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CRIMINAL APPEAL No. 199/42.

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

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

IN THE APPEAL OF :—

Joseph Zelikovitz. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Insanity — Only one degree of insanity, C. C. O. Sec. 14 — Premeditation — Onus of proof under C. C. O. Sec. 214(h) — Onus on defence if prima facie case of murder made out — Recommendation for mercy.

Appeal from a judgment of the Criminal Assize Court, sitting in Haifa (No. 53/42), dismissed :—

1. There is only one degree of insanity, as described in Sec. 14 of the C. C. O

2. It is upon the prosecution to make out a *prima facie* case for murde under section 216(h) of the C. C. O. The onus of proof then shifts to th defence to establish provocation or absence of premeditation.

ANNOTATIONS : Temporary mental derangement does not amount to insani CR. A. 64/41 (1941, S. C. J. 198) and the rule in MacNaughton's case should applied, CR. A. 8/40 (1940, S. C. J. 33).

The defence of insanity should be established like any other defence, CR. 85/41 (1941, S. C. J. 246), as the accused is presumed to be sane until the cont is proved, CR. A. 16/39 (1939, S. C. J. 185 ; 5 Ct. L. R. 174) ; CR. A. (1942, S. C. J. 88).

(*A. M. A*

FOR APPELLANT : Kaisermann.

FOR APPELLANT : Crown Counsel — (Rigby).

JUDGMENT.

The facts of this case were plain, straightforward and are no in dispute. The learned Judge has dealt very lucidly with the raised at the trial, mainly that of insanity and that of lack of pr tion. On the first point of insanity there is only one degree insanity and it is that described in Section 14. The English

which this section is based has stood the test of over 100 years and there has been no diminution or restriction on the law of insanity during that period. We are now asked to say that there is a second kind or lesser degree of insanity which has relation to, or bears on, the obligation on the prosecution to prove that this murder was committed with premeditation. It would, I think, be extremely undesirable for us to open the door wider to people, who kill others, escaping the results of their crime. That door has already been opened fairly wide in Palestine in view of the law which defines murder. The facts in this case show abundantly that there was very clear premeditation. The accused had, earlier, given expression to a remark which can be interpreted as a threat to the two men he killed. He then, a few minutes later, proceeds to shoot the father, then he chases the son firing shots at him. The son died three or four days later but the accused then returned and to make quite sure fired two additional shots into the body of the father who may or may not have been quite dead at that moment. One could not, I think, find clearer evidence of not only premeditation but determination to effect the killing of these two men.

Counsel has also raised the question of whether under Section 216(b) it is the duty of the prosecution to prove such facts as will, *prima facie*, establish the requirements of Section 216, para. (b) of which reads as follows :—

> "For the purpose of section 214 of this Code a person is deemed to have killed another person with premeditation when —
> (b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions."

The general rule is that the onus is always on the prosecution to prove all the constituent elements of the offence charged in the information. It may, of course, be difficult for the prosecution to prove affirmatively a negative but that does not absolve the prosecution from proving a *prima facie* case of murder as laid, and in accordance with the law of murder as defined, but having done so, then, in my view, the burden shifts to the defence to show or to prove that there was such amount of provocation or absence of premeditation as will reduce the crime. It may be that the prosecution witnesses themselves disclose some facts that may possibly amount to provocation or tend to show the absence of premeditation and if so, it is then a question for the defence to consider whether such is sufficient evidence to reduce the crime to manslaughter or whether to bring additional evidence in either respect. In this judgment the learned Judge quite rightly referred to this matter of the absence of provocation and there was, in

fact, no provocation in this case as the evidence led for the prosecution established quite clearly that there was no immediate provocation whatsoever and therefore the onus of proving provocation shifted to the defence. That onus the defence failed to discharge. It is quite impossible to say that incidents that took place, or conversations that took place, two or three years ago, amount in law to provocation. Provocation must be immediate and such as to take away the immediate self control of the person provoked.

For these reasons the appeal must be dismissed. As regards the final remarks by Mr. Kaisermann, a report goes to His Excellency the High Commissioner with the record and with the evidence and it is a matter for His Excellency, with the advice of the Executive Council, to say whether the sentence should or should not be carried out.

Delivered this 7th day of January, 1943.

Chief Justice.

CIVIL APPEAL No. 257/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Rachel Menkes. RESPONDENT.

Immigration deposits — Marriage and consequent naturalisation of traveller — C. A. 36/37, C. A. 22/39 — Unilateral variation of contract — Principal undertaking and guarantee — Subsequent impossibility.

Appeal from a judgment of the District Court of Jerusalem (Civil No. 88/41), allowed and judgment entered for the Appellant :—

A contract cannot be altered by the act of one of the parties thereto. The conditions of a traveller's contract of deposit are altered by her marriage.

DISTINGUISHED : C. A. 36/37 (1, 1937, S. C. J. 262 ; 1, Ct. L. R. 53) ; C. A. 22/39 (6, P. L. R. 162 ; 1939, S. C. J. 131 ; 5, Ct. L. R. 137).

ANNOTATIONS : See the cases distinguished in the judgment.

(*A. M. A.*)

FOR APPELLANT : Crown Counsel — (Hogan).

FOR RESPONDENT : Apelbom.

JUDGMENT.

This is an appeal from the District Court of Jerusalem from a judgment in an action brought by the present Respondent against the Government of Palestine for the return of a deposit made by her in the early part of 1939 in connection with the granting to her of a traveller's visa to enter Palestine. The sum of 1,800 zlotys was paid to the British Consul in Warsaw in his capacity as representative for purposes of the Immigration Ordinance of the Government of Palestine. The terms of the deposit were that the money would be refunded to the Respondent on demand, provided that she satisfied the British Consul in Warsaw before the 25th of June, 1940, that she had definitely left Palestine within the time limit authorised by the Palestine Authorities. The lady entered Palestine in April, 1939, and on a tourist's visa for three months' authorised residence. On the 22nd June, 1939, she married a Palestinian citizen and under the law as it then existed, by that act she became Palestinian herself. Since she arrived here she has not left Palestine and apparently has no intention whatever of leaving. The three months' authorised period of residence was not extended. The District Court gave judgment in her favour, basing themselves upon the case of Attorney General *v.* Bouenos, Civil Appeal No. 22/39, (6 P. L. R. 162), and gave judgment for the return of the 1,800 zlotys to be converted into Palestinian currency at the fixed rate of exchange, as published in the Palestine Gazette dated 9.5.40. The Attorney General has now appealed.

The main ground of appeal is that as the Respondent has not complied with the condition on which the visa to enter Palestine was granted to her and as she has by her own act altered the contract between the parties, she has, therefore, no claim to the return of the deposit, as no party to a contract can by unilateral action vary the terms thereof. Mr. Hogan says that the Government in this particular case did nothing themselves to vary the contract. They never agreed, and cannot in any way be held by implication to have agreed, to the Respondent remaining in the country and, therefore, she has no claim to the return of the deposit. The Respondent relies on the Bouenos case (*supra*) and says that there is no distinction between that case and this case. She also goes on to argue that, since the principal undertaking has been discharged, the subsidiary undertaking as to deposit also falls to the ground, and that as the Respondent is now married the condition that she should leave Palestine no longer applies. The Respondent also advances a further argument, that of impossibility of performance, since in June, 1940, there was no British Consul in Warsaw. Now in the Bouenos case, at page 166, the principle was laid down that "the

question of whether a deposit is returnable or not depends on the terms of the contract between the parties in connection with which the deposit was made, but that since the period of permitted residence may be extended, a deposit is not necessarily forfeited if the holder of a traveller's or tourist visa does not leave within the period stipulated in the visa". That principle applies equally to this case. The present case is not on all fours with the Bouenos case because in that latter case the woman after marriage was issued by Government with a Palestine passport, and by issue of that passport the Government authorised her to remain in Palestine permanently, and this Court held that the authorised period of residence was, therefore, indefinitely extended and the Government had themselves varied the terms of the contract, making the conditions therein contained with regard to the return of the deposit inoperative. The Battat case, C. A. 36/37 is also not the same because in that case there was a bond by a third party that if the traveller did not leave Palestine within the authorised period the bond would become operative and, since the terms of a bond must be strictly complied with, the fact that he did not leave made the bond binding and operative and the money was, therefore, held to be due.

In this present case we think that the District Court came to a wrong conclusion. We agree with Mr. Hogan's submission that no party to a contract can vary the terms thereof and, with this deposit and deposit receipt constituting a contract between the parties, there can be no doubt whatever that no party can vary the terms of a contract unilaterally. In no way did Government agree to the variation in the terms of the contract and the deposit, therefore, cannot be reclaimed.

With regard to the question of impossibility of performance, it certainly was not impossible for the Respondent to have left Palestine before June, 1940, and if she had done so, and had proved that to the satisfaction of the Government, I do not think that the Government could have successfully pleaded that she had not proved it to the British Consul in Warsaw in order to prevent the refunding of the deposit to her.

For these reasons we think that this appeal will have to be allowed and the Respondent's action before the District Court dismissed. The Appellant is entitled to costs on the lower scale both here and below with the advocate's fees which the District Court awarded to the Respondent here, and in this Court the sum of LP. 5 advocate's attendance fee at the hearing of this appeal.

Delivered this 11th day of January, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 198/42.

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

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

IN THE APPEAL OF :—

Chaim Weitmann. APPELLANT.

v.

The Attorney General. RESPONDENT.

War insurance — War Risks Insurance Ordinance, 1941, *secs.* 6, 9(1)(*a*), 9(1)(*b*)(ii) — *Voluntary confessions — "Vested", "seller", "Owner" Construction of statutes — Charge under alternative section — Sentence.*

Appeal from a judgment of the District Court of Jerusalem (Criminal 251/42) dismissed but sentence reduced. The Appellant had signed a statement to the effect that he owned the goods stored in two shops, one of which was carried in his name and the other in his wife's name. That statement was accepted by the lower Court which overruled the defence that part only of the goods belonged to the Appellant.

The War Risk Insurance Ordinance, Sections 6, 9(1)(a) and 9(1)(b)(ii) applies to owners of goods, agents, persons carrying on business and persons entitled to sell or supply goods as agents.

(*A. M. A.*)

FOR APPELLANT : Frank.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal against the conviction of the accused, dated the 21st December, 1942, for contravening Section 6 of the War Risks Insurance Ordinance, 1941. The grounds of appeal were twofold. One ground was that the learned Relieving President had wrongly admitted a statement which, it is alleged, was a confession and not given voluntary, and the other ground was on the question of ownership of the goods. We agree that the learned Relieving President rightly admitted that statement. Not only does he say in his judgment that the accused voluntarily made that statement, but in no sense can that statement be regarded as a confession.

On the other ground of ownership, the argument has mainly turned on the word "vested" in Section 9(1)(a). The accused was charged under Section 6, which states that no person shall carry on any business as a seller or supplier of goods, which goods are for the time being owned by him in the course of such business and which are of the value

exceeding LP. 1000, etc. He was a seller of goods, and seller is defined as including "a seller of goods acting as an agent". The word "owner" is used in that section, and Section 9 is a comprehensive section which describes who shall be deemed to be owners. In interpreting that latter section one must look at the whole intention of the Ordinance, and just because a word is used which in some respects has a particular and restricted meaning in regard to real property, it does not necessarily follow that the meaning to be attributed to the words "vested in a person" should thus be restricted to the technical sense as argued for the Appellant. The more important words are "for the time being". It would, I think, have been better to have used the words "goods in the possession of a person" without using a technical word, but one of the main grounds of appeal is that the learned Relieving President used an expression in his judgment which has given Counsel for the Appellant some reason for his arguments, in that the learned Relieving President said : "I think the widest meaning of which it is reasonably capable should be given to the word 'vested'," and of course it naturally followed that Counsel argued that a criminal statute should be interpreted strictly. We think that even apart from Setcion 9(1)(a), the accused in this case would also have come within Section 9(1)(b)(ii), as being a person carrying on business, entitled to sell or supply goods as agent.

For these reasons we think that the conviction should be upheld. The accused was the seller of these goods, whether he was a co-owner or merely an agent for the owner.

As regards the sentence, we feel that it is rather a heavy sentence. The accused possibly attempted to evade the Ordinance in some respects, but it is not quite on all fours with the case that was quoted to us from Tel-Aviv in which the accused was fined LP. 25. We, therefore, reduce the fine to one of LP. 50, which we think will meet the ends of justice in all respects.

Delivered this 25th day of January, 1943.

Chief Justice.

CIVIL APPEAL No. 265/42.

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

BEFORE : Gordon Smith, C. J.

IN THE APPEAL OF :—

Meyer Lesirkewicz. APPELLANT.

v.

Nathan Driangol. RESPONDENT.

Landlord and tenant — Action for eviction — Premises reasonably required for occupation of landlord — Rent Restrictions (Dwelling-Houses) Ordinance, sec. 8(1)(c) — English Act of 1919, Neville v. Hardy, Kimpson v. Markhami, Middlesex C. C. v. Hall — Onus of proof — Date on which alternative accomodation is available — Admissibility of evidence. — Variance between English and Palestine legislation.

Appeal from judgment of the District Court of Tel-Aviv, in its appellate capacity, in Civil Appeal No. 186/42, dismissed :—

1. An order of eviction may be given under sec. 8(1)(c) of the Rent Restrictions (Dwelling-Houses) Ordinance if there were alternative accomodation at the time of the expiration of the previous tenancy, and this fact was notified to the tenant.

2. Evidence as to an alleged conversation between Plaintiff and Defendant is admissible, but action should not be remitted if the facts alleged are immaterial.

DISTINGUISHED : Neville *v.* Hardy, 1921, 1 Ch. 404 ; Kimpson *v.* Markham, 1921, 2 K. B. 157 ; Middlesex County Council *v.* Hall, 1929, 2 K. B. 214.

ANNOTATIONS :

1. The first two English cases were distinguished on the ground that the relevant English Act differs in wording from the Ordinance : see C. A. 135/33 (2, P. L. R. 110 ; C. of J. 708 ; P. P. 29.v.34).

2. Under sec. 8(1)(c) of the Ordinance the landlord may apply for eviction on the ground that he requires the flat for his own uses (L. A. Ja. 220/35, Gorali, p. 98), provided he satisfies the Court (and not necessarily the tenant : C. B. M., Ja. 274/35 ; P. P. 1.xii.35 ; Gorali, p. 111) that there is reasonable alternative accomodation for the tenant. He may not do so before the expiration of the lease (C. A. D. C., Jm. 141/41, Gorali, p. 159). Alternative premises need not be similar if they are reasonable (C. B. M., Ja. 274/35, *supra*) and may be reasonable though more expensive (C. A. D. C. T. A., 196/39, Gorali, p. 84). On the onus of proving alternative accomodation, see C. A. D. C., Jm. 32/42 (Gorali, p. 179) and on the weight of evidence, C. A. D. C., Ha. 29/42 (Gorali, p. 192). In the absence of reasonable alternative accomodation, no order of eviction should be given (C. A. D. C., Ha. 71/42, Gorali, p. 195). The District Court of Tel-Aviv held in C. A. 17/42 (Gorali, p. 212) that the material time when reasonable accomodation must be proved to have existed is the time action was instituted.

A Magistrate, in making a finding as to alternative accomodation is exercising his discretion and an appellate Court cannot interfere with such discretion if reasonably exercised (C. A. 78/43, *post*, p. 18).

(*A. M. A.*)

FOR APPELLANT : Goitein.

FOR RESPONDENT : Eliash.

JUDGMENT.

This was an appeal from a judgment dated the 28th July, 1942, by a Tel-Aviv Magistrate, under which an eviction order had been made against the Appellant, the tenant. A previous appeal to the District Court was dismissed.

The point in this case is, shortly, whether a landlord who has become engaged to be married and who owns and wants a flat for his own personal occupation with his prospective wife, can reasonably require the tenant to give up possession of such flat. It comes under paragraph (c) of Section 8(1) of the Rent Restrictions (Dwelling-Houses) Ordinance, No. 44/40, which reads as follows :—

> "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 accomodation available for the tenant, considers it reasonable to give such judgment or make such order."

The Magistrate, having complied with the requirements of this paragraph and having found the facts to be as stated, made an order in terms thereof. He also found as a fact that at the expiration of the tenancy there was alternative accomodation available of which fact the landlord had notified the tenant.

The wording of the equivalent English section of the Act of 1919 is different in that the Court has to be satisfied that alternative suitable accomodation is available. I do not think, therefore, that Neville *v.* Hardy, 1921, 1 Ch. 404. or Kimpson *v.* Markham, 1921, 2 K. B., 157, cited by counsel for the Appellant are in point. The former decides that the onus of proof as to available accomodation is on the landlord, and the latter that the material date of availability is the date of hearing. In any case I should be rather loath to follow this latter case in Palestine, where eviction proceedings can be and are protracted months and even years by all sorts of ingenious devices, and by appeals. It may be that alternative accomodation is available at the date the premises should be vacated, but the tenant might hang on for six, nine or twelve months in the hope that when the case comes on for hearing such alternative accomodation may not then be available, and again, if it has to be available at the date of the hearing, why should not it also have to be available at the date of hearing of the appeal.

Neither is Middlesex County Council *v.* Hall, 1929, 2 K. B., 214, in point. That case was as to whether on an eviction order of premises used for the combined purposes of living accomodation and business, the alternative accomodation had to be suitable as business premises as well, and it was held this was not necessary. It is not, however, necessary to decide these points.

The last ground of appeal was that the Magistrate was wrong in refusing to hear relevant evidence for the defence. It is not very clear from the record what the Magistrate meant by his ruling, which reads : "The Court holds that a conversation outside the Court cannot be proved

by the evidence of a witness." *Prima facie*, of course, such a ruling is wrong, and the Magistrate should have allowed the question, which was as to an alleged conversation between the Plaintiff and Defendant. The whole defence was to the effect that the landlord was trying to get an increased rent for his flat, whereas the point in issue was whether the landlord wanted the flat for his own use because he had got engaged to be married, and which the Magistrate found was a fact. It seems to me, therefore, that any answer to the question would not be very material if at all, and moreover the Defendant had himself given evidence as to this conversation, alleging that the landlord was demanding an increased rent. It is not of sufficient importance to justify remitting the case back to the Magistrate and I see no reason to interfere with his order for eviction, as he complied with the law and had considered all the facts and came to the conclusion that such eviction order was just and reasonable.

For these reasons the appeal is dismissed, with costs to include LP. 10 advocate's attendance fee.

Delivered this 8th day of February, 1943.

Chief Justice.

MISCELLANEOUS APPLICATION No. 20/43.

IN THE SUPREME COURT OF PALESTINE.

BEFORE : Copland, A/C. J.

IN THE APPLICATION OF :—

Dr. Asher Apte. APPLICANT.

v.

1. Jehudith Gross (Jehudith Apte),
2. Asher Ansell Gross. RESPONDENTS.

Nullity of marriage — Competent Court — Application to Chief Justice under Art. 55, P. O. in C. — P. O. in C., Art. 55, 64(1) — Decree of divorce or dissolution include decree of nullity — No court competent to decree nullity of marriage of foreigners.

Application to the Chief Justice under Art. 55 of P. O. in C. to determine which Court should have jurisdiction to determine the validity of a divorce granted by the Rabbinical Court of Haifa and of the subsequent marriage of the parties, refused :—

No Court in Palestine has jurisdiction to issue a decree of nullity of a marriage contracted between foreigners.

ANNOTATIONS :

1. The Applicant had applied to the District Court, Tel-Aviv, for a declaratory judgment which was refused (*cur.* R/P. Hubbard, J.), the following being the relevant part of the judgment (Civil Case No. 7/42) :—

"As I see the case, two questions arise for decision :—

"(1) Whether what the Plaintiff asks for is a decree or nullity.

"(2) Whether a decree of nullity is included in the expression 'decree of dissolution of marriage' in the proviso to Art. 64(1) of the Palestine Order in Council.

"With regard to the first question, Mr. Hake, for the Plaintiff, contended that he was not asking for a decree of nullity, but merely for a declaration as to certain questions of fact. He cited in support of this view C. A. 22/42 (1942, S. C. J. 259). In that case the Court of Appeal allowed a declaratory judgment to the effect that the Appellant had been properly divorced. Frumkin, J., said (at p. 266) : 'Admittedly the District Court could not decree a dissolution of the marriage between the parties. But that is not what the Appellant is asking for. Her application is for a declaration that she has already been properly divorced'. All that the declaration did, therefore, was to confirm a previously effected change of status.

"Unless otherwise directed, I am not prepared to extend the method of that case to cover the granting of a declaration which will in effect itself cause a change of status. I am not unmindful of the formal difference between a dissolution of marriage, a decree of nullity on the ground of impotence, and a decree of nullity on other ground. It is admittedly true that in the case of nullity on grounds other than impotence there never was a legal marriage at all, so that in one sense the legal status of the parties may be said to be declared, rather than altered, by the decree. But this purely formal view is not the one adopted by the Courts in England in considering the question whether a decree of nullity is a judgment *in rem*. I cite the following passages from the judgment in Salvesen *v.* Administrator of Austrian Property (1927, A. C. 641), in which case a decree of a German Court was held to be a judgment *in rem* which declared null and void a marriage contracted without some of the formalities required by French Law, the *'lex loci celebrationis'* Viscount Haldane said (at p. 645) : '... the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country'. This last sentence suggests that what is meant is not the actual legal relations of the parties, but their putative status. Viscount Dunedin said (at p. 662) : 'The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a *'res'*, as that word is used when we speak of a judgment *in rem*. A *res* is a tangible thing within the jurisdiction of the Court such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a *res*, but it, to borrow a phrase, savours of a *res*, and has all along been treated as such. Now the learned Judges make this distinction. They say that in an action of divorce you have to do with a *res*, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and, therefore, no *res*. Now it seems to me that celibacy is just as much a status as marriage. I notice that in the Oxford dictionary the word status is defined (*inter alia*) as 'the legal standing or position of a person ... condition in respect, *e. g.* of liberty or servitude, marriage or celibacy, infancy or majority. The judgment in a nullity case decrees either a status or marriage or status of celibacy'.

"These passages refer, it should be noted, to a decree of nullity in regard to a

marriage which was void *ab initio*. The Plaintiff in this case is now asking for a declaration that the status of the Defendant is not that of wife of the Plaintiff but that of wife of Mr. Gross. I fail to see any real difference between such a declaration and a decree of nullity to the same effect. In my view, it is merely an attempt to induce this Court to exercise a jurisdiction it does not possess.

"Whether or not this Court does possess this jurisdiction is the second of the two questions I have enunciated. That point has already been decided in the negative by C. A. 186/37, (1937, 2 Ct. L. R. 132). In that case both parties were foreigners, but I do not think the fact that only one party is a foreigner makes any difference. Trusted, C. J., there said: 'In the ordinary meaning of words, dissolution of marriage includes a decree of nullity, and that seems to us to be supported by the decision of Inverclyde *v.* Inverclyde (1931, P. D. 41)'. I do not know on what grounds a decree of nullity was sought in C. A. 186/37 but the Inverclyde case deals solely with a decree on the ground of impotence. Nevertheless, in my view, decree of nullity on any ground, since they are, according to the authority I have cited, decrees affecting the status of the parties, should be deemed to be included in the expression decree of dissolution of marriage, so that jurisdiction to grant any decree affecting the status of married persons is administered — when the Ordinance foreshadowed by the proviso to Art. 64(1) is enacted — under the same body of general principles. I repeat the passage I quoted from the judgment of Viscount Haldane in the Salvesen case which dealt, as I have said with a marriage void *ab initio* : — 'the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country.' Put the case that the present parties had been married for several years before the husband challenged the validity of the marriage, that children had been born surely it could hardly be denied that to declare the marriage void would be for all practical purposes a dissolution of a marriage.

"For the above reason I hold that I have no jurisdiction to entertain this action and it is accordingly dismissed."

2. In the judgment of District Court, Tel-Aviv, in the "Bichovsky Case" (7, Ct. L. R. at p. 180) it was laid down, that even in the case of a marriage void *ab initio* the Court has no jurisdiction to grant a decree of nullity, under Art. 64, P. O. in C. (The judgment was set aside on appeal on different grounds).

See also the *dictum* of the Chief Justice in C. A. 9/40 (7, P. L. R. 228 ; 1940, S. C. J. 184 at p. 187 ; 7, Ct. L. R. 174) and the judgments of Frumkin and Khayat, JJ., to the same effect.

Cf. dictum of Chief Justice in C. A. 11/41 (1941, S. C. J. 230, at p. 234 ; 9, Ct. L. R. p. 241), beginning "I came to the conclusion .....".

FOR APPLICANT : Egulsky. (*A. M. A.*)

FOR FIRST RESPONDENT : Silberg.

FOR SECOND RESPONDENT : Lipkin.

ORDER.

This is an application under Article 55 of the Order-in-Council for a decision as to which Court should have jurisdiction to determine the validity of a divorce granted by the Chief Rabbinate, Haifa, to both the Respondents in this motion, and also to give a decision as to the

validity of a marriage contracted by the Applicant and the first Respondent.

The Applicant is Palestinian and a member of the Jewish Community. The first Respondent is a British subject by reason of her first marriage, and is not a member of the Jewish Community. The second Respondent was a natural born British subject when he married the first Respondent, and has since obtained double nationality by becoming a Palestinian.

The first and second Respondents were married in 1921. In 1926 the Rabbinical Court in Haifa purported to grant a divorce to the first and second Respondents. In 1931 the second Respondent became a Palestinian. In 1939, when applying for the renewal of her British passport, the first Respondent declared that she was at that time married to the second Respondent. This seems to indicate that she had not very much faith in the decree of divorce granted in 1926. In 1940 the first Respondent married the Applicant according to the Jewish law.

An application was made to the District Court of Tel-Aviv for a declaratory judgment to the effect that the ceremony of marriage performed in April, 1940, was null and void. The ground for that application was that the first marriage between the first and second Respondents was still subsisting and, therefore, the second marriage would be null and void. The learned Relieving President, in a long and very detailed judgment, went thoroughly into all the questions involved, and reached the conclusion that the Plaintiff, that is to say the present Applicant, was asking for a declaration that the status of the first Respondent was not of wife to the present Applicant, but that of wife of the second Respondent. He says, "I fail to see any real difference between such a declaration and a decree of nullity to the same effect." He, therefore, decided that he had no jurisdiction to entertain the action, since, under the Palestine Order-in-Council, 1922, the District Court has no jurisdiction to issue a decree of divorce or dissolution of marriage. This also includes a decree of nullity of marriage.

The second husband has now applied under Article 55 for the determination of the question which Court has jurisdiction to deal with the questions involved. I do not think that there is any Court in this country which has jurisdiction to decide this extremely complicated question. The Rabbinical Court obviously has no jurisdiction since one of the parties is a foreigner, and under Article 64(1) of the Order-in-Council the District Court held that it had no jurisdiction also, two of the parties involved being British and, therefore, foreigners according to the law of Palestine, and I think that the learned President, if I may say so, came to a perfectly correct decision in that case, things being

as they are. As I said, I do not think that there is any Court which can determine this question, and an order will, therefore, be made accordingly.

The first and second Respondents are each entitled to LP. 5 total costs.

Delivered this 26th day of February, 1943.

Acting Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 1/43.

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

BEFORE : Copland, A/C. J. and Khayat, J.

IN THE APPLICATION OF :—

1. Sheikh Suleiman Taji el Farouqi,
2. Hassan Rafat Mohammad Hafiz Khayri. APPLICANTS.

v.

The Arab Bank, Ltd. RESPONDENT.

Guarantees — Privy Council appeals — Guarantee of bank in favour of its branch.

Application to accept guarantee to secure Respondent pending an appeal to the Privy Council, refused :—

A bank cannot guarantee its own branch in respect of an appeal to the Privy Council.

ANNOTATIONS : The judgment of the Supreme Court (C. A. 185/42) is reported in 1942, S. C. J., p. 923.

(*A. M. A.*)

FOR APPLICANTS : Schwartz.

FOR RESPONDENT : Auni Abdul Hadi.

JUDGMENT.

We are not satisfied that the guarantee filed by the Respondent in compliance with condition 3 of our order, dated 13th January, 1943, is a proper guarantee, as the Respondent Bank cannot guarantee its own branch.

The application is, therefore, refused, with costs fixed at an inclusive sum of LP. 5.

Delivered this 23rd day of February, 1943.

Acting Chief Justice.

CIVIL APPEAL No. 41/43.

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

BEFORE : Copland, A/C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Z. A. Chelouche. APPLICANT.

v.

1. I. Roskin Levy, liquidator of the Roumanian Palestine Trading Corporation Ltd.,
2. Dr. O. Mohrus. RESPONDENTS.

Vesting Order — Construction of statutes — Trading with the Enemy Ordinance, Secs. 4(1), 9(1)(*b*) *— Order applying to property coming into "enemy" hands after date of Order.*

Application for leave to appeal an interlocutory order of the District Court, Tel-Aviv, overruling a preliminary objection (Civil Case 276/42) refused :—

The Vesting Order dated 4th January, 1940, applies to all "enemy" property, and comes into force with regard to such property at the date when the person in charge becomes an enemy.

ANNOTATIONS : See the following cases on vesting orders : H. C. 80/40 (9, P. L. R. 516 ; 1940, S. C. J. 350 ; 8 Ct. L. R. 107) ; C. A. 193/40 (9, P. L. R. 499 ; 1940, S. C. J. 520).

(*A. M. A.*)

FOR APPLICANT : Apelbom.

FOR FIRST RESPONDENT : E. Kirschner.

JUDGMENT.

We do not need to hear you Mr. Kirschner.

This is an appeal from an interlocutory order made by the learned President of the District Court, Tel-Aviv. The point in the appeal is that there was no vesting order of the property in respect of which the Custodian claimed to represent the shareholders at a meeting which was held for certain purposes. By a general Vesting Order, dated 4th January, 1940, the High Commissioner vested in the Custodian of Enemy Property all goods held for the purpose of sale, all negotiable instruments, debts and other things in action, and all other rights and interests whether in possession or not belonging to, or held or managed on behalf of, an enemy within the meaning of section 4(1) of the Trading with the Enemy Ordinance, 1939. That order purported to be made under the powers vested in the High Commissioner by Section 9(1)(b) of the

Ordinance. The Appellant argues that that Vesting Order is only effective on goods belonging to persons who were enemies on the date when that order was made. There is nothing in the order itself or in the Ordinance which can possibly support such a view. It is quite clear, to our minds, that the order vests all the prescribed property belonging to an enemy, and comes into force with regard to such property at the date or dates when the owner or the person in charge becomes an enemy. The interlocutory ruling appealed from is, therefore, correct and the application for leave to appeal must be refused. The Respondent is entitled to his costs on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this application.

Delivered this 24th day of February, 1943.

Acting Chief Justice.

CIVIL APPEAL No. 78/43.

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

BEFORE : Gordon Smith, C. J.

IN THE APPEAL OF :—

Mrs. Amalia Livazer (Veizer). APPELLANT.

v.

Moshe Postol. RESPONDENT.

Landlord and tenant —Rent Restrictions (Dwelling-Houses) Ordinance, Sec. 8(1)(c) — Flat required by landlord — Reasonable alternative accomodation — Higher rent — Magistrate's discretion overruled by District Court — C. A. 265/42.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated 29th January, 1943, in Civil Appeal 12/43, allowed and judgment of the Magistrate restored :—

1. It is for the Magistrate to determine whether alternative accomodation is reasonable.

2. If the Magistrate has reasonably exercised his discretion in making such findings these should not be upset by an appellate Court.

REFERRED TO : C. A. 265/42 (*ante*, p. 9).

ANNOTATIONS :

1. See annotations to C. A. 265/42 (*supra*).
2. On how far an appellate Court will interfere with the discretion of the

lower tribunal, see C. A. 62/40 (1940, S. C. J. 171 ; 8 Ct. L. R. 25) ; C. A. 171/40 (1940, S. C. J. 308 ; 8 Ct. L. R. 76) ; C. A. 45/42 (9, P. L. R. 289 ; 1942, S. C. J. 287 ; 11, Ct. L. R. 201) ; (*discretion not interfered with*) ; and C. A. 66/40 (1940, S. C. J. 136 ; 7 Ct. L. R. 165) ; C. A. 164/41 (1941, S. C. J. 390) ; (*discretion wrongly exercised*) ; and see also the cases set out in note 4 to C. A. 66/40 (1940, S. C. J. 136).

(*A. M. A.*)

FOR APPELLANT : Olshan.

FOR RESPONDENT : Rotenstreich & Caspi.

JUDGMENT.

This is an appeal against the decision of the District Court, dated the 29th of January, 1943, under which decision the District Court reversed the judgment of the Magistrate below given on the 31st of December, 1942.

Under the Magistrate's judgment he had granted an eviction order under Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, on the ground that the landlord of the premises occupied by the tenant required those premises for her own occupation and that of her husband, and the Magistrate took into consideration the relevant matters which he had to take under consideration under paragraph (c), that is, after considering all the circumstances of the case, including especially the alternative accomodation available for the tenant he considered it reasonable to give such judgment or make such order. That paragraph clearly vests the discretion in the Magistrate to be exercised when he has taken into consideration all such circumstances.

The Magistrate's judgment details the facts and the evidence and goes at length into the question of the alternative accomodation available. So it is clear that he has taken that matter into consideration, in fact it was evident that the landlord ascertained that 3 alternative flats were available with rents respectively of LP. 7.—, LP. 8.— and LP. 9.—. There was a question also of key money or brokerage, but the rents were LP. 7, LP. 8, LP. 9, and the rent that the tenant had been paying to the landlord in the past was, I think, LP. 5.250 mils per month. That was for rent in 1941, and in view of, as we well know, increases of rents, there is not a great deal of difference between LP. 5.250 mils and LP. 7 for one of the alternative flats.

I agree that the Magistrate in considering the question of the alternative accomodation must exercise that discretion reasonably. I quite agree it would not have been reasonable to say "well there are 3 rooms at the King David at LP. 50 per month or LP. 100 per month", but he had taken all such matters into consideration and he made an order for eviction. He concluded his judgment by saying that :—

> "Having taken *all* circumstances into account, I am of opinion that greater damage would be caused by dismissal of the action than by giving judgment of eviction ; and whereas it appears to me that it is only just that an order for eviction be given, I order defendant to vacate the flat".

He thus made an order which shows that he also took into consideration the financial position of both the landlord and the tenant.

On appeal to the District Court, the District Court themselves dealt with the alternative accomodation. As regards the other flats they found that they were not at the disposal of the Appellant in view of the enormous difference of the rent, and because of some of the considerations which the Magistrate failed, so it is alleged, to take into account, the District Court reversed his decision and allowed the appeal.

It is quite clear that the District Court substituted its own discretion for that of the Magistrate in the Court below and for which, in my opinion, there was no justification for so doing and for reversing the Magistrate's decision. I have already referred you to a similar case C. A. 265 of 1942, and I said in that case that :—

> "The Magistrate, having complied with the requirements of this paragraph (para. (c) of Section 8(1)) and having found the facts to be as stated, made an order in terms thereof".

In that case also I upheld the decision of the Magistrate as he had considered all the facts and circumstances and had applied his mind to the provisions of para. (c) of Section 8(1) which reads as follows :—

> "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 accomodation available for the tenant, considers it reasonable to give such judgment or make such order".

The appeal will, therefore, be allowed, the District Court's decision will be reversed, the Magistrate's judgment stands.

The Respondent will pay the costs here and below to include the sum of LP. 10 advocate's fee for the hearing of this appeal.

Delivered this 2nd day of April, 1943.

Chief Justice.

HIGH COURT No. 9/43.

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

BEFORE : Copland, A/C. J.

IN THE APPLICATION OF :—

Sara Levin Feinstein. PETITIONER.

v.

1. Assistant Chief Execution Officer, Tel-Aviv,
2. Shlomo Levin Feinstein. RESPONDENTS.

Maintenance — Concurrent jurisdiction — Minor not a party whose consent required — Guardian ad litem — Actions for guardianship contrasted.

Application for an order directed to the first Respondent to show cause why he should not proceed with the execution of a judgment of the Rabbinical Court, in Execution File No. 4873/40, granted :—

> In an action for maintenance before a religious Court the minor (unlike in proceedings for guardianship) is not a party and his consent to the jurisdiction is not required.

ANNOTATIONS : It was held in C. A. 40/40 (7, P. L. R. 411 ; 1940, S. C. J. 444), following C. D. C. Jm. 54/29 (not reported) that consent to jurisdiction is necessary in actions for guardianship before a religious Court. See the annotation to C. A. 40/40 in 1940, S. C. J. at p. 445.

As regards the form of consent, see H. C. 79/40 (7, P. L. R. 490 ; 1940, S. C. J. 354), following C. A. 127/26 (1, P. L. R. 109 ; C. of J. 1668) ; C. A. 22/40 (7, P. L. R. 125 ; 1940, S. C. J. 87 ; 7 Ct. L. R. 91) ; H. C. 44/38 (1938, 1 S. C. J. 405 and note ; 4, Ct. L. R. 4 ; P. P. 15.vii.38) ; C. A. 149/42 (1942, S. C. J. 783 and note 2).

See also ruling of Edwards, J., in Haddas *v.* Haddas, D. C. T. A. 293/39 (not reported) and Stevens *v.* Tirard, 56 Times Law Reports, p. 68 (*dictum* of Lord Justice Goddard).

(*A. M. A.*)

FOR PETITIONER : Silberg.

FOR SECOND RESPONDENT : E. Z. Fellman.

ORDER.

This is an application for an order to the Chief Execution Officer, Tel-Aviv, to show cause why he should not execute a judgment of the Rabbinical Court of that district ordering payment of a further LP. 3 to the Petitioner for the maintenance of one of her minor children, in

addition to the sum of LP. 2 already awarded in a previous judgment.

The main ground raised by the Respondent to the petition is that the matter of awarding maintenance is one of concurrent jurisdiction, and there must be consent by all the parties to the Rabbinical Court, that the child being a minor cannot consent and that a guardian *ad litem* should have been nominated by the District Court. I do not think that this is correct. The mother is suing for maintenance for the child. It is money to recompense her for the cost to which she is put by maintaining the child. It seems to me that the child is not a party in this case at all. The mother is claiming for the living expenses to which she is put to maintain the child who cannot sue himself. It is not the same as an action for guardianship to which the child is a party. It seems to me that in this case the learned Chief Execution Officer came to a wrong conclusion on this judgment issued by the Rabbinical Court, whatever its legal merits may be, and I do not wish to cast any doubts upon it ; it is, at any rate, a judgment given by the competent Court in a matter in which it had jurisdiction.

That being so there is no reason why it should not be executed. The rule *nisi* will, therefore, have to be made absolute. The Petitioner is entitled to disbursements and LP. 5 advocate's fees.

Given this 26th day of February, 1943.

Acting Chief Justice.

HIGH COURT No. 146/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Adolf David. PETITIONER.

v.

1. Assistant Chief Execution Officer, Jerusalem,
2. Hendel David. RESPONDENTS.

Rabbinical Court — Jurisdiction — Action in District Court for maintenance — Subsequent action in Rabbinical Court for separation and allowance — "Maintenance" and "alimony", "Mezonoth" — Judgment of Rabbinical Court.

Application for an order directed to the first Respondent to show cause why his order in Ex. File. No. 590/40, to execute a judgment of the Rabbinical Court should not be set aside, refused :—

A judgment of the District Court awarding maintenance for desertion is no bar to an action in the Rabbinical Court for separation and alimony.

ANNOTATIONS :

1. The words "alimony" and "maintenance" appearing in the Palestine Order in Council should be given the meaning ascribed to them by English Law (S. T. 1/28 : 1, P. L. R. 395 ; C. of J. 126) ; *viz.* : *Alimony* — a payment by the husband to the wife after divorce or separation, or (*pendente lite*) during such proceedings. This is within the exclusive jurisdiction of the Religious Courts (P. O. in C. Art. 51). *Maintenance* — the allowance ordered to be paid to a wife when the husband has deserted her (C. A. 62/37 : P. P. 6.xi.37 ; 2 Ct. L. R. 133). This comes within the concurrent jurisdiction of the Religious Courts (Art. 54). The liability to pay maintenance may arise not only in respect of a wife (H. C. 49/32 : C. of J. 1610). English law does not go beyond defining these two terms and reference should then be made to the law of the community to ascertain the rights of the parties (H. C. 49/32, *supra* ; H. C. 22/39 ; 6, P. L. R. 323 ; 1939, S. C. J. 273 ; 6 Ct. L. R. 45). Nor should the definition of "marriage" in the P. O. in C. be sought in English law (H. C. 22/39, *supra*).

See also H. C. 28/38 (5, P. L. R. 351 ; 1938, 1 S. C. J. 373 ; 3 Ct. L. R. 287) ; C. A. 178/34 (2, P. L. R. 282 ; C. of J. 1934—6, 582 ; P. P. 3.iv.35) ; H. C. 12/42 (9, P. L. R. 213 ; 1942, S. C. J. 254).

2. In the present case the causes of action before the two courts were distinct. When both the Civil Courts and the Religious Courts have jurisdiction and the parties agree to refer to the Religious Courts, they cannot later apply to the Civil Courts in connection with the same matter : C. A. 112/36 (C. of J. 1934—6, 750 ; 1 Ct. L. R. 12) ; C. A. 51/38 (5, P. L. R. 262 ; 1938, 1 S. C. J. 224 ; 3 Ct. L. R. 173) ; C. A. 47/42 (9, P. L. R. 312 ; 1942, S. C. J. 231).

(*A. M. A.*)

FOR PETITIONER : Buxbaum.

FOR SECOND RESPONDENT : Kister and Rosenberg.

ORDER.

This is a return to a rule *nisi*, directed to the Chief Execution Officer to show cause why his order, ordering the execution of a judgment of the Rabbinical Court, should not be set aside on the ground of lack of jurisdiction. The facts, so far as relevant, are as follows :—

The second Respondent, the wife, had obtained from the District Court a judgment for maintenance for a sum of LP. 4.500 mils monthly for herself and her child. The wife later on brought an action in the Rabbinical Court asking for separation and payment of an allowance consequent thereon. The Rabbinical Court gave a judgment for separation and decreed a sum of LP. 5 per month, in addition to the sum of LP. 4.500 mils already awarded by the District Court.

We have heard considerable argument on whether in Hebrew Law

there is any difference between maintenance and alimony. The words "maintenance" and "alimony" are used in the Order-in-Council, and each has a certain meaning which, it has been held, is the meaning attributed to it by the English Law. Maintenance is a payment made to a wife by a husband who deserts her. Alimony is a payment made to a wife after a decree of divorce or a separation has been issued, or during the pendency of an action for divorce or separation in certain circumstances. The difference between these two conceptions is important, because in the Order-in-Council alimony is a matter which is within the exclusive jurisdiction of the Rabbinical Court, whilst maintenance is a matter within the concurrent jurisdiction of the District Court and of the Rabbinical Court, subject to the consent of the parties in the latter case. In this case it is quite clear that the cause of action before the Rabbinical Court was entirely distinct from the cause of action which was before the District Court. Before the Rabbinical Court the action was for separation, while before the District Court it was for desertion by the husband. The Rabbinical Court was, therefore, right in giving the judgment which it gave as it was a matter within their exclusive jurisdiction, and not within the jurisdiction of the District Court. Whether, therefore, *Mezonoth* in Hebrew is a word which has the double meaning in English of maintenance and alimony is a matter which is of no importance in determining this present petition. While it is true that this Court does not encourage parties to run from one Court to another on separate actions, yet in this case the second Respondent had no option but to go to the Rabbinical Court to get a separation order, as that Court was the only competent Court to give her what she asked. As the learned Chief Execution Officer remarked, the Rabbinical Court could simply have fixed the allowance at an inclusive sum of LP. 9.500 mils, but in their judgment they fixed, as I have said, a sum of LP. 5, in addition to the sum of LP. 4.500 mils awarded by the District Court, in order to make quite sure that nobody could come and say that the LP. 4.500 mils was included in that former sum.

The final point is that the Rabbinical Court did not mean separation when they made their order. It is quite impossible to say what was in the minds of the learned Rabbis, but when they made the separation order, we take it, presumably that they meant it.

For these reasons the rule will be discharged. The second Respondent is entitled to her costs to include disbursements with a sum of LP. 10 advocate's attendance fees.

Delivered this 19th day of January, 1943.

British Puisne Judge.

HIGH COURT No. 15/43.

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

BEFORE : Copland, A/C. J. and Abdul Hadi, J.

IN THE APPLICATION OF :—

Dimitri Antoniades. PETITIONER.

v.

1. Abdul Rahman Salim el-Kara,
2. Chief Execution Officer, Jaffa. RESPONDENTS.

Consent judgment to postpone eviction — Judgment debtor applying for further extension — Unsuccessful action to annul consent judgment — Unsuccessful appeal from judgment dismissing action — Petition to H. C. to stay Execution — Incomplete disclosure of relevant facts.

Return to an order *nisi* issued on the 11.2.1943, directing 2nd Respondent to show cause why he should not refrain from executing judgment of eviction in favour of 1st Respondent (file No. 161/42 of Magistrate's Court, Jaffa, & 1031/42 of the Execution Office, Jaffa) ; order discharged :—

1. Where judgment debtor failed to test validity of consent judgment by applying for leave to appeal to Court of Appeal, High Court will not entertain petition for an order to Chief Execution Officer to stay execution.

2. Application for postponement of execution of consent judgment amounts to acknowledgment of its validity, and estops from alleging its invalidity or that the judgment is contrary to law.

3. High Court will refuse a petition, if the petitioner failed to make full disclosure of all relevant facts.

ANNOTATIONS :

1. The well-established rule that the High Court will not interfere when an alternative remedy is available has already in H. C. 55/42 (9, P. L. R. 349 ; 1942, S. C. J. 308 ; 11 Ct. L. R. 182) been further extended by laying down the rule that the High Court will also not interfere when the alternative remedy was not applied for in time. See also H. C. 47/37 (P. P. 24.viii.37 ; Gorali, p. 33) wherein it was found that Petitioner's course to apply for leave to appeal from order of District Court before testing this Order in the High Court was correct ; *cf. dictum* of Chief Justice in C. A. 134/40 (7, P. L. R. 405 ; 1940, S. C. J. 243 ; 8 Ct. L. R. 201) that person not having tested an order made by Police cannot rely on it.

2. Petitioner who obtained a stay of execution of an order is estopped from questioning its validity in the High Court : H. C. 71/32 (1, P. L. R. 771 ; C. of J. 859).

3. The ruling on the third point follows the decisions in H. C. 62/42 (12 Ct. L. R. 196 ; 1942, S. C. J. 447), H. C. 78/42 (12 Ct. L. R. 214 ; 1942, S. C. J. 529) and H. C. 90/42 (12 Ct. L. R. 222 ; 1942, S. C. J. 679).

4. A distinction is made between the Rent Restrictions Ordinances as the R. R. (Business Premises) Ordinance does not contain provisions similar to proviso to sec. 8(1) of the R. R. (Dwelling Houses) Ordinance. But it may well be argued that the wording both of sec. 8(1) of the R. R. (Dwelling Houses) Ordinance and of sec. 4(1) of the R. R. (Business Premises) Ordinance while mentioning the "execution officer" affords to tenants same protection as proviso to sec. 8(1) of the R. R. (Dwelling Houses) Ordinance and this proviso is, therefore, superfluous or inserted *"ex abundante cautela"*; See in this respect H. C. 47/37 (Gorali, p. 33).

5. As to postponement of eviction by consent of parties see H. C. 10/42 (9, P. L. R. 81; 1942, S. C. J. 132; 11 Ct. L. R. 57; Gorali, p. 127), H. C. 94/42 (1942, S. C. J. 598; 12 Ct. L. R. 142; Gorali, p. 148) and H. C. 106/42 (1942, S. C. J. 644; 12 Ct. L. R. 149; Gorali, p. 149).

(*M. L.*)

FOR PETITIONER: Lustig.

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

ORDER.

In this case the first Respondent brought an action for eviction against the Petitioner. By arrangement between the parties, the first Respondent agreed with the Petitioner to postpone eviction for ten months, and a consent judgment to that effect was given, whereby the Petitioner agreed to leave the premises after that period. When this judgment was put in execution the Petitioner applied for a further extension of two months, and, when that was refused, brought an action asking to annul the former judgment, which the Magistrate dismissed, and this decision was confirmed by the District Court on appeal. During the course of the proceedings in December, 1942, the provisions of the Rent Restrictions (Business Premises) Ordinance were extended to Jaffa. The Petitioner now asks for an order to the Chief Execution Officer to stay execution, relying on the provisions of the above Ordinance.

In the first place the original judgment was a consent judgment, and the Petitioner took advantage of the extensions granted to him thereunder. This judgment was confirmed by the District Court on appeal, when the Petitioner sought to have it annulled, and the proper course for the Petitioner was to have applied for leave to appeal to this Court. Having consented to judgment, he cannot now try to go back on that consent. Further, there is no provision in the Rent Restrictions (Business Premises) Ordinance, 1941, similar to that found in the proviso to Section 8(1) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940.

In the second place, by applying for a postponement of two months of the order of eviction, the Petitioner is now estopped from challenging that order by alleging that it was invalid, or contrary to law. By asking for a postponement, he acknowledged the validity of the order.

And lastly, the Petitioner did not make a full disclosure of all the relevant facts when applying for the order *nisi*. When this court is asked to exercise its discretionary powers, a full disclosure is essential and on that ground alone an order can be refused.

For these reasons the rule *nisi* is discharged, with costs at LP. 10 advocate's fee to the first Respondent.

Given this 11th day of March, 1943.

Acting Chief Justice.

CIVIL APPEAL No. 19/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

David Ben Moula Rahamim. APPELLANT.

v.

Jacob Ben Moula Rahamim. RESPONDENT.

Ownership of house — House erected by one co-owner on jointly owned land after consent partition — Evidence of partition — C. A. 210/41 — Partition effected a long time back.

Appeal from a judgment of the Land Court of Jerusalem dated 17.12.42 in L. Case No. 20/40, dismissed :—

An unregistered partition of land made 20 years ago may not be challenged.

FOLLOWED : C. A. 210/41 (8, P. L. R. 556 ; 1941, S. C. J. 537).

(*A. M. A.*)

ANNOTATIONS :

1. See C. A. 210/41 (*supra*).

2. On the effect of a party's failure to establish his claim in time see L. A. 51/27 (C. of J. 1087) and C. A. 119/42 (1942, S. C. J. 755, on pp. 764—5).

(*H. K.*)

FOR APPELLANT : Levitsky and Abrahamovsky.

FOR RESPONDENT : Goitein and Ben Yehuda.

JUDGMENT.

The facts of this case are shortly as follows. In the year 1922 a plot of land in the Ruhama Quarter was purchased by the Appellant and Respondent and registered in their joint names in the Land Registry. Within a few months afterwards, a house was erected upon a part of this land and the dispute is as to the ownership of this house. The Respondent, who is the Plaintiff in the Court below, says that this house was erected entirely at his own expense and that the Appellant did not pay anything towards it. Also he says that the house was erected upon a part of the land which was by agreement specially set aside for that purpose. In other words, that by consent the land was partitioned between the two registered owners. Now, there is a mass of evidence in this case that the house was erected solely by the Respondent and that cannot in any way be queried now.

With regard to the partition, on which the case really turns, the two parties of course contradicted one another as would be expected, but apart from that there was the evidence that a stone wall was erected between these two plots, that no objection was ever taken to that by the Appellant and that through all this time and until comparatively recent times, there was never any objection or claim made to the ownership of this house. There was also evidence before the Land Court that the Appellant for some time paid rent to the Respondent. As regards the ownership of the house, therefore, that cannot be queried. As regards the land, as I have said, I think that there is evidence before the Land Court to justify it in coming to the conclusion that there had been a partition by consent of the parties and it is not, therefore, for this Court to interfere. In support of that there is quoted Civil Appeal No. 210/41, Na'im Ibrahim Ali el Haj *v.* Safiya Qasim Hamud and others (8 P. L. R., p. 556). In this case the partition of the land was made some 20 years ago, much too late now to come forward and claim that a partition that had been in existence all this time is null and void. In fact I think that the case is put very clearly by one of the witnesses, David Korshinsky, where he says this: "It seems that David wants to get hold of something great because he never got hold of something like this at all."

For these reasons the appeal is dismissed with costs on the lower scale to include the sum of LP. 15 advocate's attendance fee on the hearing of this appeal.

Delivered this 1st day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 285/42.

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

BEFORE : Rose, J.

IN THE APPLICATION OF :—

Custodian of Enemy Property on behalf of "Polholskor" firm. APPLICANT.

v.

1. Binem Zalcman,
2. Shalom Pieprz. RESPONDENTS.

Adjournments — Letter to P. D. C. from Polish Consul General on impossibility to obtain evidence on commission from Poland, and asking for adjournment — Reasonable exercise of discretion — Possibility to apply for restoration of case to list, C. P. R. 183(3).

Application for leave to appeal an order of the District Court, Tel-Aviv (*Cur.* Plunkett, J., P. D. C.) in Civil Case No. 322/38, adjourning the case generally, dismissed :—

Adjournments are within the discretion of the trial Court and this discretion will not be interfered with on appeal if reasonably exercised.

(*A. M. A.*)

ANNOTATIONS :

1. On how far an appellate Court will interfere with the discretion exercised by a lower Court see generally note 2 to C. A. 78/43 (*ante*, p. 18).

2. On discretion in the matter of adjournments see, *e. g.*, C. A. 222/38 (5, P. L. R. 531 ; 1938, 2 S. C. J. 184 ; 4 Ct. L. R. 219) ; C. A. 68/39 (1939, S. C. J. 358 ; 6 Ct. L. R. 221) ; CR. A. 85/40 (7, P. L. R. 481 ; 1940, S. C. J. 328 ; 8 Ct. L. R. 220) ; C. A. 177/41 (8, P. L. R. 470 ; 1941, S. C. J. 467) ; C. A. 135/41 (8, P. L. R. 509 ; 1941, S. C. J. 526) ; I. T. A. 13/42 (1942, S. C. J. 571) and C. A. 103/42 (1942, S. C. J. 597).

3. On the position of the Custodian of Enemy Property in such cases see Adm. 2/40 (8, P. L. R. 339 ; 1941, S. C. J. 503) and C. A. 77/42 (1942, S. C. J. 434 ; 12 Ct. L. R. 50).

(*H. K.*)

FOR APPLICANT : Linderman.

FOR RESPONDENTS : P. Joseph.

ORDER.

This is an application for leave to appeal from an order of the District Court of Tel-Aviv, adjourning the case generally. The Applicant says that there were no good or sufficient reasons for granting this adjournment, and he takes particular exception to the fact that a letter was addressed to the President of the District Court by Dr. Rosmarin,

Consul General for Poland. I have looked at that letter and it is true that the letter says that it is impossible at the present moment to take evidence on commission of persons residing in Poland. The second paragraph says that the Consul General will be obliged to the President of the Court if he will advise the Custodian that an adjournment of the case is desirable in order to enable Messrs. Zalcman and Pieprz to defend the case. Whether that letter should have been written to the President without the Applicants seeing it is a matter of taste and opinion, but before I, as a Court of Appeal, can upset this order of the learned President I must be satisfied that in making it he was acting unreasonably — that he did not consider the merits of the matter and so forth. Nothing has been said to me which seems to me to be nearly strong enough to justify my interfering with what, after all, is eminently a matter of discretion for the trial Court — the granting or refusing of adjournments. No doubt to adjourn a case generally on the grounds that have been alleged in this case is a course that would only be adopted by a trial Court after very careful consideration, but I have no reason to believe, in fact I must assume the contrary, that that careful consideration has not been given to the particular facts of this case. I would add, as Mr. Linderman himself has pointed out, that there is always room for an application for the restoration of the case to the list under Civil Procedure Rule 183(3).

For these reasons I am of opinion that I am unable to assist the Applicant in this case, and the application must, therefore, be dismissed.

The Respondents will have their costs, which I assess at an inclusive sum of LP. 10.

Delivered this 19th day of January, 1943.

British Puisne Judge.

INCOME TAX APPEAL No. 20/42.

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

BEFORE : Gordon Smith, C. J.

IN THE APPEAL OF :—

Berko Dov Osherovitz. APPELLANT.

v.

Assessing Officer, Tel-Aviv. RESPONDENT.

Income Tax — Appeal under Sec. 53(1) *I. T. O. — Partnership converted into joint stock company in November,* 1941, *to evade income tax — I. T. O. Secs.* 5, 6 *and repealed proviso — Tax paid on income of year of assessment under the proviso — Subsequent year tax demanded on income of previous year — Whether double taxation — Assessment and taxation — Interpretation of Statutes — Bradbury v. English Sewing Cotton Co., Commissioners I. R. v. Roberts, Brown v. National Provident Institution — Stating a case, Sec.* 53(5).

A person who comes under the repealed proviso to sec. 6 pays income tax for both 1941/2 and 1942/3 on the basis of his income for 1941/2. This does not constitute double taxation.

REFERRED TO: 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; Commissioners of Inland Revenue *v.* Roberts, 1925, 41 T. L. R. 623, 9 Tax C. 603; 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.

ANNOTATIONS: In I. T. A. 10/42 (1942, S. C. J. 841) the Court also refused to state a case where the principle on which the Court acted was sufficiently clear.

(*A. M. A.*)

FOR APPELLANT: Polonsky.

FOR RESPONDENT: Levin and Wittkowsky.

JUDGMENT.

This is an appeal under Section 53(1) of the Income Tax Ordinance, No. 23/1941, against the refusal of the Assessing Officer, Tel-Aviv, to revise his assessment, and it is necessary to set out certain dates and facts, which are not in dispute.

The Ordinance, published in the Official *Gazette* of the 22nd August, 1941, came into force on the 1st September, 1941. The amending Ordinance was enacted on the 30th March, 1942, and came into force on the 1st April, 1942, except as regards Section 13, which was alone antedated to the 1st September, 1941, in consonance with the substantive Ordinance. This Section 13 dealt with deductions and does not concern this case.

Previously to 1941 the Appellant carried on business in conjunction with his wife under a registered partnership which was formally dissolved on the 19th November, 1941, the business being transferred to and thereafter carried on by a Limited Company of the same name and of which the Appellant and his wife were the principal, if not the only original shareholders. The Company was formally incorporated on the 19th November, 1941. It is not disputed that this

change took place for the purpose of evading the liability to pay income tax, anyhow as far as was legally possible under the provisions of the Ordinance.

Under Section 5 of the Ordinance, which imposes income tax for the first time in the history of Palestine, income tax is payable for the year of assessment commencing on the 1st April, 1941, and for each subsequent year commencing similarly on each 1st day of April. We are not concerned with the rates at which such income tax is payable, but this Section 5 also specifies the gains, profits or other income in respect of which income tax is payable.

Section 6 of the Ordinance, which prescribes the temporal basis on which the income is to be assessed for tax purposes, reads as follows :—

> "Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment."

Then follows a proviso which was repealed by the amending Ordinance of 1942, but which read as follows :—

> "Provided that when in any year of assessment any person ceases to possess any source of income which was acquired by him prior to the 1st day of April, 1940, tax on the income from that source shall be charged, levied and collected upon the income of the year of assessment and not upon the income preceding the year of assessment."

As stated, this proviso disappeared as from the 1st April, 1942, the only words substituted therefor being "notwithstanding that the source of income may have ceased before or during the year of assessment."

We will now deal with the income tax charged to and paid by the Appellant during this first year of Income Tax in Palestine, *i. e.* the year ending March 31st, 1942.

Because the source of the greater part of his income had ceased during the year of assessment (1941/42) he was, therefore, assessed, in accordance with the proviso to Section 6, and was not assessed on the income for the year preceding such year of assessment, and he paid the tax accordingly assessed. This completes his liability for income tax for the year of assessment, 1941/42, *i. e.* the year ending on the 31st March, 1942.

We now come to the next year's liability, *i. e.* 1942/43, and the year of assessment which ends on the 31st March, 1943. As I have stated, the law was changed slightly as from the 1st April, 1942, and the temporal basis is that in Section 6, now without the proviso. He is

therefore assessable as stated in the section, and it is quite clear that he is assessable on his income for the year ending March 31st, 1942, *i. e.* the year preceding the year of assessment, but the tax he will be paying is for the year ending 31st March, 1943.

He made a return accordingly but failed to shew his full income for the year (1941/42) and was assessed by the Assessing Officer on the full income. The Assessing Officer made the following comment in his Order of Assessment: "In the return submitted by the person chargeable to tax for the year ending 31.3.1942 his profits from his trade for the period 1.4.1941 up to 31.8.1941 were not included." In my opinion there is a mistake here in that he was chargeable for tax for the year ending 31.3.43 and not for the year ending 31.3.42. However, objection was made in due form, and the objection was overruled by formal notice, dated the 11th November, 1942, in which it is stated: "I am unable to accept the objections raised in your notice of 13.11.1942. I determine your chargeable income for the year of assessment 1942/43 to be LP. . . .". This is correct, and it is the year of assessment ending 31st March, 1943, for which he is charged with tax. It may be that this mistake is responsible for the confusion that has arisen, but I doubt it.

The Appellant's complaint is that he is being doubly taxed and that having paid tax on the profits of the business from 1.4.1941 to 31.8.1941 and such having been accepted, he cannot be taxed again on the same amount. But he is not being taxed again but is being assessed again on the same amount.

He paid tax for the year 1941/42 on a certain basis and no objection is taken to that. He now has to pay tax for the year 1942/43, and it so happens that this second year's tax is assessed on the same basis as the first year's tax, but that is merely fortuitously so, by his own action. By this action and because of such and the source of his income ceasing during the current year of assessment, he was not assessable as would ordinarily have been the case, *i. e.* on the income of the year preceding the year of assessment, but under the proviso to the section became taxable on his current income for that same year. Therefore, in his case, the year of assessment was the current year in which he received the income and he was not assessed on his previous year's income.

As I have said, but I repeat it, that completed his obligation to pay income tax for the first year in respect of which people became liable to pay Palestine Income Tax for the first time.

We now come, and I am repeating myself to some extent, to the obligation to pay income tax for the next or second year, and although

Section 6 had been slightly amended, such amendment did not affect the Appellant at all as regards this second year. On what basis is he therefore taxable in respect of this second year's obligation? In my opinion it is perfectly clear. The substantive part of Section 6 remains exactly the same as previously, and the basis of his assessment is his income during the year preceding the year of assessment. The year of assessment is that ending 31st March, 1943, and it naturally follows that he is assessable on his income for the year ending 31st March, 1942.

For the Appellant it was argued that this constitutes a case of double taxation in that it is the same person being taxed, the same income being taxed, the source of such income so taxed is the same, and for the same period, and that tax has already been paid. But, and herein lies the material distinction to be drawn, it is not the same tax that he is being called on to pay again. Admittedly he has paid the 1941/42 income tax, but he is now being called on to pay the income tax for 1942/43, *i. e.* for the year ending 31st March, 1943. The two taxes are entirely distinct. But for his own action the Appellant would have paid income tax for the year 1941/42 on the basis of his income for the year 1940/41, but owing to his own action he became assessable on the income of that current year 1941/42 and not on the previous year's income. The fact that, in his case, the next year's tax is also assessable on the same year's income, *i. e.* 1941/42, does not make it a case of double taxation. It is a different tax entirely that he has now become liable to pay, and although it may be that it is at the same rate as previously, it might very well have been at a higher rate. Even if it could possibly be held to be a case of double taxation, which in my opinion it is not, the law is perfectly clear and in such a case it would make no difference.

I agree entirely with the various quotations made from Maxwell on the Interpretation of Statutes as to the necessity for a strict interpretation of taxing statutes, and if there is a doubt, then the subject should have the benefit of such doubt. Similarly, as regards the retrospective or retroactive nature of statutes, such must be clearly stated if they are so to be interpreted. If the proviso to Section 6 had not been included in the original enactment, then the Appellant would have had to pay tax on the basis of his income for 1940/41 and not on the basis of his income for 1941/42, and even if it had not been amended, he would still have had to pay tax for the year 1942/43 on the basis of his income for 1941/42, *i. e.* the year preceding the year of assessment. The amendment has not, therefore, affected the Appellant, as regards his 1942/43 tax, and no question of it being retrospective arises.

The cases quoted for the Appellant, namely, Bradbury *v.* English Sewing Company, 1923, Appeal Cases 744 (the Bradbury case), Commissioner J. R. *v.* Roberts, 9 Tax Cases 603 ; 41, Times Law Reports, 623, (the Roberts case) and Brown *v.* National Provident Institution, 1921, Vol. 2, Appeal Cases, page 222, do not assist the Appellant's case, if anything the other way, and in the Roberts case the facts were very different. It may be that it has been said that there is a presumption against double taxation, but in my opinion, this is clearly not a case of double taxation.

In my opinion, therefore, the appeal should be dismissed with costs to include LP. 15 advocate's attendance fee, and the Assessing Officer's decision is upheld.

With regard to the request that if my decision is against the Appellant I should state a case for the Court of Appeal, as provided for in sub-section (5) of Section 53 of the Ordinance, I understand that this case is in the nature of a test case. Had the matter been of any complexity, or if I had a scintilla of doubt as to the correctness of my decision, I would gladly have acceded to such request. As however, such is the contrary, and I have no such doubt or any hesitation at all on the matter, I consider that I should be doing the Appellant a disservice by acceding to such request, thereby involving him in additional costs. It is clear that the law intends such decisions to be final, unless the Judge himself otherwise desires. The request is, therefore, refused.

Delivered this 10th day of March, 1943.

Chief Justice.

HIGH COURT No. 147/42.

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

BEFORE : Rose, J.

IN THE APPLICATION OF :—

The Labour Council of Tel-Aviv and Jaffa and others. PETITIONERS.

v.

1. Chairman and Members of an Arbitration Board under the Defence (Trade Disputes) Order, 1942,
2. Delfiner Silk Industry Ltd.,
3. Carmil Textile Dyeing Works Ltd. RESPONDENTS.

Labour Council petitioning H. C. for order restraining Arbitration Board from dealing & deciding certain disputes between employer & employees — Question whether appointment of Arbitration Board of legal effect & strike illegal or Board improperly appointed & strike legal — Magistrate trying criminal case regarding question of illegality or otherwise of strike — Discretionary powers of H. C. — Non intervention of H. C. where normal channels of justice can reasonably dispose of question at issue.

Application to restrain first Respondent from assuming jurisdiction in a dispute between Petitioner and second and third Respondents. Order *nisi* discharged :—

1. Exercise of powers by High Court — discretionary.

2. Not sufficient for petitioner merely to allege a technical violation of right ; High Court, before intervening, must be satisfied that intervention necessary for proper administration of justice.

3. High Court will not intervene where normal channels of justice can reasonably and substantially dispose of question at issue.

(*M. L.*)

ANNOTATIONS : The jurisdiction of the High Court differs from that of the High Court in England : H. C. 78/39 (7, P. L. R. 35 ; 1940, S. C. J. 25) ; H. C. 104/41 (8, P. L. R. 593 ; 1941, S. C. J. 601) ; H. C. 108/42 (1942, S. C. J. 883). The principles on which that jurisdiction is exercised have been set out in H. C. 78/39 (*supra*) where earlier decisions are reviewed :—

The jurisdiction of the High Court is discretionary and will only be exercised if such is necessary for the administration of justice : H. C. 7/39 (1939, S. C. J. 71 ; 5, Ct. L. R. 84), H. C. 78/39 (*supra*), H. C. 104/41 (8, P. L. R. 593 ; 1941, S. C. J. 601), H. C. 129/42 (1942, S. C. J. 799). The jurisdiction is further subject to the following limitations :—

1. If a public officer's duties are defined by statute, the High Court will not interfere unless he has failed to comply with his statutory duties : H. C. 78/39 (*supra*) and cases therein cited, H. C. 85/40 (7, P. L. R. 594 ; 1940, S. C. J. 413), H. C. 75/41 (8, P. L. R. 372 ; 1941, S. C. J. 369), H. C. 107/42 (1942, S. C. J. 666).

2. Where a discretion is vested in a public officer, the High Court will only interfere when such officer has misdirected himself in law or has failed to direct his mind to the question of discretion : H. C. 78/39 (*supra*), H. C. 64/40 (7, P. L. R. 474 ; 1940, S. C. J. 535 ; 8, Ct. L. R. 219), H. C. 75/41 (8, P. L. R. 372 ; 1941, S. C. J. 369), H. C. 16/42 (9, P. L. R. 83 ; 1942, S. C. J. 139 ; 11, Ct. L. R. 57), H. C. 130/42 (1942, S. C. J. 907).

3. The High Court will not assume jurisdiction where some other remedy exists : H. C. 78/39 (*supra*) and cases therein cited. This rule has lately been extended to cases where another remedy would have existed : H. C. 15/43 (*ante*, p. 25) and H. C. 55/42 cited in note 1 thereto. For an exceptional case where the interests of justice demanded the intervention of the High Court in spite of the existence of an alternative remedy see H. C. 108/42 (1942, S. C. J. 883).

4. The High Court will not interfere where the act complained of is already completed or carried into effect : H. C. 78/39 (*supra*) and cases therein cited,

H. C. 102/40 (1940, S. C. J. 570 ; 8, Ct. L. R. 167), H. C. 88/41 (8, P. L. R. 489 ; 1941, S. C. J. 449 ; 11, Ct. L. R 188).

5. The High Court may also refuse to interfere when the petitioner has been guilty of laches : H. C. 78/39 (*supra*), H. C. 45/40 (7, P. L. R. 342 ; 1940, S. C. J. 213 ; 8, Ct. L. R. 61), H. C. 74/41 (8, P. L. R. 370 ; 1941, S. C. J. 373), H. C. 80/41 (1941, S. C. J. 485), H. C. 28/42 (1942, S. C. J. 322 ; 11, Ct. L. R. 169), H. C. 20/42 (9, P. L. R. 95 ; 1942, S. C. J. 894).

(*H. K.*)

FOR PETITIONER : Berinson.

FOR FIRST RESPONDENTS : Otto May (Chairman).

FOR SECOND AND THIRD RESPONDENTS : Seligman.

FOR ATTORNEY GENERAL : Solicitor General — (Griffin) & Crown Counsel — (Rigby).

ORDER.

This is the return to an order directed to the Respondents to show cause why a certain decision of the first Respondents dated 20th December, 1942, should not be set aside and why the first Respondents should not refrain from hearing and determining certain disputes between the Petitioners and the second and third Respondents.

Various objections in the nature of short points were raised both by Mr. Seligman, counsel for the second and third Respondents, and by the learned Solicitor General, who was intervening at the instance of the Attorney General. One of these points was that the first Petitioner was not a legal person ; a second was that the affidavits were not filed in accordance with the provisions of the High Court Rules ; a third was that the Petitioners had omitted to file a certified copy of the decision to which objection was taken. I heard argument at length on those matters, but I would not wish to decide an important matter of this kind on points such as those, and I, therefore, do not propose to express any opinion with regard to them.

It seems to me that there is a more fundamental obstacle in the way of the Petitioners. As has been pointed out repeatedly in this Court, the exercise of the powers of the Supreme Court sitting as a High Court of Justice is discretionary, and it is not sufficient for a Petitioner merely to allege that there has been a technical violation of a right. Before this Court will intervene it is necessary for it to be satisfied that its intervention is required for the proper administration of justice; and, in deciding this question, one of the considerations that it will take into account is whether the normal channels of justice can reasonably and substantially dispose of the questions at issue between the parties. In this present case the principal matter to be decided is

whether a certain strike, in which certain persons who are members of the petitioning Association are engaged, is illegal. That is a matter that is governed to a large extent by the Defence (Trade Disputes) Order, 1942. That order sets out in considerable detail what may be done administratively by the Government in the event of certain labour disputes occurring. If I may summarise the relevant provisions from the point of view of these proceedings, they are that, if a dispute breaks out between an employer and a group of employees, the District Commissioner, should the matter be reported to him by either of the disputing parties, must 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. If, on the other hand, he attempts to conciliate, then he has twenty-one days within which to see whether his efforts are to be successful. If, at the end of that term, his efforts are not successful he must then, 'without delay', according to the words of the order (which means, no doubt, without 'unreasonable delay'), report to the High Commissioner. The High Commissioner then, no doubt on the advice of his technical and professional advisers, will decide whether he himself will appoint an Arbitration Board under the terms of the Order. A decision to appoint such a Board must be communicated within fourteen days of the receipt of the report made by the District Commissioner.

It is alleged by the Petitioners that one or more of the necessary steps which I have just outlined have not been taken, and that, therefore, the appointment of these five persons, who constitute the first Respondents, as an Arbitration Board is of no legal effect. It would follow from the terms of the Order itself that, if the Board was properly constituted and appointed, any strike taking place as a result of the same disputes which had given rise to the appointment of the Board would be illegal. If, on the other hand, the Board was improperly appointed then, at any rate as far as this Order is concerned, the strike would be legal.

The decision of those matters must depend to a considerable extent on evidence ; and while in a necessary case the Supreme Court, sitting as a High Court of Justice, will not shrink from entering upon such an enquiry, I am informed that as regards this particular matter there is a criminal prosecution actually at the present moment in progress before the Chief Magistrate of Tel-Aviv. In my opinion, to put the matter at its lowest, it is more convenient that a question of this kind should be determined by a Court whose normal every-day duty is to decide questions of fact as a result of hearing evidence called before it.

As, then, the substantial issues raised in this petition will be decided

in the course of the proceedings now before the Chief Magistrate, it follows that the rule must be discharged.

I would add, and I have no doubt that this aspect of the matter has already been considered by the learned Solicitor General, that it would seem to be desirable that this prosecution should be terminated as soon as can reasonably be managed, so that this unfortunate dispute between employers and employees should not unduly be protracted.

With regard to costs, I agree with the learned Solicitor General that his intervention was not untimely. In view of the fact, however, that it was an intervention, the Attorney General not being cited by the Petitioners, I think that the fair order is that he shall have no costs. The second and third Respondents will have their costs which, in all the circumstances of the case, I assess at an inclusive sum of LP. 25.—.

Given this 8th day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 40/43.

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

BEFORE : Gordon Smith, C. J.

IN THE APPEAL OF :—

Aaron Shwartz. APPELLANT.

v.

1. Mendel Hoiser,
2. Lea Hoiser,
3. Shmuel Hoiser. RESPONDENTS.

Room taken in rent for lessee's mother and brother — Landlord terminating agreement & suing for eviction on ground, inter alia, that tenant himself does not live in the room — Meaning of "tenant" under Rent Restrictions (Dwelling Houses) Ordinance — Protection afforded by Rent Restrictions Ordinance to tenant's family.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 23rd of December, 1942, in Civil Appeal No. 145/42, dismissed :—

1. "Tenant" under Rent Restrictions (Dwelling Houses) Ordinance includes the tenant himself and his wife and children who live with him and also other persons for whom the tenant has to provide accomodation such as a domestic servant or relative who is dependent upon him by reason of infirmity or otherwise.

2. Where tenant himself was not in personal occupation when making the contract of lease for his family and consequently had neither renounced occupation nor given up possession nor sublet the premises his family is entitled to the protection of the Ordinance.

FOLLOWED: Chiverton *v.* Ede, 1921, 2 K. B. pp. 39 & 45.

DISTINGUISHED: Skinner *v.* Geary, 1931, 2 K. B. 547.

ANNOTATIONS: The Magistrate in his judgment (File No. 5009/41) following his decision in a previous case (File No. 1642/41) relied on Hylton *v.* Heal, 1921, 2 K. B. D. 438 and found that the second and third Defendants had no rights towards the landlord (Plaintiff) after the Plaintiff had repudiated the lease. Then, relying on Hoshins *v.* Lewis, 1931, 2 K. B. 9, Keeves *v.* Dean, 1924, 1 K. B. 685 and on Skinner *v.* Geary (*supra*) the Magistrate came to the conclusion that the first Defendant not residing in the flat himself was not entitled to the protection of the R. R. Ord.

The District Court found that "The 2nd and 3rd Respondents (Defendants) are just as the first Appellant (Defendant) tenants of the room. They entered in the occupation of the room as tenants together with the first Appellant and are still in occupation thereof. They are consequently entitled to the protection of the Rent Restrictions (Dwelling Houses) Ordinance of 1940."

See also C. A. D. C. Jm. 14/41 (Gorali, p. 56) where the case of Skinner *v.* Geary is discussed; in C. L. A. D. C. Ja. (Gorali, p. 94) it was decided that a tenant who sublet the whole premises is still a tenant and entitled to apply to the Rent Commissioner. In C. A. D. C. Ja. (Gorali, p. 103) it was decided that a person who is no longer a tenant cannot rely on the Landlords and Tenants Ordinance, 1934.

(*M. L.*)

FOR APPELLANT: Geiger.

FOR RESPONDENTS: Eliash — by delegation from Gross.

JUDGMENT.

This is an appeal from the judgment of the District Court, Haifa, sitting in its appellate capacity, dated the 23rd December, 1942, whereby the judgment of the Magistrate, dated the 24th September, 1942, was set aside.

It is an eviction case under the Rent Restrictions (Dwelling Houses) Ordinance, 1940, and the Magistrate made an order against all three Defendants (Respondents) to vacate the room in question, then being occupied by the second and third Defendants. The judgment of the Magistrate goes into the facts and law at length, is lucidly expressed and, irrespective of whether the decision is right or wrong, is an admirable judgment which reflects great credit on the Magistrate (Mr. Agranat).

It is necessary to refer briefly to the facts, and I will refer to the Appellant as the landlord, the first Respondent as the tenant, and to the second and third Respondents as such. The second Respondent

is the mother of both the tenant and the third Respondent, the latter being the younger brother.

In 1936 the tenant rented under a written agreement the whole flat, consisting of two rooms and kitchen, *etc.* for one year, paying the rent in advance. The agreement was renewed verbally and the rent paid down to the 15th November, 1939, at the rate of LP. 5.100 *per mensem.*

Early in 1939 the tenant got married and vacated the one room and resided elsewhere with his wife, the second and third Respondents apparently continuing to occupy the other room. This vacant room was sub-let for a time, but by arrangement and as from the 15th November, 1939, between the landlord and the tenant, the landlord himself occupied this one room, the rent for the remainder being reduced to LP. 2.550, which the tenant continued to pay. The kitchen and other conveniences were jointly shared by the landlord and the second and third Respondents.

In 1941 the landlord formally terminated the agreement with the tenant and demanded full possession by the 14th November, 1941, up to which date he had received the rent from the tenant, and subsequently refused to accept any rent tendered. The second and third Respondents continued in possession, and the present proceedings commenced on the 23rd December, 1941.

In his statement of claim the landlord stated :—

> "In December, 1939, the first Defendant hired a room in the flat and in the house of the Plaintiff with a right to use half the kitchen and appurtenances, to be used as a dwelling by the second Defendant and her son, the third Defendant".

He then averred that the second and third Defendants had caused damage, *etc.*, threatened him and abused his wife, and further that he wanted the room for his own use, all of which as facts were found against him by the Magistrate.

The short point for decision is, whether the tenant is a statutory tenant within the meaning of sub-section (3) of Section 8 of the Ordinance and thereby entitled to the protection of the Ordinance in respect of or for the benefit of his mother and younger brother, the second and third Respondents.

Sub-section (3) of Section 8 reads as follows :—

> "(3) Where by reason of the provisions of this section any tenant continues in occupation of any dwelling-house after the expiration of any contract of tenancy, the terms and conditions of such contract of tenancy shall, in so far as they may be applicable and subject to the provisions of this Ordinance, be deemed to apply to such occupation".

The meaning of the word "tenant" was discussed in Chiverton *v.* Ede, 1921, 2 K. B., at pp. 39 & 45, which was a case under Section 5, sub-section (f) of the English Increase of Rent, *etc.* (Restrictions) Act, 1920, somewhat similar to Section 8(1)(c) of our Ordinance. Lush, J., said in that case :—

> "It seems obvious that the term 'tenant' as used in this clause, is not limited to the individual tenant".

McCardie, J., said :—

> "It obviously does not mean the tenant as an individual. It must include the tenant himself and his wife and children who live with him. I think it might properly include other persons also for whom the tenant has to provide accomodation, such as a domestic servant or relative who is dependent upon him by reason of infirmity or otherwise."

In this case, lodgers of the tenant were also included in the expression tenant and had to be regarded when considering the suitability of alternative accommodation offered. I agree entirely with these remarks. It might easily happen that here, a Government servant or any other person in employment, might be transferred to some other part of the country to which he is, for some reason or other, either unable or unwilling to transfer his family and that they continue in occupation of the house he has rented and for which he continues to pay the rent although himself absent. In my opinion the tenant continues in occupation although he may have solely signed the agreement of tenancy. In such case the family are, in my opinion, to be included in the expression "tenant" used in sub-section(3) of Section 8 of the Ordinance, and are entitled to the privileges conferred upon statutory tenants.

Many extracts and quotations were referred to me from Skinner *v.* Geary, 1931, 2 K. B. 547, but I think the facts in that case can very easily be distinguished, in that in this case before me the tenant expressly rented the room in 1939 for the occupation of his mother and brother who were in occupation not only for the succeeding two years but also prior thereto. The tenant himself was not in personal occupation when he made the agreement, and consequently had neither renounced occupation nor given up possession, nor was it a case of sub-letting to the second and third Respondents.

In a brief judgment the District Court reversed the decision of the Magistrate, holding that the second and third Respondents were just as much the tenants as the tenant (first Respondent) himself and, therefore, entitled to the protection of the Ordinance. I agree entirely, but have set out my reasons for so doing at greater length.

Various Articles of the *Mejelle* were quoted (namely Articles 409,

410, 433 and 522) but I do not think that it was seriously contended that the position as between the landlord and the tenant was not governed by the Ordinance.

There being no cross-appeal as to the findings of the Magistrate as to the other causes for an eviction order, it follows that this appeal is dismissed with costs to include LP. 10 advocate's fee for the hearing before me.

Delivered this 2nd day of April, 1943.

Chief Justice.

HIGH COURT No. 8/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Navi Ltd. of Haifa. PETITIONER.

v.

The Deputy District Commissioner, Haifa. RESPONDENT.

Urban Property Tax — Exemption of new buildings from taxation — Failure to object to assessment does not constitute an implied admission.

Application allowed for an order directed to the first Respondent to refrain from claiming Urban Property Tax :—

Failure to object to an assessment under the Urban Property Tax Ordinance does not constitute an implied admission that the building was erected three years before the assessment and is, therefore, not exempt from taxation.

(*A. M. A.*)

ANNOTATIONS : On exemption of new buildings from Urban Property Tax see H. C. 109/36 (C. of J. 1934—6, 887 ; 1937, 1 S. C. J. 399) — *failure to object held fatal for the particular year* ; C. A. 56/40 (7, P. L. R. 183 ; 1940, S. C. J. 133 ; 7, Ct. L. R. 182) — *exemption from additions to existing buildings* ; H. C. 99/40 (7, P. L. R. 579 ; 1940, S. C. J. 376 ; 8, Ct. L. R. 178) and H. C. 63/41 (1941, S. C. J. 472) — *calculation of period of exemption.*

(*H. K.*)

FOR PETITIONER : Goitein and Weyl.

FOR RESPONDENT : Junior Government Advocate — (Salant).

ORDER.

So far as I am able to understand the Respondent's argument, it is this — that the Petitioner is liable to pay tax for the year 1941—2 on the new building, to which it is admitted he was entitled to three years' exemption, since he did not object to being assessed for the year 1938—9. It is argued that the failure so to object is an implied admission that the building was completed before the year of assessment 1938—9. We are unable to see where there is any such implied admission. There is no evidence, nor allegation, that the building was completed prior to April 1938, and, therefore, the period of exemption began with the year of assessment 1939—40. There is no doubt that the building was wrongly assessed for the year 1938—9.

The rule is made absolute, with inclusive costs to the Petitioner of LP. 15.

Given this 5th day of March, 1943.

British Puisne Judge.

HIGH COURT No. 20/43.

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

BEFORE : Copland, A/C. J. and Abdul Hadi, J.

IN THE APPLICATION OF :—

Abraham Eliahu. PETITIONER.

v.

1. Chief Magistrate, Jerusalem,
2. Attorney General. RESPONDENTS.

High Court — Defence (Prevention of Profiteering) Regulations — No appeals in prosecutions thereunder — Rebutting evidence — Jurisdiction.

Application for an order restraining the first Respondent from allowing the second Respondent to call rebutting evidence refused :—

The High Court will not act as a Court of Appeal in criminal proceedings under the anti-profiteering regulations.

(*A. M. A.*)

ANNOTATIONS :

1. The prosecution had called one witness only but, after the defence witnesses had been heard, the prosecution asked to lead rebutting evidence which

request was granted by the first Respondent, but the Petitioner was given time to apply to the High Court.

2. *Cf.* H. C. 46/38 (1938, 1 S. C. J. 423 ; 4, Ct. L. R. 96) — *proceedings of Military Courts not to be called in question by any Civil Court* ; H. C. 87/40 (7, P. L. R. 521 ; 1940, S. C. J. 366 ; 8, Ct. L. R. 145 — following *dictum* in H. C. 74/40 (7, P. L. R. 486 ; 1940, S. C. J. 348 ; 8, Ct. L. R. 125) — *no remedy against decisions of the Registrar under section* 6(e)(4) *of the Registrars Ordinance* ; H. C. 44/42 (9, P. L. R. 300 ; 1942, S. C. J. 304 ; 11, Ct. L. R. 174) and CR. A. 147/42 (1942, S. C. J. 647) — *no change of venue or appeal in respect of proceedings before Municipal Tribunals.*

(*H. K.*)

FOR PETITIONER : Levitsky.

ORDER.

This is a petition for an order to the Chief Magistrate, Jerusalem, that an order given by him in a certain case allowing the prosecution to call rebutting evidence should be set aside. Under the Defence (Prevention of Profiteering) Regulations, it is provided that there can be no appeal from such matters. What in effect the Petitioner is asking us to do is turn ourselves, a High Court, into a Court of Criminal Appeal on an interlocutory point in a hearing in a Criminal Case. In our opinion the whole petition is misconceived. The application is, therefore, refused.

Given this 25th day of February, 1943.

Acting Chief Justice.

CRIMINAL ASSIZE No. 54/42.

IN THE COURT OF CRIMINAL ASSIZE SITTING AT TEL-AVIV.

BEFORE : Rose, J.

IN THE CASE OF :—

The Attorney General. PROSECUTOR.

v.

Joseph Ben Yafet Shett. ACCUSED.

Murder — Admissibility of evidence showing the commission of a previous offence — R. v. Mortimer, Makin v. A. G. of N. S. W., R. v. Bond — Statement under Sec. 8 Evidence Ordinance — Extra judicial confession, whether free and voluntary — Whether admissible to prove offence other than the one charged — Empire Digest, H. M. Advocate v. Stewart, R. v. Van Horst, R. v. Bucham — Journal of Criminal

Law, A. G. v. Mary Skelly, R. v. Voisin, H. M. Advocate v. Cunningham, Willis v. H. M. Advocate — English and Scottish Law — Evidence — Elements to establish premeditation — Sentence — Proof of age — Benefit of doubt.

1. Admissible evidence is not excluded by reason that it may shew the commission of another offence by the accused.

2. A statement by a victim of an act of violence is admissible under section 8 of the Evidence Ordinance if made a reasonable time after the act complained of.

3. An extra judicial confession made by an accused when charged with attempted murder is admissible to prove a charge of murder.

FOLLOWED: R. *v.* Mortimer, 1936, 25 CR. A. R. 150; Makin *v.* A. G. for New South Wales, 1894, A. C. 57, 63 L. J. P. C. 41, 17 Cox 704; R. *v.* Bond, 1906, 2 K. B. 389, 75 L. J. K. B. 693.

REFERRED TO: H. M. Advocate *v.* Stewart, 1866, English & Empire Digest, Vol. 14, p. 410, note *e*; R. *v.* Van Horst, 1914, *ibid.*, p. 413, note *d*; R. *v.* Bucham, 1936, *ibid.*, Suppl. 1941 to Vols. 13 & 14, p. 44, note *k*; A. G. *v.* Mary Skelly, 69 Ir. T. L. R. 216; R. *v.* Voisin, 1918, 1 K. B. 531, 13 CR. A. R. 89; H. M. Advocate *v.* Cunningham, 1939, J. C. 61; Willis *v.* H. M. Advocate, 1941, S. L. T. 131.

(*A. M. A.*)

ANNOTATIONS:

1. The law as to the admissibility or otherwise of evidence tending to prove other offences is set out in Archbold's Criminal Pleading, Evidence and Practice, 28th ed., p. 366 and in Halsbury, Vol. 13, *pp.* 567 *seq.*; for cases see Digest, Vol. 14, *pp.* 371 *seq.* Palestinian authorities on the question are CR. A. 146/41 (9, P. L. R. 33; 1942, S. C. J. 22) — *admissible as proving guilty knowledge* and CR. A. 14/42 (9, P. L. R. 63; 1942, S. C. J. 109) — *inadmissible as irrelevant.*

2. "The meaning of the words 'shortly after' (in Sec. 8 of the Evidence Ordinance) is a question to be determined in the light of the particular facts of the case": CR. A. 14/38 (5, P. L. R. 129; 1938, 1 S. C. J. 121; 3, Ct. L. R. 246). In that case evidence was admitted of a statement made 1½ hours after the offence had been committed although there were previous opportunities of complaining. That case was followed in CR. A. 18/42 (9, P. L. R. 168; 1942, S. C. J. 171) admitting a statement made during the transport of the victim to the hospital.

(*H. K.*)

CHARGE AGAINST ACCUSED: Murder, contrary to Sec. 214(b) of the Criminal Code Ordinance, 1936.

FOR PROSECUTION: Crown Counsel — (Rigby).

FOR DEFENCE: P. Joseph.

PLEA: Not Guilty.

JUDGMENT.

In this case the Accused is charged with the murder of one Joseph Israeli, on the night of the 28th October, 1942, at Hatikvah Quarter,

Tel-Aviv. The case for the prosecution, shortly, is that there had been, for some considerable time, ill-feeling between the Accused and the family of this deceased, Joseph Israeli, and that this ill-feeling was centred on the brother of the deceased who is the *Mukhtar* of the Quarter, a man called Yesha'yahou Israeli ; that on the evening in question this *Mukhtar* was holding a meeting at his house of the members of the Local Committee ; and that while they were sitting there the Accused came in, put his hand in his pocket, took out a revolver and fired at the *Mukhtar,* who fortunately escaped serious injury. The Accused then went away and some three quarters of an hour later shot and fatally injured Joseph Israeli.

Before dealing with the facts in detail I think it is convenient to dispose of three points of law which were raised by Dr. Joseph for the defence. I may say here that the Accused may regard himself as very fortunate that an advocate of Dr. Joseph's ability and experience should have consented to conduct this case on behalf of the defence under the provisions of the Poor Prisoners' Defence Ordinance.

The first point that was taken by the defence was that the evidence as to the shooting at the *Mukhtar* should not have been received. Dr. Joseph cited the well-known principle of law that it is not competent for the prosecution to adduce evidence of previous incidents, unconnected with the particular offence, to show that the Accused is a person who is likely, by his character or antecedents, to have committed the offence with which he is charged. That, of course, is perfectly true, but as has been stated repeatedly and has been stated again quite recently in a case to which Mr. Rigby referred me, the case of R. *v.* Mortimer, evidence which would otherwise be admissible should not be excluded merely because it may also be prejudicial to the accused on the ground that it tends to show the commission of some other offence. In the case of Mortimer, the Lord Chief Justice of England cites with approval a passage in the leading case of Makin *v.* A. G. of New South Wales, in which Lord Herschell says as follows : (Cr. Ap. Reports, Vol. XXV, p. 156):—

> "The mere fact that the evidence adduced tends to show the commission of other crime does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

And in the same judgment the case of R. *v.* Bond is referred to, where it is pointed out that care should be taken to reject such evidence unless it is plainly necessary to prove something in issue. In

this particular case it seems to me to be perfectly clear that one of the obvious defences which not only could have been raised but was actually raised in terms was one of accident. That being so, it seems to me to be relevant and permissible for the prosecution to adduce evidence of an incident of shooting at another member of the same family less than an hour before the incident which gave rise to the present charge. Further, the evidence in question is clearly relevant on the issue of premeditation.

The second piece of evidence to which objection was taken was a statement which was alleged to have been made by the deceased Joseph Israeli himself shortly before midnight on the night of the 28th. That matter is, of course, governed by Section 8 of the Evidence Ordinance and Dr. Joseph says that this statement was not taken at a sufficiently early time to justify its acceptance under the provisions of that Section. He says, and that is, no doubt, true, that the deceased was in the company of many other persons after he had been wounded and before he went to the hospital where he made this statement. It is also suggested that while he was in the ambulance in the presence of Police Constable Lichtenfeld, who afterwards took down the statement, was the time when he could and should have made his statement. Dr. Tovim told us, and indeed this clearly must have been the case in view of the nature of the injury, that the deceased was in considerable pain on arrival at the hospital and had to be given morphia and other assistance. Inspector Fairleigh says that he saw the deceased at the house before the ambulance arrived and that he was obviously in pain. Having regard to that, I do not think that the fact that a statement was not made then in any way derogates from the admissibility of the statement when it was made at the hospital. As to the ambulance point, I really see nothing in that at all because while, as Dr. Joseph says, it is not necessary in law for a deceased's statement to be taken down in writing, it is, of course, convenient from the practical point of view that that should if possible be done, and one can imagine, in practice, the criticism that would be directed to a Police Officer by the defence if it was not done. It seems to me to be eminently reasonable that the Police Constable should defer taking down any such statement until the arrival at the hospital. Apart from that, I am quite satisfied that the statement was correctly taken down and accurately records what the deceased said, and I think it is, therefore, properly receivable in evidence.

The third matter to which exception was taken is a statement which the Accused himself is alleged to have made to the Police on the 29th October, that is the day after the incident. Two grounds of objection

were taken to this statement. The first was that inducements were held out to the Accused which persuaded him to make the statement. That, of course, is a matter of fact and of evidence upon which, following the usual practice of these Courts, I heard evidence of the prosecution and of the Accused himself on that single issue. Now, Corporal Schleimer, who was the prosecution witness in question, said quite clearly that he took down the statement of the Accused which was made after charge and caution and was perfectly free and voluntary ; and that two other persons, British Sergeant Stacpoole and a Jewish Police Constable named Birkell, were also present. The Accused himself went into the box and gave a long and rambling account as to how and why he gave this statement. He said that the room in which he was detained was uncomfortable and had fleas in it ; that he was hungry and that when he asked for food he was told by the Police that he would be given food after he had made a statement. And lastly he said that Police Constable Birkell, in the presence of Corporal Schleimer and Sgt. Stacpoole, said that if he made a statement he would be let out on bail. The impression which the Accused made upon me was of being an utterly untruthful and unreliable witness and I have no hesitation in disbelieving his evidence on the points in question. I asked Dr. Joseph whether, in the circumstances, he wished Constable Birkell to be produced for examination, and he replied, very rightly, that he did not think that was necessary. In any event, I reject completely the Accused's explanations and I am perfectly satisfied from the evidence of Corporal Schleimer that this statement was, in fact, made after due caution and was free and voluntary.

The second ground of objection to this statement is one of considerable legal interest and importance. It was possibly for this reason that the Crown persisted in putting in this statement. I asked Crown Counsel on two occasions whether he wished to put in this statement because it seemed to me to be apparent at a fairly early stage of the trial that, assuming the other evidence adduced by the prosecution was to be believed, there was ample evidence on which to convict this Accused apart from any statement which he may have made. However, learned Crown Counsel, after consideration, stated that he wished a ruling to be given upon the admissibility of the statement. I thereupon ruled that, in my opinion, it was admissible.

The point taken is that at the time of making this statement the Accused was charged with the offence of attempted murder. A minor point was also raised that the form of the charge preceding the caution was bad in that reference was made to two acts — the shooting

at the *Mukhtar* and the shooting at Joseph Israeli himself. I do not consider that there is any substance in that objection because it seems to me to be clear that assuming Israeli had not died, it would have been open for the prosecution in this case to have charged two counts in the single indictment — the shooting of the *Mukhtar* in the first place and of Joseph Israeli in the second. The main point taken by the Defence is that it is possible that had the Accused realised that he was subsequently to be charged with the murder he would not have made a statement in answer to this charge of attempted murder. It seems to me that the way to approach this problem is the way that Dr. Joseph approached it, that is to say, that assuming, as in this case I have found to be the case, the statement itself, at the time it was made, to have been free and voluntary, is there any ground of exclusion, within the well-known principles which are in practice followed, which would render that statement inadmissible. Neither Dr. Joseph nor Mr. Rigby, to whose assistance in this matter I am indebted, were able to refer me to any what may be termed important or binding authority on this matter. The cases to which they were able to refer me are contained in the English and Empire Digest and Dr. Joseph himself very frankly admitted that they are really of very little value owing to the fact that the references are so compressed that there is a complete absence of reasoning and of the relevant facts. The reports themselves, one case being Canadian and another Scottish and a very old case, do not happen to be available in this country. The first case to which I was referred appears in Vol. XIV of the English and Empire Digest at page 410, note "e". It is entitled H. M. Advocate *v.* Stewart (1866) and is a Scottish case. The note that is given on that case is :—

> "A panel was tried and convicted of assault. He was thereafter charged with assault to the danger of life on the same species facts and emitted a declaration. He was then tried for murder, the person assaulted having died :— *Held* : the declaration could not be used as evidence against him."

As I have said, one does not know the facts ; nor the reasons which actuated the Court ; and one does not even know the Section of the law which the Judges were considering. I cannot, therefore, regard this reference as being of any assistance in this matter.

Another case was referred to by learned Crown Counsel which appears also in Vol. XIV of the Digest at page 413, note "d". That is a Canadian case, R. *v.* Van Horst, and was decided in 1914. The note in the Digest is as follows :—

> "— *After caution — admissible at trial on different charge.* Prisoner was arrested on a charge of burglary. After being given the usual

> caution he made certain statements to a constable ; subsequently he was charged with murder, and on his trial the Crown sought to put his statements in evidence :— *Held* : the statements were admissible."

This, of course, is in favour of the Crown, but it is such a short summary and there is such a complete absence of all the matters which one would require to know before relying on it as an authority that it is difficult to attach importance to it.

The last of the cases that was referred to appears in the Supplement to the Digest, case 4336, note "k" (Supplement 1941 to Vols. 13 & 14, p. 44 — R. *v.* Bucham, (1936) 1 Western Weekly Reports of Canada, p. 597). This again is a Canadian case and is really, in my opinion, of no assistance or materiality at all in the present matter, because, in the first place, the facts, even as stated in this very short summary, were demonstrably different from the present case, and in the second place, the note of the judgment is as follows : "Held inadmissible against accused since, on the evidence, it could not be said that they were made voluntarily". This does not carry the matter any further because the words "on the evidence" may mean that there were beatings or inducements or other reasons of fact why the statements should be rejected.

In my opinion — and as Dr. Joseph himself submits — the only logical ground upon which the acceptance of this statement might be attacked is that to charge a person with a lesser offence than the facts justify might be construed as a "constructive" inducement to the Accused to make a statement. On that matter Mr. Rigby referred me to an article in the Journal of Criminal Law (June, 1941, p. 152 *et seq.*) which, of course, is merely an expression of opinion of the writer of the article and is in no way binding on this or any other Court. Further, the article deals only with Irish cases and Irish practice. It is, however, of interest in that it discusses the exact question with which we are here concerned.

The writer refers to an Irish case, the Attorney General *v.* Mary Skelly, 69 Ir. T. L. R., p. 216, and says :—

> "It is submitted with some diffidence that the only ground on which the confession can be excluded in such cases as A. G. *v.* Skelly would appear to be that the very making of only a minor charge by the Police might perhaps be considered as an inducement to the accused to make a statement."

After citing a *dictum of* Mr. Justice Lawrence, an English Judge, in the case of R. *v.* Voisin (1918, 1 K. B., 531) : "In these cases, the duty of the judge to exclude statements is one that must depend

upon the particular circumstances of each case", he adds in a foot-note :—

> "It was, of course, in the exercise of this discretionary power that the trial judge in A. G. *v.* Skelly (*supra*) discharged the jury and put the prisoner back, on discovering that her statement, which he had already admitted, had been made at a time when she was charged with only a minor offence."

It is to be noted that, in the passages cited, the writer uses the phrases "minor charge" and "minor offence". He does not say "lesser charge" or "lesser offence". The distinction seems to me to be relevant because in this particular case of Skelly the original charge was concealment of birth. The accused made a statement in answer to this charge which was later tendered in evidence against her on the much more serious charge of murder, there being in Ireland no statutory crime of infanticide. I have not the advantage of having before me the facts of the Skelly case, but it may, no doubt, be assumed that the child was illegitimate and it would seem to be not unreasonable for a Judge to take the view that, if, for example, a baby is born dead and its mother — for the sake of her reputation — conceals its birth, the offence is of a very minor nature. Having this consideration in mind, the learned Judge evidently took the view that it was safer, in view of the great difference in degree between the two offences, not to regard the statement as being free and voluntary.

Following this line of reasoning, if an accused, in circumstances such as the present, was charged with common assault only — an unlikely enough assumption on the facts — it would seem to be open to the Judge to take the view that a statement made in response to this charge ought not to be received in evidence on a subsequent charge of murder. But what happened in this case is that the Accused was charged with the attempted murder of two persons, which at the time that he was charged was the appropriate offence, the deceased not having died until some days afterwards. Attempted murder in the circumstances outlined in the charge is an extremely serious offence and must, in the event of conviction, have resulted in a long term of imprisonment. I am certainly not, as the trial Judge, prepared to assume that the Accused, if faced at the outset with the major charge, would have withheld his statement and I decline to draw the inference that the making of this charge of attempted murder operated in any way as an inducement to the Accused. I am, therefore, of opinion that this statement is properly receivable in evidence.

I would add that learned Crown Counsel also drew my attention to another article in the same journal (July—September, 1941, p. 228) dealing with the attitude of Scottish Courts towards this matter.

In the case of a statement made in answer to a graver charge being tendered in evidence on a lesser charge no difficulty, of course, arises; but in the converse case the writer suggests that, notwithstanding the ruling of Lord Moncrieff in H. M. Advocate *v.* Cunningham (1939, J. C. 61), where a statement made in response to a charge of assault and robbery was received in evidence at a trial for murder arising out of the same facts, the practice in Scotland is not uniform and the question remains open. Colour is lent to this view by the fact that (according to the writer of the article) in the case of Willis *v.* H. M. Advocate 1941, S. L. T. 131, the High Court Judges reserved their opinion on this point, the question before them on appeal being whether a statement made in answer to a graver charge can properly be received in evidence at the trial on a lesser charge.

As regards Scotland, that may, perhaps, be the position; but as regards the Law of England, I am of opinion that the matter depends upon the particular circumstances of each case, and should be determined in the light of the considerations which I have mentioned.

That disposes of the points of law. The facts, in my opinion, present no particular difficulty. The *Mukhtar,* Yesha'yahou Israeli, stated, and he was not challenged in cross-examination on that matter, that the Accused came in wearing an overcoat; that he put his hand in his pocket as if to take out a letter; that he pretended to deliver a message from some person, and then fired. The *Mukhtar* displayed considerable presence of mind in dealing with the situation and as a result escaped into an adjoining room, having received only a minor injury, a superficial flesh wound from a bullet. His evidence is corroborated by two members of the Committee, but such corroboration is really unimportant because the fact of the shooting was not challenged by the defence. I accept the *Mukhtar's* evidence on these matters, and also the evidence of Itzhak Ison and Shalom Yafet, two other members of the Committee. I also accept the evidence of the *Mukhtar* that there had been ill-feeling for some time between him and the family of the Accused over an incident of a synagogue; that the dispute had been referred to the Rabbinical Court, whose final decision gave offence to the Accused and his family, with the result that the Accused and the witness were not on speaking terms.

The evidence is that that incident took place at round about 8 o'clock (between 20 minutes to 8 and 10 minutes past 8) on the evening of the 28th October. And it was something less than an hour later, at a distance of about one kilometre, that the deceased, Joseph Israeli, was shot. It appears that at the same time as this Committee meeting was going on there was a party being held at a house in the

Ezra Quarter within a few metres of where this shooting subsequently took place. It was described as a pre-wedding party, at which a number of young men were present. Amongst other persons who attended were the deceased Joseph Israeli and three friends of his, Shaul Silwani, Joseph Razon and David Razon. These three say that after looking at the bride they left the party. There was apparently some discussion between the two Razons as to the loan of a pound, and while that was going on this unfortunate young man was shot. One of the Razons, I think it was Joseph, says that he noticed a man, wearing an overcoat, pass him just before the shooting. He gives a further and more detailed explanation of what subsequently occurred, which I reject. I think that the truth with regard to him and David Razon, who frankly says so, is that as soon as the shot was fired they both ran away and saw nothing material.

The evidence of Shaul Silwani is that he was actually within a metre of the deceased Joseph Israeli when a man came up and fired ; that Joseph Israeli cried out and fell to the ground ; that he (the witness) jumped at the man who fired and that they both fell to the ground. While they were on the ground he was trying to get hold of the man's hands. He describes in some detail how the man had his overcoat over his head and adds that while struggling on the ground the man said words to this effect : "Shaul, let go or I will come at you with a knife". He recognised the man's voice as being that of the Accused, Joseph Shett, whom he knew well. He then says that as he was frightened, he let go and ran away.

I do not doubt that Shaul Silwani's story is substantially accurate : that he was with the deceased at the time that he was shot ; that he saw a man fire ; that he struggled with the man who fired ; and that from his voice he recognised him as being Joseph Shett. And I so find. Although no corroboration is necessary, there is also the fact that when the Accused was subsequently arrested that night his trousers were covered with mud and in a condition consistent with his having fallen on the ground.

The medical evidence is conclusive that this unfortunate boy, Joseph Israeli, died from peritonitis as a result of a bullet wound which entered the right buttock and penetrated the stomach. Much stress was laid by Dr. Joseph on the fact that the bullet entered the right buttock and, therefore, was fired presumably from behind, but this does not seem to me to affect the position one way or the other.

At the *post mortem*, Dr. Karplus, who performed it, removed a revolver bullet from the stomach of the deceased. That was produced and is obviously a revolver bullet of small calibre of the kind that

is fired from an automatic revolver. The Accused himself says that he owns an automatic revolver which used to belong to his father.

The Accused gave evidence on oath in this Court, and he also made this disputed statement to the Police on the 29th October, and it is clear from what he said here and from what he said then that he does not deny the fact that he fired the shots both at the *Mukhtar* and at the youth Joseph Israeli. But in his statement to the Police he raises, as regards the shooting of Joseph Israeli, the defence of accident. He says that he went to the Ezra Quarter ; saw the brother of the *Mukhtar*, Joseph ; said to him *'shalom'* and received no reply ; that he was "confused by that insult" and that at that moment his "overcoat was slipping down". "I slipped in the mud. I do not remember, nor do I know, how the bullet came out. He (meaning the deceased) fell to the ground. I did not intend to fire at him." As regards this defence of accident, I reject it entirely, and need only say that in my opinion it seems to me to be utterly inconsistent with the evidence adduced by the prosecution, which I accept, and with the reasonable inferences of fact that should be drawn from that evidence. Here, in this Court, the Accused tried for the first time to establish a defence of drunkenness. The defence made great play with the fact that one of the prosecution witnesses, a police constable, said that when the Accused arrived at the Police Station that night his breath smelt of alcohol. The same witness added, however, that the Accused was not drunk. The remark that I made about the Accused on the issue of the statement is, I am sorry to say, applicable to his evidence on the main issue, and that is that he struck me as being an utterly untruthful and unreliable witness. He himself described how, just before attending the Committee meeting at the *Mukhtar's* house, he stood talking to friends of his outside ; and he gave a detailed description of an assault upon him by a person who was set on to him, as he says, by the *Mukhtar*. Even his own story is inconsistent with this last-moment defence of drunkeness. I would add that in the statement he made to the Police, and which clearly, in part, is intended to be of an exculpatory character, no mention at all is made of the fact that he was drunk and that he did not know what he was doing because he was suffering from the effects of drink. The defence raised in this statement as regards the second shooting was one of accident and as regards the first shooting he says that he was upset by this assault and that all he can remember is that he "felt a head-ache and nervousness and was walking about as a blind man in the darkness." I am, therefore, satisfied that this defence of drunkenness is a pure afterthought and has no basis of fact.

The question arises as to premeditation, and it is suggested by Dr. Joseph that the Prosecution have not satisfactorily proved the statutory elements. It seems to me that from the events of that night as proved by the prosecution witnesses and accepted by me the only possible inference that can be drawn is that the three statutory elements are present and that the Accused deliberately shot both at the *Mukhtar* and at his brother, Joseph Israeli, and that the only verdict at which I can reasonably arrive is that the Accused is guilty of murder as laid in the Information.

ALLOCUTUS :

Court : I understand that you say that you are 17 years old. Is there anything else you want to say ?

Accused : I have nothing to say.

Court : In this case the point has arisen as to the age of the Accused. The Accused himself says that he is 17 and he apparently said that he was 17 when he made his statement to the Police on the 29th October, which was the day after his arrest. The question of assessing an Accused's age rests, at any rate in the first instance, upon the Court of trial. But in this case Dr. Bishara was called as part of the prosecution case, no doubt merely as a matter of convenience, on this question of age and he said that he thought, as a result of his examination, that the Accused was probably over 19, but that he might be less and might even be as young as 17. I do not profess, merely by looking at a person, particularly if he is a Yemenite, to be able to assess his age with any degree of accuracy. The Doctor, who made a thorough examination of the Accused, is not prepared to say that the Accused is over 18. The Accused himself definitely says that he is 17 and from his appearance, in my opinion, he might be over or under 18. That being so, I propose to give the Accused the benefit of the doubt on that matter and I propose to assume, for the purpose of sentence, that he is under the age of 18 years.

Sentence : Joseph Ben Yafet Shett, you have been found guilty on the clearest evidence of the most foolish and brutal crime. You have been ably defended by distinguished counsel who has raised every possible point on your behalf. The motive — hatred or jealousy or whatever it may be that you felt towards the family of the Israelis — can be no possible justification for this outrageous attack. I can see no redeeming feature at all in the case and you are fortunate that this question of age has arisen.

The sentence of the Court is that you be detained during the High

Commissioner's pleasure in such place and such manner as he may direct.

You have a right of appeal against your conviction. Your advocate will advise you.

Delivered this 10th day of March, 1943.

British Puisne Judge.

HIGH COURT No. 23/43.

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

BEFORE : Copland, J.

IN THE APPLICATION OF :—

The Oriental Mercantile Co. PETITIONER.

v.

The Director, Department of Customs, Excise & Trade. RESPONDENT.

Import licence in respect of two kinds of goods to be supplied by firms A & B respectively — Change of supplier (B instead of A) — Director of Customs, Excise and Trade refusing to hand over the goods arrived in Palestine since supplier other than firm mentioned in import licence — Non-interference of High Court.

Petition for an order *nisi* to issue directed to Respondent, calling upon him to show cause why he should not hand over to Petitioner the 3 cases of iron pins sent by Messrs. Cornish, Leach & Co., Ltd., England, which arrived in Palestine on the S/S. "Boskop", against delivery of the necessary documents :—

High Court will not interfere with decision of Director of Customs, Excise and Trade *re* import of goods (even where decision does not seem reasonable) if looking at strict terms of import licence he is technically correct and has not misdirected himself to legal position involved.

ANNOTATIONS : On non interference of High Court with decisions of Public officers compare H. C. 147/42 (*ante*, p. 35) and cases cited in annotations thereto.

(*M. L.*)

FOR PETITIONER : Goitein.

(*Exparte*).

ORDER.

In this case the Petitioner has an import licence to import safety pins to be supplied by a firm which I call "A". He has another licence to import pins from a firm which I shall call firm "B". Firm

"B" cannot supply pins ; firm "A" cannot supply the safety-pins ; but firm "A" can supply the pins which firm "B" is authorized to send. In these circumstances it would seem reasonable that, since no question of any alteration in the Foreign Exchange is involved, nor any increase of shipping space is required, that the power to import given by the licence where the firm "B" is mentioned, should be allowed for import in respect of the licence in which firm "A" is stated to be the supplier.

The Director of Customs, Excise and Trade says that, in accordance with the strict terms of the licence for goods from firm "A", this is not valid. Technically I am afraid he is correct, regrettable as it may be, since the Director has not in any way misdirected himself as to the legal position involved.

This Court is unable to interfere, and the application must, therefore, be refused.

Given this 1st day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 15/43.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Ahmad Hassan Mushni,
2. Khalil Ahmad Mushni. APPELLANTS.

v.

1. Issa 'Abdul Qader 'Ayyad,
2. Hussein 'Abdul Qader 'Ayyad. RESPONDENTS.

Arbitrator telling party's two sons (one of whom also a party) to tell their father to come to arbitration — Award in absence of party — Parties how to be summoned to appear before arbitrator — Irregular proceedings amounting to legal misconduct on part of arbitrators.

Appeal from a judgment of the Magistrate's Court, Hebron, sitting as a Land Court in Land Case No. 459/41, confirming an arbitrator's award, allowed and the case remitted to the arbitrator :—

Parties to arbitration must be summoned either by formal service or by

being notified by arbitrator himself ; summoning through party's son (even if son also party) — irregular and, technically, legal misconduct entailing remittal of case to arbitrator.

ANNOTATIONS : A party should be warned once that, if he does not attend, the proceedings will be continued in his absence — C. A. 180/42 (1942, S. C. J. 788, following Gladwin *v.* Chilcote (1841), 9 Dowl. 550, 5 Jur. 749, 61 R. R. 825). A view of the *locus in quo* by the arbitrators, in absence of parties, — not misconduct. C. L. A. 2/33 (1, P. L. R. 856, C. of J. 194).

As to misconduct generally see C. A. 53/22 (C. of J. 175), C. A. 62/36 (C. of J. 1934—6, 726 ; 1, Ct. L. R. 40), C. A. 229/41 (8, P. L. R. 603 ; 11, Ct. L. R. 127 ; 1941, S. C. J. 616 and notes thereto) and C. A. 154/42 (1942, S. C. J. 951).

(*M. L.*)

FOR APPELLANTS : Germanus.

FOR RESPONDENTS : Sha'ar.

JUDGMENT.

It is unfortunate but this appeal will have to be allowed. The main ground of the appeal is that one of the Appellants, namely, Haj Ahmad el-Mushni was not served to appear before the arbitrator. From the evidence given by the arbitrator before the learned Magistrate, it would appear that the arbitrator told Haj Ahmad's two sons, one of whom was also a party, to tell their father to come to the arbitration, and that he told them this after the noon prayers in the Mosque. Haj Ahmad did not turn up. The arbitrator proceeded in his absence. Now, it is unfortunate, as I have said before, but the arbitrator's act was irregular and cannot possibly be supported. It is essential that the parties to the arbitration, however informal those proceedings may be, at any rate should be summoned to appear before the arbitrator, either by being formally served, or by being notified personally by the arbitrator himself. In this case Haj Ahmad was not so notified personally, but merely his son was told by the arbitrator to tell him to come. Technically, therefore, this proceeding by the arbitrator, in the absence of all the parties, is legal misconduct, however regrettable it may be. We have, therefore, no alternative but to allow the appeal and remit the case to the arbitrator to hear the parties in accordance with the directions of this judgment. Costs to be costs in the cause and we certify the sum of LP. 10 advocate's attendance fee on the hearing of this appeal, to go eventually to the successful party whoever he may be.

Delivered this 11th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL Nos. 23/43 & 33/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Paulina Ingber. APPELLANT.

v.

1. Georg Sandler,
2. Walter Shidorsky,
3. Salomon Siev,
4. Joseph Sinai. RESPONDENTS.

Application to Rabbinical Court to confirm will made orally in presence of witnesses & reduced into writing several months after testator's death — Application to P. D. C. by persons interested in the estate in opposition to confirmation of will — P. D. C. ordering transfer of succession proceedings from Rabbinical Court to District Court — Meaning of "Will" & of confirmation of will — Jurisdiction of Religious Court to confirm will.

Appeal from an order of the District Court of Tel-Aviv (Probote Case No. 282/42) ordering succession proceedings to be transferred to the District Court, allowed and order set aside :—

1. Confirmation of a will — declaration that it is valid in form, that testator was not under any incapacity and not affected by mistake, fraud or undue influence ; in other words that the document propounded is a valid will or declaration in writing of testator's intentions.

2. "Will" in Succession Ordinance does not exclude an oral declaration of testator subsequently reduced into writing.

3. Question of validity of a will of a Palestinian and member of Jewish Community including verbal will reduced into writing after testator's death — a matter of Jewish law and exclusively within jurisdiction of Rabbinical Court.

ANNOTATIONS : On confirmation of will and question of its validity see C. A. 106/40 (7, P. L. R. 310 ; 1940, S. C. J. 229 ; 8, Ct. L. R. 51), C. A. 250/41 (9, P. L. R. 231 ; 1942, S. C. J. 236 ; 11, Ct. L. R. 129) and C. A. 131/42 (1942, S. C. J. 728). As to will disposing of land see L. A. 111/24 (C. of J. 1865). On admissibility of evidence of declaration of deceased see C. A. 60/35 (1, Ct. L. R. 21 ; C. of J. 1934—6, 909).

(*M. L.*)

On the power of the P. D. C. to prohibit a Religious Court from dealing with the succession of a deceased person see C. A. 127/26 (1, P. L. R. 109 ; C. of J. 1668) — *nature of order* ; C. D. C. Ja. 21/28 (C. of J. 40) — *remedies against*

order ; C. A. 120/31 (1, P. L. R. 376 ; C. of J. 1596) — *effect of Religious Court having confirmed will* ; C. A. 70/33 (2, P. L. R. 119 ; C. of J. 1678) — *P. D. C. not entitled to cancel order for transfer* ; C. A. 179/37 (2, Ct. L. R. 214) — *when order not to be made.*

(*H. K.*)

FOR APPELLANT : P. Joseph and Globus.
FOR SECOND RESPONDENT : Katzenstein.
FIRST AND FOURTH RESPONDENTS : In person.

JUDGMENT.

These two matters, one an appeal and the other an application for leave to appeal from an order given by the learned President, District Court, Tel-Aviv, restraining the Rabbinical Court from dealing further with the succession of Mrs. Ruth Fraenkel, deceased, raise interesting and difficult questions.

The deceased, a Palestinian and a member of the Jewish Community, on the 20th June, 1942, when seriously ill from cancer and about to undergo an operation, is alleged to have made an oral will in the presence of three witnesses, her doctor, her legal adviser and her economic adviser. By that alleged will she left LP. 1000 to her mother, Mrs. Rosa Busse, and the balance, said to be some LP. 5—6,000, to the Appellant, Paula Ingber, who is stated to have been for some years, and up to her death, her personal attendant. Six weeks later Mrs. Fraenkel died, but it was not, however, until some five months afterwards that this oral declaration was reduced into writing, and an application was made to the Rabbinical Court, Tel-Aviv, to confirm this alleged will.

An application was made to the President of the District Court, Tel-Aviv, by the first two Respondents, who are the curators of the mother of the deceased, to transfer the succession proceedings into the District Court. This was supported by the third Respondent, Mr. Siev, an advocate, who says that there is another will under which he himself benefited, but which cannot at the moment be found, and by the fourth Respondent, the interim administrator of the deceased husband of Ruth Fraenkel, who predeceased the latter. The first and second Respondents have also opposed confirmation of the alleged oral will before the Rabbinical Court.

It is convenient here to set out the provisions of the law on which the arguments of both sides have been based.

"Will" is defined in Section 2 of the Succession Ordinance, Cap. 135, as follows :—

> "'Will' means a legal declaration in writing of the intentions of the testator with respect to the disposal of his property after death, and includes a codicil."

Section 7 of the Ordinance provides :—

> "(1) The Courts of each of the religious communities shall have exclusive jurisdiction to confirm a will made by any member of the community who is not a foreigner.
>
> (2) The certificate of the court of the community confirming a will shall be deemed to be conclusive evidence that the will is valid in form and that the testator had capacity to make the will and was not affected by mistake, fraud or undue influence, but confirmation by a court shall not make valid any disposition of property thereby which is contrary to law."

Section 9(1) is in these terms :—

> "The President of a District Court may, upon the application of any person interested in the estate of a deceased person and if he deems it just or convenient, make an order prohibiting the court of any of the religious communities from taking cognizance of, or from dealing further with, the succession of any deceased person, and from the date of such order the administration and distribution of the estate shall be within the exclusive jurisdiction of the Civil Courts, and any proceedings which may be pending shall be forthwith transferred to the District Court :—
>
> Provided that no such order shall be made where the estate has already been distributed under the order of the court of the community ; and
>
> Provided further that no such order shall affect any proceedings taken in a religious court solely with a view to the confirmation of a will."

Section 10 :—

> "The following persons shall be deemed to the persons interested in the estate of a deceased person within the meaning of section 9 —
>
> (a) any person who, upon the distribution of the estate by a civil court, would be entitled to any share therein ;
>
> (b) an executor or beneficiary under a will made by the deceased ;
>
> (c) a creditor of any beneficiary who has renounced his share in the succession."

By Article 53(i) of the Palestine Order-in-Council, 1922, the Rabbinical Courts of the Jewish Community are given exclusive jurisdiction in matters of the confirmation of wills of members of their community other than foreigners.

The main argument of the Appellant is that the question whether this is or is not a valid will is a matter solely for the Rabbinical Court to determine under Article 53 of the Order-in-Council and that the second proviso to Section 9(1) of the Succession Ordinance equally prohibits a Civil Court from interfering in such a matter. It is pointed out that oral wills are recognized by Jewish Law, and that the word "will" in the Order-in-Council must mean a will according to the law of the community, and has, therefore, a wider meaning than in the

Succession Ordinance, and that the definition in the Ordinance cannot be imported into the Order-in-Council.

For the Respondents it is contended that it must first be decided whether this alleged oral declaration, subsequently reduced into writing, is a will at all, and that this question is not within the exclusive jurisdiction of the Rabbinical Court — that the District Court is equally competent to decide the question, but that if the District Court determines that it purports to be a will, then the matter of confirmation must be referred to the Rabbinical Court as being within their exclusive jurisdiction.

No definition is given anywhere of what confirmation of a will is, but I think that what confirmation means can be gathered from Section 7(2) of the Ordinance. Confirmation is a declaration that the will is valid in form, that the testator was not under any incapacity, and was not affected by fraud or mistake or undue influence. In other words, to my mind, confirmation of a will means that the document propounded is a valid will or declaration in writing of the intentions of the testator. It is to be noted that the definition of "will" in the Ordinance does not exclude an oral declaration subsequently reduced into writing, since it uses the words "of the testator" not "by the testator". It seems to me, with all respect to those who take the opposite view, that the first question to be decided in proceedings for confirmation of a will is the question, is this document now propounded a will, or does it purport to be a will. Under Section 7(2) of the Ordinance the Rabbinical Court has to decide, in cases of dispute, whether the testator was under any incapacity — if he were, then the document could not be his will. The same reasoning would apply if the testator in making his will had been under undue influence — in such a case again the will could not be confirmed — it would not be a will. Holding this view, it seems to me that the second proviso to Section 9(1) of the Ordinance prevents an order for transfer to the Civil Courts being made of proceedings relating to the question whether the document propounded is a valid will or not.

In all these matters the question of the credibility of the witnesses is of primary importance, but that is a matter entirely for the competent Court, and this applies equally to the present case — the credibility of the witnesses will require very careful consideration by the Rabbinical Court.

As long ago as 1922, in Rasaby *v.* Kalev, L. A. 145/22, Rotenberg, Vol. IV, p. 1580, this Court held that the question of the validity of a will was a matter of Jewish law and exclusively within the jurisdiction of the Rabbinical Court. In this case the question of whether this

document is a will or not is purely a question of Jewish law, and the Civil Courts have, therefore, no jurisdiction in my opinion, however suspicious the circumstances may be surrounding its reduction into writing, or surrounding the oral declaration itself.

I think that the appeal should be allowed, and the order of the learned President of 17th December, 1942, set aside.

Costs of all parties including LP. 10 advocates' attendance fees each to the Petitioner, first and second Respondents jointly, and fourth Respondent, to come out of the estate.

Delivered this 17th day of March, 1943.

British Puisne Judge.

HIGH COURT No. 14/43.

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

BEFORE : Copland, A/C. J. and Abdul Hadi, J.

IN THE APPLICATION OF :—

Henry Hanna Mansour. PETITIONER.

v.

1. Examining Magistrate, Haifa,
2. Inspector General of Police. RESPONDENTS.

Preliminary investigations — Contradictory statements made by a witness before the Police and the Examining Magistrate — Duty of Magistrate — CR. A. 162/28, H. C. 33/37, H. C. 31/39 — Criminal Procedure (T. U. I.) Ord., Sec. 16(2) — When these statements may be examined by the defence — Mandamus.

Application for an order directed to the first Respondent to show cause why his order, refusing a request to direct the production by the second Respondent of statements made by a witness to the second Respondent, should not be set aside, refused : —

1. There is no statutory right to the production, during the preliminary investigation, of statements made by a witness before the police.

2. An examining Magistrate need not consider the credibility of the prosecution evidence but only whether a *prima facie* case has been made out.

REFERRED TO : CR. A. 162/28 (1, P. L. R. 348 ; C. of J. 603), H. C. 33/37 (P. P. 12.vii.37), H. C. 31/39 (6, P. L. R. 340 ; 1939, S. C. J. 333 ; 6, Ct. L. R. 61).

(*A. M. A.*)

ANNOTATIONS :

1. See, in addition to the cases cited, CR. A. 7/33 (P. P. 14.iii.33) which is

referred to in H. C. 33/37 (*supra*) and Mahadeo *v.* The King, 1936, 2 All E. R. 813.

2. It is submitted that the application in this case is an application *sui generis* under section 7(d) of the Courts Ordinance rather than an ordinary petition for a *mandamus ; vide, e. g.*, H. C. 63/40 (7, P. L. R. 424 ; 1940, S. C. J. 515 ; 8, Ct. L. R. 212).

3. On *mandamus* generally see notes to H. C. 147/42 (*ante*, p. 35).

(*H. K.*)

FOR PETITIONER : Cattan.

FOR RESPONDENTS : Crown Counsel — (Rigby).

ORDER.

This is a return to a rule *nisi*, issued by this Court, calling upon the Examining Magistrate, Haifa, to show cause why he should not allow the advocate for the Petitioner to examine certain statements admittedly previously made to the police by a witness against the Petitioner in a preliminary enquiry which is being held in relation to certain offences alleged to be committed by the Petitioner.

The Magistrate declined to allow these statements to be produced at the preliminary enquiry on the ground principally that the object of this production would be to prove that the witness was an untruthful witness. The Magistrate held that it was not his duty, sitting at the preliminary enquiry, to decide whether a witness was truthful or was not truthful, that being a matter for the Court of trial, should it reach there.

Several applications with regard to production of statements in various proceedings have been made to this Court. The first one is Criminal Appeal No. 162/28, Sa'adeh Abu Rashid and another *v.* the Attorney General (reported in 1, P. L. R. p. 348). In that case the Court held that an opportunity must be given to the defence to peruse such statements before the trial if they so desired, for the purpose of deciding whether they wished to have the statements put in evidence. That last passage, that the defence are entitled to decide as to whether they wish to have the statements put in evidence, was disagreed with in High Court No. 33/37 — Sheinzwit *v.* Inspector General of Police. This latter case laid down that the accused or his advocate was entitled, under proper safeguards, to have access to the exhibits upon which the prosecution's expert based his opinion for the purposes of cross-examination. It is laid down that the defence was entitled to the production of statements made by a prosecution witness for the purposes of cross-examination and that the balance of convenience decreed that such access should be given to the accused before, rather

than at the trial. That was an extension of the English practice due, as the Court said, to the difficulties, in particular, of translation in this country. I sat in that case and the reason for that extension was to avoid the delays which might otherwise occur where the statement was in a language with which the accused's advocate might not be acquainted.

Matters of production of statements by the police again came before this Court in High Court No. 31/39, Goddard and another *v.* the Attorney General (reported in 6, P. L. R. at p. 340), where the Court again held that the defence are always entitled to call for the production at the trial of statements previously made by prosecution witnesses, but it would be inadvisable to extend to summary trials the rule that in criminal cases triable upon information the defence are entitled, if they so desire, to see before the trial statements made by prosecution witnesses. The Court there held that, as regards summary trials, there was no statutory obligation, no legal duty, upon the Attorney General to allow what the Petitioners claimed.

In this case it is contended that Section 16(2) of the Criminal Procedure (Trial Upon Information) Ordinance, as amended, gives such a statutory right to the production of statements before the Examining Magistrate. We do not agree that that is so. In this case, in particular, the production of the statements was objected to on the ground that one of them tends to incriminate a third party with regard to certain investigations which are in progress and not yet completed, and it is so undesirable in the interests of the investigation that the man's identity or name should be disclosed at this moment. The object of the production of these statements can only be to throw discredit upon a particular witness who has made a contradictory statement. It is not the function of the Examining Magistrate to determine whether a certain witness is or is not speaking the truth ; his only duty is to record the evidence, and if, having regard to the prosecution's evidence alone, he reaches the conclusion that a *prima facie* case has been established, then, whatever defence may be put before him, it is the Examining Magistrate's duty to commit for trial leaving to the Court of trial to weigh the evidence of the prosecution and that of the defence. It is needless to emphasize the fact that the Examining Magistrate is not a Court of trial.

For these reasons we think that there is no legal duty upon the prosecution to comply with the request contained in the petition. That being so a Rule of *mandamus* will not be issued, nor could it be said that it is desirable in the interests of justice and in accordance with the provisions of our law that this is a type of case where the request

should be acceded to. We do not think that it is in the interests of justice that these statements should be produced in the preliminary enquiry. If Petitioner should be committed for trial, the Petitioner or his advocate will, then, be entitled to see these statements, or copies thereof.

The rule *nisi* is discharged. The Attorney General does not ask for costs.

Given this 27th day of February, 1943.

Chief Justice.

CIVIL APPEAL No. 275/42.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

Trustees of the Property of Ahmad Ibrahim Salahi, bankrupt. APPELLANTS.

v.

Itzhak Shihadeh Dajani. RESPONDENT.

Moneys received through execution office after date of receiving order against debtor — Scope of sec. 39(1), *Bankruptcy Ordinance.*

Appeal from judgment of District Court, Jaffa, Motion 176/42 in Civil Case 40/41, allowed :—

Before creditor can retain the benefit of execution he must show that he completed execution of attachment before the date of the receiving order against the debtor and before notice of bankruptcy petition by or against debtor or commission by him of any available act of bankruptcy.

DISTINGUISHED : *Re* Andrew, (1937) 1 Ch. D. 122.

ANNOTATIONS : Compare H. C. 91/41 (8, P. L. R. 497 ; 10, Ct. L. R. 179 ; 1941, S. C. J. 445) *re* position of secured creditors.

(*M. L.*)

FOR APPELLANTS : Beruti.

FOR RESPONDENT : Dajani.

JUDGMENT.

This is an appeal from an order of the District Court, sitting in bankruptcy. It appears that the Respondent in this case was a judg-

ment creditor of the debtor for whom the Appellants are now trustees. The receiving order against the debtor was made on the 3rd October, 1941, and it appears that the relevant notices were published in the Official *Gazette* and local newspapers. On the 11th November, 1941, the 22nd November, 1941 and the 5th January, 1942, the Respondent apparently applied to the Chief Execution Officer in the course of execution of his judgment, and obtained three sums amounting in all to LP. 83.122 mils. The Appellants now ask that this money should be recovered on the ground that it was taken out of execution after the date of the receiving order.

The matter turns upon the construction of Section 39 of the Bankruptcy Ordinance, 1936, and it would appear from the wording of Section 39(1) that before a creditor is entitled to retain the benefit of the execution it is necessary for him to show two things — that he has completed the execution of attachment before the date of the receiving order ; and secondly, before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. Having regard to the fact that it is necessary for him to prove those two things, it does not seem to me to be necessary for us to decide whether the Respondent had notice of the presentation of the bankruptcy petition against the debtor, because it is clear from the admitted facts of this case that in any event these sums were received by him after the date of the receiving order.

The learned Judge of the District Court appears to have based his decision upon the case of *re* Andrew, (1937) 1 Chancery p. 122 at p. 135. If one looks at what seems to us to be the relevant part of that judgment, to which we were referred by Mr. Beruti, Lord Wright says as follows :—

> "To the extent that the creditor has been paid his debt under and in virtue of an execution, the debt is *pro tanto* discharged, and to that extent there is, in our opinion, nothing on which Section 40 can operate." (Section 40 being the same as Section 39 of our Ordinance) "The operation of the section in such cases is limited to cases where there is at the date of the receiving order or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy still on foot a subsisting execution" (these same provisions appearing in our Section 39) "and is limited to the balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the still incomplete execution which may be affected by the operation of Section 40, Sub-Section 1".

It seems to us to be clear from that language that the effect of the case of *re* Andrew is limited to the particular facts, that is to say, where

the sums in question had been taken in execution proceedings before the date of the receiving order and before the date of the creditor having notice of a bankruptcy petition. That being so it does not seem to us that there is anything inconsistent in that decision with the decision to which we propose to come to now, and that is that the Respondent has failed to show that he has completed the execution before the date of the receiving order.

For these reasons the appeal must be allowed and the order of the District Court set aside. The Appellants are entitled to the refund of this amount of LP. 83.122 mils, and will have the costs here and below, the costs of this appeal to be on the lower scale and to include the sum of LP. 10 for advocate's attendance fee.

Deliver this 2nd day of February, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 5/43.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :—

The Attorney General. — APPELLANT.

v.

Motor-Car Service Co-operative Society of Bath-Galim. — RESPONDENT.

Charge of carrying on trade of a garage without a licence — Scope of sec. 10(1), Trades and Industries (Regulation) Ord.

Appeal from judgment of District Court, Haifa, in its appellate capacity, in CR. A. 88/42, dismissed :—

Person using workshop for purpose of repairing his own busses cannot be held to be carrying on business or trade of a garage within meaning of Trades and Industries (Regulation) Ordinance.

FOLLOWED : A. G. *v.* Plymouth Corporation (1909) 100 L. T. 742.

REFERRED TO : Halsbury, Vol. 32, Hailsham Edition, *p.* 307, para. 490. (*M. L.*)

FOR APPELLANT : Ganon.

FOR RESPONDENT : Heth.

JUDGMENT.

This is an appeal from a judgment of the learned President of the Haifa District Court, in which he reversed a conviction of the Respondent by the learned Magistrate, for carrying on the trade of a garage for motor vehicles without a licence contrary to Section 10(1) of the Trades and Industries (Regulation) Ordinance.

The facts are very short. The Respondent is a Bus Co-operative Society, and for the purposes of their business they have a small building which is used as a store for spare parts and tools for repairing. This small building is surrounded by an enclosure, but no busses of the company can enter the enclosure or enter the building, and such busses as require repair are apparently repaired in some adjoining open ground. Any parts that require repairing are taken into the store in order to be worked upon. The learned Magistrate, when the case first came before him, dismissed the charge, holding that the premises were not a garage. On appeal, the learned Judges of the Haifa District Court held that this building was clearly a garage, and remitted the case to the Magistrate for completion. Acting on those instructions, the Magistrate convicted the Respondent, who thereupon appealed for the second time to the District Court, which allowed the appeal. On the second appeal to the District Court, the learned Judge held that this business or trade of repairing their own busses was not a classified business or trade within the meaning of the Trades and Industries (Regulation) Ordinance, on the ground that the trade or business of the Respondent was the conveyance of passengers, and that, since by repairing their own busses they would be carrying on a business with themselves, this was not a trade or business within the meaning of the Ordinance. The learned Judge says: "You must have some relationship with an outside person or concern. You either, with or without gain, provide something, not necessarily an article, you may provide service to someone else".

The point is an interesting one but we think that the learned Judge was correct. In Halsbury Vol. 32, Hailsham Edition, p. 307 para. 490, it is stated that "it is not a trade for a person to make articles for his own use *etc.*, nor to work for his own purposes only" and in footnote (*q*) on the same page, in the case of the Attorney General *v.* Plymouth Corporation (1909) 100 L. T. 742, it was held that — "It is not carrying on the business of a wharfinger to use one's own wharf for loading and unloading materials for one's own works". On the analogy of this case, it seems to the Court that if you use any workshop for the purpose of repairing your own busses, which you use for

providing means of conveyance to the public, you cannot be held to be carrying on the business or trade of a garage.

For these reasons we think that the appael fails and will have to be dismissed.

Delivered this 1st day of February, 1943.

Chief Justice.

CIVIL APPEAL No. 2/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

Salem Haj Nassar Dudin. — APPELLANT.

v.

Omar Salameh Dudin. — RESPONDENT.

Contract re sale of land purporting to transfer full ownership and also referring to future registration in Tabu — Deed of sale or contract to sell? — Gauging intent of parties from language used in contract.

Appeal from judgment of Magistrate's Court, Hebron, sitting as a Land Court, in L. C. 288/42, dismissed :—

1. In deciding whether contract *re* land a final sale deed, which is null and void according to sec. 11, Land Transfer Ord. or a contract to sell Court must look to intent of parties not to form of contract.

2. Intent of parties must to a very large extent be gauged from language used in contract.

3. Where contract as a whole shows that transaction a final sale of land, position not altered by fact that reference also made therein to future registration in *Tabu* and to issue of proper *Kushans* by *Tabu* Officer.

(*M. L.*)

FOLLOWED : C. A. 195/40 (7, P. L. R. 531 ; 10, Ct. L. R. 3 ; 1940, S. C. J. 491).

ANNOTATIONS :

1. The decision on this point follows C. A. 195/40 (*supra*) which in turn follows C. A. 82/33 (2, P. L. R. 69).

As to distinction between final sale and contract to sell see : C. A. 31/37 (1, Ct. L. R. 51) ; C. A. 253/37 (5, P. L. R. 61 ; 3, Ct. L. R. 119 ; 1938, S. C. J. 67 and annotations thereto), C. A. 221/38 (5, P. L. R. 543 ; 4, Ct. L. R. 252 and notes 2, 3 ; 1938, S. C. J. II, 161 and annotations thereto), C. A. 79/42 (9, P. L. R. 397 ; 12, Ct. L. R. 176 ; 1942, S. C. J. 895).

As to such distinction in cases of other dispositions see C. A. 142/40 (7, P. L. R. 398 ; 8, Ct. L. R. 204 ; 1940, S. C. J. 255).

As to equitable rights see : L. A. 1/36 (C. of J. 1934—6, 340), C. A. 15/38 (5, P. L. R. 237 ; 3, Ct. L. R. 149 ; 1938, S. C. J. 204), C. A. 132/38 (5, P. L. R. 378 ; 4, Ct. L. R. 25 ; 1938, S. C. J. 387).

2. On construction of documents and intention of parties see C. A. 34/38 (5, P. L. R. 234 ; 3, Ct. L. R. 147 ; 1938, S. C. J. 196), C. A. 135/38 (4, Ct. L. R. 15 ; 1938, S. C. J. 435), C. A. 22/39 (6, P. L. R. 162 ; 5, Ct. L. R. 139 ; 1939, S. C. J. 131), C. A. 93/41 (10, Ct. L. R. 37 ; 1941, S. C. J. 260).

3. Compare C. A. 195/40 (*supra*) wherein the Court following C. A. 82/33 (*supra*) relied, *inter alia*, on the fact that the contract in question provided for registration to be effected at a subsequent date, when deciding that it was an agreement to sell.

(A. G.)

FOR APPELLANT : Asal.

FOR RESPONDENT : Moghannam.

JUDGMENT.

This is an appeal from the learned Magistrate of Hebron, sitting as a Land Court. The action was brought by the present Respondent claiming that he was entitled to a certain plot of land in the lands of Doura village and that the Appellant, then Defendant, had been interfering and trespassing on it. The Magistrate found in favour of the Respondent, the Plaintiff, and gave judgment accordingly.

The appeal depends entirely upon one point, namely, was the deed entered into between these two parties a contract of sale or a final sale deed ? As has been remarked in a series of cases, one of which is Civil Appeal 195/40, Abu Loz *v.* Muheissen el Kadi, (7, P. L. R. p. 531), the Court looks to the intent and not the form of the contract in deciding whether it comes within the scope of Section 11 of the Land Transfer Ordinance. As regards this particular deed, the Magistrate held that it was not a contract to sell but was a final sale deed, and the intent of the parties must to a very large extent, at any rate, be gauged from the language which they use, presumably deliberately, in the deed which was the basis of the transaction. In this particular deed, Exhibit D. 1, it is emphasized over and over again that this transaction was a final complete sale. In the first line of the contract it says — "I, the undersigned, Omar Ibn Salameh Ali Dudin, have sold as a final sale", and the word "final" is repeated again, "to the purchaser Salem Ibn el Haj Nassar Dudin, both of Doura village, the plot of land" *etc.*, and then it goes on to say that the sale was made for the price of LP. 140 received in full and then it says : "Now, all the said land with all the benefits thereof, is the

property of the purchaser who can possess it in the manner he likes. I have written this deed temporarily for the sale, price and witnesses, till registration in the *tabu* and the issue of the proper *kushans* by the *tabu* Officer in any Government Department. I have no right to go back on this final sale and have given him the ownership of the property". On this wording, which is very clear and is of no doubt whatever, it would be extremely difficult, in my opinion, for the learned Magistrate to have come to any other conclusion than that at which he arrived. Every one of these cases must, of course, depend upon its own facts, the wording of the contract and the intent of the parties to be gathered from their words. It is noteworthy also that at the hearing before the Magistrate the advocate for the present Appellant said : "Plaintiff sold this land to him as a final sale". There are cases, of course, some of which fall on one side of the line and some fall on the other. To my mind, this case is a clear one. The parties have entered into a transaction, a final sale, by which they have purported to transfer the ownership of the property, and this not having been registered in the Land Registry, is null and void according to Section 11 of the Land Transfer Ordinance.

For these reasons I think that the learned Magistrate came to a correct conclusion and the appeal must be dismissed. Costs on the lower scale and I certify a sum of LP. 15 for advocate's attendance fee on the hearing of the appeal.

Delivered this 12th day of February, 1943.

British Puisne Judge.

HIGH COURT No. 6/43.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Malakeh Nasri 'Amer. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Ibrahim Rahmat-Allah el-Hindi. RESPONDENTS.

Moslem, child of Moslem father and Catholic mother, brought up as Catholic and at age of between 17 and 18 marrying Latin Catholic woman in Latin Catholic Church — Contradictory judgments as to

payment of alimony obtained by wife and by husband from Latin Ecclesiastical Court and from Moslem Sharia Court respectively — Which, if either, of the two judgments should be executed, i. e. which, if either, of the two Religious Courts has jurisdiction — Estoppel created for husband by his declaration and representation when marrying his wife.

Return to order *nisi* directing first Respondent to show cause why he should not execute judgment of Latin Ecclesiastical Court *re* alimony ; order made absolute :—

> If a husband represented himself to be a member of a certain Religious Community in order that his marriage should be celebrated in a church of that Community and the marriage was actually celebrated there, he must be deemed to have submitted to rules of that Church in all matters relating to his marriage, also to jurisdiction of that Church in matters arising out of that marriage, and is estopped in any ensuing matrimonial proceedings from alleging that he is not of that Religious Community.
>
> (*M. L.*)

ANNOTATIONS : As to estoppel from disputing jurisdiction of Religious Court see : H. C. 44/38 (4, Ct. L. R. 4 and note 2 thereto ; 1938, S. C. J. 405 and note 2 thereto), C. A. 234/38 (6, P. L. R. 101 ; 5, Ct. L. R. 121 ; 1939, S. C. J. 73), H. C. 79/40 (7, P. L. R. 490 ; 12, Ct. L. R. 221 ; 1940, S. C. J. 354). But as to the limited effect of consent see : C. A. 246/40 (8, P. L. R. 55 ; 9, Ct. L. R. 54 ; 1941, S. C. J. 17).

As to question of membership in Religious Community see *dictum* in C. A. 147/41 (8, P. L. R. 426 ; 10, Ct. L. R. 122 ; 1941, S. C. J. 428).

As to change of Religious Community in general — see H. C. 87/32 (4, C. of J. 1265) ; S. T. 1/41 (8, P. L. R. 216 ; 10, Ct. L. R. 169 ; 1941, S. C. J. 214 and note 3 thereto). As to change of religious community by minor — see H. C. 87/32 (*supra*) ; H. C. 23/40 (7, P. L. R. 151 ; 7, Ct. L. R. 112 ; 1940, S. C. J. 371) and as to not effective change — see H. C. 100/41 (9, P. L. R. 121 ; 11, Ct. L. R. 74 and note thereto ; 1942, S. C. J. 85).

(A. G.)

FOR PETITIONER : Budeiri.

FOR RESPONDENT : Sa'ad.

ORDER.

This is a return to an order *nisi* granted by this Court, which raises a difficult question on the always awkward point of the jurisdiction of Religious Courts. The parties were married on the 28th September, 1941. Very shortly afterwards disagreements arose and they separated. In the early part of 1942 the wife, the present Petitioner, brought an action before the Latin Ecclesiastical Court claiming alimony from her husband. On the 17th May, 1942, the Latin Ecclesiastical Court gave judgment in her favour for LP. 3.— a month. The husband, the

second Respondent, thereupon proceeded to the Moslem *Shari'a* Court on the ground that he was born a Moslem, was a Moslem and always had been a Moslem, and the *Shari'a* Court gave him judgment that his wife should be submissive to him. Both judgments were then put in execution in the Execution Office of Jerusalem and the learned Chief Execution Officer refused to execute both. He refused to execute the judgment of the Latin Ecclesiastical Court on the ground that the husband was a Moslem and, therefore, the Ecclesiastical Court had no jurisdiction. He declined to execute the judgment of the *Shari'a* Court on the ground that the wife being Christian, the *Shari'a* Court therefore had no jurisdiction and on the ground also that the marriage had not taken place according to the Moslem rites. The wife has now come before this Court asking that the judgment of the Latin Ecclesiastical Court should now be executed.

The story as told by the wife is that she herself is, and always has been, a Latin Catholic, that her husband was the child of a Moslem father and a Catholic mother and was brought up as a Catholic ; that in May, 1934, when eleven years old, her husband was baptized according to the rites of the Catholic Church, and that their marriage was celebrated in September, 1941, in the Parish Church of St. Saviour of Jerusalem, naturally according to the rites of the Catholic Church. The husband's reply is that he was born a Moslem and that no change of religion has ever been registered according to the Religious Community (Change) Ordinance. He argues that the fact that he was married in a Catholic Church has no bearing on the matter, that his baptizm, if true, does not affect his religion because the change of religion was never registered as above mentioned. As for the marriage in a Catholic Church, he says, somewhat naively, that he had not reached the age of maturity and he did not know what was written in the Marriage Certificate.

The wife's tale is supported by the request dated the 23rd March, 1934, by the Respondent's parents that their child who was then eleven years of age should be baptized according to the rites of the Catholic faith. This certificate is rather peculiarly worded, as follows :—

> "We, whose names are affixed hereunder, inform you that our son Ibrahim, who is eleven years of age, has not yet been baptized, and we want that he should follow the Order of the Latin Catholics. Therefore we request you to baptize him,....."

The use of the words "has not yet been baptized" seem to mean that he was a Catholic, but had not yet been baptized, up to that date. There is, in addition, a certificate dated the 19th November, 1942,

signed by the Parish Priest of St. Saviour, certifying that the husband was born in the year 1924, and baptized on the 5th May, 1934. Finally, there is the copy of a Certificate of Marriage of the two parties in which, in the column headed "Community", the husband is described as a Latin. The husband's story is not confirmed by anything but his affidavit and no documents have been filed in support of his petition.

Those are the facts, and on those facts it lies to be determined which, if either of the Religious Courts, has jurisdiction to deal with this matter or whether the case is one which should be referred to the District Court.

Now, it is quite clear that the husband must have represented himself to be a Latin Catholic in order that his marriage should be celebrated in a Catholic Church. In the wife's affidavit it is stated that for several years he used to attend the Catholic Church Services for his devotions, according to the Catholic faith, and he must have represented that fact to the person who celebrated the marriage. By that declaration, and by submitting to a marriage according to the rites of the Catholic faith, the husband must be deemed to have submitted to the rules of the Catholic Church in all matters relating to his marriage as between himself and his wife, and he must be equally deemed to have submitted to the jurisdiction of the Catholic Church in matters arising out of the marriage as between himself and his wife, and having by that representation obtained the celebration of his marriage by the Catholic Church, he is now estopped in any proceedings as between himself and his wife from alleging that he is not a Latin Catholic. We do not decide, or attempt to decide, in any way, whether he is or is not a Moslem, neither do we attempt to decide whether he is or is not a Latin Catholic. All that we say is that in these proceedings, at any rate, with his wife, he is estopped from alleging that he is other than a Latin Catholic.

For these reasons we are of opinion that the order *nisi* will have to be made absolute and the judgment of the Ecclesiastical Court dated the 13th May, 1942, should be executed. The Petitioner is entitled to her costs and the sum of LP. 10 advocate's attendance fee.

Given this 15th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 281/42.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mahmoud Muhammad Abu Mahmud. APPELLANT.

v.

Zakieh Abdul Rahman el-Jamal, Guardian of her two minor children. RESPONDENT.

Action for cancellation of transfer of land by way of gift on ground that transferor of unsound mind — Lack of proof of insanity at material moment of transfer — Validity of gift of masha or miri land.

Appeal from judgment of Magistrate's Court, Jaffa, Civil Case 1363/42, dismissed :—

1. To set aside a land transaction on account of unsound mind it must be proved that at the actual moment of effecting the transaction the party was incapable of managing his affairs.

2. Nothing prevents *masha'* or *miri* land from being transferred as gift.

(*M. L.*)

ANNOTATIONS :

1. In C. A. 53/43 (reported *infra*) it was found that a transaction made by person insane at time of transaction is void.

2. The same ruling was laid down in C. A. 135/42 (12, Ct. L. R. 208 ; 1942, S. C. J. 723) ; see Arts. 38 & 39 of Land Code and Land Law of Pal. by Goadby & Doukhan, p. 142.

(A. G.)

FOR APPELLANT : Dajani.

FOR RESPONDENT : Elia.

JUDGMENT.

We are of opinion that this appeal fails. The main point raised is that the deceased was of unsound mind when he made this gift. There is no evidence that at the actual date of the gift and the transfer he was of unsound mind though he may have been of unsound mind in the previous year. That is not sufficient. It must be proved that at the actual moment of making the gift he was incapable of managing his affairs.

With regard to the other point raised, namely, that you cannot make a gift of *masha'* and of *miri* land, we think that that equally fails. There seems to be a certain amount of confusion about the use of the word "gift", if I may say so. "Gift" is really a transfer

without consideration and if a man can transfer *miri* property for consideration, it seems to us that there is no reason why he should not be able to transfer it without consideration.

For these reasons we think, as I have said, that the appeal will have to be dismissed. The Respondent is entitled to costs on the lower scale and LP. 10 advocate's attendance fee on the hearing of the appeal.

Delivered this 9th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 260/42.

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

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

IN THE APPEAL OF :—

Abraham Apotowski. APPELLANT.

v.

1. Hanna Bombach,
2. Sheindel Bombach. RESPONDENTS.

Joint tenancy agreement with two tenants — Breach of agreement by subletting without landlord's consent — Extent of effect of knowledge & waiver of breach of agreement — Question of equitable relief in respect of breach of agreement — Acceptance of rent in advance not constituting waiver of breach.

Appeal from judgment of District Court, Jerusalem, in its appellate capacity, in C. A. 63/42, dismissed :—

1. a) Tenancy of two joint tenants comes to end on one tenant leaving premises.
   b) Knowledge and waiver of breach of expiring joint tenancy agreement does not constitute waiver of new tenancy agreement with remaining tenant.
2. Breach of agreement by subletting without landlord's consent — not a trifling breach or one in respect of which Equity grants relief, unless consent applied for and unreasonably withheld.
3. Acceptance of rent in advance cannot be considered as a waiver or condonation of any future breaches of agreement. (*M. L.*)

DISTINGUISHED : C. A. 242/42 (12, Ct. L. R. 213 ; 1942, S. C. J. 801).

ANNOTATIONS :

1. As to waiver of breach of contract of lease see : Rex *v.* Paulson, 124 L. T. 449 ; Davenport *v.* The Queen, 37 L. T. 727 ; Matthews *v.* Smallwood (1910) 1 Ch. D. 786 ; C. A. 101/42 (12, Ct. L. R. 130 ; Gorali, 143 ; 1942,

S. C. J. 625) ; C. A. 122/42 (12, Ct. L. R. 125 ; Gorali, 141 ; 1942, S. C. J. 674) ; C. A. 110/42 (12, Ct. L. R. 73 ; Gorali, 135 ; 1942, S. C. J. 481) ; and see authorities cited in C. A. 242/42 (*supra*) ; see also C. A. D. C. Jm. 101/41 (Gorali, 155) and authorities cited therein.

2. As to trifling breach of tenancy agreement see C. A. 194/42 (12, Ct. L. R. 162 ; Gorali, 151 ; 1942, S. C. J. 779) ; C. A. 121/42 (12, Ct. L. R. 81 ; Gorali, 136 ; 1942, S. C. J. 521).

This is the first authority on the point of equitable relief in cases of unlawful subletting ; equitable relief in case of delay of payment of rent has been granted in many cases — see C. A. 248/42 (12, Ct. L. R. 212 ; 1942, S. C. J. 876) ; C. A. 186/42 (12, Ct. L. R. 149 ; Gorali, 149 ; 1942, S. C. J. 687).

3. The rule that waiver is only in respect of past breaches is laid down in the cases treating this matter (see cases referred to in para. 1 (*supra*)).

(A. G.)

FOR APPELLANT : Gorali.

FOR RESPONDENTS : Levitsky.

JUDGMENT.

This was an appeal against the judgment of the District Court of Jerusalem, dated the 2nd November, 1942, which judgment reversed that of the Magistrate dated the 7th July, 1942. At the conclusion of the hearing before us we intimated that the appeal would be dismissed and that we would give our reasons in writing later owing to the many and various reasons submitted to us, both legal and otherwise, as to why the learned President was wrong in his reversal of the Court below. It is also an eviction case and although the Court has every sympathy with evicted tenants at the present time and little sympathy with avaricious landlords who get, or attempt to get, rid of tenants for the sole purpose of being in a position to demand an enhanced rent, it did not appear to us that this was a case of that nature. The Appellant and one Rosen were tenants of the premises by virtue of a written agreement which would expire at *Muharram*, 1942, *i. e.* 18.1.42. As is customary the rent was and had been paid in advance. The premises were owned by the two Respondents but managed by their respective husbands as agents for them, whom I will refer to as the Respondents. A few weeks prior to the expiration of the agreement the Respondents were at the premises and had a conversation with the Appellant as to what would be the position at the forthcoming *Muharram*. The Appellant informed them that Rosen would be leaving and apparently had left already and the Appellant had sublet Rosen's part of the flat to a relative. There appears to have been some argument as to this but apparently the Respondents did nothing at the time although it is in evidence that one of them said they did not want the Appellant or Rosen as tenants and offered the Appellant another flat. A week or two later, on the 12th Janu-

ary, apparently the Appellant sent the rent in advance for the forthcoming year which was acknowledged by the Respondents by letter of the 18th January, *i. e. Muharram*. It states: "We gather from your letter that you desire to continue the lease alone and that Mr. Max Rosen has vacated the flat". It then goes on to state in the most specific terms that if the Appellant remained on alone he was not allowed to sublet any part of the flat without their consent in writing and refers to the previous conversation of the Appellant's desire to sublet and the letter warned him of the consequences. It also expressed willingness to return the rent then acknowledged if he did not agree to an extension of his tenancy on these terms.

Shortly afterwards it was discovered by the Respondents on visiting the premises that the Appellant had sublet the flat and, to say the least, the remonstrances of the Respondents were not very tactfully received. Subsequently various lawyers' letters passed between the parties and it was not until 21.4.42 that the action for eviction was filed. The Magistrate gave judgment for the Appellant but was reversed on appeal by the learned President who set forth his reasons for so doing. He held that there was no waiver by the delay in taking proceedings nor by their knowledge of the breach of the previous tenancy agreement of which fact the Magistrate had found that they were aware. It was a term of the previous written contract that there should be no subletting without consent in writing and although there had been a breach of that agreement just before its expiration, that agreement was between the Respondents and two persons, namely the Appellant and Rosen. The fact of knowledge of that breach and possible waiver of it cannot possibly constitute a waiver of the new tenancy agreement which was entered into on the 18th January and under which there was a most specific provision against subletting. Originally the tenancy was a joint tenancy and this came to an end on 18.1.42. You cannot have waiver of a breach of a tenancy agreement which has not yet commenced, which in fact is what counsel argued before us. Neither is subletting without consent a trifling breach or one in respect of which Equity grants relief, unless such consent has been applied for and is unreasonably withheld. Neither could the acceptance of the rent in advance possibly be considered as a waiver or condonation of any future breaches of the agreement. The facts in C. A. 242/42 were entirely different to the facts in this case.

For these reasons we dismissed the appeal, with costs on the lower scale to include the sum of LP. 5.— for advocate's attendance fee.

Delivered this 25th day of January, 1943.

Chief Justice.

CRIMINAL APPEAL No. 8/43.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :—

1. Omar Sadiq,
2. Abdul Latif Abdul Rahman. APPELLANTS.

v.

Attorney General. RESPONDENT.

Supernumerary policemen taking out of a shed property of War Department — Meaning of "making away with" property — C. of A. increasing sentences of Appellants in view of seriousness of offence and aggravating circumstance of their being constables.

Appeal from judgment of District Court, Haifa, Summary Trial 453/42, dismissed and sentences increased :—

"Making away with" property is dealing in an unauthorised manner with it ; it includes, and has a wider meaning than "theft".

(*M. L.*)

FOR APPELLANTS : Salah.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

The Appellants were convicted together with another man of making away with property belonging to the Military Forces, contrary to Regulation 24A(1)(d) of the Defence (Amendment) Regulations (No. 8) of 1942. The details of the charge were that they jointly made away with seventeen motor tyres stored at the 2 B. O. D. Camp, near Tireh village at Haifa, which were the property of the War Department of His Majesty's Government. The two Appellants were each sentenced to four years' imprisonment and their companion was sentenced to two years. The latter has not appealed.

With regard to the evidence, there was ample evidence against these two Appellants to prove that they were dealing with this property. Acting on information, a special watch was being kept on that camp that night and when the patrols, having seen a car arrive, went up to the scene, they found a man, who was the person jointly convicted with these Appellants, sitting on top of a concrete post through which the wires of the fence passed, and these two men standing inside the

wire fence. The patrol got through the wire and arrested the three men. Tyres were found and the man on the post had a tyre on his knees when the patrol went around. Tyres were also on the ground near the Appellants, and the rifles of these two men, who were supernumerary policemen, were seen leaning against a post inside the wire fence. One of the windows of the shed in which these tyres were stored was discovered to be broken.

On appeal an attack has been made on the evidence of Lance Corporal Evans of the Royal Army Ordnance Corps, who was one of the witnesses. It is stated that there were contradictions between the statement which he gave to the Police and the evidence which he gave at the summary trial. There are no actual contradictions except very minor ones, but the evidence given at the Court of trial was considerably fuller than the statement to the Police. The matter was argued at considerable length before the learned Relieving President and he stated that in his opinion the evidence of Evans was given in a straightforward manner and he believed it notwithstanding the attack made on it. In view of that finding made by the learned Judge, who saw, heard and believed the witnesses, it is quite hopeless to ask this Court to interfere. The Appellants were sufficiently identified by Bloomer who arrested them.

A lengthy argument has been addressed to us on the meaning of the words "making away with". It has been argued that they mean that the goods must be legally in the possession of the person and illegally disposed of by him. The Court is of opinion that, whilst "making away with" includes "theft", yet it has a considerably wider meaning than theft. In the opinion of the Court "making away with" property is dealing in an unauthorised manner with that property. There is no doubt that what these men were doing was passing War Department property over the fence, that is, dealing with military property in an unauthorised manner. It is a matter of common knowledge that these thefts from military camps are much too prevalent all over the country. They are difficult to detect, but, when detected, an example must be made of the persons concerned, since in war time, in particular, such an offence is of a very serious nature. On several occasions this Court has pointed out the seriousness of these offences. Bearing in mind that these two men were temporary additional constables, whose duty it was to guard this property, it is difficult to imagine a more serious offence than that of which they have been guilty.

The Court is of opinion that the sentences passed by the lower Court are insufficient. The appeals against conviction are dismissed

and the sentences are increased in each case to one of six years' imprisonment to run from to-day. The tyres are to be returned to the War Department.

Delivered this 9th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 295/42.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Abdul Rahman Haj Nasrallah. APPELLANT.

v.

Ahmad Mohammad Labadi. RESPONDENT.

Action re land brought in Magistrate's Court sitting as Land Court — Matter, at request of parties, referred to and decided by arbitrators — Magistrate sitting as Land Court overruling objection of misconduct of arbitrators and confirming award — Which Court has jurisdiction to hear appeal from Magistrate's judgment ?

Appeal from judgment of District Court, Nablus, in its appellate capacity, in C. A. 16/42, dismissed :—

Where action brought in Magistrate's Court sitting as Land Court, thence matter referred to and decided by arbitrators, appeal from judgment given by Magistrate's Court as Land Court *re* award lies with Supreme Court, not District Court.

ANNOTATIONS : On application of Arbitration Ordinance to appeals in cases heard by Magistrate's Court see C. A. 239/41 (8, P. L. R. 590 ; 11, Ct. L. R. 38 ; 1941, S. C. J. 557 and annotations thereto).

(*M. L.*)

FOR APPELLANT : 'Aydeh.

FOR RESPONDENT : Qamhieh.

JUDGMENT.

We do not need to hear you, Abdul Mun'im Eff. Qamhieh.

The facts of this case are short and simple. An action was brought in the Magistrate's Court sitting as Land Court, and at the request of the parties the Magistrate referred the matter to arbitration. The arbitrators sat, issued their award, and the award was brought to the

Magistrate for confirmation. The Magistrate confirmed the award and refused the objection that there has been misconduct on the part of the arbitrators. The dissatisfied party thereupon appealed to the District Court as a Court of Appeal. The District Court decided that the appeal was not within their jurisdiction, since under Section 11 (4) of the Magistrates' Courts Jurisdiction Ordinance, 1939, the appeal from a Magistrate's Court sitting as a Land Court lay direct to the Supreme Court. Against that decision of the District Court this present appeal has been brought.

It should be noted that the judgment of the Magistrate confirming the award is undoubtedly a judgment in a land case, because the judgment is headed "Land Case No. 4/42". It is, therefore, clear that when the learned Magistrate gave the judgment he was sitting as a Land Court. He may, of course, have had no jurisdiction to sit as a Land Court, but that is not the point in this appeal. Under Section 11 (4) of the Magistrates' Courts Jurisdiction Ordinance appeals from such a judgment lie direct to the Supreme Court. In our opinion, the learned Judges of the District Court came to a correct decision in point of law. The appeal must, therefore, be dismissed with costs on the lower scale, to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

We are unable to deal with the further request made by the Appellant that we ourselves should deal with the appeal. We have no jurisdiction to deal with the matter at this stage. If he so desires the appeal must be filed in this Court after attaining, if he can do so, an extension of time for appealing.

Delivered this 11th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 273/42.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPEAL OF :—

1. Mill Products Ltd.,
2. Berthold Gottesmann,
3. Shalom Leib Singer. — APPELLANTS.

v.

Paul Kreppel. — RESPONDENT.

Execution of judgment for several hundred pounds — Agreement and subsequent dispute between parties as to satisfaction of debt — Question of subject matter of dispute and jurisdiction of Court accordingly.

Appeal from judgment of District Court, Tel-Aviv, Civil Case 174/42, allowed and case remitted to Court below :—

> Where judgment debtor claims to have satisfied debt in full (and asks for a declaratory judgment to that effect), whole amount of debt and not substantive difference between parties *re* certain part of it, determines jurisdiction of District Court or Magistrate's Court.
>
> (*M. L.*)

ANNOTATIONS : A similar rule was laid down in C. A. 12/41 (8, P. L. R. 105 ; 9, Ct. L. R. 95 ; 1941, S. C. J. 92).

In claim by co-owner regarding his share of land, value of that share, not of whole land, determines jurisdiction — C. A. 37/40 (7, P. L. R. 131 ; 7, Ct. L. R. 124 ; 1940, S. C. J. 90) ; if subject matter of dispute — land, road built on it excluded when ascertaining value of claim — C. A. 74/41 (8, P. L. R. 259 ; 9, Ct. L. R. 195 ; 1941, S. C. J. 270) ; in arbitration matters jurisdiction of Court depends on the aggregate amount of claim and counterclaim — C. A. 42/39 (6, P. L. R. 229 ; 5, Ct. L. R. 180 ; 1939, S. C. J. 286).

(A. G.)

FOR APPELLANTS : Rotenstreich and Caspi.

FOR RESPONDENT : Hake.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv.

It appears that the Respondent had obtained judgment against the Appellants for the sum of LP. 659 together with interest, costs and advocate's fees amounting in all to LP. 750.

The question to be decided, under Article 36 of the Execution law, is whether this judgment debt has been satisfied. The Appellants allege that it has, that allegation being based upon certain facts, one of the facts being that there was, in fact, an agreement between the parties whereby a lesser sum should be accepted in full satisfaction of the debt.

The Respondent does not admit that the construction placed upon the terms of the contract by the Appellant is the correct one.

It is true that now the substantive difference between the parties appears to be LP. 184 only. It is also, of course, true that a claim brought for LP. 184 would normally be brought in the Court of the Chief Magistrate. With regard to this particular case, however, we think that the matter to be regarded is what was asked for by the Appellants, and in view of their statement of claim, we think that the real matter in dispute in this case is whether this judgment debt for LP. 750 has been satisfied.

That being so we think that this is a matter that properly falls within the jurisdiction of the District Court. In view of the fact that the matter will have to be determined by them, we propose to say nothing further as to the facts or merits of this case.

The appeal will, therefore, be allowed and the matter remitted to the District Court to determine according to law.

I think that the fair order is that the Appellants should have their costs of this appeal in any event, the costs to be on the lower scale and to include, in respect of each set of Appellants LP. 5 for advocate's attendance fee.

Delivered this 10th day of February, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 15/43.

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.

Benjamin Halfon. RESPONDENT.

Defence (Control of Engineering, Building and Hardware Material) Order, Reg. 6 — "Any article or thing" includes a building — Stroud's Judicial Dictionary, "any", "thing" — Regulation 7 contrasted — Sentence.

Appeal from the judgment of the District Court, Haifa (appellate capacity, *Cur.* Shems, Baradey, JJ.) in Criminal Appeal No. 81/42, allowed, the judgments of the lower Courts set aside and the Respondent convicted under Regulation 6. Nominal fine imposed:—

The words "any article or thing" in Regulation 6 of the Defence (Control of Engineering, Building and Hardware Material) Order include a building.

(*A. M. A.*)

ANNOTATIONS :

1. Statutes and sections should be read as a whole: Halsbury, Vol. 31, *p.* 464, *sec.* 566; Digest, Vol. 42, *pp.* 645 *seq.*, *Nos.* 505 *seq.*; C. A. 56/40 (7, P. L. R. 183; 1940, S. C. J. 133; 7, Ct. L. R. 182); C. A. 84/40 (7, P. L. R. 401; 1940, S. C. J. 313; 8, Ct L. R. 132); CR. A. 57/40 (7, P. L. R. 359; 1940, S. C. J. 442; 8, Ct. L. R. 225); H. C. 9/41 (8, P. L. R. 95; 1941,

S. C. J. 55; 9, Ct. L. R. 85); H. C. 45/42 (9, P. L. R. 308; 1942, S. C. J. 273; 11, Ct. L. R. 199).

2. Where the legislature uses different words in the same enactment they should be given different meanings while the same word should in like cases be given the same meaning: Halsbury, Vol. 31, *p.* 482, *sec.* 598; Digest, Vol. 42, *pp.* 643 *seq.*, *Nos.* 479 *seq.*; H. C. 23/32 (1, P. L. R. 687; C. of J. 740); C. A. 122/39 (7, P. L. R. 60; 1940, S. C. J. 220; 7, Ct. L. R. 79) and the passage from Maxwell therein cited; C. A. 66/40 (7, P. L. R. 220; 1940, S. C. J. 136; 7, Ct. L. R. 165); H. C. 99/40 (7, P. L. R. 579; 1940, S. C. J. 376; 8, Ct. L. R. 178); C. A. 172/40 (7, P. L. R. 547; 1940, S. C. J. 537; 8, Ct. L. R. 231); C. A. 218/41 (8, P. L. R. 544; 1941, S. C. J. 533; 10, Ct. L. R. 162); CR. A. 119/41 (8, P. L. R. 442; 1941, S. C. J. 559).

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Toister.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa, confirming a judgment of the Magistrate. The point to be decided is the interpretation to be given to Regulation 6 of the Defence (Control of Engineering, Building and Hardware Material) Order, 1942.

Regulation 6 reads as follows:—

> "No person shall use any of the materials specified in the Second Schedule hereto for the manufacture or construction of any article or thing or as a component of any article or thing save under the authority and in accordance with the conditions of a Licence granted by or on behalf of the Director."

The question to be determined is whether the word "thing" covers a building. The learned Magistrate himself says in his judgment:—

> "There is no doubt that if the said para. 6 applied to the user of controlled materials into buildings there is sufficient ground before us for sentencing the accused to the punishment provided by the said order."

In the light of that observation, we consider that we can finally dispose of the matter without the necessity of remitting it to the Magistrate for completion.

It seems to us, as learned Crown Counsel has pointed out, that the words "any thing", used in juxtaposition, are the widest possible formula that could be adopted. Not only is the word "thing" of practically general application but also the word "any" is described in Stroud's Judicial Dictionary as "excluding limitation or qualification". It seems to us, therefore, that there is no reason to limit the application of this regulation to articles or things other than buildings.

The District Court appears to have been impressed by the fact that the succeeding Regulation, Regulation 7, specifically refers to a "build-

ing" as well as to an "article" or "thing". We are of opinion, however, that learned Crown Counsel is right in his contention that that regulation is a specific one of limited application, relating only to the user of Portland Cement, and in no way derogates from the general application of Regulation 6.

For these reasons the appeal must be allowed, the judgments of the District Court and Magistrate set aside and the Respondent convicted of an offence against Regulation 6.

With regard to penalty, we are informed that this is regarded as in the nature of a test case, and that the prosecution only ask for a nominal penalty. That being so, we think that justice will be done by fining the Respondent the sum of LP. 0.500 mils.

Delivered this 25th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 279/42.

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

BEFORE : Copland, A/C. J.

IN THE APPEAL OF :—

Issa Saliba Giha. APPELLANT.

v.

1. A. Halevi Hurvitch, liquidator of Bank Geulah Ubinyan, Ltd.,
2. Rabbi Shimon Vinograd. RESPONDENTS.

Vesting Order — Jurisdiction — Winding up — District Court cannot make a vesting order with respect to immovable property — Companies Ordinance, Sec. 165, P. O. in C., Art. 42, Land Courts Ordinance, Sec. 3, C. A. 91/31 — Construction of Statutes — Ordinance cannot overrule P. O. in C. — Decree and judgment — Final determination of rights of parties — C. P. R., rule 2 — Motion to set aside judgment affecting applicant, C. P. R. 213, 362, R. S. C. O. 27, r. 15.

Appeal from the judgment of the District Court, Haifa, (*Cur.* Hasna, Bardaky, JJ.) on a motion in Civil Case No. 189/37, allowed and vesting order made by the lower Court set aside :—

1. A decision which finally determines the rights of a party *vis-à-vis* the second party is a "decree" which may be appealed without leave.
2. When a judgment delivered in presence of the parties affects a stranger

to the proceedings, his proper course is to apply by motion under rule 362 to set aside the judgment.

3. A District Court may not make a vesting order, under section 165 of the Companies Ordinance, in respect of immovable property.

4. An ordinance cannot vary an Order in Council unless special powers to vary are conferred by the Order in Council.

CONSIDERED: C. A. 91/31 (2, P. L. R. 2; C. of J. 512).

(*A. M. A.*)

ANNOTATIONS :

1. It was held in an interlocutory ruling in C. A. 243/38 (6, P. L. R. 47), followed in C. A. 86/40 (7, P. L. R. 280 ; 1940, S. C. J. 164 ; 7, Ct. L. R. 193) that orders in winding up proceedings are appealable without leave.

2. See the following authorities on the meaning of "decree" in Rules 2 and 317 of the Civil Procedure Rules : Misc. A. 37/38 (P. P. 24.vii.38 ; 1938, 2 S. C. J. 255) — *decree signed by Registrar* ; C. A. 1/39 (6, P. L. R. 77 ; 1939, S. C. J. 57 ; 5, Ct. L. R. 94) — *order regarding expert's fees : not a decree* ; C. A. 86/40 (*supra*) ; C. A. 41/40 (1940, S. C. J. 244; 7, Ct. L. R. 109) — *judgment for maintenance: a decree*; C. A. 96/41 (8, P. L. R. 256; 1941, S. C. J. 346; 9, Ct. L. R. 188) — *order interpreting previous judgment: an integral part of the judgment*; C. A. 196/41 (9, P. L. R. 204; 1942, S. C. J. 190; 11, Ct. L. R. 132) — *order for adjournment: not a decree*; C. A. 54/42 (9, P. L. R. 306; 1942, S. C. J. 324; 12, Ct. L. R. 143), following C. A. 219/40 (7, P. L. R. 600; 1940, S. C. J. 480; 10, Ct. L. R. 10) — *order striking out statement of claim: not a decree*; C. A. 120/42 (1942, S. C. J. 899) — *consecutive judgments*; C. A. 158/42 (1942, S. C. J. 958) — *order refusing leave to defend: not a decree*; C. A. 66/43 (*post*, p. 95) — *order transferring succession*: not a decree.

3. On the exclusive jurisdiction of the Land Court *cf.* L. A. 14/23 (C. of J. 1112), followed in L. A. 69/25 (*ibid.*, p. 1115) — *re ownership of land irrespective of the fact that the land in dispute is claimed to be waqf;* L. A. 139/25 (C. of J. 1117) — *re rights of irrigation;* L. A. 136/26 (C. of J. 1119) — *re ownership of land*; H. C. 74/32 (1, P. L. R. 782; C. of J. 1127) — *re setting aside registration;* L. A. 53/34 (2, P. L. R. 465; C. of J. 1934—6, 842) — *re claim to registration as owner*; C. A. 77/35 (1937, S. C. J. 27) — *re dispute whether land is waqf;* H. C. 106/36 (1937, S. C. J. 401; C. of J. 1934—6, 610); C. A. 154/40 (7, P. L. R. 467; 1940, S. C. J. 334; 8, Ct. L. R. 91) and C. A. 75/41 (8, P. L. R. 214; 1941, S. C. J. 202; 9, Ct. L. R. 176) — *re cancellation of mortgage;* H. C. 89/40 (7, P. L. R. 525; 1940, S. C. J. 559) — *re category of land;* H. C. 107/40 (8, P. L. R. 13; 1941, S. C. J. 59; 9, Ct. L. R. 40) — *re ownership by prescriptive title;* C. A. 16/42 (1942, S. C. J. 227; 11, Ct. L. R. 109) — *re identity of land.*

4. "An ordinance enacted under powers conferred by an Order in Council must conform with the provisions of such Order in Council, and if it infringes such provisions it is *ultra vires* and treated as void.": H. C. 99/42 (1942, S. C. J. 605) and cases cited therein and in the annotations thereto.

5. "No consent ..... on the part of litigants can give a Court jurisdiction where that jurisdiction is not conferred by Order in Council or by Ordinance.":

C. A. 246/40 (8, P. L. R. 55; 1941, S. C. J. 17; 9, Ct. L. R. 54); see also H. C. 101/42 (1942, S. C. J. 569; 12, Ct. L. R. 209).

(*H. K.*)

FOR APPELLANT : Elia.
FOR FIRST RESPONDENT: B. Shereshevsky.
FOR SECOND RESPONDENT : Amdur.

JUDGMENT.

This is an appeal against the judgment of the District Court of Jerusalem, in which that Court refused an application by the Appellant to set aside a vesting order made by it. The original proceedings in the District Court were in connection with the winding up of a company, the Bank Geulah Ubinyan, Ltd., in liquidation. The original parties in the District Court in connection with the vesting order were the liquidator of the company, who is the first Respondent to this appeal, and the second Respondent. By consent the District Court ordered certain properties, which were registered in the name of the second Respondent, to be vested in the first Respondent as liquidator of the company. The present Appellant brought a motion in the District Court asking to set aside that vesting order on the ground that he was a creditor of the second Respondent and desired to attach certain lands which, by the vesting order, had been transferred from the second Respondent and vested in the first Respondent. The attachments had already been granted, but had not been registered.

The grounds advanced in support of that application were that the District Court, in winding up, had no jurisdiction to deal with or determine rights of ownership or possession of immovable property not registered in the name of the company in winding up, that the vesting order of 30th September, 1941, was made in proceedings to which the Appellant was not a party and could not in any way affect his rights with regard to the property, and alternatively that there had been delay by the first Respondent in getting the properties, ordered to be vested in his name, registered in due time in the Land Registry. The District Court declined to set aside the order, holding that Section 165 of the Companies Ordinance gave them jurisdiction to deal with all property, whether immovable or not, the subject of the winding up, and that there was no undue delay on the part of the first Respondent in effecting registration.

On the hearing of this appeal a preliminary point was taken by the first Respondent to the effect that this was not a final decree made by the District Court, and, therefore, no appeal lay as of right, and that it only lay by leave of the District Court or this Court. The

argument was that this order was not a decree and that it was given in the course of winding up proceedings which had not yet been concluded. The Appellant's reply is that, so far as regards his claim, the decision — to use a neutral word — of the District Court finally determined his rights vis-à-vis the first Respondent and that he, at any rate, had no power to continue in the winding up proceedings. I think that on this point the Appellant is correct. There is no doubt that this decision of the District Court does finally dtermine the rights claimed by the Appellant as against the first Respondent, and that the Appellant has no further remedies open to him.

In these circumstances, I am of opinion that this decision of the District Court falls within the definition of "decree" in Rule 2 of the Civil Procedure Rules, whatever it may be called, inasmuch as it conclusively determines the rights of the parties, that is to say, the parties to this appeal, in respect of the matter in controversy, which was the power of the District Court to make the vesting order. That point fails therefore.

With regard to the main point in this appeal, Section 165 of the Companies Ordinance is in the following terms :—

> "Where a company is being wound up by the court, the court may, on the application of the liquidator, by order direct that all or any part of the property whatsoever belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name, and thereupon the property to which the order relates shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property."

This section gives the District Court power to make orders in relation to all property. The Appellant argues that this section cannot refer to immovable property, since by Article 42 of the Order-in-Council the High Commissioner may establish Land Courts and determine the area of their jurisdiction, and by the Land Courts Ordinance, Cap. 75, Section 3, the Land Court is the only Court which has jurisdiction to determine all claims to rights in or over lands, or to decide any disputes as to the ownership of lands or any rights in or over land. The argument is that the jurisdiction of the Land Court cannot be ousted by Section 165 of the Companies Ordinance. In support of that contention he cites Civil Appeal 91/31, Gaitanopoulus *v.* Kremer (2 P. L. R., page 2). The Respondent's contention is that the Land Court has only jurisdiction in regard to disputes concerning land, but that here there was no application for the cancellation of a ***kushan***

and no dispute, since the vesting order was made by consent, and that in any case the proceedings are misconceived since under Rule 213, which he says is the only rule allowing an application to set aside a judgment, this not being an *ex parte* judgment, no action can lie.

Reference is made to Order 27, Rule 15 of the Rules of the Supreme Court, and it is pointed out that, whereas our Rule 213 says that upon application being made "by a party", the word "party" is omitted in the Rules of the Supreme Court. In reply the Appellant contends that consent cannot give jurisdiction where jurisdiction is not conferred by law, and that his application to set aside was made in the only way it could be made, that is under Rule 362 of the Civil Procedure Rules.

Now, to take the point about the rule under which this application is made. The vesting order was not an *ex parte* decree or order. It was a decree given in the presence of the parties who were named in the application, that is the two present Respondents, and though it is true that the present Appellant was not a party to it, I think however, that under Rule 362 the application to set aside was properly made. Rule 362 says :—

> "Where, under the law heretofore in force, any person would be entitled to claim or to enforce any right by way of a third party opposition to an order of any Court, under Articles 161 to 170 of the Ottoman Code of Civil Procedure, such person shall be entitled to claim or to enforce such right by action in the competent Court."

Now, in companies winding up, actions are started by petition or motion, and in my opinion the Appellant was correct in the procedure which he adopted, that is, Rule 362 is authority for his application to set aside. He applied by motion to set aside, which was the only course open to him, and under the Ottoman Code of Civil Procedure he would have been able to proceed by way of third party opposition.

With regard to the merits of the case, in Civil Appeal 91/31, the then Chief Justice, Sir Michael McDonnell, quoted from a previous judgment of his, and in that judgment there appear these words :—

> "Now there is a presumption that the legislator does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication ; or, in other words, beyond the immediate scope and object of the statute. (Maxwell on the Interpretation of Statutes, Sixth Edition, page 149)."

Further on he says :—

> "As is said in Craies on Statute Law, third edition, page 112, 'To alter any clearly established principle of law a distinct and positive legislative enactment is necessary'."

Now, in the legislation in this country Land Courts have the exclusive jurisdiction to deal with any question regarding the ownership

or possession of land, as stated above, and it seems to me that Section 165 of the Companies Ordinance cannot over-ride that distinct provision in the Land Courts Ordinance, based as it is upon Article 42 of the Palestine Order-in-Council. An Ordinance cannot vary an Order-in-Council unless power to vary in any manner is conferred by the Order-in-Council itself, neither can consent give jurisdiction to the District Court in this matter unless jurisdiction is vested in that Court by law.

For these reasons I think that the District Court had no jurisdiction to make the vesting order with regard to immovable property, and the appeal must, therefore, be allowed and the vesting order set aside as against the first Respondent, who was the only party to the application to set aside the vesting order.

With regard to costs, the Appellant is entitled to his costs both here and below as against the first Respondent, to include the sum of LP. 15 advocate's attendance fee on the hearing of this appeal. The second Respondent will neither pay nor receive costs.

Delivered this 23rd day of February, 1943.

Acting Chief Justice.

CRIMINAL APPEAL No. 19/43.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Khaled Mustafa Salman. — APPELLANT.

v.

The Attorney-General. — RESPONDENT.

Sentence — Possession of an unlicensed revolver, Firearms Ord. Sec. 36(2)(a) — Effect on sentence of accused telling a lie, Archbold on Criminal Pleading and Practice, 30th ed.

Appeal from the judgment of the District Court, Jaffa, in Criminal Case No. 367/42, (*Cur.* Windham, J.), dismissed, but sentence reduced:—

The fact that the accused told a deliberate lie in Court should not be taken into account when sentencing the accused.

(*A. M. A.*)

ANNOTATIONS: *Cf.* CR. A. 106/41. (1941, S. C. J. 374; 10, Ct. L. R. 109 — *nature of defence not to be taken into account when assessing sentence.* See also

CR. A. 60/41 (1941, S. C. J. 540 ; 10, Ct. L. R. 24) — *representations by Police as to accused's character and reference to a previous acquittal.*

(*H. K.*)

FOR APPELLANT : Dajani.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, convicting the Accused of being in possession of a revolver of military value, without having a licence for it, contrary to Section 36(2)(a) of the Firearms Ordinance. It appears that the Appellant was also charged with attempted murder but was acquitted on that charge.

Counsel for the Appellant contends in the first instance that there was no evidence on which the Court could properly find that the Appellant was in possession of a revolver. That contention was not, and indeed could not, be very strenuously urged before us in view of the evidence on the record and of the circumstances of the case. We are quite satisfied not only that there was evidence on which the learned Relieving President could find that the Appellant was in possession of a revolver, but that, in fact, the Appellant was in possession of a revolver.

Being in possession of an unlicensed revolver of military value is, as the learned Relieving President points out, a very serious offence and one for which we cannot say that a sentence of imprisonment, without the option of a fine, is too severe, but in determining the amount of that sentence we feel that we should look at the language used by the learned Relieving President himself. He says :—

> "Possession of a firearm of military value without a licence is a serious offence, particularly in Palestine. And in sentencing the accused I have in mind not only this but also the fact that he has in his evidence accused the police of beating him, an accusation which from the evidence of Dr. Khalidi alone I am satisfied is a deliberate lie, of a kind which is all too common in this country and must be discouraged."

We consider that the inference from that language, and learned Crown Counsel frankly agrees that it is the only reasonable inference, is that had it not been for this question of telling a deliberate lie the learned Relieving President would have imposed a lighter sentence. That being so, there is, in our opinion, no doubt that that matter cannot properly be taken into account when deciding what sentence to pass. We were referred by Mr. Rigby to a passage in the 30th Edition of Archbold's book on Criminal Pleading and Practice at page 336, where it points out that it is improper for a trial Judge to increase

what he would otherwise regard as the appropriate sentence because of his opinion that the accused has committed perjury in the witness-box. We have, therefore, to consider what lesser sentence should reasonably be imposed in this case. Having regard to the youth of the Appellant, we are of opinion that a sentence of three months' imprisonment will meet the case.

The appeal against conviction is, therefore, dismissed and the conviction confirmed, but the sentence will be varied as we have said.

Delivered this 25th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 66/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

1. Sofia Daoud Catato,
2. Issa Tubbeh,
3. Saba El Yusef. APPELLANTS.

v.

Custodian of Enemy Property, Jerusalem. RESPONDENT.

Succession — Order under sec. 9 Succession Ordinance, transferring succession proceedings from Ecclesiastical to District Court — Order and not decree — C. P. R. rule 2 — No appeal without leave, C. P. R., rule 317.

Appeal from the Orders of the District Court of Jerusalem, dated 19th November, 1942, and 12th February, 1943, in Probate Case No. 57/42 (Motion No. 387/42), dismissed:—

An order under section 9 of the Succession Ordinance, transferring proceedings from an Ecclesiastical to a District Court, is not a decree and cannot be appealed without leave.

(*A. M. A.*)

ANNOTATIONS: See note 2 to C. A. 279/42 (*ante*, p. 88).

(*H. K.*)

FOR APPELLANTS : Hanania.

FOR RESPONDENT : Cassel.

JUDGMENT.

In this case a preliminary objection had been taken that an appeal to this Court lies only by leave of the District Court or of this Court under Rule 317. The order made by the learned President of the District Court was one under Section 9 of the Succession Ordinance transferring all proceedings in the succession of the late Mr. Catato from the Greek Ecclesiastical Court to the District Court. The application was made *ex parte*. The Appellant then applied by motion to the learned President to set it aside. The learned President stated that he was by no means clear as to what application he was hearing, sent the Appellants away and refused to entertain the motion and said he had given them time to go to the Supreme Court.

Now, this order by the learned President transferring the succession is not a decree as the definition goes in Rule 2 of the Civil Procedure Rules, inasmuch as it does not conclusively determine the rights of the parties with regard to the matters in controversy in action. It is, therefore, an order and an appeal lies only by leave. It is frankly admitted that no such formal application for leave has been made. There is, therefore, no proper appeal before this Court and the application must be dismissed with total costs of LP. 10 to the Respondents.

Delivered this 18th day of March, 1943.

British Puisne Judge.

Puisne Judge.

CIVIL APPEAL No. 282/42.

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

BEFORE: Copland, A/C. J. and Khayat, J.

IN THE APPEAL OF :—

Arieh Leo Weisman. APPELLANT.

v.

Siegfried Pollak. RESPONDENT.

Bills of exchange — Holder in due course — B/E Ord., Sec. 28 — Consideration.

Appeal from the judgment of the District Court, Tel-Aviv, (in appellate capacity ; *Cur.* Mani, Korngrun, JJ.) in Civil Appeal No. 159/42, dismissed :—

A holder of a note who has not given consideration to the maker of the note or to the endorser, is not a holder in due course.

(*A. M. A.*)

ANNOTATIONS : The definition of "holder in due course" in Section 28 of the Ordinance is taken *verbatim* from Section 29 of the English Act. For Palestinian authorities see: C. A. 128/38 (5, P. L. R. 374; 1938, 1 S. C. J. 431; 4, Ct. L. R. 41) — *fraudulent negotiation;* C. A. 171/38 (5, P. L. R, 423; 1938, 2 S. C. J. 57; 4, Ct. L. R. 51) — *shifting of consideration;* C. A. 96/38 (1938, 2 S. C. J. 232; 4, Ct. L. R. 241) — *effect of admission that plaintiff not holder in due course;* C. A. D. C. T. A. 174/39 (Tel-Aviv Judgments, 1939, p. 23) — *alteration apparent;* C. A. D. C. T. A. 77/39 (*ibid.*, p. 27) — *adequacy of consideration irrelevant.*

(*H. K.*)

FOR APPELLANT : Seligsohn.

FOR RESPONDENT : Klavansky.

JUDGMENT.

This appeal fails. The case turns upon whether the Appellant was a holder in due course of a promissory note. It is undisputed that the Appellant, who was the Plaintiff in the Magistrate's Court, gave no consideration to the person who endorsed the note to him, neither did he give any consideration to the makers of the note. He states that he gave consideration to somebody who was not connected with the note at all. On these facts it seems too clear for argument that the Appellant is not a holder in due course, and the judgment of the District Court on appeal is, therefore, correct.

The appeal is dismissed with costs on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 23rd day of February, 1943.

Acting Chief Justice.

CRIMINAL APPEAL No. 11/43.

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

BEFORE : Copland, A/C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Aziz Khayat. APPELLANT.

v.

Raja Boulos Issa Butros. RESPONDENT.

Town Planning — Town Planning Commission overriding Town Planning Bye Laws — Demolition order — Town Planning Ord. Sec. 35: good cause shown against demolition order — No damage to private prosecutor — Nominal penalty.

Appeal from the judgment of the District Court, Haifa, (appellate capacity, *Cur.* Curry, J.) in Criminal Appeal No. 65/42, against a demolition order allowed, demolition order set aside and penalty substituted by nominal fine:—

A demolition order should not be made if accused shows good cause under Sec. 35 of the Town Planning Ordinance.

(*A. M. A.*)

ANNOTATIONS: The following authorities deal with demolition orders under the Town Planning Ordinance: H. C. 81/27 (1, P. L. R. 243; C. of J. 1756) — *intervention of High Court*; H. C. 84/30 (1, P. L. R. 510; C. of J. 1758) — *demolition orders to be in personam and not in rem*; M. A. 19/33 (1, P. L. R. 823; C. of J. 1761) — *jurisdiction of Magistrate's Court*; M. A. 13/34 (2, P. L. R. 173; C. of J. 1934—6, 612) and H. C. 62/34 (2, P. L. R. 208; C. of J. 1934—6, 615) — *jurisdiction of Municipal Courts*; H. C. 72/34 (2, P. L. R. 221; C. of J. 1934—6, 796) — *execution of demolition order;* C. A. 25/35 (2, P. L. R. 277; C. of J. 1934—6, 799) — *Local Town Planning Commission improperly constituted when passing resolution;* CR. A. 55/38 (1938, 1 S. C. J. 417; 4, Ct. L. R. 127) — *interpretation of section 35 of the T. P. O.*; CR. A. 20/39 (1939, S. C. J. 242; 6, Ct. L. R. 42) — *period of appeal for A. G.*; CR. A. 65/39 (1939, S. C. J. 515; 7, Ct. L. R. 53) — *demolition of parts of building;* CR. A. 20/40 (1940, S. C. J. 145; 7, Ct. L. R. 210) — *conviction quashed on appeal but demolition order upheld*; H. C. 9/41 (8, P. L. R. 95; 1941, S. C. J. 55; 9, Ct. L. R. 85) — *form of demolition order.*

(*H. K.*)

FOR APPELLANT: Weinshall.

FOR RESPONDENT: Kousa.

FOR ATTORNEY GENERAL: Baker.

JUDGMENT.

This is an appeal from a judgment of the learned President of the Haifa District Court, ordering the demolition of a building on Kingsway. The building was erected by the Appellant on a temporary permit, granted to him by the Town Planning Commission. On that site there had been a derelict building which was a danger to public health and generally a nuisance to the neighbourhood. The Appellant had a licence to erect a seven storey building on this site, but owing to the war, he was unable to build, as the building materials could not be obtained.

The Magistrate acquitted the Appellant when the case came before him, and an appeal was made against that decision. The learned President found that the Town Planning Commission had no power to grant any relaxation of the Town Planning Bye Laws. The prosecution, I should add, was a private one, the Town Planning Commission and the Police having refused to take any action in the circumstances.

The appeal is against the demolition order only, on the ground that good cause had been shown under Section 35 of the Town Planning

Ordinance, as amended. That section gives power to the Court to refuse to order the demolition of a building erected contrary to the law if, in its opinion, good cause had been shown why such a demolition order should not be made.

Now the learned President, in the last paragraph of his judgment, dealt with the question of penalty in these words :—

> "The question of penalty is again difficult. The fault lies really with the Town Planning Commission and not with the accused, and, therefore, I do not think he should be fined, but should the building be demolished ? It appears from the evidence that the accused owing to the war placing restrictions on building operations cannot at present proceed with the building for which he has a legal permit, and that this building which he did erect, improved the site from a sanitary and health point of view, and there is no evidence that the Appellant is suffering unduly by the breach."

Now, as I remarked in the course of the argument, stopping at that particular point, one would imagine that the learned President would have refused to order demolition, but he goes on to say :—

> "In the circumstances thereof, I think the most just order is that the Respondent shall demolish the building by 1.2.43, unless in the meantime he obtains a valid permit from the Authority concerned."

It is not clear, and in fact it would seem, that the provisions of the proviso to Section 35 of the Town Planning Ordinance were not brought to the attention of the learned President, but in any case, from his own judgment, it seems to us that good cause was amply shown why the demolition order should not be made. He finds that the fault really lay with the Town Planning Commission, that the Appellant had the right to erect a seven storey building on this site but was unable to do so owing to the war restrictions ; that the building which he did erect improved the site from a sanitary and health point of view, and that there is no evidence that the private prosecutor was in any way suffering unduly from the breach. It seems to the Court, therefore, that ample good cause had been shown why the demolition order should not be made.

The Attorney General has appeared and supports the arguments of the Appellant here, and submits that the building should not be demolished on the grounds of health and sanitary reasons.

For these reasons the Court allows the appeal and cancels the demolition order. We substitute for the penalty imposed by the learned President a fine of 250 mils, purely a nominal penalty in the circumstances. The order for costs made in the Court below will stand, and no costs on this appeal.

Delivered this 22nd day of February, 1943.

Acting Chief Justice.

CIVIL APPEAL No. 9/43.

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

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

IN THE APPEAL OF :—

The Palestine Electric Corporation, Ltd. APPELLANT.

v.

Avner Levy. RESPONDENT.

Fraud — Onus of proof — Case to be made out by party alleging fraud — Consumption of electricity — Fraudulent abstraction of current — Evidence.

Appeal from the judgment of the District Court, Haifa, (*Cur*. Weldon, J.) in Civil Case No. 247/40, dismissed :—

In actions based on fraud the ordinary rule of evidence applies that the Plaintiff must prove his case.

(*A. M. A.*)

ANNOTATIONS : "Fraud is a thing which is not enough to be alleged but must be proved": C. A. 85/42 (1942, S. C. J. 743); "..... the question of fraud or no fraud is eminently one for the Court of first instance" : C. A. 34/42 (9, P. L. R. 278 ; 1942, S. C. J. 275 ; 11, Ct. L. R. 173). "The essence of the Respondent's case ..... was that there was fraud ..... The onus of proof was therefore on the Respondent" : C. A. 216/38 (5, P. L. R. 480 ; 1938, 2 S. C. J. 115 ; 4, Ct. L. R. 167). See also C. A. 214/40 (7, P. L. R. 564 ; 1940, S. C. J. 550 ; 8, Ct. L. R. 169) and C. A. 229 & 230/40 (8, P. L. R. 48 ; 1941, S. C. J. 166 ; 9, Ct. L. R. 117).

(*H. K.*)

FOR APPELLANT : Levin and Lipshitz.

FOR RESPONDENT : Nathan.

JUDGMENT.

The Appellant in this case, the Palestine Electric Corporation Ltd., sued the Respondent, the owner of a water distributing system in Haifa, for electricity consumed and not paid for during the years 1937 and 1938. It was alleged that during that period, the electric metre in one of the wells exploited by the Respondent was not working and the claim was based on certain expert evidence and calculations intending to show how much electric power was used by the Respondent during the period and how much was shown on the metres thus arriving to the difference for which the claim was instituted. The calculations were roughly thus; it was known how much water was distributed by the Respondent to consumers from the main reservoir during the period

in question. A certain addition was added for wastage. Experiments made by the expert witness relating to the one of the three wells the metre of which was claimed to have been tampered with, showed how many kilowatt hours were wanted for drawing the required amount of water from the well to the reservoir. The conclusions were that X kilowatt hours were needed to bring up the required amount of water from the three wells to the reservoir. The metres supplied by the Appellant company showing only Y kilowatt hours, the value of the difference between X and Y less an allowance for wastage *etc.* represented the amount claimed.

Prior to this civil action, criminal proceedings were instituted by the Appellant company against the Respondent and another charging them with fraudulently abstracting electricity during the period of the 1st of January till 3rd of November, 1938. The proceedings resulted in a conviction, but it is worth noting, that the Criminal Court was not satisfied with the evidence produced as regards the greatest part of the said period and the conviction covered a very short period namely from 6.10.38 to 3.11.38.

The case for the Appellant in the Court below, as it was here, was, that whereas the claim is based on fraud and whereas the facts are peculiarly within the knowledge of the other party, it is enough for the Appellant to make up a *prima facie* case and thus shift the onus of proof on the Defendant-Respondent. The learned Judge in the Court below dismissed the claim on the ground that the Appellant failed to prove his case and hence this appeal.

Now, as already said, the origin of this action is fraud, or fraudulent abstraction of current and it is on that ground that the Appellant considered himself to be entitled to a departure from the ordinary rule of evidence that it is for the Plaintiff to prove his case.

As it has been said on many occasions, fraud must be proved. The only evidence of fraud we have before us is relating to a period of some 25 days and it cannot be said that because the Respondent has acted fraudulently for 25 days towards the end of 1938 this fact in itself goes to show that he was acting fraudulently during all the period of 1937 and 1938. It is, therefore, difficult to say that the Court below erred in applying the ordinary rule that it is for the Plaintiff to prove his case: but in doing so the Court below did not lose sight of the particular circumstances of a case of this nature. It appears that it would have been satisfied with the nature of the evidence produced although circumstantial and not based upon exact figures as to the actual amount of power abstracted had not the basis of the calculations been challenged and controverted by the other side. In order

to succeed the Appellant should have satisfied the Court that all the water distributed from the reservoir was derived from the wells by use of electric power and it was proved to the satisfaction of the Court below that for a certain period at least water was pumped from one of the wells by a diesel engine. Furthermore, the experiments were made from one well but no evidence was adduced to show that the same current would be required for each cubic metre of water when driven from the other wells used. There was also evidence of certain changes in the direction of the pipelines. This being the case, it is difficult to say that the learned Judge of the Court below went wrong in coming to the conclusion that this evidence as it stands was not enough to satisfy him that the claim was well justified.

We, therefore, consider that the District Court came to the right conclusions and the appeal is dismissed with costs on the higher scale and LP. 15 for advocate's attendance fee for the hearing of this appeal.

Delivered this 23th day of February, 1943.

Chief Justice.

CRIMINAL APPEAL No. 17/43.

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.

Amram Ben Yoseph Cohen. RESPONDENT.

Animal Diseases Ordinance, sec. 22 — Construction of statutes — "Animals or things" include meat — Plea of guilty.

Appeal from the judgment of the District Court, Tel-Aviv (appellate capacity, *Cur.* Plunkett, J.) in Criminal Appeal to 95/42, allowed and judgment of the Magistrate's Court restored save as regards the reduction of the penalty:—

The words "animal or thing" in sec. 22(3) of the Animal Diseases Ordinance include meat. The proviso is confined to the sub-section.

(*A. M. A.*)

ANNOTATIONS: See the notes to CR. A. 15/43 (*ante*, p. 86).

(*H. K.*)

FOR APPELLANT : Olshansky.

FOR RESPONDENT : Turbowitz.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, cancelling an order of confiscation of certain meat, made by the Magistrate of Tel-Aviv.

The matter concerns the interpretation of Section 22 of the Animal Diseases Ordinance, Cap. 3 of the Revised Edition. It seems to us to be quite clear, having regard to the form in which this Section is drafted, that the proviso which appears after Sub-section 3 is limited to that Sub-section. We do not consider that there is any ambiguity here, and it is, therefore, not a case in which we should invoke the rule that any ambiguity should be interpreted in favour of the accused. With regard to the meaning of Sub-section 2, we are of opinion that the words "animals or things" cover meat. Therefore, as far as this particular case is concerned, we are of opinion that the order of forfeiture made by the Magistrate was in order and that the judgment of the District Court, setting that order aside, was wrong.

We would add that there is no dispute as to the facts of the case, the Respondent in this case having pleaded guilty to the breach of the Ordinance with which he is charged.

The appeal must, therefore, be allowed, the judgment of the District Court (except as regards the reduction of the penalty) set aside and that part of the Magistrate's judgment relating to forfeiture, restored.

Delivered this 25th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 277/42.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :—

Walter and Aaron Stainman
in their capacity as the Executors of the last will of their late father Kalman Stainman. APPELLANTS.

v.

Simha Zissel Shapiro. RESPONDENT.

Cause of action — Action re consideration — Price secured by P/Ns — P/Ns prescribed — Proper parties — Assignment.

Appeal from the judgment of the District Court, Jerusalem, dated 23rd November, 1942, in Civil Case No. 76/41, allowed, and judgment entered for the Plaintiff (Appellant):—

> Action may be brought in the name of the holder of a note on consideration given by another party, even though the cause of action be on the consideration, the parties having agreed that the note should be to the plaintiff's order.

ANNOTATIONS: The action brought in the District Court was on the consideration, the promissory note being used only as evidence. The consideration, however, had moved from the vendor, a stranger to the action, to the defendant — whilst the note had been made out to the plaintiff's order. The District Court held that the plaintiff was an agent of the vendor and that the note did not create a new debt in favour of the plaintiff; that the proper parties were, therefore, not before the Court; that the holder's estate could not sue as agent under Article 1461 of the *Mejelle* as the agency had come to an end by the death of the holder (Art. 1529).

The view taken on appeal is that the plaintiff was entitled to sue on the consideration (presumably as assignee) as the note was made in his favour by mutual consent. No assignment was however averred in the statement of claim which was, therefore, subjected to the criticisms referred to in the judgment on appeal.

The following authorities were quoted in the District Court: C. A. 158/33 (2, P. L. R. 199; C. of J. 1226 *sub* No. 151/33); C. A. 22/38 (5, P. L. R. 155; 3, Ct. L. R. 129; 1938, 1 S. C. J. 145); Judge Shems' book on B/E — *suing on the consideration;* P. C. A. 23/38 (6, P. L. R. 528; 1940, S. C. J. 19; 7, Ct. L. R. 205); *Mejelle,* Art. 1588 — *admission;* C. A. 171/38 (5, P. L. R. 423; 1938, 2 S. C. J. 57; 4, Ct. L. R. 51) — *assignment; Mejelle,* Arts. 1461, 1529 — *agency.*

(*A. M. A.*)

FOR APPELLANTS: Rosenberg.

FOR RESPONDENT: Friedenberg and Rand.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, dismissing a claim by Walter and Aaron Stainman, the executors of their father Kalman Stainman, deceased, for LP. 260, balance of purchase price of land, against the present Respondent. The sale took place at the end of the year 1934. Three promissory notes were given, two of which were paid and the third note for LP. 400 which was not paid. This note fell due on the 4th May, 1935, and not being paid, was renewed by a new note on the 21st May, 1935, drawn to the order of Kalman Stainman. We have the evidence of the Respondent that this was done at the request of Kalman Stainman himself. This second note was paid at the time it fell due but two sums, of LP. 100 and LP. 40 respectively, were later paid, and receipts were given for these

sums to the Respondent by the executors of the estate of Kalman Stainman. The receipts in each case state that it is on account of the Respondent's debt under the note of LP. 400 to the order of Kalman Stainman, and in the second note, it goes still further to describe the note by saying that it fell due on 1.9.35, which in fact is the case. The first receipt is also countersigned by the Respondent himself. Further in evidence on page 8 of the typed record, page 16 of the original record, the Respondent himself states that:—

> "It does not make any difference to me to whom I pay now, provided the amount is deducted from the amount for which I am indebted".

On the face of all this evidence it is a little difficult to see how the Respondent can now deny liability to the executors of Kalman Stainman. The Respondent's reply lays stress upon certain alleged deficiencies in the statement of claim but we are quite satisfied that the statement of claim is not liable to the criticisms which have been made against it. It is quite sufficient to state that the amount claimed is the balance of purchase price, and since there has been an admission by the Respondent that the total amount of the debt was LP. 400 of which LP. 140 have now been paid, we think that the District Court came to a wrong conclusion on the evidence and the law since the notes were, in fact, drawn in Kalman's name as I have said, by mutual consent of the parties.

For these reasons we think that the appeal will have to be allowed, the judgment of the District Court quashed and judgment entered for the Appellants for the sum claimed together with costs on the lower scale both here and below to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 29th day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 86/43.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hermann Goldmann. — APPELLANT.

V.

Moshe Manela. — RESPONDENT.

Tenant tendering before expiry of lease contract rent for new period and asking landlord to sign appropriate receipt — Landlord refusing to accept rent if he had to sign that receipt — Question whether tender valid or not — How far Appellant limited to points raised in Court or Courts below.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated 29.1.43, in Civil Appeal No. 247/42, allowed:—

1. Where tenant offers payment of rent demanding receipt which contains nothing more than what is in fact the law — one cannot say there is no valid tender.

2. a) Once leave to appeal is given from an appellate judgment of District Court, all matters raised before either Magistrate's Court or District Court can properly be tested in Court of Appeal, but not matters not raised before either Court.

b) Questions such as of jurisdiction can be raised at any moment in any Court.

(*M. L.*)

DISTINGUISHED: C. A. 195/42 (1942, S. C. J. 794).

FOLLOWED: C. A. 237/37 (6, P. L. R. 8; 1939, S. C. J. 46; 5, Ct. L. R. 49); C. A. 162/41 (8, P. L. R. 596; 1941, S. C. J. 620); C. A. 223/41 (9, P. L. R. 177; 11, Ct. L. R. 114; 1942, S. C. J. 177).

ANNOTATIONS:

1. Question of proper tender is a mixed question of law and of fact — C. A. 134/42 (12, Ct. L. R. 140; 1942, S. C. J. 735; Gorali, 147); On question of tender of rent see cases cited in Gorali on pages 36, 65, 75, 79, 81, 83, 87, 88, 105, 106, 110, 160, 174, 179, 181; Cheque of a well-known bank can be tendered in payment under contract — C. A. 110/37 (2, Ct. L. R. 7).

2. See cases followed and distinguished (cited *supra*); C. A. 237/37 (*supra*) distinguished in this case followed C. A. 250/37 (5, P. L. R. 81; 3, Ct. L. R. 93; 1938, 1 S. C. J. 74).

(A. G.)

FOR APPELLANT: Goitein and Reuss.

FOR RESPONDENT: Edward Z. Fellman.

JUDGMENT.

This is an appeal from the appellate judgment given by the District Court of Tel-Aviv from a judgment of one of the learned Magistrates of Tel-Aviv. The facts were that a tenancy for two years expired on the 31st of December, 1941. Before that date, on the 25th of December, 1941, the tenant offered the rent for two years of LP. 60 to the landlord, coupled with a receipt which was to the effect:—

> "I hereby confirm that I have received from Mr. Herman Goldman the sum of LP. 60 as rent for the flat of three rooms and conveniences which he holds in my house in Bat Yam for the period of 1.1.42 to 31.12.43 and this in accordance to the Rent Restrictions Ordinance, 1940, and in accordance with the agreement dated 1.1.40."

The landlord refused to accept the rent if he had to sign this receipt. The rent was thereupon paid into a Bank. Some ten and a half months later, the landlord brought an action for eviction against the tenant. The Magistrate, after hearing the case, gave a preliminary order in which he said that the Court would refrain from granting an order of eviction if within four days the Defendant, that is the tenant, would pay the Plaintiff (the landlord), or into Court, unconditionally the sum of LP. 60 plus interest, costs and advocate's fees. The money was apparently paid in the same day. The Magistrate thereupon later gave a reasoned judgment refusing to order the eviction, though he held, with some hesitation, that the tender was not a legal tender. On equitable grounds, however, he held that the tenant was entitled to relief.

On appeal to the District Court, the learned Relieving President reversed the decision, his principal reason apparently being that ten and a half months was too long a time for a tenant to claim equitable relief with regard to the payment. He held that the delay of ten and a half months in payment of rent was clearly a discontinuance of rent. He, therefore, reversed the Magistrate's judgment and ordered eviction.

On appeal to this Court, the principal point raised is whether this tender in December, 1941, was a legal tender or not. We are clearly of opinion that it was a legal tender because the receipt demanded nothing more than what was in fact the law. It did not in any way limit the rights of the landlord and the landlord, therefore, cannot allege now that the tender was not a valid one. It follows from that, therefore, that the tenant was continuing to pay rent and cannot be evicted on the ground that he failed to pay.

One further preliminary point has been taken by the Respondent and that is, that on appeal to this Court from an appellate judgment of the District Court, this Court is limited to those points definitely raised before the District Court. The case cited in support is Civil Appeal 195/42 Zeineh *v.* Halaweh and others. There are, however, many decisions of a contrary nature in this Court which can be seen from the headnote in Apelbom's Annotated Reports, Civil Appeal 237/37, Civil Appeal 162/41, Civil Appeal 223/41, which I think perhaps would be sufficient. In many cases it was definitely held that when once leave to appeal has been given from an appellate judgment of the District Court, all matters which were raised before either the Magistrate's Court, or the District Court, can properly be tested in this Court. There are, of course, certain exceptions to that; matters not raised before either Courts cannot be raised on appeal to this Court, except questions such as of jurisdiction, which can be raised at any

moment in any Court. For these reasons, therefore, we over-rule the Respondent's preliminary objections which were hopefully tendered in an effort to shorten proceedings but which unfortunately failed in their object.

For the reasons above mentioned we allow the appeal and quash the judgment of the learned Relieving President and restore the judgment of the Magistrate's Court, that is to say, refusing the order of eviction. The Magistrate came to a correct decision in his result but in our opinion the reasons which he gave were not the correct ones. The usual rule will apply as to costs. The Appellant is entitled to his costs here and below on the lower scale and to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal. The costs in the District Court to be those awarded there to the present Respondent.

Delivered this 13th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 277/42.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Walter and Aaron Stainman
in their capacity as the Executors of the last will of their late father Kalman Stainman. APPLICANTS.

v.

Simha Zissel Shapiro. RESPONDENT.

Slip rule — Interest from date of action claimed but not awarded — "Sum claimed" — Costs in lower Court a matter for the lower Court.

Application to amend the judgment of this Court in Civil Appeal No. 277/42, dated 29.1.43, by granting interest on the sum of LP. 260.— at the rate of 9% from date of action, *i. e.* 15.6.41, allowed, and by awarding attendance fee before the District Court, refused:—

1. Judgment for "the sum claimed" includes interest from date of action if claimed.

2. Application for attendance fees in the District Court should be made by motion to that Court by the party succeeding in an appeal therefrom.

ANNOTATIONS :

1. The judgment in question is reported *ante*, p. 103.

2. Applications in respect of costs, *etc.* should be made immediately after delivery of judgment (see motions in C. A. 70/39 — 6, P. L. R. 527; 1939, S. C. J. 536 and in C. A. 95/39 — *infra*) and will not otherwise be granted. The present case is distinguishable on the ground that the words "sum claimed" were interpreted to include interest which had been claimed in both instances. No additional remedy was, therefore, granted on the application, other than an interpretation of the judgment.

(*A. M. A.*)

Other authorities on the slip rule: C. A. 87/32 (6, P. L. R. 268; 1939, S. C. J. 205; 5, Ct. L. R. 205, *sub* No. 87/39); C. A. 107/39 (6, P. L. R. 555; 1939, S. C. J. 482; 6, Ct. L. R. 199); C. A. 95/39 (6, P. L. R. 536; 1939, S. C. J. 502; 6, Ct. L. R. 178); *dito* (6, P. L. R. 538; 1939, S. C. J. 501; 6, Ct. L. R. 179); C. A. 226/38 (7, P. L. R. 153; 1940, S. C. J. 373; 7, Ct. L. R. 111); C. A. 13/42 (1942, S. C. J. 303); C. A. 2/42 (1942, S. C. J. 860).

(*H. K.*)

FOR APPLICANTS: Rosenberg.

FOR RESPONDENT: Rand.

JUDGMENT.

This is an application under the slip rule to amend the judgment given by this Court on the 29th of January, 1943, by awarding interest on the sum of LP. 260 at the rate of 9% from the date of institution of the action and to award attendance fees in favour of the Applicants for their appearance before the District Court. In the judgment given by this Court the operative part of it is as follows: "For these reasons we think that the appeal will have to be allowed, the judgment of the District Court quashed and judgment entered for the Appellants for the sum claimed together with costs on the lower scale both here and below to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal."

Now, in the Statement of Claim in the lower Court, the Applicant claimed LP. 260 plus interest from date of action. On his appeal to this Court he also asked for judgment for LP. 260 plus interest from date of action. If the actual omission to award, in so many words, interest in the judgment of this Court had been brought before us at the time, there is no doubt whatsoever that we should have included the award for interest in the judgment since it had been specifically asked for in the Notice of Appeal, but we used the somewhat abbreviated term "Sum claimed", which we think should be held to include the capital amount together with interest, which in fact come to the amount claimed in the District Court. We, therefore, amend the judgment and in place of the words "for the sum claimed" we sub-

stitute the words "for LP. 260 together with interest at 9% from date of action."

With regard to the second point of attendance fees in the District Court, our standard rule is that we do not award attendance fees in the District Court. Application for such fees must be made by motion to the District Court itself.

We think that each side should pay their own costs of this application.

Delivered this 18th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 26/43.

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

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Haj Ahmad Lababidi. APPELLANT.

v.

Ahmad Hifzi Abdul Hamid. RESPONDENT.

Landlord, ordered to demolish premises, claiming eviction for purpose of reconstruction — Failure of eviction claim as no permit to reconstruct obtained.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 18th day of November, 1942, in Civil Appeal No. 134/42, dismissed:—

Landlord suing for eviction under sec. 8(1)(d) of Rent Restrictions (Dwelling Houses) Ordinance (substantial alteration or reconstruction) cannot succeed without producing licence for proposed alterations.

(*M. L.*)

ANNOTATIONS: The ruling is based on sec. 8(1)(d) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940; a similar provision is contained in sec. 4(1)(f) of the Rent Restrictions (Business Premises) Ordinance, 1941; in L. A. L. C. Jaffa 259/35 (Gorali, 99) it was held that it is irrelevant whether tenant consents to suffer the inconveniences of alterations and if otherwise case proved eviction may be ordered.

(A. G.)

FOR APPELLANT: Atallah.

FOR RESPONDENT: Kassab.

JUDGMENT.

This appeal fails. The learned Relieving President dismissed the claim of the landlord on the ground, amongst others, that no permit had been obtained for the alterations proposed to be made. That is

provided for in Section 8, Sub-section 1(d) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940. It is admitted that a permit has not been obtained by the Appellant who argues that a permit is not necessary in this case because he has been ordered to demolish the premises on the ground that they are in a dangerous condition. He can still demolish, as indeed he has been ordered so to do, but he cannot reconstruct without a permit and he cannot evict the tenant in order to make the alterations unless he produces a permit to make the alterations. This he has not done and the action is, therefore, premature. The appeal, as I have said, fails. The Respondent is entitled to LP. 10.— total costs on the hearing of this appeal.

Delivered this 29th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 53/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Jacob Nissim Mizrahi. APPELLANT.

v.

1. Haim Ben Ishak Kishk Cohen,
2. The Land Registrar, Safad,
3. The Chief Execution Officer, Jerusalem. RESPONDENTS.

Execution proceedings culminating in registration of land in name of purchaser — Action in Land Court for cancellation of registration on ground of J/D's insanity during execution proceedings — Finding by Land Court based on unrebutted medical evidence — Late addition of new issue in course of trial.

Appeal from the judgment of the Land Court of Haifa, dated 13th January, 1943, in Land Case No. 36/39, dismissed:—

1. Where medical evidence adduced that during certain period Plaintiff was of unsound mind and no rebutting evidence on other side, trial Court's finding on question of insanity cannot be queried in Court of Appeal.
2. If execution proceedings leading up to registration of land in name of purchaser were conducted while judgment debtor insane and unable to protect his interests, both in law and in equity proceedings cannot stand and registration must be cancelled.
3. Point that new issue was added at later period in course of trial — of no avail, if other party not prejudiced by such late addition, both parties being in same position as regards production of evidence on that issue.

(*M. L.*)

ANNOTATIONS :

1. Insanity at time of making transaction has to be proved — C. A. 281/42 (*ante*, p. 77); on non-interference of appellate Court with findings of trial Court see C. A. 110/42 (12, Ct. L. R. 74 and notes; 1942, S. C. J. 481 and annotations).

2. On amending of claim after settling of issues see: C. A. 61/41 (9, Ct. L. R. 172; 1941, S. C. J. 176).

(A. G.)

FOR APPELLANT: Weyl — by delegation.

FOR RESPONDENTS: Eliash — by delegation.

JUDGMENT.

This is an appeal from a judgment of the Land Court of Haifa cancelling a registration of a plot of land which was registered in the name of the Appellant and ordering the re-registration in the name of the present Respondent.

The Land Court found that, at the time of the execution proceedings, of which the registration in the name of the Appellant was the culminating point, the Respondent debtor was of unsound mind. They say in these words: "We are not satisfied that Plaintiff was ever of sound mind during the course of the execution proceedings." Two Doctors were called for the Plaintiff and the findings of the Court on the question of insanity are amply justified by the evidence given by these Doctors. There was no medical evidence on the other side to contradict this evidence and we are of opinion that the finding of the Court on the question of insanity cannot now be queried. If, therefore, the execution proceedings which led up to the registration were conducted at a time when the judgment-debtor was insane and unable to protect his interests, it seems to us that both in law and in equity the proceedings cannot possibly stand.

With regard to the point that the issue of insanity was added later, it was perhaps unfortunate that it should have been raised at such a late period in the course of the trial, but as the Appellant was in very much the same position with regard to the calling of evidence as the Respondent was, that is the evidence of Doctors who could have been called to give evidence as to what their opinion was on examination of the present state of the Respondent and on his past medical history, and since medical evidence is really a question of opinion on these matters we do not think that the Appellant was really in any way seriously prejudiced by this late addition.

For these reasons we think that the appeal fails and must be dismissed with costs on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 26th day of March, 1943.

British Puisne Judge.

HIGH COURT No. 140/42
HIGH COURT No. 141/42.

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

BEFORE: Copland, A/C. J. and Rose, J.

IN THE APPEAL OF :—

Dr. Henry Galili and three others. — PETITIONERS.

v.

Government of Palestine. — RESPONDENT.

Detention — Treatment of detainees other than prisoners of war — Geneva International Convention — Statutory duties — Regulation 17(1)(c), H. C. 107/42.

Return to application for an order directed to the Respondent and the Chief Secretary, calling upon them to show cause why the Petitioners should not be sent to a sanatorium to be medically treated or why they should not be released from internment under such conditions as would allow them to be medically treated and why the Department of Health should not be ordered to issue the Petitioners with medical certificates; order *nisi* discharged:—

The direction of the High Commissioner under Regulation 17(1)(c) as to the treatment of detainees, that the Geneva International Convention should be applied, is not a statutory determination but a guide to the officers in charge.

REFERRED TO: H. C. 107/42 (1942, S. C. J. 666).

(*A. M. A.*)

ANNOTATIONS :

1. The following authorities deal with detention of persons under the Defence Regulations: H. C. 33/40 (1940, S. C. J. 142) — *consent order*; H. C. 108/40 (7, P. L. R. 617; 1940, S. C. J. 509; 9, Ct. L. R. 18) — *limitations on prerogative power;* H. C. 67/41 (8, P. L. R. 363; 1941, S. C. J. 321; 10, Ct. L. R. 149) — *delegation of prerogative power*; H. C. 82/41 (8, P. L. R. 429; 1941, S. C. J. 547; 11, Ct. L. R. 81) which has been overruled in H. C. 7/42 (9, P. L. R. 126; 1942, S. C. J. 51; 11, Ct. L. R. 86) — *detention of enemy aliens generally;* H. C. 25/42 (9, P. L. R. 237; 1942, S. C. J. 241; 12, Ct. L. R. 58) — *exercise of power to detain;* H. C. 88/42 (1942, S. C. J. 499) — *enemy aliens not entitled to writ of habeas corpus;* H. C. 85, 86 & 87/42 (1942, S. C. J. 541; 12, Ct. L. R. 120) and H. C. 97/42 (1942, S. C. J. 568) — *deportation of enemy aliens;* H. C. 69/42 (1942, S. C. J. 575) and H. C. 107/42 (*supra*) — *restrictions on detainees.*

2. On non-interference of the High Court where there is no statutory duty on the public officer concerned see notes to H. C. 147/42 (*ante*, p. 35); *cf.* H. C. 43/42 (9, P. L. R. 302; 1942, S. C. J. 269; 11, Ct. L. R. 175) — *no law defining conditions of service of mukhtars;* H. C. 66/42 (1942, S. C. J. 457; 12, Ct. L. R. 120) and H .C. 97/42 (1942, S. C. J. 568) — *deportation of enemy*

Council; H. C. 68/42 (1942, S. C. J. 629; 12, Ct. L. R. 104) and cases therein cited — *no duty to grant exit permit;* H. C. 14/43 (*ante,* p. 64) — *production of police files during preliminary enquiry.*

(*H. K.*)

FOR PETITIONER: Weyl and Levitsky.

FOR RESPONDENT: Solicitor General — (Griffin).

ORDER.

These two petitions deal with the same point and that is why the Government should not issue the Petitioners with medical certificates indicating the nature and duration of their illnesses, and the next one is why they should not be sent to a sanatorium, and if that is impossible why they should not be released. None of the Petitioners are enemy aliens and it is admitted by their counsel that they are not, therefore, prisoners of war technically so speaking. The argument is that since the Defence Regulations lay down that persons interned shall be confined subject to such rules as the High Commissioner may direct, and as the High Commissioner has allegedly directed, that the rules for detention shall be those laid down in the Geneva International Convention with regard to the treatment of prisoners of war, that determination is statutory and this Court, therefore, can interfere if that alleged statutory obligation is not carried out. In support of that contention, a letter is produced which says that the Internment Camps are regularly inspected by delegates of the International Red Cross Committee and are found to be conducted in accordance with the Geneva Convention, 1939, relative to prisoners of war. The Standing Orders of the Camps also refer to the treatment to be according to the International Convention relating to prisoners of war, but against that there is the argument, which we think is correct, that this determination of the High Commissioner under Regulation 17(1)(c) is not a statutory determination, and that it is more in the nature of a guide to the officers in charge, to enable them to determine the treatment which should be afforded to those men. The determination is not a statutory determination because it can, at any moment, by the will of the High Commissioner be altered. Reliance is also being placed on High Court 107/42, Dr. Henry Galili and three others *v.* Officer i/c of Mazra'a Internment Camp, which, it is argued, is authority for the proposition that this Court accepted the fact that the International Convention had statutory force. What this Court said was :—

> "In order to satisfy us that this rule *nisi* should be issued, the Applicants have to show that there was a statutory obligation on the part of the Respondent to accept and forward those letters by registered post. There is nothing, as far as we can see, which

creates that statutory obligation, and, therefore, the Respondent has not failed in his duty."

If it is thought to read into that ruling that the Judges of the Court held by implication or otherwise that this International Convention had statutory force with regard to non-enemy aliens, I, at any rate, as a member of the Court had no such idea, and I must confess it was very remote from my mind, and I do not think that that interpretation can be put upon this judgment, or need necessarily be put upon it.

For these reasons we think that both these petitions must be refused.

Given this 25th day of February, 1943.

Acting Chief Justice.

CRIMINAL APPEAL No. 16/43.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Hassan Rabah Jaber. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Criminal procedure — Amendment of charge — C. C. O. secs. 273(c), 26(1), accessory after the fact and principal offender — T. U. I. Ord., sec. 52 — Evidence — Sentence.

Appeal from the judgment of the District Court, Jaffa (appellate capacity, *Cur.* Daoudi, Shehadeh, JJ.) in Criminal Appeal No. 84/42, dismissed:—

The District Court has, on appeal, the same powers to amend the charge as the Magistrate has in first instance.

(*A. M. A.*)

ANNOTATIONS: See the following authorities on amendment of informations and charges: — CR. A. 13/38 (5, P. L. R. 69; 1938, 1 S. C. J. 93; 3, Ct. L. R. 69) — *necessity of supporting evidence;* CR. A. 18/38 (5, P. L. R. 183; 1938, 1 S. C. J. 156; 3, Ct. L. R. 137) — *amendment without consent of prosecution;* CR. A. 45/38 (1938, 1 S. C. J. 272; 3, Ct. L. R. 226 a) — *no supporting evidence before Examining Magistrate;* CR. A. 53/38 (1938, 1 S. C. J. 333) — *alteration of charge by Appellate Court;* CR. A. 54/38 (5, P. L. R. 338; 1938, 1 S. C. J. 340; 3, Ct. L. R. 284) — *interpretation of section 52 of the Crim. Proc. (T. U. I.) Ord.;* CR. A. 55/38 (1938, 1 S. C. J. 417; 4, Ct. L. R. 127) — *what amounts to amendment of charge;* CR. A. 5/39 (6, P. L. R. 40; 1939, S. C. J. 38; 5, Ct. L. R. 61) and CR. A. 37/42 (9, P. L. R. 207; 1942, S. C. J. 180; 12, Ct. L. R. 112) — *applicability of principle to Assize Court;* CR. A. 6/39 (6,

P. L. R. 113; 1939, S. C. J. 76; 5, Ct. L. R. 99) — *limitation on power to amend;* CR. A. 59/39 (1939, S. C. J. 492; 6, Ct. L. R. 209) — *obsolete;* CR. A. 63/39 (7, P. L. R. 1; 1940, S. C. J. 3; 7, Ct. L. R. 4) — *failure of prosecution to apply for amendment;* CR. A. 125/40 (7, P. L. R. 567; 1940, S. C. J. 415; 8, Ct. L. R. 191 — *impossibility of substituting charge carrying higher penalty;* CR. A. 23/41 (8, P. L. R. 122; 1941, S. C. J. 99; 10, Ct. L. R. 69) and CR. A. 71/41 (8, P. L. R. 229; 1941, S. C. J. 209; 10, Ct. L. R. 71) — *proper procedure in such cases and time for amendment;* CR. A. 54/41 (8, P. L. R. 205; 1941, S. C. J. 183; 10, Ct. L. R. 93) — *interpretation of section 48 of the Crim. Proc. (T. U. I.) Ord.;* CR. A. 183/42 (1942, S. C. J. 920) — *conviction for attempt.* For cases before the year 1938 see the annotations to CR. A. 13/38 in 1938, S. C. J. 93.

(*H. K.*)

FOR APPELLANT: Nassar.

FOR RESPONDENT: Junior Government Advocate — (Salant).

JUDGMENT.

The Appellant was charged before the Magistrate with being concerned with the theft of twenty sacks of wheat in transit on the railway. He was convicted by the learned Magistrate (as was also one of his companions) and was sentenced to one year's imprisonment. On appeal the learned Judges of the District Court found that the offence did not fall under Section 273(c) under which the Appellant had been convicted, and they, therefore, amended the charge and convicted him under Section 26, sub-section (1), of being an accessory after the fact.

The first point of the appeal is that you cannot convict somebody of being an accessory after the fact, when that person was charged with being the principal accused. Various cases have been quoted to us in support of that theory, most of the cases being of trials upon indictment. If this trial had been upon information under Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, the Court would have had the power to convict on the amended charge of being an accessory after the fact. The trial was before the Magistrate, and the Magistrate has always the power to amend the charge. And if the Magistrate had the power to amend the charge, it seems to us that the District Court on appeal must equally have had the same power as the Magistrate. That point, therefore, fails.

The second argument is that the evidence was insufficient to convict. There was evidence given, as a matter of fact by one of the co-accused, that this Appellant had carried away some of the wheat, put it in bags and stored it. There is other evidence that he promised various people compensation if they would not open their mouths on this matter. This evidence, if believed, was amply sufficient to

support the conviction. It proves that the Appellant assisted in the disposal of the stolen property.

The Court is, therefore, of the opinion that the appeal fails. The Appellant being a railway employee, concerned in this theft in the course of his employment, the sentence of four months is by no means too much.

The appeal must be dismissed.

Delivered this 4th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 264/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

George Mechael El-Khoury. APPELLANT.

v.

Abdul Karim Hussein El-Haj Khalil. RESPONDENT.

Brokerage — Construction of documents — Broker entitled to his commission when contract is signed, C. A. 1/29.

Appeal from the judgment of the District Court of Jerusalem (appellate capacity), dated 10.11.42, in Civil Appeal No. 74/42, dismissed:—

A broker is entitled to his commission when the parties have been brought together and signed a contract. His commission does not depend on the contract being carried out.

REFERRED TO: C. A. 1/29 (1 P. L. R. 406; C. of J. 121).

ANNOTATIONS: The present case holds that, on the interpretation of the document relied upon, no deviation from the general rule laid down in C. A. 1/29 (*supra*) could be established. The following authorities bear on brokers: C. A. 94/28 (C. of J. 120); C. A. 1/29 (*supra*); C. A. 61/29 (C. of J. 122); C. A. 7/32 (C. of J. 124); C. A. D. C. Jm. 197/32 (C. of J. 124); C. A. D. C. Ja. 406/32 (C. of J. 125); C. A. 121/34 (2, P. L. R. 436; C. of J. 1934—6, 75, P. P. 1.—3.iii.36; Ha. 19.iii.36); C. A. D. C. Ja. 119/35 (C. of J. 1934—6, 84); C. A. D. C. T. A. 113/37 (1937, T. A. 13); C. A. D. C. Ha. 267/37 (Northern L. R. 3); C. A. D. C. T. A. 3/38 (1937, T. A. 95) confirmed on appeal in C. A. 52/38 (5, P. L. R. 273; 1938, 1 S. C. J. 236; 3, Ct. L. R. 175); C. A. 166/40 (7, P. L. R. 452; 1940, S. C. J. 307; 10, Ct. L. R. 89); C. A. 170/40 (1940, S. C. J. 251).

(*A. M. A.*).

FOR APPELLANT: W. Salah.

FOR RESPONDENT: Ghussein.

JUDGMENT.

This is an appeal from a judgment of the Jerusalem District Court, in its appellate capacity, from a judgment of the Magistrate. The claim was for commission of 2% on the sale of a house. The Plaintiff was the man who alleged that he had brought the parties together and had arranged for the sale at the price of LP. 2,700 and, in fact, a contract between the purchaser and vendor was duly signed to that effect. The Plaintiff, who is the present Respondent, sued on an agreement entered into between himself and the Appellant, Ex. P. 1. That exhibit is in these terms:—

> "Whereas I have authorised you to sell my house situated in Lower Baka' and which consists of five rooms and appurtenances, for the sum of LP. 2700 plus the rent of the current *Hegira* year and I am ready to pay you a commission at the rate of 2% in case the sale is completed at the above mentioned price within ten days from the date hereof....".

The case hinges really upon what is the meaning of the words "in case the sale is completed". The learned Magistrate held that the sale was not completed inasmuch as the transfer had not been effected in the Land Registry. On appeal the District Court reversed that decision, and held that the sale was completed when the contract had been duly signed between the buyer and the seller, following Civil Appeal 1/29 — Avia Ratner *v.* Turkenitz and Perlstein Co. (1, P. L. R., p. 406).

The point that strikes one in Exhibit P. 1 is the fact that it stipulated that the payment would be made in case the sale was completed within ten days from the date of the agreement. This seems to indicate quite clearly that the words "the sale is completed" could not possibly have contemplated transfer in the Land Registry, since it is a matter of common knowledge that to complete a transfer in the Land Registry takes infinitely more than ten days from the date when the contract is signed. We think that the meaning of the phrase "when the sale is completed" must mean "when the contract of sale had been signed between the two parties". So far as the agent was concerned the sale was completed. He had done what he had contracted to do — he had brought the two parties together; he had arranged that one would buy from the other at the stipulated price; and a contract of sale between the two parties had been signed. If, for reasons entirely outside the control of either of the parties, the

transfer could not be effected, that, in our opinion, is no concern of the agent. There is nothing in this agreement between the parties (Ex. P. 1) by which the agent undertook to effect transfer in the Land Registry.

For these reasons we think that the appeal will have to be dismissed with costs on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 20th day of January, 1943.

British Puisne Judge.

HIGH COURT No. 19/43.

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

BEFORE : Rose, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Yochevet King, née Mizrahi. PETITIONER.

v.

Lydia Christensen. RESPONDENT.

Habeas corpus — Illegitimate child entrusted to custody of stranger — Father has no rights over the child — Mother not relinquishing rights over the child — Mother not an unsuitable person — As against a person entrusted with its care, the mother is the person entitled to the custody of an illegitimate child.

Return to a summons in the nature of a *Habeas Corpus*, issued by this Court on the 22nd day of February, 1943, directed to the Respondent, calling upon her to produce the body of a certain child called Edith, the daughter of Petitioner and one Mr. Alfred Evans before this Court and to await the further order of the Court. Order made absolute:—

As against a person entrusted with its care, the mother is the person entitled to the custody of an illegitimate child.

(*A. M. A.*)

ANNOTATIONS: For Palestinian authorities on custody of minor children see: C. A. 137/24 (1, P. L. R. 32; C. of J. 292) — *circumstances affecting grant of custody;* C. A. 176/26 (1, P. L. R. 136; C. of J. 985) — *proof of foreign law re custody;* C. A. 14/28 (C. of J. 294) — *rights of access;* H. C. 42/28 (C. of J. 299) — *proof of Jewish law & effect of agreement re custody;* C. A. 22/34 (2, P. L. R. 365; C. of J. 1934—6, 588) — *proof of foreign law;* H. C. 31/37 (P. P. 16.vii.37) — *circumstances in which custody will not be granted;* C. A. 65/37 (1937, 1 S. C. J. 291; 1, Ct. L. R. 72) — *custody a matter of discretion;* H. C. 24/40 (1940, S. C. J. 95) — *effect of family dispute;* H. C. 41/40 (1940, S. C. J. 232; 8, Ct. L. R. 4) — *when High Court*

will not interfere; H. C. 23/40 (7, P. L. R. 151; 1940, S. C. J. 371; 7, Ct. L. R. 112) — *child out of Jewish-Moslem marriage;* H. C. 10/41 (8, P. L. R. 86; 1941, S. C. J. 49) — *execution of judgment of Religious Court re custody;* H. C. 24/41 (8, P. L. R. 175; 1941, S. C. J. 161; 9, Ct. L. R. 177) — *order of Religious Court re custody being contrary to natural justice;* C. A. 38/41 (1941, S. C. J. 173; 9, Ct. L. R. 181) — *law applicable & principles of Jewish law re custody;* Misc. Appl. 60/41 (1941, S. C. J. 448; 11, Ct. L. R. 8) — *jurisdiction re guardianship;* H. C. 80/42 (1942, S. C. J. 512; 12, Ct. L. R. 90) — *jurisdiction and law applicable;* H. C. 102/42 (1942, S. C. J. 624) — *determination of age of child.*

(*H. K.*)

FOR PETITIONER: Seligman and Kritzman.

FOR RESPONDENT: Cattan.

ORDER.

This is the return to a rule, directed to the Respondent, calling upon her to produce the body of a certain child, called Edith, the daughter of the Petitioner and of one Mr. Alfred Evans, before this Court on Monday the 8th March and to await the further order of the Court.

This is in many ways an unhappy case because, leaving aside altogether the legal side of the matter, it appears that the child Edith has been in the physical care and custody of the Respondent for seven or eight years, and we have no doubt, and it is not suggested to the contrary by the Petitioner, that the child has been well and properly looked after, and we may naturally assume, as we are told is the case, that affection has sprung up between the Respondent and the child. That, as I say, makes this an unfortunate matter, but what we have to deal with is the legal position of the parties concerned in this dispute.

It is common ground that this child Edith was the offspring of the Petitioner and a certain man who was then in the Police Force, one Alfred Evans. These persons were not married either at the time or later and the child is, therefore, illegitimate. On some date in 1935, when the child was only a few days old, it was apparently taken by the Petitioner and Alfred Evans and handed over to the Respondent. The Respondent alleges that as far as Mr. Evans is concerned, who is now in England and has no doubt lost all interest in the matter, she holds certain letters from him indicating that he has relinquished all his rights in the child. This does not really carry the matter any further because in any case it is difficult to see what rights, as an unmarried father, he can have over the child. In any event, we are not concerned with the rights that Mr. Evans may have in the child — we are satisfied that he has none. What we are

concerned with is what rights the Petitioner has over the child. It is not alleged that the Petitioner ever in express terms relinquished her rights in this child. It is not even alleged that she did so by implication. On the contrary, in paragraph 2 of the affidavit in reply the Respondent says:—

> "Respondent further admits that the child was taken into custody temporarily until such time as the said parents will get lawfully married. The said parents, however, never got lawfully married to the knowledge of Respondent."

Paragraphs 3 and 4 of the affidavit in reply refer to certain payments, small indeed but nevertheless payments, made both by the Petitioner and Mr. Evans for the maintenance of this child. Paragraph 7 of the affidavit refers to 'rare visits' by the Petitioner to the child. From that, and from the facts as stated in the petition, it is clear to us that on the most favourable view of the case, from the point of view of the Respondent, it would be wrong for us to come to the conclusion that the Petitioner ever intended to abandon the child, and even if — contrary to our belief — she ever formed that intention, she certainly never implemented it. That being so, it seems to us that on the face of it she is entitled to the custody of that child.

In this case we need not go into certain considerations which might in other circumstances arise. There is no question here of the Petitioner, on the face of it, being a flagrantly unsuitable person to have the control of any small child. That has not been suggested in the affidavit in reply, and in fact a certificate has been produced to show that in December, 1941, the Petitioner, whatever mistakes or indiscretions she may have committed in the past, married a Mr. Joseph George King, who was at that time a British Constable in the Palestine Police Force and is now, I am told, a Sergeant. That being so, we have nothing to lead us to suppose that these two persons will not provide a proper home within their means in which to receive and nourish the child. We would add that the Respondent has shown no legal right herself to detain this child, and in fact has not even alleged such a right in her affidavit. All she alleges is that the mother has no better claim. For the reasons which we have given we consider that the mother has.

For these reasons the rule must be made absolute and we must order the return of this child to the custody of its natural mother, the Petitioner in this case. We would add that Mr. Seligman has stated to us in open Court, and we note it and, of course, accept it, that his clients — that is the Petitioner and, no doubt, Mr. King — are pre-

pared to pay any reasonable amount within their means for the cost of the maintenance of this child during the years that it has been in the Respondent's care. We have no doubt that that promise will be implemented. The amount involved may have to be assessed and proceedings instituted in the appropriate Court, but we refer to the matter now so as to ensure that any such proceedings may be limited to the question of amount.

This is a regrettable case, as in whichever way we decide the result must cause hardship to one side or the other, but in the circumstances we feel that the mother's claim must prevail.

The Petitioner has not asked for costs.

Given this 2nd day of April, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 12/43.

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

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

IN THE APPEAL OF :—

Haj Hussein Bakir. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Charge before Magistrate's Court under Trades and Industries (Regulation) Ordinance — Accused admitting charge — Magistrate failing to record proper plea of guilt and also conviction — Irregularities vitiating conviction and causing remittal of case for re-trial — M. C. P. R., Rule 268(2).

Appeal from the judgment of the District Court, Haifa, (appellate capacity, *Cur.* Shems, Atalla, JJ.) in Criminal Appeal No. 75/42 allowed, judgment quashed and case remitted for retrial to Magistrate's Court:—

If neither conviction nor proper plea of guilt recorded, even though it is stated that charge admitted, conviction by Magistrate will be quashed and case remitted for re-trial.

(*M. L.*)

ANNOTATIONS: See, on the question of recording the plea, C. A. D. C. T. A. 54/39 (P. P. 21.xii.39).

(*A. M. A.*).

FOR APPELLANT: Atalla.

FOR RESPONDENT: Junior Government Advocate — ('Akel).

JUDGMENT.

In this case there are irregularities which necessitate the case being sent back for re-trial. There has been no conviction recorded and it is stated that the accused admitted the charge but there is no proper plea of guilt recorded, as it should have been under Rule 268(2) of the Magistrates' Courts Procedure Rules, 1940. It has been submitted that the Court can make an order without convicting, but the accused was charged under Section "10 of the Trades and Industries (Regulation) Ordinance, the penalty for which is, if he is guilty of an offence, an imprisonment for fifteen days or a fine of five pounds, *etc.*" Sub-section (2) provides as follows:—

> "The Court, in addition, may order the closing of any premises in respect of which no licence has been obtained, or on which there has been a contravention of the conditions of a licence or of any other prescribed condition."

The judgment of the District Court must, therefore, be quashed and the case remitted to the Magistrate for re-trial.

Delivered this 15th day of February, 1943.

Chief Justice.

CIVIL APPEAL No. 28/43.

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

BEFORE: Copland, A/C. J., Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Meir Dunsky. APPELLANT.

v.

Moshe Gutbir. RESPONDENT.

Patents — Prior publication — Sketch as document — Refusal of grant of patent.

Appeal from judgment of District Court Tel-Aviv (C. A. 180/42), dismissed:—

1. A drawing without any other descriptive matter may constitute a document within the meaning of Section 11(1)(d) of the Patents and Designs Ordinance.

2. The delivery of the drawing to a member of the public amounts to "publication."

REFERRED TO: Electric Construction Co. Ltd. *v.* Imperial Tramway Co. Lt. (C. A.) 17 R. P. C. 537; Crowther's application, 51 R. P. C. 72 *seq.*

ANNOTATIONS:

1. The Appellant had applied for the grant of a patent relating to supports for diamond polishing benches. On opposition by the Respondent the Registrar of Patents and Designs refused the grant of the patent on the ground that the invention had, prior to the application, been made available to the public in a document. He found as a fact that prior to the application a sketch without any descriptive matter had been handed over to a committee member of the Palestine Diamond Manufacturers' Association, who accepted it, however, not in his official capacity. The decision of the Registrar was upheld by the District Court.

2. On the first point compare the Ruling of Sir Thomas Inskip in Wood's application, 43 R. P. C. 377: "publication *in, not by,* a document". On the second point *vide*: Halsbury, Vol. 24, *p.* 614.

FOR APPELLANT: Seligsohn.

RESPONDENT: In person.

JUDGMENT.

We do not need to hear the Respondent to this appeal.

This is an appeal from a decision of the District Court, sitting on appeal from a decision of the Registrar of Patents under the Patents and Designs Ordinance, Cap. 105.

The first ground of appeal is that there is no description and that the sketch produced by the opponent was not a document within the meaning of the Ordinance. On that matter the Registrar found that the question as to whether a drawing, without any other descriptive matter, constitutes a document was answered by Lord Alverstone M. R. in Electric Construction Co. Ltd. *v.* Imperial Tramway Co. Ltd. The words used were:—

> "It was said 'You must not act on a drawing alone.' I know of no such principle. A drawing like any other anticipation, must be judged according to the facts of the particular case."

And the Registrar goes on to say:—

> "The facts of this particular case clearly prove the sketch is 'in the nature of a description of the invention' and I am, therefore, satisfied that it constitutes a document."

The second point is that there was no publication. That again would seem to be answered by a case reported in Terrell on Patents, 8th Edition, p. 194, where the following occurs:—

> "In Lodding's application (unreported) Luxmoore, J., sitting as the Appeal Tribunal, held that the sub-section was not satisfied unless there has been publication before the date of an application for the patent to one or more persons who are members of the public in such circumstances as to leave him or them free to use the subject-matter of the publication for his or their own purposes without breach of duty to any other person or persons."

And further on page 195, in Crowther's application, the same Judge also held:—

> "That the words 'made available to the public by publication' are satisfied if knowledge of the invention has been made available to members of the public, although the disclosure of the knowledge does not by itself enable the person or persons to whom it is disclosed to use the subject-matter of the invention."

In view of these findings of fact and the principles of law laid down in the cases which I have just quoted, we are unable to say that either the Registrar or the District Court were wrong in the decisions at which they arrived. The appeal is, therefore, dismissed. The Respondent is entitled to LP. 3 total costs.

Delivered this 24th day of February, 1943.

Acting Chief Justice.

HIGH COURT No. 154/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Manzumeh Hadouté. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Mustafa Ramez Abdu. RESPONDENTS.

Execution following notarial notice by some of heirs of creditor under notarial deed requesting payment — Other heirs, without first serving notarial notice, applying for execution in respect of their shares — Condition precedent to execution of notarial deed — Time to apply to High Court.

Return to order *nisi* against Respondents directing 1st Respondent to discontinue execution proceedings against Petitioner; order made absolute:—

1. When considering whether there was undue delay in coming to High Court date of last and final order contested — material.
2. a) Before notarial deed can be executed notice must be served as provided in Ottoman Notary Public Law (art. 69) claiming payment of sum due.
   b) Notice by some of creditor's heirs to pay their shares does not dispense other heirs applying to execute in respect of their shares from service of notice.

ANNOTATIONS :

1. On the effect of delay in coming to the High Court see the cases collated in note 5 to H. C. 147/42 (*ante*, p. 35).

2. As to direct execution of notarial deeds see: H. C. 14/31 (C. of J. 1641); C. A. 10/38 (5, P. L. R. 226; 3, Ct. L. R. 144; 1938, 1 S. C. J. 182); H. C. 52/40 (7, P. L. R. 396; 7, Ct. L. R. 49; 1940, S. C. J. 233); H. C. 58/41 (8, P. L. R. 414; 10, Ct. L. R. 111; 1941, S. C. J. 392).

(*M. L.*)

FOR PETITIONER: Mizrahi and Rand.

FOR SECOND RESPONDENT: Gratch.

ORDER.

This case raises two interesting points with regard to the execution of notarial documents. The facts are that a notarial deed was made before the Notary Public on the 5th February, 1920, in favour of one, Ramez Abdu, in the sum of LE. 300. Ramez Abdu died, and on the 19th September, 1931, Jawdat Eff. El Kazimi, representing six of the heirs of the late Ramez Abdu, sent a notarial notice to the present Petitioner, demanding payment of the shares of six of the heirs, not including the share of the second Respondent. Execution took place and those shares were paid. On the 22nd of April, 1940, the present second Respondent, another of the heirs of Ramez Abdu, applied to execute against Petitioner in respect of his share. On the 14th June, 1942, notice of execution was sent to the Petitioner. The Petitioner immediately protested to the Chief Execution Officer on the grounds that the proceedings were irregular, and that the deed was prescribed, but it was not until October, 1942, and again on a further application in December, 1942, that the Chief Execution Officer finally rejected the Petitioner's objections. These dates are important because the point was raised before us that the Petitioner was guilty of undue delay in coming to this Court to contest the order of the Chief Execution Officer, but we are satisfied that there was no undue delay in coming here.

Two points in effect were raised on this application. First, that of prescription, that is to say, that fifteen years having elapsed since the date of the document, 1920, it cannot now be executed; and secondly, that no notarial notice as required by the law has been served on the Petitioner in respect of payment of the share of the second Respondent, Mustafa Ramez Abdu.

Taking the second point first, there is no doubt that the notarial notice of September, 1931, was on behalf of the widow and five children, that is to say, six of the heirs of Ramez Abdu, only. Notice was not served in respect of the present second Respondent. Now,

before a notarial deed can be executed it is essential that a notice be served as provided for in the Notary Public Law claiming payment of the sum sought to be executed. No such notice is to be found in this case as the notice served in 1931 on behalf of the six other heirs is not the notice required in respect of payment in respect of the second Respondent's share. For that reason alone the rule *nisi* will have to be made absolute.

With regard to the first point, that of prescription, we think that, unfortunate as it may be, this point will have to remain undecided in these present proceedings, since my brother and myself do not see quite eye to eye with one another. It would be better, therefore, that if the case should come up again, the matter should be re-argued before a Court of three Judges rather than two.

On the second ground, namely, of no notarial notice, the order *nisi* must be made absolute. The Petitioner is entitled to disbursements, together with the sum of LP. 10 advocate's fee.

Given this 20th day of January, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 21/43.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

The Attorney General. — APPELLANT.

v.

Tewfik Suleiman Salim. — RESPONDENT.

Criminal procedure — Plea of guilty — Court may not acquit on ground that charge should have been under different section for more serious offence — Agreements between prosecution and accused — Charge under Sec. 212 C. C. O., altered to Sec. 218 — T. U. I. Ordinance, sec. 33.

Appeal from the judgment of the District Court, Haifa (*Cur.* Shems, Atalla, JJ.) in Criminal Case No. 500/42 allowed and Respondent sentenced:—

Upon a plea of guilty the Court may not refuse to convict on the ground that the accused was guilty of a more serious offence than that charged.

(*A. M. A.*)

ANNOTATIONS: See the annotations to CR. A. 16/43 (*ante*, p. 115).

(*H. K.*)

FOR APPELLANT: Junior Government Advocate — (Salant).
FOR RESPONDENT: Koussa.

JUDGMENT.

The Respondent was charged before the District Court, Haifa, with manslaughter, contrary to Section 212. At the trial the information was amended and the Accused pleaded guilty to a charge under Section 218 of causing death by want of precaution or carelessness.

The District Court was composed of two Judges, Judge Shems and Judge Atalla. Judge Shems was of opinion that the plea of guilty should be recorded as required by Section 33 of the Criminal Procedure (Trial Upon Information) Ordinance. But Judge Atalla said that in his opinion the man, in effect, had pleaded guilty to the wrong section, and in spite of the plea of guilty he could not be convicted under it, because, if he had not pleaded guilty and the evidence had been led, he would have been convicted of a higher offence, and, therefore, the Court had to acquit him.

With all respect to the learned Judge, I must confess that I quite fail to understand his mental processes in arriving at this result. If a person pleads guilty to a charge, and that plea is accepted by the prosecution, that is the end of the matter. It is not for a Court to say, "You should not have pleaded guilty to this, you were guilty of a higher offence." And more particularly it is not the duty of a Court to say this, when the man had been charged with a higher offence but with the consent of the prosecution it is reduced to a lesser offence. In acting in this manner the Court is taking the part properly belonging to the prosecution, which is not their function.

Obviously, Mr. Koussa for the Respondent, does not attempt to support this peculiar result at which the Court of trial arrived. It is obvious that the judgment of the trial Court cannot possibly stand. We have been asked to deal with the case ourselves, and in the circumstances we are prepared to do so, seeing that the request is made by the Respondent himself.

We, therefore, allow the appeal and enter a conviction under Section 218 of the Criminal Code Ordinance, for unintentionally causing the death of Said Fahed Atallah by want of precaution and carelessness, on the night of the 26th August, 1942. And, in view of the circumstances, we impose a sentence of three months' imprisonment from today.

Delivered this 4th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 250/42.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :—

Municipal Corporation of Bethlehem. APPELLANT.

v.

Jamileh Bishara Hazineh and 5 others RESPONDENTS.

Expropriation of land — Expropriation by Municipal Council — Land (Expropriation) Ordinance — Absence of notice to treat — Jurisdiction of Land Court — Claim for compensation in respect of land usurped by Municipal Council — Questions of jurisdiction may be raised on appeal, C. A. 201/42 — Costs.

Appeal from a judgment of the Chief Magistrate's Court, sitting as a Land Court in Land Case No. 79/42, allowed and the Respondents' action dismissed. (It was argued on appeal that the scheme in respect of which the expropriation purported to be made had not been certified as a public undertaking and that there had been no notice to treat):—

1. Land taken by a public body without the formalities attending on expropriation under the Ordinance is land usurped and an action will lie for the value thereof before the appropriate Civil Court.
2. The Land Court has no jurisdiction in such cases where the Ordinance does not apply.
3. Questions of jurisdiction may be taken on appeal even if not raised until the appeal is tried.

FOLLOWED: C. A. 201/42 (1942, S. C. J. 737).

(*A. M. A.*).

ANNOTATIONS:

1. On the statutory jurisdiction of Magistrates sitting as Land Courts *cf.* C. A. 245/41 (9, P. L. R. 24; 1942, S. C. J. 3; 11, Ct. L. R. 97).

2. On the last point see the English authorities cited in C. A. 201/42 (*supra*); contrary decisions have, however, been given in C. A. 148/42 (1942, S. C. J. 650; 12, Ct. L. R. 151) and, as regards appeals from District Courts in second instance, in the interlocutory ruling in C. A. 195/42 (1942, S. C. J. 794). See also C. A. 86/43 (*ante*, p. 105).

(*H. K.*)

FOR APPELLANT: Olshan and Sharf.

FOR RESPONDENTS: Sacca and Atalla.

JUDGMENT.

This appeal, unfortunate as it may be, will have to be allowed. The action before the Chief Magistrate in the Land Court was for compensation for land belonging to the then Plaintiffs, now Respon-

dents, alleged to have been expropriated by the Municipal Corporation of Bethlehem for the purpose of making a road. An agreement between the two parties, dated the 28th December, 1938, recited that it had been agreed that a sum of LP. 150 admittedly received by the Respondents was to be the compensation for the demolition of a house which stood on the land, and for that part of the house which was to be taken for the new road. The Plaintiffs authorised the Municipal Council to demolish the house and take the required part therefrom for the road, in accordance with the decision of the Council.

I must confess that I have never had the slightest doubt whatever as to the meaning of this agreement. It is perfectly clear beyond a shadow of doubt from its wording that the LP. 150 compensation was simply and solely for the part of the house to be demolished and for the land on which that house stood. In addition thereto the Municipality have taken further land, which they now say that they cannot be compelled to pay for. It is a fact that no notice to treat was ever served upon the Respondents in respect of this land, and it is clear that in whatever way the Municipal Council took the land they did not take it under the Land (Expropriation) Ordinance. Neither did they take it under the agreement, since the agreement does not cover it, and, therefore, it seems to us that the point as to the Land Court having no jurisdiction is one that must succeed.

If the Respondents are claiming compensation for the land usurped by the Municipal Council, as in fact it has been usurped, the action for the value thereof will have to be brought before the appropriate Civil Court, other than the Land Court, in this case presumably the Chief Magistrate's Court, as the amount claimed was LP. 200. It is true that this point of jurisdiction has only been raised on this appeal — it was not even raised in the statement of appeal. That, however, is in order, as has already been pointed out in Civil Appeal 201/42. This point of lack of jurisdiction may be raised at any time during the course of the proceedings, and even on appeal, when it has not been raised in a Court of first instance. And the Court itself is entitled to take the point even if the parties themselves did not do so, when it is clear on the face of the proceedings that no appeal lies or that the Court below acted without jurisdiction.

For these reasons the appeal will have to be allowed and the Respondents' action in the Land Court will have to be dismissed. In the circumstances, in view of the late period at which this point of lack of jurisdiction has been taken, we do not award any costs to the Appellant.

Delivered this 22nd day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 1/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

Mushineh Aref Pasha Dajani, and an. APPELLANTS.

v.

Fatmeh Aref Pasha Dajani, and 2 ors. RESPONDENTS.

Action for partition by one of co-owners of immovable property — Plaintiff's attorney agreeing with valuer's report and asking offer of share to co-sharers to purchase it — Co-sharer accepting offer and paying in estimated value — Plaintiff refusing to accept estimated value — Estoppel.

Appeal from judgment of District Court, Jerusalem, appellate capacity (*Cur.*: Shaw, J.), in C. A. 54/42, dismissed:—

If Plaintiff's attorney in a partition case, agreeing with valuer's report, asks that share be offered to co-sharer, who thereupon pays in estimated value, Plaintiff estopped from disagreeing at that stage with valuation.

(*M. L.*)

ANNOTATIONS: In recent cases it was decided that estoppel is created by: paying interest on basis of gold rate: P. C. 23/38 (6, P. L. R. 528; 7, Ct. L. R. 205; 1940, S. C. J. 19); negotiating for lease of land — P. C. 57/38 (7, P. L. R. 261; 8, Ct. L. R. 185; 1940, S. C. J. 402); by signing summons to appear — C. A. 68/38 (3, Ct. L. R. 223; 1938, 1 S. C. J. 261); by *werko* registration and registration in Land Registry — C. A. 39/40 (7, P. L. R. 167; 7, Ct. L. R. 131; 1940, S. C. J. 387); by record — C. A. 49/40 (7, P. L. R. 199; 7, Ct. L. R. 152; 1940, S. C. J. 108); by pleadings — C. A. 54/40 (7, P. L. R. 196; 7, Ct. L. R. 143; 1940, S. C. J. 103) and C. A. 128/41 (8, P. L. R. 356; 10, Ct. L. R. 43; 1941, S. C. J. 332); by taxation, *etc.* — C. A. 227/40 (8, P. L. R. 107; 9, Ct. L. R. 210; 1941, S. C. J. 107) and C. A. 278/40 (8, P. L. R. 110; 9, Ct. L. R. 192; 1941, S. C. J. 97); by notarial notice — C. A. 94/41 (10, Ct. L. R. 130; 1941, S. C. J. 275); by correspondence — C. A. 123/41 (10, Ct. L. R. 77; 1941, S. C. J. 354); by admission of debt — C. A. 13/42 (9, P. L. R. 225; 1942, S. C. J. 299); in proceedings — C. A. 197/41 (8, P. L. R. 499; 10, Ct. L. R. 205; 1941, S. C. J. 458); in case of assignment — C. A. 269/40 (9, Ct. L. R. 91; 1941, S. C. J. 81); see also C. A. 255/40 (8, P. L. R. 46; 9, Ct. L. R. 74; 1941, S. C. J. 88); C. A. 25/42 (11, Ct. L. R. 224; 1942, S. C. J. 397); C. A. 123/42 (12, Ct. L. R. 223; 1942, S. C .J. 566).

(A. G.)

FOR APPELLANTS: Elia.

FOR RESPONDENTS: Eliash.

JUDGMENT.

This is an appeal from a judgment of the learned President of the Jerusalem District Court on appeal from one of the Magistrates concerning partition of joint immovable property. The application was made by one of the five co-owners under Article 8 of the Law of Partition of Joint Immovable Property, and the Magistrate thereupon made an order that the share of the Applicant should be valued, and it was valued at LP. 609. The licensed valuer was called and gave evidence in Court and the attorney of the present Appellant, who was then Plaintiff, said: "I agree with this report" and went on to say "I ask that the share be offered to the co-sharers so that in case they do not buy it the necessary action may be taken accordingly." The share of the Appellant was offered to the other four co-owners, one of whom offered to buy, the other three made no response. The LP. 609 together with costs was duly paid into Court by the purchaser and then the Appellant said "No, I do not accept the estimated value." The Magistrate ordered thereupon, under Article 9, that the whole plot should be sold. On appeal to the District Court, the learned President held that, having intimated that she agreed to a valuation and having allowed her share to be bought at the assessed price by one of the other co-owners, the present Appellant was estopped now from going back or changing her mind. There was an offer and an acceptance and the contract was completed and could not be rescinded.

I think that the learned President was correct. To my mind it is a clear case of estoppel and I agree with the learned President that the time for the Appellant to say that she did not agree with the estimated value was at the time that her agent asked that the share should be offered to the co-sharers; then was the time that the provisions of Article 9 should be applied. It is too late when one of the other co-sharers has paid in the money asked in reply to the offer to sell for the vendor to say "No, I did not mean what I said when I was asked to accept the offer."

For these reasons the appeal fails and is dismissed with costs on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 15th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 274/42.

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

BEFORE : Copland, A/C. J.

IN THE APPEAL OF :—

The Attorney General. APPELLANT.

v.

Keren Kayemeth Leisrael Ltd. RESPONDENT.

Appeals by Attorney General — Law of Procedure (Amendment) Ord. sec. 6 — Intervention by A. G. in proceedings — No appeal can be filed by A. G. — Crown Counsel to be specially authorised to file appeal — All parties not cited: quaere effect.

Appeal from the decision of the Settlement Officer, Cases Nos. 129/S & 24/H, dismissed: the full text of the decision is given below:—

DECISION.

At settlement, the Keren Kayemeth Leisrael Ltd. (referred to hereunder as "the claimants") claimed the ownership of certain lands in the villages of Sumsum and Huj. These villages are situated in Zone A as defined in the Land Transfers Regulations, 1940 (referred to hereunder as "the Regulations"). The Attorney General intervened under the provisions of Sec. 6 of the Law of Procedure (Amendment) Ordinance, No. 21 of 1934, opposing the claims on the ground that they were based on transactions which, owing to the claimants being a Jewish organization, are invalid under the provisions of Sec. 3 of the Regulations.

2. Two cases are here involved; Nos. 129/Sumsum and 24/Huj. By agreement these were combined and heard as one, and this decision applies to both. It is relative here to state that there is no opposition by the original owners or by any of the agents or sub-agents mentioned below to the claims of the claimants. The claims (except as regards certain minors' rights mentioned below) were such as would have been accepted had it not been for the existence of the Regulations.

3. Mr. Eliash, for the claimants, claimed that:—

(a) The claimants purchased the lands in question through Jewish agents (who were different persons in each village) who in turn had Arab sub-agents (also different in each village) to make the actual purchase from the land-owners. These sub-agents entered into agreements with persons who were owners of land but who, for the most part, were not registered as owners. These agreements were entered into during the years 1933 to 1935 — that is, before the Regulations came into force.

(b) The original purchasers (*i. e.* the sub-agents) assigned their rights under the agreements to the Jewish agents, or had made further agreements with them transferring such rights, and the Jewish agents had, in turn, made similar assignments or transfers to the claimants. All the assignments and the new agreements between sub-agents and agents and between agents and claimants had taken place

at the time or soon after the original agreements were made; at any rate, before the Regulations came into force.

(c) The claimants had had no actual possession of the land in Sumsum before the Regulations came into force, but they had had constructive possession under the provisions of the original agreements. In the case of Huj, the claimants had had actual possession through the sub-agents before the Regulations came into force, and although this may have been interrupted during the years of the disturbances it was renewed later.

(d) In the case of Sumsum, the balance of the purchase price was paid after the Regulations came into force, but in the case of Huj all the purchase price was paid before the Regulations came into force.

4. Crown Counsel (Mr. Rigby), for the Attorney General stated that he could not challenge the claim that the original agreements and the assignments thereof, and the further agreements by which the rest of the rights were disposed of, were made before the Regulations came into force. He, however, denied that the claimants had ever had constructive or actual possession of any of the lands or that the full purchase price had anywhere been paid before the Regulations came into force.

For reasons stated later, I have not thought it necessary to hear all the evidence on the disputed questions of fact, *viz.*, possession and payment in full of the purchase price.

5. Both Mr. Eliash and Crown Counsel made long submissions on the legal points involved and I do not think I need repeat except a few of them at any length here as they are on the records. Mr. Eliash's main point was that, in England, the purchaser of land becomes in equity its owner immediately on the signature of the agreement to sell if the contract is one of which specific performance would be ordered, and that the purchaser has the right to dispose of the land by sale, mortgage or otherwise. He submitted many extracts from authoritative books of reference to show that this is so.

He further submitted that this principle of equity is in force in Palestine, and referred to C. A. 15/38 as to equitable rights to land existing in this country on the same principles as in England.

Therefore, he submitted, the claimants, having acquired all the rights of the original purchasers by assignments or by separate agreements, must be considered to be the owners in equity of all the properties, and as they had acquired their equitable title before the Regulations came into force it must now be recognized. The Regulations could not and did not purport to cancel equitable titles existing before they came into force.

Mr. Rigby's main points were:—

(a) That an equitable title was acquired only if three elements were present, — an agreement between the parties, full payment of the purchase price, and possession by the purchaser, all of which, in these cases, must have been completed before the Regulations came into force. He based this submission on reported decisions of the Supreme Court in which specific performance of agreements had been ordered, and in which all three elements were present, and submitted that there was no authority for recognizing equitable titles except in like circumstances.

(b) That anyhow the conversion of an equitable title into an indefeasible legal title by registration at Settlement would be a disposition, and, therefore, a

transfer, which cannot now be made as the Regulations prohibit the transfers concerned in these cases.

(c) That it was undesirable that the principle of equity referred to should be applied, and referred to the proviso to Art. 46 of the Palestine Order in Council.

Mr. Eliash's reply was that, in the cases referred to in (a), the three elements did happen to be present but that the second and third of them were by no means essential. He particularly referred to the judgments in C. A. 16/39 and C. A. 40/39 in which the appeals were dismissed not because the full purchase price had not been paid to the vendor but because it had not been paid into Court as ordered; and submitted that if full payment to the vendor prior to the submission of the claim were an essential element the Court would not have ordered the money to be paid into Court but would have dismissed the claim immediately non-payment has been established. He also submitted that prior payment of the purchase price in full and possession were not necessarily required in England in order to create an equitable title in favour of the purchaser. He also replied to the other points.

6. I agree with Mr. Eliash that C. A. 16/39 and C. A. 40/39 do show that non-payment of the purchase price in full is not necessarily a bar to an equitable title being recognized. If, for instance, certain parties had agreed that the balance of the purchase price should be paid and possession to the purchaser given only after the formalities for the transfer had been carried out in the Land Registry — even immediately after and on the same day — I do not think the Court would refuse an order for specific performance if the vendor refused to carry out the Land Registry formalities, provided the purchaser came with clean hands, not being in default on any of his contractual obligations to date, and was ready and willing to carry out the rest of his contractual obligations in due time. The Court would probably require the purchaser to deposit the balance of the purchase price — probably in order that they might supervise the execution of their own order for specific performance as far as possible, but I cannot imagine that an order would be refused on account of the purchaser not having performed an obligation which had not fallen due for performance, *viz.* paid the rest of the purchase price. On this reason, it is plain that an equitable title is recognized to exist before the completion of all the elements referred to by Crown Counsel, and the only possible date of its creation must be that of the signing of the agreement.

7. In C. A. 15/38, Mr. Justice Copland quotes Mr. Justice Manning as having arrived at the conclusion in a previous judgment (of which unfortunately I have no copy) that "equitable rights to land do exist in this country on the same principles as in England." Later in that judgment, Mr. Justice Copland stated that he agreed with that conclusion *in toto*. In that case, however, the Court was equally divided, but it is noteworthy that two Supreme Court judges have expressed this opinion.

8. In regard to the proviso to Art. 46 of the Palestine Order in Council that the English doctrines of equity shall be in force in Palestine "so far only as the circumstances of Palestine and its inhabitants ..... permit, and subject to such qualifications as local circumstances render necessary.": I do not know of any circumstances which would render the availability of this particular principle of equity undesirable in Palestine or any local circumstances which call for its qualification. Regulations have been enacted which prevent transfers of titles — apparently equitable as well as legal — in certain circumstances in certain cases. Government when publishing these Regulations made them retrospective to a certain date — all apparently that was necessary to Government policy. Now, then, should a Court or a Settlement Officer

hold on the grounds of Government policy as expressed in the Regulations, that it is desirable to deem the principle in question as not having been in force prior to the date from which the Regulations took effect ?

9. Finally, to return for a moment to the question of specific performance, I observe that in C. A. 132/38 Mr. Justice Copland (Mr. Justice Greene concurring) stated that "the Courts of Palestine are empowered to grant an order for the specific performance of a contract, or *for an option* for the sale of land." In the case of an option, it is not likely that the full purchase price would have been paid or possession given, and I presume that even an option to purchase creates an equitable title — and in that case it must be as from the date the option is given.

10. Taking all the foregoing into account, I do not think it is stretching a point to hold, as I do hold, that the English principle of equity relied on by Mr. Eliash is in force in Palestine, that is, that where an agreement for the sale of land is one of which specific performance would be ordered the ownership of the land is in equity transferred to the purchaser immediately on the signing of the agreement and he is free to dispose of it to another purchaser. The Regulations operate as from a certain date in certain circumstances and in certain areas to prevent the principle being applied, but they do not operate in the cases now under consideration. I, therefore, find that, except for the matter mentioned below, the ownership of the land concerned in these two cases was in equity transferred to the claimants before the Regulations came into force, and the transactions are not, therefore, forbidden transfers under Sec. 3 of the Regulations.

11. In regard to the exception mentioned above, Nazmiya bint 'Ali esh Sharkas purported in agreement No. 14 of Huj to sell her own share and the shares of her minor daughters, Shakira and Hadiya, daughters of Husein Khayal. At Settlement, the daughter, having come of age, appeared and confirmed the sale, and Mr. Eliash submitted that this confirmation put the sale in order as from the date it was made. I do not take this view, and am of opinion that the position as at the date the Regulations were published must be considered, or the date they came into force (there is no difference in the effect in this case). At neither of those dates was there a valid agreement for the sale of the shares of the two daughters and I do not think that their later confirmation (which was after the Regulations came into force) made the sale valid with effect from the date of the original agreement. As regards the transfer of these shares to the claimants, therefore, I find that it cannot be given effect to; but there is no reason why I should not give effect to the confirmed direct sale to the sub-agents who are Palestinian Arabs. In regard to the shares of these two persons, I order that they shall be registered in the names of George as Sayigh and Isma'il el 'Azza in equal shares.

12. With regard to the rest of the parcels and shares in parcels I order that they shall be registered in the name of the claimants.

Given at Gaza on the 16th October, 1942.

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1. The Attorney General may intervene in an appeal under Sec. 6 of the Law of Procedure (Amendment) Ord., but may not institute an appeal from proceedings in which he intervened under the section.

2. The Attorney General's representative must be specially authorised to sign and prosecute an appeal.

(*A. M. A.*)

ANNOTATIONS:

1. The right to appeal is a statutory right: C. A. 71/33 (2, P. L. R. 34;

C. of J. 1665), C. L. A. 7/34 (2, P. L. R. 230), C. A. 34/35 (C. of J. 1934—6, 515), CR. A. 61/38 (1938, 1 S. C. J. 420; 4, Ct. L. R. 19); C. A. 148/38 (5, P. L. R. 389; 1938, 1 S. C. J. 447; 4, Ct. L. R. 12); H. C. 71/42 (1942, S. C. J. 508).

It was, however, held in C. A. 233/40 (8, P. L. R. 20; 1941, S. C. J. 27) that "if administrators can sue and be sued, it is obvious that they can appeal," and this decision was followed in C. A. 143/41 (8, P. L. R. 467; 1941, S. C. J. 456; 11, Ct. L. R. 210) although it was pointed out in that case that the decision "would seem to be in conflict with the English authorities". *Cf.* the annotations to C. A. 143/41 in 1941, S. C. J. 456.

2. It was held in CR. A. 119/41 (8, P. L. R. 442; 1941, S. C. J. 559) that only the Attorney General himself could file an application for the forfeiture of a vessel under the Defence (Immigration) Regulations, 1940. See, on the other hand, CR. A. 48/42 (9, P. L. R. 258; 1942, S. C. J. 357; 12, Ct. L. R. 13) referring to CR. A. 18/38 (5, P. L. R. 183; 1938, 1 S. C. J. 156; 3, Ct. L. R. 137). For earlier authorities on the question of acts to be done by the Attorney General personally see A. A. 9/25 (1, P. L. R. 34; C. of J. 587) and M. A. 9/32 (1, P. L. R. 740; C. of J. 620) and cases therein cited.

(*H. K.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENT: Eliash and Benshemesh.

JUDGMENT.

This is an appeal from a decision of the learned Settlement Officer, Gaza Settlement Area, in a case where the Attorney General intervened under Section 6 of the Law of Procedure (Amendment) Ordinance, 1934. Leave to appeal was granted by the learned Settlement Officer. By arrangement, preliminary points taken by the Respondent to the hearing of the appeal have been argued first and the merits of the appeal have not been gone into at the moment. The Respondent, who is the Keren Kayemeth Leisrael Ltd., have raised two objections to the hearing of the appeal. They are as follows:—

> "(a) That no appeal lies from a decision given in a matter in which the Attorney General only had a right of audience, and in which he has no claim to any land whatever;
>
> (b) That even if such right of appeal existed it had to be exercised by the Attorney General himself and not by a Junior Government Advocate."

Dr. Eliash raised a third point which was not mentioned in these objections to the appeal, but which he would have been entitled to raise, at any rate, on the hearing of the appeal itself, and that is that there is no proper appeal before the Court because all the parties to the original proceedings have not been cited on the appeal.

As I have said, the Attorney General intervened in the case under

Section 6 of the Law of Procedure (Amendment) Ordinance, 1934, No. 21 of 1934. That Section is in these terms:—

> "If it appears to the Attorney General that any right of His Majesty or of the Government of Palestine or any public right or interest is or may be affected or involved by or in any proceedings in any civil or criminal court, or before a Settlement Officer within the meaning of the Land Settlement Ordinance, 1928, the Attorney General may at his discretion appear in such proceedings and shall be entitled to be heard therein:—
>
> Provided that the Attorney General may specially authorise his representative to appear on his behalf in any such proceedings, and such representative so authorised shall thereupon be entitled to be heard therein."

It is argued for the Respondent, that the only right given to the Attorney General or his authorised representative is to appear and to be heard, and that there is nothing in the section quoted which gives any right of appeal. It is, of course, settled law that a right of appeal is a statutory right which can only be conferred in so many terms and is not a right which can be implied from the wording. It is further argued that the Attorney General is not, strictly speaking, a party, and, therefore, cannot appeal; that he is in the same position, in certain respects, as an ordinary litigant who has no right of appeal in any matter to which he was not a party; that an appeal only lies from a decision of a Settlement Officer by a party who is a Claimant to land, and that the Attorney General in this matter is not a Claimant to land; and that intervention means, and must mean obviously, intervention in an existing case or proceeding, and that the section does not give power to the Attorney General to initiate original proceedings but only to appear and be heard in an existing proceeding, and finally it is argued that the right to appeal can only be exercised by the Attorney General himself, or a representative specially authorised by him, and that there is in fact no such authorisation to the person who actually signed the statement of appeal.

Now, with regard to the first point that no appeal lies in this matter at all, I think that the effect of section 6 is that in any existing proceeding the Attorney General may claim to appear and be heard therein. I agree with the Respondent that this does not give power to the Attorney General himself to file an appeal, his only right is to intervene in an existing appeal. There was no appeal by any of the parties to this case, in fact the claim before the Settlement Officer was an undisputed claim and there were no parties at all, with the sole exception of the Claimant, the present Respondent, and I have considerable doubts as to whether in such a case there was even any right of intervention by the Attorney General himself, but, however that

may be, no appeal was filed by the Claimant or by anybody else, by any claimant to land, and in such circumstances, there is no existing proceeding in this Court in which the Attorney General can appear. If one takes as an illustration an ordinary case of Plaintiff and Defendant in the lower Court and the Attorney General decides to intervene under section 6, and the parties thereupon settle the matter in dispute between them, that terminates the existing case, there is, therefore, no proceeding left in which the Attorney General can appear. It seems to me very much the same form of argument can be applied to this case. There is no proceeding and the only right of the Attorney General is to appear in a proceeding. The first point is, therefore, successful.

With regard to the second point, the matter in my opinion is even more clear. I assume, because it is not disputed, that Mr. Rigby, Crown Counsel, was specially authorised under section 6 of the Ordinance to appear on behalf of the Attorney General. The notice and grounds of appeal are signed by Issa 'Akel, "Junior Government Advocate, for Crown Counsel, for Attorney General". It is not contended, for one moment, that Mr. 'Akel had been specially authorised to appear for the Attorney General in this appeal, though Mr. Rigby has been so authorised, and it cannot be argued that because a Junior Government Advocate is one of the Attorney General's representatives as defined in the Ordinance that takes the place of the special authorisation laid down in the proviso to section 6. The second point also must succeed because the grounds of appeal were signed by somebody who had no authorisation under the law, as it exists, to sign them. A similar position again would arise where an advocate, who had a power of attorney only to appear in the District Court, attempted to file an appeal in the Supreme Court; that apeal would naturally fail as having been filed by somebody, who had no authorisation to do so.

As to the third point that all parties were not summoned to appear in this appeal, that is rather more difficult. As I have already said, there were no parties except the original claimant in the proceedings before the Settlement Officer. At the same time the persons who renounced their land in these undisputed claims before the Settlement Officer, or had admitted the right of the Keren Kayemeth Leisrael to these parcels, are vitally interested in supporting the right of registration, because if the Attorney General succeeded in this appeal it would mean that persons who had received the purchase money for the land would be compelled to refund it to the Keren Kayemeth Leisrael without having had any chance of appearing and resisting the arguments of the Attorney General, but as I said, bearing in mind the

grave doubts that I have as to whether there was originally any right of intervention by the Attorney General in this matter at all, I think the best course would be to say that the third point, in the circumstances of this case, does not arise and must be left for argument on a future occasion when it is necessary to decide it.

For the reasons which I have given I think the objections are good objections and, therefore, there is no proper appeal before this Court and the appeal must be dismissed. The Respondent does not ask for any costs.

Delivered this 24th day of February, 1943.

Acting Chief Justice.

CIVIL APPEAL No. 258/42.

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

BEFORE : Rose, J.

IN THE APPEAL OF :—

Moshe Valero. APPELLANT.

v.

Ali Ismail El Najjar and 13 others. RESPONDENTS.

Judgment declaring ownership to land but without defining boundaries — Application by motion to Land Court to elucidate its judgment by demarcation of boundaries — Court considering application incorrectly as having been made under Rules 358 *and* 359 *of Civil Procedure Rules — Applicability of sec.* 3(*b*) *of Land Courts Ord. to request for demarcation of boundaries — Test as to whether a matter can properly be brought before Court by way of motion.*

Appeal from judgment of Land Court, Jerusalem, in Motion No. 148/42 (Land Case No. 144/34), dismissed:—

1. If judgment of Land Court declaring ownership of land contains no definition of boundaries, application by motion to that Court to elucidate its judgment by demarcation of the boundaries comes neither within rule 358 nor rule 359 of Civil Procedure Rules but is entertainable under sec. 3(b) of Land Courts Ordinance.

2. Where an application could properly have been entertained, fact that Court stated incorrectly, that it was made under a particular rule which, in fact, was inapplicable — not fatal to application.

3. One of the tests as to whether a matter can properly be brought

before the Court by way of motion is that such a procedure is an expeditious, convenient and satisfactory manner of bringing it before the Court.

(*M. L.*)

FOLLOWED: C. A. 22/42 (9, P. L. R. 328; 12, Ct. L. R. 3; 1942, S. C. J. 259).

ANNOTATIONS:

The previous appeal referred to is C. A. 89/39 (6, P. L. R. 460; 1939, S. C. J. 413; 6, Ct. L. R. 123).

1. In C. A. 141/33 (3, C. of J. 1071) an elucidatory order of the Court was discharged on Court finding subsequently that there was no ambiguity in the judgment; a not clear judgment of Land Court was set aside on appeal and retrial ordered — L. A. 2/24 (3, C. of J. 1012); Leave to appeal to Supreme Court from order interpreting original judgment was refused — C. A. 96/41 (8, P. L. R. 256; 9, Ct. L. R. 188; 1941, S. C. J. 346); ambiguity in judgment explained under art. 6 of Execution Law — H. C. 40/40 (8, Ct. L. R. 34; 1940, S. C. J. 157); — H. C. 36/33 (4, C. of J. 1238); Land Court explained its judgment by defining boundaries of land, subject-matter of judgment; L. C. Nablus 61/39 (P. P. 16.ii.1940).

On question of impossibility to execute judgment as no boundaries of land defined see H. C. 36/38 (3, Ct. L. R. 278; 1938, 1 S. C. J. 343); parties to apply to Court of Appeal for directions as to situation of land — C. A. 213/37 (3, Ct. L. R. 13). Court of Appeal varied judgment of Land Court by directing transfer to take place within specified period — C. A. 245/40 (8, P. L. R. 8; 9, Ct. L. R. 152; 1941, S. C. J. 65).

2. On application of the slip rule and power of Court to amend its judgment various rulings were made: correction of order can be made where the error is "an error in expressing the manifest intention" ; H. C. 92/32 (1, P. L. R. 864; 3, C. of J. 1104); not within the competence of Court to interprete in some way expression in their judgment — C. A. 38/33 (1, C. of J. 169). Judgment cannot be corrected under the slip rule to insert interest; C. A. 87/32 (6, P. L. R. 268; 5, Ct. L. R. 207, *sub* No. 87/39; 1939, S. C. J. 205); words not due to clerical mistake cannot be corrected under the slip rule — C. A. 226/38 (7, P. L. R. 153; 7, Ct. L. R. 111; 1940, S. C. J. 373); Court not to rectify a misstatement of fact in its judgment — C. A. 95/39 (6, P. L. R. 536; 6, Ct. L. R. 178; 1939, S. C. J. 502); Court has no power to make substantial alteration in its judgment — C. A. 107/39 (6, P. L. R. 555; 6, Ct. L. R. 199; 1939, S. C. J. 482); and see C. A. 277/42 (*ante*, p. 108) and notes.

3. As to ruling in point 3 see C. A. 22/42 (*supra*); see in C. A. 216/41 (8, P. L. R. 607; 1941, S. C. J. 579) *quaere* whether application for release of attachment not to be in form of statement of claim; *cf.*, as to proceedings in arbitration matters, C. A. 65/42 (9, P. L. R. 392; 1942, S. C. J. 429).

(A. G.)

FOR APPELLANT: Valero.

FOR RESPONDENTS: Nos. 1, 2, 4, 5, 7, 8 & 9 — Elia.
Nos. 10 & 11 — Mizrahi.
Nos. 12, 13 & 14 — Gavison.

JUDGMENT.

This is an appeal from the Land Court of Jerusalem. It appears that on the 19th June, 1939, the Land Court gave judgment in an action for a declaration of ownership of certain land. In that judgment there was unfortunately no definition of the boundaries of the land. An appeal against that judgment was brought to this Court by one of the parties, but it was dismissed on a preliminary point. The present Respondents Nos. 10—14 then applied by motion to the Land Court to elucidate the earlier judgment with respect to this single point as to the demarcation of the boundaries. It is true that during the hearing of that motion there appears to have been a certain amount of discussion as to whether or not the matter fell within Rule 358 of the Civil Procedure Rules. I agree with Mr. Valero that it does not; and I also agree that Rule 359 is inapplicable to this matter. It is true that in a judgment which he termed "Preliminary Judgment", dated 27th July, 1942, the learned President states that the Respondents made their application in accordance with Rules 358 and 359 of the Civil Procedure Rules. That, however, does not seem to me to be fatal to the application if, in fact, it could properly have been entertained apart from those two rules. There is nothing in the application itself to indicate that it was made under either or both of those rules; and as far as its own wording is concerned, it seems to me that it can properly be entertained by the Court under Section 3(b) of the Land Courts Ordinance (Cap. 75 of the Laws of Palestine). I think that it would be highly artificial for me to allow an appeal on the ground that an application was improperly entertained merely because the Court below happened to state, incorrectly, that it was made under a particular rule which would not, in fact, have entitled the Court to entertain it. As to whether or not a matter of this kind, that is to say, a request for the demarcation of a boundary, can properly be brought by motion, I would refer to Civil Appeal 22/42, Ct. L. R. Vol. 12, where (at page 5) the learned Chief Justice points out that one of the tests as to whether a matter can properly be brought before the Court by way of motion is that such a procedure is an expeditious, convenient and satisfactory manner of bringing the question before the Court. It seems to me that in this particular case this test has been satisfied.

Mr. Valero now asks me to go into the facts — he says that the demarcation, which has ultimately been given by the learned President, was not justified by the facts of the case or by the evidence on the record in the original proceedings terminating in the judgment of 1939. With regard to that, I think it is far too late for the Appellant to

raise that now before me. The matter was apparently gone into at considerable length by the learned President at three hearings, and it seems to me that then was the time for Mr. Valero to take the point that, apart from the question of the Court's being able to entertain the application, there was no evidence on the record to justify the demarcation. It seems to me that it is far too late for him to come and ask me at this stage to read through the record and to come to a decision on what is purely a question of fact.

For these reasons the appeal is dismissed with costs on the lower scale. Each of the three sets of Respondents will have costs on the lower scale to include in each case the sum of LP. 10 for advocate's attendance fee.

Delivered this 25th day of January, 1943.

British Puisne Judge.

HIGH COURT No. 11/43.

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

BEFORE : Copland, J.

IN THE APPLICATION OF :—

Yousef Abu Khalil. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Maria Abu Khalil. RESPONDENTS.

Latin Ecclesiastical Court of Appeal giving order for execution of arrears of alimony after having previously stayed execution — Application to High Court for stay of execution — Non-interference of High Court — Remedy against order of Latin Ecclesiastical Court of Appeal.

Application for an order to issue, directed to the first Respondent, calling upon him to show cause why he should not execute his order, dated 22.1.43 and refuse the execution of the judgment of the Latin Ecclesiastical Court of Appeal, dated 30.4.42 and 4.4.42 and the *ex-parte* order, dated the 7.11.42:—

1. High Court will not interfere with an order given by a Religious Court having jurisdiction in the matter in dispute between the parties; that the Religious Court may have made a mistake in law — of no concern to High Court, which is not a Court of Appeal from Religious Courts.
2. (*Obiter*): Remedy against an order of Latin Ecclesiastical Court of Appeal — to appeal to Supreme Ecclesiastical Court in Rome.

(*M. L.*)

ANNOTATIONS:

For former proceedings see H. C. 103/42 (1942, S. C. J. 582).

1. High Court not a Court of Appeal from Ecclesiastical Courts: H. C. 100/41 (9, P. L. R. 121; 11, Ct. L. R. 74; 1942, S. C. J. 85); H. C. 102/41 (10, Ct. L. R. 163; 1941, S. C. J. 595); H. C. 103/42 (*supra*).

2. Compare H. C. 104/41 (8, P. L. R. 593; 10, Ct. L. R. 199; 1941, S. C. J. 601).

3. High Court does not act as a Court of Appeal to decide whether a judgment is correct: H. C. 24/38 (1938, 1 S. C. J. 321). Judicial order (of *Kadi*) not subject to review by High Court: H. C. 104/40 (7, P. L. R. 589; 8, Ct. L. R. 217; 1940, S. C. J. 566).

(A. G.)

FOR PETITIONER: Sha'r.

FOR RESPONDENTS: *Ex parte.*

ORDER.

This is an application to stay the execution of an order, given by the Latin Ecclesiastical Court of Appeal in Jerusalem, ordering execution of a judgment issued by them. When the case first came before this Court (High Court No. 103/42) execution was ordered of the sum of LP. 20 monthly, for alimony *pendente lite*, and execution of a sum awarded for arrears of alimony, LP. 540, was stayed, in view of the fact that the judgment of the Ecclesiastical Court itself had stayed the execution. The Ecclesiastical Court has now given a further order for the execution of the arrears of LP. 540. In the former trial I used these words:—

> "Now in the first instance it must be made quite clear that this is not a Court of Appeal from the Latin Ecclesiastical Court of Appeal."

Those remarks apply equally with regard to this present application. The order has been given by a Court which is competent to deal with the question in issue between the parties, both of them being Catholics. The Ecclesiastical Court may have made a mistake in law, that is of no concern to this Court. The remedy is to appeal against that further order, if thought desirable, to the Supreme Ecclesiastical Court in Rome, the Congregation of the *Sacra Rota*. The order is given by a Court which has jurisdiction in the matter in dispute between the parties. It is not for this Court to assume the functions which belong properly, as I have said, to the Supreme Ecclesiastical Court of Appeal in Rome or to the Latin Ecclesiastical Courts here.

The application is, therefore, refused.

Given this 17th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 61/43.

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

BEFORE: Gordon Smith, C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Joseph Atalla. APPELLANT.

v.

1. Gabriel Tuma,
2. Alexander Barghash,
3. George Ghantus,
4. Saleh Hakim,

in their capacity as agents of the properties of the National Orthodox Community of Haifa. RESPONDENTS.

Lessee requested by landlord to deliver premises to Military Authorities — Lessee complying with landlord's request — Landlord suing on promissory note covering rent in respect of period following vacation — Question whether contract rescinded — Frustration of contract.

Appeal from judgment of District Court, Haifa, appellate capacity, Civil Appeal No. 175/42, allowed and Magistrate's judgment restored:—

1. Tenant acceding to landlord's request and vacating premises during period of tenancy — not liable to pay rent after vacation, as contract of lease rescinded.

2. (*Obiter*): If for some reason or other lessee debarred from benefit of premises contract frustrated and lessee not liable to pay rent.

(*M. L.*)

DISTINGUISHED: C. A. 138/37 (2, Ct. L. R. 73; P. P. 5—8, 10.x.37); C. A. 198/40 (7, P. L. R. 513; 8, Ct. L. R. 226; 1940, S. C. J. 552).

REFERRED TO: Whitehall Court *v.* Ettlinger, (1920), 1 K. B. 680; 122 L. T. 540; 36 T. L. R. 80), (this case was followed in C. A. 138/37, *supra*).

ANNOTATIONS :

1. C. A. 138/37 (*supra*) was also followed in C. A. 134/40 (7, P. L. R. 405; 8, Ct. L. R. 210; 1940, S. C. J. 243). Both C. A. 138/37 (*supra*) and C. A. 134/40 (*supra*) were followed in C. A. 198/40 (*supra*).

2. In C. A. 138/37 (*supra*) the Court of Appeal reviewed the former cases on the matter of frustration of contracts of lease, namely: C. A. 43/33 (C. of J. 1934—6, 543; P. P. 28.vi.1937) and C. A. 77/37 (1, Ct. L. R., Rep. 61; P. P. 27.vi.1937) and C. A. 43/33 was distinguished. C. A. 77/37 (*supra*) followed C. A. 43/33 (*supra*). See also laws, cases and authorities on doctrine of frustration cited in C. A. 138/37 (*supra*).

3. In Whitehall Court *v.* Ettlinger (*supra*) it was held that there is no

eviction by title paramount where the Government in pursuance of the Defence of the Realm Acts and the prerogative compel a lessee temporarily to give up possession of premises for an indeterminate time, and the liability of the lessee to pay rent to the lessor under the lease is not thereby suspended, even though the house is destroyed by fire during the Government occupation. This case was followed in Matthey *v.* Curling, (1922), 2 A. C. 180. In Popular Catering Association, Ltd. *v.* Romagnoli, (1937), 1 All E. R. 167 it was decided that demolition of premises by a local authority under a dangerous structure notice is not eviction by title paramount and does not suspend the rent. See also Redmond *v.* Dainton, (1920), 2 K. B. 256 (lessee not discharged by destruction of premises by enemy bomb). On discharge of lease and frustration of purpose of lease see also Woodfall, Landlord and Tenant, 24th Edition (1939) *pp.* 540—546, Chitty on Contracts, 19th Edition (1937) *pp.* 142—150 and Halsbury, Vol. 7, *pp.* 215—217.

4. For recent cases on doctrine of frustration see: Joseph Constantine Steamship Line, Ltd. *v.* Imperial Smelting Corporation, (1941), 2 All E. R. 166; Digest Supp.; 165 L. T. 27: — doctrine extended to "frustration of the adventure or of the commercial or practical purpose of the contract" to cover cases where essential object indeed exists but its condition has by some casualty been so changed as to be not available for the purposes of the contract at its date, or, if no date fixed, within any time consistent with the commercial or practical adventure and cases where by state interference or similar overriding intervention the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it, and cases where the object of the contract contemplated by both parties, was its employment for a particular purpose which has become impossible; White & Carter, Ltd. *v.* Carbis Bay Garage, Ltd., (1941), 2 All E. R. 633, Digest Supp.: — test to be applied in deciding question of frustration. (Tay Salmon Co. *v.* Speedie, (1929), S. C. 593, Digest Supp.: — the law in Scotland).

Fibrosa Spółka Akcyjna *v.* Fairbairn Lawson Comba Barbour, Ltd. (H. L.), (1942), 2 All E. R. 122: Contract containing a clause providing that in case of impossibility of delivery of goods by reason of any cause beyond the vendors' reasonable control (including, *inter alia,* war) a reasonable extension of time should be granted, was frustrated by the fact that the place of performance became enemy occupied territory, because the said clause referred only to a temporary impossibility of performance and had no reference to the prolonged period occasioned by the outbreak of war. This case also overrules Chandler *v.* Webster, (1904), 1 K. B. 493; 12 Digest 407, No. 3282; 90 L. T. 217) where the rule was laid down that, upon frustration of a contract, the loss lies where it falls; Leightons Investment Trust, Ltd. *v.* Cricklewood Property and Investment Trust, Ltd. and others, (1942), 2 All E. R. 580: — the doctrine of frustration does not apply to leases. (*Note*: The report of this case has not reached this country, but its headnote can be found in Butterworth Emergency Legislation Service, 5th Binder, (Issue No. 94), Digest of cases, page 35, para. 190.

(A. G.)

FOR APPELLANT: W. Salah.

FOR RESPONDENTS: Mu'ammar.

JUDGMENT.

In this case the District Court Haifa reversed the finding of the Magistrate in the Court below dated the 16th December, 1942. In that judgment the Magistrate details what the action is about, the relevant correspondence, certain findings of fact and then comes to the following conclusion:—

> "From these facts the Court concludes and considers the original contract 'A' as revoked as from the date of vacating the premises on 20.2.42, since Plaintiffs requested the vacation and the handing over of the premises to the Military Authorities and Defendant acceded to their request, and in between he wrote to them proposing some conditions to which they did not reply, as it appeared, since no reply was sent to his first letter B and after several other letters Plaintiffs did not agree to Defendant's proposal.
>
> Defendant cannot lease the premises to the Military Authorities unless Plaintiffs give their consent in writing, as stipulated in the contract Exhibit A, Clause 3, and Plaintiffs did not enable Defendant to do this since they did not agree in writing and the Court may say that not even orally."

The District Court reversed, as I have said, the decision of the Magistrate on the grounds that there being no rescission of the contract, the tenant though prevented from enjoying the use of the premises was clearly liable to pay rent notwithstanding that the Military had requisitioned the premises and the learned President then quotes authorities for that proposition. The action thus was on promissory notes given in advance for payment of rent of the premises covering a certain part of the period of the occupation by the Military Authorities. It seems to us that the learned President took a wrong view of the matter when he said that there was no rescission of the contract. It seems to us clear and as it seemed clear to the Magistrate that the letter of the 17th February Exhibit "C" is a rescission of the contract by the Respondents themselves. They informed the Appellant that they had been served with a notice under the Defence Regulations requiring them to hand over the property leased to him and they thereby called upon him to vacate the premises on the 20th instant thereby, in our opinion and in the opinion of the Magistrate, rescinding the contract which had been entered into. Subsequently the Respondents have sued the Appellant for the rent covered by the promissory notes. The defence is that there was no consideration or that the consideration for the promissory notes had failed. The matter can, therefore, be distinguished from the cases quoted to us by counsel for the Respondents namely Civil Appeal 138/37 and 198/40 and I would observe that the case quoted by the learned President, the

English case of Whitehall Court *v.* Ettlinger has, I think, but I am not definite about it, been over-ruled by a recent decision of the House of Lords dealing with frustration of contracts which has repealed and rescinded the law as it had existed since 1902 and on which there have been some very sarcastic remarks made in the Courts at home from time to time. It was only in the absence of statutory amendment that the House of Lords was the only authority that could give a contrary decision to what has been accepted as a correct interpretation of the law for over thirty years. They recently reversed the interpretation of the law dealing with frustration of contracts and when somebody leases premises and for some reason or other he is debarred from the benefit of those premises, previously the law held that he had to pay but now it has been held that he does not have to pay. I do not wish to give a decision on the question of frustration of contracts but in this particular case it is clear to us that the Magistrate was correct both on the facts and on the law. We, therefore, allow the appeal with costs to include LP. 10 advocate's attendance fee with LP. 20 costs allowed by the President of the District Court to the Appellant before him.

Delivered this 21st day of April, 1943.

Chief Justice.

CIVIL APPEAL No. 37/43.

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

BEFORE : Rose and Frumkin, JJ.

IN THE APPEAL OF :—

Mousa el Faqi. APPELLANT.

v.

Dalal Abed el Shafi'i and four ors. RESPONDENTS.

Claim that from time immemorial Plaintiff had a right to let water from his land flow through Defendant's land — Defendant dropping point of lack of jurisdiction — Court of Appeal dealing of its own motion with question of jurisdiction of trial Court.

Appeal from judgment of District Court, Jaffa, Civil Case No. 67/42, allowed and case remitted to Court below:—

1. Court of Appeal itself bound to take point of jurisdiction in a case where it is clear that trial Court had no jurisdiction.

2. Where it is arguable whether District Court or Land Court had jurisdiction, Court of Appeal may elect not to take point of jurisdiction of their own motion.

(*M. L.*)

ANNOTATIONS: See C. A. 250/42 (*ante*, p. 129 and annotations).

(*A. G.*)

FOR APPELLANT: Taji.

FOR RESPONDENTS: Eddin.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa. The Appellant alleges that from time immemorial water flowed from his land through a channel on to the land of his neighbours, the Respondents; that now the Respondents have obstructed this channel with the result that the water collects on the Appellant's land and causes him damage. That, in our opinion, is clearly a matter of fact and of evidence, and, as the learned Judges themselves say in the judgment, an owner cannot be heard to say that he has a right to allow water to pass unless there is an old right concerning the passage of the water. We think that on that matter the Court should have given an opportunity both to the Appellant and to the Respondents to call evidence.

A point has been raised as to jurisdiction. Issues were agreed between the parties, and the first issue was "does this action fall within the jurisdiction of the District Court?" It appears from the record that at the hearing the Respondents' advocate stated "I dispense with the first issue" and the record continues: "the case has, therefore, become limited to the question as to whether there exists a damage which should be removed in connection with the rainwater which flows from the Plaintiff's land to the Defendants' land". The case then continued on the basis that the Court had jurisdiction. It is, of course, true that the Court of Appeal itself is bound to take a point of jurisdiction in a case where it is clear that the trial Court had no jurisdiction. In this particular case, however, the matter is eminently arguable as to which of these Courts — the District Court or the Land Court — is the appropriate Court, and having regard to the attitude of the Respondents in the Court below, we elect in this case not to take the point of jurisdiction on our own motion.

We, therefore, think that the case should be remitted to the District Court to allow evidence to be called, to hear and determine the matter according to law, and to give a fresh judgment.

The costs of this appeal and the abortive hearing below will be

in the cause, the costs of this appeal to be on the lower scale and to include the sum of LP. 10 advocate's attendance fee to the ultimately successful party.

Delivered this 1st day of April, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 2/43.

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

BEFORE : Copland, A/C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mustafa Nayif and 8 ors. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Grazing rights — Damage to trees — Forests Ordinance, sec. 17(9), Forests (Protected Trees) Order, 1926 — Negligently allowing goats to cause damage — "Permit", dictum of Humphreys, J.

Appeal from the judgment of the District Court, Haifa (appellate capacity, *Cur.* Weldon, J.), in Criminal Appeal No. 72/42, dismissed:—

A person enjoying a right of grazing is criminally liable if he does not take proper steps to prevent his animals from damaging protected trees. (*A. M. A.*).

ANNOTATIONS: On the meaning of the word "permit" see also CR. A. 67/41 (8, P. L. R. 223; 1941, S. C. J. 225).

(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENT: Olshan.

JUDGMENT.

This is an appeal from a judgment of the learned Relieving President of Haifa, setting aside a judgment of the Magistrate, Nazareth, and convicting the Appellants of an offence under Section 17(9) of the Forests Ordinance. This section is in these terms:—

> "Any person who by negligence allows animals to cause damage to any tree is guilty of an offence and is liable to imprisonment for fifteen days or a fine of five pounds, or both such penalties, and the owner of the animals may be ordered to pay such compensation for the damage caused as the court may direct and,

> if the animals belong to more than one owner, all the owners may be ordered jointly and severally to pay compensation for the damage caused by such animals."

The facts are that the Appellants have grazing rights over certain land in Ma'lul village, the ownership of which is vested in the Keren Kayemeth Leisrael. Goats belonging to the Appellants have entered upon these lands in pursuance of those grazing rights, and it was proved that those goats did damage and destroy young, newly planted trees, the property of the Keren Kayemeth Leisrael.

The Magistrate in a judgment, nine-tenths of which seems to be beside the mark, acquitted the Appellants on the ground that the Company, or the Keren Kayemeth Leisrael, had not taken proper steps to prevent the damage, and that he was not satisfied that the Accused had negligently allowed their animals to cause damage, and that the presence of these goats on the land was without any criminal intent in the exercise of a right belonging to the Appellants. The learned Relieving President reversed that judgment and found that an offence had been committed under Section 17(9). From that appellate judgment an appeal has been brought to this Court.

In the first place, the Court is satisfied that these trees, which are fir trees, are protected under the Forests Ordinance, having been so declared by the Forests (Protected Trees) Order, of the 1st November, 1926. In the second place, the Court is of opinion that these trees being protected trees, it is an offence negligently to allow animals to cause damage to them wherever those trees may in fact be situated. The right of the Appellants is to graze their animals on this land. That right does not include a right to damage trees, which is not a necessary part of the right of grazing.

With regard to the argument that the Appellants were not negligent, it was stated in England by a very learned criminal Judge, Mr. Justice Humphreys, some little time ago, in a case where a person was charged with permitting an offence by one of his employees, that "permit may mean no more than a failure to take proper steps to prevent". It seems to the Court that the same process of reasoning applies in this case, and that a person negligently allows animals to cause damage to trees if he fails to take proper steps to prevent those animals causing the damage to the trees. The trees were planted on the Company's land. It is not a case, as instanced by Mr. Cattan, of a trespasser planting trees on somebody else's land, while, in any event, nobody is entitled, in exercise of a right vested in him, to commit an offence in the exercise of that right. It seems to us that the proper remedy for the Appellants, if they think they are in any way

prejudiced, is to be found in proceedings in another Court. There is no doubt, to our minds, that they did commit an offence when they allowed their animals to cause damage to these trees.

For these reasons the Court is of opinion that the appeal must be dismissed.

Delivered this 22nd day of February, 1943.

Acting Chief Justice.

CIVIL APPEAL No. 94/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

1. Adib Habayeb,
2. Mrs. Wardeh Khammar. APPELLANTS.

v.

Anis Huneikati. RESPONDENT.

Usurious interest — Repayment of entire loan unconditionally — Oral evidence to rebut mortgage deed — Evidence of parties always admissible — Repayment after action filed — Alteration of issues — C. A. 28/41, C. A. 230/41, Court may not try separate issue except by consent.

Appeal from the judgment of the District Court of Haifa, dated 8th March, 1943, in Civil Case No 141/42, allowed and case remitted to the trial Court:—

1. Where a point arises after the statement of claim has been filed and the issues framed, that point cannot be decided before the issues are amended.
2. Save by consent of the parties a Court may not try one issue alone.
3. The evidence of the parties is always admissible.

(*A. M. A.*)

REFERRED TO: C. A. 28/41 (8, P. L. R. 127; 1941, S. C. J. 133; 9, Ct. L. R. 96); C. A. 230/41 (9, P. L. R. 86; 1942, S. C. J. 115; 11, Ct. L. R. 145).

ANNOTATIONS:

1. On the first point *cf.* C. A. 53/43 (*ante*, p. 111) and note 2.

2. See C. A. 222/42 (1942, S. C. J. 853) for an exceptional case in which the District Court was held to be justified in dismissing the action without giving a decision on all the issues.

3. The leading case on the admissibility of oral evidence is C. A. 87/37 (1937, 2 S. C. J. 15; 2, Ct. L. R. 19; P. P. 2, 3.viii.37); the law governing the admissibility of oral evidence against written admissions has been explained further

in C. A. 168/41 (8, P. L. R. 563; 1941, S. C. J. 642; 11, Ct. L. R. 214) where earlier authorities are reviewed; see also C. A. 89/42 (1942, S. C. J. 445; 12, Ct. L. R. 53).

The position as regards admissions in the Land Registry has been exhaustively examined in C. A. 2/38 (5, P. L. R. 187; 1938, 1 S. C. J. 165; 3, Ct. L. R. 122) where earlier decisions are considered; but see the judgments in L. C. Haifa 1/41, upheld on appeal in C. A. 217/41 (8, P. L. R. 547; 1941, S. C. J. 609) and in C. A. 120/42 (1942, S. C. J. 899).

(*H. K.*)

FOR APPELLANTS: Atalla.

FOR RESPONDENT: Schaal.

JUDGMENT.

As this appeal will, in my opinion, have to be allowed, I do not propose to say anything about the merits. The action before the District Court was one for a sum of money alleged to be usurious interest. Certain issues were framed by the parties and when the case came on for trial an objection was taken by the present Respondent that no oral evidence could be heard with regard to documents executed before the Land Registry and that since the full amount of the mortgage had been repaid, the Usurious Loans Ordinance did not avail the Appellants-Plaintiffs. The learned Judge gave judgment dismissing the action, holding that it appeared that the Plaintiffs had filed the action and then, before service on the Defendant, they had repaid the Defendant the whole amount without any reserve, and that since the whole amount had been repaid it was too late to come to Court and claim for repayment of the usurious interest unless the repayment was made under protest. He held that no oral evidence also was admissible to rebut the mortgage deed.

Now, it is true that in the statement of claim, which was filed by the Appellants no mention was made about repayment under protest for the very excellent reason that at the time they filed the action they had not repaid the money. The learned Judge would seem to have given judgment on a point which was never an issue before the Court, though, as this point had arisen after the filing of the statement of claim, it seems to me that it was obviously a case for amendment of the issues. It has been held by this Court in Sabbagha *v.* Lax and others, Civil Appeal No. 28/41, 8 P. L. R. p. 127, and also in Levy *v.* Gittelman and others, Civil Appeal No. 230/41, 9 P. L. R. p. 86, that a Court has no power to try one issue alone. I would only qualify that in one respect and that is that there is no power to try one issue alone unless with the consent of the parties. In this case the matter was decided on something which was not even an issue as drafted.

For these reasons the appeal will have to be allowed, the judgment set aside and the case remitted for retrial.

It follows, in any event, the Plaintiffs will be entitled to ask for the evidence of the parties to be heard following the rule established for a very long time by judgments of this Court, that the evidence of parties must always be heard if applied for, since it is always possible, in theory at any rate, for the Plaintiffs to be able to extract an admission from the other side. At the retrial, of course, the Defendant will be able to raise all the various points as raised before me now, and, as I have said, the appeal is allowed; costs on the lower scale to abide the result of the retrial, and I certify the sum of LP. 10 advocate's attendance fee on the hearing of this appeal to the eventually successful party.

Delivered this 19th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 43/43.

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

BEFORE : Gordon Smith, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mutawallis of Waqf Sheikh Shams Eddin el 'Alami in Lydda:

1. Khader Mousa Rashid el 'Alami,
2. Badawi Tewfiq el 'Alami,
3. Khamis Shehadeh el 'Alami,
4. Mohammad Su'udi el 'Alami,
5. Ali Su'udi el 'Alami. APPELLANTS.

v.

Said el-Sheikh Qasem in his capacity as legal Mutawalli of the Waqf of Sheikh Qasem Balad. RESPONDENT.

Judgment — Omission to make findings of facts and law — Enquiror to produce report in witness box and to be cross examined thereon.

Appeal from the judgment of the Chief Magistrate's Court of Ramleh, sitting as a Land Court in Jaffa, dated 14th January, 1943, in Land Case No 274/41, allowed and case remitted to the trial Court:—

A judgment should not be delivered without findings of fact and law.

(*A. M. A.*)

ANNOTATIONS: C. A. 117/40 (8, P. L. R. 196; 1941, S. C. J. 343; 10, Ct. L. R. 25) is another instance of a case being remitted for findings of fact to be made.

(*H. K.*)

FOR APPELLANTS: Nakhleh.

FOR RESPONDENT: Cattan and Abu Ghazaleh.

JUDGMENT.

This is an appeal from the judgment of the Chief Magistrate's Court of Ramleh, sitting as a Land Court in Jaffa, whereby the Acting Chief Magistrate dismissed the case of Appellants.

It has been argued before us that the learned Acting Chief Magistrate did not make any findings of fact and disregarded entirely the report of the enquiror and that, therefore, the case should be remitted back to him for retrial.

We are unanimously in agreement that this case must go back to the Acting Chief Magistrate for rehearing. In spite of the fact that this judgment is very concise and short the learned Acting Chief Magistrate has not made any findings of fact or law and we, therefore, remit the case for such purpose. The parties should be entitled to produce further evidence in support of their case and the enquiror should be called into the witness box to produce his report as an Exhibit and be subject to cross examination thereon. This we say without prejudice to the merits of the case. As regards the costs of this appeal they should abide the event.

Delivered this 14th day of April, 1943.

Chief Justice.

CIVIL APPEAL No. 63/43.

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

BEFORE: Gordon Smith, C. J.

IN THE APPEAL OF :—

1. Musbah en-Nabulsi,
2. Abdel Aziz en-Nabulsi,

both on behalf of the estate of the late Hajjeh Ghusun Bint Anis Tamimi. APPELLANTS.

v.

1. Abdel Raouf el Nabulsi,

2. Amneh el Nabulsi and Muzayan el Nabulsi, through their attorney Abdel Raouf el Nabulsi,
3. Mahmoud, Ahmad, Adly, Mukkaram and Adla, children of Mohammad Rashed el Nabulsi, through their guardian Abdel Raouf el Nabulsi. RESPONDENTS.

Action on consideration — Action for loan evidenced by prescribed P/N — Action against estate — Onus and quantum of proof — Notarial document treated as a promissory note — P. C. 38/28 — P/N as prima facie evidence of liability, C. A. 79/25, C. A. 191/33, C. A. 22/38, C. A. 182/37 — Admissibility of evidence, C. A. 182/37.

Appeal from the judgment of the District Court of Nablus, dated the 25th of January, 1943, in Civil Case No. 13/42, dismissed:—

In an action on the consideration, a promissory note used as proof is *prima facie* evidence of liability.

(*A. M. A.*).

DISTINGUISHED: P. C. 38/28 (1, P. L. R. 474; C. of J. 1229).

REFERRED TO: C. A. 79/25 (C. of J. 701); C. A. 191/33 (C. of J. 1934—6, 550); C. A. 22/38 (5, P. L. R. 155; 1938, 1 S. C. J. 145; 3, Ct. L. R. 129); C. A. 182/37 (5, P. L. R. 195; 1938, 1 S. C. J. 163; 3, Ct. L. R. 132).

ANNOTATIONS: It has never been doubted that in an action on the consideration, brought after the expiry of the period laid down in Sec. 96 of the Bills of Exchange Ordinance, the bill or note could be used in evidence. It was, however, thought that in such a case the prescribed note was not sufficient by itself to cast the onus of proof on the defendant. The decision in this case extends the statutory privilege of the holder of a note over and above the 5 years' period fixed in the Ordinance and holds, in effect, that the defendant in such cases has to disprove the *prima facie* case created by the giving of a promissory note, whether the action is brought within the above 5 years or within an additional period of another 10 years. The reasoning seems to be that the giving of a note creates an admission in writing which "in this country is governed by special considerations, without reference to principles of English law" — C. A. 168/41 (8, P. L. R. 563; 1941, S. C. J. 642; 11, Ct. L. R. 214) following P. C. 23/38 (6, P. L. R. 528; 1940, S. C. J. 19; 7, Ct. L. R. 205).

(*H. K.*)

FOR APPELLANTS: W. Salah.
FOR RESPONDENTS: Scharf.

JUDGMENT.

This was an appeal against a judgment of the Nablus District Court, dated the 25th January, 1943, whereby judgment was entered for the Plaintiffs-Respondents, *i. e.* the Plaintiff and the heirs of his father, Mohammad Rashed, deceased, for their share in LP. 1000, *i. e.* five

shares out of six, against the Defendants-Appellants on behalf of the estate of their mother, Hajjeh Ghusun, with interest at 6% from the date of action.

The parties are related, the deceased Mohammad Rashed and the two Defendants being brothers, all three sons of Hajjeh Ghusun, deceased.

After the death of the father, who had previously managed the affairs of his wife, Hajjeh Ghusun, the son Mohammad Rashed (since deceased) managed his mother's affairs.

In 1930, the mother executed a document in favour of her three sons, namely Mohammad Rashed and the two Defendants for LP. 3000, stating therein "which amount I received from them in cash". This is exhibit P. I, and the execution of this document was duly confirmed and attested by a Notary Public, as evidenced by his certificate dated the 25th January, 1930.

Mohammad Rashed died in 1936.

The judgment of the District Court may be reduced to three separate and distinct findings:—

(a) That the document P. I is, by virtue of earlier decisions, a promissory note.

(b) That the Defendants had failed to prove that there was no consideration given and that certain payments made were nothing to do with it.

(c) That the action was not based on the promissory note as such but was based on a claim for money lent, and that, therefore, the period of prescription was fifteen years, which had not expired.

Judgment was given accordingly.

Apart from some technical objections in which there was no substance, the grounds of appeal can be summarized briefly as follows:—

(a) That the District Court erred in holding that the action was one for money lent and that in fact the action was based on a promissory note, which was prescribed.

(b) That, alternatively, the loan was not proved and that the note itself was insufficient proof of such loan.

(c) That the Court erred in not believing the evidence of the Defendants.

(d) That the onus of proof that the money was still owing was on the Plaintiff, and there was no evidence of such fact.

In support of (a) the Privy Council case 38/28, P. L. R. Vol. I, page 474, was cited and it was strongly argued that such case was exactly on all fours with the present case. At first sight and as quoted, there did appear to be something in this contention, but a close study

of the Privy Council case shews clearly that the facts are not comparable with the present case, nor does the decision help the Appellants before me. In that case the District Court had wrongly treated the action, which was for money lent, as being brought on a promissory note, and gave judgment for the Plaintiff accordingly. On appeal and because of such finding the Defendant raised the plea of prescription. The Court of Appeal found that it was neither an action on a promissory note nor for money lent but arose out of a guarantee, and the claim was dismissed with liberty to the Plaintiff to bring a fresh action. On appeal to the Privy Council by the original Plaintiff, the appeal was also dismissed, and in doing so the Board stated that in no circumstances could the Board recommend any course which would have the effect of restoring the judgment of the District Court, for which, in its full result, nothing could be said.

There is no question in my opinion but that this present action was based on a claim for money lent, as was specifically stated in the statement of Claim, the document P. I. being put forward in support of such claim. There is no substance in this ground of appeal.

As regards (b) there is ample authority for saying that an admission of a liability contained in a promissory note is sufficient *prima facie* evidence of such liability. See C. A. 79/25, Rotenberg, Vol. 2, p. 701; C. A. 191/33, Rotenberg, Vol. 7, p. 550; C. A. 22/38, P. L. R. 5, p. 155, a case of foreign bills of exchange and a foreign judgment thereon, and even an invalid or illegal document is admissible in evidence, C. A. 182/37, P. L. R. 5, p. 195.

As regards (c) the credibility of the witnesses was emphatically a matter for the Court below, and similarly as regards (d) the burden of proof that the money had been paid or otherwise was not still owing was on the Defendants.

I would observe that not only was the document executed by the deceased Hajjeh Ghusun in the presence of three witnesses and identifiers, but it was also confirmed and certified by a Notary Public.

I am quite clearly of the opinion that the judgment of the Court below was correct, and, therefore, the appeal is dismissed with costs to include LP. 10 advocate's fee before me, and the order as to costs by the District Court is confirmed.

Delivered this 7th day of May, 1943.

Chief Justice.

HIGH COURT No. 29/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Palestine Industrial Bank Ltd. PETITIONER.

v.

Food Controller, Jerusalem. RESPONDENT.

Requisitioning — Whether it can be made in favour of a person other than controller — Reg. 51 Defence Reguls. 1939, not ultra vires Emergency Powers Defence Act and Order in Council — Jones (Machine Tools) Ltd. v. Farrell and Muirsmith, R. v. Comptroller-General of Patents, Bayer Products Ltd. — "On behalf of His Majesty" — Alternative remedy, Compensation (Defence) Ordinance, sec. 15, position of pledgee — Requisition and acquisition.

Return to an order *nisi* directed to the Respondent to withdraw or cancel a requisition order made by him; order discharged:—

1. A pledgee of requisitioned goods has a remedy under the Compensation (Defence) Ordinance and cannot, therefore, apply to the High Court.

2. Regulation 51 of the Defence Regulations is not *ultra vires* the Emergency Powers Defence Act or the Order in Council.

3. An order of requisition need not be for delivery to the Authority but may direct delivery to a third person.

NOT FOLLOWED: E. H. Jones (Machine Tools) Ltd. *v.* Farrell and Muirsmith (1940, 3 All. E. R. 608).

REFERRED TO: R. *v.* Comptroller-General of Patents, Bayer Products Ltd. (1941, 2 All. E. R. 677).

(*A. M. A.*).

ANNOTATIONS:

1. On non interference of the High Court where an alternative remedy exists see H. C. 147/42 (*ante*, p. 35) and note 3.

2. On *ultra vires* see C. A. 279/42 (*ante*, p. 88) and note 4.

(*H. K.*)

FOR PETITIONERS: Goitein and Weyl.

FOR RESPONDENT: Solicitor General — (Griffin).

ORDER.

In this case the Petitioners ask for an order against the Food Controller to show cause why the latter's order, dated 16.2.43 requisitioning

64 tons of cocoa beans and 20 tons of cocoa butter in the possession of the Petitioners should not be set aside. The Petitioners hold a lien on these goods for about LP. 6,600.— advanced by them to certain chocolate manufacturers who are the owners of the goods and it is argued on their behalf that there was no power to make the requisition order, that the Respondent could not order the Petitioners to deliver the goods to anyone but himself, and that the act of the Respondent was to acquire and not to requisition, and that Regulation 51 of the Defence Regulations, 1939, was *ultra vires* the Emergency Powers Defence Act and Order-in-Council, inasmuch as the goods were not stated to be requisitioned on behalf of His Majesty.

As has been submitted by the Solicitor General, we think that these proceedings must fail, because the Petitioners have another remedy. By Section 15 of the Compensation (Defence) Ordinance, 1940, any lien or pledge attached to requisitioned goods is transferred to any money received as compensation for those goods and the Petitioners if not satisfied with the amount of such compensation can always apply to the tribunal set up under that Ordinance.

Further we do not think that Regulation 51 is *ultra vires* as the case relied upon by the Petitioners, E. H. Jones (Machine Tools) Ltd. *v.* Farrell and Muirsmith (1940, 3 All E. R. 608) did not turn upon the omission of the words "on behalf of His Majesty" but on quite a different point, and in any event has been over-ruled by R. *v.* Comptroller-General of Patents, Bayer Products Ltd. 1941, 2 All E. R. 677. Neither do we think that in regard to those consumable goods there is any difference between requisition and acquisition, and if the Respondent can order the Petitioners to hand over to the Respondent himself, we fail to see why he cannot order the handing over to his (the Respondent's) nominees.

For these reasons the rule *nisi* is discharged with total costs assessed at LP. 10 to the Respondent.

Given this 17th day of March, 1943.

British Puisne Judge.

HIGH COURT No. 34/43.

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

BEFORE : Copland and Rose, JJ.

IN THE APPLICATION OF :—

Liza Kava. PETITIONER.

v.

1. Chief Magistrate, Jaffa,
2. Attorney General. RESPONDENTS.

Certiorari — Change of venue in criminal proceedings — Altercation between bench and bar — Evidence, conflicting affidavits.

Return to an order *nisi* directed to the first Respondent that the record of proceedings in Criminal Case No. 2177/43, Magistrate's Court, Tel Aviv, should be removed from the first Respondent and that he be restrained from further dealing with the file; order discharged:—

> In order to justify the removal of a criminal file from a Magistrate on the ground of partiality or unfairness, the evidence should establish more than mere mistakes of law which could be dealt with on appeal.
>
> (*A. M. A.*).

ANNOTATIONS: On change of venue see: H. C. 15/30 (1, P. L. R. 455; C. of J. 1835) — *alleged enmity of judges;* H. C. 51/31 (1, P. L. R. 588; C. of J. 1835) — *public security*; H. C. 98/32 (C. of J. 1838) — *Court having already expressed opinion;* H. C. 67/33 (1, P. L. R. 865, C. of J. 1839) — *case already twice remitted on appeal*; H. C. 7/34 (2, P. L. R. 47; C. of J. 1934—6, 889) — *prestige of advocate in particular Court*; H. C. 21/34 (C. of J. 1934—6, 891) — *Court prejudiced through previous case*; H. C. 31/34 (2, P. L. R. 81) — *parties to be cited;* H. C. 32/34 (2, P. L. R. 79; C. of J. 1934—6, 892) — *convenience of parties & public security;* H. C. 36/34 (2, P. L. R. 124; C. of J. 1934—6, 894) — *Judge an eye witness of offence;* H. C. 4/37 (1937, 1 S. C. J. 410) — *transfer of judges & safety of advocate;* H. C. 33/38 (1938, 1 S. C. J. 326; 3, Ct. L. R. 262) — *allegations against judge;* H. C. 48/38 (P. P. 20.vii.38; 1938, 2 S. C. J. 14; 4, Ct. L. R. 55), H. C. 61/38 (1938, 2 S. C. J. 107) and H. C. 27 & 28/39 (6, P. L. R. 279; 1939, S. C. J. 207; 5, Ct. L. R. 220) — *public security;* H. C. 24/39 (1939, S. C. J. 290; 5, Ct. L. R. 183) — *consent order;* CR. A. 24/39 (6, P. L. R. 383; 1939, S. C. J. 323; 6, Ct. L. R. 107) — *under Regulation 3A of Emergency Regulations;* CR. A. 111/41 (8, P. L. R. 403; 1941, S. C. J. 378; 11, Ct. L. R. 125) — *effect of change in criminal proceedings;* H. C. 44/42 (9, P. L. R. 300; 1942, S. C. J. 304; 11, Ct. L. R. 174) — *Municipal Tribunals*; H. C. 76/42 (1942, S. C. J. 593) — *improper relations between advocate and Settlement Officer alleged.*

(*H. K.*)

FOR PETITIONER: Ph. Joseph.

FOR RESPONDENTS: Crown Counsel — (Rigby).

ORDER.

Rose, J.: This is the return to a rule, directed to the Respondents, calling upon them to show cause why the record of the proceedings in Criminal Case No. 2177/43, Magistrate's Court, Tel-Aviv, should not be removed from the first Respondent into this Court, in order to be dealt with as may be deemed just, and why the first Respondent should not be restrained from dealing further with the aforementioned case. This most unfortunate matter is, speaking for myself, one of the most painful and embarrassing matters which I have ever had to decide. We are confronted with conflicting affidavits as to fact, on the one hand by counsel of the standing and eminence of Dr. Philip Joseph, his view being endorsed by another member of the Bar, Mr. Azar, and on the other by the learned Chief Magistrate, supported by the interpreter of the Court and by a Mr. Olive, an Inspector of Food Control.

The question which we have to determine is whether there is a reasonable probability of such partiality or unfairness on the part of the Chief Magistrate as is sufficient to justify us in removing this matter from his jurisdiction. Before dealing with that matter, we would say that, in our opinion, it is most unfortunate that the proceedings in any Magistrate's Court should be so conducted as to make it possible for an altercation of this nature to arise, which, whatever the merits and whatever its precise detail, must tend to bring the administration of justice into ridicule and also to bring discredit upon both Bench and Bar.

With regard to this particular matter it must, I think, be apparent, even to the Petitioner, that it is most difficult, if not impossible, for us to give a decision as to which of these conflicting sets of affidavits reflects the true facts. It is for the Petitioner to satisfy us that the facts are such as to justify our exercise of this very drastic power of removal and having regard to the conflict in these affidavits, we are not prepared to say that he has done so.

Having regard to the statements of fact as sworn to by the Chief Magistrate and the interpreter and Mr. Olive, it would seem, on their statements, that at the worst there were mistakes of law on the part of the Chief Magistrate, which, of course, are matters which can properly be dealt with on appeal and would not justify the removal of the case from his jurisdiction.

For these reasons the rule must be discharged. There will be no costs.

Given this 24th day of March, 1943.

British Puisne Judge.

Copland, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 283/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Esheikh Issa Et-Tarayireh,
2. El Haj Abed Hassan,
   Mukhtars of Beni Na'eim Village. APPELLANTS.

v.

1. Odetallah Et'Amat,
2. Odeh El-Basheiteh,
   Mukhtars of Arab el Ka'abneh
   Ezuwidein. RESPONDENTS.

Arbitration — Not an "action" for the purpose of Article 1645 *of the Mejelle.*

Appeal from the judgment of the District Court, Jerusalem (*Cur.* Hasna & Bardaky, JJ.) in Civil Case No. 91/42, allowed; judgment of the District Court set aside:—

Mukhtars' powers under Article 1645 of the *Mejelle* are confined to actions and do not include arbitration.

(*A. M. A.*).

ANNOTATIONS: On the authority of *mukhtars* to represent villagers see C. A. 44/41 (1941, S. C. J. 148; 9, Ct. L. R. 112). *Cf.* C. A. 122/39 (7, P. L. R. 60; 1940, S. C. J. 220; 7, Ct. L. R. 79).

(*H. K.*)

FOR APPELLANTS: Hanania.
FOR RESPONDENTS: Muhtadie.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem, in which they confirmed an award by arbitrators and dismissed an application by the other side to set aside the award. The main ground in the appeal, and the only one on which we have heard argument, is that the *Mukhtars* who agreed to take the matter to arbitration had no power to do so as representing the inhabitants of the village in which they are *Mukhtars*. It is argued that Articles 1645 and 1646 of the *Mejelle* allow the *Mukhtars* to do so. Article 1645, however, specifically refers to proceedings in "an action". Now an action is a proceeding in Court, which an arbitration certainly is

not. In our opinion *Mukhtars*, as *Mukhtars*, have no power whatever to represent the inhabitants of the village so as to agree to an arbitration on their behalf.

This disposes of the appeal. It would give rise to an extraordinary position if *Mukhtars* had this power, because they could, unknown to the inhabitants of the village whom they may claim to represent, dispose of the property of the villagers and the latter would have no remedy whatsoever. An interpretation which would allow such a situation to arise would be fantastic.

The appeal must, therefore, be allowed, the judgment of the District Court quashed and the arbitrators' award set aside. The Appellants are entitled to their costs on the lower scale and to an advocate's attendance fee of LP. 10 — for the hearing of this appeal.

Delivered this 27th day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 82/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

Kaiser Iskander Abyad. APPELLANT.

v.

1. Nasrallah Salim Khoury,
   in his private capacity and on behalf of
   the Estate of Youssef Salim Khoury,
2. Habib Beitar,
3. Kaiser Salim Khoury. RESPONDENTS.

Equitable title — Part of purchase price paid but sale not proceeded with — No equitable title unless contract executed but for transfer — Nor where entire purchase price not paid — C. A. 221/38 — Syndic's acts, how far binding on bankrupt's heirs.

Appeal from the judgment of the Magistrate's Court, Haifa, sitting as a Land Court, dated the 24th day of February, 1943, in Land Case No. 4090/41, dismissed:—

1. There can be no equitable title unless the contract has been executed save for actual transfer, the entire purchase price paid and all the terms complied with by the purchaser.

2. A syndic's completed acts bind the bankrupt and the latter's heirs.

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

(*A. M. A.*).

ANNOTATIONS: The introduction of the doctrines of equity into the Law of Palestine by virtue of Article 46 of the Palestine Order in Council was emphasized by the Judicial Committee in P. C. 47/32 (1, P. L. R. 831; C. of J. 406) and in P. C. 1/35 (C. of J. 1934—6, 331; P. P. 22.i.36; Ha. 20.ii.36). The position thereby created was examined in L. A. 1/36 (C. of J. 1934—6, 340; P. P. 30.x., 1—5, 8.xi.36; Ha. 12, 26.xi., 10.xii.36) and in C. A. 15/38 (5, P. L. R. 237; 1938, 1 S. C. J. 204; 3, Ct. L. R. 149). In C. A. 221/38 (5, P. L. R. 543; 1938, 2 S. C. J. 161; 4, Ct. L. R. 252) an equitable title was recognised although only part of the purchase price had been paid while the whole price had been paid in C. A. 195/40 (7, P. L. R. 531; 1940, S. C. J. 491; 10, Ct. L. R. 3) and in C. A. 147 & 148/40 (7, P. L. R. 464; 1940, S. C. J. 533). For an exhaustive survey of the conditions requisite to create an equitable title see the decision of the Settlement Officer reported *ante*, p. 133.

(*H. K.*)

FOR APPELLANT: Khoussa.

FOR RESPONDENTS: No. 1 — Hawa.
Nos. 2 & 3 — A. Levin.

JUDGMENT.

This is an appeal from the decision of one of the Haifa Magistrates, sitting as a Land Court.

In 1934 the Syndic in the Khoury Bankruptcy, by public auction, sold 7 out of 504 shares in certain property in Haifa to the present Appellant. LP. 60 was paid on the signing of the auction list and the balance of LP. 63 was due to be paid on transfer. No contract was drawn up and no transfer has ever taken place, and no tender has ever been made of the balance of the purchase price of LP. 63. It is true that the Syndic in 1934 sent an application to the Land Register for a transfer of the shares sold to the Appellant but this was not proceeded with. The Syndic was discharged and the bankruptcy closed in July, 1940. In 1941 the Appellant brought this action asking for cancellation of the registration of these shares in the names of the second and third Respondents and asking for registration in his name on the payment of the balance of the purchase price. The Magistrate dismissed the claim.

In the first place it is quite clear that no question of equitable title arises. An equitable title can only be obtained when the contract has been executed with the exception merely of the transfer into the name of the purchaser. That is to say, the whole purchase price must have been paid and the purchaser must have carried out all the terms with

which he would have to comply in order to get transfer. In this case only a part of the purchase price has been paid. A case has been quoted by Mr. Koussa, C. A. 221/38, 5, P. L. R., p. 543. It does not deal with this question at all. That case held that where a person has been put into possession with the consent of the vendor, and has paid a part of the purchase price, he has an equitable lien on the property and cannot be evicted until the whole price has been paid. That is not the case here. It has been argued by the Appellant that the sale by the Syndic binds the bankrupt, and the bankrupt's heirs are also consequently bound. The bankrupt would be bound of course by a completed act of the Syndic and the heirs also would be bound by such a completed act. But as I have said in the course of argument, Mr. Koussa's argument would involve the proposition that the heirs of the bankrupt Khoury are also the heirs of the Syndic for which I know of no authority whatsoever.

In the circumstances I think that the Magistrate came to a correct decision and the appeal will consequently be dismissed with costs on the lower scale, and to include the sum of LP. 15 advocate's attendance fee, LP. 7.500 to each counsel for Respondents.

Delivered this 13th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 290/42.

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

BEFORE : Copland and Rose, JJ.

IN THE APPEAL OF :—

'Imran el Muwaqqet,
Ma'mur Awqaf of Jerusalem, in his capacity as Acting Mutawalli of the waqf of the late Ali Fawzi El Turk. APPELLANT.

v.

1. Ahmad Ali Fawzi el Turk,
2. Muhammad Ali Fawzi el Turk,
3. Fatmeh Hassan el Turk,
4. Yusef Hertz,
5. Emily Hertz,
6. Dr. M. Walach,
7. Max Stern. RESPONDENTS.

Waqfs — Dedication of mulk property as waqf — Consent of the Land Registrar obtained but waqf not registered — Succession by heirs — Property mortgaged and sold in satisfaction of mortgage — Dedication as a disposition, L. T. Ord., Secs. 2, 4, 7, 11, dedication is irrevocable (Hamilton's Hedaya, Vol. XV, p. 337, Omar Hilmi's Evqaf, Art. 111, Adda's "Droit Mussulman") and valid once made — Consent of Registrar of Lands sufficient even if waqf disposition not registered — H. C. 99/42 not binding as not fully argued — Validity of mortgage on such property (L. A. 49/35, L. A. 173/26) if made in good faith — Certificates of succession (C. A. 83/39) mere declaration of who the heirs are and the shares to which they are entitled — Importance of registering waqf — Position of bona fide purchasers — Costs.

Appeal from the judgment of the Land Court, Jerusalem (*Cur.* Shaw, J.) in Land Case 4/41 allowed, judgment set aside and the registration of 23.4.38 in the names of the first three Respondents set aside:—

1. A dedication of *waqf* in respect of which the consent of the Director of Lands has been obtained is not a void disposition although no special registration was made.

2. A mortgage on such property, if made *bona fide* and without notice of the *waqf*, is valid.

3. A certificate of succession is not a declaration entitling the heirs to specified property, but merely sets out the names of the heirs and the shares to which they are entitled.

(*A. M. A.*).

OVERRULED: H. C. 99/42 (1942, S. C. J. 605).

FOLLOWED: 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. 38); C. A. 83/39 (6, P. L. R. 462; 1939, S. C. J. 467; 6, Ct. L. R. 136).

ANNOTATIONS :

1. On section 11 of the Land Transfer Ordinance see C. A. 2/43 (*ante*, p. 71) and note 1 thereto.

2. It was held in C. A. 72/42 (1942, S. C. J. 544; 12, Ct. L. R. 110) that "whether or not ..... was a *bona fide* mortgagee without notice would be immaterial according to the Land Law of Palestine, seeing that a mortgagee's rights would depend on the validity of the title of the mortgagors."

3. The position of a *bona fide* purchaser of land is exhaustively discussed in C. A. 119/42 (1942, S. C. J. 755) where earlier authorities are reviewed.

4. On the nature of a certificate of succession see, in addition to C. A. 83/39 (*supra*), the following cases: C. A. 250/41 (9, P. L. R. 231; 1942, S. C. J. 236; 11, Ct. L. R. 129) and C. A. 82/42 (1942, S. C. J. 616; 12, Ct. L. R. 141) wherein the Court said: "Whatever difficulty may have arisen ..... is due ..... to the fact that the difference has not properly been appreciated between the issue

of a certificate of succession and the determination of the property which may or may not pass under that certificate."

(*H. K.*)

FOR APPELLANT: Abcarius and Khadra.

FOR RESPONDENTS: Buxbaum.

JUDGMENT.

This is an appeal from a judgment of the Land Court, Jerusalem, dismissing an application for the annulment of a sale and two mortgages, and the registration of the property in question as *waqf*.

The facts, which are not disputed, are as follows. I have taken the details from the judgment of the learned Judge. The property consists of two houses, and land of an area of 689 square metres, 474 square centimetres. It is situated in Jerusalem and is registered in the Land Registry of Jerusalem under deed No. 823, dated 30.3.32 (see Exhibit 1) as the *mulk* property of the late Ali Fawzi Ibn Muhammad. A petition (Exhibit 2) was submitted by Ali Fawzi to the *Qadi Shar'i* stating that he wished to dedicate the property as *Waqf Sahih* in favour of himself and (after his death) his heirs. This petition was sent by the *Shari'a* Court to the Land Registrar, Jerusalem, with an endorsement (see Exhibit 2) asking whether the property was attached or mortgaged, and whether there was any objection to the dedication. A reply (Exhibit 3) was received from the Land Registrar saying that there were no attachments or mortgages, and no objection to the continuance of the proceedings. A dedication (Exhibit 4) was accordingly made on 25.5.32.

This *waqf* was never registered in the Land Registry.

On 21.6.37 the dedicator (Ali Fawzi Muhammad) died, and on 7.7.37 a certificate of succession (Exhibit 5) was issued in favour of his heirs who were his sons, Ahmad (1st Respondent) and Muhammad (2nd Respondent) and his widow Fatmeh (3rd Respondent).

On 23.4.38 (see Exhibit 6) the property was transferred to the heirs, and each son transferred five of his shares to his mother, so that each of the heirs were shown as owning one-third of the property.

On 18.5.38 (see Exhibit 6) the property was mortgaged for LP. 600 to Respondents Nos. 4 to 7, and on 24.10.38 a further mortgage was made in their favour for LP. 300. These mortgages matured on 18.9.39 and 8.8.40 respectively, and proceedings were taken in execution. These proceedings have been stayed at the request of the Appellant pending the decision in this present case and appeal.

After he had received notice of the transfer of the property the

Ma'mur Awqaf of Jerusalem applied to the *Shari'a* Court to discharge Ahmad (1st Respondent) who had become *Mutawalli* under the terms of the *waqf* when his father died, and Ahmad was discharged on 28.11.40 (see Exhibit 7) and the *Ma'mur Awqaf* (Appellant) was appointed in his place as Acting *Mutawalli*.

The learned Judge dismissed the application on the ground that the dedication had never been registered in the Land Registry in accordance with the provisions of the Land Transfer Ordinance, Cap. 81, especially Section 7, that both the heirs and the mortgagees had acted in good faith and without notice of the dedication, and he held that he was bound by the case of Haj Ahmad Lababidi *v.* Ma'mur Awqaf, Northern District and another, High Court 99/42. From that judgment the present appeal has been brought.

The arguments depend in part upon the construction of the following provisions of the Land Transfer Ordinance, Cap. 81.

> "2. 'disposition' means a sale, mortgage, gift, dedication of *wakf* 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;"
>
> "4. (1) No disposition of immovabe 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 subsection.
>
> (3) In order to obtain the consent referred to in subsection (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."
>
> "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."
>
> "11. (1) Every disposition to which the consent required by section 4 has not been obtained shall be null and void."

As the learned Judge remarked, the real points to be decided in this case are whether the dedication of *waqf* is good and effective, and whether the mortgages are valid.

As to the first question, namely the validity of the dedication, the dedicator died without having attempted to revoke the dedication, and indeed he could not have done so, since the dedication according to the

Shari'a Law was irrevocable, and clearly, if the dedicator himself could not alter the dedication, his heirs could be in no better position than he was. In Hamilton's translation of the *Hedaya,* or commentary on the Mussulman Laws, printed in London in 1791, Volume II, Book XV, "of *waqfs* or appropriations", at page 337, there appears the following:—

> "It is reported by Kadouree, from Haneefa, that the appropriator's right of property is not extinguished, except where the magistrate so decrees, or where the appropriator himself suspends it upon his decease, *etc.* Abu Yousef alleges that his right of property is extinguished upon the instant of his saying "I have appropriated", (and such also is the opinion of Shafe'ï) because that is a dereliction of property, in the same manner as manumission. Muhammad says that it is not extinguished until he appoints a procurator and delivers it over to him and decrees are passed upon this principle. With respect to what is reported from Haneefa, that 'the appropriator's right of property is extinguished by a decree of the magistrate', our author remarks that this is the approved doctrine, as such a decree removes all difference of opinion."

Article 111 in Omar Hilmi's Treatise on the Laws of *Evqaf,* Tyser's translation, Second Edition, 1922, is to the same effect:—

> "After the completion of the dedication, its irrevocability depends on the formalities described below:—
>
> The first formality consists in the decision of a judge in favour of its irrevocability after trial.
>
> Thus if someone, after he has dedicated, in the manner prescribed by Section II, Chapter I, some specific thing of which he is the owner, and given it to the *Mutawalli* appointed by him to have it declared irrevocable by the Court, wishes to recall the act of dedication, and to take back from the *Mutawalli* that thing, in order that it may be his own property as before, but the *Mutawalli* does not agree to the giving back of the thing, and so, when a dispute and difference of opinion has sprung up between the dedicator and the *Mutawalli,* if the case is tried before some judge having knowledge of the different opinions of the *mujtehids* about the irrevocability or otherwise of a dedication, and the judge decides in favour of the irrevocability of the dedication according to the opinion of a *mujtehid* allowing the validity of the dedication, in such a case the dedication is irrevocable.
>
> If without such trial being gone through, the judge in compliance merely with the demand of the dedicator or the *Mutawalli,* decides in favour of the irrevocability of the act of dedication, its irrevocability does not result, from the judge having so said (see note)."

And in M. Adda's "Droit Mussulman", published in Cairo in 1893, it is stated that a dedication as *waqf* is irrevocable:

> "S'il est validé par une ordonnance d'un Magistrat après une

instance regulière et l'audition de témoins déposant à la suite d'une contestation soulevée par une partie adverse."

The *waqfieh* of 25.5.32 is in the usual form and recites the fictitious trial where the dedicator endeavoured to upset the dedication, and the *Qadi's* decision thereon, dismissing the dedicator's application, whereupon according to the *Shari'a* Law the dedication became irrevocable. All the requirements of the *Shari'a* Law as to validity had been complied with, and the dedication was, therefore, a perfectly valid one in accordance with the *Shari'a* Law.

Further, I think that the application (Exhibit 2) was sufficient to comply with the provisions of Section 4, subsections (2), (3) and (4) of the Land Transfer Ordinance. Exhibit 2 is as follows:—

"The *Qadi* of the *Shari'a* Court,
Jerusalem.

I beg to submit the following:—
I have a house situated at Tiloul el Masaben, composed of two stories, upper and lower, according to the attached *kushan* produced in two copies, the boundaries of which are as follows:—

East : Road
West : Road
North : Aisha Khanum
South : Ragheb Kutteineh

I have the intention to dedicate them in the *Shari'a* Court for myself and after my death to my heirs.
I pray that the transaction will take place according to the *Shari'a* Law.

22.5.32 (Sgd.) Ali Fawzi."

"I submit this application to the Registrar of Lands, Jerusalem, for an information whether the said property is attached, mortgaged or not, or if there is any objection for making the said property as *Waqf* property accordingly.

22.5.32 (Sgd.) Muhammad Rashid el Tibi,
Qadi, Shari'a Court."

The application set out the details of the property and the general intentions of the dedicator. It was accompanied by the *kushan* of the property and was forwarded by the *Qadi* to the Land Registrar, asking whether the property was mortgaged or attached and whether there was any objection to it being made *waqf*. The reply of the Land Registrar (Exhibit 3) is equally, in my opinion, the consent referred to in Section 4, subsections (2) and (3), and Section 11(1). This exhibit reads:—

"To the *Qadi* of Jerusalem.
With reference to Your Honour's letter dated 22.5.32, in respect of the property of Fawzi Muhammad, which is registered in Register No. 3/84, Jerusalem, I inform Your Honour that on inspecting the said register it was found that two houses (*mulk*)

registered in the name of the said Ali Fawzi, and on perusing them it was not found any marks dealing with mortgage, attachment or other things which prevent proceedings therewith. There is no objection whatsoever from this Department against continuance of the proceedings.

23.5.32 (Sgd.) Registrar of Lands
Jerusalem."

It has been put forward by Dr. Buxbaum, in the course of his extremely able argument, that there is nothing to show that the consent of the Director of Lands, as specified in Section 4(3), was obtained. I think, however, that the reply of the Registrar of 23.5.32, in which it is stated that "there is no objection whatsoever from this Department against the continuation of the proceedings", must be deemed to have been made after proper departmental routine had been carried out, and must be taken to have been an expression of the consent of the Director, in the absence of any proof to the contrary. The subsection only requires that the petition shall be sent to the local Land Registry office, which was done. As to the further argument that the prescribed form was not filed in the Land Registry and no fees were paid, whilst this is necessary for sales, it would seem that the filing of a form is not necessary for *waqfs*, since the dedication of the *waqf* is noted in the remarks column of the register, and no formal transfer deed, from the *mulk* registration to registration as *waqf*, is ever drawn up. In any event, I think that when once the consent of the Director has been obtained, as I hold is the case here, the disposition cannot be held to be null and void under Section 11(1). I think, therefore, that the dedication must be held to be good and effective.

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 second point concerns the validity of the mortgages. In Ehzein and others *v.* Nesson, Land Appeal 49/35, this Court, following the decision in Sheikh Sadeq Anebtawi and others *v.* Fares Ahmed and another, Land Appeal 173/26 (1 P. L. R. 269), held that where land was registered as *mulk*, and was purchased as such by the purchasers in good faith, it made no difference that the land was in fact *waqf*, and that the purchaser's title could not be upset. I cannot do better than to quote again the reasons given for this decision:—

> "To hold the contrary would imply that no purchaser of registered *mulk* property could satisfy himself that he was obtaining a good title, however carefully he might investigate the entries in the Register and the facts as to possession. Until the period of limitation of thirty-six years prescribed by Article 1661 of the *Mejelle* had expired, his title might be set aside on proof that the property sold to him was *waqf* by virtue of a dedication of which he had and could have no notice."

It seems to me that, for the same reasons, this principle must equally apply to cases where the land is mortgaged as it does to cases where the land is sold. I agree with the learned Judge that Exhibits 2 and 3 were not effective as notices to intending mortgagees, and it is also clear that the mortgagees acted throughout in good faith. There was nothing in the register to put them upon inquiry, and the *mulk* title appeared to be clear and unencumbered. In fact the Appellant admits liability to the mortgagees as a matter of grace, but in view of the above authorities I do not think that the liability could have been contested with any prospect of success. The mortgages, therefore, are valid and effective, in my view.

I now come to the position of the first three Respondents, who are the heirs of the dedicator. It is true that they obtained a certificate of succession from the *Shari'a* Court and that on the basis of that certificate this property was subsequently transferred into their names. It has been held by this Court, in several decisions, of which Patlacos *v.* Greek Orthodox Patriarchate, Civil Appeal 83/39 (6 P. L. R. 462), is one, that a certificate of succession is not a declaration that such and such property belongs to the estate of the deceased, nor is it a declaration that there is in fact anything for the heirs to inherit, but that its only effect is to determine who are the heirs of the deceased who may be entitled to share in such property as may be found to have belonged to the deceased. The certificate of succession in this case, as might be expected, does not detail the property which passed on death. Since the dedication of the *waqf* was irrevocable, it seems to me that the property dedicated did not pass to the heirs, since it was not the property of the deceased at the time of his death, and the question of good faith does not arise. The subsequent registration of the dedicated property in their names, and the rearrangement of the shares *inter se*, made on 23.4.38, was, therefore, ineffective. The position would of course have been different if the property had been sold to third parties — in such a case, if the purchase had been in good faith, the purchaser's title could not have been upset. Here the heirs inherited no part of the dedicated property.

This case is a striking example of the danger attendant upon the

non-registration in the Land Registry of *waqfs*. Because the property was not so registered this *waqf* is the loser to the extent of over LP. 900. Registration is an essential precaution in order to protect the property against dispersion of the assets, where third parties, who acted in good faith, and without notice of the dedication, have advanced money, and their claims have to be allowed.

In the result I think that this appeal should be allowed, the judgment of the learned Judge set aside, and an order made annulling the registration of 23.4.38 in the names of the first three Respondents, the heirs of the dedicator. Secondly, on payment of the amounts due to Respondents Nos. 4 to 7 on the mortgages of 18.5.38 and 24.10.38, the said mortgages to be discharged, and the necessary entries to be made in the Land Register that this property is dedicated as *waqf*. Further, that an order do issue to the first three Respondents to refrain from interfering with the Appellant in the said property, and possession to be given to the Appellant. In the meantime, and until the above mortgages are discharged, a *cavcat* to be entered in the Land Register that the property is subject to dedication as a *waqf*.

With regard to costs, it must be remembered that none of the Respondents had any knowledge that the property was *waqf* until 1940, after all the dealings in it had taken place, and none of this trouble would have arisen if the necessary steps had been taken to see that the *waqf* was duly registered. I think that the fairest order to make is that no costs in either Court should be given to the Appellant, and the first three Respondents will neither pay nor receive costs. Respondents Nos. 4 to 7 are entitled to such costs here and below as may be due to them on apportionment, bearing in mind that all the seven Respondents fought the case together. The advocate for the Respondents is entitled to LP. 10 advocate's attendance fee on the hearing of this appeal and to four-sevenths of the advocate's fee awarded by the District Court.

Delivered this 26th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 244/42.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPEAL OF :—

1. Haj Zaki Manna',
2. Ali Dasouki. APPELLANTS.

v.

Abdul Hamid Sufan and 2 ors. RESPONDENTS.

Appeals — Appeal from judgment of remittal may be taken after second judgment by intermediate Court — C. P. R. 317, 334, C. A. 18/42 — B/E — B/E Ord., secs. 2, 30, 37 — "Holder" — Stranger to a note made to order cannot sue thereon.

Appeal from the judgment of the District Court, Jaffa (appellate capacity, *Cur.* Daoudi & Toukan, JJ.), in Civil Appeal No. 72/41, allowed, judgment set aside and judgment of the Magistrate's Court restored:—

1. A judgment of remittal may be queried in an appeal from the final judgment of the intermediate Court.
2. A stranger to a promissory note payable to order may not sue thereon.

NOT FOLLOWED: C. A. 18/42 (9, P. L. R. 324; 1942, S. C. J. 315; 11, Ct. L. R. 190).

(*A. M. A.*).

ANNOTATIONS :

1. The ruling in C. A. 18/42 (*supra*) was in accordance with that in C. A. 76/38 (1938, 1 S. C. J. 266; 3, Ct. L. R. 219) wherein it was held that "the proper course for the Appellant to follow was to appeal to the Supreme Court from the first (remitting) judgment of the District Court." In C. A. 106/39 (6, P. L. R. 551; 1939, S. C. J. 489; 6, Ct. L. R. 202) it was decided that an appeal lay from a remitting judgment of the District Court. *Cf.* also C. A. 259/40 (8, P. L. R. 63; 1941, S. C. J. 249; 10, Ct. L. R. 231) and, as regards appeals from judgment remitting an award, C. A. 141/42 (1942, S. C. J. 573; 12, Ct. L. R. 117). For the position in criminal cases *vide* CR. A. 115/41 (8, P. L. R. 420; 1941, S. C. J. 407) and CR. A. 136/41 (1941, S. C. J. 631; 10, Ct. L. R. 195).

2. On an action on a bill being brought by a person who is not the holder *cf.* also C. A. 234/40 (7, P. L. R. 603; 1940, S. C. J. 439; 9, Ct. L. R. 33).

(*H. K.*)

FOR APPELLANTS: Cattan.

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

JUDGMENT.

This is an appeal by leave from a judgment of the District Court of Jaffa, dismissing an appeal from a judgment of the Magistrate. It appears that the Magistrate originally gave judgment in favour of the Appellant but that on appeal the District Court remitted the matter to the Magistrate with certain directions. On the matter again coming before the District Court it held that it was bound by its own previous decision. The Respondent now contends that no appeal can be entertained by this Court as by virtue of Section 12 of the Magistrates' Courts Jurisdiction Ordinance, 1939, the Appellant should have appealed against the first judgment of the District Court remitting the matter to the Magistrate. We agree, however, with Mr. Cattan's submission that the matter is covered by Rules 317 and 334 of the Civil Procedure Rules, and that the Appellant is at liberty, in a case such as the present, to contest the validity of the earlier judgment after the matter has been finally determined on appeal by the District Court. We were referred by Mr. Scharf to Civil Appeal 18/42, Vol. 11, C. L. R. p. 190, which may, perhaps, be argued to be authority for the contrary view. Both the members of the present Court were also members of the Court of Appeal in that case, and concurred in the judgment. We are of opinion that the cases can be distinguished; but even if they cannot, we do not follow the earlier case on the particular point which is now under consideration.

As to the appeal itself, the matter in our opinion is very simple, the only question raised being whether a person whose name does not appear upon a bill made to order can sue upon it. The law is contained in Sections 30 and 37 of the Bills of Exchange Ordinance, the definition of "holder" being contained in Section 2. We agree with the Magistrate that the first Respondent must fail in his claim for the technical but fundamental reason that he would not appear to be a party to the note.

For these reasons the appeal must be allowed, the judgment of the District Court set aside and the first judgment of the Magistrate restored. The Appellants will have the costs here and of all the hearings below, the costs of this appeal to be on the lower scale and to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 28th day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 255/42.

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

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

IN THE APPEAL OF :—

Mercaz Histadruth Hayehudim Hahararyim Hakavkazim. APPELLANT.

v.

Yehudith Adaki. RESPONDENT.

Correction of Land Registers — Ord., sec. 4, Provisional Law as to Immovable Property, Art. 4 — Land registered for corporation in name of nominee, possession enjoyed by corporation — Land Courts Ordinance, sec. 8, L. A. 19/28, C. A. 233/37 — Equitable rights — Costs.

Appeal from the judgment of the Land Court, Jerusalem (*Cur.* Shaw, J.) in Land Case No. 11/41 allowed, action remitted to Land Court to hear on the merits:—

Nam musta'ar actions may still be brought and a plaintiff seek equitable relief against the effect of Article 4 of the Provisional Law of Immovable Property.

(*A. M. A.*)

APPROVED: *dictum* in L. A. 19/28 (C. of J. 1130); C. A. 233/37 (5, P. L. R. 138; 1938, 1 S. C. J. 129; 3, Ct. L. R. 86; P. P. 3.vi.38).

ANNOTATIONS: On the effect of a nominee being registered in the Land Registry Offices *cf.* also L. C. Ha. 1/41, upheld on appeal in C. A. 217/41 (8, P. L. R. 547; 1941, S. C. J. 609) and C. A. 207/42 (1942, S. C. J. 861).

(*H. K.*)

FOR APPELLANT: B. Shereshewsky.

FOR RESPONDENT: Doukhan.

JUDGMENT.

This was an appeal from an Order of the Land Court, Jerusalem, dated the 11th November, 1942, whereby for the reasons stated, the learned Judge dismissed the claim of the Plaintiff with costs.

There was one ground of appeal only, namely, that there was no bar in law preventing the Appellant's action from being heard and tried on its merits before the Land Court of Jerusalem.

It was apparent, therefore, that preliminary objection had been taken at the commencement of the hearing of the action in the Land

Court. In fact, more than one such preliminary objection had been made but the Respondent (Defendant) was successful on the third such objection.

This objection was, briefly, that no such action was maintainable after the 10th July, 1924, by reason of the provisions of the Correction of Land Registers Ordinances 1920 and 1922 and also because of Article 4 of the Ottoman Provisional Law as to Immovable Property of 1331. The learned trial Judge held that this submission succeeded for the reason that the Ordinances specified above did not repeal the Ottoman Provisional Law but merely suspended the operation of Article 4. The Correction of Land Registers Ordinance 1920 which (as amended in 1921 and 1922) is to be found in Vol. 1 of Bentwich's Laws of Palestine at p. 647, by Section 4 provided "No application to correct the register on the grounds mentioned above shall be entertained after 10th July, 1924".

The Ordinance which deals with this particular Article 4 has several recitals the more relevant being the third and the final recitals, which read as follows:—

> "And whereas Article 4 of the same Law provides that no action of *Nam Mustaar* (Land registered through a nominee) shall be heard in respect of immovable property owned by virtue of title deeds, whether *mulk* or *miri;* but the Law granted a period of two years in which application could be made to correct the register ;"
>
> "And whereas it is desirable that a further opportunity should be given to a person or corporation claiming to be the owner of the land registered in another's name, to make application for correcting the register:"

The learned trial Judge held that the Plaintiff (Appellant) having failed to make its application for correction before the 10th July, 1924, is now debarred from bringing this action.

No evidence was given in the Court below nor were the facts gone into but from the statement of claim it appears that the land in question is registered in the name of the Respondent who acquired it in 1940 from the administrators of the estate of one Tajjer, deceased, who had died about 10 years previously. The land had been registered some considerable time previously in the name of this deceased as nominee for the Plaintiff corporation or its representatives, for the reason that, under Turkish Law, they being foreigners could not themselves be registered as the owners of land. It is also alleged that the Plaintiff is and has been continuously in possession.

It is also alleged that the Plaintiff demanded of the administrators that they transfer the land to the Plaintiff which demand was refused

and that it was transferred to the Defendant and registered in her name, with full knowledge of the facts and dispute.

For the Appellant (Plaintiff) it was argued that the action was maintainable on the authority of two cases and by reason of the Land Courts Ordinance Cap. 75 and more particularly by reason of Section 8 thereof.

The first case cited was Land Appeal 19/28 to be found in Rotenberg, Vol. III at p. 1130. As stated in the judgment the circumstances of that case were clearly such that the Correction of Land Registers Ordinance had no application. The Court then went on to discuss the provisions of this Ordinance in spite of such ruling and any such remarks made must be considered to be *obiter*. After referring to the fact that at the date the Correction of Land Registers Ordinance 1920 came into force, Land Courts had not been established and the judgment goes on to state: "Thus the utmost that a successful Applicant under the Correction of Land Registers Ordinance, 1920, could obtain if his application were contested was an entry in the register to the effect that he claimed title to the land and it was still necessary for him to bring an action under the Land Courts Ordinance, 1921, to obtain a declaration of his right to registration". Nowhere in the statement of claim is the Correction of Land Registers Ordinance mentioned and the claim is for a judgment declaring the ownership of the property in question with consequential relief and the action is brought in the Land Court for such declaration and relief.

The other case cited was C. A. 233/37, 5 P. L. R., p. 138. In this case although the Correction of Land Registers Ordinances were referred to in argument they were not mentioned in the judgment, where it is stated that in Turkish times the Appellant in that case would have had no remedy against a registered *kushan* but that since the Land Courts Ordinance, 1921, came into force the Courts had the power to have regard to equitable rights in land as well as legal rights. By implication, therefore, and as the same arguments as regards the earlier Ordinances were submitted, as before us, namely, that the Appellant's failure to have the register corrected under the earlier Ordinance did not debar her from applying under the Land Courts Ordinance was upheld, this case supports the *dicta* made in Land Appeal 19/28.

The learned President specifically held that the Appellant having failed to make its application under the Correction of Land Registers Ordinances was debarred by Article 4 but I think he was wrong in doing so and should have heard the case on its merits as, possibly

the Appellant might have been able to show grounds of equitable relief against the effect of Article 4.

For these reasons the appeal succeeds and the case should be remitted to the Land Court for hearing as to the merits and on which we express no opinion.

As it was a preliminary objection only and by the Respondent I think that the Respondent should bear the costs of her appeal before us with advocate's fee LP. 5 and the costs of the hearing in the Court below should also be paid by her.

Delivered this 25th day of January, 1943.

Chief Justice.

CIVIL APPEAL No. 103/43.

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

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

IN THE APPEAL OF :—

Albert Kaufmann. APPELLANT.

v.

Naale Tifereth b'aravon mugbal. RESPONDENT.

Costs and interest — Payment of amount claimed after institution of action — Money taken out of Court, whether under reservation regarding interest, or in satisfaction, C. P. R. 289, 290 — Costs of attachment — Costs of appeal.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 14th February, 1943, in Civil Case No. 394/42, allowed as to part and dismissed as to part:—

1. When money is taken out of Court under Rule 290 without reservation, it is taken in satisfaction of the claim.
2. A successful plaintiff is entitled to costs of a provisional attachment together with the costs of the action.

(*A. M. A.*)

ANNOTATIONS: The grant or refusal of costs is within the discretion of the Court: C. A. 83/39 (6, P. L. R. 462; 1939, S. C. J. 467; 6, Ct. L. R. 136); C. A. 93/39 (6, P. L. R. 475; 1939, S. C. J. 471; 6, Ct. L. R. 140); C. A. 137/40 (7, P. L. R. 387; 1940, S. C. J. 202; 8, Ct. L. R. 194); C. A. 103/40 (7, P. L. R. 338; 1940, S. C. J. 454; 8, Ct. L. R. 95), *etc.* They have been refused, *e. g.*, in C. A. 9/38 (5, P. L. R. 167; 1938, 1 S. C. J. 155; 3, Ct. L. R. 167) — *non appearance;* C. A. 130/38 (5, P. L. R. 395; 1938, 2 S. C. J. 3; 4, Ct. L. R. 37) — *fraud;* H. C. 68/38 (5, P. L. R. 604; 1938, 2 S. C. J. 219; 4,

Ct. L. R. 247) — *application in forma pauperis;* H. C. 14/39 (6, P. L. R. 190; 1939, S. C. J. 163; 5, Ct. L. R. 171) and C. A. 83/39 (*supra*) — *laches*; Misc. Appl. 22/39 (1939, S. C. J. 341; 6, Ct. L. R. 413) — *against absent advocate;* C. A. 154/40 (7, P. L. R. 467; 1940, S. C. J. 334; 8, Ct. L. R. 91) — *unsuccessful preliminary points;* H. C. 36/40 (7, P. L. R. 269; 1940, S. C. J. 410; 7, Ct. L. R. 195) — *justification;* C. A. 191/40 (7, P. L. R. 511; 1940, S. C. J. 527) — *advocate appearing late.* In H. C. 76/42 (1942, S. C. J. 593) the advocate responsible for signing the petition was ordered to pay the costs personally. See also H. C. 17/43 (*post*, p. 190) and note 2.

(*H. K.*)

FOR APPELLANT: Hanemann.

FOR RESPONDENT: Herman.

JUDGMENT.

This is an appeal from a judgment of the District Court, Tel-Aviv, delivered on the 14th of February, 1943. The appeal concerns two matters, one is the question of interest and the second is the question of costs of a provisional attachment. The whole matter seems to us rather trivial and possibly need not have involved the respective clients in costs which might otherwise have been avoided. But as regards the question of interest, that matter was not dealt with in the judgment of the District Court and in the record of the proceedings before the District Court it is recorded that Applicant's advocate stated:—

> "Defendant paid the money after institution of action. I received notice of payment on 4.2.43; and the money on 8.2.43. Asks costs of attachment and all other costs."

There was no mention, apparently, of interest before the District Court, and consequently the judgment of the District Court stated at the commencement:—

> "The Defendant in this case paid the amount in claim, and the only question to be decided is the question of costs."

It has been argued before us that the statement of claim did, as is usual, claim interest. On the other hand against that it has been argued that the amount was taken out of Court under Rule 289 and 290. It is not clear to us whether, even if the money was taken out under Rule 289, it was taken out with a reservation as to the question of interest, or whether under 290 the Appellant accepted the amount in satisfaction of the whole claim, including any interest.

In view of what I have said we, therefore, dismiss the appeal so far as the interest is concerned. As regards the costs, the District Court awarded the costs of the action to the Plaintiff but as regards the costs of the provisional attachment the judgment states that:—

> "inasmuch as the application therefore was not justified after that Plaintiff had allowed Defendant three days within which to comply

with his demands, but failed to wait until the expiration of that period and submitted the application for provisional seizure."

We are of the opinion that the District Court misconceived exactly what happened as the notarial notice was not addressed to the Defendant company but was addressed to an individual, giving him three days within which to comply with certain demands. No notarial notice was given to the defendant company and, therefore, there was no time limit given within which to comply with a demand for payment.

We think, therefore, that as the Plaintiff was entitled to apply for provisional attachment and did so apply, that the costs of that attachment should be included in the general costs of the action which were awarded to the Plaintiff. Those costs, of course, will have to be assessed and we, therefore, vary the judgment as regards these costs to the effect that the Plaintiff in the Court below gets the full costs of the action including the costs of the provisional attachment. As regards the costs of this appeal, in view of the fact that there were two issues on this appeal, on which each party has been successful, we, therefore, make no order as to the costs of this appeal.

Given this 6th day of May, 1943.

Chief Justice.

CIVIL APPEAL No. 133/43.

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

BEFORE : Copland and Edwards, JJ.

IN THE APPEAL OF :—

Feibisch Rosenblat. APPELLANT.

v.

Batsheva David Chanoch Halevi. RESPONDENT.

Non-enemy declaration — Defence (Courts Applications) Regulations, 1940 — "Appellant" in sec. 2 — Fresh declaration to be filed in succeeding stages of the proceedings — C. A. 73/42, difference where Appellant is original Plaintiff — Whether time should be allowed to cure the defect, C. P. R. 333 — I. T. A. 10/42.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated 31st January, 1943, in Civil Appeal No. 273/42, dismissed:—

An unsuccessful defendant who appeals should file a non-enemy declaration.

REFERRED TO: C. A. 73/42 (1942, S. C. J. 424; 12, Ct. L. R. 84); I. T. A. 10/42 — Ruling of the Chief Registrar (not reported).

ANNOTATIONS: In C. A. 73/42 (*supra*) the appeal had been filed by a party which had submitted a non-enemy declaration in a lower instance. Time to comply with the provisions of the Regulation was refused. In an unreported case, the Appellant was allowed time to comply. The view of the Court in this case is that the ruling in C. A. 73/42 may have gone too far and the remarks made in connection with Appellant's failure to apply for an extension under rule 333, make it probable that rule 333 will be applied in proper cases, on application, to relax the effect of the ruling in C. A. 73/42, at any rate where the Appellant is a party who has complied with the Regulation in another instance.

(*A. M. A.*)

FOR APPELLANT: Jacobi.

FOR RESPONDENT: Elia.

JUDGMENT.

Copland, J.: One point only is raised in this appeal and that is on the question of the non-filing of the declaration required under the Defence (Courts Applications) Regulations, 1940. The Appellant was the unsuccessful Defendant before the Magistrate. The successful Plaintiff, now Respondent here, and also Respondent in the District Court, had filed the usual non-enemy declaration in the Magistrate's Court. No similar declaration was filed by the present Appellant in the District Court on the appeal to that Court. Regulation 2 of these regulations states, and I will read only the relevant parts:—

> "No civil proceedings shall be entertained in any Court ..... unless plaintiff or petitioner, appellant or applicant, as the case may be ..... shall have filed ..... a declaration in the form prescribed in the Schedule to these Regulations".

These words are very specific and do not admit of any exeption. In this case no enemy declaration had been filed at any stage of the proceedings by the present Appellant, and if the word 'appellant' which is inserted in Regulation 2 is to have any meaning, it must apply to a case such as this.

It may possibly be that the ruling in C. A. 73/42 is somewhat too strict, and it may possibly be that in future cases where a declaration has been filed by an Appellant in the Court below there may be no necessity to file a further declaration specifically in relation to proceedings on appeal. But the words of the rule are that "no civil proceedings shall be entertained in any Court". The Appellant, neither when he was a defendant, nor as an appellant in the District Court, has ever filed such a declaration and, in our opinion, the learned Judges of the District Court were right.

A further point is that the Appellant should have been given time in the Court below to file the requisite declaration. From the record it appears that he never asked for Rule 333 to be taken into consideration, and it is not for the Court to give advice to anybody.

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

Delivered this 18th day of May, 1943.

British Puisne Judge.

Edwards, J.: I agree that, having regard to the facts and circumstances of this case, this appeal must be dismissed. In my view, the present Appellant, who had never made any declaration at any stage of the proceedings, was bound to fail in the District Court. I must not be taken as either agreeing or disagreeing with the decision in C. A. 73/42 or with the view expressed by the learned Chief Registrar in Income Tax Appeal 10 of 42.

British Puisne Judge.

CIVIL APPEAL No. 79/43.

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

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

IN THE APPEAL OF :—

Herbert Geballeh. — APPELLANT.

v.

Firm Essinger and Kahn. — RESPONDENTS.

Hire purchase agreement — Assignment by lessor — Claim by real owners.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated 11.12.42 in Civil Appeal No. 205/42, allowed and judgment entered for Appellant:—

A lessee under a hire purchase agreement is entitled to exercise the same rights against the assignee of the lessor as he would have been entitled to exercise against the lessor himself.

(*A. M. A.*)

ANNOTATIONS :

1. The same principle applies in case of assignment of a mortgage: See H. C. 35/39 (6, P. L. R. 372; 1939, S. C. J. 375; 6, Ct. L. R. 64; P. P. 28.viii.39)

and C. D. C. T. A. 19/41, upheld on appeal in C. A. 257/41 (9, P. L. R. 70; 1942, S. C. J. 141).

2. Counsel for Appellant referred, *inter alia,* to Karflex Ltd. *v.* Poole, 1933 (149, L. T. 140; 49, T. L. R. 418) — *breach of warranty of ownership;* Chitty, on Contracts, 18th ed., *pp.* 52—3, 956; Halsbury, Vol. 2, *p.* 428; Mayne, on Damages, *pp.* 120, 165 — *compulsory payments;* Lawrence *v.* Hayes, 1927 (137, L. T. 149; 43, T. L. R. 379) — *assignment of choses in action;* Spencer-Bower, on Actionable Misrepresentation, *p.* 299, *para.* 332 — *rescission of contract against assignee on ground of assignor's misrepresentation.*

(*H. K.*)

FOR APPELLANT: Ficheleff.

FOR RESPONDENTS: Vorchheimer.

JUDGMENT.

Frumkin, J.: In this case the Appellant entered into a hire purchase agreement with one Shimon Shapiro. Under the terms of that agreement instalments were to be paid at fixed periods, and as security for such instalments, promissory notes were issued. After several instalments having been paid to Shapiro, the contract was assigned by him to the present Respondents. A note to that effect was endorsed at the back of the contract, reading as follows:—

> "I confirm herewith, that I assign all my owns and interests according to clause 17 of this agreement to Messrs. Essinger and Kahn Tel-Aviv."

Clause 17 of the agreement reads as follows:—

> "The owners have the right, without previous notice to the Hirer, to assign by simple contract endorsed hereon all their rights and interests hereunder to any third party."

When this endorsement became known to the Appellant he applied to the Respondents asking them to take steps to insure that upon the completion of all the duties imposed upon him under the contract, the Respondents will be in a position to give him title to the car. The Respondents in a letter of reply mentioned *inter alia* that Mr. Shapiro had assigned that contract to them with all its rights and liabilities and that Shapiro had no authority over that car.

It transpired that Shapiro acted under misrepresentation and had in fact no right to enter into the hire purchase agreement. The true owners of the car sued the Appellant for its value namely LP. 245, and the claim was settled for an amount of LP. 110. The Appellant thereupon brought the present action against the Respondents as assignees, but both the Magistrate and the District Court dismissed his action on the ground that there was no privity between him and the Respondents. Hence this appeal.

The main argument of the Respondents in this appeal is that the endorsement on the contract although in the form of an assignment was no more than a security. It might well be that this was the intention as between the Respondents and Shapiro, but this intention does not appear on the face of the contract nor was it ever brought to the notice of the Appellant who is, therefore, entitled to look upon the Respondents as assignees, who both under the assignment and their letter put themselves in the position of the assignor.

Now, Shapiro had no right to sell the car and because of his misrepresentation the Appellant was exposed to an action by the true owners which resolved in his paying to them a reasonable amount in settlement of their claim and in my opinion the Appellant is entitled to recover such amount from the Respondents.

The appeal is, therefore, allowed; the judgments of the Magistrate's Court and District Court are set aside and judgment entered for the Appellant against the Respondents for the amount of LP. 110 with costs on the lower scale here and below together with LP. 10 advocate's attendance fees for the hearing of this appeal.

Delivered this 10th day of May, 1943.

Puisne Judge.

HIGH COURT No. 39/43.

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

BEFORE : Rose, Frumkin and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

1. Muhammad Mahmoud Akkad,
2. Najib Mahmoud Akkad,
3. Amin Mahmoud Akkad,
4. Sabe' Kan'an. PETITIONERS.

v.

1. Chief Execution Officer, Magistrate's Court, Nablus,
2. Hammade Arafat,
3. Slieman Saleh Muhammad. RESPONDENTS.

Consent judgment for muhaya — Co-owner giving a lease of the premises during his period of occupation — Lessee protected by Rent Restrictions Ordinance at expiry of co-owner's period.

Return to a rule *nisi* issued on the 14th of April, 1943, directed to the first

Respondent, calling upon him to show cause why his order dated 14.3.43 in Execution file No. 51/43, should not be set aside and why he should not be directed to order the eviction of the third Respondent from the shop in respect of which judgment for *Muhaya* was given by the Magistrate's Court of Nablus in Civil Case No. 1085/41 and why the said shop should not be handed over to Petitioners; order *nisi* discharged:—

Execution Officer cannot order delivery of premises under judgment for *muhaya,* if premises occupied by lessee and no eviction judgment against him.

(*M. L.*)

ANNOTATIONS :

1. Compare H. C. 15/43 (*supra,* p. 25) and see note 4 thereto (*supra,* p. 26). Same ruling was laid down in H. C. 47/37 (Gorali, p. 33; P. P. 24.viii.37).

2. On *Muhaya* generally see Goadby and Doukhan, Land Law, *pp.* 210, 213, 229; see also C. A. 50/41 (8, P. L. R. 218; 10, Ct. L. R. 96; 1941, S. C. J. 348) and C. A. 220/42 (1942, S. C. J. 913).

(*A. G.*)

FOR PETITIONERS: H. Atallah.

FOR RESPONDENTS: Nos. 1 & 2 — Absent — served.
No. 3 — Zu'eiter.

ORDER.

This is the return to a rule, directed to the first Respondent, calling upon him to show cause why his order, dated 14th March, 1943, in Execution File 51/43, should not be set aside and why he should not order the eviction of the third Respondent from the premises in question.

It appears that the second Respondent's period of occupation under the consent judgment for *muhaya vis-à-vis* the Petitioners expired on the 19th *Muharram,* 1362, which, we understand, is the equivalent to the 25th January, 1943. During his period of occupation he gave, as he was entitled to do, a lease of the premises to the third Respondent. Therefore, in the normal course of events the tenancy of the third Respondent would have expired on the 25th January, 1943. However, on the 24th December, 1942, the provisions of the Rent Restrictions (Business Premises) Ordinance, 1941, were applied to the Municipality of Nablus; and having regard to the terms of Section 4 of that Ordinance, the Chief Execution Officer declined to evict the third Respondent in the absence of a judgment of any Court against him. We see no reason to come to any other conclusion but that the Chief Execution Officer was correct in the view which he took.

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

Given this 3rd day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 106/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Safieh Bint Masoud Shunnar & 6 ors. APPELLANTS.

v.

Mariam Bint Muhammad Abu Azizeh & 2 ors. RESPONDENTS.

Cause of action — May not be substituted by another during course of proceedings — Mistake in judgment due to plaintiff — Proper remedy where L. S. O. erred is by way of appeal, not under L. S. Ord. Sec. 66.

Appeal from the judgment of the Land Court of Nablus, dated the 22nd day of February, 1943, in Land Case No. 9/42, allowed and first Respondent's action dismissed:—

1. A cause of action may not be substituted by another during the proceedings.
2. A plaintiff is bound by the allegations set out in the statement of claim if subsequently incorporated in the judgment.
3. The remedy against an erroneous decision of a Land Settlement Officer is by way of appeal from his decision, not by action under sec. 66 of the Land (Settlement of Title) Ordinance.

(*A. M. A.*)

ANNOTATIONS :

1. See, on estoppel generally, annotations to C. A. 1/43 (*ante*, p. 131). For an exceptional case in which a party was allowed to retract an allegation in the statement of claim which was even supported by affidavit, see C. A. 243/41 (9, P. L. R. 90; 1941, S. C. J. 119; 12, Ct. L. R. 167).

2. The ruling on the first point is in accordance with the decisions in C. A. 61/41 (1941, S. C. J. 176; 9, Ct. L. R. 172) and in C. A. 222/42 (1942, S. C. J. 853).

3. The provisions of Sec. 66 of the Land (S. of T.) Ordinance have "to be applied very strictly": C. A. 85/42 (1942, S. C. J. 743); see also C. A. 141/37 (2, Ct. L. R. 130), C. A. 216/38 (5, P. L. R. 480; 1938, 2 S. C. J. 115; 4, Ct. L. R. 167), C. A. 116/39 (7, P. L. R. 26; 1940, S. C. J. 45; 7, Ct. L. R. 72) and P. C. 21/40 (8, P. L. R. 181; 1941, S. C. J. 334).

(*H. K.*)

FOR APPELLANTS: Elia.

FOR RESPONDENTS: No. 1 — Bushnaq.
Rest — absent — served.

JUDGMENT.

This appeal succeeds for several reasons.

The first one is that the Respondent, who was the Plaintiff in the Land Court, alleged collusion on the part of the Settlement Office Clerk and Village Settlement Committee to her prejudice. Collusion implies fraud. During the hearing of the action that allegation was dropped entirely and an entire fresh cause of action was put forward, that the rights in the existing register had been omitted or incorrectly set out in the new registration. Now, if there is one thing which is well settled law, it is that nobody is entitled when a case is started to drop his original cause of action and to substitute an entirely new cause, and that is what the Respondent did before the Land Court in this case. When the Respondent dropped this cause of action and said she no longer relied upon it, the Land Court should at once have dismissed the case.

The second reason why the appeal succeeds is that a Plaintiff must be bound by what he or she states in the statement of claim. It is alleged that a mistake has arisen in this case, that the common denominator of the divisions of the shares was taken by the Settlement Officer to be 8640 whilst it should have been 1440. That mistake, if it were a mistake at all, was due entirely to the action of the Respondent herself. She herself gave the common denominator as 8640. Finally, if the Settlement Officer was wrong, if he did make a mistake, then the proper method of correcting mistakes made by judicial officers is by way of appeal to the appropriate Court, not by attempting to bring an action under Section 66 of the Land (Settlement of Title) Ordinance.

The appeal must, therefore, be allowed, the judgment of the Land Court quashed and the original action brought by the first Respondent dismissed. The Appellants are entitled to their costs both here and below on the lower scale to include the sum of LP. 10.— advocate's attendance fee on the hearing of this appeal to be paid by the first Respondent.

Delivered this 12th day of May, 1943.

British Puisne Judge.

HIGH COURT No. 17/43.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Said Salman. PETITIONER.

v.

1. The District Commissioner, Jerusalem,
2. Mitri Farradj, District Officer, Jerusalem. RESPONDENTS.

Dismissal of Mukhtar for failure to execute award of arbitrators — Non-interference of High Court after Public Officer's order carried out — Undue delay in applying to High Court — Disallowing costs to successful Respondent.

Return to an order *nisi* issued on the 18th day of February, 1943, directed to the Respondents, calling upon them to show cause why their order, dated 22.9.42 dismissing the Petitioner from the office of *Mukhtar* of Qalonia village, should not be set aside; rule *nisi* discharged:—

1. Failure to carry out an award of arbitrators — not a sufficient reason for dismissal of a *Mukhtar* under sec. 5 of *Mukhtars* (Appointment) Ordinance, 1942.

2. High Court in exercise of its discretion will not order revocation of an order already carried out.

3. High Court will not exercise its discretionary jurisdiction when there has been undue delay in applying.

4. High Court may, while discharging order *nisi* against public officer, disallow costs to Respondent, if he failed to give Petitioner proper reason for his order.

FOLLOWED: H. C. 78/39 (7, P. L. R. 35; 7, Ct. L. R. 45; 1940, S. C. J. 25).

(*M. L.*)

ANNOTATIONS:

1. As to jurisdiction of High Court see: H. C. 78/39 (*supra*); see also H. C. 147/42 (reported *supra*, on page 35 and annotations); H. C. 154/42 (reported *supra*, on page 125 and annotations).

2. On other instances where the rule that successful party is entitled to costs, was departed from, see: C. A. 94/42 (12, Ct. L. R. 105; 1942, S. C. J. 990); H. C. 88/41 (8, P. L. R. 489; 11, Ct. L. R. 189; 1941, S. C. J. 449); see also notes to C. A. 140/41 (8, P. L. R. 579; 11, Ct. L. R. 21; 1941, S. C. J. 554); Costs — in discretion of trial court — C. A. 105/42 (12, Ct. L. R. 83; 1942, S. C. J. 488) and notes. *Cf.* notes to C. A. 103/43 (*ante*, p. 180).

(*A. G.*)

FOR PETITIONER: Hassan Eff. Budeiri.

FOR RESPONDENT : Junior Government Advocate — (Salant).

ORDER.

This is a return to an order *nisi* granted by this Court, calling upon the District Commissioner, Jerusalem District, to show cause why an order dated 22.9.42, dismissing the Petitioner from the office of *Mukhtar* of Qalonia village, should not be set aside.

The relevant part of the order of the 22nd September, 1942, is in these terms:—

> "Whereas you have not informed me what happened with the execution of the arbitrator's award which you were asked to execute, I, therefore, hold you by order of the District Commissioner as discharged from your post as from to-day."

In the affidavits filed by Mr. Mitri Farradj, District Officer, Jerusalem, and Mr. Greig, Assistant District Commissioner, another reason is given for the dismissal of the Petitioner, and that is that he was not carrying out his duties satisfactorily. The deponents both state that they were satisfied that there were sufficient reasons for his dismissal.

The reason given in the letter to the Petitioner is obviously not a sufficient one for dismissing him under Section 5 of the *Mukhtars* (Appointment) Ordinance, 1942. Section 5 says that a *Mukhtar* is liable to be dismissed by the District Commissioner for misconduct or neglect of duty or any other sufficient reason. Failure to carry out an award of arbitrators, particularly in the nature of the award in this particular instance, is not a sufficient reason for dismissal. And as my brother mentioned in the course of the argument, it would seem that, though he was not carrying out his duties satisfactorily, he would still have continued in his office if he had carried out the award of the arbitrator.

But the Petitioner fails on two grounds. First, the dismissal from office had already taken place on the 22nd September, 1942; and secondly, there has been an inordinate delay in applying to this Court. In High Court 78/39, Havkin *v.* Inspector General of Police and others (7, P. L. R., p. 35), the jurisdiction of this Court was reviewed and both those propositions were laid down — that this Court in the exercise of its discretion will not order the revocation of an order which has already been carried out; and that this Court will not exercise its discretionary jurisdiction when there has been undue delay in applying. It seems to us that from the 22nd September, 1942, to the middle of February, 1943, (whatever negotiations might

have been taking place in the meantime), is much too long a period to have been allowed to elapse before coming to this Court.

For these reasons the order *nisi is* discharged but we give no costs to the Respondent for this reason — if the proper reason had been given for the dismissal of this man in September, 1942, it may be that there would have been no necessity for any application to this Court; and secondly, if an application had been made on the proper reasons, it is highly probable that an order *nisi* would have been refused.

The rule is discharged without costs.

Given this 3rd day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 202/42.

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

BEFORE : Rose, J.

IN THE APPEAL OF :—

Getzel Shapira, the late administrator of the estate of Jona Goldberg. APPELLANT.

v.

I. Barshira, interim administrator of the estate of Jona Goldberg. RESPONEDNT.

Executors — Allegations of improper payments — Authority of new executor to sue predecessor — Payment of legacy under codicil before probate thereof — Executor may pay statute barred debt — Williams on Executors — Payment of cheque in suspicious circumstances — Amendment of judgment, C. P. R. 358, 359 *— Judgment cannot substantially be amended under the slip rule — Payment of interest.*

Appeal from judgment of District Court, Tel-Aviv, Civil Case No. 213/40, partly allowed and partly dismissed:—

1. Payment of a legacy may be made under a codicil before probate thereof.

2. An executor may pay a statute barred debt unless it has been judicially so declared.

3. Interest cannot be added to the amount of a judgment in an application under the slip rule.

(*A. M. A.*)

ANNOTATIONS :

1. Authorities on the slip rule are collated in note 2 to C. A. 277/42 (*ante*, p. 108). As regards amendments *re* interest see particularly C. A. 87/32 and C. A. 2/42 therein cited and C. A. 277/42 (*supra*).

2. Interest is normally payable from the date the action is instituted: C. A. 98/25 (1, P. L. R. 84; C. of J. 650); C. A. 107/31 (1, P. L. R. 783; C. of J. 89); C. A. 215/37 (5, P. L. R. 94; 1938, 1 S. C. J. 85; 3, Ct. L. R. 73); C. A. 10/38 (5, P. L. R. 226; 1938, 1 S. C. J. 182; 3, Ct. L. R. 144); C. A. 17 & 19/39 (1939, S. C. J. 142; 5, Ct. L. R. 164); C. A. 36/42 (9, P. L. R. 367; 1942, S. C. J. 600); C. A. 206/42 (1942, S. C. J. 937).

3. "The effect of the lapse of the prescribed period appears always to be the same: the remedy is barred but not the right. Length of time does not destroy a right": Goadby-Doukhan, Land Law of Palestine, p. 250, cited in C. A. 216/41 (8, P. L. R. 607; 1941, S. C. J. 579).

(*H. K.*)

FOR APPELLANT: Ph. Joseph, Elkayam and Globus.

FOR RESPONDENT: Rosenblueth and Hanani.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv. The action concerns a claim against the Appellant for the refund of certain monies which he is alleged to have paid out improperly in the course of his duties as executor of the estate of one, Jona Goldberg, deceased.

In the event the District Court gave judgment for the Respondent in respect of certain of the items claimed. The Appellant appeals against the findings of the Court as regards three of these items: first, a sum of LP. 100 alleged to have been paid to a Mrs. Kaufman by virtue of a codicil dated 2nd February, 1932; secondly, a sum of LP. 518.750 paid to the said Mrs. Kaufman in purported satisfaction of a promissory note; thirdly, a sum of LP. 125 paid out by the Appellant to himself on account of a cheque made out in his own favour and alleged to have been given to the Appellant by the deceased.

An additional point taken by the Appellant was that the learned President, by a so-called "judgment" dated 19th October, 1942, amended his earlier judgment of the 15th September, 1942, by ordering the payment of interest at 9% on the amounts awarded from the date of action. The judgment of the learned President reads as follows:—

> "Judgment.
> This case has taken a considerable time and I consider that the Plaintiff is entitled to interest at 9% from date of action.
> Judgment amended accordingly.
> Dated this 19th October, 1942."

There can, in my opinion, be no doubt that the District Court had no power to give this judgment. Clearly, the alteration is a substantial one and cannot be said to fall within the scope of the "slip rule", Rule 358 of the Civil Procedure Rules; nor can this said judgment be

regarded as an amendment of the proceedings within the meaning of Rule 359. The Appellant, therefore, must succeed on this head; but as the Respondent, *ex abundante cautela,* has cross-appealed on this matter of interest, it will still be necessary to consider the point.

As to the form of the action, I am of opinion that the Respondent is a proper party to it, as, apart from other considerations, he is clearly acting in the interests of the beneficiaries and may, therefore, be presumed to be acting with their authority.

With regard to the first item of LP. 100, it is proved that the Appellant delayed for many years before attempting to obtain probate of the codicil, the matter only being brought before the Court in 1941, when the learned President, after a lengthy hearing, decided to reserve judgment on this matter pending the decision in the present action. It may well be that such a long delay, coupled with the fact that Mrs. Kaufman and the Appellant were on intimate terms, would in other circumstances give rise to suspicion. In the present case, however, there can, in my opinion, be no doubt as to the genuineness of the codicil. Mr. Hoffman, an advocate of standing, testified that he himself drew up the codicil, which was duly executed, and it is not even suggested by the Respondent that Mr. Hoffman's evidence should be disbelieved. In these circumstances it seems to me that the finding of the trial Court that this payment of LP. 100 was improper, on the ground that probate had not yet been granted, cannot be supported. As regards this item, therefore, the Appellant must succeed.

The next point to be considered is the payment of LP. 518.750 in purported settlement of a promissory note, for which the Respondent alleges, *inter alia,* that Mrs. Kaufman gave no consideration. Mrs. Kaufman alleged that the note was given in respect of an advance which she herself had made out of her own monies to the deceased. The Respondent suggests that Mrs. Kaufman was a person of no means at all, and that, therefore, her story should not be believed, an additional factor of suspicion being that she was on terms of intimacy with the Appellant. It would seem that this last factor weighed heavily with the learned President.

The matter is by no means free from difficulty, but in my opinion, the consideration to which I must apply my mind is, whether at the time of the payment on the note the Appellant can be held to have been wrong in assuming that Mrs. Kaufman was a holder in due course. In considering this matter it must be remembered that the Appellant had to make up his mind on the facts which were known to him at the time (that is in 1935), and it is not sufficient for the Respondent to

show that, in the light of information available today, payment on the note should not perhaps have been made.

It is relevant to consider that there appears to have been nothing furtive about the actual payment on the note. The Appellant contends that as far as he was aware there was no reason to assume that Mrs. Kaufman was not a holder in due course; that he took legal advice on the matter, and actually made the payment to Mrs. Kaufman in the presence of a Mr. Breslaw, an interested party, and a Mr. Yacov Barchenco, an official of the Anglo-Palestine Bank. This last person, who is obviously disinterested in the litigation, was called as a witness and corroborated the Appellant's story.

It is suggested by the Respondent that the note was prescribed, and that this circumstance should be regarded as evidence that the payment was fraudulent. I consider however, that Dr. Joseph is right in his contention that an executor may, in his discretion, pay out on such a note, unless it has been judicially declared to be statute barred. Even assuming that the note was prescribed, I am not satisfied that that circumstance alone would render the payment on it by an executor an improper one.

There is a passage in Mr. Williams' book on Executors (12th Edition at page 1182) which states that an executor is entitled to pay such a debt except perhaps against the unqualified wish of his co-executors, or unless it has been finally declared to be statute barred.

In considering the whole matter it seems to me that the learned President paid insufficient weight to the consideration that the onus was on the Respondent to prove that the payment of this LP. 518.750 was improper in the light of the circumstances which were, or ought reasonably to have been, known to the Appellant at the time. Having considered all the elements surrounding the transaction, I have come to the conclusion that there is not sufficient material upon which the President could properly find that the payment was improper. The Appellant, therefore, must succeed on this head also.

With regard to the cheque for LP. 125, I will only say that the document itself is of a most remarkable and suspicious nature and, having regard to all the circumstances, I am not prepared to interfere with the learned President's finding that the Appellant acted improperly in paying monies to himself in reliance upon this document. On this matter, therefore, the Appellant fails.

As to the cross-appeal I am of opinion that the reasonable order is that the Appellant should pay interest at 9% from the date of the institution of the action in regard to this sum of LP. 125.

In the result, therefore, the appeal will be allowed in respect of the items of LP. 100 and LP. 518.750, and judgment entered for the Respondent for LP. 125, with interest at 9% from the date of the institution of the action.

The Appellant will have two-thirds of his costs of this appeal on the lower scale, to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 19th day of February, 1943.

British Puisne Judge.

HIGH COURT No. 41/43.

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

BEFORE : Rose, J.

IN THE APPLICATION OF :—

Abraham Yazdi. PETITIONER.

v.

1. Chief Execution Officer, Haifa,
2. Jamil el Dor,
3. Bida Mizrahi, as administratrix of the estate of the late Jacob Eliahu Mizrahi. RESPONDENTS.

Purchase in execution — Property occupied at the time of seizure — Execution Law, Arts. 93, 112, 115, *Law of Disposition, Art.* 17 — *Jurisdiction of High Court — Balance of convenience.*

Return to a rule *nisi* issued by this Court on the 7th day of April, 1943, directed to the first Respondent, calling upon him to show cause why his decision of 24.11.42 in Execution File No. 35/1939—Tiberias refusing to evict the second Respondent from the land which Petitioner bought by public auction in the said file where the 3rd Respondent was the judgment-debtor, should not be set aside and the second Respondent evicted from the said land; rule *nisi* discharged:—

> The rights of a purchaser of immovable property at public auction and that of a person in possession, can be determined in Court at the instance of either party and the High Court will not interfere to place the purchaser in the position of a defendant.
>
> (*A. M. A.*)

ANNOTATIONS :

1. The High Court is not a Court of Appeal from the Chief Execution Officer: H. C. 7/39 (1939, S. C. J. 71; 5, Ct. L. R. 84); H. C. 50/41 (1941, S. C. J. 473; 10, Ct. L. R. 41); H. C. 102/41 (1941, S. C. J. 595; 10, Ct. L. R.

163); for a contrary *dictum* see H. C. 56/38 (5, P. L. R. 443; 1938, 2 S. C. J. 83; 4, Ct. L. R. 130; P. P. 3.xi.38).

2. See, on the jurisdiction of the High Court generally, annotations to H. C. 147/42 (*ante*, p. 35).

3. *Cf.* H. C. 129/42 (1942, S. C. J. 799; 12, Ct. L. R. 234) for another case of an application being made to the High Court in order to compel the Respondent to institute proceedings as plaintiff.

4. Art. 115 of the Execution Law has been considered in L. C. Nablus 29/29 (C. of J. 750) — *when inapplicable;* C. A. 75/34 (C. of J. 1934—6, 602) — *mortgagors not notified of execution proceedings;* H. C. 80/36 (C. of J. 1934—6, 500; 1937, 1 S. C. J. 389; P. P. 30.vi.37) — *directions of Art. 115 to be followed;* H. C. 14/39 (6, P. L. R. 190; 1939, S. C. J. 163; 5, Ct. L. R. 171; P. P. 30.iv.39) — *when inapplicable.*

5. The only reported decision on Art. 112 of the Execution Law seems to be C. A. 255/40 (8, P. L. R. 46; 1941, S. C. J. 88; 9, Ct. L. R. 74) — *scope of the Article.*

(*H. K.*)

FOR PETITIONER: Maman.

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

ORDER.

This is a return to an order directed to the first Respondent to show cause why his decision of the 24th of November, 1942, in Execution File No. 35/1939 — Tiberias — refusing to evict the 2nd Respondent from certain land which the Petitioner bought by public auction, should not be set aside and why the 2nd Respondent should not be evicted from the said land.

It appears that the Petitioner purchased certain property which was sold through the Execution Office in satisfaction of a judgment debt. When the Execution Officer visited the land for the purpose of effecting execution it appears that the 2nd Respondent was discovered to be in possession of it. The Chief Execution Officer was apparently satisfied with the evidence of certain Government officers on this matter, that the 2nd Respondent Jamil el Dor was in fact and had been for some considerable number of years in occupation of a certain yard adjoining a garage which belonged to the 2nd Respondent and who was by profession a garage proprietor. Now, the Chief Execution Officer considered Article 115 of the Execution Law which says that:—

> "Any person who claims possession of immovable property which is under auction must make his claim before the issue of the final order of sale and pray that sale be postponed; and if he provide a surety for the compensation of the decree-holder for any damage or loss which may accrue to him as a result of the

> postponement, he may be allowed fifteen days to obtain from the Court an order of stay of execution. Otherwise, the execution shall proceed."

Having considered that Article, he came to the view that as the 2nd Respondent had alleged that he was unaware of the sale and he, the Execution Officer, was satisfied that there was reasonable ground why he should have been so unaware, the reasons being that the notices were published only in the Hebrew press, the 2nd Respondent being an Arab, and that the 2nd Respondent was, in fact, absent from Tiberias at the relevant time that he should apply Article 112 which says that:—

> "Disputes arising with the purchaser or other parties concerning immovable property sold by the Execution Office at the time of delivery shall be determined by reference to the condition of the property at the time of seizure."

Complaint is made by Petitioner that it was wrong for the Chief Execution Officer to regard the occupation of the 2nd Respondent as one of the matters to be taken into consideration when determining what the condition of the property was at the time of the seizure.

As has often been said before, this Court is not a Court of Appeal from the Chief Execution Officer and I need not state my opinion as to whether the Chief Execution Officer was right in taking this matter into consideration. What I have to consider, it seems to me, is whether the rights of the parties and the administration of justice require my intervention in this matter. If counsel for Petitioner was right in his interesting and able argument as to the meaning of Articles 93, 112, 115 of the Execution Law and Article 17 of the Provisional Law Regulating the Right to Dispose of Immovable Property, it would seem that the 2nd Respondent would be in the position of having to institute proceedings himself (as a Plaintiff) if he desires to obtain any relief in this matter. Assuming, on the other hand, that the order is allowed to stand, the boot would be on the other leg and the Petitioner would have to be the Plaintiff and the 2nd Respondent the Defendant.

I sympathise to a certain extent with the Petitioner because he appears to have been put in a difficult position through no fault of his own, but it seems to me that the question whether a party to proceedings should be Plaintiff or Defendant, provided that this Court is satisfied that the questions in issue can be fairly and reasonably determined by some other Court, is not a sufficient reason for exercising the powers of this Division of the Supreme Court.

For these reasons the rule must be discharged. The 2nd Respondent

will have the cost of the day which I assess at an inclusive sum of LP. 10.

Given this 4th day of May, 1943.

British Puisne Judge.

HIGH COURT No. 38/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Sheikh Mohammad Ali Abu El Huda. PETITIONER.

v.

Acre Municipal Commission. RESPONDENTS.

Demolition order — Powers of Municipal Council to order demolition — Acre (Demolishing of Dangerous Buildings) By-law 4 not ultra vires — Town Planning Ordinance and Municipal Corporations Ordinance not conflicting regarding powers of demolition.

Return to a rule *nisi* issued on the 6th April, 1943, directed to the Respondents calling upon them to show cause why they should not refrain from demolishing Petitioner's house situated in the locality of Sheikh Abdullah at Acre; rule *nisi* discharged:—

The powers given to a Council by the Municipal Corporations Ordinance to take action in connection with dangerous buildings do not conflict with the powers granted by the Town Planning Ordinance to demolish buildings which interfere with a town planning scheme.

(*A. M. A.*)

ANNOTATIONS :

1. Authorities on demolition of buildings are collated in the annotations to CR. A. 11/43 (*ante*, p. 97).

2. On repeal by implication see Halsbury, Vol. 31, *p.* 561, *sec.* 759; Digest, Vol. 42, *pp.* 763 *seq.*, Nos. 1882 *seq.* Palestinian authorities on the question: C. A. 121/34 (2, P. L. R. 436; C. of J. 1934—6, 75; P. P. 1, 3.iii.36; Ha. 19.iii.36) — *Ottoman Brokerage Regulations impliedly repealed;* CR. A. 9/40 (7, P. L. R. 67; 1940, S. C. J. 72; 7, Ct. L. R. 85) — *Art. 1 of the Ottoman Code of Criminal Procedure impliedly repealed;* C. A. 56/40 (7, P. L. R. 183, 1940, S. C. J. 133; 7, Ct. L. R. 182) — *Ottoman Law of Werko and Musaqqafat impliedly repealed in Urban Property Tax areas;* H. C. 51/40 (7, P. L. R. 431; 1940, S. C. J. 516; 8, Ct. L. R. 122) — *Sect. 4 of Contempt of Court Ordinance still in force;* Adm. 8/40 (8, P. L. R. 15; 1941, S. C. J. 241) — *Crown Actions Ordinance still in force;* P. C. 21/40 (8, P. L. R. 181; 1941, S. C. J. 334), overruling on that point C. A. 237/37 (6, P. L. R. 8; 1939, S. C. J. 46; 5,

Ct. L. R. 49) — *Rule 2(2) of the Land Courts Rules impliedly repealed;* C. A. 79/41 (8, P. L. R. 349; 1941, S. C. J. 495; 10, Ct. L. R. 176) — *Art. 17 of the Ottoman Law of Disposition still in force.*

(*H. K.*)

FOR PETITIONER: W. Salah.

FOR RESPONDENTS: Bustani by delegation from Shukeiri.

ORDER.

On the 21st of March, 1943, the Municipal Commission of Acre served a notice on the Petitioner to demolish two dilapidated rooms in his house, one being on the ground floor and the other on the 2nd floor, and to take immediate measures to protect the safety of the public. The Commission acted upon a report made to them by their Municipal Engineer that the building was in a dangerous condition. The Petitioner was given five days to complete this work. The Petitioner did not complete or even start it but came to this Court asking for an order to the Municipal Commission to refrain from demolishing his house. That, of course, is not quite correct, because the proposal was not to demolish the house but to demolish two rooms in the house. The Commission say that their action is covered by by-law 4 of the Acre (Demolishing of Dangerous Buildings) By-Laws, 1940, published in Supplement No. 2, 1940, on page 521. By-Law 4(2) is in these terms:—

> "If the owner or occupier on whom the notice is served shall not have begun to take the measures required by the notice within five days after service of such notice, or if no owner or occupier is found, the Council shall take such action as may be deemed necessary to remove the danger whether by demolition or repair of the building or otherwise."

It seems to me that sub-section (1) of rule 4 is really in two parts. The first part empowers the Council to take immediate measure such as reinforcement, shoring up or fencing, to protect the public, and the second part gives them power to call upon the owner or occupier to take such action as shall be specified in the notice. As sub-section (2) of by-law 4 empowers the Council to demolish or repair, if the owner or occupier does not do so, it seems to me that under sub-section (1) the Council is empowered to order the owner or occupier either to demolish a part of the building or to repair. If the owner or occupier does not do so, it seems to me that under sub-section (2) the Council is empowered either to demolish a part of the building or to repair it as circumstances dictate. By the by-law the Council is entitled to act upon the report of the Municipal Engineer.

It has been argued that the by-laws are *ultra vires* in as much as

the Town Planning Ordinance has superseded, by implication, the Municipal Corporation Ordinance. I cannot see why this should be so. The power to take action to avoid dangers to the public or to occupiers, due to dangerous buildings, may quite well be vested in two bodies. It seems to me that the power given by the Municipal Council is to avoid dangers connected with the imminent collapse of buildings whilst the Town Planning Ordinance gives authority to demolish buildings which interfere with the scheme of town planning, but be that as it may, the power may quite well be vested in these two bodies and the power cannot in any way be conflicting.

By legislation the Council, as I have said, are entitled to act upon the report of their Municipal Engineer. They have so acted in this case and, however disagreeable it may be to the owner of the house to have to pull down two of the rooms, the action of the Municipal Corporation in my opinion cannot be queried. I think, therefore, that the rule should be discharged. The Respondent is entitled to disbursements together with the sum of LP. 10 advocate's attendance fee.

Given this 7th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 113/43.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

1. Farhana Rabi' Sallam,
2. Farhana Barakat 'Alaiyan,
   for herself and the rest of the heirs
   of Salama Rabi' Sallam. APPELLANTS.

v.

Salama Muhammad Abu Sweirih
& 15 others. RESPONDENTS.

Land Settlement — Claim by group of heirs of whom a number withdraw — Remaining heirs not bound by withdrawal.

Appeal from the decision of the Settlement Officer, Gaza Settlement Area, dated the 14th December, 1942, in Case No. 14/34/Sukreir, allowed and case remitted with directions:—

REFERRED TO: C. A. 85/40 (7, P. L. R. 304; 1940, S. C. J. 474; 8, Ct. L. R. 62).

ANNOTATIONS :

1. Questions similar to that treated in the first point arose in C. A. 80/27 (1, P. L. R. 290; C. of J. 1781) — *no power to fix time by notarial notice where no such provision in contract;* C. A. 25/28 (C. of J. 387) & C. A. 12/33 (2, P. L. R. 259; C. of J. 449) — *reasonableness of three days' period being fixed and power of Court to fix time of its own motion;* C. A. 13/26 (C. of J. 278), C. A. 89/29 (1, P. L. R. 533; C. of J. 784) & C. A. 35/33 (C. of J. 452; P. P. 8.iv.34) —*effect of notarial notices being sent after time for completion expired;* C. A. 42/38 (5, P. L. R. 218; 1938, 1 S. C. J. 185; 3, Ct. L. R. 165) — *fixing of time not warranted by contract;* C. A. 174/38 (*supra*); C .A. 120/41 (8, P. L. R. 343; 1941, S. C. J. 350; 10, Ct. L. R. 61) — *meaning of reasonable time.*

2. It has already been laid down in C. A. 22/27 (1, P. L. R. 154; C. of J. 314) that a waiver of the necessity to send notarial notice need not be in the exact words of Article 107 of the Ottoman Code of Civil Procedure.

3. On the last point see, in addition to the cases cited, C. A. 261/40 (8, P. L. R. 71; 1941, S. C. J. 36; 9, Ct. L. R. 61) — last paragraph.

(*H. K.*)

FOR APPELLANT: Levitsky.

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

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, dismissing a claim for interest on the sum ordered by them to be returned to the Appellants and also dismissing a claim for damages by the Appellants for breach of contract.

The history of the case and the arguments of the parties before the District Court are set out in detail in the judgment given by the learned judges and there is no necessity to repeat them here. The learned judges found that damages could not be awarded since the Appellants had not fixed a definite time by distinct written notice to the other parties to complete by a certain date. No date for completion had been fixed in the contract and the matter, therefore, depended upon what was reasonable time. It was held by this Court in Civil Appeal No. 174/38 (5, P. L. R. 426) that even where there was a clause in the contract that notarial notices were dispensed with, yet in such a case where no date for completion had been fixed, it was necessary to give some indication of a definite date on which to complete the contract. The principle laid down in that case the learned judges found applied equally to this present one and we agree with them. It makes no difference in our opinion that the clause in the

contract stated that no notarial notice or other notice was required. In a case such as the present one when no date for the completion has been fixed, it is essential that there should be some definite date fixed before the damages can be awarded.

There is only one statement in the judgment with which we do not agree and that is where the learned judges state:—

> "Article 107 provides the possibility for the parties to dispense with such a formal notice provided that they agree that the expiry of the period shall in itself be sufficient in lieu of the notice."

That Statement is not a correct statement of the law. No particular form of the words is necessary so long as it is made quite clear that the notarial notice as stipulated for under article 107 is dispensed with.

With regard to the question of interest, there is a long series of cases, of which I will quote Civil Appeal 4/38 (5, P. L. R. 176) and Civil Appeal 162/38 (6, P. L. R. 306), which laid down quite distinctly that where the purchase price is returnable, and no damages are awardable, legal interest on the purchase price is payable as from the date of action and we do not think that there is anything in Civil Appeal 85/40 (7, P. L. R. 304), which in any way affects this principle. It is too late to change this principle now which has been followed by these Courts for a very considerable period.

For these reasons we think that the District Court came to a correct conclusion and the appeal will have to be dismissed. The Respondents are entitled to their costs on the lower scale to include the sum of LP. 7.500 mils advocate's attendance fee to each of the advocates representing the Respondents.

Given this 19th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 217/42.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :—

Bulus Qustandi Debbas. APPELLANT.

v.

1. The Attorney General,
2. The Village Settlement Committee of the Damun Village,
3. Mustafa Khalil As'ad el Buqai & 5 ors. RESPONDENTS.

Land Settlement — Claim by Government to mevat settled before L. S. O. — Land Code Art. 103, *Land (Mevat) Ord., mevat may not be granted gratis but only against payment of badl misl — Aliter in case of settlement.*

Appeal from the decision of the Settlement Officer, Acre Settlement Area, dated 30th July, 1942, in Case No. 9/ED Damun, allowed as to part thereof and case remitted with directions:—

If Government so agrees with a defendant in Land Settlement, *mevat* land may be granted without payment of *badl misl.*

(*A. M. A.*)

ANNOTATIONS: See the following decisions on *mevat* land: L. A. 35/27 (1, P. L. R. 162; C. of J. 1093) — *registration of mevat land planted without Government's consent*; L. A. 72/34 (5, P. L. R. 221; 1938, 1 S. C. J. 191; 3, Ct. L. R. 193) — whether land *mevat* or *metruke*; C. A. 65 & 76/40 (7, P. L. R. 288; 1940, S. C. J. 168) — revival of *mevat* and cultivation of *miri* contrasted. *Cf.* Goadby-Doukhan, Land Law of Palestine, *pp.* 44 *seq.*

(*H. K.*)

FOR APPELLANT: Cattan and Shehadeh.

FOR RESPONDENTS: No. 1 — Junior Government Advocate — (Touqan).
No. 2 — Shukeiri.
Nos. 3—8 — O. Saleh.

JUDGMENT.

This is an appeal from the Settlement Officer of the Acre Settlement Area, on a claim by Government that certain land was *mewat*. The Appellant, who was the Defendant before the Settlement Officer, has appealed from that decision and only one point arises on this appeal, and that is from the decision of the Settlement Officer in Paragraph 14 of his judgment.

The case was one in which it was eminently desirable that a settlement should be reached between the parties. Though the major part of the land was in character *mewat*, there was evidence that quite a considerable portion had been cultivated for a considerable time by the Appellant, and at that time Government, apparently recognising that the Defendant had, at any rate, strong moral claims to this land, proposed a settlement of the question between themselves and the Appellant. On page 43 of the typed record it is stated as follows:—

"The settlement proposed with Defendant in opening the case for Government was based on the assumption that the land was in three parts:
(a) uncultivated swamp,
(b) under cultivation by Defendants at some time,
(c) registered land.

> It was presumed that the line between (a) and (b) was somewhere near the western boundary of 18069. The exact position being left to the Settlement Officer to decide".

That was a statement made by the representative of the Government. He went on to say and this was his final address to the Settlement Officer:—

> "Government stands by the proposal and leaves the fixation of the boundary to the Settlement Officer".

Now, in paragraph 14 of his judgment the Settlement Officer dealt with that proposed settlement by agreement. He held that the land was *mewat* according to the definitions given in Article 6 and 103 of the Land Code. He accepted the Appellant's claim for being in possession and cultivating this land since time immemorial, and he decided that under Article 103 of the Land Code, as it originally existed, the Appellant would have had a good claim, but that the provisions of the Land (*Mewat*) Ordinance had annulled that right to have the land *gratis*, and though the Government were willing to transfer the land on payment of *badl misl* the Settlement Officer held that there was no law by which he could deliver a decision to give effect to that arrangement. Now, it is quite true that if there had been no arrangement a Settlement Officer would not have had any power to award this land to the Appellants on payment of *badl misl*. He is quite correct in that statement, but we know of no rule by which a Settlement Officer would be prevented from giving a judgment by consent, that is to say, a judgment with regard to land under settlement, because the Land Settlement Officer obviously could not give judgment for a sum of money or any matter not arising out of land under settlement. In this case it is quite clear that the Settlement Officer thought he had no power to give effect to this arrangement. We are of opinion that in that he was wrong, and that he had the power to give effect to it, provided he was satisfied that it had been agreed upon, as apparently it was, and for that reason we think that this appeal will have to be allowed and the case remitted to the Settlement Officer to give effect to this settlement as outlined in his judgment from the account of it given in the concluding speech of the Government representative as quoted above. The Settlement Officer, in deciding the property which is subject to settlement, will take into consideration also what is stated on page 5 of his record (page 4 of the typed record before this Court) in the paragraph commencing "a proposition has been made" and finishing with "the balance of the area claimed, the boundary to be fixed by the Settlement Officer".

The appeal is, therefore, allowed and the case remitted to be de-

termined on the lines set out in this judgment. With regard to that part of the judgment which deals with the claims made by the third parties, that part of the judgment will stand. The judgment is only set aside with regard to this point about the confirmation of the agreement. The Appellant is entitled to the costs of this appeal on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 28th day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 32/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Netaniel Nahum Cohen. APPELLANT.

v.

David Abraham Mizrahi. RESPONDENT.

Umpire addressing questionnaires to arbitrators — Reply by one arbitrator containing a draft award and no reply from other arbitrator — Application for confirmation of award and petition by way of action, to set aside award — Action instead of motion and vice versa — Misconduct vitiating award.

Appeal from the judgment of the District Court, Jerusalem, in Civil Cases No. 39/42 & 48/42 (consolidated), dismissed:—

1. If a party proceeds by way of action, which is more expensive and usually takes more time, proceedings — not liable to be upset only because the more usual and more expeditious course is to proceed by way of motion; but not *vice versa* (proceeding by way of motion instead of by way of action).

2. If one party applied for confirmation of award and other, without filing signed copy of award, applied for setting it aside and on both cases being consolidated judge allowed copy of award to be filed at a late stage to remedy defect, he acted rightly, causing no injustice to parties, and Court of Appeal will not interfere with his discretion.

3. When considering setting aside award on account of misconduct, point — not actual effect which such misconduct had upon result of arbitration proceedings but effect which it might possibly have produced.

4. If an umpire addressed questionnaires to arbitrators and one of them did not reply while other sent in his answers containing a draft award,

without sending copy to other arbitrator, this is legal misconduct, as draft award might have influenced the umpire.

(*M. L.*)

ANNOTATIONS: As to 1 see annotations to C. A. 258/42, on p. 141 (*supra*). On question of misconduct see annotations to C. A. 15/43, on p. 59 (*supra*).

(A. G.)

FOR APPELLANT: B. Joseph and Caspi.

FOR RESPONDENT: Olshan and Rand.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, setting aside an arbitration award. On this appeal, two matters of procedure have been raised. The first one is that the Respondent should have proceeded in his petition to set aside the award by motion and not by action. We are of opinion that there is nothing wrong in this. It is true that the more usual and more expeditious course is to proceed by way of motion, but if a party likes to proceed by way of action which is more expensive and usually, in theory at any rate, would take a longer time, that is his business and the proceedings are not liable to be upset on that ground. It would be otherwise, of course, if a party proceeded by way of motion when his proper course was to proceed by way of action.

The second point was that the Respondent, who had applied to set aside the award, should have filed a signed copy of the award at the beginning when he filed his petition. The Appellant had applied by motion to enforce the award, and the Respondent applied by petition to set aside the same award. The two cases were consolidated and by agreement the petition to set aside was taken first. The Appellant had filed a signed copy of the award which was, therefore, before the Court. We are of opinion that in such a case as this, where a signed copy was already before the Court, and the learned Judge on a purely technical point allowed a copy of the award to be filed at a late stage in order to remedy the defect, we are of opinion that in the exercise of his discretion the learned Judge acted rightly and cannot be said to have caused any injustice to the parties, and we are not prepared to interfere.

The other points raised on the merits of the case are, first, that there was no misconduct on the part of the umpire, and secondly, that the award should be remitted and not set aside.

With regard to the first point, the facts are that the two arbitrators, who were the advocates of the parties originally, disagreed. The matter was thereupon referred to an umpire. The umpire addressed a

questionnaire to the two arbitrators, one of whom replied and the other did not reply. To the reply of the one arbitrator there was attached a draft copy of the award which he had proposed to give himself but which, owing to the disagreement, he had had no opportunity of giving. The umpire said in evidence that he never looked at this award and that he had completely disregarded it, but we are of opinion that the learned Judge was correct when he said, quoting from authority, that the point was not the effect which misconduct on his part had in fact upon the result of arbitration proceedings but of what effect it might possibly have produced. The procedure adopted by the umpire of addressing questionnaires to the two arbitrators was, to adopt a neutral phrase, highly peculiar, but no point has been taken as regards that, because it is stated that it was by consent of the parties, that is of their arbitrators. We are of opinion that this is technically legal misconduct. Unfortunate as the result may be, the umpire might well have been influenced by this draft award which was not sent to the other arbitrator. It is true that the other arbitrator could have seen it if he had shown any interest in the matter which, apparently, he did not, but to our minds it does not matter that the original draft award is in effect merely a copy of the answers to the questionnaire or *vice versa*. Technically it is legal misconduct.

With regard to the question of whether we should remit or not, in this case again, we think that to remit would be quite useless. What harm could have been done has been done, and to remit to the same arbitrator again would, in our opinion, be quite futile. It is most unfortunate after all these years, seven years it is stated of litigation, when the umpire has at last arrived at a decision in this matter, the award has to be set aside, but to our regret, we see no alternative. The appeal must, therefore, be dismissed with costs on the lower scale to include LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 5th day of April, 1943..

British Puisne Judge.

HIGH COURT No. 144/42.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :—

Elia Shubeita. PETITIONER.

V.

1. Chief Execution Officer, Jerusalem,
2. Alice Shubeita. RESPONDENTS.

Marriage and divorce — Application under Art. 55, P. O. in C. — Marriage celebrated under Melkite rites and husband reverting to Eastern Orthodox Church — Melkite Court adjudged competent, decreeing separation and awarding allowance — Consent of parties under Art. 54 no longer required — "Alimony" and "maintenance" — Constitution of and law to be applied by, Religious Court — Arrears of alimony.

Application for an order directed to the first Respondent to show cause why his order in Execution File No. 281/42, ordering execution of a judgment of the *Melkite* Court, should not be set aside, refused:—

1. After a Religious Court is adjudged to be competent in a question of personal status, the consent of the parties is no longer required to endow the Court with jurisdiction.

2. An allowance awarded as a result of an application for separation comes under the heading of alimony, not maintenance.

(*A. M. A.*)

ANNOTATIONS:

1. The previous proceedings in this case are H. C. 100/41 (9, P. L. R. 121; 1942, S. C. J. 85; 11, Ct. L. R. 74) and Misc. Appl. 19/42 (9, P. L. R. 264; 1942, S. C. J. 209; 11, Ct. L. R. 244).

2. On the meaning of "maintenance" and "alimony" see H. C. 146/42 (*ante*, p. 22) and note 1.

3. In C. A. 119/39 (7, P. L. R. 20; 1940, S. C. J. 38; 7, Ct. L. R. 55) the District Court was held to be justified in refusing to grant past maintenance in the absence of "any authority in law to prove that maintenance for the past could be granted." It was likewise held in C. A. 50/42 (9, P. L. R. 300; 1942, S. C. J. 290; 11, Ct. L. R. 207), following C. A. 14/35 (2, P. L. R. 336; C. of J. 1934—6, 584) that "maintenance was payable neither from the date when the Appellant ceased to maintain the Respondent, nor from the date of the judgment .....; but from the date of the commencement of the action." See, on the other hand, H. C. 11/43 (*ante*, p. 143) wherein the High Court refused to interfere with an order of the Ecclesiastical Court of Appeal directing the execution of its judgment for past alimony.

(*H. K.*)

FOR PETITIONER: Goitein.

ORDER.

This application concerns the unfortunate relations between a husband and wife who, as a result of matrimonial differences, have gone to the Courts to settle them.

The parties were married under the Law of the *Melkite* Church. Since the marriage the husband has reverted to his original community, namely the Eastern Orthodox Church, and, after some abortive proceedings,

application was made to the Chief Justice under the first paragraph of Article 55 of the Palestine Order-in-Council, to determine which Court had jurisdiction to entertain the action of personal status. Before the learned Chief Justice, we are informed, the present Petitioner suggested that the Eastern Orthodox Court or the District Court were the only competent Courts, whilst the wife, the second Respondent, submitted that the *Melkite* Court was the only one which had jurisdiction. The learned Chief Justice decided that the *Melkite* Court was the Court which should have jurisdiction to decide the questions involved. The *Melkite* Court sat in Jerusalem and heard the action brought by the wife, which was an action for separation with its accompanying consequences. That Court gave a decree of separation and awarded an allowance to the wife of LP. 5 per month later increased to LP. 6 monthly. That judment was then put into execution and objection was taken that the *Melkite* Court had no jurisdiction. That objection was overruled by the learned Chief Execution Officer, Judge Shaw, as was also the contention that the *Melkite* Court was improperly constituted. The same points have been raised here together with others in this application.

When the learned Chief Justice, acting under the first paragraph of Article 55, gave his decision that the *Melkite* Court should have jurisdiction, that was a decision which could not be challenged. It is argued that, after that decision was given, the provisions of Article 54 then come in, since the jurisdiction in matters of maintenance is not exclusive to the Religious Court in the absence of consent of all parties, but it must be remembered that the application and the judgment were for separation, and any allowance that is given as a result of that judgment of separation comes under the heading of "alimony". Apart from that, when it has been decided under Article 55 that a particular Religious Court has jurisdiction, it seems to us that the question of the consent of the parties concerned is no longer relevant. That point, therefore, fails.

With regard to the question of the constitution of the Court, from the judgment produced to us it is clear that the Court was composed of three persons which is the proper constitution, it is not disputed. The Registrar of the Court, who was a member of the Court, was called to give evidence before the learned Chief Execution Officer and he gave evidence that the *Melkite* Courts applied the Canon Law of the Catholic Church. It must be remembered that the *Melkite* Church is a branch of the Catholic Church and if the Registrar of that Court gives evidence proving that the Canon Law is the law which that Church applies, we think this Court must be bound by that opinion, if it is accepted by the

Chief Execution Officer, since we see no reason to differ from the conclusion arrived at by him.

As to the contention that the Court had no power to give judgment for arrears of alimony, whilst it has been held in England that it is undesirable that a Court should give judgment for arrears on the ground that it involves the person concerned in unforeseen expense and is unfair, since applications for alimony and maintenance should be brought with despatch, yet we cannot say that the *Melkite* Court was wrong in ordering arrears and that point also fails. We are not a Court of Appeal from the *Melkite* Court.

For these reasons we think that the application for an order *nisi* will have to be refused.

Given this 8th day of January, 1943.

Chief Justice.

CIVIL APPEAL No. 135/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Moshe Herzog. — APPELLANT.

v.

Esther Herzog. — RESPONDENT.

Maintenance — Suitable amount should approximate one-third of the husband's income.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 22nd of March, 1943, in Civil Case 237/42, allowed as to part:—

Amounts awarded as maintenance should be equal to one third of the husband's income.

(*A. M. A.*)

ANNOTATIONS: The amount of maintenance to be awarded is in the discretion of the Court: C. A. 119/39 (7, P. L. R. 20; 1940, S. C. J. 38; 7, Ct. L. R. 55) and C. A. 50/42 (9, P. L. R. 300; 1942, S. C. J. 290; 11, Ct. L. R. 207). The amount awarded may later be altered upon application to the Court: C. A. 72/38 (1938, 1 S. C. J. 288; 3, Ct. L. R. 299a); see also H. C. 65/38 (5, P. L. R. 558; 1938, 2 S. C. J. 189; 4, Ct. L. R. 249; P. P. 8.i.39) and C. D. C. T. A. 184/37 (Tel-Aviv Judgments, 1940, *p.* 79).

(*H. K.*)

APPELLANT : In person.

FOR RESPONDENT: Elhanani.

JUDGMENT.

This is an appeal from a judgment of the learned President of the District Court of Tel-Aviv, in a case of maintenance. The learned Judge found that the husband, the present Appellant, should pay to his wife the sum of LP. 8 per month from the date of action. There was also a claim for certain chattels by the wife which the learned Judge found was made out, and he ordered the return of these chattels or their value — LP. 26.800 mils. The third item of LP. 39 for certain debts, alleged to have been incurred by the wife, was rejected by the learned Judge. The husband does not dispute liability but queries the amount which he has been ordered to pay. We think that in this case, bearing in mind the position of the parties and the means of the husband, the fair amount to award would be one third of the husband's income at the various periods. We, therefore, vary the order of the learned Judge by substituting for the amount ordered to be paid by him, the sum of LP. 4 per month as from the 21st July, 1942; LP. 5 per month as from the 1st December, 1942; and LP. 6 as from the 1st April, 1943. The order with regard to the restoring of the chattels or their value is not interfered with. As to costs, we think that the fair order to make would be that each side would pay their own costs of this appeal. The costs ordered by the District Court will stand.

Delivered this 20th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 68/43.

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

BEFORE: Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

1. David Roth,
2. I. M. Landessmann. — APPELLANTS.

v.

Jacob Silberschatz. — RESPONDENT.

Goods carried from Tel-Aviv to Jerusalem destroyed by fire which broke out on truck — Claim for damages against person to whom goods were entrusted for transport — Scope of carrier's liability under Ottoman and French law — Article 57 and 63 of Ottoman Commercial Code.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, in Civil Appeal No. 139/42, allowed and Chief Magistrate's judgment restored:—

1. For a carrier to escape responsibility he must prove that the goods in question perished by purely fortuitous accident impossible to prevent, and that no lack of care or negligence can be attributed to him.

2. If evidence adduced by carrier only shows that he was driving along and suddenly fire started under the bonnet — Court may say that he has not discharged onus of proof that occurrence could not possibly be attributed to his lack of care.

3. Not for owner suing for value of perished goods to prove that the loss was caused by fault of carrier.

(*M. L.*)

ANNOTATIONS: As to responsibility of carriers see: C. A. 231/37 and cases cited therein (5, P. L. R. 38; 3, Ct. L. R. 51; 1938, 1 S. C. J. 57 and notes). On onus of proof as regards lack of negligence see: P. C. A. 34/38 (7, P. L. R. 273; 8, Ct. L. R. 65; 1940, S. C. J. 432 and notes).

(A. G.)

FOR APPELLANTS: Gruenwald and Zundelewicz.

FOR RESPONDENT: Seligman.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv, setting aside a judgment of the Magistrate's Court.

The appeal concerns two consolidated actions, the Plaintiffs in both cases (the present Appellants) having entrusted certain goods to the Respondent for transport from Tel-Aviv to Jerusalem. There was some argument in the Magistrate's Court and in the District Court as to whether or not the Respondent was a common carrier. The learned Magistrate found that he was, and the District Court did not disturb that finding, and before us the Respondent has argued the case on the assumption that the Respondent was, in fact, a common carrier.

The goods were destroyed by a fire which broke out on the truck of the Respondent while the goods were actually in transit from Tel-Aviv to Jerusalem. The law as to the liability of the Respondent is contained in Articles 57 and 63 of the Ottoman Commercial Code which, it is common ground, is the law applicable to the present case. Article 63 reads:—

> "A carrier is answerable for any loss of the goods to be carried by him, except in the case of *vis major*, and for any injury thereto except that arising from the nature of the article itself or from any violent cause."

And Article 57 reads:—

> "Every such agent is answerable for the arrival at the place of

> destination, within the time named in the way-bill, of all goods entrusted to him, except in the case of *vis major*."

In English law *vis major* has an interpretation which is more unfavourable to the carrier than that applicable under the Ottoman law. Under the Ottoman law, the Appellants suggest, and Mr. Seligman agrees, that the provisions of the French Commercial Code should be referred to for guidance. Having regard to that it would seem that the position is that for the carrier to escape responsibility he must prove that the goods in question perished by purely fortuitous accident impossible to prevent, and that no lack of care or negligence can be attributed to him. It follows as a corollary from that (a case from the Court of Cassation was cited to us as authority for the proposition) that it is not for the owner of the goods to prove that the loss was caused by the fault of the carrier.

In this case the driver of the truck in which the accident occurred and another person who was with him gave evidence as to the outbreak of the fire. Even taking the widest view of the original outbreak of the fire, wherever it may have been (and it is suggested that it was in the bonnet), neither of these witnesses puts forward any constructive suggestion at all as to how the fire occurred. There is nothing in their evidence, it seems to us, which could be taken as satisfaying the onus that the fire could not be attributable to the Respondent and could not have been prevented. Their evidence is that they were driving along, and suddenly the fire started under the bonnet — that is all. It seems to us that on that alone it would be open to the trial Court, that is the Magistrate's Court, to say that the Respondent had not discharged the onus of showing that this was an occurrence which could not possibly be attributed to his lack of care. But the facts go far beyond this, because the evidence is (and this is particularly clear from the evidence of Eliahu Yakub) that the fire started in the bonnet and lasted a few minutes before it passed from the bonnet, and then ultimately the petrol tank ignited with the result that the greater portion of the goods on the lorry were damaged. This witness adds that the driver never turned off the tap of the tank. There was the evidence of Mizrahi himself that there was, in fact, a tap connecting the engine with the petrol tank. Presumably, as the learned Chief Magistrate inferred, the purpose of that tap is to interrupt the flow of petrol from tank to engine. Mizrahi himself says: "I didn't turn the tap off. I was flustered". That may be a perfectly truthful explanation but it is to be remembered that while his being flustered and the fact that he was actually using a fire extinguisher and taking other remedies (although these proved ineffective) to have the fire put out, might be a good defence to an action for damages for

negligence on the ground that he did the best he could, even although it was not the best that could conceivably be done, that seems to us to fall far short of what is necessary to satisfy the onus which was upon the Respondent to show that this loss could not possibly have been prevented. That being so, it seems to us that the learned Magistrate was fully entitled to come to the conclusion that the Respondent had not satisfied the onus which was upon him. We would add that there is no dispute as to the amount of damages in this case, and we need not, therefore, go into that matter.

For these reasons the appeal must be allowed, the judgment of the District Court set aside and that of the Chief Magistrate restored. The Appellants will have the costs of the proceedings in both the Courts below and of this appeal, the costs of this appeal to be on the lower scale and to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 2nd day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 60/43.

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

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

IN THE APPEAL OF :—

Yedidia Mizrahi Barziley. — APPELLANT.

v.

Yedidia Tova, née Bauman. — RESPONDENT.

Judicial separation and custody of minors — Palestinian citizens and members of the Jewish Community — Jurisdiction of Rabbinical Court in matters of marriage and divorce is exclusive — Order of custody as ancillary order depends on jurisdiction of the Court — Concurrent jurisdiction of District Court in matters of personal status does not include questions of marriage and divorce — P. O. in C. Arts. 47, 51, 53; H. C. 146/42, H. C. 144/42 — Latey on divorce, Matrimonial Causes Act, C. A. 40/40, H. C. 10/41 — Distinction between guardianship and custody of children — H. C. 9/43, C. A. 140/40.

Appeal from the judgment of the District Court of Jerusalem, dated the 25th January, 1943, in Civil Case No. 108/42, allowed and judgment of the District Court set aside:—

1. Judicial separation is a "matter of divorce arising out of marriage" and, where the parties are Palestinian Jews and members of the Jewish Community, falls within the exclusive jurisdiction of the Rabbinical Courts.

2. A claim for custody of the children (if ancillary to such a suit for separation, may not be heard by the District Court. If it is ancillary to a claim properly before the District Court, that Court probably has jurisdiction.

3. Custody and Guardianship are distinct matters.

(*A. M. A.*)

FOLLOWED: H. C. 146/42 (10, P. L. R. 24; *ante*, p. 22); H. C. 144/42 (10, P. L. R. 6; *ante*, p. 210).

DISTINGUISHED: C. A. 40/40 (7, P. L. R. 411; 1940, S. C. J. 444; 8, Ct. L. R. 173); H. C. 10/41 (8, P. L. R. 86; 1941, S. C. J. 49); H. C. 9/43 (10, P. L. R. 122; *ante*, p. 21); C. A. 140/42 (1942, S. C. J. 783); 12, Ct. L. R. 178).

ANNOTATIONS:

1. In C. A. 238/40 (1940, S. C. J. 515) the question "whether such an order (*i. e.*, for judicial separation) could, therefore, ever be granted by a District Court, which could not grant a divorce" was left open.

2. See the annotations to Misc. Appl. 20/43 (*ante*, p. 12), H. C. 9/43 (*supra*), H. C. 146/42 (*supra*), H. C. 144/42 (*supra*) and H. C. 19/43 (*ante*, p. 119).

(*H. K.*)

FOR APPELLANT: Goitein.

FOR RESPONDENT: Caspi.

JUDGMENT.

This is an appeal against the judgment dated the 25th January, 1943, of the District Court, Jerusalem, whereby an order was made for judicial separation with the custody of both children of the marriage entrusted to the Respondent, with the option to the father, the Appellant, to assume the custody of the boy when he reaches the age of 6 years. The Appellant was also ordered to pay LP.6 maintenance to the Respondent, being at the rate of LP.2 per head for the Respondent and the two children.

The main question arising is that of the jurisdiction of a District Court to make an order of judicial separation, with subsidiary points as to the orders for custody and maintenance.

This question of jurisdiction is of paramount importance in view of the number of cases that have arisen and are arising in regard to matrimonial affairs amongst the diverse religious communities and races resident in this country, and the complexity of the laws dealing with, or attempting to deal with these matters.

On the merits of the case and on the facts proved there is no question but that the Respondent was entitled to a decree of separation, and I need say no more as to these facts.

The Appellant was a Palestinian subject of Persian extraction and

the parties were married in Poland in 1937, both coming to Palestine shortly afterwards. There is no question therefore but that, the marriage having taken place prior to the appointed day of commencement of the Palestinian Citizenship (Amendment) Order-in-Council, 1939, the Respondent acquired the status of her husband, *i. e.* of Palestinian citizenship. Both parties are Jews and profess the Jewish faith, and it is averred in the statement of claim that they belong to the Jewish Community, and such facts are not in issue.

It is not disputed that under Article 47 of the Order-in-Council concurrent jurisdiction is conferred on District Courts in matters of personal status, but such is subject to the provisions of Part V of the Order-in-Council in matters of personal status as defined in Article 51, now Article 51(1). For easy reference I set out Article 51(1), which reads as follows:—

> "Subject to the provisions of Articles 64 to 67 inclusive jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the religious communities. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons."

Article 53(1) and (2) is also extremely relevant and reads as follows:—

> "The Rabbinical Courts of the Jewish Community shall have:—
> (1) Exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in Article 59.
> (2) Jurisdiction in any other matter of personal status of such persons, where all the parties to the action consent to their jurisdiction."

The first question that arises, therefore, is, is judicial separation a matter of personal status within the exclusive jurisdiction of the Rabbinical Courts, or does it come also within the residuary jurisdiction of the District Courts.

It will be observed that personal status as defined in Article 51(1) refers to suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation, adoption, and the various matters therein set forth, whereas exclusive jurisdiction is conferred by Article 53(1) on the Rabbinical Courts in matters of marriage and divorce, alimony and confirmation of wills of members of their community only.

For the Appellant it was submitted that this point has already been decided by a decision of the High Court in H. C. 146/42, P. L. R. Ja-

nuary, 1943, p. 24, judgment in which was delivered on the 19th of January last, a few days before the delivery of this appealed judgment of the District Court, but such case had not then been reported.

In this High Court case the facts and judgment are extremely relevant.

The wife having previously obtained an order for maintenance in the District Court, subsequently applied to the Rabbinical Courts for separation and an allowance consequent thereon. An order was made by the Rabbinical Courts for such separation and an additional allowance over and above the maintenance ordered by the District Court. The application was for the setting aside of the order of the Rabbinical Court on the grounds of lack of jurisdiction. The judgment states:—

> "The words 'maintenance' and 'alimony' are used in the Order-in-Council and each has a certain meaning which, it has been held, is the meaning attributed to it by the English law. Maintenance is a payment made to a wife by a husband who deserts her. Alimony is a payment made to a wife after a decree of divorce or separation has been issued or during the pendency of divorce or separation in certain circumstances."

After discussing further the distinction the judgment goes on to say:—

> "In this case, the second Respondent (*i. e.* the wife) had no option but to go the Rabbinical Court to get a separation order, as that Court was the only competent Court to give her what she asked."

Further force is given to this distinction in the judgment in High Court No. 144/42, also delivered in January and reported in the same volume at page 6, where it states:—

> "but it must be remembered that the application and the judgment were for separation and any allowance that is given as a result of that judgment of separation comes under the heading of 'alimony'."

I would also quote Latey on Divorce (12th Ed.) at page 313:—

> "Permanent alimony is the name given to the provision made by Order of Court for a wife petitioner after a judicial separation."

There was really no answer to these authorities and, in my opinion, nor could there be an answer. Judicial separation is the equivalent of the old decree of divorce *"a mensa et thoro"* and is a matter of divorce arising out of marriage, and always has been and was recognized as such by the old Ecclesiastical Courts prior to the Matrimonial Causes Act, 1857, which Act itself empowered the new Court to pronounce (*inter alia*) decrees of dissolution of marriage and judicial separation.

Article 53(1) expressly confers exclusive jurisdiction on the Rabbinical Courts of the Jewish Community in respect of matters of marriage and divorce.

It is clear, therefore, in my opinion, that where both parties profess

the Jewish faith, are Palestinian citizens and belong to the Jewish Community, the Rabbinical Courts have been clothed with exclusive jurisdiction in matters of marriage and divorce, including judicial separation, subject to the Jewish Law on the matter.

It was submitted on behalf of the Respondent alternatively that even if the District Court had no jurisdiction to grant a judicial separation yet the claims for custody of the children and for maintenance were separate and distinct claims and divisible from the claim for judicial separation, and that the District Court had jurisdiction in this separate and distinct matter. It is somewhat difficult even if one concedes such latter point to see what justification there would be for making those orders, if the claim for judicial separation has failed. However, Civil Appeal 40/1940, P. L. R. July, 1940, page 411, was quoted, but this was purely a question of guardianship, and the distinction between guardianship and custody of children was not dealt with nor was custody as distinct from guardianship mentioned in the judgment. Similarly, High Court 10/1941, P. L. R. February, 1941, page 86, is, if any thing, an authority against the contention submitted.

It was further submitted that as guardianship is specifically mentioned in Article 51, and custody is not mentioned in this Article nor in Article 53(1), therefore custody of children is included in the term "guardianship". High Court 9/43, P. L. R. February, 1943, is not in point in this respect, nor is Civil Appeal 140/42, Apelbom, page 783.

In High Court 10/1941 (*supra*) the Chief Execution Officer is quoted as having said:—

> "I think that there can be no doubt that a Religious Court exercising the exclusive jurisdiction vested in it by Article 53(1) of the Palestine Order-in-Council in matters of marriage and divorce between a husband and wife, has jurisdiction both to make interim and final orders with regard to the custody of their minor children and that where such a Court pronounces a decree of divorce it has the necessary power and jurisdiction to give directions with regard to the custody of the children as a consequential remedy and that the Civil Court has no power to deal with such matters."

In this case the Petitioner alleged that the Rabbinical Court which had made an order in regard to divorce and had also made an order in regard to the custody of the child, had no jurisdiction to make such latter order without consent, as provided for in Article 53(2), and she applied for the judgment to be set aside, which the High Court refused to do.

In my opinion, where an application is made for a decree of judicial separation and an ancillary and consequential claim is also made for custody of a child, if the Court applied to has no jurisdiction to grant

the judicial separation on such application as being within the exclusive jurisdiction of another Court, similarly such Court has no jurisdiction to make an order as to such custody. I would, however, guard myself from saying that where the District Court can and does properly make an order as to maintenance of a wife and child, it cannot also make an order as to the custody of such child, for the reason that such application is not a matter of marriage or divorce.

I agree entirely that there is a distinction to be drawn between guardianship and custody, and that although the questions may be combined they can also be entirely separate and distinct.

Similarly as regards the claim for maintenance in this case, having held that the District Court had no jurisdiction to make a decree of judicial separation, I also hold that in this case and on such application the District Court had no power to make the ancillary orders as to custody and maintenance.

For the above reasons I am of the opinion that the appeal should be allowed, and the judgment of the District Court should be set aside. There will be no order as to costs.

Delivered this 6th day of May, 1943.

Chief Justice.

CIVIL APPEAL No. 80/43.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPEAL OF :—

Sofia Bat Sheva Disencick & 7 ors. APPELLANTS.

v.

Izchak Adler. RESPONDENT.

Sale of land — Return of purchase price — Forfeiture clause — Acquiescence in breach of contract — Unilateral cancellation — Pleadings — Capacity of parties — Liability of heirs — "Enemy" defendants, onus of proof.

Appeal from the judgment of the District Court, Tel-Aviv, in its appellate capacity, dated the 7th of December, 1942, in Civil Appeal No. 192/42, dismissed, subject to alteration in judgment:—

1. When neither party is in default, a purchaser may claim from the vendor the return of amounts paid on account for the acquisition of land.
2. The liability of heirs on their ancestor's contract is not joint and several.

(*A. M. A.*).

ANNOTATIONS:

1. The question as to whether and when the purchase price is returnable is

discussed at length in C. A. 261/40 (8, P. L. R. 71; 1941, S. C. J. 36; 9, Ct. L. R. 61). For earlier authorities see note 2 in 1941, S. C. J., on p. 37. *Cf.* also C. A. 128/41 (8, P. L. R. 356; 1941, S. C. J. 332; 10, Ct. L. R. 43); C. A. 7/42 (9, P. L. R. 247; 1942, S. C. J. 449; 12, Ct. L. R. 101) and C. A. 59/43 (*ante*, p. 203) and annotations.

2. Note that it was held in C. A. 85/40 (7, P. L. R. 304; 1940, S. C. J. 474; 8, Ct. L. R. 62): "That a sum is a penalty must be, at any rate, specifically pleaded."

3. On actions by or against heirs in the name of the estate *cf.* C. D. C. T. A. 19/41, confirmed on appeal in C. A. 257/41 (9, P. L. R. 70; 1942, S. C. J. 141) and cases cited in note 2 on p. 144 of 1942, S. C. J.

(*H. K.*)

FOR APPELLANTS: Nos. 1 & 2 — Sinai.
Nos. 3—8 — Eliash.

FOR RESPONDENT: Sussman.

JUDGMENT.

If it were not for certain subsidiary points, this appeal would be an exceedingly simple one and could present no difficulties. The claim before the Chief Magistrate was for the return of LP. 175, being part purchase price of certain land contracted to be sold by the ancestor of the Appellants to the Respondent, the transfer of which never took place. The learned Chief Magistrate found that neither side were in default, that the Appellants had committed no breach of the agreement, and that they had acquiesced in the non-payment of the balance of LP. 86 by the Respondent and also in the late payment of a part of the first instalment, and, therefore, the Respondent was not in default. He, therefore, gave judgment for the return of the part purchase price already paid, and held that the forfeiture clause in the contract was a penalty. The learned President held that there was default by both parties, and, therefore, the contract was avoidable, and in the result he confirmed the Chief Magistrate's judgment. The heirs of the vendor have appealed to this Court.

In my opinion there was material on which the learned Chief Magistrate could hold that the Appellants were not in default, since they were not bound to transfer the land until the purchase price had been paid in full which has never been done. At the same time, I think also that he was right in holding that the Appellants or their ancestor, the vendor, had clearly acquiesced in the late payment of part of the first instalment, by accepting the money after the due date, and had also acquiesced in the non-payment of the balance, since they had also accepted part of that balance, after the date when it was due. They, or their ancestor, had, therefore, extended the time for completion, not fixing any other date. It is also clear that on 19.3.41 the Appellants

notified the Respondent that they considered the contract cancelled. This was a unilateral cancellation since the Chief Magistrate held that there was no default on the part of the Respondent. In these circumstances the contract was at an end and the amounts paid were recoverable by the purchaser since he was not in default. I think that the learned President was wrong in finding that there was default in both sides. Clause 7 of the contract provides that the amounts paid shall be forfeited, if the purchaser should be in default which in this case he was not.

This disposes of the merits of the appeal, and I will now turn to the subsidiary points.

The question of a penalty does not really arise in view of the above, but I do not think that the Respondent, who was Plaintiff before the Chief Magistrate, was under any obligation to plead that clause 7 was a penalty clause, since it was the Defendants who were relying on this clause and who had to plead that it was damages. The reasoning of the learned Chief Magistrate on this point seems to me to be entirely correct.

The next point is that the Appellants were sued personally and not in their capacity as heirs of the vendor. It is true that their capacity is not stated in the heading of the claim but the nature of the claim, and the capacity in which they were sued, appear in the body of the claim itself and the action was contested throughout on this footing, and the capacity is dealt with in the defence filed on behalf of some of the Appellants. There was no possible chance of any misunderstanding on this point, which I think fails, except that it is agreed that the liability of the heirs cannot be joint and several, as the learned Chief Magistrate would appear to have held.

Finally, it is stated that four of the Defendants were enemies since they were in enemy territory. This was a matter for proof and there was no proof before the learned Chief Magistrate to this effect, and a Court is not under any obligation to act on a mere allegation that a certain state of facts exists. But in any event since the Custodian of Enemy Property gave his consent to proceedings against these Defendants being continued, the proceedings were proper and for both these reasons cannot now be contested.

In the result, I think, that with the variation that the liability of the Appellants is not joint and several, the judgment of the learned Chief Magistrate is correct and the appeal fails and should be dismissed. The Respondent is entitled to his costs on the lower scale to include the sum of LP. 10.— advocate's attendance fee on the hearing of this appeal.

Delivered this 28th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 287/42.

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

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

IN THE APPEAL OF :—

Maurice Dayan, one of the heirs and legal representative of the estate of the late Joseph Dayan. APPELLANT.

v.

Walter Krips. RESPONDENT.

Failure to give notice of intention to renew contract of lease — Sub-letting without written consent of lessor — Binding force of precedent in Court of Appeal — Lessor "continuing to accept rent" in spite of knowledge that lessee has broken condition of contract — Waiver of forfeiture — Finding contrary to weight of evidence.

Appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 26th November, 1942, in Civil Appeal No. 111/42, allowed:—

1. Court of Appeal bound by previous decision.

2. Failure to give notice of intention to remain in premises — not failure to comply with terms of tenancy agreement within meaning of Rent Restrictions (Dwelling Houses) Ordinance.

3. a) If a lessor, knowing that a forfeiture has been incurred by breach of condition, does any act whereby he acknowledges continuance of tenancy at a later period, he thereby waives forfeiture.

b) Merely lying by and witnessing breach — no waiver; some positive act must be done.

c) Where tenant gave promissory notes in advance, fact that landlord, knowing that tenant by a subsequent breach of condition incurred forfeiture, did not take notes back from Bank, where they have been presented and discounted, and return them to tenant — not a positive act of waiver.

4. Court of Appeal may reverse finding of fact by trial Court, if of opinion that finding was against weight of evidence.

(*M. L.*)

FOLLOWED: C. A. 225/42 (12, Ct. L. R. 164; 1942, S. C. J. 750; Gorali, 153); C. A. 93/42 (12, Ct. L. R. 240; 1942, S. C. J. 908).

REFERRED TO: C. A. 248/42 (12, Ct. L. R. 212; 1942, S. C. J. 876); North Eastern Railway *v.* Lord Hastings, (1900), A. C. 260.

ANNOTATIONS :

1. How far Court of Appeal bound by its decisions — H. C. 27/40 & 28/40 (7, P. L. R. 213; 1940, S. C. J. 117; 7, Ct. L. R. 150) and notes; in particular

see C. A. 158/38 (5, P. L. R. 488; 1938, 2 S. C. J. 126; 4, Ct. L. R. 169) and cases cited therein. See also H. C. 7/42 (Olles case) (9, P. L. R. 126; 1942, S. C. J. 51; 11, Ct. L. R. 86) and notes; H. C. 109/42 (1942, S. C. J. 809); C. A. 143/41 (8, P. L. R. 467; 11, Ct. L. R. 210; 1941, S. C. J. 456) and notes. On binding effect of judgment of Court of co-equal jurisdiction see C. A. 115/41 (8, P. L. R. 296; 10, Ct. L. R. 222; 1941, S. C. J. 292 and annotations).

2. Court followed C. A. 225/42 (*supra*). Sec. 4 of the Landlords and Tenants (Ejection & Rent Restriction) (Extension) Ord., 1935, contains same proviso as Sec. 10(1)(b) of that Ordinance, but it refers to dwelling houses, whereas the latter refers to premises.

3. See cases and authorities referred to in the case. See also C. A. 260/42 (*ante*, p. 78) and annotations and C. A. 248/42 (*supra*).

4. Court followed C. A. 93/42 (*supra*). On interference of appellate Court with findings of fact of trial Court see also annotations to C. A. 53/43 (*ante*, p. 111).

(*A. G.*)

FOR APPELLANT: Geiger & Levin.

FOR RESPONDENT: Weston Sanders.

JUDGMENT.

Edwards, J.: This is an appeal from a judgment of the District Court of Haifa, dismissing an appeal from a judgment of the then Acting Chief Magistrate of Haifa. The Appellant, who was the Plaintiff in the Chief Magistrate's Court, was the landlord and the present Respondent (the then Defendant) was the tenant or lessee of a certain café in Haifa.

The subject matter was a written agreement of lease between parties dated 5th November, 1940. The original Plaintiff, who was the father of the present Appellant, died before the action was instituted; but the present Appellant was properly substituted as Plaintiff during the course of the action. I quote from the judgment of the learned Acting Chief Magistrate:—

> "On the 15th November, 1938, the Plaintiff let to Defendant a small flat and, below it, a house which the Defendant proceeded to run as a café. The lease was for a calendar year and the rent was LP. 22.— per month. On the 15th November, 1939, the lease was renewed by written agreement for a further calendar year, but the rent was increased to LP. 34 per month because in the meantime the Plaintiff had built a small garden adjoining the café house and the garden was expressly included in the renewed agreement. On 15th November, 1940, the lease was again renewed by written agreement for a further calendar year, at the slightly reduced rent of LP. 30 per month. The reasons for this reduction are in dispute but the facts are that an extra room had been added to the café and that the garden was not, as in the preceding year, expressly mentioned in second renewed agreement, which ran

till 14th November, 1941. Although the garden was not expressly mentioned the Defendant in fact used it throughout the period of November, 1940, to November, 1941, as he had done during the period November, 1939, to November, 1940.

Meanwhile at the beginning of November, 1940, the Defendant sublet the flat to a subtenant without the written consent of the Plaintiff although Clause 6 of both the 1939—40 and the 1940—41 agreements prohibited subletting without the Plaintiff's written consent. The sub-tenant remained in occupation of the flat during the whole term of the lease."

In the Chief Magistrate's Court, the Appellant sued for eviction on the following grounds, namely:—

(a) That the tenant had held over without giving notice of his intention to remain in the premises under the Rent Restrictions (Dwelling Houses) Ordinance, 1940, and the Rent Restrictions (Business Premises) Ordinance, 1941, although clause 15 of the agreement reads as follows:—

> "If the lessee wants to renew the lease he shall notify his intention so to do to the lessor and get his consent thereto not later than one month before the expiration of the period of lease in accordance with this contract. At any rate the contract has to be renewed in any event of renewal of the contractual relations."

(b) The failure of the Defendant to tender a promissory note on 5th November, 1941.

(c) A claim for rent of LP. 2.500 mils a day for 5 days from 15th November, 1941, till 19th November, 1941.

(d) A claim for eviction on the ground that the tenant had sublet the premises without the consent of the landlord.

(e) A claim for LP. 146 with interest at the rate of 9% *per annum* from 20th November, 1941 to payment in respect of rent of the garden.

The learned Acting Chief Magistrate dismissed the action for reasons given by him in his judgment and the appeal to the District Court Haifa was dismissed owing to a disagreement between the two learned judges. Judge Shems held that the Plaintiff's claim should fail on every ground, except the claim for LP. 146 which he considered should succeed. Judge Atalla on the other hand, although with some apparent hesitation, considered that an appellate Court could not interfere with the dismissal of the claim for LP. 146; but he held that the Acting Chief Magistrate was wrong in refusing to order eviction on the ground of subletting without written consent. He held that the Defendant should have given notice of his intention to renew the contract prior to the 15th October, 1941, and he held that failure to give such notice

was a breach of the terms of the lease which entailed the forfeiture of the protection given by the two ordinances mentioned above.

As I have stated, the appeal was dismissed owing to disagreement between the two learned Judges. The Plaintiff in the Magistrate's Court obtained leave to appeal to this Court. At the hearing of the appeal before this Court grounds 'b' and 'c' were not pressed by Mr. Levin, the Appellant's advocate. It, therefore, remains for this Court to deal with the three following grounds:—

(a) The failure to give notice of intention to remain in the premises, (d) the subletting of the premises contrary to clause 6 of the agreement which is in the following terms:—

> "The lessee shall not be entitled to transfer or to assign this contract to anybody else and furthermore, the lessee shall not be entitled to sublet the premises in full or in part to anybody else without the consent in writing of the lessor".

and (e) the claim for LP. 146 in respect of equivalent rent of the garden.

As regards ground 'a' I think that the matter is concluded against the Appellant by the judgment of this Court in C. A. 225/42, Apelbom's Supreme Court Judgments, 1942, pages 750 to 752.

Mr. Levin argued that the attention of the learned Judge who decided that appeal was probably not drawn to the proviso to Section 4 of the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935, and that his attention appears to have been attracted only to the proviso to section 10(1)(b) of that Ordinance. I cannot, however, assume that the attention of the learned Judge was not attracted to all the provisions of the Ordinance.

I think that it would introduce uncertainty to the law if we were to hold that we are not bound by the decision in C. A. 225/42 or that the judgment in that appeal does not apply to the facts of the present case. This ground of appeal should, therefore, fail.

With regard to ground (d) (that is subletting without the written consent of the landlord) it was admitted by the Defendant that he did sublet without the written consent of the Plaintiff but the Defendant successfully contended before the learned Acting Chief Magistrate that the Plaintiff was estopped from relying on this breach by reason of his conduct and forbearance which was said to constitute a waiver.

The Acting Chief Magistrate held that the Plaintiff knew in August 1941 that the flat was sublet but that for the next three months he continued to accept rent, "rent which the Defendant had paid him by way of promissory notes maturing on the 15th of each month".

The Acting Chief Magistrate held that this amounted to a waiver.

It was contended before us for the Appellant that the Respondent had failed to prove in the Court below any such unequivocal act which could amount to a waiver of the forfeiture as is contemplated in the statement of the law to be found in Woodfall's "Law of Landlord and Tenant" 24th (1939) Edition, page 926. "Merely lying by and witnessing the breach is no waiver; some positive act must be done. The general rule is that, if a lessor or other person legally entitled to the reversion knowing that a forfeiture has been incurred by the breach of any covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture". Now, in the case before us no such act was proved because the promissory notes were given in advance (See C. A. 248/42, Apelbom's Supreme Court Judgments, 1942, page 877). Mr. Weston Sanders, advocate, for the Respondent, argued that the Appellant had continued to accept rent accruing due after the forfeiture, that is to say, had accepted such rent after he became aware of the subletting. The argument seems to be that the Appellant could have and should have gone to the bank in which the promissory notes were or may have been and taken them back and returned them to the Respondent. But, as Mr. Levin pointed out, his client was entitled to discount these promissory notes in advance.

On this point I agree with the reasoning in the judgment of Judge Atalla who said:—

> "I am still of the opinion that the collection of the promissory notes by the Bank does not amount to a positive act of waiver by the Appellant. There was no evidence before the Magistrate to show who was the holder of the promissory notes or who presented them for payment and collected them. If it is true, as alleged, that the promissory notes had already been discounted, it is difficult to see how Plaintiff could conceivably be held to have accepted the rent or waived the forfeiture. The onus of proof is on the lessee (Respondent) to establish waiver and I consider that he has failed to do so."

I am of the opinion that the Respondent did not prove before the Acting Chief Magistrate any act which might be regarded as being tantamount to a waiver of the forfeiture. The appeal on this ground should, therefore, succeed and the Appellant should be entitled to an order for eviction on this ground alone. As to ground (e), that is, the dismissal of the claim for the LP. 146 as rent of the garden, I would say that the garden was specifically mentioned in the original lease (*i. e.* the 1939—1940 lease) as also were the flat and the café but, in the 1940—1941 agreement, the garden was excluded.

It seems, however, that the learned Acting Chief Magistrate considered that the term "Café" was of so ambiguous a nature as to entitle him to hear extrinsic evidence as to whether the intention of the parties when they signed the 1940—1941 agreement was or was not to include the garden.

The Acting Chief Magistrate found as a fact that, while the "garden" was specifically mentioned in the original lease and excluded from the 1940—1941 agreement, the term "Café" was sufficiently ambiguous to entitle the leading of extrinsic evidence as he thought that "Café" might include any path or paving or enclosed space adjoining the actual building. Having heard such evidence, he found that the Plaintiff, when obtaining the Defendant's signature, informed him that the terms of the 1940—1941 agreement were identical with those of the 1939—40 agreement save in the matter of rent.

But, as aganst this, there was no suggestion at the hearing of the case, nor in the pleadings, of fraud or bad faith. Having regard to this fact, and having regard to the facts that in the original lease the garden was expressly included and that in the 1940—1941 agreement it was not included I can only conclude that parties, when signing the second lease, definitely agreed that the garden be excluded.

This seems to be borne out by the fact that the rent for 1940—1941 for the café was reduced from LP. 34 *per* month (*i. e.* LP. 22 for the cafe and LP. 12 for the garden) to LP. 30.

The reason why it was not reduced by the full amount of LP. 12 to LP. 22, appears to have been that an extra room had been added to the café. Now, if it had been intended in the 1940—1941 agreement to include the garden, the total rent (keeping in the view the extra room supplied) should have been more than LP. 34, yet it was only LP. 30. Judge Atalla referred to Halsbury's "Laws of England" 1911 Edition, Vol. 18, page 412 and to the *Mejelle*, Art. 232 and came to the conclusion that the Magistrate was justified in admitting extrinsic evidence. Whether or not the learned Acting Chief Magistrate was correct in allowing extrinsic evidence, (a point which I find it unnecessary to decide) I consider that, having regard to the facts proved before him as to the differences in the 1939—1940 and 1940—1941 agreements his finding that the garden was included in the latter agreement was against the weight of evidence, which evidence really amounted only to the Defendant's expression of his own opinion as to what the term "Café" in the latter agreement meant, notwithstanding the fact that he knew, or should have known, when he signed the latter agreement that it did not include the "garden" while the earlier agreement had included it. In my opinion, on no

view of the evidence could the learned Acting Chief Magistrate have arrived at the conclusion that the garden was included in the 1940—1941 agreement. In this connection, I refer to C. A. 93/42, David *v.* David, not yet reported in P. L. R., but reported in Apelbom's Collection for 1942, Page 908 at the top of Page 912.

Assuming that the learned Acting Chief Magistrate was right in allowing extrinsic evidence in this particular case, I think that, notwithstanding the fact that he accepted the Defendant's own account as to his (Defendant's) belief as to what was meant by the term "café" in the 1940—1941 agreement, he should have held that it did not include the "garden".

It is unnecessary to decide whether, in doubtful cases, a café may include a garden; but, in any event, in this case, the garden seems to have been a back garden and not a side path the use of which might have been necessary to gain access to the café itself. The learned Acting Chief Magistrate appears to have been impressed by the course of conduct of the Appellant after he knew that the Respondent was using the garden. Mr. Levin referred us to the case of North Eastern Railway *v.* Lord Hastings, (1900), A. C. Page 260 at page 263; but it is somewhat doubtful whether the *dictum* therein applies to the facts of the present case.

In the result, I consider that Judge Shems was right in considering that the Respondent was liable to pay the sum of LP. 146 with interest as stated by him in his judgment.

I would accordingly set aside the judgment of the learned Acting Chief Magistrate and I would enter judgment for the Appellant for eviction of the Respondent because of forfeiture due to subletting premises without written permission, and I would also enter judgment for the Appellant against the Respondent for the sum of LP. 146 with interest at 9% *per annum* from 20th November, 1941 until payment.

As regards costs I consider that we should now hear parties' advocates.

Delivered this 4th day of June, 1943.

British Puisne Judge.

Gordon Smith, C. J.: I agree with the judgment of Edwards, J.

Chief Justice.

4th June, 1943.

After hearing parties as to costs we order that the costs in the Magistrate's Court are awarded to the Appellant with advocate's fee LP. 3.

In the District Court, each party will bear its own costs.

In this Court, the Appellant will have his costs, with advocate's fee LP. 15.

British Puisne Judge.

Chief Justice.

CIVIL APPEAL No. 54/43.

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

BEFORE : Gordon Smith, C. J.

IN THE APPEAL OF :—

Kupat Am Bank Ltd. APPELLANT.

v.

1. Menahem Ettinger,
2. Menahem Halbreich. RESPONDENTS.

Bills of exchange — Cooperative society converted into limited company — Rights accrued to the company before the conversion — Conversion should be disclosed in the pleadings — Prescription, B/Ex Ord., Sec. 96(1) *— Waiver of prescription and other stipulations should be included on the bill, sec.* 15 *— Quaere as to waiver included on the bill — Bowmaker Ltd. v. Tabor — C. P. R., r.* 189 *considered.*

Appeal from a judgment of the District Court, Jerusalem, in Civil Case No. 88/42 (*Cur.* Bourke, P. D. C.), dismissed:—

1. A waiver of the right of prescription should be included in the bill, not in a separate document.
2. Rule 189, C. P. R., strictly applied, does not work hardships.

REFERRED TO: Bowmaker Ltd. *v.* Tabor, 1941, All E. R. 72.

(*A. M. A.*)

ANNOTATIONS :

1. *Cf.* C. A. 108/36 (C. of J. 1934—6, 554; P. P. 2.iii.38) where similar questions are discussed.

2. On the effect of prescription generally *vide* note 3 to C. A. 202/42 (*ante*, on p. 193). As regards limitation in respect of bills of exchange see also C. A. 63/43 (*ante*, p. 155) and note.

(*H. K.*)

FOR APPELLANT: Olshan and King.

FOR RESPONDENTS: No. 2 — Abramovsky:

JUDGMENT.

This was an appeal by the Plaintiff-Appellant against a decision of the Relieving President of the District Court, Jerusalem, dated the 14th January last, dismissing a claim for LP. 557.500 against the second Defendant-Respondent. Judgment by default had already been given against the first Defendant.

At the conclusion of the argument before me I dismissed the appeal with costs without calling on the advocate for the Respondent, but as various novel points had been raised I intimated that I would give my reasons for so doing in writing subsequently.

The action was based on a promissory note signed by the first Defendant to the order of the second Defendant and endorsed by the latter to the Appellant according to para. 1 of the statement of claim, but this is a clear mis-statement of fact as the promissory note was endorsed to the Palestine Kupat Am Bank Cooperative Society, Ltd. The fact that this Cooperative Society was in 1939 converted into a company under the Companies Ordinance, which took over all the assets and liabilities of the Society, does not excuse this bad pleading, nor was such latter fact ever pleaded. However, the learned President did not dismiss the action on this ground, although in my opinion in the absence of amendment to the statement of claim he would have been entitled to have dismissed the claim out of hand, as disclosing no cause of action. The learned President, however, dismissed the claim on the ground that, in accordance with the provisions of Section 96 of the Bills of Exchange Ordinance, Cap. 10, the promissory note having matured on the 3rd March, 1938, was prescribed, the action thereon not having been commenced until the 29th July, 1942.

Section 96(1) of Cap. 10 reads:—

> "No action on a bill of exchange, cheque or promissory note shall be maintained against any party thereto other than an endorser after the expiration of five years, or against an endorser after the expiration of one year, from the time when the cause of action first accrued to the then holder against such party."

Sub-section 2 provides that the said term shall begin to run from the maturity of the bill except as therein provided, none of which provisions being relevant to this decision.

To get over this difficulty of prescription the Appellant produced two documents, Exhibits B. and C. Exhibit B. is in the form of a letter expressed to be dated the 26.12.37 signed by the Respondent addressed to the Cooperative Society previously mentioned forwarding various bills as expressed therein, for discounting. Several and various undertakings are mentioned, including the words "I also waive the

right that the action should be brought within the prescribed time after protest in accordance with law."

There is no sufficient evidence in this letter to identify any of the bills forwarded with the promissory note in question and not even is its date mentioned either in this letter or in paragraph 1 of the statement of claim. I agree that the promissory note was attached to the statement of claim, yet the date of it should have been specifically mentioned with sufficient details of the promissory note itself, apart from it being attached.

Exhibit C. also is in the form of a guarantee or undertaking dated the 22.12.35, also addressed to the Society in respect of bills, drafts, negotiable instruments generally and in very general terms.

The learned President was of the opinion that there was no waiver of prescription of this promissory note under the circumstances, nor could there be such waiver of the prescriptive period fixed under Section 96 of Cap. 10. Section 15 of the Ordinance deals with "waiver" and was quoted to me by counsel for the Appellant, but it seems to me that this section is materially against the argument put forward as it is clearly and specifically provided that any waiver, stipulation or otherwise by a drawer or endorser relating to a bill must be included in the bill itself. This must necessarily be so in my opinion, and if such was the contrary it would strike at the very root of the negotiability of bills or other negotiable instruments, as a subsequent holder of such a bill or instrument would have no notice whatsoever of some term or variation relating to the bill, if such term or variation is not included in the bill itself. I would not, however, go quite as far as the learned President in saying that there cannot be some waiver or extension of the prescriptive period, if such waiver or extension is included in the bill by the drawer thereof. This point,

An isolated sentence out of the judgment of Bowmaker Ltd. *v.* Tabor, All England Reports, 1941, Volume 2, at page 76, was quoted to me as follows:—

> "A good illustration of a protection which can be waived is afforded by the Statute of Limitations which a debtor can waive if he chooses."

I agree that that may be so, and limitation does not bar the right but only the remedy. Similarly in gaming cases, the Gaming Act has to be specifically pleaded if advantage is to be taken of it. But such expression in such judgment was very general and in my view has no application whatsoever to a statute which itself provides conditions on which some of its provisions may be waived. Nor were the cases

quoted to me from the English and Empire Digest of any value to the Appellant's case, and I have subsequently considered them.

A further matter was referred to in argument before me in regard to the proviso to Rule 189 and which was also brought up before the learned President. In the District Court, after the Appellant's advocate had closed his case, the advocate for the Respondent elected to call no evidence and addressed the Court. The learned President declined to allow the Appellant's advocate to reply, on objection by the Respondent's advocate, and referred to Rule 189 which lays down the procedure in regard to stating one's case, calling evidence and the addresses. It was said before me that the proviso results in hardships being incurred but I cannot see that such is the case. It is a usual provision both in England and elsewhere, and counsel for the defence is entitled to take advantage of it if he cares to take the risk of calling no evidence, relying on the weakness of his opponent's case. It is a legitimate technical step of obtaining the last word before the Court, and if the advocate for the beginner has not stated his case fully or is keeping some point of law up his sleeve, that is his own misfortune if subsequently he has lost the right to put it before the Court.

In my opinion the learned President was quite right in this respect and also in dismissing the Appellant's claim for the reasons he gave and which I have amplified.

As stated, I dismissed the appeal with costs to include LP. 10 advocate's attendance fee.

Delivered this 19th day of April, 1943.

Chief Justice.

CRIMINAL APPEAL No. 54/43.

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

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

IN THE APPEAL OF :—

1. Ibrahim Farahat az-Zibdeh,
2. Salim Ibrahim az-Zibdeh. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Confessions — Admissibility and credibility — Confession may be voluntary and not be believed by trial Court — Hashish prosecution.

Appeal from the judgment of the District Court of Jaffa, dated 4th May, 1943, in Criminal Case No. 52/43, whereby Appellants were convicted of being in possession of dangerous drugs, contrary to Section 7 of the Dangerous Drugs Ordinance, 1936, as amended by Section 4 of the Dangerous Drugs (Amendment) Ordinance, 1941, and sentenced to two years' and 18 months' imprisonment respectively, allowed as regards 1st Appellant and dismissed as regards 2nd Appellant:—

A voluntary statement may be admissible as an extra judicial confession, and yet not be believed by the trial Court.

(*A. M. A.*)

ANNOTATIONS:

1. Note that as regards its admissibility the truth of a confession is entirely irrelevant: CR. A. 155/42 (1942, S. C. J. 689, on *pp.* 695—6; 12, Ct. L. R. 189, on *p.* 194).

2. Before convicting a prisoner on his uncorroborated confession, the Court has to apply certain common sense tests which are set out in CR. A. 19/38 (5, P. L. R. 210; 1938, 1 S. C. J. 199; 3, Ct. L. R. 140); this case has been followed in CR. A. 132/41 (8, P. L. R. 506; 1941, S. C. J. 626; 11, Ct. L. R. 147) and in CR. A. 40/42 (1942, S. C. J. 189; 11, Ct. L. R. 152). See also annotations to CR. A. 19/38 (*supra*), in 1938, 1 S. C. J., on *p.* 200.

3. On the admissibility of confessions generally see CR. A. 155/42 (*supra*).

(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

In this case No. 1 Accused appealed against his conviction; his son, No. 2 Accused, a lad of about 16—18, appealed against his sentence only, having pleaded guilty at the trial, and a third Accused, the wife of No. 1 Accused, who was only fined, did not appeal at all. All three were charged jointly with possession of 1.250 kgs. of *hashish* at Jaffa, which was discovered at their house, wrapped up in a quilt, which quilt the wife put under a basin of bread she was kneading at the time the Police commenced their search. No. 1 Accused was not present at all in the house.

No. 2 Accused, the son, had been found in possession of a small quantity of *hashish* at Khan Younis, and it was in consequence of this discovery that a search was made at his home later, I believe, in the same day.

As stated, the husband was absent from the house at the time of the search, he was arrested and charged, whereupon he made a statement, Exhibit P. 2, at Manshiya Police Station at 11.45 *a. m.* In this statement he denied any personal knowledge of the *hashish,* but said his wife had informed him that the *hashish* which had been seized

by the Police, had been brought by the son, No. 2 Accused, to the house without his knowledge. He went on to say that his son did not obey him and frequented the house without his knowledge. Prosecution evidence was also to the effect that the 2nd Accused was beyond the control of his father.

Subsequently the wife was charged, and she made a statement at 12.15 *p. m.*, and later at his own request, No. 1 Accused made a further statement in which he exonerated his wife completely and took full blame for the possession of the *hashish* which he said his son had brought him.

In his judgment the learned President deals with the case against the husband in the following terms:—

> "As regards the husband he at first denied any knowledge of the *hashish*, but an hour or so later he voluntarily admitted it. The defence sought to show that he had been induced to make this confession by the promise alleged to have been made by Inspector Abdalla Selim, to the effect that his wife would not be arrested. There is no doubt in my mind, from the tenor of the confession, that he resolved to make it hoping to save his wife, but there is no satisfactory evidence of any promise by the Inspector, and having heard the Inspector's evidence I am satisfied that the confession was a voluntary one."

I agree entirely with the learned President that the second statement was voluntary, and therefore admissible, but this is the only point he deals with, *i. e.* as regards its admissibility, and he does not say definitely that he believes the contents of it to be true or makes any definite finding of fact. Actually and by inference from his remarks one must infer that he did not believe it to be true, as there was no doubt in his mind that it was made in the hope that thereby the first Accused would save his wife. Apart from this alleged confession there was no evidence whatsoever of possession by No. 1 Accused of any *hashish*, within the meaning of sub-section (2) of Section 7. In fact all the evidence tends to show that he had no knowledge whatsoever of the *hashish*, and that his first and earlier statement to the Police was correct.

For this reason, apart from any other grounds put forward by Counsel for this Accused, the Court by a majority allowed the appeal, and the Accused was discharged.

The appeal by No. 2 Accused against sentence was dismissed.

Delivered this 31st day of May, 1943.

Chief Justice.

CIVIL APPEAL No. 39/43.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Mudir El Awqaf al Islamiyah El 'Am. APPELLANT.

v.

Attorney General and seventy others. RESPONDENTS.

Claim for ownership of waters of river flowing from Claimant's (waqf) land — Legal impossibility to register ownership right to waters of public river or part of public road, Article 1239 of Mejelle.

Appeal from the decision of the Settlement Officer, Case No. 167/Sheikh Muwannis, dismissed:—

1. There is no registrable right to users of water of a public river.
2. Claim to own waters of public river must fail like claim to register a right of ownership of part of public road used by claimant.

(*M. L.*)

ANNOTATIONS: As to (1) see: C. A. 182/40 & 185/40 (7, P. L. R. 489; 9, Ct. L. R. 48; 1940, S. C. J. 343) — right of passage not capable of registration. As to easement and profits *á prendre* in general see notes to C. A. 182/40 & 185/40 (*supra*).

(*A. G.*)

FOR APPELLANT: R. Dajani.

FOR RESPONDENTS: No. 1 — Crown Counsel — (Rigby).
No. 2 — Gavison.
Nos. 19 & 50 — D. Dajani.

JUDGMENT.

This is an appeal from the learned Settlement Officer of the Jaffa Settlement Area. It was a rehearing of a case, this Court having sent the matter back to be retried. The claim of the *waqf*, as far as I am able to understand it, is for the ownership of the waters of the river 'Auja where they flow through land which is in the ownership of the *waqf*.

The river 'Auja, though perhaps a small river in comparison with European or American rivers, is quite a big river for Palestine. It is some 25 kilometres long and four to five kilometres of its total length, we are told, pass through the *waqf* land.

It seems to me that the claim of the *waqf* to the ownership of the river must fail completely.

Under Article 1239 of the *Mejelle*, since this river enters *waqf* land from the East and leaves the *waqf* land and flows into the sea on the West, it seems to me that the claim to own the waters is one that cannot possibly be supported. The right claimed by the *waqf* cannot be greater than the right of all riparian owners who are the users of the waters that pass through their lands.

By Clause 25 in Part II of the Schedule to the Electricity Concessions Ordinance, Chapter 52, the concessionaires, the Palestine Electric Corporation, are under the obligation to supply all existing owners of land and all users of water with such an amount of water from the river as is reasonably necessary for their requirements. It has been urged that the High Commissioner may charge these people for this, but so far from that being the case the concessionaires are liable to pay the users if the latter cannot get the amount of water with which they hitherto have been supplied.

The claim of the *waqf* is to something of an unstable nature, the waters being those of a flowing river. I agree with the Settlement Officer that there is no registrable right belonging to the *waqf*. As the Settlement Officer says nobody can register a right to the ownership of a part of a public road which he uses. In just the same way there is no registrable right to the users of the water of a public river.

The appeal fails and is dismissed. The first and second Respondents are each entitled to their costs on the lower scale, to include the sum of LP. 5 advocates' attendance fees on the hearing of this appeal. The other Respondents are not really interested in the results of this appeal, inasmuch as they are really formal parties. But Respondent No. 11 who appeared in person, Fatmeh Deeb el Qustah, is entitled to LP. 1 travelling expenses and Daoud Eff. Abul Su'oud Dajani who appears for Respondents No. 19 and 50 is entitled to LP. 2 advocate's attendance fee in this Court.

Delivered this 6th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 99/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

Abdul Aziz Ibn Salem Hassan Awwad & 7 ors.

on behalf of the heirs of their grandfather. APPELLANTS.

v.

Nassar Ben Ali El Jundi & 5 ors. RESPONDENTS.

Village masha'a — Village custom — Sale of such lands by registered owners may be set aside, L. C. Jm. 21/31 — C. P. R. 65.

Appeal from the judgment of the Land Court, Jerusalem, dated the 26th day of February, 1943, in Land Case No. 16/41, dismissed:—

A sale of village *masha'a* by a registered nominee may be set aside.

(*A. M. A.*)

ANNOTATIONS: On *masha'a* lands see the following authorities: L. A. 57/25 (1, P. L. R. 82; C. of J. 1270) — *form of registration;* L. A. 121/26 (1, P. L. R. 234; C. of J. 1271) — *proof and possibility of masha'a tenure for adult males only*; L. A. 59/27 (1, P. L. R. 179; C. of J. 1532) — *right of prior purchase in case of masha'a;* L. A. 29/29 (1, P. L. R. 422; C. of J. 1799) and C. A. 52/42 (9, P. L. R. 318; 1942, S. C. J. 440; 12, Ct. L. R. 158) — *masha'a co-owner's right of action;* L. A. 17/36 (1937, 1 S. C. J. 344) — *prescription in respect of masha'a;* C. A. 50/41 (8, P. L. R. 218; 1941, S. C. J. 348; 10, Ct. L. R. 96) — *masha'a co-owner's right to joint possession.*

(*H. K.*)

FOR APPELLANTS: Eisenberg and O. Saleh.

FOR RESPONDENTS: Nos. 1—4 — Budeiri.
Nos. 5—6 — Assal.

JUDGMENT.

This is an appeal from the judgment of the Land Court of Jerusalem, concerning part of the village lands of Yatta which belong to the *Hamouleh el Houshiyeh.* Lands of Yatta have been registered for a very considerable time in the names of the heads of the sixty-four families who compose the various *Hamoulehs* of the village.

There are three families in the *Hamouleh el Houshiyeh* — the family of the sons of Rashed, the family of El Ghafian and the family of El Jabbour.

The main point in the dispute with regard to these lands is whether this registration in the names of the heads of families is an actual registration in favour of those particular persons and their descendants or is a nominal registration, in effect making the lands *masha'a* lands of the *Hamouleh.* A considerable amount of evidence was brought by both sides, much of it, as was only to be expected, conflicting, and much of it, no doubt, based on imagination and wishful thinking rather than upon fact. But the learned judges of the Land Court came to the conclusion that these lands were *masha'a* of the *Hamouleh* and

were not portioned and divided amongst the heirs of the *kushan* holders as if they were *mulk*, and that, in accordance with the customs which obtain in certain villages of Palestine, the *masha'a* was limited to the male inhabitants of the village, females being excluded.

Now, as I have said, that was a finding of fact made by the Land Court, and though there was contradictory evidence it was the duty of the Trial Court to weigh that contradictory evidence and to say which was the version they accepted, and there was sufficient evidence, undoubtedly, before the lower Court to support that finding of fact.

So much for the merits of the case, but two other points have been raised which call for attention. One is that certain of these lands of the *Hamouleh el Houshiyeh* have been sold by private deed, by certain members of the *Hamouleh*. If the lands are in fact *masha'a*, as the Court below found to be a fact, and which finding I am not prepared to differ from, such sales of course have no effect whatever upon the character of the land. A very similar case came before the Land Court in Jerusalem, Land Court Case No. 21/31, also concerning the lands of Yatta village, but in that case the lands were those of the *Hamouleh el Makha'mrah*. In that case the Land Court held that the shares of the *Hamouleh el Makha'mrah* were divided among the living males of the *Hamouleh* as *masha'a* and did not devolve to the heirs of the registered owners as *mulk*, and the Court in that instance set aside the sale which had been made by one of the *kushan* holders.

If the lands of Yatta are *masha'a* lands, as I hold to be a fact, then that fact of course is one that is known to all inhabitants of the village, and no sale could possibly be in good faith. That, however, is not a point in this case, actually, but I am of the opinion that no sale in such circumstances could possibly affect the finding of the Court that the lands are in fact *masha'a* belonging to the *Hamouleh* and distributable between male members of the *Hamouleh*.

The second subsidiary point which has been taken is that Rule 65 of the Civil Procedure Rules has not been complied with. It seems to me that the action when first entered in the Land Court was wrong in form and the learned President, the late Judge Sherwell, ordered that a new statement of claim should be filed and that any members of el Rashid in the *Hamouleh* who were not actually Plaintiffs should be cited as Defendants. That was done, and in the amended statement of claim the Plaintiffs are described as representatives on behalf of the family of el Rashed with the exception of three persons who were made Defendants as ordered by the Court, and the Defendants were

cited in their capacity as representatives of the rest of the *Hamouleh el Houshiyeh* with the exception of the Plaintiffs. It seems to me that the order of the learned President was duly complied with and if anybody felt that he should have been summoned and had not been summoned, it was always open to him to apply to be joined as a party. I do not think that there is anything in either of the submissions made by the Appellants.

For these reasons I think that the learned Judges in the Court below came to a correct conclusion and the appeal must be dismissed. The Respondents and the 3rd parties are entitled to their costs on the lower scale, to include in each case the sum of LP. 10.— advocate's attendance fee on the hearing of this appeal.

Delivered this 27th day of May, 1943.

British Puisne Judge.

HIGH COURT No. 150/42.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Yochewed Krongrad. PETITIONER.

v.

The Custodian of Enemy Property. RESPONDENT.

High Court — Jurisdiction — Vesting order made in respect of property registered in name of a Palestinian subject — Equitable interest — H. C. 147/42: alternative remedy.

Application for an order to issue calling upon the Respondent to show cause why he should not be ordered to refrain from dealing with certain property registered in the Petitioner's name, refused:—

The High Court will not exercise its discretion and interfere with an order which can be tested in criminal proceedings.

(*A. M. A.*)

FOLLOWED: H. C. 147/42 (*ante*, p. 35).

ANNOTATIONS: See the notes to H. C. 147/42 (*supra*), especially the second and fifth paragraphs thereof, on *pp.* 36 & 37; the possibility of instituting criminal proceedings as an alternative remedy has also been pointed out in H. C. 104/41 (8, P. L. R. 593; 1941, S. C. J. 601; 10, Ct. L. R. 199).

(*H. K.*)

FOR PETITIONER: Eliash.

ORDER.

This is an application for an order *nisi* to be directed to the Custodian of Enemy Property, calling upon him to show cause why he should not be ordered to refrain from dealing with certain house-property in Tel-Aviv alleged to belong to the Petitioner.

It appears that the Custodian has obtained a vesting order in respect of this property on the ground that an equitable interest in the property is vested in a person or persons who is or are now enemies within the meaning of the Trading with the Enemy Ordinance. The Petitioner argues that this is wrong — that she cannot be turned out of this property because she is a Palestinian, and the legal estate is vested in her, subject to the admitted equitable right vested in the enemies.

In a case decided only the other day by Rose, J., the Labour Council of Tel-Aviv and Jaffa and others *v.* Otto May and others, (High Court 147/42), a very similar state of affairs was dealt with. In that case an Arbitration Board under the Defence (Trade Disputes) Order, 1942, had been appointed by His Excellency to deal with a dispute which had arisen between employers and employees in two factories in Tel-Aviv. Objection was sought to be taken in this Court that His Excellency had no power to issue such order for various technical reasons. It transpired that there was a criminal prosecution at the moment before the Chief Magistrate at Tel-Aviv, in which the employees were being prosecuted for taking part in an illegal strike. Rose, J., discharged the order *nisi* on the ground that the substantial issues raised in the objection would be decided in the course of the proceedings then pending before the Chief Magistrate, that the jurisdiction of this Court was purely discretionary, and that, in deciding whether the intervention of this Court was required for the proper administration of justice, one of the considerations to be taken into account was whether the normal channels of justice could reasonably and substantially dispose of the questions at issue between the parties.

Mr. Eliash informs us that his client can be criminally prosecuted if she does not obey the order of the Custodian. It seems to us that if the Custodian decides to prosecute the lady the same substantial issue could be raised by her in her defence to that prosecution — that the vesting order was invalid — for the reasons which she has advanced here. Whether that defence would be successful or not is, of course, a matter which we do not attempt to determine.

Following, therefore, the principle enunciated in High Court 147/42, we think that this order *nisi* should be refused.

Given this 13th day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 136/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Abraham Dov Katzberg. APPELLANT.

v.

1. Pinhas Wagman,
2. Leah Wagman. RESPONDENTS.

Parties to action — Action by co-owner for his share of rent — Receiver appointed subsequently to payment of rents not a party to proceedings.

Appeal from the judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 26th of February, 1943, in Civil Appeal No. 272/42, allowed, judgment of the District Court set aside and judgment of the Magistrate restored:—

Where a co-owner claims his share of rents received before the appointment of a receiver to collect rents, the receiver need not be made a party to the action.

(*A. M. A.*)

ANNOTATIONS: Receivers of mortgaged property are dealt with in the following cases: H. C. 15/39 (6, P. L. R. 168; 1939, S. C. J. 122; 5, Ct. L. R. 155; P. P. 7.iv.39) and H. C. 19/39 (6, P. L. R. 224; 1939, S. C. J. 200; 5, Ct. L. R. 185; P. P. 10.v.39) — *power to appoint (obsolete; see Land Transfer (Am.) Ord.*, 1939); C. A. 88/39 (6, P. L. R. 470; 1939, S. C. J. 408; 6, Ct. L. R. 129; P. P. 22.x.39) — *appointment an equitable remedy;* H. C. 1/40 (1940, S. C. J. 17) — *objection to appointment;* H. C. 16 & 17/41 (8, P. L. R. 155; 1941, S. C. J. 121; 9, Ct. L. R. 173); H. C. 32/41 (8, P. L. R. 163; 1941, S. C. J. 150; 9, Ct. L. R. 155; P. P. 25.v.41); H. C. 65/41 (8, P. L. R. 379; 1941, S. C. J. 405; 10, Ct. L. R. 221); H. C. 91/41 (8, P. L. R. 497; 1941, S. C. J. 445; 10, Ct. L. R. 179) and H. C. 56/42 (9, P. L. R. 352; 1942, S. C. J. 425; 12, Ct. L. R. 26) — *distribution of monies collected by receiver.*

(*H. K.*)

FOR APPELLANT: Caspi.

FOR RESPONDENTS: No. 1 — In person.
No. 2 — Kehaty.

JUDGMENT.

This is an appeal from the judgment given by the District Court, Tel-Aviv, reversing a judgment of the learned Magistrate. It is unnecessary to detail the facts, because the appeal depends upon a very

short point. The Magistrate found very largely in favour of the present Appellant and the District Court held that, except as regards that only point, there was nothing in the appeal itself. The main point was, that a receiver having been appointed, he should have been made a party to the action.

In this present action, however, money was paid to one of the co-owners of the house before the Receiver was appointed, his share of which the other co-owner is now claiming, and the receiver had no power to do anything in the matter of rents other than to collect rent due from someone other than a co-owner. As regards the rent, the money having been collected by one co-owner prior to the appointment of the receiver, the receiver was not concerned and certainly the co-owner was the proper party to this action.

The District Court, therefore, were wrong in the point which they took, and the appeal is, therefore, allowed, the judgment of the District Court quashed and the judgment of the Magistrate's Court is restored.

The Appellant is entitled to his costs here and in the District Court; as regards the District Court on the same scale as those awarded by that Court to the other party. Costs on this appeal to be on the lower scale to include the sum of LP. 10 on the hearing of this appeal.

Delivered this 20th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 73/43.

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

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

IN THE APPEAL OF :—

Mr. L. APPELLANT.

v.

Mrs. L. RESPONDENT.

Maintenance — Foreign law a question of fact — Amount of maintenance where husband possessed of means and not seeking employment — Liberty to apply.

Appeal from the judgment of the District Court of Haifa, dated the 8th of February, 1943, in Civil Case No. 241/42, dismissed, but judgment varied:—

Maintenance should approximate one third of the husband's income.

(*A. M. A.*)

ANNOTATIONS: The rule in C. A. 135/43 (*ante*, p. 213) fixing the amount payable as maintenance at one third of the husband's earnings is here applied to a case where the husband, although capabale of earning, does not seek employment. See generally annotations to C. A. 135/43 (*supra*).

(*H. K.*)

FOR APPELLANT: J. S. Shapiro and S. Friedman.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa, dated the 8th February, 1943, whereby the learned Relieving President made an order for maintenance payable by the Appellant to his wife, the Respondent. The parties are Polish subjects and evidence of the Polish law on the subject was before the District Court, and foreign law is a matter of fact to be proved as other matters of fact.

The learned Relieving President was satisfied on the evidence brought before him that there was a liability under the Polish law, the liability of a husband to support his wife, and we see no reason to disagree with his finding on that fact.

As regards the amount of the maintenance, the learned Relieving President ordered LP. 14 a month, which was the amount claimed in the statement of claim. As to the evidence of means of the Appellant, he has some 22 *dunums* of land at Affuleh and a factory, which, although it may not be working, he has made no effort to realize either this or the land. He apparently is being kept on living with another woman, and he refuses to live with or support his wife. He has made no effort to obtain employment. The amount of LP. 14 is assessed rather at an arbitrary figure, and we feel that there is not sufficient evidence to support an award of that amount. Although it is a matter of discretion, we feel that we can in this particular case review the amount which he has, as I have said, rather arbitrarily fixed.

Taking the facts as far as they are before us, although the husband is 49 years old we think that he would have no difficulty whatsoever in obtaining some employment, possibly at about LP. 18 a month, which, on the basis of the English procedure dealing with these matters, would justify us in varying the order of the Relieving President to one of LP. 6 a month. He has property, and that can be realized. He has sufficient means apparently to employ counsel to fight his case in the District Court and to enter an appeal, and although we do not take that into consideration, we feel that as the husband does possess property and should be able to obtain employment we should vary the amount ordered by the District Court to maintenance of LP. 6

a month, although such variation may also appear to be somewhat arbitrary. Afterwards, if circumstances change, either party may apply later that that amount be varied. We, therefore, dismiss the appeal but vary the order to that extent.

The appeal will be dismissed with costs to include LP. 10 advocate's attendance fee.

Delivered this 13th day of April, 1943.

Chief Justice.

CIVIL APPEAL No. 46/43.

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

BEFORE : Gordon Smith, C. J., Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Ahmad Snobar. APPELLANT.

v.

1. Rouben Abdul Wahab Kayali,
2. Director of Orphans,
3. Mukhtar Hafez Ghussein,
4. Execution Officer, Jaffa. RESPONDENTS.

Grove sold together with pump and motor therein — Subsequent attachment and sale through Execution Office of pump and motor — Voidness of purchaser's title.

Appeal from the judgment of the District Court, Jaffa, in its appellate capacity, C. A. 105/42, dismissed:—

Where it is found that land sold and transferred in Land Registry included movable property fixed on it, any subsequent seizure and sale through Execution Office of such property in satisfaction of debts due from transferor of land — void, and even an innocent purchaser cannot acquire a good title to it.

(*M. L.*)

ANNOTATIONS: Compare H. C. 34/38 (3, Ct. L. R. 235; 1938, 1 S. C. J. 306; P. P. 18.v.38) and C. A. 238/41 (9, P. L. R. 115; 1942, S. C. J. 134) and notes thereto.

(*A. G.*)

FOR APPELLANT: Atalla.

FOR RESPONDENTS: No. 1 — Elia.

JUDGMENT.

This is an appeal against the decision of the District Court, Jaffa, in its appellate capacity, dated the 14th December last in which judgment they have reversed a judgment of the Magistrate's Court, Jaffa, dated the 24th September, 1942. It was a question of whether a motor-pump in an orange grove which the Appellant had bought at an execution sale was part of the immovable property of the 3rd Respondent at the time the orange grove had been bought.

The short relevant facts are that the Appellant (before us) had bought on the 18th June, 1941, at an execution sale, a pump and other plant in an orange grove, which grove, pump and other plant had, by reason of a contract of sale dated the 15th April, 1941, between the 1st and 3rd Respondents, been transferred to the 1st Respondent in the Land Registry at Gaza, on the 19th of April, 1941. Attachment at the instance of the 2nd Respondent was made on the 21st of April, *i. e.* two days after the transfer to the 1st Respondent had been completed. The short point is whether the pump and machinery in the orange grove passed to the 1st Respondent in consequence of the transfer to him and, therefore, on the 21st of April was not the property of the 3rd Respondent who was the judgment debtor. The Magistrate found that the execution sale was in order and that the Appellant's title to the pump was good.

He was reversed in that respect by the District Court which quite clearly and emphatically stated that the transfer to the 1st Respondent of the land included the motor and pump.

The District Court held that at the time the motor and pump were seized under the attachment, the 3rd Respondent was not the owner thereof and that such seizure and subsequent sale were void *ab initio*.

We agree entirely with the District Court and although it may be that the Appellant may have been an innocent purchaser that does not affect the matter in this instance and we must dismiss the appeal with costs to include LP. 10 advocate's attendance fees.

Delivered this 5th day of April, 1943.

Chief Justice.

CIVIL APPEAL No. 97/43.

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

BEFORE : Copland, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Lutfi el-Sheikh Muhammad el-Sheikh Mustafa es-Sa'ad, *alias* Mustafa el-Khatib,
2. Nafi'a el-Sheikh Muhammad el-Sheikh Mustafa, *alias* Nafi'a el-Katib. APPELLANTS.

v.

Shaker Abdul Fattah Mahmoud, *alias* Samara & 6 ors. RESPONDENTS.

Prescription — C. A. 197/41 — Obscure findings of fact — No prescription without adverse possession — Admissions.

Appeal from the judgment of the Magistrate's Court of Tulkarm, sitting as a Land Court, dated the 11th of February, 1943, in Land Case No. 5/42, allowed and action remitted for hearing:—

A plea of prescription cannot succeed after counsel's admission that the Defendant was not in possession.

(*A. M. A.*)

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

ANNOTATIONS: C. A. 150/38 (1938, 2 S. C. J. 22; 6, Ct. L. R. 164) is to the same effect. Admissions by advocates are generally binding on their clients: C. A. 237/41 (8, P. L. R. 630; 1941, S. C. J. 606; 11, Ct. L. R. 124) and C. A. 33/42 (9, P. L. R. 378; 1942, S. C. J. 401; 12, Ct. L. R. 85). See, however, C. A. 197/41 (8, P. L. R. 499; 1941, S. C. J. 458; 10, Ct. L. R. 205) — not binding if counsel acted without authority, or if made in name of minors; *cf.* C. A. 208/41 (8, P. L. R. 539; 1941, S. C. J. 541; 10, Ct. L. R. 217) — not binding if merely made by way of argument.

(*H. K.*)

FOR APPELLANTS: El Yahya.

FOR RESPONDENTS: Jayyousi.

JUDGMENT.

Abdul Hadi, J.: This is an appeal from the judgment of the Magistrate's Court of Tulkarm, sitting as a Land Court, dated 11th February, 1943, whereby it dismissed Appellants' (Plaintiffs') claim against Respondents (Defendants) in which they asked for judgment

in respect of their share in properties and lands enumerated in the statement of claim.

In brief the Plaintiffs' claim is that they inherited from their mother, Sa'ada Bint Mahmoud el Khalil, known as Samara, 493 shares out of 5760 shares in the *mulk* property, and 85 shares out of 864 shares in the *miri* lands, in all the property and lands allotted to the heirs of their mother's testator, Mahmoud el Khalil, as per Exhibit C. under the heading, "Belonging to the son of Samara el Khalil, generally", the number of which is 28 pieces allotted to them as a result of the partition referred to in the statement of claim.

In his reply, dated 26th April, 1942, counsel for Defendants raised several objections to the statement of claim, and stated that his clients are not in possession of 19 pieces of land enumerated in that statement, which form part of the properties and lands claimed.

The Magistrate stated in his judgment the findings of facts he accepted, part of which he referred to in a brief manner in paragraphs 6 and 7, and concluded his finding by the following:—

> "Therefore this case centres around one point, that is the period of prescription."

Afterwards he cited several judgments of the Supreme Court, among which is Civil Appeal 197/41, and after quoting passages from that judgment he went on to say:—

> "In our case the Plaintiffs' mother got married and left her father's house for tens of years, without taking anything of the income or produce of the lands. The Defendants have been in possession of the lands for more than the period of prescription and were the reputed owners thereof and had sold part of these lands without objection by anyone."

In the result he dismissed the Plaintiffs' case.

Upon examining the grounds of appeal and listening to the arguments addressed to us by counsel for both parties, it appears to me that the appeal must be allowed as regards the nineteen pieces, for the following reasons:—

First, the findings of fact by the Magistrate, which appear in paragraph 6 of his judgment, concerning the lands in the possession of Defendants and the lands they sold, and those which appear in paragraph 7 dealing with lands which were included in the settlement operations. Such findings are obscure and ambiguous, because these properties and plots of land which were under the possession of Defendants and which were the subject of land settlement proceedings, were not defined in a proper manner so as to ascertain and limit their areas and boundaries.

Secondly, the Magistrate was wrong in dismissing the Plaintiffs'

case in respect of the nineteen pieces of the properties and lands, the names of which are set out by counsel for Defendants in his reply dated 26th April, 1942, on the ground that Defendants were in possession of these lands for a period exceeding that of prescription, since counsel for Defendants admitted in his reply that his clients were not in possession of these properties and lands.

I, therefore, allow the appeal and set aside the judgment of the Magistrate in so far as his decision on the point of prescription in respect of the nineteen pieces of land enumerated by counsel for Defendants in his reply dated 26th April, 1942, is concerned, and remit the case to him for retrial and to give a fresh judgment in respect of these lands, in the light of further pleadings and documents on the points raised.

Costs will be costs in the cause, and on the lower scale, and we certify the sum of LP. 10 for advocate's attendance fee on the hearing of the appeal.

Delivered this 27th day of May, 1943.

Puisne Judge.

Copland, J.: I concur.

British Puisne Judge.

Frumkin, J.: I concur.

Puisne Judge.

CIVIL APPEAL No. 249/42.

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

BEFORE: Gordon Smith, C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

Mishkenot, Aguda Shetufit Leshikun. APPELLANTS.

v.

Ohannes B. Krikorian. RESPONDENT.

Execution Law, art. 43 — *Construction — Time of residence within the meaning of the article.*

Appeal from a judgment of the District Court, Tel-Aviv, (appellate capacity), in Civil Appeal No. 98/42, whereby the Appellant's appeal was dismissed by reason of a disagreement between the judges. Appeal dismissed:—

Art. 43 of the Law of Execution (second part) applies only to persons residing at the time judgment is given or execution issued.

(*A. M. A.*)

ANNOTATIONS :

1. See C. A. 56/42 (9, P. L. R. 345; 1942, S. C. J. 329; 11, Ct. L. R. 217) for other proceedings in respect of the same land.

2. The interpretation of Art. 43 of the Execution Law has been the subject of several recent decisions: H. C. 48/41 (8, P. L. R. 298; 1941, S. C. J. 509; 11, Ct. L. R. 121), H. C. 26/42 (9, P. L. R. 217; 1942, S. C. J. 205; 11, Ct. L. R. 122) and H. C. 131 & 136/42 (1942, S. C. J. 947) — *failure to invoke provisions of the Article;* H. C. 59/41 (8, P. L. R. 353; 1941, S. C. J. 305; 10, Ct. L. R. 66) — *position of sub-tenants.*

(*H. K.*)

FOR APPELLANT: Olshan and Matussevitch.

FOR RESPONDENT: Elia.

JUDGMENT.

In this appeal a small point is involved which arises out of a disagreement of the two Judges of the District Court of Tel-Aviv as to the interpretation of Article 43 of the Law of Execution. In his judgment, Judge Korngruen has stated that the three requirements of the said Article are as follows: "(a) that the opposer to the execution proceedings should be one other than the judgment-debtor; (b) that the opposer should be in possession of the subject matter of execution proceedings independent of the principal debtor; (c) and that he should prove his action by documentary evidence", and that in his opinion the opposer, in this case, had proved these three elements, and he held that the appeal should be allowed. Judge Mani relied on the first part of Article "43" and which he cited, and went on to say "that it was proved that the said Appellants went into possession of the land a long time after the judgment for eviction in favour of the Respondent." I think that it would have been quite clear if Article "43" of the Law of Execution had stated that the time of residence was to have been at the date the place was to be vacated. The second part of Article "43" reads as follows: "If persons other than the judgment-debtor are residing in the place which is to be vacated and if they claim at the Execution Office that their possession is adverse to or independent of the judgment-debtor and that they have not borrowed or rented the said place from him and produce documents to support their claim, they shall be given sufficient time to apply to the Court to obtain an order for stay of execution and proceedings will follow the event of the suit." We understand this to mean, "residing at the place at the time it is to be vacated", *i. e.* at

the time the judgment has been given, or execution issued thereunder. The Appellants went into possession a long time after such judgment and have remained there in spite of all efforts to dislodge them but it is clear that they are not entitled to avail themselves of the provisions of this Article as they are not within the class of persons described therein and to whom protection is afforded.

For these reasons the appeal must be dismissed with costs and LP. 10 advocate's fees.

Delivered this 21st day of January, 1943.

Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 6/43.
(CIVIL APPEAL No. 233/42).

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Salim Ahmad Pasha Ash-Sham'a and 44 others, whose names are set out in the application for leave to appeal. APPELLANTS.

v.

Shafiq Abdul Ghani Baydoun and 43 others, whose names are set out in the application for leave to appeal. RESPONDENT.

Privy Council — Application for leave to appeal — Judgment not final.

Application for conditional leave to appeal to His Majesty in Council from the judgment of the Supreme Court of Palestine, sitting as a Court of Civil Appeal, dated 16th of March, 1943, in Civil Appeal No. 233/42, refused:—

Appeals to the Privy Council will not be allowed save from final judgments.

(*A. M. A.*)

ANNOTATIONS: The decision in this case is in accordance with P. C. L. A. 4/35 (2, P. L. R. 423; C. of J. 1934—6, 688; P. P. 2.xii.35), P. C. L. A. 15/38 (1939, S. C. J. 21; 5, Ct. L. R. 10; P. P. 20.i.39) and P. C. L. A. 6/41 (1941, S. C. J. 171; 9, Ct. L. R. 159). Note, however, that in the case of Abdul Hamid heirs *v.* Government of Palestine special leave to appeal from a remitting judgment was granted by the Judicial Committee: see P. C. 21/40 (8, P. L. R. 181; 1941, S. C. J. 334).

(*H. K.*)

FOR APPLICANTS: Moghannam and Khadra.
FOR RESPONDENTS: No. 1 — Abcarius.
Rest — Absent — served.

ORDER.

The application must be refused, as the judgment which it is sought to appeal is not a final one. It is eminently desirable that the Settlement Officer should hear the further evidence, if such is tendered, and make the further findings of fact called for by the judgment of this Court at the earliest possible moment. LP. 5 inclusive costs to the Respondents for this motion.

Given this 31st day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 243/42.

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

BEFORE: Gordon Smith, C. J.

IN THE APPEAL OF :—

Helena Leibovitz. APPELLANT.

v.

Jacob Leibovitz. RESPONDENT.

Administration — Appointment of administrator over estate of deceased — Will under Sec. 12 Succession Ordinance — C. P. R. 3 — C. P. R. applicable to appeals in succession matters — "Order" or "decree" C. P. R. 317 — C. P. R. 2, C. A. 243/38, C. A. 161/38, C. A. 99/41, C. A. 165/42, C. A. 234/41, C. A. 86/40 — Succession Rules, 16 & 18 — Appeal by leave from orders — Succession Rules 7(1), C. A. 131/42.

Appeal from an order of administration, given by the District Court, Tel-Aviv, in Probate File No. 217/42, dismissed:—

An order of administration is not appealable without leave.

REFERRED TO: C. A. 161/38 (5, P. L. R. 408; 1938, 2 S. C. J. 27; 4, Ct. L. R. 75); C. A. 243/38 (*interlocutory ruling* — 6, P. L. R. 47); C. A. 86/40 (7, P. L. R. 280; 1940, S. C. J. 164; 7, Ct. L. R. 193); C. A. 99/41 (8, P. L. R. 269; 1941, S. C. J. 297; 10, Ct. L. R. 38); C. A. 234/41 (8,

P. L. R. 587; 1941, S. C. J. 545; 11, Ct. L. R. 59); C. A. 131/42 (1942, S. C. J. 728); C. A. 165/42 (1942, S. C. J. 828; 12, Ct. L. R. 177).

(*A. M. A.*)

ANNOTATIONS:

1. Authorities on the meaning of the term "decree" are collated in note 2 to C. A. 279/42 (*ante*, p. 88).

2. It has already been held in C. A. 172/41 (8, P. L. R. 436; 1941, S. C. J. 568; 10, Ct. L. R. 233) that "whilst the (Civil Procedure) Rules do not apply to (succession) proceedings of the District Court, there is nothing to prevent them from applying to proceedings in an appeal."

3. On wills of Palestinian Jews see C. A. 23 & 33/43 (*ante*, p. 60) and notes thereto.

(*H. K.*)

FOR APPELLANT: Eliash.

FOR RESPONDENT: Adlerstein.

JUDGMENT.

This was an appeal against a decision of the District Court, Tel-Aviv, dated the 2nd October, 1942, granting the prayer of the Respondent in a petition for administration of the estate of the deceased.

The Respondent is the eldest son and the Appellant is the widow of the deceased, having married him as his second wife about twelve years ago. The deceased was a Palestinian subject and a member of the Jewish Community. He died on the 22nd July, 1942, at Tel-Aviv, leaving movable and immovable property.

In his petition the Respondent stated the necessary facts and also that the deceased died "without having left dispositions by last will as to the distribution of his estate."

The Appellant filed a notice of opposition, and apart from making various allegations as to the proper procedure not having been complied with and of conflicting interests, produced a will which *prima facie* appears to be in order and to comply with the requisites of Section 12 of the Succession Ordinance, Cap. 135. No executors were named in this will. The opposition notice prayed that the application be postponed for two years or until publication of citations in New York and Zurich, and alternatively to appoint the Appellant as administratrix and to confirm the will.

On the hearing of the petition by the District Court, the learned President made an "Order" in the following terms:—

> "I see no reason for refusing this application; in fact, under the circumstances, there is every reason why this applicant should be appointed especially since all his brothers, the other heirs, are absent from Palestine. It is not suggested that Applicant is not a proper person.

Order as prayed.
Regarding will, Rule 5 of Succession Rules has not been complied with; there will be no order at present regarding this will."

This order is now the subject-matter of this appeal. As several technical matters of some interest were raised, I will deal with these first.

The proviso to Rule 3 of the Civil Procedure Rules expressly excludes the application of those rules to proceedings brought in the District Court under the Succession Ordinance. The rules applicable are the Succession Rules, 1923, to be found in Drayton, Vol. III, at page 2381. It does not follow however that the Civil Procedure Rules are not applicable to and must be observed in regard to an appeal from a decision of the District Court, which is not a proceeding in the District Court. The first point is, therefore, whether the decision of the District Court is an order or a decree.

If it is an order, then under the second paragraph of Rule 317, Civil Procedure Rules, the leave of the District Court or a Judge thereof or of the Supreme Court is necessary, and the notice of appeal must be lodged within 15 days of the order granting such leave.

Both "order" and "decree" are defined in Rule 2 of the Civil Procedure Rules, and the point is whether the decision "conclusively determines the rights of the parties to all or any of the matters in controversy in the action and may be either preliminary or final."

Various cases were cited on this point.

Civil Appeal 243/1938, P. L. R. 1939, page 47, was in respect of an order made in the winding up of a company which, so it was held, finally determined the rights of the parties and thus leave to appeal under Rule 317 was not necessary.

Civil Appeal 161/1938, P. L. R. 1938, page 408, decides the point in the same way, whether the decision was called interlocutory judgment or otherwise. In this case the order was dismissing a defendant from an action.

Civil Appeal 99/41, P. L. R. 1941 (July), page 269, decided that there was no appeal from an order for directions under Section 18 of the Succession Ordinance and that the Civil Procedure Rules did not apply.

Civil Appeal 165/42, not yet reported, was altogether a peculiar case and of exceptional circumstances, and is not applicable to the present facts.

Civil Appeal 234/1941 (December), page 587, was an arbitration case and was in respect of an order (called judgment) to set aside part of an award, and it was held, after reviewing previous similar

arbitration cases, that leave to appeal was necessary under Rule 317.

Civil Appeal 86/40, P. L. R. 1940 (June), page 280, refers to and follows Civil Appeal 243/38 (*supra*).

I do not think it can be said that a mere order for administration of an estate, finally and conclusively determines the rights of parties, particularly as under Rule 16 of the Succession Rules provision is made for revocation of an order of administration. This, of course, would be by petition to the District Court and these rules themselves appear to envisage that an order for administration does not finally and conclusively determine the rights of the parties. Similarly, the order itself appears to express the same view, as, as regards the will, it states, "there will be no order *at present* regarding this will."

For these reasons I think the objection is well founded and that leave was, therefore, necessary, and this appeal must be dismissed.

It is unnecessary, therefore, to go into any other question raised in argument, but I would observe that as regards this will and the fact that the deceased was a Palestinian subject and a member of the Jewish Community, there has been a recent decision of this Court in regard to Section 7(1) of the Succession Ordinance and other relevant provisions, namely Civil Appeal 131/42, reported in Apelbom, 30/33/42, which is of importance and interest in this respect.

The appeal is dismissed with costs to include LP. 10 advocate's fee.

Delivered this 18th day of January, 1943.

Chief Justice.

HIGH COURT No. 42/43.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Abdul Hadi Saleh El-Tayeh. PETITIONER.

v.

1. The Chief Execution Officer, Magistrate's Court, Jaffa,
2. Zuhdi Abul-Gibein & 13 ors. RESPONDENTS.

Partition of immovable property — Law of Partition, Art. 9 — Partition to be effected by Magistrate and not by C. E. O. — Judicial and

administrative acts — H. C. 36/40 — C. E. O. may only carry out eviction where necessary — H. C. 19/39, practice and convenience cannot alter the law.

Return to an order *nisi* issued on 14.4.1943, directed to the Respondents, calling upon them to show cause why the first Respondent's order, dated 19.3.43, in Execution file No. 5389/35 (Jaffa) should not be set aside and all proceedings therein stayed or to show cause why first Respondent should not order the sale of second Respondent's share among the co-sharers and generally apply the provisions of the Law of Partition of Joint Immovable Property; order made absolute:—

The partition of immovable property should be carried out by the Magistrate and not by the Chief Execution Officer.

(*A. M. A.*)

FOLLOWED: H. C. 36/40 (7, P. L. R. 269; 1940, S. C. J. 410; 7, Ct. L. R. 195); H. C. 19/39 (6, P. L. R. 224; 1939, S. C. J. 200; 5, Ct. L. R. 185; P. P. 10.v.39).

ANNOTATIONS: See the annotations to H. C. 36/40 (*supra*) in 1940, S. C. J. on p. 411, as to the correct translation of Article 9 of the Law of Partition.

(*H. K.*)

FOR PETITIONER: Beiruti.

FOR RESPONDENTS: No. 1 — Absent — served.
Nos. 2 & 15 — Eliash.
Rest — Absent — served.

ORDER.

This is a return to an order *nisi* calling upon the Chief Execution Officer of the Magistrate's Court, Jaffa, and others to show cause why they should not apply the provisions of the Law of Partition of Joint Immovable Property, and why the proceedings in execution should not be set aside or stayed.

The main ground advanced by the Petitioner is that, under the Law of Partition of Joint Immovable Property of 1329, in all the complicated steps which are necessary to be taken proceedings must be taken by the Magistrate himself, and it is not sufficient for a Magistrate to order the sale of jointly owned property and then to leave the conduct of the actual sale to the Chief Execution Officer.

One must, I think, disregard the fact that the Magistrate has, under the procedure in this country, two capacities, one a judicial capacity as a Magistrate, and the other an administrative capacity as a Chief Execution Officer. It is quite clear to our minds that all the various acts to be done in partition proceedings according to the Ottoman Law are judicial acts, and they must, therefore, be performed by a judicial officer and not by an administrative officer.

All the various orders in this case seem to have been made by Chief Execution Officers of the Magistrate's Court and for that reason alone they are illegal. This Court laid down in H. C. 36/40, Tovia Z. Miller *v.* Registrar of Lands, Jaffa, (7, P. L. R. 269), that under Article 9 of the Ottoman Law above-mentioned, all the duties in connection with partition proceedings are given by law to the Magistrate and not to the Execution Officer, the sole exception being if eviction should be necessary, when the Execution Officer is called in to operate. It may be, and it is probably true, that among partition proceedings, perhaps the larger number of partitions have in fact been carried out by the Magistrate acting in his capacity as Chief Execution Officer, but as this Court said in H. C. 19/39 practice and convenience cannot alter the law, and if the law lays down one system of proceedings, practice, even if more convenient than the law, when challenged, cannot over-ride the provisions of the law.

It is not necessary to deal with the other points raised in the petition. For these reasons we think that the Rule *Nisi* must be made absolute. The Petitioner is entitled to his costs consisting of disbursements and a sum of LP. 10.— advocate's attendance fee to be paid by the 2nd and 15th Respondents.

Given this 6th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 203/42.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

Dr. Jamil Taqtaq and 8 ors. — APPELLANTS.

v.

Shaker Ragheb Johari and 9 ors. — RESPONDENTS.

Appeals — Failure to cite all the parties as Appellants or Respondents, C. P. R. 313 — C. A. 118/42 — C. P. R. 333, "good cause" for delay — Joinder of parties.

Appeal from a judgment of the Land Court, Nablus, in Land Case No. 2/41, dismissed:—

1. All original parties to an action should be cited on appeal, either as appellants or as respondents.

2. Mere forgetfulness is not good cause for the exercise of the Court's discretion under rule 333.

3. Separate appeals should be lodged where there is no connection between the appellants save that each is claiming against the same person.

(*A. M. A.*)

FOLLOWED: C. A. 118/42 (1942, S. C. J. 646; 12, Ct. L. R. 133).

ANNOTATIONS:

1. For other instances of an appeal being dismissed on account of Appellant's failure to cite all parties as Respondents see the cases followed in, or cited in annotations to C. A. 118/42 (*supra*).

2. The Court of Appeal usually refuses to exercise its powers under Rule 333 of the C. P. R.; see, *e. g.*, C. A. 89/40 (7, P. L. R. 258; 1940, S. C. J. 152; 8, Ct. L. R. 150); C. A. 37/41 (8, P. L. R. 136; 1941, S. C. J. 158; 9, Ct. L. R. 158); C. A. 69/41 (8, P. L. R. 228; 1941, S. C. J. 227; 10, Ct. L. R. 35); C. A. 234/41 (8, P. L. R. 587; 1941, S. C. J. 545; 11, Ct. L. R. 59); C. A. 224/41 (9, P. L. R. 58; 1942, S. C. J. 77; 11, Ct. L. R. 34); C. A. 147/42 (1942, S. C. J. 945); *cf.* also C. A. 44/40 (7, P. L. R. 372; 1940, S. C. J. 448; 8, Ct. L. R. 193). The only case during the last years wherein the Court was satisfied that good cause had been shown seems to be C. A. 107/39 (6, P. L. R. 555; 1939, S. C. J. 482; 6, Ct. L. R. 199); see also C. A. 133/43 (*ante*, p. 182).

(*H. K.*)

FOR APPELLANTS: Nazzal.

FOR RESPONDENTS: W. Salah and Nakhleh.

JUDGMENT.

On this appeal from a judgment of the learned President sitting in the Nablus Land Court, two preliminary objections have been taken by Walid Eff. Salah and Issa. Eff Nakhleh appearing for the Respondents, that there is no proper appeal before this Court.

The first point is that under Rule 313 all parties to the original action must be joined either as Appellants or Respondents on the appeal, and that Defendant No. 5, Hamed Muhammad Hannoun, has not been so joined.

The second objection is that there should be a series of separate appeals inasmuch as the Defendants to the original action, some of whom are now Appellants, were all claiming individually separate plots of land and independently of one another but all, in fact, against the same Plaintiff.

Dealing with the first point I think that it must succeed. There is a long line of authorities, the last one of which is Civil Appeal No. 118/42, which lays down quite clearly that this rule, technical though it may be in a sense, must be applied strictly and that if a party to the original action is not joined, that is fatal to the appeal. This fifth Defendant, Hamed Muhammad Hannoun, has not been joined, as I

have said, and for that reason there is no proper appeal before this Court. I have been asked to apply Rule 333 which allows a Court to give time to fulfil a condition precedent to the hearing of an appeal on good cause shown. I do not quite know what the good cause shown in this case is, but it seems to be the suggestion that this fifth Defendant is not really interested in the appeal and that having admitted the Plaintiff's claim, he is no further interested in the proceedings. The same reason might with almost equal justice be applied to several others of the original Defendants. It seems to me that the omission of this name is really due to forgetfulness and could, and should, easily have been checked by the person responsible for drafting the appeal, by merely comparing the original names, which number 20 altogether, and adding them up seeing if you have got the correct number on the statement of appeal. I am of opinion, therefore, that good cause has not been shown and on that ground alone this appeal would have to be dismissed.

The second point is one which I think should also succeed. It is true that in the original proceedings the Plaintiff claimed, against 19 Defendants, shares in undivided land. The Plaintiff relied upon three title deeds under which he purchased certain shares, and the Defendants relied on exclusive adverse possession by themselves. It may quite possibly be that the Plaintiff should have claimed separately in separate actions against each of these 19 Defendants. That, however, I do not decide, but when it comes to the appeal the Appellants, who were some of the original Defendants before the learned Judge, each claimed an individual share as his personal share. It seems to me 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.

For both these reasons, therefore, I think that this appeal must fail and it is, therefore, dismissed.

With regard to costs I think the best thing to do will be to give inclusive costs and I, therefore, award LP. 10 total costs each to Respondent No. 1 and to Respondents 2—4 inclusive. No costs to any other of the Respondents.

Delivered this 12th day of January, 1943.

British Puisne Judge.

CIVIL APPEAL No. 95/43.

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

BEFORE : Copland and Edwards, JJ.

IN THE APPEAL OF :—

The Mukhtar and certain members of the Village Settlement Committee of Daburiya and 121 others. APPELLANTS.

v.

The Bishop for the time being in trust for the Catholic (Melkite) Community for the Diocese of Acre, Haifa, Nazareth and all Galilee and 62 others. RESPONDENTS.

Appeals — Service of process not effected on all Respondents — Adjournments — Time to object — Nominal Respondents — Application should be made to dispense with service — Forgetfulness or carelessness are not "good cause" within rule 333 — C. P. R. apply to land settlement appeals, L. S. O., sec. 63(2), 64(1) — Persons appearing both as Appellants and as Respondents need not be served — Notice of deposit, amount of deposit — Error of registry — Quaere whether failure by the Registry to serve document fatal to Appellant's case.

Appeal from the decision of the Land Settlement Officer, Nazareth Settlement Area, dated the 14th day of December, 1942, in Case No. 1/Dabburyia, dismissed:—

1. All Respondents to an appeal should be served unless the Court, on application, dispensed with service on any of them.
2. This does not apply to Respondents who also appeal as Appellants. Such parties need not be served.
3. Forgetfulness and carelessness are not good causes on which the Court will allow time to comply with the rules.
4. The Civil Procedure Rules apply to appeals in land settlement cases.

(*A. M. A.*)

ANNOTATIONS :

1. For previous proceedings in this case see C. A. 135/41 (8, P. L. R. 509; 1941, S. C. J. 526; 10, Ct. L. R. 183).

2. On the first and third points see C. A. 203/42 (*ante*, p. 259) and note 2.

3. It was held in C. A. 147/42 (1942, S. C. J. 945) that "I do not think that an advocate can appear both for an Appellant and a Respondent."

4. On the last point *cf.* C. A. 243/42 (*ante*, p. 254) and note 2 — *applicability of C. P. R. to appeals in succession matters.*

(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENTS: No. 1 — Abcarius.
Nos. 2—29, 51 — Shukairi.
Nos. 44—50 — Bustani.
Rest — Not served or represented.

JUDGMENT.

At the opening of this appeal application was made by Mr. Cattan, appearing for the Appellants, for an adjournment on the ground that he had only lately been instructed, and that his principal, Awni Bey Abdul Hadi, was ill and unable to appear, and he had not been able, therefore, to obtain proper instructions. There were, however, certain preliminary objections raised by the Respondents as to the hearing of the appeal, all of which could not in any way depend upon instructions received, or to be received, by Mr. Cattan. The Court, therefore, decided to hear the preliminary objections in the first place, and we intimated that, if those preliminary objections failed, then we would have probably granted an adjournment.

The preliminary objections taken by the Respondents are that out of the sixty-three Respondents some eleven have not been served. The notices of appeal, as filed by the advocate then representing the Appellants, have at the end a list of the Appellants and also a list of the Respondents. The sixty-three Respondents are listed on one side of the page and opposite their names in the middle of the page is this phrase: "represented by Abcarius Bey and Ahmad Eff. Shukeiri and Wadi' Eff. Bustani, advocates". The Appellant paid three sets of service fees only and those three advocates were consequently served with the notices of appeal, grounds of appeal and in most cases with the other documents required by the rules to be served. The objection has been taken that in particular Respondents 54—63 who are the heirs of Fuad Sa'd, are not represented by any of these three advocates, as purported to be stated in the notice of appeal, and in fact it is not now disputed that these particular persons are not represented by either of these three advocates. It has been held by this Court on several occasions that where Respondents who should have been served are not served then that is fatal to the hearing of the appeal, at any rate, when the objection is taken on the hearing of the appeal itself, and no application has been made to remedy the defect if discovered earlier by the Appellants. It has been suggested to us by Mr. Cattan that the Sa'ds are really only nominal Respondents, that they are the nominees for the late Bishop Hajjar, that the share

which they have has eventually to be transferred to the Bishop's estate and that, therefore, there is no necessity to regard them as effective Respondents. The answer to that of course is that if they are only formal Respondents, application should have been made to dispense with service on them, and this Court has dispensed with service in several such cases.

It has also been argued that the advocate who represented the Sa'ds in settlement proceedings and also in the first appeal to this Court, Mr. Koussa, was not served because it was thought that the other advocates were also representing the Sa'ds. How such a belief could have arisen is very difficult to understand, because in the first appeal to this Court Mr. Koussa represented the heirs of Fuad Sa'd and also all through the settlement proceedings in both hearings, and certainly in the second series of hearings before the settlement officer, Mr. Koussa was present, representing these persons. We have been asked to apply rule 333 which gives a discretion to this Court to allow time to comply with any condition precedent but we have held again and again that forgetfulness and carelessness are not good causes on which this Court would exercise its discretion and allow further time.

The second point taken by Mr. Cattan is certainly a novel one and it is this, that Section 63, subsection (2) of the Land (Settlement of Title) Ordinance only required the Appellant to file grounds of appeal, furnish security and pay the fees within 30 days from the notification that leave has been granted, and that an Appellant is not under any compulsion to comply with the other provisions in the Civil Procedure Rules relating to the hearing of appeals.

Section 64 subsection (1) of the Land (Settlement of Title) Ordinance provides that the Civil Procedure Rules, 1938, should apply for the hearing and determination of an appeal in settlement cases. If Mr. Cattan's argument were correct if would mean, as pointed out by my brother, that there would be no necessity to serve any of the Respondents before the hearing with the grounds of appeal or the other documents required by the Civil Procedure Rules, and that construction is obviously one which could not be supported for one moment. It seems to me very far from being a technical fault when the matter goes to the whole root of the appeal. It is essential that all the parties to the appeal should be summoned to appear before the Court, unless leave has been obtained to dispense with service for any reason.

Two other points have been taken, one that certain Respondents are also Appellants and are not represented by any of the three advocates named on the notice of appeal and there is no proof that they

were served as Respondents. That is a point which perhaps might be correct, but I very much doubt myself whether if, when persons are appearing both as Appellants and Respondents, it is necessary for them, as Appellants, to serve themselves as Respondents, if they are represented by the same advocate both in their capacity as Appellants and in that as Respondents. That, at any rate, is primarily a matter which concerns themselves and themselves alone.

The last point, one taken by Abcarius Bey, was that he has not in fact been served with the notice as required by the rules that the deposit ordered has been paid and he says that if he had been so served he would have certainly objected to the fact that only LP. 20.— were allowed where there are in fact three advocates engaged on behalf of the Respondents who are represented in groups. The other two advocates apparently have been served with this notice of the payment of deposit and it would seem that there may be some error on the part of the registry in not serving Abcarius Bey and it is not a matter on which we would wish to decide this present appeal.

The preliminary point as to the non-service of the heirs of Fuad Sa'd is one which, however regrettable it may be, must succeed and the appeal, therefore, is dismissed.

It is only fair to say that Mr. Cattan can in no way be held responsible for this result because he never filed the notice of appeal. He was not responsible for any of the earlier proceedings, and in fact was only brought into the proceedings on appeal at a very late date, just before this appeal was first listed for hearing. He is in no way responsible for what has occurred, and the Court wishes to make this point clear, so that nobody should be under any misapprehension on this point. Awni Bey Abdul Hadi also was only brought in for the hearing of the appeal at a very late stage and no responsibility can attach to him.

As I have said the appeal must be dismissed; the Respondents are entitled to their costs on the lower scale to include the sum of LP. 10.— advocate's attendance fee to each of the three advocates representing each group.

Delivered this 19th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 237/42.

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

BEFORE : Rose, J.

IN THE APPEAL OF :—

Tahir Said Muhammad Et Tabari & 9 ors. APPELLANTS.

v.

The Government of Palestine. RESPONDENT.

Land Settlement — Inspection of land by L. S. Officer.

Appeal from the decision of the Settlement Officer, Tiberias Settlement Area, dated 7.8.42, in Case No. 1/El Manara, dismissed:—

A settlement officer may rely on his own observation of the land, in addition to the evidence.

(*A. M. A.*)

ANNOTATIONS: On a question of cultivation the result of an inspection by the Settlement Officer is evidence as to the present state of cultivation only — C. A. 122/41 (8, P. L. R. 448; 1941, S. C. J. 421).

The principles guiding the Court of Appeal in respect of findings of fact made by a lower Court have been set out clearly, following English law, in C. A. 241/38 (6, P. L. R. 95; 1939, S. C. J. 62; 5, Ct. L. R. 128; P. P. 23.iii.39); they have been re-stated, *e. g.*, in C. A. 36/41 (1941, S. C. J. 142; 10, Ct. L. R. 53), in C. A. 110/42 (1942, S. C. J. 481; 12, Ct. L. R. 73) and, again following English authorities, in C. A. 93/42 (1942, S. C. J. 908; 12, Ct. L. R. 240). For a recent case where the trial Court's findings of fact where upset as being against the weight of evidence, see C. A. 287/42 (*ante*, p. 225) and note 4.

(*H. K.*)

FOR APPELLANTS: Abcarius.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal from a decision of the Settlement Officer of the Tiberias Settlement Area.

It appears that the Appellants, in the course of various proceedings before the Settlement Officer, laid claim to land in two neighbouring blocks — blocks 15346 and 15345.

It is true that the decision of the Settlement Officer in this case is short but it is, in my opinion, clear that he took the view that the Plaintiffs' *kushans* — one for 101 *dunums* and one for 420 *dunums* — related to land in block 15345. In the result he appears to have

awarded the Appellants the whole of that block which amounts, according to paragraph 3 of a document which he drew up when he refused leave to appeal and which was referred to in the course of argument by counsel for the Appellants, to no less than 3800 *dunums*. Whether or not the Settlement Officer was right in holding that those two *kushans* related to that particular block seems to me to be eminently a question of fact with which it is idle to ask this Court to interfere.

We then come to the neighbouring block — block 15346. With regard to that, it appears that before the Settlement Officer the Appellants, in addition to the two *kushans,* put in a tax receipt which is now before me and from which it would appear that they paid taxes in respect of this block 15346 on an area of 368 *dunums*. In fact, the Settlement Officer appears to have adopted round figures, and awarded them 370 *dunums* in the vicinity of Khirbet El Manara from parcel 1 in block 15346. It seems to me that that decision also is a matter with which I should not interfere and I would go further and say that in any event I am inclined to the view that on the merits the Appellants have been not ungenerously treated.

With regard to these findings of fact of the Settlement Officer, the Appellant complains that the Settlement Officer relied on his own inspection rather than on evidence. Theoretically, no doubt, this may be a good ground of objection, but in practice, in these land cases, it is not unusual for Settlement Officers to rely, in part at least, on their own observation and it has not been the practice of this Court to interfere in such cases on this ground.

There is one matter that has been referred to and which, on the face of it, might perhaps appear to be a little harsh, and that is that somewhere on this block 15346 there is a building or barn which, admittedly, has been put up by the Appellants. The Settlement Officer describes the building as "rough stone without mortar, with no windows, and with a northern wall falling down. It is uninhabitable." He adds that, in his opinion, its presence would not seem to be sufficient to convey title to some 800 *dunums* of land; and I respectfully agree.

Mr. Hogan states on behalf of Government that he has no objection to the Appellants removing this building and any attendant materials. Tó remove any possible feeling of grievance, I make a note here that Mr. Hogan has made this offer on behalf of Government; and I am quite sure that the Appellants may rely on Government permitting them to remove this building and any materials lying round about it.

For these reasons the appeal must be dismissed and the decision of the Settlement Officer confirmed.

The Respondent will have his costs on the lower scale to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 16th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 98/43.

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

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

IN THE APPEAL OF :—

Zeev Prussak. APPELLANT.

v.

Reuven Ben Yehoshua. RESPONDENT.

Counterclaims — Judgment on counterclaim for failure to file a defence thereto — Notice of motion — Presence of parties — Amount of counterclaim smaller than LP. 250 — District Court has jurisdiction where main claim properly before it — Quaere whether counterclaim possible if within exclusive jurisdiction of another Court — Time to reply to counterclaim, rules 82, 100 (3), 135.

Appeal from the judgment of the District Court of Jerusalem, dated 9th February, 1943, in Civil Case No. 150/40, dismissed:—

1. Judgment was given on a counterclaim, upon verbal application not supported by notice of motion.
2. A counterclaim for an amount of less than LP. 250 may be entertained by the District Court.
3. The time to file a reply to a counterclaim is fifteen days.

(*A. M. A.*)

ANNOTATIONS: It was held in C. A. 97/38 (5, P. L. R. 391); 1938, 2 S. C. J. 17; 4, Ct. L. R. 101) that counterclaims should, as far as possible, be determined together with the main claim.

Cf., on the jurisdiction of Magistrates as to counterclaims, C. A. 50/39 (6, P. L. R. 368; 1939, S. C. J. 303; 6, Ct. L. R. 217).

(*H. K.*)

FOR APPELLANT: Shereshewsky.

FOR RESPONDENT: Caspi and Even-Tov.

JUDGMENT.

We do not need to hear you Mr. Caspi.

This is an appeal against a judgment of the District Court, Jerusalem, dated the 9th February, 1943, wherein the learned Relieving President gave judgment for the Defendant on a counterclaim for LP. 200 against the Plaintiff on the ground that there had been no reply filed to that counterclaim.

The grounds of appeal are in fact three. The first ground which was not raised before the District Court was that the District Court had no jurisdiction to entertain the counterclaim. The second ground was that the District Court could not have given judgment *ex parte* for failure to reply and a further ground was that the rules contained no period within which to file a reply to a counterclaim.

The proceedings were somewhat protracted and came before the District Court on more than one occasion and the matter was adjourned until finally it came before the District Court on the 8th of February this year and at that hearing it was argued that there was no motion before the Court, because no notice had been given. The learned President found that such objection was highly artificial and that the Plaintiff who was Defendant to the counterclaim was before the Court and in fact had agreed before the Court that the matter should proceed. The question of jurisdiction is based on Article 40 of the Palestine Order-in-Council, which states that a District Court shall have jurisdiction as a Court of first instance and says, in paragraph (a), in all civil matters not within the jurisdiction of the Magistrate's Court in and for that district. This matter was commenced by the Plaintiff filing an action for an account and for whatever might be found due to him up to a sum limited to LP. 500. A defence and counterclaim was entered, the counterclaim being for LP. 200. Although it is stated in the counterclaim that the accounts were in the hands of the Plaintiff and although the Defendant's counterclaim was for LP. 200, there is a sort of postscript in which the Defendant stated that he was not able exactly to determine the amount due to him for the reason set out in the counterclaim. The learned President found that the counterclaim was for a specific sum of LP. 200 and gave judgment for that amount on the counterclaim, although it might have been that, on the taking of accounts, a larger sum than LP. 200 might have been found to be due but he held that the Defendant was limited to the amount which he specifically set out as claimed in the counterclaim.

On the question of jurisdiction the argument was that those words

in the Order-in-Council which I have quoted, exclude the District Court from entertaining a counterclaim where the amount of that counterclaim would, as a separate action, have been within the jurisdiction of the Magistrate's Court. The jurisdiction conferred in the substantive action was within the jurisdiction of the District Court and we are not prepared to hold that because a Defendant claims a sum which is within the jurisdiction of a Magistrate's Court, the District Court is thereby prohibited or restricted from hearing that counterclaim together with the claim. The greater includes the less and as I have said the substantive claim by the Plaintiff was within the jurisdiction of the District Court. The object of these rules in enabling a counterclaim to be made irrespective of what the nature of the substantive claim may be, is to avoid extra expense, delay, inconvenience and costs and enable the Defendant to cross claim, if he has any claim against the Plaintiff. I am not saying that where some exclusive jurisdiction is conferred on any other Court, for instance a Land Court, then a defendant could counterclaim before a District Court and put forward a claim which is within the exclusive jurisdiction of that other Court. We have had no authority quoted from the English procedure which is comparable with this case, and I have never heard of any case in the High Court in England where there has been a counterclaim which, if brought as a separate action would be within the jurisdiction of a County Court, has been struck out by the High Court because it had no jurisdiction to hear such counterclaim.

The third ground of appeal is on the rules that no time limit is fixed for filing a reply to the counterclaim but it is quite clear, in our opinion, that under rule 135 (which deals with failure to plead to a counterclaim by reference to other rules dealing with the filing of a defence) the time of filing a reply to a counterclaim is fifteen days unless the Court has otherwise ordered. The rules referred to are Rule 100(3) and Rule 82. Therefore we find that this appeal is without any merits and it will be dismissed with costs to include LP. 10 advocate's attendance fee.

Delivered this 5th day of May, 1943.

Chief Justice.

CIVIL APPEAL No. 92/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

Suleiman Abu Ghazaleh. APPELLANT.

v.

Schechunat Zrifim "Maccabi", Cooperative Society Ltd., Jaffa. RESPONDENT.

Partition — Date from which partition takes effect, whether from date of judgment or of registration at Land Registry — Rental — "Disposition", L. T. O., Sec. 2 — H. C. 42/43 — Whether adjustment payments condition to partition taking effect.

Appeal from the judgment of the District Court of Jaffa, dated the 19th day of February, 1943, in Civil Case No. 10/42, allowed and case remitted with directions:—

A judgment for partition takes effect from the date of the delivery of the judgment.

(*A. M. A.*)

FOLLOWED: H. C. 42/43 (*ante*, p. 257).

ANNOTATIONS: *Cf.* H. C. 55/41 (8, P. L. R. 327; 1941, S. C. J. 328; 10, Ct. L. R. 63) — *date of coming into force of Palestinian Citizenship (Am.) Order*, 1939.

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Bental.

JUDGMENT.

In this case, both before the District Court and also on appeal to this Court, all the facts have been agreed, and the sole point for decision is one of law, which, though it can be stated in simple terms, is one which has caused me considerable difficulty, and even now I am by no means sure of the correct answer. The point of law is, at what date does a judgment of the Magistrate's Court in a partition case take effect — on the date when it was given or on the date when registration was effected in the Land Registry or at any other time.

In this case the Magistrate gave judgment for partition on 3.5.39. The Appellant, as a result of the judgment, had to pay to the Respondents, the sum of LP. 111.— by way of adjustment, which sum was not paid until 24.7.41. On 24.9.41 registration was duly effected in

the Land Registry. The Magistrate's judgment had been amended on three occasions, but the amendments were immaterial with regard to the basis of the judgment itself — they were merely corrections of the proportionate shares of the Appellant and other co-owners who had been grouped with him, and also in one instance the correction of the name of one of the co-owners. On 9.10.41 the parties to this appeal again became co-owners. The Appellant claimed rent from the date of the judgment, 3.5.39 to 8.10.41, but the District Court only gave him rent for the period from 24.9.41, the date when registration was effected. The words used by the Magistrate in the operative part of his judgment were: "I decide the partition in manner shown above and I order deposit of this judgment and a plan in the Land Registry to effect registration". Earlier in the judgment the Magistrate had decided that the land should be partitioned into two parcels, as agreed by the parties, "on condition that the owners of parcel B (the Appellant and his cosharers) should pay to those of parcel A (the Respondents) LP. 111.—".

There is one point which is quite clear to my mind and that is that such a judgment is not a "disposition" within the meaning of Section 2 of the Land Transfer Ordinance, Cap. 81 and the consent of the Director of Lands is, therefore, not required. It could not in any case be required to make a judgment of a Court valid, in the absence of specific words in the law to that effect. It has been held in several cases, of which High Court No. 42/43 is the most recent example, that it is the Magistrate who is charged by law with conducting all partition proceedings and not the Execution Office of the Court.

Since registration is not required to give validity to the judgment, and the Magistrate rightly ordered the Land Registry to effect registration in his judgment, it seems to me that, generally speaking, a judgment for partition must take effect from the date of its delivery. It has been argued that a Magistrate has no power to give a judgment for ownership of immovable property. Apart from the fact that a Magistrate's Court has specific power to entertain actions for partition, I do not think that, strictly speaking, such an action is one for ownership. All that such an action decides is the division of the joint ownership of the whole into the separate ownership of the several parts, between co-owners whose individual titles of ownership are not in any way in dispute.

The difficulty in this case arises in connection with this payment by way of adjustment of the sum of LP. 111.— whether it was a condition for the coming into force of the judgment or not. On the whole, though as I have said with some hesitation, I do not think that it was

a condition which affected the coming into force of the judgment, so as to take it out of the scope of the general rule that a judgment comes into effect on the date of its delivery in the absence of specific words in the judgment itself to that effect. I base this opinion principally upon the ground that in his judgment the Magistrate ordered the necessary documents to be sent to the Land Registry to effect registration; not one word, it will be noted, about registration being dependent upon proof of payment of the LP. 111.—. It may well be that the Appellant could not have sued for rent, as from the date of the judgment, until registration had been effected, but that point does not arise in this case and I do not, therefore, decide it. It may well be also that the partition could not be registered until payment were made, though that point is equally immaterial here and does not arise on the facts. But when registered, at any rate, the Appellant had the registered title to the whole of his share and could, therefore, sue for the rent as from the date when the ownership of that whole share was vested in him, that is, from the date of the partition judgment. I think, therefore, that the appeal will have to be allowed, the judgment of the learned Judge set aside and the case remitted to the Court below to assess the amount of rent payable for the period 3.5.39 to 8.10.41. The Appellant is entitled to his costs on the lower scale to include the sum of LP. 10.— advocate's attendance fee on the hearing of this appeal. The costs of the hearings in the District Court will be dealt with by that Court when delivering the fresh judgment.

Delivered this 4th day of June, 1943.

British Puisne Judge.

CIVIL APPEAL No. 96/43.

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

BEFORE : Copland, Edwards and Abdulhadi, JJ.

IN THE APPEAL OF :—

1. Anton Khalifeh Haddad,
2. Hanna Khalifeh Haddad. APPELLANTS.

v.

Haj Khamis Hassan Lahloub. RESPONDENT.

Damages — Measure of damages where vendor in default — C. A.

69/42, *C. A.* 217/38 — *Purchaser entitled to the actual financial loss incurred — Return of purchase price and interest.*

Appeal from the judgment of the District Court of Jaffa, dated 25th February, 1943, in Civil Case No. 79/42, allowed and action remitted to District Court with directions:—

Where the vendor commits a breach of the contract, the purchaser is entitled, as damages, only to the actual financial loss incurred, such as expenses in drawing up the contract. He may also claim the return of the purchase price together with interest.

FOLLOWED: C. A. 69/42 (1942, S. C. J. 420; 12, Ct. L. R. 106).

DISTINGUISHED: C. A. 217/38 (5, P. L. R. 606; 1938, 2 S. C. J. 221; 4, Ct. L. R. 242; P. P. 23.xii.38).

(*A. M. A.*)

ANNOTATIONS: For the assessment of damages in cases where the vendor is the defaulting party see, in addition to C. A. 69/42 (*supra*), C. A. 7/42 (9, P. L. R. 247; 1942, S. C. J. 449; 12, Ct. L. R. 101).

(*H. K.*)

FOR APPELLANTS: Cattan.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal from a judgment of the District Court, Jaffa, awarding to the Respondent a sum of LP. 920, stated by the Court to be the real damages incurred by him by reason of the breach of contract by the Appellant, which sum was based upon the difference in price between the contract price and the value of the land at the date of breach. The Court also ordered the return to the Respondent of the LP. 250 paid in advance and costs and advocate's fees.

The appeal has been limited to one quite short point, and that is that this case is covered by the judgment of this Court in C. A. 69/42, David Moyal *v.* Elhanan Karwassarsky. In that case the District Court held, and this Court confirmed that opinion, that in any case where a vendor was the defaulting party the basis of assessment of damages was not that described in C. A. 217/38, Nakashian *v.* Nassar, (5, P. L. R., p. 606), but was the actual financial loss that the purchaser had incurred through the breach.

If we turn to the evidence given by the Respondent in this case in the Court below, we find that he contracted to buy twenty-six *dunums* at the price of LP. 95 per *dunum* and that when this transaction fell through he bought thirty-nine and a half *dunums* of other land at the price of LP. 40 per *dunum*.

Now, it has been sought to be argued that he, the Respondent, is entitled to damages on the basis that, assuming that he had bought land of the same type as the land comprised in the contract which fell through, he would be entitled to the difference in price which he would have had to pay for this similar land in excess of the price named in the original contract. That, however, in our opinion, cannot possibly be the right basis because he is only entitled to the actual financial loss which he incurred. If he had actually bought such land then the situation would possibly have been different, but he has not bought similar land, and has not even purported to buy similar land, and, therefore, to give him an estimated difference in price which he would have had to pay if he had bought such land would not in any sense of the word be giving him the financial loss which he had actually suffered.

We think, therefore, that the District Court were wrong in the view which they took as to the amount of damages payable and that the amount payable as damages is, as I have stated, the actual financial loss incurred through the breach.

In this present case it can only include, following the words used by Rose, J. in C. A. 69/42, "the out-of-pocket expenses incurred by him in the preparation of the contract or in reliance upon it." He is of course clearly entitled to the return of the LP. 250 plus interest thereon from the date it was paid by the Respondent until it was paid into the Bank, that is to say, until 21st July, 1942, the date of the notarial notice.

Since the parties cannot agree as to the actual amount of out-of-pocket expenses, the case will have to go back to the District Court to determine the actual amount which was spent. The appeal will, therefore, have to be allowed and the case remitted to be determined on the lines set out in this judgment. Each party to pay their own costs of the original hearing in the District Court. The District Court will deal with such costs as arise on the remission, and the Appellant is entitled to the costs of this appeal on the lower scale, to include the sum of LP. 10 advocate's attendance fee in any event.

Delivered this 26th day of May, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 174/42.

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

BEFORE : Rose and Khayat, JJ.

IN THE APPEAL OF :—

Diab Murjan Abdallah and 4 ors. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Criminal Procedure — Charge of manslaughter under sec. 212, C. C. O. — Previous acquittal of other accused by same Court on same set of circumstances — Record of previous case, inadmissible in connection with credibility of witnesses.

Appeal from a judgment of the District Court of Jerusalem, in Criminal Case No. 223/42 (*Cur.* Bourke, J., P. D. C.) whereby Appellants were sentenced to twelve years' imprisonment each on charges of manslaughter, dismissed:—

Where a person is acquitted of an offence, and another person is charged with the same offence, the Court is not bound to accept in evidence the record of the first proceedings.

(*A. M. A.*)

FOR APPELLANTS: Husseini.

FOR RESPONDENT : Crown Counsel — (Rigby).

JUDGMENT.

This is an appeal from a judgment of the District Court of Jerusalem, convicting the Appellants on three counts of manslaughter *contra* Section 212 of the Criminal Code Ordinance. The case is of a somewhat unusual nature in that on a previous occasion some ten other persons were charged with the killing of the same deceased. It appears that those ten persons were tried before the same District Court, but before another Judge, and were acquitted.

During the present proceedings in the Court below, counsel for the Appellants made repeated attempts to put in the file and judgment in the previous case as part of his defence. The learned trial Judge refused to allow him to do so. In our opinion the Judge was perfectly correct in so refusing. It was, of course, open to counsel for the defence in the trial Court to put questions to the witnesses in cross-examination in order to elicit any discrepancies or contradictions in their evidence. It is, however, quite apparent to us that the Appellants

and their counsel feel that they have suffered some substantial injustice. In order, therefore, as far as possible, to remove any feeling of grievance that may exist, we have ourselves perused the record of the previous case and have also read the judgment. We are, therefore, fully cognizant of the fact that in the earlier case the learned Judge disbelieved the witnesses for the prosecution, some of whom were called as witnesses in the present case. We would add that it is also quite clear from the record of the present proceedings in the Court below and from the judgment that the learned trial Judge himself was, in effect, fully aware of at least the result of the previous proceedings. In the judgment itself he refers to the matter in the following terms:—

> "I pointed out then (pp. 91—92 of record) that I must decide as to the guilt or innocence of the Accused on what was in evidence before me and after hearing and seeing the witnesses. I could not be asked to accept the conclusion of another Court as to credibility though in view of what had come out already I was naturally impelled to greater caution in scrutinizing the evidence and witnesses. I may say now once and for all that I have given the most anxious and searching examination and scrutiny to the evidence and the witnesses both for prosecution and defence as they came before me. Having directed myself as to the need for such extreme care I can say that my mind is easy in coming to the conclusions I do and as to which I am satisfied beyond any reasonable doubt."

As far as a Court of Appeal is concerned, it seems to us that no possible objection can be taken to that passage. The only question which we have to decide is whether there is sufficient evidence on the record upon which the Court could reasonably come to its conclusion. It is not even suggested by counsel for the Appellants that as regards four of the five Appellants there is not such evidence; but with regard to the fourth Appellant counsel does suggest that the evidence was insufficient. Learned Crown Counsel referred us to passages in the record which are abundantly sufficient to justify the finding of the learned trial Judge if, in fact, that particular evidence was believed. We may say that not only do we consider that there was evidence which entitled the Judge to come to the conclusion to which he did, but, having read the whole of the record with care, we are of opinion that the judgment is most careful and exhaustive and deals with the issues in an unexceptionable manner.

For those reasons the appeals must be dismissed and the convictions confirmed.

As to the sentences, counsel for the Appellants suggests that they are excessive. Each of the Appellants was sentenced to twelve years' imprisonment on each of the three counts, the sentences to run con-

currently. Having regard to the very grave facts of this case we cannot say that these sentences are in any way excessive.

The appeals are, therefore, dismissed and the convictions and sentences confirmed.

Delivered this 9th day of January, 1943.

British Puisne Judge.

INCOME TAX APPEAL No. 9/42.

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

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

IN THE APPEAL OF :—

Solomon Horowitz. APPELLANT.

v.

The Assessing Officer, Jerusalem District. RESPONDENT.

Income tax — I. T. Ord. secs. 2, 5, 6, 38, 45, 53, Rules — Amounts received by retired partner as his share in income earned before his retirement — Lump sum paid to retiring partner to compound such payments — I. R. C. v. Gibbs — General observations on English law relating to income tax, Konstam 8th ed., p. 6, Income Tax Acts, Kensington Comrs. v. Aramayo, Ormond Investment Co. v. Betts — Divergence in Palestine Ordinance — Text of Ordinance should be looked at for intention of Ordinance, subject to rules of construction — Construction of taxing statutes: three rules — Applicability of English case law in interpretation of Ordinance — "Chargeable income", profits or gains whether in the nature of income or capital, Van Den Berghs Ltd. v. Clark — Determination of year of assessment and year of accrual of income — Cesser of income and applicability of the proviso to Sec. 6 — Gains on profits from a profession — Accounting, "earnings basis" and "cash receipt basis" — Brown v. N. P. Institution; Bennett v. Ogston, dictum of Rowlett, J.; Fitzgerald v. C. I. R.; Taylor v. Peter Dawson; Greyhound Racing Association v. Cooper; Desoutter v. Hanger & Co., Ltd.; Lamb v. C. I. R.

Case stated under Section 53(5) of the Income Tax Ordinance, 1941, for the opinion of the Supreme Court, sitting as a Court of Civil Appeal. Case remitted with directions:—

1. The proviso to sec. 6 as originally worded does not apply to income which ceased before the year of assessment.

2. An amount received during the year of assessment should not be included in the assessment for that year, such assessment being made on the income during the previous year.

3. An amount received in commutation of future income receipts is itself income and not capital.

4. The Assessing Officer is not bound to accept as correct the description of entries made in accordance with one or another system of accounting, He can require a return made on a cash receipts basis.

(*A. M. A.*)

REFERRED TO: Commissioners of Inland Revenue *v.* Gibbs, 1942 (166, L. T. 345; 1, All E. R. 415); Kensington Commissioners *v.* Aramayo, 1916 (A. C. 215; 6, Tax C. 279; 613); Ormond Investment Co. *v.* Betts, 1928 (A. C. 143; 97, L. J. K. B. 342; 138, L. T. 600; 13, Tax C. 400); Van den Berghs Ltd. *v.* Clark, 1935 (A. C. 431; 104, L. J. K. B. 345; 51, T. L. R. 393; 153, L. T. 371; 19, Tax C. 390); 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); Bennett *v.* Ogston, 1930 (15, Tax C. 374); Fitzgerald *v.* Commissioners of Inland Revenue, 1919 (2, K. B. 154; 88, L. J. K. B. 1125; 121, L. T. 192; 35, T. L. R. 459; 7, Tax C. 284); Taylor *v.* Dawson, 1938 (22, Tax C. 189); Greyhound Racing Association *v.* Cooper, 1936 (2, All E. R. 742; 20, Tax C. 373); Desoutter Bros. Ltd. *v.* J. E. Hanger Ltd., 1936 (1, All E. R. 535; 15, A. T. C. 49; 24, R. & I. T. 283); Lamb *v.* Commissioners of Inland Revenue, 1934 (1, K. B. 178; 18, Tax C. 212).

ANNOTATIONS:

1. The judgment under appeal is reported in 1942, S. C. J. 635; for other proceedings in this case see H. C. 13/42 (9, P. L. R. 98; 1942, S. C. J. 145; 11, Ct. L. R. 54) and I. T. A. 9/42 — interlocutory ruling (9, P. L. R. 447; 1942, S. C. J. 632).

2. Other Palestinian authorities on Income Tax are: I. T. A. 7/42 (9, P. L. R. 488; 1942, S. C. J. 514); I. T. A. 8/42 (9, P. L. R. 481; 1942, S. C. J. 490); I. T. A. 10/42 (1942, S. C. J. 835, 841); I. T. A. 13/42 (1942, S. C. J. 571); I. T. A. 20/42 (10, P. L. R. 134; *ante*, p. 30).

3. On the effect of the proviso to Sec. 6 of the Ordinance see I. T. A. 20/42 (*supra*).

4. On retroactivity of taxing Ordinances *vide* C. A. 56/40 (7, P. L. R. 183; 1940, S. C. J. 133; 7, Ct. L. R. 182) and H. C. 63/41 (1941, S. C. J. 472; 10, Ct. L. R. 76).

(*H. K.*)

APPELLANT: In person.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

Gordon Smith, C. J.: This case arises under Section 53 of the Income Tax Ordinance, 1941, which Ordinance came into force on the 1st September, 1941. Consequent on an appeal by the Appellant as provided in sub-section (1) of such section, judgment was delivered

in due course on the 8th day of October, 1942, which judgment is final under sub-section (5) unless the trial Judge desires to state a case of law for the opinion of the Supreme Court sitting as a Court of Civil Appeal. The learned trial Judge did so desire and stated a case, which is dated the 28th January, 1943. The matter was argued before us on the 8th April, and the 3rd and 4th May, judgment being reserved.

2. The main facts as summarized in the case stated are as follows:—

> "(a) The Appellant, who is a member of the English Bar, practised as an advocate in Palestine from 1923 until 31st December, 1940, being as from 1933 senior partner in a firm of advocates then formed in Palestine under the name or style of S. Horowitz & Co.
>
> (b) On the 31st December, 1940, the Appellant retired from practice and from the said firm without reserving to himself any interest in the future profits of the said firm or otherwise, but under an arrangement with the remaining partners of the said firm with regard to fees outstanding at the date of the Appellant's retirement, whereby the Appellant was to receive his former partnership share of any such outstanding fee as and when the same would be collected by the remaining partners or by the successor firm, so far as such outstanding fees had been earned by or were attributable to the former partnership.
>
> (c) As from the date of his said retirement the Appellant has done no professional work.
>
> (d) The sum of LP. 1727.154 being one of the two sums that formed the subject-matter of the appeal, represents the sum total of the Appellant's share of professional fees earned by the former firm of S. Horowitz & Co. prior to the Appellant's retirement, but collected and/or paid over to the Appellant between the 1st of April, 1941, and the 26th of March, 1942.
>
> (e) The sum of LP. 1000 which forms the second of the amounts under appeal, represents a lump sum payment received by the Appellant from his former partners on the 26th March, 1942, under the said agreement of the 20th March, 1942, whereby the Appellant assigned to them in consideration of such sum his share of the balance of fees outstanding at the date of his retirement from the partnership and not collected by the date of the said agreement.
>
> (f) Whilst the Appellant was a member of the firm of S. Horowitz & Co. that firm used to have its annual accounts made up upon what is commonly known as the cash receipt basis."

3. Before referring to the details of the case stated on which our opinion is required, it is desirable to refer to the Income Tax Ordinance (hereinafter referred to as the Ordinance) in some detail. Neither of the two subsequent amending Ordinances in 1942 and 1943 affect the matter in any material respect.

4. As stated, the Ordinance commenced on the 1st September, 1941, that is to say, some considerable time after the Appellant had retired and had ceased practising and after payment of the two items

in dispute, which as regards the amount of LP. 1700 odd was paid over between the 1st April, 1941, and the 26th March, 1942, the other item of LP. 1000 being paid on the latter date.

5. The two most relevant provisions of the Ordinance are Section 5(1)(a) and Section 6, contained in Part III, Imposition of Tax, which for easy reference I set out and which read as follows:—

Charge of income tax.

"5. (1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereafter for the year of assessment commencing on 1st April, 1941, and for each subsequent year of assessment upon the income of any person accruing in, derived from, or received in, Palestine in respect of:—
(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;"

Basis of assessment.

"6. Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment: Provided that where in any year of assessment any person ceases to possess any source of income which was acquired by him prior to the first day of April, 1940, tax on the income from that source shall be charged, levied and collected upon the income of the year of assessment, and not upon the income of the year preceding the year of assessment."

It will be necessary to examine the wording of these sections more closely later.

6. It is to be observed that "income" is not defined in the Ordinance but that "year of assessment" is defined (in Sec. 2) as meaning "the period of 12 months commencing on the 1st day of April, 1941, and each subsequent period of 12 months." It is also to be observed that under Section 5(2) and in consequence, presumably, of the Ordinance coming into force after 5 months of the year of assessment had already expired, tax was to be payable only at 7/12 of the rate prescribed for that specific year of assessment (1941/42).

7. The learned Judge held that tax was payable in respect of the one item of LP. 1700 odd but not in respect of the other sum of LP. 1000, and submitted the following questions for the opinion of the Court:—

"(i) Was the Respondent right in requiring the Appellant in the present case to account in respect of professional fees on what is known as 'the cash receipt basis', or was the Appellant entitled to insist on accounting on 'the earnings basis'?

(ii) Is Section 6 of the Income Tax Ordinance, as originally enacted, to be construed as imposing an absolute direct charge on the income of the year prior to the year of assessment or is it to be construed as imposing merely a charge *sub modo*, or a charge on the income of the year of assessment where such income is itself

chargeable under Section 5, in which case that income is to be ascertained or computed on the basis of the income of the previous year?

(iii) Is it an implied condition of chargeability to income tax under the Income Tax Ordinance that the source of the income to be taxed shall continue in the year of assessment?

(iv) Is the Appellant correct in his contention that his source of income ceased on the 31st December, 1940, and that, since the cessation was prior to the enactment or coming into force of the Income Tax Ordinance, he is not chargeable with tax on either of the sums in question?

(v) Was it competent for the Respondent in the present case to raise the contention that the English principle as to the source of income or income continuing in the year of assessment is inapplicable to the Palestine Ordinance in view of the fact that he had apparently accepted the Appellant's contention on this point in respect of another item involved in the self same assessment?

(vi) Whether I was right in my view that the sum of LP. 1727.154 is, for the purpose of the assessment, not to be treated as capital but as income?

(vii)(a) Whether in view of the fact that the Appellant had not in his objection to the Assessing Officer or in his Notice of Appeal suggested that the sum of LP. 1000 was capital, I was competent to hold that it was capital?

(b) Whether apart from the question of competence I was right in so holding?

(viii) Whether I was right in my view that the judgment of the House of Lords in the case of Inland Revenue Commissioners *v.* Gibbs, Law Times Reports Vol. 166, p. 345, was relevant to the decision of the present appeal?

(ix)(a) If the Appellant is correct in his contention that his source of income ceased on the 31st December, 1940, and the Respondent is correct in his contention that tax under the Ordinance is imposed on the income of the year preceding the year of assessment, should the Appellant then be liable to account for and to tax on the whole of his 1940/41 income?

(b) If the answer to the preceding paragraph is in the affirmative, would the fact that the Assessing Officer did not at any stage prior to the hearing of the appeal call upon the Appellant to account for and to pay tax on the whole of his 1940/41 income, but assessed him, as far as professional or partnership income was concerned, on the income of the year 1941/42, preclude me from assessing him on the whole of his 1940/41 income in the present case?"

8. In argument before us the questions as stated were not dealt with *seriatim* and the Appellant commenced his argument by stating that the real point was whether the English law applied in respect of a man who had died or retired in the year prior to the year of assessment and if so whether, in such case in Palestine, he would be assessable or not. Then, after dealing with the facts he asked the question

as to what happened when the source of income ceased prior to the year of assessment and submitted that there was no provision either in English law or in the Palestinian law in this respect. He then proceeded to deal with the method of accounting, and dealt at some length with some English authorities which I will refer to later.

9. Speaking for myself and in regard to the first main point put forward by the Appellant, it would be a Herculean if not impossible task to give a concise and lucid explanation of the principles and system of the law of Income Tax in England, nor would any such attempt (if I felt it was my duty to make the attempt) be profitable or, in my opinion, serve any useful purpose in being of any local legal value. To quote Konstam, 8th Edition, at page 6:—

> "Many of the cardinal principles on which liability to Income Tax is based and by which the amount of that liability is measured are left unanswered in the Income Tax Acts and are to be found only in the decisions of the Courts and of the House of Lords, which are based on inferences drawn from the 'general scheme' of the Acts."

Income Tax in England was reimposed by the Act passed in 1842, and from then down to 1918 the statutory law was to be found in the amending Income Tax Acts and Finance Acts. In 1918 by the Act passed in that year, the previous provisions were to some extent consolidated but not, unfortunately, codified, and since then there have been more than twenty amending Acts.

Speaking of the 1841 and 1880 Acts in 1916 Lord Wrenbury said (Kensington Commissioners *v.* Aramayo, 1916 (1) A. C. at pp. 227—229):—

> "It is not possible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense. ... From a change of language I should infer a change of meaning. But I cannot do so in this case. ... The change of language is attributed only to the very indifferent drafting which is found throughout this most complicated and ill-digested Act."

In the same case Lord Loreburn said:—

> "I regret to say that in this respect the language of the different Acts is not coherent. You may strain the language to mean either one thing or the other. You may strain it to arrive at any conclusion."

In a later case (Ormond Investment Co. *v.* Betts, 1928, A. C. 143) Lord Buchmaster said at p. 147:—

> "This case affords a further illustration, if further illustrations were required, of the confusion of our law."

As has also been said:—

> "The only safe rule is to look at the words of the enactments and see what is the intention expressed by those words."

10. As is well known, income tax in England is charged in accordance with schedules to the Income Tax Act, 1918, being Schedules A. (ownership of property), B. (occupation of property), C. (securities and investments), D. (trades, professions and business), E. (salaries). These schedules correspond to the lettered paragraphs of our Section 5(1), but to each of the schedules there are included rules applicable to each particular schedule and in fact to Schedule D. there are numerous illustrative cases with further rules applicable thereto. All these schedules. cases and rules have statutory effect and they make provision for the manner in which the tax is to be charged and the income assessed, apart from the fact that there are other statutory reliefs, exemptions and abatements. It depends on circumstances and the nature of the income as to whether tax is to be deducted at source and in what year it is payable or to be deducted, and also in respect of which year's income tax is to be assessed. No useful purpose would, I think, be served by attempting any further or more detailed reference to the English Acts, but I would emphasize that it is significant that our Ordinance has not adopted this system of schedules, cases and rules.

11. In view of these remarks and of the fact that in so many respects the principles and scheme of the English Acts are so different to those contained in our Ordinance, I think that the only safe rule is to look at the wording of our Ordinance, particularly Sections 5 and 6, and see what is the intention expressed in the wording of these provisions. In doing so, one must apply the well established rules of construction of interpretation of Taxing Statutes. These are (a) to give a fair and reasonable construction to their language without leaning to one side or the other, (b) to see that no tax is imposed on a subject by statute without words clearly shewing an intention to lay the burden on the subject, and (c) so to construe these words without regard to the so-called equitable construction, which is not permissible. (See Lord Atkin in Ormond Investment Co. *v.* Betts, 1928, A. C. 162).

12. I do not say that decided cases in England cannot be referred to as affording some possible help and guidance in attempting to ascertain what that intention is, but I do say that they cannot be regarded as authoritative and binding on this Court, in view of the differences there are in the respective principles and schemes and of the confusion which exists in England.

13. Let us now turn to Sections 5 and 6 of the Ordinance, which I have detailed earlier.

It is to be observed that by the Ordinance and these sections income tax was introduced for the first time in Palestine, and income

tax became payable for the first year of assessment which was the period 1st April, 1941, to 31st March, 1942. Section 5 sets out the various types or descriptions of income which is chargeable to tax and it is not disputed that the two amounts in question are contained within the orbit of Section 5(1)(a), *i. e.*, gains or profits from a profession.

Section 6 prescribes the temporal basis on which the income for 1941/42 (in the present case) is to be assessed, namely, it is to be assessed on the chargeable income for the year immediately preceding the year of assessment, *i. e.* on the income of the year 1940/41.

"Chargeable income" is defined in Section 2 but the word "income" itself is not defined nor is the word used in the English Acts which speak of profits or gains. It is not disputed that the two disputed items were profits or gains or "something coming in", but there is a dispute as to whether they are capital or income.

14. Reverting to Section 6, the first three lines is the substantive part charging tax for each year of assessment, the amount of such tax being measured or computed upon the chargeable income for the year preceding the year of assessment. Then follows a proviso which has been subsequently repealed and replaced but which as originally enacted was in force in regard to this assessment. The proviso states that when in any year of assessment (and I emphasize these words) the source of the income ceased, tax is to be measured or computed, not on income of the year preceding the year of assessment but on the income of such later year.

15. The source of the income of the Appellant from which these two items were received, ceased on the 31st December, 1940, the date on which he retired from the firm and, therefore, such source of income did not cease in the year of assessment and, therefore, the proviso did not apply but the substantive part of Section 6 does apply to his assessment. These two items were received by him during the year 1941/42, which was the first year of assessment, and he had an income for that year of assessment and has, I assume; been duly assessed for such year on his chargeable income for the year preceding such year of assessment. But these two items were included in this assessment of the preceding year's income, but were not received in such preceding year and, therefore, should not have been included in such assessment. This seems to me to be clear and unarguable. It may well be that, having been received in the year 1941/42, when the Appellant is assessed for the year 1942/43 on his chargeable income for the year preceding this second year of assessment these items will have to be considered, and possibly included, but we are not dealing with

the 1942/43 assessment at all and it is not before us. As I have said, this Section 6 has been amended as regards the proviso, and different considerations may apply to subsequent assessments.

16. For these reasons I think that neither of such items were properly included in the Appellant's assessment for the year 1941/42. This really concludes the matter, but as various other points were argued at length I think it is desirable to express an opinion thereon, even although such opinion is *obiter*, and I do so out of compliment to the able arguments so addressed and in the hope that they may be some guide as to my own views in future cases, which undoubtedly will be brought before the Courts in an attempt to obtain some authoritative ruling on these very complex matters.

17. As regards the point as to whether either or both of these two items as received by the Appellant were capital or income, the learned trial Judge held that the item of LP. 1700 odd was income and assessable to tax but that the item of LP. 1000 was capital and not so assessable. I must confess that I am unable to see where the distinction lies, but I think the learned Judge was influenced considerably by the case of Van Den Berghs Ltd. *v.* Clark (1935, A. C. 431) from which he quoted Lord Macmillan, at page 438. But in doing so I think that he misconceived the facts of the case, as "the congeries of rights" certainly included some capital items.

18. If the item of LP. 1700 odd is to be regarded as income why should the item of LP. 1000 not be regarded as income also, as this LP. 1000 represented the balance of the fees due which were commuted for a lump sum? In other words, the Appellant discounted this income in advance. Both sums represented the share of the Appellant in respect of outstanding fees for work done by the firm prior to the Appellant's retirement and according to an arrangement made upon such retirement. The larger sum was the aggregate of fees received over a period of nearly 12 months, the latter sum was a compounded figure for fees to be received by the firm but not yet received, but out of which the Appellant would otherwise have been paid his share in driblets.

There is no doubt, in my opinion, that such fees were earned as income of the firm and were gains or profits of the firm, and when paid they became part of the income or gains and profits and were assessable to tax when so paid. The mere fact that the share of the Appellant was paid over to him in driblets or in a lump sum does not alter its character. Supposing I had a contract with a company for five years at a salary of LP. 10,000 a year, which would result in my receiving LP. 50,000 over the five years but on which I would probably

have to pay a total of about LP. 34,000 income tax, at present rates. My net receipts would be LP. 16,000 or at the rate of LP. 3,200 *per annum* instead of LP. 10,000 *per annum*. Supposing again, I discounted or assigned that salary to an Insurance Company for, say LP. 30,000, on which they would nominally make a profit of LP. 20,000, but although there would be a loss of interest, *etc.*, there would also be a handsome profit to the Insurance Company. This LP. 30,000 which I would receive would give me an average income of LP. 6,000 a year over the five years as against a net income of LP. 3,200 if I paid income tax — a saving to me of LP. 2,800 *per annum* and a loss to the revenue of LP. 6,800 *per annum*. I do not think such an arrangement would convert that salary payable by my employers but so assigned or discounted, by me, into a capital payment to me by the Insurance Company. It would still be gains on profit from employment. Similarly I think both items of LP. 1700 odd and LP. 1000 were gains on profits from a profession, and are to be regarded as income and not as capital.

19. A further point argued at considerable length was the question of the method of accounting, and the Appellant argued that the proper method was to render accounts on the "earnings basis" and not on a "cash receipts basis".

There is nothing in the Ordinance which prescribes that firms, whether business firms or professional firms or individuals, have to keep accounts for income tax purposes on any specified basis. What they have to do is to render returns in prescribed forms, see Part IX of the Ordinance and Rules. It may be that a practice has grown up in England and may very well grow up here for the Assessing Officers to accept balance sheets attached to returns as a convenient and practical method for checking such returns by the Assessing Officer, particularly if such balance sheets have been audited and drawn up by reputable accountants. Such balance sheets would show and distinguish between capital and income for the purposes of the company, business firm or individual, but neither here nor in England is the Assessing Officer bound by such form of accounts.

Each particular return has to be dealt with on its own merits and items in such return may have to be supported by accounts kept in varying form or by other verification, see Section 38 of the Ordinance. It is for the tax payer to convince the Assessing Officer that any assessment is wrong or that any particular item in any assessment has been wrongly included or excluded.

In my opinion there is nothing in the submissions made by the Appellant in this respect.

20. Numerous decided English cases were quoted to us on various points and it may be desirable to refer to some of them, although I do so subject to my earlier remarks as to their authoritative nature and to the only safe rule to be applied in attempting to interpret taxing statutes.

The case of Inland Revenue Commissioners *v.* Gibbs, L. T. R. Vol. 166 (June, 1942), p. 345, was referred to at length by the learned trial Judge, but it was agreed before us by both Appellant and Crown Counsel that it had no real application to the problems before us. The case was one of interpretation of Rule 9(1) and (2) of the rules applicable to cases I and II of Schedule D., relative to ceasing to carry on a trade or business within the year of assessment, and it might have been of some assistance had it been necessary to interpret the proviso to our Section 6, which however was not the case.

Similarly, Brown's case (Brown *v.* National Provident Institution, 1921, 2, A. C., p. 222) was discussed at some length before us and again it was necessary for the learned Law Lords to consider in minute detail the wording of the Rules and Cases in Schedule D. in order to discover and try and define the principles of the Acts. Again, I do not think this case can be regarded as of assistance in the case before us, although it does appear that the conclusion arrived at by a majority was to the effect that what was assessable was the profit which existed or arose during the year of assessment only, irrespective of what principle of measurement or computation was directed to be applied to such profit; that continuation into the year of assessment was the principle of the foundation of the tax, coupled with that of retrospective measurement.

A quotation of a remark by Rowlatt, J. in Bennett *v.* Ogston was made to us, but unfortunately we had not the full report before us, but it would appear that in that case arrears due to a business after the death of the proprietor were held not to be taxable as profits, as they were taken to have been covered by the assessment made during the lifetime of the business.

I have already referred to the Van Den Bergh case, but in that case also the agreements went beyond merely sharing past profits but capital assets were given up also, such assets being what had enabled the profits to be produced.

Other cases quoted were Fitzgerald *v.* Commissioners of Inland Revenue, 1919, 2 K. B., p. 154; Taylor *v.* Peter Dawson, E. & E. Digest, Supplement 1941, p. 62, in which the facts were somewhat applicable: Greyhound Racing Association *v.* Cooper, 1936, 2 A. E. R., p. 742, the facts in which can clearly be distinguished; Desoutter *v.*

Hanger & Co., Ltd., 1936, A. E. R. (1), p. 535; Lamb *v.* Commissioner, Inland Revenue, 1934, 1 K. B., p. 178, and other cases, none of which can, in my opinion, be regarded as authoritative and not of much practical assistance in the circumstances of the case before us.

21. In view of the conclusions I have arrived at as regards the two items in dispute, namely that the Appellant has been wrongly assessed in regard to these two items in his assessment for the year 1941/42, it is really superfluous to answer *seriatim* the questions put in the case stated. I do so, however, subject to the opinions I have expressed earlier in this judgment and to the qualifying remarks made in some instances:—

(1) The answer is contained in Section 38 of the Ordinance, *i. e.* the Assessing Officer can require a return or account made out on a cash receipts basis.

(2) Section 6 imposes or charges the tax on the income of the year of assessment, but the amount of such tax is to be measured on the chargeable income of the year preceding the year of assessment — subject to the proviso which has since been repealed.

(3) As *obiter dicta* and subject to possible further consideration and argument, my answer at present is, No.

(4) First part, Yes. Second part is answered *supra* in this judgment.

(5) Yes.

(6) Yes.

(7)(a) Yes.

(b) No.

(8) No.

(9) This point was not raised or argued before us and I refrain from answering it.

The formal order will be as in my brother Copland's judgment. The Appellant will have his disbursements here and in the Court below, the order of the Court below as to costs being set aside. The Appellant will also have the sum of LP. 12 for out-of-pocket expenses.

Delivered this 26th day of May, 1943.

Chief Justice.

Copland, J.: This is an appeal by way of case stated from a judgment of Edwards, J., on an appeal from an assessment made on the Appellant by the Assessing Officer for the purposes of the Income Tax Ordinance, 1941, of the Jerusalem District. The facts are succinctly set out by the learned Judge and have been recited by My Lord in

the judgment just delivered, and it is unnecessary for me to repeat them.

Two sums are involved, one of LP. 1727.154 mils, and the other of LP. 1000. With regard to the first sum, the learned Judge found that it formed part of the Appellant's income for the year of assessment 1941/42, and with regard to the second sum, the Judge found that it was in the nature of a capital payment and, therefore, not assessable as income at all. The Appellant appeals against the decision in respect of the first sum, whilst the revenue authorities challenge the decision as regards the second sum, contending that it is income and not capital, and is, therefore, assessable for the year 1941/42.

The relevant sections of the Income Tax Ordinance to which reference must be made are:—

Charge of income tax.

"5. (1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereafter for the year of assessment commencing on 1st April, 1941, and for each subsequent year of assessment upon the income of any person accruing in, derived from, or received in, Palestine in respect of:— and the section then goes on to detail the various types of income which are subject to tax.

Basis of assessment.

"6. Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year of assessment:—

Provided that where in any year of assessment any person ceases to possess any source of income which was acquired by him prior to the first day of April, 1940, tax on the income from that source shall be charged, levied and collected upon the income of the year of assessment, and not upon the income of the year preceding the year of assessment."

The Appellant was assessed under the proviso to Section 6 in respect of the year of assessment 1941/42.

In Palestine, a partnership as such is not liable to pay income tax, but the individual partners only are liable to be assessed on their individual income derived from the operations of the partnership; see Section 45 of the Ordinance. Gibb's case (166, L. T. R. 345) would, therefore, seem not to be applicable here.

As to whether the cash receipts basis or the earnings basis is the correct method of keeping accounts of an advocate's practice, it is to be noted that the Ordinance does not lay down any particular method of keeping accounts, and it would, therefore, appear that the Revenue authorities have a discretion in determining which is the correct method to be used. But that discretion must not be arbitrarily exercised. It must be based on what is the usual professional or commercial practice as the case may be. And it seems to me that in the case of a pro-

fessional partnership of advocates the cash receipts basis is undoubtedly the more correct basis, and the Appellant's old firm would seem to have admitted this, since this was the basis on which in fact they kept their own accounts. The cash receipts basis is the only one which shows how much the partners can draw at any moment — it is the only one which in fact shows the actual cash position. In cases of companies and traders, where amounts have to be set aside for depreciation and reserves, the earnings basis may be the more proper one, but in the Appellant's case I think that the Assessing Officer was right in taking the cash receipts basis. It is the only one which shows the actual income received. Income in the case of such a firm, or, more correctly, of a partner in such a firm, is not income until received — debts owing are not income, if one gives the ordinary meaning to ordinary words.

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 opinion that the tax is not retroactive for several reasons. In the first place, take the marginal notes — that to Section 5 is "charge of income tax" and that to Section 6 is "basis of asssessment". I am aware that marginal notes are not law, but at any rate they are a guide to show what was in the mind of the legislature. In this case the marginal notes indicate quite clearly that Section 5 is the taxing section and Section 6 lays down the basis or method of assessment — it is the computation or calculation section. And if the legislature does not mean what it says, then it should say so. In the second place the wording of the sections clearly distinguishes between taxing and assessment. Section 5 says that "income tax shall ... be payable ... for each year of assessment upon the income of any person ...", whilst Section 6 says that the tax shall be charged, *etc.*, for each year of assessment, upon the chargeable income of any person for the year immediately preceding the year of assessment. "Charged" in this section in my opinion means no more than calculated or computed. It is a tax, as it states, for each year of assessment, the income for purposes of tax being calculated by reference to the previous year's income. Thirdly, if there is, as may well be the case, a contradiction between, or ambiguity in, Sections 5 and 6, such must be resolved in favour of the tax payer, since this is a taxing statute. And lastly, the provision that for the year of assessment 1941/42, income tax shall be payable only at seven-twelfths of the annual rate shows quite clearly to my mind that the tax, though calculated by reference to the income of the previous year, is one on the income of the year of assessment

and is not retroactive. The Ordinance was only in force for seven months in the year of assessment 1941/42.

I will take now the question whether the sum of LP. 1000 is income or capital. It was a lump sum payment received on the 26th March, 1942, from the former partners of the Appellant under an agreement dated the 20th March, 1942, whereby the Appellant assigned to his former partners, in consideration of the said sum, his share of the balance of fees outstanding at the date of his retirement from the firm and not collected by the date of the said agreement.

In this connection I do not think that the English cases which have been quoted to us are of much assistance, because, with all respect, I am quite unable to extract any guiding principle from them, and some of the decisions I must confess I am unable to reconcile with one another. But it seems to me that since this sum of LP. 1000 would undoubtedly have been income, if paid over as and when received, as the items composing the sum of LP. 1727 were, then the fact that it was paid over in one lump sum does not alter its inherent character of being income. When the Appellant relinquished his right to his share of fees outstanding and not paid, what he gave up was not a capital asset when he gave it up, but was income, and it still remained income, in just the same way as arrears of interest, when finally paid over, are income and not capital. He abandoned certain profits in exchange for a lump sum payment — he did not give up a means of making profits. He did not sell a capital asset. I think, therefore, with all due respect, that the learned Judge came to a wrong decision in law, and that the sum of LP. 1000 was a payment in the nature of income.

I have now dealt with questions (i), (ii), (vi), (vii)(a), (vii)(b) and (viii) of the case stated. As to question (v), I see no reason why the Revenue authorities should not be at liberty to raise the contention set out in the question. They may at one time have held the opposite view, but they are not bound for ever by what may have been a mistaken view of the law, and they are, I think, at liberty to test the matter at any time.

I now come to the question, when did the Appellant's source of income cease. And in determining this, one must differentiate between the source of income and income from that source. The Appellant's source of income, in relation to the two sums which are the subject-matter of this appeal, was his professional practice as an advocate in Palestine. On the 31st December, 1940, the Appellant retired and has ceased to practice as from that date. Therefore this source of income ceased as from that date, though income from that source has been

received by him since then. He, therefore, ceased to possess this source of income prior to the year of assessment 1941/42, and consequently it seems to me that he cannot be assessed to income tax for that year of assessment, in respect of income derived from that source, under the proviso to Section 6, since that proviso only applies when the source of income ceases in the year of assessment. The two sums under appeal were received during the year of assessment and cannot be taxed in respect of that year. They can only be taxed, if at all, as chargeable income, in the year of assessment 1942/43. Whether they would be liable to be so brought into account for the year of assessment 1942/43 is not a point which I think can be determined on this appeal, which is only concerned with the sums to be assessed in the year of assessment 1941/42.

For this reason I do not think that it is necessary to consider Brown's case, (1921, 2 A. C. 222) and the other cases referred to by the Appellant, and I wish expressly to reserve my opinion as to whether Brown's case is, or is not, applicable in Palestine. In the view which I take, these cases at any rate can have no application to the problem before us on this present matter, and questions (iii) and (iv) in the case stated do not arise.

Question (ix)(a) is based on two propositions — first, that the Appellant's source of income ceased on 31st December, 1940, which I find to be a fact, and secondly, that the tax is imposed by the Ordinance on the income of the year preceding the year of assessment, which I have found not to be so. The question in its present form is, therefore, unanswerable, and question (ix)(b) also cannot be answered since it is dependent upon the answer to question (ix)(a) being in the affirmative. I do not think that this Court has any power to re-draft the questions put forward in the case stated.

For these reasons I think that the case should be remitted to the learned Judge with directions that in making his final assessment for the year of assessment 1941/42, these two sums of LP. 1727.154 mils and LP. 1000 respectively, should be deducted as not being chargeable income to be brought into account for that year of assessment.

I agree as to the order for costs as set out in the judgment of My Lord.

Delivered this 26th day of May, 1943.

British Puisne Judge.

Khayat, J.: I agree with the judgment of my brother Copland.

Puisne Judge.

MISCELLANEOUS APPLICATION No. 5/43.

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

BEFORE: Abdul Hadi, J.

IN THE APPEAL OF :—

Ma'mour Awqaf, Northern District. APPLICANT.

v.

Haj Abdul Kader 'Odeh and 2 ors. RESPONDENTS.

Time for appeal — Application for extension of time — Rule 324 — *Good cause.*

Application for extension of time to file an appeal from a judgment of the Magistrate's Court, Acre, sitting as a Land Court in Land Case No. 6/42, refused:—

An application to extend the time for filing an appeal will not be granted except upon good cause.

(*A. M. A.*)

ANNOTATIONS :

1. The good cause alleged for the delay was that the *waqf* official to whom the statement of appeal had been forwarded in order to obtain the authority of the Director General of *waqfs*, had fallen ill after receiving the papers and had remained ill until after the expiry of the prescribed period.

2. On the very strict requirements of "good cause" according to the practice of the Court of Appeal see note 2 to C. A. 203/42 (*ante*, p. 259).

(*H. K.*)

FOR APPLICANT: Rahman.

FOR RESPONDENTS: Atalla.

ORDER.

This is an application to extend the time for filing the appeal under rule 324 of the Civil Procedure Rules, 1938. Upon hearing counsel of both parties, I am satisfied that no good cause is shown and the application is, therefore, refused with costs fixed at an inclusive sum of LP. 3.

Given this 3rd day of February, 1943.

Puisne Judge.

CIVIL APPEAL No. 128/43.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

The Custodian of Enemy Property of Jerusalem. APPELLANT.

v.

Seelig Wolfenstein. RESPONDENT.

Custodian of Enemy Property — Loan by resident in Germany to local resident taken over by Custodian — Confession not used in criminal proceedings admissible if amounting to admission under Mejelle Art. 1588 — *Oral evidence inadmissible against written admission, C. A.* 168/41, *C. A.* 89/42 — *Allegation that admission false, oath under Mejelle Art.* 1589, *C. A.* 393/21 — *Position of Custodian as regards oath — Conversion of Reichsmark.*

Appeal from the judgment of the District Court of Haifa, dated 18th March, 1943, in Civil Case No. 137/41, allowed, and judgment entered for the Appellant:—

1. In the absence of fraud, oral evidence is inadmissible to disprove a written admission.

2. When it is alleged that an admission is not true, the person in whose favour the admission was made should, on the application of the person who made the admission, take the oath required by Art. 1589 of the *Mejelle.*

(*A. M. A.*)

FOLLOWED: C. A. 168/41 (8, P. L. R. 563; 1941, S. C. J. 642; 11, Ct. L. R. 214); C. A. 89/42 (9, P. L. R. 439; 1942, S. C. J. 445; 12, Ct. L. R. 53); C. A. 393/21 (1, P. L. R. 4; C. of J. 7).

ANNOTATIONS :

1. See note 3 to C. A. 94/43 (*ante*, p. 152) for the admissibility of oral evidence against a written admission.

2. Note that it was held in C. A. 110/39 (6, P. L. R. 558; 1939, S. C. J. 506; 7, Ct. L. R. 10) 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..."

(*H. K.*)

FOR APPELLANT: Werner.

FOR RESPONDENT: Gottschalk.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa. The Appellant is the Custodian of Enemy Property, who admittedly stands in the shoes of a Mrs. Brann of Berlin who, it is alleged by the Appellant, made a loan of 3,000 Reichsmark to the Respondent which, at the official rate of exchange in Palestine, amounts to LP. 278.551 mils. The learned Relieving President expressed the opinion that German law did not arise. With that opinion we see no reason, in the circumstances of this case, to disagree.

The Appellant relied on an alleged admission by the Respondent which is contained in a document which was produced and called Exhibit P/3. That admission was contained in a conversation of the 3rd of March with a Mr. Hamburger who appears to have been an officer in the C. I. D. The relevant part of the admission reads as follows:—

> "During the beginning of 1939, whilst I was still in Berlin, I borrowed from a certain Mrs. Zerline Brann of Berlin, a friend of my wife, the amount of three thousand Reichsmark on the understanding that at the arrival of my lift van in Palestine I would sell some carpets and some other valuables. I was to send then the money to her or to deposit it in Mrs. Brann's favour in a bank here in Palestine or in another place."

The Respondent then went on to say that he needed the money for his personal expenses and for those of his wife, and we may assume that he has, in fact, disposed of the sum in question. Further, in answer to a specific question he said:—

> "There was no agreement at all to the effect that I should pay the money which I owed to Mrs. Brann to her son, who lives in Shanghai."

The Respondent, we are told, is an elderly gentleman and, according to his own account, this interview excited him. In a letter dated 5th March (*i. e.* two days later) written to Mr. Hamburger, he refers to his excitement and he says:—

> "Dear Mr. Hamburger,
> I thank you again for your amiable reception on Monday. You have seen how terribly the idea has excited me that I should have committed a punishable violation of the provisions of the law though unknowingly. I assure you that I find no quietness day and night nor shall I find it until I shall receive good news from you. My excitement was so strong that I forgot to advise you of a further debt."

He then sets out in some detail another transaction in which he was debtor. But it is to be noted that in that letter he does not in

any way qualify the story which he had given as to the debt about which this case is concerned. It was not until the 12th of March, 1941, that in an Exhibit P/4 he makes some sort of an attempt to qualify what was said in P/3. He says as follows:—

> "At the time when I borrowed the 3,000 Reichsmark from Mrs. Brann in 1939 the money was given to me on the understanding that I should repay it to Mrs. Brann's son, Mr. Karl Brann."

He goes on to say that he did not know at the time where Mr. Karl Brann was. Even taking that document (Exhibit P/4) as it stands and assuming it to be true, that is very far from establishing that there was any definite contract that he shuold pay it to Mrs. Brann's son. At the most it establishes that there was only an understanding to this effect. There is no legal significance at all in that. It seems to us that P/3 is a perfectly clear example, taken with these other documents, of an admission within article 1588 of the *Mejelle*.

It has been urged that this admission was made in circumstances which would have rendered it inadmissible in criminal proceedings and should not, therefore, be receivable in subsequent civil proceedings. No prosecution was, in fact, ever instituted, and there is certainly nothing to indicate that any prosecution against this old gentleman was ever contemplated by the Police authorities. On the contrary, it would seem to be reasonable to infer that Mr. Hamburger had no intention of charging Mr. Wolfenstein with any offence whatsoever.

In the Court below the learned Judge was apparently influenced by the evidence of the wife of the Respondent. Mr. Wolfenstein himself did not give evidence and no request was made that his evidence should be taken on commission. Leaving aside, therefore, the question as to the admissibility of any evidence which he could have given, the fact remains that it devolved upon Mrs. Wolfenstein to endeavour to remove the impression made by these admissions of her husband. She then told a story to the effect that the money was to be paid to somebody else, a Mrs. Levy, who is a sister of the lender and apparently now living in Zurich.

It seems to us that this question of when oral evidence is admissible to disprove a written admission, is covered by authority. In Civil Appeal 168 of 1941, the case of Tibi *v.* Dasuki and another, P. L. R. Vol. 8, p. 563, this Court held that, in the absence of fraud, to disprove a written admission only written evidence is admissible. That view has since been followed in other cases, and very recently in a case to which we were referred — C. A. 89/42, 9 P. L. R. p. 439 — in which Copland, J., expressed agreement with the view expressed in Civil Appeal 168/41. It seems to me, therefore, that, taking that

view of the law, the evidence of Mrs. Wolfenstein should not have been received.

There is one question, on this question of the admission, that the learned Relieving President himself raised. He says that if the admission was false (apparently this was suggested by the Respondent) the person in whose favour the admission was made should have taken the oath required by article 1589 of the *Mejelle*. The only person who could have taken the oath would have been the Custodian of Enemy Property himself, who clearly would not have been in a position to swear to the facts in this case. Whether or not such a course would be necessary, we need not consider in this case because, as was pointed out to us by Mr. Werner, it is for the Defendant in such a case to ask that the Plaintiff should take the oath. Here we were referred to a very old case, Civil Appeal No. 393/21, P. L. R. Vol. 1, p. 4, in which this Court said:—

> "It has repeatedly been held by this Court that where a Defendant in such a case was unable to produce documentary evidence in support of his allegation and such documentary evidence must necessarily be of a kind binding upon the other party, the only course open to the Defendant was to ask in accordance with article 1589 of the *Mejelle*, that the Plaintiff should take an oath that the Defendant's admission in the document in question was not false."

No such request was made in this case.

No argument has been addressed to us as to the correctness of the figure of LP. 278.551 mils, which represents the value of 3,000 Reichsmark at the official rate of exchange of 10.77 Reichsmark to the Palestine Pound, which is apparently accepted as being the appropriate rate. We would add that there is no dispute that the Custodian properly stands in the shoes of Mrs. Brann. That being so, we are of opinion that the appeal must be allowed, the judgment of the Court below set aside and judgment entered for the Plaintiff—Appellant for LP. 278.557 mils. The Appellant will have the costs of the appeal here, and the costs assessed by the learned Relieving President for the proceedings in the Court below, the costs of this appeal to be on the lower scale and to include the sum of LP. 10 for advocate's attendance fee.

Delivered this 31st day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 84/43.

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

BEFORE: Gordon Smith, C. J. and Abdul Hadi, J.

IN THE APPEAL OF :—

1. Adib Habayeb,
2. Mrs. Wardeh Khammar. APPELLANTS.

v.

1. Mrs. Lily Bishara Aleco,
2. Peter Malak,

the first in her capacity as one of the heirs of the late Bishara Aleco and both as joint guardians over the infant children of the late Bishara Aleco, for and on behalf of the estate of Bishara Aleco. RESPONDENTS.

Bills of Exchange — Consideration for promissory note — Adequacy of consideration immaterial.

Appeal from the judgment of the District Court of Haifa, dated 6th day of February, 1943, in Civil Case No. 86/42, dismissed:—

Inadequacy of the consideration on a promissory note, even where the consideration is purely nominal, will not vitiate the note.

(*A. M. A.*)

ANNOTATIONS: To the same effect: C. A. 141/31 (C. of J. 252), upheld on appeal in P. C. 101/33 (C. of J. 1934—6, 63; P. P. 19.iv.36) and C. A. 161/32 (C. of J. ~~263~~, *sub* No. 162/32).

(*H. K.*)

FOR APPELLANTS: Atallah.

FOR RESPONDENTS: Weston Sanders.

JUDGMENT.

We have not called on the Respondents to reply to this appeal because my brother and I are satisfied that the result of the judgment given by the learned President is correct in law. There was consideration for the note which is expressed to be in the sum of LP. 350. The adequacy of this consideration, which may even be nominal, is not in general the subject of enquiry, and so long as there is a consideration, the mere fact that it is inadequate does not vitiate the note.

For these reasons we dismiss the appeal with costs to include LP. 10.

Delivered this 19th day of April, 1943.

Chief Justice.

CIVIL APPEAL No. 293/42.

IN THE SUPREME COURT SITTING AS A[e] COURT OF CIVIL APPEAL.

BEFORE : Copland, J.

IN THE APPEAL OF :—

Uliyan Khalaf Kirrit. APPELLANT.

v.

Amneh bint Haj Hassan el Arjah, widow of the late Khalaf Kirrit. RESPONDENT.

Deposit for appeal — Extension of time to pay deposit after appeal listed for dismissal — C. P. R. 327 — Good cause shown.

Application for extension of time to pay the deposit allowed and application to dismiss the appeal dismissed:—

The Court may, upon good cause shown, extend the time fixed by the Registrar to pay the deposit on appeal.

(*A. M. A.*)

ANNOTATIONS :

1. The good cause shown by the Appellant was that the notice fixing the deposit and the time within which it was payable had, along with other documents, been stolen from the office of Appellant's advocate.

2. *Cf.*, on good cause, C. A. 203/42 (*ante*, p. 259) and note 2; see also Misc. Appl. 5/43 (*ante*, p. 294).

3. For other instances of appeals being listed for dismissal by the Chief Registrar see C. A. 227/38 (5, P. L. R. 537; 1938, 2 S. C. J. 176; 4, Ct. L. R. 237; P. P. 22.xii.38) — *procedure after listing;* C. A. 238/38 (1938, 2 S. C. J. 234) — *no appearance;* C. A. 44/40 (7, P. L. R. 372; 1940, S. C. J. 448; 8, Ct. L. R. 193) — *rehearing of appeal after dismissal.*

(*H. K.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Barbari.

ORDER.

This appeal has been listed by the Chief Registrar under Rule 327 of the Civil Procedure Rules, 1938, for dismissal because the deposit has not been paid within the time limit fixed by the Chief Registrar in his order, dated 19th January, 1943.

An application has been made to extend the time to pay the deposit.

Upon hearing counsel for both parties I hereby grant the application to extend the time to pay the deposit and order that the deposit must

be paid within twenty-four hours from to-day. The application for dismissal is refused. The Respondent is entitled to her costs which I fix at total costs of LP. 10 to be paid to her in any event.

Delivered this 15th day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 125/43.

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

BEFORE: Rose, Frumkin and Khayat, JJ.

IN THE APPEAL OF:—

Elisha Levin. APPELLANT.

v.

Binyamin Branitzki. RESPONDENT.

Receivers — Whether may be appointed by the Court in the absence of a lis pendens where dispute referred to arbitration — C. P. R., balance of convenience in favour of appointing a receiver in such cases — English Arbitration Act, 1934, and previous practice — C. P. R. 297 seq., R. S. C., O. 52 r. 1, O. 50 r. 15(a) — Appointment of receiver, whether just and convenient — Form 28 may be varied.

Appeal from the order of the District Court of Tel-Aviv, dated the 21st of March, 1943, in Civil Case No. 96/43, allowed and case remitted:—

A receiver may be appointed under rule 297, C. P. R., in a case where arbitration proceedings are pending.

(*A. M. A.*)

ANNOTATIONS: On Rule 297 of the C. P. R. see also C. A. 88/39 (6, P. L. R. 470; 1939, S. C. J. 408; 6, Ct. L. R. 129; P. P. 22.x.39) — *appointment of receiver may be made by single judge.*

(*H. K.*)

FOR APPELLANT: Reichert.

FOR RESPONDNET: P. Goldberg.

JUDGMENT.

This is an appeal by leave from an order of the District Court of Tel-Aviv, refusing to appoint a receiver. The learned Judge so refused on the ground that he had no power to appoint a receiver as there was no *lis pendens* and the dispute between the parties had been referred to arbitration.

In the course of argument we were referred by counsel to English law and practice in this matter. It is, we think, clear that until the Arbitration Act of 1934, the practice in England was that before a receiver could be appointed it was necessary that there should be a *lis pendens*. The Act of 1934 provided a further statutory exception to this general rule and provided that in the case of a dispute having been referred to arbitration a receiver could, not necessarily would, be appointed by the Court.

In 1938 our Civil Procedure Rules came into force and it seems to us to be relevant to bear in mind that at that time the English legislature had apparently found that the balance of convenience was in favour of allowing in a proper case — where a dispute had been referred to arbitration — a receiver to be appointed. That being so, we may assume that in Palestine also the balance of convenience from the point of view of the public is that a Court should have power to appoint a receiver even although there has been a reference to arbitration. We think, therefore, that the method of approach to this problem is to see whether the wording of rule 297 and the following rules excludes us from holding that a Court can, if it wishes, in a case where it considers it to be just and convenient, appoint a receiver.

We have been referred to Order 52, Rule 1 of the English Supreme Court Rules, which is roughly equivalent to Civil Procedure Rule 305 of the Palestine Rules, and also to Order 50, Rule 15(a), which is roughly equivalent to Rule 297 of the Palestine Rules, and it was contended that, assuming the similarity between those various rules to be exact, the only method by which in this country provision could be made for a Court to appoint a receiver where there is no *lis pendens* would be by legislative action. That is a sound legal argument, but after consideration we are of opinion that the wording of our rules 297 and 305 is not identical with that of the equivalent English Rules and that the terms of rule 297 are sufficiently wide to enable us to hold that the appointment of a receiver in a case where arbitration proceedings are in existence is not excluded. We would point out, of course, that in any case before a receiver is appointed, it is the duty of the Judge or Court who is determining the matter to be satisfied that his appointment is just and convenient. And clearly one element — and in many cases an important element — in deciding this question is that the dispute has already been referred to arbitration.

It is true that Form 28 of the first Schedule to the Civil Procedure Rules contemplates the existence of a *lis pendens* but this does not seem to us to be important as rule 297(1) provides for such variation of the Form as the circumstances may require.

For the reasons which we have given, we are of opinion that the appeal should be allowed and the matter remitted to the District Court to consider whether on the facts a receiver should be appointed. No doubt the Court in determining this matter will take into consideration the length of time which is reasonably likely to ensue before the ending of these arbitration proceedings, and whether such appointment is necessary for the preservation of the assets of the business.

We think that the fair order is that costs should be in the cause. In order to facilitate the final arrangements, we assess the costs of this appeal at an inclusive sum of LP. 15 to the ultimately successful party.

Delivered this 4th day of June, 1943.

British Puisne Judge.

CIVIL APPEAL No. 13/43.

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

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

IN THE APPEAL OF :—

Barbara Polsky. APPELLANT.

v.

The Attorney-General. RESPONDENT.

Immigration deposits — Overstaying — Unilateral alteration of condition of bond — C. A. 22/39, C. A. 257/42.

Appeal from a judgment of the District Court, Jerusalem, (*Cur.* Bourke, J., P. D. C.), in Civil Case No. 118/41, dismissed:—

A traveller who overstays in breach of the conditions of the bond, forfeits the deposit made to secure the bond, notwithstanding the fact that the stay is legalised by marriage and by the issue of a passport.

DISTINGUISHED: C. A. 22/39 (6, P. L. R. 162; 1939, S. C. J. 131; 5, Ct. L. R. 139; P. P. 14.iv.39).

REFERRED TO: C. A. 257/42 (10, P. L. R. 14; *ante*, p. 5).

(*A. M. A.*)

ANNOTATIONS: See, in addition to the cases cited, C. A. 241/38 (6, P. L. R. 95; 1939, S. C. J. 62; 5, Ct. L. R. 128; P. P. 23.iii.39) — *failure to prove bond;* C. A. 245/42 (1942, S. C. J. 929) — *conditions of bond not affected by grant of period of grace.*

(*H. K.*)

FOR APPELLANT: Adlerstein.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal against the judgment of the District Court, dated the 27th November, 1942, dismissing the claim of the Appellant for refund of LP. 60.— which she had deposited in 1935 with the British Consul at Frankfurt, in order to obtain permission or a permit to come to Palestine. She obtained that permit and entered Palestine in 1935 and the permit was for three months expiring on the 31st March, 1936. She did not leave Palestine and the deposit was forfeited in July, 1936. She, however, obtained a passport on the 11th September. It has been submitted here and in the Court below that by reason of the fact that she had got married in March, 1936, before the expiration of the period, she had become a Palestinian citizen and that this meant that the Government has authorised her a further extension. In support, Civil Appeal No. 22/39 has been quoted to us. The learned President said that the facts in that case were different and it is apparent that they were different, because, when the lady in that case got married, she had had two extensions of the period of her stay and not only had got married but was issued with a passport within the period of such extensions. The facts, therefore, are different in this case in that the passport was issued much later, in fact some five months later and the conditions in the contract between the parties governed her stay and the forfeiture made in July. Mr. Hogan has quoted Civil Appeal No. 257/42 merely for the purpose of showing that the terms of the bond must be complied with and these terms cannot be varied by unilateral action and that the Appellant's marriage did not amount to a variation of the conditions of the bond. The bond is perfectly clear, there are two conditions on which she can obtain a refund of the LP. 60.— and she must leave Palestine within the appointed time of stay granted to her, and she must claim a refund within eighteen months from the expiration of the appointed time. The Appellant did not leave Palestine within the fixed period of three months and there is no evidence that she claimed the refund within eighteen months. This bond is a good and valid contract and the penalty contained for a contravention of a condition of such contract became enforceable as between the two parties and such cannot be varied by unilateral action by one of the parties.

For these reasons we must dismiss the appeal.

Delivered this 9th day of February, 1943.

Chief Justice.

CIVIL APPEAL No. 51/43.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Hussein Mustafa Abdul Rahman el Salem,
2. Muhammad Mustafa Abdul Rahman el Salem. APPELLANTS.

v.

1. Kamalna, daughter of Muhammad el Eissa,
2. Fatmeh, daughter of Mustapha Abdul Rahman el Salem,
3. Ali Awad Mustafa Abdul Rahman el Salem,
4. Shafika Mustafa Abdul Rahman el Salem. RESPONDENTS.

Possession by heir — Presumption that possession is on behalf of remaining co-heirs may be rebutted — Onus of proof — M. C. P. R. 139.

Appeal from the judgment of the Magistrate's Court of Ramleh, sitting as a Land Court, dated 25th January, 1943, in Case No. 831/42 (Lands), allowed and case remitted:—

The presumption that possession by an heir is on behalf of all other co-heirs, may be rebutted.

(*A. M. A.*)

ANNOTATIONS: The law regarding prescription between co-heirs is fully set out in C. A. 197/41 (8, P. L. R. 499; 1941, S. C. J. 458; 10, Ct. L. R. 205). For earlier decisions on the subject *vide* note 5 in 1941, S. C. J., on p. 460. For a recent case in which the presumption was held not to have been rebutted see C. A. 37 & 38/42 (9, P. L. R. 362; 1942, S. C. J. 416).

(*H. K.*)

FOR APPELLANTS: Elia.

FOR RESPONDENTS: Anabtawi.

JUDGMENT.

This is an appeal from a judgment of the learned Magistrate, Ramleh, sitting as a Land Court. The claim was by certain persons for their shares in land inherited from a common ancestor together with the Defendants.

The case would appear from the record to have been tried unsatisfactorily, and it is very difficult really to determine from the record what actually did happen, but it would seem that the Magistrate

treated the presumption, that possession by one heir is on behalf of all other co-heirs, as a presumption that could not be rebutted. That is a wrong view to take. The presumption is one that can be rebutted. Its only effect is that it shifts the onus of proof in this particular case from the Plaintiffs to the Defendants in the original action for them to prove that the presumption of co-possession is not the case in this particular instance. Apparently neither side had any chance to produce any evidence, and the case will have to go back for retrial.

The appeal is allowed, the judgment quashed and the case remitted, in particular Rule 139 of the Magistrates' Courts Rules to be complied with and the evidence to be heard in this case. It would seem that the Appellants (or the Defendants in the Court below) have the right to begin their evidence, and the Respondents (Plaintiffs) will have the right to call rebutting evidence if they so desire.

With regard to costs, the costs of this appeal to be costs in the cause. We certify the sum of LP. 10 advocate's attendance fee on the hearing of this appeal, which will go to the ultimately successful party.

Delivered this 17th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 4/43.

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

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

IN THE APPEAL OF :—

George Elie Yeghiaian. APPELLANT.

v.

Yeghia Garabed Yeghiaian. RESPONDENT.

Possession and ownership — Ottoman Magistrate's Law, Art. 24 — Occupation by licence — Licensee may hold over save against better title.

Appeal from a judgment of the District Court of Jerusalem, appellate capacity (*Cur.* Shaw, J., P. D. C.), in Civil Appeal No. 65/42, dismissed:—

A licensee may not apply for recovery of possession from a person whom another licensee has allowed to stay.

(*A. M. A.*)

ANNOTATIONS :

1. The premises belonged to the Armenian Patriarchate and the Appellant had resided therein by licence from the Patriarchate. Appellant, in 1937, left the premises and in November, 1941, Respondent broke into one of the rooms and, after negotiations, obtained from Appellant's son the key to another room in the premises. Respondent also obtained the consent of the Patriarchate to reside in the said second room. Appellant thereupon instituted the present action.

2. For recent authorities on Art. 24 of the Ottoman Magistrates' Law see C. A. 194/38 (5, P. L. R. 461; 1938, 2 S. C. J. 103; 4, Ct. L. R. 141) — *forceful dispossession pending action for ownership;* C. A. 25/39 (6, P. L. R. 216; 1939, S. C. J. 193; 6, Ct. L. R. 224) — *effect of criminal conviction for trespass;* C. A. 112/39 (6, P. L. R. 569; 1939, S. C. J. 517; 7, Ct. L. R. 18) — *applicability of Article to action by Government;* C. A. 107/40 (7, P. L. R. 331; 1940, S. C. J. 458) — *plaintiff himself in possession;* C. A. 24/41 (1941, S. C. J. 424; 10, Ct. L. R. 193) — *recent possession to be proved;* C. A. 190/41 (8, P. L. R. 484; 1941, S. C. J. 431; 10, Ct. L. R. 170) — *forceful dispossession to be proved;* C. A. 46/42 (9, P. L. R. 271; 1942, S. C. J. 968) — *defendants in possession by virtue of unexpired agreement;* C. A. 200/42 (1942, S. C. J. 972) — *failure to take action in time.*

3. Note that the Civil Procedure Ordinance, No. 53 of 1939, provides for the repeal of the whole of the Ottoman Magistrates' Law. The Ordinance has, however, not yet been brought into force.

(*H. K.*)

FOR APPELLANT: Cattan.

FOR RESPONDENT: Goitein.

JUDGMENT.

This is an appeal from the judgment of the District Court, Jerusalem, in its appellate capacity, whereby the judgment of the Magistrate's Court, dated the 23rd July, was set aside.

It seems that the learned Magistrate based his judgment on Article 24 of the Ottoman Magistrates' Law, which, it was submitted before him by the Plaintiff's advocate, was the law applicable, and he held that it was not so applicable. We agree that it has no application to the facts of this case.

The Plaintiff claimed possession, but in his statement of claim stated he was owner, but in evidence he said, "The house is not registered in my name. I do not know whether it is registered. It is to the Community. The Community is like this, holding the premises."

He had vacated the premises in 1937 and gone to live in Upper Bak'a, and handed the key to his son. The son had subsequently made an arrangement with the Defendant and let him into possession of the room, but the Plaintiff, the father, objected to this.

The right of occupation of either of them was by mere licence, and

the Defendant had obtained such licence from the Armenian Patriarchate, who apparently owned the property.

If the Plaintiff wishes to dispute the ownership of the property he must go to the Land Court, but the possession is that of the Defendant at the moment, and he obtained such possession from the Plaintiff's son, and the father — the Plaintiff — is not in a position to dispute that possession.

For these reasons the appeal must be dismissed, with costs on the lower scale to include LP. 5 advocate's attendance fee.

Delivered this 5th day of February, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 30/43.

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

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

IN THE APPEAL OF :—

1. Mahmud Muhammad Abu Samaha,
2. Ali Ahmad Jamileh,
3. Hassan Abdul Hadi El Masri. APPELLANTS.

v.

The Attorney-General. RESPONDENT.

Armed party committing robbery and one of them killing the robbed person — Party tried and convicted of murder by Assize Court constituted of single British Judge — Question whether Defence (Judicial) Regulations (No. 2) ultra vires Emergency Powers (Defence) Act 1939 — Common design and criminal responsibility of principals in first and second degree — Fruitless objections to caution and to Information.

Appeal from the judgment of the Court of Criminal Assize (*Cur.*: Rose, J.), dated the 8th March, 1943, dismissed:—

1. Defence (Judicial) Regulations (No. 2) prescribing constitution of Courts in view of shortage of man power — not *ultra vires* Emergency Powers (Defence) Act, 1939, as words "for the maintenance of public order and the efficient prosecution of any war" in the Act provide ample legal authority for prescribing constitution of Courts.

2. Words in caution "and may be used in evidence during your trial" —

not an inducement; caution good, and statement made thereupon by accused admissible.

3. Sec. 24, Criminal Code Ordinance — only a definition clause stating what persons shall be deemed to have committed the offence; not necessary to recite it (nor sec. 23) in Information charging several persons with commission of offence.

4. When persons go out armed to commit robbery, the natural inference to be drawn from their being armed is that all of the party contemplate the use of arms, if necessary, to resist or overcome opposition, and if each of them carries out part of the common design in one set of premises and victim of robbery is killed, all are constructively present on scene of killing.

FOLLOWED: CR. A. 195/42 (not reported); CR. A. 143/41 (9, P. L. R. 7; 11, Ct. L. R. 4; 1942, S. C. J. 67); R. *v.* Betts and Ridley, 22 Cr. App. R. 148.

REFERRED TO: R. *v.* Pridmore, 8 Cr. App. R. 193; R. *v.* Short, 23 Cr. App. R. 170.

(*M. L.*)

ANNOTATIONS:

1. On the first point *cf.* CR. A. 88/37 (2, Ct. L. R. 83) where it was held that the Criminal Code Ordinance, 1936, was not *ultra vires,* as the legislative authority in Palestine was given by Article 18 of the Palestine Order in Council the power to promulgate ordinances for the "Peace, Order and Good Government" of Palestine.

2. On the second point see as to confessions and caution generally: — CR. A. 54/43 (*ante,* p. 235 and annotations thereto) and particularly CR. A. 155/42 (12, Ct. L. R. 189; 1942, S. C. J. 689) and annotations thereto.

3. On the third point see CR. A. 143/41 (*supra*) and annotations thereto.

4. As to constructive presence on scene of crime see CR. A. 83/41 (8, P. L. R. 267; 10, Ct. L. R. 103; 1941, S. C. J. 266 and note thereto).

As to mere presence at place where offence is committed see CR. A. 9/42 (9, P. L. R. 46; 11, Ct. L. R. 11 and annotations; 1942, S. C. J. 43 and note 2).

(*A. G.*)

FOR APPELLANTS: No. 1 — Nakhleh.
No. 2 — Moghannam and Z. Dajani.
No. 3 — Cattan.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

Copland, J.: The Appellants were convicted at the Jaffa Assizes before Rose J. on March 8th of this year, after a trial extending over several days, of murder, contrary to Section 214(c) of the Criminal Code, that is to say, of wilfully killing Ahmad Muhammad Isdudi at Ijlil village in order to prepare for or to facilitate the commission of an offence, to wit, robbery, and were sentenced to death.

Before going into the details of the case, there is one point which I will deal with first, since it is not concerned with the facts, and that

is Mr. Cattan's argument on behalf of the third Appellant, Hassan Abdul Hadi, that the Court of trial was wrongly constituted. This point has already been over-ruled by this Court in Criminal Appeal 195/42, El-Abed Muhammad El-Bayer *v.* Attorney General, but I will deal with it here more fully.

By Section 10 of the Courts Ordinance, 1940, the Court of Criminal Assize is to be constituted of three Judges. On 13th July, 1942, the Defence (Judicial) Regulations (No. 2), 1942, made under Article 3 of the Emergency Powers (Colonial Defence) Order-in-Council, 1939, and the Emergency Powers (Defence) Act, 1939, came into force. The Imperial Act was applied to this territory by Article 3 of the above mentioned Order-in-Council. Section 1, sub-sections (1), (2) and (4) of the Act are as follows:—

> "1.—(1). Subject to the provisions of this section, His Majesty may by Order-in-Council make such Regulations (in this Act referred to as 'Defence Regulations') as appear to him to be necessary or expedient for securing the public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.
>
> (2). Without prejudice to the generality of the powers conferred by the preceding sub-section, Defence Regulations may, so far as appears to His Majesty in Council to be necessary or expedient for any of the purposes mentioned in that sub-section —
>
> (a) make provision for the apprehension, trial and punishment of persons offending against the Regulations, and for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm;
>
> (b) authorise —
>
> (i) the taking of possession or control, on behalf of His Majesty, of any property or undertaking;
>
> (ii) the acquisition, on behalf of His Majesty, of any property other than land;
>
> (c) authorise the entering and search of any premises; and
>
> (d) provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification.
>
> (4). A Defence Regulation, and any order, rule or byelaw duly made in pursuance of such a Regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

By paragraph (a) of the first Schedule to the above Order-in-Council, the Governor, which term includes for this territory the High Commissioner, is substituted for His Majesty in Council as the authority em-

powered to make Defence Regulations for this territory. It has been argued by Mr. Cattan, first, that Regulations, in view of the wording of sub-section (2) of Section 1 of the Act, can only make provision for the trial of offences against the Defence Regulations, but this argument ignores the words appearing at the commencement of the subsection, namely, "Without prejudice to the generality of the powers conferred by the preceding subsection". The powers in sub-section (1) are general, and are not limited to prescribing the mode of trial of persons offending against the Defence Regulations only. Secondly, it is argued that the words in Section 1, sub-section (1) of the Emergency Powers (Defence) Act, 1939, do not authorise the Defence (Judicial) Regulations, which are, therefore, *ultra vires*. I do not agree. The Defence (Judicial) Regulations were drafted after a consultation between all the British Judges of the Supreme Court and the Attorney General, and their purpose was to make provision for the shortage in manpower, by releasing Judges for war work if found necessary. It seems to me that the words in Section 1, sub-section (1) "for the maintenance of public order and the efficient prosecution of any war" provide ample legal authority for prescribing the constitution of Courts. The maintenance of public order demands that offences shall be tried expeditiously, and so does the efficient prosecution of the war. Delay in the trial of offences encourages crime, which hinders the efficient prosecution of the war, by diverting manpower to its suppression: and, due to the emergency, Courts cannot be constituted as formerly. It is urged that it is contrary to the elementary principles of justice that a man should be tried by one Judge sitting alone. I fail to see why. In many parts of the British Empire persons are so tried, and the Judge sits without a jury, and in many cases without assessors. And since manpower is an essential element in the prosecution of the war, to constitute Assize Courts of one Judge instead of three Judges is in my opinion amply covered by the provisions of Section 1, subsection (1) of the Imperial Act. This point, therefore, fails.

To come now to the facts of this case. The material facts were not in dispute. A party of men, including the three Appellants, went to the village of Ijlil intending to rob the occupants of a particular house where they had information that a considerable sum of money was to be found. According to statements made to the Police by Ali and Hassan, the second and third Appellants, the plan was proposed to them by Mahmud, the first Appellant, and they accepted it. The second Appellant had a dagger — all the other men in the party carried firearms. It is clear that they all set out with the common design of robbery. On arrival at the premises, one of the men climbed the wall and

opened the door of the courtyard, letting the others in. The party then divided into two groups, one group including Ali and Hassan proceeded to the nearest room, that occupied by Mustafa Isdudi, and the other group, including Mahmud, to the house or room of the deceased, Ahmad. This second group forced open the door of Ahmad's room, where were also his brother Abdul Rahman and his wife Halimeh. Mahmud told the occupants to keep silent, and then shot Ahmad, fatally injuring him. These witnesses say that Ahmad was about to shout when he was shot, that the assailants remained on guard for a short time after the shooting and then left, and further shots were fired after their retreat.

In the meantime the first group forced open the door of Mustafa's room and entered, threatening the occupants with firearms, found the money which was the common property of all three brothers and which was hidden in a cushion, and left with it. Whilst the search was in progress, the people in the room heard a shot from close at hand, and later, after the departure of the men, there were further shots fired. After leaving, on the way home, the party divided the proceeds of the robbery between them. Tracks of five persons were subsequently found leading from the premises for a distance of some 10—12 kilometres to the village of Sheikh Muwannis, where the Appellant Mahmud lived, and on the next morning cartridges, live and expended, were found in the vicinity of the scene of the crime.

Upon that state of facts proved beyond controversy, none of the Appellants gave any evidence at the trial. All had made statements before the trial, in which they admitted the common intention to rob, and the carrying out of the robbery. The Appellant Mahmud in his statement endeavoured to throw the responsibility for the shooting on another person, not before the Court, but the learned Judge did not believe that allegation. It has been pressed that these statements were wrongly admitted, since the wording of the caution was wrong, and might be held to be an inducement. The learned Judge rejected this submission, and for the reasons given by him, I think that all the statements were admissible. No inducement can be inferred from the words "during your trial" and the caution was in my opinion adequate and not subject to criticism.

So far as the Appellant Mahmud is concerned, there can be no question that he was properly convicted of murder. Whilst his companions were carrying out the actual robbery, which he and they had jointly planned, he killed one of the owners of the money, and he killed him when, according to the evidence, the victim was about to shout. The killing was clearly done in the furtherance of this offence of robbery,

to which he was a party. It was argued on his behalf on this appeal that there was not sufficient evidence of identification, and that the evidence should not have been believed. The learned Judge went most carefully into all the evidence against this man, and believed it. And indeed it is difficult to see what other verdict he could have arrived at. The appeal by Mahmud must fail.

Now, with regard to the case of the other two Appellants: their conviction rests upon Section 24 of the Criminal Code. This Section is a codification of the English Common Law and is in these terms:—

> "24.—When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose any offence or offences is or are committed of such a nature that the commission is a probable consequence of the prosecution of such purpose, each of such persons being present at the commission of any of such offences is deemed to have committed the offence or offences committed".

This Section is slightly wider in its effect than the English Common Law, because, whereas the Section speaks of a common intention to prosecute an unlawful purpose, the Common Law requires the common intention to be to commit a crime of violence. The distinction is immaterial here, because the common design was to commit armed robbery, a crime which is, next to murder, one of the most serious offences known to the criminal law of this territory. It has been suggested that the information was defective, since the Appellants were not charged under this Section. In my opinion this was not necessary. Section 24 is a definition clause, and states what persons shall be deemed to have committed the offence in just the same way as Section 23 does. In Criminal Appeal 143/41, Ja'bari and others *v.* Attorney General (9 P. L. R. 7) this Court held that it was not necessary to recite Section 23 in an information charging several persons with the commission of an offence, and the same reasoning applies with regard to Section 24.

It has been urged by Mr. Moghannam and Mr. Cattan, on behalf of Ali and Hassan, that there was no common design to kill, that the killing was not in furtherance of the common intention to rob, that there was no evidence of any arrangement to use violence, nor was there any evidence to shew that violence was anticipated or contemplated, and that the Appellants were not present on the scene of the killing. It is not suggested that they could properly be acquitted altogether, but it is argued that at the most they could only be convicted of armed robbery. The only question, therefore, is whether the learned Judge misdirected himself, and whether on the facts of this case they ought to have been convicted of armed robbery only.

In deciding this question, it is necessary properly to appreciate the

lay out of the premises. From the plan produced at the trial, the houses or rooms are enclosed in a walled courtyard, some eleven to eleven and a half metres square. On the northern side there is the only door leading into the courtyard from the street. In the north-western corner there is the one-roomed house of Mustafa — in the south-western corner the one-roomed house of Ahmad. Each house or room is about four and a half metres square. The passage way between the two rooms is two and a half metres wide, and the door leading to Ahmad's room opens into this passage, whilst the door to Mustafa's room is on the east wall of the room, facing obliquely the entrance door to the courtyard. It is clear that these two rooms and the courtyard are all part of one premises, and in fact the distance between the doors of the two rooms is less than seven metres, though the door of Ahmad's house cannot be seen from the doorway of Mustafa's house and *vice versa*. And these premises were occupied by three brothers and their families — in effect all living as one household.

The learned Judge in his judgment found the following with regard to all the Appellants — "it seems to me to be abundantly clear, and, in fact, to be the only reasonable inference that can be drawn, that they were engaged in a concerted design of robbery; that they went to this compound in the company of two other persons with the intention of robbing Mustafa of his money; and that in pursuance of that design three of them, armed, entered the house of Mustafa, and two, armed, entered the house of Ahmad; and that it was their intention (which intention, in my opinion, must inevitably be inferred from their acts) to resist opposition, if necessary with violence; and that the killing of Ahmad by the first Accused (Mahmud) was a probable consequence of their adventure". The learned Judge went on to reject the suggestion that there were two separate robberies, because, amongst other reasons, the statements of each of the three Appellants shewed conclusively that it was one robbery and the lay-out of the premises was also against it. No attempt was made to search Ahmad's house. It is clear beyond any doubt, in my view, that there was only one robbery.

Also, it is equally clear, to my mind, that when persons go out armed to commit robbery, the natural inference to be drawn from their being armed is that they intend to use those arms, if necessary, to resist or overcome opposition, and the use of the arms must be in the contemplation of all of the party, since even in this territory the carrying of arms is not a normal part of a man's equipment. In other words when people go out armed to commit robbery, they contemplate that violence may be used.

Bearing in mind all these circumstances it is necessary to see whether

any distinction can be drawn in law between the case of Mahmud on the one hand, and that of Ali and Hassan on the other. Two cases which have been relied upon both by counsel for the Appellants and for the Crown do not seem to be of much assistance, at any rate with regard to one of them, in view of the facts of the present case. In Pridmore (8, Cr. App. R. 193) the Court held that if two persons were engaged in a common unlawful enterprise, and one of them, to avoid apprehension, attempts murder, both might be found guilty of the felony if the jury were satisfied from their conduct at the time there was a determination on the part of each to aid the other in escaping arrest.

In Short (23, Cr. App. R. 170) it was laid down that to convict a co-defendant of more than one crime on the ground of common design, there must be satisfactory evidence that the concert extended to each such crime. In that case one offence, that of house-breaking, had been completed, and the second offence, that of attempted murder, was committed by one of the two men concerned in the first offence, when the two men had separated, in an attempt to avoid apprehension.

It seems to me that this case is governed by the case of R. *v.* Betts and Ridley (22, Cr. App. R. 148). The headnote reads:— "In the case of a common design to commit robbery with violence if one prisoner causes death while another is present aiding and abetting the felony as a principal in the second degree, both are guilty of murder although the latter had not specifically consented to such a degree of violence as was in fact used".

The facts of that case were that Betts and Ridley agreed together to rob a certain individual, that the man was attacked and struck by Betts who then stole the money and that Ridley was meanwhile waiting for him in a motor car some little distance away, and after the robbery drove him off and the two then divided the money. The man who was robbed subsequently died from the injuries received.

Avory, J., in delivering the judgment of the Court of Criminal Appeal said, in dealing with the position of Ridley, at p. 154:—

> "First of all, it is clear that in the circumstances he was a principal in the second degree to the robbery with violence, which in fact took place. It is clear law that it is not necessary that the party, to constitute him a principal in the second degree, should be actually present, an eye-witness or ear-witness, of the transaction. He is, in construction of law, present aiding and abetting if with the intention of giving assistance, he is near enough to afford it, should occasion arise. Thus, if he be outside the house, watching to prevent surprise, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. It is clear that Ridley was present in that sense, so as to make him a principal in the second degree to this crime of

> robbery with violence; and although it might be true to say that he had not agreed beforehand that Andrews should be struck on the head in a way likely to cause his death, it is clear upon the authorities that if he was a party to this felonious act of robbery with violence — some violence — and that the other person, the principal in the first degree, in the course of carrying out that common design does an act which causes the death, then the principal in the second degree is equally responsible in law. As was said in East's Pleas of the Crown, at page 256, dealing for the moment again with Betts: "He who voluntarily, knowingly and unlawfully intends hurt to the person of another, though he intend not death, yet if death ensue, is guilty of murder or manslaughter according to the circumstances. As if A. intending to beat B. happen to kill him, if done from preconceived malice" — if done from preconceived intention to rob with violence, it would be the same thing as if done with malice — "it will be no alleviation that he did not intend all the mischief that followed".
>
> That being the position of Betts, what is the position of the principal in the second degree. He is at least, if not more, responsible than an accessory before the fact, and in Foster's Crown Cases, at page 369, dealing with an accessory before the fact, it is said: "Much has been said by writers who have gone before me, upon cases where a person supposed to commit a felony at the instigation of another hath gone beyond the terms of such instigation, or hath, in the execution varied from them. If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt ..... but if the principal in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal". It appears to the Court in this case that the case of Ridley comes precisely within this description. Even if Betts did vary in the manner of execution of this agreed plan to rob, and obviously it must have been a plan to rob with some degree of violence, Ridley being present as a principal in the second degree is equally responsible".

The only difference between Betts and Ridley and the present case is that here the killing was committed by someone other than the persons who actually stole the money. Otherwise the cases seem to me to be exactly the same. But if a principal in the second degree to robbery with violence is guilty of murder, if the victim of the robbery is killed by the principal perpetrator, it seems to me that a principal in the first degree is at least, if not more, responsible than a principal in the second degree. It is obvious from what in fact happened that the robbers had agreed that the group which included Ali and Hassan was to rob Mustafa, and that the group including Mahmud was to

prevent the occupants of the other room from interfering with that project. As I have said, it is a natural inference from the fact that both parties were armed that it was contemplated by all concerned that violence might be used. This is further borne out by the fact that though Ali and Hassan heard the shot fired by Mahmud, as was admitted by them in their statements, yet they continued the search for the money, and did not leave the premises until they had found it. It is not necessary in law that there should have been an agreement to kill. It is clear in law that Ali and Hassan were constructively present on the scene of the killing, since each of the Appellants was carrying out a part of the common design of robbery in one set of premises. To adapt the words of Avory, J., above, even if Mahmud did vary in the manner of execution of this agreed plan to rob, and it was a plan which must have contemplated the possibility of some degree of violence, Ali and Hassan being present as principals in the first degree to the robbery are equally responsible, since the act of Mahmud was a probable consequence of the prosecution of the common intention to commit armed robbery.

There is no evidence to support the suggestion that the act of Mahmud may have been the carrying out of private vengeance against the man who was killed — on the contrary, the proved facts and circumstances emphatically negative such a supposition.

There was ample and cogent evidence to support the learned Judge's conclusions, and there was no misdirection in law; in these circumstances, it is impossible for this Court in my opinion to interfere.

The appeal is dismissed.

Delivered this 8th day of April, 1943.

British Puisne Judge.

Gordon Smith, C. J.: I have read and discussed with my brother Copland his judgment, and I concur and have nothing to add.

In the previous hearing we had unanimously agreed to dismiss the appeal of Appellant No. 1, Mahmud, and the appeals of the other two Appellants were dismissed by majority. We announced our decision there and said that we would give our reasons later.

Chief Justice.

Khayat, J.: I agree that the appeal by Mahmud No. 1 Appellant be dismissed.

The circumstances of this case do not disclose a previous intention to commit murder on the part of the second and the third Appellants, especially as they were both in one room where the murder did not take place. The mere fact that all Appellants came armed to the site of

the crime, does not constitute a sufficient reason that the murder was a probable consequence of the burglary.

I am, therefore, of the opinion that the second and the third Appellants are guilty of the offence of burglary and house-breaking, while armed, and not guilty of murder.

Puisne Judge.

CIVIL APPEAL No. 141/43.

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

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

IN THE APPEAL OF :—

Norbert Samueli. APPELLANT.

v.

Paulina Wangrover. RESPONDENT.

Letting of furnished flat for a limited period — Action under sec. 8(1)(c) of R. R. (Dwelling Houses) Ord. 1940 — Hotel or boarding house as alternative accommodation — English authorities on question of alternative accommodation — Discretion of Magistrate in considering case under sec. 8(1)(c) of R. R. (Dwelling Houses) Ord. — Non-interference of Court of Appeal.

Appeal from the judgment of the District Court of Haifa, dated the 13th of April, 1943, in Civil Appeal No. 57/43, dismissed:—

1. Sec. 3(1) of Rent Restrictions (Dwelling Houses) Ord. excluding hotel or boarding house from applicability — not intended to exclude it from being considered, in special circumstances, as alternative accommodation under sec. 8(1)(c).

2. English authorities on question of alternative accommodation — not very helpful in Palestine, as under existing circumstances local conditions very different to what they are in England in normal times.

3. Magistrate has discretion in considering case under sec. 8(1)(c) of R. R. (Dwelling Houses) Ord., and if discretion properly exercised, appellate Court not entitled to interfere.

(*M. L.*)

ANNOTATIONS: On question of alternative accommodation see annotations to C. A. 265/42 (*ante*, at p. 10); a distinction between English and Palestinian Law in this respect was also drawn in this case; C. A. 78/43 (*ante*, p. 18) — it is for the Magistrate to determine whether alternative accommodation is reasonable.

On non-interference with discretion of lower Court see C. A. 78/43 (*supra*) and annotations (para. 2) and C. A. 285/42 (*ante*, p. 29).

(*A. G.*)

FOR APPELLANT: Weston Sanders.

FOR RESPONDENT: Eliash.

JUDGMENT.

This is an appeal, by leave, from the judgment of the District Court, dated 30th April, 1943, which was on appeal from a decision of the Magistrate's Court, dated 5th March, 1943.

The District Court upheld the judgment of the Magistrate and dismissed the appeal. The point is under Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, and it is the usual appeal which comes before the Courts regularly under that Ordinance.

In this case the Magistrate made an order for eviction under the paragraph quoted, on the grounds that the premises were reasonably required by the landlord for her own occupation, and having considered the circumstances of the case under that section he found it reasonable to make an order for eviction. The facts are plain and straightforward.

The landlord let her furnished flat for a period of six months while she was absent in Jerusalem. The Appellant before that time was living in a hotel. When she came back to Haifa she asked the tenant to vacate the flat, and as the tenant refused to leave the premises she was compelled to take these proceedings.

On the merits there is nothing to be said for the tenant who refuses to vacate the premises and relies solely on technical points of law. The learned President of the District Court said:—

> "As regards the surrounding circumstances the Magistrate found that Appellant before leasing the flat lived in a hotel, and thought it reasonable, apparently, that Appellant should return to hotel life until he found another flat furnished or unfurnished. To my mind also, such would be reasonable, and there is no doubt Appellant would have little difficulty in securing accommodation in a hotel and living there as he did previously."

It is urged that the alternative accommodation referred to under the Rent Restrictions (Dwelling Houses) Ordinance, 1940, cannot be that of a hotel or boarding-house, as this Ordinance, under Section 3(1), has specifically provided that it shall not apply to a hotel or boarding-house. We do not agree that the wording of Section 3(1) is intended to exclude a hotel or boarding-house as regards such being considered as alternative accommodation under Section 8(1)(c).

In Palestine, people, even with families, are accustomed to living in pensions and hotels, and under existing circumstances conditions are

very different to what they are in England in normal times. English authorities are not, therefore, very helpful.

The tenant had previously lived in a hotel, was convenienced by the landlord in being allowed to occupy her flat and use her furniture for a specific period during her absence, and now tries to take advantage of the law in his refusal to vacate the premises. Every case must, of course, be considered on its own merits, and a discretion is vested in the Magistrate in considering such merits. He has properly exercised such discretion in this case, and reasonably so in our opinion, and this Court is not, therefore, entitled to interfere with the exercise of that discretion. The appeal is, therefore, dismissed.

The Appellant will pay the Respondent her costs to include the sum of LP. 10 for advocate's attendance fee before us.

Delivered this 15th day of June, 1943.

Chief Justice.

HIGH COURT No. 50/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Nathan Driangol. PETITIONER.

v.

1. The Chief Execution Officer, Magistrate's Court, Tel-Aviv,
2. Meyer Lesirkewicz. RESPONDENTS.

Judgment for eviction confirmed by District Court and by Court of Appeal — Grant of numerous extensions by Chief Execution Officer — High Court finding last extension unjustified.

Return to a rule *nisi* issued on the 28th May, 1943, directed to the first Respondent to show cause why he should not execute the judgment of the Magistrate's Court, Tel-Aviv, as confirmed by the District Court and the Supreme Court, the subject matter of Execution File No. 4370/42, and why his Order given on 20.5.43 should not be set aside; order made absolute:—

1. High Court will set aside Chief Execution Officer's order granting further extension for eviction, if they find that in the circumstances such extension unjustified.

2. "The Rent Restriction Acts are Acts for the protection of tenants and not Acts for penalising the landlords".

(*M. L.*)

FOLLOWED: *dictum* in Cumming *v.* Dawson, 168 L. T. R. at p. 36.
ANNOTATIONS: The judgment of the Court of Civil Appeal confirming the eviction order is C. A. 265/42 (10, P. L. R. 60, *ante*, p. 9). *Dictum* of Lord Greens, M. R., in Cumming *v.* Dawson (*supra*) followed.

Chief Execution Officer not to grant delays without limit — H. C. 65/40 (8, Ct. L. R. 71; P. P. 13.ix.40; 1940, S. C. J. 236 and annotations); H. C. 101/40 (8, Ct. L. R. 147; P. P. 6.xii.40; 1940, S. C. J. 398 and annotations; see also dissenting judgment of Frumkin, J.).

(*A. G.*)

FOR PETITIONER: Rubinstein.
RESPONDENTS: No. 1 — Absent — served.
No. 2 — In person.

ORDER.

This is a return to an order *nisi* granted by this Court against the Chief Execution Officer, Magistrate's Court, Tel-Aviv, calling upon him and the second Respondent, the tenant of certain premises, to show cause why an order of eviction issued should not be executed, and why the last order of the Chief Execution Officer granting a further extension, should not be set aside.

On the 28th July, 1942, the Magistrate gave a judgment of eviction in favour of the Petitioner. That judgment was confirmed by the District Court on appeal on the 30th October, 1942, and on further appeal to this Court that appeal was dismissed on the 8th February, 1943. On the 11th February, 1943, the Petitioner applied to the Chief Execution Officer to proceed with the execution which had in the meantime been stayed pending these two appeals. One month's extension was given. On the 1st March, 1943, the second Respondent petitioned for further time and, after hearing parties, on the 30th March a further extension of six weeks was granted until the 11th May, 1943. On the 5th May a further extension was given for ten days, until the 21st May, and on the 18th May a further extension was given of two days until the 23rd May. On each of these occasions, naturally of course, the Petitioner, the landlord, protested. On the 20th May the Chief Execution Officer gave an additional and, as he said, final extension until the 13th June, 1943. Against that final order the Petitioner has come to this Court.

Of course it is well known to this Court that the housing situation in many parts of the country and particularly in Tel-Aviv is very serious, but the Courts in this country, in particular the Magistrates' Courts

in Tel-Aviv, are always most reluctant to an eviction order, and they only do so in cases where there is no other alternative. In every case the greatest consideration is shown to tenants in their difficulties. But in this case the action for eviction was brought fourteen months ago. At least five extensions of the date for eviction have already been granted since the judgment was confirmed on the second appeal to this Court and it seems to us that unless a Chief Execution Officer is to be given the power to nullify completely a judgment given by the Supreme Court, in other words, to become a superior court of appeal to the Supreme Court, there must come a time that these extensions must stop. This matter of hardship has been very carefully considered on numerous occasions by the authorities whose duty it is to do so and I must say that the second Respondent seems to have been treated with the greatest consideration. As was said lately by Lord Greens, M. R., in Cumming *v.* Dawson, 168 Law Times Reports, at page 36:—

> "The Rent Restriction Acts are Acts for the protection of tenants and not Acts for penalising the landlords."

We think that the last extension given by the Chief Execution Officer was unjustified. The time, of course, is very short now, as was pointed out to the Petitioner when the application was made for an order *nisi,* but on the facts before us, and bearing in mind that this matter has been most carefully considered and every consideration given to the second Respondent for many months by the Chief Execution Officer, we think that the last extension was certainly not justified. The order *nisi* must, therefore, be made absolute. The Petitioner does not ask for costs.

Given this 10th day of June, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 45/43.

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

BEFORE : Copland, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Abdallah Salim Abu Jazar,
2. Awad Nimer Hadayed. — APPELLANTS.

v.

The Attorney-General. — RESPONDENT.

Confessions — Statements made to police inadmissible, whether subsequent confession admissible — R. v. Doherty — Sentence.

Appeal from the judgment of the District Court of Jaffa, dated the 6th day of April, 1943, in Criminal Case No. 35/43, whereby Appellants were convicted of burglary contrary to Section 295(a) of the Criminal Code Ordinance, 1936, and sentenced, the first Appellant to three years' and the second Appellant to four years' imprisonment, dismissed and sentences reduced:—

> If a statement is made to the police by an accused person, in circumstances which render it inadmissible, and a confession is subsequently made to the police, it is a question of fact whether the confession is influenced by the same motive and therefore suffers from the same defects as the first statement.
>
> (*A. M. A.*)

DISTINGUISHED: R. *v.* Doherty, 1874, 13 Cox 23.

ANNOTATIONS: The leading case on the admissibility of extra judicial confessions is CR. A. 155/42 (1942, S. C. J. 689; 12, Ct. L. R. 189); see also Ass. 54/42 (*ante*, p. 45), CR. A. 54/43 (*ante*, p. 235) and CR. A. 30/43 (*ante*, p. 308). and note 2.

(*H. K.*)

FOR APPELLANTS: Anebtawi.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

The Appellants were convicted of burglary in a Military Hospital and sentenced to three and four years' imprisonment respectively. The property stolen was 95 blankets and 105 sheets and various other articles.

An objection has been taken on the appeal that as soon as the first two statements made by the Appellants to the Police were rejected by the trial Court on the ground that they had been improperly obtained, the later two statements of the two Appellants taken by the Police should equally have been rejected. Reference is made to the case of Rex *v.* Doherty, 13 Cox 23, Archbold p. 402, where a prisoner was told by a constable at 10 o'clock in the morning that it would be better for him to tell the truth, and an admission by the prisoner to another constable after six o'clock *p. m.* on the same day was not allowed to be given in evidence although the constable had properly cautioned the accused, as it was held to be inadmissible. In this case, however, 48 hours elapsed between the two statements and I think it can be said that the learned Judge very carefully considered the question before admitting these later statements. The convictions must, therefore, stand.

With regard to sentences, we feel that they are perhaps somewhat on the heavy side, bearing in mind the youth of both Appellants. We, therefore, reduce them in each case to one of two years' imprisonment.

Delivered this 5th day of May, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 40/43.

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

BEFORE : Copland, Rose and Khayat, JJ.

IN THE APPEAL OF :—

Attorney General. APPELLANT.

v.

1. Landau Bros.,
2. Fajwel Landau,
3. Hillel Landau. RESPONDENTS.

Appeal against acquittal from charge under War Risks Insurance (Prescribed Scheme) Rules — Question of judicial notice of Regulation promulgated in Palestine Gazette — Convenience of bringing rule or regulation relied on by Prosecution to notice of trial Court — Interpretation Ordinance, Secs. 3 & 9.

Appeal from the judgment of the District Court, Tel-Aviv, in Criminal Case No 19/43, dismissed:—

1. Court of Appeal should be reluctant, especially where no point of public importance arises, to reverse the decision of a Court which has acquitted a party on holding that a scheme promulgated in Palestine *Gazette* as Rules made under a certain Ordinance is not a matter of which they should take judicial notice.

2. (*Obiter*): It is eminently convenient and better practice that when a rule or regulation forms the basis of a criminal charge that rule or regulation should, in fact, be brought to the notice of the trial Court at some stage of the proceedings.

(*M. L.*)

ANNOTATIONS: *Cf.* CR. A. 10/39 (6, P. L. R. 180; 5, Ct. L. R. 177; 1939, S. C. J. 155) — *contents of a town planning scheme to be proved.*

(*A. G.*)

FOR APPELLANT: Crown Counsel — (Rigby).

FOR RESPONDENTS: Goitein.

JUDGMENT.

This is an appeal by the Attorney General from a decision of the District Court of Tel-Aviv. The point raised is the interesting one as to whether the learned President was right in holding that a scheme prescribed under the War Risks Insurance Ordinance, 1941, is not a matter of which he should take judicial notice. It appears, oddly enough, to be the case that in the course of the proceedings in the

Court below, during which evidence was called and, judging by the record, considerable discussion took place, that the learned Judge's attention was not specifically called to the scheme in question, which appears at page 474 of Supplement No. 2 of the Palestine *Gazette*, dated 12th March, 1942.

On behalf of the Attorney General, Mr. Rigby argues that every Judge and Magistrate must take judicial notice of all ordinances. That, no doubt, is a proposition that cannot seriously be disputed. Mr. Rigby referred us to the definition of "Ordinance" appearing in Section 3 of the Interpretation Ordinance which says:—

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

And if one refers to the definition of "Regulations" in the same section, it will be seen that regulations include rules and byelaws. It is clear by looking at the wording of this gazetted notice that it contains what, in fact, are rules. It says: "These rules may be cited as the War Risks Insurance (Prescribed Scheme) Rules, 1942", and Section 14 of the Ordinance itself provides that "The Board may, with the approval of the High Commissioner, prescribe rules", this provision, in our opinion, covering a scheme promulgated under Section 4(1) of the Ordinance. It would, therefore, appear, on the face of it, that there is nothing illegal in the scheme itself, but Mr. Goitein has referred us to Section 9 of the Interpretation Ordinance which would appear to bring the law of Palestine on this matter into conformity with the practice which is followed in English Courts. Section 9 reads as follows:—

> "The production of a copy of the *Gazette* containing any regulation, order, proclamation or government or public notice, or of any copy of any regulation, order, proclamation or government or public notice purporting to be printed under the authority of the Government of Palestine shall be *prima facie* evidence, in all courts and for all purposes whatsoever, of the due making and tenor of such regulation, order, proclamation or government or public notice."

It may be that there is some conflict between the definition section of the Interpretation Ordinance and Section 9. The point is a difficult one and eminently debatable, but this is a criminal proceeding, and a Court of Appeal in such a case should, in our view, be reluctant to reverse the decision of a learned Judge who has acquitted a party in such circumstances, especially as no point of public importance arises. In our opinion, whatever the technical position may be, it is eminently

convenient and in accordance with normal practice that when a rule or regulation forms the basis of a criminal charge that rule or regulation should, in fact, be brought to the notice of the trial Court at some stage of the proceedings. We do not wish to suggest that a copy of the *Gazette* must always be formally produced, in the sense that an exhibit is produced, but it seems to us to be the better practice and one to which no possible exception can be taken, that at least some reference should be made to the rule or regulation by its actual visual production.

For these reasons we are of opinion that the appeal must be dismissed.

Delivered this 15th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 90/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

Hussein Abdel 'Al El-Nadi. APPELLANT.

v.

Mariam Abdel Halim Yousef. RESPONDENT.

Contract of sale providing for liquidated damages without necessity for any notarial or other notice — Seller under contract of sale failing to transfer the land and giving an irrevocable power of attorney to sell it to another person — Action brought six years later for recovery of part of purchase money and damages — Question of necessity or otherwise for notarial notice — Liability to pay interest on money received.

Appeal from appellate judgment of District Court, Jaffa, C. A. 1/43, allowed:—

1. Lapse of several years from date of contract of sale to date of bringing action for failure to complete must be deemed an implied extension of time mentioned in contract, and in order to fix new time for completion a notarial notice must be served (notwithstanding clause of liquidated damages dispensing with notarial or other notice).

2. When a person contracts to sell land to A and then sells it to B or gives an irrevocable power of attorney to sell the land, he has thereby put it out of his power to transfer his land to A.

3. Where a party has put it out of his power to carry out the contract, not necessary for a notarial notice being served on him.

4. Fact that after action was brought by A against C who sold (or gave an irrevocable power of attorney to sell), the land to B instead of to A, the land was retransferred to C does not undo the breach of contract.

5. An error in judgment should be corrected in presence of parties or after sending them notice to attend.

6. In absence of a clause in contract providing for interest to be paid in event of purchase money having to be returned, interest payable from date of action, not from date on which the money was paid.

(*M. L.*)

ANNOTATIONS:

1. On the first point compare C. A. 174/38 (5, P. L. R. 426; 4, Ct. L. R. 113; 1938, 2 S. C. J. 59; P. P. 31.viii.38) and C. A. 59/43 (*ante*, p. 203) and note 1. Where contract contains clause of forfeiture of money advanced — no notarial notice necessary — C. A. 128/41 (8, P. L. R. 356; 10, Ct. L. R. 43; 1941, S. C. J. 332) and annotations; on notarial notice see also C. A. 42/38 (5, P. L. R. 218; 3, Ct. L. R. 165; 1938, 1 S. C. J. 185) and annotations.

2. What amounts to a breach — C. A. 116/41 (10, Ct. L. R. 56; 1941, S. C. J. 476); damages for repudiation of contract — C. A. 162/40 (7, P. L. R. 482; 8, Ct. L. R. 105; 1940, S. C. J. 321 and notes 2, 3).

3. Notarial notice not necessary in case of anticipatory breach — C. A. 116/36 (5, P. L. R. 287; 3, Ct. L. R. 218; 1938, 1 S. C. J. 257) and annotations.

4. On the fifth point see: C. A. 277/42 (*ante*, p. 108); C. A. 258/42 (*ante*, p. 140, note 2); C. A. 202/42 (*ante*, p. 192).

5. On point 6 see: — as to interest — C. A. 85/40 (7, P. L. R. 304; 8, Ct. L. R. 62; 1940, S. C. J. 474 and annotations); C. A. 162/38 (6, P. L. R. 306; 6, Ct. L. R. 24; 1939, S. C. J. 262; P. P. 8.vi.39) and annotations; C. A. 69/39 (6, P. L. R. 374; 6, Ct. L. R. 19; 1939, S. C. J. 376; P. P. 11.vii.39) and annotations.

As to return of purchase price — C. A. 261/40 (8, P. L. R. 71; 9, Ct. L. R. 61; 1941, S. C. J. 36) and annotations; C. A. 59/43 (*ante*, p. 203) and note 3; C. A. 80/43 (*ante*, p. 222) and note 1.

(*A. G.*)

FOR APPELLANT: Elia.

FOR RESPONDENT: Haddad.

JUDGMENT.

This is a second appeal from an appellate judgment of the District Court of Jaffa, reversing a decision of the Magistrate's Court which was in favour of the present Appellant here.

The Appellant, who was the Plaintiff in the Magistrate's Court, sued for the amount of LP. 57.696 mils, the purchase price of certain property paid in advance on a contract made with the Respondent. He also sued for LP. 100 damages fixed in the contract for breach of contract. In order to bring his case within the jurisdiction of the Magistrate he reduced the total amount of the claim to LP. 150.

The Magistrate found that it was not necessary to send a notarial notice to the Respondent, because the Respondent had already transferred the land contracted to be sold to another party. It should be mentioned that the contract contained the usual clause, that in the event of breach which would include transfer to other persons, Respondent was to refund to Appellant his monies together with agreed liquidated damages in the sum of LP. 100.— without necessity for any notarial or other notice. The Respondent had given an irrevocable power of attorney to Abdul Kader Khalil Bayyoud under which she contracted to sell the same property as she had contracted to sell to the Appellant.

It was argued that that was a mistake, and that the Defendant did not know that the plot of land inserted in the power of attorney was the plot of land in dispute, but the Magistrate, who was the proper person to say whether he believed the evidence or not, did not believe that allegation and the finding of the Magistrate, therefore, cannot be queried on appeal. The Magistrate found in favour of the Appellant and ordered the refund of the sum paid on the contract and dismissed the claim for damages on the ground that he could not find that the Appellant had sustained any losses.

On appeal to the District Court that Court reversed the findings holding that the action was premature, inasmuch as the period of six years having elapsed from the date of the contract to the date of bringing the action that must be deemed an implied extension of the time mentioned in the contract, and in order to fix the new time for completion, it was necessary to serve a notarial notice. In that respect I think that the District Court was right, but I think that they failed to appreciate the fact that this land had already been contracted to be sold by an irrevocable power of attorney at the time the action was brought. It is now settled law that when a person contracts to sell land to 'A' and then sells it to 'B' he has thereupon put it out of his power to transfer his land to 'A', and for this purpose, I think that an irrevocable power of attorney has the same effect as a sale, more especially as the land was in fact transferred in accordance with the power of attorney, although subsequently the land was retransferred to the name of the Respondent. And where a party has put it out of his power to carry out the contract, it is not necessary for a notarial notice to be served on him. I think, therefore, that in the result the District Court came to a wrong decision on the appeal.

The only question that remains is as to what is the correct sum in

respect of which judgment should be entered and from what date the interest should run. Mr. Elia very frankly, on behalf of the Appellant, said that he was not present at the proceedings in the Court below while Faiz Bey was, and, therefore, he is unable to contradict what the latter has said with regard to what happened. What happened actually as it seems was that the Magistrate originally inserted the sum of LP. 50 in the judgment as being the amount claimed as purchase money to be returned, whereas in fact of course the correct figure was LP. 57.696 mils to which latter figure he subsequently altered the judgment. It is stated that this alteration was made during the absence of the parties. That of course is quite irregular. If there has been an error in the judgment it should be corrected in presence of the parties or after sending a further notice to the parties to attend. From the statement of claim it appears that interest was claimed on the sum of LP. 150 from the date of action. The Magistrate awarded interest from the 23rd of September, 1935, on the amount to be refunded, being the date on which the money was paid. There is, however, no clause in the contract which says that interest should be paid in the event of the purchase money having to be returned. Interest can only be awarded from the date of action in such a case as this and in the absence of such a clause.

In the result, I think that the appeal should be allowed, the judgment of the District Court set aside and judgment entered for Appellant for the sum of LP. 50 together with interest from the date of action, *i. e.* 18.7.41. The Appellant will get the costs awarded in the Magistrate's Court. As regards the District Court, the Appellant will get the costs awarded there to Respondent, and as regards costs in this Court the total sum of LP. 5 will be awarded.

Delivered this 19th day of April, 1943.

British Puisne Judge.

HIGH COURT No. 52/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :—

Baraf Developments Ltd. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Leib Skorokhod,
3. Shlomo Skorokhod,
4. Shalom Skorokhod,
5. Aharon Dudin,
6. Rahel Rasoumov. RESPONDENTS.

Chief Execution Officer — Ex parte orders — Payment to mortgagee of amounts deposited by mortgagor — Unconditional payment.

Return to a Rule *Nisi* issued on the 7th day of June, 1943, directed to the Respondents calling upon them to show cause why the 1st Respondent should not pay out to the Petitioners unconditionally the whole amount paid in Execution File No. 8666/38, Tel-Aviv; order made partly absolute:—

> Where a debtor pays into the Execution Office with notice of appropriation and the creditor applies for the unconditional payment of the amount so deposited, the parties should be heard and the matter determined.
>
> (*A. M. A.*)

ANNOTATIONS:

1. The Respondents (mortgagors) had made certain payments into the Execution Office specifying in each case whether the payments were on account of interest or capital. On the Petitioner's (mortgagee's) application to withdraw the whole amount paid in but without recognising the appropriations and without prejudice to his right to contest the correctness thereof, the first Respondent, on 31.3.43, held: "I can agree to no conditions".

2. On *ex parte* orders by the C. E. O. see also H. C. 51/38 (1938, 2 S. C. J. 78) — *determination whether building a dwelling house within meaning of Art.* 90, *Execution Law;* H. C. 96/40 (7, P. L. R. 576; 1940, S. C. J. 429; 8, Ct. L. R. 180; P. P. 17.1.41) — *order for payment by instalments.*

(*H. K.*)

FOR PETITIONER: Eliash and Hausner.

FOR RESPONDENTS: Ph. Joseph and Hochman.

ORDER.

The order is made absolute to the extent only that the order of the Chief Execution Officer dated 31.3.43 is set aside, as having been made *ex parte*. Application should be made again to the Chief Execution Officer who should hear and determine the matter after hearing all parties.

No costs to either side.

Given this 29th day of June, 1943.

British Puisne Judge.

CIVIL APPEAL No. 21/43.

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

BEFORE : Rose, J.

IN THE APPEAL OF :—

'Afu Shuqeiri. APPELLANT.

v.

Attorney General. RESPONDENT.

Claim under art. 78 of Ottoman Land Code to a stretch of State land on sea shore — Evidence of possession for more than 10 years in form of leasing the land for digging sand — Question as to whether art. 78 can be invoked in cases where land incapable of cultivation.

Appeal from decision of Settlement Officer, Acre Settlement Area, Case No. 21/Sumeiriya, dismissed:—

To establish a title under Art. 78 of Land Code claimant must prove possession coupled with cultivation; land incapable of cultivation — outside scope of that article.

FOLLOWED: C. A. 57/40 (7, P. L. R. 173; 7, Ct. L. R. 140; 1940, S. C. J. 146); C. A. 65 & 76/40 (7, P. L. R. 288; 1940, S. C. J. 168).

(*M. L.*)

ANNOTATIONS: As to proof of possession and cultivation under Art. 78 of the Land Code see: C. A. 145/41 (1941, S. C. J. 651); C. A. 122/41 (8, P. L. R. 448; 1941, S. C. J. 421); C. A. 57/40 (*supra*); C. A. 65 & 76/40 (*supra*) and annotations to those cases.

(*A. G.*)

FOR APPELLANT: Moghannam.

FOR RESPONDENT : Crown Counsel — (Hogan).

JUDGMENT.

This is an appeal from a decision of the Settlement Officer of the Acre Settlement Area. The dispute concerns a small area of sandy land near the sea and the Appellant bases his claim on the fact that he is the successor in title to one Sheikh Assad who was originally in possession of *kushans* in the area in question, giving his western boundary as the sea. Whether by the sea was meant the high water mark or the low water mark, or whether any other mark is intended, it is difficult to say, and in my opinion is in fact immaterial because it is undisputed that in 1926 Sheikh Assad by agreement with Government agreed to certain boundaries which made his western boundary as demarcated in a plan dated 24th October, 1926, to which the

Settlement Officer refers in his judgment and which I assume that he examined. By that arrangement in 1926 Sheikh Assad appears to have got a few more *dunums* of land in return for the possibly academic sacrifice of some sand on the sea shore. On the plan itself relating to this stretch of sand appear the words 'left to Government'. It is not disputed that this land is *miri* land and in the circumstances of the transaction between Sheikh Assad and Government, it seems to me that no complaint can be made of the Settlement Officer's conclusion that this stretch of land was, at any rate as from 1926, and possibly before, State land within the meaning of Article 78 of the Land Code.

Evidence was called, and the Settlement Officer says that he saw no reason to disbelieve it, that Sheikh Assad was in possession until he was dispossessed by the military in 1938. It appears that his possession took the form of leasing this strip of sand to a certain person who dug out sand and zifzif and in return for that facility he paid a small rent which appears to have been something between LP. 16 and LP. 30 a year. Even assuming, as I am prepared to assume for the purposes of this case, that the possession of Sheikh Assad and his successor in title, the present Appellant, may be regarded as having continued up to the present day, the question which, it seems to me, should be considered, as the learned Settlement Officer says, is whether, this being State land, possession and cultivation for a period of more than ten years has been proved by the Appellant. The only possession or cultivation that is suggested over this area is the fact that it was leased to somebody to take sand and that nobody else during that period of years endeavoured to, or in fact did, take sand. Mr. Moghannam argues that the requirement in Article 78 as to cultivation is only intended to refer to cases where the land is of such a type or quality that it can, in fact, be cultivated. That is a point which seems to me to be covered by authority. There are two cases one way and Mr. Moghannam has been unable to cite any case to the contrary. The first case is Civil Appeal 57/40, P. L. R. 7, p. 173, where this point is expressly dealt with. This Court says:—

> "The point of appeal is a short one, namely, that in order to establish a title under Article 78 it is necessary for the claimants to prove both possession and cultivation, and that in the present case not only is there no finding of cultivation but there is an inference from the wording of the decision that the land was actually uncultivable.
> The wording of the Article is quite clear and unambiguous, and we consider that the absence of a finding that the land was, in fact, cultivated is sufficient to decide this appeal."

Again in Civil Appeal 65/40, P. L. R. 7, p. 288, this Court says:—

> "Under Article 78 of the Ottoman Land Code, it is only necessary to prove occupation and cultivation for a period of ten years. Cultivation in this sense means, in my view, such regular cultivation as is reasonably possible, having regard to the nature of the land and the crops for which it is suitable."

Those cases were decided in 1940. They were not appealed to the Privy Council and there has been no decision, either subsequently or previously, to which I have been referred which is in any way in conflict with them. I, therefore, regard myself as bound by these two cases, which lay down the proposition that under Article 78 it is necessary to prove affirmatively cultivation, and that, therefore, in a case where land is incapable of cultivation a claimant cannot invoke that article.

Mr. Moghannam further contends that there is a conflict between Section 51 of the Land (Settlement of Title) Ordinance and Article 78 of the Ottoman Land Code. It does not seem to me, however, that Section 51 can have that interpretation. Apart from other considerations, in this particular case the land in question at the relevant time, was unregistered and Section 51 of the Land (Settlement of Title) Ordinance refers to registered land. In Section 54 of that Ordinance there is a specific reservation of the powers of Article 78 Ottoman Land Code.

This is an unfortunate case because the value of the land in dispute would hardly seem to be worth the ingenuity and skill that has been devoted to it.

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

Delivered this 22nd day of April, 1943.

British Puisne Judge.

CRIMINAL APPEALS Nos. 24/43, 25/43, 32/43 and 33/43.

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

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

IN THE APPEALS OF:—

S. Jacob Hay & 2 ors. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Chief Magistrates — Defence (Judicial) Regulations, Reg. 5 — P. D. C. sitting as Chief Magistrate — Proceeding a nullity.

Appeals from the judgments of the President District Court, Jerusalem, sitting as Chief Magistrate, resp. of the District Court of Jerusalem, sitting as a Court of Criminal Appeal, dated 12.2.43, 26.2.43 and 8.3.43, respectively, allowed and proceedings set aside:—

A President District Court may not appoint himself as Chief Magistrate under Reg. 5 of the Defence (Judicial) Regulations.

(*A. M. A.*)

ANNOTATIONS: For other cases on the Defence (Judicial) Regulations *vide* C. A. 139/42 (1942, S. C. J. 668; 12, Ct. L. R. 160) — *applicability of Regulations;* C. A. 195/42 (1942, S. C. J. 794) — *effect of Court consisting of one Judge only;* CR. A. 30/43 (*ante*, p. 308) — *regulations not ultra vires.*

(*H. K.*)

FOR APPELLANTS: Levitsky and Amdur.

FOR RESPONDENT: Crown Counsel — (Hogan).

JUDGMENT.

We are unanimously in agreement that these proceedings in the Magistrate's Court presided over by His Honour Judge Bodilly are a nullity, in that he is not a Chief Magistrate and is certainly not empowered, under Regulation 5 of the Defence (Judicial) Regulations, to appoint himself to sit as a Chief Magistrate. We have no information before us that his own old warrant as a Magistrate is still existing and, therefore, we have no regard to that. The proceedings, therefore, are a nullity and the conviction and sentence in the 4 cases, 24, 25, 32 and 33 will be quashed. This is without prejudice to the rights of the prosecution to take any further steps they may think fit.

Delivered this 31st day of March, 1943.

Chief Justice.

CIVIL APEAL No. 269/42.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPEAL OF:—

Central Bakery, Beit Lehem Ltd. APPELLANT.

v.

1. Otto Rabl,
2. Pischinger-Rabl Ltd. RESPONDENTS.

Court, upon consideration of circumstances, refusing application for appointment of arbitrator under sec. 7(b) of Arbitration Ord. — Question whether Court has a discretion to appoint or not to appoint an arbitrator.

Appeal from the judgment of the District Court, Tel-Aviv, Civil Case No. 140/42, dismissed:—

Court seized with application for appointment of an arbitrator under sec. 7(b) of Arbitration Ordinance has a discretion, which will only be exercised with considerable care and only where there are circumstances to be considered other than fulfilment of prerequisite conditions laid down in that section.

REFERRED TO: *Re* Eyre and Leicester Corporation (1892, 1 Q. B. 136); Bjornstad and an. *v.* Ouse Shipping Co., Ltd. (1924, 2 K. B. 673).

(*M. L.*)

ANNOTATIONS:

1. For previous proceedings in this case see C. A. 141/42 (1942, S. C. J. 573; 12, Ct. L. R. 117).

2. All persons constituting the party to join application to appoint an arbitrator — C. A. 161/37 (2, Ct. L. R. 113; P. P. 3.ii.38).

3. On interpretation of word "may" see C. A. 224/41 (9, P. L. R. 58; 11, Ct. L. R. 35 and notes; 1942, S. C. J. 77 and note 2).

(*A. G.*)

FOR APPELLANT: Katzenstein and Sandler.

FOR RESPONDENTS: Vorchheimer.

JUDGMENT.

This is an appeal from the District Court of Tel-Aviv from the refusal of that Court to appoint an arbitrator under Section 7(b) of the Arbitration Ordinance, Cap. 8. The facts, so far as they are relevant, may be put quite shortly. There was a contract between the parties and a supplementary contract, and in clause 15 of the principal contract it is provided that in the event of any disputes arising out of the agreement, such disputes should be referred to arbitrators who should adjudicate by majority. Disputes arose, and we are informed that there have been many disputes, but as regards this particular dispute the Appellant claimed to go to arbitration and appointed his arbitrator. He gave notice, in accordance with the law, to the other party, to appoint his arbitrator. The other party neglected to appoint, and after fifteen days application was made to the District Court to appoint an arbitrator on behalf of the Respondent. The District Court found that it was clear that other arbitrations had taken place between the parties under this clause, and no definite results had been obtained in them. It also found that

the validity of the contract had expired, and that the Appellant had lodged an action in Court in spite of the undertaking to go to arbitration. Taking all these circumstances into account the Court came to the conclusion that no useful purpose would be served by the appointment of an arbitrator and they dismissed the application to appoint.

The appeal to this Court has been confined to one point only and that is this, that in such a case as this the Court has no discretion in the matter and must appoint an arbitrator if the prerequisites of Section 7(b) have been complied with. In Hailsham Volume 1, p. 645, note "g", it is said as follows:—

> "Where the preliminary steps stated in the section have been taken the Court is, as a general rule, bound to make an appointment, but there may be cases in which the Court has a discretion to refuse to appoint an arbitrator, as where the Applicant is a foreigner resident outside the jurisdiction".

And reference is made to two cases, *re* Eyre and Leicester Corporation (1892, 1 Q. B. 136) and Bjornstad and another *v.* Ouse Shipping Co. Ltd. (1924, 2 K. B. 673). If one turns to the second of the cases quoted the Court would seem to have come to the conclusion that the principle laid down in the first case was somewhat too wide. Bankes, L. J., who presided in the second case, referring to the words of Lord Esher M. R. "I think that in such a case as this 'may' means 'must' and that the Court is bound to appoint an arbitrator", said "those words, and especially the last, justify the Court in saying that the Master of the Rolls intended to confine his decision to the particular facts of the case before him."

Another Judge sitting on the first case, Lopes, L. J., said: "In a case like the present where all conditions precedent have been fulfilled, the word 'may' is equivalent to 'must'." Bankes, L. J.'s comment on this was that this ought not to be read as applicable to cases which he was not considering.

Bankes, L. J., continuing in his judgment in the second case, said: "If we have a discretion, as I think we have, to appoint or refuse unconditionally to appoint an arbitrator we can impose any reasonable terms as a condition on which our discretion shall be exercised in favour of an applicant." Warrington, L. J., also said: "I conceive that cases might arise where it would be necessary to exercise some discretion", and he added that he did not think that Eyre's case decided that the Court had no discretion at all in such a matter. Scrutton, L. J., agreed.

On reading those two cases, therefore, it seems to us that there is

a discretion, but it is a discretion which will only be exercised with considerable care, and only where there are other circumstances to be considered, that is to say, circumstances other than the fulfilment of the prerequisite conditions laid down in Section 7(b). The case before us is not a very strong one, but we think that there was sufficient material, perhaps only just sufficient material, before the District Court, to justify it in exercising its discretion in refusing to appoint an arbitrator.

For these reasons we think that the appeal fails and must be dismissed. The Respondent is entitled to his costs on the lower scale to include the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 12th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 34/43.

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

BEFORE: Gordon Smith, C. J.

IN THE APPEAL OF :—

1. Abdul Fattah al Asadi,
   in his capacity as Mutawalli for the time being of the Waqf Asadi,
2. Rashid Said el Asadi,
   in his capacity as Mutawalli for the time being of the Waqf Asadi,
3. The Supreme Moslem Council,
4. Ahmad Deeb Sha'aban,
5. Tawfiq Ahmad Deeb Sha'aban,
6. Mahmud Ahmad Deeb Sha'aban. APPELLANTS.

v.

The Attorney General, on behalf of the Government of Palestine. RESPONDENT.

Expropriation of land — Assessment of compensation — Land (Expropriation) Ordinance, Secs. 8, 10 — *Compensation to tenants — Principles to be followed in assessing amount of compensation — "Open market" value explained — Enhancement value — Interest on compensation, payment into Court.*

Appeal from the judgment of the Land Court of Haifa, dated the 14th of January, 1943, in Land Case No. 8/42, allowed:—

1. Principles in assessing amount of compensation for expropriation of land discussed.

2. A tenant cannot claim compensation under the Land (Expropriation) Ordinance for the expropriation of his holding.

3. Interest from the date of expropriation is payable on the amount awarded as compensation, unless Government pays into Court the amount offered as compensation.

(*A. M. A.*)

ANNOTATIONS: The following cases deal with compensation in expropriation proceedings: L. A. 44/30 (C. of J. 885) — *rules governing assessment;* L. A. 58/36 (1937, 1 S. C. J. 380) and C. A. 74/37 (1937, 1 S. C. J. 301) — *average amount in case of experts differing;* C. A. 106/37 (2, Ct. L. R. 156) — *compensation for building and land on which building stands;* C. A. 49/41 (1941, S. C. J. 195; 10, Ct. L. R. 51) — *effect of representations for purposes of taxation;* C. A. 39/42 (1942, S. C. J. 364; 11, Ct. L. R. 232) — *apportionment; no interest on compensation;* C. A. 91/42 (9, P. L. R. 419; 1942, S. C. J. 411; 12, Ct. L. R. 182) — *when compensation not payable;* C. A. 123/42 (1942, S. C. J. 566; 12, Ct. L. R. 223) — *effect of representations in Land Registry;* C. A. 212/42 (1942, S. C. J. 969) — *time to apply for assessment of compensation.*

See especially C. A. 39/42 (*supra*) as regards the question of interest.

(*H. K.*)

FOR APPELLANTS: No. 1 — Abcarius.
Nos. 2, 4, 5 and 6 — S. Khadra.
No. 3 — Cattan.

FOR RESPONDENT: Junior Government Advocate — (Gavison).

JUDGMENT.

This is an appeal from the decision of the Land Court, Haifa, (8/42) being that of His Honour Judge Curry, sitting alone, and delivered on the 14th January, 1943.

It was a claim by the Respondent (Plaintiff) under the Land (Expropriation) Ordinance, Cap. 77, Section 8, in default of agreement between the parties, to have the amount of compensation determined by the Land Court. A considerable amount of evidence was led by both sides, which is reviewed at length by the learned Judge. As regards Appellants 1, 2 and 3, the compensation awarded as payable to them was the sum of LP. 2462.500, with 9% interest from the 16th April, 1940, the date of taking possession, and as regards Respondents (Plaintiffs) 4, 5 and 6, although their advocate did not appear for them at the hearing, Respondents 4 and 5 gave evidence as to their tenancy and cultivation. The learned Judge stated that Cap. 77 did not appear to make any provision for pay-

ment of compensation to tenants, and that their evidence was rather vague, but he suggested that Government might consider making them an *ex gratia* payment, and he considered LP. 30 would be a fair sum. They were parties to the action, and I can only conclude that he held that they had no legal right to any such compensation in the suit before him.

The matter is not free from difficulty, as stated by the learned Judge, as most of the evidence did not provide a reliable guide, and I think my best course is to set out, as far as possible, proved or admitted facts, or what appear to be the facts. Before doing so, however, it is desirable to refer briefly to some of the provisions of Cap. 77 which are more particularly relevant to the matter in issue.

Section 10 of the Ordinance details rules to be observed and matters to be considered by a Court in assessing the compensation, the most relevant being:—

(a) No allowance for compulsory purchase to be made. This refers to the additional 10% which is often paid, sometimes in accordance with statutory provision and sometimes without such provision. (Section 10 paragraph (a)).
(b) The value of the land to be potential price which would be fetched if sold in the open market, the date of the same being that of the taking of possession. (Section 10 paragraph (b)).
(c) Damage, if any, caused by severance from other land of the owner. (Section 10 paragraph (g)(i)).
(d) Enhancement or depreciation in value of other land of the owner. (Section 10 paragraph (g)(ii).

It was argued before me for the Appellants that the learned Judge assessed the compensation on a wrong basis and not in accordance with the above provisions, that he misdirected himself on the evidence or failed to take certain evidence into consideration, and erred as regards enhancement in value.

As to the facts, the area of the land in question is 98½ *dunums*, situate on Mt. Canaan, and by main road from Safad to Rosh Pina it is distant 1½ kilometres from the centre of the former town, but as the crow flies the nearest point of the land to the urban area boundary is approximately 50 metres distant but separated by broken ground and a *wadi*. Strange to say, there is a conflict in the evidence and no specific finding in the judgment as to whether the land is or is not within the municipal boundary of Safad — but I am satisfied that it is, but it is not within the urban area.

The owners of the land are the *Waqf* Asadi and the land is *Waqf Sahih*, and the part expropriated has a frontage of approximately 297 metres to the above-mentioned Safad—Rosh Pina main road.

The learned Judge first considered the case for the Respondents and as regards plot 7 shewn on Exhibit 7, and taking all factors into consideration came to the conclusion that in comparison with this plot 7, the land expropriated (hereinafter referred to as the "Police Site") would be worth somewhere between LP. 25—35 per *dunum*.

As regards plot E. on Exhibit 7, he did not think that any useful comparison could be made and he made the same remark about what was spoken of as the Sara Levy plot. I agree with him in both respects.

Next, the learned Judge refers to valuations in 1940 made by three Government Commissions specifically for the purpose of this expropriation. The first one was in January, 1940, which valued the land purely on the agricultural basis at LP. 5 per *dunum*, but actually appears to have been a Siting Commission and not concerned with valuation for compensation. In July, 1940, it was valued at LP. 40 by another Commission, but the learned Judge did not place much reliance on this Commission's finding. I will refer to this later.

In September, 1940, it was re-valued by another Commission at LP. 25, and apparently and in consequence, Government offered the owners LP. 25 per *dunum* compensation on the basis of this valuation.

The learned Judge then considered the case for the Appellants, based largely on the evidence of Mr. Landau, a licensed land valuer and the Municipal Engineer of Tiberias, but with which he was not very much impressed. Plot H. was acquired by Government in 1935 at a price of LP. 70 per *dunum*, and the Appellants relied largely on comparisons to be made with this plot. It is just within the urban area, and in comparison with this plot the learned Judge considered the value of the Police Site to be somewhere in the neighbourhood of LP. 30. In arriving at this figure of LP. 30, the learned Judge took into consideration the fact that in the urban area there was a water supply, but apparently rather a limited supply, and that it cost Government LP. 4,300 to provide a supply of water for the Police Site.

From this figure of LP. 30 per *dunum* he then deducted LP. 5 per *dunum* for enhancement, thus arriving at a figure of LP. 25 per *dunum*, which was the amount assessed by the learned Judge as being the compensation payable.

Finally he dealt with evidence by the Appellants as to an *"Ijaretain"* lease in 1935 at LP. 30 per *dunum*, which was confirmed on an

increase, by the Supreme Moslem Council in 1941, to LP. 60 per *dunum*. This was only a very small area but was adjacent to the Police Site immediately to the west, and, therefore, a few metres nearer to the urban area.

Reverting back to paragraph (a) of Section 10 of the Ordinance laying down the principle on which compensation is to be assessed as being the potential value if sold in the open market, I interpret "open market" as a sale by public auction or a sale as a result of a publicly advertised invitation to the public to make an offer or to accept a price stated. I do not consider that a transaction registered in the Land Registry as a result of a privately negotiated sale can be considered as a sale in open market, nor necessarily as reliable evidence as a basis on which to assess compensation, particularly when such transactions are few and far between and relate to transactions of plots of a widely divergent nature, purchased for varying purposes. In the absence of any such sales in open market, it necessarily follows that any such assessment must be of a somewhat arbitrary nature, and similarly, that evidence by self-styled expert land valuers is purely a matter of speculation, not necessarily of any great evidential value or reliability.

This, I think, equally applies to the evidence called by both parties and which emphasizes the difficulty in which the learned Judge found himself.

Apparently the learned Judge discarded the valuations made by the three Commissions, although it is to be noted that his final assessment agrees with the valuation made by the September Commission. There is practically no information as to how these Commissions arrived at their valuations, although one member of the July Commission did give evidence for the Appellants and stated that he had based his opinion on a transaction outside the *Tabu*.

It is to be noted that this July Commission consisted of local officers, namely, the Assistant District Commissioner, the District Officer, the Assistant Registrar of Lands and the Revenue Officer, all of them specifically appointed by Government to value the Police Site for the purpose of assessing the compensation to be paid. It is further to be noted that their assessment is endorsed by the then *Mutawalli* as being fair and reasonable. Government apparently did not accept this valuation and appointed a third Commission. I have not been able to find any reference to the report of this third Commission, and apparently such was not exhibited in the Court below, but apparently Mr. Roah, Registrar of Lands, was on this Commis-

sion. He also stated that the Police Site was outside the Municipal Area, as did Mr. Ward, the first witness, and I entirely agree with the learned Judge's statement that "most of the evidence does not provide a reliable guide." Not only do I find myself in the same difficulty as the learned Judge in regard to the evidence, but it is not very clear from his judgment how or on what basis he arrived at his figure of LP. 30 per *dunum*, from which he deducted LP. 5 per *dunum* for enhancement. Apparently he makes comparison with the LP. 70 per *dunum* paid by Government for plot H, in 1935, but allows LP. 20 per *dunum* for lack of water, and another LP. 20 per *dunum* for peak prices obtained in 1935. These appear to me to be somewhat arbitrary deductions, but as I have already said, the whole question is extremely difficult in the absence of any reliable evidence. What I do not understand is why, if the finding of the July Commission was to be rejected, the members of such Commission were not called to give evidence on the question before them. They were all local and responsible officers of experience, otherwise I presume they would not have been appointed, and they were appointed for the specific purpose of valuing this property and made such valuation, and I cannot myself see any reason nor can I find any sufficient evidence or grounds for rejecting their valuation, and I think that without such evidence the learned Judge erred in not accepting the same. I, therefore, accept this valuation of LP. 40 per *dunum*.

I next come to the questions of enhancement and depreciation. The learned Judge deducted LP. 5 per *dunum* for enhancement on the grounds of improved security but admitted that Government had taken the cream from the milk in taking this particular site and that it had a big frontage to a main road, consequently any development of the remainder would necessitate expensive road-making. I do not think that security by reason of erection of a fortress or police post is a good ground for saying that in consequence land in the neighbourhood is enhanced in value, and one might just as easily argue that depreciation is caused thereby. Similarly, it might be argued, and in fact was argued, that the *Waqf* authorities would have to invest the compensation to be received in due course in purchasing other *mulk* land, and that owing to the rise in prices of land during the last three years and since the acquisition, the Appellants will have suffered additional loss. It is possible that the July Commission took both these factors into consideration in arriving at the figure of LP. 40 per *dunum*, and I think it would be unsafe to make any deduction or allowance either for enhancement or depreciation, as un-

doubtedly there is no reliable evidence on which to base such assumptions.

As I have said, any such assessment must, under the circumstances, be of an arbitrary nature, but for the reasons given, I allow the appeal and fix the amount of compensation at LP. 40 per *dunum* for the 98½ *dunums,* the amount fixed by the July Commission, *i. e.* at LP. 3940, together with interest thereon at 6% from the 16th April, 1940, until the date of judgment, and thereafter at 9% until payment.

I agree with the learned Judge as to Defendants 4, 5 and 6, as the Ordinance makes no provision for compensation to tenants of their class. Whether they have in fact suffered any damage entitling them to any compensation against Government or their landlords, otherwise than under this Ordinance, is not a matter for this Court.

The Appellants 1, 2 and 3 having succeeded in their appeal must have their costs, both here and in the Court below, and I allow advocate's fees of LP. 15 each.

As regards the notice in lieu of cross-appeal as to interest, the obvious course for Government to have adopted was to pay the amount offered into Court upon such offer being refused. The cross-appeal is, therefore, dismissed and the order for interest will be as stated.

In conclusion I would add that I do not think that this case should be taken as a precedent for land values either round Safad or elsewhere, and similar cases must individually be taken on their own merits. My own personal opinion is that land values generally are unjustifiably high throughout the whole of Palestine, but the facts and circumstances of this particular case are somewhat peculiar.

Delivered this 22nd day of June, 1943.

Chief Justice.

CIVIL APPEAL No. 88/43.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Haj Muhammad Mahmud Doleh. APPELLANT.

v.

1. Afifeh Jubran Es-Sila'w, widow of the late Tanius Badawi Sakkab, in her personal capacity and as guardian of her minor children,
2. George Azar. RESPONDENTS.

District Court giving guardian authority to sell — Contract of sale by guardian on behalf of minors containing clause of liquidated damages — Purchaser suing for damages and return of money paid on account of purchase price — Minors' liability under contract made by guardian — Damages.

Appeal from judgment of District Court, Jaffa, Civil Case No. 126/42, dismissed and cross appeal allowed:—

1. a) Practice in *Sharia'* Court that where a contract made by a guardian contains or imposes any liability on minors, the contract, to bind the minors, must be approved by the Court, must be adopted also in District Courts. b) Authority by Court to sell — not sufficient to impose on minors liability for damages in case of guardian breaking the contract.
2. A would-be purchaser who admitted that he suffered no damages from the fact that the contract of sale has not been carried out — not entitled to damages, even if contract contains clause of liquidated damages.

(*M. L.*)

ANNOTATIONS:

1. Admission made by advocate in name of minors not binding — C. A. 197/41 (8, P. L. R. 499; 10, Ct. L. R. 205; 1941, S. C. J. 458); fact that two out of a large number of Plaintiffs found to be minors is not sufficient ground for quashing judgment — C. A. 229 & 230/40 (8, P. L. R. 48; 9, Ct. L. R. 171; 1941, S. C. J. 166); sale by guardian of *miri* land of minor needs consent of Religious Court — L. A. 39/32 (C. of J. 1746); such sale needs consent of competent Court — C. A. 173/34 (C. of J. 1934—6, 156); minor not bound by contract for purchase of land — L. A. 109/22 (C. of J. 1776); sale of minor's land by guardian null and void — L. A. 149/22 (C. of J. 945) and C. A. 273/40 (9, P. L. R. 177; 1942, S. C. J. 956); when Religious Court has power to authorize sale of property of minor — L. A. 52/35 (C. of J. 1934—6, 740).

2. Sums which purchaser entitled to claim as damages — C. A. 96/43 (*ante*, p. 273) and annotations thereto.

(*A. G.*)

FOR APPELLANT: Siksik.

FOR RESPONDENTS: No. 1 — Asal.
No. 2 — In person.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, and there is a cross appeal also from the same judgment by the Re-

spondents. The Appellant sued in the Court below the first Respondent personally and as guardian of her minor children, and the second Respondent as guarantor of a contract entered into between the first Respondent and the Appellant. That contract was for the sale of certain property belonging to the estate of the first Respondent's husband for the sum of LP. 2,600.— and contained a clause of "liquidated damages" for LP. 300. The District Court found that the Respondents were liable to pay the LP. 300 damages, and also gave judgment for the LP. 200 paid on account on the signing of the contract.

The appeal is as to the question of damages. The Appellant alleges that the first Respondent is liable, in addition to her liability personally, as guardian of the minor children and that the minor children, therefore, are liable to pay the damages also. In this case the District Court gave authority to the guardian to sell the property for a named price. So far so good; but an equally important part of a sale is the contract to sell, and we are of opinion that where a contract for sale, made by a guardian on behalf of the minors, contains or imposes any liability on the minors, then that contract must be approved by the Court. In this case it is obvious that the minors might be liable, through the default of their guardian and through no default of their own, to pay the sum of LP. 300 if there was a failure on the part of the guardian to carry out the terms of the contract. As I have said, we think that a contract of such a nature, to bind the minors, must be approved by the Court; that is the practice in the *Shari'a* Court and that is the practice which we think must be adopted also in the District Courts. For that reason the appeal of the Appellant must fail.

With regard to the cross appeal, that is to the effect that no damages are payable at all; it is not disputed that the LP. 200 should be returned, and in fact it is stated and proved that the LP. 200 was offered to the Appellant and he refused to receive it. The case is a peculiar one. The Appellant contracted to buy this property, not on his own behalf but with the intention of selling it to his brother-in-law at the same price as that at which he had bought it. The contract fell through. It seems to us that on these particular facts of this particular case, that, even though there may be a sum stipulated for damages in the contract itself, yet here it is admitted that the Appellant in fact suffered no damages at all. It might well be that the brother-in-law might have a claim against the Respondents for damages owing to the fact that he lost this property, but it seems

to us that where the would-be purchaser has admitted that he suffered no damages he is, therefore, not entitled to claim any.

For these reasons we think that the appeal fails and is dismissed, and that the cross appeal must be allowed with costs to both Respondents both here and below on the lower scale to include the sum of LP. 10 advocate's attendance fee to the first Respondent in this Court and LP. 2 travelling expenses to the second Respondent on the hearing of this appeal.

Delivered this 12th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 118/43.

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

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

IN THE APPEAL OF :—

Zipora Rubinstein. APPELLANT.

v.

Baruch Meizel. RESPONDENT.

Claim for eviction based on agreement containing admission of breach of terms of tenancy and undertaking to vacate premises — Magistrate ordering eviction on basis of compromise — Tenant obtaining stay of execution of final judgment and lodging action in District Court to declare Magistrate's judgment a nullity — Question of contracting out R. R. Ord. — Proper Court to apply to set aside judgment on ground of fraud.

Appeal from the Order of the District Court, Tel-Aviv, dated the 29th day of March, 1943, in Civil Case No. 27/43, dismissed:—

1. As a general rule any person can enter into a contract to waive benefits conferred upon him under an Ordinance, unless there is anything in such Ordinance to the contrary or it can be shown that such is contrary to public policy, yet whether R. R. Ord. can or cannot be contracted out — a matter for consideration.

2. (*Obiter*): Proper authority to which to apply to set aside a judgment on ground of fraud — Court which gave that judgment.

(*M. L.*)

FOLLOWED: C. A. 94/39 (6, P. L. R. 493; 1939, S. C. J. 446).

REFERRED TO: H. C. 15/43 (10, P. L. R. 148; *ante*, p. 25); Griffiths *v.* Dudley, 1882, 9 Q. B. 357.

ANNOTATIONS:

1. Griffiths *v.* Dudley (*supra*) followed. This case was followed by the Land Court, Jaffa, in L. A. 38/37 on appeal from the Chief Magistrate in Case No. 1198/37 (Gorali, pp. 108, 114; P. P. 2.iii.37); in this case it was decided that the Landlords and Tenants Ordinances can be contracted out. See also C. A. D. C. T. A. 4/39 (Gorali, p. 78) and C. A. D. C. T. A. 61/42 (Gorali, p. 224). Provisions as to rent can not be contracted out (Gorali, pp. 62, 74, 97).

"The provisions of the Landlords and Tenants Ordinance are binding notwithstanding any agreement between the parties to the contrary" — C. A. D. C. T. A. 209/39 (Gorali, p. 84).

"It is contrary to public policy, and not in accordance with the Ordinance itself, that anybody should contract out of it — C. A. D. C. Jm. (Gorali, p. 167).

2. The *obiter dictum* follows C. A. 94/39 (*supra*).

(*A. G.*)

FOR APPELLANT: Eliash — by delegation from Ph. Joseph.

FOR RESPONDENT: Karwassarsky.

JUDGMENT:

Gordon Smith, C. J.: The facts in this case are somewhat unusual and I, therefore, set them out. For clarity I will refer to the original Plaintiff as the landlord, and the original Defendant as the tenant.

The case came on for hearing before the Magistrate, Tel-Aviv, on the 15th June, 1942, the landlord having sued for eviction consequent on breach of the terms of the tenancy. At this hearing the landlord's advocate produced an agreement dated the 30th November, 1941, from which it appears that the tenant had broken the original tenancy agreement, dated the 24th February, 1941, expiring on the 28th February, 1942, under which she had undertaken not to turn the premises let, into a restaurant. By this agreement so produced the tenant admitted the breach, and it was agreed by her definitely to liquidate this restaurant by the 1st of May, 1942, and to vacate the premises.

Before the Magistrate, her advocate admitted this agreement but pleaded for another few months and stated that his client was prepared to vacate the premises not later than the 30th November, 1942, and to pay LP.2.— costs. The landlord's advocate consented to this and the Magistrate made an order referring to the compromise and that the tenant was to vacate the premises on the 30th October, 1942, and if she failed to do so she would have to pay in addition the balance of costs and expenses. In consequence of her failure to vacate the premises the order of the Magistrate, dated 15th June, 1942, was put in execution.

In response to this the tenant then commenced an action against the landlord in the District Court, Tel-Aviv, praying:—

(a) that the Magistrate's judgment be declared a nullity;

(b) that the Magistrate had no jurisdiction to make his order;

(c), (d) & (e) consequential relief as regards the execution;

(f) alternatively, relief against forfeiture of the contract of lease;

(g) & (h) further consequential relief and costs.

A defence was filed and the case came on for hearing before the District Court on the 22nd March, 1943, judgment being delivered on the 29th March dismissing the case. Against this judgment the tenant now appeals.

The District Court held:—

(a) that the Court had no jurisdiction to entertain the action as no appeal was lodged against the Magistrate's judgment, which was absolute and final.

(b) that if a final judgment could be set aside at all, it could only so be done on the ground of fraud, *etc.*

(c) & (d) that the tenant could have appealed the judgment and had not done so but had obtained a stay of execution from the Chief Execution Officer.

Assuming that an action could be so instituted, the District Court held also that such action should have been taken in the Magistrate's Court. The District Court struck out the statement of claim and set aside the provisional stay of execution.

Numerous authorities were quoted to us in support of these contentions, but as so often happens in these Courts, on a mature consideration of such authorities, they are frequently found to have little application to the case in point, and sometimes are even against the proposition put forward, *e. g.* High Court 15/43 quoted to us.

Taking the first two grounds together, *i. e.* of nullity or lack of jurisdiction, if I understand the argument correctly it was firstly, that the tenant could not contract out of the Ordinance; secondly, that the jurisdiction of the Magistrate was restricted by Section 4 of the Ordinance of 1941, to the instances of breaches therein contained; and thirdly, that the alleged consent by the Plaintiff did not confer such jurisdiction.

In the first place, as a general rule any person can enter into a contract to waive the benefits conferred upon him by an Act or Ordinance, unless there is anything in such Act or Ordinance to the contrary or it can be shown that such is contrary to public policy, and it is even permissible to contract out of an Act such as the

Employers' Liability Act (Griffiths *v.* Dudley, 1882, 9 Q. B. 357). There is nothing in this point in view of our finding on the next point, but we must not be taken as deciding definitely that you can contract out of this Ordinance.

Secondly, this may be so, but in any event the Magistrate did not exceed the powers so conferred by Section 4(1)(b) of the Rent Restrictions (Business Premises) Ordinance, 1941. There had been a clear breach of the terms of the tenancy which entitled the Magistrate to make an order for eviction irrespective of the consent of the tenant.

Thirdly, there was no such consent by the tenant. If anything there was consent by the landlord to an Order postponing the eviction for several months.

Actually, we had some hesitation as to calling on counsel for the Respondent-landlord at all, but desired to hear some argument as to whether the proper Court in which to file an action to set aside the judgment in this case was the District Court or Magistrate's Court. It is unnecessary really to decide the point, but on the authority of Civil Appeal 94/1939, P. L. R. 1939, p. 495, the proper Court to which to apply to set aside a judgment of the Court on the ground of fraud, is the Court which gave the judgment which it is sought to set aside, and as was said in that case, it is really a continuation of the action originally brought. In the case before us, no fraud was alleged, nor had any circumstances arisen since the Magistrate's judgment which entitled such an application to be brought.

If, months after a judgment in a Magistrate's Court, which is not appealed against, the unsuccessful party can then run to the District Court and file an action to set aside such judgment, whether on substantial grounds or on frivolous and vexatious grounds with ulterior motives, as in the case before us (the obvious reasons being to obtain further delay in execution of the judgment) there would be no finality at all in litigation.

For these reasons we are entirely in agreement with the District Court in striking out the case under Rule 21 of the Civil Procedure Rules, and although the particular paragraph of this rule is not stated in the judgment we are of the opinion that it is covered by both paragraphs (a) and (d).

The action in the District Court and the appeal is entirely without merit, and the appeal is dismissed with costs to include LP. 15.— advocate's fee.

In accordance with the final part of the Magistrate's judgment of

the 15th June, 1942, the tenant will also pay any further additional costs as a result of the execution proceedings and the balance of costs (if any) in that Court, on account of her failure to comply with the judgment.

Delivered this 25th day of May, 1943.

Chief Justice.

Edwards, J.: I agree.

British Puisne Judge.

CIVIL APPEAL No. 29/43.

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

BEFORE : Copland, J.

IN THE APPEAL OF :—

El Haj Abdel-Mehsin Abou Labban & 2 ors. APPELLANTS.

v.

El Haj Yacub Hamadeh & 7 ors. RESPONDENTS.

Water supply — Agreement to supply water for irrigation, which may be terminated by supplier — Evidence.

Appeal from the judgment of the District Court of Jaffa in its appellate capacity, dated 30th November, 1942, in Civil Appeal No. 96/42, allowed and case remitted:—

Upon the termination of an agreement to supply water for irrigation, the supplier is not compelled to continue the supply.

(*A. M. A.*)

ANNOTATIONS: The following authorities deal with rights to water: P. C. 98/25 (1, P. L. R. 71; C. of J. 1818) — *Urtas springs;* L. A. 43/28 (1, P. L. R. 336; C. of J. 669) — *use of water from well;* L. A. 26/30 (1, P. L. R. 558; C. of J. 506) — *jurisdiction re irrigation rights;* C. A. 178/37 (not reported) — *dispute as to extent of right;* C. A. 122/38 (1938, 1 S. C. J. 381; 4, Ct. L. R. 13) — *whether sale of land includes water rights;* C. A. 199/40 (7, P. L. R. 509; 1940, S. C. J. 548; 8, Ct. L. R. 223) and C. A. 45/41 (1941, S. C. J. 294) — *jurisdiction re claim to right of water;* C. A. 39/43 (10, P. L. R. 186; *ante,* p. 238) — *no registrable right to users of water of a public river.*

(*H. K.*)

FOR APPELLANTS: Alami.

FOR RESPONDENTS: Nos. 1 & 2 — Cattan.
The rest — absent — served.

JUDGMENT.

This is an appeal from the judgment of the learned Judges of the District Court of Jaffa, reversing the judgment given by the Ramleh Magistrate. The dispute between the parties was as to supply of water to a grove owned by the present Appellants. It was submitted that, by some sort of agreement or arrangement made in 1936, the Respondents had been supplying water to the Appellants, and that recently that water supply had been cut off with, of course, disastrous results to the Appellants' grove.

The learned Magistrate would seem to have held that because the Respondents had a surplus of water the Appellants might as well have it as anyone else, and he gave judgment that they should be allowed to take water for six days in every twenty-one days. The District Court reversed that, remarking that there was no law to give the Courts the right and authority to give such judgments as was given by the learned Magistrate, which judgment "appeared to have been based on motive and humanity more than on law".

A certain difficulty in determining the matter is, as the Appellants have argued, the nature of the agreement between the parties. Everything in fact depends upon that. The learned Magistrate seems to have treated the agreement made in 1936 as an agreement to continue the supply of water continuously to the end of eternity, but there is no evidence as to the nature of the agreement, and I think it is essential in such a matter that the evidence of the parties, at any rate, should be heard as to the nature of the terms of this alleged agreement in order that the Court may decide whether this is an agreement in fact for a term of years, renewable for such and such periods, or whether this is an agreement determinable at will. No Court can come to a proper determination in the absence of this evidence.

For these reasons I think that the appeal will have to be allowed, and the case remitted to the learned Magistrate to make a finding as to the nature and terms of the alleged agreement in 1936. Costs of this appeal to be costs in the cause, and I certify the sum of LP. 10 advocate's attendance fee on the hearing of this appeal to the party eventually successful.

Delivered this 3rd day of March, 1943.

British Puisne Judge.

HIGH COURT No. 35/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :—

Anis El Shileh. PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Mutawallis of Waqf Sheikh Shams Eddin El-Alami — five in number. RESPONDENTS.

Judgment of ownership given by Land Court in 1930 — *Chief Execution Officer ordering, in* 1942, *dispossession — Effect of Land Courts (Amendment) Ord. upon jurisdiction of Chief Execution Officer regarding execution of judgments of ownership of land.*

Return to an order *nisi* calling upon Respondents to show cause why first Respondent's order of 10.2.43 in Execution File, Jaffa, No. 547/37, should not be set aside; order *nisi* discharged:—

> Since amendment of 1939 to Land Courts Ordinance (giving Land Court power to make an order for possession of land as to ownership of which it gives judgment) a judgment of ownership, even if given long before 1939, must be deemed to include an order for possession; earlier judgments on question of jurisdiction of Chief Execution Officer in this respect (making it necessary to proceed to a Magistrate's Court and obtain an order of possession) — no longer binding.
>
> (*M. L.*)

ANNOTATIONS: The earlier judgments referred to in this case are: H. C. 62/26 (C. of J. 756); H. C. 10/31 (*ibid.*, p. 758); H. C. 8/32 (*ibid.*, p. 759) and L. A. 28/27(1, P. L. R. 162; C. of J. 757).

(*A. G.*)

FOR PETITIONER: Asal.

FOR RESPONDENTS: S. Dajani.

ORDER.

In this case objection has been taken to the execution of a judgment of dispossession, given by the Land Court of Jaffa in the year 1930, giving the ownership of certain lands to the *Waqf* of Sheikh Shams Eddin El Alami, and ordering that if the value of certain buildings erected on this *waqf* land was repaid to the Petitioner, the *waqf* would resume ownership of the property concerned. The *waqf* is now trying to execute that judgment but the Petitioner refuses to leave the property. It is true that before 1939, when the law was amended, it was held on several occasions by this Court that a judg-

ment of ownership did not include a judgment for possession, but since 1939, it is no longer necessary to proceed to a Magistrate's Court and obtain an order of possession, as the Land Court is competent to give such a judgment, that is to say, a judgment of ownership carries with it an order for possession. When it comes to a matter of execution, as is the case here, we think that the Chief Execution Officer cannot refuse to give possession to the Claimants who hold the judgment for ownership. In other words, as from 1939, the amendment to the Land Courts Ordinance has the effect that any judgment for ownership must be deemed to include an order for possession. In addition to that it is quite clear that a Chief Execution Officer is not a Court of Appeal from the Land Court, neither is the Chief Execution Officer a further Court of Appeal from a judgment given by the Court of Appeal. If the judgment of the Land Court was thought to be wrong, the correct course was to appeal to the Supreme Court. Whatever judgments may have been given in the past, for a long time now it has been the invariable rule in this Court not to interfere where another Court has or had jurisdiction, and those early judgments which have been quoted to us on the question of the jurisdiction of Chief Execution Officers, must now be regarded as no longer binding.

For these reasons the rule will be discharged. The Respondents are entitled to their disbursements and to the sum of LP. 10 advocate's attendance fee.

Given this 16th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 81/43.

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

BEFORE: Gordon Smith, C. J.

IN THE APPEAL OF :—

Ahmad Ibrahim Akki,
on behalf of the estate of his late father,
Sheikh Ibrahim Akki. APPELLANT.

v.

Victor Hakim,
on behalf of the estate of his late father,
Rafoul Hakim. RESPONDENT.

Evidence — Claim against estate of deceased — Pleadings, admissions — Corroboration, Evidence Ordinance, sec. 6 — Affidavit by party's son in reply to interrogatories, admissibility by consent — Mejelle, 1746.

Appeal from the judgment of the District Court of Haifa, dated the 2nd day of February, 1943, in Civil Case No. 44/40, dismissed:—

1. A statement made by a person in his personal capacity may be corroborated by a statement made by him in a representative capacity.

2. A person claiming a debt against the estate of a deceased must affirmatively prove that the debt has not been paid.

3. Effect of failure to contradict pleadings.

(*A. M. A.*)

ANNOTATIONS :

1. On corroboration in civil cases see C. A. 219/39 (5, P. L. R. 513; 1938, 2 S. C. J. 148; 4, Ct. L. R. 161) — *books of deceased as corroboration;* C. A. 87/42 (9, P. L. R. 401; 1942, S. C. J. 408; 12, Ct. L. R. 109) — *necessity of corroboration;* C. A. 24/42 (9, P. L. R. 182; 1942, S. C. J. 851) — *effect of requirements of Sec. 6, Evidence Ordinance.*

2. On failure to contradict pleadings *cf.* C. A. 87/42 (9, P. L. R. 401; 1942, S. C. J. 408; 12, Ct. L. R. 109).

(*H. K.*)

FOR APPELLANT: Hawa and Cattan.

FOR RESPONDENT: A. Levin.

JUDGMENT.

This is an appeal against the judgment of the District Court, Haifa, dated the 2nd of February, 1943, where on a claim by the Appellant against the Respondent in connection with a mortgage for a capital sum of LP. 1,604 arising out of a mortgage for meeting the balance of capital and interest outstanding, the learned President gave judgment for the Plaintiff for the sum of LP. 14.475 mils with interest of 9% as from the 4th July, 1943.

After the original defence had been filed to the statement of claim, in which it was alleged in that defence that certain payments had been made in respect of amounts due to the Plaintiff's deceased father, an amended statement of claim was filed. In that amended statement of claim specific admissions were made in respect of the amounts specified in paragraph 5 of the amended defence which repeated in these respects the original defence, but there was no specific denial of the sum of LP. 144 mentioned in the defence.

The matter really turns on this question of payment of this LP. 144 and I am entirely in agreement with the judgment of the District

Court that there was a release and statement of accounts settled in July, 1933, in accordance with Exhibit D/1. The question, therefore, arises as to this amount of LP. 144 referred to by the District Court which the learned Judge allowed as one of the payments, reducing the amount due on the mortgage and in addition to those amounts specified in Exhibit D/1 and admitted in the amended statement of claim. It is one of those cases where it is a claim of a plaintiff on behalf of his deceased father against a Defendant on his behalf of his deceased father. Neither of the two parties could give really definite and clear evidence as to all the transactions between their respective deceased fathers. Apparently the deceased fathers were in some respect doing business together and possibly had other business dealings in respect of some land or property. The case for the Appellant regarding the LP. 144 was based on Section 6 of the Evidence Ordinance which states that:—

> "No judgment shall be given in any civil case on the evidence of a single witness unless such evidence is uncontradicted or is corroborated by some other material evidence which, in the opinion of the Court, is sufficient to establish its truth."

The action was started against the Defendant's father but he died during the course of the proceedings. An endeavour was made to obtain an answer to interrogatories but the father was too ill and it was agreed that the affidavit of reply should be made by the son, the present Defendant. This was agreed to before the Registrar, although the son was not a party at that time, and strictly speaking, only a party to an action can be requested to answer interrogatories. He filed an affidavit in consequence and paragraphs 7 and 8 detail shortly what his father told him. In paragraph 7 he says:—

> "As far as my father can remember the part of the sum of LP. 144.— was paid in paper currency and part by way of income from the land, the subject matter of the relations between the two parties."

and paragraph 8:—

> "A receipt was given in respect of LP. 144.— signed by the late Sheikh Ibrahim Eff. el Akki dated 28.11.33, but I do not know where it is."

That has been accepted and is admissible as evidence by the father by agreement. In the evidence before the learned President the son, the same signatory to that affidavit, gave evidence as to the payment of LP. 144. He said "I remember seeing a sum of LP. 144 paid in our office in Haifa by my father to Sheikh Ibrahim. I don't remember the exact date or if a receipt was then given." The answer he gave in paragraph 8 was the answer of his father, the answer he

gave in the evidence was his own answer, and even if this did not amount to corroboration, which in my opinion it does, the onus of proof is, under Article 1746 of the *Mejelle,* very advisably put on the Claimant who is claiming against a deceased, to prove affirmatively that the debt claimed has not been paid. Neither, as I have said earlier, was the payment of this LP. 144 contradicted or denied in the pleadings.

In my opinion the Judge was quite right in allowing this item and he gave the benefit of the doubt to the Appellant and called it LP. 140 instead of LP. 144. The appeal is, therefore, dismissed, the judgment of the learned President will stand both as regards the amount and as regards the costs before him, but the Respondent will have the costs of the appeal before this Court. The appeal is dismissed with costs to include LP. 10 advocate's attendance fee.

Delivered this 4th day of June, 1943.

Chief Justice.

HIGH COURT No. 13/43.

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

BEFORE: Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :—

Nijmiya Lutfi Dalal and 3 ors. PETITIONERS.

v.

1. Chief Execution Officer, Acre,
2. Bader Ali El Fahl,
3. Na'im Salim Dalal. RESPONDENTS.

Attachments — Priorities, Law of Execution, Art. 123 *— Proof of date of document — Collusion.*

Application for an order to issue to the first Respondent, calling upon him to show cause why he should not allow the Petitioners to participate in the proceeds of execution in Acre Execution File No. 193/42, refused:—

Under Art. 123 of the Law of Execution the dates on documents of a person who attaches property already attached should be officially authenticated.

(A. M. A.)

ANNOTATIONS :

1. The second Respondent had levied a provisional attachment on the third Respondent's property, but, before he obtained judgment in the action brought by

him, the Petitioners also instituted proceedings against the third Respondent and obtained judgment by default which the third Respondent did not attempt to set aside. Both the second Respondent and the Petitioners started execution proceedings and the Petitioners received permission to participate in the proceeds of the proceedings instituted by the second Respondent. Later the first Respondent made an order cancelling Petitioners' rights so to participate. Hence this application.

2. The ruling factor in cases under Art. 123 of the Ottoman Law of Execution is collusion: H. C. 65/41 (8, P. L. R. 379; 1941, S. C. J. 405; 10, Ct. L. R. 221) and cases therein cited.

3. On the meaning of the words "officially authenticated" in Art. 123 see H. C. 43/27 (1, P. L. R. 194; C. of J. 1057), followed in H. C. 60/27 (C. of J. 840) and in H. C. 13/33 (C. of J. 864); *cf.* H. C. 100/40 (7, P. L. R. 581; 1940, S. C. J. 374; 8, Ct. L. R. 177).

(*H. K.*)

FOR PETITIONERS: F. Abdul Hadi.

ORDER.

The Chief Execution Officer after hearing evidence was satisfied that there was collusion. Under Article 123 it is necessary that the dates of the documents produced by the Petitioners should be officially authenticated. The Petitioners are unable to furnish this proof. We, therefore, see no reason to interfere with the Chief Execution Officer's decision. The application for an order *nisi* is refused.

Given this 8th day of February, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 39/43.

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

BEFORE: Copland, Rose and Khayat, JJ.

IN THE APPEAL OF:—

Adel Muhammad Dabbah. — APPELLANT.

v.

Attorney General. — RESPONDENT.

Charge of 3 persons with premeditated murder — Statements of witnesses to Police nearly 6 months after crime was committed — Allegation of alterations in judgment — Judgment containing no specific finding of killing with premeditation and of common design — Facts admitting of only one possible inference — Prosecution failing to tender witness on Information for cross-examination by defence —

Question of credibility of witnesses — Conviction on uncorroborated evidence of a single witness.

Appeal from judgment of Court of Criminal Assize, sitting at Haifa (*Cur.*: Gordon Smith, C. J.) in Cr. Ass. Case No. 6/43, dismissed:—

1. Objection that there were alterations in final judgment signed by trial Judge as compared with judgment orally delivered by him can only succeed if alterations substantial ones, going to grounds of judgment itself.

2. Unnecessary and unpracticable for trial Judge to take a note of everything said in cross-examination.

3. Where there are two alternative inferences to be drawn Court of Appeal will not draw an inference when trial Court has not drawn one, but where there is only one possible inference to be drawn on the proved facts and trial Court has not specifically made a finding as to that point, Court of Appeal is not precluded from drawing the only possible inference.

4. If two or more armed men went out to scene of crime, fired shots into doorway of house of man who was actually killed, returned from scene immediately after shots together, all this in night-time, and no evidence and no suggestion of provocation or quarrel only inference possible is: killing with premeditation and common design.

5. Whilst in strictness not necessary for the Prosecution to tender every witness on the Information not called by them for cross-examination by defence, better practice and one which should be generally followed in all Courts, being more favourable to accused person, to ask defence whether they wish to be given such opportunity.

6. Delay of several months in making the original statements to Police *re* murder committed does not vitiate the evidence, if reason of delay explained and trial Court believes explanation or finds it feasible.

7. Question of credibility of witnesses is one for trial Court; Court of Appeal may set aside judgment on a question of fact only where judgment obviously and palpably wrong.

8. Apart from certain exceptions a person can be properly convicted on evidence of a single witness, if believed, without necessity for corroboration.

(*M. L.*)

DISTINGUISHED: CR. A. 9/42 (9, P. L. R. 46; 11, Ct. L. R. 10; 1942, S. C. J. 43).

ANNOTATIONS:

1. As to contents of record in a criminal case see CR. A. 12/43 (*ante*, p. 122) and annotations.

2. When Court of Appeal entitled to draw an inference — C. A. 231/41 (8, P. L. R. 612; 11, Ct. L. R. 22; 1941, S. C. J. 593).

3. Principles of appellate Court in respect of findings of fact — C. A. 237/42 (*ante*, p. 266) and second paragraph of annotations.

4. On inference of common design see CR. A. 30/43 (*ante*, p. 308).

5. In CR. A. 42/42 (9, P. L. R. 222; 12, Ct. L. R. 56; 1942, S. C. J.

235) the Court of Appeal has set aside a finding of fact because the principal witness had, after the trial, gone back on his evidence and sworn it to be false.

6. No power of appellate Court to reverse findings as to credibility of witnesses — C. A. 226/41 (9, P. L. R. 1; 11, Ct. L. R. 5; 1942, S. C. J. 65) and annotations thereto; *cf.*, however, C. A. 93/42 (9, P. L. R. 554; 12, Ct. L. R. 240; 1942, S. C. J. 908).

(*A. G.*)

FOR APPELLANT: Alami and Shuqeiri.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This case is one which has given the Court some reason for consideration. The Appellant was charged before the learned Chief Justice, sitting at the Haifa Assizes, with murder contrary to Section 214(b) of the Criminal Code Ordinance, in that he, with another man, on the 7th May, 1942, at Bi'nah village, with premeditation caused the death of Ya'qoub Nimer El Khazen. After a trial lasting some six days he was convicted and sentenced to death, the second prisoner who was charged with him being acquitted.

The facts of the case are that the deceased man was killed one night at or about *'isha*-time, that is to say, some one and a half hours after sunset, close to the door of his own house in the village of Bi'nah. He was shot through the back receiving two bullet wounds both of which were fatal, one having pierced the heart and the other the aorta. The exact spot where the body was found, and which is the place where the man was killed, was some eighteen metres from the door of his own house. It was not for some five and a half months afterwards, until after this Appellant had been arrested, that the definite statements were made by the prosecution eye-witnesses identifying the Appellant with this crime.

On this appeal a large number of points had been raised, many of them of considerable importance. The ground of appeal which we will take first is that there were irregularities of procedure in the trial, and in support of that ground it is alleged that there were alterations in the final judgment as signed by the trial Judge, and which is part of the record, as compared with the judgment which was orally delivered in the Assize Court at Haifa; and secondly that the full record of the cross-examination of various witnesses was not taken down by the trial Judge. Now, it is alleged that the alterations are substantial ones. No objection was taken to the fact, and indeed could not very well be taken, of alterations made to correct mistakes made by the stenographer in taking the judgment down in

Court from dictation. In our opinion for this objection to succeed the alterations must be substantial ones going to the grounds of the judgment itself. One of the principal grounds is that in delivering oral judgment the learned Chief Justice referred to a witness, Ibrahim Bishara, who did not give evidence in the trial. In the transcript of the judgment as delivered orally these words occur:—

> "We have heard evidence that the deceased was shot I think in 1939, and wounded in the leg. That apparently, according to witness Ibrahim Bishara, was caused by the Bi'nah men."

There is an obvious mistake in this because the word "Bi'nah" is wrong and it must be "Deir El Assad", from the context. Ibrahim Bishara, though named on the information, was not called to give evidence at the trial. It is alleged that this reference to evidence that was not given caused the trial Judge to misdirect himself as to the fact of enmity between the villages and the families. If we turn to the record, from the evidence given by Inspector Black on pages 12 and 13, we find that this officer said that he knew the area well and that as between the two villages there was a dispute as to the land. Inspector Nassab's evidence on page 30 is also quite clear that there was enmity between the villages and also between the families. And there is this other fact, which must also be borne in mind, that when the murder was committed the murder was instantly attributed to the Dabbah family, which is the family of the Appellant. Apart from this reference, therefore, to Ibrahim Bishara, there was sufficient evidence on which it could be found that there was enmity not only between the villages but also between the families of the deceased and the Appellant. And we, therefore, cannot regard this alteration in the judgment as being a substantial one which would affect the conclusions arrived at by the learned Judge.

Another alteration which is suggested as a specific one is that in the original judgment it is said:—

> "It is *clearly possible* that Nazleh" (one of the prosecution witnesses) "heard the three men passing her house on the way South",

whereas in the final and corrected judgment the words read:—

> "It is *clear* that Nazleh heard the three men passing."

In our opinion the words "clear" and "clearly possible" have practically the same meaning and again we cannot regard the alteration as a substantial one.

The other alterations are minor ones, and amount to no more than changes in phraseology, and it is unnecessary, and indeed impracticable for the trial Judge to take a note of everything said in cross-examina-

tion. Actually many pages of the Judge's notes are devoted to the cross-examination of the witnesses.

To take next the point with regard to premeditation, and with that point, that there was no sufficient evidence of premeditation, there also goes a somewhat clearly linked point that there was no common design. It is true that in the judgment there is no finding whatever of common design, and the finding of murder, that is to say killing with premeditation, is merely a bare recital that "I find the Appellant guilty of murder as charged". It is true that on the first page of the judgment the learned Chief Justice says:—

> "There is no doubt whatsoever that he died as a result of these bullet wounds, and that these shots were fired and the injuries caused under circumstances which amounted to murder."

And later on on page 2, after reciting where the deceased man was found lying, and the fact that his torch was found lying by his side still alight though the glass was cracked, he goes on to say:—

> "From this it is clear that the deceased was murdered, and the question, therefore, is one of the identity of the murderers."

We think that by his use of the word "murder" in this case the learned Chief Justice meant no more than "killing with violence", and that no technical meaning was intended to be attached to the word "murder" or "murdered". It is absurd to suggest that the finding that the torch was found lying by the side of the deceased still alight with the glass cracked was any evidence of premeditation. No one could possibly have taken that as a ground for finding premeditation. And we do not think that the judgment should, or indeed can, be read as so holding.

From the facts of this case, which are that three armed men were seen proceeding from North to South at varying distances up to a maximum of a hundred metres from the house of the deceased; that shots were fired by those armed men into the doorway of the house of the deceased; that the deceased was found lying eighteen metres from his doorway with two shots in the back; that the three armed men were seen immediately after the shots had been heard proceeding together from South to North over the road by which they had approached the scene; that there is no evidence and no suggestion that there was any provocation or quarrel; and that it was night-time; — it is quite clear to our minds that the irresistible inference — the only inference possible from the facts of this case — is that this killing was done with premeditation. Reference has been made to Criminal Appeal No. 9/42, Ahmad Musa Muhammad *v.* the Attorney General (9 P. L. R. p. 46), but the facts of that case are entirely

different from the facts of this present case. In that case it was arguable that there were two alternative inferences to be drawn from the facts. It was daylight. There was no evidence of any enmity by the Appellant towards the deceased, and the part played by the Appellant in that case was a purely passive one. Also there was no evidence of any common enterprise and no evidence of any motive. This Court said:—

> "The matter is eminently arguable, and particularly as the trial Court has not stated that to be its reason for drawing its inference, we are certainly not prepared on our own motion to draw any such inference."

In a case where there are two alternative inferences to be drawn, this Court will not draw an inference when the trial Court has not drawn one; but where there is only one possible inference to be drawn on the proved facts, and the trial Court has not specifically made a finding as to that point, this Court, in our opinion, is not precluded from drawing that only possible inference. The same reasoning applies equally of course to the question of common design. Three men armed going to the scene of the crime, all returning from the scene together, all three actually shooting into the doorway of the house of the man who was eventually killed, two cartridges found showing that two shots had been fired two and a half and four metres from the place where the body of the deceased was found. From these facts it seems to this Court that common design is proved beyond a shadow of a doubt, and that no other conclusion is possible.

We have, for the moment, left out the question as to the identity of the present Appellant as connected with this offence, but that will be dealt with at a later stage.

The next ground of appeal is that the defence were refused the right to have witnesses on the information, who were not called by the prosecution, called, so that the defence might cross-examine them. In Archbold 28th Edition, p. 505, the question of whether these witnesses should be called or not is dealt with in these words:—

> "Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, it has been usual to do so, so that the Defendant may cross-examine them."

It goes on to say:—

> "If counsel will not call the witness, the Judge, in his discretion, may."

These witnesses were required in order to deal with the question of motive. It is said that they would have given evidence that there was, in fact, no enmity between the families concerned. Mousa Eff.,

for the Appellant, has argued with considerable force, that the trial Judge accepted evidence as to motive given by somebody who had not been called; that he did not hear evidence which might have been to the other effect, and which might have had an effect upon the question of motive, by proving that there was not any motive, and that that made him more ready to believe the eye-witnesses and to disregard the question of the delay which occurred in the giving of statements by those witnesses. The point has caused us a considerable amount of reflection, but we think that the strict position in law is that it is not necessary legally for the prosecution to put forward those witnesses for cross-examination, and that being so we cannot say that the learned Chief Justice erred in point of law.

This point of appeal must, therefore, fail but we would wish to say that in our opinion the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence may cross-examine them if they so wish. It has been, at any rate in recent years, since the case of the Attorney General *v.* Marina, Criminal Assize No. 36/37, the practically invariable practice of those judges of the Supreme Court, who have the duty of presiding over Assize trials, to take this course of asking the defence whether they wish any witnesses who have not been called for the prosecution to be tendered for cross-examination. Of the two courses this course is the more favourable to an accused person and for that reason alone should in our opinion be preferred. This Court, therefore, desires to lay down as a rule of practice that in the future this practice of tendering witnesses should be generally followed in all Courts. In this case it would seem that the prosecution objected to the course proposed. Whilst the strict legal position is as we have just stated, we do not think that the prosecution should have objected in the circumstances. We would add that the practice which we have laid down as the one to be followed is in accordance with that which has been generally followed in England for very many years now.

This brings us now to the evidence connecting the Appellant with the crime. That evidence was given by five witnesses, all of whom say that the Appellant was one of the three men who passed their house. They were cross-examined at very considerable length, but the learned Chief Justice believed their evidence. It has been urged that the tale that they have told is a fantastic one. It is no more fantastic than many cases of murder which come before this Court, and is not a tale so improbable that no Court could possiby have believed it — on the contrary. It has been argued that the learned

Chief Justice should not have believed their evidence, and that he misdirected himself in so believing, because the original statements to the Police were not given by these witnesses until some five and a half months after the murder was committed. Complaint is also made that the learned Chief Justice was wrong in accepting the reason given for the delay in making the statements by the various witnesses, that it was due to fear and what might happen to them if they spoke. That matter of the delay was before the learned Chief Justice and he dealt with it in these words:—

> "I believe their reasons for not giving evidence before and that they were generally afraid to do so specifically until after the Accused's arrest some five months later."

On page 8 of the transcript of the judgment deivered in Court we have this passage:—

> "The explanation of not having given full explanation to the Police is a feasible one — that is, they were afraid until Adel was arrested. Both Nazleh and Badi'a were afraid to give evidence to the Police and it was made in very general charges and very general information within two days only of the murder."

The last part of that second sentence which I have just read is clearly wrongly taken down because it does not make any sense at all. The reasons given in the final judgment are substantially the same as those given in the draft judgment. From the context it seems to us to be clear that, when the learned Chief Justice said that the explanation was a feasible one, he meant that he believed it.

It has been argued next that the witness Awad Fadil could not possiby have recognized anybody by the beam of an electric torch at a distance of thirty metres. It is a mistake to say, as was stated in the judgment, that he saw a light shining at these three persons from the direction of the deceased's house, "which was only a few metres away". The distance was actually some thirty metres, but in his evidence in the record taken down it is clear that he saw the Appellant, whom he had known for some seven to ten years, passing his house going towards the scene of the crime. The mistake as to the distance in our opinion does not vitiate the evidence given and the belief of the learned Chief Justice in the truth of the evidence given. The mistake about the distance is immaterial. It is true that in his judgment the learned Chief Justice would seem to have gone into this question of the statements from the point of view of whether there was conflict between them and the evidence given by these witnesses in Court. This, of course, was not the point made by the defence with regard to these statements which was that the lateness

at which they were given should have caused the trial Judge to have regarded their evidence with the greatest suspicion and to have rejected it. But he does go into the reason why the witnesses were late in coming forward. He accepts the reason why they were late, which was due to fear, and this part of the judgment with regard to the conflict is at the worst a surplusage. As to whether there was sufficient evidence to justify this finding that they were afraid to give evidence, we have only to turn to the evidence of Inspector Black on pages 12 and 13 of the record, where he said:—

> "We have had great difficulty in getting witnesses to come forward owing to intimidation and fear of being shot."

And in re-examination he said:—

> "The reluctance to give evidence had not ceased."

That evidence is sufficient to support the finding.

The question of credibility of witnesses, as has been so often remarked, is one for the trial Court. This Court does not proceed on such lines as these — look at the evidence, see what conclusion the Court would have come to on that evidence, and set aside the judgment of the Court below if it does not correspond with such conclusion. The Court has seen fit on occasion to set aside a judgment on a question of fact alone but only where the judgment was obviously and palpably wrong. Such cases are rare and this certainly is not one of them. The case turned very largely upon the manner in which these eye-witnesses gave their evidence, and the impression formed by the learned Judge who saw and heard them as to their truthfulness or otherwise. This Court does not see that it can interfere with the judgment without substituting itself for the trial Court, which was the proper tribunal to determine the matter. It is not necessary to say whether we should have given the same judgment or not.

There is only one further point to which we would refer and that is the passage on page 6 of the judgment with regard to the necessity of corroboration of the evidence of a single witness. The learned Chief Justice said:—

> "There was provision in our Evidence Ordinance that no judgment shall be given in any case on the evidence of a single witness unless such evidence is admitted in a criminal case by the accused person or is corroborated by some other material evidence which, in the opinion of the Court, is sufficient to establish the truth of it. Although temporarily suspended this is a guide as to the degree of proof required, and there is as I have said a single witness only as to the identity. I am unable to find any corroboration of that evidence as to his identity in the evidence for the prosecution."

This, of course, refers to the second Accused who was acquitted at the trial. The view of this Court is that this statement is not a correct statement of the law as it exists at this moment. Apart from certain well-known exceptions, a person can be convicted, and properly convicted, on the evidence of a single witness, and there is no necessity for corroboration if that witness is believed. Whether he should be so believed is, of course, another question.

For these reasons the appeal is dismissed.

Delivered this 17th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 148/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Hamakpih Ltd. APPELLANT.

v.

1. Iffland & Gimpelewitsch,
2. Baruch Iffland,
3. Mordechai Gimpelewitsch. RESPONDENTS.

Illegality of contract — Plea may be taken at any stage — "Possession for purpose of sale" explained — Effect of statutory prohibition of sale when non-prohibited articles included in sale — Prohibition of removal does not make sale illegal — Mahmoud and Ispahani — Anticipatory breach — Liquidated damages and penalty — Readiness and willingness to perform.

Appeal from the judgment of the District Court, Tel-Aviv, dated the 31st day of March, 1943, in Civil Case No. 148/42, allowed:—

1. A point of illegality which may be taken by the Court of its own motion, may be raised by the defence at any stage.
2. An owner of machinery in use in a factory holds the machinery for purpose of sale, within the meaning of the Control Order, once be makes up his mind to sell.
3. The removal, and not the sale, of machinery without a licence being prohibited, a contract of sale is not an illegal contract, even if it provides incidentally for the removal of the machinery.
4. If the purchaser is in default, the vendor may sue for damages without complying with obligations to which the purchaser's performance is a condition precedent.

5. In assessing damages for breach of contract of sale, amounts paid to a commission agent for sale to another purchaser may be taken into account.

(*A. M. A.*)

FOLLOWED: Mahmoud and Ispahani, *in re*, 1921, 2 K. B. D. 716, *per* Scrutton, L. J., at p. 729.

ANNOTATIONS:

1. On contracts forbidden by statute *cf.* Halsbury, Vol. 7, *pp.* 164 *seq., sub-sec.* 2; Digest, Vol. 12, *pp.* 269 *seq., sec.* 5.

2. The tests to establish whether a sum mentioned in a contract is to be considered as damages or as a penalty have been laid down, following English law, in C. A. 191/37 (2, Ct. L. R. 169; P. P. 6—9.xii.37; Ha. 23.xii.37), followed in C. A. 135/38 (1938, 1 S. C. J. 435; 4, Ct. L. R. 15). The distinction is now settled law in Palestine; C. A. 126/38 (5, P. L. R. 369; 1938, 1 S. C. J. 428; 4, Ct. L. R. 34).

(*H. K.*)

FOR APPELLANT: Sommerfeld.

FOR RESPONDENTS: Smoira.

JUDGMENT.

Frumkin, J.: The appellant company in this case, on the 27th of March, 1941, entered into a contract with the Respondents for the sale of machinery and other articles together described as an Ice Factory excluding, of course, the building and land within which this factory was found. The price was LP. 1,600 of which LP. 200 were paid upon signature of the contract. LP. 200 were to be paid on the 5th of April, LP. 400 on the 20th April, and the balance of LP. 800 on the 8th of May. The same date namely the 8th of May, was also fixed in the contract as the date upon which the machinery and other articles were to be removed from the place. To be correct, the 8th of May was the beginning of the date for removal which should have been completed a few weeks later on the 21st of June. As regards the payment of the balance, it was clearly stipulated that it had to be paid on the 8th of May even if for one reason or another the removal of the machinery could not begin at that date. In another clause of the contract the sum of LP. 500 was fixed to be paid by a defaulting party to the contract to the other party for a breach of the contract or any part thereof.

Apart from the LP. 200 paid upon the signature of the contract no further instalments were paid neither at the dates fixed nor at any other subsequent date nor were the machinery and articles removed from the place. When approached by the Appellant the Respondents on the 28th of May, answered that they could not remove the property because they had no money to pay. The Appellant then

brought the present action claiming LP. 500 as damages for breach of contract. The Court found that this amount constituted a penalty and not liquidated damages and went on to assess the actual damage and arrived at certain figures but refused to give judgment even for those figures on the ground that the contract was contrary to an Order issued by a competent authority which in the view of the learned Judges of the Court below, prohibited the sale of such machinery. The Court accordingly came to the conclusion that the contract was illegal or contrary to law and that the Appellant although willing was, therefore, not ready to perform the contract and as a result not entitled to damages. From this judgment there is this appeal.

The first ground of appeal is that this point of illegality was taken at a very late stage. It was not mentioned during the course of the hearing of the case but was only raised by the Defendant in final address. In fairness to the other party, points of that nature which go to the root of the matter should be brought to the notice of the Court and the other side at an earlier stage but we have to bear in mind that this objection was relating to a matter of legality or illegality which the Court could take on its own motion and we, therefore, think that the Court rightly addressed its mind to that point.

The second ground of appeal is that the Order, which is found in the 2nd supplement of 1940, Vol. 3, p. 967 does not apply to this contract at all. This ground is twofold. Firstly it is said that the order applies only to such articles which are held in possession for the purpose of selling and does not apply to a case like the present one where the articles were to be run as a factory and not held for the purpose of sale. At first sight it appeared to me that there was some substance in this argument in that the order was mainly meant to apply to dealers or to people of trade who keep such articles for the sole purpose of selling them, but upon further consideration, it seems to me that for whatever purpose property is originally held, once the owner of the property makes up his mind to sell it, he must be deemed to hold it for the purpose of sale. The best evidence in this case for that intention is the contract under which the company undertook to sell the property.

The second part of this ground of appeal is that the prohibited machinery forms only part of the subject matter of the sale. We do not think that there is any substance in this point either because it would be rather strange that an electric motor would be subject to the provisions of that order when dealt with by itself and would not be subject to the order when it is included in other articles. Par-

ticularly in this case the two electric motors formed the most essential part of the property in question. This ground must, therefore, fail.

Having arrived at the conclusion that the order does apply, the question we have to deal with now is: Does the order make the contract illegal? The contract was for the sale of property. The Order, however, does not prohibit the sale but the removal. The removal of the property is incidental to the sale in order to give effect to it and in the ordinary course a special clause would hardly be introduced in a contract of such nature because the purchaser would naturally take steps to remove his property. In this case a special clause was introduced in the contract in favour of the vendor who wanted to secure that the machinery be cleared from his grounds without delay.

The learned Judges in the Court below apparently did not direct their minds to that difference because in their judgment they say:—

> "Defendants' attorney contended that although Plaintiff was willing to deliver the machinery, he was not ready to do so, because an Order under the Defence Regulations 1939 was published by the Director of Public Works prohibiting the sale (*sic*) or transfer to any other place of property or goods without special authority."

Upon perusal of the order it will appear that all what this Order does prohibit is the removal of such articles but not their sale. Had this Order, like other orders we come across, in fact prohibited sale, of course the mere sale and even the mere signature of such a contract would be a contravention of the law and would render the contract illegal. But this is not the case in this Order. The main object of the present contract is sale which is not prohibited by law and the removal of the machinery is only auxiliary to the contract.

We have to see now whether that contract upon its mere signature was illegal. This is a case where in the words of Scrutton, L. J., in Mahmoud and Ispahani K. B. D. 1921 (2) p. 729, "the Appellant might lawfully contract with the Respondents and chance his getting a licence before the delivery of the goods." So upon the signature of the contract it was quite legal and the company could very well take the chance of attempting, at least, to obtain the permit to remove and only if unsuccessful it would be regarded as being not ready to perform.

We have to come back to this particular clause we mentioned before, that the date fixed was in favour of the Appellant and the Appellant could delay to obtain that permit until such a time when it will really be required. The conduct of the Respondents made

such an application quite unnecessary. As the first instalment was not paid in time nor any subsequent instalments, it would be a waste of time and money to try to obtain a permit for the removal of property which the purchaser could not remove from the spot. We, therefore, come to the conclusion that there is nothing to show that the Appellant was not ready and willing to perform the contract and he is, therefore, entitled to damages.

We have now to deal with the other ground of appeal that the amount of LP. 500 was not a penalty but liquidated damages. We have only to look at the particular clause of the contract to see that it was for "the breach of the contract or any part thereof" so that it would include for instance the non-payment of the second instalment of LP. 200 on the 21st of April and that, of course, is a penalty and not liquidated damages. Alternatively the appellant company claims a few other sums in addition to the amount of LP. 158.568 mils which the Court assessed as actual damages. One item is LP. 50 paid by the Appellant as commission in connection with the sale of the same property to another purchaser. The Court refused to grant this amount but we think wrongly. The Appellant got short of LP. 125 being the difference between the price he first sold the property for to the present Respondents and the price for which it was sold to the other purchasers. The fact that the LP. 50 were paid as commission does not make any difference because but for the breach of the contract by the Respondents he would not have to pay that sum. The other two items of LP. 14 for office expenses and LP. 10 for employing an engineer, were too remote to be considered as damages directly arising out of the breach. The appeal will, therefore, be allowed and that part of the judgment ordering the Appellant to restore the LP. 200 to the Respondents will be set aside and judgment entered for the Appellant for the amount of LP. 208.568 mils less the LP. 200 already in the hands of the Appellant, it means that the Respondents will have to pay LP. 8.658 mils. The Appellant is entitled to half his costs on the lower scale here and below to include LP. 5 advocate's attendance fee in this Court and also half the amount fixed by the Court below as advocate's attendance fee which is also LP. 5.—.

Delivered this 25th day of June, 1943.

Puisne Judge.

Copland, J.: I concur.

British Puisne Judge.

Khayat, J.: I concur.

Puisne Judge.

CRIMINAL APPEAL No. 14/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Hilal Ben Karmeli Korimalovsky. APPELLANT.

v.

The Attorney General. RESPONDENT.

Possession of military property — Defence Regulations 24A(1)(*d*) — *Failure of accused to appear on appeal — Forfeiture of bond, Criminal Procedure (Release on Bail) Ord., Sec.* 8 — *Whether Defence Regulations ultra vires — Emergency Powers (Colonial Defence) O. in C., "governor", High Commissioner, Emergency Powers (Defence) Act, Secs.* 1(2), 3 — *Onus of proof in prqsecutions under the Regulations, R. v. Beadon — Bail — Sentence — Production of exhibits in Court.*

Appeal from the judgment of the District Court of Haifa in Summary Trial No. 512/42, dated 29th January, 1943, whereby Appellant was convicted of being in possession of property of His Majesty's Army Force contrary to Regulation 24A(1)(d) of the Defence Regulations 1939, and sentenced to three years' imprisonment; appeal dismissed:—

1. Regulation 24A(1)(d) is not *ultra vires* the Emergency Powers Defence Act, 1939, as applied to Palestine.

2. Although the onus of proving lawful possession in a charge under the Regulation lies on the accused, the prosecution may, and in some cases should, lead evidence to rebut any possible defence. This does not alter the onus of proof.

3. It is unnecessary to bring to Court all the property seized, when it is not disputed that it is military property. One or two articles suffice.

(*A. M. A.*)

REFERRED TO: R. *v.* Beadon, 1933, 24 CR. A. R. 59.

ANNOTATIONS: All attempts to have any Defence Regulation declared *ultra vires* have hitherto failed. See H. C. 74/36 (P. P. 9.viii., 30.viii.36) — *Emergency Regulations,* 1936, *Reg.* 15B; CR. A. 109/36 (C. of J. 1934—6, 300) — *Emergency Regulations,* 1936, *Reg.* 8A(1); H. C. 105/41 (1941, S. C. J. 636; 10, Ct. L. R. 181) and H. C. 69/42 (9, P. L. R. 425; 1942, S. C. J. 575) — *Emergency Regulations,* 1936, *Reg.* 15B *and Defence (Military Commanders) Regulations*; H. C. 25/42 (9, P. L. R. 237; 1942, S. C. J. 241; 12, Ct. L. R. 58) — *Defence Regulations,* 1939, *Reg.* 15B; H. C. 29/43 (10, P. L. R. 150; *ante,* p. 159) — *Defence Regulations,* 1939, *Reg.* 51; CR. A. 30/43 (10, P. L. R. 188; *ante,* p. 308) — *Defence Judicial Regulations (No.* 2). See, however,

dictum of McDonnell, C. J., in H. C. 67/36 (C. of J. 1934—6, 290) — *Reg.* 19A *of Emergency Regulations*, 1936, *ultra vires*.

(*H. K.*)

FOR APPELLANT: S. Friedman.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

The Appellant was charged before the learned Relieving President District Court Haifa, with being in unlawful possession of military property contrary to Regulation 24A(1)(d) of the Defence Regulations as amended. The property found in his possession was composed of 1,094 pairs of new woollen stockings and 30 pairs of woollen drawers, the property of His Majesty's Forces. He was convicted and was sentenced to three years' imprisonment. The Appellant has not appeared on the hearing of this appeal although his bailor has been notified on more than one occasion. This is the third time that this appeal has been listed and the Court, therefore, orders that the bail bonds be endorsed with a certificate as laid down in Section 8 of the Criminal Procedure (Release on Bail) Ordinance, Cap. 35, and that the bonds be forfeited.

The appeal is confined to two legal points. The first one is that these Defence Regulations are *ultra vires* the Emergency Powers (Defence) Act, 1939, as applied to this territory by the Emergency Powers (Colonial Defence) Order-in-Council, 1939.

The second point is that, though by the Regulation under which the Appellant was charged the onus was upon him to prove that possession was not unlawful, yet the prosecution took that onus upon themselves, and, therefore, on the authority of Rex *v.* Beadon, Criminal Appeal Reports Vol. 24, p. 59, the onus is thereby shifted on to the prosecution to prove their case.

The Court is of opinion that there is no substance in either of these submissions. By paragraph 9 in the first Schedule to the Emergency Powers (Colonial Defence) Order-in-Council, the "Governor", which term includes in this territory "High Commissioner", shall be substituted for His Majesty in Council as the authority empowered to make Defence Regulations for the territory. Under Section 1(2) of the Emergency Powers (Defence) Act, the Defence Regulations may, so far as it appears to His Majesty in Council to be necessary or expedient, make provision for the apprehension, trial and punishment of persons offending against the Regulations. Subsection 3 gave the authority to such persons as may be specified in the Regulations to make orders, rules and byelaws for any of the

purposes for which such Regulations are authorised and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient. The effect of this legislation is that the High Commissioner has power to make Defence Regulations for such purposes as appear to be necessary or expedient for securing the public safety, defence of the realm, the maintenance of public order and efficient prosecution of the war. There is no doubt that these regulations are properly made by the High Commissioner and under the authority vested in him by the Emergency Powers (Defence) Act, 1939.

With regard to the second point, even if the onus of proof was assumed by the prosecution, there was ample proof in the evidence led by the prosecution, that the Appellant was knowingly in unlawful possession of this property. The amount of the property in the first instance, namely eleven hundred pairs of socks, the fact that he got it, as he says, from somebody whom he did not know and was to take it to somebody in Haifa whom he did not know, the method of the transport, and many other matters adduced by the prosecution, show quite clearly that the possession was unlawful and apart from that, the prosecution are always entitled to lead evidence in order to rebut any possible evidence by the defence and indeed it is a necessary precaution in many cases that they should do so. The Court is of opinion that the appeal fails and must be dismissed.

We would like to say that this is a case in which bail on the appeal should never have been granted, particularly in view of the fact that the Appellant had failed to appear on two occasions during the course of his trial before the District Court and had caused the adjournment of the trial there.

With regard to the sentence, we think that this is insufficient. This is perhaps one of the most serious cases of this kind that has come before us and the Court, therefore, increases the sentence to one of five years' imprisonment.

One further comment the Court wishes to make, and that is this, that in cases of this nature it is quite unnecessary for the whole amount of the property seized to be brought all the way from the place of trial to be produced in the Court of Criminal Appeal. Nothing hinges in this particular case upon the nature of the property and it was not disputed in the Court below that the property was military property; therefore, one or two articles out of the 1,094 would have been quite sufficient for the purposes of this Court. Thus the Army Authorities would not have been deprived of this valuable property

for all these weeks. The property is to be returned to the Military Authorities.

Delivered this 25th day of March, 1943.

British Puisne Judge.

CIVIL APPEAL No. 48/43.

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

BEFORE : Edwards and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Olgha Yusef Nilos and 4 ors. APPELLANTS.

v.

Huriya Muhammad Jamus and 15 ors. RESPONDENTS.

Deposit for appeal — Application to increase — C. P. R. 327, 329 — Grounds for application — Motions — Affidavits should be filed — C. P. R. 305, "may" — Costs.

Application to increase the amount of the deposit paid by Appellant, allowed:—

1. Notwithstanding the word "may" appearing in rule 305, motions should be supported by affidavit.

2. The value of the subject matter of the appeal and the number of respondents and advocates representing them, are items which the Court will take into account in an application to increase the amount of the security payable by the appellant.

(*A. M. A.*)

ANNOTATIONS :

1. The only other reported decision on Rule 329 of the C. P. R. is C. A. 26/40 (7, P. L. R. 134; 1940, S. C. J. 207; 8, Ct. L. R. 153; P. P. 29.iii.40); see annotations in 1940, S. C. J. 208 on the English practice.

2. On the interpretation of the word "may" see C. A. 237/37 (6, P. L. R. 8; 1939, S. C. J. 46; 5, Ct. L. R. 49) — *Land Courts Rules, Rule* 2(2); CR. A. 133/41 (8, P. L. R. 528; 1941, S. C. J. 501; 10, Ct. L. R. 197) — *textbook;* C. A. 224/41 (9, P. L. R. 58; 1942, S. C. J. 77; 11, Ct. L. R. 34) — *Land (S. of T.) Ord., Sec.* 52; C. A. 269/42 (*ante*, p. 334) — *Arbitration Ord., Sec.* 6; for English decisions see Digest, Vol. 42, *p.* 717, *Nos.* 1355 *seq.*

(*H. K.*)

FOR APPELLANTS: Gavison.

FOR RESPONDENTS: Nos. 1—9 — Caspi.
Rest — R. Dajani.

ORDER.

This is an application by the Respondents to an appeal to this Court, the appeal being from the decision of a Land Settlement Officer. The application is for the increase of a deposit and is made under rule 329 of the Civil Procedure Rules, 1938. We would first observe that the application is not supported by an affidavit or accompanied by any other document. We wish to lay it down as a matter of practice that an application should ordinarily be supported by an affidavit. It is true that the word "may" appears in line 1 of the second paragraph of rule 305; nevertheless, we think that ordinarily an affidavit should be filed. We trust that, in future, affidavits will be filed in support of all motions made under rule 305, including applications which are not *ex parte,* as well as *ex parte* applications.

As to the application itself, it is said that there will be three sets of Respondents, each of which sets will doubtless wish to be represented by a separate advocate, and it is also said that the value of the land in dispute is substantial. It is only fair to the learned Chief Registrar to say that it does not appear that all these matters were brought to his notice when he fixed the deposit under rule 327. In the circumstances we think that the deposit ought to be increased from LP. 15 to the sum of LP. 60. We order accordingly. Deposit to be made before 12 noon on 24th May, 1943.

No costs of this application.

Delivered this 10th day of May, 1943.

British Puisne Judge.

CIVIL APPEAL No. 134/43.

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

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

IN THE APPEAL OF:—

Palestine Maritime Lloyd Ltd. APPELLANTS.

v.

Palestine Oil Industry "Shemen" Ltd. RESPONDENTS.

Admiralty Court — Claim against common carrier for failure to deliver cargo is within jurisdiction of District Court — Ad. 3/42, The

Yuri Maru, Colonial Admiralty Act, 1890 — *Jurisdiction of Admiralty Court in Palestine.*

Appeal from the order of the District Court of Tel-Aviv, dated 18th December, 1942, in Civil Case No. 138/42, dismissed:—

1. The District Court has jurisdiction in claims against common carriers (by sea) for failure to deliver cargo.

2. The jurisdiction of the Admiralty Court in Palestine is limited, under the Colonial Courts of Admiralty Act, 1890, to the powers exercised in that year by the High Court of Admiralty in England.

(*A. M. A.*)

REFERRED TO: Adm. 3/42 (1942, S. C. J. 772).

ANNOTATIONS :

1. See Adm. 3/42 (*supra*) wherein it was held that the Admiralty Court in this country had no jurisdiction to entertain a claim for damages for breach of contract.

2. On the liability of carriers *cf.* C. A. 68/43 (*ante*, p. 214) and note.

(*H. K.*)

FOR APPELLANTS: P. Joseph.

FOR RESPONDENTS: Sussman.

JUDGMENT.

Copland, J.: This is an appeal from an order of the District Court of Tel-Aviv whereby an application by the Appellants to strike out the statement of claim, on the grounds that the District Court had no jurisdiction on the subject matter, was dismissed.

The only point on appeal is that the Court below erred in holding that it had jurisdiction over the subject matter of the claim inasmuch as the Admiralty Court has exclusive jurisdiction over it. The statement of claim was for damages from the Appellants on the ground that they had failed as common carriers to deliver a certain cargo loaded at Port Said to Haifa. It seems to us, with all respect to the very strenuous arguments advanced by Dr. Philip Joseph, that this claim is essentially one within the jurisdiction of the Civil Courts, and nothing has been shown to us in the argument that this is a matter for the exclusive jurisdiction of the Admiralty Court. The jurisdiction of the Admiralty Court in Palestine was dealt with in Admiralty Case, folio No. 3 of 1942, and basing itself upon "The Yuri Mari", (1927 A. C. at page 906), the Admiralty Court here held that the jurisdiction of the Admiralty Court in Palestine was limited under the Colonial Courts of Admiralty Act, 1890, to the powers exercised by the High Court of Admiralty in England in that year.

In "The Yuri Maru" Lord Merrivale, in delivering the judgment of the Board, said:—

> "Great extensions of the Admiralty jurisdiction in England were made during the nineteenth century, before the passing of the Colonial Courts of Admiralty Act, 1890. Notable extensions had also been made during the same period by Acts of the Imperial Parliament in the jurisdiction of the Vice-Admiralty Courts. It would be wholly incorrect, however, to suppose that these were extensions of jurisdiction granted to the High Court of Admiralty here and thereupon automatically operative in the Courts overseas."

And further he goes on to say:—

> "The Vice-Admiralty Courts Acts of 1863 and 1867 (26 Vict. c. 24; 30 & 31 Vict. c. 45) extended the powers of the Admiralty Courts overseas, not by reference to the powers of the High Court in England, but by scheduled statement of the causes of action in respect of which jurisdiction was newly conferred and specification of other amendments."

In our opinion, as I have said, the claim is one for damages due from a common carrier for failure to perform his contract. This is not, in our opinion, a matter within the exclusive jurisdiction of the Admiralty Court either in Palestine or elsewhere so far as we know where. For that reason we think that the District Court came to a correct decision on the point of law. The appeal must, therefore, be dismissed with the usual consequences, with LP. 10 advocate's attendance fee at the hearing of this appeal.

Delivered this 16th day of June, 1943.

British Puisne Judge.

CIVIL APPEAL No. 11/43.

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

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

IN THE APPEAL OF :—

1. Ahmad 'Ammura,
2. Zarifeh Uthman. — APPELLANTS.

v.

1. Ra'ouf Ka'war,
2. Sadek Ka'war. — RESPONDENTS.

Damages — Damages in excess of deposit — Forfeiture of deposit — Part payment and deposit — Counterclaim for refund of amount paid — Mayne on Damages, p. 202 — Amount paid should be taken into account.

Appeal from a judgment of the District Court of Haifa (*Cur.*: Shems, Atalla, JJ.) in Civil Case No. 141/41, allowed and judgment entered for Appellants:—

A vendor can claim as damages only the loss in excess of amounts received by him as deposit or part payment.

(*A. M. A.*)

ANNOTATIONS:

1. The Respondents' (vendors') claim was for damages suffered by them through Appellants' (purchasers') breach of contract. A sum of LP. 350, had been paid in advance by the Appellants but neither party referred to that sum in the pleadings and the question of its return or otherwise was, therefore, not before the Court below.

2. On the distinction between sums paid as deposit and advances on the purchase price *cf.* C. A. 261/40 (8, P. L. R. 71; 1941, S. C. J. 36; 9, Ct. L. R. 61). On return of purchase price generally see C. A. 80/43 (*ante*, p. 222) and note 1 and C. A. 90/43 (*ante*, p. 326) and note 5.

(*H. K.*)

FOR APPELLANTS: Moghannam.

FOR RESPONDENTS: Atalla.

JUDGMENT.

Rose, J.:

— — — — — — — — — — —

Under clause 3 of the agreement between the parties it was provided that a payment in advance of LP. 350 should be made by the Appellants. There is no dispute that, in fact, this payment was made and that the Respondents are now in possession of these monies. The Appellants contend that this payment was made merely as part of the purchase price, and that there was no intention between the parties, or provision in the agreement, that in the event of breach this sum should be forfeited. The Respondents, on the other hand, argue that it was paid by way of deposit and that the reasonable interpretation of the agreement is that in the event of breach by the Appellants it should be retained by the Respondents.

That is a point that may well have to be decided in subsequent proceedings between the parties, but as far as this appeal is concerned, the question whether this LP. 350 was paid as a deposit or as part of the purchase price seems to me to be immaterial. There was — somewhat surprisingly in view of the Appellants' present contention which would seem to derive some support from the wording of the

agreement — no counter-claim for the return of the money on the ground that it was a part-payment. That being so, the only question which the trial Court had to decide was the amount of damages caused to the Respondents by the Appellants' breach. In considering this amount regard should have been had to this LP. 350, because even if the Respondents' contention was true, and that it was paid by way of deposit (*a fortiori* if it was a part-payment of the purchase money), the Respondents would only have been entitled to recover damages if the loss that they had suffered was in excess of the amount of the deposit. Authority for this view, if such is needed, is to be found in Mr. Mayne's book on Damages (10th Edition), p. 202. It is abundantly clear from the judgment of both the learned Judges that this sum of LP. 350 was not taken into consideration by either of them. Therefore, even so far as the more favourable judgment from the point of view of the Respondents, that of Judge Atalla, is concerned, the amount of damages awarded was only LP. 284, which is substantially less than the amount of the deposit. For this reason the claim of the Respondents should have been dismissed.

— — — — — — — — — — —

For these reasons the appeal must be allowed, the judgment of the District Court set aside and judgment entered for the Appellants. The Appellants will have their costs here and below, the costs of this appeal to be on the lower scale and to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 2nd day of February, 1943.

British Puisne Judge.

CIVIL APPEAL No. 127/43.

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

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

IN THE APPEAL OF :—

1. Braz Bros.,
2. Joseph Braz,
3. Alexander Braz. — APPELLANTS.

V.

1. Baruch Schoenberg,
2. Fruit Trading Company. — RESPONDENTS.

Brokers — Contracts — Consensus ad idem — Contract not signed by one party — Part performance — Brokers and agents on commission — Accounts and action for accounts.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 22nd March, 1943, in Civil Case No. 253/41, dismissed:—

1. Where there is part performance of a contract, it cannot be argued that there is no *consensus ad idem* for failure by one party to sign.
2. Agents on commission need not be licensed as brokers.

(*A. M. A.*)

ANNOTATIONS: Authorities on brokers are collated in annotations to C. A. 264/42 (*ante*, p. 117).

(*H. K.*)

FOR APPELLANTS: Gratch.

FOR RESPONDENTS: Heinsheimer.

JUDGMENT.

Gordon Smith, C. J.: This is an appeal against the judgment of the District Court delivered on the 22nd March, 1943. The action was based on a contract under which the Plaintiffs (Respondents) claimed commission in respect of fruit supplied to customers introduced by them to the Defendants (Appellants). Paragraph 2 of the contract states:—

> "If the second party will sell fruit of the first party to a new buyer who was not known to the first party, the first party undertakes to pay to the second party commission on the sales the first party will sell to such buyer in the next year and even without intermediary of the second party."

One of the issues before the District Court was that there was no contract enforceable and this argument has been repeated in this Court. The learned Judge held that he was satisfied that there was an agreement between the Plaintiffs and Defendants of which P. 6 was a copy. P. 6 is the copy of the contract which apparently was drafted or put forward by the Defendants in duplicate. The Defendants signed one copy which was handed to the first Plaintiff and it is alleged that the copy returned by this Plaintiff was not signed by him and that, therefore, there was no contract and that there was no *consensus ad idem* and, therefore, the learned Judge was wrong in finding that there was a contract. That contract apparently was acted on and there has been part-performance of it and we see no reason to disagree with the learned Judge as to the existence of a valid contract between the parties.

It was similarly argued before us that the Plaintiffs were unlicensed brokers but it was a finding by the learned President that they were

acting as agents on commission and we agree with his decision in that respect. The order made by the learned Judge was to the effect that the Defendants were to produce accounts showing the firms to whom they sold, through the medium of the Plaintiffs, in the year 1937—38 and for which sales during this year they paid Plaintiffs commission and that they should also render accounts for all sales made to such firms during 1938—39. Then he held that the Plaintiffs were entitled to commission on sales to all such new purchasers as were introduced by the Plaintiffs during the season 1937—38 and to whom the Defendants sold again during the season 1938—39. Apparently, the Plaintiffs received commission on the sales to these new purchasers during the season 1937—38 but the order is, as I have said, for production of accounts and examination of those accounts for those two periods. When that has been done, it may be possible to ascertain what commission is due to the Plaintiffs for the years 1938—39 and possibly it may be necessary to apply again to the District Court for judgment to be entered for the Plaintiffs in whatever sum is found to be due.

It appears to us that the action of the Defendants has been to avoid or to delay payment of what they are due to pay under the contract and we find that there is such obligation to pay and we, therefore, dismiss the appeal with costs to include LP. 10 advocate's attendance fee.

Delivered this 8th day of June, 1943.

Chief Justice.

Copland, J.: I agree.

British Puisne Judge.

CIVIL APPEAL No. 115/43.

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

BEFORE: Rose, J.

IN THE APPEAL OF :—

Najla Khalil Meheishem. — **APPELLANT.**

v.

Kamel Ass'ad Abuzeid and 2 ors. — **RESPONDENTS.**

Illiterate co-owner of house notified by a letter that other co-owners sold their shares — Claim of Shuf'a made some half an hour or one

hour later — Strictness of formalistic provisions of Mejelle re claim of Shuf'a right.

Appeal from the judgment of the Land Court of Haifa (*Cur.*: Curry, J.) in Land Case No. 26/41, dismissed:—

Archaic provisions such as those of art. 1028 and 1029 (*Shuf'a*, pre-emption) of *Mejelle* should be construed strictly, main essential being that claim for *Shuf'a* must be made immediately at the moment the sale is heard of; where no evidence whether claimant did so or not, claim must fail.

(*M. L.*)

FOLLOWED: C. A. 267/40 (8, P. L. R. 57; 1941, S. C. J. 21; 9, Ct. L. R. 53); C. A. 109/42 (9, P. L. R. 435; 1942, S. C. J. 664; 12, Ct. L. R. 173).

ANNOTATIONS: The following authorities deal with *shufa'*: L. A. 59/24 (C. of J. 1513) — *failure to prove "Talab Muwathaba;* L. A. 121/24 (C. of J. 1514) — *against whom to be claimed;* L. A. 13/25 (1, P. L. R. 46; C. of J. 1515) — *co-sharer as purchaser;* L. A. 94/25 (1, P. L. R. 79; C. of J. 1516) — *miri planted;* L. A. 20/31 (C. of J. 1517) — *purchaser's name to be correctly stated;* L. A. 39/31 (C. of J. 1438) — *partnership's right to shuf'a;* L. A. 44/32 (1, P. L. R. 809; C. of J. 1518; P. P. 3.v.33) — *effect of offer to purchase;* L. Ja. 47/33 (C. of J. 1519) — *effect of delay;* C. A. 192/33 (2, P. L. R. 228; C. of J. 1110) — *relinquishment of right;* L. A. 49/34 (C. of J. 1934—6, 682; P. P. 26.ii.36) — *effect of re-transfer of land to vendor;* L. A. 85/34 (2, P. L. R. 397; P. P. 5.xi.35) — *meaning of "offer to purchase";* C. A. 95/38 (1938, 1 S. C. J. 338; 3, Ct. L. R. 281) — *estoppel as to right;* C. A. 267/40 (*supra*) — *failure to state purchasers' names;* C. A. 109/42 (*supra*) — *when claim to be made.*

(*H. K.*)

FOR APPELLANT: Margolin.

FOR RESPONDENTS: Asfour.

JUDGMENT:

This is an appeal from a judgment of the Land Court of Haifa. The Appellant is the registered owner of twelve out of eighty-eight shares in certain property in Khamra Square, Haifa, the other original co-owners being her brothers and sisters. Two of her brothers having become bankrupt and having sold their shares to the Respondents, the Appellant wished to claim her right of pre-emption.

The matter to be decided is whether the Appellant has satisfied the requirements of articles 1028 and 1029 of the *Mejelle*.

It appears that the Appellant is illiterate and that she was notified of the sale to the Respondents by a letter (Ex. P/1) dated 4th September, 1941. This letter was translated to the Appellant by her niece. After hearing the niece's version of the letter, the Appellant

went to a neighbour to get him to verify the contents of the letter. It is to be noted that there is no evidence that during the conversations (which were described in some detail) with the niece or with this neighbour the Appellant made any claim to her right of pre-emption. It was only when she arrived at the office of Mr. Asfour, some half an hour or one hour later, that in the presence of Mr. Asfour's clerk she made a statement which might be interpreted as being a claim to pre-emption.

In dealing with this matter the learned Judge said as follows—

> "In view of the fact that Plaintiff is a woman and that immediately after having the contents of the letter explained to her she announced her intention of seeing her lawyer and so did, going there within one hour of the letter being read to her and announcing her desire to claim *shuf'a*, I should have been inclined on what I consider to be a reasonable interpretation of the article to have held that she had complied with its requirements. However, on reference to the only authority which I have seen on the matter (Ali Haider's commentary on the *Mejelle*, Fahmi Husseini's translation) it would appear to be the opinion of the majority of the authorities that the Plaintiff should have announced to her niece or at least to her neighbour that she claimed *shuf'a*. There is no evidence whether she did so or not and as the onus is on the Plaintiff I am of the opinion that her claim must fail in that she has not proved that she announced her intention of claiming *shuf'a* immediately on hearing of the sale."

In Civil Appeal 267/40, P. L. R. Vol. 8, p. 57, this Court held that archaic provisions such as those of articles 1028 and 1029 of the *Mejelle* should be construed strictly. A similar opinion is expressed as to the interpretation of these very provisions of the *Mejelle* in Civil Appeal 109/42, which does not appear to have been reported. On that occasion the Court said:—

> "As this Court has frequently said, the provisions of the *Mejelle* on this subject are formalistic and completely out of date in the modern world. Our practice, therefore, has been always to apply those provisions with the utmost strictness. The main essential is that the moment the sale is heard of the claim for *shuf'a* must immediately be made."

It is to be noted that sub-section 1 of article 1028 provides that claim must be made "immediately" upon hearing of the sale. Article 1029 provides that a statement claiming the right of pre-emption must be made "at the moment" of hearing of the conclusion of the sale. Having regard to this wording and to the expressions used in Fahmi Husseini's translation of Ali Haider's commentary, and also by this Court in the cases to which I have referred, I am of opinion that

the learned Judge was correct in holding that the Appellant's failure to prove that she claimed the right of pre-emption either before her niece or before her neighbour is fatal to her case.

For these reasons 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 20th day of May, 1943.

British Puisne Judge.

CRIMINAL APPEAL No. 34/43.

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

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Abdul Rahman Hamdoun. APPELLANT.

v.

The Attorney General. RESPONDENT.

Chief Magistrates — P. D. C. sitting as Chief Magistrate — Order to transfer case to D. C. in summary jurisdiction — Charge should be filed in the Court in which the Accused is to be tried — Trial commenced in one Court cannot be completed in another.

Appeal from the judgment of the District Court of Jerusalem, dated 20.3.43 in Criminal Case No. 48/43, whereby Appellant was convicted of offences under Sections 2 and 3 of the Concealment and Destruction of Controlled Articles (Prohibition) Order, 1941, and sections 4(i)(iv), 10 and 14 of the Food Control Ordinance, No. 4 of 1942, and sentenced to three months' imprisonment and a fine of LP. 250 or imprisonment for a further period of three months in default of payment of the fine; appeal allowed and conviction quashed:—

1. A P. D. C. cannot appoint himself as Chief Magistrate under the Defence (Judicial) Regulations.

2. A P. D. C. cannot make an order in the course of a trial in a Chief Magistrate's Court.

3. When a case is lodged in the Chief Magistrate's Court and tried by the District Court in summary procedure, a charge should be filed in the District Court.

4. A trial cannot be commenced in a Chief Magistrate's Court and completed in the District Court.

(*A. M. A.*)

ANNOTATIONS: See CR. A. 24, 25, 32 & 33/43 (*ante*, p. 333) and note.
(*H. K.*)

FOR APPELLANT: Levitzky.

FOR RESPONDENT: Crown Counsel — (Rigby).

JUDGMENT.

This is a peculiar case. The Appellant was charged in the Chief Magistrate's Court of Jerusalem with offences under the Concealment and Destruction of Controlled Articles (Prohibition) Order, 1941. The person purporting to sit as a Chief Magistrate was Judge Bodilly. The charge, according to the record, was read over and explained to the Accused. Judge Bodilly then made an order that this case be tried by the District Court sitting in summary procedure. Thereupon the Appellant pleaded guilty and he was convicted and was sentenced both to a fine of LP. 250 and to 3 months' imprisonment.

Now it seems to the Court that whichever way you look at the case it is wrong.

After the case was lodged and begun in the Chief Magistrate's Court the person acting as Chief Magistrate had no power to change the proceedings into a District Court summary trial. If he purported to act as Chief Magistrate this Court has already held that a President cannot appoint himself to be a Chief Magistrate by the Defence (Judicial) Regulations. If he purported to act as a President of a District Court he was making the order in the course of a trial in the Chief Magistrate's Court, which seems to us to be quite illegal. Also the Appellant was never charged in the District Court but the only charge was the one filed in the Chief Magistrate's Court. It is essential that the charge should be filed in the Court in which the person is tried.

It seems to this Court that more care should be taken in the trial of these cases by Presidents sitting in their various capacities. In any case we think that in order that a case lodged in the Chief Magistrate's Court should be tried in the District Court sitting in summary procedure, an order must be made before the trial is commenced. To commence a trial in the Chief Magistrate's Court and finish it in the District Court is wholly illegal.

We think that the whole proceedings are a nullity and, therefore, the appeal must be allowed and the conviction quashed.

Delivered this 7th day of April, 1943.

British Puisne Judge.

CIVIL APPEAL No. 139/43.

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

BEFORE : Edwards, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Yehuda Golani. APPELLANT.

v.

Haim Etkin. RESPONDENT.

Action for eviction on ground of non-payment of rent — Tenant paying arrears into landlord's bank account after institution of action and before receiving summons — Question as to what amounts to discontinuance to pay rent — Tenant invoking principles of equity — Extent of applicability in Palestine of procedure based on English Rules of Supreme Court.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 20th day of January, 1943, in Civil Appeal No. 239/42, dismissed:—

1. Whether a tenant continues to pay rent — a question of fact and of degree.
2. Tenant's payment of arrears of rent into landlord's bank account a few days after action for eviction lodged, even if before receiving summons, does not cure discontinuance, if there is any, to pay rent.
3. Court of Appeal will not consider tenant's argument that there was no demand for rent, if in trial Court he did not raise the point or lead any evidence.
4. Where there is discontinuance of payment of rent it makes no difference whether term of lease already expired or not.
5. Procedure laid down in art. 20 of Ottoman Law relating to Leases of Immovable Property — not to be followed in an eviction case under Rent Restriction Ordinance.
6. Procedure based on English Rules of Supreme Court — not applicable in Palestine Courts except in so far as they have been embodied in the practice of these Courts.

(*M. L.*)

FOLLOWED: C. A. 186/42 (12, Ct. L. R. 149; 1942, S. C. J. 687; Gorali, p. 149); C. A. 52/36 (C. of J. 1934—6, 105; P. P. 7.vii.36).

REFERRED TO: Beavis *v.* Carman, 1920, 36 T. L. R. 396; Sanders *v.* Pope, Revised Reports, Vol. 90, page 844.

ANNOTATIONS: As to equitable relief in case of delay of payment of rent see: C. A. 186/42 (*supra*) and C. A. 248/42 (12, Ct. L. R. 212; 1942, S. C. J. 876) and annotations thereto.

(*A. G.*)

FOR APPELLANT: Smoira.

FOR RESPONDENT: Eliash.

JUDGMENT..

This is an appeal from a judgment of the District Court, Tel-Aviv, dismissing an appeal from a judgment of the Magistrate's Court, Tel-Aviv, whereby the present Appellant was ordered to be evicted from a certain dwelling house by reason of non-payment of rent. In the Magistrate's Court no evidence was heard, although it seems that the Appellant was given the opportunity of bringing evidence but chose not to lead any evidence. The action was filed in the Magistrate's Court on 4th September, 1942. At that date the following arrears were due:—

	LP.
Rent for August, 1942	3.250
Balance of rent for July, 1942	0.250
Balance of rent for previous months	1.500

The learned Relieving President of the District Court ignored the LP. 1.500 mils and relied on the rent for August and the small amount of 250 mils for July being in arrear. The small amount of 250 mils for July was in arrear by over two months and the sum of LP. 3.250 mils being the August rent was in arrear by over one month. The Relieving President held that this amounted to a discontinuance of payment of rent and could not be considered as so trifling a degree of unpunctuality as to come within the meaning of that term as contemplated in the judgment of this Court in C. A. 186/42. In that case it was held that the question as to whether a tenant continues to pay rent must be regarded as a question of fact and of degree. In view of that statement of law we are unable to hold that the Magistrate in the case now before us erred in regarding the failure as a discontinuance. Dr. Smoira, Appellant's advocate, laid stress on the fact that a few days after the statement of claim was filed in the Magistrate's Court the arrears weer paid into the Respondent's bank account, in fact on 10th September, and the summons was not served on the Appellant till 18th September.

We do not, however, think that this affects the matter. The reply to this argument appears to be found in Beavis *v.* Carman, (1920) 36 T. L. R. 396, cited in Vol. 31, English and Empire Digest, Page 578, Item 7271. Dr. Smoira also contended that there was no proof of demand for rent. In view, however, of the fact that the Appellant led no evidence in the Magistrate's Court and in view of the provisions of Rule 97, Magistrates' Court Procedure Rules, 1940, we think that there is nothing in this point.

It was also argued that rent should have been demanded on the premises, reliance being placed upon Article 465 of the *Mejelle*. It is at least doubtful whether this article applies nowadays to rent under a written lease. In any event this point was apparently not pleaded in the Magistrate's Court and we think that the learned Relieving President rightly rejected this ground of appeal, especially in view of the fact that the Respondent had proved non-payment of rent by the Appellant's admissions and in view of the fact that the Appellant led no evidence. It was also argued that the procedure laid down in Article 20 of the Ottoman Law of Leasing of Immovable Property as set out in Sir R. Tute's book on the Ottoman Land Laws, Page 176, should have been followed. We think that there is nothing in this point.

The main ground of appeal, apart from the allegation that there was no discontinuance, was that the Magistrate should have refused to order eviction and should have had regard to principles of equity. Dr. Smoira, for the Appellant, argued this point at great length and cited many decided cases including Sanders *v.* Pope, Revised Reports, Vol. 90, page 844. We think it unnecessary to deal with the question of whether the Magistrate should have applied English principles of equity in view of the provisions of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, especially Sec. 8. In any event, we think that the length of time by which the Appellant was in arrears had already been regarded by the Magistrate as being a discontinuance, and we, therefore, see no reason to remit the matter to the Magistrate. It has been held in C. A. 52/36, Rotenberg's Collection of Judgments, Vol. 7, p. 105, that procedure based on the English Rules of the Supreme Court is not applicable in the Courts of Palestine except in so far as these Rules have been embodied in the practice of the Courts of Palestine. We do not think that the facts of this case can be distinguished from the facts in C. A. 186/42 except that in the present case the Appellant was a tenant under a lease which had not expired and in C. A. 186/42 the term had expired. We do not, however, think that this fact should cause us to distinguish the two cases.

For the foregoing reasons the appeal is dismissed. The Appellant must pay the Respondent's costs, to be taxed on the lower scale, to include an advocate's attendance fee at the hearing of this appeal of LP. 15.—.

Delivered this 15th day of July, 1943.

British Puisne Judge.

INCOME TAX APPEAL No. 18/42.

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

BEFORE : Rose, J.

IN THE APPEAL OF :—

H. APPELLANT.

v.

The Assessing Officer, Lydda District. RESPONDENT.

Income tax — Assessment of firm dissolved in December, 1941 — *Income Tax Ord.,* 1941, *secs.* 5, 6, 33, 45 — *Liability and incidence of the tax — Cesser of income from same kind of source — I. T. A.* 9/42, *Brown v. National Provident Institution inapplicable in Palestine — Construction of Palestine Ordinance and divergence from English practice, Indian Act compared — Marginal notes — Effect of dissolution of partnership — Capitalization of profits — Case stated — Costs.*

Appeal from the assessment by the Respondent, dated 8th October, 1942, in Assessment No. 689/274, for the year of assessment 1942/43, dismissed:—

1. The scheme of the Income Tax Ordinance as regards the incidence of the tax differs from that of the English acts but is akin to the Indian Act. The English line of cases headed by Brown *v.* National Provident Institution is not, therefore, material in interpreting the relevant provisions of the Ordinance.

2. A person who had an income within sec. 5 in the year preceding the year of assessment is liable to tax in respect of such income.

3. Each partner in a partnership is separately taxed and it is immaterial whether the partnership exists or has been dissolved.

4. Income tax is payable on income even when it has been capitalized in pursuance of an agreement.

(*A. M. A.*)

REFERRED TO: I. T. A. 9/42 (10, P. L. R. 255; *ante,* p. 278).

DISTINGUISHED: 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.

ANNOTATIONS :

1. *Cf.* I. T. A. 9/42 (*supra*) and notes.

2. On the effect of marginal notes on the interpretation of statutes *cf.* Halsbury, Vol. 31, *p.* 464, *No.* 567; Digest, Vol. 42, *p.* 607, *Sub-sec.* 6. See also C. A. 18/39 (6, P. L. R. 247; 1939, S. C. J. 247; 5, Ct. L. R. 241; P. P. 18.vi.39) — *marginal note to Rule* 113, *C. P. R. held to be misleading;* CR. A. 27/41 (8, P. L. R. 169; 1941, S. C. J. 146; 9, Ct. L. R. 149) — *marginal note to Sec.* 51, *Criminal Procedure (T. U. I.) Ord., considered in*

interpreting the section; I. T. A. 9/42 (10, P. L. R. 255; *ante*, p. 278) — *holding that „marginal notes are not law, but at any rate they are a guide to show what was in the mind of the legislature."*

(*H. K.*)

FOR APPELLANT: Ph. Joseph and Globus.
FOR RESPONDENT: A. Levin and Wittkowsky.

JUDGMENT.

This is an appeal from an assessment made upon the Appellant by the Respondent, whereby the amount of income tax due by the Appellant for the year of assessment 1942/43 was assessed at LP. 11,424.011 mils. The Appellant's contention is that his income tax for the said year of assessment should be assessed at LP. 448.629 mils.

There has been no dispute before me as to the correctness of these respective figures as such, the argument being confined to the question as to which of two alternative constructions of the law is the correct one. It appears that the Appellant had, up to the 31st December, 1941, been a member of a partnership entitled L. & H., on which date the partnership was dissolved, the business then being acquired at an inclusive price by a company styled L. & H. Ltd., the shares in the new company being allotted to the previous partners in proportion to their capital invested in the partnership.

The matter turns upon the construction of Sections 5 and 6 of the Income Tax Ordinance, 1941, which read as follows:—

> "5. (1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereafter for the year of assessment commencing on 1st April, 1941, and for each subsequent year of assessment upon the income of any person accruing in, derived from, or received in, Palestine in respect of:—
>
> (a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercsied;
>
> (b) gains or profits from any employment, including the estimated annual value of any quarters or board or residence or of any other allowance:
>
> Provided that no income tax shall be payable under this paragraph in respect of a subsistence, a travelling or an entertainment allowance if it is proved to the satisfaction of the Assessing Officer that such subsistence, travelling or entertainment allowance has not been expended for purposes in respect of which no deduction is allowed under section 13:
>
> And provided further that in the case of any such entertainment allowance the amount thereof does not exceed 15% of the gains or profits from any employment;
>
> (c) the net annual value of land and improvements thereon used

by or on behalf of the owner or used rent free by the occupier, for the purpose of residence or enjoyment, and not for the purpose of gain or profit:
Provided that where the land and improvements thereon have been valued for the purposes of the Urban Property Tax Ordinance, 1940, such net annual value shall be deemed to be that adopted under the said Ordinance;

(d) dividends, interest or discounts;

(e) any pension, charge or annuity;

(f) rents, royalties, premiums and any other profits arising from property;

(g) the value of any produce receivable in respect of the use of capital, property, seed or stock for the purpose of husbandry or any share of profits receivable in respect of such use:
Provided that for the year of assessment 1941—1942 income tax shall be payable at seven-twelfths of the rate or rates hereinafter specified.

(2) Any sum realised under any insurance against a loss of profits shall be taken into account in the ascertainment of any profits or income.

6. Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment, notwithstanding that the source of income may have ceased before or during the year of assessment."

Dr. Joseph contends that Section 5 is a charging section and Section 6 a measuring section, and that unless the Appellant had, in the year of assessment 1942—43, an income under Section 5(1)(a), he could not incur liability under Section 6.

Dr. Joseph further contends that the change from a partnership to a limited company was, in effect, a change of source and also of the "kind" of source, and he cited a number of English authorities in support of his contention that in order to make the Appellant liable there must, in the year of assessment, be a source of the same kind as in the preceding year, although the source (of the preceding year) itself may have stopped, and that in the year of assessment some income must be received from that kind of source.

I have had the opportunity of reading the judgments in Income Tax Appeal No. 9/42, S. Horowitz *v.* Assessing Officer, Jerusalem District, 10 P. L. R. p. 255 — the facts of which, however, are very different from the present case — in which the majority judgment of the Court of Appeal expressly left open the point (which was not necessary for the decision of that case) as to whether the line of cases headed by Brown *v.* National Provident Institution, 1921(2) A. C., 222, is applicable to Palestine. The Chief Justice, in a minority judgment, re-

ferred to the question in the course of *obiter dictum* and expressed the view that owing to the differences in the construction of the English Act and the Palestine Ordinance, the English decided cases are of little practical assistance in this country.

In the case before me it is necessary for this question to be decided, and although the interesting and able arguments addressed to me by learned counsel occupied several days, I am of opinion that, having regard to the view which I propose to take, the matter can be disposed of comparatively shortly.

Mr. Levin's contention for the Respondent is that the scheme of the Palestine Ordinance is entirely different in conception from that of the English statute, and that in Palestine there is a direct imposition of tax on the previous year's income on the same basis as is applicable to super-tax in England.

I have little difficulty in believing that, at any rate, it was the intention of the legislature, when introducing the Income Tax Ordinance, to break away from the complicated provisions of the English law. It would seem to be most unlikely that any Colonial legislature should desire to introduce the niceties and complexities of the English Income Tax Law, which in itself is a highly specialized and fruitful branch of professional activity in England, and the decisions in respect of which are conflicting and in many instances obscure. It seems to me from the shape of the Ordinance as a whole that the intention of the legislature was that the Ordinance should be 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, and the question which I have to decide is whether the legislature has been successful in carrying out its intention.

It is to be noted that Section 6, as originally drafted, read as follows:—

> "Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment:
> Provided that where in any year of assessment any person ceases to possess any source of income which was acquired by him prior to the first day of April, 1940, tax on the income from that source shall be charged, levied and collected upon the income of the year of assessment and not upon the income of the year preceding the year of assessment."

It would seem that the proviso in this section provided an exception to the clear principle which I have stated, but that that exception was removed and the principle effectively restated in its most general form

by the substitution for the proviso of the words, "notwithstanding that the source of income may have ceased before or during the year of assessment." Dr. Joseph relies on the fact that the marginal note to Section 6 says, "basis of assessment". I do not think, however, that that is fatal to the Respondent's contention, because if, apart from the wording of that note, the language of the section is such as to make it a charging section (which in my opinion it is), the phraseology of the note, in my view, is of a neutral character and quite insufficient to detract from the clear language of the section itself. In my opinion the scheme of the Ordinance, which is akin to the Indian Act, is quite distinct from the English statute, and the intention of the legislature, which is adequately implemented by the terms of the sections themselves, is that in the year of assessment any person resident in Palestine is liable for income tax on the basis of his income received in the previous year. If his previous year's income falls within the terms of Section 5, then for the year of assessment a person is chargeable under Section 6 on the basis of such previous year's income. It is true that in certain cases this interpretation may work hardly upon the tax-payer. On the other hand, there are other cases in which it may work in his favour. I am not, however, concerned with the results of the interpretation of these sections (which is a matter, in a proper case, for adjustment by the legislature), but solely with the question as to what, in my opinion, is the correct interpretation. It follows from the view that I have adopted that Brown's case and the remainder of that line of English authorities are immaterial to the present matter.

It seems to me that the Respondent's view is supported by the terms of Section 33 of the Ordinance, which provides that in certain circumstances the legal personal representative of a person who, but for his death during the year preceding the year of assessment, would have been chargeable to tax for the year of assessment, shall be liable to and charged with the payment of such tax.

I agree with Mr. Levin's contention that, by reason of Section 45, the fact of the dissolution of the partnership is immaterial. It is, perhaps, convenient to set out the section, which reads as follows:—

> "Where a trade, business, profession or vocation carried on by two or more persons jointly has been registered as a partnership in Palestine:—
>
> (1) the sum payable by the firm itself shall not be determined but the total income of each partner of the firm including therein his share of its income, profits and gains of the year preceding the year of assessment shall be assessed and the sum

payable by him on the basis of such assessment shall be determined.

(2) (a) The precedent partner, that is to say, the partner who of the partners resident in Palestine:—

(i) is first named in the agreement of partnership; or

(ii) is the precedent acting partner if the partner named with precedence is not an acting partner;

shall, when required by the Assessing Officer, make and deliver a return of the income of the partnership for any year, such income being ascertained in accordance with the provisions of this Ordinance, and declare therein the names and addresses of the other partners in the firm together with the amount of the share of the said income to which each partner was entitled for that year;

(b) Where no partner is resident in Palestine, the return shall be made and delivered by the attorney, agent, manager or factor of the firm resident in Palestine;

(c) The provisions of this Ordinance with respect of the failure to deliver returns or particulars in accordance with a notice from the Assessing Officer shall apply to any return required under this section."

I consider that the correct interpretation of that section is that partners of a firm are taxable individually irrespective of the history of the partnership, *i. e.* whether it has ceased by dissolution or is still being carried on. Under the section the partners themselves are taxed, and not the partnership. It would, therefore, seem to be immaterial whether the partnership exists or has been dissolved, the effect of the section being that each partner is taxed as if he was a single trader, on his notional share of the profits. If this were not the intention it would seem that the opening phrase, "Where a trade, business, profession or vocation carried on by two or more persons jointly has been registered as a partnership in Palestine", should read, "Where a trade, business, profession or vocation *is* carried on by two or more persons jointly *and* has been registered as a partnership in Palestine".

As to the point taken by Dr. Joseph that the profits of the partnership had been capitalized, I agree with the Respondent's contention that each partner is liable to be taxed on his share of the profits, irrespective of any agreement as to their disposal.

In my opinion, therefore, the only question to be decided is whether the Appellant had, in fact, an income within section 5(1)(a) in the year preceding the year of assessment. If so — and it follows that in my opinion he had — he is liable to tax in respect of the amount of such income.

For the reasons which I have given, therefore, I am of opinion that the appeal should be dismissed and the assessment confirmed, but as

the matters raised are of the first importance and go to the very root of the scheme upon which the Ordinance is based, it seems to me to be clearly desirable, in order to obviate future litigation, that an authoritative decision should be obtained at an early date. I, therefore, propose to state a case for the opinion of the Court of Appeal, which will enable the parties, if they so wish, to test the matter further by appeal to the Judicial Committee of the Privy Council.

The Respondent will have the costs of this appeal. The hearing extended over eight days, and having regard to the complexity of the matter I think that the Respondent, in addition to a fee in respect of his attendances, is also entitled to an instruction fee. I, therefore, award him costs in the sum of LP. 100.

Delivered this 8th day of July, 1943.

British Puisne Judge.

CIVIL APPEAL No. 195/43.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPEAL OF :—

Gertrud Freyberger. APPELLANT.

v.

Otto Friedmann. RESPONDENT.

Divorce — Declaratory judgment of divorce if valid by Jewish law and recognised by National law — C. A. 22/42, 22/34 — In absence of National law law of Palestine applies — Jurisdiction of Rabbinical Court — Law of personal status of stateless persons in Palestine is religious or communal law.

Appeal from the judgment of the District Court of Haifa, dated 27th May, 1943, in Motion No. 72/43, allowed and judgment given as prayed by the Appellant:—

The Rabbinical Court is competent to divorce stateless Jews in Palestine.

(*A. M. A.*)

FOLLOWED: C. A. 22/34 (2, P. L. R. 365; C. of J. 1934—6, 588; P. P. 31.vii.35); C. A. 22/42 (9, P. L. R. 328; 1942, S. C. J. 259; 12, Ct. L. R. 3).

ANNOTATIONS:

1. *Cf.* C. A. 22/42 (*supra*) and note 4 thereto in 1942, S. C. J. on p. 260.

2. Note that the decision lays down the rule that in case of stateless persons the law to be applied is the law of Domicile or the *lex fori*, but not the previous national law of the parties.

(*H. K.*)

FOR APPELLANT: Gottschalk.

FOR RESPONDENT: Klug.

JUDGMENT.

Frumkin, J.: This appeal is to be governed by the principles laid down in Civil Appeal No. 22/42, following C. A. No. 22/34, in that the Civil Courts of this country will issue a declaratory judgment of divorce if satisfied that the divorce is valid under Jewish Law and that such divorce is recognized by the National Law of the parties.

As regards the first requirement, there was before the District Court evidence that the parties, both of them of the Jewish faith, were duly divorced before the Rabbinical authorities in Haifa. The matter of the jurisdiction of the Rabbinical Court over the parties does not arise in view of the nature of a divorce under Jewish Law as fully explained in the judgments referred to above.

We come, therefore, to the second requirement whether the divorce is recognized by the national law of the parties.

Now, the parties have no national law. They were at one time Austrian subjects, have since lost their nationality and are now stateless. They were for the last ten years or so both resident in Palestine where they got both married and divorced. So whether the principle of the law of Domicile is applied or the principle of *Lex Fori* we have to fall back on the law of Palestine.

But there is no uniform law in Palestine relating to Personal Status. The Courts of this country being faced with a matter of Personal Status of persons who have no nationality, have, therefore, to apply the religious or Communal Law of the parties and both of them being Jews the law applicable is Jewish Law.

A Civil Court applying Jewish Law, as regards a divorce duly performed before a Rabbinical authority, can come to only one conclusion as to the recognition of such a divorce and that is an affirmative conclusion. There is, therefore, a divorce valid under Jewish Law recognised by the law governing the rights of the parties.

The judgment of the District Court will be set aside and a declaratory judgment issued to the effect that having obtained a divorce valid

under Jewish law and recognized under her communal law Gertrud Freyberger was divorced from her husband Otto Friedmann.

As the appeal was not contested there will be no order as to costs.

Delivered this 16th day of July, 1943.

Puisne Judge.

Copland, J.: I concur.

British Puisne Judge.

CIVIL APPEAL No. 154/43.

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

BEFORE : Rose and Edwards, JJ.

IN THE APPEAL OF :—

1. Joseph Negri,
2. Behor Assa. APPELLANTS.

v.

1. J. Klebanoff,
2. Konrad Cohen,
3. Jacob Irom,
4. The Registrar of Lands, Haifa. RESPONDENTS.

Injunctions — Agreement to sell and power of attorney with third party rights — Interlocutory injunction pending determination of rights of parties.

Appeal from the judgment of the District Court of Haifa, dated the 16th day of April, 1943, in Civil Case No. 71/43, allowed:—

Instance of when an interlocutory injunction should be granted.

(*A. M. A.*)

ANNOTATIONS :

1. Appellants had contracted to sell certain lands to Respondents 2 & 3 and an irrevocable power of attorney to transfer the lands was given by Appellants to Respondent 1. Part of the purchase price was paid on signature the balance to be paid on transfer. On being requested to accept transfer Respondents 2 & 3 refused, but some years later they applied to Respondent 1 to effect transfer on the strength of the Power of Attorney in his hands. Appellants objected and filed an action in the District Court for an order declaring that the said Power of Attorney was void and that Respondents 2 & 3 had broken the contract. At the same time Appellants asked for an interlocutory injunction restraining Respondent 1 from acting on the Power of Attorney. The District Court refused the application on the following grounds:—

"The Applicants base their application on an alleged breach by the 2nd and 3rd Defendants by not being ready to accept transfer of certain lands which they had agreed to buy from the Applicants. Clause 2 of the Supplemental Agreement between the parties dated the 4th of February, 1937, imposed the duty upon the Applicants to give 10 days' notice by registered letter to the Respondents to appear and receive the transfer. This they have never done and, by omitting to do so, they did not put the Respondents in default. Further, the relief sought is an equitable relief, and in view of the fact that the Plaintiffs have kept acquiescent and slept on their alleged rights for a period exceeding 2 years, we do not think that this is a proper case to grant the relief prayed for.

The application must, therefore, be refused with costs."

2. See, on interlocutory injunctions, Halsbury, Vol. 18, *pp.* 27 *seq.*, *Sec.* 2; Digest, Vol. 28, *pp.* 371 *seq.*, *Part* II.

(*H. K.*)

FOR APPELLANTS: A. Levin and Geiger.

FOR RESPONDENTS: Nos. 1, 2 and 3 — Nathan.
No. 4 — Absent — served.

JUDGMENT.

Upon hearing parties' advocates this Court orders that the order of the District Court of Haifa, dated the 16th April, 1943, be set aside and that the first Respondent (Mr. J. Klebanoff) do refrain, pending final determination of the case now pending before the said District Court of Haifa in Civil Case No. 71/43, from exercising any of the powers conferred upon him by the Power of Attorney No. 182 executed by the Appellants before the Notary Public of Haifa on the 4th of February, 1937, and the land mentioned in the aforesaid Power of Attorney be provisionally attached pending final determination of the said case.

Each party to bear its own costs of this appeal.

Copy of this order to be served by the first three Respondents on the Registrar of Lands, Haifa.

Delivered this 18th day of June, 1943.

British Puisne Judge.

CIVIL APPEAL No. 60/42.

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

BEFORE: Chief Registrar (L. A. W. Orr) in Chambers.

IN THE APPEAL OF :—

Mizrahi Bank Ltd., Tel-Aviv. APPELLANT.

v.

1. Alexander Tiraspolsky,
2. Hanna Gezelter. RESPONDENTS.

Taxation — Bill of costs — Costs awarded by the Court of Appeal to the eventually successful party — Registrar's Ordinance, secs. 2, 3, 9 — "Ultimately" and "absolutely" successful party — C. A. 132/38, 93/39, 95/39, 143/41.

Application for taxation of costs:—

1. When the Court of Appeal certifies costs for the appeal, to be paid to the ultimately successful party, such costs are appeal costs, which come under the jurisdiction of the Chief Registrar and are payable to the party who succeeds on the rehearing. These costs are not affected by any subsequent order as to costs made by the District Court on the hearing.
2. "Ultimately" successful means "finally", not "entirely" successful.

(*A. M. A.*)

DISTINGUISHED: C. A. 132/38 (6, P. L. R. 414; 1939, S. C. J. 355; 6, Ct. L. R. 72; P. P. 27.vii.39); C. A. 93/39 (6, P. L. R. 475; 1939, S. C. J. 471; 6, Ct. L. R. 140); C. A. 95/39 (6, P. L. R. 538; 1939, S. C. J. 501; 6, Ct. L. R. 179); C. A. 143/41 (8, P. L. R. 467; 1941, S. C. J. 456; 11, Ct. L. R. 210).

ANNOTATIONS :

1. The following is the (abbreviated) text of the bill of costs:—

"*A. Costs*:—

	LP.
1. Instructions to file appeal	10.—
2. Attendance fees as per judgment	15.—
3. Attendance to hear deferred judgment	—.500
4. Attendance before Registrar on taxation	1.—
B. Disbursements:—	
1. Inspection of District Court file	—.110
2. Certified copies of District Court judgment	—.660
3. Appeal fees	15.884
4. Copy of Supreme Court judgment	—.065
5. Exhibit in District Court	—.070
6. Certified copies of District Court judgment	—.220
7. Travelling expenses to Jerusalem to lodge the appeal	—.570
8. Travelling expenses to Jerusalem to file application for taxation	—.500
9. Application for taxation	1.100"

2. The judgment awarding the costs in question is reported in 9, P. L. R. 372; 1942, S. C. J. 352; 12, Ct. L. R. 18.

3. On taxation of costs see the following authorities: H. C. 2 & 14/37 (P. P. 27.iv.38) — *taxation before coming into force of C. P. R.*; C. A. 2/39 (6, P. L. R. 175; 1939, S. C. J. 181; P. P. 25.iv.39) — *whether costs properly taxed*; H. C. 8/39 (1939, S. C. J. 265; 5, Ct. L. R. 115; P. P. 16.v.39) — *no scale of costs applicable to High Court*; C. A. 137/40 (7, P. L. R. 387; 1940, S. C. J. 202; 8, Ct. L. R. 194) — *no appeal from judgment reviewing taxation of costs by Registrar* (followed in C. A. 126/41 (1941, S. C. J. 345; 9, Ct. L. R. 207)), *discretion of Registrar to award costs on higher or lower scale;* C. A. D. C. T. A. 129/39 (Tel-Aviv Judgments, 1940, p. 102) — *no scale of costs applicable to appeals in District Courts. Cf.*, on costs generally, annotations to C. A. 103/43 (*ante*, p. 180) and note 2 to H. C. 17/43 (*ante*, p. 191).

(*H. K.*)

FOR APPELLANT: (Taxing) Schwartzman.

FOR RESPONDENT: (Opposing) Turbowicz.

ORDER.

The taxation of this bill of costs is opposed on the following grounds:—

(1) That the Chief Registrar of the Supreme Court has no jurisdiction to tax.
(2) The District Court should have awarded the costs.
(3) There has been delay insomuch as the District Court should have been asked to interpret the Court of Appeal Order as to costs.
(4) That the expression "ultimately successful" used by the Supreme Court in its judgment, meant "absolutely successful".
(5) That the Appellant was in fact only partly successful.

With regard to the first point, *i. e.* that I have no jurisdiction to tax the costs of the appeal (if any): It is obvious that the costs which the Court of Appeal allowed in the cause to the ultimately successful party were costs in the Court of Appeal and not in the District Court for the simple reason that the Court of Appeal made use of the expression "the costs in this appeal". It is patently fallacious to argue that because the Court of Appeal went on to say that these costs would be costs in the cause to the ultimately successful party, the costs in some manner or other, not specified by the advocate arguing the point, are translated into costs in the District Court. Section 9 of the Registrars Ordinance when read with sections 2 and 3 of the same Ordinance makes it clear that the Chief Registrar of the Supreme Court is the officer charged with the taxation of costs in the Supreme Court and as I have expressed the opinion above that the costs (if any) are costs of the Court of Appeal, I hold that I have jurisdiction to tax this bill.

With regard to the second point, *i. e.* that in order that there should be any costs in the cause, the District Court must have awarded costs in the re-hearing of the case, it is perfectly obvious to me that as the words "to the ultimately successful" party must be read to qualify the expression "the costs of the appeal" in addition to the LP. 15 advocates' attendance fees, the Court of Appeal intended that the successful party in the re-hearing before the District Court should have all the costs of the appeal, irrespective of the fact that the District Court in its judgment on the re-hearing did not make an out and out complete order for costs to the party who was the Appellant before the Court of Appeal. I, therefore, hold that the costs of the Court of Appeal were in no way dependent upon any order made by the District Court *as to the payment of costs* for the re-hearing before it.

The third point of opposition is somewhat difficult to comprehend, but speaking generally it seems to me that the point is, that when the advocate who is taxing this bill realised that the District Court was not giving him an out and out order for costs for the rehearing, he should have asked that Court to qualify its order so that it would be clear as to which party (if either) should have the costs which had been advised by the Court of Appeal to be in the cause to the ultimately successful party. I cannot believe that the advocate is serious in this contention. It is so clear to me that the Court of Appeal intended that the successful party before the District Court should have his costs, irrespective of the fact that he might have been only partly successful in recovering the amount he claimed, that I must hold that there was no duty placed on that party to ask the District Court to allocate or apportion the costs awarded by the Court of Appeal in the cause to the successful party.

The fourth point taken in opposition is that the expression "ultimately successful" as used by the Court of Appeal meant "absolutely successful". This seems to me to be nothing more than attempt to argue that a word in the English language has a meaning other than that in which it is commonly used and other than that which is given in dictionaries of the English language. The meaning of the word "ultimately" as commonly used in the English language is last or final and I cannot find any interpretation of the word in an English dictionary which would lead me to believe that the word "ultimately" should, in addition to conveying the meaning of finality, also convey the meaning of absolute in the quantitive sense or substantial. I, therefore, reject this argument.

The fifth point is that as the Appellant was only partly successful at the re-hearing before the District Court, he cannot have the full

costs of the appeal. Without repeating myself unnecessarily, I can only say that as I have expressed the opinion that the Court of Appeal intended the successful party without qualification as to the amount of his success, to have the costs of the appeal, I must reject this argument.

Civil Appeals 132/38, 93/39, 95/39 and 143/41 have been mentioned to me by the advocate opposing this taxation. None of these appeals appears to me to be relevant, as they only decide questions as to costs before the Court of Appeal dealt with by that Court on the merits of the appeals.

I shall now proceed to tax the costs:—

Item No. 4: Formally disallowed as the costs were not demanded.
Disbursements:—

Item No. 1: Disallowed as included in composite instruction fee.

„ „ 4: Disallowed as Decree which is furnished by the Court of Appeal, free of cost, would suffice.

„ „ 5: District Court Fee, therefore disallowed without prejudice to taxation before the Registrar of the District Court.

„ „ 6: District Court Fee, therefore disallowed without prejudice to taxation before the Registrar of the District Court.

„ „ 7-8: These are solicitor & client costs.
Travelling expenses of advocates cannot be charged as Party and Party Costs.

„ „ 9: Disallowed as no demand made for costs.

Although I have disallowed item No. 4 of the Profit Costs, because no demand was made for the costs before the filing of the bill for taxation, I feel that as the advocate opposing fought the bill on the grounds of jurisdiction and interpretation of the Court of Appeal Judgment, I must award costs to the taxing advocate, as it is obvious that even if he had demanded the costs, before filing his bill for taxation, he would not have been paid. I, therefore, restore item No. 4 of the Profit Costs.

Certified costs taxed and allowed at LP. 43.044 mils exclusive (*sic*) of the attendance fee of LP. 15 is included in the decree.

Given this 11th day of April, 1943.

Chief Registrar.

HIGH COURT No. 47/43.

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

BEFORE: Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

Sydney Ross Co. APPELLANTS.

v.

1. The Administrator General, Registrar of Trade Marks,
2. Assia Medical Laboratories Ltd. RESPONDENTS.

Trade Marks — Opposition — Trade Marks Ordinance, Secs. 14(7) *and* 18 — *New material before High Court — Cross examination.*

Appeal under Section 18(2) of the Trade Marks Ordinance, 1938, from the decision of the Registrar of Trade Marks, dated the 18th March, 1943, in the application for the registration of a Trade Mark No. 5925 by "Assia" Chemical Laboratories Limited:—

1. High Court has power in opposition proceedings under Trade Marks Ordinance to allow further material to be brought before it.
2. No right for cross examination of deponent of sworn declaration if no useful purpose served.

(*E. S.*)

ANNOTATIONS: That part of the ruling dismissing the application to file new affidavits has been omitted; the Court there held that Petitioners had been guilty at laches.

(*H. K.*)

FOR APPELLANTS: Seligman and Tori.

FOR RESPONDENTS: Wittkowski.

RULING.

The Petitioner's advocate at the hearing on 27th May, 1943, asked to be allowed to file two affidavits sworn by one Anis Shouker and by one Elie Zinovios respectively. He also asked to be allowed to cross-examine Mr. Haim Salomon on his affidavit affirmed on 14th May, 1943.

The first Respondent's advocate objected to the Petitioner's application. The first ground of objection was that no affidavit had been filed by the Petitioner showing reasons why the material to be set out in the two affidavits was not available at the hearing before the Registrar of Trade Marks. We think, however, that we are able to listen to the

Petitioner's application and to deal with it on the merits. The Respondent's advocate has argued that Section 18 of the Trade Marks Ordinance, 1938, is the only section under which this Court has power, in a case such as the present, to allow further material to be brought before it. We think, however, that we have power under Section 14(7). The question, therefore, is whether the Petitioner has made out a good case on the merits for the granting of his application. — — —

— — — — — — — — — — — —

With regard to the application to cross examine Mr. Haim Salomon on his affidavit, we have perused this affidavit and as the deponent relies on nothing but what other people told him, we see no object in any cross examination. To what extent we should rely on this affidavit is a matter for us. We, accordingly, think that no useful purpose would be served in allowing Mr. Seligman to cross examine Mr. Salomon. This application is, therefore, also refused.

Given this 30th day of June, 1943.

British Puisne Judge.

HIGH COURT No. 47/43.

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

BEFORE : Edwards and Frumkin, JJ.

IN THE APPEAL OF :—

The Sydney Ross Company. APPELLANTS.

v.

1. The Administrator General, Registrar of Trade Marks,
2. Assia Medical Laboratories Ltd. RESPONDENTS.

Trade Marks — "Vigorin" and "Vigoron" — Honest concurrent user under Sec. 18 of Trade Marks Ordinance — Burden of proof — Amount of user — No interference with findings of fact by the Registrar — Registration with limitations or under conditions.

Appeal under Section 18(2) of the Trade Marks Ordinance, 1938, from the decision of the Registrar of Trade Marks, dated 18th March, 1943, in the application for the registration of a trade mark No. 5925 by "Assia" Chemical Laboratories Ltd.; appeal dismissed:—

1. Trade Marks "Vigoron" and "Vigorin" although similar may be together on the register if there is honest concurrent user.

2. High Court will not interfere with findings of the Registrar of Trade Marks with regard to honesty and user of the mark.

3. In case of similar concurrent marks, limitations as to use of the younger mark should be imposed.

DISTINGUISHED: Enos *v.* Dunn (1890), 63 L. T. 6; 7, R. P. C. 311; 15, A. C. 252; 6, T. L. R. 379.

REFERRED TO: Hammermill Paper Co. *v.* Alexander Pirie & Sons (1933), 149 L. T. 199; 50 R. P. C. 147; Batt & Co.'s Tm's. (1898), 2 Ch. 423; 15, R. P. C. 534, *per* Lindley, M. R.

ANNOTATIONS: Considerations for the assumption of honest concurrent user:— importance of trade of parties, interest of public not to be confused — but hardship to the honest concurrent user may offset the possibility of confusion: *vide* Kerly on Trade Marks, 6th Ed., *pp.* 304/5, Halsbury, Vol. 32, *p.* 572, Alex. Pirie & Sons *v.* Hammermill Paper Co., 49 R. P. C. 195 (C. A.) and *supra* (H. of L.).

(*E. S.*)

FOR APPELLANTS: Seligman and Tori.

FOR RESPONDENTS: Wittkowsky.

JUDGMENT:

This is, in effect, an appeal from a decision of the Administrator General in his capacity as Registrar of Trade Marks. The present Petitioners (hereinafter referred to as the "Appellants") are the registered proprietors of Trade Mark No. 1075, the main part of which is the word "Vigorin".

The Respondents had successfully applied to the Registrar for the registration of the trade mark "Vigorin" in respect of a tonic liquid or syrup substance. The present Appellants opposed the registration of "Vigorin" contending before the Registrar that their mark, consisting of the word "Vigoron" in bold type, the blurred device of a man pushing an ox, and the signature "C. B. Riker", had been registered as far back as 17th October, 1927, in respect of a medicinal preparation made up and sold in tablet form.

It was not denied that "Vigorin" and "Vigoron" were very similar, but the Registrar considered that Section 18(1) Trade Marks Ordinance, 1938, applied to the facts of the case which, he further held, were indistinguishable from the facts in Hammermill Paper Company *v.* Alexander Pirie & Sons, L. T. Reports, Vol. 149, page 199. The Registrar relied on a passage from the judgment of Lawrence, L. J., in that case (see also Lord Tomlin's speech in the same case, L. T. Reports, Vol. 149, page 200). The Registrar also relied on a judgment of Lindley, M. R. in a case cited at page 378 of Kerly's "Law of Trade Marks", 6th

Edition. On the evidence and facts before him the Registrar found that there had been on the part of the present Respondents honest concurrent user, and accordingly dismissed the opposition of the Appellants and ordered registration of the mark of the present Respondents. The Appellants have now petitioned this Court against that order.

We have already, by a preliminary order dated 30th June, 1943, refused an application by the Appellants for further evidence to be adduced before us. Our reasons are fully set out in our order. It now remains to consider the main grounds of appeal. One ground is that the Registrar erred in putting the burden of proof on the Appellants. Mr. Seligman, advocate for Appellants, referred to the case of Enos *v.* Dunn, 15, A. C. 252 and, in particular, to the speech of Lord Watson, and to the English and Empire Digest, Vol. 43, pages 166 and 167, Nos. 232 and 234. In Enos *v.* Dunn Lord Watson is reported at page 257 as having said, "Here he is *in petitorio* (*i. e.* the party corresponding to the present Respondent) and must justify the registration of his trade mark by showing affirmatively that it is not calculated to deceive". We do not doubt the correctness of this statement of law, but here we are dealing with an entirely different matter, namely, the application to the facts of this case of Section 18, Trade Marks Ordinance. The Registrar, on the facts and evidence before him, came to the conclusion that there had been honest concurrent user within the meaning of those words as used in Section 18(1), and in his decision gave exhaustive and cogent reasons for exercising the powers given to him under that section. In deciding this appeal under Section 18(2) we are unable to hold that the Registrar erred in any way or failed to appreciate the relevant matters.

Mr. Seligman also complained that the following passage from the decision of the Registrar was bad law, namely:—

> "As to whether the Applicants adopted and used the mark 'Vigorin' honestly or not, I can only enquire whether they deliberately chose their mark knowing the Opponents' mark and with the intention of deceiving the public into believing that, in purchasing the VIGORIN tonic, they were receiving the Opponents' preparation. There is nothing before me to justify such an assumption, nor have the Opponents suggested that such was the case. I must, therefore, assume that the use of the mark 'Vigorin' has been an honest one".

In our view, the Registrar was not attempting to lay down any principle of law. We think that all that the Registrar meant was that there was no evidence before him to entitle him to find that the adoption and use by the Respondent of the mark "Vigorin" was not honest.

Another ground of appeal was that the sales in Palestine of the

Respondents' syrup were not so large as to entitle them to registration. The Registrar found that the Respondents' mark had been used continuously since 1936, but that registration was not applied for till 1942. He found that the Appellants' mark was registered in 1927 but not used till 1940. Mr. Seligman, quoting from the affidavit of a Mr. Elstein filed by the Respondents, argued that the sales from 1936 to 1942 of the Respondents' syrup in the three towns of Jerusalem, Haifa and Tel-Aviv, were not large enough to warrant registration. We think, however, that this was purely a matter of fact for the Registrar. In any event, the numbers of bottles of syrup sold were by no means insignificant.

To refer again to the question of burden of proof, we feel that, whatever may be the strict law on this point, the present Respondents were bound to succeed, especially in view of the fact that the Appellants were unable to place before the Registrar sufficient material or to adduce sufficient evidence to affect the matter. We again refer to our ruling of 30th June, 1943.

We consider that this ground must also fail. Mr. Seligman said that his clients disputed the user and that it was honest. These were questions of fact for the Registrar, who, in our judgment, has not applied any wrong principle of law and who seems to have applied his mind to the proper considerations.

Finally, and as an alternative argument, Mr. Seligman complains that the Registrar should, in any event, have attached to the grant of registration of Respondents' mark conditions and limitations as contemplated by the last three lines of Section 18(1). With this contention of Mr. Seligman we agree.

We, accordingly, propose to dismiss the petition but to vary the order of registration of the Respondents' trade mark by substituting the following: "Assia's Vigorin" or "Vigorin syrup", whichever of those two alternatives the Respondents prefer. We order accordingly.

As to costs, the Petitioners having partly succeeded, we consider that a fair order to make will be that no costs: *i. e.* each party will bear its own costs of this appeal.

Delivered this 15th day of July, 1943.

British Puisne Judge.

PRIVY COUNCIL APPEAL No. 1/42.

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

BEFORE: Lord Russell of Killowen, Lord Wright, Lord Porter, Sir George Rankin and Sir Madhavan Nair.

IN THE APPEAL OF :—

Syndic in Bankruptcy of Salim Nasrallah Khoury. APPELLANT.

v.

Mary Khayat. RESPONDENT.

Currency — Instruments expressed in Turkish Gold Pounds — Rate of exchange applicable is that prevailing at maturity, Di Ferdinando v. Simon Smits & Co., The Celia v. The Volturno, B/E Act, sec. 72(4), C. A. 39/32, C. A. 85/32, C. A. 79/36, P. C. 23/38 — Instruments expressed in gold are promissory notes if otherwise complying in form — A promissory note may be made in respect of a currency not in use in Palestine — "Gold": a standard of value, not a commodity — Negotiability, B/E Ord., sec. 84(1), B/E Act, sec. 83(1), Ottoman Commercial Code, Art. 145 — R. v. International Trustee for Protection of Bondholders, Feist v. Société Intercommunale Belge d'Electricité, Ottoman Bank of Nicosia v. Chakarian — Interest — Applicability of English Law, P. O. in C., Art. 46, P. C. 56/38, P. C. 1/35.

Appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Civil Appeal, dated the 24.4.40, in Civil Appeal No. 17/40, confirming a judgment of the District Court of Haifa, allowed, and new judgment entered for the Plaintiff (Respondent):—

1. The legal requirement that a promissory note should include an unconditional promise to pay a sum certain in money, is satisfied although the promise refers to Turkish Gold Pounds: the word "gold" imports a standard of value — not bullion; and a promissory note may be expressed in foreign currency.
2. The rate of exchange of negotiable instruments should be calculated as at the time when the payment falls due.
3. Although the Courts in Palestine are bound by decisions of the Supreme Court, such decisions may not alter the provisions of English Law when applicable by virtue of Art. 46 of the Palestine Order in Council.

(*A. M. A.*)

FOLLOWED: Di Ferdinando *v.* Simon Smits & Co., 1920, 3 K. B. 409; The Celia *v.* The Volturno, 1921, 2 A. C. 544.

CONSIDERED: R. *v.* International Trustee for Protection of Bondholders, 1937, A. C. 500; Feist *v.* Société Intercommunale Belge d'Electricité, 1934, A. C. 161; Ottoman Bank of Nicosia *v.* Chakarian, 1938, A. C. 260; P. C. 56/38 (7, P. L. R. 105; 1940, S. C. J. 277); P. C. 1/35 (C. of J. 1934—6, 331; P. P. 22.ii.36; Ha. 20.ii.36).

DISTINGUISHED: P. C. 23/38 (6, P. L. R. 528; 1940, S. C. J. 19; 7, Ct. L. R. 205).

OVERRULED: C. A. 39/32 (C. of J. 658; P. P. 27.vi.33); C. A. 85/32 (C. of J. 664; P. P. 14.vii.33); C. A. 79/36 (1937, 1 S. C. J. 164; 1, Ct. L. R. 55).

ANNOTATIONS:

1. The Supreme Court judgment under appeal (C. A. 17/40) is reported in 7, P. L. R. 191; 1940, S. C. J. 100; 7, Ct. L. R. 157.

2. The leading Palestinian authorities on gold clauses are C. A. 70 & 90/36 (1937, 1 S. C. J. 127; C. of J. 1934—6, 307) and C. A. 72/36 (1937, 1 S. C. J. 156; C. of J. 1934—6, 558; 1, Ct. L. R. 59).

3. On the introduction of English law by virtue of Art. 46 of the Palestine Order in Council see — as regards equity — annotations to C. A. 82/43 (*ante*, p. 165). The position is, however, different in respect of the Common Law which was held to be inapplicable as regards injury to the person: C. A. 113/40 (7, P. L. R. 363; 1940, S. C. J. 192; 8, Ct. L. R. 17). The earlier decision in C. A. 62/40 (7, P. L. R. 244; 1940, S. C. J. 171; 8, Ct. L. R. 25) recognizing a civil action for libel was not followed in C. A. 113/40 (*supra*) as the question had not been argued. C. A. 113/40 (*supra*) was, however, distinguished in C. D. C. T. A. 327/40 (1942, S. C. J. 275) recognizing the tort of deceit and in C. A. 129/42 (1942, S. C. J. 753) recognizing an action for breach of promise.

4. On the English rule as to conversion see, in addition to the cases cited in the judgment, note 2 to C. A. 17/40 in 1940, S. C. J. at p. 101.

5. The decision of the Judicial Committee may have consequences outside the orbit of this case: Their Lordships have, in effect, held that decisions of the Supreme Court are not sufficient to lay down a rule of law which is in conflict with English law applicable by virtue of Art. 46 of the Order in Council. It seems, therefore, doubtful whether, *e. g.*, the decision in C. A. 233/40 (8, P. L. R. 20; 1941, S. C. J. 27), allowing administrators to appeal although there is no statutory provision to that effect, can any longer be considered as good law as it was pointed out in C. A. 143/41 (8, P. L. R. 467; 1941, S. C. J. 456; 11, Ct. L. R. 210) that the decision "would seem to be in conflict with the English authorities." *Cf.* annotations to C. A. 143/41 in 1941, S. C. J. at p. 456 and second paragraph of note 2 to C. A. 274/42 (*ante*, at p. 137).

(*H. K.*)

JUDGMENT.

Lord Wright:

This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Civil Appeal, delivered on the 24th April, 1940, confirming a judgment of the District Court of Haifa dated the 17th January, 1940.

The Respondent who was resident in Jezzin, Syria, commenced the action on the 27th October, 1937, claiming 2,347 Turkish gold pounds as due upon three promissory notes. One disputed issue is whether these three instruments were or were not promissory notes. One was for 2,000 Turkish gold pounds and matured on the 23rd May, 1930, the second was for 300 Turkish gold pounds and matured on the 23rd

May, 1930, the third was for 47 Turkish gold pounds and matured on the 21st October, 1929.

The Appellant who is the Syndic in the bankruptcy of the firm S. N. Khoury, merchants of Haifa, Palestine, did not deny the execution of the instruments but contended that they were not promissory notes but undertakings to deliver certain commodities, namely, the quantity of bullion represented by the specific Turkish gold coins or the corresponding number of Turkish notes; he resisted the claim for interest; he further contended that the rate of exchange to be applied to the monies due should be as at the dates of maturity of the instruments, and not as the Respondent alleged, at the actual dates of payment.

The Supreme Court, affirming the District Court, held that the instruments were promissory notes and that interest was payable from the dates of maturity, but not beyond the date of the adjudication in bankruptcy. The Court further held that the dates of payment of the notes were the dates at which the exchange was to be taken. Any claim for interest under Article 305 of the Code was reserved for further decision in Palestine and is not now before the Board.

There had been considerable changes in the rates of exchange of Turkish gold pounds into the currency of Palestine. At the dates of maturity the rate stood at LP. 0.875 mils in Palestine currency to the Turkish gold pound. At the dates of the actual payments made on account of the debt between August, 1934, and September, 1937, the rates fluctuated between LP. 1.485 and LP. 1.510 to the Turkish gold pound. There is thus a considerable difference in the balance due upon the notes according as the dates of maturity are taken on the one hand or the dates of actual payment on the other. The payment actually made was made in the currency of Palestine and totalled in that currency LP. 1,780, which sum, deducted from LP. 2,052 the equivalent of 2,347 Turkish gold pounds exchanged at the rate of LP. 0.875 to the Turkish gold pound left due and owing LP. 272.375 which the Appellant paid into Court. On the other hand the Respondent claims that the original debt of 2,347 Turkish gold pounds has been only reduced by the payments on account which are brought in as totalling 1,206.500 Turkish gold pounds if the actual payments which were made in the currency of Palestine were exchanged into Turkish gold pounds at the rates actually ruling at the several dates of those payments. The Respondent accordingly claimed that there was still owing a balance of 1,140.500 Turkish gold pounds which represented a debt of LP. 1,722.155 if exchanged at the date of the claim, at the then local currency equivalent of the Turkish gold pound which was LP. 1.510 to the Turkish gold pound.

The judgments under appeal accept the Respondent's contentions and apparently accept her figures of claim, though no definite sum is stated in the judgments. It may be, however, that the precise figures were left for subsequent ascertainment, like the figures of interest due up to the date of adjudication. But since their Lordships for reasons which will appear later do not agree with the view of the Supreme Court that the relevant dates for the exchange are the dates of actual payment but are of opinion that the proper dates are the dates of maturity of the instruments, they see no reason to differ from the figures put forward by the Appellant. These first state the amounts of the debts exchanged into Palestine currency at a rate which apparently is not disputed if the Appellant is correct in taking the dates of maturity of the instruments as the basic dates. From this figure of total debt in terms of Palestine currency, the payments made and accepted in Palestine currency have been deducted, leaving the balance admitted to be due in the same currency.

Their Lordships will deal with the questions of principle which arise on the judgments appealed from.

On the first question, whether the instruments in suit were promissory notes or undertakings to purchase a commodity, that is, either gold or Turkish notes taken at their gold value, their Lordships agree with the judgments of the Courts below. The form of the instruments is obviously that of promissory notes. The first as translated from the Arabc runs simply:—

> "On 23 May 1930, I shall pay to the order of Mrs. Khayat of Jezzin the sum specified above (that is, in the heading) *i. e.* two thousand gold Turkish pounds. Value received in cash, Haifa, 11 October, 1929."

It is signed by the Appellant, and duly stamped. The others are *mutatis mutandis* in identical terms.

What seems to be relied on by the Appellant is the description of the subject matter of the obligation as "gold Turkish pounds". It is contended that Turkish gold coins are not currency in Palestine: however, it is clear that they are currency in Turkey and Syria, where the Respondent was resident. Syria was at the material times a former Turkish territory mandated to the French. A promise to pay a sum expressed in Turkish money, made in Palestine, is not outside any of the recognised definitions of a promissory note. It is a promise to pay in a currency even though it is not that of the country where the note is made or payable. It is very common to have bills of exchange in a currency foreign as regards one of the parties or as regards the place where the bills are issued or payable. Generally in that case one

of the parties is in the country in which the stipulated unit of account (such as pound or dollar) is in current use and the payment is to be made in that country. It is true that in proceedings to enforce payment, the debt, being expressed in foreign currency, must be translated into the corresponding amount of the local currency if judgment is to issue. But all the same the promise is a promise to pay money. What is peculiar here is that the note is both made and payable in Palestine, so as to make it appear strange that Turkish currency is chosen. But then the payee is resident in Syria where the unit of account in use is Turkish. In their Lordships' judgment the three instruments are promissory notes.

Nor were the notes any the less negotiable instruments because of the word "gold." That word does not here import an obligation to deliver gold or pay in gold. What it does is to import a special standard or measure of value. This special measure of value may be described sufficiently, though not with precise accuracy, as being the value which the specified unit of account would have if the currency was on a gold basis. It is equivalent to a gold clause. "Such clauses" were said by Lord Maugham in Rex *v.* International Trustee for Protection of Bondholders (1937), A. C. 500, at p. 562, to have been "intended to afford a definite standard or measure of value and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed." Gold clauses were discussed and explained by the House of Lords in the opinion delivered by Lord Russell of Killowen in Feist *v.* Société Intercommunale Belge d'Electricité (1934), A. C. 161. Such clauses often specify a standard of value based on a particular weight and fineness of gold. In this case it is taken without objection that the Turkish gold pound has an established value. The distinction between the Turkish pound and the Turkish gold pound was illustrated in Ottoman Bank of Nicosia *v.* Chakarian (1938), A. C. 260. In that case a contract which included an obligation to pay in Turkish pounds had been made at a time when Turkey was on the gold standard. Before the date when payment became due Turkey went off gold and the pound depreciated. It was held that the payee was only entitled to be paid at the depreciated rate and could not claim to be paid in gold pounds, that is, in undepreciated currency.

In their Lordships' opinion the Courts in Palestine were right in holding that the three instruments were promissory notes whether the definition applied is that contained in Article 145 of the Ottoman Commercial Code or in the Bills of Exchange Ordinance of 1929, section 84(1), which corresponds with section 83(1) of the English Bills of

Exchange Act (1882), in particular because the notes were unconditional promises to pay a sum certain in money.

Their Lordships think that the appeal fails on this issue and the Respondent is , therefore, entitled to interest from the date of maturity, though the interest will not run beyond the date of adjudication.

There remains the more serious question which is at what dates must the rate of exchange be calculated. There can, their Lordships apprehend, be now no doubt as to the English law on this point. It is true that different views have been taken at different times and by different systems of law. Indeed there are at least four different alternative rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings to enforce payment, or at the date of judgment. English law has adopted the first rule, not only in regard to obligations to pay a sum certain at a particular date, but also in regard to obligations the breach of which sounds in damages, as for an ordinary breach of contract, and also in regard to the satisfaction of damages for a wrongful act or tort. The general principles on which that rule has been based are explained by the Court of Appeal in Di Ferdinando *v.* Simon Smits and Co. (1920) 3 K. B. 409, a case of an ordinary breach of contract. The rule, however, was established many years before then. It was again enunciated by the House of Lords in The Celia *v.* The Volturno (1921) 2 A. C. 544, where the claim was for damages in tort consequent on a collision. It was there contended that the date of the judgment was the proper date for translating the Italian currency in which the damages were assessed into English currency capable of being put into the judgment of an English Court, and some reference was made to different views expressed in the United States. Lord Sumner, however, holding that the date when the obligation accrued was the date of the breach and that it was at that date that the exchange was to be taken, at p. 555 said:—

> "The agreed numbers of lire are only part of the foreign language in which the Court is informed of the damage sustained and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues, which it is used to describe."

This can be applied directly to a case where damage claimed arises from failure to pay a sum in foreign currency, like the Turkish gold pounds here. It is true that Lord Sumner does not deal specifically and seems to reserve the question of what is the rule where there is a contractual obligation for the payment of fixed or calculable sums

in a foreign place and (their Lordships would prefer "or") in a local currency. He does, however, observe that "Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays." Lord Buckmaster (p. 548) rejects summarily the idea that the date of the writ or of the commencement of the action is the proper date. His view, in their Lordships' opinion, is summed up by his statement on p. 549 that in regard to damages which have been

> "assessed in a foreign currency, the judgment here which must be expressed in sterling must be based on the amount required to convert this currency into sterling at the date when the measure was properly made and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into accunt."

In the case of bills of exchange (which include promissory notes) the English Bills of Exchange Act, 1882, by section 72(4) enacts that the amount of the foreign currency is to be translated into United Kingdom currency according to the rule of exchange for sight drafts at the place of payment on the day the bill is payable. The Act was a codifying Act and did not purport to change the law, but to declare it, and the Palestine Ordinance expressly states that it declares the law. It is true that the Act and Ordinance state the rule as being applicable to bills drawn out of and payable in the United Kingdom or Palestine as the case may be but not expressed in the currency of the United Kingdom or Palestine. But their Lordships think that the essence of the rule applies in a case where the sum is not expressed in the United Kingdom or Palestine currency, and is payable in the United Kingdom or Palestine. Their Lordships accordingly consider the Ordinance to involve an authoritative declaration of the proper rule to apply to the calculation of the exchange in a case like this. Nor do their Lordships think it necessary to consider whether the Ordinance (see S. 72(4)) applies to all the three notes or only to the notes which matured before the date of the Ordinance. The Ordinance only declares what the English rule is and as it is so it has been for many years.

The reason why the Supreme Court refused to apply the English rule and instead held that the dates of actual payment were to be adopted in converting the currency, was that the decisions of the Courts in Palestine bound them to adopt the latter principle. The Supreme Court, while not contesting what the English rule was, added "As far as Palestine is concerned, however, as the learned President (of the District Court) pointed out in his long and careful judgment, the balance of authority is the other way." What the President had said was "we must treat the decisions of the Supreme Court of this country as part of the law of Palestine and binding on us, unless and until the

principles laid down by such decisions have been varied by legislation or the opinions of the Privy Council." Their Lordships agree with this view and must determine what should be, or more precisely, is the rule in Palestine.

The Supreme Court held that in Palestine the principle that the exchange should be taken as at the date of actual payment had been established "since at any rate 1932." But the Court does not quote any authority except the Palestine decisions which do indeed in the words of the Court "lay down the proposition that in an action on a promissory note the conversion into Palestine currency should be at the rate of exchange prevailing at the actual date of payment." These decisions were Ahmad Hassan Abu Laban *v.* Bergman, Civil Appeal 39/32 (*i. e.* 1932), reported in 2 Rotenberg's Reports, p. 658, Abu Laban *v.* Lieder & Fisher, Civil Appeal No. 85/32, reported in the same volume, p. 664, and an unreported decision of the Supreme Court, No. 79 of 1936. The Supreme Court also refer to Apostolic Throne of St. Jacob *v.* Saba Said, 6 Palestine L. R. 528, decided in 1938 by this Board, where the issue was whether the bond was or was not a gold bond. It appears from the headnote to the report that the Courts in Palestine had taken the rate of exchange as at the date of payment but no issue was raised on this point before this Board and the judgment shows that it was not considered by the Board. The case cannot be regarded as a decision of the Board on this point.

Their Lordships, accordingly, have now to decide the question as one which is open to their consideration. Their conclusion is that the English rule should prevail in Palestine. Article 46 of the Palestine Order-in-Council (1922), must be considered. It was adverted to in a judgment delivered by Sir George Rankin by this Board in Mamur Awqaf of Jaffa *v.* Government of Palestine (1940), A. C. 503, and in an unreported case of Sheik Suleiman *v.* Michel Habib (P. C. Appeal No. 1 of 1935). In the latter case Lord Atkin, delivering the judgment of the Board, observed that under Article 46 the Courts in Palestine were to exercise their jurisdiction "in conformity with the substance of the common law and the doctrines of equity in force in England." This was to be subject to the provisions of the Ottoman law in force in Palestine on 1st November, 1914, and certain later Ottoman laws and such Orders-in-Council and Ordinances as were in force in 1922 and are subsequently in force, and to modifications necessarily required by local circumstances. In the present case it is not suggested that there were any provisions of Ottoman law relevant to this point and no Ordinance can be quoted except the Bills of Exchange Ordinance to which reference has already been made, and this Ordinance, as al-

ready pointed out, is in substance contrary to the view taken by the Palestine Courts. The Order-in-Council does not mean that decisions of the Supreme Court which are subject to appeal to His Majesty in Council, are in themselves authorities to establish finally a rule of law contrary to English law. A rule of law to have this consequence must be one laid down in Imperial Acts or Orders-in-Council or in Ordinances applicable to Palestine or in the former Ottoman law, that is in the various Ottoman Codes, the *Mejelle* or other authoritative sources of Ottoman law, so far as not superseded by Ordinances of Palestine.

As no rule of law is so laid down their Lordships are, therefore, of opinion that on this issue it should be held to be the law of Palestine that in such a case as the present the correct date for calculating the exchange should be the date of the breach by non-payment, that is, the date of maturity of the bill or note, and not the date of any actual payment. The Board may further observe that the English decisions seem to consider the date of actual payment as one which cannot properly be taken for converting the exchange. One effect of adopting it would be that a judgment or execution under it could not fix a definite sum because until actual payment the rate could not be ascertained. The date of judgment was rejected by the House of Lords in the Celia *v.* Volturno case (*supra*). To adopt the date of payment would be to place the rate of exchange in the control of the debtor who could at his will or convenience delay payment and thus benefit or attempt to benefit by the fluctuations of exchange.

The sum of LP. 272.375 paid into Court on 13th December, 1937, is not sufficient to cover interest due from dates of maturity to date of adjudication.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the decrees of the Courts in Palestine set aside; that the Plaintiff should have judgment for LP. 2052.375 with interest at 9 *per cent per annum* (a) on LP. 2012.500 from 23rd May, 1930, to 27th October, 1930 and (b) on LP. 39.875 from 21st October, 1929, to 27th October, 1930, less a sum of LP. 1780 paid on account in the years 1934—7: this judgment to be without prejudice to any future claim for interest under Article 305 of the Code. Liberty to either party to apply to the trial Court to withdraw the money paid into Court or any part thereof.

The Appellant must pay the Plaintiff's costs of the action. The Plaintiff must pay the Appellant's costs of the appeal to the Supreme Court and of this appeal.

Delivered this 4th day of May, 1943.