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HIGH COURT No. 9/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Joseph Shiber. PETITIONER.

v.

1. Yermiyahu Zuckerman, Magistrate, Magistrate's Court, Tel-Aviv,
2. Yitzhak Trachtengut. RESPONDENTS.

Mandamus — Refusal by Magistrate to allow service of a motion unless certain requirements complied with — Alternative remedy in appeal — Not a refusal to assume jurisdiction.

Application for an order to issue, directed to the Respondents, calling upon them to show cause why Respondent No. 1 should not issue service upon Respondent No. 2 of a notice of motion and a copy of an affidavit in support, which were filed on behalf of the Petitioner in the Registry of the Magistrate's Court, Tel-Aviv, on the 17th January, 1944, in Civil Case No. 4153/43, and why Respondent No. 1 should not fix a day for the hearing and determination of the aforesaid motion; application refused:—

> The refusal of a magistrate to issue a motion, except on terms, is not a refusal to assume jurisdiction. As the point can be taken on appeal, this constitutes an alternative remedy which excludes the intervention of the High Court.
>
> (*A. M. A.*)

ANNOTATIONS: The facts, according to the Petitioner's application, are as follows: Petitioner, who was the Defendant in an action for eviction brought by Respondent No. 2, filed a notice of motion under Rule 109 of the M. C. P. R. asking for the striking out of a certain passage in the statement of claim as being unnecessary and prejudicial for the determination of the action. The notice of motion was accompanied by an affidavit and a non-enemy declaration and, in accordance with the decision in C .A. 232/43 (1943, A. L. R. 693), no other documents were submitted. Respondent No. 1, before whom the above action for eviction was to be heard, refused to fix a date for the hearing of the said motion and to serve copy of the notice and affidavit upon Respondent No. 2, but endorsed on the original notice the following observations: "This is not an application by way of motion. You should file an application by motion according to Rules 233 and 234 of the Rules and, according to Rule 238, attach thereto Form No. 20; I shall then fix a date for hearing and serve the notice and copy of the ap-

plication..." Petitioner thereupon applied to the High Court in the terms hereinbefore stated.

(*H. K.*)

FOR PETITIONER: Pratt.
RESPONDENTS: *Ex parte.*

ORDER.

Although Mr. Pratt has argued the case ably and fully, I am of the opinion that this is not a matter in which an order *nisi* for *mandamus* should issue.

The complaint of the Petitioner is that one of the learned Magistrates of Tel-Aviv, refused to serve upon the second Respondent, who was Plaintiff in the Magistrate's Court, notice of an interlocutory application, issued at the instance of the present Petitioner (Defendant in the Magistrate's Court) unless the present Petitioner's advocate filed documents in a particular manner specified by the Magistrate in question.

Mr. Pratt has argued that this amounts to a refusal to exercise jurisdiction, and says that he is afraid that he may not be able to take this point on appeal. It seems to me, however, at least doubtful whether there is here a refusal to assume jurisdiction. It is not suggested that the Magistrate has refused or will refuse to listen to the Plaintiff's defence to the action. It seems to me that, in the event of the Petitioner failing in his defence to the action, he will be at liberty to allege, as one of his grounds of appeal, the failure by the Magistrate to comply with the provisions of the Magistrates' Courts Procedure Rules, 1940. There being, in my view, an alternative remedy, the application for an order *nisi* is refused.

Given this 28th day of January, 1944.

British Puisne Judge.

HIGH COURT No. 118/43.

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

BEFORE: Gordon Smith, C. J. and Frumkin, J.

IN THE APPLICATION OF:—

Joseph Flint. PETITIONER.

v.

1. E. Jones,
2. Miriam Flint-Jones. RESPONDENTS.

Habeas Corpus — Custody of child applied for on the basis of a judgment of the Rabbinical Court — High Court Rules, rule 6, procedure.

Return to a writ of *habeas corpus*, issued on 24th November, 1943, directed to Respondents, calling upon them to show cause why they should not produce the body of Michael Flint, the child of Petitioner, before this Court and why the said child should not return to Petitioner; writ made absolute:—

1. A respondent failing to file an affidavit in reply is considered to admit the petitioner's allegation.

2. A person entitled to custody of a minor in virtue of a judgment of the Rabbinical Court may apply for custody of the child by *habeas corpus* proceedings.

(*A. M. A.*)

ANNOTATIONS:

1. In H. C. 96/41 (8, P. L. R. 559; 1941, S. C. J. 654; 11, Ct. L. R. 44) an affidavit was held to be out of time "having been filed two days after the prescribed period. No good cause was shown for that delay and the rules have to apply strictly." See, on the other hand, H. C. 19/42 (9, P. L. R. 181; 1942, S. C. J. 314; 11, Ct. L. R. 197) and note 2 thereto in 1942, S. C. J., at p. 315 where "the affidavit in reply was accepted although filed eight days late".

2. Authorities on custody of minor children are collated in annotations to H. C. 19/43 (1943, A. L. R. 119); for later cases see C. A. 60/43 (10, P. L. R. 241; 1943, A. L. R. 217) and C. A. 161/43 (10, P. L. R. 367; 1943, A. L. R. 421).

(*H. K.*)

FOR PETITIONER: Hake.

RESPONDENTS: In person.

ORDER.

This is a return to a Writ of *Habeas Corpus* dated the 24th November, 1943, directed to the Respondents, calling upon them to show cause why they should not produce the body of Michael Flint, the child of Petitioner before this Court to-day and why the said child should not return to Petitioner.

The summons was served on both Respondents on the 2nd December, 1943, together with a copy of the petition. The petition is based on a judgment of the Chief Rabbinate of Jaffa and Tel-Aviv, dated the 21st November, 1940, whereby the custody of the child was entrusted to the mother until he attained seven years of age and thereafter to the father, the Petitioner.

It seems that the second Respondent refuses to obey the said judgment of the Rabbinical Court although at the first instance the child was handed over to the father, the present Petitioner, but was subsequently taken from school by the first Respondent who is the husband of the second Respondent now, without the knowledge of the Petitioner.

The Respondents did not comply with rule 6 of the High Court Rules, 1937, nor with the terms of the summons, as neither one of them had filed an affidavit in reply to the Petitioner's petition. We, therefore, take it that the Respondents do not challenge the facts as stated in the petition which is supported by an affidavit, and we consequently accept them. It is to be noted, however, that the Respondents were served with the summons on the 2nd December, 1943, and the petition was fixed for hearing on the 22nd December, 1943, *i. e.* to-day. They had, therefore, ample time to file an affidavit in reply as required.

In our opinion there is no substance whatsoever in the grounds raised by the Respondents regarding their failure to file an affidavit in reply, and we, therefore, make the order absolute and order that the child Michael Flint be returned to his father, the Petitioner, at the latter's place of residence within seven days from to-day.

We make no order as to costs.

Given this 22nd day of December, 1943.

Chief Justice.

CIVIL APPEAL No. 187/43.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPEAL OF:—

Izhac Gabrielovitz. APPELLANT.

v.

Mustafa Ali Hassan Abu el Diuk, in his personal capacity and as heir of his father Ali Hassan Abu El Diuk and 12 ors. RESPONDENTS.

Sale of land — Action for return of purchase price under void agreement — L. T. Ord. secs. 2, 11(1) *— Renewal of action struck out under rule* 2(1) *Default Rules — Prescription, Mejelle* 1660, *C. A.* 266/42 *— C. A.* 105/28, *C. A.* 27/32, *C. A.* 182/37 *— Mejelle* 226, *partial failure of consideration — "Disposition" and "sale".*

Appeal from the judgment of the District Court of Tel-Aviv, dated the 31st day of May, 1943, in Civil Case No. 295/41, allowed:—

1. Art. 226 of the *Mejelle* applies only to sales which are "dispositions".

2. Under sec. 11 of the L. T. Ord., a would-be purchaser is entitled to the return of the purchase price under a void agreement.

(*A. M. A.*)

REFERRED TO: C. A. 105/28 (1, P. L. R. 373; C. of J. 392); C. A. 27/32 (C. of J. 434; P. P. 19.7.34); C. A. 266/42 (not reported).

DISTINGUISHED: C. A. 182/37 (5, P. L. R. 195; 1938, 1 S. C. J. 163; 3, Ct. L. R. 132).

ANNOTATIONS:

1. On return of purchase price generally *cf.* note 1 to C. A. 80/43 (1943, A. L. R. 222) and last paragraph of annotations to C. A. 90/43 (1943, A. L. R., at p. 327); see also C. A. 130/43 (1943, A. L. R. 456).

2. For authorities on Art. 226 of the *Mejelle* see C. A. 261/40 (8, P. L. R. 71; 1941, S. C. J. 36; 9, Ct. L. R. 61) and cases cited in note 6 thereto in 1941, S. C. J., at p. 37; *cf.* C. A. 60/42 (9, P. L. R. 372; 1942, S. C. J. 352; 12, Ct. L. R. 18).

(*H. K.*)

FOR APPELLANT: Olshan.

FOR RESPONDENTS: No. 1 — In person.
Nos. 2—13 — Elia.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Jaffa dismissing an action by the present Appellant for the recovery of the sum of LE. 1399.075 mils equivalent to LP. 1434.625. This is the third occasion on which this litigation has reached this Court (see C. A. 105/28, P. L. R. Vol. 1. Page 373 and C. A. 27/32 Rotenberg's Collection of Judgments Vol. II, page 434). In consequence of the judgment in C. A. 27/32 the case came on for hearing before the District Court, Jaffa, in the year 1937. We are told by the Appellant's advocate that, owing to the unsettled state of the country in that year, the Appellant was afraid to go to Jaffa and so did not appear when the case was called. The case was, accordingly, struck out under Rule 2(1) of the Judgment by Default (District and Land Courts) Rules 1926, Revised Laws of Palestine Vol. III, page 2339.

It is clear from Rule 2(1) of those rules that the Plaintiff was entitled to enter a fresh action upon payment of the requisite Court fees. This he did on 17th November, 1941, and from the judgment in that case this appeal has been taken. At the hearing before us the Respondents' advocate attempted to argue, firstly, that if the case which was renewed was a pending action, the procedure under Civil Procedure Rules 1938 Rule 213 should have been followed, and that if it is to be regarded as a new action, then it was prescribed by reason of article 1660 of the *Mejelle*. He, however, dropped both points during the hearing

of the appeal. His reason for dropping the latter point seems to have been the fact that he had not had brought to his notice the judgment of this Court in C. A. 266/42. It is unnecessary, therefore, for us to decide either of these two points. By the judgment of the District Court of 31st May, 1943, it was held that the present Appellant had proved the amount due from him by various documents, namely Exhibits P/1 to P/14, and the learned judges then went on to say:—

> "It follows from all these documents that Defendants received from Plaintiff a total sum of LE. 2359.750 from which a sum of LE. 960.— should be deducted as being the price of 80 *dunums*, leaving a balance of LE. 1399.750, equivalent to LP. 1434.625, which is the subject matter of this action."

In spite of this clear finding, the District Court found that, although this Court had already held by the combined operation of the judgments in C. A. 105/28 and 27/32 that the contract Exh. D/1 and the supplement thereto were both null and void, that contract could be looked at to ascertain the intention of the parties as to the agreement. In their judgment, they went on to say:—

> "There is no doubt that the intention of the parties was that the vendors, *i. e.* the Defendants, should assume no liability in regard to the area sold. Further, under Art. 226 of the *Mejelle*, the Plaintiff may choose either to cancel the sale, return the land and get back the whole price, or keep the land as it is without any right to claim refund of part of the price."

For these reasons they dismissed the action of the Plaintiff (present Appellant). Mr. Elia, for the Respondents, contended before us that the District Court came to a right conclusion and he relied on a statement by this Court in C. A. 182/37 (see the last three lines of page 196 Palestine Law Reports Vol. 5 and the first seven lines of page 197). To this submission Mr. Olshan, for the Appellant, contended that, while he did not doubt the correctness of the *dictum* in C. A. 182/37, yet it was not permissible to use Exhibit D/1 in support of a claim against his clients for the retention by the Respondents of the sum of LP. 1434.625. It seems quite clear that both parties received and gave to each other the full consideration for the sum of LP. 960 under the first contract, Exhibit P.1. There is really no connection between Exhibit P.1 and Exhibit D.1. Exhibit D.1 has been held to be null and void. Under the proviso to section 11(1) of the Land Transfer Ordinance the Appellant is clearly entitled to recover the said sum of LP. 1434.625.

It might be argued on behalf of the Respondents that they are not using Exhibit D.1 in order to further a claim against the Appellant

but that they are merely using it in a legitimate attempt to resist a claim by the Appellant for the refund of that sum. A little consideration of the true position, however, will demonstrate that this contention is highly artificial. The true position is that once Exhibit D.1 has been declared null and void, the Respondents are no longer entitled to retain the sum of LP. 1434.625. If they are no longer entitled to retain it, it is difficult to see how they can suggest that they are entitled to resist the claim. It is simply because the Legislature has declared that notwithstanding the fact that the document Exhibit D.1 is null and void, yet the person who has paid money in respect of Exhibit D.1 is entitled to recover, that the present Appellant has been able to bring this action.

It is, therefore, in reality an attempt by the Respondents to resist a claim by the Appellant for the refund to him of monies paid by him which the law says the Respondents must return to the Appellant. Looked at from this angle, which we think is the proper one, the contention of the Respondents seems groundless. We, therefore, think that, while we do not doubt the correctness of the *dictum* in C. A. 182/37, the District Court was not justified in relying on Exhibit D.1 with a view to ascertaining the intention of parties with regard to liability in respect of the price of the area of land sold.

With regard to Article 226 of the *Mejelle*, we agree with Mr. Olshan that this article has no application to the facts of the present case for the simple reason that there never was a sale. We refer to the word "disposition" in line one of Section 11(1) read together with the word "sale" in the definition of "disposition" in Section 2 of the Land Transfer Ordinance.

For these reasons we set aside the judgment of the District Court of 31st May, 1943, and we enter judgment for the present Appellant in the sum of LP. 1434.625 mils together with interest as claimed in para 8 of the statement of claim dated 23rd July, 1942. The judgment debt, including costs and interest, will be paid as follows: namely one half by the first Respondent himself and the other half by the Respondents 1—13 in the proportions of the shares which they have inherited from the late Ali Hassan Abu Diuk, which judgment debt will of course include costs and interest. The costs to which we refer will be the costs here and in the Court below. The costs in this Court will be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 15.

Delivered this 2nd day of December, 1943.

British Puisne Judge.

Gordon Smith, C. J.: I concur.

Chief Justice.

Mr. Olshan applies for the provisional Order to be confirmed; Mr. Elia says that, in view of the terms of the judgment just delivered, he is unable to resist the application.

ORDER.

Provisional attachment dated the 4th of June, 1943, is confirmed.

Chief Justice.

HIGH COURT No. 105/43.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPLICATION OF :—

Tewfiq Khalil Musa & an. — PETITIONERS.

v.

1. The Assistant Chief Execution Officer, District Court, Haifa,
2. Huda Bishara el Yusef & 2 ors. — RESPONDENTS.

Execution Law, Art. 123 — *H. C.* 65/41, *H. C.* 43/27 — *Onus of proof to establish collusion.*

Return to a rule *nisi*, issued on the 10th day of November, 1943, directed to the first Respondent, calling upon him to show cause why his order of 20.10.43 in Execution File No. 155/40 should not be set aside; order made absolute:—

In the case of several attachments there is a presumption against a judgment debt later in date. That presumption may be rebutted by the holder of the later judgment showing that there was no collusion.

(*A. M. A.*)

FOLLOWED: H. C. 43/27 (1, P. L. R. 194; C. of J. 1057).

REFERRED TO: H. C. 65/41 (8, P. L. R. 379; 1941, S. C. J. 405; 10, Ct. L. R. 221).

ANNOTATIONS: On the interpretation of Art. 123 of the Execution Law *cf.* notes 2 and 3 to H. C. 13/43 (1943, A. L. R. 356).

(*H. K.*)

FOR PETITIONERS: F. Atalla.

FOR RESPONDENTS: No.. 1 — Absent — served.
Nos. 2, 3 & 4 — Sahyoun.

ORDER.

This is the return to a rule, directed to the 1st Respondent, calling upon him to show cause why his order, dated 20th October, 1943, in Execution file No. 155/40, should not be set aside.

It appears that the Petitioner and the 2nd, 3rd and 4th Respondents are judgment creditors of a common judgment debtor. And it appears from the Order of the Chief Execution Officer that the Petitioner's complaint is that his judgment, which was earlier in date, has been deferred to the judgments of the three Respondents.

The matter concerns article 123 of the Ottoman Law of Execution and the Execution Officer appears to have taken the view based, as he says, upon High Court 65 of 1941, that the onus was on the Petitioner to allege and establish collusion. It seems to us, with all respect to him, that that is based upon a misapprehension of what this Court said in that case. Mr. Justice Copland said that High Court case 43 of 1927 originally stated that the idea underlying the article was that there was collusion between the second attacher and the judgment debtor to the detriment of the first. He then goes on to say that in the present case no collusion was alleged and that, therefore, the Court saw no reason to interfere with the discretion of the Chief Execution Officer. It seems to us that there is nothing in that judgment that in any way derogates from the principle established in High Court 43/27 that there is a presumption, slight perhaps but nevertheless a presumption, against the later judgment debt.

That being so, we are of opinion, unfortunate as it may be in a matter as small as this, that this case should go back to the Execution Officer for him to give the Respondents an opportunity of rebutting this presumption and for the Petitioner, if he is able, to rebut their rebutting evidence.

The rule must, therefore, be made absolute. In the circumstances, we think that the fair order is that the costs of this hearing should be in the cause. In order to simplify the final arrangements, we certify an inclusive sum of LP. 10 to the ultimately successful party, meaning by that, that the three Respondents together will have a collective sum of LP. 10 and both the Petitioners will have a collective sum of LP. 10.

Delivered this 13th day of December, 1943.

British Puisne Judge.

HIGH COURT No. 122/43.

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

BEFORE : Rose and Frumkin, JJ.

IN THE APPLICATION OF :—

Walter Haas. PETITIONER.

v.

1. The Municipal Council of Haifa,
2. City Engineer, Haifa,
3. Chairman and Members of the Local Building and Town Planning Commission, Haifa. RESPONDENTS.

Licensing — Public entertainments — Rebuilt premises not conforming with Town Planning requirements — Subsequent compliance with requirements of Municipal Engineer — Proper authority to which application should be made — Official acting in dual capacity — Technical point taken by public Body — T. P. Ord., sec. 6, Pub. Enter. Ord., sec. 4(3) — Discrepancy in description of premises — Allegations not traversed in affidavit in reply not in issue.

Return to a rule *nisi*, issued on the 21st day of December, 1943, directed to the first Respondent, calling upon him to show cause why he should not sign and issue to Petitioner a "C" licence under the Public Entertainments Ordinance, 1935 as amended and/or to renew Petitioner's present licence allowing him to make use of his premises, situated at 72 and 74 Kingsway, Haifa, for public entertainment during the period commencing on 1.1.44 and ending on 31.12.44; order made absolute:—

When premises comply with statutory requirements and there is no other objection to the licensing of the premises, the High Court may enforce the grant of a licence under the Public Entertainments Ordinance.

(*A. M. A.*)

ANNOTATIONS :

1. An affidavit which is not contradicted by sworn evidence is *prima facie* proof of the matters therein stated: — C. A. 26/40 (7, P. L. R. 134; 1940, S. C. J. 207; 8, Ct. L. R. 153); *cf.* also H. C. 118/43 (*ante*, p. 4).

2. The High Court will interfere with the discretion exercised by licensing authorities where:—

a) there is a statutory duty to grant the licence;

b) the refusal was made without exercising a proper discretion; or

c) the refusal was made *mala fide;*

see H. C. 110/43 (1943, A. L. R. 791) and annotations.

(*H. K.*)

FOR PETITIONER: Klug.

FOR RESPONDENTS: No. 1 — Weinshall.
Nos. 2 & 3 — Absent — not served.

ORDER.

This is the return to a rule *nisi*, directed to the Respondent, calling upon him to show cause why he should not sign and issue to the Petitioner a licence under the Public Entertainments Ordinance, 1935, in respect of certain premises situated at 72, 74 and 76 Kingsway, Haifa, for public entertainment during the period 1st January, 1944, to 30th December, 1944.

It appears that the Petitioner in this case has since 1940 been the proprietor and manager of certain premises in Kingsway at which he carried on the business of a café at which entertainment was provided, and he obtained the necessary licence under the Public Entertainments Ordinance (No. 5) of 1935, for the years 1940, 1941, 1942, and 1943. In the summer of 1942 a particular portion of these premises, which have given rise to the present litigation, suffered demolition as a result of an air raid and the Petitioner then rebuilt these premises.

The point has arisen between the parties as to whether these premises comply with the Town Planning requirements both as to their line and as to their method of construction, and as a result of those disputes criminal proceedings were begun. The Petitioner, we are told, was convicted of an offence against the Town Planning Ordinance, but a demolition order was refused.

The matter which is now before us is the question of the licence for 1944. The Petitioner, after setting out the facts in his petition, alleges in paragraph 10, sub-paragraph (b), that the premises are structurally in all respects suitable for the purpose for which they are to be used within the meaning of the Public Entertainments Ordinance. And he relies on certain correspondence.

It is to be noted that the Respondent does not in his affidavit dispute the facts which were alleged by the Petitioner; instead he takes certain technical points and in considering these it is necessary to have regard to the correspondence which the Petitioner has produced. The first exhibit was a letter dated 2nd September, 1943, addressed to the Petitioner, Mr. Walter Haas, and written by the City Engineer on Municipal Corporation note-paper but stating that he was acting as a representative of the Department of Health under the Trades and Industries Rules. That letter reads as follows:—

"Sir,
Subject: Licence for Public Entertainment.
I have to refer to your above licence which expires on the 31st December, 1943, and to inform you that before its renewal can be considered, it will be necessary for you to supply the following information:
(a) Type of entertainment you propose to conduct (music only, music and dancing, cabaret *etc.*).
(b) The number of seats for which the licence is required.
(c) A plan must be submitted showing the approximate position of the tables and chairs; also the area set aside for the musicians and dancing.
I have ....."

In reply to that letter the Petitioner, Mr. Haas, writes to the City Engineer, Municipality, Haifa, a letter on the 1st of October, 1943, which reads as follows:—

"Sir,
Subject: Licence for Public Entertainment.
Refe'ce: Yours IIn/293—4337 from 2.9.43.
Find attached please the requested plan; indicated you will find the seating arrangements for the evenings. I have usually one piano player, one violonist and sometimes a singer.
As I have 26 tables in use, I should like the licence to be valid for 100 seats.
Dancing space for the patrons is indicated on the plan.
I have the honour to remain..."

He received a reply to that, again written on Municipal Corporation note-paper on the 10th October, 1943, which reads as follows:—

"Sir,
Subject: Renewal of Licence for Public Entertainment.
With reference to your letter of the 1st October, 1943, I have to inform you that before your licence can be renewed, it will be necessary for you to remove the wooden structure which you have constructed in front of your premises.
I have ....."

Then a further letter was written, again on Municipal Corporation note-paper and signed by the same gentleman, this time in his capacity as secretary of the Local Building and Town Planning Commission, addressed to Mr. Walter Haas. The letter, dated 26th October, 1943, reads as follows:—

"Sir,
I have the honour to inform you that your application to conduct public entertainment at your café at 76 Kingsway, was considered by the Local Building and Town Planning Commission at their meeting held on the 12th instant.
A licence under the Public Entertainments Ordinance will be issued

> as soon as you have removed the existing building contravention and the unlicensed temporary structure now existing at 76 Kingsway. I would ask you to give this matter your early attention, as, should you continue to operate public entertainment without complying with these conditions, I shall be forced to institute legal proceedings. I have ....."

That is the correspondence upon which the Petitioner relies for his allegation that an application was made for this licence and that it was refused. And he relies upon his allegation of fact in the petition, which is not denied in the affidavit in reply, that the premises were structurally suitable, the purpose of the allegation being to meet the requirements of sub-section 3 of section 4 of the Public Entertainments Ordinance which says that "no licence shall be issued unless the licensing authority is satisfied that the premises for which a licence is desired are structurally in all respects suitable for the purpose for which they are to be used, having regard to the safety, health and convenience of the public and the maintenance of good order therein by the Police."

It is interesting, having regard to that, to see what the reply is on behalf of the Municipal Council. The first point (and with all respect both to Dr. Weinshall and to the gentleman who signed the affidavit, we think it is not, perhaps, a very worthy point for a public body of this kind to take) is that the Petitioner must have been misled by this correspondence into thinking that he was communicating with the correct party, whereas, in fact, he was not, and that the Municipal Council as such had not had any application made to them, and as they had no application made to them, therefore this petition was premature. As we say, we think, in the first instance, it is a somewhat unworthy point for a public body to take when dealing with a member of the public who is not represented by a legal adviser; and further, we should be very reluctant to decide any case on such a point as that even if there was no alternative. But we think that there is an alternative. We think that even on the technical ground, the objection is ill-founded because section 6 of the Town Planning Ordinance says:—

> "Where under the provisions of this Ordinance the High Commissioner orders an area to be a town planning area and such town planning area includes the area of a Municipal Corporation or any part thereof, the Council of such Municipal Corporation shall be the Local Building and Town Planning Commission for such town planning area, and such Council shall exercise in such town planning area the powers by this Ordinance conferred upon such Commissions and any money or fees payable or expenses incurred in connection therewith shall respectively be paid into or defrayed from the municipal fund, notwithstanding that some part of such town planning area is outside the municipal area."

The last letter which is relied upon as a refusal is signed by the City Engineer as secretary of the Local Building and Town Planning Commission and he says that the application was considered by the Commission and refused, unless certain conditions were complied with.

Whereas it may quite well be true, as Dr. Weinshall suggested, that there may be occasions in which the officials of the Municipal Council may sit one day in one capacity as a Town Planning Commission and another day in another capacity as Municipal Council, we consider that, in regard to the facts of this case, there is no foundation for the suggestion that this application was not duly made to the proper authority, *i. e.* the Municipal Council of Haifa.

We now have to consider what occurred, on the assumption that this application was properly made. The first thing that Dr. Weinshall says is that there is no evidence before us that the application referred to the same matters which are covered by what was asked for in the application for the order *nisi*, and he relies on the fact that the premises in question consist of three buildings or houses in 72, 74 and 76 Kingsway, and he says that the particular letter, Ex. W. H. 1 to which I have already referred, from the City Engineer, states: "I have the honour to inform you that your application to conduct public entertainment at your café at 76 Kingsway was considered..." and he says that that is not evidence in support of the Petitioner's allegation that the letter applied to a licence in respect of 72 and 74 Kingsway. That might be a good point, but in this particular case we only have to turn to the affidavit of the Mayor, Mr. Levy, who sets out in paragraph 4 of his affidavit a document signed by the Petitioner himself which makes it quite clear (and this was a point raised by the Respondents in their own favour as a point of law) that Nos. 72—76 have, in fact, been regarded as one set of premises, and that from 1940 onwards only one application has been made and one licence has been granted in respect of that block 72—76. We, therefore, think that the mere fact that the City Engineer only refers to 76 in his letter is quite a neutral matter and, in fact, it is clear from the tone of the correspondence that what he was referring to was, to quote Mr. Levy "the business of the café and restaurant situated at 72—76 Kingsway". We, therefore, think that there is no doubt that the premises referred to by the City Engineer were, in fact, the premises which are now the subject matter of this discussion before us. We think the Petitioner is correct in referring to that letter of the 26th October, 1943, as a refusal to grant a public entertainment licence for the premises under consideration.

The point then arises as to whether they were justified in so refusing.

On that we are, of course, limited to the evidence that is before us, and the evidence before us, apart from the history of the matter which has been set out by the Petitioner and to which I have referred, is that, to quote again the Petitioner, "the premises are structurally in all respects suitable for the purpose for which they are to be used", that is to say, that according to the facts as stated by the Petitioner, the requirements of section 4 sub-section 3 of the Public Entertainments Ordinance have been complied with. We turn to the affidavit signed by the Mayor and there is no reference at all to this matter. There is no denial of this statement of fact. Therefore, according to the usual practice of this Court, we must take that fact as not being in issue. We are, therefore, bound to hold that the Petitioner's allegation of fact as to that matter is correct. There is no mention in the affidavit of Mr. Levy of what might be called the merits of this dispute in so far as they can affect the question as to whether or not this licence should be granted.

It follows from what I have said that this rule must be made absolute, and we would add that we come to this conclusion with the less reluctance in that it would seem to us, to put it at its lowest, to be not unreasonable that the present situation should be allowed to continue for the current year. As to the future, the position can be fully investigated and adjusted when an application is made for further renewal for the year 1945.

The rule must, therefore, be made absolute and the Petitioner will have his costs in an inclusive sum of LP. 15.

Given this 5th day of January, 1944.

British Puisne Judge.

CIVIL APPEAL No. 237/43.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Sara Maschoieff. — APPELLANT.

v.

Shimon Ungar & 5 ors. — RESPONDENTS.

Land Court — Jurisdiction — Dismissal in limine.

Appeal from the judgment of the Chief Magistrate's Court, Safad, sitting as

a Land Court, dated the 25th day of June, 1943, in Land Case No. 7/43, allowed:—

A statement of claim showing *prima facie* jurisdiction of the Land Court should be tried by that Court, even though the Court may be of opinion that the claim will not succeed and that the plaintiff will be left to his remedy before the civil court.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 216/42 (9, P. L. R. 739; 1942, S. C. J. 1004): "There is no power to try or order the trial of preliminary issues". See also C. A. 28/41 (8, P. L. R. 127; 1941, S. C. J. 133; 9, Ct. L. R. 96) — no power to try one or more questions of fact before others.

(*H. K.*)

FOR APPELLANT: S. Yehuda.

FOR RESPONDENTS: Nos. 1—4 — Ben Israel.
No. 5 — Z. Berinson.
No. 6 — Service dispensed with; *vide* order of this Court dated 27.9.43.

JUDGMENT.

This is an appeal from a judgment of the Court of the Chief Magistrate, Safad, sitting as a Land Court.

In his judgment the learned Chief Magistrate dismissed the claim of the Appellant against the first four Respondents on the ground that he had no jurisdiction in the matter.

The Appellant's case depends upon a certain mortgage deed which is unregistered and which, subject to certain arguments which may be raised, would appear to be null and void under the Land Transfer Ordinance, Cap. 81. It would follow on that view that the Appellant is entitled to certain monetary relief which would presumably be a matter for another Court — either the Magistrate's Court or the District Court, according to the amount claimed. But the Appellant in addition asked (rather vaguely) for certain equitable relief as a result of this document.

It seems to us that the learned Chief Magistrate, with all respect to him, was premature in dealing with this matter. It may be that on his view of the document, which may well be the correct view, the ultimate result of this case will be that he (sitting in his capacity as a Land Court) will have to give judgment for the Defendants. That is one thing, but it is quite a different matter, to our minds, for him now to say that he has no jurisdiction to deal with the matter. It seems to us, looking at the statement of claim and the prayer contained in it, this is eminently a matter for a Land Court to consider. Whether or not the claim is well founded is, of course, a different

matter and one which the Court will no doubt have to consider. We express no opinion on the merits of the points of law which may be argued before the Land Court. We would merely say that it seems to us to be unfortunate that, in this very small claim, this short-cut which the learned Chief Magistrate was invited to take has merely resulted, as these things so often do, in additional expense to the parties and a considerable waste of time.

The appeal must, therefore, be allowed and the case remitted to the Land Court to hear and determine according to law.

As regards costs, if the Appellant succeeds ultimately, there will be costs on the lower scale here with an advocate's attendance fee of LP. 5 against Respondents 1—4 and also against Respondent No. 5 separately. If the Respondents ultimately succeed then the group of Respondents 1—4 will have one set of costs and an advocate's attendance fee of LP. 5 and Respondent No. 5 will have one set of costs and an advocate's attendance fee of LP. 5.

Delivered this 12th day of November, 1943.

British Puisne Judge.

HIGH COURT No. 112/43.

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

BEFORE: Gordon Smith, C. J., Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Assad Zakaria Sliman. PETITIONER.

v.

1. The Chief Execution Officer, Nazareth,
2. Jamal Saad El Yousef. RESPONDENTS.

Attachment — Trustees disposing of property attached — H.C. 76/43, E. L. Arts. 51, 74, 77.

Return to an order *nisi*, issued on 18th November, 1943, directed to the first Respondent, calling upon him to show cause why his order, dated 30.6.43 in Execution file No. 126/40, Nazareth and the second attachment effected thereupon, of olives and land should not be withdrawn; order made absolute:—

Where trustees under an attachment make away with the property attached, the judgment creditor's remedy is against the trustees and he may not proceed again against the judgment debtor.

(A. M. A.)

FOLLOWED: H. C. 76/43 (10, P. L. R. 482; 1943, A. L. R. 626).

ANNOTATIONS: *Cf.* H. C. 76/43 (*supra*) and note 2 thereto in 1943, A. L. R., at p. 627.

(*H. K.*)

FOR PETITIONER: Eisenberg & Perlmutter.

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

ORDER.

In this case the Petitioner who is an execution debtor in respect of a decree made in 1938, asks for an order of the Chief Execution Officer dated the 30th June, 1943, and in respect of which an attachment was made on the 18th of September, 1943, at the instance of the judgment creditor, to be set aside. It appears that in 1938 attachment was ordered in respect of a decree for LP. 60 and grain, that is, wheat and barley was attached and handed over by the Execution Officer to trustees for the time being. Apparently nothing was done and it appears as if those trustees made away with the property and now five years later, the judgment creditor seeks a further attachment in respect of that earlier decree. In the affidavits filed by the Petitioner it is stated that the value of the grain attached and seized in 1938 was sufficient to cover the whole debt including the costs and expenses and that statement has not been formally contradicted although there was a statement denying it made by the advocate for the execution creditor on the proceedings before the Execution Officer. In pursuance of the High Court No. 76/43 of last September, we find that the judgment debtor is entitled to come under and invoke Article 77 of the Execution Law as was decided in that High Court case, and we find that the proceedings by way of execution are under Article 51 and under Cap. 2, Articles 74 and 77 as these goods are in the hands of the third party. Article 77 reads:—

> "If the third party record upon the order of attachment which is served upon him an admission that the property of which attachment is sought is in his possession, but fail to deliver it to the Execution Office, or deliver it to the judgment-debtor, either the said property or property of equivalent value will be attached and sold, and the remaining execution procedure will be carried out against the third party."

It appears to us that the remedy of the execution creditor is against the third party in accordance with Article 77. The old execution is still in existence although it has been in abeyance for some five years but it has not ceased and it is still in continuance. The remedy, there-

fore, appears to be for the execution creditor to proceed against the third party under Article 77. We, therefore, make the order absolute as prayed, and in consequence the order as regards the second attachment on the property of the judgment-debtor is cancelled. Costs to include LP. 10 advocates' attendance fee at the hearing of this application.

Given this 16th day of December, 1943.

Chief Justice.

HIGH COURT No. 124/43.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Zipora (Fania) Mizrachi, née Elkin. PETITIONER.

v.

1. Assistant Chief Execution Officer, Jerusalem,
2. Abraham Rahamim Mizrahi. RESPONDENTS.

Judgment of Rabbinical Court for payment of alimony — Refusal of execution on ground that husband's name not included in new Register of Adults of Jewish Community — Procedure of opting out of Jewish Community — Scope of sec. 4 of Religious Community (Change) Ordinance.

Return to an order *nisi*, issued on the 3rd of January, 1944, directed to the Respondents, calling upon them to show cause why the order of the first Respondent, dated 22.11.43 in Execution File No. 188/43, refusing to execute the judgment of the Rabbinical Court of Appeal of the 22nd *Iyar* 5703 (27.5.43) should not be set aside and why execution should not proceed as against the second Respondent; order made absolute:—

1. a) Sec. 4 of Religious Community (Change) Ordinance also applies in case of a person going out of a Religious Community without becoming a member of another Religious Community.
   b) Husband's liability not affected nor jurisdiction of Rabbinical Court ousted by husband opting out of Jewish Community.
2. (*Obiter*): Claim that person opted out of Jewish Community may be required to be substantiated by proof that he gave notice, either personally or by an agent duly authorised in writing, to *Vaad Leumi* during month of *Iyar*.

(*M. L.*)

REFERRED TO: C. A. 246/40 (8, P. L. R. 55; 9, Ct. L. R. 54; 1941, S. C. J. 17); H. C. 28/38 (5, P. L. R. 351; 1938, 1 S. C. J. 373; 3, Ct. L. R. 287); H. C. 101/42 (9, P. L. R. 553; 12, Ct. L. R. 209; 1942, S. C. J. 569).

ANNOTATIONS:

1. As to change of religious community see H. C. 6/43 (10, P. L. R. 78; 1943, A. L. R. 73) with annotations thereto.

2. As to the second point see Misc. Appl. 19/42 (9, P. L. R. 264; 11, Ct. L. R. 244; 1942, S. C. J. 209) with annotations thereto and H. C. 6/43 (*supra*) and H. C. 101/42 (*supra*) with annotations.

3. As to the third point compare C. A. 131/42 (9, P. L. R. 752; 1942, S. C. J. 728) with annotations thereto.

(*A. G.*)

FOR PETITIONER: M. Levanon.

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

ORDER.

This is the return to an order *nisi*, directed to the Acting Chief Execution Officer, Jerusalem, who had refused to execute a judgment of a Rabbinical Court and of a Rabbinical Court of Appeal, given in favour of the Petitioner against her husband, the second Respondent, for the sum of LP. 6 per month as from the 1st day of February, 1943, in respect of maintenance.

The sole reason why the first Respondent, that is the Acting Chief Execution Officer, refused to execute the judgment was that the name of the second Respondent did not appear in the register prescribed by Rule 18 of the Jewish Community Rules, Laws of Palestine, Vol. 3, p. 2139, as replaced by Rules of 1937 (see Palestine *Gazette*, Supplement No. 2 of 1937, p. 28). It is not denied that the name of the second Respondent did not appear in the new register of the 1st of May, 1942, nor is it denied that the Petitioner did not bring her action in the Rabbinical Court, Jerusalem, until a date in 1942 subsequent to the 1st of May. The Execution Officer relied on the judgments in Civil Appeal No. 246/40 and in High Court Nos. 28/38 and 101/42.

At the hearing before me the advocate for the Petitioner argued that the mere fact that the name of the second Respondent did not appear in the new register of 1st May, 1942, is not conclusive proof that he had ceased to be a member of the Jewish Community and he also argued that it has not been explained why his name was not on the new register especially in view of the fact that it is admitted that there is no proof that his name was on the list of persons whose names had been struck off the register. He further argues that the second Respondent has failed to prove that he gave notice either personally or by an agent duly authorised in writing, to the General Council

(*Vaad Leumi*) during the month of *Iyar* as provided by the Rules. Now, this is a point of substance; but I think that the matter can be resolved in favour of the Petitioner on another of the grounds submitted by her advocate, namely, section 4(2) of the Religious Community (Change) Ordinance, Cap. 127.

The advocate for the second Respondent has argued that his client has not changed his religion and that he is still a Jew. This is, doubtless, true. It is admitted that both the Petitioner and the second Respondent are Jews and Palestinian citizens so that Art. 53(i), Palestine Order-in-Council, 1922, applies.

Now, in my opinion, although the second Respondent did not cease to be a Jew and although his religion was still the Jewish religion, he has purported to change his community. It might be argued that the Religious Community (Change) Ordinance, does not apply to changes of community made by Jews. In my view, however, at any rate, so far as section 4 is concerned, there is no substance in such a contention. It is of interest to note that the Jewish Community Rules were made under the Religious Communities (Organisation) Ordinance, Cap. 126. In my view Section 4 of Cap. 127 was intended to meet such a case as the present. There can be no doubt that when the Petitioner married the second Respondent according to Rabbinical Law in the Rabbinical Court of the Jewish Community at Tel-Aviv in May, 1939, she was entitled to expect and (I am assured by her advocate) did expect, that any matrimonial disputes that might arise would come before a Rabbinical Court. I have no reason to doubt this statement. It seems to me, therefore, that apart from section 4(1) the Petitioner is entitled to rely on section 4(2) of Cap. 127.

The word "community" in the term "Jewish Community Rules" must be read together with the word "community" in line 1 of section 4(2) of Cap. 127. It is not suggested that the Petitioner has become a member of another religious community.

For the foregoing reasons, without casting doubt on the correctness of any of the decisions relied upon by the Acting Chief Execution Officer in his order of 22nd November, 1943, I consider that the order *nisi* must be made absolute and the order of the Acting Chief Execution Officer of 22nd November, 1943, set aside. I so order. The second Respondent will pay to the Petitioner costs of these proceedings, namely, fixed or inclusive costs of LP. 10.

Given this 16th day of February, 1944.

British Puisne Judge.

CIVIL APPEAL No. 57/43.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Shaul Mandelman. APPELLANT.

v.

Tewfic Nasser El Daoud. RESPONDENT.

Claim for return of part purchase price — Counterclaim for damages — Distinction between deposit and part payment of purchase price — No damages without default.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated 23.12.42, in Civil Appeal No. 91/42, allowed, judgment of the Magistrate restored:—

1. While a deposit is forfeited in case of non-completion of contract, money advanced in payment or part payment of purchase price — recoverable.

2. No damages where no default on part of either party to contract.

(*M. L.*)

ANNOTATIONS: Cases on the above points are collated in annotations to C. A. 80/43 (1943, A. L. R. 222) and C. A. 59/43 (*ibid.*, p. 203).

(*A. G.*)

FOR APPELLANT: Ganon.

FOR RESPONDENT: Sahyoun.

JUDGMENT.

This is an appeal from an appellate judgment of the District Court, Haifa, in which the latter court reversed the judgment given by one of the Haifa Magistrates. The claim before the Magistrate was for the return of the sum of LP. 50 part purchase price which had been paid by the present Appellant to the Respondent, and a counterclaim by the Respondent for the sum of LP. 500 damages for breach of contract. The learned Magistrate found that the LP. 50 should be returned and dismissed the counterclaim. On appeal to the District Court that Court disallowed the claim for LP. 50 and remitted the case to the Magistrate to assess the actual damages on the counterclaim holding that the amount of LP. 500 was a penalty and not damages.

The case has now come before this Court and we think that the

learned Magistrate was right and the learned Judges of the District Court were wrong.

It is quite clear that the letter from the Respondent of the 25th January, 1937, was a waiver of the breaches that might have occurred in the past on the part of the Appellant. Equally the letter of the 12th February, 1937, from the Appellant to the Respondent was an offer of an extension of time and fixing a time for the completion of the contract. That letter was never replied to and the offer of an extension, therefore, became ineffective. In such circumstances it seems to us that the party who has paid a part of the purchase price in advance as part-purchase price is entitled to claim back that amount if a contract is not completed or the transfer not effected. It is quite clear from the contract in this case that this LP. 50 was part payment of purchase price and not a deposit, which latter is forfeited in the event of non-completion of the contract. It is quite clear from this contract that the LP. 50 was part of the purchase price paid on the signature of the agreement.

With regard to the question of damages we are unable to see that there was any default on the part of either party to this contract. That being so, no damages are payable by either side. The appeal must, therefore, be allowed, the judgment of the District Court set aside, and the judgment of the learned Magistrate restored. The Appellant is entitled to his costs both here and in both Courts below on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 30th day of March, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 161/43.

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

BEFORE : Rose, Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Haim Isaac Mordowitz. APPLICANT.

v.

The Attorney General. RESPONDENT.

Conviction under sec. 338 of the Criminal Code Ordinance — Forging an official document — Accused pleading guilty upon his plea for

adjournment in order to brief an advocate being refused — Discretion of Court in granting adjournments — Question of miscarriage of justice — Accused pleading guilty — Question of reduction of sentence.

Application for leave to appeal from the judgment of the District Court, Tel-Aviv, dated the 7th day of December, 1943, in Criminal Case No. 91/43, whereby Applicant was convicted of forging an official document contrary to section 338 of the Criminal Code Ordinance, 1936, and sentenced to six months' imprisonment; appeal dismissed:—

1. The granting of an adjournment is, generally speaking, eminently a matter for the trial Court itself to decide. Court of Appeal will interfere only in most exceptional cases.

2. No miscarriage of justice if Accused pleading guilty understood what he was charged with, although deprived of opportunity to rely upon legal defences.

(*M. L.*)

ANNOTATIONS:

1. As to first point see C. A. 285/42 (10, P. L. R. 26; 1943, A. L. R. 29) and note 2 thereto in A. L. R.; *cf.* CR. A. 42/43 (1943, A. L. R. 719).

2. As to appeal by a person who pleaded guilty see CR. A. 73/43 (1943, A. L. R. 446) and annotations thereto.

(*A. G.*)

FOR APPLICANT: Ficheleff.

FOR RESPONDENT: E. Gavison — (Assistant Government Advocate).

JUDGMENT.

This is an appeal from a conviction by the District Court of Tel-Aviv of forging an official document *contra* section 338 of the Criminal Code Ordinance.

It appears that there were two counts originally — one against section 338 and one of uttering a false document against section 340 of the Criminal Code Ordinance. At the trial the Appellant pleaded guilty to the first count and not guilty to the second, whereupon the Attorney General's representative decided to call no evidence on the second count and he was acquitted.

Dr. Ficheleff tells us, and of course we accept it, that it was his intention and the Appellant's intention that Dr. Ficheleff should appear for the Appellant in these proceedings. It appears that the notice given was short, and when the case was called upon the Appellant asked for an adjournment in order to enable him to brief an advocate. That is a matter which was considered by the President,

and the granting of an adjournment, as we have so often said in this Court is, generally speaking (there are, of course, exceptions) eminently a matter for the trial Court itself to decide. And this Court only in most exceptional circumstances will say that an adjournment should or should not have been granted, if the Court below has decided differently.

Dr. Ficheleff has urged that had the Appellant been represented he would never have pleaded guilty, and that in the result a miscarriage of justice has resulted. We have gone into that matter with some care but we are quite satisfied that no miscarriage of justice has occurred in this case. It may be at the best from the point of view of the Appellant that this charge should have been brought before another Court. It may be so — we do not decide that. But even on the admitted facts of this case (it is a most serious alteration of a certificate of character given by a major in the army), it seems that this man cannot possibly complain of the course events have taken. He does not dispute, apparently, the fact of the alteration but was merely prepared, if necessary, to rely upon certain legal defences. Having regard to that, it does not seem necessary for us to take anything but the usual line in cases of this sort and that is to say that there has been a plea of guilty; that the question of adjournment was considered by the trial Court; and we must assume that they were fully satisfied when the Appellant pleaded guilty that he understood what he was charged with and the implications which would follow from his plea.

The only other matter which remains is the question of sentence. He was sentenced to six months' imprisonment. In view of the circumstances of this case it may perhaps be that the sentence is a little bit on the high side, but that again is not really a matter with which we should interfere, and we think that justice will be done if we dismiss this appeal and allow the sentence, which will remain at six months, to run as from the date of the conviction, *i. e.* the 7th December, 1943.

Delivered this 4th day of January, 1944.

British Puisne Judge.

CIVIL APPEAL No. 44/43.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ali Ben Awwad El Itayem. APPELLANT.

v.

Muhammad Abdulla El Nakrouz. RESPONDENT.

Sale of land or agreement to sell — Equitable title of purchaser of land — Successful defence not specifically referred to until advocate's closing address.

Appeal from the judgment of the Chief Magistrate's Court, Beersheba, sitting as a Land Court, dated the 16th of January, 1943, in Land Case No. 273/42, dismissed:—

1. Court of Appeal will not interfere with finding of trial Court that document produced is an agreement to sell land and not a sale (even though trial Court made no finding as to intent of the parties), if not apparent from evidence on record that intent of parties was contrary to obvious meaning of document.

2. Fact that only available defence was not adequately pleaded and was not specifically referred to until closing address of defendant's attorney and no leave to amend the pleadings was granted or even applied for — no ground for upsetting the judgment given in defendant's favour, although it may be a reasonable ground for Court of Appeal disallowing successful defendant-respondent costs of appeal.

(*M. L.*)

ANNOTATIONS :

1. The following is a translation of the Chief Magistrate's judgment:—

"Upon examination of the deed produced I find that in view of its contents it is an agreement to sell.

Whereas the Defendant paid the price of the land and received it and took possession thereof from the date of the purchase which is more than 5 years, he has, therefore, acquired an equitable right to the land and the Plaintiff has no right to ask for the cancellation of the sale and return of the land to him. See Civil Appeals 1/36, 15/38 and 193/42.

I am convinced that the Plaintiff has filed his claim merely because the prices of land went high and he wants now to have the advantage of cancelling the contract of sale and recover the land.

Plaintiff's case must, therefore, be dismissed..."

2. On the distinction between an out-and-out sale and an agrement to sell — see C. A. 140/43, (10, P. L. R. 421; 1943, A. L. R. 437) and note 1 thereto in A. L. R.

3. When Court of Appeal will draw its own inference see CR. A. 189/43 (1943, A. L. R. 645).

4. On construction of document and intention of parties to it see C. A. 165/43 (1943, A. L. R. 636) and annotations.

5. On question of establishment of equitable title to land see C. A. 168/43 (10, P. L. R. 371; 1943, A. L. R. 595) and note 2 in A. L. R.

6. On interference of Appellate Court with findings of fact see CR. A. 39/43 (10, P. L. R. 212; 1943, A. L. R. 357) and note 3 in A. L. R.

7. On discretion of Court in granting costs see C. A. 103/43 (1943, A. L. R. 180) and annotations.

(*A. G.*)

FOR APPELLANT: Bessisso.

FOR RESPONDENT: Z. Dajani.

JUDGMENT.

This is an appeal from a judgment of the Chief Magistrate's Court of Beersheba, sitting as a Land Court. The principal point which the learned Chief Magistrate had to decide was whether the agreement in question constituted an out and out sale or was an agreement to sell. Upon that matter he says: "Upon examination of the deed produced, I find that in view of its contents it is an agreement to sell", and with that view we agree.

It is quite true that in several cases it has been laid down that in deciding this question the Court should apply its mind not only to the document itself, but also to the intent of the parties as manifested by their conduct. Although the learned Chief Magistrate in his judgment does not refer to this question of the intent of the parties, we are not prepared from the evidence on the record to draw the inference that the intent of the parties was contrary to the obvious meaning of the document. We would add that we are satisfied that there are no merits in the Appellant's case.

There is one point, however, with which we feel sympathy with the Appellant, namely, that that part of the defence upon which the Respondent was successful, although one would have thought that it must be apparent to both parties that it was the only defence that could be raised, was not adequately pleaded and was not, in fact, specifically referred to until the closing address of Counsel for Respondent. We would add that no leave to amend the pleadings was granted or even applied for. We think that that is a matter which may reasonably be taken into consideration by us on the question of costs.

We consider, therefore, that while the appeal must be dismissed the fair order is that there will be no costs of this appeal.

Given this 11th day of March, 1943.

British Puisne Judge.

HIGH COURT No. 111/43.

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

BEFORE: Rose and Frumkin, JJ.

IN THE APPLICATION OF :—

Bank Kupat Am Ltd. & 2 ors. PETITIONERS.

v.

1. H. J. Miller, Land Settlement Officer, Haifa,
2. The Attorney General, on behalf of the Government of Palestine,
3. Asad Abdel Salam El-Haj & an. RESPONDENTS.

Prayer to remove proceedings from Settlement Officer — Observations of Settlement Officer indicating his state of mind — Grounds of appeal — Question of desirability of Settlement Officer to withdraw in favour of another Settlement Officer.

Return to a rule *nisi*, issued on the 23rd day of November, 1943, directed to the first Respondent, calling upon him to show cause why he should not be prohibited from trying, settling or otherwise dealing with Case No. 5/Khirbet el Shalaleh; order *nisi* discharged:—

High Court will not grant prayer to remove proceedings from Settlement Officer on ground that he already expressed his opinion on findings upon which the case will depend, this being a matter which can properly be urged as a ground of appeal.

(*M. L.*)

REFERRED TO: C. A. 135/41 (8, P. L. R. 509; 10, Ct. L. R. 183; 1941, S. C. J. 526); H. C. 108/42 (9, P. L. R. 668; 1942, S. C. J. 883).

ANNOTATIONS:

1. See cases referred to.

2. As to non interference of High Court in a case where there is an alternative remedy see H. C. 150/42 (10, P. L. R. 19; 1943, A. L. R. 242) and annotations thereto in A. L. R.

(*A. G.*)

3. It seems that the second reference should be to C. A. 124/42 (9, P. L. R. 501; 1942, S. C. J. 467; 12, Ct. L. R. 198) since H. C. 108/42 (*supra*) deals

with a writ of prohibition actually issued against a Settlement Officer despite the possibility of an appeal. *Cf.* also C. A. 59/42 (1942, S. C. J. 385; 11, Ct. L. R. 235).

(*H. K.*)

FOR PETITIONERS: Nos. 1 & 3 — Weinshall.
No. 2 — Weston-Sanders.

FOR RESPONDENTS: Nos. 1 & 2 — Griffin — (Solicitor General).
Nos. 3 & 4 — Absent — served.

ORDER.

We are of opinion that the rule in this case must be discharged.

The prayer of the Petitioners is that certain settlement proceedings should be removed from the Settlement Officer of the Haifa Settlement Area on the ground that he has already indicated bias in the proceedings in question.

It is not suggested that the bias in this case is in any way improper or due to any prejudice, but it is suggested that there are certain fundamental findings of fact upon which the particular case will depend and upon which the Settlement Officer has already expressed his opinion.

It appears that there are three claims before the Settlement Officer which, to some extent, over-lap, and in deciding two of those claims, which are not the subject matter of this petition, the Settlement Officer appears to have expressed an opinion on a question of fact which will, in the view of the Petitioners, go to the root of the matter in the third case, which is the subject matter of this petition.

It seems to us that, following two cases which were cited to us by Dr. Weinshall this morning, *i. e.* C. A. 135/41 and 108/42, that would eminently be a matter which could properly be urged as a ground of appeal when the proceedings are terminated, and in those two cases that were cited to us it seems that these very matters were investigated and treated by the Court of Appeal as being matters which might be a good ground of appeal. In the one case they decided that certain observations of the Settlement Officer indicated a state of mind which they thought was a good ground of appeal; in the second case they thought that the matter was not of sufficient importance and did not go sufficiently to the root of the matter to make it a good ground of appeal. But in both those cases it is perfectly clear that the matter was regarded as, potentially, a good ground of appeal. And the suggestion on behalf of the Petitioners that they are meanwhile put to the inconvenience of proceeding with the case, calling witnesses and incurring delay and expenditure cannot, of course, be any reason for granting the relief asked of this Court.

That would be sufficient to dispose of the matter from the legal point of view, and we would add that it would be quite improper for us to make any remarks as to the merits of this case which, clearly, we are not in a position to assess. But we would just say this, that it is quite apparent, whatever the merits of this matter may be, that the Petitioners themselves feel aggrieved and that their case is perhaps meeting at the outset with difficulties which they feel a plaintiff should not fairly be expected to meet. As I have said, as to whether those apprehensions are well-founded it is very difficult for us to express an opinion because we do not know the facts, but no doubt the Settlement Officer himself, who is more cognizant of the facts than we are, will consider, in consultation with the legal advisers of Government, whether it may not, perhaps, be desirable for him to withdraw in favour of another Settlement Officer. In making these remarks, however, we wish it to be perfectly plain that we are not in any way criticizing the Settlement Officer nor are we suggesting that after considering the matter he should necessarily come to the conclusion that it would be his duty to withdraw. We are confident that if the Settlement Officer decides that he wishes to continue to hear the proceedings, we can rely upon him to keep his mind open with regard to any further evidence which may be adduced on the issues of fact.

In the result, therefore, the rule must be discharged and the second Respondent will have his costs in an inclusive sum of LP. 10 to be paid by the 1st and 3rd Petitioners jointly and of LP. 10 to be paid by the 2nd Petitioner.

Given this 7th day of January, 1944.

British Puisne Judge.

CIVIL APPEAL No. 273/43.

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

BEFORE : Edwards and Khayat, JJ.

IN THE APPEAL OF:—

Rahel Segal. APPELLANT.

v.

David Shapiro. RESPONDENT.

Action for eviction from dwelling house under sec. 8(1)(c) of Rent Restriction (Dwelling Houses) Ord. — Magistrate finding that no

evidence as to existence of suitable alternative accommodation — Non-interference of Court of Appeal.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated the 30th June, 1943, in file No. C. A. 55/43, dismissed:—

1. Court of Appeal — bound by previous judgment in a similar case.
2. Court of Appeal will not interfere with discretion of trial Court in eviction cases as to suitability or otherwise of alternative accommodation for Defendant.

(*M. L.*)

FOLLOWED: C. A. 78/43 (10, P. L. R. 178; 1943, A. L. R. 18).

ANNOTATIONS: On question of interference with discretion of Magistrate in considering case under sec. 8(1)(c) of Rent Restriction (Dwelling Houses) Ord. see C. A. 170/43 (10, P. L. R. 432; 1943, A. L. R. 555), C. A. 216/43 (1943, A. L. R. 504), C. A. 141/43 (10, P. L. R. 289; 1943, A. L. R. 318), C. A. 285/42 (10, P. L. R. 26; 1943, A. L. R. 29) and C. A. 78/43 (*supra*) with annotations.

(*A. G.*)

FOR APPELLANT: Y. Herman.

FOR RESPONDENT: Z. Frankel.

JUDGMENT.

We need not trouble you, Mr. Frankel.

This is an appeal by leave from the District Court of Tel-Aviv which had dismissed an appeal from a judgment of one of the Magistrates of Tel-Aviv, dated the 7th March, 1943. The Magistrate had dismissed an action for eviction brought by the Plaintiff, that is, the present Appellant, against the Respondent in respect of a dwelling house at Ramat Gan. The action was brought by the present Appellant on the ground that the premises were reasonably required by the lessor and his family under Section 8(1)(c) of the Rent Restriction (Dwelling Houses) Ordinance, 1940. The Magistrate found in favour of the Appellant to the extent that the premises were required by the Appellant and his family. The Appellant and his family, which is a large one, were apparently at the time when the action was brought living in very unsuitable quarters in Ramat Gan where the Appellant had obtained work. The Magistrate in dismissing the action had great sympathy with the Appellant but was compelled to hold that it had not been proved that there was available, for the Respondent, alternative accommodation. The rent which the Respondent had been paying was LP. 3 a month and the only alternative accommodation which had been proved to be available was accommodation at a rent of LP. 6.500. As the Magistrate said, this was over 120% above the rent which the Respondent had been paying for the premises the subject matter of this appeal.

He went on to say in his judgment:—

> "I can find no evidence before me to satisfy me that there exists a suitable flat for Defendant, within the meaning of the law, and I must, to my regret, dismiss this action."

The District Court on appeal considered that there was no reason why they should interfere with the facts as found by the Magistrate.

We are bound by the judgment of this Court in C. A. 78/43 P. L. R. Vol. 10, p. 178, also reported in Messrs. Levanon and Apelbom's Annotated L. R. 1943, p. 18.

Mr. Herman, who has said everything that could be said in favour of his client (the Appellant), has invited us to hold that the hardship caused to his client and his family is greater or will be greater than the hardship caused to the Respondent and his family, and he has cited a paragraph from Woodfall's Law of Landlord and Tenant, 24th Edition, p. 299. In spite of this argument we do not feel disposed to interfere with the finding of the Magistrate or to disturb the judgment of the District Court.

For these reasons we dismiss the appeal with costs to the Respondent to be taxed on the lower scale to include advocate's attendance fee for the hearing of this appeal of LP. 5.

Delivered this 7th day of December, 1943.

British Puisne Judge.

HIGH COURT No. 45/43.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Levana Bar-Emun. PETITIONER.

v.

Moshe Bar-Emun. RESPONDENT.

Child of tender age handed over by parents to grand-father — Chief Execution Officer refusing execution of judgments of Rabbinical Court re custody of child — Primary right of mother as regards custody of child.

Return to a summons, issued on the 19th April, 1943, directed to Respondent to produce the child Amnon Bar-Emun before this Court on a date to be fixed,

for the purpose of handing him over to the Petitioner and to await the further order of the Court; order made absolute:—

1. a) When determining question of custody of child not only material benefit of child but other matters, such as need of mother's care, must be taken into consideration.

b) The mother is normally the person best fitted to look after her own little child.

2. Custody of a small child — primary legal right of mother; fact that child was handed over by parents to grandfather does not alter position as long as they did not renounce all rights over the child.

ANNOTATIONS :

1. The Petitioner originally obtained a judgment from the Rabbinical Court against her husband for, *inter alia,* the delivery of the child to her, but execution was refused on the ground that the child was in the custody of a person, the judgment debtor's father, who has never been a party to the proceedings. Subsequently, the Petitioner sought execution of another judgment of the Rabbinical Court, a default judgment against her father-in-law, for the delivery of the child. This, too, was held by the Chief Execution Officer to be unenforceable, as it was not even suggested that the grand-father ever consented to the jurisdiction of the Rabbinical Court.

The petition to the High Court was in the form of a *Habeas Corpus* application.

2. *Cf.* H. C. 118/43 (*ante,* p. 4) and see note 2 thereto for authorities on custody of minor children generally.

(*M. L.*)

FOR PETITIONER: Abramovsky.

FOR RESPONDENT: Mizrahi.

ORDER.

This is one of those unhappy cases where a dispute has arisen for the custody of a small child some 18 or 20 months old. The child is at present in the custody of the grand-father's family and it is being claimed by the mother. It appears to have been handed over to the grand-father by the parents, and later, after a dispute had broken out between the husband and the wife, the wife petitioned the Rabbinical Court, and claimed the custody of the child. There is no evidence that the parents ever renounced all rights over the child. It has been argued before us that our primary concern must be the benefit of the child. I would say that the benefit of the child is not only a material benefit, but other matters have to be taken into consideration, and a child of this age needs a mother's care, and the mother is normally the person best fitted to look after her own child, and more so than the grandfather. I know of no legal system in the world which takes a primary legal right such as the custody of a child

of tender age from the mother and places it under the custody of his grand-father.

In this case the mother has the legal right and Respondent has none, and the petition on this ground alone must succeed.

Petitioner is entitled to her costs to include the sum of LP. 5.— advocate's attendance fees.

Given this 6th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 292/43.

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

BEFORE: Gordon Smith, C. J.

IN THE APPEAL OF:—

Ashour Ahmad Ashour el Wa'ary. APPELLANT.

v.

Sitt Jamileh bint Muhammad Hassan el Wa'ary & an. RESPONDENTS.

Privity of contract — Res inter alios acta.

Appeal from the judgment of the District Court, Jerusalem, dated the 29th day of July, 1943, in Civil Case No. 28/43, allowed:—

A stranger to a contract cannot sue thereon.

(*A. M. A.*)

FOR APPELLANT: A. Atalla and Elia.

FOR RESPONDENTS: Caspi and Ousta.

JUDGMENT.

This is an appeal against the judgment of the District Court, Jerusalem, dated the 29th July, 1943, under which the Defendant (Appellant) was ordered to pay to each of the Plaintiffs (Respondents) the sum of LP. 236, with interest and costs. The statement of claim, after setting out certain allegations, claimed the sum of LP. 1264, being the price of the Plaintiffs' shares in the said (*sic*) two houses and land.

The judgment recites that the two Plaintiffs had sued the administrator of the estate of Y. Horowitz in connection with their shares, in the Land Court, but that such action had been settled in the terms

of Exhibit E., dated the 30th November, 1942, on which date also another agreement, but between different parties, was entered into. Apparently Exhibit E. was made an Order of Court. It would appear from the evidence that this action was not only not a *bona fide* claim but that the Plaintiffs also were merely nominal plaintiffs and that the Appellant was the originator of the claim. The Defendant in this land case was the administrator.

The terms of settlement in Exhibit E. were that the administrator agreed to the withdrawal of the land case by the Plaintiffs, to which the Plaintiffs also agreed on the conditions that in accordance with an agreement for such purpose, the property, the subject-matter of the action — was to be sold to the Appellant and under which agreement the Appellant had undertaken to pay or otherwise satisfy the claims of the Plaintiffs against the administrator.

If the sale did not take place, then the whole settlement was to be washed out and the Plaintiffs were to be entitled to institute fresh proceedings against the administrator. This settlement was dated the 30th November and was signed by the administrator and his attorney, H. Cohen, and by Zaki el Ousta, attorney for the Plaintiffs. It is to be noted that the Appellant did not sign this document, nor was he a party to it, but from the evidence it appears that the agreement referred to had already been executed just previously.

This other agreement which is Exhibit A., also dated the 30th November, 1942, was made between the administrator as vendor and the Appellant as purchaser, and was an agreement for sale of the property in question at the price of LP. 1575, LP. 200 of the purchase price being paid on account of this purchase price. In accordance with this agreement the property was transferred to the Appellant in the Land Registry.

The Respondents (Plaintiffs in the Land Case) were not parties to this agreement.

Clause 5 of the agreement is of importance as regards this appeal and reads as follows:—

> "The buyer (Appellant) is responsible to the vendor (administrator) for the withdrawal by each and all of the Plaintiffs in Land Case No. 6/41 of the action pending against the vendor in the Land Court of Jerusalem without costs, and he shall be liable to indemnify the vendor for all damage which may be caused to him by any of the said Plaintiffs or their heirs or Ahmad, Arafad or Hussein Ashour, or any of their heirs presenting any claim whatever against the vendor at any time. Should the said action not be temporarily withdrawn without costs within one week from the day of the date

> hereof, then the vendor shall be free from all obligations hereunder, and the buyer shall be liable to him in damages, and the buyer undertakes to make all payments to such claimants which may be necessary to satisfy their respective claims."

It is to be noted that this clause is divisible. The effect of the first part is that the Appellant is to arrange for the withdrawal of the Land Case against the administrator and he is to indemnify the administrator against any claims made against him by the Plaintiffs, their heirs and others. The second part provides that if the action is not withdrawn within a week, then the agreement for sale is cancelled and the Appellant is to be liable in damages, and then follows the last sentence whereby the Appellant undertook to settle the claims of the Plaintiffs and others against the administrator.

As I have stated, the action was withdrawn and the sale went through.

In the judgment, apart from reciting what I have set forth briefly above, there are no findings of fact or as to the law as to the effect of Exhibits A. and E. except as follows (p. 5 of the judgment):—

> "And whereas the Defendant Ashour (the Appellant) undertook in paragraph (5) of that contract that he would pay all the monies which might be claimed by the Plaintiffs in settlement of which each one of them claims, the Defendant is, therefore, responsible on this undertaking and must pay to Plaintiffs what they claim for their shares."

But the Appellant never gave such undertaking to the Plaintiffs but to the administrator, and the judgment does not deal with the construction or interpretation to be put upon these two exhibits, nor does it deal with the question of privity of contract.

The statement of claim which is very badly drawn up never alleged any contract between the parties to the suit, nor promise to pay by Defendant, nor any implied contract, nor any privity of contract, nor was anything said as to any consideration passing between the parties, but it claimed the sum of LP. 1264, the price of their shares in the property.

The Appellant was called by the Respondents as a witness for them and denied any undertaking to pay any sum to the Respondents and he stated that the addition made by their advocate to clause 5 of the agreement (Ex. A.) was to secure any rights they had against the administrator.

In clause 5 of this agreement he undertook to the administrator and not to the Respondents to indemnify him against any such claims. Instead of making such claims against the administrator, they

enter this present suit against the Appellant claiming sums of money from him on quite indefinite grounds.

The Appellant never expressly or impliedly agreed to settle any claims of the Respondents and all he did was to indemnify the administrator against any claims they might have against the administrator and whatever claims they might have would have to be proved in a Court of law. There were two express agreements executed and you cannot read into these agreements an additional implied term which is not contained therein.

Neither, in my opinion, does estoppel arise in the matter.

To sum up, therefore, it seems to me clear that no case was made out by the Respondents against the Appellant in the Court below either on express contract or implied contract, nor were the Respondents privy to the contract Exhibit A. between the administrator and the Appellant. They have sued the wrong person and if they establish any claim against the administrator which he has to settle then the question of the Appellant indemnifying him would arise.

For these reasons the appeal is allowed, together with costs here and below on the lower scale, to include LP. 15 advocate's fee for attendance before this Court.

The cross-appeal is consequently also dismissed.

Delivered this 23rd day of December, 1943.

Chief Justice.

CRIMINAL APPEAL No. 156/43.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Kalman Feierstein. APPLICANT.

v.

The Attorney General. RESPONDENT.

Probation — Offence committed whilst sentence suspended — C. C. O. 276(b) — Accused not represented — Motive.

Application for leave to appeal from the judgment of the District Court, Tel-Aviv, dated the 24th day of November, 1943, in Criminal Case No. 139/43, whereby Applicant was convicted of stealing by agent contrary to Section 276(b)

of the Criminal Code Ordinance, 1936, and sentenced to one year's imprisonment; application allowed, appeal allowed and sentence reduced:—

Motive may be material in computing the punishment.

(Circumstances of a sentence under sec. 46 C. C. O. discussed).

(*A. M. A.*)

FOR APPLICANT: Elkes.

FOR RESPONDENT: Junior Government Advocate — (Salant).

JUDGMENT.

This is an application for leave to appeal from a sentence of one year's imprisonment to commence on the 24th of November, 1943, passed by the President of the District Court of Tel-Aviv.

The facts are somewhat peculiar. On the 3rd November, 1942, the Applicant was found guilty by the District Court of Tel-Aviv of an offence contrary to Section 276(b) of the Criminal Code Ordinance and released on giving security in the sum of LP. 100 conditional on his being of good behaviour for two years and on coming up for sentence at any time during that period when called upon to do so.

The Applicant's advocate has alleged before us that some weeks after the 3rd November, 1942, the present Applicant was sentenced to one year's imprisonment for offences against the Bankruptcy Ordinance and the suggestion is that, at any rate, some of the bankruptcy offences arose out of the same transaction as that in respect of which the Accused had been convicted on the 3rd November, 1942.

Mr. Salant, who has appeared for the Respondent, informs us that he is not well acquainted with the facts of the bankruptcy offences. Be that as it may, it seems that the Applicant was released from prison some time in July, 1943, and that later he wished to join the Coastal Watch Branch of the Supernumerary Police and for this purpose signed a declaration that he had not been convicted by any Court. For this offence of making a false declaration he was sentenced to pay a fine of LP. 10 and in default of payment to undergo one week's imprisonment. It becoming known that he had been convicted of this offence of signing a false declaration he was brought before the District Court on the 24th of November, 1943, and after Judge Plunkett, who was the Judge who had made the order of the 3rd November, 1942, had heard a Police Inspector and the Accused, the Applicant was sentenced to one year's imprisonment for the original offence contrary to Section 276(b). It is against that sentence of one year's imprisonment that the Applicant now asks for leave to appeal.

Mr. Elkes, for the Applicant, has explained to us the circumstances

under which the Accused failed to be represented by an advocate before Judge Plunkett on 24th November, 1943, and we are inclined to agree with Mr. Elkes in thinking that if the position had been perhaps explained more fully by the Accused himself or by an advocate, Judge Plunkett might have passed a less severe sentence. The factor which weighs with us in making the order which we are about to make is that this case is different from a case of a convicted person who has been released on probation or on bail committing an offence of a nature similar to that of which he was originally convicted. That is not the case here; and, while it was of course wrong for the Accused to make a false declaration and although one cannot altogether excuse him, one can have some sympathy with the reasons which prompted him to do so, namely, his attempt to be employed by the Supernumerary Police on the Coastal Watch.

In all the circumstances we think that the sentence is on the severe side. We, accordingly, grant the application for leave to appeal and we reduce the sentence to one of three months' imprisonment to date from the 24th of November, 1943.

Delivered this 19th day of January, 1944.

British Puisne Judge.

HIGH COURT No. 97/43.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Awad Hanna Baddour. PETITIONER.

v.

1. The Chief Execution Officer, Magistrate's Court, Jerusalem,
2. The Jerusalem New Flour Mill Company Ltd. RESPONDENTS.

Consent judgment for eviction — Judgment containing no description of premises to be vacated — Effect of consent judgment for eviction of premises — Powers and duties of Chief Execution Officer with regard to eviction — Judgment and decree — Scope of Court's powers in actions for eviction or possession.

Return to an order *nisi*, issued on 27.10.43, directed to the first Respondent,

calling upon him to show cause why his order, dated the 12th October, 1943, in file No. 1314/43 Execution Office, Jerusalem, should not be set aside and why he should not refrain from executing an Order of Eviction, dated 2.1.43, issued by the Magistrate's Court, Jerusalem, in Civil Case No. 1517/42; order *nisi* discharged:—

1. Where Court recites agreement reached by parties to action and confirms it and makes it a judgment of Court the whole, and not only the words or lines containing the confirmation, has to be considered as the judgment of the Court.

2. Lack of description of premises in eviction judgment does not render judgment inexecutable, if no suggestion that Execution Officer was about to eject judgment debtor from premises other than subject matter of action or that he had any doubt as to what was expected of him.

3. Fact that Magistrate's judgment contains besides order of eviction also matters allegedly outside his jurisdiction — no good reason for Execution Officer not carrying out eviction.

4. Where Magistrate confirms agreement of parties to vacate premises at a fixed date and makes it an order of Court and so that eviction not subject to any condition, this is not a new agreement, and Execution Officer — entitled at any time after that date to effect ejection.

5. a) Chief Execution Officer — not a Court of Appeal from Magistrate's Court, so he is neither bound nor entitled to enquire whether Court acted within its jurisdiction.

b) While, even before approving a consent judgment, Magistrate must take into consideration the relevant sections of the Rent Restrictions Ordinances, Execution Officer, when faced with a judgment for eviction and especially with a consent judgment, is neither bound nor entitled to enquire into whether Magistrate has taken those matters into consideration.

6. There is nothing in Ottoman Magistrates' Law or in Magistrates' Courts Procedure Rules which requires compromise confirmed by Magistrate to be headed "judgment".

7. Rules 206 of Civil Procedure Rules and 156 of Magistrates' Courts Procedure Rules (reducing judgment to form of decree) should always be complied with, although no provision as to who has to do it, but in view of long practice of ignoring the provisions of these Rules judgment not in form of decree nevertheless executable.

8. A tenant cannot contract out Rent Restriction Ordinance, and if Court finds case to be one in which it is debarred from granting an order of possession, having no jurisdiction to grant it, it must refuse it, even if statute not raised by Defendant.

REFERRED TO: H. C. 10/42 (9, P. L. R. 81; 11, Ct. L. R. 57; 1942, S. C. J. 132); Misc. Appl. 56/43 (10, P. L. R. 465; 1943, A. L. R. 520); C. A. 161/38 (5, P. L. R. 408; 4, Ct. L. R. 75; 1938, 2 S. C. J. 27); H. C. 15/43 (10, P. L. R. 148; 1943, A. L. R. 25); Davies *v.* Warwick, 1942, 169 L. T. R. 130.

FOLLOWED: H. C. 106/42 (9, P. L. R. 600; 12, Ct. L. R. 149; 1942, S. C. J. 644), H. C. 55/42 (9, P. L. R. 349; 11, Ct. L. R. 182; 1942, S. C. J. 308).

NOT FOLLOWED: Misc. Appl. 38/38 (4, Ct. L. R. 20; 1938, 2 S. C. J. 257; P. P. 7.vii.38).

(*M. L.*)

ANNOTATIONS:

1. As to consent judgments for eviction see H. C. 114/43 (1943, A. L. R. 820) and annotations thereto.

2. In connection with the third point see decisions on the severability of judgments, *e. g.* CR. A. 130/43 (1943, A. L. R. 772).

3. On the fourth point see note 1 (*supra*), H. C. 106/42 (*supra*) and H. C. 15/43 (*supra*).

4. Chief Execution Officer not a Court of Appeal from Magistrate's Court: H. C. 88/43 (10, P. L. R. 494; 1943, A. L. R. 542), H. C. 65/43 (*supra*) and H. C. 55/42 (*supra*).

5. On the 7th point see Misc. Appl. 56/43 (*supra*) and C. A. 161/38 (*supra*) with annotations thereto.

6. On question of contracting out Rent Restrictions Ordinances see C. A. 118/43 (1943, A. L. R. 346) and note 1 thereto.

(*A. G.*)

FOR PETITIONER: A. Atalla.

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

ORDER.

This is the return to an order *nisi*, directed to the Chief Execution Officer, Magistrate's Court, Jerusalem, calling upon him to show cause why his order, dated 12th October, 1943, in Execution file No. 1314/43 should not be set aside and why he should not be ordered to refrain from executing an order of eviction, dated 2nd January, 1943, given by one of the Magistrates of Jerusalem in Civil Case No. 2517/42. The facts are that on the 2nd of January, 1943, the Magistrate in question made a consent order which is in the following terms:—

> "*Hearing of*: 2.1.43.
>
> Counsel for parties appeared and proceedings commenced.
>
> At this stage the parties agreed and made a compromise that the Defendant would vacate the premises on 7th October, 1943, and would deliver them to the plaintiff company in which he is a member, the premises to be in a good condition and working, as received by virtue of the previous contract, with truck No. 112, the mixing machine and the office, and that he would pay the sum of LP. 5150 the rental until 7th October, 1943. The Company will have the right to enter the mill at any time as provided in the previous contract, to supervise the mill. The Defendant will have to pay at once the sum of LP. 3000 by cheque on account of the rental and the balance of the rent namely LP. 2150 on 3.2.43.

They applied for the confirmation of this compromise and that it be complied with with LP. 1 for the costs and fees.

(*Sgd.*) *HANNA ATALLA.* (*Sgd.*) *AWAD HANNA BADDOUR.*
Counsel for Defendant. *Defendant.*
(*Sgd.*) *NASIF KARKAR — Chairman.*
(*Sgd.*) *SALIBH ZACHARIA — Secretary.*
(*Sgd.*) *DIMITRI TSIKHLAKES.*
For Plaintiff.

At the request of the parties I confirm this agreement and direct compliance therewith and deem it as an executory judgment and order eviction on the said date.

Given and delivered on 2.1.43.

(*Sgd.*) *ALI ZEIN EL ABDIN*
Magistrate — Jerusalem."

It is not disputed that parties' advocates did agree to that consent order, and, accordingly, no question of fraud or bad faith arises. The order has been attacked by Mr. Anton Atalla, Petitioner's advocate, on several grounds. He says that a petition to the High Court is now his only remedy. For the purposes of deciding this petition I shall accept this statement.

The first ground of complaint is that the consent judgment does not comply with articles 14 and 15 of the Ottoman Magistrates' Law. I have perused a translation of the certified copy of the judgment and I must say that I fail to perceive in what respect it does not comply with articles 14 and 15.

Then Mr. Atalla says that the only operative part of the judgment is to be found in the last three lines, commencing with the words "At the request of the parties" and ending with the words "on the said date". It is complained that, if this is the only judgment, it was impossible for the Execution Officer to identify the "premises" from which the Petitioner was to be evicted on that date. I think that there is nothing in this argument because the document itself as a whole is the judgment. It is all on one piece of paper. The certified copy of the judgment sent to the Execution office bears the seal of the Magistrate's Court and shows that the original bore the signature of the Magistrate. It may be that the premises are not described in the judgment itself; there is, however, no suggestion that the premises from which the Execution Officer was about to eject the Petitioner were not in fact the same premises as were the subject matter of the proceedings. In any event, it is clear that the Execution Officer had no doubt as to what was expected of him, otherwise he would have asked the Court for directions under article 6 of the Ottoman Law of Execution. He did not, apparently, require to ask the Court for directions.

Mr. Atalla then said that the so called judgment was not a compromise but was an agreement. I find it rather difficult to appreciate the fineness of the linguistic distinction which he sought to draw between what was a compromise and what was not, but I am satisfied that the judgment complies with article 14 of the Ottoman Magistrates' Law.

The next complaint is that as the judgment contained what appears to be an order for the payment by the present Petitioner of the sum of LP. 5150 and also an order for the handing over by the Petitioner of a truck, a mixing machine and an office, which reliefs were obviously beyond the jurisdiction of the Magistrate to grant, the judgment was bad and was indeed a nullity.

The answer to this seems to me to be that all that the Execution Officer was required to do was to eject the Petitioner from the premises at any time after the 7th of October, 1943. It is not suggested that he attempted to do anything more. It is quite clear that, whatever the value of the premises may be, the Magistrate's Court is the only Court which has power to order eviction (see Section 3(c) Magistrates' Courts Jurisdiction Ordinance, 1939).

Mr. Atalla then said that the judgment really had the effect of constituting a new agreement and he relied for this proposition on Mr. Justice Frumkin's judgment in H. C. No. 10/42, Vol. 9, P. L. R. p. 83. I agree, however, with the contention of Mr. Elia, namely, that all that the arrangement amounted to was a suspension of execution of the judgment, that is to say, the tenant in the case now before me is in exactly the same position as Mr. Justice Frumkin found the tenant in H. C. 10/42 to be. In my view, it is quite clear that what the Magistrate purported to say on the 2nd of January, 1943, was just this, namely, "I order eviction but I grant stay of execution till 7th October, 1943". In other words, as Mr. Justice Frumkin said in H. C. 10/42, it was the same as if the Magistrate had said "I suspend execution till the 7th of October, 1943" and thereafter the Execution Officer would be entitled to go ahead with the carrying out of the eviction from the premises of the present Petitioner. In this connection, it is of vital importance to note that the order of eviction on 7th October, 1943, was not made conditional on the payment of either the sum of LP. 5150 or conditional on the handing over of the truck or the mixing machine or the office. Even although the sum of LP. 5150 had been paid before the 7th October, 1943, the present Petitioner still had to be ejected from the premises at any time after the 7th of October. It may be that Mr. Atalla is correct in saying that it is

strictly inaccurate to describe the sum of LP. 5150 as being "equivalent rental" as set out in paragraph 2 of the second Respondent's affidavit in reply. But this does not affect matters because, apart from the fact that the payment of the sum of LP. 5150 is distinct from and not dependent on the order of eviction (which had to take place after the 7th of October, 1943), no mention of the words "equivalent rent" is made in the consent judgment. Now, this seems to me to dispose of Mr. Atalla's suggestion that the Magistrate by the consent judgment of 2nd of January was in effect deciding in advance whether or not Mr. Atalla's client would pay the amount by the 7th of October, 1943. There is no suggestion that if he did pay by that date he would be allowed to remain in or on the premises after the 7th of October. Because of several decisions of this Court, to which I shall later refer in this judgment, I do not think that the citations by Mr. Atalla from the English and Empire Digest, Vol. 16, p. 105 and following pages, are in point.

With regard to the argument that the Execution Officer is not only entitled but bound to enquire whether the Court acted within its jurisdiction, this Court has frequently held that the Chief Execution Officer is not a Court of Appeal from a Magistrate's Court. I should here mention the complaint that the compromise was not headed "judgment". There is nothing either in the Ottoman Magistrates' Law nor in rule 155 of the Magistrates' Court Procedure Rules, 1940, which requires this to be done.

It will be convenient if I now deal with Mr. Atalla's complaint that the judgment was not reduced to the form of a decree as required by rule 156, Magistrates' Courts Procedure Rules, 1940. This is an interesting point. It seems never to have been the practice since these rules came into force to require compliance with rule 156. I refer to the word "shall" in rule 156. I do not know whose duty it is to reduce the judgment to the form of a decree. Is it the duty of the Magistrate himself, whenever he gives a judgment, and before he leaves the bench, laboriously to write out in his own handwriting something on the lines of form 4 of Schedule 1? I do not know. In another territory in which I myself was a magistrate, the Civil Procedure Rules applicable to Magistrates' Courts and in fact also applicable to the Supreme Court in its original civil jurisdiction, required the successful party to an action, *e. g.* a successful plaintiff who wanted to execute a judgment, to bespeak a draft decree from the offices of the Court. When he did so and after he had paid the necessary Court fees, the clerk of the Court was bound with all convenient speed to prepare a draft decree

which was then usually submitted to the advocates for both parties and if they could not agree the draft they went before the Magistrate himself who heard parties' advocates and thereafter himself adjusted and signed the decree. Only when a decree had been signed by the Magistrate (or, in the case of the Supreme Court, by the Registrar) could execution proceed. It was the decree and not the judgment or a certified copy of the judgment which went to the bailiff or sheriff or Court broker who in other countries takes the place of the Execution Officer. That excellent practice, however, does not seem to be followed to-day in Palestine. If Rule 156 has been allowed to remain a dead letter in the same way as Rule 206, Civil Procedure Rules, 1938, also seems to have remained a dead letter that is not a matter for this Court.

I would refer to the judgment of the Supreme Court in Misc. Appl. 56/43, P. L. R. Vol. 10, pp. 465 and 466. I would also refer to C. A. 161/38, Vol. 5, P. L. R. p. 411. I must say with all respect to the learned Judge who decided Misc. Appl. 38/38 that my own view is that rule 206 Civil Procedure Rules, 1938, in particular the second paragraph of rule 206, should always be complied with. I refer to the word "shall" in rule 206. I am, of course, still in doubt as to who is the official whose duty it is under this rule and under rule 156 of the Magistrates' Courts Procedure Rules, 1940, to secure compliance therewith. Nevertheless, I feel that, in view of the long practice which has existed of ignoring the provisions of these rules, the complaint of Mr. Atalla that the judgment sent to the Execution Officer in this case is void because it was not reduced to the form of a decree is of no substance.

I find that there is very little difference between the facts in this case and the facts in H. C. 106/42, P. L. R. Vol. 9, p. 600. In the present case there was a consent judgment, the action was not dismissed, eviction was ordered but it was directed not to take effect till the 7th of October, 1943. In H. C. 55/42, P. L. R. Vol. 9, p. 349 it was held that the Chief Execution Officer is not entitled to say whether judgments of District Courts are right or not. I also refer to H. C. 15/43, P. L. R. Vol. 10, p. 148 and especially to the first paragraph at the top of page 150. In the case now before me it is clear that the present Petitioner consented to the postponement of eviction, that is to say, he consented to be evicted at any time after the 7th of October, 1943.

The next point taken by Mr. Atalla is that, on the face of it, the consent judgment did not reveal that the Magistrate had taken into consideration the matters which he was required to take into con-

sideration by Section 4 of the Rent Restriction (Business Premises) Ordinance, 1941. In my view, I think that the Chief Execution Officer is not bound to enquire as to whether the Magistrate had taken into consideration these matters or not. In fact, I think it would be an impertinence if he were to question the judgment of the Magistrate. The words "Execution Officer" in line 1 of Section 4, Sub-section 1 clearly mean that when the Execution Officer is acting on his own, *e. g.* when he has ordered a compulsory sale under a mortgage, and when he is giving possession to the new purchaser, he must enquire into the matters set out in Section 4 sub-section 1 before he ejects tenants; but it does not mean that when a Magistrate has given judgment, the Execution Officer must enquire whether the Magistrate has acted correctly. In short, the words in line 1 of Section 4(1) are intended to refer to what I might call initial or original orders of the Execution Officer himself when he is performing duties such as those enjoined upon him by provisions like the following, namely, Art. 71 Law of Notary Public, Art. 1 Execution Law, Art. 70 Law of Notary Public, Art. 111 Law of Execution and Art. 20 Law of Leasing of Immovable Property.

I think that I ought, in fairness to Mr. Atalla, say that I am prepared to agree with his contention that a person cannot contract out of the Rent Restriction (Business Premises) Ordinance, 1941, Section 4; or, to put it in another way, I would say that the expression "contract out" is inept and irrelevant, in view of the statutory prohibition laid on Magistrates and Execution Officers. I refer to the judgment of Lord Justice Goddard in the recent case of Davies *v.* Warwick, Vol. 169, L. T. R. p. 130 and p. 133, where the learned Lord Justice said that "the effect of Section 3 of the Rent and Mortgage Interest Restrictions Act 1933, which restricts the power of the Court to grant orders for possession, is not to afford a statutory defence to a party, but to limit the jurisdiction of the Court. If the Court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession, it is the duty of the Court to refuse it, even though the statute is not raised by the Defendant, because there is no jurisdiction to grant it". It is said that there is a difference between the English Acts and the Palestine Ordinances because the English Acts make contracting out a penal offence. As to this it might well be said that if an Execution Officer wilfully acted in disobedience to Section 4 of the Rent Restrictions (Business Premises) Ordinance, 1941, he would be guilty of an offence contrary to Section 142 Criminal Code Ordinance. Should a landlord induce him so to act the landlord also might be guilty of an offence (See Section

23(1)(d) Criminal Code Ordinance). But, in any event, as I have said, I do not think that the Execution Officer can enquire into whether a Magistrate has or has not considered the matters set out in Section 4, sub-section 1. I, therefore, think that it is unnecessary for me to rule on or to consider the argument that because the office was in Mamillah Road, Jerusalem, and, therefore, in an area to which the Rent Restriction (Business Premises) Ordinance, 1941, applies, while the mill was outside Jerusalem and in an area to which that Ordinance does not apply, part of the judgment was, therefore, bad on the face of it, it not being apparent that Section 4 of the Rent Restriction (Business Premises) Ordinance was considered and that, in consequence, the consent judgment must be regarded as a nullity. For these reasons I do not consider that I need deal with the question whether it was possible to split up in the judgment the part of the premises consisting of the mill and the part of the premises comprising the office. It is of interest to observe that if a decree and not a judgment had been put in execution it would not have appeared in the decree whether or not the magistrate had considered the matters set out in Section 4 of the Rent Restriction (Business Premises) Ordinance.

The next question is whether the judgment is bad because it does not comply with rules 155, 156, 157 and 159 of the Magistrates' Courts Procedure Rules, 1940. I have already dealt with rules 156 and 157. As to rule 155, as this was a consent judgment, the matter does not seem to arise.

With regard to rule 159, although the judgment does not contain a description of the property, there is no suggestion that the Execution Officer was about to eject the present Petitioner from premises which were not the subject-matter of the action. It is of course desirable that, even in a consent judgment, there should be a compliance with rule 159. I do not, however, think that in the circumstances of this case the Execution Officer erred in proceeding with execution. It is of interest to note that in H. C. 15/43, P. L. R. Vol. 10, p. 148, the tenant had consented to be evicted at any time after ten months from the date of the judgment while in the present case the tenant agreed to be ejected at any time after nine months from the date of the judgment and that to both cases the Rent Restriction (Business Premises) Ordinance, 1941, applied or at any rate in this case it applied to the office. I do not think it necessary to refer to all the cases cited by Mr. Elia for the second Respondent. They are H. C. 67/40 P. L. R. Vol. 7, p. 434, H. C. 55/42 P. L. R. Vol. 9, p. 349, H. C. 35/43 P. L. R. Vol. 10, p. 209, H. C. 10/41, H. C. 98/41, H. C. 102/41,

H. C. 8/32 Rotenberg Volume 2, p..759, H. C. 106/42 P. L. R. Vol. 9, p. 600, H. C. 10/42 P. L. R. Vol. 9, p. 81, C. A. 137/24 Rotenberg Vol. 1, p. 293, H. C. 39/43 P. L. R. Vol. 10, p. 255, H. C. 88/43 P. L. R. Vol. 10, p. 496, H. C. 47/37 and C. A. 134/40 P. L. R. Vol. 7, p. 405.

I would again merely emphasize that although, no doubt, even before giving his approval to a consent judgment, the Magistrate must take into consideration the matters set out in Section 4 of the Rent Restriction (Business Premises) Ordinance, 1941, I do not think that an Execution Officer when faced with a judgment and especially with a consent judgment can enquire into whether the Magistrate has or has not considered the matters set out in Section 4.

For all these reasons I consider that, in spite of Mr. Atalla's able and exhaustive arguments, the order *nisi* must be discharged. I cannot, however, leave this case without expressing the hope that, at no far distant date, the substantive law, that is, Article 1 of the Ottoman Law of Execution, will be amended so as to require that the document to be handed to the Execution Officer will be a "decree" as envisaged by Rule 156, Magistrates' Courts Procedure Rules 1940 instead of a "judgment". Till some such amendment is made I am afraid that Rule 156 will continue to be regarded or treated as a dead letter. I, accordingly, order that the rule *nisi* be discharged with fixed or inclusive costs of LP. 10 to the second Respondents.

Given this 18th day of November, 1943.

British Puisne Judge.

CIVIL APPEAL No. 345/43.

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

BEFORE: Gordon Smith, C. J., Rose and Edwards, JJ.

IN THE APPEAL OF :—

Assad Halaby. APPELLANT.

v.

The Assessing Officer, Lydda District. RESPONDENT.

Income Tax — Case stated under sec. 53 — Partnership transferred to company, sec. 45 — Interpretation of secs. 5 and 6 — Sec. 6, whether a charging or measuring section — I. T. A. 20/42, 9/42, 18/42 — Indian and U. K. Acts compared — Other sections discussed — C. I. R. v. Burrell, Gibb's case, Fry v. Salisbury House Estate Co., R. v. Swan-

sea I. T. C., Gaunt v. C. I. R., Fattorini's case, Ryhope Coal Co. v. Foyer, Brown v. The National Provident Institution, Blott's case, Garwood v. Garwood, Aykroyd v. C. I. R., Doughty v. C. I. R., Whitney v. C. I. R., Bartlett v. C. I. R., Austins of East Ham Ltd. v. C. I. R., Davies v. Warwick — "Chargeable income" (sec. 2), "before", "during" (sec. 6), "person" (sec. 5), "payable" (sec. 45(i)), "subject to the provisions of this Ord." (sec. 5), "charge" (sec. 6), "at the rate" sec. 5), "basis of assessment" (sec. 6), "computed" (sec. 7), "at the rate of", "rate" (sec. 5), "carried on" (sec. 45); Lindley on Partnership, Hailsham, Maxwell, Konstam, Dowell's I. T. Law, Sundaram's Indian I. T. Law.

Case stated under the first proviso to Section 53(5) of the Income Tax Ordinance, 1941, in Income Tax Appeal No. 18/42, on a question of law, for the opinion of the Supreme Court sitting as a Court of Civil Appeal, dated the 8th July, 1943; appeal dismissed by majority:—

(Gordon Smith, C. J., dissenting):

1. Section 6 of the Ordinance is the charging section, whilst section 5 enumerates categories of chargeable income.

2. On the facts of this case, the conversion of the partnership into a joint stock company did not constitute a new trade or amount to capitalisation.

3. The income of the previous year is directly chargeable and there is an irrebuttable presumption that the income of the year of assessment is the same as that of the previous year.

4. The effect of sec. 45 is to tax partners individually as though they had personally earned the profits made by the partnership.

5. The dissolution of a partnership in January, 1942, does not render sec. 45 inapplicable to the year of assessment 1942—3.

6. On the dissolution of the partnership and sale of assets to the company in this case, the proceeds of the sale constituted profits.

7. The profits of a partnership cannot be capitalized.

(*A. M. A.*)

REFERRED TO: I. T. A. 9/42 (10, P. L. R. 255; 1943, A. L. R. 278); I. T. A. 18/42 (10, P. L. R. 342; 1943, A. L. R. 389); I. T. A. 20/42 (10, P. L. R. 134; 1943, A. L. R. 30); C. I. R. *v.* Burrell, 1924, 2 K. B. 52, 93 L. J. K. B. 709, 131 L. T. 727, 40 T. L. R. 562, 9 Tax C. 27; C. I. R. *v.* Gibbs, 1942, 1 A. E. R. 415, 166 L. T. 345; Fry *v.* Salisbury House Estate Ltd., 1930, A. C. 432, 99 L. J. K. B. 403, 143 L. T. 77, 46 T. L. R. 336, 15 Tax C. 266; R. *v.* Swansea Commissioners, 1925, 2 K. B. 250, 41 T. L. R. 505, 133 L. T. 143, 94 L. J. K. B. 718, 9 Tax C. 437; Gaunt *v.* C. I. R., 1913, 3 K. B. 395, 82 L. J. K. B. 1131, 109 L. T. 555, 7 Tax C. 219; Fattorini Ltd. *v.* C. I. R., 1942, 1 A. E. R. 619, 167 L. T. 45; Ryhope Coal Co. *v.* Foyer, 1881, 7 Q. B. D. 485, 45 L. T. 404, 1 Tax C. 343; Brown *v.* National Provident Institution, 1921, 2 A. C. 222, 90 L. J. K. B. 1009, 125 L. T. 417, 37 T. L. R. 804, 8 Tax C. 57; C. I. R. *v.* Blott, 1921, 2 A. C. 171, 90 L. J. K. B. 1028, 125 L. T. 497, 37 T. L. R. 762, 8 Tax C. 101; Garwood *v.* Garwood, 1911, 105 L. T. 231; Austins

of East Ham Ltd. *v.* C. I. R., 1937, 4 A. E. R. 275, 21 Tax C. 411; Aykroyd *v.* C. I. R., 1942, 2 A. E. R. 665, 59 T. L. R. 10; Doughty *v.* Commissioner of Taxes, 1927, A. C. 327, 43 T. L. R. 207, 96 L. J. P. C. 45, 136 L. T. 706; Whitney *v.* C. I. R., 1926, A. C. 37, 134 L. T. 98, 95 L. J. K. B. 165, 10 Tax C. 88; Bartlett *v.* C. I. R. 1914, 3 K. B. 686, 84 L. J. K. B. 106, 111 L. T. 852, 7 Tax C. 229; Davies *v.* Warwick, 1943, 1 A. E. R. 309, 1 K. B. 329, 169 L. T. 130.

ANNOTATIONS:

1. For the facts of this case see the decision of Rose, J., in I. T. A. 18/42 (*supra*).

2. The questions stated in paragraph 9 of the case stated and answered *seriatim* at the end of this judgment were as follows:—

"(i) Whether s. 5 of the Income Tax Ordinance is the "charging section" of the Ordinance and s. 6 is the "measuring section", or whether s. 6 is also a "charging section".

(ii) If the answer to the last of the preceding paragraph is that s. 6 is also a charging section — is the said s. 6 as amended in 1942 to be construed as imposing an absolute direct charge on the income of the year prior to the year of assessment or a charge on the income of the year of assessment only where such income is itself chargeable under s. 5 in which case that income is to be ascertained or computed on the basis of the income of the previous year.

(iii) If the said s. 6 is a measuring section, does it in effect create an irrebuttable presumption that the income of the year of assessment is the same as that of the year preceding the year of assessment irrespective of whether or not there has been income from such kind of source in the year of assessment.

(iv) If the said s. 6 is a measuring section and no such presumption as aforesaid exists, do the rules in Brown's case and in the cases following Brown's case apply to Palestine; in other words, must there be in the year of assessment a source of the same kind as in the preceding year and must there also be in the year of assessment some income received from that kind of source in order to render a person liable to income tax although the source (of the preceding year) itself may have stopped.

(v) If the answer to the last question be in the affirmative, is the income which the Appellant derived as dividends from the Company which purchased the Partnership business and in which Company the Appellant and Lind are the sole shareholders, of a different kind and emanating from a different source than the income which the Appellant derived from the Partnership prior to the sale of the Partnership business and the dissolution of the Partnership.

(vi) Whether, irrespective of the interpretation of s. 6 and irrespective of the applicability or non-applicability of the rules in Brown's case and in the cases following that case, the effect of s. 45 as amended in 1942 is to impose the tax on a partner of a partnership which has been dissolved in the year preceding the year of assessment in respect of his share in the income profits and gains of the partnership in such preceding year.

(vii) Whether the effect of the said s. 45 is to tax the Partnership

as such and to merely render the partners liable to satisfy the Partnership's liability to pay the tax or to tax the partners individually as if they personally earned the profits made by the Partnership.

(viii) Whether the fact that the Partnership was dissolved on the 1st January, 1942, renders s. 45 inapplicable in the year of assessment 1942/43 and whether in such circumstances the partners of the firm are taxable individually for the earnings of the Partnership in the year 1941.

(ix) Whether the proceeds of sale of the business of the Partnership to the Company under the circumstances mentioned above constitute in the hands of the Partnership capital or profits and whether and to what extent the reply to this question affects the results of this case.

(x) Whether the assets which the partners obtain upon the dissolution of a partnership constitute capital (assets residue) or profits and whether and to what extent the reply to this question affects the results of the case.

(xi) Whether the profits of a partnership can be capitalized and if so whether the profits of the Partnership during the year 1941 have been effectively capitalized and if so whether and to what extent such capitalization or any other arrangement as aforesaid between the partners with regard to the disposal of the profits of the Partnership affect the results of this case."

3. On the effect of marginal notes on the interpretation of statutes see note 2 to I. T. A. 18/42 in 1943, A. L. R., p. 389; for later authorities *vide* CR. A. 59/43 (10, P. L. R. 319; 1943, A. L. R. 479) and C. A. 126/43 (10, P. L. R. 447; 1943, A. L. R. 559).

4. On retroactivity of taxing statutes *cf.* note 4 to I. T. A. 9/42 in 1943, A. L. R., p. 279.

(*H. K.*)

FOR APPELLANT: P. Joseph, Kost and Hochman.

FOR RESPONDENT: A. Levin and Wittkowsky.

JUDGMENT.

Gordon Smith, C. J.: This case arises under Section 53 of the Income Tax Ordinance, 1941, as the result of a case stated, dated the 21st October, 1943, subsequent to a judgment, dated the 8th July, 1943, of the learned Judge who heard the appeal by the Appellant against an assessment for the year of assessment 1942/43.

2. The matter concerns the proper interpretation to be put upon the Ordinance as a whole and in particular upon Sections 5 and 6.

The learned Judge held that Section 6 was a charging section and not merely a measuring section, and that the Ordinance was "based on a system according to which the year preceding the year of assessment was to be regarded not merely as a measure of the income tax of the year of assessment but as the actual basis of the assessment."

This question as to the interpretation of Sections 5 and 6 was one of the main points of argument before us.

3. In Income Tax Appeal 20/42, 10 P. L. R. March, 1943, page 134, although the facts were somewhat similar to those at present before us, the main point at issue was one of double taxation. In that case the Appellant had been charged and had paid tax for the year of assessment 1941/42, having been assessed under the proviso to Section 6 as it then stood, *i. e.* he had paid tax on the basis of the income for the current year of assessment and not on that of the previous year. For the following year's tax, *i. e.* for the year of assessment 1942/43, and the proviso to Section 6 having been amended, which amendment applied to him, he was assessed, and in consequence of his appeal being dismissed, had to pay the 1942/43 tax on the basis of the income of the previous year, notwithstanding the fact that such year's income had already formed the basis for the previous year of assessment 1941/42.

I held, on this appeal, that this was not a case of double taxation, as the tax paid for 1941/42 was entirely separate and distinct from the tax for 1942/43, although the computation for the two successive years of assessment happened, by law, to be the same, in his particular case.

4. In the later Horowitz case, I. T. A. 9/42, 10 P. L. R. May, 1943, page 255, which, as in the present case, came to the Court of Appeal on a case stated, although the facts and circumstances were different, the appeal turned largely on the interpretation to be put upon Sections 5 and 6 of the Ordinance. The effect of my own judgment in that case was, that Section 5 was the charging section and that Section 6 prescribed the temporal basis on which the income was to be assessed or computed, namely on the chargeable income for the year immediately preceding the year of assessment. My brother Copland was of the same opinion and he stated at page 268, "The next question is whether the tax is retroactive, that is to say whether it is a tax on the previous year's income as such, or is a tax on the income of the year of assessment calculated on the basis of the previous year's income. I am of the opinion that the tax is not retroactive for several reasons." One of the reasons given is stated as follows: — "It is a tax, as it states, for each year of assessment, the income for the purposes of the tax being calculated by reference to the previous year's income".

4. (*sic*) After hearing considerable further argument on these very same sections, I have not been convinced that the opinions I expressed in these two earlier cases were wrong, and I am still of the opinion that Section 6 is the measuring section or basis of calculation, or as it might be called, the yard stick, on which the tax imposed by Section 5 is to be calculated or measured.

5. It was not disputed that Section 5(1) is a charging section, nor could such very well be disputed, as it specifically charges an income tax for the year of assessment commencing on the 1st April, 1941, and for each subsequent year of assessment. Admittedly the words "subject to the provisions of this Ordinance" are included in the enacting words, but these must necessarily be included, as neither the rates of tax nor allowances or deductions, nor many other essential matters, are included in this section, but it does specify the various types or sources of income which are subject to the tax. This section contains the first imposition of income tax in the history of Palestine and the Ordinance came into force during the currency of the first year of assessment, namely on the 1st September, 1941, and by reason thereof a proviso was inserted in this section which exempted tax payers from payment of the tax in respect of the first five months of this year of assessment 1941/42.

I do not think it can possibly be disputed, if words have any meaning, that Section 5(1) imposes or charges a tax for a specified and a particularized period, present and *in futuro,* on incomes. Note also that the expression "year of assessment" is used in this section and throughout the Ordinance and is defined in Section 2. I might perhaps observe here that, as far as I am aware but without having made exhaustive research, the phrase "year of assessment" is neither used nor defined in the English legislation on the subject. Nor is it used in Section 3 of the Indian Act of 1922 nor defined in that Act.

6. It is of course clear, as I have said, that Section 5 is not complete by itself and, therefore, it is "subject to the provisions of this Ordinance" which later provides for the various matters incidental to the payment, collection and assessment of income tax. But, in my opinion, it is the most important provision of the whole Ordinance and it rightly heads that part of the Ordinance which is named "Imposition of Tax".

7. Coming next to Section 6 I have already stated that in my opinion this is the measurement section and that it sets forth the basis or method of calculation on which the tax imposed by the preceding section is to be assessed, and again this section is in proper sequence as being second in importance. On the other hand it was not only contended before us but the learned trial Judge in his judgment held that this Section 6 is also a charging section and directly imposed the tax on the income of the year preceding the year of assessment. If such is correct, then all I can say is that it is in direct conflict with Section 5, and there must then be two separate and distinct charging sections, the one charging the tax on the income of the year of assessment and the other charging the same tax on the income of the year preceding that year

of assessment. If this contention is correct, *prima facie,* the result might conceivably be double taxation against which construction Courts would naturally lean.

8. In support of this contention it was argued for the Respondent that the scheme of our Ordinance followed that of the Indian Legislation in that income tax was payable in arrear, unlike the English scheme. I am afraid that I do not agree with this contention. In the first place, the Indian charging section (Section 3 of the Act of 1922) provides that when an income tax is imposed for any year (which is done by a separate Act of the Legislature) such tax is charged in respect of (that is "on") the total income of the previous year of every individual, *etc.*

I have already observed that there is no mention of a year of assessment in the Indian Legislation and it would appear that there is a direct charge of income tax on the income of the previous year, and it must necessarily follow that such tax is payable after the close of that previous year and is thus payable in arrear. The wording of this Indian section is entirely different to that of either of our Sections 5 or 6.

9. Again, this contention that our scheme provides for payment in arrear is entirely contrary to what is contained in the Ordinance itself, in that for the first year of assessment only 7/12ths of the tax was payable in respect of such year. The Ordinance was enacted on the 22nd August, 1941, and commenced on the 1st September, 1941, and returns were called for and assessments made in respect of this 7/12th of the first year's tax, within a few months of the commencement of the Ordinance. No twelve months' grace was either given in the Ordinance or by the newly formed Income Tax Department. As a further illustration of such tax not being payable in arrear, I myself arrived in Palestine in January, 1942, and commenced to pay tax in the following April, being assessed for the new year of assessment (1942/43) on the basis of the three months' salary I had received for the last three months of the first year of assessment (1941/42). Why also am I, at the present time, having income tax deductions made from my monthly salary for the current year of assessment 1943/44, if I am paying such income tax in arrear?

Because, as I contend, my income tax is measured for this current year on salary I received during the year preceding the year of assessment, as provided for in Section 6, but not as a direct charge of tax on such previous salary in consequence of such section.

10. Other sections of the Ordinance were quoted in aid of the contention for the Respondents, more particularly Section 33 dealing with deceased persons, and Section 45 dealing with partnerships, but it seems

to me that these sections are of no avail in this respect as, before you can fix the liability of any individual, whether by devolution or otherwise, it is necessary first to ascertain what that liability is.

11. As regards the actual terms of the first part of Section 6, great emphasis was laid on the use of the word "charged" combined with those of "levied and collected". These three words are often used in combination and have become a well worn phrase in income tax legislation, and it may be that the meaning of "charge" or "charged" used by itself does not necessarily bear the same interpretation when used in combination with those other words. There is also the marginal note which can be looked at as a guide to the intention of the section, and in my opinion "basis of assessment" expresses the intention that the section is one of calculation, computation or assessment. If it had been a charging section, surely the word "charge" would have been used in the marginal note, as is done in the marginal note to Section 5.

Further, it is to be noted that the commencing words of the Section read: "Tax shall be charged, levied and collected for each year of assessment" and then follows the measurement phrase, but the tax so being measured is for the year of assessment and not for the preceding year.

12. Consideration of the whole of Section 6 as originally drafted and as amended, leads me to the belief that confusion has arisen by reason of the proviso in the first instance, and the words substituted therefor in the second instance. Undoubtedly the proviso was designed to afford relief where otherwise hardships might be suffered, but it would appear as if this contained a loophole which was taken advantage of in order to escape the whole incidence of the tax, and, therefore, an amendment was necessary but under which, it is obvious, material hardships may be suffered.

In attempting to interpret the meaning to be attached to the first three lines of the section, I think that if the proviso and the later words substituted therefor are disregarded, the meaning to be so attached becomes clearer. Also, this proviso deals with a separate and distinct matter, which might very well have been contained in another section by itself.

13. However, on the question of the interpretation of these two sections I am aware of the fact that I am in a minority in regard thereto. I have not had an opportunity of considering the reasons for the majority judgment about to be delivered; but I adhere to the opinions I have already expressed.

Under the circumstances I consider that it would be superfluous for me to attempt to give an answer to the questions asked in the case

stated, as to do so would be arrogating to myself the assumption that my views are correct, and I, therefore, refrain from doing so. I admit that other and more difficult questions would arise if my views had been acceptable. For example, if there is no income at all received during the year of assessment, and there is no source of income, is the tax payer liable for income tax at all, even though he had a chargeable income at all during the year of assessment?
circumstances, a man may have a large sum which "accrues" due on promissory notes during the year of assessment, but in fact they are worthless and he receives nothing. Is he also liable to pay income tax on this sum which "accrues" in such year, although he may receive no income during the preceding year? Similarly and under the same

However, other points on which I believe we are unanimous have been argued, and I, therefore, set forth my views on these matters very briefly.

14. As to whether our scheme and system of income tax follows that in England or that in India, my answer is that it follows neither. It is true that our system in part follows that of what was super-tax in England, but the system of assessment of super-tax in England was different from that of income tax in England. Similarly it would appear that sections of our Ordinance have been "lifted" from the Indian Legislation, but as I have endeavoured to point out, the Indian income tax is payable in arrear, whereas in my opinion ours is not so payable. For these reasons I adhere to the opinion I expressed and the remarks contained in paragraph 11 of my judgment in the Horowitz case, and I need not repeat them here.

15. As also can be gathered from the Horowitz case, I think there is a clear distinction to be drawn between "source of income" and "income from that source", and it does not necessarily follow that because the source of income ceases, the income from that source also ceases.

16. Another matter at one time seemed likely to arise and which would, I admit, have caused me great difficulty had it been necessary to give a decision thereon, and that is, what is meant by "source of income". Are the various types of income described in paragraphs (a) to (g) of Section 5(1) to be regarded collectively as one source of income, or separate sources? It is to be noted that in Section 45 the expression "total income" is used. I mention this because it might very well happen that a person has, in the year preceding the year of assessment, a large total income from the various sources so described and which all, except one, cease in that year. Consequently, in the year of assessment it may be that he only derives a small income from one such source, say a small dividend from a company, and be absent from

Palestine altogether, yet his income for that year of assessment is to be measured by the income of the year preceding the year of assessment. In such case it is quite possible that his liability for Palestine income tax will greatly exceed his income "accruing in, derived from, or received in Palestine". It may well be argued that this is no hardship, as he is paying income tax in arrear, but as I hold the contrary view and am in a minority, I do not feel called upon to attempt to answer this particular conundrum.

17. As regards Section 45, dealing with partnership, I think it is clear from this section that it is not the partnership that is liable to tax but the individual partners, according to their share of profits in such partnership. I do not think that there is any substance in the arguments for the Appellant in this respect.

18. Similarly, as regards capitalization of profits. Each partner is, in my opinion, liable for his share of profits, and what the partners may have agreed, *inter se,* as to capitalization of any annual profits is immaterial as regards the liability to tax on such annual profits. When a partnership is being wound up, it is the assets of the partnership that are distributed, as in the case of a company being wound up, and whether those assets include profits earned prior to the dissolution or winding up, is a question of fact.

19. It is to be observed that apart from the two local cases I have referred to, I have not quoted any of the numerous English cases to which we were referred, but that does not mean that I have not studied and considered some of them. In this connection I would again refer to my remarks in paragraphs 9 and 12 of my judgment in the Horowitz case, and no useful purpose is to be gained by reiterating those remarks.

20. For the reasons I have given, and with the greatest respect, I must be content to differ from the majority judgment about to be delivered in so far as it conflicts with the views I have attempted to express.

Delivered this 23rd day of December, 1943.

Chief Justice.

Rose, J.: I agree with the judgment which my brother Edwards is about to read and having regard to its contents and to my judgment in the original appeal, I have nothing to add.

British Puisne Judge.

Edwards, J.: This is an appeal by way of case stated under the first proviso to Section 53(5) Income Tax Ordinance, 1941. All the material facts and questions of law are set out in the stated case. When the

case comes to be reported in the Palestine Law Reports the reporter will doubtless set out the stated case *in extenso*. I refer to the case stated itself for its terms. The hearing of the appeal before us took six days. In addition to the cases cited in paragraph 7 of the case stated the following four cases were referred to at the hearing, namely:—

> Fry *v.* Salisbury House Estate Co. L. T. R. Vol. 143, p. 81; Rex *v.* Swansea Income Tax Commissioners (1925) 2 K. B. 250; Gaunt *v.* I. R. Commissioners (1913) 3 K. B. 395; the Fattorini Case, All E. R. (1942) Vol. I, page 621 and Ryhope Coal Coy. Ltd. *v.* Foyer (1881) 45 L. T. 404.

It is impossible to set out at length all the arguments submitted to us without running the risk of allowing this judgment to become unduly lengthy. I shall, therefore, merely set out, as briefly as I can, the contentions of Dr. P. Joseph for the Appellant and the arguments of Mr. Levin for the Respondent and finally the reply of Dr. Joseph.

Dr. Joseph submitted that the real point in issue is whether the Palestine Income Tax Ordinance follows the English or Indian Law of Income Tax, and he further submitted that if English law applies then we must be guided by the decision in Brown *v.* The National Provident Institution (1921) 2 A. C. 222. He contends that Section 5 of the Income Tax Ordinance is the charging section. His argument is that in Section 5 you have everything necessary for a good law in itself. He says that the assessee must have in the year of assessment an income of the kind which he had in the preceding year and that there must be a measure and that where there was a partnership in the preceding year and no business in the following year there is not present the same kind of source. He says that Section 1 of the Income Tax Ordinance came into force on the 1st of September, 1941, and that there is no specific provision stating that it is retroactive. He says that Section 5 is the charging section and he refers to the proviso with regard to 7/12ths of the rate and argues that if Section 5 is not a charging section this proviso should have appeared in Section 6 and he also points to the appearance in Section 5 of the word "rate" and he refers to Sections 3 and 6 of the Indian Income Tax Act. He says that in Section 2 of the English Income Tax Act of 1918 the word "rate" does not appear at all. The argument proceeds that Section 5 is a charging section and Section 6 an arithmetical or computation section, and he points to the marginal notes of Section 5 which is "Charge of income tax" and of Section 6 which is "Basis of assessment." He says that Section 5 fixes the liability and that Section 6 fixes the assessment. He also points to the word "computed" in line 5 of Section 7 and to the proviso to Section 7. He says that it is unreasonable that there should be two charging

sections, and that if Section 6 is a charging section then there is a contradiction between Section 5 and Section 6 because the Crown contends that it is a tax on the previous year's income and that it is only when you say that it is a measuring section that we get no conflict between Section 5 and Section 6. He says that, if Palestine Law requires that a tax should be on the previous year's income, there was no need for the original proviso to Section 6, that is, in the Income Tax Ordinance, 1941. He refers to the definition of "chargeable income" in Section 2. He submits that all that the amendment to Section 6 did was to alter the measure, and that if Section 5 shows that the Legislature intended that the tax should be on the income of the year of assessment then Brown's case applies and he contends that Mr. Justice Rose confused the various things to be measured with the measuring scale. He says that the words "before" and "during" in the last line of Section 6 as amended were introduced in consequence of the decisions in the Grainger and Brown Cases respectively. He says that the Crown must show that the Appellant had an income during the year of assessment from the same kind of source as existed in the previous year and that the Appellant must have had dividends from last year before he can be charged on his dividends of this year. In short, the Crown must prove that this year the Appellant had an income corresponding to the kind of source of last year. Under English Law there are special provisions as to the succession of partnerships, *e. g.* the three years' average.

The Appellant contends that the partnership had capitalised its profits during 1941 and that when it was wound up what it received was capital, and that, therefore, there was nothing to tax. It is said that the partners passed to capital account anything that was not withdrawn, and that after the tax was paid the Appellants capitalised the surplus which was then tax free.

In paragraph 4(1) of the case stated it is said that the partnership transferred to the Company as from the 1st of January, 1942, the whole business and partnership as a going concern. Dr. Joseph says that what the partners did not take in as drawings was returned as capital and not used for the benefit of the specific partners but used for the benefit of the partnership as a whole. He referred to Lindley on Partnership, 9th Edition, pp. 437, 471 and 483. If the partnership is dissolved then there is no "person" within the meaning of that word in line 5 of Section 5. He says that Section 61 of the Partnership Ordinance makes a partnership a juristic person (see also Section 62) and that the partners had divested themselves of the profits and conferred a right of ownership on the partnership. He says that in Palestine it is the partnership that carries on business and that when capitalisation takes place the

property becomes partnership property. He says that there had been a capitalisation and that there never was any distribution of profits, and that the profits never reached the partners but only the partnership. He also says that the partnership closed their balance sheet on the 31st of December, 1941, and that the partnership was dissolved on 1st January, 1942, and that the profits had become capital at the time of distribution. Mr. Justice Rose in I. T. A. No. 18/42, P. L. R. Vol. 10, p. 342, had held that the partnership was dissolved on the 31st of December, 1941, but Dr. Joseph now contends that it was dissolved on the 1st of January, 1942, and that a new Company came into existence before the 1st of January, 1942, although the partnership was dissolved on the 1st of January.

Dr. Joseph agreed that, if the partnership had continued to exist, then under Section 45, Income Tax Ordinance, his client might have been liable but he says that the partnership ceased to exist on the 1st of January, 1942, after it had discharged such tax liability as existed up to that time and that what his client then got was not income but property of the partnership (See Sections 46 and 47 of the Partnership Ordinance).

The argument proceeds that assets are not income and are not profits but become merged in the partnership property and that all to which the Appellant is entitled is a share of the assets. If the partnership subsists and the assets are distributed one would get income but in our case the partnership was dissolved and one got capital.

With regard to Section 45 of the Income Tax Ordinance, Dr. Joseph referred also to Section 33 and to the English Rule, Rule 3 of Schedule D, cases 1 and 2 mentioned in Konstam's Book on Income Tax, 9th Edition, pp. 440, 446 and 567. He says that Section 33 was already law when the original proviso to Section 6 was in the 1941 Ordinance.

Dr. Joseph says that the reason for the omission of the word "is" in Section 45 referred to by Mr. Justice Rose at p. 5 of his judgment was that at first it was thought that this would cover the cases of a registered and also of an unregistered partnership, but that now Section 45 deals only with the case of a registered partnership. The Appellant contends that Section 45 is not a charging section and was never intended to be a charging section, but that it merely provides a mode of collecting tax, the liability being on the partnership although the tax can be recovered from the partners. It can only be recovered from the Appellant if there is a liability on the partnership. If the partnership has an income then this liability is established. Liability is different from measurability. Ordinarily, you measure by Section 6 but Section

45 provides a different type of measure. He refers to the word "payable" in line 5 of Section 45(i) and to Section 32 and says that if the partnership had no income the Appellant can be made to pay nothing on behalf of the partnership. The scheme is that of payment in advance so that the partnership must exist during the year of assessment but in our case the partnership ceased before the year of assessment.

Dr. Joseph argues that there must be antecedent liability of the firm. He says that, if the firm is dissolved, it has already paid income tax because such has already been collected in advance. If there is no partnership there is no firm, and, therefore, no precedent partners, within the meaning of those words in Section 45(2)(a). In short, the Legislature contemplated an existing partnership during the year of assessment. If the partnership does not exist and does not earn an income how can it be made to pay in advance on an income which you know that it will never have? As it was dissolved on the 1st of January, 1942, it is said that its liability to income tax was *nil* and that the Appellant was liable to a *nil* payment. When the partnership was dissolved then Section 45 was also dissolved because Section 45 created a statutory liability.

Dr. Joseph referred to Rule 10 of Schedule D cases 1 and 2 and to Dowell's Income Tax Law, 9th Edition, p. 498 and to Sundaram's book on Indian Income Tax, 5th Edition (1939), pp. 789 and 981. He says that there is nothing in either the English or Palestine Law which resembles Section 44 of the Indian Income Tax Act. Dr. Joseph contends that one is entitled to look at Section 45 as amended by the Income Tax (Amendment) Ordinance, 1943, and in particular to the words "in respect of" in Section 45(2)(a). So much for Dr. Joseph's opening address.

Mr. Levin, for the Respondent, says that the wording of Section 45 makes it clear that this section covers the case of a partnership dissolved prior to the year of assessment, and that we are, therefore, not concerned with Section 5 or Section 6. Section 45 does not tax a partnership as such but taxes individuals in their own capacity and not as agents of the partnership. A single trader cannot capitalise his profits neither can partners. A partnership in Palestine is different from a partnership in England for taxation purposes, and the case of C. I. R. *v.* Burrell, (1924) 2 K. B. 52, does not apply because in England a Company itself is liable to income tax and here there is no possibility of a partner coming within the rule in Burrell's case.

Mr. Levin stresses the words "subject to the provisions of this Ordinance" in Section 5. The scheme of the Ordinance was that persons

had to pay not from the 1st of September, 1941, but for the full first year of assessment, that is, five months before the 1st of September, 1941. The Ordinance is retroactive and the tax is payable for the year of assessment but the words "for the year of assessment" relate back to the rate payable and have nothing to do with the income. You tax persons only and you cannot tax trusts.

Section 6 is clearly a charging section because the word "charge" itself appears in line 1 of the section, that word not being mentioned in Section 5. Section 6 informs one quite definitely what the Legislature are charging, namely, chargeable income (See Section 2). Section 5 stresses the local basis of income tax and Section 6 the temporal or time basis. If Section 5 had stood alone it might have been said to charge the year of assessment. There is no reason why there should not be two charging sections, namely Sections 5 and 6, and a comparison is made with Section 1 of the English Income Tax Act of 1842. No particular significance must be attached to the words "at the rate" in line 2 of Section 5. As to a marginal note if there is any ambiguity you may look at it but it cannot override the specific provisions of an Ordinance; and, in any event, the marginal note to Section 6, namely, "basis of assessment", is quite a neutral term.

Reference is made to the judgment of the learned Chief Justice (Gordon-Smith) in I. T. A. 9/42, P. L. R. Vol. 10, pp. 255 and 260.

The Palestine scheme is different from the scheme of the English Act. In the case of Gibbs, All England Reports (1942), Vol. 1, p. 415, Lord Russell said that the word "assessment" is used in eight different senses. Reference is also made to Lord Macmillan's remarks at the bottom of p. 424 and the top of p. 425, with regard to a firm in Scotland being a legal person.

Mr. Levin argues that Section 5 is not complete in itself and that one must go on to Section 6 and that Section 6 is also a charging section.

In England there are different schedules, *e. g.* Schedules A, B and C (See Konstam 9th Edition, pp. 436 and 437). In England you pay for the actual year of assessment in respect of Schedules A, B and C. As to case 1 of Schedule D the tax is computed on an average of three years.

In England in measuring sections the word used is "computed". (See Dowell's I. T. L., 2nd supplement to the 9th Edition, p. 34).

In England you charge the year of assessment and when you can find the income for the year of assessment you do so. Mr. Levin says that the Palestine draftsman well knew of the word "computed" because it

is used in line 5 of Section 7 in a very different sense. Mr. Levin says that Section 5 is the proper place for the proviso because a proviso is an exception to a rule and you must put the exceptions in the rule.

In Section 5 it is the rate with which the legislature were dealing. The emphasis is on the rate. It is not a matter of changing the charge or mode of assessment; what you are changing is the rate. Comparison is made with Section 25(3) of the Indian Income Tax Act (See Sundaram's Book, pp. 840, 279 and 281).

Mr. Levin says that the proviso to Section 5 shows that the Legislature meant to tax retroactively, and that the proviso to Section 5 used the words "at the rate of" and changed the "rate" and nothing else, while Section 6 does not deal with rates. In England it is sources that are charged but in Palestine it is the chargeable income which is taxed, that is, the total income from all the sources. In the United Kingdom one only comes to total income when you deal with sur-tax and super-tax. Mr. Levin referred to the Income Tax Act 1918 Schedule D, cases 1 and 2, Rule 2 (Dowell, 9th Edition, pp. 441 and 489) and Konstam, p. 247 and Sections 10 and 33 of the Income Tax Ordinance and Section 18 of the English Income Tax Act of 1918. Section 6 is a direct charge on last year's income while in England it is the income of the year of assessment on which one is charged. The Palestine Ordinance does not use the word "computed". (See P. L. R., Vol. 10, pp. 259 and 261). Sections 5 and 6 supplement each other. In Palestine to-day we are in the same position as they were in England when super-tax was collected. One must not draw conclusions from the wording of English Acts. Mr. Levin relies on the following passage in paragraph 4 of Exhibit D, that is, the letter from the Appellant to the Assessing Officer of the 22nd October, 1942:—

> "On the 22nd November, 1941, the partners of the firm Lind & Halaby agreed to dissolve the partnership as of the 1st January, 1942. On the 11th December, 1941, the partners caused to be incorporated under the Company Law of Palestine a private company composed of the same partners, Messrs. Lind & Halaby. No other persons were shareholders of this company. This company was formed for the convenience of the partners and the conduct of their business. They transferred all the assets and liabilities of the partnership to this new company composed of themselves and carried on the original partnership business of Lind & Halaby under the company name of Lind & Halaby Ltd. There was no break whatsoever in the continuity of the life of the business. They also sold the goodwill of the partnership to their company. For the assets and liabilities of the partnership they accepted shares in their names in the new company and for the goodwill they debited the company in their favour. The effect of this transaction was that the position

> of the respective partners in no way changed. The capital of the original partnership in which the earnings of 1941 had entered now became the capital of the company. Their respective interests in the company were identical with their respective interests in the company partnership (*sic*). Their right to profits, if any, was still similar to that under the partnership. The only difference was that their liability was now limited by virtue of the fact that they were operating under a private limited company. But I say, for income tax purposes this change in the legal form of the business could not impose any new liability upon the respective partners."

Mr. Levin refers to Sundaram, p. 285 as regards section 3 of the Indian Income Tax Act. Section 45, Income Tax Ordinance makes it clear that it is not necessary for the business to continue in the year of assessment.

Mr. Levin stresses the words "carried on" which include a business carried on now or carried on in the past. The Ordinance does not say "is carried on" or "is being carried on" (*cf.* the original 1941 Ordinance). Section 45 is capable of including a partnership which exists and also one which has ceased to exist (See Section 45 and Section 46, Partnership Ordinance). The parties themselves are taxed and not as agents of the partners and it is not the partnership that is taxed. It is not necessary to determine what is payable by the firm itself but the total income of each partner has to include his share of the gains of the partnership of the preceding year and you can then tax the partner on that sum. If one were taxing the partner as an agent it would be absurd to include a partner's total income because a partner gets concessions for his family. It is each individual partner who is taxed and not the partnership. Section 45 is taken from Section 23(5) of the Indian Act (See Sundaram, pp. 705 and 789). Section 23(5) was only inserted in India in 1939. Mr. Levin says that he is not concerned whether there was a capitalisation of profits, but in any event he denies that there was a capitalisation and says that it is clear that there was a receipt. We are dealing with the interpretation of a section which has no equivalent in the English Income Tax Act except perhaps the second proviso to Section 10 of the Income Tax Act of 1918. (Gaunt *v.* I. R. Commmissioners (1913), 3 K. B. pp. 395 and 397).

In the Blott case Mr. Justice Rowlatt distinguished the case of a partnership and that of a Company (1921, 2 A. C. 171). It is immaterial whether a single trader does or does not capitalise because Section 45 covers the matter. It is a mistake to say that in Palestine a partnership is a juristic person in the same sense that a Company is a juristic person, *cf.* the Partnership Ordinance, Cap. 103 Revised Laws of Palestine, with Section 4(2) of the English Partnership Act. Reference is also

made to the definition of "firm" in Section 2 of the Partnership Ordinance. In Palestine a partnership still exists even although it is not registered, Section 6(6) is quite clear. In England, in the event of capitalisation of assets a Company has to pay income tax whether it has capitalised, its profits or not. The question only arises when super tax is being collected. The question then would be whether bonus shares (capital) or dividends have been received. Reference is made to Lord Haldane's speech in the Blott case at the 3rd paragraph fifteen lines from the top and to the speeches of Lord Cave and Lord Finlay.

Mr. Levin says that we are dealing with the calendar year ending 31st December, 1941, and with the profits up to that date and he also says that the partners should have made up their accounts on the 31st of December, 1941, and that the case of Garwood is different from the present case. From the remarks at the top of page 3 of the stated case, it appears that the partners had been drawing out money. It is argued that the case of Garwood is not a taxing case at all from the point of view of income tax. Mr. Levin says that when you wind up a partnership in the last year you do not capitalize. Mr. Levin asks the question, "how can a partnership which has to make up its accounts at the end of 31st of December, 1941, make up its accounts before the 31st of December has expired?" Mr. Levin says that once you have decided to wind up a partnership you have finished. He says that the partners decided in November, 1941, to wind up the partnership and points out that in paragraph 4(h) of the case stated the date should be the 11th of November and not the 11th of December, 1941. He refers to the case of Austins of East Ham Limited *v.* I. R. Commissioners (1937) All E. R. Vol. 4, p. 275. If you liquidate a business you do not capitalise. In England the question arises only for the purpose of super tax. In Palestine it is the partners who are taxed. Here there is no capitalisation. There can be no capitalisation when you are winding up a business for the last year and, furthermore, this question of capitalisation arises in the United Kingdom only if one receives bonus shares or debentures in the same company, but not if one receives shares or dividends in a different company. (Hailsham, Vol. 17, p. 253, para. 513 and the case of Aykroyd, (1942) 2 All E. R. pp. 665 and 668.

Mr. Levin says that a partnership is not the same as a company, but is different for the purposes of income tax. Furthermore, he says that even in England, notwithstanding the winding up of a company, the company itself has to pay income tax on its profits and cannot escape by winding itself up. The Companies (Consolidation) Act, 1908, and all other English Companies Acts are different from the Revised Laws of Palestine, Cap. 103 (see Section 47 of Partnership Ordinance).

Mr. Levin refers to p. 3 of the case stated and to Sundaram's book p. 249. Mr. Levin says that you can, from a later amendment to the law, draw a conclusion as to what the earlier law was intended to mean and persons cannot fluctuate with a subsequent amendment to the law. Mr. Levin says that what Doughty's Case decided was that where a partnership sells a business and the partnership makes a profit on the sale you do not pay income tax on the sale, and the Doughty case has nothing to do with the case where profits of a partnership are made before the sale (See (1927) A. C. p. 327). In our case the business was not sold for more than it was worth and we are dealing with profits made before the sale. This completed Mr. Levin's argument.

Dr. Joseph, in reply said that the words "subject to the provisions of this Ordinance" in Section 5 are mere words of limitation with regard to the liability to pay and only qualify the absolute duty to pay. He also refers to the words in Section 12(1) of the Ordinance as amended in 1943, "income charged with tax" and compares them with the words in Section 41 of the original Ordinance, namely, "chargeable under Section 5(1)(b) or 5(1)(e)". He says that "payable" means "must be paid" and points out that in England a new Finance Act is passed each year providing for a fresh rate, whereas in Palestine the rate is fixed in Sections 23 and 24 although those sections may be amended from time to time. He says that, if Section 6 is a charging section, it should have read "the rate shall be the rate of the previous year". He argues that the tax is a tax for the year of assessment, that is, 1941, measured by 1940. With regard to the suggestion that the tax payer is given a free year at the beginning, he says that this argument does not help the Respondent because if it was a tax in arrear, the year 1941 should have been a free year and the tax should be exigible only after the 1st of April, 1942. He says that his client got no free year because he paid in advance, thus having paid for a year when there was no law with regard to income tax. He says that in Palestine we do as they used to do in England under the Finance Act 1926.

With regard to the proviso to Section 5 he argues that a measure always remains constant and the reason why one paid only 7/12ths was because the law was in force only for seven months. He says that the Legislature intended that income tax should be a tax in advance on the income earned in the year of assessment. If there is an ambiguity (as he contends there is) and a conflict between Section 5 and Section 6, then the marginal note becomes of importance.

With regard to statutes being retroactive he cites "Maxwell on Interpretation of Statutes", 7th Edition, p. 197. His client cannot be taxed

before the 1st of September, 1941, although for the purpose of measurement we can look at a date prior to the 1st of September. The partnership was not in existence in 1942 and income was, accordingly, not present in 1942. He relies on Lord Dunedin's speech in the Whitney case (1926) A. C. 37 and in particular on the first paragraph of p. 52. The meaning to be attributed to the word "charge" is that given by Copland, J. in I. T. A. 9/42, namely, a reckoning or calculation. He refers to Lord Atkinson's speech in the Brown case, 2 A. C. (1921) p. 248. Section 23 and Section 24 create no liability but are purely measuring sections. He further says that Section 7 is a complete answer to any suggestion that Section 6 is a charging section, neither Section 7 nor Section 6 being charging sections. The Legislature had no intention of grouping the various sources of income. He refers to the Schedule to the Income Tax Ordinance, Form A, note 3. The intention is that if there is an income from a particular source you then measure on the basis of the preceding year but it there is no income you do not have to make a return. He further says that the partnership did not carry on the old business but the Company had an income from a new source and this income was of a different kind and adds that the Bartlett case does not apply to his client.

Section 45 merely fixes one with a source of income but is not an exception to Section 5. The sole effect of the Gibbs case is to rule that a person is an entity. In Palestine income tax is payable in advance so that when a partnership is dissolved there is nothing due but in India the income tax is payable in arrear and there is something due. He quotes the paragraph with regard to firms at pp. 818, 981 and 1245 of Sundaram's book on Indian Income tax, 5th (1939) Edition. In the original Indian Income Tax Act the word "discontinuance" and not "dissolution" was used.

With regard to the word "is" in Section 45 the effect of the amendment is to limit its application to partnerships which have been registered and was a movement directed against unregistered partnerships but was not directed against a partnership which did not exist.

With regard to capitalisation, Dr. Joseph says that, if capitalisation has been effectively made by the partnership, a partner is protected and should not be in any worse position than a Company. Messrs. Lind & Halaby paid full income tax on the profits earned in 1941 and only after then did they capitalise. Mr. Halaby could not sue the partnership for the profits. The profits belong to the partnership which could make a decision or come to an agreement to capitalise. A good capitalisation is effective against the whole world including the Crown. The firm was

capitalised because the new Company took over the whole firm as a going concern. Section 31(4) of the English Finance Act 1924 has no counterpart in Palestine. His client received that to which he was entitled on dissolution, namely, surplus assets, whether distributed in *specie* or money. The position would be different when a Company continues to do business. Under Section 62 and 18 of the Partnership Ordinance partnership property cannot be attached. The proviso to Section 18 does not appear in the English Partnership Act.

Dr. Joseph says that his client's accounts were made up to the 31st of December and the dissolution and transfer took place on the 1st of January and accordingly the capitalisation was effective.

If a shareholder does not pay income tax on a Company's assets or a winding up, why should a partner? He says that the tax has been paid in advance and that the Assessing Officer has not been wrongly deprived of anything. In the Doughty Case a price was received for the business. In conclusion he says that he would not object if Section 6 were regarded as a charging section provided we charge the year of assessment but measure by the previous year. This concludes my summary of the speeches of parties' advocates.

On the whole I consider that the arguments adduced on behalf of the Respondent are sounder than those of the Appellant and should prevail.

I agree generally with the reasons given by Mr. Justice Rose in his judgment of the 8th July, 1943, and with the arguments of the Respondent's advocate addressed to us at the hearing of this appeal. I would now merely state, in brief, the manner in which the case strikes me. I am unable to resist the conclusion that the appearance in Section 6 of the word "charge" makes that section, beyond doubt, the charging section. The word is quite unequivocal. I think that Section 5 merely enumerates the classes or categories of sources of income on which tax has to be paid. It might have been more logical had the present Section 6 been Section 5 and *vice versa*. In my view, the marginal note to Section 5 "Charge of Income Tax" does not have the effect of making Section 5 the charging section, especially when one finds the word "charged" in line 1 of Section 6. The deliberate use of the word "notwithstanding" in line 4 of Section 6 is significant because it makes it quite clear that the Legislature and the draftsman realised the effect on the subject, or taxpayer, of this provision. Whatever the consequences may be, these consequences were foreseen and presumably intended by those responsible for passing this enactment. I would also refer to the recent case of Davies *v.* Warwick, Vol. 169, L. T. Reports, p. 130, where at page 131 Lord Justice Scott said:—

> "Counsel for the Defendant urged that legislation should not be construed so as to give it retrospective effect. But that canon of construction only applies to equivocal language, and the words now in question are, in my opinion, quite clear."

As regards the other points raised by the Appellant, I think that the following conclude the matter against him, namely, his own admission in para. 4 of his letter to the Assessing Officer, Lydda District, of 22nd October, 1942 (Exhibit D), quoted in this judgment, and the remarks of Lindley, L. J. (then Lindley, J.) in the Ryhope Coal Coy. Ltd. *v.* Foyer, Vol. 45 L. T. R. 404, at p. 411:—

> "It is not a new trade at all. It is a new association carrying on an old trade, that is all".

As regards capitalisation, there seems to be in the appeal now before us no evidence of any actual or real capitalisation. In spite of Dr. Joseph's able arguments and strenuous stressing of the change which occurred between 31st December and 1st January, I find it difficult to grasp what actually did happen, say, between 23.59 hours on 31st December and 00.01 hours on 1st January. We know that a company was formed; that is all. It is not suggested that the business was ever closed down. I would, accordingly, return the following answers to the questions in the case stated, namely:—

9(i) Sec. 6 is also a charging section.
(ii) The income itself of the previous year is directly chargeable.
(iii) Does create an irrebuttable presumption but (iii) does not arise.
(iv) Does not arise. The rule in Brown's Case does not apply.
(v) Does not arise.
(vi) Yes.
(vii) To tax partners individually as if they personally earned the profits made by the partnership.
(viii) Does not render Sec. 45 inapplicable and the partners of the firm are taxable individually on the earnings of the partnership in the year 1941.
(ix) Profits; and does not affect the result of the judgment of Rose, J.
(x) Same as answer to (ix).
(xi) Cannot be capitalized and the arrangements made do not affect the result of the judgment of Rose, J.

In the result, I would dismiss this appeal with costs to be taxed on the lower scale, to include an advocate's attendance fee at the hearing, of LP. 100. I do not consider that the Instructions fee should exceed LP. 25, which sum I would certify accordingly.

Delivered this 23rd day of December, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 106/43.

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

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

IN THE APPEAL OF:—

1. Nimer Ali Khalaf,
2. Sa'ad Ahmad Khalil. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Loss of file — Record and judgment lost pending appeal, T. U. I. Ord., secs. 51, 72(1)(c) — *Interest of justice.*

Appeal from the judgment of the Court of Criminal Assize, sitting at Haifa, dated 27th September, 1943, in Criminal Assize case No. 29/43, whereby Appellants were convicted of murder, contrary to section 214(b) and 23 of the Criminal Code Ordinance, 1936, and sentenced to death, allowed and retrial ordered:—

A retrial may be ordered under sec. 72(1)(c) of the T. U. I. Ord. if the file is lost before the appeal.

(*A. M. A.*)

ANNOTATIONS: For a similar decision in a civil appeal see C. A. 210/38 (5, P. L. R. 448; 1938, 2 S. C. J. 86; 4, Ct. L. R. 127).

(*H. K.*)

FOR APPELLANTS: Hazou.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from a conviction by the Court of Criminal Assize, sitting at Haifa.

The matter is unusual and unfortunate in that after a full trial had taken place, the relevant papers consisting of the judgment, the record and apparently the original depositions of the Committing Magistrate have all been lost.

It is clear, as both Mr. Hazou for the Appellant and Mr. Salant for the Crown contend, that we are not in a position to decide upon the merits of this appeal for the reason that it is quite impossible for us to say whether or not the notes of the presiding Judge contained, in accordance with section 51, sufficient material to justify his verdict, and also it is, of course, in the absence of the record, impossible for us to investigate the question as to whether the evidence was sufficient to justify the findings upon which the conviction was based.

The matter is by no means free from difficulty, but having regard

to the wide terms of section 72(1)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, we consider that there is no technical bar to our remitting this case for a new trial by a Court of Criminal Assize. It seems to us that in the interests of justice such a course is clearly desirable. It is for the Attorney General himself to consider any technical difficulties which may stand in his way with reference to the preliminary investigation. It is, of course, unnecessary and undesirable for us to make any observations with regard to the case itself, and our order, therefore, merely is that we quash the conviction and remit the case to the Court of Assize for a new trial.

Given this 24th day of January, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 311/43.

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

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

IN THE APPEAL OF:—

Salim Ibn Odeh Abu Kirshein. APPELLANT.

v.

Ghanimeh bint Salman Ibn Iyadeh & 3 ors. RESPONDENTS.

Procedure — Judgment given without hearing witnesses summoned but not present.

Appeal from the judgment of the Magistrate's Court of Beersheba, sitting as a Land Court, dated 4th August, 1943, in Land Case No. 144/43, allowed and case remitted:—

When witnesses fail to attend after being properly summoned, a ruling should be made by the Magistrate or steps taken to ensure the attendance of the witnesses.

(*A. M. A.*)

ANNOTATIONS: A similar decision was given in C. A. 9/38 (5, P. L. R. 167; 1938, 1 S. C. J. 155; 3, Ct. L. R. 167).

Note, however, that the grant or refusal of an adjournment is generally in the discretion of the Court; *cf.* C. A. 285/42 (10, P. L. R. 26; 1943, A. L. R. 29) and note 2 thereto in A. L. R.; see also CR. A. 161/43 (*ante*, p. 25) and note 1.

For other instances of that discretion being wrongly exercised see, *e. g.*, CR. A. 66/41 (8, P. L. R. 220; 1941, S. C. J. 218; 10, Ct. L. R. 81), C. A. 207/41 (8, P. L. R. 520; 1941, S. C. J. 486; 10, Ct. L. R. 195) and C. A. 135/41 (8, P. L. R. 509; 1941, S. C. J. 526; 10, Ct. L. R. 183).

(*H. K.*)

FOR APPELLANT: Kamleh.

FOR RESPONDENTS: No. 1 — Farajallah.
Others — Absent — served.

JUDGMENT.

This is an appeal from the Magistrate's Court of Beersheba, acting in its capacity as a Land Court.

The Appellant, amongst other grounds of appeal, objects to the procedure adopted by the Magistrate in that he did not hear the two witnesses who had been summoned through the Court and whose summonses appear to be quite regular. These witnesses did not appear on the day fixed; no adjournment was granted and no steps were taken to ensure their appearance on a future date. The Magistrate proceeded to give judgment without hearing these witnesses.

We hold that the Magistrate erred in making neither a ruling on this point nor taking steps to see that these witnesses would be heard.

The Magistrate's judgment is set aside and the case is remitted to him to hear the evidence of these two witnesses and to give a fresh judgment. Costs will follow the cause.

Delivered this 22nd day of February, 1944.

A/British Puisne Judge.

HIGH COURT No. 116/43.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Leon Merkin. PETITIONER.

v.

1. Director of Lands, Jerusalem,
2. Miriam Merkin. RESPONDENTS.

Discharge of mortgage — Refusal of one co-mortgagor to consent to transaction — Jurisdiction of Land Court — L. C. Ord., secs. 3(d), 5; Courts Ord., sec. 7(b) — Alternative remedy.

Return to a rule *nisi*, issued on the 31st day of December, 1943, directed to the first Respondent, calling upon him to show cause why he should not be ordered to register a discharge of mortgage on the Petitioner's property (Hadera

Block 10054, Parcel 18) without the consent of Respondent No. 2 (Land Registry File No. 1239/42 Hadera); order discharged:—

The Land Court, not the High Court, is competent to decide the rights of the parties where a mortgagor refuses to consent to the discharge of the mortgage on the property of his co-mortgagor.

(*A. M. A.*)

ANNOTATIONS:

1. See note 3 to C. A. 279/42 in 1943, A. L. R., at p. 89 for authorities on the exclusive jurisdiction of Land Courts.

2. The High Court will not interfere where there is another remedy available: — see third paragraph of annotations to H. C. 147/42 in 1943, A. L. R., at p. 36; *cf.* H. C. 111/43 (*ante*, p. 30) and note 2.

(*H. K.*)

FOR PETITIONER: S. Felman.

FOR RESPONDENTS: No. 1 — A/Solicitor General — (Hogan).
No. 2 — Sommerfeld.

ORDER.

This is the return to an order *nisi*, directed to the Director of Land Registration, calling upon him to show cause why he should not be ordered to register the discharge of a mortgage on certain land belonging to the Petitioner. The learned Acting Solicitor General has shown cause on behalf of the Director of Lands who is the first Respondent to this petition. Dr. Sommerfeld has shown cause on behalf of the second Respondent.

It seems that the Petitioner is the husband of the second Respondent and that there have, unfortunately, been matrimonial disputes between them. The Petitioner and the second Respondent had executed jointly and severally a mortgage in the sum of LP. 500 to the order of a certain person; but subsequently the mortgage was transferred to another person, Mr. Nahum Isaac Merkin, who is, I am told, the brother of the Petitioner. The present mortgagee had expressed his willingness to release the mortgage on the property of the Petitioner without renouncing his claim for the debt due to him by the Petitioner and the second Respondent. The second Respondent refused to give her consent to this discharge and the Registrar of Lands of Haifa, and later the Director of Lands, to whom the matter had been referred, refused to register the discharge unless the consent of the second Respondent had been previously obtained. It is unnecessary and it would be, I think, undesirable to deal with all the matters argued before me.

Mr. Felman, who appeared on behalf of the Petitioner, has argued that there is involved herein no question of the declaration of the rights

of parties but merely a question of law and that, as the Director of Land Registration has erred in law, and has taken up a mistaken attitude, he, Mr. Felman, is entitled to have the matter decided in this Court as the only Court to which he can come.

In my view, however, the person against whom his complaint is really directed is the second Respondent. It seems tolerably clear that there is here involved a dispute between the Petitioner and the second Respondent as to whether the second Respondent is justified in resisting the Petitioner's claim to have the land register cleared, so far as the present Petitioner is concerned, of any registrable encumbrance in his name, and at the expense of or to the possible detriment of the second Respondent. In this state of affairs it seems impossible to say that the Director of Land Registration has erred in his refusal. The Petitioner's remedy would seem to be found in action such as is contemplated by section 3(d) of the Land Courts Ordinance. I refer in particular to the words in section 3(d):—

> "where there is a dispute as to the ownership of the land or any rights in or over the land".

In the event of a Land Court giving judgment then the instructions of the Land Court will be carried out as provided for by section 5 of the Land Courts Ordinance. Should the Department of Lands refuse to perform the statutory duties prescribed by section 5, any person aggrieved could, no doubt, come to the High Court under section 7(b) of the Courts Ordinance, 1940. In my view, the present Petitioner has an alternative remedy. I, accordingly, hold that this petition fails and that the order *nisi* must be discharged. The Petitioner will pay to each of the first and second Respondents a sum of LP. 10.— as fixed (or inclusive) costs.

Delivered this 7th day of February, 1944.

British Puisne Judge.

CIVIL APPEAL No. 224/43.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF:—

The Superior of Notre Dame de France.
(Péres Augustine de l'Assomption)
Jerusalem. APPELLANT.

v.

1. The Attorney General,
2. The Municipal Corporation of Jerusalem. RESPONDENTS.

Adjournments — Difficulty in obtaining certified documents from abroad — Rates and Taxes (Exemption) Ord., sec. 15(b) — Document available against two defendants.

Appeal from the judgment of the District Court, Jerusalem, dated the 12th day of June, 1943, in Civil Case No. 93/42, allowed and case remitted:—

It is improper to strike out a case against one defendant, for lack of written evidence, and allow an adjournment for the production of such evidence against a second defendant — the effect of the evidence being the same against both defendants.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 126/43 (10, P. L. R. 147; 1943, A. L. R. 559) for another instance of the Treaty of Mytilene not being properly proved.

Note, however, the *dictum* of Edwards, J., in the above case (in 1943, A. L. R., at p. 563): "In any event, even if we were to look at the copy of the Treaty, I do not think that it would affect matters, in view of the terms of the Rates and Taxes (Exemption) Ordinance, 1938, which has made the whole matter statutory".

(*H. K.*)

FOR APPELLANT: Abcarius, Cattan and Bordcosh.

FOR RESPONDENTS: No. 1 — Baker.
No. 2 — S. Said.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem. The matter concerns an action brought under section 15(b) of the Rates and Taxes (Exemption) Ordinance, 1938, claiming exemption from taxation due to the Government of Palestine and from rates payable to the Municipal Corporation of Jerusalem.

As against both Defendants in the Court below the case for the Plaintiff depended upon a certain treaty of Mytilene that is alleged to have been made between the Turkish Government and the Government of France in 1901.

At the Court of trial the Plaintiff was faced with a certain technical difficulty in that he was unable to produce either the original of the treaty or an authenticated copy. Thereupon Saba Eff. Said — quite properly — submitted that no case had been made out against him. The Attorney General on the other hand was prepared to agree to the request of counsel for Appellant for an adjournment to enable either

the original or more probably an authenticated copy of this treaty to be produced.

In the result the learned Judge dismissed the case against the Municipality on the ground that there was no case to answer, but granted an adjournment against the Attorney General, the first Respondent.

It seems to us, with all respect to him that that is not in accordance with the correct practice. Quite apart from the merits of this case, in which it may very well be that the Appellant will have difficulties in establishing his case, in theory his case against both Defendants depends on this same document — this treaty; and if, in fact, this treaty is admitted as against the first Defendant then eminently such weight as can properly be attached to that treaty as evidence would also become admissible against the second Defendant, the Municipality. We, therefore, think that the better practice would have been for the Court to refrain from striking out the case as against the Municipality.

The judgment as regards the Municipality must, therefore, be set aside and the case remitted to the District Court to hear as against both Defendants according to law. No doubt the learned Judge will take into consideration the fact that in the event of any fresh evidence being given against the Municipality during the course of the proceedings, they will be in a position to call such rebutting evidence as they think fit. In the circumstances we think that the fair order is that the costs will be in the cause, the costs of this appeal to be on the lower scale and to include an advocate's fee of LP. 10 to each of the Respondents separately and one fee of LP. 10 for the Appellant.

Delivered this 17th day of December, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 149/43.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Michael Tewfiq el-Safadi. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Road transport offence — Consolidation of criminal cases — M. C. P. R.

261(*a*) — *R. T. R.* 11(*c*) — *Previous convictions — Sentence, suspension of licence.*

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated the 18th of October, 1943, in Criminal Appeal No. 64/43, dismissed but sentence reduced:—

A number of charges which may be tried together under M. C. P. R. 261(a) may be so tried even if "consolidated" from a number of files against the same accused if the joinder is not prejudicial to the accused, as when it is made before the accused can cross-examine the first witness.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* CR. A. 77/41 (1941, S. C. J. 317; 10, Ct. L. R. 6) where the accused was asked to plead to two charges which were, however, thereafter tried separately.

2. On proof of previous convictions *vide* CR. A. 55/24 (C. of J. 586) and CR. A. 52/40 (7, P. L. R. 286; 1940, S. C. J. 166; 8, Ct. L. R. 5); see annotations in 1940, S. C. J., at p. 166 for the law in England.

(*H. K.*)

FOR APPELLANT: Asal.

FOR RESPONDENT: Junior Government Advocate — (Salant).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem in its appellate capacity, dismissing an appeal from one of the learned Magistrates of Jerusalem.

The Magistrate had convicted the Appellant of three offences contrary to the Road Transport Ordinance and rules thereunder, and had imposed a fine of LP. 5 and in default of payment ordered him to undergo one month's imprisonment in respect of each three offences. He also ordered suspension of the Appellant's driving licence for a period of twelve months as from the 23rd August, 1943. The Appellant has now appealed to this Court against these convictions and sentences.

The first ground of appeal is that the Magistrate consolidated the three criminal cases. It seems that three criminal case files had been opened in the Magistrate's Court of Jerusalem and each had been given a number. It also appears that before the trial commenced the prosecution asked that the second charge be tried along with the first one and that this was done, and that very shortly after the first prosecution witness had started to give evidence the Magistrate read all three charges to the Accused who pleaded not guilty. The Magistrate wrote on the record, "The Accused and the prosecution were informed that the evidence that was heard and will be heard, will be used for all the three cases". It will be noticed that the time for cross-exa-

mination of the first witness for the prosecution had not then arrived and in the circumstances it is impossible to say that the Appellant suffered any prejudice. The Appellant's advocate has argued that it is not accurate to use the word "consolidate" in connection with criminal cases. From a linguistic point of view this may be true; but, so long as there was a compliance with the provisions of Rule 261(a) of the Magistrates' Courts Procedure Rules, 1940, the Magistrate was entitled to try all three charges together. We think that the series of acts with which the Accused was charged were so connected as to form the same transaction. This ground of appeal, accordingly, fails.

At the hearing before us a fresh point was taken for the first time, namely, that the Magistrate was not justified in holding on the evidence, that there had been a contravention of rule 11(c) of the Road Transport Rules. We have perused the record and we consider that the Magistrate was justified in finding that there had been a contravention of this rule. This ground of appeal also fails.

The last ground of appeal is that the sentence and in particular the order suspending the Appellant's driving licence was excessive. After the Accused was convicted the prosecution alleged that the Accused had been convicted on about 54 previous occasions and it was also said that his licence had been issued as recently as 1941. It is clear from the Magistrate's record that the Magistrate must have put to the Accused the question whether he admitted those previous convictions because the Magistrate records the following reply by the Accused — "About 54 offences more or less. I ask mercy. I work with Sam'an el-Zamiri".

The Appellant's advocate, Shafiq Eff. Asal, argued before us that there is nothing to show that the Magistrate had before him the list of previous convictions or a list showing the nature of the offences and the various sentences that had been passed. This may be so; and, while it is eminently desirable that as a rule the list of previous convictions should be carefully perused, it was scarcely necessary in the present case because the Accused himself admitted about fifty four offences more or less. It is said that there is nothing to show that these offences were offences contrary to the Road Transport Ordinance; but we think that it is obvious from the Accused's reply that they must have been offences contrary to that Ordinance. The Magistrate in ordering suspension of the Appellant's driving licence considered that his conduct in the case before him coupled with the fact that he had admitted 54 previous offences, all committed during a relatively short

time, showed him to be an irresponsible driver and a breaker of laws. We think that the Magistrate was justified in taking this view. We think, however, that in the circumstances the period of suspension was perhaps unduly long. We, accordingly, vary the judgment of the Magistrate by ordering suspension of the licence for a period of six months as from the 24th of August, 1943. Subject to that variation the appeal is dismissed and the convictions and sentence are confirmed.

Given this 19th day of January, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 142/43.

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

BEFORE : Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF:—

Abdalla Muhammad Salem el Wawi. APPELLANT.

v.

The Attorney General. RESPONDENT.

Witness going back on his statement made to Police — Prosecution under sec. 4, Criminal Procedure (Evidence) Ord.

Appeal against judgment of District Court, Jerusalem, allowed and conviction set aside:—

To obtain a conviction under sec. 4, Criminal Procedure (Evidence) Ordinance there must, as a rule, be sufficient material for trial Court to find that there was an intention to deceive either the Officer (or other authorised person) who took down the original statement, or the Court.

(*M. L.*)

ANNOTATIONS: On conviction under sec. 4 of the Criminal Procedure (Evidence) Ord. see CR. A. 144, 145/41 (9, P. L. R. 20; 11, Ct. L. R. 14; 1942, S. C. J. 70).

(*A. G.*)

FOR APPELLANT: Nazal.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an application for leave to appeal against a conviction by the District Court of Jerusalem, of giving false evidence, contrary to Section 4 of the Criminal Procedure (Evidence) Ordinance. We have treated the application for leave as the appeal itself.

It is suggested that the Appellant in this case, who witnessed a scene of violence, made a statement to a Corporal of Police to the effect that the person who ultimately died was hit by a certain other person. At the proceedings before the Magistrate the Appellant said that it is true that he saw the woman being hit but that he is not prepared to say who hit her. He also suggested that the Corporal had taken the statement down incorrectly.

Assuming the facts at their worst against the Appellant, that is to say that he said to the Corporal that he saw the person who hit and that he said to the Magistrate that he did not see the person who hit, the question is as to whether, on those facts, unsupported by any other fact which would seem to indicate any sinister design in this case, there was sufficient material for the trial Court to find that there was an intention to deceive — to deceive either the officer who took down the original statement, or the Magistrate.

While being careful to avoid laying down any general principle, we are of opinion that in this particular case there was not sufficient material for the Court of trial to draw the inference that there was any intention to deceive in either of these statements.

That being so, we are of opinion that the appeal must be allowed and the conviction be set aside.

Delivered this 29th day of November, 1943.

British Puisne Judge.

CIVIL APPEAL No. 283/43.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Rachel Halperin. APPELLANT.

v.

1. The Attorney General, for and on behalf of the Government of Palestine,

2. Muhammad Mubada Khalifa & 10 ors. RESPONDENTS.

Failure of appellant to cite all parties to proceedings — Scope of Rule 333, Civil Procedure Rules — Precedent.

Appeal from the decision of the Land Settlement Officer, Haifa Settlement Area, dated the 28th day of June, 1943, in Case No. 2/Daliyat el Karmel, dismissed:—

1. Failure on appeal to cite and serve person who was a party to proceedings before trial Court — fatal to appeal.

2. a) Rule 333, Civil Procedure Rules, applies only when Notice of Appeal has been filed.

b) Where Notice of Appeal does not include a party who ought to be included — Rule 333, Civil Procedure Rules, cannot be relied on.

3. Court of Appeal — bound by its previous decisions.

(*M. L.*)

FOLLOWED: C. A. 89/40 (7, P. L. R. 258; 8, Ct. L. R. 150; 1940, S. C. J. 152); C. A. 113/41 (8, P. L. R. 323; 10, Ct. L. R. 128; 1941, S. C. J. 313); C. A. 118/42 (12, Ct. L. R. 133; 1942, S. C. J. 646).

ANNOTATIONS: In addition to cases followed see C. A. 203/42 (10, P. L. R. 17; 1943, A. L. R. 259) and C. A. 191/43 (10, P. L. R. 500; 1943, A. L. R. 669).

(*A. G.*)

FOR APPELLANT: F. Atalla.

FOR RESPONDENTS: No. 1 — Assistant Government Advocate — (Salant).
Nos. 2—8 — Mu'ammar.
No. 9 — Absent — served.
Nos. 10—12 — Absent — Served to appear on 10.1.44 when the appeal was originally before the Court.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Haifa. Mr. Mu'ammar, on behalf of Respondents Nos. 2—8, has taken the preliminary objection that a certain person, Adeeb Habayeb, who was 3rd party No. 8 before the Land Settlement Officer, has not been cited and has not been served as a party to this appeal. He has relied on the decisions of this Court in Civil Appeals Nos. 113/41, 89/40 and 118/42. Fouad Bey Atalla, for the Appellants, has suggested that this person, Adeeb Habayeb, was never a claimant and was never regarded as a party by the Land Settlement Officer. We are unable to accept this contention because his name clearly appears as a party not only in the record of proceedings but also in the decision of the Land Settlement Officer who subsequently referred to this 3rd party No. 8 in para. 9 of the decision as follows:—

> "The 3rd party No. 8 must submit a formal claim within 15 days of this decision which is limited to parcel 34, supported by a survey with marked boundaries properly referred to that parcel. In the event of failure to do so the parcel will be recorded in the name of the High Commissioner by virtue of Section 29 of the Land (Settlement of Title) Ordinance."

His name also appears in para. 3 of the decision where the Land Settlement Officer says:—

> "The only other private claim to parcel 34 is that of 3rd party No. 8. The claim is at the moment extremely vague, it has not been properly defined in relation to the parcel. Since it does not conflict with the other parties in this case, it will be dealt with as a separate issue."

Fouad Bey Atalla has, in the alternative, asked that we grant an adjournment to enable him to remedy this defect. When one looks carefully at Rules 313 and 333 it is to be observed that Rule 333 applies only when Notice of Appeal has been filed. In this case no Notice of Appeal has been filed which includes the 3rd party No. 8. In these circumstances the Appellant cannot rely on Rule 333. We are bound by the previous decisions of this Court which have been cited and we, accordingly, have no alternative but to uphold the preliminary objection.

The appeal is, accordingly, dismissed. The Appellant must pay fixed (inclusive) costs — two sets of costs namely one set to the 1st Respondent and another set to Respondents Nos. 2—8 of LP. 5.— each.

Delivered this 14th day of February, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 141/43.

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

BEFORE: Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF :—

Muhammad Salim Awad Tahhan. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Plea of guilty — Court taking into consideration previous convictions referred to by prosecution.

Appeal from District Court, Haifa, in Criminal Case 181/43 allowed; sentence reduced:—

Before taking previous convictions into consideration trial Court must either obtain admission of accused that those convictions have, in fact, been sustained or call upon prosecution to prove them and a note to that effect should appear on the record.

(*M. L.*)

ANNOTATIONS: On sentence in case of previous convictions see CR. A. 49/42 (11, Ct. L. R. 139; 1942, S. C. J. 228) and annotations. On proof of previous convictions see CR. A. 149/43 (*ante*, p. 78) and note 2.

(*A. G.*)

FOR APPELLANT: O. Saleh.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, convicting the Accused of causing grievous harm *contra* section 238 of the Criminal Code Ordinance. In passing sentence the learned Relieving President referred to the fact that the Appellant had had ten previous convictions. As to that, they do not seem to be of a very serious nature in themselves and also it does not appear from the record that these previous convictions were either admitted by the Accused or proved by the prosecution. It seems to us that a trial Court cannot be too careful before taking previous convictions into consideration either to obtain the admission of the accused person that those convictions have, in fact, been sustained, or to call upon the prosecution to prove them, and a note to that effect should appear on the record.

In the circumstances of this case, we have regard to the attitude very fairly adopted by Mr. Salant for the Crown and we are of opinion that the sentence is perhaps on the high side. We think, therefore, that justice will be done by reducing the sentence to one of two years' imprisonment to run from the date of conviction.

Delivered this 29th day of November, 1943.

British Puisne Judge.

HIGH COURT No. 119/43.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Ahmad Hassan Hilweh. PETITIONER.

v.

The Food Controller, Jerusalem. RESPONDENT.

Order of confiscation under sec. 8 of Food Control Ordinance — Charge

of dealing in commodities without a licence — Power of Magistrate to order confiscation under sec. 5 of Food Control Ordinance — Discretion of Food Controller — Hoarding and concealing — Construction of penal statute — Forfeiture under conviction — Possession of forfeited goods — Seizure of goods by police.

Return to an order *nisi*, issued on the 6th day of December, 1943, directed to the Respondent, calling upon him to show cause why he should not deliver to Petitioner 179 sacks and 119 boxes of soap and 11 sacks of soda, or to sell them and give their proceeds to Petitioner; order discharged:—

1. High Court not entitled to question acts of Food Controller if he acted within the four walls of sec. 8 of Food Control Ordinance and existence of *mala fides* not proved.

2. Strict construction of a penal statute means that in cases of doubt as to the meaning of a particular word or section, the court should lean towards such interpretation as will be more favourable to the accused or the subject.

FOLLOWED: Liversidge *v.* Anderson (1941) 3 A. E. R. p. 338; Point of Ayr Collieries Ltd. *v.* Lloyd George (1943) 2 A. E. R. p. 546; Carltona Ltd. *v.* Commissioners of Works (1943) 2 A. E. R. p. 560; H. C. 78/43 (10, P. L. R. 526; 1943, A. L. R. 631); H. C. 92/43 (10, P. L. R. 513; 1943, A. L. R. 697).

ANNOTATIONS:

1. On principles guiding High Court in cases against Food Controller see H. C. 110/43 (1943, A. L. R. p. 791) and H. C. 92/43 (*supra*) with annotations.

2. H. C. may question decision of Public Officer if reasons for decision given: H. C. 77/28 (1, P. L. R. 353; C. of J. 990).

(*A. G.*)

FOR PETITIONER: Shama.

FOR RESPONDENT: Solicitor General — (Griffin).

ORDER.

This is the return to an order *nisi*, calling upon the Respondent to show cause why an order made by him under Section 8(1) and 8(2)(a) of the Food Control Ordinance, 1942, confiscating 179 sacks and 119 boxes of soap, amounting in all to about 17 tons, should not be set aside and why he should not be called upon to deliver to the Petitioner these sacks and boxes of soap. The order *nisi* originally contained reference to certain sacks of soda; but I am told that I need not concern myself with these as they have already been returned to the Petitioner.

The learned Solicitor General has appeared and shown cause on behalf of the Food Controller who has sworn an affidavit which is before me. There is also before me an affidavit by an Inspector of Police, called Fadeel Jarjoura.

It seems that originally the Petitioner was charged criminally before the learned Chief Magistrate of Haifa, sitting at Safad and that eventually he pleaded guilty to four charges of dealing in a certain commodity, namely, soap, without a licence, and was fined certain sums in respect of each of those four charges.

By the Defence (Application of Food Control Ordinance, 1942) Regulations 1942, Regulation 2, and schedule thereto, the Food Control Ordinance has been applied to soap. It seems that at the trial before the Chief Magistrate there were originally charges of concealing commodities but at the close of the case for the prosecution the Magistrate found that there was no case to answer on the charge of concealing. The Petitioner thereupon pleaded guilty to the charges of dealing in commodities without a licence. After the Petitioner had been convicted and sentenced, the Prosecutor submitted that the Magistrate had power to order confiscation of the soap under Section 5 of the Food Control Ordinance 1942. The Chief Magistrate said that he was in some doubt as to whether he had power to order confiscation under what he called "the old law" and he, therefore, made no order and said that the Food Controller or the Defendant, that is, the present Petitioner must "take such steps as they think proper". It seems that an appeal against this decision of the Chief Magistrate was heard by the District Court of Haifa in its appellate capacity and was dismissed. Section 8 of the Food Control Ordinance, 1942, is clear in its terms and seems to give the Food Controller complete discretion.

Before dealing with the various points raised by the Petitioner, I think that it will be desirable to say that I agree generally with the statement of the law as put forward by the learned Solicitor General, namely, that, provided that the Food Controller has acted within the four walls of Section 8 and provided also that the existence of *mala fides* has not been proved, this Court is not entitled to question his acts. There is a long list of decided cases to this effect, among them being, Liversidge *v.* Anderson (1941) 3 A. E. R., p. 338, Point of Ayr Collieries Ltd. *v.* Lloyd George (1943) 2 A. E. R., p. 546, Carltona Ltd. *v.* Commissioners of Works (1943) 2 A. E. R., p. 560, and in Palestine H. C. No. 78/43, Vol. 10 P. L. R., p. 526 and H. C. No. 92/43, P. L. R. Vol. 10, p. 513. The Petitioner's advocate has suggested that these cases, being cases dealing with Defence Regulations, have no application to powers exercised under the Food Control Ordinance. I do not think that there is any substance in this contention because the Food Control Ordinance is as much war time legislation as Defence and Emergency Regulations.

In his affidavit the Food Controller has sworn that he had formed the opinion that the quantity of 17 tons of soap acquired by the Petitioner, a garage owner, who had no licence to trade in soap and had been convicted for illegal dealings in soap, was unreasonably large for his domestic requirements and was so great that its possession by the Petitioner constituted hoarding within the meaning of Section 8. It seems to me to be impossible for this Court to question the correctness of this opinion. I would merely say that a distinction seems to be drawn in the Ordinance between hoarding and concealing. The Petitioner's advocate has argued that there can be no hoarding without concealing and that, as his client was not convicted of concealing, it cannot be said that he hoarded. He has referred to a dictionary definition of hoarding; but, whatever one may find in dictionaries, it must be remembered that there is no finding by the Magistrate that the Petitioner had not in fact hoarded. The mere fact that in the Criminal Trial all that happened to the Petitioner was that he was convicted of the offence of dealing in soap without a permit, does not necessarily mean that the facts show that he did not hoard. The Petitioner's advocate contends that once the Food Controller has given his reasons for his order, this Court has power to enquire into those reasons. This may be so; but it seems to me that the reasons given in paragraph 3 of his affidavit are quite sufficient to show that the Food Controller did apply his own mind to the matter and that he arrived at an honest opinion both with regard to the question of hoarding and with regard to whether he should confiscate the soap under the powers given to him by Section 8(2)(a). It seems to me impossible for this Court to say that his reasons were not sound.

It is next said that the Food Control Ordinance is highly penal and must be strictly construed. When it is said that a penal statute should be strictly construed what is meant is, that in cases of doubt as to the meaning of a particular word or section, this Court should lean towards such interpretation as will be more favourable to the Accused or the subject. That aspect does not arise here.

It is next said that because there was a prosecution in a Criminal Court that should have ended the matter so far as forfeiture was concerned and that the Food Controller should rest content with the order of the Criminal Court. Now, had the Criminal Court decided that it had power to order confiscation and had then applied its mind to the question of the reasonableness or desirability of ordering confiscation and had come to the conclusion that it was unreasonable or undesirable it might well be that the Petitioner could argue that the

Food Controller in subsequently availing himself of powers given to him by Section 8 was aggrieved by the action of the Magistrate, and that, therefore, his action in still proceeding to make an order for confiscation showed *mala fides*. That, however, is not the case here. The Magistrate obviously took a grave view of the offence to which the present Petitioner had pleaded guilty. He refrained from making an order of confiscation because he had doubts as to his powers so to do. It seems to me that the power exercised by the Food Controller was quite distinct from any powers given to Criminal Courts. It is also said that the Petitioner was punished twice. I do not think this is correct because he was not fined twice nor was he sent to prison twice. He was not even sent to prison once. It cannot strictly be said that he was punished twice for the offence although his being deprived of the subject-matter in respect of which an offence had been committed, doubtless entailed considerable loss to him in addition to the loss suffered by him by reason of having to pay a fine. It is also said that the Food Controller did not take possession of the soap. It seems that the Accused was convicted on the 4th of May, 1943, and that the appeal to the District Court was dismissed on the 16th of September, 1943. By a letter dated 11th of June, 1943, the Food Controller informed the Petitioner that he had ordered confiscation of the soap.

Petitioner's argument is that it was the Police who had taken possession of or had seized the soap under Section 5. It seems to me, however, that the complaint of the Petitioner is that the Food Controller, at any rate, after the dismissal of the appeal on the 16th of September, refused to hand back to the Petitioner the soap. It is clear, therefore, that after the 16th of September the Food Controller had taken possession. By this date the Police Prosecutor had no longer any interest in the matter. Had the Food Controller, after the 16th of September, returned the soap to the Petitioner, the Petitioner would not have complained (unless, perhaps, he claimed damages) so that we can conclude that after the 16th of September there was a taking of possession under Section 8(1)(a) by the Food Controller and that it is that act of taking possession of which the Petitioner now complains.

For all the foregoing reasons the order *nisi* is discharged with fixed (inclusive) costs of LP. 10.— to the Respondent.

Given this 27th day of January, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 9/44.

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

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

IN THE APPEAL OF:—

Muhammad Fahed el Abbas. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder, Identification — Whether identification parade necessary — Evidence not on oath, weight and admissibility — Premeditation — Circumstantial evidence where various inferences may be drawn.

Appeal from the judgment of the Criminal Assize Court, sitting at Haifa, dated the 15th day of January, 1944, in Criminal Assize Case No. 42/43, whereby Appellant was convicted of murder contrary to section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death, allowed; conviction and sentence for manslaughter substituted:—

1. It is unnecessary to hold an identification parade where the witness is acquainted with the accused.

2. Evidence of identification at a parade is admissible although the witness does not, in Court, identify the accused on oath.

3. If the trial Court fails to consider a possible alternative inference which might be drawn from the facts, a conviction based on the inference drawn by that Court will be set aside.

(*A. M. A.*)

ANNOTATIONS:

1. On the question of identification see Halsbury, Vol. 9, *p.* 184, note (*h*) and Vol. 13, *p.* 605, note (*k*).

Cf. CR. A. 30/42 (1942, S. C. J. 221; 11, Ct. L. R. 206) wherein it was held that an identification at the preliminary enquiry only was "quite useless."

2. On the question of inferring premeditation see, *e. g.*, CR. A. 57/40 (7, P. L. R. 359; 1940, S. C. J. 442; 8, Ct. L. R. 225) and cases cited in note 3 at 1940, S. C. J. 442, CR. A. 4/42 (9, P. L. R. 44; 1942, S. C. J. 19), CR. A. 12/42 (1942, S. C. J. 74; 11, Ct. L. R. 18), CR. A. 41/42 (1942, S. C. J. 203), CR. A. 98/42 (9, P. L. R. 390; 1942, S. C. J. 981), CR. A. 39/43 (10, P. L. R. 212; 1943, A. L. R. 357).

3. On the position of the Court of Criminal Appeal in respect of inferences drawn, resp. not drawn by the trial Court, *cf.* CR. A. 101/43 (10, P. L. R. 506; 1943, A. L. R. 714) and cases cited in annotations at 1943, A. L. R., at p. 715.

4. On the value of circumstantial evidence in criminal cases see CR. A. 124/43 (10, P. L. R. 559; 1943, A. L. R. 660) and note 2 in 1943, A. L. R., at p. 661; *cf.* CR. A. 125/43 (10, P. L. R. 539; 1943, A. L. R. 725).

(*H. K.*)

FOR APPELLANT: Alami and El Yehya.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize, sitting at Haifa, convicting the Accused of murder.

The facts of the case have been set out with his usual care by the trial Judge, and it is unnecessary to refer to them in any detail. The principal matter which has been raised on appeal is the question as to whether the Accused was adequately identified as being the person concerned in these events. The first point is with regard to one of the principal prosecution witnesses, a man called Zeidan, a taxi-driver, that the evidence of identification was not sufficient. It is suggested that an identification parade should have been held in his case; and certain English authorities were cited in which the learned Judges of the Court of Criminal Appeal in England expressed the opinion that the correct method of identification where a man is picking out somebody with whom he is previously unfamiliar is by way of an identification parade. In this particular case the learned Judge clearly applied his mind to the question as to whether or not an identification parade should have been held and actually expressed the opinion that it might have been better if one had been held; but he goes on to consider the matter and to give his reasons as to why he thinks that the absence of an identification parade in this particular case was not fatal. It appears that the witness Zeidan in fact knew the Accused by sight — at least there was evidence on which the learned Judge was entitled to draw the inference that Zeidan knew the Accused by sight. And in fact on the day following the incident he picked out the Accused from other hospital patients in the hospital.

Having regard to that, we think that there was material upon which the learned Judge was entitled to hold, as he did, that the identification of the Accused by Zeidan was sufficient. And, of course, it stands to reason that an identification parade loses its value and its significance if, in fact, the witness concerned is already acquainted with the person who is to be picked out. If the evidence of Zeidan as to identification is regarded as adequate, then the objections as to the evidence of identification given by two other witnesses — the benzine seller and one other man — become of less importance.

With regard to the witness Reuben Schwartzbord, it appears that at an identification parade a few days after the incident in question he picked out the Accused as having been in Zeidan's taxi on the 12th

of May. And when the matter came to the Court of Criminal Assize the witness said that while he picked this man out at the identification parade, he was not absolutely certain (or words to that effect) that this was the man whom he saw in the taxi. Moussa Eff. in a powerful argument, cited to us an English case in which one of the Judges stated that the prosecution cannot rely on evidence of identification not on oath when their attempt at identification on oath has failed. The context, of course, in which those words were used in that case, as was pointed out by Mr. Salant for the Crown, was very different to the circumstances of the present case. And, as Moussa Eff. himself conceded, there can be no doubt that the evidence as to what happened at an identification parade is certainly admissible although the weight to be attached to it naturally varies according to the circumstances. But the learned Judge again appears to have appreciated the difficulty in the matter and to have applied his mind to it. And therefore, the fact that he attached importance and credence to Reuben's evidence does not seem to us to be a matter which can avail the Appellant. Then there was also the question of this watch which might or might not have an innocent interpretation, but the learned Judge chose to draw an unfavourable inference to the Accused from that circumstance, and we certainly cannot say that he was wrong in so doing.

We consider, therefore, that looking at the evidence as a whole, there was sufficient evidence to show that the Accused and the deceased were the persons in this taxi on that day and that the Accused was, in fact, the last person seen with the deceased. Other inferences could no doubt have been drawn from all this evidence, but we think that the learned Judge was entitled to infer that it was in fact the Accused who shot the deceased. With regard to that part of the matter, we think there can be no possible complaint as to the judgment.

We now come to the question of premeditation, which is very much more difficult. As to that, it must be remembered that the prosecution case is that the Accused lured the deceased on a false story about obtaining some stolen tyres to a secret and hidden place where he shot him. And it is clear from the judgment that it was on that version of the facts that the learned Judge came to the conclusion from the other circumstances which are set out in his judgment, that the elements of premeditation were present.

As the learned Judge himself pointed out when considering the earlier matter of the identification, the evidence against the Accused is purely circumstantial, and he went on to say — which is undoubtedly true — that circumstantial evidence, if it leads to one irresistible in-

ference, is, in a sense, the strongest and most reliable type of evidence. But of course that only applies if, in fact, there is only one inference which reasonably and irresistibly should be drawn from those facts.

Speaking for myself, I should, perhaps, have felt a certain difficulty, in view of the powerful argument of Mr. Salant in pointing out that the inferences to be drawn are really for a trial Court, in coming to any different view from the trial Judge. But both my brothers in this matter have formed a definite view, with which I certainly am not disposed to disagree, and that is, that while the inference that the learned trial Judge drew was one possible inference to be drawn from the facts, there were certain other inferences which were at least as likely to be the true ones to draw. And one which, of course, clearly occurs to the mind is this, that the story of the luring is, perhaps, less likely than the fact that the expedition to steal these two tyres was a perfectly genuine expedition of theft up to the moment of the arrival on the scene. It appears that the Accused, the deceased and the other witnesses concerned, are people of baddish character, and there seems nothing inherently unlikely in their going out on an expedition of stealing, a circumstance which is re-enforced by a matter that was not referred to in any great length by counsel before us, and that is that one tyre was actually found subsequently near the body. There is also, of course, the fact that apparently these men were associating together and were friends, and that the suggested motive of enmity was a very stale one; and the circumstance that the Accused himself, if he had intended to lure the deceased there, would have been perhaps unlikely to have mentioned to another witness, one of the prosecution witnesses, that he, in fact, was going there to get some tyres with the deceased. As I say, it seems to my brothers to be at least an equally reasonable inference to draw from the facts of this case, that up to the arrival on the scene there was no evidence that the Accused had any intention to murder. Therefore, if, of course, there is a doubt as to whether the learned Judge drew the correct inference on that matter, then clearly the Accused is entitled to that doubt. It is quite true that even on those sets of facts it would be open to a trial Court to have found an accused person guilty of murder. On that set of facts it might have drawn either inference. But the fact remains that the learned Judge did not consider that aspect of the matter at all, because in arriving at this finding of premeditation he based it upon a different set of facts. And we do not think that it would be proper for us to draw an inference which might or might not be the correct one to draw and which, in any event, would be eminently one for a trial Court to draw.

That being so we think that it must follow that the prosecution have failed to establish the presence of the three elements of premeditation. The Appellant is, of course, entitled to avail himself of that circumstance. We think, therefore, that the conviction for murder cannot be sustained, and we, therefore, substitute a conviction for manslaughter.

In all the circumstances of the case, we all think that the Appellant is fortunate in the ultimate result of his trial, and we think that the least sentence we can pass is one of fifteen years' imprisonment.

Delivered this 2nd day of March, 1944.

A/Chief Justice.

CIVIL APPEAL No. 252/43.

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

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

IN THE APPEAL OF :—

Hassan Muhammad Jum'a el-Kharanba and 20 others. APPELLANTS.

v.

1. The Palestine Jewish Colonization Association, Haifa,
2. The Government of Palestine,
3. Hamdan Hussein Muhammad es Saad and 13 others. RESPONDENTS.

One appeal by several appellants — Binding force of previous decisions of Court of Appeal.

Appeal from the decision of the Land Settlement Officer, Tiberias Settlement Area, dated the 2nd of April, 1943, in Case No. 4/Ghuweir Abu Shusha, dismissed:—

1. Where several appellants are not all claiming same thing separate appeals must be entered.

2. Court of Appeal — bound by its previous decisions.

(*M. L.*)

FOLLOWED: C. A. 203/42 (10, P. L. R. 17; 1943, A. L. R. 259); C. A. 122/43 (1943, A. L. R. 417); C. A. 191/43 (10, P. L. R. 500; 1943, A. L. R. 669).

ANNOTATIONS :

1. Service on Respondents Nos. 2—16 was dispensed with by a preliminary decision reported in 10, P. L. R. 516; 1943, A. L. R. 811.

2. On the first point see cases followed.

3. On the second point see C. A. 273/43 (*ante*, p. 32) and note 1 to C. A. 287/42 (1943, A. L. R. 225).

(*A. G.*)

FOR APPELLANTS: F. Atallah.

FOR RESPONDENTS: No. 1 — A. Levin and Gavison.
Others — Absent — not served.

JUDGMENT.

At the hearing of this appeal from a decision of the Land Settlement Officer, Tiberias, a preliminary objection has been taken on behalf of the first Respondents who are the only Respondents who have been served with notice of this appeal.

The preliminary objection is that there should have been a series of separate appeals on behalf of each of the twenty-one Appellants. Reliance has been placed by Mr. Levin, for the first Respondents, on the following cases, Civil Appeals Nos. 203/42, 122/43 and 191/43. It is unnecessary for us to go into the matter at length; but it is clear that the twenty-one Appellants are not all claiming the same parcel of land. It will be sufficient if we cite one instance which was brought to our notice by Mr. Levin. With regard to block 47, parcels 1—4, claim 33, the present tenth Appellant, Nadwa, claimed one quarter of that plot by registered title, while the first Respondents in claim 23 claimed three quarters of this same parcel also by registered title and the Government of Palestine claimed the whole parcel as *Mewat* and the other Appellants claimed the same parcel as against the tenth Appellant on the basis of revival. The same applies to block 47, parcels 9—11 and block 48, parcels 1—4. We find it impossible to distinguish the facts of this case from the facts of Civil Appeal No. 203/42. We would cite from the judgment in that case:—

> "It seems that in such a case separate appeals should have been entered by each of the persons who disputed the correctness of the original judgment. The only connecting link between them is that each is claiming against the same person.

We are, of course, bound by the decisions in the cases cited. For these reasons the preliminary objection succeeds and the appeal is, therefore, dismissed with costs to the first Respondents to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 10.

Delivered this 16th day of February, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 140/43.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Joseph Shachar. APPELLANT.

v.

The Attorney General. RESPONDENT.

Possession of stolen property — Irregularities of procedure causing no miscarriage of justice — Inference of guilty knowledge.

Appeal from judgment of District Court of Tel-Aviv (Criminal Case 85/43), dismissed:—

1. While general practice is to pass sentence immediately after plea of guilty, fact that accused who so pleaded and who was tried with another accused was not sentenced until after close of proceedings — not such an irregularity as to be a good ground of appeal.
2. Where witness was permitted to be treated as hostile witness it is not in accordance with correct practice to put in, without cross-examining him on it, the statement he made to Police.
3. Irregularity of putting in a previous statement of a witness which should not be accepted — not a successful ground of appeal, if it appears that it has not affected subsequent proceedings, no mention of it made in the addresses of either counsel for defence or for prosecution and no reference at all in judgment.
4. Court of Appeal will not upset finding of fact of trial Court if they think that various elements taken collectively, not individually, were sufficient to justify trial Court to draw the inference which it did.

(*M. I.*)

ANNOTATIONS: On circumstantial evidence and on question of interference with it on appeal see CR. A. 124/43 (10, P. L. R. 559; 1943, A. L. R. p. 660) and note 2. See also CR. A. 123/43 (10, P. L. R. 539; 1943, A. L. R. 725). On proof of elements of offence of receiving see CR. A. 77/43 (10, P. L. R. 471; 1943, A. L. R. 655) and note 2.

On irregularities in accepting evidence see CR. A. 57/43 (10, P. L. R. 291; 1943, A. L. R. 451) and annotations and CR. A. 39/43 (10, P. L. R. 212; 1943, A. L. R. 358). See also CR. A. 45/43 (1943, A. L. R. 323).

(*A. G.*)

FOR APPELLANT: Seligman.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, convicting the Appellant of an offence against section 309 of the Criminal Code Ordinance.

Various points were raised by the Appellant, the first one being that there was an irregularity of procedure in that the second Accused, who was tried with the present Appellant, pleaded guilty but was not sentenced until after the close of the proceedings. While it is, no doubt, true, as stated in the text-books, that the general practice is to pass sentence immediately after the plea, we do not regard that as a successful ground of appeal.

We would add that in this particular case, no possible grievance can arise, owing to the fact that the evidence of the second Accused, who gave evidence for the prosecution, was apparently disbelieved by the Court of trial.

Another irregularity was suggested in that a certain witness Leon Ginsburg was permitted to be treated as a hostile witness and to be cross-examined upon a statement which he had made to the Police. It is, of course, perfectly in order for a witness to be cross-examined as to a statement that he had made, but it appears that in this case no cross-examination, in fact, took place, but the statement was put in. That, of course, is not in accordance with the correct practice, but we do not regard the matter in this instance as of being of any importance, because the statement itself does not seem in any way to have affected the subsequent proceedings. There was no mention of it in the speeches of learned counsel either for the defence or for the prosecution, and is not adverted to at all in the judgment.

That being so we think that that also fails as a ground of appeal.

Now we come to the principal ground, which is that there was no sufficient material for the learned President to come to the conclusion that the Appellant knew the goods in question to have been stolen.

It is true that in his judgment the learned President only makes a general finding that from all the evidence he is of the opinion that the Appellant knew that the goods were stolen, and he does not state the specific matters upon which he relies for that finding. But in the course of the judgment he sets out at considerable length various elements which we think collectively are sufficient to justify him in drawing the inference which he did. The elements in question are that it was generally known that a substantial theft of furs had taken place in Tel-Aviv recently. There is no doubt that the goods were, in fact, stolen and found in the possession of the Appellant; and there was, in fact, no dispute as to that. There is the fact that he consigned these furs to Jerusalem under a fictitious name, and that he hired and used another room for the purpose of storing and exhibiting these furs to potential buyers. There is also the fact that on his own statement,

he paid LP. 2000 in cash to a certain man, who was not produced as a witness, without taking any document in connection with the transaction. It is also a fact that the man from whom he alleges he bought the furs told the Appellant that he had bought them at an auction sale of the Customs Department in Haifa, but apparently the Appellant thought fit to take no document of any kind from this man to show that he had any title to these goods.

Each of those elements individually might, of course, be capable of explanation, but taking them collectively, we think that there is sufficient material for the Court, if it wishes, to draw the inference that the Appellant knew that these furs were stolen.

For these reasons we think that the appeal must be dismissed and the conviction confirmed.

As to sentence, having regard to the seriousness of this offence, we certainly do not think that a sentence of one year's imprisonment is in any way excessive. As to the hundred pounds compensation to be paid under section 43, we see no reason to interfere with that either. We understand that the Court below made an order that the Appellant should have special treatment, and we see no reason to interfere with that order.

The appeal must, therefore, be dismissed and the conviction and sentence confirmed. The sentence to run from to-day.

Delivered this 30th day of November, 1943.

British Puisne Judge.

MISCELLANEOUS APPLICATION No. 75/43.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Raja Taher Hussein & 2 ors. APPLICANTS.

v.

Ali Bey el Khalil. RESPONDENT.

C. P. R. 330 — Appeal from an order dismissing the action — C. P. R. 21, sec. 6 L. S. Ord. — Application to British Judge of S. C. to determine whether application for leave necessary — Application not in

accordance with provisions of C. P. R., Part XXXI, C. P. R. 317, Misc. Application 56/43 distinguished.

Application under the second part of Rule 330 of the Civil Procedure Rules, 1938, dismissed:—

Rule 330 cannot be invoked in order to receive legal advice whether an appeal lies as of right or whether leave is required. The rule applies when the Registrar refuses to accept the appeal for filing.

(*A. M. A.*)

DISTINGUISHED: Misc. Appl. 56/43 (10, P. L. R. 465; 1943, A. L. R. 520).

ANNOTATIONS:

1. For other applications under Rule 330 of the C. P. R. see C. A. 252/43 (1943, A. L. R. 811) and note 3 thereto.
2. The appeal itself is reported *post*, p. 100.

(*H. K.*)

FOR APPLICANTS: S. Khadra.

FOR RESPONDENT: Eliash.

ORDER.

This application purports to have been made under Rule 330 of the Civil Procedure Rules, 1938. The facts briefly are as follows:—

The present Applicants filed an action for prior purchase (*awlawieh*) in the Land Court of Haifa. Their advocate informs me that a motion under Rule 21 was dismissed by that Court, but later a further motion, namely Haifa Land Court Motion No. 282/43, was made for the dismissal of the action under Section 6 of the Land (Settlement of Title) Ordinance. On the 26th of October, 1943, the learned Relieving President of the Land Court, granted that application and dismissed the action before issues were framed.

The present Applicants, feeling aggrieved by that decision, wish to test it in this Court, but they appear to be in some doubt as to whether an appeal lies as of right or whether leave to appeal is necessary.

The wording of the application before me is that "a British Judge of the Supreme Court do decide whether an appeal from the judgment of the Land Court, Haifa, No. 16/43, needs or does not need leave." It appears that Applicants have filed both an appeal and an application for leave to appeal. It is to be noted that the Chief Registrar does not seem to have raised any objection to the appeal on the ground that there has not been a compliance with the provisions of Part 31 of the Civil Procedure Rules.

The Applicants' advocate has relied on Miscellaneous Application No. 56/43, P. L. R. Vol. 10, page 465. That application, however, can be distinguished from the present one. In Miscellaneous Applica-

tion No. 56/43 the Registry refused to accept the appeal on the ground that no leave to appeal had been obtained. The applicant in that case had definitely taken the step of filing an appeal and was apparently prepared to run the risk of it being subsequently held that no appeal lay as of right. When the matter came before me it was clear that I had to decide the matters mentioned in Rule 317. In other words, I had to decide whether what was being appealed from was or was not a decree. Here the matter is very different. There has been no refusal by the Registry to accept the appeal for filing. I am, in fact, now being asked to give legal advice as to whether or not an appeal lies. In my view, that was not the purpose or intention of Rule 330.

The Applicants must themselves decide whether to proceed with their appeal or whether to apply for leave to appeal. If they proceed with their appeal, and if it is not accepted for filing they can doubtless make use of the provisions of Rule 330, but only if there has been a refusal by the Registry to accept the appeal for filing.

I, accordingly, agree with Dr. Eliash that this application is misconceived, and I, accordingly, make no order.

The costs of this application should be in the cause. In order to facilitate the final arrangements, I shall certify an advocate's attendance fee for the hearing of this application of LP. 5 to the ultimately successful party.

Delivered this 28th day of January, 1944.

British Puisne Judge.

CIVIL APPEAL No. 366/43.
CIVIL APPEAL No. 367/43.

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

BEFORE: Rose, A/C. J.

IN THE APPEAL OF :—

Raja Tahir Hussein & 2 ors. — APPELLANTS. (APPLICANTS).

v.

Ali El Khalil. — RESPONDENT.

Appeals — Dismissal of action appealable without leave — L. S. Ord., sec. 6 — Failure to state grounds in judgment — Costs.

Appeal from the judgment of the Land Court, Haifa, dated the 26th day of October, 1943, in Motion No. 282/43 Land Case No. 16/43, allowed and case remitted:—

1. Although leave is required to appeal an order striking out a claim under Rule 21, where the Court finally dismisses the action before framing issues, an appeal lies without leave.

2. Where sec. 6 of the Land (Settlement of Title) Ord. is invoked by the defence, the Court should not dismiss the action before determining whether that Section is fatal to the Plaintiff's case.

(*A. M. A.*)

ANNOTATIONS :

1. See Misc. Appl. 75/43 (*ante*, p. 98) for previous proceedings.

2. For a contrary decision *vide* C. A. 54/42 (9, P. L. R. 306; 1942, S. C. J. 324; 12, Ct. L. R. 143) where although the claim had also been "dismissed with costs" the Court of Civil Appeal held that the Court below had in effect struck out the statement of claim and that, therefore, leave to appeal was necessary; and that, although no formal application under Rule 21 had been made as in this case. *Cf.* also CR. A. 144/43 (10, P. L. R. 619; 1943, A. L. R. 780) where the word "dismissed" used by the Magistrate was held to mean "discharged."

The decision in the present case marks a departure from the principle hitherto adopted in such cases by the Court of Appeal, namely "to see what was really meant by those words" (*i. e.*, of the Court below — C. A. 54/42 — *supra*).

(*H. K.*)

FOR APPELLANTS: No. 1 — Abcarius and Bordcosh.
Nos. 2 & 3 — S. Khadra.

FOR RESPONDENT: W. Salah.

JUDGMENT.

This is a matter which has caused me some little difficulty because it appears that an application to strike out the present Appellants' claim was made by the Respondent to the District Court of Haifa, sitting as a Land Court under Rule 21 of the Civil Procedure Rules. That application was dismissed. It then appears that another application was made to the same Court sitting in the same capacity but differently constituted, again asking for the action to be struck out on the same ground. On this occasion the second Court purported to grant the application, but in the event, instead of striking out the Statement of Claim, dismissed the action with costs. The Appellants now appeal to this Court.

Walil Eff. Salah on behalf of the Respondent, says that no appeal lies in such a matter without leave and it is quite true, and he has cited a number of authorities to that effect, that an order striking out a statement of claim under Civil Procedure Rule 21 cannot be appealed against without leave. I accept that proposition as being correct but in this case, whatever may have been intended by the District Court, what

they did was to dismiss the action and against a final dismissal of an action an appeal, of course, lies without leave. Now, it is not for me to express any opinion as to whether or not this statement of claim could have been struck out but there was a point of law argued before me this morning, and presumably it was argued before the Land Court, as to whether or not Section 6 of the Land (Settlement of Title) Ordinance is a fatal bar to the Appellants' claim; and that is a matter, of course, that no doubt will have to be decided by the Court. There is nothing in the second judgment of the District Court to show the reasoning which they have applied in coming to the conclusion which they did, and it seems to me that on the merits of this matter that it is eminently desirable that this case should be tried and determined. On the ground, therefore, that the Land Court erred in dismissing the action at this stage of the proceedings, I am of opinion that the appeal must be allowed and the case remitted to the Land Court to hear and determine according to law.

In all the circumstances I am of opinion that the fair order is that the costs of this appeal should be in the cause and in order to simplify the final arrangements, I certify the costs of this appeal to be on the lower scale to include an advocate's attendance fee of LP. 10 to the ultimately successful party. There will be only one advocate's fee in respect of this appeal.

Delivered this 8th day of March, 1944.

A/Chief Justice.

CRIMINAL APPEAL No. 17/44.

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:—

Meir Mansdorf & 2 ors. — APPELLANTS.

v.

Benjamin Trachtenberg. — RESPONDENT.

Criminal appeals — Appeal with or without leave — Bond under Sec. 45 C. C. O. not part of the punishment for the purpose of appeal without leave — Imprisonment pending filing of bond.

Appeal from the judgment of the District Court, Jerusalem, in its appellate

capacity, dated the 21st day of January, 1944, in Criminal Appeal No. 106/43, dismissed:—

> Where a magistrate orders an accused person to enter a bond to be of good behaviour, neither the amount of the bond nor the period of imprisonment ordered pending the bond is material when determining whether the judgment is subject to appeal without leave.
>
> (*Quaere* whether the same applies when the amount of the bond ordered exceeds the maximum fine which the magistrate may impose).
>
> (*A. M. A.*)

ANNOTATIONS: A somewhat similar point arose in M. A. 9/35 (2, P. L. R. 380; 7, C. of J. 240) where the accused had been sentenced to pay a fine of LP. 5.— or to undergo one month's imprisonment: Held "that, although the fine was only LP. 5.—, the alternative term of imprisonment was one month and that this gave the Appellant a right to appeal ....."

(*H. K.*)

FOR APPELLANT: Amdour.

FOR RESPONDENT: P. Rabinovitch.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem dismissing an appeal from the Magistrate. It is a strange little case in which it appears that some elderly persons have quarrelled on a number of occasions and have insulted each other. The Magistrate thereupon imposed a very small fine, and in order to try and preserve the peace between the parties, he — it seems to us very sensibly — ordered the Accused to enter into a bond. The amount of the bond was LP. 50. They appealed to the District Court and the learned President held that there was no appeal as of right because the fine in question did not exceed LP. 10.

There is no doubt that if a fine exceeds LP. 10 or if the sentence of imprisonment exceeds seven days, an appeal lies as of right.

In this case it is to be noted that under section 45 of the Criminal Code Ordinance, where a bond is ordered in circumstances such as the present, imprisonment may only be ordered for such time until the recognizance with its sureties is entered into. In this case the point is even more academic because a bond has, in fact, been filed; but in any event, it seems to us that that can in no way give a right to appeal. The matter might, of course, be different (we express no view upon that) if the amount of the bond ordered by the Magistrate exceeded the maximum amount which he is enabled to impose by way of fine, but in this case that point does not arise. We were referred to no authority on this point either way, and it seems to us that the more reasonable interpretation is that the imprisonment imposed

pending the filing of the bond is not really the operative part of the sentence which one must consider when considering the right of appeal.

That being so we think that the President was correct in dismissing the appeal from the Magistrate. We think that the Respondent should have the sum of LP. 10 for costs to be divided equally amongst the three Appellants.

Delivered this 2nd day of March, 1944.

A/Chief Justice.

CIVIL APPEAL No. 251/43.

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

BEFORE : Gordon Smith, C. J. and Edwards, J.

IN THE APPEAL OF:—

1. Mustapha Bey Khalidi,
2. Bader Eff. Khalidi. APPELLANTS.

v.

1. Dr. Mahmud T. Dajani,
2. Dr. Hussein Fakhri Khalidi,
3. Mamduh Eff. Khalidi, purporting to be *Mutawallis* of a *Waqf* made by Miss Amineh Khalidi. RESPONDENTS.

Question of validity or otherwise of Waqf made before Sharia Court but not registered under Land Transfer Ordinance — Conflicting decisions of Supreme Court.

Dedication of land before Sharia Court not valid and complete, nor is dedicator divested of ownership of such property unless and until dedication (Waqf) has been registered under and in accordance with provisions of Land Transfer Ordinance.

Appeal from the judgment of the Land Court of Jerusalem, dated the 8th of July, 1943, in Land Case No. 26/42, allowed:—

(*Per Gordon Smith, C. J.*):

1. Where there is a conflict between two decisions, Court of Appeal not bound to follow latest decision but entitled to consider that case and, whether or not the facts are distinguishable, can express its approval or otherwise.

2. a) Letter from *Sharia* Court to Registrar of Lands giving particulars of property to be dedicated as *Waqf* and asking whether there is any objection to registration of the *Waqf* or not cannot replace petition contemplated by sec. 4(3), Land Transfer Ordinance.

b) Communication by Director of Land Registration not made to dedicator or his representatives of his preparedness to give a qualified consent to registration of *Waqf* — not consent required by sec. 4, Land Transfer Ordinance.

(*Per Edwards, J.*):

1. Where Director of Land Registration gives his consent to substance of transaction, mere fact that he draws attention of parties to necessity of complying with the provisions of Land Transfer Ordinance or of paying off certain mortgages does not render the consent conditional.

2. Validity of consent given by Director of Land Registration to transaction cannot be affected by mere fact that the petition was not in a particular form or was not adequate with regard to details of proposed transaction.

(*M. L.*)

FOLLOWED: H. C. 99/42 (9, P. L. R. 608; 1942, S. C. J. 605); C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R. 509); C. A. 158/38 (5, P. L. R. 488; 4, Ct. L. R. 169; 1938, 2 S. C. J. 126).

NOT FOLLOWED: C. A. 290/42 (10, P. L. R. 159; 1943, A. L. R. 166).

REFERRED TO: P. C. A. 98/25 (1, P. L. R. 71; C. of J. 1818); L. A. 173/26 (1, P. L. R. 269; C. of J. 1843); L. A. 49/35 (C. of J. 1934—6, 491; 1, Ct. L. R., 2nd Edition, p. 45); L. A. 21/30 (1, P. L. R. 555; C. of J. 1502); C. A. 105/32 (1, P. L. R. 810; C. of J. 1172); C. A. 132/38 (5, P. L. R. 378; 4, Ct. L. R. 25; 1938, 1 S. C. J. 387); C. A. 100/40 (7, P. L. R. 318; 1940, S. C. J. 477); C. A. 154/40 (7, P. L. R. 467; 8, Ct. L. R. 91; 1940, S. C. J. 334); C. A. 195/40 (7, P. L. R. 531; 1940, S. C. J. 491); C. A. 2/43 (10, P. L. R. 75; 1943, A. L. R. 71); C. A. 255/43 (10, P. L. R. 552; 1943, A. L. R. 721); H. C. 8/40 (7, P. L. R. 121; 7, Ct. L. R. 101; 1940, S. C. J. 76); H. C. 102/40 (8, Ct. L. R. 167; 1940, S. C. J. 570); H. C. 76/41 (8, P. L. R. 460; 11, Ct. L. R. 140; 1941, S. C. J. 474); L. A. 22/31 (1, P. L. R. 611; C. of J. 977); H. C. 4/38 (5, P. L. R. 91; 3, Ct. L. R. 71; 1938, 1, S. C. J. 91); P. C. A. 2/36 (6, P. L. R. 292); C. A. 240/37 (5, P. L. R. 159; 3, Ct. L. R. 104; 1938, 1 S. C. J. 148); Taylor *v* Sturrock, 1900 A. C. 225.

ANNOTATIONS:

1. For former proceedings see H. C. 129/42 (9, P. L. R. 771; 12, Ct. L. R. 234; 1942, S. C. J. 799).

2. On binding authority of judgments of Supreme Court see note 2 to C. A. 252/43 (*ante*, p. 94) and C. A. 233/43 (10, P. L. R. 593; 1943, A. L. R. 734).

3. On the other points in the headnote see cases referred to.

4. On jurisdiction in matters of *wakf* see S. T. 1/43 (10, P. L. R. 535; 1943, A. L. R. 671) with annotations thereto.

(*A. G.*)

FOR APPELLANTS: Goitein.

FOR RESPONDENTS: No. 1 — Abcarius & Haddad.
No. 2 — Eliash.
No. 3 — H. Atalla.

JUDGMENT.—

Gordon Smith, C. J.: This is an appeal from the judgment of the Land Court, Jerusalem (H. H. Judge Shaw, sitting alone), dated the 8th July, 1943, whereby the claim of the Appellants for registration in their names of certain properties as heirs of the late Sitt Amineh, who died on the 9th November, 1942, was dismissed.

The Appellants had gone to the Land Court for a decision, as a result of their failure in the High Court, in H. C. 129/42, to obtain a mandatory order to the Director of Land Registration to enter their names on the register as the owners of such properties.

2. The facts which are not in dispute, together with details of the exhibits, are fully and lucidly set forth in the admirable judgment of the learned trial Judge and need not be repeated here, except as may be commented on. It is however necessary to consider closely and even analyse such judgment.

3. The matter concerned the validity of a dedication of property as *Waqf* property by a *Waqfieh* and as to whether the *Waqfieh* was valid and subsisting and irrevocable at the time of the dedicator's or deceased's, as I will call her, death.

After setting out the facts and referring to the exhibits, the learned Judge finds that in accordance with Article 1739 of the *Mejelle* the order of the *Sharia* Court for registration of the *Waqf* was conclusive and that the deceased was estopped from revoking the dedication, and that she could have no rights in the property except such as were given her by the *Waqfieh* itself. I have passed over the ruling by the learned trial Judge as to the jurisdiction of the Land Court in the matter, as such has not been contested before us, nor has the case been argued on the basis of lack of jurisdiction in the Land Court.

4. Nor is it disputed that shares of the deceased in nine of the properties to which she had become entitled by inheritance had not, at the time of her death, been registered in her name in the Land Registry, and also that two of the properties were encumbered by registered mortgages still outstanding at the same date.

5. The learned Judge then finds as follows:—

(a) That this *Waqf* was irrevocable.
(b) That there had been a good dedication of an individual share in the properties.
(c) That the fact that some of such property was mortgaged did not affect the validity of the *Waqf*. And
(d) That the fact of non-registration of the shares in her own name did not affect her ownership, and similarly that she could validly dedicate them.

If such findings had been prefaced by the statement that such were in accordance with *Sharia* or Muslim law I think that they would have been less open to criticism. It is also to be noted that the learned Judge used the word "dedication" and not the word "disposition".

6. The judgment then goes on to consider what is stated to be the crux of the whole case, namely whether Exhibit B*) was a sufficient consent by the Director of Land Registration to the disposition as required by Section 4 of the Land Transfer Ordinance (Cap. 81) and in the absence of any indication that the Director had repudiated Exhibit B*), and feeling himself bound by the decision of this Court in Civil Appeal 290/42 (which I will hereafter refer to as the Turk case) the learned Judge held that Exhibit B*) was a good and sufficient consent for the purposes of such section. Amplifying this he went on to state, as a result of his previous findings which I have enumerated, that as the deceased had finally and irrevocably parted with her property and as she owned nothing, the heirs could inherit nothing on her death. The dedication was a good and valid disposition and, therefore, he dismissed the claim of the Appellants.

7. Before proceeding to the grounds of appeal against this judgment briefly analysed above, it will be convenient here, for a proper appreciation of the grounds of appeal and submissions thereon, to set out certain provisions of the law — more particularly provisions of the Land Transfer Ordinance, Cap. 81, which were the subject of considerable argument before us. The long title of this Ordinance reads "An Ordinance to provide for the registration of dispositions and transmissions of land."

In Section 2 "disposition" is defined as follows:—

> "Disposition" means a sale, mortgage, gift, dedication of *waqf* of every description, and any other disposition of immovable property, except a devise by will or a lease for a term not exceeding three years, and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years;"

> "3. This Ordinance shall apply to all immovable property the subject of the Ottoman Land Code dated 7 *Ramadan*, 1274, as well as to *mulk* land, all forms of *waqf* land and every other form of immovable property.

> 4. (1) No disposition of immovable property shall be valid until the provisions of this Ordinance have been complied with.

> (2) Any person wishing to make a disposition of immovable property shall first obtain the written consent required by the next succeeding sub-section.

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*) Should read: "Exhibit D"; see paras 9(2) and 17 of the judgment. (*Ed.*)

(3) In order to obtain the consent referred to in sub-section (2), a petition shall be presented through the land registry office in which the land is situated to the Director setting out the terms of the disposition intended to be made and applying for his consent to the disposition.

(4) The petition shall be accompanied by proof of the title of the transferor and shall contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition.

(5) The petition may also include a clause fixing the damages to be paid by either party who refuses to complete the disposition if it is approved."

— — — — — — — — — — —

"7. After the title has been examined and the consent required by Section 4 has been obtained, a deed shall be executed in the form prescribed and shall be registered in the Land Registry:

Provided that where a registered mortgage contains a covenant by the mortgagor not to lease the mortgaged property without the consent of the mortgagee the Director shall refuse to register any lease by the mortgagor of the mortgaged property unless the written consent of the mortgagee is first lodged with the Director of Lands."

— — — — — — — — — — —

"11. (1) Every disposition to which the consent required by Section 4 has not been obtained shall be null and void:

Provided that any person who has paid money in respect of a disposition which is null and void may recover such money by action in the Courts."

— — — — — — — — — — —

"13. (1) When any immovable property passes by operation of a will or by inheritance, the legatees or heirs, as the case may be, shall be jointly and severally responsible for the registration of the immovable property in the name of the legatees or heirs within a year of the death.

(2) The registration shall be made upon the certificate of a competent Court stating that the person or persons requiring registration are entitled as legatees or heirs or upon a certificate signed by the *mukhtar* or *imam* and two notables."

Apart from fees payable as prescribed under Section 16, an *ad valorem* fee or stamp duty is also payable before registration can be effected.

8. References were made to other provisions of the law, and I set out Section 5 of the Civil and Religious Courts (Jurisdiction) Ordinance, Cap. 18, as follows:—

"5. Every action or other proceeding concerning the ownership or possession of immovable property, shall be decided by a civil Court, notwithstanding any claim by any party or person that the land is *waqf*."

Other references were made to the Order-in-Council — Articles 17, 46, 52 and 56, and to Article 9 of the Mandate, to the *Mejelle* — Articles 760, 1527 and 1739, and the Land Code, Article 4, the Ottoman Law of Execution — Sections 108 and 111, and Section 8 of the Mortgage Law (Amendment) Ordinance, Cap. 95. This latter section provides that where immovable property is sold under the Ottoman Law, the registration thereof in the name of the purchaser transfers all the estate and title of the mortgagor in the property mortgaged and as against the mortgagor the purchaser's title is indefeasible.

Quotations were also made from Hamilton's translation of the *Hedaya* and Omar Hilmi, which appear on page 163 of the report of the Turk case (290/1942).

9. It will probably be convenient to refer at this stage to the more important of the exhibits, as follows, and in chronological order:—

(1) 1.4.42, *Exhibit B.* Letter from the *Kadi, Sharia* Court, to the Registrar of Lands, forwarding a schedule of the properties of the deceased, mentioning the (proposed) *Waqf* and ending up: "Please say whether there is any objection for registration of the *Waqf* or not."

(2) 1.4.42, *Exhibit D* (1). From Registrar to *Kadi,* acknowledging Exhibit B. and saying that from searches made the properties appear to be *Mulk* property "and there is no objection to its being made a *Waqf* accordingly."

(3) 15.4.42, *Exhibit E.* Letter from *Kadi* to Registrar, forwarding a copy of the *Waqfieh,* Exhibit F. (dated 4.4.42) briefly explaining the objects of the dedication which had been made in due form of a judgment, and giving a description of the properties concerned. The last paragraph appears to me to be important, as, in effect, it seeks to put a *caveat* on those properties against transfer, and asks for an acknowledgment of the letter "with the knowledge that Sitt Amineh El Khalidi referred to above is taking all the necessary legal and official measures for the registration of this charitable *Waqf* in the Land Registry, Jerusalem, in accordance with the usual procedure."

As regards the *Waqfieh* forwarded, it was agreed in Court before us that in the copies supplied, in clause 10(12) the word *"waqf"* had been mistranslated as such, and that there should be substituted therefor the word "trusteeship".

(4) 16.4.42, *Exhibit N.* This was a receipt issued by the Land Registry for LP. 0.550 "petition fees", presumably Exhibit E. being regarded as the petition referred to in Section 4(3) of the Land Transfer Ordinance.

(5) 22.4.42, *Exhibit L.* A letter from the third Respondent to the

Registrar requesting registration of the properties as *Waqf*, as provided in the *Waqfieh*.

(6) 24.4.42, *Exhibit M*. Letter from third Respondent to the Registrar, drawing attention to the fact that some of the properties were mortgaged, as mentioned in the *Waqfieh*, that the dedicator was endeavouring to settle these mortgages "before commencing to execute her *Waqfieh*", and that as the rights of the mortgagors (*sic*.) were reserved by the terms of the *Waqfieh*, he, therefore, requested registration of the mortgaged properties as *Waqf* in the *Tabu* Registers.

(7) This point was apparently the subject of consideration by the Land Registry over some considerable period. Some interdepartmental correspondence was exhibited which should be studied with the evidence given by Mr. Sofar, the Assistant Land Registrar. This matter culminated in the Director giving a qualified consent to the registration. See Exhibit 9 of the 16th September, 1942, in a letter addressed to the Registrar of Lands.

(8) From Exhibits O., P. and Q. it is apparent that the Appellants, having obtained certificates of succession to Hajjeh Nafeeseh, deceased, and Sheikh Khalil, deceased, forwarded them on the 11th November, 1942, to the Registrar of Lands for registration.

10. The appeal was argued before us for three whole days, and it is no fault of the advocates concerned if we have failed to appreciate the submissions put forward, which were done, if I may say so, in an extremely lucid and able manner, in spite of the numerous authorities which it was necessary to quote. Any matter to do with *Waqfs* is usually an extremely complicated and more often than not a confused matter, and we also appreciate the difficulties which lie before us in attempting to come to a right and proper decision.

11. Coming to the grounds of appeal, I need not set them out *seriatim*, as they were conveniently and lucidly incorporated in his main submissions by Mr. Goitein in opening his address. If I understood him correctly, and I think I did, these were as follows:—

(a) The Turk case was wrongly decided and was contrary to law.

(b) There can be no completed disposition of property (and of course the reference throughout is to immovable property) except by registration in the Land Registry.

(c) There can be no disposition of property without the consent of the Director, but when that consent has been obtained the disposition is no longer null and void but it is not, merely by such consent having been given, a completed disposition.

(d) If, in accordance with *Sharia* Law, property becomes vested in the Almighty by a dedication, under Palestine law such

property does not become divested from the dedicator until registration under the Land Transfer Ordinance has been effected.

(e) An incomplete disposition (or dedication) is interrupted by death and cannot be completed without the consent of either the heirs or devisees, after death.

(f) A person who, as an heir or devisee, becomes entitled to property of a deceased, cannot dispose of that property without it having been first registered in the name of such heir or devisee, or he has been put on the register as being so entitled by means of a certificate of succession issued by the competent authority.

12. It is, I think, similarly unnecessary to set out *seriatim* the counter submissions for the Respondents in reply to these submissions by Mr. Goitein, as they were all controverted and dealt with in turn by Abcarius Bey, Dr. Eliash and Hanna Eff. Atalla. Arising however out of their arguments it seemed to me that there was, in fact, a further submission made by them to the effect that the Muslim Law of *Waqf* was a sacred and holy thing, and similar to "the law of the Medes and Persians which altereth not", and such being so, it was the law of Palestine in regard to this matter. In other words, if by the *Sharia* Law a *Waqf* dedication is valid, such fact is incontrovertible, and if such law says that a dedication is irrevocable, then it is so, and while agreeing that such may be so, I guard myself from saying that such facts are wholly dependent on the *Sharia* Law. I will, however, deal with this point later.

13. I now come to the Turk case (C. A. 290/42) and the earlier Lababidi case (H. C. 99/42), and I will deal with the latter first as it was earlier in date and also I was responsible for the decision. It is true, as pointed out in the Turk case, that no question of consent under the Land Transfer Ordinance was raised in this earlier Lababidi case, and it was only fortuituously discovered that the *Waqf* of 1925 had never been registered at all. The dedicator, who was also the then *Mutawalli,* was in possession and had quite wrongly sold and transferred part of the *Waqf* property, the transfer of such property having been duly registered.

For the reasons given, *i. e.* failure to register the *Waqfieh,* I held that in accordance with the provisions of the Land Transfer Ordinance the disposition, that is the *Waqfieh,* was null and void. The headnote to the Turk case states that this Lababidi case is over-ruled, but I think that this is hardly correct, as in the Turk case the judgment stated that for the reasons given the point was still open, and the Court did not consider itself bound by the decision. It is true, there

is a conflict between the two decisions, and in such case and following Civil Appeal 158/38, it is permissible for this Court to consider the Turk case and, whether or not the facts can be distinguished, this Court is not bound to follow it but can express its approval or otherwise.

In the Turk case the application before the Land Court was for the annulment of a sale, of two mortgages and for the registration of the property in question as *Waqf* property. In the present case, the Appellants applied for their own registration of the property in question as heirs, and averred that no unconditional consent under the Land Transfer Ordinance and as required thereby, had been given to the dedication by the deceased, nor had any fees been paid, nor had registration been effected.

14. It is perfectly correct that there is a great similarity between Exhibit 2 and the reply, Exhibit 3, in the Turk case and Exhibits B. and D. in the present case, but there, in my opinion, the similarity between the two cases ends. No further attempt was made in the Turk case to register the subsequent *Waqfieh* and five years later the dedicator died and the *Waqf* property was transferred to the heirs to whom a succession certificate, Exhibit 5, had been issued. These heirs dealt with the property, including a transfer of one-third, to their mother, Exhibit 6, and subsequently they mortgaged the property.

The Court held that the consent contained in Exhibit 3, sufficiently complied with the provisions of the Land Transfer Ordinance and annulled the transfer to the heirs and to the mother, but preserved the rights of the mortgagees by ordering a *caveat* to be entered on the Register until such mortgages were discharged, and that the necessary entries be made in the Land Registry shewing that the property was dedicated as *Waqf*.

15. The effect of the Turk decision undoubtedly is that an intending dedicator of property can express such intention, even for the benefit of himself and his heirs, with little charitable intention, by merely writing to the *Kadi* and asking that the transaction should take place, upon which the *Kadi* had merely to write to the Registrar and ask if there is any objection, and on receiving a reply in the negative, this procedure complies sufficiently with all the detailed provisions of the Land Transfer Ordinance for registration as therein contained. No formal entries as to this *Waqf* were ever made in the Register in this Turk case until such were ordered by the Court, approximately ten years later, after the dedication. In the meantime

the dedicator had died, and transfers and mortgages had been effected and had been registered.

I have had some experience, not only of land and deeds but also of Registration of Titles under the Torrens system, and it is somewhat startling to me to find that a nebulous enquiry, followed by an equally nebulous reply by a junior official, can take the place of specific statutory requirements for registration of an important deed transferring at least the legal estate in land to another person, irrespective of how the word "person" is to be interpreted.

In my opinion the effect of the decision is to render null and void, so far as *Waqfs* are concerned, those detailed and specific provisions I have mentioned, or alternatively, to exclude altogether *Waqfs* and *Waqfiehs* from the provisions of the Ordinance as if the definition of "disposition" in Section 2 had expressly done so, instead of exactly and specifically doing the reverse.

Consequently it follows that in my humble opinion and with the greatest respect to the learned Judges in that case, their decision in the Turk case is erroneous.

16. I agree however that the facts in the present case are not on all fours, and a distinction can be drawn between them and those in the Turk case, and it is necessary to examine these facts.

17. It is a coincidence that the learned Judge who decided the Turk case in the Land Court and who was over-ruled, should have also been the trial Judge in the present case, and it is natural that he should have held in the present case, that he felt "bound to hold on the strength of C. A. 290/42, that this letter (Ex. D) gave a good consent for the purposes of Section 4 of the Land Transfer Ordinance, Cap. 81". (See page 9 of the judgment). I have already set out the brief effect of Exhibits B. and D., and if one turns to the terms of sub-sections (3) and (4) of Section 4 of the Land Transfer Ordinance one can see how the consent required by sub-section (2) is to be obtained.

By sub-section (3) it is to be, (a) by petition; (b) such petition is to set out the terms of the disposition; and (c) the petitioner is to apply for the consent to the disposition.

By sub-section (4) the petition is to be accompanied by proof of title and is to contain an application for registration of a deed to be executed.

Apparently there is no prescribed form of consent but the Respondents submit that Exhibit D. is the consent required by sub-section (2),

which had been granted and was contained therein. It follows, therefore, that Exhibit B. must be the petition on which such consent was founded and granted. This point was rather overlooked in argument, but in any case anything more unlike a petition than Exhibit B. is difficult to imagine, and I would observe that petition writing almost amounts to a profession in Palestine, as it does in India and the East.

Moreover, fees have to be paid on filing such a petition, which was not then done. Let us turn, however, to Exhibit E., dated a fortnight later. This document can very well be construed as a petition such as is required by sub-sections (3) and (4) and it complies with the terms of these sub-sections. Further, and what seems to me to be fairly conclusive, there is the fact that petition fees were paid on the presentation or filing of Exhibit E., for which a formal receipt for "petition fees" was issued, dated the 16th April (see Ex. N.).

But, no consent to this petition Exhibit E. was ever issued or received. A few days subsequently the third Respondent writes to the Registrar, Exhibit M., drawing specific attention to the fact of mortgages on the properties and that the rights of the mortgagees were reserved or preserved under the *Waqfieh*. This appears to have hung up the question of consent for some considerable time in the Registry, and the Director, interdepartmentally, eventually in September (see Ex. G.) is prepared to give a qualified consent. Even so, no formal consent, qualified or unqualified, was ever communicated to the Respondents, or at least none was produced. I think that my criticism of the documents held to be a consent in the Turk case as being, in effect, a nebulous enquiry followed by a nebulous reply, apply equally to Exhibits B. and D. in the present case.

For these reasons I am of the opinion that the consent required by and in accordance with Section 4 of the Land Transfer Ordinance was never obtained by the Respondents.

18. As regards Mr. Goitein's submission (see paragraph 11(b) above) that there can be no completed disposition under the Land Transfer Ordinance except by registration in the Land Registry, I think that this submission admits of no argument, and I, therefore, pass on to the next submission.

19. This was, that there can be no disposition without the consent of the Director, and again I think that this also admits of no argument. For the reasons given I have already expressed the opinion that such consent was not obtained in this case, but the submission goes further and is to the effect that even when such consent has been

given, although the disposition (as for as it has got) is no longer null and void, yet it is not merely thereby a completed disposition. Again I think that this submission admits of no argument, as in my opinion a disposition under the Land Transfer Ordinance is only completed by registration thereunder and only then does it become valid and effective. Section 4(1) specifically provides that no disposition is valid until the Ordinance has been complied with, Section 7 specifically provides for registration after consent has been given, and Section 11(1) states that without such consent the disposition is null and void.

20. The next submission (see paragraph 11(d) above) is extremely important and was the main basis of the Respondents' case and argument. As put by Mr. Goitein in his reply to the Respondents' case, it was that even if according to *Sharia* Law property becomes vested in the Almighty by a disposition, as contended by the Respondents, yet under the law of Palestine such property does not become divested from the dedicator until registration under the Land Transfer Ordinance has been effected.

It was argued by the Respondents that once a dedication has formally taken place before the *Sharia* Courts and in accordance with the *Sharia* Law, the dedication is (subject to the terms of the *Waqfieh* itself) complete for all purposes and is irrevocable. In other words, the dedicator has completely divested himself of all interests in the property, the ownership of which, or in English conceptions the legal estate in which, has passed to the Almighty, or as Hanna Eff. Atalla put it, the *Waqf* — a juristic personality — became the owner. This being so, it was argued that as the constitution of a *Waqf* was within the exclusive jurisdiction of the *Sharia* Courts, the dedication was complete, not only as far as the dedicator was concerned but as regards the dedication itself.

In support of this contention the *Hedaya* and Omar Hilmi cases were quoted (see the Turk case for translations) and on the other hand Mr. Goitein produced a translation from Sheikh Abdul Jalil's "Book of *Waqfs*", 2nd Edition, page 19, as follows:—

> "It is understood from the statements of *Sharia* professors of the 'Hanafite School' that any *waqf* can be a proper and just one even if the person who dedicated the *waqf* was indebted. In this case creditors cannot apply for the abolition of the *waqf* even if their money is included in the said *waqf*. During the time of Mufti Abul Seoud, the kings prevented judges from adhering to this ruling and from considering that such a *waqf* is valid, as by so doing creditors will lose their money, which is an improper act. Judges were,

> therefore, instructed not to consider such a *waqf* as valid. It should be understood that the main point in cases of *waqf* should be to the interests of all concerned and that no injury or harm should affect anybody by any *waqf*. It is preferable that a *waqf* which may harm anybody should be abolished."

21. It seems to me, however, that we are not so much concerned with the *Sharia* Law or what that law is, but whether, as I understood it to be contended by the Respondents, at least in effect, such *Sharia* Law is all-powerful and over-rides the provisions of any other law. At the same time it was generally agreed by all three advocates for the Respondents that a consent under the Land Transfer Ordinance to a *Waqfieh* had to be obtained and that also, *vis à vis* third parties, registration was also necessary under such Ordinance. It was further contended that the constitution of a *Waqf* was within the exclusive jurisdiction of the *Sharia* Courts, but at the same time Dr. Eliash stated that Section 5 of Cap. 18 (see paragraph 8 *supra*) did not destroy such exclusive jurisdiction.

22. This Ordinance, the long title of which reads "An Ordinance to define more exactly the jurisdiction of the Civil and Religious Courts with regard to questions of *Waqf*..." by Section 5 provides definitely and in unambiguous terms that any action or other proceeding concerning the ownership or possession of land is to be decided by a Civil Court, notwithstanding any claim that such land is *Waqf*.

It was not contended that this Ordinance or Section 5 thereof was *ultra vires* the Mandate or the Order-in-Council.

23. It seems to me that there may have been some confusion of thought in what appears to me to be conflicting contentions, and I think that this may have arisen in not keeping in mind the clear distinction which, in my opinion, is to be drawn between a "disposition" and a "dedication". A disposition as defined by the Land Transfer Ordinance includes a dedication of *Waqf* of every description, but a dedication does not in my opinion necessarily amount to a disposition within the meaning of and within the provisions of the Land Transfer Ordinance.

I do not dispute for one moment that you can have a perfectly valid, good, complete and irrevocable dedication according to *Sharia* Law made and even registered before the *Sharia* Court but that does not necessarily amount by itself to a disposition. I admit there has been confusion and that there are conflicting decisions in the Civil Courts, some of which I will refer to later, but it seems to me that this point is the crux of the whole case. To put it quite plainly,

my opinion is that a dedication of land as *Waqf* does not become a disposition until such dedication has been registered under and in accordance with the provisions of the Land Transfer Ordinance.

24. Although various Articles of the Order-in-Council were referred to (17, 46, 52, 56) and the *Mejelle* (Articles 760, 1527 and 1739) it was not seriously contended, if at all, that the Land Transfer Ordinance, was *ultra vires,* and I do not think I need go into this point. In my opinion the Land Transfer Ordinance governs the position which has arisen, namely that there has been no disposition within the meaning of this Ordinance, by reason of the fact that no consent had been given nor had the dedication been registered thereunder, prior to the death of the dedicator. The effect of this appears to me to be that at the time of her death the dedicator had not divested herself of the ownership of the property in question, and such property as was vested in her at her death, passed, in the absence of a valid will, to her heirs, in accordance with Section 13 of the Land Transfer Ordinance and the Succession Ordinance.

25. A further alternative submission was that the *Waqfieh* in question might be construed as a Will, but a reference to the definition of "Will" in the Succession Ordinance and to the *Waqfieh* itself, shows that there can be no substance in this contention. It was further contended that by reason of the proceedings on dedication before the *Sharia* Court being in the form of a suit and judgment in terms of the *Waqfieh,* albeit an admittedly fictitious suit and judgment, therefore, such "judgment" was executable by the Civil Courts under Article 56 of the Order-in-Council and the Law of Execution. Again a reference to the *Waqfieh* discloses how impossible it would be to execute such a "judgment", and moreover no attempt has been made to execute the same.

26. Except as regards the Lababidi and the Turk cases and Civil Appeal 158/1938, I have not as yet referred to any of the numerous cases quoted, and I will now proceed to mention some of these, but very briefly, also in chronological order.

P. C. A. 98/25, 1 *P. L. R.* 71 *at* 76. This case was quoted by Dr. Eliash as authority for this Court considering whether an Ordinance was consistent with the Mandate, and quoted Article 9 of the latter, which reads, "In particular the control and administration of *Waqfs* shall be exercised in accordance with religious law and the dispositions of the founders." I do not think that in any of the local laws under consideration, there is anything inconsistent with the principles to be observed.

L. A. 173/26, 1 *P. L. R.* 269. The judgment was, in effect, that a *bona fide* purchaser for value without notice acquired a good title to property included in an unregistered *Waqf*. This case was followed in L. A. 49/35 (unreported).

L. A. 21/30, 1 *P. L. R.* 555. It was held that since the commencement of the Land Transfer Ordinance an irrevocable power of attorney for the sale of land did not confer any title.

C. A. 105/32, 1 *P. L. R.* 810 *at* 817. An unregistered lease coming within the definition of "disposition" was held to be null and void.

C. A. 132/38, 5 *P. L. R.* 378 *at* 388. It was held that an agreement for the sale of land could be specifically enforced, subject to the consent of the Director of Lands.

C. A. 100/40, 7 *P. L. R.* 318 *at* 323. This was a most interesting *Waqf* case and as to *Waqfs* generally, but does not help us in this case, as there was no dispute as to the ownership of land so as to bring the matter within the ambit of Section 5 of Cap. 18, and the Court held that it had no jurisdiction.

C. A. 154/40, 7 *P. L. R.* 467. The assignment of a mortgage is a disposition of land and a registrable right in land, the matter, therefore, being within the jurisdiction of the Land Court.

C. A. 195/40, 7 *P. L. R.* 531. The point in this case was whether a document was one of sale and void as not being registered, or merely an agreement for sale, conferring equitable rights, the latter view being preferred.

C. A. 2/43, 10 *P. L. R.* 75. The same point arose as in the last quoted case, and in this case it was held that a final document of sale having been entered into by which it purported to transfer the ownership of property and not having been registered under the Land Transfer Ordinance, it was null and void under Section 11.

The latest Civil Appeal quoted was C. A. 255/43, as yet unreported, but it is extremely interesting and rather relevant.

A *Waqf* dedication took place before the *Sharia* Court in 1931, and the dedicator had died without such dedication having been registered. In 1941 the *Kadi* applied for registration, but on objection being taken by some of the heirs, the matter came before the Land Court, which held, on the authority of the Turk case, that the dedication was, according to *Sharia* Law, irrevocable and, therefore, the heir was in no better position than the dedicator himself. A qualified consent to register was given by the Director of Land Registration in 1942 to the *Kadi*, and the trial Judge found in favour of the *Waqf* which he held to be good and effective.

On appeal however his decision that the *Waqf* was valid was reversed, apparently on the grounds that Section 4 of the Land Transfer Ordinance had not been complied with, and the judgment stressed that sub-section (3) (referring to the petition setting out the terms of the disposition intended to be made) had not been complied with. Prior to his death in 1936 the dedicator himself had transferred some of the dedicated property.

It is somewhat difficult to reconcile this case with the Turk case, although admittedly the facts are somewhat different, in that what I have described as a nebulous consent was given at the time in the Turk case, although sub-sections (3) and (4) of Section 4 of the Land Transfer Ordinance were not complied with. Moreover, one of the learned Judges sat on both of these appeals, which seem to me to be in conflict, as, if sub-sections (3) and (4) of Section 4 must be strictly complied with in the latter case, then surely they should have been complied with in the former case, of which there was no attempt whatsoever.

I have already referred at length to High Court 99/42 (the Labadidi case) and Civil Appeal 290/42 (the Turk case) and also to Civil Appeal 158/38 dealing with conflicting judgments, which latter case was followed in Civil Appeal 236/42, 10 P. L. R. 383 and page 390, but there were some High Court cases quoted to which I would refer.

H. C. 8/40, 7 *P. L. R. p.* 121. It was held in this case that an order of sale by a Chief Execution Officer notified to the Registrar of Lands, coupled with the receipt by the latter of the prescribed transfer fees, was equivalent to acknowledgment in a consent transaction, and it was then too late for the judgment debtor to pay the debt, for the satisfaction of which the property had been sold. In other words, registration of the sale had then already taken place in the Land Registry.

This case was followed and approved in High Court 102/40 and also in High Court 76/41, 8 P. L. R., 460, in which it was said at page 463 that the test was whether the prescribed transfer fees had been received.

I would also refer to Taylor *v.* Sturrock, 1900 A. C. 225, referred to by Mr. Goitein and which also seems to me to be extremely relevant. In this case it was held that the failure to register a post-nuptial settlement in accordance with the law rendered such settlement not only void as between the parties thereto but void for all purposes.

27. It is not suggested at all that registration under the Land Transfer Ordinance confers an indisputable or guaranteed title as

under the Torrens system of registration of title, but as stated in the long title it is an Ordinance to provide for the registration of dispositions and transmissions of land. In Civil Appeal 105 of 1932 at page 815 Mr. Justice Frumkin said, "The obvious object of imposing the duty of registration as regards a long term lease is to protect the members of the public from possible surprises", and similarly this must be so in the case of "dedications of *Waqf* of every description", particularly in view of some of the facts and circumstances in some of the cases I have referred to.

If a mere informal enquiry of and reply by the Registrar is to be taken to be a consent under Section 4 of the Ordinance and is to have the effect of registration thereunder, whether it is in respect of a *Waqf* or any other disposition of any other property, there will be no protection whatsoever to the public and registration will be of no use or force, and the objects of the Ordinance will be avoided.

I would observe that in the case before us the deceased died approximately eight months after the date of the dedication. What would have been the position if she had, say, quarrelled with the *Waqf* authorities and changed her mind in this interval, and had transferred the property subsequently to a *bona fide* purchaser for value without notice, and who thereupon had obtained registration of his transfer?

28. I have considered the matter long and earnestly, and in my opinion there is only one answer to the conundrum or conundrums put before us so forcefully and with great lucidity. That answer is, in my opinion, that irrespective of the *Sharia* Law, a dedication of a *Waqf* of any description before the *Sharia* Courts is not valid and complete, nor is the dedicator of the property intended to be transferred thereby divested of the ownership of that property, unless and until such dedication has become a disposition by registration as such under and in accordance with the provisions of the Land Transfer Ordinance.

29. In my opinion, therefore, this appeal should be allowed and the decision of the lower Court be reversed. I think also it is proper to record, as I believe is recorded in the proceedings below, that the Appellants do not seek the property for their own use or benefit, but themselves wish to give effect to the dedicator's charitable intentions but under their own supervision.

30. The appeal is, therefore, allowed, with costs on the lower scale, to be paid out of the estate, and we certify advocate's attendance fees of LP. 100 to each side, together with an instruction fee of LP. 25.

Delivered this 22nd day of December, 1943.

Chief Justice.

Edwards, J.: With some hesitation I agree with the judgment just delivered by the learned Chief Justice. Although I have some doubts, they are not sufficient to entitle me to dissent. I find it difficult to controvert the following statement in the judgment just delivered, namely — "A dedication of land as *Waqf* does not become a disposition until such dedication has been registered under and in accordance with the provisions of the Land Transfer Ordinance."

The first matter with regard to which I have some doubt is whether we are not bound by the judgment of this Court in Civil Appeal No. 290/42. On the question of conflicting decisions I refer to Civil Appeal No. 236/42, Vol. 10, P. L. R., page 383, and in particular page 390. I find it difficult to believe that Copland, J. and Rose, J. were not aware of the decisions in High Court No. 8/40 (P. L. R. Vol. 7, p. 121, at the top of p. 124) and High Court No. 76/41 (P. L. R. Vol. 8, p. 460 at the top of p. 463) when they decided Civil Appeal 290/42.

In High Court No. 76/41 the Court quoted with approval the decision of Frumkin, J., namely:—

> "The order of the Chief Execution Officer for transfer duly given and duly brought to the notice of the Land Registrar, coupled with the receipt by him of the prescribed transfer fees, must be taken to be equivalent to acknowledgment in a consent transaction."

I think that the Court in deciding Civil Appeal 290/42 must have felt that the practice prescribed by High Court No. 8/40 and High Court No. 76/41 should be limited in application to forced sales; for example, sales in execution of the property of a judgment-debtor or of a defaulting mortgagor, notwithstanding the fact that the words "dedication of *waqfs* of every description" are mentioned along with "sales, mortgages, gifts and other dispositions of immovable property" in the definition of "disposition" in Section 2 of the Land Transfer Ordinance. I cannot help feeling that Copland, J. and Rose, J. realised the inappropriateness of applying to "dedication of *waqfs*" the same test and the same procedure as was laid down by the High Court in the two High Court cases which I have now cited. The reason for fixing a definite time such as that of the time of payment of fees, seems to have been the desirability of enabling a judgment-debtor or a mortgagor to know up to what limit of time he had the power to redeem his property, and so prevent it from being sold by being able to raise the amount of the judgment debt or the mortgage debt. I would, therefore, be prepared to hold that the Court, in deciding Civil Appeal 290/42, were able to draw a vital distinction

between the circumstances of that case and the circumstances in the two High Court cases which I have cited. One might, therefore, well say that the Court, in deciding Civil Appeal 290/42, were not doing as Mr. Goitein has suggested, namely, going back on previous decisions of this Court, sitting as a Court of Civil Appeal and as a High Court.

In Land Appeal 22/31 (Vol. 1 P. L. R. p. 611) it was held that:—

> "The judgments of the Supreme Court, sitting as a High Court of Justice bind the Supreme Court sitting as a Court of Appeal and all inferior Courts."

It is, therefore, with hesitation that I accept the suggestion that we are not bound by the decision of this Court in Civil Appeal 290/42, and I also doubt whether it can truly be said that Civil Appeal 290/42 was wrongly decided.

The next point with regard to which I have had some doubts is the question of consent. In the first place, there is on this matter a clear finding of fact by the learned President of the Land Court (Judge Shaw). It is doubtful whether we are not bound by that finding of fact. Apart from this, however, I think that there was, during the argument before us, some misapprehension as to the true nature of the consent required by Section 4(2) of the Land Transfer Ordinance. In my view, the consent which the Director has to give is not a mere drawing of a party's attention to the necessity for compliance with the various requirements of the Land Transfer Ordinance as to registration. This would be superfluous and, I should think, needless because people are supposed themselves to be able to ascertain the requirements of the law. In my view, the consent envisaged is a consent to what I might call the "pith and substance" of the transaction. Now, if one considers the facts of the case and the various documents and copies of letters exhibited, it would seem that from the very outset the Director of Land Registration was prepared to give, and in fact did give, his consent to the pith and substance of the transaction. It is difficult to say that his consent to the substance of the transaction was at any time at all conditional. I think that it was from the outset unconditional. The fact that he drew the attention of the parties to the necessity of complying with the provisions of the Land Transfer Ordinance, and of paying off certain mortgages, does not in my view have the effect of rendering the consent, which he had already given, conditional.

I now wish to refer to two matters, namely, (a) the form of the petition, and (b) the form of consent required by Section 4(3). As the Director subsequently did give his consent I do not think that

the mere fact that the petition was not in a particular form or was not sufficiently adequate with regard to details of the proposed transaction, can affect the validity of the consent subsequently given. It would be odd if the party who subsequently obtained the consent were to be able to turn round to the Director and say, "I am afraid that my petition was not sufficiently voluminous, and I now want to give you more particulars even though you have already given your consent." It would be equally strange if the person who had obtained the consent, not being satisfied with the form and substance of the letter in which the Director gave his consent, were to write to the Director as follows: "Thank you for your consent but I really think that you should have given it in another way."

During the argument I put a question with regard to these two matters to Mr. Goitein, and his reply seemed to be that a consent given without the terms of the proposed disposition having been adequately put before the Director might be capable of being set aside.

A matter which has given me more cause for doubt is the question whether, assuming that we are entitled not to follow the decision in Civil Appeal 290/42, it can be said that, notwithstanding the consent which the Respondents obtained, the Appellants as heirs of the late Sitt Amineh are entitled to have their names placed on the Land Register. Before I deal with certain aspects of this matter I would like to say that there is one point which has rather puzzled me, and it is this, that if, as was at times suggested by Dr. Eliash, the *Waqf* intended to be registered was in effect a judgment of a Court (in this case the *Sharia* Court) then it would seem that by virtue of Article 1 of the Ottoman Law of Execution and Section 14 of the Land Transfer Ordinance, the *Waqfieh* or judgment of the *Sharia* Court should have been taken to the President of the District Court in his capacity as Chief Execution Officer. I refer to High Court No. 4/38, (P. L. R. Vol. 5, p. 91) and in particular to paragraph 2 of the judgment at page 93. As, however, Dr. Eliash did not say that his clients should have taken the *Waqfieh* to the President of the District Court as Chief Execution Officer, I leave this matter undecided, but I think that I ought to mention it.

There is one branch of the argument of Mr. Goitein with regard to which I am not altogether in agreement. He seemed to think that the heirs had an indefeasible right to be placed on the Land Register immediately on the death of Sitt Amineh. Now, what was the position on her death? It seems to me that at her death, in so far at any rate as the properties which were registered in her own name were con-

cerned, the position was this, namely, that it would be incorrect for her name to remain on the register as owner, and it would be equally wrong to put the names of her heirs on the register until they had obtained a certificate of succession. I pose the following, namely, supposing that the heirs or relatives of the late Sitt Amineh after her death had found among her belongings a will? (I am informed that a Moslem can dispose by will of a certain proportion, namely one-third, of his *mulk* property). If such a will had been properly proved before the *Sharia* Court, the beneficiaries entitled to succeed under the will would have the right, at any rate in so far as their portion of the *mulk* property was concerned, to have their names put on the register in preference to the heirs. In this connection if there were a dispute between parties, such a dispute would not as in England be decided by a Probate Court or by a Chancery Court, but would be decided in Palestine by a Land Court, and the Department of Lands would have to "carry out the instructions of the Land Court as regards the registration of any rights to ownership, mortgage, or any other registrable rights, and shall issue title deeds in accordance with such instructions." (See Section 5, Land Courts Ordinance). I see little difference in practice between the finding of a will and the finding of a *waqfieh*. I realise that a will does not come into operation until death, but it seems to me that what has happened in this case is that, instead of leaving a will, Sitt Amineh left a *Waqfieh*. Now, if we are to follow Civil Appeal 290/42 (P. L. R. Vol. 10, p. 159) especially the remarks in the first five lines of page 159 it seems to me that the present Respondents have made out a good case. I refer to Privy Council Appeal No. 2/36, P. L. R. Vol. 6, page 292, and to Article 46 of the Palestine Order-in-Council, 1922, in so far as Ottoman law is concerned, and to the judgment of Manning, J., in Civil Appeal 240/37, P. L. R. Vol. 5, p. 159 at page 163, and to Privy Council Appeal No. 98/25, P. L. R. Vol. 1, page 71, especially at page 76, and Article 52 of the Palestine Order-in-Council, and to Article 9 of the Mandate. In view, however, of what I said at the beginning of this judgment, I am not prepared to dissent.

I repeat that I find it difficult to dispute the correctness of the statement in the judgment of the learned Chief Justice that a dedication of land as *Waqf* does not become a disposition until registered in accordance with the provisions of the Land Transfer Ordinance. I, accordingly, concur in the judgment of the learned Chief Justice.

Delivered this 22nd day of December, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 16/44.

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.

Elyas Nakhle Malti. RESPONDENT.

Trial Upon Information — Interpretation of Regulation 24A(1)(*d*) — *The Reg. provides an alternative method of trial to that in sec.* 3 *T. U. I. Ord. — Grounds on which an appeal may be filed under sec.* 67 *T. U. I. Ord., CR. A.* 111/41.

Appeal from the judgment of the District Court, Haifa, dated the 7th day of January, 1944, in Criminal Case No. 246/43, whereby the Respondent was discharged without being called upon to plead on the information preferred against him for an offence contrary to regulation 24A(1)(d) of the Defence Regulations, allowed and case remitted:—

1. Summary trials under Reg. 24A are an alternative method of trial. The method of trial by information is not excluded under the regulation.

2. (Following CR. A. 111/41) An appeal lies under sec. 67 T. U. I. Ord. against a dismissal of a prosecution for want of jurisdiction.

(*A. M. A.*)

FOLLOWED: CR. A. 111/41 (8, P. L. R. 403; 1941, S. C. J. 378; 10, Ct. L. R. 125).

ANNOTATIONS: On the Attorney General's right to appeal in cases where the accused is discharged for want of jurisdiction, *cf.* CR. A. 31/38 (5, P. L. R. 206; 1938, 1 S. C. J. 177; 3, Ct. L. R. 131) — followed in CR. A. 111/41 (*supra*). See, on the other hand, CR. A. 104/37 (P. P. 17.xi.37; 2, Ct. L. R. 103) — no right of appeal where accused discharged by District Court on the ground that the committal order committed the accused for trial before the Assize Court and not before the District Court.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: H. Atalla.

JUDGMENT.

This appeal concerns a very short point as to whether, where an accused person is charged with an offence against Regulation 24A of the Defence Regulations, 1939, the Attorney General has an option of proceeding against him either upon information or summarily in a District Court.

Regulation 24A(1)(d) says that "any person who does ..... shall be guilty of an offence against this Regulation, and notwithstanding anything contained in section 3 of the Criminal Procedure (Trial Upon Information) Ordinance, shall be triable by a District Court summarily, and on conviction shall be liable to imprisonment for a term not exceeding ten years."

With great respect to the learned Relieving President and to the persuasive arguments of Mr. Atalla this morning, we are of opinion that the better view is that those words in fact provide an alternative method of procedure — that is to say, that the normal method would be to proceed upon information, but that notwithstanding the relevant provision in section 3 of Cap. 36, nevertheless a person may be tried summarily by a District Court. We think that that was the intention of the legislature and that that intention is adequately implemented by the wording of the section.

We should perhaps mention that Mr. Atalla also took the point that the Attorney General could not appeal at all in this case as he could not bring himself within any of the grounds provided by section 67 of the Criminal Procedure (Trial Upon Information) Ordinance. Logically, that argument has something to commend it, but in fact we are covered by authority in this case, the most recent being, so far as I know, Criminal Appeal No. 111/41, 8 P. L. R. p. 403, which exactly tallies with the present case. We think, therefore, that the Attorney General is entitled to appeal.

For the reasons which we have given, the appeal must be allowed and the case must, therefore, be remitted to the District Court to hear and determine according to law.

Delivered this 2nd day of March, 1944.

A/Chief Justice.

CIVIL APPEAL No. 282/43.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Fayeq Haha. APPELLANT.

v.

Awni El-Dabbagh. RESPONDENT.

Vague remarks by Magistrate contrary to weight of evidence — Question of alternative accommodation for tenant — Landlord offering alternative accommodation in appeal court.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, dated 19.7.43, in Civil Appeal No. 35/43, allowed and judgment of Magistrate restored:—

1. Where Magistrate made no definite finding but only vague remarks indicating that he was not satisfied that claimant proved a necessary fact, and appeal court on reviewing the evidence and seeing it was not shaken by other party, comes to conclusion that the only finding which Magistrate could and should have made was that claimant did prove his case, appeal court justified in substituting a definite finding for Magistrate's remarks.

2. Too late for landlord on appeal to offer tenant a house as alternative accommodation; only matter for appeal court to consider — correctness or otherwise of trial court's decision.

(*M. L.*)

ANNOTATIONS: On question of interference with discretion of Magistrate in considering case under sec. 8(1)(c) of Rent Restriction (Dwelling Houses) Ord. see annotation to C. A. 273/43 (*ante*, p. 33).

(*A. G.*)

FOR APPELLANT: Malak.

FOR RESPONDENT: Goitein.

JUDGMENT.

This is an appeal by leave from the District Court of Jaffa which Court had set aside a judgment of one of the Magistrates of Jaffa. The present Respondent was the Plaintiff in the Magistrate's Court and there sued the Appellant for eviction from a certain dwelling house in Jaffa. The Magistrate on 13th February, 1943, dismissed the present Respondent's case but the District Court on appeal ordered eviction. The present Respondent had claimed that the premises were reasonably required for occupation by himself and his wife. The Magistrate does not seem to have made a definite finding as to whether the landlord had proved to his satisfaction that his premises were reasonably required. It seems, in fact, that he was not satisfied. The District Court, however, on a review of the evidence came to the conclusion that the only possible finding that the Magistrate could and should have made on the evidence was that the Plaintiff did require those premises. There were ample reasons of a family or domestic nature, which showed beyond doubt that the Plaintiff's desire to reoccupy those premises was a reasonable one and the evidence on this head was not shaken by the tenant. We, therefore, think that the District Court were justified in substituting

a definite finding on this head for the rather vague remarks of the Magistrate. We wish to make it clear that the District Court were not in fact interfering with a definite finding of fact of the Magistrate.

The only other question now remaining is whether, assuming that the premises were reasonably required by the landlord for occupation by himself, the Magistrate was justified in holding that it was unreasonable to order the eviction of the tenant. The District Court on appeal held that, as the Appellant had accepted the sum of LP. 40, this sum being the difference between the sum which he would have paid over a period of years as rent of the premises from which it was sought to eject him and the rent of premises offered to him, namely, the house of one Hassib Eff. el Dirhalli, he could not later refuse to leave the Respondent's dwelling-house. The District Court were also of the opinion that the Magistrate should, on the evidence, have held that the landlord had done all that could reasonably have been expected of him in the way of "showing the Defendant houses for his residence." We are not altogether certain that the first reason given by the District Court is sound; nevertheless, we find it unnecessary to decide this, as the sole point now is whether the District Court, as an appellate Court, were justified in interfering with the refusal of the Magistrate to order eviction. In other words, were the District Court justified in deciding that the Magistrate should, on the evidence before him with regard to the existence of alternative accommodation have been satisfied that alternative accommodation was available? It is, accordingly, necessary for us to ascertain what evidence the Magistrate had before him on this head.

The Respondent alleged that the house of a Mr. Dirhalli at a rental of LP. 75 *per annum* was available. The rent which the Appellant had been paying for the premises of the Respondent was LP. 38 a year. There was thus a difference of LP. 37 *per annum*. The Respondent says that he had offered to pay the Appellant LP. 40 towards the difference in respect of two years rent. Even if this had been accepted the Appellant would still have been out of pocket at the end of two years to the extent of LP. 34. The Defendant's evidence was that he went to Nassib Dirhalli's house; but, on arriving there, Mr. Hassib Dirhalli informed him that although he was ready to give up the premises he was not the owner. It cannot, therefore, be said that it was sufficiently proved that this house was available for the Appellant.

It is next alleged by the Respondent that there was a house of one Halimeh but it would appear that the tenant in occupation refused to

leave. Now, that was the only evidence before the Magistrate proving the existence of alternative accommodation. Nevertheless the District Court said in its judgment:—

> "The Plaintiff in this case showed his good faith and did all that could be done in accordance with Section 8(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, that he proved his need by his evidence and the evidence of the Doctor and by showing the Defendant houses for his residence in accordance with letters which he sent to him indicating therein these houses, to which the Defendant did not reply and even went to the extent of refusing to receive one of them after it had been sent to him by registered post and after it had remained in the post for some time."

Having perused the record of evidence before the Magistrate we think that the District Court were not justified in interfering with the findings of the Magistrate who said in his judgment:—

> "The Defendant (*sic*) has not produced any evidence which proves to me the existence of a suitable house for the accommodation of the Defendant."

In other words, we do not think that the District Court were justified in upsetting the finding of fact of the Magistrate. After all, it was for the Magistrate to weigh the evidence and to decide whether he preferred the bare assertions of the Plaintiff to that of the evidence of the Defendant. In any event, whichever view the Magistrate was entitled to take as to witnesses, it seems tolerably clear that there was little, if any, satisfactory evidence of the availability of alternative accommodation. It is true that before the District Court the Plaintiff seems to have offered one of his own houses. It was, of course, too late for him to make this offer because the District Court was an appellate Court and the only matter with which it should have concerned itself was the correctness or otherwise of the Magistrate's decision; but in any event, it is not clear from the record whether the house offered by the Respondent was the house in which he had previously been residing or another house. Moreover, it is not clear whether the Respondent had permission to sub-let. We ought to add that the Defendant, when giving evidence before the Magistrate, said that he, the Plaintiff, that is, the present Respondent, offered one of his houses to him and that he (the Defendant) offered to pay the same rent as he had been paying, namely LP. 38, but the Plaintiff refused to accept this sum. It does not transpire what rent the present Respondent would have been prepared to accept from the present Appellant for this house; but, in any event, it seems immaterial because it would appear that the present Respondent was insisting on an excessive rental which the present Appellant was apparently unwilling

to pay. The Magistrate believed the evidence of the Defendant and his witnesses, and in the result held that the Plaintiff had failed to satisfy him that alternative accommodation was available.

For the reasons which we have given we consider that the District Court were not justified in interfering with the finding of the Magistrate. We, accordingly, set aside the judgment of the District Court and restore that of the Magistrate. The present Respondent will pay the Appellant's costs in the District Court which we assess as fixed (inclusive) costs of LP. 5 and in this Court the costs of this appeal will be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 10.

Delivered this 23rd day of December, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 159/43.

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

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

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

David M. Mizrahi. RESPONDENT.

Licensing — Licence under Trades and Industries (Regulations) Ord. — Evidence, municipal area, T. & I. (Haifa District) Order, 1940 *— Conditions attached to the licence — Card "games" need not mean gambling — Who may impose conditions — Interpretation of sec.* 7(1) *— Secs.* 2, 7(2) *— Criminal Procedure.*

Appeal from the judgment of the District Court of Haifa in its appellate capacity, dated 26th October, 1943, in Criminal Appeal Case No. 134/43, allowed and case remitted to Magistrate:—

1. The Trades & Industries (Regulations) Ord. applies to the whole of the Haifa District and it is, therefore, sufficient to prove that a café is situate in one of the principal streets of Haifa in order to bring it under the provisions of the Ordinance.

2. A prohibition, in the conditions of a licence, against "card games" includes all card games, whether gambling or not.

3. On the interpretation of sec. 7(1) of the Ordinance, both the Director of Medical Services and the Inspector General may attach conditions to any licence.

4. A conviction cannot be entered immediately after overruling a submission that there is no case to answer. The prosecution is entitled to rebut the defences raised on the submission, after the defence is heard.

(*A. M. A.*)

ANNOTATIONS:

1. The principle applying in civil cases that a point not raised at the trial cannot be taken on appeal, has up to now never been clearly followed in a criminal appeal. The only case where it is alluded to seems to be CR. A. 108/42 (9, P. L. R. 469; 1942, S. C. J. 534); *cf.* 1942, S. C. J., second paragraph of p. 539.

2. The procedure governing a submission of "no case to answer" and its effect is exhaustively explained in CR. A. 48/42 (9, P. L. R. 258; 1942, S. C. J. 357; 12, Ct. L. R. 13).

(*H. K.*)

FOR APPELLANT: Ganon.

FOR RESPONDENT: Geiger.

JUDGMENT.

Frumkin, J.: This is an appeal on behalf of the Attorney General from a judgment of the District Court of Haifa, in its appellate capacity, setting aside a judgment of the Magistrate's Court of Haifa convicting the Respondent on the charge of failing to comply with the conditions of a licence issued to him under the Trades anl Industries (Regulations) Ordinance.

The judgment of the District Court is based on the following reasons, namely, that there was no evidence that the café for which the licence was issued was situated within the Municipal Area of Haifa. This matter can easily be disposed of because not only is it undisputed that the café in question is situated within one of the main streets of Haifa Town which is clearly within the Municipal Area of Haifa, but the Ordinance applies not only to the Municipal Area of Haifa, but by the Trades and Industries (Haifa District) Order, 1940, it also applies to the whole area of Haifa District.

Another reason relied upon by the Relieving President was that the condition attached to the licence, to the effect that "no card games are permitted on the premises" is of very doubtful validity. It seems that what the learned Relieving President had in mind was that card games do not amount to gambling. It is, however, obvious that the charge was not for gambling but for not complying with one of the conditions of the licence which, if properly imposed, should be complied with. The licensing authorities could attach to a licence such conditions as are considered to be in the interest, *inter alia*, of public order, and it could not be said that upon licensing a café the Police Authorities could not restrict that café so that no card games are permitted on the premises.

The argument adduced that all that was proved in evidence was that there was playing of cards which does not amount to card games, is a mere playing of words.

Another reason relied upon by the learned Relieving President is not free from some difficulty. It depends upon the interpretation of section 7(1) of the said Ordinance as to the meaning to be attached to the word "and" in that subsection which reads as follows:—

> "The Director of Medical Services, or any officer authorised in writing by him, and the Inspector-General of Police and Prisons, or any officer authorised in writing by him, may refuse to approve any licence to carry on a classified trade under section 6 or may attach to any licence special conditions under which a classified trade shall be conducted, in the interests of public health, public order or public safety, or for the purpose of ensuring due compliance with any town planning relevant to the conduct of such classified trade."

It seems to me that the proper construction to be put on this point is that each of the Director of Medical Services and the Inspector-General of Police and Prisons may attach to any licence special conditions within the scope of control vested in each of them, so that if any of these two authorities have imposed a condition on the licence it should be complied with. This view is supported by the same subsection which prior to dealing with the attaching of conditions deals with the power to refuse to approve any licence and there is no doubt that any of the two authorities could use such power of refusal. While there is apparently no remedy upon the refusal by the Police authorities, there is a procedure provided for in subsection 2 of section 7, to be applied in cases of refusal by the Medical authorities. In other words, it is clear that either of the two authorities might refuse to approve a licence and if that is the meaning of sub-section 1 in relation to refusal, the same meaning has to apply to the attachment of conditions.

It has been argued that the fact that section 7(2) deals with the possibility of a difference of opinion between the Director of Medical Services and the Inspector-General of Police as regards the conditions to be attached to a licence, indicates the necessity that each of the two licensing authorities should be given an opportunity to see the conditions imposed by the other. This may be so, but in the present case this point does not arise, since no objection to the validity of the licence or conditions was taken on this ground either before the learned Magistrate or before the District Court on Appeal.

Another point taken in argument but not dealt with in the judgment of the District Court is that the officer who signed the licence was not

authorised in writing so to do by the Inspector-General of Police and Prisons. No opportunity was given to the prosecution to rebut this allegation. After the close of the prosecution case before the Magistrate, the defence pleaded that there was no case to answer; the Magistrate adjourned for consideration and then proceeded to give judgment against the Accused. If not for this error of procedure, the defence would have been in a position to put up the said defence that the condition was not imposed by a person in authority, and if that were so that would of course make the licence invalid, otherwise the prosecution would have an opportunity to rebut this allegation. For this reason the case will have to be remitted to the Magistrate for completion.

The judgment of the District Court is, therefore, set aside and the case remitted to the Magistrate. By consent there will be no order as to costs.

Delivered this 22nd day of February, 1944.

Puisne Judge.

Plunkett, A/J.: I concur in the judgment delivered by my learned brother.

A/British Puisne Judge.

Abdul Hadi, J.: I concur in the judgment of my learned brother.

Puisne Judge.

CIVIL APPEAL No. 250/43.

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

BEFORE : Edwards, J.

IN THE APPEAL OF:—

Rashid Naser ed Din. APPELLANT.

v.

Haj Ahmad Abu Zeineh. RESPONDENT.

Action by part-owner for eviction of tenant — Tenant becoming a co-owner while action pending — Failure of preliminary objections to appeal — Costs.

Appeal from the judgment of the District Court of Jerusalem, in its appellate capacity, dated 4th June, 1943, in Civil Appeal No. 21/43, dismissed:—

1. a) Action for eviction must be dismissed, if during its pendency tenant became co-owner, so that relationship of landlord and tenant has terminated.

b) An action against a co-owner for eviction from jointly owned property cannot succeed.

2. Where preliminary objections to hearing of appeal are found to be frivolous, Court of Appeal will as a rule deprive Respondent of his costs, even thought he succeeded on the merits.

(*M. L.*)

REFERRED TO: Possessory Appeal No. 141/22.

ANNOTATIONS:

1. On merger of lease see C. A. 5/29 (1, P. L. R. 526; C. of J. 1157). On merger generally see C. A. 262/43 (1943, A. L. R. 776) with annotations.

2. As to the second point see C. A. 232/37 (5, P. L. R. 77; 1938, 1 S. C. J. 72).

3. For grounds for which costs have been refused see annotation to C. A. 103/43 (1943, A. L. R. 180).

(*A. G.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Hiller.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem, in its appellate capacity, which Court had dismissed an appeal from a judgment, dated 19th April, 1943, of one of the learned Magistrates of Hebron.

The facts are set out in the notice of appeal as follows:—

> "1. The Appellant is a part owner of a shop situate in Hebron, which shop was leased to Respondent for the year 1361 by Appellant and his partners. The Rent Restrictions (Business Premises) Ordinance does not apply to Hebron.
>
> 2. At the termination of the period of lease, Appellant instituted an action for eviction against the Respondent on the ground that the lease had expired and that any new contract of lease with the other co-owners was void, as Appellant had not consented and had not leased his share.
>
> 3. During the pending of the said action for eviction, Respondent bought certain shares in the shop and thereby became himself also a joint owner, together with the Appellant.
>
> 4. The learned Magistrate found for the Appellant on all points except for this new development after the institution of the case, *i. e.* that because the Respondent became part-owner, the action for eviction was untenable.
>
> 5. The Appellant appealed to the District Court, which confirmed the opinion of the learned Magistrate."

The main ground of appeal is that a co-owner is not entitled to occupy the jointly owned premises without the consent of the other co-owners. Alternatively, it is submitted that as the Respondent in this case had originally been a lessee he should have been evicted.

The Magistrate found that after the action had been brought the

present Respondent, who had originally been a tenant, became a co-owner, and the action had inevitably to be dismissed because the relationship of land-owner and tenant had terminated.

The learned President of the District Court (Judge Bodilly) in his judgment said that whatever remedy the Appellant might have he was quite satisfied that he could not succeed in having the Respondent, who was a co-owner, evicted from jointly owned property. He went on to say, "if he occupies such property to the detriment of the other co-owners they have other remedies." I see no reason to differ from the judgment either of the Magistrate or of the District Court. I would merely add that the Respondent's advocate, at the hearing of this appeal, directed my attention to Possessory Appeal No. 141/22, referred to in Judge Shems' book on the Ottoman Magistrates' Law, page 48.

The appeal fails and is dismissed.

With regard to the costs of this appeal, the Respondent's advocate before allowing the Appellant's advocate to open the appeal, stood up and said that he wished to argue two preliminary points. I warned him that in accordance with the practice of this Court, if these objections were subsequently found to be frivolous, he would be deprived of his costs of the appeal, even though he succeeded in the appeal on the merits. Notwithstanding that, he insisted on raising two preliminary objections, although in fairness to him he did say that he would be and he was in fact very brief. Neither of the preliminary objections had any substance. I have seriously considered whether I should deprive the Respondent of his costs, but in this particular case I shall content myself by awarding the Respondent a small sum of costs, that is, fixed (inclusive) costs of LP. 5.

Delivered this 14th day of March, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 26/44.

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

BEFORE: Edwards, J., Shaw, President District Court and Frumkin, J.

IN THE APPEAL OF:—

Khalil Hilmi Nafe' Abdul Hadi. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Murder — C. C. O. Secs. 214(b), 216 — Defence of accident — Admissibility of evidence — Complaints by accused against victims — Evidence Ord. sec. 9, T. U. I. Ord. Sec. 39 — Manslaughter — Judgment not setting out all the facts dealing with the three elements in 216 C. C. O. — Resolution to kill — Inferences drawn from facts — Elements under 216(a), (b) and proviso — Provocation or hot blood.

Appeal from the judgment of the Criminal Assize Court, sitting at Jerusalem, dated the 14th day of February, 1944, in Criminal Assize Case No. 41/43 whereby Appellant was convicted of murder, contrary to Section 214 of the Criminal Code Ordinance and sentenced to death, dismissed:—

1. Evidence of a prior complaint by the accused against the victim is admissible to show enmity or motive.

2. After rejecting the defence of accident the Court need not consider manslaughter but must consider whether the necessary elements for murder are present.

3. It is unnecessary to set out *seriatim* in the judgment, all the facts on which the Court relies in dealing with the presence or absence of the elements required by sec. 216 C. C. O.

(*A. M. A.*)

ANNOTATIONS :

1. On motive for a crime see CR. A. 96/37 (P. P. 12.x.37; 2, Ct. L. R. 108) — no necessity to prove motive; see, on the other hand, CR. A. 9/42 (9, P. L. R. 46; 1942, S. C. J. 43; 11, Ct. L. R. 10) — motive important to show common design; and CR. A. 6/42 (1942, S. C. J. 88; 12, Ct. L. R. 29) — when absence of motive a matter for comment and consideration.

2. On inference of premeditation see CR. A. 9/44 (*ante*, p. 90) and note 2 thereto.

(*H. K.*)

FOR APPELLANT: Alami.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize, sitting in Jerusalem, whereby the Appellant was convicted of murder contrary to Section 214 of the Criminal Code Ordinance. The facts are fully set out in the judgment of the Court of Criminal Assize and it is unnecessary for us to refer to them at length. Shortly stated, the facts are that on the 18th of April, 1943, the son of the deceased victim Fakhri was being married. Some thousands of people were present. In the afternoon a procession composed of Fakhri and his guests was proceeding from the village down to the horse-race course. Prior to this the party seemed to have been on a threshing floor. About 50 or 60 metres past the threshing floor on the outskirts of Arrabeh village, a single shot was fired from a pistol, and it was not

denied that the shot was fired from the pistol of the present Appellant. The shot struck Fakhri in the back and inflicted injuries from which he died in a very few moments. The case for the prosecution was that the shot was fired deliberately with the intention of killing Fakhri and the defence was that the pistol went off by accident and that the Appellant had no intention of killing anybody at all least of all Fakhri. The Court of Criminal Assize heard evidence, including the evidence of eye-witnesses, some of whom swore that they had actually seen the Appellant shoot the deceased. After a careful review of all the evidence the Court of Criminal Assize rejected the defence of accident and convicted the Accused of murder, presumably under Section 214(b) and 216. Against that judgment the Appellant has appealed to this Court. The appeal was argued before us very ably and very fully by Moussa Bey Alami, the Appellant's advocate.

The first ground of appeal is that certain evidence was wrongly admitted. This evidence was two-fold. First of all, a petition sent to His Excellency the High Commissioner in June, 1939, by the present Appellant in conjunction with his uncle Anas Nafe' Abdul Hadi and a complaint dated the 19th July, 1939, made by the present Appellant to the officer in charge of Nablus Police Station. The main ground of complaint against Fakhri Abdul Hadi, the present victim, was that he had extorted from the Appellant and his uncle one Anas, a certain sum of LP. 1,200 and had also imprisoned them and subjected them to certain indignities. It has been argued, that no evidence of any statement made by an accused person can be admitted unless under Section 9 of the Evidence Ordinance or Section 37 of the Criminal Procedure (Trial Upon Information) Ordinance. Now, it is perfectly true that if it is sought by the prosecution to lead evidence of a statement by an accused person relating to the facts of the crime or offence with which he is charged, then such evidence cannot be led unless in accordance with the statutory provisions to which we have referred. Here, however, the position is totally different. It was merely sought to show that in 1939 the present Appellant had made a complaint against the man whom he is alleged to have killed in 1943. The object of leading that evidence was, of course, to prove the existence of enmity and thus, to provide evidence of the existence of a motive. We know of no provision in Palestine law which makes such evidence inadmissible. This ground of appeal, therefore, fails.

— — — — — — — — — — —*)

*) Passage dealing with findings of fact omitted.

(*Ed.*).

The only question now remaining is the last ground of appeal namely that the Court of Criminal Assize should have gone more thoroughly into the question of manslaughter. Now, we think that once the defence of accident had been rejected the only matter to which the Court of Criminal Assize had to apply its mind was whether the elements stated in Section 216 have been found to be present. Moussa Bey Alami criticizes the judgment on the ground that it does not set out *seriatim* the facts on which the Court relied for the existence or presence of these three elements. In view of the facts of this case, however, we do not think that it was necessary, although trial courts occasionally do set out *seriatim* the different facts on which they rely for proof of the existence of the three elements required by Section 216. The whole circumstances, in our view, point to the existence of a resolution to kill. The Appellant was at the wedding as the Court of trial appears to have held, not by invitation. Moreover, neither his uncle, Anas nor his own father was at the wedding and it is, therefore, not unreasonable to assume that the Appellant was there for some evil purpose. We think that the trial Court were entitled to take the view that he went there with fell intent. There was the very clear evidence of Jamil Suleiman that the Appellant walked five or six metres, put his hand inside his jacket and pulled out a pistol and fired and hit Fakhri. This witness said "He went up to within one metre of Fakhri, one metre behind him and shot him in the back." There is also the evidence of the witness Amin Haj Mohammad corroborating Jamil's evidence. It is clear, therefore, that the Appellant waited for a moment and then went straight up behind his uncle and shot him. His act in moving forward constituted preparation and the taking of the pistol was a completion of the act of preparation; so that, in view of Section 216(a) 216(c) and the proviso to 216, we think that resolution and preparation are clearly proved. With regard to Section 216(b) there is not the slightest evidence of any immediate provocation and there is not the slightest evidence of the existence of hot blood.

For these reasons we think that premeditation within the meaning of Section 216 was proved. We, accordingly, consider that we are unable to interfere with the judgment of the Court of Criminal Assize. The appeal is, therefore, dismissed and the conviction and sentence confirmed.

Delivered this 8th day of March, 1944.

British Puisne Judge.

CIVIL APPEAL No. 320/43.

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

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

IN THE APPEAL OF:—

Mordechai Agrest. APPELLANT.

v.

Joseph Fish. RESPONDENT.

Brokers — Claim for quantum meruit — Craven Ellis v. Canons Ltd.; Chandler Bros. v. Boswell; Prickett v. Badger; C. A. 264/42; Luxor (Eastbourne) v. Cooper — Terms of agreement must be followed — Throllope & Sons v. Martyn.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 16th July, 1943, in Civil Appeal No. 117/43, dismissed:—

In an ordinary brokerage agreement the broker cannot insist that the promisor accept the bargain offered, even if reasonable.

(*A. M. A.*)

REFERRED TO: C. A. 264/42 (1943, A. L. R. 117); Craven Ellis *v.* Canons Ltd., 1936, 2 K. B. 403, 2 A. E. R. 1066, 105 L. J. K. B. 767, 155 L. T. 376, 52 T. L. R. 657; Chandler Bros. Ltd. *v.* Boswell, 1936, 3 A. E. R. 379; Prickett *v.* Badger, 1856, 1 C. B. N. S. 296, 26 L. J. C. P. 33; Trollope & Sons *v.* Martyn Bros., 1934, 2 K. B. 436, 103 L. J. K. B. 634, 152 L. T. 88, 50 T. L. R. 544.

APPLIED: Luxor (Eastbourne) Ltd. *v.* Cooper, 1941, 1 A. E. R. 33, A. C. 108, 110 L. J. K. B. 131, 164 L. T. 313, 57 T. L. R. 213.

ANNOTATIONS:

1. Palestinian authorities on brokerage are collated in annotations to C. A. 264/42 (*supra*).

2. On the right to *quantum meruit* see Halsbury, Vol. 1, *pp.* 257 *seq.*, Sub-sec. 2; Digest, Vol. 1, *pp.* 516 *seq.*, Sub-sec. 3(1) E (d).

(*H. K.*)

FOR APPELLANT: Toister.

FOR RESPONDENT: Slonim.

JUDGMENT.

This is an appeal from the judgment of the District Court, Haifa, sitting in its appellate capacity.

The learned Relieving President upheld the decision of the Magistrate, dismissing the Plaintiff's claim for LP. 100 remuneration for services as brokerage or agent's fees, in respect of the sale of certain property. There was an alternative claim of *quantum meruit*. The

learned Relieving President held that from the Plaintiff's evidence he was to get commission one half when contract signed and remainder on transfer in Land Registry. No contract was signed and that although a broker may have considerable work to do to get an eventual purchaser to the seller that is part of his professional duties. That the Plaintiff sued on an agreement and could not get remuneration *quantum meruit*.

Mr. Toister for the Appellant argues that it was due to the conduct of the Defendant, here the Respondent, that the sale was not concluded and that the Appellant is entitled to be paid on completion of his work, that is, when he produced the purchaser. That Exh. P. 1 indicates only the mode of payment, and alternatively, that the Appellant is entitled to remuneration *quantum meruit*. In support of his argument he quotes a number of authorities — Craven Ellis *v.* Canons Ltd. In this case the agreement was held to be a nullity and, therefore, Plaintiff was entitled to *quantum meruit;* Chandler Bros. *v.* Boswell, at p. 186 of the Report. Here again the contract was broken and further that it was impossible to imply the terms suggested in the contract. Neither of these or other cases quoted are similar to the present one. Prickett *v.* Badger is also discussed and must be regarded as turning on special facts. In C. A. No. 264/42 the contract for the vendor and purchaser was duly signed.

Mr. Slonim, for the Respondent, submits that the argument of the Appellant is that the express contract made between the parties does not exist. A purchaser does not have to buy because he inspects the property. A broker has to take the risk he knows his work may come to nothing. According to the contract Exh. P. 1, the Plaintiff was to be paid when the sale was concluded and failing such sale he is entitled to nothing.

I do not think that it is necessary to look further than to the case of Luxor (Eastbourne) *v.* Cooper, A. E. L. R. 1941, p. 33, referred to by both Appellant and Respondent. Here the law on the question of agency, *etc.*, is very fully discussed. Their Lordships, in this case, point out that the decision on any such agreement for payment of commission is always only the construction of that particular agreement and is wholly dependent upon the precise wording of that agreement.

At p. 38 referring to the case of Throllope & Son *v.* Martyn, every man who receives and refuses, without giving reason, an offer, which he is not bound to accept may be said to act arbitrarily, but I cannot understand why he is in default. The implied term, as in this case,

amounts to saying that once be has introduced his duly qualified nominee, the vendor is bound in absence of "just excuse" to do his best to sell to that nominee. Here the agreement P. 1 reads as follows:—

"General Commercial Agency,
Jerusalem.

Jerusalem, 24 *June* 1942.

Mr. Mordekhai Agrest,
Haifa.

I, the undersigned Yosef Fish of Jerusalem, give you herewith an option for five days from the date hereof, *i. e.* until 29.6.42 to sell my house at 19, Shabtaiy Levy Street, Haifa for a price of LP. 4500.— and also if you bring a purchaser for the said amount I then undertake to pay you 2% commission of the price of the sale ....."

I think the only true construction of the contract in this case is that the agent also takes the risk of the owner not being willing to conclude the bargain with the agent's nominee. We, therefore, consider that from the wording of the contract the Appellant is not entitled to remuneration except when a sale has been concluded and that since no such sale was concluded he could not succeed in his claim. Neither is he entitled to *quantum meruit* since the contract sued upon is an express contract.

The appeal is dismissed and the judgment of the District Court confirmed. The Respondent will get his costs on the lower scale and to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 20th day of March, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 166/43.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Nasrallah Salim Khoury & 10 ors. APPELLANTS.

v.

1. The Government of Palestine,
2. Tewfiq Hussein Issa es-Sahli & 16 ors. RESPONDENTS.

Privilege — Land Registrar refusing to produce a file on the ground of privilege — Manner of claiming privilege — Previous proceedings,

L. A. 134/26; P. C. L. A. 1/27 — Opportunity to cross-examine on evidence before the Court — Appearance of counsel in Land Settlement cases, when desirable.

Appeal from the decision of the Settlement Officer, Haifa Settlement Area, dated the 19th day of March, 1943, in Case No. 16/Balad-esh-Sheikh, allowed and case remitted:—

1. If an officer of the Government refuses to produce a file on the ground of confidentiality, the proper method is to go into the witness box and claim privilege. The court then considers the arguments advanced by the parties and gives a ruling on privilege.

2. Where the Court peruses a plan in a Land Settlement case, the parties should be allowed to cross examine the surveyor responsible for the preparation of the plan.

(*A. M. A.*)

ANNOTATIONS: For the procedure in case of a claim of privilege see Halsbury, Vol. 13, *pp.* 724 *seq.*, Sec. 2; Digest, Vol. 22, *pp.* 392 *seq.*, Sec. 2.

(*H. K.*)

FOR APPELLANTS: A. Levin and Catafago.

FOR RESPONDENTS: No.1 — Junior Government Advocate — (Gavison).
Nos. 2—17 — Mu'ammar.
No. 18 — Rubinstein.

JUDGMENT.

This is an appeal from a decision of the Land Settlement Officer, Haifa, dated the 19th March, 1943.

The dispute between the Appellants and the Government of Palestine came before this Court in Land Appeal No. 134/26. In consequence of an alleged agreement entered into between the parties and signed on the 26th of September, 1935, an application by the present Appellants for leave to appeal to the Privy Council, P. C. L. A. No. 1/27, was withdrawn by the Appellants who are said by the Land Settlement Officer to have accepted the judgment of this Court in Land Appeal No. 134/26.

Several grounds of appeal were argued before us; but we think that the matter can be decided on two grounds alone. It seems that, before the Land Settlement Officer, the present Appellants' advocate wished to call as a witness the Land Registrar, Haifa, and that the summons to that witness had mentioned the fact that he was required to produce Haifa Land Registry file No. 14 of 1933. It seems that the Land Settlement Officer, apparently acting on instructions received from the Director of Land Settlement in accordance with some directions given to the latter officer by the Chief Secretary to the Govern-

ment of Palestine, decided in advance the question of confidentiality and would not allow the matter to be argued. The Land Settlement Officer made the following ruling:—

> "I do not consider this case should be delayed for the production of the file and by refusal to produce the Defendants must be prepared to rebut whatever inferences may be drawn from their conduct."

We consider that the Land Settlement Officer did not follow the proper procedure. The Land Registrar should have been made to enter the witness box and he could then have claimed privilege on the ground of confidentiality. The Land Settlement Officer would then have had judicially to consider the arguments advanced by the various parties and to give a ruling on the question of confidentiality.

Another ground of appeal is that the Land Settlement Officer took from the Land Court Case file a report and a plan made by a certain Mr. N. Epstein, a surveyor, and perused these papers. The complaint of the Appellants' advocate is that he should have been allowed an opportunity of cross-examining Mr. Epstein. We think that there is substance in this ground of complaint also.

For these reasons alone we think that the decision of the Land Settlement Officer of 19th March, 1943, cannot be allowed to stand. It is, therefore, set aside and we order a re-hearing before the same Settlement Officer. At the hearing, if the Appellants' advocate wishes to summon the Land Registrar as a witness he should be allowed to do so and the Land Registrar should appear together with any document mentioned in the witness summons. Should he object to produce them on the ground of confidentiality he can make his submission to the Land Settlement Officer who will give a ruling after hearing parties' advocates. At this hearing it will be desirable for the Government to be represented by Crown Counsel or by the Government Advocate or an Assistant Government Advocate.

The appeal is, accordingly, allowed, the decision of the Land Settlement Officer set aside and we order a retrial which should take place in the manner which we have just indicated. The costs of this appeal will abide the event, and, in order to facilitate the final arrangements, we certify an advocate's attendance fee for the hearing of this appeal of LP. 10 to the ultimately successful party. We would add that we do not consider that either Respondents Nos. 2—17 or Respondent No. 18 should have any costs of this appeal.

Delivered this 25th day of February, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 151/43.

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

BEFORE: Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF:—

The Attorney General. — APPELLANT.

v.

Elias Yousef Abboud. — RESPONDENT.

Possession of stolen property — C. C. O. 263, 273, 311 — Goods in possession of accused "in an unlawful manner" — "Taking" may be with a claim of right — Findings of fact — Civil claim.

Appeal from the judgment of the District Court of Jaffa (CR. A. 88/43), dismissed:—

On the facts, the *taking* of the property by the Appellant did not exclude taking with a claim of right.

(*A. M. A.*)

ANNOTATIONS: For authorities on Secs. 310 & 311 of the C. C. O. see CR. A. 55/42 (9, P. L. R. 255; 1942, S. C. J. 954) and cases cited in annotations thereto; *cf.* also CR. A. 57/43 (10, P. L. R. 291; 1943, A. L. R. 450).

(*H. K.*)

FOR APPELLANT: Assistant Government Advocate — (Salant).

FOR RESPONDENT: Nasser.

JUDGMENT.

This is an appeal by leave from a judgment of the Relieving President of the District Court of Jaffa setting aside a judgment of the Magistrate of Jaffa.

It appears to us, with all respect to the Attorney General and to the learned Relieving President himself, who was courteous enough to grant leave to appeal in this case, that this is not really a matter with which this Court should have been troubled at all. It appears that the Respondent in this case had cohabited with a certain Mrs. Schindler who died in 1941. She appears to have been possessed of means, and the inference, apparently, is that the Respondent was possessed of less means. A dispute has now arisen between the legal personal representative of the late Mrs. Schindler and the Respondent as to the ownership of certain properties that were previously in the possession and ownership of the deceased lady. That, no doubt, is a matter which will be decided by the appropriate Civil Court in the ordinary way, but

with regard to certain of these properties, a prosecution was instituted at the instance of the legal personal representative against the Appellant for offences *contra* sections 263 and 273 of the Criminal Code Ordinance for stealing certain properties; and also *contra* section 311 for having in his possession certain properties reasonably suspected of having been stolen. In the event, the Magistrate of the Jaffa Court acquitted the Respondent on the stealing charges, but convicted him on the charges *contra* section 311.

It seems to us that this appeal can be dealt with very shortly. As the learned Relieving President himself says, in the very brief judgment of the Magistrate there is no finding at all that these goods were, in fact, stolen. The only finding which could be said to support that view is the following passage: "The Court is satisfied that these articles were found in the possession of the accused Elias Abboud in an unlawful manner contrary to section 311 of the Criminal Code Ordinance."

The learned Relieving President, who went into this matter with extreme care, says in paragraph 4 of his judgment that this finding, if indeed it can be treated as a sufficient finding of fact at all on this matter, depends on the evidence of two witnesses, one of them being Dr. Schindler, who was the divorced husband of the deceased, and the other Jacob Nasner.

It appears that the learned Relieving President has accurately quoted the record when he says that all these witnesses say is that they suspect the Appellant of having *taken* the property. He then goes into the question of translation and says he is satisfied that the record is accurately translated when it says "the Appellant had *taken* the property" (and not *stolen* the property). That, as he points out, is very far from saying that the Appellant may not have a claim of right. He may very well, in civil proceedings, succeed in establishing that in fact he was entitled to the property. But that is not a matter for us to deal with here. All we need say is that we agree with the learned Relieving President when he says that the Magistrate's judgment does not contain a sufficient finding of fact in the first place, and, alternatively, that even if he had made a sufficient finding of fact, that there was no evidence on the record to support it.

For these reasons we are of opinion that the appeal must be dismissed.

As to the request that that part of the Magistrate's order relating to the disposition of the property itself should stand, we consider that we cannot give any effect to that as it would seem that the legal personal

representative has a perfectly good remedy through the ordinary civil machinery of the Courts by making an application for suitable relief to the appropriate District Court.

Delivered this 23rd day of December, 1943.

British Puisne Judge.

CIVIL APPEAL No. 317/43.

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

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

IN THE APPEAL OF:—

Joseph Morcos Nassar. APPELLANT.

v.

Hanna Bendak. RESPONDENT.

Application without motion for amendment of statement of claim — Amendment of statement of claim not amounting to change of cause of action.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated the 17th day of July, 1943, in Civil Appeal No. 91/42, allowed and case remitted to Magistrate's Court:—

1. Where Magistrate allowed application, without motion, for amendment of statement of claim and ordered appropriate adjournment so that no one was prejudiced by such grant of application, appeal court should not interfere with Magistrate's discretion.
2. Where Plaintiff claimed a debt in capacity of heir of deceased and subsequently claimed same debt as deceased's assignee, this is not really changing the cause of action, and claim that the application for amendment should not be allowed — not a sufficient ground of appeal.

(*M. L.*)

DISTINGUISHED: C. A. 106/43 (1943, A. L. R. 188).

ANNOTATIONS:

1. As to point 1 a similar decision was given in C. A. 44/43 (*ante*, p. 28).
2. On discretion of trial Court in granting adjournments see CR. A. 161/43 (*ante*, p. 26) and note 1. See also C. A. 311/43 (*ante*, p. 73) and annotations.
3. On question of change of cause of action see C. A. 106/43 (*supra*) and note 2.
4. On requirements of motion see C. A. 192/43 (10, P. L. R. 437; 1943, A. L. R. 535).

(*A. G.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: R. Hadad.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court, Jerusalem, in its appellate capacity, allowing an appeal from a judgment in favour of the Plaintiff (the Appellant in this Court) for LP. 49.850 mils.

In the Magistrate's Court of Bethlehem, the present Appellant alleged that the present Respondent owed a certain sum of money which he had borrowed from the Appellant's father. The Appellant's father had died and the heirs had made accounts between themselves and it at first seemed that the share of the Appellant (who is one of the heirs) included the debt due by the Defendant to the Plaintiff's father. After the Plaintiff had given evidence in the Magistrate's Court, the Plaintiff's advocate realised that the evidence showed that that sum had not reached the Plaintiff by way of inheritance from the estate of the deceased father, but had been assigned to the Plaintiff by his father during the latter's life time. The Plaintiff's advocate, accordingly, applied orally to the Magistrate for leave to amend the statement of claim under rule 110 of the Magistrates' Courts Procedure Rules, 1940.

The Defendant's advocate objected on the ground that the application should have been by motion under Rule 202; but the Magistrate overruled the objection and allowed the amendment, granting the Plaintiff a period of ten days within which to file an amended statement of claim. He also adjourned the hearing for a period of about three weeks. It is clear, therefore, that no one was prejudiced by that application having been granted.

In the result, after hearing the case, judgment was given in favour of the Plaintiff for the sum of LP. 49.850 mils.

The appeal in the District Court was allowed on two grounds the first of which was that the application to amend the statement of claim should have been refused because the Plaintiff had dropped his original cause of action and substituted an entirely new one.

The learned President of the District Court relied on C. A. 106/43 — Levanon and Apelbom (1943) page 188. Another ground which also succeeded in the District Court was that the Magistrate had erred in refusing to allow the Defendant's advocate to cross-examine one of the Plaintiff's witnesses.

With regard to the first ground, we think that the learned President was not entitled to interfere with the discretion of the Magistrate.

We think that the facts can be distinguished from the facts in C. A. 106/43. The circumstances in that case were peculiar because

it seems that in that case the Plaintiff had originally alleged fraud, and then abandoned that allegation and attempted to bring an action under Section 66 of the Land (Settlement of Title) Ordinance.

With regard to the present action, we think that it is at least doubtful whether the cause of action was really changed. The cause of action seems always to have been that a debt was due by the Defendant to the Plaintiff's father, and the only matter that was sought to be altered was the narrative with regard to how the Plaintiff came to stand in the shoes of his father.

For these reasons we do not think that the learned President of the District Court should have allowed the appeal on this ground.

We think it undesirable to deal with the second ground of appeal because it is clear that, once the learned President had decided to allow the appeal on the first ground, it followed that the judgment in favour of the Plaintiff could not stand and must impliedly have been set aside.

In the present state of affairs we do not think that we can simply leave the matter by allowing the appeal from the judgment of the District Court.

We think that, as it is at least doubtful whether the Plaintiff was entitled to object to the cross-examination by the Defendant's advocate of Abdallah Hanna Bendak, the judgment in favour of the Plaintiff should not be allowed to stand. The only satisfactory order, with a view to doing justice between parties, will be to set aside the judgments of the District Court and of the Magistrate of Bethlehem and to order a retrial of the Plaintiff's action before the Magistrate of Bethlehem. We allow the Appellant his costs of this appeal, namely, fixed (inclusive) costs of LP. 10.

Delivered this 10th day of February, 1944.

British Puisne Judge.

Plunkett, A/J.: I have nothing to add to the judgment just delivered by my brother. So I concur.

A/British Puisne Judge.

HIGH COURT No. 86/43.

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

BEFORE: Rose, A/C. J. and Khayat, J.

IN THE APPLICATION OF :—

Hassan Omar El-Zaideh. PETITIONER.

v.

1. The Chief Execution Officer, Magistrate's Court, Haifa,
2. Nazira Cook. RESPONDENTS.

Partition of land and recovery of possession — Disclosure of facts in petition to High Court.

Return to a rule *nisi*, issued on the 28th of September, 1943, directed to the first Respondent, calling upon him to show cause why he should not rescind his orders of the 29th July, 1943, and 16th August, 1943, in Haifa Execution File No. 708/41, and why he should not refrain from delivering the land in issue or any part thereof or any building or trees thereon, to the second Respondent, and from dispossessing the Petitioner thereof; order made absolute:—

1. a) Where judgment is one for partition and parcellation and not for possession Chief Execution Officer cannot order dispossession and delivery of land or any part thereof to judgment creditor.
   b) Where dispossession is sought against a co-owner and *a fortiori* against a third party a separate action for possession must be brought.
2. High Court will not discharge rule *nisi* for lack of full disclosure of facts, if it finds that at any rate by reference there was sufficient disclosure.

(*M. L.*)

ANNOTATIONS :

1. On functions of C. E. O. in partition proceedings see H. C. 51/43 (1943, A. L. R. 525) and annotations.
2. On case of eviction against co-owner see C. A. 250/43 (*ante*, p. 133). See also C. A. 179/43 (1943, A. L. R. 640).
3. As to point 3 see H. C. 15/43 (10, P. L. R. 148; 1943, A. L. R. 25) with annotations thereto in A. L. R.

(*A. G.*)

FOR PETITIONER: A. Levin and G. Mu'ammar.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Goitein, Abcarius and F. Atalla.

ORDER.

This is the return to an order, directed to the first Respondent, calling upon him to show cause why he should not rescind his orders of the 29th July, 1943, and 16th August, 1943, in Haifa Execution File No. 708/41, and why he should not refrain from delivering the land in issue, or any part thereof, or any building or trees thereon, to the second Respondent, and from dispossessing the Petitioner therefrom.

We have heard considerable argument in this matter, but in our opinion the point of law is simple and well established, and we consider that the original order of the Execution Officer, dated the 8th of October, 1942, correctly states the position. This order reads as follows:—

> "This judgment is a judgment of partition and parcellation and not for possession, and for this reason the application is refused."

It would seem that in such a case a separate action for possession under Article 24 of the Magistrates' Law should be brought against a co-owner, and *a fortiori* against a third party.

Mr. Goitein argued in the alternative that the order should be discharged, because the Petitioner had not made a full disclosure of the relevant facts. We are of opinion, however, that at any rate by reference there was a sufficient disclosure.

For these reasons the rule must be made absolute, with costs in an inclusive sum of LP. 20, to be paid by the 2nd Respondent.

Given this 10th day of February, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 356/43.

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

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

IN THE APPEAL OF:—

Hashem Muhammad El Farran. APPELLANT.

v.

Alexander Steinberg & an. RESPONDENTS.

Illegal contracts — Sale of tyres otherwise than in accordance with Order under D. R. Reg. 46 — Illegality vitiates entire transaction — Party to illegality cannot seek the assistance of the Court. Agreed issues — Points not taken and not in the issues may not be argued.

Appeal from the judgment of the District Court, Jaffa, dated the 15th day of October, 1943, in Civil Case No. 47/43, dismissed:—

1. Illegality vitiates the entire transaction.
2. A party to an illegal transaction cannot, unless he fall within the excepted cases, seek the assistance of the Court.

3. A point not taken in defence and not included in the issues may not be argued.

(*A. M. A.*)

ANNOTATIONS:

1. On contracts forbidden by statute see C. A. 148/43 (10, P. L. R. 310; 1943, A. L. R. 366) and note 2 thereto in 1943, A. L. R., at p. 367.

2. On the principle *"ex turpi causa non oritur actio"* see C. A. 276/40 (8, P. L. R. 62; 1941, S. C. J. 62; 9, Ct. L. R. 102), C. A. 142/41 (1941, S. C. J. 417) and C. A. 114/42 (1942, S. C. J. 704; 12, Ct. L. R. 201).

3. For exceptions where the parties are not in *pari delictu* see Halsbury, Vol. 7, *pp.* 174 *seq.*, No. 249, especially footnote (*t*) at p. 175; for cases see Digest, Vol. 12, *pp.* 286 *seq.*, *Sub-sec.* 1C(c)(ii).

(*H. K.*)

FOR APPELLANT: Malak.

FOR RESPONDENTS: Siev.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, dismissing a claim by the Appellants.

It appears that the Appellants purchased three motor-tyres from the Respondents, who are licensed tyre-dealers, for a price considerably in excess of that prescribed under an order made by a competent authority under Regulation 46 of the Defence Regulations, 1939.

It appeared, most unfortunately, that after this transaction was completed, the tyres were, in fact, discovered or suspected to be stolen property; and the Appellant in this case has lost his tyres as well as having lost his money. The issues which were framed in this case, and which are set out in the judgment of the learned President, were as follows:—

1. Did the Defendant sell to the Plaintiff the tyres claimed and what was the price paid?
2. If the sale is above the controlled price, or otherwise, will this affect the liability of the Defendants?

It is to be noted, as the learned Judge points out, that there is no issue as to whether the Defendants were guilty of fraud or of any other conduct of such a nature as to lead the Court to the conclusion that the Appellant and the Respondents were not in *pari delicto* in so far as this transaction was concerned. The Appellant has argued before us that the contract is not an illegal contract because under the law, while the Respondents were prohibited from selling at this price, the Appellants were not prohibited from buying at this price. It seems to us, as it seemed to the learned President, that there is nothing in this argument. If, in fact, the contract of sale was tainted with il-

legality, it seems to us that the contract as a whole must be regarded as an illegal contract; and that being so, that neither party can come to the Courts to ask for relief in respect of that contract, unless, of course, they are able to bring themselves within one of the exceptions provided by law. Before they do that the matter must first of all be pleaded and also, as the learned President points out, be made an issue in the case. In this particular matter it appears from the record that counsel for the Appellants intimated to the Court that he had agreed to this framing of the issues and so there can be no question as to whether or not the issues were framed in accordance with the wishes of the parties.

Having formed the conclusion that we have — that this was an illegal contract — it seems to us that the learned President was perfectly right in saying that on the case as pleaded before him and on the issues as agreed upon by the parties, that was the only matter which he had to decide.

That being so it is unnecessary for us to consider the further question whether the fact that these tyres were stolen, if indeed they were stolen, would have availed the Appellant, had the matter been pleaded.

For these reasons the appeal must be dismissed with costs on the lower scale to include the sum of LP. 5 for advocate's attendance fee.

Delivered this 9th day of March, 1944.

Acting Chief Justice.

CRIMINAL APPEAL No. 20/43.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Zayed Ali Samhadan. APPELLANT.

v.

The Attorney General. RESPONDENT.

Confessions — Admissibility of statement by accused — Caution — C. C. O. 311 — Charge under the section where evidence of theft is available.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated the 13th of February, 1943, in Criminal Appeal No. 3/43, which confirmed the judgment of the Chief Magistrate's Court, sitting at Hebron, dated the 30th of December, 1942, in Criminal Case No. 1099/42, whereby the Appellant

was convicted of being in unlawful possession of property suspected to have been stolen, under Section 311 of the Criminal Code Ordinance, 1936, and sentenced to three months' imprisonment and to pay a fine of LP. 40, or in default, three months' imprisonment, dismissed:—

A charge will lie under sec. 311 C. C. O. even if there be proof that the property was stolen, and not only reasonably suspected of being stolen.

(*A. M. A.*)

ANNOTATIONS:

1. The decision in this case involves an important question as to the applicability of Sec. 311 of the C. C. O. in cases where the property is not "reasonably *suspected*", but is actually *proved* to have been stolen. Although it does not appear clearly from the judgment itself, the main ground of appeal was in effect that "It is submitted that, where property is definitely known to be stolen property, a charge under Sec. 311 of the Criminal Code Ordinance does not lie".

2. On Secs. 310 and 311 of the C. C. O. generally *cf.* CR. A. 151/43 (10, P. L. R. 708; *ante*, p. 144) and annotations thereto.

(*H. K.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

The Appellant was charged before the Chief Magistrate, Jerusalem, with being in unlawful possession of property, contrary to Section 311 of the Criminal Code Ordinance, that is to say, of four motor-car wheels, which were reasonably suspected of having been stolen, and which were identified as having been military property. He was convicted principally upon his own statement. The statement was made in two parts — first of all he was questioned as a witness; he then made an incriminating statement, and at that moment he was charged and cautioned, and then continued his voluntary statement.

After being charged and cautioned, he made this incriminating statement:—

> "These four wheels were on the car when I sold it to Ishak and this car is mine."

It was proved that the wheels were military property, and the Chief Magistrate disbelieved the Appellant's statement to the Police that he had sold the car, but found that he had only rented it.

In these circumstances it seems perfectly clear that the conviction is correct, for the man was at this particular date in constructive possession of four stolen wheels. The Court is of opinion that the appeal fails and is dismissed. The sentence will run from today and in accordance with our usual procedure.

Delivered this 4th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 331/43.

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

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

IN THE APPEAL OF:—

Matityahu Rabinowitz. APPELLANT.

v.

Avraham Nudelman. RESPONDENT.

Discretion of trial Court in questions of alternative accommodation.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated 30th July, 1943, in Civil Appeal No. 128/43, allowed and judgment of Magistrate restored:—

Appeal Court — not entitled to substitute their discretion for that of Magistrate's Court in action for eviction unless there are very adequate reasons for doing so.

(*M. L.*)

FOLLOWED: C. A. 141/43 (10, P. L. R. 289; 1943, A. L. R. 318).

ANNOTATIONS: On question of interference with discretion of Magistrate in case under sec. 8(1)(c) of Rent Restrictions (Dwelling Houses) Ordinance see C. A. 282/43 (*ante*, p. 127) and annotation.

(*A. G.*)

FOR APPELLANT: Gross.

FOR RESPONDENT: Geiger.

JUDGMENT.

This is an appeal from the judgment of the District Court acting in its appellate capacity, wherein the learned Relieving President set aside the judgment from the Magistrate's Court granting an order of eviction to the Plaintiff, here the Appellant.

The decision of the District Court is based upon the question of "alternative accommodation". The Magistrate in his judgment has clearly considered all the facts of the case and exercised his discretion, stating that the Defendant argued vaguely against the alternative accommodation which is offered, relying on his disease which he says requires sun and air; but that he did not prove that the alternative accommodation lacks sun and air. The doctor who gave evidence did not know either fact. The learned Relieving President considers that this is a point which should have been decided by the Magistrate. The Magistrate found it was suitable, notwithstanding that the doctor

said that the Appellant required hygienic conditions, among which I presume, would be adequate accommodation. The learned Relieving President goes on to state that it would be forcing the Respondent to go into the smaller flat in his present state of health rather than preferring to let the lesser evil remain, that of the Appellant remaining in the cramped quarters that apparently he has been satisfied with for some years.

We do not consider that these reasons are adequate reasons for allowing the Relieving President to substitute his discretion for that of the Magistrate. It is clearly set out in Court of Appeal No. 141/43, P. L. R. Vol. 10, p. 289: The Appeal Court is not entitled to substitute their discretion for that of the Magistrate's Court unless there are very adequate reasons for doing so. We do not consider that the reasons are adequate in this case and that if the learned Relieving President had desired further evidence he could have sent the case back to the Magistrate's Court. With that we are not concerned.

The appeal must be allowed, the judgment of the Relieving President reversed and the judgment of the Magistrate restored with inclusive costs in the Court below and in this Court of LP. 10.—.

Delivered this 2nd day of March, 1944.

A/British Puisne Judge.

HIGH COURT No. 13/44.

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

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

IN THE APPLICATION OF :—

Said Mohammad Ubeid & 23 ors. PETITIONERS.

v.

1. The Food Controller, Jerusalem,
2. Asst. Food Controller, Samaria District, Nablus. RESPONDENTS.

Belated filing in High Court of affidavits in reply.

Return to a rule *nisi*, issued on the 11th day of February, 1944, directed to the Respondents, calling upon them to show cause why they should not cancel the order issued by the Food Controller served upon Petitioners through the Food Inspector of Tulkarm on the 31st of August, 1943, withdrawing the licence

given to Petitioners in respect of the Egg Collecting Centre by virtue of the Food Control (Table Eggs) Order (No. 2) of 1942; order made absolute:—

Where affidavits in reply are out of time, even a few days only, and High Court sees no reason or good cause for exercising discretion to excuse the delay, rule *nisi* will be made absolute.

(*M. L.*)

ANNOTATIONS :

1. On belated affidavits in reply see note 1 to H. C. 118/43 (*ante*, p. 5); *cf.* H. C. 100/43 (10, P. L. R. 567; 1943, A. L. R. 702).

2. On requirements of "good cause" see C. A. 156/43 (10, P. L. R. 335; 1943, A. L. R. 582) and note 2 thereto in A. L. R.

(*A. G.*)

FOR PETITIONERS: Hawari.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

In this matter as Counsel for the Petitioners has pointed out the Affidavits in reply are about 3 or 4 days out of time. It is true that we have a discretion — to be exercised, of course, reasonably and in the event of good cause shown — to excuse the delay, but in this matter, as Mr. Rigby admits, there is no reason or good cause shown for that delay. While it is always regrettable that matters should be disposed of in such a way, we have no alternative but to make the rule absolute. The Petitioners will have their costs in an inclusive sum of LP. 10.— to be paid by the 1st Respondent.

Given this 3rd day of March, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 301/43.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Gubrail Giries Eidy. APPELLANT.

v.

Asher son of Ishaac Abu Gurshum in his capacity as administrator over the property of Rifkeh daughter of Ishaac Abu Gurshum (Balciano) & 2 ors. RESPONDENTS.

Service — Failure to serve a defendant — M. C. P. R. r. 20; C. P. R. r. 34 — Defendant resident abroad — Advocate producing power of attorney at end of hearing — Service on advocate — Question of jurisdiction to be raised at the outset of a case.

Appeal from the judgment of the Chief Magistrate's Court of Haifa, sitting as a Land Court at Acre, dated 17.8.43 in Land Case 2/43, allowed and case remitted:—

1. Proceedings are vitiated if one of the main defendants is not summoned and does not attend the hearings.

2. Service may be effected on an advocate duly authorised.

3. An objection to jurisdiction (*ratione materiae*) should be taken at the outset of the case.

(*A. M. A.*)

ANNOTATIONS: An objection to the jurisdiction may be raised at any time, even on appeal: C. A. 250/42 (10, P. L. R. 32; 1943, A. L. R. 129) and note 2 thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: A. Atalla.

FOR RESPONDENTS: No. 1 — Hawa.
Nos. 2 & 3 — Service dispensed with by order of this Court dated 15.11.43.

JUDGMENT.

This is an appeal from a judgment of the learned Chief Magistrate of Haifa, sitting as a Land Court. Several grounds of appeal have been taken; but if the first one succeeds it will be unnecessary for us to deal with the others.

The first ground is that the Appellant who was the third Defendant in the Court below was not served with a summons. It seems that the Appellant was the only real defendant because during the trial the Plaintiff discontinued his action against the first and second Defendants. Issues were framed by the learned Chief Magistrate on the 22nd of May, 1943. On that day after issues had been fixed, Ahmad Eff. Shukairy, advocate, asked that personal service be effected on the third Defendant (Appellant). It would appear that at that time Ahmad Eff. Shukairy had no power of attorney from the Appellant. For some reason the learned Chief Magistrate refused the application, holding that it was unnecessary to serve the third Defendant. He, thereupon, set down the case for hearing on the 5th of June. The hearing lasted several days and was completed on the 8th of August, 1943, on which day the Court reserved judgment to the 17th August; but before noting on the file the fact that judgment had been reserved the learned Chief

Magistrate wrote on the file the following, namely, "Mr. Shukairy has now filed a power of attorney on behalf of 3rd Defendant".

Mr. Anton Atalla, who has argued this appeal on behalf of the Appellant, has submitted that rule 20 of the Magistrates' Courts Procedure Rules, 1940, cannot apply because it is not true to say that service could not be effected on the third Defendant in person, because the latter was at the time residing in Port Said where his address was known. It seems that the procedure in Magistrates' Courts sitting as Land Courts is that laid down by the Magistrates' Courts Procedure Rules, 1940; but, in any event, rule 34 of the Civil Procedure Rules, 1938, is in similar terms. We think that Mr. Atalla's contention is sound and must prevail.

It seems that, right up to the end of the hearing, the Defendant was absent and had not been served. It equally appears that up to the end of the hearing there was no one before the Court who had a power of attorney from the third Defendant. The whole proceedings, therefore, were bad. The judgment of the learned Chief Magistrate of 17th August, 1943, must be set aside and the case remitted to him to hear *de novo*.

We would merely add that now that Ahmad Eff. Shukairy has a power of attorney from the Appellant, service on Ahmad Eff. should be sufficient. We would also add that if it is sought again to argue before the learned Chief Magistrate that the value of the property exceeds LP. 250 then that point should be taken at the very outset.

Costs of this appeal will abide the event; but, in order to facilitate the final arrangements, we certify an advocate's fee at the hearing of this appeal of LP. 10 to the ultimately successful party.

Delivered this 28th day of March, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 18/44.

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

BEFORE: Rose, A/C. J., Shaw, President District Court and Frumkin, J.

IN THE APPEAL OF:—

David Segal. APPLICANT.

v.

The Attorney General. RESPONDENT.

Criminal procedure — Form of charge — Payment by agent — Acts linked together as set out in charge — Findings of fact — Police traps, when they may be used, Roscoe's Criminal Evidence — Corroboration of the evidence of an accomplice — A requirement of law in Palestine — Crystallized practice — Evidence in corroboration discussed — Cumulative effect of such evidence — Failure to supply reasonable explanation, whether may be used in corroboration — Its effect on credibility — Form of judgment, findings to justify verdict — Objection to evidence — Evidence of a conversation by accomplice as conspirator — Archbold — Rules of evidence are rules of exclusion — Onus of establishing inadmissibility — Credibility and admissibility — Sentence — Matters which may be taken in mitigation.

Appeal from the judgment of the District Court, Haifa, dated the 24th day of January, 1944, in Summary Trial Case No. 128/43, whereby Applicant was convicted of receiving money to show favour contrary to Section 109 of the Criminal Code Ordinance, 1936, and sentenced to six months' imprisonment, dismissed:—

1. Even if objectionable, police traps may be used to disclose offences otherwise difficult to trace. The illegality of an act is not affected by the fact that it was done in consequence of a trap.

2. The evidence of an accomplice needs corroboration.

3. Failure to supply an acceptable innocent interpretation of a transaction may not be used in corroboration, though it may affect credibility.

4. Whether or not conspiracy is charged, acts and declarations by one person may be used against his accomplice to show a furtherance of the common design. These acts and declarations may be proved by the actor himself, or extraneously.

5. The proper manner of appealing to the clemency of the Court is to enter a plea of guilty.

(*A. M. A.*)

REFERRED TO: R. *v.* Mortimer, cited in Roscoe's Criminal Evidence, 14th ed., p. 156; R. *v.* Blatherwick, 1911, 6 Cr. A. R. 282.

ANNOTATIONS :

1. The first appeal in this case, CR. A. 105/43, is reported in 1943, A. L. R., p. 754.

2. Authorities on defective charges are collated in note 2 to CR. A. 57/43 (10, P. L. R. 291; 1943, A. L. R. 450) in 1943, A. L. R. at pp. 451—2.

3. See note 2 to CR. A. 105/43 (*supra*) on the necessity for corroboration of the evidence of an accomplice; *vide* especially last paragraph at p. 755 as to the distinction attempted to be drawn in the judgment below between the law in England and the practice "now crystallized" in Palestine.

4. On evidence of conspiracy see judgment of Copland, J., in CR. A. 29/39 (6, P. L. R. 405; 1939, S. C. J. 345; 6, Ct. L. R. 85).

5. As regards the question of sentence, *cf.* CR. A. 106/41 (1941, S. C. J. 374; 10, Ct. L. R. 109) — *nature of defence not to be taken into consideration;* see

also CR. A. 19/43 (10, P. L. R. 120; 1943, A. L. R. 93) — *irrelevant that accused told a deliberate lie.*

(*H. K.*)

FOR APPLICANT: P. Joseph.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, convicting the Appellant of an offence against section 109 of the Criminal Code Ordinance.

The first point taken by Dr. Joseph on behalf of the Appellant is that even assuming the prosecution's facts to have been proved satisfactorily and believed by the Court, the form of the charge is defective. The first point that he takes on that head is that according to the wording of the charge, the receipt of the money is alleged to have been from Aba Patt, whereas, in fact, the physical receipt was from Kuentzler, who gave evidence for the prosecution. As regards that matter, we think that the point is not well-founded because, on the case as presented for the prosecution, it is clear to us that Kuentzler was the agent of both parties, and that the receipt from Kuentzler was, in fact, receipt from Patt, and that the two transactions — the receipt of the LP. 200 at 1 o'clock in the afternoon, and the receipt of the lesser sum of LP. 40 from Kuentzler by Segal at 6 or 7 o'clock in the evening — is really, in effect, on the story of the prosecution, one transaction. It is true that in the form of words which the Crown elected to use in their second count they limited the matter to the receipt between Nordau St. and Balfour Street, so that as far as that aspect of the matter is concerned, they have chosen to limit themselves to the lesser amount of LP. 40. But for the reasons which we have stated, that cannot avail the Appellant.

The second point taken as to the form of the charge is that the favour alleged is the allocation of flour, whereas, as Dr. Joseph contends, the evidence went to show that the favour in fact expected and hoped for was the stopping of a prosecution in connection with an offence concerning rusks. The prosecution's answer to that, which seems to us to be well founded, is that the two matters are linked together in that the allocation of the flour depended at least in part upon the prosecution in the rusks matter, because a successful prosecution in the rusks matter would, in fact, have been a fatal bar to the allocation of flour to the two Messrs. Patt. On that matter (although at this stage we do not wish to go into the evidence in detail) it is important to consider the

evidence of Mr. Kuentzler at a very early stage of the proceedings where he refers to what may be termed the earliest of the guilty conversations with the Appellant on the 26th of February, when this matter of assistance to be given by Segal was, according to the prosecution story, discussed. As to that, it seems to us to be clear that the discussion, if any, must have been about the allocation of flour, or at least, that the trial Court was entitled so to infer, because the question of the prosecution itself, as is abundantly clear from evidence to which we will refer later in another connection, had gone to sleep at this period and was only revived on the 15th March when Mr. French, for one reason or another, possibly as a result of representations from the District Commissioner's Office, remembered the matter of this pending prosecution and asked Mr. Segal what was the position. And it was then — subsequent to that re-opening of the matter on the 15th March — that the fatal transaction of the 18th of March, which has given rise to the present prosecution, took place. It seems to us, therefore, that the count is not defective, because the allocation of flour depended, although not exclusively, upon the fate of this prosecution. With regard to this matter, Dr. Joseph stressed at considerable length the fact that there was no affirmative evidence that Segal knew that his decision in the matter of the prosecution would have any effect on the allocation, and he relied on a passage in Mr. French's evidence in which he said: "I cannot swear that Segal knew that the allocation of flour depended upon the decision in the rusks case". It is quite clear that Mr. French was in no position to swear to such a matter, but the presence or absence of Segal's knowledge would, in our opinion, be eminently a matter for the trial Court to consider and to infer from all the surrounding circumstances, and it seems to us that if the prosecution case is to be believed, there is ample material from which the Court could reasonably infer that Segal must have realized the connection — and the very close connection — between this prosecution and the decision as to whether or not to allocate flour.

There is another matter that Dr. Joseph stressed, again quite properly — that the actual receipt of these monies at the junction of these two streets was as a result of a Police trap. That, of course, is perfectly true, but perhaps I cannot do better here than quote the words of the late Lord Chief Justice Alverstone:

> "I do not like police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other way, and unlawful acts done in consequence of a trap are none the less unlawful."

This passage is quoted on page 156 of the 14th Edition of Mr. Roscoe's book on Criminal Evidence.

We think, therefore, that the points taken by Dr. Joseph as to the form of the charge, cannot be sustained.

We then come to what is really the crux of this case, and that is to the question of corroboration. There can be no doubt on the case of the prosecution as presented, that Mr. Kuentzler was an accomplice, and the first question that perhaps we should express our opinion upon is as to whether, in such a case, corroboration is necessary. We should have thought that that matter had now, as far as Palestine is concerned, long been settled, but it does appear, and the matter is adverted to in the judgment of the trial Judge here, that some little confusion may perhaps have been caused by the very proceedings in this Court, differently constituted, in this same matter of Segal, when the matter came up on appeal by the Attorney General; and there it appears that the Chief Justice Mr. Gordon Smith did say, in a minority judgment, words to the effect that he thought that corroboration might not in every case be necessary, basing himself, no doubt, on what we all know to be the law in England, and that is, that provided an adequate warning is given to the jury of the desirability of corroboration that then a finding on their part of guilt in the absence of corroboration will not necessarily be quashed on appeal. That is no doubt correct as to the law in England, but we are of opinion that as far as Palestine is concerned, certainly for the last seven years, the practice has now crystallized, and I would say that it has now become at the very least a rule of practice that an accomplice's evidence needs corroboration and that in the absence of such corroboration a conviction will be quashed upon appeal. In this case is there sufficient corroboration of Kuentzler's story, which story, of course, if believed and so corroborated, clearly affords ample ground for a conviction?.

The learned trial Judge sets out in detail under five heads the matters which he relies upon as being corroboration. As regards the first head — which is in many ways the most important — it is, perhaps, desirable to read it. The Judge says:—

> "The fact that between the 15th and 18th March the question whether or not the Patt firm should be prosecuted was ripe for decision, the dates upon which Kuentzler approached the Patts for a bribe correspond with these dates, and that on the 17th March the Defendant did ask for the decision in the case to be postponed."

As to that, Dr. Joseph has attacked the last statement of the learned Judge by saying that there is no evidence that the Defendant asked for the decision in the case to be postponed, but it seems to us that that

is putting too narrow a construction upon the words of the Judge; because, what are the facts? It is undisputed — one, in fact, of the few common facts to the prosecution and the defence in the case — that on the 15th March this prosecution, which appeared to have gone to sleep, was revived by Mr. French himself, the Assistant Controller, who asked Segal what was the position in this rusks prosecution. Whatever may or may not precisely have been said between Segal and French and Segal and the other inspectors — Monsun and Frank — the fact remains that on the 17th March Segal was not prepared (and that abundantly appears from the record) to give a decision. He said that he thought the case might well be successful, but that he would like a few more days to consider the matter. Having regard to the fact that Mr. French had asked for a reply to this question by noon on the next day of the 16th March, that seems to us to justify the learned Judge in putting the matter in that way, that is to say that Segal asked for time to consider his decision as to the prosecution.

The question of these dates seems to us to be of particular significance on the very mater that was raised by Dr. Joseph, because, had there been any doubt at the conversation of the 26th of February as to what form Mr. Segal's assistance should take, that doubt seems to us to be removed by the situation which had arisen from the 15th to the 18th March. On the 26th February, Kuentzler says in his evidence that Segal did not suggest how the difficulty would be removed, that is to say, he (Segal) was presumably to use his discretion as to the form of favour which he was to show; but after the 15th of March, when this question of the prosecution had again come to life and when the picture which, no doubt, the learned Judge had before his mind was this that you had the Patts, supported by the District Commissioner's Office, pressing for this allocation of flour on the one side and you had the Food Control Office, for reasons good or bad, inclined to resist it, upon the other. And it was at this period that Mr. French remembers (which he is perfectly entitled to do) this question of the pending prosecution on the 15th March and he asks Segal, as the prosecution officer, what the position is; and it is on the 18th March, the day after Mr. Segal asks for more time, that this alleged transaction in the street of the passing of the LP. 40, takes place. It seems to us that in the light of those facts clearly that first head, which the learned Judge relied upon as corroboration, is eminently a matter which can, not necessarily must, be properly so regarded.

The next matter relied upon is that the place at which the money was given was an unusual place for an innocent transaction such as

a loan, to take place. And the third ground is that no receipt, security or any document was exchanged between the two people.

These two matters are matters which are, of course, susceptible of explanation. The fact that the money was handed over at 7 o'clock in the evening on some steps between two streets, that it was handed over quickly and without the exchange of documents, are matters which, no doubt, are susceptible of explanation, but it seems to us that we cannot say that the Court below was wrong in attaching some slight importance to these matters, having regard to the accompanying circumstances. It would not, in our opinion, be necessary for us to hold, in order to regard these grounds of corroboration as being good, that each one of them standing by itself would, in fact, be sufficient to entitle the Court to convict, but it seems to us that, with regard to the point made against them by the Appellant, it is impossible for us to say that the trial Judge was wrong in regarding the fact that no document was exchanged and that the place was unusual for an innocent transaction to take place as to some extent corroboration of the accomplice's evidence.

Then we come to the question of the alleged loan, and it is here that one has to consider the defence that Mr. Segal elected to put forward in this case, and that is, that while it is perfectly true that he received this sum of money at the time and place and in the circumstances alleged by the prosecution, in fact it was a loan from Kuentzler. And here it is perhaps convenient to interpellate a point that Dr. Joseph in his argument took a little later, and that is, whether the fact that Segal's story as to the loan was disbelieved could be corroboration of the accomplice's story. With regard to that, Dr. Joseph stated that the fact that no explanation or an unacceptable explanation is given by an accused person cannot implement a prosecution case which has, at that stage, failed to set up a *prima facie* case; and it is clear, in our mind, that had there been no sufficient corroboration of the accomplice's evidence, the mere fact that Mr. Segal gave an explanation of the matters which the Court found to be untrue would not assist the prosecution, but where, of course, there is an absence of an explanation or, *a fortiori,* if an unacceptable explanation is given, that may quite properly make a Court more ready, at the conclusion of the case, to believe the evidence given for the prosecution including, of course, those matters which can properly be taken into consideration as corroboration; and in that matter I might perhaps refer to another passage in Mr. Roscoe's book at page 287 where he touches on this very point. Again quoting from a judgment of Chief Justice Alverstone:—

"Although the fact that Appellant was not called" (and, *a fortiori,*

> of course, where the Appellant puts forward a story which is rejected by the Court) "is not of itself corroboration, we think it entitles a jury to act where, perhaps, they would not otherwise have done so".

On that matter the next ground of corroboration — linking with this — is the fact that a loan from Kuentzler to the Defendant would have been extraordinary in the circumstances in which the two men were placed and having regard to their different positions in life. As to that Dr. Joseph has attacked that ground very strongly and says that it appears from the example which the learned Judge gives in the next passage in his judgment that he is considering social distinctions which might, of course, be a permissible ground from which to draw an inference. And Dr. Joseph says that so far from Kuentzler being on a different social plane there was evidence that he was a man whose financial position was no worse than Segal and that, therefore, it was not fair or proper for the Judge to draw this inference. There, again, it seems to us that having regard to the language of the Judge, "the circumstances in which the two men were placed and their different position in life", it was permissible for him to have regard to the appearance and background of this man Kuentzler who admittedly on his own showing is a rogue and a scoundrel, and this young man Segal, who is a professional man who has borne up to this stage an unblemished character and whose father is a person of substance. Here, again, it seems impossible for us to say that the trial Judge was wrong in drawing an inference from those facts and in saying that he thinks it is unlikely that a man of Segal's position and good background should borrow money in these circumstances from a man such as Kuentzler. As I say, it seems to us that that is a matter that the Court could properly, if it wished, rely upon as a matter for corroboration.

Then there is the final ground about the incident at the Atara Café. That is a comparatively minor matter, but again, it seems to us that the fact that Aba Patt saw Segal in that Café at the time when Segal is alleged to have informed Kuentzler that Patt was there, is some corroboration. It does not, of course, carry the matter very far; nor does it appear to have been strongly relied upon by the trial Judge, but it is some corroboration of the truth of the story on that particular matter put forward by Kuentzler. We think, therefore, taking those grounds *seriatim*, that we cannot say in any particular instance that the Court was wrong in drawing an inference from them, and we are also of opinion that collectively — particularly having regard to the first ground stated — there was ample material upon which a trial

Court could, if it wished, hold that there was corroboration of Kuentzler's evidence.

The next matter taken by Dr. Joseph is against the form of the judgment, and he says that there are no sufficient findings of fact to justify the verdict. It is quite true, of course, that different Judges adopt different styles when writing their judgments, but in this particular case what the learned Judge did was to set out in considerable detail the story as told by Kuentzler, and then, at a later stage in his judgment, he says that he is satisfied that the story told by Kuentzler is substantially true. And, in order to meet Dr. Joseph's objection on this point, it is clear from the tenor of the judgment as a whole and from the other parts of the evidence which he accepted, that the Judge applied his mind to what was important in Kuentzler's evidence in distinction from what was mere detail and unimportant. It seems to us that, having regard to the case as a whole, we cannot possibly say that the form that the Judge took in expressing his findings of fact is a reason for vitiating the conclusions to which he came. It is clear that he accepts the evidence of Kuentzler which he regards as being adequately corroborated. If he accepts the evidence of Kuentzler then, to our mind, there can be no doubt that his verdict was a correct one.

The last point taken by Dr. Joseph was that certain inadmissible evidence was admitted; and he referred us to five occasions upon which the same objection was taken to the same class of evidence and that was as to conversations between Kuentzler and Aba Patt. It is to be noted that these conversations were deposed to by Kuentzler — conversations which he said took place between him and Aba Patt — touching, of course, the question in which he was acting for Segal. It would seem to us to be quite clear and, I think, is not seriously disputed even by the Appellant, that although a conspiracy in this matter was not charged, that nevertheless the whole case for the prosecution depended upon the fact that there was a conspiracy, in fact, between Kuentzler and Segal. On page 1419 of the 31st Edition of Archbold's Book on Criminal Pleading it says:—

> "The acts and declarations, also, of any of the conspirators in furtherance of the common design, may be given in evidence against any other conspirator, and this principle applies when the charge is one of a crime committed in pursuance of a conspiracy, whether the indictment contains a count for conspiracy or not."

It is quite clear, of course, from that, that the evidence of a third person stating what was said to him by in this particular case Kuentzler, relative to the matters in issue, would clearly be admissible, and it

seems to us, as Mr. Rigby has pointed out, very difficult to find any principle in law by which if a third person could say what Kuentzler said to him on behalf of Segal, that Kuentzler himself could not say what was said to him or what he himself, said on behalf of Segal. As Mr. Rigby pointed out, the rules which govern the admissibility of evidence are rules of exclusion and, in order to treat this evidence as inadmissible, it has got to be shown by the Appellant that this evidence falls within one of the well-known rules of exclusion. There seems to us to be no reason in principle why, if a third person may say what a conspirator has said, the conspirator himself cannot say what he said. And Dr. Joseph, who argued this case with his usual thoroughness, was unable to cite to us any authority in support of that proposition. That being so, we consider that there is no rule of exclusion which covers this matter, and there is no reason why these conversations should not have been admitted in evidence. It is probably unnecessary to say, in case this matter causes any confusion in future, that this only goes to the question as to whether these conversations are admissible. Naturally, Kuentzler being an accomplice, there would have to be corroboration of his evidence. The question of credibility and admissibility are, of course, quite distinct.

For all these reasons we are of opinion that the appeal must be dismissed.

We now come to the very difficult question of sentence, to which we have given the most anxious consideration. The first matter which has been raised in mitigation is the good circumstances of the Accused and the consequently very heavy social and professional results which follow upon a conviction. That is a matter that the learned trial Judge himself quite clearly took into consideration. He adverts to it both at the outset of his judgment and again in passing sentence. No doubt also he was alive, as we too must be alive, to the facts that while if a person in a prominent position commits an offence his fall is greater; so, also, is the offence greater; and, particularly having regard to the fact that the learned trial Judge has adverted to the matter with such care himself, we cannot, therefore, say that as regards that head of mitigation there is any ground for interfering with the sentence of the Court below.

There is one other matter that has given us considerable thought, and that is the fact that the crime itself was committed almost exactly a year ago to-day, and that the history of this prosecution has been prolonged, in that originally there was an acquittal on a point of law before the District Court differently constituted; that there was an

appeal to this Court by the Attorney General, which appeal was allowed and the matter was remitted to the trial Court as a result of which the present appeal has been made. Dr. Joseph presses very strongly that this matter should be treated as a ground of mitigation. There, again, apart from the fact that the sentence passed by the trial Judge in this case was by no means high in itself, we feel a certain difficulty in treating this as a permissible ground for the exercise of clemency, because, if a compassionate appeal is to be made to the Court on behalf of a young man of good position who allows himself to be tempted to do a thing of this kind, it seems to us that the appropriate course for an Appellant in such circumstances to take is to plead guilty. If he had pleaded guilty at the outset of these proceedings — if he had said 'I yielded to sudden temptation' — then that, no doubt, is a matter which the Court would and could take into consideration. But here, not only was the case contested with extreme vigour and determination, but also — and this seems to us a matter which we cannot disregard on this aspect of the case — the Accused or those people acting on his behalf (I do not, of course, mean Dr. Joseph) prevailed upon another professional man to come and give evidence as to this alleged loan which the Court disbelieved and which, if we may say so, we think the Court was perfectly right to disbelieve. It seems to us that that circumstance must, to a considerable extent, out-weigh any compassionate appeal that has been addressed to us on this question of the prolonged litigation that this unfortunate young man has had hanging over his head for the last twelve months. In all the circumstances of the case, while we are fully alive to the tragedy of it from the point of view of the Appellant, we also must have regard to the seriousness of the class of offence where a young man with a position of responsibility — a professional man — takes a bribe in circumstances of which there can be nothing to be said in mitigation at all. Having regard to all that, we are certainly not prepared to say that the sentence of six months is in any way excessive. We note that the trial Judge ordered special treatment, and we see no reason to interfere with that order.

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

Delivered this 21st day of March, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 284/43.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

Eliezer Eliachar & 3 ors. RESPONDENTS.

Expropriation of land — Assessment of value by Land Court — Consequential loss, potentialities — Sri Raja v. Revenue Officer, Vizagapatam — Ord., sec. 10, English Act, sec. 2(3), Halsbury, Plymouth case, In re Arbitration Lucas Chesterfield Gas Board — "Special need of a particular purchaser etc." — Cross appeal, C. P. R. 339 — Apportionment and distribution of depreciation — C. A. 34/43, 39/42, payment of money into Court — Interest.

Appeal from the judgment of the Land Court of Jerusalem, dated 30th day of July, 1943, in Land Case No. 12/43, dismissed:—

1. Potentialities of the land expropriated can and should be taken into consideration in determining the value of compensation payable.
2. When money is paid into Court following upon a refusal by the owner to accept compensation, interest will run from the date of institution of the action.

(*A. M. A.*)

REFERRED TO: Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu *v.* Revenue Divisional Officer, Vizagapatam, 1939, 2 A. E. R. 317; I. R. Commissioners *v.* Clay ("Plymouth" case), 1914, 3 K. B. 466 C. A., 83 L. J. K. B. 1425, 111 L. T. 484, 30 T. L. R. 573; Lucas & Chesterfield Gas & Water Board, *in re*, 1909, 1 K. B. 16, 77 L. J. K. B. 1009, 99 L. T. 767, 24 T. L. R. 858; C. A. 39/42 (1942, S. C. J. 364; 11, Ct. L. R. 232); C. A. 34/43 (10, P. L. R. 300; 1943, A. L. R. 337).

ANNOTATIONS :

1. The trial Court's finding as to the "consequential loss" was as follows:—

"I have still to consider whether this assessment is to be increased owing to the consequential depreciation of the estate. As I said, there is undoubtedly considerable consequential loss.

The second part of section 10(c) is the most effective part of the Land Expropriation Ordinance in considering this matter as it may limit my powers. It reads:—

> "The special suitability or adaptability of the land for any purpose shall not be taken into account if it is a purpose to which it could be applied only in pursuance of powers derived from legislation or for which there is no market apart from the special needs of a particular purchaser or the requirements of the promoters".

It was argued by the defence that supposing some person wanted to build an air ground (leaving out the question whether legislation would be necessary for that), that scheme of his could not be considered because it would be a special need for a special purchaser. They attempted to distinguish that example from the present case by drawing my attention to the fact that there are within a few kilometres from Abu Ghosh several other health resorts; that the place is suitable for such purposes; and that these other flourishing resorts argue that there is a strong probability that another is needed.

It is difficult to decide where precisely to draw the line, but it seems to me that where it is shown that there is some genuine public need for a particular scheme, in this case a health resort, this sub-section does not apply. I think the sub-section only applies where the scheme is of no public importance at all, the "special needs" being those of the promoters only. I do not think that that is the case here.

To revert to the example taken by the defence, a landing ground would only be required for persons engaged in flying, who are very few, at any rate in Palestine, except for war necessities, and one could hardly say that there is any general call for landing grounds. But health is another matter. Everybody may suffer from ill health, and I think that there is enough evidence before me that this health resort, when the scheme is developed, will be actually used to a considerable extent by the public. The other health resorts are substantially used and I cannot think that, if it is developed, this will be the only one to be ignored by the public. It is a very convenient place both for people of Tel-Aviv and Jerusalem and I think I am justified in saying that there will be a reasonable general use of this estate. That, to my mind, justifies me in assessing the compensation to be paid for these *dunams* so as to cover, at least in part the consequential loss to the rest of the estate.

I do not think that the whole loss to the estate must be put on these few *dunams*. I must assess what I think is a fair figure taking an all-round view of the circumstances".

2. For authorities on the assessment of compensation see annotations to C. A. 34/43 (*supra*) in 1943, A. L. R., at p. 338.

3. Note that the Land (Expropriation) Ordinance has now been replaced by the Land (Acquisition for Public Purposes) Ordinance, No. 24 of 1943, Sec. 12(c) whereof corresponds to Sec. 10(c) of the former Ordinance.

(*H. K.*)

FOR APPELLANTS: Assistant Government Advocate — ('Akel).

FOR RESPONDENTS: Olshan.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, which Court had assessed the value of certain land expropriated by Government at LP. 60.— *per dunum*.

The action was under the Land (Expropriation) Ordinance. The facts are set out in the judgment from which we quote as follows:—

> "This is an action by the Government against the Defendants with a view to having assessed by the Court compensation for a certain

area of land expropriated by Government for the building or enlargement of a police station. The locality is on the top of the hill above Abu Ghosh village on the road from Jerusalem to Jaffa. There has always been a police post there, but, on the enlargement of the post into a big police station, further land was required and this was taken by Government under the Expropriation Ordinance. The Defendants possess a large estate of some 500 to 600 *dunums* which includes a cultivated *wadi* and a bare hilltop. The Jaffa-Jerusalem road cuts right through the centre of this. The land expropriated by Government takes in about 180 metres of road frontage on the south side of the Jerusalem-Jaffa road. It is not disputed that the value of the land round the hilltop, for ordinary purposes, is less than the cultivated land in the *wadi*, but the Defendants have a scheme for developing the whole of the higher land of the estate into a health resort. Plans have been drawn for this purpose by Mr. Kaufman, who was called by them to give evidence. I accept entirely his evidence. My opinion is that he was an honest and competent witness and I think the Plaintiff also agrees with me. But Mr. Kaufman was unable to express any opinion about money values. Plans have been put in showing how the estate is to be developed, the course the roads will take, the entrance into the main road and all other features. It is clear that this land expropriated by Government cuts out one of the main entrances to the estate and, as Mr. Kaufman explained, to put that entrance into another place, will involve making a road of exceptional steepness which would be very bad, if not impossible, for motor traffic.

Close behind the police station and within 45 yards of the new building is a dwelling house. It has been described as a fine house and has been valued at LP. 6000. I accept the fact that it was a fine dwelling house surrounded by trees and with an entrance to the main road. By the expropriation a good part of these trees have been cut down and the entrance has been closed. A new entrance was made after a previous expropriation but this has now been closed by the present expropriation. The result of this is that, except by a roundabout route for which at present there is no road at all, the house is completely cut off from the main road. There is no doubt whatever that the value of this house has very considerably depreciated."

The Attorney General now appeals to this Court and complains that the amount awarded is excessive. The Attorney General's representative, Issa Eff. 'Aqel, the Assistant Government Advocate, admitted at the bar before us that he could not contest the finding of the learned Trial Judge that the fair value of the land standing alone, was LP. 18.— *per dunum,* but says that he cannot understand how the Court below came to add the figure of LP. 42.— *per dunum.*

Issa Eff. 'Aqel said that the Court below was not justified in considering the question of consequential loss. Now, it may be that the words "consequential loss" are not altogether apt to describe the

matter in question; but there is clear authority for holding that potentialities can and should be considered. Mr. Olshan, for the Respondents referred us to the case of Sri Raja *v.* Revenue Officer, Vizagapatam (1939) 2 A. E. R., p. 317, and in particular to the words of Lord Romer at pages 321 and 322:—

> "Sometimes, it happens, however, that the land to be valued possesses some unusual, and it may be, unique, features as regards its position or its potentialities. In such a case, the arbitrator, in determining its value, will have no market value to guide him, and he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities, for it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under sect. 4(1)), but also by reference to the uses to which it is reasonably capable of being put in the future.

The Court below heard evidence and came to the conclusion that the sum of over LP. 100 *per dunum* claimed by the present Respondents was excessive but that LP. 60 *per dunum* was reasonable. Having regard to the evidence before the learned trial Judge it is impossible for us to say that he came to a wrong conclusion. The relevant sections of the Land (Expropriation) Ordinance are Section 10(b), 10(c) and 10(g)(i). Mr. Olshan says that Section 10(c) corresponds to Section 2(3) of the Acquisition of Land (Assessment of Compensation) Act 1919 (See Halsbury's Laws of England (Hailsham Edition), Vol. 6 page 46, para. 44, note (j) on page 47). Mr. Olshan has also referred to the Plymouth Case (1914) 3 K. B. 466, and to *In re* Arbitration Lucas Chesterfield Gas Board (1909) 1 K. B. pages 16 and 30. As regards Section 10(c) we do not think that the desire and intention to develop a building estate on a health resort site can be regarded as the "special needs of a particular purchaser or the requirements of the promoters". We are, accordingly, of the opinion that the learned President of the District Court of Jerusalem (Judge Bodilly) came to a correct conclusion when he held that "where there is some genuine public need for a particular scheme, in this case a health resort, sub-section (c) of Section 10 does not apply". The present Respondents have filed a notice of motion under Rule 339, Civil Procedure Rules 1938, asking that the judgment of the Court below be varied and that the sum of LP. 1,500 found by the learned Trial Judge to be the amount of depreciation on the house should be spread not over all the 500 *dunums* owned by the Defendants, but merely proportioned with reference to the 12

dunums 210 metres expropriated by the Court. We think that the learned Trial Judge, in arriving at the figure which he eventually fixed in respect of compensation, must have given due consideration to all the relevant factors, including allowance for an appropriate distribution of the depreciation. We, accordingly, do not think that the Respondents have proved that they are entitled to succeed in what we might call the cross appeal, which is, therefore, dismissed. The Respondents 1—4 also ask that interest on the sum awarded to them should run from the 30th of April, 1940, and not from the 5th of January, 1942, which was the date of filing the statement of claim.

We have been referred to C. A. No. 34/43, Levanon and Apelbom, (1943) pages 337 and 343, and to C. A. No. 39/42, Apelbom (1942) pages 364 and 365. In C. A. No. 34/43 it was held that Government should pay into Court the amount offered, that is, in the event of the offer being refused. We understand that in the present case, when the money was refused, the money was paid into Court. In these circumstances we consider that interest should run merely from the date of filing by the Government, of the action. The Respondents Nos. 1—4, therefore, fail also on this ground of their cross appeal.

The appeal and cross appeals are, accordingly, dismissed. The Appellant will pay to the Respondents one set of costs to be taxed on the lower scale to include an advocate's attendance fee on the hearing of this appeal of LP. 15.

Delivered this 31st day of January, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 38/44.

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

BEFORE: Rose, A/C. J., Plunkett, A/J. and Shaw, President District Court.

IN THE APPEAL OF:—

Jan Hajdamovitz. APPELLANT.

v.

The Attorney General. RESPONDENT.

Manslaughter — Finding of manslaughter on charge of murder — Prisoner shot by sentry — Arrest without warrant by Polish military

authorities on suspicion of attempt to purchase arms — C. C. O. 23, 275 — Arrest Ord., sec. 7 — Superior orders, whether manifestly unlawful; a question of law — C. C. O. 19(b) — Duties of a sentry when prisoner escapes, reasonable means, Mansell v. A. G. — Court may not reject, in certain circumstances, evidence for prosecution and retain part.

Appeal from the judgment of the Court of Criminal Assize, sitting at Jerusalem, dated the 14th day of March, 1944, in Criminal Assize Case No. 3/44, allowed:—

1. Whether the order of a superior is manifestly unlawful is a question of law.

2. A sentry is entitled to use reasonable means to prevent a prisoner from escaping.

3. The Court should not accept part of the prosecution's evidence and reject a part as to which there is no contrary evidence accepted by the Court.

(*A. M. A.*)

FOLLOWED: CR. A. 5/39 (6, P. L. R. 44; 1939, S. C. J. 38; 5, Ct. L. R. 61).

ANNOTATIONS: On the question of acts done in obedience to lawful orders see Halsbury, Vol. 9, *p.* 24, esp. footnote (*a*); Digest, Vol. 14, *pp.* 67 *seq.*, Nos. 328 *seq.* The Court below referred also *in extenso* to an item "Soldiers' obedience to Orders" which appeared in the "Law Journal" Newspaper, 1940, Vol. 90, p. 227, and which runs as follows:—

"At the Manchester Autumn Assizes a soldier was charged with shooting with intent to do grievous bodily harm. The circumstances were unusual and raise a matter which is very generally misunderstood, *i. e.* the rights and duties of a soldier when the country is not under martial law.

In this case (R. *v.* Taylor) Taylor was in Bolton on leave from his regiment. He had orders to take his rifle, ammunition, and gas-mask, and to report to the nearest barracks, police station or fire station whenever an air-raid alert was sounded. On the night of the offence, early in August last, an alert had been sounded and Taylor was on his way to report when he met an air-raid warden having difficulty in making motorists dim or extinguish their lights. He began to assist the air-raid warden and was soon joined by a sergeant of another regiment. One motorist in particular would not respond to the admonitions, and the air-raid warden, according to the accused, expressed the opinion that he needed shooting. The sergeant apparently concurred in this view and forthwith gave the order: "Lance-Corporal, Fire". Taylor fired at the retreating shape of the car, aiming, as he said, for the tyre. The shot passed through the back seat and finished in the container box of the driver's respirator. The driver happened to be a special constable.

This occurrence was at once reported to the police by the special constable and by the accused himself. The accused was committed to the Assize eventually, and pleaded Not Guilty. After the hearing

of the evidence, Stable, J., addressed the jury and explained to them that although a war in progress and fighting taking place at sea, in the air, and in Greece, England is not under martial law but under the ordinary criminal law as it is in time of peace. The rights of all citizens are the same whether they be in uniform or not. There are circumstances in which a weapon, if there is one to hand, may be used and its use justified by circumstances. But if its use is not so justified by circumstances, it cannot, therefore, be justified by the order of a superior. Taylor clearly thought he was obliged to obey the Sergeant's order, but in this he was mistaken. The judge then went on to say that it was for the jury to find whether the soldier intended to shoot so as to cause grievous bodily harm, or to shoot so as to give the motorist a sharp warning; in the latter case they would find him Not Guilty. The jury, in fact, returned a verdict of Not Guilty without leaving the box."

(*H. K.*)

FOR APPELLANT: Cattan.

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

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Jerusalem.

The Appellant was charged with the murder of a man, called Shuster at Mughazi Military Camp on the 20th December, 1943. It seems to us to be important to bear in mind that the original charge was murder, and the case put forward by the prosecution in support of that charge was clear and, if accepted by the Court, could only have resulted in a conviction for murder. On that case there could have been no question as to the existence of premeditation.

The story as opened by learned Crown Counsel in the Court below, of which opening the trial Judge took an unusually full note, is shortly as follows: that the deceased man Shuster and another man Blumenstein arrived at this Polish camp at about 9 *p. m.* on the evening of the 19th December; that Blumenstein had in his possession the sum of LP. 66 in cash; that both these men were taken into custody by the Polish authorities in the belief that they were attempting to purchase arms from Polish soldiers; that Blumenstein and Shuster (Shuster being arrested somewhat later) were placed in a building which has been described as a wash-house which had no proper door capable of being closed; that sentries were placed to watch over them — one sentry at a time, taking it in turns to be on duty; and that during the second spell of duty of the Appellant, the shooting took place. It is suggested that the Appellant (the motive no doubt being that he felt indignation at this attempt to purchase arms) de-

liberately attempted to trap these two men Blumenstein and Shuster into going outside the hut; that Blumenstein being suspicious (particularly, no doubt, in view of the fact that a warning had been given to both men by an officer, Lieutenant Klemasz, that any attempt to escape would entail being shot at) resisted the trap, but that Shuster fell into the trap and went outside where he was shot with a tommy gun at point-blank range by the sentry — the Appellant. Blumenstein further alleges that the Appellant tampered with the position of the body and the position of the expended cartridges in order, no doubt, to mislead any subsequent investigators into the incident.

It is apparent that that case, if believed, is indisputably one of murder. No alternative verdict on that aspect of the facts could possibly be considered; and it is important to remember that this trial, which lasted about a fortnight in the Court below, was conducted throughout on the basis that this issue of murder was still very much alive. So far from the charge of murder ever having been dropped by the prosecution, we have the fact that Mr. Hogan, perfectly properly, in his final speech for the Crown most strongly urged the Judge (a fact which the Judge refers to in his judgment) to accept the evidence of Blumenstein, and put forward cogent reasons why Blumenstein's evidence was likely to be true and should be believed. In the result, however, the learned Judge found the Appellant not guilty of murder but guilty of another offence altogether which was based upon an alternative and completely different set of facts. It may be that the learned Judge himself was perhaps conscious of the apparent incongruity of the result because, in passing sentence on the Appellant, he says: "After a long trial you have been convicted of manslaughter. You may be puzzled at the outcome of the trial". In coming to that conclusion of manslaughter, the Court in effect rejects, or at any rate declines to act upon, the evidence of Blumenstein as to this main issue of the trap and the point-blank shooting. In another passage in the record he expressly disbelieves Blumenstein's suggestion as to the altering of the position of the body. He says: "I may here say that I am not prepared to accept Blumenstein's suggestion that the Accused tampered with the body or the expended cartridges or bullets after the incident".

That being so a completely different picture of this matter is presented. The sinister picture of a deliberate and utterly brutal and unjustifiable killing disappears, and we are confronted instead with the question as to whether or not a sentry has been over-zealous in the execution of his duty. As to that, Mr. Hogan, who argued the

case for the Crown before us with his usual ability, says, first of all, that irrespective of whether the sentry would appear in the circumstances to have acted reasonably in shooting, technically a conviction must result because from the very outset of the matter the arrest of Shuster was illegal and unjustified.

Many points were urged before us on that, and there was much argument both in the Court below and before us as to whether Shuster was arrested outside or inside the camp, and whether the reasons for the arrest of Shuster were as cogent as the reasons for the arrest of Blumenstein. But, as far as that aspect of the matter is concerned, it seems to us that it does not really touch the Appellant, which is also true of the further question as to whether or not the Polish authorities erred in not handing over these two men sooner to the civil authorities. There would seem to be no doubt (and it is, I think, common ground to both the Crown and the defence) that this purchasing of arms is an offence that would justify arrest without a warrant. It is punishable with imprisonment for ten years under the original regulations and (although the matter is immaterial) the maximum sentence has now, we are told, been increased to imprisonment for life. In any event, such an act would be a contravention of section 275 read together with section 23 of the Criminal Code, which is a felony punishable with imprisonment for seven years. That being so then there can be no question that, had the Polish authorities arrested these men reasonably suspecting that they were attempting to buy arms, and had they, in accordance with section 7 of the Criminal Arrest and Searches Ordinance, handed them promptly over to the civil authorities, any soldier watching over them would have been entitled to act as any duly appointed sentry or police officer would be entitled to act in preventing escape. But Mr. Hogan says that the Polish authorities admittedly kept these people from 9 o'clock in the evening until 4 o'clock in the morning, when the shooting took place, and therefore, their detention was illegal. That may or may not be so. There was much argument here before us on that matter. The answer would, of course, depend upon certain factors such as the availability of transport (the distance of the camp, we are told, is some nineteen or twenty kilometres from the nearest centre), and, as far as the senior officers of this Polish camp are concerned, many interesting and difficult points might arise. But the factors upon which the answer would depend could not be (and cannot fairly be presumed to be) within the knowledge of the Appellant. As far as that part of the case is concerned, we are of opinion that he is completely covered by section 19(b) of the Criminal Code Ordinance which says that "a person is

not criminally responsible for an act or omission done in obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful". Whether an order is manifestly unlawful is a question of law and, therefore, for us to consider.

What was the order? The order was referred to in the evidence of a witness for the prosecution, Corporal Gorajnow. He says (p. 26 of the record):—

> "These sentries" (*i. e.* the Appellant and the other sentries) "were there for the purpose of guarding these two civilians. This duty was divided. One was on sentry go and the remainder in a hut near by".

It seems to us that the only inference from that is that this Appellant was one of a number of sentries who were put for the sole purpose of guarding these two men in this wash-house. And it is an irresistible inference that if a sentry gets out of his bed and walks up and down outside a wash-house to guard two people, that he has been ordered to do so. Moreover, Lieutenant Klemasz specifically describes the posting of the sentries. So that, as far as that order was concerned, was there anything manifestly unlawful about it? In our opinion there was not.

Looking at the whole picture of the case as opened by Mr. Hogan and as relied on by the prosecution and as consistently maintained until the termination of the trial, this Appellant and the other Polish personnel concerned knew that these two men were arrested and detained on the suspicion of being there to purchase arms. If, as the Appellant was perfectly entitled to assume, his senior officers had complied with the necessary formalities — were justified in arresting these men and had complied with any requirements as to making arrangements for handing them over — there was nothing even unexpected, let alone manifestly unlawful, in the order to go on sentry duty outside the wash-house and watch them. From his point of view (which is all that we are concerned with) it was a perfectly reasonable and not even a particularly unusual order for a soldier to receive. It seems to us that it would be artificial and unfair to the Appellant in the highest degree to come to the conclusion that the question whether Lieutenant Klemasz or any senior officers may have been wrong in law in failing to hand over these people at once to the civil authorities, is a matter with which a sentry should concern himself at all. Therefore, as far as the order to guard these people was concerned, we think that there was nothing manifestly unlawful in that order, and that the sentry was entitled and, in fact, bound, to obey it. He was, therefore, in the position of any other sentry, properly and duly appointed; that is to

say, he had to perform the duties and was entitled to the immunities of any other person similarly appointed.

Before considering the question as to when a sentry in general is entitled to shoot and as to whether this sentry in particular was entitled to shoot on this night, there was another point raised by the defence at the trial on this same section — section 19(b) — that relates to another order (which is common ground between the prosecution and the defence) of Lieutenant Klemasz, the exact words of which are immaterial but the gist of which was that he said to Shuster and Blumenstein in the presence of the Appellant "if you try to escape arms will be used".

Lieutenant Klemasz himself in giving evidence on this matter, says (p. 19 of the record):—

> "I gave the following instructions, *viz.* in order to warn the persons detained that if there were any attempts to run away arms would be used. Whenever they ran away arms should be used."

In so far as that was a warning to the detained persons there is, of course, nothing objectionable in it. In so far as it was intended as an instruction to the sentry, we are of opinion that it would not avail the sentry as a defence to a prosecution for manslaughter. We agree on that matter with the learned trial Judge that that would be an order that is manifestly unlawful, in that a reasonable sentry must be presumed to know that an order to shoot at sight at a person escaping is an unlawful order. Therefore, on that aspect of the matter, Lieut. Klemasz's order to the Appellant cannot avail him although, as we will point out later, the fact that that instruction or warning was given is significant in another connection. But in the present connection Lieutenant Klemasz's instruction does not seem to be of any great importance because the defence is that Lieutenant Klemasz's order was not acted upon at all, but that the sentry acted in accordance with the general rule which a sentry should follow in such circumstances.

We then have the position that in our opinion the sentry was, from his reasonable point of view, duly appointed. And it is now necessary to consider whether he exceeded his duties.

Here we have been referred (and I think both sides substantially agree that the position is adequately summarized there) to the case of Mansell *v.* the Attorney General, reported in P. L. R. Vol. 6 at p. 44, where this Court said:—

> "Putting it generally, a police constable" (that would apply in this case to a duly appointed sentry) "is entitled to use all reasonable means to prevent the escape of a prisoner who has been charged with a serious offence such as was the case here, and if firing is

> the only means or reasonable means available to him, then he is entitled to fire — but the means must be reasonable — circumstances must be such that if this last resort of firing be not taken then there is a reasonable probability of the prisoner escaping. That I think is a fair summary of the law derived from the text books. From this it is apparent that every case has got to be considered on its own merits, with regard to the surrounding circumstances."

There is one qualification of that passage subject to which Mr. Hogan accepted it as being correct, that is, that he suggests that the phrase "serious offence" should read "felony". That may be so, but in this case the point really does not arise because the matter here was a felony; that is to say, the offence of which these persons were reasonably suspected, was a felony.

The Court goes on to say at a later passage in the judgment:—

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

While, therefore, we would be most reluctant to interfere with the findings of fact made by the learned trial Judge, the inferences from those findings in such a matter as this are eminently questions for a Court of Appeal to consider.

In short, the learned Judge bases his conviction for manslaughter on two factors — that the Appellant fired too soon, and that he also fired too many shots.

To deal first with the first point, it is necessary to consider the reasons why the learned Judge came to the conclusion that the Appellant fired too soon. It is to be noted that the learned trial Judge makes two very significant findings of fact by which, of course, we are bound. On page 14 of his judgment he finds that the body was about ten feet from the door of the hut, and the Accused himself says that the deceased was about fourteen feet from the door of the hut when he fired. On that matter, therefore, the version of the Accused as against Blumenstein's version is substantially accepted. And the other finding of fact is that the Appellant fired the shots at a distance of about eight metres; and the Appellant himself in his evidence said that he fired at about ten metres. The difference between eight and ten metres at night is, of course, a very small matter and, therefore, again the Appellant's version is substantially accepted on that point as against the prosecution's contention that the shots were fired at point-blank range.

A very important question arises at this stage as to whether or not a warning was given. It is to be remembered that these two men were detained in a wash-house that had no proper door. There was only half

a door, the other half being missing. The Appellant says that, when he saw Shuster come out of the hut, he shouted *"stój"*, which is the Polish for "halt"; that he waited a second or two and, as the man did not stop, he fired. Now, Blumenstein's evidence being rejected, we must consider what evidence there was before the Judge on this matter of whether *"stój"* was said or not. The Appellant himself and a number of witnesses for the defence all say that he gave this warning. The Judge, however, says (although apparently after some difficulty) that he disbelieves this evidence. The point is whether he is entitled to disbelieve it, because it is not only the defence witnesses that say so, but — and this is of great importance — the prosecution evidence is that this warning was given.

On page 9 of his judgment the learned Judge says, when speaking of Corporal Gorajnow: "This is a witness for the prosecution and, subject to the reservation that his evidence is perhaps coloured in favour of the Accused, I must accept the main facts as narrated by him". We respectfully agree and, of course, it is clear that when Blumenstein's evidence has gone, the prosecution has to rely upon the evidence of Gorajnow. What does Gorajnow say on this matter? After describing how he detailed the sentries, he says:—

> "I walked about the camp near the tanks, because there were machine guns ..... and I was afraid our guns might be stolen. I heard a cry *'stój'* at about 4 *a. m.* At this time I was about 40 metres from where the civilians' hut was. I could not see the hut. There was a pause and then I heard shots. The length of the pause between *'stój'* and the shots was between one and two seconds. I then ran to the spot where the sentry was stationed near. I ran to the spot and the Accused reported to me that one of the detained persons was running away."

That is the evidence of a witness for the prosecution upon whom the Crown presumably relied. It seems to us, with all respect, that the Court was not entitled to disregard that. There was no other evidence, which the Court accepted, to the contrary. And it appears, if we may say so, that the learned Judge himself may have felt some doubts as to his rightness in rejecting this evidence because he goes on to consider the alternative possibility in the event of the word *"stój"* having been said. And he goes on to give his reasons why, even assuming that *"stój"* was said, the shooting was still, in his opinion, not justified. The reasons which the learned Judge relied upon in coming to his conclusion that the shooting was premature were these: He says:—

> "It must be remembered that this 40 years old man wearing a heavy coat, had to emerge into the dark and climb up two steps..."

He goes on in another passage in his judgment to say:—

> "I am unable to believe that he could have been running fast or that he could not have been caught or stopped in some other way."

In another passage he says:—

> "I think sufficient time should have been allowed to elapse to enable perhaps a dull-witted person to understand the warning and to obey it before the final and irrevocable step of firing to kill should be taken."

As to this, it is true that the deceased was wearing a heavy leather coat at the time, but it may perhaps have been overlooked that the Appellant was wearing just as heavy or even heavier a coat. And, in addition to that, he was burdened with a heavy tommy gun.

With regard to the age of forty — we do not make too much of a point of that, but there was no evidence that Shuster was suffering from any incapacitating disease, and a normally fit man of forty is, of course, able for all practical purposes to move as quickly as anyone else. The point is that on the findings the Judge himself made — that this shooting was at a distance of eight metres on a dark night, and that the body was ten feet from the door-way, the deceased having crossed the ditch and mounted the steps and (as the other evidence shows) having his back to the sentry when he shot — having regard to that, what is a sentry, in charge of two men the second of whom is still in a hut with a half-open door, to do when he is himself wearing a heavy coat and carrying a heavy tommy gun? Before leaving that point, it seems important to consider this other sentence that the learned Judge uses: "I think that sufficient time should have been allowed to elapse to enable perhaps a dull-witted person to understand the warning and to obey it". There might conceivably have been some mistake — one of these two men might have wandered out by inadvertance and being slow-witted not understood the order to halt — and a terrible mistake might have occurred. But that, clearly, was not the position in this case. This is, of course, where Klemasz's order comes in; and while it was irrelevant on the earlier matter, it becomes relevant here. One of the few facts that is common ground to the prosecution and the defence in this case is that Klemasz said to Shuster and Blumenstein (he spoke in Polish — a language which they both understood). "If you try to escape you will be shot at". Whether or not he was entitled to say that is, of course, an entirely different matter. The fact remains that he said it; so that both Blumenstein and Shuster were fully aware of the risk that they ran if they left the hut without permission. Another possibility that occurs to one's mind in a case like this is that the deceased might, perhaps,

have been coming out of the hut to relieve himself. That would be a possibility that I think normally a sentry might well be expected to take into consideration. But that again is ruled out in this case because at some earlier stage the deceased Shuster had actually asked permission to leave the hut for that very purpose and had been refused on the ground that he was only in a wash-house and, therefore, it was quite unnecessary for him to come out for that purpose.

In considering this matter, we must apply the test of what a reasonable person — a reasonable sentry — on duty outside would think in these circumstances. He feels that there can be no possibility of a mistake on the part of Shuster — he has been refused permission to come out to relieve himself and he has been expressly warned by Lieutenant Klemasz that if he tries to escape he will be shot at. In spite of that he comes out. On the version of the facts that the learned Judge accepted on this matter of coming out, it seems to us that the only reasonable inference that any sentry could draw would be that the man was coming out in order to escape. And did he feel any doubt upon that matter, that doubt would be resolved by the fact that when he shouted "halt" the man did not halt. The question is whether on that picture, which was the picture upon which the Judge acted (whether it was the right picture or not is entirely a different matter) it is fair or reasonable to say that a sentry would not be entitled to shoot. As the Appellant says himself: "It was a dark night; ..... if I had delayed a little longer, the man would have been out of sight". We do not think we have seriously to consider the alternative suggestion that the sentry should have thrown down his tommy gun to the ground (which was immediately outside the hut where Blumenstein was detained) and run after this man without his tommy gun in order to catch him and bring him back in that way. That seems to us to be an unreasonable suggestion.

That being so, we are of opinion that on the picture accepted by the Court, this sentry was entitled to shoot, not being able, or reasonably thinking that he was not able, to stop the deceased in any other way. And if he was entitled to shoot in order to stop the deceased, and by misfortune he killed, he would not be liable for that. The Crown says, however, that even assuming all that, by firing all these twenty shots from a tommy gun the sentry fired an unreasonable number of shots.

It seems to us to be helpful, in considering that matter, just to pause for a moment and to consider the extraordinary change that has come over this trial. The sinister murder charge has completely

disappeared; the point as to the illegality of detention, as far as the Appellant is concerned, has disappeared; and we are left with the case of a sentry confronted on a dark night with a situation in which it is reasonable that he should shoot. Therefore, this one-time murder charge has resolved itself into an investigation as to whether, in the stress of the moment, the Appellant fired a few shots too many. On that matter we have to consider the circumstances in which the sentry was placed. There is evidence (and it is not challenged by the prosecution) that the only weapons available for sentries to use at this time in this camp, which was in the process of liquidation, were tommy guns. A tommy gun is naturally a more dangerous weapon than a rifle. Had the Appellant been armed with a rifle, it is extremely probable that he would have missed the deceased altogether. The fact remains that he was armed with a tommy gun, and being confronted with a situation in which he was entitled to shoot, the only thing that he was able to shoot with was the weapon with which he was provided. At first sight to fire twenty shots seems a very severe step to take, but one has to remember that the agreed evidence is that these guns fire at the rate of twelve shots to the second. Therefore, the whole twenty shots would only take a matter of some second and a half. And there is no suggestion here and no vestige of evidence to the effect that the Appellant continued firing after he knew that he had hit the deceased. It is suggested by the Crown that he might have fired in bursts of three or four shots as an experienced and well-trained person in firearms could have done, and that would have minimized the risk to the deceased. It certainly would have minimized the risk; it may well have been that the Appellant would have missed altogether if he had only fired three shots. In fact, on this picture as accepted by the Judge — this firing at a moving target at a distance of eight metres at night — it was extraordinarily unlucky shooting that as many as thirteen bullets did hit the deceased at all. That, of course, was one of the factors strongly relied upon by the prosecution in support of their murder charge. It was suggested that one of the inferences to be drawn from the fact that no less than thirteen shots hit this man at night shows that they must have been fired at very close range indeed and that the killing must have been deliberate. That, of course, is a powerful argument, but the Court rejected it. And that is not for us to interfere with. It is eminently a question of fact, and the Court found that the shots were fired at a distance of eight metres, which, as we say, means remarkably unfortunate shooting. We certainly are not inclined and we think it would be

grossly unfair to a sentry in the circumstances which we have outlined to say that although he was entitled to shoot — a dark night; a man escaping; another man (not locked in) to be guarded — he ought nevertheless only to have fired a burst or two; that he ought, perhaps, to have fired for a fraction of a second only instead of for a second and a half.

That being so, and for the reasons which we have given, we are of opinion that, on the facts as accepted by the Court and on the picture as acted upon by the Court, there is no ground for saying that the Appellant acted unjustifiably or in excess of his duties as a sentry in firing at and killing this unfortunate man Shuster on this night.

We would again at this stage stress, so as to avoid any misunderstanding in this most regrettable case, that the case as presented for the prosecution was one of calculated and brutal murder; that there was ample evidence upon the record which would have entitled the trial Court, had it so wished and had it accepted that evidence, to bring in a verdict of murder; but that the Court elected not to do so and instead accepted a completely different version of the facts. We are sure that it is unnecessary to state that the fact that the Appellant may (we express no opinion on that matter) have been fortunate to escape a conviction of murder on one set of facts, can be no justification for a conviction of a lesser offence based on inferences from a completely different set of facts, which inferences the evidence does not support.

In the result, therefore, the appeal will be allowed, and the conviction set aside. The Appellant must be discharged unless he is detained on any other charge.

Delivered this 3rd day of April, 1944.

A/Chief Justice.

SPECIAL TRIBUNAL No. 2/43.

IN THE SPECIAL TRIBUNAL CONSTITUTED UNDER ARTICLE 55 OF THE PALESTINE ORDER IN COUNCIL.

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

IN THE APPLICATION OF :—

Afif Kardoush. — PLAINTIFF. (APPLICANT).

V.

Ifaf Kardoush & an. — DEFENDANTS. (RESPONDENTS).

Breach of promise — Claim for damages — Question of jurisdiction — District Court referring matter to Special Tribunal.

Reference by the District Court, Haifa, under Article 55 of the Palestine Order in Council and Rule 354 of the Civil Procedure Rules, 1938, to decide whether or not the subject matter of Civil Case No. 263/42, District Court, Haifa, is one of personal status within the exclusive jurisdiction of a Religious Court:—

Claim for damages for breach of promise, even where the dissolution of betrothal was ordered by Religious Court of Community of both parties — not a matter of marriage, hence not within jurisdiction of Religious but Civil Court.

(*M. L.*)

ANNOTATIONS:

1. The relevant facts of this case are set out in full in the Memorandum of the District Court, Haifa, which is as follows:—

"MEMORANDUM UNDER RULE 354 OF THE CIVIL PROCEDURE RULES.

I. The following are the facts of the case to which the parties agree:—

(a) The parties are and were at the time of the alleged breach of promise complained of in this action members of the Orthodox Church.

(b) Applicant and Respondent No. 1 were betrothed in Nazareth on the 24th day of May, 1942.

(c) Respondent No. 2 is the father of Respondent No. 1.

(d) On the 18th of July, 1942, Respondent No. 2 with the consent of Respondent No. 1 applied to the Orthodox Ecclesiastical Court in Nazareth for the dissolution of the betrothal.

(e) On the 6th of August, 1942, the Orthodox Ecclesiastical Court of Nazareth gave its order dissolving the betrothal between Applicant and Respondent No. 1 and granted leave to Respondent No. 1 to marry some one else if she so desired.

(f) On the 9th of August, 1942, Respondent No. 1 married a certain Yanni Kiryazi of Jaffa.

II. The facts in dispute between the parties are the following:—

(a) Whether or not the Applicant himself in his own house and on a date prior to the 12th of July, 1942, had announced the dissolution of his betrothal to Respondent No. 1.

(b) Whether or not Respondent No. 1 was betrothed to her present husband prior to the date of the Order of the Orthodox Ecclesiastical Court dissolving the betrothal of Applicant and Respondent No. 1.

(c) Whether or not Respondent No. 2 has ever held himself liable as guarantor for Respondent No. 1.

(d) Whether or not the Applicant had consented to the jurisdiction of the Orthodox Ecclesiastical Court.

(e) Whether or not the question of damages ousts the jurisdiction of the Orthodox Ecclesiastical Court where the conflict arises out of an alleged Ecclesiastical betrothal.

(f) Was the betrothal between Applicant and Respondent No. 1 which took place on 24/5/42 carried out in accordance with the rites and ceremonies of the Eastern (Orthodox) Church?

(g) Is a betrothal which takes place according to the rites and ceremonies of the Eastern (Orthodox) Church a matter of marriage within the meaning of Article 54(i) of the Palestine Order-in-Council?

(h) Whether at any time the parties agreed before the Ecclesiastical Court that the question of damages be decided by the Civil Courts.

III. The contentions of the parties are as follows:—

(*a*) *Plaintiff*:

Plaintiff's contentions are:—

(a) The betrothal was not carried out in accordance with the rites and ceremonies of the Eastern Orthodox Church.

(b) The claim for damages and return of gifts *etc.*, is not a matter of marriage within the meaning of Article 54(i) of the Palestine Order-in-Council.

(c) Respondent No. 2, although not a party to the betrothal, undertook liability before the Religious Court on 18/7/42 for Respondent No. 1 in respect of damages that the Plaintiff may sustain by reason of the dissolution of the betrothal.

(d) The claim for damages is entertainable not by the Religious Court but by the Civil Court.

(*b*) *Defendants*:

Defendants' contentions are:—

(a) The betrothal was carried out in accordance with the rites and ceremonies of the Eastern Orthodox Church.

(b) The claim for damages and return of gifts *etc.*, is a matter of marriage within the meaning of Article 54(1) of the Palestine Order-in-Council.

(c) Respondent No. 2 did not on 18.7.42 or at any other time undertake liability before the Religious Court in respect of damages that the Plaintiff might sustain by reason of the dissolution of the betrothal.

(d) The claim for damages is entertainable not by the Civil Court but by the Religious Courts.

A question having arisen in these proceedings as to whether or not this case is one of personal status within the exclusive jurisdiction of a Religious Court, the Court directed that this matter shall be referred and we, accordingly, refer this matter to the Special Tribunal in accordance with Article 55 of the Palestine Order in Council and Rule 354 of the Civil Procedure Rules, 1938.

Given this 9th day of November, 1943.

(*Sgd.*) *M. BARADEY*
Judge.

(*Sgd.*) *AHARON SHEMS*
Judge."

2. Similar questions were raised in S. T. 1/30 (1, P. L. R. 511; 4, C. of J.

1255). For other authorities on breach of promise to marry see C. A. 129/42 (9, P. L. R. 707; 1942, S. C. J. 753) and annotations thereto.

(*A. G.*)

FOR APPLICANT: Nakkara.

FOR RESPONDENTS: Hazou.

ORDER.

We are unanimously of the opinion that the claim made by the Plaintiff in Civil Case No. 263/42 in the District Court of Haifa is within the jurisdiction of that Court and should proceed and be heard and determined by that Court. We, accordingly, decide that the District Court of Haifa is the Court which shall have jurisdiction. Costs of the proceedings in this Court to be costs in the cause. We fix the costs of to-day at LP. 5 (fixed or inclusive costs) to be paid to the ultimately successful party.

Given this 25th day of February, 1944.

British Puisne Judge.

HIGH COURT No. 18/44.

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

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

IN THE APPLICATION OF :—

Eliahu Goldberg. PETITIONER.

v.

1. Chief Execution Officer, Haifa,
2. Maurice Dayan & an. RESPONDENTS.

Lack of description of premises to be vacated.

Return to a rule *nisi*, issued on the 15th day of February, 1944, directed to the first Respondent, calling upon him to show cause why his order given in Execution File No. 221/43, District Court, Haifa, dated the 28th day of January, 1944, dismissing the Petitioner's application for stay of execution of the judgment in the file, should not be set aside; order *nisi* discharged:—

Where there is no doubt at all as to what premises are referred to, Execution Officer when executing a judgment for eviction need not apply to Court for an explanation, even where judgment contains no exact description of premises in question.

(*M. L.*).

ANNOTATIONS:

1. The Supreme Court judgment referred to is C. A. 287/42 (1943, A. L. R. 225).

2. Same rule was laid down in H. C. 97/43 (*ante*, p. 41; 10, P. L. R. 569).

(*A. G.*)

FOR PETITIONER: Heth.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Geiger. No. 3 — Stern.

ORDER.

This is a petition which seems to us to be entirely without merits. The action before the Court was one for eviction from certain premises. It is quite true, as is pointed out by counsel for the Petitioner, that in the documents which were filed and indeed in the various judgments and even in the judgment of the Supreme Court there is no exact description of the premises in question. And the point raised is that the Execution Officer when executing that judgment should apply to the Court for an explanation as to what premises are, in fact, referred to. That might be a good point of objection, and it was no doubt for that reason that the rule was originally granted. In fact, in this case it is quite clear from the documents, and we are abundantly satisfied, that there is no doubt as to what premises are referred to, and it was no doubt for that reason that the C. E. O. declined to apply to the Court because he too felt, as we feel, that there is no doubt at all as to what flat is referred to, and that is the flat that is occupied in this particular building by Mr. Cripps and is sublet to the present Petitioner.

That being so we think that the petition must be dismissed with costs in an inclusive sum of LP. 15 to be paid to both Respondents.

Given this 10th day of March, 1944.

Acting Chief Justice.

HIGH COURT No. 4/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPLICATION OF:—

Shlomo ben Shalom Dily. PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Margalith Castellow bat Nissim Levy. RESPONDENTS.

Jurisdiction of Rabbinical Court — Matters ancillary to divorce proceedings.

Application for an order to issue, directed to the first Respondent, calling upon him to show cause why his order, dated 14.1.44 in Execution File No. 536/43 District Court, Tel-Aviv, should not be set aside and the judgment of the Rabbinical Court of Tel-Aviv, dated 14.11.43 in File No. 89/5704 forbidding the second Respondent to take her minor daughter Yona abroad or ordering her to leave the said daughter with the Petitioner on the second Respondent going abroad should not be executed, alternatively the Migration Authorities are to be informed of the terms of the judgment of the Rabbinical Court; order *nisi* refused:—

Rabbinical Court has no jurisdiction to entertain an application not ancillary to divorce proceedings which took place before it many years ago.

(*M. L.*)

ANNOTATIONS :

1. The facts of this application are stated in the following extract from the order of the Relieving President, District Court, Tel-Aviv, sitting as C. E. O.:—

"Some years ago the Applicant and Respondent who are both Jews, were married. The marriage continued for five years and a daughter, Yona, was born to them. She is now eight years of age. At the end of five years the parties were divorced by consent and on the basis of a written agreement. The Applicant and Respondent have both remarried. The Applicant has married a British Constable, who is about to be repatriated. The Applicant has a British Passport and is not a Palestinian. Yona is at present with her mother. The Respondent brought an action in the Tel-Aviv Rabbinical Court and the following judgment was delivered on 14th November, 1943:—

> "Whereas S. D. has instituted before us a claim against his divorcee M. D. C. who he alleges is about to go abroad with their child Yona who is about eight years of age, contrary to the agreement which was concluded between them before the divorce, whereby the said divorcee undertook to let the father visit the child whenever he may wish and he asks that a judgment be issued prohibiting the aforementioned divorcee to take out his daughter abroad and upon consideration and deliberation we decide:—
> to forbid the said M. D. C. from taking out their said child Yona to foreign parts and if she should leave the country she must deliver the said child to her said father..."

The agreement referred to in this judgment has not been produced, but I am told that clause two provides that the mother is to have the custody of the child and to maintain her, and is to allow the father to visit the child whenever he wishes to.

The judgment was filed in the Tel-Aviv Execution Office and on 15 November the Assistant Chief Execution Officer, H. H. Judge Mani made the following order: "To write to Mrs. M. D. C. not to take her daughter Yona abroad".

This order was apparently not proceeded on in any way. On the same date H. H. Judge Plunkett, as Chief Execution Officer, made the following order: "Migration authorities to be notified of terms of the Rabbinical Court Judgment". The migration authorities were notified and the Applicant has been prevented from leaving the country with her daughter.

Mr. Cohen, on behalf of the Applicant, submitted that the Rabbinical Court

had no jurisdiction to make its order and prays that the two Execution orders made in pursuance thereof be set aside.

Mr. Wilner, for the Respondent, argues that the enforcement of the agreement on the basis of which the parties were divorced is a matter ancillary to divorce and thus within the exclusive jurisdiction of the Rabbinical Court.

I think this contention is clearly unsound. As was stated in C. A. No. 22/34 the jurisdiction of a Rabbinical Court in matters of divorce is limited to deciding whether a husband is bound according to the religious law to divorce his wife. There the jurisdiction of the Court ceases.

It has no jurisdiction to enforce the decision, and there is in fact no divorce unless the husband of his own will grants the divorce. If there is no true jurisdiction to divorce, much less is there, under the head of "matters of divorce", any jurisdiction to enforce in an action entirely separate from the divorce proceedings such an agreement as the one which was before the Court.

The Respondent's claim is to enforce his right to visit his child. No such matter is dealt with among the matters specified in the Palestine Order in Council as being matters of personal status. If in fact the mother left the country and the child remained behind, presumably the father would take her, unless, of course, he is insisting on his contractual right merely as a means to prevent the mother leaving the country. He has in fact made no claim to take the child, but even if he had, if it were regarded as a matter of custody, it cannot be said in the circumstances of this case to be ancillary to a claim for divorce, and if it be regarded as a matter of guardianship, then in that case also the Court has no jurisdiction (see Privy Council Appeal No. 41 of 1942). Moreover, the Applicant is a foreigner, and for this reason also the Rabbinical Court had no jurisdiction to entertain the action.

It appears to me on consideration, therefore, that the Rabbinical Court had no jurisdiction to make its order. The two Execution orders referred to are, therefore, set aside...".

Against this order the petition to the High Court was made requesting to set it aside on the following grounds:—

a) The first Respondent should not set aside former orders given by another Chief Execution Officer in the same file and substitute his order.

b) The first Respondent erred in not accepting the argument that the enforcement of the agreement on the basis of which the parties were divorced is a matter ancillary to divorce.

c) The Rabbinical Court is the only Court which has jurisdiction in all matters regarding the divorce of the parties and any ancillary claims.

d) The Rabbinical Court of Tel-Aviv is the proper tribunal to adjudicate upon any dispute or matter ancillary to the divorce of the parties, because they have consented to its jurisdiction.

2. On question of jurisdiction of Rabbinical Court in matters of divorce the Chief Execution Officer applied C. A. 22/34 (2, P. L. R. 365; C. of J. 1934—6, p. 588), and on the jurisdiction in matters of guardianship P. C. 41/42 (10, P. L. R. 328; 1943, A. L. R. 487) was applied.

3. On jurisdiction of courts in matters of custody of children see H. C. 45/43 (*ante*, p. 35) and annotations.

(*A. G.*)

FOR PETITIONER: Gorali.

ORDER.

We do not think that the Rabbinical Court had jurisdiction and we think that the present application is not ancillary to the Divorce proceedings which took place many years ago. The order *nisi* is, therefore, refused.

Given this 18th day of January, 1944.

British Puisne Judge.

HIGH COURT No. 7/44.

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

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

IN THE APPLICATION OF :—

Labibeh Ibrahim Baqluq. PETITIONER.

v.

1. Salibah Yaqub Baqluq,
2. Chief Execution Officer, District Court, Jerusalem. RESPONDENTS.

Effect of change of religious community upon jurisdiction of Religious Court of that community.

Return to a rule *nisi*, issued on the 25th of January, 1944, directed to the second Respondent, calling upon him to show cause, if any, why his order, dated 10.12.43, in Execution File No. 222/43, refusing the execution of a judgment of the Latin Ecclesiastical Court, should not be set aside, and why he should not execute the said judgment; order made absolute:—

1. Court of Community which celebrated a marriage has jurisdiction in matters arising out of that marriage. This principle also prevails in cases of a previous change of religious community.

2. No change of religious community subsequent to marriage can affect jurisdiction of Court of community to which the parties belonged at the time of their marriage.

3. Non-compliance with all requirements of Religious Community (Change) Ordinance does not altogether invalidate the change. Person so changing his community cannot avail himself of his action but nothing prevents others taking up the change against him.

4. Consent contemplated by sec. 3(1) of Religious Community (Change) Ordinance to minor's change of religious community may be given either by father or by mother (or guardian).

(*M. L.*)

FOLLOWED: H. C. 6/43 (10, P. L. R. 78; 1943, A. L. R. 73).

DISTINGUISHED: H. C. 100/41 (9, P. L. R. 121; 11, Ct. L. R. 74; 1942, S. C. J. 85).

ANNOTATIONS:

1. Authorities on effect of change of religious community are collated in the annotations to H. C. 124/43 (*ante*, p. 21).

2. On consent by guardian on behalf of minor see C. A. 236/43 (10, P. L. R. 542; 1943, A. L. R. 822) with annotations.

3. On minor's change of religious community see H. C. 6/43 (*supra*) with annotations.

(*A. G.*)

FOR PETITIONER: F. Nazzal.

FOR RESPONDENTS: No. 1 — El-Ancar.
No. 2 — Absent — served.

ORDER.

Frumkin, J.: The Petitioner in this case was born to parents who were members of the Greek Orthodox Community, and when at the age of 9 years, she, together with her mother, joined the Latin Church.

Some thirteen years later she was married in the Latin Catholic Church of Jerusalem to the Respondent, who was also born into the Greek Orthodox Church, and when at the age of 15 or 16 was, together with his mother, admitted to the Latin Catholic Church.

From the mere fact that we have to deal with this matter it is clear that the marriage was not a happy one. The wife had to take legal action against her husband, asking among other things for the support of herself and her daughter, who was born after the marriage, which action resulted in the judgment by the Latin Ecclesiastical Court, ordering the Respondent to pay a monthly allowance of LP. 7 to Petitioner and her daughter.

When this judgment was put into execution the learned Chief Execution Officer, Jerusalem, refused to execute it, being of opinion that he had no jurisdiction over the parties, on the ground that the change of their religious community has no legal effect in that it did not comply with the Religious Community (Change) Ordinance (Cap. 127), and that, therefore, both parties remained and still are members of the Greek Orthodox Community. In his decision the learned Chief Execution Officer dealt with what he considered to be two conflicting judgments of this Court, and contrary to High Court 6/43 (10, P. L. R. p. 78) which followed the principle that the Court of the Community in which a marriage was celebrated has jurisdiction in matters arising out of such marriage, he followed High Court 100/41 (9, P. L. R.

p. 121) in which it was held that unless both parties are members of one community, the Court of that community has no jurisdiction over them. As already mentioned, the Chief Execution Officer held that in this case both parties were not members of the Latin Community inasmuch as the change of the religious community was not legally effective.

The conflict we are faced with in this case is more than being a conflict between two judgments, rather a conflict between the strict application of some formal requisites of the law on the one hand, and its practical result on the foundations of family life on the other. Because a decision that the Court had no jurisdiction over the parties can only be based on the fact that they were not members of the Latin Community, with the consequence that they were not legally married in the church of that community, with the further result that the spouses lived in sin, and that the offspring of their union were not born in legal matrimony. If at all possible such a consequence must be avoided.

For years it has been the practice of this Court that no change of religion subsequent to marriage can affect the jurisdiction of the Court of the Community to which the parties belonged at the time of the marriage. This sound and logical principle was adopted in the Religious Community (Change) Ordinance, Section 4(2), which allowed one diversion from the rule, and that is, when both parties have subsequent to the marriage changed their religious community. The object of this principle is obvious. No party to a marriage should be allowed to escape matrimonial obligations by depriving a Court of its natural jurisdiction through a change of community, a matter which if it does not involve the real change of religion, but as in this case a change of a rite within one religion, is not very difficult. If such is the case when no reflection can be made on the validity of a marriage for the reason that at the time of its celebration both parties were undoubtedly members of the community, so much so should this principle to preserve the jurisdiction of the Court of the community of marriage be followed in cases of a previous change of religious community. Otherwise a person might change his religious community, purposely omit to comply with certain technical formalities of the law, enter into a form of marriage within the new faith, and then disclaim the validity of his marriage, with all its drastic results to wife and children.

We have to bear in mind that we are not dealing with the change of religious community *per se,* but with the rights of the wife and child to be supported by their husband and father respectively. If

the Court of the Community which celebrated the marriage had no jurisdiction to grant the relief required, hardly any Court would have it, because if the reasons are correct, namely that the change was defective, the same reason might involve the nullity of the marriage.

It is with this view in mind that I am approaching the problem. Fortunately, there will be no difficulty to reach a proper conclusion, even under a strict application of the law.

The Religious Community (Change) Ordinance was enacted with a view, as stated in the head-line of the Ordinance, to provide for the notification of change of religious community. Section 2 imposes upon a person who changes his religious community and desires legal effect to be given to such change, to fulfil the formality of obtaining a certificate from the Head of the Community which he has entered, and of notifying the fact to the District Commissioner. In the case of minors, Section 3(1) provides for the consent of the parent or guardian to be obtained.

It is to be noted that the Ordinance did not attempt to invalidate the change of the religious community, in case all the requirements of the Ordinance were not complied with. All that it provides for is that if you wish to avail yourself of the change you have to do certain things, but notwithstanding the omission in doing such things the change is still there. There is nothing in the Ordinance to prevent taking up the change against the person who has by his own free will acted upon it, particularly when his action involved the rights of other persons.

For twelve years prior to his marriage the Respondent was a Latin Catholic by religion. At his marriage he gave himself out to be a Latin Catholic, and even if the requirements of the Ordinance were not fulfilled, following the principle laid down in High Court No. 6/43, he is estopped in the proceedings, at any rate with his wife, from alleging that he is other than a Latin Catholic.

This case is distinguishable from High Court Case No. 100/41, in which the wife until her marriage was not a member of the Latin Church, and the Court held that a Religious Court has no jurisdiction unless both parties are members of their community, while in the present case both parties were for a period of over ten years prior to the marriage, *de facto* members of the community.

Furthermore, it seems to me that in this particular case it is difficult to say that the Respondent has not complied with the requisites of the law. He was a minor at the time of the change, which was effected with the consent of his mother, who brought him to church, and took

the oath together with him. We do not know whether his father had consented, but the law does not require the consent of the parents in plural; the consent of a parent, in this case the mother, is sufficient. The Respondent at the time was a minor. The duty to notify the District Commissioner rested, therefore, upon his parents, and he is not to be held responsible for the omission on their part to give the notification.

For these reasons we come to the conclusion that at the time of the marriage both parties to this case were Roman Catholics, and that the Court of the Roman Catholic Community, therefore, had jurisdiction over them.

Having come to this conclusion, we agree with the learned Chief Execution Officer that the jurisdiction was an exclusive jurisdiction, and that no consent was necessary. That part of the judgment of the Ecclesiastical Court, ordering the payment of a monthly allowance of LP. 7, is, therefore, capable of execution.

The order *nisi* is, accordingly, made absolute, with costs to include advocate's attendance fee of LP. 10 to Petitioner.

Given this 30th day of March, 1944.

Puisne Judge.

Rose, A/C. J.: I concur.

Acting Chief Justice.

CRIMINAL APPEAL No. 154/43.

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

BEFORE : Rose, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ali Muheisen Muhammad Ali. APPELLANT.

v.

The Attorney General. RESPONDENT.

Confession — Whether free and voluntary — No specific finding required, but may be inferred from judgment — Evidence that confession is true.

Appeal from a judgment of the District Court, Jerusalem, in CR. C. 139/43, whereby the Appellant was found guilty of breaking contrary to sec. 297(a), C. C. O., and sentenced to one year's imprisonment, dismissed:—

A judgment on conviction need not state, as a finding of fact, that a confession on which the judgment relies, was free and voluntary.

(*A. M. A.*)

ANNOTATIONS: On the necessity for evidence corroborating a confession see note 2 to CR. A. 54/43 (1943, A. L. R., at p. 236).

(*H. K.*)

FOR APPELLANT: Nazzal.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an application for leave to appeal from a judgment of the District Court of Jerusalem, convicting the Applicant of an offence against section 297 of the Criminal Code Ordinance. In accordance with our usual practice, we are treating the application for leave as the appeal itself.

It appears that the Appellant was one of three persons charged with an offence of breaking and entering certain premises and committing a theft therein. In the Court below one of these three persons pleaded guilty and according to the story of the prosecution was undoubtedly the ringleader. Another of these persons was convicted and sentenced to eighteen months' imprisonment and did not appeal.

The present Appellant relies principally on the fact that the learned President has not made a sufficiently clear finding of fact. The evidence for the prosecution depends upon statements of these persons, and as against this Appellant they depend, of course, on the statement of the Appellant himself and on certain consequential evidence which would bear out the truth of these statements. It is quite true, as Mr. Nazzal points out, that in his judgment the learned Judge does not expressly say "I find that the statement made by the third accused (*i. e.* the present Appellant) was free and voluntary". And Mr. Nazzal also argues that there is nothing to show from the wording of the judgment that the Judge actually considered this statement as being free and voluntary, the relevant finding reading as follows: "Having considered the evidence, I have no doubt at all that accused one and three (*i. e.* the present Appellant) took part in this affair". The question is, of course, whether the omission to make that finding is fatal to the conviction. We are of opinion that in the circumstances of this case it is not, because it is quite clear that the learned Judge applied his mind to this question of the statement being free and voluntary in view of the fact that he sets out in detail in his judgment

the allegations made by the various accused persons that they had, in fact, been coerced into making their statements. Therefore, the Judge clearly considered that problem and had he formed the opinion that their statements are true that they had been coerced then, of course, it is an irresistible assumption that he would have rejected the confessions.

A further question arises as to whether there is other evidence which would tend to show that this confession was true. The evidence on that point is that tracks of three persons were found which tends to bear out the story of these three persons that they were the three persons concerned. The stolen property was, in fact, discovered, and these three accused persons apparently showed the Police the place of the incident. That, in our opinion, is clearly evidence relating to matters which tend to show that these confessions are true. We think that the learned Judge, therefore, was entitled to rely on that confession; and we further think that, reading the judgment as a whole, we cannot accede to Mr. Nazzal's submission that the learned Judge meant to convey that he excluded the confession from the evidence upon which he relied for the convictions.

Mr. Nazzal also argues that even assuming that the confession was properly admissible, its contents are not sufficient to justify the President in convicting under this section. We think there is nothing in that point because in his statement the present Appellant sets out that he was invited to go to these premises to steal certain property, and he relates the disposition of the property after it had been stolen. We think that that, coupled with the other matters to which we have adverted, is sufficient to support this conviction.

As to sentence, of course there can be no doubt that a sentence of twelve months for an offence of this kind, committed at night, is in no way excessive.

The appeal is, therefore, dismissed and the conviction and sentence confirmed.

Delivered this 4th day of January, 1944.

British Puisne Judge.

CIVIL APPEAL No. 124/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Aharon Spivak. APPLICANT.

v.

The Mayor, Councillors and Townsmen of Tel-Aviv (also known as Municipal Corporation Tel-Aviv). RESPONDENTS.

Question of appealability or otherwise of decision of District Court under sec. 111(4), *Municipal Corporations Ordinance,* 1939.

Application for leave to appeal from the judgment of the District Court, Tel-Aviv, dated the 10th March, 1944, in Civil Case No. 450/43:—

1. (*Obiter*): The whole position of the law with regard to leave to appeal under various Ordinances is vague, obscure and unsatisfactory.

2. A civil matter is any matter properly brought before a Court otherwise than on the criminal side and is different from a civil case.

3. District Court acting under sec. 111(4), Municipal Corporations Ordinance is acting as Court of first instance, and an appeal from its decision lies as of right.

(*M. L.*)

REFERRED TO: C. A. 177/38 (4, Ct. L. R. 72; 1938, 2 S. C. J. 54; P. P. 8.viii.38); C. A. 158/38 (5, P. L. R. 488; 4, Ct. L. R. 169; 1938, 2 S. C. J. 126); C. A. 179/38 (5, P. L. R. 441; 4, Ct. L. R. 67; 1938, 2 S. C. J. 80); C. A. 233/43 (10, P. L. R. 593; 1943, A. L. R. 734); C. A. 118/27 (1, P. L. R. 259; 3, C. of J. 1061); C. A. 1/34 (2, P. L. R. 127; C. of J. 1934—6, 917); C. A. 85/33 (2, P. L. R. 90; C. of J. 1413); Shubrook *v.* Turnell, 1882, 6 Q. B. D. 621, 46 L. T. 749.

ANNOTATIONS :

1. As regards point 1) see Misc. Applic. 75/43 (11, P. L. R. 17; *ante,* p. 98) with annotations.

2. On question whether opinion of court is a judgment see cases collated in annotations to C. A. 233/43 (*supra*) and Misc. Applic. 56/43 (10, P. L. R. 465; 1943, A. L. R. 520).

(*A. G.*)

FOR APPELLANT: Goitein and Hornstein.

FOR RESPONDENTS: Eliash and Olshansky.

JUDGMENT.

This is an application for leave to appeal against a decision of the District Court of Tel-Aviv under the proviso to Section 111(4) Muni-

cipal Corporations Ordinance, 1934, which is in the following terms:—

> "(4) A decision of the Appeals Tribunal shall be final and no appeal shall lie therefrom to any court:—
>
> Provided that the Appeals Tribunal may, or if ordered by a District Court so to do, shall give its decision in the form of a case stated upon a point of law for the opinion of the District Court.

Mr. Goitein, for the Applicant, has submitted that there is probably an appeal as of right; but that, as the matter is perhaps not free from doubt or difficulty, he has at the moment seen fit to make this application for leave to appeal.

I would at once say that if no appeal lies at all there would be no object in my granting leave to appeal. If on the other hand my own opinion is that there is an appeal as of right there is just the danger that when the appeal comes on for hearing the Respondent might be able to convince the Court hearing the appeal that no appeal lies as of right and there is then the other possibility that the Court might take the view that leave to appeal should have been obtained. I consider that the whole position of the law with regard to leave to appeal under various Ordinances is vague, obscure and unsatisfactory.

Dr. Eliash, for the Respondent, submits that the Appeals Tribunal, having taken the opinion of the District Court, has now given a final decision against which there is no appeal. Alternatively, he argues that, even if we are to regard the opinion of the District Court as something separate from the decision of the Appeal Tribunal, nevertheless it is simply an opinion on a point of law and not a judgment determining the rights of parties. The argument then proceeds that even if Mr. Goitein can persuade me that an opinion is a judgment he cannot then come to me and ask me for leave to appeal. (Civil Appeal No. 1/34, P. L. R. Vol. 2, p. 129).

Mr. Goitein, as I have pointed out, has said that he is afraid that the Court of Appeal may eventually say that he ought to have obtained leave to appeal; but he thinks that he has an appeal as of right, relying, as he does, on Civil Appeal No. 85/33, Vol. 2, P. L. R. p. 90, especially at the bottom of page 91 and at the top of page 92, which is certainly a strong authority for his proposition, and it would seem that Section 16 of the Orthodox Patriarchate Ordinance, 1928, is somewhat similar in terms to Section 111(4) above referred to.

It is curious to note that in Civil Appeal 85/33 this Court does not seem to have considered the question whether the judgment had been given by a District Court in first instance (see line 5 of Article 43 Palestine Order-in-Council, 1922).

Mr. Goitein points to Article 40(1)(a) and he submits that the District Court acting under Section 111(4) of the Municipal Corporations Ordinance, 1934, is acting as a Court of first instance dealing with a civil matter. In my view this contention is sound and I consider that a civil matter is different from a civil case and, further, I think that a civil matter is any matter properly brought before a Court otherwise than on the criminal side.

Mr. Goitein has referred to Civil Appeal No. 177/38 Levanon's Current Law Reports, Vol. 4, p. 72 and to the case of Shubrook *v.* Turnell, Vol. 9 Q. B. pp. 621 and 622, where an opinion was held to be a judgment. He has also pointed out that when the Legislature wished, as in the Urban Property Tax Ordinance, 1940, Section 18, to ensure that there could be no appeal from the District Court they said so in terms. He also referred to Civil Appeal No. 158/38, P. L. R. Vol. 5, p. 488, to Civil Appeals No. 179/38, P. L. R. Vol. 5, p. 441 and 233/43. Dr. Eliash referred to Civil Appeal No. 118/27, P. L. R. Vol. 1, p. 259.

A further question arises whether the opinion of the District Court is an "order" or "decree" for the purposes of rules 2 and 317, Civil Procedure Rules, 1938. This question is difficult; but I do not think it necessary to decide it. In my view, an appeal lies as of right and the application for leave to appeal should be refused; but, in the event of the Court dealing with the appeal considering that leave to appeal should have been applied for, then the answer is in the application now before me — an application which I think, if it is at all necessary, ought to be granted.

With regard to the costs of this application they will be in the cause.

Delivered this 5th day of April, 1944.

British Puisne Judge.

HIGH COURT No. 127/43.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPLICATION OF :—

Sadi Arabi. PETITIONER.

v.

1. Chief Execution Officer, Magistrate's Court, Ramleh,
2. Jamil Abdallah el-Taji. RESPONDENTS.

Landlord and tenant — Consent judgment to vacate premises — No variation of terms of consent judgment — Kinch v. Walcott; H. C. 65/43.

Application for an order, calling upon the first Respondent to show cause why his order in Ramleh Execution file No. 300/43, ordering the execution of a consent judgment should not be set aside. Order *nisi* discharged:— .

A consent judgment may be executed if not varied.

(*A. M. A.*)

FOLLOWED: H. C. 65/43 (10, P. L. R. 351; 1943, A. L. R. 467); Kinch *v.* Walcott, 1929, A. C. 482, 98 L. J. P. C. 129, 141 L. T. 102.

ANNOTATIONS: *Cf.* Halsbury, Vol. 13, *pp.* 404—5, No. 458 and footnote (*c*). See also note 1 to H. C. 114/43 (1943, A. L. R., at p. 821).

(*H. K.*)

PETITIONER: In person.

FOR RESPONDENTS: No. 2 — Cattan.

ORDER.

This is the return to an order *nisi,* directed to the first Respondent, calling upon him to show cause why he should not refrain from executing the judgment given in Civil Case No. 1058 Magistrate's Court (Execution File No. 300/43) and why his order, dated 23rd December, 1943, should not be set aside. The facts are that on the 6th of February, 1943, the present Petitioner appeared before the Magistrate of Ramle and signed a consent judgment in which he agreed to leave certain premises on the 1st of *Muharram,* 1944. He failed to do so and the judgment was put in execution. The Petitioner has attacked the judgment on various grounds. The fact remains, however, that it was a consent judgment and that the second Respondent, i. e. the landlord, who also signed the consent judgment, never did any act after the consent judgment to show that he wished to depart from its terms. It seems to us that the following two cases cited by Mr. Cattan for the second Respondent are in point namely, Kinch *v.* Walcott (1929) A. C. at p. 482 and High Court 65/43 10 P. L. R. at p. 351.

For the foregoing reasons we discharge the order *nisi.* Petitioner must pay to the second Respondent fixed or inclusive costs of LP. 5.

Given this 31st day of January, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 29/44.

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

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

IN THE APPEAL OF :—

Osias Ephraim Rath. APPELLANT.

v.

The Attorney General. RESPONDENT.

Sentence — Charge under Finance Regulations — Uniformity in sentences — Policy behind the Regulations.

Appeal from the judgment of the District Court, Tel Aviv, in its appellate capacity, dated the 27th day of January, 1944, in Criminal Appeal No. 106/43, allowed, sentence varied:—

1. Although offences against the Defence (Finance) Regulations sometimes appear to be merely technical, they must not be treated lightly.

2. There should be uniformity in sentences imposed by various courts in similar offences.

(*A. M. A.*)

ANNOTATIONS:

1. It is "one of the functions of this Court (*i. e.*, the Court of Criminal Appeal) to try and get uniformity of sentences;" — CR. A. 111/42 (9, P. L. R. 477; 1942, S. C. J. 999).

2. In cases of offences against the Defence (Finance) Regulations "the sentence should normally bear some relation to the profit that the offender reasonably expects to make;" — CR. A. 129/41 (1941, S. C. J. 442). See also CR. A. 138/41 (1941, S. C. J. 641; 10, Ct. L. R. 203) and CR. A. 48/42 (9, P. L. R. 258; 1942, S. C. J. 357; 12, Ct. L. R. 13).

(*H. K.*)

FOR APPELLANT: Seligman.

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

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Tel Aviv, allowing an appeal by the Attorney General against a sentence passed by the Chief Magistrate of Tel Aviv.

The Appellant was charged on two counts of offences against the Defence (Finance) Regulations, 1941. Before the learned Chief Magistrate, after a certain amount of argument and evidence had been adduced, he pleaded guilty to both charges. We are satisfied that that is, in fact, the effect of the proceedings before the Court. He

was then bound over in the sum of LP. 5 for two years to be of good behaviour and to come up for judgment if called upon.

Upon appeal by the Attorney General to the District Court, the sentence was increased to a fine of LP. 300 on each count or to three months' imprisonment in default of payment thereof and in the event of default in the payment of both fines the alternative sentences of imprisonment should run consecutively.

Now, it is somewhat startling to find two tribunals arriving at such widely different results on the same set of facts, and it is for us to consider what is the reasonable fine to impose in this case, having regard to the whole circumstances of the case. Mr. Seligman tells us, and he was present in Court, and it must indeed be apparent from the record itself, that the Magistrate rightly or wrongly did not take a very serious view of the matter. The learned Relieving President did take a serious view of the matter. Now, we must have regard, as to these war time offences, to the desirability of some degree of uniformity of sentence as well as to the mischief to be dealt with. It is to be borne in mind that this offence took place as long ago as 1941, and we have also been referred by counsel for the Appellant to a case, one of a number, dealt with by the same Court in Tel Aviv in which the money involved was somewhat less and in which a fine of LP. 10 was imposed. Again that was an appeal by the Attorney General against sentence. We agree with the observations of the Court there that offences of this nature against the Defence (Finance) Regulations may sometimes appear to be merely technical and to involve no moral guilt, but that these regulations, and the financial policy behind them, are a most important element in the conduct of the war, and must not be treated lightly. That seems to us to be very sensible. We, therefore, think that the learned Relieving President was perfectly correct in coming to the view that the Magistrate was wrong and that the sentence should be increased.

As to the amount of the sentence, having regard to the circumstances of the case, we are of opinion that justice will be done if the fine is reduced to LP. 25 on both counts, that is to say, LP. 25 with the alternative of one month's imprisonment.

Delivered this 28th day of April, 1944.

A/Chief Justice.

CRIMINAL APPEAL No. 170/43.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Issa Khalil el-Siryani. APPELLANT.

v.

The Attorney General. RESPONDENT.

Breaking — C. C. O., 297(a) — Breaking by pushing back bricks acting as props.

Appeal from a judgment of the District Court, Jerusalem, in CR. C. 171/43, whereby the Appellant was convicted of an offence contrary to sec. 297(a) C. C. O., and sentenced to three years' imprisonment, dismissed:—

There can be "breaking" within the meaning of sec. 297(a) of the C. C. O., where bricks, placed to hold a door half-open, are pushed back.

(*A. M. A.*)

ANNOTATIONS: On the meaning of "breaking" see Halsbury, Vol. 9, *pp.* 542—3, No. 923 and Archbold, 30th ed., *pp.* 678 *seq.*

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

This is an appeal from a judgment of the District Court, Jerusalem, whereby the Appellant was convicted of breaking into a building adjacent to a dwelling house and committing theft of three motor-car tyres contrary to section 297(a) of the Criminal Code Ordinance, and sentenced to three years' imprisonment.

The learned Relieving President convicted the Appellant mainly on two pieces of evidence, namely, the evidence of Constable Doyle who had seen the Appellant in the vicinity of the house at about between 10.30 and 11 o'clock on the night in question which was the 18th of August, 1943, the theft apparently taking place at about 12.10 *a. m.* on the morning of the 19th of August, that is to say, less than two hours before the time when the theft took place, and the fact that at some time on the morning of the 19th August finger-prints were discovered on the motor car from which the tyres were stolen which admittedly were the finger-prints or palm prints of the Appellant.

Mr. Elia, who has said everything that can be said for the Appel-

lant, has argued that the learned Relieving President should not have been satisfied with the evidence of Constable Doyle as to the date of the occurrence. It seems that at first in examination-in-chief, Constable Doyle mentioned the night of the 19th. It is quite clear that he made, as the learned Relieving President found, an honest mistake which he later corrected and that he meant the night of the 18th August. It is easy to see how this mistake happened because it is obvious that he recorded everything in his diary on the page applicable to the day of the 19th. This was eminently a matter for the Court of trial and it is for that Court to say whether they accepted Constable Doyle's explanation. There is, therefore, nothing in this ground of appeal.

Mr. Elia's next complaint is that the palm prints might, as explained by the Appellant, have been laid upon this particular car on some other occasion at the Jaffa Gate or elsewhere. The learned Relieving President considered this matter and came to the conclusion that having regard to the evidence as to the Accused's presence near the house less than two hours before the theft, coupled with the presence of finger-prints or palm prints, he was not prepared to hold that there was sufficient material to make him have any reasonable doubt as to the guilt of the Accused. The learned Relieving President pointed out in his judgment that although the Accused himself had given evidence to the effect that he was at home on the night in question he made no attempt to substantiate the defence of *alibi*.

All these matters were matters for the trial Court and we consider that there was ample evidence to justify the finding that it was the Appellant and no other person who had broken into this garage.

The Appellant's advocate also argued that the facts found did not justify a conviction for breaking under Section 297(a) but that these facts were perhaps sufficient to identify the Accused with the theft of the tyres, and that in consequence the Appellant should have been convicted of theft under Section 270 or on the particular facts of this case at the most under Section 278(1). It is true that in cross-examination the owner of the car said: "The car is too big for garage and so doors left a little open". In re-examination however, he said: "Doors of garage kept together by two bricks. The doors had been opened and bricks pushed back".

It seems that the learned Relieving President accepted this evidence and in view of this evidence taken together with the definition in Section 294, namely,:—

"Any person who breaks any part ..... by unlocking, pulling,

> pushing, lifting, or any other means whatever, ... any other thing intended to close or cover an opening in a building, ... is deemed to break the building."

and in view also of the fact that the two bricks had been pushed back it seems to us that, the facts justified the conviction for an offence contrary to Section 297(a).

With regard to sentence the Accused admitted two previous convictions one of which was for theft. In view of this fact and in view of the prevalence of this type of offence which in itself is a serious offence it cannot be said that the sentence was any too severe. The appeal is, accordingly, dismissed and the conviction and sentence are confirmed.

Delivered this 24th day of January, 1944.

British Puisne Judge.

INCOME TAX APPEAL No. 16/43.

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

BEFORE : Edwards, J.

IN THE APPEAL OF :—

Nathan Zwi. APPELLANT.

v.

The Assessing Officer, Haifa. RESPONDENT.

Income Tax — Appeal under sec. 53 — Cesser of income during year of assessment — Sec. 6 as enacted in 1941 — Interpretation Ord., sec. 5, vested rights — "Unless a contrary intention appears" — Charging section, I. T. A. 20/42, C. A. 345/43 — Double taxation, Bradbury v. English Sewing Cotton Co. Ltd., Stevens v. Durban Roodeport Gold Mining Co. — "For each year of assessment", "Notwithstanding" (sec. 6) — Schedule 2 I. T. (Am.) Ord., 1942 — Sec. 53, r. 9 — Costs.

Appeal from the assessment by the Respondent for the year of assessment 1942/1943, in assessment No. 170/J/398, dated 19.5.43, allowed:—

> The same income can be used again as a measure; it may not be taxed twice in the same year. Under sec. 6, before the amendment, no tax can be exacted for any particular year on an income whose source ceased during that year.
>
> *(A. M. A.)*

REFERRED TO: I. T. A. 20/42 (10, P. L. R. 134; 1943, A. L. R. 30); C. A. 345/43 (10, P. L. R. 678; *ante*, p. 50); Bradbury *v.* English Sewing Cotton Co. Ltd., 1923, A. C. 744, 92 L. J. K. B. 736, 129 L. T. 546, 39 T. L. R. 590, 8 Tax C. 491; Stevens *v.* Durban-Roodeport Gold Mining Co., 1909, 100 L. T. 481, 25 T. L. R. 316, 5 Tax C. 402.

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is an appeal under Section 53 of the Income Tax Ordinance. The facts, which are not in dispute, are set out in the notice of appeal, the relevant parts of which are as follows:—

> "1) On or about the 25th day of March, 1943, the Appellant was assessed by the Respondent for the year of assessment 1942/1943 in the sum of LP. ..... and the Respondent stated that the tax due was LP. .....
>
> 2) On or about the 5th day of April, 1943, an objection was made to the Respondent to the said assessment.
>
> 3) On or about the 19th day of May, 1943, the Respondent made an order under Section 52(5) of the Income Tax Ordinance (which order was received on or about the 21st day of May, 1943) in which the Respondent stated he was unable to accept the objections raised in Appellant's notice dated April 5th, 1943, hereinbefore referred to. Copy of the said order of the Respondent is attached hereto and marked 'A'.
>
> 4) The Respondent was wrong in assessing the Appellant on the basis of an alleged income earned during 1941/1942 because in 1942 the Appellant had ceased to earn an income from the business he was engaged in on the previous year.
>
> 5) The income which the Appellant earned during 1942/1943 was income based on new sources which came into existence in the year 1942/1943.
>
> 6) It is submitted, therefore, that the income declared, namely LP. ..... mils was the correct income and the Respondent was wrong in adding the sum of LP. ..... mils as 'Income of 1941—42 taxed last year'."

The contention of the Appellant is that he paid income tax for the year 1941—1942 on the profits of the business which he was conducting until August, 1941.

It is argued that, as his source of income from this business ceased in August, 1941, and that as he had already paid income tax for the years 1941—1942 the original section 6 as first enacted in the Income Tax Ordinance, 1941, which came into force on 1st September, 1941, applies. Mr. Goitein, advocate for the Appellant, submits that the

tax payer on perusing the original section 6 knew that he was entitled not to pay any taxes in 1942 and 1943, if he closed his business in 1941, provided he then decided not to run any business in 1942. Mr. Goitein further contends that, by reason of Section 5 of the Interpretation Ordinance, the law cannot be interpreted in such a way as to take from a person a privilege which he already has; nevertheless, the new section 6 (if interpreted in the manner contended for by the Crown) does purport to take away that right or privilege. Section 5(b) of the Interpretation Ordinance is also said to help the Appellant. The argument proceeds that the original ordinance which was in force throughout 1941 dealt with taxation for the year of assessment commencing on the first April, 1941, and that, therefore, the law operated as to the Appellant's liability not only during that year, but during the next year, namely, from 1st April, 1941, to 1st April, 1942. Mr. Goitein contends that the amendment to section 6 does not apply to the Appellant, and that, in any event, if he does come under Section 6 as amended, he could not be taxed again for the same period, because this would amount to double taxation. Section 6 is a charging section and, as he has been charged once, he cannot be charged again. (I. T. A. 20/42) P. L. R. Volume 10, page 134, and C. A. 345/43, P. L. R. Vol. 10, page 678. In short, Section 6 applies from the year 1942 to enable the basis of assessment for the year 1943—1944 to be the income for the year 1942—1943. The assessment for the years 1942 and 1943 is not affected because he is saved by Section 5 Interpretation Ordinance.

Mr. Wittkowski, advocate for the Respondent, contends that the case is similar to previous appeals brought by tax payers which appeals have been dismissed. He contends that there is nothing in the notice of appeal with regard to double taxation. This may be so; but I think that the matter is open and that the Appellant is entitled to ask me to decide it.

Mr. Wittkowski contends that it is not correct to say that but for the amendment to section 6 the assessing officer would not have been able to tax the Appellant again for the year of assessment 1942—1943, on the basis of the income of the year 1941—1942 and he says that the amendment has not been detrimental to the Appellant. The argument proceeds that, in the next year of assessment, that is 1942—1943, the proviso to Section 6 would not have applied because there would have been no cessation of business so that in 1942—1943 the Appellant would have been charged under the main part of Section 6, that is, on the income of the succeeding year.

Mr. Wittkowski says that the Interpretation Ordinance has no relevance here because no privilege or right acquired by the tax payer under the original proviso to Section 6 has been taken away by the new Section 6. It is said that the original proviso referred to a certain state of facts which must have existed in the year of assessment so that, if the business ceased in that year, then tax was payable on the income of that year and not on the income of the previous year. The proviso to Section 6 held out no promise that, in the following year, the ordinary rule (*i. e.* the rule of law in the main part of Section 6) would not apply. Section 5 of the Interpretation Ordinance contains the important words, "unless a contrary intention appears".

With regard to double taxation Mr. Wittkowski says that the Crown never argued I. T. A. 20/42 on lines, inconsistent with those on which the Crown argued C. A. 345/43. He referred to the dissenting judgment of Lord Sumner in the case of Bradbury *v.* English Sewing Cotton Company Limited (1923) A. C. Pages 744 and 760, while Mr. Goitein referred to the judgment of Viscount Cave in the same case at page 752. He also referred to the Case of Stevens *v.* Durban-Roodeport Gold Mining Co., Vol. 5 Tax Cases Part 7, Pages 402, 406 & 407.

In short, Mr. Wittkowski submits that the tax claimed now, *i. e.* for 1942—1943 is not for the same period as that already taxed. We must not ignore the words in Section 6 "for each year of assessment". It is submitted that, if the Appellant has paid tax in 1941—1942 for the year of assessment 1941—1942, tax on the income of 1941—1942, and if it happens that the incidence of tax of the years 1942—1943 falls on the same income, *i. e.* for 1941—1942 it is still a different tax and he is not being called upon to pay double taxation because it is for a different period, and that the remarks of the learned Chief Justice (Gordon Smith, K. C.) in I. T. A. 20/42 are equally appropriate to the present case.

Finally, it is argued that, if there is any authority of law prohibiting double taxation in the present case, the law makes it clear that there is power to impose double taxation in Palestine both under the original section 6 and under Section 6 as amended. In the second year of assessment it was the main part of Section 6 that applied to the Appellant. Regard must be had to the word "notwithstanding" in line 4 of Section 6 as amended.

In reply, Mr. Goitein argued that the proviso to Section 6 enables the Appellant to close down his business and that then two things

happened, namely, the Appellant pays Income Tax for 1941 and in 1942—1943 he pays income tax on any new income which he may have; but he does not pay on the income for 1941 because Government has already collected that tax by virtue of the proviso to Section 6. The proviso means that if his business stops in any year of assessment (*e. g.* in 1941) as soon as it is stopped and the Appellant pays income tax he, as a tax payer, has nothing to pay out of that income, because he had been charged on the year 1940. The tax payer in 1941, was able to know what would be his assessable income in 1942. The amended Ordinance came into force on the first April, 1942, except as regards the amendment to Section 13. At the end of 1941 the Appellant had the right to know how much of his income for 1941 was going to be affected. On the 31st March, 1942, he knew how much of his income was going to be taxed. He knew that in 1942—1943, he would not be charged income tax on 1941. The *dictum* of this Court, in I. T. A. 20/42 with regard to double taxation has not been affected by any decision of the Supreme Court, sitting as a Court of Civil Appeal. The position, Mr. Goitein says, is that the same income cannot be taxed twice although you can use it again as a measure of assessment. In 1942—1943 the Appellant was not liable to pay any further taxes on the money which he had already received. His business ceased on the 31st July, 1941, that is four months after the commencement of the year of assessment, *viz.* the first April, 1941, to first April, 1942. After 1st April, 1941, the Appellant became a different person and became merely an employee of a company. Government is not being deprived of any income tax for that year in the business in which Appellant is now working. Mr. Goitein referred to Schedule 2 Income Tax (Amendment) Ordinance, 1942.

I have considered the respective submissions of Mr. Goitein and Mr. Wittkowski, and I have come to the conclusion that we have here a clear case of an attempt to tax the income of the same year twice. I think that there is force in Mr. Goitein's contention that, although you can use the same income again as a measure, you cannot tax the income itself twice in the same year. I so hold.

It remains to consider what order I should make under Section 53(3) and Rule 9(e) Rules of Court (Income Tax Appeals), 1941.

Dated this 28th day of April, 1944. Judgment read in presence of Mr. Wittkowski.

British Puisne Judge.

Adjourned for argument till 9.30 *a. m.* on 5th May, 1944.

British Puisne Judge.

5th May, 1944: Mr. Goldberg for Appellant.
Mr. Wittkowski for Crown.

Mr. Wittkowski: The correct figure in this case is the following, namely, *Re* tax LP. ..... mils. As regards costs, I ask Court to consider two things, *viz.* (1) decision of this Court at the time, and (2) one ground of appeal not even mentioned by Mr. Goitein, devoid of merits.

Mr. Goldberg: I am not to ask for costs.

JUDGMENT.

I assess the Income Tax payable at LP. ..... mils, no costs. Amount deposited in excess of tax to be refunded.

Delivered this 5th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 401/43.

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

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

IN THE APPEAL OF:—

Suleiman Muhammad Suleiman & 2 ors. APPELLANTS.

v.

Abdul Wahab Zeidan
on behalf of his father who is also guardian over Ratib Zeidan and on behalf of Sabha Zeidan. RESPONDENT.

Stamp objection taken in and sustained by trial Court — Appeal raising matter of stamp objection — Power of attorney specific although conferring certain general powers.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated the 1st day of November, 1943, in Civil Appeal No. 34/43, allowed and case remitted:—

1. (*Obiter*): A general power of attorney must be drawn up by a Notary Public.

2. Principle that decisions overruling stamp objections are not appealable does not extend to decisions sustaining such objections.

3. A power of attorney is specific, notwithstanding certain general powers conferred therein, if it is for a particular action and for matters relating to or arising therefrom.

(*M. L.*)

REFERRED TO: C. A. 140/42 (9, P. L. R. 615; 12, Ct. L. R. 163; 1942, S. C. J. 680).

ANNOTATIONS :

1. The following is the relevant part of the P/A.:—

"Know all men by these presents that I/We the undersigned ..... of ..... do (and each of us doth) hereby appoint Messrs. ..... Advocates and each of them jointly and severally to be my attorney (or the attorneys and attorney of us and each of us) to represent me (or us and each of us) in all Courts of Palestine including Civil, Criminal ... and before any executive and administrative authorities in Palestine in the action, proceedings, claims or demands whether Civil or Criminal now pending or arising between me (or us or any of us) and ..... and/or any third parties or against me (or us or any of us).

And for purposes aforesaid or any of them and without prejudice to the generality of the powers hereinbefore conferred to institute, commence ..... such action, suits, proceedings, appeals, demands, claims, disputes, accounts and matters as may concern the subject matter of this instrument and also to impose oaths, apply for seizure of any property either preliminary to starting action or otherwise and do all acts necessary in the process of execution of judgments and to institute and carry on bankruptcy proceedings.

And also to receive and give effectual receipts, releases and discharges for all or any monies which may by virtue of these presents or in relation to the premises be payable to me (or us or any of us) and also to execute and do all such documents, instruments and things as may be necessary or expedient for giving effect to all or any of the matters aforesaid and also to appoint and remove any substitutes or subagents or attorneys or agents in respect of all or any of the matters aforesaid."

2. As to the second point see C. A. 140/42 (*supra*) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: W. Salah.

JUDGMENT.

In this case the Respondent takes the preliminary objection that no appeal lies as the appeal in this case is based upon a stamp objection but it seems to us to be quite clear on looking at the cases to

which counsel for the Respondent has referred, the last one being Civil Appeal No. 140/42, that all this Court has done is to approve the English principle that in the event of a stamp objection being taken in the Court below and being overruled, that no appeal lies in such a case. We know of no principle that if a stamp objection is sustained the aggrieved party may not raise that matter on appeal. In any event in this particular case a further point has arisen as to whether or not the power of attorney, the subject-matter of this particular argument was properly drawn up. It is clear from Section 21 of the Advocates Ordinance, as the learned Relieving President said, that a general power of attorney must be drawn up by a Notary Public. In this particular case the power of attorney was not drawn up by a Notary Public and Mr. Eliash submits that it is a specific power. We have read the power of attorney with care and we think that having regard to its language, that there is really no doubt that it is not a general power of attorney but is a specific one for this particular action and for matters relating to or arising therefrom. We think, therefore, that the appeal succeeds and the case must be remitted to the District Court to hear and determine according to law. We think that the fair order is that the costs of this appeal should be in the cause and in order to simplify final arrangements we certify 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 9th day of March, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 187/43.

IN THE SUPREME COURT OF PALESTINE.

BEFORE: L. A. W. Orr, Chief Registrar.

IN THE APPLICATION OF :—

Izhac Gabrielovitz. APPLICANT.

v.

Mustafa Ali Hassan Abu el Diuk, in his personal capacity and as heir of his father Ali Hassan Abu el Diuk & 12 ors. RESPONDENTS.

Court of Appeal remitting case with certain directions — Case struck out in District Court, Jaffa, for non-appearance of Plaintiff and restored

4 years later in District Court, Tel-Aviv — Appeal from judgment of District Court, Tel-Aviv, dismissing the case — Application to Chief Registrar for refund of fees paid on second appeal.

Application for a refund of Court Fees allowed:—

1. Rule 13, Court Fees Rules 1935 — a rule of civil procedure, it does not merely govern payment of Court fees in certain eventualities.

2. Jaffa District Court and Tel-Aviv District Court exercise concurrent jurisdiction, actions may be filed in one or other at the will of the parties; an action struck out in one may be restored in other.

3. Where a case remitted by Court of Appeal was struck out and restored, no fees are payable on appeal from judgment of trial Court dismissing the case, and if paid, Appellant entitled to refund.

(*M. L.*)

REFERRED TO: C. A. 226/38 (6, P. L. R. 334; 1939, S. C. J. 337; 6, Ct. L. R. 96); C. A. 50/37 (3, Ct. L. R. 18; 1937, 1 S. C. J. 281; P. P. 29.vii.37).

ANNOTATIONS:

1. The appeal in question is reported in 10, P. L. R. 615; *ante*, p. 6.

2. On the first point see cases referred to.

3. On the second point see C. A. 156/40 (7, P. L. R. 435; 8, Ct. L. R. 113; 1940, S. C. J. 545) and C. A. 175/40 (7, P. L. R. 454; 8, Ct. L. R. 114; 1940, S. C. J. 305).

(*A. G.*)

ORDER.

This is an application for a refund of the Court fees paid in the Court of Appeal on Civil Appeal No. 187/43, made to me by the Appellant under Section 6(e)(4) of the Registrars Ordinance, 1936.

The history of the matter is briefly as follows:—

The Appellant originally lodged his claim in the District Court of Jaffa, in the year 1931. The District Court dismissed the claim and the Plaintiff appealed to the Court of Appeal. The Court of Appeal allowed the appeal and remitted the case to the District Court of Jaffa, with certain directions. The case came before the District Court of Jaffa, and it was struck out on the 18th of January, 1937, under Rule 2 of the Judgment by Default (District and Land Courts) Rules, of 1st June, 1926, which were then in force, because the Plaintiff did not appear. In 1941 the case was reinstituted by the Plaintiff by way of an action lodged in the District Court, Tel-Aviv. The District Court, Tel-Aviv, dismissed the claim, and the Plaintiff appealed to the Court of Appeal, and his appeal was allowed.

The Appellant now claims that he should not have paid any fees on filing the last-mentioned appeal in the Court of Appeal, and he

relies upon Rule 15 of the Court Fees Rules, 1935, contending that this last-mentioned appeal was "a second or subsequent appeal against a judgment of a Court of first instance in an action remitted, with directions by an Appellate Court as a consequence of a previous appeal in the same action, by the same Appellant or Appellants".

This application clearly depends upon the interpretation of the expression "the same action" used in Rule 15 of the Court Fees Rules, 1935. When the District Court of Jaffa struck out the claim in 1937 under Rule 2 of the Judgment by Default (District and Land Courts) Rules, then in force, the Plaintiff could have instituted a fresh action under Rule 2(1) upon payment of the prescribed fees, or he might have been able to restore the action under Rule 13 of the Court Fees Rules, 1935, as both sets of rules were "of equal legal validity as against each other, ... and not contradictory when read together", (C. A. 50/37, Vol. 3, Ct. L. R., p. 18, quoted in C. A. 226/38, p. 337 of Law Reports of Palestine, 1939).

Rule 13 of the Court Fees Rules provides for the restoration of an action within fifteen days of the order striking out the original action, on the payment of half fees, and for the restoration of an action on the payment of full fees outside this period of fifteen days. When the action was reinstituted in the District Court of Tel-Aviv (that District Court exercising concurrent jurisdiction with the District Court of Jaffa), the Judgment by Default (District and Land Courts) Rules had been repealed, and it is clear, therefore, that the reinstitution of the action in the District Court of Tel-Aviv cannot have been a fresh action filed within the terms of these rules, although it would appear from page 2 of the judgment of the District Court of Tel-Aviv, dated 31st May, 1943, that the Court may have considered that it was so.

I now have to decide whether or not this action was restored in accordance with Rule 13 of the Court Fees Rules, 1935, and whether or not Rule 13 is a rule governing the payment of Court fees alone, or is a rule of procedure.

I will take the second point first, and will refer again to Civil Appeal 226/38 mentioned above. On reading the judgment in that appeal it is clear to me that the Court of Appeal regards Rule 13 of the Court Fees Rules as a rule of civil procedure and not merely a rule governing the payment of half or full Court fees in certain eventualities, and I am bound by that decision.

Taking the first point, it is clear that the case must have been restored under Rule 13 of the Court Fees Rules, 1935, as there is

no rule providing for the institution of a fresh action in place of Rule 2 of the Judgment by Default (District and Land Courts) Rules, which were repealed in 1938.

I, therefore, hold that the case was restored within the meaning of Rule 13 of the Court Fees Rules, as explained in the judgment of Civil Appeal 226/38, and, therefore, it was a continuation of the original action.

In coming to this decision I have not overlooked the fact that the original action was in the District Court of Jaffa, and the case was restored in the District Court of Tel-Aviv, but as it is clear from the Establishment of Courts Order, 1939, published at page 1496 of Volume 5 of the Regulations, Rules and Orders, 1939, that the District Court of Jaffa and the District Court of Tel-Aviv exercise concurrent jurisdiction, that is to say, actions may be filed in one or the other at the will of the parties, presumably an action struck out in one may be restored in the other.

Having come to the conclusion, therefore, that the action in the District Court of Tel-Aviv was a continuation of the original action in the District Court of Jaffa, it is clear that Rule 15 of the Court Fees Rules, 1935, is applicable, and that on the appeal from the judgment of the District Court of Tel-Aviv no fees should have been paid.

I, therefore, order the refund to the Appellant of the fees paid in Civil Appeal 187/43.

Given this 15th day of February, 1944.

Chief Registrar.

HIGH COURT No. 35/44.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Arnold Eissman & an. — PETITIONERS.

v.

1. The Chief Execution Officer, Magistrate's Court, Haifa,
2. Kurt Butermilch & an. — RESPONDENTS.

Judgment ordering eviction but reminding Plaintiff of his sworn decla-

ration that he will not ask for execution until lessee has found alternative accommodation — Judgment creditor applying 19 months later for execution — Chief Execution Officer staying execution pending new decision as to alternative accommodation.

Return to a rule *nisi*, issued on the 27th day of March, 1944, directed to the first Respondent, calling upon him to show cause why his order, dated 3rd March, 1944, made in Execution File No. 198/44, Execution Office, Haifa, should not be set aside and why he should not execute the judgment of eviction given by the Magistrate's Court of Haifa, on the 17th August, 1942, in Civil Case No. 1368/42, against the 2nd and 3rd Respondents in respect of the flat described in the said judgment; order made absolute:—

> Additional words in clear order of eviction reminding Plaintiff of his sworn declaration not to execute until lessee has found alternative accommodation cannot be regarded as operative part of judgment, and Chief Execution Officer — not entitled to delay execution pending new decision as to alternative accommodation.
>
> (*M. L.*)

ANNOTATIONS:

1. Alternative accommodation should be proved to have existed at time of expiration of the tenancy — C. A. 265/42 (10, P. L. R. 60; 1943, A. L. R. 9).

2. For an example of a judgment containing in addition to an order of eviction a matter outside the jurisdiction of the Magistrate see H. C. 97/43 (10, P. L. R. 569; *ante*, p. 41).

(*A. G.*)

FOR PETITIONERS: Ganon.

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

ORDER.

This is the return to an order *nisi*, directed to the Chief Execution Officer, Magistrate's Court, Haifa, calling upon him to show cause why he should not carry out an order of eviction granted by one of the learned Magistrates of Haifa on 17th August, 1942. We quote paragraphs 15 and 16 of the Magistrate's judgment:—

> "15. On the above stated grounds I order the Defts. to vacate their premises situated in the Pltf's house at Bath Galim, Haifa, consisting of three rooms, kitchen and appurtenances, and I order the Defts. to pay Pltfs. the costs and LP. 2.— advocates fees.
>
> 16. Finally I want to remind Pltf. No. 1 as regards his sworn declaration which he gave in Court on 10.7 (page 3 of the Record) that he will not ask for the execution of the eviction Order for such time as Defendants will not be able to find an alternative accommodation."

In March, 1944, the present Petitioners, who had been the Plaintiffs in the Magistrate's Court, applied to the Execution Officer for

execution of the judgment. The Chief Execution Officer seems to have realised that paragraph 16 was not an operative part of the judgment; nevertheless, in the last paragraph of his order he said:—

> "In exercise of my powers as Chief Execution Officer I, therefore, give a delay to Debtors, pending a new decision to be given after the Creditors shall have submitted an application for fixing a new hearing and satisfied me that the Defendants were able to obtain the flat of Reich or any other suitable flat."

At the hearing to-day, Mr. Kaisermann, who appeared for the Respondents, with his usual moderation and fairness, admitted that he could only succeed if he could convince us that paragraph 16 was an operative part of the judgment. We feel, however, that it cannot be so regarded because it comes after the very clear order of eviction granted in paragraph 15. It would seem that the learned Magistrate was merely expressing a hope that the first Plaintiff would not press for execution of the eviction order until after the Defendants had obtained alternative accommodation. The matter for us to decide is whether the Chief Execution Officer was justified in making the order which he did in the last paragraph of his decision where he said: "pending a new decision".

In my view of the clear terms of paragraph 15 of the judgment there was no room for any new decision to be given. Although the judgment was given in August, 1942, the Plaintiff did not ask for execution until March, 1944. The Chief Execution Officer had no alternative but to carry out the order stated in paragraph 15 of the judgment, at any rate, when asked by the judgment-creditor so to do.

In the result the rule must be made absolute; the second and third Respondents will pay one set of costs to the Petitioners, *i. e.* fixed or inclusive costs of LP. 10.—.

Given this 27th day of April, 1944.

British Puisne Judge.

CIVIL APPEAL No. 202/43.

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

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

IN THE APPEAL OF:—

Breindel Diamant. — APPELLANT.

v.

Palestine Plantations Ltd. — RESPONDENT.

Contract for sale of land — Damages and forfeiture of deposit — Alleged repudiation by purchaser — Readiness and willingness — Construction of contract — C. A. 17, 19/39, C. A. 261/40; Cellulose Acetate Silk Co. Ltd. v. Widnes Foundry (1925) Ltd. — Inverted penalty clause limits damages.

Appeal from a judgment of the District Court, Tel Aviv, in Civil Case 45/41, allowed, judgment set aside and a new judgment substituted:—

When a purchaser, without repudiating the agreement, fails to pay the balance of the purchase price, a condition in the agreement, providing for the forfeiture of *part* of the instalments paid must be enforced and the vendor cannot claim damages in excess of the forfeiture.

(*A. M. A.*)

REFERRED TO: C. A. 17 & 19/39 (1939, S. C. J. 142; 5, Ct. L. R. 164); C. A. 261/40 (8, P. L. R. 71; 1941, S. C. J. 36; 9, Ct. L. R. 61); Cellulose Acetate Silk Co. Ltd. *v.* Widnes Foundry (1925) Ltd., 1933, A. C. 20, 101 L. J. K. B. 694, 147 L. T. 401, 48 T. L. R. 595.

ANNOTATIONS:

1. See annotations to C. A. 17 & 19/39 and to C. A. 261/40 (*supra*) in S. C. J.

2. On the effect of an "inverted penalty clause" see Halsbury, Vol. 10, *p.* 145, No. 185 and footnotes (*p*) and (*q*).

(*H. K.*)

FOR APPELLANT: Scharf.

FOR RESPONDENT: Goitein and Harari.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Tel-Aviv, given in favour of the Respondent allowing them to retain certain instalments of purchase price stipulated for in two contracts of sale and also ordering the Appellant to pay to the Respondent the sum of LP. 135.967 mils in respect of damages and refund of certain taxes and insurance premia. The Appellant, who was the Plaintiff in the Court below, in her statement of claim asked that the Respondent company be ordered to repay her the instalments of purchase price which she had paid or alternatively 50% of those instalments. The total instalments paid amounted to LP. 1,115.865 mils. The present Respondent in the Court below denied liability and counterclaimed for damages and it was in respect of that counterclaim that the learned Relieving President awarded damages and allowed the Respondent to retain the instalments of the purchase price, he at the same time dismissing the present Appellant's claim. Against that judgment the Appellant has appealed to this Court but there is no cross-appeal by the Respondent.

The Appellant on 18th December, 1932, and on 1st February, 1933, entered into two contracts with the Respondent, Exhibits P. 1 and P. 2. The learned Relieving President made the following finding:—

> "Each of the two contracts was in respect of a plot of land on the Tel-Mond estate in the sub-district of Tulkarm, the company undertaking in consideration of the purchase price not only the transfer of the land on the terms set out in the contracts, but also the stocking of the land with citrus trees, their cultivation, and other connected matters.
>
> The Plaintiff, after paying a number of instalments under each contract, failed to pay the instalments which fell due under "P. 1" from 1st March, 1936, to 1st December, 1939, and under "P. 2" from 1st January, 1936, to 31st December, 1939.
>
> Clause 30 of the contract P. 2 reads in the English translation as follows: 'The company will deliver to the purchaser the Deed of Title after the payment of 40% of the purchase price in cash'."

The Court of trial found that the Appellant had committed a breach of the contract by reason of non-payment of instalments but that, as the Respondent had not exercised their right under Clause 21A of the contract, they were not entitled to damages. The Court, however, held that the company's claim based on a repudiation of the contract on the part of the Appellant was sound and should succeed. For that reason the Court awarded the company damages. The learned Relieving President in his judgment stated:—

> "If the Plaintiff had carried out the contracts the Defendant would have received LP. 2,360.945. The Plaintiff having renounced the contracts the Defendant was left with two groves worth at the time of renunciation LP. 1,146.850, and with the instalments paid by the Plaintiff totalling LP. 1,107.895, making together a total of LP. 2,254.745.
>
> A payment of LP. 106.200 will, therefore, together with the retention of the instalments and of the groves, put the Defendant company, as far as possible, into the same position as if the contract had been performed."

He, accordingly, gave judgment allowing the company to retain the instalments of purchase price already paid by the Plaintiff and he also ordered the present Appellant to pay to the Respondent the sum of LP. 106.200 mils as damages and two small sums in respect of taxes and insurance premia, amounting in all to the sum of LP. 135.967 mils already mentioned in this judgment.

The hearing of the appeal before us occupied several days. We heard much argument and we were referred to the reports of many decided cases and to many text books. It would be tedious and it is, in my opinion, unnecessary for the purposes of this judgment to go at any

length into the facts or to deal with all the arguments of the respective advocates. I think that the appeal can be decided on one short ground, namely, the point whether the learned Relieving President was entitled on the facts and on the evidence and on a scrutiny of the documents and correspondence before him to hold that there was repudiation by the Appellant. In my view, he was not justified in so holding. From a consideration of the correspondence it would appear that, at any rate from 12th September, 1933 until 1937 or possibly 1938, the Respondents were constantly writing letters to the Appellant calling upon her to pay the outstanding instalments. The replies of the Appellant were quite frank and were to the effect that her financial position was such that she simply could not find the money. It is significant that in some of the letters the Respondents threatened to cancel the contract and promised to return to the Appellant 50% of the amounts which she had paid. It is also significant that the Respondents' advocate in his final address to this Court argued that as a rule whenever the Respondents wrote to the Appellant, the Appellant sent a small sum of money. Without discussing the effect of the correspondence and without dealing with the facts, I think that this Court can well come to the conclusion that the evidence did not justify a finding that there was repudiation by the Appellant. To put the matter shortly, the position really all along seems to have been that the Appellant repeatedly told the Respondents that she was unable to find money with which to pay the instalments overdue. Now, the learned Relieving President, although he found that the Respondents were not entitled now to rely on Clause 21A which was in the same terms in both contracts, does not seem to have decided the point whether the Appellant could claim under that clause. As I have said, the learned Relieving President did not agree with the contention of the company that there had been rescission of the contract. It also seems that he would have dismissed the counterclaim entirely had he not held that there had been repudiation on the part of the Appellant. As I am of the opinion that the Appellant did not repudiate the contract I consider that the judgment cannot stand. I think that the Appellant is entitled to rely on Clause 21A and to recover thereunder. Clause 21A is in the following terms:—

> "If the purchaser, after having paid up two yearly instalments, shall make default in the punctual payment of the aforesaid instalments of the purchase-price and such default shall continue for 90 days from the date on which payment ought to have been made hereof, the company shall be entitled to terminate this agreement at the expiration of the said period of 90 days retaining the absolute property in the said grove for its own use and benefit and to retain by way of agreed compensation for the purchaser's said default

50% of the total amount actually paid by him under Section 2 of this agreement up to the date of the said default.
The company will repay to the purchaser the balance of the 50% of the total amount so paid by him in 5 yearly payments each consisting of one-fifth of the 50% and the purchaser hereby agrees to the repayment of such sum in the manner above described and that he shall not be entitled to any interest of the said amount."

In my judgment Clause 21 A stated the limit which the Respondents could claim. Their right to recover anything is to be found within the four walls of that clause. In this connection I respectfully agree with the learned Relieving President when he says in his judgment — "The damages are fixed in Clause 21A at 50% of the moneys actually paid by the purchaser and whether you call that liquidated damages or a penalty the company cannot claim, as it does by this action, more by way of damages for breach by non-payment than it would have received under this clause." The learned Relieving President found that the Respondents had failed to notify the Appellant of any particular day or time at which she should appear before the Land Registry for the land transfer. I think it unnecessary and undesirable to deal with the arguments adduced before us as to readiness and willingness and as to the practice approved by this Court with regard to the duty of a vendor in the way of inviting the purchaser to attend at the Land Registry. I certainly would not be prepared to throw doubt on the correctness of previous decisions of this Court without hearing further argument. The following cases seem to me to be relevant to the facts of this case, namely, Civil Appeals 17 and 19 of 1939, Levanon's Current Law Reports, Vol. 5, p. 164, and Civil Appeal 261/40, P. L. R. Vol. 8, p. 71 and Cellulose Acetate Silk Co. Ltd. *v.* Widnes Foundry (1925) Ltd. (1933) Appeal Cases, p. 20 and in particular the remarks in the speech of Lord Atkin at pp. 25 and 26. In short, Clause 21A would appear to be what might be called an inverted penalty clause to limit damages. In my view, therefore, all that the company are entitled to recover or retain is 50% of the purchase price. I would, accordingly, set aside the judgment of the District Court of Tel-Aviv of 10th May, 1943, and for it I would substitute a declaration that the Appellant is entitled to recover half the amount which she had paid, such half amounting to LP. 557.932 mils. With regard to costs, I think that, as the Appellant sued for the full amount and has only recovered half, she should recover only a small sum as costs in the Court below. This sum I would assess at LP. 20 fixed (inclusive) costs in accordance with line 1 of the second paragraph of Rule 278 Civil Procedure Rules, 1938. With regard to the costs of this appeal the Appellant has had to come to this Court and she should, accordingly, have her costs of

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

Delivered this 31st day of January, 1944.

British Puisne Judge.

Rose, A/C. J.: I concur.

A/Chief Justice.

CIVIL APPEALS Nos. 277 & 278/43.

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

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

IN THE APPEALS OF :—

Civil Appeal No. 277/43:

Nahum Naftali Porickier. APPELLANT.

v.

Shukri Kuwetli. RESPONDENT.

Civil Appeal No. 278/43:

Nahum Naftali Porickier. APPELLANT.

v.

Omar Hilal and 99 ors. RESPONDENTS.

Compromise — Agreement by parties signed by advocates and confirmed by parties in open Court — Judgment by consent cannot be defeated — Procedure, C. A. 191/43 *— Costs in consolidated appeals.*

Appeals from the judgments of the Land Court, Haifa, dated the 14th of July, 1943, in Land Cases No. 98/35 & 102/43, dismissed:—

A party whose advocate agrees, in his presence, to a consent judgment cannot be heard to say that the advocate was not authorised.

(A. M. A.)

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

ANNOTATIONS: *Cf.* C. A. 1/43 (10, P. L. R. 81; 1943, A. L. R. 131) for another instance of a party being estopped from challenging an act done by his attorney. See, however, C. A. D. C. T. A. 135/42 (Tel-Aviv Judgments, 1941—2, p. 161) — no valid compromise if advocate not expressly empowered to settle.

(H. K.)

FOR APPELLANT: Siev.

FOR RESPONDENTS: Cattan and Khadra.

JUDGMENT.

These are two consolidated appeals from the Land Court of Haifa. With respect to the advocate for the Appellant, they seem to us to be most astonishing appeals.

It appears that these disputes originally came before the Land Court on the 25th May, 1943, when, on the application of all the parties in Court, the case was adjourned with a view to settlement. Some two months later, on the 14th July, 1943, the Land Court made the following note:—

> "Hearing of Wednesday, 14th July, 1943. Appearances as before. Parties announce a settlement and submit a compromise signed by advocates of both parties, marked "A", attached to proceedings and signed by the Court."

And then there is a judgment which says:—

> "Settlement affirmed in the terms set out in compromise "A", and judgment is given in these consolidated cases in the terms therein set out. No order as to costs. In open Court this 14th day of July, 1943, in the presence of Subhi Bey Khadra and Solomon Yehuda, advocates of the parties."

That, I should have thought, would have been conclusive enough for anybody, but counsel for the Appellant now comes here and raises the point that his own client had not authorised his own advocate to make this settlement. On that we have two observations to make: first, it would not appear to be accurate, because the power-of-attorney was produced in this Court from which it is quite clear that the advocate is authorised to make such a settlement; and secondly, that even if it was accurate, it does not seem to us that it would lie in the mouth of a client to raise such a point in order to defeat a judgment by consent. If a party holds out an advocate on his behalf to settle a case, and appears in open Court and asks the Court to ratify a settlement, then it is clear that he cannot afterwards be heard to say that his advocate had no authority to settle.

There is, incidentally, a further point which it is unnecessary to decide, and that is whether in the light of Civil Appeal 191/43 there has been a compliance with Rule 313, in that the names of the parties to the dispute are not properly set out.

For all these reasons we are of opinion that the appeals must be dismissed.

We think that justice will be done by giving, jointly, one set of costs on the lower scale to both Respondents in the two appeals to include a joint advocate's attendance fee of LP. 25.

Delivered this 19th day of May, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 49/44.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

The Attorney General. APPELLANT.

v.

George Henry Thompson. RESPONDENT.

C. C. O. 311 — Scope of sec. 311 — Property suspected of being stolen — Date on which suspicion first aroused — Accused need not have been found in possession, cf. sec. 299 — Section 311 may be applied in cases where there is a certainty of theft.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 8th of March, 1944, in Criminal Appeal No. 25/44, allowed; case remitted for completion:—

1. For the purpose of an offence under sec. 311 C. C. O., it is immaterial whether suspicion is aroused before or after the property passes from the possession of the accused.

2. It is sufficient to show that the accused had possession of the articles suspected of being stolen, at any time after the suspected theft. He need not be found in actual possession of the article.

3. Sec. 311 may be applied even if the property is known, not merely suspected of being stolen.

(*A. M. A.*)

ANNOTATIONS: The third point had already been decided in CR. A. 20/43 (*ante*, p. 152). For other cases on secs. 310 & 311 of the C. C. O. see annotations to CR. A. 151/43 (*ante*, p. 144).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Hogan).

FOR RESPONDENT: Bustani.

JUDGMENT.

This appeal concerns the interpretation of section 311 of the Criminal Code Ordinance. The matter appears to have been a source of difficulty to courts of first instance in Palestine, and we are informed that conflicting judgments have been given. We may say at the outset that we agree with the opinion expressed by the learned Chief Magistrate that section 311 was probably intended for a narrow purpose, that is to say, a person such as a dock labourer being found leaving the dockyard with some valuable article which it would appear it would be most unlikely that he could have come by honestly. We

also agree with him that the section should be used sparingly. But this does not seem to us sufficient justification for imposing a limitation upon the section which its language would not seem to support. It appears that in this case there was a radio set which was suspected of having been stolen from a British Constable in the Palestine Police Force and that in the course of the few previous days this set had passed through the hands of the Respondent who sold it to another person who in turn sold it to another person whose suspicions were aroused by the fact that the identification disc had been removed from the set.

The learned Chief Magistrate held that there was no case to answer because the suspicion was not aroused until after the property had passed from the possession of the Respondent. While the matter is not free from difficulty, we are of opinion that this is too narrow a construction, and that once the quality of being reasonably suspected of being stolen property is acquired by an article then that quality attaches to the article during every stage of its journeyings subsequent to the time of the suspected theft.

On appeal to the District Court the learned Relieving President upheld the Magistrate on this point and himself propounded two further propositions. First, that it is necessary for the prosecution to show that the Respondent was actually found in possession of the article. With respect to the learned Judge of the District Court, we are of opinion that this proposition is unsound as, where the legislature intended such a restriction, they have, in the same Ordinance, said so unequivocally as, for example, in section 299, which begins:—

> "Any person who is found under any of the following circumstances, that is to say:—
>
> (a) Being armed with any dangerous or offensive weapon..."

It seems to us, therefore, that it is sufficient for the prosecution to show that an accused person has had in his possession at any time subsequent to the suspected theft, an article which has acquired the necessary quality of being reasonably suspected of being stolen property.

Secondly, the learned Judge takes the point that this section does not cover a case where the property is known to be stolen, his argument being that where an article is known to be stolen it cannot be said to be suspected of having been stolen. It seems to us again that this is putting too narrow a construction upon the ordinary meaning of the words, and that it is open to the prosecution to proceed under this section even in a case where suspicion has ripened into knowledge, although, naturally, such a use of the section would presumably be

rare for the practical reason that in a clear case of theft the Crown would be likely to proceed under one of the sections in Cap. XXIX of the Code.

For these reasons we are of opinion that the appeal must be allowed and the case remitted to the District Court for completion.

Delivered this 30th day of May, 1944.

British Puisne Judge.

HIGH COURT No. 14/44.

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

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

IN THE APPLICATION OF :—

Rev. Father Barouyr Minassian. PETITIONER.

v.

1. His Beatitude Archbishop Mesrob Reshanian,
2. The A/District Commissioner, Jerusalem District. RESPONDENTS.

Priests — Deprivation of Holy Orders — Expulsion from Brotherhood and residence in convent — Armenian Church — Christian Communities in Ottoman Empire — "Berats" under present administration — Jurisdiction of High Court — Temporal and spiritual organisation of Community.

Return to an order *nisi*, issued on the 9th day of February, 1944, directed to the first Respondent, calling upon him to show cause why his order, No. 2534/15, dated 22nd November, 1943, should not be set aside and the Petitioner allowed to reside in the Armenian Convent, Jerusalem, and be granted the full rights and privileges of a (*Vartabed*) priest of the Brotherhood of St. James, Armenian Convent, Jerusalem, in accordance with the Laws and Regulations of the said Brotherhood, in other words, that Petitioner should be reinstated as he was previously, and why the second Respondent should not refrain from interfering with the Petitioner's exercise of his rights to reside in the Armenian Convent, Jerusalem, and receive the full rights and privileges of a (*Vartabed*) priest, as aforesaid, and that in future the second Respondent should receive his orders from a competent Court and not from the first Respondent; rule discharged:—

1. The withdrawal of Holy Orders is a spiritual act for which the Bishop is not accountable in Court.
2. The High Court has jurisdiction to enquire whether the Bishop exercised legal powers.

(*A. M. A.*)

ANNOTATIONS: *Cf.* H. C. 48/30 (1, P. L. R. 501; 5, C. of J. 1693) and H. C. 61/31 (5, C. of J. 1701) where applications of a similar nature against the Supreme Moslem Council were successful as the matter was governed by law, namely, by the Ottoman Regulations relating to the appointment of Religious Officers. It was held in both cases that the dismissal was bad as Reg. 53 of the said Regulations had not been complied with.

(*H. K.*)

FOR PETITIONER: Goitein, Elian and Bordcosh.

FOR RESPONDENTS: No. 1 — B. Joseph, Caspi and Jerushalmi.
No. 2 — Crown Counsel — (Hogan).

ORDER.

This is a return to an order *nisi.*

The Petitioner, Barouyr Minassian, is a priest of the rank of *Vartabed* of the Armenian Church, and a member of the Brotherhood of the Convent of St. James in Jerusalem. The first Respondent is the Armenian Patriarch of Jerusalem. The District Commissioner was cited as a second Respondent. Mr. Hogan, who appeared for him, stated that his only interest was to carry out any order the Court would make. He was thereupon permitted to withdraw from the proceedings.

The Petitioner complains that on the 22nd November, 1943, he received a written order signed by the Patriarch, the effect of which was to deprive him of Holy Orders or, as it has been termed, unfrock him as a priest, and expel him from the Brotherhood and from residence in the Convent of St. James. The first Respondent admits that he issued such an order. The Petitioner avers that the first Respondent had no power to issue the order, because he had not followed the procedure which the Petitioner alleges is a condition precedent to any order of expulsion.

The Armenian Church is one of the most ancient branches of the Christian Church. Like all the early Christian churches is is organized on an hierarchic basis, the head or premier archbishop being known as the *Catholicos,* with two Patriarchs, one at Constantinople and one at Jerusalem. The Patriarch of Jerusalem and all the priests of his diocese are, indeed they must be, members of the Brotherhood of St. James. The Brotherhood is composed of seven classes: Bishops, *Vartabeds,* Deacons, Acolytes, Seminarists, Lay Brethren and Nun Sisters. Membership of the Order carries certain material privileges, such as free residence and board in the Convent. It follows that to qualify for membership a person must fall within one of these classes.

The Christian religious communities played a prominent, indeed often a disturbing part in the Ottoman Empire, and among the reforms which

the Sublime Porte initiated at the close of the Crimean War was the codification in legal instruments of certain rights and privileges claimed for many centuries by those religious communities, claims which they were able to advance with confidence by reason of the fact that the communities concerned were accorded the protection of one or another of the Great European Powers.

In pursuance of these reforms, the affairs of the Armenian nation and church were regulated by an edict of the Sublime Porte addressed to the Patriarch Elect of Constantinople, dated 14th March, 1863. The edict conferred a large degree of autonomy in regard to civil and religious affairs. The position of the Patriarch *vis-à-vis* the Ottoman Administration was further amplified in the *Berat* issued to the Patriarch Issaye in 1864.

Since the advent of British Administration, it has been the practice of His Majesty to issue to each Patriarch on his election a warrant, still styled by the communities concerned a *"Berat"*, recognizing him as Patriarch and confirming him in the exercise of "his ancient rights and privileges". Those rights and privileges are not specifically set out in the warrant but presumably they are those covered by the *Firmans*, Ordinances, *Berats* and Edicts of Turkish times, in so far as they are applicable to modern conditions. Such a warrant, dated 17th August, 1939, was issued by His Majesty King George VI to the present Armenian Patriarch of Jerusalem.

In accordance with the provisions of Article 48 of the Edict of 1863, regulations for the administration of the Brotherhood of St. James were promulgated in 1888. Those regulations provide *inter alia* for the expulsion of members of the Brotherhood and the procedure to be followed thereto.

The Petitioner alleges that the order complained of was an order of expulsion, and that the procedure outlined in Articles 9 and 15 of the regulations was not followed. He, therefore, applies to this Court for a *mandamus* directing the Patriarch to set aside the order made by him on 22nd November, 1943.

It has been argued that the Patriarch is not a public body, and that this Court has no jurisdiction to entertain this suit. Now, if the Patriarch was acting or purporting to act under the provisions of any law, regulation or warrant of appointment, we do not doubt that this Court has jurisdiction to hear and determine petitions and applications arising out of the exercise or lack of exercise of the powers conferred by that law, regulation or warrant. The question then arises as to whether the order of the Patriarch, dated 22nd November, 1943, which

is the order complained of, was made or purported to be made, under the authority of any law, regulation or warrant.

Mr. Goitein, for the Petitioner, argues that the order of the Patriarch could only have been made under Articles 9 and 15 of the regulations of 1888, and as admittedly it did not comply with the procedure set out therein, it is, he contends, bad, and the Patriarch should be directed to cancel it. Dr. Joseph says that the order has no connection with the regulations. It was the order of the Patriarch in his capacity as a Bishop of the Armenian Church exercising a spiritual right which was vested in him by his consecration as Bishop, and which enables him to deprive a priest of the sacrament of Holy Orders. I pause here to remark that if a priest ceased to be a priest, he automatically ceases to be a member of the Brotherhood of St. James. To this argument Mr. Goitein replies that whatever may have been the powers of the Bishops and priests in ancient times, they have now been circumscribed by the Edict of 1863, and the regulations made under it, at least in so far as the Edict or regulations deal or purport to deal with the exercise of those powers.

Now the Armenian Church, like most of the Christian churches, claims the apostolic succession, which means I take it, that in the performance of their spiritual functions the Bishops and priests are the successors of the Apostles, and they purport to do exactly as the Apostles did. They derive their authority from Christ Himself, through His Apostles. If this be so, it is clear that no Christian church could admit the competency of any human legislature to regulate the manner of the exercise of those spiritual functions. The State could, however, and in many countries has, regulated what may be termed the temporal organization of religious affairs, and it could set out in appropriate legislation the privileges accorded by the State to a particular church. In this connection it is relevant to note that not only did the Armenian Church accept the Edict of 1863, but they petitioned the Sultan for it.

Dr. Joseph argues that all that the Edict attempted to do was to regulate the temporal organization of the Armenian Religious Community. I think that he is right. Apart from the inference to be drawn from the claim of apostolic succession, it seems clear from the *Berat* of Patriarch Issaye, dated 1864, that the Edict of 1863 was not intended to apply to spiritual matters. A provision of that *Berat* reads as follows: "Let there not be, contrary to ancient custom, any interference by other persons when he (the Patriarch) dismisses any priest, or orders that a priest have his beard or hair cut off", cutting off the beard and hair being the technical term for unfrocking a priest.

I turn now to examine the order of which the Petitioner complains. The operative part is the last sentence:—

> "Taking into consideration that all these in their details are in every way against the religious vow, I sign this order with regret but with calm conscience and conviction whereby Barouyr *Vartabed* Minassian shall cease any more from belonging to the clergy of the Armenian Apostolic Church and that of this Holy See."

It is clearly an order purporting to deprive the priest of Holy Orders. The act of conferring, withdrawing or suspension of Holy Orders is, in my view, a spiritual act, pure and simple, in the performance of which the Bishop is responsible only to his own conscience. The fact that expulsion from the Brotherhood must follow, because the Petitioner would cease to hold the required qualification for membership, does not in my opinion bring the order of the Patriarch within the ambit of the regulations of 1888.

This Court cannot entertain any action questioning the manner in which the spiritual consolations or reprimands of the Armenian Church are administered, and the rule *nisi* is discharged.

Respondent will have his costs in an inclusive sum of LP. 25.

Given this 18th day of May, 1944.

Chief Justice.

CRIMINAL APPEAL No. 8/44.

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

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

IN THE APPEAL OF:—

1. Abdul Rahim Ahmad Saleh,
2. Ahmad Yousef Darred. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Charge against two accused of premeditated murder — Trial taking place 5 years after occurrence of crime — Conviction based on evidence of eye-witnesses who have not given an early statement — Non-interference of Court of Appeal with findings of fact — Question of sentence in connection with accused's age.

Appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, in Criminal Assize Case No. 46/43, dismissed:—

1. Whether an eye-witness who has not given an early statement should be believed after several years — a matter for trial Court; if that Court applied their mind to question of delay, considered it and were satisfied that there was a reasonable explanation, Court of Appeal cannot interfere with finding of fact.

2. Relevant time to be considered in matter of sentence — age of accused at time of trial, not his age at time of commission of offence.

(*M. L.*)

FOLLOWED: CR. A. 152/42 (9, P. L. R. 643; 12, Ct. L. R. 179; 1942, S. C. J. 643).

ANNOTATIONS:

1. As to 1 see CR. A. 39/43 (10, P. L. R. 212; 1943, A. L. R. 357) with annotations.

2. As to 2 see CR. A. 152/42 (*supra*).

(*A. G.*)

FOR APPELLANT: Bordtcosh and Daoudi.

FOR RESPONDENT: Assistant Government Advocate — (Wa'ary).

JUDGMENT.

We need not trouble you, Omar Eff. El-Wa'ary.

This is an appeal from a judgment of the Court of Criminal Assize, sitting at Nablus, convicting the two Appellants of the murder of a man, called Haj Nimer el Sab'a at Qalqilia Village in the District of Nablus. The crime occurred on the 20th November, 1938, and the trial did not take place until January, 1944. It is largely this time element that is relied upon by counsel for the Appellants as their ground of appeal. No point of law has been argued, but we are invited to interfere with the findings of fact of the trial Court on the ground that they are unreasonable. Everything possible has been said by both counsel — Mr. Bordtcosh and Awni Eff. Daoudi — who addressed us this morning, and we are fully alive to the extreme difficulty of these old, what we may call "disturbances" cases, that took place some five or six years ago: particularly when, as in this case, there is no circumstantial evidence at all, the case for the prosecution depending almost entirely upon the evidence of alleged eye-witnesses; and in this case criticism is directed to these witnesses in that they held their peace on the relevant matters for as long as four or five years. Now, all those are matters which a Court of trial will, no doubt, anxiously consider before coming to their conclusion on the case, but we have no reason to believe that the Court did not carefully consider these matters. The question whether a witness as to identification should be believed after an interval of time and in a case where he has not given an early statement, seems to us to be eminently a matter for the Court of trial,

provided, of course, that we are satisfied that they applied their minds to the proper considerations. In this case, as the judgment and the record show, the learned Judges did consider this question of delay and were satisfied that there was a reasonable explanation. In these circumstances, it seems to us that it is impossible to interfere with these findings of fact.

As to the question of premeditation, it would seem to be abundantly clear that, if the story of the prosecution is believed, there can be no question that the statutory elements of premeditation are present and that while the fatal shots were actually fired by the first Appellant, he was assisted by the second Appellant, who kept guard, outside the building where the attack took place.

Awni Eff. Daoudi also raised a point as to age with regard to the first Appellant who, he says, was in the year 1938 only seventeen years old and he asks, therefore, if it is proper that the death sentence should be passed upon him. That question has been considered several times by this Court the most recent authority being Criminal Appeal 152/42, Vol. 9, P. L. R. p. 643, in which it is laid down that the relevant time to be considered in this matter of sentence is the age of the accused at the time of trial and not his age at the time of the commission of the offence. The fact that an accused person was young at the time of committing the offence is, of course, a matter which may properly be taken up administratively with the appropriate authority.

For these reasons the appeals must be dismissed and the convictions and sentences confirmed.

Delivered this 19th day of February, 1944.

A/Chief Justice.

HIGH COURT No. 22/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF :—

Omar Saleh Barghuty. PETITIONER.

v.

1. The Chief Execution Officer in the District Court of Jerusalem,
2. Badia, widow of Midhat Abdul-Latif Abu-Hantash, on behalf of his estate & 2 ors. RESPONDENTS.

Execution Law, Art. 36 — Dispute whether a judgment debt is discharged — Competence of C. E. O.

Return to a rule *nisi*, issued on 29th February, 1944, directed to the 1st Respondent, calling upon him to show cause why his order in Execution File No. 318/43, District Court, Jerusalem, dated 29th January, 1944, should not be set aside, and why the judgment in District Court case No. 102/43, dated 1st March, 1943, should not be executed; rule made absolute:—

When there is a dispute between the judgment-creditor and the judgment-debtor whether a judgment-debt has been paid, and the allegation of payment is capable of proof, the C. E. O. should not deal with the matter, but should refer the parties to the competent Court.

(*A. M. A.*)

ANNOTATIONS: On Art. 36 of the Execution Law *cf.* H. C. 65/37 (5, P. L. R. 47; 1938, 1 S. C. J. 43; 3, Ct. L. R. 37) and C. A. 12/41 (8, P. L. R. 105; 1941, S. C. J. 92; 9, Ct. L. R. 94) — *applicability of the article in case of sale of mortgage*; H. C. 39/41 (1941, S. C. J. 352; 9, Ct. L. R. 191) — *alleged settlement to be first brought to C. E. O.'s notice;* H. C. 64/41 (1941, S. C. J. 382; 10, Ct. L. R. 91) — *quantum of prima facie evidence required;* C. A. 273/42 (10, P. L. R. 69; 1943, A. L. R. 84) — *jurisdiction on claim under the article.*

(*H. K.*)

FOR PETITIONER: G. Salah & Hamoudi.

FOR RESPONDENTS: No. 1 — Absent — served.
Others — Atallah.

ORDER.

This is a return to a rule *nisi*, given on the 29th of February, 1944, calling upon the Respondent to show cause why the order of the Chief Execution Officer, Jerusalem, dated the 29th January, 1944, should not be set aside and why the judgment of the District Court No. 102/43, dated 1st January, 1943, should not be executed.

The Chief Execution Officer was faced with the objection by the judgment-creditor that the cheque produced by the judgment-debtor before him and admittedly signed by the judgment-creditor for the amount of LP. 500 did not represent in fact a payment to the judgment-creditor of the amount of the last instalment due under the judgment. The Chief Execution Officer heard a certain amount of evidence on the allegation by the judgment-creditor that no cash payment was made. The Chief Execution Officer came to the conclusion that Article 36 of the Execution Law should not be applied against the judgment-debtor as the amount is considered to have been paid and the judgment settled. He went on to say: "I therefore refuse to execute the judgment produced and the judgment-creditor may file a High Court application". The argument advanced by the judgment-debtor is that this cheque admittedly signed by the judgment-

creditor has been produced from the correct source, namely the bank where the amount was debited to the judgment-creditor's account and that this amount had been previously paid by the Arab Bank in Jerusalem to Arafat Bitar who, it is alleged, had paid the cash sum of LP. 500 to the judgment-creditor in Jerusalem. On these facts the judgment-creditor maintains that the Chief Execution Officer correctly made the order that he did in refusing to execute the judgment. The Petitioner, however, states that the Chief Execution Officer should have applied the terms of Article 36 of the Execution Law and that once he had satisfied himself that the objection to the execution by the judgment-debtor was capable of proof, he should have referred the judgment-debtor to the appropriate Court and that by his decision he has constituted himself a Court and made findings of fact which he was not entitled to do. At first sight, it would seem possible that the contention of the judgment-debtor was correct and that of the judgment-creditor is not. On the other hand, we have to consider what is the actual procedure; here there is a judgment debt which is represented by a consent judgment by the District Court. Payments were to be made by instalments. Apparently it is admitted that all the instalments except the last one, which is now in dispute, were settled. Execution is sought by the judgment-creditor for payment of his last instalment whereupon the judgment-debtor produces the cheque in question and says "I have paid".

It seems that there is a matter in dispute between the parties, and the Chief Execution Officer is definitely not a Court, that has been decided on many occasions by this and many other Courts. His duty is to enquire if he should immediately execute the judgment or where he must under certain circumstances postpone the execution. In my opinion he has exceeded his discretion in this case. He should have applied the terms of Article 36 of the Execution Law and having ascertained that the denial of the judgment-debtor was capable of proof he should have referred him with his document which, on the face of it, he concluded was a good document, to the appropriate Court, and postponed the execution of the judgment. The order is, therefore, made absolute and the Execution Officer directed to postpone the execution of the judgment to enable the judgment-debtor to apply to a Court having jurisdiction to prove that his debt has been paid. Costs will follow the cause, and in order to simplify arrangements, I certify an inclusive sum of LP. 10 advocate's attendance fee.

Given this 28th day of March, 1944.

A/British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 24/43.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Arieh Zvi Lipshitz. APPLICANT.

v.

Moshe Valero. RESPONDENT.

Application for leave to appeal to Privy Council — Ascertaining value of matter in dispute by considering value of property together with right of lease.

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

Where value of property in dispute together with right of lease involved amounts to LP. 500 or upwards, appeal to Privy Council lies as of right.

(*M. L.*)

REFERRED TO: P. C. L. A. 1/40 (7, P. L. R. 160; 1940, S. C. J. 393).

ANNOTATIONS :

1. The application was for leave to appeal from the judgment of the Supreme Court in C. A. 240/43 (10, P. L. R. 584; 1943, A. L. R. 699).

2. As to value of matter in dispute for purposes of Article 3(a) of the Palestine (Appeal to Privy Council) Order in Council, 1924, see P. C. L. A. 1/40 (*supra*) with annotations.

(*A. G.*)

FOR APPLICANT: H. Cohen.

FOR RESPONDENT: Valero.

ORDER.

This is an application under Article 3(a) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924. The facts are sufficiently set out in the judgment of this Court of the 24th November, 1943.

The sole question is whether the matter in dispute amounts to the value of LP. 500 or upwards or whether the appeal involves directly or indirectly some claim or question to or respecting property or a right of lease amounting to LP. 500 or upwards.

With regard to the building which the present Applicant erected on the land, there is before us an affidavit sworn by Mr. Moreno Meyouhas, a licensed land valuer, in which he has sworn that the present cost of the said building would be about LP. 450. We accept this affidavit and we think that it may safely be said that, apart from the value of

the building, there is involved in this appeal a tenancy right which must, in the very nature of things, amount to at least LP. 50. In these circumstances we think that an appeal lies as of right. We refer to P. C. L. A. No. 1/40, P. L. R. Vol. 7, p. 160. We, accordingly, grant conditional leave to appeal subject to the usual conditions, namely, that the Applicant give security for the costs of the appeal in the sum of LP. 300 by bank guarantee of one of the three banks, namely, Barclays, Anglo Palestine or Ottoman, and that the Applicant do take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England within two months from the date of this order. After fulfilling the above conditions the Appellant may apply to this Court with notice to the Respondent for final leave to appeal. We order stay of execution pending the decision of His Majesty in Council.

Given this 1st day of February, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 40/44.

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

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

IN THE APPEAL OF:—

Tewfiq Ahmad Ibrahim. APPELLANT.

v.

The Attorney General. RESPONDENT.

C. C. O. 388 — *Confiscation of money paid for the perpetration of an offence — Attempted murder — Sentence.*

Appeal from the judgment of the District Court, Haifa, sitting at Nazareth, dated the 13th day of March, 1944, in Criminal Case No. 28/44, whereby Appellant was convicted of attempted murder contrary to Section 222(a) of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment and the confiscation of a sum of LP. 150.—; appeal dismissed but confiscation order set aside:—

There is no provision whereby money, paid to a hired assassin convicted of attempted murder, may be confiscated and credited to the Government Treasury.

(*A. M. A.*)

ANNOTATIONS: No power to confiscate in absence of specific provision; *cf.* CR. A. 130/43 (10, P. L. R. 578; 1943, A. L. R. 772).

(*H. K.*)

FOR APPELLANT: Barghouti.

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

JUDGMENT.

This is a strange case in which the Appellant, who was charged with attempted murder, appears on his showing to be a hired assassin; and he was, again according to his own story, paid the sum of LP. 150 in order to shoot a certain person. According to the judgment (there is no suggestion that there is no evidence in the record to support it) the Accused fired several shots at this person from close quarters and fired more shots after he had hit him and when he was lying on the ground. Very fortunately for the Appellant in this case, it appears that none of the bullets that hit struck in a dangerous place; and it appears that the man has now made a good recovery. But it is perfectly clear that on that set of facts that is a most serious and deplorable offence. And we cannot possibly say that a sentence of ten years is in any way excessive.

Another point has arisen as to the LP. 150 which were paid by way of fee to the Appellant. The Court ordered the confiscation of this sum and that it should be credited to the treasury of the Government of Palestine. It appears, however, and is not disputed by the Crown, that there is no section of law which would appear to entitle the Court to have taken this step, and we do not think that it is a case in which we should invoke section 388 of the Criminal Code Ordinance. That being so we vary the sentence of the Court below in so far as this money is concerned and cancel the order of confiscation. The practical effect of that will be a matter for the legal advisers of the Crown on the one side and of any applicant on the other to consider.

The appeal is, therefore, dismissed subject to that variation.

Delivered this 25th day of April, 1944.

Acting Chief Justice.

CIVIL APPEAL/No. 295/43.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Baruch Ram. APPELLANT.

v.

Capt. Alexander Aaronson & an. RESPONDENTS.

Jurisdiction of courts — Claim for value of trees — Defence of ownership — Ownership of subadjacent land in issue — Jurisdiction of Land Court, L. A. 14/23, H. C. 99/35, C. A. 16/42, C. A. 68/40, C. A. 279/42, C. A. 204/42, C. A. 75/41, C. A. 98/42; L. S. Ord., secs. 3(2), 5(2), 43, 66, 68; Land Code, Art. 29; Mejelle, Art. 920; "land" in L. C. Ord., sec. 2.

Appeal from the judgment of the District Court of Haifa, dated the 30th July, 1943, in Civil Case No. 128/41, allowed:—

When a dispute as to trees involves the question whether the subadjacent land belongs to plaintiff or defendant, the action should be tried by a Land Court.

(*A. M. A.*)

REFERRED TO: L. A. 14/23 (3, C. of J. 1112); H. C. 99/35 (2, P. L. R. 413; 9, C. of J. 863; P. P. 9.1.36); C. A. 68/40 (7, P. L. R. 224; 1940, S. C. J. 126; 7, Ct. L. R. 181); C. A. 75/41 (8, P. L. R. 214; 1941, S. C. J. 202; 9, Ct. L. R. 176); C. A. 16/42 (1942, S. C. J. 227; 11, Ct. L. R. 109); C. A. 98/42 (1942, S. C. J. 655; 12, Ct. L. R. 118); C. A. 204/42 (1942, S. C. J. 914); C. A. 279/42 (10, P. L. R. 96; 1943, A. L. R. 88).

ANNOTATIONS: See, in addition to the cases cited, note 3 to C. A. 279/42 (*supra*) in 1943, A. L. R., at p. 89.

(*H. K.*)

FOR APPELLANT: Goitein and Bernblum.

FOR RESPONDENTS: Eliash.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, whereby the Defendant (now Appellant) was ordered to pay to the present Respondents the sum of LP. 446.600, plus LP. 60 fixed (or inclusive) costs in respect of the value of 186 cypress trees alleged to have been the property of the Respondents, and said to have been wrongly cut down and appropriated by the Appellant.

It is common ground that the Respondents own Parcel 2, Block 10052, and that the Appellant owns Parcels 3 and 15 of the same block, and that these parcels adjoin each other or are contiguous. It was clear from the written pleadings before the lower Court that the defence was that the trees in question were on his (Appellant's) own land.

At an early stage in the proceedings before the District Court the advocate then appearing for the Appellant objected to the jurisdiction of that Court, claiming that the matter lay within the exclusive jurisdiction of the Land Court. The District Court over-ruled that objection mainly on the ground that the claim was one for the value of trees alleged to have been cut by the Defendant, and that such a claim was within the jurisdiction of the District Court.

At the hearing of the appeal before me, Mr. Goitein for the Appellant, strenuously argued that the matter was within the exclusive jurisdiction of the Land Court. He relied on many decided cases of this Court, notably Land Appeal 14/23, High Court 99/35, Civil Appeal 16/42, Civil Appeal 68/40, Civil Appeal 279/42, Civil Appeal 204/42, Civil Appeal 75/41, Civil Appeal 98/42. Dr. Eliash, for Respondents, cited the Land (Settlement of Title) Ordinance, Sections 3(2) and 5(2), Sections 43, 66 and 68, Article 29 Ottoman Land Code and Article 920 *Mejelle*.

Shortly stated, Mr. Goitein's argument is that what in effect the Plaintiffs (now Respondents) tried to do was to obtain part of the Appellant's land, under the guise of a claim for the value of trees. The attitude of the Defendant (now Appellant) from the commencement of the action against him was, "Yes, I cut down those trees, but they were my own trees; they were growing on my own land. I have never quarrelled with, or been dissatisfied with, the decision of the Land Settlement Officer in 1932. So that there is no need for me to proceed under Section 68(3), Land (Settlement of Title) Ordinance, or any other section of that Ordinance. I refer to the definition of land in Section 2, Land Courts Ordinance, namely, "'land' includes houses, buildings and things permanently fixed in the land". I maintain that trees are things permanently fixed in the land. You (the Plaintiff) are, therefore, in effect, claiming from me part of my land. That being so, you must go to the Land Court."

It seems implicit from the first of the three agreed issues that one of the matters which fell for decision was whether these trees were in fact on Parcel 2. If they were not on Parcel 2, then clearly the Respondents would be claiming part of the land which belonged to the Appellant and not to the Respondents. In other words, there would appear to be a genuine dispute as to the ownership of land. In my view, the District Court should have upheld the objection to jurisdiction, as I consider that the matter was within the exclusive jurisdiction of the Land Court.

Several other matters were argued before me by the advocates for both the Appellant and Respondents; but, because of the view I have taken on the point of jurisdiction, it is manifestly undesirable that I should deal with them.

I, accordingly, set aside the judgment of the District Court of Haifa of 30th July, 1943, with costs here and below. With regard to the costs in the District Court, I assess the Appellant's costs as one set of fixed (or inclusive) costs of LP. 25; the costs in this Court

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

Delivered this 31st day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 302/43.

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

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

IN THE APPEAL OF:—

Salameh Hassan Abu Kashef & 2 ors. APPELLANTS.

v.

Zayed Muhammad Abul Haj & an. RESPONDENTS.

Agreement re land found to be a contract for sale and not a final contract of sale outside Tabu — Improvements carried out on land by purchaser — Acquisition of equitable rights.

Appeal from the judgment of the Magistrate's Court, Beersheba, sitting as a Land Court, in Land Case No. 1/43, dismissed:—

Improvements carried out by party to a contract for sale of land while in possession of that land with consent of other party entitle former to acquire equitable rights.

(*M. L.*)

ANNOTATIONS: See C. A. 44/43 (*ante*, p. 28) and notes 2 and 5 thereto.

(*A. G.*)

FOR APPELLANTS: Farajallah.

FOR RESPONDENTS: Hanania.

JUDGMENT.

The main points to be considered in this case are, firstly, whether the contract "D. 1" is a contract for sale or a final contract of sale outside the *Tabu;* secondly, whether the Respondents' possession and improvements of the land entitle them to acquire an equitable right.

As regards the first point, we do not have sufficient reason to differ from the conclusions come to by the learned Magistrate regarding the intention of the parties, namely, that "D. 1" is a contract for sale and not a final contract of sale outside the *Tabu.*

As regards the second point, we agree with the Magistrate that the

improvements carried out by the Respondents while in possession of the land with the consent of the Appellant, entitle them to acquire equitable rights.

The appeal is dismissed and the Magistrate's judgment confirmed, with inclusive costs and attendance fee of LP. 10.

Delivered this 8th day of February, 1944.

A/British Puisne Judge.

HIGH COURT No. 24/44.

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

BEFORE: Rose, A/C. J.

IN THE APPLICATION OF :—

Haj Mustafa Steitiyeh & an. PETITIONERS.

v.

1. His Worship the Magistrate, Magistrate's Court, Acre,
2. Yvonne Gad Habib Hawa & 19 ors. RESPONDENTS.

Rescission for misrepresentation — Sale at public auction conducted after unsuccessful partition suit — Material misdescription of property — Magistrate functus officio, H. C. 42/43, 74/43 — Alternative remedy — High Court.

Return to a rule *nisi*, issued on the 2nd day of March, 1944, directed to the first Respondent, calling upon him to show cause why he should not enter upon and consider the merits of the application, dated 8th December, 1943, addressed to him by the Petitioners herein; to cancel his order of 3rd December, 1943, and to direct that the amounts paid by the Petitioners in file 527/42 — Acre Magistrate's Court, be refunded to them; order discharged:—

> A Magistrate who conducts the sale proceedings in connection with a partition suit is exercising judicial powers. After the sale of the property the Magistrate is *functus officio* and an action for cancellation of the sale on the ground of material misrepresentation should be taken in the competent Court.
>
> (*A. M. A.*)

FOLLOWED: H. C. 42/43 (10, P. L. R. 239; 1943, A. L. R. 257); H. C. 74/43 (10, P. L. R. 467; 1943, A. L. R. 526).

ANNOTATIONS :

1. See the cases cited and the annotations thereto in A. L. R.

2. On actions for misrepresentation *cf.* C. A. 34/42 (9, P. L. R. 278; 1942, S. C. J. 275; 11, Ct. L. R. 173).

(*H. K.*)

FOR PETITIONERS: Wittkowski.

FOR RESPONDENTS: Nos. 2, 3, 7, 14 to 18 — Cattan, Hawa and Kurdi.

Rest — Absent — served.

ORDER.

This is a somewhat difficult matter. It appears that there was certain property that was incapable of partition and, therefore, in the ordinary course a public auction was ordered. At that public auction the Petitioners in the present matter were the highest bidders, and in due course the property was knocked down to them. After the formalities had been completed, the Petitioners alleged that they discovered that there was a material misdescription of the property sold, the fact being that they bought the property under the reasonable impression that it was unencumbered and later they discovered that it was, in fact, subject to encumbrances.

It is not for me at this stage to decide whether there was a misdescription of this property at all or, if there was a misdescription, whether it was a material misdescription. That seems to me, in view of the attitude which I propose to adopt in this matter, to be a question that will have to be decided later.

The Petitioners allege that upon their discovery of these facts they applied to the Magistrate, who is the first Respondent in this case, to consider whether or not he would permit them to withdraw their bid; and the Magistrate, relying upon High Court 42/43, P. L. R. Vol. 10, p. 240, held that he was *functus officio* in the matter and had no power to consider the application. The Petitioners then come to this Court and all they ask for is that the matter be remitted to the Magistrate with the direction to consider their application on its merits.

Much and very interesting argument has been addressed to me by both sides on this matter, but it seems to me that the position is covered by H. C. 42/43 which was approved in express terms in H. C. 74/43, P. L. R. Vol. 10, p. 468, and that we must regard the decision given by the Magistrate in this matter as a judicial decision.

What the position might be on that head seems to me to be academic because, in my opinion, assuming the Petitioners' complaints that there was a material misdescription and that that misdescription was made

in circumstances which would entitle them to relief, then they have an alternative remedy. And it seems to me, in view of the form of the Magistrate's refusal to consider their application, that there is no bar in that or in these proceedings, to any subsequent proceedings in respect of this matter which the Petitioners may elect to bring in the appropriate Court. It is not for me to suggest what Court that should be, but I would merely say this that it does seem to me that there should be no technical bar to the Petitioners instituting such an action in the appropriate Court for relief either in damages or for rescission on the basis of a material misdescription in circumstances which entitle a plaintiff to relief.

That being so, it seems to me that this petition was misconceived and the rule must be discharged.

Respondents 2, 3, 7, 14, 15, 16, 17 and 18 will have the sum of LP. 15 as inclusive costs. The remaining Respondents were absent served and will have no costs in these proceedings.

Given this 28th day of March, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 330/43.

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

BEFORE : Rose, J.

IN THE APPEAL OF:—

Dov Vilensky & an. APPELLANTS.

v.

"Hamenia" Goods Transport Co. & 3 ors. RESPONDENTS.

Hire-purchase — Construction of contract — Hire-purchase or Sale — Dunstan's Hire-purchase — Notice of termination — No arguments on questions not covered by the issues.

Appeal from the judgment of the District Court, Tel Aviv, dated the 16th day of August, 1943, in Civil Case No. 15/43, dismissed:—

1. If an agreement confers upon the hirer an option to determine the hiring by returning the goods, the agreement is one of hire-purchase. Where no such option is conferred, the agreement is one of sale.
2. A point not pleaded in the defence and not covered by the issues cannot be argued on appeal.

(*A. M. A.*)

ANNOTATIONS :

1. The ruling on the first point is in accordance with the decision in C. A. 212/40 (7, P. L. R. 587; 1940, S. C. J. 519; 8, Ct. L. R. 4). See also C. A. 25/42 (1942, S. C. J. 397; 11, Ct. L. R. 224) and annotations.

2. On the second point *cf.* C. A. 356/43 (*ante*, p. 150).

(*H. K.*)

FOR APPELLANTS: Hake.

FOR RESPONDENTS: Nos. 1 & 3 — A. Goldberg.
No. 2 — Seligman.
No. 4 — Absent — served.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv.

The Appellants hired a truck from the second Respondent in 1937 by virtue of a contract which was produced in the Court below and marked Ex. P/1. It is common ground that the Appellants failed in the payment of the instalments, and the principal question to be decided is whether the contract was a hire-purchase agreement or an agreement for sale.

The law as to the test to be applied — as I think is now accepted on the authorities, as being clear, and as is set out in Mr. Dunstan's book relating to the law of hire-purchase would seem to be that where the agreement contained a clause conferring upon the hirer an option to determine the hiring by returning the goods, the agreement is one of hire-purchase; and where no option is conferred, the agreement is an agreement for sale. Whether or not that option is conferred in any particular case, depends upon the terms of the contract itself, but it seems to me that the learned President was quite correct in looking at the relevant clauses — clauses 3 and 11 — and having regard to the general scope of the agreement, and coming to the conclusion that the only reasonable interpretation is that the hirer had an option either to return the truck and to recover his deposit or to retain the truck and become the full purchaser thereof. That being so, it seems to me that I am unable to say that the learned President was wrong in law in coming to the conclusion that this was, in fact, a hire-purchase agreement and not an agreement for sale.

In the alternative, Mr. Hake argues that even if that is so, that the second Respondent failed to comply with the requirements of clause 10 of the contract as to the giving of notice of termination; and it appears that although the period of 22 months expired some time in 1939, it was not until May 21st, 1940, that a letter definitely

was written by Mr. Schwartz, which was relied upon by him as being notice of termination.

Two points arise on that. Mr. Hake says, first, that even the letter of the 21st May is not a compliance with clause 10. With respect to him, I disagree with that view. I think that the learned President was entitled to assume, as I myself would certainly assume from that letter, that while the letter was not written in terms in which his solicitor would, no doubt, have phrased it, it was nevertheless a perfectly adequate notice of termination of the agreement and of his intention to sell the truck to somebody else. With regard to the question as to the "immediate notice", that seems to us, as it seemed to the learned President, to be answered by clause 17 of the contract which expressly provides that any relaxation or indulgence on the part of either side extended towards the other shall not be held against them, nor shall it operate as an alteration of the terms of this agreement. It seems to me that the only reasonable inference to be drawn from the second Respondent's conduct at that time was that he was allowing an extension of time to the Appellants in order to enable them, if they could, to pay the outstanding monies due. And it seems to me that that is clearly an indulgence contemplated by clause 17 of the contract.

So that point also fails.

A further point was taken by Mr. Hake as to estoppel, but as Mr. Seligman pointed out, that was not pleaded in the statement of defence — was not one of the six agreed issues — and it was not adverted to in the judgment. Mr. Hake says that in spite of that, some evidence was admitted on the point. That may or may not be so, but it seems to me that the fact that it was not an issue and was not pleaded, debars me from listening to it now.

The remaining grounds of appeal — grounds 11 and 12 — relate to a mistake in law made by the Execution Officer in releasing this truck prematurely to the second Respondent. It does not seem to me to be necessary to go into that matter at all having regard to my decision on the principal points, because if the learned President was right, as I have held that he was, in holding that this was a hire-purchase agreement, then due notice having been given, the Respondent was entitled, as a result of the Appellant's failure in carrying out the terms of the contract, to a declaration that he was the owner of the car. If he is entitled to a declaration that he is the owner of the car, it seems to me to be immaterial, as far as the Appellant is concerned, whether

some technical error was made by the Execution Officer of the Magistrate's Court.

For all these reasons, I am of the opinion that the appeal must be dismissed and the judgment of the District Court confirmed.

The second Respondent will have his costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee. The 1st and 3rd Respondents together will have one set of costs on the lower scale to include a joint fee of LP. 10 for advocate's attendance fee.

Delivered this 5th day of May, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 14/44.

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 Rashid Abdul Ghani & an. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Conviction by trial Court of murder with premeditation — Court of Appeal substituting conviction of manslaughter for murder.

Appeal from the judgment of the Court of Criminal Assize, sitting at Nablus, in Assize Case No. 53/43, allowed:—

Court of Appeal may find facts as disclosed in the case more consistent with absence of premeditation than with its presence and thereupon substitute conviction of manslaughter for conviction of murder.

(*M. L.*)

ANNOTATIONS: On inference of premeditation see CR. A. 26/44 (*ante*, p. 135) and note 2 thereto.

(*A. G.*)

FOR APPELLANT: Moghannam.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Nablus convicting the two Appellants of murder. The matter is, perhaps, unfortunate in that it appears that there was a misunder-

standing on the part of counsel for the defence in that he was under the impression — and it seems on what has been stated to us under the reasonable impression — that counsel for the prosecution was prepared to accept a plea of guilty to manslaughter; and that being under that impression he advised his clients to plead guilty to manslaughter, which they did. Then counsel for the prosecution, to the surprise of counsel for the defence, stated that he wished to continue the case on the basis of a charge of murder. Of the four accused persons who were before the Court, two were in fact acquitted altogether and the two present Appellants were convicted of murder.

Mr. Rigby for the Crown suggests that the only question to be considered is whether the mind of the Court was prejudiced; and he says that the course of the trial itself would seem to indicate that the Court was in no way prejudiced. That would be an interesting and difficult question, but in this case we do not think it necessary to go into that side of the matter because we are of opinion that the facts themselves as disclosed in this case are more consistent with the absence of premeditation than with its presence.

We, therefore, think that the conviction for murder cannot be sustained and that a conviction for manslaughter should be substituted. In the circumstances we see no reason to distinguish between the two Appellants and the sentence imposed upon each of them is imprisonment for twelve years to run from the date of arrest.

Delivered this 21st day of February, 1944.

Acting Chief Justice.

HIGH COURT No. 30/44.

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

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

IN THE APPLICATION OF :—

Dr. Hussein El Khaldi & 2 ors.
In their capacity as Mutawallis of the Waqf of Sitt Amineh El-Khaldi within the City Walls of Jerusalem. PETITIONERS.

v.

The Director of Land Registration, Jerusalem & 3 ors. RESPONDENTS.

Question of validity or otherwise of Waqf to which the consent of Director of Land Registration was obtained but which was not registered in Land Registry — Binding force of previous decisions of Supreme Court.

Return to a rule *nisi*, issued on the 8th day of March, 1944, directed to the Respondents, calling upon them to show cause why the property within the city walls of Jerusalem, enumerated in the *Waqfieh*, dated 7th July, 1942, should not be registered in the names of the Petitioners; petition adjourned *sine die*:—

1. A previous decision of Supreme Court binds that Court unless overruled by a superior Court or unless it was given in circumstances different from those of the case before them.

2. Advocates should not be encouraged or even permitted to criticize in one division of Supreme Court recent, considered and authoritative decisions of another division.

3. (*Obiter*): Where there are conflicting judgments, Court is entitled to select from those judgments and is not necessarily bound by the latest.

(*M. L.*)

REFERRED TO: C. A. 236/42 (10, P. L. R. 383; 1943, A. L. R. 509); C. A. 158/38 (5, P. L. R. 488; 4, Ct. L. R. 169; 1938, 2 S. C. J. 126); C. A. 290/42 (10, P. L. R. 159; 1943, A. L. R. 166); H. C. 99/42 (9, P. L. R. 608; 1942, S. C. J. 605); C. A. 251/43 (10, P. L. R. 646; *ante*, p. 104).

ANNOTATIONS:

1. For former proceedings see C. A. 251/43 (*supra*) and H. C. 129/42 (9, P. L. R. 771; 12, Ct. L. R. 234; 1942, S. C. J. 799).

2. On binding authority of judgment of Supreme Court see C. A. 251/43 (*supra*) and note 2 thereto in A. L. R.

(*A. G.*)

FOR PETITIONERS: Abcarius and Eliash.

FOR RESPONDENTS: Nos. 1 & 2 — Crown Counsel — (Hogan).
Nos. 3 & 4 — Goitein.

ORDER.

Rose, A/C. J.: This is a return to an order, directed to the Respondents, calling upon them to show cause why certain property enumerated in a *waqfieh*, dated 7th July, 1942, should not be registered in the names of the *mutawallis* of the *waqf*.

It appears that the first Respondent gave his consent to the dedication of the properties in question as *waqf* in a letter Ex. P. 3, dated 6th July, 1942, and signed by the Registrar. The Director of Land Registration himself at the request of the parties gave evidence before us and said that he regarded this letter as being the necessary consent required by section 4 of the Land Transfer Ordinance. Subsequently, however, by a letter dated 18th February, 1944 (Ex. P. 8), the Di-

rector withdrew his consent to the registration in the light of the decision of the Supreme Court in Civil Appeal No. 251/43 — Mustafa Khalidi and Bader Khalidi *v.* Mahmud Dajani and others, P. L. R. Volume 10, p. 646. That case has been appealed to the Judicial Committee of the Privy Council, whose decision is now awaited.

Distasteful as the task may be, it seems to me to be necessary, in the interests of the efficient working of the Courts of Justice, to refer to the recent history in the Supreme Court itself of the point at issue which, shortly stated, is whether the dedication of a *waqf*, once the consent of the Director of Land Registration has been obtained, can be held to be a null and void disposition under section 11(1) of the Land Transfer Ordinance on the ground that no registration as *waqf* has taken place in the Land Registry. The matter was adverted to by Gordon Smith, C. J., in High Court No. 99/42, P. L. R. Volume 9, p. 608, in which he came to the same conclusion as he did in Civil Appeal No. 251/43. The former case was remarkable in that the point upon which the learned Judge decided the matter was not argued before him and, it appears, was not even referred to by learned counsel in the course of the arguments. While one may admire the assurance of a judge, but recently arrived in Palestine, who feels himself competent to pronounce upon a difficult and fundamental point of the law of *waqf* when the matter has not been argued before him nor even referred to by the experienced counsel appearing in the case, one would, in my opinion, be wrong to regard his conclusion as authoritative. It is true that in the final result the learned Judge's conclusion (whatever his method of arriving at it) may prove to be correct, but that does not affect the question as to whether a decision so arrived at should be regarded as binding by his fellow judges. On that matter in Civil Appeal 290/42 — Imran el Muwaqqet *v.* Ahmad Ali Fawzi el Turk and others, P. L. R. Volume 10, p. 159 — when this same point came up for consideration and was fully argued by experienced counsel, Copland, J., said (p. 165):—

> "With regard to High Court Case No. 99/42, in that case the Court did not have the advantage of hearing the very full and able arguments which have been addressed to us on this appeal. Indeed, we are informed that no argument on this point was placed before the Court, and the point was not referred to by counsel. In these circumstances we consider that the point is still open and that it would be wrong for us to regard ourselves as bound by this case."

The Court thereupon came to the conclusion, after full consideration consequent upon lengthy argument, that once the consent of the Director of Land Registration has been obtained to the dedication of a

waqf, the lack of registration in the Land Registry does not cause the disposition to be null and void. That conclusion may or may not be held by the Judicial Committee of the Privy Council to be correct, but it was arrived at, as I have said, after full discussion and full consideration, and I would have expected that, until over-ruled by a superior Court, it would have been regarded as binding by the other judges of the Supreme Court.

On this very matter it is interesting to refer to the judgment of Gordon Smith, C. J., himself in Civil Appeal 236/42, P. L. R. Volume 10, p. 383, at p. 390, in which he refers with approval to the judgment of Copland, J., in Civil Appeal 158/38, P. L. R. 1938, p. 488, in which, after referring to the following passage from an English case:—

> "It was a decision of the identical question arising upon the construction of the identical act. It is, therefore, binding upon us unless it has been over-ruled" (meaning, of course by a superior Court) "or unless it was given in circumstances different from those of the case before us".

Copland, J., went on to say:—

> "It is on the ground of judicial comity that an appellate Court bows to its own decisions. If it does not, then the impossible situation arises, when the decision of the Court depends upon the individual views of the constituent Judges and one gets a series of conflicting decisions which bring the Court into disrepute. Without judicial comity the law would become completely chaotic."

Gordon Smith, C. J., said:—

> "I agree with the views expressed by Copland, J., and would merely add that unless it is possible to draw a distinction, either in law or on the facts, a Court of Appeal is bound to follow its earlier decisions in cases *pari materia*."

This principle was accepted also by Trusted, C. J., with the reservation, which is obviously reasonable, that where there are, in fact, despite this principle, conflicting judgments, the Court is entitled to select from those judgments and is not necessarily bound by the latest. It is, therefore, somewhat surprising to find in paragraph 11 of Gordon Smith, C. J.'s, judgment the following passage:—

> "Coming to the grounds of appeal, I need not set them out *seriatim* as they were conveniently and lucidly incorporated in his main submissions by Mr. Goitein in opening his address. If I understood him correctly, and I think I did, these were as follows:— (a) The Turk case was wrongly decided and was contrary to law."

There then follows an analysis of the judgment in the Turk case concluding with the following words:—

> "Consequently it follows in my humble opinion and with the

> greatest respect to the learned judges in that case, that their decision in the Turk case is erroneous."

While it is to my mind surprising that counsel of experience and standing should have submitted such an argument, it is even more surprising that the Court of Appeal should have entertained it. I would add that Edwards, J., who agreed with considerable hesitation in the final conclusion of Gordon Smith, C. J., although not with the greater part of his reasoning, says on this particular matter:—

> "It is, therefore, with hesitation that I accept the suggestion that we are not bound by the decision of this Court in Civil Appeal 290/42, and I also doubt whether it can truly be said that Civil Appeal 290/42 was wrongly decided."

It is surely unnecessary to stress, from the point of view of the prestige of the Bench and the dignified administration of justice, the undesirability of advocates being encouraged or indeed even permitted to criticize in one division of this Court recent, considered and authoritative decisions of another division.

Apart from this, an obvious evil which might result from this practice is that parties might be tempted to manoeuvre to get their cases listed before particular judges.

With regard to this particular point of law, however, the mischief has already been done, and I feel that the fairest order in the present matter is that the petition should be adjourned *sine die* pending the decision of the Judicial Committee of the Privy Council on the point at issue. As to the administration of the properties in the meantime, application may if necessary be made to the appropriate Court. Meanwhile it is clearly desirable that no alteration in the status of the property should be attempted by either party. I have no doubt that the parties themselves and the Director of Land Registration will have regard to our wishes in this matter.

The costs of this petition will be reserved. The matter can be considered upon application by any of the parties when the decision of the Judicial Committee of the Privy Council in Civil Appeal 251/43 is known.

Given this 30th day of May, 1944.

British Puisne Judge.

Plunkett, A/J.: I concur that the petition should be adjourned *sine die*.

A/British Puisne Judge.

CIVIL APPEAL No. 324/43.

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

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

IN THE APPEAL OF:—

Muhammad Said Salah. APPELLANT.

v.

Hafiza Abdul Rahman Abu Sunneina & 14 ors. RESPONDENTS.

Leave to appeal granted by Assistant Settlement Officer who gave a combined judgment in two separate cases — Losing party presenting one appeal instead of two separate appeals.

Appeal from the judgments of the Assistant Land Settlement Officer, in Cases No. 5/Jalil Esh-Shamaliya and No. 27/Jalil El-Qibliya, dismissed:—

1. The more convenient and practical view is that the Assistant Settlement Officer, if given power to hear and decide a case, should also be the person to grant or to refuse leave to appeal. This is not excluded by wording of sec. 63 or any other section of Land (Settlement of Title) Ordinance.

2. Where there were two separate cases, there must be two separate appeals, even if for convenience a combined judgment was given in the two cases; one appeal concerning both cases cannot be heard.

(*M. L.*)

ANNOTATIONS: On question of separate appeals see C. A. 252/43 (11, P. L. R. 57, *ante*, p. 94) and cases therein cited.

(*A. G.*)

FOR APPELLANT: A. Khouri.

FOR RESPONDENTS: Nos. 1—4 — Moyal. Nos. 5—13 — Elia.
No. 14 — Israeli.
No. 15 — Crown Counsel — (Rigby).

JUDGMENT.

This is one appeal from what are termed "combined decisions" of the Settlement Officer in cases Nos. 27/Jalil Al-Qibliya and 5/Jalil Al-Shamaliya.

Two preliminary points have been taken by Mr. Moyal. The first one is that there is no proper appeal before this Court because leave to appeal was granted by the wrong person. He pointed out, quite correctly, that under section 63 leave to appeal must be granted either by the Settlement Officer who made the decision or by the Chief Justice. In this particular case, an Assistant Settlement Officer was

duly appointed, in accordance with section 4(1) of the Land (Settlement of Title) Ordinance, to hear and decide these particular matters, and the same Assistant Settlement Officer granted leave to appeal.

We are of opinion that certainly the more convenient and practical view is that the Assistant Settlement Officer, if he is given power to hear and decide a case, should also be the person who should decide whether leave to appeal should be granted or not, and we consider that that view is not excluded by the wording of the appropriate sections.

We think, therefore, that that point fails.

With regard to the second point, that two separate appeals should have been presented, we are of opinion, in view of the line of authorities that have been quoted to us, that it must be sustained. It appears from the record itself that there were two separate cases before the Settlement Officer. His judgment, or his decision, is headed "combined decisions in cases Nos. 27/Jalil Al-Qibliya and 5/Jalil Al-Shamaliya", and in fact during the proceedings an application was made to him to consolidate these two claims, which he refused, although he gave an intimation that for convenience he might, perhaps, give a combined judgment. Therefore, while these things are always unfortunate — that an appellant should be debarred by technical grounds from having his appeal argued — we are of opinion that there is no alternative but to sustain the preliminary objection and to dismiss the appeal.

The Appellant must pay the costs of the appeal on the lower scale to include an advocate's fee of LP. 5 to each of the groups of Respondents — Respondents 1—4 as one group; Respondents 5—13 as another group; and Respondent 14 as another group. Respondent 15 has withdrawn, and, therefore, does not ask for any costs.

Delivered this 22nd day of February, 1944.

Acting Chief Justice.

CRIMINAL APPEAL No. 27/44.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Moshe Michaeli & 3 ors. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Strikes — Defence (Trade Disputes) Order, Sec. 19 — CR. A. 59/43, Validation Regulations — Chief Secretary signing by High Commissioner's Command, CR. A. 62/43 — Point not raised in lower Court — Interpretation, retroactivity — Right to strike where Government decides not to intervene — Question of fact — Failure by trial Court to make the necessary findings.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated the 7th day of December, 1943, in Criminal Appeal No. 23/43, allowed and conviction quashed:—

1. Regulation 2 of the Validation Regulations is retroactive in its effect.

2. In deciding whether a strike is legal the substantial cause of the strike must be looked at. If this was reported and Government did not intervene, the strike is legal. The introduction, by either party, of minor matters not reported, should not defeat the legality of the strike.

(*A. M. A.*)

REFERRED TO: CR. A. 59/43 (10, P. L. R. 319; 1943, A. L. R. 479); CR. A. 62/43 (10, P. L. R. 354; 1943, A. L. R. 469).

ANNOTATIONS: On retroactivity of criminal enactments *cf.* CR. A. 123/42 (9, P. L. R. 548; 1942, S. C. J. 558) and note 3 thereto in S. C. J.

(*H. K.*)

FOR APPELLANTS: Berinson.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

Rose, J.: This is an appeal by leave from a judgment of the District Court of Tel-Aviv in its appellate capacity, dismissing an appeal from a judgment of the Chief Magistrate of Tel-Aviv, convicting the first three Appellants of taking part in an unlawful strike contrary to section 19 of the Defence (Trade Disputes) Order, 1942, and the 4th Appellant of attempting to support such unlawful strike contrary to section 22 of the said Order.

Mr. Berinson for the Appellants raised two preliminary legal points. It appears that in Criminal Appeal No. 59/43 this Court held that the Defence (Trade Disputes) Order, 1942, was invalid for reasons to which it is unnecessary to refer now. Accordingly, on the 8th July, 1943, Government purported to validate these Regulations by the Defence (Validation of Defence (Trade Disputes) Order, 1942) Regulations, 1943 (page 612 of Supplement No. 2 to the Palestine *Gazette* 1943). Mr. Berinson's first point is that these validating Regulations are themselves invalid because they were signed by the Chief Secretary by the High Commissioner's command instead of by the High Commissioner himself. It is true that a similar matter was

adverted to by this Court in Criminal Appeal No. 62/43 — Plaskovsky *v.* the Attorney General. But, as Mr. Berinson points out, there would seem to be a distinction between that case and the present one in that in the Plaskovsky case the original Regulations, which contained a provision that the Interpretation Ordinance should apply to them and to any orders or rules made under them, were in fact signed by the High Commissioner himself. This point, however, was not taken either before the Chief Magistrate or the District Court, and Mr. Berinson very properly agreed, having regard to the wider issue involved in the case as a whole, not to press this point. We refrain, therefore, from deciding it.

Secondly, Mr. Berinson contends that it is unreasonable so to interpret Regulation 2 of the Validating Regulations as to make them retrospective as regards matters which might give rise to a criminal prosecution. He points out that the principal Order contains many provisions quite apart from Criminal provisions which could properly be validated and that it would be harsh and inequitable to apply a wider interpretation. It is true that, acting upon the presumption that the legislature does not intend what is unjust, Courts, in the event of any ambiguity, lean most strongly against giving retrospective operation to criminal provisions. In the present case, however, it seems to us that there is no ambiguity in the wording of Regulation 2 and that it clearly expresses the intention of the legislature that the Regulations as a whole should be deemed to have come into force on the 1st of January, 1942. We should add that as regards this particular case no injustice would seem to have arisen as the persons concerned acted throughout in the belief and on the basis that the principal Order was in force at the relevant times. We are of opinion, therefore, that this point fails.

We now come to the merits of the matter. The principal Order provides, *inter alia,* that if a dispute arises between an employer and a group of employees, it is open to either party to report the matter to the Director of the Department of Labour (at the material times in the present case the appropriate officer was the District Commissioner), who must thereupon decide whether he should attempt to conciliate the parties. If he decides not to do so, that disposes of the matter from the point of view of Government, and in such a case, or where the High Commissioner, after reference, has decided not to refer the dispute to a board of arbitration, any strike arising from the same matters would be legal.

It is unnecessary to set out in detail the facts of this case as the

learned Chief Magistrate has done so with care in his judgment. He sets out eight matters which, at different times, were in dispute between the parties. It is common ground that five of these matters had previously been reported but that Government had not intervened and, as Mr. Berinson says, the position was that by September 25th, 1942, at the latest, the employees were entitled to strike on these matters. He contends that a final decision to strike was made on the 10th of October but that a final meeting was arranged with the employers for the 11th of October, at which certain fresh matters were raised by the employers. It seems that the employers were then informed that unless all the employees' demands were complied with within 24 hours, the strike, as previously decided upon, would begin. There being no compliance on the part of the employers, the strike in fact began on the 12th of October.

It seems to us that the decision as to whether or not in a case such as this a strike is illegal, is very largely a question of fact and degree. But the point which we have to decide is what is the proper test for the trial Court to apply in determining this question of fact. It seems to us that the material question to be determined is on what substantially did the employees strike. It seems to us that on any other view the purpose of the Order would largely be defeated. Let us take for example a case in which the employees wishing to strike at all costs on a major issue, previously raised a comparatively minor issue which they duly reported to Government. Government having refused to intervene because of the minor nature of the dispute, the employees thereupon couple the major issue with the matter which has been previously reported, and upon a non-compliance by the employers, forthwith strike. On such a set of facts it would, in our opinion, be proper for the trial Court to come to the conclusion that the substantial cause of the strike was the later and major issue and that as this matter had not been reported to Government, the strike was illegal. Conversely, if one or more matters had already been reported to Government, who had decided not to intervene, and at the last moment during final negotiations to avoid a strike, the employers raise a new and minor matter upon which agreement also is impossible and the employees, none of their demands having been met, strike, it would, in our opinion, be unreasonable for a trial Court to conclude that the strike was illegal on the ground that this additional matter, which had not materially affected the employees' decision to strike, had not been reported to Government.

On this question on page 6 of his judgment the learned Chief Ma-

gistrate, after setting out the eight points of difference between the parties, five of which, as already stated, had previously been reported to Government, says:—

> "It is clear that these demands made by the Defendants on the one hand and the refusal of immediate compliance by Mr. Johananoff (on behalf of the employers) on the other, were, in fact, the direct and immediate cause of the strike on the following day."

As a broad statement that is, of course, no doubt true, and it is also no doubt true that one of the three fresh grounds, that relating to the proportion of labour to be recruited through the *Histadruth,* was of considerable importance, more especially to the 4th Appellant. But we were referred to evidence on the record to show that the strikers had already determined to strike on the other five matters, and that the purpose of the meeting on the 11th of October was merely to see if last minute concessions on the part of the employers could be obtained. Now, the learned Chief Magistrate makes no finding upon this matter and does not seem to have applied his mind to it. In the absence of such a finding, it seems to us to be difficult, if not impossible, to decide whether the substantial cause of the strike was those original five matters which had previously been reported. On the record it seems to us that there is material which would, if accepted, support a finding that the employees substantially struck on the five matters, and if that were so then the fact that an additional matter was added at the last moment — even if that matter, as in this case, is of importance — would not, in our opinion, make the strike illegal. In the present case, it seems to us that the learned Chief Magistrate might, on the material before him, have found either way. He might have found that, notwithstanding the previous reporting of the five matters, the substantial cause of the strike was the question of the proportion of labour, although this matter was raised at a late stage, in which case he could, in our opinion, properly have held that the strike was illegal. On the other hand he could have found that the strike was substantially on the five matters and that if the employers failed to comply with those five matters there would have been a strike irrespective of the fresh matters raised, in which case it seems to us that he should have held that the strike was legal. It follows, of course, that in any particular case the decision of these matters may be difficult, but provided that this test is applied, the finding of the trial Court, assuming, of course, that it is supported by evidence, would be conclusive. That, to our mind, is the difficulty in the present matter — that we are not satisfied that the learned Chief Magistrate ever put to himself the crucial test. It would, we suppose, be open

to us to remit the matter to him to reconsider the facts in the light of our observations and to make a further finding. Having regard, however, to the fact that these events took place as long ago as October, 1942, we feel not only that this course would perhaps be unduly severe on the Appellants but also that it is in the interests of all parties concerned that the matter should now be terminated. We are reinforced in this view by the fact that the learned Chief Magistrate himself, judging by the lenient penalties imposed, took the view that this was not a mischievous and perverse strike in deliberate contravention of the law, but one which arose owing to a misconception as to what the law was. We, therefore, prefer to take the view that the prosecution have failed to establish that the strike was illegal. That being so, it is unnecessary to consider separately the special case of the 4th Appellant in which it was urged by Mr. Berinson that there was insufficient evidence of his having supported the strike.

For all these reasons we are of opinion that the appeal must be allowed and the convictions quashed. It follows that the 4th Appellant is entitled to a refund of the monies which he has been called upon to pay.

Delivered this 18th day of May, 1944.

British Puisne Judge.

Khayat, J.: I concur.

Puisne Judge.

Frumkin, J.: I fully concur and have nothing to add except that as regards the test applicable in such cases I would formulate it shortly thus: if workers are entitled to strike on previously reported disputes, they still may go on strike even if at the last moment new disputes have arisen whether on their part or on the part of the employers, provided the conditions are found to be such that they would have struck even if not for the new disputes. On the other hand, if it is found that but for the new unreported dispute the workers would not have gone on strike, thus making the new dispute the substantial cause for striking, the strike would be illegal.

Puisne Judge.

CIVIL APPEAL No. 289/43.

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

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

IN THE APPEAL OF :—

Haneh, widow of Jacob Suleiman Saca & 2 ors. APPELLANTS.

v.

Katrina, widow of Joseph Jacamàn el-Ali & 2 ors. RESPONDENTS.

Claim of title to land based on old document and long possession — Question of authenticity of old document.

Appeal from the judgment of the Land Court, Jerusalem, in Land Case No. 13/43, dismissed:—

1. Appellate Court cannot interfere with findings of fact if satisfied that the evidence was sufficient to justify trial Court's conclusions.

2. Cases in which there was no person to identify old document relied upon must be distinguished from cases in which there is evidence as to authenticitiy of such document.

(*M. L.*)

REFERRED TO: C. A. 24/42 (9, P. L. R. 182; 1942, S. C. J. 851).

DISTINGUISHED: L. A. 45/34 (2, P. L. R. 459; 9, C. of J. 840).

ANNOTATIONS:

1. On the first point see C. A. 44/43 (*ante*, p. 28) and note 6 thereto.

2. On proof of old documents see L. A. 45/34 (*supra*).

(*A. G.*)

FOR APPELLANTS: Saca.

FOR RESPONDENTS: Cattan.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Jerusalem, which had given judgment in favour of the present Respondents and ordered registration in their names of a house in Bethlehem and certain land adjoining that house.

The facts reveal an unhappy state of affairs because the first Appellant and the first Respondent are sisters. The Respondents' case in the Court below was that in the year 1916 the husband of the first Respondent bought from Yacoub El Saca, the husband of the first

Appellant, the house and the surrounding land for the sum of 200 French napoleons. The old Turkish *Kushans* were in the hands of Yacoub el Saca.

The first ground of appeal is that there was not sufficient evidence to prove the authenticity of the *hujjeh* or document of sale, the Appellants' advocate complaining that the Court below erred in accepting the evidence and in not complying with Section 6 of the Evidence Ordinance.

The Respondents' advocate has referred us to Civil Appeal No. 24/42, P. L. R. Vol. 9, p. 182. We might at once say that the Court below were not satisfied with the evidence led on behalf of the Defendants (Appellants). That being so it is quite unnecessary for us to deal with that part of the evidence because we cannot interfere with findings of facts. We must, of course, be satisfied that the evidence adduced by the Respondents was sufficient to justify the Land Court in coming to the conclusion that the authenticity of the *hujjeh* had been proved.

The first witness was the first Respondent herself. She gave very clear evidence that Yacoub el Saca signed the *hujjeh* in her presence and that he received the money in her presence and she also swore that she could recognize the *hujjeh* of sale because it used to be kept in her husband's safe. The *hujjeh* was made by a petition writer, Salim Daoud Nassar, and the two brothers of the first Respondent signed the *hujjeh* as witnesses. It seems that these two brothers are no longer alive.

The Appellants' advocate has attacked this witness's evidence because in cross-examination she said: "I think Yacoub could write and read and I believe he signed the *hujjeh* for sale." This, of course, is no reason for casting doubt on the authenticity of the *hujjeh*. The mere fact that she was cautious in her answers in cross-examination does not amount to a suggestion that Yacoub was not able to write. It may be that a person who is in the general sense of the term illiterate is yet able to sign his name. The first Respondent's evidence was corroborated by the petition writer, Salim, himself. It is not suggested that he was a witness whom the Court should not have believed. He swore that he wrote the *hujjeh* on the date appearing on it and he says that the signature was not in his handwriting although his own signature appears at the foot of the *hujjeh*. He did not remember Yacoub el Saca signing but he swore that the *hujjeh* is not a forged one. The Appellants' advocate contends that what his clients allege is that there is no proper proof that Yacoub el Saca signed the

hujjeh. It may be that no witness was available who could come forward and say definitely: "I saw so and so actually signing it", but there is the evidence of Katrina and Salim Daoud Nassar as to the circumstances and this evidence certainly goes far to show, at any rate, that the document was, at any rate, not a forgery. Moreover, Salim in evidence said: "I don't write a *hujjeh* for sale at the sole request of the purchaser but both sides should be present, *i. e.* the vendor and the purchaser." These facts, taken together with the fact that the signature does appear, would seem to show that the *hujjeh* was a genuine one. We think that there was abundant evidence to justify the Court below in holding that the authenticity of the *hujjeh* had been established.

Tewfic Eff. el Saca who has argued this case very ably and fully on behalf of the Appellants, next says that the mere production of the *hujjeh*, even although proved to be authentic, is not sufficient but that it is necessary that the Plaintiffs should have proved continuous and substantial possession.

Now, the evidence which apparently was accepted by the Land Court was that not only of Katrina the first Respondent, but that of Jamil who was a witness called by the Plaintiffs and was the son of Yousef el Abdullah. The evidence established that after the deed of sale in 1916 the keys of the house were taken over by the husband of Katrina. Katrina swore that her husband did take over the house and the land. The whole history would appear to be as follows, namely, from 1916 till 1922 the house, which was in a bad state of repair, remained unoccupied. From 1922 till 1927 the first Appellant was allowed to live in it free of rent, in other words, it is said that it was lent to her. From 1927 till 1937 it remained vacant; from 1937 till 1939 it was occupied by Jamil and from 1939 onwards the first Appellant was again allowed to occupy the house on the same terms as previously.

The Appellants' advocate says that there is not sufficient evidence to show that the first Appellant ever borrowed the house. We, however, think that the only inference which the Court below could draw from the evidence of Katrina and Jamil was that from 1916 the house was in the possession of Katrina's husband and after his death of his heirs, and that this possession was never lost.

There was also evidence that the original Turkish *Kushans* were delivered to the Respondents and that they remained in their possession. The Appellants' advocate says that this is merely a neutral fact because the parties were sisters and it was natural that one sister

might leave documents with another sister, trusting her to look after them. This may be so; but it was certainly an element which the Court below were entitled to take into consideration.

The Appellants' advocate relied on Land Appeal No. 35/34 * with regard to the authenticity of the *hujjeh,* but, as Mr. Cattan has pointed out, the facts of that case can be differentiated from the facts of this case because in that case there was no person alive who could identify the document, whilst here we have the evidence of Salim in addition to that of Katrina.

The Appellants' advocate strenously argues that there is not sufficient evidence that the first Appellant ever borrowed the house and he says that there should be an admission by his client as to this. There might have been something in that argument if there was evidence that, after the sale in 1916, the Appellants were in possession; but there is clear evidence that from 1916 to 1922 the house remained closed and the keys were in the possession of Jamil, the Court below were entitled to accept this evidence, as also the evidence that between 1922 and 1927 the first Appellant was allowed to live in the house and then again that she was allowed to remain from 1939.

For these reasons we think that the Land Court were entitled to find as they did in favour of the Plaintiffs and we, accordingly, hold that it is impossible for us to disturb their finding.

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

Delivered this 2nd day of February, 1944.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 20/43.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mufleh Ahmed el Moussa & 33 ors. APPLICANTS.

v.

1. Keren Kayemeth Leisrael Ltd.,
2. Meshek Palestine Building Co. Ltd. RESPONDENTS.

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* *Semble*: Should be L. A. 45/34.

(*Ed.*)

Conditional leave to appeal to Privy Council — Applicant giving bank guarantee for 1 year instead of 3 as ordered by Court — Refusal of final leave to appeal.

Application for final leave to appeal to the Privy Council refused:—

1. Where one of conditions of order granting conditional leave to appeal to Privy Council is not complied with, final leave will be refused.

2. After lapse of 3 months since grant of leave to appeal to Privy Council Court of Appeal cannot grant any extension or vary their order.

(*M. L.*)

ANNOTATIONS:

1. The judgment which it was sought to appeal is C. A. 191/43 (10, P. L. R. 500; 1943, A. L. R. 669).

2. For cases where leave to appeal to the Privy Council has been rescinded or final leave refused on account of Applicants' failure to comply with the conditions imposed or to prosecute the appeal see note 2 to P. C. L. A. 9/43 (1943, A. L. R. 760).

3. On the impossibility of extending period see P. C. L. A. 1/42 (9, P. L. R. 144; 1942, S. C. J. 941) with annotations thereto.

(*A. G.*)

4. Note that the same objection to a guarantee has been overruled in P. C. L. A. 9/36 (P. P. 17.viii.37). It does not appear whether the attention of the Court was directed to that decision.

FOR APPLICANTS: F. Atalla.

FOR RESPONDENTS: Stoyanovsky.

ORDER.

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

On the 11th of November, 1943, this Court granted conditional leave to appeal, one of the conditions being that the Appellant give within two months from the 11th of November, 1943, a bank guarantee of one of three banks, namely, Barclays, Anglo Palestine or Ottoman Bank, in the sum of LP. 300 effective for three years or more.

At the hearing of this application, the Respondents' advocate objected to the application on the ground that the bank guarantee given on the 22nd of December, 1943, by Barclays Bank (D. C. & O.) Ltd., Haifa, states that it is valid until 22nd of December, 1944. It is clear that the bank guarantee should have been valid up to the 10th of December, 1946. It, therefore, follows that one of the conditions of the order of the 11th of November, 1943, has not been complied with.

Now, had we been asked at any time before the 10th of February, 1944, to extend the time or to vary the order of the 11th November, we might have been able to do so; but, since a period of more than

three months has elapsed since the 11th November, 1943, we are precluded by the clear terms of Art. 6(a) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, from granting any extension.

The application for final leave to appeal is, therefore, refused with fixed costs of LP. 5 to the Respondents.

Given this 15th day of February, 1944.

British Puisne Judge.

HIGH COURT No. 25/44.

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

BEFORE: Fitzgerald, C. J.

IN THE APPLICATION OF :—

The Manufacturers' Association of Palestine. PETITIONER.

v.

1. The Chairman and Members of an Arbitration Board:
   (a) S. Tolkowsky, M. B. E., Chairman,
   (b) Dr. I. Pinner, appointed Member,
   (c) I. Vilenshak, appointed Member,
   (d) Dr. A. Ariel, Member representing interests of the Employers,
   (e) Dr. A. Ankorion, Member representing interests of the Workers,
2. General Federation of Jewish Labour in Palestine,
3. "Workers' Committee". RESPONDENTS.

Trade Disputes Arbitration — Petition to set aside arbitration award — Parties to the proceedings — Defence (Trade Disputes) Order — "Trade dispute", Defence Regulations, 46A — Member leaving the board after decision taken — Restriction on freedom of employment — Labour Law and practice — Position of Histadruth — Award does not create precedent, 11(1) of the Order — Remedy of party affected is to appear before the board and present his case.

Return to an order *nisi*, issued on the 15th day of March, 1944, directed to the Respondents, calling upon them to show cause why the purported Arbitration

Award, alleged to be given by the first Respondent on the 20th December, 1943, should not be set aside, and why the Respondents, and each of them should not be restrained from enforcing the said award; order discharged:—

1. A member of the Arbitration Board who leaves the meeting after a decision is reached but before it is incorporated in the award, cannot defeat the award which may be made by a majority.

2. It is competent for an arbitration board under the Trade Disputes Order to take cognizance of labour conditions, including the standing of the *Histadruth*, within the area of their jurisdiction.

3. Awards under the Trade Disputes Order do not create precedents.

(*A. M. A.*)

ANNOTATIONS:

1. Paragraph 4 of the award was in the following terms:—

"4. *RECRUITMENT.*

Taking into consideration that the *status quo* at Okava as to the recruiting of new workers was a percentage system by which 80% of the workers were sent by the *Histadruth* and 20% freely accepted by the management, and whereas *Histadruth* now participates, together with most of the Minority Unions, in the operation of the Joint Labour Exchanges, the Board decided to adjust the *status quo* to the changed circumstances so that Okava shall recruit 90% of their workers through the General Exchange and shall have 10% free choice."

2. In H. C. 19/42 (9, P. L. R. 181; 1942, S. C. J. 314; 11, Ct. L. R. 197) an application to the High Court was dismissed on the ground that the Petitioner was not "personally interested in the matter". See note 1 to that case in S. C. J.

3. For other authorities on the Defence (Trade Disputes) Order see H. C. 147/42 (10, P. L. R. 7; 1943, A. L. R. 35), CR. A. 59/43 (10, P. L. R. 319; 1943, A. L. R. 479) and CR. A. 27/44 (*ante*, p. 255).

(*H. K.*)

FOR PETITIONERS: Goitein.

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

ORDER.

In this return to an order *nisi*, the Petitioners are the Manufacturers' Association of Palestine, a registered society, the principal aim of which is to protect the interests of manufacturers.

There were three Respondents: the Chairman and Members of an Arbitration Board appointed under Section 7 of the Defence (Trade Disputes) Order, 1942, the General Federation of Jewish Labour in Palestine, and the Workers' Committee of Okava Ltd., Rishon le Zion. Respondents 1 and 2 filed affidavits in reply. Only the second Respondent appears and is represented by counsel. Mr. Berinson says there is no Workers' Committee of Okava Ltd. capable in law of either

being served or appearing. As they have scarcely been mentioned during the proceedings I take it that the fact is as stated by him.

The Petitioner asks this Court to declare that the award of an Arbitration Board appointed under the Defence (Trade Disputes) Order, 1942, be set aside.

On 18th May, 1943, the High Commissioner, under the powers conferred upon him by the Defence (Trade Disputes) Order, 1942, referred a dispute in the Palestine Razor Blade Works, Okava Ltd., for settlement to an Arbitration Board composed of the first Respondents. The Board published its award on 20th December, 1943.

Several matters concerning the dispute are dealt with in the award, but it clearly emerges that the only part to which objection is taken is contained in paragraph 4, and it is because of this paragraph that the Petitioners seek redress.

It has been argued by Mr. Berinson for the second Respondents that the Petitioners are not in fact an interested party. They were not a party to the trade dispute and consequently they have no standing in the matter. To this Mr. Goitein replied that this Association was interested in any matter affecting manufacturers in Palestine, that the award of the Board would be used as a precedent in other cases, and that paragraph 4 of that award vitally affected all manufacturers. Moreover, Okava Ltd. were members of the Manufacturers' Association.

I thought there was much substance in Mr. Berinson's point, but on the whole, I came to the conclusion that the Manufacturers' Association were sufficiently interested to allow them to proceed to argue the merits of the case.

Several technical points were taken which at times tended to obscure the real issue, although this did not detract from the lucidity and ability with which the essential point in dispute was presented by both Mr. Goitein and Mr. Berinson.

Mr. Goitein argued that there was in fact no trade dispute and that in consequence the whole proceedings of the Arbitration Board were a nullity. "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.

It was also submitted that the award was bad, because Dr. Ariel, who represented the interests of the employers, was not present when the final or any other text of the award was drafted, and that he was not present when the award was approved. The Chairman and all the other members of the Board have sworn an affidavit to the effect that the decisions of the Board were made in the presence of all the members, including Dr. Ariel, but they admit that Dr. Ariel did leave the Board after the decision which is incorporated in paragraph 4 of the award had been taken. Whatever Dr. Ariel's intention may have been in thus quitting the meeting, and I do not say that it was not an honest one, I am not prepared to hold that such an action, which obviously is open to any representative of the workers or employers who foresees a decision adverse to the interests he represents, should be permitted to defeat the specific provision of paragraph 8(4) of the order, which states that a decision of the majority shall prevail.

I come now to the real cause of this litigation. Clause 4 of the award the Petitioners say is *ultra vires,* because it restricts the liberty of the workers to obtain employment, and it restricts the freedom of the employer to engage any person who seeks employment. Restrict the liberty the clause certainly does, but the forty-fourth year of the 20th Century is late in the day to talk about the liberty of the employer to regulate the terms under which he will employ workmen. His liberty in this connection has long since been circumscribed by law, by the activities of Trade Unions and by Trade Practice. It seems to me that whether any particular clause in the award of an Arbitration Board in a trade dispute is *ultra vires,* must depend on an examination of the law or trade practice prevailing in the area within the jurisdiction of the Arbitration Board.

Now it is a matter of common knowledge that the vast majority of the Jewish workers in Palestine belong to the *Histadruth,* a type of Trade Union which, I am told, exercises considerable political influence. I do not feel called upon to express an opinion as to whether

this is in the best interests of industry and workers generally, I merely state it as a fact. Where you have a situation in which one union such as the *Histadruth* holds a dominant position, the question of the relationship between *Histadruth* and non-*Histadruth* workmen in any industry is bound to be of paramount importance, and it is eminently a question for consideration by an Arbitration Board appointed under the Trade Disputes Order. I cannot but feel that it was particularly relevant in this case, seeing that there had at one time existed an agreement on the part of Okava Ltd. to recruit 80% of their workers from the *Histadruth*. The only effect of paragraph 4 of the award was to stipulate that 90% should in future be taken from that source *. In these circumstances I cannot agree that it was not within the jurisdiction of the Board to consider the matter dealt with in paragraph 4.

I would add that I am unable to appreciate why the decision of the Arbitration Board must necessarily have the disastrous effect on manufacturers that the Petitioners allege. The award does not create a precedent in the sense that a case once decided by a superior Court of record creates a precedent. Indeed, paragraph 11(1) of the Defence (Trade Disputes) Order, 1942, specifically provides that in the exercise of the powers conferred upon it by the Order, the Board shall be governed in each case solely by equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms, or the practice of the Courts. Provision is made in the order not only for the adequate presentation of any particular employer's case, but paragraph 8 provides that one of the members of the Board shall be chosen as representative of the employers. It would appear, therefore, that the appropriate remedy for an employer is to appear before the Board which is arbitrating on a matter affecting his interest, and submit his case.

If I am correct in holding that the matter dealt with in paragraph 4 of the award was *intra vires* the powers of the Board, then the Petitioners' case resolves itself into nothing more than a protest against the general policy embodied in the Defence (Trade Disputes) Order, 1942.

The order *nisi* must be discharged.

I award LP. 25 inclusive costs to the Respondents.

Given this 18th day of May, 1944.

Chief Justice.

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* Note that paragraph 4 of the award (set out in annotation 1) provides for the compulsory recruiting of 90% of the workers from the "Joint Labour Exchange" and *not* from the "Histadruth".

(*Ed.*)

CIVIL APPEAL No. 380/43.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Siman Dalal & 2 ors. APPLICANTS.

v.

Wakeem Ayoub Zaher & 3 ors. RESPONDENTS.

Leave to appeal to Supreme Court — Appeal entered more than 15 days after grant of leave — Unsuccessful application for extension of time.

Application for extension of time to file an appeal against the judgment of the District Court, Haifa, in its appellate capacity, in C. A. No. 124/43, dismissed:—

Provisions of last paragraph of sec. 14(2), Magistrates' Courts Jurisdiction Ordinance — mandatory; Court of Appeal has no power to extend time beyond period of 15 days mentioned in that section.

(*M. L.*)

ANNOTATIONS: On the impossibility of extending a period laid down by statute see C. A. 184/41 (8, P. L. R. 492; 11, Ct. L. R. 6; 1941, S. C. J. 507) and P. C. L. A. 20/43 (*ante*, p. 264).

(*A. G.*)

FOR APPLICANTS: H. Atalla.

FOR RESPONDENTS: No. 1 — Mu'ammar.
Rest — No appearance.

ORDER.

We need not trouble you, Mr. Mu'ammar.

This is an application for extension of time for the lodging of an appeal to this Court against a judgment of the District Court of Haifa in its appellate capacity. The judgment of the District Court on appeal was dated the 30th of July, 1943. Leave to appeal to this Court was granted on the 12th November, 1943. The appeal, however, was not entered until the 7th of December, 1943. Under the last paragraph of Section 14(2) of the Magistrates' Courts Jurisdiction Ordinance, 1939, the appeal should have been entered within 15 days from the 12th of November, 1943. In other words, the last day for filing the appeal was the 27th of November, 1943. Mr. Atalla, on behalf of the Applicants, relies on Rules 324 and 361 of the Civil Procedure Rules, 1938, and has asked us to read into Rule 361 the words "where any

period is fixed by law or by Ordinance or otherwise". We are, however, of the opinion that the provisions of the last paragraph of Section 14(2) of the said Magistrates' Courts Jurisdiction Ordinance, 1939, are mandatory and that there is nothing therein which might enable us to extend the time beyond the period of fifteen days mentioned in Section 14(2).

For these reasons the application is dismissed. We grant to the first Respondent his costs of today, namely, fixed (inclusive) costs of LP. 3.—.

Delivered this 14th day of February, 1944.

British Puisne Judge.

HIGH COURT No. 20/44.

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

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

IN THE APPEAL OF:—

Jamil Abdallah Taji. PETITIONER.

v.

1. Chief Execution Officer, Ramleh,
2. Saadi Arabi. RESPONDENTS.

Consent judgment in an eviction case — Application for leave to appeal after unsuccessful petition to High Court — Chief Execution Officer granting stay although not considering that Applicant had any chance of success whatsoever.

Return to an order *nisi*, calling upon Respondent No. 1 to show cause why his order of stay of execution in Ramleh Execution File No. 300/43, dated 9.2.1944, should not be set aside; order made absolute:—

Chief Execution Officer stating himself that he did not consider that party applying for stay of execution had any chance of success whatsoever is wrong in staying execution merely because judgment debtor has filed an application for leave to appeal, especially in case of a consent judgment and where application was filed a year after that judgment.

(*M. L.*)

ANNOTATIONS :

1. Former proceedings — H. C. 127/43 (11, P. L. R. 31; *ante*, p. 201).
2. In H. C. 50/43 (1943, A. L. R. 320) Court set aside an order of a Chief Execution Officer granting extension for eviction on the ground that it was unjustified.

3. On consent judgments for eviction see H. C. 97/43 (10, P. L. R. 569; *ante*, p. 41) with annotations.

(*A. G.*)

FOR PETITIONER: Morcos.

FOR RESPONDENTS: No. 2 — In person.

ORDER.

This is the return to a rule *nisi*, issued on the 14th day of February, 1944, directed to the first Respondent, calling upon him to show cause why he should not be ordered to cancel the stay of execution granted by him on 9.2.44 in Execution File No. 300/43.

Soon after his petition to the High Court (High Court Case No. 127/43) was discharged, the second Respondent filed an application for leave to appeal in the District Court of Jaffa from the consent judgment of the Magistrate, dated the 6th day of February, 1943, which was given in the eviction case between the present Petitioner and the 2nd Respondent. Thereafter the 2nd Respondent applied to the 1st Respondent to stay execution pending the determination of the application for leave to appeal by the District Court of Jaffa. The first Respondent granted stay apparently for sporting reasons rather than legal ones, as he himself states that he did not consider the Applicant had any chance of success whatsoever. Moreover, the 2nd Respondent admits that the application for leave to appeal was filed a year after the consent judgment was given.

For these reasons the rule *nisi* must be made absolute. The Petitioner is entitled to his costs which we fix at an inclusive sum of LP. 10 to be paid by the second Respondent.

Given this 29th day of February, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 389/43.

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

BEFORE: Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Abdel Kader Saleh Kaznar. APPELLANT.

v.

Handoumi Abdul Rahman El-Haroun & an. RESPONDENTS.

Awlawiyeh — Evidence against registered title — Object of awlawiyeh — Alteration of facts after filing claim — L. C. Art. 41 — Costs.

Appeal from the judgment of the Magistrate's Court, Tulkarm, sitting as a Land Court, dated the 22nd day of November, 1943, in Land Case No. 23/43, dismissed:—

1. The object which Art. 41 of the Land Code is intended to meet is that a person should not be forced into co-ownership with a stranger. If a retransfer to the transferor is effected before the claim is determined, the right of *awlawiyeh* lapses.

2. In the absence of special circumstances, such as fraud, oral evidence cannot be heard to establish that a sale of land was intended only as a security.

(*A. M. A.*)

ANNOTATIONS:

1. Earlier authorities on the right of *awlawiyeh* are collated in the annotations in S. C. J. to C. A. 122/38 (1938, 1 S. C. J. 381; 4, Ct. L. R. 13); for later authorities see C. A. 225/38 (5, P. L. R. 551; 1938, 2 S. C. J. 167; 4, Ct. L. R. 217; P. P. 7.xii.38); C. A. 127/40 (7, P. L. R. 357; 1940, S. C. J. 440; 8, Ct. L. R. 189); C. A. 245/40 (8, P. L. R. 8; 1941, S. C. J. 65; 9, Ct. L. R. 151); C. A. 271/40 (1941, S. C. J. 136; 9, Ct. L. R. 101); C. A. 229 & 230/40 (8, P. L. R. 48; 1941, S. C. J. 166; 9, Ct. L. R. 117); C. A. 183/43 (10, P. L. R. 429; 1943, A. L. R. 612); C. A. 229/43 (10, P. L. R. 510; 1943, A. L. R. 644).

2. On the second point *vide* note 3 to C. A. 94/43 (1943, A. L. R. 152).

(*H. K.*)

FOR APPELLANT: F. Atalla.

FOR RESPONDENTS: Elia.

JUDGMENT.

This is an appeal from a judgment of the Magistrate of Tulkarm, sitting as a Land Court, who had dismissed an action by the present Appellant (Plaintiff) for registration of certain shares in land at Tulkarm on the basis of *awlawiyeh*. The facts, shortly stated, are that the Plaintiff and the second Defendant (now second Respondent) were co-owners. On 10th November, 1942, the second Defendant transferred his shares to his daughter, the first Defendant (now first Respondent) as he, the second Defendant, was about to proceed on pilgrimage to Mecca and it is said that the object of the transfer was to secure a debt due by him to his daughter. The statement of claim in the action was filed on 20th April, 1943, and on 22nd April, 1943, the first Defendant transferred, or perhaps it is more accurate to say "re-transferred" the shares in question to her father. The Magistrate dismissed the action on the ground that, having heard the oral evidence of parties and their witnesses, he came to the conclusion that the transfer of 10th

November, 1942, was not an out and out transfer but was effected merely for the purpose of securing a debt and was only a temporary transfer valid only till such time as the father might return safe and sound to Palestine, which he did. In this we think that the Magistrate erred because it is well established that, except in certain circumstances, *e. g.* fraud, (and such circumstances do not arise in this case), oral evidence may not be led to contradict an admission made in the Land Registry. This, however, does not dispose of the appeal. The point which we have to decide is difficult and, we believe, novel.

The Appellant's advocate has argued that his client's right to *awla-wiyeh* arose immediately on the transfer of 10th November, 1942, and that nothing that happened thereafter can deprive him of his right.

The Respondents' advocate, on the other hand, argues that when his clients defended the action they were entitled to urge, as they did urge, before the Magistrate through their advocate, in his final address on 21st November, 1943, that the second Defendant was now reinstated as co-owner and that the Plaintiff could not possibly have any cause of action because his co-owner now was the very same person who was co-owner immediately before the transfer of 10th November, 1942. It is true that Art. 41 of the Ottoman Land Code makes no mention of the reason for this enactment but we think that it has always been understood to be to give a co-owner a chance of avoiding having a stranger forced upon him as a co-owner:—

> "The owner of an undivided share in State land cannot transfer his share, by way of gift or in consideration of payment, without the leave of the persons jointly interested. If he does so the latter have the right, within 5 years, to claim from the transferee the restitution of his share, on paying him its value at the time of the claim. The right of claiming back the land lapses at the expiration of the said term, even if there exist the excuses recognised by law, *viz.*, minority, unsoundness of mind, or absence on a journey.
>
> But if any person jointly interested at the time of the transfer has given his consent to it, or has refused to take the share in question although offered to him, he cannot afterwards maintain any claim.
>
> ADDITION. 19 *Sha'ban* 1291. In the event of the person jointly interested dying within the said period of 5 years his heirs, having the right of succession, shall have the right to claim possession of the property from the transferee or his heirs*, in the event of the death of both the person jointly interested and of the transferee the heirs of the former shall have the right to claim possession from the latter."

* According to the translation given in Goadby-Doukhan's Land Law of Palestine the words "in the event of death, and" should here be inserted. (*Ed.*)

On the whole, however, we incline to the view that, when the case came on for hearing, circumstances were such as to render it impossible for the Magistrate to give judgment in favour of the Plaintiff because, by then, the whole basis on which a judgment for *awlawiyeh* rests, namely, the right of a co-owner not to have a stranger forced upon him by reason of the act of another co-owner, no longer existed. We realise, of course, the force of the contention of Appellant's advocate that his client's right emerged and was complete immediately after the transfer of 10th November, 1942. Nevertheless, for the reasons we have given which are different from those given by the Magistrate, we think that the Plaintiff's action was rightly dismissed.

The appeal, accordingly, fails and is dismissed but, in the circumstances, there will be no costs of this appeal, *i. e.* each party will pay its own costs.

Delivered this 30th day of May, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 168/43.

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

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

IN THE APPEAL OF:—

Issa Kaloti. APPELLANT.

v.

The Attorney General. RESPONDENT.

Passing off camel as beef — Charging more than maximum price for camel meat — Separate counts.

Appeal from the judgment of the District Court, Jerusalem, sitting in its appellate capacity, in CR. A. 89/43, dismissed, but sentence reduced:—

1. Provision that no person should be held responsible twice for same offence does not apply where the acts committed by accused can be sufficiently separated to justify separate counts.

2. Passing off camel as beef and charging more than maximum price permitted for camel meat are two separate offences.

(*M. L.*)

ANNOTATIONS: As to first point see CR. A. 76/43 (10, P. L. R. 375; 1943, A. L. R. 460), CR. A. 70/41 (8, P. L. R. 252; 9, Ct. L. R. 187; 1941, S. C. J. 251) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Olshan.

FOR RESPONDENT: Tscherniak.

JUDGMENT.

This is an appeal by leave from a judgment of the President of the District Court, Jerusalem, dismissing an appeal from a judgment of the Chief Magistrate, Jerusalem.

The Appellant was found guilty and sentenced on two counts — first, of contravening the Food Control (Sale of Camel Flesh) Order, 1943, by passing off camel as beef; and secondly, of contravening the Food Control (Maximum Prices for Slaughter Stock and Meat) Order, by charging more than the maximum price permitted for camel meat.

The Appellant urges in this case that section 21 of the Criminal Code Ordinance is applicable, which provides that a person should not be held criminally responsible twice for the same offence. As the learned President (Judge Bodilly) says in his judgment, while the principle is clear, the actual application of this principle is very often difficult.

Having heard the arguments of both counsel in this case, we are of opinion that Mr. Tscherniak is right and that in this particular instance the acts can be sufficiently separated to justify two separate counts. In all the circumstances of the case, however, we think that justice will be done by reducing the fine on each count to half the existing fine, that is to say, that on the first count the Appellant will pay a fine of LP. 62.500 and on the second count LP. 62.500, with the appropriate terms of alternative imprisonment in default of payment.

Delivered this 15th day of February, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 378/43.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Abdul Ghani el-Kawasmeh. APPELLANT.

v.

Yusra bint Eid Mahmoud Abdallah el Kawasmeh & 4 ors. RESPONDENTS.

Partition of immovable property — Ottoman Law of Partition, arts. 8—10 — Effect of defence — Jurisdiction of Magistrate's Court in matters of land, M. C. J. O., sec. 4 — Whether particular land is capable of partition — C. A. 92/43, H. C. 74/43, H. C. 51/43, acts to be done by Magistrate himself.

Appeal from the judgment of the District Court of Jerusalem, in its appellate capacity, dated the 25th day of October, 1943, in Civil Appeal No. 44/43, allowed and case remitted to Magistrate:—

1. A Magistrate, when deciding a partition case, may decide, incidentally, as to the ownership of certain shares.

2. Effect should be given to an admission by a number of Defendants in favour of another Defendant, when set out in the written defences.

3. In partition cases the Magistrate should personally adjudicate as to the shares; he cannot merely decide what should be done, as his judgment is thereby not final.

(*A. M. A.*)

FOLLOWED: C. A. 92/43 (1943, A. L. R. 271); H. C. 51/43 (*ibid.*, p. 525); H. C. 74/43 (10, P. L. R. 467; 1943, A. L. R. 526).

ANNOTATIONS:

1. *Cf.* C. A. 196/41 (9, P. L. R. 204; 1942, S. C. J. 190; 11, Ct. L. R. 132).

2. On the third point see, in addition to the cases cited, H. C. 42/43 (10, P. L. R. 239; 1943, A. L. R. 257).

(*H. K.*)

FOR APPELLANT: Eisenberg and Perlmutter.

FOR RESPONDENTS: No. 1 — Ousta.
Rest — Absent — served.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem, in its appellate capacity, whereby that Court dismissed an appeal from the Magistrate of Hebron who in partition proceedings had ordered cessation of the common ownership (*musha'*) of a certain vineyard in accordance with Articles 8, 9 and 10 of the Ottoman Law of Partition of Immovable Property. The Magistrate found that the vineyard was incapable of partition.

Several grounds of appeal have been taken before us but we propose to deal with only two of them.

One of the grounds of appeal with which we deal is that the Magistrate did not give effect to a statement of defence filed by three out of the five Defendants in the Court below. We may say that the present Appellant was the first Defendant in the Court below. The third, fourth and fifth Defendants filed in the Magistrate's Court a statement in which they declared that they claimed nothing in the vineyard in

question and that they had no rights or shares therein, and they further declared that it was the present Appellant who had purchased the vineyard with his own money and had been in continuous and independent possession for 26 years. The Courts below seemed to think that the Magistrate could not act on this statement as, if he did so, he would be giving a judgment as to land, which is forbidden by Section 4 of the Magistrates' Courts Jurisdiction Ordinance. We think, however, that this is a mistaken view of the position. It is true that disputes as to land can be decided only by a Land Court; but, by the very nature of things, a Magistrate who has jurisdiction to order partition must declare ownership, at any rate, to the shares in the land partitioned. Once he was faced with this statement of the third, fourth and fifth Defendants he clearly could not grant to them any shares which they did not claim.

The complaint of the Appellant, in which we think there is substance, is that the Magistrate in deciding that the land was incapable of partition relied on the report of a certain architect, Mr. Fuad Hitti, who was clearly influenced by the fact that, if the land were divided into very small portions, each owner would obtain a trifling share. It seems to us that if the Magistrate had realised that the shares of the 3rd, 4th and 5th Defendants should go to the present Appellant the shares which the remaining parties to the case would receive might not be so small as to make partition impracticable. We think that for this reason alone the judgment of the Magistrate cannot stand and must be set aside.

The other ground of appeal with which we deal is that the Magistrate gave judgment prematurely. It has been held that in partition proceedings every act must be the act of the Magistrate himself as a Magistrate (see C. A. No. 92/43, H. C. No. 74/43 and H. C. No. 51/43). In the present case, however, the Magistrate in what purported to be the complete judgment of 21st June, 1943, after ordering cessation of the common ownership, merely set out what ought to be done. It is the duty of the Magistrate to do every act himself and until he does so his judgment is not a judgment from which there can be an appeal.

The judgment of the Magistrate is, accordingly, set aside and the case is remitted to him for a re-hearing solely on the question as to whether the land is capable of partition between the parties to the case other than the third, fourth and fifth Defendants who have abandoned any claim to the vineyard. The Magistrate must act in accordance with the judgments which we have cited.

The costs of this appeal will be costs in the cause; but, in order to

facilitate the final arrangements, we certify a fixed (or inclusive) sum of LP. 5.— advocate's attendance fee for the hearing of this appeal to the ultimately successful party.

Delivered this 31st day of May, 1944.

British Puisne Judge.

HIGH COURT No. 31/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

1. Lt. Commander E. M. V. James, Nazareth & 2 ors.,
4. The Government of Palestine. PETITIONERS.

v.

Herman Langsfelder & an. RESPONDENTS.

Change of venue — Action against Government filed in Jerusalem, C. P. R., r. 4 — Convenience of trial, jurisdiction of High Court, Courts Ord., sec. 7(c) — Non-Enemy Declaration need not be filed with petition — Time to apply to the High Court — Evidence, inspection — Plaintiff's convenience in securing attendance of advocate.

Return to an order *nisi*, issued on the 24th day of March, 1944, directed to the Respondents, calling upon them to show cause why the proceedings in Civil Case No. 141/43 (District Court, Jerusalem) should not be removed for trial from the said District Court to the District Court of Haifa; rule made absolute:—

1. No Non-Enemy Declaration need be filed with a petition to the High Court for change of venue when such a declaration is in the proceedings file.
2. It is not too late to come to the High Court for change of venue after exhausting the alternative remedy of applying to strike out the action for lack of jurisdiction.
3. Balance of convenience is considered when dealing with application for change of venue.

(*A. M. A.*)

ANNOTATIONS :

1. On non-enemy declarations *vide* C. A. 232/43 (10, P. L. R. 563; 1943, A. L. R. 693) and cases therein cited.

2. For authorities on change of venue see annotations to H. C. 34/43 (10, P. L. R. 157; 1943, A. L. R. 161) in A. L. R.; see especially H. C. 32/34 (2, P. L. R. 79; 9, C. of J. 892) where the Court said: "We are not concerned with the question of convenience of the parties' counsel or of the Law Officers."

(*H. K.*)

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

FOR RESPONDENTS: Weyl.

ORDER.

This is the return to an order *nisi*, calling upon the Respondents to show cause why Civil Case No. 141/43 in the District Court of Jerusalem, in which they are the Plaintiffs, should not be removed for trial to the District Court of Haifa. The statement of claim was filed in December, 1943. The summonses were served on the present Petitioners on 8th January, 1944, the Petitioners entered appearance on 12th January, 1944, and on 26th January they filed a motion asking that the action be struck out or dismissed on the ground of lack of jurisdiction.

The District Court of Jerusalem dismissed that application by an order, dated 18th February, 1944, on the ground that the District Court of Jerusalem had jurisdiction, because the first Defendants are the Government of Palestine, whose residence the District Court held to be anywhere in Palestine, and that that being so the matter fell within Rule 4 of the Civil Procedure Rules, 1938.

The District Court went on to say that the fact that it might be more convenient to the Defendants that the case be heard in Haifa, might be a ground for an application to the High Court for change of venue. The present Petitioners accordingly filed the present petition on the 8th March, 1944, relying on Section 7(c) Courts Ordinance, 1940.

The first objection to the petition taken by the advocate for the Respondents is that no enemy declaration as required by the Defence (Courts Applications) Regulations, 1944, has been filed. In my view, however, the civil case in the District Court of Jerusalem is the proceeding instituted within the meaning of Regulation No. 2. That proceeding has already been instituted, and it is not suggested that the present Respondents did not file a proper declaration. I do not think that, on coming to the High Court with a petition for change of venue, the present Petitioners are required to file an Enemy Declaration Form. It is on record that the present Respondents have filed the declaration that they are not enemies. The Government of Palestine are clearly satisfied with that declaration and it is surely unnecessary for the Government of Palestine or the other three Petitioners, who are all Government servants, to declare that they themselves are not enemies. This ground of objection, accordingly, fails.

The next gound of objection is that the Petitioners should have

come to this Court immediately after the summons in the District Court had been served upon them. To this the Petitioners' advocate, Mr. Gavison, Assistant Government Advocate, replies that had he not moved the District Court to dismiss the action on the ground of lack of jurisdiction, he would have been met in this Court by the plea that there was an alternative remedy, of which he should have availed himself, namely, to move the District Court. I agree with Mr. Gavison, and furthermore I do not think that there has been undue delay on the part of the Petitioners in coming to this Court.

As to the merits of this petition, it is not denied that the Respondents, who are the Plaintiffs in the action in the District Court, reside in Tel-Aviv. They appear to be a married couple without occupation. It is quite as easy for them to go to Haifa as it would be for them to go to Jerusalem. The first three Petitioners are stationed in Haifa, where they are said to be engaged on important defence and security duties, and there is an affidavit before me from which it appears that absence for any length of time from Haifa would be detrimental to the interest of the State. That I accept.

It is also stated that the Petitioners intend to apply, when the civil action is being heard, for an inspection by the Court of the site of the accident in Haifa Harbour, and for an inspection of the wreck of the S. S. "Patria" in the same harbour.

It is also stated that most of the witnesses whom the Petitioners will call reside in Haifa. The action has been brought in respect of the loss of certain articles belonging to the Respondents, and it is alleged that these articles were lost as a result of an explosion on the S. S. "Patria", and the subsequent sinking of that ship.

It seems to me that the only ground on which the Respondents are seeking to resist the application by Petitioners is that they are poor people, and that their present advocate, who is apparently willing to undertake the case for no fee, or, at any rate, for a very small fee, resides in Jerusalem, and is unable to spare the time or money to attend the District Court of Haifa. While I have every sympathy with the present advocate for the Respondents, I do not think that this should weigh with me, especially in view of the very strong grounds which the Petitioners have been able to urge. It does not seem unlikely that, if necessary, the Respondents will be able to obtain the services of an advocate living in Haifa. I dare say that their present advocate could instruct another advocate in Haifa. In any event, that is a matter for the Respondents to consider.

I, accordingly, hold that the rule must be made absolute, and I so order. The Petitioners do not ask for costs, so the order will be "no costs."

Given this 5th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 298/43.

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

BEFORE : Edwards, J.

IN THE APPEAL OF :—

Jack Almaleh. APPELLANT.

v.

Behor Moshe Haim. RESPONDENT.

Oral evidence — Corroboration, admission — Evidence Ord., sec. 6 — Findings of trial Court — Greenhalgh's case — Pleadings, Stevens v. Hill, Walker v. Rostron, Mejelle 1582, 1588, 1607, 1610, 1628 — *Money transferred from foreign country to Defendant for use of the Plaintiff — Conditional Judgment — Costs.*

Appeal from the judgment of the District Court of Tel-Aviv, Civil Case No. 157/42, dismissed:—

Conduct may, in certain circumstances, as when it amounts to an admission, afford corroboration for the purpose of sec. 6 of the Evidence Ordinance.

(*A. M. A.*)

REFERRED TO: Greenhalgh (W. P.) & Sons *v.* Union Bank of Manchester, 1924, 2 K. B. 153, 93 L. J. K. B. 844, 131 L. T. 637; Stevens *v.* Hill, 1805, 5 Esp. 247; Walker *v.* Rostron, 1842, 9 M. & W. 411, 11 L. J. Ex. 173.

ANNOTATIONS :

1. On corroboration in civil cases see C. A. 81/43 (1943, A. L. R. 352) and note 1 thereto.

2. On the effect of foreign currency legislation *vide* C. A. 276/40 (8, P. L. R. 62; 1941, S. C. J. 62; 9, Ct. L. R. 102).

(*H. K.*)

FOR APPELLANT: Polonsky and Nochimovsky.

FOR RESPONDENT: Levison and Samuel.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, which had given judgment against the present Appellant for LP. 1000, with interest and costs.

The Plaintiff (now Respondent) resided in Bulgaria till 1938, when he came to Palestine. Before leaving Bulgaria he liquidated his business and handed over to his cousin, Eliya Alkalai, a sum of about one million levas. He instructed Alkalai to send the money to Palestine if that could be done lawfully, otherwise to keep it with him.

In March, 1941, he heard from Alkalai telling him to go and get greetings from the Defendant (now Appellant). The Respondent gave evidence before the lower Court, in which he swore that in March, 1941, in Tel-Aviv, he met the Appellant, who told him that he had for him LP. 1030.

Some time later, in consequence of some persuasion by certain people, including the Respondent's advocate, Mr. Pardo, the Appellant paid to the Respondent a sum of £ 500 sterling on account of the sum of LP. 1000, and on 30th June, 1941, the present Respondent gave the Appellant a receipt, Exhibit P. 1, at the bottom of which the Appellant wrote:—

> "I hereby confirm to you in writing that I shall, as quickly as possible, exchange for you the above-mentioned English pounds — which I handed to you this day in accordance with the said receipt — into Palestinian pounds, and likewise deliver to you the balance of the amount."

The learned President of the District Court accepted the evidence of the Respondent and considered that the Appellant had admitted having LP. 1030 belonging to the Respondent, and further held that there was sufficient corroboration of the Respondent's evidence by reason of the fact that the Appellant paid LP. 500, and when asked about the other LP. 500 he, the Appellant, offered to the Respondent cloth or a lorry.

The hearing of the appeal lasted two days before me, during which time twelve grounds of appeal were advanced on behalf of the Appellant. I do not deem it necessary to deal with all the matters raised, because I think that the matter lies within a very small compass. It is, however, desirable that I should, in fairness to the Appellant's advocate, deal with some of the matters raised by him.

He says that the Respondent should not have been believed because he says that the conversation with the Respondent took place in March, 1941, whereas the Appellant did not arrive in Palestine till May, 1941. This, however, was no doubt considered by the Court below and may simply have been an honest mistake or due to forgetfulness on the part of the Respondent. The learned President nevertheless believed in the essential trustfulness of the Respondent with

regard to the substance of the narrative which he gave. It is, accordingly, not for this Court to interfere. It seems to me that the crux of the whole case is whether there was sufficient evidence to entitle the Court below to hold that LP. 1000 had been received by the Appellant in Palestine. It is unnecessary to deal with the extra sum of LP. 30 which is not claimed.

The Appellant denied that he had received the money and gave reasons for having paid the LP. 500 and for offering cloth or a lorry. Another trial Court might perhaps have accepted that explanation; but, unfortunately for the Appellant, the Court below did not accept it and came to the conclusion that the Respondent had told the truth when he said that the Appellant admitted to him that he had money for him. This evidence alone would probably not be sufficient to satisfy the requirements of Section 6 of the Evidence Ordinance, but the learned President had before him the evidence with regard to the LP. 500 paid to the Respondent and the confirmation signed by the Appellant at the bottom of the receipt for the LP. 500 given by the Respondent. The learned President considered that there was sufficient evidence that the Appellant had received the sum of LP. 1000 in Palestine.

Mr. Polonsky, for the Appellant, complains that the learned trial Judge based his judgment on mere conjecture. I have anxiously considered this submission; but, in view of the evidence given by the Respondent — which evidence was accepted by the Court below — together with the evidence with regard to the LP. 500 and the evidence with regard to the offer of cloth or a lorry, I think that there was just sufficient evidence to entitle the learned President to hold that it was proved that the money had been received in Palestine. It was no part of the case of the Respondent that the Appellant owed money to the Respondent, nor could it be any part of the Respondent's case that the Appellant was under an obligation, no matter what might have been the legal difficulties in the way of transferring money from Bulgaria to Palestine, to see to it that that money arrived in Palestine.

The Respondent relies on the case of J. & W. P. Greenhalgh (1924) 2 K. B., pages 153 and 161. As against this, Mr. Polonsky for the Appellant, says that the statement of claim should have said, "money had and received for the use of Plaintiff." I do not think that the matter need be decided on niceties of pleading. The Respondent relies on the case of Stevens *v.* Hill, and Walker *v.* Rostron, 1842 (9, M. & W.) 411, and on the *Mejelle*, Articles 1582, 1588, 1607 and

1610. He says that the first part of example 2 of Article 1628 is on all fours with the Respondent's case.

I think that there is substance in this argument. Once it was found that the money was in Palestine and was in the hands of the Appellant and in fact belonged legally to the Respondent, any question of how the money was brought from Bulgaria to Palestine, whether legally or not, seems to me to be irrelevant. The Respondent is not an enemy, and, therefore, any suggestion that the money should be with the Custodian of Enemy Property seems to me to be baseless.

There is one matter which I should mention, because I think that it is important. Had there been evidence that it was impossible for money to be transferred from Bulgaria to Palestine, whether directly or in a roundabout manner, for example through London, I think that the case for the Appellant would have been very much stronger; but in cross-examination the Appellant himself admitted that he had paid to other people some LP. 7000 or LP. 8000. This, I admit, was while he was still in Bulgaria, but there certainly was evidence that money could be and was in fact got out of Bulgaria. This would tend to strengthen the probability that the Appellant had been able to get out of Bulgaria money belonging to the Respondent. In other words, this would strengthen the probability of the Respondent's case.

In the result, I am not prepared to upset the finding of the learned President of the Court below, except on one matter. The Respondent's advocate admitted at the Bar before me that his client had £ 500 sterling, which he was prepared to place at the disposal of the Court. I order that no decree do issue in favour of the Respondent for the LP. 1000 until he has placed at the disposal of the Execution Officer the £ 500 sterling. It will be for the Execution Officer to ascertain from Barclays Bank, Jerusalem, whether there is, on the part of the authorities charged with dealing in currency, any objection to the £ 500 sterling being handed to the Appellant. Once it has been handed over to the Appellant a decree can issue against the Appellant for LP. 1000, and interest and costs as awarded by the Court below.

As the Appellant has in effect partly succeeded in a monetary sense, I consider that there should be no costs of this appeal, that is to say, each party will pay his own costs of this appeal.

Delivered this 16th day of February, 1944.

British Puisne Judge.

INCOME TAX APPEAL No. 25/43.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

The Consolidated Near East Co., Ltd. APPELLANT.

v.

The Assessing Officer, Haifa. RESPONDENT.

Income Tax — Appeal under Sec. 53(1) — Facts set out in memorandum not denied — British Company registered in Palestine — Deduction of British excess profit tax — Amendment of sec. 13(g) "United Kingdom excess profit tax" — Secs. 11, 13, sec. 3 of the 1942 Ord. — Construction of Statutes, repeal of negative provision — Maxwell, Hailsham, Union S/S Co. of N. Z. v. Robin — "Including" (sec. 11(1)), items (a)—(j) not exhaustive — Whether excess profit tax is deductible before arriving at profit, Ashton Gas Co. v. A. G.; Johnston v. Chestergate Hat Manufacturing Co., Ollivant v. Ollivant; Patent Castings Syndicate Ltd. v. Etherington, Sundaram on I. T. — Tax imposed by foreign Government, Chief C. I. T., Madras v. Eastern Extension Australasia & China Telegraph Co. Ltd., Grainger v. Gough.

Appeal against the assessment by the Respondent, dated 13th January, 1943, in Assessment No. 15/0/37, dismissed:—

1. Items (a) to (j) of sec. 11(1) are not exhaustive.

2. Excess profit tax payable by an assessee in the United Kingdom is not deductible before arriving at the profit.

(*A. M. A.*)

FOLLOWED: Union Steamship Co. of New Zealand Ltd. *v.* Robin, 1920, A. C. 654, 89 L. J. P. C. 119, 123 L. T. 145.

REFERRED TO: Ashton Gas Co. *v.* A. G., 1906, A. C. 10, 75 L. J. Ch. 1, 93 L. T. 676, 22 T. L. R. 82; Johnston *v.* Chestergate Hat Manufacturing Co., Ltd., 1915, 2 Ch. 338, 84 L. J. Ch. 914, 113 L. T. 1148; Ollivant (G. B.) & Co. Ltd.'s Agreement, *in re*, 1942, 2 All E. R. 528; Patent Castings Syndicate Ltd. *v.* Etherington, 1919, 2 Ch. 254, 88 L. J. Ch. 398, 35 T. L. R. 528; Chief Commissioner of I. T., Madras *v.* Eastern Extension Australasia & China Telegraph Co. Ltd., 1 Indian Tax Cases 120; Grainger & Son *v.* Gough, 1896, A. C. 325, 65 L. J. Q. B. 410, 74 L. T. 435, 12 T. L. R. 364.

(*H. K.*)

FOR APPELLANT: Smoira.

FOR RESPONDENT: A. Levin.

JUDGMENT.

This is an appeal under Section 53(1) Income Tax Ordinance, 1941. No evidence was heard or tendered by either side.

Although Mr. Levin, who appeared for the Respondent, stated at the Bar that he was not prepared to admit the complete correctness of a written memorandum setting out the position of the Appellant, which was filed by Dr. Smoira, advocate for the Appellant, he (Mr. Levin) did not specifically deny it.

I, accordingly, feel that I can safely say that the facts appear to be that the Appellant Company (hereinafter referred to as the Company) which was incorporated in England in 1932 by three British Companies, for the purpose of securing a fair share for British goods in the Palestinian market, was registered as a foreign Company in Palestine on 6th March, 1933. Two directors reside in England and the third in Palestine. The meetings of the Company are held in London. The activities of the Company are carried on both in the United Kingdom and in Palestine, as stated in paragraphs 8 and 9 of Exhibit A/2, *i. e.* statement of facts:—

> "8. The London office of the company deals in particular with the following matters:—
> (a) to purchase goods;
> (b) to obtain export permits and to make the necessary shipping arrangements;
> (c) to settle the accounts with the suppliers of goods. This settling of accounts requires sometimes negotiations and adjustments to be made by the Directors in London.
>
> 9. The Palestine Office is engaged in the sale of the goods."

The sole question falling for decision is whether the Appellants are entitled to deduct the amount of United Kingdom excess profits tax paid by them in arriving at the figure of their income for purposes of Palestine Income Tax. The first matter relied on by Dr. Smoira is the fact that, when the Income Tax Ordinance, 1941, was amended by the Income Tax (Amendment) Ordinance, 1942, Section 13(g) of the principal Ordinance was amended by the words "United Kingdom excess profits tax" being repealed. Dr. Smoira argues that by Section 3 of the 1942 Ordinance, Section 13 of the principal Ordinance was in force as from 1st September, 1941, and that, in consequence, the United Kingdom excess profits tax was made deductible. The argument proceeds that one has to look at the repealed portion of Section 13(g) and also at the words previously contained in the sub-section, and in support of that argument he cited many authorities. In my view, however, the matter is concluded by Section 3 of the 1942 Ordinance.

The position then is that, from the very outset, *i. e.* from 1st September, 1941, one must read the Ordinance as if the words "United Kingdom excess profits tax" had never appeared at all. That being so, I agree with Mr. Levin's contention that the repeal of a negative provision does not imply the positive. (Maxwell on "Interpretation of Statutes," 7th (1929) Edition, page 31), Hailsham, Vol. 31, page 561, para. 579, and Union Steamship Coy. of New Zealand, (1920) A. C., pages 657, 659 and 661. One must look at Section 13 as if there had never been any reference at all at any time to United Kingdom excess profits tax. I, accordingly, think that Mr. Levin's further contention is sound; that contention is that one is relegated to Section 11 in order to ascertain whether United Kingdom excess profits tax is such an outgoing or expense exclusively incurred during the year preceding the year of assessment in the production of the income.

It is to be noted, in favour of the Appellant, that items (a) to (j) of Section 11(1) are not exhaustive. I refer to the word "including" in line 5 of Section 11(1). The question, therefore, now is whether any sums paid by way of United Kingdom excess profits duty are in fact outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment in the production of the income.

Dr. Smoira has cited many decided cases in support of his argument that gains or profits within the meaning of Section 5(1)(b) Income Tax Ordinance, 1941, are only such gains or profits as remain after paying outgoings and expenses, and that provided that there is no prohibition against deducting United Kingdom excess profits tax before arriving at one's gains or profits, such deduction is wholly justifiable. I refer to the cases mentioned at the bottom of page 3 of my record. In other words, ordinary commercial principles apply.

Mr. Levin's reply is that all the cases cited by Dr. Smoira are irrelevant because none of them deals with taxes on income, while excess profits tax *is* a tax on income. (Ashton Gas Company *v.* Attorney General (1906) A. C. pages 10 and 12, and Johnston *v.* Chestergate Hat Manufacturing Co. Ltd. (1915) 2 Chancery Div., page 343). "But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, *etc.*, but a part of the net profits themselves." In short, Mr. Levin contends that the cases cited by Dr. Smoira are not cases on Income Tax law at all, but are cases dealing with the interpretation of private agreements with regard to share of profits, and the question in most of those cases was whether excess profits duty or tax was to be deducted before ascertaining the divisible profits. In other words, the question in most of those cases

was "what are the divisible profits remaining to the shareholders," and not "what are the profits of the company." (Ollivant *v.* Ollivant, All England Reports (1942) Vol. 2, pages 528 and 531).

Mr. Levin referred to Patent Castings Syndicate, Ltd. *v.* Etherington (1919) 2 Chancery Div., pages 254, 267 and 269, and Sundaram's text book on Indian Income Tax Law (5th Edition) page 574. United Kingdom excess profits tax is, so far as Palestine is concerned, a tax imposed by a foreign government. (Chief Commissioner of Income Tax, Madras *v.* Eastern Extension Australasia and China Telegraph Coy., Ltd., 1 Indian Tax Cases 120, Sundaram's book, pages 975 and 976). Mr. Levin has referred to Section 13(g) and Section 13(h), and Section 62 and Section 63 Income Tax Ordinance, 1941, and Sundaram, page 215, *re* trading, and Grainger *v.* Gough (1896) A. C. 345.

Having carefully considered the respective arguments of and cases cited by Mr. Levin and Dr. Smoira (all of which cases are noted on my record) I have come to the conclusion that Mr. Levin's arguments should prevail. The appeal is, therefore, dismissed with fixed (or inclusive) costs of LP. 50.—.

Delivered this 31st day of May, 1944.

British Puisne Judge.

HIGH COURT No. 6/44.

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

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

IN THE APPLICATION OF :—

Jaqov Menashe Mizrahi. PETITIONER.

v.

Joseph Levy Madinah. RESPONDENT.

Custody of minors — Rights of father as against persons to whom minor entrusted — Effect of previous Order.

Return to an order, directed to the Respondent, calling upon him to show cause why the girl Hanna should not be returned to the Petitioner; order made absolute:—

A father does not always have an absolute right to custody of his minor children.

(*A. M. A.*)

ANNOTATIONS :

1. Respondent in 1941 consented to his daughter being handed over and

entrusted to Petitioner. In October, 1943, Respondent asked for a writ of *habeas corpus* for the return of the child to him but his application was dismissed on 30.11.1943 (H. C. 101/43 — not reported) on the High Court finding that the child was well kept and that the dispute was only as to the frequency of the girl's visits to Respondent. Thereafter Respondent removed the girl out of Petitioner's care and took her to himself; whereupon Petitioner filed the present application for the return of the child alleging, *inter alia*, that Respondent was not a fit person to have the custody of his child.

2. See H. C. 19/43 (1943, A. L. R. 119) and annotations.

(*H. K.*)

FOR PETITIONER: Perles.

FOR RESPONDENT: Rand.

ORDER.

The order is made absolute, and the child is to be returned to the custody of the Petitioner under the same conditions as existed previous to her removal, as per judgment of the 30th November, 1943.

There will be an inclusive sum of LP. 10 costs as advocate's attendance fee.

Child Hanna is handed over to the custody of Jaqob Menashe Mizrahi.

Given this 11th day of February, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 339/43.

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

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

IN THE APPEAL OF:—

Abraham Abaya. APPELLANT.

v.

Nissim Oplatka. RESPONDENT.

Failure to mention in notice of appeal name and occupation of Respondent.

Appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, dated the 15th day of September, 1943, in Civil Appeal No. 37/43, allowed and case remitted:—

Omission in notice of appeal served upon Respondent's advocate to set out address and occupation of Respondent — no sufficient reason, if taken alone, for dismissing the appeal.

(*M. I.*)

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

ANNOTATIONS: See C. A. 72/40 (*supra*) and Motion 163/43 D. C. Jm. (unreported).

(*A. G.*)

FOR APPELLANT: Rosenberg.

FOR RESPONDENT: Mizrahi.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, dismissing an appeal on what the learned President himself admits is a purely technical point. It appears that the Appellant omitted in his notice of appeal to set out the address and occupation of the Respondent. In fact, we are informed — and it appears to be undisputed — that the papers were served upon the advocate for the Respondent, but there was this technical omission in contravention of Civil Procedure Rule 314(b).

The learned President appears to have considered himself bound by C. A. 72/40, P. L. R. Vol. 7, p. 334, where there were two preliminary objections made by the 1st Respondent, one of which and the less important was this same question about the address and occupation of the Respondent. In the result the Court, on both grounds, dismissed the appeal.

We have been referred to an earlier ruling by the same learned President on exactly the same point — Motion 163/43 — in which he distinguishes C. A. 72/40 on the very ground that would seem to be applicable to this case, that the appeal was dismissed "for all these reasons," one of the reasons being a question of a power of attorney. We think that the learned President was right the first time, if we may say so, and that had this earlier ruling of his own been brought to his notice at the hearing of the present case he would have given a different decision.

He says himself that he arrives at his conclusion with regret and that he would, if he could, have allowed the appeal subject to the costs of the adjournment.

We are of opinion, in all the circumstances of this case, that the appeal should be allowed and the case remitted to the District Court for the hearing of the appeal from the Magistrate's Court. No doubt the Appellant will be careful to comply with the rules before the next hearing.

The Respondent will have the costs of the abortive appeal before

the District Court in any event. The costs of this appeal will be in the cause and on the lower scale and, in order to simplify the final arrangements, we certify an advocate's attendance fee of LP. 10 to the ultimately successful party.

Delivered this 19th day of May, 1944.

British Puisne Judge.

HIGH COURT No. 37/44.

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

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

IN THE APPLICATION OF :—

Zeev (Wolf) Avinoar (Kremer) & an. PETITIONERS.

v.

1. Assistant Chief Execution Officer, District Court, Jerusalem,
2. Haya Kremer. RESPONDENTS.

Attachment by Execution Officer of shares in a private company —. Inapplicability of English law or procedure to attachment of shares in a private company.

Return to an order *nisi*, issued on the 24th day of March, 1944, directed to the first Respondent, calling upon him to show cause why his order, dated the 5th March, 1944, refusing the Petitioners' allegations and ordering the continuation of the execution proceedings as to the attachment of LP. 1500, shares of the Zaaz Company, The Palestine Woodwork Industry, Ltd., and their sale by public auction, should not be set aside, the attachment of the said shares should not be cancelled, and why all and singular execution proceedings in the District Court of Jerusalem as to these shares, Execution File No. 305/43, should not be stayed; order discharged:—

> Nothing in art. 81, Execution Law, prevents its application to shares in a private company, so it is unnecessary to look to English law or procedure for guidance. Subject to the limitations imposed by sec. 25A Companies Ordinance, such shares may be attached by Execution Officer and, if necessary, sold by public auction.
>
> (*M. L.*)

ANNOTATIONS: On application of English law see P. C. 1/42 (10, P. L. R. 271; 1943, A. L. R. 408) and C. A. 240/37 (5, P. L. R. 159; 3, Ct. L. R. 104; 1938, 1 S. C. J. 148) and annotations.

(*A. G.*)

FOR PETITIONERS: Frank.

FOR RESPONDENTS: No. 1 — Absent — served.
No. 2 — Mrs. Stern.

ORDER.

This is a return to an order *nisi,* directed to the first Respondent, calling upon him to show cause why his order, dated the 5th March, 1944, refusing the Petitioners' allegations and ordering the continuation of the execution proceedings as to the attachment of LP. 1500.— shares of the Zaaz Company, The Palestine Woodwork Industry, Ltd., and their sale by public auction, should not be set aside, the attachment of the said shares should not be cancelled, and why all and singular execution proceedings in the District Court of Jerusalem as to these shares, Execution File No. 305/43, should not be stayed.

There is only one point for decision, namely, has the Execution Officer authority to attach shares in a private company.

Respondent argues that the established practice in Palestine is for the Chief Execution Officer to attach and if necessary sell the shares of a private company, and that he has full authority to do so in accordance with Article 81 of the Execution Law. In Palestine we have an Execution Law and Execution Officers, whereas in England there is a different procedure — there is no Execution Officer and the Sheriff executes. There is no necessity to look further than the Execution Law, Article 81, and this petition should be dismissed.

The Petitioner argues that as shares in a private company are the subject-matter of attachment in this case, the correct procedure is by way of application to Court for a charging order, as in England, following the English practice, where execution is effected by the Sheriff and there is no Execution Officer. Halsbury, Vol. 14, note (i) page 120, as to effect of charging order page 129.

Article 81 of the Execution Law has no bearing whatever as to the shares of a private company — a private company restricts the right to transfer its shares. The Execution Law was enacted in 1914 at the time Turkish legislation, based on French law affecting companies, was in force. Shareholders held certificates which were negotiable and constituted their right. In this case there is no document to seize, a share in a private company is not a share within the meaning of the word 'document' in Article 81 of the Execution Law — a person gets no transferable share. If there is something missing in the law it cannot be supplied by the Execution Office. There is nothing to attach except the Petitioner's interest. Asks that this order be made absolute.

The procedure by way of charging order in England does not constitute an order of sale but has much the same effect as an order of attachment in Palestine. Its effect as regards stocks, funds, *etc.*, is to

restrain the company or other body from permitting a transfer of the stock or shares, *etc.*, in the meantime until such order is made absolute or discharged. To enforce the order when made absolute, the remedy of the unpaid judgment-creditor is to take proceedings to procure a sale of the charged property. This is done by way of originating summons in the Chancery Division. In some cases a further "stop order" is necessary.

We are invited by the Petitioner to adopt this entirely new procedure on the ground that Article 81 of the Execution Law does not apply to private companies. In our opinion there is nothing in the wording of Article 81 which prevents its application to shares in a private company subject to the limitations imposed by Section 25A of the Companies Ordinance Cap. 22, and that, therefore, we need not look to English law or procedure for guidance.

For these reasons the order *nisi* is discharged with inclusive costs of LP. 10.

Delivered this 6th day of June, 1944.

A/British Puisne Judge.

HIGH COURT No. 59/44.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPLICATION OF :—

Fayez Darwish Wheidi & 5 ors.
on behalf of themselves and on behalf
of the Wheidi Tribe Tarabin, Beersheba. PETITIONERS.

v.

1. Assistant District Commissioner, Beersheba,
2. District Commissioner, Gaza,
3. The Attorney General. RESPONDENTS.

Bedouin Control Ordinance — "Nomadic tribe" — Secs. 2, 3, 4 — Conflicting affidavits — Evidence in High Court.

Return to a rule *nisi*, issued on the 5th of May, 1944, directed to the first and second Respondents, calling upon them to show cause why they should not be restrained from removing or causing to be removed forcibly or otherwise, all or any members of the Wheidi Tribe from their places of residence in the Beersheba Sub-district to any other area; order made absolute:—

1. The Bedouin Control Ord. may only be applied to tribes which are nomadic or semi-nomadic at the time of application.

2. When faced with conflicting affidavits, the High Court may hear evidence.

(*A. M. A.*)

ANNOTATIONS: For other instances of conflicting affidavits in the High Court see, *e. g.*, H. C. 58/42 (1942, S. C. J. 380; 12, Ct. L. R. 27) and H. C. 34/43 (10, P. L. R. 157; 1943, A. L. R. 161) in both of which cases it was held that the Petitioner had failed to discharge the onus of proof which was upon him.

(*H. K.*)

FOR PETITIONERS: Cattan.

FOR RESPONDENTS: Solicitor General — (Griffin).

ORDER.

This is a return to a rule *nisi*, directed to the Respondents, calling upon them to show cause why they should not be restrained from removing or causing to be removed forcibly or otherwise all or any members of the Wheidi Tribe from their places of residence in the Beersheba Sub-district to any other area.

Now, the matter depends of course upon the interpretation of the Bedouin Control Ordinance. That Ordinance provides, under Section 3, that "the High Commissioner may by order declare that the provisions of this Ordinance shall apply to any nomadic or semi-nomadic tribe or community in Palestine", and then if one refers to the definition of a "nomadic tribe", it says, "Nomadic tribe means any nomadic or semi-nomadic tribe or community in Palestine to which the provisions of this Ordinance have been applied." There has been no argument in this case and there is in fact no dispute that if the Ordinance was applicable to this Wheidi Tribe or community, then the particular order of the District Commissioner was fully covered by Section 4(a) of the Ordinance. The point, however, has been taken by Mr. Cattan, Petitioners' advocate, that these persons, the Wheidi Tribé, are not nomadic, and by the wording of Section 3 and Section 2(2) the High Commissioner is only empowered to apply the Ordinance to a nomadic or semi-nomadic tribe, that is to say, that it is a condition precedent that before the Ordinance can be applied by the High Commissioner to any tribe, such tribe should be nomadic or semi-nomadic.

On that matter when the case first came before us on the return day we were confronted with two conflicting affidavits. The Petitioners' affidavit stated that the Wheidat are not nomadic, and the first Respondent's affidavit says that they are. In view of that it seemed to us that this was one of those rare cases when this Court should hear evidence, and we gave an opportunity to the Petitioners and the

Attorney General to call responsible and impartial persons to give their considered opinion as to whether the Wheidi sub-tribe is nomadic or otherwise.

We had the opportunity today of listening to the evidence of Sheikh Sani, who says that he is a Sheikh of the Tayaba Tribe which has no connection with the Tarabin, of which the Wheidi are a sub-tribe. This gentleman was for some time a Judge of the Tribal Court, and is now a member of the Blood Committee charged with settling blood-feuds, and from time to time he is called upon to arbitrate in private feuds. He says that he is about 53 years of age, that he lived all his life on the eastern boundary of the locality where dwells the Wheidi Tribe, and that while he himself and his tribe are nomadic, and the Hanajra and Jubeirat tribes are the same, yet in his opinion the Wheidi are not. He says that they are of Bedouin origin and he would generally describe them as Bedouins. But for all the time he has known them, and he does not know for how many years before, they in fact have not been living a nomadic life. He says that they have a *Khirbet* consisting of some half-a-dozen clusters of houses, of a few houses each. They have lands which have been partitioned, and in fact they have always remained on the same lands. And he says from all these facts he concludes that they have developed from a nomadic community into a non-nomadic community. This gentleman has given his evidence fairly, and we have no reason to doubt it. It is also the only evidence before us.

The learned Solicitor General with his usual ability has put before us a seductive argument, and he says that there is no doubt that these people are of Bedouin origin — which is undoubtedly the case — and that once you have people of a nomadic origin then that quality must remain, even if their habit of life is subsequently changed, and they should always be treated as nomads. That, of course, raises an interesting field of discussion, but we are only dealing for the purpose of this Ordinance with the point whether the Wheidi Tribe are nomadic within the meaning of the said Ordinance. We are of the opinion that in order to bring a tribe within the operation of the Ordinance the nomad quality must exist at the relevant time (*i. e.* at the time of the making of the Order) and, if it has ceased to exist then, in our opinion the Ordinance would not apply to that tribe.

We are, therefore, of the opinion that the High Commissioner had no power to apply the Ordinance to this particular sub-tribe.

We would add that as to the future, the difficulty can be met, if

it is intended to give this wider power to the Administration, by a simple amendment of the Ordinance.

The rule must, therefore, be made absolute. The Petitioners do not ask for costs.

Given this 20th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 336/43.

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

BEFORE: Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Shaul Rein. APPELLANT.

v.

Izhak N. Mirkin. RESPONDENT.

Adjournments — Magistrate refusing adjournment — Exercise of discretion not to be interfered by appellate Court — Function of appellate Court, C. P. R. 339 — Costs.

Appeal from the judgment of the District Court of Tel Aviv, in its appellate capacity, dated the 23rd day of July, 1943, in Civil Appeal No. 62/43, allowed:—

Adjournments are matters within the discretion of the trial Court.

An appellate court should not interfere with matters within the discretion of the trial Court unless the discretion was exercised unreasonably or capriciously.

(*A. M. A.*)

ANNOTATIONS: See C. A. 311/43 (*ante*, p. 73) and annotations.

(*H. K.*)

FOR APPELLANT: Kolodny.

FOR RESPONDENT: Adereth.

JUDGMENT.

This matter first came before the Magistrate of Tel-Aviv on the 14th June, 1942, and concerned a claim for LP. 46.840 mils. There were repeated adjournments ending up in an appeal to the District Court where judgment was given on the 23rd July, 1943. An appeal by leave has been made to this Court and now the matter comes before us. It is perhaps unnecessary to say more than that it is really deplorable that a perfectly simple matter of this nature could not have been determined in less than two years.

Now, in the original case, the Magistrate gave judgment for the Defendant, that is the present Appellant, on the ground that the Plaintiff-Respondent had failed to prove his case, which was that in pursuance of the guarantee he had paid out the sum of LP. 46.840 mils on behalf of the present Appellant. The Respondent appealed to the District Court who decided that the Magistrate was wrong in refusing to give them still another adjournment in order to call the clerk of a certain advocate to testify to material matters. That, in our opinion, whatever the merits of this dispute may be, seems to us to be perfectly a matter within the discretion of the trial Court and an appellate Court should be most reluctant to interfere with the discretion either to grant or to refuse an adjournment unless they can be fully satisfied that the discretion was exercised unreasonably or capriciously.

It seems to us that that really concludes the matter. There was no cross appeal under rule 339 complaining that the District Court had not given judgment forthwith for the Plaintiffs. It is suggested here by the Respondent that in any event under rule 350 we should give judgment for LP. 12 as it would seem to be extremely probable, from the documents in the case, that such an amount is due but, as has been pointed out by counsel for the Appellant, that would really involve our going into the secondary matter as to the question of payment of LP. 25 which is, as the District Court themselves say, a matter to consider after hearing the evidence of Dr. Zakheim's clerk, when it would then be for the Defendant to prove payment. In our opinion the Magistrate was entitled to refuse to grant an adjournment to call that gentleman to give evidence. The appeal, therefore, is allowed, the judgment of the District Court set aside and the judgment of the Magistrate restored.

Having regard to the merits of the matter and more especially having regard to the question of the LP. 12, we feel, however, that as regards the costs of the appeal the Appellant should have only nominal costs. We give him, therefore, an inclusive sum of LP. 5 for this appeal. He will, of course, have the costs of the proceedings in the District Court and the Magistrate's Court.

Delivered this 15th day of May, 1944.

British Puisne Judge.

HIGH COURT No. 42/44.

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

BEFORE : Rose and Frumkin, JJ.

IN THE APPLICATION OF :—

Abdul Razak el Kayaly. PETITIONER.

v.

1. Yaqub Samoury,
2. Chief Execution Officer, Magistrate's Court, Jaffa. RESPONDENTS.

Consent judgment for eviction — Agreement between parties regarding lease made after consent judgment — Question as to whether or not agreement created novation.

Return to a rule *nisi*, issued on the 24th of April, 1944, directed to the second Respondent, calling upon him to show cause why he should not refrain from proceeding with execution in Execution File No. 52/44, and why his order, dated 15th March, 1944, should not be set aside; order discharged:—

Where wording of agreement of lease made by parties subsequent to judgment for eviction shows that parties had in mind the judgment and intended to bind themselves by it and not to cancel it by the new agreement, there is no novation, and if Execution Officer proceeds with eviction High Court will not interfere.

(*M. L.*)

ANNOTATIONS:

1. On effect of consent judgment for eviction see H. C. 114/43 (10, P. L. R. 706; 1943, A. L. R. 820) and annotation in A. L. R.

2. On execution of consent judgment if not varied see H. C. 127/43 (11, P. L. R. 31; *ante*, p. 201) and cases followed and annotations.

(*A. G.*)

FOR PETITIONER: Germanus.

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

ORDER.

In this case it appears that the Petitioner and the Respondent entered into a judgment by consent, duly approved by the Magistrate on the 25th March, 1943, by which the Petitioner agreed to vacate at a certain date. For reasons which, in spite of Mr. Elia's ingenuity, appear to us still to be obscure, a new agreement was entered into between the parties, and the Petitioner now relies upon that new agreement as showing that, in fact, a novation has taken place.

This matter was argued before the Chief Execution Officer, Jaffa, and he, on the 15th March, 1944, made an order in the following terms:—

> "It is obviously clear from the wording of the contract of lease that the parties had in mind the judgment of the Court at the time they have written the deed and had intended to bind themselves by that judgment and, further, they had no intention of cancelling the said judgment by the deed they had concluded. I, therefore, order the execution of eviction proceedings."

That is what Mr. Nusseibeh said, after looking at the relevant documents, and we certainly are not prepared, in view of the deletion of one of the clauses which is relied upon by the Petitioner, to say that the Chief Execution Officer was wrong in forming that view. In any event, having regard to the merits of the matter, we would not be disposed to exercise our discretion in favour of the Petitioner.

For these reasons the rule must be discharged, with costs in an inclusive sum of LP. 10.

Given this 22nd day of May, 1944.

British Puisne Judge.

HIGH COURT No. 57/44.

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

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

IN THE APPLICATION OF :—

Mifleh Ahmed el Musa & 27 ors. — PETITIONERS.

v.

1. Assistant Chief Execution Officer, Magistrate's Court, Haifa,
2. The Meshek Co. Ltd. — RESPONDENTS.

Execution — Failure of advocate to appear — Cultivators dispute pending under sec. 19 — Effect on execution — Merger.

Return to a rule *nisi*, issued on the 10th May, 1944, directed to the first Respondent, calling upon him to show cause why his orders, dated the 4th and the 6th of April, 1944, in Execution File No. 2294/35 should not be set aside; rule discharged:—,

> The existence of a determinable dispute under sec. 19 of the Cultivators (Protection) Ord. is no bar to eviction proceedings.
>
> (*A. M. A.*)

FOR PETITIONERS: F. Atalla.

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

ORDER.

FitzGerald, C. J.: This is a return to a rule *nisi;* it concerns a protracted and apparently bitter land dispute. It is understandable, therefore, that it was argued at some length before us although the issue with which we are called upon to deal can be stated briefly and can be disposed of with equal brevity.

In 1938 the 2nd Respondents — the Meshek Co. Ltd. — got a writ of execution for possession of certain lands against the Petitioners in execution of a judgment delivered in 1935. Owing to certain disturbances created by the Petitioners the writ was not completely executed in 1938. Indeed it is not denied that the completion was postponed at the intervention of the 2nd Respondents who, so they aver, were anxious to enter peacefully if that were possible. Meanwhile land settlement operations took place in the area and the right of the 2nd Respondents to the land in dispute was confirmed by the Settlement Officer. The 2nd Respondents thereupon again applied to the Chief Execution Officer to execute the writ. The Chief Execution Officer fixed 8.30 *a. m.* on 4th April, 1944, for what is termed a hearing. Notice of hearing was served on Fuad Bey Atalla on behalf of the Petitioners and such notice was duly endorsed by his clerk. Fuad Bey Atalla did not appear at the hearing. The Magistrate — who was the Chief Execution Officer — waited until 8.45 *a. m.* when he endorsed the application for execution as granted.

The Petitioners now seek relief from the consequence of this grant of execution on the grounds (a) that the Chief Execution Officer should not have proceeded in the absence of the Petitioners' advocate, (b) that proceedings are pending under the Cultivators (Protection) Ordinance, (c) the length of time from the judgment.

In regard to the first point it will suffice if I say that failure of an advocate to appear to defend the interests of his client at the time appointed would not be a ground for setting aside an order made in his absence unless I were satisfied that the time and place fixed were unreasonable. As I am far from coming to any such conclusion I dismiss this point.

I come now to (b). It is admitted that a dispute exists in regard to rights claimed under the Cultivators (Protection) Ordinance. That

dispute has not yet been determined under section 19 of the Ordinance. In my opinion the mere fact that a dispute is pending under the Cultivators (Protection) Ordinance does not constitute a bar to the execution of a judgment of possession granted by a competent Court. I would moreover observe that in this case the dispute as to cultivators' rights has been pending for no less than six years. The petition fails on this ground.

Finally it has been argued that the judgment granted in 1935 cannot be executed now because it has been merged in the judgment of the Settlement Officer. In my opinion there is no real substance in this contention. The 2nd Respondents in fact did apply to the Settlement Officer who told them that as they already had a judgment in their favour any further order from him was unnecessary.

For these reasons the rule must be discharged with LP. 10.— inclusive costs.

Given this 12th day of June, 1944.

Chief Justice.

Abdul Hadi, J.: I concur.

Puisne Judge.

HIGH COURT No. 32/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF:—

Director of Customs, Excise and Trade, Haifa & an. — PETITIONERS.

v.

Moshe Merdinger & an. — RESPONDENTS.

Change of venue — Conditional order — Costs of application, H. C. 21/38, H. C. 23/40 — Costs in test case.

Return to an order *nisi*, issued on the 24th day of March, 1944, directed to the Respondents, calling upon them to show cause why the proceedings in Civil Case No. 140/43 (District Court, Jerusalem) should not be removed for trial from the said District Court to the District Court of Haifa; order made absolute:— Conditions on order for change of venue refused.

(*A. M. A.*)

REFERRED TO: H. C. 31/44 (*ante*, p. 280); H. C. 21/38 (1938, 1 S. C. J. 251; 3, Ct. L. R. 209); H. C. 23/40 (7, P. L. R. 151; 1940, S. C. J. 371; 7, Ct. L. R. 112).

ANNOTATIONS: After the decision in H. C. 31/44 (*supra*) had been given Respondents did no longer oppose the petition in this case as such but asked the Court to impose conditions as to costs. In support of this prayer reference was made to the necessity for "an undertaking that the petitioner is willing to give security" according to para. (iii) of Form No. 1 in the Schedule to the High Court Rules (P. G. 1937, Suppl. 2, at p. 303) and H. C. 21/38 and 23/40 (*supra*) were cited as examples of orders being made by the High Court on terms.
(*H. K.*)

FOR PETITIONERS: Assistant Government Advocate — (Gavison).

FOR RESPONDENTS: Weyl.

ORDER.

This is the return to an order *nisi*, calling upon the Respondents to show cause why a certain civil action in which they are the Plaintiffs should not be removed for trial from the District Court of Jerusalem to the District Court of Haifa.

Dr. Weyl, for the Respondents, has said that, in view of the decision of this Court in High Court No. 31/44 the facts in which are similar to those in the present case, he is not able to resist this petition but he has asked that I may, in making the order absolute, make certain conditions as to the Defendants to the action paying, in any event, additional costs which may be incurred by his clients by reason of the change of venue and in support of his application he has cited High Court No. 21/38 and High Court No. 23/40, P. L. R. Vol. 7, p. 151.

Mr. Rigby, Crown Counsel, who has appeared for the Petitioners, has left the matter to myself; but I think that no conditions ought to be imposed. I have, however, no doubt that, whatever the result of the case in the District Court may be, that Court in dealing with the question of costs will, at any rate, listen to any arguments put before it on behalf of the present Respondents, that is, the Plaintiffs in the action, dealing with the question of any additional expense to which the Plaintiffs have been put.

I am also told that this is a test case; if this be so, then I have no doubt that in the event of the action being dismissed the Government will realise this and will not press for excessive costs.

The order is made absolute. I understand that Government does not ask for the costs of this petition; so that the order will be "no costs."

Given this 24th day of May, 1944.

British Puisne Judge.

CRIMINAL APPEALS Nos. 163 & 164/43.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Haj Mohammad el Eisawi. APPELLANT.

v.

The Attorney General. RESPONDENT.

Question of additional fine under Reg. 46, Defence Regulations, 1939 — Order of confiscation qualified by addition that proceeds of sale of the goods should be paid to owner.

Appeals from the judgment of the District Court, Jaffa, sitting in its appellate capacity, dated 26th November, 1943, in Criminal Appeals Nos. 105/43 and 106/43, dismissed and sentences varied:—

1. Additional fine under Reg. 46, Defence Regulations 1939, can be imposed only if prosecution after conviction or plea of guilty and before sentence, adduces evidence as to the value of the goods.

2. Court, when ordering confiscation of goods under Reg. 46, Defence Regulations, 1939, has no power to qualify the order that the proceeds of the sale should be paid to the owner.

3. When a professionally qualified magistrate uses a technical term referred to in a regulation, he must be presumed to know what that term implies, thus if he orders confiscation under Reg. 46, Defence Regulations, 1939, any addition qualifying the order cannot render it ineffective.

(*M. L.*)

ANNOTATIONS :

1. As to an order of a Court containing a matter not within the jurisdiction of the Court see H. C. 35/44 (*ante*, p. 217) and note 2 thereto.

2. On power of confiscation under Defence Regulations see CR. A. 130/43 (10, P. L. R. 578; 1943, A. L. R. 772), by Magistrate — CR. A. 76/43 (10, P. L. R. 375; 1943, A. L. R. 460).

(*A. G.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

These are appeals by leave from a judgment of the District Court of Jaffa varying a judgment of the Chief Magistrate's Court of Jaffa.

In these cases the Appellant pleaded guilty to two offences against the Defence Regulations — in one case of being in possession of certain yarn without a licence; and in another of selling a certain quantity of paper contrary to the relevant provisions of the Defence Orders.

To deal first with the yarn — he was liable under regulation 76 of the Defence Regulations, 1939, to a term of imprisonment not exceeding three months or to a fine not exceeding LP. 100 or to both such imprisonment and fine. The learned Chief Magistrate in fact sentenced him to a fine of LP. 25.

It is to be noted that the quantity of yarn in this case is substantial, and we think on the whole that the learned Relieving President was correct in regarding the fine as insufficient and in increasing it to LP. 100, which was the maximum fine provided by the regulation.

With regard to the paper, the learned Chief Magistrate in that case imposed the maximum financial sanction by imposing a fine of LP. 100, and so no point on that part of the case arises. But in addition a person who is found guilty of such offences as these renders himself liable under regulation 46 of the Defence Regulations, 1939, to a further fine which, in a case such as we are considering, must not exceed an amount three times the price which the article might be expected to fetch if lawfully sold. In this particular case no evidence was adduced before the Chief Magistrate as to what the value of this property was or what price it was likely to fetch in the event of its sale; and the learned Relieving President himself adopts that fact as the reason for his not imposing a fine in respect of the cotton yarn. He says in his judgment that there was no evidence of the value of the goods, and he, therefore, does not exercise his powers under regulation 46 and leaves the fine at LP. 100. With regard, however, to the paper, he adverts to the fact that the Attorney General in his grounds of appeal to the District Court stated the value of the goods to be LP. 1,400. I suppose by that he means the value they would be likely to fetch in the open market. On that the learned Relieving President proceeded to impose a fine of LP. 500.

It seems to us that adopting the argument which he himself adopted in the instance of the yarn, and which we consider to be correct, the same principle should be applied with regard to the paper. It seems to us that the appropriate time for the value of the paper to be proved was after the plea of guilty was taken and before sentence was imposed in the trial Court. It is clear in our view that where you have a regulation that provides, as it were, a yardstick for the amount of the fine to be imposed, a Court is unable to apply that yardstick unless it is given, at the time it passes sentence, the material which enable it to apply it. In this case it seems to us that the correct and sensible practice is that in the event of a plea of guilty, after the plea has been taken and before sentence is given, the prosecution should, if they wish

regulation 46 to be acted upon, adduce evidence as to the value of the goods which, of course, the defence would be at liberty to challenge on that issue. In the absence of such evidence we think, on the learned Relieving President's own reasoning, that he was wrong in imposing this additional fine with respect to the paper, and we would add, which reinforces us in our view, that learned Crown Counsel himself agrees that he finds difficulty in supporting that part of the sentence.

An important point now arises as to confiscation. Under Regulation 46 the Court by or before whom a person is convicted of an offence, may order the confiscation of the goods in question. The first point that arises on that is as to whether in this particular case the learned Chief Magistrate ordered confiscation. What he said was "the goods to be confiscated, sold on the open market and proceeds to be paid to the rightful owner, Ragheb Tewfik Elias Abu Hassan". I think it is clear, and common ground to both sides, that the learned Chief Magistrate had no power to make such a qualification of his order. His power under regulation 46 is to confiscate, and in a case where confiscation is ordered, certain results follow by the regulation itself. We therefore have no doubt whatever that he was quite wrong in making such a qualification. The point we have to consider is whether the making of that qualification means in effect that there was no confiscation at all. Mr. Cattan argues that that should be the reasonable interpretation given. There are, of course, cases in which in spite of the use of the word "confiscation" the subsequent wording of the Chief Magistrate might lead a Court irresistibly to the conclusion that he did not intend the goods to be confiscated; but it seems to us that one of the tests must be the effect on the Appellant; that is to say, did he intend these goods to be removed from the ownership of the Appellant? And it seems that he did. As the learned Relieving President said: "the Magistrate used the word 'confiscated', and I presume he meant 'confiscated'," and we are not prepared to disagree with that. After all, when a professionally qualified Magistrate uses a technical term that is referred to in a regulation, he must be presumed to have known what that term implies. That being so, we think that in fact it was an order of confiscation. We would add that we feel less anxiety in this matter because on the merits we agree with the learned Relieving President when he says that he thinks that this was a case in which confiscation should have been ordered. And if an order of confiscation was made, then the learned Relieving President was clearly right in varying the order and deleting this additional qualification which the learned Chief Magistrate had no power to impose. Therefore, the effect is that an order of confiscation was made

and the results prescribed in regulation 46(1)(a) must follow from that order.

That being so, it is unnecessary for us in this case to consider the further interesting and potentially important point as to whether the Attorney General has a right to appeal against a refusal to confiscate under this regulation by a Magistrate's Court or of any court of first instance.

For these reasons both the appeals will be dismissed subject to the variation as to the LP. 500 fine to which we have already referred. The Appellant is, of course, entitled to a refund of this amount, if he has already paid it.

Delivered this 9th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 340/43.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Ibrahim Muhammad Lazan. APPELLANT.

v.

Rabah Aref el Rayyes,
in his capacity as Mutawalli on the
wakf of Sheikh Muhammad el Jabri. RESPONDENT.

Mutawalli leasing 16 out of 24 shares of land — Order of eviction from land at expiration of lease — Lessee alleging co-ownership, also invoking Cultivators (Protection) Ordinance.

Appeal from the judgment of the District Court of Jaffa, in its appellate capacity, dated 31.7.43, in Civil Appeal No. 77/43, dismissed:—

1. A power of attorney given to lessee of land by owners of undivided shares therein authorising him to sell those shares does not make him a co-owner within meaning of art. 1072 of *Mejelle.*

2. Fact that a dispute between lessor and lessee of land is pending before Special Commission under Cultivators (Protection) Ordinance does not preclude Magistrate from ordering eviction of that land.

(*M. L.*)

ANNOTATIONS: On action for eviction against co-owner see C. A. 250/43 (11, P. L. R. 99; *ante*, p. 133).

(*A. G.*)

FOR APPELLANT: Hawari.

FOR RESPONDENT: Elia.

JUDGMENT.

In this case the Respondent in his capacity as *Mutawalli* on *wakf* of Sheikh Mohammad el Jabri leased 16 shares out of 24 *kirats* of certain land known as Sakiet el Maraja to the Appellant. At the termination of the lease the Respondent applied to the Magistrate's Court at Gaza for an order of eviction which the Magistrate duly granted. The District Court at Jaffa on appeal upheld the Magistrate's decision. The lessee was granted leave by the District Court to take this further appeal.

I find it difficult to appreciate the reasons that urged the lower Court to grant leave to appeal in this case. The issues are simple ones and they are almost entirely on questions of fact.

The Appellant says that he is a co-owner because he purchased the remaining shares of the land that was leased to him. A co-owner, he argues, cannot be ejected and he quotes Article 1072 in support of this theory. I find it unnecessary to consider what in fact is the real effect of Article 1072 of the *Mejelle* because I agree with the Respondent that the Appellant is not a co-owner. The document upon which he relies to establish his co-ownership is nothing more than a Power of Attorney from the owners of the remaining shares authorising him to sell their shares.

One other point was stressed in this appeal although it appears to have been but barely touched upon before the Magistrate and the District Court, that is the claim of the Appellant to the relief afforded by the Cultivators (Protection) Ordinance. That claim of the Appellant is disputed by the Respondent. It appears that that dispute is pending before, but has not yet been decided by the Special Commission provided for in Section 19(1) of the Ordinance.

I agree with the learned Judges in the Court below that the fact that this issue was pending under the Cultivators (Protection) Ordinance would not preclude the Magistrate from making an eviction order.

The appeal is dismissed with LP. 10 inclusive costs.

Delivered this 5th day of June, 1944.

Chief Justice.

HIGH COURT No. 40/44.

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

BEFORE: Edwards, J.

IN THE APPLICATION OF :—

Rabbi Abraham Shlomo Borvick through his representative Yona Leib Kaplansky. PETITIONER.

v.

1. President, District Court, Tel-Aviv, in his capacity as Chief Execution Officer,
2. Nachum Isaac Merkin, in his personal capacity and as legal representative of the estate of the late Hilel Merkin. RESPONDENTS.

Order nisi made absolute in absence of Respondent — Petition by aggrieved Respondent to set aside the order — Failure to file certified copy of order complained of — High Court setting aside its order on being satisfied that there was no proper service on Respondent.

Return to an order *nisi*, issued on the 24th of April, 1944, directed to the Respondents, calling upon them to show cause why: (a) the order of the High Court of Justice, dated 16th February, 1944, in High Court Case No. 126/43, should not be set aside; and (b) the order of the Chief Execution Officer, Tel-Aviv, dated 29th September, 1943, in Execution File No. 7716/38, should not be reinstated, or in the alternative, such other relief and/or remedy as the High Court of Justice may deem just; order made absolute:—

1. a) Certified copy of order complained of, which as a rule petitioner in High Court must file, may be dispensed with, if petitioner gives a satisfactory explanation for not having filed such copy.
b) Petitioner's presumption that his petition will be regarded as motion in decided High Court case and fact that certified copy of order complained of was in Respondent's hands may be sufficient reason for dispensing with filing of copy.

2. Where High Court Rules are silent English practice must be resorted to under art. 46 of Palestine Order-in-Council.

3. Before High Court can make an order *nisi* absolute in Respondent's absence they must have sufficient proof of valid service of order on Respondent.

4. An order made by High Court in absence of Respondent can be upset, if Respondent shows that he never had a chance of replying to the petition.

(*M. L.*)

REFERRED TO: C. A. 143/43 (10, P. L. R. 407; 1943, A. L. R. 492); C. A. 94/39 (6, P. L. R. 493; 1939, S. C. J. 446); Kennedy *v.* Dandrick (All England Law Reports (1943), Vol. 2, p. 606).

ANNOTATIONS:

1. As to what is good cause under the Civil Procedure Rules see C. A. 156/43 (10, P. L. R. 335; 1943, A. L. R. 582) with annotations thereto.

2. As to possibility of importing English practice see H. C. 1/41 (8, P. L. R. 2; 9, Ct. L. R. 80; 1941, S. C. J. 8).

3. On remedy of setting aside judgment on ground of fraud see cases referred to with annotations thereto.

(*A. G.*)

FOR PETITIONER: Orren.

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

ORDER.

This is the return to an order *nisi*, calling upon the second Respondent to show cause why the order of this Court of 16th February, 1944, in High Court Case 126/43, should not be set aside.

At the hearing before me on the return day, the advocate for the second Respondent took the preliminary objection that a certified copy of the order of this Court of 16th February, 1944, in High Court 126/43, had not been produced. While it is true that it has been decided by this Court that petitioners in High Court cases ought to file a certified copy of the order against which they are complaining, the advocate for the present Petitioner has satisfied me that in this case it has been unnecessary for him to do so. He has explained to my satisfaction that, when he filed his petition in the present matter, he thought that the Registry would regard his petition as in essence a motion in High Court 126/43. He, therefore, did not think that it was necessary to file a copy of the order in High Court 126/43. Moreover, he did not know that the Registry would give his petition a new number, namely 40/44, and in any event the certified copy of the order of 16th February, 1944, was in the hands of the second Respondent, who, in fact, had taken it to the Chief Execution Officer, Tel-Aviv, for execution. It was, therefore, superfluous for him to file a copy and serve a copy on the second Respondent.

The facts of High Court 126/43 shortly were, that the Chief Execution Officer, Tel-Aviv, on the 29th September, 1943, made an order in favour of the present Petitioner who was a mortgagor. By that order the Chief Execution Officer required the present second Respondent, the mortgagee, to commence fresh proceedings for the execution of his

mortgage on the ground that the proceedings had been interrupted for over four years. The present second Respondent applied to this Court in High Court 126/43 for the setting aside of the ruling of the Chief Execution Officer. This Court, on 18th January, 1944, granted an order *nisi*, and on the return date, which was the 16th February, 1944, this Court made the following order:—

> "The second Respondent has not filed an affidavit in reply, nor did he appear on the return day. The rule *nisi* is, therefore, made absolute."

The present Petitioner has made various allegations of fraud before me; but, in my view, the sole ground on which he can at the moment rely for the setting aside by this Court of the order of 16th February, 1944, is that he was not served with the order *nisi* of 18th January, as is required by rule 5 of the High Court Rules, 1937.

It seems that a copy of the petition in High Court 126/43 was served on a Mr. Krauthamer, who refused to accept service. Service was intended to be effected upon the present Petitioner, that is the second Respondent in High Court 126/43, through a Mr. Shlomo Felman, advocate. The present Petitioner's advocate alleges that Mr. Felman was not the proper agent for service on Mr. Borwick, the present Petitioner. It is at least doubtful whether Mr. Felman was entitled to accept service on behalf of Mr. Borwick. Quite apart from that, however, there is absolutely nothing to show that Mr. Krauthamer was entitled to accept service on behalf of Mr. Felman. It is not clear what relationship Mr. Krauthamer bore towards Mr. Felman. I am told that he occupied the same office, or at any rate a room in the same building as Mr. Felman, but there is nothing to show that he was a partner or an assistant of Mr. Felman. At any rate, the fact remains that Mr. Krauthamer refused to accept service. In my view, therefore, there was before this Court on the 16th February, 1944, no sufficient proof of valid service, as is required by rule 5. I am told that there is no decided case which can guide me. Can an order of the High Court made in the absence of a Respondent be set aside in the same manner in which an order in a civil case made in default of appearance can be set aside under rule 213 of the Civil Procedure Rules, 1938? I am not quite sure; but, if the High Court Rules are defective, I feel that Mr. Orren, who argued this matter for the Petitioner, is correct when he says that we must fall back on English practice under Article 46 of the Palestine Order-in-Council, 1922. Mr. Orren has referred me to Civil Appeal 143/43, 10 P. L. R., page 407; Civil Appeal 94/39, 6 P. L. R., page 493; Hailsham, Vol. 19, page 263, paragraph 562; Law Journal (Chancery), Vol. 99, page 228; Law Times Re-

ports (1918), Vol. 87, page 844; and to the case of Kennedy *v.* Dandrick, All England Reports (1943), Vol. 2, pages 606 and 608.

In my view, in order to do justice, it is essential that the present Petitioner should have a chance of replying to the petition in High Court 126/43. That chance I feel he has never had. It must also be remembered that the order of the Chief Execution Officer of 29th September, 1943, was in his favour. I hold that there is nothing in law to prevent my setting aside the order of this Court of 16th February, 1944. This I accordingly do.

Dr. Kleinzeller's client must serve the present Petitioner with the order *nisi*, dated the 18th January, 1944, and thereafter the present Petitioner must, after due service, act in accordance with the High Court Rules, and a new return date for the hearing of the order *nisi* of 18th January, 1944, will be fixed by he Chief Registrar.

The present second Respondent must pay the Petitioner's costs of this petition, which I assess as fixed costs of LP. 5.

Given this 31st day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 360/43.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Joseph Rotenberg. APPELLANT.

v.

Kalman Bernstein & an. RESPONDENTS.

Claim before Chief Magistrate for LP. 200 as equivalent of 2,500 zlotys, based on foreign judgment — Dismissal of claim for lack of jurisdiction — Methods of suing on a foreign judgment.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 30th day of July, 1943, in Civil Appeal No. 79/43, dismissed:—

Person relying on a foreign judgment (not where he is suing, without mentioning foreign judgment, on documents expressed in foreign currency) has only two methods of suing, whatever the sum claimed may be: 1) application to District Court for grant of an *exequatur;* 2) action in District Court on the foreign judgment.

(*M. L.*)

FOLLOWED: C. A. 145/38 (5, P. L. R. 428; 4, Ct. L. R. 60; 1938, 2 S. C. J. 67); C. A. 210/40 (7, P. L. R. 537; 8, Ct. L. R. 175; 1940, S. C. J. 540).

DISTINGUISHED: C. A. 22/38 (5, P. L. R. 155; 3, Ct. L. R. 129; 1938, 1 S. C. J. 145).

ANNOTATIONS: See cases followed and distinguished (*supra*) and annotations.

(*A. G.*)

FOR APPELLANT: Tory.

FOR RESPONDENTS: B. Joseph and Hausner.

JUDGMENT.

We need not trouble you, Dr. Joseph.

This is an appeal by leave from a judgment of the District Court of Tel-Aviv, in its appellate capacity, dismissing an appeal from a judgment of the learned Chief Magistrate of Tel-Aviv. The Appellant, who was the Plaintiff in the Court below, sued for the recovery of the sum of 2,500 zlotys, being the amount of eleven promissory notes. In the Court below he restricted his claim to LP. 200 in Palestinian currency.

Paragraph 5 of the amended statement of claim is in the following terms:—

> "On the 22nd July, 1932, judgment was given in Poland for notes (c), (e), (f), (g), (i) and (k), and on the 29th July, 1932, judgment was given for notes (a), (b), (d) and (h), in the total sum of 2800 zlotys. On the 10th October, 1932, the firm paid 300 zlotys in Poland on account of the said judgment indebtedness."

Both Courts below came to the conclusion that the only Court that had jurisdiction, *i. e.* original jurisdiction, was the District Court because of rule 3 of the Foreign Judgments Rules. Reference has been made to Civil Appeals 145/38, 5 P. L. R. p. 428, and 210/40, 7 P. L. R. p. 537. From a perusal of these judgments it is clear that there are only two methods of suing on a foreign judgment — one is by grant of an *exequatur* by a District Court, and the other is by action in a District Court on the foreign judgment. Mr. Tory, for the Appellant, suggested that there may be yet a third method; but we are unable to agree. He relied on Civil Appeal No. 22/38, P. L. R. Vol. 5, pp. 155—157. The facts in that case were, however, different from the facts in the present case. In C. A. 22/38 the Plaintiff had sued for a sum of money and he relied on bills expressed in Lithuanian currency. No mention was made of any foreign judgment. Paragraph 5 of the amended statement of claim makes it clear that the Appellant in the present case relied on the judgment given by the Court in Poland.

That being so, he should have brought his action in a District Court and not in a Magistrate's Court.

For these reasons we think that both courts below came to a correct conclusion. The appeal is, therefore, dismissed, with costs, to be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 10.—.

Delivered this 30th day of May, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 146/43.

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

BEFORE: Edwards, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Said Ahmad Samman. APPELLANT.

v.

The Attorney General. RESPONDENT.

Contravention against provisions of Defence (Control of Cattle Hides and Leather) Order — Question of validity or otherwise of confiscation order — Para. 20 of Defence (Control of Cattle Hides & Leather) Order.

Appeal from the judgment of the District Court of Jerusalem, dated the 22nd day of October, 1943, in Criminal Appeal No. 58/43, dismissed:—

1. Para. 20, Defence (Control of Cattle Hides and Leather) Order, 1942, can be regarded *pro non scripto*, "the competent authority" having no power himself to prescribe penalties.

2. Magistrate convicting a person of an offence under Defence (Control of Cattle Hides and Leather) Order has power to order confiscation under Regul. 46(1A), Defence Regulations, 1939, as amended by Defence (Amendment) Regulations (No. 6), 1942.

(*M. L.*)

ANNOTATIONS: As to point 2 see CR. A. 163, 164/43 (*ante*, p. 305) and annotation.

(*A. G.*)

FOR APPELLANT: Levitsky & Cohen.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jerusalem in its appellate capacity which Court had dismissed an appeal from the learned Chief Magistrate of Jerusalem.

The only matter about which the present Appellant now complains is an order for the confiscation of a quantity of leather. The Appellant contravened the provisions of the Defence (Control of Cattle Hides and Leather) Order, 1942, Palestine *Gazette* No. 1188, Supplement No. 2, of 16th April, 1942, page 662.

The Appellant's advocate contends that the only penalty clause is to be found in paragraph 20 of that order. In our view paragraph 20 can be regarded as *pro non scripto* for the reason that the competent authority has no power himself to prescribe penalties. Paragraph 20 should not have appeared in the Order of the 16th April, 1942. Any reference to Regulation 76 of the Defence Regulations, 1939, can, therefore, be disregarded. The power to make orders of confiscation is to be found in Regulation 46(1A) of the Defence Regulations, 1939, as amended by Defence (Amendment) Regulations (No. 6), 1942, Palestine *Gazette* No. 1179, Supplement No. 2 of 23rd March, 1942, page 537.

We also refer to Mr. Kantrovitch's book (War Legislation) Vol. 1, pages 62—64 and 372—378. We quote from Regulation 46(1A) as follows:—

> "The Court by or before whom a person is convicted of an offence against this Regulation consisting of a contravention of any such provision as aforesaid may order that the article in respect of which any such offence has been committed shall be confiscated and where confiscation is so ordered the Court shall dispose of it by delivering it to the competent authority, or a person designated by that authority, for disposal in such manner as the competent authority may deem fit."

In view of that provision we think that the learned Chief Magistrate had power to order confiscation and that the judgments of both Courts below are correct.

We were invited by Mr. Levitsky for the Appellant to hold that the learned Chief Magistrate wrongly exercised his discretion in confiscating the leather; alternatively, Mr. Levitsky asked us, in view of what he contended was the doubtful position of the law, to have pity on his client and quash the order of confiscation. We have carefully considered these submissions; but in all the circumstances we are not prepared to interfere.

The appeal is, therefore, dismissed and the order of confiscation confirmed.

Delivered this 29th day of March, 1944.

British Puisne Judge.

CIVIL APPEAL No. 387/43.

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

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

IN THE APPEAL OF:—

Salman Ibn Suleiman Abu Shanan & 2 ors. APPELLANTS.

v.

Hanna El Sayegh & 2 ors. RESPONDENTS.

District Court dismissing appeal on finding non-enemy declaration filed on appeal substantially different from prescribed form.

Appeal from the judgment of the District Court of Jerusalem, in its appellate capacity, dated 6th November, 1943, in Civil Appeal No. 42/43, allowed and case remitted:—

1. Technical or other defect in a declaration discovered subsequent to institution of proceedings and prior to hearing may be cured in Registry or in Court with Court's permission, prior to judgment in the case being delivered.

2. This principle also applies where Court sits in its appellate capacity.

(*M. L.*)

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

ANNOTATIONS: See C. A. 249/43 (*supra*) and annotations in A. L. R. and cases decided subsequently: C. A. 232/43 (10, P. L. R. 563; 1943, A. L. R. 693) and H. C. 100/43 (10, P. L. R. 567; 1943, A. L. R. 702).

(*A. G.*)

FOR APPELLANTS: Jad.

FOR RESPONDENTS: Nashashibi.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem. The point was taken that a declaration which it is necessary to make under the Defence (Courts Applications) Regulations, was not in the exact form set out in the standard form of the Official *Gazette*. In fact, the learned President was of opinion that there was substantial disagreement between the form submitted to his Court and the form in the *Gazette*. He held that this was a sufficient ground for dismissing the appeal with costs.

It is clear that the learned President at the time when he gave judgment was not aware of the decision of this Court in Civil Appeal 249/43, Palestine Law Reports, Vol. 10, page 549. In that case the learned Chief Justice, Mr. Gordon Smith, remarked at page 552:—

> "In my opinion also, where a technical or other defect in a declaration is discovered subsequent to the institution of proceedings and prior to the hearing, such defect may be cured in the Registry prior to the hearing, or in Court, with the permission of the Court, prior to judgment in the case being delivered, by virtue of Rule 359, subject of course to any order as to costs."

With all respect, I entirely agree with this opinion and would only add that the principle enunciated also applies where the Court is sitting in its appellate capacity.

The case is, therefore, remitted to the District Court for the appeal to be determined on its merits. Costs to abide the result. For the guidance of the Court we assess LP. 5 for advocate's attendance fee.

Delivered this 6th day of June, 1944.

Chief Justice.

CRIMINAL APPEAL No. 60/44.

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

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

IN THE APPEAL AND APPLICATION OF:—

Eissa Ahmad Ed Dreiss & 2 ors. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Criminal Procedure — Identification parade, identification in Court — Hailsham XIII, 605, CR. A. 30/42, CR. A. 13/38, CR. A. 59/39, CR. A. 71/41 — Identification of stolen property — Duty to cross-examine — CR. A. 101/43, CR. A. 57/43, CR. A. 62/43, presumptive evidence — Amendment of charges under District Court (Summary Trials) Rules, r. 9; sec. 52 T. U. I. Ord. compared; M. C. J. O. sec. 13 — Regulations 24(A)(1)(d) and 74 — T. U. I. Ord. sec. 65(1) — Sentence, C. C. O. 42(2), Regulation 76.

Appeal and application for leave to appeal from the judgment of the District Court of Haifa, dated the 29th day of April, 1944, in Summary Trial No. 54/44, whereby Appellants were convicted of an offence contrary to Section 24A(1)(d) and 74 of the Defence Regulations, 1939, and sentenced the first Appellant to pay a fine of LP. 150 or 18 months' imprisonment, the second and third Appellants to pay a fine of LP. 100 each or one year's imprisonment; convictions confirmed and sentences varied:—

1. There can, in certain circumstances, be an identification in Court in lieu of an identification parade.

2. The Court cannot be asked to disregard evidence which was not challenged by cross-examination.

3. In certain circumstances a presumption of guilty knowledge may be raised.

4. (*Semble*): The Court may, in summary trials, convict of an attempt without amending the charge. On appeal, the Court may invoke sec. 65(1) of the Trial Upon Information Ord.

(*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. 59/39 (1939, S. C. J. 492; 6, Ct. L. R. 209); CR. A. 71/41 (8, P. L. R. 229; 1941, S. C. J. 209; 10, Ct. L. R. 71); CR. A. 30/42 (1942, S. C. J. 221; 11, Ct. L. R. 206); CR. A. 57/43 (10, P. L. R. 291; 1943, A. L. R. 450); CR. A. 62/43 (10, P. L. R. 354; 1943, A. L. R. 469); CR. A. 101/43 (10, P. L. R. 506; 1943, A. L. R. 714).

ANNOTATIONS:

1. On the necessity or otherwise of an identification parade *cf.* CR. A. 9/44 (*ante*, p. 90) and note 1.

2. On the effect of failure to cross-examine see also CR. A. 75/43 (1943, A. L. R. 486).

3. As regards proof of guilty knowledge see, in addition to the cases cited, CR. A. 77/43 (10, P. L. R. 471; 1943, A. L. R. 654).

(*H. K.*)

FOR APPELLANTS: Maman.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

These are an appeal by the first Accused in Criminal Case (Summary Trial) No. 54/44, District Court Haifa, and an application for leave to appeal by the second and third Accused in the same case.

The first Accused was sentenced to pay a fine of LP. 150 and in default to undergo eighteen months' imprisonment, while the second and third Accused were each sentenced to pay a fine of LP. 100 and in default to undergo one year's imprisonment. The convictions were under Regulation 24(A)(1)(d) of the Defence Regulations, 1939, and in the case of the second and third Accused the convictions were said to be both under that Regulation and under Regulation 74 which latter Regulation deals with attempts. The second and third Accused required leave to appeal and in accordance with the usual practice of this Court we treated the application for leave to appeal as the appeal and the appeals of all three Accused were heard together.

Several grounds of appeal were taken by Mr. Maman who appeared on behalf of all three Accused. The first ground is that the first Appellant, that is, the first Accused, was not properly identified and in

support of his argument he has referred us to Hailsham Vol. 13, p. 605, paragraph 672 (note *k*) and to Criminal Appeal No. 30/42 and to Criminal Appeals No. 13/38, No. 59/39 and No. 71/41. The facts found by the District Court, shortly stated, were that a Private Thomas, a Private Vant and a Private Appleby, were on duty at a Military Vehicle Depot near Athlit at 6.30 *a. m.* on the 25th September, 1943, their sole duty at the time being to look out for possible thieves of military property. Thomas gave evidence that at about 6.30 *a. m.* he saw three Arabs approaching the trucks. He saw them climb over the Camp fence and come over to the vehicle next to where he was. They then proceeded to remove the tyre from one of the wheels, a front wheel. The vehicle was already jacked up. They removed the wheel and tyre by unscrewing the nuts. After they had done this two of the Arabs left the other one with the wheel. The witness got out of the truck and the Arab with the wheel walked straight into his arms. The witness identified the first Accused as the man who had walked straight into his arms. The witness was sure of this. The other two privates chased the other two Arabs. The witness next saw the other two privates at the Company Office where he had taken the first Accused. The witness telephoned to Sgt. Bookless at Athlit Police Station who came and collected the first Accused.

Sgt. Bookless was not called to give evidence.

Mr. Maman complains that there should have been a proper identification parade. To this Mr. Rigby, Crown Counsel, replies that the question whether there should be an identification parade depends on circumstances and that in the circumstances of this case it was unnecessary. It is said that Thomas caught the Accused No. 1 in broad daylight, kept him for some appreciable time, took him to the Company Office where presumably they waited for some time till Sgt. Bookless arrived. During this time the witness had every opportunity of seeing the first Accused. Moreover, when he identified him in Court, the Accused was not alone in the dock. He was with the other two Accused and the witness very fairly said that he could not recognise the second and third Accused. There was, therefore, a sort of identification parade in Court. Had the first Accused been the only person in the dock perhaps the position would have been different. We think that in the peculiar circumstances of this case the evidence of identification was sufficient. We must not, however, be taken as throwing any doubt on recent decisions of this Court with regard to the inadequacy of a first and only identification in the Court or in the dock.

Mr. Maman pointed out some discrepancies between the evidence

of a certain tracker and other evidence; but we do not think that this affects matters.

Mr. Maman's next complaint is that there was not sufficient evidence of the identification of the wheel and the tyre, in other words, he stated that there was nothing to show that the wheel and tyre produced in Court were the same as had been taken from the Accused or that they bore any mark to show that they were War Department property.

To the first complaint Mr. Rigby replies that Private Thomas gave evidence at the trial as to the tyre, Exh. P. 1, and as to the wheel brace, Exh. P. 2, and that he was not cross-examined by any of the Accused on this matter and that Private Vant also gave evidence with regard to Exh. P. 1 and Exh. P. 2 and that he also was not cross-examined by any of the three Accused. This contention seems to be borne out by a perusal of the record. We, therefore, think that there is nothing in this ground of appeal.

The next ground of appeal is that there was not sufficient evidence that the tyres at the Camp were War Department property or that the tyres in Court were War Department tyres. Mr. Maman has referred to Criminal Appeal No. 101/43, P. L. R. Vol. 10, p. 506 and to Criminal Appeal No. 57/43, P. L. R. Vol. 10, p. 291. Mr. Rigby has referred to Criminal Appeal No. 62/43, P. L. R. Vol. 10, pages 354, 360. Mr. Rigby contends that there was sufficient presumptive evidence that the property was War Department property and that this evidence was not rebutted.

With regard to the knowledge of the three Accused that the wheel and tyre were War Department property, Mr. Rigby argues that the circumstances were such as to give rise to an irresistible inference that the Accused knew that the tyres belonged to the War Department, an inference which the learned trial Judge was justified in drawing. We think that this is so. What were the facts? Three Arabs climbed over the fence and entered a camp which is nothing more than a Military Vehicle Depot. Anyone approaching that Depot must have known that all the vehicles there, and parts of the vehicles such as tyres and wheels, belonged to the War Department. Now, as regards the second and third Accused, it is true that there was little, if any, evidence against them or rather to identify them as being the other two men beyond voluntary statements made by them to the Police. The learned trial Judge held that these statements were voluntary statements and no suggestion has been made to us that they were not voluntary. In their statements they admitted that they were with the first Accused and that the first Accused was arrested, but they said that they ran away

and they denied that they were ever inside the wire fence. Mr. Maman has complained that the learned trial Judge should have accepted their statements entirely. We do not agree. The learned trial Judge was entitled to draw such conclusions as the rest of the evidence warranted. They admitted having been with the first Accused. This makes it clear that they were the other two men mentioned by Private Thomas and by Private Vant. Both these privates swore that they saw all the three climb over the camp fence. We, therefore, think that there is nothing in this argument.

It is next complained, with regard to the second and third Accused, that the learned trial Judge did not amend the charge as is required by rule 9 of the District Courts (Summary Trial)*), 1938. Now, it is true that there is in these rules no provision analogous to Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36. It is also noteworthy that Section 13 of the Magistrates' Courts Jurisdiction Ordinance, 1939, does not apply Section 52, Cap. 36, to summary trials in District Courts. It seems that the learned trial Judge convicted the second and third Accused of attempting to make away with the said property under Regulation 74 and that he made no mention of Regulation 74 until he convicted. It is of this that Mr. Maman complains. Apart from the fact that convicting them of an attempt was really in their favour, we think that we can call in aid the proviso to Section 65(1) Criminal Procedure (Trial Upon Information) Ordinance, which is applied to Summary Trials by Section 13 of the Magistrates' Courts Jurisdiction Ordinance. This ground of appeal, therefore, fails.

For the foregoing reasons we think that there was sufficient evidence to justify the conviction of all three Accused. Mr. Maman has not urged that the sentences should be reduced. Mr. Rigby has drawn our attention to the fact that the first Accused on the 26th of October, 1943, was convicted of theft of War Department property committed on the 17th July, 1943, and sentenced to four months' imprisonment. At his trial on the 29th April, 1944, he admitted this. Mr. Rigby has also drawn our attention to the fact that under Regulation 76 of the Defence Regulations, unless the trial is on Information, the maximum period of imprisonment which can be passed in default of payment of a fine is a period not exceeding three months. He has also referred to Section 42(2) of the Criminal Code Ordinance.

With regard to the first Accused we affirm the conviction but as to sentence we substitute a sentence of imprisonment for eighteen months.

* *Scil.*: Rules. (*Ed.*)

We think that, in view of his previous conviction and in view also of the serious nature of the offence, a severe sentence is called for.

With regard to the second and third Accused we affirm the convictions but alter the sentence to six months' imprisonment in each case.

Subject to the foregoing, the appeals are dismissed.

Delivered this 22nd day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 359/43.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Mustafa Muhammad Mustafa. APPELLANT.

v.

Darwish Samara. RESPONDENT.

Contribution between guarantors — Findings of fact — Document produced to Court and returned to witness — Verbal evidence — Res inter alios acta.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 6th October, 1943, in Civil Appeal No. 162/43, allowed and judgment of Magistrate restored:—

Verbal evidence is insufficient to prove discharge of guarantee or undertaking by guarantor to release co-guarantor.

(*A. M. A.*)

ANNOTATIONS:

1. On the admissibility or otherwise of oral evidence see note 2 to C. A. 247/43 (1943, A. L. R. 689).

2. *Res inter alios acta* cannot be relied upon — C. A. 292/43 (*ante*, p. 36).

3. On the right to contribution between guarantors *cf.* C. A. 64/41 (8, P. L. R. 197; 1941, S. C. J. 177; 9, Ct. L. R. 147) and notes thereto in S. C. J.

(*H. K.*)

FOR APPELLANT: F. Atallah.

FOR RESPONDENT: Aidi.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Haifa in its appellate capacity, which Court had set aside a judgment of the Magistrate of Nazareth.

The Magistrate had given judgment in favour of the Plaintiff (now Appellant) against the Defendant, who was his co-guarantor, for the sum of LP. 62.500 mils, being half of what the Plaintiff had to pay in respect of a certain judgment-debt guaranteed by him and the Defendant. The Defendant in the Magistrate's Court admitted that he was liable under a deed of guarantee, but set up the defence that the Plaintiff had undertaken himself to be responsible for and to settle the particular debt in question.

In the Magistrate's Court there was produced a document which had been an exhibit in Civil Case No. 733/40 of the Magistrate's Court of Nazareth. This document, Exhibit 1 in that case, was dated 13th April, 1940 and purported to be a list of debts due by the present Appellant, and acknowledged by him as such by his thumb print. It is, we think, tolerably clear that the Magistrate in hearing the case now under appeal must have seen the actual document, Exhibit 1 in Civil Case No. 733/40, although it was apparently handed back to the clerk of the Magistrate's Court, Farid Sukhun, who was a witness before the Magistrate in the case now under appeal. Nevertheless the Magistrate found that the Defendant had failed to prove any agreement by which the Plaintiff had undertaken himself to settle the whole amount of the judgment-debt in question. He, accordingly, gave judgment in favour of the present Appellant.

The present Respondent appealed to the District Court, which Court held that the document to which we have referred, namely, Exhibit 1 in Civil Case No. 733/40 of the Magistrate's Court, Nazareth, combined with a letter signed by the present Respondent, dated the 10th April, 1944, and addressed to Amin Eff. Salem, the judgment-creditor, taken together with certain verbal evidence, satisfied them that the present Appellant had agreed to be alone responsible for the whole debt. They, accordingly, reversed the judgment of the Magistrate and dismissed the Plaintiff's action. It is against their judgment that the Appellant now appeals.

In view of the fact that the Magistrate did not say whether he believed the evidence of the present Respondent, it is difficult to understand how the District Court who had not seen the witnesses came to the conclusion to which they did come. In any event, verbal evidence alone was not sufficient to prove that the guarantee had been discharged or that the present Appellant had agreed to release the present Respondent from his guarantee.

Now, the letter signed by the present Respondent and addressed to Amin Eff. Salem, clearly could not bind the present Appellant. It was

merely a statement by Darwish Samarah, the present Respondent, to the effect that the present Appellant had agreed to "divide" the debts guaranteed by them. The other document, Exhibit 1 in Civil Case No. 733/40, is headed "List of Debts and Other Amounts Due from Mustafa Muhammad el Mustafa", that is, the present Appellant. Nowhere in that document does the Appellant say that he agrees to release the present Respondent; on the contrary he says:—

> "The above-mentioned judgment is given in favour of the estate of the late Adeeb Salem and against Mustafa Muhd. el Mustafa, in his capacity as guarantor, together with the second guarantor Darwish Samarah — Execution Case No. 284/40."

The Respondent's advocate has argued that Amin Eff. Salem had released his client. That may be so, but the reason appears to have been that the present Appellant had paid the amount in full. This, of course, cannot affect the present Appellant's right to recover the amount in question, from his co-guarantor, namely, the present Respondent.

We think that the Magistrate was justified in finding that the present Respondent had not proved that he had been released by the Appellant. That being so, we think that the District Court were not justified in interfering with the finding of the Magistrate. We, accordingly, set aside the judgment of the District Court and restore that of the Magistrate.

The Respondent must pay the Appellant's costs of the District Court, which we assess at a fixed (inclusive) sum of LP. 8, and also the costs of the Appellant in this Court, which will be taxed on the lower scale to include an advocate's attendance fee of LP. 10 for the hearing of this appeal.

Delivered this 21st day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 385/43.

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

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

IN THE APPEAL OF:—

Hevrat Mataei Eretz-Israel Kafrisin Ltd. APPELLANTS.

v.

Joshua Rakover Lipschutz. RESPONDENT.

Companies — Forfeiture of shares — Failure to meet calls — Notice of allotment — In re British Artificial Silk Co. Ltd., ex parte Bolton.

Appeal from the judgment of the District Court of Tel-Aviv, dated 31st October, 1943, in Civil Case No. 333/41, allowed:—

1. Forfeiture is distinguishable from damages.

2. A company may, under the terms of an agreement to allot, forfeit shares and the deposit paid therefor, if calls are not met.
The company may subsequently dispose of the forfeited shares for the full price.

(*A. M. A.*)

DISTINGUISHED: Bolton, *Re, ex parte* North British Artificial Silk, Ltd., 1930, 2 Ch. 48, 99 L. J. Ch. 209, 143 L. T. 425.

ANNOTATIONS: On forfeiture of shares see Halsbury, Vol. 5, *pp.* 286 *seq.*, subsec. 6.

(*H. K.*)

FOR APPELLANTS: Livay and Minkowitch.

FOR RESPONDENT: E. Z. Fellman.

JUDGMENT.

In this case the Appellants are a limited company of Limasol, Cyprus. The Respondent was a shareholder in the company.

It appears that there were two categories of shares issued by the company, Category "A" and Category "B". Originally the Plaintiff had a bundle of Category "A" shares. The shares, both "A" and "B", were allotted in bundles, each bundle costing LP. 3000. Financial difficulties caused the Plaintiff to negotiate the transfer of his bundle of Category "A". This he succeeded in doing. Before the transfer could be completed the approval of the company was necessary. It seems that there was some bargaining between the Respondent and the Appellant as to the terms on which the consent would be given. It was alleged that one of the terms was that he should buy a bundle of "B" shares. But whether it was as the result of this bargain or not, the fact emerges that he did buy a bundle of "B" shares. For this bundle he paid a deposit of LP. 500, and gave an undertaking to pay the remaining instalments of the LP. 3000 at stated intervals. This appears to me to be abundantly clear from the receipt which was Exhibit P/2.

These being the facts as I find them, the question now arises what was the position of the Respondent *vis-à-vis* the Appellants. In my opinion the answer is free from ambiguity. His relationship with the company was contractual and the terms of the contract — which he accepted when he accepted the shares — were set out in the Articles

of the Association. The group of Articles is in the usual form. Articles 17 and 22 deal with forfeiture of shares. They read as follows:—

> "17. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the Directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued."
>
> "22. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified."

Now it is admitted that the Respondent never paid any money for these shares other than the LP. 500. In a word, he defaulted on his instalments.

The Company, therefore, acting in pursuance of the powers vested in them by the above quoted Article, forfeited the shares of the Respondent.

It has been argued by the Respondent that there had in fact been no notice of allotment of shares, and consequently there could have been no forfeiture. I am satisfied that the receipt, Exhibit P/2, was clear notice of allotment, indeed it is difficult to appreciate how the words, "For on account of shares as per Board Resolution without meeting, dated 25/9/36," which appear on the receipt, could be otherwise interpreted.

I come to the forfeiture on 17.8.37. The Company sent to the Respondent a letter pointing out that he had not paid his instalments and that unless he paid the outstanding instalments before the 31st August, 1937, the Board would proceed under the forfeiture clauses. The Respondent did not pay the instalments, and at the 53rd Board Meeting the shares and the deposit of LP. 500 were duly forfeited by a proper resolution, as I hold it to be, of the Board.

Now, as far as the contract between the Respondent and the Appellants is concerned, this would seem to be the end of the matter. The question as to whether the forfeiture operated harshly was a question that should have been considered by the Respondent when he entered into a contract, involving as it did forfeiture in certain circumstances.

But it has been argued that on the analogy of Bolton, *In re* North British Artificial Silk Co., Ltd., *ex parte*, (L. R. Ch. Div., 1930, Vol. 2) that as the Company suffered no loss since, as it is alleged, they sold all the forfeited shares for the same price, *viz.* LP. 3000, the Respondent was entitled to the return of his deposit of LP. 500.—.

It seems to me that such an argument misconceives the decision in that case. The issue *in re* Bolton was a very different matter. That was the liability of a person whose shares had been forfeited to pay outstanding calls, notwithstanding the forfeiture. That liability was based on a specific provision in the Articles of Association of the North British Artificial Silk Co., Ltd., similar to Article 21 of the Articles of Association of the Cyprus Palestine Plantations Co. Ltd. What the Court decided was that if the new allottee pays up the uncalled capital, this payment must enure for the benefit of the original allottee. The Court was concerned solely with the question of damages for breach of contract, and it applied the well recognized principle that in such cases a person can only recover the amount of the damage he suffers.

The question in issue here is not one of damages but of the effect of a specific provision of a contract (*e. g.* Article 29) entered into by the Respondent with the Appellants.

The appeal is, therefore, allowed with 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. 9/44.

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

BEFORE : Rose and Frumkin, JJ.

IN THE APPEAL OF :—

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

v.

Arieh Neidermann. RESPONDENT.

Land Settlement — Prescription — Servitude not claimed in Settlement — C. A. 71/41.

Appeal from the judgment of the Magistrate's Court, Haifa, sitting as a Land Court, dated 17th December, 1943, Case No. 2041/43, allowed:—

User over the period of limitation does not give a right if that right was not claimed in Land Settlement which occurred after the expiry of the period of limitation.

(*A. M. A.*)

DISTINGUISHED: C. A. 71/41 (8, P. L. R. 232; 1941, S. C. J. 211; 10, Ct. L. R. 73).

ANNOTATIONS: See C. A. 71/41 (*supra*).

(*H. K.*)

FOR APPELLANTS: A. Levin.

FOR RESPONDENTS: Ganon.

JUDGMENT.

This is an appeal from a judgment of the Magistrate, sitting as a Land Court in Haifa. The Appellants — the Plaintiffs in the Court below — claimed a declaration that they were the owners of a certain piece of land with buildings upon it which had been declared to be in their ownership by settlement proceedings in the year 1941. That was their first prayer. Their second prayer was that the Respondent, who, it appears, had been in constructive occupation of two cellars in the house for a considerable number of years, should be evicted therefrom.

The facts appear to be that these two cellars, which are of no commercial value except from the point of view of obstruction to the claim of the Appellants to the house and land as a whole, had been used for a considerable number of years — we are told 30 years — by the Respondent for purposes of his own, and the Magistrate finds, and we accept, that the Appellants did not object during that time. In 1941 there were settlement proceedings and the Appellants asked for and obtained registration in their names. The Respondent took no steps, did not even attend the proceedings, but sat back until the present action in the Magistrate's Court was instituted. It seems to us that the case which was relied upon by the learned Magistrate — C. A. 71/41 — is distinguishable because in that case there had been no settlement proceedings. In the present matter we think that it would have been proper to register this user of these two cellars as a servitude over the parcel, had such an application been made. In fact no such application was made, and we are of opinion that it is quite unreasonable that in a case such as this, the Respondent having slept on his rights for all this time should now, having let the settlement proceedings go without intervention, raise this point in the Magistrate's Court. We come to our conclusion with less difficulty in that on the merits we consider that the Respondent has nothing to justify his attitude at all.

In the result, therefore, the appeal will be allowed and judgment entered for the Appellants on both issues. The Appellants will have the costs here and below, the costs of this appeal to be in an inclusive sum of LP. 10.—.

Delivered this 9th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 343/43.

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

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

IN THE APPEAL OF:—

Muhammad Mahmoud Ahmad Hamdan & 3 ors. — APPELLANTS.

v.

Hassan Mahmoud Ahmad Hamdan. — RESPONDENT.

Magistrates' Courts — Case involving title to land — Jurisdiction of Magistrates' Courts in land cases — Sec. 4.

Appeal from the judgment of the District Court Nablus, in its appellate capacity, dated 29th June, 1943, in Civil Appeal No. 14/43, dismissed:—

A case involving title to land should be determined by a Land Court. If the value of the land is not in excess of LP. 250, the Land Court will be constituted by a Magistrate.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 295/43 (*ante*, p. 239) and note thereto.

(*H. K.*)

FOR APPELLANT: Toister.

FOR RESPONDENT: Eila.

JUDGMENT.

In this case the Appellants are farmers of Bal'a village near Tulkarm.

In the Magistrate's Court of Tulkarm they filed a claim against the Respondent for LP. 83 odd pounds, alleging that it was their share in the produce of three pieces of land. The Magistrate gave judgment in their favour. On appeal the judgment was set aside by the District Court of Nablus on the ground that the issues raised the question of a title to immovable property and that the Magistrate should have either dismissed the appeal (*sic*) or at least adjourned the hearing so that the action should be brought in the proper Court, which is the Land Court.

I find it difficult to appreciate what arguments the Appellants were able to advance to permit of a further appeal to this Court.

Mr. Toister has endeavoured to argue that section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1939, in fact gives a magistrate jurisdiction to deal with the question of immovable property, provided only that the value of the property is within the ambit of his jurisdiction. We are unable to accede to this argument. It seems to us clear

that actions concerning immovable property must be determined in accordance with the provisions of the Land Courts Ordinance.

We agree with the learned Judges in the Court below, and for the reasons given by them in their judgment, the appeal is accordingly dismissed with LP. 10.— inclusive costs.

Delivered this 26th day of June, 1944.

Chief Justice.

HIGH COURT No. 5/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF :—

Hamdi Shawa. PETITIONER.

v.

District Superintendent of Police, Gaza. RESPONDENT.

Car licensing — Transfer of car — Consent of Licensing Authority — Whether licence attaches to vehicle or is issued to owner — R. T. R. 9, 75, 78; Defence Regs. — Public vehicles — "Ownership" — Lapsed licences.

Return to an order *nisi,* issued on 21.1.44, directed to the Respondent, calling upon him to show cause why he should not relicense as a taxi Chevrolet car, Engine number 3086682, registered number M 502 F and release it for service; order discharged:—

1. A licence is issued to the owner of a vehicle authorising him to operate it.
2. Changes of ownership must be notified to the licensing authority within 15 days.
3. In the case of a public vehicle, the Licensing Authority should approve the transfer.
4. When a licence lapses, the new owner should apply for a fresh licence and cannot ask for a renewal.
5. But where the purchaser applies for renewal of the vendor's licence before expiry the fact that no approval or refusal is made before that licence lapses does not prejudice the applicant.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 174/43 (10, P. L. R. 402; 1943, A. L. R. 531) and note 2 thereto in A. L. R.

(*H. K.*)

FOR PETITIONER: El-Ghusseini.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

Petitioner bought a car on 1.4.43 from Shamuel Daniel. The car in question was originally registered in the name of Tanous on 21.5.40, and renewed on 5.8.41. Tanous sold it to Bustani who obtained a licence in his name on 15.8.42. The car, at the time Petitioner purchased, was licensed in the name of Bustani from whom Daniel had purchased in July, 1942. There was no licence in Daniel's name.

At the time Shawa purchased, in April, 1943, the licence in Bustani's name had still three months remaining to run. Shawa, before the expiry, made an application for transfer to his name. The car was tested and examined and certificate of Road worthiness signed and a licence prepared. At this point Bustani gave information to the police that Daniel had stolen the car. The investigation took three or four months and the complaint was found to be unfounded. In the meantime the Bustani's licence had expired and the Petitioner was no longer in a position to apply for a transfer and the authorities decided to refuse him a licence. The wording of the letter dated 6.1.44 is, namely:—

> "Owing to the fact that the ownership of vehicle No. 502 F, Taxi, the licence of which expired on 22.7.43, was changed without the approval of the local licensing authority as required by Rule 78(1) of the Road Transport Rules, 1929, as amended in Palestine *Gazette* No. 1185 Supplement No. 2 of 9.4.42, I, therefore, inform you that the vehicle shall not be relicensed as a taxi."

and is according to the Respondent's submission incorrect and the real reason being that the Petitioner had become the owner of a vehicle which at the time was licensed in the name of Bustani and registered as a public vehicle. The licence in respect of that vehicle could only be transferred to the Petitioner with the approval of the Licensing Authority but no such approval had ever been given.

It is not, therefore, competent for the Petitioner to apply for the renewal of a licence which had never been granted or transferred to him, although he could apply for an original licence in his name. The Respondent goes on to state, that such an application would have been refused as only a limited number of licences to keep and drive public vehicles are issued and that a list of applications is kept and dealt with in order of priority.

The Petitioner submits that the Respondent has wrongly interpreted the law:—

1. The licence as a taxi applies to vehicles and not to persons and operates *in rem* and not *in personam*.

2. Rule 78(1) of the Road Transport Rules refers to approval of

transfer of a licence and not to transfer of ownership of public vehicle.

3. No approval for the transfer of ownership from the Licensing Authority is necessary.

4. Section 9 of R. T. O. gives authority merely to limit the number of Public vehicles in a District.

The Respondent maintains that a public vehicle licence is granted to the owner of a vehicle personally in respect of a certain vehicle and does not part with the vehicle. No subsequent owner is entitled to claim transfer or renewal by the mere fact of being the owner of the vehicle. He may have to take his place on the waiting list.

The Petitioner maintains that this is a test case as to whether the Licensing Authority have authority to refuse issue of a licence in the name of an owner who is not the original licensed owner. Rule 78 of the Road Transport Rules was originally made for omnibuses and was amended only in Sub-Rule (1) to include other public vehicles. Sub-Rule (3) refers to other vehicles than those included in Sub-Rules (1) & (2). Sub-Rule (6) — Notification of change of ownership shall be made within fifteen days.

When the amendment to Rule 78 Sub-Rule (1) was made, it should have included Sub-Rule (3). Therefore all that is now necessary is the delivery of the licence *etc.* in compliance with Sub-Rule (3) on form P. 706 — Schedule I to Rules. Rule 78(1) only deals with transfer of licence and Sub-Rules (3) & (6) do not call for approval.

It is clear from Rule 75(2) that the Licensing Authority has power to approve, or otherwise, every application for a licence. Under the Defence Regulations and the Emergency Powers (Defence) Act, 1939, Kantrovitch Vol. III, page 197 the Controller of Road Transport has power under Regulation 3 to cancel the validity of an existing licence; power under Reg. 4, to extend or revoke extension of validity of a licence, and under Reg. 5 to restrict the grant or renewal of licences. In my opinion, one must be the owner of the particular vehicle in order to obtain a licence, and the licence is a permission to the owner authorising him to run his particular vehicle on the road, be it omnibus or other public or private vehicle. It has, therefore, been laid down in Rule 78 of Road Transport Rules that all change of ownership must be notified to the Licensing Authorities within 15 days. Rule 78(1) & (2) have been amended on 9.4.42 to include Public Vehicles. This in my opinion merely transfers "other Public Vehicle" from the scope of Rule 78(3) to that of Sub-Rules (1) & (2). No amendment of Sub-Rule (3) was necessary. Where a licence has lapsed a new owner of the

vehicle cannot as of right claim renewal of the previous licence — he may be compelled to apply for a fresh licence in his name.

It would appear from the wording of Rule 78(3) that no approval of the local licensing authority was required, but the local Licensing Authority should be notified forthwith on the form prescribed in the first schedule to the Rules, Form P. 706, and deliver the "registration book" for amendment, by which, I conclude, is meant "licence" for amendment.

Apparently the Petitioner purchased in April, 1943, a vehicle licensed at the time, as a public vehicle, in the name of Bustani, and since the amendment to Sub-Rules (1) & (2) of Rule 78 of the Road Transport Rules to include "Public Vehicles", the transfer of this vehicle is subject to the approval of the Local Licensing Authority. It appears that application was made to this authority three months before the expiry of the licence but that, although all formalities were completed, the transfer was neither approved nor refused. Bustani's licence duly expired and now the Licensing Authority maintains that Petitioner, as the owner of an unlicensed vehicle, must apply for a new licence and take his turn on the list.

With great respect to the Local Licensing Authority they should have exercised their discretion in accordance with Rules 78(1) & (2) on the application which was made in time by Petitioner. They cannot avail themselves of their own delay to place the Petitioner in this predicament. Had Bustani's licence expired before the Petitioner applied for transfer of the licence, then possibly the Respondent's argument would hold good.

Regarding the interpretation of Rule 78 of the Road Transport Rules I consider, that since the amendment to Rules 78 (1) & (2) on 9.4.42, approval for transfer of licence of an omnibus or other public vehicle is necessary, and that Sub-Rule (3) continues to refer to any other type of vehicle. There is no approval required for change of ownership mentioned anywhere in Rule 78. The Petitioner's application to the Licensing Authority is still subject to that authority's approval and, if approved, he can then apply for renewal.

I cannot accept the Respondent's submission that the use of the word "ownership" was a clerical error. It seems to me quite clear that the Licensing Authority considered that its approval was necessary for the change of ownership of a vehicle under R. T. Rules 78(1). In this it is mistaken. This error does not help the Petitioner, since the vehicle he purchased in 1943 was, being a public vehicle, subject to the amend-

ment to Rules 78 (1) & (2) — he cannot claim transfer of licence under Rule 78(3) without approval.

Rule is discharged. No costs.

Given this 4th day of May, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 38/44.

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

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

IN THE APPEAL OF:—

Sheikh Ali Ghanem Sharab. APPELLANT.

v.

Masmah Ayad Masmah Salih & 3 ors. RESPONDENTS.

Equitable title — Illegal disposition under sec. 11 *L. T. O.*

Appeal from the judgment of the Magistrate's Court of Gaza, sitting as a Land Court, dated 16th January, 1944, in Land Case No. 308/43, allowed:—

A sale contrary to sec. 11 of the Land Transfer Ord. cannot give rise to an equitable title.

(*A. M. A.*)

ANNOTATIONS: The following are the requirements of an equitable title:—

a) contract for sale;

b) payment of price in full;

c) purchaser in possession for a considerable time.

See C. A. 168/43 (10, P. L. R. 371; 1943, A. L. R. 595). For later cases *vide* C. A. 181/43 (10, P. L. R. 424; 1943, A. L. R. 618); C. A. 165/43 (1943, A. L. R. 636); C. A. 302/43 (*ante*, p. 242) and note.

(*H. K.*)

FOR APPELLANT: Hawari.

FOR RESPONDENTS: Nos. 1 and 2 — Shawa.
Nos. 3 and 4 — Absent — served.

JUDGMENT.

In this case the Plaintiffs, now the first and second Respondents, say that they bought certain land which the Appellant now claims as heir of the original owner. The learned Magistrate, in the course of his judgment which is appealed from, said:—

> "I am of the opinion that although the deed of the Plaintiffs is a final deed of sale contrary to Section 11 of the said Ordinance (the

Ordinance referred to being the Land Transfer Ordinance) yet their possession over the land for such a period gives them an equitable title to the said land."

His decision in favour of the Respondent was based on this opinion.

Now, the terms of Section 11 of the Land Transfer Ordinance leave no ground for ambiguity. The disposition is declared to be null and void. We are of opinion that the learned Magistrate was wrong in holding that an equitable title could flow from a contract which by a specific legislative enactment is declared to be null and void.

The appeal must be allowed, and the action is dismissed with LP. 10 inclusive costs.

Delivered this 19th day of June, 1944.

Chief Justice.

CIVIL APPEAL No. 14/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Eliahou Ben David Rosenfeld. APPELLANT.

v.

Ketti Wassertredinger. RESPONDENT.

Admissions in Land Registry — Amount due on mortgage admitted in Land Registry — No allegation of fraud or undue influence — Interest on mortgage — C. A. 96/29, C. A. 75/34 — Costs.

Appeal from the judgment of the District Court, Tel-Aviv, dated 23.12.43, in Civil Case No. 201/43, dismissed, cross-appeal dismissed and judgment of lower Court varied:—

Where a mortgage is given without interest, interest does not run from the date of execution proceedings but from the date of filing a statement of claim.

(*A. M. A.*)

REFERRED TO: C. A. 96/29 (1, P. L. R. 583; 1, C. of J. 319); C. A. 75/34 (8, C. of J. 600).

ANNOTATIONS:

1. On the inadmissibility of oral evidence against admissions in the Land Registry see C. A. 94/43 (1943, A. L. R. 152) and last paragraph of annotations thereto.

2. See C. A. 96/29 and 75/34 (*supra*).

(*H. K.*)

FOR APPELLANT: Pevsner.

FOR RESPONDENT: Kadoury.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv which had dismissed an action brought by the present Appellant asking for a declaration that he owed only the sum of LP. 227.547 mils on a certain mortgage.

The Plaintiff (Appellant) mortgaged his house property in Jerusalem on 10th August, 1935, to the "Pinati" National Saving and Building Company Ltd. for LP. 458. On the 7th March, 1938, the Appellant made a declaration in the Land Registry whereby he admitted that he still owed the sum of LP. 447. On 11th March, 1938, the "Pinati" Company transferred the mortgage to the present Respondent who was the Defendant in the Court below.

The District Court held that the Appellant was bound by his admission in the Land Registry of 7th March, 1938. We consider that this finding of the District Court was correct.

The Appellant's advocate has attempted to show that on the 7th March, 1938, the Appellant actually owed less than LP. 447. He frankly admits that there is no question of fraud or undue influence and that the Appellant must be taken to have known and appreciated what he was doing when he made the declaration referred to. Whether he was over-persuaded or whether he was careless does not seem to affect matters. It is not denied that full allowance has been given for any payments made after the 7th March, 1938. The District Court held that the Plaintiff had failed to prove payments other than those admitted by the Defendant. We see no reason to differ from the conclusion arrived at by the District Court.

The Respondent's advocate has, in effect, cross-appealed against the refusal of the District Court to grant interest for the present Respondent. The District Court relied on Civil Appeal No. 96/29, Vol. 1 P. L. R. p. 583, while Mr. Kadoury, for the Respondent, relies on Civil Appeal No. 75/44 *. The District Court found that there were express stipulations both in the Deed of Mortgage and in the so-called Deed of Correction of Mortgage of 7th March, 1938, that no interest was payable on the mortgage. Nevertheless, Mr. Kadoury has argued that his client is entitled to interest as from the time when he found it necessary

* *Semble*: Should read "C. A. 75/34."

(*Ed.*)

to take the mortgage to the Execution Office. We think, however, that, in view of the express stipulations referred to, no interest was payable on the mortgage. The only interest that can be awarded is legal interest as from the date of filing the statement of claim. In this case, however, the present Respondent was himself a Defendant.

The District Court ordered that each party bear its own costs in the Court below. We do not think that the District Court were justified in depriving the Defendant of her costs. We, accordingly, vary the order of the District Court by ordering the present Appellant to pay to Respondent her costs in the Court below which we assess as fixed (or inclusive) costs of LP. 5.

As the Respondent has lost her cross-appeal we think the fair order to make will be "no costs of this appeal," that is, each party will bear its own costs of this appeal.

Delivered this 13th day of June, 1944.

British Puisne Judge.

HIGH COURT No. 50/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF:—

Hanneh Hanna Yesse. PETITIONER.

v.

Father Afram Haddad. RESPONDENT.

Religious courts — Alimony within exclusive jurisdiction — Refusal by religious court to entertain claim for alimony.

Application for an order, directed to the Respondent in his capacity as President of the Syrian Catholic Religious Court, Jerusalem, calling upon him to show cause why he refused Petitioner's application whereby she claimed alimony for herself and for her minor child and that he be ordered to receive it and act upon it; order *nisi* refused:—

The High Court will not compel a Religious Court to entertain a claim within its exclusive jurisdiction.

(*A. M. A.*)

ANNOTATIONS:

1. The facts underlying this application appear in the following extract from Petitioner's affidavit:—

"I, I. A. Saadeh, advocate, Ramallah, for Hanneh Hanna Yesse, Musrara, Jerusalem, hereby declare on oath that:—

1. Hanneh Hanna Yesse lodged in the Syrian Catholic Religious Court, Jerusalem, an application, dated 14.3.44 claiming alimony.

2. Father Afram Haddad in his capacity as President of the said Court, refused her Statement of Claim after keeping it in his custody for a period of fourteen days and returned it to her covered with a letter, dated 28.3.44 unacted upon.

3. No summons were ever issued, nor any sittings were ever held.

4. Her husband, Hanna Fathallah Hazou, put in the said Court an application for separation which was dismissed on 24.2.44 after several hearings.

5. My claim for alimony for her and for her minor baby is a separate case which should be heard by the said Court."

2. The following is the relevant part of Respondent's letter of 28.3.44, referred to in para 2 of the above affidavit:—

"After scrutinization we found that the judgment of your husband's, Hanna Fathalla Hazou's, rights in the action he brought before our Ecclesiastical Court, Jerusalem, is contrary to the Laws of the Church. We have, therefore, cancelled it and as from the date of this letter it will have no executable force (See 1701, 1740, 1874, 1876, 1877, 1897).

Whereas the claim you have brought before our Ecclesiastical Court, dated the 14th of March, 1944, asking for alimony and the suckling of your minor children is dependent on the above-mentioned action and whereas this action is still under consideration we, therefore, refuse your claim and return it back to you. Your rights are reserved until your husband's action will be determined according to the law when your action or claim will be examined."

3. Note that in H. C. 18/41 (8, P. L. R. 140; 1941, S. C. J. 117; 9, Ct. L. R. 131) the Rabbinical Court of Appeal was ordered to entertain an appeal which that Court had refused to hear.

(*H. K.*)

FOR APPLICANT: Sa'adeh.

FOR RESPONDENTS: *Ex parte.*

ORDER.

This Court cannot entertain this application. The claim for alimony is within the exclusive jurisdiction of the Syrian Catholic Religious Court with which this Court cannot interfere. The application for a rule *nisi* is refused.

Given this 10th day of May, 1944.

A/British Puisne Judge.

CIVIL APPEALS Nos. 45/44 & 51/44.

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

BEFORE: Plunkett, A/J.

IN THE APPEALS OF :—

C. A. 45/44:—

Adaile, widow of Jabra Awad. APPELLANT.

v.

Boulos Butros El Noursi & 3 ors. RESPONDENTS.

C. A. 51/44:—

Yousef Nassar. APPELLANT.

v.

Boulos Butros El Noursi & 3 ors. RESPONDENTS.

Consolidation of two eviction cases — Question of alternative accommodation.

Appeals from the judgment of the District Court of Jerusalem, sitting in its appellate capacity, dated 13th January, 1944, in Civil Appeal No. 59/43, allowed and Magistrate's judgment confirmed with variation:—

1. Appellate Court will not interfere with discretion of Magistrate in consolidating two actions under Rule 231, Magistrates' Courts Procedure Rules, unless injustice is done by exercising such discretion.

2. Not necessary for landlord suing for eviction to show that alternative accommodation was available at the time he lodged the action.

3. a) Landlord suing for eviction on ground that the premises are required for himself must be prepared during trial to prove that there is alternative accommodation available for tenant.

b) Alternative accommodation must be available at time of adjudication in first instance, otherwise the landlord would be placed in an entirely unfair position.

4. Decision as to availability or otherwise of alternative accommodation rests within discretion of trial Court.

(*M. L.*)

REFERRED TO: C. A. 265/43 (10, P. L. R. 565; 1943, A. L. R. 717); C. A. 99/42 (9, P. L. R. 443; 1942, S. C. J. 551); C. A. 110/42 (9, P. L. R. 437; 12, Ct. L. R. 73; 1942, S. C. J. 481; Gorali, p. 134); C. A. 265/42 (10, P. L. R. 60; 1943, A. L. R. 9).

ANNOTATIONS :

1. As to points 2 and 3 see C. A. 265/42 (*supra*) and annotations in A. L. R. and H. C. 35/44 (*ante*, p. 217) and annotations.

2. As to point 4 see C. A. 110/42 (*supra*) and cases cited in point 1.

(*A. G.*)

C. A. 45/44:—

FOR APPELLANT: H. Atalla.

FOR RESPONDENTS: Nos. 1, 2 & 3 — Eisenberg.
No. 4 — Oweidah.

C. A. 51/44:—

FOR APPELLANT: Oweidah.

FOR RESPONDENTS: Nos. 1, 2 & 3 — Perlmutter.
No. 4 — H. Atalla.

JUDGMENT.

These are appeals from the judgment of the District Court of Jerusalem in its appellate capacity, dated 13.1.44 in Civil Appeal No. 39/43.

The learned President while agreeing with the order of eviction made by the Magistrate allowed the appeal and sent the case back to the Magistrate to make an order of eviction within the limitations indicated and to fix a suitable definite date.

The Appellants are appealing against both these judgments on the ground that the Magistrate erred first of all in consolidating the two cases and proceeding to try them together.

Respondents reply that this is a matter of discretion for the Court of trial. The Court ruled that as no injustice followed the exercise of this discretion by the Magistrate under Rule 231, Magistrates' Courts Procedure Rules, 1940, this Court would not interfere. This ground of appeal, therefore, fails.

Appellants further submit that the Magistrate's and District Court erred in holding that alternative accommodation should be available at the date of delivery of the judgment and not at the date of filing the action, that the District Court erred in holding that the Magistrate held that there was alternative accommodation at all or that it is similar or suitable, that the offer to Respondents Nos. 1—3 amounts to evidence of availability of alternative accommodation. As regards Respondent No. 2 there was a vague suggestion but no finding by the Magistrate that alternative accommodation was offered before or at the date of filing of the action, and the offer was at a very much higher rent than that paid by the Appellants. Whereas the Magistrate only dealt with the two houses offered during the hearing of the action the one to Yousef Nassar on exchange and the other to Adaile; but this house was not under the control of the Respondents and there was no evidence that the owner was willing to let to Adaile.

On these grounds the judgment of the District Court and Magistrate's Court should be set aside and the appeals allowed.

Advocate for Yousef Nassar submits that his client is a labourer and not in a position to pay higher rent and no alternative accommodation was offered except during the hearing. Referring to Sec. 8(1)(c) Rent Restrictions (Dwelling Houses) Ordinance, he admits that there is a discretion given to the Courts but that the question of alternative accommodation is not a secondary consideration. And as regards available accommodation there is no evidence that it is suitable such as a move from a house in Upper Bakaa to the Old City and no offer by the occupiers to leave, or that place is suitable. Alternative accommodation must be available when offered. Reference is made to Civil Appeal No. 265/43, Vol. 10 P. L. R., p. 565 at p. 566. That Section 4 of the Rent Restrictions (Business Premises) Ordinance, 1941, and the Rent Restrictions (Dwelling Houses) Ordinance, 1940, which are similar as to the motive, and alternative accommodation must be available when the action is filed, Civil Appeal No. 265/43.

The Respondents submit that there is no occasion for this Court to interfere. (Civil Appeal No. 99/42, 9 P. L. R., p. 443 and Civil Appeal No. 110/42, 9 P. L. R., p. 437 judgment referred to).

The Respondents offered to pay the difference in rent up to 4 years and the Magistrate held that the house offered was sufficient and he did not deal further with the other offers. The case was sent back to the Magistrate on the ground that he should have made a definite order. The appeal was made against the whole judgment, but the Court held that no ground of appeal was made against this point of reference to the Magistrate. If the Court wished to apply Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, the time when alternative accommodation should be available is the date of adjudication. Civil Appeal No. 265/43 does not decide this point, but was a decision on the point that should the law be altered, the law applicable at the time of adjudication applies. The tenant is not entitled to say that unless alternative accommodation is available at the time action lodged then the landlord cannot succeed, or that it is not enough, if alternative accommodation becomes available only during the hearing. The Magistrate in this case found that there was alternative accommodation available and this discretion cannot be interfered with. The District Court also held the same view at page 2 of the judgment and the Appellants have called no evidence to prove the contrary. The District Court dealt with all the points, that the Respondent needed the rooms, that alternative accommodation was

available, and that the Respondents were prepared to pay up to four years difference in rent.

It is further argued in the reply by Appellant that the Magistrate has not directed his mind to the offer before action and there is no finding to show that he has, that any offer made was out of proportion to the rent being paid. And that as regards the other offer during the hearing Appellants had no opportunity to show that it was unsuitable.

Considerable argument has been directed by the Appellants on the point that according to the correct interpretation of Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, alternative accommodation must be considered on the same footing as that the premises are reasonably required by the landlord for the occupation of himself *etc.* and, therefore, that such accommodation should be available at the time the action is lodged. In my opinion this would be an unnecessary burden to place on the shoulders of the landlord. Most landlords are, I feel sure, well acquainted with the Rent Restrictions (Dwelling Houses) Ordinance, 1940, and a landlord who wishes to apply section 8(1)(c) goes to Court only as a last resort, previous negotiations and offers having been rejected by the tenant. I hold that a landlord who takes action for eviction under Section 8(1)(c) must be prepared during the trial to satisfy the Court that the premises are reasonably required for his personal use and that there is alternative accommodation available for the tenant. The matter is one of proof before the Court, the burden of proof is on the landlord. The Court having taken into consideration all the circumstances of the case, the decision rests within the discretion of the Court. The words "reasonably suitable for the purpose *etc.*" occur only in Section 4 of the Rent Restrictions (Business Premises) Ordinance, 1941, and not in Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940. The matter is for the Court to decide taking into consideration all the circumstances of the case. I further hold that there must be alternative accommodation available at the time of adjudication in first instance, otherwise owing to the protracted nature of proceedings in eviction cases in this country the landlord would be placed in an entirely unfair position. In Civil Appeal No. 265/42 this question is discussed but there is no decision on the point.

Section 8(1)(c) reads "no judgment or order for eviction of a tenant shall be given ..... except (c) on the ground that the premises are reasonably required ..... and the court ..... after considering all the circumstances of the case including especially alternative accommodation available for the tenant ..... it reasonable to give such

judgment." The words "alternative accommodation available" are in no way qualified by the mention of available at any specific time and seem to me to have no other meaning than at the time of adjudication. Having disposed of this point there remain only the 3rd and 4th grounds of appeal which seem to me to be questions of fact and para. 6 & 8 of the Magistrate's judgment is clearly a finding in favour of the Plaintiff regarding the offer of alternative accommodation and offer to pay up to 4 years' difference in rent. In the District Court's judgment the learned President upholds the Magistrate's judgment that there was alternative accommodation available but sent back the case to the Magistrate to fix a date within which the eviction shall be effected.

I consider that the further delay can be dispensed with and I hereby vary the judgment of the District Court * by ordering eviction and granting the period of one month within which the eviction shall be effected.

For the above reasons the Magistrate's decision is confirmed but varied and the District Court's judgment set aside. The Respondents in both appeals will have their costs on the lower scale to include LP. 15 to each for advocate's attendance fee.

Delivered this 29th day of June, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 342/43.

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

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

IN THE APPEAL OF:—

1. 'Awadallah Ibrahim el Zitawi,
2. The Beer-Zeit Bani Zeid Bus Co. Ltd. Jerusalem. APPELLANTS.

V.

Muallem Ibrahim Saleh & 10 ors. RESPONDENTS.

Companies — Rectification of share register ordered only when ownership in shares has passed — Judgment exceeding remedy claimed —

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* Should (*semble*) be : Magistrate. (*Ed.*)

Palmer's Precedents — Ward and Henry, Co.s Ord., secs. 19, 31(3), 35, *Table A, Ex parte Shaw, Re Overend Gurney & Co.*

Appeal from the judgment of the District Court, Jerusalem, dated 4th October, 1943, in Civil Case No. 6/43, allowed:—

Rectification of the share register will not be ordered unless the ownership in the shares has passed.

(*A. M. A.*)

REFERRED TO: Ward and Henry's case, 1867, 2 Ch. App. 431, 36 L. J. Ch. 462, 16 L. T. 254; Overend Gurney & Co., *re* Musgrave & Hart's case, 1867, L. R. 5 Eq. 193, 37 L. J. Ch. 161, 17 L. T. 313.

DISTINGUISHED: Diamond Rock Boring Co., Ltd., *Re, ex parte* Shaw, 1877, 2 Q. B. D. 463, 25 W. R. 569 C. A.

ANNOTATIONS: On rectification of the register of members *vide* Halsbury, Vol. 5, *pp.* 231 *seq.*, sub-sec. 4.

(*H. K.*)

FOR APPELLANTS: Nazzal and A. Levin.

FOR RESPONDENTS: Eliash.

JUDGMENT.

Edwards, J.: This is an appeal from the District Court of Jerusalem which Court had ordered the first Appellant to transfer to the Respondents, who were Plaintiffs Nos. 1, 2, 3, 4, 6, 7, 8 and 9 in the Court below, certain shares in the second Appellant Company, which the learned President had held the Respondents had bought from the first Defendant (now first Appellant).

The shares were shares in the Defendant Company (*i. e.* the second Appellants). It is unnecessary for the purpose of this judgment to discuss at length the rather complicated relationships between the parties because, in my view, this appeal can be decided on one short point, namely, that, unless it had been proved or admitted that the Respondents to this appeal were the legal owners of the shares in question, the Court below could not have ordered rectification of the Share Register. In this connection is it pertinent to observe that, while the learned President of the District Court did, in fact, order the first Appellant to transfer certain shares to the Respondent, yet by the amended statement of claim the Respondents had asked that their names be entered in the Share Register of the Company (*i. e.* the second Appellants), so that, in effect, the application in the Court below was substantially one for rectification of the Share Register. (Palmer's Company Precedents (1931) Part I, p. 1199). It is clear from the record that the legal title of the Respondents to the shares in question

was not established in the Court below. It is admitted that no transfer had ever been executed.

The Appellants' advocate relied on Ward and Henry's case, Law Reports, Chancery Appeal Cases (1866—1867) Vol. II, p. 431, and on the Companies Ordinance Cap. 22 sections 19, 31(3) and 35. The Company in question is a private Company to which Art. 17 of the third Schedule, Table A (Laws of Palestine, Revised Edition, Vol. I, p. 341) applies. The Respondents' advocate relied on *Ex parte* Shaw, L. R. Queen's Bench Division (1876—1877) Vol. 2, p. 463. In that case, however, it seems from the report at p. 470 (fourth last line of p. 470) that the legal title of the transferee had been established. That is certainly not the case in the present litigation. Support for the Appellant's contention seems to be found in *Re.* Overend Gurney & Co. (Musgrave & Hart's case) (1867) L. R. 5 Eq. 193 and E. & E. Digest, Vol. 9, p. 219 Items 1379, 1345 and 2293.

For these reasons I consider that the Respondents' application in the Court below should have been dismissed. Whatever claims the respective Plaintiffs (Respondents) may have against the first Appellant, it is clear that the statement of claim in the form in which it was made in the Court below was misconceived. Taking, as I do, that view of the position, it is, for obvious reasons, undesirable that this Court should discuss the question whether or not it was proved that the first Appellant was the owner of the shares in question.

For the foregoing reasons I would allow this appeal and set aside the judgment of the District Court of Jerusalem of 4th October, 1943, leaving the Respondents to take such action against the Appellants as they are advised. The eight Respondents to this appeal should pay jointly to the first Appellant one set of costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee at the hearing of LP. 15; they should also pay jointly to the first Appellant one set of costs in the Court below assessed as fixed (inclusive) costs of LP. 5.—.

Delivered this 12th day of July, 1944.

British Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

HIGH COURT No. 19/44.

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

BEFORE: Rose, A/C. J.

IN THE APPLICATION OF :—

Nabiha Salim Zahwa. PETITIONER.

v.

1. Attorney General,
2. Inspector General of Police and Prisons. RESPONDENTS.

High Court — Onus of proof — Deportation Order — Alleged wife of Palestinian citizen — Person habitually resident in Palestine on 1.8.25 *— Immigration Ord., sec.* 10(1)(*f*).

Return to an order *nisi,* directed to the Respondents, calling upon them to show cause why the deportation order made against Petitioner should not be cancelled and why Respondents should not be restrained from proceeding with her deportation and why they should not release her from custody; rule *nisi* discharged:—

A person applying for the cancellation of an administrative order should satisfy the High Court that the order was improperly made.

(*A. M. A.*)

ANNOTATIONS: *Cf.* H. C. 59/44 (*ante,* p. 295) and annotations.

(*H. K.*)

FOR PETITIONER: Cattan.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

In this matter an order of deportation was made against the Petitioner under section 10(1)(f) of the Immigration Ordinance, 1941, on the ground that she was not a Palestinian citizen, and the High Commissioner deemed it to be conducive to the public good to make such order. The Petitioner comes to this Court and alleges that the order was wrongly made and should be set aside. It is, of course, for her to satisfy me that the order was wrongly made. The ground upon which she relies is that in 1937 she married a certain person who died last year, that this person was a Palestinian citizen and that, therefore, she, by her marriage, also became a Palestinian citizen. The point to be decided is whether this late husband, who admittedly was born in Lydda and was originally a Turkish subject, was habitually resident in the territory of Palestine on the 1st August, 1925. If he had been he would then have been deemed, by means of the Citizenship Order-in-Council, to have been a Palestinian citizen.

Affidavits and documents have been produced on both sides, and it seems to me that the balance of probability is in favour of the Respondents' contention that, in fact, this man was not habitually resident in Palestine on the 1st August, 1925. But even if I am wrong in that, it seems to me that the position at the best from the point of view of the Petitioner is that I am left in doubt, as a result of looking at these documents and affidavits, as to whether or not this man was habitually resident in Palestine on the 1st of August, 1925. That being so, it seems to me that one must presume that the order has been properly made. On the face of it it appears to have been properly made, and there is eminently, in my opinion, a presumption that it was so properly made, unless the Petitioner is able to satisfy me to the contrary.

For the reasons which I have given, the Petitioner has failed to satisfy me on that point, and it is not for me at this stage to consider the merits or any possible hardship which may have been incurred. That, one must hope and presume, has been considered by the High Commissioner before making the order.

The rule is, therefore, discharged. The Respondents do not ask for costs.

Given this 27th day of March, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 350/43.

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

BEFORE: Rose, A/C. J.

IN THE APPEAL OF:—

Haj Mustafa El 'Ashi. APPELLANT.

v.

Abdallah Enjeileh. RESPONDENT.

Landlord claiming eviction on ground that tenant committed waste and premises were reasonably required for landlord's own occupation — Short judgment for eviction with no mention of waste point — Question whether case should be remitted to Magistrate.

Appeal from the judgment of the District Court of Jaffa, sitting in its appellate capacity, in C. A. 44/43, dismissed:—

1. Question of alternative accommodation in an eviction case — eminently a matter for trial Court to consider.

2. If Defendant devoted in his pleading a lengthy argument to one of the causes of action and Plaintiff without referring to it at all, confined himself to other cause of action mere fact that judgment does not contain a finding as to first cause — not a sufficient ground for remitting case to trial Court.

(*M. L.*)

ANNOTATIONS:

As to point 1 see C. A. 331/43 (*ante*, p. 154) and annotations.

(*A. G.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Habayeb.

JUDGMENT.

In this case the Appellant was claiming eviction of certain premises on two grounds. First, that the Respondent had committed a waste and secondly that the premises were reasonably required by the Appellant, who was the landlord, for his own occupation, and that in all the circumstances of the case including alternative accommodation to be provided, it was reasonable that the Court should give him an order for possession.

Mr. Goitein urges that the judgment of the Magistrate is very short and that the case at least should be remitted to him to make the necessary findings of fact on these matters. Now, it is true that the judgment itself is short but the record, in our opinion, is extremely careful and also extremely detailed and with regard to the complaint that there is no mention in the judgment of the waste point we would say that at the end of the very full record appears an extremely detailed note of speeches for the counsel for both sides, and counsel for the Defendant has one lengthy paragraph devoted to this waste point. It is true that the judgment does not refer to it but neither does the advocate for the Appellant refer to the note, who appears to have confined himself simply to the alternative accommodation point. Having regard to that we certainly cannot say that this is a matter which should be remitted to the Magistrate to make a finding upon this matter of waste.

With regard to the alternative accommodation, that is eminently a question for the trial Court to consider. We have here the Magistrate who knows the neighbourhood in which this dispute has arisen and is presumably familiar with the actual accommodation that was suggested and offered. The record at least shows that he made a very full note on all the circumstances including this matter of alternative

accommodation and it seems to us that the mere fact that the judgment is on the brief side is not sufficient ground for us to remit the case to make further findings of fact. For all these reasons we think that the appeal should be dismissed with costs on the lower scale to include the sum of LP. 10 advocate's attendance fee.

Delivered this 6th day of March, 1944.

Acting Chief Justice.

CIVIL APPEAL No. 13/44.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Leib Szczupak & an. — APPELLANTS.

v.

Samuel Rapoport & an. — RESPONDENTS.

Injunction to remove water pipes from Plaintiff's land — Inapplicability of English Law where sufficient provisions in Palestine Law — Revocability of consent to passage or laying of pipes.

Appeal from the judgment of the District Court of Tel-Aviv, dated 23rd December, 1943, in file No. 219/42, allowed:—

1. Where there are sufficient provisions in the *Mejelle* governing the case, no need to refer to principles of English Common Law.
2. Right, obtained by consent and not from time immemorial, to lay pipes or the like in other person's land is in nature of tenancy at will and can be revoked at any time.

(*M. L.*)

ANNOTATIONS:

1. As to application of English Common Law see H. C. 37/44 (*ante*, p. 293) with annotations thereto.
2. As to rights to lay pipes or the like in other person's land see C. A. 167/43 (1943, A. L. R. 682) with annotations thereto.

(*A. G.*)

FOR APPELLANTS: Goitein.

FOR RESPONDENTS: N. Rudy.

JUDGMENT.

Frumkin, J.: This is an appeal from the judgment of the District Court of Tel-Aviv, wherein an application for an injunction to remove certain pipes from the land of the Plaintiffs (Appellants) laid by the Defendants (Respondents) was dismissed.

There were two main defences: one that there was prescription, and alternatively that there was consent. On both these points the Court below decided against the Respondents. Having heard witnesses on both sides, the Court found that the Respondents failed to prove both the plea of prescription and the fact that the pipes in Appellant's land were laid with the consent of the previous owner.

I think that in this case the *Mejelle* applies, as there are ample provisions governing cases of this nature dealt with specifically. There is, therefore, no need to refer to the principles of English Common Law.

Article 1228 of the *Mejelle* (Tyser's translation) reads as follows:—

> "When someone's water-channel or aqueduct flows by right through the building site of another, the owner of the building site cannot prevent it saying 'I will not let it flow hereafter'."

Emphasis is to be made to the words "by right" which, reading the article together with the entire chapter, must be taken to mean an acquired right from time immemorial. In this case it was never pleaded that there was a right from time immemorial, nor was it proved that there was any right for a period exceeding the time of prescription. It follows, therefore, that as the pipes were not laid by right, the owner of the said site may prevent its continual use. Even if there was consent, it being in the nature of tenancy by will, that consent could at any time be withdrawn. Article 1226 reads:—

> "A person who has given leave to take and consume gratuitously, has a right to go back from the leave given."

The example in this article deals with the right of passage but it equally applies to a right, other than a right acquired by time immemorial, of the laying of water-pipes. It follows, therefore, that the Respondents have established no right to keep the pipes in the land of the Appellants, and the appeal must succeed.

Taking into consideration the difficulties of the present times connected with the removal and the relaying of pipes, we are of the opinion that the execution of this judgment should be postponed for a period of one year from to-day.

The appeal is, therefore, allowed, and the judgment of the District Court set aside. The Appellants will have their costs on the lower scale here and below, together with an inclusive sum of LP. 10 advocate's attendance fee for this hearing.

Delivered this 12th day of June, 1944.

Puisne Judge.

Edwards, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 159/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Itzhak Trachtengot. APPLICANT.

v.

1. The Official Receiver, Government of Palestine,
2. Dr. Werner Sommerfeld, Liquidator of Amiel Bros. Ltd., in liquidation,
3. Dr. Eliezer Amiel. RESPONDENTS.

Liquidators — Allegation against liquidator — Matters to be considered by the Court — Evidence may be heard on motions, C. P. R., rr. 312, 189—193 *et seq. — Ex parte Newitt — Application by liquidator granted without enquiry, Co.s Ord.* 173(3) *— Costs.*

Application for leave to appeal from the order of the District Court of Jaffa, dated 26th day of April, 1944, in File No. 169/43, consolidated motions Nos. S/7/44 and S/8/44; order of the District Court partly confirmed and partly set aside:—

1. Evidence of witnesses may be led in the trial of motions.
2. The Court should not accede to the liquidator's application for sale without enquiring into the matter.

(*A. M. A.*)

REFERRED TO: Mansell, *in re, ex parte* Newitt, 1884, 14 Q. B. D. 177, 54 L. J. Q. B. 245, 52 L. T. 202, 1 T. L. R. 98.

ANNOTATIONS:

1. Prayer (c) of 2nd Respondent's application, the grant of which was set aside by the Court of Civil Appeal as either unnecessary or premature, was for directions to the liquidator "to proceed with the examination of the other assets ..... for the purpose of ascertaining the real value of the company's assets .....".

2. On removal of liquidators *vide* Halsbury, Vol. 5, *pp.* 622—3, No. 1025. One of the main grounds advanced in support of Applicant's arguments was that as he owned 50% of the company's share capital and was also the main creditor of the company, regard should be had to his wishes and to the fact that he had no confidence in the liquidator appointed by the Court.

3. On procedure by way of motion *cf.* judgment of Edwards, J., in C. A. 65/42 (9, P. L. R. 392; 1942, S. C. J. 429).

(*H. K.*)

FOR APPLICANT: Levitzky.

FOR RESPONDENTS: No. 1 — Kantrovitch.
No. 2 — A. Levin.
No. 3 — S. Wolf.

JUDGMENT.

This is an application for leave to appeal from an order of 26th April, 1944, of the District Court of Jaffa, whereby the learned Relieving President (Judge Hubbard) made orders on two consolidated motions under the Companies Ordinance.

In effect, the District Court dismissed an application by the present Applicant (Mr. Trachtengot) to remove the liquidator of Amiel Bros. Ltd. (in liquidation) but granted an application by the liquidator (Dr. Sommerfeld) who had applied for permission to sell certain finished diamonds approximating in quantity to 214 carats and for directions as to proceeding with the sale of the other assets of the Company. Against these orders the Applicant now applies for leave to appeal to this Court, leave having been refused by the District Court. At the commencement of the hearing I agreed to treat the application for leave as the appeal. I have heard arguments by Mr. Levitzky, for the Applicant, Mr. Levin, for the second Respondent, Dr. S. Wolf, for the third Respondent, and the Official Receiver (Mr. Kantrovitch) in person. I quote paragraphs 2 to 7 of the order of the District Court:—

> "2. I need only repeat the remark which I have already made in two previous orders, namely, that what I am really dealing with is a partnership in the guise of a private company (see *in re* Yenidgi Tobacco Co. Ltd. 1916, 2 Ch. Div. 426). The two principal partners, holding between them all but one of the 1,200 LP. 10 shares, are at loggerheads and there is a dead-lock. The existence of a dead-lock owing to internal disputes was in fact one of the grounds of the petition and the winding-up order was made by consent. The facts of the case and the nature of the company are such that for the reasons given in my Order, dated 10th March, I refused to appoint a committee of inspection and I refused also to appoint as liquidator either of the persons nominated by the meetings of creditors and contributories, and I appointed a liquidator of my own choice, Dr. Werner Sommerfeld.
>
> 3. In the first of the applications now before me Mr. Trachtingott, one of the two co-directors of the company, whom I previously called the two partners, asks for an order staying the sale of the company's diamonds, removing the liquidator or appointing an additional one, and allowing his auditor to inspect the company's books.
>
> 4. In the other application the liquidator asks authority to proceed with the sale of the diamonds, and to carry out the necessary examination and valuation of the various classes of diamonds with the aid of an expert but in the absence of both Mr. Trachtingott and the other co-director Mr. Eliazer Amiel. Mr. Amiel does not oppose this application by the liquidator and it is supported by the Official Receiver.

5. Mr. Trachtingott's main object in petitioning for a winding-up was his desire to have an investigation into certain charges he makes against Mr. Amiel. Had it not been for these allegations he would have settled, so he says, with Mr. Amiel amicably. This he states in para. 4 of his motion dated 1st April and in para. 4 of his advocate's letter to Dr. Sommerfeld, dated 30th March, and Mr. Levitzki, who appeared on his behalf, also admitted it. Whether he might not have been better advised to institute criminal proceedings I express no opinion, but the motive behind his petition explains his attitude and conduct since.

6. Mr. Trachtingott has made in his affidavit a number of allegations against Dr. Sommerfeld and against the veracity of the latter's affidavit. Dr. Sommerfeld has the complete confidence of this Court and I say without hesitation that where Mr. Trachtingott has challenged the veracity of his affidavit, I believe Dr. Sommerfeld and I disbelieve Mr. Trachtingott. I am satisfied that Dr. Sommerfeld is carrying out his duties as liquidator capably and impartially. Part of those duties, although not the main duty, is an investigation into the charges Mr. Trachtingott has made against Mr. Amiel, of which the liquidator has taken note, and which investigation he is in fact carrying out. I know of no legal right Mr. Trachtingott has to be present at the examination of the diamonds, as long as the other director is also excluded, nor could Mr. Levitzky cite any authority. Dr. Sommerfeld is the liquidator, not Mr. Trachtingott, and Dr. Sommerfeld is entitled to carry out his duties without perpetual interference from Mr. Trachtingott. In the light of Dr. Sommerfeld's affidavit and the letters written to him on behalf of Mr. Trachtingott, it is clear that the latter, actuated by the motive I have indicated, is behaving in a way, which, in plain, if somewhat colloquial English, would be called "making an unmitigated nuisance of himself", and that is a course of unhelpful conduct for which he will receive no support from this Court.

7. I need only add that I do not propose to go into the question whether or not the present is a good time to sell diamonds. I am satisfied and so is the Official Receiver that the liquidator is taking reasonable steps to inform himself on this matter, and I have no doubt that he will act in the best interests of the Company."

Mr. Levitzky complains that the learned Relieving President never enquired into his client's allegations against the liquidator but merely said, in effect, that Mr. Trachtengot was a troublesome person and that, as he (the Relieving President) had known Dr. Sommerfeld (the liquidator) of old, and had formed a high opinion of his integrity, it would be quite useless for Mr. Trachtengot to attempt to convince him to the contrary. With all respect to the learned Relieving President, I am inclined to agree with Mr. Levitzky that this is the impression that one has from the quite uncompromising and rather dogmatic wording of the second sentence to the sixth paragraph of the

order of the District Court. The main ground of appeal, however, is that the learned Relieving President did not hear evidence. This is a matter which has caused me some anxiety. Mr. Levitzky assured me at the Bar that some Presidents and Relieving Presidents and Judges of District Courts have expressed their unwillingness to hear the evidence of witnesses on the trial of motions. I do not know whether this is so. I would merely say that, if a party to a motion wishes to lead evidence, a District Court or a Land Court has no option but to allow him to do so. I refer to the combined effect of Rules 312, 189, 190, 191, 192, 193 *et seq.* Civil Procedure Rules, 1938. This may tend to hinder or delay the work of a busy District Court but the rules are clear.

In the present case, however, I am not satisfied that the present Applicant's advocate, when before the District Court, ever applied to that Court to hear the verbal evidence in the witness box of his client or of his witnesses. Were it clear that he had done so and that the learned Relieving President had refused to allow him to put his client or his witnesses into the witness box, I should certainly have set aside the order refusing to remove the liquidator and refusing to appoint an additional liquidator and I would have remitted the matter for a re-hearing, attracting the attention of the Court below to the rules which I have cited. It remains, therefore, to consider whether, on the material before him, the learned Relieving President was justified in refusing the application and its alternative, namely, to remove the present liquidator, alternatively to appoint an additional liquidator to act with him. Having heard Mr. Levin and the Official Receiver, I am not satisfied that sufficient reasons were adduced before the District Court to justify either the removal of the present liquidator or the appointment of an additional liquidator. I was referred by both Mr. Levitzky and Mr. Kantrovitch to *Ex parte* Newitt (1884) 14 Q. B. D. pages 177 and 181. This ground of appeal accordingly fails.

With regard to the appeal against the part of the order granting the liquidator's application, this seems to me to give rise to different considerations. The learned Relieving President merely said in paragraph 7 of his order that he did not propose to go into the question. It is clear that this order cannot stand because the Court never enquired into the matter at all.

I set aside the order granting the application for leave to proceed with the preparation of and to carry out the sale of finished diamonds and I remit the matter for a re-hearing by the District Court. That is to say, I set aside the order granting prayers (a) and (b) of the

liquidator's application for directions under Section 173(3) Companies Ordinance and I remit the matter for a re-hearing. As regards prayer (c), I consider that this application was either unnecessary or premature and in either case should not have been granted. I accordingly set aside the order granting it. I do not remit it for a re-hearing. In other words, the order granting prayer (c) is set aside *simpliciter*. I shall hear parties' advocates on the question of costs of this appeal.

Having heard parties' advocates, on costs, I order that the liquidator's costs of this appeal be paid out of the Company's assets; these costs will be taxed on the lower scale to include an advocate's attendance fee at the hearing of this appeal of LP. 25.

Delivered this 30th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 379/43.

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

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

IN THE APPEAL OF:—

"Aviv" Aloof Nahagei, Ltd. APPELLANT.

v.

Rachel Trauber & an. RESPONDENTS.

Carriers — Taxi companies, whether common carriers in respect of luggage — Luggage conveyed together with passengers — Ottoman Commercial Code, art. 67.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 17th September, 1943, in Civil Appeal No. 72/43, dismissed:—

The liability imposed by the Ottoman Commercial Code applies to luggage carried by a taxi service.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 68/43 (10, P. L. R. 175; 1943, A. L. R. 214) and notes thereto in A. L. R.

(*H. K.*)

FOR APPELLANT: E. Z. Fellman.

FOR RESPONDENTS: Rotenstreich and Caspi.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel-Aviv, which, in its appellate capacity, allowed an appeal from the Magistrate's

Court, Tel-Aviv. The case against the second Respondent was dismissed by the learned Magistrate, whose decision on this part was upheld by the District Court. The second Respondent has, therefore, no further interest in the case.

The facts are simple and they are not in dispute.

The Appellant is a taxi company. The Respondent bought a ticket for a seat from Haifa to Tel-Aviv in one of the Company's public taxis. She had a trunk and some packages, all of which she carried with her in the taxi. The trunk was lost en route, and the Respondent has never recovered it or any of the articles in it.

The point for determination is whether the Appellant company are common carriers in respect of passengers' luggage. It is conceded that the company were common carriers in respect of the passengers themselves.

It appears that the company has a separate service for the transport of goods and luggage. Mr. Rotenstreich, for the Respondent, argues that the company are liable for loss or damage to that luggage which has been accepted for conveyance with the passenger himself.

Now, it is true that the Appellant company could have refused to carry this luggage, and they could have insisted that it should be consigned by the luggage route, but they did not do so. After some argument with the Respondent they decided to allow her to take the trunk with her in the taxi. It was thereupon placed on the top of the taxi, which was under the sole control of the Appellant's servant or agent. This being the case, it seems to me that they are liable for the loss or damage done to the trunk to the same extent that they are liable in respect of the other, although perhaps smaller packages of luggage which they allow passengers to carry with them. I have no doubt that they are common carriers of those smaller packages. It follows that they are common carriers of the trunk.

But Mr. Fellman, for the Appellant, falls back on another argument and says that Chapter 5 of the Ottoman Commercial Code deals with goods only, and not with passengers' luggage, and consequently there is no law under which the Respondent can recover. Article 67 of the Commercial Code contains specific provision that the Articles of Chapter 5 shall apply to ship-masters, managers of diligences, public coaches, and all other carriers of goods. It is obvious that the provisions of the Commercial Code, which was first promulgated in 1850, must be interpreted in the light of the modifications and alterations which are inevitably introduced to the subject-matter with which they deal by the progress of society. The liability which the Commercial Code

attaches to managers of diligences and public coaches, is in my opinion transferred to the managers of taxi-cabs just as effectively as similar provisions in the English law were transferred from the managers of diligences and stage-coaches to the managers of railways and motor-cars, and even now to commercial aeroplanes.

For these reasons I consider that the R/President of the District Court was right, and the appeal is dismissed. 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. 398/43.

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

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

IN THE APPEAL OF:—

Yehuda (Leo) Neulinger. APPELLANT.

v.

The Custodian of Enemy Property. RESPONDENT.

Enemies — Claim by Custodian on behalf of enemy — Allegation of composition — Schering Ltd. v. Stockholms Enskilda Bank Ltd. — Rights vesting in Custodian — Rate of exchange — P. C. A. 1/42 — T. E. (Custodian) Order 4(d).

Appeal from the judgment of the District Court of Tel-Aviv, dated 22.11.43 in Civil Case No. 237/43, dismissed:—

In the absence of a formal document the Court will not infer that a debt due to an enemy has been liquidated by a new agreement.

(*A. M. A.*)

DISTINGUISHED: Schering Ltd. (in voluntary liquidation) *v.* Stockholms Enskilda Bank Aktiebolag, 1943, 2 A. E. R.

NOT APPLIED: P. C. 1/42 (10, P. L. R. 271; 1943, A. L. R. 408).

ANNOTATIONS:

1. *Cf.* Halsbury, Vol. 1, *pp.* 458 *seq.* and Supplement 1943, *pp.* 42 *seq.*
2. As regards the rate of exchange see also H. C. 62/43 (10, P. L. R. 364; 1943, A. L. R. 418).

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: E. A. Kirschner.

JUDGMENT.

This is an appeal from the District Court at Tel-Aviv. Until the Belgian surrender in 1940 the Appellant Yehuda (Leo) Neulinger had dealings with the firm of S. A. Fabriques Reunies de Fibro-Ciment, a Belgian firm domiciled in Belgium. It is not denied that at the time of the surrender of Belgium he was indebted to the firm to the extent of 96.383.09 Belgian francs. On 12.6.1940 Belgium was declared to be an area in enemy occupation.

The Custodian of Enemy Property sued for the recovery of the sum due in the District Court Tel-Aviv, judgment was given in his favour and this appeal is against that judgment.

Only two points arise in the appeal. Mr. Eliash for the Appellant has argued that there was a composition of the debt by a contract or agreement that it should be paid off by adding 10% to the cost price of articles ordered in the future by the Appellant from the Respondent *. It is common ground that owing to the state of war and the present position of Belgium further goods can neither be ordered nor supplied. The result of this, argues the Appellant, is that payment of the debt must at least be suspended pending the time when the resumption of trading arrangements becomes possible. In support of his argument he referred to certain general principles decided in the case of Schering Ltd. (in voluntary liquidation) *v.* Stockholms Enskilda Bank Aktiebolag, All England Law Reports, 1943, Vol. II. That case is of course both recent and authoritative. It discussed in great detail the effect of the outbreak of war on existing contracts with enemy nationals and neutrals, and the question of the abrogation and frustration of such contracts was exhaustively examined. It seems to me that in the first place I must consider whether any contract of the nature discussed in this authoritative case exists here and whether the principles laid down by the Court of Appeal have any application to the facts of this case.

There is no doubt that there was an agreement or arrangement by which the firm of S. A. Fabriques Reunies de Fibro-Ciment permitted the Appellant to redeem his debt by payment from time to time of an addition of 10% to the cost price of all further orders placed by him.

But no contract or formal document which would entitle this Court to infer that the debt had been liquidated by a new agreement has been produced. Indeed such documents as are available tend to prove that the firm did not intend to do anything more, nor were they in fact

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* *Scil.*: The Belgian firm now represented by the Respondent.

(*Ed.*)

doing anything more, than accommodating a client, whose business they wished to keep, in regard to an outstanding debt. I cannot see in what way they renounced any of their rights to the 96.383.09 francs. What they said in fact was: if you continue to deal with us and pay 10% additional price on new orders we will not enforce our legal claim against you. They did not abrogate that legal claim. There is, for instance, no doubt in my mind that if the Appellant was declared bankrupt the Respondent could — were it not for the prohibition imposed by war legislation — file a declaration in bankruptcy for the full outstanding amount.

The Respondent as Custodian of Enemy Property can exercise any rights possessed by the Belgian Co. He can, therefore, terminate this accommodation — for such I hold it to be — in regard to the redemption of the outstanding debt and demand that it be paid in full.

There remains for consideration the question of the exchange rate. The debt became due to the Custodian on the date on which he assumed control of Belgian Property under the provisions of the Trading with the Enemy Ordinance which was the 12th June, 1940. I can well believe that it would have been impossible to say what was the exchange rate for Belgian francs during that disastrous period. Mr. Eliash has referred me to P. C. A. 1/42 (10 P. L. R., p. 271). I am fully alive to the implications of that case but it appears to me that the principle enunciated therein has been superseded by statutory provisions. Order 4(d) of the Trading with the Enemy (Custodian) Order, 1939, states how the rate of exchange for the purposes of payments under the Ordinance is to be calculated. It is to be either at the middle Official Rate of Exchange for Sterling fixed by the Bank of England or if there is no such rate at such rate as the High Commissioner may determine. Now, I have had no evidence that there was any middle Official Rate of Exchange for Sterling fixed by the Bank of England. I believe it is a fact that there never was such a rate at the date when the debt became due to the Custodian. But the High Commissioner did fix a rate in accordance with the provisions of the order by Order No. 87 of 1940, which fixed the rate of the Belgian Franc at 110 to one Palestine Pound and I am of opinion that this is the rate of exchange applicable to this debt.

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

Delivered this 20th day of June, 1944.

Chief Justice.

CRIMINAL APPEAL No. 24/44.

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

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

IN THE APPEAL OF:—

Henry Hanna Mansour. APPELLANT.

v.

Attorney General. RESPONDENT.

Criminal Procedure — Information filed by J. G. A. omitting counts on which accused was committed for trial — When information should be filed by A. G. — Dropping charges amounting to a nolle prosequi — T. U. I. Ord., history of the legislation, secs. 28(1), 28(5)(*a*), 59, *M. A.* 9/32, *A. A.* 3/29, *CR. A.* 82/42 — *Point not taken at the trial.*

Appeal from the judgment of the District Court of Haifa, dated the 14th of February, 1944, in Criminal Case No. 229/43, whereby Appellant was convicted of uttering a forged official document, contrary to section 340 and 23 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, allowed:—

1. If the prosecution intend to pursue only part of the charges on which an accused is committed for trial, one of two courses are open to them: either to file an information *on behalf* of the Attorney General, following the terms of the information, and then refrain from leading evidence on a number of counts — in which case the accused is entitled to an acquittal; or to file an information *signed* by the Attorney General on the counts intended only.

2. Failure to file an information on all the counts on which the accused is committed amounts to a *nolle prosequi* of the counts dropped. The information should, therefore, be signed by the Attorney General himself, under sec. 59.

3. A point going to the validity of the information may be taken for the first time on appeal.

(*A. M. A.*)

REFERRED TO: A. A. 3/29 (1, P. L. R. 362; 2, C. of J. 604); M. A. 9/32 (1, P. L. R. 740; 2, C. of J. 620); CR. A. 82/42 (9, P. L. R. 357; 1942, S. C. J. 312; 12, Ct. L. R. 145).

ANNOTATIONS:

1. On Sec. 28(5)(a) of the T. U. I. Ordinance see also CR. A. 85/38 (6, P. L. R. 34; 1939, S. C. J. 15; 5, Ct. L. R. 125) and CR. A. 14/41 (8, P. L. R. 69; 1941, S. C. J. 53).

2. See note 2 to C. A. 274/42 (10, P. L. R. 105; 1943, A. L. R. 133) at p. 137 in A. L. R. on acts to be done by the Attorney General personally.

3. On the third point *cf.* C. A. 148/43 (10, P. L. R. 310; 1943, A. L. R. 366) — a point of illegality may be taken at any time.

(*H. K.*)

FOR APPELLANT: Cattan and Asfour.

FOR RESPONDENT: Assistant Government Advocate — (Salant).

JUDGMENT.

At the hearing of this appeal a preliminary point has been taken by the Appellant's advocate that the trial was a nullity on the ground that the Information was bad.

The facts are that on 10th April, 1943, the Magistrate committed the Accused for trial on twenty-one counts. On 19th November, 1943, the Junior Government Advocate (Mr. Salant) filed an Information signed by him in which only one of the twenty-one counts was charged, namely, count No. 2.

It has been argued by Mr. Cattan, for the Appellant, that, if the Crown had wished to act in this manner, the Attorney General himself should have made an order of committal under Section 28(5)(a), Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36, Revised Laws of Palestine. In the present case, however, it is not denied that the Information was filed "*on behalf of*" the Attorney General under Section 28(1). It is not denied that in this case no order of committal was made by the Attorney General, nor can it be denied that the Information was filed after the expiry of three months from the date of committal by the Magistrate (See Section 28(5)(a)).

Mr. Salant, Junior Government Advocate, has argued that he himself as a representative of the Attorney General, was entitled to frame, sign and file an Information under Section 28(1); and he has further argued that he was entitled to refrain from including in the Information 20 out of the 21 counts on which the Appellant had been committed for trial by the Magistrate.

He further argues that there was no variation of the order of the committal by the Magistrate; but merely a dropping of twenty out of the twenty-one counts.

Mr. Cattan, for the Appellant, has argued that, whenever the Prosecution wish to file an Information not exactly in accordance with the order of committal of the Magistrate, then the Attorney General himself must act under Section 28(5)(a).

Mr. Cattan has, in support of his argument, drawn our attention to the history of the legislation in question, *viz.* Ordinance No. 37 of 1929, Bentwich Vol. I p. 419, *i. e.* Trial Upon Information Ordinance 1924—1925, Section 28 and to Misdemeanour Appeal 9 of 1932, P. L. R. Vol. I, p. 740, and in particular to the last two paragraphs of p. 743:—

> "That is to say, under Sec. 26(ii) as amended, whether the Magistrate has committed or refused to commit upon any charge whatever, the Attorney-General must now make an order committing the accused for trial upon any charges which he desires to have included in the information. The only exception being where the Magistrate has committed the accused for trial upon the charges in question. The object of this amendment is clear. Where it is intended to override the decision of the Magistrate, the authority of the Attorney General himself is required, and the matter is not to be left to the discretion of a Junior Government Advocate."

The *ratio decidendi* seems to be found in the last paragraph of p. 743.

Mr. Cattan has argued that, when it is intended to interfere with the discretion of the Magistrate, action under Section 28(5)(a) must be taken. We think that there is force in this contention because we are of the opinion that, if action under that section is taken, then an accused person might well be able later on, if necessary, to argue that the order of committal made by the Attorney General had taken the place of the order of committal of the Magistrate, and that, if this be so, the order of the Magistrate is dead and the accused cannot later be tried on any of the remaining twenty counts, whereas, if the Junior Government Advocate is allowed to file an Information, as he has done in this case, charging only one count, the accused might, at any time in the future, be faced with any or all of the other twenty charges. If this be so, then his sole remedy would be to rely on the mercy of the Attorney General who might or might not be willing to express his intention or to give a promise not to proceed further on any of the other charges. If, however, the Information had been in complete accordance with the order of committal of the Magistrate, then it would have been open to the Attorney General or his representative at the trial to intimate that he did not intend to lead evidence on any of the other twenty charges, whereupon the accused would have been entitled to ask for an acquittal on those twenty charges. That, we think, is what should have been done in the present case because, as it is, if Mr. Salant's contention that he can in the Information charge only one of the twenty-one counts is sound, then the accused would have the other twenty charges hanging over his head indefinitely.

We would also add that the action of the Junior Government Advocate in filing an Information dropping twenty of the counts amounted in effect to a stay of proceedings, which, it would seem, can only be ordered by the Attorney General himself under Section 59 of the Criminal Procedure (Trial Upon Information) Ordinance. (See Criminal Assize Appeal 3/29 (P. L. R. Vol. I, p. 362) and Criminal Appeal 82/42 (P. L. R. Vol. 9, p. 357 and at p. 359) "... a stay of pro-

ceedings or a *nolle prosequi* is no bar to the filing of further proceedings against the person concerned.").

For the foregoing reasons, we hold that the Information was bad and that the proceedings which followed thereon were a nullity. It is true that this point was not taken at the trial; and, while we think that it might have been more desirable had it been taken at the trial, it is clear that, as it goes to the whole root of the matter and affects the validity of the whole proceedings, we think that the point can be taken at any time, even on appeal. This being so, we have no option but to allow the appeal on this point and quash the conviction. We so order.

Delivered this 22nd day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 349/43.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Shimon Dov Lande. APPELLANT.

v.

Itzhak Cohen & 3 ors. RESPONDENTS.

Oath under Mejelle 1818 — *Action for goods supplied for the use of a person — Undertaking to pay, whether res inter alios acta — Price v. Easton, C. A.* 292/43 — *Formulation of oath — C. P. Ord., sec.* 4 — 1818 *Mejelle not repealed — C. A.* 110/39 — *Oath and evidence, M. C. P. R.* 139.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 31st day of May, 1943, in Civil Appeal No. 33/43, dismissed:—

1. Article 1818 of the *Mejelle* is still applicable.

2. The oath under this article is distinct from cross-examining the other party as a witness.

(*A. M. A.*)

REFERRED TO: Price *v.* Easton, 1833, 4 B. & Ad. 433, 1 Nev. & M. (K. B.) 303, 2 L. J. K. B. 51; C. A. 292/43 (*ante*, p. 36).

NOT APPROVED: C. A. 110/39 (6, P. L. R. 558; 1939, S. C. J. 506; 7, Ct. L. R. 10).

ANNOTATIONS:

1. On repeal by implication generally *vide* H. C. 38/43 (1943, A. L. R. 199) and note 2.

2. On the decisive oath under the *Mejelle* see, in addition to C. A. 110/39 (*supra*), C. A. 195/38 (5, P. L. R. 538; 1938, 2 S. C. J. 157; 4, Ct. L. R. 229), C. A. 65/39 (1939, S. C. J. 354) and C. A. 128/43 (1943, A. L. R. 295); *cf.* also C. A. 138/38 (1938, 2 S. C. J. 65; 4, Ct. L. R. 65).

3. On the effect of *res inter alios acta* see C. A. 359/43 (*ante*, p. 323) and note 2.

(*H. K.*)

FOR APPELLANT: Lande.

FOR RESPONDENTS: Abrahami.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Tel-Aviv in its appellate capacity, which had dismissed an appeal from a judgment of one of the Magistrates of Tel-Aviv, given in favour of the Plaintiff, now first Respondent.

The Plaintiff had admittedly supplied sand and gravel for a certain building which was being constructed for the present Appellant. It could not be disputed that the material was supplied for the Appellant's use and that the Appellant got the benefit therefrom. As is not unusual with people in the Plaintiff's walk of life, he was not, at first, certain as to whom he should apply for payment. He, accordingly, first of all, sued one Kovansky, who he thought was the main contractor. After he had instituted the action his advocate applied under rules 55 and 59 of the Magistrates' Courts Procedure Rules, 1940, for the third and fourth Respondents and the present Appellant to be joined as defendants. This application was granted and in the result judgment was given against the present Appellant and the third and fourth Respondents, the second Respondent being dismissed from the action.

The evidence of a certain witness named Meir Gershuni, together with certain exhibits, namely, Exhibits P. 1 and P. 2, testified to by the said Meir Gershuni, showed that this witness and the present Appellant had come to an agreement whereby Meir Gershuni was no longer responsible but that the Appellant himself agreed to pay all outstanding accounts due to suppliers of material and that the Appellant and the first Respondent (Plaintiff) had even met and that the Appellant agreed to pay the Plaintiff what was due to him and, because of this, the Plaintiff continued to supply the Appellant with material. Moreover, the Appellant paid to the Plaintiff a certain sum

of money on account and the Appellant perused an account produced by the Plaintiff, wrote some remarks on it and deducted a certain sum from the account.

The Appellant's advocate has contended that the contract, Exhibit P. 1, whereby the Appellant undertook to pay the Plaintiff his account, was an undertaking given to Meir Gershuni and not to the Plaintiff. The Appellant's advocate relies on the case of Price *v.* Easton, Hailsham Vol. 7, p. 79, par. 108 note (s) and on Civil Appeal No. 292/43 Annotated Law Reports (1944), Vol. 1, p. 36. I do not doubt the correctness of those decisions.

Having heard the evidence to which I have alluded and certain other evidence, the Magistrate decided to tender the oath under Article 1818 of the *Mejelle*. There was in the Court below some argument as to the form of the oath which the Appellant should take, his advocate saying that his client was prepared to swear in a certain form, but eventually the Magistrate ordered that the form of the oath to be sworn by the Appellant should be:—

> "I swear by God that I have not undertaken to pay to Plaintiff the sum of LP. 27.280 or part thereof, which the Defendants 2 and 3 remained owing to Plaintiff for *zifzif* and gravel which Plaintiff supplied, between the 8th June, 1939, and 13th November, 1939, to the building at 13, Borochov Street, nor have I undertaken towards Defendants 2 and 3 to be liable for the payment of the above sum; and I don't owe Plaintiff the amount in claim, or part thereof, in any manner whatsoever."

In the result, the Appellant refused to take the oath and judgment was given against him and the second and third Defendants jointly and severally. Against that judgment the present Appellant appealed to the District Court which dismissed his appeal. The District Court in their judgment said:—

> "In the case before us, however, Plaintiff only brought his witnesses and tried to prove his case through them; and when he finished, Defendant intimated that he was citing no witnesses. In such a case, Plaintiff is entitled, under the said Articles of the *Mejelle*, to ask that Defendant be given the decisive oath. Such an application is not inconsistent with the procedure and constitutes an additional right. Plaintiff is always entitled to summon the Defendant as his witness to prove his claim in full or in part, as per the text prepared by the Magistrate.
>
> The appeal is, therefore, dismissed and the judgment of the Magistrate confirmed."

It has been argued before me that, by reason of Section 4 of the Civil Procedure Ordinance, 1938, and rules 138 and 139 of the Magistrates' Court Procedure Rules, 1940, Article 1818 of the *Mejelle*

must be regarded as no longer having any effect. It is, of course, true that Civil Appeal No. 110/39, P. L. R. Vol. 6 pp. 358—361, was decided in 1939, before the Magistrates' Court Procedure Rules, 1940, came into force. It is also true that Article 1818 appears in Section IV of Chapter I of Book XVI *Mejelleh* which is headed "Hearing of an Action". Articles 1815—1828 may be said to be procedural rule sections, nevertheless the right given by Article 1818 seems to be a substantive right going far beyond a matter of mere procedure and, as such, seems to me so fundamental a right granted to the people of these parts that it would, for its abolition, in my opinion, require legislation far more certain and passed by a greater authority than an authority which makes mere rules of Court. I am, therefore, of opinion, that Article 1818 is still of effect.

It is important to note that it was only after the present first Respondent (Plaintiff) had closed his case that the fourth Respondent (Appellant) intimated that he was not going to give evidence or to call any evidence and it was only then that the Magistrate suggested that, as the Plaintiff had not made out his case, he should ask the Court to allow him (Plaintiff) to put to the fourth Defendant the decisive oath.

It was said by the learned Judges who decided Civil Appeal No. 110/39 that:—

> "The oath administered in the way laid down in the *Mejelle* is now of course largely obsolete. The parties can be called as witnesses and it is for the opposing side to extract admissions from them, *etc...*"

It may well be that a plaintiff can call the Defendant as a witness; but, if he does so, he is his own witness and he cannot cross-examine him, that is, he cannot put leading questions to him unless, of course, he can persuade the Court to treat the witness as hostile, but one cannot always be sure that the Court will accede to such a request. Furthermore, under rule 139 of the Magistrates' Court Procedure Rules, 1940, the Plaintiff does not know whether the Defendant is going to call any witnesses or whether the Defendant will go into the witness-box so that he does not know whether he will ever, if at all, have an opportunity of cross-examining him. I am accordingly not altogether prepared to agree with the statement at the bottom of p. 560 and the top of p. 561, P. L. R. Vol. 6, which, in any event, is mere *obiter dicta.*

The only other question raised in this appeal is whether the Magistrate was justified in framing the oath as he did. As to this I respectfully agree with the words used by this Court in Civil Appeal No. 110/39 "parties, of course, cannot always have the oath tendered

in the exact form, suggested by them in the form most advantageous to themselves". There is, therefore, nothing in this ground of appeal. I am not prepared to hold that either the learned Magistrate or the District Court came to a wrong decision.

I accordingly dismiss this appeal. The Appellant must pay the first Respondent his costs of this appeal which I assess as fixed (inclusive) costs of LP. 10.

Delivered this 30th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 155/44.

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

BEFORE : Rose, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Tewfiq Iskandar Zacharia. APPELLANT.

v.

Shukri Hanna Khabbaz. RESPONDENT.

Evidence — Partnership — Evidence of existence of partnership — Whether writing required — English Law and Palestine Law, Part. Ord., sec. 2(2) — Article 80 C. P. C. and Statute of Frauds compared — No necessity in Palestine of signature of party to be charged — C. P. C, art. 72 — Partnership agreement or agreement to enter a partnership — Elements to be taken into account — Findings of fact.

Appeal from the judgment of the District Court of Jerusalem, dated the 18th day of April, 1944, in Civil Case No. 138/43, dismissed:—

1. Article 80 of the Civil Procedure Code applies to actions under the Partnership Ord.

2. Article 80 requires a memorandum in writing but, unlike cases under the Statute of Frauds, the signature of the party to be charged is not required.

3. In deciding whether a partnership has been formed or is merely contemplated, account may be taken of whether certain details connected with the formation of the partnership have been settled.

(A. M. A.)

ANNOTATIONS :

1. *Cf.* C. D. C. Na. 86/32 (1, C. of J. 254) where the Court held: "We do not think, however, that Sec. 2(2) of the Bills of Exchange Ordinance enables or intended the Courts of Palestine to apply the law of England as to evidence or procedure in regard to bills of exchange .....".

2. It seems doubtful whether Art. 80 of the Ottoman C. P. C. should still be "read together with Art. 72" of the same Code, the latter article having been repealed by Sec. 2(1) of the Civil Procedure Ord., 1938.

(*H. K.*)

FOR APPELLANT: A. Atalla.

FOR RESPONDENTS: Nakhleh.

JUDGMENT.

Rose, J.: This is an appeal from a judgment of the District Court of Jerusalem. As the learned President said at the outset of his judgment, the issue in the case is whether the parties had actually formed a partnership in a certain piggery business or whether the position was that at the relevant time they were still only contemplating the formation of a partnership.

Many points have been argued in this case and, if we may say so, with considerable ability by counsel on both sides. The first point taken is that having regard to section 2(2) of the Partnership Ordinance it is no longer necessary to have regard to article 80 of the Ottoman Code of Civil Procedure and therefore that it is unnecessary to produce a document in order to establish that in fact there exists a partnership. Section 2(2) reads:—

> "This Ordinance shall be interpreted by reference to the law of England relating to partnership, and the English rules of equity and common law applicable to partnership shall apply in Palestine, save so far as they are inconsistent with the express provisions of this Ordinance."

Mr. Atalla contends that the meaning of that is clear; that there is no saving of any existing legislation, such as article 80, and that the intention of the legislature was that the English Common Law, and Common Law alone, should apply to the law of partnerships. If that were so, the position would be that you would have in this country the law of partnerships of the English Common Law without the safeguards provided by the Statute of Frauds, which provides a very similar provision to article 80, and that is that, as far as the Statute of Frauds is concerned, a partnership that is to last for more than one year must be evidenced by a note or memorandum in writing to be signed by the party to be charged. That is the English statute which has not been applied to this country. Mr. Nakhleh argues that the reason why that statute has not been applied to this country is that we already have a provision — article 80 — which, so far from having been repealed, has been specifically preserved under the Civil Procedure Ordinance of 1938. The point is a difficult one, and surprisingly

enough, having regard to the fact that the Partnership Ordinance came into force in 1930, no authority of this Court has been cited to us on this point, but we cannot help feeling that it will be most dangerous for us so to interpret section 2(2) of the Partnership Ordinance as to mean that a partnership which may last and continue for years or even for the life-time of the parties, can be proved without a document within the meaning of article 80 as explained by article 72 of the Ottoman Code of Civil Procedure. We think, therefore, that the Appellant is wrong in his contention that it was not necessary to produce a document.

The next matter that arises is as to a certain document which was, in fact, produced and upon which the Appellant relies, that is Ex. T. Z. VI in the Court below. It relates to a sum of LP. 250 which, by common ground, was paid by cheque by the Respondent to the Appellant on the 13th July, 1943, and the cheque was cashed on the 14th July, 1943. That document was written in the hand-writing of the Respondent and was signed by the Appellant, and reads:—

> "Receipt No. 27.
> Received from Shoukri Khabbaz the sum of LP. 250 (two hundred and fifty Palestine Pounds) on account of his capital in the Bait Safafa Piggery Partnership — Cheque No. 589098 on Barclays Bank, Jerusalem."

The learned President came to the conclusion that that document did not comply with article 80, and no doubt in coming to that conclusion he took the view, which is by no means an illogical view, that that article should be interpreted in the same way as the Statute of Frauds, that is to say, that the document in question should be signed by the party to be charged. Mr. Atalla before us concedes that that will generally be the rule but that there can be a circumstance — and he says that this case provides one — where that rule could be relaxed. He says that here you have a document signed by the Appellant but admittedly prepared by the Respondent, written in the hand-writing of the Respondent and, after signature by the Appellant, retained by the Respondent. Having regard to all these facts, we are of opinion that as article 80 (read together with article 72) does not specifically say that in every case the note or memorandum in writing must be signed by the party to be charged, there is nothing in law which compels the rejection of this document as being a document outside the meaning of the article.

In addition to that document there was considerable oral evidence on both sides, the Appellant on his side saying that the partnership had actually been formed and the Respondent that it was only in

contemplation. We have been urged with great force by Mr. Atalla that this is really a case in which we should set aside the judgment of the District Court on this question as to whether or not the partnership had been formed or whether it was only in contemplation. We feel considerable doubt in this matter, more particularly having regard to the fact that we have all — rightly or wrongly — formed the impression that the merits rest with the Appellant. He has suffered a very unfortunate loss which he, in the event, would appear to have to carry alone. The fact remains that the learned President gave an extremely careful and reasoned judgment; and having set out the oral evidence, and having referred to the contents of this document, he says in the termination of his judgment:—

> "I come to the conclusion, therefore, that the Plaintiff has not shown that the partnership went beyond the stage of contemplation though it is clear that both parties fully expected that it would be formed. Relying on his belief, the Plaintiff proceeded with the building of the sties before he was justified in so doing and cannot now claim contribution from the Defendant."

This passage immediately follows another passage which refers to the fact that there was still, at the relevant time, a dispute in existence between the parties as to the value to be put upon the pigs. As the learned President points out, this dispute directly affected the amount of capital that the Defendant would have to contribute and he adds that that was a major question of dispute. It seems to us that that is a finding with which we should not interfere. In this case, on the common evidence of both parties, a principal term of the proposed partnership was that the Appellant should supply the pigs and the Respondent was to supply an amount of capital equal to the value of the pigs.

Clearly the learned President was entitled to take the view that whereas a partnership may well be formed when there are still matters of detail to be settled between the partners, the fact that this fundamental question as to the amount of the capital to be supplied by the Respondent was in doubt was an element for him to consider in deciding whether or not the formation of the partnership was proved.

With regard to the document itself, it is also open to two constructions. It says "... on account of his capital in the Bait Safafa Piggery Partnership ...". That, no doubt, might well mean, as the learned President appears to have taken that it did mean, that it related to the proposed Piggery Partnership and that the document itself was not conclusive evidence of the completion of the partnership. As we say, on this matter the trial Court might conceivably have come to another

conclusion upon the evidence before it, but having regard to the documents and to the oral evidence on the record to which we have been referred with care by advocates on both sides, we are unable to say that this is a case in which we should substitute our view of the facts for the view formed by the learned President.

For these reasons, sympathetic as we feel to the Appellant, we are of opinion that the appeal must be dismissed. The usual results must follow. The Respondent is entitled to his costs on the lower scale to include an advocate's attendance fee of LP. 15.

Delivered this 23rd day of May, 1944.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

Abdul Hadi, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 72/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Menahem Shoshàni & 4 ors. APPELLANTS.

v.

The Firm "Bejarano Bros." RESPONDENT.

Application for leave to appeal not accompanied by affidavit — Notice to Respondent regarding deposit in lieu of security not stating amount fixed by Registrar.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 28th January, 1944, in Civil Appeal No. 206/43, dismissed:—

1. Supreme Court — bound by its previous decisions.

2. (*Obiter*): An application should ordinarily be supported by affidavit, but where no facts are in issue, affidavit may be dispensed with.

3. If notice served on respondent regarding deposit in lieu of security does not state amount of deposit fixed by Registrar, appeal will be dismissed.

(*M. L.*)

REFERRED TO: C. A. 48/43 (10, P. L. R. 251; 1943, A. L. R. 374); C. A. 37/41 (8, P. L. R. 136; 9, Ct. L. R. 158; 1941, S. C. J. 158).

FOLLOWED: C. A. 156/43 (10, P. L. R. 335; 1943, A. L. R. 582).

ANNOTATIONS:

1. On force of precedents in Supreme Court see H. C. 30/44 (*ante*, p. 249) and annotations.

2. See C. A. 48/43 (*supra*) and annotations in A. L. R.

3. See C. A. 156/43 (*supra*) and annotations in A. L. R.

(*A. G.*)

FOR APPELLANTS: J. Herman.

FOR RESPONDENT: Margalith.

JUDGMENT.

In this case two preliminary points have been taken by the Respondent. The first, that there was no proper application for leave to appeal in that the motion was not accompanied by an affidavit. The second was an objection that the notice served under Rule 328 (c)(ii) of the Civil Procedure Rules, 1938, did not state the amount of the deposit fixed by the Chief Registrar.

It is a matter for regret that this case, which *prima facie* would appear to raise an interesting point of law, cannot be decided now on its merits. But it appears to me that there are too many previous decisions of this Court in favour of the preliminary objections raised, for me to over-rule them.

In regard to the first objection, Civil Appeal No. 48/43, P. L. R. Vol. 10, page 251, decided that as a matter of practice an application should ordinarily be supported by an affidavit. I would not have felt inclined to uphold the first preliminary objection, because it appears to me that in this case no facts were in issue which would ordinarily require an affidavit. But following the previous decisions of this Court, the second objection is fatal to the Appellant's case.

In Civil Appeal 156/43, Annotated Law Reports, Part 37 of 1943, page 582, a similar point was in issue. There the learned Judge, in considering whether he should exercise his discretionary powers under Rule 333 of the Civil Procedure Rules, 1938, stated that the Court has always very strictly interpreted the words "good cause shown". It is true that in that particular case, after some hesitation, he ruled that the Appellant had general good cause, because he thought that the judgment in Civil Appeal No. 37/41, P. L. R. Vol. 8, page 136, might have led the Appellant into thinking that it was the practice of the registry to fill up the form. But after the delivery of the judgment in Civil Appeal 156/43, there could no longer be any doubt as to what the correct practice was.

In the result I must hold that the preliminary objection succeeds,

and that the Respondent is entitled that the appeal be dismissed, with LP. 5 inclusive costs.

Delivered this 29th day of June, 1944.

Chief Justice.

CIVIL APPEAL No. 123/44.

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

BEFORE : Edwards, J.

IN THE APPEAL OF:—

Izhak Feller. APPELLANT.

v.

Yehoshua Orenstein & 3 ors. RESPONDENTS.

Order of interim injunction — Agreement with regard to alleged copyright — Delay in hearing action — Affidavit produced at the last moment — Cross-examination of deponent — Procedure in Motions — Early trial.

Appeal from the Order of the District Court, Tel-Aviv, dated the 1st day of March, 1944, in Civil Case No. 188/43, dismissed:—

Party cannot complain that Court acted upon affidavit produced at the last moment by the 2nd party, if he has not insisted on asking the deponent to attend for cross-examination or has not asked the Court to follow the procedure laid down by rule 312 of the Civil Procedure Rules.

(*M. L.*)

ANNOTATIONS: On effect of uncontradicted affidavit see C. A. 65/42 (9, P. L. R. 392; 1942, S. C. J. 429) and C. A. 26/40 (7, P. L. R. 134; 8, Ct. L. R. 153; 1940, S. C. J. 207).

(*A. G.*)

FOR APPELLANT: Gorali.

FOR RESPONDENTS: No. 1 — Polonsky.
Nos. 2—4 — Absent.

JUDGMENT.

This is an appeal from an order of the District Court of Tel-Aviv, dated 1st March, 1944, refusing to set aside or dissolve an interim injunction which had been granted by that Court against the present Appellant, who is the Defendant in an action for breach of an agreement with regard to the alleged copyright in certain text-books written by the Appellant who is a school-teacher and author of school-books.

The matter has already been before this Court in C. A. 123/43 when a consent order was made on 17th July, 1943. For various reasons which it is unnecessary to discuss, the trial of the action in the District Court has been delayed. I am not concerned at this stage with allocating any blame for this state of affairs. It is said by the Respondents' advocate that the Appellant is to blame; but there is, of course, some ground for believing that the delay was partly due to the congested state of the list and the change of the constitution of the Court (owing to one of the judges going on leave after the case had been part-heard). I wish to confine myself to the main ground of appeal against the order of the 1st March, 1944, which seems to be that the Court acted on an affidavit produced at the last moment by the advocate for the first Respondent. This may be so; but it seems to me that the present Appellant should either have insisted on asking the deponent to that affidavit to attend for cross-examination or, at any rate, should have asked the Court to follow the procedure laid down by rule 312. In this connection I fully realise that it is undesirable that the hearing of motions should be as protracted as the hearing of a civil case itself. But, within limits, there is no reason why the procedure laid down by rule 312 should not be followed while at the same time ensuring that the hearing of a motion take as short a time as possible, provided that the matters on which parties and their witnesses are examined and cross-examined be kept within proper limits.

In my view, the Appellant cannot now complain of the action of the District Court which made a finding that no sufficient cause had been shown why the order for an interim injunction should be set aside. The District Court also said that, while it was regrettable that the hearing of the case had been so protracted, it was not the fault of the first Respondent. They, therefore, decided to dismiss the application, and I see no reason to interfere with this ruling.

While the matter is, of course, entirely a matter for the learned President of the District Court of Tel-Aviv, I hope that every effort will be made to have this case listed for hearing early in September. It will, of course, be the duty of the advocates of both parties to speed up the hearing and not to examine or cross-examine or re-examine witnesses unnecessarily and not to call too many witnesses. If advocates on both sides can co-operate in achieving this object, there is no reason why the hearing of the case should occupy any great length of time.

The appeal is dismissed. The Appellant must pay the first Respondent his costs of this appeal, which will be fixed costs of LP. 10.—.

Delivered this 19th day of July, 1944.

British Puisne Judge.

CIVIL APPEAL No. 300/43.

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

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

IN THE APPEAL OF :—

1. Elka Pritzker,
2. Baruch Gabovitz. APPELLANTS.

v.

Custodian of Enemy Property. RESPONDENT.

Enemy property — Evidence that territory is enemy occupied, Trading with the Enemy Ord., secs. 2(2), 3(3), 9 *— Certificate of Custodian under powers delegated by High Commissioner conclusive evidence — "Residence" in enemy territory, whether implies "voluntary residence" — Sec.* 4(1)(*b*) *— Power of attorney given by enemy, Tingley v. Muller, Sovfracht v. Van Udens Scheepvaart — Trading with the Enemy (Custodian) Order, sec.* 6(1), *not ultra vires — Interpretation Ord., sec.* 27 *— Ejusdem generis rule, "Any other person" — Vesting Orders — Re Brown.*

Appeal from the judgment of the Land Court, Tel-Aviv, Land Case No. 10/41, dismissed:—

1. A certificate by the Custodian of Enemy Property under sec. 2(2) of the Ordinance is conclusive evidence of the facts stated therein.
2. *Quaere* whether "residence" in enemy territory means "voluntary residence".
3. Regulation 6(1) of the "Custodian Order" is not *ultra vires.*
4. The words "any other person" in sec. 9(1)(d) of the Ordinance are not *ejusdem generis* with the word "Custodian".
5. A vesting order entitles the Custodian to ask for ownership.

(*A. M. A.*)

DISTINGUISHED: Tingley *v.* Muller, 1917, 2 Ch. 144; 86 L. J. Ch. 625; 116 L. T. 482; 33 T. L. R. 369.

REFERRED TO: Sovfracht *v.* Van Udens Scheepvaart, 1943, 1 All E. R. 76; Nokes *v.* Doncaster Amalgamated Collieries, Ltd., 1940, A. C. 1014; 1939, 3 All E. R. 549; 163 L. T. 140; 56 T. L. R. 988.

FOLLOWED: *Re* Brown, 1895, 2 Ch. 666; 64 L. J. Ch. 808.

ANNOTATIONS:

1. As regards the point of "voluntary residence" the Land Court found that the donors of the power of attorney proceeded to Lithuania at the time the Germans overran Poland and that there was no evidence to show that they went there otherwise than voluntarily. Nor could their residence at Kovno be held to be involuntary merely be reason of the fact that they would rather be somewhere else.

2. On the question of the validity or otherwise of the power of attorney *cf.* Halsbury, Vol. 1, *p.* 311, *No.* 501 and the Sovfracht case (*supra*).

3. For another instance of the *ejusdem generis* rule being inapplicable see C. A. 240/43 (10, P. L. R. 584; 1943, A. L. R. 699).

(*H. K.*)

FOR APPELLANTS: Ph. Joseph.

FOR RESPONDENT: Kirshner and Blum.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Tel-Aviv.

The matter concerns certain property which was originally owned and registered in the names of a Mr. and Mrs. Flancrejch. It appears that a power of attorney was given to the husband of the first Appellant, Mr. Pritzker, and that, in pursuance of that power of attorney, he purported to transfer the property into the names of the two Appellants in this case.

The Custodian of Enemy Property alleges that the Flancrejchs at the material time were enemies and resident in occupied territory. The first point to be considered on this matter is whether Kovno, or Kaunas, as it has been called throughout these proceedings, is, in fact, enemy territory, the allegation being that this was the place in which these persons were resident at the material time. As to that, a certificate was produced by the Respondent which purported to have been made under section 2(2) of Trading with the Enemy Ordinance, 1939, and reads as follows:—

> "In exercise of the powers vested in the High Commissioner by section 2(2) of the Trading with the Enemy Ordinance, 1939, and delegated to me on 7th June, 1941, it is hereby certified that the city of Kaunas (Kovno) was on the 24th day of June, 1941, an area in the occupation of the enemy and that the said city continues in occupation as aforesaid at the date hereof.
>
> Given under my hand this 11th day of September, 1942.
>
> (*Sgd.*) *M. BAILEY*
>
> *Custodian of Enemy Property*".

By reason of section 2(2) of the Ordinance the High Commissioner may give such a certificate. And at p. 971, Palestine *Gazette* No. 1105 of 11.6.41, Supplement No. 2, appears an order dated 7th June,

1941, by the High Commissioner delegating his powers under section 2(2) to the Custodian. It appears to us, therefore, that there is no substance in Dr. Joseph's objection to the validity of this certificate. And in view of the wording of section 2(2) of the Ordinance, it seems clear that the certificate is conclusive evidence of the fact stated, that the town of Kovno was on the 24th June in the occupation of the enemy. That being so, the further point taken by Dr. Joseph that effective occupation has to be proved, really becomes immaterial, because, whether or not under the wording of our Ordinance "effective occupation" should be read into the term "occupation", it is not important in view of the fact that this certificate is conclusive that whatever occupation is required under the Ordinance, that state existed with regard to the city of Kovno on the relevant date.

That point of appeal, therefore, also fails.

The next point to be considered is whether, on the relevant date, the two Flancrejchs were resident in Kovno. Considerable argument was addressed both before us and in the lower Court as to the facts on this matter, but it seems to us that there was ample material upon which the learned President could have found, as he did, that for a period of about eighteen months prior to the summer of 1941, these two people were, in fact, living in this town.

We then have to consider whether or not it is necessary for the Custodian to show that their residence was voluntary. As to that, Mr. Kirshner for the Respondent argues that there is nothing in our law to indicate that voluntary residence is necessary. And if he is right on that point then there is, of course, no substance whatever in Dr. Joseph's point taken on behalf of the Appellants. But even assuming that it is necessary to read in the provision, similar to the English law, that by "residence" is meant "voluntary residence", it seems to us that on the evidence adduced in the Court below, the President was entitled to find (and indeed it would have been difficult on the limited material before him to have made any other finding) that the Flancrejchs were, in fact, voluntarily resident, within the technical meaning of that term, in the city of Kovno.

That being the position, it, therefore, follows that these people at the material time were enemies within the meaning of section 4(1)(b) of the Ordinance.

That being so, the next point to be considered is whether the power of attorney given to Mr. Pritzker was, in fact, of any validity. Dr. Joseph relied on the case of Tingley *v.* Muller, (1917) 2 Ch., p. 144, which related to an irrevocable power of attorney. With regard to

that case, there are two observations to be made: first, that it is of very doubtful authority, in view of the treatment that was meted out to it in the Sovfracht *v.* Van Udens Scheepvaart case, 1943, All England Law Reports, p. 76. And in any event, not only in that case was the power of attorney irrevocable whereas in the present case it was not, but also the case of Tingley *v.* Muller was decided during the last war when there was in force no equivalent provision to our section 3(3), which is based upon an equivalent section in the present English Act. Section 3(3) reads:—

> "Any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy."

Having regard to that, and in addition to the fact that the power of attorney was revocable in the present case, it seems to us that Tingley *v.* Muller does not affect the position, and that the legal position is that the power of attorney to Mr. Pritzker was, in fact, inoperative. If that is so, it would seem to follow, as Mr. Kirshner argued, that the purported transfer of this property by Mr. Pritzker, in pursuance of this power of attorney, was void *ab initio*, and the whole transaction was illegal, as being contrary to the relevant Ordinance. It follows from that (and there is, of course, ample English authority to which we were referred for this proposition) that as the contract was void *ab initio*, the registration should have remained in the names of the Flancrejchs.

That is sufficient to dispose of this appeal, but perhaps we should also deal with a further ground raised by the Custodian, that even apart from what might be called the common law aspect on which we have decided this case and section 3(3) of the Ordinance, this transaction was also specifically void under regulation 6(1) of the Trading with the Enemy (Custodian) Order, 1939, which says that "no person shall, without the consent of the High Commissioner save as directed by this Order, transfer, part with, or otherwise deal with the property of any enemy...".

That, of course, would clearly cover this case. But Dr. Joseph suggested that regulation 6 is *ultra vires*. That matter was very carefully considered by the learned President of the Land Court and we agree with his conclusions that this regulation is clearly covered by the powers provided by section 9(1)(d)(i) and 9(1)(d)(iii) of the Ordinance. It is worth noting that the concluding words of section 9(1) read as follows:—

> "... and any such order may contain such incidental and supplementary provisions as appear to the High Commissioner to be necessary or expedient for the purposes of the Order."

In view of that, we are of opinion that there was ample power to make Regulation 6(1).

In this connection I might, perhaps, deal with an argument that Dr. Joseph put forward with regard to section 9(1)(d) which says:—

> "The High Commissioner may by order confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed...."

Dr. Joseph contended that the *ejusdem generis* rule should be applied to that, and that the Appellants did not fall within that class. Mr. Kirshner's answer to that was two-fold: first, he says that if the rule is to be applied then clearly the Appellants would come within that class, if, in fact, a class is necessary; but the true answer would seem to be provided, as the learned Relieving President himself pointed out, by section 27 of the Interpretation Ordinance. It would seem that having regard to that section and to the wording of section 9(1)(d), the *ejusdem generis* rule is clearly excluded.

The only remaining point, therefore, to be considered is whether the vesting order, which was made in November, 1941, entitled the Custodian to ask for ownership, as he did in this case. On that matter Mr. Kirshner referred us to the case of Nokes *v.* Doncaster Amalgamated Collieries, Ltd., All England Law Reports, 1940, Volume 3, p. 554 *, which seems to cover the matter, and where it is laid down that there is nothing to limit the word "vest" to anything less than ownership. As the learned Relieving President points out, while it is no doubt true that the Custodian is, of course, in a sense in a fiduciary capacity with regard to these properties, that need have no effect upon the question as to whether or not for the time being he is the owner of these properties which are vested in him.

For all these reasons we are of opinion that the appeal must be dismissed with costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 30th day of March, 1944.

Acting Chief Justice.

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* The case referred to by counsel for Respondent in this connection was Brown, *in re*, 1895, 2 Ch. 666, 64 L. J. Ch. 808 and *not* the Nokes case (*supra*).

CIVIL APPEAL No. 17/44.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Jamal Dhiab el Dahnoun & 114 ors. APPELLANTS.

v.

1. The Government of Palestine,
2. The Village Settlement Committee of Beit Lahya. RESPONDENTS.

Appeal from Settlement Officer by 115 appellants while leave to appeal sought by and granted to applicant "for himself and others" — Dismissal of appeal because of defective application for leave.

Appeal from the decision of the Land Settlement Officer, Gaza Settlement Area, dated the 30th October, 1943, in Case No. 133/Beit Lahya, dismissed:—

1. After leave to appeal is granted Respondent may take any point concerning form of appeal, also point that no proper leave to appeal was granted.
2. Person who was not a party before Settlement Officer has no right to be heard on appeal.
3. Where application for leave to appeal was made by Applicant "for himself and others", without stating that he was acting in a representative capacity, appeal cannot be heard upon leave to appeal being granted, even with regard to such applicant alone.

(*M. L.*)

FOLLOWED: C. A. 191/43 (10, P. L. R. 500; 1943, A. L. R. 669); C. A. 147/42 (9, P. L. R. 786; 1942, S. C. J. 945).

ANNOTATIONS:

1. As to the second point see C. A. 161/43 (10, P. L. R. 367; 1943, A. L. R. 421).
2. As to the third point see C. A. 191/43 (*supra*).

(*A. G.*)

FOR APPELLANTS: Ghussein.

FOR RESPONDENTS: No. 1 — Asst. Government Advocate — (Salant).
No. 2 — In person.

JUDGMENT.

In this appeal many preliminary points have been taken by the Respondent. The history of the matter really indicates most clearly, if any such indication is needed, the necessity for complying with certain

rules of the Civil Procedure Rules, which might appear at first sight to be technical.

What happened in this case was that leave to appeal having been refused by the Settlement Officer, an application was made to me as Acting Chief Justice in Chambers for leave to appeal on behalf of the first Appellant and others. Leave was granted. Whether it should have been granted in those terms is another matter, but it is perfectly open to the Respondent to take any point on the form of the appeal when it reaches this Court. When the appeal reached this Court there were no less than 115 Appellants and two Respondents.

Mr. Salant says, and in our opinion correctly, that on the analogy of Civil Appeal 191/43, 10 P. L. R. at page 500, there has been no proper leave to appeal granted at all, because this Court and the Respondents can have no idea, when the leave to appeal is granted, as to who, in fact, are to be the Appellants.

With regard to these 115 Appellants, 60 of them, or rather 58 of them because there was some duplication in the names, were not parties before the Settlement Officer at all, and in accordance with Civil Appeal 147/42, 9 P. L. R. page 786, it would seem that they at least have no right to be heard now. With regard to one Appellant, who appears twice in the list — as No. 9 and again as No. 82 — it would seem that he is definitely out of time. The decision was notified to him, according to the record, on the 24th November, 1942, and he only asked the Settlement Officer for leave to appeal on the 29th November, 1943, whereas he should have asked for leave within thirty days of being notified. Nos. 106—115 appear never to have applied to the Settlement Officer at all for leave to appeal. They would, therefore, appear to be in some difficulty in this case, even apart from the first point taken by Mr. Salant.

With regard to the remainder, Mr. Salant says, and Fawzi Bey has not disputed, that their advocate held no power of Attorney for them either when they made their application for leave in Chambers on the 28th March, 1944, or when the appeal was filed on the 27th April, 1944. But what counsel for the Appellant does say is that even assuming that there are all these defects, nevertheless the first Appellant is still entitled to have his appeal heard. To that argument we cannot accede. First of all it would not only seem that separate appeals should have been filed, in which case this appeal as a whole would be bad, but also that even on his application for leave to the Acting Chief Justice in Chambers he did not state in his application that he was acting in a representative capacity but stated that he was appearing for himself. The application was "for himself and others."

Further, as Mr. Salant points out, another answer to that argument would seem to be supplied by Section 14 of the Land (Settlement of Title) Ordinance, Cap. 80 of the Revised Edition.

For all these reasons we are of opinion that there is no proper appeal before us and it must, therefore, be dismissed.

As to costs, counsel agreed that the most convenient course would be that the order for costs should be made only against the first Appellant, and that in that case costs should be limited to an inclusive sum of LP. 15.

The appeal is, therefore, dismissed on those terms.

Delivered this 12th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 396/43.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Lilian Lubin. — APPELLANT.

v.

Mordechai Gileady. — RESPONDENT.

Action for eviction — District Court disagreeing with Magistrate's decision yet abstaining from interfering with his discretion re alternative accommodation — When discretion of trial Court may be interfered with.

Appeal from the judgment of the District Court of Tel-Aviv, sitting in its appellate capacity, dated 19.11.43, in Civil Appeal No. 126/43, allowed:—

1. A Court of Appeal should not substitute their discretion for that of trial Court merely because had they been trying the case in first instance they would have exercised their discretion differently.

2. Where appellate Court finds that Magistrate in determining the question of availability of alternative accommodation and exercising his discretion under sec. 8(1)(c), Rent Restriction Ordinance, directed his mind to matters none of which should be taken into account in that particular case, they should reverse his judgment.

3. Difference in rent of alternative accommodation — not sufficient to warrant refusal of an order of eviction.

(*M. L.*)

FOLLOWED: C. A. 170/43 (10, P. L. R. 432; 1943, A. L. R. 555).

ANNOTATIONS:

1. On question of discretion of Magistrate in cases under sec. 8(1)(c) of the Rent Restriction (Dwelling Houses) Ord. see C. A. 331/43 (*ante*, p. 154) with annotations.

2. On question of alternative accommodation see C. A. 170/43 (*supra*) with annotations and C. A. 141/43 (10, P. L. R. 289; 1943, A. L. R. 318) with annotations.

(*A. G.*)

3. The Magistrate had found that the rent hitherto paid by Respondent was LP. 9 per month for four rooms, a servant's room, central heating, use of the garden *etc.*, including municipal rates, while the two alternative flats offered consisted each of three rooms only, without a garden and without central heating and the rent demanded was LP. 12.— per month exclusive of rates *etc.*; it follows, as the Magistrate found, that the rent for the alternative accommodation was at least 100% higher than that paid by Respondent to Appellant. In addition, the Magistrate found that in none of the flats offered by the Appellant was there a sufficient number of rooms necessary for the Respondent according to his professional needs and for the convenience of the members of his family.

FOR APPELLANT: Polonsky.

FOR RESPONDENT: Smoira.

JUDGMENT.

This is an appeal from a judgment of the District Court in which it does not agree with the decision of the Magistrate regarding alternative accommodation yet it confirms the Magistrate's judgment on the following grounds: "Having regard, however, to the practice of the Court of Appeal, that where there is a conflict of views between the Courts regarding discretion with respect to facts, it would be necessary to accept the discretion of the first instance Court which heard the proofs and gathered the independent impression, we do not see any possibility of setting aside the discretion of the Magistrate in the point of alternative accommodation". First of all there is no such thing as a practice of the Court of Appeal. In such matters, there are decisions of this Court laying down general principles to be followed on the subject but there are not, neither could there be, any hard and fast rules, each case must be dealt with separately. This Court has expressed the view that a Court of Appeal should not merely because had they been trying the case in first instance, they would have exercised their discretion differently, substitute their discretion for that of the Magistrate. This is not the same thing, however, as reversing the Magistrate because he has, in exercising his discretion, directed his mind to matters which should not be taken into consideration when determining the availability of alternative accommodation

in the particular case. In this case the Magistrate from his findings was clearly influenced by the fact that the Respondent is a doctor and received some patients. This has no relevance to the question as it appears that the Respondent is on an all-time contract with the Bnei Brak Mental Hospital and merely rented the house to live in, that in one room he keeps various instruments.

The Magistrate in his judgment sets out in the first para, page 3:—

> "Defendant, a doctor by profession, occasionally has from time to time received patients at home as well, although his fixed working place is at the Mental Asylum in Bnei Brak. In one of his rooms are various instruments. The apartment is arranged in such a way that Defendant can attend to his patients without disturbing the members of his family. And the patients sometimes also wait in the corridor."

Again in para 3 page 3:—

> "In addition, in none of the flats offered are there a number of rooms required by Defendant, according to his professional needs, or for the convenience of his family: nor is there central heating in any of them, which should be taken as an essential part of the conditions of tenancy."

It is quite clear in the circumstances of this case that none of these considerations should have been taken into account by the Magistrate and that moreover they formed the main ground upon which he came to the conclusion that alternative accommodation was not suitable. The difference in rent is not sufficient to warrant the refusal of an order of eviction. The decision in Civil Appeal 170/43 is very much to the point.

For these reasons the appeal is allowed and the judgments of the District Court and Magistrate's Court are reversed and eviction ordered. The Appellant will have his costs on the lower scale here and in the District Court, to include the sum of LP. 10.— advocate's atendance fee for the hearing of this appeal. The District Court order of costs is reversed.

Delivered this 26th day of July, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 351/43.

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

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

IN THE APPEAL OF:—

Khadir el Hassan & 13 ors. APPELLANTS.

v.

Farham Ibn Hamdan Abu Shehab & an. RESPONDENTS.

Action for dispossession of alleged trespasser — Defendant claiming to be in lawful possession as mortgagee — Incompetence of Magistrate to try issue of mortgage.

Appeal from the judgment of the District Court of Nablus, in its appellate capacity, dated the 27th September, 1943, in Civil Appeal No. 17/43, dismissed:—

Where in an action for recovery of possession defendant relies on his being a mortgagee and as such in lawful possession, Magistrate cannot try this issue but must order defendant to go to Land Court to prove existence of mortgage.

(*M. L.*)

ANNOTATIONS: As to jurisdiction of Land Court see C. A. 117/29 (1, P. L. R. 585; 3, C. of J. 946).

(*A. G.*)

FOR APPELLANTS: Nos. 1—13 — Elia.
No. 14 — A. L. Salah.

FOR RESPONDENTS: No. 1 — Abdul Hadi.
No. 2 — Absent.

JUDGMENT.

In this case the learned Magistrate recorded a finding of fact that the Defendants did not encroach upon the land in suit and take possession thereof by force and coercion, contrary to the last paragraph of Article 24 of the Ottoman Magistrates' Law, and he dismissed the Plaintiffs' claim.

On appeal to the District Court of Nablus the judgment of the Magistrate was set aside.

It is clear to us, as it was to the District Court, that this question of the mortgage played a large part in the proceedings. In fact the Appellants specifically refer to the mortgage in paragraph 6 of their reply, and the Magistrate based the findings he arrived at, after a pains-

taking hearing and analysis of the evidence, on the assumption that the Appellants were mortgagees of the land and as such they were in lawful possession. It may well be that they are mortgagees, but as the learned Judges of the District Court pointed out, this issue could not have been tried by the Magistrate. The moment the question of mortgage became relevant, as it did in order to enable him to arrive at his finding of fact, we agree with the District Court that the Respondents, the Appellants in this case, should have been ordered to go to the Land Court to prove that a mortgage existed on the land.

The appeal is dismissed, with LP. 10 inclusive costs.

Delivered this 30th day of May, 1944.

Chief Justice.

CIVIL APPEAL No. 67/44.

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.

The Keren Kayemeth Leisrael Ltd. RESPONDENT.

Interpretation — "Proceedings" in Sec. 26 of Land (Acquisition for Public Purposes) Ord., 1943 — Sec. 2(2) of the Ordinance — Proceedings mean proceedings in Court — C. P. R., rr. 2, 7 — M. C. P. R., rr. 2, 5.

Appeal from the judgment of the Magistrate's Court of Haifa, sitting as a Land Court, dated the 9th of February, 1944, in Land Case N. 2/44, dismissed:—

The word "proceedings" in sec. 26 of the Land (Acquisition for Public Purposes) Ord., 1943, refers to proceedings instituted in Court.

(*A. M. A.*)

ANNOTATIONS: See the following authorities on the meaning of "proceeding", resp. "proceedings": C. A. 41/26 (1, P. L. R. 105; 4, C. of J. 1599) — *generally;* Misc. Appl. 48/38 (1938, 2 S. C. J. 250; 4, Ct. L. R. 157; P. P. 16.9.38) and C. A. 143/41 (8, P. L. R. 467; 1941, S. C. J. 456; 11, Ct. L. R. 210) — *whether appeal included;* H. C. 39/41 (1941, S. C. J. 160; 9, Ct. L. R. 160; P. P. 26.4.41), CR. A. 144 & 145/41 (9, P. L. R. 20; 1942, S. C. J. 69; 11, Ct. L. R. 14) and CR. A. 62/42 (9, P. L. R. 304; 1942, S. C. J. 297; 12, Ct. L. R. 135) — *whether committal proceedings included;* C. A. 104/41 (8, P. L. R. 272; 1941, S. C. J. 300; 9, Ct. L. R. 205) — *in Sec. 95(2) of the Bankruptcy Ordinance;* H. C. 31/44 (*ante*, p. 280) — *in Reg. 2 of the Defence (Courts Applications) Regulations.*

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Wittkowsky.

JUDGMENT.

This is an appeal by the Attorney General from a judgment of one of the Magistrates of Haifa, sitting as a Land Court. On 3rd January, 1944, the Attorney General filed in that Court a statement of claim presumably under Section 9 of the Land (Acquisition for Public Purposes) Ordinance, 1943, which came into force on 10th December, 1943. In paragraph 3 of that statement of claim it was said that by a certificate dated 26th May, 1943, published in the Palestine *Gazette* No. 1270 of 3rd June, 1943, the Chief Secretary by His Excellency's command had certified the acquisition of certain land as being an undertaking of a public nature within the meaning of Section 2 of the Land (Expropriation) Ordinance. Under the 2nd proviso to Section 26 of the Land (Acquisition for Public Purposes) Ordinance, 1943, any proceedings commenced before the 10th December, 1943, under the Land (Expropriation) Ordinance may be continued under that Ordinance. When the matter came before the Magistrate he held, in view of the provisions of Section 2(2) of the 1943 Ordinance, that a Land Court had to be constituted by a President or a Relieving President of a District Court sitting alone. He, therefore, held that he had no jurisdiction to try the case and dismissed it.

Against that judgment the Attorney General now appeals. At the hearing of the appeal before us, Mr. Clayton Rigby, Crown Counsel, said that the Magistrate placed too narrow a construction on the word "proceedings" and he argued that proceedings must be deemed to have commenced, at any rate, with the notice to treat, which was served on the appropriate parties on the 7th July, 1943. In other words, the argument is that proceedings must include all the steps of procedure leading up to the assessment and payment of compensation.

Mr. Wittkowsky, for the Respondent, informed us that his clients are not particularly anxious to oppose this appeal but he says that he considers that the Magistrate was right in his interpretation of the word "proceedings". Mr. Rigby says that, had the Legislature intended to restrict the meaning of the word "proceedings" in the 2nd proviso to Section 26, to proceedings in Court, they would have used some such word as "action" or "suit" (See the definition of "action" in Rule 2 Magistrates' Courts Procedure Rules, 1940, and Rule 5 of those Rules and Rules 2 and 7 of the Civil Procedure Rules, 1938). We think, having regard to the words "commenced" and "continued"

in the 2nd proviso to Section 26 and having regard also to the fact that a clear distinction is made between the subject-matter of the first proviso to Section 26 and the subject-matter of the second proviso to that section, the proper construction to be put on the word "proceedings" is proceedings commenced in Court. It is clear that in this case no proceedings were commenced in Court until the 3rd January, 1944. We, therefore, think that the Magistrate came to a correct conclusion and we accordingly dismiss this appeal.

Delivered this 27th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 358/43.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Sarano and Bonfarado & an. — APPELLANTS.

v.

G. S. Gurji. — RESPONDENT.

Appeals — Judgment by Magistrate's Court for less than LP. 20 — Interest accrued after filing action is not taken into account — Leave to appeal required — C. A. D. C. T. A. 97/39.

Appeal from the judgment of the District Court of Haifa, appellate capacity, in C. A. No. 43/43, allowed and case remitted to Court below:—

In determining the amount of a judgment for purposes of appeal by leave, interest accrued from the date of filing action is not taken into account.

(*A. M. A.*)

APPROVED: C. A. D. C. T. A. 97/39 (Tel-Aviv Judgments, 1939, p. 75; P. P. 15.xi.39).

ANNOTATIONS: See C. A. D. C. T. A. 97/39 (*supra*).

(*H. K.*)

FOR APPELLANTS: No. 1 — Unger.
No. 2 — Mittelman.

FOR RESPONDENT: Tovbin.

JUDGMENT.

In this case the Appellant obtained leave to appeal from a judgment of the Magistrate for LP. 19.575 mils. The Respondent has taken the

point * that no appeal lies as the sum for which judgment was given carried interest of 9% from the date of filing of the action and that, therefore, the amount now due is in excess of LP. 20, and that under the Rules leave to appeal is not necessary, with the result that in the present case the Appellant is out of time. The question does not appear to have been decided by this Court but we have been referred to a judgment of the District Court of Tel-Aviv, sitting in its appellate capacity — District Court Civil Appeal No. 97/39 — in which the Court drew a distinction between interest already accrued at the date of filing of the action and interest subsequently accruing. We agree with this view, and in view of the fact that at the date of the filing of the action the amount due was only LP. 19.575 mils, we are of opinion that the Appellant was correct in asking for leave to appeal.

That being so the appeal is allowed, the judgment of the District Court set aside and the matter remitted to the District Court for the hearing of the appeal. The costs of this appeal will be in the cause and on the lower scale, and to simplify the final arrangements, we certify an advocate's attendance fee of LP. 10 to the ultimately successful party.

Delivered this 30th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 60/44.

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

BEFORE : Rose and Frumkin, JJ.

IN THE APPEAL OF:—

Esther Levy & an. — APPELLANTS.

v.

Esther Huvaga & an. — RESPONDENTS.

Magistrate dismissing action for eviction under sec. 8(1)(*c*), *Rent Restriction (Dwelling Houses) Ord. — District Court quashing Magistrate's judgment and ordering eviction — Court of Appeal restoring Magistrate's judgment.*

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated the 22nd of November, 1943, in Civil Appeal No. 154/43, allowed and Magistrate's judgment restored:—

* *Scil.*: at the hearing of the appeal in the District Court.

(*Ed.*)

1. Where wording of judgment shows that trial judge considered the matter of alternative accommodation, absence of specific reference to some of the offers of alternative accommodation — no ground for upsetting the judgment and ordering eviction.

2. In all cases under sec. 8(1)(c), Rent Restrictions Ordinance, the discretion is in trial Judge; only in exceptional cases should appellate Court, if satisfied that some wrong test has been applied, vary that discretion.

(*M. L.*)

ANNOTATIONS: On discretion of Magistrate in cases under sec. 8(1)(c) of Rent Restriction (D. H.) Ordinance see C. A. 331/43 (*ante*, p. 154) with annotations thereto; *cf.* C. A. 396/43 (*ante*, p. 383).

(*A. G.*)

FOR APPELLANTS: Needer.

FOR RESPONDENTS: S. T. Cohen.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Tel-Aviv, setting aside a judgment of the Magistrate's Court of Tel-Aviv.

The matter concerns Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940. The learned Magistrate found in favour of the tenants on three principal grounds, and the learned President came to the conclusion that the learned Magistrate was wrong on all three. It seems to us to be necessary to consider one only of these three grounds, and that is the matter of alternative accommodation which, under the section to which we have referred, is an important element in considering whether or not it is reasonable to grant eviction to a landlord.

On that matter the learned Relieving President, while quite rightly pointing out that he should be reluctant to substitute his own discretion for that of the trial Court, came to the conclusion that the finding of the Magistrate that he was not satisfied that there was alternative accommodation could not be supported in that in his judgment he refers to two offers of alternative accommodation and gives reasons for their rejection but does not specifically refer to two other offers of alternative accommodation which appear in the record.

With great respect to the learned Relieving President, it seems to us that he took too formalistic a view of the matter, because if one turns to the judgment of the Magistrate itself, one sees the following passage:—

> "Further, the Court is not satisfied that on the day the action was filed, or shortly before that, there existed adequate alternative accommodation for Defendants. Defendants are poor and of no

means. The rent of a flat found was more than double; and another was inundated with water all through the winter".

And he goes to say:—

"The Court is not satisfied that this is a *bona fide* case, and decides to dismiss it".

It seems to us that that is a sufficient finding of fact and that the reasonable inference to draw from the language used is that he considered the matter of the evidence before him on this alternative accommodation and came to the conclusion that he was not satisfied that there was adequate alternative accommodation. He then cites two examples out of the four which were quoted in the Court, and gives specific reasons for rejecting those two. It seems to us that it is not reasonable to infer from the language used that he did not consider the matter of the other two accommodations.

It has been urged before us that we should remit the case to him to make a further finding, but it seems to us that that would be sheer waste of time and would merely add to the costs, because it would appear from the tenor of the judgment and from his finding on this very matter that if it was remitted he would merely repeat his former finding. We would add that in all these cases, as the President himself points out, the discretion is in the trial Judge, and it is only in exceptional cases, where the appellate Court can be satisfied that some wrong test has been applied, that that discretion should be varied by an appellate Court.

The appeal will, therefore, be allowed, the judgment of the learned Relieving President set aside, and that of the Magistrate restored. The Appellants will have their costs of this appeal only, which we assess at an inclusive sum of LP. 10.

Delivered this 20th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 34/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF :—

Keren Kayemeth Leisrael Ltd. — APPELLANTS.

v.

Kamel Hassan Musleh. — RESPONDENT.

Court fees — Payment of appeal fees as certified by the counter clerk —C. A. 39/39, effect of previous decisions — "Proper Court fees" — Ruling of Chief Registrar in C. A. 245/40 — Functions of Chief Registrar and Colonial Auditor — Registrars Ord., Secs. 8, 17 — Fees payable on appeal involving awlawiyeh — Court Fees Rules, Schedule, Item 36B — "Full fees", "Correct fees" — C. A. 113/38.

Preliminary objection in an appeal from the judgment of the Land Court, Nablus, Land Case No. 8/43, overruled:—

1. A respondent cannot challenge the amount of Court fees paid by the appellant on the appeal.

2. Nor will the Court interfere with the assessment of Court fees except in a claim by Government for the recovery of the balance of fees.

(*A. M. A.*)

REFERRED TO: C. A. 39/39 (6, P. L. R. 275; 1939, S. C. J. 254; 5, Ct. L. R. 209).

NOT FOLLOWED: C. A. 113/38 (1938, 1 S. C. J. 360).

ANNOTATIONS:

1. See the cases cited in C. A. 39/39 (*supra*); *cf.* C. A. 89/39 (6, P. L. R. 460; 1939, S. C. J. 413; 6, Ct. L. R. 123).

2. See second paragraph of annotations to C. A. 233/43 in 1943, A. L. R. at p. 735 for examples of previous decisions not being followed by the Supreme Court on the ground that the matter had not been fully argued. On the binding force of precedents generally *cf.* H. C. 30/44 (*ante*, p. 249) and note 2.

(*H. K.*)

FOR APPELLANTS: Eliash and Scharf.

FOR RESPONDENT: A. and H. Atalla.

RULING.

At the hearing of this appeal a preliminary objection has been taken by the advocate for the Respondent that no appeal lies on the ground that the proper Court fees or the full Court fees on filing the appeal have not been paid. The objection is not that Court fees have not been tendered or paid but that what the advocate for the Respondent himself considers should have been the proper Court fees have not been paid, and, in support of his objection, he relies on several judgments of this Court, and, in particular, on Civil Appeal 39 of 1939 Vol. 6, P. L. R. page 275. I have enquired carefully into what actually happened when the statement or memorandum or notice of appeal in the appeal now before me was filed and it seems that the clerk of the firm of advocates now appearing for the Appellants went before the clerk at the counter of the Registry of the Court charged with the duty of accepting appeals for filing and, of course, charged also with the duty of satisfying himself, before accepting the appeal for filing,

that all the proper Court fees were being duly tendered. The counter clerk assessed the proper fees on filing at LP. 4.400. This is evidenced by a certificate in the handwriting of the counter clerk setting out the fees chargeable and initialled by him. It is significant that this notification appears on the same piece of paper as does a certificate signed by Mr. L. A. W. Orr, the Chief Registrar of the Supreme Court, as to the amount of the deposit.

An ordinary person would surely be entitled to think that this assessment by the responsible counter clerk at the Registry is sufficient and would guarantee an honest advocate that he had fully complied with the requirements of the law, including the Court Fees Rules, 1935, and that he or his firm or his clerk had done all that he or they, acting *bona fide* in the interests of their clients (the Appellants) could be expected to do. But, says Mr. Anton Atalla, advocate for the Respondent to this appeal, "Oh, no. The advocate for the Appellants, on being told by the counter clerk what the proper Court fees on filing the appeal were, should have said to the counter clerk: 'I do not agree with you. You, on behalf of the Government of Palestine, are charging my client too little. I consider that the proper Court fees should be — (mentioning a figure higher than that demanded by the counter clerk). I must ask you to refer the matter to the Registrar whose decision under Section 17 Registrars Ordinance will be final'." In my view, this would lead to a thoroughly impossible result. I do not doubt that if the counter clerk demands a sum in respect of Court fees higher than that which the Appellants or their advocate are prepared to pay, the Appellants or their advocate are entitled to require the dispute to be laid before the Registrar for his decision under Section 17 Registrars Ordinance. But that is not the case here. As I have pointed out, the position is that the Appellants were quite prepared to pay and did pay all the Court fees demanded by the responsible clerk at the counter of the Cash Offices of the Court. Consider, for a moment, what an impossible position would arise if the contention of Mr. Anton Atalla is correct. It is simply this, namely, that any timid advocate for an appellant, not being satisfied that the counter clerk had charged him enough Court fees could say, and, indeed would (in order to protect his client's interests) have to say to the counter clerk "Oh, No. I do not think that you are charging my client enough; take me before Mr. Orr, Chief Registrar of the Supreme Court, or at any rate before Mr. Cotran, the Assistant Registrar of that Court". At the hearing I posed this to Mr. Atalla, who replied that, even so, that is the effect of the decisions of this Court. Now,

is that really so? I do not think that it is. I am, of course, bound by previous decisions of this Court unless they are clearly wrong. In the reports of the decisions which have been cited in C. A. 39/39 the facts and circumstances leading up to the assessment by the responsible Court officials of the proper Court fees do not appear to have been fully investigated. It seems to me that, in considering those reported cases, what one has to ascertain is what is meant by the words "proper Court fees". Who is the person to decide what are the "proper Court fees?" It must be (a) the responsible counter clerk at the offices of the Court or (b) the Colonial Auditor when, later on, that official complains that the officers of the Court have not charged enough. But, says Mr. Atalla, there is a third alternative upon which, he (Mr. Atalla) relies and this I shall call (c). Alternative (c), according to Mr. Atalla, is that if, at the hearing of the appeal, an advocate for a Respondent can set up an ingenious argument that the Court fees assessed and charged by the counter clerk were not enough and if this argument is sufficiently plausible and ingenious as to convince the Judge or Judges of the Supreme Court sitting as a Court of Civil Appeal that the counter clerk of the Supreme Court was too lenient then the Court of Appeal must, at once, throw out the appeal. Speaking for myself, I have not the slightest difficulty in rejecting alternative (c) which I think is rather extravagant, quite apart from leading to manifest injustice to an Appellant, who, either by himself or through his advocate, has in all good faith done everything that the proper officers of the Court accepting his appeal had required him to do. At the hearing of the appeal before me on 29th March, 1944, I postulated this aspect to Mr. Atalla. "Nevertheless", replied Mr. Atalla, "that is the effect of previous decisions of this Court".

I do not agree for the simple reason that this Court did not in those decisions define, or saw no need to define, who is the person who is to decide the "proper Court fees" or "sufficient Court fees". So that the matter is still left open for me to decide and I, accordingly, decide it in the manner I have already indicated. Even if I am wrong in coming to this conclusion, there is still to be considered the question whether, in point of fact, the Court fee of LP. 4.400 mils was or was not proper or sufficient. In this connection, Dr. Eliash, for the Appellants, has drawn my attention to a ruling given by the Chief Registrar in C. A. 245/40 which was also a case for *awlawiyeh*. I have perused the ruling of the Chief Registrar in that case and I see no reason to doubt its correctness. It is:—

"Having heard Mr. Scharf for Appellants, I am of opinion that the

> subject-matter of this appeal is a right which is not capable of being expressed in money. The right for instance cannot be sold. The right is not worth LP. 7000, although the present owner of the right has the option of acquiring the property on payment of LP. 7000.
>
> I assess the fee on this appeal at LP. 4".

But, says Mr. Atalla, the position here is different. In the case now before me the Appellants are not complaining that they (the Appellants) were found to be entitled to exercise the right of *"Awlawiyeh"*. The present Appellants are complaining that the Court below ordered them in the event of their wishing to have the land in question registered in their names, to pay more than the Appellants consider that they ought to be made to pay. Hence, argues Mr. Atalla, there is a distinction between the two cases. As I view the matter, however, there is no essential difference. The matter involved is the Appellants' right to exercise the power of *awlawiyeh*. It may be that an alert Colonial Auditor might, at some future time, raise the point whether what was involved was not indeed the actual value of the land. But such possible audit queries I must leave to be discussed by the Chief Registrar and the Colonial Auditor, should the occasion arise. One thing is clear and that is that this Court is not an arbiter between the Chief Registrar and the Colonial Auditor and it is also clear that this Court is not a Court of Appeal from a decision of the Chief Registrar or any Registrar on a matter of Court fees except as is provided by the machinery of the Registrars Ordinance, 1936 (See Sections 8 and 17). I am not now functioning under that Ordinance. It is not the fault of the present Appellants or their advocate that the matter never came before the Chief Registrar under Section 17 Registrars Ordinance. It might have come before the Registrar under Section 17 had the Appellants' advocate refused to pay the Court fees required by the counter clerk. But they never did refuse. I would merely add, with reference to the argument of Mr. Atalla as to the words "Court or Judge or Registrar" in Rule 9 Court Fees Rules, 1935, that the word "Court" would seem to refer to the case of a Court (such as a Magistrate's Court) which has no Registrar, and where the Magistrate himself, in the combined role of presiding officer of his Court and of ministerial officer of his own Court, has to adjudicate on the proper Court fees exigible. To sum up, I would say that where an Appellant complies with the financial demands of the proper ministerial officer of the Court on its office or financial side, with regard to the filing of an appeal, the Respondent to such an appeal cannot invite the Court of Appeal, on the hearing of the appeal, to say that the proper Court

fees on filing the appeal have not been paid. A clear distinction must be drawn between this case and the case where an appellant has never paid any Court fees on filing his appeal and has never invited the proper ministerial officer of the Court to assess the Court fees. It is not (and cannot be) suggested in this case that the clerk who assessed the fees in the appeal now before me was not an officer acting under the orders of the Chief Registrar of this Court and as such was not an officer properly and duly charged by the Chief Registrar with the duty of assessing the appropriate Court fees on his behalf, *i. e.* on behalf of the Chief Registrar. On a full consideration of the whole matter, it seems to me that the Appellants did all that could reasonably have been expected of them on the filing of this appeal. If it should later transpire, either on a request made by the Chief Registrar to the Appellants' advocate or on a requirement of the Colonial Auditor that the Keren Kayemeth Leisrael Ltd. or their advocates ought to pay further Court fees, that must be a matter to be fought out between the Keren Kayemeth Leisrael Ltd. on the one hand and the Chief Registrar or the Colonial Auditor on the other hand. But the Respondent to this appeal can be no party to such dispute; still less can a Judge or Judges of the Supreme Court of Palestine sitting as a Court of Civil Appeal be invited or called upon the adjudicate upon such a dispute, should it arise, except, of course, in a suit properly brought by Government for the recovery of any balance of Court fees. In my view, I cannot now interfere with the adjudication of the counter clerk when he assessed the appropriate Court fee on filing this appeal at LP. 4.400 as laid down in the Schedule, Item 36B, Court Fees Rules, 1935, as amended. I think that the mistake under which certain people have been labouring is in their interpretation of previous decisions of this Court, namely in thinking that the only persons competent to decide what are the "full Court fees" or "proper Court fees" are the Judges of this Court and then only when the appeal comes on for hearing and when the matter is raised by a respondent to an appeal or his advocate. In my view, the person to decide what are the proper Court fees or the full Court fees is the appropriate ministerial officer of the Court and the time for his so deciding is the time when the papers are tendered (for filing) over the counter of the offices of the Court. This, of course, is subject to the case where the Appellant or his advocate does not see eye to eye with the ministerial officer of the Court as to the proper amount of Court fees exigible. In this latter event, there may be a reference to the Registrar under Section 17 Registrars Ordinance. The mere fact that the ministerial officer of the Court (*e. g.*

a cashier or counter clerk in the cashier's office) is not specified or mentioned by the name of his office in the Registrars Ordinance or Court Fees Rules or in any other enactment does not mean that such an official is not duly authorised by the Registrar, or the Chief Registrar, as the case may be, to act for that official in the performance of his duties as accounting officer or revenue collector of the Court in respect of Fees of Court. The very fact that Section 17 has been enacted clearly shows that the Legislature envisaged that there might be and would be a few more humble unnamed ministerial officers who would normally be charged with the duties of assessing Court fees and collecting them. In the absence of proof that such latter persons were not, in fact, authorised by the Chief Registrar (or Registrar) to act for him as assessing officers of Court fees and collectors of Court fees, one must assume that these more humble officials are duly clothed with power to assess, and if a prospective Appellant complies with the demands of such officials, I fail to see what more an appellant or his advocate can be expected to do.

It may be that in some cases an appellant's advocate may be sufficiently persuasive as to succeed in convincing the counter clerk that a Court fee smaller than some people might think ought to be charged should be accepted. If so, that is just the good fortune of the appellant. The counter clerk will later have to run the risk of answering queries made by his superiors or by the Colonial Auditor. The Respondent's advocate has argued that as the land, to the prior purchase of which the Appellants were found to have a right, was valued in the aggregate at LP. 4232 odd, the Court fee exigible was LP. 110, *i. e.* LP. 100 plus the present statutory addition of 10% as is provided for by Court Fees Rules, 1935, Schedule, Item 36B. As I have said, I am not prepared to accept this argument.

The fallacy exists in the failure to understand what is meant by the term "correct fees" or "full fees". In my view, once the Appellants have paid the sum required by the counter clerk, these are the full fees or the correct fees, notwithstanding the fact that a Judge or Judges may later on, after hearing the Respondent's advocate, consider that more fees should have been charged.

I think that the position at once becomes clear if I pose the case of a litigant in person. Suppose an illiterate peasant comes to the offices of the Supreme Court, sitting as a Court of Civil Appeal, with a statement of appeal drawn up for him by a friend or a petition-writer and asks the counter clerk what fees should be paid, and on being told he pays all that is demanded from him. Would it not be monstrous

if this man were going to have his appeal dismissed *in limine* simply because an advocate for a respondent is able to persuade the Judges or a Judge of the Court of Appeal that the counter clerk had charged too little? Can there be any difference when the appellant is represented by an advocate? Of course, at the worst, even if Mr. Atalla were right, I think that I could act under Rule 9 of the Court Fees Rules, 1935, as amended; but in this case I see no need to do so.

Nothing that I have said in this ruling must be taken as questioning the right of the Government of Palestine to call upon an appellant at a later date to pay any balance of Court fees, should the advisers of Government subsequently discover that a Court fee lower than what should have been charged has been assessed by the counter clerk.

I now realise that Mr. Atalla was fully justified in raising this matter as a preliminary point. I am grateful to him not only for his argument but also for the opportunity which he has given me of reviewing all the authorities.

I have not ignored the decision in C. A. 113/38. The judgment in that case is, however, very brief. No reasons are given for the judgment and it does not appear, from the report, that the matter was argued. I accordingly feel that that is not a decision which binds me. In the result, the preliminary objection by the Respondent fails, and I shall now proceed to hear the Appellants' advocate argue the appeal on its merits.

This case cannot be heard before the vacation which commences on 6th April and ends on 17th April. By consent, (without prejudice to the hearing or result of this appeal), the judgment of the Court below is varied, by consent, to read — "Plaintiffs to comply with the terms of the judgment within five months from 11th January, 1944". The judgment is varied accordingly.

Delivered this 3rd day of April, 1944.

British Puisne Judge.

HIGH COURT No. 45/44.

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

BEFORE : Rose and Abdulhadi, JJ.

IN THE APPLICATION OF :—

Ohannes Mergerian. PETITIONER.

v.

The Law Council, Jerusalem & 2 ors. RESPONDENTS.

Refusal to issue Certificate of Jerusalem Law Classes — Adequacy or otherwise of evidence of secondary education — Non-interference of High Court with discretion of competent authorities.

Return to a rule *nisi*, issued on the 24th April, 1944, directed to the Respondents, calling upon them to show cause why Petitioner should not be issued with the Certificate of the Jerusalem Law Classes; rule *nisi* discharged:—

If Law Council and Director of Education formed the considered opinion that the documents and certificates produced by Petitioner are not evidence of adequate secondary education as envisaged by clause (3)(b) of Reg. 5, Jerusalem Law Classes Regulations, 1933, High Court will not go beyond the discretion, if it is not suggested that its exercise was actuated by an improper motive.

(*M. L.*)

PETITIONER: In person.

FOR RESPONDENT: Crown Counsel — (Hogan).

ORDER.

The Petitioner in this case asks that the decision of the Law Council, declining to grant him a certificate, should be over-ridden.

It seems that he is one of those persons to whom the Regulations of the Jerusalem Law Classes, 1933, are applicable by virtue of Regulation 38 of the 1938 Law Council Rules.

We have in this case a certain amount of sympathy with the Petitioner, who would appear from the documents and the various certificates which he has produced, to be a person of adequate education; but the matter seems to us to be governed by regulation 5 of the Regulations to which we have already referred.

Regulation 5(4)(c) says that officers admitted under certain circumstances, which are set out in an earlier regulation, "will not be qualified to receive the certificate of diploma of Council unless they have, either while students under the Council, or within a reasonable time after completing their studies, obtained a qualification which would have entitled them to admission as students under the provisions of clause (3)(a) or (b) of this rule".

Clause 3(a) says that the person must hold either the Palestine Matriculation Certificate, or a certificate held to be equivalent to the Matriculation Certificate by the Department of Education. Section 3(b) says that the person must hold a foreign secondary certificate which would be accepted by a university of high standing as qualifying the applicant for admission and which is considered by the Director of Legal Studies, after consultation with the Director of Education, to be evidence of an adequate secondary education.

As regards 3(a), it is common ground that the Petitioner does not hold the said Matriculation Certificate, and he does not allege in his petition — and it certainly would appear not to be the case — that the examinations which he has passed have been accepted by the Department of Education as being equivalent to the Matriculation Certificate.

The Petitioner is, therefore, reduced to 3(b). There the answer of the Secretary of the Law Council and that of the Director of Education himself would seem to be conclusive. The Director of Education says in his affidavit that he has formed the considered opinion that the documents and certificates produced by the Petitioner are not evidence of an adequate secondary education; and the Secretary of the Law Council says that there was a meeting of the Law Council at which the Director of Education attended; that the Director of Education expressed his opinion and the Law Council accepted that opinion.

It seems to us that the Petitioner cannot possibly go behind that discretion, there being no suggestion that its exercise has been actuated by any improper motive. The matter seems to us to be a pure question of opinion, and in this case the paramount is that of the Director of Education.

For these reasons we are of opinion that the rule must be discharged. There will be no costs.

Given this 12th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 16/44.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Meir Gorodissky. APPELLANT.

V.

Matityahu Spokoine. RESPONDENT.

One of two Judges constituting Court replaced by other Judge after part of evidence heard — Neither party taking objection to new Judge or asking to be allowed to recall the witnesses — Scope of Rule 197, Civil Procedure Rules.

Appeal from the judgment of the District Court, Tel-Aviv, dated 23.12.43, in Civil Case No. 346/41, allowed and case remitted:—

1. Rule 197, Civil Procedure Rules, applies only where whole Court, consisting of one or more Judges, is replaced by new Judge or Judges.

2. Where, after Court consisting of two Judges heard evidence, one Judge is replaced by new or fresh Judge party's failure to apply for rehearing of evidence — immaterial; judgment given by Court in its new composition, without rehearing the evidence, cannot stand.

(*M. L.*)

REFERRED TO: C. A. 215/42 (9, P. L. R. 737; 1942, S. C. J. 988); C. A. 20/39 (6, P. L. R. 143; 5, Ct. L. R. 150; 1939, S. C. J. 116).

ANNOTATIONS: See cases referred to and annotations thereto.

(*A. G.*)

FOR APPELLANT: Olshan and Scharf.

FOR RESPONDENT: Henigman.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, whereby the Appellant was ordered to pay a sum of LP. 300 to the Respondent upon a promissory note.

The controversy centred around the authenticity of a certain receipt which the Defendant (present Appellant) alleged had been given to him by the wife of the Plaintiff.

The hearing commenced on the 7th of January, 1943, before Judge Korngrun and Mr. Shitreet, an Acting Judge. On that day the evidence of the Defendant himself was heard and concluded, as well as that of his only witness. Owing to want of time the case was adjourned to the 21st January, 1943. On the 21st January the Court was composed of Judge Many (presiding) and Judge Korngrun. We gather, although there is no proof of this, that Mr. Shitreet had by then ceased to be an Acting Judge. At any rate on the 21st January the Plaintiff was heard. Both parties were represented by advocates. It was open to the advocate who then appeared for the Defendant to insist, or at any rate to apply to the Court to allow him to recall the Defendant and his witness, Hassan Ali Abu Sa'adi, who had given evidence on the 7th of January, 1943; so that their evidence could be heard *de novo* in the presence of Judge Many, but the advocate appearing for the Defendant made no such application and was apparently content to allow Judge Many to deal with the evidence of the defence witnesses under rule 197 of the Civil Procedure Rules, 1938.

As we have said, judgment was eventually given for the Plaintiff and it is against that judgment that the Defendant now appeals to this Court.

On the suggestion of the Court Mr. Olshan, for the Appellant, dealt, first of all, or at any rate at an early stage of the hearing of this appeal, with the question as to whether rule 197 applies to the circumstances of this case. There have been two judgments dealing with rule 197, namely, Civil Appeal No. 215/42, P. L. R. Vol. 9, p. 737 and Civil Appeal No. 20/39, P. L. R. Vol. 6, p. 143. We have heard able and exhaustive arguments both by Mr. Olshan and Mr. Henigman on this matter which is certainly not free from difficulty.

We would say at the outset that, if the view contended for by Mr. Olshan is correct, then the mere fact that at the trial no objection was taken by the Defendant's advocate to Judge Many acting under rule 197 is immaterial.

Giving the best consideration we can to the matter we have come to the conclusion that rule 197 applies to the following cases only, namely,

(a) where the hearing of an action is commenced before one Judge sitting alone and that Judge is replaced by another Judge sitting alone, and

(b) where the hearing is commenced before a Court consisting of two or more Judges, both of them, or in the case of a Court consisting of more than two Judges all of them, being replaced by new or fresh Judges.

but that it does not apply when the action is commenced (as it was in this case) before a Court composed of two Judges only one of whom is replaced by another Judge. Apart from the wording of the rule there are obvious considerations which render this interpretation desirable, the main one being that in the case of an entirely new Judge or entirely new Judges dealing with the matter, the new Court will bring an entirely fresh mind to bear on the matter, whereas if only one Judge is replaced and another Judge has sat all the time there is the risk that, perhaps quite unconsciously, the new Judge might be influenced by any impressions gained by his colleague who has sat on the case all the time. We do not think it necessary to deal with the other grounds of appeal. We think that, because of the view we take of rule 197, the judgment cannot stand. It is, therefore, set aside and the case remitted for a rehearing *de novo* by the District Court of Tel-Aviv. The costs of this appeal will abide the event; but, in order to facilitate the final arrangements, we certify an advocate's attendance fee for the hearing of this appeal of LP. 10.—.

Delivered this 13th day of June, 1944.

British Puisne Judge.

HIGH COURT No. 46/44.

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

BEFORE : Edwards and Khayat, JJ.

IN THE APPLICATION OF:—

Asher Gleiberman. PETITIONER.

v.

Director of Land Settlement. RESPONDENT.

Licensing — Licence to practise as a land valuer — Land Valuers Ord., sec. 3 — Effect of certificate by D. C. — "On being satisfied", "is fitted by his knowledge" — Failure to cross examine on affidavit — Exercise of discretion.

Procedure on return to Order nisi — High Court Rules, form IV of Schedule — Form of affidavit.

Return to an order *nisi* issued to the Respondent, directing him to show cause why he should not issue a land valuer's licence to the Petitioner; order *nisi* discharged:—

1. An applicant for a land valuer's licence must satisfy the Director of Land Settlement, not the District Commissioner, of his knowledge and qualifications.

2. There is nothing in the High Court Rules requiring the respondent to make a formal application that the petition be dismissed.

(*A. M. A.*)

ANNOTATIONS: On the discretion of licensing authorities see H. C. 122/43 (*ante*, p. 12) and note 2.

Note, however, that "cases involving discretion should in future be dealt with by the officer to whom that discretion is given by law, and should not be delegated by him to a subordinate". — H. C. 31/42 (1942, S. C. J. 251; 11, Ct. L. R. 167).

(*H. K.*)

FOR APPLICANT: Seligman.

FOR RESPONDENT: Crown Counsel — (Rigby).

ORDER.

This is the return to an order *nisi*, calling upon the Director of Land Settlement to show cause why he should not be ordered to grant to the Petitioner a licence to practise as a land valuer in Palestine.

At the hearing of the petition a preliminary objection has been taken by the Petitioner's advocate, to the affidavit sworn by the Respondent, on the ground that this affidavit does not end with the words: "I make this affidavit in support of my application that the petition

be dismissed", as is said to be required by Form IV of the Schedule to the High Court Rules, 1937, rule 10 of which says that the forms of orders in the Schedule shall be used as far as circumstances permit.

The reply of Crown Counsel is that he did not require to dispute the facts alleged by the Petitioner and that, therefore, issue was not joined, and that accordingly the words were inappropriate and unnecessary. We think that this is so; in any event, it is difficult to understand to what document the words "my application" in the form refer. It is clear that there is nothing in the rule, nor in the procedure for the hearing of High Court petitions, requiring the Respondent to make a formal application for the petition to be dismissed. The preliminary objection of the Petitioner, therefore, fails.

To deal with the merits of the petition it is unnecessary to go into the whole history of the matter; but we are told, that on the 1st June, 1938, the Petitioner became apprenticed to a certain licensed land valuer with the intention of ultimately applying for a licence under Section 3(1)(b)(ii) of the Land Valuers Ordinance.

The next relevant date is the 27th October, 1943, when the District Commissioner of the District in which the Petitioner has been employed signed such a certificate as is contemplated by Section 3(2). That certificate was, in due course, forwarded to the Director of Land Settlement. We think that we ought now to deal with the first argument of Mr. Seligman, Petitioner's advocate, namely, that, once the District Commissioner had signed such a certificate, it was not open to the Director of Land Settlement to make any further enquiry as to the suitability or otherwise of the Applicant; in other words, it is suggested that, if the Applicant chooses to apply under Section 3(1)(b)(ii) instead of under Section 3(1))(b)(iii), then the person whom the Applicant has to satisfy is the District Commissioner and not the Director of Land Settlement. We think that for a number of reasons this argument fails. First, the words "on being satisfied" in line 3 of Section 3(1) control all the following parts of the Section, and, secondly, were the contention of Mr. Seligman sound, there would have been no need to insert in Section 3(1)(b)(ii) the words "and is fitted by his knowledge of the principles of land valuation" because those words would have appeared in Section 3(2) and nowhere else. Moreover, we agree with Mr. Rigby, Crown Counsel, in his submission that the scheme is this, namely, that if the candidate chooses to proceed under Section 3(1)(b)(ii) he must, as a condition precedent to his application, produce a certificate from the District Commissioner. We are fortified in arriving at this conclusion by the appearance of the

word "applying" in Section 3(2). Even if he has produced the certificate he is still a person "applying", and we think that he is still a person who must yet satisfy the Director of Land Settlement that he is fitted by his knowledge of the principles of land valuation. We think that it is unreasonable to suggest that the person to decide such matters would be the District Commissioner, however well qualified in many subjects District Commissioners may be. We, therefore, reject this contention of the Petitioner.

Mr. Seligman has further urged that, if his first argument fails, this order *nisi* should nevertheless be made absolute on the ground that his client has done everything that can reasonably be required of him. He contends that his client has never been required to submit to an examination. At the Bar, however, Mr. Rigby, Crown Counsel, informed us that, after the Respondent had received from the Petitioner the certificate from the District Commissioner, someone on behalf of the Respondent requested the Petitioner to appear at his office for the purpose of an interview. This is not denied by the Petitioner. (See para. 8 of the petition). Para. 9 of the petition states:—

> "On the 11th December, 1943, Petitioner called at the office of the Director of Land Settlement, but was given no satisfactory reply to his enquiry into the reason for the delay in issuing a licence to him".

Mr. Seligman suggests that the Respondent in his affidavit should have set out what happened at that interview, or, at any rate, should have explained in the affidavit the circumstances and the result of the test of the Petitioner's capabilities, if any.

It appears to us that there are two answers to this suggestion. At the commencement of the hearing Mr. Seligman was asked whether he wished to cross-examine the Respondent, Mr. Bennett, who was present in person, and ready to be cross-examined; but Mr. Seligman intimated that he did not wish to do so. Now, it is clear that an excellent opportunity was afforded to Mr. Seligman to ascertain from Mr. Bennett the real reasons why he was not satisfied that the Petitioner was fitted by his knowledge of principles of land valuation to be granted a certificate. Had the instructions given by the Petitioner to Mr. Seligman been to the effect that no test was given then surely that matter could have been elicited in cross-examination. If, on the other hand, the test had been given, what happened at the test could equally have been elicited.

The mere fact that perhaps Mr. Bennett himself did not give the test or was not in Palestine at the time of the alleged interview does not affect matters. In a matter of this nature the Respondent, as the

responsible head of the department concerned, was always entitled to look at files and reports and obtain therefrom facts on which he could base the exercise of his discretion. It may be that Mr. Seligman did not think it necessary to cross-examine Mr. Bennett or he may have had another reason for not doing so; in any event, we think that his refraining from cross-examining Mr. Bennett is fatal to him in so far as the question of the reasons why Respondent was satisfied that the Petitioner was not fitted for a licence are concerned. It is quite clear from para. 9 of the petition, quoted above, that more must have happened at this interview than the Petitioner has set out. It is unlikely that he would be sent for simply to be told that he could not have a licence, especially in view of the fact that the Petitioner himself says in para. 8 that he was called there "for an interview".

There is accordingly nothing before us to justify us in holding that the Director of Land Settlement has acted from wrong motives or in an arbitrary manner. The fact that the Petitioner was sent for to attend an interview really points in the other direction. Mr. Seligman in reply has said that his client should have been told why he had failed. Here again we think that an answer might have been elicited had Mr. Seligman chosen to cross-examine Mr. Bennett, particularly on the last words of para. 4(3) of his affidavit.

For all the foregoing reasons the order *nisi* is discharged. With regard to costs we award to Government fixed (or inclusive) costs of LP. 5.

Given this 23rd day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 18/44.

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

BEFORE : Rose and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Yousef Abdul Rahim el Za'eem. APPELLANT.

v.

Ammouneh Bint Khalil Allawa. RESPONDENT.

Defendant relying on document but unable to produce it — Missing document found after case decided — Court of Appeal ordering re-hearing de novo.

Appeal from the judgment of the Magistrate's Court of Ramleh, sitting as a Land Court, dated 27th December, 1943, in Civil Case No. 748/43, allowed and case remitted:—

Where a document was relied upon but could not be produced and was discovered after judgment, appeal will be allowed and case remitted for rehearing in the light of that document.

(*M. L.*)

FOLLOWED: C. A. 142/43 (1943, A. L. R. 796).

ANNOTATIONS: See C. A. 142/43 (*supra*).

(*A. G.*)

FOR APPELLANT: Nazzal, by delegation from Dajani.

FOR RESPONDENT: El-Mubasher.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Ramleh.

The Appellant, who was the Defendant in the Court below, relied upon a certain deed of sale which he alleged would have established his case. He was unable to produce the document, and the Magistrate, quite properly in the circumstances, decided that the document and the facts alleged by the Respondent * were not established.

That document has now been discovered, and in reliance upon Civil Appeal 142/43, Annotated Law Reports, 1943, at page 796, the Appellant argues that the case should be remitted to the Magistrate to consider this document. It is clear to us that, had the document been before the learned Magistrate, while he might have come to the same result, he could not have done so for the same reasons.

The appeal will, therefore, be allowed and the case remitted to the Land Court to consider the document and to give a fresh judgment in the light of it. It will, of course, be open to the Respondent to attack the document either by the calling of evidence or in any other way, if he thinks fit. And the Appellant, too, will be at liberty to call any evidence which he may think necessary.

The costs of this appeal will be in the cause, and having regard to the comparatively small value of the land, we certify an inclusive sum of LP. 10 for this appeal to the ultimately successful party. It follows that the costs of the original proceedings before the Magistrate will also be in the cause.

Delivered this 12th day of June, 1944.

British Puisne Judge.

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* Should be "Appellant" or "Defendant". (*Ed.*)

HIGH COURT No. 68/44.

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

BEFORE : Rose, J.

IN THE APPLICATION OF :—

Dr. Martin Kupper & 2 ors. PETITIONERS.

v.

1. District Commissioner, Jerusalem District,
2. Mr. Dwossis & an. RESPONDENTS.

District Commissioner ordering the possession of a flat for accommodation of an officer in Land Registry — Discretionary powers of "competent authority" under Defence Regulations, 1939 — Meaning of "land" in Reg. 48, Defence Regulations.

Return to an order *nisi*, issued on the 22nd of May, 1944, directed to the first Respondent, calling upon him to show cause why his order, dated the 27th of April, 1944, in File No. 5/23/PO/6, for taking possession of the premises consisting of three rooms and conveniences, in the third floor of the small (middle) block in Gan-Rehavia, being the property of "Kinyan-Bait" Ltd., situated at the junction of Bezalel and Ratisbonne Streets, and registered under Jerusalem Urban Property Block No. 42, parcel No. 39, should not be set aside; rule *nisi* discharged:—

1. High Court will not interfere with discretion exercised under Reg. 48, Defence Regulations, 1939, by competent authority commandeering a flat for accommodation of a Government Officer on considering it necessary for efficient prosecution of the war.

2. For purposes of Reg. 48, Defence Regulations, 1939, "land" includes a flat or building.

(*M. L.*)

REFERRED TO: H. C. 78/43 (10, P. L. R. 526; 1943, A. L. R. 631).

ANNOTATIONS: See H. C. 78/43 (*supra*) with annotations.

(*A. G.*)

FOR PETITIONERS: Nos. 1 & 3 — Frank.
No. 2 — Katzenstein.

FOR RESPONDENTS: No. 1 — Asst. Government Advocate — (Salant).
No. 2 — Amdur.

ORDER.

This is one of those unfortunate cases in which members of the public are genuinely and, from their point of view, quite righteously

indignant at rights of property being interfered with by arbitrary actions of Government, but while one may feel sympathetic for the Petitioners, the only point which I have to consider is whether the requirements of the law have been complied with.

The relevant provision is Regulation 48 of the Defence Regulations, 1939, and the competent authority, who admittedly in this case is the District Commissioner of Jerusalem, purported to commandeer a flat on the ground that he considered it essential to do so for the efficient prosecution of the war. He sets out in his affidavit that he commandeered this flat for a Mr. Dwossis, who is an officer in the Land Registry in Jerusalem, and the District Commissioner states that in his belief the efficient performance of this officer's duties required a flat, and that his duties, as part of Government, were such as to be necessary for the efficient prosecution of the war.

Whether or not the District Commissioner is right in that view is, I suppose, a matter of opinion, but on the face of it there is nothing palpably ridiculous or unreasonable in that view, and that being so it seems to me that I should not interfere with the discretion which is vested in him. It is for the District Commissioner to apply his mind to the question and come to a conclusion. If he does so it seems to me that no Court can interfere. Authority for that view, if it is needed, is supplied by High Court 78/43, Vol. 10, P. L. R. at page 526.

The Petitioners have taken a further point that Regulation 48 does not entitle the competent authority to requisition a flat but only land within the usual meaning of the word as contained in the definition section of Cap. 77. To my mind that is a matter which has now been covered by authority, it having been held in the same High Court case 78/43, that land includes, for the purpose of this article, a flat or building.

That seems to me to dispose of the matter, and for these reasons the rule must be discharged.

The first Respondent and the second Respondent will each have costs in an inclusive sum of LP. 10. The third Respondent has not appeared and will have no costs.

Given this 16th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 307/43.

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

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

IN THE APPEAL OF:—

Muhammad El Hadi El Yashruti. APPELLANT.

v.

Muhammad Qasem Muhammad Kiwan & 65 ors. RESPONDENTS.

Land Settlement — Sec. 27 (1) and (2) — Preliminary or public investigation — Remittal.

Appeal from the decision of the Land Settlement Officer, Case No. 1/Buteimat, dismissed:—

1. There is no need to hold separate enquiries under sec. 27(1) and 27(2) of the Land Settlement Ord.
2. A litigant will not be given a second opportunity to prove his case.

(*A. M. A.*)

FOR APPELLANT: Shukeiri and Hawa.

FOR RESPONDENTS: No. 15 — Ben-Shemesh.
No. 17 — Asfour.
Rest — Absent — served.

J U D G M E N T*.

— — — — — — — — — — — — —

The first ground of appeal is that the learned Settlement Officer held merely a public investigation of claims under Section 27(1) of the Land (Settlement of Title) Ordinance, and that the Appellant understood that all that the Settlement Officer was going to do at the hearing to which he was summoned, was to conduct a preliminary investigation, and that the learned Settlement Officer never heard the dispute as contemplated by Section 27(2).

The argument seems to be that there are two completely separate enquiries, namely one under Section 27(1), and another under Section 27(2). We, however, think that there is nothing in this argument. The particular Settlement Officer is very experienced in these matters; moreover, the present Appellant was represented before the Settlement Officer by an advocate who is also experienced in settlement matters,

* Parts of the decision dealing with the facts of the case have been omitted. (*Ed.*)

namely Hassan Eff. Hawa. The matter was heard at great length by the Settlement Officer, and Hassan Eff. Hawa cross-examined the witnesses and himself called witnesses, and it is interesting to note that Hassan Eff. Hawa called and examined one, Hassan Ali Hamad, whom he described as his most important witness.

It is abundantly clear that Hassan Eff. Hawa fully understood that the dispute which the Land Settlement Officer was hearing was the dispute contemplated by line 2 of Section 27(2). The first ground of appeal, therefore, fails.

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Ahmad Eff. Shukeiri at the Bar said that the most that he could ask was that the case be remitted for a re-hearing. This seems very significant. We do not think that it is unfair to say that it seems that the Appellant, having been unsuccessful before the Land Settlement Officer in his attempts to prove adverse possession and a proper partition, now seeks a second chance of doing so, and proving these matters. What is the position? If the evidence already before the Land Settlement Officer was sufficient to justify him in finding in favour of the present Appellant, then surely the decision should be reversed. But that is not what the Appellant has asked. If, on the other hand, the Appellant failed (as we think he did) to satisfy the Land Settlement Officer on the matters which we have mentioned, why should the Appellant have another chance? Looked at in this way it at once becomes obvious that the Appellant's position is hopeless. It cannot be said that the decision of the Land Settlement Officer was against the weight of evidence.

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Delivered this 5th day of April, 1944.

British Puisne Judge.

CIVIL APPEAL No. 369/43.

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

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

IN THE APPEAL OF :—

Jacob Leibovitz & an. — APPELLANTS.

v.

Helena Leibovitz. — RESPONDENT.

Order appointing administrator of deceased's estate in a contested case whether "order" or "decree" — Power of Court to amend order appointing administrator — Scope of sec. 15(2), Succession Ordinance.

Appeal from the order of the District Court of Tel-Aviv, dated the 24th September, 1943, in Probate File No. 217/42, dismissed:—

1. Order appointing administrator in contested case — not a decree, as it does not finally and conclusively determine parties' rights, since any interested person can under Rule 16, Succession Rules, object to the order.

2. (*Obiter*): Rule 16, Succession Rules, can be applied in same case more than once.

3. Where it appears from order of appointment of administrator that Court did not purport to come to a final conclusion, Court may subsequently alter such order by granting administration to another person.

4. Proviso in sec. 15(2), Succession Ordinance, applies only to a person whose only interest in the estate is as creditor and who claims to be appointed as such, but not to a person claiming in the inheritance itself who happens to be a creditor of the estate.

(*M. L.*)

ANNOTATIONS:

1. As to the first point see C. A. 124/44 (11, P. L. R. 153; *ante*, p. 199) with annotations thereto in A. L. R.

2. See the previous proceedings in this case: C. A. 243/42 (10, P. L. R. 21; 1943, A. L. R. 254).

(*A. G.*)

FOR APPELLANTS: Goitein and Adlerstein.

FOR RESPONDENT: Eliash.

JUDGMENT.

Mr. Eliash raised the preliminary point that the decision of the District Court was a decree and not an order of an interlocutory nature, because in a contested action it decided definitely an issue between the parties, *i. e.* who was to be administrator. This being the case, an appeal, he argues, lies as of right, and if it lies of right it is out of time.

In the Civil Procedure Rules "'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the action and may be either preliminary or final".

Now, it is true that the issue as to whether the Appellants or Respondent should be administrator was contested and determined by the Court. But under Rule 16 of the Succession Rules any person interested could still have objected to the order of administration, and the Court might have revoked the order, and such revocation might

have the effect of completely altering the status of the parties. The fact that Rule 16 was already applied in the present case does not make its further application impossible. It cannot, therefore, in my opinion be said that the order of administration finally and conclusively determined the rights of the parties. The preliminary objection is over-ruled.

On the 21st of October, 1942, the first Appellant was appointed administrator of his father's estate. On 24th July, 1943, by application of the Respondent, that order was amended by the Relieving President to the effect that the administration, with the will annexed, was granted to the Respondent. Mr. Goitein argues that there was no ground for setting aside the order of the President in appointing the Appellant to be administrator. The Court, he says, was in possession of the full facts and exercised its discretion in favour of his client. Now, it is clear from the judgment of the learned President that he did not purport to come to a final conclusion. As the Respondent has submitted, he left the door open. At the time of the making of the first order by the President there were doubts as to the existence of a will, and it is obvious that the learned President made the order without taking into consideration any implications that might flow from the terms of the will, and on the assumption that any issues arising out of the will would be decided at a later stage. I am of opinion, therefore, that the Relieving President was entitled to amend the order of the District Court, dated 21st October, 1942.

It was further contended that the Respondent could not be appointed administrator by reason of Section 15(2) of the Succession Ordinance. On this point it suffices to say that I am of opinion that the learned Relieving President's interpretation that Section 15(2) is intended to apply only to a person whose only interest in the estate is as a creditor and who claims to be appointed as such, and not to a person claiming in the inheritance itself, who may happen at the time to be a creditor of the estate, is correct.

Finally there remains the question as to the respective merits of the parties to the grant of administration. The Appellant is the son of the deceased by a former marriage. The Respondent is the widow of deceased. She is entitled to a greater interest in the succession than the son, and she is, therefore, primarily entitled to the administration.

For these reasons the appeal must be dismissed, with LP. 15 inclusive costs.

Delivered this 20th day of June, 1944.

Chief Justice.

CIVIL APPEAL No. 390/43.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Fatmeh Hassan Sabboubeh & an. APPELLANTS.

v.

Abdel Kader Ahmad Jarad, for and on behalf of the estate of his late father Haj Ahmad Jarad. RESPONDENT.

Adverse possession — Co-heirs building on jointly owned land without consent of all heirs — L. L. (Am.) Ord., sec. 2 — Ord. not retrospective — Procedure under r. 175, M. C. P. R.

Appeal from the judgment of the Magistrate's Court, Tulkarm, sitting as a Land Court, in Land Case No. 9/43, allowed:—

The provisions of sec. 2 of the Land Law (Amendment) Ord. do not apply with retrospective effect.

(*A. M. A.*)

ANNOTATIONS :

1. Prescription is only valid as a defence: see the annotations in S. C. J. to C. A. 238/37 (5, P. L. R. 37; 1938, 1 S. C. J. 32; 3, Ct. L. R. 63) and to C. A. 228/37 (5, P. L. R. 105; 1938, 1 S. C. J. 99; 3, Ct. L. R. 95), *cf.* also H. C. 91/36 (1937, S. C. J. (N. S.), 8; 1, Ct. L. R. 130; P. P. 29.iii.37).

2. On prescription between co-heirs see C. A. 197/41 (8, P. L. R. 499; 1941, S. C. J. 458; 10, Ct. L. R. 205); *cf.* C. A. 51/43 (1943, A. L. R. 305).

3. See the *obiter dictum* in C. A. 197/41 (*supra*) where Copland, J., doubted the correctness of the decisions to the effect that Sec. 2 of the Land Law (Am.) Ordinance did not come into operation until ten years after its enactment. *Cf.* note 8 to that judgment in S. C. J.

(*H. K.*)

FOR APPELLANTS: F. Atalla.

FOR RESPONDENT: Qamhiyeh and Kamleh.

JUDGMENT.

Abdul Hadi, J.: This is an appeal from a judgment of the Magistrate's Court of Tulkarm, sitting as a Land Court, dated 28th November, 1943, whereby the ownership of Respondent (on behalf of his father's estate) was established in 18 *kirats* out of 24, in the southern room of a house situated in the eastern quarter of Tulkarm, which is composed of two rooms, a courtyard and appurtenances, the boundaries

of which are set out in the judgment whereby registration of the property in the Land Registry of Tulkarm was ordered.

A summary of the facts is set out in the statement of claim filed on 22nd February, 1943, by Plaintiff, Haj Ahmad Jarad, testator of judgment-creditor against the first Respondent as Defendant. The Plaintiff averred that he inherited from his deceased brother, Assad Jarad, husband of the first Appellant (Defendant), 18 out of 24 *kirats* in the room claimed, courtyard and appurtenances, and he asked for a declaration of ownership in the said shares.

On 29.6.43 Chekib Eff.. Jayousi, advocate, filed an application on behalf of the second Appellant, Khadra bint Abdalla Jarad, requesting the Court to join his client, the third party, as a Defendant.

During the pendency of the case before the Court below the Plaintiff, Haj Ahmad, died. His advocate having obtained a power of attorney from the son Abdul Kader (Respondent) applied to the Court on 20.10.43, on behalf of Abdul Kader, in his personal capacity and as representing his father's estate, for leave to proceed with the hearing of the case and asked the Court to give judgment for his client. On the 9th November, 1943, the Magistrate ordered the second Appellant to be joined as a Defendant and he then proceeded with the hearing. The Magistrate heard the evidence of witnesses and listened to the arguments of both parties and perused the documents produced, and in the result gave the judgment now under appeal. The advocate for Appellants (Fatmeh and Khadra) has now appealed and, at the hearing of the appeal before us, took the objection that Abdul Kader should not have been joined as a party on behalf of his father's (Haj Ahmad) estate, alleging that the procedure prescribed by Rule 175 of the Magistrates' Courts Procedure Rules, 1940, had not been followed. We are, however, of the opinion that the Respondent's advocate acted in accordance with this rule, because, upon the death of his client, he, as advocate for the deceased's son, on 20th October, 1943, applied to the Court for leave to proceed with the case. We, therefore, reject this ground of appeal.

Another point taken by Appellants' advocate was that the Magistrate erred in giving judgment for the Respondent, because the two old rooms, on which the Magistrate found the two new rooms had been built, had been built on the same land as that on which the old rooms were erected, and as appears clear from the *Tabu* extract, they were owned in common and registered in the names of Ahmad (the testator of Respondent Abdul Kader), Yassin, Assad (husband of the first Appellant), Abdalla (testator of the second Appellant, Khadra), Nasra

and Eishe — all children of Muhammad Hassan Jarad. The argument proceeds that even if the allegation that the two new rooms were built by Ahmad and Assad on their own private property, without the permission and full consent of all their partners or heirs, is true, then the Plaintiff's claim is unfounded and that consequently a claim for possession cannot be entertained.

In our opinion the decision at which the Magistrate arrived on the facts as found by him was wrong, because the facts show that the two rooms, one of which is claimed to be and known as the southern room, were built on part of the land belonging to Haj Ibrahim Safieh, that is land on which the two old rooms were originally built and which were owned in common and registered by way of inheritance in the names of the six children of Muhammad Yassin Jarad, one of whom is Haj Ahmad, husband of first Appellant, and another of whom is Abdalla, father of the second Appellant. They, without permission, built the two rooms on land owned in common by them and the other heirs. This debars the Plaintiff from succeeding in his claim in its present form.

As regards the question of adverse possession by Respondent (Plaintiff), on which the Magistrate relied, he finding as a fact that such adverse possession exists, this cannot be the basis for a judgment. The land on which the two new rooms were built was owned in common, and possession by one of the heirs or some of the heirs in common property does not affect the period of prescription, as this Court has frequently held. We are further of the opinion that the principle of adverse possession, referred to in Section 2 of the Land Law (Amendment) Ordinance, cannot be relied upon, as this Court has on several occasions held that this Ordinance is not retrospective, and the period that has elapsed between the date of the enactment of this Ordinance, *i. e.* 23.8.33, and the date of filing this action, *i. e.* 22.2.44 *, is less than the period of prescription.

For the foregoing reasons we allow the appeal, set aside the judgment of the Court below, and we dismiss the Plaintiff's action with costs here and below, the costs in this Court being fixed (or inclusive) costs of LP. 10.

Delivered this 30th day of May, 1944.

Puisne Judge.

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* Should be: 22.2.43 and *not* 44; see second para of judgment. (*Ed.*)

HIGH COURT No. 48/44.

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

BEFORE: Plunkett, A/J.

IN THE APPLICATION OF :—

Zakie Mulki, widow of Jiries Habib Hawa. PETITIONER.

v.

1. Chief Execution Officer, Haifa,
2. Raji Isa & an. RESPONDENTS.

Judgment for delivery of a fixed quantity of oil — Chief Execution Officer ordering execution and, in case of refusal to deliver, purchase of oil on judgment debtor's account — Scope of art. 47, *Execution Law.*

Return to a rule *nisi*, issued on the 14th of May, 1944, directed to the first Respondent, calling upon him to show cause why his order, dated the 13th of April, 1944, in Execution File No. 4877/40, Execution Office, Magistrate's Court, Haifa, should not be set aside, and why he should not refrain from executing the judgment of the Magistrate's Court, Acre, dated the 20th April, 1932, in Civil Case No. 349/32, otherwise than in accordance with law; order made absolute:—

Art. 47 Execution Law applies only where judgment is for performance of an act (as distinct from delivery of goods), it does not apply to cost of goods, hence judgment for delivery of definite quantity of goods — not capable of execution, if value of goods is unknown and not fixed in the judgment; in such case a fresh judgment must be obtained as to the value.

(*M. L.*)

ANNOTATIONS: See H. C. 70/33 (2, P. L. R. 40; 4, C. of J. 1268).

(*A. G.*)

FOR PETITIONER: Cattan.

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

O R D E R.

The Magistrate of Acre, by his order, dated 20th April, 1932, given by default, ordered Defendant to deliver to Plaintiff 1000 *okkas* of first class olive oil, pure and absolutely free from water adulteration and sediment, and to pay costs and expenses and LP. 1 advocate's fee.

This judgment was put into execution, and after many appearances and negotiations, which failed, the Execution Officer made the order which is now the subject-mater of this return. In this order the Execution Officer decided that:—

> "Upon carefully considering the pleadings of both sides, I hold that the provisions of Article 47 of the Execution Law apply to this case, and, therefore, I order the Defendant (J. D. Zakie) to deliver to the Plaintiffs (judgment-creditors) 1000 *okkas* of first-class olive oil, free from water adulteration and sediment, to be delivered to them within a week from the date of service of this notice upon her and in the event of refusal, one of the firms dealing in oil will be selected, a sufficient amount of money for this oil will be given to this firm, which will deliver the oil to the Plaintiffs and the price will be deducted from the moneys attached and belonging to the judgment debtor".

For the Respondent * it is argued that the Magistrate's order is for delivery of 1000 *okkas* oil and no alternative of money value, and this is a final finding. Petitioner ** agrees, but that the question is of price, and Article 47 of the Execution Law applies, and that there is no necessity to go to the Court to fix the price.

The first Respondent, the Chief Execution Officer, is wrong in his interpretation of Article 47. Article 46 is to deliver goods; Article 47 to perform an act; neither apply, and Applicant's remedy is to go before a competent Court. Reference is made to "Commentaries" by Fares Bey Khoury (who translated Article 47). The "cost of work *etc.*", even taking the translation in Court "cost of act", cannot mean cost of goods.

I have no doubt whatever that the Execution Officer has misinterpreted the meaning and application of Article 47 of the Execution Law. It was never intended by this section to grant an Execution Officer such extensive powers.

In support of my opinion I refer to commentary by Ahmad Rafiq, Execution Officer, Istanbul, First Edition, year 1340. I think the provisions of Article 5 of the Execution Law have been overlooked. That article reads:—

> "No decree shall be executed unless it consist of an order to do or to abstain from doing something or to deliver a definite thing".

Commentary on Article 5 of the Execution Law, page 103, by Ahmad Rafiq:—

> "A judgment which provides for the payment of the value of the property consumed, although ordering the payment of such money, cannot be executed by the execution office if the value is not fixed, and whereas the execution office has no jurisdiction to assess the value, it shall direct the Plaintiff to go to Court".

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* Should be "Petitioner".

** Should be "Respondents".

(*Ed.*)

And on page 189:—

> "..... but if the articles are destroyed or lost, and it is difficult to deliver the subject-matter of the judgment *in specie*, and its value is also unknown, resort must be had to the Court, and a fresh judgment obtained in respect of the value".

It is clear that the Execution Officer should have called upon the parties to obtain judgment, to have the price fixed, and that the interpretation placed on Article 47 of the Execution Law by the Execution Officer is not correct.

For these reasons the judgment as it stands is not capable of execution, and the order of the Execution Officer is set aside, and the rule is made absolute.

The Petitioner will have his costs fixed at an inclusive sum of LP. 10.

Given this 29th day of June, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 334/43.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Othman Bushnaq. APPELLANT.

v.

Hamunuta Co. Ltd. & 3 ors. RESPONDENTS.

Appeals — Application to join additional Defendant — Appeal from refusal only by leave.

Appeal from the decision of the Land Court of Nablus, Land Case No. 19/43, dismissed:—

A refusal to join an additional defendant is an order, not a decree, and cannot be appealed save by leave.

(*A. M. A.*)

ANNOTATIONS:

1. Appellant had made an application to the Land Court asking for the joinder of additional defendants in an action brought by him; the application was refused and Appellant's application for leave to appeal against such refusal — made orally immediately after the delivery of the above ruling — was also refused by the Land Court. Appellant thereupon appealed to the Supreme Court.

2. See, on "decrees" and "orders", note 2 to C. A. 279/42 (1943, A. L. R. 89) and notes 2—8 to M. A. 56/43 (1943, A. L. R. 521).

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENTS: No. 1 — A. Hamburger.
Others — Eliash.

JUDGMENT.

I must hold that the decision of the Court below was an order and not a final decision regarding the rights of the parties and that an application should be made for leave to appeal and not to file an appeal as of right. The Civil Procedure Rules, 1938, must be strictly complied with. For this reason the appeal is dismissed, with costs fixed at an inclusive sum of LP. 5 to each advocate representing each set of Respondents.

Delivered this 4th day of May, 1944.

A/British Puisne Judge.

CIVIL APPEAL No. 362/43.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF:—

Haifa Wire Works, Haifa. — APPELLANT.

v.

Robert Horowitz. — RESPONDENT.

Contract of employment — Implied termination of contract — Mejelle, 425 — Unnecessary for employee to continue to attend.

Appeal from the judgment of the District Court, Haifa, dated 11.10.43, in Civil Appeal No. 167/43, dismissed:—

Where the employer is unable to provide the employee with work of the kind contracted, the employee is justified in refusing to do the work and this amounts to a termination of the contract.

(*A. M. A.*)

ANNOTATIONS: *Cf.* C. A. 58/40 (7, P. L. R. 187; 1940, S. C. J. 119; 7, Ct. L. R. 141).

(*H. K.*)

FOR APPELLANT: Olshan.

FOR RESPONDENT: Schimel.

JUDGMENT.

This is an appeal by leave from a judgment of the District Court

of Haifa in its appellate capacity which Court had dismissed an appeal from a judgment of one of the learned magistrates of Haifa.

The Magistrate had given judgment in favour of the Plaintiff, now Respondent, for one month's wages in lieu of notice. The Respondent had been engaged by the Appellant as a skilled engineer on three months' probation, as from the beginning of June, 1942. It seems that on 5th August, 1942, the Respondent was called upon to do certain work, namely, straightening out horse shoes which the Magistrate found to be manual labour and not work of the type that the Respondent had contracted to do.

The District Court found that they were unable to interfere with this finding of fact and Mr. Olshan who appeared for the Appellant before us eventually agreed that he could not press his complaint on this head.

The only question now is "what was the effect of the incident of the 5th August?" It seems that after the Appellant realised that the Respondent was unwilling to do the work of straightening out of horse shoes, he, the Appellant, was unable to provide him with work which could properly be said to be of the kind which he had contracted to perform. The Magistrate held that the Respondent was justified in his refusal to do this manual labour. We think that the fact of the Appellant not being able to provide him with suitable work amounted in law to a termination of the contract.

Mr. Olshan says that if this is the position then the Respondent should either have treated the Appellant's conduct as a breach of contract and should have sent his client a notarial notice and later if necessary have sued for damages; or alternatively the Respondent should have, even after the 5th August, daily presented himself for work. Mr. Olshan relies on Article 425 of the *Mejelle*. We think, however, that it was clear to both parties after the 5th August, that it would have been futile for the Respondent to attend daily especially when one realises that the Appellant had shown that he did not intend to give the Respondent suitable work. We, therefore, think that the Magistrate was justified in giving judgment for one month's wages seeing that the three months' probation period did not expire until the beginning of September, 1942. The appeal accordingly fails. In fairness, however, to the Appellant we think that we ought to say that we do not think that the Magistrate was justified in drawing the conclusion that the Appellant had in any way exploited the Respondent. It seems to have been a genuine dispute between employer and employee such as frequently happens without any suggestion of improper dealing on the part of either.

We, therefore, think that the Magistrate should have refrained from criticizing the Appellant. The appeal is accordingly dismissed. The Appellant must pay the Respondent's costs of this appeal which we assess at fixed (or inclusive) costs of LP. 5.—.

Delivered this 14th day of June, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 47/44.

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

BEFORE: Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Abdul Ghani el Bakri. APPELLANT.

v.

Attorney General. RESPONDENT.

Criminal Procedure — Evidence — Credibility of witness made dependent on the result of a prosecution against him.

Appeal from the judgment of the District Court, Jerusalem, whereby Appellant was convicted of robbery, allowed and conviction quashed:—

Proceedings are vitiated when the findings of the Court were made dependent on the result of criminal proceedings instituted against the prosecution witness.

(*A. M. A.*)

ANNOTATIONS: The previous judgment referred to is CR. A. 125/43 (1943, A. L. R. 685).

(*H. K.*)

FOR APPELLANT: Ghussein.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an application for leave to appeal from a judgment of the District Court of Jerusalem. In accordance with our usual practice we have treated the application for leave as the appeal itself. The whole matter, if we may say so, seems to us to be astonishing and the less we comment on it the better. In the first instance the Appellant, who was charged with robbery, was convicted and sentenced to twelve months' imprisonment. The case apparently came up on appeal before this Court, differently constituted, who granted the application for leave to appeal, the reason being apparently that the Accused has over 20

years service in the Customs as a preventive officer against smuggling and "the evidence against him was only one man and a woman on a donkey or mule and a small boy". (*sic*). They then remitted the case to the Court below in order to reconsider the matter and hear further evidence. When the case went back for trial it appears that, as before, the case for the prosecution depended very largely upon the evidence of those people "on the donkey or mule". At the time an independent charge of robbery was pending against one of those persons. The Court seemed to have decided that it was difficult, if not impossible for them, to make up their minds whether they believed his evidence until they knew the result of the prosecution in that pending matter. They thereupon postponed delivering judgment. Subsequently the witness was acquitted and the Court thereupon convicted the present Appellant. As Crown Counsel himself observed, this is not the duty of a trial Court. Their duty is to make up their minds on the evidence adduced before them, irrespective of whether a certain witness is under a charge or has subsequently been convicted or not. Clearly the judgment cannot stand. The appeal must, therefore, be allowed and the conviction and sentence quashed. The fine must be refunded to the Appellant.

Delivered this 9th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 352/43.

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

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

IN THE APPLICATION OF :—

Aharon Shlomo Elberg. APPLICANT.

v.

Bank Hamizrachi Ltd. RESPONDENT.

Arbitration — Petition to enforce award and petition to set aside heard together — No order of consolidation — C. P. R., rr. 2, 304, 305 — Arb. Rules, r. 7 — "Action".

Application for leave to appeal from the judgment of the District Court of Tel-Aviv, dated the 30th of July, 1943, in Civil Case No. 84/43, allowed, appeal allowed and case remitted with directions:—

An application to enforce an award (together with the opposition thereto)

cannot be heard together with an application for setting aside the award, unless an order of consolidation has been made.

(*A. M. A.*)

ANNOTATIONS:

1. *Cf.* C. A. 235/43 (1943, A. L. R. 814) where an award was confirmed immediately after the Court had dismissed an application to set it aside.

2. On the proper method of originating proceedings under the Arbitration Ordinance see C. A. 65/42 (9, P. L. R. 392; 1942, S. C. J. 429).

(*H. K.*)

FOR APPLICANT: Abramovsky.

FOR RESPONDENT: Amikam.

JUDGMENT.

This is an application for leave to appeal from an order of the District Court of Tel-Aviv of the 30th July, 1943, confirming an award of an arbitrator, dismissing the opposition to the confirmation of the award, and dismissing the application to set aside the award under Section 15 of the Arbitration Ordinance.

The Respondent to this appeal had made an application for the confirmation of the award in question. The present Applicant opposed the confirmation and also filed a separate motion to have the award set aside.

It is clear from rule 7 of the Arbitration Rules and from certain judgments of this Court that proceedings in the District Court under the Arbitration Ordinance are properly brought under rule 305 of the Civil Procedure Rules. That being the case, it would seem that such matters are "actions" within the meaning of rules 2 and 304.

At an early stage of the proceedings in this Court we decided to grant leave to appeal and we have now heard parties' advocates on one ground of appeal, which we think, at the present moment, disposes of the matter. The Applicant complained that the District Court, although they purported to have tried the two actions together, never, in effect, ordered the consolidation of the application to confirm the award and the application to have it set aside.

Mr. Arkin, who has appeared before us to-day on behalf of the Respondent to this appeal, has informed the Court that the present Appellant well knew that the District Court were, in effect, hearing the two matters together. Unfortunately, there is nothing on the record to show that the District Court ever ordered a consolidation of the two motions.

The first time one learns of the so-called consolidation is in the judgment which says that "all three applications were heard together

(consolidated)". It may well be, as Mr. Arkin suggests, that the Appellant did, in fact, realise that the District Court were hearing both applications; but, unfortunately, as we have said, there is nothing on the record to show hat there ever was an order of consolidation.

For these reasons the appeal is allowed, the order of the District Court of Tel-Aviv of 30th July, 1943, is set aside and the case remitted to the District Court who will hear the following, namely, the application for the confirmation of the award, the opposition by the present Appellant to the confirmation of the award, and also the application of the present Appellant to have the award set aside.

Costs of this appeal will abide the event; but, in order to facilitate final arrangements, they will be taxed on the lower scale and will include an advocate's attendance fee for the hearing of this appeal of LP. 10 to the ultimately successful party.

Delivered this 20h day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 70/44.

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

BEFORE: FitzGerald, C. J.

IN THE APPEAL OF:—

Juda Joseph Rafel. — APPELLANT.

v.

Gabriel Rachamim & 3 ors. — RESPONDENTS.

Shufa' — Mejelle, Arts. 1028—1035 — *Type of preemption inapplicable to modern conditions — Object is to prevent incursion of stranger into family life — Construction — Cyprus decisions — The three claims, C. A.* 115/43 *— Delay — Second claim not made on behalf of partners — Christo Romani v. Emilia Skoullou.*

Appeal from the judgment of the Land Court of Tel-Aviv, dated 7th February, 1944, in Land Case No. 13/42, allowed:—

1. *Shufa'* is an archaic remedy suitable to conditions which do not always apply in Palestine. The Courts have consequently construed it strictly.

2. The first claim should be made without any delay.

3. The formal requirements of the *Mejelle* regarding the second claim should be strictly complied with. An omission to mention partners, on whose behalf the claim should also be made, is fatal.

APPLIED: C. A. 115/43 (10, P. L. R. 252; 1943, A. L. R. 381).

FOLLOWED: Romano *v.* Skoullou, 1922, 11 Cyprus Law Reports 17.

ANNOTATIONS:

1. The judgment of the Land Court is reported in Selected Cases of the District Courts, 1944, p. 51.

2. For Palestinian authorities on *Shufa'* see annotations to C. A. 115/43 (*supra*) in A. L. R.

(*A. M. A.*)

FOR APPELLANT: Goitein & Shwartzman.

FOR RESPONDENTS: No. 1 — Many.
Nos. 2 & 3 — Kitzinger.

JUDGMENT.

This is an appeal from the judgment of the District Court * of Tel-Aviv, which decided that the first Respondent had established a claim to *Shufa'* in accordance with the relevant provisions of the *Mejelle*.

The Respondents were the owners of certain undivided shares of a plot of *Mulk* land registered in the Land Registry of Tel-Aviv in Volume 63, Folio 35. On the 18th of September, 1942, the fourth Respondent sold her shares in the land to the Appellant for LP. 800. The sale was registered in the Land Registry on that date. The first Respondent claimed the right to *Shufa'* in respect of this sale.

Shufa' is a claim preferred under the provisions of Articles 1028 to 1035 of the *Mejelle*. It is a type of preemption which enables a person who is a co-owner to claim that any part of the property which has been sold to a stranger shall be transferred to him by way of *Shufa'* on payment to the buyer of the purchase price paid by him for the property. The question of *Shufa'* has been many times before the Courts in this country, and I cannot discover one case in which it has been allowed since the British Occupation.

It is convenient for the purposes of appreciating the arguments advanced to examine the origin of these, to modern ideas, archaic provisions of the law. Such an examination makes them understandable in their application to the state of society which prevailed at the time of their enactment, but it will also disclose their incongruity when confronted with modern conditions. Generally speaking, it can be said that prior to the British Occupation, land held in co-ownership was usually held by members of the same family, who may have lived in separate houses but all of which were situated in the same compound,

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* *Scil.*: Land Court. (*Ed.*)

so that the activities of every-day life were performed in close association between the families. In order to maintain law and order and friendly relationship between parties living so intimately together it was essential that the incursion of a stranger into the family circle should, if possible, be prevented. Hence these *Shufa'* provisions, which were intended, I take it, to enable a member of the family to pre-empt in respect of any part of the property which another co-member was desirous of selling to an outsider. These provisions have lived on to the present day, and it may well be that there are areas in this territory where they can and should still be applied with equal advantage to the individual and to the state, but it is obvious that in a progressive community they are entirely anomalous and tend to upset the economic structure and to retard development.

It is for these reasons that the Courts in this country and in Cyprus have displayed a unique unanimity in holding that the provisions of the *Mejelle* on the subject of *Shufa'* are formalistic and completely out of date, and that the practice of the Courts should be to apply the provisions with the utmost strictness.

With all respect, I am in entire agreement with this canon of construction. In a country such as Palestine, where a part of the patriarchal system lingers on in some of the provisions of the *Mejelle,* ancient laws should be interpreted by the Courts in the light of the scientific knowledge and cultural progress of the age in which it is sought to enforce them.

This is a case affecting land situated and registered in Tel-Aviv. It is not denied that it was honestly sold for money's worth. The first Respondent, who has initiated this litigation, is a Jewish merchant who carries on an apparently extensive business of money-lending on mortgage. It was by way of foreclosure of a mortgage that he acquired an interest as co-owner of the property. It is with this background that he advances his claim to *Shufa'*.

According to the *Mejelle,* there are three conditions precedent to the advancement of a successful claim to *Shufa'*. They are a claim made immediately upon hearing of the sale, a second claim made formally in the presence of witnesses and a claim that the person alleging the right of pre-emption is entitled to bring an action and to be granted the absolute ownership of the property.

In regard to the first claim, it has been held by this Court in Civil Appeal 115/43 that an illiterate peasant woman who first learned that she might have a claim to *Shufa'* upon hearing her niece translate a

letter, and then waited until she got to the office of a lawyer, less than an hour later, was too late to sustain her claim. In the present case it was in evidence that the first Respondent, who was in Jerusalem, received a wire from his lawyer telling him to "come immediately". He waited four days before taking any action, one of the days was admittedly his *Sabbath*. The learned Relieving President stated that he had no doubt that the Appellant * had a shrewd suspicion as to what the wire was about. With all respect it seems to me that the learned Judge might have been justified in having something more than a shrewd suspicion. Indeed, the very alacrity with which the Respondent mentioned *Shufa'* the moment he went into the lawyer's office, might be regarded as an indication that he had been pondering as to how he could get hold of this land ever since he received the wire. It seems to me, on the analogy of the case cited, that this lapse, slight though it may have been, would have justified a finding against him on formalistic grounds.

I come now to the second condition precedent, that is a claim made formally in the presence of witnesses, and I lay emphasis on the word "formally". It is true that the first Respondent did go to the site with witnesses, but there is contradictory evidence as to what happened at the site. According to the Respondent himself, and one can assume that he would give the most favourable version of events, he said the words used were, "I have come to repeat my claim for *Shufa'*. I have heard that Juda Rafel bought part of the land from Bahiya El Kassem for LP. 800.—. I am prepared to pay him that sum at once". I note that he made no mention of his partners, and it is admitted that he could not sustain his claim unless his co-partners joined with him. His witness, Ben-Zion Gershon, remedied this later on by stating in his evidence that the Respondent definitely said he asked for *Shufa'* on behalf of his co-partners, but this only after the importance of the point had been brought up in the cross-examination of the first Respondent.

In a Cyprus case of Christo Romani *v.* Emilia Skoullou, it was held that the second claim should be made in the exact form set out in the *Mejelle*. However near the words used by the first Respondent may have come to the form, they certainly were not in the exact form. The learned President was of the opinion that to dismiss the claim on this ground would be a refinement of hair-splitting, although he went on to say that it was more than doubtful whether the provisions of the *Mejelle* were enacted to sustain a claim of this nature. Without

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* *Scil.*: First Respondent. (*Ed.*)

going so far as the learned President, I am prepared to concede that it would involve a dismissal on a very technical ground. From this consequence, however, I do not shrink, because the first Respondent has himself sought to gain possession of land to which he has not otherwise a scintilla of right, by appealing to a technical provision of a law which is totally foreign to the way of life of himself and the people against whom he seeks to enforce it.

For these reasons the appeal must be allowed, with costs on the lower scale to include LP. 15 advocate's attendance fees at the hearing of this appeal.

Delivered this 13th day of July, 1944.

Chief Justice.

INCOME TAX APPEAL No. 5/44.

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

BEFORE: Edwards, J.

IN THE APPEAL OF:—

Palestine Mortgage and Credit Bank, Ltd. APPELLANTS.

v.

The Assessing Officer, Tel-Aviv. RESPONDENT.

Income tax — Appeal under sec. 53(1) *— Claim for reduction of assessable income on the ground of reduction of interest — Method of reckoning income — Gresham Life Assurance Society v. Styles; Odham's Press Ltd. v. Cook,* 1938 & 1940; *Usher's Wiltshire Brewery Ltd. v. Bruce; Bernhard v. Gahan; British Mexican Petroleum Co. v. Jackson; Short Bros. Ltd. v. C. I. T.; Lowry v. Consolidated African Selection Trust Ltd.; British Insulated Cable Co. v. Atherton; Scammell & Nephew Ltd. v. Rowles; Text books — Secs.* 11(1)(*j*), 14 *— North British and Mercantile Assurance Co. v. Easson; Dinshaw v. Bombay Commissioner of Income Tax — Whether outgoing incurred purely in the acquisition of income — Date from which deduction may be claimed.*

Appeal from the assessment by the Respondent in Assessment No. 297/917 for the year of assessment 1943/44, partly allowed:—

1. A mortgage and credit bank may be forced to reduce the rate of interest and the forgiven sums may be considered outgoings or expenses. These amounts are incurred in the acquisition of the income.

2. The deduction may not be claimed for the periods preceding the enactment of the Income Tax Ordinance.

(*A. M. A.*)

REFERRED TO: Gresham Life Assurance Society *v.* Styles, 1892, A. C. 309, 62 L. J. Q. B. 41, 67 L. T. 479, 8 T. L. R. 618, 3 Tax C. 185; Odham's Press Ltd. *v.* Cook, 1938, 4 All E. R. 545, affirmed by House of Lords in 1940, 3 All E. R. 15, 56 T. L. R. 704; Usher's Wiltshire Brewery Ltd. *v.* Bruce, 1915, A. C. 433, 84 L. J. K. B. 417, 112 L. T. 651, 31 T. L. R. 104, 6 Tax C. 399; Bernhard *v.* Gahan, 1928, 13 Tax C. 723; British Mexican Petroleum Co. Ltd. *v.* Jackson, 1932, 16 Tax C. 570; Short Bros. Ltd. *v.* C. I. R., 1927, 136 L. T. 689, 12 Tax C. 955; Lowry *v.* Consolidated African Selection Trust Ltd., 1939, 1 All E. R. 253 and 1940, A. C. 645, 2 All E. R. 545, 109 L. J. K. B. 539, 56 T. L. R. 735; British Insulated and Helsby Cables Co. Ltd. *v.* Atherton, 1926, A. C. 205, 95 L. J. K. B. 336, 134 L. T. 289, 42 T. L. R. 187, 10 Tax C. 155; Scammell & Nephew Ltd. *v.* Rowles, 1939, 1 All E. R. 337, 22 Tax C. 479; North British & Mercantile Insurance Co. *v.* Easson, 1919, 7 Tax C. 463; Dinshaw *v.* Bombay Commissioner of I. T., 1934, 50 T. L. R. 527.

ANNOTATIONS: The case referred to on the interpretation of Sec. 11(1) of the Income Tax Ordinance is I. T. A. 25/43 (11, P. L. R. 229; *ante*, p. 287).

(*H. K.*)

FOR APPELLANT: Dunkelblum.

FOR RESPONDENT: Wittkowski.

JUDGMENT.

This is an appeal under Section 53(1) Income Tax Ordinance, from an assessment made by the Assessing Officer, Tel-Aviv, whereby the chargeable income of the Appellants for the year of assessment 1943/44 was assessed at LP..... The Appellants claim that their chargeable income amounted to LP. ..... only, on the ground that during the year 1942 they granted to a certain group of persons a reduction of or in interest previously accrued, amounting to LP.....

The matter arose in this way. The Appellants between the years 1932 and 1934 granted 122 loans on mortgage to certain settlers, interest on the said loans being at the rate of 8% *per annum*. In 1940, owing to the settlers being unable or unwilling to repay the instalments of capital and interest, the Appellants, after consultation by correspondence with their parent corporation in New York, decided to reduce the interest from 8% to 5%. The arrangement was set out in a letter addressed by each of the mortgagors to the Appellants as follows:—

> "(a) The above debt, together with interest according to the conditions set forth below, will be repaid to you in equal successive monthly instalments during a period of 19 years as from the 1st of January, 1941, and ending the 31st of December, 1959; the

due dates of payment of the instalments will be within the period of each month.

(b) As from this year and until 1959 (inclusive) you will credit our account with you at the end of each year with 1/19 of 3/8 (one nineteenth from three-eighths) of the total amount of interest paid by us and/or not paid by us and accrued to our debit for the period since the receipt of the loan at 8% interest (eight per cent.) until the end of the year 1940, and a credit of 1/19 of ¼ (one nineteenth of one-quarter) of the total amount of interest paid by us and/or not paid by us and accrued to our debit for the period since the receipt of the loan at 6 2/3% (six and two-thirds per cent.) until the end of 1940, and accordingly our monthly instalments, as explained in (a) above will be correspondingly reduced in advance.

(c) As from January of this year interest will be paid on the amount of the loans, except in the case of the loan which we received from the Trust Fund for Palestine (see para. 5 below) on which 5% (five per cent.) will be paid, as follows: as from this year and until 1959 (inclusive) you will credit our account with you at the end of each year with 3/8 (three-eighths) of the interest in respect of the years when 8% interest is payable, and ¼ (one-quarter) of the interest in respect of the years when 6 2/3% (six and two-thirds per cent.) *per annum* is payable, and accordingly our monthly instalments, as explained in (a) above, will be correspondingly reduced in advance".

No evidence has been heard by me, although a vast number of documents including accounts, balance sheets, *etc.*, have been submitted to and perused by me.

Dr. Dunkelblum, for the Appellants, relies on the argument that, by reducing the interest from 8% to 5%, the Appellants were forgiving or foregoing something. He does not suggest that it is a bad debt, as a bad debt is something which is not recoverable, whereas the Company hope eventually to recover from the mortgagors the capital and interest advanced, and he also says that it is not a rebate. His clients pay income tax on the accrual basis and not on the cash receipt basis. He relies on the following cases: Gresham Life Assurance Society *v.* Styles, L. T. R. Vol. 67, page 479; Odham's Press, Ltd. *v.* Cook, All E. R. (1940) Vol. 3, page 15, and All E. R. (1938) Vol. 4, page 545; Usher's Wiltshire Brewery, Ltd. *v.* Bruce, L. T. R. Vol. 112, pages 651 and 653; Hailsham Vol. 17, page 125, para. 235, and page 120, para. 226; Bernhard *v.* Gahan, 13 Tax Cases, page 723; Dowell's Income Tax (Supplement 2) (1933), page 305; British Mexican Petroleum Co. *v.* Jackson, 16 Tax Cases, page 570; Short Bros., Ltd. *v.* C. I. R., L. T. R. Vol. 136, pages 689 and 694; Lowry *v.* Consolidated African Selection Trust Ltd., All E. R. Vol. 1 (1939) page 253;

(1940) A. C. page 645; Konstam, 9th Edition, pages 112 and 219; British Insulated Cable Co. *v.* Atherton (1926) A. C. page 205; Scammell & Nephew, Ltd. *v.* Rowles, All E. R. (1939) Vol. 1, pages 337 and 351.

Mr. Wittkowski, for the Respondent, says that the year of assessment is 1943/44 and that the Appellants made their return on the basis of the Gregorian calendar year of 1942. He also says that the Appellants made a calculation and arrived at the figure of LP. ....., which would be the 3% reducible in respect of 44 settlers, of the arrears up to 31st December, 1941. Mr. Wittkowski argues that the Appellants cannot rely on deductions made for a period of past years commencing with the year 1935, in view of the fact that the Income Tax Ordinance did not come into force until the end of September, 1941. He further contends that the amount in dispute does not appear as a debit in any Profit and Loss account. He also says that the Appellants contend that they have incurred an expenditure which does not appear either in the balance sheet or in any Profit and Loss account, and the argument proceeds that the Government cannot be bound to regard this item of LP. ..... as something by which the Company is poorer, if the Company from their accounts do not regard themselves as poorer. In any event, these were all contingent agreements and, until the end of the current year, one could not tell whether the contingency had materialised. He further argues that Section 14 is purely a machinery section enacted to enable persons to set off a loss from one trade or source of income against a profit from another source of income.

Dr. Dunkelblum, at the Bar, said that he did not rely on Section 14.

Mr. Wittkowski points to Section 11(1)(j), which was repealed soon after its enactment.

Dr. Dunkelblum says that all expenditure properly incurred, unless it is incurred in bad faith, must be deducted. It is clear that Dr. Dunkelblum is forced to rely on Section 11(1). As I pointed out in a previous case, items a.—k. of Section 11(1) are not exclusive.

Mr. Wittkowski relies on North British and Mercantile Assurance Co. *v.* Easson, Tax Cases, Vol. 7, Part 8, page 463, a case decided by the Court of Session in Scottland. Mr. Wittkowski says that this is the nearest analogous case to ours. By parity of reasoning, it would seem that the difference between the 8% and the 5% was not a sum which was disbursed at all. (See the Lord President's remarks at page 471).

Dr. Dunkelblum relies on Odham's Press *v.* Cook, (1940) Vol. 3, All E. R. page 15, and All E. R. (1938) Vol. 4, page 545. I take it that what Dr. Dunkelblum means is that in the Odham's Press case it was found as a fact that a certain sum which was written off was not so written off wholly and exclusively for the trading or business of the Appellant, while in the case now before me he suggests that it is the difference between the 8% and the 5% which the Appellant admittedly had to lose as outgoings and expenses wholly and exclusively incurred during the preceding year of assessment by the Appellants in the production of their income. As regards the question of bad debt, Dr. Dunkelblum referred to the case of Dinshaw *v.* Bombay Commissioner of Income Tax, Vol. 50 L. T. R. page 527.

I assume that the arrangement come to by the Appellants as a result of the letter of the 25th April, 1940, addressed to the parent corporation in New York, was made in order to enable the mortgagors substantially to keep up their payments. Had they failed to keep up their payments there might have been forced sales under Section 14 of the Land Transfer Ordinance. I am prepared to hold that, in order to keep their business, that is the business of a mortgage and credit bank, going they were compelled to consent to the reduction from 8% to 5% interest, and I do not think that it is stretching the law too much to say that these sums forgiven may properly be regarded as outgoings and expenses.

The next question is whether they were outgoings and expenses wholly and exclusively incurred in the production of the income. This is not so easy to decide; but here again I think that one can well say that, if the Company had not agreed to this reduction, a catastrophic state of affairs might have arisen. They might have had to agree to forced sales of the mortgaged property at a serious loss. In other words, in order to keep their business going, that is to say, to produce their normal income, which is of course derived from mortgage interest, they were bound to make this reduction. That being so, I think that it is a proper deduction within the meaning of Section 11(1) as being an outgoing and expense wholly and exclusively incurred in the production of the income. I agree with Mr. Wittkowski that the Appellants cannot claim the total amount from the year 1935, which was several years before the Income Tax Ordinance came into force.

At the end of his speech in reply, Dr. Dunkelblum made an alternative prayer, namely, that, as the Company had written off the sum of LP. ..... (see Schedules 2 and 5 to Exhibit A.) which represented a cancellation of debts to the extent to which settlers in 1942 fulfilled

the conditions of the agreements, and that as out of this sum of LP. ....., LP..... was in respect of agreements made during the year of assessment, the Appellants' chargeable income be reduced by this sum of LP..... I think that this is reasonable and is all that Dr. Dunkelblum can expect.

Mr. Wittkowski, on hearing this alternative prayer, made by Dr. Dunkelblum in his speech in reply, seemed to complain that the Appellants were entirely altering the basis of their appeal, and that he had had no opportunity of meeting this. I do not, however, think that there is anything in Mr. Wittkowski's complaint.

The result of the appeal is that the Appellant company should be allowed, as a proper deduction, this sum of LP.....

I shall now hear the parties' advocates, not only as to the costs of this appeal, but as to what final order I should make under Section 54(3).

Judgment delivered in presence of Dr. Dunkelblum and Mr. Wittkowski this 12th day of July, 1944.

British Puisne Judge.

Having heard parties' advocates, I order that the assessable income be reduced by LP.....

Appellant must pay the Respondent's costs of this appeal, *viz.* inclusive costs of LP. 30.

British Puisne Judge.

CIVIL APPEAL No. 4/44.

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

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

IN THE APPEAL OF:—

Fatima Abdallah Nimr & 3 ors. APPELLANTS.

v.

Mamour el Awqaf of Jaffa,
in his capacity as representative of Al-Radwan Waqf & an. RESPONDENTS.

Land Settlement — Agreement to plant land in consideration for future transfer of part of land — Registration of trees, L. L. (Am.) Ord., 1937 — Registration of rights.

Appeal from the decision of the Settlement Officer, Ramleh Settlement Area, dated 20th November, 1943, in Case No. 31/Ramleh, dismissed:—

1. The Land Settlement Officer cannot grant ownership to a claimant who is admittedly a tenant.
2. Registration in Land Settlement of separate ownership in trees cannot be effected as it is contrary to the Land Law (Amendment) Ord., 1937.
3. Rights of enjoyment may be entered in the Schedule of Rights.

(*A. M. A.*)

ANNOTATIONS:

1. On Sec. 10 of the Land Law Amendment Ordinance as enacted by the 1937 Ordinance *cf.* C. A. 62/42 (9, P. L. R. 413; 1942, S. C. J. 393; 12, Ct. L. R. 51) — *no registration of a room distinct from that of the land;* C. A. 231/43 (1943, A. L. R. 546) — *co-operative common flats building;* C. A. D. C. T. A. 98/43 (Selected Cases of the District Courts, 1944, p. 108) — *sale of flat only invalid.*

2. For other examples of indeterminate rights of enjoyment *vide* C. A. 182 & 185/40 (7, P. L. R. 489; 1940, S. C. J. 343; 9, Ct. L. R. 48) and C. A. 114/42 (1942, S. C. J. 704; 12, Ct. L. R. 201).

(*H. K.*)

FOR APPELLANTS: A. S. Dajani.

FOR RESPONDENTS: No. 1 — In person.
No. 2 — Deceased (service on heirs dispensed with by order of Court dated 15.12.44).

JUDGMENT.

Frumkin, J.: In this case three out of four of the Appellants entered in the year 1918 into agreements with the Respondent, the *waqf* of Al Radwan, concerning the planting of certain land belonging to the *waqf*. In the course of time one of the Appellants (the fourth) transferred part of his rights under the agreement to the third Appellant, but this fact is of no relevance to the case.

Under the agreements the Appellants were to plant and cultivate the entire land and several stages of relationship were envisaged by the parties. During the first year the Appellants were to pay a nominal rent. After a period they were to give the *waqf* a quarter of the produce of the trees and again after a period the *waqf* would be entitled to have the entire land and trees planted on it partitioned into two parts, one part going to the *waqf* and one half retained by the Appellants. That would have apparently settled the relationship between the parties for good. The partition never took place. The Appellants cultivated the land and for the last years paid to the *waqf* an annual rent equivalent to the value of a quarter of the produce of the trees in question.

Upon the settlement of the area in which this land is situated the Appellants claimed to be registered as owners of half of the land and trees planted on it. The Land Settlement Officer dismissed the claim for half of the land on the ground that the admitted position of the Appellants being that of tenants is fatal to such a claim of ownership. We agree with the Land Settlement Officer on this point.

There was apparently an alternative claim by the Appellants for the registration of half of the trees without the land in their name which the Land Settlement Officer rightly refused relying on the Land Law (Amendment) Ordinance, No. 34 of 1937.

Before this Court counsel for the Appellants stated that he would be satisfied with an entry in the appropriate column of the schedule of rights that subject to his clients' paying an agreed rent they would be entitled to the produce of the trees planted by them. Such an entry would, to my mind, not be contrary to the Land Law (Amendment) Ordinance, cited above, which prohibits the registration of ownership of trees in the name of a person other than the registered owner of the land. The Ordinance does not prevent the entry as to the enjoyment of certain rights in or over land which land together with the trees planted on it are registered in the name of one owner; but what the Appellant is, in fact, asking for amounts to a registration of a lease. This point was not overlooked by the Land Settlement Officer who held that there was no proper and definite lease capable of registration. This is so in view of the fact that the agreements of 1918 envisaged certain stages of development and were not definite in terms.

The result might be somewhat harsh on the Appellants, but they have to bear the consequences of an agreement they have chosen to enter into. Fortunately for them the Respondent does not contest their rights under the agreement and stated that the *waqf* has got no intention to disturb them in the cultivation of their land as hitherto. He went on to say that the *waqf* would be prepared to enter into a new long term agreement of lease which would then be capable of registration. This being so it is with less reluctance that we decide to dismiss the appeal and affirm the judgment of the Land Settlement Officer. The 1st Respondent will have his costs to include LP. 2 travelling expenses.

Delivered this 20th day of June, 1944.

Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.

CIVIL APPEAL No. 57/44.

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

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

IN THE APPEAL OF:—

Taasiya Chemit Tel-Aviv Ltd. APPELLANTS.

v.

Sick Fund of the General Federation of Jewish Labour in Palestine & an. RESPONDENTS.

Injunctions — Noisome smells — Efforts of appellants to abate nuisance — Evidence on appeal — Liberty to apply — Extension of time.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 30th day of January, 1944, in Civil Case No. 221/43, dismissed, but judgment of lower Court varied:—

1. Evidence by affidavit admitted an appeal to show efforts to abate nuisance since date of injunction.

2. Judgment altered by provision for liberty to apply and extension of time to comply.

(*A. M. A.*)

ANNOTATIONS:

1. The judgment of the District Court is reported in Selected Cases of the District Court, 1944, p. 37.

2. On suspending the operation of an injunction see Halsbury, Vol. 18, *p.* 19, *No.* 25.

(*H. K.*)

FOR APPELLANTS: A. Levin.

FOR RESPONDENTS: No. 1 — Ishai.
No. 2 — Selikson.

JUDGMENT.

This is an appeal from a judgment of the Relieving President of the District Court of Tel-Aviv wherein the facts are very fully set out, granting an injunction against the Appellants who are manufacturers of chemical products and ordering them to refrain from sending forth malodorous gases and from causing or permitting the escape of malodorous gases from their factory at Kiryat Arye.

The nuisance complained of by the Plaintiffs, the Sick Fund of the General Federation of Jewish Labour in Palestine and Dr. Harry Heller, is that the patients of their hospital which was constructed in Autumn of 1936, suffer discomfort and in some cases harmful physical

effects from the noxious fumes coming from the Defendants' factory. The average number of patients *per annum* is 5000. The Defendants maintain that although it is possible and in fact customary to manufacture superphosphate by a process which is free from noxious gases they are however prohibited from doing so by the Controller of Heavy Industries and that they are licensed to manufacture only by use of acid tar and sulphuric acid in such proportions as may from time to time be ordered by the Controller. This is a new process and one which gives forth noxious gases.

The Defendants' factory is apparently the only one in Palestine manufacturing superphosphate and in fact there is only one other small factory in Egypt. The Appellants' factory, therefore, supplies practically the whole of the Middle East with superphosphate, a chemical which is of great assistance to the War effort owing to its high value as fertilizer for agricultural and vegetable production.

Respondents * do not deny that superphosphate can be manufactured without smell by using pure sulphuric acid. The use, however, of pure sulphuric acid is prohibited by order of the Controller of Heavy Industries. The only approved method is by the use of tar acid in proportions which are prescribed by the Controller from time to time as set out in their licence. The Appellants maintain, therefore, that they are compelled by the Controller of the Heavy Industries to make smells, which, however unpleasant they may be, they are not poisonous and dangerous to health. That due to these exceptional and unavoidable circumstances no injunction should have been granted.

Further that the District Court was wrong in including in the judgment the proviso "without liberty to apply to enlarge the time". That whereas before and during the three months' delay granted to them the smells complained of have been reduced very considerably due to the unceasing efforts on the part of the Appellants, in fact they have left nothing untried. The Appellants have every reason to hope that the smells will entirely disappear or at any rate disappear to a negligeable extent in the near future.

In order to prove to the Court what steps had been taken since the judgment of the District Court on 30th January, 1944, Appellants submit affidavits of Messrs. S. H. Shaw, E. A. Gardiner, Mr. A. Reiter and Mr. F. Loebl, dated 1st day of May, 1944. Respondents object but the objection is overruled on the ground that this Court must be in a position to fully understand the facts especially as to

* Should be: "Appellants" or "Defendants".

(*Ed.*)

the efforts made to reduce the smells. The Respondents were at liberty to cross-examine the makers of the affidavits had they so desired.

We agree with the decision of the District Court in granting an injunction but we consider that the learned Relieving President should not have deprived the Appellants of leave to apply. We, therefore, vary the judgment of the District Court by removing the words "without liberty to apply to enlarge the time".

We further consider that due to the special circumstances in this case and the fact that the Appellants are making very genuine efforts to overcome the exit of malodorous gases from their factory a further stay of 6 months from 1st May, 1944, is granted. No costs.

Delivered this 30th day of May, 1944.

A/British Puisne Judge.

CRIMINAL APPEAL No. 57/44.

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

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

IN THE APPEAL OF:—

Pte. G. Dowdall No. C. 14192 & 4 ors. APPELLANTS.

v.

Attorney General. RESPONDENT.

Criminal Procedure — Preliminary enquiry conducted by two Magistrates — M. C. P. R., rr. 1, 147, 263 — Omnia praesumuntur rite esse acta.

Appeal from the judgment of the Court of Criminal Assize, sitting at Haifa, whereby Appellants Nos. 1—4 were convicted of murder *contra* Sec. 214(c) of the C. C. O. and sentenced to death, and Appellant No. 5 convicted of an offence *contra* Sec. 288(2) of the C. C. O. and sentenced to imprisonment for five years, dismissed:—

1. As a preliminary enquiry constitutes proceedings in the Magistrate's Court, r. 147 applies and enquiries may be conducted by more than one Magistrate.

2. In the absence of evidence to the contrary, it will be presumed, when the proceedings are continued by a new Magistrate, that the former Magistrate was prevented from continuing.

(A. M. A.)

ANNOTATIONS: For the proposition that proceedings at a preliminary enquiry

are "criminal proceedings" see H. C. 30/41, CR. A. 144 & 145/41 and CR. A. 62/42, cited in annotations to C. A. 67/44 (*ante*, p. 387).

(*H. K.*)

FOR APPELLANTS: Asfour.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the Court of Criminal Assize sitting at Haifa, convicting the first four Appellants of murder and the 5th Appellant of an offence against section 288(2) of the Criminal Code Ordinance.

The first point that Mr. Asfour took on behalf of the Appellants was that the whole proceedings were a nullity in that the preliminary investigation was conducted by two Magistrates instead of by one Magistrate throughout. The answer to that, as was pointed out by the trial Court, would seem to be supplied by the Magistrates' Courts Procedure Rules which, by rule 1 thereof, are stated to apply to all proceedings in Magistrates' Courts. We were referred by learned Crown Counsel to a Palestinian authority of the Supreme Court which held that proceedings before a Magistrate and in the course of a preliminary enquiry are proceedings in a Magistrate's Court.

Rule 263 provides that "in criminal cases evidence may, subject to the laws for the time being as to the admissibility of evidence, be taken in the same manner and on the same conditions as are provided under these rules for the taking of evidence in civil matters". And rule 147 says that "where any Magistrate is prevented by any cause from concluding the trial of an action another Magistrate may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down or heard by him and may proceed with the action from the stage at which his predecessor left it". It seems to us, having regard to rule 263, that this rule is also applicable to a preliminary enquiry. We think, therefore, that on that aspect of the matter Mr. Rigby and the Court below were correct in their view.

Mr. Asfour takes a further point. He says that even assuming that to be so, there is nothing on the record to show, and in fact no evidence was adduced to the effect, that the original Magistrate was prevented by any cause from continuing with the preliminary investigation. That, of course, is perfectly true, but it seems to us that in the absence of a challenge by the defence as to some frivolous or perverse reason on the part of the Magistrate, the doctrine of *omnia praesumuntur rite esse acta* must be applied; and that there is a presumption in this

case, there being no indication to the contrary, that the original Magistrate was prevented by some cause (it is to be noted that the rule is in the widest possible terms) from continuing the preliminary investigation, and that, therefore, the second Magistrate was fully entitled to continue. In any event, even assuming that we are wrong on this point, we are also in agreement with Mr. Rigby's alternative argument that even applying what he contends to be the English test on this matter, there was sufficient evidence before the second Magistrate to enable him to have committed on that alone irrespective of what occurred before the earlier Magistrate. For these reasons we think that this technical objection fails.

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— — — — — — — — — —*

Delivered this 18th day of May, 1944.

British Puisne Judge.

CIVIL APPEAL No. 187/44.

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

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

IN THE APPEAL OF :—

The Hadera Local Council. APPLICANTS.

v.

The Palestine Jewish Colonisation Association. RESPONDENTS.

Appeals — Refusal to grant leave to defend, followed by decree made and served — Appeal must be against decree — C. A. 158/42, C. P. R. 317, 241.

Application for leave to appeal from the order of the District Court of Haifa, dated 8th January, 1944, in Civil Case No. 224/43 (Motion No. 398/43), dismissed:—

When leave to defend is refused and this is followed by decree served upon the defendant, an appeal can lie against the decree and leave to appeal may not be sought from the order of refusal of leave to defend.

(A. M. A.)

REFERRED TO: C. A. 158/42 (9, P. L. R. 690; 1942, S. C. J. 958).

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* Omitted as dealing with questions of fact only.

(Ed.)

ANNOTATIONS: Applicants contended that on the proper interpretation of C. A. 158/42 (*supra*) the correct procedure where leave to defend is refused consists in applying for leave to appeal against such refusal; the Court, however, accepted Respondents' submission that once the final decree itself was served on Applicants the only course open to them was to appeal against such decree.

(*H. K.*)

FOR APPLICANTS: Harari.

FOR RESPONDENTS: Eliash, J. Kaisermann and Olshan.

JUDGMENT.

This is an application for leave to appeal against an order of the learned Judge of the District Court of Haifa, refusing to give leave to defend in accordance with rule 242 of the Civil Procedure Rules.

It appears that the Respondents in this matter instituted a claim in accordance with rule 241 of the Civil Procedure Rules. The present Applicants desired to defend, and on the 6th January of this year (1944) the matter was argued before the learned Judge. On that same day he came to the conclusion that leave should not be granted, and he refused leave to defend, reducing his order to the form of a decree on the same day — the 6th January, 1944.

The Applicants argue that once leave to defend had been refused, they must be regarded as having ceased to exist legally *vis-à-vis* the learned Judge, and they cited in support of that proposition Civil Appeal 158/42, P. L. R. Vol. 9., p. 690. That may well be so, but in this case the decree was served upon the Applicants on the 16th January, 1944, and it was not until 3 days after the service of that decree upon them that they filed an application for leave, which was dated the 19th January, 1944.

The Respondents now take the point that there is no application with which we can deal; and it seems to us that that contention is well-founded because it would seem to be clear under the Rules — and eminently reasonable — that the proper course for a dissatisfied party, where leave has been refused and where the decree has been served upon him, is to appeal against the final judgment; and there is nothing in rule 317 which would appear to be in the least inconsistent with this. In fact, the effect of that rule would seem to be to the contrary. We have also been asked by counsel for the Applicants that in any event we should extend the time for him to file an appeal against this final decree. The only powers we would have would be under rules 324 or 333. Under rule 324 the time limit has expired, and under rule 333 we have no powers at all in a case where the defect is a failure to file the notice of appeal itself.

For these reasons we are of opinion that the application is misconceived and must be dismissed. The Respondents will have their costs in an inclusive sum of LP. 10.

Delivered this 21st day of July, 1944.

British Puisne Judge.

CRIMINAL APPEAL No. 56/44.

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

BEFORE : Rose, Edwards and Khayat, JJ.

IN THE APPEAL OF:—

Muhammad Suleiman Muhammad Deeb. APPELLANT.

v.

The Attorney General. RESPONDENT.

Killing by inflicting several wounds with dagger — Question as to whether or not there was premeditation.

Appeal from the judgment of the Court of Criminal Assize, sitting at Jaffa, dated the 24th day of April, 1944, in Criminal Assize Case No. 12/44, whereby the Appellant was convicted of murder, contrary to section 214 of the Criminal Code Ordinance and sentenced to death, allowed and conviction for manslaughter substituted:—

> While number of wounds inflicted on victim is a matter proper to be taken into consideration in deciding whether or not there was premeditation and may be an element fortifying the Court in coming to an affirmative conclusion, it is not in itself sufficient to justify a finding that there was a resolution to kill and killing was in cold blood without provocation.
>
> (*M. L.*)

ANNOTATIONS: See CR. A. 14/44 (*ante*, p. 248) with annotations thereto.

(*A. G.*)

FOR APPELLANT: Nazzal — by delegation from Z. Dajani.

FOR RESPONDENT: Assistant. Government Advocate — (Wa'ary).

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the Court of Criminal Assize, sitting at Jaffa whereby the present Appellant who was the first Accused in the Court below was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death. The deceased man, Jamil, was married to a daughter of the present Appellant and sister of Atieh, who was the second Accused

in the Court below. The Trial Court set out in its judgment a narrative of the matrimonial troubles that had arisen between the deceased man and his wife, the daughter of the first Accused. It is unnecessary for us to refer to that narrative. It seems that on the 12th January, 1944, neither the Appellant nor the second Accused went to work, although no particular significance need attach to this fact. The suggestion of the prosecution, however, seems to have been that both the Accused had made up their minds to kill the deceased, or, at any rate, that there was an arrangement whereby the second Accused would invite the deceased to the house of the first Accused and that the two Accused would there waylay and kill him. At any rate, this is what the Assistant Government Advocate has told us at the bar to-day. The principal witness for the prosecution was a woman called Souad, who said in evidence:—

> "I went out into the door of my house and saw Accused 2, Atiyeh, in grips with the deceased: just near the door of my house. I caught Atiyeh's hands and told him relationship and quarrel together: "He is your kinsman". I released Jamil from Atiyeh and told him to go away. As I released Jamil, the mother of Accused 2 threw a stone from over her wall at Accused 2. He was near her at the time. This hit him on the head and he became giddy. Wall was a meter and ½ about. He was just the other side of the wall. And at same time Muhammad, Accused 1, came from the door of his house and said "Stop, you pimp". As he got near deceased, he seized him with left hand and stabbed him on right side of belly and then drew out the knife and stabbed him again, left side, and then again in middle of his belly".

This witness also gave evidence of having heard the Appellant threatening the deceased but the Trial Court disregarded her evidence as regards those threats although generally they believed her evidence. Once this evidence is disbelieved it is clear that there was before the Court no evidence of threats or evidence which went to show that the Appellant intended to kill the deceased. There was some evidence that some time before the incident the deceased man had been forbidden to go near the house of the Appellant; but this fact is capable of another interpretation, at any rate, in so far as it is said to assist the prosecution in proving premeditation. It might well be that, seeing the deceased approaching his house in spite of the prohibition, the Appellant suddenly became angry and surprised, so this is really quite a neutral factor. A matter which is of some importance is that the trial Court acquitted the second Accused.

Now, we think that had the trial Court believed that there was what one might call a pre-fabricated plan on the part of the present

Appellant to instigate his son to waylay the deceased and entice him to the house so that the present Appellant might there stab him, we think that it is almost inevitable that the Trial Court would have convicted the second Accused as well. At any rate, it seems illogical that they did not do so had they believed the story of the preconcerted plan. It, therefore, becomes necessary to examine closely the evidence as to the actual incident and also the findings made by the trial Court on that evidence. The case for the Appellant has been argued solely on the ground that he should have been convicted of manslaughter and not of murder *contra* section 214(b). It has been urged that the elements required by section 216 have not been proved to be present. What is the story told by Souad? It is that the Accused was apparently in his house when presumably he heard the sounds of persons quarrelling. He may or may not have seen who was the assailant or who was getting the better of the fight. We have been told that the deceased was well built, about 25 years old, and at any rate as big as the second Accused. Souad said that the second Accused had been hit by a stone by his mother. At the same time the Accused came to the door of his house and said "stop, you pimp". It may well be that the Appellant was afraid that his son might be getting the worst of the fight. This, of course, would not excuse the killing but it may take the matter out of the provisions of Section 216(a) and (b). It is not clear from the evidence whether when he first came out from the house he had a dagger poised in such a way as to show that he was prepared to kill. Souad does not appear to have been questioned very closely on this matter. It is clear from the fact that the Court did of its own motion ask Souad some questions that the Court wanted to advise itself as to the actual condition of the Appellant when he was emerging from his house. There is, however, on the record an absence of clear answers on this point. If there had been clearer evidence as to this, it might have gone far towards helping the Prosecution to prove premeditation. The evidence of Halimeh does not assist one because she merely said that she saw the person while he was stabbing the deceased. Both Halimeh and Yusra merely said that they saw the Appellant stabbing the deceased. Fatmeh's evidence is a little stronger because she said that Mohammad came to the deceased, seized him and hit him in the back. The Trial Court in its judgment merely says that they find that Mohammad killed the deceased in cold blood without any provocation; but it is not clear on what evidence or parts of the evidence they relied for establishing the matters required by Section 216 (a) and (b). It may well be said that the requirements of

Section 216(c) were satisfied by the fact that the Appellant had a dagger.

There is one matter which made us pause and that is the number of wounds inflicted on the deceased. The medical evidence was that death was due to two stab wounds out of six or seven stab wounds inflicted. We realize that there are judgments of this Court to the effect that the number of wounds is a matter proper to be taken into consideration in arriving at a conclusion as to whether or not there was premeditation. We do not doubt the correctness of these decisions; but in most of those cases the matter of the number of stab wounds was merely one element which fortified the Court in coming to the conclusion that there was premeditation. We do not think, however, that in this particular case the number of stab wounds is in itself sufficient to justify a finding that there must have been resolution to kill and that the Accused, Appellant, must have killed in cold blood without immediate provocation. On the whole we do not think that premeditation appears either from the finding of the Court or from the record to have been sufficiently established.

We accordingly quash the conviction for murder and substitute therefor a conviction for manslaughter, *contra* Section 212 of the Criminal Code Ordinance and punishable by Section 213.

As regards sentence, we have carefully considered the matters urged by the Appellant's advocate but we are unable to pass a sentence of less than fifteen years' imprisonment to run from date of arrest, the 13th of January, 1944.

Delivered this 20th day of May, 1944.

British Puisne Judge.

Rose, J.: I agree.

British Puisne Judge.

Khayat, J.: I agree.

Puisne Judge.

CIVIL APPEAL No. 346/43.

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

BEFORE: Plunkett, A/J.

IN THE APPEAL OF:—

Azriel Grossfield. APPELLANT.

v.

Shoshana Levy. RESPONDENT.

Landlady giving her room to her son after his marriage and claiming other room for herself — Dismissal of claim because son got married only after action was lodged — Scope of sec. 8(1)(c), Rent Restrictions Ordinance.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 23rd day of July, 1943, in Civil Appeal No. 88/43, dismissed:—

1. Judgment given under sec. 8(1)(c), Rent Restrictions (Dwelling Houses) Ord., cannot stand if based not on exercise of discretion but on erroneous interpretation of that section.

2. Where requirements of sec. 8(1)(c), Rent Restrictions Ord., are satisfied and defendant knew the material facts before action was lodged, fact that actual need of the premises by landlord has arisen after filing of action — immaterial.

(*M. L.*)

ANNOTATIONS: On exercise of discretion under and requirements of sec. 8(1)(c) of the R. R. (Dwelling Houses) Ord. see C. A. 60/44 (*ante*, p. 390) with annotations.

(*A. G.*)

FOR APPELLANT: Caspi and Hausner.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 23rd day of July, 1943, in Civil Appeal No. 88/43.

The District Court reversed the decision of the Magistrate who dismissed the application of the Respondent for an order of eviction against the Appellant on the ground that the Respondent requires the room for her own use and at the same time offering alternative accommodation in accordance with Section 8(1)(c) of the Rent Restrictions (Dwelling-Houses) Ordinance.

From the record it appears that Appellant * owned the whole flat consisting of 3 rooms and appurtenances and rented one room to Respondent *. She lived with her daughter and son in the other two rooms. Her daughter got married and one room was given to her and her husband. Some time after her son became engaged to be married

* Should be "Respondent".

* Should be "Appellant".

(*Ed.*)

but before the marriage took place, this action was instituted. After his marriage Respondent gave her room to her son and had to find accommodation elsewhere, going from place to place, pending the decision in this action. Respondent offered the Appellant alternative accommodation at a somewhat increased rent which he refused. The Respondent maintains that owing to the marriage of her son and daughter she needs the room occupied by the Appellant for her own use and that she has offered the Appellant alternative accommodation which, although possibly at increased rent, the increase is not out of proportion to the rent now being paid by him.

The Magistrate found that the Respondent's son got married after institution of this action and that the alternative accommodation offered to Appellant was at LP. 3.500 whereas he was paying only LP. 2.— to Respondent and refused to order eviction. It is maintained by the Appellant that the Magistrate exercised his discretion correctly and that the District Court erred in interfering with the proper use by the Magistrate of this discretion. The Respondent draws the attention of this Court to the evidence which discloses that Appellant was aware before the institution of this action that the son of Respondent was about to get married and that for this reason Respondent required the room.

It is clear from the evidence of both Appellant and Respondent that the Appellant knew that the Respondent's son was engaged to get married and that she (Respondent) looked for alternative accommodation and he (Appellant) saw the alternative accommodation offered by the Respondent which he refused, and offered to pay an increased rent if permitted to stay on.

The Magistrate in dismissing the action held that the Court must take into account the position existing on the day the action was filed and not at the present or at the time the son got married.

In my opinion the Magistrate erred in holding that Respondent could not succeed in her action as her son was not married until after the date when action was lodged. I do * consider that this is a correct interpretation of Section 8(1)(c) Rent Restrictions (Dwelling-Houses) Ordinance; the wording of this section is:—

> "On the ground that the premises are reasonably required by the landlord for the occupation of himself, and the court, judge or execution officer, after considering all the circumstances of the case, including especially the alternative accommodation available for the tenant, considers it reasonable to give such judgment or make such order".

* *Scil.*: "not". (*Ed.*)

The Court has taken all the circumstances into account and I agree with the conclusion come to by the District Court in paras 3 and 4 of their judgment. From the record it appears that in the evidence of Plaintiff and Defendant that the Defendant, here the Appellant, knew that the Respondent's son was about to get married. I do not consider that the Magistrate's decision was based on the exercise of his discretion but rather on a wrong interpretation of Section 8(1)(c) of the Rent Restrictions (Dwelling-Houses) Ordinance. For these reasons the judgment of the District Court is upheld and the appeal is dismissed with costs fixed at an inclusive sum of LP. 5.—. I must add that when granting leave to appeal the rules should be strictly applied according to the grounds of application in each case and not as a matter of custom in any particular Court.

Delivered this 23rd day of June, 1944.

A/British Puisne Judge.

CRIMINAL APPEAL No. 71/44.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Ahmad Muhammad Ali. APPELLANT.

v.

The Attorney General. RESPONDENT.

Charge of corruption under sec. 106(a) Criminal Code Ord: — Conviction based on corroborated evidence of accomplice — Question as to whether witness an accomplice or not — Question of sufficiency or insufficiency of corroboration.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 13th of May, 1944, in Criminal Appeal No. 60/44, dismissed:—

Question as to whether or not witness is an accomplice — a matter for trial Court to decide provided they apply their minds to the proper tests in coming to their conclusion.

(*M. L.*)

DISTINGUISHED: CR. A. 77/40 (7, P. L. R. 438; 8, Ct. L. R. 57; 1940, S. C. J. 257).

FOLLOWED: CR. A. 124/41 (8, P. L. R. 473; 11, Ct. L. R. 229; 1941, S. C. J. 451).

REFERRED TO: CR. A. 18/44 (*ante*, p. 158).

ANNOTATIONS: See CR. A. 62/43 (10, P. L. R. 354; 1943, A. L. R. 469).
(*A. G.*)

FOR APPELLANT: W. Salah.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Haifa in its appellate capacity from a judgment of one of the Magistrates of Haifa who had convicted the Appellant of an offence, contrary to Section 106(a) of the Criminal Code Ordinance, 1936, and had sentenced him to imprisonment for two months and ordered him to pay a sum of LP. 6 to the complainant.

When the case came before the Magistrate there were only two main witnesses on whom he relied, namely, Ibrahim Abdul Rahman Mughrabi, hereinafter referred to as Mughrabi, and a Mr. Soussa. The Magistrate found that Mughrabi was an accomplice but that there was in the evidence of Soussa sufficient corroboration of his evidence. The Magistrate disbelieved the evidence of one witness, called Said As'ad.

On appeal to the District Court the learned Relieving President held that Mughrabi was not an accomplice, but he also held that in any event there was sufficient corroboration of Mughrabi's evidence and, therefore, dismissed the appeal.

When the case came for hearing before this Court the Appellant's advocate asked us to hold that the Magistrate was correct in regarding Mughrabi as an accomplice. Crown Counsel (Mr. Clayton Rigby) on the other hand asked us to hold that the Magistrate was wrong in regarding Mughrabi as an accomplice. We have regard to the judgments of this Court in Criminal Appeals Nos. 77/40, Vol. 7 P. L. R., p. 438, and 124/41, P. L. R. Vol. 8, p. 473, in the latter of which it was said: "The question as to whether or not a witness is an accomplice is primarily a matter for the Court of Trial, provided of course that they applied their minds to the proper tests in coming to their conclusion". We accordingly think that we cannot interfere with the finding of the Magistrate on this point.

The facts were that Mughrabi admitted in cross-examination that he paid the money as a bribe, and he further admitted that the only reason he complained to the Police was because his employer, Mr. Izzat Karaman, had ordered him to do so. We, therefore, think that there was material on which the Magistrate could hold that Mughrabi was an accomplice. We must not be taken as holding that in every case where

someone hands over money to a person employed in the Public Service within the meaning of Section 106(c) Criminal Code Ordinance, the person who so hands over money must necessarily be regarded as an accomplice. It must depend on the circumstances of each case.

The only question now remaining for decision is whether there was sufficient corroboration in the evidence of Mr. Soussa. Mughrabi's evidence was that he was a motor-car driver employed by a certain Shafiq Dick, and that on the 29th December, 1943, he was driving the motor-car from Jerusalem to Haifa. Mr. Soussa and an old woman were with him. When they arrived at the Azizieh Check-Post the Appellant searched them and opened a box in which he found neckties, stockings and two boxes of cartridges. The Appellant confiscated these articles and asked Mughrabi to whom they belonged. Mughrabi replied "to Shafiq Dick". The Appellant then took Mughrabi to the Police Station where he asked him to give him LP. 10 and a box of cartridges. The witness said that he had not LP. 10, so the Appellant reduced the sum to LP. 6 and a box of cartridges. To this Mughrabi agreed. Mughrabi had on himself LP. 5, which he gave to the Appellant, and the other LP. 1 Mughrabi obtained from Soussa. That is the gist of the evidence of Mughrabi. Mr. Soussa, in giving evidence said:—

> "Passed Azizieh Check-Post. Police stopped us. Police came. The present Accused, No. 920, asked us (have you got anything). We said "No". He asked the driver about the place of the suit cases, he pointed it out to him. He opened the place of the suit cases. He found this parcel, Exhibit A. The police opened it and found it to contain neckties and stockings and two boxes of cartridges. The police asked "to whom are these". I said "not to me". He said I must know to whom they are. I heard the driver say "Shafiq Dick has given them to me". The driver came down with this Accused to the police station. I remained in the car. Later on the driver returned and asked for one pound from me. I gave him. He went away. He then returned with this box, Exhibit A. The driver stayed about half an hour in the police station. The pound is a bank note".

We think that the Magistrate was justified in holding that there was sufficient corroboration in the evidence of Soussa. In his judgment the Magistrate said that he had not the slightest doubt that these witnesses were telling the truth. Mr. Rigby referred to Criminal Appeal No. 18/44, and the remarks of this Court in that appeal on the question of corroboration of an accomplice. Walid Eff. Salah, advocate for the Appellant, has relied on several cases, including Criminal Appeal No. 77/40, P. L. R. Vol. 7, pp. 438—440. We think, however,

that the facts of the present case can be distinguished from the facts in Criminal Appeal No. 77/40.

Having regard to Soussa's evidence it would seem that there was not time available in which the Appellant or anyone else could have charged Mughrabi at the Police Station; so that the only possible object of the departure of the Appellant, together with Mughrabi, to the Police Station would seem to have been that of the Appellant obtaining money from Mughrabi. On scrutinizing Soussa's evidence as a whole it convinces us that there was ample corroboration of the evidence of Mughrabi.

For the foregoing reasons we think that the reasoning of the learned Magistrate was correct and that his judgment cannot be attacked.

For the foregoing reasons we dismiss the appeal.

With regard to the sentence, as we do not think that it was too severe, we are not prepared to interfere.

The appeal is accordingly dismissed and the conviction and sentence affirmed.

Delivered this 17th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 319/43.

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

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

IN THE APPEAL OF :—

Frieda Riterband & an. — APPELLANTS.

v.

Rachel Rosenblum. — RESPONDENT.

Landlords and tenants — Statutory tenant's servant continuing to stay in flat after his master's death — Scope of rights of deceased tenant's heir and administrator as regards tenancy.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 26th July, 1943, in Civil Appeal No. 121/43, dismissed:—

1. Provision of Ottoman Law relating to Lease of Immovable Property that lessee's or lessor's death does not dissolve the lease — not affected by sec. 133 of Municipal Corporations Ordinance; it applies however only to a lease under an existing contract, not to a statutory tenant.

2. A deceased tenant's heir and administrator who never lived in flat with testator cannot be said to have derived title from deceased for purposes of Rent Restrictions Ordinances.

3. Servant of a statutory tenant has no right under Rent Restrictions Ord. to remain in premises after his master's death.

(*M. L.*)

REFERRED TO: C. A. 40/43 (10, P. L. R. 170; 1943, A. L. R. 39); C. A. 264/43 (10, P. L. R. 639; 1943, A. L. R. 751); Collis *v.* Flower, 1921, 1 K. B. 409; Mellons *v.* Law, 1923, 1 K. B. 522; Reeves *v.* Davis, 1921, 2 K. B. 486; Parkinson *v.* Noel, 1923 1 K. B. 117; Keaves *v.* Dean, 1924, 1 K. B. 685; Skinner *v.* Geary, 1931, 2 K. B. 562—3; Sutton *v.* Dorf, 1932, 2 K. B. 304; Lovebond & Son *v.* Vincent, 1929, 1 K. B. 687 and 692.

ANNOTATIONS :

1. On nature of interest created by a lease in Palestine see Land Law of Palestine by Goadby and Doukhan, pp. 184—186.

On nature of statutory tenancy in England see Woodfall's Law of Landlord ·nt, 24th Edition, pp. 294 and *seq.* and Redman's Landlord and Tenant, p. 705 and English cases referred to (*supra*).

ian cases on statutory tenancy — C. A. 179/40 (Gorali, p. 38; ·; 8, Ct. L. R. 138; 1940, S. C. J. 358); C. A. 80/40 (Gorali, R. 302; 7, Ct. L. R. 198; 1940, S. C. J. 162); C. A. 195/41 8, P. L. R. 530; 10, Ct. L. R. 141; 1941, S. C. J. 599). See ases referred to (*supra*).

g of tenant and on position of non-occupying tenant see anno- R. to C. A. 40/43 (*supra*) and H. C. 87/43 (10, P. L. R. 511; 592). On meaning of landlord see note 2 in A. L. R. to C. A.

English case of Skinner *v.* Geary was distinguished in C. A. D. C. 43 (Curry, J.), reported in the Collection of Judgments of District .t Haifa, May 1943, p. 317. In C. A. 101/42 (Gorali, p. 143; 9, P. L. R. 576; 12, Ct. L. R. 130; 1942, S. C. J. 625) the Court of Appeal (Copland, J.) made a distinction between the English Statute and the Rent Restrictions Ordinance in the matter of non-occupying tenants.

In C. A. D. C. Jm. 18/44 (not reported) the Court (Bourke, J.) said: "Mr. G. has argued ..... to show that the lower Court erred in following the decision in Skinner v. Geary, Mr. G. may well be right ..... but the point in the circumstances is somewhat academic".

6. The distinction between the English and Palestinian Law lies in the different wording of the relevant sections. Sec. 15 of the English Act (Redman, p. 744; Woodfall, p. 1249) reads "a tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions .....". Skinner *v.* Geary and other English cases rely on the words "retains possession". See also Redman, p. 746.

7. As to point 3 see C. A. D. C. Jm. 21/44 (Selected Cases of the District Courts of Palestine, 1944, p. 178) and C. A. D. C. Haifa 110/42 (Gorali, p. 203). See C. A. 40/43 (*supra*).

(*A. G.*)

FOR APPELLANTS : Sanders.
FOR RESPONDENT: Shapira and Komissar.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, in its appellate capacity, dated 26th July, 1943, dismissing the appeal from the Magistrate's judgment of the 10th May, 1943, ordering the Defendants, here the Appellants, to vacate within one month the flat in question.

Briefly the facts as described are that S. W. Aaronson, now deceased, in 1940 took the flat in question on contract of lease. After the expiry of the contract, no new contract was made between the parties and S. Aaronson continued to occupy the premises by virtue of the Rent Restrictions (Dwelling-Houses) Ordinance No. 44/40. In summer, 1941, S. Aaronson fell ill and went to a nursing home in Jerusalem where in December, 1942, he died. At the time he was still a tenant of the flat in Haifa. The second Defendant is heir and manager of his father's estate. The first Defendant served during the lifetime of S. Aaronson as his cook and maid servant in his Haifa flat. The first Defendant still lives there.

There were two points in issue, the deceased being a statutory tenant: (1) is the second Appellant as heir and administrator entitled to remain in the flat?

(2) is the house keeper in possession entitled to remain?

The Appellants refer to section 2 of the Rent Restrictions (Dwelling-Houses) Ordinance, 1940, and to definition of "Landlord" and "Tenant" which include any person from time to time deriving title under the original landlord or tenant, and that Article 443 of the *Mejelle* relates to cases where there is an impediment, not as here where the second Appellant requires the flat to enable him to carry on his father's business and someone to look after the place.

They further maintain that the District Court misapplied the terms of the Law of Leases of Immovable Property of 1299 (1882) as amended by the Law of 1332 (1914) and the learned Relieving President erred in stating that the provisions have been repealed by Section 133 of the Municipal Corporations Ordinance, 1934. This possibly does repeal the part relating to stamping but that which relates to contracts is still in force. Title in the Rent Restriction Ordinance should be construed as interest. In England to derive title has a different meaning than in Palestine. In Civil Appeal No. 40/43, 10 P. L. R. p. 170, the Court accepted a very wide interpretation of the word tenant.

English cases quoted: Collis *v.* Flower, 1921, 1 K. B. p. 409 on execution. Mellons *v.* Law, 1923, 1 K. B. p. 522. Reeves *v.* Davis,

1921, 2 K. B. p. 486. Parkinson *v.* Noel, 1923, 1 K. B. p. 117. (Statutory Tenancy devolving on a Trustee in Bankruptcy). The Magistrate was guided by the case of Keaves *v.* Dean, 1924, 1 K. B. p. 685, but this case was based on a special provision in the English Statute, preventing a statutory tenant from assigning the tenancy. There is very little Palestine authority on the subject except Civil Appeal No. 264/43, Vol. 10, P. L. R., p. 639.

The Respondent submits at the time of his death S. Aaronson was a statutory tenant, no contract (*sic*) and the first Appellant was his servant and stayed with him as such. Neither Appellants are entitled to remain on any other ground except under the Rent Restrictions Ordinance. The interpretation of tenant is identical with the interpretation in Rent and Mortgage Interest Restriction 1920, Section 12 (1) 7, where landlord is defined.

The authorities quoted by Appellants are either not applicable or expressly overruled. Scrutton, J., in Skinner *v.* Geary (1931), 2 K. B. D., p. 562—563, decided that Collis and Flower is no more an authority. Parkinson *v.* Noel is expressly overruled in Sutton *v.* Dorf, 1932, 2 K. B. 304 and again in Lovebond & Son *v.* Vincent, 1929, 1 K. B. p. 687 and p. 692. That a tenant's right is purely personal and must cease when he dies. He cannot moreover assign his right. The Appellant did not reside with deceased. Decision in Civil Appeal No. 40/43 does not apply. Regarding Art. 17 of the Ottoman Law of Leases of Immovable Property of 1299 (1882) as amended by the Law of 1332 (1914) enacted by an Imperial *Iradeh* may be taken as a presumption that a contract is not terminated by death of one of the parties and contemplates death during continuance of a lease. This law even if not entirely repealed does not affect the Civil law of the country, and is in any case a fiscal law as to formalities.

This appeal has been argued at great length and many of the English authorities quoted by the Appellant have been overruled and, therefore, cannot be of assistance. It is clear, in our opinion, that according to Art. 17 of the Turkish law of Leases of Immovable Property of 1299 (1882) as amended by the law of 1332 (1914), upon death *etc.*, the contract shall continue and that this amendment to the Turkish law by the Municipal Corporations Ordinance refers to stamps only. The Turkish law definitely refers to an existing contract, whereas in this case the contract no longer exists and the deceased S. Aaronson was a statutory tenant, remaining in the flat under the provisions of the Rent Restrictions Ordinance.

It is not even suggested that Appellant No. 2 ever lived with his

father in the flat in Haifa. He is not entitled to be treated as a dependent or entitled to derive title from the original tenant.

As regards Appellant No. 1 she could only have remained on in the flat as a servant if Appellant No. 2 had been successful in his appeal. She has no rights whatever.

For the above reasons the appeal is dismissed.

Costs LP. 10 inclusive.

Delivered this 19th day of June, 1944.

A/British Puisne Judge.

HIGH COURT No. 51/44.

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

BEFORE : Edwards, J.

IN THE APPLICATION OF :—

Nathan Reznik. PETITIONER.

v.

The Local Council of Holon. RESPONDENT.

Local Council limiting the number of butcher shops in its area — Refusal to issue a licence for a new shop — Non-interference of High Court.

Return to an order *nisi*, issued on the 10th day of May, 1944, directed to the Respondent, calling upon them to show cause why they should not sign, issue and deliver a licence under the Trades and Industries (Regulation) Ordinance, 1927, to the Petitioner for opening, keeping and carrying on a butcher's shop on the premises of the Petitioner situated in the area of the Respondent and registered in the Land Registry of Jaffa under Block No. 7171, Parcel No. 37; order *nisi* discharged:—

High Court will not interfere with refusal of Local Council to grant a licence for a shop in addition to those already existing and whose number the Council regards sufficient.

(*M. L.*)

APPLIED: H. C. 3/42 (9, P. L. R. 75; 11, Ct. L. R. 41; 1442, S. C. J. 71).

REFERRED TO: Royal Aquarium Society *v.* Parkinson (1892), 1 Q. B. 431; H. C. 12/40 (7, P. L. R. 127; 7, Ct. L. R. 187; 1940, S. C. J. 182); H. C. 34/31 (4, C. of J. 1203); H. C. 71/31 (4, C. of J. 1204); H. C. 7/36 (9, C. of J. 907); H. C. 8/36 (9, C. of J. 831); H. C. 79/42 (9, P. L. R. 543; 1942, S. C. J. 548); H. C. 92/43 (10, P. L. R. 513; 1943, A. L. R. 697); H. C. 30/42 (11, Ct. L. R. 164; 1942, S. C. J. 248); R. *v.* Lancashire Justices (1870), L. R. 6 Q. B. 97; R. *v.* Smith (1878), 48 L. J. M. C. 38; Sharpe *v.* Wakefield (1891), A. C. 173; R. *v.* Kingston Justices, *ex parte* Davey (1902), 86 L. T. Rep. 589; R. *v.* Walsall, E. & E. Digest, Vol. 30, p. 29, Item 204; R. *v.* Sylvester, E. & E. Digest, Vol. 30, p. 28, Item 190.

ANNOTATIONS: See H. C. 3/42 (*supra*) and annotations in Ct. L. R. and in S. C. J. and cases referred to (*supra*).

(*A. G.*)

FOR PETITIONER: Turbovitz.

FOR RESPONDENT: Berinson.

ORDER.

This is the return to an order *nisi*, directed to the Local Council of Holon, calling upon them to show cause why they should not deliver a licence to the Petitioner under the Trades and Industries (Regulation) Ordinance, to open a butcher's shop on premises belonging to him within the Local Council Area. On the hearing before me of the return Mr. Berinson for the Respondent cited the following cases, namely, Royal Aquarium Society *v.* Parkinson (1892), 1 Q. B. 431; Hailsham Vol. 19, page 70, Para 187; H. C. 12/40, P. L. R. Vol. 7, page 127; H. C. 3/42, P. L. R. Vol. 9, page 75; H. C. 34/31, Rotenberg Vol. 4, p. 1203; H. C. 71/31, Rotenberg Vol. 4, pp. 1203 and 1204; H. C. 7/36, Rotenberg Vol. 9, p. 907; H. C. 79/42, Annotated Supreme Court Judgments (1942), p. 548; H. C. 92/43, P. L. R. Vol. 10, p. 513; H. C. 30/42, Annotated S. C. Judgments (1942), p. 248; Hailsham, Vol. 19, page 71 note (r); R. *v.* Lancashire Justices (1870), L. R. 6 Q. B. 97; R. *v.* Smith (1878), 48 L. J. M. C. 38; Sharpe *v.* Wakefield (1891), A. C. 173; Hailsham, Vol. 9, page 760, Para 1291, and Hailsham Vol. 19, page 100, Para 240; R. *v.* Kingston Justices, *ex parte* Davey (1902), Vol. 86, L. T. Rep. page 589; Local Council (Holon) Order, Palestine *Gazette* No. 993 of 14th March, 1940, Supplement No. 2, page 429, Para 10(1)(p); H. C. 3/42, P. L. R. Vol. 9, page 75.

Mr. Turbovitz for Petitioner referred to Revised Laws of Palestine, Vol. 2, page 1455, Rule 4(2) under Trades and Industries Ordinance; Supplement No. 2, Palestine *Gazette* No. 1154 of 18th December, 1941, pages 1929 and 1930, Regulation 2; H. C. 34/31; H. C. 8/36, Rotenberg Vol. 9, p. 831; H. C. 7/36, Rotenberg Vol. 9, page 907; Hailsham, Vol. 19, page 71, Para 187 and to R. *v.* Walsall, English and Empire Digest, Vol. 30, page 29, Item 204 and R. *v.* Sylvester, E. & E. Digest, Vol. 30, page 28, Item 190.

At the request of the Petitioner the President of the Local Council of Holon, Dr. Haim Kugel, was cross-examined before me on his affidavit. I also heard very lengthy and able arguments both by Mr. Berinson for the Respondent and Mr. Turbovitz for the Petitioner. In view, however, of the decision of this Court in H. C. 3/42, P. L. R. Vol. 9, p. 75, the matter lies within a very small compass. I say this particularly because the order made by the High Commissioner constituting this Local Council is in terms similar to that of the Local

Council of Kfar Yona, referred to at page 77 of the Report in H. C. 3/42.

The main complaint of the Petitioner is that in September, 1943, he was led by the President or Secretary of the Local Council to believe that his petition would be granted, whereas is was not until 22nd March, 1944, that he was told that the Respondent Council had decided not to issue a licence. In fairness to the Petitioner, I questioned Mr. Turbovitz very closely on this matter, and at the Bar he replied to the Court that all that he could say was that his client had instructed him that in September, 1943, he had had a conversation with the chairman or the clerk and that from this conversation he gathered that he was likely to receive a licence.

This is a very different matter from any suggestion that in September, 1943, the Council itself had held a meeting and had then decided to grant a licence. If this had happened, then the Petitioner might have had legitimate ground for complaint especially if, relying on such guarantee or promise, he had incurred expenditure. I am told that he did, in fact, after the conversation of September, 1943, incur expenditure of about LP. 100. This, of course, is unfortunate, and it may be regrettable that the Petitioner was misled by this conversation into thinking that he would likely receive a licence. If, however, as would appear to be the case, the Local Council never applied their mind to the matter until March, 1944, it seems to me that this Court can afford the Petitioner no remedy on this ground. It seems that the main reason why the Local Council refused to grant a licence was because there were already three butcher's shops in Holon and, owing to the small amount of meat which was available, namely, 140—160 kilos weekly for the whole population — three butchers would have work which would occupy them only for about two hours in one week. The Respondents had, therefore, decided to restrict the number of butchers in the area under their control to three.

This question of limitation of numbers was dealt with in H. C. 3/42.

Mr. Turbovitz faintly argued that the Local Council had, in coming to a decision, relied not on their own views but on the wishes of the local Food Controller. This does not, however, seem to be correct. Once they understood from the local District Food Controller that the quantity of meat likely to be available for distribution would be very small, it was obviously reasonable for them to take this into consideration when limiting the number of butchers' licences. There is no question here of discrimination against the Petitioner personally. In addition to the Petitioner, there were apparently two other applicants for licences for butchers' shops, and these also were refused licences. I would repeat that it is not correct to say that the Local Council as

such would appear to have changed its mind, or that after September, 1943, it was *functus officio*, as is suggested by Mr. Turbovitz.

I do not consider it necessary to deal with all the other points raised by Mr. Berinson for the Respondent. I merely say that the Petitioner has failed to establish grounds on which a writ of *mandamus* should issue.

The rule *nisi* is accordingly discharged with fixed (inclusive) costs to the Respondent of LP. 10.

Given this 19th day of June, 1944.

British Puisne Judge.

CIVIL APPEAL No. 71/44.

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

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

IN THE APPEAL OF:—

Bernard Hyam Silver. APPELLANT.

v.

Dvoshe Liebe Shekerka (Silver). RESPONDENT.

Marriage and divorce — Validity of marriage of foreigners arising incidentally in succession case, Misc. A. 20/43 — P. O. in C., Arts. 47, 64(ii), Succession Ord., secs. 4(iii)(c), 23 — National Law importing law of domicil, Dicey — Validity of Marriage, Sottomayor v. De Barros — Marriage celebrated during the life of former spouse, Sasson v. Sasson, C. A. 22/42 — Ghet and Heter — Question of bigamous marriage.

Appeal from the judgment of the District Court of Tel-Aviv, dated 15th February, 1944, in Probate Case No. 203/43, dismissed:—

1. The validity of a marriage of a Jewish British subject domiciled in Palestine is to be determined in accordance with Jewish Law — by *renvoi* from the National Law.
2. Such a question, when arising incidentally in succession matters, may be determined, positively or negatively, by a District Court.
3. Jewish Law, in such cases determines the validity of the marriage both as regards form and capacity.
4. The validity of a divorce (*ghet*) from a wife who was *non compos mentis* may be upheld if the strict procedure provided by Jewish Law was followed.

(*A. M. A.*)

FOLLOWED: Sottomayor *v.* De Barros, 1877, 3 P. D. 1, 47 L. J. P. 23, 37 L. T. 415; Sasson *v.* Sasson, 1924, A. C. 1007, 94 L. J. P. C. 13, 132 L. T. 163; C. A. 22/42 (9, P. L. R. 328; 1942, S. C. J. 259; 12, Ct. L. R. 3).

REFERRED TO: Misc. Appl. 20/43 (10, P. L. R. 124; 1943, A. L. R. 12).

ANNOTATIONS:

1. For the facts of this case see the judgment of the District Court, reported in Selected Cases of the District Courts, 1944, p. 75.

2. Note that the Supreme Court decided the case on the ground that the deceased had been divorced whereas it is clear from paragraph 3 of the District Court judgment (*supra*), as based on the evidence, that there had never been an effective divorce but that the deceased had received permission from 100 rabbis to enter into a second marriage "although not divorced" from his first wife. It was in effect never seriously alleged that there was an effective divorce and the argument before the Court centred round the question whether, in view of the English law regarding bigamy, the importation of the law of domicil (*i. e.* Palestinian law, *i. e.* Jewish law) could make the second marriage valid.

In support of his contention that in the case of British subjects a "bigamous" marriage is always void, whatever the law of the domicil of the persons contracting the marriage, Appellant relied on the case of Shaw *v.* Gould (1868, L. R. 3 H. L. 55; 37, L. J. Ch. 433; 18, L. T. 833) and on the fact that bigamy is one of the very few offences for which a British subject can be tried for felony in England *wherever* he commits the crime in that Sec. 57 of the Offences against the Person Act, 1861, provides that "whosoever, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland *or elsewhere,* shall be guilty of a felony, *etc.*"

3. Note that the decision in this case recognizes the validity of a Jewish divorce of British subjects domiciled in Palestine. On the nature of a Jewish divorce generally *cf.* C. A. 195/43 (10, P. L. R. 405; 1943, A. L. R. 395) and cases therein cited.

4. An application for leave to appeal to the Privy Council is pending.

(*H. K.*)

FOR APPELLANT: Sassoon.

FOR RESPONDENT: Goitein and Gluckman.

JUDGMENT.

Frumkin, J.: The Appellant in this case applied to the District Court of Tel-Aviv sitting as a Probate Court for a certificate of succession, declaring himself and his brother as the sole heirs of their deceased father.

This application was opposed by the Respondent claiming that as the wife of the deceased she is entitled to a quarter of his *miri* property. It was the Appellant's case that the Respondent was not the legal wife of his deceased father, in that she was married to him in the lifetime of his mother, the first wife of the deceased.

The learned Relieving President was thus faced with the problem as to the validity of a marriage. This is a matter of personal status incidentally arising, which the Court had to determine before coming to any conclusion. This the Court was entitled to do by virtue of the second paragraph of Article 47 of the Palestine Order-in-Council.

The first question which arises is, what is the law applicable for the determination of that point? The deceased being a foreigner, both under Article 64(ii) of the Palestine Order-in-Council and Sections 23 and 4(iii)(c) of the Succession Ordinance the national law applies unless it imports the law of domicile. Now the deceased was a British

subject; his national law is, therefore, the law of England. The law of England imports the law of domicile. As put in Rule 182, in Dicey's "Conflict of Laws", 5th Edition, page 732:—

> "A marriage is valid when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other and if the marriage is celebrated in accordance with the local form".

In the case before us it is both a question of capacity and form in that the objection taken as regards the validity of the marriage of the Respondent to the deceased is based on the allegation that the deceased had no capacity to re-marry because the first wife was not properly divorced. An attempt was also made to question the validity in form of the marriage on the ground that although the deceased was a British subject, the marriage was celebrated in religious form only.

The Rule referred to above is based *inter alia,* on the case of Sottomayor *v.* De Barros (1877) P. D. (C. A.) where it was held by Cotton, L. J. that:—

> "It is a very recognised principle of law that a question of personal capacity to enter into any contract is to be decided by the law of domicile.
>
> ..... The law of a country where a marriage is solemnized must alone decide that question relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile".

At the time of the marriage in question the deceased and the Respondent were domiciled in Palestine, and were both members of the Jewish community. There being no civil law of personal status applying to all the citizens of this country in the case of members of the Jewish Religion, their religious law must apply.

As the validity of the marriage in this case depends on whether or not the deceased has prior to his second marriage properly divorced his first wife, it is important to mention that the rule as to the importation of the law of domicile was in terms extended also to matters of divorce between British Jews, members of the Jewish faith, domiciled in a country which recognised a divorce under Jewish law. In Privy Council Appeal, Sasson *v.* Sasson, 1924 (A. C. 1007), where both parties were British Jews domiciled in Egypt, divorced by the Grand Rabbinate in Alexandria, Lord Dunedin, in delivering the judgment of Their Lordships, held that the Supreme Court of Alexandria —

> "had no jurisdiction itself to dissolve a marriage. It had, however, jurisdiction to declare rights and, in matters relating to marriage (which obviously include divorce), it was bound in the case of persons not belonging to Christian communities to recognise and apply the religious law and custom of the persons concerned. It is not necessary to cite the various cases in which the power of Courts

> to divorce *a vinculo* has been discussed. The case of Le Mesurier *v.* Le Mesurier finally settled that the proper and only Court is the Court of domicil. Now the Court of the domicil here could not grant divorce, but on the other hand it was bound by the words above cited to acknowledge the validity of a divorce good according to the religious law of the non-Christian subject".

This judgment was followed by the Courts in this country in Civil Appeal No. 22/42, P. L. R. 9, page 328. In that case it was not a matter between British subjects, but that makes no difference to the principle.

What then is the position under Jewish law?

The marriage was attacked firstly on the ground of capacity in that at the time of the second marriage the deceased had no capacity to marry because his first wife was then still alive and not properly divorced. What we have to look at is whether under Jewish law there was a proper divorce. The nature of a divorce under Jewish law has been fully discussed in previous judgments of this Court, where it was stated that a divorce is an act of mutual consent contracted between husband and wife. The present case may appear to be somewhat complicated by the fact that the first wife was insane and incapable of receiving herself the *Ghet* or Deed of Divorce. It is true that there was no mutual consent, and in fact the wife was not a party to the divorce proceedings; but in cases of incapacity of a wife by reason of insanity, there is under Jewish law a special procedure, very strict and stringent in its application, substituting the act of the delivery of the deed of divorce into the hands of the wife by a method of depositing it on her behalf. This being done, under Jewish law the husband is considered to have properly divorced his wife, and if in addition to that act of divorce he obtained the permission from hundred Rabbis to re-marry, he is allowed to do so. There was evidence before the Court below that this procedure was adhered to in this case.

It follows, therefore, that all the requisites, both as regards capacity and form, have been duly complied with, and that under the law applicable the deceased had the legal capacity to enter into the second marriage, and this second marriage was duly celebrated.

This is sufficient to dispose of the matter, as it is clear that the Respondent was the wife of the deceased and thus entitled to her share of inheritance. The Appellant has based his main argument as to the invalidity of the marriage on the ground that it was a bigamous one, but this question does not now arise.

At the end of his judgment the learned Relieving President expressed a view which, although *obiter*, calls for some comment if only for the purpose of indicating that it should not be taken that this Court upholds that view as a definite proposition of law. I refer to that ex-

pression of opinion by the learned Judge that under Article 64(i) of the Palestine Order-in-Council as interpreted by the Supreme Court, Miscellaneous Application No. 20/43, it was not competent for the Court to make any other finding which to his mind would, in effect, amount to a declaration of the nullity of the marriage, because in Miscellaneous Application No. 20 it was held that the "expression 'decree of dissolution of marriage' in the proviso to Article 64(i) includes a declaration of nullity, and that accordingly a District Court has no jurisdiction to issue a decree of nullity in respect of a marriage contracted between foreigners". With the last part I agree. My doubts as to the soundness of the proposition in general are the difficulty that it really amounts to making the jurisdiction of the District Court dependent upon whether or not the decision is going to be in favour of the validity of the marriage or against it. In this case the learned Judge came to the conclusion that the marriage is valid and he had jurisdiction. Had he come to a different conclusion he would have had to say that he had no jurisdiction. A Court cannot have conditional jurisdiction, — either it can decide the matter or not. In this case I should have thought that it can.

The whole object of the second paragraph of Article 47 of the Palestine Order-in-Council is to confer upon the District Court jurisdiction to determine any matter of personal status incidentally arising, and if, as in this case, the right of a party to a share in the inheritance of an estate depends upon her being or not being the lawful wife of a deceased, I should have thought that the District Court would have to decide it. Had the Court even come to a negative conclusion, that would not to my mind amount to the issue of a decree of nullity or dissolution in respect of the marriage. Such a judgment would at most be taken on its face value and would only affect the right of the party in the particular cause of action. But as this important point has not been argued by counsel for the Appellant, and as a final decision on it is not necessary for the determination of this appeal, I would not in this case go any further than saying that the point has not been decided and is still open for argument.

For all the foregoing reasons the appeal is dismissed, with costs on the lower scale to include LP. 15.— advocate's attendance fee for this hearing.

Delivered this 21st day of July, 1944.

Puisne Judge.

FitzGerald, C. J.: I concur.

Chief Justice.