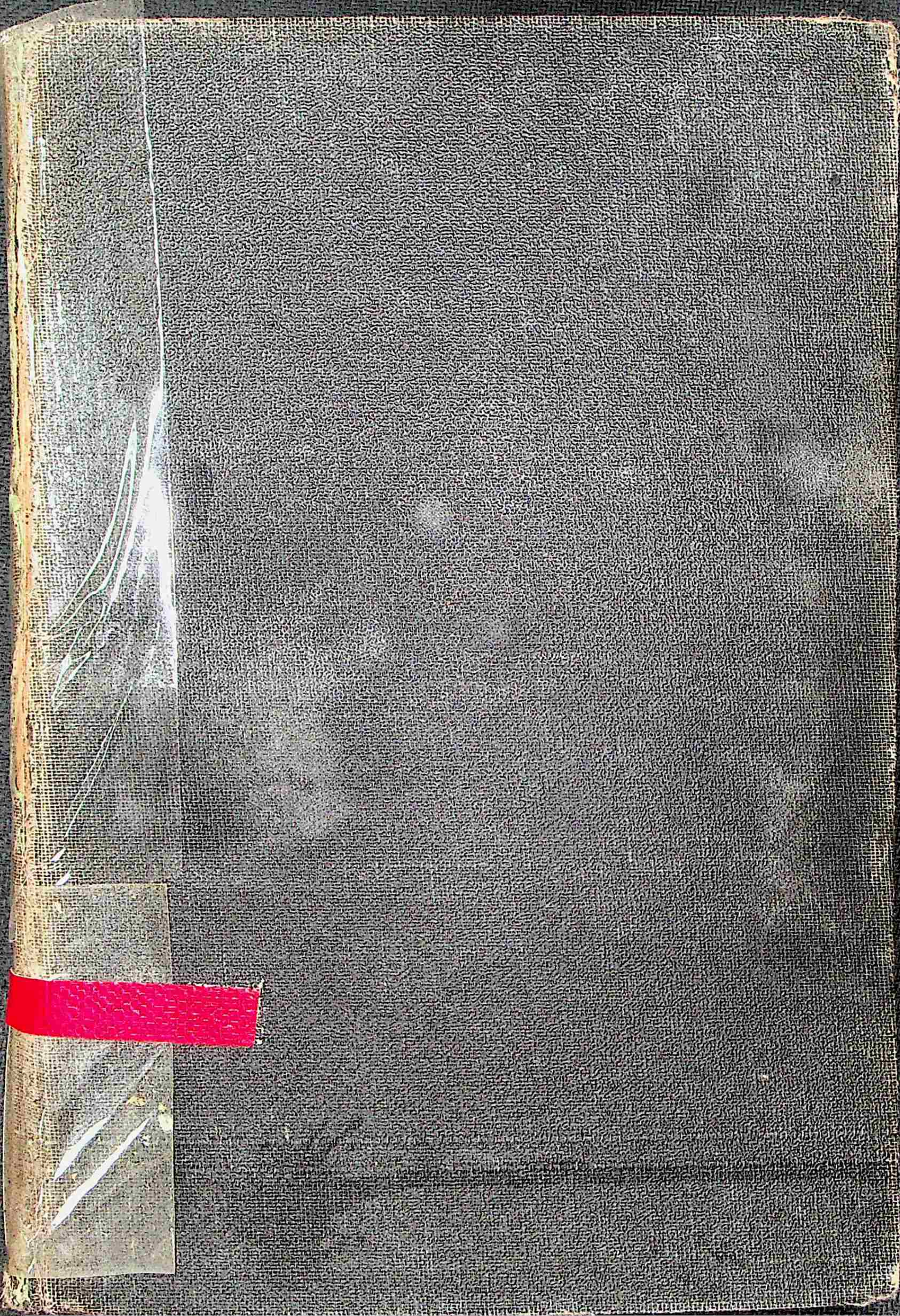

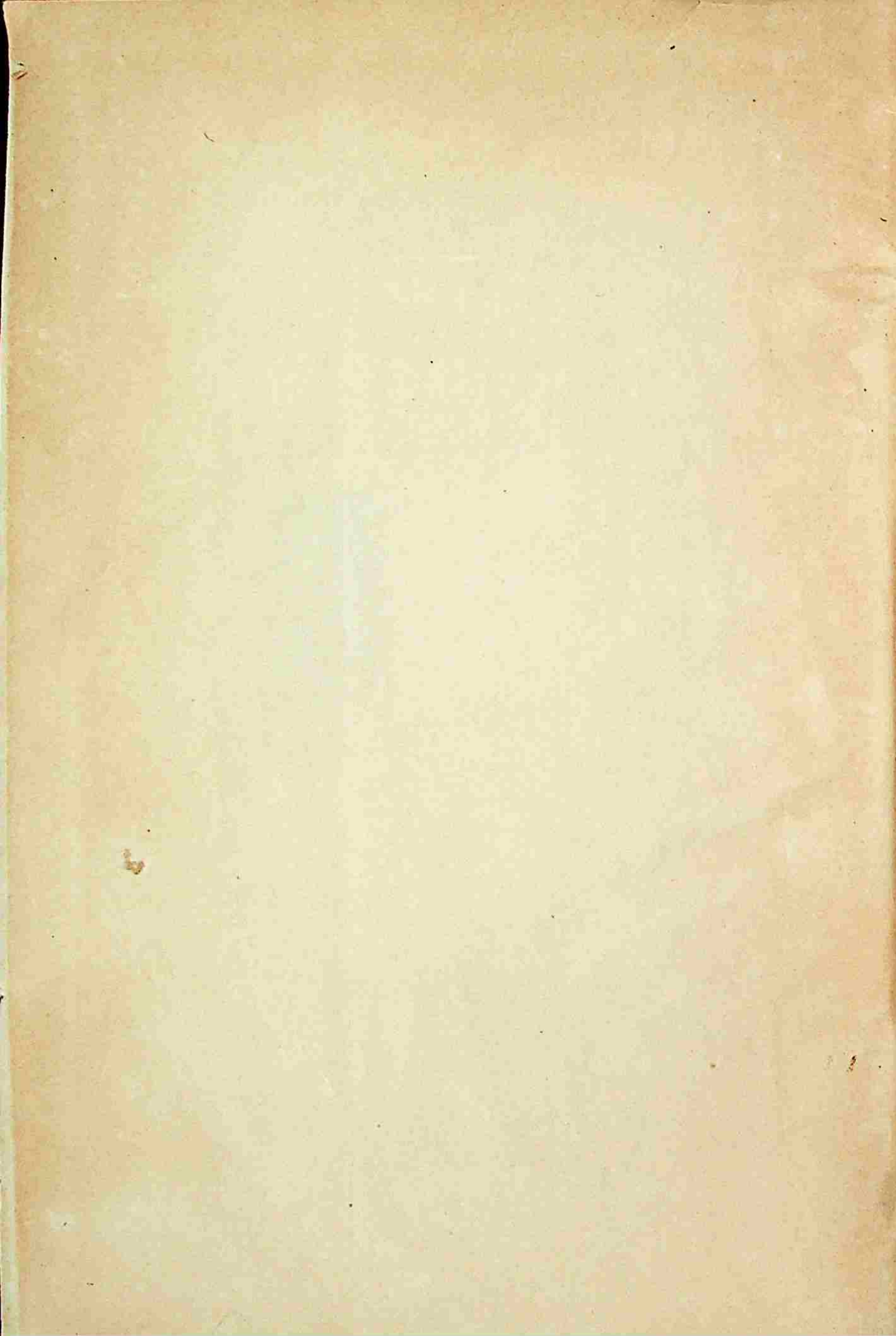

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ANNOTATED

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PRIVY COUNCIL APPEAL No. 66/43.

IN THE PRIVY COUNCIL SITTING AS A COURT OF APPEAL FROM THE SUPREME COURT OF PALESTINE.

BEFORE: Viscount Maugham, Lord Thankerton and Sir Madhavan Nair.

IN THE APPEAL OF :—

Adel Muhammad El Dabbah. APPELLANT.

v.

The Attorney General of Palestine. RESPONDENT.

Composition of Criminal Assize Court — Chief Justice's discretion under Defence (Judicial) Regulations, 1942 — Alterations in judgment as orally delivered — Prosecution tendering witnesses for cross-examination.

Appeal from the judgment of the Supreme Court, sitting as a Court of Criminal Appeal, dated 17.4.1943, in CR. A. 39/43, dismissed:—

1. Discretion conferred on Chief Justice by regulation 3, Defence (Judicial) Regulations involves no delegation of High Commissioner's powers, but is an executive discretion necessary to the carrying out of High Commissioner's conclusions.

2. a) Direction by Chief Justice under regulation 3, Defence (Judicial) Regulations — not a regulation or order within meaning of sec. 7, Interpretation Ordinance and need not be published in *Gazette*.
b) There is no provision for form of such direction; approval by Chief Justice of Cause List of Supreme Court showing constitution of Court to try the cases fixed for hearing is a proper method for Chief Justice exercising the discretion vested in him.

3. If Court in oral judgment by obvious mistake referred to evidence of a witness which was not given before them omitting such reference in judgment finally issued, this will not affect the judgment, if there was sufficient evidence to support the conclusion arrived at by Court.

4. It should be a general procedure of prosecutor, yet it remains a matter of his discretion, to tender for cross-examination by accused the witnesses mentioned on back of indictment but not called by prosecution; witnesses so tendered are made accused's own witnesses.

(*M. L.*)

REFERRED TO: R. *v.* Woodhead (1847), 2 Car. & Kir. 520; 14 Digest 274, 2841; R. *v.* Cassidy (1858), 1 F. & F. 79; 14 Digest 274, 2842; R. *v.* Nicholson (1937), unreported; R. *v.* Dora Harris, (1927) 2 K. B. 587; Digest Supp.; 96 L. J. K. B. 1069; 137 L. T. 535.

ANNOTATIONS :

1. The judgment appealed from is CR. A. 39/43 (10, P. L. R. 212; 1943, A. L. R. 357).
2. On point 3 see annotation to CR. A. 39/43 (*supra*) in A. L. R.
3. On calling witnesses mentioned on back of indictment see Halsbury, Vol.

9, p. 164 and English and Empire Digest, Vol. 14, pp. 274—275 and cases referred to.

4. This case is referred to and discussed in CR. A. 97/44 (reported *infra*) and see annotations to that judgment.

5. This judgment is also reported in 1944, All E. R. Vol. II, p. 139.

6. On constitution of Courts under Defence (Judicial) Reg. see CR. A. 34/43 (1943, A. L. R. p. 384) and annotations.

(*A. G.*)

FOR APPELLANT: G. Beyfus, K. C. & J. Bassett.

FOR RESPONDENT: Solicitor General — (Sir D. Maxwell-Fyfe, K. C.) & K. Preedy.

JUDGMENT.

Lord Thankerton: On the 24th March, 1943, the Chief Justice of Palestine, sitting alone as the Court of Criminal Assize at Haifa, convicted the Appellant of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced him to death. An appeal by the Appellant was dismissed on the 17th April, 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal, and the Appellant, by special leave, now appeals against that judgment.

Mr. Beyfus, in his full and able argument on behalf of the Appellant, conveniently submitted his contentions under two heads, *viz.*, those which challenged the constitution of the Court of Criminal Assize by which the Appellant was tried, and those which alleged grave impropriety in the course of the trial.

As regards the constitution of the trial Court, the Chief Justice sat alone by virtue of regulation No. 3 of the Palestine Defence (Judicial) Regulations (No. 2), 1942, which provided as follows:—

> "3. Whenever the Chief Justice considers it expedient so to do he may, either generally or for the hearing of any particular case, direct that the Court of Criminal Assize shall consist of the Chief Justice or a British Puisne Judge, sitting alone, or with any one or more judge or judges of the Supreme Court, or with a president, or relieving president, or any one or more Palestinian judge or judges of the District Court".

At the date of making these regulations, the constitution of the Court of Criminal Assize was prescribed by section 10 of the Courts Ordinance, 1940 (No. 31 of 1940), under which, in the absence of any application by the accused, such Court must consist of three judges. No such application was made by the present Appellant.

Mr. Beyfus submitted that the Court of Criminal Assize was not validly constituted on three grounds, *viz.*, (a) that regulation No. 3 already referred to, which was made by the High Commissioner under

the powers vested in him by Article 3 of the Emergency Powers (Colonial Defence) Order in Council, 1939, and the Emergency Powers (Defence) Act, 1939, was not within the powers thus vested in him, and was, therefore, *ultra vires* of the High Commissioner; (b) that, assuming that regulation No. 3 was *intra vires* of the High Commissioner any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case; and (c) that, in any event, such a direction was an order within the meaning of section 7 of the Palestine Interpretation Ordinance, 1933 (No. 69 of 1933), which was applied to the Defence (Judicial) Regulations, 1942, by regulation No. 9 thereof, and which required publication in the *Gazette* before such an order could have the force of law. These submissions were raised for the first time before this Board.

(a) It is unnecessary to refer to the Order in Council of 1939 in detail; it is sufficient to state that its effect was to extend the Emergency Powers (Defence) Act, 1939, to Palestine, and, for present purposes, that the parts of section 1 of the Act which are material may be read as originally enacted, with the substitution of the High Commissioner for His Majesty in Council. The material parts of section 1 are as follows:—

> "1. (1) Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as 'Defence Regulations') as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community".
>
> "(2) ... ..."
>
> "(3) Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and bye laws for any of the purposes for which such Regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the Regulations".
>
> "(4) A Defence Regulation, and any order, rule or bye law duly made in pursuance of such a Regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act".

Counsel maintained that the discretion conferred on the Chief Justice by regulation No. 3 involved a delegation of his powers by the High Commissioner which was not authorised by subsection 3 of section 1 of

the Act of 1939, which only authorised a delegation in general terms of the High Commissioner's power to make regulations under subsections 1 and 2 of section 1, and that, therefore, the attempted delegation in regulation No. 3 was *ultra vires* of the High Commissioner. Counsel also maintained that the right conferred on an accused to be tried by a Court of three by the Courts Ordinance of 1940 could not be modified or abrogated by any such regulation made by the High Commissioner, and that, in any event, the intention to modify or abrogate such a right must be made clear beyond any doubt in the regulations.

Their Lordships are unable to accept any of these contentions. In their opinion, it is clear that the High Commissioner satisfied himself that these regulations were necessary or expedient for the purposes stated in sub-section 1 of section 1 of the Act of 1939, and, *inter alia,* that a flexibility in the constitution of the courts of criminal assize was necessary or expedient. It was rightly admitted by counsel for the Appellant that he was not able to challenge the validity of the High Commissioner's conclusions. Their Lordships are of opinion that the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers, but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions. Accordingly no question can arise under subsection 3 of section 1 of the Act. As regards the other contentions as to modification or abrogation of the Appellant's right to a court of three under the Courts Ordinance of 1940, regulation No. 3 of 1942 is clearly inconsistent with it, and, by virtue of subsection 4 of section 1 of the Act, the regulation must prevail. The suggestion made by counsel that the Appellant's right was not modified or affected until the Chief Justice exercised his discretion is fallacious; it was modified by the regulation as soon as it came into operation.

(b) Regulation No. 3 of 1942 makes no provision for the form which the direction by the Chief Justice is to take. In the present case the constitution of the Court which was to try the Appellant was prescribed in the Cause List of the Supreme Court of Palestine for the week ending Saturday, 20th March, 1943, which had been approved by the Chief Justice prior to Monday, 15th March, 1943. Their Lordships can see no ground for suggesting that this course for fixing the constitution of the Court which was to try the Appellant, and which is obviously the usual method of administering the business of the Court, was not a proper method by which the Chief Justice should exercise the discretion vested in him.

(c) Section 7 of the Interpretation Ordinance, 1933, so far as material, provides as follows:—

"7. Where an Ordinance confers power on any authority to make regulations or orders, the following provisions shall have effect with reference to the making and operation of such regulations or orders —

... ...

(d) all regulations and orders, save where otherwise provided, shall be published in the *Gazette* and shall have the force of law upon such publication thereof or from the date named therein".

It follows from the views already expressed by their Lordships that the direction by the Chief Justice under regulation No. 3 of 1942 is not a regulation or order within the meaning of the above section, and that there was no need to publish it in the *Gazette*.

Their Lordships now turn to the second group of contentions raised on behalf of the Appellant, which relate to the course of the trial, and are as follows: — (a) That the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him; (b) that there was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of sections 214 and 216 of the Palestine Criminal Code Ordinance, 1936, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon; and (c) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the Appellant's right to a fair trial.

(a) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on the 17th April, 1943, which the learned Judge now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the Appellant founds upon, is admitted by the learned Judge in his statement, *viz.*, the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his deposition at the preliminary enquiries, and which mention was omitted in the judgment finally

issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villages but also between the families of the deceased and the Appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the learned Judge.

(b). The Appellant was charged under section 214(b) of the Criminal Code Ordinance as having "with premeditation" caused the death of the deceased, and section 216 provides as follows:—

> "216. For the purpose of section 214 of this Code a person is deemed to have killed another person with premeditation when:— (a) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and
>
> (b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions, and
>
> (c) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed.
>
> In order to prove premeditation it shall not be necessary to show that an accused person was in any state of mind for any particular period or within any particular period before the actual commission of the crime, or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime".

Under this section the three essential ingredients are cumulative and while Mr. Beyfus admitted that there was sufficient evidence to justify a finding under (b) and (c), he submitted that there was no sufficient evidence to justify a finding under (a), and that, subject to his next contention, the learned Judge misdirected himself, and the conviction under section 214 could not be supported. It will seldom be found that there is direct evidence of a resolution to kill; such resolution will more often rest on legitimate inferences from the proved circumstances and the conduct of the accused, and, in the opinion of their Lordships, the circumstances proved in the present case and the conduct of the Accused, along with the two others who accompanied him, but whose identity has not been proved, afford ample ground for a finding that the Appellant resolved to kill the deceased.

The Court of Criminal Appeal, holding, in effect, that the Chief

Justice had pronounced no finding as to premeditation, and forming an independent view of their own upon the evidence, stated, "it is quite clear to our minds that the irresistible inference — the only inference possible from the facts of this case — is that this killing was done with premeditation." While not accepting their criticism upon the judgment of the Chief Justice, their Lordships are unable to come to any different conclusion upon the facts, which are summarised by the Court of Criminal Appeal as follows: — "That the three armed men were seen proceeding from north to south at varying distances up to a maximum of a hundred metres from the house of the deceased; that shots were fired by those armed men into the doorway of the house of the deceased; that the deceased was found lying eighteen metres from his doorway with two shots in the back; that the three armed men were seen immediately after the shots had been heard proceeding together from south to north over the road by which they had approached the scene; that there is no evidence and no suggestion that there was any provocation or quarrel; and that it was night time". On the question of common design, they state, "Three men armed going to the scene of the crime, all returning from the scene together, all three actually shooting into the doorway of the house of the man who was eventually killed, two cartridges found showing that two shots had been fired two and a half and four metres from the place where the body of the deceased was found. From these facts it seems to this Court that common design is proved beyond a shadow of a doubt, and that no other conclusion is possible". It is also well to bear in mind the conclusions of the Court of Criminal Appeal as to proof of enmity between the Appellant and the deceased and between their families, which have been already referred to. This evidence of enmity was also treated by the learned Chief Justice as relevant to the question of premeditation. It may be added that the Appellant himself admitted that there were broken relations between the deceased and himself.

The Appellant's counsel submitted that, in any event, the Chief Justice had neither considered, nor made any finding on, premeditation, and the Court of Criminal Appeal would appear to have accepted this critizism to some extent. In their Lordships' opinion, the learned Judges did not pay sufficient attention to the clear and express language of the Chief Justice. The form of his judgment was provided for by section 51 of the Criminal Procedure (Trial Upon Information) Ordinance, 1933, which provides:—

> "51. Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction is based:—

> Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case".

It is only necessary to make a short quotation from the judgment of the learned Chief Justice:—

> "It is not necessary for the prosecution to prove a motive for a murder, but it does explain what otherwise might be unexplainable. In this case it explains the shooting in cold blood of the deceased, and it was a premeditated murder.
>
> I, therefore, find that Adel, Accused No. 1, was one of the three men who took part in this murder, and I, therefore, find him guilty of murder as charged, ... Adel Muhammad el Dabbah, as I said a few moments ago, this is a cold-blooded premeditated murder, of which I find you guilty".

The Court of Criminal Appeal does not pay attention to these findings as to premeditation, which expressly formed part of the charge, and one could not easily assume even apart from his express reference thereto — that the learned Chief Justice had not considered this outstanding element in the law of murder in Palestine.

(c) The last contention of the Appellant is that the Accused had a right to have the witnesses, whose names were upon the information, but were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence, at the close of the case for the prosecution. The learned Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses, and that they could not say that the learned Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence may cross-examine them if they so wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all Courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses and, therefore, this contention of the present Appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognises that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such suggestion is made in the present case.

It will be sufficient to go back to the judgment of Baron Alderson in R. *v.* Woodhead (1847), 2 Car. & K. 520, in which he said, "You are aware, I presume, of the rule which the Judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled. He might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in Court, but they are to be called by the party who wants their evidence. This is the only sensible rule". In reply to the counsel for the prisoner who asked if he was to understand that if he called them he would make them his own witnesses, Baron Alderson said, "Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought to give evidence to show them unworthy of credit, however falsely the witnesses might have deposed". In a later case — R. *v.* Cassidy (1858), I F. & F. 79 — Baron Parke stated the correct principle to be "that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury, whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them. He would, therefore, follow the course said to have been pursued by Campbell, C. J., who ruled that the prosecutor was not bound to call such a witness and that if the prisoner did so, the witnesses should be considered as his own. Cresswell, J., who was consulted by Baron Parke, agreed with this view.

It is consistent with the discretion of counsel for the prosecutor, which is thus recognised, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this practice has probably become even more general in recent years, and rightly so — but it remains a matter for the discretion of the prosecutor.

Archbold in the 31st edition of 1943, contains a list of a series of decisions, but in none of these has the Court superseded the prosecutor's discretion. The most recent of these was an unreported case of R. *v.* Nicholson, at the Nottingham Assize in 1937, where Hawke, J., declined to force the prosecution to call a witness whom they regarded as unnecessary. Reference should also be made to an interlocutory re-

mark by Hewart, C. J., in R. *v.* Dora Harris (1927) 2 K. B. 587, at p. 590, to the effect that "in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury". In their Lordships' view, the learned Judge could not have intended to negative the long established right of the prosecutor to exercise his discretion to determine who the material witnesses are. It may be noted that under section 41 of the Criminal Procedure (Trial Upon Information) Ordinance, 1933, already referred to, the Court has the right, of its own motion, to call upon persons to give evidence.

This last contention of the Appellant, therefore, also fails, and, on the whole matter, their Lordships are of opinion that the appeal should be dismissed, and the judgment of the Court of Criminal Appeal should be affirmed, and their Lordships will advise His Majesty accordingly.

Delivered this 18th day of May, 1944.

CIVIL APPEAL No. 370/43.

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

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

IN THE APPEAL OF:—

Nazha Abdel Jaber Amer & 2 ors. APPELLANTS.

v.

Zahran Farah Abdel Jaber Amer. RESPONDENT.

Possession of land by co-heir — Rebuttal of legal presumption — Court of Appeal upsetting finding of fact unwarranted by evidence.

Appeal from the judgment of the Magistrate's Court of Ramallah, sitting as a Land Court, dated the 28th October, 1943, in Civil Case No. 134/43, allowed:—

1. Land Law (Amendment) Ordinance, 1933, has no retroactive effect.

2. a) In absence of rebutting evidence presumption prevails that co-heir occupying land devolved from common ancestor does so also on behalf of other co-heirs.

b) If Court of Appeal finds there was no evidence sufficient to justify conclusion that said presumption was rebutted they may upset trial Court's finding and reverse its judgment.

(*M. L.*)

REFERRED TO: C. A. 8/40 (7, P. L. R. 76; 8, Ct. L. R. 198; 1940, S. C. J. 84); C. A. 197/41 (8, P. L. R. 499; 10, Ct. L. R. 205; 1941, S. C. J. 458);

L. A. 66/28 (1, P. L. R. 356; 3, C. of J. 958); L. A. 36/30 (1, P. L. R. 630; 3, C. of J. 959); C. A. 288/42 (10, P. L. R. 317; 1943, A. L. R. 477); L. A. 128/23 (1, C. of J. 276); C. A. 68/41 (8, P. L. R. 575; 11, Ct. L. R. 51; 1914, S. C. J. 657); C. A. 111/38 (3, Ct. L. R. 230a; 1938, 1 S. C. J. 312); C. A. 116/42 (12, Ct. L. R. 66; 1942, S. C. J. 470); C. A. 220/41 (9, P. L. R. 14; 11, Ct. L. R. 9; 1942, S. C. J. 11).

ANNOTATIONS :

1. On point 1 see C. A. 8/40 (*supra*).
2. On occupation by co-heirs see cases referred to and C. A. 51/43 (1943, A. L. R., p. 305) and C. A. 390/43 (11, P. L. R. 217; *ante*, p. 415) and annotations.

(*A. G.*)

FOR APPELLANTS: A. Atalla.

FOR RESPONDENT: Nazzal.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Ramallah, sitting as a Land Court, whereby the claim of the Appellants, who were Plaintiffs in the Court below, was dismissed. The claim was to two plots of land in Bireh village registered in the name of Ali el Amer, but there is no dispute that the land belonged to Ali's deceased brother, Abdul Jaber. Abdul Jaber had a family of three, namely, Nuha who was the first Plaintiff, Farrah, now deceased whose son Zahran is the Respondent to this appeal (Defendant in the Court below), and another son Ibrahim, who predeceased his father leaving two daughters, Khadra and Sabha, who are the second and third Appellants.

The first ground of appeal is that the Magistrate erred in holding that section 2(2) of the Land Law (Amendment) Ordinance applied to this case. We think that this ground of appeal succeeds because it is now settled law that this Ordinance has no retroactive effect. The Ordinance came into force on 23rd August, 1933, whereas the action was filed on 8th May, 1943, so that the period of prescription of 10 years had not expired. We may add that the Magistrate found that the land was *miri* and there is neither an appeal nor a cross-appeal against this finding. Ottoman Land Law accordingly must be applied.

Mr. Anton Atalla, who appeared for the Appellants, referred to Civil Appeal 8/40, P. L. R. Vol. 7, p. 76, Civil Appeal 197/41, P. L. R. Vol. 8, p. 499, Land Appeal 66/28, P. L. R. Vol. 1, p. 356, Land Appeal 36/30, P. L. R. Vol. 1, p. 630, to Messrs. Goadby and Doukhan's "Land Law of Palestine", pages 251, 253 and 258 and to Civil Appeal 288/42, P. L. R. Vol. 10, p. 317.

Fayaz Eff. Nazzal, who appeared for the Respondent, referred us to Land Appeal 128/23, Rotenberg Vol. 1, p. 276, but as to this the

answer is to be found in section 7 of the Land Law (Amendment) Ordinance. He also referred to Civil Appeals 68/41, 111/38, 116/42 and 220/41.

The sole question before this Court is whether, on the evidence adduced before it, the Land Court was entitled to hold that the presumption that the Respondent occupied the land as a co-owner on behalf of his co-heirs had been rebutted. Before dealing with the facts, we wish to say that we do not intend to decide whether this is one of the type of cases in which the presumption is absolute. We do not wish to cast any doubt on previous decisions of this Court which have held that there are or may be types of cases or circumstances in which the presumption is absolute and is incapable of being rebutted. It is clear that the deceased, Farrah, was the eldest male member of the family and that, after his death, his son Zahran (the Defendant) was the only male left. All the parties were blood relations and at the commencement, *i. e.* on the death of the common ancestor, Abdul Jaber, the parties to the suit were all minors. The presumption, therefore, is that Farrah's possession was on their behalf. The Magistrate said in his judgment that some of the Plaintiff's witnesses stated that the Plaintiffs did receive their share of the produce but the Magistrate did not say that he disbelieved these witnesses. While it is true that we cannot interfere with findings of the fact, the question is whether there was sufficient evidence to justify the Magistrate in coming to the conclusion that the presumption had been successfully rebutted.

Zahran (the Defendant), admitted that his father died seven or eight years ago and that he (Zahran) is to-day only thirty years of age. In cross-examination he admitted that there is no document which deprives the heirs and he also admitted that Nazha inherited from her father and that he, Khadra and Sabha, lived together when they were young. There was evidence that Nazha had inherited from her father. We consider that, even accepting the Magistrate's own appreciation of the evidence, that evidence falls far short of rebutting the presumption that the Respondent's occupation of the land was on behalf of himself and his co-heirs. There was no evidence to show that his occupation was adverse to the other co-heirs.

In the result, the appeal is allowed and judgment will be entered in favour of the Appellants, that is to say, a declaration of their ownership in the shares devolving on them by inheritance in the two plots mentioned in the statement of claim will be made, such declaration to be registered in the Land Registry of Jerusalem. The Respondent will pay the Appellants' costs here and in the Court below. We assess the

costs in the Court below at a fixed (inclusive) sum of LP. 8 and in this Court at a fixed (inclusive) sum of LP. 10.—.

Delivered this 30th day of June, 1944.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 12/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

The Palestine Kupat Am Bank Co-operative Society Ltd. APPLICANT.

v.

1. The Government of Palestine,
2. Ayisha Mustafa Dirbas & 20 others,
23. Barclays Bank (D. C. & O.). RESPONDENTS.

Cross-appeal to Privy Council.

Application by the first Respondent for conditional leave to cross appeal to His Majesty in Council the judgment of the Supreme Court, sitting as a Court of Civil Appeal, dated 27th July, 1944, in Civil Appeal No. 160/43; no order made:—

Supreme Court cannot grant leave to cross-appeal to Privy Council; a petition for such leave is addressed to His Majesty in Council.

(*M. L.*)

FOR APPLICANT: Abcarius.

FOR RESPONDENTS: No. 1 — Acting Solicitor General — (Hogan). Rest — Absent — served.

ORDER.

As to the application by the Government of Palestine for conditional leave to cross appeal, there appears to be no provision for Cross-Appeals in the Palestine (Appeal to Privy Council) Order-in-Council, 1924. I, therefore, think that this Court cannot entertain such an application. This view seems to be supported by the statement at page 173 of the 3rd (1937) Edition of Mr. Norman Bentwich's book on "The Practice of the Privy Council". "A petition for leave to enter a cross appeal is addressed to His Majesty in Council", so I shall make no order on this application.

Given this 12th day of September, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 97/44.

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

BEFORE: Rose, A/C. J., Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Barjass Eid Nasser & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Sufficiency or insufficiency of corroboration — Submission by prosecution of witnesses for cross-examination by defence.

Appeals from the judgment of the Court of Criminal Assize, sitting at Haifa, dated the 17th day of July, 1944, in Criminal Assize Case No. 21/44, whereby Appellants were convicted of murder contrary to sections 214 and 23(d) of the Criminal Code Ordinance and sentenced to death, dismissed:—

1. Court of Appeal may find that question as to whether or not corroboration in the case before them should be regarded as sufficient is one for trial Court.

2. (*Obiter*): Practice that prosecution should submit for cross-examination by defence, if defence so wish, those witnesses whose names appear on back of Information but who have not been called by prosecution, is becoming more general in recent years both in England and in Palestine and is operating in favour of accused and, therefore, should not be varied.

(*M. L.*)

DISTINGUISHED: P. C. A. 66/43 (*ante*, p. 465).

REFERRED TO: R. *v.* Cassidy (1858), 1 F. & F. 79, 14 Digest 274, 2842; R. *v.* Woodhead (1847), 2 Car. & Kir. 520, 14 Digest 274, 2841; R. *v.* Nicholson (1937), unreported; Knowles *v.* The King, 1930 A. C. p. 371; Ibrahim *v.* The King, 1914 A. C. p. 99.

ANNOTATIONS :

1. As to point 1 see CR. A. 105/43 (1943, A. L. R. 754) and annotations.
2. As to point 2 see cases referred to and distinguished (*supra*).

(*A. G.*)

FOR APPELLANTS: No. 1 — Bustany.

No. 2 — Abdul Hadi & Abbassi.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

These are appeals from a judgment of the Court of Criminal Assize, sitting at Haifa, convicting the two Appellants of murder.

The case is a little unusual in one aspect of its facts in that it appears that the two Appellants were persons who were persuaded by some

hidden principal to carry out this crime. The case for the prosecution is that the hidden principal, who is apparently unknown, approached in the first instance the second Accused, Mahmoud Ahmad Ibrahim, who, in turn, approached the first Appellant, Barjass Eid Nasser. It appears that the man Jad el Khoury, the deceased in the present case, was one of a group of six persons who it was suggested should be removed.

To take the case of the first Appellant, it is contended by counsel that there was not sufficient evidence to justify the verdict of the Court below; but, as to that, it seems to us that there was material upon which the Court were entitled to act. There was evidence that the first Appellant was in the immediate neighbourhood of the crime very shortly before it occurred; that very shortly after the crime he had been in possession of a revolver, and this revolver was shown by evidence which the Court accepted to have been the same revolver which, in fact, fired the shots from which Jad el Khoury died. There is further the evidence of Barjass himself and of a man called Naif (to whose evidence we must refer in more detail with regard to the second Appellant) that Barjass had been approached by Mahmoud Ibrahim to commit this crime. It is true, as counsel for the first Appellant argues, that there is a certain interval of time unaccounted for by the prosecution; but it seems to us that, on the evidence which we have summarized, there was material from which the Court were entitled to draw the inference that it was the first Appellant who fired the shots which killed Jad el Khoury. No argument was addressed to us on premeditation, and it is obvious that, assuming that it was the first Appellant who fired the shots, the necessary statutory elements were present.

With regard to the second Appellant the matter is, perhaps, not so simple; but in his case too we are of opinion that there was material which is sufficient to support the conviction. The case against him is that he counselled or procured the commission of this offence, and the principal story against him is contained in the evidence of a man called Naif, whom the trial Court held to be an accomplice. Naif's story, if accepted as true by the Court, as it was, would be ample to justify a conviction. The question, therefore, to consider is whether there was sufficient corroboration which would entitle the Court to accept it. The corroboration suggested is, first, the wife of Naif, who bears out the fact that the second Appellant in the week before the crime visited Naif and Barjass on several occasions. There is the evidence of a youth called Subhi which the Court appears to have ac-

cepted, which is to the effect that the three persons — the two Appellants and Naif — were all together, shortly before the crime was committed on the 14th of August. As to this point of his presence, we have the admission of the second Appellant himself that he was there, although he gives an explanation of his presence which the Court rejected. Then, further, we have the evidence of Barjass himself, the co-defendant of the second Appellant, that he had been approached by Mahmoud in order to commit this crime.

It seems to us that in a case of this kind, the question as to whether or not this corroboration should be regarded as sufficient is really one for the trial Court. They apparently regarded these matters collectively as being sufficient corroboration of Naif's story, and Naif's story itself was one which they were prepared to accept as being true.

For these reasons we are of opinion that both appeals fail and the convictions and sentences must be confirmed.

Although we are satisfied that no injustice resulted from the practice followed in this trial, we feel that we should refer briefly to a point of practice referred to by the trial Court on p. 24 of the record. It would appear from the note of the presiding Judge that he was under the impression that as a result of Lord Thankerton's judgment in Privy Council Appeal No. 66/43, Adel Mohammad Dabbah *v.* the Attorney General, the practice which hitherto has been observed of the prosecution submitting for cross-examination by the defence those witnesses whose names appear on the back of the Information but who have not been called by the Crown, should be discontinued. We feel, therefore, that we should take the earliest opportunity of re-stating that in the opinion of this Court the better practice is that such witnesses should be submitted by the Crown for cross-examination by the defence, if the defence so wish. Lord Thankerton himself says that this practice "has probably become even more general in recent years and rightly so", but refers to the fact, which is undoubtedly correct, that this practice derives from a benevolent exercise of its discretion by the prosecution. And he cites two old cases — 1847 and 1858 — which undoubtedly support that view. He also refers to the unreported case of R. *v.* Nicholson at the Nottingham Assizes in 1937, where Hawke, J., "declined to force the prosecution to call a witness whom they regarded as unnecessary". We are indebted, however, to learned Crown Counsel for referring us to an article in the Journal of Criminal Law, which refers to a more recent case at the York Assizes in 1938, when Hilbery, J., followed a different course. In that case it appears that the learned Judge, to quote the words of the article, "indicated to

the prosecution that he considered they should call before the jury" a witness whose name appeared on the back of the Information but whom the prosecution considered unnecessary for their case. It would seem that Hilbery, J., favoured the practice which, as Lord Thankerton himself says, is rightly the general practice and that his intimation to the prosecution was an acceptance of the position that, irrespective of the historical origin and theoretical aspect of the matter, the correct practical course is for such a witness to be produced, if required, for cross-examination by the defence. We would add that, apart from the generality of the practice both in this country and in England, the practice is one which operates in favour of an accused person, and for that reason also we consider that it should not be discontinued. We are aware of no recent judgment of the Court of Criminal Appeal in England referring to this point of practice, and we have no reason, therefore, to assume that that authoritative Court takes a different view of the prevailing practice from that adopted by Hilbery, J.

We would add that we have no doubt that Lord Thankerton himself would not wish his observations to be construed as a direction to us to vary the practice of these Courts. In the first place, his observations are not in themselves inconsistent with the continuance of such a practice, and secondly, we would refer to a passage in the judgment of Lord Dunedin in a Privy Council Appeal of Knowles *v.* The King, 1930 A. C. p. 371, which reads as follows:—

> "Before dealing with the question of the evidence, their Lordships think it necessary emphatically to repeat what has been said on many occasions, that they do not sit as a Court of Criminal Appeal. To allow criminal proceedings to be reviewed, to use the words of Lord Watson in Dillet's case, there must have been "substantial and grave injustice ......done".

He then goes on to quote with approval a *dictum* of Lord Sumner in the case of Ibrahim *v.* the King, 14 A. C. p. 599, that the Privy Council only interfere if the procedure adopted "deprives the accused of the substance of fair trial". It follows, of course, from these observations of Lord Dunedin that it would not be for their Lordships of the Privy Council to prescribe for the Criminal Courts of Palestine what practice should be followed on a matter of this kind, unless, of course, such practice operated to the substantial detriment of an accused person.

Delivered this 10th day of August, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 277/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

1. Siegfried Blumenthal,
2. The Near East Publishing Co. Ltd. APPELLANTS.

v.

Dr. Friedrich Reichenstein. RESPONDENT.

Refusal to grant interim injunction — Non-interference of Court of Appeal.

Appeal from the decision of the District Court of Tel-Aviv, dated 25th May, 1944, in Civil Case No. 170/44 (Motion No. 122/44), dismissed:—

(*Obiter*): Matters of injunction should be given preference in hearing list in point of time.

(*M. L.*)

ANNOTATIONS: For a similar ruling see C. A. 123/44 (*ante*, p. 374).

(*A. G.*)

FOR APPELLANTS: Wittkowski & Zysmann.

FOR RESPONDENTS: Sharf & Eliash.

JUDGMENT.

This is an appeal from a refusal by the District Court of Tel-Aviv to grant an interim injunction. The Appellants are the Plaintiffs in an action now pending before the District Court, in which the claim itself is for an injunction to restrain the Respondent from publishing a certain newspaper in the German language. The matter has been argued at great length before us; nevertheless, we do not think that sufficient grounds have been adduced to warrant us interfering with the discretion of the District Court. The very nature of the claim itself makes it obviously undesirable that we should discuss the matter at length or comment on the arguments adduced by the advocates for both parties. We would merely say that, while we have no desire to interfere with the arrangements of the learned President of the District Court of Tel-Aviv or of the Registrar of that Court, it seems eminently desirable that cases of this nature should be given preference in the hearing list in point of time. As the substance of the claim is an injunction the case is clearly of a different category from a case in which only a claim for the payment of money is made. We hope, therefore,

that the learned President of the District Court of Tel-Aviv in conjunction with the Registrar, may see his way, so far as circumstances will allow, to give this case priority in the list. The appeal is dismissed; the Appellants must pay one set of costs to the Respondent, *i. e.* costs to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.—.

Delivered this 29th day of September, 1944.

British Puisne Judge.

HIGH COURT No. 26/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF :—

Okava Palestine Razor Blade Works, Ltd. PETITIONERS.

v.

1. The Chairman and Members of an Arbitration Board: S. Tolkowsky, M. B. E., Chairman & 4 ors.,
2. General Federation of Jewish Labour in Palestine,
3. "Workers Committee". RESPONDENTS.

Trade dispute — Award of Arbitration Board.

Return to an order *nisi*, issued on the 15th day of March, 1944, directed to the Respondents, calling upon them to show cause why their award, dated the 20th of December, 1943, should not be set aside or annulled, and why they should not be restrained from enforcing the said award pending the final decision in this case; rule *nisi* discharged:—

Whatever the political background of a "trade dispute" or the objective of any party to such dispute may be, it does not by itself take it out from the definition of "Trade Dispute" as given in 46A, Defence Regulations.

FOLLOWED: H. C. 25/44 (11, P. L. R. 187; *ante*, p. 266).

ANNOTATIONS :

1. It was found that there is no real point of principle in this case that differs from the issues dealt with and decided in H. C. 25/44, which was, therefore, followed.
2. See H. C. 25/44 (*supra*) and annotations in A. L. R.

(*M. L.*)

FOR PETITIONERS: Levison.

FOR RESPONDENTS: Nos. 1 & 3 — Absent — served.
No. 2 — Berinson.

ORDER.

This is a return to an order *nisi*. The Petitioners are the Okava Palestine Razor Blade Works Ltd. There are three Respondents.

As in H. C. Case No. 25/44, only the second Respondents appear, and in fact they are the only Respondents really interested.

It is admitted by the Petitioners that this case raises substantially the same issues as those decided in High Court Case No. 25/44. I confess that after two days hearing I have failed to discover in any of the arguments so ingeniously advanced by Mr. Levison for the Petitioners, any real point of principle that differs from the issues so thoroughly thrashed out in High Court Case No. 25/44. The gist of his argument was that there was no trade dispute, the whole affair he says was a political manoeuvre on the part of *Histadruth* to gather all the workers in Palestine within their net. It may well be that such is the objective of the *Histadruth*. It may also be true, as he avers, that the *Histadruth* as the owners or managers of several industrial concerns, are trade competitors who wish to force the Petitioners out of trade. It may also so happen that this particular dispute, and the part they played in it has favoured those alleged designs of this important organization. But these facts do not help him to obtain the remedy he now seeks. In referring to this trade dispute in High Court Case No. 25/44 I said:—

> "'Trade dispute' is defined in the Defence Regulations, 46A, as follows:—
>
> 'Trade Dispute' means any dispute or difference between employers and workers, or between workers and workers connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person, and shall include any such dispute or difference as may arise between employers and workers or between workers and workers out of a contract between the employers on the one hand and the Government or any Municipal or Local Council on the other, but does not include any such dispute to which the Government or any Municipal or Local Council is a party".
>
> — — — — — — — — — — —
>
> "Apart from the fact that the Director of Labour considered that a trade dispute did exist, and that the employers and workers were represented on the Arbitration Board, from which it may be assumed that they did not doubt that they were dealing with a trade dispute, I am of opinion that the matters referred for settlement to the Arbitration Board did amount to a trade dispute within the meaning of paragraph 3 of Regulation 46A of the Defence (Amendment) Regulations, 1942".

I see no reason to alter that conclusion. It follows that despite the

further arguments, which appeared to me to be more in the nature of political speculation than an analysis of the legal inferences to be drawn, adduced with such vigour by Mr. Levison, I must hold that this was a Trade Dispute which was properly referred to and adjudicated upon by a Board duly appointed under the Defence (Trade Disputes) Order, 1942.

This being so, the whole case built up by the Petitioners falls to the ground. The rule *nisi* must be discharged with LP. 25 inclusive costs.

Given this 12th day of June, 1944.

Chief Justice.

CRIMINAL APPEAL No. 106/44.

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

BEFORE: Rose, A/C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Straty Foto. RESPONDENT.

Specifying date of offence.

Appeal from the ruling of the District Court, Haifa, dated the 7th day of June, 1944, in Criminal Case No. 66/44, whereby Respondent was discharged, owing to a difference of opinion, of offences contrary to sections 152(1)(c) and 159 of the Criminal Code Ordinance, 1936, allowed and case remitted:—

Statement in Information that the offences charged with occurred within a specified period of days in a specified locality is technically a sufficient compliance with the requirements of drafting Informations.

(*M. L.*)

ANNOTATIONS: *Cf.* CR. A. 118/42 (9, P. L. R. 479; 12, Ct. L. R. 97; 1942, S. C. J. 472) — necessity of particular date in charge sheet; CR. A. 35/41 (8, P. L. R. 143; 1941, S. C. J. 124; 9, Ct. L. R. 139) — relevance of the exact date of the offence.

(*A. G.*)

FOR APPELLANT: Crown Counsel — (Rigby).
FOR RESPONDENT: Hazou.

JUDGMENT.

In this matter which has been argued in the absence of the Respondent by his counsel, the Attorney General appeals against a judgment of

the District Court of Haifa in which there was a disagreement as a result of which it was held that the Information was bad.

The Accused was charged with six offences of committing indecent acts upon children, and the prosecution were apparently in some difficulty as to specifying the dates on which such acts were committed. The learned Crown Counsel informs us that he is prepared to abandon the third, fourth, fifth and sixth counts. That being so we need not consider what our decision would have been with regard to those charges. As regards the first two charges, the offences were stated as having occurred within a period of ten days at Haifa. Having regard to the authorities and to the practice in these matters, we are of opinion that that is technically a sufficient compliance by the Attorney General with the requirements of drafting Informations. We express no opinion as to whether or not the Respondent may raise at the trial the fact that owing to the vagueness of the date, the evidence as to identification should be regarded with even closer attention than usual. That, as we say, seems to us to be a matter for the trial Court and not for us here; but as far as we are concerned, we think that the appeal must be allowed as regards the first two charges, and that the matter should be remitted for the trial of those two charges by the District Court.

Delivered this 14th day of September, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 303/43.

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

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

IN THE APPEAL OF :—

Hassan Muhammad Ali Ahmad es Sahli & 2 ors. APPELLANTS.

v.

El Haj Salim Hamdan Muhammad es Sahli & an. RESPONDENTS.

Contradictory claims before Settlement Officer regarding title to land — Sale and agreement to sell — Equitable rights acquired by payment of purchase price and possession.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated 13th July, 1943, in case No. 3/Balad esh-Sheikh, dismissed:—

1. Contradiction not within meaning of relevant articles of *Mejelle* — not fatal to claim.

2. In determining whether or not agreement for transfer of land is void as a disposition outside *Tabu* wording of document relied upon must be considered as to whether parties intended it to be an agreement of final sale or only an agreement to sell.

(*M. L.*)

ANNOTATIONS :

1. On contradictory pleadings see C. A. 243/41 (9, P. L. R. 90; 12, Ct. L. R. 167; 1942, S. C. J. 119); C. A. 30/39 (6, P. L. R. 363; 6, Ct. L. R. 65; 1939, S. C. J. 299); C. A. 15/38 (5, P. L. R. 237; 3, Ct. L. R. 149; 1938, 1 S. C. J. 204); C. A. 218/38 (5, P. L. R. 485; 4, Ct. L. R. 165; 1938, 2 S. C. J. 124) with annotations thereto.

2. On the second point see C. A. 38/44 (*ante*, p. 335).

(*A. G.*)

FOR APPELLANTS: A. Atalla and Mu'ammar.

FOR RESPONDENTS: Koussa.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Haifa Settlement Area, dated the 13th of July, 1943, whereby Appellants' claim that the contract produced was one of mortgage and not of sale, was dismissed, and registration of the plots in dispute ordered in the name of Respondents.

Counsel for Appellants raised several points before us:

1. That the Respondents made contradictory claims. In their memorandum of claim they stated that they acquired the property by inheritance, by possession and by purchase, from persons other than the Appellants, while before the Settlement Officer they claimed to have acquired the property from the Appellants by way of purchase, *vide* the document produced, and that such a contradiction necessitates the dismissal of the claim. After hearing the Respondents in Court we find that this contradiction is not fatal to the claim and does not fall within the meaning of Articles 1647 and 1651 of the *Mejelle*.

2. That the document produced is an agreement for mortgage, and he relies upon clause 4 of this document. It is sufficient for us here to refer to paragraph 3 of the decision of the Settlement Officer, which reads:—

> "As evidence of the transaction between the parties in 1932, this document can only be construed as evidence of a sale, a sale made outside the land registry for the reason that the land was unregistered at the time. As all the land of Balad-esh-Sheikh was unregistered, there is nothing unreasonable or extra-ordi-

> nary in a stipulation that Defendants should not make a second private bargain without the Plaintiffs' consent. There is indeed nothing in clause 4 so strong as to raise the presumption of a mortgage in the face of the unambiguous statements that the land was sold for LP. 50. The fact that the Plaintiffs were to pay the land settlement fees indicates they were purchasers, for these fees would normally have been paid by the Defendants if they had been mortgagors. The Settlement Officer finds no sufficient evidence in paragraph 4 of the agreement to set aside the clear provisions elsewhere in the agreement to the effect that the land was sold".

3. Alternatively, that if the Court finds this agreement is not an agreement for mortgage, it is an agreement for sale made outside the *Tabu*, and on this ground it should be considered as illegal and void in accordance with Section 11 of the Land Transfer Ordinance. Having carefully considered the wording of this document we come to the conclusion that both parties intended it to be an agreement to sell and not an agreement for final sale.

4. That the Respondents * are paying government taxes on this property, and that this is proof that they are still the owners of this property, and is further an additional proof that the agreement is one of mortgage and not an agreement for sale. We think that the mere payment of taxes — if the allegation is true — is not sufficient to prove that the agreement was an agreement for mortgage.

5. Further points were raised regarding the jurisdiction of the Settlement Officer to deal with the question of specific performance and existence of various conditions precedent for such an order. We think it unnecessary here to decide these points, as we consider that the Settlement Officer's decision was based on the principles of equitable title, as the Respondents had paid the purchase price and went into possession in the year 1932.

For these reasons the appeal is dismissed with costs on the lower scale and LP. 10.— advocate's fees.

Delivered this 17th day of May, 1944.

A/British Puisne Judge.

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* Should be: "Appellants".

(*Ed.*)

CIVIL APPEAL No. 321/43.

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

BEFORE: Rose, A/C. J.

IN THE APPEAL OF:—

'Amer Abdul Rahman Sheikh Omar in his capacity as administrator of the properties of this absent brother, Husni Abed. APPELLANT.

v.

Hamdan Hamed Hamdan & an. RESPONDENTS.

Sale of J/D's property through C. E. O. — Action for cancellation of registration because of alleged fraud — Striking out statement of claim.

Appeal from the judgment of the Land Court of Haifa, dated the 20th September, 1943, in Land Case No. 12/43 (Motion No. 201/43), dismissed:—

1. Where it is sought to cancel registration of property allegedly obtained by fraud there must be a specific plea of fraud, otherwise statement of claim may be struck out.
2. Striking out statement of claim as disclosing no cause of action does not prevent Plaintiff from starting his action again and pleading his case differently.

(*M. L.*)

ANNOTATIONS:

1. The gist of Plaintiff's claim was that the land in question was sold to the first Defendant by order of the Execution Officer and at the instance of the 2nd Defendant three days after he (Plaintiff) had paid his entire judgment debt into the Execution Office of which payment the first Defendant had full knowledge.
2. As to 1 see C. A. 254/43 (1943, A. L. R. 711) and annotations.
3. On striking out statement of claim see C. A. 118/43 (1943, A. L. R. 346) and see Civil Procedure Rules, 1938, Rule 23: C. A. 54/42 (9, P. L. R. 306; 12, Ct. L. R. 143; 1942, S. C. J. 324) and C. A. 219/40 (7, P. L. R. 600; 10, Ct. L. R. 10; 1940, S. C. J. 480) — order striking out statement of claim is not a decree.

(*A. G.*)

FOR APPELLANT: Habiby.

FOR RESPONDENT: W. Salah.

JUDGMENT.

This is an appeal from a decision of the Land Court of Haifa, striking out the statement of claim of the Appellant in Land Case No. 12/43. The allegation against the two Respondents is that they have falsely and fraudulently obtained property belonging to the absent brother of

the Appellant, and got it registered in their names. That may or may not be so, but, as the learned Relieving President points out, such a specific allegation of fraud must be pleaded, and in his opinion (and I agree with him) there was no such specific plea of fraud in the statement of claim.

There is also a suggestion that in any event the Execution Officer was negligent and exceeded his duties. That again may or may not be so, but it may well be that the Execution Officer, assuming the facts to be as stated by the Appellant, might be liable in damages. I express no opinion as to whether that is so or not, but on the case as opened by the Appellant and as compared with his statement of claim, I agree with the learned Relieving President that in fact there are no causes of action disclosed against the Respondents. There is, of course, nothing to prevent the Appellant from starting his action again and pleading his case differently in order to bring himself within the requirements of the rules.

This appeal must, therefore, be dismissed, with costs on the lower scale to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 7th day of March, 1944.

Acting Chief Justice.

INCOME TAX APPEAL No. 3/44.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE : Edwards, J.

IN THE APPEAL OF :—

Leather Centre Ltd. APPELLANT.

v.

The Assessing Officer, Jerusalem District. RESPONDENT.

Income Tax — Appeal under sec. 53(1) *— Price Reserve Account or Special Reserve Fund — "Income", "gains or profits"* (5(1)(*a*)) *— Vallambrosa Rubber Co., Rowntree & Co. Ltd. v. Curtis — Construction, head of exemption to be pleaded by assessee, secs.* 8, 11.

Appeal from the assessment made by the Respondent, dated 22nd November, 1943, in assessment No. J/2054/1707, for the year of assessment 1943/44, dismissed:—

Without taking into account the manner in which a special reserve fund or price reserve account might be disposed of, if the amount thereof resulted

from gains and profits and the assessee cannot bring it under a head of exemption or deduction, the amount of the fund is liable to taxation.

(*A. M. A.*)

REFERRED TO: Vallambrosa Rubber Co., Ltd. *v.* Farmer, 1910, S. C. 519, 5 Tax C. 529; Rowntree & Co. *v.* Curtis, 1925, 1 K. B. 328, 93 L. J. K. B. 570, 131 L. T. 41, 40 T. L. R. 363.

ANNOTATIONS: On what constitutes "income" see also I. T. A. 9/42 (10, P. L. R. 255; 1943, A. L. R. 278) and C. A. 345/43 (10, P. L. R. 678; *ante*, p. 50).

(*H. K.*)

FOR APPELLANT: Smoira.

FOR RESPONDENT: Wittkowsky.

JUDGMENT.

This is an appeal by the assessee under section 53(1) Income Tax Ordinance, from an assessment of the Assessing Officer, Jerusalem.

The sole ground of appeal is that a sum of LP. 15,000 which had been transferred to a Price Reserve Account in accordance with an arrangement made between the Appellants and the Controller of Light Industries, Government of Palestine, was regarded by the Respondent as taxable income, whereas the Appellants contend that the said fund was not a reserve fund within the ordinary commercial meaning of the term.

During the hearing I was referred to many decided cases and to copies of correspondence which had passed between the Appellants and the Controller of Light Industries, and also to a letter from the Secretary of the War Supply Board to the Anglo Palestine Bank Ltd., Tel-Aviv. It is, in my view, unnecessary for me to discuss this correspondence at length.

Dr. Smoira, the Appellant's advocate, argued that this LP. 15,000 was never really income because it never really came into the pockets of the Appellant. I do not think that this argument is sound because I consider that profits are, as Mr. Wittkowsky for the Respondent submitted, the difference between purchasing and selling prices. It is to be noted that, in addition to the LP. 15,000 mentioned, there was a Government Price Adjustment Fund of LP. 10,335. From the correspondence it would seem that the fund in question, *viz.* the LP. 15,000.— was really an ordinary reserve fund without any qualification. The purpose of the arrangement seems to have been more to safeguard the interests of Government than to benefit the Company.

I refer to the remarks made by Lord Dunedin in Vallambrosa Rubber Company (1910) 5 Tax Cases pp. 529 and 535, referred to by Pollock,

M. R., in Rowntree and Company Ltd. *v.* Curtis (1925) 1 K. B. p. 328 at p. 334. In my view, there can be no doubt that this sum did come in as profits, but that it was thereafter diverted to a reserve fund.

Dr. Smoira's main contention is that the fund in question is not for the use, benefit and disposal of a tax payer and, therefore, is not income, and further that it is not a reserve fund in the ordinary sense of the term, but a Price Reserve Account entirely at the disposal of the Government. In my view, however, there is nothing to show that the sum in question did not, in fact, represent gains or profits within the meaning of section 5(1)(a) of the Income Tax Ordinance; and, unless the Appellants are able to show that they are exempt from taxation under section 8 or that they are allowed a deduction under section 11, this so called "fund" is liable to taxation. After all, there can be no question that it was made as a result of gains or profits and the mere fact that because of an arrangement with the Controller of Light Industries or with the Secretary of the War Supply Board, these profits or gains when received were diverted into a particular fund, does not make them any the less profits or gains and, as I have said, unless the Appellants are able to show some section in the Ordinance exempting this sum from taxation, the sum must be regarded as taxable income of the Appellants. The Appellants having failed to show that it is exempt from taxation, the appeal fails and is dismissed. The Assessment is confirmed. The Appellants must pay the Respondent's costs of this appeal, namely, fixed (or inclusive) costs of LP. 40.—.

Delivered this 20th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 79/44.

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

BEFORE: Rose, A/C. J.

IN THE APPEAL OF:—

Muhammad Ali Hussein & an. APPELLANTS.

v.

Lulu Bint Andoni Tarazi, widow of Issa Farah & 7 ors. RESPONDENTS.

Specific performance — Purchaser paying half value of land and in possession for eight years — Subsequent sale by owner to third party

— Discretion of trial Court — Findings of fact — C. A. 181/43 — Other remedies available.

Appeal from the judgment of the Land Court of Jaffa, dated 14th February, 1944, in Land Case No. 7/43, dismissed:—

1. Specific performance is a discretionary remedy.
2. Specific performance will not be granted if the entire purchase price has not been paid.

(A. M. A.)

REFERRED TO: C. A. 181/43 (10, P. L. R. 424; 1943, A. L. R. 618).

ANNOTATIONS: See and *cf.* C. A. 157/43 (10, P. L. R. 315; 1943, A. L. R. 482) and C. A. 287/43 (10, P. L. R. 642; 1943, A. L. R. 786) and annotations thereto in A. L. R.

(H. K.)

FOR APPELLANTS: H. Atalla.

FOR RESPONDENTS: Nos. 2, 3, 4, 6 & 7 — Elia.
Nos. 1, 5 & 8 — Absent — served.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, sitting as a Land Court.

The Appellants, the Plaintiffs in the Court below, ask for specific performance of an agreement to sell certain land, which agreement was entered into between the parties in 1934. It appears that from 1934, when half the purchase price was paid, until 1942, the Appellants were in possession of the land, but that in that year the land was allegedly disposed of by the Respondents to a third party.

The matter has been argued fully before me and is not free from difficulty. It seems to me, however, that as the Land Court declined to make a finding that the full purchase price had been paid, there is insufficient material to enable me to make such a finding in their stead. It has to be borne in mind also, as was apparently present to the minds of the trial Court, that the grant of the remedy of specific performance is discretionary, and it would seem that the Land Court on this matter took an unfavourable view of the Appellants' failure to intervene in the settlement proceeding.

While giving full weight to the circumstances which have been pressed upon me by counsel for the Appellants, that in 1939 the Respondents purported to enter into a renunciation in favour of the Appellants, I do not feel that there is sufficient material before me to justify my disturbing the judgment of the Land Court.

Counsel for the Respondents referred me to Civil Appeal No. 181/43,

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10 P. L. R., page 424, which would seem *mutatis mutandis* to be applicable to the present case. Other remedies are no doubt available to the Appellants as regards any payments which they may have made, or damage which they may have suffered.

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

Delivered this 28th day of September, 1944.

A/Chief Justice.

HIGH COURT No 76/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Keren Kayemeth Leisrael Ltd. PETITIONERS.

v.

1. His Honour Judge Ali Bey Hasna in his capacity as Assistant Chief Execution Officer, Jerusalem,
2. Muhammad Musa Saleh Mansur. RESPONDENTS.

Mortgages — Right of mortgagee when part of the mortgaged property adjudicated to a third party in action for awlawiyeh — Appearance under protest before C. E. O. does not result in estoppel — Rights of mortgagee, Hailsham, C. A. 72/42 — Effect of lis pendens — No joinder of parties on appeal; C. P. R. 313, 317, 339 — What amounts to execution of judgment, H. C. 8/40, 16 & 17/41 — Judgment affecting rights of petitioner, Mejelle 731, H. C. 66/38 — Notice, Execution Law, art. 38.

Return to a rule *nisi*, issued on the 27th day of June, 1944, directed to the first Respondent, calling upon him to show cause why he should not cancel his order, dated 26th June, 1944, and why he should not abstain from executing the judgment of the Land Court, Jerusalem, dated 27th March, 1944, subject matter of Execution File No. 169/44, in so far as Petitioner is concerned, or alternatively why the first Respondent should not discharge the mortgage only on payment in full by the second Respondent, or on payment of a proportionate share on proper valuation and survey; order made absolute:—

1. Execution of a judgment cannot be effected against a stranger to the judgment.
2. An order for execution of a judgment before the expiration of the seven days provided by art. 38 of the Execution Law is bad.

3. A person who was not a party to civil proceedings cannot be joined on appeal.

(*A. M. A.*)

REFERRED TO: C. A. 72/42 (9, P. L. R. 494; 1942, S. C. J. 544; 12, Ct. L. R. 110); H. C. 8/40 (7, P. L. R. 121; 1940, S. C. J. 76; 7, Ct. L. R. 101); H. C. 16 & 17/41 (8, P. L. R. 155; 1941, S. C. J. 121; 9, Ct. L. R. 173); H. C. 66/38 (6, P. L. R. 62; 1939, S. C. J. 52; 5, Ct. L. R. 57).

ANNOTATIONS :

1. Persons who were not parties in the trial Court cannot be joined on appeal — C. A. 161/43 (10, P. L. R. 367; 1943, A. L. R. 421).

2. An appearance under protest does not operate as an estoppel — H. C. 96/42 (9, P. L. R. 589; 1942, S. C. J. 618) and case therein followed.

3. See H. C. 119/42 (1942, S. C. J. 942) for the latest authority on the question when execution is completed.

(*H. K.*)

FOR PETITIONERS: Eliash & Scharf.

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

ORDER.

This is the return to an order *nisi*, directed to the Assistant Chief Execution Officer, Jerusalem, calling upon him to show cause why his order of 26th June, 1944, should not be set aside.

The facts briefly are that the second Respondent to this petition was the successful Plaintiff in an action for *Awlawiyeh* brought against the Palestine Land Development Company, Ltd. The present Petitioners were originally Defendants to that action, namely Land Case No. 24/43 Land Court of Jerusalem; but the Plaintiff at the hearing of the case dropped the action against all the Defendants except the Palestine Land Development Company who contested the action.

The Land Court composed of Judges Ali Bey Hasna and Dr. N. Bardaky decided in favour of the Plaintiff in the following terms:—

> "... We, therefore, decide that the Plaintiff should pay the sum of LP. 375 as price of the said shares and that registration thereof be made in his name in the *Tabu* after cancellation of its registration in the name of the Defendant company, and after he will pay the amount of the mortgage to the mortgagee company in proportion with these shares in the mortgaged capital on the land, and the Plaintiff should pay the sum of LP. 375 within one week from to-day to the Court, and after payment of the amount of the mortgage this amount will be paid on account of the amount of the mortgage. The Defendant company, namely the Palestine Land Development Co., shall pay the costs, fees and LP. 5 advocate's fees".

The Palestine Land Development Company were the owners of the

land and there was no dispute as to their title; but the present Petitioners had lent money to the Palestine Land Development Co. and as security the Palestine Land Development Co. granted the present Petitioners two mortgages under the first of which eight pieces of land were mortgaged and under the second of which nine pieces of land were mortgaged. At the time of the mortgage the Palestine Land Development Company held undivided shares in the said pieces of land. The action for *awlawiyeh* was brought in respect of four of those pieces of land. It is to be observed that the judgment of the Land Court does not prescribe the method of calculation of the proportionate share of the mortgages nor does it state whether for that purpose all the lands mortgaged to the Petitioner are to be assumed to be of equal value or not. The copy of that judgment was served on the Petitioners on the 22nd June, 1944 and on the 25th June the Petitioners were served with a notice from the Execution Officer, Jerusalem, calling upon them to carry out the above mentioned judgment and to register within 7 days of notice. The Petitioner on becoming aware of the fact that the Asst. Chief Execution Officer (Judge Ali Bey Hasna) would on 26th June, 1944, consider an account prepared by the present second Respondent computing the amount to be paid by the latter in partial discharge of the Petitioners' mortgage, and being afraid that the Execution Officer might thereupon order the Land Registrar to discharge the mortgage on payment of the amount found due, appeared before the Asst. Chief Execution Officer (first Respondent) on the 26th June, 1944, and made certain submissions objecting to what was being done.

The Palestine Land Development Company were also represented before the first Respondent and also took certain objections to the account presented by the second Respondent. Nevertheless, the first Respondent issued an order directing the Land Registrar to transfer certain shares to the name of the present second Respondent on certain terms and conditions set out in his order of 26th June, 1944. It is that order which is now attacked by the Petitioners.

At the hearing on the return day, Fawzi Bey Ghussein, on behalf of the second Respondent, argued that the right of a mortgagee depends on the right of the mortgagor (Civil Appeal No. 72/42, P. L. R. Vol. 9, p. 494, and Hailsham Vol. 23, p. 543 para. 800). This is, no doubt, true; but, as Dr. Eliash, for the Petitioners, has rightly contended, the title of the Palestine Land Development Company was a good one and nothing should be done to the prejudice of the rights of the present Petitioners without their being heard.

Fawzi Bey Ghussein also argued, that having appeared before the Asst. Chief Execution Officer on the 26th June, 1944, the Petitioners are estopped from complaining of his order. The answer to this is that the Petitioners appeared under protest and apart from the fact that Dr. Eliash's written application to the Asst. Chief Execution Officer before the hearing of the 26th June was apparently made on behalf of the Palestine Land Development Company, it is clear to me that the present Petitioners having protested against the Execution Officer commencing to do what he eventually did, it cannot be said that the Petitioners are estopped.

Fawzi Bey next says that, as an appeal is now pending before this Court, sitting as a Court of Civil Appeal against the judgment of the Land Court of 27th March, 1944, the present Petitioners should have applied to be joined as a third party to that appeal. Without necessarily deciding the matter I would say that there seems to be no procedure for a person who was not a party to the original case becoming a party to an appeal except, perhaps, the Attorney General, in certain cases in which the public interest is involved. Neither rule 313, nor rule 317 nor rule 339 Civil Procedure Rules, 1938, would seem to enable a person not a party to the case to be joined as a party to the appeal. It is true that the Palestine Land Development Company seem to have cited the present Petitioners as Respondents to the appeal; but, as Dr. Eliash rightly contended, it may be that the present second Respondent, as Respondent to the appeal, may when the appeal comes on for hearing object to the present Petitioners being a party to the appeal.

Fawzi Bey has further contended that, as the execution of the judgment has been completed, the High Court should not interfere and in support of this argument he relies upon the decision of this Court in High Court No. 8/40, P. L. R. Vol. 7, p. 121, and High Court Nos. 16/41 and 17/41, Levanon's Current Law Reports, Vol. 9, p. 173.

I agree, however, with Dr. Eliash when he says that the judgment was never, in fact, executed; on the contrary, Judge Hasna himself granted a stay of execution pending the filing of the petition in this Court and Mr. Justice Rose on the 27th June, 1944, also granted a stay of execution pending the determination of this petition.

I also agree with Dr. Eliash when he says that the Petitioners were not parties to the judgment of the Land Court and that no judgment can be given which may affect their rights. He has referred to article 731 of the *Mejelle* and contends that the judgment does affect his clients' rights. He has criticised certain parts of the judgment; but,

in view of the fact that an appeal is pending to this Court sitting as a Court of Civil Appeal, it is obviously undesirable for me to make any comments thereon nor do I desire to say whether the judgment as it stood on the 27th March, 1944, was at that time capable or not of execution. I prefer to base my decision on one ground, namely, that the present Petitioners were not parties to the action in the Land Court and that the Execution Officer when he made his order of 26th June, 1944, clearly purported to affect the rights of the present Petitioners to their prejudice. The case quoted by Dr. Eliash, High Court No. 66/38, Vol. 6 P. L. R. pp. 62 and 65 seems to be in the Petitioners' favour. I consider that the other argument of Dr. Eliash also helps him in showing that the order of the Execution Officer is bad, this argument being that article 38 of the Execution Law was not complied with, in that notice was served on the present Petitioners only on the 25th June, 1944, and that the Petitioners then had seven days within which to act and that these seven days did not expire until the 2nd July whereas the order now complained of was made on the 26th June.

I agree that the purpose of article 38 seems to be to give the present Petitioners an opportunity of objecting if so advised. I prefer to express no opinion on the merits of the account submitted by the second Respondent to the Asst. Chief Execution Officer on which the latter seems to have acted when making his order of 26th June, or on the other matter raised by Dr. Eliash, namely, that the period of three months given by the judgment of the 27th March, 1944, had expired by the 26th June, 1944, Vol. I (1944) A. E. R. pp. 640 and 641. Nothing that I have said in this judgment is intended in any way to affect the proceedings in Civil Appeal No. 153/44 now pending before this Court sitting as a Court of Civil Appeal.

For the foregoing reasons the petition succeeds and the order *nisi* is made absolute. The second Respondent must pay the Petitioners' costs of these proceedings which I assess as fixed (inclusive) costs of LP. 10.

Given this 26th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 17/43.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Kamel Diab Hassan & an. APPELLANTS.

v.

1. Jacob Haftel & 2 ors.,
4. Chief Execution Officer, Tel-Aviv,
5. Registrar of Lands, Jaffa. RESPONDENTS.

Mortgages — Various agreements resulting in registration of mortgage — Construction — Land Court jurisdiction.

Appeal from the judgment of the Land Court of Jaffa, dated the 17th of December, 1942, in Land Case No. 15/41, dismissed:—

1. Extraneous evidence cannot be admitted to contradict the explicit terms of a mortgage.
2. *Quaere* whether the Land Court has jurisdiction to make a declaratory judgment as to the rights of a mortgagee to enforce a mortgage.

(*A. M. A.*)

ANNOTATIONS: Contrast C. A. 120/42 (1942, S. C. J. 899) where the majority of the Court (Frumkin, J., *dissentiente*), following C. A. 249/40, held that it was "clear that a District Court in an action by a mortgagor for a declaration can look at other documents in order to determine whether money is due or not under a mortgage".

Generally, on the evidential value of admissions in a mortgage deed, *vide* C. A. 217/41 (8, P. L. R. 547; 1941, S. C. J. 609) and C. A. 94/43 (1943, A. L. R. 152) and annotations.

(*H. K.*)

FOR APPELLANTS: Cattan.
FOR RESPONDENTS: No. 1 — Sussman.
Nos. 2 & 3 — Dwek.
Nos. 4 & 5 — Absent — served.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Tel-Aviv, which Court had dismissed an action by the present Appellants for a declaration that the present Respondents were not entitled to enforce a certain mortgage granted by the Plaintiffs in favour of the Respondents.

A point was taken at an early stage before the Land Court constituted otherwise than it was constituted when judgment was given, namely, that the Land Court had no jurisdiction. The Land Court overruled this objection. The matter has again been raised before me by the advocate for the Respondents; but, although the point is an interesting one, it is, because of the view I take of the case, unnecessary to decide it. Although the matter is not free from doubt I shall assume, for the purposes of this appeal, that the Land Court had jurisdiction.

The facts of the present case briefly are that on 28.3.35 the Plaintiff

and his cousin Said Abdallah Hassan entered into a contract with the Defendants for the sale to the latter of certain land, the contract being Exh. D, the important clauses of which are:—

> "10. Second party undertakes to mortgage his lands situated in Daniel village in favour of first party as a security for the amounts received by him in accordance with the provisions of this contract within a period of six months from the date of the signature of this contract and also as a security for the amounts received after the lapse of the said six months.
>
> 12. Any party guilty of a breach of the provisions of this contract or any part thereof, or if he does not fulfil or delays in the fulfilment of his undertakings or any part thereof, undertakes to pay to the other party the sum of LP. 3000 as liquidated damages without necessity of sending notarial notice or any other notice, the happening of the breach, or non fulfilment being in lieu of the notarial notice.
>
> 13. Should second party be liable for the breach or the delay, he would be bound to refund first party with all sums received on account of the said purchase and the mortgage debt would then immediately mature without the necessity of notarial notice".

On the 3rd January, 1936, the present Appellants, who were the Plaintiffs in the Court below, gave a mortgage to the Respondents which was in the usual form and was definitely for one year and in which they undertook to pay to the Respondents on the 3rd January, 1937, the sum of LP. 1,526, the receipt of which they acknowledged. It is not denied that this sum was not repaid. The learned President of the Land Court held that, as the date of the maturity of the mortgage was 3rd January, 1937, and as the land had not been transferred to the Defendants, the Plaintiffs were not entitled to succeed in their action.

Mr. Cattan, advocate for the Appellants, has argued that the mortgage is governed by the provisions of the clauses of Exh. D which I have quoted. He has also argued that the Court below held that there was some connection between the mortgage and Exh. D and that Exh. D showed what was the purpose of the mortgage. He also relied on Exh. G, which is a letter dated the 31st January, 1936, given by the Respondents to the Appellants in which the Respondents said:—

> "You are hereby notified that a part of the receipts in our possession aggregating the sum of LP. 1526 (one thousand five hundred and twenty six pounds) in respect of various amounts which we have paid to you on various dates in respect of the land which we have purchased from you in the villages of Jib and Bitunia (Jerusalem District) were concluded and passed into the mortgage of the Grove which was made in our favour to-day by Mr. Kamel Diab in security of the above sum in accordance with the agreements entered into between us".

Mr. Cattan's argument, in short, is that these various documents explain the purpose of the mortgage. This may be so; but it is quite clear that the Deed of Mortgage, which was a document entered into in the Land Registry, is the more solemn document and the one which must prevail. There is no ambiguity about the contents of the mortgage. It is clear that under its terms the present Appellants agreed that, if they did not repay the sum of LP. 1,526 by the 3rd January, 1937, the Respondents would be at liberty to take steps to enforce the mortgage in the manner laid down by the Provisional Law for the Mortgage of Immovable Property of 16 *Rabi el Tani,* as amended. That being so, I fail to see to what other conclusion the learned President of the Land Court could have come.

I, accordingly, dismiss the appeal. The Appellants must pay to the Respondents one set of costs to be taxed on the lower scale and to include an advocate's attendance fee at the hearing of this appeal of LP. 15.

Delivered this 20th day of September, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 96/44.

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

BEFORE: Rose, A/C. J., Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Nimer Ali Khalaf & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Evidence — Loss of record and judgment of conviction — Proof of loss — Secondary evidence of information, T. U. I. Ord. sec. 32 *— No miscarriage of justice, T. U. I. Ord. sec.* 65 *— Interpretation of judgment — Effect of remission on information — Premeditation in charge of murder.*

Appeal from the judgment of the Court of Criminal Assize, sitting at Haifa, dated the 12th of July, 1944, in Criminal Assize Case No. 29/44, whereby Appellants were convicted of murder, contrary to Section 214 of the Criminal Code Ordinance, 1936, and sentenced to death, dismissed:—

1. Secondary evidence of the depositions and information is admissible when the originals are lost. In any event, the loss does not prejudice the accused if correct copies are provided.

2. A remission for retrial does not have the result of quashing the information. (*A. M. A.*)

ANNOTATIONS: The previous judgment in this case is CR. A. 106/43 (11, P. L. R. 8; *ante*, p. 72). (*H. K.*)

FOR APPELLANTS: Hazou.

FOR RESPONDENT: A/Solicitor General — (Hogan).

JUDGMENT.

These are appeals from a judgment of the Court of Criminal Assize, sitting at Haifa, convicting the two Appellants of murder. The case is unusual in that this is the second occasion upon which the Appellants have been put up for trial. On a previous occasion they were, as a result of a lengthy trial, found guilty and sentenced to death, but owing to an unfortunate chain of circumstances, which it is unnecessary to set out here, the record, judgment, and all the accompanying documents were lost. When, therefore, the matter came up on appeal to this Court on the first occasion, the case was remitted for re-trial before the Court of Criminal Assize, and it is with that trial that we are concerned in this appeal.

Counsel for the Appellants raises a technical point as to the correctness of the procedure, arguing that there was no proper information before the trial Court.

It appears that prior to the actual trial at the Court of Criminal Assize, an application about this same matter was made before a Court differently constituted, and that Court then directed that evidence should be given on behalf of the Attorney General of the loss of the depositions of the preliminary investigation before the Magistrate, of the record of the trial Court and of the Information. That in due course was done, but Mr. Hazou for the Appellants now says that the evidence of loss was insufficient. We are of opinion that there is nothing in this point, as it seems to us to be abundantly clear from the evidence adduced that the only reasonable inference which could have been drawn by the Court of Assize was that these documents had been lost. Further, — and this relates also to the other technical matter raised by the Appellants — we are satisfied that no possible injustice resulted to the Appellants as a result of the loss of these documents, as a copy of the translation of the depositions was, in fact, available for the defence, and a copy of the Information was in fact read out to the Appellants. No suggestion was made either here or at the trial Court that the translation of the depositions or the wording of the Informa-

tion was incorrect. We are of opinion, therefore, that the reading of the copy of the Information to the Appellants was a sufficient compliance with Section 32 of the Criminal Procedure (Trial Upon Information) Ordinance. But even if we were wrong upon that point, we should have no hesitation — did we think it necessary — in applying the proviso to Section 65 on the ground that no miscarriage of justice has occurred. On this aspect of the matter it is of course unfortunate that a second trial was necessary, but that is a consideration that has constantly to be borne in mind in any normal case of remission for re-trial, and standing alone cannot, in our opinion, form a successful ground of appeal.

We would add that we disagree with the further contention of counsel for the Appellants that the effect of the remission for re-trial by this Court was to quash the Information and the proceedings before the Magistrate. We take the view that the effect of the order of remission was merely to quash the conviction of the Court of Criminal Assize in the first instance and to remit the matter for a second trial.

With regard to the actual facts of the case, there was little argument before us on that matter. It is true that the judgment of the Court of Criminal Assize is brief, but it seems to us to be clear that their findings are supported by evidence on the record, and there is no good ground to justify our interference. On the question of premeditation, it seems to us that there is ample material on which the trial Court were entitled to infer, if they wished, that premeditation was present. It appears on the facts as found by the trial Court that these two Appellants were present at the time, one armed with a rifle and one armed with a pistol; that the deceased amongst others was being led under arrest by these two Appellants to some further person; that he then endeavoured to escape and ran away; that one of the Appellants with the pistol fired at him and missed, and that he then instructed the other one to shoot with his rifle. The latter did so and the unfortunate deceased was killed.

It seems to us that on those facts, which were the facts found by the trial Court, it was open to them to find that premeditation was present.

For these reasons we are of opinion that the appeals must be dismissed and the convictions and sentences confirmed.

Delivered this 14th day of September, 1944.

Acting Chief Justice.

HIGH COURT No. 91/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Eugen Berger. PETITIONER.

v.

1. M. L. Gorodissky, Chairman, Rents Tribunal, Tel-Aviv & 3 ors.,
5. Beit Bnei Yaacov Co. Ltd. RESPONDENTS.

Rents Tribunal — Standard Rent.

Return to an order *nisi*, issued on the 19th day of July, 1944, directed to the Respondents, calling upon them to show cause why their decision, dated 23.1.44 in file No. 221/43, whereby the standard rent in respect of Petitioner's flat was fixed at LP. 9.500 mils per month should not be set aside and why the matter should not be heard *de novo*, fixing the rent on the lines and principles of "standard rent", namely, the rent which would be payable for the said premises on 1.4.40; order made absolute by consent:—

ANNOTATIONS :

1. The facts of this case were as follows:—

Petitioner is a tenant of the 5th Respondent. There was no standard rent in respect of the premises and the 5th Respondent applied to the Rents Tribunal to fix the standard rent "to be in correspondence with the present value of the premises". Petitioner was abroad when service was effected upon his wife and nobody appeared on his behalf. The Rents Tribunal proceeded to fix the standard rent in Petitioner's absence, but the decision of the Rents Tribunal contained the clause "after hearing the parties". When Petitioner returned to Palestine he applied to the Rents Tribunal to hear the case *de novo* and received a reply from the 1st Respondent that "the tribunal has no jurisdiction to entertain again a matter which was heard before it and in which a final decision was given".

2. The first 4 Respondents did not file any affidavit in reply and so also the 5th Respondent who appeared through his advocate and consented to the order *nisi* being made absolute.

3. The case is reported because of the importance of the order *nisi*.

4. Compare H. C. 50/44 (*ante*, p. 338) and case cited in annotation.

(*A. G.*)

FOR PETITIONER: Gorali.

FOR RESPONDENTS: Nos. 1—4 — Absent — served.
No. 5 — Porter.

ORDER.

By consent, order *nisi* made absolute. The 5th Respondent must pay Petitioner's costs (inclusive costs of LP. 6.—).

Given this 12th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 327/43.

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

BEFORE: Rose, A/C. J.

IN THE APPEAL OF:—

Zahide Azmi Al-Sharkas. APPELLANT.

v.

Mary Karafilaki. RESPONDENT.

Claim for eviction — When appellate Court may interfere with discretion of Court of trial.

Appeal from the judgment of the District Court of Jerusalem, dated the 19th of July, 1943, in Civil Appeal No. 27/43, dismissed:—

Matters under sec. 8(1)(c), Rent Restrictions Ordinance — within discretion of trial Court: Appellate Court can only interfere if abundantly satisfied that that discretion has been improperly exercised; not sufficient that they should think it would have been better if the discretion had been exercised in another way.

(*M. L.*)

ANNOTATIONS: See C. A. 346/43 (*ante*, p. 447) and annotations.

(*A. G.*)

FOR APPELLANT: King.

FOR RESPONDENT: Cattan.

JUDGMENT.

This appeal concerns a claim by a landlord for the possession of certain premises. It appears that the Appellant in the present case brought an action in the first instance in the Magistrate's Court based upon Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, on the ground that she reasonably required the house for herself and at the same time was in a position to offer suitable alternative accommodation. The learned Magistrate decided the case on the point that he was not satisfied, after hearing the evidence, that the Plaintiff had satisfied him that she reasonably required the premises for her own occupation. That matter was taken on appeal to the District Court, and there the learned President pointed out that whereas he might himself have exercised his discretion in a different way, the material point to consider was whether the Magistrate had manifestly exercised his discretion in an improper manner. And he then proceeded to dismiss the appeal.

It is natural, of course, and it is indeed evident from Mr. King's argument, that the Appellant feels a definite grievance. No doubt it is equally possible that had the case been decided the other way, the Respondent would have felt the same grievance. But the point about these cases under this particular section of law is that the intention of the legislature is that these matters should be left to the discretion of the Court of first instance, and that an appellate Court can only interfere if they are abundantly satisfied that that discretion has been improperly exercised. It is not sufficient that they should think that perhaps it would have been better if the discretion had been exercised in another way.

That seems to me to be sufficient to dispose of the appeal. We would add that we would not wish our remarks to be taken as in any way meaning that we ourselves have formed an opinion on the merits of this case one way or the other, because on the material before us we have no reason either to agree or to disagree with the finding of the Magistrate on the issue of fact.

For these reasons it seems to us that the appeal must be dismissed and the judgment of the Magistrate and the District Court confirmed. The Respondent will have the costs of this appeal in an inclusive sum of LP. 10.

Delivered this 13th day of September, 1944.

Acting Chief Justice.

CRIMINAL APPEAL No. 88/44.

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

BEFORE: Rose, A/C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Leopold Kaminetzky. RESPONDENT.

Jurisdiction — Construction of statutes — Town Planning Offence — T. P. Ord. sec. 35.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 25th day of May, 1944, in Criminal Case No. 51/44, allowed and case remitted:—

The effect of sec. 35 of the Town Planning Ordinance is to invest Magistrates and Municipal Courts with the power to determine a certain class

of cases which do not come within their jurisdiction. It does not affect the jurisdiction of the District Courts.

(*A. M. A.*)

ANNOTATIONS:

1. Note that, as regards civil matters, Art. 40 of the Order in Council limits the jurisdiction of the District Court to "matters not within the jurisdiction of the Magistrates' Courts" while there is no such reservation in respect of criminal matters: the jurisdiction is to be exercised "in all criminal matters which are not within the jurisdiction of the Court of Criminal Assize".

2. *Cf.* CR. A. 16/44 (11, P. L. R. 79; *ante*, p. 125) — provision for summary trials under Reg. 24A of the Defence Regulations does not exclude possibility of trial upon information.

(*H. K.*)

FOR APPELLANT: Olshansky.

RESPONDENT: Absent — served.

JUDGMENT.

In this case the Respondent has not appeared and is not represented. In the District Court he was charged with an offence against section 35(1) of the Town Planning Ordinance, and the District Court came to the conclusion that they were precluded from considering the matter by virtue of section 35(4) of the Ordinance, they holding that they had no jurisdiction to entertain the case.

It is no doubt true that the effect of section 35(4) is to confer upon Magistrates' Courts and Municipal Courts a jurisdiction in a class of case which, were it not for that provision, would be beyond their jurisdiction. It seems to us, however, that that is by no means the same thing as providing that the jurisdiction of the District Court is ousted from cases which would normally fall within it; and we accede to Mr. Olshansky's argument that the effect of this sub-section is that matters of the present class and kind may be brought either before the District Court or before the Magistrate's Court or the Municipal Tribunal *.

That being so we are of opinion that the appeal must be allowed, the judgment of the District Court set aside, and the case remitted for completion.

Delivered this 12th day of September, 1944.

A/Chief Justice.

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* *Scil.*: Municipal Court.

(*Ed.*)

HIGH COURT No. 93/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF :—

Dr. Friedrich Reichenstein. PETITIONER.

v.

1. The Near East Publishing Co. Ltd.,
2. Siegfried Blumenthal. RESPONDENTS.

Contempt of Court — C. of C. Ord., sec. 4(1) — Publication of report of proceedings — Publication — Plea in mitigation — Question whether report constitutes contempt — Undue publicity not to be given to report — H. C. 11/30; H. C. 59/34; H. C. 51/40; R. v. Daily Mail; Hailsham, Digest.

Return to a rule *nisi*, issued on the 20th day of July, 1944, directed to the Respondents, calling upn them to show cause why they should not be punished for Contempt of Court by fine or imprisonment; order made absolute and fines imposed:—

> A report of proceedings in Court, which is not fair and which is calculated to prejudice public opinion against the opponent in the proceedings, constitutes contempt of Court within the meaning of sec. 4 of the Ordinance.
>
> (*A. M. A.*)

FOLLOWED: H. C. 11/30 (1, P. L. R. 876; 1, C. of J. 369); H. C. 59/34 (2, P. L. R. 144; 7, C. of J. 116); H. C. 51/40 (7, P. L. R. 431; 1940, S. C. J. 516; 8, Ct. L. R. 122); R. *v.* Daily Mail (Editor), *ex parte* Factor, 1928, 44 T. L. R. 303.

ANNOTATIONS:

1. Authorities on contempt of Court are collated in the annotations in A. L. R. to H. C. 81/43 (10, P. L. R. 478; 1943, A. L. R. 579).

2. Other proceedings between the parties (C. A. 277/44) are reported *ante*, p. 482.

(*H. K.*)

FOR PETITIONER: Scharf.

FOR RESPONDENTS: Wittkowski and Zysmann.

O R D E R.

This is an application under Section 4(1) Contempt of Court Ordinance. The second Respondent is the managing director of the first Respondent company. Arising out of disputes between the present Petitioner and the Respondents over the sale by the present Petitioner

to the second Respondent of a certain newspaper originally published in both Hebrew and German and later on only in German, the second Respondent brought an action against the Petitioner in the District Court of Tel-Aviv. Subsequently both the first and second Respondents brought a further action in the same Court asking for an injunction to restrain the Petitioner from publishing a certain newspaper or any other newspaper in the German language. In the course of the latter proceedings the first and second Respondents applied to the District Court for an interim injunction which application was dismissed on the 25th of May, 1944. Some days after the dismissal of this application, the Respondents published a pamphlet printed on one side in the Hebrew language and on the reverse in the German language. The second Respondent was cross-examined in Court before us on his affidavit in reply. It is not denied that this pamphlet was published by the second Respondent whose excuse for publishing it is that on the 26th May, 1944, *i. e.* one day after the District Court had refused the application for an interim injunction, the present Petitioner had published in his own newspaper a report of the proceedings in the District Court to which report the second Respondent took exception. The second Respondent says that, as a result of this report being seen by his business friends, he felt compelled to have the pamphlet, the subject-matter of the proceedings now before us, printed and circulated with a view to satisfying his business friends and of correcting the wrong impression which they may have gained from the publication of the present Petitioner. This circumstance may, of course, be pleaded in mitigation but it does not make the Respondents any the less guilty of contempt of Court if indeed the pamphlet in question does offend against the law relating to contempt. The second Respondent admitted that 272 copies had, in fact, been distributed. This is ample evidence of publication. The sole question, therefore, remaining for decision is whether the contents of the pamphlet itself are such as may be calculated to prejudice the minds of members of the public against the second Respondent's opponent in the litigation, or tend to produce an atmosphere calculated to prejudice the proceedings and pervert the public mind. It is, for obvious reasons, undesirable that we should give any more publicity to the contents of this pamphlet. We merely say that it is headed "For the sake of Truth" and we are satisfied that it does not contain, as has been claimed for it by Mr. Wittkowsky, Respondents' advocate, a fair report of the proceedings before the District Court when that Court dismissed the application for an interim injunction. It seems clear to us that the second Respondent's motive was to create prejudice against the present Petitioner. We need say no

more than to declare that, in our opinion, such publication offended against Section 4. In arriving at that conclusion we are guided by authority, both English and Palestinian, namely, H. C. 11/30, H. C. 59/34, H. C. 51/40 Vol. 7, P. L. R. p. 431 and R. *v.* Daily Mail, Vol. 44 Times L. R. 303 and to various cases noted in Hailsham Vol. 7, pp. 9, 11 and 12 and in the English and Empire Digest Vol. 16, pp. 25 and 28. In the result the petition succeeds. We think that the ends of justice will be met by imposing on each of the first and second Respondents a fine of LP. 10.—. Each of the Respondents must pay LP. 5 to the Petitioner as costs of these proceedings.

Given this 29th day of September, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 102/44.

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

BEFORE: Rose, A/C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Khalaf Sa'ad Muhammad & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Evidence — Tests to be applied in convicting on retracted confession.

Appeal from the judgment of the District Court, Jerusalem, dated the 19th day of July, 1944, in Criminal Case No. 82/44, whereby Appellants were convicted of offences contrary to Sections 287, 288 and 321 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment each, allowed and convictions quashed:—

When a case depends entirely on retracted confessions of an accused person, the trial Court should apply certain common sense tests to determine whether the confessions are likely to be true.

(*A. M. A.*)

ANNOTATIONS: The common sense tests to be applied before convicting on an uncorroborated retracted confession are set out, following English authority, in CR. A. 19/38 (5, P. L. R. 210; 1938, 1 S. C. J. 199; 3, Ct. L. R. 140). That case has been followed, *e. g.*, in CR. A. 132/41 (8, P. L. R. 506; 1941, S. C. J. 626; 11, Ct. L. R. 147) and in CR. A. 40/42 (1942, S. C. J. 189; 11, Ct. L. R. 152).

(*H. K.*)

APPELLANTS: In person.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is a very unfortunate matter, but learned Crown Counsel, with his customary fairness, has drawn our attention to the case which says that when a case depends entirely on retracted confessions of an accused person, a trial Court should apply certain common sense tests to see if those confessions are likely to be true. It certainly seems in this case that the Court did not apply their minds to this consideration. And, apart from the confessions of the two Accused, which they both withdrew at the trial Court, there is no evidence at all in this case implicating them in this offence. The result may very well be unfortunate as it is quite likely that these two Appellants were, in fact, the persons concerned. However, we must endeavour to be consistent in applying the principle which we have hitherto applied in such cases. It seems to us, therefore, that we have no alternative but to allow the appeal.

The appeals must be allowed and the convictions quashed. The Appellants will be discharged unless they are detained on any other charge.

Delivered this 14th day of September, 1944.

A/Chief Justice.

CIVIL APPEAL No. 357/43.

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

BEFORE: Rose, J.

IN THE APPEAL OF:—

Ihsan Agha el Nimer. APPELLANT.

v.

Fahmi Agha el Nimer,
in his capacity as Mutawalli of one-third
of the Waqf of the Nimer family. RESPONDENT.

Interpretation of judgment — C. A. 16/42 — Grounds for dismissal — Obiter dictum.

Appeal from the judgment of the Land Court, Nablus, dated the 26th of October, 1943, in Land Case No. 5/42, allowed and case remitted:—

Import of judgment in C. A. 16/42 analysed.

(*A. M. A.*)

REFERRED TO: C. A. 16/42 (1942, S. C. J. 227; 11, Ct. L. R. 109).

ANNOTATIONS:

1. See C. A. 16/42 (*supra*).

2. *Cf.* note 3 in A. L. R. to Misc. Appl. 32/43 (10, P. L. R. 439; 1943, A. L. R. 603) as to the effect of decisions being set aside or declared null and void.

(*H. K.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Barghouti.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Nablus. It appears that the present Respondent began these present disputes by instituting an action in the Magistrate's Court for *bedl misl* in respect of the land, the subject-matter of the present proceedings. He obtained judgment for LP. 56, but on appeal before the District Court that judgment was set aside on the ground that other matters were involved in the decision of the case which were outside the jurisdiction of the Magistrate's Court. The matter then came on appeal to this Court in Civil Appeal No. 16/42. There the appeal was dismissed without calling upon the Respondent (who is the Appellant in the present case), and it is important to note that the ground on which the appeal was dismissed was that the case was outside the jurisdiction of the Magistrate and was a matter for the Land Court.

The Appellant argues today, and I agree with his contention, that that was the sole ground upon which the appeal before the Supreme Court was dismissed. It is true that in the course of their judgment the Court of Appeal made certain observations on other matters, but it seems to me that those observations are *obiter* in so far as they did not affect the issue on which the appeal was decided in favour of the then Respondent who, as I have already said, was not even called upon to reply. The present Respondent then instituted a fresh action before the Land Court, and the learned President there seems both in his judgment and in a passage on page 2 of his record, to have taken the view that he was bound by the observations of the Supreme Court in Civil Appeal No. 16/42, and, therefore, that it was not open to him to consider all of the six agreed issues. To quote the learned President's own words, he says:—

> "The sole issue before me now is whether the piece of land which is shown in Exhibit R. J. 3 is *Maidan Ein Miri*, and, therefore, within the *Waqfieh*".

It seems to me, with all respect to the learned President, that he was wrong in that as that particular matter was only one of the issues in dispute between the parties. It may well be, as counsel for the Respondent contends, that the Appellant may fail if the case is fully

argued before the Land Court. I express no opinion on that matter except to say that even if that were so — even if on the facts he is unlikely to succeed — that can afford no possible reason for him to be denied the right, — which is due to every litigant, — to have his case heard and adjudicated upon by the appropriate Court.

It seems to me, therefore, that I have no alternative but to remit the case to the Land Court for determination of all the material issues.

The appeal will, therefore, be allowed, and the case remitted to the Land Court for this purpose. The costs of this appeal will be in the cause, as also will be the costs of the proceedings before the learned President of the Land Court. In order to simplify the final arrangements, I now certify the costs of this appeal to be on the lower scale, to include the sum of LP. 15 for advocate's attendance fee to the ultimately successful party.

Delivered this 26th day of September, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 90/44.

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

BEFORE: Rose, A/C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Leslie Albert Bates, B/C No. 603 & 2 ors. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Preliminary investigation — Refusal by Magistrate to commit — No appeal — T. U. I. Ord. 28(5) *— Charges contrary to secs.* 112 *and* 293 *C. C. O.*

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated the 6th of June, 1944, in Criminal Appeal No. 65/44, allowed:—

There is no appeal from a refusal by a magistrate to commit.

(*A. M. A.*)

ANNOTATIONS: See, on sec. 28(5) of the Criminal Procedure (T. U. I.) Ord., CR. A. 24/44 (11, P. L. R. 201; *ante*, p. 361) and note 1 thereto in A. L. R.

(*H. K.*)

FOR APPELLANTS: Gottschalk.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal which raises a point of procedure. It appears that the three present Appellants together with another person, who does not appear to have appealed but no doubt whose position will be dependent upon what happens in this case, were charged with an offence against Section 293 of the Criminal Code Ordinance of demanding property with menaces, and also against Section 112 of the Criminal Code Ordinance of doing an act in abuse of office. Needless to say, those offences, if proved, are of an extremely serious nature. What we have to consider is the legal position with regard to these matters.

It appears that the learned Magistrate who heard the preliminary investigation refused to commit both on the charge against Section 293 and against Section 112. His reasons for so refusing may have been good or bad, but we are told by counsel for the Appellant, and nothing has been cited to us to the contrary by learned Crown Counsel, that it would seem that no appeal as such lies either from a committal or a refusal to commit by a Magistrate. The only powers which exist in such a case would seem to be those which are provided to the Attorney General, and to the Attorney General alone, under Section 28, sub-section 5 of the Criminal Procedure (Trial Upon Information) Ordinance, and in accordance with sub-section (5), sub-clause (a) of that sub-section, the Attorney General has to move within a certain period of time in matters such as we are here considering. We are told now — that of course is no concern of ours — that in fact the Attorney General is out of time on this matter. That may be unfortunate but does not seem to us to be any reason for our stretching the provisions of the legislature. Our attention has not been called to any other provision which would appear to be in conflict with them. The result would seem to be that there is no way now — at any rate as far as these present proceedings are concerned — of overriding the refusal of the Magistrate to commit.

The appeal must, therefore, be allowed, with the usual consequences.

Delivered this 12th day of September, 1944.

Acting Chief Justice.

HIGH COURT No. 74/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

Bedrich Singer. APPLICANT.

v.

1. Director of Medical Services,
2. Inspector-General of Police,
3. Chief Secretary of the Government of Palestine. RESPONDENTS.

High Court — Medical treatment of detainees — Arbon v. Anderson & ors — Administrative remedies.

Application for an order directed to the Respondents, calling upon them to show cause why they should not be ordered (a) to bring Petitioner before an English Medical Board, (b) to issue a bulletin about Petitioner's present state of health and (c) to give Petitioner an opportunity of being treated at a private hospital, refused:—

> The High Court will not interfere with the enforcement of administrative instructions relating to the treatment of detainees. The remedy is administrative and not judicial.

(*A. M. A.*)

FOLLOWED: Arbon *v.* Anderson & ors. and De Laessoe *v.* Anderson & ors., 1943, 1 K. B. 252, 1 All E. R. 154.

ANNOTATIONS: For a similar ruling, following the same authority, see H. C. 85/43 (10, P. L. R. 480; 1943, A. L. R. 575). *Cf.* annotations to that case in A. L. R. for authorities on detainees generally.

(*H. K.*)

PETITIONER: In person.

ORDER.

This petition is in effect a complaint about the Petitioner's treatment whilst under detention, that treatment being in accordance with Government instructions. This being so, the case does not differ from that of Arbon *v.* Anderson and others (1943, 1 K. B. 252) which was decided by the Court of Appeal in England and which was to the effect that the Courts will not interfere to enforce compliance with such administrative instructions. The safeguards against the abuse which

the Petitioner alleges are an appeal to the Inspector-General of Police, the District Commissioner, and finally to the High Commissioner.

In these circumstances the application for a rule *nisi* is refused.

Given this 23rd day of June, 1944.

Chief Justice.

HIGH COURT No. 47/44.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPLICATION OF:—

Moriva Ltd. PETITIONER.

v.

The District Commissioner, Lydda District,
A. J. Ryder & an. RESPONDENTS.

flat — Petitioner abstaining from cross-examining the official.

. order *nisi* issued on the 26th of April, 1944, directed to the first
lling upon him to show cause why the requisition order of 24th
,4, whereby the first Respondent took possession of the flat comprising
s and conveniences, on the ground floor of the building, situated at 9,
am Street, Tel-Aviv, registered as parcel 68 in block 6918, should not be set aside; order *nisi* discharged:—

Where Petitioner does not wish to cross-examine the Public Officer — High Court unable to make any findings of fact and if Petitioner cannot show that Officer did any act in a matter affording ground for an order of *mandamus* they will not interfere.

(*M. L.*)

REFERRED TO: Progressive Supply Co. Ltd. *v.* Dalton, L. R. (Chancery) March 1943 p. 54, (1942) 2 All E. R. 646; Conway *v.* Stocks, "Weekly Notes" 24th April 1943 p. 96, (1943), 2 All E. R. 226; Greene *v.* Secretary of State for Home Affairs (1941) 3 All E. R. 388; Jones (Machine Tools) Ltd. *v.* Farrell (1940) 3 All E. R. 608; Minister of Munitions *v.* Macrill (1920) 3 K. B. 513; H. C. 78/43 (10, P. L. R. 526; 1943, A. L. R. 631); H. C. 78/39 (7, P. L. R. 35; 7, Ct. L. R. 45; 1940, S. C. J. 25); H. C. 77/28 (1, P. L. R. 353; 3, C. of J. 990); H. C. 37/39 (6, P. L. R. 422; 6, Ct. L. R. 189; 1939, S. C. J. 365); H. C. 122/43 (*ante*, p. 12).

ANNOTATIONS :

1. On requisition of premises see cases referred to and H. C. 73/44 (*infra*).
2. On discretion of competent authorities see H. C. 73/44 (*infra*) and annotations.

3. On cross-examination of deponent see H. C. 90/44 (*infra*).

(*A. G.*)

FOR PETITIONER: Michaelowsky.

FOR RESPONDENTS: No. 1 — Crown Counsel — (Hogan).
Nos. 2 & 3 — Absent — served.

ORDER.

This is the return to an order *nisi*, calling upon the first Respondent to show cause why an order made by him on 24th January, 1944, under Regulation 48, Defence Regulations, 1939, requisitioning a flat composed of four rooms on the ground floor of a building at 9 Rambam Street, Tel-Aviv, should not be set aside.

The first Respondent, for whom Mr. Hogan, Crown Counsel, appeared, has sworn an affidavit, paragraphs 3 to 6 of which are in the following terms, namely:—

"3. I requisitioned the said flat for the second Respondent, Mr. A. J. Ryder, who is the Director of the Anglo-Polish Institute.

4. As such director, Mr. Ryder is directly concerned with the furtherance of the joint Anglo-Polish War Effort and for the purposes of enabling him to carry out his duties in this connection I was satisfied that it was expedient to requisition this flat. It appeared to me that it was expedient so to do for the efficient prosecution of the war.

5. I requisitioned the flat for the use of Mr. Ryder. I am not acquainted with the third Respondent, nor with her activities nor with the allegations made in paragraph 4 of the petition, but Mr. Ryder informs me that a Mrs. Lublinsky, who is presumably the third Respondent, is employed by him as a housekeeper, and I so believe.

6. It still appears to me expedient for the efficient prosecution of the war that this flat should continue to be requisitioned for the use of Mr. A. J. Ryder."

We also quote paragraphs 3 and 4 of the petition:—

"3. On the 27.1.44, acting on the authority of the said Requisition Order, the District Officer, Tel-Aviv, has caused Itzhaq Borenstein, then in occupation of the said flat, to hand over the keys and to vacate the flat, and has delivered the possession thereof to Respondents No. 2 and No. 3.

4. Immediately upon occupation of the flat by Respondents No. 2 and No. 3, part of the said flat was converted into a show-room or drapery shop. The remaining rooms formed the residence of Respondents No. 2 and No. 3, as indicated by two sign cards affixed at the main entrance to the flat."

At the hearing on the return day we asked the Petitioner's advocate whether he wished to cross-examine the first Respondent on his affidavit under Rule 8, High Court Rules, 1937, but the reply was in the negative. We are, therefore, not in a position to make any finding

of fact because it is clear from the first Respondent's affidavit that the official merely relied on what the first* Respondent had told him with regard to the second** Respondent being his housekeeper. The Petitioner is unable to show that at the time when the order of 24th January was made the first Respondent did any act which can be questioned here, or did it in such a manner as can afford ground for an order of *mandamus*. The acts of the second and third Respondents of which the Petitioner now complains, were not committed even according to the Petitioner till 27th January or later. It is true that the Petitioner did, in paragraph 5 of his petition, allege that his grievance is that on 27th January his advocate wrote to the first Respondent requesting him to reconsider the matter, and thereafter to cancel the Requisition Order. It is clear, therefore, that the Petitioner's complaint is against the first Respondent's refusal so to do. In view, however, of the fact that the Petitioner's advocate did not wish to cross-examine the first Respondent on his affidavit under Rule 8, High Court Rules, 1937, we are unable to find any facts on which we could base the making absolute of the order *nisi*.

We refer to the following cases, namely, H. C. 78/43, Vol. 10, P. L. R. page 526; Progressive Supply Co., Ltd. *v.* Dalton, L. R. (Chancery) March, 1943, page 54; Conway *v.* Stocks, "Weekly Notes" 24th April, 1943, page 96; Greene *v.* Secretary of State for Home Affairs (1941), 3 All England Reports 388. Mr. Michaelovsky, for Petitioner, referred to H. C. 78/39; Jones Machine Tools, Ltd. (1940), Vol. 3 All England Reports 608; H. C. 77/28, Vol. 1 P. L. R. 353; H. C. 37/39 and H. C. 122/43, and to Minister of Munitions *v.* Macrill (1920) 3 K. B. 513.

We cannot, however, leave this matter without expressing the hope that the first Respondent will enquire into the matter; and, if he is satisfied that part of the requisitioned premises are being used as a drapery shop or show-room, he will, in the interests of the Petitioner, do what he can to remedy such state of affairs.

We are sure that the Authorities realise that, even in war-time, it is of paramount importance that the ordinary citizen should not be left with legitimate cause for grievance.

The order *nisi* is discharged with LP. 5 fixed (inclusive) costs.

Given this 5th day of June, 1944.

British Puisne Judge.

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* *Scil.*: Second.

** *Scil.*: Third.

(*Ed.*)

HIGH COURT No. 73/44.

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

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

IN THE APPLICATION OF:—

Moshe Lewitt. PETITIONER.

v.

The District Commissioner, Haifa. RESPONDENT.

Regulations 2 & 48 of the Defence Regulations, 1939 — Essential services — Requisition of premises — Notice of requisition — Discretion of governing authorities — Services essential to the life of the Community.

Return to an order *nisi*, issued on the 13th June, 1944, directed to the Respondent, calling upon him to show cause why he should not refrain from taking possession of the premises now occupied by the Petitioner on the 1st floor of 57 Kingsway, Haifa (known as Café Vienna) by virtue of his requisition notice dated the 11th of May, 1944, which purports to be made under Regulation 48 of the Defence Regulations, 1939, and why the said notice should not be set aside; order made absolute:—

1. It is for the governing authorities to exercise their full and unfettered discretion in matters under Defence Regulations and Courts of Justice would interfere in exceptional circumstances only, one of them being when the order of the competent authority does not exactly fall within the 4 walls of the regulation.
2. Regulations 2 & 48 of the Defence Regulations, 1939, must be read together with the result that when regulation 48 deals with services essential to the life of the community it means such services which have been previously declared to be essential by order of the High Commissioner.

(*M. L.*)

ANNOTATIONS:

1. As a result of this case Regulations 2 & 48 of the Defence Regulations, 1939, were amended by substituting a new definition for "essential services" in regulation 2 and by adding a new provision at the end of sub-regulation (2) of regulation 48 (Palestine *Gazette* No. 1349 of 3.8.44, Suppl. 2 p. 752).

Regulation 48 was again replaced by a new regulation in *Gazette* No. 1362 dated 28.9.44, Suppl. 2 pp. 981—3.

2. On requisitioning of premises generally see H. C. 47/44 (*ante*) and H. C. 58/44 and H. C. 90/44 (*infra*) and annotations.
3. This case was distinguished in H. C. 58/44 (*infra*).
4. On discretion of competent authorities see H. C. 51/44 (*ante*, p. 457) and annotation and cases cited in note 2 (*supra*).

(*A. G.*)

FOR PETITIONER: B. Joseph.

FOR RESPONDENT: A/Solicitor General — (Hogan).

ORDER.

Frumkin, J.: This case depends largely upon the construction of the words "maintaining ... services essential to the life of the community" in Regulation 48 of the Defence Regulations, 1939, in conjunction with the definition of "essential services" in Regulation 2 of the same Defence Regulations.

The facts of this case are very simple. In order to accommodate one of the Police Departments in Haifa, the District Commissioner, in exercising his powers as a competent authority under the Defence Regulations and acting under Regulation 48, requisitioned premises hitherto occupied by one of the leading banks in that town. With this requisition we are not concerned. In order, however, to accommodate the Bank, premises under the possession of the present Petitioner are being requisitioned also under Regulation 48. The premises are at present used by the Petitioner as a café and he feels very much aggrieved because on being put out of his premises he would either be deprived of earning his living as a café-owner and thus suffer great damage or else would have to undergo heavy expense to acquire some other accommodation suitable for carrying on the same sort of business which again could only be secured, if at all, without breaking the law, at great cost which he says he is unable to afford.

On the face of it it looks as if it were a question of closing a café in order to provide, true indirectly, accommodation for such important an institute as a Police Department, which is undoubtedly necessary for safety and security reasons, but it is obvious that this immediate object has already been achieved by requisitioning the Bank so that it seems more likely now to be a question of choice between bank and café. Speaking for myself I would think that the community of Haifa would not be much worse off with one café less. A similar view might be taken as regards banks; but that is really not the point and certainly not the point for us to decide. We are dealing with Defence Regulations and we are bound by previous decisions both by the Courts in England and the Courts of this country, all to the effect that it is for the governing authorities to exercise their full and unfettered discretion in matters of this kind.

Although in this country we have not got that high sanction of criticism by Parliament referred to by Lord Greene in one of his judgments, still responsibility must rest on the shoulders of Government facing such criticism as may or may not exist in this country. But even following this line of thought and series of judgments, Courts of Justice would interfere in exceptional circumstances, one of them being

when the order of the competent authority does not exactly fall within the four walls of the Regulation.

The notice of requisition in this case is dated 11th May, 1944, and reads as follows:—

> "I, Alfred Noel Law, District Commissioner, Haifa District, hereby give yo: Mr. Lewitt, the tenant, and Mr. Abraham Schugurensky, the owner, both of Haifa, Notice that it is necessary in the interest of public safety and maintenance of services essential to the life of the community, to take with effect from the 24th day of May, 1944, and to retain until further notice, possession of the premises now occupied by you, situated on the first floor of No. 57, Kingsway, Haifa, and known as Café Vienna.
>
> 2. And you are further notified that on satisfactory evidence being submitted that you are entitled thereto, you will be paid such compensation for the occupation of the said property as may be agreed upon between us or, failing such agreement, as may be determined in accordance with the provisions of the Compensation (Defence) Ordinance, 1940."

It is to be noticed that the requisition, or in the words of the law, the taking possession of the premises, is based on two grounds, that of "public safety" and "maintenance of services essential to the life of the community". Now, the interest of public safety has already been secured by the order to take possession of the Bank and the learned A/Solicitor General does not, before us, press this ground. He relies on the second ground, namely, the "maintenance of services essential to the life of the community". Were we left with Regulation 48 standing alone that would be the end of the matter and we would have had to say that the District Commissioner, as a competent authority, having found that the Bank is a service essential to the life of the community, we cannot interfere with, whatever view one may himself take on the matter. But we were referred to a definition of "essential services" in Regulation 2 of the Defence Regulations, 1939. That definition reads as follows:—

> " 'essential services' means such services as may for the time being be declared by order of the High Commissioner to be of public utility or to be essential for the prosecution of the war or essential to the life of the community;"

and it has been argued by Dr. Joseph, for the Petitioner, that "essential services" in Regulation 2 are the same as "services essential to the life of the community" in Regulation 48 and require an order of declaration by the High Commissioner.

Mr. Hogan advanced the argument that "services essential to the life of the community" and "essential services" are two different things and while the latter requires declaration, the first does not. It is true, he says, that under the definition "essential services" include "services

essential to the life of the community" but that does not mean that every "service essential to the life of the community" is an "essential service" and Regulation 48 deals with services essential to the life of of the community only, and such services do not call for a declaration.

With this proposition I am unable to agree. The fallacy being that the legislature could have foreseen a service essential to a factor of no less importance than the life of the community which is not an essential service at all. It would be a contradiction in terms to have a service essential for one thing or another, which is not in itself essential. We have, therefore, to read the two Regulations together with the result that when Regulation 48 deals with services essential to the life of the community it means such services which have been previously declared to be essential by order of the High Commissioner. While in matters of primary importance such as public safety, defence, efficient prosecution of the war, the legislature was satisfied with leaving it to the competent authority to decide whether any land is required for such purposes, the legislature thought otherwise as regards comparatively less important matters like public utility, or "services essential to the life of the community", in which case their essentiality was provided for to be declared by the High Commissioner. There being no declaration by the High Commissioner neither as regards banks in general nor as regards this bank in particular, the notice in question does not come within the four walls of Regulation 48. In consequence the District Commissioner, as competent authority, had no power to issue the order he made.

Having come to this conclusion it is not necessary now to deal with the other points raised on behalf of the Petitioner.

The order of this Court will, therefore, be made absolute in the terms prayed, with costs to include LP. 15 advocate's attendance fee.

Given this 28th day of July, 1944.

Puisne Judge.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

HIGH COURT No. 58/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF:—

Arie Girstein. PETITIONER.

v.

The District Commissioner, Haifa District. RESPONDENT.

Requisition of rooms for Income Tax Offices — Non-interference of H. C. with discretion of "competent authority".

Return to an order *nisi*, issued on the 10th day of May, 1944, directed to the Respondent, calling upon him to show cause why his order No. 581/457 of 12.2. 1944 should not be set aside and why he should not abstain from taking possession of the premises of the Petitioner; order *nisi* discharged:—

> Competent authority for requisition of land has the widest powers: Court cannot investigate the adequacy of his reasons or lack of investigation, *etc.;* all it can do — to see that those powers given by the legislature are exercised in good faith.

(*M. L.*)

FOLLOWED: Point of Ayr Collieries Ltd. *v.* Lloyd-George (1943) 2 All E. R. 546; Carltona Ltd. *v.* Commissioners of Works & ors. (1943) 2 All E. R. 560 at p. 564.

DISTINGUISHED: H. C. 73/44 (*ante*).

ANNOTATIONS: See H. C. 47/44 and H. C. 73/44 (*ante*) and H. C. 90/44 (*infra*).

(*A. G.*)

FOR PETITIONER: Ruthberg.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

The facts of the case are briefly that the Respondent, in accordance with the powers conferred upon him by section 48(1) of the Defence Regulations, 1939, made under Emergency Powers (Defence) Act, 1939, by notice of the 12th February, 1944, notified the Petitioner that he would take possession of certain rooms in his Hotel for the accommodation of Government offices.

In his affidavit, the Respondent states that he requires the offices to accommodate the Income Tax Office, Haifa, as it appears to him necessary and expedient in the interest of public safety, the efficient prosecution of the war and for maintenance of services necessary to the life of the community. Mr. Rigby for the Respondent submits that when such powers are given by the Regulations to a competent authority the Courts cannot interfere with the exercise of these powers by a competent authority, except on the ground of bad faith. It is for the competent authority and not for the Court to judge.

The Petitioner submits that his business is completely dislocated; that the affidavit of the Respondent is not a proper affidavit; that Income Tax does not fall within any of the objects as set out in sec-

tion 48(1); that certain skilled and semi-skilled occupations are named as War Service Occupations under Defence (War Service Occupations) Regulations, 1942, and that Income Tax is not included. Neither can it be considered as a Service essential for Public Safety or the life of the community. It is clear from the English decisions that the competent authority has the widest powers and it is not for the Courts to investigate the adequacy of his reasons or lack of investigation, *etc.* It is, in England, for Parliament to supervise the ministers — Lord Greene, M. R. in Carltona Ltd. *v.* Commissioners of Works and others, 2 A. E. L. R. 1943 at p. 564, said: "Parliament, which authorises this regulation, commits to the Executive the discretion to decide and with that discretion if *bona fide* exercised no Court can interfere. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith." Also see Point of Ayr Collieries Ltd. *v.* Lloyd George, 2 A. E. L. R. 1943, p. 546.

I can only say as regards the present application that had it been considered a question of being a service of public utility, or essential for the prosecution of the War, or essential to the life of the Community, the Respondent (*sic*) would be entitled to succeed since there is in section 2 to this regulation a definition of "'essential service' means such service as may for the time being be declared by order of the High Commissioner to be of public utility or essential to the prosecution of the war or essential to the life of the community". And the High Commissioner has made no such declaration as regards Income Tax.

There are, however, in section 48 other headings, namely, the interest of Public Safety, not covered by definition, *etc.* I am not prepared to say, and in fact I do not consider that I have any right to say, that the competent authority has not decided to requisition the rooms in question on this ground which he had included in his affidavit.

For the above reasons, the rule *nisi* is, therefore, discharged. This case must be distinguished from H. C. 73/44 where the premises were alleged to be requisitioned for an essential service only. Costs will be on the lower scale and will include LP. 15 advocate's attendance fee.

Given this 28th day of July, 1944.

A/British Puisne Judge.

HIGH COURT No. 90/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF:—

Yousef Khalifeh & 2 ors. PETITIONERS.

v.

The Acting District Commissioner of Jerusalem. RESPONDENT.

Affidavit on behalf of Government official — Requisition of premises — Onus of proof of mala fides.

Return to a rule *nisi,* issued on the 19th of July, 1944, directed to the Respondent, calling upon him to show cause why his Notice of Requisition, dated the 12th of May, 1944, should not be revoked, and why he should not release the three rooms which have been requisitioned; order *nisi* discharged:—

1. High Court will accept affidavits sworn by a deputy to or assistant of a Government official, provided deponent himself has been familiar with the negotiations in question.

2. Petitioner in High Court may require presence of deponent on behalf of respondent for cross-examination on his affidavit.

3. a) In a case of requisition of premises onus is on petitioner affected by it to prove absence of *bona fides* on part of requisitioning authority.
b) High Court will not interfere with an order of requisition made for purpose of Reg. 48(1), Defence Regulations, 1939, if there is nothing before them to show that it was anything other than a *bona fide* decision.

4. Powers of District Commissioner — not exhausted after requisition under Reg. 48(1), Defence Reg. 1939; he may subsequently requisition other premises to accommodate the evicted persons.

(*M. L.*)

FOLLOWED: H. C. 47/44 (*ante,* p. 516); Point of Ayr Collieries Ltd. *v.* Lloyd George (1943) 2 All E. R. 546; Carltona Ltd. *v.* Commissioners of Works & ors. (1943) 2 All E. R. 560.

DISTINGUISHED: Wilcock *v.* Booth (1920) 89 L. J. K. B. p. 864; 122 L. T. R. 678.

REFERRED TO: H. C. 68/44 (*ante,* p. 409); H. C. 78/43 (10, P. L. R. 526; 1943, A. L. R. 631); H. C. 58/44 (*ante*).

ANNOTATIONS:

1. As to point 1 see H. C. 25/42 (9, P. L. R. 237; 12, Ct. L. R. 58; 1942, S. C. J. 241) and annotations thereto.

2. On cross-examination of deponent see Rule 8 of High Court Rules, 1937, and H. C. 47/44 (*supra*).

3. As to point 3 see cases followed and referred to and annotations in A. L. R.

(*A. G.*)

FOR PETITIOERS: A. Atallah.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is the return to an order *nisi,* calling upon the Respondent to show cause why his Notice of Requisition of three rooms in a certain building in Jerusalem should not be set aside. On behalf of the Respondent an affidavit, sworn by the Acting Assistant District Commissioner, Jerusalem, has been filed. The Petitioners' advocate has objected to the Court considering this affidavit on the ground that the deponent has sworn to matters not within his own knowledge, namely, the state of mind of the Acting District Commissioner when he made the order of requisition. The deponent has, however, sworn that, throughout the period of the events connected with this matter, he (the deponent) was conversant with the circumstances of the case. This Court has in previous cases of a similar nature accepted affidavits sworn by the deputy to or assistant of a Government official, who has been a respondent to a High Court action, provided always — as in this case — the deponent himself has been familiar with the negotiations in question. In my view, there is nothing in this point made by the Petitioner, who, in any event, could have chosen to require the presence of the Acting Assistant District Commissioner for cross-examination on his affidavit. The Petitioner, however, has not chosen to do so.

With regard to the substance of the petition, the facts are that the Petitioners claimed to be partners and lessees of a café, which consists of three rooms in a building commonly known as the New Russian Building, Jaffa Road, Jerusalem, by virtue of a lease granted to them for two years from the first of *Muharram,* 1362. Owing to a certain licence being withdrawn, the Petitioners were compelled to close the premises on the 27th March, 1943. The order of requisition was not made until 12th May, 1944, so that the Respondent is entitled to take advantage of the argument that, when he requisitioned the premises, they were vacant.

The reason for the requisition is that, by virtue of another order of requisition, dated 17th March, 1944, made for the purpose of securing a building called the Sansour Building for the Controller of Road Transport, a body known as the "Union of Hotels, Cafés and Restaurants of Jerusalem", and a gentleman named Suzyn, a tailor, were

ejected from the Sansour Building, and apparently the Acting District Commissioner requisitioned the premises of the present Petitioners in order to accommodate therein the Union of Hotels, *etc.*, and Mr. Suzyn.

Mr. Anton Atallah, advocate for the Petitioners, contends that the District Commissioner exceeded his powers by ordering the requisition of premises when he arranged alternative accommodation for civilians who had been evicted by reason of a previous order of eviction, and he also contends that there is no connection between the eviction of the Petitioners and the order of the requisition of the Sansour Building. The answer seems to be found in High Court 47/44, and in the Defence (Amendment) Regulations No. 6 of 1944, Supplement No. 2, *Gazette* No. 1349, of 3rd August, 1944, paragraph 3. Mr. Atallah has also quoted the case of Wilcock *v.* Booth, (1920) 89 L. J. K. B., page 864, and Volume 122, L. T. R. 678, which, however, seems to have dealt with an entirely different matter, namely, that of alternative accommodation under the Rent and Mortgage Interest Restriction Acts. I do not agree with Mr. Atallah when he contends that the powers of the District Commissioner were exhausted when he requisitioned the Sansour Building. Mr. Atallah has also referred to High Court 68/44 and High Court 78/43, Volume 10 P. L. R., page 526. Mr. Clayton Rigby, Crown Counsel, for the Respondent, has referred to High Court 47/44 and High Court 58/44, and to Point of Ayr Collieries, Ltd. *v.* Lloyd George (1943) 2 A. E. R. page 546, and to Carltona Ltd. (1943) 2 A. E. R. page 560.

Mr. Atallah complains that the requisition order of 12th May, 1944, does not contain the names of the Union of Hotels, *etc.*, or the name of Mr. Suzyn, and that it merely authorises the District Housing Committee to enter into possession of the property on behalf of the Acting District Commissioner.

In my view, however, the notice of requisition is in accordance with and in compliance with the provisions of Regulation 48(1) Defence Regulations, 1939. I also refer to the penultimate paragraph of Lord Greene's judgment at page 563 of the report of the Carltona case. Mr. Atallah's complaint is that, when the Acting District Commissioner made the order of 12th May, 1944, he did not have in mind either the Union of Hotels, *etc.*, or Mr. Suzyn. The test, however, seems to be that laid down in the Point of Ayr Colliery case. I quote from Lord Greene's judgment, page 547 of the report: "In my opinion the Appellant's evidence does not establish any circumstances which give this Court power to interfere with what is admittedly the *bona fide* decision

of the Minister. We cannot investigate the adequacy of his reasons." The onus is on the Petitioner to prove the absence of *bona fides*. I do not think that he has succeeded in doing so. There is nothing to show that the suggestion that it was necessary for the war effort or that it was necessary for the purpose of Regulation 48(1) that the Union of Hotels, *etc.* and Mr. Suzyn should have accommodation in Jerusalem, is so palpably ridiculous or unreasonable as to prove the existence of bad faith on the part of Respondent when he made the order of 12th May. Mr. Atalla has also complained that when the Respondent made his order of the 12th May, 1944, he did not have in mind the Union of Hotels, Restaurants, *etc.*, or Mr. Suzyn. This, however, seems to be contradicted by the Respondent's reply of the 19th June, 1944, to a letter of 27th May, 1944, addressed to him by Mr. Atallah, which is in the following terms:—

> "In the present case the premises of Messrs. Yousef Khalifa & Co., which were not in use at the time, were required by me to accommodate two of the tenants of the Sansour Building, who were evicted to provide office accommodation for Government and War Service Departments. The requisitioning was in accordance with approved precedents."

It may, of course, surprise some people that the accommodation of this Union of Hotels, *etc.*, and Mr. Suzyn are matters coming within the purview of Regulation 48(1); but, in my view, there is nothing before me to show that, when the Respondent decided that it was necessary for the purpose of Regulation 48(1) to make this Order of Requisition, he made anything other than a *bona fide* decision.

For these reasons the petition fails and must be dismissed, and the order *nisi* discharged, with costs to the Respondent of LP. 10, *i. e.* fixed or inclusive costs.

Given this 27th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 393/43.

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

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

IN THE APPEAL OF :—

Raphael Habib Ben-Shalom & an. APPELLANTS.

v.

Hassan Said El Karmi. RESPONDENT.

Awlawiyeh — Time within which right may be exercised — Land Code, art. 41, *Land Law (Am.) Ord., sec.* 6(1)(*a*), *H. C.* 8/40 — *Knowledge — Value, assessment, hearing experts' evidence.*

Appeal from the judgment of the Magistrate's Court, Tulkarm, sitting as a Land Court, in Land Case No. 29/43, dismissed:—

1. By the combined effect of art. 41 of the Land Code and sec. 6(1)(a) of the Land Law (Amend.) Ord., the right of *awlawiyeh* is exercisable within one year from the time when the right developed in such a way that a third party would have a chance of knowing of its existence.
In the present case the material date was the date of transfer as the public could not, by mere reference to the register, ascertain even the existence of the file.

2. Unless the parties assent, whether explicitly or tacitly, experts' reports should not be accepted in evidence unless the experts are called as witnesses.

(*A. M. A.*)

DISTINGUISHED: H. C. 8/40 (7, P. L. R. 121; 1940, S. C. J. 76; 7, Ct. L. R. 101).

ANNOTATIONS:

1. See, on the question when a sale in the Land Registry is completed, H. C. 76/44 (*ante*, p. 494) and note 3.

2. *Cf.* C. A. 132/43 (1943, A. L. R. 791) where the parties to an arbitration agreed to have the expert's answer by telephone.

(*H. K.*)

FOR APPELLANTS: Beruti.

FOR RESPONDENT: Jayousi.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Tulkarm, sitting as a Land Court. The matter concerns the interpretation of Section 6(1)(a) of the Land Law (Amendment) Ordinance, Cap. 78 of the Revised Edition. Section 6(1)(a) reads:—

> "No right to claim a transfer of land under any of the said Articles shall be exercisable on the part of any person more than one year after the right first accrued."

It appears that the Appellants purported to purchase the land in question from the co-sharer of the Respondent on the 13th January, 1942. It appears that the vendor and the purchasers went before the Land Registry official, that they signed a deed and that the purchase money and the necessary fees were paid; but registration was not effected owing to the opinion of the Land Registry official that as the vendor was a Government official he should have first obtained the permission of his head of department to the sale of his property. That consent apparently was not obtained but, in due course, a letter was

produced showing that the vendor had left Government service and that, therefore, the objection of the Land Registry official no more subsisted and, in fact, he registered the property in the name of the Appellants on the 7th July, 1943, and it was in that same month in July, 1943, that the Respondent instituted his action asking for a declaration that he was entitled to purchase by right of priority. The Appellants say that the period of one year begins to run from the 13th January, 1942, on the analogy of High Court Case No. 8/1940, P. L. R. 1940, p. 121, and the words relied on are the following passage from the judgment of Mr. Justice Frumkin —

> "It is undisputed that in an ordinary case of transfer by consent of the parties the critical moment is when the parties appear before the Registrar of Land, acknowledge the transfer and pay the prescribed transfer fees. From that moment and onwards this transfer is for all intents and purposes conclusive and the Registrar would proceed with further transactions relating to the same property such as mortgaging the property just transferréd without first awaiting the actual inscription of the transfer in the Registry book,"

and as Mr. Beruti points out that case has been approved in subsequent decisions of this Court. It seems to us that this is undoubtedly a correct view of the law as regards the parties actually concerned in the transaction, but we think, in the absence of any authority on this point, that it would be wrong to extend that principle to a case of a third party because in these cases (whether or not the law is reasonable or unreasonable) Article 41 confers a right of priority of purchase and the Land Law (Amendment) Ordinance says "within one year after the right first accrued". It would seem to be only reasonable that that must mean within one year of the time when the right developed in such a way that the third party would have a chance of knowing of its existence. On this point the Registry official himself said that the general public know nothing about the existence of a mere file, and their only method of reference is to the register. We, therefore, think that the Appellants fail on that point.

Another point taken is that the value of the land should have been assessed at LP. 50 instead of LP. 40.240 mils and we are told that the Respondent, the Plaintiff in the Court below, admitted that the value of the share claimed was LP. 50. But all the Plaintiff said was that the value was *about* LP. 50 and the learned Magistrate appears to have arrived at this decision by considering three reports of experts. Technically the experts should have been called but it appears that both parties tacitly agreed that the reports should be put in. That being so we cannot say that the Magistrate was wrong in assessing the property at LP. 40.240 mils. The appeal must, therefore, be dis-

missed. The Respondent will have his costs in an inclusive sum of LP. 15.

Delivered this 26th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 7/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Leon Merkin. APPELLANT.

v.

Baruch Ram. RESPONDENT.

Defective non-enemy declaration — Leave to defend in an action brought under "Summary Procedure" — Raising on appeal a point not included in agreed issues — Constitution of Court.

Appeal from the judgment of the District Court of Haifa, dated the 23rd December, 1943, in Civil Case No. 11/42, dismissed:—

1. Where non-enemy declaration is found to be not in accordance with prescribed form, declarant may be allowed to file a fresh declaration.

2. Where leave to appear and defend was given and action tried and evidence heard, fact that words "Summary Procedure" were not written on back of statement of claim — not a good ground of appeal.

3. Where issues were agreed, Court of Appeal will not listen to a point which was not in issue.

(*M. L.*)

FOLLOWED: C. A. 249/43 (10, P. L. R. 549; 1943, A. L. R. 651); C. A. 232/43 (10, P. L. R. 563; 1943, A. L. R. 693).

ANNOTATIONS:

1. On non enemy declarations see C. A. 232/43, C. A. 249/43 (*supra*) and annotations in A. L. R. See also H. C. 31/44 (*ante*, p. 280) and annotations.

2. As to point 3 see C. A. 86/43 (10, P. L. R. 204; 1943, A. L. R. 106) and annotations.

(*A. G.*)

APPELLANT: Absent — served.

FOR RESPONDENT: Bernblum.

JUDGMENT.

When this appeal was called on for hearing neither the Appellant nor his advocate was present, although the Appellant's advocate appears to have been duly served on the 17th of May to attend the hearing to-day at 9 *a. m.* We may say that it is now after 9.30 *a. m.* and there is still no appearance for the Appellant. The Respondent has been represented by Mr. Bernblum and, in accordance with rule 337(c) of the Civil Procedure Rules, 1938, we decided to hear the appeal.

Mr. Bernblum has replied to all the matters raised in the written grounds of appeal. With regard to the complaint relating to the Non-Enemy Declaration, this matter was dealt with by the Court below in paragraph 7 of their judgment which reads as follows:—

> "During the trial counsel for Defendant objected to the declaration filed by the Plaintiff under the Defence (Courts Applications) Regulations, in that Clause D was omitted from it. The Court having regard to the judgments of the Supreme Court in Civil Appeal 249 of 1943 and Civil Appeal 232 of 1943 allowed the Plaintiff to file a fresh declaration within 24 hours. This was duly complied with".

In view of the judgments of this Court in Civil Appeals Nos. 249 (10, P. L. R. p. 549) and 232 of 1943 (10, P. L. R. p. 563) and two more recent decisions of this year, we think that there is nothing in this ground of appeal.

Another ground of appeal is that the statement of claim was not endorsed "Summary Procedure", that is to say, that the words "Summary Procedure" were not written on the back of the statement of claim. In view, however, of the fact that leave to appear and defend the action was eventually given and the action tried on the merits, there is nothing in this ground of appeal, especially when one remembers that the words "Summary Procedure" appeared at the top of the statement of claim. The Court below having heard evidence, preferred the evidence of the Plaintiff to that of the Defendant. It is clear that there was sufficient evidence to justify the Court below in holding that the Defendant had received consideration for the sum of LP. 200.

In the third ground of appeal the Appellant complains that the Court below refused to deal with an alternative defence, namely, that the present Respondent had undertaken to "cancel" the action. This, however, was not in issue and, as issues were agreed, this ground of appeal fails.

It is also complained that the Court which tried the action on the merits was not properly constituted. We have before us, however, the order made by the then Relieving President, who at the time was Acting President, under Regulation 4(1) of the Defence (Judicial) Regulations,

1943, Palestine *Gazette* No. 1291 of 30th September, 1943, Supplement No. 2, p. 883, appointing Judge Shems to sit alone for the trial of this particular action. This ground of appeal, therefore, also fails.

The Appellant's advocate has raised the point that his client was a soldier serving in the British Army and that Section 10 of the Civil Trial of Members of the Forces Ordinance should have been complied with. It would appear, however, that the Appellant's advocate had not had his attention drawn to the provisions of the Defence (Amendment of the Civil Trial of Members of the Forces Ordinance) Regulations, 1943, Regulation No. 5. This ground of appeal, therefore, also fails.

The fifth ground of appeal relates to certain evidence. We fail to see that there is any substance in this ground and the Appellant has not appeared to explain it.

For all the foregoing reasons the appeal is dismissed and the judgment of the District Court confirmed. The Appellant must pay the Respondent's costs, which we assess as fixed (or inclusive) costs of LP. 15.—.

Delivered this 12th day of June, 1944.

British Puisne Judge.

HIGH COURT No. 101/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Hassan Husni El Kayyali. PETITIONER.

v.

Assistant District Commissioner, Lydda, in his administrative capacity and/or as Assistant Food Controller, Lydda & an. RESPONDENTS.

Rights of holders of licences under sec. 4(5) of the Food Control Ordinance.

Petition for an order *nisi* to issue to the Respondents, directing them to show cause why the Petitioner should not be granted a proportionate share in the commodities allotted for the Sub-district of Lydda for distribution among the consumers of the sub-district and the town of Lydda, dismissed:—

Holders of licences under sec. 4(5) of the Food Control Ordinance have no

vested right to receive a proportionate share of any particular rationed commodity.

ANNOTATIONS: See cases cited in annotations to H. C. 119/43 (11, P. L. R. 12; *ante*, p. 86).

(*A. G.*)

FOR PETITIONER: Ghussein.

RESPONDENTS: *Ex parte.*

ORDER.

The Petitioner has not shown that he has any statutory right to receive any specified proportionate share in the commodities mentioned in Paragraph 13 of the petition. The application is accordingly refused.

There is nothing in the Food Control Ordinance which appears to give even persons who do hold licences under Section 4(5) a vested right to receive a proportionate share of any particular rationed commodity.

Given this 14th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 64/44.

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

BEFORE: Rose, A/C. J.

IN THE APPEAL OF:—

Sheikh Yunis el Khatib. APPELLANT.

v.

Hikmat Fawal. RESPONDENT.

Eviction on ground of annoyance and nuisance — Remittal of case for retrial before another Magistrate.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 29th of January, 1944, in Civil Appeal No. 203/43, dismissed subject to a variation:—

1. In an appeal from a judgment remitting the case for retrial Court of Appeal cannot, where Respondent has not cross-appealed, consider any argument by him entailing, if accepted, the dismissal of the action.

2. Court of Appeal will not uphold order of District Court for remittal before another Magistrate, if it does not seem to them necessary or justified by the circumstances.

(*M. L.*)

ANNOTATIONS :

1. On remittal of case to Court differently constituted see Motion D. C. T. A. 105/44 (Selected Cases of District Courts, 1944, p. 201) and C. A. 135/41 (8, P. L. R. 509; 10, Ct. L. R. 183; 1941, S. C. J. 526).

2. On non-application of Rents Restrictions Ordinance to contractual tenancy see C. A. D. C. Jm. 141/41 (Gorali, p. 159) and C. A. D. C. Ha. 29/44 (Selected Cases of District Courts, 1944, p. 205).

3. On user of premises for illegal or immoral purposes see E. & E. Digest Vol. 31, pp. 562, 579.

(A. G.)

FOR APPELLANT: Habiby.

FOR RESPONDENT: Weston Sanders.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, setting aside a judgment of the Magistrate's Court of Haifa and remitting the matter for retrial before a differently constituted Court. The present Appellant was the Plaintiff before the learned Magistrate and brought his action for the recovery of certain premises under Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940. His claim and the evidence in support of it would, if fully accepted, have been sufficient to justify an order for possession on the ground of annoyance and nuisance, the allegation being that the Defendant had burnt the door of the premises in question, and also that the neighbours were disturbed late at night by her accepting soldiers and other men to visit her for improper purposes.

The learned Magistrate in his judgment did not refer to the question of the burnt door, but he appears to have based his order of eviction on the ground of annoyance. I am prepared to agree with the learned Acting Relieving President that in order to support the finding based on that ground it must clearly appear from the learned Magistrate's judgment that he believed that the Respondent was visited by these men for improper purposes, as in fact is stated by the first witness who is the present Appellant, who deposed that he saw people coming to her "for abominable action".

Mr. Sanders, for the Respondent, stated that the section in question is inapplicable to cases where the tenant is on the premises by virtue of a contract of tenancy. This point cannot be considered by me now, because if it is correct it would follow that the judgment of the learned President must be set aside and the action of the Plaintiff dismissed, — but there is no cross-appeal by the Respondent, nor did he raise this point in his grounds of appeal before the District Court.

The learned President was in my opinion correct in remitting the case to the Magistrate's Court to be completed and for proper findings of fact to be made on the question as to whether there was any annoyance or nuisance.

Finally, the learned President ordered that the case should be tried before a differently constituted Court. This does not seem to me to be necessary or justified by the circumstances, and that part of his judgment will be varied accordingly. The case will, therefore, be remitted to the Magistrate's Court for completion. That part of the Magistrate's judgment providing for the sum of LP. 22.500 mils to be paid by the Defendant to the Plaintiff (and against which no appeal was made by the present Respondent to the District Court), will stand.

As regards the costs of the hearing before the Magistrate, and the subsequent hearing before the District Court, they will be in the cause, to be decided at the discretion of the Magistrate. The costs of this appeal will be in the cause and on the lower scale, to include the sum of LP. 10 advocate's attendance fee to the ultimately successful party.

Delivered this 18th day of September, 1944.

Acting Chief Justice.

HIGH COURT No. 106/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Leon Ginzburg. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Shmuel Broza. RESPONDENTS.

Imprisonment for debt — Debt Imprisonment Ord., sec. 2(c)(i), 2(c)(ii), 10, 11 — Necessity to inquire as to debtor's means — Imprisonment of debtor without inquiry — Release of petitioner pending return to the rule nisi — H. C. 57/41, 23/38, 88/43 — Practice — "Arrest" and "Imprisonment" — Debtor to be brought before E. O. before imprisonment.

Return to a rule *nisi*, issued on the 21st of August, 1944, directed to the first Respondent, calling upon him to show cause why his order of imprisonment of the

Petitioner, dated the 28th of July, 1944, made in Execution File No. 208/44, Execution Office District Court, Tel-Aviv, should not be set aside and cancelled; order made absolute:—

1. After arrest a debtor must in all cases be brought before an Execution Officer to show cause why he should not be imprisoned, no matter how recently his ability to pay was gone into.

2. "Arrest" and "imprisonment" are not synonimous.

(*A. M. A.*)

FOLLOWED: H. C. 23/38 (5, P. L. R. 271; 1938, 1 S. C. J. 229; 3, Ct. L. R. 174); H. C. 57/41 (1941, S. C. J. 525; 10, Ct. L. R. 85); H. C. 88/43 (10, P. L. R 494; 1943, A. L. R. 525).

ANNOTATIONS:

1. *Cf.* also H. C. 22/41 (8, P. L. R. 167; 1941, S. C. J. 165; 9, Ct. L. R. 41) and note thereto in S. C. J.

2. On *ex parte* orders by the C. E. O. generally, *vide* note 2 to H. C. 52/43 (1943, A. L. R. 329).

3. "Arrest consists of the actual seizure or touching of a person's body *with a view* to his detention". — Halsbury, Vol. 9, p. 84, No. 111.

(*H. K.*)

FOR PETITIONER: Adereth.

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

ORDER.

This is the return to an order *nisi,* directed to the Chief Execution Officer, Tel-Aviv, calling upon him to show cause why his order, dated the 28th July, 1944, under Section 2 of the Debt (Imprisonment) Ordinance, should not be set aside. By the order in question the Petitioner was imprisoned for twenty-one days.

The relevant facts briefly stated are as follows, namely: On the 20th July, 1944, the Assistant Chief Execution Officer had before him a written application for the imprisonment of the judgment-debtor. I assume that he also had before him an affidavit sworn by the judgment-creditor on 19th July, 1944. Notwithstanding the fact that he had that affidavit before him, he very properly made the following order:—

> "It is necessary to make an enquiry regarding the means of the debtor".

Now, one would have thought that the advocate for the judgment-creditor would then have taken steps to secure the presence of the judgment-debtor before the Assistant Chief Execution Officer. He could have done so by taking out a summons to be served on the judgment-debtor to appear before the Assistant Chief Execution Officer,

and if the judgment-debtor had failed to appear on the stated day, he could have asked the Assistant Chief Execution Officer to issue a warrant of arrest. But what happened was that on 28th July, 1944, that is to say, only eight days after the Assistant Chief Execution Officer had made his order, the advocate for the judgment-creditor presented to the Chief Execution Officer an application which was headed "application *ex parte* to order imprisonment under Section 2(c)(ii) of the Debt (Imprisonment) Ordinance". The learned Chief Execution Officer thereupon made the following order:—

> "On reading the affidavit of the judgment-creditor, and on hearing counsel, it is ordered that judgment-debtor be imprisoned for twenty-one days, conditional on payment of LP. 285 plus the costs of this application which I assess at LP. 4 to include advocate's attendance fees".

That order was apparently sent somewhere for execution, and on 17th August, 1944, the Petitioner was asked by some person to appear at the Police Station, Tel-Aviv, on the following morning. He apparently voluntarily appeared at the Police Station on the 18th August, 1944, but there was apparently then no suggestion of his being taken before a Chief Execution Officer or an Assistant Chief Execution Officer with a view to showing cause why he should not be imprisoned. He was then apparently taken to the Jaffa lock-up, there to undergo a period of imprisonment of 21 days; but, before being removed, he appears to have made a written application to the Assistant Chief Execution Officer (Mr. Zuckerman). This application was in the form of an affidavit sworn on the 18th August, 1944. Mr. Zuckerman did not see the judgment-debtor and apparently merely perused the affidavit, and wrote an order to the effect that, if the judgment-debtor would pay at once the sum of LP. 50, he would discharge the order of imprisonment and then a hearing would be fixed. The judgment-debtor, not surprisingly, was unable to pay the sum of LP. 50, and was, therefore, taken to the Jaffa lock-up where he remained until the 21st August, when his advocate applied to this Court for an order *nisi*, which was at once issued. At the same time an order for the release of the petitioner pending the determination of this petition was made.

Before I deal with any other matter, I would say that I am at a loss to understand why the order of 20th July, 1944, was disregarded by the advocate for the judgment-creditor. The advocate for the second Respondent, who has argued this matter before me and who, it is only fair to say, is not the advocate who appeared for the second Respondent before the Execution Officer, has sought to differentiate these proceedings from ordinary proceedings under Section 2(c)(i), on the ground

that this order was made apparently under Section 2(c)(ii); but, even if the application was made under Section 2(c)(ii) Debt (Imprisonment) Ordinance, the judgment-debtor was clearly entitled to show cause why he should not be imprisoned. He might well have been able to prove that he had not made or suffered to be made any gift of his property, or charged or concealed his property.

The advocate for the Petitioner has cited High Court 57/41, 23/38 and 88/43, P. L. R. Vol. 10, page 495. I understand that there is some confusion in certain quarters as to the practice which should be followed in these matters. To take a concrete example, I have been informed, not by the advocates to-day but by officials who are familiar with these matters, that supposing on the 21st September a judgment-debtor consents to judgment against him in the sum of LP. 100, and promises to pay instalments of LP. 10 a month, the first instalment to be paid on the 30th of September, in such circumstances it is believed by some people that if the judgment-creditor swears an affidavit on the 2nd October that the judgment-debtor failed to pay the instalment due on 30th September, then the Execution Officer is entitled to issue a warrant for his imprisonment, and that warrant may be executed at once, and the judgment-debtor arrested and taken to prison without any opportunity of showing cause why he should not be imprisoned. The argument of those who take this view seems to be that the inquiry as to means was made as recently as 21st September, and that this is a sufficient compliance with Section 2(c) or even with Section 10 and Section 11 of the Debt (Imprisonment) Ordinance.

That is entirely fallacious, and a little reflection will show why it is fallacious. It may well be that when the judgment-debtor gave his promise on the 21st September, he thought and had reason to believe that he would receive a remittance from a relative or a friend, or even from someone who owed him money, and that he would receive that sum of LP. 10 before the 30th September. Assuming that that remittance failed to reach him by 30th September, he is surely entitled before being incarcerated to be brought before the Execution Officer with a view to showing cause why he should not be imprisoned.

I think that perhaps the confusion has arisen because of the uncompromising way in which the three words "arrest and imprisonment" in lines 2 and 3 of Section 2 appear together. There seems also to be some confusion as to the meaning of the word "arrest". In the languages of some continental countries the word "arrest" is synonymous with the word "imprisonment". That is not so in the English language. Arrest means the act of taking into custody by a constable.

The object of that arrest is to detain the person arrested until such time as he can be brought before a Court, or in this country, in certain matters of civil imprisonment, before an Execution Officer.

I wish to lay down, if it still be necessary to do so, that, whenever a person is arrested under Section 2 of Cap. 48, he must in all cases, before being imprisoned, be brought before an Execution Officer with a view to showing cause why he should not be imprisoned, no matter how recently he may have promised to pay instalments, and no matter how recently he may have failed to keep that promise.

In this case it is clear that the judgment-debtor (Petitioner) has had no chance of showing cause in person why he should not be sent to prison. For that reason alone, and following the long line of authority cited by the Petitioner's advocate, the rule must be made absolute.

The second Respondent must pay the Petitioner's costs of these proceedings, that is, fixed or inclusive costs of LP. 10.

Given this 21st day of September, 1944.

British Puisne Judge.

HIGH COURT No. 98/44.

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

BEFORE : **Edwards and Frumkin, JJ.**

IN THE APPLICATION OF :—

Miriam Salem. PETITIONER.

v.

Registrar of Lands, Tel-Aviv & an. RESPONDENTS.

Heirs renouncing before Registrar, District Court, their shares in favour of their mother — Effect of certificate of succession issued by Registrar in favour of mother as sole heir — Registrar of Lands demanding transfer fees.

Return to a rule *nisi,* issued on the 28th day of July, 1944, directed to the Respondents, calling upon them to show cause why they should not proceed with registration of the property: Block 6407, Parcel 2, Magdiel, in the name of the Petitioner in file S/1818/44 without charging transfer fees and/or why their order to pay some transfer fees in respect of this property should not be set aside; order made absolute:—

1. Issue of a certificate of succession embodying renunciation by an heir

of his share in estate to benefit of other heirs — not outside powers of Registrar.

2. Renunciation by an heir of his share in estate in favour of other heir prior to order declaring succession — not a disposition in nature of a gift within meaning of sec. 2, Land Transfer Ordinance.

(*M. L.*)

REFERRED TO: C. A. 251/43 (10, P. L. R. 646; *ante*, p. 104); C. A. 255/43 (10, P. L. R. 552; 1943, A. L. R. 721).

ANNOTATIONS :

1. On effect of waiver of person of rights to estate see C. A. 179/37 (2, Ct. L. R. 215) and C. A. 76/41 (8, P. L. R. 235; 10, Ct. L. R. 23; 1941, S. C. J. 253). See also C. A. 24/36 not reported but Hebrew translation in "Haaretz" of 10.9.36.

2. On disposition not within meaning of disposition under Land Transfer Ordinance see H. C. 5/36 (7, C. of J. 113) and C. A. 92/43 (1943, A. L. R. 271).

3. On nature of certificate of succession and duty of Land Registry to register land of deceased in accordance with it see H. C. 30/39 (6, P. L. R. 399; 6, Ct. L. R. 92; 1939, S. C. J. 342) and C. A. 290/42 (10, P. L. R. 159; 1943, A. L. R. 166) and note 4 on page 167 in A. L. R.

(*A. G.*)

FOR PETITIONER: Gorali.

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

ORDER.

This is the return to an order *nisi*, directed to the Respondents to show cause why they should not proceed with the registration of certain *miri* immovable property in the name of the Petitioner without requiring her to pay to the Government land transfer fees. The facts are that the Petitioner is the widow of an Iraqi Jew who died in Palestine on the 1st of March, 1944, leaving a widow (Petitioner) and three daughters. The daughters are, of course, entitled to share in the *miri* property in accordance with Article 6 of the 2nd Schedule to the Succession Ordinance, Laws of Palestine Vol. II, p. 1392. The Registrar of the District Court of Tel-Aviv at the instance of the widow (the present Petitioner) on the 18th April, 1944, issued a certificate of succession from which I quote the following:—

> "After the above Neima Salem, Lea Arvili and Rachel Salem by their declaration of 18th April, renounced in the most valid and absolute manner their share in the estate of the above deceased to the benefit of the above Miriam Salem and the latter declared on the 18.4.44 that she is ready and willing to accept the a/m renunciation;
>
> It was, therefore, decided that the immovable property of *miri* category in Palestine of the deceased Zion Reuven Salem known also

as Zion Reuven Salim and Zion Salem will pass by inheritance to Mrs. Miriam Salem known also as Miriam Saleem".

The Petitioner's advocate relies on Land Transfer (Fees) Rules, 1939, Rule 8(ii). I quote Rule 8:—

"(8) Succession:—

(i) Registration of succession shall be made pursuant to an application supported by an order of the competent Court and upon payment of the fee prescribed in paragraph (ii) of this sub-rule.

(ii) If the application and order are lodged with the Registrar:—
(a) within six months of the death of the registered owner, no fee will be charged".

Mr. Gavison, Assistant Government Advocate, has shown cause on behalf of the Respondents. His argument is that the Registrar of the District Court of Tel-Aviv was sitting as a Probate Court and that he was not entitled to sanction any renunciation as his powers were limited to declaring who, in fact, were the heirs left by the deceased and as such heirs entitled to the *miri* property. He cites Sections 2 and 21 Succession Ordinance and Civil Appeals 251/43 and 255/43, P. L. R. Vol. 10, p. 646 *. He also says that the alleged renunciation by the three daughters was in the nature of a gift and, therefore, comes within the meaning of the word "disposition" in Section 2 of the Land Transfer Ordinance and that as such it is void under Section 4. We think that this argument is fallacious. With regard to the form of the order of the Registrar of the District Court of Tel-Aviv declaring the succession, we would point out that we are not sitting as a Court of Appeal from that order; but we have before us a final order which in effect declared that the widow was the only person entitled to succeed to the *miri* estate. His order is, therefore, the order of a competent Court as contemplated by Rule 8(1). We also think that Rule 8(ii)(a) applies to the facts of this case. The fallacy of the argument adduced on behalf of the Respondents seems to us to be, if we may say so with respect, to lie in thinking that the daughters ever became the owners of the *miri* land. Mr. Gavison has laid stress on the words "on the death" in line 1 of Article 1 of the 2nd Schedule to the Succession Ordinance as showing that the daughters did, in fact, succeed to the *miri* estate immediately their father expired. This is not so because the father was the registered owner; his name and his name alone appeared in the Land Register and presumably his name could not be struck off the register until an order of a competent Court declaring the succession was made. The position, of course, would be otherwise if the daughters' names were included in the certificate of succession and if they then

* C. A. 251/43 is on p. 646 and C. A. 255/43 is on page 552.

transferred the property to their mother or joined in a transfer. Presumably in such circumstances, which would be those of an ordinary transfer, the usual land transfer fees would be chargeable. In the present case we think that the widow is entitled to benefit from the terms of the certificate of succession and that this being the case she is also entitled to the exemption provided by Rule 8(ii)(a) and for these reasons the rule must be made absolute. The Respondents must pay one set of costs to the Petitioner namely, fixed or inclusive costs of LP. 10.

Given this 29th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 392/43.

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

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

IN THE APPEAL OF:—

Muhammad Said Totah. APPELLANT.

v.

Saleh Abdel Aziz Dabash. RESPONDENT.

Practice — Witnesses — C. P. R. 165, 168 — Witnesses summoned to attend and not examined — Upon adjournment of case they should be summoned again or warned to attend.

Appeal from the judgment of the Land Court, Jerusalem, dated 1.12.1943, in Land Case No. 46/43, dismissed:—

When witnesses have been summoned and the case is adjourned without their evidence being taken, the party calling them should either ask the Court to warn them to appear on the adjourned hearing or summon them again.

A deposit for the allowances in respect of the new hearing should in any event be made.

(A. M. A.)

ANNOTATIONS: An adjournment should, however, be granted where witnesses fail to appear although duly summoned: C. A. 311/43 (11, P. L. R. 72; *ante*, p. 73). See also annotations to that case in A. L. R. as to adjournments generally.

(H. K.)

FOR APPELLANT: Omar Saleh.

FOR RESPONDENT: F. Nazzal.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem which had dismissed a claim by the present Appellant for a declaration that he be entitled to be registered as the owner of 4½ *dunams* of land known as el Siwaneh situated in Sur Baher Village. He claimed under two contracts, or *hujjehs,* both of which had admittedly been made outside the Land Registry. The Appellant also admitted in evidence that they were contracts of final sale. The Land Court accordingly held them to be void dispositions which could form no basis for title. The learned Relieving President also found that the Plaintiff had never possessed the land in dispute although the Plaintiff claimed to have been in possession since 1928. The Land Court also found that these claims could not operate to vest any equitable right in the Plaintiff over the land. We are unable to interfere with those findings of the learned Relieving President.

There is only one matter raised in the grounds of appeal with which we intend to deal, as there seems to be doubt in some quarters as to practice. We are told that the Plaintiff summoned certain witnesses for the first hearing which took place on the 25th November, 1943, and that he had paid the proper fees for witness summonses as also the deposit required by the Registrar under rule 168, Civil Procedure Rules, 1938. Their evidence could not be heard on the 25th November and the case was accordingly adjourned to the 1st December, 1943. On that date the advocate for the Plaintiff admitted that he had not summoned his witnesses for that day and he accordingly asked for an adjournment to issue summonses for a fresh date. The advocate for the Defendant objected and the learned Relieving President declined to adjourn as he held that there had clearly been a lack of diligence on the part of the Plaintiff's advocate who could have taken steps to have summoned the witnesses for the 1st December had he so wished.

At the Bar to-day the Appellant's advocate has suggested that, as he had in the first instance paid what was required under rule 168, he should have been told by the Registrar what further sum, if any, was needed to enable the witnesses to be present on another day. This, of course, is quite wrong. It is clear that the deposit required under rule 168 covered only the first day. On the 25th November, the learned Relieving President intimated to the parties that the case would be taken on the 1st December at 9 o'clock. It was, therefore, the duty of the Appellant's advocate either to have had them summoned afresh and to have paid the additional witness allowances necessary, or to have asked the Court to warn them to appear on the 1st December,

in which latter case he should, of course, have seen to it that a further day's witness allowance was tendered to them or deposited in advance.

There is, therefore, nothing in this ground of appeal. The appeal is accordingly dismissed. The Appellant must pay the Respondent's costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Delivered this 22nd day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 341/43.

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

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

IN THE APPEAL OF :—

Raji el Issa. APPELLANT.

v.

Hanna Koperstock & an. RESPONDENTS.

Contract of lease — Stipulation as to date of commencement of lease — Liability of lessee — Breach of contract — Judgment for rent and damages and eviction.

Appeal from the judgment of the District Court, Haifa, sitting as a Court of Appeal, dated the 15th June, 1943, in Civil Appeal No. 56/43, dismissed:—

Where a clause in a contract of lease provides that the period of lease shall commence after grant of a licence to lessee and lessee by his own default failed to apply for it, his liability begins from the date on which he could, if he wished, receive the licence.

(M. L.)

FOR APPELLANT: A. Levin and Geiger.

FOR RESPONDENTS: Rand.

JUDGMENT.

In this case the Appellant is the owner of a house in Kingsway, Haifa. Apparently the house was divided into two flats, one flat consisting of ten rooms and the other of six rooms. The flat of ten rooms was leased to the first Respondent, and she utilized it as a hotel. The second Respondent is her husband and is cited merely as guaranteeing her.

In 1941 the Respondent, being anxious to extend her business, negotiated with the landlord for the lease to her of the flat of six rooms in addition to the ten she already occupied. As a result of these negotiations, an agreement was entered into. A copy of this agreement was an exhibit as P/2 in the District Court. The agreement, *inter alia,* purported to cancel the lease under which the Respondent held the ten rooms, and it re-enacted provisions under which the ten rooms, together with the six additional rooms, were to be leased. It was provided that before the contract came into effect the Appellant should fix wash-basins in these six rooms and instal baths and other necessary amenities for the purpose of using the premises as a hotel. When the repairs had been carried out and the authorities of the Public Health Department and the Municipality were prepared to grant the necessary certificates that the building was fit and proper for use as a hotel, clause 10 of the agreement stipulated that the new rent, which was LP. 30 as against the old rent of LP. 15 a month, should be payable. Clause 11 of the agreement provided that the period of the contract was to be two years from the date of the grant of a hotel licence to the Respondent. It is not denied that the obligation to apply for the licence was the Respondent's, not the Appellant's.

In September, 1941, the Appellant was notified officially that the permit contemplated in clause 10 would be granted, but that it would only be issued subject to the condition that one of the extra six rooms should be used as a store-room. Upon learning this the Respondents refused to carry out their part of the contract to take over these six extra rooms. They argued that the contract contemplated six bed-rooms, and that in fact owing to this condition they would only have five bed-rooms. It is quite clear that the whole dispute between the Appellant and the Respondents resolves itself around this point.

It is well to bear in mind that the Respondent had for many years been managing a hotel, and she must have been well aware of the usual conditions upon which a permit is issued for the utilization of a building as a hotel. It is admitted by her counsel that she knew that the Public Health Authorities would insist on a store-room, but she says that she understood from the landlord that this store-room would be erected in the corridor. It is common ground that the Public Health Authorities refused to allow the store-room in the corridor, and the only alternative open to the landlord was to set aside one of the rooms for this purpose. It can reasonably be assumed that the parties to the contract never anticipated an addition to the building, indeed such an addition would have been impossible. What they had in mind

was such structural alterations as would enable the additional six rooms to be used for hotel purposes.

These being the facts, I am of opinion that when the landlord was in a position to hand over the permits, as he was in September, 1941, he had carried out his part of the agreement. That agreement was to convert the six rooms. This he had done. The fact that the whole six could not be used as bed-rooms was due to no action on his part, but to a condition insisted upon by the Public Health Authorities, a condition which each party to the contract might reasonably have anticipated when they were entering into the contract. This being the case, it was in my opinion the duty of the Respondents to apply for the hotel licence when they were notified that the permits contemplated in clause 10 would be issued. This they failed to do. I, therefore, agree with the learned President that this failure was a breach of clause 13 of the contract.

I come now to consider the effect of this failure. It is at this point that I must part company with the learned Relieving President. He held that the first agreement, *i. e.* the agreement for the lease of the ten rooms, was revoked by mutual consent. But he also held that the second agreement, *i. e.* the agreement Exhibit P/2, had not yet come into effect by virtue of clause 11, which reads:—

> "Both parties have agreed that the period of this contract is two years, commencing with the date of the grant of an hotel licence to the second party."

If the learned Relieving President is correct, then it seems to me that the effect of his conclusion would be that the Respondents would benefit by what he has found to be their own default. He has, it is true to some extent, avoided this result by further holding that Articles 460—462 of the *Mejelle* applied, and that in so far as the ten rooms were concerned the Respondents were in possession with the consent of the Appellants. They held, he says, by virtue of a voidable lease, and the lessor could not sue for the delivery of the premises until he had exercised his right of cancellation of the voidable tenancy. It is conceded that he did not purport to exercise any such right.

I am unable to agree with this line of reasoning. I think that the argument of the Appellant on this issue is correct; that is, that the Respondent having failed to carry out the obligation which the Court found was imposed upon her by clause 13 of the contract, and by that failure having made the strict provisions of clause 13 inoperative, we can return to clause 10 of the agreement to fill the lacuna.

Clause 10 provided for the payment of the increased rent, *i. e.* the rent for the ten rooms plus the six rooms, the moment the conversion

was completed, and the authorities had agreed to grant the necessary permits. In other words, the parties contemplated that the grant of the licence would be simultaneous with the completion of the repairs. It seems to me that the Appellant could have sued for this extra rent if the Respondent had taken over the extra rooms on that date, although for some reason she might not have applied for the licence until a later date.

The failure to apply for the licence was, as the Court has found, and I agree with that finding, due to the default of the Respondent. She cannot now be allowed to benefit from that default. This being the case I do not think that clause 11 can be taken as alone determining the date of the contract. That clause must be interpreted in the light of the provisions of clause 10, and interpreting in that light I have come to the conclusion that the contract (P/2) came into operation on the date when the repairs were completed and the authorities were prepared to grant the necessary permits, *i. e.* in September, 1941.

In these circumstances we allow the appeal and order that the Respondents be evicted from the premises, and that the Appellant be awarded rent and liquidated damages together, amounting to LP. 82 claimed by him under the terms of the contract.

Costs in all instances and advocate's attendance fee of LP. 10 on the hearing of this appeal.

Delivered this 26th day of June, 1944.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 7/44.

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

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

IN THE APPLICATION OF:—

Hanna Koperstock & an. APPLICANTS.

v.

Raji el Issa. RESPONDENT.

Judgment for LP. 82 and order of eviction — Leave to appeal to Privy Council.

Application for leave to appeal to His Majesty in Council from the judgment

of the Supreme Court, sitting as a Court of Civil Appeal, dated 26th June, 1944, in Civil Appeal No. 341/43, refused:—

1. What has to be assessed for an appeal as of right to Privy Council is the value of the immediate issue in dispute, not the speculative consequences that may flow from it.

2. Value of consequences of an eviction — practically inassessable, hence no appeal as of right to Privy Council from a judgment for eviction.

(*M. L.*)

ANNOTATIONS:

1. The judgment which it was sought to appeal is reported *ante*, p. 545.

2. See P. C. L. A. 13/44 (*infra*, p. 550) and annotations thereto, and compare P. C. L. A. 24/43 (11, P. L. R. 33; *ante*, p. 237).

(*A. G.*)

FOR APPLICANTS: Goitein.

FOR RESPONDENT: A. Levin.

ORDER.

This is an application for leave to appeal to the Privy Council from the judgment of the Supreme Court, sitting as a Court of Civil Appeal in Civil Appeal No. 341/43.

There is available to every subject, machinery by which he can appeal by petition against the decision of the Courts of the Empire to the Privy Council, but appeals as of right are regulated by statute.

This is an application under Article 3(a) of the Palestine (Appeal to Privy Council) Order-in-Council. The Article provides that the issue in dispute must be capable of being estimated in sterling value to the amount of LP. 500 or upwards. No provision under Article 3(a) is made for appeals not capable of being so estimated. We are of opinion that this sum must be assessed on the value of the immediate issue in dispute, and not the speculative consequences that may flow from it. The sterling value of the consequences of an eviction is well nigh incapable of being assessed. Indeed, there may be cases in which there might be a gain to the evicted person, as for instance in this case, if the hotel in future were run at a loss.

Now, the immediate issue in dispute here was a claim for rent due amounting to LP. 2; a further claim for rent due for another period amounting to LP. 30; and liquidated damages of LP. 50; amounting in all to LP. 82. The judgment of the Court of Appeal is that the Respondents * should vacate the premises, and that the Appellant ** be awarded rent and liquidated damages together amounting to LP. 82.

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* Here: Applicants.

** Here: Respondent.

(*Ed.*)

It follows that the estimate in sterling value of the matter in dispute is LP. 82. With the consequences which may flow from the order of eviction, which in any case are purely speculative, we are not concerned. For these reasons the application must be refused with LP. 5 costs. The application for a temporary stay is refused.

Given this 21st day of July, 1944.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 13/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Bernard Hyam Silver. APPLICANT.

v.

Dvoshe Liebe Shekerka (Silver). RESPONDENT.

Privy Council leave to appeal — Proof of value of subject matter.

Application for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court, sitting as a Court of Civil Appeal, dated 21.7.44 in Civil Appeal No. 71/44, refused:—

Where respondent to application for conditional leave to appeal to Privy Council denies that matter in dispute exceeds LP. 500 applicant must affirmatively prove with adequate material that it does; affidavit merely saying "The subject matter of dispute on the appeal exceeds the value of LP. 500" is not sufficient evidence.

(*M. L.*)

REFERRED TO: P. C. L. A. 7/44 (*ante*, p. 548); P. C. L. A. 13/38 (6, P. L. R. 69; 5, Ct. L. R. 97; 1939, S. C. J. 98).

ANNOTATIONS :

1. For former proceedings see C. A. 71/44 (*ante*, p. 460).
2. See cases referred to (*supra*) and annotations in A. L. R.

(*A. G.*)

FOR APPLICANT: Sassoon.

FOR RESPONDENT: Goitein.

ORDER.

This is an application for conditional leave to appeal to His Majesty in Council.

The advocate for the Respondent to this application objects to the application being granted on the ground that the subject matter in dispute cannot be assessed in money value, the only issue in the District Court of Tel-Aviv, sitting as a Probate Court, and in this Court, sitting as a Court of Civil Appeal, having been the question whether the Respondent to this application was or was not the lawful wife of the deceased Nathan Yehuda Silver. The District Court and this Court on appeal found that she was his only lawful wife at the time of his death and she was, therefore, entitled to a quarter of his *miri* estate, in accordance with article 6 of the 2nd Schedule to the Succession Ordinance.

Mr. Goitein, for the Respondent, has referred to P. C. L. A. No. 7/44, the facts in which differ from P. C. L. A. No. 13/38, Vol. 6 P. L. R. p. 69. He contends that the facts in the present application are on all fours with those in P. C. L. A. 7/44.

Mr. Sassoon, for the Applicant, has argued that the effect of the judgment was to grant to the Respondent to this application a quarter of the *miri* estate of the deceased and he says that it is obvious that that quarter must be over LP. 500 in value.

I have carefully perused the record of proceedings and the judgment of the District Court and the judgment of this Court on appeal; but nowhere can I find any reference to the value of the *miri* estate. The affidavit supporting this application merely says "the subject matter of dispute on the appeal exceeds the value of LP. 500." In my view, this is not sufficient evidence of the value of the *miri* estate to enable me affirmatively to hold that the value of the *miri* estate exceeds LP. 500.—. I, therefore, prefer not to decide this application on the basis of upholding Mr. Goitein's contention. It may be that Mr. Goitein's contention is correct; but on this I prefer to be silent. I decide this application on the sole ground that the Applicant has failed to produce satisfactory evidence that the *miri* estate exceeds LP. 500 in value. It may be that it does; but it was the duty of the Applicant affirmatively to prove this with adequate material. This he has failed to do. The application must, therefore, be refused with costs, namely, fixed or inclusive costs of LP. 3.—.

Given this 21st day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 53/44.

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

BEFORE: Rose and Frumkin, JJ.

IN THE APPEAL OF:—

Najla Andrawos Khalil Naser. APPELLANT.

v.

Fuad Andrawos Khalil Naser & 2 ors. RESPONDENTS.

Prescription — Possession between co-heirs — Whether adverse — Possession begins on ancestor's death — Adverse possession within the period of prescription insufficient to establish title.

Appeal from the judgment of the Magistrate's Court, Ramallah, sitting as a Land Court, in Case No. 92/43, allowed:—

In order to establish title against co-heirs a defendant must show adverse possession for the period of prescription commencing from the death of the common ancestor.

(A. M. A.)

ANNOTATIONS: On possession by co-heirs generally see C. A. 370/43 (*ante*, p. 474) and notes.

(H. K.)

FOR APPELLANT: Ancar.

FOR RESPONDENTS: Sa'adeh.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court of Ramallah sitting as a Land Court. The Magistrate has found, and there seems to us to be sufficient material upon which he could properly so find, that the Appellant, who was the Plaintiff in the Court below, and the first Respondent were, together with their mother, the second Respondent, co-heirs of their father Andrawos who died in America in the year 1933. It appears that the first Respondent, Fuad, had taken possession of the properties during his father's life-time, his father having died in America, but as the Magistrate points out he could base no claim upon that possession until the death of the father at the end of 1933. Now, the learned Magistrate says as follows:—

> "Calculating the time from the end of 1933, the date of the death of the ancestor until the date of the present action, *viz.*: 11.3.1943, period of less than 10 years had passed and assuming that the

> lands were *Miri* (evidence of category of land is not available) the period of prescription had not expired".

The learned Magistrate goes on to consider an allegation that was made by the first Respondent that his possession was adverse to his sister's and, therefore, the presumption that he was holding on her behalf had been rebutted. The Magistrate found that he had, in fact, rebutted the presumption and gave judgment in his favour. It seems to us there that the Magistrate went wrong because if the period of prescription has not passed then the question of adverse possession cannot assist the Respondent. It seems to us that on the Magistrate's own finding that he came demonstrably to a wrong conclusion. That being so, the appeal must be allowed, the judgment of the Magistrate set aside and judgment entered for the Appellant as prayed in the statement of claim. The Appellant will have her costs here and below. The costs of this appeal to be on the lower scale and to include the sum of LP. 10 advocate's attendance fee.

Delivered this 22nd day of June, 1944.

British Puisne Judge.

HIGH COURT No. 41/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Yaacov Balaban & 3 ors. PETITIONERS.

v.

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

Putting in execution a notarial lease — Effect of repeal of sec. 14, Rent Restrictions (Business Premises) Ord. on a 3 years' lease which expired prior to repeal.

Return to an order *nisi*, issued on the 1st day of May, 1944, directed to the Respondents, calling upon them to show cause why the order of the first Respondent made in Execution File No. 180/44, dated 28.3.44, whereby Petitioners were ordered to vacate the premises situated at Dizengoff Square Tel-Aviv and known as "Cinema Esther" should not be set aside; order *nisi* discharged:—

1. A document drawn up by a Notary Public can be put in execution directly and executed like a judgment.

2. Art. 71, Notary Public Law (premises rented by notarial lease). only provides machinery to compel eviction upon failure to vacate, but right to recover possession of such premises accrues on expiry of lease.

3. Sec. 14, now repealed, of Rent Restrictions Ord. secured to landlords a right denied to other lessors of business premises; sec. 5(1)(c), Interpretation Ordinance, therefore applies.

(*M. L.*)

REFERRED TO: Lewis *v.* Hughes (1916) 1 K. B. p. 831; H. C. 58/41 (8, P. L. R. 414; 10, Ct. L. R. 111; 1941, S. C. J. 392); C. A. 139/42 (12, Ct. L. R. 160; 1942, S. C. J. 668).

ANNOTATIONS:

1. On execution of document drawn up by a Notary Public see: H. C. 154/42 (10, P. L. R. 28; 1943, A. L. R. 125); H. C. 58/41 (*supra*) and C. A. 139/42 (*supra*) with annotations.

2. On sec. 5(1)(c) of Interpretation Ordinance see H. C. 98/40 (7, P. L. R. 535; 8, Ct. L. R. 159; 1940, S. C. J. 539) and the English case of Lewis *v.* Hughes (*supra*).

3. As regards execution of judgments for eviction obtained before R. R. (B. P.) Ord. was applied see H. C. 114/43 (10, P. L. R. 706; 1943, A. L. R. 820) and annotations in A. L. R.

4. For subsequent proceedings in this case see H. C. 105/44 (*infra*).

(*A. G.*)

FOR PETITIONERS: Nos. 1 & 2 — Eliash.
Nos. 3 & 4 — Sommerfeld.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Goitein & E. Z. Felman.

ORDER.

This is the return to an order *nisi*, directed to the learned Relieving President of the District Court of Tel-Aviv, sitting as Chief Execution Officer, calling upon him to show cause why an order made against the present Applicants requiring them to deliver up possession of certain premises known as the "Esther Cinema", Tel-Aviv, should not be set aside.

Although the matter was argued at great length before me, and although the learned Chief Execution Officer gave lengthy reasons for his order, the matter can be disposed of in very few words.

On the 20th December, 1940, the present Applicants, who were the tenants, entered into a notarial lease with the second Respondent for a period of three years as from the 1st January, 1941. On the expiry of the lease the landlord served on the tenants a notice to quit within fifteen days under Article 71 of the Ottoman Notary Public Law of 1913. The learned Chief Execution Officer said that it was settled law that a document drawn up by a notary public can be put in exe-

cution directly and executed like a judgment (see High Court No. 58/41 and Civil Appeal No. 139/42). By section 14 of the Rent Restriction (Business Premises) Ordinance, 1941, this Ordinance did not apply to the matter in question because the premises in question had been made the subject of an agreement of lease for a term of three years. It would seem, therefore, that on 31st December, 1943, the second Respondent was entitled to evict the Applicants from the premises. Section 14 was repealed by the Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations, 1944, which came into force on 6th January, 1944.

The main controversy centred round the provisions of section 5(1)(c) Interpretation Ordinance; but, before dealing with this, I wish to dispose of the plea that Article 71 Ottoman Notary Public Law, 1913, secured the tenant because, as it is contended, the 1944 Defence Regulations above referred to were in operation with regard to the lease in question so as to oust the provisions of section 5(1)(c) of the Interpretation Ordinance. As to this the learned Chief Execution Officer in his written order said:—

> "One answer by the Respondent is that here there was no right accrued or liability incurred until the expiry of the 15 days' notice to quit under Article 71 of the Notary Law, which brings us up to the 17.1.44 when section 5(1) of the Interpretation Ordinance obviously could not avail the Applicant. I do not think that there is any substance in this point."

Dr. Eliash, for the Petitioners argued before me that the right to eject did not come into effect until 17th January, 1944, and that any application made before then would have had to be refused as being premature. I agree, however, with the learned Chief Execution Officer in thinking that Article 71 is concerned merely with providing machinery to compel eviction upon failure to vacate; but that the right to recover possession accrued on the expiry of the lease, that is on 1st January, 1944, which was prior to the repeal of section 14. This ground advanced by Dr. Eliash accordingly fails.

Dr. Eliash went on to argue that the landlord did not have any right or did not incur any liability under any ordinance or law repealed or abrogated. As to this I prefer the argument of Mr. Goitein, for the second Respondent, which is that his client had a right granted to him by section 14 of the Rent Restrictions (Business Premises) Ordinance, 1941, which was a right denied to other lessors of business premises, that is, lessors who had granted leases for periods of less than three years. Now, that right was secured to the landlords by the combined operation of Regulation No. 8 of the 1944 Defence

Regulations above referred to and Section 5(1)(c) of the Interpretation Ordinance. In support of his argument, Mr. Goitein cited the case of Lewis *v.* Hughes (1916) 1 K. B. p. 831.

In the result I am not prepared to hold that the learned Chief Execution Officer came to a wrong conclusion in law. The order *nisi* must, therefore, be discharged and the Petitioners must pay one set of costs to the second Respondent which I assess as fixed (inclusive) costs of LP. 10.

Given this 9th day of August, 1944.

British Puisne Judge.

HIGH COURT No. 105/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Yacov Balaban & 3 ors. PETITIONERS.

v.

1. The Chief Execution Officer, Tel-Aviv, (His Worship, the Magistrate Mr. Zuckerman),
2. Moshe Nathanel. RESPONDENTS.

Order of eviction unsuccessfully tested in H. C. — Regulations affecting execution enacted after H. C. judgment and prior to completion of execution proceedings — Time for satisfying a judgment.

Return to a rule *nisi*, issued on the 12th day of August, 1944, directed to the first Respondent, calling upon him to show cause why he should not refrain from continuing execution proceedings in execution file No. 180/44, Execution Office, Tel-Aviv, and why he should not stay all the execution proceedings in the said file; order made absolute:—

1. (a) Eviction proceedings not completed before 8.8.1944, date of promulgation of Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations (No. 2), 1944, must be discontinued if eviction could not have been lawfully ordered had the above Regulations and the principal Regulations been in force at the time of such order.

(b) Sec. 5(1)(c), Interpretation Ordinance — inapplicable to cases coming under Reg. 2, since from the clear and mandatory words of this Reg. the contrary intention to that of sec. 5(1)(c) appears.

2. Chief Execution Officer must comply with art. 38, Execution Law, providing for seven days' notice to judgment debtor to satisfy the judgment.

3. Where judgment debtor in eviction proceedings is given by Chief Execution Officer 48 hours to file a reply and so that he is liable to be ejected after 48 hours, he is right in applying at once to High Court.

4. Only provisions limiting the wide powers by sec. 1(1) Emergency Powers (Defence) Act, 1939 are those set out in sec. 1(5).

(*M. L.*)

REFERRED TO: R. *v.* Comptroller of Patents (1941) 2 All E. R. 677; H. C. 15/43 (10, P. L. R. 148; 1943, A. L. R. 25); H. C. 97/43 (10, P. L. R. 569; *ante*, p. 41); CR. A. 30/43 (10, P. L. R. 189; 1943, A. L. R. 308).

DISTINGUISHED: Young *v.* Adams (1898) A. C. 469 at p. 474; Day *v.* Kelland (1900) 2 Chancery 745 at p. 747.

ANNOTATIONS:

1. See the former proceedings (H. C. 41/44 — *ante*).

2. On sec. 5(1)(c) of Interpretation Ordinance see H. C. 41/44 (*supra*) and note 2 thereto.

3. As to points 1 and 4 see R. *v.* Comptroller of Patents (*supra*), CR. A. 30/43 (*supra*) and H. C. 97/43 (*supra*).

4. On disclosure of relevant facts in affidavit of Petitioner to H. C. see H. C. 15/43 (*supra*) and annotations in A. L. R.

(*A. G.*)

FOR PETITIONERS: Nos. 1 & 2 — Eliash.
Nos. 3 & 4 — Sommerfeld.

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

ORDER.

This is the return to an order *nisi*, directed to the Chief Execution Officer, Tel-Aviv, calling upon him to show cause why an order made by him on the 11th August, 1944, ordering the Petitioners to be evicted from certain premises should not be set aside.

It is necessary for me to refer to what happened in High Court No. 41/44. In that case I completed the hearing of arguments by parties' advocates on 26th July, 1944, and on the hearing of 9th August, 1944, I delivered judgment. My judgment was to the effect that an order made by the then Chief Execution Officer of Tel-Aviv, dated 28th March, 1944, evicting the present Petitioner from the same premises, as are the subject-matter of this petition, was a good order and could not be disturbed. The effect, therefore, of my judgment was that execution should proceed. Just as I was about to deliver judgment, Dr. Sommerfeld, advocate, drew my attention to the Defence (Amendment

of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations (No. 2) 1944, which had appeared in the Palestine *Gazette* Extraordinary No. 1350 of 8th August, 1944. I intimated to Dr. Sommerfeld that I had closed the hearing of arguments on the 26th July and had reserved judgment and that I had prepared my judgment and that I intended to deliver it and I also said that the mere fact that regulations had been passed the day before was not going to preclude me from delivering the judgment which I had already prepared. It would have been quite wrong for me to be affected by my own perusal of those regulations seeing that parties' advocates had had no chance of further arguing the matter before me. In any event, I was merely concerned with whether Judge Bourke had on 28th March, 1944, made a good order or rather one that could be attacked in this Court. I came to the conclusion that it could not be attacked.

It seems that on 11th August, 1944, the Chief Execution Officer on the application of the present second Respondent made an order which was in effect an order to the present Petitioners to comply within 48 hours with the order of Judge Bourke. Thereupon the present Petitioners filed this petition and on 12th August, 1944, they obtained an order *nisi*. These proceedings are the return to the order *nisi*.

The second Respondent has filed an affidavit sworn on the 11th September, 1944. At the hearing of the return several matters were urged by Mr. Goitein on behalf of the present second Respondent. He says that the order of this Court of 9th August, 1944, had to be obeyed by the Chief Execution Officer. As to this I agree with Dr. Eliash when he says that it was the order of Judge Bourke which was in effect to be exeeuted. Dr. Eliash rightly points to the words in paragraph 6 of the affidavit of the second Respondent "execute the Notary Public lease", not "execute the High Court judgment".

Regulation 2 of the Regulations of the 8th August, 1944, is in the following terms:—

> "2. For the avoidance of doubts, it is hereby declared that the Rent Restrictions (Business Premises) Ordinance, 1941, as amended by the principal Regulations, applies to any premises or the tenancy of any premises in respect of which an agreement of tenancy had been made for a term of not less than three years, notwithstanding that such agreement expired before the 6th day of January, 1944, and no execution proceedings for the eviction of any tenant from any such premises shall be commenced, continued or completed pursuant to any judgment given or order made before or after the 6th day of January, 1944, if such judgment could not have been lawfully given or such order could not have been lawfully made

> had the principal Regulations and these Regulations been in force at the time such judgment was given or such order was made."

Dr. Eliash argues that, if the execution proceedings were not completed by the 11th August, 1944, then the Chief Execution Officer on that date could not complete them because there was a definite prohibition by His Excellency the High Commissioner, that is to say, Regulation 2 of the Regulations of 8th August, 1944. I think that this contention of Dr. Eliash is sound.

Mr. Goitein says that there has been concealment of certain facts in that the Petitioners did not tell this Court that the Chief Execution Officer on the 11th August, 1944, gave the present Petitioner 48 hours within which to file a reply with him, that is with the Chief Execution Officer.

I agree with Dr. Eliash when he refers to Article 38 of the Law of Execution which required the Execution Officer to give seven days' notice, and I also agree with Dr. Eliash when he says that in face of that order the present Petitioners were liable to be ejected at any time after the 48 hours, that is to say, by Sunday the 13th August, and that the only course open to the Petitioners was at once to apply to this Court.

Although Mr. Goitein has cited High Court No. 15/43, Annotated Law Reports, 1943, p. 25, I do not think that it can be said that the Petitioner has failed to disclose relevant facts. The same reply must be given to the suggestion that there was an alternative remedy, namely, that the Petitioners could have waited for the decision of the Chief Execution Officer. Once the Chief Execution Officer had shown that he was going to evict them or that he might evict them after 48 hours the Petitioners were compelled to apply to this Court.

I also agree with Dr. Eliash when he says that Judge Bourke had, in fact, held that the Ordinance in question applied to a notarial notice and that the only matter before the Court in High Court No. 41/44 was the question of Sec. 5(1)(c) Interpretation Ordinance.

Dr. Eliash referred to High Court No. 97/43 P. L. R. Vol. 10, p. 575, in support of his contention that the order of the Chief Execution Officer is such an order as is contemplated by line 9 of Regulation 2 of the Regulations of 8th August, 1944.

Mr. Goitein next contended that the Regulations of 8th August, 1944, do not affect the application to this matter of Section 5(1)(c) Interpretation Ordinance. To this Dr. Eliash replies by quoting the words "unless the contrary intention appear" in line 3 of Section 5(1), Cap. 69. It is obvious from the very clear and mandatory words of Regulation 2 of the Regulations of 8th August that the contrary in-

tention does appear. This case is, therefore, to be distinguished from the case of Young *v*. Adams (1898) A. C. p. 474; and Day *v*. Kelland (1900) 2 Chancery p. 747.

Mr. Goitein's next argument is that the directions which His Excellency the High Commissioner purported to give in paragraph 2 of the Regulations of 8th August, 1944, cannot be given by regulation because His Excellency is given no power to amend by regulation any ordinance passed after 1940. He says that the Rent Restrictions (Business Premises) Ordinance was enacted in 1941, and he refers to Section 1(2) of the Emergency Powers (Defence) Act, 1940, (Mr. Kantrovitch's War Legislation, Vol. 1, p. 9). That Act was passed on 22nd May, 1940. Dr. Eliash replies that Section 1(2) of the 1940 Act is limited in its application to the matters set out in paragraph d of subsection i Section 1 of the Emergency Powers (Defence) Act, 1939, (Mr. Kantrovitch's book on War Legislation Vol. 1, pp. 1 and 2).

Mr. Goitein's argument is that the expression "enactment" means an enactment passed before 22nd May, 1940, and in support thereof he has quoted the case of King *v*. Comptroller of Patents A. E. R. (1941) Vol. 2 p. 677. Dr. Eliash replies that this argument overlooks the wide powers given by Section 1(1) of the Emergency Powers (Defence) Act, 1939, and the words in Section 1(2) "without prejudice to the generality of the powers conferred by the preceding subsection." (See Criminal Appeal No. 30/43, P. L. R. Vol. 10, pp. 189 and 191).

Dr. Eliash says that the only provisions for limiting the powers given by Section 1(1) are those set out in Section 1(5). With this contention of Dr. Eliash I agree.

Mr. Goitein next contends that there is no evidence to show that the Rules and Orders, 1943, No. 1036, *i. e.* the Order in Council made at the Court at Buckingham Palace on 22nd July, 1943, apply to Palestine. I do not think that there is any substance in this argument because it is clear that the Emergency Powers (Defence) Acts, 1939 and 1940, were extended so as to continue in force up to 23rd August, 1944. It follows, therefore, that all provisions made under the original Emergency Powers (Defence) Acts, 1939 and 1940, must be taken to apply to Palestine. Palestine is included in the second schedule to the Emergency Powers (Colonial Defence) Order in Council, 1939 (Mr. Kantrovitch's Book, Vol. 1 pp. 11 and 14). The regulation in question was made on 8th August, 1944, *i. e.* before the 23rd August, 1944. I refer to Supplement No. 2 of the Palestine *Gazette* No. 1288 of 9th September, 1943, p. 803. It follows, therefore, that all Mr.

Goitein's arguments must fail for the simple reason that Regulation 2 of 8th August, 1944, entirely prohibited the Execution Officer completing the execution proceedings in question. Once it is realised that on the 11th August, 1944, these execution proceedings had not been completed the Chief Execution Officer had no option but to comply with Regulation 2 of 8th August, 1944.

The Order *nisi* is, therefore, made absolute. The second Respondent must pay one set of costs to the Petitioners, namely, fixed (inclusive) costs of LP. 10.

Given this 26th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 365/43.

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

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

IN THE APPEAL OF:—

Abdul-Jawad Isma'il Jadallah. APPELLANT.

v.

Allan Isma'il Jadallah & an. RESPONDENTS.

Arbitration — Applications under secs. 13 and 14 — Misconduct or mistake may be raised only on an application to set aside, not in opposition to an application for enforcement — Submission must in general be signed — Caerleon Tinplate Co. v. Hughes — Person signing submission as a witness.

Appeal from the judgment of the District Court, Jerusalem, Civil Case No. 82/43, dismissed:—

1. Misconduct or mistake cannot be raised by way of defence in opposing the enforcement of an award: a special application should be made to set the award aside on those grounds.
2. In general, a submission should be signed by both parties or their agents.

(*A. M. A.*)

FOLLOWED: Caerleon Tinplate Co. *v.* Hughes, 1891, 60 L. J. Q. B. 640, 65 L. T. 118, 7 T. L. R. 619.

ANNOTATIONS:

1. An award can only be set aside upon a specific application to that effect: C. A. 6/38 (1938, 1 S. C. J. 98; 3, Ct. L. R. 114 — *leave to appeal;* 5, P. L. R.

311; 1938, 1 S. C. J. 346; 3, Ct. L. R. 299 — *appeal*). See also C. D. C. T. A. 285/38 and 265/40 (Tel-Aviv Judgments, 1940, *pp.* 175 & 163, resp. — in Hebrew).

2. Note that there is no necessity to draw up and sign a special submission to arbitration if such is embodied in a properly signed contract — C. A. 180/42 (9, P. L. R. 745; 1942, S. C. J. 788).

(*H. K.*)

FOR APPELLANT: Ancar.

FOR RESPONDENTS: A. Saba.

JUDGMENT.

While it is clear that there are two separate proceedings under the Arbitration Ordinance, one under Section 14 to confirm, against which the Respondent may enter an opposition, the other under Section 13 to set aside the award on the ground of misconduct, there is nothing to prevent this latter application being submitted by separate motion, and heard at the same time as the application for confirmation. Defendant cannot in an action under Section 14 plead as a defence misconduct or mistake on the part of the arbitrators. His proper course, if these grounds exist, is to move to set aside the award.

The application here was to enforce the award, and the usual reply to such a motion is to oppose, yet I can see no objection, if the Respondent desires to allege misconduct, to his applying by way of motion to set aside the award.

It is not, however, necessary to discuss these objections further, as there is another point which is fatal to the validity of the whole proceedings, namely that Allan Isma'il Jadallah signed the submission as witness only.

In general a submission should be signed by both parties, see Russell on Arbitration, 13th Edition, page 302. Quoting Caerleon Tinplate Co. *v.* Hughes (1891, 60 L. J. Q. B. 640) in which case Denman, J., said that in his judgment there could be no written agreement to submit unless it was in writing, signed by the parties as their agreement; Wills, J., took the same view. Halsbury, Vol. 1, page 441 at page 478 *, Bray, J., held that the signatures of the parties or their agents were necessary.

For the above reasons we agree with the judgment of the District Court refusing to confirm the award.

Possibly the use of the word "misconduct" in the judgment is a mistake, as it implies that the Court directed their minds to the pro-

* *Sic.* The correct reference is page 624, note (*o*).

(*Ed.*)

visions of Article 13 rather than to Article 14, under which the application was made. But it is clear that the District Court's decision is in accordance with Article 14 of the Arbitration Ordinance.

The appeal is dismissed with costs on lower scale to include LP. 10.— advocate's attendance fee.

Delivered this 29th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 406/43.

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

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

IN THE APPEAL OF:—

Abraham Moshe Freitelowitz & an. APPELLANTS.

v.

Israel Wolf Minzberg & 2 ors. in their capacity as trustees of the Charitable Trust Rabbi Salomon David son of Eliezer Mendel Bidermann's Charitable Trust. RESPONDENTS.

Action for removal of trustees — Deciding case only on one out of several issues.

Appeal from the judgment of the District Court, Jerusalem, dated the 26th of November, 1943, in Civil Case No. 131/42, allowed:—

Not desirable or even correct for a District Court, where there are several issues involved, to decide the case on one issue only.

(*M. L.*)

FOLLOWED: C. A. 230/41 (9, P. L. R. 86; 11, Ct. L. R. 145; 1942, S. C. J. 115).

ANNOTATIONS: See C. A. 230/41 (*supra*) and annotations in Ct. L. R. and S. C. J. For a recent case on the same point see C. A. 94/43 (1943, A. L. R. 152) and annotations.

(*A. G.*)

FOR APPELLANTS: No. 1 — Lande.
No. 2 — Abcarius.

FOR RESPONDENTS: No. 1 — Rand.
Nos. 2 & 3 — Geichman.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem.

The Appellants, who were Plaintiffs in the Court below, are asking for the removal of the trustees of a charitable trust under Section 29 of the Charitable Trust Ordinance, for accounts to be furnished, and for certain consequential relief.

The ground of appeal is that the learned President was premature in his method of dealing with the matter in that he decided the case on one issue only, without going into the question of whether or not there had been any breaches of duty as alleged.

It has been decided on several occasions in this Court, — and we have been particularly referred to Civil Appeal No. 230/41 (9 P. L. R. page 86) — that it is not desirable or even correct for a District Court, where there are several issues involved, to decide the case on one issue only.

In this particular case the learned President appears to have based his judgment on the ground that the Appellants have shown that they had no interest in the Bidermann Trust, principally it would seem, for the reason that the six houses or property in which they alleged they had an interest, had not formed part of the Bidermann Trust itself.

Now, whether that ultimately proves to be so or not we are unable to express any opinion, but we would draw attention to the fact that the evidence of Mr. Minzberg, who is the first Respondent and one of the trustees of the property in question, would appear to be against the finding of the learned President, because he says in cross-examination on page 5 of the record: "The six houses are not separate trust — they form part of the Bidermann Trust". There may be reasons why the Court may ultimately come to the conclusion that the houses referred to in the judgment before us do not form part of the Bidermann Trust, but no reason has been given by the President for disregarding the statement of the first Respondent, nor does it seem to us that he even referred to this matter of evidence when he dealt with this very issue. But in any event, in view of the many issues involved in this case, we are of the opinion that the appeal must be allowed and the case remitted to the District Court to hear and determine according to law.

The costs of this appeal will be in the cause and on the lower scale, but to simplify the final arrangements, we certify an advocate's attendance fee of LP. 10. If ultimately successful the Appellants will

have one set of costs and one advocate's attendance fee; the first Respondent will have one set of costs and one advocate's attendance fee; and the second and third Respondents together will have one set of costs and one advocate's attendance fee.

Delivered this 27th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 61/44.

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

BEFORE: Rose and Edwards, JJ.

IN THE APPEAL OF:—

Abraham Karassowsky & an. APPELLANTS.

v.

Rafoul Dalal & 2 ors. RESPONDENTS.

Bills of Exchange — Guarantors — Release of one guarantor discharges co-guarantors on joint and several undertaking — Motive for guarantee immaterial.

Appeal from the judgment of the District Court of Haifa, dated the 31st day of January, 1944, in Civil Case No. 203/43, allowed:—

The release of one of a number of joint and several guarantors on a promissory note discharges all other guarantors.

The motive which may have induced any guarantor to sign the note as such does not affect co-guarantors.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 206/41 (8, P. L. R. 494; 1941, S. C. J. 597; 10, Ct. L. R. 173), C. A. 162/41 (8, P. L. R. 596; 1941, S. C. J. 620; 10, Ct. L. R. 225) and C. A. 164/42 (1942, S. C. J. 797).

(*H. K.*)

FOR APPELLANTS: Wittkowski.

FOR RESPONDENTS: No. 1 — Asfour.
No. 2 — Absent — served.
No. 3 — In person.

JUDGMENT.

Rose, J.: In this case the first Respondent who was the Plaintiff in the Court below, sued on a promissory note for LP. 200, maturing on the 13th July, 1938, made by Kantor Brothers who were the first

Defendants in the Court below and guaranteed jointly and severally on the face of the note by the two present Appellants and the third Respondent. Now, during the proceedings, it became clear that the fourth Defendant Mr. Aboud, who was only a formal party to the present proceedings, had, in fact, been released and the document Exhibit D/1 signed by Mr. Dalal and dated the 15th July, 1938, was accepted by the trial Court as being a release of Mr. Aboud and judgment was thereupon entered for Mr. Aboud forthwith. Kantor Brothers, the first Defendants, had judgment given against them jointly with the present Appellant but have not appealed. Now, Karassowsky Brothers, who are the Appellants, say that this release of Aboud by Dalal is a release for them also and they rely on the note itself, Exhibit P/8, the terms of which would seem to be open to no doubt. It reads as follows, after the formal heading:—

> "On the 15th of July, 1938, we shall pay at Haifa to the order of Rafoul Dalal the above stated sum namely LP. 200 (Two Hundred Palestine Pounds). Value received from him in cash.
>
> (Sgd.) *Rubin Cantor*
>
> Signed on behalf of Cantor Bros."

Underneath that were the following words:—

> "We, the undersigned, hereby guarantee the above amount jointly and severally, individually and collectively on maturity and thereafter.
>
> (Sgd.) *Arieh Krassowsky*
>
> (Sgd.) *Abraham Krassowsky*
>
> (Sgd.) *Elias Aboud.*"

And on the back of the Bill:—

> "Please pay to order of Anglo Palestine Bank Ltd.
>
> (Sgd.) *Rafoul Dalal.*
>
> 19th April, 1938."

Now, the Appellants say that on the face of it, that is a perfectly clear example of a joint and several guarantee of a promissory note and that being so the release of one of the three co-sureties means a release of all. The learned Relieving President in the first instance appears to have come to the conclusion that this was not a joint and several guarantee but a several guarantee and that that being so there was evidence from which he was entitled to infer that there was an agreement or an understanding between the parties that there should be no contribution as between Aboud and the others. In the first place it seems to us, with respect to the learned Relieving President,

that there was no material upon which he could properly come to the conclusion that this was not a joint and several liability. We think that on the face of it, it is expressed to be so and there is nothing in the accompanying documents which would appear to weaken that conclusion, but even if there were, it seems to us that in the documents referred to us there is nothing to show clearly and conclusively that Aboud was not to contribute in the event of any of the sureties becoming liable to pay. We have been referred to documents, Exhibit P/2 and Exhibit P/6, which were an agreement and a supplementary agreement made by the parties and others, settling up their various financial affairs and referring to this particular note; but while we have been referred to them in detail, it appears on looking at the judgment of the learned Relieving President that he did not rely on these documents nor did he even refer to them. In the relevant passage of his judgment he refers in his conclusion to Exhibit D/1 and Exhibit D/2, D/1, the release, being the more important of the two, which sets out that the purpose of Mr. Aboud signing this note was to assist Mr. Dalal in discounting the note with his Bank. But it seems to us, again with all respect to the learned Relieving President, that the motive which causes a guarantor to guarantee a bill is not material, in so far as his guarantee in itself has been drawn to the attention of the other co-guarantors who thereupon agree by implication or expressly to be liable to contribute. The fact that a guarantor has a reservation in his own mind as to when and in what event he should incur liability on the note seems to us not to affect the legal position. For these reasons we are of opinion that the release of Mr. Aboud operated as a release for the Karassowsky Brothers, but the position of the Cantor Brothers we need not consider as they are no longer parties to the case.

The appeal must, therefore, be allowed and the judgment of the District Court set aside in so far as the Appellants are concerned, and judgment must be entered for them. The Appellants will have the costs here and below, the costs of this appeal to be on the lower scale to include the sum of LP. 15 advocate's attendance fee. The costs to be paid only by the first Respondent.

Delivered this 7th day of July, 1944.

British Puisne Judge.

CIVIL APPEAL No. 8/44.

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

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

IN THE APPEAL OF :—

Heirs of Muhammad Yusuf Qaddura (Zaki Qaddura). APPELLANTS.

v.

Jamal 'Iz ed Din Muhammad Qaddura & 18 ors. RESPONDENTS.

Appeals — Civil Procedure Rules 313, 314 — Failure to cite names of all Appellants — Land Settlement proceedings.

Appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated 30th July, 1943, in case No. 1/Esh Shuna, dismissed:—

Where the names of persons are lumped together in the notice of appeal by the words "and others" or "heirs" these names must be separately stated up to whatever number they may be.

(*M. L.*)

FOLLOWED: C. A. 191/43 (10, P. L. R. 500; 1943, A. L. R. 669).

ANNOTATIONS: See C. A. 17/44 (11, P. L. R. 254; *ante*, p. 381) and case followed.

(*A. G.*)

FOR APPELLANTS: Shukairy.

FOR RESPONDENTS: Nos. 1—3 — Eliash.
Rest — Absent — served.

JUDGMENT.

In this case Mr. Eliash has raised the preliminary point that there is no proper appeal before this Court in that the description of the Appellants in the Notice of Appeal is not a sufficient description since it fails to comply with the provisions of Rules 313 and 314 of the Civil Procedure Rules. The numerous cases quoted by him are too overwhelming to leave room for any doubt on the point. Mr. Shukairy has sought to draw a distinction between proceedings before Settlement Officers and proceedings in the other Courts of this territory, but we cannot agree that on the issue before us there is any such distinction. It is true that this Court will recognise and tolerate a certain looseness of procedure in land settlement operations, but when a litigant appeals, the rules which are designed to enable the Court to

function as a practical part of the machinery of good and organised Government, must be adhered to. The Appellants in this case are described as the Heirs of Muhammad Yusuf Qaddura (Zaki Qaddura). It will be sufficient if I quote from the judgment in Civil Appeal No. 191/43 and say that in our opinion this is quite insufficient to comply, even in a limited sense, with Rules 313 and 314. Where the names of persons are lumped together by the words "and others" or "heirs" those names must be separately stated, in brackets will be sufficient, up to whatever number they may be.

For these reasons the preliminary point succeeds and the appeal must be dismissed with costs taxed on the lower scale including advocate's attendance fee of LP. 10.

Delivered this 28th day of September, 1944.

Chief Justice.

CIVIL APPEAL No. 384/43.

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

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

IN THE APPEAL OF:—

Arieh Shmayewitz. APPELLANT.

v.

Eliahu Habouba & 4 ors. RESPONDENTS.

Subletting contrary to stipulation in contract of lease — Order of eviction in favour of one co-owner.

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, Civil Appeal No. 133/43, dismissed:—

1. Examples in *Mejelle* — merely illustrative not exhaustive, some of them obsolete.

2. Where contract contains no stipulation restricting lessee from transferring the lease or part of it, art. 428 of *Mejelle* may apply, but where parties specifically and clearly stipulate that tenant will have no right to transfer or sublet, restriction is effective and tenant bound by it.

3. Where there is no doubt that all co-owners consented to the action being brought against defendant, not necessary for all co-owners to be plaintiffs.

(*M. L.*)

DISTINGUISHED: C. A. 179/43 (1943, A. L. R. 639).

ANNOTATIONS:

1. On the nature of the examples to the *Mejelle* Articles see Hooper's Civil Law of Palestine, Vol. 2, pp. 19—20. *Cf.* also C. A. 138/37 (2, Ct. L. R. 73; 1937, S. C. J. (N. S.) 268; P. P. 5—10.x.37).

2. On nature of breach by sub-letting see C. A. 260/42 (10, P. L. R. 38; 1943, A. L. R. 78) and annotations in A. L. R.

C. A. D. C. Ha. 29/44 (Sel. Cases of D. C., 1944, p. 204) — change of user, no forfeiture of lease so long as greater injury to premises does not result therefrom.

C. A. D. C. Ha. 55/44 (*ibid.*, p. 214) — person letting alone a room may take in his wife whom he subsequently married.

3. As to point 3 see case distinguished (*supra*) and annotations thereto. See also C. A. 250/43 (11, P. L. R. 99; *ante*, p. 133).

(*A. G.*)

FOR APPELLANT: S. Friedman.

FOR RESPONDENTS: Nos. 1—4 — Ben-Haviv.

JUDGMENT.

In this case an order of eviction was given by the Magistrate against the Appellant on the ground that contrary to the stipulations of the contract of lease entered into between himself and some of the Respondents, he did sub-let part of the premises in question. The judgment was upheld by the District Court in its appellate capacity, and hence this appeal.

The Appellant relies on two grounds, and I will first deal with the first one, which is also the main ground of appeal, and that is that under the *Mejelle* a condition not to sub-let is not valid. He relies on Articles 427 and 428 of the *Mejelle*, the substantive parts of those Articles being as follows:—

> "Art. 427. If there is a difference by the change of the person using anything, effect is given to a restriction.
>
> Art. 428. If there is no difference by the change of the person using anything, no effect is given to a restriction."

The example for Article 428 is:—

> "In the case of a house let, to be dwelt in by someone, a person other than that person can dwell in it."

Now, as it has already been said on previous occasions, the examples cited in the *Mejelle* are merely to illustrate the rule laid down in the principal or substantive part of the article, and such examples are neither exhaustive nor do they always hold water. What was at one time a suitable illustration of a rule may, in the course of events, cease to be so. But still, in the absence of any stipulation to the contrary in a contract entered into between two parties, Article 428, together with its example, might be taken as binding upon the parties

that there is no restriction in the person using the property, and hence a transfer of the lease or a part of it might be in conformity with the law, but when parties choose to stipulate specifically and clearly that a tenant will have no right to sub-let, they have clearly taken the property out of the rule. The effect being that in so far as this particular property is concerned, in the eyes of the contracting parties, there is a difference by a change of the person using it, and, therefore, effect must be given to restriction. In other words, the landlord having restricted the use of the property to the tenant only, the latter cannot, without the former's consent, sub-let it to others.

Article 587 also would not help the Appellant, because in this case the parties agreed that as regards the property in question there is a variety as to the use and enjoyment people get from it. (The wording of this as well as the other articles of the *Mejelle,* used in this judgment, is according to Tyser's translation). That disposes of this point and it is not necessary to dwell on the effect of Article 64 of the Ottoman Civil Procedure Code on the *Mejelle,* a point which has to my mind been clarified in earlier judgments.

Another ground of appeal taken by the Appellant was that not all the co-owners of the property were Plaintiffs. The facts as regard this point were roughly this, that the second Respondent has transferred her shares in the property to the third and fourth Respondents. The action was originally brought on behalf of the first, third and fourth Respondents, and in the course of the proceedings the second Respondent was joined as a plaintiff. The Magistrate gave judgment in favour of the first and second Respondents and dismissed the action of the third and fourth Respondents. The District Court found that as the second Respondent is no more the co-owner of the property, she is not a proper party to sue, but at the same time it gave no judgment in favour of the third and fourth Respondents. It would, therefore, seem that the judgment was in favour of one co-owner only.

This case, however, is distinguishable from Civil Appeal No. 179/43 in that in the present case there is no doubt that all the co-owners, past and present, consented to the action being brought against the present Appellant, and on this ground also the appeal must fail.

The appeal will, therefore, be dismissed and the judgment of the District Court confirmed, with costs to include LP. 10 advocate's fees for the attendance of this hearing.

Delivered this 20th day of June, 1944.

Chief Justice.

CIVIL APPEAL No. 27/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF :—

Nazmi Bey Badrakhan Pasha. APPELLANT.

v.

Sitt Yumna Bint Michael Nassar & 3 ors. RESPONDENTS.

Custody of children of a couple who married before Sharia Court in Transjordan — Agreement signed by father giving up all his rights over the children to their grandmother — Action against mother for the custody of the children — Joining on appeal persons not cited before trial Court.

Appeal from the judgment of the District Court of Jaffa, dated 16th January, 1944, in Civil Case No. 92/42, dismissed:—

1. Where custody of children was with a third person by free agreement of their father, action for custody of the children brought by him against their mother — misconceived, and question as to the personal law applicable does not arise.

2. Person not cited in trial Court cannot be joined on appeal, and his name must be struck out.

(*M. L.*)

ANNOTATIONS:

1. Previous proceedings in this case are reported in H. C. 80/42 (9, P. L. R. 467; 12, Ct. L. R. 90; 1942, S. C. J. 512) and in C. A. 161/43 (10, P. L. R. 367; 1943, A. L. R. 421).

2. On the first point see H. C. 6/44 (*ante*, p. 290) and H. C. 45/43 (*ante*, p. 34) with annotations thereto.

3. On the second point see C. A. 161/43 (*supra*) and note 2 thereto; *cf.* H. C. 76/44 (*ante*, p. 494).

(*A. G.*)

FOR APPELLANT: Dajani.

FOR RESPONDENTS: Siksik.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa in which the learned President dismissed the Appellant's claim to the custody of his two children.

The facts are that the Appellant married the Respondent before the

Sharia Court at Amman in 1926. Of this marriage there were two children. Some time after the marriage the Appellant was convicted of embezzlement and was sentenced to a term of imprisonment. The 1st Respondent's mother took charge of her and her children, and has supported them and brought them up ever since. The children have been sent to good schools and have been admirably cared for. In 1935 the Appellant signed an agreement giving up all his rights over the children to their grandmother.

The case first came before the District Court in April, 1943, and the learned President held that as the Appellant was a foreigner, his marriage at Amman was not one which the District Court could recognize. On appeal the judgment of the learned President was set aside and the case remitted to the District Court for evidence to be heard, if necessary, as to the *Sharia* Law with regard to custody of the children.

In pursuance of this order of the Court of Appeal the District Court again heard the case and delivered judgment on 16th January, 1944. In that judgment the learned President stated that he could find nothing in the evidence which would compel him to alter his opinion that as the Plaintiff was a foreigner and the Defendant a Palestinian it was the District Court which had jurisdiction to decide the question. He went on to refer to the agreement of 1935, which he found was still binding. In the result he confirmed the custody of the children to the grandmother. It is against this judgment that the Appellant appeals.

Now, I find it unnecessary to decide what is the position in *Sharia* law between the Appellant and the Respondent, for it appears to me that this action against the first Respondent is misconceived. The second, third and fourth Respondents were not joined in the lower Court. The only issue argued before the lower Court and this Court is whether the mother was entitled to retain possession of the children. All the facts tend to show that she has never had the custody of the children; that custody has been in the grandmother ever since the Appellant deserted them when he went to prison. To that custody the Appellant agreed by an agreement which he freely executed in 1935.

For these reasons I agree with the learned President's conclusion that the Appellant's action against the first Respondent must fail. In the action before the District Court the first Respondent was the sole Defendant, but on this appeal the Appellant has cited as additional Respondents the grandmother and the two children. In my opinion this procedure was wrong. As these persons were not cited in the

District Court they cannot be joined on appeal, and their names must, therefore, be struck out.

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

Delivered this 27th day of July, 1944.

Chief Justice.

CIVIL APPEAL No. 191/44.

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

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

IN THE APPEAL OF:—

Ali Rasem Jaouni & 3 ors. APPLICANTS.

v.

Nuzha Abdul Salem Jaouni. RESPONDENT.

Appeals — Application for leave to appeal or for extension of time — C. P. R. 324 — Striking out statement of claim under r. 21, whether order or decree — Title given by Court of trial not conclusive — Decision on the merits within the meaning of r. 2 — C. A. 234/41.

Application for leave to appeal or, in the alternative, for extension of time to file an appeal against the decision of the Land Court of Jaffa, dated 23rd March, 1944, in Land Case No. 16/43, dismissed:—

1. It is necessary to examine the terms of a decision to ascertain whether it is an order or, as when it decides the merits, a decree. What the decision is termed by the Court of trial is not final.

2. An appellant who misunderstood the effect of such a decision will not, without showing good cause, be granted an extension of time to file an appeal.

(*A. M. A.*)

FOLLOWED: C. A. 234/41 (8, P. L. R. 587; 1941, S. C. J. 545; 11, Ct. L. R. 59).

ANNOTATIONS:

1. For previous proceedings between the parties see C. A. 152/41 (8, P. L. R. 409; 1941, S. C. J. 375; 10, Ct. L. R. 133) and case cited in note 1 thereto in S. C. J.

2. Applicants had filed an action in the Land Court to set aside on the ground of fraud the previous judgment of 8.5.1940 which had been restored by the Supreme Court in C. A. 152/41 (*supra*). The Land Court (Hubbard, J.) was of opinion that the statement of claim was vexatious, but allowed Appli-

cants 14 days to file an amended statement of claim and an affidavit substantiating their allegation of fraud. That order was not complied with and Respondent thereupon formally applied under Rule 21 of the C. P. R. to have the statement of claim struck out as being frivolous and vexatious, and in its "order" of 23.3.44 the Land Court granted the application after dealing fully with the merits of the case. Applicants thereupon applied to the Land Court for leave to appeal which application was refused on the ground that the said "order" of 23.3.44 was in effect a decree dismissing the action; hence this application.

3. *Cf.* C. A. 366 & 367/43 (11, P. L. R. 85; *ante,* p. 100) and annotations thereto in A. L. R. on the contradictory decisions of the Supreme Court in such cases. See also *dictum* of Edwards, J., in C. A. 124/44 (11, P. L. R. 153; *ante,* p. 199): "I consider that the whole position of the law with regard to leave to appeal under various Ordinances is vague, obscure and unsatisfactory".

(*H. K.*)

FOR APPLICANTS: Berouti.

FOR RESPONDENT: Nakhleh.

JUDGMENT.

In this case there are in fact two motions. One for leave to appeal on the ground that the decision of the learned Relieving President, dated the 23rd of March, 1944, was an order and not a decree. Alternatively, if we decide that it was a decree, there is a motion for extension of the period for filing the appeal under Rule 324 of the Civil Procedure Rules, 1938.

Now, the judgment of the learned Relieving President, which is given in Land Case No. 16/43, is not only headed "order" but in the final words which embody his decision, he states that the statement of claim is struck out as disclosing no cause of action. There are several decisions of this Court to the effect that a striking out of a statement of claim under Rule 21 of the Civil Procedure Rules is an order and not a decree. But there are also decisions to the effect that the Court must look to the judgment itself in order to decide whether it constituted an order or a decree. In other words, the title given to the judgment by the Court below is of little effect, if in fact that title is an erroneous description.

The judgment of the learned Relieving President covered nine pages of type. He dealt fully with all aspects of the merits of the case and whatever he may have called his judgment, it was, in our opinion, a decision on the merits, and it is a decree within the meaning of Rule 2.

I turn now to the alternative motion for leave to extend the time for appeal under Rule 324. The decision on this point must, in my opinion, flow inevitably from the answer to the question whether the judgment was an order or a decree. I confess that I have had

some sympathy with the Applicants, because the wording of the learned Relieving President, both in the opening and closing paragraphs of his judgment, was open to an ambiguous interpretation. But it appears to me that no extension of time under Rule 324 could be given, consistent with the decision in Civil Appeal 234 of 1941, P. L. R. Vol. 8, page 589. I quote from the judgment of the Acting Chief Justice Copland:—

> "Misunderstanding of the law, I am afraid, is not a good cause, and as I remarked in the course of the argument, anyone who reads the judgment would immediately have seen that it was dealing with a case of arbitration, and the point should have at once been seen that leave to appeal was necessary."

I have found as a fact that a perusal of the judgment (of the learned Relieving President), dated the 23rd March, 1944, must have led to the conclusion that it was a decree whatever the Relieving President chose to call it. This being so, and applying the principles enunciated in Civil Appeal 234/41, I must refuse an extension of time under Rule 324.

The application is, therefore, refused, with LP. 10 inclusive costs.

Delivered this 21st day of June, 1944.

Chief Justice.

CIVIL APPEALS Nos. 110—116/44.

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

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

IN THE APPEALS OF :—

Gershon Mabovitz & 7 ors. APPELLANTS.

v.

Joseph Furer. RESPONDENT.

Jurisdiction of Courts — Land Court has jurisdiction where a claim to ownership of immovables involved — Ancillary relief does not oust jurisdiction — Construction of documents of title — Mejelle 1226.

Appeals from the judgment of the District Court, Tel Aviv, in its appellate capacity, dated the 25th day of February, 1944, in Civil Appeals Nos. 199/43, 196/43, 211/43, 210/43, 195/43, 197/43 and 198/43, allowed:—

1. The Land Courts have jurisdiction where the principal claim relates to ownership of immovable property.

2. Where the other Courts have jurisdiction, a question of title incidentally arising does not oust the jurisdiction.

3. But where the claim depends on the construction of a transaction giving title to immovable property, the Land Court should be approached.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in Selected District Court Judgments, 1944, p. 108.

2. *Cf.* C. A. 295/43 (11, P. L. R. 224; *ante*, p. 239), C. A. 343/43 (11, P. L. R. 303; *ante*, p. 330) and C. A. 351/43 (*ante*, p. 386).

On the jurisdiction of the Land Court generally *vide* note 3 in A. L. R. to C. A. 279/42 (10, P. L. R. 96; 1943, A. L. R. 88).

3. On jurisdiction in respect of ancillary matters *cf.* C. A. 60/43 (10, P. L. R. 241; 1943, A. L. R. 217) and H. C. 4/44 (11, P. L. R. 7; *ante*, p. 189).

(*H. K.*)

FOR APPELLANTS: Eliash and Olshan.

FOR RESPONDENT: Goitein and Gluckman.

JUDGMENT.

Rose, J.: These are appeals from the judgment of the District Court of Tel Aviv, sitting in its appellate capacity, which appeals, for the sake of convenience, have been consolidated.

This is one of those unfortunate matters in which we feel obliged to say that the learned Magistrate had no jurisdiction to entertain the matters before him. While these distinctions, in cases of this class, between the jurisdictions of the Magistrate's Court, the Land Court and the District Court may perhaps seem to be somewhat artificial, there is a long line of authorities to the effect that where a claim to ownership of immovable property is principally involved, it is the Land Court alone that has jurisdiction. It is true, as the Respondent argues, that there is authority for the proposition that the jurisdiction of a Court is not ousted merely because some ancillary relief is asked for which, taken by itself, would lie beyond the jurisdiction of the Court, provided that the principal matter or claim is within its jurisdiction. This principle, however, would not seem to avail the Respondent in the present proceedings because, as Mr. Eliash points out, these proceedings are for the recovery of possession of a number of flats, the defence being that each tenant is the owner by purchase of his particular flat.

This matter must, of course, depend upon the interpretation of the particular agreements entered into between the parties, and it seems to us that the Appellants' contention is correct that it was necessary for the Plaintiff-Respondent in order to succeed in his action to obtain

a decision on the question whether the agreements were null and void. So far from the question of ownership, which is, of course, dependent upon the agreements, being an ancillary matter it seems to us that this question lies in the very forefront of the dispute. That being so, we are of opinion that the Magistrate had no jurisdiction to decide this matter. We come to this conclusion with regret, not because we have formed any opinion on the merits adverse to the Appellants' case, but merely on the ground that it is unfortunate that, after a lengthy hearing in two Courts, the matter should have to be recommenced *ab initio*.

Having regard to the result to which we have come, we consider that it is undesirable for us to express any opinion on the other matters which have been raised before us, as they will no doubt have to be considered *de novo* by the appropriate Court. We feel it unnecessary, therefore, to deal at length with the various propositions enunciated by the learned Magistrate but we would, perhaps, mention in passing that the answer to the example cited by him of an indulgent host inheriting an importunate guest for the whole of his lifetime if the Magistrate has no power to order recovery of possession, would seem to be provided by article 1226 of the *Mejelle*.

The appeal is, therefore, allowed and the judgments of the Magistrate's Court and the District Court are set aside and judgment entered for the Appellants. The Appellants will have their costs here and below, the costs of this appeal to be on the lower scale and to include the sum of LP. 25 for advocate's attendance fee. Advocate's fees in the Court below are reversed.

Delivered this 28th day of July, 1944.

British Puisne Judge.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 28/44.

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

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

IN THE APPEAL OF:—

Mordechai Mikhashvily. APPELLANT.

v.

Estate of the late Dr. Arthur Waksberger,
represented by the widow and heir,
Mrs. Anna Waksberger. RESPONDENT.

Claim for eviction — Lease comprising shops and rooms — Which Rent Restrictions Ordinance applies?

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated the 30th day of November, 1943, in Civil Appeal No. 104/43, dismissed:—

1. Where contract of lease contains no restriction as to dwelling or otherwise, tenant cannot be said to act in contravention of lease if he uses the place for commercial purposes.

2. Where lease and rent is for rooms and shops as one letting, it is a matter within discretion of trial Court to decide, having regard to sec. 3(2), Rent Restrictions (Dwelling Houses) Ord., whether this Ordinance or Rent Restrictions (Business Premises) Ord. applies.

(*M. L.*)

ANNOTATIONS:

1. On change of user of premises by subletting see C. A. 384/43 (*ante*, p. 570; 11, P. L. R. 283) and cases cited in note 2 in A. L. R.

2. If terms of lease do not limit user of premises, in such case the *de facto* user must determine the question whether or which R. R. Ord. applies to the premises — C. A. District Court, Jm. 78/42 (Gorali, 189); the English authorities on this point are referred to on pages 190 & 191 (*ibid.*). See also C. A. District Court, Tel-Aviv 171/39 (Gorali, p. 81; 1939, Law Reports of District Court of Tel-Aviv, p. 89); *cf.* C. A. District Court, Tel-Aviv 127/42 (Gorali, 228; 1941—2, Tel-Aviv D. C. Reports, p. 70.

3. On cases under sec. 3(2) of the R. R. (Dwelling Houses) Ord. see C. A. District Court, Haifa 85/42 (Gorali, 205); C. A. District Court, Tel-Aviv 53/42 (Gorali, p. 216;. 1941—2, Tel-Aviv D. C. Reports, p. 59); *cf.* C. A. D. C. T. A. 128/42 (Gorali, 229; 1941—2, Tel-Aviv D. C. Reports, p. 64).

(*A. G.*)

FOR APPELLANT: Felman.

FOR RESPONDENT: Ben-Ari.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated 20th November, 1943.

There is only one point for consideration, namely, whether the Rent Restrictions (Dwelling Houses) Ordinance, 1940, applies or the Rent Restrictions (Business Premises) Ordinance, 1941.

The facts are clearly set out in the learned Magistrate's judgment and it is sufficient to say here that the premises which were formerly held by the Respondent on lease or renewed lease, comprised some shops on the ground floor and 7 rooms *etc.* on the upper floors. All

were leased by one lease. The Appellant apparently purchased the whole building at the time the Respondent was still in occupation under lease which expired some time in 1942. The Respondent is a dealer and manufacturer of furniture which he exhibited for sale both in his shop and in the rooms above.

The Magistrate found that the Respondent did use the seven rooms for commercial purposes. Some of these rooms were used at the same time as a dwelling; clients inspected the furniture in these apartments and were at liberty to buy the furniture or order similar furniture. After the expiration of the lease, the Respondent remained in occupation of the premises as statutory tenant. The Appellant sued for possession under the Rent Restrictions (Dwelling Houses) Ordinance, Section 8(i)(c) as he required the premises for his own use.

It has been argued by the Appellant that even if the terms of the lease should apply, the Respondent is acting contrary to these terms by using the dwelling rooms for commercial purposes; but with this argument we do not agree since the heading in the lease "purpose of lease" is left blank and there is no restriction as to dwelling or otherwise.

The Appellant further argues that in any case the lease is terminated and the Court is, therefore, at liberty to treat the rooms separately as coming under the Rent Restrictions (Dwelling Houses) Ordinance, and that since the Appellant has offered alternative accommodation which, in fact, has been found satisfactory by the Court, then eviction should be granted in respect of the seven rooms. In support of this argument several English cases are quoted.

The Respondent rightly points out, in reply, that whereas in England there is an act only for the protection of dwelling houses, here in Palestine business premises also are protected and that the English Act does not, therefore, contain the proviso which appears in section 3(2) of the Palestine Rent Restrictions (Dwelling Houses) Ordinance, which reads as follows:—

> "This Ordinance shall apply to a dwelling-house which is also used by the tenant for any professional or commercial purpose, provided that the Court is satisfied that no substantial part of the rent is payable in respect of the portion used for such purpose."

With this argument we agree. Section 3(2) of this Ordinance clearly provides for a means whereby the Court may decide under which ordinance the tenancy of the premises should be considered.

It is not possible to consider in this case the tenancy of the rooms apart from the shops *etc.*, the lease and rent are for rooms and shops

as one letting. It is a matter within the discretion of the Magistrate to decide whether or not a substantial portion of the rent is payable in respect of the portion used for commercial purposes and consequently which Ordinance applies. We find no reason to interfere with the Magistrate's decision that the Rent Restrictions (Business Premises) Ordinance applies in this case. Consequently the definition of "premises" in this Ordinance is applicable.

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

Delivered this 12th day of October, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 386/43.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Sam'an Rizk Azar & 10 ors. RESPONDENTS.

Appeals — Separate appeals against various respondents — C. A. 191/43, C. A. 203/42, C. A. 252/43, C. A. 324/43 — No distinction for cases under Land (Expropriation) Ord., L. A. 71/32 — Discretion of trial Court as to costs — Cross appeal on points not raised in trial Court, C. P. R. 137-9 — C. A. 34/43, C. A. 284/43.

Appeal from the judgment of the Land Court of Jaffa, Land Case No. 7/43, dismissed; cross-appeals dismissed subject to a variation:—

1. The requirement for separate appeals when there are a number of respondents not having a common interest applies to appeals under the Land (Expropriation) Ord.
2. A point which was not raised in the Court of trial cannot be raised in a cross appeal.
3. Interest would run from date of judgment in the case of the Respondents who had not taken the point in the Court of trial.

(*A. M. A.*)

FOLLOWED: C. A. 203/42 (10, P. L. R. 17; 1943, A. L. R. 259); C. A. 191/43 (10, P. L. R. 500; 1943, A. L. R. 669); C. A. 252/43 (11, P. L. R. 57; *ante*, p. 94); C. A. 324/43 (11, P. L. R. 67; *ante*, p. 254).

DISTINGUISHED: L. A. 71/32 (2, P. L. R. 51; 3, C. of J. 891).

REFERRED TO: C. A. 34/43 (10, P. L. R. 300; 1943, A. L. R. 337); C. A. 284/43 (11, P. L. R. 26; *ante*, p. 169).

ANNOTATIONS :

1. On the necessity for separate appeals see cases cited and annotations thereto; *cf.* also C. A. 17/44 (11, P. L. R. 254; *ante*, p. 381).

2. It does not appear whether the attention of the Court was invited to C. A. 89/39 (6, P. L. R. 460; 1939, S. C. J. 413; 6, Ct. L. R. 123) where it was held that "the appeal having been dismissed (on a technical point), the cross-appeal automatically fails".

(*H. K.*)

FOR APPELLANT: Assistant Government Advocate — (Touqan).

FOR RESPONDENTS: No. 1 — Kanafani
Nos. 2—8 — Elia.
Nos. 9—11 — Husseini.

JUDGMENT.

At the hearing of this appeal a preliminary objection has been taken by the advocate for the Respondents Nos. 2—8, that separate appeals should have been filed against the various Respondents. He has relied on Civil Appeal 191/43, P. L. R. Vol. 10 p. 500, Civil Appeal 203/42 P. L. R. Vol. 10 p. 17 and Civil Appeal 252/43 P. L. R. Vol. 11 p. 57 and Civil Appeal 324/43 P. L. R. Vol. 11 p. 67. In reply, Naim Bey Touqan, Assistant Government Advocate, on behalf of the Appellant, has argued that these judgments cannot be said to apply to appeals under the Land (Expropriation) Ordinance, Revised Laws of Palestine Cap. 77. He has referred to Land Appeal No. 71/32 P. L. R. Vol. 2 p. 51. That case, however, was decided before the Civil Procedure Rules, 1938, came into force and, moreover, the question of appeals was not dealt with by the Court which decided that appeal. In any event, the subject-matter in Land Appeal No. 71/32 seems to have been one single plot held in *masha'a* by several co-owners.

Mr. Elia, for the Respondents 2—8, has argued that in the case now before us we are concerned with four separate plots of land owned by different individuals who were not linked together by any common interest.

The separate plots are of different categories of land and apparently also of different values. While it is true that the judgments cited do not appear to have been concerned with the Land (Expropriation) Ordinance, we think that the *ratio decidendi* is the same. In the present case the first Respondent claims to be the owner in whole of parcel

No. 4 in Block 4347 while parcel No. 5 is owned in whole by an entirely different person, namely, the *mutawalli* of the *Wakf* al Radwan. Parcel No. 6 is owned in whole by a third Respondent who is another person. We find it impossible to distinguish in principle this case from the cases cited by Mr. Elia. We are, of course, bound by this long line of authority.

For these reasons the preliminary objection succeeds and the appeal is dismissed.

All the three Respondents have lodged cross-appeals with regard to costs and interest. They cross-appealed on the grounds that they were wrongly deprived of costs in the Court below.

The Court below held that the Government had offered less than the Court eventually awarded, and the present Respondents had claimed more than they were ultimately allowed; and so ordered each party to pay their own costs. This was within the discretion of the Land Court and with their exercise of that discretion we are not prepared to interfere.

The first Respondent was the only party who raised the question of interest when issues were being framed. Had the other Respondents wished, they could easily have done so under Rules 137, 138, and 139, Civil Procedure Rules, 1938. Their cross-appeals on this ground must fail except with regard to interest from the date of judgment. We have been referred to Civil Appeals 34/43 and 284/43. With regard to the first Respondent we award him interest on the sum assessed by the Land Court at 6% from the date of the filing of the statement of claim namely, 18th April, 1942, until the date of judgment, and at 9% from the date of judgment till payment. The other Respondents will receive interest on the sums awarded at 9% *per annum* from the date of judgment till payment. Subject to that modification the appeal and the cross-appeals are dismissed and the judgment of the Land Court confirmed.

With regard to the costs of this appeal, the Appellant must pay the sum of LP. 15 as fixed (inclusive) costs to each of the three sets of Respondents who have appeared and been represented by advocates to-day.

Delivered this 27th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 33/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Mohammad Abdallah Abu El Ghussein & 3 ors. APPELLANTS.

v.

Musa'id Salameh Abu Katmah. RESPONDENT.

Agreement to sell land — Claim of equitable right based on payment of purchase price and alleged possession, actual and constructive.

Appeal from the judgment of the Land Court of Jerusalem, dated 13th January, 1944, in Land Case No. 15/43, dismissed:—

1. Possession by mortgagee whom purchaser paid off — not possession by purchaser for purpose of acquisition of equitable rights, if redemption of mortgage by purchaser was not part of agreement between him and vendor.
2. Purchaser in possession of land after paying purchase price does not acquire equitable right, if possession was without vendor's consent.

(*M. L.*)

ANNOTATIONS: On the requirements of an equitable title to land see C. A. 38/44 (11, P. L. R. 274; *ante*, p. 335) with annotations thereto.

(*A. G.*)

FOR APPELLANTS: Hiller.

FOR RESPONDENT: Barbari.

JUDGMENT.

This is an appeal from the Land Court Jerusalem. The Respondent owns certain land known as El Hamra situated in Beersheba. He executed a deed of sale concerning this land with the Appellants. According to the judgment of the lower Court, the parties agreed that this document was an agreement to sell and not an absolute sale. The Appellants claimed that as they had paid the purchase price and entered into possession they acquired an equitable title to the land. That claim failed and they now appeal from the judgment. It is not denied that the Appellants paid the purchase money. Their case is that in addition to this payment they were, in fact, in possession for four years. For one year they had ploughed the land themselves and they claimed that they were in possession for the other three years through a mortgagee. Now, when the document was executed between the Appellants and the Respondent, the land was, in fact, mortgaged to

a man called Hassah Habib. It seems that the Appellants by a private arrangement with Habib, paid off the mortgage but they allowed the mortgagee to remain in possession. They now say that this was possession on their behalf. It emerges however from the evidence that the Respondent did not acquiesce in this arrangement, indeed he says he knew nothing about it. It is abundantly clear from the document of agreement to sell which was an exhibit, that it was not part of the bargain, as the Appellants claim it was, that they (the Appellants) should pay off the mortgage. Clause 2 of the agreement states that the second party *i. e.* the Respondent, "undertakes to deliver the land free from any encumbrances and third party rights." The only inference I can draw from this is that the land was not due for delivery to the Appellants until the Respondent had cleared the mortgage. In these circumstances I am unable to agree that the possession of Hassan Habib was possession on behalf of the Appellants.

There remains now for consideration the question of the period of actual possession by the Appellants. They entered into actual possession nine months before the Respondent took action against them in the Court of first instance. Furthermore the Respondent immediately served upon the Appellants a notarial notice objecting to the possession. I am satisfied that this possession, which was without the consent of the Respondent, and against which he protested immediately, is not sufficient to establish an equitable title, and I see no reason to differ from the conclusion arrived at by the Land Court. For these reasons the appeal must be dismissed.

For the reasons stated in the judgment no costs were awarded in the Court below, I think however that in this appeal the Respondent is entitled to LP. 10 inclusive which I award.

Delivered this 27th day of July, 1944.

Chief Justice.

MISCELLANEOUS APPLICATION No. 47/44.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J., in Chambers.

IN THE APPLICATION OF :—

Maurice Litwinsky & an. APPLICANTS.

v.

Raymond Litwinsky. RESPONDENT.

C. P. R., r. 6 — Staying proceedings in one Court lite alibi pendente — Determination of questions between Jews — Jurisdiction of Tel Aviv and Jaffa Court — English and Irish authorities compared — Government policy.

Application under rule 6 of the Civil Procedure Rules, 1938, for the purpose of determining which Court has exclusive jurisdiction to deal with the matter of the winding up of the partnership Litwinsky Brothers, and of appointing a surveyor of the assets of the said partnership and/or a manager of its business:—

Where all the parties to proceedings are Jews the provisions of r. 6 C. P. R. may be invoked to have the proceedings determined in Tel Aviv instead of Jaffa. (*Et semble vice versa*).

(*A. M. A.*)

ANNOTATIONS: *Cf.* Sec. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925 and see the commentaries on the section in the Annual Practice, 1938, pp. 2402 *et seq.*, particularly title *"Lis alibi pendens"*.

2. On concurrent jurisdiction of Courts of Tel-Aviv and Jaffa see C. A. 175/40 (7, P. L. R. 454; 8, Ct. L. R. 114; 1940, S. C. J. 305) and C. A. 156/40 (7, P. L. R. 434; 8, Ct. L. R. 113; 1940, S. C. J. 545) with annotations thereto.

(*H. K.*)

FOR APPLICANTS: No. 1 — Caspi.
No. 2 — Eliash.

FOR RESPONDENT: A. Atalla.

JUDGMENT.

This was an application under rule 6 of the Civil Procedure Rules, where two actions in respect of the same matter were listed one in Jaffa and the other in Tel Aviv. It is prayed that the action in Jaffa be stayed and that the action in Tel-Aviv be determined. The parties to the action are all Jews. The issue concerns the winding up of a purely Jewish Company.

Mr. Atalla for the Respondent argued that Jaffa was the more appropriate Court. He said, and I agree with him, that in filing his action it is not part of his duty to consider the convenience of Defendants. He cited several English cases. Now, in the first place, it must be noted that there is no rule in the English Procedure exactly like Rule 6 of the Civil Procedure Rules. There is, it is true, an English Rule which is analogous to it. Rule 6 of the Civil Procedure Rules was not fortuitous. It was enacted to meet a particular situation prevailing in Palestine. The English cases, therefore, are not much of use, save in so far as they indicate the general principle to be followed. All these English cases are to the effect that a Court should only alter the venue of trial if the Plaintiff filed his motion vexatiously.

In this connection it must be borne in mind that what might be

normal in England might be vexatious in Palestine. In Irish Civil Procedure there is a rule similar to rule 6 of our rules. It was a recognition of the political clash between rival communities similar to the clash in Palestine.

It is my policy as Chief Justice, and indeed I think it is in line with the general policy of the Government, to consider that the more appropriate Court for purely Jewish cases is the Court of Tel-Aviv, and the appropriate Court for purely Arab cases is the Court of Jaffa. It is solely for the purpose of giving effect to that policy that I grant this application and I order that the action filed in the Court at Jaffa should be determined at the Court of Tel-Aviv.

Delivered this 9th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 288/43.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF:—

Hanneh Bint Said Kattan. APPELLANT.

v.

Shukri Abdel Ahad Kattan. RESPONDENT.

Presumption regarding boundaries of municipal area — Testamentary disposition as to miri land built on by mulk houses.

Appeal from the judgment of the Land Court of Jaffa, dated 31st July, 1943 in Land Case No. 18/43, allowed:—

1. Where question of boundaries of a Municipal area is involved there is no presumption that state of affairs existing in a certain year also existed some decades earlier.

2. *Miri* land, even if *mulk* houses or trees stand on it, cannot be disposed of by will, no matter whether or not the beneficiary is the same both as regards the houses or trees and the land.

(*M. L.*)

ANNOTATIONS :

1. As to the presumption which was alleged to exist in this case see articles 5, 6 and 10 of the *Mejelle.*

2. On article 81 of Land Code see Goadby and Doukhan, Land Law of Palestine, pp. 22, 115 and 158.

3. On disposition of *Miri* Land by Will see — C. A. 117/40 (9, P. L. R. 291; 1942, S. C. J. 371) with notes thereto.

4. See the following authorities on succession to *mulk* accretions: L. A. 32/22

(1, C. of J. 20); C. A. 147/22 (*ibid.*, p. 21); C. A. 54/40 (7, P. L. R. 196; 1940, S. C. J. 103; 7, Ct. L. R. 143); C. A. 137/42 (8, P. L. R. 596; 1942, S. C. J. 713).

5. For other instances of Constantinople Court of Cassation decisions being referred to by the Supreme Court, *vide* C. A. 127/40 (7, P. L. R. 357; 1940, S. C. J. 440; 8, Ct. L. R. 189) and note 3 in S. C. J.

(*A. G.*)

FOR APPELLANT: Abcarius, Eliash and Darwish.

FOR RESPONDENT: A. and H. Atallah.

JUDGMENT.

Rose, J.: This is an appeal from a judgment of the Land Court of Jaffa.

It is, perhaps, convenient to deal first with the cross-appeal in which Mr. Atalla contends that the learned R/President erred in his application of article 21 of the Land Code. Mr. Atalla's contention is that the land on which the houses in question are situated should have been held to be *mulk* in that it was proved to be within the Municipal area of Jaffa in the year 1898 and that having regard to its proximity to the port area it should have been presumed also to have been within the town boundaries in 1858, which is the date of the promulgation of the Land Code. Unfortunately for the Respondent, he was unable to adduce any evidence as to the nature and extent of the boundaries of Jaffa in 1858. That being so, the learned R/President declined to draw the inference that, because this land was within the area in 1898, it, therefore, must have been so in 1858. I agree with Mr. Eliash that there is no presumption in such a case as this that the state of affairs existing in the later year necessarily existed in the earlier. I, therefore, see no reason to interfere with the finding of the learned R/President which is one of fact and on the face of it not unreasonable.

Now we come to the appeal itself, which must be considered on the basis that the houses are *mulk* but the land on which they are situated is *miri*. The question to be decided is whether it is possible to dispose of that *miri* land by will. It appears that the testator died on 12th July, 1942, the will having been executed on 23rd June, 1942. The Respondent argues that the effect of article 81 of the Land Code is that in a case where *mulk* trees or houses stand on *miri* land, the land may be disposed of by will provided that the beneficiary is the same both as regards the trees or houses and the land. In that view he is supported by the learned R/President. It seems to me, however, that while prior to 1929 (when the Interpretation Ordinance was enacted), in case of intestacy, *miri* land in such a case as we are considering would, in fact, be disposed of to the *mulk* heirs in accordance with the

provisions of article 81 of the Land Code, this is no authority for the proposition that a will can be made as to that *miri* land. After 1929 it would seem that, even upon an intestacy, the matter would be dealt with on the basis that it was a *miri* intestacy and not a *mulk* intestacy.

Mr. Goadby in his book on the Land Law of Palestine says at p. 40 that, although there is a conflict of opinion, the prevailing opinion is that *miri* cannot be changed into *mulk* save by the express declaration of the sovereign, *i. e.* by the grant of a *raqabe*. Again, on p. 30, he says that, although in a case where *mulk* trees remain on *miri* land the land is "subject to the *mulk*", nevertheless the land remains *miri* although in certain cases (such as those mentioned in article 81) the owner of the trees has special rights over it. There would appear to be no direct authority on this point, and Mr. Goadby himself refers to the obscurity of the relevant articles. We were, however, referred to a case of the Court of Cassation in the year 1329, which would seem to support the view which I have stated, the salient part of the judgment reading as follows:—

> "After consideration we hold that, as the will is in respect of a house built on *miri* land, subject to *Muqata'a*, the will cannot operate on that part which is *miri* land; but as the building is *mulk*, there is nothing in law to prevent the operation of the will on this part".

It is true that since the addition in 1937 of Section 10 to the Land Law (Amendment) Ordinance, there can be no separate registration of trees or buildings apart from the land on which they stand. But this, particularly having regard to section 21 of the Succession Ordinance (Cap. 135), would not seem to affect the proposition that *miri* land cannot be left by will. I would add that the original Land Registry Extracts (Exhibits P. 7 and P. 8) do not state that the houses are *mulk*.

That being so, and as since 1937 it has become impossible to be registered as an owner of houses or trees apart from the land, it follows that the Appellant must succeed in his appeal.

The appeal will, therefore, be allowed, the judgment of the District Court set aside and judgment entered for the Appellant. The cross-appeal is dismissed. The Appellant will have the costs here and below, the costs of this appeal to be on the lower scale and to include the sum of LP. 15 for advocate's attendance fee. The order for advocate's attendance fee in the District Court is reversed.

Delivered this 27th day of July, 1944.

British Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 66/44.

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

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

IN THE APPEAL OF:—

Bejarano Bros. APPELLANTS.

v.

Meyer Getzil Shapira. RESPONDENT.

Possession — Art. 24, Magistrates' Law — Recovery of possession of part of immovable property obstructed by columns — M. C. J. O.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, C. A. 125/43, dismissed:—

A claim for the removal of an obstruction on immovable property is within the jurisdiction of the Magistrate's Court.

(*Per* Frumkin, J.): The Court has jurisdiction in virtue of the Magistrates' Courts Jurisdiction Ord., which is wider in its application than art. 24 of the Magistrates' Law.

(*A. M. A.*)

ANNOTATIONS:

1. Respondent, in 1937, had purchased a house in Tel-Aviv, but it was only in 1941 that he went finally into undisputed possession. On the roof of the said house Appellants, with the permission of the person then in possession, had in 1938 erected supports for a signboard. In 1942 Respondent filed an action in the Magistrate's Court, praying, in para. 7 of the statement of claim, for the removal of the said supports *etc.* The Magistrate dismissed the action on the grounds (1) that Respondent had not been previously in possession and also (2) that it was doubtful whether he had jurisdiction in view of the fact that the structures were fixtures and as such immovable property. Respondent appealed and the District Court allowed his appeal. Appellants thereupon appealed by leave to the Supreme Court.

2. Authorities on Art. 24 of the Ottoman Magistrates' Law are collated in note 2 in A. L. R. to C. A. 4/43 (10, P. L. R. 57; 1943, A. L. R. 306). It was already held in C. A. D. C. T. A. 121/42 (Tel-Aviv Judgments, 1942, p. 151 (in Hebrew)) that an action for recovery of possession need not be based on the said Art. 24 and that such actions are always within the exclusive jurisdiction of the Magistrate.

(*H. K.*)

FOR APPELLANTS: Margalith.

FOR RESPONDENT: Ayon.

JUDGMENT.

FitzGerald, C. J.: The whole of this claim turns on paragraph 7 of the statement of claim which prays for the removal of columns from

the roofs of Plaintiff's property and the restoration unto the Plaintiff of the possession of the said property. In the absence of any allegation as to ownership, and the question of ownership did not arise, I am of opinion that the Magistrate had jurisdiction to adjudicate in the matter. The case for the Appellants was based on the emphasis laid by the District Court on the application of Article 24 of the Ottoman Magistrates' Law. Taking his stand on this emphasis, Mr. Margalith adduced a most interesting and lucid argument as to the effect of the article. But in fact, I fail to find that the District Court did in fact place the emphasis which the Appellant attributes to it. It is true that the Court did refer to the article but their reference was only secondary, as is obvious from the introductory words "even if Article 24 is considered". It is clear to me that they went much deeper into the matter. They considered the case on the merits and they arrived at the conclusion that the Magistrate had jurisdiction to deal with the claim made in paragraph 7 of the statement of claim, and in my opinion, they were right in coming to this conclusion. The appeal must, therefore, be dismissed and the judgment of the District Court upheld with inclusive costs of LP. 10.

Delivered this 27th day of June, 1944.

Chief Justice.

Frumkin, J.: In concurring I wish to add a few words as regards the application of a once very famous article which has now appeared on the scene again, namely Article 24 of the Ottoman Magistrates' Law. I agree that if the article applies, it would be stretching the point too artificially to bring this case within its framework. Article 24 was in the nature of an emergency rule providing a quick remedy in the case of recent trespass pending a decision as to ownership relating to the land in dispute. That is the reason for the essential requisites appearing in the article namely that the Plaintiff must, to begin with, produce *prima facie* documentary evidence of title, prove his previous possession and also prove that the Defendant has only recently obtained wrongful possession. If those three elements were established the Magistrate would then restore possession to the party that was in possession prior to tresspass leaving it to the Defendant in such a case to go to the proper Court if he has any claim for ownership.

That being the essence of this article it is very difficult to see how it could apply in a case like the present one. But as it has already been pointed out by my learned brother the Chief Justice even the District Court did not rely merely on this article and only considered

the eventuality of its application holding that even if it applies the Plaintiff could succeed. With this proposition of the District Court I do not agree.

What troubled me somewhat during the hearing of this appeal was whether in case Article 24 does not apply had the Magistrate jurisdiction to hear the action. My answer to that is that the Magistrates' Courts Jurisdiction Ordinance confers general jurisdiction on a Magistrate to hear cases for recovery of possession. Recovery of possession generally and not necessarily under Article 24. The present action is a clear case for recovery of possession. The Defendant did not claim ownership, did not claim to be on the roof in question as of right of any sort and I can see no reason why a Magistrate should not have jurisdiction to hear a case of this nature. In fact the jurisdiction of the Magistrate was not seriously disputed in any stage of the proceedings. In the result the District Court came to a right conclusion and for this reason the appeal must be dismissed.

Puisne Judge.

CIVIL APPEAL No. 94/44.

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

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

IN THE APPEAL OF :—

Murshed Ibn Rashid Awad & 2 ors. APPELLANTS.

v.

Kamel Ibn Hamad Abu Maria. RESPONDENT.

Illegal disposition — Sec. 11 L. T. O. — Construction of agreement: whether a sale or an agreement to sell — C. A. 195/40.

Appeal from the judgment of the Magistrate's Court of Hebron, sitting as a Land Court, dated the 28th of February, 1944, in Land Case No. 234/43, dismissed:—

Construction of a document to determine whether it constitutes an agreement to sell or an illegal disposition within the meaning of sec. 11 L. T. O.

(*A. M. A.*)

DISTINGUISHED: C. A. 195/40 (7, P. L. R. 531; 1940, S. C. J. 491 & 572; 10, Ct. L. R. 3).

ANNOTATIONS: *Cf.* C. A. 2/43 (10, P. L. R. 75; 1943, A. L. R. 71) and notes thereto in A. L. R.; see also C. A. 44/43 (*ante*, p. 28) and C. A. 303/43 (*ante*, p. 486).

(*H. K.*)

FOR APPELLANTS: Abdul Hadi.
FOR RESPONDENT: O. Es-Saleh.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the Magistrate's Court, Hebron, sitting as a Land Court, in which judgment was given for the Plaintiff (now Respondent) ordering the present Appellant not to interfere with the Respondent's ownership in a certain plot of land.

The facts, shortly stated, are that this land was registered in 1935 in the name of the present Respondent, who entered into a certain transaction with the Appellant, which transaction was reduced to writing and is Exhibit D/1, dated the 23rd *Muharram* 1358, *i. e.* 1939. The Magistrate found the deed to be an out and out sale, and as such, null and void under Section 11(1) of the Land Transfer Ordinance.

The sole ground of appeal argued before us is that the Magistrate erred in considering the document to be one of out and out sale, instead of an agreement to sell. The Magistrate carefully considered the terms of the document and concluded that the intention of the parties was to pass the ownership of the land to the present Appellant. We quote from his judgment:—

> "The expression used in the document, 'this deed has been written provisionally until legal transfer, relinquishment and vacation at the Land Registry' is of no effect; nor can consideration be given to the undertaking by the Plaintiff to pay LP. 20 as damages to the Defendants should the Plaintiff fail to confirm at the Land Registry.
>
> Moreover, all the expressions used in the document show clearly that the intention of the parties was an absolute sale; and this has occurred clearly more than once in the said document.
>
> It is true that the expression 'sold' and 'bought' does not affect the decision as to the nature of the contract and that intention is the important factor in this, yet I find that the intention of the parties is as already stated an absolute sale; and this is specially so as the contract was executed on 23rd *Muharram*, 1358, *viz.* five years ago, and the sale was not registered at the Land Registry, although the Plaintiff says 'the land sold is registered in his name in the register of the year 1935'. It would have been easy to transfer the sold share to the name of the Defendants and they had sufficient time to proceed in this legal way, but they chose to acquire ownership of this land by virtue of the said deed".

We agree with those remarks of the Magistrate. Indeed the term "absolute sale" appears twice, and the term "he has sold" appears once in the document. Awni Bey Abdul Hadi, for the Appellant, has relied on Civil Appeal 195/40, P. L. R. Vol. 7, page 531, in support

of his contention that we should regard Exhibit D/1 as an agreement of sale. We have sent for the original file of Civil Appeal 195/40, and we have scrutinized the deed exhibited in that case. The terms of the deed in that case are very different from Exhibit D/1. In Civil Appeal 195/40 the plot of land, the subject-matter in dispute, still remained to be measured; the vendor had still to pay taxes and remove attachments, and these and certain other items clearly influenced the majority of the Court in holding that the intention of the parties was merely to enter into an agreement of sale. It is clear from the judgment that the important factor was the circumstance that the area of the land was not ascertained at the time of the agreement.

We do not consider that we can interfere with the finding of the Magistrate in this case; and, as he held that the document was an out and out sale, he had no option but to conclude that the transaction was null and void under Section 11(1) of the Land Transfer Ordinance.

For all the foregoing reasons the appeal is dismissed; the judgment of the Court below is confirmed.

The Appellant must pay the Respondent's costs of this appeal, namely, fixed or inclusive costs of LP. 6.

Delivered this 27th day of September, 1944.

British Puisne Judge.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 59/44.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

Salman Ibn Hussein Es-Soufi. APPELLANT.

v.

Muhammad Hussein Es-Soufi & an. RESPONDENTS.

Discretion of trial Court as to granting or refusing adjournment — Exceptional interference of Court of Appeal in matter of adjournment.

Appeal from the judgment of the Magistrate's Court of Beersheba, sitting as a Land Court, dated 16th February, 1944, in Case No. 302/43, allowed and case remitted to the Magistrate for new trial:—

1. Appellate Court should not interfere with discretion of trial Court as

to granting or refusing adjournment unless the facts demand such interference.

2. Where adjournment was refused while party had every reason to believe that as a result of his requests the witnesses would appear appellate Court may find it equitable to remit the case for trial.

3. Parties in Magistrate's Court should come on day of hearing fully prepared with their arguments and their witnesses in support of their case; if they do not do so they run a grave risk.

(*M. L.*)

ANNOTATIONS: On discretion of trial Court as to granting or refusing adjournment see C. A. 336/43 (*ante*, p. 298) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Khalafawi.

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

JUDGMENT.

This appeal raises a question as to when, if ever, the discretion of a trial Court as to the granting or refusing of adjournments should be interfered with. We are, of course, fully alive to the undesirability of interfering with such a discretion unless the facts demand such interference. Further, we would stress once again the importance of parties in Magistrates' Courts coming on the day of the hearing fully prepared with their arguments and with their witnesses in order to support their case; and if they do not do so they run a grave risk. In the circumstances of this case, however, this was the first time that the matter came before the Magistrate and the advocate for the Appellant tells us and, of course, we accept his statement that he had every reason to believe that as a result of his requests the necessary witnesses would appear. While we are not free from doubt in the matter we feel that on the whole the equitable course is that this case should be remitted for trial. The judgment of the learned Magistrate will, therefore, be set aside and the case will be remitted to him to hear and determine according to law. The second Respondent will have the costs of the abortive hearing before the Magistrate as ordered by the Magistrate, in any event, and also the costs of this appeal in any event, which we assess at an inclusive sum of LP. 5. The first Respondent, we are told, is not directly interested in this appeal. He is not represented and has not appeared, he, therefore, will have no costs. He was awarded no costs by the Magistrate below and there is no need to vary that part of his decision.

Delivered this 6th day of July, 1944.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 37/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Nadeen Markoff of Jerusalem
in her capacity as administratrix of the estate and executrix of the will of her late father Alexander Sheikh Ashiri. APPLICANT.

v.

Habib George Daoud Homsi & 7 ors. RESPONDENTS.

Application for exemption from fees on appeal — Court Fees Rules 19(2), *as amended — C. P. R. do not apply — "Inquiry", "application", "grounds" — Grounds for order need not be given.*

Application for exemption from payment of Court fees on appeal from the judgment of the Land Court, Jaffa, dated 29th July, 1944, in Land Case No. 19/42, refused:—

1. The Civil Procedure Rules do not apply to an inquiry under r. 19(2) of the Court Fees Rules, as amended.

2. The "application" mentioned in the rule is not of the nature contemplated by C. P. R. 305.

3. A simple answer should be given in such applications, without discussing the matter at length.

(*A. M. A.*)

ANNOTATIONS :

1. *Cf.* C. A. 27/39 (6, P. L. R. 255; 1939, S. C. J. 260; 5, Ct. L. R. 239) and C. A. 101/39 (6, P. L. R. 499; 1939, S. C. J. 423; 6, Ct. L. R. 133) — applications to fix the amount of the deposit under C. P. R. 327 need not be by motion.

2. Note that it has been laid down in Misc. Appl. 9/42 (9, P. L. R. 154; 1942, S. C. J. 105; 11, Ct. L. R. 98) that in order not to prejudice an intending appellant the enquiry into his means should precede the enquiry into the merits of his appeal. In this case, however, the "intended Respondents (did) not question the allegation of poverty".

(*H. K.*)

FOR APPELLANT: Nakhleh.

FOR RESPONDENTS: Nos. 1—7 — Homsi.
No. 8 — Azar.

ORDER.

This matter comes before me under Rule 19(2) of the Court Fees Rules, 1935, as amended by the Court Fees (Amendment) Rules (No. 2) 1938.

At the hearing before me the advocate for one of the intended Respondents to the contemplated appeal objected to my dealing with the matter on two grounds, namely, that Rules 305 and 311 Civil Procedure Rules 1938 had not been complied with, and that the formal grounds of appeal contemplated by Rule 315 had not been filed.

With regard to the first objection I consider that procedure under Rule 19(2) is not to be governed by the Civil Procedure Rules 1938. I think that what is contemplated by the word "inquiry" in line 4 of Rule 19(2) is an informal inquiry at which, however, in accordance with the practice of this Court, it is usual to invite the attendance of the intended Respondents to the contemplated appeal who should, of course, be given an opportunity of challenging the allegations of the person mentioned in line 1 of Rule 19(2).

I am also satisfied that the word "grounds" in line 4 of Rule 19(2) does not mean the formal grounds mentioned in line 2 of Rule 315 Civil Procedure Rules. I am fortified in this view by a scrutiny of Rule 323. I come now to deal with the merits of this request. I advisably use the word "request" in preference to the word "application" because, although the word application is used in line 5 of Rule 19(2), I do not think that this is an application of the nature contemplated by Rule 305 Civil Procedure Rules 1938. The intended Respondents do not question the allegation of poverty. It remains, therefore, for me merely to consider whether this lady, Mrs. Nadeen Markoff, has satisfied me that she has reasonable grounds of appeal. It is, for obvious reasons, undesirable that I should discuss this matter at length. In my view, it is preferable that I should return a simple answer in the affirmative on the negative to this question. Giving the best consideration which I can to this question, I must say that I am not satisfied that she has reasonable grounds of appeal. I, therefore, refuse her request.

Delivered this 29th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 75/44.

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

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

IN THE APPEAL OF:—

Edward Haddad. APPELLANT.

v.

Adele Paul Conisky, widow of Barnaba Damiani & 6 ors. RESPONDENTS.

Indistinctness of both claim and defence — Remittal of case for determination of point in dispute.

Appeal from the judgment of the District Court of Jerusalem, sitting in its appellate capacity, dated the 24th of September, 1943, in Civil Appeal No. 24/43, allowed and case remitted for further evidence to be heard:—

If it appears that both Plaintiff and Defendant were not clear in putting their case and defence, Court of Appeal may remit the case to trial Court to allow the parties to call further evidence, if any, for determination of point in dispute.

(*M. L.*)

ANNOTATIONS: On effect of inadequate pleadings see C. A. 44/43 (*ante*, p. 28) and C. A. 317/43 (*ante*, p. 146).

(*A. G.*)

FOR APPELLANT: H. Atallah.

FOR RESPONDENTS: King.

JUDGMENT.

Frumkin, J.: The cause of action in this case arises out of previous litigation between the same parties, or rather between the Appellant and the ancestor of the first to the sixth Respondents in the present case.

In one of the judgments, Civil Case No. 164/38, the District Court, Jerusalem, held that the Defendant (present Appellant) was entitled to be credited with half of any amount that Damiani, that is the ancestor of the first to the sixth Respondents, may actually recover from Gellat, but he was not entitled to any such credit at the time judgment was given.

The present action was brought by the Appellant on the ground, *inter alia,* that the ancestor of the first to the sixth Respondents, whom we shall call for convenience sake the Respondents, have already received from Messrs. Gellat the amounts claimed.

The main issue in this case is whether, in fact, any money has actually been received by the Respondents or their ancestor, and if so, what amount. The Magistrate's Court and the District Court took different views as to the law on the subject, whether the statement of claim was or was not sufficiently clear so as to ask for a specific denial or at least a denial by implication on behalf of the Defendant.

The relevant passage in the judgment, Civil Case No. 164/38, to which I have already referred above and which was not affected by the later judgments issued in the litigation between the same parties, reads as follows:—

> "We hold the Defendant (present Plaintiff) is entitled to be credited with a half of any amount that Damiani may actually recover from Gellat, but he is not entitled to any such credit at present."

In paragraph 15 of the statement of claim the Appellant said:—

> "Plaintiff now understood that the first Defendant has already received from Messrs. E. and G. Gellat the amount adjudged in his favour in the said civil cases".

Referring to this statement, the Respondent in the statement of defence said:—

> "Alternatively, the account as stated by the Plaintiff is absolutely wrong."

On this statement of claim and reply the Magistrate took the view that there was a statement of fact clear enough to call for a specific denial, and in the absence of such denial the Plaintiff was entitled to succeed, whereas the District Court took the view that there was no clear statement of facts, so that no denial was necessary at all, and, therefore, came to the conclusion that the Plaintiff failed to prove his case and dismissed his action, setting aside the judgment of the Magistrate.

In the circumstances and in view of the fact that both Plaintiff and Defendant were not clear in putting their case and defence, I think that better justice will be served if the case be remitted to the Magistrate in order to allow the parties to call further evidence necessary, if any, for the determination of the point in dispute, namely what amount, if any, was actually received on behalf of the Respondents since the issue of the judgment in Civil Case No. 164/38, and give a fresh judgment accordingly. Both the judgments of the District Court and the Magistrate's Court are, therefore, set aside, and the case remitted as above.

Costs will follow the event, but in order to facilitate matters we

assess an advocate's attendance fee for this hearing of LP. 10 to the ultimately successful party.

Delivered this 30th day of June, 1944.

Puisne Judge.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 354/44.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J., in Chambers.

IN THE APPLICATION OF:—

Zbeida Aziz Taleb Subh & 3 ors. APPLICANTS.

v.

Keren Kayemeth Leisrael Ltd. & an. RESPONDENTS.

Land settlement — Period for filing appeal — Notification under sec. 63(1).

Application for leave to appeal from the decision of the Land Settlement Officer, Safad Settlement Area, dated 12th day of October, 1943, in Case No. 8/ Meirun, refused:—

The period of appeal in land settlement begins to run from the date of public notification of the decision, not from the subsequent reduction of the decision to writing.

(*A. M. A.*)

FOR APPLICANTS: Cattan and Khadra.

FOR RESPONDENTS: No. 1 — Eliash and Feiglin.
No. 2 — *Ex parte.*

ORDER.

In this application for leave to appeal only one question arises, *viz.* whether the application for leave has been made within the time limit provided in Section 63(1) of the Land (Settlement of Title) Ordinance.

The Settlement Officer delivered his decision orally in the Settlement Court on 12th October, 1943. Afterwards he reduced that decision to writing. It is admitted that the application for leave to appeal was not made within 30 days of the delivery of the decision. It has been argued on behalf of the Appellants that there was a duty on the Settlement Officer to notify each person interested in the settlement individually by writing if that person was not present in Court when the

decision was given. I am unable to accept this contention. If conceded it would, in view of the conditions prevailing in Palestine, make land settlement operations almost impracticable. In my opinion if the Land Settlement Officer complies with the provisions of the ordinance in regard to giving the various notices provided for and follows the procedure outlined in the ordinance and then publicly announces his decision, that public announcement must be deemed to be notification within the meaning of Section 63(1) of the Ordinance. It follows that I cannot allow an appeal in this case.

Given this 13th day of October, 1944.

Chief Justice.

CIVIL APPEAL No. 36/44.

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

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

IN THE APPLICATION OF:—

Father Athanaseos Matar,
Superior of the Maronite Convent
of Jaffa. APPLICANT.

v.

Lydia Willner of Alexandria & an. RESPONDENTS.

Maronite waqf — Interpretation of waqfieh — S. T. 1/43 considered — Appointment of mutawalli etc. within the jurisdiction of the religious court — Jurisdiction of civil over religious courts to prevent violation of principles of justice.

Application for leave to appeal from the order of the District Court of Jaffa, dated 2nd December, 1943, in Civil Case No. 130/30, Motion No. Z/27/43, allowed:—

1. The appointment of a *mutawalli,* trustee *etc.,* of a religious *waqf* is a matter of administration within the exclusive jurisdiction of the relevant religious Court.
2. In determining such matters, the religious Court should ensure the protection of persons interested, as a violation of justice may call for the intervention of the civil Courts.

(*A. M. A.*)

CONSIDERED: S. T. 1/43 (10, P. L. R. 535; 1943, A. L. R. 671).

ANNOTATIONS:

1. For previous proceedings in connection with the Howard *waqf* see, in addition to S. T. 1/43 (*supra*), H. C. 36/37 (1937, S. C. J. (N. S.) 302), C. A.

84/40 (7, P. L. R. 401; 1940, S. C. J. 313; 8, Ct. L. R. 132) and H. C. 104/41 (8, P. L. R. 593; 1941, S. C. J. 601; 10, Ct. L. R. 199).

2. The leading case on non-recognition of a Religious Court judgment which is contrary to natural justice is C. A. 62/37 (1937, S. C. J. (N. S.) 249; 2, Ct. L. R. 133; P. P. 6.8.37); see also H. C. 24/41 (8, P. L. R. 175; 1941, S. C. J. 161; 9, Ct. L. R. 177) and H. C. 103/42 (9, P. L. R. 579; 1942, S. C. J. 582).

(*H. K.*)

FOR APPLICANT: Beiruti, Scharf and Eliash.

FOR RESPONDENT:: No. 1 —— Goitein.
No. 2 — Gluckmann.

JUDGMENT.

This is an appeal from an order or ruling of the District Court of Jaffa given on the 2nd December, 1943. It arose out of prolonged litigation in connection with a *Waqfieh* executed before the Moslem Religious Court in 1899 by the late Alexander Awad (Howard) a British subject of the Maronite faith. The *Waqf* provided that the *Mutawalliship* and the *Nazership* should be vested in the British Consul at Jaffa, with the supervision of the spiritual head of the Maronite Convent at Jaffa.

Owing to the change of the status of Palestine after the Great War (1914—1918) and the abolition of the post of British Consul, the District Commissioner, by the consent of all the parties interested, functioned as joint *Nazer* with the spiritual head of the Maronite Convent at Jaffa until 1938, when he submitted his resignation to the District Court. There was then a dispute as to who should take his place.

By an order of the District Court, dated the 31st of July, 1942, the President decreed that the District Court should act in place of the District Commissioner. The jurisdiction of the Court to make such an order was questioned by the present Appellant, and the matter of jurisdiction was then referred to a Special Tribunal constituted under Section 9 of the Courts Ordinance, 1940. That Tribunal gave its decision on the 3rd of November, 1943. Meanwhile the Maronite Ecclesiastical Court appointed the head of the Maronite Convent at Jaffa to be the sole *Mutawalli*.

Before leaving this point I am forced to express the opinion that the appointment of one party who was vitally interested in the administration of the *Waqf*, to the exclusion of the other party who had an equal interest, showed a complete disregard of the express wishes of the dedicator, who specifically appointed a neutral person in the British

Consul at Jaffa, and a similar indifference to the legitimate interest of the heirs.

There has been much argument as to the exact submissions made to the Special Tribunal, but a perusal of their judgment leaves little doubt in my mind that the learned members where well aware that the bone of contention between the parties was the question as to who was to be the *Mutawalli*. Paragraphs 11 and 12 of that judgment read:—

> "11. The short point is, whether the appointment of a *Mutawalli* is a matter of constitution or validity of a *waqf* and so comes within paragraph (a) of Section 3 of Cap. 18, and thus within the jurisdiction of the District Court, or whether it is a matter of internal administration of the *waqf*, coming within paragraph (b) of such section, and thus within the exclusive jurisdiction of the religious Court of the community to which the dedicator belonged.
> 12. This Tribunal entertains no doubt upon the latter view being correct. Support for this view is contained in Civil Appeal 5/1925, Rotenberg Vol. IV, at page 1586. The constitution and validity of the *waqf* has not been questioned, and it seems to us, therefore, that the mere appointment of an administrator, trustee, *mutawalli*, *nazer*, or whatever you like to call him, is purely a matter of administration of the *waqf* funds, and as such any action or proceeding in regard thereto has, under paragraph (b) of Section 3 of Cap. 18, to be brought in the Court of the religious community therein described".

I can draw only one conclusion from those very clear findings, and that is that the appointment of a *Mutawalli* is within the exclusive jurisdiction of the Religious Court of the Maronite Community. It has been argued for the Respondent, that a distinction must be drawn between the nomination and appointment of a *Mutawalli*, but it appears to me to be perfectly clear from Section 12 of the Tribunal's judgment, that any action or proceeding (which I take it includes nomination) in regard thereto, *i. e.* to the appointment of a *Mutawalli*, has to be decided in the Court of the Religious Community.

It follows that the District Court had no jurisdiction to make the order dated the 31st of July, 1942, and the question as to who should now take the place of the British Consul at Jaffa, or the District Commissioner, must be decided by the Maronite Ecclesiastical Court. In coming to their decision that Court will no doubt bear in mind the remarks I have made in regard to their responsibility for ensuring that the legitimate interests of the heirs are protected. It is true that the Maronite Court has exclusive jurisdiction, but it will be borne in mind that the Courts of the Territory are armed with the necessary power of intervention to prevent any violation of the fundamental principles of justice.

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

Delivered this 27th day of July, 1944.

Chief Justice.

HIGH COURT No. 62/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

Fernand Nandor Weiss. PETITIONER.

v.

1. Assistant Commissioner for Migration, Haifa,
2. Commissioner for Migration, Jerusalem,
3. Attorney General. RESPONDENTS.

Immigration — Application to remain permanently in Palestine — Immigration Ord., secs. 5(1)(a)—(f), 5(3) — "May be granted" in r. 2(1)(b) — Discretion, may not be transferred — Art. 7 of the Mandate, P. O. in C. 17(1)(c), Citizenship O. in C. 7(1)(a) — No repugnancy to Mandate — Lawful residence.

Return to an order *nisi*, calling upon the Respondents to show cause why they should not be ordered to accept and grant Petitioner's application to remain permanently in Palestine; order *nisi* discharged:—

1. Rule 2(1)(b) of the Immigration Rules invests the Director with complete discretion.

2. The exercise of this discretion may not be transferred by departmental instructions.

3. The Immigration Ord. and the rules thereunder are not *ultra vires* for repugnancy to the Mandate.

(*A. M. A.*)

ANNOTATIONS:

1. See note 2 in A. L. R. to C. A. 48/43 (10, P. L. R. 251; 1943, A. L. R. 374) for authorities on the interpretation of the word "may".

2. On unauthorised delegation of a discretion vested by statute *cf.* H. C. 31/42 (1942, S. C. J. 251; 11, Ct. L. R. 167). See, on the other hand, H. C. 46/44 (11, P. L. R. 208; *ante*, p. 404) and P. C. 66/43 (11, P. L. R. 237; *ante*, p. 465).

3. See M. A. 9/36 (1937, S. C. J. (N. S.), p. 31) and cases therein cited on the effect of enactments being inconsistent with the Mandate for Palestine.

(*H. K.*)

FOR PETITIONER: Ketter.

FOR RESPONDENTS: Assistant Government Advocate — (Salant).

ORDER.

This is a return to an order *nisi*.

The Petitioner, Dr. F. N. Weiss, was an eminent member of the Budapest Bar. The Respondents are the Assistant Commissioner for Migration, Haifa, the Commissioner for Migration, Jerusalem, and the Attorney General.

The Petitioner entered Palestine as a traveller on 22nd May, 1939, he having been issued with a British Consular visa on his passport. In his affidavit he states that on 27th March, 1944, he applied under Rule 2(1)(b) of the rules made under the Immigration Ordinance for permission to remain permanently in Palestine. He avers that the first Respondent refused to accept this application on the grounds that he originated from occupied enemy territory.

Mr. Mills, the Commissioner for Migration, was called for cross-examination. He outlined the procedure followed in dealing with such applications. He stated that the "quota" prescribed under Section 5(3) of the Immigration Order * was exhausted ** on 27th March, 1944. He denied the contention in paragraph 4 of the Petitioner's affidavit. No person, he stated, was prejudiced because he came from occupied enemy territory, unless, of course, the security authorities objected to an individual on the grounds of public security. He admitted that the status of no illegal immigrant had been regularised by deduction from the quota. He further affirmed that when a person has overstayed his traveller's permit he is considered an illegal immigrant.

In the course of an able argument advanced with deep sincerity, Mr. Ketter submitted that there was in fact no discretion vested in the Commissioner for Migration under Rule 2(1)(b). Provided, he says, that the Applicant does not fall within the prohibitions of Section 5(1)(a) to (f) of the Immigration Ordinance, and it is not alleged that he did, and provided the quota is not exhausted, and it is admitted that it was not, the words "may be granted", appearing in Rule 2(1)(b) should be read as "must be granted". In support of his argument he has quoted Maxwell's familiar analysis of the imperative or directory nature of certain statutory provisions.

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* *Scil.*: Ordinance.

** *Quaere* whether this should not be "not exhausted"; *cf.* next following paragraph.

(*Ed.*)

Now it is true that in order to carry out the intention of the legislature it is sometimes necessary, in the interpretation of a statute, to couple a power with a duty, and consequently expressions which are worded in the language of mere permission are given a compulsory force. But it seems to me that there is no doubt as to the intention of the legislature in enacting Rule 2(1)(b). An authorised person, the Director, is vested with a discretion as clearly as words could do so. Had it been the intention to make the grant of permission mandatory, the words "shall be granted" could be used, not only without unbalancing the general structure but they would be the obvious words to convey that intention. It seems to me that if I were to interpret the word "may" as meaning "shall" in the application of Rule 2(1)(b) the whole aim and object of the legislature would be plainly defeated.

Before leaving this point I must mention that Mr. Mills admitted that until the filing of this petition he had in fact never seen the application, which was dealt with solely by the Assistant Commissioner at Haifa, full departmental instructions having been sent to him as to how he should deal with all such applications.

Now, Rule 2(1)(b) vests the authority to grant permission in the Director. That is a statutory authority which cannot be transferred to any other person merely by the issue of departmental instructions. It follows that when the petition was filed the legal requirement of Rule 2(1)(b) had not been carried out, and the Petitioner would have been entitled to an order directed to the Commissioner to comply with the requirements of the rule. He did not, however, press for this, and it is obvious that it would not have helped him, because Mr. Mills stated that he had now read all the papers and he would not be prepared to grant the permission required by the rule.

It has further been argued that Rule 2(1)(b) is repugnant to Article 7 of the Mandate, and this being so it is *ultra vires* by virtue of Article 17(1)(c) of the Palestine Order-in-Council. Article 7 places an obligation on the Administration of Palestine to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine. The obligation imposed by this Article is given effect to by the Palestinian Citizenship Order, 1925. Article 7(1)(a) of that Order empowers the High Commissioner to grant a certificate of naturalization to a person who, *inter alia,* satisfies him that:—

> "(a) he has resided in Palestine for a period not less than two years out of the three years immediately preceding the date of his application".

Resided in Palestine must be interpreted as meaning lawfully re-

sided in Palestine. The Palestinian Citizenship Order does not, in my opinion, preclude the legislature from prescribing the conditions under which persons may lawfully enter and reside in Palestine. It follows that neither the provisions of the Immigration Ordinance nor the rules made thereunder, are repugnant to Article 7 of the Mandate.

I am far from denying a measure of sympathy to the Petitioner in the dilemma in which he finds himself. On the other hand, one must appreciate the always difficult, and in the present catastrophe, the heart-breaking task of balancing the claims of the unfortunate victims of persecution against the immigration certificates available."

For these reasons the rule must be discharged. No order as to costs.

Given this 30th day of June, 1944.

Chief Justice.

HIGH COURT No. 117/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Mrs. Hilaneh widow of Issa el Kayyal in her capacity as guardian of her daughter Nuha Issa Kayyal. PETITIONER.

v.

Husni Hassan el Ammouri. RESPONDENT.

Habeas Corpus — Marriage of girl apparently over the age of 18 outside her community — H. C. 23/40, H. C. 13/44 — Proof of age — C. C. O. 172(5)(b), 182(c) — Procedure — Endorsement of order absolute on file — Revision before formal order and investigation of facts — High Court Rules and Crown Office Rules.

Return to a summons, issued to the Respondent, calling upon him to produce Nuha, Petitioner's daughter, before this Court on a fixed day and to deliver her to Petitioner; order *nisi* discharged:—

1. The High Court will not interfere in cases of the marriage outside their community of people over 18.

2. The results of radiological examination, as to age, by the Government Radiologist are conclusive.

3. The High Court may re-open a case before it when an order absolute is endorsed on the file in the mistaken belief that the respondent does not object, without an investigation of the facts and before issue

of formal order. This does not constitute a reversal, by the Court, of its own judgment.

4. The statutory rules relating to High Court applications in England are not applicable in Palestine.

(*A. M. A.*)

FOLLOWED: H. C. 23/40 (7, P. L. R. 151; 1940, S. C. J. 371; 7, Ct. L. R. 112).

REFERRED TO: H. C. 13/44 (11, P. L. R. 83; *ante*, p. 155).

ANNOTATIONS :

1. *Cf.* H. C. 102/42 (9, P. L. R. 535; 1942, S. C. J. 624) where the High Court, in a similar case, found a girl to be under 18 years old although the radiological examination gave a contrary result.

2. On the impossibility of importing English rules of procedure outside the Palestinian (Civil Procedure) Rules see, *e. g.*, C. A. 154/40 (7, P. L. R. 467; 1940, S. C. J. 334; 8, Ct. L. R. 91), H. C. 73/42 (9, P. L. R. 539; 1942, S. C. J. 546) and C. A. 139/43 (1943, A. L. R. 386). See, however, H. C. 40/44 (11, P. L. R. 226; *ante*, p. 310) where it was held that English practice must be resorted to where the High Court Rules are silent.

(*H. K.*)

FOR PETITIONER: 'Asal.

FOR RESPONDENT: Eila.

ORDER.

This is the return to an order *nisi* for *habeas corpus*.

The Petitioner is the mother of a girl, called Nuha Issa Kayyal whom she alleges is under eighteen years of age and whom she says has been taken away by and married accordingly to Moslem Law to the Respondent.

I issued the order *ex parte* on the 15th September, calling upon the Respondent to produce the girl in Court at 11 *a. m.* on the next day, namely, 16th September. On the 16th the Respondent did not appear although I was satisfied that he had been duly served. A warrant of arrest was issued and on the 18th September he was brought before me under arrest. He was not then represented by an advocate. The allegation of the Petitioner was read out to him and he thereupon said that he was prepared to hand over the girl to the Court. It is to be noted that there was no admission by him of the allegation although, of course, it is now clear that he admitted marrying her, and, yet, it is obvious that he did not admit on the 18th September that the girl was under eighteen and even if he had admitted that suggestion it would certainly be no proof that the girl was, in fact, under eighteen at the time of the alleged marriage, namely, the 5th September, 1944. On the Respondent saying that he was prepared to hand over the girl

I wrote on the file the words "I make the order absolute, Respondent not objecting". On the following day, 19th September, the parties appeared before me, the Respondent now being represented by an advocate and bringing the girl before the Court. His advocate then said that all that his client had meant to say on the previous day was that he was prepared to produce the girl in Court, but was not prepared to hand her over, that is, to her mother, and the advocate further says that his client intended to contest the petition. I accepted this assurance as being doubtless the correct version of what the Respondent had intended and I then said that, as no formal order had issued from the Court, that is to say, no formal order absolute, the mere fact that I had written on my notes "I make the order absolute" did not preclude me from re-opening the matter and investigating the facts. (I wish to emphasize that, up to then, there had been no investigation of the facts). This was all the more desirable in the interests of justice seeing that the girl herself appeared anxious to remain with the Respondent whom she regarded as her husband. The matter was then adjourned for hearing to the 29th September.

On the 29th September the Petitioner's advocate objected to my hearing the matter and quoted Hailsham Vol. 9, p. 751 p. 1246; but it is clear that that Article refers to the Crown Office Rules, which have statutory force in England and have not been applied to Palestine where we have our own rules, namely, High Court Rules 1937. While, of course, it is obviously undesirable that Courts should reverse their own judgments, there was here in fact no reversing of a considered judgment. On the 16th September I had heard nothing. I merely made the order absolute because, perhaps mistakenly, I understood that the Respondent did not object. I, therefore, do not regret having made my order of the 19th September and on the 29th September I refused to accept the argument of the Petitioner's advocate that I should not hear the Respondent and that I should not investigate the facts. From a formal point of view there is certainly no objection because no formal order absolute had been issued from the Court and from the practical point of view and in the interests of justice it is clearly a case the facts of which ought to be investigated and I am glad that I have done so.

In approaching this matter I am guided by High Court No. 23/40, P. L. R. Vol. 7, p. 151, and High Court No. 13/44, P. L. R. Vol. 11, p. 83. In High Court No. 23/40 this Court said: "We are not concerned with the position of people over the age of eighteen who marry outside their own communities". In the present case the girl herself

admits that she was married according to Moslem Law to the Respondent about the 5th September, 1944, and she admits that the marriage has since been consummated. She appeared in Court before me and, at the request of the Respondent's advocate and with her own consent, she unveiled her face and I saw her. From her appearance I have no reason to disbelieve her own word that she is nineteen years of age. I have before me an affidavit sworn on the 27th of this month by Dr. Abdallah el Moghrabi, who, I understand, is a medical officer usually engaged by the Social Welfare Department of Government. He swears that on the 1st September, 1944, a lady employee of the Social Welfare Department brought Nuha to him with a request that he should examine her in order to determine her age. He examined her with great care and, "technically", and found that her age was about 20. I have no reason to disbelieve this evidence nor have I any reason to believe that the lady employee of the Social Welfare Department was impersonated by someone else or that the person whom Dr. Moghrabi examined was not Nuha. I am assured by Miss Nasr of the Social Welfare Department that one of her employees did, at the request of the Social Welfare Department, take Nuha to Dr. Moghrabi for examination and that Dr. Moghrabi is the regular doctor of the Social Welfare Department.

The Respondent's advocate says that Nuha was not born a Catholic and contests the fact that she was born a Greek Orthodox and he says that she only later became a Catholic. I have no evidence as to this; but Nuha herself says that she became Catholic when she first went to school at about the age of six or seven.

It is clear that the only point calling for decision is the girl's age. Her mother (the Petitioner) alleges that she was born on the 28th of May, 1937 and baptised on the 19th of May, 1929, but I have merely the word of the Petitioner, given although it was, on oath. I am, however, not impressed by the mother's statement and I feel that there is no proof either that Nuha was born on the 28th May, 1927 or that she was baptised on the 19th of May, 1929. There is on the file what purports to be the decision of a certain President of an Ecclesiastical Court, dated the 2nd September, 1944, confirming the facts alleged by the mother as to the dates of birth and baptism; but here again I am left in doubt as to whether this decision was not based on something told to the Ecclesiastical Court by Nuha's mother. There is certainly no extract certificate from any register of births or register of baptisms. I do not think that this is a trustworthy evidence as to the date of birth.

The Petitioner's advocate has referred to sections 172(5)(b) and 182(c) Criminal Code Ordinance which are, of course, in the point. The most convincing piece of evidence, however, is the certificate of the Government expert on X-rays (Radiologist) of the Government Hospital, Jerusalem whose certificate was given after an examination of Nuha, performed by him at about 12.15 *p. m.* yesterday, that is, immediately on the conclusion of the hearing before me. At the conclusion of the hearing yesterday both parties' advocates agreed on the suggestion of a lady present in Court, representing the Government Social Welfare Department who made the suggestion because she felt that it might set the Petitioner's mind at rest, that Nuha be examined by the Government Radiologist who has now, after examination, reported to the Court that the X-ray examination shows that Nuha is over nineteen years of age. This is conclusive. I find that the young lady, Nuha, is over the age of nineteen and that, of course, she must have been over 18 years of age at the beginning of this month. The order *nisi* must be discharged without costs. I so order.

Given this 30th day of September, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 75/44.

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

BEFORE: Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Pinchas Waller. APPELLANT.

v.

Attorney General. RESPONDENT.

Criminal law — Slaughter of stock without authority — Food Control (Slaughter Stock Sale Restrictions) Order, Reg. 4A — R. v. Oliver, Buckman v. Button, Williams v. Russell, R. v. Harry Scott — Onus of proving absence of licence — Interpretation — Effect of amendment in interpreting legislation — CR. A. 47/34, CR. A. 76/40.

Appeal from the judgment of the District Court, Tel-Aviv, CR. A. 5/44, allowing an appeal from the judgment of the Chief Magistrate's Court, Tel-Aviv and remitting the case to the Chief Magistrate, dismissed:—

1. In charges contrary to Reg. 4A of the Food Control (Slaughter Stock Sale Restriction) Order, of slaughtering stock without authority, the pro-

secution need not prove the absence of a licence. (Distinguishing CR. A. 47/34 where the question of licence arose incidentally, and CR. A. 76/40, where it did not appear to have arisen at all).

2. The effect of an amendment of the law on the interpretation thereof before the amendment, considered.

(*A. M. A.*)

FOLLOWED: R. *v.* Oliver, 1943, 2 All E. R. 800.

REFERRED TO: CR. A. 47/34 (2, P. L. R. 181); CR. A. 76/40 (7, P. L. R. 437; 1940, S. C. J. 301; 8, Ct. L. R. 79); Buckman *v.* Button, 1943, 1 K. B. 405, 2 All E. R. 82, 196 L. T. 75; Williams *v.* Russell, 1933, 149 L. T. 190, 49 T. L. R. 315; R. *v.* Hary Scott, 1921, 86 J. P. 69.

ANNOTATIONS:

1. See R. *v.* Oliver (*supra*) and *cf.* CR. A. D. C. Ha. 84/44 (Selected District Court Cases, 1944, p. 221).

2. For another instance of an amendment *ex abundante cautela* see CR. A. 33/36 (P. P. 12.8.36).

(*H. K.*)

FOR APPELLANT: Hake.

FOR RESPONDENT: Tcherniak.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv remitting a case to the Chief Magistrate's Court, Tel-Aviv, for completion.

The Appellant was charged with an offence against Regulation 4A of the Food Control (Slaughter Stock Sale Restriction) Order, 1942, the allegation against him being that he slaughtered certain stock without having the authority of the Food Controller.

It seems to us that the matter is one in which the Common Law of England is properly applicable, and on that footing the matter seems to be completely covered by the recent case of R. *v.* Oliver, reported in 1943(2) All England Law Reports, at page 800. In that case it is to be noted that the Appellant was charged with having sold sugar as a wholesaler without the necessary licence and that at the conclusion of the judgment on that aspect of the case the Court said:—

> "In the circumstances of the present case we are of opinion that the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence".

The case is interesting in that it refers in detail to many cases which were referred to both before the learned Chief Magistrate and the learned Relieving President in this matter. And, acceding to the argument of Mr. Hake that the case of Buckman *v.* Button (1943) 1

K. B. p. 405 is not relevant in that, as the Court said in the case of Oliver, the Court did not in the Button case have to consider what would have been the position as regards onus apart from the provisions of the Summary Jurisdiction Acts of 1848 and 1879 which, of course, as Mr. Hake points out, had no applicability to Palestine. But, acceding to that, we are still left with the case of Williams *v.* Russell (1933) 149 Law Times at p. 190, where Mr. Justice Talbot said:—

> "On the principle laid down in the R. *v.* Turner and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority, I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute".

Further, the Court referred with approval to the case of R. *v.* Harry Scott (1921) 86 J. P. p. 69, which was a case under the Dangerous Drugs Act of 1920, where Mr. Justice Swift held that if the Defendant were licensed, it was a fact which was peculiarly within his knowledge and there was no hardship on him in being put to the proof. And in the particular passage in his judgment he says:—

> "It might be very difficult or impossible for the prosecution satisfactorily to prove that he did not possess any one or other of the qualifications which might entitle him to deal with the drug. But the Defendant could prove without the least difficulty that he had authority to do so".

Again, in the Oliver case the Court, after stating:—

> "The point taken by the Appellant is wholly without merits inasmuch as no one knew better than the Appellant whether he had a licence or not,"

goes on to say:—

> "But none the less the point requires consideration particularly in view of certain decisions to which our attention was called".

It seems to us that that case conclusively covers the present matter. But we feel, in justice to Mr. Hake's argument for the Appellant, that we should deal with two other points that he raised. First, he says that this is a matter which should not be covered by the Common Law of England because here we have a local law applicable; and he drew our attention to the fact that there were several Ordinances in which specific provision has been made conferring the onus upon the Defendant; and he points out that even in this particular matter, with regard to this Food Control Ordinance, there was in January of this year an amendment passed stating specifically that the onus is upon the Defendant. And he says that the inference from that is that the intention of the legislature before that was that the law should be the re-

verse; but while that is always a powerful legal argument, it is not conclusive, and we think that in this matter the more reasonable interpretation is, as Mr. Tcherniak says, that this amendment was merely introduced for the removal of doubts, and that, therefore, no inference which can help the Appellant should necessarily be drawn.

The second matter was concerning the decided cases of this Court relating to the Firearms Ordinance. One of them is Criminal Appeal No. 47/34, P. L. R. Vol. 2 p. 181; and the second one is Criminal Appeal No. 37/40, P. L. R. Vol. 7 p. 438 *. In both these "firearms" cases the allegation as to the licence was purely incidental and certainly, as far as the latter case is concerned, there was nothing in the record to show that until the delivery of the judgment the attention of the Court or the Appellant had been directed at all to the question as to whether or not the Appellant had a licence for his firearm. In this particular case, although it may have been unnecessary to do so, the attention of the Appellant was specifically drawn to the importance of a licence in that in the particulars of the offence in the Information it is specifically stated that the above-mentioned Accused slaughtered two oxen without the authority or written permission under the hand of the Food Controller.

For these reasons we are of opinion that the appeal must be dismissed. It follows, therefore, that the case must be remitted to the learned Chief Magistrate for completion.

Delivered this 21st day of June, 1944.

British Puisne Judge.

INCOME TAX APPEAL No. 2/44.

IN THE SUPREME COURT SITTING UNDER SECTION 53(1) OF THE INCOME TAX ORDINANCE, 1941.

BEFORE : Edwards, J.

IN THE APPEAL OF :—

Jacob Gesundheit. APPELLANT.

v.

Assessing Officer, Tel-Aviv. RESPONDENT.

Occupation of premises — Sec. 5(1)(c) — "Used" and "having the

* The reference should, *semble*, be to CR. A. 76/40 (7, P. L. R. 437 at 438; 1940, S. C. J. 301; 8, Ct. L. R. 79).

(*Ed.*)

use of" — London County Council v. A. G., Lambe v. I. R. C., Leigh v. I. R. C., Dewar v. C. of I. R., I. T. Act 1918, *Sched. A., Bertram v. Wightman, Associated Cinema Properties v. Mayor of Hampstead, the Essex Hall case, R. v. St. Pancras Assessment Committee, R. v. Melladew, Gage v. Wren, C. of I. R. v. Wemyss, L. C. C. v. Erith Parish wardens & ors. — I. T. A.* 9/42 — *Interpretation — English authorities.*

Appeal from the assessment by the Respondent of the income tax due by Appellant for the year of assessment 1943/44, allowed:—

The word "used" in sec. 5(1)(c) should be restricted to its ordinary meaning. A furnished house available for use but not actually used does not, therefore, fall within the section.

(*A. M. A.*)

REFERRED TO: I. T. A. 9/42 (1942, S. C. J. 635); London County Council *v.* A. G., 1901, A. C. 26, 70 L. J. Q. B. 77, 83 L. T. 605, 17 T. L. R. 131, 4 Tax C. 265; Lambe *v.* I. R. Commissioners, 1934, 1 K. B. 178, 150 L. T. 190, 18 Tax C. 212; Leigh *v.* I. R. Commissioners, 1928, 1 K. B. 73, 96 L. J. K. B. 853, 137 L. T. 303, 43 T. L. R. 528, 11 Tax C. 590; Dewar *v.* I. R. Commissioners, 1935, 2 K. B. 351, 51 T. L. R. 336, 153 L. T. 357, 104 L. J. K. B. 645, 19 Tax C. 561; Bertram *v.* Wightman, 1936, 2 All E. R. 487, 2 K. B. 521, 105 L. J. K. B. 784, 155 L. T. 412, 52 T. L. R. 570, 20 Tax C. 411; Associated Cinema Properties *v.* Mayor of Hampstead, 1943, 2 All E. R. 696 and 1944, 1 All E. R. 436; R. *v.* Special Commissioners, *ex parte* Essex Hall, 1911, 2 K. B. 434, 80 L. J. K. B. 1035, 104 L. T. 764, 27 T. L. R. 466, 5 Tax C. 636; R. *v.* St. Pancras Assessment Committee, 1877, 2 Q. B. D. 581, 46 L. J. M. C. 243, 37 L. T. 126; R. *v.* Melladew, 1917, 1 K. B. 192, 76 L. J. K. B. 262, 96 L. T. 189, 23 T. L. R. 207; Gage *v.* Wren, 87 L. T. 271, 18 T. L. R. 699; I. R. Commissioners *v.* Wemyss, 1924 S. C. 284, 8 Tax C. 551; London County Council *v.* Erith Parish (Churchwardens, *etc.*) and Dartford Union Assessment Committee, 1893, A. C. 562, 63 L. J. M. C. 9, 69 L. T. 725, 10 T. L. R. 1.

(*H. K.*)

FOR APPELLANT: Smoira.

FOR RESPONDENT: Wittkowsky.

JUDGMENT.

This is an appeal under Section 53(1) of the Income Tax Ordinance from an assessment by the Assessing Officer of Tel-Aviv.

The sole question is whether the Assessing Officer should have made a deduction in respect of a period of three months, during which it is admitted that the Appellant did not reside in a house belonging to him on Mount Carmel during the year of assessment, 1943/44.

A brief statement of facts has been filed in which it is stated *inter alia* that in the year 1942/43 the Appellant lived in the house on Mount Carmel for a period of nine months only; this house was not given

on lease but was furnished and ready for habitation throughout the year.

Dr. Smoira, for the Appellant, has argued that a proper assessment should have been on what he calls the *pro-rata temporis* basis, and that his client should only pay three quarters of the amount for one year. The relevant section of the law is Section 5(1)(c) of the Income Tax Ordinance, 1941, which is in the following terms:—

> "5(1) Income tax shall, subject to the provisions of this Ordinance, be payable ...... upon the income of any person accruing in, derived from, or received in, Palestine in respect of:—
>
> — — — — — — — — — — —
>
> (c) the net annual value of land and improvements thereon used by or on behalf of the owner or used rent-free by the occupier, for the purpose of residence or enjoyment, and not for the purpose of gain or profit".

In short, the question is simply whether during the three months mentioned the Appellant actually used the house, although the house itself, apart from furniture, was empty. It is admitted that it was not let, and Dr. Smoira argues that there was no income during the period in which he did not use the house and that during the three months' absence the Appellant did not, in fact, use the house. Emphasis is laid on the fact that the Ordinance says "used" and not "having the use of."

The argument proceeds that the mere fact that the house was furnished and ready for habitation is irrelevant. The test is whether there was, in fact, income. It is said that during these three months no income was received. In support of the argument the following decided cases were cited, namely, London County Council *v.* The Attorney General (1901) A. C. page 26; Lambe *v.* I. R. Commissioners (1934) 1 K. B., page 178; Leigh *v.* I. R. Commissioners (1928) 1 K. B., page 73. "Receivability without receipt is nothing". Dr. Smoira accordingly says that "usability without use is nothing". Dewar *v.* Commissioners of I. R. (1935) 2 K. B., page 351; Income Tax Act, 1918, Schedule A. No. VII, Rule 4 — "tax shall not be levied thereon during the period while it is so unoccupied and the General Commissioners on proof, *etc.*" Bertram *v.* Wightman (1936) 2 K. B., page 521; Associated Cinema Properties *v.* Mayor of Hampstead, All England Reports (1943) Vol. 2, page 696, and All England Reports (1944) Vol. 1, page 436; Hailsham, Vol. 27, page 351, paragraph 781; Public General Statutes (1925) pages 1744 and 1745; Public General Statutes (1918) page 275, Schedule A. No. 5, Rule L(d).

Mr. Wittkowski, for the Respondent, has referred to Judge Konstam's Book on Income Tax (9th Edition) page 31; The Essex Hall Case (1911) 2 K. B., page 434; All England Reports (1943) Vol. 2, page 696; Rex *v.* St. Pancras Assessment Committee (1877) 2 Q. B. D., page 581; Rex *v.* Melladew (1917) 1 K. B. page 192; Gage *v.* Wren (1902) Vol. 87, Law Times Reports, pages 271 and 274; Commissioners of I. R. *v.* Wemyss, 8, Tax Cases, page 551.

Mr. Wittkowski's argument is that by having this house furnished and ready for habitation so that at a moment's notice the Appellant could go to it and live in it, he had something that afforded him pleasure and advantage. (See definition of "use" in the Oxford Dictionary). It is to be remembered that Section 12 of the Income Tax Ordinance gives full relief for Urban Property Tax and Rural Property Tax.

Dr. Smoira, on the other hand, says that there was no real use, and that the word on which emphasis should be placed is "used" and not the word "occupied". Dr. Smoira's argument proceeds that it is too far fetched to say that his client could enjoy the house when he was not in it. The word "used" must mean actually "dwelling in it". (Hailsham, Vol. 27, p. 351, para. 782).

Mr. Wittkowski frankly admits that the net value can sometimes be split up, and he states that, in fact, the Assessing Officer claimed only one-quarter of the annual value of another house belonging to the Appellant in Tel-Aviv, because in that house he had only lived for three months, it having been during the remaining nine months let to another person. In the present case, however, it is said that the Appellant kept his house on Mount Carmel during the whole of the twelve months and kept it for his own private use, having it constantly ready for habitation.

Dr. Smoira contends that decisions on rating matters in England do not apply to Income Tax.

I have considered the judgment of Mr. Justice Lawrence in Bertram *v.* Wightman. It is to be noted that the reason why rating cases sometimes do not apply to Income Tax matters is because of the difference between the law of rating and the Income Tax law in that, in the Statute of Elizabeth (43 Eliz. C. 2) there is no definition of "occupier", and, therefore, occupation has to be treated as a question of fact, whereas in the rules under the Income Tax Act 1918, there is a definition in Rule 2, which provides that a certain person shall be deemed to be the occupier, and Rule 4 provides that the Tax shall be charged on all lands, whether occupied at the time of assessment or not,

from which it appeared to Mr. Justice Lawrence that although the person is not an occupier in fact, he may be deemed to be the occupier if he has the use of the lands, and that, therefore, he can have the use of the lands although he does not occupy them in fact.

We must remember that these rules do not apply to the Income Tax Ordinance of Palestine. There is a statement in Hailsham, Vol. 27, page 352, which tends rather to support Mr. Wittkowski's argument:—

> "In order to constitute rateable occupation there must be a use and enjoyment which is, or is capable of being, beneficial; the test of beneficial use is not whether a profit can be made but whether the use is of value".

London County Council *v.* Erith Parish (Church-wardens) and Dartford Union Assessment Committee (1893) A. C. 562. Lord Justice Du Parcq, in Mayor of Hampstead *v.* Associated Cinema Properties, Ltd., All England Reports (1944) Vol. 1, page 438, said:—

> "A man has left furniture in a house though he is not residing there. That fact shows an intention to return or to enter, and so proves that he is enjoying the use of a furnished house. The tenant of a seaside boarding-house has shut it up for the winter. The fact that he intends to reopen it in the summer is proof that he is now using and occupying it as a boarding-house, although the seasonal nature of the trade causes it to be temporarily closed. It is never true to say that a mere intention to occupy can in hypothetical circumstances, which may never come into existence, be equivalent to occupation".

It seems to me that there is much in Mr. Wittkowski's argument if one agrees that there is value in having a furnished house available for one, although one is temporarily absent from it. I wish to exclude, of course, the rather ridiculous argument that a person might put forward, namely, that although for 365 days of the year he is able to use a house, yet, as he is in fact absent every day from his house for, say, eight hours, he should only be made to pay two-thirds and not three-thirds of the annual value. I shall be quite capable of dealing with such an argument if and when it is advanced before me.

There is, however, no argument between the parties in this case of that nature, and no dispute as to the facts. As I said in Income Tax Appeal No. 9 of 1942, Annotated Supreme Court Judgments (1942) Vol. 2, page 637:—

> "While it is true that several sections of the Palestine Income Tax Ordinance, 1941, have been drafted in similar terms to those of the corresponding sections of the various United Kingdom Income Tax Acts or Finance Acts, one must remember that there are many differences. It would be a pity if, in Palestine, a huge mass of case law on this Ordinance is allowed to grow up in the manner and

> to the extent to which in England a mass of case law on the Income Tax and Finance Acts and on the Workmen's Compensation Acts has grown up. It is of interest to observe that in the "Law Times" newspaper of the 18th April, 1942, page 121, it is stated that Income Tax Law in England has now become a 'tangled morass'."

While I do not wish to throw doubt on the correctness of decisions of eminent judges on Income Tax Law in England I feel that one should try to interpret the Palestine Income Tax Ordinance as far as possible untrammelled by authority. I find the matter somewhat difficult, but I am not prepared to extend the word "used" in line 2 of Section 5(1) (c) beyond what I conceive to be its ordinary meaning. In any event, in case of doubt or difficulty in interpreting taxing statutes, one must lean towards that interpretation which is more favourable to the tax-payer.

Attractive although Mr. Wittkowski's argument may be, I am not prepared to hold that it can truly be said that the Appellant used the house in question during the three months when he was absent. I am not afraid of the result of this judgment because I do not think that the Revenue will needlessly suffer. In a case like this, if the parties do not agree on the facts, the onus would be on the tax-payer to prove his absence. If, during the three months, the Appellant had paid spasmodic visits to the house, evidence would doubtless have been available to the Crown to prove this, had it been necessary so to do.

In the result I allow the appeal. Question of costs reserved.

Delivered this 14th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 128/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Shlomo Rinzler & an. — APPELLANTS.

v.

Wolf Nives & an. — RESPONDENTS.

Action for recovery of possession — Scope of art. 24, para 2, Ottoman Magistrates' Law.

Appeal from the judgment of the District Court of Haifa, in its appellate ca-

pacity, dated the 24th day of January, 1944, in Civil Appeal No. 209/43, allowed:—

1. Art. 24 para. 2, Ottoman Magistrates' Law (taking possession by force from trespasser) does not apply to a landlord taking over a room vacated by tenant.

2. In an action under art. 24, Ottoman Magistrates' Law, Plaintiff cannot succeed by mere allegation, without proof, of previous possession.

(*M. L.*)

ANNOTATIONS: Authorities on possessory actions are collated in note 2 to C. A. 4/43 (1943, A. L. R. 307). See also C. A. 179/43 (1943, A. L. R. 639) and C. A. 66/44 (*ante*, p. 590) and annotations.

(*A. G.*)

FOR APPELLANTS: Wittkowski.

FOR RESPONDENTS: Slonim.

JUDGMENT.

This is an appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated 24th January, 1944. In the Statement of Claim the first Respondent has clearly claimed that he was the tenant of the room in question, and (that the Appellants rented one room only) kept furniture there, and resided in the room, and that owing to business reasons he left Haifa, subsequently to America, and gave the key to his agent. The Appellants thereupon opened the door of the room and took possession thereof. From the record of the case and paragraphs 1, 2 and 3 of the Statement of Claim, it appears that the above is an entirely incorrect statement of the true facts. According to the evidence and exhibits P/1 and P/2, the Appellants leased two rooms and paid rent for same by means of promissory notes which were duly honoured. One of these rooms is the room in question. The first Respondent did apparently use this room before he left for America, but the terms of this occupation are not disclosed. Although the Appellants state that the first Respondent occupied this room as a sub-tenant, he vacated it and Appellants took over the room. Article 24 of the Ottoman Magistrates' Law including the second paragraph appears to refer to what action and remedy the person in possession may take and have if dispossessed. The second paragraph clearly refers to such a person and precludes him from taking possession by force from the trespasser, the property trespassed upon. Therefore it would appear that the second paragraph of Article 24 of the Ottoman Magistrates' Law in any case cannot be applied to the Appellants.

The first Respondent relied in his statement of claim on the fact that he rented the room, and on possession and that the Appellants only rented one room, not the one in question. The Magistrate rightly

in my opinion assumes that this is a claim under Article 24 of the Ottoman Magistrates' Law and that the first Respondent, therefore, failed to prove his claim. This, in my opinion, is sufficient reason for dismissing the first Respondent's claim and he is not entitled to succeed, as his advocate argues, by merely alleging possession.

I do not say that the conduct of the Appellants is correct nor do I say that the first Respondent might not have succeeded had he framed his action differently; nevertheless under the circumstances in this case and for the above reasons the judgment of the District Court must be reversed and the judgment of the Magistrate's Court restored with costs on the lower scale at LP. 10 advocate's fee.

Delivered this 12th day of October, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 285/43.

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

BEFORE: Rose and Edwards, JJ.

IN THE APPEAL OF :—

Muhammad Ali El Nakib El Husseini & 11 ors. — APPELLANTS.

v.

Muhammad Adib Mutawalli, Mutawalli of Sinan Pasha Waqf. — RESPONDENT.

Right of Khulou — Expenditure for improvement of waqf property — Technical requirements to satisfy acquisition of right — Evidence.

Appeal from the judgment of the District Court, Jaffa, Civil Case No. 75/42, allowed and case remitted:—

A right of *khulou* may be extinguished only by paying to the person responsible for the improvements the value of such improvements and the difference in value of the property due thereto.

(*A. M. A.*)

FOR APPELLANTS: Abcarius and Daoudi.
FOR RESPONDENT: Nakhleh.

JUDGMENT.

Rose, J.:

This is an appeal from a judgment of the District Court of Jaffa. The matter concerns a right of *Khulou* which the Appellants allege

had vested in them as a result of certain improvements which they had effected in properties leased from the Respondent.

While many points were raised before the District Court, it seems to me that the matter, as far as this Court is concerned, is susceptible of reasonably brief treatment. The evidence as a whole and the findings of fact of the learned Relieving President would seem to establish that the sum of 74,700 Turkish piastres was actually expended by the Appellants upon repairs and improvements to property in one of three villages, the subject-matter of the leases in this case.

Not only was no acceptable evidence produced on behalf of the Respondent challenging this allegation, but there were in fact repeated admissions by various *Mutawallis* of the *Waqf* that these sums were, in fact, expended for the purposes stated. The learned Relieving President, however, came to the conclusion that the right of *Khulou* had not been technically proved, in that there was no evidence that the expenditure had been proved to the satisfaction of the *Qadi*. It seems to me, however, with respect to the learned Relieving President, that this is taking too narrow a view of the matter.

We were referred to three documents, Exhibits P. 8, 9 and 10, which were leases signed by the Appellants, the *mutawalli* for the Respondent and by the *Qadi* himself, in which there is the clearest possible admission by the *mutawalli* concerning the expenditure of this sum upon the improvement and repair of properties in one of the three villages covered by the documents. The evidence in question and the preparation and signing of these documents took place many years ago, and it seems to me that this is eminently a case in which, in the absence of any indication to the contrary, we should assume that the *Qadi* himself was well aware both of the inadequacy in law of an admission by a *mutawalli* on behalf of the *Waqf* for which he was acting, and of the technical requirements necessary to establish a right of *Khulou*. The fact, therefore, that he signed these documents, together with the Appellants and the *mutawalli*, seems to me to give rise to a presumption (which could of course have been rebutted but which the Respondent has made no effort to rebut) that the legal requirements had been satisfied and that a right of *Khulou* was recognized by the *Qadi* to exist.

The Respondent now, however, raises in this Court for the first time the contention that even assuming there was a right of *Khulou*, that right has been extinguished in that the Appellants have received back sums in excess of the moneys advanced.

Abcarius Bey, on behalf of the Appellants, contends (and it would

appear to be so) that his clients' rights in the property can only be defeated upon payment by the Respondent of the amount expended, plus the improved value of the properties in the village in question attributable to the work effected therein. Awni Eff. Daoudi, who also appeared for some of the Appellants, goes further than this and says that once a right of *Khulou* has been created, the persons in whom this right is vested are entitled to perpetual possession.

I am unable to accept this view of the matter, which would seem on the face of it to be palpably unreasonable, and I prefer the statement of the position as enunciated by Abcarius Bey. Counsel for the Respondent alleged that as against this initial debt of 74,700 Turkish piastres the Appellants have received sums in excess of LP. 25,000, and that, therefore, their right, if any, has been extinguished. This is eminently a question of fact, which it would be wrong for this Court to decide.

The appeal is, therefore, allowed, and the case remitted to the District Court to decide whether the Appellants have, in fact, received from these properties sums in excess of the amount originally expended, with the addition of such sum as the District Court considers to represent the improved value of the properties in that village on which the money was expended.

The costs of this appeal will be in the cause and on the lower scale. To simplify the final arrangements, we certify an advocate's attendance fee of LP. 25 to the ultimately successful party. The Appellants, if successful, to have only one set of costs and one advocate's attendance fee.

Delivered this 30th day of June, 1944.

British Puisne Judge.

Edwards, J.: I concur and I have nothing to add.

British Puisne Judge.

CIVIL APPEAL No. 78/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Nina (Nehama) Bloom. APPELLANT.

v.

Aba Berlinsky & an. RESPONDENTS.

Judgment for eviction of business premises rented for 3 years — Effect of legislation subsequent to judgment.

Appeal from the judgment of the District Court, Tel-Aviv, sitting in its appellate capacity, dated the 7th March, 1944, in Civil Appeal No. 185/43, allowed without costs:—

1. High Commissioner was competent under Emergency Powers (Defence) Acts, 1939 and 1940 to make the Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations (No. 2), 1944, dated 8.8.1944.
2. A Court of Appeal must take judicial notice of any new legislation passed between date of judgment appealed from and delivery of judgment on appeal and must decide whether or not such legislation is applicable to the appeal before it.
3. Until a judgment for eviction becomes final Court of Appeal has to apply the Regulations above referred to (Note 1); when judgment is final Execution Officer will have to refuse execution.

(*M. L.*)

DISTINGUISHED: C. A. 265/43 (10, P. L. R. 565; 1943, A. L. R. 717); H. C. 114/43 (10, P. L. R. 706; 1943, A. L. R. 820).

REFERRED TO: Lewis *v.* Hughes, (1916) 1 K. B. p. 831.

FOLLOWED: H. C. 105/44 (*ante*, p. 556).

ANNOTATIONS:

1. As to 1 & 2 see H. C. 105/44 (*supra*), cases cited therein and annotations.
2. As to point 3 see cases distinguished (*supra*) and annotations in A. L. R.
3. The judgment of the District Court is reported in 1944, S. C. D. C., p. 71.

(*A. G.*)

FOR APPELLANT: Eliash and Scharf.

FOR RESPONDENTS: No. 1 — Polonsky.
No. 2 — Goitein.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv, sitting as a Court of Appeal, dated the 7th of March, 1944, upholding the decision of the Magistrate's Court, dated 3rd November, 1943, ordering the Defendant, here the Appellant, to vacate the premises in question.

The facts are that the Appellant is apparently a tenant of Respondents in respect of business premises under a three-year lease, which expired the 30th of April, 1943. The Rent Restrictions (Business Premises) Ordinance did not apply, since by Section 14 of that Ordinance leases of three years and upwards were excluded. On the 10th May, 1943, Respondent lodged an action for eviction against the Appellant and on the 3rd November, 1943, the Magistrate ordered evic-

tion. Appeal from this judgment was lodged in the District Court on 19th November, 1943.

On the 6th January, 1944, Section 14 of the Rent Restrictions (Business Premises) Ordinance was repealed by Regulation 7 of the Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations, 1944, expressed to come into operation on that date. The Appellant, therefore, added a fresh ground of appeal, namely that since 6th January, 1944, they were protected by the above amendment and could not then be evicted, and asked the District Court accordingly to reverse the decision of the Magistrate's Court.

The learned Relieving President in paragraph 2 of his judgment discusses the question whether if the decision of the Magistrate was correct at the time of making, the District Court has any power to do otherwise than uphold it, and he comes to the conclusion that he had power to reverse the Court below, which was correct under the then existing law, if subsequent alteration of the law renders it unnecessary *. In paragraph 3 he continues to consider whether this is a proper case for reversing the Magistrate's eviction order or not, by reason of the subsequent protection granted by the Ordinance to leases of three years and over. The learned Relieving President here decides that the Interpretation Ordinance applied both to the *Defence (Amendment of* Rent Restrictions (Business Premises) Ordinance, 1941 **, and to the above-mentioned regulations, which on January 6, 1944, repealed Section 14 of the Ordinance. Section 5 of the Interpretation Ordinance provides that, unless the contrary intention appears, the repeal of an Ordinance, *etc.*, shall not affect any right, privilege, obligation or liability accruing or incurred under any Ordinance so repealed; affect any legal proceedings or remedy in respect of any such right *etc.*, and such right may be enforced as if the repealing Ordinance had not been passed. He finds that on the 6th January, 1944, the Respondent had an accrued right and that Appellant had incurred a liability.

On the 30th April, 1943, the Appellant's tenancy expired and the Respondent immediately acquired the right to evict, which was confirmed by the Magistrate's judgment of 3rd November, 1943. There are, however, the words "unless the contrary intention appears". It was argued that this does appear, in that Section 14 has been repealed and that the repeal is retrospective. The learned Relieving President

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* *Scil.*: necessary.

** The words in italics should be deleted. See the context in 1944, S. C. D. C. at p. 73.

(*Ed.*)

holds, however, that the amendment in this case is not retrospective. He continues, "it is specifically expressed to come into operation on the date of its publication in the *Gazette*, namely 6th January, 1944, and without other express terms it cannot be construed otherwise. In the present amendment there are no such terms, and Section 5(1) of the Interpretation Ordinance must, therefore, come into operation, there being no "contrary intention" within the meaning of the section". (Similar section in English Interpretation Act, 1889, Section 38(2)). (Lewis *v.* Hughes (1916) 1 K. B. p. 831). Civil Appeal 265/43 and High Court 114/43 are distinguished on the ground that in the former the alteration of the law took place between the filing of the action and the delivery of the judgment, and not as here, after delivery of the Magistrate's judgment, and in the latter the basis of the judgment was a consent judgment and in the nature of an agreement between the parties.

Such was the position when judgment was delivered in the District Court on 7th March, 1944.

The matter now comes before me on appeal, and once again further legislation has been passed and published in Supplement No. 2 of *Gazette* Extraordinary No. 1330, page 753, dated 8th August, 1944, and headed "Defence Regulations made by the High Commissioner under the Emergency Powers (Defence) Act, 1939, as extended to Palestine from time to time by His Majesty-in-Council". It reads:—

> "1. These Regulations may be cited as the Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations (No. 2), 1944, and shall be read as one with the Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations, 1944, hereinafter refered to as 'the principal Regulations'.
>
> 2. For the avoidance of doubts, it is hereby declared that the Rent Restrictions (Business Premises) Ordinance, 1941, as amended by the principal Regulations, applies to any premises or the tenancy of any premises in respect of which an agreement of tenancy had been made for a term of not less than three years, notwithstanding that such agreement expired before the 6th day of January, 1944, and no execution proceedings shall be commenced, continued or completed pursuant to any judgment given or order made before the commencement of these Regulations, whether before or after the 6th day of January, 1944, if such judgment could not have been lawfully given or such order could not have been lawfully made had the principal Regulations and these Regulations been in force at the time such judgment was given or such order was made."

The question before me is whether the judgment of the Magistrate and District Court must stand, or whether in view of this Regulation

of the 8th of August, 1944, this Court is bound to reverse these two previous judgments. The argument advanced by the Appellant is that the Regulation of 8th August, 1944, is a declaratory regulation and is binding on this Court.

The case in the Magistrate's Court was heard and determined prior to the repeal of Section 14, Rent Restrictions (Business Premises) Ordinance, and, therefore, the Magistrate was bound by the law as it stood at the time of delivery of his judgment. When this judgment came on appeal the Regulation of the 6th January, 1944, had been published, which cancelled Section 14, but the learned Relieving President held that the Magistrate's decision was not thereby affected, as it related to a right which accrued from 30th April, 1943, and since the Regulation of 6th January, 1944, was not retrospective, he upheld the Magistrate's decision granting eviction.

It is argued for the Appellant that although the Magistrate's decision may have been good at the time, yet before the District Court gave judgment on appeal, the law was altered by the Regulation of 6th January, 1944, repealing Section 14 of the Ordinance, 1941, and that the District Court gave a wrong interpretation to the effect of this repeal, namely, that it was not retrospective.

There has been considerable argument by both sides regarding (1), whether the High Commissioner is competent or not to make the Regulation of the 8th August, 1944, and (2) whether this Court on appeal is entitled to apply the effect of new legislation which did not exist when a judgment is given by a Magistrate and subsequently by a District Court on appeal.

As regards (1), this point has been argued at great length previously by the same advocates in Civil Appeal * 105/44, and I cannot find any fresh force in the arguments advanced before me in the present case. I entirely agree with the findings in that judgment and that it is clear that the Emergency Powers (Defence) Acts, 1939 and 1940, were extended so as to continue in force up to 23rd August, 1944. All provisions made under the original Emergency Powers (Defence) Acts, 1939 and 1940, must be taken to apply to Palestine. The High Commissioner was, therefore, competent to make the Regulation of the 8th August, 1944.

As regards (2), there is no doubt in my mind that a Court of Appeal must take judicial notice of any new legislation which may have been

* *Scil.*: High Court.

(*Ed.*)

passed between the date of the judgment appealed from and the delivery of judgment on appeal, and must, therefore, decide whether or not such legislation is applicable to the appeal before it.

I do not agree with the argument that this Regulation is intended to affect execution proceedings only. Until a judgment becomes final it is open to a Court on appeal to apply this regulation. When a judgment is final, no doubt the Execution Officer will apply the Regulation by refusing to execute.

For the above reasons and in accordance with the declaration contained in Section 2 of the Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations (No. 2), 1944, of the 8th August, 1944, the judgments of the District Court and of the Magistrate's Court are reversed, and the order of eviction cancelled.

There will be no costs.

Delivered this 7th day of November, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 408/43.

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

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

IN THE APPEAL OF:—

Zahra Mustafa Salahi. APPELLANT.

v.

Nur Hanna Ibrahim Hanania & 10 ors. RESPONDENTS.

Prescription — Admissions — Origin of possession — Mejelle, 1674 — Burden of Proof — Procedure.

Appeal from the judgment of the Land Court, Jaffa, in Land Case No. 10/43, allowed and case remitted:—

A plea of prescription is a good defence irrespectively of the origin of possession, so long as no explicit admission is made by the possessor, within the meaning of art. 1674 of the *Mejelle.*

(*A. M. A.*)

ANNOTATIONS: On the requisites of an admission according to Art. 1674 of the *Mejelle* see L. A. 64/24 (2, C. of J. 646) and C. A. 139/40 (7, P. L. R. 376; 1940, S. C. J. 505; 8, Ct. L. R. 196).

(*H. K.*)

FOR APPELLANT: Goitein and Gluckman.

FOR RESPONDENTS: No. 1 — Nakhleh.
No. 2 — Abcarius.
No. 3 — In person.
Rest — No appearance.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jaffa. The action was brought against the present Appellant and other persons, for a declaration that the Respondents were the owners of certain land and for the dispossession of the Appellant and the others from that land. The present Appellant pleaded that the action should not be heard because she had been in possession of the said property independently without any dispute or opposition for a period exceeding fifteen years, which in the present matter, the land being *mulk*, is the period of limitation. Now, the Appellant herself says — whether, of course, she is correct is a matter which must be decided in due course — that she has been in possession of the land for 22 years; that her husband was the owner of it and that she herself has always taken the income from the land and the full produce.

The learned Relieving President took a short point at the hearing below that as the Plaintiffs, that is the Respondents, alleged that the Appellant's husband originally entered the land as a gardener on their behalf her title would be no better than his and, therefore, "her claim must fail" (*sic*). It seems to us, with all due respect, that while it may well be that ultimately the Respondents in this case may succeed on the various points which their counsel, Mr. Nakhleh, raised before us and which he will be fully entitled to take before the Land Court, that proposition is not correct. The Appellant contends that she has been on the land in full possession of it and in full enjoyment of the fruits for 22 years. She makes no admissions in accordance with Article 1674 of the *Mejelle* and there is no suggestion that there have been any previous admissions by her during this period of 22 years which would be inconsistent with her allegation that, irrespective of any right which the Respondents may have, their remedy has been barred by effluxion of time.

While it is always unfortunate that matters of this kind must be remitted for a retrial, we are of opinion, in this case, that the judgment as it stands cannot be supported. The appeal must, therefore, be allowed and the case remitted for the Land Court to hear and determine according to law. Either party will, of course, be at liberty to call

any further evidence which they may think fit. The costs of this appeal will be in the cause and on the lower scale. To facilitate the final arrangements we certify an advocate's attendance fee of LP. 15 to the ultimately successful party. Should the Respondents ultimately succeed they will have jointly only one set of costs and one advocate's attendance fee.

Delivered this 28th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 375/44.

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

BEFORE: Rose, J.

IN THE APPLICATION OF :—

Moisei Weinbaum. APPLICANT.

v.

Ronea Weinbaum & an. RESPONDENTS.

Amendment of pleadings, C. P. R. 125 — Addition of allegation of fraud — Delay — Discretion — Costs.

Application for leave to appeal from the order of the District Court, Tel-Aviv, dated the 30th day of June, 1944, in Civil Case 249/43 (M. A. 56/44), dismissed:—

Courts should be reluctant to allow an amendment of pleadings intended to raise a question of fraud. But if the trial Court, bearing these considerations in mind, decides to allow the amendment, the appellate Court will not interfere unless there has been an improper exercise of discretion.

(*A. M. A.*)

ANNOTATIONS:

1. On the necessity of pleading fraud in clear terms see, e. g., C. A. 220/37 (1938, 1 S. C. J. 9), C. A. 95/39 (1939, S. C. J. 531; 7, Ct. L. R. 13), C. A. 26/40 (7, P. L. R. 346; 1940, S. C. J. 286; 8, Ct. L. R. 206), C. A. 179/41 (8, P. L. R. 536; 1941, S. C. J. 629), C. A. 69/42 (8, P. L. R. 422; 1942, S. C. J. 420; 12, Ct. L. R. 106) and C. A. 153/42 (8, P. L. R. 635; 1942, S. C. J. 769; 12, Ct. L. R. 210).

2. On amendment of the statement of claim see C. A. 53/43 (1943, A. L. R. 111) and C. A. 193/43 (1943, A. L. R. 597) and annotations.

(*H. K.*)

FOR APPLICANT: Y. Fraenkel.

FOR RESPONDENTS: Scharf.

JUDGMENT.

This is an application for leave to appeal from an interlocutory order of the District Court of Tel-Aviv, allowing the Respondents, who were the Plaintiffs in the trial Court, to amend their pleadings. The amendment asked for was an addition of a plea of fraud. It is to be noted that Mr. Fraenkel says that this application to amend, which was apparently made under Civil Procedure Rule 125, was made about nine months after the original statement of claim was filed only about one week before the case was listed for hearing.

As Mr. Fraenkel points out, the English practice in interpreting the equivalent rule, which is, in fact, identical, that is rule 1 of order 28 of the Rules of the Supreme Court, is that it is only in special circumstances that an amendment by the addition of a plea of fraud is allowed and that Courts are reluctant to accede to such a request unless there are special circumstances. Had the learned President not applied his mind to this aspect of the matter, I might have been prepared to assist the Applicant in this case; but it appears from his order that he had in mind this precise practice of the English Courts which, of course, (our rules being based upon the English rules) are to be followed as much as possible in this country. And he states in his order that he is aware of the fact that Courts are reluctant to permit the addition of a plea of fraud unless such fraud has been pleaded in the first instance. But he then goes on to give reasons why, in his opinion, in this particular case the amendment should be allowed.

While I would not go so far as to say that I either agree or disagree with the reasons given by the learned Judge in this case, the fact remains that he has given reasons, and it seems to me that it is quite impossible for me to say that he has improperly exercised his discretion within the meaning of the rule to a degree that would entitle this Court to interfere.

For these reasons I am of opinion that the application must be dismissed. I think that in the circumstances justice will be done by ordering that costs will be in the cause, to include the sum of LP. 5 for advocate's attendance fee.

Delivered this 16th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 310/43.

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

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

IN THE APPEAL OF:—

The Keren Kayemeth Leisrael Co., Ltd. APPELLANT.

v.

1. The Village Settlement Committee of Beit Thul Village, Jerusalem District,
2. The Government of Palestine. RESPONDENTS.

Right of way — Land settlement — Effect of signing a map on which right of way not asserted — No claim of right of way in land settlement — L. S. Ord., sec. 27 — Acquiescence in plantation of forest.

Appeal from the judgment of the Land Settlement Officer, Jerusalem Settlement Area, dated 12th August, 1943, in Case No. 4/Qiryat Anavim, allowed and case remitted with directions:—

Acquiescence and failure to take objection to the plantation of a forest are inconsistent with the allegation of an *ab antiquo* right to a road.

(*A. M. A.*)

ANNOTATIONS:

1. Palestinian authorities on the right of way are collated in annotations to C. A. 167/43 (1943, A. L. R. 682).

2. On failure to assert rights in settlement proceedings *cf.* C. A. 9/44 (*ante*, p. 328).

(*H. K.*)

FOR APPELLANT: Ben Shemesh.

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

JUDGMENT.

This is an appeal against the judgment of the Settlement Officer of the Jerusalem Settlement Area, in case No. 4 Qiryat Anavim. The Appellants are the Keren Kayemeth Leisrael, Ltd., who own the land of Qiryat Anavim, and the Respondents are the Village Settlement Committee of Beit Thul Village, and the Government of Palestine. The latter are only technical Respondents in that the block of land, which is the subject-matter of this case, has been registered in their name.

The material facts are not substantially in dispute. The Keren Kayemeth Leisrael acquired some land for a settlement, which is called

Qiryat Anavim. The boundaries of that land run parallel to the boundaries of the village of Beit Thul. Those boundaries were settled in a map which was accepted by both parties and which is registered in the Land Registry of Jerusalem with deed No. 536 of the 28th June, 1921. What is in dispute now, in fact, is a track or road running through the lands of Qiryat Anavim.

It is admitted that this track or road does not appear on the 1921 plan of the land, although what is alleged to be a prolongation of this track does appear in the Government survey plan of 1933 of this neighbourhood. Since the inhabitants of Qiryat Anavim entered into possession of the land in 1921, this track has never been used by the people of Beit Thul. The Respondents allege that they did not use it because Qiryat Anavim allowed them to use an alternative track, which was just as convenient. Some seven years ago this alternative track was closed to them after the murder of seven men of Qiryat Anavim. In 1934 the members of Qiryat Anavim settlement planted a forest in the area in which the track now claimed is situated. The whole of this forest area apparently was enclosed, so that the forest could develop free from the depredations of goats, *etc.* Land Settlement operations took place in 1943, and as a result of those operations the Settlement Officer granted to the Village of Beit Thul this track as a right-of-way or road. The Appellants appeal against this part of the judgment of the Settlement Officer.

It has been urged by the Respondents that the map of 1921, which admittedly was signed by the elders of the village of Beit Thul, was signed by them solely as a demarcation of boundaries and not as an acceptance of everything contained in the map. The Settlement Officer accepted this explanation, and he may well have been right. But I cannot refrain from remarking that it seems strange that Beit Thul should not have insisted on the reservation of this to them all important right, particularly as by 1921 the Arabs were already vehement in asserting their claims *vis-à-vis* the new Jewish Settlements.

Another significant factor that emerges from these proceedings is that when the incidence of settlement operations was notified, the Village Committee do not appear to have presented any claim in regard to this track. The claim at settlement seems to have come through what I may call the back door of Section 27 of the Land (Settlement of Title) Ordinance. That section is an omnibus section which gives the Settlement Officer power to deal with other matters which might arise generally in the course of settlement. But to my mind the most significant factor of all is that for ten years the Respondents sat on

their so-called rights in regard to this track. They watched the trees which were planted by the toil of man on this stony ground grow up. They took no action to prevent this planting, of which they were well aware. They made no move during the early years. Now they prefer a claim which in effect demands the right to hack a road six metres wide through this young forest, a road which presumably would be open to motor and animal traffic and all those activities which are so prejudicial to the successful development of this vitally necessary forest. Deplorable as this result might be it would be no ground for refusing the Respondents their legal rights, if they had legal rights. The remedy, if any remedy was called for, would lie in other hands. But I am satisfied that the Respondents have not the legal rights they claim, because I cannot resist the conclusion that their conduct throughout the last twenty odd years, and particularly their failure during the ten years 1933—43, to take any action to prevent the planting of this forest, was quite inconsistent with the allegation of the existence of *ab antiquo* rights to a road or right-of-way.

The appeal is allowed and the case is returned to the Settlement Officer for modification in his judgment in accordance with this decision.

The Appellant will have his costs to include LP. 10.— advocate's attendance fee on the hearing of this appeal.

Delivered this 20th day of June, 1944.

Chief Justice.

CIVIL APPEAL No. 119/44.

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

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

IN THE APPEAL OF:—

P. Margolin, the Trustee under a scheme of arrangement between A. Labzovsky and his creditors, dated 15.2.43. APPELLANT.

v.

Joseph Weisblach. RESPONDENT.

Guarantee — Surety claiming in bankruptcy — Subrogation by surety who has not paid the full amount of his debt — In re Rhodesia Gold-

fields, in re Akerman, ex parte Turquand, in re Sass, Ellis v. Emmanuel, in re Paine, in re Houlder, in re Fox, Walker & Co. ex parte Bishop.

Appeal from the order of the District Court, Haifa, dated the 7th of March, 1944, in Civil Case No. 270/42 (Motion No. 20/44), allowed:—

A surety cannot claim subrogation in bankruptcy unless he has paid in full the debt guaranteed.

(*A. M. A.*)

FOLLOWED: Rhodesia Goldfields, Ltd., *Re,* Partridge *v.* Rhodesia Goldfields, Ltd., 1910, 1 Ch. 239, 79 L. J. (CH.) 133, 102 L. T. 126; Akerman, *Re,* Akerman *v.* Akerman, 1891, 3 Ch. 212, 61 L. J. (CH.) 34, 65 L. T. 194; Fothergill, *Re, ex parte* Turquand, 1876, 3 Ch. 445, 45 L. J. (BCY.) 153, C. A.; Sass, *Re, ex parte* National Provincial Bank of England, 1896, 2 Q. B. 12, 65 L. J. (Q. B.) 481, 74 L. T. 383; Ellis *v.* Emmanuel, 1876, 1 Ex. D. 157, 46 L. J. (Q. B.) 25, 34 L. T. 553; Paine, *Re, ex parte* Read, 1897, 1 Q. B. 122, 66 L. J. (Q. B.) 71, 75 L. T. 316; Houlder, *Re,* 1929, 1 Ch. 205, 98 L. J. (CH.) 12, 140 L. T. 325.

DISTINGUISHED: Fox, Walker & Co., *Re, ex parte* Bishop, 1880, 15 Ch. 400, 50 L. J. (CH.) 18, 43 L. T. 165.

ANNOTATIONS: For the law on the subject see Halsbury, Vol. 2, pp. 271 *et seq.*, Nos. 352 *et seq.*; Vol. 16, p. 61, No. 53 and footnote (*s*); Vol. 33, pp. 264—5, No. 468 and footnote (*t*).

(*H. K.*)

FOR APPELLANT: P. Margolin.

FOR RESPONDENT: A. Levin.

JUDGMENT.

FitzGerald, C. J.: This is an appeal from a decision of the District Court, Haifa, directing the Appellant, who is a trustee in bankruptcy of the estate of Mr. Labzovsky, to allow Respondent to prove in the bankruptcy for a certain sum paid out by him as surety. The Respondent, who was surety for the principal debtor, now a bankrupt, had his property sold in execution to meet his bond, but it was only sufficient to cover some 45% of his liability. It had realised in all LP. 4770.500 mils. The creditors of the estate submitted proofs to the trustee in the bankruptcy for the whole amount of the debt due to them. The trustee admitted the proofs only in respect of the balance that was due after deducting the 45% paid by the surety. The surety then sought to prove in the bankruptcy for the sum of LP. 4770.500 mils. This the trustee rejected on the ground that as he had paid only a part of the amount of his surety, he was not entitled to prove his claim. The District Court considered that the trustee was wrong, hence this appeal.

The case had been argued at great length, and we were referred to

many cases going back a considerable number of years. It cannot be said that any case dealt exactly with the particular issue arising here, but they establish certain general principles which can in my opinion readily be applied to the facts of this case.

Now, subject always to the exception that a surety is a creditor within the meaning of the fraudulent preference doctrine, all the authorities appear to substantiate the view that a surety can only exercise his right to prove in bankruptcy when he himself has paid the full amount of his debt. The learned Judge in the District Court in dealing with this aspect of the question said:—

> "Although the surety, as a general rule, can exercise his right of subrogation only after he has paid the entire debt, yet there are cases where it may be allowed before the whole debt has been paid. Where the creditor does not object to the exercise by the surety of his right of subrogation, or if he is not injured by this act of the surety, the surety is entitled to exercise it."

I have examined most carefully all the cases cited, and many others, and I confess I am unable to find any authority for the general proposition contained in the last sentence of this opinion. At this point it is convenient to consider how the surety comes into the matter at all. What is the privacy between him and the bankrupt estate? It is what I may call an artificial one. It is a right accorded to him to stand in the shoes of the creditor he has paid, but following the authorities which I have examined, it seems to me that he can only exercise that right when he has paid 20 shillings in the pound. He can then say, "give me up the security which you have got", and he can take the place of the creditor whom he secured in the bankruptcy proceedings. I am unable to accept the argument so ably advanced by Mr. Levin, that the sole reason for this limitation of the surety's rights was to prevent any violation of the rule against double proof. It seems to me most likely to be derived from the very sound principle that until the surety has fulfilled the terms of his bond he cannot deplete the assets of the estate.

The general principle involved does not in my view differ from that examined by Eady, J., in *In re* Rhodesia Goldfields Ltd. (1910, 1 Ch. 239) when he said, "The rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund". And again, by Kekewick, J., in *In re* Akerman (1891, 3 Ch. 212), "A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an *aliquot* share

given to him out of the mass without first making the contribution which completes it." The argument that this operates as an injustice on the surety has been effectively answered by the judgments of James, L. J. and Mellish, L. J., in *ex parte* Turquand, L. R., 3 Ch. Div. 1876. The equity of the surety, says Mellish, L. J., is to make up 20 shillings in the pound to the creditors, and take the arrangement in the place of the principal creditor. He has the additional protection that when he has paid up the amount of his bond, he can compel the creditor to prove in the estate for the full amount. It is admitted that a surety who has guaranteed part only of the debt, and has paid that part, can prove in the estate for the amount he has paid.

I think that the position of a surety in regard to proving in bankruptcy, has been very clearly set out in *In re* Sass, 2 Q. B. 1896. Vaughan Williams, J., sums it up thus:—

> "When bankruptcy supervened the right of the principal creditor — the bank was to prove for that amount unless there was a surety, and that surety was a surety for a part of the debt. In that case, if the surety is a surety for part of the debt, and the surety has paid that part, then by virtue of that payment the right of proof, which would have been the right of proof of the principal creditor, becomes *pro tanto* the right of proof by the surety. The surety has a right, having paid part of the debt in that way, to stand *pro tanto* in the shoes of the principal creditor; and even if the principal creditor has proved and has received the dividend, and the surety comes and repays the full amount, the principal creditor would then be trustee for the surety of the amount of the dividend which he had so received. In my judgment that right of the surety as against the principal creditor only arises in a case where the surety has paid the whole of the debt. It is quite true that where the surety is surety for a part of the debt as between the principal creditor and the debtor, the right of the surety arises merely by payment of the part, because that part, as between him and the principal creditor, is the whole."

Much reference has been made to Ellis *v.* Emmanuel, 1875—76, 1 Chancery Division. Now the facts in Ellis *v.* Emmanuel differ materially from the facts of this case, but the inferences to be drawn from the judgment, and the arguments advanced during the trial, are certainly very relevant. The question in Ellis *v.* Emmanuel was whether a certain engagement on the part of a person was an engagement for the whole of the debt or for a part only. That was the issue. It seems to have been admitted during the argument, that if the engagement was for the whole of the debt the guarantor could not deduct the rateable portion of the dividend until he had paid the whole of the debt, but if it were for a part of the debt, which he had paid in full, he

would be entitled to so much of the dividend in the pound as was applicable to the amount he had guaranteed, from which I conclude that he cannot benefit from the dividends payable in the bankruptcy until he has paid 20 shillings in the pound of his liability. In the result it was held that on a true construction the intention of the bond was that the surety guaranteed the whole of the amount, and he was not, therefore, entitled to deduct a rateable portion of the dividend.

In re Paine, 1 Q. B. 1897, was also cited, but it appears to me that all that was decided by that case was the right, which I have already admitted, of a surety to intervene to avoid a fraudulent preference. The latest case dealing with the point is probably *In re* Houlder, 1 Ch. Div. 1929. In that case Mr. Justice Astbury, when examining the position of a surety in regard to proof in bankruptcy, said, "It would have been manifestly wrong on the words of this guarantee to hold that the surety could, as against the bank, get any right to dividend or security or anything else, by reason of the payment of this part of what was to be treated as between him and the bank, as the whole debt, unless and until the bank had received every sixpence of the full debt".

Great stress was laid by Mr. Levin on the case of *ex parte* Bishop, *In re* Fox, Walker & Co., 15 Ch. Div. 1880. He developed from it an attractive argument, and at first sight it would seem difficult to reconcile the decision in that case with the conclusions I draw from the authorities I have quoted. But a close analysis has satisfied me that a clear distinction can and must be drawn between the issue decided in *In re* Bishop, and the issue with which we are here confronted, and once that distinction is appreciated, the judgment can entirely be reconciled with, indeed it confirms the decisions I have quoted.

In the case of *In re* Bishop, a firm of bill brokers, Messrs. Sanderson & Co., had discounted with the London & Westminster Bank and Messrs. Glyn, certain bills accepted by a firm, Messrs. Fox, Walker & Co., of Bristol. The total amount of the bills, it is true, amounted to some £ 19,000. The drawer of the bills, Messrs. Fotergell & Hankey, suspended payment and filed a liquidation petition. This compelled Sanderson & Co. also to suspend payment and make a deed of arrangement with their creditors. Under this deed they paid as dividends in respect of the bills an amount of LP. 3575 to the Bank, who were the holders. The last of these dividends was paid on 19th July, 1876. Now there is no doubt that on that date Sanderson & Co. had a claim against the acceptors, Messrs. Fox, Walker & Co., for that amount. It was a definite amount which could have been sued for

immediately. After this payment by Sanderson & Co., Fox, Walker & Co. became bankrupt. Sanderson & Co. then filed a proof in the bankruptcy for the amount. This was contested by the trustee. The important point to bear in mind is that the debt which Fox, Walker owed to Sanderson in respect of this payment of £ 3575, accrued before the former's bankruptcy. It seems clear to me that this was a debt provable in bankruptcy, the same as any other debt, and the whole issue before the Courts resolved itself round the question as to whether the claim of Sanderson & Co. violated the rule against double proof, seeing that the bank held the bills and could also prove on them. The decision of the Court was directed solely to this issue, and on it it went in favour of Sanderson & Co.

Let me now examine the facts in this case, and apply the law as I have interpreted it — I hope correctly — to them.

The bond of surety was not in evidence, but it emerges from the affidavit and admissions that the surety has only paid 45% of the claims secured by him. Whatever other remedy may be open to him, it seems to me to be clearly established by the cases to which I have referred, that he cannot claim in the Bankruptcy until he has paid the full amount of the debt guaranteed by him.

For these reasons I think the appeal must be allowed, with costs on the lower scale to include LP. 10.— advocate's attendance fee.

Delivered this 23rd day of October, 1944.

Chief Justice.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 332/43.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Dr. Rahel Ossorguine & an. APPELLANTS.

v.

The Hotzaah Ivrit Ltd. & an. RESPONDENTS.

Application for a declaratory judgment re copyright — Effect of absence of infringement of copyright.

Appeal from the judgment of the District Court, Jerusalem, in Motion No. 190/43, dated 20th September, 1943, dismissed:—

Where declaratory relief is sought that Respondent is not entitled to interfere with Applicant's copyright, no order can be made, if no infringement.
(*M. L.*)

FOLLOWED: Odhams Press Ltd. *v.* London and Provincial Sporting News Agency (1929) Ltd., 1936, 1 All E. R. 217.

ANNOTATIONS: As to what amounts to infringement of copyright see Copinger on The Law of Copyright, 7th Edition, pp. 109—154. On law and cases on declaratory judgments see Halsbury, Vol. 19, pp. 212—217; Digest, Vol. 30, pp. 142—153 and cases cited in the case followed (*supra*).
(*A. G.*)

FOR APPELLANTS: Smoira.

FOR RESPONDENTS: Katzenstein.

JUDGMENT.

This is an appeal from the judgment of the Relieving President, Jerusalem, of the 20.9.44 wherein the application by the Appellants for a declaratory judgment in respect of the publishing rights regarding the books of the late Usher Ginzberg was dismissed. It appears that the Applicants are the sole heirs of the late Usher Ginzberg — the late Usher Ginzberg was the author of one of the standard works of modern Hebrew literature used as a textbook in Jewish schools in this country. Usher Ginzberg died on the 1st January, 1927. The copyright of his works is part of his estate and claimed by his heirs. By an agreement 30.8.20 Usher Ginzberg conferred the exclusive right to publish his essays on the Jeudischer Verlag in Berlin — and the Respondents reply that the rights under the said agreement have been transferred to them and that they are exclusively entitled to make a 2nd edition of *"Al Parashat Derachim"* but that neither the late U. Ginzberg or his heirs have ever consented to such a transfer after the Juedischer Verlag had discontinued its publishing activities, and that no valid transfer of right under the agreement could take place without the consent of the author or his heirs.

The heirs are now anxious to publish a new Hebrew edition of this work which is now out of print. As long as the copyright of the heirs is in dispute no publishing houses are willing to enter into a new agreement with the heirs and to run the risk of investing money in a new edition — The Applicants are, therefore, applying for this declaratory judgment to declare that the Respondent is not entitled to interfere with the rights of the Applicant No. 1, to print the work of the late Achad Haam or to publish any translation of his work. At the

first hearing before the learned Relieving President, Mr. Katzenstein for the Respondents raised two points, one that a declaratory judgment could not in law be sought to establish ownership of a copyright where there was no allegation of infringement. The Relieving President ruled as follows:—

> "At this stage I am unable to discern anything improper in seeking declaratory relief; it may be another matter when after the merits have been gone into and I have to rely on my discretion as to whether or not a declaration should be given. I only rule now against the submission that the proceeding is misconceived and that declaratory relief cannot in the circumstances alleged be prayed."

In the judgment now appealed from the learned Relieving President refers to his ruling and continuing to the case of Odhams Press Ltd. *v.* London and Provincial Sporting News Agency (1929) Ltd. A. E. L. R. (1936) I, 217, to which Respondents' advocate had drawn his attention and that this case is illuminating to the circumstances that should be present to justify the proper exercise of discretion. It was held in this case that in such circumstances that appropriate evidence should be given to show that there has been an infringement of copyright. While the argument advanced by Dr. Smoira is extremely plausible, and I agree with much of his argument — I think, however, that it is necessary to look back to the terms of the motion before the District Court.

Page 2 of this motion in para 13 is as follows:—

> "The applicants, therefore, pray:—
> (a) To declare that the Respondent is not entitled to interfere with the rights of the applicant No. 1 to print the works of the late Achad Haam or to publish any translation of his works."

It is quite clear from this that the Applicants are not seeking a declaration as to their right to the sole copyright but a declaration that the Respondents are not entitled to interfere. The learned Relieving President had decided that since there has been no interference he cannot make such an order and in support of his decision he relies upon the Odhams Press Ltd. *v.* London and Provincial Sporting News Agency (1929) Ltd. A. E. L. R. (1936) I, p. 217, where an application was refused on the grounds that there had been no infringement and, therefore, no order could be made. I agree with Dr. Smoira that the subject matter in that case is very different from the present case but that again makes no difference as Lord Wright M. R. stated that had the question rested on the subject matter in that case he was doubtful if a copyright could exist but the point which was decided was that no order could be made as there had been no infringement. Had the

motion been differently framed it is possible that the Applicants might have succeeded.

For the above reason the appeal is dismissed and the judgment of the District Court confirmed, with costs on lower scale, LP. 10.— advocate's appearance inclusive fee.

Delivered this 28th day of July, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 372/43.

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

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

IN THE APPEAL OF:—

Eliahu (Leo) Heiman & 5 ors. APPELLANTS.

v.

Joseph Klein & 2 ors. RESPONDENTS.

Declaratory judgment — Counterclaim for declaratory judgment in action on account — C. P. R. 52(4), 85 *— In re Staples, Austen v. Collins — Finding of fact upset for insufficient evidence.*

Appeal from the judgment of the District Court of Tel-Aviv, dated the 31st day of October, in Civil Case No. 261/42, allowed:—

Quaere whether a declaration of rescission of contract may be given on a counterclaim in an action for an account.

(*A. M. A.*)

REFERRED TO: Austen *v.* Collins, 1886, 54 L. T. 903; Staples, *Re*, Owen *v.* Owen, 1916, 1 Ch. 322, 85 L. J. Ch. 495, 114 L. T. 682.

ANNOTATIONS: For the English law on the subject see Halsbury, Vol. 19, pp. 212 *et seq.*, sub-sec. 3, particularly para. 512 at pp. 215—6.

(*H. K.*)

FOR APPELLANTS: No. 1 — Ben Jaminy.
Nos. 2, 3, 4 & 6 — Goitein.
No. 5 — Abcarius.

FOR RESPONDENTS: Nos. 1 & 2 — Dunkelblum.
No. 3 — A. Levin.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Tel-Aviv which Court had allowed a counterclaim by the present Respondents, in which they asked for a declaration that a certain contract for the sale of some shops had been rescinded.

The present Appellants, who were the Plaintiffs in the Court below, had asked for accounts to be taken and for a declaration as to what was the balance of money due from them in respect of contracts for the sale of certain shops. The Court below dismissed the Appellants' claim for accounts but allowed the counterclaim and made a declaration that the contracts between the parties were rescinded. There is no appeal against the part of the judgment dismissing the claim for accounts and this appeal is directed solely against the part of the judgment which allowed the counterclaim. We do not rule that a defendant to an action for accounts can never by way of counterclaim ask for a declaration that a contract for sale is or has been rescinded. The matter in Palestine is governed by rule 85, Civil Procedure Rules, 1938, read together with rule 52(4).

In the course of the argument Mr. Goitein, for the Appellants, referred to the case of *in Re* Staples (1916) 1 Chancery Division 322 and to Austen *v.* Collins Vol. 54, Law Times Reports, p. 903.

Because of the view which we take of this matter it is, for obvious reasons, undesirable that we should deal at length with the judgment of the Court below or with the lengthy arguments advanced before us by the several advocates who have appeared on behalf of the various parties. Suffice it to say that, while an appellate Court is always reluctant to interfere with the discretion of a Court of first instance, we think that, in the peculiar circumstances of this case, it was not appropriate to order rescission of the contracts — the subject-matter of this dispute — by way of declaration in a counter-claim to an action for accounts. We are not, of course, laying down any rule of law or of practice. There is, however, a stronger reason why the judgment of the District Court cannot stand and that is that the judgment does not, in our view, contain sufficient findings of fact to support a finding that the contracts had been rescinded or should be rescinded.

We accordingly allow the appeal and set aside that part of the judgment of the District Court which allowed the counterclaim. The parties will pay their costs in the Court below and the Appellants will be allowed one set of costs of this appeal to be taxed on the lower scale to include one advocate's attendance fee of LP. 15.

Delivered this 7th day of November, 1944.

British Puisne Judge.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CIVIL APPEAL No. 29/44.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

Awad Elias el Khalil & 97 ors. APPELLANTS.

v.

Keren Kayemeth Leisrael Ltd. RESPONDENTS.

Appealability of decision of Land Court on appeal from a Special Commission under Cultivators (Protection) Ordinance.

Appeal from the judgment of the Land Court of Haifa, in its appellate capacity, dated 17th day of December, 1943, Civil Appeal No. 106/43, dismissed:—

1. (*Obiter*): Where no appeal lies as of right, it cannot lie by way of leave unless there is a statutory provision to that effect.

2. Once a party reached Land Court he may avail himself of the provisions of Land Courts Ordinance, hence an appeal lies as of right from decision of Land Court on appeal from Special Commission under Cultivators (Protection) Ordinance.

3. If as a result of asking and obtaining leave to appeal, while appeal lies as of right, appeal is out of time, it will be dismissed.

(*M. L.*)

REFERRED TO: C. A. 14/39 (6, P. L. R. 156; 6, Ct. L. R. 6; 1939, S. C. J. 145); C. A. 29/39 (6, P. L. R. 281; 6, Ct. L. R. 10; 1939, S. C. J. 229); C. A. 30/39 (6, P. L. R. 363; 6, Ct. L. R. 65; 1939, S. C. J. 299); C. A. 122/39 (7, P. L. R. 60; 7, Ct. L. R. 79; 1940, S. C. J. 220).

ANNOTATIONS:

1. On the right to appeal being statutory see C. A. 257/43 (10, P. L. R. 625; 1943, A. L. R. 802) with annotations thereto.

2. Cases on the necessity of leave to appeal are collated in the annotations to Misc. Appl. 56/43 at p. 521 of the A. L. R.

3. On the impossibility of extending period see P. C. L. A. 20/43 (*ante*, p. 264) and note 3 thereto.

4. The contention that an appeal in such cases lies as of right was already brought forward in L. A. 21/36 (P. P. 6.6.37 — without case number). It is, however, not clear from the decision whether this contention was accepted by the Court.

(*A. G.*)

FOR APPELLANTS: A. Atalla and Bustani.

FOR RESPONDENTS: Eliash and Feiglin.

JUDGMENT.

In this matter the learned Relieving President gave leave to appeal from a decision of a Special Commission appointed under the Cultiva-

tors (Protection) Ordinance, Cap. 40 of the Revised Edition. In the result, in what is described as a judgment, he set aside the findings of the Special Commission, delivering that judgment in open Court on the 17th December, 1943. On the 3rd February, 1944, the notice of appeal was filed and on the basis of various decisions of this Court to which we have not been specifically referred, this would be too late, if, in fact, leave to appeal was not necessary. In effect the Appellants appear to have taken the view that leave to appeal was necessary, and they went and obtained leave to appeal; had they been right in this course then they were in time of filing their notice of appeal on the 3rd February, 1944. Somewhat surprisingly this point does not seem to have been decided that is to say the point as to whether an appeal lies of right from a Land Court, sitting in its appellate capacity from a Special Commission under the Cultivators Ordinance. But we were referred to several cases, Civil Appeals 14/39, 29/39, 30/39 and 122/39 from which, in fact, although no reasons are given in the judgments, it would appear that they were appeals entertained by the Court of Appeal from a Land Court sitting in its appellate capacity, and certainly in two of those four cases the point was taken by the respondent that no appeal lay. It would, therefore, seem, at any rate by inference, to be the view of this Court that an appeal can lie from a decision of a Land Court sitting in that capacity. That being so we have to consider whether an appeal lies as of right or whether leave is necessary. It is probably unnecessary to state that, if no appeal lies as of right, then no appeal can lie by way of leave unless there is statutory provision to that effect.

Mr. Eliash contends that in the first place Article 43 of the Palestine Order-in-Council, which provides that the Supreme Court, sitting as a Court of Appeal, shall have jurisdiction to hear appeals from a Land Court, in itself confers a right on a party aggrieved to appeal irrespective of any other statutory provisions. While that may be so and it may be that that was the view accepted by the Court in these earlier cases it seems to us that in any event his second argument is the stronger one, because under the Cultivators (Protection) Ordinance there is express provision that an appeal lies to the Land Court on a point of law from a decision of the Commission; and it is to be noted that there is no provision that the decision of the Land Court shall be final and also no provision excluding the operation of Section 4 of the Land Courts Ordinance (Cap. 75). Now it seems to us that, as Mr. Eliash contends, once a party has reached the Land Court, as he is entitled to do under the provisions of the Cultivators (Protection)

Ordinance, he may then avail himself of the provisions of the Land Courts Ordinance. It is quite true, of course, that when Section 4 of the Land Courts Ordinance, which provides that an appeal lies on a question of law, was enacted it was intended to refer to cases contemplated by Section 3 of the Land Courts Ordinance, but the wording of the section itself is perfectly clear and in the event of subsequent legislation widening the powers of the Land Court, then it seems to us to be an irresistible inference, according to the ordinary laws of interpretation, that section 4 must apply to any new matter that is brought within the powers of the Land Court. In the absence of such an exclusion in the Cultivators (Protection) Ordinance, we are of opinion that an appeal lies as of right in a case such as the present one.

That being so we are of opinion that the Appellants are out of time, as they filed their notice of appeal some six weeks after delivery of the judgment by the Land Court. For these reasons the appeal must be dismissed. The Respondents must have their costs on the lower scale, to include the sum of LP. 15.— advocate's atendance fee. The costs will be paid jointly by the various Appellants.

Delivered this 7th day of July, 1944.

British Puisne Judge.

CIVIL APPEAL No. 133/44.

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

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

IN THE APPEAL OF :—

Haj Taher Bey Karaman. APPELLANT.

v.

David Itshak Hershenbaum & an. RESPONDENTS.

Eviction — Member of family — Subtenant.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated 11th February, 1944, in Civil Appeal 210/43, dismissed:—

1. Tenant cannot be ordered to vacate for letting other persons reside with him, if it is found that these are relatives of his who always lived with him as one family.

2. Contribution by member of family to joint expenses of household does not make him a sub-tenant.

(*M. L.*)

ANNOTATIONS :

1. On meaning of tenant see C. A. 40/43 (10, P. L. R. 170; 1943, A. L. R. 39) and annotations in A. L. R. and notes 4 & 7 of annotations to C. A. 319/43 (11, P. L. R. 270; *ante*, p. 454). See also cases cited in note 2 to C. A. 384/43 (11, P. L. R. 283; *ante*, p. 570).

2. On members of family for whom landlord may require premises under sec. 8(1)(c) of R. R. Ord. see C. A. 170/43 (10, P. L. R. 432; 1943, A. L. R. 555) and annotations in A. L. R. and C. A. 346/43 (*ante*, p. 448). On distinction between sub-tenant and guest see C. A. D. C. Jerusalem 93/40 (Gorali, p. 51).

(*A. G.*)

FOR APPELLANT: Sahyoun.

FOR RESPONDENTS: Tovbin.

JUDGMENT.

The background against which this lease was negotiated is not without significance. In October, 1941, the Appellant decided to leave his house in Haifa because, it was said, of the enemy bombardments. He let it to the Respondents. One of the conditions of the letting was as follows:—

> "The Defendant as well undertakes not to let to anyone else for the purpose of residing with him, and he declares that the number of persons of his family are five and he himself is the sixth, and he promises from now that no one else will reside with him except the same persons only and that if it is found at any time that the number of persons exceeds it, then the lessor is entitled to rescind at once this contract before its expiration."

Now, it appears that the actual immediate family of the first Respondent consisted of himself, his wife and two children, but there lived also with him in the flat another couple, a husband and wife, who were cousins of his wife. It was alleged that this was a breach of the contract, as the latter couple could not be regarded as members of his family.

It seems to me that the main limitation that the Appellant wished to put on this contract of tenancy was that the number occupying should not exceed six, and it is admitted that it never has. All six entered the first day of the lease, and all six have occupied ever since. Before they entered this house all six lived together, and all the evidence goes to prove that they have always lived as one family. Taking into consideration the fact that in Palestine relations, even of a remote degree of consanguinity, are regarded as members of the immediate family, I have no hesitation in arriving at the conclusion that for the purposes of this contract those six people did constitute one family.

It was contended that this Yoel and his wife were sub-tenants in that

they contributed, as is admitted, to the joint expenses of the household. I cannot agree with this contention, any more than I could agree that if the son and daughter happened to contribute money from their earnings to meet the joint expenses, that they would be sub-tenants.

For these reasons I think the Magistrate and the District Court were right, and the appeal must be dismissed with inclusive costs of LP. 10.

Delivered this 25th day of October, 1944.

Chief Justice.

HIGH COURT No. 81/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF:—

Angel (also known as Rebecca) Benyamin Anton. PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem,
2. Ibrahim Gabriel Soumi. RESPONDENTS.

Judgments of Ecclesiastical Courts — Separation granted when husband is a member of the Community — Construction of judgment — Execution — Limitation in judgment — H. C. 7/44, Consent to jurisdiction — Marriage celebrated according to the rites of the community.

Return to a rule *nisi*, issued on the 12th of July, 1944, directed to the first Respondent, calling upon him to show cause why his order of the 17th June, 1944, in Execution File No. 141/43, District Court, Jerusalem, should not be set aside, and why he should not refuse the execution of the judgment of the Ecclesiastical Court of the Syrian Orthodox Community in Jerusalem against the Petitioner, dated 9th April, 1943; order made absolute:—

Quaere whether the celebration of a marriage before, and according to the rites of the husband's community is sufficient to invest the Court of that community with jurisdiction in matrimonial matters when the wife belongs to a different community.

(*A. M. A.*)

REFERRED TO: H. C. 7/44 (11, P. L. R. 128; *ante*, p. 192).

ANNOTATIONS: See and compare the following cases: H. C. 6/43 (10, P. L. R. 78; 1943, A. L. R. 73), C. A. 161/43 (10, P. L. R. 367; 1943, A. L. R. 421) and H. C. 7/44 (*supra*).

(*H. K.*)

FOR PETITIONER: Elian.

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

ORDER.

This is a return to an order *nisi*, issued on the 12th day of July, 1944, directed to the Chief Execution Officer, Jerusalem, calling upon him to show cause why his order of the 17th June, 1944, in Execution file No. 141/43, should not be set aside and why he should not refuse the execution of the judgment of the Ecclesiastical Court of the Syrian Orthodox Community in Jerusalem given against Petitioner on the 9th April, 1943.

The facts briefly are that Appellant * married the Respondent on 10th July, 1937. They were married by the Syrian Orthodox Church. In the certificate of registration both parties are described as of the Syrian Orthodox religion. In 1943 the Respondent applied to the Syrian Orthodox Ecclesiastical Court for a divorce. The Appellant * appeared through her advocate to protest against the jurisdiction on the grounds that she was a Syrian Catholic and that the Syrian Orthodox Court had no jurisdiction. She made no further appearance. On the 9th of April, 1943, the Syrian Orthodox Court made an order of separation for a period of six months and gave custody of the children to the Respondent.

On the 30th of April, 1943, Appellant * applied to have the judgment by default set aside on the ground of lack of jurisdiction. This application was dismissed. She then applied to the Syrian Orthodox Court of Appeal, and that Court held on 5th October, 1943, that the Syrian Orthodox Court had jurisdiction on the ground that the marriage had taken place in the Syrian Orthodox Church, and in accordance with its rites. Further, that the marriage was celebrated between Ibrahim Soumi, who is subject to that authority, and her who was originally subject to the Syrian Catholic authorities — and the Court which has jurisdiction in matrimonial disputes is the Court of that authority under which the marriage had been celebrated, *etc.* This judgment then proceeds to confirm the order of separation for six months and the custody of the children to the Respondent. They extended the period for an additional six months.

The Respondent submits that this additional period should be taken as twelve months from the date of judgment, but with this submis-

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* *Scil.*: Petitioner. (*Ed.*)

sion I do not agree, as the words are "extended for a period of an additional six months", which can only mean from the termination of the first six months, namely from 9.10.43 to 9.4.44. In fact they gave what amounted to six months from the date of Court of Appeal judgment, 5.10.43.

The order of the Chief Execution Officer is dated the 17th June, 1944. It is quite clear, therefore, that at the time the matter came before the Chief Execution Officer the judgment was no longer effective and, therefore, could not be executed. It is not necessary for me to express any opinion as to whether this judgment should have been executed or not. I will only mention that both the Syrian Orthodox Religious Court of First Instance and the Court of Appeal in their judgments mentioned that the jurisdiction was disputed in Court, and these Courts both come to the same conclusion, namely, that their jurisdiction is governed by the fact that the parties were married before the Syrian Orthodox Church and according to its rites. There is, however, some inference to be drawn from the words in the judgment of the Syrian Orthodox Court of Appeal, "and her who was originally subject to the Syrian Catholic Authorities", that this matter was before the Court, and that there must have been some grounds for this statement.

I do not feel that on the facts as disclosed, High Court 7/44 is on all fours, since there it was held that the Respondent was estopped from alleging he was other than a Roman Catholic, due to his conduct before and during the marriage, and since both partners were held Roman Catholics it followed that the Religious Court of that Community had jurisdiction, whereas in this case the Syrian Orthodox Religious Courts consider that they have jurisdiction, because the marriage took place in their Church. There is no definite finding as to whether the Appellant * was or was not a Syrian Catholic at the time of marriage.

The order is made absolute and the Chief Execution Officer ordered to refuse to execute the judgment of the Religious Court, which was no longer effective after the 9th of April, 1944. No costs.

Given this 27th day of October, 1944.

A/British Puisne Judge.

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* *Scil.*: Petitioner.

(*Ed.*)

CIVIL APPEAL No. 160/43.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF:—

The Government of Palestine. APPELLANT.

v.

1. 'Ayisha Mustafa Dirbas & 20 ors.,
22. The Palestine Kupat Am Bank Cooperative Society, Ltd.,
23. Barclays Bank (D. C. & O.). RESPONDENTS.

Land Code, art. 103 — *Grant of lands under art.* 103 — *Subsequent declaration of area as forest reserve — Correction of area obtained by part owner — Allegation of fraud in effecting correction of area — Applicability of art.* 47 *to original state grant, L. A.* 15/28 — *L. S. O. relying on the evidence of his own inspection — Admissibility of Government Surveyor's evidence — Correction of area under Provisional Law of Disposition, art.* 5, *C. A.* 206/40 — *Object of correction — Estoppel against Government — P. O. in C., arts.* 4—6, 12, 13, *Royal Instructions, H. C.* 7/42 — *Public Lands Ord.,* 1942 — *P. C.* 56/38, *kushan may be rebutted, Land Code, arts.* 43, 45 — *L. S. Ord., sec.* 29 — *Plans — Succession to Mejliss Idara — Mistake, Anglo Scottish Beet Sugar Corp. Ltd.*

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated the 15th of March, 1943, in case No. 2/Tira, allowed:—

1. Only the High Commissioner can make a grant of public lands. Such grant cannot be indirectly obtained by means of a correction of area.

2. A *kushan* is not irrebuttable in evidence.

3. Art. 47 of the Land Code applies not only to sales but to original Government grants.

4. If the Land Settlement Officer disbelieves the witnesses of both parties, he is entitled to rely on the evidence of his own inspection.

5. The Land Settlement Officer may hear and act upon the evidence of a Government surveyor who made enquiries concerning area and boundaries of land.

6. Practice and case law recognises the correction of boundaries and areas, and the consequent issue of fresh *kushans*. This makes it possible to insert the correct area in old Turkish *kushans*.

7. The Government of Palestine, as regards grant of lands, is the High Commissioner. There is no estoppel against Government if an officer,

not authorised by specific statute, customarily exercises powers which were formerly vested in a special officer.

(*A. M. A.*)

REFERRED TO: L. A. 15/28 (4, C. of J. 1475); P. C. 56/38 (7, P. L. R. 105 at p. 113; 1940, S. C. J. 277 at p. 283); C. A. 206/40 (8, P. L. R. 30; 1941, S. C. J. 11; 10, Ct. L. R. 241); H. C. 7/42 (9, P. L. R. 126; 1942, S. C. J. 51; 11, Ct. L. R. 86); Anglo-Scottish Beet Sugar Corporation, Ltd. *v.* Spalding Urban District Council, (1937) 2 K. B. 607, (1937) 3 All E. R. 335, 106 L. J. (K. B.) 885, 157 L. T. 450, 53 T. L. R. 822.

ANNOTATIONS:

1. The soundness of the decision in L. A. 15/28 (*supra*) is also doubted in Goadby-Doukhan's Land Law of Palestine, p. 56, footnote 1. For another authority on Art. 47 of the Land Code see C. A. 145/41 (1941, S. C. J. 651).
2. On the L. S. O.'s powers in respect of inspections see C. A. 226/42 (10, P. L. R. 302; 1943, A. L. R. 463) and note 4 thereto in A. L. R.; *cf.* C. A. 185/43 (1943, A. L. R. 538).
3. See C. A. 95, 96, 97 & 138/40 (1940, S. C. J. 294; 8, Ct. L. R. 116) on the effect of the *Mejliss Idara* of 1323 *A. H.*
4. On the "strictest proof" required to upset a *kushan* see also C. A. 179/42 (8, P. L. R. 798; 1942, S. C. J. 926) and note 1 in S. C. J.
5. For other cases dealing with the question whether certain land is included in a *kushan* see C. A. 70/42 (1942, S. C. J. 355; 12, Ct. L. R. 24) and note thereto in S. C. J.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Hogan).

FOR RESPONDENTS: Nos. 1 & 2 — Weinshall.
Nos. 9 & 11 — Goitein.
No. 17 — deceased.
No. 22 — Abcarius and Eliash.
No. 23 — Absent.
Rest — Koussa.

JUDGMENT.

Edwards, J.: This is an appeal by the Government of Palestine from a decision of the Land Settlement Officer, Haifa.

In 1882 *A. D.* The Turkish Government made a grant of 34 old *dunums*, that is 32 new *dunums*, of land to one, Dirbas and his partners, under Article 103 of the Ottoman Land Code. In 1929 the land in question was proclaimed as Forest Reserve No. 195, Palestine *Gazette* No. 819 of 16th July, 1929, page 819, or, to be more accurate, the proclamation covered the whole of the area except two parcels of ten *dunums* and five *dunums* respectively, the latter part being held by the Land Settlement Officer to fall outside the boundaries of the title deed granted to Dirbas. The Government claimed all the land in

question except the original 34 Turkish *dunums* and seven *dunums* admitted to have been in the possession of a certain cultivator for a long period, and the two parcels which I have just mentioned.

In 1882 only one *kushan* was granted for the 34 old *dunums*, and no *kushan* was granted for any other portion of the land which is known as Khirbet Yunis, a ruined *Khirbeh* standing on a plateau five kilometres south of Tireh village.

About the year 1926 a certain Mr. Levy, with a view to forming a garden city, commenced buying up shares in this *kushan* and acquired a 63% interest in the *kushan*, the remaining 37% belonging to a large number of people who were Defendants Nos. 1—21 before the Land Settlement Officer, and who are Respondents Nos. 1—21 in this Court. In 1937 Mr. Levy transferred his interest to the Kupat Am Bank, who are said to be merely nominal Defendants and are Respondents No. 22 here.

It is said that this land is not included in the balance sheet of this Bank. In the Land Registry Mr. Levy declared that the consideration for the purchase of his 63% shares in this *kushan* was LP. 184. In 1937 he opened in the Land Registry, Haifa, a transaction for the "correction of area".

In the result, after certain enquiries by the Acting Director of Land Registration, the Kupat Am Bank were registered as the owners of shares in 3296 *dunums* and 192 square metres, for which they paid *bedl el misl* of LP. 426.529. The other Defendants, who were their co-partners and who were all heirs of the transferees, were not parties to the registration and remained registered as part-owners in 34 *dunums* by separate registration.

In 1940 the Kupat Am Bank promoted a Town Planning scheme, No. 34, which was finally approved by the Haifa District Town Planning Commission on the 2nd December, 1941. I should have said that the application for the correction of area was made on the 24th September, 1937, and was accompanied by a certain plan filed by the Kupat Am Bank. This plan showed the land divided into four parts, a, b, c, and d, equal to 3528 *dunums*, and a fifth part which was not included in the application or considered and dealt with as part of the application.

On 23rd November, 1941, the Bank submitted a memorandum of claim under the Land (Settlement of Title) Ordinance, and on the 28th November, 1941, the Government filed its claim to the land as unassigned State Domain and part of Forest Reserve No. 195. The co-

partners of the Bank claimed the remaining shares in all the land by registration and possession.

The Government claimed before the Land Settlement Officer that the correction of area had been obtained by gross misrepresentation; that other localities besides Khirbet Yunis were included in the plan; and that the boundaries were incorrectly shown and that the whole plan was misconceived by both parties. The Government further claimed that there was never in fact any intention to make a grant of fresh rights, and that the original grant was for 34 *dunums* only, and that that was all to which the Respondents were entitled.

After hearing much evidence and addresses by parties' advocates, the Land Settlement Officer found against the Government on the question of gross misrepresentation, but found in favour of the Government on all other points of fact, and in particular he found that there was no justification for correcting the area, as no error had been proved. In other words, he found entirely in favour of the Government of Palestine except for the fact that he considered that they were bound by the conduct of their officers in granting the new *Kushan*. He, therefore, found that, as no fraud had been alleged or proved, the Kupat Am Bank were entitled to have their title confirmed, that is, to say, the title deed or *kushan* which had been issued to them showing that they were the owners of shares in 3296 *dunums,* 192 square metres. He, therefore, dismissed the claim of the Government to the shares of the Kupat Am Bank, and he also dismissed the claim of the twenty-one other Defendants, with the exception of their claims to the shares in the 34 Turkish *dunums*. Against this decision the Government have appealed to this Court.

The hearing before us occupied several days. It was not of course necessary for the Kupat Am Bank, as they were successful before the Land Settlement Officer, to lodge any cross-appeal, although their advocate at the Bar attacked and criticised several of the findings of the Land Settlement Officer. I think that it will be well if I now deal with certain findings which were in favour of Government .

The Land Settlement Officer found that the original grant to Dirbas had been made under Article 103 of the Ottoman Land Code. This finding was criticised by the advocate for the Kupat Am Bank; but, in view of the evidence led before the Land Settlement Officer, I feel that this Court must infer that, prior to 1882, the Land of Khirbet Yunis was *mewat* and subject to the provisions of Article 103. The advocate for the Kupat Am Bank also criticised the Land Settlement Officer's finding that Article 47 of the Ottoman Land Code applied

only to sales between private persons and not to an original grant by the state. Crown Counsel (Mr. Hogan) on the other hand supported this finding, relying on Land Appeal No. 15/28, Rotenberg's "Collection of Judgments", Vol. 4 page 1475. The Kupat Am Bank, however, say that the present case is one of private sale. It is clear that there was a sale, at any rate to Mr. Levy.

The point is a difficult one; but I think that it should be resolved in favour of the Bank, and I, therefore, for the purpose of this case, assume that Article 47 does apply.

The advocate for the Bank also criticised the Land Settlement Officer's decision as to the boundaries and as to what was contained in the original *kushan*. The Land Settlement Officer heard evidence at great length, and in his decision exhaustively reviewed this evidence and gave ample reasons, which seem to me to be satisfactory, for his conclusions. This matter was eminently a matter for the Land Settlement Officer to decide, and I think that it is impossible for this Court to interfere with his conclusion. I would merely say that strong criticism was advanced by the advocate for the Bank against the last sub-paragraph of paragraph 8 of the decision, where the Settlement Officer said that he considered that the evidence of both parties concerning their *"jurn"* (that is a hole or bowl in the rocks) was partisan and biased, and that the witnesses had freely drawn upon their imaginations. He, therefore, held that the only evidence which could be accepted was that of his own eyes. The advocate for the Bank has said that it was improper of the Land Settlement Officer to rely on his own eyes. Now, if the Land Settlement Officer had perversely refused to believe the evidence of any particular witness without any reason for so disbelieving it, the matter might be different, but that is not the case here, nor is that the complaint of the Respondents.

This Court has frequently held that a Land Settlement Officer is entitled to inspect the land and to draw his own conclusions from what he sees. This is precisely what the Land Settlement Officer did in this case. He went on to say that he was satisfied from numerous inspections that the *"jurn"* of the Defendants was a cave in the cliffs, and never a hole in the shape of a flask as the Defendants tried to make him believe. He, therefore, decided that the *"jurn"* of the Government is the Jurn en-Nsura of the entry. He also found that the entry under discussion was a record that the transferees had cleared and opened a field of 34 Turkish *dunums* and paid the *bedl el misl* as required. There is no other entry in any land book for Ard Khirbet Yunis, and this fact shows that the whole of Khirbet Yunis was covered

by the entry. The area actually under cultivation had never exceeded 200 *dunums*. The land books of Tireh were registers of land transactions, in sequence as they came to be registered, and were not registers of land in which every parcel in the village was recorded. He found that it was clear that other localities, that is to say, localities other than those in the original *kushan*, were included in the plan which the Bank submitted at the time when they applied for a correction of area.

In view of my finding that Article 47 of the Ottoman Land Code applies, the sole question is whether the Bank are entitled to any more than was contained within the boundaries of the original *kushan*.

At this stage I would say that Mr. Loxton, Assistant Superintendent of Surveys, Government of Palestine, gave evidence that he had been instructed by the Chief Secretary of Palestine to make certain enquiries. Objection was taken before the Settlement Officer by one of the advocates for the Respondents to Mr. Loxton's evidence as to the report anl plan made by him. The Land Settlement Officer overruled this objection, and I see no reason to question the correctness of his ruling.

Mr. Loxton had before him the original Turkish *kushan*, and based his conclusions on answers elicited from persons whom he interrogated and from an inspection of the land and a comparison with the *kushan*. The area found to be within the *kushan* was 625 *dunums*. The Land Settlement Officer seems to have accepted Mr. Loxton's evidence, and I see no reason why he should not have done so. There is, therefore, clear evidence, which must be accepted, that the Land within the *kushan* was 625 *dunums* and no more.

The only remaining questions, therefore, are: (1) what is the nature and effect of this proceeding known as "correction of area"; and (2) what is the effect of the grant by the Acting Director of Land Registration to the Kupat Am Bank of the new *kushan*.

The Land Settlement Officer held that the only authority for correction of area of boundaries was Article 5 of the Provisional Law regulating the right to dispose of immovable property, of 5th *Jumad il Awal*, 1331, (Sir R. Tute's book on Ottoman Land Laws, pp. 169 & 170). The Land Settlement Officer held that there was nothing to be corrected and that the whole proceedings were misconceived.

If the Land Settlement Officer were right in holding that Article 47 did not apply, then it would seem that his reasoning was sound. But what this Court has to face is this problem of correction of area.

The advocate for the Kupat Am Bank has strenuously argued that

this process of correction of area has been followed in Palestine for over twenty years, and has now the sanction of authority and must be recognised by this Court. I think that this contention is sound and must be upheld. The process has been recognised by this Court in several cases, in particular in Civil Appeal No. 206/40, P. L. R. Vol. 8, page 30 at page 32, where it is said that a certain person "opened a file in the Land Registry, Haifa, for the correction of the boundaries and area of his property, and obtained a fresh *kushan*". It is clear, therefore, that this Court has recognised the practice of fresh *kushans* being issued after a correction of boundaries and area.

The question, however, is, "what is the Land Registrar expected to do when a file is opened for the correction of area, and what should a fresh *kushan* contain?" In my opinion, it is not unreasonable to assume that the sole purpose and object of this process was to enable holders of old Turkish *kushans* to have the area, as found by modern methods of survey to be the correct area within the boundaries which the Turkish Government meant them to be, corrected accordingly. It is well known that, in Turkish times, *kushans* sometimes showed fewer numbers of *dunums* than the number actually within the boundary intended to be granted, the reason for this being to escape taxation on a large amount. It has, however, been argued that, as the Land Settlement Officer found that there was an absence of bad faith or gross misrepresentation, Government are estopped from withdrawing the title which they are alleged to have given to the Bank when they issued the *kushan* showing 3296 *dunums* and 192 square metres, and it is also argued on behalf of the Bank that the Land Settlement Officer was entitled to hold that Government was bound by the actions of its officers.

It is unnecessary to go into the question of whether the acting Director of Land Registration and other officers of Government were careless or perfunctory when they made the correction and grant of a new *kushan*. It is common knowledge that at the time when the Acting Director of Land Registration sent out surveyors and land Officers and agricultural inspectors and so on, to inspect the land, the country was in a disturbed condition, and it is no doubt true that the inspections made were perfunctory. This, however, seems to me to be irrelevant, because I agree with Mr. Hogan when he says that, if the Director of Land Registration had no power to make a grant greater than what was found to be actually within the boundaries of the original *kushan*, then the Bank cannot get more.

I now wish to deal with the question whether an Acting Director

of Land Registration, or any other officer of Government, can make a grant of land.

The respective advocates who argued the matter on behalf of the Respondents cited many authorities and tried to show that, since the British Occupation, several specified Government officials have been performing duties which in Turkish times were performed by specified Turkish officials, *e. g. Ma'mur Tabu, etc.* This, however, seems to me to be entirely irrelevant and to carry matters no further. In the absence of specific statutory provision enabling a particular specified official of the Palestine Government to perform the duties formerly undertaken by a specified Turkish official, I am of opinion that no amount of evidence as to practice which has prevailed over a number of years can assist the Defendants. In other words, they must prove that there is statutory authority for the grant, by a particular Government official, of land. If they cannot do so, then it is idle to suggest that Government were holding out the Acting Director of Land Registration or any other official as a person competent to make a grant of land. Ignorance of the law cannot avail the Respondents. They, that is the Respondents, were in as good a position as anyone else to know who was the proper authority to make a grant, and if they went to the wrong person and obtained something from that person, they cannot expect to be any better off.

Who is the Government of Palestine. My own view is that, with regard to grants of public lands, it is the High Commissioner. It is clear from Articles 12 and 13 of the Palestine Order-in-Council, 1922, that the High Commissioner alone can make grants. I refer also to Articles 4, 5, 6 and 7 of the Palestine Order-in-Council, 1922, and to the Royal Instructions of 1st January, 1932, Laws of Palestine, Revised Edition, Vol. III, page 2659, and to High Court No. 7/42, Palestine Law Reports, Vol. 9, page 126.

The Respondents argue that this was not public land; but the answer to this is that they themselves have constantly, and even before us, said that they rely on the original grant. The original grant was under Article 103, and the land was, therefore, clearly public land. The 34 Turkish *dunums* have now, in my view, been extended to 625 new *dunums*. This is clearly an extension of the original land which was certainly public land. If it had not been public land the area in question could not have been declared a Forest Reserve. If, then, the Defendants wish to prove that they are entitled to more than 625 *dunums*, they can only do so by proving a grant by the High Commissioner. No question of estoppel can arise. It was the Kupat Am

Bank or Mr. Levy, or both of them, and they only, who started the "ball rolling" by asking for this correction. It is obvious that they were only too glad to induce the Acting Director of Land Registration to make this grant and to obtain a new *kushan*, which they doubtless hoped would never be attacked.

The Public Lands Ordinance, 1942, does not help the Respondents, because there is no question here of licence to occupy, nor is there any question of purchase by or on behalf of the Government or His Majesty's Forces. In my view, the very fact that the Public Lands Ordinance, 1942, had to be passed so recently, is clear evidence that the High Commissioner alone can make grants of public land. Moreover, the fact that an Ordinance had to be passed to enable the High Commissioner to delegate his powers to some particular named official to grant licences, is clear proof of the fact that the right to make grants of land is still vested solely in the High Commissioner.

The only question which remains is whether a *Kushan* is so sacrosanct as not to be able to be attacked. It is true that in Privy Council Appeal 56/38, P. L. R. Vol. 7, page 113, Sir George Rankin, when delivering the judgment of the Board, said that the latest *tapou* register is competent evidence as to the character of the land in question, and that the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect. Apart from the fact that that judgment referred only to the character of the land, it would seem that, far from affirming the proposition that a *kushan* is sacrosanct, the judgment seems to indicate that if there *is* strict proof the *kushan* may be attacked.

It is clear from the evidence of Mr. Jardine, the then Acting Director of Land Registration, and of Mr. Stubbs, the substantive Director of Land Registration, that Mr. Jardine never intended or purported to make any grant of land when the new *kushan* was issued.

Mr. Hogan referred to Section 43 and 45 of the Land (Settlement of Title) Ordinance in support of the proposition that before a Settlement Officer a *kushan*, or at any rate what is in a *kushan*, can be questioned. In my view, this contention is sound. It is to be remembered that the Government are not attacking the *kushan* or the title of the Kupat Am Bank to land at Khirbet Yunis. What is being attacked is the number of *dunums* which the title deed should show the Kupat Am Bank as owning.

It has been argued on behalf of the Respondents that a registered plan is as sacrosanct as the *kushan* itself. This may well be after land settlement; but, until land settlement, I think that the plan also can

be attacked. I think that Government are perfectly entitled to question a *kushan* at land settlement under the provisions of Section 29 of the Land (Settlement of Title) Ordinance, as amended in 1939 and 1942.

I do not think it necessary to deal with some of the other points raised in the judgment, *e. g.* as to who succeeded the *Mejliss Idara.* In any event, there is no proof that any statutory authority has succeeded the *Mejliss Idara,* and there is certainly no proof that it was succeeded by the Director of Land Settlement. Nor do I think it necessary to discuss the law with regard to mistake, or the authorities cited by Mr. Hogan, namely, Hailsham, Vol. 23, pages 142 & 145, or the case of Anglo-Scottish Beet Sugar Corporation Ltd., (1937) 2 K. B. 607.

I decide the matter on the footing that, whatever was done in this matter by the various Government officials concerned, these officials could not grant and did not purport to grant any fresh land or additional land other than that which they were entitled to grant by reason of a proper correction of area. If they exceeded their powers, then that cannot help the Respondents, whose title to this land was liable to come under the scrutiny of the Land Settlement Officer when land settlement came to this area.

For these reasons I would allow the appeal and I would direct the Land Settlement Officer to order registration of the land in question in the name of the Government of Palestine, except the land comprised in the original *kushan,* which should now be recorded as containing 625 *dunums,* of which 63% will be registered in the name of the Kupat Am Bank.

The 22nd Respondents must pay the Appellant's costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15.—.

Delivered this 27th day of July, 1944.

British Puisne Judge.

Rose, J.: I agree and would only add this. As my brother Edwards points out, it would now seem to be too late to challenge the practice of correcting areas, as this practice has been recognised by the Courts of Palestine, at least by implication, for many years. The question to be decided, therefore, is, what is the effect of such a correction. It is, of course, true that the registered holder of a *kushan* is *prima facie* entitled to the land covered by that *kushan,* but it seems to me, as my brother intimates, that at settlement the question of what area is included within the boundaries mentioned in the *kushan* is one for the

decision of the Settlement Officer, and his discretion should not be fettered by the fact, if such be the case, that the area is inaccurately set out in the *kushan*. And this position, in my opinion, should not be affected by the fact that the *kushan* in question is a fresh *kushan* issued in substitution of the original as a result of a correction of area.

It may then, perhaps, be asked what is the purpose of such a correction, if it is not to be treated by the Settlement Officer as conclusive? The answer would seem to be that the holder of a *kushan*, in which the area is manifestly underestimated, may well desire either to satisfy himself or a prospective purchaser, to bring his area into apparent conformity with his boundaries. This, however, as already stated, would not seem to affect the duty of the Settlement Officer to determine, in case of dispute, whether the corrected area accurately represents the land contained within the boundaries.

British Puisne Judge.

CIVIL APPEAL No. 125/44.

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

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

IN THE APPEAL OF:—

Sheikh Khalil el-Dasuki. APPELLANT.

v.

Raphael Habib Ben Shalom. RESPONDENT.

Damages — Deliberate breach of contract to secure higher price — Whether it amounts to bad faith — Damages and loss of profit — Interest, C. A. 90/43.

Appeal from the judgment of the District Court, Nablus, dated the 6th day of March, 1944, in Civil Case No. 26/43, allowed:—

The fact that a person, in order to secure a better price, fails to comply with his undertaking to sell is not, in itself, sufficient to establish bad faith. (*A. M. A.*)

FOLLOWED: C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326).

ANNOTATIONS:

1. The decision in this case seems to imply that "bad faith" within the meaning of Art. 110 of the Ottoman C. P. C. presupposes fraud or some similar aggravating element. Otherwise it would be difficult to understand the judgment which also recites Respondent's contention that "everything he did, he did openly without bad faith." See, however, Hooper's Civil Law of Palestine, Vol. 2,

p. 146: "Where delay has been due to bad faith, e. g. failure to deliver goods owing to a rise in prices, the vendor having found a more favourable market ...".

2. On the measure of damages where the vendor is the defaulting party, see generally C. A. 96/43 (1943, A. L. R. 273) and annotations.

(H. K.)

FOR APPELLANT: Elia.

FOR RESPONDENT: Beirouti.

JUDGMENT.

This is an appeal from the District Court of Nablus wherein the learned President awarded to the Respondent who was Plaintiff in the Court below, a sum of LP. 1040.117 mils in respect of his claim for the return of LP. 316.777 mils and damages.

The facts of the case briefly are that the Respondent purchased from the Appellant certain shares of land, four of which were transferred outright and five of which could not be transferred owing to provisional attachments on these shares made in respect of actions pending in various District Courts. At the time of transfer, on 3.5.42, a sum of LP. 316.777 mils was paid to the Appellant for which he gave a receipt (Exhibit R. H. 3). This receipt sets out that this sum was made * in respect of shares whose transfer shall be effected in Block 8003, Parcel 2 and 4, provided this amount shall be deducted from the price at the first transfer, and there is a remark at the end of this document: "I received from Mr. Raphael Habib thirty Palestine Pounds only to be accounted for from the first transfer".

The argument of the Appellant on this point is that this payment was made in respect of the transfer of the four shares which were actually made to the Respondent. The learned President found to the contrary and with his finding on this point, namely, that this sum was in respect of a future transfer which was anticipated to be made when the attachments were removed from the five shares, with this finding we agree. The Appellant subsequently, some nine months afterwards, found a better purchaser in the Hamnuta Co. who offered him over LP. 17 per *dunum*. He approached the Respondent asking him if he would purchase the shares at this price. The Respondent was not willing to do so and the Appellant thereupon sold the shares to the Hamnuta Co. releasing the attachments at the same time.

The Respondent alleged that there was bad faith in this transaction and the learned President found that there was bad faith on the part of the Appellant and awarded the Respondent damages in the amount

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* *Scil.*: "paid". *(Ed.)*

of the difference between the amount of LP. 12 as agreed upon by the Respondent and the Appellant, and LP. 17 at which price the Hamnuta Co. actually bought later on; a difference of LP. 5 per *dunum*.

It has been argued by the Appellant that there is no evidence of bad faith in this transaction. Everything he did he did openly without bad faith. The Respondent, however, contends that there was bad faith and quotes several cases in support of his argument. We do not agree, however, with the learned President's finding on this point. He found that the Appellant acted in bad faith; but the only evidence of bad faith is the transfer of the shares to the Hamnuta Co. at a higher price and we cannot accept this alone as sufficient proof of bad faith.

For these reasons the Appellant must succeed on the second ground of his appeal and fail on the first ground of his appeal as it is clear that the price was paid in respect of the five shares which had not been transferred.

The question now arises as to what damages, if any, the Respondent is entitled. We consider that under the circumstances he is entitled, as found by the learned President, to the return of his LP. 316.777 mils and a further LP. 30 making in all the sum of LP. 346.777 mils, but he is not entitled to loss of profit. Following Civil Appeal No. 90/43, A. L. R. 1943 p. 326, he is, however, entitled to interest as from the date of payment, *i. e* 3.5.42.

As to costs, each party will bear their own costs here and below.

Delivered this 5th day of October, 1944.

A/British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 3/44.

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

BEFORE: Rose and Frumkin, JJ.

IN THE APPLICATION OF:—

Palestine Plantations Ltd. APPLICANTS.

v.

Briendel Diamant. RESPONDENT.

Privy Council appeals — Application for stay of execution made after final leave granted — Powers of Court to grant stay may be exercised

only when granting leave — Palestine (Appeal to Privy Council) Order in Council, art. 7 — Construction of statutes — Residuary powers.

Application for an order, directing Respondent to enter into sufficient security before executing the judgment of the Court of Civil Appeal in C. A. 202/43, pending an appeal to the Privy Council, dismissed:—

> The Supreme Court will grant stay of execution pending appeal to the Privy Council only when granting leave to appeal.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment under appeal is C. A. 202/43 (11, P. L. R. 21; *ante*, p. 219).

2. On the restricted powers of the Supreme Court in respect of matters regarding appeals to the Privy Council, *vide* P. C. L. A. 1/42 (9, P. L. R. 144; 1942, S. C. J. 941) and P. C. L. A. 20/43 (11, P. L. R. 50; *ante*, p. 264). An "inherent power to preserve the rights of parties intact pending an appeal to His Majesty in Council" was, however, assumed by the Supreme Court in P. C. L. A. 13/38 (6, P. L. R. 69; 1939, S. C. J. 98; 5, Ct. L. R. 97).

(*H. K.*)

FOR APPLICANTS: Goitein.

FOR RESPONDENT: Scharf.

ORDER.

This matter concerns a case in which final leave to appeal has already been granted to the Privy Council. It is to be noted that conditional leave was granted on the 20th March of this year, and final leave on the 15th of May, which is approximately two and a half months ago. On neither of those occasions was there any discussion as to the granting of a stay or as to the imposing of any conditions upon the execution of the judgment.

Counsel for the Applicants asks us to say that this is still a proper time for us to give an order specifying good and sufficient security to be provided by the successful Respondent before she is permitted to execute her judgment.

Mr. Goitein has put forward an interesting and persuasive argument, but it seems to us that the matter with which we are primarily concerned is to see that the practice followed in these appeals to the Privy Council should be as speedy as is consistent with the proper administration of justice.

Now, under Article 7 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, this Court has power, when granting leave to appeal, to make such an order as requested today. It seems to us that that Article should be interpreted strictly, that is to say, that we have that special power only when we are granting leave to appeal.

Leave to appeal was granted in this case some two and a half months ago. Therefore, at the most — it is unnecessary for the decision of this application to consider the further argument that this Court has no such residuary powers at all — this Court has the ordinary discretion vested in any appellate Court in matters of stays and the ordering of security. It seems to us that, even on that view (which is the more favourable to the Applicants), there is no reason why we should now either grant a stay, — which we have not been asked to do — or impose any conditions as to security, which we were not asked to do either on the 20th March, or on the 15th May. If any injustice results ultimately to the Applicants, that is unfortunate, but of the two evils it seems to us that it is better that these particular Applicants should run the risk of suffering some financial loss than that the practice of these appeals to the Privy Council should be complicated by any ruling which might lead to the introduction of further delays in a class of case in which, in any event, for reasons of geography, a considerable amount of delay is unavoidable.

For these reasons we consider that the application is misconceived and must be dismissed. The Respondent will have her costs in an inclusive sum of LP. 5.

Given this 26th day of July, 1944.

British Puisne Judge.

HIGH COURT No. 126/43.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Nahum Isaac Merkin. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Abraham Shlomo Borwick through his General Attorney Jona Leib Kaplanski. RESPONDENTS.

Sale of mortgage — Ex. Law, art. 114 — L. T. O., sec. 14 — Only order of sale need be made by P. D. C. — Delay in the proceedings — H. C. 119/42, reopening sale before transfer fees paid.

Return to a rule *nisi*, issued on the 18th day of January, 1944, directed to the first Respondent, calling upon him to show cause why his order, dated 29.9.43 in Execution file No. 7716/38 should not be set aside and why he should not be ordered to issue an order to the Land Registrar, Tel-Aviv for the registration of the mortgaged property in the name of the Mortgagees; order *nisi* discharged:—

1. When the original order of sale under sec. 14 of the Land Transfer Ord. is made by the President District Court, any subsequent order may be made by an Assistant Chief Execution Officer.

2. Art. 114 applies if, after final order of sale, the creditor grants time to the debtor and no steps are taken in the meantime.

(*A. M. A.*)

REFERRED TO: H. C. 119/42 (1942, S. C. J. 942).

ANNOTATIONS:

1. For previous proceedings in this matter see H. C. 40/44 (11, P. L. R. 226; *ante*, p. 310).
2. For recent authorities on Art. 114 of the Execution Law see H. C. 69/37 (5, P. L. R. 144; 1938, 1 S. C. J. 133; P. P. 31.3.38), H. C. 94/40 (7, P. L. R. 574; 1940, S. C. J. 547; 9, Ct. L. R. 182) and H. C. 98/42 (1942, S. C. J. 781).
3. See, in addition to H. C. 119/42 (*supra*), H. C. 76/44 (*ante*, p. 494).

(*H. K.*)

FOR PETITIONER: Kleinzeller.

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

ORDER.

This is the return to an order *nisi*, calling upon the Chief Execution Officer, Tel-Aviv, to show cause why his order of the 29th September, 1943, annulling certain sale proceedings under a mortgage and requiring fresh proceedings to be taken should not be set aside.

The facts are rather complicated; but, in my view, in spite of the lengthy arguments adduced before me by the advocates who appeared for the parties concerned, the matter lies within a small compass.

The learned Chief Execution Officer seems to have relied on Article 114 of the Ottoman Law of Execution. I have obtained, from what I believe to be a reliable source a translation from the original Turkish text of that Article, which is in the following terms:—

> "In case an auction has been delayed due to certain legal grounds, or because the creditor failed to pursue the proceedings, although its repetition within a period of 15 days is sufficient, but in case an auction has been abandoned for a period exceeding one year, the previous periods which had elapsed shall not be taken into consideration, and it shall be necessary to start the auction anew."

The original sale order under section 14 Land Transfer Ordinance, was made by the then President of the District Court of Tel-Aviv on

the 1st July, 1938, ordering sale but postponing sale until 1st September, 1938. In my view, there was no necessity for any subsequent order in the Execution Office to be made by the President himself. Any further orders in the Execution Office could be made by an Assistant Chief Execution Officer provided that, as in this case, the original order under section 14 was made by the President himself. It is not denied that in the instant case this was done.

It seems that, thereafter, negotiations proceeded between the mortgagee and the mortgagor, and I have no doubt that the mortgagee showed certain leniency towards the mortgagor who is the second Respondent to this petition and who, I am told, is now in the United States of America.

The Petitioner's advocate has contended that the reason why there has been delay is because of an alleged agreement which his client entered into at the request of the second Respondent. This may be so; but the effect of the alleged agreement does not seem to have been argued before the learned Chief Execution Officer. It may well be that one should sympathize with the Petitioner who, I am told, may now have to wait a long time before a fresh sale can take place and before he can obtain payment of the sale proceeds. That, however, does not concern me.

The Petitioner's advocate has strenuously argued that the final order which was made on the 12th July, 1939, by Judge Mani, the Assistant Chief Execution Officer, was bad.

The wording of Judge Mani's order was "to transfer in an absolute manner". I think that that order cannot be attacked although the second Respondent's advocate said that Judge Mani was not a Chief Execution Officer. I have sufficiently dealt with this earlier in this judgment and I think that the one and only order contemplated by section 14 was properly made on the 1st July, 1938, by the then President of the District Court .Had the Petitioner, immediately after the order of the 12th July, 1939, taken steps to have the property transferred to his name in the Land Registry and paid the Land Transfer fees, it is clear that the second Respondent could have had no answer to this petition.

I refer to High Court No. 119/42, Annotated Supreme Court Judgments (1942) Vol. 2, p. 944. It seems to me that if, after final sale but before payment of transfer fees, the final sale is stayed then proceedings can be reopened. Applying that test to the facts of the case now before me I feel that the mortgagee (or judgment creditor) has failed to pursue the proceedings within the meaning of Article 114. He

could have pursued the proceedings by insisting on Judge Mani's final order of sale being transmitted to the Land Registrar and by paying the Land Transfer fees. For reasons of his own or, perhaps, out of tenderness to the second Respondent, he did not do so. I am, therefore, of opinion that Article 114 applies to the facts of this case.

The order *nisi* is accordingly discharged. The Petitioner must pay the second Respondent's costs, namely, fixed (inclusive) costs of LP. 15 (to include order of LP. 5.— made on 21st September, 1944).

Given this 8th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 19/44.

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

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

IN THE APPEAL OF :—

I. Trachtengott. APPELLANT.

v.

Assessing Officer, Lydda District. RESPONDENT.

Income Tax — Case under sec. 53(5) — Court will hear case according to questions stated — Function of judge under sec. 53(1) similar to that of Commissioners in England — Decides facts as well as the law — Onus of proving that assessment is bad — Effect of 1944 Amendment — Sec. 137(4) of English I. T. Act of 1918 compared — Rule 9(a) explained — Construction of taxing statutes.

Case stated under the first proviso to Section 53(5) of the Income Tax Ordinance, 1941, in Income Tax Appeal No. 19/43, on a question of law, for the opinion of the Supreme Court sitting as a Court of Civil Appeal; decision of British Puisne Judge set aside:—

Before the amendment of the Ordinance in March, 1944, it was for the Assessing Officer to justify his assessment if the assessee produced any evidence which contradicted the assessment.

(*A. M. A.*)

ANNOTATIONS :

1. The facts of this case appear from the decision of Edwards, J., in I. T. A. 19/43 (1943, A. L. R. 584, at pp. 588 *et seq.*).

2. The opinion of the Court of Civil Appeal was sought on the following questions:—

"(1) Whether a Judge sitting in pursuance of Section 53(1) of the Income Tax Ordinance has duties analogous to those of the Commissioners for the Special

Purposes of the English Income Tax Acts or has duties analogous to those of a Judge of the High Court of England under these Acts.

(2) Is it sufficient for the Appellant to make out a *prima facie* case to show that the assessment was wrong or must he satisfy me by sufficient evidence that the assessment ought not to have been made.

(3) On the facts of the case as found by me, was I right in law in confirming the assessment or should I have chosen some figure of my own somewhere between the figure of assessable income claimed by the Respondent and that suggested by the Appellant".

3. Note that in CR. A. 123/42 (8, P. L. R. 548; 1942, S. C. J. 558) it was held that an amendment providing for the casting of the onus on proof in a particular question on the accused "clearly had retrospective and retroactive effect".

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is a case stated under Section 53(5) of the Income Tax Ordinance, 1941. There was some argument before us as to whether the questions set out in paragraph 9 of the case sufficiently cover the matters in issue. We are of opinion, however, that we should confine ourselves to the questions as stated by the learned Judge.

No argument was addressed to us on the first question but it was conceded by both parties that a Judge sitting on an appeal under Section 53(1) of the Ordinance is a Judge of fact as well as of law, and his functions would seem, therefore, to approximate to those of a Commissioner under the English Income Tax Acts.

As to the second question, the point to be decided, which is not an easy one, is perhaps no longer of great practical importance except, of course, to the immediate Appellant, in that a recent amendment to the Ordinance enacted in March, 1944, provides that the onus of showing that an assessment is wrong shall rest upon the appellant. This language is, in our opinion, not open to doubt and brings the Palestine law on this point into conformity with the English law, section 137(4) of the Income Tax Act, 1918, after setting out that a person aggrieved may endeavour to prove that an assessment is incorrect, concluding with the words, "but otherwise it (*i. e.* the assessment) shall stand good".

At the time of the hearing of the appeal in the present matter, the new law was not applicable, Section 53(1) merely providing that the Assessing Officer shall be the Respondent to any appeal under the subsection. It is true that rule 9(a) of the Rules of Court (Income Tax Appeals), 1941, provides that the onus shall be upon the Appellant,

but this provision in the rules seems to us to fall far short of the subsequent statutory amendment, and it would seem that rule 9 as a whole is intended to cover matters of procedure only, and that sub-rule (a) means no more than that it is for the Appellant to begin. As Mr. Goitein points out, taxing statutes must be construed strictly, and in the event of any ambiguity, in favour of the subject.

Having regard to that principle, it seems to us that in the present case, the Appellant having produced some, even if slight, material in support of his contention that he incurred a trading loss for the financial year in question, it was then for the Respondent to justify his assessment. Having considered all the evidence it would then, of course, have been open to the learned Judge to have confirmed, reduced, increased or annulled the assessment under Section 53(3) of the Ordinance. Apparently, in the opinion of the learned Judge, there was insufficient material for him to form any positive view as to the correct assessment. That being so, and the Appellant having, as would appear from the judgment, satisfied the slight onus which was cast upon him by Section 53 of the Ordinance, and Rule 9 of the Rules of Court, it would seem that he should have succeeded in his appeal.

The answer to the first part of the second question is, therefore, in our opinion, in the affirmative, and as to the third question, it follows that, in our opinion, on the facts as found by the learned Judge, the assessment should have been annulled.

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.

Delivered this 14th day of July, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 109/44.

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

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

IN THE APPEAL OF:—

Ahmad Rashad Kumbargi & 2 ors. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Committal by Attorney General — T. U. I. Ord., sec. 28(1), 28(5) — Committal by A. G. failing committal by Court — Time limit — History of the section — English law — Findings of fact — Corroboration of the evidence of an accomplice — Nature of corroboration — Sentence in hashish smuggling cases.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 21st day of July, 1944, in Criminal Case No. 74/44, whereby Appellants were convicted of unlawful possession of Dangerous Drugs, contrary to sections 7 and 16(1) of the Dangerous Drugs Ordinance, 1936, and sentenced to three years' imprisonment each, dismissed:—

1. The limitation of three months applies to the exercise of powers under sec. 28(5)(a) of the Trial Upon Information Ord., not to the general powers under sec. 28(1).

2. Corroborative evidence need not be on all fours with the principal evidence; it should merely be independent facts which tend to render more probable the truth of the story of the witness.

(*A. M. A.*)

ANNOTATIONS:

1. See, on sec. 28(1) & (5)(a) of the Criminal Procedure (T. U. I.) Ord., CR. A. 24/44 (11, P. L. R. 201; 1944, A. L. R. 361) and note 1 thereto in A. L. R.

2. *Cf.* the following authorities on the sufficiency or otherwise of corroborative evidence: CR. A. 77/41 (1941, S. C. J. 317; 10, Ct. L. R. 6) and note 3 in S. C. J.; CR. A. 122/43 (10, P. L. R. 590; 1943, A. L. R. 770) and notes in A. L. R.; CR. A. 18/44 (11, P. L. R. 101; *ante*, p. 158); CR. A. 97/44 (*ante*, p. 478).

(*H. K.*)

FOR APPELLANTS: No. 1 — W. Salah.
No. 2 — Elia.
No. 3 — In person.

FOR RESPONDENT: Assistant Government Advocate — ('Aqel).

JUDGMENT.

This is an appeal from a conviction of an offence against the Dangerous Drugs Ordinance. Except for one point with which I will deal first, the defence of the first Accused followed different lines from that advanced by the second and third Accused.

It was urged on behalf of all the Accused that the filing of the information was out of time because of the provisions of Section 28(5) of the Criminal Procedure (Trial Upon Information) Ordinance. The argument appears to me to have misconceived what the legislature had effected by the subsection to which I have referred. The procedure by way of information, filed by the Attorney General, goes far back in our history. Originally an information would be quashed by the

Courts on the slightest technicality. As society developed it was deemed necessary to give more extended powers to the Crown but those powers were very properly circumscribed. An example of those extended powers is provided by section 28(5)(a) of our Ordinance, which follows similar procedure in England. It gives the Attorney General power to commit a person in respect of a charge for which he had never been committed by the lower Court. It gives him power to refuse to file an information or to order the accused to be tried summarily; but in resorting to those far-reaching powers he is limited by the condition that he can only exercise them within three months of date of committal. Section 28(5)(a) deals with what the Attorney General can do in certain stated circumstances. It does not detract from the generality of the power given by section 28(1). We are of the opinion, therefore, that the preliminary point fails.

Now, the case so ably advanced in favour of the first Accused is this: It is said that he was a police informer and that in being a party to this *hashish* deal, as undoubtedly he was, he was merely acting in his capacity as an informer and as such he had no criminal intent. This issue was fully considered by the learned Relieving President. We can only say that we entirely agree with him that the conduct of the first Accused throughout the whole of this deal was entirely inconsistent with the fact that he was an informer. This is evident from the statement he made to the Police Sergeant in the first instance as well as from his defence when the truck passed through the various police checks. As the learned Relieving President remarked, the defence that he was an informer was an afterthought, and, in our opinion, there is nothing more to be said in his favour.

With regard to the second Accused. It has been urged that the evidence of Oweita is evidence of an accomplice and that it needed corroboration. Now, even if we accept that Oweita was an accomplice his evidence was amply corroborated. Corroboration in law need be nothing more than some independent facts which would tend to render more probable the truth of the story of the witness, it does not necessarily follow that the corroborative evidence must be on all fours with the evidence given by the principal witness. But in this case the question of corroboration is not really relevant because we agree with the learned Relieving President that there was no reason to believe that Oweita was an accomplice.

Turning now to the third Accused. The evidence against him is the same as that against the second Accused with this exception, that he was not found in the lorry. Since we agree with the learned Re-

lieving President that Oweita was not an accomplice we are of opinion that there was sufficient evidence to justify the Court in convicting this Accused also. For these reasons the appeals must be dismissed.

As regards sentence, once an Accused has been found guilty of this offence which is pernicious and most serious in its consequences, convicted persons can expect very little sympathy from the Courts. We know, unfortunately, only too well, the extent of this illegal traffic in this part of the world. We, therefore, find no reason for interfering with the sentences passed.

Delivered this 11th day of October, 1944.

Chief Justice.

CIVIL APPEAL No. 375/43.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Raja Boury. RESPONDENT.

Question of admissibility of further evidence — Evidence of system.

Appeal from the order of the District Court of Haifa, dated the 17th November, 1943, in Civil Case No. 86/43, allowed and case remitted:—

1. Where party seeks to prove certain particulars which he could have obtained by further cross-examination, it is for Court of trial to decide whether further evidence of that nature should be admitted.
2. Evidence of system — admissible also in civil cases to prove party's state of mind or intent.

(*M. L.*)

FOLLOWED: C. A. 80/36 (1, Ct. L. R. (N. S.) 49; 7, C. of J. 188); R. *v.* Jones, 1877, 14 Cox C. C. 3.

ANNOTATIONS:

1. On failure to cross-examine Accused see CR. A. 75/43 (1943, A. L. R. 486).
2. On evidence of system see cases followed. The case of Rex *v.* Jones (1877) 14 Cox 3 is cited in Phipson on Evidence, 8th Edition pp. 161 & 165. In the Digest the title of the case is Rex *v.* Jones & Hayes reported in 14 Digest, p. 382 para. 4030 and 15 Digest, p. 970, para 10, 838.
3. The reference to Halsbury in this case is to the old edition. In Hailsham Edition the corresponding paragraphs are on pp. 564—571.

(*A. G.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Wittkowsky.

JUDGMENT.

Plunkett, A/J.:

This is an appeal from an order of the District Court of Haifa, dated 17th November, 1943, in Civil Case No. 86/43, refusing the Appellant permission to prove that Respondent had similar goods seized on a previous occasion.

It was sought to prove a course of conduct by means of evidence, and after the Respondent, who was heard first, had concluded his evidence, Mr. Rigby for the Attorney General argued generally the question of the admissibility of evidence to prove system in civil cases, and in particular as applicable to this case.

It does not appear to me that the learned Relieving President's order contains any ruling upon the point, as he states:—

> "This matter of kokosene in the lorry on 25/26 May, 1942, is the subject of civil proceedings in an action now part-heard by this Court. The Defendant in that case is the Plaintiff in this case and is represented by an advocate other there than today and who has no opportunity to cross-examine on what is sought to be proved now, and, therefore, it is manifestly unjust that such evidence should be heard in this case without opportunity for cross-examination by the other advocate."

This appears to be the reason for his refusal to admit the evidence. He continues:—

> "The question as to intent or system on the facts proved by admissible and relevant evidence is for the Court to determine in each case."

While we agree that the weight to be attached to admissible and relevant evidence is a matter for the Court, that paragraph does not seem to refer at all to the admissibility of this class of evidence in civil cases. From the reference of Rex *v.* Jones, and Civil Appeal 80/36 in the last paragraph of the order, one may assume that the Relieving President had in mind the legal aspect regarding the admission of such evidence in a civil case. It is correct, as Mr. Rigby points out, Rex *v.* Jones is a clear instance of admissibility of such evidence, and that Civil Appeal 80/36 is also extremely relevant. The Relieving President does not seem to base his refusal on this ground, although he seems to require a ruling on the point.

It appears from reference to the record that the Respondent stated

at the end of his evidence, page 4, that "I had kokosene of mine seized on the road near Ismarieh about two months previously in a truck". He was not cross-examined to ascertain particulars of this seizure, and the Appellant is now seeking to introduce further evidence on this point. Even if this evidence were admitted, it could only be admitted to prove the particulars of the previous seizure, which could have been obtained by further cross-examination. Having failed to do so it is a question for the Court of trial to decide whether in this particular case further evidence of this nature should be admitted.

As to the admissibility of such evidence of system in a civil case, it appears from the record at page 10, hearing of the 17th November, 1943, that the learned Relieving President refers to a ruling he made in the other case, Civil Case 239/42. I have not this ruling before me. I think that the question could have been avoided by adjourning this case until case 239/42 had been concluded, but possibly the same point arose in that case. I have no doubt that evidence of similar facts may be tendered in civil cases on the basis as set out in Civil Appeal 80/36 and Halsbury, Vol. 13, page 448, paragraphs 622, 623 and 624.

> "Facts showing a state of mind.
>
> 623. A party's knowledge of a fact may be inferred circumstantially in a variety of cases. Thus, it may be shown he had prior knowledge of the fact, in which case there will be a presumption that such knowledge continued for a more or less lengthened period.
>
> 624. In cases of intention, the line of demarcation between substantive law and evidence is not always very clearly observed. ...... When, however, intent can be, and is, properly put in issue, its proof becomes cognizable by the law of evidence, it being recognized that the state of a man's mind is as much a matter of fact, and so, as much the subject of evidence, as the state of his digestion. It may be harder to prove than an external fact, but wherever it is material, litigants may prove it if they can. Intention, therefore, may be proved by the direct testimony of the party whose intention is in question; as well as by proof of his declarations made out of Court at the time that such intention was material. But it may also, and much more often, be established circumstantially by the party's previous or subsequent conduct. ......
>
> 625. Evidence of similar facts may be tendered for three main purposes: (1) to prove the occurrence of the main fact; (2) to prove that the given party was its author; (3) to prove the state of mind of that party with reference to such facts. ...... The rule of exclusion may be stated as follows: — Facts similar to, but not part of, the same transaction as the main fact are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. ......
>
> 627. Evidence of similar facts, although in general admissible to

> prove the main fact or the connection of the parties therewith, is receivable after evidence *aliunde* on these points has been given. ...... In general, wherever it is necessary to rebut (even by anticipation) the defence of accident, mistake, or other innocent condition of mind, evidence that the Defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given".

In general such evidence is admissible, therefore, only to prove the party's state of mind or intent.

For the above reasons I hold that such evidence is admissible within the limits as set out above, and that the order of the District Court is set aside and the matter referred back to the Court to hear such evidence as is considered to fall within the above decision.

Costs to follow the event.

Delivered this 29th day of June, 1944.

A/British Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 309/43.

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

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

IN THE APPEAL OF:—

Nassar Muhammad Nassar Dudin. APPELLANT.

v.

Musbah El-Nammura & an. RESPONDENTS.

Title to land — Unregistered partition of family musha' — Effect of entry in Rural Property Tax Register — Title may be inferred from possession, C. A. 195/37, L. A. 13/34, C. A. 238/37, C. A. 80/39 — Discontinuation of possession.

Appeal from the judgment of the Magistrate's Court of Hebron, sitting as a Land Court, dated the 30th of August, 1943, in Land Case No. 98/43, allowed:—

The judgment or the record of the Land Court should show that there was evidence of possession to justify an inference of ownership.

(A. M. A.)

REFERRED TO: L. A. 13/34 (2, P. L. R. 352; 9, C. of J. 836); C. A. 195/37 (3, Ct. L. R. 41); C. A. 238/37 (5, P. L. R. 37; 1938, 1 S. C. J. 32; 3, Ct. L. R. 63); C. A. 80/39 (6, P. L. R. 513; 1939, S. C. J. 426; 6, Ct. L. R. 151).

ANNOTATIONS: On the possibility of inferring ownership from possession see C. A. 238/43 (1943, A. L. R. 638) and annotations.

(*H. K.*)

FOR APPELLANT: Perlmutter and Eisenberg.

FOR RESPONDENTS: Nazzal.

JUDGMENT.

Edwards, J.: The Appellant was the Defendant in a Land Court action tried by the Magistrate of Hebron who had entered judgment in favour of the present Respondents declaring them to be the owners of certain land. Neither party had any document of title to the land, which was not registered in the Land Registry.

From the evidence of one, Suleiman el Ta'amari, a witness for the Plaintiff, who had been at one time *Mukhtar* of the area in which the land was situated, it seemed that this land was originally *musha'a* for all the members of the El-Orjan family, among whom were the Defendant and the Plaintiffs, and that about thirty years ago the land was divided among the various families comprising the sub-tribe of El-Orjan.

The Magistrate found that in 1935 the land was registered in the Rural Property Tax Register as to one parcel, in the name of the Plaintiff and his partner, and as to another parcel in the name of the Defendant (Appellant). This, of course, is a perfectly neutral fact and cannot assist the Plaintiffs (Respondents). The Plaintiffs claimed that the land had devolved upon them by way of purchase from the father of the first Plaintiff about the year 1938. The Defendant, on the other hand, alleged that the land had devolved upon him by way of gift made fifteen years ago by his father, who is still alive.

The Magistrate had no means of deciding ownership except by making deductions from the evidence of possession. There is ample authority for holding that in such a case a Land Court is entitled to infer title from the fact of possession. (C. A. 195/37, Levanon Current Reports, Vol. 3, page 41; Land Appeal No. 13/34, P. L. R. Vol. 2, p. 352; C. A. 238/37, P. L. R. Vol. 5, page 37, and C. A. 80/39, P. L. R. Vol. 6, p. 513). It was not disputed that the Appellant had been in possession from the year 1935 until the commencement of the action on 6th April, 1943, that is to say, for a period of eight years.

The Magistrate came to the conclusion that the Plaintiff had been in possession for a period of seven years up to the year 1935, and he accordingly gave judgment in favour of the Respondents. The Appellant's advocate complains that there was no finding of fact that

the Respondents had lost possession in 1935, by reason of any unlawful means used by his client, and he has cited Hailsham's Laws of England, Vol. 25, page 200, paragraph 336. I think, however, that the test to be applied is whether there was sufficient evidence of the Respondents' possession to justify the inference that the title to the land was in them. We are, of course, not entitled to interfere with a finding of fact if it is supported by evidence. In this case, however, I have carefully perused the judgment of the Magistrate and also the record of the evidence. In the judgment there is no clear finding of fact that the Plaintiffs were in possession, and the Magistrate certainly does not point to the evidence of any witness whom he believes, which evidence would support such a finding, nor have I been able to find that any witness gave evidence sufficiently clear as to show that the Plaintiffs had been in possession. In my view, the Magistrate should have dismissed the action on the ground that the Plaintiffs had failed to prove their case.

I would accordingly allow the appeal, set aside the judgment of the Magistrate of the 30th August, 1943, and dismiss the Plaintiffs' action with costs here and below. The costs in this Court will be fixed (or inclusive) costs of LP. 10.

Delivered this 23rd day of November, 1944.

British Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

HIGH COURT No. 71/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

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

v.

The Officer Commanding the Polish Forces in Palestine & an. RESPONDENTS.

Allied Forces — Allied Forces (Application of Acts to Colonies etc.) Order, (No. 1), 1941 — Jurisdiction of Polish Military Court to try

member of their forces — Arrest under sec. 3(2), *No.* 2 *Order,* 1941 *— Army Act, secs.* 12, 154 *— Deserters should be handed first to Civil Courts — Effect of order of discharge.*

Return to an order *nisi,* directed to the Respondents, calling upon them to show cause why they should not produce the body of Haim Novik before the High Court for the purpose of enquiring into the irregularity of his arrest, the handing over of him to the Polish Military Authorities, his detention, trial and imprisonment, and to show cause also why Novik should not be released from custody; order *nisi* discharged:—

> An irregularity in the arrest and detention of a member of the Polish Forces does not vitiate his trial by a Court Martial properly constituted by such Forces.

(*A. M. A.*)

ANNOTATIONS :

1. For a similar decision in respect of the arrest and surrender of a prisoner in violation of an extradition agreement see CR. A. 14/42 (9, P. L. R. 63; 1942, S. C. J. 109; 12, Ct. L. R. 77) and note 1 in S. C. J.

2. On the jurisdiction and powers of the Polish Military Authorities *cf.* H. C. 78/42 (9, P. L. R. 526; 1942, S. C. J. 529; 12, Ct. L. R. 214).

(*H. K.*)

FOR PETITIONER: Olshan and Wajner.

FOR RESPONDENT: Cattan.

ORDER.

This is a return to an order *nisi,* in which Itzhak Katz applies by way of *habeas corpus* on behalf of Haim Novik. Haim Novik, to whom I will hereafter refer as the prisoner, was tried by a Polish Court Martial on a charge of desertion and sentenced to six years' imprisonment. The Polish Military Authorities maintain that as he was a Polish soldier, jurisdiction to so try him was given by the Allied Forces (Application of Acts to Colonies, *etc.*) Order, (No. 1), 1941.

The first question I have to determine is whether, in fact, the prisoner was a Polish soldier, and thus came within the provisions of the Act. He denies that he was, and he produced a certificate from a Polish Recruiting Officer which stated that he was released from active service but qualified for auxiliary military service Category "D", and that he was not liable at present to be called up to the colours.

Captain Piontek Stanislaw, whom the Petitioner called for cross-examination, stated that Polish citizens placed in Category "D" are not liable for front-line service but are liable for auxiliary service, and were enrolled as soldiers. He produced from official custody the official record of names of members of the 16th Infantry Regiment of the Polish Army. On page 416 of that record the name of Haim Novik,

that is the prisoner, appears as having been incorporated on the 15th of August, 1942. He also produced the official record of calling up of conscripts for the year 1918. List No. 5713 contains full particulars of Haim Novik as having been called up and allocated to auxiliary service Category "D". He produced his military History Sheet which, *inter alia*, records the conviction of the accused by a Court Martial. He further produced the official publication in Army Orders of the prisoner's desertion from the 6th Sanitary Company No. 954. From these documents I have no hesitation in coming to the conclusion that the prisoner was a Polish soldier, and as such, that he could be tried by a Polish Court Martial under the provisions of the Allied Forces Act.

I now come to a point which was argued very ably and at great length, and which I confess at first sight appeared to have considerable merit. It is not denied that the prisoner was arrested by the Civil Police of the Palestine Government and handed over direct to the Military Police of the Polish Army.

It was argued that under the provisions of Section 3(2) of the Schedule to the Allied Forces (Application of 23 George V. Cap. 6) (No. 2) Order, 1941 *, this procedure was illegal and that it vitiated the whole of the Court Martial proceedings. The effect of this sub-section, which is in fact sub-section 3(2) of the Visiting Forces British Commonwealth Act, 1933, was to apply Section 154 of the Army Act to a soldier of the Allied Forces in the same manner as it applied to a member of His Majesty's Naval Military and Air Forces.

Now Section 154 of the Army Act deals with the apprehension of deserters. It sets out the statutory procedure to be followed which includes the bringing of a deserter before a civil Court of summary jurisdiction and the delivery of him by that Court, if it so thinks fit, to the Military Authorities. The prisoner here was never brought before a civil Court. This being so, it would appear that the handing over by the Civil Police to the Military Authorities without resort to the procedure set out in Section 154 of the Army Act was irregular, and his custody, if he was detained in custody, as I presume he was, pending his trial by Court Martial, by the Polish Military Authorities, might have been successfully challenged in this Court.

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* Should, *semble*, be "(No. 1) Order, 1940" as the Order cited refers to the Free French Forces only. See P. G. 1146 of 27.11.41, Suppl. 2, pp. 1775 and 1781, respectively.

(*Ed.*)

The question for determination now is what effect, if any, had this irregularity or illegality on his subsequent trial for desertion. It seems to me that Section 154 of the Army Act does not purport to do anything more than deal with the manner in which deserters shall be apprehended. The Army Act applies only to enlisted soldiers and certain other categories of persons connected with army organization. It is obvious that to give effect to certain provisions of the Act, particularly provisions relating to desertion, the co-operation of the civil power was necessary, and I am of opinion that Section 154 does nothing more than indicate how that co-operation shall be achieved. It is in the nature of a subsidiary provision for the purpose of giving better effect to the main sections.

I am re-enforced in this opinion by an examination of Section 12, which is the section that deals with desertion. That section provides that a person subject to military law, who commits the offence of desertion, can be tried and convicted by a Court Martial. The section does not stipulate that only those deserters who have been the subjects of proceedings under Section 154 shall be liable to trial under Section 12.

I have come to the conclusion that, provided the Court Martial is properly constituted, and provided the Accused, who is before it, is subject to its jurisdiction, the circumstances in which he was arrested and arrived before the Court are not relevant to the question of the jurisdiction of the Court. It is not denied that the Polish Military Code contains provisions similar to Section 12 of the Army Act. The Polish Court was, therefore, competent to try this soldier for desertion.

Finally it was urged that as part of the sentence pronounced by the Court Martial was discharge from the army, the prisoner is no longer a soldier, and he cannot be imprisoned in a Military Prison. The Allied Forces Act gives the Allied Powers jurisdiction to try their soldiers according to their own military code, and authority to enforce their own sanctions must follow this power.

I am of opinion, therefore, that he can be imprisoned in the appropriate prisons which presumably have been established in Allied Territory by decree of the Polish Provisional Government with the sanction of the Allied Power concerned. The rule *nisi* is, therefore, discharged. No order as to costs.

Given this 7th day of July. 1944.

, Chief Justice.

CIVIL APPEAL No. 201/44.

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

BEFORE : Rose, J.

IN THE APPEAL OF:—

Suleiman Ibn el Haj Ibrahim Abu El Hassan & an. APPELLANTS.

v.

Haj Salameh Ibn 'Irfan. RESPONDENT.

Evidence — Oral evidence as to the contents of a deed — Practice — Omission of notice to produce — Transfer of action from Magistrate's Court to Land Court — Unregistered mortgages made before and after L. T. O.

Appeal from the judgment of the Magistrate's Court, Beersheba, sitting as a Land Court, dated the 3rd day of May, 1944, in Land Case No. 355/43, dismissed:—

1. Although secondary evidence of a document in the possession of the opposite party cannot be given unless a notice to produce is served, the Court may overlook the technicality if the pleadings make it clear that the other party denies possession of the document.

2. If a land case filed in the Magistrate's Court and transferred by a Magistrate to himself sitting as a Land Court is heard without objection, the jurisdiction of the Court cannot be subsequently challenged.

(*A. M. A.*)

ANNOTATIONS :

1. This decision goes farther than the rule laid down in C. A. 175/43 (10, P. L. R. 340; 1943, A. L. R. 430), C. A. 156/43 (10, P. L. R. 427; 1943, A. L. R. 449) and C. A. 200/43 (10, P. L. R. 497; 1943, A. L. R. 664) all of which decisions dealt only with the possibility of remitting cases from one Land Court to another Land Court. On the other hand, it was already held in L. A. 70/35 (8, C. of J. 699; P. P. 15.6.37) that the distinction between Land Courts and District Courts had become artificial in that "by the Establishment of Courts Order of the 22nd December, 1932, the Land Court was merged in the District Court in the sense that its jurisdiction is now exercised by the Judges of the District Court". This reasoning applies even more forcibly now, after the enactment of the Land Courts (Am.) Ordinances, 1939 and 1942, which brought the jurisdiction of Land Courts in line with that of Magistrates', resp. District Courts. For a recent case where the Court of Civil Appeal deplored the result of the technical distinction between the two Courts see C. A. 110—116/44 (11, P. L. R. 422; *ante*, p. 576).

2. See, on notice to produce documents, C. P. R., Rule 220 and *vide* Halsbury, Vol. 26, p. 61, para. 98.

3. A party cannot appeal a decision in his favour: See C. A. 116/38 (1938,

1 S. C. J. 325; 3, Ct. L. R. 274) and cases cited in the note in S. C. J.; see also C. A. 5/37 (1937, S. C. J. (N. S.) 74) and C. A. 68/37 (*ibid.*, p. 57).

(*H. K.*)

FOR APPELLANTS: Hiller.

FOR RESPONDENT: Nazzal.

JUDGMENT.

This is an appeal from the Magistrate's Court of Beersheba, sitting as a Land Court. It concerns a small piece of land of the value of about LP. 100 in that district.

Many points were urged by counsel for the Appellants, nearly all of them of a technical nature. First, he says that the case was not properly before the Land Court in that in the first instance the Plaintiff in the Court below, *i. e.* the Respondent here, brought his action before the Magistrate in the Magistrate's Court. On objection being taken by the Defendants, *i. e.* the Appellants, the Magistrate then remitted it to himself sitting as a Land Court. Mr. Hiller says that that is wrong. That may or may not be so, but when the Magistrate started the case in his capacity as a Land Court, no further point seems to have been taken that more fees should have been paid or that the matter was not properly before him. And as the point is entirely without merit, I do not propose to assist the Appellants on that head.

The next matter alleged by the Appellants is that the mortgage upon which the Plaintiff relied was unregistered and was, therefore, invalid. It appears in the statement of claim that there was only one mortgage in 1918; and that, in effect, seems to have been what the Magistrate has found — that there was one mortgage in the amount of LP. 100. The Respondent himself, however, in the Court below stated that there was an original mortgage in 1918 for LP. 84 and there was a further mortgage some 15 years later for a further LP. 16, making in all LP. 100, the second mortgage being with the present first Appellant, the son of the original mortgagee.

It is clear, of course, that the first mortgage of 1918 would not be affected by the provisions of the Land Transfer Ordinance, and the second one — if there was one — no doubt would be. Mr. Hiller says that, on the only evidence on this matter (of the Plaintiff himself), the mortgage was void and, therefore, that the Court should not have given that part of its judgment which stated that the mortgage should be released on the payment of LP. 100. Even if Mr. Hiller is right on that point, he concedes that there was nothing to prevent the Magistrate, if he was satisfied that there was, in fact, an unre-

gistered mortgage, from giving an order for possession to the Respondent; and that then it would have been for the Appellants to recover their money in a separate action.

That being so, it seems to me that his complaint is entirely without substance, because even assuming that the Magistrate was wrong — that he should have believed that there was a second mortgage after the passing of the Land Transfer Ordinance, and that he should, therefore, not have ordered the release of the mortgage on the payment of this sum — it seems to me that what he has done is purely in favour of the Appellants, because on the basis of his findings of fact, he has given the Appellants the sum of LP. 100 which, at this stage of the proceedings, would appear to be premature. That does not seem to me to be a good ground of appeal.

As to whether or not these mortgages were sufficiently proved to exist, that depends, of course, on the oral evidence of the parties. The Magistrate stated that he disbelieved the Appellants and those persons called on their behalf, and he believed the Respondent and another gentleman who stated himself to be a farmer, who corroborated him sufficiently for the purposes of section 6, that there were, in fact, these mortgages, and that the documents were, in accordance with the custom in the District of Beersheba, kept in the custody of the Appellants. That is a finding of fact with which I have no reason to interfere. Mr. Hiller says, and it is perfectly correct, that this document, before evidence could have been adduced on it, should have been produced, or at least that a notice to produce should have been given to the Appellants to give them the opportunity of producing it. That is a perfectly good technical argument. In fact no notice to produce was given, but it seems to me, in considering that point, that in deciding whether to allow the appeal on that ground, it is permissible and indeed reasonable for me to have regard to the attitude of the parties in this case; and the Appellants' case was that there was no mortgage at all, and it is, therefore, obvious, from a practical point of view, that had they been asked to produce this document their answer would have been that there was no such document in existence. I do not, therefore, regard this as a sufficient ground for allowing the appeal.

I think, therefore, as far as that aspect of the matter is concerned, that the mortgages were sufficiently proved, provided that the Magistrate believed, as he said he did, the evidence of those two gentlemen who were called for the Respondent.

The final point taken by the Appellants is that in any event the Respondent was not entitled to the whole of the land as he stated in

his statement of claim that he claimed by inheritance. But, as Mr. Nazzal points out, there is nothing to show in the statement of claim that there are other heirs. He may have been the sole heir for all I know, and he was not challenged on this point in the Court below. And it seems to me that if he had had brothers or sisters it was for the defence to prove that; but actually the Magistrate, it seems, took the view that the statement that the Respondent owned by inheritance was merely a description as to how he came into possession of this particular piece of land.

I do not think that is a good ground on which to allow the appeal.

For these reasons I am of opinion that the appeal must be dismissed. Costs will be on the lower scale to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 16th day of November, 1944.

British Puisne Judge.

HIGH COURT No. 78/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Leiba (Arye) Rosenzweig. PETITIONER.

v.

The Controller of Light Industries, Jerusalem. RESPONDENT.

Remedy of person complaining against order of requisition — Matters to be proved by Petitioner alleging improper exercise of discretion.

Return to an order *nisi*, issued on the 10th of July, 1944, directed to the Respondent, calling upon him to show cause why his order, dated the 26th day of May, 1944, whereby a quantity of 14789 yards of woollen cloth belonging to the Petitioner was requisitioned; order *nisi* discharged:—

1. Complainant against an order of requisition of goods — entitled to come to High Court; it would not be right to say that he has an alternative remedy, *viz.* an action under Crown Actions Ordinance.

2. a) In a case concerning the exercise by a public officer of his discretionary powers — not sufficient for Petitioner to prove that officer acted arbitrarily, he must affirmatively prove *mala fides*, though not necessarily dishonesty in the ordinary sense of the word.
b) Conclusion of Court as to whether existence of *mala fides* has or has not been proved depends in each case on the facts.

c) To satisfy Court that officer who ordered requisition of goods acted *mala fide* Petitioner must prove that officer (a) did not reasonably require the goods for his policy and scheme of maintaining supplies essential to life of community, (b) does not intend to use them for the purpose mentioned in (a).

(*M. L.*)

FOLLOWED: H. C. 119/43 (11, P. L. R. 12; *ante*, p. 85).

REFERRED TO: Carltona Ltd. *v.* Commissioner of Works (1943), 2 All E. R. 560; Point of Ayr Collieries *v.* Lloyd George (1943), 2 All E. R. 546; Conway *v.* Stocks (1943), 2 All E. R. 226; Progressive Supply Co. Ltd. *v.* Dalton, L. R. (Chancery), March, 1943, p. 54; (1942), 2 All E. R. 646; H. C. 30/42 (11, Ct. L. R. 164; 1942, S. C. J. 248); H. C. 31/42 (11, Ct. L. R. 167; 1942, S. C. J. 251); H. C. 78/39 (7, P. L. R. 35; 7, Ct. L. R. 45; 1940, S. C. J. 25).

ANNOTATIONS:

1. On the principle that one cannot apply to the High Court if there is another remedy see H. C. 35/43 (10, P. L. R. 210; 1943, A. L. R. 352); H. C. 150/42 (10, P. L. R. 19; 1943, A. L. R. 242) with annotations thereto and H. C. 78/39 (*supra*).
2. On the second point see H. C. 119/43 (*supra*), the cases referred to and H. C. 90/44 (*ante*, p. 525) with annotations thereto.

(*A. G.*)

FOR PETITIONER: Abcarius and O. Goldberg.

FOR RESPONDENT: Acting Solicitor General — (Hogan) and Malchi.

ORDER.

This is the return to an order *nisi*, directed to the Controller of Light Industries, calling upon him to show cause why his order, dated 26th May, 1944, requisitioning 14789 yards of woollen cloth belonging to the Petitioner should not be set aside. Both parties have sworn affidavits and the Respondent at the request of the Petitioner's advocate has been cross-examined in Court before me on his affidavit.

The history of the matter is rather long and complicated but I shall try to summarize it as briefly as possible. The Petitioner and one Dattner were the sole partners in equal shares in a partnership registered under the name of "Dattner and Rosenzweig" the principal business of which was the import and sale of woollen and other cloths. The partnership had a licence issued by the Respondent for dealing in cloth but this expired at the end of June, 1943, and apparently no new licence was issued. On the 10th February, 1943, the Respondent issued an order under the Defence (Control of Cloth) Order, 1942, Paragraph 11, directing him not to sell or transport or dispose of any cloth in his possession without a special permit in writing from the Respondent.

This is commonly known as a "Freezing Order". The Respondent is the competent authority under Regulation 36 of the Defence Regulations, 1939, and has power to make orders relating to the control of articles of any description (Supplement 2 Palestine *Gazette* of 17th May, 1942, page 797). Powers have also been delegated to him to requisition chattels under Regulation 51(4) of the Defence Regulations, 1939 (Suppl. 2 Palestine *Gazette* of 28th May, 1942, p. 933). He is also a controlling authority for the purposes of the Defence (Prevention of Profiteering) Regulations (No. 2), 1942, (Suppl. 2 of Palestine *Gazette* of 1st October, 1942, p. 1503). The allegation of the Petitioner is that this Freezing Order was made because his firm had refused to comply with a request by the Respondent that the Petitioner should sell a quantity of woollen goods to a Mr. Theodor Dresjuk. A considerable volume of correspondence, which is on the file of this case, passed between the Respondent and the Petitioner's advocate, or rather advocates acting for the Petitioner. I shall later, in this judgment, when necessary, refer to particular parts of this correspondence. In August, 1943, negotiations between the Petitioner's advocate and the Respondent having broken down, Petitioner removed a portion of the stock belonging to his firm from the store in which it was to other stores. Petitioner alleges that all that was removed was his own particular share of the partnership property. This transfer was, of course, in contravention of the Freezing Order to which I have referred. In the result, the firm of Dattner and Rosenzweig and the Petitioner were tried by the District Court, Tel-Aviv, in Criminal Summary Trial No. 71 of 1943. After some of the witnesses for the prosecution had given evidence, the Petitioner withdrew his plea of not guilty and pleaded guilty. A complete copy of the record of proceedings in the Criminal Court is on the file of this case and has been referred to by the Petitioner's advocate. The importance of the criminal proceedings lies in the fact that at the trial Crown Counsel (Mr. Rigby), who appeared for the prosecution, withdrew the charges against the partnership and, of course, Dattner, and although the property involved was the partnership property, the suggestion of the present Petitioner is that the part of the property belonging to Dattner himself should not be affected. The present Petitioner was convicted on his plea of guilty and sentenced to one month's imprisonment and also fined which fine he appears to have paid. The trial Judge refused to order confiscation of the goods and wrote on the file "goods to be returned". It is not disputed by the Respondent that this really meant that the goods were to be returned to the Accused or, at any rate, to the partnership. Notwithstanding this order, the Respondent did not return the goods but kept

them in a store of his department in Tel-Aviv for a period exceeding seven months. I should have said that the date of the conviction was 10th October, 1943. The reason given by the Respondent for not returning the goods seems to be that he considered that the Judge trying the criminal case did not intend to enable anyone to commit an offence and it was an offence to keep woollen goods without a permit from the Respondent. On 10th November, 1943, the District Court of Tel-Aviv, on the application of Dattner, ordered dissolution of the partnership between Dattner and the present Petitioner. Subsequently the Petitioner and Dattner came to an agreement with regard to their disputes and by virtue of a contract dated 16th January, 1944, the present Petitioner acquired or bought over the share of Mr. Dattner in all the assets in Palestine of the said partnership and thereby became the sole owner of all the goods belonging to the firm including those retained by the Respondent. On 21st March, 1944, Petitioner's then advocate wrote to the Respondent informing him of the dissolution and enclosing a document signed by Dattner confirming the fact that the Petitioner had acquired his share of the partnership and assets. On 3rd April, 1944, Respondent sent a formal reply stating that the matter was receiving attention. On 6th June, 1944, Petitioner was served with a copy of a Notice of Requisition by the Respondent whereby the latter, purporting to act in exercise of the powers vested in the High Commissioner by Regulation 51 of the Defence Regulations, 1939, and allegedly delegated to the Respondent, requisitioned a quantity of 14,354 yards of woollen cloth for ladies' dresses and 435 yards of woollen cloth for men's suits. Simultaneously with the aforesaid Notice of Requisition the Petitioner was given a permit to possess a quantity of 1481 yards of woollen cloth for goods which amount is said to constitute the remainder of the woollen cloth belonging to the Petitioner and certain quantities of English khaki and a small quantity of other cloth. The Petitioner alleges that the quantity of woollen cloth requisitioned represents about 90% of the whole stock of the Petitioner. In March, 1944, it is said that Theodor Dresjuk received from the Respondent a permit to purchase 2200 yards of woollen cloth from the Petitioner's stock but that he did not receive the same. The submission of the Petitioner is that the Respondent arbitrarily exercised his discretion in making this requisition inasmuch as his motive for this requisitioning was not to secure the maintenance of supplies necessary to the life of the community but to punish the Petitioner for the refusal of the firm Dattner and Rosenzweig to deliver goods to Dresjuk and mainly to punish the Petitioner for the same offences in respect of which he had already been sentenced by the District Court

of Tel-Aviv, although that Court had refused to order confiscation of the goods in question. It is also submitted that, in consequence of the said requisition, Petitioner will be unable to carry on his business as a dealer in cloth because his main stock of goods has been taken from him and he has no prospect of obtaining similar goods in the near future. The Respondent in his affidavit has declared that the Petitioner in his individual capacity was never licensed to deal in cloth under the Defence (Control of Cloth) Order, 1942, and that, although he applied for such a licence on the 30th May, 1944, and again on the 17th July, 1944, such application was refused. The firm of Dattner and Rosenzweig were at one time licensed to deal in cloth but their licence expired on 30th June, 1943, and has never been renewed. The Freezing Order was issued merely because the Respondent had reason to believe that the cloth would, if disposed of, be used for the purpose of profiteering and possibly other illegal purposes and not in accordance with the Respondent's policy of having cloth put on the lawful market for sale at a reasonable price. The Respondent says that he was prepared to issue permits to the firm authorising them to sell their cloth to purchasers approved by him or to Government provided that the sale price would not exceed their cost price plus a reasonable profit. He denies that he issued the direction merely because of the refusal of the firm to sell some goods to Mr. Dresjuk. In his affidavit he refers to the action of the Petitioner which led to his conviction for removing a greater portion of the cloth in flagrant defiance of the controller's direction to a secret place of storing. The Respondent believes that goods were removed by the Petitioner with the object of preventing the exercise of control by Government over such goods and in paragraphs 7 and 8 of the Respondent's affidavit certain facts are set out in support of this suggestion. The reason why the Respondent did not deliver physical possession of the goods after the Criminal Court had refused to order confiscation was that the licence of the firm to deal in cloth had expired on the 30th June, 1943, and was not renewed and that it would, therefore, have been illegal for the firm to take possession without a permit (see paragraph 5(1) of the Defence (Control of Cloth) Order, 1942. The Respondent denies the Petitioner's allegation that he exercised his discretion in requisitioning the goods in an arbitrary manner and says that his sole motive in ordering and making the requisition was to maintain supplies essential for the life of the community. He also denies that he was affected by any desire to punish the Petitioner for an alleged refusal to deliver certain goods to Mr. Dresjuk and he denies that he wanted further to punish the Pe-

titioner for the offence in respect of which he had already been convicted by the District Court of Tel-Aviv and he denies that the Petitioner is unable to carry on his business as a dealer in cloth because of the requisition.

Before I deal with the contentions of the Petitioner's advocate and with his criticisms of the Respondent's evidence and answers in Court in cross-examination, I think it will be well if I set out the authorities relied on by the Petitioner's advocate on the one hand and by the learned Acting Solicitor General (Mr. Hogan) on the other.

Abcarius Bey, for the Petitioner, referred to Section 7(d) * of the Courts Ordinance and to H. C. 119/43, P. L. R. Vol. 11, p. 12 and to H. C. 30/ & 31/1942, Levanon's Current Law Reports, Vol. 11, page 164 and to Carltona Ltd. *v.* Commissioner of Works (1943), 2 All England Reports, p. 560.

The learned Acting Solicitor General referred to Section 3 Crown Actions Ordinance, the Carltona case, the Point of Ayr Collieries *v.* Lloyd George (1943), 2 All England Reports, p. 546; H. C. 78/39, Vol. 7, P. L. R. p. 43; H. C. 119/43, P. L. R. Vol. 11, p. 12 and to the definition of "*bona fide*" in Stroud's Judicial Dictionary and to Conway *v.* Stocks, "Weekly Notes" of 24th April, 1943, p. 96 and to Progressive Supply Co. *v.* Dalton L. R. (Chancery) March, 1943, p. 54.

Mr. Hogan said that he had not been able to come across any case where the Court had interfered with an order made by a controller on the ground that it was not made in good faith; but he said that the principle to be deduced from all the decided cases, at least by implication, seems to be that the Court *would* interfere if the subject could establish affirmatively that the order had not been made in good faith. Mr. Hogan, however, said that the Petitioner must prove affirmatively that a Government Official had acted dishonestly and not merely arbitrarily. I quite agree that it is not sufficient to prove that the official has acted arbitrarily but I am not so sure that it is necessary to go so far as to require the Petitioner to prove that a Government Official has acted dishonestly if that word is used in its ordinary sense. I prefer to rely on what one finds in decided cases. I do not think that it is necessary to lay down any general proposition or to give a general definition of *mala fide*. The Court in each case can come to its own conclusion on the facts as to whether the existence of *mala fides* has or has not been proved. I again refer to H. C. 119/43, P. L. R. Vol. 11, p. 12.

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* Should be: 7(b). (*Ed.*)

I now wish to deal with the submission of the Crown that the Petitioner has an alternative remedy and could have raised an action under Section 3 of the Crown Actions Ordinance in the District Court of Tel-Aviv for return of goods. This is not altogether an easy point to decide but I am inclined to agree with Abcarius Bey when he says that, if his client were to sue in the District Court, that Court might hold that it is not entitled to interfere with the order of requisition or with the discretion of the Controller of Light Industries and I am also impressed by the reference to Section 7(d) * of the Courts Ordinance. I think on the whole that the Petitioner was and is entitled to come to this Court.

I now wish to deal with the arguments of Abcarius Bey which arguments were designed to show that from the evidence of the Respondent the Court must conclude that he made this order of requisition in bad faith. Abcarius Bey has referred to the previous conduct in this matter of the Respondent and he argues that, if one looks at all the exhibits, it is clear that for some reason the Controller, or someone in his Department, who influenced the controller, wished to favour this man Dresjuk. Abcarius Bey, however, says that the Controller was in contempt of the order of the Criminal Court in not returning to the partnership that part of the partnership goods which belonged to Dattner and he says that there is clear evidence of deliberate failure on the part of Government to abide by the undertaking given at the criminal trial by Crown Counsel (Mr. Rigby) when he withdrew the case against the partnership. Abcarius Bey points out that the Respondent never asked Crown Counsel for advice as to what action he should take, having regard to the clear order of the Judge at the criminal trial namely, "goods to be returned". He also says that the Respondent could have applied but did not apply to the Criminal Court for directions as to what it meant by the words "goods to be returned". He also says that, when one looks at Exhibit H, that is the permit which was given on the 12th May, 1944, to possess and store cloth, one realises that if the controller could issue a permit to possess and store, that is evidence of bad faith because it shows that he himself had no difficulty and knew that he could issue a permit to the Petitioner to possess and store cloth. What Abcarius Bey means is that once the Criminal Court had ordered the return of all the cloth, the Respondent should have had no difficulty whatsoever in knowing what to do to comply with the order of the Criminal Court and also to keep

* *Should be*: 7(b).

(*Ed.*)

within the law namely, all that he had to do was to issue a permit such as he did in fact issue in May, 1944, when he issued Exhibit H. The argument then proceeds that the Respondent's own difficulty appears to have been "How can I return to Dattner his half but still retain the other half?" The Controller then said to himself "I shall requisition the same quantity which I cannot confiscate". That is Abcarius Bey's argument. Abcarius Bey goes on to say that Exhibit H is a permit to possess and not to deal in cloth. Why then did the Controller not issue a permit such as Exhibit H in respect of the goods which the Criminal Court had ordered to be returned? The argument proceeds that, as recently as October, 1943, the Controller was prepared to return Dattner's share so that this is proof of the fact that in October, 1943, the controller did not require this woollen cloth for distribution to the Public.

Having regard to the authorities (including cases decided by the Court of Appeal in England) cited to me, I conclude that, unless the Petitioner has affirmatively proved that the Respondent did, when he made the requisition order in question, in fact act *mala fide*, the order *nisi* must be discharged. What is *mala fides?* Is it, as the learned Acting Solicitor General has contended, equivalent to acting dishonestly? As to this, it seems to me undesirable to discuss the dictionary meaning of words. I shall, however, merely say that, in order to satisfy me that the Respondent has acted *mala fide*, the Petitioner must prove that the Respondent (a) did not reasonably require the requisitioned articles for his policy and scheme of maintaining supplies essential to the life of the community and (b) that he does not intend to use the goods requisitioned for the purposes mentioned in (a).

In my view, the Petitioner has succeeded in proving neither of those two matters. Had the Petitioner been able to prove either of those matters it might well be that the past history of the relations between parties would have afforded proof of motive and thus have shown the presence of *mala fides;* but, as he has failed to prove either of those two matters, I feel that, even if the Petitioner is right in saying that the action of the Respondent in refraining from handing back the Petitioner's woollen goods immediately after the conviction in the criminal case was improper, the Petitioner cannot succeed in the present proceedings notwithstanding the able and exhaustive argument of Abcarius Bey, who has urged all that he could on behalf of the Petitioner. The rule *nisi* is accordingly discharged. The Petitioner must pay the Respondent's costs of these proceedings which I assess at LP. 10 (fixed or inclusive costs).

Given this 26th day of September, 1944.

Abcarius Bey intimates that his client intends to apply for special leave to appeal to His Majesty in Council.

British Puisne Judge.

CRIMINAL APPEAL No. 135/44.

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

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

IN THE APPEAL OF :—

Michal Korycki. APPELLANT.

v.

The Attorney General. RESPONDENT.

Poor prisoners — Poor Prisoners' Defence Rules, r. 7 — Discretion of trial Judge to assign advocate.

Criminal procedure — Appointment of advocate by the Court — Jurisdiction of Court — Defence (Judicial) Regulations (No. 2) 1942, reg. 3 — Election under sec. 10 of the Courts Ord. — Evidence.

Appeal from the judgment of the Court of Criminal Assize, sitting at Tel-Aviv, dated 11th October, 1944, in Criminal Assize Case No. 33/44, whereby Appellant was convicted of murder, contrary to section 214(b) and 215 of the Criminal Code Ordinance, 1936, and sentenced to death, dismissed:—

(*Preliminary Order*): The discretion conferred upon the trial Judge by r. 7 of the Poor Prisoners' Defence Rules to assign an advocate to the accused includes the power to change the advocate at any time up to the time of hearing of the appeal by the Court of Appeal.

The right of election under sec. 10 of the Courts Ordinance has been superseded by the Defence (Judicial) Regulations (Reg. 3) which provide for the constitution of Courts of Assize.

(*A. M. A.*)

ANNOTATIONS:

1. The preliminary ruling seems to be in accordance with the decision in CR. A. 81/38 (1938, 2 S. C. J. 111; 4, Ct. L. R. 160; P. P. 26.10.38).

2. On the constitution of the Court of Criminal Assize under reg. 3 of the Defence (Judicial) Regulations (No. 2), 1942, see P. C. 66/43 (11, P. L. R. 237; *ante*, p. 465) and note 6 at p. 466, *ante*.

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

ORDER.

In our opinion the powers conferred by Rule 7 of the Poor Prisoners' Defence Rules should be interpreted as conferring on the trial Judge a continuing power to exercise his discretion to assign an advocate, or if he deems fit to do so to change the advocate so assigned at any time up to the time of hearing of the appeal by the Appeal Court.

The case is adjourned to enable the trial Judge to exercise his discretion in such manner as he may deem proper in the light of this opinion.

Given this 1st day of November, 1944.

Chief Justice.

JUDGMENT.

This is an appeal from the Court of Criminal Assize sitting at Tel-Aviv, in which the Accused was convicted of murder and sentenced to death.

The Accused was represented by counsel at the trial Court, but in this Court he appears in person. In this connection a report by the trial Judge is attached to the judgment.

Only two points were raised in the appeal — the first concerned the jurisdiction of the Court of trial. The Accused argued that he was entitled to be tried by a British Military Court; or, alternatively, that he was entitled to be tried by a British Judge of the Supreme Court sitting alone. The Court of Assize was duly constituted under the provisions of regulation 3 of the Defence (Judicial) Regulations (No. 2) of 1942, and it was, therefore, lawfully empowered to try him.

Turning now to the issue as to whether he was entitled to elect under the provisions of section 10 of the Courts Ordinance 1940. The proviso to that section enables an accused person to elect to be tried by a British Judge sitting alone. That section has, however, been superseded by the Defence Regulations to which we have referred, in which there is no such proviso. The Accused, therefore, had no right of election.

The only other issue raised by the Accused concerned the evidence adduced in the trial Court. He has asked this Court to reject that evidence in favour of his own story. He has invited attention to alleged discrepancies in the evidence of the witnesses. Now, in almost every trial one expects to find discrepancies in detail of evidence, but in this case even such discrepancies seem to be singularly lacking. The learned trial Judges most carefully analyzed the evidence, and they

accepted the story of the Crown witnesses. We see no reason to differ from the conclusion they arrived at in this respect. His defence in the trial Court was in substance a defence of drunkenness. Now, it is unnecessary to examine the legal consequences of a defence of drunkenness because the Court, in fact, found that the Accused was not drunk, and there was overwhelming evidence to support this finding. There was equally overwhelming evidence to support the finding of premeditation.

For these reasons the appeal must be dismissed.

Delivered this 24th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 404/43.

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

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

IN THE APPEAL OF:—

Mahmoud Hussein Ali. APPELLANT.

v.

Mubarak Mahmoud Saleh & an. RESPONDENTS.

Specific performance — Jurisdiction of Courts — Magistrate's Court sitting as a Land Court may decree specific performance — Irrevocable power of attorney considered as agreement to sell.

Appeal from the judgment of the Magistrate's Court of Nablus, sitting as a Land Court, Land Case No. 14/43, dismissed:—

1. A power of attorney given in connection with land may constitute a contract to sell and establish an equitable title.
2. A Magistrate's Court, sitting as a Land Court, can decree specific performance of a contract to buy land.

(A. M. A.)

ANNOTATIONS:

1. Note that it was held in C. A. 153/41 (8, P. L. R. 377; 1941, S. C. J. 398; 10, Ct. L. R. 101) that "this particular claim for specific performance is within the jurisdiction of the District Court since it is not a claim, strictly speaking, to the ownership of the land, but is an action to obtain the fulfilment of a contract". See also note 2 to that case in S. C. J. and *cf.* C. A. 207/42 (9, P. L. R. 794; 1942, S. C. J. 861) and note 2 in S. C. J.

2. "An irrevocable power of attorney has the same effect as a sale" — C. A. 90/43 (10, P. L. R. 225; 1943, A. L. R. 326).

(H. K.)

FOR APPELLANT: Nimer.

FOR RESPONDENTS: Zu'eiter.

JUDGMENT.

In this case the main point taken by the Appellant, indeed it was the only point, was that the Magistrate's Court, sitting as a Land Court had no power to grant a decree of specific performance. The power of attorney which was produced and which was not called in question by the Appellant was duly executed before a Notary Public. We agree with the Magistrate that that power of attorney constituted a contract to sell and established an equitable title to the land.

We are, therefore, of the opinion that the Magistrate sitting as a Land Court could decree specific performance.

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

Delivered this 3rd day of July, 1944.

Chief Justice.

CRIMINAL APPEAL No. 134/44.

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

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

IN THE APPEAL OF :—

Saleh Abdel Aziz el Astal. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Different charges in respect of same commodity.

Appeal from the judgment of the District Court of Jaffa, sitting as a Court of Appeal, dated 23.7.44, in Criminal Appeal No. 30/44, dismissed:—

There is nothing to prohibit the laying of two different charges in respect of the same commodity.

(*A. M. A.*)

ANNOTATIONS: The Appellant was charged with (1) dealing in eggs without a licence contrary to the Wholesale and Retail Dealing in Controlled Articles (Limitation) Order, 1941, and (2) moving of eggs without a permit contrary to the Food Control (Table Eggs) Order (No. 2), 1942.

(*H. K.*)

FOR APPELLANT: Barbari.

FOR RESPONDENT: Lamm.

JUDGMENT.

In this case the only point raised is that the Accused was charged with two different charges in respect of the same commodity. There is nothing in law which prohibits this and the appeal must, therefore, be dismissed.

Delivered this 15th day of November, 1944.

Chief Justice.

HIGH COURT No. 96/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF:—

Faheem Suleiman Daoud. PETITIONER.

v.

1. Chief Execution Officer, District Court, Haifa,
2. Fahimeh, daughter of Kurayyem Asad & 2 ors. RESPONDENTS.

Sale in execution — Defects in sale — Order of competent Court may be obtained before final sale.

Return to an order *nisi*, issued on the 26th day of July, 1944, directed to the first Respondent, calling upon him to show cause, if any, why his order, dated the 28th June, 1944, in Execution File No. 275/43, Acre Execution Office, should not be set aside and why the sale proceedings in the said file should not be stayed pending application by the Respondents Nos. 2, 3 and 4, to prove their claim to the lands in issue (described in the attached petition) and alternatively why the notices of sale should not accord with the report of taking of possession and state the true facts of Petitioner's possession of the lands; order *nisi* discharged:—

Stay of proceedings not granted where the debtor has time, until final sale order, to assert his rights in the competent Court.

(*A. M. A.*)

ANNOTATIONS:

1. The jurisdiction of the High Court is discretionary and will not be exercised unless it is necessary for the administration of justice; see H. C. 147/42 (10, P. L. R. 7; 1943, A. L. R. 35) and second paragraph of annotations in A. L. R.

2. On misdescription of property in execution proceedings see H. C. 57/42 (1942, S. C. J. 443; 12, Ct. L. R. 116) and note; *cf.* H. C. 95/44 (*post*).

(*H. K.*)

FOR PETITIONER: Elia.

FOR RESPONDENTS: Nos. 1 & 3 — Absent — served.
No. 2 — H. Atalla.
No. 4 — G. Salah.

ORDER.

This is a return to a rule *nisi,* calling upon the first Respondent to show cause why his order, dated 28th June, 1944, in Execution file No. 275/43, Acre, should not be set aside. I do not consider that it is necessary to set out the facts of the case further than to say that the lands in question are being sold in execution for non-payment of a mortgage. The Petitioner alleges collusion between the mortgagor and mortgagee and also other irregularities — and he asks this Court to grant a stay of execution to enable the Respondents Nos. 2, 3 and 4 to prove their claim to the lands in question and that alternatively the notice of sale should indicate that vacant possession is not available. The order of the Chief Execution Officer merely directs execution to proceed, as the property is not likely to reach the stage of Final Sale for some considerable time. I see no reason to interfere with the order of the Chief Execution Officer of 28.6.44. There seems to be no hardship in his order nor is there any apparent reason why at present the mortgagee should have his sale proceedings delayed. Either party have ample time to apply to an appropriate Court should they so desire. It seems to me advisable however that all notices of sale should contain some reference as to whether vacant possession can be given or not. Order *nisi* is discharged. Inclusive costs of LP. 15.—.

Given this 7th day of November, 1944.

A/British Puisne Judge.

HIGH COURT No. 95/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF :—

Ata A'ish & 11 ors. PETITIONERS.

v.

1. The Chief Execution Officer, District Court, Tel-Aviv,
2. Mordekhay Yousef Khajahinoff & an. RESPONDENTS.

Sale in execution — Possession — Notices of sale — Misdescription — Time to apply.

Return to a rule *nisi*, issued on the 26th July, 1944, directed to the first Respondent, calling upon him to show cause why his order, dated the 16th of June, 1944, referring to a former order, dated 28th April, 1944, in Execution file No. 13714/38, Execution Office, Tel-Aviv, should not be set aside, and why Respondents Nos. 2 and 3 should not be ordered to go to the Land Court to prove their allegations and claims to the land in dispute, or, alternatively, that notice be given to prospective purchasers that Petitioners are in possession of this land and that no vacant possession could be given to such purchasers; order made absolute:—

> Order of stay granted to enable either party to apply to the competent Court, where the notice gave boundaries which differed from the *kushan* entries and had not been checked, and where the fact that vacant possession could not be given was not set out in the notice.

(*A. M. A.*)

ANNOTATIONS: *Cf.* H. C. 96/44 (*ante*) and note 2.

(*H. K.*)

FOR PETITIONER: Elia & Hamudi.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — In person.
No. 3 — Dunkelblum & Pratt.

ORDER.

This is a return to an order *nisi*, calling upon the first Respondent to show cause why his order, dated the 16th June, 1944, referring to a former order dated 28th April, 1944, in Execution file No. 13714/38, in the Execution Office of Tel-Aviv, should not be set aside and why Respondents Nos. 2 and 3 should not be ordered to go to the Land Court to prove their allegations and claims to the land in dispute, or, alternatively, that notice be given to prospective purchasers that Petitioners are in possession of this land and that no vacant possession could be given to such purchasers.

It appears that an order of sale of this property was originally obtained on the 4th November, 1938, in Execution file No. 13714/38 of Tel-Aviv, and possession was taken on 5th June, 1939. From the Execution file it is evident that the Execution Officer had to visit the locality several times before identifying the land. In the report of possession of 5th June, 1939, the Execution Officer states that the Petitioners were in possession and object to his taking possession. The same was published in the Palestine *Gazette* No. 912 of 24th August, 1939, at p. 875, and under Nos. 12 and 13 the boundaries are set out as follows:—

"12. *Boundaries as set out in the Extract of the Land Registry.*	13. *Actual Boundaries.*
N. Numan el Jaouni,	N. Athaj Zaker Abd Schnak and Co.
S. Karem el Karmnieh,	S. Ismail Aluajar,
E. Heirs of Abdel Rahman Jaouni,	E. Ata Aish & Coy. of Lifta,
W. Karem el Imari.	W. Govt. Garden and its continuance — Leib Silberstein & Reichtiler."

Apparently no further steps were taken in execution until a fresh order of sale was obtained on the 3rd March, 1944, and alleged possession carried out on the 29th March after considerable opposition and order by force. There is a report of the Execution Officer of the 17th March, 1944, when possession proceedings could not be carried out and a report of the 28th March, 1944, when the alleged possession took place. The Petitioners applied to the Chief Execution Officer, Tel-Aviv, for a stay of execution on the 28th April, 1944. Stay was refused and the Petitioners were informed that they had ample time to establish their alleged title before a competent Court and obtain a stay from that Court. The present petition is made against that order.

It appears to me, taking into consideration the execution proceedings in 1939, and the fact that what is described in the notice of sale in the Palestine *Gazette* as the actual boundaries are so completely different from those described in the *kushan* and further it is by no means clear from the Execution Officer's report of 28th March, 1944, that the boundaries were ever checked and the land identified. It is moreover stated that the land is plain land ploughed and planted by Ata Ayesh and others. Under the circumstances to give vacant possession does not seem possible and a notice of sale should contain some reference to this fact.

I must, therefore, order that the execution in Execution file No. 13714/38 in respect of these present proceedings is stayed for one month to enable either party to apply to the appropriate Court to establish their claims. There are no costs. The order *nisi* is made absolute.

Given this 13th day of October, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 409/43.

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

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

IN THE APPEAL OF :—

Ali Ahmad Ibrahim. APPELLANT.

v.

Shihadeh Ahmad Ibrahim. RESPONDENT.

Correction of land registers — Correction applied after Land Settlement under sec. 66 L. (S. of T.) Ord. — Instances when remedy may be applied for.

Appeal from the judgment of the Land Court of Jaffa, Land Case No. 20/38, dismissed:—

Sec. 66 of the Land (Settlement of Title) Ord. cannot be extended beyond the two cases for which it provides, *viz.*:—

Where the registration has been obtained by fraud, and
Where a right recorded in the existing registers has been omitted or incorrectly set out in the register.

(*A. M. A.*)

ANNOTATIONS: See C. A. 106/43 (1943, A. L. R. 188) and note 3 thereto on the strict requirements of sec. 66 of the Land (S. of T.) Ordinance.

(*H. K.*)

APPELLANT : In person.

RESPONDENT : In person.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jaffa. The action was brought under Section 66 of the Land (Settlement of Title) Ordinance. This section provides for rectification of the register in two cases only, (a) where the registration has been obtained by fraud, and (b) where a right recorded in the existing registers has been omitted or incorrectly set out in the register.

The Appellant has neither alleged fraud nor that he had any right recorded in a register existing prior to the settlement. He merely alleged that a certificate of succession was wrongly interpreted by the Settlement Officer when giving his decision, which decision was duly given effect to in the new register, and the learned Relieving President found accordingly that Appellant's claim disclosed no cause of action.

We agree with the judgment of the learned Relieving President, and the appeal is, therefore, dismissed with LP. 1 inclusive costs.

Delivered this 11th day of July, 1944.

Chief Justice.

CIVIL APPEAL No. 103/44.

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

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

IN THE APPEAL OF:—

Abraham Goldstein & 7 ors. APPELLANTS.

v.

Zeidan Yousef ez-Zeidan & 5 ors. RESPONDENTS.

Title to land — Effect on purchasers of title obtained as the result of a forgery — Ratification of forgery — C. A. 43/39 — Judgment inter partes or in rem.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated the 28th of January, 1944, in case No. 54/Daliyat el-Karmel, dismissed:—

Title may not pass as the result of a forgery. Ratification of the forgery may affect the question of damages but not title.

(*A. M. A.*)

REFERRED TO: C. A. 43/39 (6, P. L. R. 344; 1939, S. C. J. 315; 6, Ct. L. R. 53).

ANNOTATIONS :

1. See C. A. 43/39 (*supra*).
2. "A forgery is probably, as being void in its inception, incapable of ratification by the person whose name is forged though he may incur a liability on the instrument on the principle of estoppel." — Halsbury; Vol. 1, p. 230, para. 398.

(*H. K.*)

FOR APPELLANTS: Nos. 1—7 — Eliash and Weinshall.
No. 8 — Absent — served.

FOR RESPONDENTS: Abdul Hadi.

JUDGMENT.

This action concerns land in the Mount Carmel Range. It is of a highly speculative value, and when this fact was recognized it became the subject-matter of shady dealings. The negotiations which have culminated in this litigation were ushered in by a forged power-of-attorney and a forged certificate of succession produced by Ahmed Zeidan, one of the heirs of Yusef Zeidan, the original Arab holder of the land in question.

It is undoubtedly a fact that many people have suffered injury by these forgeries. It may well be that the various victims, if indeed any are left with clean hands themselves, have good causes of action in

this Court. One at least, Peter Deuell, has already successfully sought redress. Indeed, the whole unsavoury history may open a wide field for litigation. I emphasize this aspect of the case at the outset, because I cannot help thinking that at times, during the course of the able arguments, it tended to obscure the true issue. Now what is that issue. It is set out lucidly in paragraph 5 of the grounds of appeal. It is a prayer that a judgment be set aside and that land be registered in the name of the Appellants; in other words, that the title to the land be given to the Appellants.

Having warned myself against the pitfalls, I proceed to state the facts. The land in dispute comprises an area of about 130 *dunums*. It falls within the boundaries of an old registration in the locality of "Um esh-Shukaf". It was originally registered in the name of Yusef Zeidan. On his death it descended to his heirs. It was at this point that the forgery started.

One of the heirs, Ahmad Zeidan, forged the names of the other heirs on a power-of-attorney and a certificate of succession. By means of these forged documents the lands were transferred, or were purported to be transferred, to one Mascheaff. Criminal proceedings were taken in respect of the forgery, amongst the Accused being Mascheaff. Several persons were convicted, but Mascheaff was acquitted. Despite these criminal proceedings, Mascheaff purported to transfer the land to one, Peter Deuell. When Peter Deuell became aware of the shady transactions to which I have referred, he sued Mascheaff for the return of the money he had paid him for the transfer. He was successful in the District Court of Haifa, and he was also successful in the Court of Appeal. I will return to those judgments in a moment. As a result of the case between Peter Deuell and Mascheaff, the former returned the title deeds to Mascheaff, on the return to him of the purchase money which the Court had awarded to him. I should mention that the land was held on behalf of Peter Deuell by two trustees; one of the trustees has died, and no action has yet been taken by his executors, but the other trustee, Eichweld, did transfer the land back to Mascheaff, who again, despite all the doubts which the Court proceedings must have thrown on the title, managed to sell the land to Appellants Nos. 1 to 7.

Now what emerges from all this. Simply this: that the root of title of all the Appellants is derived one way or another from Mascheaff, — they must stand or fall by his title.

Let me now examine this title. Mr. Eliash took this power-of-attorney and examined the signatures on it. Painstakingly he undoubt-

edly succeeded in involving all the Respondents in the signatures either by their willing act or by their willing acquiescence or ratification later on. There was no question as to the genuineness of the signature of Hana, who is not a party to this case, and Mohanna. Kablan at a later stage confirmed his signature which originally had been forged, and this confirmation, argue the Appellants, commits his sons, Hana and Massoud. The remainder are committed by the later agreement they made with Mascheaff. They are therefore, says Mr. Eliash, bound by this power-of-attorney, despite its original taint of forgery. They may be bound in the sense that they may be liable to pay damages. As to this I make no pronouncement, but the real issue still remains — did this tainted document pass title.

I will now examine the part Mascheaff played. Much has been made of his acquittal. Mr. Eliash says he was the victim of a trap. I cannot find that the Magistrate's judgment went anything like so far as that in his favour. Suffice to say he was acquitted, and he is entitled to that benefit.

But the District Court and the Supreme Court formed a very different opinion of Mascheaff. Here is what the District Court said:—

> "We also find that it" (that is the representations made by Mascheaff to Peter Deuell) "did deceive the Plaintiff and in fact all his fellow investors and associates. Then we have admitted the record in the Magistrate's case 7558/35, and on this authority of *In re* Crippen, 1911, page 108, we accept this as proof against the Defendant (Mascheaff) who, we are satisfied, was a Defendant thereto; that the power-of-attorney and the certificate of succession on which transfer to the Plaintiff depended were forged and false. The transfer was worthless."

On appeal to the Appeal Court in Civil Appeal No. 43/39, 6 P. L. R., p. 344, the judgment states as follows:—

> "The District Court were fully entitled to rely on the judgment of the Criminal Court finding that the power-of-attorney and the certificate of succession were forged. It was a judgment of a Court competent and entitled to deal with such a question, and the Appellant (Mascheaff) had in fact been a party to that criminal case and was aware of the fraud though he was acquitted of the charges made against him, whilst several of his co-defendants were convicted. This in itself would be sufficient to vitiate the contract."

Here then is a decision of the Supreme Court of Palestine which in effect holds that a contract made by Mascheaff in respect of this land is vitiated because of the forged power-of-attorney and the forged certificate of succession.

Now, as I have indicated, this Court, in this case at all events, may

not be concerned with the morals of Mr. Mascheaff, but it is concerned with his title. Whether he has a cause of action against the people who, he alleges, deceived him, is not for this Court to say. I accept the decision, as I read it, of the Supreme Court in C. A. No. 43/39, that he has no title to this land. Mr. Eliash, with much ingenuity, argued that Civil Appeal 43/39 was a simple issue between Peter Deuell and Mascheaff, but a careful analysis of both the judgments of the District Court and of the Supreme Court leaves no doubt in my mind on this point. In my opinion, the judges in that case decided not merely the issue of the return of money between Peter Deuell and Mascheaff, but they went right back to examine the title of Mascheaff and they came to the conclusion that that title was worthless, and their judgment ordering the money to be returned to Peter Deuell flowed solely from that conclusion. The title of Mascheaff is still worthless, and the Appellants have derived no legal title from him.

It follows that the appeal must be dismissed, with costs on the lower scale to include LP. 20 advocate's attendance fee.

Delivered this 26th day of October, 1944.

Chief Justice.

CRIMINAL APPEAL No. 83/44.

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

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

IN THE APPEAL OF:—

Nimer Abdul Muttaleb Kawasmeh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Information on charge in respect of which there was no committal — T. U. I. Ord., sec. 28(5), (8) *— Powers of Attorney General — Plea of guilty on one charge — No conviction for stealing and receiving — Charges contrary to secs.* 297(*a*), 309 *C. C. O.*

Appeal from the judgment of the District Court of Jerusalem, dated the 20th June, 1944, in Criminal Case No. 67/44, whereby Appellant was convicted on two charges of offences against secs. 297(a) and 309 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment; appeal partly allowed and sentence reduced:—

1. The Attorney General or his representative may, after committal and

after the information has been submitted and served upon the accused, amend or replace the information.

2. A person cannot be convicted both of stealing and of receiving the same articles.

(*A. M. A.*)

ANNOTATIONS :

1. Note that sec. 28(8) of the Criminal Procedure (T. U. I.) Ordinance is now replaced by sec. 28(9) as enacted in the Amendment Ordinance No. 31 of 1944.

2. "Where an indictment charges the same person with both stealing and receiving, strictly speaking he cannot be convicted of both offences on the same facts, but such a verdict may be treated as a general verdict of guilty on the indictment if the conviction does not affect the sentence passed (R. *v.* Lockett, (1914) 2 K. B. 720, C. C. A.).": Halsbury, Vol. 13, p. 551, footnote (g).

(*H. K.*)

FOR APPELLANT: Goitein and Ousta.

FOR RESPONDENT: Assistant Government Advocate — ('Aqel).

JUDGMENT.

This is an appeal against a judgment of the District Court, Jerusalem, convicting the Accused on two charges contrary to sections 297(a) and 309 of the Criminal Code Ordinance, 1936. The Accused was charged with two others and was committed by the Magistrate on 28.3.44 for breaking into a building and committing theft therein, contrary to section 297(a) of the Criminal Code Ordinance.

This information was served upon the Accused, but according to the statement of the Appellant's counsel, when the case came up for trial, a further information had been filed which included a charge of receiving stolen property, against Accused No. 2, the present Appellant.

It was argued by Mr. Goitein that the second information was bad because there was no committal order made by the Attorney General or the Magistrate as regards the charge of receiving stolen property under section 28(5) of the Criminal Procedure (Trial Upon Information) Ordinance. With this contention we do not agree. It is open to the Attorney General or his representative under section 28(8) to replace or amend an information once it has been submitted and served upon the Accused. A further objection was raised, namely that there is only evidence against the Accused in respect of receiving stolen property and that after the evidence was heard against the Appellant Mr. Ousta, for the Accused, asked the Court for half an hour's adjournment to consult with his client. When they came back to the Court the Accused pleaded guilty. It is quite clear from the whole record of the case that this plea was intended only to be in respect of receiving stolen property. There is a further point, namely, although

we see from the record that the Accused was convicted on his plea of guilty for breaking and receiving, nevertheless by giving him a lesser sentence, the Court considered that they were dealing only with the charge of receiving stolen property.

It is further submitted by Mr. Goitein that in any case the Court could not have convicted Accused of the two offences, namely breaking into and stealing, and receiving, at the same time. With this contention we agree. We are of the opinion that from the record it appears that the Court, having passed on the Accused a lesser sentence, had in mind that they were sentencing him only for the second offence, namely that of receiving.

We, therefore, quash the conviction in respect of the first charge of breaking into and confirm the conviction of receiving. With regard to the sentence we vary the sentence to one of two years' imprisonment.

Delivered this 18th day of July, 1944.

A/British Puisne Judge.

HIGH COURT No. 70/44.

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

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

IN THE APPLICATION OF:—

Haj Abdul Rahman Hijazi. PETITIONER.

v.

Assistant District Commissioner, Hebron District. RESPONDENT.

Village ghaffirs — Police Ordinance, sec. 23 *— Construction — "Village", "town" — Administrative Divisions (Am.) Proclamation,* 1943, *Schedule, and Administrative Divisions Proclamation,* 1939, *sec.* 3.

Return to an order *nisi*, calling upon the Respondent to show cause why his order of 1.5.44, appointing twenty *ghaffirs* for service in Hebron for the protection of security *etc.* in and around Hebron and ordering the salaries of those *ghaffirs* to be collected from the male adult inhabitants of the Qazzazin Quarter of Hebron should not be set aside; and why the amounts already collected from Petitioner should not be refunded; order *nisi* discharged:—

The words "village" and "town" are synonymous for the purpose of sec. 23 of the Police Ordinance.

(*A. M. A.*)

ANNOTATIONS: It seems clear from the Administrative Divisions Proclamation made under Art. 11 of the Palestine Order in Council that in the absence of a special definition to the contrary, all places in Palestine are "villages"; see the schedule to the Proclamation which describes Haifa, Jaffa, Jerusalem and Tel-Aviv also as "villages". *Cf.* also definition of "village" in sec. 2 of the Land (S. of T.) Ordinance. For definitions which specifically exclude municipal or local council areas from the term "village" see sec. 2 of the Village Administration Ordinance, 1944, and Reg. 2 of the Defence (Village Committees) Regulations, 1942.

(*H. K.*)

FOR PETITIONER: Kamal.

FOR RESPONDENT: Assistant Government Advocate — (Wa'ary).

ORDER.

In this return to an order *nisi* the only point taken by the Petitioner was that as Hebron was a town and not a village, Section 23 of the Police Ordinance does not apply. The term village is not defined but we are of opinion that for the purposes of the Ordinance the terms town and village may be regarded as synonymous. Furthermore we observe that the Schedule to the Administrative Divisions (Amendment) Proclamation, 1943, read together with Section 3 of the Administrative Divisions Proclamation, 1939, describes Hebron as a village. For these reasons the order must be discharged with LP. 5 inclusive costs.

Given this 13th day of July, 1944.

Chief Justice.

CIVIL APPEAL No. 120/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Wolf Landau & an., APPELLANTS.

v.

The Custodian of Enemy Property. RESPONDENT.

Construction of contracts — Res judicata — New Brunswick Rly. Co., C. A. 9/39 — Point not taken in lower Court may not be raised on appeal — C. P. R., r. 350 — Procedure — Failure to decide all issues — C. A. 118/40; C. A. 230/41; C. A. 94/43 — Currency — Payment

of foreign debt in local currency — Whether finding of Court arrived at independently of other proceedings.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 29th of February, 1944, in Civil Case No. 338/43, dismissed:—

There can be *res judicata* in connection with the construction of contracts.

(*A. M. A.*)

REFERRED TO: New Brunswick Railway Co. *v.* British and French Trust Corporation, (1939) A. C. 1, (1938) 4 All E. R. 747, 108 L. J. (K. B.) 115, 160 L. T. 137; C. A. 9/39 (6, P. L. R. 138; 1939, S. C. J. 104; 6, Ct. L. R. 205); C. A. 118/40 (7, P. L. R. 390; 1940, S. C. J. 204; 8, Ct. L. R. 41); C. A. 230/41 (9, P. L. R. 86; 1942, S. C. J. 115; 11, Ct. L. R. 145); C. A. 94/43 (1943, A. L. R. 152).

ANNOTATIONS:

1. It was contended by the Respondent, in both instances, that C. A. 9/39 had been decided *per incuriam* as the New Brunswick Rly. Co. case had been misapplied, and that the Court was bound by the construction placed on the contract in previous litigation.

Although the case was decided in favour of the Respondent on the facts, without finally dealing with the question of *res judicata*, the remark of Edwards, J., that "the speeches of their Lordships in the New Brunswick Rly. Co. case can be referred to for their terms", appears to bear out the contentions of the Respondent.

2. On failure to decide all issues see also C. A. 406/43 (*ante*, p. 563).

3. On the currency point *vide* P. C. 1/42 (10, P. L. R. 271; 1943, A. L. R. 408), H. C. 62/43 (10, P. L. R. 364; 1943, A. L. R. 418) and C. A. 398/43 (11, P. L. R. 286; *ante*, p. 358).

(*H. K.*)

FOR APPELLANTS: Eliash.

FOR RESPONDENT: Y. Frankel and Spitbaum.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel-Aviv, which Court had ordered the Appellant to pay LP. 799.687 mils, interest, costs, *etc.*, under an agreement made between the Appellants and the Union Textile S. A. of Lodz, in Poland.

The first Appellant owed money to the Union Textile (hereinafter referred to as the Company), and the first Appellant's wife, who is the second Appellant, guaranteed the payment of 17½% of the original debt, which amount the Company agreed to accept in full settlement on terms set out in the agreement (Exhibit B.). Issues were framed by a judge under Rule 138 of the Civil Procedure Rules, and the substantial ground of appeal is that the learned Trial Judge did not decide all the issues (see Civil Appeals 118/40, 230/41 & 94/43).

It seems that there had been previous litigation between the parties

arising out of failure to pay an instalment under the same agreement. The present Appellants were ordered to pay LP. 80.418 mils by the Magistrate's Court, Tel-Aviv, in Civil Case No. 7046/39, and the District Court of Tel-Aviv on appeal in Civil Appeal 181/41 confirmed the judgment of the Magistrate and the then Chief Justice (Mr. Gordon Smith, K. C.) in Civil Appeal 32/42, refused leave to appeal to this Court. The question whether clauses 5 and 6 of Exhibit B. were independent or concurrent obligations was before the Magistrate, and must have been considered by the District Court on appeal, and possibly also by the then Chief Justice. Nevertheless, the learned Relieving President, against whose judgment the present appeal has been lodged, held, in accordance with the rule in the New Brunswick Railway Company case (All England Law Reports (1938) Vol. 4, p. 747) cited with approval in Civil Appeal 9/39, P. L. R. Vol. 6, page 141, that he was at liberty to decide afresh, if need be, whether clauses 5 and 6 represented independent or concurrent obligations.

It will be convenient if I now set out clauses 5 and 6:—

> "5. Within one month after the payment of the first instalment out of the 32 instalments the Creditor shall return to the Debtor or to a person nominated by him the promissory notes enumerated in the Schedule attached hereto.
>
> 6. The Creditor shall on the day of execution of this agreement by the Creditor inform the Public Prosecutor in Lodz, that the complaint lodged by the Creditor against the Debtor has been withdrawn".

I also cite issues 3 and 8 as framed:—

> "3. Did the Union Textile Co. commit a breach of the agreement made between it and the Defendant especially by failing to comply with paragraphs 5 and 6 of the agreement and whether by that the Defendants were released from fulfilling the obligation under the contract?
>
> 8. Did the Defendants waive their right to claim that the Union Textile Co. should fulfil their obligations in accordance with paragraphs 5 and 6 of the agreement and whether has this firm committed a breach of contract in general?"

The learned Relieving President said, at page 4 of the typed copy of the judgment:—

> "It is open to me, then, to consider whether non-fulfilment of the undertakings in clauses 5 and 6, assuming such circumstance, would have the effect of releasing the Defendants from the performance of their obligations under the agreement. I may say that I have carefully considered all that has been put forward on their behalf and I have come to the conclusion that it would not. The question seems to have been very fully argued before the Court of first in-

> stance in the earlier case, as it has been here. I have no doubt it was again comprehensively developed before the District Court on the appeal upholding the decision of the Magistrate, and was laid before the learned Chief Justice, Gordon Smith, C. J., on the application for leave which was refused. I confess it reassures me to find judicial opinion all the one way when the point was tested before, and, I may add, I would be slow to fly in the face of such providential concurrence."

Mr. Frankel, who argued the appeal for the Respondent, although he did not require to lodge a cross-appeal, criticized the part of the judgment of the learned Relieving President which dealt with the New Brunswick Railway Company case. Mr. Frankel also submits that this Court, when deciding Civil Appeal 9/39, made too sweeping a statement when it said that "in any case the construction of a contract can never be the subject of *res judicata*". I do not wish to discuss this matter because the speeches of their Lordships in the New Brunswick Railway Company case can be referred to for their terms.

Dr. Eliash, for the Appellants, relying on the judgment in Civil Appeal No. 9/39, argued that the learned Relieving President (Judge Bourke) should have made a finding of his own on the question of clauses 5 and 6 of Exhibit B.; Dr. Eliash complains that the learned trial Judge did not do so but merely seemed to have approved of and adopted the finding of the Magistrate and of Judge Hubbard.

The true view, however, is that Judge Bourke made a definite finding with regard to clauses 5 and 6, which was adverse to the contention of the present Appellants. It may be a coincidence that his own view was likewise held by the other Courts, and it may also be that he was influenced by the unanimity in the other Courts; but nevertheless it is a finding of the nature contemplated by Rule 205, and I am not disposed to disturb it, nor am I disposed to remit the matter for the District Court to reconsider it or to give fuller reasons for the finding on that point.

Dr. Eliash has argued that the learned Relieving President was not justified in failing to consider issue No. 8, notwithstanding his views on the legal effect of clauses 5 and 6 of Exhibit B. As, however, he made a finding (which I do not think can be disturbed) to the effect that the agreement was not conditional on the performance by the creditors of the undertakings set out in clauses 5 and 6, I think that it was unnecessary for him to deal with issue No. 8. At the same time I think that it is always better for a Court of first instance to decide all the issues, because one can never tell in advance what view an appellate Court may take of a legal point arising out of one of the issues.

At the hearing before me Dr. Eliash raised another point, namely that the judge had ordered his clients to pay in Palestine pounds. This matter does not seem to have been argued in the Court below, and in the particular circumstances of this case I do not think that it can be raised now.

Dr. Eliash said that the Judicial Committee of the Privy Council recently held that sums in foreign currency should be converted into Palestine currency at the rate of exchange prevailing at the time of the breach, and that, therefore, the judgment should be altered so as to enable this to be done, and he says that I can make use of the powers given to me by Rule 350 of the Civil Procedure Rules, 1938. In my view, however, this is not a suitable case for the exercise by me of such powers, especially in view of Palestine *Gazette* (1940) Supplement No. 2, page 678, and Chitty on Contracts (19th Edition) pages 273 and 274.

In the result I find it unnecessary to remit the case.

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

Delivered this 27th day of October, 1944.

British Puisne Judge.

CIVIL APPEAL No. 102/44.

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

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

IN THE APPEAL OF:—

Moshe Feldberg. APPELLANT.

v.

Itzhaq Trachtengut. RESPONDENT.

Landlords and tenants — Verbal tenancy — Conditions of staying over — Rent Restrictions (Business Premises) Ord. — Evidence, inferences of fact — Findings of lower Court.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 29th February, 1944, in Civil Case No. 156/43, allowed:—

The Court of Appeal may upset the findings of the Court of trial if those findings are inconsistent with the facts.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 287/42 (1943, A. L. R. 225) and note 4.

(*H. K.*)

FOR APPELLANT: Polonsky & Nochimowsky.

FOR RESPONDENT: Levitzky.

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv. The District Court awarded Itzhaq Trachtengut LP. 270 in respect of rent due to him by one Moshe Feldberg, the Appellant in this case.

The case unfortunately discloses the low standard of commercial morality prevailing in certain circles, particularly in regard to the leasing of houses. There can be no doubt in the minds of either the Appellant or the Respondent as to what was the real intention of the agreement between them. This litigation started in the lower Court and found its way to this Court solely because the parties failed to reduce their contract to writing, and in consequence each side puts forward the contention that suits his own interests.

The Respondent's case against the Appellant in the lower Court was that in the year 1937 he made a lease of a shop for one year at the rate of LP. 6 per month. After a few months, owing to the disturbances and the bad state of business, the Appellant found he was unable to pay this rent, and the Respondent says he allowed him to pay it by instalments of LP. 2.500 mils a month. The Appellant on the other hand says that it was an entirely new lease under which the rent was reduced to LP. 2.500. On the expiration of twelve months the Appellant, so the Respondent says, remained on under the provisions of the Rent Restrictions (Business Premises) Ordinance. In this contention the Respondent is certainly wrong and his statement misleading, as at the expiration of the first year of lease the rent restriction measures were not yet extended to business premises which only came into force in 1941 with the promulgation of the Rent Restriction (Business Premises) Ordinance, 1941.

Now, it has been proved beyond doubt that the Appellant has remained in these premises for some five years, and during the whole of that period he had paid the sum of LP. 2.500 per month only. There was no evidence of any demand being made by the Respondent for the amount he alleges was outstanding, nor of any payment being made by the Appellant by way of interest on this outstanding amount. Furthermore the Appellant produced one receipt which makes no mention of it being in respect of a part payment only. It is not denied that he had other receipts but these could not be produced because apparently he acquiesced in the Respondent issuing unstamped receipts

and thus avoiding the revenue laws. We cannot but think that these facts were quite inconsistent with the Respondent's version of the deal, but they do fit in with the Appellant's contention that after his representations that he could not carry out the original agreement there was an entirely new deal under which the rent was to be LP. 2.500. For these reasons we are of the opinion that the appeal must be allowed, the judgment of the District Court set aside, and Plaintiff's (Respondent's) action dismissed with costs here and below, the costs of this appeal to be on the lower scale to include the sum of LP. 5 advocate's attendance fee.

Delivered this 14th day of November, 1944.

Chief Justice.

CRIMINAL APPEAL No. 128/44.

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

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

IN THE APPLICATION OF:—

Sha'ban Hamed el Azar. APPLICANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Evidence — Guilty knowledge may be proved by inference — Proof that property is military property — Reg. 24A(1)(*d*).

Application for leave to appeal from the judgment of the District Court, Jaffa, dated 4.10.44 in Criminal Case No. 78/44, whereby Appellant was convicted of an offence under regulation 24A(1)(d) of the Defence Regulations, 1939, and sentenced to four months' imprisonment, refused:—

Guilty knowledge may be proved by inference, such as when the accused attempts to make use of a false invoice to explain possession.

(*A. M. A.*)

ANNOTATIONS: In charges under Reg. 24A(1) the prosecution must prove that the property in question is military property: CR. A. 101/43 (10, P. L. R. 506; 1943, A. L. R. 714); the accused's guilty knowledge of this fact may in certain circumstances be inferred without direct proof: CR. A. 60/44 (*ante*, p. 318) and cases therein cited.

(*H. K.*)

FOR APPLICANT: Barbary.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an application for leave to appeal from the judgment of the District Court of Jaffa, sitting at Gaza, which convicted the Applicant of being in possession of military property contrary to regulation 24A (1)(d) of the Defence Regulations, 1939.

Only two points really arise in this appeal. It has been urged that there was no proof that the goods were military stores, and it has been stated even if there had been such proof guilty knowledge on the part of the Accused was absent.

It is obvious that if military stores have got the W. D. markings on, there is an overwhelming onus on the accused. But there are many types of stores which have not got W. D. markings on them, but nevertheless there can be no doubt as to their military character. We think that the lower Court was right in coming to the conclusion that this calico very definitely fell within the latter category; and we are satisfied that the calico was military property.

The second point raised was the absence of guilty knowledge. It has been argued that time and again this Court has held that guilty knowledge on the part of the accused must be proved. With respect we entirely agree, but guilty knowledge is an element which cannot always be proved scientifically or by direct evidence. In the vast majority of cases the guilty knowledge on the part of the accused is a matter of inference from the surrounding circumstances. In this case the Accused attempted to explain away his possession of the goods by producing what was proved to have been a false invoice. This fact alone would, in our opinion, amply justify the Court below in inferring guilty knowledge.

The application for leave to appeal is refused and the conviction and sentence confirmed.

Delivered this 15th day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 63/44.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Na'im Rida Nourallah & an. APPELLANTS.

v.

Haj Muhammad Sharif Mansour. RESPONDENT.

Res judicata — Requirements to establish that defence — Partition of immovable property — Advertising — Valuation, whether need be stated in advertisement — H. C. 29/32; H. C. 22/33; H. C. 55/32; Law of Execution, Arts. 103, 106, 107.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, Civil Appeal No. 116/43, dismissed:—

1. There can be no *res judicata* where the parties are not the same and the former proceedings were not concluded.

2. *Quaere* whether the advertisement required in the case of partition should set out the value of the property.

(*A. M. A.*)

REFERRED TO: H. C. 29/32 (3, C. of J. 856); H. C. 55/32 (1, P. L. R. 779; 3, C. of J. 858); H. C. 22/33 (3, C. of J. 866).

ANNOTATIONS:

1. The facts underlying the *res judicata* point were as follows: Respondent's predecessor in title obtained a judgment for partition in 1938. In accordance with the practice then prevailing the said judgment was put into the Execution Office, but, before execution was completed, Respondent's predecessor sold his shares in the land to Respondent. In 1942, Respondent filed a fresh action for partition in respect of the same properties and obtained the judgment, the subject matter of this appeal.

2. A judgment *inter partes* raises an estoppel against the parties and their privies, *i. e.*, those deriving title under them. (Halsbury, Vol. 13, p. 426, para. 479). A vendor and purchaser, as here, are "privies in estate" (*ibid.*, p. 428), provided that the sale took place after judgment was given in the first proceedings (*ibid.*, pp. 429—430, para. 481). Nor does the fact that execution proceedings were not completed seem to be relevant so long as "the judgment stands, although unsatisfied" (*ibid.*, p. 415).

3. On the other hand, a plea of *res judicata* cannot be said to be a plea to the jurisdiction and it is submitted, therefore, that the point must be raised in the first instance (*cf.* Halsbury, Vol. 13, p. 435, para. 489). The Court may, however, in exceptional circumstances act *proprio motu* in order to prevent an abuse of its own process (*cf.* H. C. 7/42 (9, P. L. R. 126; 1942, S. C. J. 51; 11, Ct. L. R. 86) and case cited in note 2 in S. C. J.).

(*H. K.*)

FOR APPELLANT: Asal.

FOR RESPONDENT: Yehya.

JUDGMENT.

This is an appeal, by leave, from a judgment of the District Court of Haifa, in its appellate capacity, dismissing an appeal from one of the Magistrates of Haifa in a partition action. The first ground of

appeal is that the matter was *res judicata*. It appears, however, that this matter was not raised in the Magistrate's Court and the learned President of the District Court held that it was too late to raise the matter before him. The Appellant has argued that, as this is a matter of jurisdiction, it could be raised at any time and even in an appellate Court. Without deciding this latter point we merely say that in the case before us there is no *res judicata* because not only was the Plaintiff in the original action the predecessor in title of the present Respondent and, therefore, not the same person, but the proceedings in the original case seem never to have been concluded.

The only other ground of appeal was that in the advertisement of the 5th February, 1943, the value of the land in question was not inserted, although it is admitted that the value was inserted in the advertisement in the newspaper *"Falastin"* of 9th of April, 1943. Reference has been made to Article 9 of the Law of Partition and to Article 10 of the Provisional Law for the Mortgage of Immovable Property and to High Court 29/32 Rotenberg, Vol. 3, p. 856 and to H. C. 22/33 Rotenberg, Vol. 3, p. 866 and to H. C. 55/32 Rotenberg, Vol. 3, p. 858 and to the Law of Execution Articles 103, 106 and 107. The learned President of the District Court in his judgment said that he could find nothing in the law which requires that the valuation of the property should be stated in the advertisement. We are not prepared to say whether or not this is a correct statement of the law; but, in view of the fact that the valuation or value clearly appeared in the advertisement of the 9th April, 1943, we are not prepared to interfere with the judgment of the District Court and the appeal is accordingly dismissed. The Appellants must pay to the Respondent his costs of this appeal, namely fixed or inclusive costs of LP. 10.—.

Delivered this 26th day of July, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 107/44.

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

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

IN THE APPEAL OF:—

Yousef Ibrahim Salloum. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Evidence under sec. 36 of the T. U. I. Ord. — Analysis of hashish — Inference drawn by Court — Confiscation.

Appeal from the judgment of the District Court of Haifa, dated the 22nd day of July, 1944, in Criminal Case No. 96/44, whereby Appellant was convicted of being in possession of dangerous drugs contrary to Section 7 of the Dangerous Drugs Ordinance, 1936, as amended in 1941, and sentenced to 12 months' imprisonment, dismissed:—

> When the Court allows evidence taken under the provisions of sec. 36 of the Criminal Procedure (Trial Upon Information) Ord., the evidence recorded must strictly be adhered to. When the prosecution resorts to that section the Court will not give an indulgent interpretation to the evidence in order to explain ambiguities.

(*A. M. A.*)

ANNOTATIONS :

1. For authorities on sec. 36 of the Criminal Procedure (T. U. I.) Ord. see CR. A. 138/28 (2, C. of J. 782), CR. A. 78/30 (1, P. L. R. 498; 2, C. of J. 792), A. A. 6/36 (7, C. of J. 268; P. P. 21.ii.37) and CR. A. 27/41 (8, P. L. R. 169; 1941, S. C. J. 146; 9, Ct. L. R. 149).
2. On confiscation *cf.* CR. A. 138/43 (10, P. L. R. 592; 1943, A. L. R. 764), CR. A. 163 & 164/43 (11, P. L. R. 173; *ante*, p. 305) and CR. A. 146/43 (11, P. L. R. 119; *ante*, p. 315) and notes to these cases in A. L. R.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa convicting the Appellant of the offence of being in possession of 20 kilos of *hashish*. The real substance of the case argued by the Appellant was that there was no sufficient evidence before the Court that the *hashish* in respect of which he was convicted, was the drug which had been certified by the laboratory as being *hashish*. Now, it is true that there was some difference as to the date upon which the exhibit, which it was alleged was *hashish*, was handed to British Constable Anderson to take to Jerusalem, and the date on which he actually did take it. The learned Judge in the Court below was satisfied that the certificate Exhibit P. in the Court below, issued by the laboratory, was issued in respect of the slabs which were found in the truck, and for the possession of which the Accused was convicted. Taking the evidence as a whole, we are of opinion that the inference drawn by the learned President that this certificate did, in fact, relate to the slabs confiscated by the Police, was not an unreasonable inference.

That being so, the appeal, in so far as this issue is concerned, must be dismissed.

One other point was raised: that the truck should not have been confiscated. The question of confiscation was a question within the discretion of the Court below. It is clear from the evidence that the learned President did direct his mind to the arguments advanced by Mr. Eliash on the issue of confiscation, and having so directed his mind, he decided to order confiscation. We see no reason to interfere with his exercise of that discretion. We think it desirable to utter a caution in regard to another issue raised. The evidence of B/C Anderson was taken in accordance with the provisions of section 36 of the Criminal Procedure (Trial Upon Information) Ordinance. Mr. Eliash quite rightly pointed out that that was an indulgence granted to the prosecution, and the evidence as recorded must be strictly adhered to. We agree with him, and would only add that where the Crown has resort to that section, as it obviously must from time to time, the Courts will not be inclined to give an indulgent interpretation to the evidence in order to explain ambiguities.

The appeal is, therefore, dismissed and the conviction and sentence confirmed.

Delivered this 1st day of November, 1944.

Chief Justice.

CIVIL APPEALS Nos. 167 & 168/44.

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

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

IN THE APPEAL OF:—

Moshe Joseph Behar. APPELLANT.

v.

Haim Heskel Nathaniel. RESPONDENT.

Carriers — Divergence in markings on B/L and on consignment — Conditions in B/L for payment of freight — Obligations of assignee for value — Parsons v. New Zealand Shipping Co. — Effect of forfeiture by Customs.

Appeal from the judgment of the District Court, Haifa, dated the 5th April, 1944, in Civil Cases Nos. 162/42 and 171/42, dismissed:—

A variation in the markings on the consignment and in the B/L, if not material, does not entitle the consignee to refuse the consignment.

(*A. M. A.*)

APPLIED: Parsons *v.* New Zealand Shipping Co.; 1901, 1 K. B. 548, 70 L. J. (K. B.) 404, 84 L. T. 218, 17 T. L. R. 274.

ANNOTATIONS: *Cf.* Halsbury, Vol. 30, p. 536, footnote (*l*).

(*H. K.*)

FOR APPELLANT: Lebel.
FOR RESPONDENT: Bernblum.

JUDGMENT.

These are two appeals from a judgment of the District Court of Haifa, which by the consent of both parties were heard together.

The Respondent is a carrier, and the action concerns 1219 boxes of dried apricots which he transported from Teheran to the Palestine Discount Bank of Tel-Aviv, the original consignee, in April, 1942. The Respondent *, on the 3rd of May, 1942, became the assignee for value from the Palestine Discount Bank. Later in the same month he declined to accept the boxes of apricots on the ground that the identification marks on the boxes were not the same as those contained in the Bill of Lading. The Bill of Lading stated that the boxes were marked "N.M.A.R.", whereas in fact they were marked "A.R.".

The first point raised by the Appellant is that the Respondent should have had recourse to the consignor in Teheran, and that the action against him (the Appellant) was, therefore, misconceived. The answer to this, however, would seem to be contained in the Bill of Lading itself, in which is a special provision that the freight charges should be paid by the consignee to the carrier (the Respondent). We are of opinion, therefore, that for the purposes of the agreement as to the payment of freight charges, the consignor was the agent of the consignee. It is not disputed that an assignee for value must accept all the obligations and liabilities arising from the particular Bill of Lading. This point does not, therefore, avail the Appellant.

As to the remainder of the appeal, we agree with the District Court that the markings in question were identification marks only, and did not relate to the quality of the fruit. The Appellant alleges that he was justified in refusing to accept the consignment because, owing to the variation in the marking, he could not reasonably be satisfied that these boxes of apricots would not subsequently be claimed by some other person. The learned President considered this matter and stated that he was satisfied from the general evidence in the case that these 1219 boxes of apricots marked "A.R." were the very boxes to

* *Scil.*: Appellant.

(*Ed.*)

which the consignment note refers, and which were handed over to the Respondent by the consignor for transport from Teheran to Tel-Aviv. He adds that he was also satisfied that no apricots marked "N.M.A.R." were transported by the Respondent, nor did any boxes so marked ever reach the Customs Department, Haifa.

As to the merits of the matter, we would add that had the Appellant felt any genuine anxiety on the point, this should have been set at rest by a letter (Exhibit P. 13) dated the 21st of May, 1942, from the Respondent to the Appellant, setting out the terms of a telegram received from the original consignor in Teheran to the effect that these boxes marked "A.R." were in fact the boxes intended to be despatched and referred to in the accompanying documents. The learned President held, and we agree with him, that this variation in the marks of identification of the boxes did not entitle the Appellant to refuse to take delivery. As he pointed out, this decision seems to be in accordance with the reasoning adopted in the English case of Parsons *v.* New Zealand Shipping Co., 1 K. B. (1901) page 548, which although it deals with a different provision of the law, nevertheless discusses the principles which should be adopted in matters of this kind.

We are of opinion, therefore, that the Respondent is entitled to his freight charges in the amount of LP. 452.047 mils, which figure does not in itself seem to have been seriously challenged by the Appellant in the Court below. The 1219 boxes of apricots themselves were apparently sold by the Customs Department to defray storage and other charges. It would follow, therefore, that the Appellant is not entitled to recover their value from the Respondent.

For these reasons we are of opinion that the appeals must be dismissed. The Respondent will have one set of costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 10th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 138/44.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abdul Kader Mustafa Kandil. APPELLANT.

v.

Haj Sa'di Hussein Khayyal
on his own behalf and on behalf of the
estate of the late Hussein Khayyal. RESPONDENT.

Partition — Effect of unregistered partition not made with the consent of all owners — Partition a disposition, L. T. Ord., secs. 2, 11 — C. A. 132/38, C. A. 221/38 — Point only raised on appeal.

Appeal from the judgment of the Land Court of Jerusalem, dated the 9th of March, 1944, in Land Case No. 17/43, dismissed:—

1. No effect can be given to an unregistered partition to which all the co-owners have not consented.
2. A question of equitable rights not taken in the trial Court cannot be pleaded on appeal.

(*A. M. A.*)

REFERRED TO: C. A. 132/38 (5, P. L. R. 378; 1938, 1 S. C. J. 387; 4, Ct. L. R. 25); C. A. 221/38 (5, P. L. R. 543; 1938, 2 S. C. J. 161; 4, Ct. L. R. 252).

ANNOTATIONS:

1. Note, however, that an unregistered partition of long standing will not be interfered with: C. A. 19/43 (1943, A. L. R. 27) and case therein followed.
2. An illegal disposition cannot give rise to an equitable title: C. A. 38/44 (11, P. L. R. 274; *ante*, p. 335).

(*H. K.*)

FOR APPELLANT: Nakhleh and Dajani.

FOR RESPONDENT: Nashashibi.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jerusalem, which Court had ordered the present Appellant to refrain from interfering with the Respondent's title in certain land which had devolved upon him as one of the heirs of his deceased father, who had died in 1930. The present Appellant in 1930 and 1940 respectively, entered into agreements of sale with one, Jamal, a brother of the present Respondent.

The present Appellant relying on an alleged partition made between the heirs in 1935, says that he agreed to buy Jamal's shares, which had been definitely allotted to him and were described in the two agreements of sale, exhibits D/1 and D/2. The Court below in its judgment said:—

> "From the evidence adduced we find that about eight years ago a partition was made among the heirs, which partition was not registered in the Land Registry, as well as the land itself was not

so registered too. Later on, some of the heirs (Haj Sa'di was one of them) revoked the said partition, while the other heirs remained in possession of their portions. Jamal, who sold his share to the Defendant Zaki, his brothers and his mother, who sold their shares to others, were, as shown by Exhibit D/1, among those who remained in possession of their portions.

The said partition was not registered in the Land Registry nor prescribed, and was not consented to by all the heirs. Furthermore, it is a disposition within the meaning of Section 2 of the Land Transfer Ordinance, and in view of the fact that it was made outside the Land Registry, it is according to Section 11 of the said Ordinance, null and void. And, therefore, the sale effected by Jamal in respect of the Plaintiff's shares and those of the other heirs who did not consent to that sale, is illegal; and Jamal has no right to sell anything but only his own share as shown in the certificate of succession attached with the statement of claim, namely 3/56 share."

We see no reason to doubt the correctness of this finding.

Issa Eff. Nakhleh, for the Appellant, has strenuously argued that the Land Court found that the partition had been agreed to by all the heirs. If one reads the judgment as a whole, however, it seems clear that this is not so. Jamal, who was not a party to the case but who was a witness, gave evidence, which the trial Court seems to have accepted, to the effect that some of the heirs did not consent, as for example his father's wife and her two children, and he also swore that there were thirteen (*certain?*) minors who were not bound by the partition. It is clear, therefore, that there was no evidence that all the parties had agreed to the partition. Issa Eff. Nakhleh has cited Civil Appeal 132/38, P. L. R. Vol. 5, page 378; but the question of equitable rights does not seem to have been raised in the Court below, and we, therefore, think that the question does not now arise here.

We were also referred to Civil Appeal 221/38, P. L. R. Vol. 5, page 543. The facts in that case were however different from the facts now before us. In Civil Appeal 221/38 all the persons concerned seem to have agreed to the partition. In our view the Land Court came to a correct conclusion, and 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. 10.

Delivered this 4th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 134/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hadassah Medical Organization. APPELLANTS.

v.

1. The Attorney General,
2. The District Commissioner, Jerusalem. RESPONDENTS.

Urban Property Tax — Rates and Taxes (Exemption) Ord. sec. 13(*b*) *— Construction of statutes — "And not administered for profit", whether applying to the words "any house property or land" or to the words "charitable waqf" — Maxwell, Hailsham, Giles v. Melsom, I. T. A.* 1918 *sec.* 37, *Broom's Legal Maxims, C. A.* 126/43, 218/43, 230/43 *— Description of property should be specific — Separation of properties under* 1938 *Ord. and U. P. T. Ord.* 1940, *secs.* 2 *and* 6 *— Costs.*

ppeal from the judgment of the District Court of Jerusalem, dated the 25th arch, 1944, in Civil Case No. 51/43, dismissed:—

words "and not administered for profit" in sec. 13 of the Rates es (Exemption) Ord. apply to "any house property or land", so rt of a property has been let, it brings in a profit and exemption ion cannot be claimed under the section.

ratory judgment exempting part of a property from taxation must 1 an accurate description of the property.

): But it is possible to separate the component parts of such nder the scheme of the Rates & Taxes (Exemption) Ordinance and n Property Tax Ordinance.

(*A. M. A.*)

RED TO: Giles *v.* Melsom, 1873, L. R. 6 (H. L.) 24, 42 L. J. (C. P.) L. T. 789; C. A. 126/43 (10, P. L. R. 447; 1943, A. L. R. 559); C. A. /43 (10, P. L. R. 523; 1943, A. L. R. 615); C. A. 230/43 (1943, A. L. R. 641).

ANNOTATIONS:

1. The judgment of the District Court is reported in 1944, S. C. D. C. 128.
2. See the cases cited and *cf.* P. C. 34/41 (10, P. L. R. 517; 1943, A. L. R. 800).

(*H. K.*)

FOR APPELLANT: Wittkowski.

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

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, dismissing an action in which the present Appellants sought a declara-

tion that certain house property belonging to them should be declared exempt from Urban Property Tax under Section 13(b), Rates and Taxes (Exemption) Ordinance, 1938. The main question argued before us is whether the words "and not administered for profit" apply to the words "any house property or land" or whether they apply to the words "charitable *wakf*". In support of the latter, Mr. Wittkowski, for Appellants, has referred to Maxwell's Interpretation of Statutes 7th Edition, p. 2 and the case of Giles *v.* Melsom, L. R. (H. L.) Vol. 6 (1873) p. 33, to the English Income Tax Act 1918 Section 37 and to Broom's Legal Maxims (10th Edition), p. 461.

Mr. Gavison, for the Respondents, has also cited Maxwell, pages 2, 17 & 20 and Hailsham, Vol. 31 p. 483 paragraph 603. The 1938 Ordinance has already been examined by this Court in Civil Appeals 126/43, 218/43 and 230/43. In our view, the effect of all these judgments is to show that this Court has leant to the view that the words "and not administered for profit" apply to the house property or land. In other words, it is house property or land which must not be administered for profit before exemption can be claimed. We are not prepared to depart from this view which is reinforced by a scrutiny of the last five lines of page 525 of Vol. 10 P. L. R. It is admitted here that a part of the property of the Appellants, Parcel 37, Block 52, Street of the Prophets, Jerusalem, has been let to tenants, one of whom, the Seligsberg Trade School, is connected with the parent association of the Appellants in America; but which school nevertheless pays rent to the Appellants; and other parts of this parcel are let to private individuals who, of course, pay rent. We therefore think that, as this house property brings in a profit, exemption under Section 13 cannot be claimed. This ground of appeal, therefore, fails. We now turn to the other or alternative ground of appeal, namely, that the Appellants are entitled to partial exemption in respect of Parcel 37 to the extent to which it is let to the charitable organizations mentioned in paragraph 4 of the Statement of Claim. The learned Relieving President in his judgment said:—

> "The only aspect of this claim in the alternative that has given me cause for thought arises from the fact that from 1.11.42 the Plaintiff has used for its own medical activities the section of the premises referred to in paragraph 4(c) of the statement of claim. As to that part presumably this Court is asked to declare that there is no liability for the tax in respect of part of the fiscal year 1942/43 for which demand has been made. It is apparent that profit was derived from this particular section for the greater part of the fiscal year. The only description vouchsafed of this section of the parcel is that it was part of "the former Childrens' Department". Similar

considerations arise with regard to "the former laundry building" referred to in paragraph 4(d) of the statement of claim, which has only been let since the 10.2.42; presumably exemption is desired in respect thereof from 1940 up to the date of the letting. Indeed I am left rather in the dark as to what form of declaratory relief precisely the Plaintiff seeks as to these two portions which were not administered for profit over part of the three years from 1940 to 1943 in respect of which urban property tax on the whole parcel is demanded. Nor, I must say, have I been rendered much assistance as to how the problem should be approached. In the first place it seems to me that the description given of these two portions is far too vague for the purpose of a declaratory judgment. By paragraph 6 of the statement of claim it is admitted that the whole parcel is a house property clearly within the meaning of section 13(b), the material parts of which are quoted in the paragraph in terms. Learned Crown Counsel points to the definition of 'house property' and argues that since there was an administering for profit the parcel is taxable as a whole; he says it would be impracticable and that the law does not permit a dividing off and exempting of a portion of a house property (it might, for example, be a single room), not administered for profit over a part of the fiscal year, where the rest of the house property was employed to yield an income. Conversely, would the letting of *e. g.* a room, vitiate the right to exemption in respect of the whole? However, it is not in dispute here that the letting extended to the main part of the parcel (see paragraph 3 of the statement of claim). The point does not appear to have been taken in argument in the *International Committee of the Y. M. C. A. v. Attorney General* (*sup.*) where the right to exemption was recognised with regard to portions of the whole house property while another portion was held not to be exempt. It is to be noticed further that in section 13(c) of the Ordinance the Legislature makes express provision for the exemption of any cemetery, or *that part* of any cemetery, which is not used for pecuniary profit. There is nothing similar in section 13(b) as to *part* of any house property or land which is not administered for profit. Again, is a distinction to be made where a house property or portion thereof is administered for profit only during a part of the fiscal year? The whole of this aspect of the case was indeed but lightly touched upon by counsel for both sides; but left to me largely, as it is, I may say that, as at present advised, I incline if anything to accept the view put forward by learned counsel for the Defendants. But, were I forced to the opposite opinion, I still do not see my way to give a declaratory judgment of exemption in respect of these two portions indefinitely described as 'Part of the former Childrens' Department' and 'The former laundry building'. Moreover, the alternative prayer in paragraph 7 of the statement of claim clearly and in terms seeks a declaration as to partial exemption to the extent to which the parcel *is being let to the charitable organizations* specified in paragraph 4. There is nothing claimed by the statement of claim as to exemption in

> respect of such parts (*e. g.* the two portions under reference) as are or were used by the Plaintiffs themselves for particular periods during the years 1940 to 1943; though reference has crept into the fixed issue B as further alternative matter for decision whether the Plaintiff is entitled to exemption — 'in respect of such parts as are used by the Plaintiffs themselves'. Strictly that particular issue does not, I think, arise upon the pleadings; but if it can be said fairly to arise then it is left to be gathered from the issue as fixed and from the face of the statement of claim that such exemption is asked to cover the three financial years from 1940 to 1943 in respect of which the tax demand is made. Manifestly, if my view upon the earlier questions dealt with in this judgment is right, there could be no exemption as regards these two portions with which I am now concerned over such a three year period. But surely it is not for this Court to work out and conjecture as to the precise nature of the declaratory relief that may be sought as to these two portions when they were not let to third parties, if the terms of such desired relief are not specifically stated as part of the prayer in the alternative, or at least unless some attempt is made, which is not the case, in argument for the Plaintiff to reduce the matter from the nebulous to more concrete form both as to what exactly is wanted and how under the law that object is entitled to be achieved. As I have already said, whatever may be the correct position in law as to these two portions over the periods respectively during 1940 to 1943 when they did not yield profit in the form of rent, and I have indicated the view to which I incline, there is both the vagueness of description and the absence of specific pleadings by the Plaintiff which constitute no foundation for a declaratory judgment against the Defendants."

While not definitely saying that we agree with everything that the learned Relieving President has said in the passage from his judgment which we have just quoted, we think that there is nothing in the Ordinance or in the Plaintiff's statement of claim sufficiently precise to enable a declaratory judgment of the kind sought to be given. While it is no part of the duty of a Court to give legal advice we would merely say that we think that there is something in the suggestion made at the Bar by Mr. Gavison that the Appellant's remedy in this direction would seem to be some separating of the different properties under the scheme of the 1938 Ordinance and the Urban Property Tax Ordinance 1940 (see Sections 2 and 6 of the 1940 Ordinance).

The appeal fails and is dismissed. The Respondents ask for only nominal costs which we assess as fixed (inclusive) costs of LP. 1.—.

Delivered this 16th day of November, 1944.

British Puisne Judge.

HIGH COURT No. 1/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Hadar Hacarmel Co-operative Society Ltd., Haifa. PETITIONERS.

v.

The District Commissioner, Haifa. RESPONDENT.

Tax exemption — Jurisdiction of High Court — Alternative remedy — C. P. R. 52(4), C. A. 134/44, H. C. 99/40, failure to raise point of jurisdiction in previous decisions — U. P. T. Ord., sec. 8(3)(a) — High Court practice.

Return to an order *nisi*, issued on 12.1.44, directed to the Respondent, calling upon him to show cause why he should not refrain from claiming Urban Property Tax upon parcel 142 in block 10851, Haifa, from the Petitioner for the year 1943/44; order *nisi* discharged:—

The proper manner of applying for urban property tax exemption is by way of application to the District Court for a declaratory judgment.
In view of that remedy the High Court will not intervene.

(*A. M. A.*)

NOT FOLLOWED: H. C. 99/40 (7, P. L. R. 579; 1940, S. C. J. 376; 8, Ct. L. R. 178).

REFERRED TO: C. A. 134/44 (*ante*, p. 724).

ANNOTATIONS:

1. Note that H. C. 99/40 (*supra*) was followed in H. C. 63/41 (1941, S. C. J. 472; 10, Ct. L. R. 76) and that in H. C. 8/43 (1943, A. L. R. 43) a similar application was likewise entertained by the High Court.

2. The High Court has on several occasions declined to follow a decision of its own where the case had not been fully argued; see, *e. g.*, H. C. 27 & 28/40 (7, P. L. R. 213; 1940, S. C. J. 116; 7, Ct. L. R. 150) and cases cited in notes thereto in S. C. J., and H. C. 7/42 (9, P. L. R. 126; 1942, S. C. J. 51; 11, Ct. L. R. 86). *Vide*, however, H. C. 30/44 (*ante*, p. 249).

3. Note that the High Court has on several occasions heard evidence from persons other than the parties; for recent examples see H. C. 59/44 (11, P. L. R. 198; *ante*, p. 295) and H. C. 117/44 (*ante*, p. 607).

(*H. K.*)

FOR PETITIONERS: Goitein.

FOR RESPONDENT: Crown Counsel — (Hogan).

ORDER.

This is the return to an order *nisi,* calling upon the Respondent to show cause why he should not be ordered to refrain from claiming Urban Property Tax from the Petitioners in respect of parcel 142 in block 10851, Haifa, for the year 1943—44.

This litigation has in some ways an unfortunate history because the matter first came before me as long ago as the 24th of February. On that occasion Mr. Hogan, Crown Counsel, objected to this Court dealing with this matter as he considered that the Petitioners had an alternative remedy, namely, an action in the District Court for a declaration. (See rule 52(4), Civil Procedure Rules, 1938, and Civil Appeal 134/44, Hadassa Medical Organisation *v.* A. G. and District Commissioner, Jerusalem). The hearing of the petition had, however, to be adjourned as the Petitioners wished an opportunity of cross-examining the Respondent on his affidavit to which the Petitioners were entitled by reason of the High Court Rules. The matter was accordingly adjourned until the 17th November, when the present District Commissioner (Mr. A. N. Law, M. C.) appeared and was cross-examined by Mr. Goitein, for the Petitioners. After his evidence was concluded I again heard arguments by Mr. Goitein and Mr. Hogan respectively Mr. Hogan again pressed the point of jurisdiction. In reply Mr. Goitein argued that the matter was covered by authority, namely, High Court 99/40, P. L. R. Vol. 7, p. 579. Mr. Goitein argued that that case was authority for the proposition that this Court was competent to deal with a claim for exemption under Section 8(2)(a) Urban Property Tax Ordinance. To this Mr. Hogan replies that the question of jurisdiction, or rather of alternative remedy, was not raised and was not argued in High Court 99/40 and that if it had been argued that case might have been decided differently, and that he is entitled to raise it now and to require from me a decision on this point. He strenuously argues that the question to be decided in the present case is purely one of fact, namely, whether a particular building was completed by the 31st March, 1940, or not till May, 1940; the latter being the suggestion of the Petitioners. Mr. Hogan argues that this matter cannot be decided on affidavits. Both parties' advocates agree that the High Court Rules make no provision for anyone being called to give evidence in Court other than parties to the action, and then only in response to a request or a demand that they appear for cross-examination on their affidavits.

The only matter which has caused me difficulty is whether it is not now too late for Mr. Hogan to raise the question of alternative remedy in view of the decision in High Court 99/40. As, however, the matter

was not argued and not raised in that case, I am of the opinion that it is not too late. It seems to me quite clear, in view of rule 52(4) Civil Procedure Rules and Civil Appeal 134/44, that there is an alternative remedy, namely, an action in the District Court for a declaration. I am certain that an action in the District Court for a declaration is preferable to any attempt by myself in this Court to decide a disputed question of fact such as the present.

For the foregoing reasons I dismiss the petition, and discharge the order *nisi* with fixed (inclusive) costs of LP. 15.

Given this 29th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 101/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Matilde Hadad & 2 ors. APPELLANTS.

v.

Adib Mikhail Habayeb. RESPONDENT.

Procedure — Application to strike out particular in statement of defence — C. P. R. 109, 110, 124 *— Foreign judgment, how impeached for fraud — Whether fraud on the foreign Court — Halsbury, C. A.* 155/43; *Abouloff v. Oppenheimer; Vadala v. Lawes; Dicey, Digest.*

Appeal from the order of the District Court, Haifa, dated the 18th day of February, 1944, in Civil Case No. 158/43 (Motion No. 30/44), dismissed:—

The grounds on which a foreign judgment may be impeached for fraud are not exhaustively set out in Halsbury, Vol. 6, pp. 333—4.

(*A. M. A.*)

REFERRED TO: C. A. 155/43 (10, P. L. R. 332; 1943, A. L. R. 577); Abouloff *v.* Oppenheimer, 1882, 10 Q. B. D. 295, 52 L. J. (Q. B.) 1, 47 L. T. 325; Vadala *v.* Lawes, 1890, 25 Q. B. D. 310, 63 L. T. 128.

ANNOTATIONS: See C. A. 155/43 (*supra*) and the passage in Halsbury referred to.

(*H. K.*)

FOR APPELLANTS: Schaal.

FOR RESPONDENT: H. Atalla.

JUDGMENT.

This is an interlocutory appeal by leave from an order of the learned President of the District Court of Haifa, refusing an application under rule 124, Civil Procedure Rules, 1938, to strike out a paragraph of the particulars of the defence lodged under rules 109 and 110.

The present Respondent is the Defendant in an action now pending in the District Court of Haifa, brought by the present Appellants, on a foreign judgment given by the Court of first instance, at Beirut, Lebanon, on the 19th June, 1940. The paragraph in question is as follows:—

> "On 16.6.39 George Hadad acting for himself and on behalf of his brother Wadie Hadad, *de cujus* of Plaintiff, obtained by defrauding Defendant an agreement of sale whereby Defendant was made to admit the receipt of LP. 3000 when everything paid to Defendant up to that date was only a sum of LP. 750 only. Defendant was promised that the balance would be paid to him but no money was paid either at the time of the agreement nor afterwards."

Mr. Schaal, who argued the appeal on behalf of the Appellants, says that there is no allegation that the judgment itself was obtained by fraud. His argument is that, in order to impeach a foreign judgment on the ground that it was obtained by fraud, one must show that it was the Court which delivered the judgment which was misled and not one of the parties.

He also contends that only two kinds of fraud may be relied upon, namely, frauds not discovered till after judgment or frauds which may actually have been the subject of investigation by the foreign Court (Hailsham Vol. 6, p. 333, paragraph 389). In my view, the sentence in the first paragraph of page 334 of Vol. 6 of Hailsham does not pretend to be an exhaustive list of the types of fraud which may be alleged.

I have been referred to the following cases: Civil Appeal 155/43, Vol. 10, P. L. R., p. 335; Abouloff *v.* Oppenheimer (1882) 10 Q. B., p. 295; and Vadala *v.* Lawes (1890) 25 Q. B., p. 310; Dicey's Conflict of Laws, 2nd Edition, p. 620 and English and Empire Digest, Vol. 11, p. 456, No. 1125, and p. 457, No. 1132.

Mr. Hanna Atalla, who argued the appeal on behalf of the Respondent, contends that, if fraud has been practised on a party and continued in the foreign Court, this is fraud of a type which may be set up in defence to an action on a foreign judgment. The argument is that the foreign Court may have been misled by the allegation or, perhaps, by suppression of the true facts.

I content myself with saying that I see no sufficient reason for re-

versing the order of the learned President of the 18th February, 1944.

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

Delivered this 20th day of October, 1944.

British Puisne Judge.

CIVIL APPEAL No. 105/44.

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

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

IN THE APPEAL OF :—

Keren Kayemeth Leisrael Ltd. APPELLANT.

v.

1. The Custodian of Enemy Property, Jerusalem,
2. Dr. Alfred Werner, in his capacity as administrator of the Estate of the late Else Blumenthal. RESPONDENTS.

Enemy property administration — Wills — Interpretation — Juedischer Nationalfonds and Keren Kayemeth Leisrael — Trading with the Enemy (Custodian) Order, sec. 3(2)(*i*).

Appeal from the order of the District Court, Haifa, dated the 29th February, 1944, in Civil Case No. 220/43, dismissed:—

The Juedische Nationalfonds is distinct from the Keren Kayemeth Leisrael and any amounts payable to the former fall under the Custodian Order and should be paid to the Custodian of Enemy Property.

(*A. M. A.*)

FOR APPELLANT: Eliash.

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

JUDGMENT.

FitzGerald, C. J.: This is an appeal by the Keren Kayemeth Leisrael against the judgment of the District Court of Haifa, directing the administrator of the late Else Blumenthal to pay to the Custodian of Enemy Property the share of two-ninths of the said estate.

It appears that in the year 1928, Else Blumenthal, a German Jewess,

made a will in which she left the residue of her estate, which amounted to some LP. 237, to be applied for Zionist purposes, particularly for the "N.F.". It is said that at the time the lady intended to come and settle in Palestine, but unfortunately she died in Berlin on December 4th, 1934. In 1935 the Magistrate's Court of Berlin issued an "Erbschein", or a declaration of inheritance, declaring the Juedische Nationalfonds, No. 10 Meineke Street, Berlin, to be the inheritors of two out of nine shares, which represented the amount she devised to the "N.F.".

There is registered under German Law in Berlin a company known as the Juedische Nationalfonds. According to the evidence, the main object of this company was to carry on Zionist propaganda and collect funds for Zionist ideals, particularly for the purchase of land in Palestine. In this respect it had undoubtedly a very close connection with the Keren Kayemeth Leisrael, a company incorporated in England and registered in Palestine for the purpose, as everyone knows, of purchasing land for the establishment of the Jewish National Home. Indeed, it is clear that most of the money collected for the Juedische Nationalfonds in Berlin was passed on to the Keren Kayemeth Leisrael in Jerusalem.

The issue before the Court was whether the monies derived from the will of Else Blumenthal and now in Palestine can be paid to the Keren Kayemeth Leisrael, or whether they should be paid to the Custodian of Enemy Property as representing the Juedische Nationalfonds in accordance with the Trading with the Enemy Ordinance.

Two questions call for answers. The first is whether the letters "N.F." in the will meant the Keren Kayemeth Leisrael in Jerusalem or the Juedische Nationalfonds registered in Berlin. There was evidence that the Jews in Germany generally referred to the company registered in Berlin as the "N.F.". Although there is no doubt in my mind that Else Blumenthal intended the money eventually to find its way to the Keren Kayemeth Leisrael in Jerusalem, her actual bequest was to the body registered in Berlin as the Juedische Nationalfonds. Her intention undoubtedly was that they should dispose of it according to their articles of association which, according to the evidence before the Court, provided that after payment of certain local expenses, the residue should be sent to the Keren Kayemeth Leisrael. This disposes of the first question.

In regard to the second, it was argued with great force that the Juedische Nationalfonds in Berlin was nothing more than a post office or conduit pipe, and that the administrator would be entitled to, and

should in fact, hand the money over to the Keren Kayemeth Leisrael in Jerusalem. I am unable to accept this line of argument. It may well be that the learned President laid too much stress on the legal effect of the Erbschein when tendered as evidence in the Court below, but there is no doubt in my mind that the Juedische Nationalfonds in Berlin was a separate legal entity, with a legal existence totally independent to the Keren Kayemeth Leisrael. Were it not for the war, it could sue and be sued, without the necessity of joining the Keren Kayemeth Leisrael, a company which is not even registered in Germany.

I turn now to a consideration of the effect of "war legislation", on a testamentary disposition made to a person who is an enemy within the meaning of that legislation. I am unable to avoid the conclusion that this money in the hands of the administrator is a payment within the meaning of Section 3, sub-section 2(i) of the Trading with the Enemy (Custodian) Order, 1939. Furthermore, since I have held that were it not for the war it would have been payable to the "N.F.", it follows that it would have been payable to a person who is an enemy.

In these circumstances I agree with the order of the Court below, directing the administrator to pay the Custodian of Enemy Property the share of two-ninths of the said estate, after the deduction of the costs and fees.

The appeal is accordingly dismissed with costs on the lower scale to include LP. 10.— advocate's attendance fee.

Delivered this 16th day of October, 1944.

Chief Justice.

Frumkin, J.: I concur.

Puisne Judge.

HIGH COURT No. 115/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF:—

Charif and Alami. PETITIONERS.

v.

Director of Customs, Excise and Trade, Haifa. RESPONDENT.

Emergency Powers (Defence) Act, 1939 — Application to Palestine — Whether requires renewal — Construction of statutes.

Customs — Forfeiture — Goods imported after expiration of validity of licence — Customs Ord., sec. 190 — Import, Export and Customs Powers (Defence) Ord., 1939.
High Court — Frivolous applications — Costs.

Return to an order *nisi*, issued on 4.10.44, directed to the Respondent, calling upon him to show cause why he should not clear and deliver to Petitioner the five bales of Worsted Woollen Yarn No. 2/20 W. C. (Wool Count), marked C. A. Nos. 305, 306, 307, 309 and 310, imported by Petitioner on 10th October, 1942, and 2nd December, 1942, under import licence No. 27768 of 23rd October, 1940; order *nisi* discharged:—

1. The provisions of the Emergency Powers (Defence) Act, 1939, made applicable to Palestine by Order in Council of 1942, apply until repealed.
2. The High Court may impose higher costs on an unsuccessful petitioner if it is of opinion that the petition was frivolous.

(*A. M. A.*)

ANNOTATIONS: *Cf.* H. C. 93/43 (10, P. L. R. 622; 1943, A. L. R. 797) and note thereto in A. L. R.

(*H. K.*)

FOR PETITIONERS: E. Z. Fellman.

FOR RESPONDENT: Solicitor General — (Griffin).

ORDER.

This is the return to an order *nisi*, calling upon the Respondent to show cause why he should not clear and deliver to the Petitioner five bales of worsted woollen yarn which were forfeited to Government under Section 5 of the Import, Export and Customs Powers (Defence) Ordinance, 1939, as enacted by Regulation 4 of the Defence (Amendment of the Import, Export and Customs Powers (Defence) Ordinance, 1939) Regulations (No. 2), 1942.

The Collector of Customs in charge of the Import and Export Control Section (previously known as the Import Licensing Section of the Respondent's office) has sworn an affidavit in reply to the petition. From the papers before me I gather that the facts shortly are that on the 23rd October, 1940, the Respondent issued to the Petitioner an import licence bearing No. 27768 by virtue of which the Petitioner was authorised to import woollen yarn and other goods to the value of LP. 3,500 from the United Kingdom. This licence was due to expire on the 31st December, 1941. There was another licence to import goods from India which was also due to expire on the 31st December, 1941, but does not concern the present petition.

On the 18th November, 1941, the Petitioner ordered from Messrs. Btesh Bros. & Co., Manchester, the worsted woollen yarn, the subject-

matter of this petition. The Petitioner must then have known that, as his licence was due to expire within six weeks, it was unlikely that the goods would arrive in Palestine by the end of 1941. On the 23rd January, 1942, the Petitioner wrote to the Respondent informing him that certain goods covered by import licence No. 27768 had arrived in Palestine after 31st December, 1941. The Respondent was then good enough to extend the validity of the licence up to the 10th of January, 1942, to enable the Petitioner to clear and receive the goods which had arrived in January. Certain other goods which had been imported from Egypt arrived after the expiry of the licence and here again the Respondent was good enough to issue three licences in substitution of the ones that had expired. This fact does not really concern me although it is of interest as showing the attitude of the Respondent and it is also of interest, as showing that the Petitioner must well have realised that by accepting these three licences he was obtaining all that he had asked for. On the 20th February, 1942, the Respondent wrote a letter to the Petitioner, Exhibit K, attached to the affidavit of the Respondent. This letter is in the following terms:—

> "Further to my letter of even number dated the 16th instant, I have to inform you that any orders placed with your foreign suppliers relating to goods not yet shipped should be cancelled forthwith. Any goods which will be shipped after the expiry of the validity of import licences in your possession will be liable to forfeiture on their importation".

It is clear, therefore, that on the 20th February, 1942, or soon thereafter, the Petitioner was aware of the risk that he was taking. It seems that the goods, the subject-matter of these proceedings, were not shipped until the 26th of June, 1942, and the 17th July, 1942, and did not arrive in Palestine till the 10th October, 1942 and the 2nd December, 1942, respectively; in other words, the Petitioner after receiving the letter of the 20th February had over four months in which to notify the shippers in Manchester that they should not proceed with the shipment.

The learned Solicitor General urged four formal grounds on which the order *nisi* should be discharged. I prefer, however, to deal with the substantial matter at issue although I must not be taken as holding that Respondent might not be able to succeed on any or all of the four preliminary objections. It seems to me to be quite clear that there can be no answer by the Petitioner to the order of forfeiture. Goods were clearly imported long after the valid import licence had expired and imported in contravention of law and moreover with full knowledge on the part of the Petitioners that they were breaking the law. I found

it difficult during the argument to appreciate on what Mr. Fellman, for the Petitioners, was relying. So far as I can gather, he was relying on two grounds (apart from legal grounds with which I shall deal presently) namely, (a) the fact that there had been some practice on the part of the Customs Authorities to allow goods to be imported even after Import Licences had expired, and (b) that, as his clients had not imported goods to the full value of the licence, they were entitled to offset the unexpended balance by the import of goods in the future. Both these arguments seem to me to be specious and of no avail to the Petitioner.

Mr. Fellman argued that the Respondent should have acted under Section 190 of the Customs Ordinance and he complains that the Respondent neither sent his clients the notice contemplated by Section 190(1)(a), nor did the Respondent himself institute a suit as is provided for by Section 190(1)(b). To this the learned Solicitor General replies that the matter is now governed by the proviso to Section 10(1) of the Import, Export and Customs Powers (Defence) Ordinance, 1939, (Mr. Kantrovitch's Book on War Legislation, Vol. 2, pp. 9 and 10). Mr. Fellman retorts that the Defence Regulations of Palestine were brought into force by the Emergency Powers (Defence) Act, 1939, and that this Act was in force only for one year as is shown by Section 11, and the argument continues that only the Act itself was extended and that there was no Order-in-Council extending it to Palestine and he says that in spite of the fact that in the Second Schedule to the Order-in-Council under subsection (1) of Section 4 of the Emergency Powers (Defence) Act, 1939, printed at p. 14 of Vol. 1 of Mr. Kantrovitch's Book, Palestine is mentioned, the Emergency Powers (Defence) Act, 1939, does not now apply to Palestine. He argues that the Defence Regulations made in 1942 were invalid inasmuch as the Act itself had not been extended to Palestine for the year 1942. He says that at the time of the Defence Order-in-Council, namely, the 25th October, 1942, the Emergency Powers (Defence) Act had already expired, namely on the 24th August, 1942, and that there was no publication in the Palestine *Gazette* till 4th March, 1943. In other words, at the time of the promulgation of the Order of October, 1942, the Act was not in force in Palestine. It is true that a notice appears annually in the Palestine *Gazette* to the effect that an Order-in-Council has been made at Buckingham Palace extending the Emergency Powers (Defence) Act for another year; but the learned Solicitor General says that this is unnecessary and is merely published *ex abundante cautela*. He points to article 3 of the Order-in-Council printed at

p. 12 of Vol. 1 of Mr. Kantrovitch's Book on War Legislation which is in the following terms:—

> "The provisions of the Emergency Powers (Defence) Act, 1939, other than section four thereof (excepting the following provisions thereof, that is to say, subsections (3) and (4) of section two, section five, subsection (3) of section six, and sections eight, nine, eleven and twelve) shall, subject to the adaptations and modifications contained in the First Schedule to this Order, extend to the territories mentioned in the Second Schedule to this Order."

It will, therefore, be seen that Section 11 which was the Section of the Emergency Powers (Defence) Act, 1939, limiting the duration of the Act to one year in Great Britain, did not apply to the territories mentioned in the Second Schedule (p. 14 of Vol. 1 of Mr. Kantrovitch's Book). Therefore, if one cuts out Section 11, the Emergency Powers (Defence) Act, 1939, was in force in the territories mentioned in the Second Schedule including Palestine, until repealed. In other words, the provisions of the Emergency Powers (Defence) Act, 1939, mentioned in Article 3 of the Order-in-Council of 1942, are in force until repealed. I agree with this contention of the learned Solicitor General.

I, therefore, hold that the order of forfeiture of 20th January, 1943, made under the Defence (Amendment of the Import, Export and Customs Powers (Defence) Ordinance, 1939) Regulations (No. 2) 1942, was a valid order.

For the foregoing reasons the petition fails. The learned Solicitor General, at the close of his speech said that while he fully realised the value, and, indeed, sometimes the need in the interests of the Public of High Court proceedings directed against such officials as the Respondent, nevertheless he (the Solicitor General) would welcome a pronouncement from myself that the present petition is a frivolous one which has caused much waste of time, not only of the Court, but of the Customs' Department and the Law Officers of the Crown. I am inclined to agree. I suppose that the only remedy would be to grant a larger sum in costs than has heretofore been the case. This Court may have to take such action in the future; but in the present case I shall merely content myself with putting this on record.

The order *nisi* is discharged with costs, *i. e.* fixed (inclusive) costs of LP. 10.

Given this 29th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 272/44.

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

BEFORE: Rose, J.

IN THE APPEAL OF:—

Shlomo Ben Yahouda. APPELLANT.

v.

Dib C. Ghanem. RESPONDENT.

Case under sec. 8(1)(*c*) *of Rent Restrictions (Dwelling Houses) Ordinance — Alternative accommodation — Discretion of Trial Court — Alternative accommodation consisting of rooms by way of sub-tenancy.*

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 1st of May, 1944, in Civil Appeal No. 26/44, allowed:—

1. Intention of legislature is that matters under sec. 8(1)(c) should be left to the discretion of the Court of trial and a Court of Appeal should only interfere if it is abundantly satisfied that the discretion has been improperly exercised — not necessarily mistakenly exercised.
2. Whether a sub-tenancy is adequate alternative accommodation is to be decided by Court in the light of the particular circumstances and Court may decide the matter either way.

FOLLOWED: C. A. 327/43 (11, P. L. R. 456; *ante*, p. 505).

ANNOTATIONS:

1. As to point 1 see case followed and annotations in A. L. R.
2. As to point 2 see C. A. 223/44 (*post*) and annotations thereto.

(*A. G.*)

FOR APPELLANT: Eliash.
FOR RESPONDENT: A. Atalla.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Haifa, in its appellate capacity, setting aside a judgment of the Magistrate of Haifa.

This is one of those unfortunate cases under the Rent Restrictions (Dwelling Houses) Ordinance, 1940, in which one's sympathies are divided because it seems that whichever side loses this case will undoubtedly feel that he is labouring under a grievance.

The point is a simple one, and that is, whether or not the Plaintiff, *i. e.* the landlord — the Respondent in the present case, satisfied, or should have been regarded as having satisfied the Magistrate that he had complied with Section 8(1)(c) of the Ordinance. The Magistrate came to the conclusion, for which he gave reasons, that the alternative accommodation which was offered was not suitable. And not only did

he discuss in his judgment the evidence upon which he based that conclusion, but he also, apparently on the invitation of the parties, went to inspect the premises. It is suggested by Mr. Atalla that in fact he made a mistake — that he directed his mind to the wrong rooms and to the wrong considerations. But it seems to me if in this class of case one is going to analyze the findings of fact of a Magistrate, when it is clear that he has applied his mind to the point, and not only has applied his mind to the point but that he applied it with care, the purpose of the Ordinance would be defeated. As has been stated in many cases, and quite recently in Civil Appeal 327/43, the intention of the legislature is that these matters should be left to the discretion of the Court of first instance, and a Court of Appeal should only interfere if it is abundantly satisfied that that discretion has been improperly exercised — not necessarily mistakenly exercised.

It seems to me that that is sufficient to dispose of the appeal, but there is another point which Mr. Eliash has raised, and that is that in any event the landlord must fail in this case because the accommodation he offered consisted of certain rooms by way of a sub-tenancy. Mr. Eliash contends that the security afforded to a sub-tenant is less than that afforded to a tenant for the reason that the sub-tenant steps into the shoes of the tenant, and therefore if the tenant committed some breach which would render him liable to eviction, the sub-tenant himself, through no fault of his own, might have to leave. That seems to me to be a terrible point of view, and there might well be cases in which a Court might come to the conclusion that a sub-tenancy was not, in fact, adequate alternative accommodation. But I am not prepared to go so far as Mr. Eliash suggests in saying that automatically a sub-tenancy must always be held not to be adequate alternative accommodation. No Palestinian or English authority has been cited to me on the point, but as at present advised my opinion is that that is an element which the Court should properly take into consideration, but when they have considered it, they may well decide the matter either way, in the light of the particular circumstances. I consider, therefore, that that point fails.

For the reasons which I have given, the appeal must be allowed, the judgment of the District Court set aside, and the judgment of the Magistrate restored. The Appellant must have the costs here and below, the costs of this appeal to be on the lower scale, to include an advocate's attendance fee of LP. 10.

Delivered this 27th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 223/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Moshe Cohen & an. APPELLANTS.

v.

Abraham Laks. RESPONDENT.

Case under sec. 8(1)(*c*) *of the Rent Restrictions (Dwelling Houses) Ordinance — Discretion of Trial Court — Alternative accommodation — Scope of section* 8(3) *of Rent Restrictions (Dwelling Houses) Ordinance — Alternative accommodation consisting of dwelling house by way of sub-tenancy.*

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated 10.5.44 in Civil Appeal No. 59/44, allowed:—

1. It is for the Magistrate to decide whether landlord reasonably requires premises for himself.

2. Mere expression of opinion by a witness of a tenant not sufficient to justify the Magistrate in holding that the requirement of the landlord is unreasonable (if landlord abundantly proved that his desire to occupy his own premises is reasonable).

3. a) Under section 8(3) of Rent Restrictions (Dwelling Houses) Ordinance and in view of the definition of "tenant", "tenancy", and "let" in section 2, person in occupation is protected.

b) If tenant lawfully sublets the premises the sub-tenant in occupation will be protected under section 8(3) of Rent Restrictions (Dwelling Houses) Ordinance if he continues to pay rent within the meaning of section 8(1), even although the tenant does not hand over that rent to the landlord.

FOLLOWED: C. A. 170/43 (10, P. L. R. 432; 1943, A. L. R. 555).

DISTINGUISHED: H. C. 59/41 (8, P. L. R. 353; 10, Ct. L. R. 66; 1941, S. C. J. 305; Gorali, p. 122); C. A. 101/42 (9, P. L. R. 576; 12, Ct. L. R. 130; 1942, S. C. J. 625).

REFERRED TO: C. A. 221/42 (9, P. L. R. 775; 12, Ct. L. R. 166; 1942, S. C. J. 770; Gorali, p. 154).

ANNOTATIONS:

1. As to point 1 see cases followed (*supra*) and annotations in A. L. R. See also C. A. 272/44 (*ante*).

2. As regards cases when appellate Court may interfere with judgment of trial Court under section 8(1)(c) of Rent Restrictions (Dwelling Houses) Ordinance see cases in point 1 (*supra*).

3. On the difference between the Business Premises Ordinance and Dwelling Houses Ordinance in respect of definitions of landlord and tenant see annotations in A. L. R. to C. A. 221/42 (*supra*).

4. The far-reaching decision of the Court of Appeal in this case that a sub-tenant is protected even against the landlord by virtue of section 8(3) raises very important and interesting questions, *viz.* whether the landlords's right of re-entry is altogether destroyed even if tenant does not pay the rent or commits breach of tenancy; what is the rent payable by the sub-tenant and to whom should it be payable if the head-tenant does not continue the head-lease, *etc.*

5. This case was followed by District Court, Jlm. (Judge Bourke) in C. A. 76/44 (1944, S. C. D. C. 410).

(*A. G.*)

FOR APPELLANTS: Goitein.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Haifa, in its appellate capacity, dismissing an appeal from one of the Magistrates of Haifa who had dismissed an action for eviction in which the present Appellants were the Plaintiffs.

The Magistrate found as a fact that the premises to which the Rent Restrictions (Dwelling Houses) Ordinance, 1940, applies were not reasonably required by the Appellants and he also found that the Appellants had not proved that alternative accommodation was available for the Respondent (see Section 8(1)(c) of the Ordinance). We think that it is now settled law that the first matter for the Magistrate to decide is whether the landlord reasonably required the premises for himself. (Civil Appeal 170/43, P. L. R. Vol. 10, p. 433). In that case this Court held that there was a discretion vested in the Magistrate but that he had misdirected himself as to the exercise of that discretion and the Court went on to say:—

> "It is abundantly clear that the landlord did reasonably require the premises for himself and family."

In the case now before us it was established that the first Plaintiff, who was the wife of the second Plaintiff, had suffered from rheumatism and from nervousness and that her doctor had advised her to move to the premises in question, which, of course, were their own premises. In support of the Plaintiffs' case the first Plaintiff's medical adviser, Dr. Torian, gave evidence. There can be no suggestion that Dr. Torian's evidence was false or biassed, or extravagant, and in the state of facts as revealed to the Magistrate we think that it was abundantly proved that the desire of the first Plaintiff and her husband to occupy their own premises was reasonable.

The Defendant, however, called a Dr. Levy who swore that in his opinion there was more noise in the premises sought to be recovered by the Plaintiffs than in the house where the Plaintiffs were living at the time when the action was brought. The Magistrate accepted this doctor's evidence and on this ground alone he seems to have come to the conclusion that it was not reasonable for the Plaintiffs to require the premises for themselves.

While it is not for us to substitute our own discretion for that of the Magistrate, we have no hesitation in holding that the mere expression of opinion of Dr. Levy was not sufficient to justify the Magistrate in holding that the requirement of the Plaintiffs was unreasonable. For these reasons we are unable to agree with the decision of the Magistrate or with that of the District Court. The Appellants, of course, still had to prove the existence of alternative accommodation available for the tenant. That they did so is to be found in paragraph H2(a) of the Magistrate's judgment where he held that the Plaintiffs were ready to offer to the Defendants the flat in which the Plaintiffs were residing at the time when the action was brought. We quote from the judgment:—

> "There is no doubt that this flat both as regards size and convenience is fit for the Defendant. The fact that this flat is less new, and in fact an old flat — is not one which I have to take into consideration. The duty of Plaintiff is only to prove that there is alternative accommodation, which accommodation must not be exactly similar to the present flat of the Defendant, if it fulfils the requirement of the Defendant."

The Magistrate went on to say that the Plaintiffs however were merely as regards the flat which they were offering to the Defendant sub-tenants * of one Kassem. There was, however, uncontradicted evidence, that the Plaintiffs were tenants by virtue of a lease which did not prohibit sub-letting. In view, therefore, of the definition of "tenant", "tenancy" and "let" in section 2 of the Ordinance, and in view also of the fact that it is persons in occupation who are protected (see section 9) ** we think that if the present Respondent continues to pay rent within the meaning of line 3 of section 8(1) he will be protected even although the present Appellants do not hand over that rent to Kassem. The position, therefore, is different from that in High Court 59/41, P. L. R. Vol. 8, p. 353. We do not think that the decision in Civil Appeal 101/42 definitely covers the point.

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* *Scil.* tenants.

** Should be: 8(3).

(*Ed.*)

In Civil Appeal 221/42, P. L. R. Vol. 9, page 775 this Court had occasion to point out the difference between this Ordinance and the Rent Restrictions (Business Premises) Ordinance, 1941. In view of the clear finding of the Magistrate that suitable alternative accommodation was available and in view of the fact that the Plaintiffs were not forbidden by the lease from Kassem to sub-let and because of the definitions in Section 2 which we have mentioned, we think that the Magistrate should have ordered eviction.

We accordingly set aside the judgment of the District Court and of the Magistrate, with costs here and in the Courts below, and as the alternative accommodation is at present in the occupation of the present Appellant, and therefore still available, we enter judgment for the Plaintiffs in terms of the prayer at the end of paragraph 11 of the Statement of Claim. The Respondent will pay to the Appellants their costs in this Court, namely, fixed (inclusive) costs of LP. 10.—. The advocate's attendance fees in the Court below will be the same amounts as awarded by those Courts to the present Respondent.

Delivered this 1st day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 324/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Ma'mur Awqaf, Northern District, Acre. RESPONDENT.

President District Court striking out action regarding cemetery — Proper course under Palestine (Holy Places) Order in Council.

Application for leave to appeal from the judgment of the Land Court, Haifa, dated the 24th of July, 1944, in Land Case No. 17/43, granted and appeal allowed:—

Court seized with an action involving property within orbit of Palestine (Holy Places) Order in Council must stay it (and not strike it out) and refer the matter to the High Commissioner.

(*M. L.*)

FOLLOWED: L. A. 2/33 (2, P. L. R. 53; 3, C. of J. 983).
ANNOTATIONS:

1. On procedure in matters relating to holy places see case followed, L. A. 53/32 (3, C. of J. 983) and C. A. 55/40 (7, P. L. R. 291; 1940, S. C. J. 483).

2. Authorities on leave to appeal are collated in annotations in A. L. R. to C. A. 191/44 (11, P. L. R. 292; *ante*, p. 574) and C. A. 124/44 (11, P. L. R. 153; *ante*, p. 199).

(*A. G.*)

FOR APPLICANT: Assistant Government Advocate — (Gavison).

FOR RESPONDENT: Khadra.

JUDGMENT.

This is an application for leave to appeal from a decision of the learned President of the District Court sitting as a Land Court, striking out an action.

The Appellant has also taken the precaution of filing an appeal, because he is in some doubt as to whether an appeal lies as of right. As both the application for leave to appeal and the appeal are before us, we do not think it necessary to decide whether an appeal lies as of right, especially in view of the fact that the appeal and the application for leave have both been lodged in time.

The reason why the action was struck out was because the learned President, on perusing a letter from the Acting District Governor * of Haifa to the *Mufti* of Haifa, dated 4th June, 1925, believed that a final decision had been arrived at by the High Commissioner under the second paragraph of Article 3 of the Palestine (Holy Places) Order-in-Council, 1924, declaring a certain cemetery to be a holy place. We have carefully perused the letter, and, without setting forth its contents, we think that it is implicit from its terms that no action under the Order-in-Council has yet been taken in respect of this particular cemetery.

We accordingly think that the learned President was wrong in striking out the action. He should have stayed the action and referred the matter to His Excellency the High Commissioner, in accordance with the principles laid down in Land Appeal No. 2/33, P. L. R. Vol. 2, pages 53 and 54. We therefore set aside the decision of the 24th July, 1944, and remit the case to the Land Court of Haifa for action in accordance with the principles laid down in Land Appeal No. 2/33.

The Appellant is entitled to his costs of today's proceedings in any

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* *Scil.* Commissioner.

(*Ed.*)

event, which costs will be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Delivered this 11th day of December, 1944.

British Puisne Judge.

HIGH COURT No. 69/44.

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

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

IN THE APPLICATION OF:—

Nasri Fiani. PETITIONER.

v.

Qadi of the Sharia Court, Nablus. RESPONDENT.

Complaint before High Court against decision of Sharia Court — Non-interference of High Court.

Return to an order *nisi*, calling upon the Respondent to show cause why his order refusing to hear Petitioner's evidence in Case No. 374/43, Nablus *Sharia* Court, should not be set aside; order *nisi* discharged:—

Proper course for a person aggrieved by a decision of a lower Court — to appeal to Appeal Court provided for this purpose, not to invoke High Court.

(*M. L.*)

ANNOTATIONS: On non interference of High Court when there is another remedy see H. C. 35/43 (10, P. L. R. 210; 1943, A. L. R., 352) and H. C. 150/42 (*ibid.*, pp. 19 and 242) and annotations.

(*A. G.*)

FOR PETITIONER: Elia.

FOR RESPONDENT: Assistant Government Advocate — (Wa'ary).

ORDER.

In this return to an order *nisi*, the Petitioner complains against a decision of the *Qadi* of the *Sharia* Court of Nablus to the effect that he was not eligible on the ground of his personal status to give evidence before the Court in a matter concerning the personal status of Moslems. We do not find it necessary to comment on the grounds upon which it is said his evidence was refused. Clearly it involved a question of Moslem Law. There is an appeal from the Court of a *Qadi* to the *Sharia* Court of Appeal and in our opinion the proper course for a person aggrieved by a decision of a lower Court is to appeal to the Appeal Court provided for this purpose. The order *nisi* is therefore discharged with LP. 5 inclusive costs.

Given this 13th day of July, 1944.

Chief Justice.

CIVIL APPEAL No. 301/44.

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

BEFORE: Rose, J.

IN THE APPEAL OF:—

Kamel Muhammad Hassan. APPELLANT.

v.

Darwish el Khalil. RESPONDENT.

Failure to mention in Notice and Grounds of Appeal name of locality of Court appealed from.

Appeal from the judgment of the District Court, Haifa, in its appellate capacity, dated the 16th June, 1944, in Civil Appeal No. 63/44, allowed:—

Appeal should not be dismissed on a point in nature of a mere oversight in Notice of Appeal which cannot mislead either the Court official or the Respondent such as omission of name of locality of Court appealed from.

(*M. L.*)

FOLLOWED: C. A. 339/43 (*ante*, p. 291).

ANNOTATIONS: See case followed and annotations in A. L. R. On Notice of Appeal not stating names of all parties see C. A. 8/44 (11, P. L. R. 487; *ante*, p. 568) and annotations.

(*A. G.*)

FOR APPELLANT: Wittkowski.

FOR RESPONDENT: Habiby.

JUDGMENT.

The point of appeal in this case is a very short one. It appears that the present Appellant filed a notice and grounds of appeal in the District Court of Haifa on appeal from the Magistrate's Court. It is to be noticed that he omitted therefrom the words "of Haifa".

Now, in his notice and grounds of appeal the Appellant sets out that this is an appeal from a judgment of the learned Magistrate in the Magistrate's Court case No. 335/44 delivered on the 13th of March, 1944, and then there are the grounds of appeal set out in detail.

Before the District Court the Respondent took the point that there was no compliance with Rule 314(c) of the Civil Procedure Rules, 1938, which provides that the name of the Court which gave the decree appealed from must be included in the notice of appeal. The learned President upheld the objection and dismissed the appeal.

It seems to me that it is most unfortunate that an appeal should be

dismissed on a point of this nature which is obviously a mere oversight on the part of the one who drafted out the Notice and Grounds of appeal and it cannot in any degree mislead either the official of the Court or, which is more important, the Respondent himself. It seems to me that I am entitled to rely on the reasoning followed in Civil Appeal No. 339/43 reported in the Annotated Law Reports, 1944, at p. 292.

For these reasons I am of opinion that this defect in the Grounds of Appeal is not fatal to the appeal. The appeal must, therefore, be allowed and the case remitted to the District Court to hear the appeal on its merits. The costs of this appeal will be in the cause but to simplify the final arrangements I certify the costs to be on the lower scale and to include an advocate's attendance fee of LP. 10.

Delivered this 6th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 287/44.

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

BEFORE: Rose, J.

IN THE APPEAL OF:—

Emile Massabki & an. APPELLANTS.

v.

Mituva Ltd. RESPONDENT.

Construction of contract — Implied condition, Halsbury VII, 322 — Argument not adduced before Court of trial — Notification of confirmation of contract.

Appeal from the judgment of the District Court of Jaffa, dated 30th May, 1944, in Civil Case No. 168/43, allowed and case remitted:—

Where a contract becomes operative on the occurrence of a specified event in the sole knowledge of one of the parties, an implied term should be read in the contract that that party should notify the other of the fulfilment of the condition.

(*A. M. A.*)

ANNOTATIONS: The judgment of the District Court (C. D. C. Ja. 168/43) is reported in 1944, S. C. D. C. 182.

(*H. K.*)

FOR APPELLANTS: Berouti.

FOR RESPONDENT: Minkovitch.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jaffa, striking out the statement of claim of the Appellants on the ground that it disclosed no cause of action.

It appears that the Appellants rely on a contract between them and the Respondent relating to the sale of some truck chassis, in pursuance of which contract they paid the sum of LP. 500 as an advance payment; and the contract now having, they say, become void, they ask for the recovery of that sum. In their pleadings they allege that they were not notified by the Respondent of the receipt of a confirmation from the owners of the trucks in Turkey, and they further allege that the Respondent did not confirm the said sale.

The learned Relieving President pointed out — which is, in fact, the case — that there was no provision in the contract for the notification by the Respondent to the Appellants of the receipt of the confirmation from the truck owners in Turkey. That is perfectly true. But Mr. Berouti has referred me to a very well known principle which is set out in Halsbury's Laws of England, Vol. 7, p. 322, which says:—

> "In construing a contract, a term or condition not expressly stated may, under certain circumstances, be implied by the Court if it is clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such a term or condition to be a part of the agreement between them. Such an implication must in all cases be founded on the presumed intention of the parties and upon reason, and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have..."

It seems perhaps a little unfortunate that this aspect of the matter was not stressed before the learned R/President because I cannot help feeling that had it been so presented to him, he would have come to the same conclusion which I myself feel bound to come to now, and that is, that the only reasonable, commercial interpretation of this contract is that there was an obligation upon the Respondent, upon the receipt of the confirmation from Turkey, to notify the Appellants that they had received it, and that therefore the contract was effective; or, to use the actual words of the agreement, that the contract, therefore, had been confirmed within the meaning of clause 5. And it seems to me that, from the practical point of view, the confirmation in clause 5 clearly has to be conveyed to the Appellants, because the Appellants have to undertake certain obligations only upon the confirmation. That must clearly mean the confirmation from the Respondent to them, and the only step that was necessary in order for

the contract to be confirmed was the notification from the truck owners in Turkey that they had no objection to the sale.

That being so, it seems to me that the issues, in fact, which were agreed upon between the parties, do really cover the matter. The agreed issue was, did the Defendant inform the Plaintiffs of the receipt of the confirmation of the sale by the owners of the trucks in Turkey within 15 days of the contract, and did the Defendant confirm the said sale. It seems to me really, if I may say so, that these two issues are one, because the confirmation of the sale must, as Mr. Minkowitch admits, at least by implication, mean the notification of the consent of the owners in Turkey. It seems to me, therefore, that the proper course in this case is for the matter to be remitted, either party to be at liberty to call any further evidence they may desire, to be tried upon the merits. And it may well be (I express no opinion on that, nor has the learned Relieving President), that in due course the Respondent will be able to satisfy the Courts that he, in fact, carried out all his obligations under the agreement. But that is a matter that seems to me must be considered by the Court below.

In all the circumstances I think that the costs of this appeal should be in the cause. To simplify the final arrangements, I certify that the costs of this appeal will be on the lower scale to include an advocate's attendance fee of LP. 15 to the ultimately successful party.

Delivered this 29th day of November, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 79/44.

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

BEFORE : Rose, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Hilmi Hashem Ajour. APPELLANT.

v.

The Attorney General. RESPONDENT.

Charge of soliciting or enticing members of H. M.'s Forces to sell property belonging to such Forces — Acquittal of charge of soliciting and conviction of buying without legal authority or reasonable excuse property belonging to H. M.'s Forces — Question of remitting a criminal case with a view of amending the charge.

Appeal against the judgment of the District Court of Jaffa, Criminal Case No. 24/44, allowed and conviction quashed:—

1. Conviction of an offence with which an accused was not charged cannot stand if charge not amended during trial.

2. A criminal case tried summarily by District Court cannot be remitted for amendment of charge since under Rule 9, District Courts (Summary Trials) Rules such amendment must be made before accused was called upon to enter upon his defence.

(*M. L.*)

ANNOTATIONS: Authorities on amendment of informations and charges are collated in annotations to CR. A. 16/43 (10, P. L. R. 131; 1943, A. L. R. 115).

(*A. G.*)

FOR APPELLANT: Ghussein.

FOR RESPONDENT: Assistant Government Advocate — ('Aqel).

JUDGMENT.

In this case the Appellant was tried summarily by the District Court of Jaffa for an offence against Regulation 24A(1)(a) and (b) of the Defence Regulations, 1939, the offence with which he is charged being that of soliciting or enticing members of His Majesty's Forces to sell property belonging to His Majesty's Forces. It is true that in the particulars of offence, after setting out the soliciting and enticing, the charge goes on to say that as a result of the soliciting the Appellant bought the property from certain persons without any legal authority or reasonable excuse, but it is, of course, clear from that wording that the offence of buying must depend upon the prior establishment of the soliciting. If one turns to the judgment there is a clear finding by the trial Court that the soliciting and enticing was not proved against the Appellant as the Court says the soliciting and enticing was made by two boys who ran away and the Court says therefore we acquit the Accused regarding this point. But they then proceed to find him guilty of an offence against Regulation 24A(1) which is of buying, that being an offence with which the Appellant was not charged and no amendment was made or even asked for throughout the trial.

Mr. 'Aqel for the Attorney General suggests to us that although the charge is bad on the face of it, and the conviction would appear to be bad on the face of it, that we should remit the case to enable these defects to be put right. Not only are we doubtful whether we have powers to remit in such a matter as this but we are certainly of opinion that it would be quite wrong for us to do so in the present case even if we had such power because the effect of such a remittal would, apart from other considerations, seem to over-ride and nullify the provisions of Rule 9 of the District Courts (Summary Trials) Rules, 1938, which

says that a Court may amend or cause to be amended a charge or charges contained in the statement of charge at any time during the proceedings before the Accused has been called upon to enter upon his defence. For these reasons we are of opinion that the appeal must be allowed and the conviction quashed.

We would add that it seems particularly unfortunate that owing to these errors in procedure this result should be necessary.

Delivered this 5th day of July, 1944.

British Puisne Judge.

CIVIL APPEAL No. 276/44.

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

BEFORE : Rose, J.

IN THE APPEAL OF:—

Shemaya Safrai Buchman. APPELLANT.

v.

Nathan Cooks & an. RESPONDENTS.

Procedure — Evidence — Point not taken in Court of trial cannot be pleaded on appeal — Evidence against written admission — Interest — Costs.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 26th May, 1944, in Civil Case No. 20/42, dismissed subject to a variation:—

A point relating to the admissibility of evidence cannot be taken for the first time on appeal.

(*A. M. A.*)

ANNOTATIONS: "Where ... a party in a civil case ... objects to the reception of any evidence, he should raise objection when that evidence is tendered, and should invite the Court to record that objection under Rule 200". — C. A. 3/41 (8, P. L. R. 93; 1941, S. C. J. 255; 10, Ct. L. R. 232). See also C. A. 228/41 (8, P. L. R. 624; 1941, S. C. J. 570; 11, Ct. L. R. 222) and C. A. 191/42 (9, P. L. R. 710; 1942, S. C. J. 1000).

(*H. K.*)

FOR APPELLANT: Eliash.

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

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv.

In this case the Appellant and the first Respondent appear to have had a number of financial transactions extending over a period of years. The learned R/President, after a lengthy hearing, came to the view that the version of the facts as given by the first Respondent was true and that that of the Appellant and his wife was untrue and that their claim was "baseless and fraudulent". He therefore gave judgment for the first Respondent for LP. 620.608 mils, the amount claimed, and dismissed the set-off of the Appellant. Counsel for the Appellant raises one principal point — that there was a written receipt signed by the first Respondent regarding the amount claimed to be set off. There is, of course, a settled line of authorities that an admission in writing by one party can only be displaced by another document in writing, an admission by the opposite party or an entry in his books. In this case the learned Judge does not deal with this point, and does not refer to any admission or document upon which he relies in order to displace the admission contained in this receipt.

I have read the record of the proceedings, which is a lengthy one, with care, and have noted the submissions made by counsel for the Appellant in the trial Court; and I have formed the conclusion, as Mr. Polonsky for the first Respondent states to be the case, that the point that has been argued before me was never taken in the Court below. It seems to me, therefore, that, in the circumstances of this particular case and having regard to the view of the facts formed by the learned trial Judge, with which I see no reason to disagree, I should not permit this point to be taken now.

The remaining issues are pure questions of fact.

For these reasons I am of opinion that the appeal must be dismissed subject to a minor point as to interest. The learned Relieving President ordered that interest at the rate of 7% *per annum* should be paid as from 1.12.41 on the sum of LP. 620.608 mils. This, as counsel for the first Respondent agrees, appears to have been a mistake, as the Respondent was only claiming from that date interest on the sum of LP. 500. The judgment is therefore varied to read as follows:—

"Judgment is given for the Plaintiff for the sum of LP. 620.608 mils and for a sum equivalent to the interest at the rate of 7% *per annum* on a sum of L. 500 from 1.12.41 to date of payment". As the first Respondent has substantially succeeded in this appeal, he will have two thirds of the costs to be taxed on the lower scale to include a sum of LP. 10 for advocate's attendance fee.

Delivered this 8th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 361/43.

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

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

IN THE APPEAL OF:—

Hemnutah Ltd. APPELLANT.

v.

Abdul Karim Muhammad Freij. RESPONDENT.

Awlawiyeh and partition — Land Code, art. 41.

Appeal from the judgment of the Chief Magistrate's Court of Tulkarm, sitting as a Land Court, dated the 26th day of October, 1943, in Land Case No. 13/43, allowed:—

An action for partition may (in certain cases) defeat a claim for *awlawiyeh*. (*A. M. A.*)

ANNOTATIONS: On *awlawiyeh* see C. A. 389/43 (11, P. L. R. 214; *ante*, p. 273) and note 1 thereto at p. 274, *ante*.

(*H. K.*)

FOR APPELLANT: Sadmon.

FOR RESPONDENT: Cattan & Jayoussi.

JUDGMENT.

This is an appeal from a judgment of the Acting Chief Magistrate, sitting as a Land Court at Tulkarm which Court had given judgment in favour of the Respondent who had claimed by way of *awlawiyeh* 11 out of 225 shares in certain land at Qaqun village. The Land Court had ordered registration in the name of the Respondent on payment by him of the value of the land estimated at LP. 12 per *dunum*. Against that judgment, Hemnutah Ltd. now appeal to this Court. The main ground of appeal is that, prior to the filing of the statement of claim in the *awlawiyeh* action, the present Respondent was one of the Defendants in a partition action brought in the Magistrate's Court, Tulkarm, by one Ahmad Hassan ej Shak'a. The statement of claim in the partition action was filed on the 6th February, 1943, while the statement of claim in the *awlawiyeh* action was filed on 9th March, 1943. It is true that judgment in the partition action was not delivered till 20th of June, 1943. Mr. Cattan, for the Respondent to this appeal, argues that, when his client filed the *awlawiyeh* action, the land was still *masha'* while Mr. Sadmon, advocate for the Appellants, argues that the Land Court gave judgment in the *awlawiyeh* action on 26th

October, 1943. The argument proceeds that the land was by reason of the judgment in the partition action of 20th June, 1943, no longer *masha'* and that to succeed in an action for *awlawiyeh* under Article 41 of the Ottoman Land Code one of the pre-requisites is that the land be *masha'*. To this the rejoinder of Mr. Cattan is that, if this argument is sound, one could always defeat an *awlawiyeh* action by bringing a partition action. He also relies on the principle of law that a *lis pendens* should not affect the *status quo*. I do not think that this Court should lay down any hard and fast rule; but it seems to me that Mr. Cattan's argument is a two edged one because it might equally be argued that you can defeat a partition action by bringing an action for *awlawiyeh*. In this case the dates are of importance. The present Appellants were Defendants in the partition action. They were Defendants No. 18 and were the only Defendants who filed a defence. The present Respondent was also a Defendant but he filed no defence. On the contrary, after lots had been drawn and the shares of the respective parties were known, he filed a document, exhibit 'D 3', paragraphs 2—5 of which read as follows:—

> 2. In accordance with this lot and sketch, the Defendant No. 13 was allotted sub-division No. 7 of parcel (C) shown on the sketch mentioned above and Defendant No. 19 was allotted sub-division No. 1 of parcel (C) shown on the said sketch.
>
> 3. On 23.3.43 Defendant No. 1 (Applicant now) had bought from Defendant No. 13 the undivided jointly owned (*Masha'*) share which was registered in the name of Defendant No. 13 and took a *Kushan* in respect thereof. Defendant No. 1 had also bought on 30.3.43 from Defendant No. 19 the *masha'* share which was registered in the name of Defendant No. 19 and took a *Kushan* in respect thereof.
>
> 4. In my capacity as Defendant No. 1 and the present owner of the *masha'* share of Defendants Nos. 13 and 19 I accept without condition or limitation or reservation all the proceedings which took place in this action to day's date but wish now to obtain the share of the Defendants Nos. 13 and 19 parcellated as it appeared after the lots were drawn (were cast).
>
> 5. Wherefore it is prayed when the final judgment is given in this action that sub-divisions Nos. 1 and 7 of parcel (C) which fell by lot to Defendants Nos. 13 and 19 be registered in my name in addition to sub-division No. 4 of parcel (C) mentioned above which fell to me by lots in my capacity as Defendant No. 1.

The Defendants Nos. 13 and 19 also signed that document confirming its contents. In view of the fact that the partition action was filed about a month before the *awlawiyeh* action, and in view also of the attitude of the present Respondent when he was a Defendant in the

partition action, I do not think that he should have been allowed to succeed in the *awlawiyeh* action.

For the foregoing reasons, I set aside the judgment of the Acting Chief Magistrate of 26th October, 1943, with costs here and below, the costs in this Court to be a fixed sum of LP. 15.—.

Delivered this 27th day of July, 1944.

British Puisne Judge.

CIVIL APPEAL No. 302/44.

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

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

IN THE APPEAL OF:—

Zeev Ben Petachia & an. APPELLANTS.

v.

Etel Berman & 2 ors. RESPONDENTS.

Bankruptcy — Appeals under sec. 75 — Time to file the appeal — Lack of jurisdiction not to be taken for the first time when arguing the appeal — Proof of debt — Discretion of trial Court.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 30th of June, 1944, in Civil Case No. 259/41, dismissed:—

1. An objection to jurisdiction which does not go to the root of the jurisdiction cannot be argued on appeal if not taken in the trial Court and if not raised in the grounds of appeal.

2. No period being provided for appeals under sec. 75 of the Bankruptcy Ordinance, an appeal may be filed within a reasonable time after the Appellant feels aggrieved by the order.

(*A. M. A.*)

ANNOTATIONS:

1. The facts underlying the point of jurisdiction were as follows: The hearing in the District Court started before two Palestinian Judges but was continued after one of them had left and had been replaced by another Judge. Both parties, however, expressly consented at the time to the continuation of the hearing before the differently constituted Court, and the consent was recorded.

Cf. the principle that a point of jurisdiction may be taken at any time, even on appeal, and even by the Court *probrio motu*: C. A. 201/42 (9, P. L. R. 696; 1942, S. C. J. 737); C. A. 250/42 (10, P. L. R. 32; 1943, A. L. R. 129).

The consent given by the parties would also seem irrelevant as "no consent ... on the part of litigants can give a Court jurisdiction where that jurisdiction is not

conferred by Order in Council or by Ordinance": C. A. 246/40 (8, P. L. R. 55; 1941, S. C. J. 15; 9, Ct. L. R. 54); C. A. 279/42 (10, P. L. R. 96; 1943, A. L. R. 88).

The Court here took the view that the point did not go to "the root of jurisdiction", but a different attitude was adopted in similar circumstances in the recent case C. A. 16/44 (11, P. L. R. 262; *ante*, p. 401). The Court did not give a ruling as to when a point of jurisdiction goes to the root and when it does not.

2. It was held in C. A. 144/42 (1942, S. C. J. 578; 12, Ct. L. R. 205) "that although no time limit is prescribed by Sec. 173, sub-sec. 5, Companies Ordinance, (which corresponds with sec. 75 of the Bankruptcy Ordinance) yet an application to the District Court, under that sub-section, should have been made within a reasonable time ..., and that to wait for a year and a half was certainly not reasonable."

The Court, however, in the present case accepted the proposition that a person may be aggrieved (or *feel* aggrieved) not at the time the trustee's order is given, but only later in the proceedings when realising the practical effect of the order in question.

(*H. K.*)

FOR APPELLANTS: Y. Frankel.

FOR RESPONDENTS: Nos. 1 and 2 — Harari.
No. 3 — No appearance.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv in an application based on Section 75 of the Bankruptcy Ordinance. Three points were urged in favour of the Appellants. The first was the question of the jurisdiction of the Court. The point was not taken in the Court below; it was not embodied in the grounds of appeal; it is now raised for the first time. Whatever may be the technical merits of it, it does not in our opinion go to the root of the jurisdiction, and we do not propose to allow the objection to be taken now.

The second point was that although there is no time limit for the appeal allowed under Section 75 of the Bankruptcy Ordinance, that appeal must be within a reasonable time. Without necessarily agreeing that from the strict legal point of view this is so, it is indubitably true that the Court will view with suspicion a claim where a man has sat on his rights for a considerable period of time. In this case the lower Court came to the conclusion that the appeal was lodged within a reasonable time, and we see no reason to differ from it. As counsel for the Respondents pointed out, they did not feel aggrieved until they discovered that they would not get 100% of their debts because of the admission of this claim of LP. 1211. Their sense of grievance may not, it is true, have arisen from any high moral sense, but we see no reason

to reject their explanation of the delay in filing the appeal because of this.

The third point advanced was that the learned Judges did not correctly appreciate the evidence adduced before them. The main evidence as to the existence of this debt was Exhibit P/1. We have perused this document and we do not hesitate to agree with the District Court that whereas it may have established contractual relationship between the parties, which relationship might in its turn have given rise to financial transactions, there is nothing in it to substantiate this claim of indebtedness to the amount of LP. 1211.

For these reasons we consider that the Court below was right when it set aside the decision of the trustee in bankruptcy with regard to the approval of the debt in bankruptcy of the sum of LP. 1211.995 mils. It follows that the appeal must be dismissed, with costs on the lower scale to include the sum of LP. 15 advocate's attendance fee.

Delivered this 7th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 217/44.

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

BEFORE: Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Said Shehadeh Hassan & an. APPELLANTS.

v.

Munir el-Rayyes, in his personal capacity and on behalf of his father, Muhammad el-Rayyes & 3 ors. RESPONDENTS.

Building on land of another — Jurisdiction of Courts.

Appeal from the judgment of the Magistrate's Court, Gaza, sitting as a Land Court, dated the 9th day of May, 1944, in Case No. 721/43, dismissed:—

Where a right is alleged, and contested, to build on land registered in another person's name, the dispute should be brought before the Land Court.

(A. M. A.)

ANNOTATIONS: The Land Court has jurisdiction to order the demolition of buildings: C. A. 204/42 (1942, S. C. J. 914), following C. A. 229/38 (5, P. L. R. 560; 1938, 2 S. C. J. 181; 5, Ct. L. R. 11).

(H. K.)

FOR APPELLANTS: H. Atalla.

FOR RESPONDENTS: Elia and Dajani.

JUDGMENT.

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

The Appellants first take the point that there was no jurisdiction for the Land Court to order the demolition of this house under article 11 of the Provisional Law Regulating the Right to Dispose of Immovable Property. That might, perhaps, be so if the attitude of the Appellants had been that they admitted the ownership to the land of the Respondents, and the whole question was the value of the compensation to be given to them in view of the destroyed house. But in this case it seems to us that this is almost a typical example of a case which should be brought before the Land Court. The Respondents say that they are entitled to demolish the house because it was built on their land without consent; the Appellants, on the other hand, allege that they were entitled to build the house because they had a claim to the land by cultivation over a long period of years. It seems to us that that is a clear issue for a Land Court to determine.

As to the appeal itself, it is, of course, a pure question of fact. It appears that the Appellants had some sort of small building on this land prior to the erection of the present building to which this case refers. Counsel for the Appellant tells us that this earlier building was burned down by the present Respondents — possibly wrongly, but we are not concerned with that — in 1942, and it was in that year that the Respondents registered their present land. In 1943, the following year, this present house was built, and there is no suggestion, and there is no evidence to support any such suggestion, that this second house, built in 1943, was built with the approval of the Respondents; and there is ample evidence on the record to the contrary. We certainly cannot interfere, therefore, with the Magistrate's finding of fact that this present house was built without the consent of the Respondents. Further, in view of the registration, we cannot upset the finding of the Magistrate that the Respondents in fact were the owners of this land.

For the reasons which we have given, we are of opinion that the appeal must be dismissed. The Respondents are entitled to their costs, which we assess in an inclusive sum of LP. 10.—.

Delivered this 4th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 355/44.

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

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

IN THE APPEAL OF :—

Nakleh Acra. APPELLANT.

v.

Mikhail Abdalla Hanna Suleiman Hazboun in his personal capacity and on behalf of the estate of Abdalla Hazboun & an. RESPONDENTS.

Title to land — Unregistered partition cannot upset subsequent registered title lawfully acquired — Principles of land registration — Position of mortgagee — Right to levy attachment.

Appeal from the judgment of the Land Court of Jerusalem, dated 27th July, 1944, in Land Case No. 18/42, allowed:—

A title to land acquired *bona fide* cannot be upset by an unregistered deed of partition previously made and purporting to negative the title of the registered owner's predecessor.

(*A. M. A.*)

ANNOTATIONS :

1. See, on unregistered partitions, note 1 to C. A. 138/44 (*ante,* p. 721).

2. Note, however, that "registration is no guarantee of title in Palestine": C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R. 509); see also note 5 to that case in A. L. R. and para. 27 of the judgment of Gordon Smith, C. J., in C. A. 251/43 (10, P. L. R. 646; *ante,* p. 104).

3. On the position of *bona fide* purchasers see C. A. 119/42 (1942, S. C. J. 755) where earlier authorities are reviewed; as regards *bona fide* mortgagees see C. A. 290/42 (10, P. L. R. 159; 1943, A. L. R. 166) and note 2 in A. L. R.

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENTS: Elia.

J U D G M E N T.

This is an appeal from the judgment of the Land Court, Jerusalem, in Land Case No. 18/42. This judgment ordered that a registration in the *Tabu* should be cancelled and that an attachment levied by the Appellant on the *Tabu* registration should be released with costs. Were it not for the fact that in the judgment I am about to deliver I differ from the learned Judges in the Court below I should not have thought that this case left any room for doubt.

I will deal first with the preliminary point, which was that the Appellant, who admittedly sues as the attaching creditor, had no right to sue. I reject this contention. It appears to me to be abundantly clear that a judgment creditor is sufficiently interested within the meaning of the Rules of Civil Procedure in the matter in dispute to sustain this action.

The facts are simple. The subject matter of the claim in the Court below was a house, and the basis of the claim was that the second Respondent was not entitled to a half share in the house. In the light of the developments of this litigation it is interesting to note that the first and second Respondents are relatives; the second Respondent is at present in America. There was evidence adduced from the Department of Land Registration that in 1891 the two brothers were registered as owners of a half share each. In 1924 the heirs of the owner of the half now in dispute sold their share. This sale was registered. In 1931 it was mortgaged, which again was registered. It is this mortgage which is the subject matter of an attachment by the Appellant. When the Appellant sought to execute his claim the first Respondent took action as Plaintiff in the Court below against the Appellant and the second Respondent, claiming ownership of the whole house. The second Respondent did not appear. During the hearing, the Plaintiff produced a document some 39 years old. This document was called a deed of partition and, if accepted, it would, of course, have defeated the title of the heirs to the claim of half the house; consequently it would have defeated the claim of the present Appellant, which is derived solely from the heirs. After a lengthy hearing and an inspection of the premises, the learned Judges in the Court below decided in favour of this document of partition and they ordered that any registration which was in conflict with that document should be cancelled, and that the house should be registered in the name of the Plaintiff. This involved the cancellation of the registration in 1924, the cancellation of the registration in 1931, and in consequence it defeated the Appellant's writ of execution. I am quite aware that there are cases in which this Court has held that in exceptional circumstances a subsequent registration can be defeated by some prior unregistered document. For myself I should require very strong extenuating circumstances before I should reject a registered title in favour of an unregistered one. It appears to me that no other course would be open to me if I were not to strike at the very root of the security of title, which it is the object of every system of land registration to give. If I were to uphold the decision of the lower Court it would involve the setting aside of a title honestly obtained by third parties for money's worth, and duly registered by

them. And this on the basis of some obscure 39 year old alleged deed of partition of which the registered parties never even heard, a deed moreover which was not only not registered but was not even proved before the Court. In my opinion such a decision would shake the very foundations of land registration in this country.

For these reasons the appeal must be allowed with costs on the lower scale to include LP. 10 for advocate's attendance fees.

Delivered this 20th day of December, 1944.

Chief Justice.

CRIMINAL APPEAL No. 84/44.

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

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

IN THE APPEAL OF:—

Muhammad Sadr Eddin el Dajani. APPELLANT.

v.

1. The Attorney General,
2. Husni el Habal. RESPONDENTS.

Merchandise Marks — Similarity of marks — Res ipsa loquitur — Evidence — Appeal by A. G. in private prosecutions — M. C. J. O., 11(3), 17.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated 23rd May, 1944, in Criminal Appeal No. 9/44, dismissed:—

1. Although in prosecutions for infringement of trade marks evidence should normally be called to show that there is such similarity between the trade mark and the mark complained of as to deceive the general public, there is no such necessity in cases where the similarity is obvious.

2. The Attorney General may appeal in any criminal case brought on a private complaint.

(*A. M. A.*)

ANNOTATIONS :

1. The relevant facts of this case as appearing from the Magistrate's judgment are as follows:—

Respondent No. 2 who is the owner of a Syrian trade-mark "El Arais", registered there in 1936, applied in 1937 for registration of his mark in Palestine; the application was duly published in the *Gazette* but was not followed up and the mark was never registered in this country. Appellant recently commenced using a similar trade mark "El Arais" and applied for its registration in Palestine,

which application was published in the *Gazette* of 12.8.43. Respondent No. 2 thereupon instituted criminal proceedings against Appellant under the Merchandise Marks Ordinance, the only evidence adduced being that (of an advertisement and) of the 2nd Respondent himself to the effect that he had been using his mark for several years.

2. On the first point note, however, the distinction between infringements of registered trade marks under the Trade Marks Ordinance, Secs. 35 & 38 (*vide* Kerly on Trade Marks, 6th ed., pp. 459 *et seq.*) and of unregistered "false trade descriptions" under the Merchandise Marks Ordinance, Secs. 2(1) and (2).

3. As regards the evidence required in "passing off" cases *cf.* Kerly, *o. c.*, p. 546 and White, Tomkins & Courage Ltd. *v.* United Confectionery Co. Ltd., 1914, 31 R. P. C. 430.

4. For Palestinian authorities on foreign trade marks not registered in Palestine, see C. A. 15/29 (1, P. L. R. 453; 5, C. of J. 1769) — *"Ceres"*, and H. C. 84/36 (9, C. of J. 823) — *"Noxcema"*.

5. As to the second point note, however, that the A. G. may not appeal against a judgment in a civil case in which he intervened under Sec. 6 of the Law of Procedure (Am.) Ord., 1934 — C. A. 274/42 (10, P. L. R. 105; 1943, A. L. R. 133).

6. See the further proceedings, H. C. 107/44 (*infra*).

(*H. K.*)

FOR APPELLANT: Seligsohn.

FOR RESPONDENTS: Ginzberg.

JUDGMENT.

These proceedings started by way of a complaint under Section 17 of the Magistrates' Courts Jurisdiction Ordinance made by Husni el Habal, against Sadr Eddin Dajani, Jerusalem, which averred that the latter had contravened the provisions of the Merchandise Marks Ordinance in that he applied a false trade description to a certain cream sold by him in the course of his business as a chemist. The Magistrate acquitted, and on appeal to the District Court the appeal was allowed and Sadr Eddin Dajani was convicted, and sentenced to pay a fine of LP. 5. Against that conviction he appealed to this Court, after formal leave had been granted.

A preliminary point has been taken by Mr. Seligsohn that as the Attorney-General did not originally prosecute in this case he could not now appeal. I am unable to accept this argument. Section 11(3) of the Magistrates' Courts Jurisdiction Ordinance places no such limitation on the powers of the Attorney-General. Under the provisions of that section I am of the opinion that the Attorney-General can appeal in any criminal case.

Turning now to the merits. It has been argued at great length that

there was no sufficient evidence in this case. Mr. Seligsohn particularly submitted that evidence should be called to prove that the public were in fact deceived. Now it is true that normally in cases of infringement of trade marks it would be necessary to call evidence that there was such similarity between the trade mark and the mark complained of as would deceive the general public. In this case the Palestine *Gazette* was produced, which contained the trade mark used by the Complainant for the sale of "Crème El Arais" and the trade mark utilized by the Accused for the advertisement of cream sold by him. It is clear to us from an examination of this, as it was to the learned President, that in this case there was no need to call evidence — it is a case of *res ipsa loquitur*. It would have been extremely difficult, if not impossible, for any member of the public to differentiate between the two marks.

For these reasons the appeal is dismissed and the conviction and sentence confirmed.

Delivered this 24th day of October, 1944.

Chief Justice.

HIGH COURT No. 107/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

The Registrar of Trade-Marks. PETITIONER.

v.

1. Mohamad Sadr Din El Dajani,
2. Husni El Habal. RESPONDENTS.

Trade Marks — Rival Claimants — Opposition — Trade Marks Ord. 1938, Secs. 14, 17.

Reference by the Registrar of Trade Marks under Sec. 17 of the Trade Marks Ordinance determined:—

A reference to the High Court of a dispute between rival claimants to a trade mark supersedes opposition proceedings before the Registrar of Trade Marks.

(*A. M. A.*)

REFERRED TO: CR. A. 84/44 (*ante*, p. 762).

ANNOTATIONS:

1. See the previous proceedings (H. C. 84/44 — *supra*).

2. For authorities dealing with the relation of opposition proceedings before the Registrar to references of rival claims to the Court, see C. A. 110/33 (2, P. L. R. 101; 5, C. of J. 1773), Alb. Baker & Co. (1898) Ltd.'s Application, 1908, 2 Ch. 86, 25 R. P. C. 513 and Javal and Parquet and Piesse and Lubin's Application, 1912, 29 R. P. C. 627.

(*H. K.*)

PETITIONER: Absent — served.

FOR RESPONDENTS: No. 1 — Seligsohn.
No. 2 — Ginzberg.

ORDER.

This is a reference under Section 17 of the Trade Marks Ordinance. It is conceded that the real point in dispute has already been decided in Criminal Appeal No. 84/44. In this case Mr. Seligsohn raises a purely technical issue. It appears that a person had filed an opposition to a Trade Mark in accordance with the provisions of Section 14 of the Ordinance and that the Registrar, after hearing some evidence, refused to register and ordered the parties to have recourse to Section 17 of the Ordinance. It is now argued that once proceedings have been started under Section 14, that section supersedes 17 and that the remedies afforded in the section should be exhausted before recourse is had to Section 17. I am unable to accept this argument. Sections 14 and 17 were enacted to deal with two different sets of circumstances. Section 14 deals with the case where there is opposition to register the Trade Mark as it stands. The Registrar after hearing the parties may decide to register the trade mark subject to certain conditions and the conditions imposed might perfectly well satisfy the opposer. Section 17 deals with the case where there are rival claims to an identical trade mark. It may well happen that the evidence adduced in proceedings under 14 may disclose that the real issue between the parties is a claim to an identical mark. If the Registrar arrives at this conclusion I see no reason why he should be precluded from refusing to proceed any further pending a settlement of the issue in accordance with the provisions of Section 17.

Given this 11th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 131/43.

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

BEFORE: Rose and Edwards, JJ.

IN THE APPEAL OF :—

Mustafa Ahmad Muhammad Diab. APPLICANT.

v.

Government of Palestine & an. RESPONDENTS.

Motion to Appeal Court to set aside its second judgment as being a nullity, because Applicant not cited as Respondent — Applicant, while a party to original proceedings and also to first appeal to Appeal Court being no longer a party after judgment in first appeal — Scope of Rule 313 (para. 2), Civil Procedure Rules.

Application to cancel the judgment of the Court of Civil Appeal in C. A. 131/43, dated 1.6.1943, dismissed:—

In a second appeal to Appeal Court only the persons remaining as parties to the case as a result of the first appeal must be cited as Respondents.

(*M. L.*)

ANNOTATIONS:

1. The judgment referred to in C. A. 131/43 was a consent judgment and, therefore, not reported. The first appeal judgment in this case is C. A. 217/42 (1943, A. L. R. 205).

2. On citing of parties in notice of appeal see C. A. 301/44 (*ante*, p. 747) and C. A. 339/43 (*ante*, p. 291).

(*A. G.*)

FOR APPLICANT: Weinshall and Asfour.

FOR RESPONDENTS: No. 1 — A/Solicitor General — (Hogan).
No. 2 — Cattan.

JUDGMENT.

This is a motion to cancel a judgment given by the Supreme Court in Civil Appeal No. 131/43 on the ground that it is a nullity because the Applicant who was a party to proceedings before the Settlement Officer in the land covered by this appeal, was not cited as a party to the appeal. There was a further allegation that the judgment was obtained by fraud and collusion. It seems that the matter was first decided by the Settlement Officer on the 30th June, 1942, the area in dispute concerning Block 18069 which appears to have been divided into 56 shares. The present Applicant was a third party and at the

conclusion of the judgment the Settlement Officer deals with his claim as follows: "The claim of the first and of the third parties to a right of preference to purchase 53 out of 56 shares in parcels 18069/1, 2, 3 and 4 is dismissed".

And then the next paragraph: "The claim of the first of the third parties to 3 out of 56 shares in parcels 18069/1, 3 and 4 and to all except 12 Turkish *dunums* in parcel 18069/2 is dismissed". There is no dispute that these 12 Turkish *dunums*, of which it appears that the present Applicant is registered as the owner of 3 shares out of 56 shares, do not form part of the area the subject matter of the dispute in the present proceedings. That was the position after the first proceedings before the Settlement Officer. There was then an appeal to this Court by the 2nd Respondent in the present motion, that is to say, Mr. Boulos Costandi Dabbas. Eight Respondents were cited and amongst them the present Applicant was Respondent No. 6 It is to be noted that the present Applicant himself did not appeal against the decision of the Settlement Officer dismissing his claim both to preference and to his share of 3 out of 56 shares. The Court of Appeal on the 28th January, 1943, allowed the appeal of Mr. Dabbas and remitted the matter to the Settlement Officer to be determined on the lines which were set out in the judgment, but they added with regard to that part of the judgment which deals with the claim of the third parties that that part of the judgment will stand, the judgment only being set aside with regard to the point about the confirmation of the agreement. Whether or not the decision arrived at was correct is not for us to say, but that language seems to us to be perfectly clear, and it would seem, therefore, that the contention of the Respondent is correct that when the matter came again before the Settlement Officer, the matter in dispute was limited to the question stated by the Court of Appeal, and it is relevant to notice that on the headnote which precedes the Settlement Officer's decision of the second proceedings, he sets out the parties as being Plaintiff the Government of Palestine and Defendant Boulos Costandi Dabbas. No other parties are mentioned at all. The Settlement Officer gave his judgment for the second time on the 5th March, 1943, and after dividing up the 53 shares out of 56 in Block 18069 between the Government of Palestine and Boulos Costandi Dabbas, he then proceeds, in spite of the fact that the matter is not remitted to him on that point, to reopen the matter as to the 3 shares out of the 56 and decides that the present Applicant is entitled to it. The Government then appealed to the Supreme Court citing as the Respondent the only party left in the case as a result of the judgment of the Supreme Court, namely, Boulos Costandi Dabbas, and

the matter then came before the Supreme Court on the 1st June, 1943, the parties being only those two persons, the one Appellant and the one Respondent.

Now, Mr. Hogan, the acting Solicitor General, submits to us, and we are in agreement with him on this matter, that the only requirement in accordance with rule 313, as interpreted by the decisions of this Court, is for him to cite as Respondents, the persons remaining as parties to the case as a result of the first appeal to the Supreme Court. It appears that when the matter was heard on the 1st June, 1943, after some argument there was an agreement between the parties and a judgment by consent which, in fact, divides the whole of these 56 shares between the two parties. I would add that the learned acting Solicitor General pointed out, and it has not been contraverted in argument, that the effect of the original decision of the Settlement Officer dismissing the present Applicant's claim to these 3 shares is that these 3 shares out of 56 remained or became the property of Government; therefore, it was within the competence of Government to dispose of them in any settlement which they might arrive at in the later proceedings. It seems to us, therefore, that the application is misconceived and must be dismissed. That being so it seems to us unnecessary to decide the further point as to whether, in any event, a motion of this kind can be entertained by this Court. The first Respondent does not ask for costs. The second Respondent will have an inclusive sum of LP. 10.

Delivered this 6th day of July, 1944.

British Puisne Judge.

HIGH COURT No. 116/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Seharia Amrani. PETITIONER.

v.

1. The Central Electoral Committee of the Elected Assembly of the Jewish Community,
2. Seharia Gluska & an. RESPONDENTS.

Elections — Elected Assembly of the Jewish Community — Regulations 23, 24 — Publication — Construction of statutes — "In this matter", "conduct of the election", "distribution of seats" — Failure to appeal to Elected Assembly — Nullity, whether appeal should be filed — High Court — Jurisdiction — Discretion — Specific remedy should be applied for.

Return to an order *nisi*, issued on the 21st day of September, 1944, directed to the Respondents, calling upon them to show cause why the Central Electoral Committee should not be ordered to revoke the return of the second and third Respondents or any other candidates of list 20 as members of the Elected Assembly and to distribute the remaining two vacant seats in accordance with law; rule *nisi* discharged:—

> A person who wishes to contest the validity of elections to the Elected Assembly of the Jewish Community should appeal from the decision of the Central Electoral Committee to the Elected Assembly.

(*A. M. A.*)

ANNOTATIONS:

1. The principles governing the exercise of its jurisdiction by the High Court are fully set out in H. C. 78/39 (7, P. L. R. 35; 1940, S. C. J. 25; 7, Ct. L. R. 45); *cf.* also notes in A. L. R. to H. C. 147/42 (10, P. L. R. 7; 1943, A. L. R. 35).

2. Palestinian elections authorities are collated in the notes in S. C. J. to H. C. 40/38 (5, P. L. R. 357; 1938, 1, S. C. J. 400; 4, Ct. L. R. 105). For later decisions see H. C. 45/40 (7, P. L. R. 342; 1940, S. C. J. 213; 8, Ct. L. R. 61), H. C. 66/42 (1942, S. C. J. 457; 12, Ct. L. R. 34) and C. A. 257/43 (10, P. L. R. 625; 1943, A. L. R. 802).

(*H. K.*)

FOR PETITIONER: Sussman.

FOR RESPONDENTS: No. 1 — Eliash & Scharf.
No. 2 — Absent — Served.
No. 3 — Berinson.

ORDER.

This is the return to an order *nisi*, calling upon the first Respondents to show cause why they should not be ordered to revoke the election of the second and third Respondents or any other candidates on list No. 20, that is the list of the Yemenite Federation, as members of the Elected Assembly, and why they should not be ordered to distribute the remaining two vacant seats in accordance with law.

The regulations in question are to be found in Palestine *Gazette* No. 254 of 1st March, 1930, pp. 142—145. Many matters have been argued before me by the advocates for the respective parties; but, in my view, the matter can be decided on one point only. I am satisfied that the publication contemplated by line 4 of Regulation 22 was properly made in *"Ha'aretz"* newspaper of Tel-Aviv, on the 21st Au-

gust, 1944. Because of the fact that the Central Electoral Committee did hear an appeal lodged under Regulation 23, I think that the question of whether the appeal was premature is now immaterial. The Petitioner was present at the hearing of that appeal which was dismissed.

The Petitioner's advocate has argued that his client had no right of appeal to the Elected Assembly under Regulation 24 because an appeal is limited to a particular matter and he points to the words "in this matter" in line 4 of Regulation 24. He agrees that the matter in question is the certificate referred to in line 2 of Regulation 24; but he says that that certificate is limited to matters dealing with numbers of votes received and the personal qualifications of the candidate but does not include the question of distribution of seats. With this contention of the Petitioner's advocate I do not agree. The words "conduct of the election" and the "distribution of seats" are matters specifically mentioned in the first two lines of Regulation 23. The scheme of things is, to my mind, easy of apprehension, it being that if a person objects to the Central Electoral Committee providing a member of the Elected Assembly with a certificate that he has been properly elected the person aggrieved should appeal to the Central Electoral Committee and say: "Please do not issue this gentleman with a certificate until you have heard my appeal."

The matters with which the Central Electoral Committee and, in my view, on appeal the Elected Assembly, deal with under Regulations 23 and 24 are the conduct of the election and distribution of seats. It is admitted that the Petitioner did not appeal to the Elected Assembly. In my view, his failure to do so is fatal to this petition.

The Petitioner's advocate has contended that, as the Central Electoral Committee did not determine the appeal within one week of the date of the receipt by them of the appeal, the decision of the Central Electoral Committee was a nullity and that, as the Elected Assembly is not a Court of record, his client could not go to the Elected Assembly to correct the decision of the Central Electoral Committee and in support thereof he cited Hailsham Vol. 31, p. 530 para. 692.

The appeal seems to have been received in Jerusalem on the 18th August, while the appeal was determined on the 3rd September, 1944. In my judgment, however, it is not so clear that the decision was a nullity because that might depend on many considerations such as the reasons for the delay and the interpretation of Regulation 23. I consider that all such matters were matters fit and proper to be decided by the Elected Assembly which has been given definite statutory powers

to hear appeals from the Central Electoral Committee. Whether I am right or wrong in this matter, the powers of this Court are discretionary and no good reason has been advanced why the Petitioner did not appeal to the Elected Assembly. In any event, I agree with the contention of Dr. Berinson that the relief asked for is not sufficiently specific.

The rule *nisi* is accordingly discharged. The Petitioner must pay the first Respondent's (Mr. Bar Rav Hay) costs of these proceedings, namely, fixed (inclusive) costs of LP. 10 and he must also pay the third Respondent's costs, namely, fixed (inclusive) costs of LP. 10.

Given this 8th day of November, 1944.

British Puisne Judge.

HIGH COURT No. 121/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Muhammad Hamed El Qasem. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Ita Rapoport. RESPONDENTS.

Sale of land in execution — Execution Law, art. 90 — Laches, H. C. 17/43, H. C. 97/40, H. C. 80/41 — Jurisdiction of High Court — Discretion — Effect of party pleading his own case — C. E. O. revising his own order, H. C. 39/38, H. C. 36/38.

Return to a rule *nisi*, issued on 12.10.44, directed to the first Respondent, calling upon him to show cause why his order, dated 2.7.43 (Ex. File No. 450/42, Tel-Aviv) should not be set aside and why he should not be ordered to refrain from ordering the sale of the land of Petitioner, the subject-matter of the said execution file, which is not even sufficient for the maintenance of Petitioner and his family; order made absolute:—

In the special circumstances of this case the Petitioner's delay in applying to the High Court for a remedy was condoned.

(*A. M. A.*)

REFERRED TO: H. C. 36/38 (1938, 1 S. C. J. 343; 3, Ct. L. R. 277); H. C. 39/38 (1938, 1 S. C. J. 378; 4, Ct. L. R. 3); H. C. 97/40 (8, Ct. L. R. 182); H. C. 80/41 (1941, S. C. J. 485; 10, Ct. L. R. 87); H. C. 17/43 (1943, A. L. R. 190).

ANNOTATIONS :

1. On the C. E. O.'s power to vary his own orders see also annotations in S. C. J. to H. C. 4/40 (1940, S. C. J. 238; 7, Ct. L. R. 76).

2. On the effect of laches *cf.* note 3 to H. C. 102/43 (1943, A. L. R. 830). For another instance of a delay being condoned by the High Court on account of special circumstances see H. C. 14/39 (6, P. L. R. 190; 1939, S. C. J. 163; 5, Ct. L. R. 171).

(*H. K.*)

FOR PETITIONER: Asal.

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

ORDER.

This is the return to an order *nisi*, directed to the Chief Execution Officer, Tel-Aviv, calling upon him to show cause why an order made by him, directing the sale of land of the Petitioner in satisfaction of a judgment debt should not be set aside. The order complained of was made on the 2nd July, 1943, when the Petitioner appeared in person. It was contended before me by the Petitioner's advocate that when his client appeared before the Chief Execution Officer he did not sufficiently urge before that officer his requirements with a view to the provisions of Article 90 of the Ottoman Law of Execution being taken into account and it is further urged that the learned Chief Execution Officer did not sufficiently apply his mind to all the matters set out in Article 90; and that there is nothing in the order to show that he did. Now, the mere fact that a party pleads his own case does not entitle him to be in a better position than a party who has had an advocate, that is, in the event of it being later said that he has delayed too long in coming to this Court. It seems that on the 21st February, 1944, the Petitioner submitted an application to the Chief Execution Officer for a rehearing. There is authority in High Court 39/38 and High Court 36/38 for a Chief Execution Officer revising his own order. The hearing of the application of the 21st February was fixed for the 21st of April, 1944, and it seems that on that date, owing to some misapprehension as to the room in which the Chief Execution Officer was sitting, the Petitioner, although present in the building, was not heard and his application was dismissed. He then on 21st July, 1944, submitted a fresh application which was dismissed on the 28th of July, 1944, by another Chief Execution Officer on the ground that the latter did not think that he could go into the matter. I may say at the outset that there is some reason for doubting whether the learned Chief Execution Officer on the 2nd July, 1943, sufficiently considered

the matters set out in Article 90 and, had the Petitioner come to this Court soon after the 2nd July, 1943, I think that one would have had no difficulty in making this order absolute. My difficulty, however, arises because of the delay. There has been about seven months delay, *i. e.* from 2nd July, 1943, to 2nd February, 1944. There is authority in High Court 17/43 and High Court 97/40 and High Court 80/41 for the proposition that this Court will not entertain petitions if there has been undue delay. This, however, I think is an exceptional case. The matter is of supreme importance to the Petitioner who has had all his land taken from him on the ground that his two wives have land registered in their own name. I do not wish to express any view on the merits of the Petitioner's application. I merely mention this in order to show that the matter is of great importance to the Petitioner. It seems that at the time of the hearing on the 2nd July, 1943, the Petitioner was paying monthly instalments in reduction of the judgment debt. It may be that he was under some misapprehension as to the effect of the proceedings of the 2nd July, 1943, especially in view of the fact that he was then before the Chief Execution Officer not as a Petitioner but as a Respondent or judgment-debtor. While I trust that the order which I am about to make will not be regarded as a precedent, I think that, in view of the circumstances of this case and of its great importance to the Petitioner and of the fact that there may be some reason for his delay, I ought to make the rule absolute. This I accordingly do. The order of the 2nd July, 1943, is set aside and the matter will go back to the Chief Execution Officer for reconsideration by him. Each party will pay his own costs of these proceedings.

Delivered this 15th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 141/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Musa Jabir. APPELLANT.

v.

Abdul-Aziz Jabir & an. RESPONDENTS.

Partition of land — Authority, intention, construction of documents —

"Munakaleh" and "kismeh" — Admissibility of letters in evidence — How proved.

Appeal from the judgment of the Magistrate's Court, Ramallah, sitting as a Land Court, dated the 23rd day of March, 1944, in Civil Case No. 329/43, dismissed:—

Meaning and effect of an unregistered partition considered.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 138/44 (*ante*, p. 721) and annotations; see also C. A. 355/44 (*ante*, p. 760).

(*H. K.*)

FOR APPELLANT: Ancar.

FOR RESPONDENTS: Sa'adeh.

JUDGMENT.

This is an appeal from a judgment of the Magistrate's Court, Ramallah, sitting as a Land Court on 23rd March, 1944.

Plaintiff, Musa Jabir, resident in U. S. A., brought an action through his son, Abdullah, by virtue of a power-of-attorney of 1943, against his two brothers, Respondents 1 and 2, asking for a declaration of title to one-third in the land known as Ras Hussein, which devolved on the parties from their father, who died in August, 1930.

At the time Plaintiff and Defendant 1 were both in the U. S. A., Defendant 1 returning to Palestine in 1932. After his return he received a letter from Plaintiff, Exhibit 2, authorising him, it is alleged, to carry out the partition of the estate between the three brothers. It seems that negotiations were carried out, and by virtue of Exhibit 3 the land in dispute was given to the first Defendant. This document is undated, but not denied to have been made subsequent to Exhibit 2. It was signed by the second Defendant and by Plaintiff's son, who purported to sign on behalf of his father, although he held no power-of-attorney.

Since the year 1932 Defendant 1 has been in possession of this land and has improved and cultivated it. Whereas Abdullah, Plaintiff's son, was in sole possession of the house and certain other plots of land allotted to his father by virtue of the partition, for which it is alleged there is a further document, the Plaintiff alleges that the partition was merely a temporary arrangement and for purposes of cultivation, and until the Plaintiff Musa should return from U. S. A.

Defendant 1 maintains that the partition was made by agreement between the parties and with the express approval of Plaintiff, as seen from letter Exhibit 2, and that he has since 1932 greatly improved the land and planted and walled it in.

The Magistrate dismissed the Plaintiff's claim and held that there was a partition in 1932 or early in 1933, in the negotiations of which the Plaintiff's son, Abdullah, took part by direction of and on behalf of his father, in which capacity he signed Exhibit 3; that Plaintiff cannot now undo what was done ten years ago; and there was ample evidence, which he believed, that the Plaintiff authorised the partition, and his son has since enjoyed the independent benefits accruing from the partition, and he is estopped from going back on it now.

There is a further point, namely that the partition is bad for lack of registration, which is also dismissed.

On appeal the Appellant alleges that Exhibit 3 is null and void, on the following grounds: 1, that Abdullah had no authority to act for his father; and 2, that it is a disposition of land and not registered and invalid, and from its wording it is not an agreement of partition. Further, that Exhibit 2, the letter, was improperly admitted in evidence and is not in any case an authority to partition; that there is no evidence to justify the finding that the Appellant only after ten years tried to upset the partition, whereas the evidence goes to show that he always objected, and in 1940 wrote to the District Officer and *Mukhtars* to intervene.

For Appellant it is admitted that Defendants 1 and 2 are co-owners, and only the question of partition is denied, and that this temporary partition was made because there had been quarrels over ploughing early in 1932.

Objection was taken to production of letter Exhibit 2, which was admitted as evidence after producing it to Abdullah in the witness-box, and he denied all knowledge of it as it was not addressed to him.

Here I will say that the signature of the letter could have been proved by Abdullah, but that the letter could not have been produced by him, and to this extent the procedure was incorrect. This letter was however later produced by Abdul Aziz, to whom it was addressed. I can assume, therefore, that this letter was properly admitted in evidence.

There is a further submission, namely that Exhibit 3 only deals with one part of the jointly-owned property, and cannot therefore be considered as a deed of partition, and that Abdullah had no power-of-attorney from his father until 1943. In 1940 Abdul Aziz was about to build, and Plaintiff wrote to the District Officer, and there is evidence that the District Officer received a letter from Plaintiff on 15.2.40, and Defendants 1 and 2 were informed accordingly, and apparently they did not build. The Plaintiff never authorised a final partition.

In Exhibit 2 the word used in Arabic is "*Munakaleh*", which the

Appellant maintains does not mean partition but rather change of hands.

The first Respondent submits that Appellant has never objected to this partition for ten years, and he has been in possession by agreement of Abdullah and his father. He has much improved the land. The Appellant has a home and land of greater value than this. He further submits he is entitled to equitable title.

From the record in this case and the translation of the letter Exhibit 2 and document Exhibit 3, it appears that Exhibit 2 was written by the Plaintiff to Respondent 1 on the 21st July, 1932. The second paragraph sets out as follows:—

> "Dear brother: You wrote to me telling me about the enactment of the recent law, namely the Survey Ordinance. I have to inform you that you know much better than I do, and if you agree, as you have intimated to me, to make the house a piece, the El-Midan another piece, and Jisr Ras El Hussein a third piece, that will be all right; and to leave the house for us, should brother Abdul Rahman accede to that. As regards my remaining share in Ras El-Hussein, will you please value it in the way you deem fit and leave it, *in toto,* in your name and anything which may flow from your sea please give it to Abdullah.
>
> I beg you brother to take care of Abdullah and assist him in the transfer (assignment) *"Munakaleh"*. If you can arrange to join our plots and yours, and give each one his plot, do not hesitate to do so, even if that will cause you some trouble; as there should be a leniency in the matter of transfer (assignment) *"Munakaleh"*; if there are trees or otherwise, change the trees with that of arable land.
>
> I wrote to Abdullah to ask him to abide by your wishes. Anything you will accept for your brother that will be accepted, whatever it may be."

This is Exhibit 3:—

> "Hareket Ras Hussein is bounded by Dar Sarsour; from the south: Abdul Aziz Jaber; East: Isleem Abu Ibead; North: Ramalla lands; and El Midan; bounded from south Dar Sarsur and sons of Atieh and Awad Mustafa Nasrieh, as partitioned (*Kismeh*) between us, the brothers; this has been written to Abdul Aziz.
>
> (Sgd.) Signatures of witnesses.
>
> I certify this partition (*Kismeh*) on behalf of my father Abdullah Musa Jabir.
>
> (Sgd.) Abdul Rahman Jabir."

It appears to me from letter Exhibit 2, second paragraph, that the Plaintiff contemplated the application of the Survey Ordinance, yet from the next paragraph, that there should be a partition of some kind. The learned Magistrate interprets this, together with Exhibit 3, as a binding final partition. With this reasoning I must differ and hold that under the circumstances in this case, and since the Appellant was

absent in U. S. A., and in his letter Exhibit 2 refers specifically to the Survey Ordinance, he intended that there should be a temporary partition, pending the operation of the Survey Ordinance.

I am further influenced in my decision by the fact that Exhibit 3 is made in respect of Hareket Ras Hussein only, and is not signed by Respondent No. 2, Abdul Rahman Jabir — a co-owner. It is also to be noted that the Arabic word *"Munakaleh"*, which was made use of twice by the Appellant in letter Exhibit 2, means exchange or transfer, and is not used in Exhibit 3, whereas the word *"Kismeh"*, which is the usual word for partition, is used.

I consider therefore that there was an arrangement come to between the parties in 1932, as a result of which Exhibit 3 was drawn up as a temporary settlement of partition, and this document is binding between the parties thereto, Plaintiff and Respondent, until Land Settlement or the judgment of a competent Court sets it aside.

The appeal is dismissed with costs and LP. 15.— advocate's fees.

Delivered this 7th day of November, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 99/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Musbah Ibn Ramadan Abu Khadra. APPELLANT.

v.

Yehoshua Lichter & an. RESPONDENTS.

Land Transfer Ord. — Lease for over three years effected by three separate documents to escape the necessity for registration — Lease and undertaking to let — Effect of illegal transaction on promissory notes given in connection therewith — Construction of contract — Failure of consideration.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 29th of February, 1944, in Civil Case No. 38/43, dismissed:—

A claim cannot be made in respect of promissory notes given in connection with a void transaction to which the holder was a party.

(*A. M. A.*)

ANNOTATIONS: On bills of exchange given in connection with transactions which are illegal, resp. null and void, see Halsbury, Vol. 2, pp. 651—2, paras. 897—898.

(*H. K.*)

FOR APPELLANT: Ben Jaminy & Elia.

FOR RESPONDENTS: E. Z. Fellman.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel-Aviv, of the 29th February, 1944, whereby the Appellant's (there the Plaintiff) claim was dismissed. The Plaintiff's claim is that the first Defendant made in Jaffa two promissory notes, each for LP. 140.500 mils, dated 1st August, 1935, payable to the Plaintiff six and seven years after date: (1) interest at 9% from 1st August, 1941, *etc.*; (2) interest at 9% from 1st August, 1942, *etc.* — total LP. 306.201.

The facts briefly are that the Appellant with two others entered into three separate agreements with the Respondent Lichter, each for a period of three years. It is alleged by Appellant that these agreements were distinct and separate, although they covered a period of nine years in all, and that they were in no way connected, and therefore not contrary to the Land Transfer Ordinance and invalid unless registered. Promissory notes were given in respect of these agreements, and the Appellant (Plaintiff in the Court below) is claiming here on the basis of the two promissory notes which he holds, D/4, in accordance with his statement of claim. The District Court held that these three successive contracts of lease were made in order to escape the Land Transfer Ordinance which requires a lease of over three years to be registered, and that the whole transaction is null and void, and that the Plaintiff is barred from claiming under promissory notes given by virtue of a void transaction to which Plaintiff was one of the parties, and the other, the three other persons who at the time were in partnership relations. Also that the amounts in question were given in connection with a period when the land was already sold by Plaintiff, and Defendants could not recover *.

The Appellant maintains that there was not a total failure of consideration and that the Appellant is entitled to recover the value of these promissory notes on the ground that there was not a "total failure of consideration".

---

* *Scil.* "receive enjoyment". See last words of the quotation from the D. C. judgment (*infra*).

(*Ed.*)

The claim against Defendant 2 is as guarantor and that there was no ground for holding that the contract D/4 should have been registered in the Land Registry and consequently promissory notes P/1 & 2 were given in respect of an illegal contract and, therefore, became null and void. Further, that the Respondent did not sell this land until 1943, after the maturity of the promissory notes, and that the Court below was mistaken; the so-called lease is not a lease but an undertaking to make a lease, and therefore not subject to the Land Transfer Ordinance. There is nothing in the evidence to show that Plaintiff wished to evade the law fraudulently.

The Respondent submits that there was a partnership between the Appellant and the two other lessees. The lease was for nine years, and the evidence shows they were partners, all three leases signed the same day, but the leases are not dated and must be null and void. The document is a lease and not an undertaking to make one. It is quite clear that no rents were paid and no consideration received.

I consider that it would only be a waste of time to go separately into the arguments in this case. I am satisfied that the learned District Court Judges, after a very careful consideration, came to the only conclusion possible, as stated in their judgment at page 2:—

> "(a) There is no doubt that the three successive contracts of lease were made in order to escape the law which requires that a contract of over three years should be registered in the Land Registry. This was proved from the evidence of the Plaintiff himself and from the proceedings of the case. It follows that the whole transaction is null and void, and that Plaintiff is barred from claiming under the promissory notes which were given by virtue of a void transaction, to which Plaintiff was one of the parties, and the others, the three persons who at that time were in partnership relations.
>
> (b) It was also proved that the said promissory notes were given in connection with the third contract at a time when the land had already been sold by Plaintiff and the Defendant could not have received the necessary enjoyment."

I entirely agree with their conclusions.

The appeal is dismissed with costs and LP. 15.— advocate's fees.

Delivered this 7th day of November, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 44/44.

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

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

IN THE APPEAL OF:—

Adib Mikhail Habayeb. APPELLANT.

v.

Anis Badr Hassoun & 5 ors. RESPONDENTS.

Land Settlement — Boundaries — Inspection by L. S. O. who is a surveyor — Inferences, evidence — Map tendered in evidence — Procedure.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated the 18th of December, 1943, in case No. 26/Daliet el Carmel, dismissed:—

1. The Court of Appeal will not interfere with the demarcation made by a Land Settlement Officer after a personal inspection, unless he made a patent mistake.
2. An old official survey map should be considered by the L. S. O. although informally produced in evidence.

(*A. M. A.*)

ANNOTATIONS:

1. On the first point see C. A. 160/43 (11, P. L. R. 397; *ante*, p. 651) and notes 2 and 5 at p. 652, *ante*.
2. Note that it was held in C. A. 145/41 (1941, S. C. J. 651) that "the survey map of 1928 was sufficiently proved inasmuch as the surveyor who superintended the survey was called and gave evidence with regard to it." See also note 3 to that decision.

(*H. K.*)

FOR APPELLANT: A. Atalla.

FOR RESPONDENTS: Nos. 1, 2 & 4 — In person.
No. 3 — Absent — served.
No. 5 — Asst. Government Advocate — Gavison.
No. 6 — Halevy.

JUDGMENT.

FitzGerald, C. J.: This was an appeal from the decision of the Land Settlement Officer of the Haifa Settlement Area, in case No. 26/Daliet el Carmel.

The case was argued at great length, but I can deal with it very briefly, because only one issue was raised. That was whether the Land Settlement Officer, when he went on the land, correctly identified certain boundaries alleged to be set out in the *kushans* and other documents. I deem it desirable to make the preliminary observation

that where the Settlement Officer visits the land for the purpose of tracing boundaries set out in the very inadequate sketches and described on the loosely worded *kushans* of Turkish times, this Court will be reluctant to reject his demarcations unless it can be shown from the documents or from the evidence adduced before the Settlement Officer that he made a patent mistake. This is particularly so when the Settlement Officer is himself a qualified surveyor, as he is in this case.

Now what is the case of the Appellant? He says that the *kushan* shows the boundary on the west as the village of Ijaim, which of course can be easily identified. He argues that the other boundaries, which were described in the *kushans* as *Wadies*, ought to be equally easily identified. The Settlement Officer does appear to have deviated from the *Wadi* boundary, but he gave very good reasons for it. The deed throughout referred to the area as "*Ult*" (not fit for cultivation) and he confined his award in favour of those claiming under the *kushans* to the land of that description. In that I think he was right. If there was a conflict between the sketch, which as I have remarked is usually unreliable, and the clear words in the deed, the words should prevail.

Furthermore, the Settlement Officer's interpretation is borne out by an official survey map published many years ago which describes the area as a forest reserve. I am told that I should reject this map because it was not properly tendered. I unhesitatingly reject the suggestion. This map is an official map of the country, published years before this dispute ever arose, and the argument that the Settlement Officer should not take cognizance of it, presumably because an official of the Survey Department did not come to the Settlement proceedings and formally tender it, is untenable. I can discover no reason for setting aside what I regard as findings of facts arrived at by the Settlement Officer, after a most careful investigation and a painstaking analysis of all the evidence available to him.

There remains for consideration the cross-appeal by the sixth Respondent. Having decided that we accept the findings of fact by the Settlement Officer, the cross-appeal must fail with that of the Appellant.

The appeal fails with costs on the lower scale to include LP. 10 advocate's attendance fee to the fifth Respondent.

Delivered this 23rd day of November, 1944.

Chief Justice.

Plunkett, A/J.: I concur.

A/British Puisne Judge.

CRIMINAL APPEAL No. 150/44.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Tewfik Saleh Ali. RESPONDENT.

Sentence — Difference of opinion between judges — Opinion of presiding Judge to prevail, Courts (Amend.) Ord., 1942, sec. 21A — Discretion.

Appeal from the judgment of the District Court of Jaffa, dated the 2nd October, 1944, in Felony No. 137/44, whereby the Respondent was convicted of manslaughter, contrary to Section 212 of the Criminal Code Ordinance, and of attempted murder, contrary to Section 222(a) of the Criminal Code Ordinance, and sentenced to seven years' imprisonment on the first count and two years on the second, both sentences to run concurrently, dismissed:—

When there is a conflict between two Judges as to the sentence to be imposed, the opinion of the presiding Judge should prevail.

(*A. M. A.*)

FOR APPELLANT: Assistant Government Advocate — (Gavison).

FOR RESPONDENT: Heller.

JUDGMENT.

This is an appeal by the Attorney General against the sentence of the District Court, Jaffa, sitting in its criminal capacity. The Accused was tried on a charge of manslaughter and found guilty. It appears that there was a difference of opinion between the Judges as to the sentence which should be passed. The presiding Judge was of opinion that the sentence should be one of ten years' imprisonment, and the other Judge was of the opinion that it should be one of seven years' imprisonment.

Now, where there is a conflict of opinion as to the proper sentence to be passed, the terms of Section 21A of the Courts (Amendment) Ordinance, 1942, leave no room for doubt. The opinion of the presiding Judge should prevail and sentence should be passed accordingly. But we are not at all satisfied from the judgment that in the final result any conflict did prevail in this case. The wording of the judgment may be somewhat ambiguous, but it is open to the interpretation

that the presiding Judge finally accepted the view of the other Judge that seven years would adequately meet the offence.

In these circumstances we do not feel justified in interfering with the discretion of the Court below, and the appeal is dismissed.

Delivered this 6th day of December, 1944.

Chief Justice.

CRIMINAL APPEAL No. 142/44.

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

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

IN THE APPEAL OF :—

Zeev Eiselman. APPELLANT.

v.

The Attorney General. RESPONDENT.

Adulteration of milk — Food Control Ord., sec. 10 — *"Adulteration" and "non-conformity" — Reasonable suspicion.*

Appeal from the judgment of the District Court of Jerusalem, in its appellate capacity, dated 25th of October, 1944, in Criminal Appeal No. 96/44, dismissed:—

There can be non-conformity of milk with the Food Control Ordinance without adulteration; but where the adulteration is such as to cause lack of the ingredients specified in the Public Health Ordinance, it amounts to non-conformity and a charge lies under the Food Control Ordinance.

(*A. M. A.*)

ANNOTATIONS: The judgment of the District Court is reported in 1944, S. C. D. C. 434.

(*H. K.*)

FOR APPELLANT: Perlmutter.

FOR RESPONDENT: Tsherniak.

JUDGMENT.

This is an appeal from a decision of the Chief Magistrate, Jerusalem. An appeal has already been heard at great length by the learned Relieving President, and the case has found its way to this Court by leave to appeal. The whole question resolves itself round the introduction of the words "adulterated milk" in the charge sheet. It has been argued by Mr. Tsherniak that adulteration of milk is a charge which can be brought under the Public Health Ordinance, and

he drew a distinction between non-conformity and adulteration. We agree with him that there can be non-conformity with the Food Control Ordinance without necessarily adulteration. But where the adulteration is of such a kind as to cause lack of the ingredients specified in the Public Health Ordinance, it must amount to non-conformity for the purpose of the section under which he was charged. It has been argued with great force, that in fact the charge in this case was really a charge of adulterating milk, and that the Accused was prejudiced in his defence because throughout he was under the impression that that was the charge he was meeting. Now having perused the judgment of the learned Relieving President and the record of the case, I find myself unable to accept this argument. The learned R/President pointed out that the essence of the offence alleged is that the Appellant was found in possession and control of fresh milk which fell short of the specified requirements laid down in paragraph 3 of the order aforesaid. It appears to me that it is immaterial whether it fell short by non-conformity caused by negligence or by deliberate adulteration.

Moreover on reading the charge it appears to me quite clear that it was a charge under section 10. As the counsel for the prosecution has pointed out, the wording of the charge could leave no reasonable doubt as to its nature and I agree with the learned R/President that the introduction of the words "adulterated milk" served only to elaborate the details of the non-conformity. It is in fact nothing more than a question of precision of language. It was argued that reasonable suspicion in the mind of the Inspector was a necessary ingredient of the offence. I entirely agree. But reasonable suspicion is not always capable of scientific proof. It must be inferred from the circumstances surrounding the incident. Here there was an authorised Inspector of the Food Control Department whose duty it was to go round and see that the provisions of the Food Control Ordinance had been complied with. He had suspicion of this man, and the fact that he took samples of the milk indicates clearly that the suspicion was present in his mind. I see no reason for holding that this suspicion was not a reasonable and honest one.

For these reasons the appeal must be dismissed.

In regard to the sentence, we see no grounds to interfere with the discretion of the experienced learned R/President of the District Court. The appeal of the Attorney General is also dismissed.

Delivered this 22nd day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 121/44.

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

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

IN THE APPEAL OF:—

Fakher Daoud Halloun. APPELLANT.

v.

Tamameh Mansour Hajjar & 3 ors. RESPONDENTS.

Appeal from order by President District Court refusing application under sec. 9(1), Succession Ord. — "Order" and "decree".

Appeal from the order of the District Court, Haifa, dated the 19th of February, 1944, in Pr. case No. 99/43 (Motion No. 391/43), dismissed:—

Refusal by President District Court of application under sec. 9(1), Succession Ordinance, to prohibit Ecclesiastical Court from dealing further with the matter — not an "order", but a "decree" within meaning of rule 2, Civil Procedure Rules.

(*M. L.*)

REFERRED TO: C. A. 243/42 (10, P. L. R. 21; 1943, A. L. R. 254).

ANNOTATIONS:

1. On nature of interlocutory and final orders see the recent English case of Egerton & ors. *v.* Shirley, 1944, 2, All E. R. 583; in the editorial note at p. 584 laws and authorities on this point are collated.

2. On distinction between order and decree see C. A. 191/44 (11, P. L. R. 292; *ante*, p. 574) and Misc. Appl. 56/43 (10, P. L. R. 465; 1943, A. L. R. 521) and annotations.

3. Note that in C. A. 66/43 (1943, A. L. R. 95) a decision granting an application under sec. 9(1) of the Succession Ord. was held to be an "order" and *not* a "decree".

(*A. G.*)

FOR APPELLANT: F. Atallah.

FOR RESPONDENTS: Asfour.

JUDGMENT.

In this case the preliminary point has been taken that the Court cannot entertain this appeal in that the decision appealed from was a decree, and that the appeal was not lodged within the thirty days provided for in Rule 321 of the Civil Procedure Rules.

Now this is not the first time that this point has been before these Courts. The principle to be followed in deciding whether a decision is an order or a decree has been examined in Civil Appeal No. 243/42. As was stated there by the learned Chief Justice Gordon Smith, the

point is whether the decision conclusively determines the rights of the parties to all or any of the matters in controversy in the action, and may be either preliminary or final. This was merely following the definition of "decree" in Section 2 of the Civil Procedure Rules.

I turn now to consider what was the issue between the parties in the District Court at Haifa in the judgment now appealed from. It was an application for an order under Section 9(1) of the Succession Ordinance to prohibit the Ecclesiastical Court from dealing further with the matter. Now it cannot be denied that one of the matters in controversy between the parties was whether the Ecclesiastical Court should or should not deal with it. The President, in the exercise of the discretion which is given to him under Section 9(1) of the Ordinance, refused to make an order prohibiting the Religious Court from dealing further with this succession. I cannot therefore avoid the conclusion that this order of the learned President did conclusively determine that particular issue. It follows, in my opinion, that it was a decree within the meaning of the definition in Rule 2 of the Civil Procedure Rules, and the preliminary point must succeed.

The appeal must, therefore, be dismissed with inclusive costs of LP. 10.

Delivered this 19th day of October, 1944.

Chief Justice.

CIVIL APPEAL No. 219/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

El Haj Ibrahim son of the late Saleh el Hilu. APPELLANT.

v.

Hashem Abu Khadra. RESPONDENT.

Agreement for sale of land — Claim for specific performance.

Appeal from the judgment of the Magistrate's Court of Gaza, sitting as a Land Court, dated 16.5.44 in Case No. 503/43, dismissed:—

Specific performance cannot be granted, where full purchase price had not been paid or tendered.

(*M. L.*)

ANNOTATIONS: A similar ruling was given in the recent case C. A. 79/44 (*ante*, p. 492); see also annotations to that case.

(*A. G.*)

FOR APPELLANT: Zein Ed-Din.

FOR RESPONDENT: Asal.

JUDGMENT.

This is an appeal from a judgment of the Magistrate of Gaza who had dismissed an action in which the present Appellant had claimed specific performance of an agreement to sell certain land in Gaza Sub-District. The Magistrate gave several reasons for dismissing the action and while we must not be regarded as agreeing with all those reasons there is one which we think was clearly right. That reason was that the Plaintiff (now Appellant) had not paid in full the purchase price. In the agreement the vendor (the Respondent) asserted that he owned and possessed 8 *dunums* being the share inherited by him from his aunt. By clause 2 he undertook to sell "eight *dunums* mentioned in Clause 1 of this agreement out of the whole share inherited from the said aunt for a sum amounting to LP. 11, that is 138 piastres per *dunum*. The vendor admits that he did receive from second party the purchase price in cash". The last clause of the agreement, however, was in the following terms:—

> "In case it is found that the area of the share in question exceeds eight *dunums*, second party undertakes to pay to first party the value of such excess at the rate of 138 piasters per *dunum*".

The Magistrate found that, although the Plaintiff knew that the area amounted to about 12 *dunums*, (this being admitted by his advocate at the hearing of 4th April, 1944) he had not even deposited the balance of the purchase price by the time of lodging the action. In view of this finding, namely, that the full purchase price had not been paid or tendered the Magistrate was justified in refusing to make an order for specific performance.

In these circumstances, it is unnecessary for us to deal with the further point argued at the hearing of this appeal by the Respondent's advocate, namely, that neither the subject-matter nor the price was certain (See Halsbury's Laws of England, Vol. 27, p. 24, paragraph 35 and page 25, paragraph 38). The appeal is, therefore, dismissed with costs namely fixed (inclusive) costs of LP. 10.

Delivered this 16th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 15/44.

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

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

IN THE APPEAL OF:—

Ali Hussein Hassan Awad & an.
Both minors appealing through their father and natural guardian Hussein Hassan Awad. APPELLANTS.

v.

Shihadeh Yousef Muhammad Hassan. RESPONDENT.

Partition of land — When consent of Director of Lands not required — Forfeiture of right to prior purchase.

Appeal from the judgment of the Magistrate's Court, Majdal, sitting as a Land Court, dated the 29th day of December, 1943, in Land Case No. 231/43, allowed:—

1. Judgment for partition of land — not a disposition within meaning of sec. 2, Land Transfer Ord., and consent of Director of Lands not required.

2. Person who, while knowing all about sale of land and having ample opportunity to offer to buy, declined to do so, cannot subsequently claim a right to prior purchase.

(*M. L.*)

FOLLOWED: C. A. 92/43 (1943, A. L. R. 271).

ANNOTATIONS:

1. On other transactions not being a disposition under the L. T. O. see H. C. 98/44 (11, P. L. R. 491; *ante*, p. 540) and annotations thereto.

2. For authorities on right to prior purchase see C. A. 70/44 (11, P. L. R. 367; *ante*, p. 426) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANTS: Elia.

FOR RESPONDENT: Kamleh.

JUDGMENT.

The Respondent, who was the Plaintiff in the lower Court, brought an action in the Magistrate's Court of Majdal, sitting as a Land Court, claiming a right to prior purchase. He was successful in that action. The present Appellants are the purchasers or the alleged purchasers of this land from the late co-owners of the present Respondent. It

seems that on the 22nd of January 1941 there was an agreement for sale of the land in dispute by the co-sharers of the Respondent — two persons — to the present Appellants. On the 22nd April 1941, there was a partition between the co-owners of this land to which the present Appellants were not parties. That partition has never been registered, and counsel for the Respondent says that it should have no effect by reason of section 2 of the Land Transfer Ordinance, Cap. 81. He says that the partition is a disposition within the meaning of that section, and that therefore the requirements of section 4 of the Ordinance should have been complied with. On this matter we are bound by the authority of this Court in Civil Appeal 92/43, reported in Annotated Law Reports, 1943, Vol. 1 at p. 271, where Mr. Justice Copland said:—

> "There is one point which is quite clear to my mind and that is that such a judgment is not a disposition within the meaning of section 2 of the Land Transfer Ordinance and the consent of the Director of Lands is therefore not required."

It seems to us, therefore, that as far as the legal position is concerned, this partition as between the parties to it, not, of course, as regards the Appellants, was a valid partition; and we would add that the present Appellants, it is common ground, were in possession of their portion of this land ever since January, 1941, up to the present day.

On the 30th April 1943 this agreement of sale was registered, and on the 16th June, 1943, the present action claiming a right of prior purchase was instituted.

It seems, to take the short point first, that at the date of the institution of that action — 16.6.43 — and at the date of the registration of the contract of sale — 30.4.43 — the Plaintiff, *i. e.* the Respondent, was not a co-owner in this share at all because it is admitted before us, and it is common ground between the parties, that this land that is now in dispute fell into that portion of the land in the partition belonging to the vendors, and therefore, as it was in their share of the land, they are at liberty either to keep it or to dispose of it as they think fit. Further, it would seem, on the merits of the matter (although the learned Magistrate seemed to be doubtful on the point) to be quite clear that the Respondent must have known all about this sale — the people were on the land and there is evidence of a certain witness which, as counsel for the Appellant points out to us, was not challenged, who says quite definitely (Mariam Mohd. Awad Hamad):—

> "I did not sell to my brother the Plaintiff because his land is mortgaged. He did not ask to buy land. The persons who were present in the sitting room of Khamis Hamad offered him to buy but he said 'I cannot afford to buy it'."

And another witness, Haj Hussein Hassan Ahmad Awad Hamad, says:—

> "I partitioned the claimed share in presence of the Plaintiff, and it was I who partitoned it."

It seems to us in view of that and in view of the circumstances of this case as a whole, that the only reasonable conclusion to draw is that the Respondent knew all about this sale, and could, if he wished, have taken advantage of the ample opportunity that he had to offer to buy.

For these reasons we are of opinion that the appeal must be allowed, the judgment of the Magistrate set aside and judgment entered for the present Appellants, who were the Defendants in the Court below. The costs of this appeal will be on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 28th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 117/44.

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

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

IN THE APPEAL OF:—

Odeh ibn Suleiman ibn Jkheidem. APPELLANT.

v.

Ihmoud ibn el-Haj Salem el-Abra. RESPONDENT.

Arbitration — Allegation of misconduct.

Appeal from the judgment of the Magistrate's Court of Beersheba, sitting as a Land Court dated 1.3.44 in Land Case No. 334/42, dismissed:—

> Charge of misconduct on part of arbitrator, although not necessarily importing *mala fides,* is a serious one, and party alleging it must be expected to call and cross-examine the arbitrator.

(*M. L.*)

ANNOTATIONS :

1. On procedure for setting aside award on ground of misconduct by arbitrator see C. A. 365/43 (11, P. L. R. 318; *ante,* p. 561) and annotations in A. L. R.

2. On misconduct of arbitrator see pp. 123—132 of Vol. 2, Annotated Laws of Palestine, and annotations to C. A. 32/43 (10, P. L. R. 181; 1943, A. L. R. 208).

3. On examination of arbitrator in Court see C. A. 229/41 (8, P. L. R. 603; 11, Ct. L. R. 126; 1941, S. C. J. 616).

(*A. G.*)

FOR APPELLANT: Nashashibi.

FOR RESPONDENT: Kamleh.

JUDGMENT.

Only one point arises in this appeal. That was the question of misconduct on the part of the Arbitrator. This miserable dispute which has already been before the Court four or five times, concerns six *dunums* of land. In an effort to come to settlement, an Arbitrator, the District Officer of Beersheba, was appointed. He made an award. It was attacked before the Magistrate, because, as it was alleged, he had taken no evidence. It was attacked in this Court, because, as was alleged, he heard the evidence of Abu Warrad secretly.

It is clear that the District Officer visited the land of the parties concerned, and there he heard oral evidence and made some notes, which he afterwards elaborated in writing.

Now a charge of misconduct on the part of the Arbitrator although not necessarily importing *mala fides*, and Mr. Nashashibi was at pains to emphasize that he did not allege *mala fides*, is a serious one. To sustain it we should have expected the Arbitrator to be called and cross-examined, or at least Abu Warrad should have been called. But this was not done. We are asked to infer misconduct from a vague suggestion that because Abu Warrad visited the District Officer's Office he gave secret evidence there.

The learned Magistrate did not believe this.

The witness Salem swore that he was present when the Arbitrator took the statement of Abu Warrad. We see no reason for not assuming that this was the evidence of Abu Warrad to which the Arbitrator refers in his report. We agree with the learned Magistrate that no misconduct on the part of the Arbitrator was proved, and like him we can discover no grounds for setting aside the award. The appeal is, therefore, dismissed with LP. 10 inclusive costs.

Delivered this 9th day of October, 1944.

Chief Justice.

HIGH COURT No. 63/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Abed Yousef Salman. PETITIONER.

v.

1. Assistant Chief Execution Officer, Jerusalem,
2. Miriam Bint Augustine Ghattas. RESPONDENTS.

Matrimonial dispute between husband and wife both of whom Palestinians and members of a Religious Community — Order of Ecclesiastical Court re custody of children — Jurisdiction of Religious Court.

Return to a rule *nisi* issued on the 19th May, 1944, directed to the Respondents calling upon them to show cause why (a) the first Respondent's orders made in Execution File No. 469/40, District Court, Jerusalem, on the 28th of September, 1940, and on the 27th of April, 1942, and in Execution File No. 386/43 on the 11th of March, 1944, should not be set aside and the judgments granted by the Latin Religious Court of Jerusalem on the 28th of May, 1940, and 3rd December, 1943, ordering the second Respondent to deliver the undermentioned children to their father, the Petitioner, be executed, or in the alternative, why at least the undermentioned children numbered 1 to 4 should not be so delivered; (b) the second Respondent should not deliver the children, 1. Rebecca, 2. Lorice, 3. Eveline, 4. Theresa, 5. Rosa, 6. Jeanette, 7. Raymunda, to their father, the Petitioner, in accordance with the aforementioned judgments of the Latin Religious Court of Jerusalem, or in the alternative at least the abovementioned children, 1 to 4; order made absolute:—

Claim regarding custody of minor children ancillary to a matrimonial suit between Palestinians and members of a Religious Community — within sole jurisdiction of Court of that community.

(*M. L.*)

FOLLOWED: C. A. 60/43 (10, P. L. R. 241; 1943, A. L. R. 217).

ANNOTATIONS: See annotations to case followed (*supra*) in A. L. R. and note 2 to C. A. 27/44 (*ante*, p. 572).

(*A. G.*)

FOR PETITIONER: Elian.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — In person.

ORDER.

This is the return to an order *nisi* directed to the Assistant Chief Execution Officer, Jerusalem, calling upon him to show cause why he should not comply with an order of the Latin Ecclesiastical Court of

Jerusalem granting the custody of certain minor children to their father, the Petitioner.

The Petitioner and the second Respondent are husband and wife. They are both Palestinians and apparently both belong to the Latin Church. It would, therefore, appear that the rule in Civil Appeal No. 60/43, P. L. R. Vol. 10, p. 241, applies to the facts of this case.

For nearly four years there have been matrimonial disputes between the parties which recently culminated in judgments given by the Ecclesiastical Courts and confirmed by an Ecclesiastical Court of Appeal. I have before me a copy of a long judgment of the Ecclesiastical Court of Jerusalem of 9th September, 1944, from which it appears that that Court has gone very carefully into the whole matter and has ordered that seven of the children of the marriage, whose ages range from seventeen to six years, be handed over to the custody of the Petitioner.

The second Respondent has been allowed to retain the custody of one daughter, aged 3½. The second Respondent has informed me that she is anxious to retain the custody of two other daughters, namely, Rosa, aged eight, and Jeannette, aged six. The Ecclesiastical Court, however, has ordered that these two girls be handed over to their father. The Petitioner's advocate informs me that it is his client's intention to place these two girls in a boarding school. He contends that the second Respondent is herself a working woman and has neither the means nor the time to look after her own daughters who, it is said, are allowed to roam the streets and are not obtaining any education. I have no doubt that the Ecclesiastical Court duly considered all these matters.

The Assistant Chief Execution Officer, in his order, said: "whereas the two younger daughters are in a boarding school I cannot force them to go with their father".

I am now told that these two girls, Rosa and Jeannette, are not in a boarding school; but that the Petitioner himself will place them in a boarding school. This, however, need not concern me because the matter seems to be one within the sole jurisdiction of the Ecclesiastical Court, which Court has definitely awarded the Petitioner the custody of these two daughters.

The rule *nisi* is accordingly made absolute and the order of the Assistant Chief Execution Officer is set aside. The custody of the following children will be awarded to the Petitioner, namely, Yusef, Rebecca, Lorice, Eveline, Theresa, Rosa and Jeannette.

No costs.

Given this 20th day of October, 1944.

British Puisne Judge.

CIVIL APPEAL No. 291/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Ibrahim Hamid Ibrahim ar-Rabi & 4 ors. APPELLANTS.

v.

Ibrahim Sa'id Ibrahim ar-Rabi & 4 ors. RESPONDENTS.

Failure to pay deposit in lieu of guarantee within fixed time limit — Unsuccessful application for enlargement of time.

Appeal from the decision of the Assistant Land Settlement Officer, Jaffa Settlement Area, dated 14.12.43 in Case No. 151/Arab Muwailih, dismissed:—

Failure by Appellant or his advocate to pay deposit in lieu of guarantee within time limit fixed by Registrar — fatal to appeal.

(*M. L.*)

ANNOTATIONS: On "good cause" in cases of this nature see C. A. 72/44 (11, P. L. R. 325; *ante*, p. 372) with annotations thereto.

(*A. G.*)

FOR APPELLANTS: Scharf.

FOR RESPONDENTS: Elia.

ORDER.

The Appellants in this case having failed to comply with the Order of the Assistant Registrar, Supreme Court, dated 16th day of August, 1944, in that they have failed to pay the deposit within the time limit fixed, it is ordered that the appeal be dismissed.

Before the hearing of this an application was made to extend the time for payment of deposit on the ground that the advocate having received the amount from his client forgot to pay the same into Court within the time fixed by the Order of the Assistant Registrar. I am of opinion that the negligence of an advocate is not such a good cause as would justify the granting of this application.

The application is, therefore, refused.

Given and delivered this 13th day of October, 1944.

Chief Justice.

CIVIL APPEAL No. 149/44.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Odeh Salman Abu Hamad. APPELLANT.

v.

Ali Khalef Kirret & 2 ors. RESPONDENTS.

Belated application under Rule 163, Magistrates' Courts Procedure Rules, to set aside ex parte judgment — Question of enlargement of time.

Appeal from the judgment of the Magistrate's Court of Beersheba, sitting as a Land Court, dated 23.3.44 in Case No. 345/40, dismissed:—

Rule 284, Magistrates' Courts Procedure Rules, applies only where period was fixed or granted by Court itself not where fixed by law.

(*M. L.*)

REFERRED TO: C. A. D. C. T. A. 191/43 (1944, S. C. D. C. 60).

ANNOTATIONS: On the question whether the appeal lay see C. A. D. C. Jm. 2/44 (1944, S. C. D. C. 91).

(*A. G.*)

FOR APPELLANT: Nashashibi.

FOR RESPONDENTS: Elia.

JUDGMENT.

This is an appeal from a decision of the Magistrate of Beersheba sitting as a Land Court, whereby he refused an application to set aside an *ex parte* judgment given on the 18th December, 1940.

Mr. Elia, for the Respondent, took a preliminary objection namely, that no appeal lay from a refusal to set aside an *ex parte* judgment. In support thereof, he cited a judgment of the District Court, Tel-Aviv, in its appellate capacity, namely, C. A. of Tel-Aviv No. 191/43.

Mr. Nashashibi, for the Appellant, has pointed out that the matter before us is governed by a different provision of law, namely, sub-section 3 of section 11 of the Land Courts (Amendment) Ordinance, 1939. Because of the view we take of this case as a whole, we do not feel called upon to express any opinion as to the correctness or otherwise of the judgment of the District Court of Tel-Aviv above referred to.

Coming now to the facts of this case, the Appellant was served on the 24th January, 1941, with a copy of the *ex parte* judgment. On 27th January, 1941, he applied for exemption from payment of Court fees, but this application was refused on 26th February, 1941. The application was apparently made with a view to his being allowed to make a further application under Rule 163 of the Magistrates' Courts Procedure Rules 1940. He apparently did nothing until the 3rd November, 1943, when he formally applied under Rule 163. The Magistrate held that Rule 284 could not be invoked because that rule applies merely to matters in which the period has been fixed or granted by the Court itself, and not where the matter is fixed by law. We think that the Magistrate came to a correct conclusion because the matter here is fixed by law, namely, Rule 163. The Magistrate accordingly dismissed the application, and we see no grounds for interfering with that order of dismissal. The appeal is therefore dismissed with costs (inclusive or fixed costs) of LP. 10 which will include the sum of LP. 3 being the costs of the hearing of the 6th instant.

Delivered this 18th day of November, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 127/44.

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

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

IN THE APPEAL OF:—

Jamal Ayyoub el-Yousef. APPELLANT.

v.

The Attorney General. RESPONDENT.

Corroboration.

Appeal from the judgment of the Court of Criminal Assize sitting at Haifa dated the 5th day of October, 1944, in Criminal Assize Case No. 29/44, whereby Appellant was convicted of murder, contrary to section 214 of the Criminal Code Ordinance, 1936, and sentenced to death, dismissed:—

Main evidence need not be corroborated in every detail; sufficient if supporting evidence is of a nature as to lead Court to conclusion that main story very probably true.

(*M. L.*)

ANNOTATIONS: See CR. A. 109/44 (*ante*, p. 670) and annotations thereto.
(*A. G.*)

FOR APPELLANT: Abdul Hadi & Shuqairi.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal from the Court of Criminal Assize sitting at Haifa, at which the Accused was convicted of murder and sentenced to death.

The grounds of appeal were that there was no sufficient evidence to support the conviction. To sustain this ground, counsel for the Accused argued, as indeed he was compelled to argue, that the whole of the evidence of the wife, which was the main evidence, should be disregarded. He asked us to do this because, as he alleged, the evidence was vague and unreliable. He based his allegation of vagueness on the fact that the wife said that the Accused came up behind and shot her husband, whereas the medical evidence is to the effect that the husband was shot through the right eye. Now, apart altogether from the fact that one would not expect the wife in such circumstances to describe the incident with photographic accuracy, her evidence is quite consistent with the medical evidence. No significance need be attached to the fact that the shot entered the eye, as it is more than probable that the unfortunate victim turned round before his assailant fired.

Another ground advanced in favour of the rejection of the prosecution case was, that the supporting evidence which the Court rightly looked for was unreliable and not sufficiently linked up with the killing. In this connection it must be borne in mind that in seeking for supporting evidence the Court did not expect to find that the main evidence would be corroborated in every specific detail. It is quite sufficient if the supporting evidence is of such a nature as to lead the Court to the conclusion that the main story is very probably true. We are of opinion that the supporting evidence adduced was more than adequate in this respect.

Only one other point was raised, and that was the usual one in murder cases — the question of premeditation. Without necessarily accepting the argument advanced by the learned counsel that it is essential that the Judge should state specifically the facts on which he finds there was premeditation, we have come to the conclusion that there can be no doubt in this case. Dealing with this question the trial Court said: "Considering the picture of the deceased in the company of his wife and small children being shot in broad daylight (at

close range and in the eye), without warning and without a shadow of provocation, by a man who had a motive of enmity against him, we are satisfied that the crime was premeditated within the meaning of Section 216 of the Criminal Code Ordinance". We entirely endorse that expression of opinion.

The appeal must therefore be dismissed.

Delivered this 2nd day of November, 1944.

Chief Justice.

CIVIL APPEAL No. 188/44.

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

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

IN THE APPEAL OF:—

The Estate of the late Joseph Alpern, through its administrator Asher Levitsky. APPELLANT.

v.

Zadok Perelman. RESPONDENT.

Evidence — No variation of terms of registered mortgage by oral evidence — Position of administrator.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 28th March, 1944, in Civil Case No. 395/43, allowed:—

Oral evidence corroborated by circumstantial evidence is insufficient to vary the terms of a registered mortgage.

(*A. M. A.*)

ANNOTATIONS: *Cf.* note 1 to C. A. 14/44 (*ante*, p. 336).

(*H. K.*)

FOR APPELLANT: Hopp.

FOR RESPONDENT: Schifter.

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv, the Appellant being the administrator of the estate of the late Joseph Alpern.

The Respondent was a mortgagor for the amount of LP. 1000.— at 9% in favour of Joseph Alpern. It was duly registered under the registration number of 1663/37 in the Land Registry at Jaffa. It is

not denied by either party that the Respondent had not paid any amount on account of the mortgage, except interest, until the 5th of February, 1939, on which date he ceased to pay interest.

It is alleged by the mortgagor that in March, 1939, there was some kind of verbal agreement, under which Joseph Alpern agreed to forego payment of the interest in the future, and also agreed to forego LP. 200 of the capital, leaving the amount of indebtedness at LP. 800. The administrator of the estate refused to recognize this verbal agreement; hence the action in the lower Court.

The lower Court were of the opinion that there was an agreement but not quite in the terms argued by the mortgagor. In their view the gist of the agreement was a waiver of interest but no waiver of capital. They gave a declaratory judgment to that effect, which involved payment for LP. 1000. The administrator of the estate now appeals in this Court.

The case presents a unique feature, in that the Appellant seems inclined to agree that there was some kind of an agreement, but he felt that as administrator it was his duty to appeal in the interest of some of the heirs of the deceased who are living outside the jurisdiction. Be that as it may, the issue appears to us to be a clear-cut legal one, and that is whether the oral evidence of the wife of Alpern, who alleged that she knew of some such agreement, together with the inference to be drawn from the fact that Alpern, who was apparently an astute man of business, did not demand the interest, was sufficient to modify the clear provisions of the deed of mortgage. We do not hesitate in reaching the conclusion that this evidence fell far short of what would be required to vary the terms of the duly registered mortgage.

For these reasons we think that the appeal must be allowed with costs on the lower scale to include LP. 10 for advocate's attendance fee.

Delivered this 19th day of December, 1944.

Chief Justice.

CIVIL APPEAL No. 283/44.

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

BEFORE: **Edwards and Frumkin, JJ.**

IN THE APPEAL OF:—

Yehuda Blau. APPELLANT.

and

In the matter of the succession to the estate of Fruma Blau, deceased. RESPONDENT.

Succession — Appeal from an order of succession by the Registrar — Guardian ad litem — Succession Ord., sec. 22(1)(d) — Registrars Ord., secs. 6(e)(vi), 11 — Attorney General to be served.

Appeal from the judgment of the Registrar of the District Court, Jerusalem, delivered on 30th May, 1944, in Succession (Appl.) No. 89/44; papers sent to Attorney General:—

When a minor is not represented by a guardian in an appeal under the Succession Ordinance, the Attorney General may be served.

(*A. M. A.*)

FOR APPELLANT: Perlmutter by delegation & Eisenberg.

RESPONDENT: *Ex parte.*

ORDER.

This is an appeal from a decision of the Registrar of the District Court, Jerusalem, in which he ordered a certificate of succession to issue in respect of the estate of the late Fruma Blau, in accordance with the provisions of the Ottoman Law, contained in Articles 1 and 6 of the second Schedule of the Succession Ordinance, granting to the husband one-quarter share and to the fourteen years old son of the deceased three-quarters share of the estate.

The deceased's husband (who is also the father of the fourteen years old son) now appeals to this Court and contends that he should be declared the sole heir of the deceased to the exclusion of his son. We find ourselves in some difficulty because no guardian *ad litem* has been appointed. We have in mind the provisions of Section 22(1)(d) of the Succession Ordinance and Sections 6(e)(vi) and 11 Registrars Ordinance, 1936. It seems that no person interested in the welfare of the son has applied for a guardian *ad litem* to be appointed.

We accordingly think that the papers should be served on the learned Attorney-General who, if he thinks fit, may consider sending a representative to the next hearing at 9 *a. m.* on Friday the 12th January, 1945, to render such assistance to this Court as he deems desirable.

Delivered this 28th day of November, 1944.

British Puisne Judge.

CIVIL APPEAL No. 183/44.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Sheikh Hussein Abdel Asl al Nadi. APPELLANT.

v.

Hassan Ali Fayed. RESPONDENT.

Partition — Registered musha holder applying for partition — Defendant producing unregistered agreement of partition — Defendant to apply to competent Court for cancellation of registration.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, dated 30.3.44 in Civil Appeal No. 19/44, allowed and case remitted:—

When a registered holder applies for partition of *musha'* lands and the Defendant relies on an unregistered partition agreement, it is for the Defendant to apply to the Land Court for the alteration of registration.

(*A. M. A.*)

ANNOTATIONS: On the effect of an unregistered partition see C. A. 138/44 (*ante*, p. 271) and notes, C. A. 141/44 (*ante*, p. 773) and C. A. 15/44 (*ante*, p. 788).

(*H. K.*)

FOR APPELLANT: Malak.

FOR RESPONDENT: Elia.

JUDGMENT.

This is an appeal from the District Court of Jaffa in its appellate capacity, confirming a judgment of one of the Magistrates of Jaffa who had dismissed an action brought by the present Appellant (Plaintiff in the Court below) for partition of certain immovable property. The Defendant's advocate before the Magistrate admitted that the property was registered in the name of both parties, but relied on a certain document Exhibit "A", executed by both parties on 24th October, 1941, which appeared to be, or represented, an unofficial partition. Before the present action was commenced, there had been previous litigation arising out of this document, but the present Appellant had withdrawn the action in the former proceedings with which we are not here concerned. In the case the subject of this appeal the Magistrate being impressed by Exhibit "A" ordered the present Ap-

pellant to bring an action in the competent Court for the cancellation of that document. For that purpose he on the 27th December, 1943, adjourned the case to the 24th February, 1944. After he delivered judgment the Plaintiff verbally informed the Court that he did not wish to refer the matter to any other Court and in consequence of this the Magistrate dismissed the Plaintiff's action for partition.

On appeal the District Court confirmed the judgment of the Magistrate and against both judgments the Plaintiff now appeals to this Court. We heard lengthy arguments by the advocates for the respective parties. We do not wish to cast doubt on the correctness of any of the decided cases cited to us; but we think that they were concerned with other branches of the law and were not apt to the circumstances of the case now before us. We think that both Courts below erred in ordering the Appellant to go to a competent Court. The registered title stood, and we think that the proper order for us to make on this appeal is to set aside the judgment of both Courts and to order the Magistrate to resume the hearing of the case and to require parties' advocates to appear before him on a specified date when he should inform them that the case is adjourned for a further month and will then be set down for hearing on which date he will expect the present Respondent to produce before him evidence that he has brought proceedings in a competent Court for the setting aside of the registration. If the Magistrate is so satisfied, he will adjourn the case for an appropriate period for the purpose of enabling the party seeking to set aside the registration to produce a judgment of a competent Court accordingly. If, after the lapse of an appropriate period, he is not satisfied that the Respondent has taken proper steps to have the registration set aside, he (the Magistrate) will proceed with the hearing of the partition action.

We so order. The Respondent will pay the Appellant's costs of this appeal, namely fixed (inclusive) costs of LP. 10.

Delivered this 11th day of December, 1944.

British Puisne Judge.

CIVIL APPEAL No. 83/44.

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

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

IN THE APPEAL OF :—

Marie Raykowska. APPELLANT.

v.

Shalom Ltd. RESPONDENTS.

Tacit agreement of landlord to tenant subletting one room — Tenant giving over whole premises to sub-tenant — Breach of contract justifying eviction.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, in C. A. 80/43, dismissed:—

Landlord's tacit agreement to one room being occupied by a sub-tenant does not operate as waiver of forfeiture for breach of contract upon tenant later sub-letting to that sub-tenant the whole premises.

(*M. L.*)

DISTINGUISHED: Roberts *v.* Enlayde Ltd. (1924) 1 K. B. 335.

REFERRED TO: Chatterton *v.* Terrell (1923) A. C. 578.

ANNOTATIONS:

1. Authorities on nature of breach by sub-letting are collated in annotations in A. L. R. to C. A. 384/43 (11, P. L. R. 283; *ante*, p. 569). See especially similar ruling given in C. A. 138/41 (8, P. L. R. 412; 10, Ct. L. R. 83; 1941, S. C. J. 434; Gorali, p. 123); see also the English cases (*supra*) and C. A. 133/44 (*ante*, p. 646).

2. On waiver of forfeiture see annotations in A. L. R. to C. A. 328/43 (10, P. L. R. 633; 1943, A. L. R. 762).

3. The judgment of the District Court is reported in 1944, S. C. D. C. p. 194.

(*A. G.*)

FOR APPELLANT: Nashashibi.

FOR RESPONDENTS: Stoyanowski.

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 a judgment of one of the Magistrates of Jerusalem.

The Magistrate had dismissed an action by the present Respondents who had sued for the eviction of the present Appellant from a certain flat in Rehavia, Jerusalem.

It was admitted that Mr. Weiss, who was the head tenant by virtue of an ordinary contract of lease entered into between him and the present Respondents, had sublet the flat to the present Appellant. In July, 1941, Mr. Weiss sublet to the Appellant a room in the premises in question. The Respondents did not rely in their statement of claim on this subletting which was admittedly without their written consent as being the breach of which they complained; but during the hearing before the Magistrate the matter seems to have been raised and in his judgment the Magistrate held that the present Respondents must have known about the occupation of this one room by the present Appellant and that they must be taken to have waived any objection thereto. The learned Relieving President of the District Court in his judgment said that he was not prepared to interfere with that finding.

About March, 1943, Mr. Weiss, having decided to leave Palestine, gave over the whole premises to the present Appellant who was already in occupation of one room. The written contract between the present Respondents and Mr. Weiss prohibited the subletting of the premises or any part of them and it is of this sub-letting of the whole premises in March 1943, clearly without the permission of the present Respondents, that the latter complained in their statement of claim and on which they relied in their action before the Magistrate. The Magistrate dismissed the Plaintiffs' action; but the learned Relieving President of the District Court, relying on the case of Chatterton *v.* Terrell (1923) Appeal Cases p. 578, set aside the Magistrate's judgment and against the judgment of the District Court the Appellant now appeals.

The Appellant's advocate relied on the case of Roberts *v.* Enlayde Ltd. (1924) 1 K. B. 335. It seems to us, however, that the facts in that case are distinguishable from the facts of the present case. To quote the judgment of Bankes, L. J., at pp. 338 and 339:—

> "What happened was that the tenant underlet a small part of the premises to one sub-tenant for less than three years, and then underlet the remainder of the premises to another sub-tenant for more than three years. Neither of those underlettings was a breach, for the former was excepted from the covenant by the proviso, while the latter was not an underletting of the whole of the premises."

It is clear that in the case now before us the letting of 20th March, 1943, was a letting of the whole premises which was a breach of the contract not to sublet, and it is to be noted that the clause prohibiting subletting was a clause prohibiting subletting of the premises or any part of it. That being so, it is clear that, although the word "tenant" in Section 2 of the Rent Restrictions (Dwelling Houses) Ordinance,

1940, includes sub-tenant, there was a breach of the conditions of the tenancy, which breach disentitles the tenant to the protection afforded by Section 8 of that Ordinance.

In these circumstances we think that the learned Relieving President of the District Court arrived at a correct conclusion. We accordingly dismiss the appeal with costs which we assess as fixed (inclusive) costs of LP. 10.

Delivered this 27th day of July, 1944.

British Puisne Judge.

CIVIL APPEAL No. 288/44.

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

BEFORE : Rose, J.

IN THE APPEAL OF :—

Fuad Abdul Ghani El-Khaldi. APPELLANT.

v.

Mohammad Yousef Bey El-Khaldi & 8 ors. RESPONDENTS.

Possession by co-heirs — Sec. 2(1) *Land Law Amendment Ord. — L. A.* 36/30, *presumption that heir holds for co-heirs — Whether position differs as regards mulk, Mejelle* 597, 1075 *— Costs.*

Appeal from the judgment of the Land Court of Jerusalem, dated 6th June, 1944, in Land Case No. 38/43, allowed and case remitted:—

The presumption that possession by an heir is on behalf of his co-heirs can be rebutted whether the land is *miri* or *mulk*.

(*A. M. A.*)

FOLLOWED: L. A. 36/30 (1, P. L. R. 630; 3, C. of J. 959).

ANNOTATIONS :

1. The general principles underlying the doctrine regarding prescription between co-heirs are set out in C. A. 197/41 (8, P. L. R. 499; 1941, S. C. J. 458; 10, Ct. L. R. 205); see also notes 5 and 6 to that case in S. C. J. and, for later authorities, C. A. 51/43 (1943, A. L. R. 305), C. A. 390/43 (11, P. L. R. 217; *ante*, p. 415) and C. A. 370/43 (*ante*, p. 474).

2. Note that sec. 2 of the Land Law (Amendment) Ord. speaks of "land" generally which term as defined in the Interpretation Ord. "includes land of any tenure".

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENTS: Cattan and Ousta.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem. While the matter took some time in the Court below and was argued at length before me, the point to be decided is one of no great difficulty. The Land Court took the view — and at least as far as cases to which section 2(1) of the Land Law (Amendment) Ordinance, Cap. 78 is inapplicable there is authority to support their view — that the property in question should be considered as having been held by the Appellant in his capacity as co-owner on behalf of the other co-owners and co-heirs; and that therefore his possession could not be regarded as adverse While, as I have said, there is authority to support that view, it would seem that the better view is that contained in Civil Appeal * 36/30, 1 P. L. R. 630 (which view has been supported in a number of subsequent decisions), namely, that the presumption that land is so held may be rebutted. Mr. Cattan for the Respondents contends that whatever the position may be as regards *miri* land, as regards *mulk* the presumption is irrebuttable, and he cited articles 1075 and 597 of the *Mejelle*. It seems to me, however, that these articles do not support the construction which he puts upon them, and I see no reason to suppose that the presumption in the case of *mulk* property cannot equally be rebutted.

That being so, it seems to me that this case must be remitted for the Land Court to consider the question as to whether in this particular case the presumption has been rebutted. As regards the second Respondent, Sit Khaldiyeh, the Court has, in my opinion, already made an adequate finding of fact that the Appellant's possession was not adverse. She, therefore, is entitled to succeed forthwith; but as regards the remaining eight Respondents, the matter will be remitted accordingly. Costs will be in the cause, and to simplify the final arrangements I certify that costs will be taxed on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

As regards Sit Khaldiyeh, she would have been entitled to costs had she incurred any special costs in this appeal, but as this would not appear to be the case, there will be no order as to costs regarding her. If the Respondents are ultimately successful they will be entitled to one set of costs only for this appeal.

Delivered this 8th day of December, 1944.

British Puisne Judge.

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* *Should be*: Land Appeal. (*Ed.*)

MISCELLANEOUS APPLICATION No. 28/44.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: FitzGerald, C. J.

IN THE APPLICATION OF:—

Mariam Hanna Ziadeh. APPLICANT.

v.

Ibrahim Issa Yacoub Katato & an. RESPONDENTS.

Application under art. 55, Pal. Order in Council by party who appeared before Relig. Court without disputing its jurisdiction — Proper time for application under art. 55, Palestine Order in Council.

Where parties of different Religious Communities acquiesced in having their case tried and decided by the Court of one party's Community — too late to apply under art. 55, Palestine Order in Council (for a decision as to which Court shall have jurisdiction); such application must be made before case comes up for hearing in particular Religious Court.

(*M. L.*)

ANNOTATIONS:

1. On estoppel from disputing jurisdiction of Religious Court see H. C. 81/44 (*ante*, p. 648) with annotations thereto.

2. On the question whether an action in a religious Court is a bar to an action in another Court — see C. A. 201/43 (10, P. L. R. 484; 1943, A. L. R. 557).

(*A. G.*)

FOR APPLICANT: Ancar.

FOR RESPONDENTS: Nasr.

ORDER.

In my opinion this application is misconceived. In the first place there is no evidence which would justify me in assuming that the persons involved belong to different religious communities. Judging by their actions, they appear at one time to have been members of the Latin Community, and at another time they acquiesced in having their case tried by the Court of the Greek Community. Apart from these considerations, it appears to me that an application under Article 55 of the Palestine Order-in-Council should be made before the case is listed or at least comes up for hearing, in the particular Court concerned. In this case the Court of the Greek Religious Community took evidence and recorded their decision. The Applicant appears to have acquiesced in the jurisdiction of that Court.

In the result I am unable to entertain this application.

Delivered this 26th day of July, 1944.

Chief Justice.

HIGH COURT No. 78/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Leiba (Arye) Rosenzweig. PETITIONER.

v.

Controller of Light Industries. RESPONDENT.

High Court practice — Re-examination of deponent on Respondent's affidavit — Ordinary rules of re-examination apply — Phipson on Evidence.

Interlocutory ruling during the hearing of the return to an order *nisi*:—

The deponent of the Respondent's affidavit in reply may be re-examined by the Respondent.

(*A. M. A.*)

ANNOTATIONS:

1. The final order is reported at p. 685, *ante*.

2. Rule 8 of the High Court Rules contains no provisions regarding the right to re-examination. Note that sec. 16 of the Criminal Procedure (T. U. I.) Ord., which did not give the prosecution the right to re-examine their witnesses in preliminary investigations, has been substituted in 1944 by a new section containing an express provision to that effect.

(*H. K.*)

FOR PETITIONER: Abcarius and Kost.

FOR RESPONDENT: Malchi.

RULING.

I think that the Respondent's advocate is entitled to re-examine the Respondent, although, of course, the re-examination must be restricted to questions which are asked with a view solely to explaining matters arising out of the cross-examination. (Phipson on Evidence 7th (1930) Edition Page 466).

Given this 29th day of August, 1944.

British Puisne Judge.

CIVIL APPEAL No. 329/43.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Rose Alexander & an. APPELLANTS.

v.

Hassan Omar El Zeideh. RESPONDENT.

Action by joint owner for recovery of whole property — Interruption of prescription by action of one co-owner — Absence for "muddat safer" barring claim of prescription.

1. When trespass occurs on jointly owned property, one co-owner may sue and obtain judgment for recover of the whole.

2. Action by co-owner regarding jointly owned property prevents and interrupts period of prescription running against absent co-owner.

3. Residence at a distance of *"Muddat Safar"* — a good excuse to a claim of prescription even if absent person had an agent in Palestine.

(*M. L.*)

FOLLOWED: L. A. 29/29 (1, P. L. R. 422; C. of J. 1799).

ANNOTATIONS:

1. As to the first point see C. A. 384/43 (11, P. L. R. 283; *ante*, p. 569) and note 3 thereto.

2. As to interruption of period of prescription — see C. A. 228/42 (9, P. L. R. 741; 1942, S. C. J. 991) with annotations thereto.

(*A. G.*)

FOR APPELLANTS: Mogannam and Hiller.

FOR RESPONDENT: Levin and Mu'ammar.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Haifa wherein the Plaintiffs, here the Appellants, who have claimed fourteen shares out of 96 shares in a plot of land situated in Ballan locality, was dismissed. The facts are very fully set out in the judgment of the Land Court, and it is not necessary to repeat them in detail.

Briefly the Appellants purchased 14 out of 96 shares in the land in question from Malakeh Touma in 1933, who had previously purchased them in 1909. Nazira Cook is a co-owner.

There were several hearings, in fact the case started in 1935 and was concluded in July, 1943. The Plaintiffs claim ownership of 14 out of 96 shares as against the Defendant. The Defendant claims that

he has a prescriptive right to the land of which he has been in continuous possession since 1905. The Appellants submit that many actions and execution proceedings were taken against the Defendant by Nazira Cook, and in fact that delivery of possession of all the land was made to her by the Execution Officer, and this constitutes delivery to all co-owners. Although the Defendant did not give up physical possession, in spite of the promises to vacate, the proceedings taken against him are sufficient to interrupt his claim to prescription both in respect of Appellants' share and that of their co-owners. That according to Articles 1086 and 1087 of the *Mejelle,* in the absence of one co-owner the other is trustee for the whole of the property, and it is considered to be deposited for safe-keeping with the other. That the action for possession of one co-owner is considered for the benefit of the other co-owners. That the Respondent admitted in a criminal case that he had taken arbitrary possession, and that according to Article 20 of the Land Code there is no prescription in cases of persons taking arbitrary possession.

The question of *"Muddat Safar"* was raised in respect of Malakeh Touma, who resides in Beirut, and the High Court decided on the 1st April, 1926, that this was a good excuse to the claim of prescription, even if she had an agent in Haifa. The Appellants have made several applications to Court, which were refused, to have Malakeh Touma's evidence taken on commission.

Respondent submits that he has been in possession since 1935, and that at the time when the Appellants purchased he was an owner, and the land was registered in the *werko* in his name. There is an endorsement on the Land Registry file that Plaintiff bought with open eyes and cannot have better title than Malakeh Touma. Malakeh Touma purchased in 1909, was never in possession or in any way exercised ownership over the land. She eventually sold to the Appellants, and the Appellants have based their whole case upon what Nazira Cook, the co-owner, did. Nazira Cook admittedly obtained judgment against the Defendant and tried to obtain possession, but failed. The delivery made by the Execution Office was a paper transaction, and the Respondent has never been parted from the physical possession of the land. The High Court decided that Nazira Cook could claim possession only in respect of her share.

I have to consider first of all, what is the legal effect of the various actions taken by Nazira Cook in respect of the co-owned property as regards the defence of prescription. These actions were taken admittedly in her own name but for the whole property. The Appellants

maintain that a suit brought by a co-owner against a trespasser or person claiming possession of the whole land is a perfectly good action, and judgment should be given for recovery of the whole land. Malakeh Touma was away in Beirut, and Nazira Cook, being a co-owner, brought many proceedings against the Respondent for the recovery of the whole land. An order of possession was granted on the 12th July, 1921, for the whole land. In 1922 another complaint was made by Nazira Cook, and Respondent was convicted and fined LP. 5, or one month's imprisonment, but again went into possession. On 8.11.31 possession was again ordered and this decision was taken to the High Court * where an order was made to dispossess the shares of Nazira Cook only, but this has no connection with the previous orders given in 1924 and 1929 for the whole land.

The Land Court, in its judgment of the 5th December, however, does not consider these various proceedings as interrupting prescription, but based its decision upon (1) Respondent was not physically ejected, and (2) ejectment could only apply to the share of Nazira Cook, and not to that of the other co-owner. What happened was that the Respondent was officially dispossessed but resumed possession.

I do not think that it is necessary to go further into detail regarding the lengthy proceedings in this case but merely to give a decision as regards the effect of various legal proceedings taken by Nazira Cook, and whether they can be considered, due to the order of the High Court in 1931, as affecting the whole land, and for the benefit of the co-owners or partners.

Firstly I consider that the action taken by Nazira Cook and subsequent formal delivery made by the Execution Officer, although Respondent resumed possession on each occasion, are sufficient to interrupt the running of the period of prescription. Recovery of the whole land has been ordered and confirmed on appeal, and although the High Court subsequently made an order to a return in 1930 that the execution should proceed only in respect of shares of Nazira Cook, I do not consider that this order invalidates or repeals any of the previous proceedings. I am satisfied, moreover, that the judgment of the Land Court, which is confirmed by the Court of Appeal in Land Appeal 29/29, P. L. R. Vol. 1, pages 422—423, sets out the correct interpretation of the law as applicable to this case.

> "Can one of several co-owners sue alone for ejectment? The *Mejelle* defines the powers of partners jointly and severally. The articles in question are 1643 and 1075. They state that one partner

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* H. C. 67/31.

> cannot represent his co-owners in respect of a property which has come to them otherwise than by inheritance, and further, that each jartner is for the purpose of litigation a stranger to his co-owners when he is in the position of a defendant.
>
> We hold that this means that a suit cannot be brought against one partner as representing all the other owners — all must be made partners. The reason is that the contrary procedure would facilitate collusion — Article 1643 of the *Mejelle*, last paragraph, supports this view. Article 1078 *Mejelle* states that partners are to be regarded as strangers *inter se* and cannot be taken as representing one another for the purpose of disposition.
>
> In our opinion, this refers to disposition or use things such as clothes or other personal articles, which cannot be used by one partner without excluding the other while the user lasts. This kind of use may be prejudicial to the partners. Land is not used thus. When trespass occurs on jointly owned land, a part-owner is not prevented by any clear provision of the law from suing for the recovery of the whole. The share of such a partner is not separated, and relates to each and every part of the land. If it be held that such a suit must be confined to the undivided share owned by the Plaintiff, it becomes impossible to execute a decree for ejectment by delivery. If as a result of the suit the whole property is delivered to the Plaintiff, temporary possession of a partner is preferable to the illegal possession of a stranger, since the partner has defined interests, which is not the case with a trespassing stranger.
>
> In this connection Articles 1075, 1077 and 1086 *Mejelle* should be consulted. If it be granted that the partners who do not join in the suit agree to the trespass or do not oppose it — their complaisance has no legal value. They own no defined interests which they can yield to the trespasser; they can give no leave of user to such a person where the rights of others are involved; in short, their action has no legal value whatever.
>
> We consider that in such a case a suit brought by one of the partners for the recovery of the whole area, in the case in which the trespass is recent, is admissible both in law and justice."

The above decision is supported by the law and references as set out in Goadby and Doukhan in Chapter XIII on co-ownership, and Chapter XVI, Limitation of Action, Prescription. The period of prescription is interrupted by presentation of a claim before a judge, in other words, institution of action in Court, Article 1666 *Mejelle*. Possession must be adverse for the whole period — and as to the effect of closure of the Courts, see Article 16 of Proclamation 42 of June, 1918.

It may be safely assumed that in the absence of any specific provision as to *miri*, the principles of the *mulk* law, as laid down in the *Mejelle*, would be deemed applicable also to *miri* interests.

The question of the manner of dealing with jointly owned property

is set out in the *Mejelle*, Section II, Hooper's translation, page 277 and onwards.

I am in complete agreement with the views expressed in the judgment of the lower Court in Land Appeal 29/29, and in my opinion a joint owner is in the position of a trustee for an absent joint-owner, and may sue to preserve the rights of the joint-owners in the whole property, and that any such action is sufficient to prevent and interrupt the period of prescription running against the absent joint owner. The period of prescription could not, therefore, start to run in this case until possibly 1930, when the High Court ordered execution to be made only in respect of the share of Nazira Cook. Since the present action was instituted in 1935, the question of prescription cannot arise from the period after 1930.

I must say here that I cannot agree with the order made by the High Court, and I feel that it is based rather on the assumption that the joint-owner was injuring the land, not as in this case protecting it. Such an order in my opinion could only be made when the subject to be executed is possibly a judgment against one of the co-owners personally, whereas in this case the judgment was in favour of the joint-owner against a trespasser and in respect of the whole undivided property. In any case this order cannot have any effect upon the previous judgments in the case.

For the above reasons I hold that when a trespass occurs on jointly owned land, one joint owner is entitled to sue and obtain judgment for the recovery of the whole; that the proceedings taken by Nazira Cook against the Respondent do interrupt the running of the period of prescription against the joint owners and their predecessor in title, Malakeh Touma; that the Respondent was dispossessed on several occasions, although he subsequently renewed possession; that the claim by the Appellants that no prescription could run while she was at a distance of "*Muddat Safar*" is established; that as set out in the judgment of the Land Court, page 6, Respondent's possession is established as from 1917. This will be the earliest date, therefore, under consideration and is affected by the proceedings taken by the joint-owner, Nazira Cook, 1920—21 onwards.

The judgment of the Land Court is set aside and judgment entered for the Appellants confirming their title to the land, 14 out of 96 shares, in accordance with certificates of registration, No. 2318, dated 28.9.33, and that Defendant is not entitled to contest their ownership.

Costs here and below on the higher scale and LP. 15 advocate's at-

tendance fee for appearing in this appeal, the advocate's fees in the Court below is reversed.

Delivered this 28th day of July, 1944.

British Puisne Judge.

HIGH COURT No. 97/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Adel Aat Moosa & an. PETITIONERS.

v.

1. Inspector Nour El Deen Bississo,
2. District Superintendent of Police Nablus,
3. Inspector in charge of the Prison, Nablus. RESPONDENTS.

Habeas corpus — Order of detention after acquittal in criminal case — Defence (Military Courts) Regs., reg. 17, Schedule, para. 1 — T. U. I. Ord., sec. 52 — Archbold, Phipson, Broom, Halsbury — CR. A. 13/38, 54//38, autrefois acquit.

Return to an order *nisi,* calling upon the Inspector in charge of the Prison of Nablus to show cause why he should not produce the bodies of the Petitioners before the High Court and also calling upon Inspector Nour el Deen Bississo and the District Superintendent of Police, Nablus, to show cause why they should not refrain from prosecuting them for the offence of unlawful possession of fire-arms allegedly used in the commission of the offence of murder of which they were acquitted by a lawfully and legally constituted Court of Criminal Assize; order *nisi* discharged:—

If an order of detention for production before the Military Court is regular and legal on the face of it, the High Court will not order the release of the detainee on the ground of a possible defence of *autrefois acquit.*

(*A. M. A.*)

REFERRED TO: CR. A. 13/38 (5, P. L. R. 69; 1938, 1 S. C. J. 93; 3, Ct. L. R. 69); CR. A. 54/38 (5, P. L. R. 338; 1938, 1 S. C. J. 340; 3, Ct. L. R. 284).

ANNOTATIONS: On detention under the Defence (Military Courts) Regulations see also H. C. 51/42 (8, P. L. R. 341; 1942, S. C .J. 279; 11, Ct. L. R. 198).

(*H. K.*)

FOR PETITIONERS: A. Dajani.

FOR RESPONDENTS: Crown Counsel — (Rigby).

ORDER.

This is the return to an order *nisi* directed to the District Superintendent of Police and Inspector in charge of the Prison, Nablus, and to another Inspector of Police, Nablus, calling upon them to show cause why they should not produce the Petitioners, Adel Ata Mousa and Mahmoud Muhammad Joudeh, and also calling upon them to show cause why they should not refrain from prosecuting the Petitioners for the offence of unlawful possession of firearms, namely rifles.

The Petitioners were, on the 12th day of July, 1944, acquitted by the Court of Criminal Assize sitting at Nablus of murder contrary to section 214 of the Criminal Code Ordinance, 1936. In acquitting the Accused that Court ended their judgment with the usual words:—

> "The Accused must, therefore, be discharged unless they are detained on any other charge."

It appears that after their acquittal the District Superintendent of Police, Nablus, signed an order for their detention under paragraph 1 of Schedule to the Defence (Military Courts) Regulations, 1937, to be found at p. 1138 of Volume 3, Annual Volumes of Ordinances *etc.* for 1937. Both those original orders which have been submitted to me appear to be valid orders for the detention of the Petitioners pending their being produced before a Military Court. It is argued, however, by Petitioners' advocate, that they should not have been arrested on a charge of carrying firearms, and that they should not be taken before a Military Court on such a charge inasmuch as the Court of Criminal Assize could, if they had so desired, have acted under section 52 of the Criminal Procedure (Trial Upon Information) Ordinance and could have convicted them of illegal possession of firearms, notwithstanding their acquittal on the charge of murder.

Reliance has been placed on section 52 above referred to and on Archbold's Criminal Practice, 31st edition, p. 336 and on Phipson on Evidence, 8th edition, p. 419, and on a certain passage in the judgment of the Court of Criminal Assize which is as follows:—

> "Assuming that the Accused were in possession of rifles and that the explanation which they gave of their presence was untrue, that still seems to us not to help the prosecution in their murder charge."

I prefer not to discuss the possible effect of section 52 although Crown Counsel, Mr. Rigby, has drawn my attention to Criminal Appeals Nos. 13/38 and 54/38 of Palestine Law Reports, Vol. 5, pp. 69 and 338. The English Law on the matter can be found in Broom's Legal Maxims 10th (1939) edition, p. 223. I feel that this plea of *autrefois acquit* is one which should be raised before the Military Court

although I naturally refrain from expressing any opinion as to whether the plea may or may not succeed.

The Accused's advocate has also referred to Halsbury (Hailsham) Vol. 9, p. 702, para. 1201. He has also contended that this Court has power to issue orders to the Palestine Police. By Regulation 17 of the Defence (Military Courts) Regulations, 1937, "the forces" include the Palestine Police Force and the combined effect of Regulation 17 and paragraph 1 of the Schedule to the Regulations is to give power to the Palestine Police or, at any rate, to a commissioned officer of the Palestine Police or to an officer in charge of a Police Station, to apprehend a person and take him before a Military Court.

I refrain from deciding the question whether in any particular case it may or may not be possible for this Court to restrain a member of the Palestine Police Force from acting under paragraph 1 of the Schedule to which I have referred.

It seems to me that the detention of the two Petitioners is, on the face of it, regular and legal.

For the foregoing reasons the petition is dismissed and the order *nisi* discharged. Each of the two Petitioners must pay a sum of fixed (inclusive) costs of LP. 5.— to the Respondents.

Given this 10th day of August, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 52/44.

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

BEFORE: Rose, A/C. J., Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Joseph Kassab. RESPONDENT.

Appeal by A. G. against sentence — Increase of sentence on appeal — Time elapsed from sentence to appeal — Conviction under Reg. 24A (1)(b) and C. C. O. 311.

Appeal from the judgment of the District Court, Tel-Aviv, in Criminal Case No. 4/44, whereby the Respondent was convicted of (1) soliciting or enticing without lawful authority or reasonable excuse, an officer of an Allied Force to sell

chattels, being the property of His Majesty's Government, contrary to Regulation 24A(1)(b) of the Defence Regulations, 1939, and (2) unlawful possession of property contrary to Section 311 of the Criminal Code Ordinance, and sentenced to a fine of LP. 30 or three months' imprisonment in default, allowed and sentence increased:—

> The Court of Appeal, although normally reluctant to do so, may when the sentence imposed by the court of trial is manifestly too low, alter the sentence to the detriment of the Accused.
>
> (*A. M. A.*)

ANNOTATIONS: On alteration of sentence on appeal see Halsbury, Vol. 9, pp. 279—280. *Cf.* CR. A. D. C. T. A. 66/44 (1944, S. C. D. C. 242).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

RESPONDENT: In person.

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv, convicting the Respondent of two offences — one against Regulation 24A(1)(b) of the Defence Regulations, 1939, and the second against section 311 of the Criminal Code Ordinance, 1936. In both cases the Appellant pleaded guilty.

The facts as disclosed by learned Crown Counsel are obviously serious, and while we are always most reluctant to interfere to the detriment of an accused person in a matter of sentence from the Court below, we do feel that in this case a fine of LP. 30 with an alternative of three months' imprisonment is too light, having regard not only to the nature of the offence but to the value of the property. We should have taken an even more severe view had it not been for the fact — not the fault of the prosecution — that six months have elapsed since sentence was passed by the District Court. Having regard to that, we propose to impose a lesser sentence than we would otherwise have done. We feel that the least sentence that should be properly imposed upon the Respondent is that he should go to prison for six weeks, and that that part of the judgment relating to the fine should stand.

The appeal is therefore allowed in so far as stated.

Delivered this 12th day of September, 1944.

British Puisne Judge.

CIVIL APPEAL No. 106/44.

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

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

IN THE APPEAL OF:—

Diab Salem 'Iliweh & an. APPELLANTS.

v.

Khadra Haj Ibrahim 'Iliweh. RESPONDENT.

Adverse possession — Possession by husband on behalf of wife after divorce — Possession by co-heirs — Land Law (Amendment) Ord., sec. 2(1) — Presumption and evidence.

Appeal from the judgment of the Magistrate's Court of Beersheba sitting as a Land Court, Land Case No. 289/42, dismissed:—

1. Possession by a person on behalf of his divorced wife, is possible.
2. The presumption that an heir holds for his co-heirs may be rebutted by evidence of adverse possession but such evidence is not in itself sufficient to oust the title of the possessor.

(*A. M. A.*)

ANNOTATIONS: The allegedly adverse possession of the Respondents extended to eight or nine years only.

"If the period of prescription has not passed then the question of adverse possession cannot assist the Respondent" — C. A. 53/44 (11, P. L. R. 300; *ante*, p. 552).

Note also that prescription is valid as a defence only (see note 1 to C. A. 390/43 at p. 415, *ante*) and see C. A. 288/44 (*ante*, p. 805) and annotations on prescription between co-heirs generally.

(*H. K.*)

FOR APPELLANTS: Ancar.

FOR RESPONDENT: F. Dajani.

JUDGMENT.

The Appellants' advocate raises two points in this appeal. The first was that the husband could not hold possession on behalf of his divorced wife. It is not denied that in fact he was in possession. All the evidence was to the effect that his only claim to possession was on behalf of his divorced wife and we know of no reason in law why he could not hold in this capacity of trustee. The only other point raised by the Appellants was that the Respondent has not been in possession since 1934, and that the adverse possession of the Appellants destroys any title she had. Reference is made to section 2(1) of the Land Law (Amendment) Ordinance.

The only effect of section 2(1) of the Land Law (Amendment) Ordinance is that a presumption in favour of a co-heir may be rebutted by evidence of adverse possession, but such possession does not automatically oust the title of the co-heir.

For these reasons the appeal is dismissed with LP. 10 inclusive costs.

Delivered this 9th day of October, 1944.

Chief Justice.

CRIMINAL APPEAL No. 100/44.

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

BEFORE: Edwards J., Judge Bourke R/P.D.C. and Abdul Hadi, J.

IN THE APPEAL OF :—

Muhammad Assa'ad Abu Shamleh. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Murder — C. C. O. 214(b)(c), 24 — Judgment of conviction drawn up by dissenting Presiding Judge, T. U. I. Ord., sec. 51 — Technical objection not taken at the trial, T. U. I. Ord., sec. 65 — Killing consequent upon an abduction — Abduction in itself not an offence, C. C. O. 254—60 — Manslaughter, C. C. O. 212, 213 — A. G. v. Edge.

Appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, in Case No. 24/44, whereby Appellant was convicted of murder contrary to sec. 214(c) of the C. C. O. and sentenced to death, allowed and conviction for manslaughter substituted:—

An abduction which is not proved to have been carried out for any of the purposes set out in C. C. O. 255—60 does not constitute an offence.

If a person is killed in the course of such an abduction, the offence committed is therefore manslaughter (212—3) and not murder (214(c)).

(*A. M. A.*)

REFERRED TO: Attorney General *v.* Edge, 1943, 1 R. 115.

ANNOTATIONS:

1. *Cf.* CR. A. 54/41 (8, P. L. R. 205; 1941, S. C. J. 183; 10, Ct. L. R. 93).

2. On majority judgments in criminal cases and the effect of sec. 51 of the T. U. I. Ordinance see CR. A. 54/41 (*supra*), CR. A. 18/42 (9, P. L. R. 168; 1942, S. C. J. 171; 12, Ct. L. R. 69) and CR. A. 54/42 (9, P. L. R. 252; 1942, S. C. J. 366; 11, Ct. L. R. 225).

(*H. K.*)

FOR APPELLANT: W. Salah.

FOR RESPONDENT: Acting Solicitor General — (Hogan).

CIVIL APPEAL No. 106/44.

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

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

IN THE APPEAL OF:—

Diab Salem 'Iliweh & an. APPELLANTS.

v.

Khadra Haj Ibrahim 'Iliweh. RESPONDENT.

Adverse possession — Possession by husband on behalf of wife after divorce — Possession by co-heirs — Land Law (Amendment) Ord., sec. 2(1) — Presumption and evidence.

Appeal from the judgment of the Magistrate's Court of Beersheba sitting as a Land Court, Land Case No. 289/42, dismissed:—

1. Possession by a person on behalf of his divorced wife, is possible.
2. The presumption that an heir holds for his co-heirs may be rebutted by evidence of adverse possession but such evidence is not in itself sufficient to oust the title of the possessor.

(*A. M. A.*)

ANNOTATIONS: The allegedly adverse possession of the Respondents extended to eight or nine years only.

"If the period of prescription has not passed then the question of adverse possession cannot assist the Respondent" — C. A. 53/44 (11, P. L. R. 300; *ante*, p. 552).

Note also that prescription is valid as a defence only (see note 1 to C. A. 390/43 at p. 415, *ante*) and see C. A. 288/44 (*ante*, p. 805) and annotations on prescription between co-heirs generally.

(*H. K.*)

FOR APPELLANTS: Ancar.

FOR RESPONDENT: F. Dajani.

JUDGMENT.

The Appellants' advocate raises two points in this appeal. The first was that the husband could not hold possession on behalf of his divorced wife. It is not denied that in fact he was in possession. All the evidence was to the effect that his only claim to possession was on behalf of his divorced wife and we know of no reason in law why he could not hold in this capacity of trustee. The only other point raised by the Appellants was that the Respondent has not been in possession since 1934, and that the adverse possession of the Appellants destroys any title she had. Reference is made to section 2(1) of the Land Law (Amendment) Ordinance.

The only effect of section 2(1) of the Land Law (Amendment) Ordinance is that a presumption in favour of a co-heir may be rebutted by evidence of adverse possession, but such possession does not automatically oust the title of the co-heir.

For these reasons the appeal is dismissed with LP. 10 inclusive costs.

Delivered this 9th day of October, 1944.

Chief Justice.

CRIMINAL APPEAL No. 100/44.

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

BEFORE: Edwards J., Judge Bourke R/P.D.C. and Abdul Hadi, J.

IN THE APPEAL OF :—

Muhammad Assa'ad Abu Shamleh. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — C. C. O. 214(b)(c), 24 — Judgment of conviction drawn up by dissenting Presiding Judge, T. U. I. Ord., sec. 51 — Technical objection not taken at the trial, T. U. I. Ord., sec. 65 — Killing consequent upon an abduction — Abduction in itself not an offence, C. C. O. 254—60. — Manslaughter, C. C. O. 212, 213 — A. G. v. Edge.

Appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, in Case No. 24/44, whereby Appellant was convicted of murder contrary to sec. 214(c) of the C. C. O. and sentenced to death, allowed and conviction for manslaughter substituted:—

> An abduction which is not proved to have been carried out for any of the purposes set out in C. C. O. 255—60 does not constitute an offence.
>
> If a person is killed in the course of such an abduction, the offence committed is therefore manslaughter (212—3) and not murder (214(c)).

(*A. M. A.*)

REFERRED TO: Attorney General *v.* Edge, 1943, 1 R. 115.

ANNOTATIONS:

1. *Cf.* CR. A. 54/41 (8, P. L. R. 205; 1941, S. C. J. 183; 10, Ct. L. R. 93).
2. On majority judgments in criminal cases and the effect of sec. 51 of the T. U. I. Ordinance see CR. A. 54/41 (*supra*), CR. A. 18/42 (9, P. L. R. 168; 1942, S. C. J. 171; 12, Ct. L. R. 69) and CR. A. 54/42 (9, P. L. R. 252; 1942, S. C. J. 366; 11, Ct. L. R. 225).

(*H. K.*)

FOR APPELLANT: W. Salah.

FOR RESPONDENT: Acting Solicitor General — (Hogan).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Nablus, whereby the Appellant was convicted of murder, contrary to Section 214(c) Criminal Code Ordinance, and sentenced to death.

The allegation of the Crown is that on the 17th September, 1939, at Ya'bad village, Jenin, two foremen of the Public Works Department were driving back in a motor-car, after having inspected work done by a gang of labourers. They were stopped by two men, one of whom had a pistol and the other of whom had a rifle. The suggestion is that the man with the rifle was the Appellant. These two people got into the car and made the Public Works Department foremen drive a certain distance, whereupon the armed men ordered the two foremen to alight and walk in a certain direction. Said Muhammad Bashir, who was apparently one of the labourers working on the road, came up with the intention of interceding with the armed men in favour of the foremen, or perhaps of preventing the armed men from harming the foremen. In the result the man with the pistol shot Said Muhammad Bashir dead, while the present Appellant stood by with his rifle, and it is said that his action comes within the provisions of Section 24 Criminal Code Ordinance. We may say at the outset that there was some evidence that the Appellant ordered the man with the pistol to fire; but this, apparently, was not pursued and form no part of the basis of the judgment of the Court of Criminal Assize.

The case, as the learned presiding Judge pointed out, depended entirely upon the verbal evidence of eye-witnesses, there being no circumstantial evidence of any kind, nor any suggestion of personal motive which would implicate the Appellant. In the result the Appellant was convicted, as we have stated, although the learned presiding Judge said:—

> "Speaking for myself, I feel considerable hesitation in convicting an accused in a murder case on the strength of eye-witness evidence only, uncorroborated by any single piece of circumstantial evidence, as it seems to me that such a course, especially in this country, may he dangerous, and that this danger is increased in a case, such as the present, where the Accused is admittedly a man of bad character who, on his record, would be likely to have committed this type of crime. It is, of course, obvious that a Court must be most careful to resist the temptation of convicting a man of one offence because he may very reasonably be suspected of having committed others. My brothers, however, do not share my hesitation, and having regard to the fact that I share their favourable impression of Sharif's evidence, my own hesitation is not sufficient to lead

> me to dissent from their conclusion, which is that the prosecution have established the fact that the Accused was one of the two armed men present at the shooting."

Notwithstanding the actual words used, we feel that the judgment is, in effect, a majority judgment, because it seems clear that, if the learned presiding Judge had been sitting alone, he would not have convicted. Although the judgment is that of a majority, it is of course none-the-less valid and effective, and must be accepted as such.

The learned presiding Judge was obviously in some difficulty when he came to write the judgment, because he had to collect the opinions of the members who formed the majority, although it is clear that he himself did not altogether agree with them. We have no doubt, however, that the judgment is a true and complete synthesis of the views of the two members who formed the majority. It is odd that a judgment convicting an accused should have to be prepared by a Judge who is himself not satisfied of the guilt of the Accused. It is reasonable to suppose that the draftsman of Section 51, Criminal Procedure (Trial Upon Information) Ordinance, did not contemplate a case like the present.

Turning to the grounds of appeal, the first ground is a highly technical one, namely that the offence charged in the paragraph of the Information headed "Statement of Offence" is "murder, contrary to Section 214 of the Criminal Code Ordinance, 1936", while in the "Particulars of Offence" the words "with premeditation" appear. It is clear that everyone at the trial realised that the words "with premeditation" had been allowed to appear by inadvertence, and it is also clear from the further particular alleged and the judgment, that the Appellant was actually charged with an offence, contrary to Section 214(c), Criminal Code Ordinance, and convicted thereunder. In any event, this objection was not taken at the trial, and if it had been necessary we would certainly have acted under the proviso to Section 65 of the Criminal Procedure (Trial Upon Information) Ordinance.

The next ground of appeal is that the judgment is vague and does not sufficiently set out findings of fact. It is urged that the words "he appears to have" and "it then appears" give no indication as to whether the trial Court accepted and believed the prosecution story. Here again the answer is to be found in the proviso to Section 51 of the Criminal Procedure (Trial Upon Information) Ordinance.

The only substantial ground of appeal is that the trial Court misdirected themselves with regard to the evidence of a young man, named Sharif Ben Farris Muhammad Kassem, by whose evidence the trial

Court said they were impressed. In the judgment it is said that Sharif "has no connection with any of the parties such as to lead us to the conclusion that his evidence is not disinterested".

Walid Eff. Salah, the Appellant's advocate, who has urged everything that could be urged on behalf of his client, suggests that the trial Court in their judgment had forgotten that this man, Sharif Ben Farris Muhammad Kassem, said that the deceased victim was his maternal uncle. The reply to Walid Eff.'s argument seems to be found in the following words "such as to lead us to the conclusion that his evidence is not disinterested". The only inference we can draw is that the trial Court realised that the deceased was the maternal uncle of the witness, but that they thought that this relationship was not such a close relationship as to make them believe that his evidence was not disinterested. Moreover, the Appellant himself is a maternal cousin of this witness. We therefore reject this ground of appeal.

Sharif definitely swore that he saw the two foremen, namely, Salim Ben Deeb al Kassem, who was driving the car, and Abdallah Ben Ahmed Musa, and the two armed men in or on the car, namely, the one with the pistol on the running board and the man with the rifle in the motor-car. Sharif had no difficulty in identifying the present Appellant as being the man with the rifle.

Now this evidence, if believed, and it was believed and we see no reason why it should not have been believed, was in itself sufficient to warrant a conviction. There was, however, the evidence of other witnesses, which evidence was subjected to much criticism before us by Walid Eff. It may be that the evidence of those other witnesses was not so strong as that of Sharif; but, once the Court of trial believed the evidence of Sharif, the matter of the evidence of the other witnesses becomes of little or no importance because, as has been so often said, this Court is not a Court of retrial. On the facts, therefore, the appeal fails.

The judgment of the trial Court went on to say:—

> "We now have to consider the legal effect of our finding. We accept that it was not the Accused who fired the fatal shot, but that circumstance would not seem to assist him, having regard to Section 24 of the Criminal Code Ordinance. It is abundantly clear that on the facts as accepted by us the Accused and his companion were engaged together upon an unlawful purpose — abduction, probably with a view to robbery, although the motive of the abduction is immaterial. It seems to us that it is an irresistible conclusion that the death of this unfortunate man, Said Muhammad Bashir, was a probable consequence of the armed adventure of these two men.

> It follows, therefore, that as both were present at the killing, both are equally liable for what occurred, irrespective of which of them fired the fatal shot."

As regards the English law on kidnapping, we refer to a recent case decided in Ireland, Attorney-General *v.* Edge (1943, I. R. 115) cited in the "Journal of Criminal Law", January, 1944, page 65. In Palestine the law is to be found in Section 214(c), Criminal Code Ordinance, which is in the following terms:—

> "Any person who wilfully causes the death of any person in preparing for or to facilitate the commission of an offence or in the commission of an offence."

The word "offence" must be an offence against the Criminal Code Ordinance, or perhaps against some other penal Ordinance of Palestine. If one turns to Section 254 *et seq.* one finds that abduction *per se* is not an offence, Section 254 being merely a definition section. Sections 255 *et seq.* define the purpose of the abduction. Having regard to this fact, the words "although the motive of abduction is immaterial" seem rather difficult to understand. It may be that the Court of trial in using the word "motive" really meant "purpose". Be that as it may, there is no finding that the abduction was an abduction for the purposes set out in any of the following sections, namely, 255, 256, 257, 258, 259 and 260. It is clear that there was no finding of robbery, and the offence contemplated in Section 214(c) could not have been robbery for two reasons, namely, (a) there seems to be no evidence of it, and (b) the use by the Court of trial of the words "probably with a view to robbery".

We feel, therefore, that the Court of trial made no finding which would justify a conviction under Section 214(c). It is not suggested that the Accused was either ever charged with, or that the facts proved would justify a conviction for, an offence contrary to Section 214(b). Causing death by an unlawful act is manslaughter, and does not amount to murder unless the facts proved clearly bring it within any one of the four sub-heads of Section 214.

We therefore feel that the conviction for murder cannot stand. We think, however, that, having regard to Section 24 and to the evidence which the majority of the Court accepted, the facts warrant a conviction for manslaughter. We accordingly quash the conviction for murder and substitute therefor a conviction for manslaughter, contrary to Section 212, and punishable by Section 213, Criminal Code Ordinance.

The Accused is asked whether he wishes to say anything as to sentence. He says that he leaves it to his advocate.

Walid Eff.: I understand that the relatives of the deceased have received compensation of LP. 250. The Appellant himself did not do the actual act of killing. The Appellant is sorry that Said Muhammad Bashir is dead, and asks for leniency.

Naim Bey: I understand from the relatives of deceased that no compensation has been paid. This case has nothing to do with riots or disturbances. Just an ordinary case of robbery. The Appellant has been in custody since 4th December, 1943.

SENTENCE.

Muhammad Assa'ad Abu Shamleh, we have carefully considered everything that has been said on your behalf by your advocate. We think that we can pass a lesser sentence than is usually passed in cases of this nature. The sentence of the Court is that you be imprisoned for twelve years to commence from the date of your arrest, namely the 4th December, 1943.

Delivered this 30th day of September, 1944.

British Puisne Judge.

HIGH COURT No. 100/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Ellie Papadimitriou. PETITIONER.

v.

1. Inspector General of Police and Prisons,
2. Officer in charge of Detention Camp, Sarona. RESPONDENTS.

Deportation — Order under sec. 10(1), *Immigration Ord. and directions for custody and conveyance — Order need not state the clause (a) to (f), under which the order is made or that the High Commissioner is satisfied that it was conducive to the public good to make the order — Whether order need be gazetted, sec.* 10(8)(9), *Interpretation Ord., sec.* 7(*d*) *— Interim detention,* 10(5), (8) *— Deportation, ex parte Duke of Chateau Thierry, ex parte Sacksteder, position in England compared — R. v. Goldfarb — Form of order nisi, H. C.* 88/42.

Return to a rule *nisi* directed to the Respondents calling upon them to show cause why they and each of them should not produce the body of the Petitioner before the Court for the purpose of examining the legality of her detention and for an order to be given to her to remain in Palestine, and to await the further order of the Court; rule *nisi* discharged:—

> In an order of deportation under sec. 10(1) of the Immigration Ordinance, no mention need be made of the clause in that sub-section under which the order is made, or, if made under clause (f), that the High Commissioner is satisfied that it is conducive to the public good to make the order. The order need not be gazetted.
>
> The person in connection with whom the order was made may be ordered to be taken into custody prior to deportation. No mention need be made in such order of the sub-section under which it is given.
>
> A person against whom a deportation order has been made cannot choose where to go.

(*A. M. A.*)

REFERRED TO: R. *v.* Home Secretary, *ex parte* Duke of Chateau Thiery, 1917, 1 K. B. 552; on appeal in 1917, 1 K. B. 922, 116 L. T. 226, 33 T. L. R. 264, 86 L. J. (K. B.) 923; R. *v.* Chiswick Police Station Superintendent *ex parte* Sacksteder, 1918, 1 K. B. 578, 118 L. T. 160, 34 T. L. R. 279, 87 L. J. (K. B.) 608; R. *v.* Goldfarb, 1936, 1 All E. R. 169, 154 L. T. 408, 52 T. L. R. 254, 25 Cr. App. Rep. 161; H. C. 88/42 (9, P. L. R. 516; 1942, S. C. J. 499).

ANNOTATIONS: On deportation of aliens see Halsbury, Vol. 1, pp. 484 *et seq.*, particularly para. 823 at p. 486.

(*H. K.*)

FOR PETITIONER: B. Joseph.

FOR RESPONDENTS: Acting Solicitor General — (Hogan).

ORDER.

This is the return to an order *nisi* calling upon the Respondents to show cause why they should not produce the body of Miss Ellie Papadimitriou for the purpose of examining the legality of her detention; in other words, these are proceedings by way of "*habeas corpus*".

The learned Acting Solicitor General, Mr. Hogan, has appeared and shown cause. The first Respondent has sworn an affidavit as has also Mr. Dalgleish, Assistant Secretary, Chief Secretary's Office, Government of Palestine. The Applicant herself has also sworn an affidavit in which she avers that she is a Greek national, her permanent residence being in Athens, and that she entered Palestine by train from Turkey in 1941. Her permit to remain in Palestine was extended from time to time until she was arrested in April, 1944. It seems common ground that she is not a Palestinian citizen and that she is subject to the Immigration Ordinance, 1941, and that she is not now entitled to be in Palestine.

The first Respondent has sworn that prior to the 21st July, 1944,

the Petitioner was detained by virtue of an order of detention made by the High Commissioner under Regulation 17(c) Defence Regulations. On that date the High Commissioner cancelled the original detention order and made an order under section 10(1) Immigration Ordinance, ordering her deportation from Palestine and directing her to be kept in custody pending her deportation from Palestine, and directing also that she be handed over to the General Officer Commanding in Palestine for conveyance out of Palestine. The original order signed by the High Commissioner on 21st July, 1944, has been submitted to me.

Dr. Bernard Joseph, advocate, who appeared for the Petitioner, has raised many grounds of objection to the order made under section 10(1) and in deference to his able and exhaustive arguments I shall deal *seriatim* with all his points.

He first argues that the order must show, on the face of it, under which paragraph, namely, (a) or (b) or (c) or (d) or (e) or (f) of section 10(1) the order was actually made. The order in question merely mentions section 10(1). Mr. Dalgleish has sworn that from personal knowledge he can state, and he has the authority of the High Commissioner for so stating, that the order was, in fact, made under section 10(1)(f) of the Immigration Ordinance, 1941. Dr. Joseph has said that Mr. Dalgleish's statement is merely hearsay evidence. Nevertheless, I am prepared to accept the fact that the order was made under section 10(1); but I go further because I think that, on the face of the order itself and having regard to the comprehensive provisions of (f) which I can hold to be a residuary or omnibus sub-section, it seems clear that the order was made under section 10(1)(f). It would seem that, in the absence of any mention of sub-sections (a), (b), (c), (d) or (e) one is forced to the conclusion that the High Commissioner had decided that it was conducive to the public good to order the deportation of the Petitioner. It is not suggested by the Respondents, nor is there any material on which it can be said that the order was made under (a), (b), (c), (d) or (e) and one can, therefore, only conclude that it was made under (f). I am satisfied that Mr. Dalgleish was a person properly able and qualified to swear this affidavit and that he is fully aware of the fact that it was made under section 10(1)(f).

Dr. Joseph next contends that the High Commissioner should have said in the order that he himself was satisfied that it was conducive to the public good to make an order. In support of this contention Dr. Joseph has cited some cases decided in England where the Secretary

of State for Home Affairs had sworn an affidavit in which he said that he "was satisfied". My view, however, is that there is nothing in section 10 of the Immigration Ordinance which requires the High Commissioner, in making the order, to state in terms that he was satisfied. I would say, in passing, that Dr. Joseph does not seem to go so far as to contend that it was necessary for the High Commissioner to state in his order his reason for deeming it conducive to the public good to make an order of deportation.

The next objection taken by Dr. Joseph is that assuming, which he does not admit, that one can invoke the provisions of section 10(8) of the Ordinance it would still be necessary for the High Commissioner to publish the order in the Palestine *Gazette*. In support of this argument he quoted section 7(d) of the Interpretation Ordinance. In my view, however, the matter is covered by the provisions of section 10(9), and I think that this subsection, far from supporting Dr. Joseph's argument, is really against it. It is next submitted that when the High Commissioner made the order for deportation under section 10(1) he had no power, at the same time, to make an order for the detention of the Petitioner. The argument is that he should have made an order for her deportation and at the same time required her to leave Palestine within a stated period and that she should have been given an opportunity to leave of her own accord.

It may well be that there is power in suitable cases for the High Commissioner to order a person to leave and to give that person an opportunity of leaving of her own accord; but it seems clear that both under the corresponding English legislation and under the Palestine legislation there is power in the proper authority, at the time of making the deportation order, to make an order for immediate detention. This is to be found in section 10(8) which is in the following terms:—

> "A person against whom such an order is made, while awaiting deportation ......, shall be liable to be kept in custody in such manner as the High Commissioner may by order direct and whilst in that custody shall be deemed to be in legal custody."

In my view this gives the High Commissioner power, immediately he has made the order of deportation or simultaneously with the making of that order, to direct that the person be taken into custody. The actual terms of the order of the 21st July, 1944, seem to be in accord with the letter and spirit of section 10(8). It is next said that no order was made under section 10(5). It is true that there may be cases under which an order can and should be made under section 10(5); but the mere fact that there was no mention in the order of

21st July, 1944, of section 10(5), seems to me not to affect the validity of the order made under section 10(1) or of the consequential detention under section 10(8).

I accordingly hold that the order of 21st July, 1944, was a valid order and that this Court is not entitled to question the matter or to enquire into the reasons which prompted the High Commissioner to make it.

Dr. Joseph has, however, raised another matter, namely, that, even if the order is good, the Respondents must give his client an opportunity of going to the country to which she wishes to be sent. It is said that she does not wish to go to Egypt but wishes to be sent to Turkey or Greece from which latter country she says she came. I may say that it was denied at the Bar by the learned Acting Solicitor General that she had entered Palestine from Greece; but as this matter was not in issue before me I do not comment on it.

Dr. Joseph has relied on the *dictum* of Viscount Reading L. C. J. in the King's Bench Divisional Court in the case of Rex *v.* Secretary of State for Home Affairs, *ex parte* Duke of Chateau Thierry, (1917) 1 K. B. p. 552 at p. 555 and in the Court of Appeal at p. 922. At p. 555 Lord Reading said:—

> "In form the order is correct, but this Court must look behind the mere form, and, when there is no doubt that the intention is to deport the alien to a particular country, though the form of the order does not state that that is the object and intention of the Executive in marking the order, we must treat it as if the order did in effect state that the alien was to be deported to France."

It is to be noted, however, that the Court of Appeal reversed the order of the Divisional Court and it is interesting to note that in the case of Rex *v.* Superintendent of Chiswick Police Station, *ex parte* Sacksteder, (1918) 1 K. B. p. 578, at p. 584 Pickford, L. J. (as he then was) said:—

> "We did express opinions, whether wisely or not, upon two other points."

Pickford, L. J., went on to say that under Art. 12 of the Aliens Restriction (Consolidation) Order, 1916, it was left to the Secretary of State to select the ship upon which the alien was to be placed. That, of course, is a judgment dealing with a particular English statute, but an order made under that statute is of interest here in Palestine because it shows that the effect of leaving the choice of ship to the Secretary of State is to deprive the alien of choice of ship, and, of course, choice of destination. It may well be that in consequence of this the alien

might be landed in a country to which he has objected to go. It is clear, of course, that Great Britain, (that is to say, a tany rate, England, Wales and Scotland) is an island and that the only method, except perhaps by aeroplane, of effecting deportation, is by putting an alien on board a ship. Nevertheless it is of interest because it negatives any suggestion that an alien has a right to be returned to a particular country. It is not suggested in this case that there is any mention in the order of the country to which the Petitioner is going to be taken. In this connection I quote the words of Warrington, L. J., at p. 589 of the report of *ex parte* Sacksteder:—

> "The order is on the face of it valid, and there is no pretence for saying that it is a sham order or anything of the kind, nor is there any pretence for saying that under it or in consequence of it something illegal is going to be done by any of the officers of the Executive Government. As soon as a ship leaves these shores the function of the Executive Government comes to an end. What happens after that is no concern of theirs, and I think it is not for us to consider what may be the ultimate motive with which the Secretary of State may make the order. The intention with which he makes the order is the intention that the man shall be placed on board a ship going to France. It may be that the motive actuating that intention was that the man shall be landed in France. In my judgment in the present case, at all events, we cannot go behind the order made; that order is a valid order, and for these reasons the appeal must be dismissed:—

Scrutton, L. J., at p. 591 said:—

> "I understand all the members of the Court to have said this Court is not a Court of Appeal from the discretion of the Secretary of State in making an order of deportation. I understand all the members of the Court to have said that art. 12 of the Order in Council gives the Secretary of State a power to select the ship on which the alien shall be deported so that, while they all say the Secretary of State cannot in terms make an order that an alien shall be deported to a specific country, yet he has power to select the ship on which the alien may be placed, with the probable result that, unless the alien manages to get overboard on to some other ship, he will go to the country to which the ship on which he is placed is sailing. That has been decided for me by the Court of Appeal, and I am bound by it."

Dr. Joseph has relied on the case of Rex *v.* Goldfarb (1936) 1 All E. L. R. p. 161 which, however, seems to have dealt with an entirely different matter, namely a recommendation by a Criminal Court for the deportation of persons found guilty of a criminal offence. I do not think that it is an authority which can help the present Petitioner.

Aplying the principles laid down in the cases cited, it seems to me, having regard to the provisions of section 10(8), that the High Com-

missioner has power to place an alien, against whom an order of deportation has been made, on any vessel, aeroplane, aircraft or motor or other vehicle, and it does not seem to me that the alien can demand that the particular vehicle should travel in any particular direction in which he wishes, in the case before me, to the North in preference to the South.

Dr. Joseph has been unable to quote any statutory authority securing to an alien or a prohibited immigrant in Palestine the right to be returned to his country of origin or to any particular country. Whatever may in the past have been the practice (perhaps indeed never an universal practice), the English authorities make it clear that in England, at any rate, the Secretary of State for Home Affairs has the power to choose the ship and by implication, therefore, denies to the alien the right to be sent to a particular country.

Before leaving this case I wish to place on record the fact that the learned Acting Solicitor General has taken exception to the paragraph in the order *nisi* of the 25th July, 1944, which reads:—

> "AND IT IS FURTHER ORDERED that the deportation from Palestine in respect of the said Ellie Papadimitriou be stayed, and that she be detained in Palestine by the Respondents pending the further order of this Court."

I may say that the above wording followed the order *nisi* in High Court No. 88/42. Out of deference to the learned Acting Solicitor General's submission I would say that it is doubtful whether this paragraph should have appeared in the order *nisi* and, speaking for myself, I do not wish it to be regarded as a precedent.

For the foregoing reasons the petition fails and the order *nisi* is discharged.

Given this 3rd day of August, 1944.

British Puisne Judge.

CRIMINAL APEAL No. 116/44.

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

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

IN THE APPEAL OF:—

Attorney General. APPELLANT.

v.

Arab Union Cigarette and Tobacco Company, Ltd. RESPONDENTS.

Trades and Industries (Regulations) Ord. — Sec. 10(1)a) — Store used in connection with a classified licensed trade — CR. A. 5/43, A. G. v. Plymouth Corporation — Sentence.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, CR. A. 86/44, allowed:—

A special licence should be taken out under the Trades and Industries Ord. in respect of a store used in connection with a classified trade in respect of which a licence has already been issued.

(*A. M. A.*)

REFERED TO: A. G. *v.* Plymouth Corporation, 1909, 100 L. T. 742; CR. A. 5/43 (10, P. L. R. 49; 1943, A. L. R. 69).

ANNOTATIONS: See Halsbury, Vol. 32, p. 307, para. 490 and *cf.* CR. A. D. C. Ha. 16/44 (1944, S. C. D. C. 66).

(*H. K.*)

FOR APPELLANT: Ganon.

FOR RESPONDENTS: A. Atalla.

JUDGMENT.

This is an appeal by the Attorney General against the judgment of the District Court, Haifa, given in Criminal Appeal No. 86/44, which confirmed the judgment of the Magistrate acquitting the Respondents of a charge under Section 10(1)(a) of the Trades and Industries (Regulation) Ordinance.

The material facts are not in dispute. The Respondents carry on a business as cigarette manufacturers. They have a licence under the Trades and Industries (Regulation) Ordinance for the factory where they manufacture these cigarettes. They also maintain a store in another part of the town where they store tobacco. The Appellant contends that in respect of this store they are also liable to take out a licence under the Ordinance. Both the industry of tobacco manufacturing and stores are scheduled as classified trades under the Ordinance. It is quite clear that both the learned Relieving President of the District Court and the Magistrate founded their judgment on Criminal Appeal No. 5/43. In the course of his judgment the learned Relieving President said:—

"I am fortified in this view by the judgment of this Court and by the authority quoted by the Supreme Court in confirming this judgment, that is to say, that it is not a trade where he makes articles for his own use or to work for his own purposes only. It seems to me clear by analogy from this remark that it is not an offence under the Trades and Industries Ordinance for a tobacco company to use a premises as a store for their own products merely, and for no other purposes as is the case here."

Now, with great respect, it seems to me that the learned Relieving

President misconceived the true effect of what was decided in that case. The facts in the case were that a motor-car service co-operative society, whose business was the conveyance of passengers by bus, had a small building which they used as a store for spare parts and tools for repairing. It was contended that this building was a garage, and that as such it should be licenced under the Trades and Industries Ordinance. On appeal to the District Court, Haifa, the learned Judge held that the business or trade of repairing their own buses was not a classified business within the meaning of the Ordinance. "You must", he said, "have some relationship with an outside person or concern. You either, with or without gain, provide something — not necessarily an article — you may provide service to someone else". This follows the decision in the case of the Attorney General *v.* Plymouth Corporation (1909) 100 L. T., where it was held that it is not a trade for a person to make articles for his own use, nor to work for his own purposes only.

Now it must be borne in mind, when considering Criminal Appeal No. 5/43 in relation to this case, that the trade or industry of what I may call conveying passengers by bus was not a classified trade under the Trades and Industries Ordinance. The learned Judge did not say that this repair shop or garage, call it what you like, was not part of the general business carried on by the co-operative company. I have not doubt that it was, and if that general business required a licence, which in that case it did not, I am of opinion that the repair shop would equally require a licence. Let me take, for example a brewery, which is a classified trade. It may well be that the beer is bottled in one place of business and fermented in another place of business. In such a case it is my opinion that each place would require a licence. The test, it appears to me, is whether the store forms an integral part of the general business which is classified under the Ordinance. In this case, not only is a tobacco store necessary for the purpose of the manufacture of the cigarettes, but it seems to me that it would be impossible to carry out the manufacture without a store.

I arrive, therefore, at the conclusion that the storing of tobacco in this store formed an integral part of the trade or industry of cigarette manufacture. It was therefore obligatory on the owners to take out a licence under the Ordinance.

The appeal must be allowed. As the Respondent has already been acquitted by two Courts, I impose the nominal fine of LP. 1.

Delivered this 24th day of October, 1944.

Chief Justice.

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PREPARED BY DR. H. KITZINGER, ADVOCATE.

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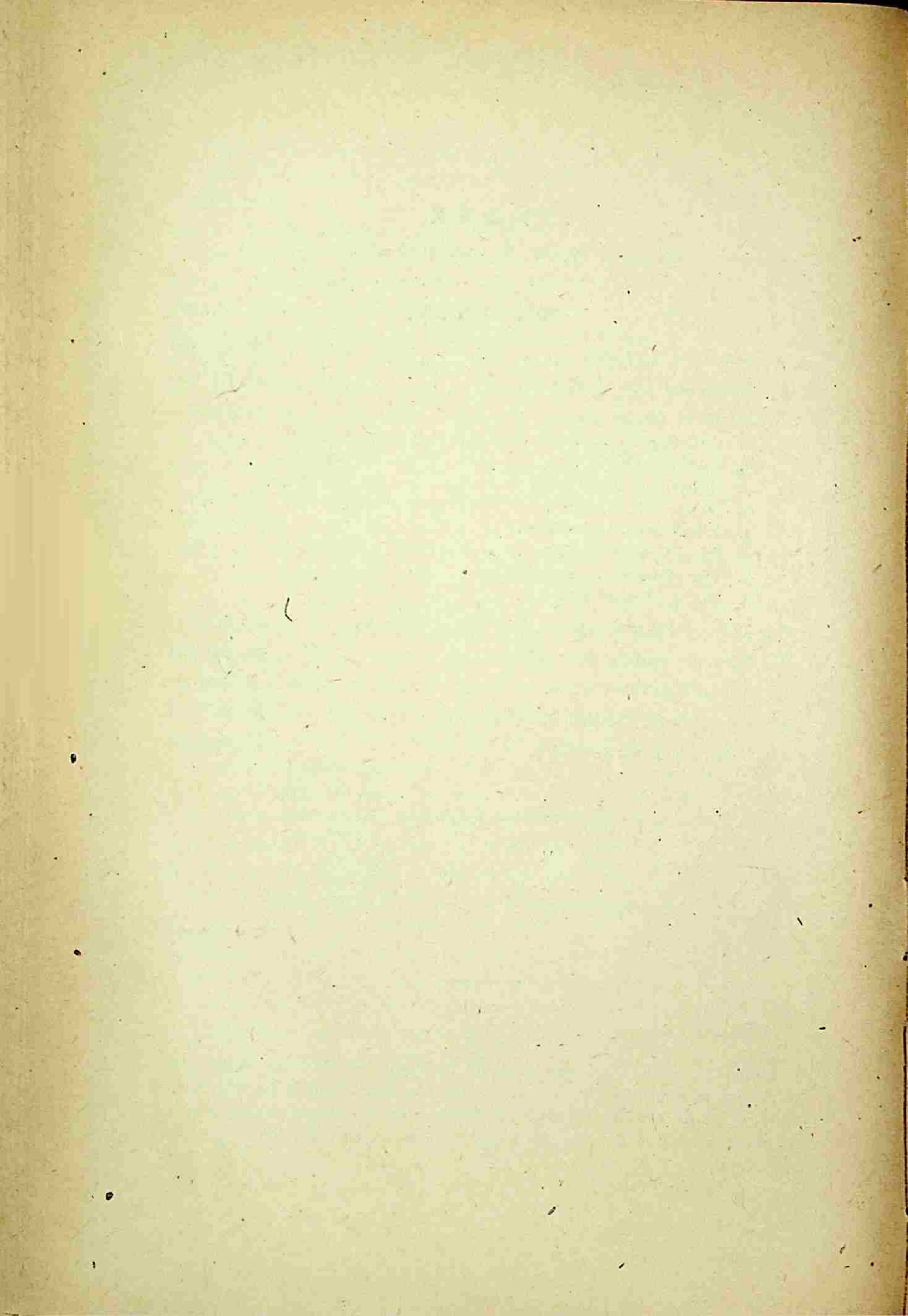
NOTE.

Owing to paper restrictions some of the judgments delivered during 1944 could not be included in this volume and had to be held over for publication in A. L. R. 1945. The reference numbers of these cases have, however, been included in the Numerical List where the respective page numbers in the 1945 volume are given. (*Ed.*)



ADDENDA & CORRIGENDA

Page 3, *Note*: Further proceedings in this case: C. A. D. C. T. A. 170/44 (1945, S. C. D. C. 252);

7, *Note*: Further proceedings in this case are reported at p. 214, *post;*

58, *the 7th and 12th lines should be interchanged;*

72, *Note*: Further proceedings in this case: CR. A. 96/44 (*post*, p. 501);

105, *Note*: Further proceedings in this case: H. C. 30/44 (*post*, p. 249);

136, *line* 3, *read*: "T. U. I. Ord., Sec. 37" *instead of* "... Sec. 39";

154, *Note*: Further proceedings in this case: H. C. 126/44 (1945, A. L. R. 343);

199, *Note*: The final judgment is reported in 1945, A. L. R. 197;

202, *Note*: Further proceedings in this case: H. C. 20/44 (*post*, p. 272);

220, *Note*: Further proceedings in this case: P. C. L. A. 3/44 (*post*, p. 663);

265, *2nd line of annotation* 4, *add*: "1937, S. C. J. (N. S.) 321" *after* "P. P. 17.VIII.37";

287, *Note*: This decision was confirmed on appeal in C. A. 358/44 (1945, A. L. R. 222);

310, *Note*: Further proceedings in this case: H. C. 126/43 (*post*, p. 665);

352, *Note*: Further proceedings in this case: C. A. 332/44 (1945, A. L. R. 237) & C. A. 36/45 (*ibid.*, p. 328);

377, *Note*: The judgment of the lower Court is reported in 1943, S. C. D. C. 7;

384, *Note*: See further H. C. 118/44 (1945, A. L. R. 181);

461, *add the following to annotation* 4: "See P. C. L. A. 13/44 (*post*, p. 550);

466, *third line, add* "p. 478" *after* "reported *infra*";

477, *Note*: The judgment which it was sought to appeal is reported at p. 651, *post;*

478, *Note*: The decision in this case was criticised and not followed in CR. A. 157/44 (1945, A. L. R. 367);

485, *Note*: Further proceedings in this case: CR. A. 151/44 (1945, A. L. R. 267);

495, *Note*: See further C. A. 153/44 (1945, A. L. R. 28);

545, *line* 15 *from bottom, last word, read*: "allowed" *instead of* "dismissed"; *Note*: Further proceedings in this case: P. C. L. A. 7/44 (*post*, p. 548);

554, *Note*: The order of the C. E. O. is reported in 1944, S. C. D. C. 332;

600, *line* 7, *read*: "CIVIL APPEAL No. 354/43" *instead of* "... 354/44";

615, *Note*: This decision was confirmed on appeal in C. A. 310/44 (1945, A. L. R. 294);

642, *last line of heading, read*: "Collins — Judgment upset when it does not set out findings of fact sufficient to base legal inference" *and not as printed;*

Note: Previous proceedings in this case: C. A. 260/43 (1943, A. L. R. 766);

652, *Note*: Further proceedings in this case: P. C. L. A. 12/44 (*ante*, p. 477);

686, *Note*: For a preliminary ruling in this case see *post*, p. 808;

745, *delete the asterisk in the second line of the third paragraph and the editorial note at the bottom of the page;*

757, *Note*: The judgment of the lower Court is reported in 1944, S. C. D. C. 528;

799, *Note*: Further proceedings in this case are reported in 1945, A. L. R. 347;

807, *Note*: Previous proceedings in this case: C. A. 8/32 (5, C. of J. 1673);

811, *last line, add*: "(1, C. of J. 289)" *after* "H. C. 67/31".

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166	1943	141	74
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202	1943	219	21
224	1943	76	—
237	1943	17	—
250	1943	133	99
251	1943	104	Vol. X, p. 646
252	1943	94	57
273	1943	32	—
277/278	1943	224	196
282	1943	126	—
283	1943	82	—
284	1943	169	26
285	1943	621	329
288	1943	587	408
289	1943	261	34
292	1943	36	—
295	1943	239	224
298	1943	283	59
300	1943	376	121
301	1943	156	—
302	1943	242	41
303	1943	486	—
307	1943	411	151
309	1943	676	—
310	1943	632	—
311	1943	73	72
317	1943	146	42
319	1943	453	270
320	1943	139	—

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327	1943	505	456
329	1943	809	414
330	1943	245	170
331	1943	154	—
332	1943	639	419
334	1943	420	165
336	1943	298	—
339	1943	291	—
340	1943	308	248
341	1943	545	—
342	1943	344	360
343	1943	330	303
345	1943	50	Vol. X, p. 678
346	1943	447	—
349	1943	364	333
350	1943	348	84
351	1943	386	—
352	1943	424	275
354	1943	600	—
356	1943	150	94
357	1943	511	—
358	1943	389	212
359	1943	323	—
360	1943	313	—
361	1943	754	—
362	1943	421	—
365	1943	561	318
366/367	1943	100	85
369	1943	412	277
370	1943	474	—
372	1943	642	—
375	1943	673	—
378	1943	277	234
379	1943	356	280
380	1943	271	49

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386	1943	581	307
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389	1943	273	214
390	1943	415	217
392	1943	543	298
393	1943	528	305
396	1943	383	389
398	1943	358	286
401	1943	212	97
404	1943	695	341
406	1943	563	—
408	1943	628	316
409	1943	700	358
4	1944	435	289
5	1944	1945, p. 145	562
7	1944	531	—
8	1944	568	487
9	1944	328	—
13	1944	350	252
14	1944	336	—
15	1944	788	489
16	1944	401	262
17	1944	381	254
18	1944	407	256
19	1944	668	373
27	1944	572	—
28	1944	578	—
29	1944	644	348
33	1944	584	—
34	1944	392	133
36	1944	601	—
38	1944	335	274
44	1944	780	577
45	1944	340	320
49	1944	1945, p. 79	607

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57	1944	438	—
59	1944	594	347
60	1944	390	—
61	1944	565	351
63	1944	715	392
64	1944	534	—
66	1944	590	310
67	1944	387	313
70	1944	426	367
71	1944	460	381
72	1944	372	325
75	1944	598	—
78	1944	623	528
79	1944	492	—
82	1944	1945, p. 88	536
83	1944	803	411
94	1944	592	—
99	1944	777	533
101	1944	730	—
102	1944	712	—
103	1944	702	—
105	1944	732	—
106	1944	818	505
107	1944	1945, p. 167	550
110—116	1944	576	422
117	1944	790	—
119	1944	634	510
120	1944	708	—
121	1944	785	508
122	1944	1945, p. 75	522
123	1944	374	379
124	1944	199, 1945 p. 197	153, —
125	1944	661	502
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137	1944	1945, p. 202	—
138	1944	721	—
139	1944	1945, p. 40	—
140	1944	1940, p. 183	—
141	1944	773	—
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152	1944	1945, p. 209	617
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159	1944	352	220
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178	1944	1945, p. 172	—
183	1944	801	619
187	1944	442	386
188	1944	798	—
190	1944	1945, p. 250	547
191	1944	574	292
192	1944	1945, p. 161	—
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201	1944	682	556
217	1944	758	—
219	1944	786	—
221	1944	1945, p. 220	608
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224	1944	1945, p. 119	568
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230	1944	1945, p. 211	586
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287	1944	748	589
288	1944	805	615
290	1944	1945, p. 285	602
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299	1944	1945, p. 191	580
301	1944	747	610
302	1944	756	—
305	1944	1945, p. 272	613
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319	1944	1945, p. 280	621
324	1944	744	—
327	1944	1945, p. 57	—
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355	1944	760	642
369	1944	1945, p. 216	—
375	1944	630	560

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142	1943	81	Vol. X, p. 604
146	1943	315	119
149	1943	78	—
151	1943	144	Vol. X, p. 708
154	1943	196	1

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163/164	1943	305	173
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170	1943	205	9
8	1944	232	63
9	1944	90	—
14	1944	248	65
16	1944	125	79
17	1944	102	81
18	1944	158	101
24	1944	361	201
26	1944	135	87
27	1944	255	179
29	1944	203	—
38	1944	173	140
40	1944	238	156
47	1944	423	178
49	1944	226	221
52	1944	816	449
56	1944	444	—
57	1944	440	184
60	1944	318	—
71	1944	450	—
75	1944	611	295
79	1944	750	342
83	1944	705	376
84	1944	762	515
88	1944	506	451
90	1944	513	452
96	1944	501	458
97	1944	478	445
100	1944	819	495
102	1944	510	—
106	1944	485	461
107	1944	717	527

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127	1944	796	—
128	1944	714	554
134	1944	696	—
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141	1944	1945, p. 307	625
142	1944	783	—
146	1944	1945, p. 80	611
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111	1943	30	3
112	1943	19	Vol. X, p. 637
116	1943	74	39
118	1943	4	—
119	1943	85	12
122	1943	12	—
124	1943	21	54
126	1943	665	539
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9	1944	3	19
13	1944	155	83
14	1944	228	191
18	1944	188	—
19	1944	347	115
20	1944	272	77
22	1944	234	—
24	1944	243	117
25	1944	266	187
26	1944	483	—
30	1944	249	—
31	1944	280	—
32	1944	303	—
35	1944	217	158
37	1944	293	249
40	1944	310	226
41	1944	553	438
42	1944	300	—
45	1944	399	257
46	1944	404	208
47	1944	516	—
48	1944	418	327
50	1944	338	—
51	1944	457	—
57	1944	301	260
58	1944	522	428
59	1944	295	198
62	1944	604	337
63	1944	792	—
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70	1944	707	372

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81	1944	648	—
90	1944	525	483
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93	1944	508	—
95	1944	698	—
96	1944	697	—
97	1944	814	442
98	1944	540	491
100	1944	824	431
101	1944	533	—
102	1944	1945, p. 213	—
105	1944	556	478
106	1944	536	465
107	1944	764	623
115	1944	734	594
116	1944	768	—
117	1944	607	—
118	1944	1945, p. 181	574
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3	1944	490	462
5	1944	430	362

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47	1944	585	542

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66	1943	465	737

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13	1944	550	469

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