writing to be furnished on the Controller of all cloths attached or seized by any lawful authority, *etc.* Section 6(c) provides likewise for a return to be furnished of all cloth purchased at auction conducted by lawful

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[2] *Scil.*: H. C. 73/44.

authority, or to sell or allow to be sold without permit. This section deals with notification and permit and does not seem to me to be relevant to the main question in issue. Paragraph 51(1) of the Regulations sets out the power of High Commissioner to requisition. Paragraph (2) where any property requisitioned, the High Commissioner may use or deal or otherwise regulate the use or dealing with such property in such manner as he thinks fit for the maintenance of supplies and services essential to the life of the Community, *etc.*, and may sell or dispose of property as if he were the owner thereof and as if such property were free from any mortgage, pledge, lien or other similar obligation. Paragraph 2 does not contain any definition restricting the maintaining of supplies, and so I am left with the wording of paragraph 51(2) "Mortgage, pledge, lien or other similar obligation".

It has been argued by Petitioner that an attachment cannot be included amongst "other similar obligations". With this contention I do not agree and I am not prepared to assume, because attachments are not specifically mentioned, that in the absence of an express declaration it was the intention of the legislature to exclude attachments. In my opinion, therefore, attachments are covered by "other similar obligations". I consider that although the Controller has power to seize and control goods which have been sold by public sale *etc.*, this, does not mean that the Controller has not also power to requisition attached goods, the matter is one within his discretion and therefore not to be interfered with by the Courts, provided it falls within the four corners of the regulation. These regulations are emergency measures and undoubtedly give, in many instances, a very wide discretion to the controlling power, but this is not a matter with which the Courts should, in general, interfere. See C. A. No. 58/44 [3], Vol. 11, P. L. R. p. 428. It is not necessary for me to deal with the other minor questions raised by the Petitioner.

For the above reasons the order *nisi* is discharged with costs of LP. 15 inclusive.

Given this 23rd day of February, 1945.

A/British Puisne Judge.

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[3] *Scil.*: H. C. 58/44.

HIGH COURT No. 49/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Nazmi Eff. Anabtawi, PETITIONER.

v.

Chief Execution Officer, Nablus & an. RESPONDENTS.

Jurisdiction of Sharia Courts re maintenance of ascendants and other members of family — Application of Moslem Family Law in Sharia Courts — Power of Assistant C. E. O. to execute judgments of Religious Courts.

Return to an Order *Nisi* issued on 20th day of June, 1945, directed to the 1st Respondent calling upon him to show cause why his order given on the 8th day of June, 1945, should not be set aside and why he should not refuse to execute the judgment of the *Sharia* Court given without any jurisdiction,; order *nisi* set aside:—

1. Previous order of High Court not to execute a certain judgment, without a hearing on merits or a finding that judgment was a nullity, does not dispense High Court from hearing and determining petition of other person affected independently and to a different extent by that judgment.

2. a) The terms "alimony" and "maintenance" in Palestine Order-in-Council cannot in relation to jurisdiction of Moslem Religious Courts be confined to their meaning in English Law of "Husband and Wife".
b) Moslem Religious Courts have jurisdiction to order descendant to pay maintenance to ascendant.

3. a) There is no duty under Moselm Law on a child to maintain a step-mother.
b) If father sick or infirm and requires care by wife or servant, child must supply necessary maintenance for both.

4. a) Moslem Family Law (Application) Ordinance does not deprive Moslem Religious Courts of jurisdiction in matters not referred to in Ottoman Family Law, 1333.
b) It is highly improbable that legislature giving Moslem Religious Courts exclusive jurisdiction to award maintenance to ascendants, descendants and wives intended to deprive them of jurisdiction *re* maintenance to brothers, sisters or other persons entitled to maintenance under *Sharia* Law.

5. A Magistrate duly appointed as Assistant Chief Execution Officer under sec. 19(2), Courts Ordinance is entitled to deal with execution of judgments of Religious Courts.

(*M. L.*)

DISTINGUISHED: C. A. 62/37 (1937, S. C. J. (N. S.) 249; 4, P. L. R. 249; 2, Ct. L. R. 133).

REFERRED TO: H. C. 60/31 (1, P. L. R. 616; 3, C. of J. 854); H. C. 12/42 (9, P. L. R. 213; 12, Ct. L. R. 22; 1942, S. C. J. 254); C. A. 18/39 (6, P. L. R. 247; 5, Ct. L. R. 241; 1939, S. C. J. 247).

ANNOTATIONS:

1. For former proceedings see H. C. 23/45 (unreported).

2. As to the first point see C. A. 129/44 (*ante*, p. 92) with annotations thereto on requirements of a plea of *res judicata*.

3. As to the second point see case distinguished and two first cases referred to.

4. As to High Court not being a Court of Appeal from a Religious Court see — H. C. 80/43 (1943, A. L. R. 611) and note 4 thereto.

(*A. G.*)

FOR PETITIONER: Goitein.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — In person.

ORDER.

This is a return to an Order *nisi* dated 20.6.45 calling upon the first Respondent to show cause why his order dated 8.6.45 should not be set aside. By that order the first Respondent rejected the application of the Petitioner for the non-execution of a judgment dated 1.8.43 of the *Sharia* Court, Nablus. That judgment ordered the Petitioner to pay a monthly sum of LP. 18 for the support of the second Respondent, the second Respondent's wife Arabieh, and his six children. The Petitioner is the son of the second Respondent.

Mr. Goitein, advocate, who has appeared for the Petitioner, has first of all submitted that the High Court, in H. C. No. 23/45 and by its order dated 3.5.45, had already directed that the judgment dated 1.8.43 should not be executed, and that that order was not confined to the then Petitioner Hamdeh Eff. Anabtawi. In my judgment there are no merits in this submission. The Order *nisi* in H. C. No. 23/45 was made absolute on the application of a person (not the present Petitioner) who was affected by it. That person did not represent the Petitioner, and the latter was affected by the judgment dated 1.8.43 independently and to a different extent. In H. C. No. 23/45 there was no hearing on the merits, and no finding that the judgment was a nullity. I find that this objection fails.

The second submission of Mr. Goitein is that the judgment of the *Sharia* Court of Appeal, confirming the judgment of the *Sharia* Court of Nablus, was not a valid judgment, since it was signed only by the President and not by the members of the Court. In this connection Mr. Goitein has referred to the Rules of Court for Moslem Religious Courts which are to be found at p. 461, Vol .2, Legislation of Palestine

(compiled by Bentwich). Mr. Goitein, quite rightly in my opinion, did not stress this objection, and again I see no merits in it. The original judgment (dated 1.8.43) was given by one Judge, and the judgment of the *Sharia* Court of Appeal confirmed that judgment. If the judgment of the *Sharia* Court of Appeal were invalid (which I do not find) the judgment of the *Sharia* Court of Nablus would not be affected by it, and Rule 14 of the Rules referred to above provides that any judgment awarding a sum of money for maintenance may be executed forthwith notwithstanding appeal. This objection also fails.

I now come to Mr. Goitein's third and principal objection which is that the *Sharia* Court of Nablus did not have jurisdiction to give the judgment dated 1.8.43. The wife (Arabieh) of the second Respondent is not the mother of the Petitioner.

Art. 52 of the Palestine Order-in-Council, 1922, (at p. 251, Vol. 3 Laws of Palestine) provides that:—

> "Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems who are Palestinian citizens or foreigners who, under the law of their nationality, are subject in such matters to the jurisdiction of the Moslem Religious Courts, in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of the 25th October 1333 *A. H.* as amended by any ordinance or rules; .....
> There shall be an appeal from the Court of the *Qadi*, to the Moslem Religious Court of Appeal whose decision shall be final".

Art. 9(5) of the procedure law dated 25.10.1333 provides that:—

> "All *Sharia* Courts have jurisdiction to fix shares of inheritance; to assess *nafaqa* for ascendants and descendants and wives; and to issue permissions to administrators and guardians".

The Moslem Family Law (Application) Ordinance, Cap. 96, which was enacted on 25.9.1919 provides that:—

> "The provisions of the Ottoman Family Law 1333 (Fiscal), concerning the personal status of Moslems shall be applied by the Moslem Religious Courts".

With regard to the procedural law of 25.10.1333 *A. H.* Mr. Goitein has submitted that it does not clothe the *Sharia* Court with jurisdiction except in regard to "alimony" and "maintenance" in the English meaning of these terms and to the extent allowed by the Ottoman Family Law (1333). He has referred to C. A. 62/37 (2, C. L. R. 133) in which the Court said, with regard to the words "alimony" and "maintenance" in the Order-in-Council:—

> "I assume that the Order-in-Council was drafted by English lawyers and that the words have the same meaning as they have in the English Law relating to 'Husband and Wife'."

The Court then goes on to say what those words do mean in English Law. Mr. Goitein submits that the second Respondent might be able to claim successfully in a Civil Court if he could show that under some law he was so entitled, but that he cannot succeed in the *Sharia* Court, inasmuch as the Ottoman Family Law 1333 (Fiscal) which (he submits) is the applicable substantive law, does not entitle him to maintenance. Mr. Goitein submits that there is no substantive law recognised by the Government of Palestine which allows of *nafaqa* for fathers, fourth wives, and half brothers and sisters.

Now, with regard to C. A. No. 62/37 it must be observed that the Court in that case was not considering the jurisdiction of the Moslem Religious Courts. For that reason alone I do not consider that case to be an authority for holding that the words "alimony" and "maintenance", in Art. 52 of the Order-in-Council, are to be interpreted according to the English law of "Husband and Wife".

In an earlier case — H. C. No. 60/31 (1, P. L. R. p. 616) — the Court held that the sum awarded by the *Sharia* Court for the period of three months following the divorce, as "*Iddeh*", was alimony within the meaning of Arts. 133 and 141 of the Execution Law. So in that case the Court did not confine itself to the meaning of the term "alimony" in the English Law of "Husband and Wife".

Again in H. C. No. 12/42 (9, P. L. R. 213), which is a later case than the one referred to by Mr. Goitein, the following appears:—

> "Alternatively counsel for Petitioner argued that the Rabbinical Court had obtained jurisdiction by consent of the parties under Article 53(ii) and the first point which arises is whether the amount awarded by the Rabbinical Court is maintenance and thus a matter of personal status within the meaning of Article 51 of the Palestine Order-in-Council.
>
> The law on this point has been laid down by Trusted, C. J. in Shtark *v.* Chief Execution Officer and others, H. C. 22/39, 6 P. L. R. 323, when, after dealing with the previous case in which it was held that alimony and maintenance in the Order-in-Council should be given the English meaning said:—
>
> 'As Articles 53 and 54 of the Order-in-Council draw a distinction between alimony and maintenance, I think these Courts are bound to enquire into the English meaning of these words, but having ascertained that thereunder alimony is a payment by a husband to a wife in consequence of divorce proceedings and that maintenance means certain other payments, such payments, when their nature is ascertained, will respectively be gorvened by the law of the community concerned. I do not think the application of the English meaning goes further than that'."

In my judgment the reference to the Law of Procedure of the Moslem

Religious Courts of 25.10.1333 *A. H.* in Article 52 of the Order-in-Council also makes it impossible to confine the terms "alimony" and "maintenance" to their meaning in the English law of "Husband and Wife", because the procedural law of 1333 speaks of *"nafaqa"* for ascendants and descendants as well as wives.

So far as the second Respondent is concerned there appears to me to be no doubt that the *Sharia* Court had jurisdiction to make an order for maintenance.

I shall now deal with the question whether under *Sharia* law orders can be made for the maintenance of a step-mother, or half-brothers and half-sisters. The second Respondent is a Sunni Mohammedan of the Hanafite School. At page 133 of International and Inter-Religious Private Law in Palestine by Goadby (1926 Edition) the following passage appears:—

> "The maintenance of the Moslem Courts with their traditional jurisdiction is undoubtedly in accordance with the interest of the country. The bulk of the population is Moslem, and the Courts have for many centuries administered a body of law, well known and easily accessible. The law applied is that of the *Hanefite* rite upon which numerous and excellent works both in Arabic, English and French are procurable. The Code of Moslem Personal Law compiled in Egypt by Kadry Pasha and applied by the Moslem Courts there gives this in a convenient form".

In the "Code of Mohammedan Personal Law" by Kadry Pasha (translated by Sterry & Abcarius and published in 1914) the following appears at page 107 in Chapter 4, under the heading "Of the Maintenance due to the Distant Kindred":—

> "Section 415 — Maintenance is due to every relative with whom marriage is prohibited, when he is without means and in need of receiving charity, from his presumptive heir, even if a minor, in proportion to his share of inheritance.
>
> Such relative can be compelled to pay the maintenance if, being of means, he refuses to provide it. There is no distinction as to whether the person so entitled to maintenance is a minor or of age, in a state of infirmity and unable to earn his living, or of the female sex, even if of age, in good health and able to work, but not working in fact".

Mr. Goitein has referred to "International Law — An Abridgement according to its various Schools" — by Seymour Vessey Fitzgerald (1931 Ed.) in which, at page 98, it is stated that adult children are bound to maintain their parents but not their step-parents, and also that while neither *Malaki* nor *Shafii* law recognises any right or duty of maintenance between collaterals, *Hanifi* and *Shia* law do recognise that right.

Again in the *Hedaya* in Book 4, Chapter 15, section 5, p. 147 of the Library edition, under the sub-heading entitled "Maintenance to other relations, besides the wife, parents or children", it is stated that:—

> "It is a man's duty to provide maintenance for all his infant male relations within the prohibited degrees, who are in poverty; and also to all female relations within the same degrees whether infants or adults, where they are in necessity, and also to all adult male relations, within the same degrees, who are poor, and disabled or blind".

I find that there is no duty to maintain a step-mother, as she is not a relation by blood. But at page 105 of Kadry Pasha's Book the following appears in section 409:—

> "If the state of the father who is sick or infirm requires his being taken care of by a wife or a servant the child should supply the necessary maintenance for them".

On referring to the judgment, dated 1.8.43, of the *Sharia* Court of Nablus, I find that the maintenance in respect of Arabieh is granted to — "His (*i. e.* second Respondent's) servant, namely, his wife Arabieh", and the judgment dated 21.10.43, of the *Sharia* Court of Appeal, speaks of — "his wife Arabieh bint Said Bey El Fahoum, who serves him".

The second Respondent gives his age as seventy years and it is, I think, clear that the *Sharia* Court gave maintenance to Arabieh not in her capacity as step-mother but in her capacity as a wife or servant whose services were reasonably required by the second Respondent.

In the result, therefore, I am unable to find that the *Sharia* Court could not, in accordance with *Sharia* Law, make orders in favour of the persons named in the judgment of 1.8.43.

I now come to the very important question whether the *Sharia* Court had jurisdiction, under the law of Palestine, to make these orders for maintenance in respect of persons other than the father of the Petitioner. It has been held that Moslem law, as such, is not a part of the legal system of Palestine. In C. A. 18/39 (6, P. L. R. 247) Frumkin, J., said (at p. 253):—

> "As more fully set out in Haifa Municipality *v.* Khoury, and Palestine Mercantile Bank Ltd. *v.* Fryman and others (C. A. 240/37, P. L. R. Vol. 5, p. 165) Moslem law as such is not a part of the legal system of Palestine, and only such parts of it became applicable as have been embodied in the Civil Legislation by special Imperial *Irade*, or otherwise".

The following passage at pp. 114 and 115 of Mr. Goadby's book, to which I have already referred, is of interest:—

> "The substitution of a British for an Ottoman authority in Palestine did not in general affect the jurisdiction of the religious Courts of Personal Status. But a change almost inevitably took place as regards the position of the Moslem Courts. The Government being no longer distinctively Moslem by religion it resulted that the Moslem inhabitants of Palestine came to be conceived as a religious community, the Courts of which had jurisdiction over Moslems only. So long as the Moslem law and the Moslem Courts represented the religion of the State it was natural that that law should, in the absence of specific legislation, be deemed the Common law, and the Moslem Courts of Personal Status should be held to possess residuary jurisdiction in matters of personal status. When the Moslem Community became a separate Community, though far the largest Community, the residuary jurisdiction in matters of personal status fell to the State (Civil) Courts to which the previous jurisdiction of the Consular Courts in matters of personal status was also transferred. The new situation is regulated by the Palestine Order-in-Council, 1922".

Mr. Goitein's principle submission is that the Ottoman Family Law, 1333 (Fiscal) makes provision for maintenance (*nafaqa*) only as between spouses, and he submits that it is that law and no other that has to be applied by virtue of the Moslem Family Law (Application) Ordinance (Cap. 96).

Mr. Goitein, when asked by me, said that he knew of no case on which a civil Court had made a maintenance order where the parties were Moslems. That would suggest that such cases have always been dealt with by the *Sharia* Courts — whether rightly or wrongly.

The Order-in-Council 1922 is of later date than the Moslem Family Law (Application) Ordinance (Cap. 96). The Order-in-Council was enacted on 10.8.22 while the Ordinance was enacted on 25.9.19. There are no Ordinances corresponding to the Moslem Family Law (Application) Ordinance in the case of the Courts of the Jewish & Christian Communities. If Article 52, 53 and 54 are compared it is seen that the Moslem Religious Courts have exclusive jurisdiction in certain matters which, in the case of the Jewish and Christian Courts can only be dealt with by those Courts where all the parties consent to the jurisdiction. And, as far as my information goes, it appears that the invariable practice has been for the *Sharia* Courts to exercise exclusive jurisdiction in all matters of personal status (as defined in Art. 51) in the case of Moslems. It appears to me to have been the intention of the legislature that the *Sharia* Courts should exercise such jurisdiction. The Moslem Family Law (Application) Ordinance does not, in

my opinion, deprive the *Sharia* Court of jurisdiction in matters not referred to in the Ottoman Family Law (1333). On the other hand if there were any conflict between the provisions of that law and some other *Sharia* law, it may well be that the former would prevail. It appears to me to be highly improbable that the legislature intended to give the Moslem Religious Courts exclusive jurisdiction to award maintenance to ascendants, descendants and wives, and to deprive them of jurisdiction (even with the consent of all parties) to award maintenance to brothers or sisters, or other persons entitled to maintenance by virtue of *Sharia* law.

It may also be observed that Art. 7(7) of the procedural law of 1333 provides that the *Sharia* Courts shall hear and determine all matters connected with "*nafaqa*". It might be argued that owing to its juxtaposition the term "*nafaqa*" in that Article means "*nafaqa*" for wives. But if that is so it is not obvious why "wives" should be mentioned again in Article 9(5) where the term used is again "*nafaqa*".

So my conclusion is that the *Sharia* Court had jurisdiction to give the judgment dated 1.8.43.

Mr. Goitein has further submitted that the judgment is contrary to natural justice. He stresses the fact that the second Respondent has qualified to be maintained by his son as a result of his own unworthiness. The second Respondent was an advocate, but he has been struck off the roll. The affidavit of the Petitioner shows that he (the Petitioner) supports his mother who was divorced by the second Respondent, and that the latter makes no contribution to her maintenance. It is submitted by Mr. Goitein that if the second Respondent had not been guilty of conduct which resulted in his being struck off the roll he would be in a position to support himself and his family.

The Petitioner's affidavit further shows that he has a wife and five children of his own to support and that his total income is LP. 787. It is obvious that in such circumstances an annual payment of LP. 216 would involve a great strain upon the finances of the Petitioner. These circumstances certainly entitle the Petitioner to sympathy. But, in my judgment, they are not such as to enable the High Court to assist him by stopping the execution of the judgment. I do not think that this Court can interfere unless it appears that the *Sharia* Court acted without jurisdiction; or in bad faith, or clearly against natural justice. If the Petitioner finds that it is really impossible for him to pay so much his remedy is to move the *Sharia* Court to reduce the amount. The High Court is not a Court of Appeal from the *Sharia* Court of Appeal. The judgments of that Court are final.

Mr. Goitein has finally submitted that the judgment of the *Sharia* Court can in any event be executed only by order of the President of the District Court and not by a Magistrate. I find that the order dated 8.6.45 was signed by Mr. F. Halazoun in his capacity as Asst. Chief Execution Officer. It has not been suggested that Mr. Halazoun was not duly appointed as Asst. Chief Execution Officer under section 19(2) of the Courts Ordinance No. 31/40, and having been so appointed he was entitled to deal with the matter.

In the result the Order *nisi* must be set aside, but in view of the circumstances I make no order for costs.

Given in open Court this 30th day of July, 1945, in the presence of Mr. Goldberg for Petitioner and second Respondent in person.

British Puisne Judge.

CIVIL APPEAL No. 40/45.

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

BEFORE: Edwards, A/C. J.

IN THE APPEAL OF:—

Atta Abdallah Salman Kuneyath & 5 ors. APPELLANTS.

v.

Abdel Mu'ti Mustafa el Mashharawi. RESPONDENT.

Dispossession and specific performance of agreement of sale — Illegal disposition, L. T. O., secs. 4, 11 — *C. A.* 165/43 — *Minor owners — Equitable title — Deciding all the issues, C. A.* 28/41 *distinguished — Counterclaims, C. P. R.* 95, 66 — *Damages as alternative to specific performance — Points not taken in lower Court — C. A.* 287/43; *C. A.* 270/42; *C. A.* 157/43; *C. A.* 192/44.

Appeal from the judgment of the Land Court, Jerusalem (R/P Judge Bourke), dated the 4th January, 1945, in Land Case No. 23/44, dismissed:—

Specific performance, granted on a counterclaim, confirmed by the Supreme Court, the Respondent having paid the full price, taken possession, paid taxes and planted and improved the land.

(*A. M. A.*)

REFERRED TO: C. A. 165/43 (1943, A. L. R. 636); C. A. 387/43 (10, P. L. R. 642; 1943, A. L. R. 786); C. A. 270/42 (not reported); C. A. 157/43 (10, P. L. R. 315; 1943, A. L. R. 482); Osenton (Charles) & Co. *v.* Johnston, 1941, 2 All E. R. 245, (1942) A. C. 130, 110 L. J. (K. B.) 420, 165 L. T. 235,

57 T. L. R. 515; Broughton *v.* Snook, 1938, 1 All E. R. 411, (1938) Ch. 505, 107 L. J. (CH.) 204, 158 L. T. 130, 54 T. L. R. 301.

DISTINGUISHED: C. A. 28/41 (8, P. L. R. 127; 1941, S. C. J. 133; 9, Ct. L. R. 96); C. A. 192/44 (*ante*, p. 161).

ANNOTATIONS:

1. The judgment of the Land Court is reported in 1945, S. C. D. C. 8.

2. In addition to the cases cited see also C. A. 97/44 (*ante*, p. 14), C. A. 327/44 (*ante*, p. 57), C. A. 132/44 (*ante*, p. 122) and C. A. 228/44 (*ante*, p. 135) and notes to these cases.

3. On failure to decide all issues *cf.* C. A. 230/41 (9, P. L. R. 86; 1942, S. C. J. 115; 11, Ct. L. R. 145) and note 3 in S. C. J.; see also C. A. 120/44 (1944, A. L. R. 708) and note 2.

(*H. K.*)

FOR APPELLANT: Bisseiso.

FOR RESPONDENT: Mogannam.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jerusalem, which dismissed an action brought by the present Appellant seeking cancellation of an alleged deed of sale of land and an order that the land be delivered to the Plaintiff and that the present Respondent be dispossessed, but which had allowed a counterclaim by the present Respondent for specific performance of an agreement of sale. The appeal has been argued at great length and with ability by the advocates for both parties.

The first ground of appeal is that the learned Relieving President of the Land Court did not decide all the issues and reliance has been placed on Civil Appeal 28/41 Vol. 8 P. L .R. p. 127 which, however, in my view, is distinguishable from the present case. It is clear that the Court below decided all the matters in issue or, at any rate, all the matters which were still in issue when the case came on for trial. The Appellant in the Court below relied on one ground, namely that the document was one of final sale and as such was contrary to sections 4 and 11 Land Transfer Ordinance. The Court below, for reasons which they gave, held that the document was an agreement of sale. There was evidence before the Court below with regard to the intention of the parties and the Court below had also before it the document itself. It is impossible to say that the Court below drew wrong inferences from the evidence or from the document and I am unable to interfere with the decision that the document was an agreement of sale. There remained therefore only one question, namely, whether the present Respondent was entitled to succeed in his counterclaim for

specific performance. I refer to C. A. 165/43 Apelbom (1943) page 637.

Another ground of appeal is that the document did not contain the signature of one Khalaf, the three year old nephew of the Respondent. I agree with the learned Relieving President that it is absurd to say that this child was ever intended to be a party to the agreement and it is equally absurd to say that some person properly appointed should have signed the agreement on his behalf. In this connection Mr. Mogannam has referred to Hailsham Vol. 7, p. 68 paragraph 87(3), p. 79 paragraph 106 and to English and Empire Digest Vol. 12, p. 46 item 245. It is clear that there was only one purchaser, namely, the Respondent, and that he paid the purchase price.

It is also complained that the Court below erred in allowing the counterclaim. Having regard to Civil Procedure Rules 1938, rule 95, and the fact that the Plaintiff did not make Khalaf a defendant to the action, I think that the Court below was entitled to deal with the counterclaim. Rule 66 Civil Procedure Rules is also in Respondent's favour.

Dr. Bisseiso, for the Appellant, advanced in reply a further argument, namely, that the Appellants had never acquired an equitable title. I find it hard to appreciate the force of this argument because the Respondent proved (and this was even admitted by the Plaintiffs at the trial) that he had paid the full purchase price and that the land had been delivered to him. The Court below was satisfied that the Defendant, shortly after the time of the contract, had his name entered in the books of the local taxation office as the person liable to be taxed and has, in fact, since the contract was made, paid the taxes. He also employed a surveyor and had a map of the property made. The Appellants admitted receiving the full purchase price and they also admitted delivering possession to the Defendant. In cross-examination the first Plaintiff said (referring to the deed) "if that is legal I am prepared to stand by it". One of the Plaintiff's witnesses admitted that the Respondent had planted the land with maize in the year in which he had bought it. The Respondent had been on the land for two years and five months.

Another ground of appeal is that it was not proved that the Respondent paid off a certain mortgage for LP. 70. This question does not seem to have been one of the issues in the Court below nor does it seem to have been raised specifically as a ground of appeal. In any event, the Respondent gave evidence, which appears to have been accepted, that he paid the LP. 70 to one Hussein Elyan in return for which he received a deed of mortgage (Exhibit 2) from Hussein Elyan.

This deed of mortgage seems to have been accepted by the Court below as a receipt from Hussein Elyan for the LP. 70 in compliance with paragraph 1(a) of the agreement of sale, Exhibit A, and I think that they were entitled to regard the mortgage in that manner. The substantial ground of appeal is that the Land Court should have held that payment by the Appellant of damages was sufficient. Dr. Bisseiso has pointed to clause 5(d) of the agreement which is in the following terms:—

> "To pay LP. 100.— liquidated damages agreed to in advance between both parties and the second party will be entitled to claim it from the first and third party without need for a notice by the second party".

This question was however not raised in the Court below nor was any evidence as to it led by the Appellants. It was never mentioned until Dr. Bisseiso in his final address to the Land Court said "Defendant can be compensated in damages". The Land Court found as a fact that the Respondent had made improvements costing about LP. 300. They also found that the price of land had increased since the contract was made. The learned Relieving President also said that he saw nothing to justify him in holding that the Respondent had barred himself from obtaining specific performance.

Mr. Mogannam has referred to English and Empire Digest Vol. 1, p. 183, No. 961, All England Reports (1938) Vol. 1, p. 417, Hailsham Vol. 29, p. 388 paragraph 533, Hailsham Vol. 31, p. 341 para. 372, English and Empire Digest Vol. 42, p. 427 No. 10, p. 438 No. 91, p. 447 No. 174 and p. 455 No. 162 and to Snell's Principles of Equity (22nd Edition), p. 538 and to C. A. 287/43 Vol. 10, P. L. R. p. 642 and to C. A. 270/42 and to C. A. 157/43, P. L. R. Vol. 10, p. 315 and to Osenton and Co. *v.* Johnston 2 All E. R. (1941), p. 253.

Dr. Bisseiso has relied on C. A. 192/44 Annotated Law Reports (1945), p. 161. I think however that the facts in C. A. 192/44 are distinguishable from the facts in the present case. Dr. Bisseiso in reply raised a matter with regard to an alleged partition between the four Plaintiffs and their two sisters. This matter, however, does not seem to have been raised in the grounds of appeal and, in any event, was sufficiently and correctly dealt with at the beginning of the judgment of the Land Court.

For the foregoing reasons I am unable to hold that the Court below came to a wrong conclusion or delivered a judgment which can be attacked. 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 LP. 15.—.

Delivered this 25th day of September, 1945, in the presence of Fuad Eff. Atalla for Appellants and T. Eff. Mogannam for Respondent.

Acting Chief Justice.

CRIMINAL APPEAL No. 69/45.

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

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

IN THE APPEAL OF:—

Nizar Robert Minkari. APPELLANT.

v.

Attorney General. RESPONDENT.

Term of imprisonment in default of payment of fine.

Appeal from the judgment of the District Court, Haifa (R. P. Judge Weldon). in CR. Case No. 27/45, allowed:—

Court imposing a fine cannot order imprisonment for a term exceeding maximum laid down in sec. 42(2), Criminal Code Ordinance, in case of default of payment.

(*M. L.*)

ANNOTATIONS:

1. The sentence imposed was a fine of LP. 1000 or two years imprisonment in default of payment of the fine.

2. On sentence exceeding the maximum see CR. A. 130/43 (10, P. L. R. 578; 1943, A. L. R. 772).

3. As to interference of Court of Appeal with sentence see CR. A. 52/44 (11, P. L. R. 449; 1944, A. L. R. 816) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Michaeli.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

It has been argued by counsel for Appellant that in accordance with section 42(2)(a) of the Criminal Code Ordinance, 1936, the Court of trial is only empowered to impose a term of imprisonment in default of payment of fine not exceeding the maximum laid down under this section which in this case would be a term of three months' imprisonment. With this proposition of law we agree. In the circumstances

we quash the sentence passed by the trial Court and substitute for it a sentence of 18 months' imprisonment.

Delivered this 23rd day of May, 1945.

Chief Justice.

CIVIL APPEAL No. 51/45.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Khadijeh Juma' Hussein. APPELLANT.

v.

Mohammad Muhsen Abu Shakra & 2 ors. RESPONDENTS.

Claim of recovery of possession — Violence not a necessary element in claim under Art. 24, Mag. Law — Possession of land through cultivator — C. A. upsetting finding of fact of Mag.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated the 22nd of December, 1944, in Civil Appeal No. 62/44, allowed:—

1. For a plaintiff claiming under Art. 24, Magistrates Law — not necessary to prove that force in form of violence has been used.

2. While Court of Appeal will not lightly interfere with a finding of fact of a lower Court, it will enquire whether the finding of fact was reasonable.

3. For purposes of Art. 24, Magistrates Law a person can have possession of land through another person cultivating it for him against remuneration.

(*M. L.*)

ANNOTATIONS:

1. On claims under Art. 24 of Magistrates Law see C. A. 308/44 (12, P. L. R. 36; *ante*, p. 266) with annotations thereto.

2. On interference with findings of fact see CR. A. 51/45 (12, P. L .R. 232; *ante*, p. 570) and C. A. 5/44 (11, P. L. R. 562; *ante*, p. 145) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Cattan.

FOR RESPONDENTS: Nos. 1—2 — No appearance (Mr. Cattan says they are not interested; did not file their defence and are only formally cited).

No. 3 — Rashed Eff. Haddad.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem which, sitting in its appellate capacity, from the judgment of the Magistrate of Bethlehem, upheld the Magistrate's decision and dismissed the claim of the Plaintiff now the Appellant. The Plaintiff's claim in this case is a claim for the recovery of possession of certain land of which, she alleges, she has been recently dispossessed by the first, second and third Respondents.

The Magistrate refused the claim on two grounds. The first ground was that before a plaintiff can succeed under Article 24 of the Magistrates Law it is necessary to prove that force in the form of violence has been used. The District Court did not uphold this contention of the Magistrate. The Respondent's advocate has indicated that he also does not wish to press for this interpretation of law. It is sufficient for me therefore to say that on this point I am in entire agreement with the judgment of the District Court. The second ground on which the Magistrate dismissed the claim was that he was not satisfied that the Plaintiff had been in possession of the land from the time of her father's death, the possessors, according to the evidence, being Khader and Uthman. In regard to this he was of opinion that those two persons did not possess on behalf of the Appellant. On this point the District Court while indicating that they might not have come to the same conclusion were not disposed to interfere with what they called "the discretion" of the Magistrate. I have repeatedly stated that this Court sitting as a Court of Appeal will not lightly interfere with the finding of a fact of a lower Court but it will enquire whether the finding of fact was reasonable.

Turning to the evidence. There was first the evidence of the Plaintiff herself that she possessed this land which she inherited from her father, for 15 years and that during all this period until the recent possession by the Respondent it has been ploughed on her behalf by Uthman and Khader, the arrangement being that she was to receive one third of the produce and they were to receive two-thirds. There was further the production of a copy of a judgment delivered some years ago. According to it, the Respondents sued the Appellant for the possession of this land and they failed in the suit. It is true that the Respondent's counsel alleges that it is not the same land. But the evidence of the Plaintiff in the Court below was not contradicted by any evidence produced by the Defendants. It seems therefore that the Magistrate based his conclusion on the fact that for the purpose of Article 24 the Plaintiff could not have possessed through the two persons Uthman

and Khader who ploughed the land for her. On this point I consider, with all respect, the learned Magistrate erred. If then I accept, as I do, that the Appellant did possess the land through those two persons, it follows that she had for the relative period that possession which is necessary to sustain a claim under Article 24. For this reason I am of opinion that the appeal must be allowed, the judgment of the Magistrate and the District Court set aside and that the Plaintiff's prayer that she be given possession to the land under Article 24 of the Magistrates Law, granted, with LP. 10 inclusive costs.

Delivered this 13th day of June, 1945.

Chief Justice.

HIGH COURT No. 26/45.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Ibrahim Suleiman El Talla' & 9 ors. PETITIONERS.

v.

The Assistant District Commissioner, Beersheba & 3 ors. RESPONDENTS.

Sentence of imprisonment under Beduin Control Ord. — Irregular procedure — Habeas corpus application.

Return to a rule *nisi* directed to the first and second Respondents calling upon them to show cause why the order of the first Respondent dated 8th February, 1945, in Case No. 2/45 Beersheba, sentencing Petitioners Nos. 1, 5, 6, 7, 8, 9 and 10 to ten weeks imprisonment, Petitioner No. 2 to four months imprisonment and Petitioners Nos. 3 & 4 to enter into a bond of LP. 200 with two sureties of LP. 100 each to be of good behaviour for a period of one year, and ordering them to pay the amount of LP. 220 the value of certain stolen property purporting to be made under sections 4, 5 and 7 of the Beduin Control Ordinance, 1942, should not be set aside and for a summons to issue to Respondent No. 3 to produce the bodies of Petitioners Nos. 1, 5, 6, 7, 8, 9 and 10 and to Respondent No. 4 to produce Petitioner No. 2 before this Court on a day to be fixed and to show cause why they should not be released:—

1. Where Petitioner has no statutory right of appeal High Court is entitled to enquire into matter of his allegedly unlawful imprisonment.
2. Failure to inform Accused under Beduin Control Ordinance of nature of offence with which he was charged is a defect fatal to inquiry contemplated by sec. 6 of the Ordinance and renders the proceedings a nullity.

3. Petition to High Court cannot succeed, if Petitioner has or had an alternative remedy.

(*M. L.*)

REFERRED TO: H. C. 59/44 (11, P. L. R. 198; 1944, A. L. R. 295); H. C. 13/45 (12, P. L. R. 191; *ante*, p. 442); H. C. 77/28 (1, P. L. R. 353; 3, C. of J. 991); H .C. 90/40 (7, P. L. R. 539; 9, Ct. L. R. 8; 1940, S. C. J. 382); H. C. 81/43 (10, P. L. R. 478; 1943, A. L. R. 579); H. C. 39/39 (6, P. L. R. 433; 6, Ct. L. R. 117; 1939, S. C. J. 389).

ANNOTATIONS:

1. On the first point see cases referred to and annotations thereto.

2. On jurisdiction of H. C. in case of existing alternative remedy see H. C. 32/45 (12, P. L. R. 207; *ante*, p. 522).

(*A. G.*)

FOR PETITIONERS: Hiller.

FOR RESPONDENTS: Solicitor General — (Griffin).

ORDER.

This is the return to an order *nisi* for a writ of *Habeas Corpus*. The second Petitioner was sentenced to four months' imprisonment and Petitioners Nos. 1, 5, 6, 7, 8, 9 and 10 to ten weeks' imprisonment each, and Petitioners Nos. 3 and 4 were each ordered to enter into a bond in LP. 200 to be of good behaviour for one year and also to pay certain sums of money. The proceedings purported to have been held under sections 4, 5 and 7 of the Beduin Control Ordinance, 1942.

The proceedings before me have had an unfortunate history because, although the Petitioners' advocate served the necessary notice under Rule 8 of the High Court Rules 1937, requiring the Assistant District Commissioner, Beersheba, (the Earl of Oxford and Asquith) to appear for cross-examination on his affidavit, this Court was informed by the learned Solicitor General on the return day that the Earl of Oxford had just departed or was about to depart from Palestine en route to the United Kingdom on leave. I was also told that, for security reasons, in time of War, persons are not allowed to divulge their movements or probable dates of departure by sea. This may well be so; but I cannot help feeling that some effort might have been made by the authorities to inform this Court as to when the Earl of Oxford might have been available to give evidence at an expedited and special hearing of this Court which could have taken place at any time on a few minutes' notice being given to the Court and to the Petitioners' advocate. I do not suppose that the cross-examination would have occupied more than about fifteen minutes. In the circumstances the learned Solicitor General applied for the special leave of the Court to use the Earl of Oxford's affidavit under Rule 8. This special leave,

which is seldom granted, I accorded because I felt that, had I not done so, the order *nisi* would have had to have been made absolute at once, whereas it seemed to me that the learned Solicitor General might have been able, in the course of the hearing, to convince me that, on the face of the affidavits of the Petitioners themselves, the petition would have to be dismissed.

As I have said, I have before me the Earl of Oxford's affidavit and the Petitioners' advocate very naturally complains that he has now no opportunity of cross-examining the Earl, and he assures me that the Earl in conversation with him was kind enough to make some admissions which, had he been able to extract them in cross-examination, would have materially assisted his case.

The first point to be decided is whether the Petitioners belong to a nomadic or semi-nomadic tribe in Palestine. Mr. Hiller, for the Petitioners, cross-examined some of the *sheikhs* who had sworn affidavits in support of the Respondents' case that the Petitioners are semi-nomads. Mr. Hiller also cited H. C. 59/44, P. L. R. Vol. 11, p. 198. For reasons which will shortly be apparent I do not need to decide this point and I refrain from discussing it so far as the Petitioners other than No. 2 are concerned. It is, however, necessary for me to deal with the point because of the position of the second Petitioner who was sentenced to four months' imprisonment and has or had a right of appeal to His Excellency the High Commissioner under section 8 of the Ordinance. I shall merely say that there is not sufficient satisfactory evidence before me to enable me, in the presence of conflicting affidavits, to hold that the second Petitioner is not a semi-nomad. His petition fails and the order as regards him is discharged. With regard to the other Petitioners, as they have no statutory right of appeal, I think that Mr. Hiller was correct in saying that this Court is entitled to enquire into the matter on the authority of Art. 43, Palestine Order-in-Council 1922 section 7, Courts Ordinance, 1940; Hailsham, Laws of England, Vol. 9, p. 702, para. 1201; H. C. 77/28, P. L. R. Vol. 1, p. 353; H. C. 90/40 P. L. R. Vol. 7, p. 539; H .C. 81/43, P. L. R. Vol. 10, p. 478; H. C. 39/39, P. L. R. Vol. 6, pp. 433, 439.

The learned Solicitor General cited H. C. 13/45; but I do not think that this case is at variance with the Petitioners' advocate's arguments.

Many points are raised by the Petitioners' advocate in paragraph 8 of the petition, the substantial objection (in addition to the allegation

that the Petitioners are not nomads or semi-nomads) being that the enquiry contemplated by section 6 of the Beduin Control Ordinance, 1942, was in this case conducted in such a manner as to show a disregard of the elementary principles of justice and as showing that the Petitioners did not have a proper chance of submitting their defence or calling witnesses. I say at once that I would dismiss the petition if the only complaint were as to the lack of summonses or absence of notification before the enquiry of the nature of the offences with which they were to be charged or of the inadequacy of the information in the summonses. I think that what is contemplated is that the accused persons should be informed at the enquiry itself of the nature of the charge and be given opportunities of calling witnesses in defence, and (unless the matter is desperately urgent) being granted an adjournment in order to bring defence witnesses. The Earl of Oxford in paragraph 15 of his affidavit has sworn that none of the Accused asked to be allowed to produce any further witnesses and he goes on to say that, if they had done so, the hearing would have been adjourned to enable such witnesses to be called. It may well be that, had the Earl of Oxford been cross-examined, Mr. Hiller might not have been able to shake him; but I cannot say, and it would be most improper on my part as well as unfair were I to say in the absence of cross-examination, that I must accept the affidavit of the Earl of Oxford in preference to affidavits sworn by the Petitioners.

The position, as I see it, is that I am faced with two conflicting affidavits and there is no means now open to me of resolving any doubts that Mr. Hiller and his clients may have raised in my mind. In other words, the Petitioners have given *prima facie* proof that there was such a radical departure from the procedure prescribed for trials before a Magistrate exercising summary jurisdiction as to render the proceedings a nullity. I am far from saying that the procedure contemplated by section 6 should be in every respect as rigid as the procedure for a summary trial before a Magistrate. Section 6 says:—

> "Such enquiry shall be conducted, as far as is in the opinion of the District Commissioner practicable and expedient, in the manner of a trial before a Magistrate exercising summary jurisdiction".

I go no further than to say that the Petitioners have on their affidavits (and it is important to note that the learned Solicitor General did not choose to cross-examine) given *prima facie* evidence in paragraphs 7 and 8 and in particular in paragraph 5 of the petition which has been sworn to by the second Petitioner, that they were not informed of the nature of the offences with which they were charged.

Now, if this be true, then I think that such a defect would be fatal to the enquiry contemplated by section 6. I think, of course, that even if they had only been verbally informed of the nature of the charge that would have been sufficient. I do feel, however, that they should have been informed of the particular sub-sections of section 5 or the sub-sections of section 7 under which they were charged. There is a sworn allegation that they were not so informed.

There is also an admission by the Earl of Oxford in paragraph 14 of his affidavit that the formal details of the charge may not have been made clear to the Petitioners. This is not a suitable case for me to lay down any principles for future guidance seeing that I have not had the advantage of hearing the Earl of Oxford replying to cross-examination.

I reiterate that the Petitioners have established a *prima facie* case that the enquiry was so unsatisfactory as to be a nullity and require interference by this Court. I realise, of course, that the affidavit in support of the petition was sworn to by the second Petitioner whose petition, as I have said, fails. Nevertheless, in paragraph 5 of the petition he includes all the Petitioners and swears that the statements made in paragraph 5 are true. I might add that, at the last hearing, Mr. Hiller asked for an adjournment till the reutrn to Palestine of the Earl of Oxford. The learned Solicitor General, however, opposed this application, which was refused.

For the foregoing reasons the petition as regards all the Petitioners except the second succeeds and is made absolute. The petition of the second Petitioner is dismissed as he has or had an alternative remedy under section 8 of the Ordinance.

Given this 30th day of April, 1945.

British Puisne Judge.

CIVIL APPEAL No. 37/45.

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

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

IN THE APPEAL OF:—

Youssef Green & 2 ors. — APPELLANTS.

v.

Perla Cohen. — RESPONDENT.

Action for recovery of possession — Scope of sec. 3(c), Mag. Courts Jurisdiction Ord. — Effect of registration of title under Land (Settlement of Title) Ord. — Proper procedure when registered title questioned.

Appeal from the judgment of the District Court of Tel Aviv in its appellate capacity, dated the 15th of December, 1944, in Civil Appeal No. 214/43, allowed:—

1. Art. 24, Magistrates' Law, does not exhaust all remedies open to a legitimate owner to recover possession and does not oust provisions of sec. 3(c), Magistrates' Courts Jurisdiction Ordinance.

2. "Recovery" in sec. 3(c), Mag. C. Jurisd. Ord. merely means recovery from trespasser; it does not necessarily presuppose previous possession and is not confined to cases of reinstatement of ousted owners.

3. a) Before proceeding to entertain an action for recovery of possession Magistrate must be satisfied that there is no dispute as to title.

b) A mere allegation by trespasser does not constitute a dispute as to title.

4. a) Effect of sec. 43 Land Settlement Ordinance, is that until register is rectified all other titles must fail.

b) If a party questions other party's registered title it is for that former party to take steps available to him to have it rectified; until such steps are taken Magistrate can properly entertain action for recovery of possession.

(*M. L.*)

APPLIED: P. C. A. 21/40 (8, P. L. R. 181; 1941, S. C. J. 334).

ANNOTATIONS:

1. On first 2 points see C. A. 384/44 (12, P. L. R. 87; *ante*, p. 200) with annotations thereto in A. L. R.

2. On the third point see C. A. 110—116/44 (11, P. L. R. 422; 1944, A. L. R. 567) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANTS: A. Levin & Seligsohn.

FOR RESPONDENT: Hake.

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv which, sitting as a Court of Appeal, confirmed a judgment of the Magistrate's Court, Tel Aviv, awarding possession of certain property to the Respondent. The material facts are not disputed. The land in question consists of plots Nos. 226 and 227, in Block No. 6155 of the lands of Salma village, in a quarter known as Kiryat-Yosef. Land settlement in respect of this area of land took place in 1929 and the land was registered in the Schedule of Rights in the name of forty-one persons who were absent. Those persons did not immediately assert their rights to possession and various trespassers, among them being the present Respondent, settled on the land. These trespassing stttlements seemed

to have taken place round about the year 1933. In 1934 a claim for partition was lodged by some of the registered owners, and in the partition judgment, plots Nos. 226 and 227 were allotted to Parchat Levy one of the forty-one absent persons. They were duly registered in his name. In 1935 Parchat Levy transferred his plot to Ezra Ben-Ner and two other persons. This transfer was also duly registered, and in 1938 the land was again transferred to the present Plaintiffs whose title was also duly regsitered. Meanwhile the Respondent remained on the land as a trespasser. The Magistrate's Court refused to order her dispossession on an action brought by the registered owners, the present Appellants, and the District Court upheld the Magistrate's decision. Apparently the argument in the Magistrate's Court centred round Article 24 of the Magistrates' Law, and the procedure that should be adopted in cases for recovery of possession under that Article. It seems to me that it has not been sufficiently appreciated that Article 24 only deals with the recovery of possession in certain specific circumstances. It is concerned primarily with recovery of possession where there has been recent trespass. The object of the Article was, I believe, to provide a quick remedy instead of Land Court proceedings which in Turkish times involved prolonged litigation. But in my opinion, the Article does not exhaust all the remedies open to a legitimate owner to recover possession. It does not oust the provisions of section 3(c) of the Magistrates' Jurisdiction Ordinance. I concede that that sub-section which empowers the Magistrate to entertain actions for the recovery of the possession of immovable property, should not be interpreted so as to confer on the Magistrate jurisdiction to determine title to land. On the other hand I am unable to place the restricted construction, which it has been argued should be placed on it, *i. e.* that the use of the word "recovery" presupposes that the person bringing that action should himself have had possession of which he has been deprived. I think that the word "recovery" merely means recovery from the trespasser, it is not necessarily confined to the case of the reinstatement of an ousted owner. Before the Magistrate proceeds to entertain the action he must undoubtedly be satisfied that there is no dispute as to title. But in this connection I would emphasize that a mere allegation by the trespasser would not constitute a dispute as to title. According to the admitted facts in this case the Appellant is the registered owner of this land. I must, therefore, consider the effect of section 43 of the Land (Settlement of Title) Ordinance. That section as Their Lordships of the Privy Council have pointed out in the Heirs of Prince Mohd. Selim *v.* The Attorney Ge-

neral (Privy Council Appeal No. 21/40) which, as in most provisions for the registration of title, is the keystone of the whole structure. Until the register is rectified it seems to me that all other titles must fail. That is the underlying principle of any system of Land Registration. If the Respondent questions that registered title, it is for her to take steps which are available to her under the Land (Settlement of Title) Ordinance, to have it rectified, but until she has taken those steps the Magistrate must presume that there is no dispute as to title and he can, therefore, properly entertain an action for recovery of possession under the provisions of section 3(c) of the Magistrates' Courts Jurisdiction Ordinance. The appeal is allowed and the jugdments of the Magistrates' Court and the District Court are set aside and we enter judgment in favour of the Appellants for recovery of possession of the land in question, namely plots No. 226 and 227 in Block No. 6155, as asked in the Statement of Claim, and the Respondents be dispossessed therefrom with costs here and below to be taxed on the lower scale and include the sum of LP. 10 for advocate's attendance fee.

Delivered this 18th day of June, 1945, in the presence of Mr. A. Levin for Appellants.

Chief Justice.

CRIMINAL APPEAL No. 38/45.

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

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

IN THE APPEAL OF:—

Gebicki Stanislaw. APPELLANT.

v.

Attorney General. RESPONDENT.

Disagreement between Judges of Assize Court as to sentence — Relation between sec. 21A, Courts (Amendment) Ord. and Art. 41, Palestine Order-in-Council.

Appeal from the judgment of Criminal Assize sitting at Jaffa (Mr. A/Justice Plunkett and Judge Daoudi) in CR. Assize No. 5/45, partly allowed:—

1. A Court once established is a legal person irrespective of whether it is composed of one Judge or several Judges.

2. Sec. 21A, Courts Ordinance (providing that in case of conflict of opinion as to proper sentence opinion of presiding judge shall prevail) — not

ultra vires and not inconsistent with Art. 41, Palestine Order in Council (vesting in Assize Court exclusive jurisdiction with regard to capital offences, *etc.*) since it does not affect exclusive jurisdiction of Assize Court.

3. In case of disagreement as to sentence between two Judges constituting trial Court, Court of Appeal may feel justified in reducing the sentence to one which represents the mean between the conflicting opinions.

(*M. L.*)

ANNOTATIONS: On interference of Court of Appeal with sentence see CR. A. 69/45 (12, P. L. R. 330; *ante*, p. 671).

(*A. G.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: A/G. Advocate — (Beham).

JUDGMENT.

It has been argued that section 21A of the Courts (Amendment) Ordinance, 1942, is *ultra vires* in that it is inconsistent with the provisions of Art. 41 of the Order-in-Council. Section 21A reads as follows:—

> "Where after conviction of any person charged before the Court of Criminal Assize or a District Court, a conflict of opinion exists amongst the Judges as to the proper sentence to be passed, the opinion of the presiding Judge shall prevail, and he shall pass sentence accordingly".

Art. 41 is in the following terms:—

> "There shall be a Court of Criminal Assize which shall have exclusive jurisdiction with regard to offences punishable with death and such jurisdiction with regard to other offences as may be prescribed by Ordinance".

It is admitted that under the provisions of Article 38 of the Order-in-Council a Court of Criminal Assize can be constituted by an Ordinance but, argues the Appellant, once it has been constituted Art. 41 comes into operation and the Ordinance cannot interfere to regulate its procedure. Now, a Court, once it is established, is a legal person irrespective of whether it is composed of one Judge or several Judges.

We now enquire, wherein is section 21A inconsistent with Art. 41? It is inconsistent, says Mr. Cattan, because it militates from the exclusive jurisdiction of the Court in that it vests the final say as to what the sentence should be in one member. It sems to us that this argument does not sufficiently appreciate the fact that the exclusive jurisdiction given by Art. 41 is conferred on the Court not on the individual members. In our view, the whittling down of the power of one member does not whittle down the exclusive jurisdiction of the Court in which the exclusive jurisdiction is vested. The decision of the Court of Criminal Appeal in England is very often the decision of

the majority, and the fact that the opinion of one member of that Court can not only be whittled down, but completely ignored, does not involve any infringement of the exclusive jurisdiction of the Court. If it did, and the argument of Mr. Cattan were accepted, it would follow, as he argues in this case, that the decision of the Court would be a nullity. For the same reasons we cannot see that the provisions of section 21A of the Courts (Amendment) Ordinance constitute any whittling down of the exclusive jurisdiction of the Court, which is conferred by Art. 41. Indeed, we would go farther and say that when Art. 38 of the Order-in-Council provided for the constitution of a Court by an Ordinance, there was an obligation on the legislature to enact the subsidiary provisions necessary to enable the Court to function. If the legislature had power to constitute a Court of two persons, and it cannot be denied that it has, then, in the absence of section 21A, the provision in regard to the constitution of a two Judges' Court would in many cases be rendered inoperative, which is another reason which would preclude us from accepting Mr. Cattan's interpretation. Nevertheless as there was a disagreement between the two Judges, both of them experienced Criminal Court Judges, we feel we are justified in reducing the sentence to one of 7 years' imprisonment, which represents the mean between the conflicting opinions.

Delivered the 2nd day of May, 1945.

Chief Justice.

CIVIL APPEAL No. 161/45.

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

BEFORE: Edwards and Shaw, JJ.

IN THE APPEAL OF :—

Fayez Oeh Elias. APPELLANT.

v.

Azar Mina Ghandour. RESPONDENT.

Question as to whether premises are "reasonably required" by landlord — Alternative accommodation.

Appeal from the judgment of the District Court, Jerusalem, dated 20.3.45, in Civil Appeal No. 57/44, allowed:—

1. Landlord's admission that he managed to rent a suitable flat for

himself and his family does not cancel fact that he reasonably requires, and has a genuine need of, his own premises.

2. Fact that rent for house shown as alternative accommodation is some 43% above rent of tenant's present premises does not make the house out of question.

(*M. L.*)

REFERRED TO: Aitken *v.* Shaw (Blundell's Rent Restriction Cases (1944) p. 3); Jackson *v.* Harbour (Blundell's Rent Restriction Guide (1944) p. 57; Blundell's Rent Restriction Cases p. 108; Shrimpton *v.* Rabbits (131 L. T. R. 478; 40, T. L. R. 541.

ANNOTATIONS:

1. As to landlord reasonably requiring premises — see C. A. 466/44 (12, P. L. R. 187; *ante*, p. 423) with annotations thereto in A. L. R.

2. As to the availability of alternative accommodation see C. A. 398/44 (12, P. L. R. 55; *ante*, p. 269) with annotations thereto in A. L .R.

3. As to interference of Court of Appeal with findings of Magistrate under sec. 8(1)(c) of R. R. Ord. see C. A. 59/45 (*ante*, p. 624) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Smoira.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem in its appellate capacity, which Court had set aside an order of eviction given by one of the Magistrates of Jerusalem. It is unnecessary to set out the facts at length. Suffice it to say that the Appellant who was Plaintiff in the Magistrate's Court is a Government official, who in February, 1942, was stationed at and living in Bethlehem. By contract of lease dated 3rd February, 1942, he let his house in Jerusalem to Respondent. He then thought that he might at any time be re-transferred to Jerusalem. He accordingly inserted a condition in the lease, to which the Respondent agreed, that if at the expiry of the period of one year he (the landlord) were transferred to Jerusalem the tenant should vacate the house. We pay no attention to this clause because it might well be argued that it is of no binding effect as being an attempt to contract out of the Rent Restrictions (Dwelling-Houses) Ordinance, 1940. At the end of 1943 the Appellant, who had been transferred to Jerusalem, required the house for his own occupation and accordingly requested the Respondent to vacate the house which the tenant refused to do. Hence the action in the Magistrate's Court.

When the case came on for hearing before the Magistrate, the Appellant and his wife admitted that they had managed to obtain suitable

accommodation in Jerusalem but nevertheless they desired to return to their own house. The Magistrate, having heard evidence, came to the conclusion that the Appellant had proved that the premises were reasonably required by the Appellant for occupation by himself and his family, and he also held that the Appellant had proved that there was available for the Respondent alternative accommodation, and there being no other special circumstances raised or proved by the present Respondent (tenant) he made an order of eviction. The present Respondent appealed to the District Court which held that all that the present Appellant had proved was that he wished or preferred to live in his own house but that there was not sufficient proof that the present Appellant reasonably required the premises for occupation by himself. The appeal was accordingly allowed and the order of eviction set aside. Against that decision the Plaintiff now appeals to this Court, having obtained leave from the learned Relieving President of the District Court.

Mr. Cattan, for the Appellant, contends that the learned Relieving President of the District Court was influenced by a mistranslation from the Arabic record in the District Court. It seems that the word actually written down in Arabic by the Magistrate when recording the evidence of the Plaintiff or the Plaintiff's wife, was "yured" whereas the clerk who translated the record into English used the word "desires". We are told that there is another Arabic word namely *"yehtaj"*. We, however, think that nothing depends on this matter of alleged mistranslation.

The first question falling for decision is whether the learned Relieving President was justified in holding that the landlord had not proved that he reasonably required the premises for his own occupation. The learned Relieving President seems to have held that because the landlord had managed to obtain for himself suitable accommodation he could not be said reasonably to require his own premises. In other words, it was held that the mere preference of the landlord for his own house did not amount to proof that he reasonably required the premises. We must here part company with the learned Relieving President. We do not think that an honest and frank answer by the landlord or his wife that they had managed to obtain suitable accommodation cancels the fact that they reasonably required their own premises. What were the facts? The Appellant had been retransferred to Jerusalem. He required a dwelling-place large enough for himself and his family to dwell in and that dwelling place had to be reasonably near his place of work. It is not suggested that his requirement of his

own house was capricious or that he wanted to let it to someone else. We think that it would be in the highest degree cynical for a tenant to be able to turn round and say "I admit that you require accommodation for yourself and your family in Jerusalem and in that part of Jerusalem where your own house is; but you have managed somehow, at any rate for the time being, to rent another house; you must therefore stay there". We think that the Plaintiff did all that could reasonably have been expected of him to prove that he required his own house for occupation by himself and that his desire was a reasonable one.

Dr. Smoira, for the present Respondent, says that the nearest case which he can find fitting the circumstances of ours is Aitken *v.* Shaw mentioned in Blundell's Rent Restrictions Cases (1944) p. 3 where it was held that the words "reasonably required" connote something more than a mere desire and really mean that there must be a genuine present need of the house for the landlord's own occupation. Even if we accept this case as good authority it seems to us that the present Appellant has proved that he has a genuine need of the house for his own occupation, and it is no answer to him to say "Oh; you must stay where you are because by your own exertions you have managed to rent another house".

Mr. Cattan has drawn our attention to the case of Jackson *v.* Harbour cited in Blundell's Rent Restrictions Guide (1944) page 57. We quote from that book:—

> "The reasonableness of the requirement is a question of fact to be determined as at the date of the hearing. An example of reasonableness would be nearness to business, and on this principle it would be a reasonable requirement for occupation of the house that the landlord, having let the house when his department was evacuated to the country, had now had his employment returned to its original town, and therefore he reasonably required to return to that town himself. It is open to the tenant, however, to show that the hardship occasioned to him by being evicted would be the greater. From the wording of the section the burden of proof would appear to lie upon the tenant to satisfy the Court as to the greater hardship. The question of greater hardship must necessarily depend upon the individual circumstances of each case. It is suggested that, generally, a landlord who had evacuated voluntarily, and now wished to return, irrespective of any movements of the business or department employing him, would find it difficult to show that his hardship was greater than that of a tenant who had taken the house near his employment, in a district where accommodation was scarce. The position might well be otherwise

> where the landlord's desire to return is dictated by the movement of the business or department employing him."

At this stage we think it well to quote from the case of Shrimpton *v.* Rabbits Vol. 131 L. T. Reports page 478 and Vol. 40 Times L. R. p. 541, where Mr. Justice Swift said: "A good deal of confusion seemed to have crept in through no clear distinction having been made between a landlord reasonably requiring the premises within the meaning of paragraph (d) of section 5(1) and the Court thinking it reasonable to give effect to the landlord's requirements. The fact however that a landlord satisfied the County Court Judge that he was entitled to possession on any of the grounds specified in section 5(1)(a)(ii) did not absolve him from the further necessity of persuading the County Court Judge that it was reasonable that an order of possession should be made".

The next question is whether the Plaintiff satisfied the Magistrate as to the availability of suitable alternative accommodation for the tenant. The Magistrate dealt very fully with this matter and considered four separate houses. It is abundantly clear that there was available for the tenant at any rate one house near his place of residence in the Deir Abu Tor Quarter the only objection to it being that the rent was LP. 100 *per annum* whereas the rent which the tenant had previously been paying was LP. 70. In other words, his salary is LP. 26 a month which means that he has to pay an additional sum of LP. 2.500 mills a month. Having regard to the fact that the Respondent is doubtless in receipt of cost of living allowance we do not think that this circumstance made this house out of the question, and we therefore think that the Magistrate was justified in holding that suitable alternative accommodation was available.

The sole remaining question is whether the Respondent before the Magistrate alleged the existence of any special circumstances other than the question of alternative accommodation which should have made the Magistrate pause before ordering eviction. We have carefully perused the record, including the final address of the Respondent's advocate to the Magistrate, but nowhere can we find that he alleged any special circumstances of the nature indicated.

In the result we think that the Magistrate was justified in ordering eviction and we accordingly allow the appeal, set aside the judgment of the District Court and restore the judgment of the Magistrate. The Respondent will pay the present Appellant's costs here and in the District Court. The costs in the District Court will be fixed costs of LP. 7 and the costs in this Court will be fixed costs of LP. 10.

Delivered this 27th day of July, 1945, in the presence of Mr. O. Merguerian for Appellant and in the presence of Dr. Smoira for Respondent.

British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 11/45.

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

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

IN THE APPEAL OF:—

David Moyal. APPELLANT.

v.

Armand Brunshvig and 4 ors. RESPONDENTS.

Mortgages — Usurious interest — Penalty — Res inter alios acta — Assignee of a mortgage granted a discount — Deposit of amount in Land Registry.

Appeal from the judgment of the District Court of Tel-Aviv (Judges Mani and Cheshin), C. C. 235/43, dismissed:—

1. A discount allowed to a person who acquires a mortgage from a mortgagee does not affect the amount or interest payable by the mortgagor.

2. If the amount due is deposited by the mortgagor at the Land Registry, interest continues to accrue on the mortgage debt.

(*A. M. A.*)

ANNOTATIONS: The facts of this case are as follows:—

Appellant owed to Fidelity Emun Co., Ltd. the sum of LP. 5,500.— and a mortgage was executed on lands of the Appellant as a security for the debt; the mortgage deed provided for maturity on 1.10.36 and for 9% interest in case of default. Appellant defaulted.

In 1937, with Appellant's consent, the mortgage was transferred to Respondent. An agreement was entered into between the parties providing, *inter alia*, that Respondent should grant Appellant a reduction of LP. 250.— if he would repay LP. 1,000.— of the debt within three months, and a further reduction of LP. 1,000.— if he would repay the whole debt within three years; none of these conditions were fulfilled.

On 28.5.43 Appellant sold the lands in issue and this necessitated a discharge of the mortgage; disputes having arisen as to the amount due, Appellant deposited *under protest* with the Land Registry Office the sum of LP. 8,800, *i. e.* LP. 5,500.— capital and LP. 3,300 interest at 9% from 1.10.36 to 28.5.43.

Appellant subsequently instituted proceedings for the recovery of part of the amount deposited in the Land Registry Office and contended that Respondent had only paid LP. 4,250.— for the mortgage (and not LP. 5,500.—) and that the difference of LP. 1,250 was usurious interest or, alternatively, constituted a penalty.

The District Court dismissed Appellant's action and Appellant appealed.

(*H. K.*)

FOR APPELLANT: Eliash and Rubinstein.

FOR RESPONDENTS: No. 1 — Ganon.
Rest — Gavison.

JUDGMENT.

Frumkin, J.: The facts in this case are fully stated in the judgment of the Court below and need not be repeated. The main issue between the parties relates to two sums of money, namely LP. 250 and LP. 1,000, which Appellant claims to be entitled to deduct from the principal sum of LP. 5,500 secured by a mortgage entered into between him as mortgagor and the first Respondent as mortgagee. It might be here stated that the other Respondents in this appeal were formally cited and are not interested in this case. We will, therefore, in this judgment, refer to the first Respondent simply as the Respondent.

Now, the allegation of the Appellant is that what the Respondent paid in consideration of the mortgage was only LP. 4,250 and that although the mortgage was registered for the amount of LP. 5,500 the Respondent undertook, under certain conditions, to deduct the two sums of LP. 250 and LP. 1,000 respectively. He, therefore, alleges that these two sums represent usurious interest or, alternatively, a penalty.

In our opinion the question of usurious interest does not arise. It is not denied that prior to the registration of the mortgage in question there were no business relations whatsoever between the two parties. If the Respondent only paid LP. 4,250 on this mortgage this was a bargain between him and the original mortgagees and he is entitled to benefit by this bargain. It is true that the Respondent agreed to part with his bargain in favour of the Appellant under given conditions, but those conditions not having been fulfilled in full he is under no obligation to do so. The same consideration applies also to the alternative plea of the Appellant that these two sums represent a penalty. They do not. The Appellant owed LP. 5,500 to the predecessors of the present Respondent. If not for the transfer he would have to pay this sum in full. He agreed to the transfer of the mortgage to the present Respondent and it is this sum which he has to pay to him.

Another ground of appeal concerns the period for which interest is payable. When the Appellant wanted to redeem the mortgage in order to enable him to sell the mortgaged property to other parties he deposited the entire amount of both capital and interest in the Land Registry. He claims that since that date he is under no obligation to pay interest, but the fact is that there was no dispute between the parties as regards at least the greatest portion of the capital due and also as regards a considerable amount of the interest. There was nothing to prevent the Appellant to pay the undisputed sums directly to the Respondent and deposit only the disputed amounts. He has not done so. He is, therefore, liable to pay interest until the date when, in fact, the Respondent could withdraw the capital from the Land Registry.

For these reasons the appeal is dismissed and the judgment of the Court below confirmed, with costs on the lower scale to include LP. 15 advocate's attendance fee to the first Respondent for the hearing of this appeal.

Delivered this 7th day of May, 1945.

Puisne Judge.

CRIMINAL APPEAL No. 118/45.

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

BEFORE: Shaw, J., Judge Curry and Abdul Hadi, J.

IN THE APPEAL OF:—

Mahmoud Muhammad Daoud. APPELLANT.

v.

The Attorney General. RESPONDENT.

Findings of fact — Misdirection of trial Court as to evidence — Tests to be applied — Particulars of misdirection to be given in pleadings.

Appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, dated 21st June, 1945, in Criminal Assize Case No. 24/45, whereby Appellant was convicted of murder, contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death, allowed:—

1. The Court of Appeal will set aside a finding based upon a misdirection in regard to the evidence if satisfied that but for the misdirection the Accused might have been acquitted.

2. Where misdirection is alleged substantial particulars thereof should be given in the notice of appeal.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* CR. A. 51/45 (12, P. L. R. 232; 1945, A. L. R. 570) and note 1 in A. L. R.

2. See, on the second point, CR. A. D. C. Ja. 176/44 (1945, S. C. D. C. p. 490).

(*H. K.*)

FOR APPELLANT: Abdul Hadi & F. Atalla.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from the judgment dated 21st June, 1945, of the Court of Criminal Assize sitting at Nablus, in Criminal Assize Case No. 24/45, convicting the Appellant, on a charge under section 214 of the Criminal Code Ordinance, of the offence of murder. The trial Court accepted the Appellant's age as being about 20 years, and the age of the deceased (who was the Appellant's wife) as being about 23 years.

The following grounds of appeal have been put forward:—

"1. There was evidence which was wrongly excluded during the trial.
2. There was evidence which was wrongly admitted.
3. There were findings of fact which were not based on any evidence.
4. The trial Court have not directed their minds to the issues in this case.
5. The Court have in many instances made findings of fact which are against the weight of the evidence heard".

We shall deal with the various points which were argued by the advocate for the Appellant.

At pages 1 and 2 of the judgment the following appears:—

> "Some time prior to her death there had been matrimonial trouble owing to the Accused asking his wife to obtain from her father a sum of LP. 60 out of the dowry which the Accused had paid. The deceased's father had obtained LP. 175 from the Accused, and the deceased's father says that he gave Aminch LP. 50 and kept LP. 125 for himself. It further seems that relations between the deceased and the Accused were unhappy, owing to her failure to get for him this LP. 60, with which sum he apparently wished to open a shop".

The Appellant has submitted that there was no admissible evidence that the Appellant had asked the deceased to obtain LP. 60 from her father. We would say at once that evidence as to what the deceased said to other persons on this subject, not in the presence of the Ap-

pellant, is hearsay evidence and inadmissible. But in re-examination Prosecution Witness 1, Khaled Ben Nimer el Haj (brother of the deceased) had stated — "I knew that the Accused had gone to Haifa, because he came to my father and I heard him say to my father, 'I'm going to Haifa, and on my return if I find she has not paid me LP. 60, I'll not let her remain in my house, but if she brings LP. 60 it will be all right'." When this witness was cross-examined he had stated — "I don't remember hearing my father in my presence ask the Accused why he wanted LP. 60. I myself never heard the Accused ask for LP. 60".

In the cross-examination of Nimer Haj Ali (father of the deceased) the following passages appear:—

> "I never had any conversation with Accused about this money which he wanted from me. I gave evidence before the Magistrate.
> Q. Did you say to the Magistrate — "I asked him, 'what for do you want the LP. 60?' After he said that he did not ask her to bring the money for him, he said, 'I am going to Haifa'."
> A. Yes, I did say, but I had forgotten that I said so.
> Q. The only time you spoke to him about the LP. 60 he denied having asked her for the money?
> A. That is so. ....."

The Court at page 4 of its judgment said:—

> "There is abundant evidence that he (*i. e.* the Appellant) must have been very angry, because after having paid LP. 175, his wife had not only left him and gone to Nazareth, but she could not get from her father the comparatively small sum of LP. 60. There is therefore ample evidence of motive".

The Court adverted to this matter of the LP. 60 more than once in its judgment. At page 2 this passage appears:—

> "It further seems that relations between the deceased and the Appellant were unhappy, owing to her failure to get for him this LP. 60, with which sum he apparently wished to open a shop".

The Appellant himself, when examined in chief on this point, had stated — "I did not ask her for money, nor did I ask her father. The story about the LP. 60 is not true. I have property".

The Appellant's advocates have stressed the fact that no questions were put to the Appellant in cross-examination on the subject of the LP. 60 — a strange circumstance, if the prosecution relied on this fact for the purpose of showing that the Appellant had a motive for killing the deceased. At this point we would mention the comment of the Appellant that if the failure of the deceased to get the LP. 60 for him was a substantial motive for the murder, it would be strange that when the Appellant returned from Haifa on the evening of the 2nd January

(the date of the murder) he should have killed the deceased without attempting first to ascertain whether she had succeeded in getting the LP. 60 from her father.

We think that the evidence was very slender for supporting a finding that the failure of the deceased to get the LP. 60 was one of the reasons why the Appellant was very angry.

At page 2 of the judgment the following appears:—

> "In any event, about fifteen days before her death the deceased went to Nazareth in order to visit her daughter by her first husband. She stayed with the brother of her first husband, and we are all satisfied that she did not go to visit former husband".

The Appellant takes strong exception to the statements of fact contained in this passage of the judgment. In the first place, and this is conceded by Mr. Rigby, Crown Counsel, who appeared for the Attorney-General, there is no evidence at all that the deceased stayed with the brother of her first husband. According to Prosecution Witness 7, Nimer, she did not "stay" in Nazareth at all — in the sense of staying for the night — because he (Nimer) went by car with his son, brother and two cousins, and fetched her back the same day.

As to the reason for this visit, we find the following in the evidence of Prosecution Witness 1, Khaled (brother of deceased):—

> "Q. The former husband of your sister brought a British Constable to prevent her being taken back to Yamoun?
> A. Yes. The story of the LP. 60 is true. ....."

Now the reference to the LP. 60 in this reply is a *non sequitur*. The question did not refer to the LP. 60. It is, of course, possible that the witness did not hear the question properly, or that he did not apply his mind to it properly, but the question was perfectly clear, and the answer was a clear affirmative. We must, we think, accept it as it stands. We cannot assume that the question was not understood. So the reply is that the former husband brought a British Constable to prevent the deceased from being taken back to her village.

Aisheh stated in evidence that the deceased's former husband was living in Nazareth at the time of the deceased's death. She also said that deceased's daughter had gone to Nazareth only four days before her death, so the deceased had seen her quite recently, and there is no apparent reason why she should have been anxious to see her again so soon.

In this connection it is interesting to note what the Appellant himself said when he was charged on 3.1.45 — see Exhibit P/7. He then said:—

> "... I understood that some ten days ago she went to her first husband, but her father brought her back. I got angry from her because she went to her said husband, but I did not kill her at all..."

And if the deceased's only reason for going to Nazareth was to visit her daughter, it appears to us to be highly improbable that the deceased's father, who was apparently a poor man, would have gone to the expense of following her by car with a number of other persons. With regard to this journey Nimer said:—

> "The reason I took my cousins with me (my son and my brother Naji and two cousins of mine) was that I was afraid I might not find her at Nazareth. I paid all the travelling expenses. I took a special car because we could not find a bus".

The following appears in Nimer's evidence:—

> "Q. Did you say this to the police — 'I asked her why she had left her husband and gone to Nazareth. She said that he had beaten her and asked her for money and she got angry and went to Nazareth to see her child. I therefore brought her back with me to Yamoun on the same day in a special car for fear of shame'? A. I did say that to the police in the village during the investigation. It is correct and true. I do not consider her action as bringing disgrace on the family, because she had a daughter whom she wanted to see. The other members of the family did not consider it disgraceful. ....."

The question whether the deceased had gone to see her former husband was of vital interest to the Appellant, because his case is that it was a matter of family honour, and that it was the deceased's family who murdered her for having brought disgrace upon the family honour. It is a matter of common knowledge that it is considered to be the duty of the woman's family to punish her if she brings disgrace upon the family honour.

At page 4 of the judgment the following appears:—

> "Except the Accused, it is extremely unlikely that anyone should have wished to kill Amineh — except perhaps Amineh's own relations. There is, however, not the slightest evidence that Amine's father or brothers had instigated anyone to kill Amineh. With regard to the suggestion of the defence that perhaps one of her own relatives had killed Amineh, we have ruled this out because it is highly improbable. No question of family honour was involved, and no question of shame arises. There is nothing to show that she visited Nazareth for any other purpose than to visit her daughter. She apparently did not see her former husband".

It appears to us to be very doubtful, to say the least of it, whether the Court could properly direct itself that — "no question of family honour was involved, and no question of shame arises". We think

that it was not reasonable for the Court to come to any definite finding that the deceased had not gone to Nazareth to see her former husband.

In describing what happened at the time of the killing the Court says:—

> "The principal evidence is that of the eye-witnesses Aisheh, Nimer and Khaled. These three people and the deceased, and one Nayef Khader who was spending the night with them, were sitting around a stove, the gate of the courtyard being open. The deceased and Khaled both looked out, and together said simultaneously, 'Father, that is Mahmoud coming'. Aisheh, in evidence, says that she thought that the Accused was coming to take back his wife. When Aisheh first saw him, the Accused was in the courtyard approaching them. There was an oil lamp (a No. 2 lamp) in the room, and light was shed outside sufficient to throw light for one metre from the threshold into the yard. In other words, a person a metre outside could be seen by people who were inside. This was testified by British Constable Remnant, who gave evidence as to the results of his investigation. We accept Mr. Remnant's evidence.
> Aisheh says that the door of the room was open and that when she saw the Accused approach she noticed a small pistol in his hand. The Accused stretched out his hand and fired three shots. Amineh was hit. At the first shot Amineh shouted, 'Father, Mahmoud Rahijeh has killed me'. The deceased moved a little, and two other shots were fired".

With regard to the evidence of the three eye-witnesses, Aisheh (mother of the deceased), Nimer Haj Ali (father of the deceased), and Khaled (brother of the deceased), the Court says:—

> "Now it is clear that the question for this Court to decide is whether we believe the evidence of the witnesses, Aisheh, Nimer Haj Ali, and Khaled. From their demeanour we think that they are witnesses of the truth. They told a simple straightforward story, and moreover a natural one. Aisheh proved to us by answers in Court that she now bears no resentment against the Accused, while she does not in any way deny the truth of her evidence implicating the Accused. We also think that Khaled and his father, Nimer Haj Ali, told straightforward stories. The evidence of British Constable Remnant conclusively proves that Aisheh and Khaled and Nimer Haj Ali were all in a position to see and identify the assailant. There was a light in the room, and (as we have said) that light could show to a person in the room a person who was a metre outside the door".

The Appellant has drawn attention to the discrepancy between the evidence of the eye-witnesses and that of British Constable Remnant (described by the Court as being unassailable). Mr. Remnant said that a person a metre outside the room could be seen by people who were inside.

Khaled said — "When I first saw and recognised Mahmoud coming, he was four or five metres from the door of the room. He was not in a hurry. My sister did not stand up to receive him. We merely said, "Welcome". The visit was not a surprise".

Aisheh said — "While we were sitting around the stove the gate of the courtyard was opened, and the deceased and Khaled looked out. Then deceased and Khaled said at the same time, 'Father, that is Mahmoud coming'. I thought he might be coming to take his wife. I looked outside and saw him (points to the Accused). He was alone. When I first saw him he was in the courtyard approaching us. There was an oil lamp No. 2 in our room and light was protruding outside. The door of our room was open. When I saw the Accused approaching I saw a small pistol in his hand. He stretched out his hand and fired three shots. She was hit. At the first shot she shouted, 'Father, Mahmoud Rahijeh killed me'."

Nimer said — "There was a light showing outside the room. I heard the noise of the gate being opened. Amineh and my son, Saleh, looked out and at once said, 'Father, that is Mahmoud coming'. I looked out and saw that man (points to the Accused). I thought he was coming to take back his wife. I said to my son and dauhgter when they told me that Mahmoud was coming: "He is welcome'. Mahmoud stepped on to the threshold, fired three shots at Amineh, and she shouted — 'Oh, father, Mahmoud Rahijeh has killed me'."

If a witness embellishes his statement — particularly in regard to non-essentials — it does not of course prove that his story is a false one, and if the Appellant was really the man, it might well be that these witnesses said that they recognised him when he was in the courtyard because they had later seen and recognised him when he was at the door. These discrepancies alone would not give us (as a Court of Appeal) any ground for interfering. Perfectly honest witnesses are liable to make discrepant statements, especially in regard to circumstances which are observed at about the time when their minds are affected by alarm and excitement. Section 11 of the Evidence Ordinance, Cap. 54, provides that:—

> "Contradictions in the evidence of witnesses shall not in themselves prevent the Court from finding facts in respect of which the contradictions occur".

There is, however, a very marked discrepancy between the evidence of Prosecution Witness 2, British Constable Remnant, and of Prosecution Witness 1, Khaled, because Remnant stated that a person sitting at point 'C' on the plan (*i. e.* at the point where Khaled was sitting)

could not see a person who approached from outside until that person was actually entering the room, whereas Khaled stated that he saw and recognised the Appellant when he was four or five metres from the door.

We come now to another misstatement in the judgment. At page 2 the following appears:—

> "On the first night of her return to Yamoun, she (the deceased) and her father and her brother, went to the house of one Hardan, who is a brother of the deceased's father. The deceased's father's name is Nimer Haj Ali, and the deceased's mother's name is Aisheh, and the deceased's brother's name is Khaled. On the following night she was in her father's house, and it was on that night that she met her death. It seems that when she returned to Yamoun her husband (the Accused) was on a visit to Haifa, but had returned to Yamoun on or before the day of the murder".

It is quite incorrect to say that on the night following the night after her return from Nazareth the deceased "was in her father's house, and it was on that night that she met her death". What happened was that the deceased stayed for the first night at the house of Hardan (cousin of Nimer). On the next two nights she stayed with the Appellant, and then she came back to her father's house. When the Appellant left for Haifa the deceased was in her father's house. In the words of the deceased's mother, Aisheh:—

> "Her father and her brother brought her back from Nazareth six days before the murder. On her return from Nazareth she returned to her husband for two nights only, and he again sent her to bring money. After then she remained with us till her murder".

Khaled stated that the deceased had been with them for six days before her death.

The misstatement is not unimportant, because the fact is that after the deceased had returned from Nazareth the Appellant took her back to his house, which he might well not have done if he was so angry with her that he wished to kill her. Moreover, if he had really sent her back to her father's house to get the money, it is passing strange that he should have killed her before at least ascertaining that she had failed to get it.

The judgment is again incorrect when it sets out at page two, that — "It seems that when she returned to Yamoun, her husband (the Accused) was on a visit to Haifa, but had returned to Yamoun on or before the day of the murder". When the deceased went to Nazareth the Appellant was working at Jenin. The Appellant went to Haifa to look for work after the deceased had made her visit to Nazareth, and after the deceased had returned to his house for two days.

We come now to a further and very important point in connection with which the trial Court has failed to appreciate the evidence properly. At page five of the judgment, the following appears:—

> "We disbelieve the defence of *alibi*, and in particular we disbelieve the evidence of Tawfiq Haj Ali when he says that he heard Aisheh say, 'I do not know who fired the shots'. The evidence of Tawfiq is discredited as was pointed out by the Assistant Government Advocate in his final speech (page 57 of record). In view of the fact that Abdul Kader before us denied that he was present, which is in direct contradiction to Tawfiq's evidence, we think that Tawfiq was obviously lying, and the reason for his doing so emerged in cross-examination at pages 47 and 48 of the record".

It is true that Defence Witness 5, Abed el Kader, denied having gone to Nimer's house on the night of the murder, but the Court appears to have overlooked the fact that Nimer himself said that Abed el Kader did come to his house, although he did not come inside. So the person who was lying about this was not Tewfiq Abd el Kader. Tewfiq's evidence was very important, if true, because he said that he had heard both Aisheh and Khaled say that they had not recognised the person who had killed Amineh. Tewfiq is Nimer's brother, and an uncle of the deceased.

Mr. Rigby has submitted that there is no reason for believing that the deceased's relatives knew that Appellant had come back to the village that evening. The Appellant in cross-examination stated that they (*i. e.* Nimer, Aisheh and Khaled) did not know that he had returned from Haifa that day. He further stated that the house of Muhammad Quassem (where he had gone after he got back) was not near to Nimer's house, and that he stayed there till about 9.30 *p. m.*, and had returned again to his own house at about 9.30 *p. m.*, only half an hour before his arrest.

The Appellant had got back only about two hours before the killing took place, but it was obviously not impossible for the deceased's relatives to find out that he had returned.

Mr. Rigby has submitted that the all-important point is that the Court believed the eye-witnesses. It is true, of course, that if the eye-witnesses have told the truth, the Appellant is guilty, but the fact must not be lost sight of that these eye-witnesses, although three in number, are all closely related. They are the father, mother, and brother of the deceased. They are in no sense independent witnesses.

Auni Bey has criticised the following passage at page four of the judgment:—

> "The next question which we have to consider is whether there are

> any circumstances whereby we can test the evidence of the three eye-witnesses. We think that there are. The Accused was arrested in his own house (which is not far from the scene of the crime) about two hours after the murder. The mere fact that he did not abscond does not assist him if, as we assume, he hoped that he would be able to shoot his wife and then make off without being noticed by anyone. This is consistent with his being found in his own bed, thereby pretending that he had been sleeping there the whole night".

We have found it difficult to understand what inference adverse to the Appellant the Court drew from the fact that he was found in bed, and Mr. Rigby has conceded that this passage carries the case against the Appellant no further.

It should be mentioned that Nimer stated in the trial Court that he had dropped or waived his rights against the Appellant, and it has been submitted that he would not have done this if he really believed that the Appellant was guilty.

At page 307 of Archbold's Criminal Pleading (31st Edition) the following appears:—

> "Misdirection as to the evidence to be of any avail to an Appellant must be of such a nature and the circumstances of the case must be such that it is reasonably probable that the jury would not have returned their verdict had there been no misdirection. The burden of establishing this lies upon the Appellant, not upon the prosecution".

It is clear from what has been stated above that the trial Court did misdirect itself in regard to the evidence. The case for the defence being that the family of the deceased was responsible for her killing, we consider that the misdirections, particularly in regard to the reason for the deceased's visit to Nazareth and in regard to the evidence of Tawfiq, were of vital importance. After giving the case our most careful consideration we cannot be satisfied that if the Court had not misdirected itself it would not, at least, have given the Appellant the benefit of the doubt.

We must therefore allow this appeal, and order the acquittal of the Appellant. He must be dishcarged from custody unless he be detained on some other charge.

Mr. Rigby has drawn our attention to the following passage at page 308 of Archbold's Criminal Pleading (31st Edition):—

> "Where misdirection is alleged substantial particulars must be given in the notice of appeal".

While we do not say that failure to give such particulars would alone be a sufficient ground for dismissing an appeal, we consider that in future particulars should be given in the notice of appeal.

Delivered in open Court this 21st day of July, 1945, in the presence of Auni Bey Abdul Hadi for the Appellant, and Mr. Rigby for the Respondent.

British Puisne Judge.

CIVIL APPEAL No. 14/45.

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

BEFORE: Shaw and Frumkin, JJ.

IN THE APPEAL OF:—

Joseph Rosner. APPELLANT.

v.

Habib Bishara. RESPONDENT.

Wrongful appropriation — Bailee — Value of property entrusted — Debentures — Mejelle, 891 — *Principal and agent.*

Appeal from the judgment of the District Court of Jerusalem, (Judges Hasna and Bardaky), C. C. 105/43, dismissed:—

The decisive period, when dealing with the value of a pledge, is the time at which it had to be returned.

(*A. M. A.*)

ANNOTATIONS: Appellant sued Respondent in the lower Court for the return of three 5% debentures of the General Mortgage Bank of Palestine, or their nominal value of LP. 100.— each. The District Court found:

a) that the debentures were handed over by Appellant to Respondent in their personal capacities and not, as alleged by Respondent, as representatives, for the purpose of enabling Respondent to obtain a loan thereon;

b) that Respondent had undertaken to return the said debentures within three months;

c) that the said debentures had meanwhile been redeemed; and

d) that the value of the debentures at the time Respondent had undertaken to return them was LP. 81.250, and that this was the decisive date.

The District Court gave judgment accordingly. The main point on appeal was that, according to Appellant's contention, he was entitled — as against a bailee who had denied the bailor's title — to the return of the debentures in kind or their *nominal* value.

(*H. K.*)

FOR APPELLANT: Steif.

FOR RESPONDENT: Levy.

JUDGMENT.

Frumkin, J.: This is an appeal and a cross-appeal. For easier reference we will refer to the parties by their names.

Rosner was the Plaintiff in the Court below and is the Appellant and cross-Respondent. Bishara was the Defendant in the Court below and is the Respondent and cross-Appellant in this case. The facts are fully stated in the judgment of the Court below. It is more convenient to deal first with the cross-appeal.

The main ground of Bishara is that there was no privity of contract between himself and Rosner. He, Bishara, so he alleges, acted on behalf of his sister Rose Bishara, and Rosner on behalf of one Rembach, deceased. He submits, therefore, that whatever rights Rosner might have in claiming the value of the three debentures he can do so only as against Rose and on behalf of Rembach.

When we turn, however, to the evidence before the Court below we find that the letter dated 13th January, 1942 (Ex. P. 2) was signed by Bishara in his name personally. He thereby undertook himself to pay certain amounts to the Bank and failing that to restore the securities on the date fixed. Furthermore all the other documentary evidence in the file shows that the debentures were received by Bishara, and that it was he who was to return them at the expiration of the agreed period. All there is against this is the evidence of Bishara himself which did not satisfy the Court below. The cross-appeal must, therefore, fail.

The appeal relates only to the amount payable in consideration of the three debentures which have, in the meantime, been redeemed by the company and cannot be restored in kind. There was evidence before the Court below as to the value of the debentures at different periods. The Court held that the debentures should be valued as at the time when they had to be restored, and we think that this decision was correct. In our opinion Article 891 of the *Mejelle* applies. The provisions of this Article have to be taken in a broader sense to include not only the destruction or perishing of the goods taken, but also any other cause which prevents them from being returned in kind. In such a case the wrongful appropriator is liable to give the value at the time and place of the wrongful appropriation, which in this case must mean at the time when he had to return the goods.

Another minor point taken on behalf of Rosner on his appeal relates to the value of the coupons attached to the debentures when delivered by him to Bishara. But it seems that the Court accounted for them in fixing the value of the debentures. The appeal must also fail.

In the result the judgment of the District Court is confirmed. As both appeal and cross-appeal fail, there is to be no order as to costs.

Delivered this 7th day of May, 1945.

Puisne Judge.

CRIMINAL APPEAL No. 115/45.

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

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

IN THE APPEAL OF:—

Jamal Hussein Mahmoud Abu Hassoun. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Various indictments for separate offences arising out of the same facts — Civil and Military Courts — Sentence.

Appeal from the judgment of the District Court of Nablus, dated 13.6.45, in Crime No. 233/45, whereby Appellant was convicted of robbery *contra* sections 287 and 288 of the Criminal Code Ordinance, 1936, and sentenced to six years' imprisonment, dismissed as to conviction but sentence varied:—

> Where a number of offences are charged, arising out of the same facts, it is usual to join them in the same indictment and to try them before the same Court. This procedure is particularly desirable here as an accused can be charged simultaneously before the Military and Civil Courts.
>
> (*A. M. A.*)

FOR APPELLANT: Kamhieh.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

In this case we confirm the conviction.

The Court sentenced the Accused to six years' imprisonment and with this we would not interfere were it not for a fact which emerged during the hearing of this appeal. It appears that the Accused had already been tried by a Military Court on a charge of possession of the firearms with which he committed this robbery. Now the Crown is of course entitled to indict an accused in respect of any number of offences arising out of the same act provided they form distinct offences under the Code, but it is usual to join them in the same indictment and to try them before the same Court. We consider this procedure particularly

desirable in Palestine where an accused can be charged simultaneously before the Military and Civil Courts neither of which need necessarily know what sentence the other has passed.

In these circumstances we consider that this sentence should be reduced to one of five years' imprisonment to coincide with that awarded by the Military Court and to run from the date of conviction by the District Court and concurrently with the sentence which he is now serving and which was imposed by the Military Court.

Delivered this 4th day of July, 1945.

Chief Justice.

CIVIL APPEAL No. 226/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, JJ.

IN THE APPLICATION OF —

The Palestine Jewish Colonization Association. — APPLICANTS. (*Original 3rd party*)

v.

Emira Zahra Jazayiri & an. — RESPONDENTS. (*Original Plaintiffs*)

and

Abdallah Hosha El Ali & 36 ors. — RESPONDENTS. (*Original Defendants*)

Stay of execution pending appeal — May be granted in Land Settlement Appeals — C. P. R. 331—2; *L. S. Ord., secs.* 10, 48, 49, 64(1), — *Settlement of Title* (*Procedure*), *Rules* 14, 19.

Application that the execution of an order granted *ex parte* by the Settlement Officer, on 1.9.45, for immediate possession to be awarded to Respondents 6—37, and of an order of 22.9.45, refusing to alter the aforesaid order of immediate possession, be stayed and/or that this Court may grant an interim order to prevent the said Respondents Nos. 6—37 from entering into immediate possession of parcels 1 and 2 of Block 13759 of Kirad el Ghannama lands, pending the determination of the appeal submitted in respect of these lands and that the costs of this application be borne by Respondents Nos. 6—37; application granted:—

The Supreme Court, when seized with an appeal from a Land Settlement Officer, may grant stay of execution.

(*A. M. A.*)

FOR APPLICANTS: Wittkowski.
FOR RESPONDENTS: Nakleh — for Emira & Amira Asma,
Cattan — for Responents Nos. 1—37 (2nd group of Respondents).

RULING.

This is an application for stay of execution of a decision of the Land Settlement Officer of Safad of 1st September, 1945, whereby that Settlement Officer refused to rescind an order of possession made by him in favour of the present Respondents consequent on his decision in case No. 3/Kirad El Baqqara. On 19th July, 1945, the learned Chief Justice (Sir William FitzGerald) granted leave to appeal to this Court. Mr. Cattan, for the Respondent, relying on the words "or possession" in section 10 of the Land (Settlement of Title) Ordinance, and Rules 14 and 19 of the Settlement of Title (Procedure) Rules contends that grant of leave to appeal does not operate as a stay of execution and that therefore this Court had no power to interfere with the order of the Land Settlement Officer of 1st September, 1945. Mr. Cattan argues that once the Land Settlement Officer has given his decision, matters must go forward as laid down in sections 48 and 49 of the Land (Settlement of Title) Ordinance. We wish to leave open the question of whether the Land Settlement Officer was or was not competent to make the order of the 1st September, 1945, that is, the order of possession made about six months after his decision the date of which was the 16th February, 1945. The short question, however, for us to decide is whether we have power to stay execution at all. Section 64(1) of the Land (Settlement of Title) Ordinance is in the following terms:—

> "The Civil Procedure Rules, 1938, shall apply to the hearing and determination of the appeal".

Mr. Cattan contends that this merely imports such rules of Civil Procedure, 1938, as govern the hearing and determination of the appeal, but do not import those Civil Procedure Rules, 1938, which deal with other matters.

We think, however, that this is too narrow an interpretation to place on section 64(1). We think that Rules 331 and 332 apply in this case.

Mr. Cattan next argues that rules cannot override the substantive provisions of an Ordinance. This is true. But we do not think that there is anything in the Land (Settlement of Title) Ordinance which makes Rule 331 inapplicable to the circumstances of this case.

Turning again to Rule 19 of the Settlement of Title (Procedure) Rules we think that this rule is limited to regulating transactions in the Land Registry, but that Rule 19 has nothing to do with the question of maintaining the *status quo* on the land. We therefore conclude that Rules 331 and 332 give us power to grant stay of execution pending the determination of the appeal.

In all the circumstances of the case, we think that stay of execution of the decision of 16th February, 1945, should be granted. The present Applicant must give an open guarantee to secure any costs or damages suffered by the Respondents. Subject to such security being given no order of possession in favour of the present Respondents will issue. Costs of this application will abide the event, but, in order to facilitate the final arrangements, we certify an advocate's attendance fee at the hearing of LP. 5.— to the ultimately successful party.

Given this 23rd day of October, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 71/45.

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

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

IN THE APPEAL OF :—

Nathan Kravitz. — APPELLANT.

v.

Itzhak Nussovsky. — RESPONDENT.

Interference with discretion of trial Court — Finding that premises were reasonably required by landlord.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated the 15th December, 1944, in Civil Appeal No. 97/44, allowed:—

1. Court of Appeal should only interfere with discretion of trial Court, if satisfied that it has been improperly exercised.

2. Magistrate's discretionary finding that premises were reasonably required by landlord based on medical evidence that house occupied by him was injurious to his health — not assailable merely because landlord did not adduce evidence that house which he seeks to recover was beneficial to his health.

(*M. L.*)

FOLLOWED: C. A. 272/44 (11, P. L. R. 582; 1944, A. L. R. 739).

ANNOTATIONS: In addition to case followed see C. A. 398/44 (12, P. L. R. 55; *ante*, p. 269) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPELLANT: Elkayam.

FOR RESPONDENT: Lin.

JUDGMENT.

This is an appeal by leave from the judgment of the District Court of Tel-Aviv sitting in its appellate capacity in which it reversed the decision of the Magistrate in Tel-Aviv, who awarded the possession of a flat to the Appellant.

Two points were raised in this appeal, that there was no alternative accommodation and that if there was it was not suitable. The Magistrate came to the conclusion that there was alternative accommodation and that it was suitable. The District Court agreed that the alternative accommodation offered was suitable and on this point we see no reason to interfere with the decision of the Magistrate and the District Court.

It has been argued that the alternative accommodation was not available because it is alleged that the lessor or occupier of that alternative accommodation was not entitled to sublet. It appears that since the institution of these proceedings there has been some dispute between the lessor of the alternative accommodation and his wife which might place difficulties in the way of the letting. Be that as it may, there is the clear finding of the Magistrate based on an agreement which was an exhibit and which definitely proved that the owner of the alternative accommodation was in a position to give possession at the relevant date. But the real point raised in the appeal was whether the Court could be satisfied that the conditions precedent to the granting of the relief under 8(1)(c) existed, that is, that the Plaintiff reasonably required the flat for his own use. The Magistrate found that he did and he gave his reasons for so finding. The District Court examined those reasons, and in the event they decided that on the same facts they would have come to a different conclusion. Now, it seems to us that the issue raised here has for all practical purposes been decided in Civil Appeal No. 272/44, which emphasized that a Court of Appeal should only interfere if it was satisfied that the discretion has been improperly exercised. The learned Magistrate had before him the evidence of a medical man that the house in which the Plaintiff was living was injurious to his health, and it was for that reason he wished to change his abode. The District Court were of opinion that before they could

consider that as a sufficient reason they would require to be satisfied also by medical evidence that the house to which he was transferring would be beneficial to his health. Such evidence would, of course, have re-enforced the opinion of the Magistrate and it can be conceded that if the discretion was vested in the District Court, which it was not, they would have been entitled to insist on this further evidence, but, in our opinion, failure to call it cannot be regarded as an improper exercise of a discretion which is pre-eminently vested in the Magistrate. Having therefore come to the conclusion that the Magistrate did not improperly exercise his discretion, we consider that the District Court was wrong in interfering with that discretion.

For these reasons the appeal must be allowed, the decision of the Magistrate's Court restored with costs here and below on the lower scale to include LP. 10 for advocate's attendance fee.

Delivered this 20th day of June, 1945.

Chief Justice.

CRIMINAL APPEAL No. 140/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Dakhil Ali Abdul Rahman. APPELLANT.

v.

Attorney General. RESPONDENT.

Stealing after previous conviction — C. C. O., 278(2) — The section does not apply to attempted theft — Sentence.

Application for leave to appeal from the judgment of the District Court of Haifa, dated 10th of July, 1945, given in Criminal Case No. 77/45, whereby the Applicant was sentenced to one year's imprisonment on a charge of attempting to steal after previous conviction contrary to sections 278(2) and 29 of the Criminal Code Ordinance, 1936; application allowed and conviction altered to one under secs. 272 and 29:—

Sec. 278(2) of the Criminal Code Ordinance does not apply to an attempted theft.

(*A. M. A.*)

FOR APPELLANT: Hamoudeh.

FOR RESPONDENT: Legal Assistant — (McFee).

JUDGMENT.

This is an application for leave to appeal from a judgment of the District Court of Haifa, whereby the Appellant was convicted of attempted theft of a horse contrary to section 278(2) of the Criminal Code Ordinance, and sentenced to one year's imprisonment.

It is not now contended that the facts found by the trial Court do not warrant a conviction for theft of a horse. It is however contended that section 278(2) of the Criminal Code Ordinance does not apply to the case where a person who has been previously convicted of theft under section 272 is later convicted only of attempted theft. The important words in section 278 are "before committing a theft". We are of the opinion that the prosecution must prove on the subsequent occasion that the accused has committed theft.

We accordingly agree with the contention of the Appellant's advocate. We therefore entertain the application for leave to appeal and alter the conviction to one under section 272 read together with section 29(d) Criminal Code Ordinance. The maximum sentence therefore to which the Applicant was liable was 18 months' imprisonment. The sentence of one year's imprisonment was not excessive. The sentence will stand, but it will date from the date of conviction, 10th July, 1945.

Delivered this 18th day of August, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 179/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Muhammad Abdul Muhsin Akil Abdul Hadi Awshah & 3 ors. APPELLANTS.

v.

Rushdi Ahmad Ibrahim Awshah. RESPONDENT.

Specific performance — Sale by power of attorney — Remedy against transferees with notice — C. A. 156/44 — C. A. 181/43 — C. A. 48/38, C. A. 215/38 — Collusion.

Appeal from the judgment of the Magistrate's Court of Majdal sitting as a Land Court, dated the 1st of May, 1945, in Land Case No 35/45, dismissed subject to a variation:—

A claim for specific performance may be granted although the land has subsequently to the contract of sale (or irrevocable power of attorney) been transferred to purchasers with notice who are cited as defendants.

(*A. M. A.*)

REFERRED TO: C. A. 48/38 (5, P. L. R. 313; 1938, 1 S. C. J. 327; 3, Ct. L. R. 257); C. A. 215/38 (5, P. L. R. 553; 1938, 2 S. C. J. 177; 4, Ct. L. R. 209); C. A. 181/43 (10, P. L. R. 424; 1943, A. L. R. 618).

ANNOTATIONS: In addition to the cases cited see the following authorities: C. A. 142/40 (7, P. L. R. 398; 1940, S. C. J. 255; 8, Ct. L. R. 204), C. A. 23/41 (8, P.L.R. 101; 1941, S.C.J. 271; 10, Ct. L. R. 238); C.A. 119/42 (1942, S. C. J. 755); C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R. 509) and C. A. 355/44 (11, P. L. R. 642; 1944, A. L. R. 760).

(*H. K.*)

FOR APPELLANTS: Hawari.

FOR RESPONDENT: Michaeli.

JUDGMENT.

This is an appeal from the judgment dated 1st May, 1945, of the learned Magistrate of Majdal in Land Case No. 35/45.

In that judgment the Magistrate ordered specific performance of a power-of-attorney (Exhibit C.) dated 17.3.38, and he cancelled the registration of parcel 39, block 1540, of the Land Registry, Gaza, which registration was half in the name of the second and third Appellants and half in the name of the fourth Appellant.

The Magistrate further ordered that half of that parcel should be registered in the name of the Respondent, and that the Appellants must not oppose the possession of the Respondent in that half share.

The facts are as follows.

The Respondent (original Plaintiff) made an agreement with the first Appellant (original first Defendant) to purchase from him (first Appellant) an undivided half share of parcel No. 35, block 1540. A power-of-attorney (Exhibit C.) dated 17.3.38, was made wherein the first Appellant authorised a certain Ahmad Ibrahim Hamdan to effect transfer to the Respondent. The Respondent paid the purchase price of LP. 60, and took possession of the half share as from that date, namely 17.3.38. The Respondent actually took possession of parcel 39, block 1540, and the first Appellant brought an action in the Magistrate's Court of Majdal (Land Case No. 272/43) on 4.7.43, asking for the cancellation of the power-of-attorney, and for an order restraining the Respondent from interfering with parcel 39. On 29.3.44 the Magistrate gave a judgment cancelling the power-of-attorney and ordering the Respondent not to interfere with parcel 39. He also ordered

the first Appellant to refund the purchase price of LP. 60. That judgment was taken on appeal to the Supreme Court — C. A. 156/44. The Supreme Court set aside the Magistrate's judgment on 25.10.44 — see Exhibit D. — and remitted the case with certain directions, the principal of which was that the Magistrate should verify whether parcel 35 referred to in the power-of-attorney was identical with parcel 39.

While that appeal was pending in the Supreme Court, the first Appellant, on 29.9.44, effected the transfer of half of parcel 39 in *musha'* to Appellants Nos. 2 and 3, and on 21.11.44, that is to say after judgment had been given in the Supreme Court, he transferred the other half to Appellant No. 4.

When the case was remitted from the Supreme Court to the Magistrate, the first Appellant (who was the Plaintiff) applied to discontinue the case under Rule 135 of the Magistrates' Courts Procedure Rules, and the case was accordingly terminated. So the power-of-attorney still remained uncancelled.

On 6.2.45 the Respondent brought an action (Land Case No. 35/45) in the Magistrate's Court of Majdal asking for specific performance of the power-of-attorney, and for the cancellation of the registration which had been effected in the names of Appellants Nos. 2, 3 and 4. The Magistrate gave judgment as stated above. It may be observed here that the Magistrate found that parcels 35 and 39 were identical, and he also found that Appellants Nos. 2, 3 and 4 had notice of the power-of-attorney at the time when they took transfer.

Mr. Hawari for the Appellant has put forward three grounds of appeal. In the first place he submits that the Magistrate erred in giving a decree for specific performance in favour of the Respondent in this particular case. His submission is that the doctrine of equitable title can only apply between a purchaser and his immediate vendor.

Mr. Hawari has referred to Civil Appeal No. 181/43 (10, P. L. R. 424). In that case the following passage appears in the judgment:—

> "It is quite clear that the document on which the Respondent relied was a contract for sale, but for nearly ten years the Respondent took no steps to implement this contract by obtaining registration in his name in the Land Registry. After some nine and a half years the first Appellant sold this same land to the second Appellant, his wife. The doctrine of equitable title can only apply between a purchaser and his immediate vendor. It is always a wise precaution for such a contract to be carried out and the final transfer completed, because if this does not happen the purchaser always runs the risk of the vendor selling this same property to somebody else. ..... He still of course can bring a claim, if so disposed, for damages for breach of the contract to sell in the competent Court".

Mr. Hawari points out that the power-of-attorney was made on 17.3.38, and that it was not till 6.2.45 that the Respondent brought his action asking for specific performance.

The second ground of appeal, which is in effect the same as the first ground, is that the Magistrate erred in his interpretation of Civil Appeal 181/43. It may be observed that the Magistrate held that the decision in Civil Appeal 181/43 was confined to cases where there was a *bona fide* transfer, and not to a case like the present where the transferees had notice of an earlier agreement to transfer to someone else. In its judgment in Civil Appeal 181/43 the Court has drawn no distinction between a transfer with notice and a transfer without notice.

Mr. Hawari has urged that Appellants Nos. 2, 3 and 4 have proved that their vendor (Appellant No. 1) had a valid title.

Mr. Michaeli in reply has referred to Civil Appeal No. 48/38 (5, P. L. R. 313). The following appears in the headnote to that case:—

"HELD: 1. The Respondent was not a *bona fide* purchaser of the said undivided share which was claimed by the Appellant before the Land Settlement Officer as before the transfer to him had been effected he had been served by the Appellant with a notarial notice in which he was definitely informed that the Appellant had purchased the land in dispute by means of an irrevocable power-of-attorney, the date and number of which were duly set out in the notice, and he was warned in the said notice that the purchase by a certain Nelly Abella, his vendor, was in bad faith, as she as well as her father knew that the Appellant was the purchaser and had been in possession for a long time of the said land, and that consequently he would purchase the said land at his own risk. It made no difference that the Respondent had, before receiving the said notice, entered into an agreement with the said Nelly Abella to purchase the said undivided share.

2. The fact that the Respondent was not a *bona fide* purchaser without notice would not affect him if he could show that his vendor, the said Nelly Abella, was herself a *bona fide* purchaser because the Respondent would take her title".

Mr. Michaeli has also referred us to Civil Appeal 215/38 (5, P. L. R. 553) in which the decision in Civil Appeal 48/38 was followed.

In our judgment the position is generally similar to that in Civil Appeal No. 48/38. If Appellants Nos. 2, 3 and 4 had taken transfer from someone who had himself taken transfer from Appellant No. 1 without having notice of the power-of-attorney, then in that case they would have been entitled to keep the land. But Appellants Nos. 2, 3 and 4 took transfer knowing that the first Appellant, being bound

by the power-of-attorney, had no right to give transfer to them. They were indeed knowingly assisting the first Appellant to deprive the Respondent of his rights. In such circumstances we find that they are in no better position than the first Appellant himself. For purposes of specific performance they are identified with the first Appellant, and the Respondent is entitled to claim from them the half share in the land which the Appellant was under contract to sell to him. It would be clearly inequitable to refuse specific performance to the Respondent in such circumstances and to allow others to benefit by what was a collusive transaction.

Mr. Hawari has put forward a third ground of appeal, which is that in any event the sale to the second and third Appellants was good because when he sold to them the first Appellant was still the owner of half of the parcel and therefore entitled to sell it.

Mr. Michaeli in reply stated he does not dispute that the first Appellant was entitled to sell half of the parcel, and that he has no intention of asking for *awlawiyeh*. In the circumstances we find that the learned Magistrate erred in cancelling the registration in favour of the second and third Appellants. The only registration which must be cancelled is that in the name of the fourth Appellant which was effected on 21.11.44.

Subject to this reservation the appeal must be dismissed. In the result Appellants Nos. 2 and 3 will remain the registered owners of half of parcel 39, block 1540, and the registration in the name of Appellant No. 4 will be cancelled, and that half share will be registered in the name of the Respondent.

The Respondent must have his costs against Appellants Nos. 1 and 4, and Appellants Nos. 2 and 3 must have their costs against the Respondent. These costs will be taxed on the lower scale and will include a fee of L.P. 10 (ten pounds) in each instance for attendance at the hearing.

Delivered in open Court this 26th day of November, 1945, in the presence of Mr. Hawari for the Appellants and Talat Eff. Dajani for the Respondent.

British Puisne Judge.

CRIMINAL APPEAL No. 136/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Eissa Mohammad Mousa. APPELLANT.

v.

The Attorney General. RESPONDENT.

Identification of Accused — Circumstances in which an identification parade should be held — CR. A. 30/42, 9/44.

Appeal from the judgment of the District Court of Haifa, dated 16.7.45, in Criminal Case No. 148/45, whereby Appellant was convicted of an offence of housebreaking contrary to section 295 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, allowed:—

Conviction based on an identification set aside on the ground that the identification was not satisfactorily made.

(*A. M. A.*)

REFERRED TO: CR. A. 30/42 (1942, S. C. J. 221; 11, Ct. L. R. 206); CR. A. 9/44 (1944, A. L. R. 90).

ANNOTATIONS: See the notes in S. C. J. to CR. A. 30/42 (*supra*) and *cf.* CR. A. 60/44 (1944, A. L. R. 318).

(*B. K.*)

FOR APPELLANT: Hamoudeh.

FOR RESPONDENT: Legal Assistant — (McFee).

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, convicting the Appellant of housebreaking and sentencing him to three years' imprisonment.

On 8th March, 1945, at about 1.15 *p. m.* a man entered the house of Mrs. Adela Perl on Mount Carmel. Mrs. Perl tried to catch the man, but he kicked her and she had to let him go and he managed to escape. Mrs. Perl, who had never seen the assailant before, went on the following day to Mount Carmel Police Station, where she asked to see Corporal Grossman into whose office she was shown. There she saw the Appellant. It is not clear whether Mr. Grossman was expecting the lady or whether it was just by mere chance that the Appellant happened to be with Mr. Grossman at the time.

Mr. Grossman's evidence, however, was to the effect that he had the Appellant in his room for the purpose of an interview and for checking

his movements on the previous day. It would therefore seem that it was just by chance that the lady entered his office when the Accused was with Grossman. Mrs. Perl said that she recognized the Appellant as being the Accused. No identification parade was held, yet she had said that she did not know the man before. It was, of course a natural thing for the lady when seeing someone in the Police Office closeted with the corporal to assume that this was a man who had been caught by the Police and who was in fact the same man who had entered her house on the previous day. Had there been in the room more than one person not in Police uniform and had Mrs. Perl picked out one of these men, the position might have been different, because one might have been able to say that the proceedings were as good as an identification parade. There can, however, be no doubt from the evidence that the Appellant was the only person with Mr. Grossman at the time. The Appellant's advocate has remarked on a very significant fact which is found in Grossman's evidence from which we quote:—

> "At my office I began to question him and said I would like to check his movements on the previous day. While I was doing this the complainant Mrs. Perl was shown into my office. I told her to go out and P/C. 2075 to take her out. They went out. She said nothing".

We think that, had Mrs. Perl really recognized the Appellant, she would, on seeing him in Grossman's room, at once have said: "That is the man". To put it very briefly, we think that the circumstances of this case required an identification parade to be held. We refer to Criminal Appeals 30/42 and 9/44. We do not think that the evidence can be said to be satisfactory or sufficient. For this reason the appeal is allowed and the conviction is quashed and the Appellant is set at liberty unless he is detained on another charge.

Delivered this 18th day of August, 1945.

A/Chief Justice.

HIGH COURT No. 35/45.

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

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

IN THE APPLICATION OF :—

Sheikh Fahmi Hafez el Agha & 10 ors. PETITIONERS.

v.

Chairman of the Building and Town Planning Commission, Gaza sub-District, Gaza & 2 ors. RESPONDENT.

District Commission modifying scheme of Local Commission re widening of road — Importance of provisions re deposit of scheme and plans and notice of deposit — Power of Local Commission to take possession of all land, irrespective of area, effected by scheme.

Return to a rule *nisi* issued on the 2nd of May, 1945, directed to the 1st and 2nd Respondents calling upon them to show cause why the detailed scheme known as the widening of roads scheme No. 1 at Khan Younis, should not be cancelled and/or to cancel the notices issued by the 2nd Respondent to the Petitioners dated 21.1.45, No. B. K. of 23.4.44, whereby the Local Town Planning Commission at Khan Younis was authorised to take possession of the areas of lands shown in these notices, the properties of Petitioners, including the buildings and other constructions thereon, for the purpose of widening the street known as El-Mahhatta (the Station Street) which extends from Haj Mustafa el Batta's shop on the West to the new house of Said Hijazi on the East, and why the Respondents should not be ordered to refrain from widening the street and/or take possession of Petitioner's property; order *nisi* discharged:—

1. Where a District Commission sees it fit to modify a town planning scheme submitted to them by a Local Commission they need not send it back for approval by latter.

2. Where provisions of sec. 16, Town Planning Ordinance were not fully carried out and scheme affects Petitioner's property, High Court will grant relief.

3. Statutory provision empowering Local Commission to expropriate without compensation any area not exceeding one quarter of owner's plot does not preclude Commission from entering into possession of more than such quarter, though any excess area must be compensated for.

(*M. L.*)

FOR PETITIONER: Bisseiso.

FOR RESPONDENTS: Nos. 1 & 3 — Crown Counsel — (Rigby).
No. 2 — Elia.

ORDER.

This is a return to a rule *nisi* calling upon the District Commissioner of Gaza and the Mayor of Khan Younis to cancel the detailed Town Planning Scheme as it is applied to the Municipality of Khan Younis. On the application of the Petitioners, the District Commissioner and the Mayor of Khan Younis were called for cross-examination.

The detailed Town Planning Scheme, which is the subject-matter of this petition, is concerned with the widening of a road in Khan Younis.

The Petitioners do not deny the statutory authority of the Local Commission to formulate such a scheme, subject to the provisions of the Town Planning Ordinance. They base their case on the fact that the statutory conditions precedent to enforcing the scheme have not been complied with. The first of these statutory omissions, according to Dr. Bisseiso, is concerned with section 14 of the Ordinance. Apparently the scheme, as originally prepared by the Local Commission, provided for a widening of the road by ten metres. When this was submitted to the District Commissioner, he approved it with the modification that the road be widened to the extent of fifteen metres.

It is argued by Mr. Bisseisso, that this modification, which he concedes the District Commissioner was perfectly entitled to introduce, should have been sent back to the Local Commission to be approved by them before putting it into force. We can find no authority for this proposition. Our interpretation of the section is that the District Commissioner has a complete discretion to approve the scheme as it stands or to approve it with such modification as he sees fit to introduce. The expansion of the width of the road to fifteen metres was, in our opinion, a modification within the meaning of the section. This point therefore fails.

The second ground upon which the legality of the scheme was attacked was that it did not comply with the combination of sections 16 and 18A(1). Section 16 provides, and it is a very important provision from the point of view of those whose property is to be affected, that the detailed scheme should be deposited at the office of the Local Commission, and should be open for inspection, and that the notice of such deposit should be posted at the Municipal Offices for a certain period. If we were satisfied that the provisions of this section were not fully carried out, we should not hesitate to hold that the scheme did not satisfy the statutory provisions, and we should grant the relief sought.

The question as to whether or not those statutory provisions were carried out resolves itself into one of fact. The Petitioners allege that the scheme was not posted until the 24th of May, which, for reasons which will be apparent later on, would have been too late. The Mayor of Khan Younis, on the other hand, swore that the scheme was posted on the 24th of April. In regard to this point we can say immediately that we are not surprised that the Petitioners felt themselves justified in filing a petition, because it emerges that in fact there were two postings, one on the 24th of April and one on the 24th of May. This Court enquires, and enquires with a certain amount of suspicion, as to why if a scheme was posted on the 24th of April, it was necessary again

to post it on the 24th of May. The Mayor gave an explanation. He says that immediately on seeing the notice in the *Gazette*, he posted the scheme in Arabic; later, when he got the notice from the District Commissioner on the 24th of May, he again posted it. This second posting was undoubtedly a superfluous act on the part of the Mayor, but we see no reason for rejecting his sworn evidence that not only was the scheme posted on the 24th of April, but that he himself saw it posted up on the notice-board of the Municipality. Apart from the fact that we see no reason to doubt the evidence of this responsible official, there is before us the endorsement on Exhibit "A" (the notice posted on 24th April) which confirms that it was posted, becase it appeared in the *Gazette* and we know that the notice appeared in the *Gazette* on 2nd April, 1944. This Court is not concerned as to whether the consideration, which one would expect to be extended to people whose property is about to be expropriated, was shown to the Petitioners in this case — as to this we make no pronouncement one way or the other — but for the reasons which we have given we are satisfied that the statutory requirements of the Ordinance in regard to those particular sections, on which the Petitioners' case was based, were adequately executed.

One further point which was advanced by the Petitioners. It raises a more difficult technical question than those which we have already considered. It is in connection with section 27 of the Town Planning Ordinance, which provides that it shall be lawful for the Local Commission after giving one month's notice in writing to such owner to enter into immediate possession of such land not exceeding one quarter part as aforesaid, for the purposes aforesaid. It has been argued that this precluded the Commission from entering into possession of more than a quarter part for the purposes of enforcing the scheme. In regard to this we must agree with Mr. Rigby that to place this interpretation on the section would in fact frustrate what was the obvious purport of the section. I think that the section must be read together with section 25, and that the true interpretation is that the Commission is empowered to enter into possession of all the land affected by the scheme, but where the area of land exceeds 25%, the excess area must be compensated for in accordance with the provisions of the Expropriation Ordinance.

One final point of the Petitioners was that the alternative accommodation which is obligatory under the provisions of section 29 of the Ordinance was not provided for the Petitioners. Here again this resolves itself into a question of fact. The Petitioners stated that the

houses were dwelling houses. We had the sworn evidence of the District Commissioner, Mr. McGeagh, and the Mayor of Khan Younis, that those houses were not dwelling houses, and we see no reason to reject the evidence, which of course brings them outside the ambit of section 29 of the Town Planning Ordinance.

For these reasons we are of opinion that the rule must be discharged, with inclusive costs of LP. 10 for both the 1st and 2nd Respondents.

Given this 19th day of June, 1945.

Chief Justice.

CIVIL APPEAL No. 488/44.

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

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Fred Khayat. APPELLANT.

v.

Haj Hasan Hawa. RESPONDENT.

Delay of 80 days in paying the rent — Finding of fact that in the circumstances there was no discontinuance.

Appeal from the judgment of the District Court, Haifa, sitting in its appellate capacity dated the 13th November, 1944, in Civil Appeal No. 143/44,dismissed:—

Question whether tenant has or has not continued to pay rent — one of fact and degree. A very short delay might constitute a discontinuance in one case whereas a comparatively long delay might not, in another.

(*M. L.*)

ANNOTATIONS: See C. A. 139/43 (1943, A. L. R. 386) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Ganon.

FOR RESPONDENT: W. Salah.

JUDGMENT.

The Respondent is not called upon to reply.

This is an appeal, by leave, from the judgment dated 13.11.44 of the District Court, Haifa, in C. A. No. 143/44, dismissing an appeal from the judgment dated 31.7.44 of the Magistrate, Haifa, in Civil Case 688/44.

In the case before the Magistrate the Appellant sought to evict the

Respondent on the ground that the tenancy agreement had expired and/or, alternatively, on the ground that the Respondent had failed to pay in time the reserved rent.

The lease had expired on 23.11.43, and under the terms of that lease the rent (LP. 15) was payable in advance — that is to say, the rent for the new lease year in this instance was payable on 23.11.43. The learned Magistrate found as a fact that the Respondent offered to pay the rent on 12.2.44, that is to say after a delay of some eighty days, and that the Appellant refused then to accept the money.

It should be mentioned that the Respondent had been in occupation of the premises for some fifteen years, and the Magistrate found that the Appellant or his late father used to allow the Respondent any extension of time that he might require for paying the rent. The Magistrate observed: "Thus many a year the Defendant was several months late".

Delay in paying the rent does not of itself necessarily constitute a discontinuance of payment for the purpose of section 8(1) of the Rent Restrictions (Dwelling Houses) Ordinance, No. 44/1940. That has been held in several cases. The question whether the tenant has or has not continued to pay rent is one of fact or degree. A very short delay might constitute a discontinuance in one case whereas a comparatively long delay might not constitute a discontinuance in another case.

Mr. Ganon, who has appeared for the Appellant, has submitted that a delay of about one month might be reasonable. He would, it seems, ask me to hold that a delay of more than one month would always constitute a discontinuance. I, however, think that it is not possible to fix any definite period. It entirely depends upon the facts of each case.

The question I must ask myself is whether, on the facts in the present case, it was so unreasonable for the lower Court to find that there was no discontinuance that it would be proper for me to upset its judgment.

Having considered the facts I do not find this to be the case. There is no evidence that the Respondent had any cause for thinking that the Appellant wanted him to give up the premises. It is admitted that prior to 12.2.44 no request had been made that the Respondent should quit. In view of the length of the tenancy and of the readiness of the lessor, in the past, to allow the tenant to pay when it suited him, I think that it was open to the lower Court to find that the delay in this case did not constitute a discontinuance. I would again observe

that a very short delay might in another case be held to constitute a discontinuance.

In the result I find that this appeal fails, and I dismiss it with fixed costs in the sum of LP. 10 (ten pounds).

Delivered this 29th day of June, 1945.

British Puisne Judge.

HIGH COURT No. 33/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF:—

Moshe Haim Teiberg & 3 ors. PETITIONERS.

v.

The District Commissioner, Lydda District, Jaffa & 3 ors. RESPONDENTS.

District Commissioner refusing to act upon complaint regarding elections to Local Council — Power and duty of District Commissioner — Petition to High Court for an order nisi.

Return to an order *nisi* issued on the 27th day of April, 1945, directed to the first and second Respondents calling upon them to show cause why the decision of the second Respondent as to the return of the third Respondent (since Respondent No. 4 as per order of this Court, dated 22nd May ,1945) as elected member of the Local Council of Rehovot should not be set aside, and why, of the last three Petitioners, the one who has received the largest number of the votes cast for the Hapoel Hamizrahi Party at the elections to the Local Council of Rehovot held on the 4th February, 1945, should not be declared to have been duly elected as member of the Council in lieu of the third Respondent (since Respondent No. 4, as per order of this Court dated 22nd May, 1945), or alternatively, that such order or further order be made to the effect that one of the last three Petitioners as aforesaid be declared to have been duly elected as a member of the Local Council of Rehovot instead of the third Respondent, order *nisi* discharged:—

1. District Commissioner is empowered to correct any eventual mistake of returning officer in carrying out his statutory duties; he cannot refuse to take action upon a complaint made to him within prescribed time regarding conduct of elections to Local Council.

2. Where District Commissioner refuses to take action upon complaint, proper course for person concerned — to ask High Court for an order *nisi* against District Commissioner.

(*M. L.*)

ANNOTATIONS:

1. For cases in election matters see H. C. 116/44 (1944, A. L. R. 769) and note 2 thereto in A. L. R. See also H. C. 53/45 (*post*, p. 724; 12, P. L. R. 434) and H. C. 57/45 (*post*, p. 722; 12, P. L. R. 397).

2. As to point 2 see H. C. 57/45 (*infra*) and note 1 in A. L. R.

(*A. G.*)

FOR PETITIONERS: Harari.

FOR RESPONDENTS: Nos. 1 & 2 — Salant.
No. 3 — Mrs. Goldstein.
No. 4 — Ankorion.

ORDER.

This is a return to an order *nisi* dated 27th April, 1945, issued to the District Commissioner, Lydda District and other persons.

The only point with which I am at present dealing is the question whether the District Commissioner has any, and if so what, powers to deal with a complaint made to him under Article 24 of the Schedule to the Local Councils (Rehovoth) Order (see Vol. 3, Laws of Palestine, page 1863). Article 24 reads as follows:—

> "Any complaint regarding the conduct of the elections shall be referred to the District Commissioner within fifteen days of the date of the declaration of the result".

The returning officer for the conduct of the elections is appointed by the District Commissioner under the provisions of Article 5.

Although Article 24 is silent on the subject, I do not think it can possibly have been the intention of the legislature that the District Commissioner should merely receive the complaint and take no action on it. Various Articles provide for the duties of the returning officer, and the "conduct" of the elections has to be done accordingly.

It appears to me to be clearly the intention of the legislature that the District Commissioner should be empowered to correct any mistake that may have been made by the returning officer in carrying out the duties imposed upon him by law.

I therefore find that the District Commissioner erred in refusing to take action upon the complaint which was made to him by the Petitioners, assuming that it was made within the time allowed by law. The District Commissioner's refusal is contained in his Ref. No. J/1442 dated 15.3.45.

In view of my finding on this point I further hold that the Petitioners ought not to have asked for an order *nisi* in the form in which, and to the persons to whom, it was issued. They ought to have asked for

an order *nisi* calling upon the District Commissioner to show cause why he should not be ordered to carry out his duties under Article 24.

The order *nisi* must therefore be discharged, but it is open to the District Commissioner to take action upon the complaint in the light of this Order.

Henia Goldstein and Michael Diamand to have joint costs in the sum of LP. 7 (seven pounds).

Delivered in open Court in the presence of Mr. Harari for the Petitioners, Eissa Eff. 'Akel (Assistant Government Advocate) for Respondents 1 and 2, and Mr. Berinson for Henia Goldstein and Michael Diamond, this 9th day of July, 1945.

British Puisne Judge.

HIGH COURT No. 57/45.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF :—

Nachman Cohen. PETITIONER.

v.

1. The Chairman & Members of the Electoral Committee of the Local Council of Kiriat Motzkin consisting of:—
   1. Fishel Breitman, Chairman,
   2. Dr. Shlomo Doarman — Member,
   3. Kurt De Haz — Member,
   4. Moshe Segal — Member,
   5. Arye Strozinski — Member,
   6. Israel Amsler — Member,
   7. David Reznik — Member,
2. Mrs Shoshana Abovitz. RESPONDENTS.

Application to High Court re register of voters of Local Council — Altenrnative remedy of appeal to Magistrate's Court.

Application for an order *nisi* to issue directed to the Electoral Committee of the Local Council of Kiriat Motzkin calling upon it to show cause why it should not revoke its decision to keep the second Respondent enrolled as a voter on the register of voters of the Local Council of Kiriat Motzkin and to amend the register of voters accordingly by striking the name of the second Respondent off

the said register of voters; or for such other order or alternative relief as this Honourable Court may deem just, refused:—

1. When it is demonstrated that intervention of High Court is necessary, it should intervene.

2. a) High Court will not intervene where there is an altrenative remedy. b) In presence of a statutory provision for an appeal to a Court from an order of a public officer, High Court will not entertain complaint *re* such order.

3. Decision of two Chief Magistrates that a statutory provision is *ultra vires* — not sufficient for High Court, in absence of repeal by legislature, to regard the provision of appeal to Magistrate's Court as ousted.

(*M. L.*)

REFERRED TO: H. C. 21/32 (1, P. L. R. 683; 2, C. of J. 734); H. C. 24/32 (1, P. L. R. 691; 2, C. of J. 743); C. A. 257/43 (10, P. L. R. 625; 1943, A. L. R. 802).

ANNOTATIONS:

1. As to the first point see in addition to cases referred to also H. C. 41/43 (1943, A. L. R. 196) with annotations thereto in A. L. R. and see also H. C. 33/45 (*ante*, p. 720).

2. On jurisdiction of H. C. in case of existing alternative remedy see H. C. 26/45 (*ante*, p. 674) with annotations thereto.

3. On election cases see H. C. 33/45 (*supra*) and H. C. 53/45 (*infra*) and annotations.

(*A. G.*)

FOR PETITIONER: Berinson.

FOR RESPONDENTS: *Ex parte.*

JUDGMENT.

This application raises a not unimportant question in regard to the granting of relief through the medium of high prerogative writ. Art. 43 of the Palestine Order-in-Council authorises the Supreme Court sitting as a High Court of Justice to hear and determine matters necessary to be decided for the administration of justice. Subject to the limitation that the Court sitting as a High Court is not empowered to usurp or override the functions of another Court having jurisdiction in the matter at issue, the grant of relief is entirely at the discretion of the Court. When it is demonstrated that the Court's intervention is necessary it will, and in fact it should, intervene. In the cases quoted by Mr. Berinson in his interesting argument, *viz.* H. C. 21/32, 24/32 and C. A. 257/43, the Court intervened because it was established to its satisfaction that intervention was necessary in that there was no alternative remedy. Now it is a well settled principle that the Court sitting as High Court will not intervene where there is an alternative remedy. Briefly stated this application is an appeal against the de-

cision of the Electoral Committee of the Local Council of Kiriat Motzkin. The order appealed against purported to be made by the Electoral Committee under the provisions of the Local Councils (Kiriat Motzkin) Order No. 48 of 1940. It concerned the right to be entered on a voters roll. I may say immediately that I agree with Mr. Berinson that this is a right of such substance that the Court would intervene, if necessary, to enforce it. I come, therefore, to the question whether there was in this case an alternative remedy.

Order 4(5) of the Order to which I referred reads:—

> "The person making any claim or objection or the person objected to may within seven days from the date of adjudication by the Electoral Committee appeal to a Magistrate's Court presided over by a Senior Magistrate on any question of law involved in the adjudication but not on any other ground".

Clearly this provides an alternative remedy. But Mr. Berinson argues that the provision is *ultra vires*. He has produced copies of decisions of Chief Magistrates both in Tel-Aviv and in Haifa, to sustain his contention. *Ultra vires,* indeed, this particular provision may be, but it appears to me that a decision of the Magistrate's Court is not sufficient to oust it from the Statute Book. Every law enacted by the legislature is presumed to be *intra vires* the powers of the legislature until a Court of competent jurisdiction decides otherwise, in which case the legislature repeals it. I observe that in this case the legislature has not seen fit to repeal the provision. It is true, as Mr. Berinson has argued, that a bill has been published which appears to accept the decision of the Magistrate, but as far as the Courts are concerned the provision is still on the Statute Book.

In these circumstances can I be satisfied that the Petitioner has exhausted every alternative remedy? I am afraid I cannot because, as Mr. Berinson admits, he has never even approached a Magistrate under Regulation 4(5) of the Order.

The application must, therefore, be refused.

Given this 10th day of July, 1945.

Chief Justice.

HIGH COURT No. 53/45.

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

BEFORE: Shaw, J.

IN THE PETITION OF:—

Dov Caspi. PETITIONER.

v.

The Chairman and Members of the Electoral Committee of the Local Council of Ramat-Gan, consisting of:—

1. Yona Eisenstein, Ramat Gan,
2. Eliyahu Yeshayahu, Ramat Gan,
3. Shlomo Salzfas, Ramat Gan,
4. Yoseph Aharoni, Ramat Gan,
5. Yaacob Rosenblum, Ramat Gan,
6. Hayim Rubin, Ramat Gan. RESPONDENTS.

Preparation of Register of Voters prior to date approved by District Commissioner — Subsequent ratification of approved date — High Court declaring Register invalid.

Return to an order *nisi* given on the 27th day of June, 1945, directed to the Electoral Committee of the Local Council, of Ramat-Gan, to show cause why they should not revoke the so-called register of voters approved by such Electoral Committee on 10.6.1945, and published on 12.6.1945, as being invalid and of no legal effect, and why they should not refrain from proceeding any further in the matter (such as entertaining claims or objections against such so-called register), and to wait with the preparation of a proper register of voters until a date shall be prescribed according to law by the Local Council of Ramat Gan, with the approval of the District Commissioner, Lydda District, for the commencement of the preparation of such register by the Electoral Committee; order *nisi* made absolute:—

1. a) Where date prescribed by a Local Council for commencement of preparation or revision of register of voters requires approval by District Commissioner, commencement of preparation prior to approved date renders the register invalid.

b) Retrospective ratification by Local Council of date approved by District Commissioner for commencement of preparation of register is, where there is no statutory provision for ratification, of no avail.

2. (*Obiter*): Register of voters should contain addresses or other particulars to enable persons named to be identified.

(*M. I.*)

ANNOTATIONS: For other cases in election matters see H. C. 33/45 (*ante*, p. 720; 12, P. L. R. 395) with annotations thereto and also H. C. 57/45 (*ante*, p. 722; 12, P. L. R. 397).

(*A. G.*)

FOR PETITIONER: Berinson.

FOR RESPONDENTS: Nos. 1, 2, 3 & 5 — Harari.
No. 4 — In person.
No. 6 — Eliash and Scharf.

ORDER.

This is a return to an Order *Nisi* dated 27.6.45 calling upon the Electoral Committee of the Local Council of Ramat Gan to show cause why they should not revoke the so-called Register of Voters approved by such Electoral Committee on 10.6.45 and published on 12.6.45 as being invalid and of no legal effect, and why they should not refrain from proceeding any further in the matter (such as entertaining claims or objections against such so-called Register), and to wait with the preparation of a proper Register of Voters until a date shall be prescribed according to law by the Local Council of Ramat Gan, with the approval of the District Commissioner, Lydda District, for the commencement and preparation of such register by the Electoral Committee.

As it appeared to me to be desirable for the Local Council of Ramat Gan and the District Commissioner, Lydda District, to be given notice of the proceedings, I adjourned them. At the adjourned hearing the Local Council was represented but the District Commissioner did not appear.

The Local Councils (Ramat Gan) Order, 1943, is to be found at page 1157 of Supplement No. 2 of 1943. The Article which I am required to construe in this case is Article 5(1). Having considered the submissions of the advocates for the parties, and having studied the wording of the Article, I find that the date prescribed by the Council for the commencement of the preparation or revision of the register of voters by the Electoral Committee requires to be approved by the District Commissioner.

It is quite clear that the procedure laid down by the Order was not followed in the present instance. The date which the Council prescribed was 15.5.45, while the date which was approved by the District Commissioner was 31.5.45, and that approval was only notified in a letter dated 12.6.45 written after the Electoral Committee had not only commenced to prepare the register of voters but had actually approved it.

The Local Council has since ratified the date 31.5.45, and I have to consider whether such ratification is a proper or suiffcient compliance with the terms of the Order.

The date prescribed for the commencement of the preparation of the register of voters is an important date because (as shown in Article 1(c) of the Second Schedule to the Order) a person is not entitled to be enrolled on the register unless he "has resided in or has been the owner of property situated within the area of jurisdiction of the Council for a period of not less than twenty-four months immediately preceding

the date prescribed for the preparation or revision of the register of voters".

Having carefully considered the matter I have come to the conclusion that the Order *Nisi* ought to be made absolute. In the first place the Order does not provide for a ratification. The date has to be prescribed, that is to say, settled beforehand. It is important that the provisions of the Order should be properly complied with, and I feel that I would be introducing an unsatisfactory element of uncertainty, if not legislating, if I held that a ratification was sufficient. It would also establish a possibly undesirable precedent for the future interpretation of other Local Councils Orders.

In the second place, it appears to me that the approval of the register of voters was unduly rushed, and that time ought to have been given in order that the Electoral Committee might examine the list of names carefully.

In the third place, I am strongly of the opinion that addresses, or other particulars, should be given in the register, to enable the persons named to be identified. Unless this is done it might be difficult for anybody to be sure that a name appearing in the register was his name and not that of a person of similar name, and it would facilitate the identification of persons against whom objections are made if particulars for purposes of identification are given. It may be observed that the Fourth Schedule seems to require the giving of an address when an objection is made.

I therefore direct that the Order *Nisi* be made absolute, but in place of the word "revoke" will be read the word "treat".

The Petitioner must have costs in the fixed sum of LP. 20 (twenty) to be paid by each of Respondents 1, 2, 3, 4 and 5 in equal shares.

Delivered in open Court this 30th day of July, 1945, in the presence of Mr. Berinson for Petitioner, Mr. Harari for the Local Council, Ramat Gan and for Respondents Nos. 1, 2, 3 and 5, and Respondent No. 4 in person.

British Puisne Judge.

CRIMINAL APPEAL No. 120/45.

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

BEFORE: Edwards, J. and Ali Bey Hasna, Judge, D. C., Jerusalem.

IN THE APPEAL OF:—

Sheva Yoskovitz. APPELLANT.

v.

The Attorney General. RESPONDENT.

"Watching the place where another person works", Reg. 23A(1)(c) — "Watching", "compel" — Negative averments, CR. A. 75/44 — Charge sheet, CR. A. 62/43 — M. C. P. R. 270 must be shown to have been complied with.

Appeal from the judgment of the District Court of Tel-Aviv, in Criminal Case No. 103/44, whereby the appeal of the Respondent against the Magistrates Courts' judgment was allowed; appeal allowed and case remitted:—

1. "Watching" and "compelling", within the meaning of the Regulation, considered. No duress need be proved.

2. It is for the prosecution to establish the averment that the strike was unlawful.

(*A. M. A.*)

REFERRED TO: CR. A. 62/43 (10, P. L. R. 354; 1943, A. L. R. 469); CR. A. 75/44 (11, P. L. R. 295; 1944, A. L. R. 611).

ANNOTATIONS:

1. The ruling on the second point confirms the decision in CR. A. D. C. T. A. 101/44 (1945, S. C. D. C. 52); see also the cases quoted in that judgment and notes 1 & 2 thereto.

2. As regards the penultimate paragraph of the judgment note that this was not a case of a submission of "no case to answer", but that Appellant, after the case for the prosecution was closed, decided to call no evidence; contrast in this respect CR. A. 159/43 (11, P. L. R. 69; 1944, A. L. R. 130).

(*H. K.*)

FOR APPELLANT: Ankorion.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Tel-Aviv, allowing an appeal by the Attorney General, from an order of acquittal made by one of the Magistrates of Tel-Aviv in a criminal case in which the present Respondent was charged with the offence of "watching the place where another person works", contrary to Regulation 23A(1)(c) Defence (Amendment) Regulations (No. 3) 1943, Suppl. No. 2 Palestine *Gazette* No. 1246 of 23rd January, 1943, Vol. 2 of 1943 p. 87.

There were two main grounds on which the Magistrate considered that the prosecution had failed to prove its case. Firstly, he did not consider that the act complained of amounted to an offence contrary to the Regulation which we have quoted. There was uncontradicted

evidence that the Accused stood and held a red poster on which were the words "On the 3rd April, 1944, a strike was declared in the firm of O. B. G., let no one go to work". She stood opposite the entrance to the O. B. G. shop in the centre of the pavement, remaining quiet and not disturbing people entering the shop. On these facts we think that there can be no doubt that she was "watching" this place of business. It is not suggested that she can bring herself within the proviso to Regulation 23A(1). The only question that remains is whether what she did was done with a view to compelling any person to do any act which he was not legally bound to do or to abstain from doing any act which he has a legal right to do. There was much discussion in both Courts below as to the meaning of the word "compel", the Magistrate thinking that it was synonymous with duress and that it was necessary to establish the use of physical force. The District Court took a different and, in our opinion, a correct view. There is a clear distinction between the offences mentioned in sub-paragraph (a) of Regulation 23A(1) and sub-paragraph (c). The only act required under (c) is the simple one of watching. It is not suggested that the Accused did anything beyond standing outside the shop holding this placard. We have no doubt that the Accused's action was done with a view to constraining employees of the O. B. G. to continue to absent themselves from work. A person of very firm resolve might perhaps not have been deterred by the sight of the Accused standing with this poster; but an ordinary person might well have felt compelled (in the ordinary sence of the word) not to enter the shop once he saw the Accused with this banner standing outside. Although not for precisely the same reasons we uphold the decision of the District Court on this ground.

The next ground of appeal is that the District Court erred in holding that the onus of proving that the strike was lawful lay on the Accused. We think that the District Court erred in law because the law with regard to negative averments is to be found in Archbold's Criminal Practice (30th Ed.) pages 356 and 357 and Criminal Appeal 75/44. We have, however, perused the record of proceedings before the Magistrate and it is clear that there was ample evidence from which it could be presumed from the circumstances that the Director of the Department of Labour had decided to intervene and that therefore the strike was unlawful. The Magistrate should have been satisfied on the evidence that the prosecution had discharged the onus of proving that the strike was unlawful. Although for different reasons we think that the result which the District Court arrived at was correct.

The last ground of appeal is that the charge sheet did not specify

that someone was compelled to do any act. We have perused the charge sheet which seems to follow the wording of the Regulation; but, in any event, the Magistrate did not specifically find that the charge sheet was bad although he seemed to have some doubt. We do not think that the charge sheet was defective. We refer to Criminal Appeal No. 62/43 Annotated Law Reports (1943) page 469.

For all these reasons we think that the Accused (Respondent) should have been convicted. The District Court, however, remitted the case to hear, what according to the translation of the judgment they call "other statements of the advocate for the Accused". We are unable to understand why they made this order because at the trial, after the case for the prosecution had closed, the Accused did not give evidence or make a statement on oath and did not call witnesses and thereupon the prosecutor addressed the Court and the Accused's advocate made a final address. In these circumstances we do not think that the Accused was entitled to have the case remitted to the Magistrate.

We would attract the attention of Magistrates to the necessity of noting on the record the fact that Rule 270 Magistrates' Courts Proceure Rules, 1940, has been complied with. We accordingly hold that the District Court were wrong in remitting the case to the Magistrate. We, therefore, set aside the judgment of the District Court and remit the case to that Court with directions to give judgment according to law.

Delivered this 24th day of July, 1945.

British Puisne Judge.

HIGH COURT No. 34/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF :—

Sheikh Anis Mohammad Ibrahim & 7 ors. PETITIONERS.

v.

The Assistant District Commissioner, Lydda District, Ramle & an. RESPONDENTS.

Order of possession of land in dispute without proper enquiry — Powers of Assistant District Commissioner under Land Disputes (Possession) Ordinance.

Return to an order *nisi* issued on the 27th of April, 1945, directed to the Respondents calling upon them to show cause why the decision of the first Respondent dated the 16th April, 1945, in File No. R/1814 by which he allowed the second Respondent with others to take possession of the lands in dispute by virtue of the Land Disputes (Possession) Ordinance, should not be set aside; order *nisi* made absolute:—

1. An order under Land Disputes (Possession) Ordinance, without a proper enquiry being held, allowing a party to take possession of disputed land not being an order given in proper exercise of legitimate judicial discretion cannot stand.

2. Assistant District Commissioner cannot delegate his powers to hold an enquiry to some other person. He can only order a public officer to make a local enquiry.

3. There is no legal objection to an Assistant District Commissioner ordering a committee of more than one public officer to make a local enquiry under Land Disputes (Poss.) Ord.

4. Term "proceedings" in sec. 2(10), Land Disputes (Poss.) Ord. refers to proceedings before District Commissioner (or Assistant District Commissioner) himself; public officer appointed under sec. 5 cannot take evidence on oath.

5. An order of possession in favour of persons not parties to the proceedings or as to whom there was no evidence that they had ever been in possession of the disputed land is not an order given in proper exercise of legitimate judicial discretion.

(*M. L.*)

APPLIED: H. C. 92/32 (1, P. L. R. 860; 3 C. of J. 1100).

ANNOTATIONS:

1. As to meaning of "proceedings" in other legislation see C. A. 67/44 (11, P. L. R. 313; 1944, A. L. R. 387) with annotations thereto in A. L. R.

2. For other cases under Land Disputes (Possession) Ordinance see H. C. 102/43 (1943, A. L. R. 830) with annotations thereto.

(*A. G.*)

FOR PETITIONERS: Hawari.

FOR RESPONDENTS: No. 1 — Solicitor General (Mr. Griffin).
No. 2 — Hammoudeh.

JUDGMENT.

This is a return to an order *nisi* calling upon the Respondents to show cause why the decision of the 1st Respondent dated 16.4.45, in file No. R/1814, by which he allowed the second Respondent with others to take possession of the lands in dispute, by virute of the Land Disputes (Possession) Ordinance, should not be set aside.

The Petitioners, who are inhabitants of the village of El Qubab, have been represented in these proceedings by Mohammad Eff. Hawari, advocate. The first Respondent, who is the Assistant District Commissioner Lydda District, Ramleh, has been represented by the

Solicitor General, and the second Respondent by Yehia Eff. Hammoudeh, advocate.

The learned Solicitor General in showing cause has referred me to section 2(10) of the Land Disputes (Possession) Ordinance (Cap. 76) which provides that no appeal shall lie against any order by the District Commissioner under this Ordinance. He has submitted that this Court should refuse to interfere unless there has been a flagrant breach of statutory duty, or unless, having regard to the facts, there has been a failure amounting to a grave risk of injustice.

It is not disputed that neither the Assistant District Commissioner who issued the order dated 6.3.45 nor the Assistant District Commissioner who issued the order dated 16.4.45 against which the present petition has been made, held any enquiry personally.

The main point in this petition is whether the order dated 16.4.45 could properly be issued by an Assistant District Commissioner who had himself made no enquiry.

Section 2(4) of the Land Disputes (Possession) Ordinance (Cap. 76) provides that:—

> "The District Commissioner shall then, without any reference to the merits or the claims of any such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, and make such inspection, if any, as he thinks necessary and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in actual possession of the said subject of dispute".

Section 5(1) provides that:—

> "Whenever a local enquiry is necessary for the purpose of this Ordinance, the District Commissioner may depute any public officer to make the enquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the enquiry shall be paid".

And section 5(2) provides that:—

> "The report of the person so deputed may be read as evidence in the case".

The Ordinance clearly intends that the District Commissioner (and it is not disputed that these words include an Assistant District Commissioner) shall hold an enquiry and, as I have observed, it is admitted that no enquiry was in fact held.

In H. C. 92/32 (1, P. L. R. p. 860) to which Mr. Hawari has referred, the following passage appears:—

> "Following this judgment, we hold that the principle to be applied in determining whether this Court has jurisdiction is that this Court can only hear this petition if the order of the Assistant District Commissioner was not 'an order given by him in the proper exercise of legitimate judicial discretion'."

I think it is impossible to say that an order given in the absence of any such enquiry is one given in the proper exercise of legitimate judicial discretion. The Ordinance does not provide that the Assistant District Commissioner can delegate his powers to hold an enquiry to some other person. He can only order a public officer to make a local enquiry. It seems to me that the order complained of in this case was made in serious breach of statutory duty, and it is impossible to say that if the Assistant District Commissioner had held an enquiry himself he would necessarily have made the order which he did make. There is an obvious risk of injustice if an order is made without a proper enquiry being held.

So I am of opinion that the order dated 16.4.45 was bad in law and that it must be set aside.

Several other points of less importance have been dealt with in the course of the arguments. One was the question whether the Assistant District Commissioner could order not only a single public officer but a committee of three public officers to make a local enquiry. Mr. Hawari has rightly conceded that the singular includes the plural, and that there is no legal objection to the appointment of three public officers.

Another point which was argued was whether the public officer appointed under section 5 of the Ordinance had power to hear evidence on oath. The learned Solicitor General has drawn my attention to section 2(10) of the Ordinance, but having considered the provisions of that sub-section, I consider that they do not empower the public officer to take evidence on oath. There is no doubt, of course, that the Assistant District Commissioner himself can take evidence on oath, but I think that the term "proceedings" in sub-section 10 refers to the proceedings before the District Commissioner (or Assistant District Commissioner) himself.

A further point raised by Mohammad Eff. Hawari was that in the order dated 16.4.45 it was held that certain persons, who were not parties to the proceedings before the District Commissioner, were in possession. In H. C. 92/32 it was held that to give an order in favour of persons not parties to the proceedings, or in favour of persons as to whom there was no evidence that they had ever been in possession

of the disputed land, was not to exercise properly the Assistant District Commissioner's legitimate judicial discretion. Yehia Eff. has stated that his client represented the other twelve persons because he was their *Mukhtar,* and also because he was a co-owner with them. In the order dated 6.3.45 the second Respondent (Muhammad Atallah) is only cited in his personal capacity. If he was representing, and was authorized to represent the twelve other persons whose names appear with his in the order dated 16.4.45, that fact should have been made to appear in order that the other party would have notice that not only Mohammad Atallah himself but those twelve other persons also were claiming to be in possession.

In the result the petition must be allowed and the order *nisi* must be made absolute. The Petitioners will have fixed costs in the sum of LP. 15 to be paid in equal shares by the two Respondents.

Delivered this 20th day of June, 1945, in the presence of Jaber Ancar by delegation for Petitioners and in the presence of Mr. Paglin for 1st Respondent and Yehia Eff. Hamoudeh for 2nd Respondent.

British Puisne Judge.

HIGH COURT No. 27/45.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

Devorah Mansour. PETITIONER.

v.

The Chief Execution Officer, Tel-Aviv & an. RESPONDENTS.

Action in Rabbinical Court for divorce and maintenance — Defendant, a foreigner, consenting to jurisdiction in matter of divorce but not maintenance — Limited jurisdiction of Rabbinical Court.

Return to a rule *nisi* issued on the 23rd day of March, 1945, directed to the first Respondent calling upon him to show cause why his decision of 22nd January, 1945, in Civil File No. 333/44, Execution Office, Tel-Aviv, should not be set aside, and why the judgments of the Chief Rabbinical Court of Tel-Aviv, dated 18.4.44 and 12.9.44, should not be executed and for an order directed to the first Respondent to execute the said judgment, order *nisi* discharged:—

1. (*Obiter*): It is desirable that a Rabbinical Court when purporting

to exercise jurisdiction under Art. 53(ii), Palestine Order-in-Council, should record exact nature of claim and the consent of both parties to their jurisdiction.

2. When sued in Rabbinical Court for divorce and maintenance Defendant, if a foreigner, is entitled to limit his consent to jurisdiction to question of divorce only.

(*M. L.*)

ANNOTATIONS: As to consent to jurisdiction of Religious Court see H. C. 81/44 (1944, A. L. R. 648) and annotations thereto.

(*A. G.*)

FOR PETITIONER: Gorali.

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

ORDER.

This is a return to an order *nisi* directed to the Chief Execution Officer, Tel-Aviv, to show cause why he should not execute two judgments of the Chief Rabbinical Court — one given on the 18th April, 1944, which awarded the Petitioner maintenance for herself and her daughter for an interim period of three months, and a later judgment which confirmed that maintenance without specifying any time limit. The Execution Officer refused to execute the judgments on the ground that the Rabbinical Court had no jurisdiction to hear the case. It is not denied that Respondent was a foreigner and the Rabbinical Court could, therefore, only have jurisdiction under Article 53(2) of the Palestine Order-in-Council. The record of the Rabbinical Court indicated that it was dealing with a subject matter of personal status. This case illustrates the desirability on the part of the Rabbinical Court, when it purports to function by virtue of the jurisdiction conferred by Article 53(2) of recording in precise terms the exact nature of the claim and of recording with equal precision that the purport of Article 53(2) has been explained to both parties and that they consent to jurisdiction. It is also desirable, although not legally necessary, that the parties should record their consent in writing. In this case the second Respondent, Rachamim Mansour, states that he consented to the issue of divorce only being tried and that he never intended to submit the question of maintenance to the jurisdiction of the Court.

It is true that in the Rabbinical Court the Petitioner claimed maintenance as well as divorce. It is also true that the second Respondent appeared in that Court to defend, but when the question of consent to the jurisdiction arose the attorney for the defence stated according to the translation of the record which is before us:—

"The Defendant has all the while agreed to litigate upon the question of divorce; however, the Defendant did not agree to go into the question of reconciliation and the like".

It is now argued that the words "the like" included "maintenance". It must be borne in mind that maintenance does not automatically follow an order for divorce. It is indeed a separate issue determined by the circumstances of the case. It seems to me therefore that the second Respondent was entitled to limit his consent to jurisdiction to the question of divorce only and that such limited consent would not bind him to accept the jurisdiction of the Rabbinical Court on the question of maintenance.

For these reasons I am of opinion that the conclusion of the Chief Execution Officer was right and the order *nisi* must be discharged, with inclusive costs of LP. 5.—.

Given this 19th day of June, 1945, in the presence of Mr. Gorali for Petitioner and Mr. S. Cohen for Respondents.

Chief Justice.

CRIMINAL APPEAL No. 119/45.

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

BEFORE: Edwards, J. and Ali Bey Hasna, Judge D. C. Jerusalem.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Salomon Ben Ephraim Fradis. RESPONDENT.

Evasion of customs duty — Goods lawfully imported for the military and sold without payment of customs duty — Customs Ord., secs. 211(a), 139, 227, 216 — Onus of proving payment of duty — Facts required to prove evasion — Forfeiture.

Appeal from the judgment of the District Court of Tel-Aviv in Summary Trial No. 68/45 delivered on 25.5.1945, allowed:—

A person who disposes of goods received or acquired from military personnel and on which customs duty has not been paid (the onus of proof being on the defence), commits an offence under the Customs Ordinance.

(*A. M. A.*)

ANNOTATIONS: On sec. 227 of the Customs Ordinance see C. A. 196/40 (7, P. L. R. 507; 1940, S. C. J. 531; 8, Ct. L .R. 127), CR. A. 110/41 (8, P. L. R.

387; 1941, S. C. J. 384; 10, Ct. L. R. 154) and C. A. 199/42 (1942, S. C .J. 709).
(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Olshan — by delegation from Henigman.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Tel-Aviv which had acquitted the present Respondent of the offence of evading payment of Customs Duty contrary to section 211(a) Customs Ordinance. We have no doubt that the appeal has been brought with a view to obtaining a decision which will clarify the law. The facts (except to the extent to which we shall later in this judgment allude) are not in dispute. The Respondent, who is a resident of Tel-Aviv, had in his house a very large number of commodities which had been imported into Palestine as property of the Navy, Army and Air Force Institutes or by similar organisations of the United States Army. There were in fact twenty two bottles of whisky and eight bottles of English gin and a large quantity of imported cigarettes and imported tobacco and many articles of tinned foodstuffs, *e. g.* corned beef, tinned fruit, tooth-pastes *etc.* The defence on the facts is that the Respondent had, since the war broke out in 1939, entertained visiting officers of the British and United States Armies and that these officers in return for hospitality had sometimes left with him these articles as gifts in appreciation of the kindness extended to them.

Mr. Olshan, the Respondent's advocate, has, however, suggested that not all of these goods were given as presents to his client but that quite a number of the goods were left by various officers who intended themselves to consume them on their next visit to the Respondent's house. We agree, however, with Mr. Rigby, Crown Counsel, that on the material on the record of the District Court it cannot but be assumed that all these goods had been disposed of by the various officers and disposed of to the Respondent. The learned Acting Relieving President of the District Court held that the goods were not smuggled but were goods which had been legally imported into Palestine. Now, that is quite a correct statement if one is confining the inquiry into whether when the goods were lying on the shores of Palestine and imported into Palestine they were or were not dutiable. The learned Acting Relieving President seems to have overlooked the provisions of section 139 of the Customs Ordinance as amended by section 2 Customs (Amendment) Ordinance, 1939, which is in these terms:—

"Any person who disposes of such goods as aforesaid shall before

the disposal thereof furnish the director with particulars and pay the duties which may be due thereon".

There can be no doubt that if the officers who disposed of these goods to the Respondent had themselves been charged under section 211(a) the burden of proving that they had furnished the director with particulars and had paid the duties due under section 139 would by operation of section 227 have lain on them. The first question is "did the officers or persons who gave the goods to the Respondent dispose of them to the Respondent?" We think that there can be no doubt that they did. The further question arises whether it can be said that the Army officers or other persons who gave these goods to the Respondent evaded payment of duty. Mr. Olshan has contended that in order to prove evasion the Prosecution must prove some overt act of moving the goods soon after they arrived in the country. We think, however, that if one reads section 139(1) aright the duty is cast on a person who intends to dispose of goods under section 139(2) to furnish the Diretcor of Customs with particulars and pay the duties. If without doing so he disposes of the goods he must be regarded as evading payment. There is clearly no obligation on him to dispose of the goods and, if he does so without furnishing the Director with particulars and paying the duties, he cannot complain if he is charged with evading payment under section 211(a).

The next question is whether the Respondent by accepting these goods from the officers can be said to have brought himself within the provisions of section 216. It cannot be disputed (and in fact it is not denied) that the Respondent knew that these goods were goods imported in the circumstances set out in section 139(1). He therefore must be taken to have known that any acceptance by him of these goods from any of these military officers would be helping the military officers to dispose of the goods. We particularly refer to the words in section 216 "in any way directly or indirectly concerned in". The Respondent therefore took the risk; he should before accepting the goods have inquired and satisfied himself that the persons giving him the goods had furnished the Director with particulars and paid the duties due thereon. In the result we think that on the material before him the learned Acting Relieving President should have convicted the Respondent of an offence contrary to section 211(a). We accordingly allow the appeal and set aside the judgment of the District Court under section 72(1)(e) Criminal Procedure (Trial Upon Information) Ordinance and convict the Accused of an offence contrary to section 211(a) of the Customs Ordinance. It only remains to assess the appropriate

penalty, always a difficult task. But, as the Prosecution have now attained their object of obtaining a decision and a conviction, we think that the ends of justice will be met by the imposition of a fine of LP. 5.—. The goods in respect of which the offence has been committed, *i. e.* the goods mentioned in the first count of the Charge Sheet, will be forfeited to the Government of Palestine.

Delivered this 24th day of July, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 104/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Khalil Mahmoud Dochan. APPELLANT.

v.

Attorney General. RESPONDENT.

Sentence — Appeal against — Adjournments, CR. A. 65/42 — Sentence increased in absence of accused-respondent — Reasonable sentence in case of escape from custody.

Appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal dated 28.5.45 in Cr. Appeal No. 166/44, dismissed:—

Where the Attorney General appeals against sentence and the Respondent does not attend at the hearing of the appeal, the appeal proceeds and the sentence may be increased by the Court.

(*A. M. A.*)

DISTINGUISHED: CR. A. 65/42 (9, P. L. R. 316; 1942, S. C. J. 305; 12, Ct. L. R. 153).

ANNOTATIONS: See also CR. A. 80/42 (9, P. L. R. 399; 1942, S. C. J. 581; 12, Ct. L. R. 172).

(*H. K.*)

FOR APPELLANT: T. Dajani.

FOR RESPONDENT: Assistant Government Advocate — ('Akel).

JUDGMENT.

The Appellant pleaded guilty before a Magistrate to the charges of escaping from lawful custody and assaulting and resisting a Police Officer in the execution of his duty and was fined LP. 3 which fine he

apparently paid. The Attorney General appealed to the District Court on the ground of inadequacy of sentence. The Appellant was duly served with a notice of date and place of hearing of the appeal but he failed to appear. The District Court then sentenced him in his absence to three months' imprisonment. Against that sentence the Appellant, with leave, appeals to this Court. His advocate, Talat Eff. Dajani, who has urged everything that could be urged on his behalf, informs us that the reason why the Appellant did not appear before the District Court was that he was ill and had no opportunity of sending his certificate. We do not however think that we can now go into this matter. The Appellant was duly served and should have appeared or sent someone to ask for an adjournment or sent some communication.

With regard to Criminal Appeal No. 65/42 Vol. 9, p. 316, we do not think that the judgment in that case conflicts with our view which is that, in an appeal by the Attorney General to the District Court against inadequacy of sentence, where the accused person has been duly served with the notice of the date and place of hearing and the Respondent fails to attend, and there is no application to the District Court for an adjournment the District Court need not (and in fact perhaps has no power to) issue a warrant of arrest but is entitled to deal with the appeal in the absence of the Respondent to the appeal and can increase the sentence. We therefore do not agree with Talat Eff. Dajani's suggestion that a warrant of arrest for his client should have been issued before the District Court heard the appeal.

Talat Eff. Dajani finally urges that the sentence is excessive in that the act of resistance was committed before his client had reason to believe that the person arresting him, who, we are told, was in plain clothes, was in fact a Police Officer. This may be so, nevertheless the Accused pleaded guilty and in any event no satisfactory excuse or answer to the charge of escape from lawful custody has been advanced. Escape from lawful custody is in itself a serious offence. The Appellant before the Magistrate admitted a large number of previous convictions one of which was a sentence of three months' imprisonment for escape from custody passed in 1940. In view of all the circumstances we are not prepared to say that the sentence of three months' imprisonment passed by the District Court was excessive. We dismiss the appeal.

Delivered this 13th day of September, 1945.

Acting Chief Justice.

MISCELLANEOUS APPLICATION No. 28/45.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

Abdul Razzak Nimer Abdul Razzak. APPLICANT.

v.

"Hassadeh" Well Boring Co. Ltd. RESPONDENT.

Change of venue in civil cases.

Chief Justice has no jurisdiction to entertain an application for change of venue in trial of civil actions in District Courts and Land Courts.

(*M. L.*)

ANNOTATIONS:

1. This was a joint application by the Plaintiff and the Defendant for the transfer of a civil case from the District Court of Nablus to the District Court of Haifa.

2. Under sec. 7 of the Courts Ordinance, 1940 the application should have been addressed to the High Court, which has exclusive jurisdiction in the matter.

3. With regard to the change of the place of trial in Magistrates' Courts see sec. 10 of the Magistrates' Courts Jurisdiction Ordinance, 1939.

4. For authorities on change of venue see H. C. 31/44 (11, P. L. R. 226; 1944, A. L. R. 281) and annotations thereto in A. L. R.

(*M. L.*)

FOR APPLICANT: No appearance.

FOR RESPONDENT: Shvo.

ORDER.

I have no jurisdiction to entertain this application.

Given the 1st day of June, 1945.

Chief Justice.

HIGH COURT No. 48/45.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPLICATION OF:—

Ibkheitan Ali Abdul Halim. PETITIONER.

v.

The Superintendent, Central Prison, Jerusalem. RESPONDENT.

Habeas corpus application in an extradition matter — Questioning legality of warrant issued by High Commissioner — Identity of fugitive criminal.

Return to an order *nisi* given on the 18th day of June, 1945, directed to the Respondent calling upon him to show cause why he should not produce the said Petitioner before this Court on a day to be fixed for the purpose of determining his release or otherwise, and to await the further orders of this Court, dismissed:—

High Court must assume that before issuing a warrant in extradition proceedings to Trans-Jordan High Commissioner had satisfied himself that all documents specified in Art. 4(1), Extradition Agreement between Trans-Jordan and Palestine had been received. High Court — not entitled to enquire into these matters.

(*M. L.*)

APPLIED: H. C. 29/45 (unreported); CR. A. 2/41 (8, P. L. R. 43; 9, Ct. L. R. 89; 1941, S. C. J. 15).

ANNOTATIONS: For cases on extradition matters see H. C. 124/42 (9, P. L. R. 683; 1942, S. C. J. 975) with annotations thereto and cases applied (*supra*).

(*A. G.*)

FOR PETITIONER: G. Salah.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is the return to a writ of *habeas corpus*. On 14th June, 1939, a warrant of arrest and surrender was signed by His Excellency the High Commissioner requiring the Palestine Police to arrest the present Petitioner and hand him over to the authorities in Trans-Jordan, there to be tried for an offence. At that time, however, the Petitioner was undergoing a sentence of life imprisonment passed by a Military Court on the 9th June, 1939, and the warrant of arrest and surrender was accordingly returned to the Chief Secretary by the Deputy Inspector-General, Criminal Investigation Department, Palestine Police. On the 10th of May, 1945, His Excellency the High Commissioner granted a general amnesty to a certain number of persons, one of whom was the Petitioner, who was, however, detained by virtue of the warrant of arrest to which we have referred. The relevant provisions of the law are to be found in the Extradition Ordinance, section 13(3) and section 23, as amended by the Extradition (Amendment) Ordinance, 1940, and the Extradition Agreement between the Governments of Trans-Jordan and Palestine, in the volume of Ordinances for 1934, page 657.

At the request of the advocate for the Petitioner this Court heard the evidence of the head clerk of the Crime Branch, Criminal Investigation Department, Palestine Police, Jerusalem, who swore (and his

evidence is not contradicted) that not only was the warrant received from the Chief Secretary's Office but also what he calls the "dossier" containing all the relevant documents. The office copy of a letter dated 15th June, 1939, from the Deputy Inspector-General, C. I. D., to the Chief Secretary, returning the extradition dossier, has been produced. We mention this fact because the matter was raised, although we do not think that it affects matters.

The argument of the Petitioner's advocate is that one should infer from the fact that, in a recent letter the Chief Secretary wrote to the effect that the papers could not be traced, that no documents other than the warrant of arrest were ever received from the Chief Secretary's Office. We do not think that that is a reasonable assumption in view of the evidence, but, in any event, we do not agree with the contention that this Court is entitled to ascertain whether, when the High Commissioner issued his warrant, he had received from the authorities in Trans-Jordan the documents specified in sub-paragraphs (b), (c) and (d) of Article 4(i), namely:—

> "(b) A copy of the text of the article of law on which the charge is based.
>
> (c) A statement as detailed as possible of the identity and description of the accused person.
>
> (d) A certified copy of the deposition of the police witness or witnesses showing that there is a *prima facie* case against the Accused".

Article 5 is in the following terms:—

> "The particulars referred to in Article 4 above shall be referred in the case of Trans-Jordan to His Highness the Emir and in the case of Palestine to His Excellency the High Commissioner, whose decision shall be final".

We must assume that before the High Commissioner issued a warrant he had satisfied himself that the documents mentioned in Article 4, sub-paragraph (1) had been received.

In Criminal Appeal No. 2/41, Volume 8, P. L. R. page 43, at page 44, this Court sitting as a Court of Criminal Appeal said — "If the Government concerned is satisfied that the provisions of Articles 4, 5 and 6, have been carried out, that we think must be the end of the matter, except that possibly the Courts of this country are not entitled to try the man for an offence different from that on which his extradition was obtained". We refer also to High Court No. 29/45.

We accordingly reject the contention that this Court is entitled to enquire into the matters which we have mentioned.

Mr. Salah, for the Petitioner, contends that, unless the argument

which we have just stated is sound, there would be no object in this Court having jurisdiction in such matters. It is clear that this Court has jurisdiction, because the authorities are enjoined not to execute the warrant until the lapse of a certain period within which the arrested person can apply to this Court. There are several circumstances in which an arrested person could properly apply to this Court. We refer to section 7 of the Extradition Ordinance. The person arrested might also be able to prove that he was not the person whom the Court in Trans-Jordan wanted to have arrested.

This brings us to the other argument of Mr. Salah, which is that in the warrant the person to be arrested is described as being "of Trans-Jordan", while we are told that the Petitioner in fact comes from Jericho. The answer to this is that it is not seriously contended that the name of the person specified in the warrant of arrest differs from the name of the Petitioner, and not only is Jericho very near Trans-Jordan but it is not suggested that the Petitioner never visited Trans-Jordan. It may well be that on some occasion he was in Trans-Jordan, and it is quite natural if a person being in Trans-Jordan commits an offence or is accused of having committed an offence there, to describe him as "of Trans-Jordan".

In any event, the Petitioner has failed to satisfy us that he is not the person mentioned in the warrant of arrest. We would point out that his name is rather unusual.

For all these reasons the petition is dismissed and the order *nisi* discharged.

Given this 19th day of July, 1945.

British Puisne Judge.

CIVIL APPEAL No. 131/45.

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

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

IN THE APPEAL OF:—

Yehya Moshe Mizrahi. APPELLANT.

v.

Isaac Cohen. RESPONDENT.

Cheques — Not evidence of Loan — Onus of proof.

Appeal from the judgment of the District Court of Haifa (Judges Shems and Nasr), in its appellate capacity in C. A. 166/44 dated 30th January, 1945, from the judgment of the Magistrate's Court, Tiberias, dated 4.10.44 in Civil Case No. 170/44, dismissed:—

A cheque, even if coupled with an acknowledgement of the receipt thereof is not evidence of a loan.

(*A. M. A.*)

REFERRED TO: C. A. 93/42 (9, P. L. R. 554; 1942, S. C. J. 908; 12, Ct. L. R. 240).

ANNOTATIONS:

1. For the full facts of this case see the judgment of the District Court which is reported in 1945, S. C. D. C. 111.

2. *Cf.* the cases cited in note 2 in S. C. J. to C. A. 93/42 (*supra*); see, on the other hand, C. A. 373/44 (*ante*, p. 148) and note thereto. *Vide* also C. A. D. C. Jm. 40/45 (1945, S. C. D. C. 389) and C. D. C. T. A. 145/44 (*ibid.*, p. 460).

(*H. K.*)

FOR APPELLANT: S. T. Cohen.

FOR RESPONDENT: Sodri.

JUDGMENT.

In this case we are of opinion that the judgment of the District Court was right. The issues were clearly set out both in the judgments of the Magistrate and the District Court. In the first instance we would refer to Civil Appeal 93/42 which decided that the mere giving of a cheque is not presumptive evidence of a loan. The question arises, therefore, if there was no presumption in favour of a loan what evidence was adduced in support of the contention before the Magistrate. Reading the judgment of the learned Magistrate it is clear that he was of opinion that the acknowledgement of the receipt of the cheque together with an averment by the Claimant, was sufficient *prima facie* presumptive evidence to shift the burden of proving that it was not a loan to the Defendant. We are of opinion that in this the learned Magistrate erred. On this issue the District Court came to a correct conclusion.

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

Delivered this 19th day of November, 1945.

Chief Justice.

HIGH COURT No. 39/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

115/40
246/4

IN THE APPLICATION OF:—

Najah Muhammad Taleb. PETITIONER.

v.

Inspector General of Police and Prisons. RESPONDENT.

Deportation order against wife of a Palestinian citizen — Desirability of service of order upon intended person.

Immigration Ordinance does not provide for service of deportation order upon person against whom it is directed, but service is desirable as also a record of service to provide proof that the person was aware of it.

(*M. L.*)

ANNOTATIONS: See H. C. 100/44 (11, P. L. R. 431; 1944, A. L. R. 824) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: 'Assal.

FOR RESPONDENT: Assistant Government Advocate — (Paglin).

JUDGMENT.

This is a return to an order *nisi* dated 22.5.45, calling upon the Respondent to show cause why an order for the deportation of the Petitioner should not be cancelled, or in the alternative to show cause why the deportation should not be put off for two months on account of the Petitioner's illness.

Shafiq Eff. Assal, advocate, has appeared for the Petitioner, and Mr. Paglin, Assistant Government Advocate, for the Respondent.

Affidavits have been made by the Petitioner, and by Mr. James Munro, Acting Assistant Inspector General of Police, on behalf of the Respondent. Shafiq Eff. has dropped the alternative prayer.

We do not think it necessary to set out the facts at any length because it is clear that the petition must fail owing to the inability of the Petitioner to prove that her alleged marriage with Ibrahim Ahmad Jamal Mustafa took place on or before 25.7.39. Unless she establishes that fact, the Petitioner fails to prove that she is a Palestinian citizen — see Article 12 of the Palestine Citizenship Order 1925 as amended by Article 6 of the Order-in-Council dated 25.7.39, which appears at page 715, Supplement No. 2, 1939. If she is not a Palestinian citizen the order for deportation dated 27.1.44 (Exhibit B) was properly made against her.

From the petition itself, the facts of which are supported by the affidavit of the Petitioner, it appears that her marriage took place probably in 1940, and the order of divorce dated 1.3.44, of the *Sharia* Court of Nazareth, also shows that the alleged marriage must have

taken place in 1940. So although it is not disputed by Mr. Paglin that Ibrahim Ahmad Jamal Mustafa was a Palestinian citizen, it is clear that by a marriage in 1940 the Petitioner could not acquire Palestinian nationality. It must further be observed that no document has been produced proving that such a marriage actually took place, although Petitioner stated in her affidavit that the marriage was registered in the *Sharia* Court of Haifa.

It has been submitted by Shafiq Eff. Assal that the Petitioner was never served with the order of deportation dated 27.1.44. Shafiq Eff. does not, however, deny that such an order was made. The Immigration Ordinance, No. 5 of 1941, does not provide for the service of an order of deportation. But in our opinion it is obviously desirable that such an order should be served upon the person against whom it is directed, and that a record of such service should be made, in order that proof may be available that the person against whom the order has been made was aware of it.

In the present case, however, we are satisfied that the Petitioner must have known of the existence of the order dated 27.1.44. Mr. Munro's affidavit says that the Petitioner was deported from Palestine on 12.2.44 on the strength of that order.

Section 10(7) of the Immigration Ordinance provides that "Any person with respect to whom a deportation order has been made shall leave Palestine in accordance with the order and shall thereafter, so long as the order is in force, remain out of Palestine". The order dated 27.1.44 is still in force. Section 10(5) of the Ordinance provides that "A person against whom such an order is made may be expelled from Palestine".

In the circumstances, we can see no grounds for making the order *nisi* absolute. Certain other points were taken by Mr. Paglin. One of these was that the Petitioner had failed to make a full and true disclosure of all the relevant facts and circumstances. Another was that she had delayed in coming to this Court for relief. Mr. Paglin submits that she should have come to this Court after the order dated 27.1.44 had been made and before it was carried out. There is a good deal of weight in both of these submissions, but in view of our finding upon the main issue we do not think it necessary to deal with them further.

In the result, the order *nisi* must be set aside, and the petition dismissed. No costs.

Given on this 26th day of July, 1945.

Chief Justice.

CRIMINAL APPEAL No. 145/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Ibrahim Mustafa El Habashi. RESPONDENT.

Criminal information — Committal on 3 charges — T. U. I. Ord. secs. 18(1), 28(10), 72(1)(c).

Appeal from the judgment of the District Court of Haifa sitting at Nazareth dated the 10th day of June, 1945, in Criminal Case No. 70/45 whereby the Respondent was acquitted of a charge contrary to section 287 and 288(1) of the Criminal Code Ordinance, 1936, allowed and case remitted:—

A general committal made in respect of a number of charges is good if it does not appear that there was a refusal to commit on any particular charge.

(*A. M. A.*)

ANNOTATIONS: The order of the District Court is reported in 1945, S. C. D. C. 498.

(*H. K.*)

FOR APPELLANT: Assistant Government Advocate — (Salant).

FOR RESPONDENT: Asfour — absent.

JUDGMENT.

This is an appeal by the Attorney General from an order of the District Court of Haifa discharging an accused person on the ground that an information filed was bad. At a preliminary inquiry held under section 13, Criminal Procedure (Trial Upon Information) Ordinance, the Police Charge Sheet alleged three acts of robbery committed by the present Respondent on the same day and at the same place against three separate individuals. In his Committal Order the Magistrate said "I commit the Accused for trial before the District Court on the charge of robbery contrary to sections 287 and 288 Criminal Code Ordinance'. The Attorney General thereupon filed an information setting out the three counts more or less in accordance with the Police Charge Sheet. At the trial (before the Accused pleaded) his advocate took the preliminary objection that the Committal Order was bad because the information was bad. The District Court upheld this objection although they very frankly said that they were not in a

position to say that the Magistrate had refused to commit the present Respondent on any of the three charges. While we think that it might have been better if the Committal Order had been more specific, we think that it is obvious that as the Magistrate did not dismiss any of the charges under section 18(1) he must be regarded as having committed the Accused for trial on all the charges set out in the Police Charge Sheet. It is therefore unnecessary for us to deal with the further argument of Mr. Salant, namely, that it is not the Committal Order but the depositions which form the basis of the information and which are the authority for the Attorney General to act under section 28(10) as amended by the Criminal Procedure (Trial Upon Information) (Amendment) Ordinance, 1944. We accordingly hold that the information was good and we, therefore, by virtue of the powers given to us by section 72(1)(c), set aside the order of discharge and remit the case to the District Court for a new trial with direction to them to treat the information as good.

Delivered this 19th day of September, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 38/45.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Jacob Nissim Mizrahi. APPELLANT.

v.

Joseph Toussia. RESPONDENT.

Remittal — Lower Court may deal with technical defences — Adjournments — Discretion interferred with on appeal — New trial, C. P. R. 350 — Costs.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated the 6th of November, 1944, in Civil Appeal No. 58/43, dismissed:—

1. A case remitted to the trial Court after a technical defence is overruled on appeal does not preclude the Trial Court from considering other technical defences.

2. An appellate Court may, in certain instances, interfere with the discretion of the lower Court regarding adjournments. It may also order a new trial under C. P. R. 350.

(*A. M. A.*)

ANNOTATIONS:

1. On the adjournment point see notes in A. L. R. to C. A. 311/43 (11, P. L. R. 72; 1944, A. L. R. 73); *cf.* C. A. 59/44 (*ibid.*, pp. 347 & 594) and C. A. 152/44 (11, P. L. R. 617; *ante*, p. 209).

2. On remitting a case to a differently constituted Court see C. A. 64/44 (1944, A. L. R. 534) and note 1 thereto; *vide* also CR. A. D. C. Ha. 60/45 (1945, S. C. D. C. 355) and CR. A. D. C. Ha. 82/45 (*ibid.*, p. 375). In the present case the order was made as the Magistrate, after refusing an adjournment, had heard the case and expressed his opinion on the credibility of the witnesses.

(*H. K.*)

FOR APPELLANT: M. Goldberg.

FOR RESPONDENT: S. T. Cohen.

JUDGMENT.

In this appeal I confess straightaway to having considerable sympathy with the Appellant, because it is quite obvious that the Respondent has resorted to every technicality in order to avoid the trial of this issue on its merits. Be that as it may, the issue now before this Court is a clear-cut one. This case once before found its way to this Court on a technicality with regard to the filing of a non-enemy declaration. That issue was disposed of by this Court and the case was returned to the District Court to be tried on its merits.

The first point made by Mr. Goldberg was that this decision of the appellate Court precluded the District Court from deciding the case, as it did, on another technical point. On this I am unable to agree with the advocate. When a case is remitted for retrial on the merits, it merely means that the technical point which was before the appellate Court has been settled and that the case should proceed to trial in the ordinary way, subject to the pronouncement of the appellate tribunal on the technical issue. This would not preclude either party from again raising other technical issues. The appeal therefore fails on the first ground.

The second ground was the more important one. The Magistrate refused an adjournment, and here I can say that I agree with the District Court that on the facts before him at the time the Magistrate's decision appears to have been fully justified, but the District Court came to the conclusion that certain material facts emerged which were not before the Magistrate when he exercised the discretion which is vested in him in regard to that adjournment. The District Court also were forced to the more important conclusion that if these facts had been before the Magistrate he would have exercised his discretion differently. It is of course quite true, as Mr. Goldberg has pointed out,

that an appeal Court will very rarely interfere with the discretion of a Magistrate in regard to an adjournment, but having arrived at the conclusion to which they did, this was eminently a case in which the District Court sitting in its appellate capacity was entitled to upset the Magistrate's discretion, and I am not prepared to say that the District Court was not justified in arriving at a conclusion which forced it to interfere with the Magistrate's discretion.

On the other point raised by the Appellant, I am of opinion that the District Court has undoubtedly the power under Rule 350 of the Civil Procedure Rules to direct a new trial, and we consider that it can direct that the new trial should be held before a differently constituted Court. For these reasons this appeal must be dismissed.

In regard to costs, I cannot avoid the conclusion that the Respondent has throughout endeavoured by taking every technical point, including some with no real substance, to avoid the trial of this case on its merits. The claim concerns a sum of LP. 50, yet it has twice already been before the Supreme Court, and the real issue between the parties has not yet been considered by any Court. I allow no costs.

Delivered this 25th day of June, 1945.

Chief Justice.

CRIMINAL APPEAL No. 144/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Mohammad Saleh Othman. APPELLANT.

v.

The Attorney General. RESPONDENT.

Agent provocateur — "Soliciting" within the meaning of Reg. 24(A)(1)(*b*).

Appeal from the judgment of the District Court of Jaffa sitting at Gaza dated 12.7.45 in Misd. Case No. 133/45 whereby the Appellant was convicted of soliciting members of His Majesty's Forces to sell firearms without lawful authority or reasonable excuse contrary to section 24A(1)(b) of the Defence Regulations (Amendment) No. 8, 1942, allowed:—

To secure a conviction for soliciting a member of H. M.'s Forces to sell arms, contrary to Reg. 24A(1)(b), actual "soliciting" within the dictionary

meaning of the word must be established. There is no soliciting if the Accused yielded to the invitation of an *agent provocateur*.

(*A. M. A.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Assistant Government Advocate — ('Akel).

JUDGMENT.

This is an application for leave to appeal against a judgment of the District Court of Jaffa, whereby the Applicant was sentenced to one year's imprisonment for an offence contrary to Regulation 24A(1)(b), Defence Regulations, 1939, as amended, the allegation of the prosecution being that the Applicant solicited a British Army sergeant to sell four rifles. The prosecution did not suggest that the Applicant enticed the sergeant but said that he solicited him.

The story told by Sgt. Albert, which was accepted by the trial Court and which, of course, we must accept as being true, is a strange one. The sergeant first saw the Accused, who was apparently a newspaper seller in Julus Military Camp, Gaza, sitting outside the barber's shop in that camp. The sergeant himself appears to have gone up to him and spoken to him. This is important because it shows that everything came from the side of the sergeant from whose evidence we quote:—

> "I talked to him. As a result he knew that I was i/c of the Arms Store at Barbara Camp. I talked to him in English. He knows English very well. He asked me whether we had an Armourers shop at the camp, I answered in the affirmative. I asked him if he wanted to see this shop. He agreed. I took him there where he saw 4 rifles and a tommy gun. (Thums made). The Accused told me that he was ready to pay LP. 100 should I give him the said 4 rifles and the tommy gun. I agreed. He asked me how I was going to deliver them out of camp. I told him that I shall let him know next morning. At 6.30 of that day, I saw the Liason Officer (Cap. Marks), and informed him of what had happened. He asked me to go on doing it".

The rest of the evidence is really unimportant because it does not affect the alleged act of soliciting. What apparently happened was that on the following day the Military Authorities had certain rifles put on a truck which the Accused, by prior arrangement with them, met. No money passed, the desire of the Military Authorities apparently being that the truck should go to Gaza. The Accused however wished that the truck should go to Jerusalem — a request which the Military refused. Shortly afterwards the Accused was arrested by a sergeant of the Civil Police, apparently not because of anything which he did on the second day, but for the alleged act of soliciting committed when he had the first interview with Sgt. Albert.

The question for this Court to decide is whether, accepting Sgt. Albert's account, it can be said that the Applicant did solicit him. The definition of the word "solicit" in the Concise Oxford Dictionary (1934) is — "invite, make appeals or requests to, importune" while the definition of the word "importune" is "solicit pressingly".

The following decided cases with regard to the term "solicit" do not help one very much, namely, R. *v.* De Kromme, Vol. 66, L. T. R. 301; Hornton *v.* Mead (1913) 1 K. B. 154; Killick *v.* Graham (1896) 2 Q. B. 196; and Elias *v.* Dunlop (1906) 1 K. B. 266, at least one of which deals with this subject of soliciting or taking orders. It would almost seem that Sgt. Albert was, in fact, soliciting or attempting to persuade or, at any rate, encouraging the present Applicant to buy rifles. There is no suggestion that the Applicant ever went up to the sergeant, it was Sgt. Albert who started talking to the Applicant. It is most significant that the suggestion that the Applicant should have a look at the armourer's shop came from the sergeant himself. There can, of course, be no doubt that the sergeant was an *"agent provocateur"*. That, of course, does not make him an accomplice, and we are unable to agree with the contention of the Applicant's advocate that Albert was an accomplice. While it must be admitted that a person who has been induced to commit a crime by an "agent provocateur" can be convicted once it is proved that he has committed a crime, the question for us is whether the facts as alleged by Sgt. Albert bring the Applicant within Regulation 24A(1)(b). We do not know what conversation actually took place in the armourer's shop. It is clear that Sgt. Albert invited the Applicant to come with him to the armourer's shop. All we know is that the Accused told Sgt. Albert that he was ready to pay LP. 100 should Sgt. Albert give him the four rifles. We do not know whether that statement was made in answer to such a question as "how much would you like to pay". If it were, then merely to answer such a question would scarcely amount to soliciting. We think that Albert's evidence merely shows that Albert induced the Applicant to make an offer for the purchase of rifles. If that is so it cannot be said that a person who agrees to make an offer in reply to such a request does, in fact, solicit some one to sell arms, the property of the War Department of His Majesty's Government. In the result we allow the application for leave to appeal and we quash the conviction and direct that the Applicant be released unless he is detained on another charge.

Delivered this 26th day of September, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 172/45.

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

BEFORE: Shaw, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ahmad Ibn Murpan Aboud & an. — APPELLANTS.

v.

Sha'ban Ibn Kadoura Ibn Mohd. Ibn Daoud Abu Nour & 2 ors. — RESPONDENTS.

Prescription — Land Law (Amend.) Ord. not retroactive — Heir holding for co-heirs.

Appeal from the judgment of the Magistrate's Court of Gaza sitting as a Land Court, dated 23.4.45, given in Land Case No. 31/44, dismissed:—

To establish a defence of prescription, an heir must establish that he has been in exclusive *and* adverse possession for a period exceeding ten years after the 23.8.33 — the date on which the Land Law (Amend.) Ord. came into force.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 288/44 (11, P. L. R. 615; 1944, A. L. R. 805) and C. A. 278/44 (12, P. L. R. 193; *ante*, p. 496) and notes to these cases in A. L. R.

(*H. K.*)

FOR APPELLANTS: F. Dajani.

FOR RESPONDENTS: Hawari.

JUDGMENT.

The Respondents are not called upon to reply.

This is an appeal from the judgment dated 23.4.45 of the Magistrate's (Land) Court of Gaza in Case No. 31/44, dismissing the Appellants' claim in respect of 80/640 shares, each, in Parcel No. 1, Block 694, Gaza. The learned Magistrate dismissed the claim on the ground that it was barred by limitation.

The Appellants allege that the land is *miri*, so the period of limitation would be ten years.

The provisions of the Land Law (Amendment) Ordinance (Cap. 78) are not retroactive, and although, by virtue of this Ordinance, the presumption that one heir holds land as agent for the co-heirs not in occupation can be rebutted, it is necessary for the heir in possession to show that his possession has been not only *exclusive* but also *adverse* for a period exceeding ten years (in the case of *miri* land) after the

coming into force of the Ordinance. The Ordinance came into force on 23.8.33.

The learned Magistrate made no finding on the question whether the possession was *adverse,* and we must consider whether we can make such a finding upon the facts as they are known to us.

Zeinab, through whom the Appellants claim by inheritance, died in 1916 (that is the date as given by the Appellants' advocate Fauzi Eff. Dajani). Fauzi Eff. also tells us that in 1935, when the Appellants brought an action in the Land Court, Jaffa, they did not claim the land which is the subject-matter of this case because there were trees on it, and the Appellants were under the impression that they were not entitled to any shares in it. Fauzi Eff. also admits that the Appellants have never had actual possession, and that there has never been any accounting between them and the Respondents in respect of the proceeds of this land.

It may be observed that the period of *exclusive* possession in this instance is over ten years since the coming into force of the Ordinance, as the action in the Magistrate's Court was brought on 13.1.44.

So it is clear the Appellants did not regard Sha'aban or the other Respondents as being their agents, and the occupation by the Respondents in respect of this land must therefore be held to have been adverse to the rights of the Appellants.

In the circumstances we find that there has been more than ten years adverse possession subsequently to 23.8.33, and that the case was properly dismissed on account of limitation. The appeal fails, and is dismissed with inclusive costs in the sum of LP. 10 (ten pounds).

Delivered this 12th day of June, 1945.

British Puisne Judge.

CIVIL APPEAL No. 63/45.

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

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

IN THE APPEAL OF:—

Hassan Farah El Nounou. APPELLANT.

v.

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

Confiscation under Food Control Ord. — Sec. 8 contemplates seizure and confiscation — Reasonable confiscation made in good faith — High Court as alternative manner of challenging order — No Order of Court required — Dating judgment.

Appeal from the judgment of the District Court Jaffa dated the 27th January, 1945, in Civil Case No. 55/44, dismissed:—

1. Sec. 8 of the Food Control Ordinance contemplates two steps; firstly a seizure of the goods and secondly a possible confiscation. It is in the interest of justice that the owner should be given an opportunity of making representations before the second step is taken.

2. No Court order is required for the confiscation and the confiscation will not be queried by the Court if made reasonably and in good faith.

3. A judgment should be dated on the date of delivery.

(*A. M. A.*)

ANNOTATIONS:

1. On sec. 8 of the Food Control Ordinance see also C. A. 176/43 (10, P. L. R. 425; 1943, A. L. R. 502) and H. C. 119/43 (11, P. L. R. 12; 1944, A. L. R. 85).

2. *Cf.* C. A. 320/44 (12, P. L. R. 119; *ante*, p. 385) on the meaning of "seized" and "seized as forfeited" in the Customs Ordinance.

3. "The judgment shall be dated at the time of pronouncing it" — C. P. R., Rule 203.

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Paglin.

JUDGMENT.

This is an appeal from the judgment dated 27.1.45, of the District Court, Jaffa, in C. C. 55/44. The Appellant (original Plaintiff) sued the Government of Palestine for a sum of LP. 1300, being the alleged price of 88 sacks of coffee confiscated by the Food Controller by virtue of the powers given to him by section 8 of the Food Control Ordinance (No. 4 of 1942).

In the District Court the parties had agreed the following issues:—

1. Whether the Defendant was justified in confiscating the coffee by virtue of the powers conferred upon him, without restoring to Court or obtaining an order from the Court.

2. If not, what is the value of the coffee?

The District Court held that the Food Controller had complete authority to confiscate the coffee; that he had used his powers under section 8 reasonably; and that the District Court could not interfere with the order which the Food Controller was authorised to make without a Court order.

The Appellant puts forward the following grounds of appeal:—

> "1. The Honourable District Court erred in holding that it has no jurisdiction or power to interfere with the Food Controller's Order of confiscation purporting to be made under section 8(1)(2) of the Food Control Ordinance, 1942.
>
> 2. The Honourable District Court erred in holding that Appellant's remedy lies solely in High Court proceedings.
>
> 3. The Honourable District Court erred in not ordering the payment to the Appellant of the sum of LP. 880.875 mils, the value of his confiscated goods".

With regard to the first ground, Mr. Elia has asked us to construe the judgment of the District Court as being a finding that the Court could in no circumstances whatever interfere with the order even, for instance, if it found that the Food Controller had acted in bad faith. Mr. Paglin for the Respondent does not support such a proposition, and having read the judgment of the District Court I am unable to find that to be its meaning. The District Court held that the Food Controller had acted within the powers given him by law, and it further held as a fact that he had exercised his powers in a reasonable manner. It may be observed that it was not alleged that the Food Controller had acted in bad faith. The issue upon which the case came to trial was a legal one — whether the Food Controller could exercise his powers without obtaining an order from a Court. I find that the District Court correctly held that no Court order was necessary.

With regard to the second ground of appeal — it is clear from its judgment that the District Court did not hold that the Appellant's remedy lay solely in High Court proceedings. The Court stated specifically that the fact that the Appellant had not applied to the High Court did not estop him from coming to the District Court.

With regard to the third ground of appeal — I would say that it does not arise out of the agreed issues. But Mr. Elia, for the Appellants, has argued at considerable length the question whether the Food Controller's order was valid or not, and I shall state my conclusions.

Section 8 of the Food Control Ordinance visualizes two steps — first a seizure of the goods, and then a possible confiscation. Mr. Paglin has agreed that the Food Controller's order (Exhibit M. 1) ought not to have been called a confiscation order. It was in fact only a seizure order. Although section 8 does not provide that the person whose goods are seized shall be called upon to show cause why they should not be confiscated, I think that it is in the interests of justice that the goods should not be finally disposed of (except perhaps where this is necessary owing to their perishable nature) before the owner has had

an opportunity of stating his case, either verbally or in writing, to the Food Controller. In the present instance Mr. Moghannam, advocate, acting on behalf of the Appellant, did state his case at considerable length, in a letter dated 8.2.43 which was an exhibit at the trial. And it appears from his reply dated 15.2.43 that the Food Controller reconsidered the matter in the light of that letter. I think that the Food Controller's reply dated 15.2.43 must be regarded as being an intimation of the Food Controller's final decision that the coffee should be confiscated. I would say that having considered the contents of Mr. Moghannam's letter dated 8.2.43, I am unable to find that the Food Controller's decision was unreasonable. Nor does the evidence given at the trial support a finding that the Food Controller's decision was unreasonable.

So the position as it appears to me is this — The Food Controller acted within the scope of the powers given to him by law, and it is not suggested that he acted in bad faith. The Appellant actually stated his case, and that statement was considered by the Food Controller. In rejecting the Appellant's explanation the Food Controller did not act unreasonably.

In my judgment, the Food Controller was not estopped from reconsidering the matter when he received Mr. Moghannam's letter — he was at liberty to restore the coffee to the Appellant if he considered such a course to be just and proper. The fact that the Food Controller wrongly described the seizure order as a confiscation order did not make it a confiscation order.

In these circumstances I am unable to find that the Food Controller contravened the law, and it follows that the District Court did not err when it refused to order the payment to the Appellant of the sum of LP. 880.875 mils.

The result is that the appeal fails, and I would dismiss it with costs on the lower scale to include a hearing fee of LP. 10 (ten pounds).

I notice that the judgment of the District Court bears two dates — one when it was signed and one when it was delivered. There is no objection to the judgment being signed before it is delivered, but it should be dated only at the time of its delivery.

Delivered this 28th day of November, 1945, in the presence of Mr. Goldberg for Appellant, and Mr. Salant for Respondent.

British Puisne Judge.

CRIMINAL APPEAL No. 128/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Mousa Elias Aboud. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal Appeal — Death of Appellant before the hearing — Town Planning offences — Appeal under sec. 35(8) — M. C. J. O., secs. 12, 14(2) — Ottoman CR. P. Code, Art. 2.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 25th May, 1945, in Cr. Appeal No. 81/45, dismissed:—

1. Leave to appeal is required from a judgment of the District Court in its appellate capacity, under sec. 35(8) of the Town Planning Ord.

2. A criminal appeal cannot be heard if the Appellant has died before the date of the hearing.

(*A. M. A.*)

ANNOTATIONS:

1. On sec. 35(8) of the Town Planning Ord. see also CR. A. D. C. Ha. 45/45 (1945, S. C. D. C. 333).

2. On the second point *cf.* CR. A. 56/38 (1938, 1 S. C. J. 418; 4, Ct. L. R. 114).

(*H. K.*)

FOR APPELLANT: Habibi.

FOR RESPONDENT: Weinshall.

JUDGMENT.

On 21st March, 1945, Mousa Elias Aboud (hereinafter referred to as the deceased) was convicted by the Chief Magistrate of Haifa of offences contrary to sections 11(b) and 35(1)(a) Town Planning Ordinance as amended by the Town Planning (Amendment) Ordinance, 1941, and fined in two sums but the Trial Court refused to order him to demolish a certain structure. On appeal the District Court of Haifa on 25th May, 1945, increased the fine and also ordered the deceased to demolish 11 partition walls unless he obtained a permit from the Town Planning Commission within six months from the 25th May, 1945. The order therefore was in fact an order on the now deceased person to effect demolition by the 25th November, 1945. We are told that the deceased, who was then alive, was present when the judgment of the District Court was delivered. The Appellant in fact died on

the 27th July, 1945. As we have said, the date of the judgment of the District Court was the 25th May, 1945, and an appeal was lodged on 13th July, 1945. Dr. Weinshall, for the Respondent, has argued that as there was an appeal as of right under section 35(8) as amended, the appeal was out of time. We think, however, that on a sound construction of section 35(8) when the District Court sits as an appellate Court from a Magistrate, leave to appeal under section 12 of the Magistrates' Courts Jurisdiction Ordinance is still necessary. It should be noted that section 35(8) deals with two instances namely the District Court sitting as a Court of first instance in a summary criminal trial and as an appeal Court from a Magistrate. It is not denied that leave to appeal was obtained in time and that the appeal was filed in accordance with the last paragraph of section 14(2) Magistrates' Courts Jurisdiction Ordinance, 1939.

Jamil Eff. Habiby, on behalf of the heirs of the deceased, relies on Article 2 of the Ottoman Criminal Procedure Code (which is still in force in Palestine) and on the Commentary by Baz on that section. Whatever may be the effect of the various judgments which have been given in the present matter up to date, there is no Appellant before us, he having died on 27th July, 1945. It is not for us to say what is the effect of the various judgments with regard to the property or what is the position of the heirs of the deceased in relation to that property or what are the present or future powers of the Town Planning authority. We merely say that there is no Appellant before us and that there is therefore no appeal. The appeal is accordingly dismissed.

Delivered this 19th day of September, 1945.

Acting Chief Justice.

PRIVY COUNCIL LEAVE APPLICATIONS Nos. 20—28/45.

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

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

IN THE APPLICATION OF:—

Reuven Lev & 9 ors. APPLICANTS.

v.

Joseph Forer. RESPONDENT.

Question of including interest on principal when ascertaining amount for purposes of Privy Council Leave Application.

Applications 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 13.4.45 in Civil Appeals Nos. 289—397/44, partly granted:—

1. If sum awarded taken together with interest up to date of judgment in District Court amounts to LP. 500 appeal to Privy Council lies as of right.

2. Where appeal from District Court is dismissed without any variation, interest accrued due between date of District Court's judgment and date of appellate judgment should not be included for purposes of ascertaining amount involved.

(*M. L.*)

ANNOTATIONS:

1. The original judgment of the Supreme Court is C. A. 389—397/44 (12, P. L. R. 240; *ante*, p. 430).

2. On Art. 3(a) of Pal. (Appeal to Privy Council) O. in C. see P. C. L. A. 33/45 (*ante*, p. 556) with annotations.

(*A. G.*)

FOR APPLICANTS: Eliash.

FOR RESPONDENT: Goitein.

ORDER.

Edwards, J.: These are separate applications for conditional leave to appeal to His Majesty in Council which have by consent been consolidated for hearing. Shortly stated, the facts are that the Respondent to these applications who is the landlord of a house in Tel-Aviv in which there are blocks of flats entered into agreements for the sale of these flats which agreements a certain Magistrate subsequently held to be void. The Respondent then brought separate actions in the District Court of Tel-Aviv for equivalent rent against his tenants (the would-be purchasers). In these actions he was successful and appeals to this Court by the present Applicants failed. The present Applicants now wish to appeal to His Majesty-in-Council. It is admitted that in only two cases the sums awarded to the Respondent together with interest up to the date of the judgments of the District Court amounted to LP. 500. These are P. C. L. A. 29 and 26 of 1945 respectively. It will be convenient if we at once dispose of the argument of Mr. Goitein, for the Respondent, that, in assessing the amount of the judgment for the purposes of Article 3(a) of the Palestine (Appeal to the Privy Council) Order-in-Council, 1924, one should ignore interest accrued due between the date of filing of the statement of claim and the date of judgment. We decide against Mr. Goitein's contention for two reasons,

namely, (a) in the statements of claim interest from the date of filing to the date of judgment was specifically claimed and (b) we think that the matter in dispute was the correctness or otherwise of the judgment of the District Court. In the operative part of each judgment of the District Court the learned trial Judge awarded the principal amount with interest up to the date of judgment. We think, therefore, that, if the sum awarded plus interest up to the date of judgment in the District Court amounts to LP. 500, there is an appeal as of right.

We next deal with the contention of Dr. Eliash, for the Applicants, namely, that in arriving at the sum for the purposes of Article 3(a) one is entitled to and should include the amount of interest on the principal up to the date of the judgment of this Court sitting as a Court of Civil Appeal, is sound. We do not agree with the argument that it is the decretal amount due at the time of the decree issued by the Court of Appeal which is the matter in dispute on appeal for the purposes of Article 3(a). We do not ignore the definition of "appeal" in Article 2 nor are we unmindful of the provisions of Rule 352 Civil Procedure Rules, 1938. It sometimes happens that the Court of Appeal varies the judgment of a District Court by increasing the amount awarded. In such cases other considerations would probably apply. But that is not the present case. We have not seen the actual decree issued under Rule 352 but we assume that all that that decree contained was a bare statement that the appeal from the District Court was dismissed. We do not think that interest accrued due between the date of the decree of the District Court and the date of the decree issued under Rule 352, should be included for the purpose of bringing the amount up to LP. 500. In the result, conditional leave to appeal will be granted on the usual terms in P. C. L. A. 24 and 26/45 but will be refused in all the other applications.

In P. C. L. A. 24 and 26 of 1945 the Applicants will each within two months from this date furnish security in LP. 300 for three years by a bank guarantee of one of the recognized banks and will take steps with a view to procuring the preparation of the record and its despatch to England within two months from this date. We would merely add that in those cases in which the applications have been dismissed we have considered whether we should act under Article 3(b); but we are unable to hold that these cases are of such a nature as to bring them properly within the scope of that sub-article. We direct that the appeals be consolidated under Article 18. We direct that the judgments of the District Court in the cases giving rise to P. C. L. A. 24 and 26 of 1945 be executed and that the Respondents to P. C. L. A. 24

and 26 of 1945 do give security to the satisfaction of the Chief Registrar, as laid down in Article 7.

Delivered this 16th day of July, 1945, in the presence of Mr. M. Eliash for Applicants, and Mr. E. D. Goitein for Respondent.

British Puisne Judge.

CIVIL APPEAL No. 218/45.

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

BEFORE: Edwards, A/C. J. and Mr. Curry, A/J.

IN THE APPEAL OF:—

Miriam Ligner. APPELLANT.

v.

Lothar Ligner. RESPONDENT.

Claim of maintenance by child's next friend — Plea by father that child is being maintained in a Kibbutz.

Appeal from the judgment of the District Court, Haifa, dated 6th June, 1945, in Civil Case No. 80/44, allowed:—

1. Not necessary for next friend under Rule 70, Civil Procedure Rules to prove that he or she is maintaining the infant.
2. Fact that child is kept in an institution or by a third person — no reason for father not to contribute towards child's maintenance.

(*M. L.*)

FOR APPELLANT: Gottschalk.

FOR RESPONDENT: Bach.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa dismissing a claim brought by a five year old Jewish girl through her next friend against her father claiming a contribution towards her maintenance.

The facts, shortly stated, are that this child who was born in Kibbutz Hazorea is now living in the children's kindergarten of the Kibbutz. Some time ago her parents were divorced and it seems that her mother is still in the Kibbutz while her father, the present Respondent, has actually left the Kibbutz although his advocate maintains that he has not ceased to be a member. There were, however, written pleadings in the Court below including a statement of defence drawn up by his advocate from which it appears that this point was never taken. We

are satisfied that the child was properly the Plaintiff and we refer to Rule 70, Civil Procedure Rules, 1938, and to the Yearly Practice (1937) p. 221.

The learned Relieving President held that there was no evidence that the next friend maintained this child. In holding that this was of importance we think that the Court below erred in law. It is not necessary for the next friend to prove that he or she herself is maintaining the child.

The main argument adduced before us by the Respondent's advocate was that his client had come to some arrangement with the Kibbutz for the maintenance of his child. There was, however, no evidence of this; and, even if there had been, it would merely lead to a claim by the father against the Kibbutz. It was not proved that the Kibbutz were under any legal obligation to maintain the child in the future free of charge, nor was it proved that the Kibbutz had ever undertaken to maintain the child free of charge. On the contrary, the Respondent himself in cross-examination admitted that, one year after he left the Kibbutz, the Kibbutz asked him to pay money for the child. It is not denied that according to Jewish Law, (the parties being Palestinian Jews) a child of this age is entitled to claim from her father a contribution towards maintenance, and it is not necessary for her or her next friend to prove how that money is going to be spent in the future, or how or where the child is going to live. The Court below, therefore, erred in refusing to order the Respondent to pay a contribution. The learned Relieving President, in his judgment, said that should his view not be upheld he would award a sum of LP. 8.— monthly, this being the least sum on which in his opinion the child could be kept. It is said that the learned Relieving President did not show how he arrived at this figure. The Respondent's advocate has admitted that his client is in receipt of a monthly salary of LP. 25 and that he has to maintain his present wife only there being no children of the second marriage.

In the whole circumstances we are not prepared to hold that the figure of LP. 8.— was excessive. The appeal is, therefore, allowed, the judgment of the District Court set aside and judgment will be entered for the Appellant against the Respondent in the sum of LP. 8.— monthly till further order, the payments to commence as from 17th September, 1944. The Appellant will have her 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 6th day of November, 1945.

Acting Chief Justice.

HIGH COURT No. 2/45.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF:—

Muhammad Ibn el Haj Ibrahim Abul Hassan & an. — PETITIONERS.

v.

His Worship the Magistrate, Beersheba, sitting as Chief Execution Officer, Beersheba & an. — RESPONDENTS.

Claim against an heir on behalf of estate of deceased for redemption of mortgage — Proper course for other heirs opposing the claim.

Return to a rule *nisi* issued on the 5th day of January, 1945, directed to the Respondents calling upon them to show cause why (a) the judgment of the Magistrate's Court of Beersheba sitting as a Land Court in Land Case No. 355/43 should not be declared void for lack of jurisdiction of the Court and (b) alternatively why the judgment should not be stayed against the Petitioners and the second Respondent ordered to bring an action against the Petitioners to establish his claim to the land, if any, discharged:—

1. An action for redemption of a mortgage of LP. 100.— within jurisdiction of Magistrate's Court sitting as Land Court, regardless of value of land in question.

2. Where a case is brought against a person in his capacity as heir and representative of estate, proper course for other heirs claiming an interest is to apply to be joined as Defendants or third parties and not to wait until execution of final judgment and then petition High Court.

(*M. L.*)

ANNOTATIONS:

1. For former proceedings see C. A. 201/44 (11, P. L. R. 556; 1944, A. L. R. 682).

2. Compare C. A. 351/43 (1944, A. L. R. 386).

(*A. G.*)

FOR PETITIONERS: Ghussein and Michaeli.

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

ORDER.

This is a return to a rule *nisi* issued on the 5th day of January, 1945, directed to the Respondents calling upon them to show cause why:—

(a) the judgment of the Magistrate's Court of Beersheba sitting as

a Land Court in Land Case No. 355/43 should not be declared void for lack of jurisdiction of the Court, and

(b) alternatively, why the judgment should not be stayed against the Petitioners and the second Respondent ordered to bring an action against the Petitioners to establish his claim to the land, if any.

The Petitioner seeks the execution proceedings to be stayed and that an order be given that the subject matter of these proceedings in file No. 77/44 is incapable of execution and time be given to the Applicant to go to the appropriate Court to obtain a judgment to this effect. The subject matter of the judgment was the redemption of a mortgage of LP. 100. This mortgage was originally made to the father of the two Petitioners seven or eight years ago and the Respondents took further sums from the brothers of the Petitioners later on. The mortgage was registered in the Rural Property Tax and shows the name of the Respondent No. 2 as the owner and the mortgagee to be the father of the Petitioners. Respondent No. 2 brought an action in the Land Court to release the mortgage against the two brothers of the Petitioners, who were in possession, on behalf of their deceased father's estate. The Plaintiff obtained judgment in his favour, which judgment was confirmed on appeal in C. A. No. 201/44. This judgment was put into execution in Execution File No. 77/44 Beersheba, whereupon the present Petitioners who are also sons and heirs of the mortgagee applied to the Execution Office to stay the execution on the ground that they wished to bring an action to set aside the judgment in respect of their shares. This application was refused by the Execution Officer. The Respondent submits that the whole petition is in the nature of an appeal from the judgment of the Land Court which was confirmed by the Court of Appeal. The claim in that case was against the two Defendants on behalf of their father's estate for the redemption of a mortgage and that the Petitioner argues that the Land Court had no jurisdiction to give judgment for possession or ownership as the Petitioners were in fact in possession and had not been made parties to the suit and further that the subject matter is of a value outside the jurisdiction of a Magistrates' Court. There is neither law or merit in this petition. The action before the Magistrate's Court sitting as a Land Court was for the redemption of a mortgage of LP. 100. The father of the present Petitioner was the mortgagee, the Respondents were the mortgagors and the action was brought against the Defendants in their capacity as representatives of their father's estate. The defence of ownership was raised by the Defendants, the

Magistrate who was upheld on appeal decided that the land was mortgaged and belonged to the Plaintiff, here the Respondent. Had the Petitioners desired to do so they could have applied to be joined as Defendants or third parties to that case, but they did not do so and waited for some eight months and then lodging what I can only term this brazen petition. The order *nisi* is discharged with costs, LP. 15.— advocates fees.

Delivered this 23rd day of March, 1945.

A/British Puisne Judge.

HIGH COURT No. 75/45.

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

BEFORE: Mr. Curry, A/J.

IN THE APPLICATION OF —

Ali Ahmad el Amir El Astal. PETITIONER.

v.

The Assistant District Commissioner, Gaza District. RESPONDENT.

Service of notice of valuation re land not yet included in urban area — Non-interference of High Court where Petitioner had other remedy.

Return to an order *nisi* issued on 18th September, 1945, directed to the Respondent calling upon him to show cause why the assessment of taxes made in respect of lands added to the Khan Yunis Urban Area by virtue of the Khan Yunis (Variation of Municipal Area) Order, 1945, and the Urban Property Tax (Variation of Khan Yunis Urban Area), 1945, should not be declared void and why the Respondent and his subordinates should not refrain from claiming thereunder, discharged:—

1. High Court will not entertain petition if Petitioner had another remedy.

2. Any person aggrieved by a notice of valuation *re* land not within urban area at time of service of notice may object and if necessary appeal under sec. 15 and 17, respectively, of Urban Property Tax Ordinance.

(*M. L.*)

FOLLOWED: H. C. 78/39 (7, P. L. R. 35; 1940, S. C. J. 25).

ANNOTATIONS: On jurisdiction of H. C. in case of existing alternative remedy see H. C. 26/45 (*ante*, p. 674).

(*A. G.*)

FOR PETITIONER: Michaeli and T. Dajani.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is the return to an order *nisi* calling upon the Respondent to show cause why the assessment of taxes made in respect of lands added to the Khan Yunis Urban Area should not be declared void.

The position is as follows. The Property Tax Ordinance, 1940, section 10, provides for the establishment of Assessment Committees in every Urban Area to which the Ordinance applies. Subsequently the High Commissioner by virtue of the powers vested in him by section 5 of the Municipal Ordinance, made an order dated the 11th March, 1945, extending the Municipal Area and that order was to come into force on the 1st April, 1945. On the 17th March, 1945, the High Commissioner made a further order by virtue of section 3 of the Urban Property Tax Ordinance, 1940, varying the boundaries of the Khan Younis Urban Area. This order was also to come into force on the 1st day of April, 1945. The Petitioner received a notice of valuation on 25.3.45 and his contention is that as the land concerned did not fall within the Urban Area as extended until the 1st April, 1945 — therefore, on the 25th March the land was not Urban land and on that date the Assessment Committee had no power to make any assessment in respect thereof.

The point is an interesting one. I should have liked to have decided it on its merits but the Respondent submitted an alternative argument to the effect that this Court has time and again held it will not assume jurisdiction where some other remedy exists. Now section 15 of the Urban Property Tax Ordinance, 1940, provides for objections to be made by any person who feels he is aggrieved by the valuation list on the ground that he is not liable to pay the tax or on the ground that he is liable to pay the tax, or on the ground of the incorrectness of the valuation of any properties included therein. Section 17 provides for a right of appeal to any decision on any such objection and section 18 provides for the Appeal Commission to state a case upon a point of law material to the issue. The argument of the Petitioner is that he was not disputing his liability to pay or of the incorrectness of the valuation but merely that he did not recognise the right of the Committee to make the assessment. This seems to me to be begging the question. The objection of the Petitioner in fact is that on the 25th March, 1945, an Assessment Committee served him with a notice of valuation in respect of land which at that date was not within the Urban Area of Khan Younis and therefore he should not have been included in that valuation list.

It appears to me clearly that the Petitioner had an alternative remedy. He could have objected under section 15 on the ground that on the said date the land was not within the urban area and therefore the valuation list was incorrect. Had his objection been overruled he could have appealed and could have requested the Appeal Commission to state a case upon the point of law.

Holding as I do that the Petitioner had another remedy open to him and following the judgment in High Court 78/39 this order *nisi* must be discharged.

Given this 26th day of October, 1945, in presence of Omar el Wari for Respondent, Petitioners absent — served.

A/British Puisne Judge.

CRIMINAL APPEAL No. 125/45.

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.

Fuad Iskandar Rizik & 8 ors. RESPONDENTS.

Amendment of information — T. U. I. Ord., sec. 28(9) — Fresh information filed subsequently to the amendment — When trial is deemed to have commenced — Effect of quashing fresh information on former, amended information — CR. A. 14/42.

Appeal from the judgment of the District Court of Haifa, Cr. No. 51/45, allowed and case remitted for new trial:—

1. A criminal appeal may be signed by Crown Counsel in the name of the Attorney General.

2. Once an information has been amended by the Attorney General under sec. 28(9), before trial, he cannot, under the same sub-section, file a fresh information. Any fresh information, being in the circumstances a nullity, cannot affect the amended information.

(*A. M. A.*)

FOLLOWED: CR. A. 18/38 (5, P. L. R. 183; 1938, 1 S. C. J. 156; 3, Ct. L. R. 137); CR. A. 14/42 (9, P. L. R. 63; 1942, S. C. J. 109; 12, Ct. L. R. 77); CR. A. 48/42 (9, P. L. R. 258; 1942, S. C. J. 357; 12, Ct. L. R. 13).

ANNOTATIONS :

1. On the first point see also note 2 in A. L. R. to C. A. 274/42 (10, P. L. R.

105; 1943, A. L. R. 133 at p. 137) and CR. A. 24/44 (11, P. L. R. 201; 1944, A. L. R. 361).

2. On the second point see CR. A. 14/42 (*supra*).

(*H. K.*)

FOR APPELLANT: Assistant Government Advocate — (Salant).

FOR RESPONDENTS: No. 3 — Asfour.
Nos. 1, 4—9 — W. Salah.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of the District Court of Haifa discharging the Respondents who had been arraigned on an information alleging several offences.

A preliminary objection has been taken by Mr. Asfour on behalf of the Respondents, that no appeal lies inasmuch as the notice of appeal was signed not by the Attorney General himself but by Crown Counsel. In view, however, of the judgments of this Court in CR. A. 18/38, Vol. 5, P. L. R. p. 133, and CR. A. 48/42, Law Reports, Vol. 9, p. 258, by which we think that we are bound, this preliminary objection fails. The position is not affected by reason of any of the provisions of the Criminal Procedure (Trial Upon Information) Amendemnt Ordinance, 1944.

To deal now with the appeal, the facts are that an information had been filed on 31st December, 1944, and the Accused came up for trial on the 13th January, 1945, and as soon as the Respondents had answered to their names, the Attorney General's representative applied for an amendment of the information. This was apparently granted and the case was adjourned. It seems clear that the Attorney General's representative at that time was entitled to amend the information under section 28(9) of Cap. 36 as amended, as it is common ground that this was done before the trial. We, therefore, regard that amendment as having, in fact, been made under section 28(9).

On the 25th April, 1945, the Attorney Generals' representative filed an entirely fresh information incorporating the previous amendments and adding certain new counts. The Respondents again appeared for trial on the 2nd May, 1945. When this entirely new information was read out to the Respondents before they were called upon to plead, Mr. Asfour, who was the advocate for some of them, and another advocate who was advocate for the others, objected, contending that what the Attorney General's representative had done was to replace an information which contained additional counts and that he could not do so having already acted once under section 28(9). It seems

that the argument was that he could either choose to amend or to replace, but that having chosen in February to amend he had exhausted his powers under sub-section 9, and that he could not then replace. The learned R/President upheld this contention stating that the information of the 31st December, 1945, as amended, stood and was the proper information. He seems to have held that the trial had already commenced. It is difficult to say, and we do not intend specifically to determine for the time, whether in such circumstances the trial may be said to have commenced because we have been invited by Mr. Asfour to hold that the Attorney General's representative had purported to replace the information before the trial. Accepting, as we do, this hypothesis, we think that it is correct to say that the Attorney General's representative could act only once under section 28(9). That seems to have been the view taken by the learned Relieving President because immediately after he had announced the fact that he quashed the information, that is to say, the new information of 25th April, 1945, the Attorney General's representative applied to be allowed to proceed on the information of the 31st December, 1944, as amended. Mr. Asfour replied that the Attorney General's representative, by his action in purporting to replace the information, that is to say, by filing the new one of 25th April, 1945, had abandoned the first information, that is, the one of 31st December, 1944, as amended. He further contended that the information of 31st December had disappeared and that the trial Court having quashed the information of 25th April, 1945, there was no information before the Court. The learned Relieving President upheld this contention and discharged the Accused although he said that the matter was one of considerable difficulty and he felt some doubt.

The crux of this case is whether the action of the Attorney General's representative in filing the alleged new information of 25th April had the effect of making the information of the 31st December, 1944, as amended, disappear. We think that the position at the resumed hearing of the 2nd of May was that there were on the file two documents alleged to be informations. It is clear from section 28(1) of Cap. 36 that an information has to be filed. Now, one had already been filed, that is to say, the one of the 31st December, and it had been properly amended. On proper objection being taken to the new information of April which had also been filed, it was, in our opinion, the duty of the trial Court to give a ruling as to which of the informations should be read out to the Accused. Neither of the informations had been withdrawn from the Court nor had the Court, apart from sanctioning the amend-

ment to the one of December, approved in any way the acceptance for filing of the new one. We appreciate the argument of Walid Eff. Salah and Mr. Asfour that the Attorney General's representative, by his own action in filing the new information, had impliedly withdrawn the old one. We are unable to accept the suggestion that this was so for the simple reason that once it is conceded that the Attorney General's representative had no power to act twice under sub-section 9 then any purported action of his could not have the effect of withdrawing from the file or indeed any effect (in the absence of an order of the Court) on the information of 31st December, 1944, as amended. Our view seems to be confirmed by the following citation from CR. A. 14/42 Annotated Supreme Court Judgments, (1942) at p. 113, namely — "the first information, however, remained upon the file until the beginning of the second trial". Now, keeping in view this statement and having reagrd to the contention of Mr. Asfour at the Bar to-day that the trial had not commenced, we are reinforced in our view that the first information remained on the file and was indeed the only good information and was the one which should have been read to the Accused. We accordingly by virtue of the powers given to us by section 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, set aside the order of the District Court of 2nd May and remit the case to the Court for a new trial with directions to try the Respondents on the information of 31st December, 1944, as amended.

Delivered this 26th day of July, 1945.

British Puisne Judge.

CIVIL APPEAL No. 204/45.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J. (in Chambers).

IN THE APPLICATION OF :—

Tewfic Giovanni. APPLICANT.

v.

Bahiya Douani & an. RESPONDENTS.

Sub-tenancy from a tenant who is prohibited from sub-letting — Position of sub-tenant — Leave to appeal under sec. 12, Magistrates' Courts Jurisdiction Ordinance.

Application for leave to appeal from the judgment of the District Court, Haifa,

in its appellate capacity, dated the 12th of June, 1945, in Civil Appeal No. 168/44, refused:—

1. A tenant can only convey the title he is lawfully empowered to give. If he entered an agreement with landlord which prohibits sub-letting, sub-tenant is not protected by Rent Restrictions Ordinance; question whether landlord in fact did acquiesce in the sub-tenancy — immaterial.

2. A case cannot be said to involve a point of novelty for purpose of leave to appeal under sec. 12, Magistrates' Courts Jurisdiction Ordinance, if point raised has already been decided by Court of Appeal in another case.

(*M. L.*)

FOLLOWED: C. A. 383/44 (12, P. L. R. 161; *ante*, p. 465).

ANNOTATIONS: See case referred to and annotations thereto in A. L. R.

(*A. G.*)

FOR APPLICANT: Levin and Geiger.

FOR RESPONDENTS: No. 1 — Cattan.

No. 2 — Absent — served.

ORDER.

The application for leave to appeal in this case must be refused. The application was made under section 12 of the Magistrates' Courts Jurisdiction Ordinance. Two issues arise, the first concerns an allegation of fraud. This issue was fully considered by the Magistrate and by the District Court, and it will suffice if I say that I can discover neither in the arguments advanced nor in the judgment, any point of novelty or complexity of such a nature as would induce me to grant an appeal.

The second issue raised a question of undoubted legal interest. It was whether a sub-tenant who is lawfully in possession could subsequently be evicted if his head tenant had entered into an agreement prohibiting him from sub-letting and at the time of the agreement the owner of the house had not taken steps to forfeit the lease of the sub-tenant. It appears to me that the decision on the principle involved can be inferred from Civil Appeal No. 383/44. It is not denied in this case that the Appellant in the District Court who was also the Appellant before me, derives title from Yousef Ghammashi, the second Respondent. The sub-tenancy was apparently a yearly one and the agreement prohibiting sub-letting was entered into before the Rent Restrictions Ordinance. The sub-tenant derived title, as I have said, from the second Respondent, who could only convey the title which he was lawfully empowered to give. After the 1939 agreement he had no title to convey because he was prohibited from sub-letting. It appears to me, therefore, to be immaterial whether in fact — which I do not decide one way or the other — the owner did acquiesce in the sub-tenancy.

Following the principle I relied on in Civil Appeal 383/44, the sub-lease would have died (subject to its right to run out the current year) at the same time as Ghammashi's right to renew it died.

This was the principle established in Civil Appeal No. 383/44, and I cannot therefore say that this case raises any point of novelty.

Given this 21st day of June, 1945.

Chief Justice.

CRIMINAL APPEAL No. 121/45.

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

BEFORE: Shaw, J., Curry, P. D. C. and Abdul Hadi, J.

IN THE APPEAL OF:—

Hassan As'ad Abdul Fattah Asfour. APPELLANT.

v.

The Attorney General. RESPONDENT.

Character of Accused — English rule as to admissibility of evidence does not apply — T. U. I. Ord., sec. 39 — Irregularity not prejudicial to Accused.

Appeal against the judgment of the Court of Criminal Assize sitting at Nablus, delivered on 26.6.45 in Criminal Assize Case No. 27/45, whereby the Appellant was convicted of manslaughter contrary to section 212 of the Criminal Code Ordinance, and sentenced to 15 years' imprisonment, dismissed:—

The English rule that evidence as to the character of the Accused may be led by the prosecution if the Accused has attacked the character of a prosecution witness does not apply in Palestine.

(*A. M. A.*)

ANNOTATIONS:

1. For the English rule in question see Halsbury, Vol. 9, p. 189 and pp. 215 *et seq.*; note that the rule is statutory (Criminal Evidence Act, 1898).

2. No provision corresponding to sec. 39 of the T. U. I. Ordinance is to be found in the District Courts (Summary Trials) Rules or in the M. C. P. R.

(*H. K.*)

FOR APPELLANT: Jayyousi & Hijab.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

— — — — — — — — — — —*

There is one other point which was raised by Mr. Jayyousi and that

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

is that the Appellant, when giving evidence, was asked about his previous convictions. The defence had attacked the character of one of the prosecution witnesses, P. W. 17, Ahmad Muhammad Qassem, and the rule in England is that if such an attack is made on the character of a witness for the prosecution that will let in, evidence as to the character of the accused person himself. Mr. Jayyousi, however, has drawn our attention to section 39 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36. That section provides that:—

> "... No question shall be put to the Accused for the purpose of showing that he has been previously convicted of an offence, unless he himself shall have made a statement as to his own good character or shall have produced evidence or obtained evidence by cross-examination to that effect".

This point, I must admit, has caused a certain amount of surprise to me as I was under the impression that the English rule held good in Palestine. If section 39 is the only law on the subject it would appear that the English rule does not hold good here. We have not thought it necessary to call upon Mr. Rigby to reply on this point, as we are satisfied that the admission of that evidence in this case did not affect the result of the trial in any way.

In the result we find that this appeal fails and that it must be dismissed.

Delivered this 12th day of July, 1945.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 38/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF :—

Sa'di Said Kosi. — APPLICANT.

v.

Joseph Khawam. — RESPONDENT.

Appeal to C. A. on last day, filed by mistake in D. C. — Unsuccessful application for extension of time.

Application under Rule 324 of the Civil Procedure Rules, 1938, for extension of time within which to file an appeal from the judgment of the District Court in Civil Case No. 197/44, dismissed:—

Mistake of advocate's clerk in filing appeal in trial Court instead of Court of Appeal — no good cause for extending time for appeal under Rule 324, Civil Procedure Rules.

(*M. L.*)

ANNOTATIONS: On the requirement of "Good cause" see C. A. 462/44 (12, P. L. R. 38; *ante*, p. 437) with annotations thereto in A. L. R.

(*A. G.*)

FOR APPLICANT: Shamma.

FOR RESPONDENT: F. Bustani.

ORDER.

The Respondent is not called on to reply.

This is an application under Rule 324 of the Civil Procedure Rules, 1938, to extend the time for filing an appeal.

The only reason given for the failure to file the appeal in time is that the advocate's clerk made a mistake, and filed the appeal in the District Court at Haifa instead of in the Supreme Court at Jerusalem.

There is no precedent for making an order under Rule 324 of the Civil Procedure Rules in such circumstances, and I think it is most undesirable to establish such a precedent.

The law allows a period of 30 days for filing an appeal, and if the Applicant had not waited till the very last day he would have had time to discover his mistake and to rectify it.

I find that there are no merits in this application, and I therefore dismiss it with fixed costs in the sum of LP. 10 (ten pounds).

Given this 13th day of September, 1945.

British Puisne Judge.

CIVIL APPEAL No. 2/45.

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

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

IN THE APPLICATION OF:—

Moshe Poisek. APPLICANT.

v.

Batia Davidovitz. RESPONDENT.

"Slip Rule" — C. P. R. 358 — Award of inclusive costs — Time to object.

Application for amendment of the judgment in C. A. 2/45, refused:—

A question relating to costs should be raised immediately after judgment. The Court cannot, after delivery of judgment, review the costs under the "slip rule".

(*A. M. A.*)

ANNOTATIONS:

1. The judgment in question is reported *ante*, at p. 382 and the relevant sentence reads as follows (p. 385): "The Respondent should pay the Appellant's costs of this appeal, namely fixed (or inclusive) costs of LP. 10."

2. *Cf.* C. A. 277/42 (1943, A. L. R. 108) and C. A. 242/42 (*ibid.*, p. 829) and annotations to these cases.

(*H. K.*)

FOR APPLICANT: Stoyanovsky.

FOR RESPONDENT: King.

ORDER.

We cannot say that the award of inclusive costs constituted an omission on our part. If counsel for Applicant was dissatisfied with that order he could have objected to it at the time we delivered our decision, but this he failed to do.

That being so the present application does not fall within the ambit of the so-called "slip rule", Rule 358 of the Civil Procedure Rules, 1938, and must therefore be refused.

We make no order as to the costs of this application.

Delivered this 2nd day of July, 1945.

Chief Justice.

HIGH COURT No. 50/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPLICATION OF:—

David Levison. PETITIONER.

v.

The Chief Execution Officer, Jerusalem & an. RESPONDENTS.

Suit in Rabbinical Court for divorce and alternatively maintenance — Husband a foreign subject and not consenting to jurisdiction — Judgment given without jurisdiction unenforceable.

Return to a rule *nisi* issued on 22nd June, 1945, calling upon the 1st Respond-

ent to show cause why his order or decision of the 7th of May, 1945, in Execution File No. 123/45, District Court, Jerusalem, should not be set aside, and why he should not refuse the execution of the alleged judgment of the Rabbinical Court of Jerusalem against the Petitioner dated 12th March, 1945, order *nisi* made absolute:—

1. If husband was a foreigner and did not consent to jurisdiction of Rabbinical Court, Chief Execution Officer should refuse execution of judgment ordering husband to divorce or else pay maintenance.
2. Fact that husband was born in Palestine — not sufficient for Rabbinical Court to assume jurisdiction if husband was not a Palestinian citizen.

(*M. L.*)

ANNOTATIONS: On estoppel from denying jurisdiction of Religious Court see H. C. 64/45 (*ante*, p. 640) and note 2 thereto.

(*A. G.*)

FOR PETITIONER: Levison.

FOR RESPONDENTS: No. 2 — Geichman.

ORDER.

This is the return to an order *nisi* directed to the Execution Officer, Jerusalem, District Court, calling upon him to show cause why he should not refrain from executing a judgment of a Rabbinical Court which had, in a suit at the instance of the 2nd Respondent for "divorce and in the event of refusal to pay her maintenance and the maintenance of her child" ordered the Petitioner to divorce his wife (the second Respondent) and until he did so to pay her LP. 10 *per mensem*. The facts, shortly stated, are that the parties, who are both Jews, were married by a Rabbi on 21st July, 1940, in Tel-Aviv. At the time of the marriage a document (Exhibit A) was drawn up wherein it was provided, *inter alia*, that "the rules concerning marriage contract should be governed by the customs of *Ashkenaz* and rules laid down in the Shpair-Gershon-Magenza Conference". A son was born to Petitioner on 4th May, 1942. In June, 1942, marital relations appear to have become strained and early this year the second Respondent brought proceedings in the Rabbinical Court which, on 12th March, 1945, gave the judgment of which Petitioner now complains. It is common ground that the Petitioner is not a Palestinian citizen, he having a British Passport, nor is it denied that, at the time of the marriage, the Petitioner was not and still is not a Palestinian citizen. The second Respondent who, at the request of Petitioner, was cross-examined on her affidavit in reply, testified that at the time of the marriage she assumed that the Petitioner was a Palestinian because he had lived all his life in Palestine. There is, however, no suggestion that Petitioner ever made any false representations or that he by conduct ever led his wife to believe that he was a Palestinian citizen.

We consider that the subject matter of the claim was "divorce and alimony" under Article 53(1) Palestine Order-in-Council, 1922, and that the Petitioner, for the purposes of that article, is a "foreigner". The Petitioner, immediately on the receipt of the summons, submitted that the Rabbinical Court had no jurisdiction and he never gave his consent to that Court assuming jurisdiction, although this fact is no longer material, since we do not think that Article 53(ii) applies. In the judgment it is stated that the Petitioner did not consent to the jurisdiction and the only reason given by the Rabbinical Court for assuming jurisdiction was that he had been "born in Palestine" but there is no statement that he was a "Palestinian citizen". It was apparent therefore that he was a "foreigner".

For these reasons we hold that the Execution Officer should have refused to execute the judgment. We accordingly make absolute the order *nisi*.

Given this 25th day of September, 1945, in the presence of Mr. N. Levison for Appellant and in the presence of Mr. B. Geichman for Respondent.

Acting Chief Justice.

HIGH COURT No. 52/45.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

The Hassadeh Well Boring Company, Ltd. PETITIONER.

v.

Alhag Abdul Razak Ibn Nimer Abdul Razak. RESPONDENT.

Application consented to by other party for transfer of civil case to another District Court.

Petition for change of venue directing that the records of Civil Case No. 1/45, District Court, Nablus, be transmitted to the District Court, Haifa, in order that the trial may be held there, granted:—

Where both parties to a civil case agree to change of venue from one District Court to another, High Court may grant application even if Court to which it is sought to transfer the case would otherwise have no jurisdiction under Rule 4, Civil Procedure Rules.

(*M. L.*)

FOLLOWED: H. C. 24/39 (5, Ct. L. R. 183, 1939, S. C. J. 290); H. C. 21/34 (9, C. of J. 891).

ANNOTATIONS: For other cases of change of venue see Misc. Appl. 28/45 (12, P. L. R. 347; *ante*, p. 741) and H. C. 38/45 (12, P. L. R. 353; *ante*, p. 504) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: Shvo.
FOR RESPONDENTS: *Ex parte.*

ORDER.

This is an application under section 7(c) Courts Ordinance, 1940. The Petitioners are Defendants in a civil case brought against them by the present Respondent in the District Court of Nablus. The Respondent's advocate has sworn an affidavit to the effect that his client has instructed him to agree to the transfer of the case to the District Court of Haifa owing to the lack of proper means of communication. Speaking for myself I should have thought that this Court had power to order change of venue only in cases in which the Court to which it is sought to transfer the case has, in any event, jurisdiction under Rule 4, Civil Procedure Rules, 1938. There is a faint suggestion that Rule 4(b) applies, but it is by no means clear that the District Court of Haifa would otherwise have jurisdiction.

Mr. Shvo has cited High Court 24/39, Annotated Supreme Court Judgments, 1939, Vol. 1, page 290; High Court 21/34, Rotenberg, Vol. 9, page 891; and Hailsham, Vol. 8, page 232, paragraph 424. Although it does not seem that the matter was argued either in High Court 24/39 or High Court 21/34, I think that I ought to follow the decisions in those cases.

I accordingly grant the prayer of the petition and direct that Civil Case 1/45 of the District Court, Nablus, be transferred for hearing to the District Court, Haifa. There will be no costs of this petition.

Given this 11th day of July, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 147/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Yousef Rafail Katchinsky & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Identification — Failure to identify accused before proceedings in Court, CR. A. 30/42 — Reasonable explanation for failure to identify.

Appeal from the judgment of the District Court of Jaffa, dated 18.7.45 in Criminal Case No. 119/45 whereby the Appellants were convicted of Robbery contrary to sections 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment, dismissed:—

> In cases where an identification is necessary, when the complainant or witness did not know the Accused previously to the offence, failure to identify the Accused cannot be condoned merely because a reasonable explanation is given for the failure to identify.
>
> (*A. M. A.*)

REFERRED TO: CR. A. 30/42 (1942, S. C. J. 221; 11, Ct. L. R. 206).

ANNOTATIONS:

1. On the necessity or otherwise of an identification parade see CR. A. 60/44 (1944, A. L. R. 318) and note 1, and CR. A. 136/45 (*ante*, p. 713).

2. For a case where failure to pick out the Accused at an identification parade was held not to be fatal see CR. A. 175/44 (12, P. L. R. 8; *ante*, p. 364).

(*H. K.*)

FOR APPELLANTS: No. 1 — In person.
No. 2 — G. Salah.

FOR RESPONDENT: Legal Assistant — (McFee).

JUDGMENT.

The Appellants were convicted by the District Court of Jaffa of robbery contrary to sections 287 and 288(1), Criminal Code Ordinance, and each sentenced to five years' imprisonment. They both now appeal to this Court alleging that they were wrongly convicted.

The facts found by the Court below, shortly stated, are that a Mr. Bilbaissi, who was accompanied by his 15 year old son, was attacked by two persons when on his return to his home from work and was robbed of a bag containing a large sum of money. It is alleged that the first Appellant pointed two pistols at Mr. Bilbaissi. Mr. Bilbaissi,

who had not known the first Appellant before, picked him out at an identification parade which was properly held. There was ample evidence before the Court of trial to show that the identification parade had been properly held in accordance with the established principles and practice, and that Mr. Bilbaissi picked out the first Appellant as being the man who had attacked him and who had pointed pistols at him. There is nothing in the appeal of the first Appellant which fails and is dismissed.

At the identification parade at which Mr. Bilbaissi picked out the first Appellant it seems that he failed to pick out the second Appellant. It was not until the second Appellant appeared before the Magistrate that Mr. Bilbaissi picked him out.

With regard to this type of identification we need only refer to Cr. App. No. 30/42, Annotated Supreme Court Judgments (1942) p. 222. In the case now before us the learned A/Relieving President in his judgment when referring to Mr. Bilbaissi's explanation for not picking out the second Accused at the identification parade said:—

> "Shortly after the robbery he was approached by an unknown man and told that he would receive part of his money back within a month if he purposely refused to identify the 2nd, and at the same time it seems that some element of threats was introduced in the vent of his failing to carry out this plan. So on seeing the 2nd fendant on the parade he did not pick him out, but as the ıth went by and none of his money was forthcoming, he did hesitate to pick him out as his 2nd assailant when called upon lo so in the Court below. He is quite certain here moreover, : this was the man. I am asked to regard him as an accomplice view of his action in what counsel describes as compounding a lony. I consider, however, although the proper course would nave been for him to have gone to the Police after this visit and told them all about it, yet he can hardly be blamed for yielding to a natural inclination to get some of his money back, especially when it was combined with a natural apprehension that he might be subjected to further violence if he didn't agree".

While we agree that a Court of trial is entitled to believe a witness who gives an explanation for not identifying a person at an identification parade, it is difficult to understand how that carries the matter any further. It merely establishes the fact that the person did fail to pick out the Accused at an identification parade. Either it is a case in which an identification parade should have been held or it is a case in which there was no necessity for an identification parade. It is not suggested that the present case falls under the later category. There are, of course, cases in which an identification parade is unnecessary,

e. g. where a witness knew the accused person before the alleged crime; but that is not the case here. This was obviously a case in which an identification parade was necessary. The mere fact that a truthful witness explains why he did not pick out a person at an identification parade is, in our view, no substitute for the picking out of a culprit at an identification parade properly held.

With what are we left in this case, at any rate, as regards the identification? Merely with the identification of the second Appellant in the dock. That is, of course, tantamount to an answer to a leading question. "Do you see your assailant here". The witness will naturally point to the dock. It happens however that in the case before us very definite evidence was given by an impartial witness, namely, one Mattar Juma El Ghazaweh, who swore that, shortly before sunset on the day in question, he saw both the Appellants standing outside Mr. Bilbaissi's office. He then saw Mr. Bilbaissi and his son walk up the hill with the two Appellants following them at a distance of about 15 yards. Some time later this witness gave information to the Police. In our view having regard to this witness's evidence there was sufficient material to justify the trial Court in concluding that both the Appellants were the persons who attacked Mr. Bilbaissi and his son. It follows, therefore, that the appeals of both Appellants must be dismissed. It cannot be said that the sentences of five years' imprisonment were excessive.

Delivered this 19th day of September, 1945.

Acting Chief Justice.

CIVIL APPEAL No. 262/45.

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

BEFORE: Edwards, A/C. J. and Curry, A/J.

IN THE APPLICATION OF:—

Itzhak Trachtingott. APPLICANT.

v.

1. W. Sommerfeld, Liquidator of the Amiel Bros. Ltd. in Liquidation,
2. E. Amiel & 2 ors. RESPONDENTS.

Companies — Application for directions — Companies Ordinance, sec. 173(3) — W. U. Rules, 86, 87 — Liquidator on officer of the Court.

Application for leave to appeal from the Order of the District Court of Jaffa, dated 20.6.45, in Civil Case No. 169/43, (Motion No. S/11/44), allowed:—

Once the liquidator has given a decision on a proof of debt, the Court can no longer entertain his application for directions which would amount to a review of his decision.

(*A. M. A.*)

ANNOTATIONS: For previous proceedings in this liquidation see C. A. 159/44 (11, P. L. R. 220; 1944, A. L. R. 352), C. A. 332/44 (*ante*, p. 237), C. A. 36/45 (*ante*, p. 328) and C. A. 211/45 (*ante*, p. 538).

(*H. K.*)

FOR APPLICANT: Levitsky.

FOR RESPONDENTS: No. 1 — In person.
No. 2 — S. Wolf.
Nos. 3 & 4 — Elchanany.

JUDGMENT.

This is an application for leave to appeal from an order of the District Court of Jaffa which had given directions under section 173(3) Companies Ordinance.

By consent of parties we have treated the hearing of this application as the hearing of the appeal. The application for directions was in effect an application to the Court to approve a course whereby the claims of certain workmen against the company should be referred to arbitration. The application was filed on the 1st June, 1944, but unfortunately for certain reasons the hearing did not take place till 20th June, 1945. By the 17th May, 1945 the liquidator had, in fact, given his decision on all the proofs of debt submitted by the workmen. The liquidator himself has at the Bar given us his reasons for not waiting any longer. Those reasons were doubtless good — but we are really not concerned with them.

The sole question for us to decide is whether having given his decision he could then apply to the Court for directions, the effect of which would of course be to enable a fresh adjudication on the claims to be made. It is to be noted that among the Respondents in the District Court was the present Applicant who resisted the application for directions. He holds approximately half of the shares of the company, the other half being held by the second Respondent.

We have been told by the advocate for the second Respondent that it is immaterial to his client whether these workmen's claims are de-

cided by arbitration or whether the decision of the liquidator under Rule 87, Companies (Winding Up) Rules, 1936, should stand. It is important to note that, had the matter gone to arbitration, Mr. Trachtengott would not have been a party to the submission and presumably (although we do not need to decide the matter) he might have experienced difficulty in finding a remedy had he been disappointed with the award.

The learned A/Relieving President when making his order said:—

> "I, therefore, conclude that it is the considered opinion of the legal advisers for both sides that this is the better course".

We assume that by "both sides" he merely meant the liquidator on the one hand and the workmen on the other. It is clear from the wording of Rules 86 and 87 that what the liquidator does is to give a decision and it must also be remembered that the liquidator is an officer of the Court. (See Halsbury's "Laws of England" (1st edition) Vol. 1, p. 442, para. 748). We are of opinion that once the liquidator has given his decision the only remedy which a dissatisfied person has is to apply to the Court under Rule 87, Companies (Winding Up) Rules, 1936. We do not think that once having given his decision the liquidator can apply for directions that the matter be submitted to arbitration because the effect of that would presumably be that a decision, different from that which he himself had already given, might be issued. We would merely add that if a workman whose proof has been rejected could rely on an arbitration clause in an existing contract of service he could presumably under Rule 87, ask the Court to order the liquidator to stay any decision until the production by him (the workman) of an award of an arbitrator.

For these reasons we think that the District Court erred in granting the application for directions in the form in which it did. We accordingly set aside the order of the District Court of 20th June, 1945. The Applicant will have his costs of this application to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10, such costs to be paid out of the assets of the company.

Delivered this 5th day of November, 1945.

Acting Chief Justice.

CRIMINAL APPEAL No. 157/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Nazli Said Abu Kamha. RESPONDENT.

Brothels — 163(a) C. C. O. — English and Palestine Law — CR. A. 91/45.

Appeal from the judgment of the District Court of Haifa in Criminal Appeal No. 59/45 dated 9.6.45, whereby the Respondent was discharged on a charge contrary to section 163 of the Criminal Code Ordinance, 1936, dismissed:—

Evidence of one act of presence in the building is not sufficient to establish frequentation in support of a charge of running a brothel.

(*A. M. A.*)

REFERRED TO: CR. A. 91/45 (12, P. L. R. 336; *ante*, p. 540).

ANNOTATIONS: In addition to CR. A. 91/45 (*supra*) see also CR. A. 22/40 (1940, S. C. J. 99; 7, Ct. L. R. 138) and note 2 in S. C. J.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Y. Hamoudi.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa in its appellate capacity, allowing an appeal from one of the Magistrates of Haifa who had convicted the Respondent on an offence contrary to section 163(a) of the Criminal Code Ordinance, 1936, and sentenced him to six months' imprisonment. On appeal the learned Relieving President, District Court, quashed the conviction and acquitted the Respondent saying:—

> "As I have held previously in Criminal Appeal No. 49/45 that in order that premises may in law constitute a brothel there must be some evidence that they are frequented by two or more females and there must also in my opinion be proof that the premises were habitually used and resorted to by a number of persons for the purpose of illicit sexual intercourse".

From that judgment of the District Court the Attorney General now appeals to this Court. Learned Crown Counsel concedes that the passage from the judgment of the District Court which we have just

quoted, is a correct statement of the law of England, but argues that the law of Palestine, which is to be found in section 151 of the Criminal Code Ordinance, 1936, is different. The facts found by the Magistrate briefly are that the Respondent and another woman were on one occasion standing at the window of a house in Haifa, and beckoned to two soldiers to enter. It seems that the two soldiers did enter and had intercourse with Respondent and the other woman and that money passed. Mr. Rigby lays emphasis on the fact that Respondent gave no explanation for her presence in that room, and he contends that there was *prima facie* evidence of occupation for the purpose of prostitution. This Court in Criminal Appeal No. 91/45 accepted the definition of prostitution laid down by Avory, J., in Winter *v.* Wolfe (1931) 1 K. B., page 549, namely, that permitting premises to be a brothel is permitting people of opposite sexes to come there and have illicit sexual intercourse.

The Respondent's advocate has referred to section 4, Criminal Code Ordinance, 1936. It must, of course, be remembered that if a Palestine penal Ordinance is worded differently from an English Statute, the Palestine Ordinance must prevail. Nevertheless if the wording is not very different, one must have regard to section 4. The Respondent's advocate cited Archbold (1943 Edition), pages 1337 to 1340. The first question is whether the mere presence of the Respondent in this house on a single occurrence is sufficient evidence of occupation for the purpose of prostitution. We do not think that it is. Evidence of one act of presence in the building is clearly not sufficient evidence of frequenting. We do not intend to attempt to lay down how many visits would be required to establish occupying or frequenting, and we may say that we think that the learned Relieving President went too far when he said that in Palestine there must be proof that the premises were habitually used, and resorted to by a number of persons. We confine ourselves to the facts of this case, and we think that on them the District Court was justified in quashing the conviction of the Respondent.

The appeal is, therefore, dismissed.

Delivered this 24th day of October, 1945, in the presence of Mr. Rigby, for Appellant, and in the presence of Yehya Eff. Hamoudeh for Respondent.

Acting Chief Justice.

CIVIL APPEAL No. 66/45.

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

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

IN THE APPEAL OF:—

Azizeh Hussein Hammad. APPELLANT.

v.

Yacoub Bornstein. RESPONDENT.

Sale of land — Specific performance — Time, whether of the essence — Equitable remedy, when granted — C. A. 79/44, C. A. 219/44, C. A. 437/44, C. A. 97/44 — Notarial notice, C. A. 90/43.

Appeal from the judgment of the District Court Jaffa, dated the 21st February, 1945, in Civil Case No. 12/44, dismissed:—

1. Time is normally not of the essence of the contract in agreements to sell land. But if the period contemplated is extended by mutual consent, time may become of the essence.

2. A prospective purchaser cannot claim specific performance if he has neither paid nor been ready and willing to pay the entire purchase price.

3. It is unnecessary for a defendant to send a notarial notice before relying on a defence of breach of contract.

(*A. M. A.*)

REFERRED TO: C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326); C. A. 79/44 (1944, A. L. R. 492); C. A. 97/44 (*ante*, p. 14); C. A. 219/44 (1944, A. L. R. 786); C. A. 437/44 (*ante*, p. 126).

ANNOTATIONS:

1. See the cases cited and the notes thereto in A. L. R.; *vide* also C. A. 59/43 (1943, A. L. R. 203) and note 1, and C. A. 40/45 (*ante*, p. 667) and note 2.

2. On time being of the essence of the contract see C. A. 228/44 (*ante*, p. 134) and note 1.

(*H. K.*)

FOR APPELLANT: F. Nazzal.

FOR RESPONDENT: Persitz.

JUDGMENT.

Curry, A/J.: The Appellant and the Respondent entered into an agreement dated the 2nd of April, 1943, whereby in consideration of the payment of the sum of LP. 3,700 by the Appellant to the Respondent the latter undertook to transfer certain land to the Appellant. The payment of the purchase-price had to be made as follows: LP. 200 upon the signing of the agreement and the balance of LP. 3,500 on the

day of transfer which had to be completed within 40 days. On 1.2.44 the Appellant filed an action in the District Court (Civil Case 12/44) claiming specific performance alleging that she had paid the Respondent the sum of LP. 200 on the signing of the contract, and other sums amounting to a further LP. 700 upon different subsequent dates and that although she had asked the Respondent on several occasions to effect the transfer the latter refused to do so. The learned Judge refused to grant an order for specific performance and against that judgment this appeal is lodged.

In the course of his judgment the learned Judge stated that he found the following facts:—

> "The true reason for the non-transfer of the land within the forty days was that although the Plaintiff has opened a file in the Land Registry, she was unable or unwilling to pay the balance of the purchase-price. I do not believe that the balance was tendered as alleged. There is no evidence of tender except that of the Plaintiff and her husband. On the other hand, I accept Mohammad Eff.'s evidence that the Plaintiff asked for a two weeks' extension of the period of forty days and that this was granted and that subsequently the Plaintiff asked Mohammad Eff. to try and get the instalments already paid back from the Defendant. In fact, I have no hesitation in holding that it was the Plaintiff who failed to carry out her part of the contract, and that it was only when prices had risen that she decided to send the belated notarial notice in the hope of being able to compel the Defendant to carry out his contract to her profit".

The Appellant submitted some nine grounds of appeal but in arguing her appeal in main, she concentrated on the ground that time not being of the essence of the contract there had been no breach on her part and therefore she was entitled to judgment.

As regards the actual findings of fact by the trial Judge I would merely say that on the evidence before him I consider he was fully entitled to make the findings that he did and in fact I am in full agreement with them.

At this point I think it advisable to note that the Judge held that the allegations of the Appellant that she tendered the balance of the purchase-price within the forty days were entirely untrue and he further held that her allegations that she was ready and willing throughout to pay the balance were also untrue. On the other hand he found that the Plaintiff asked for and obtained an extension of fourteen days in which to pay the balance but failed to pay them within that period and subsequently she applied for the return of her instalments but Respondent although at first agreeing thereto subsequently insisted on

retaining them to cover his expenses. I think it is necessary to bear these findings of fact in mind because the application of the Appellant was for an equitable remedy and therefore her conduct and behaviour was a matter to be considered in regard to granting or withholding specific performance.

The learned advocate for the Appellant has argued and cited cases to support his contention that in contracts for the sale of land time is not usually of the essence of the contract and therefore any failure in respect thereof does not amount to a breach disentitling the Appellant to an order for specific performance. Whilst I think his contention as regards the completion of the transfer within forty days is correct, I am inclined to the view that when Respondent granted the Appellant an extension of fourteen days that fixed a definite time after which he was not prepared to consider the contract as subsisting and therefore time then became an essence of the contract. However, entirely apart from the fact as to whether time was of the essence of the contract or not; in this case one must, I think, consider the whole position. The granting of specific performance is an equitable remedy and at the discretion of the trial Judge although he must not, of course, exercise his discretion arbitrarily. In Civil Appeals Nos. 79/44, 219/44 and 437/44, this Court held that it could not grant specific performance unless the purchase money had been paid, and that it would not interfere with the discretion of the trial Court in granting or withholding the remedy of specific performance unless that discretion had been used arbitrarily. In this case not only was the purchase money not paid by the date fixed for the completion, or after the further extension granted, but the Appellant actually asked for the return of the instalments she had paid. It was not until the 1st of February, 1944 — some seven months later — that Plaintiff paid the money into Court when she filed this action. By asking for the return of her instalments I think it can be argued that she had abandoned the contract. The Appellant referred to Civil Appeal No. 97/44 but that case does not appear to me to help him at all. In that case the purchaser was always ready and willing to pay the purchase money but the vendor arbitrarily rescinded the contract without any reasonable cause — a very different state of affairs from his case. The Appellant further sought to argue that to defeat his claim for specific performance the Respondent should have served him with a notarial notice and he cited Civil Appeal No. 90/43. I would merely say in respect thereto that there the question was the necessity for a plaintiff to send a notarial notice to a defendant notifying him of the alleged breach before instituting an action against

him but of course that does not mean that a defendant cannot as a defence allege a breach by the Plaintiff unless he first serves him with a notarial notice.

In conclusion I would say that in my opinion this is essentially a case for the trial Judge to decide whether he should grant specific performance or not. In my opinion in view of the behaviour of the Appellant and all the circumstances in this case I certainly do not think the Judge used his discretion wrongly or arbitrarily in refusing to grant specific performance. This appeal must therefore be dismissed with costs on the lower scale and an inclusive advocate's attendance fee of LP. 10.

Delivered this 28th day of November, 1945, in presence of Mr. Hornstein for Respondent. No appearance for Appellant.

A/British Puisne Judge.

Shaw, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 58/45.

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

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

IN THE APPEAL OF :—

Ahmad Shukri Taji Farouki & 2 ors. APPELLANTS.

v.

Ibrahim Adham el Farouki in his capacity as *Mutawalli* of the *Wakf* of Abu el Huda and his children Hideyet-Allah and Taj ed Din. RESPONDENT.

Inquiry into accounts — C. P. R. 221 — Appointment made by Court suo proprio — Circumstances in which an order should be made under the rule.

Appeal from the interlocutory order of the District Court Jaffa dated the 16th January, 1945, in Civil Case No. 148/43, allowed and case remitted:—

The Court cannot invoke R. 221 to delegate its functions to another person. If the parties do not agree to arbitration, a person appointed under R. 221 cannot be invested with the powers of an arbitrator.

(*A. M. A.*)

ANNOTATIONS: For the English practice under the corresponding O. 33, r. 2 see the commentaries to that rule in the White Book.

(*H. K.*)

FOR APPELLANTS: Elia.

RESPONDENT: In person.

JUDGMENT.

This is an appeal from the Interlocutory Order dated 16.1.45 of the District Court Jaffa in Civil Case No. 148/43. The Court made an order under Rule 221 of the Civil Procedure Rules, 1938, appointing a certain person to make enquiries and take accounts.

Having read the Issues we are unable to find that the making of such an appointment was justified at the stage that the case had reached. There are various issues which have to be decided by the Court itself, and the Court cannot delegate its own duties to another person. From the wording of the order it would appear that the Court was directing the person appointed to do what an arbitrator might have done. But the parties had not agreed to the appointment of an arbitrator. We are not prepared to rule that the Court could not make an order under Rule 221 of its own motion as we do not feel that this point has been sufficiently argued. But it appears to us to be quite clear that the Court ought not to have made the order which it did make in this instance. If at a later stage it appears necessary for accounts to be taken the Court can consider whether an appointment should be made.

We allow this appeal and order the case to be remitted to the District Court in order that it may call upon the Plaintiff to prove his case. As it appears that the Court made the appointment of its own motion we do not think that the Respondent ought to be made to pay the full costs of this appeal. We order no costs (except the actual disbursements to follow the event).

Delivered this 7th day of November, 1945.

British Puisne Judge.

CRIMINAL APPEAL No. 158/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPLICATION OF:—

Abdul Razzaq Hassan Wafa Dajani. APPLICANT.

v.

Attorney General. RESPONDENT.

Possession of textiles — Powers of Controller — Reg. 46(1) Defence Regulations — Creation of an offence by notice — Confiscation — Definition of "utility textiles" — King v. Darlington school — Onus of proof as regards consumption — Stray v. Docker, CR. A. 108/45 — Leave to appeal.

Application for leave to appeal from the judgment and sentence of the District Court, Jerusalem, in Summary Trial 89/45 dated 10.9.45 whereby Applicant was convicted of being in possession of an excessive quantity of utility textiles contrary to paragraph 9 of the Defence (Utility Goods) (Textiles) Order, 1942, and sentenced to two months' imprisonment with confiscation of the goods; application dismissed:—

In exercise of the powers conferred upon him by Reg. 46, the Controller of Light Industries may enact subsequent legislation, and whether this is headed "Regulations" "Scheme" or "Notice" will not affect the validity of that legislation if it is otherwise *intra vires* Reg. 46.

(*A. M. A.*)

REFERRED TO: R. *v.* Darlington School, 1845, 14 L. J. Q. B. 67; Stray *v.* Docker, 1944, 1 All E. R. 367; CR. A. 108/45 (12, P. L. R. 376; *ante*, p. 583).

(*H. K.*)

FOR APPLICANT: Eliash.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an application for leave to appeal from a judgment of the District Court, Jerusalem, whereby the Applicant was convicted of possession of an excessive quantity of utility textiles contrary to paragraph 9 of the Defence (Utility Goods) (Textiles) Scheme, 1942, and paragraph 23 of the Defence (Utility Goods) Order, 1942, and sentenced to two months' imprisonment and confiscation of the goods ordered.

The first ground of appeal is that possession of an excessive quantity of utility goods is no offence in law. It is not denied that the Controller of Light Industries is a competent authority, but it is argued that under Regulation 46(1) Defence Regulations, 1939, he has power only to make orders. In Palestine *Gazette* of 15th October, 1942, No. 1228 Supplement No. 2 p. 1597, appears the Defence (Utility Goods) Order, 1942, by paragraph 3 of which the Controller took power to make or approve any scheme for the manufacture, labelling, marking, treatment, keeping, storage, *etc.*, utility goods and matters incidental thereto.

Dr. Eliash for the Applicant argues that the Controller has power

to make or approve a scheme but that he cannot by making an order say that he has that power. In Palestine *Gazette* 1943 No. 1259 Supplement No. 2 p. 315, appears the Defence (Utility Goods) (Textiles) Scheme, 1943, which is headed "Defence Regulations 1939. Defence (Utility Goods) Order, 1942. Notice of a Scheme under paragraph 3". Dr. Eliash complains that it is not an order at all but merely a notice which does not emanate from Regulation 46 but from paragraph 3 of the order which the Controller himself made. The first line of the notice is in the following terms: "Notice is hereby given that in exercise of the powers vested in him..". Dr. Eliash argues that the powers were not vested in him but that the Controller gave himself those powers and that he could not by reason of paragraph 3 of the Order of 1942 take unto himself additional powers. It is contended for the Applicant that an offence was created by the notice whereas it should have been done by an order under Regulation 46. In the Palestine *Gazette* (1944) No. 1312 Supplement No. 2 p. 63, appears a notice of change of provisions of the scheme under paragraph 3(iii) Defence (Utility Goods) Order, 1942, and at p. 64 appears the following:—

> "9. *Excessive quantity of utility textiles*:
>
> No person other than a licensed dealer in utility textiles shall have in his possession or under his control any quantity of utility textiles exceeding the quantity reasonably required by him as a consumer, unless he can show good cause for having in his possession or under his control such a quantity of utility textiles".

Shortly stated, the *gravamen* of the complaint is that when a citizen reads the Palestine *Gazette* unless he sees that it is an order he is not supposed to expect that the notice may be creating an offence. Reference has been made to Maxwell's Interpretation of Statutes (6th Edition) p. 525. It is said that the provision is *ultra vires* in so far as a mode of procedure was adopted in creating an offence (see Regulation 76 of the Defence Regulations, 1939, and Dicey's Law of The Constitution (9th Edition) p. 487 appendix).

It is next complained that there is no power to order confiscation. Regulation 46 of the Defence Regulations was, however, amended by the insertion of paragraph 1A (see Palestine *Gazette* 1942 No. 1179 Supplement No. 2 p. 537). Dr. Eliash lays stress on the words "where an order" in paragraph 1A of Regulation 46. To sum up, the argument for this ground of appeal is that it is only when an order is made and not a notice given that an offence can be created and confiscation ordered on proof of such an offence.

The next ground of appeal is with reference to the definition of

utility textiles. In the Palestine *Gazette* of 1943 No. 1259 Supplement No. 2 p. 319, utility textiles are defined as meaning "any textiles which are utility goods" and in Palestine *Gazette* 1944 No. 1343 Supplement No. 2 p. 580, Defence (Utility Goods) (Amendment) Order (No. 3) 1944, utility goods are defined as meaning "any scheduled goods marked or labelled under any utility scheme provided that such goods shall cease to be utility goods at such time as may be specified in such scheme or if no time is specified when sold to the consumer". In Palestine *Gazette* 1942 No. 1228 Supplement No. 2 p. 1597 a "consumer" is defined as "any person who purchases or otherwise acquires in any manner whatsoever any utility goods with any object in view regarding the ultimate disposal of such goods other than the sale thereof to any person or the execution of any work in connection with such goods with a view to selling them to any person".

Dr. Eliash's argument is that it was necessary for the prosecution to prove that his client had purchased the goods for sale.

Dr. Eliash further contends that the Controller took to himself additional powers in that in paragraph 3 of the 1942 Order he added two matters, namely, labelling and marking which were not in Regulation 46(1)(a), see Defence (Utility Goods) (Amendment) Order No. 3, 1944, Palestine *Gazette*, Supplement No. 2, 1944, p. 580. The argument is that it is *ultra vires* to create the offence of marking and labelling. The main complaint, however, is that the prosecution did not prove that these were utility goods bought not for sale but for the Applicant's own purposes. The learned Acting Solicitor-General, Mr. Clayton Rigby, replies that Dr. Eliash does not contend that the scheme is bad in substance as being *ultra vires* Regulation 46 except in so far as marking and labelling is concerned and that the objection is as to form only. This is so and we agree with Mr. Rigby in thinking that if the notice had been headed "order" instead of "scheme" the Applicant could have had no possible ground of complaint. We think that there is nothing in Regulation 46 which lays down or prescribes the manner in which the Controller can pass subsequent legislation. The test is whether what he did was within the powers given to him by Regulation 46 and mere nomenclature is immaterial. Regulation 76 of the Principal Rules is in very wide terms, namely, "if any person contravenes or fails to comply with any of these regulations or any order or rule made under any of these regulations or any direction given or required to be imposed under any of these regulations, he shall be guilty of an offence against these regulations". In paragraph 3 of the Defence (Utility Goods) Order, 1942, the Controller merely recapitulates the

powers already given to him by the regulations adding only "labelling" and "marking". The 1942 Order merely sets out the framework of the scheme, paragraph 23 of the Order, Palestine *Gazette* Supplement No. 2 of 15th October, 1942, p. 1602 fully informing the Public as to the penalty. The penalty clause appears in the order itself and not in the scheme (Maxwell on Interpretation of Statutes (6th Edition) p. 526, King *v.* Darlington School). Once it is proved that an offence contrary to Regulation 46 has been committed the article in respect of which the offence has been committed is liable to be confiscated. It seems to us that the offence is complete once it is proved that the Applicant, not being a licensed dealer, had in his possession or under his control a quantity of utility textiles exceeding the quantity reasonably required by him as a consumer. We agree with the learned Acting Solicitor General's argument that all that the prosecution had to prove was whether the Applicant was a consumer or not. Paragraph 9 seems to contemplate any person other than a licensed dealer having utility textiles in his possession, that is, goods which are in fact utility textiles, in other words, goods sold and accepted as such. It is clear that the Applicant did not show cause to the satisfaction of the trial Court for having in his possession such a large quantity.

With regard to Dr. Eliash's argument that the prosecution had to prove that his client had purchased goods for sale, once one realises that utility textiles mean goods which are in fact utility textile, this argument falls to the ground. As Mr. Rigby rightly said, it would be impossible for the prosecution to prove for what purpose the consumer was in possession of the goods, he alone can say. We agree with the learned President's view that the remarks of Humpreys, J., in Stray *v.* Docker, All England Reports (1944) Vol. I page 367 are in point. We also refer to Criminal Appeal 108/45.

We may say that, in accordance with the usual practice of this Court we have treated the application as an appeal.

For all the foregoing reasons the application fails and is refused. We see no ground for interfering with the sentence or for altering the order of confiscation.

Delivered this 17th day of October, 1945.

A/Chief Justice.

INCOME TAX APPEAL No. 7/45.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE: Shaw, J.

IN THE APPEAL OF :—

M. G. APPELLANT.

v.

The Assessing Officer, Income Tax Office, Haifa. RESPONDENT.

Income tax — Construction of sec. 6 — Cesser of income — P. C. A. 79/23, C. A. 345/43 — Case stated.

Appeal against the assessment made by the Respondent dated the 9th July, 1945, in assessment No. J/104 for the year of assessment 1944/45, dismissed:—

Sec. 6 is the charging section. It provides for payment of the tax on a yearly rate, whether or not the assessee continues to enjoy an income from the same source.

(*A. M. A.*)

REFERRED TO: St. Lucia Usines & Estates Co., Ltd. *v.* St. Lucia Colonial Treasurer, 1924, A. C. 508, 93 L. J. P. C. 212, 131 L. T. 267; Ranger (Inspector of Taxes) *v.* Maxwell, 1926, 1 K. B. 430; I. T. A. 9/42 (10, P. L. R. 255; 1943, A. L. R. 278); I. T. A. 18/42 (*ibid.*, pp. 342 & 389); I. T. A. 20/42 (*ibid.*, pp. 134 & 30); I. T. A. 16/43 (11, P. L. R. 160; 1944, A. L. R. 207); C. A. 345/43 (10, P. L. R. 678; 1944, A. L. R. 50); C. A. 310/44 (12, P. L. R. 168; *ante*, p. 294).

ANNOTATIONS: See the cases cited and the notes thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

By his order dated the 9th day of July, 1945, the Respondent determined that the chargeable income of the Appellant for the year of assessment 1944/45 was LP. 18,472, and that income tax thereon was LP. 8701, and surtax LP. 3643, making a total of LP. 12,344, less a set-off under section 26 of the Income Tax Ordinance of the sum of LP. 334.862 mils. The total sum payable as tax was accordingly held to be LP. 12,009.138 mils.

With regard to the question of the provident fund this has been settled between the parties, and it is unnecessary for me to deal with it.

The facts are not in dispute, and the Assessing Officer held as follows:—

> "Assessee, until 31.1.44, carried on business as the sole proprietor of the Endor Cinema, Haifa. Further until that date, he carried on jointly with other persons the business of the Cinema Armon, Haifa, and shared profits at 60%.
>
> The accounts of these two businesses were made up year by year to the 31st January and profits for all previous years of assessment were computed, under section 7 of the Ordinance, upon the profits of the year ending on that date. On 1.2.44 Assessee ceased to carry on these businesses which were taken over as from that date by three companies incorporated for this purpose on 31.3.1944.
>
> I consider that under section 6 of the Ordinance the fact that Assessee's source of income may have ceased before or during the year of assessment is irrelevant. Assessee is, therefore, liable to be taxed for the year of assessment 1944/45 upon the profits from these two sources for the year preceding the year of assessment, computed under section 7 upon the profits for the year ending 31.1.44, the day to which the accounts of the two businesses have usually been made up. Assessee contends that the business of the Armon Theatre, carried on jointly with other persons until 31.1.44, was not a partnership. Assessee apparently refers to the fact that his original partner died on 15.8.1940 and since that date the business was carried on jointly with the legal personal representative of the deceased partner or with his heirs and that no partnership was registered under the Partnership Ordinance.
>
> I therefore apply section 45(11)(a) of the Ordinance and being satisfied that Assessee was in fact entitled to a share of 60% in the profits of the business, I elect him as the person to whom 60% of the profits shall be deemed to have accrued, and have made the assessment accordingly".

Mr. Goitein for the Appellant has summarized the facts regarding his client's position by saying that originally *all* of the land and profits of the Endor Cinema, and *half* of the land and profits of the Armon Cinema, belonged to the Appellant, whereas to-day Haifa Theatres Ltd. receives all of the profits of the Endor Cinema, and Haifa Theatres Ltd. & Co. receives all of the profits of the Armon Cinema.

Mr. Goitein has submitted that the source of income in this case is the profits from the running of the two cinemas, and that these sources of income have not ceased, but the income from them is no longer received by his client.

I am dealing with the assessment year 1944—45, *i. e.* the year ending 31.3.45.

The relevant sections of the Income Tax Ordinance (No. 23 of 1941), are sections 5 and 6. The most important section, from the point of

view of this case, is section 6. That section originally read as follows:—

> "Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment:
>
> Provided that where in any year of assessment any person ceases to possess any source of income which was acquired by him prior to the first day of April, 1940, tax on the income from that source shall be charged, levied and collected upon the income of the year of assessment and not upon the income of the year preceding the year of assessment".

As amended by Ordinance No. 10 of 1942, that section reads as follows:—

> "Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment, notwithstanding that the source of income may have ceased before or during the year of assessment".

Several cases have been referred to by Mr. Goitein for the Appellant and Mr. Wittkowski for the Respondent. They include:—

P. C. Appeal No. 79/23 — St. Lucia Usines and Estates Company Ltd. *v.* Colonial Treasurer of St. Lucia (1924 A. C. 508); Ranger (Inspector of Taxes) *v.* Maxwell (1 K. B., 1926, 430); I. T. A. No. 9/42 (10, P. L. R. 255); I. T. A. No. 18/42 (10, P. L. R. 342); I. T. A. No. 20/42 (10, P. L. R. 134); Civil Appeal No. 345/43 (10, P. L. R. 678); I. T. A. No. 16/43 (11, P. L. R. 160); Civil Appeal No. 310/44 (12, P. L. R. 168).

The case upon which Mr. Goitein chiefly relies is the St. Lucia case, while Mr. Wittkowski chiefly relies on the Halaby case (C. A. 345/43). I have not seen the section in the St. Lucia Income Tax Ordinance which corresponds to section 6 of the Palestine Income Tax Ordinance, so I cannot say whether the wording is identical.

Having considered the submissions which have been made by the advocates of the parties and the cases to which they have referred, I have come to the following conclusions: In the first place, I am unable to regard section 6 of the Ordinance as anything but a charging section. It is true that the marginal note is "Basis of assessment", but the section provides that "Tax shall be charged, levied and collected". Section 5 shows what income is liable to pay tax, while section 6 is the operative, charging, section.

Section 6 of the Ordinance as originally drafted was, I think, designed to prevent the Ordinance from being given a retrospective interpretation. After the first year of assesssment section 6, having served

its purpose for the first income-tax year, was amended, and for the purposes of this case it takes the form which it was given in the Income Tax (Amendment) Ordinance (No. 10) of 1942, as set out above.

It is of course true that the sources of income have not ceased in this sense that the two cinemas which produced the income still exist, but those sources of income were no longer available to the Appellant in the income tax year with which I am dealing. Those sources of income have ceased to exist so far as the Appellant is concerned, because he no longer draws an income from them. And I think that that is what the section means. It refers to the cessation of a source of income so far as a particular person is concerned. It seems to me perfectly clear that the legislature intended that a person who pays income tax should, in effect, after the first year in respect of which special provision had been made in the 1941 Ordinance, pay a year late. I can see nothing unjust or unreasonable in such an arrangement.

Mr. Goitein has submitted that if a person does business and makes a profit of, say, LP. 100,000 during the first six months of any year of assessment, and then closes his business and receives no income from it in the subsequent year of assessment, he is not liable to pay any tax at all. Mr. Goitein is only prepared to concede that if such person received an income of even LP. 1 in the subsequent year of assessment he would be liable to pay tax upon the whole sum of LP. 100,000. This would clearly be an absurd state of affairs, and it cannot have been what the legislature intended. Of course, as a result of faulty drafting, effects have sometimes been produced which were not intended. But having carefully considered the wording of the section, I am unable to construe it in the way Mr. Goitein wishes. In my judgment it clearly means that tax is payable upon the chargeable income of any person for the year immediately preceding the year of assessment, even though he has not, during the year of assessment, received anything from a particular source from which he did receive an income in the previous year. In effect he is required to pay the tax a year late, and it makes no difference that in the year of assessment the income from that source goes no longer to him but to someone else.

In the result I find that this appeal fails and I dismiss it with fixed costs in the sum of LP. 20.

Delivered this 7th day of December, 1945, in the presence of Mr. Goitein for Appellant, and in the presence of Mr. Wittkowski for Respondent.

British Puisne Judge.

Mr. Goitein: I ask the Court to rule that this is a fit case for a case stated.

Mr. Wittkowski: It is entirely a matter for the Court's decision. I submit that it is not necessary to state a case. The fact that the amount is large is not a point that should be considered.

ORDER.

I consider that in this instance it would be reasonable to state a case. Mr. Goitein and Mr. Wittkowski say that they can agree the form that it should take.

Given this 7th day of December, 1945.

British Puisne Judge.

CIVIL APPEAL No. 199/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Salim Saba on behalf of the heirs of the late Iskander Saba. APPELLANT.

v.

1. The Municipal Corporation of Jaffa,
2. The Appeal Tribunal for the Municipal Corporation of Jaffa. RESPONDENTS.

Rating — Need not coincide with Urban Property Tax assessment — Municipal Corporations Ord., secs. 104, 107 — *Increase in assessment.*

Appeal against the judgment of the District Court of Jaffa in Civil Case No. 114/44, dated 25.5.45, dismissed:—

In assessing the rateable value of a building a municipal corporation need not be bound by the assessment for the purpose of Urban Property tax or by the maximum rent payable under the Rent Restrictions legislation.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 92/42 (9, P. L. R. 503; 1942, S. C. J. 501; 12, Ct. L. R. 229) — an instance of a municipal council adopting the U. P. T. assessment lists.

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Homsi.

JUDGMENT.

We do not consider it to be necessary to call upon Mr. Homsi for the first Respondent to reply.

This is an appeal from the judgment dated 25.5.45 of the District Court, Jaffa, in C. C. 114/44.

Two substantial points have been argued by Mr. Elia for the Appellants. In the first place he submits that the proviso to Section 107 of the Municipal Corporations Ordinance (No. 1 of 1934), as amended by Ordinance 3 of 1940, means that where the rate is leviable upon the owner (as in the present case) the rateable value *must* be that fixed in the assessment under the provisions of the Urban Property Tax Ordinance. We are quite unable to place such a construction upon the proviso. We think it is quite clear that the assessment committee of the Municipality is not bound to accept the assessment under the Urban Property Tax Ordinance. They can accept it if they see fit to do so, but they are at liberty to make their own assessment if they so prefer.

In the second place Mr. Elia submits that the assessment for the year 1943 was only LP. 20, and that no grounds exist for raising it to LP. 150 in 1944. In this connection he submits that if the premises had been let at a rental of LP. 20 (or LP. 27 which was the figure fixed under the provisions of the Urban Property Tax Ordinance) his clients, who are the landlords, would have been estopped by the provisions of the Rent Restrictions (Business Premises) Ordinance, No. 6 of 1941, from raising the rent by more than 5%.

Although the increase in the assessment — from LP. 20 to LP. 150.— is obviously great, we are unable to conclude that the assessment committee did not act in good faith. Their opinion is that this is the figure at which the premises might be expected to let from year to year. The relevant provisions of law are section 104 of the Municipal Corporation Ordinance No. 1 of 1934, and the Jaffa (Rateable Value of Buildings) By-Laws, 1937 (at page 500 of the Palestine *Gazette* Supplement No. 2 for that year).

We agree with the learned Judge of the District Court in thinking that the Rent Restrictions (Business Premises) Ordinance, 1941, has no application in this case.

In the result we dismiss this appeal with fixed costs in the sum of LP. 10 (ten pounds).

Given this 12th day of December, 1945.

British Puisne Judge.

CIVIL APPEAL No. 83/45.

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

BEFORE: Shaw and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Mansour Elleyyan el Shobaki. APPELLANT.

v.

Othman Salim Bushnaq. RESPONDENT.

Dispossession — Arts. 24, 26 Magistrates' Law — Recovery of possession of musha shares.

Appeal from the judgment of the District Court Jaffa, sitting in its appellate capacity dated the 30th of January, 1945, in C. A. No. 123/44 from the judgment of the Magistrate's Court Jaffa, dated the 29th of August, 1944, in Civil Case No. 1486/43; appeal dismissed:—

An order of recovery of possession may be made in respect of *musha'* shares in land.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 50/41 (8, P. L. R. 218; 1941, S. C. J. 348; 10, Ct. L. R. 96).

(*H. K.*)

FOR APPELLANT: Nazzal by delegation from Dajani.

FOR RESPONDENT: Elia.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, in Civil Appeal No. 123/44, delivered on 30.1.45, whereby the judgment dated 29.8.44, of the Magistrate's Court of Jaffa, in Civil Case No. 1486/43, dismissing the claim of the Respondent for the recovery of possession of shares in Parcel No. 2, Block No. 6596, and Parcel No. 2, Block No. 6597, was set aside, and the Appellant was himself ordered to be dispossessed of those shares.

The facts are shortly as follows:—

1. Respondent (original Plaintiff) on 23.10.43 brought an action in the Magistrate's Court of Jaffa, against the Appellant (original Defendant) asking for the recovery of possession of certain shares, comprising areas of 39 *dunums* 96 square metres in parcel 2 Block 6596, 21 *dunums* 108 square metres in Parcel 2 Block 6597, and 27 *dunums* 120 square metres in Parcel 2 Block 6598.

2. The Magistrate's Court of Jaffa on 29.8.44 ordered the Defendant

to be dispossessed of the Plaintiff's shares in parcel No. 2, Block No. 6598, and dismissed the Plaintiff's claim in respect of the other two parcels.

3. Plaintiff appealed to the District Court of Jaffa, and that Court on 30.1.45 reversed the judgment of the Magistrate, and ordered the Defendant to be dispossessed of the shares claimed by Plaintiff in Blocks Nos. 6596 and 6597.

4. Defendant appealed to this Court by leave of the presiding Judge of the District Court.

5. Counsel for Appellant has argued:—

(i) that Respondent was not entitled to judgment in his favour, because he failed to establish the two conditions required by Article 24 of the Magistrates' Law, namely (a) that he had actually been in possession of the shares in dispute, and (b) that his possession was prior to the trespass of the Appellant;

(ii) that Appellant was a statutory tenant of the land in dispute, as shown by Exhibit X dated 15.3.34, and was therefore protected by the Cultivators (Protection) Ordinance from any order of dispossession; and

(iii) that no order of dispossession could be made in respect of *musha'a* shares.

6. As regards the first point — the Appellant does not deny that Respondent is the true owner of the shares in dispute, nor does he claim that he has been in possession thereof for a prescriptive period which would prevent the Respondent from bringing his claim. It should be mentioned here that Respondent had previously filed Civil Case No. 133/42 against the Appellant in the District Court of Jaffa, contending that the Appellant was wrongfully in possession of these shares, and had claimed from him equivalent rent for a period of eight years — from 1934/35 to 1941/42. On 6.4.43 judgment was given in his favour against the Appellant for LP. 174.548 mils as equivalent rent. That judgment was confirmed by the Supreme Court on 27th July, 1943 — C. A. 158/43. This ground accordingly fails.

7. As regards the second ground — we find that Appellant failed to prove that he was a statutory tenant of the shares of the Respondent, because the document (Exhibit X) refers to the Appellant and a certain Hussein Abdel Jalil. The present Respondent was not a party to those proceedings. Furthermore, the District Court, in its judgment referred to in para. 6 above which was confirmed on appeal, held the Appellant to be a trespasser and not a tenant.

8. As regards the third ground — there is nothing to prevent the Court from ordering the recovery of possession of *musha'a* shares, and such an order would enable the Respondent to enjoy the benefit of those shares jointly with the other co-owners or their statutory tenants. The principle of joint possession is recognised in Article 26 of the Ottoman Magistrates' Law.

For the foregoing reasons the appeal is dismissed with costs on the lower scale, to include an advocate's attendance fee of LP. 15.— (fifteen pounds).

Delivered this 13th day of November, 1945,

British Puisne Judge.

CRIMINAL APPEAL No. 159/45.

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

BEFORE: Edwards, A/C. J. and Abdul Hadi, J.

IN THE APPEAL OF:—

Ruth Tuchner. APPELLANT.

v.

Attorney General. RESPONDENT.

Road transport — Rule 2 R. T. R., whether ultra vires sec. 23 of the Ordinance — CR. A. 89/38 — Construction of Statutes — Framing charges — M. C. P. R. 242(2), English Law compared.

Appeal from the judgment of the District Court of Haifa in its appellate capacity, dated 29.7.45, in Criminal Appeal No. 126/45, whereby the judgment of the Magistrate's Court, Tiberias, acquitting the Appellant in Criminal Case No. 980/45, was set aside and the case remitted to him; appeal dismissed:—

1. Rule 2 of the R. T. R. is not *ultra vires* sec. 23 of the Ordinance. No reference had to be made, in the 1939 Rules, to sec. 7 of the Interpretation Ordinance.

2. The 1934 Routes and Tariffs Regulations should perhaps more properly been called Rules, but this does not make them bad.

(A. M. A.)

REFERRED TO: CR. A. 89/38 (6, P. L. R. 22; 1939, S. C. J. 10; 5, Ct. L. R. 55).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1945, S. C. D. C. 370.

2. See the annotations to the D. C. judgment (*supra*) and *cf.* CR. A. 158/45 (*ante*, p. 792).

FOR APPELLANT: Spaer and Wilkenfeld.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Haifa in its appellate capacity, setting aside an order of acquittal made by the Magistrate of Tiberias and ordering that the case be remitted to that Magistrate for trial according to law.

The first ground of appeal relates to Rule 2 of the Road Transport (Routes and Tariffs) (Amendment) Rules, 1939, which amends Rule 11B so as to read as follows:—

> "11. Any person who fails to comply with the provisions of these rules is guilty of an offence and is liable to imprisonment for one month or a fine of twenty-five pounds *etc.*"

The Appellant's advocate argues that it is necessary for the prosecution to prove that the Accused has failed to comply with all the provisions of the rules. This argument is, to say the least, rather startling and one which does not commend itself to this Court.

It is next argued that Rule 2 of the 1939 rules is *ultra vires* in that sub-section (s) of section 23 of the Road Transport Ordinance, Cap. 128, does not prescribe any penalty for a breach of a rule made under it.

The matter came before this Court in Criminal Appeal 89/38, P. L. R. Vol. 6, p. 22, and it appears to have been as a consequence of the judgment in that case that Rule 2 of the 1939 rules was made. It is now argued that neither sub-section (p) nor sub-section (s) of section 23 created a penalty for a breach of the rule, and that the High Commissioner when he enacted the 1939 rules should have, instead of referring to sub-section (p) and (s) of section 23, mentioned section 7 sub-section (b) of the Interpretation Ordinance. It is, however, clear to us that what the High Commissioner did in 1939 was to annex to the breach of the rules which had already been made, a penalty. We are unable to agree that specific reference to section 7 sub-section (b) Interpretation Ordinance should have been made in the 1939 rules.

It is next argued that the reference to the Road Transport (Routes and Tariffs) Regulations, 1934, in Rule 1 of the Road Transport (Routes and Tariffs) (Amendment) Rules (No. 5) of 1943, Palestine *Gazette* No. 1301, Supplement No. 2 of 18th November, 1943, was erroneous and should have called the 1934 regulations "rules", because of section 5 sub-section (1) and section 5 sub-section (2) of the Statute Law Revision Ordinance, 1934, Laws of Palestine, Vol. 1, page IV and p. XXIII. It may be (it is arguable) that since 20th September, 1934, the Road Transport (Routes and Tariffs) Regulations, 1934, should

have been called rules, but this does not make the 1943 rules bad, because they were properly made and properly named.

The last ground of appeal is that the charge sheet is defective. It is in the following terms:—

> "Being a person engaged in the selling of tickets and charging a prospective passenger, Jirius Salameh, a fare in excess of the fare scheduled in the fourth column of Palestine *Gazette* No. 1073 of 1941, as amended by Palestine *Gazette* No. 1308 of 30.12.43, contrary to Road Transport (Routes and Tariffs)' Regulations, 1934, as amended by P. G. 1073 of 1941 and P. G. 1308 of 30.12.43, in that at the a/m date, time and place the person charged did sell, while being employed by the Egged Bus Co-op. Tiberias, as a ticket saleswoman, ticket No. 4390, priced at 100 mils, for the journey, Tiberias to El-Hamme, whereas the scheduled price as above should only have been 56 mils, *i. e.* 44 mils overcharge".

The argument is that there was no reference to the 1939 rules and that therefore the Accused did not know that she was liable to a penalty. It is, however, clear that she was given full information of the nature of the charge against her, and she, like anyone else, was presumed to know of the existence of rule 11B as enacted in 1939.

The procedural law in this matter in Palestine is to be found in Rule 242 of the Magistrates' Courts Procedure Rules, 1940. Rule 242 sub-rule 2 does not state what the charge shall contain; but, in any event, we are of opinion that the charge in this case was sufficiently adequate to inform the Accused of what was alleged.

In England the matter is regulated by the various Summary Jurisdiction Acts. The relevant provisions are set out in the 1944 (76th) edition of Stone's Justice's Manual, pages 165 and 166. These, however, are statutory provisions.

For all these reasons the appeal is dismissed.

Delivered this 10th day of October, 1945.

Acting Chief Justice.

HIGH COURT No. 47/45.

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

BEFORE: Edwards, A/C. J.

IN THE APPLICATION OF:—

Hanna Kawas. PETITIONER.

v.

Chief Execution Officer, Jerusalem & 3 ors. RESPONDENTS.

Action by heirs of deceased — Execution of judgment given for Plaintiffs in their private capacity — Rate of conversion of foreign currency — Interest on amount adjudged.

Return to a rule *nisi* issued on 12th June, 1945, calling upon Respondent No. 1 to show cause why he should not refrain from acting on his order of 15.5.45 in Execution File No. 514/40 and discontinue any further proceedings in this file, order *nisi* discharged:—

1. Where judgment was given for Plaintiffs as individuals, although they sued in their capacity as heirs, Chief Execution Officer is right in executing judgment in favour of judgment creditors in their private capacity; too late to allege before him fraud or incorrectness of certificate of succession or to set up a will.

2. Where years after termination of partnership judgment involving foreign currency was given for a partner against other, conversion cannot be based on rate of exchange prevailing at date of termination of partnership.

3. Payments to heirs on account of moneys due to estate — to be deducted from interest, not from capital.

4. Where judgment orders payment of interest at a specified rate below limit of legal interest Chief Execution Officer is wrong in allowing 9%.

(*M. L.*)

REFERRED TO: British American Continental Bank Ltd. *v.* Credit General Liegeois claims (1922) 2 Chancery Div. p. 589; 127, L. T. R. 284; Manners *v.* Pearson & Son, (1898) 1 Chancery 589; 78, L. T. R. 432; Warrant Finance Co. 4 Chancery Appeals p. 645; 20, L. T. R. 859; Parr's Banking Co. *v.* Yate (1898); 79, L. T. R. 321; Whittingstall *v.* Cower (1886) 55, L. T. R. 213; H. C. 70/40 (7, P. L. R. 478; 8, Ct. L. R. 161; 1940, S. C. J. 409); H. C. 59/42 (9, P. L. R. 331; 11, Ct. L. R. 177; 1942, S. C. J. 319); P. C. A. 1/42 (10, P. L. R. 271; 1943, A. L. R. 408); C. A. 475/44 (12, P. L. R. 339; 1945, A. L. R. 389).

ANNOTATIONS:

1. The Privy Council Appeal No. 41/42 is reported in 10, P. L. R. at p. 328 and in 1943, A. L. R. at p. 487.

2. On the currency point see first 2 English Cases referred to and P. C. A. 1/42 (*supra*), C. A. 475/44 (*supra*), H. C. 59/42 (*supra*) and C. A. 120/44 (1944, A. L. R. 708) with note 3 thereto in A. L. R.

3. On the third point see H. C. 70/40 (*supra*) with annotations thereto.

4. On the fourth point see H. C. 27/40 and 28/40 (7, P. L. R. 213; 7, Ct. L. R. 150; 1940, S. C. J. 117) where rate of interest stated in mortgage deed, interest goes on being payable after the term of the mortgage until final payment has been effected.

(*A. G.*)

FOR PETITIONER: Eliash and Scharf.

FOR RESPONDENTS: No. 1 — Absent — served.

Nos. 2, 3 & 4 — Smoira.

ORDER.

This is the reutrn to an order *nisi* calling upon the first Respondent to show cause why his order of 15th May, 1945, in execution proceedings should not be set aside or, at any rate, varied. The matter arises out of Privy Council Appeal No. 41/42. The first question is whether the learned Chief Execution Officer was correct in holding that judgment was given in favour of the judgment-creditors Jamileh Suleiman Talamas and George Bishara Kawas in their personal capacity. I think that he was correct because the judgment of the Court below (admitted both by the Supreme Court of Palestine, and by Their Lordships of the Judicial Committee of the Privy Council to be correct) was in favour of these three persons as individuals. It is true that they sued in their capacities as the two children and the wife of the late Elias Issa Kawas, but it is clear that all the Courts regarded these three persons as being the sole heirs of Elias Issa Kawas. It is too late now when before the Execution Officer to allege any fraud or incorrectness in a Certificate of Succession or to set up a will. Such matters should have been alleged and proved during litigation. His Majesty in Council in terms affirmed the judgment of the Supreme Court of Palestine of 31st July, 1940.

The next question is whether the rate of exchange in dollars should have been calculated according to the rate of exchange prevailing on the date when the partnership between Elias Issa Kawas and his brother terminated, namely, the 1st November, 1927, or on the 9th February, 1940, the date of the judgment of the District Court of Jerusalem. The learned Chief Execution Officer held that accounts had only been taken after the judgment of the Court had been given. He relied on the cases of Manners *v.* Pearson & Son (1898) 1 Chancery Division page 581 and British American Continental Bank Ltd. *v.* Credit General Liegeois' Claim (1922) 2 Chancery Division p. 589. He did not consider that the judgment of the Privy Council in Privy Council Appeal 1/42 P. L. R. Vol. 10 (1943) p. 271 was applicable. The latter case was concerned with promissory notes of which the date of maturity was known and certain.

Dr. Eliash, for the Petitioner who argued that the case of Manners *v.* Pearson has been overruled referred to Civil Appeal 475/44 Vol. 10 P. L. R. p. 277 * and H. C. 59/42 Vol. 9 P. L. R. p. 331 and to Dicey's "Conflict of Laws" (5th Edition) p. 730 note. I am, however, not prepared to hold that the learned Chief Execution Officer erred in this respect.

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* *Scil.*: Vol. 12, p. 339.

The next point is as to whether a sum of LP. 1000 paid on account by the judgment-debtor on the 20th December, 1940, should be deducted from interest and not from capital. The learned Chief Execution Officer, relying on H. C. 70/40 Vol. 7 P. L. R. p. 478, held that this sum of LP. 1000 had to be deducted from interest.

Dr. Smoira, for the Respondents, relied on Lindley on Partnership (10th Edition) p. 290 paragraph 8 and to the following cases: Warrant Finance Co. 4 Chancery Appeals p. 645, Parr's Banking Co. *v.* Yate (1898) 2 Q. B. D. p. 466, Thompson *v.* Hudson (1870) 10 Eq. 497 and Whittingstall *v.* Grover (1886) 55 L. T. 213. Here again I think that the learned Chief Execution Officer did not err.

The last point is as to interest. There was considerable argument before the Chief Execution Officer and myself with regard to the word "accordingly" in the judgment of the District Court. Dr. Smoira strenuously argued that it has always been the custom in the Courts of this country over a period of 25 years, to allow interest on decretal amounts at 9% *per annum*. This may be so; but each case depends upon the terms of the particular judgment. The judgment of Their Lordships of the Privy Council in Privy Council Appeal 41/42, confirmed the judgment of the Supreme Court of Palestine of 31st July, 1940. In that judgment the Supreme Court said:—

> "The Trial Court gave judgment for the Plaintiffs, the Respondents, for a specified sum, with interest at 6%, with the qualification that from this amount must be deducted the sums 'admittedly received by Jamileh'."

They then went on to say:—

> "subject to this amendment ..... the judgment of the District Court is confirmed".

Whether or not the Supreme Court of Palestine were entitled to make specific reference to 6% is not for me to say. In my view, however, it was the judgment of the Supreme Court which was confirmed by the Judicial Committee of the Privy Council. The judgment of the Supreme Court definitely said "with interest at 6%". I accordingly hold that the learned Chief Execution Officer erred in allowing interest at 9%. Interest should be at 6%.

Subject to this variation the order *nisi* is discharged with one set of costs to Respondents Nos. 2, 3 and 4 namely fixed (that is, inclusive) costs of LP. 15.

Given this 12th day of September, 1945, in the presence of Mr. M. Scharf, Petitioner's advocate, and Dr. M. Smoira Respondents' advocate.

A/Chief Justice.

HIGH COURT No. 85/45.

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

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

IN THE APPLICATION OF:—

Ibrahim Naim. PETITIONER.

v.

The Chief Execution Officer, Magistrate's Court, Haifa & an. RESPONDENTS.

Order of eviction against head-tenant on ground of sub-letting in breach of tenancy agreement — Judgment stating that no order is made for or against sub-tenant — Sub-tenant automatically undergoing fate of head tenant.

Return to a rule *nisi* issued on the 31st October, 1945, directed to the first Respondent calling upon him to show cause why his order of the 1st of August, 1945, in Execution File No. 54/45, Haifa, should not be cancelled and the judgment of eviction given by the Magistrate's Court, Haifa, on the 7th January, 1945, in Civil Case No. 1734/44 and confirmed on appeal by the District Court Haifa on the 24th April, 1945, in Civil Appeal No. 8/45 should not be executed against Respondent No. 2; order *nisi* made absolute:—

A sub-tenant, whether or not a party to the proceedings, must follow the fate of head tenant if judgment for eviction is given against latter; an order against sub-tenant in the eviction judgment — superfluous.

(*M. L.*)

FOLLOWED: H. C. 59/41 (8, P. L. R. 356; X, Ct. L. R. 66; 1941, S. C. J. 35).

DISTINGUISHED: C. A. 223/44 (11, P. L. R. 509; 1944, A. L. R. 741).

ANNOTATIONS:

1. This case lays down the rule that an eviction order given on the ground of *unlawful* sub-letting applies automatically to the sub-tenants and the rule in C. A. 223/44 does not apply in such a case.

2. The a/m headnote applies to cases of unlawful sub-letting only in view of the a/m authorities as to protection of lawful sub-tenants *vis-a-vis* the superior landlord.

(*A. G.*)

FOR PETITIONER: Eliash.

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

ORDER.

This is a return to an order *nisi* requesting the cancellation of the order of Respondent No. 1 dated 1.8.45 and commanding him to execute

the judgment of the Magistrate's Court in C. C. 1734/44 against Respondent No. 2.

The facts briefly are as follows:—

The Petitioner brought an action against one Muhammad Muhammad el Fawal for eviction on the ground of a breach of the tenancy agreement by sub-letting. Respondent No. 2, the sub-tenant on his own application was joined as a second Defendant. The Magistrate gave judgment in the following terms:—

> "Now therefore the Plaintiff is successful on his claim which he has proved, I accordingly decide to order the 1st Defendant (Muhammad Muhammad el Fawal) to vacate the premises let with costs to the Plaintiff and LP. 3.— advocates fee and I do not make any order either for or against the second Defendant".

When the present Petitioner put this judgment in the Execution Office, the Execution Officer refused to execute it against the second Respondent presumably on the ground that the judgment contained no order for or against him.

I think this case is entirely answered by H. C. 59/41, 8 P. L. R. p. 356. It was there held that by virtue of Article 43 of the Execution Law that unless the possession is adverse to or independent of the judgment-debtor, the person in possession has no right to stay in the premises and that, therefore, a sub-tenant must follow the fate of the head-tenant if judgment for eviction is given against the latter. That order further points out that there is no necessity to join the sub-tenants as parties to the action and the practice so to do is bad and unnecessary. In this case the actual judgment for eviction of the tenant was based on the granting of the sub-lease to the Respondent No. 2. Having obtained the judgment against the head-tenant, it automatically follows that the sub-tenant must be evicted and the failure of the Magistrate to make an order against the sub-tenant does not make the judgment bad, requiring the present Petitioner to appeal, for any order in the judgment in respect of the sub-tenant would have been superfluous.

Respondent No. 2 referred us to C. A. No. 223/44, 11 P. L. R., p. 599, but the circumstances in that case are entirely different from this — in that case there was permission to sublet.

For the foregoing reasons the order *nisi* will be made absolute with costs on the lower scale and an advocate's attendance fee of LP. 10.

Given this 26th day of November, 1945.

A/British Puisne Judge.

HIGH COURT No. 73/45.

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

BEFORE: Edwards, A/C. J.

IN THE APPLICATION OF:—

Nakhleh Cattan. PETITIONER.

v.

The Chief Execution Officer, Magistrate's Court, Jerusalem & an. RESPONDENTS.

Consent judgment for eviction to be unenforceable upon Defendant fulfilling certain conditions — Judgment debtor claiming to have complied with terms of judgment — Scope of Art. 36, Ottoman Execution Law — Better practice in certain cases of agreement on consent judgment.

Return to an order *nisi* issued on 18th September, 1945, directed to the 1st Respondent calling upon him to show cause why he should not be ordered to proceed with the execution of the judgment for eviction given against the 2nd Respondent by the Magistrate's Court of Jerusalem on 7.6.45 in Civil Case No. 1604/44 or alternatively why he should not be ordered to proceed in accordance with the provisions of Art. 36 of the Execution Law:—

1. a) Where Execution Officer dealing with a Magistrate's judgment acts under Art. 36, Execution Law, no place for either party to apply to District Court for a declaratory judgment.

b) Judgment debtor under a Magistrate's judgment, when referred to competent Court, under Art. 36, Execution Law, — not required to bring a new case; he can apply to the Magistrate by motion for a certificate that he complied with the judgment *etc.*, certificate will not be given without hearing Plaintiff.

2. (*Obiter*): When parties agree that judgment be entered for Plaintiff but be unenforceable if Defendant complies within a specified time with Plaintiff's request, Court should, instead of confirming the agreement, record Defendant's offer, fix a date and then give judgment according to the result.

(*M. L.*)

ANNOTATIONS:

1. On conditional judgments see: — C. A. 206/42 (9, P. L. R. 757; 12, Ct. L. R. 252; 1942, S. C. J. 937); H. C. 127/44 (*ante*, p. 130); C. A. 36/44 Jm. (1944, Selected Cases, p. 296) and C. A. 28/44 Jm. (1944, Selected Cases, p. 251).

2. On Art. 36 of Execution law see H. C. 62/45 (*post*, p. 816) and H. C. 19/45 (*ante*, p. 535) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Cattan.

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

ORDER.

This is the return to an order *nisi* directed to the Execution Officer, Jerusalem Magistrates' Court calling upon him to show cause why he should not be ordered to execute a consent judgment of that Court of 7th June in an action for eviction in which the present Petitioner was Plaintiff and the second Respondent was Defendant. The judgment is in the following terms:—

> "By agreement of both parties, I order eviction of Defendant from the demised premises which he is using in Plaintiff's house at Zichron Moshe, Jerusalem, after the lapse of one month provided that if the Defendant removes the motor, tanks and pipes before the expiry of the period of one month and pays all arrears of rent due and water rates for the water consumed, this judgment shall become unenforceable. I order Defendant to pay the costs of this action which I assess at LP. 3.— to be paid by Defendant within the period of one month".

The first Respondent, for reasons given by him, held that the judgment was incapable of execution. I have listened to an interesting argument at the Bar and I was assured by Mr. Cattan, for Petitioner, that the matter raises points of importance which do not seem yet to have been decided. I make at the outset, two remarks, namely, that under Articles 14 and 15 Ottoman Magistrates' Law (still in force in Palestine) consent judgments are quite valid and that this particular judgment is quite clear and unambiguous in its terms so that Article 6 Ottoman Law of Execution has no application to the facts of this case. As I see the matter, the position is that at any time after 6th July, 1945, the Plaintiff (present Petitioner) was entitled to take the judgment to the Execution Office and ask for it to be put into execution. If the Defendant claims that he has removed the motor *etc.*, and paid all arrears of rent and if the Plaintiff denied that the Defendant had done so and denied that the Plaintiff had received all arrears of rent and water rates, then the Execution Officer would act under Article 36 and if the Defendant produced proof sufficient to comply with Article 36, the Execution Officer would give the Defendant a reasonable period within which to apply to the competent Court. It is here that doubt arises. It was faintly suggested on behalf of the second Respondent that the Plaintiff should go to the District Court for a declaration, the District Court being the Court in Palestine having residuary jurisdiction. I entirely dismiss the suggestion that either the Plaintiff or the Defendant should go to the District Court. It would be fantastic and would bring the law into disrepute if a judgment-debtor in a Magistrate's Court had to go to the District Court for a declaration that he

had paid a very small judgment debt in a Magistrate's Court case. In my view, there is nothing in Article 36 which requires the judgment-debtor to bring a new case. The word used in Article 36 is "apply" and I see no reason why the judgment-debtor should not apply under Rules 232 and 233 of the Magistrates' Courts Procedure Rules 1940 for a certificate or a note to be placed on the file in the original Magistrate's Court case that he had complied with the judgment or had made part-payment. The Magistrate would naturally not give such a certificate or make such a note until he had heard the Plaintiff (see Rule 233). A certified copy of the certificate of the Magistrate would then be sent to the Execution Office or delivered by the judgment-debtor to the Execution Office. What I am now laying down may surprise some persons; but I am certain that it is the right procedure. In most countries a Magistrate or County Court Judge has complete control over execution of his own judgments and in one territory in which I served there was specific provision for a judgment-debtor obtaining such a certificate as I have contemplated. I do not think that I am legislating or making any rule, I think that I am merely giving effect to Article 36. In my view, it is not too late even now for the second Respondent when he is again before the Execution Officer to ask the Execution Officer to allow him time to go before the Magistrate with a view to his proceeding in the manner which I have indicated. I have little sympathy with the second Respondent in these proceedings because he or his advocate was a party to the consent judgment of the 7th June 1945. I would, however, make one suggestion both to Magistrates and other Courts of first instance and to advocates and that is that when a defendant cannot resist judgment but asks for judgment to be delayed in order that he may pay the debt or comply with the prayer of the Plaintiff within a specified time and the Plaintiff or his advocate is not sure whether the Defendant will comply in the manner offered, in such circumstances it is better for the Magistrate to make a note of the offer and tell the parties to come before him again on a named date about a month later. To make my meaning clear, what should have happened in this case was that on the 7th June the Magistrate should have noted the Defendant's offer and should have told parties' advocate to appear before him again on 7th July and warn the Defendant that if on 7th July he (the Magistrate) was not satisfied that the Defendant had complied with his offer, he, the Magistrate, would at once enter judgment against him without any conditions. That is the policy I myself always adopted when I set as a Magistrate or Judge of first instance in civil cases and it is much the most satisfactory

method. For the foregoing reasons the order *nisi* is made absolute. The Execution Officer will resume consideration of the matter and if the second Respondent still claims that he has complied with the judgment the Execution Officer will act in the manner set out in this judgment. The second Respondent will pay the Petitioner costs of this petition, fixed (inclusive) costs of LP. 5.—.

Given this sixth day of November, 1945, in the presence of Mr. T. Moghannam for Petitioner and Mr. Z. Rozovski for Respondents.

Acting Chief Justice.

HIGH COURT No. 62/45.

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

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

IN THE APPLICATION OF :—

George Joseph Khoury. PETITIONER.

v.

Acting Chief Execution Officer, Haifa & an. RESPONDENTS.

Judgment for principal sum plus legal interest — J/D declared bankrupt after judgment put into execution — J/C claiming in E. O. interest as from date of adjudication up to full payment — J/D denying liability to pay interest — Onus of proof — Scope and effect of Art. 36, Ottoman Execution Law.

Return to an order *nisi* issued on the 14th of September, 1945, directed to the first Respondent calling upon him to show cause why he should not proceed with the execution of the judgment delivered by the District Court of Haifa on the 28th of February, 1930, in Civil Case No. 36/30 and filed in the Execution Office of Haifa under the file No. 1019/30 and why the ruling given on the 3rd of July, 1945, should not be set aside:—

1. A decree of a Court ordering payment of a principal sum together with legal interest from date of judgment without any further words must be interpreted that interest runs up to date of payment.

2. Where judgment debtor alleges that since date of decree events have intervened which discharge him from liability to comply with the decree (or part of it), onus of proof is on him and it is he who must apply to competent Court.

(*M. L.*)

ANNOTATIONS:

1. See H. C. 73/45 (*ante*, p. 813) with annotations thereto.
2. On the interest point see H. C. 47/45 (*ante*, p. 807) with note 4 thereto.

(*A. G.*)

FOR PETITIONER: Weinshall.

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

ORDER.

This is a return to an order *nisi* issued on the 14th September, 1945, directed to the Acting Chief Execution Officer, Haifa, calling upon him to show cause why he should not proceed with the execution of the judgment by the District Court, Haifa of the 28th February, 1930.

The facts are simple and clear: On 28.2.30 the Petitioner obtained a judgment against Respondent No. 2 and execution proceedings in respect thereof started on 7.3.30. On 27.10.30 however the Respondent was declared bankrupt and his bankruptcy was antedated to 7.3.27. Thereupon the Petitioner withdrew the judgment from the Execution Office and submitted it to the Syndic applying for interest up to the date of adjudication. The claim was approved and the judgment debt, costs and interest up to the date of adjudication was duly paid by instalments — the last instalment being paid on 5.10.37.

In 1940 the bankruptcy was terminated but the debtor never applied for rehabilitation. On the 18th November, 1944, the Petitioner again put the judgment in the Execution Office asking for interest from the date of adjudication to payment.

The Chief Execution Officer refused to give an order for execution to proceed stating that the judgment-creditor was at liberty to obtain a declaratory judgment if he so wished.

Before us, both parties admit that there is only one real point at issue *viz.* should the Chief Execution Officer refer the judgment-creditor or the judgment-debtor to the appropriate Court to ascertain whether in the circumstances of the case interest is payable for the period subsequent to the adjudication. In our opinion when a Decree of a Court is filed in the Execution Office ordering the payment of a principal sum together with legal interest from date of judgment without any further words, it must be interpreted that the interest runs up to the date of payment.

Article 36 of the Execution Law makes it clear that if the judgment-debtor alleges that payment, settlement, or compromise has been made outside the Execution Office and the creditor denies, it is for the judg-

ment-debtor to be referred to the competent Court to prove the payment, settlement or compromise.

In this case the judgment-debtor alleges that owing to the bankruptcy he is not liable for interest for the period after the adjudication unless the bankrupt applies for rehabilitation *vide* Article 305 of the Commercial Code and that as he has not so applied he is not liable. He further alleges that as the judgment-creditor made no reservation for future interest when filing this claim with the Syndic he is now estopped. Finally he alleges that the judgment-creditor assigned the judgment debt to another.

It seems to us that it must follow from Article 36 of the Execution Law that where the judgment-debtor alleges events have intervened since the date of the decree which events discharge him from liability for payment in accordance with that decree the onus of proving that the decree cannot be executed as it otherwise would be executed, were it not for the intervening event, must fall upon the judgment-debtor.

For the foregoing reasons the order *nisi* is made absolute subject to the condition that the Chief Execution Officer shall not proceed with the execution of the judgment if the 2nd Respondent institutes proceedings within one month in a competent Court with a view to determining his denial of liability in respect of interest accruing after the date of adjudication. Petitioner is entitled to inclusive costs fixed at LP. 10.—.

Given this 14th day of November, 1945, in the presence of Mr. Eisenberg — by delegation — for Petitioner and Stoyanovsky for Respondents.

A/British Puisne Judge.

HIGH COURT No. 54/45.

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

BEFORE: Shaw, J.

IN THE APPLICATION OF :—

Joseph Mosheyoff. PETITIONER.

v.

The Chief Execution Officer, Tel-Aviv & an. RESPONDENTS.

Petition to High Court for order to C. E. O. to refrain from execution

of judgment of Rabbinical Court — Allegation of lack of jurisdiction — Obligation to state in petition itself every important fact.

Return to an order *nisi* issued on the 11th day of July, 1945, directed to the 1st Respondent calling upon him to show cause why he should not refrain from executing the judgment of the Chief Rabbinate, Jaffa and Tel-Aviv District No. 256/705, as per file No. 327/45 of the Execution Office Tel-Aviv, and/or why his order dated 10th day of May, 1945, and/or 23rd day of May, 1945, and/or the 4th day of June, 1945, should not be set aside; petition dismissed:—

1. Petition to High Court must state every fact which may influence the Court before deciding whether or not to grant order *nisi*. It should not be left to Court to discover it for itself by perusing the annexures nor should it be left to be disclosed to Court at the hearing of the petition.

2. If petition to High Court against execution of judgment of a Rabbinical Court allegedly given without jurisdiction omits fact that at time of or shortly before marriage Petitioner consented that Rabbinical Court should have jurisdiction in all questions of personal status that might arise between the parties, petition will not be entertained, even though the fact is disclosed in exhibits annexed to petition.

(*M. L.*)

FOLLOWED: H. C. 78/42 (9, P. L. R. 526; 12, Ct. L. R. 214; 1942, S. C. J. 529).

ANNOTATIONS: See in addition to H. C. 78/42 (*supra*) H. C. 64/45 (*ante*, p. 641) and note 1 thereto.

(*A. G.*)

FOR PETITIONER: Buchhalter.

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

JUDGMENT.

This is a return to an order *nisi* dated 11.7.45, calling upon the 1st Respondent to show cause why he should not refrain from executing the judgment of the Chief Rabbinate, Jaffa and Tel-Aviv District, No. 256/705 (in Execution File No. 327/45 of the Execution Officer, Tel-Aviv), and/or why his order dated 10.5.45, and/or 23.5.45, and/or 4.6.45, should not be set aside.

Two preliminary objections have been raised by Mr. Katz who has appeared for the 2nd Respondent. The first of these is that the petition does not disclose all of the important facts.

It is not denied that the petition does not state the very important fact that at the time of or shortly before the marriage, the Petitioner had consented that the Rabbinical Court should have jurisdiction in all questions of personal status that might arise between the parties.

Mr. Buchhalter, who appears for the Petitioner, has submitted that

although this fact is not stated in the petition it is disclosed in exhibits which are annexed to the petition.

In my judgment it is essential that a very important fact of this kind, which might influence the Court when deciding whether or not to grant an order *nisi*, ought to be stated in the petition so that there may be no doubt that it has been brought to the notice of the Court. It should not be left to the Court to discover it for itself by a close perusal of documents attached to the petition, nor should it be left to be disclosed to the Court at the hearing of the application for the order *nisi*.

Mr. Katz has referred to H. C. 78/42 (Supreme Court Judgments, 1942, Vol. 2 page 529) where the Court said:—

> "This Court has said more than once, recently also, that if Petitioners invite the assistance of the Court by this rather technical procedure, the exercise of which is entirely in the discretion of the Court, the Court is entitled to expect a full disclosure of the facts on which the petition is based".

The second objection raised by Mr. Katz is that the petition does not contain a full statement of the grounds upon which the Petitioner relies in averring that the Rabbinical Court acted without jurisdiction. Here again it is not denied that the grounds are not stated. Para. 10 of the petition merely says that the Rabbinical Court acted without jurisdiction, and that its judgment is a nullity. Mr. Katz has pointed out that there are several reasons why a Rabbinical Court may not have jurisdiction — the parties may not be Palestinian citizens, or they may not be members of the Jewish Community, or they may not have consented to the jurisdiction. In H. C. 78/42 the Court stated:—

> "The Petitioner makes, or should make, a full statement of the grounds of his application in the first instance, to which the Respondent is called on to reply and show cause against the order *nisi* applied for and issued, being made absolute".

It is obviously necessary that the Respondent should be told in clear terms what the point or points are that he has to meet. Otherwise he will be prejudiced in his reply. And it is also necessary that the Court should be told, in the petition itself, what the Petitioner's case is.

In my judgment these two objections succeed, and together and separately they justify the dismissal of the petition. Mr. Buchhalter has asked to be allowed to amend his petition, but I am not prepared, in the circumstances to allow an amendment.

The petition is therefore dismissed with fixed costs in the sum of LP. 10 (ten pounds).

Delivered this 26th day of October, 1945.

British Puisne Judge.

HIGH COURT No. 77/45.

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

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

IN THE APPLICATION OF:—

Kassem Mustafa el Assadi & 2 ors. PETITIONERS.

v.

The Attorney General & 2 ors. RESPONDENTS.

Notice to Mukhtar of village re appointment of Ghaffirs — Petition to High Court against completed appointment — Suppression of fact in petition to High Court.

Return to an order *nisi* issued on the 25th of September, 1945, directed to the second Respondent calling upon him to show cause, if any, why his order of the 18th day of August, 1945, purporting to be made under section 23 of the Police Ordinance for the appointment of 4 Ghaffirs for service in Farradiya Village should not be set aside; petition dismissed:—

1. a) (*Obiter*): Where a Public Officer issued an order suddenly so that the person affected had no opportunity to object until after the matter was an accomplished fact, High Court may hold it can interfere notwithstanding fact that act complained of has been completed.

b) Where Petitioner could have applied before the order complained of was carried out, High Court will not interfere.

2. Notice to *Mukhtar* of village regarding appointment of *Ghaffirs* under sec. 23, 24 of Police Ordinance is good notice to all villagers.

3. No important fact should be suppressed in petition to High Court.

4. (*Obiter*): Judgment against Defendants on behalf of all inhabitants of a village dispossessing them of Plaintiff's interest in water which interest was purchased by other village is a judgment *in rem*, and remedy of anybody claiming to be prejudiced by it is to apply to competent Court and prove ownership of the water.

(*M. L.*)

DISTINGUISHED: H. C. 86/36 (3, P. L. R. 192; 8, C. of J. 458).

ANNOTATIONS:

1. On the first point see in addition to case distinguished also H. C. 58/45 (*ante*, p. 639) and annotations thereto.

2. On the powers of *mukhtars* to represent villagers see C. A. 283/42 (10, P. L. R. 44; 1943, A. L. R. 163) and annotations thereto in A. L. R.

3. On the third point see H. C. 54/45 (*ante*, p. 818) with annotations thereto.

(*A. G.*)

FOR PETITIONERS: Elia.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Paglin.
No. 3 — Asfour.

ORDER.

This is a return to an order *nisi* dated 25.9.45 calling upon the second Respondent to show cause why his order of 18.8.45, purporting to be made under section 23 of the Police Ordinance for the appointment of 4 *Ghaffirs* for service in Farradiya Village, should not be set aside.

Certain preliminary objections have been taken by the advocates who appear for the 2nd and 3rd Respondents. The first of these is that the act complained of has been done and that the long established practice of this Court is to refuse to interfere where the act complained of has been completed.

We have been referred to High Court No. 86/36 (3 P. L. R. 192). In that case *ghaffirs* were appointed and the High Court in its judgment observed that:—

> "We think, however, that the jurisdiction of this Court in a matter of this kind is confined to ordering a District Commissioner to do or refrain from doing something. When the act is done, no order can be made and the jurisdiction does not extend to ordering public officials or bodies to cancel orders which they have already made".

It has been pointed out by Mr. Elia, for the Petitioners, that in the case referred to the objection to the appointment of the *ghaffirs* was not, apparently, taken till it was a question of collecting the cost of their maintenance. So that case is not on all fours with the present case, and it may well be that if the *ghaffirs* had been suddenly appointed so that the Petitioners had no opportunity to object until after the appointments were an accomplished fact the High Court might not have held that it could not interfere. But in the present case it is clear that the *mukhtar* of Farradiya did have notice of the impending appointment of *ghaffirs,* and the statutory period of seven days within which the nominations were to be made (see section 24 of the Police Ordinance, Cap. 112) was allowed. We think that notice to the *mukhtar* was good notice to the Petitioners. It is not suggested that the interest of the *mukhtar* and of the Petitioners is not the same. We must take it that the *mukhtar* is not a person completely ignorant of the processes of the law, and we consider that an application could reasonably have been made, and ought to have been made, before the *ghaffirs* were appointed. This alone is a sufficient ground for our refusing to make an order absolute.

Mr. Paglin has further argued that the Petitioners suppressed an important fact as they did not state that the *ghaffirs* had actually been appointed and had taken up their duties. In view of the practice of this Court to refuse to make an order where the act complained of has

been done we think that the fact of the appointment of the *ghaffirs* ought to have been set out on the petition.

Mr. Asfour, for the 3rd Respondent, has urged that the Petitioners have made a mis-statement of fact in para. 5 of their petition where they aver that the Magistrate's Court judgment of 1920 was never executed. It appears to us from Exhibit B to the affidavit of the 3rd Respondent that at any rate in 1933 there was execution of the judgment. That report states that:—

> "The canal was opened to Kufer Anan Village in presence of all and then the period of 24 hours should be given to Farradiya Village and so on till further notice".

So it was incorrect to state that there had been no execution.

We would observe further that it is now clear that there is a judgment (dated 17.4.20) of the Magistrate of Acre which was given against the then Defendants on behalf of all the inhabitants of the village of Farradiya, dispossessing them of the then Plaintiff's interest in the water and that interest has (as shown in the affidavit dated 6.10.45 of Mr. Cornes) been purchased by the villagers of Kufer 'Inan, on behalf of which village the *mukhtar* has been made a respondent on these proceedings. That judgment was confirmed on appeal to the Court of Appeal, in a judgment dated 7.10.20, in which the Court stated that it was satisfied that:—

> "the Magistrate's judgment is in compliance with law and justice and that all grounds set out in the Appellants appeal are not sufficient to set aside or alter the judgment".

We hold the view that the Magistrate's judgment was quite clearly a judgment *in rem*, and that the remedy of anybody who could show that he was prejudiced by it was to file an action in the competent Court with a view to proving who were the owners of the water.

We also observe with regret that Mr. Cornes' affidavit shows that certain villagers of Farradiya forcibly prevented the *ghaffirs* from carrying out their duties, and also attacked the police. We are not inclined to help persons who show themselves ready to take violent action in resisting an order made by a responsible authority who was acting in good faith.

For all these reasons we find that this petition fails, and we dismiss it. The order *nisi* is set aside. The 2nd and 3rd Respondents will each have fixed costs in the sum of LP. 10 (ten).

Given this 31st day of October, 1945.

British Puisne Judge.

HIGH COURT No. 68/45.

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

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

IN THE APPLICATION OF:—

Mashiah Nissan. PETITIONER.

v.

Municipal Commission of Jerusalem. RESPONDENTS.

Application for issue of licence for café — Health Department prepared to approve provided certain constructural alterations are made — Town Planning Authority refusing permit to make the alterations — Scope of sec. 7(2), Trades & Industries (Reg.ul.) Ord. as amended.

Return to an order *nisi* dated 13th of September, 1945, directed to the Respondents calling upon them to show cause why they should not issue a Café licence to the Petitioner in respect of his premises at Nahlat Shiva, order *nisi* discharged:—

1. If allegation in affidavit occompanying petition to High Court is not specifically denied in Respondent's affidavit, High Court will accept the allegation as a fact.

2. Where petition to High Court is for an order to Public Officer to do a certain act, High Court will not consider complaint that the Public Officer did not notify Petitioner the reasons for the refusal, particularly where Petitioner was aware of the reasons.

3. Sec. 7(2), Trades & Industries (Regulation) Ord. as amended does not apply where Police Department have no objection to grant a licence and Health Department refuses approval unless Applicant carries out certain constructural alterations.

(*M. L.*)

ANNOTATIONS:

1. On the first point see H. C. 122/43 (1944, A. L. R. 12) and note 1 thereto.

2. On interference of H. C. with discretion of public officer see H. C. 78/44 (11, P. L. R. 471; 1944, A. L. R. 685) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: A. Atallah.

FOR RESPONDENTS: S. Said.

ORDER.

This is a return to an order *nisi* directed to the Municipal Commission to show cause why they should not issue a Café licence to the Petitioner. Actually from the evidence before us, there is nothing to

show that the Commission ever did refuse to issue a licence to the Petitioner. The only refusal appears to have been made by the Department of Health. However as in the petition it was alleged that the Commission did refuse to issue a licence, and the allegation was not specifically denied by the Respondent in his affidavit, we accept as a fact that they did do so. From the evidence before us it appears that in accordance with its usual procedure the Commission referred the application for the licence to the Police Department which stated it had no objections, and to the Department of Health. The latter Department refused the application. It appears clearly from the evidence of the Respondent who was cross-examined upon his affidavit that the Public Health Department was prepared to give its approval to the licence provided that the Petitioner carried out certain constructural alterations in the premises. It further appears that the Town Planning Authority refused to grant the building permit in connection therewith. As a result, the application for the licence was refused.

The Petitioner appears to base his objections on three grounds:—

(a) That in fact it was the Town Planning Commission who refused the application, and that they had no power to do so. The only Departments concerned being the Police Department and the Department of Health *vide* Section 6 of the Trade and Industries Regulations. I do not think that there is any merit in this ground. It was the Health Department that refused the application as evidenced by Exhibits A and C. It is true that their refusal was based upon the refusal of the Town Planning Authority to grant a permit for the necessary alterations, but clearly it would be absurd for the Health Department to grant a licence if the required alterations were done without obtaining the necessary permit.

The next ground is that the Respondent did not notify the Petitioner the reasons for its refusal. The answer to this objection appears to be twofold — (1) the petition before us does not request us to order the Respondent to give the reasons for his refusal, but to issue the licence, (2) it is quite clear from the documents that actually the Petitioner was fully aware of the reasons for the refusal of the application.

The final objection is that as the Police approved the application, but the Health Department refused it, then in accordance with section 7(2) of the aforesaid Ordinance, the Commission had to refer the application to the High Commissioner. Here again the Petitioner makes no prayer for such an order, he limits himself to requesting us to order the Commission to issue the licence. Apart therefrom I think the only reasonable interpretation of section 7(2) is that a reference has to be

made to the High Commissioner where there is a difference of opinion between the two departments upon one and the same fact or condition and not merely where the Police say that they have no objection, clearly from a security point of view, to the granting of the licence, and the Health Department require certain conditions to be complied with from a health point of view, before approving. If the Police were to say that they considered any alterations unnecessary, then of course there would be a clear difference of opinion between the two departments and the matter would have to be referred to the High Commissioner.

For these reasons the order *nisi* must be discharged.

Given this 19th day of October, 1945, in the presence of Atallah for Petitioner, and in the presence of Saba Said for Respondents.

A/British Puisne Judge.

CIVIL APPEAL No. 135/45.

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

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

IN THE APPEAL OF:—

Siegmund Levy & an. — APPELLANTS.

v.

Dave Heller. — RESPONDENT.

Arbitration — Error of law upon the face of the award — Interpretation of submission — Frustration — Estoppel.

Appeal from the judgment of the District Court, Jerusalem, (dated the 6th February, 1945, in Civil Case No. 33/44 (Motion No. 137/44), dismissed:—

An arbitrator is not entitled, in construing an agreement, to make a fresh bargain between the parties.

(*A. M. A.*)

ANNOTATIONS: See the judgment of the District Court in 1945, S. C. D. C. 22 and the notes thereto; *cf.* C. D. C. T. A. 33/44 (*ibid.*, p. 528) and notes.

(*H. K.*)

FOR APPELLANTS: Smoira.

FOR RESPONDENT: Hausner and Caspi.

JUDGMENT.

Shaw, J.: I do not consider it to be necessary to call upon Mr. Hausner for the Respondent to reply.

This is an appeal against the judgment dated 6.2.45 of the learned Relieving President District Court, Jerusalem, in Motion No. 137/44 (Civil Case No. 33/44) whereby the award given by Dr. Joseph Frank in the arbitration proceedings between the parties dated 16th February, 1944, ordering Respondent to pay to Appellants LP. 1,160.790 plus 6% interest as from the 16th February, 1944, was set aside and the petition to enforce the award which by consent was consolidated with the application attacking the award, was dismissed with costs and advocate's fees. Leave to appeal was granted by the District Court on the 7th March, 1945. (Motion No. 57/45).

Several grounds of appeal have been put forward but the chief of these are that the learned Relieving President erred in holding that there was an error of law upon the face of the award, that the contract made between the parties on 13.8.41 had been frustrated and terminated by frustration, and that the Arbitrator had no power to make the award of 16.2.44. And further, that the learned Relieving President failed to observe that the Respondent was estopped from questioning the powers of the arbitrator.

Issue No. 1 before the arbitrator reads as follows:—

> "Whether there was a binding agreement between the parties that in the house bought by the parties only a café should be built and run either by the parties or somebody else".

When dealing with this issue the arbitrator stated:—

> "There cannot be the slightest doubt that when buying the house the parties intended to complete it as a coffee-house and to run there, either themselves or by others, a coffee-house".

This finding by the arbitrator is not disputed by Dr. Smoira who has appeared for the Appellants.

Issue No. 2 reads as follows:—

> "If case No. 1 is proved, are there special circumstances which entitle Mr. and Mrs. Levy to rescind such agreement?".

When dealing with this issue the learned arbitrator wrote:—

> "It may be said that had the parties known when buying the house that it would be impossible to complete it as a coffee-house, they would surely not have entered into the contract".

It later appeared that there was no possibility of using the premises as a coffee-house and the arbitrator held that under the powers given to him by the arbitration clause every party was entitled in spite of the former intention to ask for a change in the use of the house.

The arbitrator said:—

> "When interpreting the contract I have to ask myself what would normal parties do with the house if it turned out to be impossible

> for reasons outside their control, to complete it as a coffee-house and to use it as such. I find that in such circumstances they had to try to complete it for some other purpose allowed in order to be able to have some benefit of it".

Clause 8 of the contract dated 13.8.44 is the clause from the provisions of which the arbitrator derives his powers. That clause reads as follows:—

> "Any dispute which may arise between the parties and originating directly or indirectly from this contract and in particular the matters regarding the administration and supervision of the house, as provided for in the preceding clause, shall be referred to the absolute decision of Dr. Joseph Frank, advocate, as single arbitrator.
>
> Dr. Frank, as single arbitrator, shall have power to construe, amend and improve this agreement wholly or partly. The arbitrator shall have power to issue definite instructions to all the parties or to each of them separately and the parties hereby undertake, jointly and severally, to comply with these instructions.
>
> The arbitrator shall also have power to decide as to the measures which will have to be adopted against a party who will disobey his instructions.
>
> The arbitrator shall make his award in conformity with the Arbitration Ordinance, 1926, and all the rules and amendments made thereunder".

The position as I see it is this. The written contract has not failed so far as the purchase of the premises goes. The parties are joint owners of the premises. But the verbal agreement to complete the building for use as a coffee-house has been completely frustrated. I am unable to find that Clause 8 of the contract gives the arbitrator any authority to make a fresh agreement between the parties in regard to the use to be made of the premises, and to force that fresh agreement on one of the parties who does not want it. When the parties entered into the agreement they did not contemplate that they will not be able to construct the building for use as a coffee-house, so they cannot be held to have intended to give the arbitrator authority to order the construction of the building for an entirely different purpose.

What the learned arbitrator has done is to make a new contract with regard to the construction and use of the building. In my judgment he had no authority to do this. His authority is limited to construing, amending and improving the original agreement, and that original agreement was to complete the building for use as a coffee-house and not for any other purpose. I am unable to see how the parties could have intended something which, in fact, they never had in view at all. The purpose for which the parties intended to complete the building having failed through no fault of either party, they were thrown back into

the position of being joint owners, and it was for them, if they so wished, to agree upon some new method of utilising their property.

With regard to the question of estoppel, I am unable to find any merit in Dr. Smoira's submissions. The arbitrator derives his powers from Clause 8 of the agreement and not from the issues which were agreed between the parties prior to the hearing before the arbitrator. Those issues do not extend his powers.

In the result I find that this appeal fails and that it must be dismissed with costs on the lower scale to include an advocate's fee of LP. 10 (ten pounds) for attendance at the hearing.

Delivered in open Court this 28th day of November, 1945, in the presence of Dr. Smoira for Appellants and Mr. O. Hausner for Respondent.

British Puisne Judge.

Curry, A/J.: I concur.

A/British Puisne Judge.

CRIMINAL APPEAL No. 181/45.

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

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

IN THE APPEAL OF :—

Baruch Forshtat. APPELLANT.

v.

The Attorney General. RESPONDENT.

Town Planning — Prosecution under sec. 35(1) *— Demolition — Evidence.*

Appeal from the judgment of the District Court Tel-Aviv, in its appellate capacity in Criminal Appeal No. 64/45, delivered on the 23rd of July, 1945, whereby the appeal by the Attorney General against the judgment of the learned Chief Magistrate, Tel-Aviv, in Criminal Case No. 744/43 has been allowed and the case has been remitted to the Court of trial for the purpose of hearing evidence; appeal allowed and Magistrate's judgment restored:—

If the Magistrate is satisfied, by his own inspection, that demolition should not be ordered, he may order accordingly without hearing any evidence, unless invited by the prosecution to do so.'

(A. M. A.)

ANNOTATIONS: On demolition under the Town Planning Ordinance and "good

cause" why it should not be ordered see also CR. A. 11/43 (10, P. L. R. 93; 1943, A. L. R. 97); *cf.* CR. A. D. C. Jm. 11/44 (1944, S. C. D. C. 199) and CR. A. D. C. T. A. 86/44 (*ibid.*, p. 356).

(*H. K.*)

FOR APPELLANT: Hake.

FOR RESPONDENT: Olshanski.

JUDGMENT.

This is an appeal from the learned Relieving President of the District Court of Tel-Aviv, sitting on appeal from the Chief Magistrate.

Counsel for the prosecution has told us that this is a very important case with serious implications in regard to town planning in the future. We are fully alive to the importance of giving every possible assistance to the Town Planning Authorities, but we feel that it is an exaggeration to say that this case is important in the sense that it may establish any embarrassing precedent. It is advisable therefore, to set out the facts: A person was prosecuted under section 35(1) of the Town Planning Ordinance. He pleaded guilty, but it is obvious from the record that he reserved his plea in regard to the further question of the demolition of the erection. At this stage the Town Planning Authorities and the Defendant agreed that the Chief Magistrate should go and inspect the erection. This he did. As a result of the inspection he was satisfied that good cause had been shown within the meaning of paragraph 2 of sub-paragraph 1 of the section, why the order for demolition should not be made. Counsel for the Town Planning Authorities has maintained that there was no proper investigation by the Chief Magistrate, because he had not called sworn evidence. Now, it is not for the Magistrate to advise either side in a contested issue as to what evidence they shall or shall not call. In this case the Defendant, in support of his contention, submitted the building for inspection. It was open to the Town Planning Authorities, if they so wished, to tender any further evidence to controvert the impression that might be left by the inspection. Had they done so and had the learned Magistrate refused to hear that evidence, we might have held that he could not have been satisfied that the good cause, which is a condition precedent to the exercise of his discretion under the paragraph, had been shown. But there is no reason why questions of law or fact should necessarily always be determined, as counsel for the Respondent here seems to suggest, by sworn evidence. For instance, there are many cases where the production of a map might satisfy the Court as to the location of a place, and we can well imagine that in town planning cases the production

of a model of a building might be far more effective in convincing a judge as to the true state of facts, on his own inspection, might be open to question. But in this case the Magistrate was apparently satisfied by his own inspection that good cause had been shown. No further evidence was tendered by the Town Planning Authorities to remove the impression left on the Magistrate's mind by the inspection; and we are of the opinion that in these circumstances he was entitled to decide the issue of good cause in the manner in which he did.

For these reasons the appeal must be allowed and the judgment of the Magistrate's Court restored. No costs.

Delivered this 22nd day of November, 1945.

Chief Justice.

CIVIL APPEAL No. 48/45.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Shaw, J.

IN THE APPEAL OF:—

Muhammad Ramadan Himmo. APPELLANT.

v.

Municipal Corporation of Jaffa. RESPONDENT.

Municipal rates — Statute barred actions under sec. 115 *Municipal Corporations Ord. — Costs — Secs.* 102(1)(*a*), *and* 104, *occupied and unoccupied land — Orange grove — Objection under sec.* 110.

Appeal from the judgment of the District Court of Jaffa, sitting in its appellate capacity, in C. A. 58/44, dismissed:—

1. An orange grove is "occupied land" for the purpose of rating.
2. The rate is due if no objection is made as provided in sec. 110.

ANNOTATIONS: See Stroud's Judicial Dictionary, 2nd ed., pp. 1310 *et seq.*, for authorities on the meaning of "occupation", and (p. 1314) "occupied".

(*H. K.*)

FOR APPELLANT: Azar.

FOR RESPONDENT: Homsi.

JUDGMENT.

This is an appeal by leave from the judgment dated 29.10.44 of the District Court, Jaffa, in Civil Appeal No. 58/44.

Three grounds of appeal have been stated. The first ground raises

the point whether the parcels in question fall within the boundaries of the Municipal Corporation of Jaffa. When he stated his case in the Magistrate's Court on 8.11.43 the Appellant's attorney told the Court that the dispute was not whether the properties in question were within the municipal boundaries or not, but whether rates could legally be levied upon them. In view of that statement the Appellant cannot now raise this point.

With regard to the third ground of appeal I find that the action is not barred by reason of the fact that notice under section 115 of the Municipal Corporations Ordinance (No. 1/1934) was not served until 1943. If the action had been brought before service of a notice, and if the Appellant had paid the amount claimed into Court when he filed his statement of defence, the Respondent would doubtless have been unable to recover his costs of the action.

With regard to the second ground of appeal it appears that the claim was one under section 102(1)(a) of the Ordinance in respect of the municipal property rate of 2% on the rateable value of the property, and the notice did not specify whether the property was "occupied land" or "unoccupied land". The rate in either case would be 2%, but of course the amount would depend upon the rateable value which is determined as shown in section 104.

There has been a good deal of argument as to whether an orange-grove is "occupied land" or "unoccupied land". Having considered these arguments I have come to the conclusion that it is "occupied land" for the purpose of the section 110. In my judgment the maintenance of orange trees on the land constitutes a use and occupation of it.

The Appellant told the Magistrate's Court that the first time that he had objected was in 1943. If I had found that the land was neither "occupied land" nor "unoccupied land" I would have felt bound to allow this appeal, but as I have held that it is "occupied land" I find that this appeal fails because the Appellant made no objection under the provisions of section 110. He ought to have filed an objection as provided in that section. Having failed to do so he must pay the rate. His remedy, if he does not want to continue paying it, is to file an objection at the proper time, asking for a rectification of the list.

In the result the appeal is dismissed with fixed costs in the sum of LP. 10.

Delivered this 28th day of September, 1945.

British Puisne Judge.

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NOTE.

Owing to paper restrictions some of the judgments delivered during 1945 could not be included in this volume and had to be held over for publication in A. L. R. 1946. The reference numbers of these cases have, however, been included in the Numerical List where the respective page numbers in the 1946 volume are given.

(*Ed.*)

ADDENDA & CORRIGENDA

Page 13, *first line of annotations, read*: "On the power of the Court to dispense" *instead of* "On dispense";

15, *Note*: The judgment of the District Court is reported in 1944, S. C. D. C. 531;

31, *second line of annotation* 2, *read*: "1944, A. L. R. 273" *instead of* " ... 272";

51, *Note*: The appeal itself is reported at p. 433, *post;*

75, *Note*: Further proceedings in this case: P. C. L. A. 17/44 (*post*, p. 190);

81, *second line of headnote, read*: "Cure of" *instead of* "Case of";

91, *line* 4, *read*: "to be legal" *instead of* "to en legal";

117, *line* 13, *read*: "January, 1945" *instead of* "December, 1944";

143, *line* 8, *read*: "revoked" *instead of* "reached"; *second line of annotation* 3, *read* "resorted" *instead of* "restored";

145, *Note*: Further proceedings in this case: P. C. L. A. 22/44 (*post*, p. 375);

166, *Note*: Further proceedings in this case: C. D. C. T. A. 238/44 (1945, S. C. D. C. 96);

168, *Note*: Further proceedings in this case: P. C. L. A. 23/44 (*post*, p. 601);

171, *Note*: A preliminary ruling in this case is reported *post*, p. 437;

174, *Counsel for Respondent, read*: "Rosenthal" *instead of* "Rosenfeld";

178, *Note*: Previous proceedings in this case: C. D. C. T. A. 99/43 (1944, S. C. D. C. 93);

188, *line* 12, *read* "Haifa" *instead of* "Tel-Aviv";

Note: The appeal itself is reported *post*, p. 505;

190, *Note*: The judgment which it was sought to appeal is reported *ante*, p. 75;

199, *line* 6, *read*: "January, 1945" *instead of* "December, 1944";

200, *Note*: Further proceedings in this case: H. C. 58/45 (*post*, p. 638);

202, *Add* "and C. A. 6/45 (*post*, p. 335)" *at the end of annotation* 3;

228, *Note*: Further proceedings in this case: P. C. L. A. 14/45 (1946, A. L. R. 344);

237, *Note*: Further proceedings in this liquidation: C. A. 36/45 (*post*, p. 328), C. A. 211/45 (*post*, p. 538) and C. A. 262/45 (*post*, p. 783);

285, *Note*: Further proceedings in this case: P. C. L. A. 25/44 (*post*, p. 486);

Page 322, *Note*: Further proceedings in this case: P. C. L. A. 12/45 (*post*, p. 537);

328, *Note*: See the note to p. 237, *supra;*

383, *Note*: Further proceedings in this appeal are reported at p. 776, *post;*

393, *The words* "as the date of payment" *should be deleted in line* 15 *and inserted after the word* "conversion" *in line* 16;

412, *Headnote* 4, *read* "Discussion" *instead of* "Dismission";

430, *Note*: Other proceedings in this case: C. A. D. C. T. A. 98/43 (1944, S. C. D. C. 108), quashed in C. A. 110—116/44 (1944, A. L. R. 576), P. C. L. A. 15/45 (*post*, p. 515), P. C. L. A. 20—28/45 (*post*, p. 760), C. A. 16—24/45 (*post*, p. 628), P. C. L. A. 44—52/45 (1946, A. L. R. 230), C. A. 289—291/44 (1946, A. L. R. 200) and L. C. T. A. 16/43 (1946, S. C. D. C. 151);

433, *Note*: Previous proceedings in this appeal are reported at p. 51, *ante;*

468, *Names of parties, read*: "J. Aleco *v.* L. Aleco" *instead of* "A. *v.* B.";

507, *Note*: Further proceedings in this case: H. C. 67/45 (1946, A. L. R. 109);

515, *Note*: The judgment which it is sought to appeal is reported at p. 430, *ante;* see further P. C. L. A. 20—28/45 (*post*, p. 760) and, for other proceedings in this litigation, see the note to p. 430, *supra*;

538, *Note*: See the note to p. 237, *supra;*

546, *insert* "not" *between* "will" *and* "interfere" in the first line of headnote 1;

593, *Note*: The appeal itself is reported at p. 607, *post;*

628, *Note*: Annotation 1 should be completed in accordance with the note to p. 430, *supra*;

684, *Note*: The judgment of the District Court is reported in 1945, S. C. D. C. 234;

741, *Annotation* 4, *cross out* "11, P. L. R. 226" *and* "in A. L. R." *at the end of lines* 1 & 2, *respectively*;

Note: The application was later granted by consent by the High Court: H. C. 52/45 (*post*, p. 779);

761, Annotation 1 should be completed in accordance with the note to p. 430, *supra*;

773, *Note*: The judgment of the District Court is reported in 1945, S. C. D. C. 380;

780, A previous application to the Chief Justice was refused: Misc. Appl. 28/45 (*ante*, p. 741).

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